FEDERAL TRADE COMMISSION

I N D E X

IN RE POM WONDERFUL, ET AL.

TRIAL VOLUME 1

PUBLIC RECORD

MAY 24, 2011

WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS	VOIR
L. RESNICK	72				

EXHIBITS	FOR ID	IN EVID	IN CAMERA	STRICKEN/REJECTED
CX				
(none)				
RX				
(none)				
JX				
Number1	125			
Number2	7			

23 DX

24 (none)

25

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

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
	)

Tuesday, May 24, 2011

10:03 a.m.

TRIAL VOLUME 1

PUBLIC RECORD

BEFORE THE HONORABLE D. MICHAEL CHAPPELL

Administrative Law Judge

Federal Trade Commission

600 Pennsylvania Avenue, N.W.

Washington, D.C.

Reported by: Josett F. Whalen, RMR-CRR

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P R O C E E D I N G S

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JUDGE CHAPPELL: Call to order Docket 9344, In Re POM Wonderful, et al.

Start with the appearances of the parties, government first.

MS. VISWANATHAN: Good morning, Your Honor. Serena Viswanathan for complaint counsel.

MS. DOMOND: Good morning, Your Honor. Devin Domond for complaint counsel.

MS. HIPPSLEY: Good morning, Your Honor. Heather Hippsley for complaint counsel.

MS. JOHNSON: Good morning, Your Honor. Mary Johnson for complaint counsel.

JUDGE CHAPPELL: And respondents.

MR. GRAUBERT: John Graubert for respondents, Your Honor.

MR. FIELDS: Good morning, Your Honor. Bert Fields for the respondents. And I note that

Mr. and Mrs. Resnick are here in the courtroom right behind me.

MS. DIAZ: Good morning, Your Honor. Kristina Diaz with Roll Law Group on behalf of all respondents.

MR. TRABOULSI: Good morning, Your Honor. I'm

Johnny Traboulsi with Roll Law Group on behalf of respondents.

MS. HAMMOND: Good morning. Brooke Hammond on behalf of respondents.

JUDGE CHAPPELL: Thank you.

Do we have any matters to take up before opening statement, perhaps joint exhibits?

MS. VISWANATHAN: Yes, Your Honor. We have joint stipulations of law and facts to submit as well as the joint stipulations on the admissibility of exhibits.

As far as the joint stipulations, there's one that was crossed out this morning, and perhaps at the break we can give Your Honor a clean copy rather than a version with a cross-out, if that's okay. And we do have stipulations.

JUDGE CHAPPELL: You took one off the table?

MS. VISWANATHAN: Yes. As of this morning.

JUDGE CHAPPELL: That's fine. I'll wait for a

clean copy.

Are you prepared to offer the other exhibit?

MS. VISWANATHAN: The exhibits? Are we? Okay.

Yes, Your Honor, we are. We do have the joint exhibits as well as the conditionally admitted exhibits, are in this document.

JUDGE CHAPPELL: And is that JX 1?

MS. VISWANATHAN: This is JX 2. JX 1 will be the stipulations of facts and law.

JUDGE CHAPPELL: JX 2 is agreed to by the government.

MS. VISWANATHAN: I'm sorry?

JUDGE CHAPPELL: Agreed to by the government?

MS. VISWANATHAN: Yes. JX 1? JX 2, yes. JX 2 is agreed to by the complaint counsel.

JUDGE CHAPPELL: Let's keep the record clear.

JX 1 you're going to polish and admit -- you're going to offer it later.

MS. VISWANATHAN: Yes.

JUDGE CHAPPELL: This is JX 2.

MS. VISWANATHAN: This is JX 2.

JUDGE CHAPPELL: Agreed to by the government.

MS. VISWANATHAN: Agreed to by the government.

JUDGE CHAPPELL: Agreed to by respondents.

MR. GRAUBERT: Yes, Your Honor.

JUDGE CHAPPELL: JX 2 is admitted.

(Joint Exhibit Number 2 was admitted into evidence.)

JUDGE CHAPPELL: Are you ready to present your opening?

MS. DOMOND: Your Honor, we just had one other

matter that we wanted to bring to the court's attention. It's about scheduling for Thursday, May 26.

About two weeks ago we gave notice to Ms. Posell, the witness we intended to call that day, to let her know that we wanted to request her appearance. And last Monday, after Ms. Posell's attorney informed us that she had an opportunity to talk with her client, we sent a subpoena to her and notice.

However, late afternoon last Friday, Ms. Posell's attorney informed us that her client needs to return home to LA no later than Thursday evening, so in an effort to help accommodate Ms. Posell's schedule, we respectfully request that the court perhaps consider starting at 11:00 a.m. on Thursday rather than at noon.

And again, we apologize for not bringing this to the court's attention earlier. However, we had sent, after talking with Ms. Posell's attorney on Friday, an e-mail to see if respondents would agree to the change of time, and we did not hear anything until receiving an

e-mail from Ms. Posell's attorney late yesterday evening around 6:00 saying that the respondents were agreeable, though we hadn't received a response.

JUDGE CHAPPELL: All right. Let me see if I can figure out the facts here.

You were planning to call what witnesses on

Thursday and Friday of this week?

MS. DOMOND: On Thursday we were going to call Ms. Fiona Posell, and then on Friday we are calling Ms. Elizabeth Leow.

JUDGE CHAPPELL: And you anticipate Ms. Posell will take how long?

MS. DOMOND: We expect half a day.

JUDGE CHAPPELL: For your direct, or is this an adverse witness?

MS. DOMOND: No. That would be as to the direct and redirect.

JUDGE CHAPPELL: Mr. Graubert?

First of all, do you have any objection to --

MR. GRAUBERT: No, not at all, Your Honor. We realize you have to deal with the ProMedica folks, so whatever you can do there.

I was prefacing this on our understanding that Ms. Resnick will be finished on Wednesday afternoon. Is that your understanding?

MS. DOMOND: Correct.

MR. GRAUBERT: Thank you, Your Honor.

JUDGE CHAPPELL: And what do you anticipate for the time you need for cross of Ms. Posell?

MR. GRAUBERT: I think very little at this point, but we'll have to see how it goes, but very

little.

JUDGE CHAPPELL: Did you say "very little"?

MR. GRAUBERT: Yes, Your Honor.

JUDGE CHAPPELL: I think -- the court reporter asked me to ask if you would please slow down.

MR. GRAUBERT: I appreciate that.

JUDGE CHAPPELL: It might be a New York way of speaking. I don't know. But I can understand you, but she's got to type it all up.

MR. GRAUBERT: I can see I've revealed myself, so I'll keep that in mind. Thank you, Your Honor.

JUDGE CHAPPELL: All right. Not that there's anything wrong with the New York manner of speech.

MR. GRAUBERT: Of course.

JUDGE CHAPPELL: The problem I have with 11:00, I have three dockets on my calendar, three things going on on Thursday, not a good day for me to move anything.

MS. DOMOND: We understand, Your Honor.

JUDGE CHAPPELL: I have a final prehearing at

10:00, I have an initial prehearing at 11:00, and I have you at 12:00. I'm prepared to go as late as it takes on Thursday, so prepare to stick around Thursday. We'll get it done.

MS. DOMOND: Okay. Thank you, Your Honor.

JUDGE CHAPPELL: And one other point there. You

know how the final prehearings work, having done this a couple days ago. I'll have a brief session. Then they'll go back and lock horns, debate, whatever, work out their differences, and at some point we'll come back. And what I'll probably do is schedule that during a one-hour break that I give all of you, sometime in the afternoon. It depends on when they tell me they're ready.

Anything further?

MS. DOMOND: No, Your Honor.

MR. GRAUBERT: Your Honor, if I just might make a suggestion, it's not our witness, but from respondents' point of view, we have no problem with making sure that Ms. Fiona -- Ms. Posell is available if you do have a break at some point earlier than 1:00, so we're fine with however you want to proceed, Your Honor.

JUDGE CHAPPELL: You said 1:00. We're actually going at 12:00.

Is that fine?

MR. GRAUBERT: Yes, Your Honor.

JUDGE CHAPPELL: Anything further?

MS. DOMOND: No, Your Honor.

JUDGE CHAPPELL: We'll hear your opening now.

MS. HIPPSLEY: Good morning, Your Honor. Again,

it's Heather Hippsley.

JUDGE CHAPPELL: I have one procedural statement to make on the record. If it wasn't clear Thursday, I have adjourned the final prehearing conference, and this is the hearing on the merits.

Go ahead.

MS. HIPPSLEY: And again, I'm complaint counsel for the Federal Trade Commission.

In 2009, respondent Lynda Resnick published her book "Rubies in the Orchard, The POM Queen's Secrets to Marketing Just About Anything." This book, which is Complaint Counsel's Exhibit 1, recounts the development of the POM Wonderful business and her keys to the successful marketing of the POM products at issue in this matter. They are the flagship product, 100 percent POM Wonderful juice, and POMx, their pomegranate extract dietary supplement pills and liquid.

Let's listen to Mrs. Resnick explain in her own words the history of the respondents' companies and her

marketing secret for these products.

(Whereupon, a videotape was played.)

JUDGE CHAPPELL: What was the approximate date of this telecast you just showed?

MS. HIPPSLEY: I'm sorry?

JUDGE CHAPPELL: What was the approximate date

of the telecast you just showed us?

MS. HIPPSLEY: This was in 2008, and it's Plaintiff's Exhibit 473.

As Mrs. Resnick so aptly stated in her book: "Pure and unadulterated, this juice was not only delicious; it had the power to heal people. It was health in a bottle. People needed pomegranate juice in their lives (even if they didn't know it yet), and I knew they would pay what it was worth."

The commission's complaint alleges that respondents made both false establishment claims and unsubstantiated health claims for POM juice and the two POMx supplements.

In order for complaint counsel to prevail, first, we will establish that the claims were made and were material and, second, that the establishment claims were false and that the respondents lacked a reasonable basis for their efficacy claims.

Here, we have constructed a timeline of the

business practices at issue, which I will now go through in some detail.

The record will show that the ads challenged in the complaint focused on claims that POM juice and the POMx products prevent or treat heart disease, prostate cancer, and erectile dysfunction, just as Mrs. Resnick

outlines in her book, in interviews, and as a plethora of documents and testimony will demonstrate.

The primary evidence of the claims an advertisement conveys to reasonable consumers is the advertisement itself. The commission considers the overall net impression created by the advertisement as a whole by evaluating the interaction of such elements as language and visual images.

In addition, as the commission concluded in Removatron International, a case involving a purported hair-removal device, references to clinical testing, research and case studies are express claims that the respondents' representations are supported by scientific evidence. Providing a scientific aura can reasonably be interpreted as implying a scientific level of support.

Accordingly, as in Removatron, we will demonstrate that the net impression of these advertisements and promotional materials is that the

respondents' claims were based on competent scientific proof.

Although intent to make the challenged claims is not an essential element of a section 5 and 12 case, intent, if found, is powerful evidence that goes both to a finding that the claims were indeed made and to a

finding of materiality. And if an ad is targeted at a particular audience, the commission analyzes the ads from the perspective of that audience.

So now I'd like to go through some of the documents that we will be putting into the record that establish the intent of the respondents to make these claims.

The intent to make the challenged claims comes from the marketing plans of POM Wonderful LLC, which we will establish were created by its marketing team, approved by management, and passed on to Roll International, where respondents' informal, in-house ad agency known as Fire Station prepared the actual marketing pieces for both POM juice and POMx.

The creative briefs were a critical part of the creative process for marketing of the POM Wonderful products.

As Mrs. Resnick states in her book, "I always say I want a marketing brief so tight that if the author

were run over by a bus, anyone could pick up the project and complete it."

Complaint Counsel's Exhibit 409 is comprised of all of the creative briefs produced by respondents. Although it is not complete, because respondents couldn't find all of them in their files, it still

provides a detailed roadmap to the marketing pieces utilized by respondents to sell POM juice and POMx from 2003 through 2010.

I'm now going to take some time to go over a sampling of the creative briefs we will enter on the record.

The first creative brief is dated February of 2005. The objective of this brief, the primary objective of the advertisements to be used in print and outdoor advertising, is to educate consumers about health benefits of POM Wonderful pomegranate juice.

The target audience is described. The usual POM target is hip, GenX. They are likely to be affluent, professional, college grads who are health conscious, indeed hypochondriacs.

The target for this particular ad that the creative brief supports is a slightly older, affluent woman who is health conscious.

The creative brief outlines the benefits to be

communicated to the consumers, either general health -- If you drink POM Wonderful daily, you will live forever -- or heart health -- If you drink POM Wonderful daily, you will have clean and healthy arteries, i.e., floss your arteries daily.

The reasons to believe to be communicated to

consumers:

The powerful antioxidants in POM Wonderful guard your body against harmful free radicals that can cause chronic diseases, such as heart disease, premature aging, Alzheimer's disease, even cancer;

Drinking POM Wonderful daily can help reduce plaque in your arteries up to 30 percent;

It's like flossing your arteries daily.

The tonality was to describe the branding and style of the ads: straight to the point, simple. Here it was described in juxtaposition to another ad they had, "Cheat death." But I wanted to draw your attention to the bold, underlined statement: The challenge is to stay on strategy with the health message while achieving these objections of tonality.

The next creative brief was the copy writing for a bikini ad, which I will show in a minute. Write the print ad copy for the bikini concept. This was going to run in the Sports Illustrated Swimsuit Edition.

The health message can be reflected in the copy, but the primary communication should be wildly irreverent, et cetera.

Again, the benefits of drinking POM Wonderful pomegranate juice, it's delicious, packed with healthy antioxidants that fight free radical damage.

And again, the reason to believe to tell consumers: The powerful antioxidants in POM Wonderful guard your body against harmful free radicals that can cause chronic disease, such as heart disease, premature aging, Alzheimer's, even cancer.

The next creative brief is a brief for the pomegranate extract pill print ads. This is dated in 2006. And this was an overall brief for the strategy of launching the POMx diet supplements in the marketplace.

"LRR" stands for Lynda Resnick, and she wanted to run multiple ads, say, in one issue with various headlines.

The ads were to be serious and medicinal and would be an extension of the content from the POMx pills brochure. The ads should be clean and simple.

The main creative focus is prostate cancer.

The brief was to be used in all future POMx pill print ads. These ads would be advertorial in

style, and they would have a variety of creative approaches depending on who the target audience was, which would include men, seniors, young health-conscious females.

Again, the bold was in the document; we didn't add that.

The target consumer audience: Start with men 40-plus, HH income 75K, primarily men who are scared to get prostate cancer. Two other targets could be seniors 55 who are heavy supplement users and again young health-conscious women.

Further, an explanation of the psychographic of this targeted consumer was a consumer who won't drink the juice or tea but who is seeking a natural cure for current ailments or to maintain health and prevent future ailments.

The POMx brief included a discussion about using leading researchers in the field, Michael Aviram and David Heber, who you will -- David Heber is one of the respondents' experts -- and having them make statements that the research suggests that POMx provides the same health benefits in the areas of cardiovascular health and prostate cancer as the juice.

Again, the benefit to be conveyed to consumers: Main creative focus for first round is prostate cancer.

The benefits from the study, which showed decrease in doubling time of PSA levels, would be communicated.

The first-round media plan was to put the ads and place them in the magazines listed here, presumably to reach the target audience.

The next creative brief is in 2008. The

description of the creative assignment --

JUDGE CHAPPELL: Excuse me. Remind me again the procedural status of these creative briefs. They're all in-house?

MS. HIPPSLEY: Yes. They are created by POM marketing Wonderful's corporation by the marketing department.

JUDGE CHAPPELL: And they're directed to management?

MS. HIPPSLEY: They are then given to Roll International, where the in-house advertising agency resides. And the purpose is to provide the creative outline for then the in-house agency to execute and create the actual print ads or Web sites or whatever piece is being described in the creative brief.

JUDGE CHAPPELL: Is your position that every creative brief resulted in a marketing plan or an advertisement that ran?

MS. HIPPSLEY: No, that is not our position.

The creative briefs, though, do match up the description of the target audience and whatnot. The POMx print ads obviously, yes, there are POMx print ads that match up. The bikini ad matches up, which I will show you in a minute.

But, again, the respondents did not have a complete set, and so again they're to show the intent of the various advertisement pieces.

This, for example, the one I'm going to go through, covers the whole broad campaign of the pomegranate juice print ads for 2008, so we would associate these creative briefs with all the print ads for the POM juice in this time period.

JUDGE CHAPPELL: And I'm trying to understand the breadth of this.

Were they intended to be what in this town are called talking points for everyone to stick to, or was it just perhaps the genesis of an idea or a suggestion for a marketing campaign?

MS. HIPPSLEY: No. As Mrs. Resnick says, they were more like the talking points. The marketing brief had to be so detailed and tight that her advertising agency could then execute the print ads from it.

You will see testimony in the deposition record

and through our live witnesses that if the creative brief was flawed, it was sent back to POM Wonderful marketing to be redone until it was so polished that the advertising agency could then execute the ads based on the creative brief.

JUDGE CHAPPELL: Okay. Thank you.

MS. HIPPSLEY: So here, for example, in 2008, the assignment is a new campaign for POM juice.

It's going to be deployed across multiple tactics: outdoor, radio, guerilla, print and online.

There's a background given of sort of where POM juice advertising has been and where it's going to go. It states it's a challenging period in its history, two years ago they were the only game in town, but -- and the undisputed leader in pomegranate juice, health beverages, maybe even antioxidants, but now there are many new competitors on the market, their view being that the pomegranate juice competitors often falsely claim that they contain a hundred percent juice and priced at a lower price point.

The end of that paragraph describes that "Thus, while still growing, POM continues to lose volume to lower-cost and lower-quality competitors. At this time, a new campaign is needed to fundamentally differentiate POM and reinvigorate growth."

The objective was to develop a relaunch campaign for POM juice. The campaign had to differentiate POM from all the other competitive juices.

Again, the campaign takeaway: The campaign would stop the target audience dead in their tracks, inspire them to take notice of POM, discount the other

fortified health beverages from Coke and Pepsi and fly-by-night me-too elixirs that promise the world. Realizing the product is expensive, they should be more willing to pay the price and more.

Again, the target audience is described as the health-conscious, affluent adults. It also notes that this is not a mass audience but perhaps 5 to 15 percent of the U.S. population.

The benefits to be provided, there were two options stated. Basically there's just a slight deviation. For consumers who are passionate about their health and vitality and what they do to maintain it, POM is the only pomegranate juice that is truly revolutionary and life affirming, because only POM is backed by 25 million in health research and is the only brand guaranteed to contain 100 percent pomegranate juice.

The reason to believe, again underscoring, "In the last decade, there have been over 35 medical

studies (8 on humans) that have been published in recognized medical journals showing a correlation between drinking POM Wonderful pomegranate juice and improving heart health, prostate health, diabetes, erectile dysfunction, and a host of other diseases associated with aging."

Again, also noting the reason to believe was the uniqueness that the above medical studies and tests were conducted exclusively using POM Wonderful pomegranate juice.

Here is a creative brief describing the POM Wonderful Web site Health Benefits section. This was to redesign the POM Wonderful Health Benefits section. The overall tone must be authoritative and approachable.

It goes on to explain that the objective is a more consumer-friendly and authoritative Health Benefits section for the layperson, gives some further information. "We want a site that creates 'evangelists' and positions us as the undisputed leader in providing, articulating and backing up our health benefits."

The concept: Educate consumers that we are the only company that started by doing medical research and then selling juice.

Again, highlighting under the Health Benefits section that there should be an undertone throughout all of these sections on the Web site "backed by science!" Even on the more consumer-friendly pages we will need to show our authoritative status and passion for the investment and research in your health.

Here, there's an additional insight provided, that at this time the Health Benefits section, the homepage of the Web site garnered 61 percent of the total traffic to the site, aging 20 percent landing by consumers, and cancer 18 percent.

The creative brief goes on to explain the proposed content for the Health Benefits section of the Web site.

For cardiovascular and heart health, first they should lead with a discussion that coronary heart disease is the number one cause of death in the United States and then highlighting the information, the results from these studies that the respondents had sponsored, highlighting that they had a study for decrease in arterial plaque, stating that just -- stating that patients who consumed eight ounces of POM Wonderful pomegranate juice daily for one year saw a 30 percent decrease in arterial plaque, also listing the improved blood flow, citing the study conducted by Dr. Ornish and sponsored by the respondents and providing those results. And all of those studies should be linked to on the Web site.

For the prostate health page in the Web site, again, state the problem: Every year over 232,000 men are diagnosed with prostate cancer, 30,000 die,

et cetera. If detected early, prostate cancer is treatable, and then lists the UCLA study that they had sponsored in this area.

So this is an outline of -- the creative brief gives an outline to the advertising agency and others who would be developing and reworking the POM Wonderful Web site.

This is another creative brief for a prostate dedicated e-mail blast, and this is done in 2009. And the objective is to drive consumers to the pomwonderful.com Web site.

The target audience again is men 40-plus who are concerned about their prostate health and are either interested in preventative measures or healing solutions and women who have an active interest in the health of their men, specifically their prostates.

Again, it goes on to state that the benefit will be the research on POM Wonderful has shown promising results on prostate health.

There's a designated -- a designation that the mandatory body copy, that is, the language to be used in the e-mail blast, should include the statements about the UCLA medical study that they sponsored, stating they found hopeful results for prostate health. The study followed 46 men previously treated for

prostate cancer either with surgery or radiation. After drinking eight ounces of POM Wonderful daily for two years, these men experienced significantly lower PSA double times, goes on to explain that. It states that PSA is a biomarker for prostate cancer and slower PSA doubling time may indicate slower disease progression.

The headline for the e-mail blast would be: I'm off to save prostates! And again discussing how the idea was to drive the folks that got the e-mail to visit the pomwonderful.com Web site.

Here is a creative brief again in 2009 for a POM juice New York marketing campaign. This is to integrate a POM comic book campaign that we'll be hearing testimony on. The objective was to reignite the buzz and increase POM juice weekly sales by 30 percent in the New York market by year end.

Again, a brief history of where their marketing had been previously in the New York market but that they

had faced two key issues at the end of 2005, a short crop, meaning they had less juice available for sale, and significant competition.

Here again the target audience is health-conscious, affluent New Yorkers who care about what they put into their bodies.

And the main campaign message is: POM Wonderful 100 percent pomegranate juice is truly health in a bottle -- there's nothing else like it.

And the support for this statement: Only POM is backed by 25 million in real medical research from the world's leading universities, with promising results for heart and prostate health.

We'll also establish the intent of the respondents to make the claims and that they actually were made through a variety of respondents' documents, such as e-mails among the corporate respondents' managers and staff, meeting notes with Mrs. Resnick and Mr. Tupper, the president of POM LLC, and even correspondence that was directed to the consumers.

Here's one example of the type of e-mails that will go into the record.

This is an e-mail from Pam Holmgren, who works in public relations for the respondents. It's addressed to Mrs. Resnick and Mr. Tupper, describing an LA Times

article on the superfruits published today, which is March 2008. It states that the LA Times article on superfruits, while it was not negative, it was skeptical of all the superfruits.

She goes on to explain that Rob, Mark and I emphasized all of the pomegranate truth message points,

and here is what was included in the article:

POM has invested 23 million in medical research;

POM's published human studies include increased blood flow, reduced markers of heart disease, cleaner arteries, prostate cancer, and reduced symptoms of erectile dysfunction.

