

FEDERAL TRADE COMMISSION

I N D E X

POM WONDERFUL LLC

TRIAL VOLUME 5

PART 1, PUBLIC RECORD

JUNE 6, 2011

WITNESS:	DIRECT	CROSS	REDIRECT	RE CROSS	VOIR
DREHER	525	586			
PERDIGAO	589				

EXHIBITS	FOR ID	IN EVID	IN CAMERA	STRICKEN/REJECTED
----------	--------	---------	-----------	-------------------

CX

None

RX

None

JX

None

DX

None

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) Docket No. 9344
STEWART A. RESNICK,)
LYNDA RAE RESNICK, and)
MATTHEW TUPPER, individually)
and as officers of the)
companies.)
)
-----),

MONDAY JUNE 6, 2011

9:30 a.m.

TRIAL VOLUME 5

PART 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: Susanne Bergling, RMR-CRR-CLR

APPEARANCES:

ON BEHALF OF THE FEDERAL TRADE COMMISSION:

HEATHER HIPPSLEY, ESQ.

MARY L. JOHNSON, ESQ.

SERENA VISWANATHAN, ESQ.

DEVIN WILLIS DOMOND, ESQ.

THEODORE H. HOPPOCK, ESQ.

Federal Trade Commission

Bureau of Consumer Protection

601 New Jersey Avenue, N.W.

Washington, D.C. 20001

(202) 326-3285

hhippsley@ftc.gov

ON BEHALF OF THE RESPONDENTS:

JOHN D. GRAUBERT, ESQ.

SKYE LYNN PERRYMAN, ESQ.

Covington & Burling LLP

1201 Pennsylvania Avenue, N.W.

Washington, D.C. 20004-2401

(202) 662-5938

jgraubert@cov.com

APPEARANCES: (continued)

ON BEHALF OF THE RESPONDENTS:

BERTRAM FIELDS, ESQ.

Greenberg Glusker

1900 Avenue of the Stars

21st Floor

Los Angeles, California 90067

(310) 201-7454

-and-

KRISTINA M. DIAZ, ESQ.

BROOKE HAMMOND, ESQ.

JOHNNY TRABOULSI, ESQ.

Roll Law Group P.C.

11444 West Olympic Boulevard

10th Floor

Los Angeles, California 90064

(310) 966-8775

kdiarez@roll.com

P R O C E E D I N G S

- - - - -

JUDGE CHAPPELL: Okay. Docket 9344, we will reconvene. Do we have anything to take care of before the first witness?

MR. GRAUBERT: No, sir.

MR. HOPPOCK: No, Your Honor.

JUDGE CHAPPELL: All right. Let's go.

MR. HOPPOCK: Good morning, Your Honor. Ted Hoppock for Complaint Counsel. Complaint Counsel will call Dr. Mark Dreher.

JUDGE CHAPPELL: Go ahead.

Whereupon--

MARK DREHER, Ph.D.

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

DIRECT EXAMINATION

BY MR. HOPPOCK:

CHAPPELL: HOPPOCK:

Q. In late 2010, you entered a consent agreement with the FTC. Is that correct?

A. That's correct.

Q. And that consent agreement obligates you to provide information to the FTC?

A. Yes.

Q. And that consent agreement also obligates you to provide oral testimony, if asked by the FTC?

A. Yes.

Q. And are you also appearing here today pursuant to that requirement of your consent agreement?

A. Yes.

Q. If you would, please summarize your education after high school.

scientist, as a person in product development, and as a director and vice president in these corporations, leading nutrition science research.

Q. And did there come a time when you were employed by POM Wonderful?

A. Yes.

Q. And when was that?

A. Starting August 2005.

Q. Okay. And about how long were you employed by POM?

A. Approximately four years.

Q. And when did you leave POM?

A. Let's see. June -- June 1st, 2009.

Q. Okay. And what was your position at POM?

A. Vice president of scientific and regulatory affairs.

Q. And did your job title ever change during the course of your employment at POM?

A. The job title remained officially the same, but I modified myself into focusing on science, chief science officer.

Q. And can you give me a general overview of what your duties as vice president of scientific and regulatory affairs entailed?

A. Primarily, it entailed exploratory research.

Q. Okay. And what is exploratory research?

A. Looking at new products, such as, you know, POMx, one of the -- and then to develop clinical and basic science for new applications for POM brand products.

Q. And, when you say "basic science," what does that refer to?

A. It refers to test-tube, animal studies, and preclinical research.

Q. And that was something you were responsible for at POM?

A. For exploratory products, yes.

Q. And you also mentioned clinical research. What does that involve?

A. It involves setting up studies, contracting studies with universities and contract research organizations, looking at developing the basic research to support clinical studies and to carry out the studies with different universities.

Q. Okay. And what responsibilities did you have with regard to the conduct of these clinical studies?

A. I provided the materials for testing. I helped in organizing the objectives for the studies, and basically arranging for contracts and funding of research.

Q. And was there anyone else at POM who also had responsibility for clinical studies besides yourself?

A. Several people. Dr. Harley Liker on core research, and some of the my staff, Keith Martin, who reported to me, and Pamela Josephson.

Q. And did Ms. Josephson also report to you?

A. Yes. Yes, she reported to me, too.

Q. And you mentioned Dr. Liker. Who is Dr. Liker, to your understanding?

A. He is a consultant for the Resnicks who was responsible -- he was the chief medical officer, basically, who was responsible for core research relating to cardiovascular, prostate, and ED, erectile dysfunction.

Q. When you say "core research," what does that refer to?

A. Those -- cardiovascular, prostate were the primary areas of research.

Q. And to whom did you report at POM?

A. Matt Tupper, the president of POM.

Q. And was there any other person you reported to from time to time?

A. I would report, to a certain extent, to Harley Liker to help him manage the logistics associated with some of the larger studies.

Q. And as part of your interaction with Dr. Liker, did you have any sort of periodic, regular meetings?

A. We had roughly weekly meetings for the first 2 1/2 and 3 years, and then they were less frequent than that in the last year of my employment.

A. Yes.

Q. And what are they?

A. They are roughly weekly Thursday meetings with Lynda for -- organized by marketing to review a whole range of topics.

Q. Okay. And you mentioned Lynda. Is that Mrs. Resnick?

A. Yes. That's right.

Q. And did you attend these meetings with Mrs. Resnick on a regular basis?

A. I wouldn't say regular, but I attended the meetings, you know, frequently, but not a regular, per se, especially the last two years of my employment.

Q. When you refer to the last two years of your employment, are you -- did I understand you correctly that you were less regular in attendance at the meetings than you were earlier?

A. Yes. That's right.

Q. Okay. And how lengthy were these meetings with Mrs. Resnick?

A. Approximately an hour to two hours, somewhere in that range.

Q. And when you attended these meetings, did you stay for the totality of the length of the meetings, typically?

A. Generally not.

Q. Okay. And could you explain how much or what part of the meetings you did attend?

A. I would attend -- I would come in and have lunch. I would come in to -- if there was a topic that there was a brief update, I would attend and then generally leave shortly thereafter.

Q. Okay. And I think you started to touch on it, but what role would you play at these meetings with Mrs. Resnick?

A. Provide exploratory research updates, if called for, but that was my primary role.

Q. Do you know what a creative brief is?

A. I've heard the term. I don't know -- I -- it's a -- it's a marketing term; but I don't know completely what is involved, no.

