

Original

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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

In the Matter of)
))
))
POM WONDERFUL LLC and)
ROLL GLOBAL LLC,)
as successor in interest to)
Roll International Corporation,)
 companies, and)
))
STEWART A. RESNICK,)
LYNDA RAE RESNICK, and)
MATTHEW TUPPER, individually and)
 as officers of the companies.)
_____)

Docket No. 9344

PUBLIC

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RECORD REFERENCES

App. – Appendix to Complaint Counsel’s Appeal Brief

CCCL – Complaint Counsel’s Proposed Conclusions of Law

CCFF – Complaint Counsel’s Proposed Findings of Fact

CCPTRB – Complaint Counsel’s Post-Trial Reply Brief

CX – Complaint Counsel Exhibit

ID – Initial Decision

ID App. – Appendix to Initial Decision

IDF – Initial Decision Findings of Fact

PX – Respondents Exhibit

Reply CCFF – Complaint Counsel’s Reply to Respondents’ Proposed Findings of Fact

Tr. – Trial transcript testimony

RPTB – Respondents’ Post-Trial Brief

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I. STATEMENT OF CASE

A. Introduction

The evidence shows, and the Administrative Law Judge (“ALJ”) found, that Respondents POM Wonderful LLC (“POM”), Roll Global LLC (“Roll”), Stewart Resnick, Lynda Resnick, and Matthew Tupper (collectively “Respondents”) engaged in deceptive acts or practices and false advertising in violation of Sections 5 and 12 of the FTC Act by advertising that POM Wonderful 100% Pure Pomegranate Juice (“POM Juice”), POM_x Pills, and POM_x Liquid extract (collectively, the “POM Products”) treat, prevent, and reduce the risk of heart disease, prostate cancer, and erectile dysfunction (“ED”) (the “Challenged Claims”). (ID at 5-6, 296).

Respondents disseminated the challenged advertisements and promotional materials (App. A, Tables 1 and 2) between 2003 and 2010 using a variety of media, including packaging, direct mail, print, Internet (websites, banner ads), and public relations (press releases publicizing research, press interviews). (*See, e.g.*, CCF ¶¶325, 385, 430, 435, 443, 536, 541, 570). All of Respondents’ challenged advertising and marketing constitute “advertisements” within the scope of Section 12, and alleged deceptive acts or practices within the scope of Section 5. In fact, Respondents admit that several challenged media interviews by Lynda Resnick and Matthew Tupper are among their “advertising and promotional materials.” (CCF ¶578; PX0364 ¶9).

The ALJ found that many of Respondents’ ads conveyed the Challenged Claims. (IDF ¶¶290-476, 579-84; ID at 220-34). He also found that these claims were material and likely to mislead reasonable consumers, and that Respondents’ substantiation fails to meet the level of competent and reliable scientific evidence required for disease efficacy and establishment claims. (ID at 5-6; ID at 290-96; IDF II.G; IDF II.J; ID at 250-96). As a result, the ALJ correctly held

that Respondents are liable for violating Sections 5 and 12 and entered a cease and desist order to prevent future violations (IDF¶¶1378-1431; ID at 296-325).

Complaint Counsel appeals the ALJ's conclusion that there was insufficient evidence to determine that other challenged ads convey the alleged claims, and his conclusion that Respondents' press interviews are not advertising under Section 12. (IDF II.E.3, ¶¶585-91). On substantiation and remedy, Complaint Counsel appeals the ALJ's erroneous articulation of the scientific standard necessary to provide a reasonable basis for disease efficacy claims and his failure to adopt the appropriate remedy to address Respondents' conduct. Complaint Counsel seeks *de novo* review of the Initial Decision on these issues. In addition, Complaint Counsel asks the Commission to vacate findings in the Initial Decision that are irrelevant or unsupported by substantial record evidence.

B. Summary of Facts

1. The Respondents, the POM Products, and Respondents' Advertising and Marketing Strategy

POM and Roll are Delaware companies located in Los Angeles, California. (CCFF¶¶16, 88, 92). POM began operating in 2001, and since then has emerged as the self-described largest grower and distributor of pomegranates and pomegranate juice in the United States. (CCFF¶¶87, 149). The company markets and sells fresh pomegranates and several derivative products, including the POM Products, pomegranate juice blends, and nutrition bars. (CCFF¶¶87, 122-23).

Roll is a \$2 billion company with several affiliated businesses, including POM, Teleflora, Fiji Water, Paramount Citrus, and Justin Vineyards. (CCFF¶12). Roll provides advertising, public relations, consulting, accounting, and human resources services to its family of

companies. (CCFF¶¶94-96, 104-05; CX1359_0027). Over the years, POM and Roll have collaborated to create and place direct mail and online advertisements, as well as public relations communications for the POM Products. (CCFF¶¶99-103; PX0364¶2).

Stewart Resnick, Lynda Resnick, and Matthew Tupper directed and controlled the business activities of POM and Roll. (CCFF¶¶9-86; CX1421_0002-3; PX0364¶¶3-4). They actively participated in POM's business operations by, for example, hiring personnel, developing the medical research program, directing the marketing strategy, and providing input on marketing materials including the decision of what studies to reference in product advertising. (CCFF Section II.A; CCFF¶¶161, 163, 165-67, 187-91, 309, 331-33, 336-39, 372-73).

POM began selling and marketing POM Juice regionally in 2002 and nationally in 2003. (CCFF¶151). The juice is produced by pressing whole pomegranates into a concentrate that is later reconstituted to make "100% juice." (IDF¶¶58-60). The processing strips the juice of its Vitamin C and fiber; thus, it does not meet FDA's classification for "healthy" claims. (IDF¶62; PX0268_0003). In 2007, the company introduced POM_x Pills and POM_x Liquid. (CCFF¶141). POM_x is derived from the fruit mash that remains after the first juice pressing. (CCFF¶130). POM has sold POM_x to consumers via POM's website, telephone, and some U.S. retail outlets. (CCFF¶¶142, 231).

From the outset, Respondents' marketing strategy for POM Juice, and later POM_x, was to emphasize the products' health benefits for certain diseases. Lynda Resnick firmly believed that POM Juice has "the power to help heal people." (CCFF¶¶155, 283). She was convinced that "[p]eople needed pomegranate juice in their lives (even if they didn't know it yet)" and that "they would pay what it was worth." (CCFF¶155). The POM Products are expensive. A one-

year supply (8-ounce bottles) of POM Juice “costs at least \$780, and a “one year supply of POMx costs approximately \$315.” (ID at 249).

As early as 2001, Respondents’ research efforts for POM Juice were two-fold: “(A) for use in marketing (primarily circulation) and (B) ‘home run’ cure for cancer, etc.” (CCFF¶159). Mrs. Resnick saw value in ensuring “that the science was made public when the supply is available.” (CCFF¶160). Her 2001 internal memo on POM Juice outlined several purportedly “proven health benefits,” such as lowering LDL cholesterol and guarding against heart disease, that POM could “‘talk about’ at scientific meetings, public relations campaigns and consumer promotions.” (CCFF¶160). Over the years, Respondents’ marketing teams continued to focus on Mrs. Resnick’s core message that the POM Products are proven by scientific research to provide specific heart, prostate, and erectile disease benefits. (CCFF Sections V.D-F).

As early as 2004, Respondents’ POM Juice ads referenced a study by Dr. Michael Aviram on the juice’s effect on arterial plaque, touting that eight ounces a day of POM Juice reduced plaque buildup in the arteries “up to 30%.” (CCFF¶¶170, 329-30, 336). In fact, the Aviram Study was an unblinded, uncontrolled study of a handful of patients with severe heart disease. (CCFF¶¶805-21). The study’s results were not replicated in a larger well-designed, well-controlled study (Davidson CIMT Study (2009)) completed in early 2006. (CCFF¶¶879-911). Nevertheless, Respondents continued to tout the Aviram Study results well into 2009 in both POM Juice and POM_x ads. (CCFF¶¶420, 821).¹

¹ In or about 2008, Respondents also began promoting the results of a heart study on the effect of POM Juice on myocardial perfusion (blood flow to the heart) by Dr. Dean Ornish, even though the study showed no improvement on two of three blood flow measures and no significant changes in other cardiovascular disease risk measures. (CCFF¶¶171, 410-11, 415, 419, 449, 824-54).

In 2006, Respondents began promoting the POM Products as effective for preventing and treating prostate cancer, based on a published study by Dr. Allan Pantuck on the effect of POM Juice on PSA doubling time (“PSADT”) in 46 men previously treated for prostate cancer. (CCFF¶¶172, 368, 378, 397, 410-11, 440, 987). Respondents touted a significant PSADT increase, despite the critical design limitations emphasized in the Pantuck Study publication – the study was unblinded, uncontrolled, and measured efficacy based solely on PSADT, which Respondents knew was not an accepted endpoint to support claims to prevent, treat, or reduce the risk of prostate cancer. (CCFF¶¶402-04, 996, 1002-12, 1044-53). Despite Dr. Pantuck’s concern that “the lay interpretation” of POM’s ads would be that “[POM Juice] shows promise for the treatment of prostate cancer” (CCFF¶402), Respondents used the Pantuck Study from 2006 to as recently as 2010 to represent that the POM Products have prostate cancer benefits. (CCFF¶¶415, 419).

As early as 2007, Respondents’ ads emphasized, under headings like “Science, Not Fiction,” that the POM Products’ health benefits are supported by millions of dollars in medical research. (CCFF¶398). Over time, the dollar figures steadily increased from \$20 million (2007) to \$34 million (2010). (CCFF¶309; *see, e.g.*, CX0101; CX0330). POM communicated to consumers the amount of money invested in medical research to emphasize that POM does not “just say our product is great, we have clinical studies that prove its efficacy.” (CCFF¶311). The medical research figure cited in the advertising, however, was not for completed, published, peer-reviewed studies. (CCFF¶¶319-23). It simply reflected the cumulative amount of research expenses at a particular time, including money spent on: 1) studies with inconclusive results; 2) areas of research unrelated to the products or health conditions in the POM Product ads; and 3) activities other than direct research costs. *Id.* Of the \$34 million in medical research cited in

the advertisements, the five frequently-advertised studies cost less than \$2.49 million combined. (CCFF¶¶168, 324).

Also in 2007, Respondents began promoting the POM Products as beneficial for ED based on a published study by Christopher Forest (Forest ED Study (2007)). (CCFF¶¶168, 173, 271, 386, 425, 447, 563, 576). The research showed no statistically significant difference between POM Juice and placebo based on two different erectile function questionnaires, but Respondents used the study to advertise that POM Juice and POM_x treat, prevent, or reduce the risk of ED. (CCFF¶¶1076-78, 1101).

Many of the POM Juice advertisements and the entire POM_x campaign conveyed Respondents' disease efficacy message in a serious, medical tone with substantial content about scientific findings. (*See, e.g.*, CCFF¶¶295, 303, 329-33, 369). POM ads also used wit to convey disease benefit. For example, the "Dressed Bottle" campaign cloaked the POM Juice bottle in attire such as a blood pressure cuff, an EKG, or an IV bag, and the "Super Hero" campaign portrayed the POM Juice bottle in a series of comic book style vignettes. (CCFF¶¶24, 73, 341, 344, 352, 372, 443). Respondents' goal was to break through the clutter of competing food advertising messages and convey POM's serious health message by connecting with consumers at a visceral level. (CCFF¶¶295-97). Their research confirmed that this marketing approach worked. Consumers cited health reasons more often than other choices provided (*e.g.*, taste) as the reason for why they drank POM Juice, and cited disease prevention (*e.g.*, "helps protect against prostate cancer") as a reason to purchase POM Juice. (CCFF¶¶639-50). Indeed, Respondents state that the millions of dollars spent promoting POM Juice for health largely created the market for pomegranate juice. (CCFF¶176).

2. Procedural History

On September 24, 2010, the FTC issued an administrative complaint charging Respondents with violating Sections 5(a) and 12 of the FTC Act in connection with advertising claims for the POM Products.² The Complaint alleged that the challenged ads make false and unsubstantiated efficacy and establishment claims that:

- drinking eight ounces of POM Juice daily, or taking one POM_x Pill or one teaspoon of POM_x Liquid daily, treats, prevents, or reduces the risk of heart disease, including by (1) decreasing arterial plaque, (2) lowering blood pressure, and/or (3) improving blood flow to the heart. (CX1426_00017-20);
- drinking eight ounces of POM Juice daily, or taking one POM_x Pill or one teaspoon of POM_x Liquid daily, treats, prevents, or reduces the risk of prostate cancer, including by prolonging PSADT. (CX1426_00018-20); and
- drinking eight ounces of POM Juice daily treats, prevents, or reduces the risk of ED. (CX1426_00019-20).

On October 18, 2010, Respondents filed an answer admitting that they manufactured, advertised, labeled, offered for sale, sold, and distributed the POM Products, but denying that they violated the FTC Act. (PX0364¶¶6, 22).

After nineteen days of trial, the evidentiary record closed on November 18, 2011.³ On May 17, 2012, Administrative Law Judge D. Michael Chappell issued his Initial Decision and Order. Complaint Counsel and Respondents each filed a Notice of Appeal on June 4, 2012.

² On September 27, 2010, proposed respondent Mark Dreher Ph.D., the Vice President of Science & Regulatory Affairs of POM Wonderful LLC from approximately August 2005 to May 2009, entered into a consent agreement with the Commission. *Mark Dreher*, No. C-4306 (F.T.C. Nov. 4, 2010).

³ Complaint Counsel filed a motion on June 13, 2012, to reopen the record for the limited purpose of admitting certain POM Product ads that Respondents created after issuance of the Initial Decision.

C. Summary of Argument

Although the ALJ correctly found that Respondents violated Sections 5 and 12 by making material, false and unsubstantiated disease establishment and efficacy claims for the POM Products, the ALJ's analysis was critically flawed in three respects: 1) he erred in finding insufficient evidence to determine whether some ads make the Challenged Claims; 2) he erred in finding the level of substantiation experts in the field require to support the disease claims at issue here; and 3) he failed to enter the appropriate relief for the disease claims at issue.

II. QUESTIONS PRESENTED ON APPEAL

Complaint Counsel raises the following questions for the Commission on appeal:

1. Whether the ALJ erred in failing to find that: a) certain challenged ads, including media interviews, make the claims alleged in the Complaint; and b) the FTC has authority to, and can, find that the media interviews are false advertising and deceptive acts or practices in commerce;
2. Whether the ALJ erred in concluding that "competent and reliable scientific evidence" for the Challenged Claims does not require randomized controlled clinical trials (RCTs); and
3. Whether the ALJ erred in concluding that Part I of the Notice Order is not necessary and appropriate to prevent future violations by Respondents.

III. ARGUMENT

A. All of the Challenged Ads Convey the Alleged Disease Claims

Complaint Counsel identified 43 of Respondents' ads and promotional pieces as violating the FTC Act ("the challenged ads"), 26 of which convey the disease benefit claims at issue for POM Juice and 17 of which convey the disease benefit claims at issue for both POM_x and POM Juice. Thirty-eight of the challenged ads convey *establishment* claims touting a scientific level of substantiation that the POM Products treat, prevent, or reduce the risk of heart disease, prostate cancer, and ED. (App. A, Table 1). The ads containing establishment claims also make

the unsubstantiated disease efficacy claims. (ID at 243). A handful of the challenged ads make non-establishment claims only. (App. A, Table 2).

The ALJ correctly found a number of the challenged ads make the claims alleged in the Complaint, and the Commission should adopt these conclusions to the extent that he found the Challenged Claims. (IDF¶¶579-84; ID at 220-34). The ALJ, however, incorrectly concluded that there was insufficient evidence to prove that certain ads make the claims Complaint Counsel alleged.⁴ (IDF¶¶585-91). Complaint Counsel requests that the Commission set aside these adverse findings. A facial analysis and substantial corroborating evidence demonstrate that all the ads at issue on appeal convey the Challenged Claims. (App. B, contains the challenged ads on appeal and relevant CCFFs).

1. Facial Analysis Demonstrates That the Ads at Issue Convey the Challenged Claims

Courts have consistently held that the FTC may use its own reasoned analysis to determine what claims an advertisement conveys. (CCCL¶13). Whether an ad conveys a particular claim is a question of fact and begins with a facial analysis of the ad as a whole, judged from the perspective of a reasonable consumer. (ID at 213; CCCL¶¶12, 14-16). “If, after examining the interaction of all the different elements in the ad, the Commission can conclude with confidence that an advertisement can reasonably be read to contain a particular claim, a

⁴ For some ads, the ALJ failed to find all the claims challenged by Complaint Counsel. *E.g.*, CX0031 (“Floss your arteries”) and CX0034 (“Amaze your cardiologist”) (App. B, Tabs 1-2) (found efficacy claims but failed to find establishment claims (IDF¶¶440-48, 456-68, 585)); CX0473(Compl. Ex. E-1) (pomegranatetruth.com) (App. B, Tab. 24) (found heart disease establishment claims but failed to find prostate cancer and ED establishment claims, because he mistakenly believed the pomegranatetruth.com website capture to be incomplete (IDF¶¶411-15, 591). The website capture is complete and shows the prostate cancer and ED claims. (CX0473(Compl. Ex. E-1 at 1:15; ID App. at 92 (screenshot of “Backed by Science” webpage”))).

facial analysis is a sufficient basis to conclude that the advertisement conveys the claim.” (ID at 213). Indeed, “[w]here implied claims are conspicuous and ‘reasonably clear from the face of the advertisements,’ extrinsic evidence is not required.”⁵ *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 958 (N.D. Ill. 2006), *aff’d*, 512 F.3d 858 (7th Cir. 2008) (hereinafter “*QT*”) (citation omitted); *see also* CCCL¶19.

The challenged ads at issue on appeal make express, virtually express, or strongly implied claims for disease treatment, prevention, and reduction of risk. Almost all of the ads at issue contain establishment claims, referencing clinical testing or medical research or otherwise suggesting that Respondents’ claims are based upon reliable scientific evidence. (App. B; *see also* CCCL¶40).

2. The Challenged Ads Make “Clinically Proven” Disease Claims

Through a combination of: 1) strong medical imagery (*e.g.*, POM Juice bottle hooked to an electrocardiogram; POM Juice bottle in a blood pressure cuff; caduceus; subscript “x” in POM_x); 2) bold headlines and subheadings (*e.g.*, “Backed by Science”; “Science, not fiction”; “\$34 million in research. We’re not just playing doctor”); and 3) statements touting their science (*e.g.*, “backed by \$25 million in medical research”; “[j]ust eight ounces a day can reduce plaque by up to 30%”; “statistically significant prolongation of PSA doubling times”), all but four of the

⁵ *See also Telebrands Corp.*, 140 F.T.C. 278, 291 (2005) (“[i]f an ad is targeted at a particular audience, the Commission analyzes ads from the perspective of that audience”) (citing *Federal Trade Commission Policy Statement on Deception*, 103 F.T.C. 174, 178-79 (1984) (*appended to Cliffdale Assocs., Inc.*) (“*Deception Policy Statement*”)), *aff’d*, 457 F.3d 354 (4th Cir. 2006). The ALJ found that Respondents were aware that among those purchasing the POM Products were “people that have heart disease or prostate cancer in their family, or have a fear of having it themselves.” (ID¶1320; *see also* CCFF¶¶299-308). In addition, Respondents’ ads were distributed in magazines such as *Health Magazine* and *Men’s Health*, because these publications target the health-conscious consumer. (IDF¶172; CCFF¶299).

ads at issue on appeal convey the net impression that the POM Products are scientifically proven to treat, prevent, or reduce the risk of disease. (App. B, *e.g.*, CX0031, CX0034, CX0103, CX0475, CX0122, CX0169, CX0180, CX0348, CX0350; *see also* cases cited in CCCL¶¶20-23 (examples of establishment claims)).

The ALJ erroneously concluded that the Challenged Claims were not reasonably clear or conspicuous on the face of the ads at issue on appeal, essentially because in his view the ads: 1) did not use the literal words “heart disease,” “prostate cancer,” or “erectile dysfunction”; 2) used vague and substantially qualified language; 3) used language or imagery inconsistent with the Challenged Claims; or 4) did not draw a clear connection between the product’s health benefits or study results and the disease claims alleged.⁶ (ID at 221-223).

An advertisement need not contain the exact words “heart disease” or “prostate cancer” to convey the net message that the POM Products treat, prevent, or reduce the risk of these diseases. In the POM ads, phrases such as “cardiovascular health,” “prostate health,” and “erectile function” contribute to communicating the Challenged Claims. For example, in the “Decompress” POM Juice ad, the phrase “cardiovascular health” combined with a strong visual image (*e.g.*, blood pressure cuff surrounding the product), a host of medical language (*e.g.*, “decompress,” “helps guard your body against free radicals . . . that contribute to *disease*,” “keep

⁶ The ALJ also reasoned that “the nature of the transaction” – which he defines as “the purchase of a food product, or a supplement derived therefrom, as opposed to the purchase of a drug” – weighed against finding the alleged claims. (ID at 222). The record and the ALJ’s own findings, however, do not support this interpretation. The marketing strategy for the POM Products was premised on convincing consumers that the claimed health benefits are the reason to buy their expensive products over competing products. (CCFF¶¶154-157, 629). These claims were the “unique selling proposition” for the POM Products. (CCFF Section V.C.1). The ALJ acknowledged this when he found the Challenged Claims to be important to consumers’ purchase decisions. (IDF Section II.J; ID at 290-96).

your ticker ticking”), and a claim that POM Juice is “supported by \$20 million in initial scientific research from leading universities” convey the message that the product is scientifically shown to treat, prevent, or reduce the risk of heart disease by lowering blood pressure. (App. B, CX0103; CCF¶¶357-61). Similarly, in the “Off to Save Prostates” ad, a bold headline declares that POM Juice will “save prostates”; the text speaks of “defending” healthy prostates and emphasizes that the claim is “backed by \$25 million in vigilant medical research;” and an asterisked footnote directs consumers to “prostate study details” on the “health benefits” section of the POM website. “Prostate health” in this context contributes to a strong message that POM Juice prevents or reduces the risk of prostate cancer. (App. B, CX0274; CCF¶¶372-76). Mrs. Resnick herself admitted that “prostate health” means “keeping you safe from prostate cancer.” (CCF¶374). Moreover, Respondents’ own linguistic expert stated this ad possibly communicates that POM Juice is protecting or defending prostates from disease. (CCF¶375).⁷

Ironically, the ads at issue on appeal use the same techniques, including language and imagery, that the ALJ recognized as communicating the Challenged Claims in the ads he found to be violative. For example, he stated:

Respondents made [heart disease efficacy] claims indirectly and obliquely, typically by presenting, through words and images, a logical syllogism that: free radicals cause or contribute to heart disease; the POM Products contain antioxidants that neutralize free radicals; and, therefore, the POM Products are effective for heart disease. . . . [M]any of the advertisements further state or represent that the POM Products have been shown in one or more clinical, medical, or scientific studies,

⁷ The ALJ erroneously, and without explanation, discounted Respondents’ expert’s testimony that speakers of American English would interpret the phrases “heart health” and “prostate health” that were used in the advertisements to mean a condition of not being diseased (ID at 223; Butters, Tr. 2851); yet he adopted the same expert’s finding that “erectile function” would mean the ability of men to achieve and maintain erections and that the term is closely related to the absence of erectile dysfunction. (ID at 230).

to reduce plaque, lower blood pressure, and/or improve blood flow to the heart, in a context where it is readily inferable that the referenced study results involve heart disease risk factors and, therefore, constitute clinical support for the effectiveness claim.

(ID at 225-26) (internal citations omitted).⁸ Further, the ALJ's conclusion that qualifying words such as "preliminary," "promising," "encouraging," or "hopeful," "fail to materially alter the overall net impression" of ads he found make the Challenged Claims (ID at 232-33 (referencing IDF¶¶300-01, 312, 333, 342, 349-350, 354, 519)) applies with equal force to the ads at issue on appeal.⁹ (CCCL¶¶25-26).

This illogical dichotomy is especially apparent in the case of the POM_x Pill print ads where, aside from the ED claim contained in one ad (CX0355), the ALJ incorrectly ruled that there was insufficient evidence to conclude that the ads convey that POM_x and POM Juice are clinically proven to treat, prevent, or reduce the risk of heart disease and/or prostate cancer. (IDF¶¶325, 587). The Commission should set aside the ALJ's erroneous findings and rule that these ads make the challenged establishment claims. (App. A and B). The imagery and text of the POM_x ads, particularly in light of Respondents' intention to target consumers who sought to

⁸ Using similar reasoning, the ALJ found that several of Respondents' ads conveyed that the POM Products are clinically proven to treat, prevent, or reduce the risk of prostate cancer, by prolonging PSA doubling time. (ID at 228). Yet he inexplicably found there was insufficient evidence that the "Drink to Prostate Health" ad communicated that POM Juice is clinically proven to treat prostate cancer, despite the ad having the necessary indicia, including reference to POM Juice helping "men previously treated with prostate cancer," who in turn "experienced significantly longer PSA doubling times." (CCFF¶¶368-71).

⁹ Here, the ALJ correctly relied on the testimony of Complaint Counsel's expert Dr. Stewart, who opined "that the typical consumer would likely have little understanding of what 'initial' or 'pilot' means, particularly in the context of being referred to as having been published in a major journal." (ID at 232-33).

prevent diseases (CCFF¶¶302-05), represent virtually expressly, or at least strongly imply, that POM_x and POM Juice are clinically proven to treat, prevent, or reduce the risk of heart disease and/or prostate cancer.

For example, the POM_x ads at issue employ headlines with a medical tone such as “24 Scientific Studies In One Little Pill” and “Science, Not Fiction,” and subheadlines such as “\$32 Million in Medical Research. A Sound Investment” and “Complicated studies simplified.” Respondents described POM_x Pills as “medicinal in nature.” (IDF¶¶177). Providing study results and amounts spent on scientific research gave consumers a “reason to believe” the disease benefit claims were clinically proven, and helped sell the products. (IDF¶¶180, 519, 1319; *see also* IDF ¶¶1323, 1327-28). Moreover, POM_x print advertisements frequently include a caduceus, a symbol associated with medicine, which the ALJ acknowledged “creates a ‘medical’ tone and contributes to the overall net impression.” (IDF¶¶316, 396, 402, 412, 541).

The text that follows these headlines and images describes POM_x’s purported benefits for prostate cancer, cardiovascular disease, and ED, often referencing specific POM Juice studies, citing statistical results, and offering selective quotes from scientific researchers. (CCFF¶¶389-429). As in POM Juice advertising, the POM_x ads often tout that their products are backed by tens of millions of dollars in medical research. For all these reasons, the Commission should set aside the ALJ’s incorrect facial analysis of these ads and find that they convey the establishment and efficacy claims alleged. (App. A and B).

3. The Challenged Ads Make Non-Establishment Disease Claims

As with the establishment claims, the ALJ failed to employ his own technique of examining words and imagery to find that the net impressions of four of the challenged ads

(CX0463, CX0466, CX0036, CX0188) convey that POM Juice treats, prevents, and/or reduces the risk of heart disease or prostate cancer. (App. B). The “Heart Therapy” and “Off to Save Prostates” banner ads convey the net impression that POM Juice prevents or reduces the risk of disease claims through engaging visuals (*e.g.*, image of POM Juice bottle reclining on a therapist couch with a pulsating heart logo and audio of a beating heart), and text that clearly suggests a disease benefit (*e.g.*, “Heart Therapy”; “HURRY! Prostates everywhere are in danger!”; and “I’m off to save PROSTATES!”). This net impression is amplified if a consumer, as directed by the ads, clicks through to the pomwonderful.com website, which the ALJ found contained the violative claims. (CCFF¶¶538, 540; IDF¶¶368-85).

Although the ALJ found that CX0036 (2005-2006 Cheat Death print ad) conveys that POM Juice reduces the risk of heart disease, he did not find sufficient evidence that the ad also conveys a heart disease prevention claim. His analysis is flawed. On its face, the ad says that the juice “has more antioxidants than any other drink and can help **prevent** premature aging, **heart disease**, stroke, Alzheimer’s, even cancer. Eight ounces a day is all you need.” (CX0036, emphasis added). Even a POM marketing executive testified that the “Cheat Death” advertisement’s message was that one could avoid or prevent the diseases mentioned (heart disease, stroke, Alzheimer’s) to live longer. (CCFF¶350). The net impression of CX0036, and similar ad CX0188, is that POM Juice prevents or reduces the risk of heart disease. (App. B., Tab 3). The Commission should set aside the ALJ’s erroneous findings for these four ads and find that they convey the claims alleged. (App. A, Table 2).

4. The ALJ Erroneously Dismissed Corroborating Evidence of Ad Meaning

The record is replete with evidence of consumer ad interpretation and advertiser intent that supports the facial analysis proposed by Complaint Counsel. The ALJ erred in assigning little weight to Respondents' own extrinsic evidence of consumer ad interpretation (the Bovitz Survey (ID at 222)), and by ignoring POM's communications with consumers and Respondents' admissions regarding ad meaning.¹⁰ (CCFF V.G). The ALJ also erred in disregarding substantial evidence of Respondents' intent to communicate the challenged advertising messages to consumers, incorrectly stating that Complaint Counsel submitted such evidence to stand alone to prove ad meaning. (CCFF V.C; ID at 216-218). Both the extrinsic and intent evidence provide substantial support that all the ads communicate the Challenged Claims.

Respondents' Bovitz Survey, which assessed open-ended consumer responses to headlines and images in several of the challenged ads, provides evidence that at least a significant minority of consumers took away the relevant health messages.¹¹ For example, seventeen percent of POM Juice users surveyed took from the image and headline of the "Decompress" print ad that the ad's main idea was that drinking POM Juice lowers blood

¹⁰ The *Deception Policy Statement* states that "[i]n all instances, the Commission will carefully consider any extrinsic evidence that is introduced." 103 F.T.C. at 176.

¹¹ See also *Stouffer Foods Corp.*, 118 F.T.C. 746, 799 (1994) ("The Commission does not require methodological perfection before it will rely on a copy test or other type of consumer survey, but looks to whether such evidence is reasonably reliable and probative."). The Bovitz Survey provides additional reliable evidence of how consumers interpreted various elements of Respondents' challenged ads. The Commission has relied upon surveys conducted in the ordinary course of business in the past. See, e.g., *Novartis Corp.*, 127 F.T.C. 580, 682 (1999), *aff'd*, 223 F.3d 783 (D.C. Cir. 2000); *Thompson Med. Co.*, 104 F.T.C. 648, 795-97 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986).

pressure. (CCFF¶588). This likely is an underestimate. *Telebrands Corp.*, 140 F.T.C. at 319 (open-ended results likely understated consumer take-away).