She states that "The article also mentioned the NDA filing against POM Wonderful in 2005" -- I believe it's a typo and she meant the National Advertising Division filing, which we'll get into during the course of the hearing -- "and the fact that our prostate cancer study didn't have a placebo group. The bottom line of the article is that more research is needed across all superfruits and eating a variety of fresh, colorful produce does more good than obsessing over the 'superfruit of the moment.'"

This shows both the intent of the respondents to get these messages across to the press, public relations

was a very key component of their marketing, and also their knowledge that there are problems with their research being raised.

This isn't terribly clear, but I'll just give one example.

This is a consumer log that was kept by the

company, and it shows consumer e-mails that are received by POM Wonderful LLC and then explains the response that was provided back to the consumer. And this is Plaintiff's Exhibit 456. And these are excerpts from the consumer log, which is a database that's maintained by POM Wonderful.

Here, the consumer is discussing "remove the noose." This is in reference to an advertisement entitled "Cheat death" that I will show you in a minute, and basically it had a POM juice bottle with a noose, a hangman's noose around the neck. And it was a controversial print ad just from a taste standpoint, and consumers were complaining about the ad to the company.

But the critical thing for our case is the response that the company gave back. In the response, they state, "Our advertising campaign is created with the intent of using imagery that irreverently and boldly conveys to consumers that drinking our juice may help

prevent disease."

And the date on this is November 2008.

"POM Wonderful pomegranate juice has many distinct health benefits that set it apart from other products, and recent medical research supports an acknowledgment that drinking pomegranate juice may

lessen factors that contribute to heart disease. Since heart disease is, sadly, the number one cause of death in the United States for men and women, we feel that it is important to communicate to our consumers the powerful benefits of drinking 100 percent pomegranate juice."

JUDGE CHAPPELL: Did you say that ran in Italy?

MS. VISWANATHAN: I'm sorry?

JUDGE CHAPPELL: Did you say that was in Italy, complaints from Italy? I thought I heard you say something about Italy.

MS. HIPPSLEY: No. It was an advertisement that was here called "Cheat death," and the complaints were from consumers who were seeing the advertisement. And I have several other samples, but I'll just move on.

And that would be Complaint Counsel's Exhibit 456, and there there are perhaps a half a dozen of similar responses by the company to consumers who

saw the "Cheat death" print ad and disliked the style of it.

But the key is that the response shows exactly -- in fact the company is explaining to the consumer that the intent was to convey their heart health, heart disease prevention claims to the consumer

through the ad. And that was the purpose of it, of our showing it.

JUDGE CHAPPELL: I didn't know if you said "Italy" or if it was a mistake. I heard "Italy."

MS. HIPPSLEY: No. It was a mistake.

JUDGE CHAPPELL: I heard "Italy."

So the idea with the noose was, with POM you can slip the noose.

MS. HIPPSLEY: Right. You can live longer, cheat death.

With this backdrop, I'd like to now go through a sampling of the fairly indicative advertisements used by respondents to take their sales of POM products from zero to 165 million by 2008, as stated by Mrs. Resnick in her book. And here you will see how some of the benefits that were listed in the creative briefs match up with the ad copy actually found in the ads.

For example, we saw that there's a reference to the medical studies about plaque buildup. This early ad

has ad copy "Medical studies have shown that drinking eight ounces of POM Wonderful pomegranate juice daily minimizes factors that lead to atherosclerosis (plaque background up in the arteries), a major cause of heart disease."

This two-page ad focus is again "And a clinical

pilot study shows that an eight-ounce glass of POM Wonderful 100 percent pomegranate juice, consumed daily, reduces plaque in the arteries up to 30 percent."

Again, this was stated in the briefs as a reason to believe.

Here, you can see the images being used to assist in the body copy message, using the IV bottle, and then the statement that we saw in the creative briefs to be utilized: "These antioxidants fight hard against free radicals that can cause heart disease, premature aging, Alzheimer's, even cancer. Just drink eight ounces a day and you'll be on life support -- in a good way."

Here again the imagery being combined with the body copy, the body copy states, "Just eight ounces a day can reduce plaque by up to 30 percent," and the bottle is sitting in a consumer's medicine cabinet, with the headline that we saw in the creative briefing, "Floss your arteries. Daily."

Here, "Amaze your cardiologist," again imagery of an EKG, again the same sort of body copy about reducing plaque by up to 30 percent, "Trust us, your cardiologist will be amazed."

And here is the "Cheat death" ad that was the subject of some of the consumer complaints, again with

the body copy stating that drinking the juice can help prevent premature aging, heart disease, stroke, Alzheimer's, even cancer. And he writes the tag line being "The sooner you drink it, the longer you will enjoy it."

Moving through the juice ads, this is another juice ad that was done in late 2007, 2008, again very graphic imagery, the body copy stating (as read), "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 eight ounces a day."

Here's the bikini ad that we saw the creative brief for: What gets your heart pumping? Supermodels or beaches? And perhaps healthy arteries.

It goes on to explain about antioxidants and again the critical sentence that POM Wonderful 100 percent pomegranate juice is supported by 23 million

of initial scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health.

Again, the "Cheat death" ad was brought back in 2008. This is what the consumers were writing about. Here, the tag line is similar to the other POM juice ads

during this time that we saw the creative brief about bringing back the POM juice advertisements in 2008, and the body copy matches what was in the creative briefs, supported by 23 million of medical scientific research from leading universities, again with the statement uncovering -- "encouraging results in prostate and cardiovascular health. So drink a glass a day and cheat death. Live life."

Another piece of advertising that was used in 2008 for the pomegranate juice was what was called a Time magazine wrap. This was put around Time magazines that were placed in urologists' offices so that the patients while waiting to see the urologists would be able to flip through this magazine wrap, as it was called by the respondents, and read about the benefits of pomegranate juice for prostate cancer.

Although this one is difficult to read, the headline starts with a recently published medical study involved POM Wonderful 100 percent pomegranate juice,

followed 48 (sic) men previously treated for prostate cancer either with surgery or radiation, and goes on to describe their study using a series of medical imagery that produces here and the headline "Drink to prostate health."

And then in 2007 they introduced the pomegranate

extract pills.

Here, these ads do track the creative brief for the POM pills. They were to be in advertorial style and to emphasize the prostate cancer research that they had at that time and that they had sponsored. The key statement: "An initial UCLA medical study on POM Wonderful 100 percent pomegranate juice showed hopeful results for men with prostate cancer."

And the -- as you will see -- I'll quickly flip through these -- but as Mrs. Resnick requested, the headline changed, but the body copy stayed pretty much the same but using a variety of headlines for the POMx pills and then a quote from a New York Times article: "Findings from a small study suggest that pomegranate juice may one day prove an effective weapon against prostate cancer."

So as the creative brief had noted, the target audience and the main creative for the POMx supplement advertising would be prostate cancer.

Here's another example, "Science, not fiction," adding that the company has only pomegranates backed by 20 million in medical research, and again going through the prostate cancer study that they had sponsored.

And these continue with medical imagery, highlighting information about the studies that they

have sponsored and highlighting that it's backed by science, 23 million in medical research.

And you can see that the headlines just continue to rotate with the body copy fairly consistent. They do increase the dollar amount in medical research as they spend more money in medical research along the way.

Here's another headline, similar idea, describing their prostate cancer study that they had sponsored.

This went through with ads through the time that we brought our complaint in the fall of 2010.

Here, a pomegranate extract pill advertisement, the headline is "The only antioxidant supplement rated X." And in these ads in 2010 the respondents introduced the fact that they had a preliminary study on erectile function and stated that men who consumed POM juice reported a 50 percent greater likelihood of improved erections as compared to placebo.

And you will hear our experts and their experts discuss this, but it was a very preliminary study, and it did not reach statistical significance and also had an unvalidated endpoint questionnaire.

This ad again ran in 2010, "24 scientific studies now in one easy-to-swallow pill," highlights

again the 32 million in medical research, science, not fiction, and then provides samples of the studies that the 32 million is comprised.

And in 2008, the juice ads also highlighted the prostate cancer research, "Drink to prostate health. Good medicine can taste great," and explaining the results they got in the UCLA cancer study.

Another ad, "I'm off to save prostates," highlighting again that their product, 100 percent pomegranate juice, respondents' product, is committed to defending healthy prostates, powered by pure pomegranate juice, backed by 25 million in vigilant medical research.

Another vehicle that the respondents used for advertising was the Web, and as we saw, they wanted to drive traffic to the Web.

Here are two example banner ads that were utilized to take consumers to the POM Wonderful Web site, very powerful imagery, backed by 25 million in

medical research.

This is for prostate.

The Web sites themselves were quite detailed in the Health Benefits sections as we saw the creative brief describing.

This is the screen shots for the POMx Web site

that were provided by respondents' counsel to the Federal Trade Commission. It's a 2008 screen capture.

Here again the health benefits are highlighted.

Under Heart Health, "We have researched the effects of pomegranate juice on cardiovascular health for almost ten years, and findings suggest that pomegranate juice may help counteract factors leading to arterial plaque buildup, as well as inhibit a number of factors associated with heart disease," and goes on to explain that preclinical tests have shown that the POMx extracts are equivalent cardiovascular benefits to POM Wonderful juice, then a description of their preliminary UCLA medical study on the POM juice for prostate health showed hopeful results for men with prostate cancer, and every POMx capsule is equivalent, in their view, to eight ounces of POM Wonderful pomegranate juice.

Then there was a further description of research, again using medical research imagery,

explaining the studies that they had, highlighting that they worked with top scientists in these areas of cardiovascular disease and prostate cancer, and to date they have multiple peer-reviewed studies, et cetera.

This page is for prostate health. Just as the creative brief had described, they led with the fact

that prostate cancer is the most commonly diagnosed cancer among men in the U.S., second leading cause of cancer death in men, after lung cancer, and then described the promising news from their prostate cancer study that respondents had sponsored.

There's the quote from Dr. David Heber that the creative brief described, and he states that the most abundant active ingredients in pomegranate juice are also found in POMx. He's providing an endorsement for the Web site. And again, Dr. Heber is one of the experts that respondents are using in this matter.

They had an FAQs page which gave great detail about health, heart health:

How does drinking POM juice help the fight against cardiovascular disease?

Prostate cancer: There has been promising news on the benefits of POM juice in the fight against prostate cancer. Is this really true?

Erectile dysfunction: Can pomegranate juice

benefit men with erectile dysfunction?

And of course all these questions were answered in a very positive fashion, providing very specific science to the consumers so that they would have a reason to believe the statements about the benefits for these diseases.

Here's the page for the heart health, again using some of their headlines that they first started in 2004, "Amaze your cardiologist." Now they're applying the same information to the POMx supplement which has come out. Again, this was in 2008, this screen shot.

Here's the POM Wonderful Web site capture.

Whoops. I'm going to turn that down.

Going to the Health Benefits page, again the imagery with the IV bottle, highlighting the cardiovascular, prostate and erectile function benefits, underlining key terms "atherosclerosis and plaque," presenting one of the studies that they had sponsored.

And here, in the presentation of the study that was most often used in their advertising, they've created a graphic which boldly shows the reduced plaque result from a study they had sponsored -- I'll go through the study in a minute -- very preliminary,

growing the 30 percent reduction. And this information about reducing plaque by 30 percent as an indicator that the products would treat or prevent cardiovascular disease was used in the advertisements from the very beginning through 2010.

And finally, the ad that I wanted to show is

actually a marketing piece. This is a hang tag that was placed on every bottle of 100 percent pomegranate juice at the time, which was 2009, and so a consumer would go to the grocery store to get their pomegranate juice and would have a hang tag that stated (as read) "Backed by 25 million in medical research. Proven to fight for cardiovascular, prostate and erectile health."

Not only do the ads themselves of course, as the commission must show, make the claims stated, there are other sources of evidence that the messages were conveyed. We will demonstrate that the claims were both conveyed and acted on by consumers.

First, POM had their own consumer research conducted in the normal course of business and adopted by the respondents to make decisions about their marketing.

This is a summary of excerpts from the marketing research that was done and were the excerpts that were posited in our requests for admission to the

respondents. They admitted that these were the results of the surveys in their response to the requests for admission, with the exception of the last entry which I'm going to show. And that entry, we will be putting Exhibit 259 on the record that shows that the results were indeed there from the consumer research.

This June 2009 POM Wonderful consumer research study goes basically to materiality. It's explaining that consumers were interested in purchasing POM Wonderful and the reason why: 85 percent surveyed, POM juice users surveyed, stated that it was good for my health; and of those that said that, 57 percent said that it helps promote heart health.

These were closed-ended questions. It was basically a survey that had multiple-choice responses provided to the consumers, one being "helps promote heart health."

The other was that 47 percent of the POM juice users who answered it was good for your health, when given the answers they could choose from, said that it helps protect against prostate cancer.

64 percent stated they learned about the health benefits from the news and 48 percent from the advertising.

Respondents also conducted a survey by

Bovitz Research Group. This was more akin to a traditional copy test.

The survey respondents were exposed to five billboard ads from what the respondents called their dressed bottle campaign. This included the "Decompress" ad that I have just shown you.

And 21 percent of the consumers surveyed responded that the ads convey that they help -- or that the product helps or lowers blood pressure when asked, "Based on these ads, what are the specific benefits, if any, of drinking POM Wonderful?"

Also 56 percent of the consumers surveyed said based on the ads they thought POM Wonderful had proven health benefits.

In this same survey, they had the respondents exposed to five of the billboard ads from the superhero campaign. And in that set of advertisements, 63 percent of the consumers said the ads conveyed that POM Wonderful had proven health benefits.

And the last survey that was conducted by Accent Health that we will introduce into the record showed that that -- there was a poster in urologists' offices, and it displayed the "Drink to prostate health" advertisement. And 73 percent of the patients who saw the poster agreed that POM Wonderful helps slow

increases in PSA levels among men treated for prostate cancer.

Another source of information that shows consumers not only took the messages that POM Wonderful products would treat prostate cancer or heart disease but also acted on those representations, that is, using

the products for disease treatment and prevention as promised, is again the consumer feedback and inquiries about the products received by POM Wonderful.

Again, these are not the clearest. I'll just give a couple examples.

Here, there's an inquiry from a consumer, dated February 2007. The statement says (as read): I wonder if you could help me. I'm dosing my husband with your wonderful and hopefully miraculous pomegranate juice. He had radiation treatment for prostate cancer a year or so ago and his PSA nbrs are still up there. They came down this past September only to go up again in December. I started him with your juice last year. He stopped, but he has started again and drinks at least eight ounces or more a day. My question: Is there any way I could buy three cases at a time or four of the eight or 15 ounce bottles that I can get it directly from you?

The answer by POM Wonderful was to describe the

difficulty in shipping and that the combination of the specially designed containers, labor, et cetera, is expensive, a case of 16 ounce bottles costing 48.95, et cetera.

Here again, a consumer writing in May 2007 (as read): I suffer from prostate cancer and presently

drink a third of a bottle of pomegranate -- of POM Wonderful -- excuse me -- per day in the hope that this will reduce the rate of increase in my PSA. It is too early to assess the results, but in the meantime a routine blood check by the GP who is monitoring my high blood pressure has disclosed an increase in my potassium level, and this will require medication.

He wanted to know if pomegranate is a source of potassium, and the company answered his response by providing the amount of potassium and then at the end said, "Each POM product has the same purpose: to bring you closer to your daily dose of antioxidants."

Again, a consumer writing in in 2008 (as read): I am considering buying POM juice instead of pomegranate juice from other manufacturers. My husband drinks it daily since he has been diagnosed with prostate cancer. Do you have any coupons or promotions? When I signed up for the monthly delivery, I saw a discount code, et cetera.

They explained to the consumer that they are probably seeking the POMx pills.

Here, "Mr. Kellogg has prostate cancer and he cannot find POM juice in his town. He requests some samples as he is on a very fixed income." And the company responds that samples will go out.

Here, a consumer writes in in March of 2009, saying that someone was questioning the health benefits (as read): I want to know if they're true. I heard Lynda Resnick on a podcast from another radio health show describing how great pomegranate juice is for health and wellness.

And the answer by POM Wonderful (as read): POM Wonderful has spent 25 million researching the health benefits of POM Wonderful 100 percent juice. The findings are all available on our Web site: pomwonderful.com. Unbiased clinical trials have proven that pomegranate juice is effective in the treatment of prostate cancer, arterial plaque and many other health issues.

And these just go on and on.

What I wanted to highlight here is the consumer again says that "I just purchased a reoccurring monthly supply of POM pills. My brother recently was diagnosed with advanced prostate cancer at 48 years old which puts

me (44) in a high risk category," asks about when they should take the pills.

POM Wonderful gives some advice on when during the day that the POMx pills should be taken and ends their correspondence: "We hope this information helps you to combat the possible risk of prostate cancer, and

we wish the best of health to you and your brother."
And this is from the POM Wonderful consumer affairs.
Again, a segue here, "We hope that your daily consumption of POM juice helps you to fight the prostate cancer. Please let us know if there is anything more we can do..."
In this last entry that I'll show, this is a woman who has a couple of questions. This is dated April of 2010. The consumer has a couple of questions. They prefer the POMx pills to the juice because they want to avoid the extra calories in the juice, and they've been wondering if there's research on the POMx capsules, and price is also a factor.
They then ask, if people's arterial plaque has decreased by 30 percent in one year, does that mean that after three years and four months it would all be gone and your arteries would be clean as a whistle?
Again, this is in the year 2010.
Third, I have been noting that in the Israeli

study everyone was also taking cholesterol-lowering medication.

It goes on to state that she's tried some of these medications but has terrible side effects.

And the question is: "Have there been any studies with pomegranate juice in which the people were

not taking cholesterol medications?

"I am concerned about my heart health because I am almost 59 and had a heart attack a year ago. Fortunately no damage was done to the heart."

And the answer by POM Wonderful is that over the past several years we have conducted a number of studies evaluating POMx and lists the studies. The results obtained indicate that the efficacy of POMx mirrors that of POM Wonderful pomegranate juice.

Then the response goes on to say, "Regarding your question about arterial plaque and the 2004 publication by Dr. Aviram." Remember, this is the one that's used in all of their advertising pretty much throughout.

And now POM Wonderful states in 2010 (as read): This study enrolled older patients with severe plaque buildup. Therefore, the results observed in this population may not represent all patients. Lastly, please note that this trial followed ten patients for

one year and five over a three-year period. It's difficult to estimate the long-term effect of the pomegranate juice based on this limited sample size.

And then regarding the request about whether other studies had consumers in them for the heart disease where they didn't have to take

cholesterol-lowering medications, "Finally, regarding cholesterol-lowering medications, in Dr. Davidson's recent study of pomegranate juice in patients at moderate risk for (sic) coronary heart disease, only 16 percent of enrolled patients were also using statin medications."

Of course they give a link to the study, but the e-mail response from POM is silent as to the point that this study had no effect for the patients with mild to moderate cardiovascular disease, leaving the impression for this gentleman (sic) that in fact they do have a study that would help consumers even if they don't take the cholesterol-lowering medication.

So just to briefly summarize, the respondents have made the claims that we have challenged in our complaint for heart, prostate disease and erectile dysfunction, both that they treat, prevent and reduce the risk of these diseases but also telling consumers that their research proves the efficacy of the

products.

And now I'm just going to go through the last part of the presentation, which is the science. And again, the commission has the burden to show that the respondents lack the requisite level of scientific proof to make the marketing claims truthful and not

misleading.

It's well-established that for health-related efficacy claims such as these disease treatment and prevention claims, the appropriate level of substantiation is competent and reliable scientific evidence. Competent and reliable scientific evidence is defined typically as tests, analyses, research studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield reliable results.

Most importantly, though, where advertising expressly or impliedly represents that it is based on scientific evidence, the advertiser must have that level of substantiation and must satisfy the relevant scientific community that the claim about their science establishing the efficacy is true.

Thus, for example, does respondents' 32 million

in medical research that it tells consumers backs and proves its claims really do so? Do their real studies, real results really prove that POM juice and POMx dietary supplements treat or prevent the three diseases at issue?

We will demonstrate that these repeated

representations of 20, 25, 32 or 34 million in medical science in addition to the link to specific studies sponsored by defendants in the advertisements and described as examples of the body of this 34 and 32 million in research do not prove that POM juice and POMx dietary supplements treat the diseases at issue.

So their claims that science did prove it, their reason for consumers to believe, as they so aptly put it in their creative briefs, are false.

Now, to begin the substantiation analysis, first we want to make sure that there's an understanding of the specific products challenged in the commission's complaint.

We are not challenging claims about whole foods or fresh fruit, such as the whole pomegranate or even fresh pomegranate juice.

The commission is challenging claims about POM Wonderful's juice, which is produced by crushing and squeezing Wonderful variety pomegranates, resulting in a

liquid concentrate. To make it ready for sale, the concentrate is reconstituted to make 100 percent pomegranate juice, which is pasteurized and bottled for retail.

The commission is also challenging claims for POMx pills and liquid.

As Mrs. Resnick puts it in her book, POMx extract is derived from the discarded, mashed-up pomegranates left over from the juicing process and manufactured following a patented process.

We don't deny that the products have polyphenol antioxidants, but they do not contain many of the core nutrients which are associated with whole fruits and vegetables. The documents provided by respondents show that because of the manufacturing process involved, core nutrients found in whole pomegranates are actually not found in either the POM Wonderful 100 percent pomegranate juice or the extract.

For example, POM juice and POMx do not contain any meaningful level of vitamin C or other antioxidant vitamins.

JUDGE CHAPPELL: Do I understand you to mean that if respondents were selling fresh, whole pomegranates making the same claims, you wouldn't have a problem with that?

MS. HIPPSLEY: No. We probably would have a problem with some of the hard-hitting claims because also the research has been on the juice so far. But the point is respondents have argued that all fruits and vegetables are healthy for you. There's public statements about having fruits and vegetables in a diet

for consumers, but that is different than stating that their commercially manufactured pomegranate juice, which actually doesn't contain some of the core vitamins that are at the base of the public health statements, vitamin C, for example, and fiber I was just going to say, are not there.

JUDGE CHAPPELL: And the bottle says "100 percent pomegranate juice." You're not quibbling with the label.

MS. HIPPSLEY: No. It is 100 percent POM juice, but because of the pasteurization process and manufacturing, it does not contain vitamin C and it does not contain fiber, two of the key things that the FDA and USDA guidance to the public are based on, the science on vitamin C and fiber and its relationship. At a very structure/function type of claim about eating -- healthy eating would be a diet that contains fruits and vegetables.

So here, I think we would still take issue if

the claims for the whole fruit were as hard-hitting as the claims they have made for the POM juice and POMx, that is, related to a specific disease, a specific condition, a specific treatment, and prevention results.

JUDGE CHAPPELL: So is your position that there

are benefits from pomegranates, but whatever those benefits are, they're lessened by the production process?

MS. HIPPSLEY: Our point is that to prove the health benefits for the POM juice and POMx, because they are uniquely manufactured, just as with any product making specific health benefit claims, the product claims here must be supported by the testing on these very specific products.

So, for example, the POMx supplements, to make claims for those supplements, the testing must be done on the supplement. You can't go from the whole pomegranate through the process to the diet supp and say that they're equivalent, because they're not.

JUDGE CHAPPELL: Like apples and oranges?