Q. Okay. Were you ever asked to review a creative brief for a POM Juice advertisement?

A. A creative brief? I -- I don't understand what -- could you repeat your question?

Q. Sure.

I'm asking you, during the course of your employment, did anyone at POM ask you to review a creative brief for a POM Juice advertisement?

A. I don't recall specifically that.

Q. Okay. Dr. Dreher, did you ever advise POM that

between you and Dr. Heber in late June of 2006, correct?

A. Yes, that's right.

Q. And who is Dr. Heber?

A. He's a professor at the UCLA School of Human Nutrition.

Q. And does he have any involvement with scientific issues with POM?

A. He's a consultant with POM.

Q. And do you have knowledge of the type of -- the types of work he does for POM?

A. At the time I worked for the company, we worked on various projects. So, I had knowledge of his activities.

Q. So, you worked with Dr. Heber?

A. Yes. That's right.

Q. Okay. And was one of the purposes of contacting Dr. Heber in these emails that are in CX 812 to get a quote from him?

A. Yes. That's right.

Q. And what was the purpose of obtaining -- of obtaining a quote from Dr. Heber at this time?

A. I believe in this time frame it was for a press release.

Q. Okay. And did someone ask you to obtain a quote from Dr. Heber?

A. Yes.

Q. Who was that?

A. Fiona Posell.

Q. And do you have an understanding of why Ms. Posell asked you to get the quote from Dr. Heber, rather than her asking him directly?

A. Because he was a colleague of mine, and I was in regular communication with him.

Q. Now, let me direct your attention to Dr. Heber's email to you, near the top of CX 812, which is timed at 11:29 a.m.

A. Yes.

Q. And I think it's on the screen. Whatever is easier for you, to look at the screen or in the notebooks, is fine.

Does that email contain the final quote you obtained from Dr. Heber?

A. I don't recall if it's the final quote, but it looks -- generally, the elements are there of the final quote.

Q. Did you transmit Dr. Heber's quote to Ms. Posell?

A. I believe so, yes.

Q. To your knowledge, was Dr. Heber's quote also used in POM advertising?

A. I believe so.

Q. Let me ask you to look at CX 1426, at pages 38 to 42.

A. Yes.

Q. Do you have that?

A. I do.

Q. All right. And if I could ask -- direct you, then, to page 41 of CX 1426, which I think is on the screen as well.

A. Yes.

Q. In the lower right-hand corner, there is a quotation that is attributed to Dr. Heber. Is this the quotation that you were referring to that was also used in advertising?

A. I believe so.

Q. Now, if you would go back to Exhibit 812, the email chain.

A. Sure.

Q. I don't mean to make this confusing, but...

A. Okay.

Q. And I've asked to be put up on the screen, just for your convenience, a split screen that contains the quote from Dr. Heber in the brochure that's CX 1426 at the top of the page, and the quote from Dr. Heber that was in CX 812 at the bottom of the page.

If you take a moment to compare them, tell me if you agree that they're -- the quote in 1426 is not identical to the quote in CX 812.

A. I agree.

Q. And do you know how Dr. Heber's quoted language in CX 1426 came to be different from the one in CX 812?

A. I can't give you the details, but it's basically the same. The basic science is laboratory science, and I think there was some redundancy, and the basic science and laboratory science were the same thing. So, it's basically the same message. But I don't know anything beyond 2006 on this quote.

Q. Okay. So, you say you don't know. Can I assume, then, you were not the person -- strike that.

Did you ask Dr. Heber if his quote could be changed?

A. I don't recall.

Q. Do you recall if you asked Dr. Heber for his permission to have his quote be changed?

A. I don't recall.

Q. All right. Now I am going to ask you to take a look at another email that's marked as Exhibit CX 813.

A. Okay. I'm there.

Q. Okay. And is CX 813 an email exchange between you and Dr. Aviram?

A. Yes.

Q. And who is Dr. Aviram?

A. He's a -- the first researcher that POM Wonderful worked with. He is a consultant and researcher at POM Wonderful.

Q. And do you have knowledge of the types of work he does for POM?

A. Yes.

Q. And can you explain, in broad strokes, the sort of work that he does for POM?

A. Primarily basic research and initial exploratory clinical science.

Q. And was one of the purposes of contacting Dr. Aviram, at the time of this email, to get a quotation from him?

A. What was your question again?

Q. I'm sorry, yes.

With regard to the email that's marked as CX 813 --

A. Yes.

Q. -- was one of the purposes of this email exchange to get a quote from him?

A. Yes.

Q. And was the -- the reason for obtaining a quote from Dr. Aviram at this time the same as it was from

Dr. Heber?

A. Yes. That's my understanding.

Q. Okay. So, at the time, it was to be used in a press release?

A. That was my understanding.

Q. And looking at Exhibit 813, the email from Dr. Aviram to yourself, is that the quotation he provided to you at that time?

A. I believe so.

Q. And did you transmit Dr. Aviram's quote to Ms. Posell as well?

A. I believe so.

Q. And, to your knowledge, was Dr. Aviram's quote also used in POM advertising?

A. I believe that that was the case.

Q. And let me ask you, then, to take a look back at CX 1426, which is the brochure for POMx products that we looked at previously, and specifically at page 42.

A. Okay. Yes, I see it.

Q. In the upper left-hand corner of page 42, is that the quotation you were referring to from Dr. Aviram that was used in POM advertising?

A. I believe that is the quote.

Q. Okay. Then, again, I'd like to have you compare the quote in 1426, the POMx brochure, to the quote

Dr. Aviram provided in the email, marked CX 813. And we've put it on the split screen for your convenience.

A. Here's the one thing that I don't know, if there was communication with Dr. Aviram outside of my communications with him, because he was a very -- he's a consultant beyond my consulting. He worked and he communicated with many people within the company. So, I don't know anything --

Q. Do you agree that the quote in CX 813 is different from the quote in CX 1426?

A. It appears to be different in wording but the same -- in my understanding, the same message.

Q. Were you involved in asking Dr. Aviram if it was okay to change his quotation for use in advertising?

A. I don't recall.

Q. All right. I would like to briefly ask you to look at a document that's marked as CX 94.

A. (Document review.) Yes.

Q. Okay. The -- there are two emails here, but the one that fills most of the page is from Charlene Rainey to Staci Glovsky and copied to other people, including yourself. Is that correct?

A. Yes, that's right.

Q. And who was Charlene Rainey?

A. She was a consultant who worked for me, ad hoc

A. Yes, I see it.

Q. What are you asking for in that item number 1?

A. I am asking for Dr. Heber and Dr. Seeram to start some research.

Q. And what was the subject matter of the research?

A. It was to do a -- the most comprehensive analysis of antioxidants of juice that has ever been performed before, to get a really strong and good comparison of what the true antioxidant content is of the juice. So, it was a major study of importance.

Q. Okay. And you used the phrase "fast track." It references "juice or antioxidant beverage -- antioxidant publication -- fast track." Do you see that?

A. Yes.

Q. What did you mean by "fast track"?

A. Well, I didn't want to get caught in the academic malaise. I wanted the study to be looked at as something that could get -- that they could work it through their slower research process at a fast track.

Q. And was the research you were requesting in item number 1 intended to be used, in part, to support an advertisement?

A. Ah, yeah. It was in part to do good research, and we didn't know where POM Wonderful was going to come out, but we were -- whatever the results, we wanted to

have it published.