Moreover, the ALJ ignored probative evidence of actual consumer take-away from Respondents' consumer communication logs. (CCFF¶¶616-17) (noting the following communications to POM by its customers: "I've started pomegranate juice to help with a small blockage in my heart"; "I want to reduce my plaque and lower my blood pressure"; "I have been drinking [POM Juice] for almost 8 months for prostate cancer prevention"; "Has [POM_x] been proven as effective as the liquid form in treating prostate cancer?"). Further, he failed to acknowledge Respondents' admissions that the POM Product ads conveyed serious health and medical messages. (*See, e.g.*, CCFF¶¶281-90, 293, 295-97, 334, 337-38, 350-55, 359-60, 365, 369, 373-74, 383, 547, 616-17).

The ALJ did not consider evidence of Respondents' intent to make the Challenged Claims. (ID at 216). This is clear error. The ALJ acknowledged, but ignored, case precedent that "evidence of an advertiser's intent to make a claim can bolster or confirm a finding that a claim was in fact made." (ID at 216-17) (citing *Telebrands*, 140 F.T.C. at 304; *Novartis*, 127 F.T.C. at 683).

The evidence shows that Respondents viewed the claimed medical benefits of the POM Products as their "unique selling proposition." (CCFF¶¶156, 281-83, 289, 292, 294). Lynda Resnick was eager to market POM Juice as protective against heart disease when the product initially launched and to publicize scientific findings on a continuing basis to keep medical news about POM Juice fresh for consumers. (CCFF¶¶153-60, 290). To lend credibility to the claims, Respondents consistently highlighted medical research in POM Product marketing.

(CCFF¶306). And to underscore the depth and rigor of Respondents' science, the ads stressed that Respondents' claims are backed by \$20-34 million in scientific research. (CCFF¶¶309-315).

The advertising mirrors Respondents' outspoken beliefs "that people should try to both prevent and cure diseases as naturally as they can" and that pomegranate juice "can be very helpful as a natural disease prevention and curative," including "to ward off prostate cancer," to reduce arterial plaque and factors leading to atherosclerosis, and to treat some forms of impotence, and that POM_x has been shown to possess the same health benefits as POM Juice. (CCFF¶¶154, 284-86, 406-12, 574, 576).

As the ALJ found, "the evidence shows that advertising the results of studies related to heart disease, prostate cancer, and erectile dysfunction resulted in sales and that Respondents were aware of this fact." (ID at 292; *see also* IDF¶¶1317, 1321, 1323-24, 1326). Moreover, the ALJ recognized that Respondents' targeted advertising of the POM Products to consumers concerned about preventing or reducing their risk of illness resonated. (ID at 295 (stating that "POM was aware that among those purchasing the POM Products were 'people that have heart disease or prostate cancer in their family, or have a fear of having it themselves,' . . . [thus] it defies credulity to suggest that Respondents would advertise study results related to these conditions if such advertising did not affect consumer behavior"))).

For the above reasons, the Commission should consider all relevant evidence of ad interpretation that corroborates the facial analysis of the ads and find that all the ads make the Challenged Claims.

5. The Challenged Media Interviews Are Actionable Under the FTC Act and Convey the Challenged Claims

Four media interviews by Lynda Resnick and Matthew Tupper make express claims that POM Juice treats heart disease, and treats, prevents, or reduces the risk of prostate cancer and ED. (App. B, Tabs 27-30; CCF ¶¶570-77). Three of the four media interviews – CX0473(Exh.E-7), CX0472, and CX1426_00032-35 – convey that the claims are supported by clinical proof. (CCF ¶¶572-77). One of the interviews – CX0473(Exh.E-6) – was incorporated into Respondents’ pomwonderful.com website when Respondents linked to it on their “Blog” page. (CX1426_00032-35). Respondents admitted that three of the challenged interviews were among “advertisements and promotional materials” that they disseminated or caused to be disseminated. (PX0364 ¶9, CX0473(Exh.E-7), CX1426_00032-35, and CX0473(Exh.E-6)).

The ALJ ruled, however, that the four media interviews “do not constitute ‘advertisements’ within the scope of Section 12 of the FTC Act” and ended his analysis there. (ID at 207-10). The ALJ’s conclusion is flawed and should be set aside. The ALJ relied upon a Commission statement in *R.J. Reynolds Tobacco* that “the complaint alleges that ‘Of Cigarettes and Science’ is an advertisement (Complaint ¶2), which we understand to mean a notice or announcement that is publicly published or broadcast and is paid for.” *R.J. Reynolds Tobacco Co.*, 111 F.T.C. 539, 547 (1988) (hereinafter “*RJR*”); ID at 208. That case, however, was not brought under Section 12. *R.J. Reynolds Tobacco Co.*, 113 F.T.C. 344, 344-45 (1990) (FTC complaint). The Commission merely observed as part of its commercial speech analysis that the term “advertisement” indicated that “the ‘means’ used to disseminate the Reynolds advertisement – paid-for advertising – is typical of commercial speech.” *RJR*, 111 F.T.C. at 547.

By contrast, in a more relevant case brought under both Sections 5 and 12, the Commission interpreted the term “advertisement” as used in its order to mean a publication that has “a tendency or capacity to induce the sale of, or to affect any other commercial behavior toward the product[.]” *Nat’l Comm’n on Egg Nutrition*, 88 F.T.C. 89, 200 (1976), *aff’d in part*, 570 F.2d 157 (7th Cir. 1977); *see also Daniel Chapter One*, No. 9329, 2009 FTC LEXIS 157, at *168 (Aug. 5, 2009) (Initial Decision) (defining the term “advertisement” for purposes of Section 12 as “[t]he act or process of calling something to the attention of the public.”). Clearly, the plain language of Section 12 does not limit the FTC’s reach to paid-for advertising. 15 U.S.C. § 55(a)(1). Moreover, Section 5(a) of the FTC Act provides that “unfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful” and is not limited to “advertisements,” paid for or otherwise. 15 U.S.C. § 45(a)(1). The media interviews at issue constitute deceptive acts or practices in or affecting commerce and the ALJ did not find otherwise. (ID at 207-10).

The evidence shows that these four interviews are actionable as false and deceptive marketing because the interviews are commercial speech. *RJR*, 111 F.T.C. at 542 (“The more limited protection accorded commercial speech permits the FTC to act when necessary to challenge false or deceptive advertising.”). The challenged media appearances comfortably fit within the indicia of commercial speech outlined in *RJR*.¹² The interviews convey explicit

¹² The indicia are: 1) “contain[s] a message promoting the demand for a product or service”; 2) “refers to a specific product or service”; 3) conveys “information about attributes of a product or service offered for sale, such as type, price, or quality” or “information about health effects associated with the use of a product”; 4) “frequently takes the form of paid-for advertising”; and 5) “benefit[s] or seek[s] to benefit the economic interests of the speaker by promoting sales of its products.” The Commission held that no single factor was dispositive in its determination. *RJR*, 111 F.T.C. at 544-46; *see also* CCPTRB at 44-48 (discussing Respondents’ media interviews).

messages promoting demand for the POM Products, refer to the POM brand and POM Juice by name, and make specific claims about the health effects associated with consuming POM Juice. (App. B; CCFF¶¶570-77). The record evidence shows that promoting sales of the POM Products was Mrs. Resnick's and Mr. Tupper's primary motivation for their press appearances.¹³ (Reply CCFF¶2549; *see also* CCFF¶¶261-62, 568). Respondents viewed public relations (PR) activities as a critical component of their efforts to promote the POM Products. Mrs. Resnick called PR "the unsung hero of marketing," crediting it with POM's status as "a staple on the morning news . . . above all with medical breakthroughs from POM Wonderful." (CX0001_00025-26). Respondents quantified the publicity achieved through press interviews and news articles using an advertising expense equivalency metric to gauge the monetary value of their "free" advertising. (CCFF¶¶274-80). Increasingly, companies use non-traditional media (*e.g.*, unpaid promotional or PR efforts) to hawk their wares. The ALJ's erroneous position would create a loophole if upheld. Based on the record in this case, the Commission has the authority to find, and should find, that the four press interviews are false advertising and deceptive acts or practices in commerce.

B. The Requisite "Competent and Reliable Scientific Evidence" Standard to Support the Challenged Claims Must Include Well-Conducted Randomized Controlled Human Clinical Trials

The Complaint alleged, and the ALJ found, that many of Respondents' advertisements claimed that the POM Products treat, prevent, or reduce the risk of heart disease, prostate cancer,

¹³ Interestingly, in *Egg Nutrition*, the ALJ, in illustrating the "commercial" nature of respondents' promotional campaign, described a spokesperson for the company making appearances on local television and radio programs and taking interviews with local newspapers to gain "considerable publicity." *Nat'l Comm'n on Egg Nutrition*, 88 F.T.C. at 108-09 (Initial Decision). Complaint Counsel in that case apparently did not specifically challenge the representations made in the interviews as deceptive.

or ED, and were clinically proven to do so. (ID at 225, 228-29). Although the ALJ ultimately, and correctly, found that Respondents' scientific studies were inadequate to support the Challenged Claims, he erred in determining the level of scientific evidence required. The law on substantiation, the substantial weight of the record evidence, and the ALJ's own conclusion that Respondents' claims are false and deceptive, demonstrate that well-designed, well-conducted, double-blind, randomized, controlled clinical trials (RCTs) showing statistically and clinically significant improvements in valid endpoints are required to provide the "competent and reliable scientific evidence" to support the disease benefit claims at issue. The Commission should set aside the ALJ's unsupported standards that RCTs are not necessary to evaluate the truthfulness of the Challenged Claims. (ID at 253(heart disease); 273(prostate cancer); 285(ED)).

The Commission also should set aside the ALJ's conclusions that went far beyond the Complaint allegations. The ALJ made findings about, and created standards for, a variety of hypothetical claims not at issue here, and thus improperly went beyond the record. He has no authority to reach outside of the dispute presented and opine generally on issues not challenged in the Complaint. *First Buckingham Comm., Inc.*, 73 F.T.C. 938, 945 (1968) (hearing examiners are "reliev[ed] . . . from participation in determinations of broad administrative policy and discretion which cannot be closeted within the record of a single case"). In doing so, he adopted many of Respondents' irrelevant arguments about the evidence required to "convey [unspecified] information" about a food or supplement, or to substantiate weaker advertising claims, such as "promotes [or supports] prostate health," or "has a beneficial effect on erectile . . . function," none of which are germane. (ID at 243, 282, 288; *see also* ID¶¶684, 686, 707, 958, 1121, 1124, 1141, 1142, 1146, 1147, 1300, 1312). These claims were not challenged and therefore were not within the ALJ's legal authority; reaching beyond the Complaint to set standards for food health

claims impinges upon the Commission’s policy discretion. *Fla. Citrus Mut.*, 50 F.T.C. 959, 961 (1954) (“[T]he Commission has not delegated to its examiners any authority to substitute their discretion for that of the Commission.”).

1. The Law and the Record Evidence Support Complaint Counsel’s Position That RCTs Are Required to Substantiate Respondents’ Disease Establishment Claims

Most of the challenged advertisements claim that the POM Products have been clinically proven to treat, prevent, or reduce the risk of heart disease, prostate cancer, and ED. (IDF¶¶580-82; CCCL¶64; *see also supra* Section III.A). The ALJ correctly found that Respondents made these science-based establishment claims (*i.e.*, claims about the amount and type of evidence the advertiser has about the product’s efficacy), and that the law requires them to possess at least “a level of proof sufficient to satisfy the relevant scientific community of the claim’s truth.” (ID at 237). The ALJ also correctly stated that the Commission does not apply the *Pfizer* factors¹⁴ to determine the level of substantiation for establishment claims. (ID at 237).

When an advertiser claims that a product’s health-related efficacy is established through scientific tests, the advertiser must substantiate those claims via “a reliable test” with “statistically significant results achieved.” (ID at 246; *see also Thompson Med. Co. v. FTC*, 791 F.2d 189, 194 (D.C. Cir. 1986) (“The FTC has usually required two well-controlled clinical tests before such a non-specific establishment claim may be made.”)). Here, Respondents boasted to consumers that their product claims were supported by a very high level of science, stating on their website, “[w]hen you look at the medical research that has been conducted on POM and

¹⁴ *Pfizer Inc.*, 81 F.T.C. 23, 64 (1972).

compare it to research that's been done on other foods and beverages, what's been done on POM is . . . more akin to research being done on pharmaceutical drugs.” (CCFF¶1121).¹⁵

Complaint Counsel's experts in the fields of heart disease, prostate cancer, and ED consistently testified that to substantiate claims that clinical studies, trials, or tests prove that the POM Products treat, prevent, or reduce the risk of these diseases, experts in the respective fields would require well-designed, well-conducted RCTs. (CCFF¶784(heart disease); CCFF¶¶974, 977(prostate cancer); CCFF¶1055(ED)). Nothing in the record nor in the Initial Decision supports any other conclusion. *None* of Respondents' six scientific experts testified that disease benefit establishment claims can be proven with anything less rigorous than well-designed, well-conducted RCTs, nor did they testify that Respondents' substantiation justified such claims. (*See, e.g.*, CCFF¶¶729-32, 737, 746, 750, 754; *see also infra* Section III.B.2.a (Respondents' experts were not asked to opine on the Challenged Claims)).

Although Respondents argued that *in vitro*, animal, and small “pilot” studies could substantiate the “health benefits” of the POM Products (RPTB at 33), it is axiomatic that only well-designed, well-controlled human clinical studies that are scientifically reliable can establish the causal link that a product is “proven” to treat, prevent, or reduce the risk of a specific disease. Federal Judicial Center, *Reference Manual on Scientific Evidence* 218 (3d ed. 2011) (“Randomized controlled experiments are ideally suited for demonstrating causation.”). The ALJ agreed with Complaint Counsel's experts that Respondents' human clinical studies were exploratory (IDF¶¶780, 798), lacked a proper control group (IDF¶¶1060, 1083, 1087, 1088, 1096, 1118), used endpoints not accepted as surrogate markers for disease treatment (IDF¶¶825,

¹⁵ Respondents' ads, even those with relatively brief text, typically referred consumers to their websites (*see, e.g.*, CCFF¶¶341, 349, 536, 539), which in turn made strong establishment claims. (IDF¶¶368, 397, 411).

1131, 1134), or failed to reach statistical significance (IDF¶1236), among other flaws. The ALJ also agreed that the studies that were well-designed and well-conducted, including RCTs, did not prove an effect. (*See, e.g.*, IDF¶¶858, 864, 865(Ornish CIMT study); ¶884(Davidson CIMT study)). Thus, the ALJ correctly concluded that *none* of the studies offered by Respondents constituted competent and reliable scientific evidence that experts in the fields of heart disease, prostate cancer, and ED would require to validate Respondents’ establishment claims. (ID at 257-59, 262-65, 266-69, 278-82, 287-89). The ALJ’s well-supported findings on the studies, which indicate that a high level of competent and reliable scientific evidence is necessary to support the disease benefit claims at issue, cannot be squared with his conclusion that RCTs are not required.

2. The Law and the Record Evidence Also Support Complaint Counsel’s Position That RCTs Are Required to Substantiate Respondents’ Disease Efficacy Claims

The ALJ found that some of Respondents’ advertisements make non-establishment efficacy claims that POM Juice treats, prevents, or reduces the risk of heart disease.¹⁶ (IDF¶583). Respondents must have a “reasonable basis” to support non-establishment disease efficacy claims, as determined by application of the *Pfizer* factors. (ID at 244). The most critical factors are the type of claim made and the level of substantiation experts in the field would agree is required for such claims.¹⁷ The Commission also considers the type of product, the

¹⁶ The ALJ correctly found that the advertisements that make establishment claims also make the challenged efficacy claims. (ID at 243).

¹⁷ The determination of “competent and reliable scientific evidence” is based on what experts in the relevant fields would deem necessary to support the particular claims made. *See, e.g., FTC v. Nat’l Urological Group.*, 645 F. Supp. 2d 1167, 1190 (N.D. Ga. 2008), *aff’d*, 356 F. App’x 358 (11th Cir. 2009); *see also* Beales et al., *In Defense of the Pfizer Factors*, PX0209-

consequences of a false claim, the benefits of a truthful claim, and the cost of developing substantiation for the claim. (ID at 244). Application of the *Pfizer* factors here demonstrates that well-conducted RCTs are needed to substantiate Respondents' specific disease efficacy claims.

a) *Respondents' Disease Benefit Claims Warrant a High Level of Substantiation and Experts in the Field Would Agree RCTs Are Necessary to Meet That Level*

Contrary to the ALJ's statements, Complaint Counsel does not contend that RCTs are automatically required for *any* health efficacy claim. (ID at 238). Respondents' claims that their products treat, prevent, or reduce the risk of diseases, however, warrant a high standard of proof – specifically, well-conducted RCTs. As the ALJ observed, because Respondents “crossed the line from making general and highly qualified health claims to making implied disease claims, ‘the level of proof sufficient to satisfy the relevant scientific community of the claim’s truth’ and ‘the amount of substantiation experts in the field would agree is reasonable’ were necessarily heightened.” (ID at 289 (*quoting QT*, 448 F. Supp. 2d at 962)).

This position is well supported by Commission and judicial precedent. Claims that are difficult or impossible for consumers to evaluate for themselves, or that refer to specific facts and figures, require a high level of substantiation, such as scientific tests. *Removatron Int'l Corp. v. FTC*, 111 F.T.C. 206, 306 n.20 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989); *Thompson Med.*, 104 F.T.C. at 822-23. The great weight of persuasive, qualified expert testimony proffered in this matter compels a finding that experts in the relevant field would require a high level of substantiation, specifically RCTs, for the types of claims made here. Moreover, Complaint Counsel has cited several cases involving similar serious disease treatment or health claims in

0013 (“The type of claim is critical in evaluating the required level of substantiation, because it determines the kind of support that consumers are likely to expect.”).

which the Commission and courts have required RCTs; although not dispositive, these cases are instructive. (CCCL¶68).

The ALJ gave undue weight to Respondents' argument that public health recommendations for nutrient intake, which suggest the *possibility* that a food, nutrient, or diet may reduce the risk of disease, are sometimes made based upon evidence short of RCTs. (IDF¶¶631, 633, 644-45). This analogy is inapt, in effect comparing apples to oranges (or in this case, to pomegranate juice). The Challenged Claims that the POM Products *treat, prevent, and reduce the risk of* heart disease, prostate cancer, and ED are qualitatively different from a general recommendation to the public to eat a balanced diet rich in fruits, vegetables, whole grains, and the like, which may have health benefits. Respondents did not tell consumers to eat a balanced diet; instead their ads communicated a direct causal link between consuming the POM Products alone and specific disease benefits (*e.g.*, treating heart disease or prostate cancer).¹⁸ Indeed, the ALJ acknowledged that advertising cannot be equated to a general public health recommendation. (ID at 248). Moreover, he correctly found that even public health recommendations are based on large human observational trials, which compare food or nutrient intake with disease outcomes over time. (IDF¶¶600-01; CCF¶765). None of the studies Respondents offered to substantiate their claims for the POM Products was a large human observational trial. (CCFF¶766).¹⁹ Thus, the ALJ's public health recommendation analogy is flawed.

¹⁸ In fact, Respondents specifically decided against making more general public health-type claims about heart disease or prostate cancer because the claims would be "weak" and would not provide a competitive advantage in the market. (CCFF¶684).

¹⁹ Similarly, the ALJ cited testimony from Complaint Counsel's expert Dr. Stampfer, a renowned expert on the diet-disease relationship, that evidence short of RCTs could support a

The ALJ also improperly discounted Complaint Counsel’s expert testimony that RCTs are required for the Challenged Claims by citing an irrelevant example of a common prostate cancer surgery done without RCT evidence. (IDF¶¶652-53). The medical treatment decisions of a trained physician, carried out according to the prevailing professional standard of care for a particular disease, in the context of a doctor-patient relationship, occur in a far different context than the buying decisions of a consumer in a supermarket aisle. Indeed, Respondents’ erectile function experts Drs. Goldstein and Burnett acknowledged that they viewed any evidence of the POM Products’ benefits only in the context of a doctor-patient relationship. Dr. Goldstein specifically noted that when discussing the use of POM Juice for erectile conditions, he was *not* talking about “somebody who just goes . . . to a supermarket and just drinks pomegranate juice for no reason”; instead, he assumed that consuming POM Juice for erectile conditions “would be done in a context of a dialogue with the patient and physician[.]” (CCFF¶1095; *see also* CCFF¶1092 (Dr. Burnett would support use of POM Juice as a complement to conventional ED treatment, not a primary intervention)).²⁰

Consumers who buy POM Juice in the supermarket typically are not accompanied by trained experts to evaluate the disease claims and weigh the scientific evidence. They must place their faith in the marketer’s honesty about the type and reliability of the evidence supporting the

weak, highly qualified health claim (*i.e.*, “there is some evidence to suggest the possibility that nuts may reduce the risk of diabetes”) *if the claim does not imply a causal link*. (IDF¶631; ID at 247). This in no way undercuts Dr. Stampfer’s view that RCTs *are* needed for the claims here, which *do* link the product to disease treatment and prevention. (CX1293 (Stampfer, Report at 0030)).

²⁰ Respondents’ prostate expert Dr. deKernion also testified that, as a physician, he emphasizes to his patients that the POM Products have not been proven to prevent prostate cancer or prolong their lives. (CCFF¶1041). *See also* Miller, Tr. 2209-10 (agreeing that with pomegranate use in cancer patients, “you can’t take the physician out of the formula”).

product claims, particularly with serious disease claims that they cannot evaluate on their own. The Commission should afford no weight to the ALJ's findings on RCTs in the contexts of public health guidelines on nutrition, or medical procedures not at issue here; if anything, these examples illustrate why a high level of evidence is necessary for the specific claims about the POM Products made to a general audience.

Respondents' own conduct in commissioning and paying for RCTs for their products strongly corroborates Complaint Counsel's evidence that experts require such trials to establish the causal link between the POM Products and the disease benefit claims in this case. Respondents' scientific advisors and consultants, including Drs. Heber and Ornish (who served as their expert witnesses), conducted at least ten RCTs on the POM Products involving heart disease, prostate cancer, and ED endpoints. (CCFF¶1127).²¹ It was not a mere coincidence that when asked to conduct high quality studies, these experts recommended, designed, and conducted RCTs looking at the causal link between POM Juice and disease endpoints. But now, when it suits Respondents' purposes (and after the RCT evidence did not establish the claims Respondents had hoped for), these experts change their position and instead make the far-fetched argument that such clinical trials, for which Respondents invested several million dollars (*infra* Section III.B.2.b), were wholly unnecessary to demonstrate a link between the POM Products

²¹ Dr. Heber, for example, has consulted for Respondents since at least 2002, done several RCTs for them, and collected over \$2 million for UCLA and his Center for Human Nutrition. (CCFF¶724). Dr. Ornish testified that he encouraged the Resnicks to conduct these types of studies, and two of his RCTs for Respondents cost over \$1.2 million. (CCFF¶¶823, 1118).

and disease benefits. Their actions, however, speak louder, and more plausibly, than their words.²²

As with the challenged establishment claims, Respondents' experts did not testify that the specific efficacy claims alleged in the Complaint – that the POM Products treat, prevent, or reduce the risk of diseases – were substantiated. Instead, they qualified their answers in such a way that makes clear that they were opining on *non*-disease claims, which explains why the ALJ ultimately correctly found that the greater weight of the evidence proved that Respondents' science had not substantiated the Challenged Claims. (*Supra* Section III.B.1). For example, Dr. Heber, Respondents' nutrition expert, did not opine on the level of science needed to support heart disease or prostate cancer treatment, prevention, or reduction of risk claims, nor did he testify that RCTs are *not* required for such claims. (IDF¶¶671-73; *see also* CCF¶¶730-32).²³ In fact, he testified that nutritional products cannot be “treatments” for disease. (CCF¶¶730, 732).

Similarly, Dr. Ornish, Respondents' heart disease expert, did not speak to the Challenged Claims. At trial, Respondents asked him only if RCTs would be necessary “to test and substantiate *health claims of something like pomegranate juice*” or if one is “*talking about fruit juice or broccoli or things like that.*” (Ornish, Tr. 2329, 2331) (emphasis added). Dr. Ornish

²² Indeed, the evidence shows that Respondents, who consulted numerous scientific experts over the years, understood and embraced that human clinical trials were the standard of evidence needed to make the types of claims they wanted, at least until the results of such trials came out less than favorably. *Compare supra*, Section III.B.1 (statement on website that Respondents' science was on par with pharmaceuticals), *with* CCF¶1130 (Lynda Resnick's trial testimony that she had “recently been educated to the fact that” studies on fruits were better done in test tubes than in humans).

²³ At most, Dr. Heber opined that experts would look to the totality of the science, and not necessarily RCTs, to support “health claims for pomegranate juice,” but did not say what those unspecified “health claims” might be. (Heber, Tr. at 2182).

actually agreed that RCTs are the most rigorous design to determine whether an intervention causes effects. (CCFF¶771).

The testimony from Respondents' other experts likewise failed to address the disease claims at issue. Dr. deKernion, Respondents' prostate cancer expert, only testified that RCTs were not required to substantiate "health benefit" claims for prostate health, but did not address the level of science needed for prostate cancer treatment or prevention claims. (IDF¶965).²⁴ Drs. Burnett and Goldstein, Respondents' experts in erectile function, testified only that RCTs would not be required for "health benefit claims" like "preserving erectile function" or "having a potential beneficial effect" on ED, but again did not testify about treatment or prevention. (IDF¶¶1146-47). In fact, Dr. Burnett's testimony that RCTs *are* the standard for evaluating ED treatments actually supports Complaint Counsel's position. (CCFF¶1102).

Only Respondents' witness, Dr. Miller, testified that RCTs were not needed to support the claim that a fruit juice treats or prevents prostate cancer, but he is not an expert in prostate cancer. (IDF¶667). The Commission should accord little, if any, weight to his non-expert opinion. (*Compare* IDF¶219 (Dr. Miller not offered or accepted as an expert in urology or prostate cancer) *with* IDF¶¶200-04 (Dr. Eastham's qualifications) *and* IDF¶¶250-56 (Dr. deKernion's qualifications)).²⁵ Moreover, the basis of his opinion was not his own evaluation or

²⁴ Dr. deKernion admitted that there is no clinical study, research, or trial proving that POM Juice, POM_x Pills, or POM_x Liquid treats, prevents or reduces the risk of prostate cancer. (CCFF¶1038).

²⁵ Dr. Miller is a pediatric hematologist/oncologist who did not treat prostate cancer patients as a practicing physician, has not published any articles about the results of prostate cancer treatment, and has not researched preventing cancer in healthy people. (*See, e.g.*, CCRFF¶¶679, 698; PX0354 (Miller, Dep. at 17, 21); Miller, Tr. 2218). He was not testifying "as a urological oncologist whose primary activities clinically, or even in the laboratory, are to do research in prostate cancer[.]" (PX0354 (Miller, Dep. at 21)).

knowledge of what medical experts in the relevant field would require, but rather a legal advocacy paper that Respondents provided to him. (CCFF¶¶1115-16).²⁶

In sum, Respondents failed to contradict or rebut Complaint Counsel’s expert testimony on the need for well-designed, well-conducted RCTs to support claims that the POM Products treat, prevent, or reduce the risk of disease. (CCFF¶¶784(heart disease), 974(prostate cancer), 977(prostate cancer), 1055(ED)). Rather, Respondents’ experts frequently went to great lengths to avoid addressing, head-on, the Challenged Claims. The end result is uncontroverted evidence supporting Complaint Counsel’s position that RCTs are required here. The ALJ’s conclusions on this issue are therefore unsupported by the record and should be set aside.

b) The Other Pfizer Factors Also Support the Need for RCTs to Substantiate the Disease Efficacy Claims

There is no basis in the record or the law to parse out a unique substantiation standard for foods.²⁷ Here, the high substantiation standard is a consequence of Respondents’ strong disease claims. POM Juice was not promoted merely as a generally healthy beverage. By “crossing the line” into disease benefit claims as the ALJ found, and by emphasizing the scientific evidence

²⁶ Dr. Miller’s testimony at trial also contradicts: (1) his expert report, which notes that the standards are more rigorous when making a treatment claim versus a general health benefit claim (CCFF¶1113); and (2) his sworn testimony in a prior FTC administrative trial, in which he asserted that cancer treatment claims for fruit juice *would* require RCTs. (CCFF¶1112). Dr. Miller’s rationale for his new position was that his views “had evolved” since the prior case (CCFF¶1115), indicating that he was simply testifying as to his own personal opinion as to what would be required here, rather than that of experts in the field.

²⁷ The classification of a product as “food” or “drug” is not a strict bright line, nor is it meaningful without context. The identification of a product as a “drug” ultimately depends on its intended use (in other words, the claim being made about its effect). 15 U.S.C. § 55(c) (FTC Act defines “drugs” as, among other things, articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man). Thus, the inquiry again returns to the claims. Nothing prevents a food product from being considered a “drug” under the FTC Act, if it is promoted for certain uses and otherwise meets the standards set forth in the Act.

underpinning the benefits, Respondents portrayed the POM Products as therapeutic (*i.e.*, akin to pharmaceuticals), and thus brought on a concomitantly high standard of required evidence.

The ALJ relied heavily on the determination that pomegranate is “generally recognized as safe” (GRAS) under FDA regulations, but a general recognition of safety says nothing about whether pomegranates treat, prevent, or reduce the risk of disease – claims that require a high level of scientific support.²⁸ Indeed, most FTC cases alleging false or misleading health claims have not involved “dangerous” products, yet courts still have required RCTs as substantiation because of the nature of the efficacy claims. *See, e.g., QT*, 448 F. Supp. 2d at 917, 962 (pain treatment claims for a metal bracelet); *FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 303 (D. Mass. 2008), *aff’d*, 624 F.3d 1 (1st Cir. 2010) (cancer and heart disease treatment claims for a calcium supplement); *see also* CCCL¶68.²⁹ Respondents presented no evidence that a food or food derivative requires lesser evidence than RCTs *for a claim that the food treats or prevents a disease*. (*Supra*, Section III.B.2.a (Respondents’ experts did not address the Challenged Claims)). Thus, the type of product here does not weigh in favor of scientific evidence less than RCTs.

²⁸ Complaint Counsel introduced evidence regarding the POM Products’ safety (Reply CCFF¶¶201, 1011), which contravenes the ALJ’s view that the products are “absolutely safe.” (ID at 248).

²⁹ Despite pomegranate’s GRAS status, in February 2010, the FDA issued a warning letter to POM Wonderful, asserting that it made therapeutic claims about the POM Products (*i.e.*, claims that the products were intended for use in the cure, mitigation, treatment, or prevention of disease). The FDA concluded that the POM Products were “*promoted for conditions that cause the product to be a drug*” under FDA law. (CCFF¶681; CX0344_0001 (emphasis added)). Thus, Respondents cannot escape stringent substantiation or regulatory requirements for disease efficacy claims simply by calling their products “foods” or pointing to their safety; the analysis still turns on the type of claim made.