MS. HIPPSLEY: More like apples and apple juice, which most dieticians say is -- does not have much nutrient value, or apples and applesauce. You would have to test the applesauce to ensure that that gave the

health benefits that are being advertised.

Also the problem here is, unlike the pomegranate, as Mrs. Resnick states in her book, each eight-ounce serving of POM juice is the equivalent of two and a half pomegranates; thus, the juice does contain a very high level of sugar, 34 grams, and a fair

amount of calories, 140 calories per serving.

We will introduce four preeminent experts in the field of heart disease, prostate cancer, erectile dysfunction, and epidemiology. These four experts, Dr. Frank Sacks, Dr. James Eastham, Dr. Arnold Melman and Dr. Meir Stampfer, independently opined on the level of substantiation they would expect, as experts in their respective fields, to support respondents' claims. We will show that in no instance does respondents' evidence meet that standard.

I'm going to briefly preview the relevant studies in each area that respondents touted in their advertising or rely on for their substantiation and what our experts will explain is the reason why the results did not yield real proof of the claims.

For cardiovascular disease, these are the human clinical studies that were sponsored by respondents in the area of cardiovascular disease.

The first study was by Dr. Aviram, who was

looking at the endpoint of blood pressure. He had ten subjects. The duration was two weeks. And it did show a moderate drop in blood pressure as the endpoint.

The next study by Dr. Aviram was to look at both plaque reduction and blood pressure. This is the study that they use throughout their advertising. Again,

there were ten patients.

I note that for both these studies there is no placebo control.

Blood pressure was reduced by 12 percent. This is a fine point, but we'll show that in the advertising we looked at, all the way throughout, respondents' advertising touted a 21 percent blood pressure reduction. There was a typo and it was never fixed, making obviously a greater benefit than there was.

And this is the study that respondents touted as having the 30 percent arterial plaque reduction.

And that is about it for the positive results for cardiovascular disease.

There is actually one more study by Ornish, a blood flow study in 2005. This study was cut off at three months. The protocol called for it to be conducted for twelve months. There was no change in blood pressure. And it did show an increase in blood flow, which is a positive result, but as our expert will

explain, there are problems with this study, primarily that it was cut off prematurely.

Dr. Ornish also conducted an arterial plaque reduction study. It was unpublished. But this study actually is a negative study. There were 73 patients. It was placebo-controlled. The product was POM juice.

No change in blood pressure. No change in the arterial plaque reduction endpoint, which was the purpose of the study, to replicate Dr. Aviram's study, and the study failed to do that.

Dr. Davidson also did a blood flow study, 45 patients, POM juice, again no change in blood pressure, no change in blood flow. He was not able to replicate Dr. Ornish's study.

Dr. Davidson did their largest heart study. The endpoint was arterial plaque reduction. It involved 289 patients, using POM juice. One of the endpoints was blood pressure, again no change. The key endpoint was that there was no change in arterial plaque reduction at 18 months, the conclusion of the study, and thus didn't replicate the study they have continued to use in their advertising, which was the ten-patient study showing an arterial plaque reduction.

So this very large study is a no-effect study. And it was published in 2009. It was completed in 2006,

however, and you will hear testimony about the gap in the timing there between the completion and the publication date.

There were also other biomarkers analyzed, and there were no changes in the other cardiovascular biomarkers that are relevant to analyzing any benefit

for cardiovascular disease.

There were two other studies done by Dr. Heber, again an expert that you'll be hearing from for respondents. They were not placebo-controlled. They dealt with the POMx pills. And there is no change in blood pressure for either of these studies, no change in the inflammatory markers.

There was a small benefit in the 2007 Heber overweight study showing a benefit on the TBARS endpoint for cardiovascular, but again it was not placebo-controlled. Otherwise, no positive changes were indicated.

And these are the only studies that were done on the dietary supplement as opposed to the fruit juice or the pomegranate juice for cardiovascular disease.

Moving on to prostate cancer, there really is one study, and that is the study that they have touted in their advertising. This was done by Dr. Pantuck at UCLA. 48 subjects were enrolled. This was not a

placebo-controlled study. The product was POM juice. And there was a positive effect on mean PSA doubling time.

You'll hear from our experts that despite this positive effect, though, it is not a recognized biomarker for analyzing whether or not the product

treats or prevents prostate cancer.

They have two ongoing studies. The results are not known. These are placebo-controlled, but, again, we don't know any of the results. Again, the endpoint on the one would not be recognized as a proper endpoint to analyze the treatment.

Dr. Carducci at Johns Hopkins has completed a study. This was made public, his abstract, at a convention of urologists. It is not placebo-controlled. But it did show a median increase in the doubling time.

And our experts will elaborate on this further. But, again, the one study that was conducted as has been noted had no placebo and does not support the prevention or treatment claims of respondents.

On ED there were two studies.

The Forest/Padma-Nathan study sponsored by the respondents had 61 subjects. It was placebo-controlled, looking at POM juice, but neither of the two surveys that were utilized to -- as endpoints for the consumers

to explain whether or not they had any benefit, neither the International Index of Erectile Function, which is the validated survey, nor the unvalidated Global Assessment Questionnaire, showed statistical significant results.

The respondents will say they got very close,

but that was close on the Global Assessment Questionnaire, which is unvalidated. The validated questionnaire they were not close on statistical significance.

And perhaps as equally important as our experts, we will enter into evidence a summary of respondents' own assessment of its science as it relates to the health claims at issue, prepared by Dr. Mark Dreher, respondents' scientific director from 2005 to 2009, and it was edited by the president and respondent, Mr. Matt Tupper.

This document and others like it were shared with respondent Stewart Resnick to create a strategic plan for their investment in medical research.

This medical research portfolio is Plaintiff's Exhibit 1029. And here's the page in respondents' assessment, their own assessment, of where they stand on claims for heart disease and whether or not they have the science to back it up.

Here are the human studies outlined. Similar to the chart that we created, it lists some, not all, of the relevant studies, the Aviram study being the positive one they used in advertising, the Ornish plaque reduction study showing no change, the Davidson plaque reduction study showing no change, also admitting that

they have no change on blood pressure studies since the Aviram study in 2004.

So they summarize. Where do we go from here? Two different options: Prevent heart disease; lower blood pressure. Required action: They need more studies, large studies. Not worth pursuing, too expensive or too risky to do the science necessary for a "prevent heart disease" claim or a "lower blood pressure" disease claim.

Health claims. Two options for health claims: Reduced risk of heart disease; reduced risk of hypertension.

Again, what is the required action for this scenario? Their own analysis was that they needed two studies for either option. They explained the number of patients that would have to be involved. The cost would be three to five million dollars over three to five years. They would need two years for FDA approval of an unqualified health claim.

And an assessment was that it was probably not worth pursuing. One problem is that the claim would not be specific to POM but, rather, generic to all pomegranate products meeting a minimum level of polyphenol content.

Science risk: Our heart disease and blood

pressure data may not be strong enough.

There was an issue of whether or not an option to do additional, targeted research for marketing, PR and medical outreach purposes. Some of the options would be to continue basic research with Dr. Aviram, maybe one or more clinical studies, need to decide which areas to pursue, plaque reduction or blood pressure. They had discussions about whether or not that was a viable option.

And then here you can see that where we go from here, another option is: No more clinical research -- publicize what we already have.

The assessment here is that it's low risk, but our research has holes. Current body of research only viewed as a 3 on a scale of 1 to 10 by M.D.s.

A similar chart of respondents' own assessment of their prostate cancer studies. Again, it shows that they have one published human study. What would they need for a "prevent or treat prostate cancer" claim?

Two studies, a thousand patients. PSA will not be accepted as an endpoint. They would have to come up with other endpoints. And it would require pharmaceutical-grade manufacturing.

Health claims. Reduced risk of prostate cancer. At least one study would be needed, a hundred patients,

one and a half to two million. It takes two to three years. Endpoint would have to be active surveillance of cancer. PSA alone is not sufficient.

Again, what was a possible option? No more clinical research -- publicize what we have.

Also noting in the assessment, POM currently has a research gap, no data on prostate cancer prevention, prior to radiation or prostatectomy. And in contrast, tomatoes and selenium are actively studying that approach.

And finally, on the ED study, they acknowledge that they would need a larger ED clinical study to achieve statistical significance to get stronger marketing value.

Again, one possible solution: No more clinical research -- publicize what we have. It's the lowest cost.

And again noting that the study that they did have had limitations. It was small and missed

statistical significance.

Again, this is respondents' own assessment of their science supporting the various claims options.

And finally, we will show that as respondents promoted their products as a magic elixir for a variety of diseases, they repeatedly ignored warning signs

indicating that the marketing did not match the science.

We'll show that respondents, as you have just seen in their science summary, had a keen understanding of the level of science required to make disease treatment and reduction of risk claims.

The respondents' awareness of the necessary level of evidence and their continued disregard for these standards is evident.

Respondents' health claims for POM juice have been the subject of two NAD decisions. NAD is the industry's self-regulatory body of the Council of Better Business Bureaus.

In 2005, NAD recommended that POM Wonderful modify its claims to avoid misleading consumers into believing that drinking eight ounces of POM juice would prevent arterial plaque buildup in healthy individuals.

In 2006, when Welch's Foods filed a claim with NAD challenging POM Wonderful's various disease prevention and treatment claims, again the NAD found

that the POM Wonderful studies did not support their claims and again recommended that POM Wonderful modify the claims.

However, the respondents' pattern of ignoring these warning signals continued.

In May 2008, POM Wonderful sought clearance from

NBC for a television commercial which included copy stating that POM juice's antioxidants promoted prostate health. They wanted to run that ad. NBC's advertisement reviewer found that POM Wonderful's substantiation failed to meet the network's clinical testing guidelines. NBC considered human studies only for such a claim and noted that the prostate cancer study relied on was neither randomized nor controlled, and the study itself clearly stated that there was a need for further research.

We will demonstrate that in May 2008 the UCLA Institutional Review Board for scientific studies conducted there that were sponsored by the respondents expressed concern about respondents' advertising.

In response, Mark Dreher, their science director for POM Wonderful, sent a letter along with a copy of the FTC's dietary supplement guidelines to Dr. Pantuck at UCLA, explaining that FDA governs, quote, nondisease structure and function claims, that

the FTC oversees advertising claims and that, quote, "As a policy, POM does not make drug-related disease claims associated with treatment, cure, prevention or diagnosis."

Despite this representation to UCLA's IRB board, respondents continued their advertising of

disease treatment and prevention claims.

Moreover, regulatory agencies like the FDA and the FTC have expressed concerns.

The commission sent its letter alerting the company to concerns about advertising in January of 2008. Respondents did not make any attempt to change the advertising.

In February 2010, the FDA issued a warning letter to POM Wonderful finding POM made claims involving the cure, mitigation, treatment or prevention of diseases such as prostate cancer, erectile dysfunction and heart disease.

In sum, respondents have knowledge of the necessary level of substantiation for the claims they were making, received numerous signals over the years concerning their misleading and unsubstantiated claims for POM juice and POMx, and persisted in discounting the signals and continuing the advertising.

And to wrap up the preview of the evidence, I'd

like to end once again with two public relations interviews by Mrs. Resnick and Mr. Tupper.

(Whereupon, a videotape was played.)

MS. HIPPSLEY: This is an interview that was given by Mr. Tupper, the president of POM Wonderful and a respondent.

JUDGE CHAPPELL: Let's back up to Martha Stewart.

MS. HIPPSLEY: I'm sorry?

JUDGE CHAPPELL: Back up to Martha Stewart. What was the date of that interview?

MS. HIPPSLEY: The Martha Stewart interview was in 2008.

JUDGE CHAPPELL: The one you're preparing to show, what was the date of the one you're preparing to show?

MS. HIPPSLEY: I'm sorry?

JUDGE CHAPPELL: You're preparing to show another video; is that correct?

MS. HIPPSLEY: Oh. When did we take the clip?

JUDGE CHAPPELL: No.

MS. HIPPSLEY: The show was aired in 2008, and it was obtained by the Federal Trade Commission from YouTube, YouTube in '09 I believe.

JUDGE CHAPPELL: So it aired in 2008.

MS. HIPPSLEY: Correct.

JUDGE CHAPPELL: Thank you.

MS. HIPPSLEY: And this interview with Matt Tupper aired in 2009 that we're just about to see.

(Whereupon, a videotape was played.)

MS. HIPPSLEY: And to wrap up, these interviews

as well as the compelling documentary and testimonial evidence will clearly show that respondents made the challenged claims that POM juice and POMx products treat, prevent or reduce the risk of heart disease, prostate cancer and erectile dysfunction and made claims that they had the science to back up these representations. We'll show that these claims were material to consumers and that they were unsubstantiated and false.

Thank you.

JUDGE CHAPPELL: So in summary, the government is not saying that respondents are selling snake oil; the government is saying respondents don't have the proper research and studies to back up the claims made about their products.

MS. HIPPSLEY: That's right. They don't have the right science, and they don't have the level of science that they themselves told consumers proved the claims.

JUDGE CHAPPELL: Okay. Thank you.

Respondent, you're reserving your opening until the government rests?

MR. FIELDS: Yes, Your Honor, with your permission.

JUDGE CHAPPELL: That's fine. Thank you.

Are you ready to call your first witness?

MS. HIPPSLEY: Yes, we could do that, or do you want to -- we'll need to set up our TrialDirector.

Do you want to take a lunch break now?

JUDGE CHAPPELL: Since it's going to take a while to reconfigure the room, we'll go ahead and take a break.

MS. HIPPSLEY: What time would you like us back, Your Honor?

JUDGE CHAPPELL: We're going to take our lunch break and reconvene at 1:00 p.m.

We're in recess.

(Whereupon, at 11:57 a.m., a lunch recess was taken.)

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AFTERNOON SESSION

(1:03 p.m.)

JUDGE CHAPPELL: Back on the record Docket 9344.

Government, are you ready to call your first witness?

MS. HIPPSLEY: Yes, Your Honor.

And just to correct the record of the opening, you had asked about the dates of the videos, and I wanted to clarify the dates of those. We checked them over lunch.

JUDGE CHAPPELL: Okay.

MS. HIPPSLEY: The Lynda Resnick interview with the CBS Morning Show, which was the first video shown, was in February 2009.

The interview on The Martha Stewart Show was November 2008.

And the Fox News interview with Mr. Tupper was in June 2008.

JUDGE CHAPPELL: Okay. Thank you.

MS. HIPPSLEY: Just so we have those straight.

JUDGE CHAPPELL: Where are we on JX 1, the stipulation?

MS. VISWANATHAN: I believe we have it ready.

MS. HIPPSLEY: Do we have it ready to present?

JUDGE CHAPPELL: If not, we can do it after the

next break.

MS. HIPPSLEY: Okay. We'll get it after the next break.

JUDGE CHAPPELL: All right.

MS. HIPPSLEY: All right.

So at this time I would like to call Lynda Resnick to the stand, please.

- - - - -

Whereupon --

LYNDA RAE RESNICK

a witness, called for examination, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. HIPPSLEY:

Q. Good afternoon, Mrs. Resnick.

Could you please state and spell your full name for the record.

A. Certainly. Lynda, L-Y-N-D-A, Rae, R-A-E, Resnick, R-E-S-N-I-C-K.

Q. Thank you.

Now, Mrs. Resnick, you've described yourself in your book Rubies in the Orchard as the marketer in the family; is that right?

A. Yes.

Q. And your work for POM Wonderful and

Roll International is building the brands that your company owns; is that correct?

A. It was.

Q. And what do you mean by the term "was"?

A. I'm spending a majority of my time working in the Central Valley with the underserved population there, and I have been for the last seven or eight months.

Q. And currently do you do any work with POM Wonderful?

A. I take about two meetings a month for about an hour and a half to three hours, depending on the amount of things that we have to discuss.

JUDGE CHAPPELL: Excuse me. What do you mean by "underserved population"?

THE WITNESS: The Central Valley, Your Honor, is in California. It's a huge agricultural area. It's about 2200 -- 22,000 square miles. And it is in many places poorer than Appalachia, highest teen pregnancy in

America, and many other -- high diabetes, and about 40 percent of the kids don't graduate high school, so that's what I mean.

BY MS. HIPPSLEY:

Q. And when you do work on building the brands for the company, this includes both marketing strategy and

advertising; is that correct?

A. That's correct.

Q. And in fact you've been in the business of marketing and public relations since you were 19; is that also correct?

A. It is.

Q. And can you describe briefly for us your business history in the marketing field?

A. Well, I opened a small advertising agency in my very late teens or early twenties. I only went to college for a year, and I went to work. And I stayed in that business until about 19 -- I'm bad with dates, but I stayed in that business for quite a while.

And then when Stewart and I got married, which was 38 years ago, I had two children and he had three, and I felt that I needed to be home more with the children, so for about four or five years I ran a decorating business that was less demanding of my time.

But then we bought Teleflora in 1979 I believe,

and I went back to work running the marketing for Teleflora. We still own Teleflora today.

Q. Okay. And your marketing philosophy, as we saw this morning, is to look at the intrinsic value of a product; is that right?

A. Yes.

Q. And in fact in the book you state, "For me, every marketing campaign begins with the same question: What is the intrinsic value of the product or service?" Is that correct?

A. Yes.

Q. And part of the intrinsic value of POM juice is its power to heal people; is that right?

A. That's what I think.

Q. And more specifically, part of the intrinsic value is that the fruit was shown to reduce arterial plaque and factors leading to atherosclerosis and shown to have a powerful effect against prostate cancer; is that right?

A. I'm not sure what you're reading or -- is this from the book?

Q. Why don't we show page 4 of the Rubies in the Orchard book.

A. Okay. Yes.

Q. All right. Thank you.

And now, could you explain for us what the term "unique selling proposition" means.

A. I'll try.

JUDGE CHAPPELL: You understand you have a pending question with no answer?

MS. HIPPSLEY: Oh, I'm sorry.

JUDGE CHAPPELL: If you want to move along, that's fine.

MS. HIPPSLEY: No. I thought it was answered.

BY MS. HIPPSLEY:

Q. So to repeat the question, part of the intrinsic value that was stated in your book for the pomegranate juice was that it was shown to reduce arterial plaque and factors leading to atherosclerosis and shown to have a powerful effect against prostate cancer; is that correct?

A. Yes.

MS. HIPPSLEY: Thank you, Your Honor.

BY MS. HIPPSLEY:

Q. And could you explain what the term "unique selling proposition" means.

A. What is it about your product or service that sets you apart from the competition, that is a unique selling proposition. I guess that would be a good explanation.

Q. And would it also include how to differentiate your product from the competition?

A. Yes.

Q. And does a unique selling proposition also include communicating a product's intrinsic value to consumers?

A. Yes.

Q. And can you explain for us how a marketing claim rises to the standard of a unique selling proposition. I believe this was covered in your book.

A. Can you rephrase that in another way?

JUDGE CHAPPELL: Can we be clear on the record? Are you asking this lady to give you an answer as she's sitting here or are you asking her to tell you what was written in her book? Let's be clear.

MS. HIPPSLEY: Okay.

BY MS. HIPPSLEY:

Q. Today, if you could explain how a marketing claim would rise to the standard of a unique selling proposition, what would be the criteria that you would use?

A. But it's the reverse.

Q. Oh, okay.

A. Okay? So you don't start out with a marketing claim and then make that a unique selling proposition.

You have to have a unique selling proposition, and then you find a way to translate that in a clever way that's effective to your audience.

Q. And is the unique selling proposition for pomegranate juice -- part of the unique selling proposition is that it is health in a bottle; is that

correct?

A. Well, I've certainly said that it's health in a bottle. Yes.

Q. And do you consider it to be health in a bottle because of all the medical benefits? Is that correct?

A. You know, there's an 8,000-year history of pomegranates. The Greeks and Romans revered it as a great medicine. Even during the Dark Ages, it was really considered to be a great healer.

So it's this entire body of evidence, not only the research that we've done and others have done, but also the history of this fruit being consumed by millions of people over thousands of years.

Q. And in fact, are the studies that you sponsored on your POM products also considered part of the unique selling proposition for the product?

A. I think that the fact that we're so serious about our science, it was not mentioned specifically I don't think -- I can't remember. I haven't read the

book in a while -- but it certainly is what makes us stand out from other fruits and vegetables because you barely ever see a natural food investing the way we have in science, so it definitely sets us apart from the crowd, yes.

Q. And you want consumers to know about the

investment that you've made in science; is that correct?

A. Yes.

Q. And in fact POM Wonderful uses these studies as a source of marketing material or ad copy; is that correct?

A. When are you speaking of and what specifically and -- that's a very general statement.

Q. Do you recall in the matter of POM Wonderful versus Tropicana Products having your deposition taken, Mrs. Resnick?

A. I must apologize because it is absolutely sort of a fog. I'm -- if you know that my deposition was taken, then I believe you.

Q. Okay. And this would have been in October of 2010, and it was conducted by the attorney Mr. Clare?

A. Mr. Clare is my attorney.

Q. Represented yourself?

A. Uh-huh.

Q. And so, again, does that help refresh your recollection that you had a deposition taken in Tropicana?

A. I'm sorry. I'm not trying to be difficult. It's just that --

Q. You've had your deposition taken in several

matters where POM has brought litigation against its competitors; is that correct?

A. Yes. Several, some.

Q. And in the deposition transcript of POM Wonderful versus Tropicana, the deposition of Lynda Resnick that was conducted October 11, 2010, the question was asked: "And" --

JUDGE CHAPPELL: Excuse me. You haven't laid a proper foundation to be reading from a deposition.

MS. HIPPSLEY: Uh-huh.

JUDGE CHAPPELL: She hasn't disagreed with any question you've asked her, so I don't know where you're going here.

MS. HIPPSLEY: The last question was does POM Wonderful use these studies as a source of marketing.

JUDGE CHAPPELL: And she asked you to be clear, and then you went to the deposition, which is not a proper foundation.

MS. HIPPSLEY: Okay.

BY MS. HIPPSLEY:

Q. So let's --

JUDGE CHAPPELL: If a witness disagrees with a point, then you may impeach or contradict with a deposition, but that hasn't occurred here.

BY MS. HIPPSLEY:

Q. And does POM Wonderful, for example, in some of its print advertising use studies that it has sponsored in the print ads, results of those studies?

A. The results of the studies?

Q. Yes.

A. I'm not sure. I'd have to be refreshed about our use of specific studies.

Q. In the advertising?

A. Yes.

Q. And now, you created the U.S. consumer market for pomegranate juice; is that correct?

A. We created it? Is that your question?

Q. Yes.

A. Well, thank you. To some extent.

Q. And you did that by using the spectrum of marketing vehicles, such as advertising, public relations, events, and all arms of marketing; is that correct?

A. No. I don't think all the arms of marketing but certainly the ones that you called out.

Q. Okay. And which arms of marketing didn't you use?

A. Well, I don't know that we had wild postings. I don't know that we did much advertising in newspapers

per se. I mean, there's -- you know, we did a little radio but not a lot. I mean, there's a lot -- marketing is a very big field.

Q. Right.

And in fact, you have used the analogy that marketing is a wheel with many spokes; is that correct?

A. Yes.

JUDGE CHAPPELL: Let me be clear also. I'm not saying that you cannot in this courtroom use a deposition to refresh recollection or memory. What I was saying earlier was there wasn't a proper foundation at that point in the record when you started doing that.

MS. HIPPSLEY: Okay.

BY MS. HIPPSLEY:

Q. And again, some of the spokes that were utilized for the POM Wonderful business included advertising; is that correct?