Q. Okay. So, you said, in part, it was to do good research, but was -- was it also intended, at least if it came out the way you hoped, to be used to support an advertisement?

A. I think that was a possibility.

Q. And did Drs. Heber and Seeram conduct the antioxidant study requested?

A. Yes, they did.

Q. All right. Dr. Dreher, when you first began working at POM in 2005, did you undertake any effort to familiarize yourself with the research that POM had conducted and was conducting?

A. I did, yes.

Q. Okay. And, in that regard, let me ask you to look at a document that is numbered as CX 764.

A. (Document review.) Yes, I see that.

Q. Okay. And CX 764 is a chain of emails that you either received or sent, correct?

A. Yes. That's correct.

Q. And, at the very bottom of page 1 of CX 764, there's an email that's sent from Risa Schulman, and then it continues on to page 2 to indicate it was sent to you, correct?

A. I believe that -- if you say so. I think that's

correct.

Q. Okay. If you just look at the bottom of page 764, the very last line, do you see where it says, "From: Schulman, Risa"?

A. I'm trying to find it. Yes, I see it now.

Q. Okay, sorry. And then if you continue on to page 2, do you see that it's addressed to you?

A. Yes.

Q. Okay. And who was Risa Schulman?

A. She was previously a director of research for POM Wonderful before I joined the company.

Q. And was the purpose of Ms. Schulman's email to you of October 7, 2005, to send you some summary data regarding POM's research activity?

A. I believe so, yes.

Q. Okay. And then if you go back to page 1 of CX 764, the next email up from the bottom, it indicates that you forwarded the research information summary that Ms. Schulman sent to you to Dr. Liker. Is that right?

A. That's correct.

Q. And then -- so, that was on -- and your email to Dr. Liker is October 7, 2005. Is that correct?

A. Can you repeat that again?

Q. Sure. Your email to Dr. Liker, at the bottom of the page, where you forwarded the research information,

is dated October 7, 2005.

A. Let's see here. Yes, that's right.

Q. And then if you look above that, you'll see that there's an email message from Dr. Liker to yourself, dated October 10, 2005. Do you see that?

A. That's right.

Q. And there are three numbered items in Dr. Liker's email, and if you would focus on items 1 and 2. Was Dr. Liker informing you of additional studies that had been conducted on POM products that were not in the research summary information you had forwarded to him?

A. I believe that's -- yeah, I believe that's the case. Yes.

Q. Okay. And, in item 1, he references an IMT study conducted by Dr. Ornish, correct?

A. Yes.

Q. Okay. What is IMT?

A. It is a carotid intima-media thickness. It's a plaque, basically a measure of plaque build-up.

Q. Okay. So, it's a -- it's a measure of plaque in the arteries?

A. Yes.

Q. And in item 2, Dr. Liker also references an IMT study being conducted by Radiant, correct?

mean in the context of this email you received?

A. I guess negative. It didn't -- it didn't show the intended -- it didn't meet the hypothesis that they were looking at.

Q. All right. Let me now ask you to look at a document that is marked as CX 994.

A. Yes.

Q. CX 994 is an email you sent to Mr. Tupper on July 21, 2008. Is that correct?

A. That is correct.

Q. And what -- it -- the email contains an attachment, correct?

A. That's correct.

Q. And what is the attachment?

A. It looks like an overview summary of the data.

Q. And the data --

A. The study -- from the study.

Q. And is that data from a study from Dr. Ornish?

A. Yes.

Q. And Mr. Tupper ask you to send this information to him?

A. I don't believe so.

Q. Do you know why you sent this information to him?

A. Well, I think because I was -- I didn't know a

lot about the studies, and I just -- I didn't know if -- you know, what he knew. So, I was just trying to be a good, you know, employee.

Q. So, you were attempting to keep Mr. Tupper informed of the research?

A. Yes.

Q. Did Mr. Tupper ever ask you to explain any of the results that were in the research summary that you forwarded to him --

A. No.

Q. -- in this email?

A. No.

Q. Okay. All right. And in a similar vein, let me ask you to look at CX 998.

A. Yes.

Q. Okay. And it's a lengthy document. I'm not going to expect you to know everything that's in it, but initially, looking at the email exchanges on the first two pages, starting on page 2.

There's an email from you to Dr. Liker, dated July 29, 2008. Is that correct?

A. Yes. That's right.

Q. And, in that email, you indicate that "Matt has a renewed interest in understanding our past research with Ornish on BART." Is that correct?

A. Yeah. I believe it was based on a conversation I had with Matt.

Q. Okay. And when you refer to Matt in this email, you're referring to Mr. Tupper?

A. Yes. That's right.

Q. And you say you believe this was based on a conversation you had with Mr. Tupper. What did that conversation entail?

A. I think it was -- I didn't know a lot about these studies, and I was trying to -- I think as one of probably a dozen topics, it was a small part of our conversation. And since I couldn't explain the studies, I interpreted Matt wanted to get some information. So, I was asking Harley to, you know, explain the studies to me, and then I could hopefully explain it to Matt. But then we never had a subsequent conversation after this on these studies.

Q. Okay. All right. Eventually -- let's look at page 1 of CX 998. I'm referring specifically to the bottom of the page, where Dr. Liker sends an email to you on July 30th, 2008. Do you see that?

A. Yes, I do.

Q. And what -- what he says is, "Study was done by Davidson. Here are the results." Correct?

A. Yes, that's right.

Q. And when he refers to "Davidson," do you know who he's referring to?

A. Dr. Davidson from Radiant Labs.

Q. Okay. So -- then, ultimately, at the top half of the first page of -- well, strike that.

Are the results of Dr. Davidson's study the attachment to this email that begins on page 4 of CX 998?

A. I believe so, yes.

Q. And the rest of CX 998 constitutes the results that you sent to Mr. Tupper from the Davidson study?

A. I believe so.

Q. Okay. And so going back to the first page, to close this loop, the first page of CX 998, your email to Mr. Tupper forwarded the results of the Davidson BART study and contained a brief summary in the body of your email. Is that right?

A. Yes, that's right.

Q. And, in your summary to Mr. Tupper, you highlighted one sentence in the middle of the summary. Is what you highlighted the results -- the ultimate results of the Davidson BART study?

A. I believe so.

Q. Okay. Now let me ask you to look at a document that's marked CX 953.

wasn't really -- maybe "Claim Assessment" is a little -- it was listing all the studies.

Q. Okay. Now, in March 2008, the Davidson BART study was not listed on this chart. Is that correct?

A. I -- here's what I'm not sure. It may be part of the blood flow. There's two Ornish studies, and I believe that was -- Davidson and Ornish were collaborating. But I didn't -- I didn't know all the logistics of who was doing what at that time.

Q. Okay. The first entry on this chart does refer to the carotid IMT study by Dr. Davidson, correct?

A. That's correct.

Q. And could you explain what that study was, as you understood it?

A. It was a large study with healthy -- relatively healthy patients, with some risk for heart disease, and they consumed pomegranate juice versus placebo control over 18 months, and they were -- the primary outcome was to look at the carotid to see IMT, plaque.