The Commission has made clear that strong disease treatment, prevention, or reduction of risk claims for foods require the level of scientific evidence experts in the field consider necessary to substantiate the claims. The claims, not the type of product, drive the substantiation analysis. *FTC Enforcement Policy Statement on Food Advertising*, CX0002_0018 (noting that “[t]he Commission’s standard for substantiation of health claims in food advertising shares many elements with FDA’s approach to such claims in labeling. Like FDA, the Commission imposes a rigorous substantiation standard for claims relating to the health or safety of a product, including health claims for food products.”); *see also Dietary Supplements: An Advertising Guide for Industry*, CX1014_0014 (“The FTC typically requires claims about the efficacy or safety of dietary supplements to be supported with ‘competent and reliable scientific evidence.’ . . . This is the same standard the FTC applies to any industry making health-related claims”). Complaint Counsel’s expert evidence clearly established that a high standard of scientific substantiation is needed for the disease claims in this case, even if the product is a food (POM Juice) or a dietary supplement (POM_x Pills).

Nor do the other *Pfizer* factors warrant a less rigorous standard. As the ALJ stated, “[t]he fact that individuals could benefit from truthful claims about a product’s ability to treat, prevent, or reduce the risk of diseases or medical conditions is obvious.” (ID at 247). As to the potential cost or other challenges of developing substantiation for claims that a product treats or prevents disease, a marketer chooses to incur these costs when it chooses to make such claims. The record also makes clear that it is feasible to test foods and supplements in well-designed RCTs to evaluate whether a causal relationship exists with disease endpoints. (CCFF¶1102).

Respondents sponsored several RCTs on the POM Products for the diseases at issue, and touted the significant amount of money they voluntarily spent on these and other studies (more than \$34

million), as well as the rigor of these studies, as a marketing tool to persuade consumers of the benefits and superiority of their juice. (CCFF¶¶309-15, 1127). The record shows that the cost of the major RCTs (including two not advertised), together, was less than \$4.5 million. (CCFF¶¶823, 878, 1063). Having championed their science as extra-rigorous (indeed, as akin to that on “pharmaceuticals”) and having advertised their studies as evidence of the POM Products’ direct benefits on diseases, Respondents cannot now complain of the cost, burden, or feasibility of reliably substantiating these claims.

The ALJ also noted that the cost of the POM Products (\$315-\$780 per year for the pills and juice, respectively) is “not insignificant” and further found ample evidence that the Challenged Claims were material to consumers’ purchase decisions (ID at 249, 292-295). These expenditures caused economic injury, which also weighs in favor of requiring a higher level of substantiation. (CCCL¶87). The Commission has found that significant economic harm “result[s] from the repeated purchase of an ineffective product by consumers who are unable to evaluate” the efficacy claims, even where “there is little potential for the product to cause serious injury to consumers’ health[.]” *Thompson Med.*, 104 F.T.C. at 824; *cf. FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994) (“[A] major purpose of the Federal Trade Commission Act is to protect consumers from economic injuries.”). Thus, the *Pfizer* factors all weigh in favor of RCTs here.

The record evidence clearly supports Complaint Counsel’s position that RCTs are required to substantiate Respondents’ non-establishment disease benefit claims. The Commission should set aside any findings and conclusions that create a legally or factually

unsupported substantiation standard for disease treatment or prevention claims involving food products.³⁰

3. The ALJ's Determinations Regarding the Standards for Vague or Hypothetical Health Claims Are Irrelevant and Should Be Vacated

As noted above, the ALJ went beyond the facts presented in this case to set a standard for general health claims for products like the POM Products. For example, the ALJ concluded that RCTs are not required “[i]f the claim does not suggest that an individual should forgo conventional medical care . . . and does not imply that a causal link between the product and the effect has been established[.]” (ID at 243, 247). The Commission should make clear that it does not endorse this conclusion.³¹ In any event, the ALJ found that the advertisements at issue did draw a causal link between the POM Products and the treatment, prevention, or reduction of risk of disease. (IDF¶¶580-83).

Furthermore, the ALJ made findings about certain hypothetical claims Respondents’ experts opined on, which the ALJ expressly acknowledged were not the Challenged Claims. (*E.g.*, IDF¶1142, 1312; ID at 289). Complaint Counsel did not litigate the issue of whether health support claims were made, whether there was “competent and reliable scientific evidence”

³⁰ Despite not requiring RCTs as part of the standards, the evidence still supports, and the Commission should adopt, the ALJ’s findings that the RCTs and other studies presented by Respondents do not constitute competent and reliable scientific evidence to support the Challenged Claims.

³¹ Numerous recent court decisions on health product efficacy claims found RCTs were necessary, without requiring an additional claim that the product was a substitute for conventional treatment. (CCCL¶68). It is exceedingly rare that marketers will affirmatively urge their products as a total substitute for conventional care. Under the ALJ’s standard, a product could be advertised to treat cancer, heart disease, or diabetes, and marketers would not need RCTs to support that claim, as long as the ad has a disclosure to the effect of “this product is not a substitute for medical care.” This would result in an illogical, confusing, and possibly dangerous precedent for the marketing of health products.

for general health support claims, or the level of evidence required to convey such information about a food or nutrient supplement. The ALJ recognized that the level of substantiation required for “the challenged claims” is a question of fact to be determined based on the evidence adduced on the record. (ID at 237). Yet the ALJ addressed certain imaginary claims as though they were at issue and fully and fairly litigated in this case. These findings by the ALJ, which have no connection to the Complaint allegations, are ad hoc policy-making. *Supra*, Section III.B.1. Such findings are unnecessary and should be set aside.

C. The Record Supports a Stronger Remedy Consistent with Part I of the Notice Order

1. Part I of the Notice Order Is Reasonably Related to the Violations Found

While the ALJ correctly found all Respondents liable for making false and unsubstantiated disease claims for the POM Products and that their conduct warranted a cease and desist order with fencing-in relief, the ALJ erred in not adopting Part I of the Notice Order. (ID at 296-309). Part I addresses disease claims for any POM Product (defined as any food, drug, or dietary supplement containing pomegranate or its components). It provides that the necessary substantiation for future claims that any POM Product is effective in the diagnosis, cure, mitigation, treatment, or prevention of any disease – including heart disease, prostate cancer, or ED – is meeting the FDA statutory requirements to make such a claim. FDA approval may be provided by a tentative final or final over-the-counter (“OTC”) drug monograph, a new drug application, or labeling approval under regulations promulgated pursuant to the Nutrition Labeling and Education Act of 1990 (“NLEA”).

Because the level of evidence required to support disease treatment, prevention, and reduction of risk claims found in this matter are similar to FDA’s evidentiary standards, the

requirement for FDA approval contained in Part I is reasonably related to the challenged acts. Reference to FDA's evaluation of scientific evidence is consistent with prior Commission practice. For example, in *Thompson Medical*, the Commission determined that the proper level of substantiation for the company's advertising claims as well as for the Order imposed for the topical analgesic Aspercreme was two well-controlled clinical tests. The Commission stated:

We are additionally persuaded to use this level of substantiation because . . . this is the standard currently being required . . . by the [FDA]. We believe that advertisers of drug products subject to the joint jurisdiction of the FTC and the FDA will benefit from greater regulatory certainty if they can act with reasonable assurance that the two agencies will accept the same evidence to demonstrate the safety and efficacy of a particular ingredient.

Thompson Med., 104 F.T.C. at 826.

Another example of the FTC harmonizing its practices with FDA is found in the FTC's *Enforcement Policy Statement on Food Advertising*, which states that "[t]he Commission regards 'the significant scientific agreement' standard, as set forth in the NLEA and FDA's regulations, to be the principal guide to what experts in the field of diet-disease relationships would consider reasonable substantiation for an unqualified health claim." (CX0002_0006). Indeed, the Commission views the "absence of an FDA determination that a health claim is scientifically valid" as a "significant factor in the Commission's assessment of the adequacy of substantiation." (CX0002_0007). The Commission specifically cautioned that "[f]ood marketers should not expect to circumvent FDA's petition process for health claims simply by limiting the assertion of unapproved or unreviewed claims to advertising." (CX0002_0013). Respondents have done just that and attempted to exploit a perceived regulatory loophole. In fact, the FDA already put Respondents on notice that the POM Products' labeling made

unapproved disease/drug claims. (CX0344 (warning letter to POM)). Part I of the Notice Order is designed to prevent such behavior in the future.³²

The Part I relief proposed here as fencing-in also is consistent with the relief approved in recent Commission settlements, including a settlement in this matter with Respondents' scientific advisor. *Mark Dreher*, No. C-4306 (F.T.C. Nov. 4, 2010) (consent order); *Dannon Co., Inc.*, 151 F.T.C. 62, 93 (2011) (consent order); *Nestlé HealthCare Nutrition, Inc.*, 151 F.T.C. 1, 12-13 (2011) (consent order); *FTC v. Iovate Health Scis. U.S.A., Inc.*, No. 10-CV-587 (W.D.N.Y. July 29, 2010) (stipulated final judgment and order). In *Dannon* and *Nestlé*, the Commission imposed provisions similar to Part I of the Notice Order for claims regarding safe food products (*i.e.*, yogurt, nutrition drinks) that were not promoted as substitutes for medical care. The Commission could not have entered those consent orders if requiring FDA pre-approval as substantiation for disease claims was not reasonably related to the violations alleged. The ALJ erroneously dismissed the relevance of these orders.³³ The Commission previously has relied upon consent orders and policy statements to analyze the appropriateness of a remedy and should do so here. *See, e.g., Realcomp II, Ltd.*, 2009 F.T.C. LEXIS 250, at *128 (Oct. 30, 2009) (stating the chosen remedy was "consistent with relief accepted in settlement of recent similar cases"); *N. Tex. Specialty Physicians*, 140 F.T.C. 715, 753 (2005) (noting the "wealth of guidance available"

³² Indeed, the FTC and FDA share a common goal of "preventing injury and deception of the consumer." *Memorandum of Understanding Between Federal Trade Commission and the Food and Drug Administration*, 36 Fed. Reg. 18,539 (Sept. 16, 1971).

³³ By ignoring past Commission consent orders, the ALJ failed to exercise his initial fact-finding functions and rulings on conclusions of law in "conformity with Commission decisions and policy directives[.]" 16 C.F.R. § 0.14.

from FTC policy statements and “ten past Commission consents”), *aff’d in part*, 528 F.3d 346 (5th Cir. 2008).

By erroneously concluding that competent and reliable scientific evidence does not require RCTs for Respondents’ disease claims, the ALJ was then able to find that Part I was not an appropriate remedy because it would “impose a different and/or higher level of substantiation” for Respondents’ future disease claims than he found necessary. (ID at 319). As set forth above in Section III.B, the ALJ’s findings on the proper substantiation standard for disease benefit claims are clearly erroneous. The record evidence demonstrates that RCTs are necessary to substantiate the disease claims made by Respondents.

The ALJ further attempted to drive a wedge between Part I and Respondents’ practices by departing from the FTC Act’s definition of “drugs” and creating his own definition of drug claims: those where a product is “urged as a substitute for medical treatment or advice.” (ID at 319). This artifice allowed him to bifurcate “drug” claims from the disease claims at issue. (ID at 319-20). He noted that *if* respondents advertise “drug” claims in the future, then the required level of substantiation could well be the FDA standards required for drug approval. (ID at 320, n.29). The ALJ’s redefinition of Respondents’ treat, prevent, and reduce the risk of disease claims as something short of “drug” claims directly contravenes Section 15 of the FTC Act. 15 U.S.C. § 55(c) (defining drug as “articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals”). Indeed, Respondents did advertise “drug” claims, for which the ALJ found them in violation of Sections 5 and 12. Thus, by the ALJ’s own logic, it is appropriate to require Respondents to meet FDA’s standards for drug approval as fencing-in relief for future claims.

Consequently, the Commission should adopt Part I of the Notice Order as reasonably related to Respondents' violations based upon Commission case law, policy, and past consent orders. Part I of the proposed Order provides fencing-in relief that harmonizes substantiation for disease claims with what the FDA may find appropriate for pomegranate products in the future.

2. Part I of the Notice Order Provides an Essential Bright Line Rule for Compliance

It is evident from the facts of this case that the Notice Order's requirement of FDA pre-approval for future disease benefit claims for the POM Products is necessary to ensure Respondents' compliance. The ALJ correctly stated that an Order's prohibitions must be sufficiently clear and precise to be understood by Respondents. (ID at 321). In the ALJ's view, the "competent and reliable scientific evidence standard" in Part III of the Notice Order is the substantiation standard that should be applied in Part I to all disease claims for the POM Products. (ID at 322).³⁴ Unfortunately, the ALJ's ruling that competent and reliable scientific evidence does not require RCTs, coupled with dicta that certain "health benefits" for the POM Products are substantiated, creates an Order with a highly ambiguous science standard.

The need for a bright-line substantiation standard requirement for any future disease claims about the POM Products is particularly warranted given Respondents' demonstrated willingness to flout the law. Respondents have always known the "rules of the road" but have

³⁴ The ALJ's suggestion that the FDA pre-approval requirement of Part I may lead to more disputes between Respondents and the FTC is unfounded. In fact, recently, companies have attempted to exploit the lack of perceived clarity in the "competent and reliable scientific evidence" standard in Commission Orders to re-litigate its meaning at every turn. *E.g.*, *Basic Research, LLC v. FTC*, 807 F. Supp. 2d 1078, 1096 (D. Utah 2011) (denying FTC's motion to dismiss and granting plaintiff's motion to consolidate); *FTC v. Lane Labs-USA, Inc.*, No. 00-cv-3174, 2009 U.S. Dist. LEXIS 70146 (D.N.J. Aug. 10, 2009), *vacated* 624 F.3d 575, 592 (3d Cir. 2010); *FTC v. Garden of Life, Inc.*, No. 06-80226-civ, 2012 U.S. Dist. LEXIS 74148 (S.D. Fla. May 23, 2012). The certainty imposed by Part I of the Notice Order will end such disputes.

ignored them. For example, Respondents could have sought FDA approval for a qualified health benefit claim for pomegranate juice. In a 2003 proposal to POM, a consultant noted that a qualified health claim “allow[s] food and dietary supplement manufacturers to communicate emerging scientific information about the health benefits of their products, as long as it is truthful and not misleading.” (CX0017_0002; *see also* CCF¶683). Respondents chose not to go through this process because they believed it would provide no benefit to POM against competitors. (CCF¶683).

Respondents’ willingness to sidestep regulatory requirements is further evidenced by their reluctance to file an Investigational New Drug application (IND) with the FDA, despite receiving questions from at least five research institutions as to whether POM’s prostate cancer studies were intended to support a significant change in advertising the product, or whether POM intended to market its tested product for the treatment, cure, or prevention of disease. (CCF¶686-88, 692). Instead, Respondents repeatedly argued against filing an IND and told the institutions they did not advertise their products to treat or prevent prostate cancer. (CCF¶689-93). Respondents only filed an IND when Johns Hopkins threatened to shut down their studies. (CCF¶1034).

Respondents’ past conduct of failing to heed warnings from law enforcement agencies is especially troubling. In January 2008, the FTC staff sent POM a letter raising concerns about the POM_x advertising claims. (CCF¶678). Also, in February 2010, the FDA issued a warning letter to POM, finding POM made therapeutic claims on its website about POM Juice and that it was intended for use in the cure, mitigation, treatment, or prevention of diseases, such as prostate cancer, ED, and heart disease. (CCF¶681). At trial, Mr. Tupper testified that POM did not

make any specific changes to its marketing in response to the FTC and FDA letters.

(CCFF¶684).³⁵

The ALJ erroneously dismissed these facts as merely “a disagreement between the Respondents and regulatory authorities.” (ID at 323). However, Complaint Counsel contends that the record demonstrates a pattern of Respondents playing by their own rules. In fact, Mr. Resnick stated that he did not refer to any standards promulgated by the FTC or FDA in considering how much evidence is enough to make a claim. When questioned, he testified that Respondents are “hitting my standard[,]” which he believes is “more than adequate[.]” (CCFF¶684). Accordingly, Part I of the Notice Order is an appropriate remedy for Respondents. In light of this testimony and other record evidence, Complaint Counsel anticipates that a requirement merely stating that disease claims must be substantiated by “competent and reliable scientific evidence,” especially given the ALJ’s erroneous findings on this point, would engender more disputes with Respondents who insist on adhering to their own standards, regardless of those laid down by the FTC and the FDA.

The requirement of FDA pre-approval before Respondents make future disease claims for the POM Products will result in an order that is “clear and precise,” and reasonably related to the alleged violations. In light of their past conduct, the complexity of the scientific issues, the expertise of the FDA to evaluate scientific evidence relating to disease claims for food, drugs, and diet supplements, and the Commission’s interest in harmonizing with the FDA, Complaint

³⁵ See also Mr. Tupper’s testimony during a deposition that FDA was “off [its] rocker.” (CCFF¶682).

Counsel requests that the Commission set aside the Order entered by the ALJ, and for the above reasons, enter the proposed Notice Order accompanying the Complaint.³⁶

IV. PROPOSED ORDER

Based on the record evidence and the foregoing, Complaint Counsel submits the following proposed order:

ORDER

DEFINITIONS

For purposes of this Order, the following definitions shall apply:

1. Unless otherwise specified, “individual respondents” shall mean Stewart A. Resnick, Lynda Rae Resnick, and Matthew Tupper, individually and as officers of POM Wonderful LLC (“POM Wonderful”) and Roll Global LLC (“Roll”).
2. Unless otherwise specified, “respondents” shall mean POM Wonderful and Roll, their successors and assigns; the individual respondents; and each of the above’s officers, agents, representatives, and employees.
3. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
4. “Covered Product” shall mean any food, drug, or dietary supplement, including, but not limited to, the POM Products.
5. “Food” and “drug” shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.
6. “Endorsement” shall mean as defined in 16 C.F.R. § 255.0.

³⁶ If the Commission sees fit, it can also include an additional subpart to Part I of the Notice Order that would permit the disease claims for POM products if such claims are approved in “authoritative statements” by other federal health agencies or the National Academy of Sciences, as provided for in Section 403(r)(3)(C) of the Food and Drug Act, under the Food and Drug Administration Modernization Act, commonly known as FDAMA. The proposed subpart would state that “the representation is about the relationship between a nutrient and a disease or health-related condition to which the representation refers and is permitted in labeling for such product pursuant to 21 U.S.C. § 343(r)(3)(C)-(D).”

7. “POM Product” shall mean any food, drug, or dietary supplement containing pomegranate or its components, including, but not limited to, POM Wonderful 100% Pomegranate Juice and pomegranate juice blends, POMx Pills, POMx Liquid, POMx Tea, POMx Iced Coffee, POMx Bars, and POMx Shots.
8. The term “including” in this Order shall mean “without limitation.”
9. The terms “and” and “or” in this Order shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.

I.

IT IS ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any POM Product, in or affecting commerce, shall not make any representation in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, illustration, trademark, or trade name, that such product is effective in the diagnosis, cure, mitigation, treatment, or prevention of any disease, including, but not limited to, any representation that the product will treat, prevent, or reduce the risk of heart disease, including by decreasing arterial plaque, lowering blood pressure, or improving blood flow to the heart; treat, prevent, or reduce the risk of prostate cancer, including by prolonging prostate-specific antigen doubling time (“PSADT”); or treat, prevent, or reduce the risk of erectile dysfunction; unless, at the time it is made, the representation is non-misleading and:

- A. the product is subject to a final over-the-counter (“OTC”) drug monograph promulgated by the Food and Drug Administration (“FDA”) for such use, and conforms to the conditions of such use;
- B. the product remains covered by a tentative final OTC drug monograph for such use and adopts the conditions of such use;
- C. the product is the subject of a new drug application for such use approved by FDA, and conforms to the conditions of such use; or
- D. the representation is specifically permitted in labeling for such product by regulations promulgated by the FDA pursuant to the Nutrition Labeling and Education Act of 1990.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product, in or affecting commerce, shall not misrepresent, in any manner, expressly or

by implication, including through the use of a product name, endorsement, depiction, or illustration, trademark, or trade name, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

III.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product, in or affecting commerce, shall not make any representation, other than representations under Part I of this Order, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, illustration, trademark, or trade name, about the health benefits, performance, or efficacy of any Covered Product, unless the representation is non-misleading, and, at the time of making such representation, respondents rely upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. For purposes of this Part, competent and reliable scientific evidence means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results.

IV.

IT IS FURTHER ORDERED that:

- A. Nothing in Parts II or III of the Order shall prohibit respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990; and
- B. Nothing in Parts II or III of the Order shall prohibit respondents from making any representation for any drug that is permitted in the labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

V.

IT IS FURTHER ORDERED that POM Wonderful, Roll, and their successors and assigns, and individual respondents shall, for five (5) years after the last date of dissemination of any representation covered by this Order, maintain and upon request make available to the Commission for inspection and copying:

- A. All advertisements, labeling, packaging, and promotional materials containing the representation;

- B. All materials that were relied upon in disseminating the representation;
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and
- D. All acknowledgments of receipt of this Order, obtained pursuant to Part VI.

VI.

IT IS FURTHER ORDERED that POM Wonderful, Roll, and their successors and assigns, and individual respondents shall deliver a copy of this Order to all of their current and future principals, officers, directors, and managers, and to all of their current and future employees, agents, and representatives having managerial responsibilities with respect to the subject matter of this Order, and shall secure from each such person a signed and dated statement acknowledging receipt of the Order. POM Wonderful, Roll, and their successors and assigns, and individual respondents shall deliver this Order to such current personnel within thirty (30) days after the effective date of this Order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

IT IS FURTHER ORDERED that POM Wonderful, Roll, and their successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporations or any business entity that POM Wonderful, Roll, and their successors and assigns, and individual respondents directly or indirectly control, or have an ownership interest in, that may affect compliance obligations arising under this Order, including but not limited to formation of a new business entity; a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; the proposed filing of a bankruptcy petition; or a change in the business or corporate name or address. Provided, however, that, with respect to any proposed change about which POM Wonderful, Roll, and their successors and assigns, and individual respondents learn less than thirty (30) days prior to the date such action is to take place, POM Wonderful, Roll, and their successors and assigns, and individual respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line *FTC v. POM Wonderful*. Provided, however, that, in lieu of overnight courier, notices may be sent by first class mail, but only if electronic versions of such notices are contemporaneously sent to the Commission at DEbrief@ftc.gov.

VIII.

IT IS FURTHER ORDERED that each individual respondent, for a period of ten (10) years after the date of issuance of this Order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line *FTC v. POM Wonderful*. Provided, however, that, in lieu of overnight courier, notices may be sent by first-class mail, but only if electronic versions of such notices are contemporaneously sent to the Commission at DEbrief@ftc.gov.

IX.

IT IS FURTHER ORDERED that POM Wonderful, Roll, and their successors and assigns, and individual respondents within sixty (60) days after the effective date of this Order, shall each file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of their compliance with this Order. Within ten (10) days of receipt of written notice from a representative of the Commission, they shall submit additional true and accurate written reports.

X.

This Order will terminate twenty (20) years from the date of its issuance, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the Order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this Order that terminates in less than twenty (20) years;
- B. This Order's application to any proposed respondent that is not named as a defendant in such complaint; and
- C. This Order if such complaint is filed after the Order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that respondents did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this Part as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is

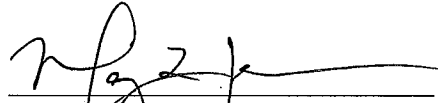
filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Donald S. Clark
Secretary

SEAL:

Respectfully Submitted,



Mary L. Johnson
Serena Viswanathan
Heather Hipsley
Tawana E. Davis
Janet M. Evans
Michael F. Ostheimer
Elizabeth K. Nach
Devin W. Domond
Andrew D. Wone

Date: June 18, 2012

Federal Trade Commission
Bureau of Consumer Protection
Division of Advertising Practices
600 Pennsylvania Ave., NW NJ-3212
Washington, DC 20580
Telephone: (202) 326-3090
Facsimile: (202) 326-3259

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2012, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW H-135
Washington, DC 20580
dclark@ftc.gov

I also certify that on June 18, 2012, I delivered via electronic mail and hand delivery a copy of the foregoing document to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW H-110
Washington, DC 20580
oalj@ftc.gov

I further certify that on June 18, 2012, delivered via electronic mail a copy of the foregoing to:

John D. Graubert, Esq.
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Attorneys for Respondents

/s/ Mary L. Johnson
Mary L. Johnson
Complaint Counsel

APPENDIX A

Tables Categorizing the Challenged False Establishment and Unsubstantiated Efficacy Claims

Table 1: Ads Making Both False Establishment Claims and Unsubstantiated Efficacy Claims†

Ad	Ad Exhibit Number	Heart Disease	Prostate Cancer	Erectile Dysfunction	
POM Juice Print Ads (12)	CX0016 (“Drink and Be Healthy” Ad)	✓ ^{P,R}			
	CX0029 (“10 out of 10 People” Ad)	✓			
	CX0031 (“Floss your arteries. Daily” Ad)	✓			
	CX0034 (“Amaze your cardiologist” Ad)	✓			
	CCFF ¶¶ 325-340, 344-348, 357-388	CX0103 (“Decompress” Ad)	✓		
		CX0109 (“Heart Therapy” Ad); CX0192 (“What gets your heart pumping” Ad)	✓ ^{P,R}		
		CX0260/1426 Ex. B (“Drink to Prostate Health” Ad)		✓ ^T	
		CX0274/1426 Ex. C (“I’m off to save prostates” Ad)		✓ ^{P,R}	
		CX0314 (“Drink to Prostate Health” Magazine Wrap); CX0372/CX0379/CX0380 (“Lucky I have super health powers” Magazine Wrap)		✓	
		CX0475/1426 Ex. A (Juice Bottle Hang Tag)	✓	✓	✓
*POMx Pill Print Ads (13)	CX0120 (“One Small Pill for Mankind” Ad); CX0122 (“Science, Not Fiction” Ad)		✓		
	CX0169/1426 Ex. L (“The power of POM” Ad); CX0180/1426 Ex. K (“Antioxidant Superpill” Ad); CX0279 (“Science, Not Fiction” Ad)	✓	✓		
	CX0280 (“Live Long Enough” Ad); CX0328 (“Your New Health Care Plan” Ad); CX0331/1426 Ex. J (“Healthy Wealthy” Ad); CX0337 (“The First Bottle You Should Open” Ad)	✓	✓		
	CX0342/CX0353 (“Take Out A Life Ins” Ads); CX0348/CX0350 (“24 Scientific Studies” Ads)	✓	✓		
	CX0351/CX0355 (“Only Antioxidant Supplement Rated X” Ads)	✓	✓	✓	
	CX1426 Ex. I (“Antioxidant Superpill” brochure)	✓	✓		
	*News-letters (2)	CX1426 Ex. M (POMx Heart Newsletter)	✓		
CX1426 Ex. N (POMx Prostate Newsletter)			✓		
Web Promo (4)	CX0473(POMWonderful.com); CX0473 (POMWonderful.com Community site); CX0473 (Pomegranatetruth.com); *CX0473 (POMPills.com)	✓	✓	✓	
CCFF ¶¶ 443-535					
	PR Promo (7)	CX0013 (Jan. 2003 POM Juice press release)	✓		
		CX0044 (Sept. 2005 POM Juice press release)	✓		
		*CX0065_0002 (July 2006 POMx press release)	✓ ^{P,R}	✓ ^T	
	CCFF ¶¶ 541-567, 572-578	CX0128_0002 (June 2007 POM Juice press release)			✓ ^T
		CX0473 (June 2008, Tupper on Fox Business show)	✓ ^T	✓ ^T	
CX0472 (Feb. 2009, Lynda Resnick on CBS <i>Early Show</i>)			✓		
	CX0473 (Mar. 2009, Lynda Resnick interview in Newsweek.com)		✓ ^{P,R}	✓	

✓ = The ad makes prevention (P), risk reduction (R), and treatment (T) claims, unless otherwise noted in superscript.

* = The ad makes establishment claims and efficacy claims for both POMx and POM Juice.

† The ads making false establishment claims (Table 1) by their nature also make unsubstantiated efficacy claims.

APPENDIX A

Tables Categorizing the Challenged False Establishment and Unsubstantiated Efficacy Claims

Table 2: Ads Making Unsubstantiated Efficacy Claims Only

Ad	Ad Exhibit Number	Heart Disease	Prostate Cancer	Erectile Dysfunction
POM Juice Ads (4)	CX0033 (“Life Support” Print Ad)	✓ ^{P, R}		
	CX0036, CX0188 (“Cheat Death” Print Ad)	✓ ^{P, R}		
CCFF ¶¶ 341-343, 349-356, 536-540	CX0463 (“Heart Therapy” Banner Ad)	✓ ^{P, R}		
	CX0466, 1426 Ex. H (“Off to save prostates” Banner Ad)		✓ ^{P, R}	
PR Promo (1)	CX0473 (Nov. 2008, Lynda Resnick on <i>Martha Stewart</i> Show)		✓	
CCFF ¶¶ 570-571				

✓ = The ad makes prevention (P), risk reduction (R), and treatment (T) claims, unless otherwise noted in superscript.