A. Yes.

Q. And public relations?

A. Yes.

Q. Is that correct?

A. Yes.

Q. And product development; is that right?

A. I don't know that product development per se is

an arm of marketing. It's a separate discipline.

Q. Okay. Was Internet marketing utilized?

A. Yes.

Q. And event sponsorship?

A. Yes.

Q. And was product placement part of the marketing for POM Wonderful?

A. Yes.

Q. Now, in your book you note that in marketing, messages are important; is that correct?

A. I'd have to see the context.

Q. Okay. Let's pull up page 111 of the Rubies in the Orchard book, please.

And here there's a statement, and it's from page 111 of the book: Messages are important, and the most important thing, it takes time to do them right. When I sit down with my team, our goal is to devise a message that is concise, direct and immediately accessible.

So again, the messaging, meaning the messages to consumers, is an important aspect of marketing; is that correct?

A. Yes.

Q. Let's leave that up.

Also in this paragraph it states: "Above all,

we're looking for a message that delivers on two distinct levels: We want it to be authentic, and we want it to register on the brain. The message has to be memorable."

And you agree still with that statement today; is that right?

A. I do.

Q. And you designed your marketing for POM Wonderful products to break through the clutter of other marketing messages; is that correct?

A. I did not design the advertising or any of it for POM.

Q. Okay. And perhaps that's a poor word choice.

In marketing for the POM Wonderful products, the idea for marketing was to break through the clutter of other marketing messages; would that be a correct statement?

A. Yes. But I -- that's correct for all of our brands.

Q. And just for the record, can you list the other brands that you're involved with for the Roll Global company.

A. Well, I'm involved with Fiji Water; Teleflora, the flowers-by-wire service; Wonderful Pistachios; Cuties, which are little clementines, the little orange

clementines. We don't do much marketing for almonds except for sliced almonds, so, you know, as needed.

Q. And of course involved with marketing for the POM Wonderful --

A. Yes.

Q. -- products.

And is it true that in your book you stated that if you -- if -- excuse me -- "If we can make you chuckle, we have an opportunity to connect with the more serious message grounded in our brand's identity and intrinsic value"? Is that correct?

A. Yes.

Q. Mrs. Resnick, is it accurate to state that you have the final say over all advertising content?

A. No.

Q. And why isn't that correct?

A. Because -- are you speaking about POM Wonderful or are you talking --

Q. For POM Wonderful.

A. Okay. Because there are --

JUDGE CHAPPELL: Excuse me. You need to speak one at a time. You're talking over the witness.

MS. HIPPSLEY: Okay.

BY MS. HIPPSLEY:

Q. You can continue.

A. Rephrase the question, will you please.

Q. The question was: Is it accurate to state that you have the final say over all advertising content for POM Wonderful products?

A. It is not accurate.

Q. And can you explain why?

A. I can.

There is a lot of advertising that is done, and I don't often read the body copy or look at every hang tag or look at every sales and marketing sheet for the field force. There's a lot that goes through.

I haven't paid much attention to the Web site for years and years, unfortunately, because I've been busy with other things.

And so my involvement I would say since I started writing my book, which was in 2007, has decreased as I've had more confidence in the management of POM, and I'm looking for the big picture rather than the minutia.

Q. All right. And prior to 2007, would it be accurate to state that you had the final say on all marketing content for POM Wonderful products?

A. Even then, I didn't because -- I don't want to play my sad song for you, but five children, four grandchildren, a mother and father still alive, a

demanding husband, these take time and all the other brands that I represent and work with, so there was no way. This is not my only business. This is a small portion of our portfolio.

Q. Right.

And who then would have final say over advertising content at POM Wonderful?

A. Well, if I didn't look at it, hopefully Matt Tupper looked at it, and if he didn't look at it, then whoever the chief marketing officer or senior director was at the time would because there's a lot.

Q. And the way the process worked for marketing was that you would brief the marketing department, the people in marketing at POM; is that correct?

A. No, I wouldn't necessarily brief them. No, that's not correct.

Q. Would you work with them on a creative concept, the marketing department --

A. Yes.

Q. -- at POM Wonderful?

A. Yes. We would get together with the scientists and, you know, whoever was running science at the time, the PR. We had this team approach where everyone works in-house, so there would be representatives from public relations, representatives from the field force often,

you know, senior level, and so forth, and we would brainstorm about a new campaign, but not certainly every single thing that went through, but big changes.

Q. Okay. And then would the marketing staff at POM then brief the advertising agency at Roll International?

A. Yes, they would. That's their responsibility.

Q. Okay. And then the agency at Roll International, what was their responsibility?

A. To fulfill the goals of the campaign and to bring in several creative solutions that I suspect more times than not are looked at by the marketing department first and sometimes Matt, sometimes not, and then they would pick the ones that they felt solved the problem the best to me, and we would work together to figure out which direction we would go.

Q. And can you explain the term "agency" -- I think that will come up during the hearing -- and define what the agency is for us, please.

A. Do you speak of our agency --

Q. Yes.

A. -- or agencies in general?

Q. No. The Agency at Roll International, when it's used in that context.

A. Okay. So we have an in-house advertising

agency, and it used to be called The Agency, but now it's called the Fire Station. And it is pretty much a full-service advertising agency in that it does -- PR answers to The Agency and media buying does, as well as the creative process.

Q. And today it's called Fire Station; is that correct?

A. Yes. Because it used to be part of the Teleflora business years ago and it took other clients because Teleflora was driving most of the business, but then we changed it to be an independent arm of the Roll family of companies.

Q. Okay. And what clients does Fire Station have? Are these just Roll International subsidiaries that are serviced by Fire Station, or does it have outside clients as well?

A. It handles the advertising -- most of the advertising for our businesses, but we do a lot of not-for-profit work.

Q. I see.

A. And so we have the Epilepsy Foundation that we work with and we have the LA County Art Museum. I don't know if you want to hear a list of what we do, but it goes on and on because we like to give back, so that's our way.

Q. All right. And who is in charge of the Fire Station Agency today?

A. Today it is Michael Perdigao.

Q. And has he always been the head of the Fire Station organization?

A. No.

Q. And who was the head of the Fire Station organization prior to Mr. Perdigao?

A. I don't remember his name. I'm sorry. His first name was John. I don't remember. And for a while Liz Leow ran it when it was much smaller --

Q. I'm sorry.

A. -- years and years ago.

Q. And the predecessor to Mr. Perdigao, was that when it was known as the Fire Station or known as just The Agency?

A. I don't know exactly. My instinct is that it was -- the name was changed when Michael Perdigao came, but I can't say if it was three months later or an hour

later. I don't know.

Q. And this gentleman John, was he within the Teleflora organization?

A. I believe he was.

Q. And when, if you can, a year perhaps if you can remember, was it that The Agency sort of left the

umbrella of Teleflora and just became an independent part of Roll International?

A. I think that that was when we hired Mike Perdigao, but I can't be positive.

Q. And when would that have been, if you can recall, how many years ago roughly?

A. It seems like he's been there for a long time, but I'm not sure exactly. Maybe 2008. I'm not sure.

Q. And when you described getting together as a group to go over the concepts that the Fire Station had developed, who would be part of the group that would look at the advertising that had been developed by the Fire Station Agency?

A. Well --

Q. For the POM Wonderful -- this always relates to POM Wonderful unless I say otherwise.

A. I can't tell you because it depends on when in time that you're speaking about because people come and go, people are necessary or have further processes or

not. It's very hard to tell you who they were.

Q. Instead of by individual persons, what would be their roles in either the Roll International company or POM Wonderful if they were part of the process of reviewing the ads?

A. Okay. I thought I answered this, but I'll try

again, that PR more times than not would be there.

Q. Okay.

A. And The Agency would be represented. Sometimes media is there, media buying, sometimes not. Sometimes Internet, sometimes not. Sometimes sales, sometimes not.

I don't know who I'm forgetting.

Marketing certainly of course.

Q. And that would be the marketing folks at POM Wonderful?

A. Yes.

Q. And would Mr. Tupper be present at these meetings?

A. More often than not.

Q. And would the science director for POM Wonderful, whomever that would be at the time, be present at these meetings?

A. Certainly not for the last several years, but I don't remember whether they were or not.

Q. And do you know who Dr. Liker is?

A. I do.

Q. And what is his role in conjunction with POM Wonderful? If you know.

A. I don't know exactly what it is. I know he's involved in the science. He's also our family doctor,

so...

Q. Would he attend these meetings that you've just described to go over advertising concepts?

A. I doubt it.

Q. And prior to 2007, you were involved on a weekly basis with POM Wonderful; would that be correct?

A. I -- I'm not sure. But certainly I saw them more than I do now.

Q. And at some point in time were you involved on almost a daily basis with the POM Wonderful business?

A. Certainly at the very beginning I was. Yes.

Q. And how long in time would that go through? A couple years or --

A. I would say a couple of years.

Q. A couple of years?

A. (Witness nodding.)

Q. And then after that, it evolved to a weekly basis; is that correct?

A. Probably biweekly as needed. We're not very

formal.

Q. And again, even today, once concepts were developed by the advertising agency, is it correct that you would be the last word on approving new advertising concepts before they went out to the public?

A. I would say more often than not.

Q. And I know you had stated that you're not involved that much with the Internet and Web site currently.

Was there a time when you were more involved in the POM juice Web site and its development?

A. Well, it wasn't a POM juice Web site. It was a pomegranate -- POM Wonderful Web site.

Q. Okay. Excuse me.

A. And certainly at its inception, conceptually I was very involved.

Q. Okay. Thank you.

Let's pull up what is Complaint Counsel's Exhibit 24, please.

Can you see that, Mrs. Resnick?

A. I certainly can't.

Q. Okay. Thank you.

And the first page of Complaint Exhibit 24 is at the top an e-mail from John Regal, dated June 2004, to various folks at POM Wonderful.

And can you tell us who John Regal was?

A. Did I -- did you hear me that I cannot see it?

Q. Oh, I thought you said you could see it.

A. Can you blow it up?

Q. We can give you a hard copy to look at.

A. Okay. I mean, I could try to lean forward.

Q. Let's try seeing if we can blow it up for you at the top.

A. Yeah, that would be good.

There you go.

Q. Does that help?

A. Yes. Quite a bit.

Q. All right. And again, the question was: Can you tell us who John Regal was in relation to POM Wonderful?

A. I don't know what his actual title was in 2004 because I think his title changed, but he was either a director or a vice president at this time.

Q. And was he involved in marketing for POM Wonderful?

A. Yes. He was in the marketing department at POM.

Q. All right. And the e-mail states that "Attached is the latest wireframe and notes from my meeting with LRR on Saturday."

Does "LRR" refer to yourself?

A. I think so.

Q. So in the company it was common that we've seen documents that use "LRR" when referring to you, Mrs. Resnick?

A. Yes.

Q. And what is a wireframe?

A. A wireframe is -- and I'm not giving you an actual, you know, technical definition, if you'll forgive me, but the wireframe is actually the layout of the Web site.

Q. So it would be used when you're developing pages that would then become a Web site?

A. Exactly.

Q. And if we could turn to page 19 of the attachment.

And here there is a page titled POM, POM Juice, Health Benefits, and I'm going to blow up the bottom of the page for you so you can see it better.

A. I have to read the whole thing to know what I was talking about if it indeed is me.

Q. Sure.

(Pause in the proceedings.)

A. Are you going to blow it up?

Q. Yes. I was waiting for you to read it.

A. I can't read it.

Q. Oh, you can't read it.

May we approach the witness, Your Honor?

JUDGE CHAPPELL: Go ahead.

THE WITNESS: What page is this? 11?

BY MS. HIPPSLEY:

Q. Yes, it's page 11 or CX page 19.

A. It would be helpful if you could turn to the right page so I don't have to go through this whole thing. I don't know where it is.

Q. It's page 11 of the attachment.

A. Well, they're not numbered and it's very odd.

Q. At the bottom you'll see there are some Bates numberings and the last number is stamped with a CX, and then if you look for number 19 --

A. I found it.

Q. Okay.

(Pause in the proceedings.)

A. Okay.

Q. Okay. And the question I had was, the large capped type on the document, are those your comments: Needs finessing; please research through our PR and see if you can get a third-party endorsement, maybe a quote from Aviram, Heber, or better yet Dr. Ignarro?

A. I believe so.

What is the date of this? March 2004?

Q. June --

A. I'm looking for a date.

Q. If you look at --

JUDGE CHAPPELL: Hold on, hold on.

Now, you're talking over the attorney, so let's both try to be careful and speak one at a time.

THE WITNESS: Okay, Your Honor.

JUDGE CHAPPELL: Thank you.

BY MS. HIPPSLEY:

Q. Again, the first page of this document where we figured out that Mr. Regal had sent the attached wireframe, the date of that e-mail is June 2004.

A. Okay. Thank you.

Q. And again the question is, are the comments in all caps your comments on this particular wireframe?

A. They certainly appear to be. That's a long time ago.

Q. Was it common for you to put your comments in the all-caps style?

A. Sometimes. To differentiate it from the body copy of a document or sometimes in a different color.

Q. All right. And if you can turn to page 21 of that document.

The CX 2421.

A. I'm looking at page 21, but it doesn't look like

what's on the monitor.

Q. POM and Heart Health (page 1)?

A. No. It says 21, but it doesn't appear to be the same.

Q. Mrs. Resnick, are you looking at the CX 24 and then dash 21?

A. No. I'm not used to looking at legal documents, so I...

Okay.

Q. Okay. Thank you.

And in the top corner, the right-hand corner, there are the initials LRR.

A. Okay. I got it.

Q. Okay. Totally rewrite, photos of arteries, little more science than other pages is okay, again, are these your comments at that time on the wireframe?

A. I have no idea.

Q. And you don't recall whether those were the comments that you made at that time?

A. I don't.

Q. Okay. And looking again using the CX numbers for the page numbers -- okay? -- if you'd go to page 24.

A. Got it.

Q. All right. And here there is a list of comments under POM and Nitric Oxide: Baby talk description of

NO2, link NO2 to pomegranate juice, use quote from Ignarro, and image.

Are these comments yours about the baby talk description?

A. I would think that they probably are because I do use that term when trying to take difficult

information and make it more accessible to people.

Q. And here it would be making it more accessible to consumers who came onto the Web site; is that correct?

A. Yes.

Q. And then if you follow along the CX numbers, it's CX 27.

A. Okay.

Q. And this is a --

A. I'll be with you in a minute.

Q. Okay.

(Pause in the proceedings.)

A. Okay.

Q. All right. And this appears to be a POM glossary page, and if you look under the section titled Atherosclerosis, again in all caps there's a sentence "I'm looking for more explanation here. Explain how the arteries harden and how POM softens the plaque and helps the body eliminate it."

Again, would this be your comment on the document?

A. It appears to be.

Q. And if you look to the right-hand comments outside the wireframe under Glossary, and the statement "I want more detail. Most of these do not go

far enough; example atherosclerosis, how does it happen?"

Is that your comment as well?

A. Well, it's odd because there's two different typefaces with that comment and then the one below it, so I'm not sure how that happened, but I'm not sure.

Q. So you're not sure whether or not --

A. They appear to be.

Q. I'm sorry?

A. It appears to be, but I'm not sure.

Q. It appears to be your comment?

A. At least one of them.

Q. Okay. But under the Glossary heading, does that appear to be your comment?

A. I'm not sure. Because it's a different typeface than what I used in the body of the document.

Q. All right.

JUDGE CHAPPELL: Who else would have been making comments on this document other than yourself?

THE WITNESS: Oh, I think lots of people.

JUDGE CHAPPELL: Can you name a few?

THE WITNESS: Well, Matt probably did. I don't remember who was there then, Your Honor, exactly, but maybe the scientist did. I don't want to guess. But these things went through a review of lots of people.

JUDGE CHAPPELL: That's what I'm just trying to figure out here. You weren't the only one who would have been making the comments. You thought it was you on some of these earlier, but there were a number of people who could have been making comments.

THE WITNESS: That's right.

JUDGE CHAPPELL: All right. Thank you.

BY MS. HIPPSLEY:

Q. Now, Mrs. Resnick, do you recall having your deposition taken in this matter about a month ago by myself?

A. I do.

Q. Okay. And during that deposition we did go over this document. Do you recall that?

A. I don't.

Q. Going over the one we're looking at now?

A. I don't remember. I'm sorry.

Q. I guess it's all a blur, is it?

All right. Well, turning to the -- let's see.

Hold on for one moment.

(Pause in the proceedings.)

Well, that's all right. We may not have touched on this page. Okay.

All right. Moving along, let's look at the next page number on your document, the very next page, which

is page 28, again in the POM glossary.

A. Page 23.

Q. CX 28, so it would be the very next page with oxidation listed in the POM glossary?

A. Excuse me, but my next page is 0029. Am I in the wrong place or -- oh, no, I see it. Okay.

So it's 0028?

JUDGE CHAPPELL: Is that 20 on that page, is that --

MS. HIPPSLEY: Yeah, page 20.

JUDGE CHAPPELL: Maybe if we use that number because a lot of people aren't used to Bates stamp numbers.

MS. HIPPSLEY: All right. Thank you, Your Honor.

THE WITNESS: Thank you.

BY MS. HIPPSLEY:

Q. So the page 20?

A. Okay. I got it.

Q. Okay. Thank you.

And again, there is an all-capped comment under Systolic Blood Pressure, the comment "What about stroke... we are also helpful there and high blood pressure helps prevent stroke. Can we talk about blood flow yet?"

And again, are these your comments on the wireframe?

A. I'd assume so. But I'm not positive.

Q. These are in the font that you described as yours; right, the all-capped font?

A. Well, it's not mine, but it's one I use.

Q. The one that you would use to make comments.

A. Sometimes, yes. Thank you.

Q. All right. And now speaking of this time frame from 2007 till present, is it correct that you would still go in every week or biweekly, as you stated, to make sure that the proper decisions were being made at POM Wonderful?

A. In 2007 and 2008 and 2009 I was extremely busy with a television show I was doing as well as lots of other issues, and I don't know that I was there that often at all.

Q. Well, would your answer be that you don't know or is it a no?

A. Well, I don't think that I was there every week or twice a week, especially during 2008 and 2009 because I was writing, doing the show, and I was also on the road for most of 2009 promoting my book.

Q. All right. And again, in the POM Wonderful-Tropicana matter, there was a deposition

of Lynda Resnick October 11, 2010, and the attorney that conducted the deposition was Mr. Siegler.

Does that refresh your recollection of having your deposition taken in the Tropicana matter?

A. No.

Q. And you have no recollection of having a deposition in October 2010?

A. Not specifically. I know I had depositions.

Q. And do you know that you had a deposition taken with the matter that concerned Tropicana Minute Maid juice?

A. I know that we had something with Minute Maid, yes.

Q. And that your deposition was taken in that manner?

A. I -- yes. I think so, yes.

Q. Okay. All right. And in the deposition that was taken in that matter, on page 21 of the deposition transcript there was a question posed to you,

Mrs. Resnick: "And as you disengaged a bit from the POM business in 2007, who was it in your view that took over your responsibilities for marketing?"

And the answer was: "Oh, God, there are a series of people, but Matt is the ultimate, you know, person. And I -- you know, if they organized their

work properly, I could still go in every week or every other week and make sure that the proper decisions were made."

All right. And when you had meetings with POM Wonderful, was it typical that the staff would prepare a meeting agenda? Is that correct?

A. Yes.

Q. And after the meetings were held, was it a practice of your staff to prepare meeting recaps or notes after the meetings were held?

A. I hope so.

Q. And what would the purpose of those notes be?

A. You'd have to ask them.

Q. Okay. Well, when you stated you hope so, why did you hope that they had prepared meeting notes?

A. If their memory is as bad as mine, I wouldn't want them to commit it to memory what our next steps were.

Q. Thank you.

So the purpose of the meetings and the meeting notes was so that staff could follow through on next steps; is that correct?

A. Yes.

Are you finished with this document?

Q. Yes. Thank you.

And if we could pull up Exhibit Complaint Counsel 410.

Okay. And if we could blow up the top part again so Mrs. Resnick can read it.

And again, this is an e-mail or I guess -- I'm sorry. Strike that.

It's a memo from Mr. John Regal. It's dated December 10, 2004. And it goes to a variety of people.

First of all, the first recipient is Matt Tupper at POM Wonderful, and can you explain his role at POM Wonderful at this time in 2004?

A. I don't remember whether he was chief operating officer then or president back then. I don't remember.

Q. But it would be one of those two positions?

A. I think so.

Q. And another person receiving this document is Fiona Posell.

Do you know her position or role at that time in 2004?

A. Well, I believe that she was head of public relations either just for POM or for all of the Roll family of companies. I don't know when it changed.

Q. And another name on the list receiving this document is Risa Schulman, and can you explain her role at that time?

A. For a brief time I think she was in charge of some medical outreach.

Q. And what do you mean by "medical outreach"? What's the term refer to?

A. Marketing to dieticians, naturopaths, doctors, nurses, a whole host of people.

Q. And this would be marketing the POM Wonderful juice in 2004?

A. Yes.

Q. And you see in the copy line that you yourself are copied and the subject is meeting notes.

Do you recall receiving these LRR meeting notes from Mr. Regal just generally speaking, not this specific set, but was it typical that you would be copied on the meeting notes that had been prepared?

A. I don't think it was typical. It certainly hasn't been for years and years. I have no time to read meeting notes, so...

Q. All right. So you routinely did not read the

meeting notes after the meetings; is that correct?

A. I did not.

And I don't even recognize this e-mail address.

It's certainly not mine.

Q. lyndaresnick@paramountagribusiness.com?

A. I don't ever remember having that e-mail

address.

Q. But in 2004 is it possible that that would have been one of the addresses you would use?

A. I certainly never used it.

Q. And what are the addresses that you use typically in association with the POM Wonderful business?

A. Well, pomqueen or roll.com.

Q. lyndaresnick@roll.com?

A. Correct.

Q. Okay.

Okay. If you can call up the next page, page 5.

And can you blow up the Next Steps section.

Thank you.

So as you had previously described, one of the purposes of the meeting notes was to articulate the next steps that had to be taken by the POM Wonderful staff; is that correct, just generally speaking?

A. Please repeat that.

Q. That one of the purposes of the Lynda Resnick meeting notes was to enable staff to memorialize the next steps that were decided at the meeting and then act on them; is that correct?

A. I love your choice of words, "memorialize." Yes. But they're not necessarily everything I said.

You have to understand there are lots of people in the meeting, and so it could be Matt asking for it. The meeting was called the LRR meeting because that's what it was, but the next steps may or may not have been something I asked for.

Q. Right.

But you were present at these meetings; is that correct?

A. If it's an LRR meeting, the chances are I was there.

Q. Okay. And what types of business would be conducted at these LRR meetings that were held?

A. Everything from product development to a PR plan to a sales report, anything to do with the business that they thought I would be interested in hearing about. The science.

Q. Thank you.

A. But we never did anything with saccharin, I can assure you of that. I don't know what this is.

Q. All right. We can -- we're done with that document. Oh, that's right, you don't have a copy.

The next one is CX 410. This is another Lynda Resnick meeting, 10-11-07 recap. And I wanted to direct your attention to the second page of this exhibit, which is CX 410-81.

And if we can turn to that page and blow up the middle section titled Pomegranate Truth Campaign.

And this document was dated 2007.