Q. And the second column in the chart is headed "Key Study Findings/Objectives." Do you see that?

A. Yes.

Q. Could you explain the entry that is in the -- the line with regard to Dr. Davidson's IMT study?

A. It says there was significant reduction at 12

A. Yes. I see it here.

Q. I appreciate this is a larger document, but let me ask you this: Do you know who prepared this document?

A. Yes. It was a joint effort by myself and Matt Tupper.

Q. And what was the purpose of this document?

A. To summarize the overall research -- POM Wonderful overall research portfolio.

Q. And was this document provided to Stewart Resnick?

A. Yes.

Q. And did you attend any meeting or meetings at which this document was discussed?

A. Yes.

Q. And was -- the document is dated January 13, 2009. Was -- was there a meeting you attended at approximately that date?

A. Yes.

Q. And who attended that meeting?

A. I believe there was Matt Tupper, Harley Liker, myself, Stewart Resnick, and I don't recall who else, if anyone else, was at the meeting.

Q. Okay. Was Dr. Heber at that meeting?

A. Potentially. I just don't recall.

Q. All right. Did Dr. Heber regularly attend meetings at POM when research plans were being discussed in Mr. Resnick's presence?

A. Often, he did. Yes.

Q. All right. And what was the nature of the discussion that was -- took place at this meeting you've previously described?

A. It was generally a relatively brief meeting, looking at the first page, the portfolio summary, and then if there were questions, we would turn to some of the larger sections, but it was a real high-level overview.

Q. And you say this was a joint effort between you and Mr. Tupper. Can you describe what role Mr. Tupper played in preparing this document?

A. Yes. He played the role of where do we go from here. There's two -- the documents have two subsections --

Q. Okay.

A. -- one technical and one, you know, the direction that a president of the company would take. And so we worked together, and I was the science input.

Q. Okay. And specifically, then, let's look at page 3 of CX 1029.

A. Yes.

Q. Is this an example of what you just described?

A. Yes. That is correct.

Q. So, in terms of -- you said you took care of more of the scientific/technical. Does that -- is that the upper half of the page under the heading "What have we learned?"

A. Ah, yes.

Q. And then what portion was Mr. Tupper primarily responsible for?

A. Section 2, "Where do we go from here?"

Q. Okay. If you would please direct your attention to the blood flow and pressure data on the chart that you indicated was the portion that you were mostly responsible for.

A. Yes.

Q. And then speaking only to the column "Human Studies," are these studies that measured either blood flow or blood pressure?

A. I believe so, yes.

Q. And the Davidson BART study was a blood flow study, correct?

A. The Davidson BART study? That was, I believe, one of the elements that they studied.

Q. Was there a reason that the Davidson BART study wasn't included on this chart?

A. I don't recall.

Q. Okay. Now, the -- in the list of human studies, there's an -- A says, "Blood flow to the heart," and it talks about Ornish 45; and then B, "Blood pressure studies, changed versus controlled."

Does the B portion of this list studies that blood pressure was measured in?

A. What --

Q. The -- let me restate that. I'm not sure I -- that was the most comprehensible question in the world.

Do you see the chart, B, "Blood Pressure Studies"?

A. Yeah.

Q. The studies listed there measured change -- change, if any, in blood pressure between an active version and placebo version. Is that correct?

A. Yes.

Q. And the study in -- that follows the A right above that chart is listed as "Blood Flow to the Heart," and there's a study by Dr. Ornish, correct?

A. That's right.

Q. Did the Ornish blood flow to the heart study also measure blood pressure, to your knowledge?

A. No, it didn't. I believe it was -- it was an ischemic blood flow through a different methodology.

Q. All right. Let me ask you to take a quick look at -- and I'm going to come back to CX 1029, but I am going to ask you to take a quick look at CX 1015, if you would.

A. Yes. I see that.

Q. Can you just take a quick look through that?

A. (Document review.) Yes, I see it.

Q. Okay. First of all, the first page of CX 1015 is an email from Mr. Tupper to yourself, dated November 30, 2008, correct?

A. Yes. That's right.

Q. And does this email and the attachment to it illustrate some of the input Mr. Tupper had in the creation of the previous chart we looked at, CX 1029?

A. Yes.

Q. And, just quickly, if you look at page 2 of CX 1015, which is a chart on heart disease, if you look at that, and this is going to get a little more difficult, but if you look at that and compare it to the heart disease chart on page 3 of Exhibit 1029 --

A. Um-hum.

Q. -- would you agree that there are significant similarities between the two charts?

A. Yes.

Q. Okay. And the one thing that's -- that seems to

be different is the chart on page 3 of 1029, at the bottom, under the first column, which is called "End Game Scenarios," has boxes listed A, B, C, and D, and the same column on Exhibit 1015 only has boxes listed A, B, and C, correct?

A. Yes, that's right.

Q. Do you know how row D in the CX 1029 came into existence?

A. I don't recall the exact details, but there were probably a half a dozen, you know, wordsmithing revisions and changes between this draft and the final draft in January. So, there were just lots of -- you know, discussions about how to improve the communications.

Q. Was Mr. Tupper primarily responsible for adding the column -- I'm sorry, row D on page 3 of CX 1029?

A. Yes.

Q. And do you have an understanding of what the purpose of the information contained in row D of CX 1029, page 3, was?

A. I believe we just wanted to be as comprehensive as possible to, you know, looking forward to possible scenarios. None of these were set. They were just sort of future planning possibilities or assessments.

Q. And in the column that's headed "Assessment" on

POM products?

A. Yes.

Q. And, again, were you primarily responsible for creating the top of this page, under "What have we learned?"

A. Yes.

Q. And was Mr. Tupper primarily responsible for creating the bottom half of this page, entitled "Where do we go from here?"

A. Yes.

Q. Okay. Now, if we look at the bottom half, where Mr. Tupper was primarily responsible, and I'll start out asking you to look at row A in the "Required Action for Each Scenario" column.

Do you see that?

A. Can you repeat that one more time?

Q. Sure.

Let me just be a bit more explicit. On page 4 of 1029, in the bottom half, "Where do we go from here?," there is a column, "End Game Scenarios," and row A says, "Botanical Drug (Pills only)," correct?

A. Yes.

Q. And the next column over is, "Required Action for Each Scenario," is the title of the column, correct?

A. Ah, yes.

Q. And then the second entry is, "PSA will not be accepted as an endpoint."

Do you know what that refers to?

A. I believe that was the FDA's position, that it -- that they didn't currently accept PSA as a -- as an official endpoint for prostate cancer. But I think in the scientific community, PSA is well accepted in the totality of the research.

Q. Now, let me ask you, on the same page, 4 of 1029, to look at row C, and specifically under the column "Assessment."

A. Yes.

Q. There is a statement that's made, "POM currently has a research gap: No data on prostate cancer prevention, prior to radiation or prostatectomy."

Can you explain what the -- that means?

A. I think that -- I believe it means that the research studies that were in process were not complete yet and potentially there were some other studies that we could add.

Q. Were -- strike that.

So, at the time CX 1029 was written, was it your understanding that there was no study of POM products that dealt with prostate cancer prevention?

A. I think from a drug perspective of prevention, I

think that was true, from a drug perspective.

Q. Was there any other study that existed that went to prostate cancer prevention?

A. I think there was a pre-prostatectomy study that was ongoing at the time that would address some prostate health aspects that would lead to risk reduction.

Q. When you say -- we both used the word "prostatectomy." What is a prostatectomy?

A. It's basically if you -- before the prostate's removed, you -- in this particular case, you would provide them with pomegranates, and then you would -- they would do -- they would take a biopsy and check for bioactivity that would be considered indicators of reduced risk.