APPENDIX B

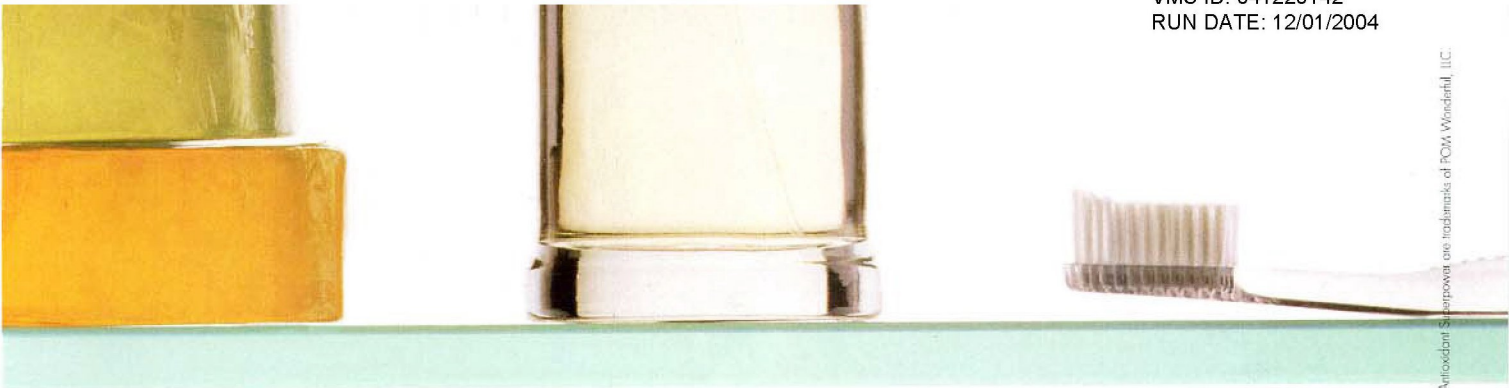
Table of Ads at Issue in Complaint Counsel's Appeal

Tab	Ad Exhibit No.	Description of Ad	Complaint Counsel's Proposed Findings of Fact
1	CX0031	"Floss your arteries. Daily"	CCFF ¶¶ 336-340
2	CX0034	"Amaze your cardiologist"	CCFF ¶¶ 344-348
3	*CX0036 / CX0188	"Cheat Death"	CCFF ¶¶ 349-356
4	CX0103	"Decompress"	CCFF ¶¶ 357-362
5	CX0192	"What gets your heart pumping?"	CCFF ¶¶ 363-367
6	CX0109	"Heart Therapy"	CCFF ¶¶ 363-367
7	*CX0463	"Heart Therapy" banner ad	CCFF ¶¶ 536-538
8	CX0274 (Comp. Ex. C)	"I'm off to save prostates"	CCFF ¶¶ 372-376
9	*CX0466 (Comp. Ex. H)	"Off to save prostates" banner ad	CCFF ¶¶ 539-540
10	CX0260 (Comp. Ex. B)	"Drink to Prostate Health"	CCFF ¶¶ 368-371
11	CX0475 (Comp. Ex. A)	Juice bottle hang tag	CCFF ¶¶ 385-388
12	†CX0120	"One Small Pill for Mankind"	CCFF ¶¶ 397-405
13	†CX0122	"Science, Not Fiction"	CCFF ¶¶ 397-405
14	†CX0169 (Comp. Ex. L)	"The power of POM"	CCFF ¶¶ 406-414
15	†CX0180 (Comp. Ex. K)	"Antioxidant Superpill"	CCFF ¶¶ 406-414
16	†CX0279	"Science, Not Fiction"	CCFF ¶¶ 406-414
17	†CX0280	"Live Long Enough"	CCFF ¶¶ 415-418
18	†CX0328	"Your New Health Care Plan"	CCFF ¶¶ 415-418
19	†CX0331 (Comp. Ex. J)	"Healthy Wealthy"	CCFF ¶¶ 415-418
20	†CX0337	"The First Bottle You Should Open"	CCFF ¶¶ 415-418
21	†CX0342 / CX0353	"Take Out A Life Ins"	CCFF ¶¶ 419-424
22	†CX0348 / CX0350	"24 Scientific Studies"	CCFF ¶¶ 419-424
23	†CX0351 / CX0355	"Only Antioxidant Supplement Rated X"	CCFF ¶¶ 425-429
24	CX0473 (Comp. Ex. E-1)	Pomegranatetruth.com site capture	CCFF ¶¶ 496-500
25	†CX0473 (Comp. Ex. E-8)	POMPills.com site capture	CCFF ¶¶ 501-535
26	†CX0065_0002	POMx press release, July 2006	CCFF ¶¶ 556-562
27	CX0473 (Comp. Ex. E-7)	Tupper on Fox Business show, June 2008	CCFF ¶¶ 572-573
28	CX0472	Lynda Resnick on CBS <i>Early Show</i> , Feb. 2009	CCFF ¶¶ 574-575
29	CX0473 (Comp. Ex. F)	Lynda Resnick interview in Newsweek.com, Mar. 2009	CCFF ¶¶ 576-578
30	*CX0473 (Comp. Ex. E-6)	Lynda Resnick on <i>Martha Stewart Show</i> , Nov. 2008	CCFF ¶¶ 570-571

* = The ad makes unsubstantiated disease efficacy claims only.

† = The ad makes claims for both POM Juice and POMx.

Tab 1



**Floss your arteries.
Daily.**



Clogged arteries lead to heart trouble. It's that simple. That's where we come in. Delicious POM Wonderful Pomegranate Juice has more naturally occurring antioxidants than any other drink. These antioxidants fight free radicals—molecules that are the cause of sticky, artery clogging plaque. Just eight ounces a day can reduce plaque by up to 30%!* So every day: wash your face, brush your teeth, and drink your POM Wonderful.



POM Wonderful Pomegranate Juice. The Antioxidant Superpower.™

*Aviram, M., Clinical Nutrition, 2004. Based on clinical pilot study.

VMS-000212

CX0031_0001

c. **“Floss your arteries. Daily.” Print Ad (CX0031)**

336. In December 2004, POM disseminated in *Details* magazine and *Fitness* magazine a POM Juice advertisement with the bold headline **“Floss your arteries. Daily.”** The advertisement contained an image of a POM bottle with logo on a medicine cabinet shelf along with items such as a toothbrush, toothpaste, and soap. The advertisement’s body copy stated:

Clogged arteries lead to heart trouble. It’s that simple. That’s where we come in. Delicious P♥M Wonderful P♥mehranate Juice has more naturally occurring antioxidants than any other drink. These antioxidants fight free radicals – molecules that are the cause of sticky, artery clogging plaque. Just eight ounces a day can reduce plaque by up to 30%!* So every day: wash your face, brush your teeth, and drink your P♥M Wonderful. **P♥M Wonderful P♥mehranate Juice. The Antioxidant Superpower.**

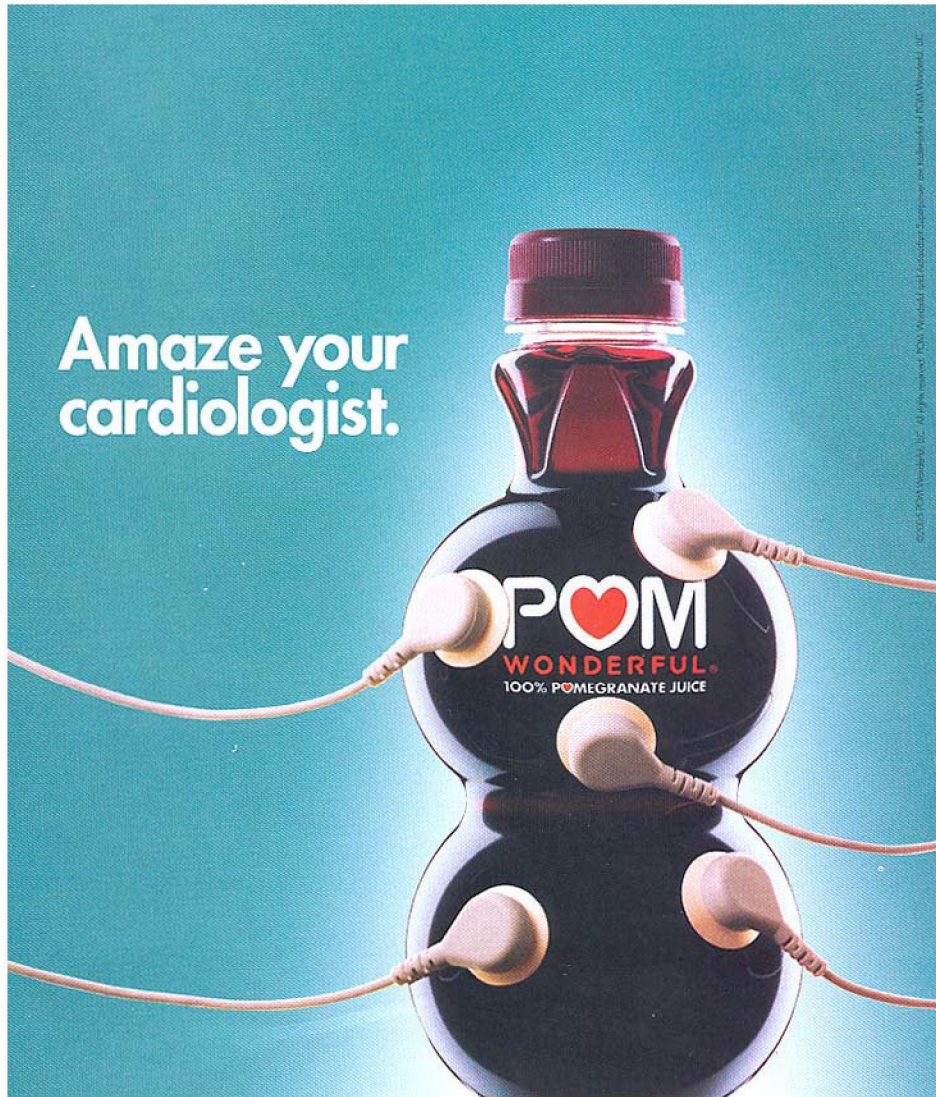
In very small type after the asterisk, the advertisement cited to one of the studies conducted by Dr. Aviram: “Aviram, M. *Clinical Nutrition*, 2004. Based on a clinical pilot study.” (CX0031 (referring to the Aviram CIMT/BP Study (2004))).

337. Monique McLaws, former brand manager for POM Juice, testified that the message POM intended to convey with this advertisement and headline was “cleaning out your arteries.” (CX1351 (McLaws, Dep. at 123-24)).
338. A 2005 creative brief about print and outdoor advertising aimed at women’s lifestyles also indicates that POM Marketing believed the phrase “Floss Your Arteries Daily” communicated the benefit that “*If you drink POM Wonderful DAILY, you will have clean and healthy arteries.*” (CX0409_0010).
339. Mrs. Resnick approved this specific advertisement. (CX0471_0010; L. Resnick, Tr. 158-

59).

340. The imagery and text of this advertisement, for example, placing the POM Juice bottle in a medicine cabinet, referring to “floss[ing]” one’s arteries, and referring to a specific percentage reduction in plaque with a study citation, convey the net impression that drinking eight ounces of POM Juice daily treats, prevents, or reduces the risk of heart disease, including by reducing arterial plaque, and that this benefit is clinically proven. (CCFF ¶¶ 336-38).

Tab 2



Amaze your
cardiologist.

Ace your EKG: just drink 8 ounces of delicious POM Wonderful Pomegranate Juice a day. It has more naturally occurring antioxidants than any other drink. Antioxidants fight free radicals... nasty little molecules that can cause sticky, artery clogging plaque. A glass a day can reduce plaque by up to 30%! Trust us, your cardiologist will be amazed.

POM Wonderful Pomegranate Juice. The Antioxidant Superpower.™

*Aviram, M., Clinical Nutrition, 2004. Based on clinical pilot study.

POM
WONDERFUL

pomwonderful.com

VMS-000219

CX0034_0001

e. **“Amaze your cardiologist” Print Ad (CX0034)**

344. In February 2005, POM disseminated in *Prevention* magazine a POM Juice advertisement with the headline **“Amaze your cardiologist.”** The advertisement featured an image of a bottle of POM Juice with electrocardiogram (EKG) leads attached to it. The advertisement’s body copy stated:

Ace your EKG: just drink 8 ounces of delicious P♥M Wonderful P♥megrante Juice a day. It has more naturally occurring antioxidants than any other drink. Antioxidants fight free radicals . . . nasty little molecules that can cause sticky, artery clogging plaque. A glass a day can reduce plaque by up to 30%!* Trust us, your cardiologist will be amazed. **P♥M Wonderful P♥megrante Juice. The Antioxidant Superpower.**

(CX0034).

345. In very small type after the asterisk, the advertisement cited to one of the studies conducted by Michael Aviram: “Aviram, M., *Clinical Nutrition*, 2004. Based on a clinical pilot study.” The advertisement also directed consumers to POM’s website, pomwonderful.com, directly under the POM logo. (CX0034).
346. Dr. Butters testified that the phrase “amaze your cardiologist” makes explicit the theme of the importance of heart health. (Butters, Tr. 2911).
347. Mr. Resnick testified that he is comfortable with the “Amaze your cardiologist” claim given the company’s “very positive results around heart health,” citing, for example, the clinical study by Dr. Ornish on blood flow to the heart, and the study of “patients that had serious carotid artery problems [showing] it did reduce the plaque by up to 40 percent.” (CX1376 (S. Resnick, OS Dep. at 159-60)).
348. The copy and images in this advertisement draw a clear association with cardiovascular disease diagnosis and treatment, particularly the bottle “dressed” as an EKG patient, references to a cardiologist and “ac[ing] your EKG,” and specific citations to a study purportedly showing 30% reduction of arterial plaque. This advertisement conveys the net impression that drinking eight ounces of POM Juice daily treats, prevents, or reduces the risk of heart disease, including by reducing arterial plaque, and that this benefit is clinically proven. (CCFF ¶¶ 344-47).

Tab 3

Cheat death.



©2005 POM Wonderful, LLC. All rights reserved. POM Wonderful and Antioxidant Superpower are trademarks of POM Wonderful, LLC.

Dying is so dead. Drink to life with POM Wonderful Pomegranate Juice, the world's most powerful antioxidant. It has more antioxidants than any other drink and can help prevent premature aging, heart disease, stroke, Alzheimer's, even cancer. Eight ounces a day is all you need. The sooner you drink it, the longer you will enjoy it.

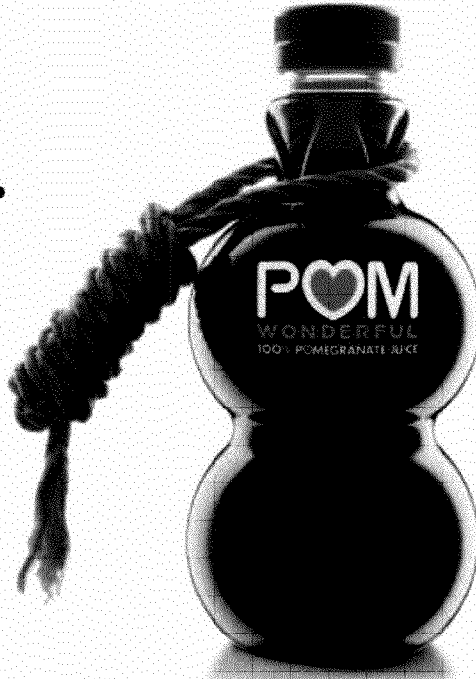
POM Wonderful Pomegranate Juice. The Antioxidant Superpower.™

POM
WONDERFUL
pomwonderful.com

VMS-000221

CX0036_0001

Cheat death.



You need more than luck to live longer. You need antioxidants. And POM Wonderful 100% Pomegranate Juice is loaded with them. It helps guard your body against free radicals, unstable molecules that emerging science suggests aggressively destroy healthy cells in your body and contribute to disease. POM Wonderful 100% Pomegranate Juice is supported by \$23 million of medical scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health. So drink a glass a day and cheat death. Live life.



POM Wonderful 100% Pomegranate Juice. The Antioxidant Superpower.

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JOB NO.: PJ8516	TRIM: 7" x 10.125"	COLOR: 4/C PROC	DATE IN: 03-27-08
PROJECT: PJ Advocate Print Ad CheatDeath June08	LIVE: n/a	TRIM (DO NOT PRINT)	DATE OUT: 04-1-08
SCALE: 1 : 1	BLEED: n/a	PRINTOUT SIZE: 100%	PROOF ROUND: F

f. “Cheat Death” Print Ad (CX0036)

349. In 2005 and 2006, POM disseminated a POM Juice advertisement with the headline, “**Cheat Death.**” The advertisement ran in *Rolling Stone* magazine in March, June, and July 2005; in *Prevention* magazine in May 2005; and in *Fitness* magazine in January 2006. (CX0036_0002). The advertisement featured an image of the POM Juice bottle with logo with a rope noose around the neck of the bottle. The advertisement’s body copy stated:

Dying is so dead. Drink to life with P♥M Wonderful P♥meganate Juice, the world’s most powerful antioxidant. It has more antioxidants than any other drink and can help prevent premature aging, heart disease, stroke, Alzheimer’s, even cancer. Eight ounces a day is all you need. The sooner you drink it, the longer you will enjoy it. **P♥M Wonderful P♥meganate Juice. The Antioxidant Superpower.**

The advertisement also directed consumers to POM’s website, pomwonderful.com, directly under the POM logo. (CX0036; *see also* CX0188 (similar advertisement disseminated in June 2008)).

350. Ms. McLaws testified that the “Cheat Death” advertisement’s message was that one could avoid or prevent the diseases mentioned (heart disease, stroke, Alzheimer’s) and therefore live longer. (CX1351 (McLaws, Dep. at 134-35)).
351. In her book, Mrs. Resnick says the “Cheat Death” advertisement’s imagery was intended to symbolically endow the juice with heroic powers: “When you see that brave little bottle with a noose around its neck – a noose broken by the antioxidant power of POM – you identify with it just as you identify with a hero’s triumph or last-minute escape from danger on the movie screen.” (CX0001_0019-0020).
352. Ms. Leow testified that the intent of the “Dressed Bottle” campaign, which included the “Cheat Death” and other similar juice advertisements (described in CCFF ¶¶ 336, 341, 344, and 357), was to “personify” the product. (Leow, Tr. 475, 487).
353. POM considered the “Cheat Death” advertisements to be a “hard-hitting execution,” and after a period of little or no advertising, the company, with Mrs. Resnick’s approval, decided to revive these and similar prior advertisements in 2008 in order to create some attention among consumers. (Perdigao, Tr. 627; CX0185_0003; CX1368 (L. Resnick,

Welch Dep. at 100-01)).

354. POM kept a log of consumer complaints. (CX1357 (Kuyoomjian, Dep. at 203)). In response to November 2009 and March 2010 consumer complaints about a billboard version of the “Cheat Death” advertisement, which contained the same headline and image, POM’s consumer affairs representative told those consumers:

The intention of “Cheat Death” is the recognition that disease of the heart and circulatory [*sic*] system (cardiovascular disease or CVD) are some of the main causes of death in the US. There are preventative actions that can be taken to decrease this risk and finding healthy options that could potentially increase one’s heart health, such as drinking POM, increases one’s chances to live longer and healthier, to “cheat death.”

(CX0454_0006-07; CX0456_0005).

355. In response to additional complaints about the “Cheat Death” billboard advertisement, POM’s consumer affairs representative also repeatedly told consumers (*e.g.*, in November 2008, January 2009, and again in April 2010) that POM’s advertising was created with the intent of using imagery that irreverently and boldly conveys to consumers that drinking POM Juice “may help prevent disease” or is “incredibly healthy.” (CX0456_0002-03; CX0454_0009-10).

356. The copy and images in these “Cheat Death” advertisements, particularly the references to prevention of heart disease, stroke, and cancer, convey the net impression that drinking eight ounces of POM Juice daily prevents or reduces the risk of heart disease. (CCFF ¶¶ 349-52, 354-55).

Tab 4

Decompress.



Amaze your cardiologist. Drink POM Wonderful Pomegranate Juice. It helps guard your body against free radicals, unstable molecules that emerging science suggests aggressively destroy and weaken healthy cells in your body and contribute to disease. POM Wonderful Pomegranate Juice is supported by \$20 million of initial scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health. Keep your ticker ticking and drink 8 ounces a day.

POM Wonderful Pomegranate Juice. The Antioxidant Superpower.™

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POM
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pomwonderful.com

VMS-0000242

CX0103_0001

g. “Decompress” Print Ad (CX0103)

357. In 2007, POM disseminated a juice advertisement with the headline “**Decompress,**” which depicted the POM Juice bottle with logo wrapped in a blood pressure cuff. One version of the advertisement, disseminated in 2007 in *Health* magazine, *Prevention* magazine, and *New York* magazine, stated in the body copy:

Amaze your cardiologist. Drink P♥M Wonderful Pomegranate Juice. It helps guard your body against free radicals, unstable molecules that emerging science suggests aggressively destroy and weaken healthy cells in your body and contribute to disease. P♥M

Wonderful Pomegranate Juice is supported by \$20 million of initial scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health. Keep your ticker ticking and drink 8 ounces a day. **P♥M Wonderful Pomegranate Juice. The Antioxidant Superpower.**

The advertisement also directed consumers to POM's website, pomwonderful.com, directly under the POM logo. (CX0103).

358. POM repeatedly disseminated advertisements with the headline "Decompress" and the blood pressure cuff imagery, including in 2007, 2008, and 2009. (Tupper, Tr. 976).
359. Ms. Leow testified that the purpose of dressing the POM Juice bottle in a blood pressure cuff for the "Decompress" advertisement was to show or suggest that POM may be healthy for the heart and the arteries. (Leow, Tr. 489).
360. Mr. Tupper, in testifying about a POM advertisement depicting a blood pressure cuff at the trial in *POM Wonderful, LLC vs. Tropicana Products, Inc.*, stated that the advertisement is "*talking about . . . the fairly vast body of published medical research. Many of those studies are, in fact, on various elements of the cardiovascular system, including blood pressure, but many others as well.*" He further acknowledged there was a strong association between the image of the blood pressure cuff and receiving medical care: "[I]t's very obviously a blood pressure cuff, and that's typically the first thing that your doctor will do when you go in for a physical is check your blood pressure as a means of getting an overall picture on your health." (CX1406 (Tupper, Trop. Tr. at 0179) (emphasis added)).
361. The copy and images in the "Decompress" advertisement, including the easily-recognizable blood pressure cuff and reference to cardiologists, as well as the statement that POM Juice would "[k]eep your ticker ticking," convey the net impression that drinking 8 ounces of POM Juice daily treats, prevents, or reduces the risk of heart disease, including by lowering blood pressure. In addition, by expressly stating that "[POM Juice] is supported by \$20 million of initial scientific research," the advertisement further conveys the net impression that these benefits regarding heart disease are clinically proven. (CCFF ¶¶ 357, 359-60).
362. Consumer research confirms that the headline and imagery alone of this advertisement created a net impression to consumers that POM Juice treats, prevents, or reduces the risk

of heart disease, including by reducing blood pressure. (CCFF ¶¶ 585-591).

Tab 5



What gets your heart pumping?

Supermodels or beaches? 36-24-36? Or perhaps healthy arteries. Drink POM Wonderful 100% Pomegranate Juice. It helps guard your body against free radicals, unstable molecules that emerging science suggests aggressively destroy healthy cells in your body and contribute to disease. POM Wonderful 100% Pomegranate Juice is supported by \$23 million of initial scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health. Eight ounces a day is enough to keep your heart pumping, even if you're not dating a supermodel.

POM
WONDERFUL®
pomegranatetruth.com

POM Wonderful 100% Pomegranate Juice. The Antioxidant Superpower.™

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h. “Heart therapy” and “What gets your heart pumping?” Print Ads (CX0109) and (CX0192)

363. In April 2007, POM disseminated in *InStyle* and *Town and Country* magazines an advertisement with the headline “Heart therapy.” The advertisement depicted a bottle of POM Juice with logo reclining on a couch, as in a therapist’s office. The body copy of the advertisement stated:

Seek professional help for your heart. Drink P♥M Wonderful Pomegranate Juice. It helps guard your body against free radicals, unstable molecules that emerging science suggests aggressively destroy and weaken healthy cells in your body and contribute to disease. P♥M Wonderful Pomegranate Juice is supported by \$20 million of initial scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health. Keep your heart healthy and drink 8 ounces a day. **P♥M Wonderful Pomegranate Juice. The Antioxidant Superpower.**

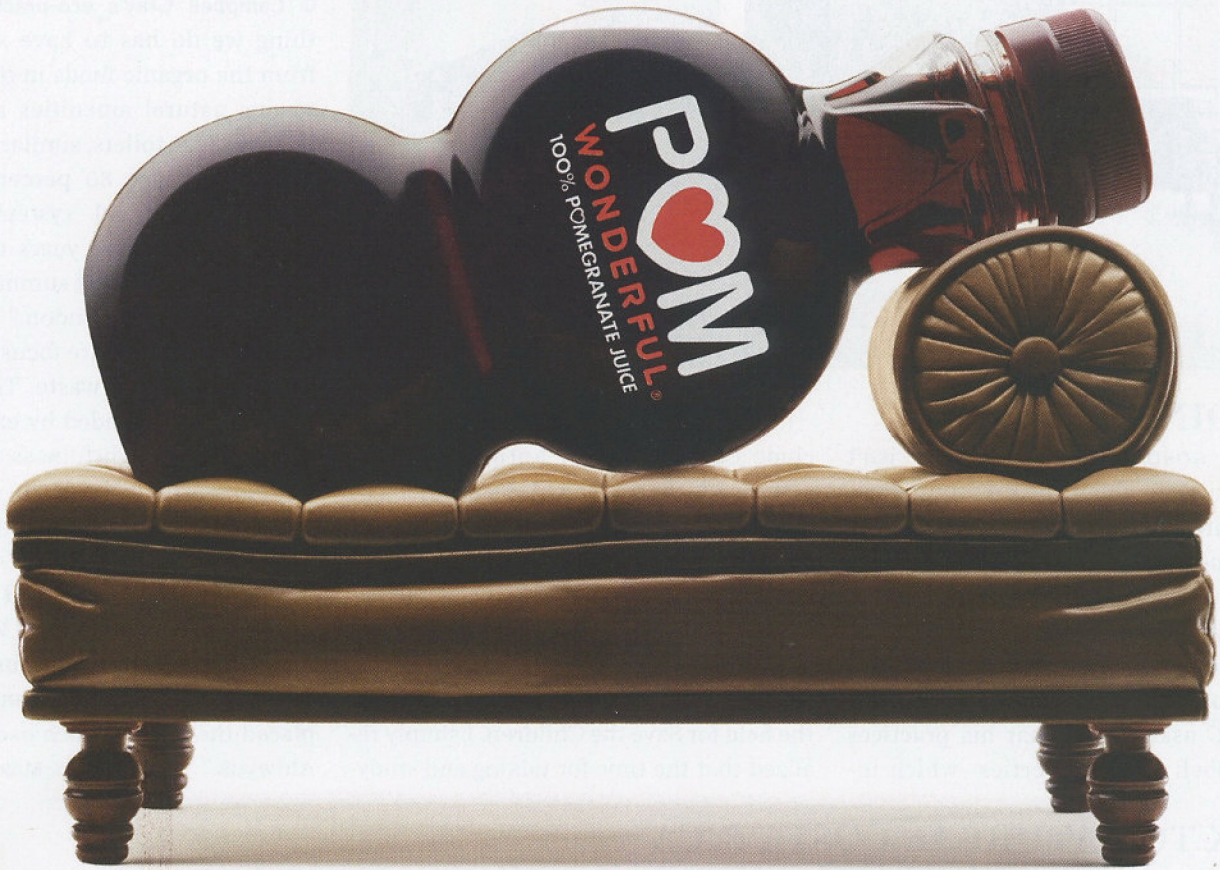
The advertisement also directed consumers to POM’s website, pomwonderful.com, directly under the POM logo. (CX0109).

364. In May 2008, POM disseminated an advertisement headlined “What gets your heart pumping?” and featuring an image of a POM bottle sideways, in a bikini top on a clothesline. The body copy read, “Supermodels or beaches? 36-24-36? Or perhaps healthy arteries . . . P♥M Wonderful 100% Pomegranate Juice is supported by \$23 million of initial scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health. Eight ounces a day is enough to keep your heart pumping, even if you’re not dating a supermodel.” (CX0192 (disseminated in *Men’s Health* magazine)).
365. When shown the bikini top advertisement in a prior litigation, Mr. Tupper testified that “[t]here’s been quite a lot of published medical science around the cardiovascular benefits associated with pomegranate juice, so heart pumping obviously refers to that research.” (CX1364 (Tupper, TCCC Dep. at 293-94)).
366. The “Heart Therapy” and “Heart Pumping” advertisements have almost identical body copy to the “Decompress” advertisement. As Mr. Tupper described with respect to the

“Decompress” advertisement, POM considers the “scientific research” referred to in these advertisements to be the “fairly vast body of published medical research . . . on various elements of the cardiovascular system[.]” (CX1406 (Tupper, Trop. Tr. at 0179)).

367. The copy and images in the advertisements, including the bold headlines “Heart therapy,” and “What gets your heart pumping” and text advising consumers to “[k]eep your heart healthy and drink 8 ounces a day,” or “[e]ight ounces a day is enough to keep your heart pumping,” convey the net impression that drinking eight ounces of [POM Juice] daily prevents or reduces the risk of heart disease. In addition, by expressly stating that POM Juice is supported by \$20 [or \$23] million of scientific research, the advertisements further convey the net impression that this benefit regarding heart disease is clinically proven. (CCFF ¶¶ 363-66).

Tab 6



Heart therapy.

Seek professional help for your heart. Drink POM Wonderful Pomegranate Juice. It helps guard your body against free radicals, unstable molecules that emerging science suggests aggressively destroy and weaken healthy cells in your body and contribute to disease. POM Wonderful Pomegranate Juice is supported by \$20 million of initial scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health. Keep your heart healthy and drink 8 ounces a day.

POM
WONDERFUL[®]
pomwonderful.com

POM Wonderful Pomegranate Juice. The Antioxidant Superpower.™

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VMS-000245

CX0109_001

h. “Heart therapy” and “What gets your heart pumping?” Print Ads (CX0109) and (CX0192)

363. In April 2007, POM disseminated in *InStyle* and *Town and Country* magazines an advertisement with the headline “Heart therapy.” The advertisement depicted a bottle of POM Juice with logo reclining on a couch, as in a therapist’s office. The body copy of the advertisement stated:

Seek professional help for your heart. Drink P♥M Wonderful Pomegranate Juice. It helps guard your body against free radicals, unstable molecules that emerging science suggests aggressively destroy and weaken healthy cells in your body and contribute to disease. P♥M Wonderful Pomegranate Juice is supported by \$20 million of initial scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health. Keep your heart healthy and drink 8 ounces a day. **P♥M Wonderful Pomegranate Juice. The Antioxidant Superpower.**

The advertisement also directed consumers to POM’s website, pomwonderful.com, directly under the POM logo. (CX0109).

364. In May 2008, POM disseminated an advertisement headlined “What gets your heart pumping?” and featuring an image of a POM bottle sideways, in a bikini top on a clothesline. The body copy read, “Supermodels or beaches? 36-24-36? Or perhaps healthy arteries . . . P♥M Wonderful 100% Pomegranate Juice is supported by \$23 million of initial scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health. Eight ounces a day is enough to keep your heart pumping, even if you’re not dating a supermodel.” (CX0192 (disseminated in *Men’s Health* magazine)).
365. When shown the bikini top advertisement in a prior litigation, Mr. Tupper testified that “[t]here’s been quite a lot of published medical science around the cardiovascular benefits associated with pomegranate juice, so heart pumping obviously refers to that research.” (CX1364 (Tupper, TCCC Dep. at 293-94)).
366. The “Heart Therapy” and “Heart Pumping” advertisements have almost identical body copy to the “Decompress” advertisement. As Mr. Tupper described with respect to the

“Decompress” advertisement, POM considers the “scientific research” referred to in these advertisements to be the “fairly vast body of published medical research . . . on various elements of the cardiovascular system[.]” (CX1406 (Tupper, Trop. Tr. at 0179)).

367. The copy and images in the advertisements, including the bold headlines “Heart therapy,” and “What gets your heart pumping” and text advising consumers to “[k]eep your heart healthy and drink 8 ounces a day,” or “[e]ight ounces a day is enough to keep your heart pumping,” convey the net impression that drinking eight ounces of [POM Juice] daily prevents or reduces the risk of heart disease. In addition, by expressly stating that POM Juice is supported by \$20 [or \$23] million of scientific research, the advertisements further convey the net impression that this benefit regarding heart disease is clinically proven. (CCFF ¶¶ 363-66).

Tab 7



Heart therapy.



Backed by \$25
million in medical
research.