Can you explain what the pomegranate truth campaign is referring to?

A. Yes. There are a lot of fake pomegranate juices in the marketplace.

For instance, the one that you spoke of earlier, the one that Coca-Cola makes, has less than 1 percent POM in it, but it's called pomegranate-something. I can't remember what the other ingredient is.

There are a lot of companies out there that are calling their product pomegranate, but they really have very little pomegranate in it. And so in order to fight that, we wanted a pomegranate truth campaign that would show people that we were a hundred percent pomegranate juice.

Q. And what else did you want to show people that would distinguish yourself from these pomegranate

products that you felt just had a little bit of pomegranate in them?

A. That we were the ones conducting the research and they were palming off, if you will, on that research.

Q. And so, for example, here there's a statement

"requested we use the phrase 'over 23 million' spent on human health medical studies so we're consistent with the dollar amount spent."

Is that what you mean by communicating the research that POM was conducting to consumers?

A. It doesn't sound like I wrote that.

Q. Okay.

A. But I certainly would want the consumer to know that we were spending our own money on research, but "human health" is not something I would say.

So you have to remember that I didn't look at these documents, I didn't change them in any way, and this is what whoever was taking the notes heard in their own minds or the way they hoped to present it. I'm not responsible for the words here.

Q. Right.

But these were notes again just to memorialize a discussion, not necessarily words that you stated, but a discussion that was held in your presence; is that

correct?

A. Yes.

Q. And then do you see the Actions area there, "Agency - work with Pam/Fiona on copy for review next week"?

Could you -- first of all, "agency" there is

again referring to The Agency; is that correct?

A. Yes.

Q. And that would be The Agency that's at Roll International -- or let's see. 2007, do you know if it was part of Teleflora at that time?

A. I don't.

Q. So it either could be Teleflora or reside at Roll International; is that right?

A. Correct.

Q. And do you know who Pam is in this reference?

A. Pam Holmgren.

Q. And what was her position?

A. She worked for Fiona in public relations.

Q. And Fiona being Fiona Posell; is that correct?

A. Correct.

Q. And what type of copy would they review as part of the public relations, if you know?

A. I have no idea.

Q. Now we're going to look at what's been marked as

Complaint Counsel's Exhibit 410 page 155.

And don't blow it up quite yet.

And these are POM LRR meeting notes dated October 16, 2008.

And if we could blow up the section starting with Juice Advertising. For the homepage through I

guess interactive, that will work.

A. Are you waiting for me?

Q. No. I'm waiting for my assistant to help me here. Make it more visible for you, Mrs. Resnick.

A. Thank you.

Q. All right. And Q4 homepage refresh, four designs approved, and it lists health's angel, heart therapy, death defying, and right for the heart.

Would these be designs that you approved for use in juice advertising?

A. I suppose so, but right for the heart, I don't remember that.

Q. Do you remember approving the health's angel, heart therapy, and death defying?

A. I do.

Q. And in the next section, fourth quarter banner ads, approved designs, health's angel, heart therapy, death defying, trust in POM/pouring juice, and urologist, would that be referring to designs that you

had approved?

A. I suppose so, but I don't remember urologist or trust in POM/pouring juice.

Q. Okay. But the other three you do recall approving, the health's angel, heart therapy -- hold on -- and death defying?

A. I approved them in some form. I do not know if they ever became banner ads. I only know that the things that I remember were billboards. I cannot say that they were banner ads or used in any other way.

Q. All right. And if you can go back and blow up the next section.

The next section of the meeting notes is 2009 superpower campaign OOH.

Can you explain what the OOH is referencing?

A. Out of home.

Q. And is that another term for billboard advertising?

A. Anything that is out of home. It could be a billboard. It could be a wild posting. It could be a super graphic on the side of a building, lots of things.

Q. Okay. And billboards would be included in that category.

A. Yes.

Q. All right. And then you can see there's a listing of ten out-of-home headlines approved. I'll take them one at a time so we can see which you recall approving.

The first one, Lucky I have super health powers, do you recall approving that headline?

A. I feel like I have to explain something to you.
Q. Uh-huh.
A. Just because I approve a headline doesn't mean it's ever going to be an ad, because we approve the headline and then they have to come up with a graphic, and in the end if it doesn't work, we don't do it.
Q. Okay.
A. So please do not assume that these were necessarily billboards.
Q. But this is the beginning, as you state, in the conceptualizing of a marketing campaign, the meetings that you would hold, and then from this stage a creative brief would be written by marketing; is that correct?
A. I'm not sure when the creative brief was written. I would think it would have been before this.
Q. Before a Lynda meeting was done?
A. Well, not in general a Lynda meeting but a Lynda meeting to talk about advertising. They had to have a

brief in order to prepare any of these things.

Q. Okay. So a creative brief would also be prepared to allow the agency -- is that who would create the headlines for your approval?

A. That's right.

Q. All right. And so then the process here would

be we're at the stage where the ad agency has prepared headlines and brought them back to POM Wonderful for discussion; is that correct?

A. It could be headlines. It could be headlines and an idea for a graphic, and then we could brainstorm and change the graphic.

So this is a very liquid state in the very beginning because you couldn't possibly run all these headlines. There are too many. So later on we'll cull through them and pick the ones that we think the most effective.

Q. All right. And again going through at this stage of the creative process, do you recall approving "Lucky I have super health powers"?

A. I don't.

Q. And what about "I'm off to save prostates"?

A. Yes.

Q. And "Uh-oh! That heart is under attack"?

A. I don't remember that one.

Q. And the next one, "Holy health! 25 million in medical research"?

A. I'm not sure.

Q. If you had approved that headline?

A. Right.

Q. All right. And the next one, "Risk your health

in this economy? Never"?

A. I just saw that was a banner ad or something, but I don't know if it ever became a headline for out of home because it's a little long.

Q. All right. And the next one, "Back off imposter juices"?

A. I do remember that.

Q. You remember approving that for out-of-home use?

A. I think so, yes.

Q. And the next, "Up, up and away with erectile dysfunction"?

A. I'm not sure that that was the headline.

Q. And the next, "100 percent pure pomegranate juice to the rescue"?

A. It sounds familiar, but I don't remember seeing it as an ad.

Q. And again we're talking about the out-of-home ads.

A. That's right. It's a little long.

Q. For a billboard; is that correct?

A. Yes.

Q. Okay. And the next one, "Saving health one mortal at a time"?

A. I'm not sure.

Q. And the final, "Ka-pow"?

A. I know we used that; I don't know where.

Q. All right. And turning to the next page of these meeting notes from October 2008, which is CX 410 page 156. And if we could blow up I guess the first set of information.

And here it refers to the 2009 superpower campaign print, and would "print" be referring to print advertisements?

A. Yes.

Q. And print advertisements would be placed in magazines typically?

A. Yes.

Q. And again, going through the approved print headlines, we'll just take them one at a time.

Did you approve for print for the 2009 superpower campaign "Risk your health in this economy? Never"?

A. I'm not sure. I don't remember running a lot of

print for this campaign, so I would not have any idea about any of these.

Q. You wouldn't have an idea if you had approved "I'm off to save prostates"? For print advertising.

A. I don't remember.

Q. Okay.

A. I didn't think we did that much in print.

Q. All right. And the next one, "Up, up and away with erectile dysfunction (if copy can support)," did you approve that if the copy would support it?

A. I don't remember.

Q. And the next print headline, "Holy health! 25 million in medical research," do you recall if you approved that for print use?

A. No.

Q. And the next, "100 percent pure pomegranate juice to the rescue," do you recall if you approved that for use in print advertisements?

A. I may have approved it, but it may never have happened. I mean, I have no reason to think that I didn't. It's just that I don't think that we ever ran much.

Q. Okay. And can you go to the next column on the document.

And in the next column it's titled 2009 First

Quarter Media Plan U.S. and Canada, media plan approved with modifications, and again the approval would be referring to you approving the media plan; is that right?

A. I suppose I -- some part of this is cut off. Can you move it to the right a little bit.

Q. I don't know if we can do that.
A. All right. Fine.
Q. And under Print, the first sentence says, "Add Fortune."
Would that be referring to Fortune magazine?
A. Yes. I suppose so.
Q. And then the next line item says "late night spot TV."
Did POM Wonderful ever run in the first quarter of 2009 television late-night spot ads?
A. No. I do not believe we did.
Q. And again, the next item under the media plan is the out of home, avoid Wall Street locations.
Do you know what the reference is there to avoiding the Wall Street locations?
A. Yes.
Q. And what did that mean?
A. There was no one there anymore. No one was in Wall Street anymore. It was completely deserted. We

had a serious financial -- as a country, a serious financial reversal, and so Wall Street was pretty empty.

Q. And then other elements would include online, doctor office media, health club posters.

Were those other elements approved?

A. They may have been approved, but I don't know that they did run.

Q. Okay. In the doctor office media, it is true that the cover wraps ran; is that correct?

A. The cover wraps?

Q. Well, cover wraps as a marketing tool.

A. Well, I know we did one. I don't know the plural is true.

Q. Okay. And again, the cover wrap would be what exactly? What does that describe?

A. The insert. It's a -- I believe -- I really am not equipped to answer that perfectly. Okay? So I think you should direct that to the agency.

Q. Did the cover wrap involve covering Time magazine with an advertisement for POM Wonderful juice?

A. I believe it did.

Q. Okay. Now I'm going to switch gears a little bit and discuss the creative briefs which you saw we went through this morning in my opening statement.

And again, you stated in your book, correct, that the product -- well, why don't we call it up, which is page 76 of the Rubies in the Orchard book.

And again, the statement which starts in the second line is that "The product is only as good as the brief that goes into it, and I always say I want a

marketing brief so tight that if the author were run over by a bus, anyone could pick up the project and complete it," and this is the statement that you had in your book; is that correct?

A. Yes.

Q. And does "marketing brief" mean the same thing as a creative brief?

A. Yes. In this particular case because we felt that the average reader wouldn't know what a creative brief was, so we changed it to "marketing brief."

Q. Oh, I see.

A. In the book.

Q. Very good.

And in the business of POM Wonderful then the creative briefs are synonymous with the marketing brief that you're referring to in your book; is that correct?

A. Correct.

Q. And again, can you explain, in the POM business, who created the creative briefs that were utilized?

A. The marketing department.

Q. And what was the purpose of the creative brief?

A. To brief the advertising agency on some of the key elements that should appear in the advertising.

At some point very soon I'm going to have to

excuse myself for a moment.

MS. HIPPSLEY: Your Honor, do you -- it doesn't matter to me when we take a break. Do you have a preference?

JUDGE CHAPPELL: We'll go ahead and take a quick break now. We'll reconvene at -- and again we're going by the clock on the wall. It appears to be functioning properly now. We'll reconvene at 2:40.

We're in recess.

(Recess)

JUDGE CHAPPELL: Back on the record Docket 9344.

Next question?

MS. HIPPSLEY: Your Honor, actually we do have that joint stipulation, if you want us to have that entered.

JUDGE CHAPPELL: JX 1.

MS. HIPPSLEY: JX 1. It's been signed by both parties.

JUDGE CHAPPELL: Signed by government?

MS. HIPPSLEY: Yes. Signed by the government and signed by respondents.

JUDGE CHAPPELL: Signed by respondents?

MR. GRAUBERT: Yes, Your Honor.

JUDGE CHAPPELL: Thank you.

JX 1 is admitted.

(Joint Exhibit Number 1 was admitted into evidence.)

JUDGE CHAPPELL: I don't know if the parties saw the e-mail to notify my office of the witness schedules. I just wanted to verify what's the schedule for the rest of the week. I've heard bits of pieces.

MS. HIPPSLEY: Okay. Yes.

Tomorrow we will conclude with Mrs. Resnick.

And then on Thursday we're starting at noon, as you had previously scheduled, and that would be with Mrs. Posell, Fiona Posell, and that will be the witness for Thursday.

And then on Friday we have Ms. Liz Leow.

And we anticipated -- you recall at the pretrial, Mr. Perdigao is not available because of his wife having a baby this week, and so -- and then we have the week-long recess, so we'll finish Ms. Leow on Friday, but we suspect that that will only take half a day on Friday.

JUDGE CHAPPELL: Right. In the event Mrs. Resnick doesn't take all day tomorrow.

MS. HIPPSLEY: Ms. Posell was only available on Thursday, and so -- and the other employee was available for Thursday and Friday. She's backing up Ms. Posell if that finishes early.

JUDGE CHAPPELL: At the end of the day I would like an estimate of how much more time you expect this witness to be on the stand.

MS. HIPPSLEY: Tomorrow?

JUDGE CHAPPELL: At the end of the day today.

MS. HIPPSLEY: Right. For tomorrow?

JUDGE CHAPPELL: For tomorrow, yes.

And I think the e-mail said to notify my office once a week of anticipated witness schedules, and also notify my office when there's any change in those schedules that you've already sent to my office.

MS. HIPPSLEY: Yes, Your Honor.

JUDGE CHAPPELL: Thank you.

Go ahead.

BY MS. HIPPSLEY:

Q. Mrs. Resnick, if you approved an ad concept for one medium, say, the out-of-home medium, would it be approved for use in another medium?

A. Not necessarily.

Q. So you would have to look at what was being used in each medium before it was put out in the marketplace; is that correct?

A. Not necessarily.

Q. Okay. Can you explain your answer, please.

A. Well, we would have an informal discussion

perhaps if we were going to adapt a headline for another medium, and we would talk about whether it worked in that medium or not.

Q. All right. And would that --

A. It wouldn't necessarily take a meeting or anything as formal as that.

Q. Can you describe generally who the target audience is for the POM Wonderful juice advertising.

A. Well, it's changed through the years.

Q. Okay. What about at the beginning?

A. At the beginning we assumed it would be people in their forties and fifties that had health issues, but we were wrong. Because we couldn't really do market research about a product that no one knew about, so we had to wait a couple of years to do our research until POM was out in the marketplace and people knew what a pomegranate was.

So our initial research indicated that it was really twenty and thirty-year-olds who dug the bottle

and were early adopters of new things and may have had parents in their family that were ill; therefore, they wanted to protect their own health.

Q. All right. And today who would be the target audience for POM Wonderful juice?

A. And you have to understand that we -- when you

say "target audience," the market responds to that. They tell us who the target audience is more than we tell them, because you can have these grand plans, but they don't necessarily turn out to be who you thought they were.

Q. Uh-huh.

A. So the age is creeping up definitely. And I don't know the exact demographic profile today of our POM juice buyer, but they tend to be in their forties and maybe even into their fifties and onward. That's what we know, so that the age has gone up. And they have to be sophisticated to some extent about their health, and so forth.

JUDGE CHAPPELL: I have a question. The word "Wonderful" in the company name, is that descriptive or is that the type or variety of pomegranate you grow and use?

THE WITNESS: Well, it's both. We grow the Wonderful variety, and we think the juice is wonderful.

JUDGE CHAPPELL: Is it a hybrid or is Wonderful one that is grown around the world?

THE WITNESS: I know that it is grown in a few other locales, but I'm not sure where.

JUDGE CHAPPELL: But the only variety you grow for this juice is the Wonderful variety?

THE WITNESS: Yes. And some Early Wonderful sometimes also.

JUDGE CHAPPELL: Early Wonderful, that's a different variety?

THE WITNESS: A slightly different variety, yes. They come to bloom and ripen earlier than the Wonderfuls do.

JUDGE CHAPPELL: Thank you.

BY MS. HIPPSLEY:

Q. And for the POMx dietary supplement pills and liquid, who's the target audience for those products?

A. Well, they're two different products.

Q. Okay. Let's take the POMx dietary supplement pills first.

A. Okay.

So I'm in the market. People that don't want the calories from the sugar. Maybe people that have diabetes I assume that want to consume pomegranate but don't want the naturally occurring fructose that occurs

in the juice. People that travel because you could just pop them in your pocket and take them wherever you're going, and the juice is very fragile, so -- there are no preservatives in it, so it can go bad. And I think that the market is slightly older than the juice.

Q. And is it also people who are concerned about

their health?

A. Oh, yes. That's for sure.

Q. Then, for example, when you buy magazine placement for the print ads for either the juice or the POMx products, you stated in your book that you look at publications for niche markets like health and wellness that deliver a passionate audience; is that correct?

A. Well, first of all, I don't buy any of the media.

Q. I'm sorry?

A. I do not buy any of the media, so do you speak of the company in that case?

Q. Yes.

When the company, I guess the agency and your media placement folks are looking to buy magazine placement, you've stated in the book that you look at publications for niche markets like health and wellness that deliver a passionate audience; is that correct?

A. Yes. But we also do freestanding inserts, which

is just about everybody, so...

Q. Uh-huh.

But for -- a freestanding insert isn't a magazine; right?

A. No. But it's print.

Q. But when you're looking at magazine placement,

do you utilize magazines that are what would be referred to as niche market magazines?

A. That is part of the plan. It is not the whole plan.

Q. Okay.

A. For instance, Sports Illustrated.

Q. Uh-huh.

And when you run advertising, isn't it true that you want to know that it actually ran in the medium that you're purchasing?

A. That's a good thing to know.

Q. Because of course you don't want to pay for something that didn't run; isn't that correct?

A. It is correct.

Q. All right. And is it customary that the media department would as a matter of course verify that ads actually ran by hiring these tracking services to track that the ad was actually placed in the magazine?

A. I'm not entirely positive about that.

Q. Now, in the POM Wonderful versus Welch's Foods matter, a deposition was taken May 11, 2010 of yourself.

Do you recall a deposition in the Welch's matter?

A. Vaguely.

Q. Okay. What I'd like to do is read a portion and

see if that refreshes your recollection on using the tracking services.

And there was a discussion of a document, and it had a bunch of numbers on it, and you were working on that, and then the question just states --

MR. GRAUBERT: Excuse me. What page?

MS. HIPPSLEY: Oh, I'm sorry. Page 136.

BY MS. HIPPSLEY:

Q. And the question is: "Okay."

But the answer that you gave: (as read) "When you run advertising you want to make sure it ran, so you hire those services that -- I don't know where you got this document, whether you ordered it or it was ordered by us, but it would be customary that the media department would, as a matter of course, verify that the ads actually ran because you can't read every publication, et cetera, you know. So that's probably what it is."

"QUESTION: I take it one reason you'd like to

track that is because if someone's billing you for running --

"ANSWER: Right.

"QUESTION: -- your ad, you'd like to have some way to verify --

"ANSWER: Right.

"QUESTION: -- that it actually appeared?

"ANSWER: Right."

So, again, to your knowledge, the media department would use these tracking services to ensure that your ads were placed as you had purchased the media for; is that correct?

A. I would hope so.

Q. And in your dissemination marketing plan, you also use product Web sites; is that correct?

A. I don't know what you mean.

Q. Web sites that have been created by POM Wonderful for its products?

A. Separate Web sites just for the products?

Q. For the POM Wonderful products.

Is there a POM Wonderful Web site?

A. There is a POM Wonderful Web site.

Q. Okay. And is -- the purpose of the Web site is part of the marketing of the POM Wonderful products; is that correct?

A. Yes.

Q. And does POM Wonderful also use blogs as part of its marketing plan?

A. Yes. We market to bloggers.

Q. And you also have message boards that are utilized as part of the marketing plan where consumers

have a way to talk back to the company and provide information back to you; is that correct?

A. I'm not sure if that still goes on. It was once. I'm not sure.

Q. But at one time it was used by the POM Wonderful, the message boards?

A. I believe so.

Q. And your POM Wonderful -- the company's POM Wonderful Web site, it also has consumer testimonials on it; is that correct?

A. I think it used to. I don't know if it does anymore.

Q. Okay. And when it did have testimonials, isn't it true that some would contain quotes from people who had written to POM about medical phenomenons that had occurred because of drinking pomegranate juice?

A. I think for a brief moment in time. Yes.

Q. And when in time would that have been, if you can recall?

A. I'm not sure.

Q. Do you know how many years testimonials were available on the POM Wonderful Web site?

A. I think it was brief.

Q. And by "brief" what do you mean?

A. Much less than a year.

Q. So under a year there were consumer testimonials?

A. To the best of my knowledge.

Q. And the category of product promotion, that's also a component of marketing; is that correct?

A. I don't know what you mean by "product promotion."

Q. Let's see if the category in your book -- if we could have page 125 of Mrs. Resnick's book.

And I guess what I meant was the example that you provided in your book was that you would send POM products to, as the statement says, a long list of influential people, including doctors, celebrities, politicians and media industry leaders; is that right?

A. Only if they asked for it.

Q. How did you create this list to send POM products?

A. Well, I know that, for instance, Rupert Murdoch had an incident with his prostate, so I gave it to him,

and he takes it.

And other -- you know, I gave it to Jeff Koons, who's a famous artist, and he asked me to give it to some of his friends who were artists.

And Justice Briar takes it, but he makes me accept money.

A lot of doctors that are friends of ours, we send it to them. You know, we want to keep the world healthy.

Q. And is the maintenance of this list and directions about who to send the products to, is that done by POM Wonderful or the agency at Roll International?

A. Please repeat the question.

Q. Who handles this part of the promotion of providing product to this list of influential people? Is that done by POM Wonderful marketing or is that done through Roll International staff?

A. I make the initial request, although some other people may also send it to people. I'm not aware of who. And I just send an e-mail to someone at POM that will make it happen.

Q. Okay.

A. Or to my own assistant who then contacts POM and asks to send the pills to so-and-so, send the juice to

so-and-so.

Q. All right. And I believe you explained in the book that an example in this type of promotion was that you had met Martha Stewart at a prostate cancer event, and after that, you would send her a case of pomegranates each year; is that right?

A. Yes. This is many years ago, I think before -- just when we -- you know, we bought -- we started marketing POMs in 1986, and Martha told me that she loves pomegranates more than any other fruit, and so whenever the harvest would come I would send her the first great picks of the season.

Q. And again in your book you describe that some years later then she had you on her television show, and is that the excerpt that we watched this morning? Is that correct?

A. I believe I was on twice, so I'm not sure which is which.

Q. So she invited you onto the show twice then?

A. Yes.

Q. Is that correct?

A. Yes.

Q. I think you described earlier -- I just want to make sure I'm clear -- that the public relations component of POM's marketing is done through the agency

at Roll International; is that right?

A. Certainly the conceptual work is done there and a lot of the legwork.

But, for instance, when we market in Asia, we hire local agencies. And we often hire local agencies in other states if we're doing a separate promotion

there and we need someone on the ground that really understands, because a lot of what we do is outreach to food because food is the most visited thing on our Web site. We have a hundred -- I don't know -- 55 to 75 recipes for food as well as drinks, alcoholic and nonalcoholic, and so that's a very big part of our marketing push, and so we hire local people that understand their restaurants and the food scene to help us.

So we do the concept work, but a lot of legwork is done on the ground with local people.

Q. All right. And are the local people employees of POM, or did you say you hire outside PR firms?

A. We hire outside PR firms or individuals.

Q. But the PR that's done at the conceptual level is done by in-house public relations folks?

A. By and large.

Q. And does the public relations include issuing press releases about POM Wonderful products?

A. Yes.

Q. And with regard to pomegranate research and studies that are funded by POM and its affiliates, you would issue press releases when there were results that were published from those studies; is that correct?

A. I would never issue a press release. It would

come through public relations.

Q. I'm sorry. "You," meaning the public relations department, would issue a press release; is that right?

A. That's correct. If it was appropriate. If it had been reviewed in a peer-reviewed journal, not just the results but if it had been published.