Q. But, literally, when -- can you explain what a prostatectomy is?

A. The removal of the prostate.

Q. Okay. And is that done -- is that a procedure performed on someone who already has prostate cancer?

A. Or at high risk or has some early stage. It varies depending on the surgeon, I think, but I'm not a doctor. So, I don't know about all the decisions. I mean, I am not a medical doctor.

Q. Believe me, I have my own layman's understanding, and that's all I want to know.

All right. Let me ask you to turn ahead briefly to page 13 of CX 1029.

A. I can see it on here.

Q. This page of the chart is entitled "Erectile Dysfunction/Sexual Function," correct?

A. Yes, that's right.

Q. And I simply want to ask you, as with the previous pages, were you primarily responsible for creating the portion of the page that's entitled "What have we learned?"

A. Yes.

Q. And was Mr. Tupper primarily responsible for creating the bottom half of that page, entitled "Where do we go from here?"

A. Yes.

Q. All right. Let me now ask you to turn to a document that is marked CX 1006, 1-0-0-6.

A. Okay. Yes. (Document review.) Yes, I see it.

Q. Okay. This is an email chain between you and Dr. Heber in September of 2008, correct?

A. Yes.

Q. And the subject matter of the various emails is listed as "POM 2009 Research." Do you know what that refers to?

A. It refers to I was pulling together the research

budget for 2009, and I was corresponding with Dr. Heber to determine what research he might be able to participate in.

Q. So, you had responsibility for the research budget at POM?

A. For setting that up, yes.

Q. And so the -- the subject of this email, then, is research and other activities that Dr. Heber would be seeking funding for for the year 2009?

A. That's correct.

Q. And in the middle of page 1, you send Dr. Heber an email. It's dated September 9, 7:11 a.m. Do you see that?

A. 7:11 a.m.? Yes, I see it now.

Q. And if you would just take a look at that and then let me -- my question is, what -- what, generally, are you suggesting that Dr. Heber do?

A. I was suggesting that he work on a POMx diabetes clinical study, and there was a cognitive function study related here, and then general consulting and staffing on ad hoc projects.

Q. Were you also suggesting that he be a bit more informative about what he would -- would do regarding the various areas he was seeking research funding for?

A. I think I was just trying to be more, you know,

focused on the type of research that we needed to initiate in 2009, as just a suggested framework.

Q. Okay. Looking at -- in your "for example" portion of this email here, this 1, 2, 3, the entry for consulting and staffing, rapid response, 150,000K -- well, 150K, with a dollar sign, and list projects. Do you see that?

A. Um-hum.

Q. What does that refer to?

A. I think areas of research that might be related to authenticity of juice, might be a range of different studies that we would like to work with him on.

Q. Okay. And what does consulting refer to?

A. I don't know exactly. It was just a general category. It was -- you know, when you have funding categories, you have a -- there's -- it was just a consulting category. I don't know all the details. Attending meetings with Mr. Resnick off and on.

Q. Let me ask you to take a look at page -- well, strike that.

If you look at pages 3 through 7 of CX 1006, which is what follows the email exchange.

A. Sure. I think it lays it out pretty good, pretty well.

Q. I'm sorry?

A. I think it lays out the requests in more detail.

Q. Right.

A. And I had forgot about this.

Q. Okay. And this is what -- on page 3, beginning on page 3 through the end, this was prepared by Dr. Heber?

A. Yes.

Q. Okay. And let me ask you to take a look at page -- well, strike that.

And is he listing, by number 1, 2, et cetera, the various projects that he's seeking funding for in 2009?

A. Yes, I believe so.

Q. Okay. If you look at page 4, item 4, it says, "Consultation - 150K."

A. Yes, um-hum.

Q. Does that lay out more specifically what's involved in consultation?

A. Yes, I think so.

Q. Okay. And it says -- the first line says, "Attend scientific meetings with Dr. Mark Dreher as frequently as needed, often weekly."

Did you have frequent meetings with Dr. Heber?

A. I did. And this is more aspirational as far as actually what happened, but I did have frequent meetings

with Dr. Heber.

Q. Okay. And it says, "Rapid response to develop manuscripts, abstracts, and presentations of research agenda on a regular basis."

What does rapid response refer to, as you understand it?

A. If I -- if I were -- what I understood is that I could call him and when he had time in his schedule that he would talk with me, either on the phone or in a meeting, to understand the evolving research needs that we needed.

Q. Okay. And at the risk of being overly dense, does 150K refer to \$150,000 for --

A. Yes.

Q. -- for --

A. Yes, it does.

Q. Okay. All right. Let me ask you to briefly look at CX 905.

A. Yes. I see that. (Document review.) Okay.

Q. CX 905 is an email exchange between you and Dr. Heber in early June of 2007, correct?

A. That's correct.

Q. And in the -- if you look at the email from Dr. Heber to you at the bottom half of the page, the subject is "Note from Allen Pantuck," correct?

A. Yes.

Q. And who is Allen Pantuck?

A. He's a UCLA researcher, a urologist, who did research on pomegranate and prostate health.

Q. And did he receive funding from sources at POM to do this research?

A. Yes.

Q. And if you look at the -- the second paragraph of Dr. Heber's email to you in the bottom half of the page, it indicates that Dr. Pantuck has a donor who wants him to do mangosteen research on prostate cancer. Is that correct?

A. Yes.

Q. Is mangosteen a fruit?

A. I believe so.

Q. And is fruit juice made from mangosteen?

A. I believe so.

Q. To your knowledge, is mangosteen fruit juice available for consumers to purchase in the U.S.?

A. I believe so.

Q. And then Dr. Heber also asks you if you thought it would be a conflict if Dr. Pantuck did prostate cancer research with mangosteen, correct?

A. Yes.

Q. Okay. You then made a reply to Dr. Heber on

June 4, 2007, correct?

A. That's right.

Q. And your reply indicates that POM would prefer that you focus on pomegranate and prostate cancer, but it's your -- but your call, correct?

A. Yes.

Q. And when you -- prior to sending that message to Dr. Heber, did you consult with anyone at POM about -- about this information?

A. You know, I don't recall exactly how that -- that came about.

Q. All right. All right. Then turning to a new subject area, do you know what the American Botanical Council is?

A. Yes.

Q. Okay. What is it?

A. It's an organization which gives communications regarding botanical products and their sources and benefits and research.

Q. During the time you were employed by POM, was POM ever a member of the American Botanical Council?

A. I think they were one of the members, yes.

Q. And does the American Botanical Council do scientific reviews for the members if a member requests one?

A. Yes.

Q. And does a member need to pay the American Botanical Council for such a review?

A. I sent them the references that I knew of, and then they did their own independent research.

Q. Okay. And does the American Botanical Council consider unpublished studies when conducting a scientific review?

A. I think they would consider the option. It's not something they typically do, but they would consider it.

Q. Let me ask you to look at CX 919.

A. I'm there, yes.

Q. Okay.

A. (Document review.)

Q. Okay. CX 919 is an email chain among you, Dr. Liker, and Mr. Tupper, of August 29, 2007, correct?

A. Yes.

Q. And, in your original email to both Mr. Tupper and Dr. Liker at the bottom of the page, the first page of CX 919, you indicate that the American Botanical Council will accept a one- one to two-page summary of unpublished research, correct?