[Learn more ▶](#)

SOUND: **ON** | OFF

a. “Heart Therapy” Banner Ad (CX0463)

536. In December 2008, POM disseminated an animated banner ad with the headline “Heart Therapy” depicting a bottle of POM Juice reclining on a couch, as in a therapist’s office. The heart in the “POM” logo was animated to expand and contract, like a beating heart. The animation also included the sound effect of a beating heart. Under the image was the copy, “Backed by \$25 million in medical research,” with a link “Learn more” that directed the consumer to the pomwonderful.com website. (CX0463).
537. In an internal document on “POM On-line Banner ads,” from October 2008, copy points for a “Heart Therapy,” banner ad included: “POM Wonderful 100% Pomegranate Juice is backed by \$25 million in medical research with promising results for cardiovascular health,” “Only our pomegranate juice has real, proven heart health benefits,” and “Keep your heart healthy and drink a glass a day.” The document also described the “close” of the ad as “Call to action to get consumer to click-through to learn more about POM Juice and heart health: http://www.pomwonderful.com/health_benefits.” (CX0246_0002).
538. The “Heart Therapy” banner ad, with the imagery and audio of the beating heart, “Heart Therapy” headline, and reference to “\$25 million in medical research,” conveys the net impression that POM Juice prevents or reduces the risk of heart disease. This net impression is even stronger if a consumer, as directed by the ad, were to click through to the pomwonderful.com website section on “Health Benefits.” (See CCF ¶¶ 536-37).

Tab 8

***I'm off to save
PROSTATES!***



©2009 Pom Wonderful, LLC. All rights reserved. POM Wonderful and Antioxidant Superpower are registered trademarks of Pom Wonderful, LLC.

Man by man, gland by gland, The Antioxidant Superpower[®] is 100% committed to defending healthy prostates. Powered by pure pomegranate juice... backed by \$25 million in vigilant medical research*... there's no telling just how far it will go to improve prostate health in the future.

*Prostate study details at http://www.pomwonderful.com/health_benefits.html

pomwonderful.com

The Antioxidant Superpower.[®]

VMS-0000281

CX0274_0001

b. “I’m Off to Save Prostates” Print Ad (CX0274)

372. POM disseminated, in February 2009 in *Men’s Fitness* magazine, a POM Juice advertisement with the headline, “**I’m off to save PROSTATES!**”. The advertisement also appeared in March 2009 in *Advocate* magazine and *Men’s Journal*. (CX0274_0002). It depicted a POM Juice bottle shooting off into the sky like a super hero. The advertisement’s body copy stated:

Man by man, gland by gland, The Antioxidant Superpower is 100% committed to defending healthy prostates. Powered by pure pomegranate juice . . . backed by \$25 million in vigilant medical research* . . . there’s no telling just how far it will go to improve prostate health in the future. *Prostate study details at http://www.pomwonderful.com/health_benefits.html.

(CX0274; *see also* CX1426_00029).

373. Mrs. Resnick testified that this advertisement intended to convey the message that POM was good for prostates and was backed by research to improve prostate health. She also testified that the prostate health benefits in the advertisement referred to the Pantuck Phase II Prostate Cancer Study (2006) and the basic science that had been done. (L. Resnick, Tr. 218); *see* CCF ¶ 172).
374. Mrs. Resnick has testified that “prostate health” means “keeping you safe from prostate cancer.” (CX1362 (L. Resnick, TCCC Dep. at 10)).
375. Dr. Butters testified that “defend” could mean “resist an attack made on (someone or something) and protect from harm or danger” and that it is possible this advertisement

communicates to viewers that POM Juice is protecting or defending prostates from disease. (Butters, Tr. 2899-2901).

376. This advertisement, with its references to “sav[ing]” and “defending” prostates, as well as “improve[ing] prostate health,” conveys the net impression that drinking eight ounces of POM Juice daily prevents or reduces the risk of prostate cancer. Moreover, the advertisement’s claim that POM Juice is “backed by \$25 million in vigilant medical research,” as well as a footnote referencing a “prostate study” under a URL entitled “health benefits” conveys the overall net impression that POM’s benefits for prostate cancer have been proven by clinical testing. (CCFF ¶¶ 372-75).

Tab 9

The POM logo is a stylized black bomb with a lit fuse, set against a background of red and black radial lines. The letters 'POM' are written in white on the side of the bomb.

*I'm off to save
PROSTATES!*

The Antioxidant Superpower.

[Learn more ▶](#)

b. “I’m Off to Save Prostates” Banner Ad (CX0466)

539. In February 2009, POM disseminated an animated banner ad with the headline “HURRY! Prostates everywhere are in danger!” showing the POM Juice bottle flying like a super hero, then landing and announcing “I’m off to save PROSTATES!” The banner also displayed the copy “The Antioxidant Superpower,” and a link to “Learn

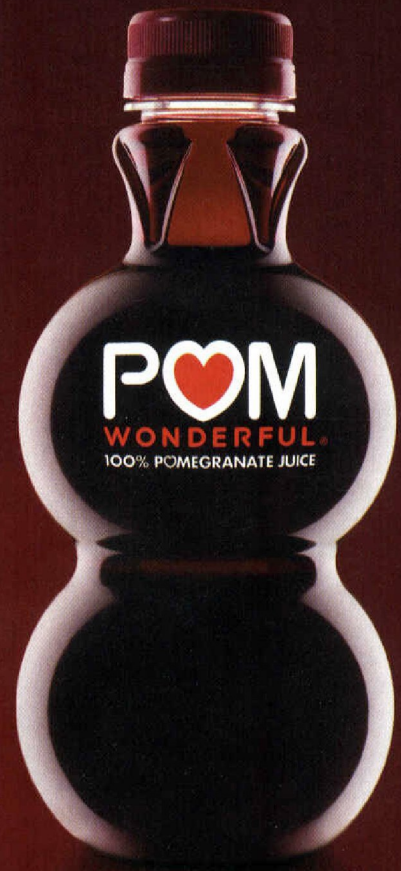
more.” (CX0466).

540. This banner ad, with its animated copy of “HURRY! Prostates everywhere are in danger!” and “I’m off to save PROSTATES!” conveys the net impression that POM Juice prevents or reduces the risk of prostate cancer. This net impression is amplified if a consumer, as directed by the ad, were to click through to the pomwonderful.com website. (See CCF ¶ 539).

Tab 10

VMS ID: 081200704
RUN DATE: 12/01/2008

Drink to prostate health.



Sometimes, good medicine can taste great. Case in point: POM Wonderful®. A recently published preliminary medical study followed 46 men previously treated for prostate cancer, either with surgery or radiation. After drinking 8 ounces of POM Wonderful 100% Pomegranate Juice daily for at least two years, these men experienced significantly longer PSA doubling times. Want to learn more about the results of this study? Visit pomwonderful.com/prostate. **Trust in POM.**

pomwonderful.com

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VMS-0000276

CX0260_0001

a. **“Drink to Prostate Health” Print Ad (CX0260)**

368. An advertisement for POM Juice, disseminated in December 2008 in *Men’s Health* and *Prevention* magazines with the headline, **“Drink to prostate health,”** featured a stark image of a POM Juice bottle with logo against a bright red background (the same color as the juice). (CX0260_0002). The advertisement’s body copy stated:

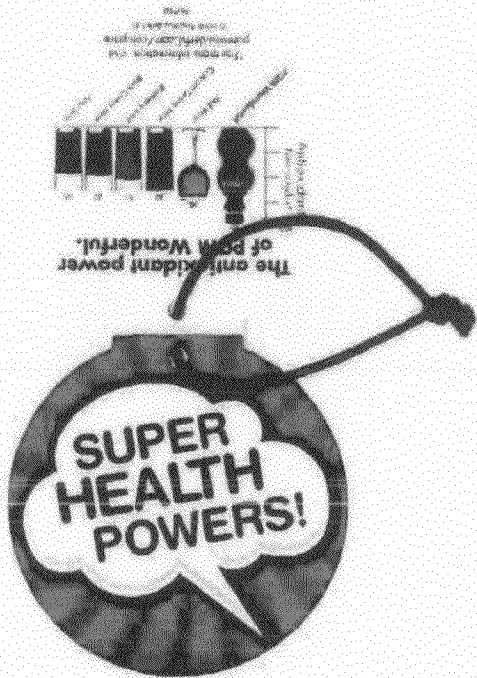
Sometimes, good medicine can taste great. Case in point: P♥m Wonderful. A recently published preliminary medical study followed 46 men previously treated for prostate cancer, either with surgery or radiation. After drinking 8 ounces of P♥M Wonderful 100% Pomegranate Juice daily for at least two years, these men experienced significantly longer PSA doubling times. Want to learn more about this study? Visit pomwonderful.com/prostate.
Trust in P♥M.

(CX0260; *see also* CX1426_00028).

369. In testifying about this advertisement in the *POM vs. Tropicana* lawsuit, Mr. Tupper noted that although POM tries “to have a pleasant, humorous, cute, funny voice, [in this advertisement] we’re talking about some very serious published research on pomegranate juice and, in this particular case, it was a study looking at men with advanced prostate cancer. So, it’s clearly a very serious topic.” (CX1406 (Tupper, Trop. Tr. at 0178)).

370. Dr. Butters testified that the inference from this advertisement is that POM Juice may be beneficial for people who have had prostate cancer. (Butters, Tr. 2943-44).
371. This advertisement, with a description of a study on prostate cancer patients and a bold headline advising consumers to “drink to prostate health,” conveys the net impression that drinking eight ounces of POM Juice daily treats prostate cancer, including by slowing PSA doubling-time. Moreover, the advertisement’s reference to a specific medical study conveys the net impression that POM’s benefits for prostate cancer have been proven by clinical testing. (CCFF ¶¶ 368-70).

Tab 11



100% PURE POMEGRANATE JUICE.

It's 100% pure! It's heroically healthy! It's The Antioxidant Superpower, POM Wonderful 100% authentic pomegranate juice.

Backed by \$25 million in medical research. Proven to fight for cardiovascular, prostate and erectile health. Committed to keeping you healthy for a good, long time!

PLF _____ DEF _____
 EXHIBIT _____
 WITNESS M. Trapp
 DATE 2/2/11
 TONI COHEN

Exhibit A

3. POM Juice Bottle Hang Tag Made Establishment Claims Regarding Heart Disease, Prostate Cancer, and Erectile Dysfunction (CX0475 / CX1426_00027 [Compl. Ex. A])

385. POM disseminated “hang tags,” which were hard paper stock tags hung around the neck of POM Juice bottles, in order to promote the product or make announcements to consumers. (L. Resnick, Tr. 264).
386. One hang tag, which was disseminated on POM Juice bottles since at least September 2009, contained the bold headline “**SUPER HEALTH POWERS!**” on the outside of the tag. Inside, the hang tag stated:

100% PURE POMEGRANATE JUICE. It’s 100% pure! It’s heroically healthy! It’s The Antioxidant Superpower, P♥M Wonderful 100% authentic pomegranate juice. Backed by \$25 million in medical research. Proven to fight for cardiovascular, prostate and erectile health. Committed to keeping you healthy for a good long time!

The back of the hang tag contained a chart purporting to show that POM Juice has the most antioxidants, as compared to other beverages, and directed consumers to a page on POM's website, pomwonderful.com/compare. (CX0475; *see also* CX1426_00027).

387. Dr. Butters testified that a reasonable reader could infer from the phrase "backed by \$25 million in medical research" on the hang tag that the research has been completed and has results. (Butters, Tr. 2878).

388. The hang tag's reference to "[p]roven to fight for cardiovascular, prostate and erectile health" and that the juice is "[b]acked by \$25 million in medical research," combined with the POM Juice bottle and logo, convey the net impression that POM Juice treats, prevents, or reduces the risk of cardiovascular disease, prostate cancer, and erectile dysfunction, and that these health benefits are clinically proven. (*See* CCF ¶¶ 386-87).

Tab 12



One small pill for mankind.

"Findings from a small study suggest that pomegranate juice may one day prove an effective weapon against prostate cancer."

The New York Times (July 4, 2006).

Introducing POMx™—a highly concentrated, incredibly powerful blend of all-natural polyphenol antioxidants made from the very same pomegranates in **POM Wonderful 100% Pomegranate Juice**. Our method of harnessing astonishing levels of antioxidants is so extraordinary, it's patent-pending. So now you can get all the antioxidant power of an 8oz glass of juice in the convenience of a calorie-free capsule.



Ready to take on free radicals? Put up your POMx and fight them with a mighty 1000mg capsule – that's more concentrated pomegranate polyphenol antioxidants than any other 100% pomegranate supplement. An initial UCLA medical study on POM Wonderful 100% Pomegranate Juice showed hopeful results for men with prostate cancer.^{1,3} And preliminary human research suggests that our California-grown pomegranate juice also promotes heart health.^{2,3} Take your antioxidants into your own hands. **Call 1-888-POM-PILL now, or visit pompills.com/fort and get your first monthly shipment for just ~~\$29.95~~ \$24.95 with coupon.**

POM IN A PILL™

**CALL 1-888-POM-PILL now, or visit pompills.com/fort
Not available in stores | 100% money-back guarantee**



SAVE \$5 ON YOUR FIRST ORDER.

Call 1-888-POM-PILL or visit pompills.com/fort and mention or enter code **FORT5** at checkout. To pay by check, call 1-888-POM-PILL for instructions. Hurry, offer expires July 31, 2007.

CONSUMER: This offer expires July 31, 2007. Mention or enter coupon code FORT5 at checkout. This coupon can only be used on POMx products. One coupon redemption per customer. Cannot be combined with other offers. No substitutions, transfer rights or cash equivalents will be given. We reserve the right to modify or discontinue this promotion at any time. Coupon code valid only at pompills.com/fort or 1-888-POM-PILL.



¹ pomwonderful.com/cancer.html ² pomwonderful.com/heart_health.html ³ These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease.

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VMS-0000246

CX0120_0001

a. **“One small pill for mankind” / “Science, not fiction” Print Ads (CX0120 / CX0122)**

397. As early as 2007, POM disseminated print advertisements introducing POMx Pills. One such advertisement, which ran in *Fortune* magazine in May 2007, included an image of a POMx Pill bottle over a bold headline, **“One small pill for mankind.”** Directly underneath the headline, in smaller but still bold font, the advertisement included a quote from a *New York Times* article dated July 4, 2006: **“Findings from a small study suggest that pomegranate juice may one day prove an effective weapon against prostate cancer.”** (CX0120).
398. POM disseminated a very similar POMx advertisement in June 2007 in *Discover* and *Scientific American* magazines. (CX0122_0002). This advertisement included the same images of the POMx Pill bottle, POM Juice bottle, and caduceus. The headline of this advertisement read, **“Science, not fiction.”** and the subheadline read, **“Made from the only pomegranates backed by \$20 million in medical research.”** (CX0122).
399. The body copy of the “Science, not fiction” advertisement was otherwise almost identical to the “One small pill for mankind” advertisement.
400. Both advertisements expressly stated that taking one POMx Pill was the equivalent of drinking eight ounces of POM Juice: “Introducing P♥Mx – a highly concentrated, incredibly powerful blend of all-natural polyphenol antioxidants made from the very same pomegranates in **P♥M Wonderful 100% Pomegranate Juice**. . . . So now you can get all the antioxidant power of an 8oz glass of juice in the convenience of a calorie-free capsule.” This paragraph appeared next to an image of a POM Juice bottle. The advertisements also included the tag line **“P♥M IN A PILL”** in bold font near the bottom of the page. (CX0120; CX0122).

401. The advertisements went on to state:

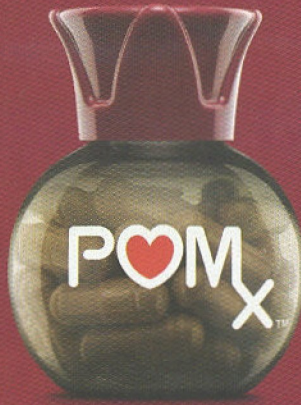
Ready to take on free radicals? Put up your P♥Mx and fight them with a mighty 1000 mg capsule – that’s more concentrated pomegranate polyphenol antioxidants than any other 100% pomegranate supplement. An initial UCLA medical study on P♥M Wonderful 100% Pomegranate Juice showed hopeful results for men with prostate cancer. And preliminary human research suggests that our California-grown pomegranate juice also promotes heart health. Take your antioxidants into your own hands.

Footnotes in the advertisements, which appeared next to a caduceus, referred consumers to two of POM’s web pages, pomwonderful.com/cancer.html and pomwonderful.com/heart_health.html. (CX0120).

402. In August 2006, shortly after the Pantuck Phase II Prostate Cancer Study (2006) was published, Dr. Pantuck complained to Respondents that the information they intended to disseminate about his study, including information on POM’s website, was “marketing” and that the claims troubled him. Dr. Pantuck told Dr. Liker in an email, which was forwarded to Mr. Tupper and Mrs. Resnick, that “I am not sure what it means to say PJ [POM juice] shows ‘promise for prostate cancer.’ I think the lay interpretation will be that it shows promise for the treatment of prostate cancer. I am very concerned that my legitimacy will be affected by displaying my name in such a manner[.]” (CX0072_0001; *see also* CCF ¶ 691).
403. POM was also aware of Dr. Pantuck’s view, expressed in an interview in October 2006 after the study was published, that he was “not at the point where [he] would say that everyone who has prostate cancer or who is at risk for prostate cancer should be drinking pomegranate juice.” The article, in the Center for Science in the Public Interest’s *Nutrition Action Newsletter*, was forwarded to Mr. Tupper and Mrs. Resnick. (CX0087_0001, 0004).
404. Nevertheless, even though POM was aware of Dr. Pantuck’s concerns about overselling the scope of his study, POM continued to cite his study and claim it provided “hopeful results for men with prostate cancer” in advertisements in 2007, and made references to a website with the URL “pomwonderful.com/cancer.html.” (CCFF ¶¶ 397-401; Tupper, Tr. 1004-05).

405. The imagery and text of these POMx advertisements, particularly in light of POM's stated intention to target consumers who sought to prevent diseases, including prostate cancer, *see* CCFE ¶¶ 304, 307, convey the net impression that taking one POMx Pill daily treats, prevents, or reduces the risk of prostate cancer and that those health benefits are clinically proven. Because the advertisements specifically note that the study was done on the POM Juice, and that one POMx Pill is equivalent to eight ounces of POM Juice, they also convey the net impression that drinking eight ounces of POM Juice daily treats, prevents, or reduces the risk of prostate cancer and that those health benefits are clinically proven. (CCFE ¶¶ 397-401).

Tab 13



Science, not fiction.

**Made from the only pomegranates backed by
\$20 million in medical research.**


Introducing POMx™ – a highly concentrated, incredibly powerful blend of all-natural polyphenol antioxidants made from the very same pomegranates in **POM Wonderful 100% Pomegranate Juice**. Our method of harnessing astonishing levels of antioxidants is so extraordinary, it's patent-pending. So now you can get all the antioxidant power of an 8oz glass of juice in the convenience of a calorie-free pill.



Ready to take on free radicals? Put up your POMx and fight them with a mighty 1000mg capsule – that's more concentrated pomegranate polyphenol antioxidants than any other 100% pomegranate supplement. An initial UCLA medical study on POM Wonderful 100% Pomegranate Juice showed hopeful results for men with prostate cancer.^{1,3} And preliminary human research suggests that our California-grown pomegranate juice also promotes heart health.^{2,3} Take your antioxidants into your own hands. **Call 1-888-POM-PILL now, or visit pompills.com/dvr and get your first monthly shipment for just ~~\$29.95~~ \$24.95 with coupon.**

POM IN A PILL™

**CALL 1-888-POM-PILL now, or visit pompills.com/dvr
Not available in stores | 100% money-back guarantee**



SAVE \$5 ON YOUR FIRST ORDER.
Call 1-888-POM-PILL or visit pompills.com/dvr and mention or enter code **DVR5** at checkout. To pay by check, call 1-888-POM-PILL for instructions. Hurry, offer expires July 31, 2007.

CONSUMER: This offer expires July 31, 2007. This coupon can only be used on POMx products. One coupon redemption per customer. Cannot be combined with other offers. No substitutions, transfer rights or cash equivalents will be given. We reserve the right to modify or discontinue this promotion at any time. Coupon code valid only at pompills.com/dvr or 1-888-POM-PILL.



¹ pomwonderful.com/cancer.html ² pomwonderful.com/heart_health.html ³ These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease.

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VMS-0000247

CX0122_0001

a. **“One small pill for mankind” / “Science, not fiction” Print Ads (CX0120 / CX0122)**

397. As early as 2007, POM disseminated print advertisements introducing POMx Pills. One such advertisement, which ran in *Fortune* magazine in May 2007, included an image of a POMx Pill bottle over a bold headline, **“One small pill for mankind.”** Directly underneath the headline, in smaller but still bold font, the advertisement included a quote from a *New York Times* article dated July 4, 2006: **“Findings from a small study suggest that pomegranate juice may one day prove an effective weapon against prostate cancer.”** (CX0120).
398. POM disseminated a very similar POMx advertisement in June 2007 in *Discover* and *Scientific American* magazines. (CX0122_0002). This advertisement included the same images of the POMx Pill bottle, POM Juice bottle, and caduceus. The headline of this advertisement read, **“Science, not fiction.”** and the subheadline read, **“Made from the only pomegranates backed by \$20 million in medical research.”** (CX0122).
399. The body copy of the “Science, not fiction” advertisement was otherwise almost identical to the “One small pill for mankind” advertisement.
400. Both advertisements expressly stated that taking one POMx Pill was the equivalent of drinking eight ounces of POM Juice: “Introducing P♥Mx – a highly concentrated, incredibly powerful blend of all-natural polyphenol antioxidants made from the very same pomegranates in **P♥M Wonderful 100% Pomegranate Juice**. . . . So now you can get all the antioxidant power of an 8oz glass of juice in the convenience of a calorie-free capsule.” This paragraph appeared next to an image of a POM Juice bottle. The advertisements also included the tag line **“P♥M IN A PILL”** in bold font near the bottom of the page. (CX0120; CX0122).

401. The advertisements went on to state:

Ready to take on free radicals? Put up your P♥Mx and fight them with a mighty 1000 mg capsule – that’s more concentrated pomegranate polyphenol antioxidants than any other 100% pomegranate supplement. An initial UCLA medical study on P♥M Wonderful 100% Pomegranate Juice showed hopeful results for men with prostate cancer. And preliminary human research suggests that our California-grown pomegranate juice also promotes heart health. Take your antioxidants into your own hands.

Footnotes in the advertisements, which appeared next to a caduceus, referred consumers to two of POM’s web pages, pomwonderful.com/cancer.html and pomwonderful.com/heart_health.html. (CX0120).

402. In August 2006, shortly after the Pantuck Phase II Prostate Cancer Study (2006) was published, Dr. Pantuck complained to Respondents that the information they intended to disseminate about his study, including information on POM’s website, was “marketing” and that the claims troubled him. Dr. Pantuck told Dr. Liker in an email, which was forwarded to Mr. Tupper and Mrs. Resnick, that “I am not sure what it means to say PJ [POM juice] shows ‘promise for prostate cancer.’ I think the lay interpretation will be that it shows promise for the treatment of prostate cancer. I am very concerned that my legitimacy will be affected by displaying my name in such a manner[.]” (CX0072_0001; *see also* CCFE ¶ 691).
403. POM was also aware of Dr. Pantuck’s view, expressed in an interview in October 2006 after the study was published, that he was “not at the point where [he] would say that everyone who has prostate cancer or who is at risk for prostate cancer should be drinking pomegranate juice.” The article, in the Center for Science in the Public Interest’s *Nutrition Action Newsletter*, was forwarded to Mr. Tupper and Mrs. Resnick. (CX0087_0001, 0004).
404. Nevertheless, even though POM was aware of Dr. Pantuck’s concerns about overselling the scope of his study, POM continued to cite his study and claim it provided “hopeful results for men with prostate cancer” in advertisements in 2007, and made references to a website with the URL “pomwonderful.com/cancer.html.” (CCFE ¶¶ 397-401; Tupper, Tr. 1004-05).

405. The imagery and text of these POMx advertisements, particularly in light of POM's stated intention to target consumers who sought to prevent diseases, including prostate cancer, *see* CCFE ¶¶ 304, 307, convey the net impression that taking one POMx Pill daily treats, prevents, or reduces the risk of prostate cancer and that those health benefits are clinically proven. Because the advertisements specifically note that the study was done on the POM Juice, and that one POMx Pill is equivalent to eight ounces of POM Juice, they also convey the net impression that drinking eight ounces of POM Juice daily treats, prevents, or reduces the risk of prostate cancer and that those health benefits are clinically proven. (CCFE ¶¶ 397-401).

Tab 14



The power of POM, in one little pill.

The easy, portable,
calorie-free way to get your
daily antioxidants.

Antioxidant Superpill.™ Not all antioxidants are created equal. POMx™ fights free radicals with a mighty 1000mg in every pill. That's more concentrated antioxidants than any other pomegranate antioxidant supplement. There are antioxidants, and then there are POMx antioxidants.

Peace of Mind in a Pill. POMx is a highly concentrated, powerful blend of polyphenol antioxidants made from the very same pomegranates as POM Wonderful® 100% Pomegranate Juice. The same pomegranates we grow exclusively in California, where they're hand-picked on site.

Safe and Natural. POMx is made from pure pomegranates. So there are no added sugars, preservatives or any other ingredients – just 100% pomegranate polyphenol antioxidants. So naturally, POMx is absorbed safely into your body. In fact, POMx is the first and only antioxidant supplement reviewed for safety by the FDA.

Backed by Science. POMx is made from the only pomegranates supported by \$23 million in medical research. Emerging science suggests that free radicals aggressively destroy healthy cells in your body – contributing to premature aging and even disease. The good news is POM Wonderful pomegranate antioxidants neutralize free radicals. An initial UCLA MEDICAL STUDY on POM Wonderful 100% Pomegranate Juice found *hopeful results for prostate health*. "Pomegranate juice delays PSA doubling time in humans," according to AJ Pantuck, et al, in *Clinical Cancer Research*, 2006.^{1,2,3} Two additional preliminary studies on our juice showed *promising results for heart health*.

"Pomegranate juice improves myocardial perfusion in coronary heart patients," per D. Ornish, et al, in the *American Journal of Cardiology*, 2005.^{1,2,4} "Pomegranate juice pilot research suggests anti-atherosclerosis benefits," according to M. Aviram, et al, in *Clinical Nutrition*, 2004.^{1,2,5}



California-grown.

One a Day, For Life. Ready to take on free radicals? A daily POMx pill is all you need. Invest in your health and order your 30-day supply today. Call now to get your first monthly shipment.

Call 1-888-POM-PILL (766-7455) or visit pompills.com/nb
and enter NB30 at checkout.



The antioxidant power of our 8 oz. juice.



Reviewed for Safety by the FDA.



100% Natural Pomegranate Extract.

Try POMx for one month – FREE!

We'll even pay for the shipping. Visit pompills.com/nb or call 1-888-POM-PILL. Use discount code: NB30

SIGN UP FOR POMx MONTHLY, AND WE'LL SEND YOUR FIRST BOTTLE FREE. AFTER THAT, YOU'LL CONTINUE TO RECEIVE MONTHLY SHIPMENTS FOR \$29.95 WITH COMPLIMENTARY SHIPPING. Offer expires April 15, 2008. The first month free plus free shipping offer applies only to the purchase price for the first month of POMx Monthly. Following months will be \$29.95 per bottle. This discount can only be used on POMx products. One discount per customer. Cannot be combined with other offers. No substitutions, transfer rights or cash equivalents will be given. We reserve the right to modify or discontinue this promotion at any time. We reserve the right to change product price or shipping charge at any time. Offer valid only at pompills.com/nb or 1-888-POM-PILL. Discount code is not valid on POMx trial.

¹ pompills.com/research ² These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease. ³ 45 men with rising PSA after surgery or radiotherapy drank 8 oz. 100% pomegranate juice daily for two years. ⁴ 45 patients with coronary heart disease and myocardial ischemia drank 8 oz. 100% pomegranate juice daily for three months. ⁵ 19 patients aged 65-75 years with severe atherosclerosis drank 8 oz. 100% pomegranate juice daily for one year. ©2008 PomWonderful LLC. All rights reserved. POM Wonderful, POMx and "Antioxidant Superpill" are trademarks of PomWonderful LLC.



b. “The power of P♥M, in one little pill”/ “The Antioxidant Superpill”/ “Science, not fiction” Print Ads (CX0169 / CX0180 / CX0279)

406. In 2008 and 2009, POM continued to disseminate POMx advertisements, with additional, detailed copy describing the POMx Pill’s purported health benefits, usually citing scientific journal articles to bolster the claims. (See CCFE ¶¶ 407-11).
407. For example, one advertisement disseminated in January 2008 in the *New York Times* with the headline, “**The power of P♥M, in one little pill.**” included several different bold subheadlines, “**Antioxidant Superpill,**” “**Peace of Mind in a Pill,**” “**Safe and Natural,**” “**Backed by Science,**” and “**One a Day, For Life.**” The advertisement also included images of a POMx Pills bottle next to a POM Juice bottle with an equal sign in between, a caduceus, and a POMx Pills bottle next to a pomegranate fruit. (CX0169).
408. As another example, in February 2008, POM disseminated in the *Los Angeles Times* a similar print advertisement for POMx Pills headlined, “**The antioxidant superpill.**” (CX0180).
409. A POMx Pills print advertisement with the headline, “**Science, not fiction.**” and with similar claims was disseminated in *Popular Science* magazine in March 2009. (CX0279).
410. The body copy for the “The Power of POM” advertisement described the purported effects of POM Juice in prostate cancer and coronary heart patients:

POMx is made from the only pomegranates supported by \$23 million in medical research. . . . An initial UCLA MEDICAL

STUDY on POM Wonderful 100% Pomegranate Juice found *hopeful results for prostate health*. “Pomegranate juice delays PSA doubling time in humans,” according to AJ Pantuck, et al, in Clinical Cancer Research, 2006. Two additional preliminary studies on our juice showed *promising results for heart health*. “Pomegranate juice improves myocardial perfusion in coronary heart patients,” per D. Ornish, et al, in the American Journal of Cardiology, 2005. “Pomegranate juice pilot research suggests anti-atherosclerosis benefits,” according to M. Aviram, et al, in Clinical Nutrition, 2004.

(CX0169).

411. Similarly, “The Antioxidant Superpill” print advertisement stated:

POMx is made from the only pomegranates backed by \$23 million in medical research, the same pomegranates we use to make our POM Wonderful 100% Pomegranate Juice. An initial UCLA MEDICAL STUDY on POM Wonderful 100% Pomegranate Juice found *hopeful results for prostate health*. The study reports “statistically significant prolongation of PSA doubling times,” according to Dr. Allen [*sic*] J. Pantuck in Clinical Cancer Research, 2006. Two additional preliminary studies on our juice showed *promising results for heart health*. “Stress-induced ischemia decreased in the pomegranate group,” Dr. Dean Ornish reported in the American Journal of Cardiology, 2005. “Pomegranate juice consumption resulted in a significant IMT reduction by up to 30% after one year,” said Dr. Michael Aviram, referring to reduced arterial plaque in Clinical Nutrition, 2004.