Q. Uh-huh.

And you have stated in your book that public relations is the unsung hero of marketing; is that right?

A. It is.

Q. And you noted, quote, "There is nothing as effective in the entire world as getting someone else to say something good about your product or service, what we call a third-party endorsement, and of course POM is newsworthy; right?"

Is that correct, that was stated in your book?

A. It sounds familiar.

Q. And then you went on to state -- and we can pull

up Rubies at page 127.

And you went on to state that "First, the press loved us because the fruit was so new and yet so old, and the health story was a revelation. As time went on, we became the darling of food editors when our fresh season started."

And then the emphasis in the book was: "We have new medical breakthroughs on a regular basis, so there is always something new and exciting to learn about POM."

And this was your explanation of how public relations was used by POM Wonderful; is that right?

A. Yes. But it's only part of the story.

Q. Okay. And this was also, as you pointed out in the book, done on a modest ad budget; is that right?

A. Well, there's no ad budget because it's public relations.

Q. Okay. And so the marketing importance of public relations is that basically you could equate it to money that would have had to be spent on advertising otherwise; is that right?

A. Well, the PR department likes to show us how good they are by showing us what it would have cost to get that kind of press if we paid for it. It's a good metric.

Q. Now, I want to touch on consumer research, and I believe you had mentioned earlier in your testimony that, for example, to figure out your target audience you would conduct market research from time to time; is that right?

A. Well, that was one of the things we were looking

for, but we were looking for all sorts of things from market research.

Q. Okay. And what other types of topic were you looking for when POM Wonderful conducted market research?

A. Well, that's an exhaustive list. Why don't you ask me specifically.

Q. Okay. Well, first, to lay a foundation, POM Wonderful did indeed commission market research from time to time; is that right?

A. It is.

Q. Okay. And would one purpose of the market research be to understand why consumers were interested in purchasing POM Wonderful juice?

A. In a manner of speaking.

Q. And in fact, based on the market research, you know that 72 percent of the people who buy pomegranate juice buy it for the health reason; is that correct?

A. My understanding is that -- no. That isn't what

I know. Okay. What I know is that half the people say they buy it for the taste and about half say they buy it for the health, so you may have a study that says that, but I don't ever remember that as being the only motivator.

Q. Okay. Let's look at again a deposition that you

took in POM Wonderful versus The Coca-Cola Company, and this deposition took place in 2009.

And again, do you recall a deposition in conjunction with the litigation POM had against Coca-Cola Company?

A. Yes.

Q. Okay. And I'm at page 97 of that deposition.

The question was asked: "Okay. Is it your contention that those outside of your customer base, just the general population that may or may not buy it, that they buy pomegranate juice to aid in their prostate health?

"ANSWER: I know that 72 percent of the people who buy pomegranate juice buy it for the health reason. Now, what health reason that is I'm not sure. Something like 72 percent.

"QUESTION: Okay. So 72 percent of your customer base, which may be women too, don't have prostate --

"ANSWER: Of our market or potential market. Yeah, our market.

(as read) "And of your market?

"ANSWER: (as read) Of your customers.

"QUESTION: Do it for health reasons?

"ANSWER: (as read) Yes, there's -- that is the

number one reason that they may choose."

And so would the 72 percent be accurate as of the date of the deposition, which was in 2009?

A. I have no memory of that, but I'm sure if you say I said it, I must have said it.

Q. Okay. Thank you.

And in conducting the consumer research, I believe you stated during our deposition that it was similar to a creative brief where the marketing department at POM Wonderful would be involved in creating the consumer research questionnaire; is that correct?

A. That's right. They wouldn't actually --

Q. I'm sorry.

A. They wouldn't actually do the questionnaire. They would do the goals and objectives of the research study, and we would more often than not leave the actual wording of the questions to the research firm that was going to conduct the research.

Q. Right. Okay.

And yes, I believe you had stated that the questionnaire that would be fielded, that would be done by an outside market research firm. Is that correct?

A. Yes.

Q. And that they would put the questionnaire into

the proper form; is that right?

A. That's right.

Q. And then when we discussed this previously, you said that then it would come back, and you would look at it and see if you felt that it was precise enough and would yield the answers you wanted; is that right?

A. We would look at what?

Q. At the questionnaire that was now in the proper form.

A. Some of us would, yes. Sometimes I would look at it; sometimes I wouldn't. It depends.

Q. But you would want the market research firm to provide the final product back to POM Wonderful before they put it into the field; is that correct?

A. Absolutely. Yes.

Q. And was one of the purposes of the consumer research to try to determine the effectiveness of the various marketing campaigns that POM Wonderful utilized over time?

A. Sometimes we would ask about specific campaigns and sometimes we wouldn't.

Q. And do you recall using Bovitz Research to analyze the dressed bottle campaign, for example?

JUDGE CHAPPELL: Did you say "bogus"?

MS. HIPPSLEY: Bovitz, B-O-V-I-T-Z. Bovitz, I

think, research firm.

THE WITNESS: I don't know the names.

BY MS. HIPPSLEY:

Q. But did you commission a research firm to do a survey of the effectiveness of the dressed bottle campaign?

A. I believe we did.

Q. And did you use that same company to conduct research on the effectiveness of the superhero campaign?

A. Yes.

Q. And was this then used by the marketing department at POM Wonderful to decide whether the campaign should continue, that sort of thing?

A. Yes. We -- you know, research is just information. You have to make up your own mind in the end.

I actually disagreed with the decision, but it was -- it appeared as though the cartoon execution was

more popular with consumers. I never really felt that happy about it. And -- but we did for a period of time use that. Now we're back to the dressed bottle, if we do anything, outdoor.

Q. Now I'm going to shift direction a little bit.

And when you launched back in -- actually when

did you launch POM juice nationally? Was that in 2002?

A. I believe 2002-2003. But -- no. Nationally it -- I don't know exactly because we started in Los Angeles and then we moved to New York and then sometime in the next year or so we spread our distribution throughout the United States.

Q. And before you launched the POM juice campaign, you came up with the heart logo to use in the name "POM"; is that correct?

A. I did.

Q. And the logo that appears in the labeling and the advertising of the POM products where the O turns into a heart, you developed that as a heart symbol to convey that the juice is good for your heart; is that right?

A. Well, yes. It's good for you, the heart meaning you. And I didn't do the logo as you see it today. I just drew it, a P and a heart and an M on a piece of paper, and then the design people turned that into a

logo.

Q. All right. And let's look at the Rubies in the Orchard book at page 11 if we could.

And I believe you stated here, "I wrote 'POM' on a piece of paper and passed it to Stewart. Here is the name of your product. The heart will immediately tell

them it's heart healthy."

And that is of course is what you explained in the book about the logo; is that correct?

A. Yes.

Q. And now we're going to call up Plaintiff's Exhibit 4 page 1.

Can you read the date through the title there, Mrs. Resnick, or would you like us to expand that?

A. It's March 27, 2001.

Q. Right.

And it was to distribution, and it's from yourself, Lynda Rae Resnick, the subject: Pomegranate juice project, Details on the Pomegranate Juice Project.

Can you explain this document that was authored by yourself and what the purpose of it was?

A. I think it was an effort to organize my thinking about the marketing of the juice. Stewart -- I had just started working -- or Stewart had asked me

to come to a marketing meeting where -- and I was not working on pomegranates at all at that time. I was working in other areas of the business.

And the marketing people that were working on it wanted to sell it in the shelf-stable aisle along with Welch's and Minute Maid and all of those other

shelf-stable juices. And they wanted to put 10 percent pomegranate juice in it and fill it with belly wash, you know, just useless juices, in order to get the price down. And I disagreed with that marketing. I thought that that would have been really a tragedy for the juice and something that I certainly didn't want to have anything to do with.

So I persuaded him through this document I believe -- I haven't read it in, you know, ten years -- to sell it in the produce section with fresh fruits and vegetables where it belonged because it was indeed and that it would be refrigerated and that it would be 100 percent pomegranate juice and that that was the thing that would be successful rather than some also-ran.

Q. And one of the reasons for that was because your belief was that you didn't want to dilute the health benefits that would only be derived from the 100 percent POM juice, in your view; is that correct?

A. I didn't know about a lot of health benefits in those days because I believe that only the Aviram study was done, but I didn't want to dilute the juice because it would dilute the whole idea and it would just be sugar water like everyone else does.

Q. All right. And if we could go to page 12 of

Exhibit 4.

This is Exhibit H to your memo, and there the health benefits are described.

"Basically, there are three proven health benefits associated with consumption of POM juice that we can currently 'talk about' at scientific meetings, public relations campaigns and consumer promotions."

And this was what you stated at that time was your belief were the health benefits associated with the pomegranate juice; is that correct?

A. You know, I'm really having a hard time reading this, but I assume it's correct.

Q. Okay. We can blow it up for you.

And then there were a list of, as you stated, proven health benefits associated with consumption: one being that it was a powerful antioxidant; second, lowers LDL oxidation and cholesterol -- and if we could show the last two -- and three, that it improves circulation; and four, healthy heart.

"By neutralizing LDLs and increasing circulation, POM juice drinkers are taking advantage of the best natural fruit juice to guard against heart disease."

And at that time who had provided you with the information about the proven health benefits that you

note here?

A. I remember now that this is just basic science, test tubes, and so forth, and it was Dr. Dornfeld, D-O-R-N-F-E-L-D.

Q. And who is Dr. Dornfeld?

And can you explain who Dr. Dornfeld was in relation to the POM Wonderful project?

A. He really came up with the idea. He was a physician. He was our family doctor and also helped all of our wellness programs at our company and -- because we do a lot of that, you know, mammogram screening, and so forth, and high blood pressure and smoking cessation in those days when people still smoked.

And so he really believed in the history and message of the pomegranate, and it was his idea to go to Michael Aviram, who had done the seminal work on red wine, and so he handled this during that period of time.

Q. And so his assessment of the science, in other words, was the basis for the health benefits that you've

listed here?

A. Yes. This is what I was told.

Q. And told by Mr. Dorn- -- I'm sorry --

Dr. Dornfeld --

A. Yes.

Q. -- is that correct?

And how long was Dr. Dornfeld involved with the POM Wonderful project?

A. I can't remember right now. He passed away tragically.

Q. And is that when -- he had not stopped working for POM previous to his passing away?

A. Well, not -- no.

Q. And so when would that have been roughly, how many years after this date of 2001?

A. I'm sorry. I don't remember.

Q. And would it have been through, let's say, the product going national in 2003 or 2004 time frame?

A. I'm sorry. I don't remember.

Q. And after Dr. Dornfeld passed away, was there another doctor that basically took on a similar role for the company on the POM Wonderful project?

A. A similar role would be Dr. Liker.

Q. Okay. And can you describe -- I think you had stated previously that Dr. Liker was your family doctor,

so was he also hired then as a consultant for POM Wonderful?

A. Yes. I believe so. Or for the whole Roll family of companies because of the wellness, and so forth.

Q. Okay. And is Dr. Liker still serving that role

today for POM Wonderful and the Roll companies?

A. I'm not entirely sure.

Q. Now let's look at -- we'll look at a few ads here.

Let's call up CX 471-2.

And this is a "Cheat death" ad, and this was -- of course you saw this this morning in the opening.

And based on the information that you had from Dr. Dornfeld at that time, which is around 2005, then is this the type of advertising that was utilized by POM Wonderful to sell the POM Wonderful pomegranate juice?

A. I don't understand your question.

Q. The statement at the bottom of the body copy states (as read), "It has more antioxidants than any other drink, can help prevent premature aging, heart disease, stroke, Alzheimer's, even cancer."

What was the -- your understanding of the science that was behind that statement that it would

help prevent premature aging, heart disease, stroke, Alzheimer's, even cancer?

A. That's what I was told from the scientists that were working on our business. I don't remember where I got it from.

Q. And in 2005 do you know what scientists were

working or who was working for POM Wonderful?

A. I'm not sure. I know Dr. Aviram and Dr. Heber, but I don't know the others specifically.

Q. And did you get the statement or -- let's start with the statement.

Did Dr. Heber -- did you go over -- are you aware of Dr. Heber reviewing the statement "help prevent premature aging, heart disease, stroke, Alzheimer's, even cancer" and basically letting the company know that that was a proper statement about the state of the science at that time?

A. I have no memory of that. But I know that the scientists would give us the information and legal would bless it and that's how it happened.

MS. HIPPSLEY: Your Honor, we have a stipulation with respondents' counsel that advice of counsel is not a defense that will be utilized in this matter, and so I just want to make sure that that's clear when we get into testimony about ads being run through the legal

department.

JUDGE CHAPPELL: Okay. She answered your question.

MS. HIPPSLEY: Yes.

BY MS. HIPPSLEY:

Q. Now, as of this year, let's say, in 2010, do you

currently believe that POM's research to date supports the Alzheimer's and stroke advertising claim as is presented in the "Cheat death" advertisement?

A. It's 2011.

Q. Okay. Sorry.

A. Say it again, please.

Q. So as of, let's say, 2010, do you believe that POM's research up to that date of 2010 supports the Alzheimer's and stroke advertising claim that's presented in the "Cheat death" advertisement?

A. Today do I believe it.

Q. Right.

A. This ad was run when?

Q. 2005.

A. It depends on who's judging.

Q. Well, what is --

A. I know that we have basic science on all of these things, I believe we do, so test tube and in rats, and so forth. I don't know -- I don't think we have

human studies in some of them. It's what I believe, and at the time it was what I was told.

Q. Okay. But today are you comfortable with telling consumers that POM Wonderful can help prevent Alzheimer's?

A. We don't do that any longer.

Q. And can you answer the question yes or no, please?

A. Am I comfortable with telling individuals that --

Q. Telling consumers that POM Wonderful can help prevent Alzheimer's.

A. I do not make public statements about that.

Q. But at the time -- so your answer is that you would not be comfortable making the statement that was made in the "Cheat death" ad today; is that correct?

A. You know, this is so confusing an area for me, and I know it's not admissible, but I still rely on my attorneys and the scientists to tell me what's appropriate today.

Q. Okay.

A. And my personal views I'm sure are of no interest.

Q. All right. Well, in the deposition of POM Wonderful versus Tropicana, dated October 11, 2010,

the question was asked of you: "Do you feel comfortable and confident today telling consumers that POM Wonderful can help prevent Alzheimer's?"

Oh, I'm sorry. Page 102.

MR. FIELDS: Give us a moment.

MS. HIPPSLEY: Yeah.

Middle of the page.

BY MS. HIPPSLEY:

Q. "QUESTION: Do you feel comfortable and confident today telling consumers that POM Wonderful can help prevent Alzheimer's?

"ANSWER: Not specifically in an ad. I would not put that in an ad today because, you know, I don't think our research is really exhaustive enough.

"QUESTION: (as read) Would your answer be the same for the other diseases that are listed in the statement, premature aging, heart disease, stroke and cancer?

"ANSWER: Stroke I'm not sure," and it goes on. We'll get to the cancer later.

But for the question about Alzheimer's and stroke, that was the answer that you provided at the Tropicana deposition; is that correct?

A. The same thing I told you today essentially.

Q. And yet when we saw this morning your interview

on The Martha Stewart Show which occurred in November of 2008, I believe that you stated that POM juice was helpful for Alzheimer's. Is that correct?

A. That's what I believed at the time and still do. And that wasn't an ad.

Q. All right. Let's call up Plaintiff's

Exhibit 471 page 4.

And if you could -- this ad is a "Drink and be healthy," and if you can look in the left corner.

Here there's a statement "Medical studies have shown that drinking eight ounces of POM Wonderful pomegranate juice daily minimizes factors that lead to atherosclerosis (plaque buildup in the arteries), a major cause of heart disease."

Do you recall approving this text for the ad?

A. Not specifically. But it's a very old ad because it has the glass bottle in it, so it was done a long time ago.

Q. But do you recall whether or not you would have approved the body copy for this ad at that time?

A. I'm not sure.

Q. And during this time period, though, you have stated that you were more involved in the company in the early time period.

A. Can you share with me the exact date of this

ad?

Q. The ad -- the expiration for the coupon is February 29, 2004.

A. 2004, so usually the expiration date is like 18 months, so this is one of the first ads we ever ran.

Q. Okay. And that's the time period where you were

working with the company, as you stated, on basically a daily basis; is that right?

A. Yes. That's true.

Q. And if you could go to the next ad, which is Complaint Counsel's 471 pages 7 and 8, this is another ad we saw this morning.

Here the copyright is 2004. The title of the document is Studies Show that 10 Out of 10 People Don't Want to Die.

And I wanted to direct your attention to the second page of the advertising under the column Our Research: Heartening, and we'll try to blow that one up.

And here there's a statement "And a clinical pilot study shows that an eight-ounce glass of POM Wonderful 100 percent pomegranate juice, consumed daily, reduces plaque in the arteries up to 30 percent."

And again at this time would you have approved this ad and the body copy contained in it?

A. The chances are I would have because this is -- I remember this ad. I think it's the first ad we ran in Prevention magazine, so I was involved in it.

Q. And then if we could show Plaintiff's Exhibit -- sorry -- Complaint Counsel's Exhibit 471 page 10.

Here is the "Floss your arteries" ad, and again

there's the statement "Just eight ounces a day" -- "Just eight ounces a day can reduce plaque by up to 30 percent. So every day: wash your face, brush your teeth, and drink your POM Wonderful."

And the copyright date is 2004, and so again would you have approved the ad?

A. Yes. I think I would have approved the copy on this one as well as the visual. It only I think ran once, but I remember it.

Q. And then if we could show Complaint Counsel's Exhibit 471 page 12, this ad is titled Amaze Your Cardiologist, and if we could blow up the body copy.

"Ace your EKG: just drink eight 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 cause sticky, artery-clogging plaque. A glass a day can reduce plaque by up to 30 percent. Trust us, your cardiologist will be amazed."

And again, the copyright date is 2004, so would you have approved this ad?

A. What do you mean, "the copyright date"? I don't ever remember this. You know, the things that you're showing me today were mainly billboards with no body copy. I don't remember many of them running as ads.

Are you sure that they actually ran and weren't just produced but never ran?

Q. Yes.

And in fact do you recall that there was a proceeding in front of the National Advertising Division concerning ads that were being -- print ads that were being run by POM Wonderful during this time period?

A. But I don't know which ads they were.

Q. Okay. But do you have any -- so there is a copyright. I realize it's hard to see.

If it's copyrighted, does that mean that it was put out for dissemination?

A. No.

Q. All right. And so your position is that you don't know whether or not this "Amaze your cardiologist" actually ran.

A. I don't know if any of these ran as ads because we produce a lot of things that we don't necessarily run. And I'm not disputing that if the copy appeared in

the early days that I did not okay it. I'm only saying did they really run.

Q. Okay. And again, you do recall that in 2005 POM's arterial plaque reduction claims were challenged by the National Advertising Division of the Better Business Bureau; is that correct?

A. I believe that one of our competitors brought that, and I vaguely remember it. I didn't really pay much attention to it or, you know, involved in the legal part of it, but I guess Welch's was jealous of our success.

Q. Okay. And do you recall that in your Tropicana deposition in October 2010 -- page 74 -- and the question is quoting from the conclusion of the NAD ruling that says, with respect to the "Amaze your cardiologist" advertisement, "NAD recommended that the advertiser modify its claim that the daily consumption of eight ounces of POM Wonderful pomegranate juice 'can reduce plaque by up to 30 percent' to more clearly articulate the preliminary nature of the pilot study and the details of the parameters of the study," and you acknowledged that that was in the conclusion.

A. I do?

Q. All right.

A. I don't. I don't know.

Q. And did POM Wonderful actually modify its claims with respect to the cardiological benefits of drinking POM Wonderful after the NAD challenge?

A. I have no idea at the timing or whatever, how binding it was, if we did or didn't.

Q. And at the time of your deposition, on page 75,

when you were asked, "Did POM Wonderful modify its claims with regard to the cardiological benefits of drinking POM Wonderful?

"ANSWER: We did."

So does that refresh your recollection as to whether POM agreed to change its advertising for POM juice after this NAD decision?

A. I know that we have evolved over time and changed many things. I don't know what the impetus was for change, so I don't know. But what we said in the early days is far different from what we say today.

Q. All right. Now, in 2005, roughly the same time period as the NAD challenge, do you recall that POM learned that Dr. Dean Ornish's -- a clinical study that had been sponsored by POM on the effect of POM juice on arterial plaque buildup did not have a positive outcome.

Do you recall receiving that information?

A. I don't know exactly. I know there was some

discussion about it, but I'm not sure that it was negative or -- I don't know.

Q. All right. Let's show what's been identified as Complaint Counsel's Exhibit 756.

And on this we'll start with page 2 because it's an e-mail chain, so we'll start with the first e-mail

and work our way backwards.

And if you could try to blow up the resolution on first the second message.

The original message was from Dean Ornish.

And do you know who Dr. Dean Ornish was? Were you familiar that he was doing studies for POM Wonderful?

A. Yes. I know Dean.

Q. And that he was actually doing studies that had been sponsored by affiliates of the POM Wonderful company; is that correct?

A. I don't know the legal terminology, but he certainly was doing things, and I think we paid for it.

Q. Okay. And this e-mail is directed to sresnick@rollinternational.com and Lynda Resnick -- lresnick@pomqueen.com.

Now, you have stated that that is an appropriate e-mail address for you.

A. It is.

Q. All right. And it states there's a summary attached and it's called the Bev 2 summary.

And then if we go to the next e-mail on that page, a message from yourself to hliker@mail.com, summary now attached, with the request "Can you bottom-line for us."

Is the H. Liker referring to Dr. Liker?

A. Yes.

Q. And then if we go to the first page, the next e-mail then is from Harley Liker, sent August 5, 2005, to Lynda Resnick, subject: Summary now attached.

"Bottom line.

"The subjects who drank POM juice for one year had less progression of the buildup of plaque in the carotid arteries (these supply blood to the brain) compared to those who drank placebo (sugar water). The magnitude of the change was small and the sample size (73 subjects) was not large enough for these changes to meet statistical significance."

So again, do you recall receiving this information in this time period of 2005?

A. Not specifically, no.

Q. And do you recall whether or not anything about how you were going to advertise the cardiovascular benefits of POM juice, whether you had any discussions

about how this study would affect the advertising?

A. Not specifically.

Q. Do you recall anything at all in general?

A. We had ongoing discussions about the science and what we should say and shouldn't say. I have no memory of this specific study or anything. I just knew that

Dean was working with us.

Q. All right. And can you blow up the second paragraph of this e-mail.

In Dr. Liker's e-mail to you, after he gives you the results on the Ornish study, he then goes on to say:

"Our study (also looking at plaque buildup in the carotids) with Dr. Davidson in Chicago and Dallas has nearly 300 subjects. If the trend that we saw at 12 months continues until the study concludes at the 18-month mark (results should be available in December 2005), we will likely reach statistical significance and this will be a major breakthrough for us. Dr. Davidson is using a more sensitive technique than Dean and also has more patients that are being studied for a longer period of time."

So do you recall in the time period of December 2005 or early 2006 having Dr. Liker or anyone else provide you with the results from Dr. Davidson's

study on arterial plaque reduction?

A. That was seven years ago. I don't remember.

Q. And do you have any recollection of an understanding of the results when they came in and how it would affect what you could advertise about the cardiovascular benefits of the POM Wonderful juice in

this time period of 2005-2006?