A. That's right.

Q. And is what you're asking Dr. Liker and Mr. Tupper with regard to this opportunity -- strike that.

What are you asking Dr. Liker and Mr. Tupper

with regard to this opportunity to submit a summary of

Q. So, it does sound like Dr. Davidson's study; you're just focusing on certain parts of the results.

A. I think so.

Q. Now, if you would go to the top of the page where Dr. Liker responds to your email. Do you see that?

A. I do.

Q. And he says, "I don't think Stewart wants this data in the public domain as it will raise questions as to why a paper was not published."

Is that correct?

A. That's what it says.

Q. And what Stewart did you understand Dr. Liker to be referring to?

A. Stewart Resnick.

Q. And did you send the American Botanical Council any summary of the results of Dr. Davidson's IMT study?

A. No.

Q. And why did you not send it?

A. Because it wasn't published yet.

Q. Okay.

A. We wanted to stick with the published research.

Q. And, likewise, did you send the American Botanical Council any summary of the results of Dr. Ornish's IMT study?

A. No.

Q. Okay. And why not?

A. Because they weren't published.

Q. And did you send the American Botanical Council any summary of the results of Dr. Davidson's BART study?

A. No.

Q. And why not?

A. Because they weren't published.

Q. Yes. All right. Let me ask you to turn now to CX 940.

A. (Document review.) Okay.

Q. And you're listed as a recipient of some of the emails on this document, correct?

A. Yes, that's right.

Q. And, if you would please, first of all, look at the email in the middle of the page from Michael Carducci, Janet Walczak, Dr. Liker, and yourself.

A. That's right.

Q. Who is Michael Carducci?

A. He is a researcher at Johns Hopkins, doing research on prostate cancer, and he was one of the principal investigators of a POM prostate cancer -- prostate health study.

Q. Okay. So, he was doing research on POM products related to prostate cancer at this time?

A. Yeah, prostate health.

Q. And what product was he researching?

A. I think -- I guess I -- I believe he was doing POMx, but I don't recall specifically since I wasn't a primary person interacting with him.

Q. Okay. Who was the primary person working with him?

A. Dr. Harley Liker.

Q. All right. And the subject of Dr. Carducci's email is, "IRB Questions," correct?

A. Yes.

Q. What is an IRB?

A. It's an institutional review board.

Q. And what does an institutional review board do, to your understanding?

A. They review the -- the overall protocol and factors associated with the study to confirm that it's -- it would be safe for the subjects and that it would be an acceptable study to perform in clinical research.

So, it's sort of an outside evaluation of the factors involved in the study, to see if it's worth doing, see if it's acceptable to do the study, without

Q. And was Janet Walczak an individual who was working with Dr. Carducci on the POMx study?

A. I believe so.

Q. And if you would now look -- please look at her email to both Dr. Liker and yourself at the bottom of page 1 of CX 940, and continuing to page 2.

A. (Document review.) Yes.

Q. Okay. She indicates that the IRB has raised some questions regarding this POMx study, correct?

A. Yes.

Q. And if we look at page 2 of CX 940, the paragraph numbered 1 near the top of the page.

A. Yes.

Q. Do you see that?

A. I do.

Q. That is a summary of one of the issues raised by the IRB. Is that correct?

A. Let me read it. (Document review.) Yes, I believe so.

Q. All right. And in that paragraph, the IR -- was the IRB raising a question that the study will be an investigation to determine the treatment effect of the capsules on a disease process? Is that right?

A. I think that's the case, yes. Yes, I think so.

Q. And then the -- the IRB is also asking that an

INDA, or a request for an FDA opinion, be submitted, correct?

A. I believe so, yes.

Q. Okay. What is an INDA?

A. An I -- it's an investigational new drug application.

Q. And where does one submit an INDA?

A. To the FDA.

Q. Okay. And what's the purpose of an INDA?

A. I guess to review -- to prepare for doing a clinical study to -- on drugs.

Q. Now, POM had not filed an INDA with the FDA for this study by Dr. Carducci at this time, had they?

A. No.

Q. Okay. If -- to your knowledge, if POM did file an INDA for Dr. Carducci's prostate cancer study, would the FDA have some oversight of that study?

A. I -- I'm not -- I'm not a drug person. I don't know what their role would be.

Q. Now, let me ask you, back to page 1 of CX 940, again, at the email from Dr. Carducci to you and others in the middle of the page.

A. Yes.

Q. His email also includes, by forwarding, an email that Dr. Liker sent to Janet Walczak. Is that right?

your question, Mr. Hoppock.

MR. HOPPOCK: Can I reread the question, is that okay, or did you...

JUDGE CHAPPELL: It says "to your knowledge."
I'll allow that. Overruled.

BY MR. HOPPOCK:

Q. I'll repeat the question again, Dr. Dreher.

A. Thank you.

Q. To your knowledge, does the advertising of a dietary supplement for the use in the diagnosis, cure, treatment, or prevention of prostate cancer make that supplement subject to FDA regulation as a drug?

A. I would defer to the legal folks in whatever company I worked for to make a final decision there.

Q. Okay. And I appreciate you would defer to the lawyers. I'm asking you, to your knowledge, does advertising a dietary supplement for use in the diagnosis, cure, treatment, or prevention of prostate cancer, make that supplement subject to FDA regulation as a drug?

A. I think it depends on the wording of that. If it's related to prostate health, probably not. If it's related to prevention or any other terminology associated with drugs, it might.

Q. Okay. And the terminology I'm specifically

relating -- asking about is "for use in the diagnosis, cure, treatment or prevention of prostate cancer." And to your knowledge, would that be -- would that make the supplement subject to regulation as a drug?

A. I believe so.

Q. Okay. Now, did there come a time when UCLA also raised similar concerns about the need for an IND for prostate cancer research that was being conducted there?

A. I believe that that was -- that that was raised.

Q. Okay. And did you write a letter similar to CX 939 to Dr. Pantuck, reassuring him of POM's adherence to the dietary supplement regulatory guidance?

A. I believe so.

Q. And did -- and did your letter to Dr. Pantuck also assure him that POM would not advertise POMx for use in the diagnosis, cure, treatment, or prevention of prostate cancer?

A. I'd have to look at the letter to be sure, but I think that's probable. It's possible.

Q. Okay. Did you also receive communications from the University of Miami regarding their concern that an investigational new drug application would be required for them to participate in a prostate cancer study for POM?

A. I don't know if I received it. Probably

Dr. Liker received it, but I was aware of it.

Q. Okay. You were aware of communications from the University of Miami regarding their concern that an investigational new drug application would be required for them to participate in a prostate cancer study with POM?

A. Yes.

Q. Okay. All right. Dr. Dreher, I just have a few more questions regarding your role, if any, in reviewing ad copy for POM.

Did you ever see POM ad copy in newspapers or magazines that you had never reviewed in your position at POM?

A. It's possible, yes.

Q. Yes. All right. Let me ask you to take a look at CX 109. I think for the -- you can just look at the screen for these.

A. Oh, sure.

Q. They are all one-page -- one-page ads.

A. Right.

Q. Did you ever review or approve this ad while you were employed at POM?

A. No.

Q. Okay. And if you would look at CX 260, please. Did you ever review or approve this ad while you were

employed by POM?

A. No.

JUDGE CHAPPELL: Hold on a second. Did I not hear him tell us earlier he had nothing to do with advertising?

MR. HOPPOCK: Yes, Your Honor.

JUDGE CHAPPELL: Then why do we need this exercise? I think that pretty much covers it if he said that.

MR. HOPPOCK: All right.

JUDGE CHAPPELL: Are you not going over advertising?