(CX0180; *see also* CX0279 (similar body copy but stating “backed by \$25 million in medical research”)).

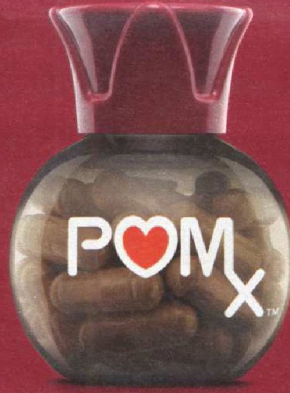
412. The clear implication of these claims, along with the images and text indicating equivalence between POMx Pills and POM Juice, is that the studies on POM Juice also support the same health benefits of POMx Pills. (CCFF ¶¶ 406-11).
413. Moreover, although Respondents did not use the specific terms “heart disease” or “prostate cancer,” Dr. Butters testified that speakers of American English would interpret the phrases “heart health” and “prostate health” that were used in the advertisements to

mean a condition of not being diseased. (Butters, Tr. 2851).

414. These advertisements (CX0169, CX0180, and CX0279) convey the net impression that taking one POMx Pill daily treats, prevents, or reduces the risk of cardiovascular disease and prostate cancer, and that those health benefits are clinically proven. Because the advertisements specifically note that the studies were done on POM Juice, and that one POMx Pill is equivalent to eight ounces of POM Juice, they also convey the net impression that drinking eight ounces of POM Juice daily treats, prevents, or reduces the risk of cardiovascular disease and prostate cancer, and that those health benefits are clinically proven. (CCFF ¶¶ 406-13).

Tab 15

VMS ID: 080203607
RUN DATE: 02/03/2008



The antioxidant superpill.™

1000 milligrams. 0 calories.

Ready to take your antioxidants into your own hands? Introducing POMx™ – a highly concentrated, incredibly powerful blend of all-natural polyphenol antioxidants made from the same pomegranates as POM Wonderful® 100% Pomegranate Juice.

POMx fights free radicals with a powerful 1000 milligrams. That's more concentrated polyphenol antioxidants than any other pomegranate supplement. And POMx is the first and only antioxidant supplement reviewed for safety by the FDA.



The antioxidant power of our 8 oz. juice.

POMx is made from the only pomegranates backed by \$23 million in medical research, the same pomegranates we use to make our POM Wonderful 100% Pomegranate Juice. An initial UCLA MEDICAL STUDY on POM Wonderful 100% Pomegranate Juice found *hopeful results for prostate health*. The study reports "statistically significant prolongation of PSA doubling times," according to Dr. Allen J. Pantuck in *Clinical Cancer Research*, 2006.^{1,2,3} Two additional preliminary studies on our juice showed *promising results for heart health*. "Stress-induced ischemia decreased in the pomegranate group," Dr. Dean Ornish reported in the *American Journal of Cardiology*, 2005.^{1,2,4} "Pomegranate juice consumption resulted in a significant IMT⁵ reduction by up to 30% after one year," said Dr. Michael Aviram, referring to reduced arterial plaque in *Clinical Nutrition*, 2004.^{1,2,6}

CALL 1-888-POM-PILL (766-7455) now or visit pompills.com/la

Try POMx for one month – FREE!

We'll even pay for the shipping. Visit pompills.com/la or call 1-888-POM-PILL. Use discount code: LA30

SIGN UP FOR POMx MONTHLY, AND WE'LL SEND YOUR FIRST BOTTLE FREE. AFTER THAT, YOU'LL CONTINUE TO RECEIVE MONTHLY SHIPMENTS FOR \$29.95 WITH COMPLIMENTARY SHIPPING. Offer expires April 15, 2008. The first month free plus free shipping offer applies only to the purchase price for the first month of POMx Monthly. Following months will be \$29.95 per bottle. This discount can only be used on POMx products. One discount per customer. Cannot be combined with other offers. No substitutions, transfer rights or cash equivalents will be given. We reserve the right to modify or discontinue this promotion at any time. We reserve the right to change product price or shipping charge at any time. Offer valid only at pompills.com/la or 1-888-POM-PILL. Discount code is not valid on POMx trial.



¹ pompills.com/research ² These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease. ³ 45 men with rising PSA after surgery or radiotherapy drank 8 oz. 100% pomegranate juice daily for two years. ⁴ 45 patients with coronary heart disease and myocardial ischemia drank 8 oz. 100% pomegranate juice daily for three months. ⁵ Study measured intima-media thickness (IMT). ⁶ 19 patients aged 65-75 years with severe atherosclerosis drank 8 oz. 100% pomegranate juice daily for one year. ©2008 PomWonderful LLC. All rights reserved. POM Wonderful, POMx and "antioxidant superpill" are trademarks of PomWonderful LLC.

POM
WONDERFUL®

VMS-0000261

CX0180_0001

b. “The power of P♥M, in one little pill”/ “The Antioxidant Superpill”/ “Science, not fiction” Print Ads (CX0169 / CX0180 / CX0279)

406. In 2008 and 2009, POM continued to disseminate POMx advertisements, with additional, detailed copy describing the POMx Pill’s purported health benefits, usually citing scientific journal articles to bolster the claims. (See CCFE ¶¶ 407-11).
407. For example, one advertisement disseminated in January 2008 in the *New York Times* with the headline, “**The power of P♥M, in one little pill.**” included several different bold subheadlines, “**Antioxidant Superpill,**” “**Peace of Mind in a Pill,**” “**Safe and Natural,**” “**Backed by Science,**” and “**One a Day, For Life.**” The advertisement also included images of a POMx Pills bottle next to a POM Juice bottle with an equal sign in between, a caduceus, and a POMx Pills bottle next to a pomegranate fruit. (CX0169).
408. As another example, in February 2008, POM disseminated in the *Los Angeles Times* a similar print advertisement for POMx Pills headlined, “**The antioxidant superpill.**” (CX0180).
409. A POMx Pills print advertisement with the headline, “**Science, not fiction.**” and with similar claims was disseminated in *Popular Science* magazine in March 2009. (CX0279).
410. The body copy for the “The Power of POM” advertisement described the purported effects of POM Juice in prostate cancer and coronary heart patients:

POMx is made from the only pomegranates supported by \$23 million in medical research. . . . An initial UCLA MEDICAL

STUDY on POM Wonderful 100% Pomegranate Juice found *hopeful results for prostate health*. “Pomegranate juice delays PSA doubling time in humans,” according to AJ Pantuck, et al, in Clinical Cancer Research, 2006. Two additional preliminary studies on our juice showed *promising results for heart health*. “Pomegranate juice improves myocardial perfusion in coronary heart patients,” per D. Ornish, et al, in the American Journal of Cardiology, 2005. “Pomegranate juice pilot research suggests anti-atherosclerosis benefits,” according to M. Aviram, et al, in Clinical Nutrition, 2004.

(CX0169).

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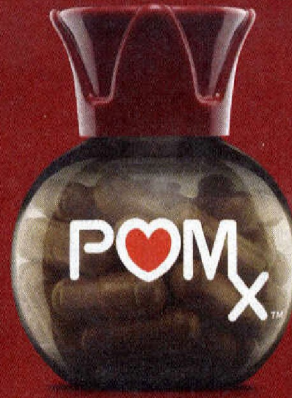
(CX0180; *see also* CX0279 (similar body copy but stating “backed by \$25 million in medical research”)).

412. The clear implication of these claims, along with the images and text indicating equivalence between POMx Pills and POM Juice, is that the studies on POM Juice also support the same health benefits of POMx Pills. (CCFF ¶¶ 406-11).
413. Moreover, although Respondents did not use the specific terms “heart disease” or “prostate cancer,” Dr. Butters testified that speakers of American English would interpret the phrases “heart health” and “prostate health” that were used in the advertisements to

mean a condition of not being diseased. (Butters, Tr. 2851).

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Tab 16



Science, not fiction.

Made from the only pomegranates backed by \$25 million in medical research.

Ready to take your antioxidants into your own hands? Introducing POMx™ – a highly concentrated, incredibly powerful blend of all-natural polyphenol antioxidants made from the same pomegranates as **POM Wonderful® 100% Pomegranate Juice**.

POMx fights free radicals with a powerful 1000 milligrams. That's more concentrated polyphenol antioxidants than any other pomegranate supplement. And POMx is the first and only antioxidant supplement reviewed for safety by the FDA.



100% All-natural.



The antioxidant power of our 8oz juice.

POMx is made from the only pomegranates backed by \$25 million in medical research, the same pomegranates we use to make our POM Wonderful 100% Pomegranate Juice. An initial UCLA MEDICAL STUDY on POM Wonderful 100% Pomegranate Juice found *hopeful results for prostate health*. The study reports "statistically significant prolongation of PSA doubling times," according to Dr. Allen J. Pantuck in *Clinical Cancer Research*, 2006.^{1,2,3} Two additional preliminary studies on our juice showed *promising results for heart health*.

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ORDER NOW: 1-888-POM-PILL (766-7455) or pompills.com/pop

Try POMx for one month – FREE!

We'll even pay for the shipping. Visit pompills.com/pop or call 1-888-POM-PILL. Use discount code: POP30

SIGN UP FOR POMx MONTHLY. AND WE'LL SEND YOUR FIRST BOTTLE FREE. AFTER THAT, YOU'LL CONTINUE TO RECEIVE MONTHLY SHIPMENTS FOR \$29.95 WITH COMPLIMENTARY SHIPPING. Offer expires June 30, 2009. The first month free plus free shipping offer applies only to the purchase price for the first month of POMx Monthly. Following months will be \$29.95 per bottle. This discount can only be used on POMx products. One discount per customer. Cannot be combined with other offers. No substitutions, transfer rights or cash equivalents will be given. We reserve the right to modify or discontinue this promotion at any time. We reserve the right to change product price or shipping charge at any time. Offer valid only at pompills.com or 1-888-POM-PILL. Discount code is not valid on POMx trial.



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b. “The power of P♥M, in one little pill”/ “The Antioxidant Superpill”/ “Science, not fiction” Print Ads (CX0169 / CX0180 / CX0279)

406. In 2008 and 2009, POM continued to disseminate POMx advertisements, with additional, detailed copy describing the POMx Pill’s purported health benefits, usually citing scientific journal articles to bolster the claims. (See CCFE ¶¶ 407-11).
407. For example, one advertisement disseminated in January 2008 in the *New York Times* with the headline, “**The power of P♥M, in one little pill.**” included several different bold subheadlines, “**Antioxidant Superpill,**” “**Peace of Mind in a Pill,**” “**Safe and Natural,**” “**Backed by Science,**” and “**One a Day, For Life.**” The advertisement also included images of a POMx Pills bottle next to a POM Juice bottle with an equal sign in between, a caduceus, and a POMx Pills bottle next to a pomegranate fruit. (CX0169).
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STUDY on POM Wonderful 100% Pomegranate Juice found *hopeful results for prostate health*. “Pomegranate juice delays PSA doubling time in humans,” according to AJ Pantuck, et al, in Clinical Cancer Research, 2006. Two additional preliminary studies on our juice showed *promising results for heart health*. “Pomegranate juice improves myocardial perfusion in coronary heart patients,” per D. Ornish, et al, in the American Journal of Cardiology, 2005. “Pomegranate juice pilot research suggests anti-atherosclerosis benefits,” according to M. Aviram, et al, in Clinical Nutrition, 2004.

(CX0169).

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(CX0180; *see also* CX0279 (similar body copy but stating “backed by \$25 million in medical research”)).

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413. Moreover, although Respondents did not use the specific terms “heart disease” or “prostate cancer,” Dr. Butters testified that speakers of American English would interpret the phrases “heart health” and “prostate health” that were used in the advertisements to

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Tab 17

LIVE LONG ENOUGH TO WATCH YOUR 401(k) RECOVER.

Antioxidants are a necessity. Not a luxury.

Emerging science suggests that antioxidants are critically important to maintaining good health because they protect you from free radicals, which can damage your body. Taking one POMx pill a day will help protect you from free radicals and keep you at your healthy best. Even when you're going through the worst.



The Antioxidant Superpill.™

Recession-proof your health with POMx.

POMx – an ultra-potent anti-oxidant extract made from the same



The antioxidant power
of our 8oz juice.

pomegranates as POM Wonderful® 100% Pomegranate Juice – is the most potent natural anti-oxidant supplement available. Each 1000mg POMx pill has the antioxidant power of a full glass of POM Wonderful 100% Pomegranate Juice.

\$25 million in medical research. A sound investment.

POMx is made from the only pomegranates backed by \$25 million in medical research at the world's leading universities.

Not only has this research documented the unique and superior antioxidant power of pomegranates, it has revealed promising results for prostate and cardiovascular health.



Hope for the future. Yours.

Our POMx pills are made from the same pomegranates we use to make our POM Wonderful 100% Pomegranate Juice, on which each of the following medical studies was conducted.

An initial UCLA study on our juice found hopeful results for prostate health, reporting "statistically significant prolongation of PSA doubling times," according to Dr. Allen J. Pantuck in *Clinical Cancer Research*, '06.^{1,2,3}

Two additional preliminary studies on our juice showed promising results for heart health. "Stress-induced ischemia (restricted blood flow to the heart) decreased in the pomegranate group," Dr. Dean Ornish reported in the *American Journal of Cardiology*, '05.^{1,2,4}

"Pomegranate juice consumption resulted in significant reduction in IMT⁶ (thickness of arterial plaque) by up to 30% after one year," said Dr. Michael Aviram in *Clinical Nutrition*, '04.^{1,2,5,6}

Try POMx Monthly
FREE for
ONE MONTH.
We'll even pay for the shipping.*



Order Now: 888-766-7455 or pompills.com/n3
Use discount code: N330

*SIGN UP FOR POMx MONTHLY, AND WE'LL SEND YOUR FIRST BOTTLE FREE. AFTER THAT, YOU'LL CONTINUE TO RECEIVE MONTHLY SHIPMENTS FOR \$29.95 WITH COMPLIMENTARY SHIPPING. Offer expires 5/30/09 and applies only to the purchase price for the first bottle of POMx Monthly. Following months will be \$29.95 per bottle. One discount per customer. Cannot be combined with other offers. No substitutions, transfer rights or cash equivalents. We reserve the right to discontinue this promotion, change product price or shipping charge at any time. Valid only at pompills.com or 1-888-766-7455. Not valid on POMx Trial or other POM products.



¹pompills.com/research ²These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease. ³46 men with rising PSA after surgery or radiotherapy drank 8oz 100% pomegranate juice daily for two years. ⁴15 patients with coronary heart disease and myocardial ischemia drank 8oz 100% pomegranate juice daily for three months. ⁵Study measured intima-media thickness (IMT). ⁶19 patients aged 65-75 years with severe atherosclerosis drank 8oz 100% pomegranate juice daily for one year. ©2009 PomWonderful LLC. All rights reserved. POM Wonderful, POMx and "antioxidant superpill" are trademarks of PomWonderful LLC. PP1120

- c. **“Live Long Enough to Watch Your 401(k) Recover” / “Your New Health Care Plan” / “Healthy, ~~Wealthy~~, and Wise” / “The First Bottle You Should Open in 2010” Print Ads (CX0280 / CX0328 / CX0331 / CX0337)**

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Emerging science suggests that antioxidants are critically important to maintaining good health because they protect you from free radicals, which can damage your body. Taking one P♥Mx pill a day will help protect you from free radicals and keep you at your healthy best.

P♥Mx – an ultra-potent antioxidant extract made from the same pomegranates as P♥M Wonderful 100% Pomegranate Juice – is the most potent natural antioxidant supplement available. Each 1000 mg P♥Mx pill has the antioxidant power of a full glass of P♥M Wonderful 100% Pomegranate Juice.

P♥Mx is made from the only pomegranates backed by \$25 million in medical research at the world's leading universities. Not only has this research documented the unique and superior antioxidant power of pomegranates, it has revealed promising results for prostate and cardiovascular health.

Our P♥Mx pills are made from the same pomegranates we use to make our P♥M Wonderful 100% Pomegranate Juice, on which each of the following medical studies was conducted.

An initial UCLA study on our juice found hopeful results for prostate health, reporting “statistically significant prolongation of PSA doubling times,” according to Dr. Allen [*sic*] J. Pantuck in *Clinical Cancer Research*, ‘06.

Two additional preliminary studies on our juice showed promising results for heart health. “Stress-induced ischemia (restricted blood flow to the heart) decreased in the pomegranate group,” Dr. Dean Ornish reported in the *American Journal of Cardiology*, ‘05.

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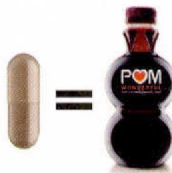
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Tab 18

YOUR NEW HEALTH CARE PLAN. (NO TOWN HALL MEETING REQUIRED.)

Antioxidant Health Insurance.

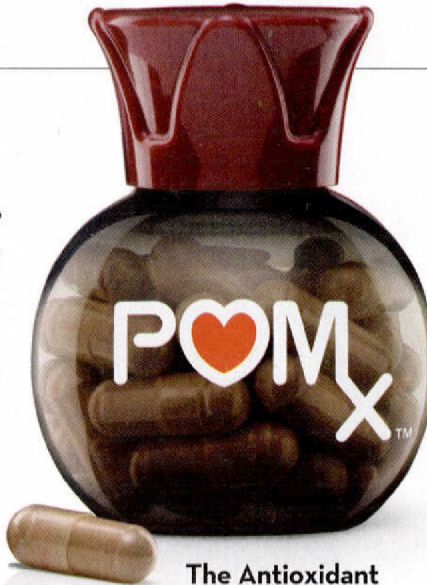
Emerging science suggests that antioxidants are critically important to maintaining good health because they protect you from free radicals, which can damage your body. Taking one POMx pill a day will help protect you from free radicals and keep you at your healthy best. Better yet, it's a health plan that's open to everyone.



The antioxidant power of our 8oz juice.

All-natural. Non-political.

POMx is an all-natural, ultra-potent antioxidant extract. Containing a full spectrum of pomegranate polyphenols, POMx is so concentrated that a single capsule has the antioxidant power of a full glass of POM Wonderful® 100% Pomegranate Juice.



The Antioxidant Superpill.™

\$32 million in medical research. Zero deductible.

POMx is made from the only pomegranates backed by \$32 million in medical research at the world's leading universities. Not only has this research documented the unique and superior antioxidant power of pomegranates, it has revealed promising results for prostate and cardiovascular health.



A health care plan for a healthy future.

Our POMx pills are made from the same pomegranates we use to make our POM Wonderful 100% Pomegranate Juice, on which each of the following medical studies was conducted.

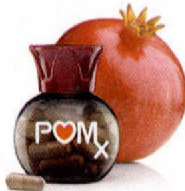
An initial UCLA study on our juice found hopeful results for prostate health, reporting "statistically significant prolongation of PSA doubling times," according to Dr. Allen J. Pantuck in *Clinical Cancer Research*, '06.^{1,2,3}

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"Pomegranate juice consumption resulted in significant reduction in IMT⁵ (thickness of arterial plaque) by up to 30% after one year," said Dr. Michael Aviram, in *Clinical Nutrition*, '04.^{1,2,5,6}

Try POMx Monthly
FREE for
ONE MONTH.

We'll even pay for the shipping.



Order Now: 888-766-7455 or pompills.com/wp
Use discount code: WP30

*SIGN UP FOR POMx MONTHLY, AND WE'LL SEND YOUR FIRST BOTTLE FREE. AFTER THAT, YOU'LL CONTINUE TO RECEIVE MONTHLY SHIPMENTS FOR \$29.95 WITH COMPLIMENTARY SHIPPING. Offer expires 4/30/10 and applies only to the purchase price for the first bottle of POMx Monthly. Following months will be \$29.95 per bottle. One discount per customer. Cannot be combined with other offers. No substitutions, transfer rights or cash equivalents. We reserve the right to discontinue this promotion, change product price or shipping charge at any time. Valid only at pompills.com or 1-888-766-7455. Not valid on POMx Trial or other POM products.



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- c. **“Live Long Enough to Watch Your 401(k) Recover” / “Your New Health Care Plan” / “Healthy, ~~Wealthy~~, and Wise” / “The First Bottle You Should Open in 2010” Print Ads (CX0280 / CX0328 / CX0331 / CX0337)**

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P♥Mx – an ultra-potent antioxidant extract made from the same pomegranates as P♥M Wonderful 100% Pomegranate Juice – is the most potent natural antioxidant supplement available. Each 1000 mg P♥Mx pill has the antioxidant power of a full glass of P♥M Wonderful 100% Pomegranate Juice.

P♥Mx is made from the only pomegranates backed by \$25 million in medical research at the world's leading universities. Not only has this research documented the unique and superior antioxidant power of pomegranates, it has revealed promising results for prostate and cardiovascular health.

Our P♥Mx pills are made from the same pomegranates we use to make our P♥M Wonderful 100% Pomegranate Juice, on which each of the following medical studies was conducted.

An initial UCLA study on our juice found hopeful results for prostate health, reporting “statistically significant prolongation of PSA doubling times,” according to Dr. Allen [*sic*] J. Pantuck in *Clinical Cancer Research*, ‘06.

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The advertisements contained the same images as in other POMx print ads, including the graphic equating one POMx Pill to an eight-ounce bottle of POM Juice and the POMx Pill bottle next to a pomegranate fruit. They additionally contain an image showing a pill capsule with pomegranate fruits inside. (CX0280 (disseminated at least 70 times in various publications from March to November 2009); CX0328 (*Washington Post*, November 2009); CX0331 (disseminated at least 99 times in various publications from September to October 2009); CX0337 (*New York Times*, January 2010)).

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Tab 19

HEALTHY. WEALTHY. AND WISE.

(2 OUT OF 3 IN THIS ECONOMY AIN'T BAD.)

Antioxidants are a necessity. Not a luxury.

Emerging science suggests that antioxidants are critically important to maintaining good health because they protect you from free radicals, which can damage your body. Taking one POMx pill a day will help protect you from free radicals and keep you at your healthy best. Even when you're going through the worst.



The antioxidant power of our 8oz juice.

Recession-proof your health with POMx.

POMx is an all-natural, ultra-potent antioxidant extract. Containing a full spectrum of pomegranate polyphenols, POMx is so concentrated that a single capsule has the antioxidant power of a full glass of POM Wonderful® 100% Pomegranate Juice.



The Antioxidant Superpill.™

\$32 million in medical research. A sound investment.

POMx is made from the only pomegranates backed by \$32 million in medical research at the world's leading universities.

Not only has this research documented the unique and superior antioxidant power of pomegranates, it has revealed promising results for prostate and cardiovascular health.



Hope for the future. Yours.

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Try POMx Monthly
FREE for
ONE MONTH.
We'll even pay for the shipping.*



Order Now: 888-766-7455 or pompills.com/ph
Use discount code: PH30

*SIGN UP FOR POMx MONTHLY, AND WE'LL SEND YOUR FIRST BOTTLE FREE. AFTER THAT, YOU'LL CONTINUE TO RECEIVE MONTHLY SHIPMENTS FOR \$29.95 WITH COMPLIMENTARY SHIPPING. Offer expires 12/31/09 and applies only to the purchase price for the first bottle of POMx Monthly. Following months will be \$29.95 per bottle. One discount per customer. Cannot be combined with other offers. No substitutions, transfer rights or cash equivalents. We reserve the right to discontinue this promotion, change product price or shipping charge at any time. Valid only at pompills.com/ph or 1-888-766-7455. Not valid on POMx Trial or other POM products.



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Tab 20

THE FIRST BOTTLE YOU SHOULD OPEN IN 2010.

2010, Year of the Antioxidant.

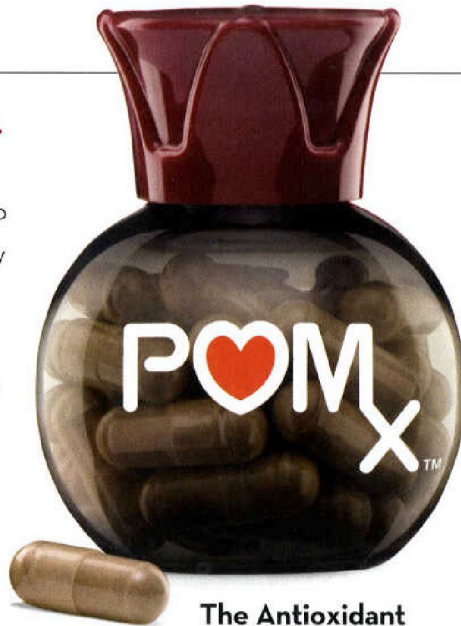
Emerging science suggests that antioxidants are critically important to maintaining good health because they protect you from free radicals, which can damage your body. Taking one POMx pill a day will help protect you from free radicals and keep you at your healthy best. Make it your first New Year's resolution.



The antioxidant power of our 8oz juice.

POMx: Ultra-potent. Hangover-free.

POMx is an all-natural, ultra-potent antioxidant extract. Containing a full spectrum of pomegranate polyphenols, POMx is so concentrated that a single capsule has the antioxidant power of a full glass of POM Wonderful® 100% Pomegranate Juice.



The Antioxidant Superpill.™

\$32 million in medical research. Cheers.

POMx is made from the only pomegranates backed by \$32 million in medical research at the world's leading universities.

Not only has this research documented the unique and superior antioxidant power of pomegranates, it has revealed promising results for prostate and cardiovascular health.



Our bottle. Your health.

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Try POMx Monthly
FREE for
ONE MONTH.

We'll even pay for the shipping!



Order Now: 888-766-7455 or pompills.com/n3
Use discount code: N330

*SIGN UP FOR POMx MONTHLY, AND WE'LL SEND YOUR FIRST BOTTLE FREE. AFTER THAT, YOU'LL CONTINUE TO RECEIVE MONTHLY SHIPMENTS FOR \$29.95 WITH COMPLIMENTARY SHIPPING. Offer expires 3/31/10 and applies only to the purchase price for the first bottle of POMx Monthly. Following months will be \$29.95 per bottle. One discount per customer. Cannot be combined with other offers. No substitutions, transfer rights or cash equivalents. We reserve the right to discontinue this promotion, change product price or shipping charge at any time. Valid only at pompills.com or 1-888-766-7455. Not valid on POMx Trial or other POM products.



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Tab 21

TAKE OUT A LIFE INSURANCE SUPPLEMENT.

TRY
POMx
MONTHLY
FREE!

Antioxidants? We've got you covered.

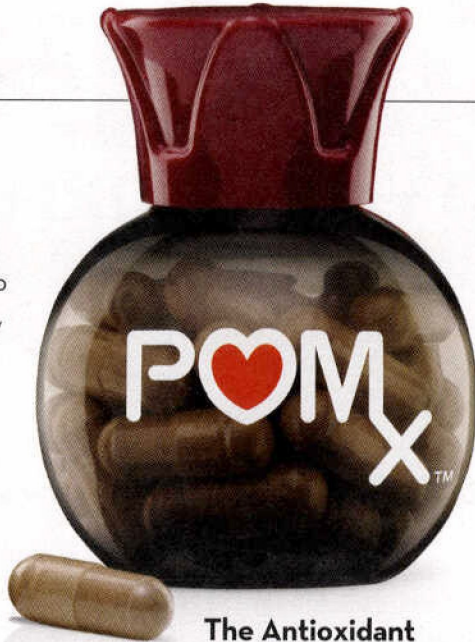
Emerging science suggests that antioxidants are critically important to maintaining good health because they protect you from free radicals, which can damage your body. Taking one POMx pill a day will help protect you from free radicals and keep you at your healthy best. (Just the way insurers like you to be.)



The antioxidant power of our 8oz juice.

POMx. Now that's a plan.

POMx is an all-natural, ultra-potent antioxidant extract. Containing a full spectrum of pomegranate polyphenols, POMx is so concentrated that a single capsule has the antioxidant power of a full glass of POM Wonderful® 100% Pomegranate Juice.



The Antioxidant Superpill.™

\$32 million in medical research. No deductible.

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Get the maximum benefits.

Our POMx pills are made from the same pomegranates we use to make our POM

Wonderful

100%

Pomegranate



Juice, on which each of the following medical studies was conducted.

An initial UCLA study on our juice found hopeful results for prostate health, reporting "statistically significant prolongation of PSA doubling times," according to Dr. Allen J. Pantuck in *Clinical Cancer Research*, 2006.^{1,2,3}

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FREE ONE MONTH TRIAL



We'll even pay for the shipping.*

Order Now: 888-766-7455
or pompills.com/t Use discount code: T30

*SIGN UP FOR POMx MONTHLY, AND WE'LL SEND YOUR FIRST BOTTLE FREE. AFTER THAT, YOU'LL CONTINUE TO RECEIVE MONTHLY SHIPMENTS FOR \$29.95 WITH COMPLIMENTARY SHIPPING. Offer expires 6/30/10 and applies only to the purchase price for the first bottle of POMx Monthly. Following months will be \$29.95 per bottle. One discount per customer. Cannot be combined with other offers. No substitutions, transfer rights or cash equivalents. We reserve the right to discontinue this promotion, change product price or shipping charge at any time. Valid only at pompills.com or 1-888-766-7455. Not valid on POMx Trial or other POM products.



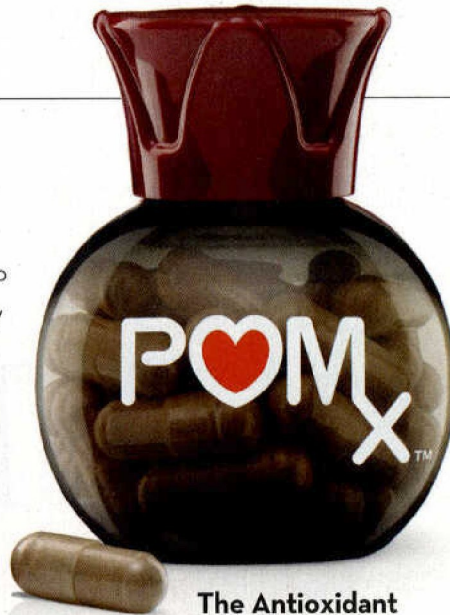
¹ pompills.com/research ² These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease. ³ 46 men with rising PSA after surgery or radiotherapy drank 8oz 100% pomegranate juice daily for two years. ⁴ 45 patients with coronary heart disease and myocardial ischemia drank 8oz 100% pomegranate juice daily for three months. ©2010 PomWonderful LLC. All rights reserved. POM Wonderful, POMx and Antioxidant Superpill are trademarks of PomWonderful LLC. PP3219

TAKE OUT A LIFE INSURANCE SUPPLEMENT.

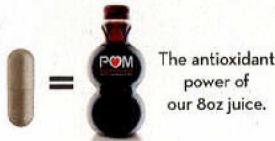


Antioxidants? We've got you covered.

Emerging science suggests that antioxidants are critically important to maintaining good health because they protect you from free radicals, which can damage your body. Taking one POMx pill a day will help protect you from free radicals and keep you at your healthy best. (Just the way insurers like you to be.)



The Antioxidant Superpill.™



POMx. Now that's a plan.