A. Not specifically.

Q. Do you recall anything generally?

A. No.

Q. So you don't recall Dr. Liker discussing with you the impact these results might have on advertising; is that right?

A. We often had discussions like that. I don't remember what they specifically were about, and I'm not going to generalize some thought that -- random thought in my head if I don't know. I relied on the scientists and the legal people to tell us what we could and could not say.

MS. HIPPSLEY: And again I just want to make clear that there's a stipulation that there will be no advice of counsel defense in this matter.

JUDGE CHAPPELL: I'm not sure why you needed to restate that.

MS. HIPPSLEY: Because she's saying she relied

on counsel and the reason I can't delve into that any further is that we're not going to break the attorney-client privilege which we would be allowed to do if indeed the defense of advice of counsel was entertained by respondents.

And so the reason I can't ask any follow-up

questions is we are honoring the attorney-client privilege, but that is because they are not going to rely on the defense of -- on the advice of counsel as a defense to their advertising in this matter.

JUDGE CHAPPELL: But in both instances the witness said scientists and legal.

MS. HIPPSLEY: That's right. That only runs to the legal part.

BY MS. HIPPSLEY:

Q. Now, we discussed that NAD proceeding that occurred in 2005.

And NAD again took issue with POM's heart claims for its juice in 2006; is that right?

A. I don't know.

Q. So you don't recall that there were actually two separate NAD proceedings about the POM Wonderful advertising of its health benefits?

A. No.

Q. And again in the Tropicana deposition, at

page 104, the bottom statement there, there is a question, referring to the NAD statement: "Now, as to the next statement on page 16 states that, 'Promotes heart health by preventing the buildup of plaque in the arteries leading to the progression of atherosclerosis,'" which you answered, "Easy for you to

say," so you were right about that.

"QUESTION: Is that a true and accurate statement with a scientific basis?"

And that's the question that I have for you today.

Is that statement that was challenged by the NAD a statement that has a scientific basis?

A. Well, it had a scientific basis or we wouldn't have said it.

Q. All right. And your answer in the deposition was: "I believe that it's true. But we don't have enough science, you know, to actually make that -- and we've been told that, and we have changed what we say."

Is that a correct statement today?

A. Well, as I said, our advertising has evolved over time and we do what we're told.

Q. And indeed --

A. To some extent.

Q. And indeed, during this deposition, do you

recall stating that some of the marketing concepts were a little more out there than we would say today and that you had overstepped your bounds a bit early on in the advertising? Is that a fair statement?

A. Am I saying that today?

Q. Would you agree with that statement that you

made during the deposition?

A. What deposition was this, please?

Q. It's the Tropicana deposition and it's at page 103 to 104.

A. And the date was?

Q. October 2010.

A. 2010.

I have newer information today than I did then, and so I don't know legally what we're allowed or not allowed to say, but I've been led to believe that our basic science is very valid --

Q. Uh-huh.

A. -- and especially for a natural food, so I'm not sure, quite frankly.

Q. And so at the time of the deposition, again on page 104, you stated that "... I realize, you know, you need more of a body of evidence and so forth."

Would you still agree with that statement today?

A. You know, I'm really not sure because various scientists feel that we have plenty with our basic science as it relates to food, and I think that your -- the FTC may not agree with that, and so who am I to say. I just follow orders.

Q. All right. Well, now I'd like to show you some

of the claims that POM has used since 2006.

I just, you know -- do you need a break or --

A. I mean, I will, but I can go on.

Q. Okay. And first I'd like to show you a clip from the POM Wonderful Web site. This was captured by the commission on April 29, and it's a complaint exhibit, E-2, and we looked at this this morning also.

A. What year is it?

Q. April 2009.

(Whereupon, a clip was played.)

Okay. And the graphic again was highlighting the claim that POM Wonderful pomegranate juice would reduce arterial plaque by 30 percent.

And in this time period of 2009, what is the body of evidence that this graphic is based on?

A. I'm not sure.

Q. And when you do this advertising, who determines what basis there is for the claims that are being made?

A. I told you that it's the scientists and the legal department, even though I'm not supposed to say that.

Q. Did the scientists look at this graphic, for example, and tell you that the graphic and the bar chart with the 30 percent reduced arterial plaque was an

appropriate claim?

A. You know, I didn't work on the Web site in these years. I never met with the scientists about the Web site, so I have no idea who saw what when.

Q. So when you say that this is based on the scientists, let's go back to the time when you were more involved in the company, 2004 and 2005.

Did you provide the advertising copy to, for example, Dr. Liker to get his view on whether the ad copy was supported by the science that the company had at that time?

A. I -- the only ad copy that I ever gave to a scientist was in the very beginning when I read the headlines to David -- he used to be the head of the FDA -- David --

Q. David Kessler?

A. Kessler.

And I asked him, I said, These are humorous. Do you think they'll be all right? Because he -- we knew

him socially. And David assured me that they would be fine, he said, because we only did billboards in those days.

But I personally would never have done this. It would have been done in the marketing department by people that were ushering things through the various

approval channels, so it wasn't me. But of course my peace of mind was that it was being done.

Q. And what you mean by "being done" just to be clear is that your marketing department-level people were checking with, for example, Dr. Liker in 2004 and 2005, showing him ad copy, and making sure that he agreed that there was a scientific basis for it?

A. That I -- you're putting words in my mouth.

So what I felt was and what I've been led to believe is that we went through the proper channels to make sure that the claims we made in advertising were okay to make scientifically and legally and that that work was being done and that I never would do it because that isn't what I did.

Q. All right. And let's look at the POMx Web site Health Benefits page from 2008. This is Complaint Counsel's Exhibit 177 page 23.

And if you could expand the column on heart health.

And here again we have under Heart Health a statement: We have researched the effects of pomegranate juice on cardiovascular health for almost ten years, and findings suggest that POM juice may help encounter -- I'm sorry -- may help counteract factors leading to arterial plaque buildup, as well as inhibit a

number of factors associated with heart disease.

Now, the statement "counteract factors leading to arterial plaque buildup," this is similar to what was challenged by the NAD.

And again, did you have any discussions with anyone at POM Wonderful or the agency about the appropriateness of continuing to discuss the fact that POM juice would be advertised as helping counteract factors leading to arterial plaque buildup?

A. As I shared with you previously, this was maybe the busiest year of my life, and I had nothing to do with the Web site per se. I never -- I assumed that the proper checks and balances were in place. I don't even remember this.

Q. But as you stated earlier, you would check in with POM Wonderful to make sure that the proper decisions were being made; is that right?

A. I never said that.

Q. In the previous testimony today.

You were involved still in decisions about advertising and marketing in 2008 at POM Wonderful?

A. Yes. But I didn't -- I did not go in very often. And I didn't say every time are you doing the right checklist or are you doing that. I assumed that the proper work was being done.

Q. And if these statements were created earlier in time -- you picked it up in 2008, but we saw the POM pills were introduced in 2007 -- would you have been involved in the initial development of the pompills.com Web site?

A. No. I don't believe I was. I was involved in the brochure to some extent. I really never read body copy very much, especially on the Web site.

Q. So is it your statement that when the pompills.com Web site was developed you did not have any final approval over the body copy for that Web site?

A. I don't remember having any. I don't remember reviewing it. I may have, but it certainly is not top of mind, and I have no reason not to tell you if I did.

Maybe this is a good time.

MS. HIPPSLEY: Your Honor? It's fine with me if we take a break.

JUDGE CHAPPELL: Okay. We're going to go until at least 5:30 today. And this will be our last break.

We'll reconvene at 4:15.

We're in recess.

(Recess)

JUDGE CHAPPELL: Back on the record Docket 9344.

Next question.

BY MS. HIPPSLEY:

Q. Mrs. Resnick, I'd like to show you a POMx print ad. This was Exhibit K to the commission's complaint, and it's identified as Complaint Exhibit 1426 at page 44.

And this ad ran in 2010, and I believe that your lawyers admitted that this ad did run and was an accurate copy when it was part of the complaint exhibits.

And if we could blow up the text of the body copy a little bit there.

And again, this is in conjunction with the heart claims that are being made in the advertisement for POMx pills, and there are two statements there.

"Two additional preliminary studies on our juice found promising results for heart health."

And then it's in red ink. "'Stress-induced ischemia decreased in the pomegranate group,' Dr. Dean Ornish reported in the American Journal of Cardiology, 2005."

And also there's a statement in red: "Pomegranate juice consumption resulted in a significant IMT reduction by up to 30 percent after one year," quoting Dr. Michael Aviram, referring to reduced arterial plaque in Clinical Nutrition in 2004.

And the question I had is, at this time that the

ad ran, were you aware at this point of the results from Dr. Davidson's IMT study?

A. What was the date of --

Q. 2010.

A. The IMT study?

Q. No. The ad is 2010.

And at this time were you aware of the results of the Dr. Davidson study?

A. When was the Dr. Davidson study published?

Q. Well, as we discussed earlier, Dr. Liker's e-mail indicated that the results would be made -- the results would be ready in 2005-2006.

At any time between that time period of 2005 and 2010, did you learn the results of Dr. Davidson's study?

A. I probably did. I'm sure I did.

When -- when I say I don't remember, it's because I'm telling you the truth. That doesn't mean I'm not responsible. I feel the responsibility for

everything that was done by the marketing department and by my staff whether I remember it or not.

So I just want to tell you that I don't remember this, I remember the headline, and we should have known because it was already published. But did I know, do I remember, I don't.

Q. And again, the question was, did you come to know the results of Dr. Davidson's study during this time period preceding this ad -- from 2005 where it appeared Dr. Liker said the results would become available and 2010 when this ad ran, anytime during that time period did you learn of the results of the Dr. Davidson study?

A. I don't remember learning about them. I still don't understand them.

So I may have heard about them, but I don't really know the significance of them. But other people do and...

Q. And what, if anything, do you recall about the Dr. Davidson results on the arterial IMT study that was stated in Dr. Liker's e-mail as being run?

A. I'm sorry. I don't really remember anything specifically.

Q. All right. Let's look at CX 1426 page 42, which is a POMx brochure, and this is Complaint Exhibit I.

And have you seen this "Antioxidant Superpill/POM in a Pill" brochure before?

A. I have.

Q. And how is the brochure used as part of the marketing -- or was it used as part of the marketing for the antioxidant POMx?

A. I think it was put in the shipments of the pills to the consumer.

Q. Okay. So when -- and the POMx dietary supplements were only available to be purchased through the pompills.com Web site; is that correct?

A. I think that there was a chain of drugstores that also -- or GNC I believe, we sold them through GNC, and there may have been a drugstore that was going to handle them. I don't know if that ever happened.

Q. Okay. But most of the orders for the supplements were direct purchases from POM Wonderful, which is why you were shipping product out; is that correct?

A. Yes.

Q. And this brochure was then put in a shipment of the pills; right?

A. Yes. But it may also have been used to pick up when you bought them at GNC or a form thereof.

Q. Okay. All right. And now if we could turn

to -- it's Exhibit 1, page 5 of the exhibit.

And first if you could highlight the headline there.

A. I'm sorry?

Q. I'm asking --

A. Oh.

Q. -- the paralegal to help us read it.

Great.

And the headline here is a quote from Dr. Michael Aviram, "POM Wonderful pomegranate juice has been proven to promote cardiovascular health, and we believe that POMx may have the same health benefits."

And that's the title.

Did you discuss with Dr. Aviram whether or not POM juice had been proven to promote cardiovascular health?

A. Initially, when his first research came out, I believe he came to Los Angeles and we spoke about it. I haven't spoken to him in quite a while, however, years.

Q. All right. Okay. Then if we could go to the copy under Heart Health.

And here again there's a description: Two groundbreaking preliminary studies. Patients who drank POM juice experienced impressive cardiovascular results.

A pilot study in Israel included 19 patients with atherosclerosis (clogged arteries). After a year, arterial plaque decreased 30 percent for those patients who consumed eight ounces of POM Wonderful pomegranate juice daily.

And then it also goes on to explain the

additional study by Dr. Ornish, 45 patients with impaired blood flow to the heart. Patients consumed the juice daily for three months, experienced a 17 percent improvement. Initial studies on POMx share similar promise for heart health, and our research continues.

And did you have any discussions about whether or not it was appropriate to have the two studies that were based on POM juice in advertisements for POMx?

A. I must have, but I'm not sure when or how.

Q. And at the time that POMx pills were introduced, was Dr. Mark Dreher associated with POM Wonderful LLC?

A. Well, he was there for quite a while, and I do believe he was there when we had POM pills initially. I can't be sure of the exact dates.

Q. Uh-huh.

And is Mr. Dreher one of the scientists -- when you referred to scientists that you relied on for the

basis of the various claims that are being made in the advertising, would Mr. Dreher be one of those scientists?

A. Yes. But I think he spoke for the other scientists. I don't think he did the actual research.

Q. Right.

But is he someone that you would have conversations about in terms of learning the science that the company had for its advertising?

A. Absolutely.

Q. And during the period when we saw those heart ads in 2005, was Mr. Dreher someone that you consulted at that time?

A. I'm not sure. I don't know when he started.

Q. And do you recall having any of the conversations you would have had about the appropriateness of advertising this reduction of 30 percent in arterial plaque with Mr. Dreher?

A. Not specifically.

Q. And during this more current time period of 2008 or 2009, do you recall any discussions with Mr. Dreher about whether or not it was appropriate to continue to advertise the 30 percent reduction in arterial plaque?

A. Not specifically, no.

Q. And in general do you recall any discussions about using the Aviram study in advertising in this later 2008-2009 time period?

A. I was -- I don't remember specific discussions, but as a general rule, we wouldn't have done it unless we thought it was okay.

Q. Okay. And I believe you had mentioned that the advertising in this time period was approved through various marketing channels at POM Wonderful.

Can you describe who at POM Wonderful would be part of those marketing channels, the position rather than the person, the different --

A. What time period?

Q. The 2008-2009 time period.

A. When you say -- I said it went through various departments in the company.

Q. Of POM Wonderful?

A. And of Roll.

Q. Oh, of Roll. Excuse me.

So could you list for me the departments that you can recall were part of the process.

A. Well, I can give you a general idea.

Q. Okay.

A. I can't tell you for sure that each and every item went through the same rigors as the one I mentioned

before.

But I believe that the marketing department would review. We would have proofreaders review it. You would make sure that the science was valid through Mark or whoever was running that department. You would make sure that legally we could say the things that we

were saying. You would -- I mean, I don't think they ever went up to Stewart unless -- very rarely. Matt of course and myself.

Q. All right. Now, in terms of the marketing department at POM Wonderful, during the time of -- that POM Wonderful has been in business, is it fair to say that there's been a fair amount of turnover in who was head of the marketing department at POM Wonderful?

A. Who's judging what a fair amount of turnover is?

Q. Well, let's try to go through it. I've tried this before.

Let's start with the present time.

Who is the head of marketing today?

A. Jan Hall.

Q. And when did she start with POM Wonderful, roughly, as head of the marketing department?

A. About six months ago.

Q. And prior to Ms. Hall, who was the head of the

marketing?

A. Paul Coletta.

Q. And how long did Mr. Coletta have that position?

A. Less than a year I think. He was a consultant.

Q. And do you participate in the hiring of the

head of marketing for POM Wonderful?

A. I participate to the extent on a very senior level -- I don't interview anyone below the chief marketing officer or a senior VP anymore, I haven't for years, so I would only interview for those -- you know, I would be part of the interview process for those and then really basically the finalists.

Q. And so you would interview, for example, Ms. Hall for the position?

A. Yes.

Q. She would be considered head of marketing?

A. Yes.

Q. And the same with Mr. Calltier (phonetic)?

A. Coletta.

Q. Coletta. Sorry.

A. Uh-huh. We would have interviewed him.

Q. And who else would be part of the process to decide who would be hired for the head of marketing?

A. I think you would have to talk to Matt,

Matt Tupper, about that. It depends on the job or whatever, but...

Q. Okay. And then going through the folks that had this position, who had the position prior to Mr. Coletta?

A. I don't remember. But I'm sure that you'll

remind me.

Q. I don't know if I know, but let's recall some of the names.

Is Diane Kuyoomjian, I believe -- was she head of the marketing department?

A. She was I think for a couple of years.

Q. And was she the one who was there prior to Mr. Coletta, do you know?

A. Yes. You're right.

Q. And prior to Diane K, who held the position as head of marketing?

A. I think it was Jen Stein.

Q. And how long did she have the position roughly?

A. She was with us a long time -- I don't remember exactly -- four or five years, and then she went on to Teleflora and then she had twins.

Q. And prior to Jen Stein, who held the position?

A. John Regal.

Q. And were there occasions in between these

various people that were hired to be head of marketing where Mr. Tupper himself had to handle the marketing department sort of in between hires for this position?

A. Well, on occasion. I mean, I don't know to what extent, but if we didn't have a senior leader, then he would step in, but he's very busy.

Q. Earlier we had referred to an FSI, and I just want to make clear.

What does the "FSI" term refer to?

A. Freestanding insert.

Q. And what is that used for in marketing terms?

A. They are the coupons that come with the Sunday paper. I don't know if Washington has them, but many markets in America do have them, and that's where you get a coupon for money off on a product.

Q. Okay. And POM Wonderful used freestanding inserts for POM Wonderful juice products?

A. On occasion.

Q. And did they also use it for the POMx pills?

A. I believe once. But I'm not sure. Once or twice.

Q. All right. If we could show Exhibit 471, and it's page 16.

In this ad, the "Decompress" ad, if we could go to the copy.

It states (as read): "Amaze your cardiologist. ...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 eight ounces a day."

First of all, do you recall this ad being used?

A. I know it was a billboard.

Q. Uh-huh.

A. I don't remember it as an ad.

What year was this, please?

Q. I believe the copy date is 2007.

And did you approve the body copy that was used in this ad?

A. I probably did not.

Q. If new body copy was going to be used in an ad, who would have to approve that body copy?

A. Either myself or Matt. Or whoever the chief marketing officer was, as long as it fit our guidelines.

Q. But if the copy was being used for the first

time, could it go out just under the head of marketing's approval or did you or Matt have to see it before it went out?

A. I believe that one of us had to see it, but you know, what we may have approved may not have been what actually ran because I never saw them after they ran,

and you know, I would approve a general direction but not every word.

Q. And we had discussed earlier that POM had commissioned consumer research where ads from the -- well, first of all, would this "Decompress" ad be considered an ad that was part of the dressed bottle campaign?

A. Yes.

Q. And we had talked about consumer research that was commissioned to see what consumers were taking away from the dressed bottle campaign. Do you recall that discussion earlier?

A. Yes, I do.

Q. And were you aware that the results from that consumer research demonstrated that 21 percent of the target consumers surveyed responded that the ads -- I believe there were four or five shown, one of which was the "Decompress" -- they responded that the advertisements -- when asked what are the specific

benefits you saw, based on the ads, they responded "helps/lowers blood pressure."

Do you remember getting the results of that survey and that specific takeaway that 21 percent felt the ad indicated that it helps to lower blood pressure?

A. I don't remember that specifically, but I

certainly remember that we did the research because the outcome was that we went to the other campaign.

Q. You went to the superhero campaign.

A. That's right.

Q. Okay. And do you recall any discussion about a concern that this takeaway was shown in the consumer survey that 21 percent responded that the ad indicated that it helps to lower blood pressure?

A. I don't remember that specifically, no.

Q. And have you had any discussions with any of the -- anyone at POM Wonderful about whether or not there was science to support a claim that the POM Wonderful juice would help lower blood pressure?

A. I don't think we make any claims that we lower blood pressure.

Q. And if consumers in a survey communicated that they took that away from the ad copy, would that be a concern to you?

A. Well, I'm not sure because 21 percent is a pretty low number and people are often confused about things. But we don't run it anymore and we haven't run it for years, so there must be some reason.

Q. But do you recall yourself having any conversations about whether or not the ad should be pulled based on the fact consumers were taking that

claim away?

A. I know that we pulled the ad. I don't remember what the reason was.

Q. And do you think that the company has science to make a blood pressure reduction claim?

A. I'm not sure. I don't think that we promote it, so -- I know that I've heard many people tell me that their blood pressure has gone down, but I don't know if we have any science about it.

Q. I'd now like to turn to Exhibit 1029. This is the front page of a document titled POM Wonderful Medical Research Portfolio Review, dated January 13, 2009, and it's CX 1029.

Have you ever seen this document before, Mrs. Resnick?

A. I don't remember. I don't go to the scientific summits. I went to one or two, but I don't go to them anymore.

Q. And again, the question was, do you recall

prior to today seeing this medical research portfolio review?

A. No. I don't remember.

Q. Let's just check on page 3 of the summary.

Do you recall ever seeing this particular page of the summary?

A. I'm sorry. Just -- no.

Q. Let's look at Exhibit -- Complaint Exhibit 188. This is a "Cheat death" ad that was provided by respondents.

I apologize for the small size, but this ad does have some critical information about the fact that it was placed March 27, '08. And I wanted to direct your attention again to the ad body copy.

And this body copy is similar to the previous ad we saw for "Decompress," and again the statement is that POM Wonderful 100 percent pomegranate juice is supported by 23 million of medical scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health.

Do you recall bringing back the "Cheat death" headline for use in 2008?

A. Not specifically, no.

Q. So you have no recollection of discussions about using the "Cheat death" image and headline?

A. Well, yeah, we had a lot of discussions because a few people felt that it was wrong to do, and so we pulled it. And I pulled it when Saddam Hussein was killed because I felt that people would look at this and think of him. And I don't remember when he was hung, but I know that that was one time I pulled it. And also

in the U.K. there was some sensitivity to it, so we pulled it then.

Q. And had it been running continuously then from the first time this slogan and noose was used in 2005 to when you pulled it, as you state, when Saddam Hussein was hung?

A. We have a very small advertising budget and lots of different approaches to advertising, so nothing ran continuously. We couldn't afford that, you know.

So we would often start advertising at the beginning of the fresh season, and it's also the cooler months, so that's when more people drink pomegranate juice, so if we were going to do any advertising, we would do it then.

But there were years that we didn't advertise because we had a very small crop and we didn't have any -- we didn't have a lot of product, so we would pull back on the advertising.

So it isn't as though there's some enormous

advertising budget and we're running these billboards and ads everywhere because we're not. It's much different than that, than it seems.

Q. So in 2006-2007, that's the time period where there was actually a shortage of juice available for manufacturing; is that right?

A. I don't remember the exact dates, but there certainly were two years that were very hard.

Q. But then in 2008 there was a push to sort of -- now that you had supply to bring the demand back for pomegranate juice; isn't that right?

A. Yes. After that, there was, yes.

Q. And so then you brought forward a lot of the print advertisements and ran print ads for the POM juice again; isn't that right?

A. Yes. But not a huge amount.

Q. And even during the time period where there wasn't any juice, the pomwonderful.com Web site, it was not pulled down, was it?

A. Oh, no. We told people that we were out of juice, and so that was another vehicle for letting them know that out of POM, so are we, you know.

Q. And so the pomwonderful.com Web site stayed through that period; is that right?

A. It did because there was product there; it just

wasn't enough to meet the demand.

Q. And in fact during that time wasn't it true that you offered to consumers that they could still get the blends that were available? Rather than the 100 percent pomegranate juice, there was still enough to make some of the blended juice products; is that right?

A. I don't know if that was mutually exclusive to the hundred percent POM, but I remember some discussion sort of around that.