MR. HOPPOCK: That's fine, Your Honor.

May I have one moment?

JUDGE CHAPPELL: Go ahead.

(Pause in the proceedings.)

MR. HOPPOCK: I have no further questions, Your Honor.

JUDGE CHAPPELL: All right. Will there be cross?

MS. DIAZ: Just a short one. Just a little bit, Your Honor.

JUDGE CHAPPELL: Okay. Go ahead.

CROSS-EXAMINATION

BY MS. DIAZ:

Q. Hello. Should I call you Dr. Dreher or Mr. Dreher?

A. Dr. Dreher.

Q. Dr. Dreher, okay.

Dr. Dreher, you stated earlier that you entered into a settlement agreement with the FTC, correct?

A. Yes, that's right.

Q. And you're here today because you entered into a settlement agreement with the FTC, correct?

A. Yes.

Q. Does your settlement agreement with the FTC in any way, shape, or form suggest that you believe that you did something -- anything -- wrong in connection with this case?

A. No.

Q. And that is not why you entered into a settlement agreement with the FTC, correct?

A. Yes. That's right.

Q. And regarding the two newsletters that formed the bases for the FTC's allegations against you -- do you know what newsletters I'm talking about?

A. Yes.

Q. To this day, do you believe that there was anything false or misleading about those newsletters?

A. No.

Q. And that's true despite the FTC's accusations against you in connection with those newsletters, correct?

A. Yes.

Q. And to this day, despite what's happened to you in the settlement, do you believe -- you do believe in the science supporting the health benefits of pomegranates, correct?

A. I do.

MS. DIAZ: I have no further questions.

JUDGE CHAPPELL: Is there any redirect based on the cross?

MR. HOPPOCK: One minute, Your Honor.

(Pause in the proceedings.)

MR. HOPPOCK: No, Your Honor.

JUDGE CHAPPELL: Thank you, sir. You're excused.

THE WITNESS: Thank you.

JUDGE CHAPPELL: All right. We are going to take our morning break. We will reconvene at 11:35. We're in recess.

(A brief recess was taken.)

JUDGE CHAPPELL: Okay, back on the record,
Docket 9344.

Next witness.

MS. JOHNSON: Yes. We would like to call
Michael Perdigao, please.

JUDGE CHAPPELL: Okay.

Whereupon--

GEORGE MICHAEL PERDIGAO

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

DIRECT EXAMINATION

BY MS. JOHNSON:

Q. Good morning, Mr. Perdigao.

A. Good morning.

Q. I am Mary Johnson with Complaint Counsel.

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

A. George Michael Perdigao, G-E-O-R-G-E, Michael,
M-I-C-H-A-E-L, Perdigao, P-E-R-D-I-G-A-O.

Q. Thank you.

And you are appearing here today in response to
a subpoena from the FTC. Is that correct?

A. I wasn't aware that I received a subpoena, but
I -- based on my counsel asking me to be here, I am
here.

Q. Okay. First, I just want to start with some background information. You are currently employed by Roll Global LLC?

A. Correct.

Q. And, until recently, Roll Global was called Roll International Corporation. Is that right?

A. Correct.

Q. And so for simplicity, I will just refer to it as Roll.

And you've worked at Roll since approximately the summer of 2007?

A. Correct.

Q. Right?

And your title currently at Roll is president of advertising and corporate communications.

A. Correct.

Q. And, before you came to Roll, your experience overall in the advertising and marketing industry has been approximately 25 years. Is that right?

A. Correct.

Q. And that has included positions at Mike Glickman Realty as director of advertising and public relations?

A. Yes.

Q. And that was for three years, from 1987 to 1990?

A. Yes.

Q. Right?

A. Correct.

Q. Also, after that, a position as account executive at Bozell Advertising?

A. Yes.

Q. And that was from 1990 through 1992. Is that right?

A. Yes.

Q. Okay. And then after that, you had several positions at Dailey & Associates. Is that right?

A. Correct.

Q. And that would have been the end of 1992 through the summer of 2007?

A. Correct.

Q. Okay. And, when you began at Dailey, you started as an account executive and then, over the years, were promoted to a managing director. Is that right?

A. Correct.

Q. Okay. So, from Dailey & Associates, you went to work at Roll.

A. Yes.

Q. Okay. And when you started at Roll in 2007, your position was president of advertising. Is that right?

A. Yes.

Q. And that was for Roll's in-house advertising agency. Is that right?

A. I'll clarify. When I arrived, there was a small group of advertising professionals within Teleflora, one of the companies that Roll International owned -- owns. I can't remember the exact date, but let's say January 2008ish, it moved out of Teleflora and became a -- an in-house agency, separate from the individual companies, within Roll International.

Q. Okay, is that right?

A. Correct.

Q. Okay. And just for clarification, Teleflora, Roll, and POM Wonderful and Fire Station are all within the same building. Is that right?

A. Parts of those companies are within the same building, yes.

Q. Okay. But, generally speaking, you work in the same building with your advertising clients.

A. The marketing staffs for those companies --

Q. Um-hum.

A. -- yes, are in the same building that we are in.

Q. Okay. And that's at the West Olympic Boulevard location?

A. Correct.

Q. And so I just want to turn a little bit to your responsibilities in your current position. You oversee the creation of the advertising and marketing communications for the various brands that Roll owns?

A. Yes.

Q. And what brands do those include?

A. Teleflora; POM Wonderful; Fiji Water; Paramount Farms, which owns a number of nut brands, Wonderful Pistachios, Everybody's Nuts, Wonderful Almonds, Mini Almonds, Almond Accents; Paramount Citrus, which owns Cuties, they have a small lemon business and a lime

business that we also do work for. JUSTIN Winery, they make wine. Rarely, we'll do some work for Suterra, which is a pheromone disruption company. And that's -- that's primarily it.

Q. Okay, thanks.

And so approximately how many employees work at the agency?

A. Currently?

Q. Yes.

A. Sixty-five.

Q. Okay. And you -- at a broad level, you oversee all of -- all of that staff, correct?

A. Yes.

Q. And corporate communications, that is -- and correct me if I'm wrong -- that is a function of Roll, but it is not within Fire Station ofwhthat werigh

Q. And you mentioned Rob Six reports to you. Did you also know Fiona Posell?

A. Yes.

Q. And was she employed there at the same time as you?

A. When I originally arrived, yes, she was there.

Q. Okay. Would she have been someone that reported to you?

A. No.

Q. Okay. And did she leave soon after -- how much overlap did you have?

A. I can't be certain, but let's say six months to 12 months. And it was before -- she left before my title evolved to include corporate communications.

Q. And did you have a predecessor in corporate communications with that title or were you the first person with the title of president of corporate communications?

A. As far as I know, I'm the first. Yeah, I was the first.

Q. And on the corporate communications side, what does your work entail?

A. It's not nearly as involved as the Fire Station work, the advertising work. It's more of a administrative, managerial, budget responsibility. The

day-to-day activity of corporate communications is primarily Rob Six.

Q. Okay. And so, for example, in terms of press releases, would that be an area that you review?

A. I don't.

Q. You don't, okay.

And would that be Rob Six's responsibility?

A. Yes. Yes.

Q. And, other than press releases, what other types of public relations efforts does the corporate communications department do, just broadly?

A. Anything that generates press, so it could be events, it could be -- they also deal with any -- the responses to any corporate issues. So, not necessarily a press release, but maybe a response to the FTC's actions or some other legislative body or just work that we're doing for each of the companies.