POMx is an all-natural, ultra-potent antioxidant extract. Containing a full spectrum of pomegranate polyphenols, POMx is so concentrated that a single capsule has the antioxidant power of a full glass of POM Wonderful® 100% Pomegranate Juice.

Get the maximum benefits.

Our POMx pills are made from the same pomegranates we use to make our POM

Wonderful

100%

Pomegranate

Juice, on which each of the following medical studies was conducted.

An initial UCLA study on our juice found hopeful results for prostate health, reporting "statistically significant prolongation of PSA doubling times," according to Dr. Allen J. Pantuck in *Clinical Cancer Research*, 2006.^{1,2,3}

An additional preliminary study on our juice showed promising results for heart health. "Stress-induced ischemia (restricted blood flow to the heart) decreased in the pomegranate group," Dr. Dean Ornish reported in the *American Journal of Cardiology*, 2005.^{1,2,4}



\$34 million in medical research. No deductible.

POMx is made from the only pomegranates backed by \$34 million in medical research at the world's leading universities. Not only has this research documented the unique and superior antioxidant power of pomegranates, it has revealed promising results for prostate and cardiovascular health.

Try POMx Monthly
FREE for
ONE MONTH.



We'll even pay for the shipping.*

Order Now: 888-766-7455
or pompills.com/sm Use discount code: SM30

*SIGN UP FOR POMx MONTHLY, AND WE'LL SEND YOUR FIRST BOTTLE FREE. AFTER THAT, YOU'LL CONTINUE TO RECEIVE MONTHLY SHIPMENTS FOR \$29.95 WITH COMPLIMENTARY SHIPPING. Offer expires 10/31/10 and applies only to the purchase price for the first bottle of POMx Monthly. Following months will be \$29.95 per bottle. One discount per customer. Cannot be combined with other offers. No substitutions, transfer rights or cash equivalents. We reserve the right to modify or discontinue this promotion. change the product price or change the shipping charge at any time. Valid only at pompills.com or 1-888-766-7455. Not valid on POMx Trial or other POM products. Credit or debit card required.



¹pompills.com/research ²These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease. ³46 men with rising PSA after surgery or radiotherapy drank 8oz 100% pomegranate juice daily for two years. ⁴45 patients with coronary heart disease and myocardial ischemia drank 8oz 100% pomegranate juice daily for three months. ©2010 PomWonderful LLC. All rights reserved. POM Wonderful, POMx and Antioxidant Superpill are trademarks of PomWonderful LLC. PP3930

d. “Take Out a Life Insurance Supplement” / “24 Scientific Studies” Print Ads (CX0342 / CX0348 / CX0350 / CX0353)

419. POMx disseminated print advertisements headlined, “**TAKE OUT A LIFE INSURANCE SUPPLEMENT**” and “**24 SCIENTIFIC STUDIES NOW IN ONE EASY-TO-SWALLOW PILL**,” which included similar images and text as the advertisements described in CCFE ¶ 415. However, the body copy in these advertisements referred only to the Pantuck and Ornish studies, and omitted the Aviram study:

An initial UCLA study on POM Wonderful 100% Pomegranate Juice found hopeful results for prostate health, reporting “statistically significant prolongation of PSA doubling times,” according to Dr. Allen [sic] J. Pantuck in *Clinical Cancer Research*, 2006. Additional preliminary study on our juice showed promising results for heart health. “Stress-induced ischemia (restricted blood flow to the heart) decreased in the pomegranate group,” Dr. Dean Ornish reported in the *American Journal of Cardiology*, 2005.

(CX0342_0001 (disseminated at least three times in various publications in February and March 2010); CX0348_0001 (*Men’s Health* magazine and *Popular Science* magazine, April 2010)). POM disseminated additional, very similar advertisements, but which cited \$34 million in research, instead of \$32 million. (CX0350_0001 (*Time* magazine, April 2010)); CX0353_0001 (disseminated at least six times in various media including the *New York Times* and *Men’s Health* magazine in June and September 2010)).

420. POM admits that it had continued to run advertisements promoting the 30% reduction in arterial plaque purportedly shown by the Aviram CIMT/BP Study (2004) (*see, e.g.*, CCFE ¶¶ 410, 415), even after it was aware, as early as 2006, of the inconsistent results of the Davidson CIMT Study (2009) that showed, at most, a 5% decrease in arterial plaque in some patients measured at an interim point in the study. (Tupper, Tr. 965-966.)

421. The Davidson CIMT Study (2009), with its negative results, was finally published in late 2009, and only in mid to late 2010 did POM's advertisements finally omit reference to the results of the Aviram CIMT/BP Study (2004), as in the advertisement cited above. (CCFF ¶ 419).
422. Dr. Butters testified that a viewer of the "24 Scientific Studies" advertisement would find it reasonable to believe that the headline is accurate and that there must be 24 scientific studies on POMx. (Butters, Tr. 2940).
423. Mrs. Resnick testified that she would have seen the POMx advertisement in CX0348 and that she would have approved specific elements of the advertisement, including the headline "24 Scientific Studies Now in One Easy-to-Swallow Pill," the image of the pill equaling eight ounces of POM Juice, and the image of the pomegranates pouring out of the pill. (L. Resnick, Tr. 249-51).
424. These advertisements (CX0342, CX0348, CX0350, and CX0353), by using terms such as "life insurance," citing specific studies, and referencing support by a significant dollar amount of medical research conducted, convey the net impression that taking one POMx Pill daily treats, prevents, or reduces the risk of cardiovascular disease and prostate cancer, and that those health benefits are clinically proven. Because the advertisements specifically note that the studies were done on the POM Juice, and that one POMx Pill is equivalent to eight ounces of POM Juice, they also convey the net impression that drinking 8 ounces of POM Juice daily treats, prevents, or reduces the risk of cardiovascular disease and prostate cancer, and that those health benefits are clinically proven. (CCFF ¶¶ 419, 422).

Tab 22

24 SCIENTIFIC STUDIES NOW IN ONE EASY-TO-SWALLOW PILL.



Antioxidants 101.

Emerging science suggests that antioxidants are critically important to maintaining good health because they protect you from free radicals, which can damage your body. Taking one POMx pill a day will help protect you from free radicals. It's just that simple.



The antioxidant power of our 8oz juice.

POMx is powerful. Naturally.

POMx is an all-natural, ultra-potent antioxidant extract. Containing a full spectrum of pomegranate polyphenols, POMx is so concentrated that a single capsule has the antioxidant power of a full glass of POM Wonderful® 100% Pomegranate Juice.



The Antioxidant Superpill.™

\$32 million in medical research. Science. Not fiction.

POMx is made from the only pomegranates backed by \$32 million in medical research at the world's leading universities. Not only has this research documented the unique and superior antioxidant power of pomegranates, it has revealed promising results for prostate and cardiovascular health.

Complicated studies. Simplified.

Our POMx pills are made from the same pomegranates we use to make our POM

Wonderful

100%

Pomegranate



Juice, on which each of the following medical studies was conducted.

An initial UCLA study on our juice found hopeful results for prostate health, reporting "statistically significant prolongation of PSA doubling times," according to Dr. Allen J. Pantuck in *Clinical Cancer Research*, 2006.^{1,2,3}

Additional preliminary study on our juice showed promising results for heart health. "Stress-induced ischemia (restricted blood flow to the heart) decreased in the pomegranate group," Dr. Dean Ornish reported in the *American Journal of Cardiology*, 2005.^{1,2,4}

Try POMx Monthly
FREE for
ONE MONTH.

We'll even pay for the shipping.*



Order Now: **888-766-7455**
or pompills.com/mh Use discount code: MH30

*SIGN UP FOR POMx MONTHLY, AND WE'LL SEND YOUR FIRST BOTTLE FREE. AFTER THAT, YOU'LL CONTINUE TO RECEIVE MONTHLY SHIPMENTS FOR \$29.95 WITH COMPLIMENTARY SHIPPING. Offer expires 8/31/10 and applies only to the purchase price for the first bottle of POMx Monthly. Following months will be \$29.95 per bottle. One discount per customer. Cannot be combined with other offers. No substitutions, transfer rights or cash equivalents. We reserve the right to discontinue this promotion, change product price or shipping charge at any time. Valid only at pompills.com or 1-888-766-7455. Not valid on POMx Trial or other POM products.



¹pompills.com/research ²These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease. ³46 men with rising PSA after surgery or radiotherapy drank 8oz 100% pomegranate juice daily for two years. ⁴45 patients with coronary heart disease and myocardial ischemia drank 8oz 100% pomegranate juice daily for three months. ©2010 PomWonderful LLC. All rights reserved. POM Wonderful, POMx and Antioxidant Superpill are trademarks of PomWonderful LLC. PP3273

24 SCIENTIFIC STUDIES. NOW IN ONE EASY-TO-SWALLOW PILL.



Antioxidants 101.

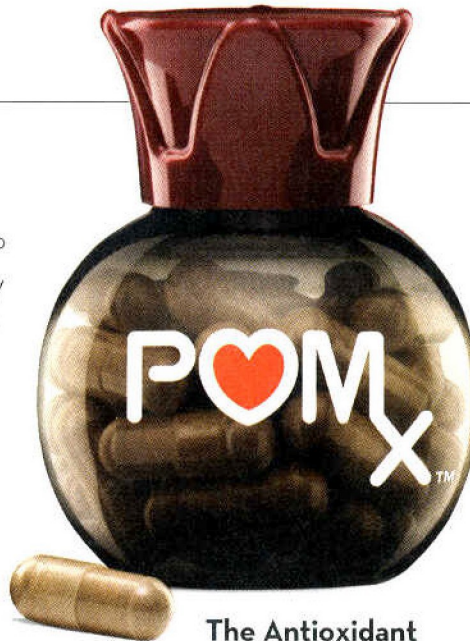
Emerging science suggests that antioxidants are critically important to maintaining good health because they protect you from free radicals, which can damage your body. Taking one POMx pill a day will help protect you from free radicals. It's just that simple.



The antioxidant power of our 8oz juice.

POMx is powerful. Naturally.

POMx is an all-natural, ultra-potent antioxidant extract. Containing a full spectrum of pomegranate polyphenols, POMx is so concentrated that a single capsule has the antioxidant power of a full glass of POM Wonderful® 100% Pomegranate Juice.



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Complicated studies. Simplified.

Our POMx pills are made from the same pomegranates we use to make our POM Wonderful



100% Pomegranate

Juice, on which each of the following medical studies was conducted.

An initial UCLA study on our juice found hopeful results for prostate health, reporting "statistically significant prolongation of PSA doubling times," according to Dr. Allen J. Pantuck in *Clinical Cancer Research*, 2006.^{1,2,3}

Additional preliminary study on our juice showed promising results for heart health. "Stress-induced ischemia (restricted blood flow to the heart) decreased in the pomegranate group," Dr. Dean Ornish reported in the *American Journal of Cardiology*, 2005.^{1,2,4}

Try POMx Pills **FREE**
FOR ONE MONTH

when you sign up for
POMx Monthly delivery.*

Cancel Anytime.

Order Now: 888-766-7455
or pompills.com/t Use discount code: T30

*SIGN UP FOR POMx MONTHLY, AND WE'LL SEND YOUR FIRST BOTTLE FREE. AFTER THAT, YOU'LL CONTINUE TO RECEIVE MONTHLY SHIPMENTS FOR \$29.95 WITH COMPLIMENTARY SHIPPING. Offer expires 7/31/10 and applies only to the purchase price for the first bottle of POMx Monthly. Following months will be \$29.95 per bottle. One discount per customer. Cannot be combined with other offers. No substitutions, transfer rights or cash equivalents. We reserve the right to modify or discontinue this promotion, change the product price or change the shipping charge at any time. Valid only at pompills.com or 1-888-766-7455. Not valid on POMx Trial or other POM products. Credit or debit card required.



1. pompills.com/research 2. These Statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease. 3. 45 men with rising PSA after surgery or radiotherapy drank 8oz 100% pomegranate juice daily for two years. 4. 45 patients with coronary heart disease and myocardial ischemia drank 8oz 100% pomegranate juice daily for three months. ©2010 Pom Wonderful LLC. All rights reserved. POM Wonderful, POMx and Antioxidant Superpill are trademarks of Pom Wonderful LLC. P09654.

d. “Take Out a Life Insurance Supplement” / “24 Scientific Studies” Print Ads (CX0342 / CX0348 / CX0350 / CX0353)

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(CX0342_0001 (disseminated at least three times in various publications in February and March 2010); CX0348_0001 (*Men’s Health* magazine and *Popular Science* magazine, April 2010)). POM disseminated additional, very similar advertisements, but which cited \$34 million in research, instead of \$32 million. (CX0350_0001 (*Time* magazine, April 2010)); CX0353_0001 (disseminated at least six times in various media including the *New York Times* and *Men’s Health* magazine in June and September 2010)).

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421. The Davidson CIMT Study (2009), with its negative results, was finally published in late 2009, and only in mid to late 2010 did POM's advertisements finally omit reference to the results of the Aviram CIMT/BP Study (2004), as in the advertisement cited above. (CCFF ¶ 419).
422. Dr. Butters testified that a viewer of the "24 Scientific Studies" advertisement would find it reasonable to believe that the headline is accurate and that there must be 24 scientific studies on POMx. (Butters, Tr. 2940).
423. Mrs. Resnick testified that she would have seen the POMx advertisement in CX0348 and that she would have approved specific elements of the advertisement, including the headline "24 Scientific Studies Now in One Easy-to-Swallow Pill," the image of the pill equaling eight ounces of POM Juice, and the image of the pomegranates pouring out of the pill. (L. Resnick, Tr. 249-51).
424. These advertisements (CX0342, CX0348, CX0350, and CX0353), by using terms such as "life insurance," citing specific studies, and referencing support by a significant dollar amount of medical research conducted, convey the net impression that taking one POMx Pill daily treats, prevents, or reduces the risk of cardiovascular disease and prostate cancer, and that those health benefits are clinically proven. Because the advertisements specifically note that the studies were done on the POM Juice, and that one POMx Pill is equivalent to eight ounces of POM Juice, they also convey the net impression that drinking 8 ounces of POM Juice daily treats, prevents, or reduces the risk of cardiovascular disease and prostate cancer, and that those health benefits are clinically proven. (CCFF ¶¶ 419, 422).

Tab 23

THE ONLY ANTIOXIDANT SUPPLEMENT RATED X.



Always use protection.

Emerging science suggests that antioxidants are critically important to maintaining good health because they protect you from free radicals, which can damage your body. Taking one POMx pill a day will help protect you from free radicals and keep you at your healthy best.



The antioxidant power of our 8oz juice.

POMx. Super-potent. Like you.

POMx is an all-natural, ultra-potent antioxidant extract. Containing a full spectrum of pomegranate polyphenols, POMx is so concentrated that a single capsule has the antioxidant power of a full glass of POM Wonderful® 100% Pomegranate Juice.



The Antioxidant Superpill.™

\$32 million in research. We're not just playing doctor.

POMx is made from the only pomegranates backed by \$32 million in medical research at the world's leading universities. Not only has this research documented the unique and superior antioxidant power of pomegranates, it has revealed promising results for erectile, prostate and cardiovascular health.



Is that POMx in your pocket?

Our POMx pills are made from the same pomegranates we use to make our POM Wonderful 100% Pomegranate Juice, on which each of the following medical studies was conducted.

In a preliminary study on erectile function, men who consumed POM Juice reported a 50% greater likelihood of improved erections as compared to placebo. "As a powerful antioxidant, enhancing the actions of nitric oxide in vascular endothelial cells, POM has potential in the management of ED... further studies are warranted." *International Journal of Impotence Research*, '07.^{1,2,3}

An initial UCLA study on our juice found hopeful results for prostate health, reporting "statistically significant prolongation of PSA doubling times." *Clinical Cancer Research*, '06.^{1,2,4}

A preliminary study on our juice showed promising results for heart health. "Stress-induced ischemia (restricted blood flow to the heart) decreased in the pomegranate group." *American Journal of Cardiology*, '05.^{1,2,5}

Try POMx Pills **FREE**
FOR ONE MONTH
when you sign up for
POMx Monthly delivery.*
(cancel anytime)

Order Now: **888-766-7455**
or pompills.com/adv Use discount code: **ADV30**

*SIGN UP FOR POMx MONTHLY, AND WE'LL SEND YOUR FIRST BOTTLE FREE. AFTER THAT, YOU'LL CONTINUE TO RECEIVE MONTHLY SHIPMENTS FOR \$29.95 WITH COMPLIMENTARY SHIPPING. Offer expires 9/30/10 and applies only to the purchase price for the first bottle of POMx Monthly. Following months will be \$29.95 per bottle. One discount per customer. Cannot be combined with other offers. No substitutions, transfer rights or cash equivalents. We reserve the right to modify or discontinue this promotion, change the product price or change the shipping charge at any time. Valid only at pompills.com or 1-888-766-7455. Not valid on POMx Trial or other POM products. Credit or debit card required.



¹ pompills.com/research ² These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease. ³ 53 men with mild/moderate erectile dysfunction drank 8oz 100% pomegranate juice daily for one month. ⁴ 46 men with rising PSA after surgery or radiotherapy drank 8oz 100% pomegranate juice daily for two years. ⁵ 45 patients with coronary heart disease and myocardial ischemia drank 8oz 100% pomegranate juice daily for three months. ©2010 PomWonderful LLC. All rights reserved. POM Wonderful, POMx and Antioxidant Superpill are trademarks of PomWonderful LLC. PP3423

THE ONLY ANTIOXIDANT SUPPLEMENT RATED X.



Always use protection.

Emerging science suggests that antioxidants are critically important to maintaining good health because they protect you from free radicals, which can damage your body. Taking one POMx pill a day will help protect you from free radicals and keep you at your healthy best.



Is that POMx in your pocket?

Our POMx pills are made from the same pomegranates we use to make our POM Wonderful 100% Pomegranate Juice, on which each of the following medical studies was conducted.

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An initial UCLA study on our juice found hopeful results for prostate health, reporting "statistically significant prolongation of PSA doubling times." *Clinical Cancer Research*, '06.^{1,2,4}

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The antioxidant power of our 8oz juice.

The Antioxidant Superpill.™

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Try POMx Monthly
FREE for
ONE MONTH
We'll even pay for the shipping.*



Order Now: **888-766-7455**
or pompills.com/ga Use discount code: **GA30**

*SIGN UP FOR POMx MONTHLY, AND WE'LL SEND YOUR FIRST BOTTLE FREE. AFTER THAT, YOU'LL CONTINUE TO RECEIVE MONTHLY SHIPMENTS FOR \$29.95 WITH COMPLIMENTARY SHIPPING. Offer expires 9/30/10 and applies only to the purchase price for the first bottle of POMx Monthly. Following months will be \$29.95 per bottle. One discount per customer. Cannot be combined with other offers. No substitutions, transfer rights or cash equivalents. We reserve the right to modify or discontinue this promotion, change the product price or change the shipping charge at any time. Valid only at pompills.com or 1-888-766-7455. Not valid on POMx Trial or other POM products. Credit or debit card required.



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e. **“The Only Antioxidant Supplement Rated X” Print Ads
(CX0351 / CX0355)**

425. POM disseminated POMx print advertisements headlined, **“THE ONLY ANTIOXIDANT SUPPLEMENT RATED X,”** in male-oriented magazines such as *Advocate* and *Playboy*. The advertisements used subheadlines presumably intended to appeal to male readers, such as “Always use protection,” “P♥Mx. Super-potent. Like you.” “\$32 million in research. We’re not just playing doctor.” and “Is that P♥Mx in your pocket?” However, the body copy was substantially similar to prior POMx print advertisements, with the addition of several claims that POM Juice and therefore, POMx, improves erectile function:

POMx is made from the only pomegranates backed by \$32 million in medical research at the world's leading universities. Not only has this research documented the unique and superior antioxidant power of pomegranates, it has revealed promising results for erectile, prostate and cardiovascular health.

Our P♥Mx pills are made from the same pomegranates we use to make our P♥M Wonderful 100% Pomegranate Juice, on which each of the following medical studies was conducted.

In a preliminary study on erectile function, men who consumed POM Juice reported a 50% greater likelihood of improved erections as compared to placebo. "As a powerful antioxidant, enhancing the actions of nitric oxide in vascular endothelial cells, POM has potential in the management of ED. . . further studies are warranted." *International Journal of Impotence Research*, '07.

An initial UCLA study on our juice found hopeful results for prostate health, reporting "statistically significant prolongation of PSA doubling times," *Clinical Cancer Research*, '06.

A preliminary study on our juice showed promising results for heart health. "Stress-induced ischemia (restricted blood flow to the heart) decreased in the pomegranate group," *American Journal of Cardiology*, '05.

(CX0351_0001 (*Advocate* magazine, June 2010); CX0355_0001 (*Playboy* magazine, July 2010)). The *Playboy* advertisement cited a figure of \$34 million in medical research. (CX0355).

426. Respondents' expert, Dr. Butters, testified that speakers of American English would interpret the phrase "erectile function" to relate to the ability of men to achieve and maintain erections and that erectile function and the absence of erectile dysfunction are closely related. (Butters, Tr. 2851).
427. Dr. Butters also stated in his report and testified at trial that this advertisement conveys that preliminary initial studies suggest that pomegranate extract, a strong source of antioxidants, could help alleviate erectile dysfunction. (Butters, Tr. 2943).

428. Mrs. Resnick admits she approved the headline for the POMx print advertisement headlined “The only antioxidant supplement rated X” that appeared in *Playboy* magazine. (L. Resnick, Tr. 266).
429. The advertisements (CX0351 and CX0355) convey the net impression that taking one POMx Pill daily treats, prevents, or reduces the risk of cardiovascular disease, prostate cancer, and erectile dysfunction, and that those health benefits are clinically proven. Because the advertisements specifically note that the studies were done on the juice, and that one pill is equivalent to eight ounces of POM Juice, they also convey the net impression that drinking eight ounces of POM Juice daily treats, prevents, or reduces the risk of cardiovascular disease, prostate cancer, and erectile dysfunction, and that those health benefits are clinically proven. (CCFF ¶¶ 425-27).

Tab 24

3. Pomegranatetruth.com Made Establishment Claims Regarding Heart Disease, Prostate Cancer, and Erectile Dysfunction

496. The pomegranatetruth.com homepage was titled “**The truth about our pomegranates**” and stated at the center of the page in a bold subheading, “**Backed by science.**” Directly following this heading, flanked by a large image of the medical caduceus symbol, was the explanatory text:

POM is the only pomegranate juice backed by \$25 million in medical research. To date, numerous published clinical studies have documented the benefits of drinking pomegranate juice, benefits that include improved heart and prostate health and better erectile function. **All of these studies featured patients who drank POM Wonderful 100% Pomegranate Juice, not any other brands.** [Read more.](#)

(CX0473 (Compl. Ex. E-1 at 00:10)).

497. The “Read more” link directed the consumer to a page titled, in large, bold, red letters,

“**Backed by Science.**” (CX0473 (Compl. Ex. E-1 at 01:15)). The “**Backed by Science**” page reiterated that “POM is the only pomegranate juice backed by \$25 million in medical research,” continuing, “Actually, we are the only pomegranate juice backed by any medical research at all.” Reinforcing the scientific theme was a large image of the POM Juice bottle depicted with projecting arms of a molecular model chemistry set. (CX0473 (Compl. Ex. E-1 at 01:15)).

498. After urging the consumer to “keep in mind that all of the research has been done on POM Wonderful 100% Pomegranate Juice” and that “[n]o other pomegranate juice can claim these distinctions, and no other brand has been clinically tested,” the “**Backed by Science**” page states, “So what are the medical results on POM Wonderful 100% Pomegranate Juice?” (CX0473 (Compl. Ex. E-1 at 01:17); *see also* CX0473 (Compl. Ex. E-1 at 03:58) (stating on the “Wonderfully superior” page of pomegranatetruth.com that “POM is the only pomegranate juice made exclusively from the Wonderful variety, which is the only variety featured in all of the promising medical research you have heard about,” and “[p]atients drinking POM Wonderful 100% Pomegranate Juice in clinical trials have experienced promising results in hearth health, prostate health, and erectile function.”)).
499. Selected “medical results” from the Ornish MP Study (2005), the Pantuck Phase II Prostate Cancer Study (2006), and the Forest Erectile Dysfunction Study (2007) were presented under the bold subheadings “**Heart Health,**” “**Prostate Health,**” “**Erectile Dysfunction,**” respectively. (CX0473 (Compl. Ex. E-1 at 01:25)). The study descriptions were substantially similar to those on the pomwonderful.com website. (*See* CCFE ¶¶ 445-447, 449).
500. The pomegranatetruth.com website, through textual references and medical imagery, touts POM Juice’s “health benefits,” “medical results,” and POM’s research on heart disease, prostate cancer, and erectile dysfunction, and other health conditions. The pomegranatetruth.com website conveys the net impression that drinking eight ounces of POM Juice daily treats, prevents, or reduces the risk of heart disease, prostate cancer, and erectile dysfunction, and that these health benefits are clinically proven. (*See* CCFE ¶¶ 496-499).

Tab 25

4. Pom pills.com Made Establishment Claims Regarding Heart Disease, Prostate Cancer, and Erectile Dysfunction

501. The pom pills.com website was an e-commerce site and had everything from learning about the product to ordering the product. (CX1347 (Glovsky, Dep. at 134)).

502. The pompills.com homepage displayed the large, bold heading “**Antioxidant Superpill**,” accompanied by the image of a bottle of POMx Pills. The equivalence of POMx Pills to POM Juice was immediately communicated in the subheading “**The Power of POM. Now in a single pill**,” and by the image in the center of the homepage of a bottle of POMx Pills connected by an equals sign to an eight-ounce bottle of POM Juice. The caption under this image stated, “[a]ll the antioxidant power of an 8oz. glass of POM Wonderful 100% Pomegranate Juice in the convenience of a calorie-free capsule.” A red button to “**BUY NOW**” appeared prominently below this description. (CX0473 (Compl. Ex. E-8 at 00:10)).



503. In April 2009, the menu bar at the top of the pompills.com homepage included links to “**Health Benefits**,” “**Potency**,” “**POMx Pills**,” “**POMx Liquid**,” and “**Buy Now**.” (CX0473 (Compl. Ex. E-8 at 00:10)). In January 2010, “**Health Benefits**,” was replaced with “**Medical Research**” on the menu bar. (CX0473 (Compl. Ex. E-9 at 00:04)).
504. The “**POMx Pills**” page displayed the headline “**Take it daily. Feel it forever.**” The message that POMx Pills are equivalent to POM Juice was conveyed in the subheadings, “**One POMx Pill = the antioxidant power of an 8oz glass of POM Wonderful 100% Pomegranate Juice**,” and “**POM in a Pill**”; in the text “All of the antioxidant power of POM Wonderful 100% Pomegranate Juice is now available in a supplement. So you can still get your daily antioxidants from an 8oz. glass of juice, or now the convenience of a calorie-free pill”; and in a caption to a diagram of a POMx Pill reading “fact 2. The antioxidant power of an 8oz. glass of juice, in a calorie-free pill.” (CX0473 (Compl. Ex.

E-8 at 00:15-00:25)).

505. The “**POMx Pills**” page also displayed a red “**BUY NOW**” button. (CX0473 (Compl. Ex. E-8 at 00:15-00:25)).
506. The toll-free number for placing orders, 1-888-POM-PILL, appeared at the bottom of nearly all pages on the pompills.com website. (CX0473 (Compl. Ex. E-8 at 04:23)).
507. The “**POMx Pills**” page stated, “Research has shown that the naturally occurring polyphenol antioxidants in pomegranates have extraordinary health benefits.” Continuing down the page, other bold subheadings touted POMx Pills as “**The Most Concentrated Source of Pomegranate Antioxidants Available**” and “**Ultra Potent.**” (CX0473 (Compl. Ex. E-8 at 00:25)).
508. Under the subheading “**Science, Not Fiction,**” the “**POMx Pills**” page stated:
- Made from the only pomegranates backed by \$25 million in medical research and the POM Wonderful brand
 - Clinically tested
 - Proven to be easily absorbed
 - Guards your body against free radicals
 - Promotes prostate and heart health
- (CX0473 (Compl. Ex. E-8 at 00:35)).
509. The “**POMx Liquid**” page featured the headline “**Not for the Faint of Heart.**” Directly below this headline, a subheading stated, “**POMx Liquid: The most concentrated source of pomegranate antioxidants available,**” elaborating, “[t]ake your antioxidants into your own hands. The Antioxidant Superpower is now available in a single teaspoon. POMx Liquid is a highly concentrated, incredibly powerful blend of all-natural polyphenol antioxidants made from the very same pomegranates in POM Wonderful 100% Pomegranate Juice.” (CX0473 (Compl. Ex. E-8 at 01:00)).
510. The “**POMx Liquid**” page also depicted the POMx Liquid bottle and teaspoon with the caption, “One teaspoon = the antioxidant power of 8oz. of POM Wonderful 100% Pomegranate Juice” and a link to “**BUY NOW.**” (CX0473 (Compl. Ex. E-8 at 01:00)).

511. The “**POMx Liquid**” page contained substantially similar language touting the research behind the product as the POMx Pills page. (*Compare* CX0473 (Compl. Ex. E-8 at 00:35) *with* (CX0473 (Compl. Ex. E-8 at 01:15)).
512. The “**Health Benefits**” section of pompills.com featured links to web pages titled “Research,” “Antioxidant Benefits,” “Heart Health,” and “Prostate Health.” (CX0473 (Compl. Ex. E-8 at 01:38)).
513. A list of study citations followed this introduction under the headings “**Cardiovascular Studies**,” “**Cancer Studies**,” “**Chemical Composition Studies**,” “**Diabetes Studies**,” and “**Bioavailability Studies**.” (CX0473 (Compl. Ex. E-8 at 01:43-04:23)).
514. The “**Cardiovascular Studies**” listed on the “**Research**” page included those with titles like, “Pomegranate juice improves myocardial perfusion in coronary heart patients,” “Pomegranate juice pilot research suggest anti-atherosclerosis benefits,” and “Pomegranate juice helps promote normal systolic blood pressure.” (CX0473 (Compl. Ex. E-8 at 01:41)). These titles were POM’s paraphrases of the studies’ actual titles. (CX0473 (Compl. Ex. E-8 at 01:43-02:31)). For example, the study POM listed as “Pomegranate juice improves myocardial perfusion in coronary heart patients,” was published with the title “Effects of Pomegranate Juice Consumption on Myocardial Perfusion in Patients with Coronary Heart Disease.” (CX0473 (Compl. Ex. E-8 at 02:05-02:10)).
515. The “**Cancer Studies**” listed on the “**Research**” page included those with titles like, “Pomegranate juice delays PSA doubling time in humans,” “Pomegranate polyphenols have anti-inflammatory effects on colon cancer cells,” and “Pomegranate juice shows superior anti-cancer bioactivity when compared to its purified compounds.” (CX0473 (Compl. Ex. E-8 at 02:56)). These titles were POM’s paraphrases of the studies’ actual titles. (CX0473 (Compl. Ex. E-8 at 02:34-03:10)). For example, the study POM listed as “Pomegranate juice delays PSA doubling time in humans,” was published with the title “Phase II Study of Pomegranate Juice for Men with Rising Prostate-Specific Antigen Following Surgery or Radiation for Prostate Cancer.” (CX0473 (Compl. Ex. E-8 at 02:34-02:45)).
516. The “**Diabetes Studies**” listed on the “**Research**” page included those with titles like, “Pomegranate juice has antioxidant benefits for people with type 2 diabetes,” and “Pomegranate juice stimulates unique antioxidant function relevant to diabetes.” (CX0473 (Compl. Ex. E-8 at 02:56)).