Q. And the idea of the "Cheat death" ad is to convey that drinking POM juice may prevent heart disease; isn't that right?

A. The idea of the "Cheat death" ad is to prevent heart disease?

Q. Uh-huh.

A. No. The idea of the "Cheat death" ad is to make you laugh. And what we're saying here essentially with puffery is that you'll live longer if you -- you can cheat death, which we all know you can't.

Q. And what about the use of the statement that it's supported by 23 million of medical scientific research? Do you need research to euphemistically cheat death?

A. Well, we feel it supports our claim.

Q. And what is the claim that the 23 million in

medical scientific research supports?

A. That you can cheat death.

Q. And does it provide -- the copy says that the research is at leading universities, which has uncovered encouraging results in prostate and cardiovascular health, so what is the statement intended to say about

cardiovascular and prostate health?

A. Just what it says.

Q. And if we could look at Exhibit 456, please.

A. I still can't read this.

MS. HIPPSLEY: Your Honor, can we approach the witness?

JUDGE CHAPPELL: Go ahead.

BY MS. HIPPSLEY:

Q. And if you could turn to page 2 of the document, and there there's an entry of the 14th of November '08, and there's a consumer writing, from Theresa Coleman.

Do you see that --

A. I can't read this.

Q. -- on your page 2?

A. It's in four-point type. I can't read it.

Q. Well, I'll read it to you then.

The subject matter is: Remove the noose from POM now! And the consumer is stating that they love the juice, but given that you're demonstrating as a

love --

A. I can read it now because they made it bigger.

Q. Okay. Great.

So here's the statement by the consumer concerned, as you said, about the "Cheat death" ad and the connotations, and then if we can go over to the

response by POM Wonderful.

Okay. Why don't we do the first paragraph.

Can you read that, Mrs. Resnick?

A. I can.

Q. Oh, okay.

So in the first paragraph, the last sentence states, "Our advertising campaign is created with the intent of using imagery that irreverently and boldly conveys to consumers that drinking our juice may help prevent disease."

Do you agree with that statement?

A. It's part of an arsenal of a healthy lifestyle. "Prevent" may not have been a word that legally we're allowed to use, but, you know, who knows who wrote this and why. And I really -- this is one consumer. Do you think in any way, shape, or form that we wanted to do a racial slur to hurt people's feelings?

Q. No. I'm asking you about the sentence in the response by POM Wonderful that describes the ad campaign

as being created with the intent of using imagery that irreverently and boldly conveys to consumers that drinking our juice may help prevent disease.

A. These are not my words. Okay? I would never see this. I'm responsible for it, but I didn't write it, so I can't tell you why it's there.

Q. And the question is, do you agree with the sentence that the intent of the ad is to convey to consumers that drinking our juice may help prevent disease?

A. No. I think the intent of the ad is to stop you, make you chuckle and then go on and read and remember the shape of the bottle and the fact that we have a healthy message.

Q. And do you want them to read the rest of the body copy that's there about the 23 million in scientific research showing promising results for cardiovascular health?

A. Of course.

Q. And the POM Wonderful consumer affairs person, is that someone who is part of the marketing department in POM Wonderful?

A. I'm not sure where that position falls or who it answers to. But it's certainly part of our marketing -- you know, our overall marketing effort is to be

available to consumers to answer questions.

Q. Okay.

A. Are you finished with this document?

Q. Yes.

A. Okay. Now I'm going to turn to the area of the prostate health and the advertising there.

And first why don't we show Complaint Counsel's Exhibit 815.

And this study -- could we approach the witness, Your Honor?

JUDGE CHAPPELL: All right.

BY MS. HIPPSLEY:

Q. We'll give you a hard copy.

A. To have this light in your face for hours really gives you a headache.

Q. I can understand.

And Complaint Exhibit 815 is a copy of the published study, and it's titled Phase II Study of Pomegranate Juice for Men with Rising Prostate-Specific Antigen Following Surgery or Radiation for Prostate Cancer.

Have you read this published study?

A. No.

Q. Did you discuss the results of this study in the time it was published, which is 2006, by the

American Association for Cancer Research?

A. I'm sure I did.

Q. And could we blow up the grant support statement.

And in a footnote at the base of the published document, there's an item, "Grant support: Lynda and

Stewart Resnick Revocable Trust" and two other grants.

What is the Lynda and Stewart Resnick Revocable Trust?

A. It's our will.

Q. Okay.

A. I believe.

Q. And does this mean that the revocable trust -- are you aware that it sponsored this study that was done at UCLA?

A. No. Because -- no. It's a technicality I think. I mean, I'm not a lawyer. We sponsored this study.

Q. So "we" meaning --

A. Me and Stewart.

Q. Okay. And "sponsored" means that you provided the financial support for the study to be conducted; is that right?

A. Yes.

Q. And then it also states that you and Mr. Resnick

own the POM Wonderful company, which provided the juice for the study; is that right?

A. Yes.

Q. And then -- and do you remember at the time the study was published in 2006 that you were eager to use it in marketing for POM juice and POMx? Is that right?

A. I remember that we were having a dinner party and Dr. Belldegrun came running into the house and he had just seen some of the results and he was just -- he's a surgeon and -- a cancer surgeon at UCLA, and he was just -- he said, I've never seen anything like this. There's no substance at the time. There was nothing that would prolong the life of a man who had prostate cancer who was treated with either surgery or radiation and then their PSA started to rise. There was nothing that would increase the doubling time.

And he was over the moon about it, and it was -- the whole dinner party we talked about that, so obviously it was something that we wanted to tell the world. My grandfather and my uncle died horrible premature deaths from prostate cancer, and it's very important to me that we do anything that we can because my children are at great risk because of heredity, so obviously I wanted the world to know.

Q. Let's show Exhibit 60 page 1, and if we could

pull up the top part.

And this is an e-mail from yourself, dated July 1, 2006, to various people at Paramount Agribusiness. Earlier you had said that you didn't recognize that e-mail that was associated with Paramount and your name.

What is the Paramount Agribusiness?

A. That is the farming and processing operation that grows the Wonderful pistachios, the almonds, the Cuties, and the pomegranates.

Q. And here this e-mail is being used -- is it possible that there was an e-mail assigned to you as part of the Paramount business?

A. Oh, it's possible. I just never went there or -- I can't even access it on my computer, so...

Q. Okay.

A. But, you know, sometimes the Internet people or the tech people would take something and bounce it over to my computer, my own personal, you know, e-mail account, so that may be the way this occurred.

Q. And this e-mail is directed to Matt Tupper at Paramount Agribusiness, and this is 2006.

At this time he was president or CEO of POM Wonderful; isn't that right?

A. I don't remember, but I'll take your word for

it.

Q. But he was associated with POM Wonderful?

A. Of course.

Q. And was he associated with Paramount Agribusiness?

A. Not specifically I don't believe.

Q. So his position at this time would have been either the president or the CEO of POM Wonderful; right?

A. I do not dispute that I got any of these e-mails, that I ever saw these things when they were published. I only -- you asked me do I remember.

Q. No, I'm not going there. I'm just trying to make sure that Matt Tupper getting this e-mail was because of his business with POM Wonderful rather than with the Paramount Agribusiness.

You're directing this e-mail to people at POM Wonderful despite the e-mail addresses; isn't that right?

A. Yeah, it's odd that they have a different e-mail address because I would never think of that e-mail address, but I think that that's not the issue here, is it?

Q. No.

A. It's the content.

Q. The issue is you were sending the e-mail to folks at -- associated with POM Wonderful.

A. Yes.

Q. And here you describe that there's stories all over the Internet this morning on the subject of the prostate cancer research, but sadly they don't mention

POM Wonderful, and you state that "We can't push it too much because we don't have the juice."

So this is the time period where there was a shortage of juice that you've described previously; is that right?

A. Yes.

Q. And then you go on to say that by the time -- I'm in the second paragraph -- "By the time we have the juice in the marketplace it will be so late to promote the facts. We should have a full court press on the following:

"Get the study completed with rats and POMx ASAP. I assume the human study with POMx in the works. If it isn't, I want a timetable on Monday when it will be and the end date. Get POMx liquid and pills done," et cetera.

So was the purpose of this e-mail to make sure that the POMx was being prepared to go to market at this time?

A. Well, that was one of the things.

Q. So you wanted POMx to be available so that you would be able to then use the prostate cancer research to market the POMx pills; isn't that right?

A. Well, I think you have it wrong, you know. I think we wanted the POMx pills available so that if

there was ever another shortage for whatever reason in this world -- we all see what's happening with the climate, and so forth -- that we would have a way to market POM to consumers.

So we needed it for -- you know, there was no other way to get POM into your system if for some reason we had a blight on our crop or something else happened.

Q. Okay. Now I'll show you what's been marked as Complaint Counsel's Exhibit 61.

And part of this e-mail train starts with an e-mail from Lynda Resnick, yourself. Again, the date is July 1, 2006. And it's being sent to a variety of people.

And if we continue on the second page. It's 2, 61-2.

And if you could blow up the top again.

And it's the continuation of your e-mail, subject: Prostate cancer research on Yahoo! News.

And then the e-mail from yourself is that there was an article all over the Internet. "The news on POM Wonderful juice is amazing. Our new POMx is even stronger, although those trials continue."

You explain how the information is published in the esteemed Journal of Urology and states, "Our

research (not yet published) indicates that drinking pomegranate juice may also delay the onset of this dreaded disease."

So first the news about POM Wonderful juice is amazing, this is based on the study that we just looked at, the Pantuck study in 2006?

A. I assume.

Q. All right. And what is the basis for the statement that our new POMx is even stronger?

A. At the time, we thought it was going to be stronger. We thought that the pill was going to have more than eight ounces, but it didn't. It had the equivalent of eight ounces.

And this is an e-mail that I wrote to my personal friends.

Q. Right. Okay.

And what is the research that is not yet published? Is that referring to research on the POMx pill?

A. I'm not sure.

Q. And then if you can go down further into the document, at the bottom if you could bring up the article that's attached to the e-mail.

That was the same page 2.

And here is the article that you were referring

to on news.yahoo.com, Pomegranate Juice May Be Cancer Weapon.

And it states, "A daily glass of pomegranate juice showed potential for slowing the growth of prostate cancer in a small study, but more evidence is needed before doctors recommend it, U.S. scientists said on Saturday."

So when you were talking about the enthusiasm of Dr. Belldegrun, did you have further conversations where your own scientists cautioned that it was a small study and that more evidence was still needed?

A. I was always led to believe that it was pretty amazing. And you know, you have to remember that we had done studies in the test tube, we had done studies in rats, so this was, you know, the first human study, but we had lots of basic research before this.

Q. And who led you to believe that the results were pretty amazing?

A. I told you.

Q. I'm sorry. Could you --

A. Dr. Belldegrun and others.

Q. And who were the others?

Did Dr. Liker lead you to believe that the results were amazing?

A. Yes.

And Michael Milken, who's the head of a prostate cancer research foundation, and they recommended to everyone and the people -- the scientists that he works with, I mean, everyone was very excited about the news.

Q. And did you have discussions with Dr. Dreher about --

A. Yes.

Q. -- the results?

A. Well, I don't know if he was there then, but --

Q. Not at this specific moment in time, but in this time period where you found out about the results in 2006, did you have any discussions with Dr. Dreher about what the results indicated and what the state of the science told you at that time?

A. I can't remember.

Q. Okay. Let's show Exhibit 65, Complaint Counsel's Exhibit 65.

And can you blow up the top part of the

document.

Thank you.

This is a press release that states, "POMx, a highly concentrated form of healthy pomegranate antioxidants, becomes available to consumers for the first time."

And then if you could highlight the date, please.

And this was issued July 10, 2006.

And then if we could go to the second page -- first of all, do you recall this press release being issued in July of 2006 regarding the POMx dietary supplement?

A. I'm sure I read it because this is, you know, the type of thing that I would definitely read.

Q. Okay. And does the time sound about right that this press release was put out in the 2006 time, summer of 2006, about the POMx dietary supplement?

A. I'm not sure.

Q. But if it's stated there on the document, then your press release would have a date that was accurate; is that right?

A. I assume. Of course.

Q. And if we go to page 2 of the press release, which is 65 page 2, and if you could highlight the top

paragraph, please.

And so this was being issued on July 6, and it's a paragraph stating, "The POMx research comes as the benefits derived from the Wonderful variety of pomegranates 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 eight ounces of POM Wonderful pomegranate juice daily prolonged post-prostate surgery PSA doubling time from 15 to 54 months," with a cite. "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."

And so -- and you stated that you saw this before it went out; is that right?

A. Yes.

Q. And you would have approved the language in that paragraph used to describe the study?

A. I assume that I did. I wasn't in Los Angeles during this time, but I guess I saw it via e-mail or something.

Q. Now, at the time this press release was issued,

was the POMx supplement pills ready for market at this time in the summer of 2006?

A. I assume so. Why would we talk about it.

Q. Well, let's look at Exhibit 1347, and that might refresh your recollection.

I'm sorry. We don't have that exhibit.

But do you recall that the first POM pills advertising, print advertisements, didn't appear until 2007?

A. No.

Q. So you don't know exactly when POMx pills were available for market?

A. No.

Q. Let's look at Complaint Counsel's Exhibit 70.

And if we could show the second e-mail.

Again, this is an e-mail from yourself, dated July 24, 2006, to Fiona Posell and John Regal, with a copy to Matt Tupper, Urgent.

And there's in the second paragraph a statement that "Although there is nothing about POM, only tea in the PR of 2006, what about the medical breakthroughs. The article on prostate cancer is very important," et cetera.

So at this time was the medical breakthrough something that was important to the marketing of the

POM Wonderful products?

A. I don't understand your question.

Q. There's a statement here that there's nothing about POM, only tea in the PR for 2006.

Now, is that because there was a shortage of POM juice at that time?

A. I'm not sure. But I -- I don't want to guess because that's inappropriate.

Q. Okay. And then there appears to be a statement that the article on prostate cancer is very important, what about the medical breakthroughs.

Were you asking -- Ms. Posell is in charge of public relations; isn't that right?

A. Yes.

Q. And were you asking that there be PR about the prostate cancer study at that time?

A. I don't know. I don't know who "him" is. I don't know who I'm speaking with tomorrow. The whole thing is just so odd, out of context. I don't know what it means.

Q. And in the next sentence, Mr. Resnick and I have discussed our approach to an interview and medicine has been a huge part of our success.

Do you recall giving a press interview in the summer of 2006 where you wanted to discuss the prostate

cancer study?

A. No.

Q. And how it would relate to POMx dietary supplements?

A. I do a lot of interviews. I don't remember.

Q. If we can call up Complaint Counsel's

Exhibit 72.

This is another e-mail chain, and let's start with the middle of the document where the e-mail is from Allan Pantuck.

There's an e-mail from Dr. Pantuck to Dr. Liker, and there's a description here -- well, actually first let's go -- well, no. We'll stay here. Okay.

So there's a description by Dr. Pantuck to Harley, Harley Liker, and he states (as read): "My feeling is that they are making a mistake. They got a huge amount of publicity from the study, and they got the best kind of publicity because it was other reputable sources saying nice things... Any claims that POM makes on its own behalf will be seen as self-serving and looked at with suspicion."

Do you remember having any discussions with Dr. Liker about concerns by Dr. Pantuck about the -- POM Wonderful publicizing his study?

A. No. But that isn't what this says.

Q. Okay. Do you recall any discussions with Dr. Liker about concerns that Dr. Pantuck had that any claims that POM would make on its own behalf would be seen as self-serving?

A. If I heard that, I wouldn't pay attention to it. Dr. Pantuck is not a marketing person.

Q. And if you look to the second paragraph, Dr. Pantuck goes on to explain to Dr. Liker that he thinks it's appropriate for them to link to their Web site, to the cancer paper, published paper, to The New York Times article, the Newsweek article, various press releases.

"By doing this, they are making external information available to others. My own feeling is that if they create their own content and display it on their own Web site, I think this is marketing, though I agree, the line is somewhat fuzzy. I am not sure what it means to say POM juice shows 'promise for prostate cancer.' I think the lay interpretation will be that it shows promise for the treatment of prostate cancer."

And again, does that refresh your recollection of any discussions with Dr. Liker about Dr. Pantuck's concern?

A. No.

Q. And then if we go to the top of this chain,

there's an e-mail from Matt Tupper, dated August 2006, to Lynda Resnick, with a copy to John Regal, and the subject is the prostate cancer ad.

And it states: "Lynda, I am writing to alert you to a potential issue with our prostate cancer ad.

"Bottom line: Even if we word the ad very

carefully, running it may damage our relationship with Dr. Pantuck and Dr. Belldegrun, who are just beginning to start up a new prostate cancer POMx study at UCLA."

It expresses that "it may irritate the UCLA medical review board, whose support we need to pursue future research."

And again, does this refresh your recollection of discussing with Mr. Tupper any concerns that either Dr. Pantuck or Dr. Belldegrun had about POM Wonderful running ads based on their prostate cancer study?

A. I -- no. I mean, it's an overreaction. We're still very friendly with Arie Belldegrun, and Allan Pantuck I think did a reasonable study, so I think that Matt was just concerned.

Q. And do you know whether or not ad copy that had been prepared for a prostate cancer ad was actually pulled back, a decision was made not to run an ad based on their concerns?

A. No.

Q. So you don't recall any discussion with Matt about stopping a prostate cancer ad in August of 2006?

A. No. I think we've had -- we've mentioned it after that.

MS. HIPPSLEY: I'll just do one more exhibit, Your Honor, and then we'll -- if that -- to finish

this.

JUDGE CHAPPELL: We're not stopping before 5:30.

MS. HIPPSLEY: Oh, okay.

BY MS. HIPPSLEY:

Q. All right. Let's look at Complaint Counsel 71 page 1.

And this states that it's final copy for prostate cancer ad, dated August 4, '06. The headline is "Wonderful variety pomegranate juice shows promise for prostate cancer," a secondary headline "Findings from a small study suggest that pomegranate juice may one day prove an effective weapon against prostate cancer," a quote from The New York Times article, and then the statement "This is not a cure, but we may be able to change the way prostate cancer grows," a quote from WebMD citing to Dr. Allan Pantuck, and then a -- the ad goes on to describe the study.

Do you recall if this ad was actually placed by

POM Wonderful?

A. This doesn't look like an ad to me. I don't know what it is --

Q. Well, it's --

A. -- we run such an ad.

Q. It states at the top that it's final copy for

prostate cancer ad.

Have you ever seen this before?

A. No. And it doesn't look like any ad we've ever run.

Q. Right.

And again the question is, was this ad developed and then not run based on the concerns that Dr. Pantuck had?

A. I have no information about that.

Q. And you had no discussions with Matt Tupper --

A. That I can remember.

Q. And again, you had no discussions with Mr. Tupper about that?

A. I don't remember any.

Q. And then as you yourself stated I think a couple of questions ago, POM did disseminate numerous advertisements that relied on the Pantuck research; isn't that right?

A. Yes.

Q. And I believe in your book, which is at page 4, you have stated that studies suggested that pomegranates have a powerful effect against prostate cancer; isn't that right --

A. Yes.

Q. -- that's in your book?

All right. And then -- but would you agree that POM currently does not have any studies that prove POM juice can prevent cancer? Isn't that right?

A. That POM juice can prevent cancer?

Q. Right. Prove that POM juice can prevent cancer.

A. Not to my knowledge.

Q. Okay. Could you show Complaint Exhibit 1426 page 9.

And do you recall this ad being used by POM Wonderful, "I'm off to save prostates"?

A. Yes.

Q. And the body copy there, "Man by man, gland by gland, The Antioxidant Superpower is 100 percent 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."

What was the message that you were intending to convey in this ad?

A. That we were good for prostates.

Q. And "I'm off to save prostates" would mean that you would prevent prostate cancer; isn't that true?

A. Absolutely not.

Q. And what prostate health then are you referring to?

A. The Pantuck study and all the work that we did in the test tubes and with rats, and so forth, all the basic science.

Q. So that your intent was to state that the pomegranate juice based on Pantuck would then treat prostate cancer?

A. You know, I have such a blinding headache that I don't think that I can really answer any more questions because this -- this -- I'll wear sunglasses tomorrow or something.

But I've answered this over and over again. You read the copy. It says that it's backed by research, that we improve prostate health. We don't say anything about preventing prostate cancer.

So we have other studies about -- early on about -- you know, I can't even think because my head hurts so bad.

I don't want to misrepresent to you, but don't put words in my mouth. Okay?

Q. I was not putting words in your mouth. I was asking you the question that did you intend for this study -- you said based -- you were using it based on, for example, Dr. Pantuck's research, so then was the

intent of this advertisement to communicate to consumers that POM Wonderful juice would treat prostate cancer?

A. No.

Q. And what's --

A. It was -- you know, it was meant to say that we're good for your prostate, which is exactly what it says.

Q. And what does "good for your prostate" mean based on 32 million in medical research?

Have you done research on benign prostate hyperplasia, for example?

A. I don't even know what that means. I'm not a scientist.

Q. So what do you mean by "prostate health"?

A. A healthy prostate, you know -- I mean, I don't want to speak as a scientist because I don't know what I'm talking about, but I have been told that it's good for prostate health, and therefore we've put it in an

ad.

We're not trying to misrepresent to anybody.

JUDGE CHAPPELL: All right. Let's call it a day.

I need your estimate on how much time you need tomorrow for this witness.

MS. HIPPSLEY: I think that the direct will definitely be done by late morning I would guess. And I don't know how much time for redirect.

MR. FIELDS: Based on today, I'll either say "no questions" or I'll have two short ones, so unless something happens tomorrow that changes that, we'll be done.

JUDGE CHAPPELL: And you don't have any other witness lined up?

MS. HIPPSLEY: The problem is that Ms. Posell is a third-party witness and she was only available on Thursday. She's coming from California. My understanding is that she's here on business tomorrow.

Now, I don't know if Ms. Leow, who is a company employee, is already in Washington. That would be the other -- she's flying in tomorrow?

JUDGE CHAPPELL: Well, the problem I see, we're just starting this, and I'm seeing this week probably two days that are going to be partial days, and we need

to move this along.

MS. HIPPSLEY: I understand, Your Honor. And we will finish the case in the time frame we were given before the ProMedica case picks up again.

JUDGE CHAPPELL: So you're going to consult, and there's a chance there will be another witness you can

call this week.

MS. HIPPSLEY: They're all in California. That's part of the difficulty.

JUDGE CHAPPELL: I thought you just referred to someone who may be in town.

MS. HIPPSLEY: Ms. Posell is coming to Washington, but my understanding is that she's here on other business tomorrow. We can check with her, though, to see if she could come in in the afternoon perhaps if her meeting is in the morning.

JUDGE CHAPPELL: Is she with respondents?

MS. HIPPSLEY: She's a third party. She's an ex-employee. But we will see if we can make her available tomorrow.

JUDGE CHAPPELL: Okay. We're starting at 9:30 in the morning.

We're in recess.

(Whereupon, the foregoing hearing was adjourned at 5:37 p.m.)

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C E R T I F I C A T I O N O F R E P O R T E R

DOCKET/FILE NUMBER: 9344

CASE TITLE: In Re POM Wonderful LLC, et al.

HEARING DATE: May 24, 2011

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: MAY 31, 2011

JOSETT F. WHALEN, RMR

C E R T I F I C A T I O N O F P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

ELIZABETH M. FARRELL