517. Another page, titled “**Why take an antioxidant supplement?**” described free radicals as “unstable molecules [that] aggressively destroy healthy cells in our bodies and may be linked to everything from the wrinkles we get as we age to more serious health threats like cancer and heart disease. In fact, scientists have already linked free radicals to as many as 60 different types of diseases.” (CX0473 (Compl. Ex. E-8 at 04:37)). Farther down the page, under the red, bold subheading “POMx: The Antioxidant Superpill,” was the text:

It’s enough to make other antioxidants feel inferior: in the fight against free radicals, POMx is the Antioxidant Superpill. POMx fights free radicals with more concentrated pomegranate antioxidants than any other 100% pomegranate supplement. . . . POMx is made from the only pomegranates with \$25 million in medical research behind them, and backed by the POM Wonderful brand. A single capsule or teaspoon of POMx gives you all the antioxidant power of an 8oz. glass of POM Wonderful 100% Pomegranate Juice – the very same juice that in a preliminary UCLA medical study showed hopeful results for men with prostate cancer.

(CX0473 (Compl. Ex. E-8 at 04:50)).

518. A section on “**Heart Health**” stated:

We have researched the effects of pomegranate juice on cardiovascular health for almost 10 years, and findings suggest that pomegranate juice may help counteract factors leading to arterial plaque build-up, as well as inhibit a number of factors associated with heart disease. Initial pre-clinical tests have shown that POMx has equivalent cardiovascular benefits to POM Wonderful Juice, and additional studies are now going on. [Learn more](#).

The “Learn more” link took the consumer to a page titled “**The Heart of The Matter**.”

(CX0473 (Compl. Ex. E-8 at 05:05) (underlined hyperlink in original)).

519. “**The Heart of The Matter**” page displayed a large image of the medical caduceus symbol. Directly under this image was a link to “Order POM Pills Now!” Next to the medical caduceus symbol was the subheading in red, “Amaze your cardiologist. Take

POMx.” The explanatory text under “Amaze your cardiologist” stated:

POMx is made from the only pomegranates supported by \$25 million of initial scientific research from leading universities The very same pomegranates in POM Wonderful 100% Pomegranate Juice that showed encouraging results in initial cardiovascular health studies.

Let’s start with some facts: atherosclerosis (or too much plaque in the arteries) is a leading cause of heart disease. Emerging science suggests that free radicals may be the culprits that can oxidize LDL (also known as “bad” cholesterol) – turning it into plaque that clogs up arteries. And science also tells us that pomegranate antioxidants neutralize free radicals.

(CX0473 (Compl. Ex. E-8 at 05:09)).

520. “**The Heart of the Matter**” page also presented summaries of the Aviram CIMT/BP Study (2004) and the Ornish MP Study (2005) that were substantially similar to those on pomwonderful.com. (CX0473 (Compl. Ex. E-8 at 05:10); *see also* CCF ¶ 449 (summaries of the Aviram and Ornish studies)).
521. The “**Prostate Health**” section of the “**Health Benefits**” page stated “A preliminary UCLA medical study on POM Wonderful 100% Pomegranate Juice showed hopeful results for men with prostate cancer who drank an 8oz. glass of pomegranate juice daily. And every POMx capsule provides the antioxidant power of an 8oz. glass of POM Wonderful 100% Pomegranate Juice. Learn more.” (CX0473 (Compl. Ex. E-8 at 05:50)). The “Learn more” link took the consumer to a page titled “**Pomegranates and Prostate Health.**” (CX0473 (Compl. Ex. E-8 at 05:55) (underlined hyperlink in original)).
522. Like “**The Heart of the Matter**” page, the “**Pomegranates and Prostate Health**” page also prominently displayed the medical caduceus symbol. Directly under the caduceus symbol was a quote from the July 4, 2006 issue of *The New York Times* that “Findings from a small study suggest that pomegranate juice may one day prove an effective weapon against prostate cancer.” (CX0473 (Compl. Ex. E-8 at 05:55)).
523. On the “**Pomegranates and Prostate Health**” page the explanatory text under the

subheading “**Prostate Health**” focused on prostate cancer:

Prostate cancer is the most commonly diagnosed cancer among men in the United States, and the second leading cause of cancer death in men, after lung cancer. However, emerging science suggests that diet, lifestyle and dietary supplements may improve prostate health.

(CX0473 (Compl. Ex. E-8 at 05:55)).

524. Following this statement about prostate cancer, the “**Pomegranates and Prostate Health**” page referenced the Pantuck Phase II Prostate Cancer Study (2006), interpreting the reported result as indicating a “350% increase” in PSA doubling time:

Men who had been treated surgically or with radiation for prostate cancer were given 8oz. of POM Wonderful 100% Pomegranate Juice. A majority of the 46 men participating in the study experienced a significantly extended PSA doubling time. . . . Before the study of pomegranate juice, the average PSA doubling time for the participants was 15 months. After drinking 8oz. of juice daily, the average PSA doubling time increased to 54 months. That’s a 350% increase.

(CX0473 (Compl. Ex. E-8 at 05:55)).

The page also explained that “PSA (prostate-specific antigen) is a marker that is thought to be associated with the progression of prostate cancer; a slower PSA doubling time may reflect slower progression of the disease.” Placing the mouse over the hyperlinked word “doubling time” produced a pop-up text box that reiterated, “The amount of time it takes for the prostate-specific antigen[s] (also called PSA levels) to double in men with prostate cancer may reflect the progression of the disease. A longer doubling time may indicate a slower growing cancer.” (CX0473 (Compl. Ex. E-8 at 05:55-05:59) (underlined hyperlink in original)).

525. Consistent with the statement on the “**Health Benefits**” page that “every POMx capsule provides the antioxidant power of an 8oz. glass of POM Wonderful 100% Pomegranate Juice,” (see CCFF ¶ 524) the “**Pomegranates and Prostate Health**” page quoted Dr. Heber, identified as “Director of UCLA’s Center for Human Nutrition,” as stating:

The most abundant and most active ingredients in Pomegranate

Juice are also found in POMx. Basic studies in our laboratory so far indicate that POMx and Pomegranate Juice have the same effect on prostate health.

(CX0473 (Compl. Ex. E-8 at 05:59)).

526. The pomfills.com website also featured an “FAQs” page. (CX0473 (Compl. Ex. E-8 at 07:51)). The first set of FAQs, under the subheading “**Pomegranates and Health,**” included questions like, “**Heart Disease: How does drinking pomegranate juice help the fight against cardiovascular disease?**”; “**Prostate Cancer: There has been promising news on the benefits of pomegranate juice in the fight against prostate cancer. Is this really true?**”; and “**Erectile Dysfunction: Can pomegranate juice benefit men with erectile dysfunction?**” (CX0473 (Compl. Ex. E-8 at 07:51)).
527. The response to the FAQ “**Heart Disease: How does drinking pomegranate juice help the fight against cardiovascular disease?**” discussed “Improved Cardiac Blood Flow” and “Decrease in Arterial Plaque,” again summarizing the results from the Ornish MP Study (2005) and the Aviram CIMT/BP Study (2004). (CX0473 (Compl. Ex. E-8 at 09:05)).
528. The response to the FAQ “**Heart Disease: How does drinking pomegranate juice help the fight against cardiovascular disease?**” also stated that “Initial pre-clinical tests have shown that POMx has equivalent cardiovascular benefits as POM Wonderful 100% Pomegranate Juice, and human studies are now ongoing” and quoted Dr. Aviram, identified as “one of the world’s preeminent cardiovascular researchers,” as commenting, “*The results of our pre-clinical studies showed that POMx is as potent an antioxidant as pomegranate juice, and just like pomegranate juice may promote cardiovascular health.*” (CX0473 (Compl. Ex. E-8 at 09:05); *but see* CCFF ¶ 395).
529. The response to the FAQ “**Prostate Cancer: There has been promising news on the benefits of pomegranate juice in the fight against prostate cancer. Is this really true?**” once again summarized the Pantuck Phase II Prostate Cancer Study (2006). (CX0473 (Compl. Ex. E-8 at 09:05)). The answer went on to state that “[a] new study is underway to more fully investigate the potential of POMx to extend PSA doubling time” and quoted Dr. Heber, identified as “Director of UCLA’s Center for Human Nutrition,” as commenting, “*The most abundant and most active ingredients in pomegranate juice are also found in POMx. Basic studies in our laboratory so far indicate that POMx and pomegranate juice may have the same effects.*” (CX0473 (Compl. Ex. E-8 at 09:05)).

530. The response to the FAQ “**Erectile Dysfunction: Can pomegranate juice benefit men with erectile dysfunction?**” cited the Forest Erectile Dysfunction Study (2007), stating: “Initial results linking POM Wonderful 100% Pomegranate Juice and erectile performance are promising. In a soon-to-be-published clinical study on men with erectile dysfunction, the group who consumed 8oz. of POM Juice daily experienced better erectile performance than the group who drank a placebo.” (CX0473 (Compl. Ex. E-8 at 9:05)).
531. The response to the FAQ “**Why are pomegranates and pomegranate juice so healthy?**” assured consumers that “Today, modern science confirms that the pomegranate is truly a medical marvel.” (CX0473 (Compl. Ex. E-8 at 8:45) (emphasis added)).
532. Other FAQs repeatedly stressed the “extraordinary health benefits” of POMx and its polyphenol antioxidants. For example, in response to the FAQ, “**How long does it take for my system to get benefits of POMx?**” the response stated, “[b]ecause the polyphenol antioxidants in POMx are absorbed rapidly by the body, they can begin their healthy disease-fighting effects almost immediately. However, studies on POM Juice consumption have shown that it can take 1 to 2 years to see benefits.” (CX0473 (Compl. Ex. E-8 at 10:34-10:53)).
533. The response to the FAQ “**Dosage: How much POMx should I take?**,” stated “Whether you choose pills or liquid, it is important to remember that to reap POMx’s full health benefits, you must take it every day.” (CX0473 (Compl. Ex. E-8 at 11:03)).
534. In January 2010, under the subheading “**Science Not Fiction**,” the “**POMx Pills**” and “**POMx Liquid**” touted that the amount of money POM purportedly spent on medical research was \$32 million.” (CX0473 (Compl. Ex. E-9 at 00:16, 00:30)). This \$32-million figure also appeared throughout the rest of pompills.com, including in the “**Medical Research**” section, the “**Research**,” “**Antioxidant Benefits**,” and “**Heart Health**” pages, and the “**About Us**” section of the website. (See, e.g., CX0473 (Compl. Ex. E-9 at 00:36, 00:55, 01:01, 01:22, 02:12)).
535. The pompills.com website, through textual references, graphs, and medical imagery, touts the “medical benefits” of POMx Pills and POMx Liquid, and POM’s research on heart disease, prostate cancer, and erectile dysfunction, and other health conditions. The pompills.com website conveys the net impression that taking one POMx Pill or one teaspoon of POMx Liquid, daily, treats, prevents, or reduces the risk of heart disease,

prostate cancer, and erectile dysfunction, and that these health benefits are clinically proven. In addition, in representing that one POMx Pill or one teaspoon of POMx Liquid is equivalent to eight ounces of POM Juice, the pompills.com website also conveys the net impression that drinking eight ounces of POM Juice, daily, treats, prevents, or reduces the risk of heart disease, prostate cancer, and erectile dysfunction. (See CCFB ¶¶ 501-534).

Tab 26



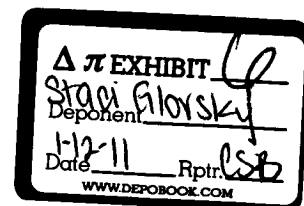
Contact: Fiona Posell (310) 966 5810
fposell@pomwonderful.com

Note to Editors: Interviews with medical researchers quoted are available upon request.

POM_x, a Highly Concentrated Form of Healthy Pomegranate Antioxidants, Becomes Available to Consumers for the First Time

LOS ANGELES (July 10 - 2006) – Three years after introducing consumers to the health benefits and delicious taste of the world’s first refrigerated, super-premium pomegranate juice, **POM Wonderful**[®] announced today that it has developed a concentrated form of pomegranate antioxidants known as **POM_x**. **POM_x**, already being noted by medical researchers as an important natural ingredient, is so concentrated that only a small amount is needed to obtain an optimal level of daily antioxidants. For consumers who are not seeking additional calories and sugars, this is an important product benefit. **POM_x** comes from the same Wonderful variety of pomegranates that are used to make **POM Wonderful**’s healthy pomegranate juices. It also has a similar biochemical profile to pomegranate juice since both contain a diverse range of phytochemicals, of which polyphenols make up a large proportion. **POM_x** is currently an active ingredient in **POM Tea** (<http://pomtea.com>), a refreshing, healthy, ready-to-drink iced tea that is available in retail stores nationally.

According to Michael Aviram, DSc, Professor of Biochemistry and Head Lipid Research Laboratory, Technion Faculty of Medicine and Rambam Medical Center, Haifa, Israel, who was at the forefront of the initial research on pomegranates, the research on **POM_x** looks very promising. In 2006, Aviram led a study on **POM_x** which was recently published (*Journal of Agriculture and Food Chemistry*, 2006 54:1928-1935). Commenting on this research, Professor Aviram remarks, “The results showed that **POM_x** is as potent an antioxidant as pomegranate juice and just like pomegranate juice may protect against cardiovascular as well as other diseases.”



The **POM**x research comes as the benefits derived from the Wonderful variety of pomegranate are, once again, being noted by the worldwide medical community. Recently, the American Association for Cancer Research published research that indicates that a daily pomegranate regimen has a positive effect for men with prostate cancer. Specifically, drinking 8 ounces of **POM** Wonderful pomegranate juice daily prolonged post-prostate surgery PSA doubling time from 15 to 54 months (*Clinical Cancer Research*, July 1, 2006). PSA is a protein marker for prostate cancer and the faster PSA levels increase in the blood of men after treatment, the greater their potential for dying of prostate cancer.

David Heber, MD, PhD, Professor of Medicine and Director, UCLA Center for Human Nutrition, provided additional commentary on **POM**x as it relates to prostate cancer. "Basic studies indicate that the effects of **POM**x and **POM** Wonderful pomegranate juice on prostate cancer are the same. The most abundant and most active ingredients in pomegranate juice are also found in **POM**x."

The Wonderful variety of pomegranate is a type of pomegranate rather than a brand. Just as there are different varieties of apples, oranges and grapes, there are several different varieties of pomegranates grown in the United States and in other countries. **POM** Wonderful's products only use extractions from the Wonderful variety of pomegranate. Of the many published peer-reviewed medical papers that speak to the health benefits of the pomegranate, most were conducted using juice or pomegranate extract from this variety of pomegranate.

About **POM** Wonderful

POM Wonderful is the largest grower of the Wonderful variety of pomegranate. The company exclusively grows and sells this variety because of its exquisite sweet flavor, health benefits, large size and plentiful juice. **POM** Wonderful's pomegranates are grown in Central California, in the sunny San Joaquin Valley. Fresh pomegranates are in season from October through January and November is National Pomegranate Month. In addition to selling the fresh fruit, the company also juices its fresh pomegranates to make **POM** Wonderful pomegranate juice and **POM**x. To learn more, visit <http://www.pomwonderful.com>.

###

c. July 2006 Press Release (CX0065)

556. A press release POM issued in July 2006, titled “POMx, a Highly Concentrated Form of Healthy Pomegranate Antioxidants, Becomes Available to Consumers for the First Time,” discussed research published by the American Association for Cancer Research “indicat[ing] that a daily pomegranate regimen has a positive effect for men with prostate cancer” and that

[s]pecifically, drinking 8 ounces of P♥M Wonderful pomegranate juice daily prolonged post-prostate surgery PSA doubling time from 15 to 54 months (*Clinical Cancer Research, July 1, 2006*). PSA is a protein marker for prostate cancer and the faster PSA levels increase in the blood of men after treatment, the greater their potential for dying of prostate cancer.

(CX0065_0002).

557. The press release also quoted Dr. Heber, identified as “Professor of Medicine and Director, UCLA Center for Human Nutrition,” as stating, “[b]asic studies indicate that the effects of POMx and POM Wonderful pomegranate juice on prostate cancer are the

same. The most abundant and most active ingredients in pomegranate juice are also found in POMx.” (CX0065_0002).

558. Ms. Glovsky testified that Dr. Heber “ha[d] been around the supplement market for a long time,” and that “sometimes you’ll have a product and you want to use a physician, a professor’s name, that . . . helps give it credibility.” (CX1347 (Glovsky, Dep. at 93)).
559. In an email pertaining to this press release, Ms. Posell wrote, “[t]his press release supports our overall strategy to explain the power of the Wonderful variety of pomegranate and to announce that we have developed POMx which is a new and healthy alternative to [POM Juice]. We need news, and this press release has it!! I use the prostate cancer study to substantiate our statements about POMx.” (CX0062_0001).
560. Referring to a 2006 study on POMx, the press release also quoted Dr. Aviram as stating, “[t]he results showed that P♥Mx is as potent an antioxidant as pomegranate juice and just like pomegranate juice may protect against cardiovascular as well as other diseases.” (CX0065_0001). The press release did not disclose that this 2006 study was on mice. (CX0062; CX0787_0002).
561. Ms. Glovsky testified that she believed the July 2006 press release was “premature” because no POMx product was available for purchase yet. (CX1347 (Glovsky, Dep. at 91)).
562. The net impression of this press release is that drinking 8 ounces of POM Juice or taking one POMx Pill daily, treats prostate cancer by prolonging PSADT, and prevents or reduces the risk of heart disease, and clinical studies, research, or trials prove this effect. (CCFF ¶¶ 556-60).

Tab 27

**b. June 2008 *Fox Business* Interview with Matthew Tupper
(CX0473 (Compl. Ex. E-7))**

572. In a television interview on *Fox Business* in June 2008, Mr. Tupper stated:

MR. TUPPER: With pomegranate, the dose that's been shown to be effective is eight ounces a day . . . pomegranate is the one fruit that's actually been tested in human beings by dozens of researchers across the globe. There's actually been a study published recently on prostate cancer. Men suffering from advanced stages of prostate cancer drinking eight ounces a day saw the progression of the prostate cancer actually slow dramatically. In addition, there have been a number of studies published on cardiovascular disease in which sick patients again consuming eight ounces of pomegranate juice every day saw dramatic improvements in things like atherosclerosis, which is plaque in the arteries, the amount of blood flow delivered to the heart.

* * *

MR. SULLIVAN: There's a lot of different pomegranate things. How many more products can you put out there, and how much of it is just hooey, . . . you know, pomegranate pills, et cetera?

MR. TUPPER: *** The products that we put into the market, though, all stem from the fundamental science of the pomegranate, and everything that we put into the market, whether it's juice, whether it's tea, whether it's the supplements that we sell, are all backed by an enormous investment in science. We've actually funded more than \$25 million of scientific research worldwide since we started the business. And, therefore, every product that we sell is backed by that science. Every product that we sell contains those unique antioxidants. We don't do things for scents and flavors. We do them for the health benefits and for the science.

(CX0473 (Compl. Ex. E-7)).

573. The net impression of Mr. Tupper's statements, including his references to published studies on prostate cancer and cardiovascular disease, his statement that "the dose [of pomegranate] that's been shown to be effective is eight ounces a day," and his statement that "everything that we put into the market . . . [is] backed by an enormous investment in science" is that drinking 8 ounces of POM Juice a day (1) treats heart disease including by decreasing arterial plaque and improving blood flow to the heart and (2) treats prostate cancer, and that these health benefits are clinically proven. (CCFF ¶¶ 572).

Tab 28

c. February 2009 *Early Show* Interview with Lynda Resnick (CX0472)

574. In a February 2009 interview on CBS's *Early Show* on the topic "Making it Happen: Turning Ideas into Ca\$h," Mrs. Resnick described how POM started marketing POM Juice:

[E]veryone knew in mythology that the pomegranate was the secret of everlasting life. And we decided to see if that was true, and we started doing scientific, peer-reviewed research. And we found out that, indeed, the pomegranate has all these health-giving properties. There isn't a man in America that shouldn't drink 8oz. a day [of pomegranate juice] because it keeps you from getting prostate cancer or from your PSA from rising. It's really an amazing, amazing thing. And good for circulation, too.

(CX0472 at 01:40-2:07). She also stated:

. . . [POM] is the antioxidant superpower. And once we realized the health-giving benefits, that was our marketing direction. And, people didn't know what a pomegranate was, but once they found out, they sure wanted it.

(CX0472 at 02:36)

575. Mrs. Resnick's statements expressly convey the net impression that drinking 8 ounces of pomegranate juice a day treats, prevents, or reduces the risk of prostate cancer, and clinical studies, research, or trials prove these effects. (CCFF ¶ 574).

Tab 29



[« Cornish Game Hen with POM Pomegranate Glaze | Main | What's in your juice? And where has it been? »](#)

03/20/2009

● Striking Out On Your Own

Newsweek

Read the latest Lynda Resnick interview by [Newsweek's Nick Summers](#). Lynda is the founder of POM and answers the question, is now a good time to start a company? Absolutely...

Posted by POM Wonderful on 03/20/2009 at 09:42 AM | [Permalink](#)
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Striking Out On Your Own

Is now a good time to start a company? Absolutely, says Lynda Resnick, the founder of Fiji Water and POM Wonderful.

Nick Summers

Newsweek Web Exclusive

When Lynda Resnick brings her own water to an interview, she really brings her own. That is, when she produces a bottle of Fiji, she owns the entire company—as well as POM Wonderful, maker of pomegranate juice and antioxidant supplements. She's a serial entrepreneur who also owns the Teleflora floral service and a number of other ventures. Resnick's new book, [Rubies in the Orchard](#), details a lifetime acquiring businesses and transforming them with a keen eye for value, marketing and community. The writing can be flat—especially compared with how charismatic Resnick is in person—but the ideas are so sound, and the track record so full of success, that the book is still a fun read, and highly instructive to anyone wishing to start a business in these bleak times. Resnick spoke to NEWSWEEK's Nick Summers about the Bush administration's economic legacy, balancing risk with reward and why now is a great time to be running [your own business](#). Excerpts:

How long were you working on the book?

Of course it took me my whole life, but six months. I turned in the manuscript, and my editor said it was the cleanest he'd ever seen. I thought, "Is that a compliment?" The corrections took about half an hour; that was it. There was a page and a half that he took out that was a little too strident.

What was it strident about?

I get carried away. The Bush administration—I was hysterical during the entire eight years. Beating my chest, crying, screaming at the television. I saw the end. I did. I have a Cassandra complex. Do you know who Cassandra was?

I do!

And do you know what happened when she broke up with Apollo, what he did to her?

I don't.

He gave her the gift of prophesy, but made it so that no one would believe her.

So you saw the end—of what?

I didn't see the debacle the way it is today, but I did—every time the stock market went up another 300 points, I would get sick. I was very upset, because I've lived through so many bubbles. I knew that there was no way that this was going to last. You can't expect to make 20 percent a year, year in and year out.

Why did you write the book? Who was the target audience?

I wrote it, I hope, for small- to medium-size businesses, although Wall Street could learn a lot from it. But alas, will they? I talk about the tyranny of instant gratification that our country has gone through over the last 20 years. Running companies for quarterly profits is not a long-term game, as we've seen. So my concept is, if you have a product or business or service, you have to make sure you have true intrinsic value in what you're selling. You have to figure out where that value resides—is it your technology, is it some invention that you've made? Is it the fact that your water fell as rain 200 years ago? Is it the fact that your pomegranate has healing properties?

Then communicate that value. You have to have a unique selling proposition, something that sets you apart from the other people in your realm. If you're a dry cleaner, is your front office as pristine as the clothes you're returning? If it's a movie theater, maybe it's an art theater, showing films that they can't get somewhere else?

Community and transparency can level the playing field. Small businesses are not burdened with

the overhead and the debt of a big business—they can zoom in with their disruptive technology and take over. There was no chance for small business up until recently; it was very hard to come to market with your new idea. Nobody was interested; they wanted to write fancy derivatives and instruments that were going to make it quick on Wall Street. But today there's a real opening, and it's a good day for small business.

So there's reason for optimism, for entrepreneurs with an idea for a business? And what about taking risks in general?

What do they have to lose? They may as well go for it. They're not going to see another opening like this. Investing in your own business is what we've always done; we've never been a public company. Who are you going to believe in more than yourself?

Now, I disagree that we should be spending. I'm not, and believe me, I love to. Now I'm very cautious about what I'm buying. I used to buy at the auction houses all the time. We have a big art collection, but I'm not doing it, man. I don't need it. I don't need another thing. Cash is king. If we start saving, we may be able to finance our own future. So it's OK, pull in your belt a little bit.

What else should entrepreneurs consider about today's economy?

The wonderful thing about the Internet is that it wasn't there during the last depression. It's the No. 1 thing that I think will save us. Let's say you have a great idea that you've invented: the best mousetrap. How easy it is today to comb the Web and find out if someone else has done that mousetrap. A piece of cake; I could do that in 20 minutes. Then you could go to zoomerang.com, which is a market-research Web site. For \$20 a month, you can find your target market and ask, "How do you feel about this mousetrap? Is this the mousetrap you've longed for? The roach hotel that will make your life easy?" Then, you're ready to go to your patent attorney. And there are also cheap patent attorneys online!

You write that you despise the phrase "think outside the box."

Because the answer's inside the box. The answer to your problem is always inside the box, always understanding the intrinsic value again of your product or service. Look there for your marketing answer. Take Fiji Water. Smartwater got Jennifer Aniston to be their spokesperson for millions of dollars. But every celebrity drinks my water. I just take the pictures from Us and Touch, or whatever the hell those magazines are called, and put those on our Web site.

I hate "think outside the box" too.

People don't like the obvious—it's like, boring. It's "boring" to think of value, "boring" to think of unique selling proposition, "boring" to think of community and hard work. "We should have this big idea that's just going to transport us to riches!" But it isn't like that, especially now. Hard work is back—with a vengeance.

That's probably a good lesson for almost everyone.

I realized after reading [Malcolm Gladwell's] "Outliers" why I did so well when I started [business] at 19. By the time everyone else was graduating from an MBA program, I had been in business for so many years that I was ahead of the pack!

Do you still have an inner competitiveness to stay on top of the business world? Are you still looking to buy new companies or start new ones?

Sure, yeah!

Always? Till you drop dead?

Well, yeah! I have no plans to retire. You think it's undignified for a woman my age to still be working? There's so much need in this world, how can I not? If I can motivate a person that comes to one of my lectures, that's something. [*Coughs, clears throat*] Excuse me. My vitamins. I take POMx.

Should I take vitamins?

I don't know your family history. How's your father?

He's in good health. Had a bout of prostate cancer, but that's—

You have to be on pomegranate juice. You have a 50 percent chance of getting it. Listen to me. It is the one thing that will keep your PSA normal. You have to drink pomegranate juice. There is nothing else we know of that will keep your PSA in check. Ask any urologist—your father should be on it. Your father should be on it. I'm sorry to do this to you, but I have to tell you. We just did a study at UCLA, on 43 men ... It arrested their PSA. How old are you, 28?

Twenty-six.

Get a base line now. [*Pause, wink*] It's also 40 percent as effective as Viagra. Not that you need it.

**d. March 2009 *Newsweek.com* Interview with Lynda Resnick
(CX1426_00032-35)**

576. In a March 20, 2009 interview with *Newsweek.com*, posted on the pomwonderful.com “Blog” page, Mrs. Resnick stated:

[Interviewer:] Should I take vitamins?

[Lynda Resnick:] I don’t know your family history. How’s your father?

[Interviewer:] He's in good health. Had a bout of prostate cancer, but that's—

[Lynda Resnick:] You have to be on pomegranate juice. You have a 50 percent chance of getting it. Listen to me. It is the one thing that will keep your PSA normal. You have to drink pomegranate juice. There is nothing else we know of that will keep your PSA in check. Ask any urologist—your father should be on it. Your father should be on it. I'm sorry to do this to you, but I have to tell you. We just did a study at UCLA, on 43 men ... It arrested their PSA. How old are you, 28?

[Interviewer:] Twenty-six.

[Lynda Resnick:] Get a base line now. [*Pause, wink*] It's also 40 percent as effective as Viagra. Not that you need it. But—couldn't hoit [sic]!

(CX1426_00032-35).

577. The net impression of Mrs. Resnick's statements recommending that a healthy, but at-risk person has to be on pomegranate juice, and referring to a study at UCLA, is that drinking POM Juice prevents or reduces the risk of prostate cancer, and that this effect is clinically proven. By comparing POM to Viagra, with a specific percentage measure of effectiveness, her statements also convey the net impression that drinking POM Juice treats, prevents, or reduces the risk of erectile dysfunction, and that this effect is clinically proven. (CCFF ¶ 576).
578. Respondents admitted in their Answer that *The Martha Stewart Show* interview with Mrs. Resnick, the *Fox Business* interview with Mr. Tupper, and the *Newsweek.com* interview with Mrs. Resnick (Complaint Exhibits E-6, E-7, and F (CX0473)) were "advertisements and promotional materials" that they disseminated or caused to be disseminated. (Answer ¶¶ 9-10).

Tab 30

a. **November 2008 *The Martha Stewart Show* Interview with Lynda Resnick (CX0473 (Compl. Ex. E-6))**

570. In a television appearance on NBC's *The Martha Stewart Show* in November 2008, Lynda Resnick stated:

MRS. RESNICK: . . . But, the Wonderfals are the [pomegranates] ones that we grow because they're the sweetest and they have the health benefits.

* * *

MRS. STEWART: But, the medical benefits even outweigh the mythical benefits?

MRS. RESNICK: Oh, they do, they do. I mean, it is the magic elixir of our age and of all ages, and we know that it helps circulation, it helps Alzheimer's, it helps all sorts of things in the body--

MRS. STEWART: Antioxidants.

MRS. RESNICK: Antioxidants. Polyphenol antioxidants off the chart.

MRS. STEWART: Right.

MRS. RESNICK: And if you know a man that you care about or you are a man, make him drink eight ounces of pomegranate juice a day because what it does for prostate cancer is amazing.

(CX0473 (Compl. Ex. E-6)).

571. The net impression of Mrs. Resnick's statements, including her response to Ms. Stewart's question about the "medical benefits" of POM, is that drinking 8 ounces of POM Juice a day treats, prevents, or reduces the risk of prostate cancer. (*See* CCFE ¶ 570).