Q. Okay. And would it also include things like putting together press kits?

A. Sure. Yeah.

Q. Or responding to questions from journalists, that type of work?

A. Certainly, although the press kits -- just to clarify, the press kits take on quite an artistic slant. So, Fire Station becomes involved in the development and

creation of those as well.

Q. Oh, okay. Are they actually just put together in -- in physical books?

A. Some of them are books, yeah. Some of them are on flash drives. Some of them are microsites, yeah.

Q. And while you've been at Fire Station, roughly how many types -- how many press kits have you put together or has Fire Station been involved in putting together for the POM products?

A. We do one big press kit per year.

Q. Okay. And would that cover both POM Wonderful 100% Pomegranate and POMx?

A. It has a -- some content from all the POM products. It's -- the lion's share of it, though, is related to the fresh product, the actual fruit, and the juice.

Q. Um-hum.

A. Yeah.

Q. And some of the press releases that the corporate communications department disseminates are -- pertain to scientific studies that POM has sponsored. Is that right?

A. Yes.

Q. And the press releases are one way of marketing POM Wonderful's products. Is that right?

A. Yes.

Q. So, now, coming to your responsibilities as president of advertising, those responsibilities would include oversight of your 65-member staff at the agency. Is that right?

A. Yes.

Q. And what departments in the agency report to you?

A. Well, all the departments. You want me to name them?

Q. Yes.

A. Yeah, okay.

Q. If you could go through which departments report to you.

A. Sure. Creative department, the media department, the production department, the interactive department, the traffic department.

Q. Okay. And so let's start with the creative department. It would be Liz Leow that's the creative director?

A. Executive creative director, correct.

Q. Executive creative director. And can you just describe the functions of the creative department?

A. Sure. They are developing consumer communication that is placed in paid media generally to

promote products or messages that the various companies want to disseminate.

Q. And you mentioned the media department. Who heads that department?

A. Brian Fisher.

Q. And, generally, what does that department do?

A. Plans and negotiates and purchases the media that those creative elements run with.

Q. And that would involve a variety of media. Is that correct?

A. Yes.

Q. So, print, for example, outdoor?

A. Yes.

Q. Television?

A. Yes.

Q. Online?

A. Yes.

Q. Okay. And the production department, who is the head of the production department?

A. Lou Uhler.

Q. And what does his department do?

A. I'll clarify. Lou oversees the print production group. So, they put together and finalize the files for print, meaning magazine, newspaper, newsletters, et cetera, and out-of-home creative elements that then get

disseminated to actual vendors.

Q. Okay. And just to clarify, out-of-home would include things such as billboards?

A. Yes.

Q. All right. What other types of out-of-home?

A. Oh, there's so many. A bus stop, a taxi top, a health club panel, a wall posting. You name it.

Q. Okay. I just wanted to get a broad sense.

So, the interactive department, who's responsible for that department?

A. Brien Grant.

Q. And what does that department do?

A. Also develops advertising materials, but they generally reside in digital formats.

Q. So, would those be for online media, primarily, or a Web site?

A. Primarily. We do design the Web sites for a lot of the brands, but yes, also digital and online media, yeah, social media, et cetera.

Q. Okay. And then you mentioned the traffic department.

A. Um-hum.

Q. And so who heads that?

A. Well, Lou Uhler is also in charge of that team.

Q. And is there an Andrea Hernandez?

A. There is, yes.

Q. And what is her role?

A. She's a traffic manager. She's more senior than the other traffic managers, but she reports to Lou, yes.

Q. Okay. And a Jake Sugarman, is he also in traffic?

A. He was. He no longer works with the company, but he was at one time.

Q. Okay. And the functions -- how do the functions of the traffic department work?

A. In general, they're -- they're making sure schedules are adhered to. They're distributing materials between -- within the agency and back to our clients and from our clients. So, they are -- hence, the name -- trafficking all of the work.

Q. And so they are, in a way, a liaison between some of the other departments in the group as well?

A. Internally at Fire Station?

Q. Yes.

A. Yes.

Q. Okay.

JUDGE CHAPPELL: I heard you earlier mention a microsite.

THE WITNESS: Microsite, yes.

JUDGE CHAPPELL: What do you mean by

"microsite"?

THE WITNESS: A microsite is just a mini -- a miniwebsites. It's just a smaller focused subsite, if you will, that you might be able to get to via a separate URL, or you could also get there through the larger Web site.

JUDGE CHAPPELL: So, from the position of the person online, the -- let's say the target audience, tell me again how they would access it.

THE WITNESS: Yeah. You could access -- if you were the consumer and I was advertising to you, I might, in a print ad or something, say go to our microsite at -- I'll make this up -- pompills.com. So, you wouldn't have to necessarily feed through the larger POM Wonderful site to get to the content that's relevant to that print ad.

JUDGE CHAPPELL: So, it could be a link?

THE WITNESS: It could be a link, yeah, a separate link, but you could also access it through the larger site.

JUDGE CHAPPELL: Okay. And would a microsite appear on a Google search?

THE WITNESS: I don't know. I mean, if you just did a search term for POM Pills, would it come up as a separate --

JUDGE CHAPPELL: Yes, with your example, right.

THE WITNESS: I don't know.

JUDGE CHAPPELL: Would that depend on your deal with Google?

THE WITNESS: Well, if I did a paid deal with Google, I'm sure it would come up. I'm just talking about a natural, organic search, I'm not sure.

JUDGE CHAPPELL: Okay. Thank you.

BY MS. JOHNSON:

Q. And so the people that you just identified in those departments, those five different departments, they work on POM Wonderful projects, at least in part? Is that right?

A. Yes, all of them touch POM, yep.

Q. Okay. And, since 2007, when you joined Roll, Lynda Resnick and Stewart Resnick have been your supervisors. Is that right?

A. They are my bosses, yes.

Q. And on what types of matters do you interact with Mr. Resnick?

A. Primarily budget and staffing matters.

Q. And what types of matters would you interact with Mrs. Resnick on?

A. Primarily marketing and advertising matters.

Q. And is it fair to say that Mr. and Mrs. Resnick

have a final authority on ad campaigns?

A. I think that on a campaign it's fair to say that Lynda Resnick has final authority. I'm not sure that Stewart ever gets involved in the advertising.

Q. Okay. Might he have occasion to -- might it vary, depending on the advertisement?

A. If he does, he doesn't-- he doesn't communicate that to me. I've heard through the grapevine from someone that Stewart doesn't like that ad, but that's, you know, secondhand.

Q. So, now I just want to focus on your advertising -- sorry, the agency's advertising work for POM. And throughout your time at Roll, POM has been one of the agency's clients?

A. Yes.

Q. And, since you joined Roll in 2007, has the agency routinely created advertising for POM Juice?

A. Yes.

Q. And POM Pills? POMx Pills? I'm sorry.

A. Not as frequently, but yes.

Q. Okay. And what about POMx Liquid?

A. I can't -- I don't believe we've ever done an ad for POMx Liquid.

Q. Okay. And Ms. Leow had already testified in this matter about -- and took us through a lot of the

advertising vehicles that the agency uses and that POM has utilized, as well as some of the major campaigns, like the Dress Bottle and Superhero. So, I just want to ask you about a few types of point-of-sale advertising that we didn't cover with her.

Did the agency create bottle hangtags that were utilized by POM?

A. I don't know which specific ones you're talking about, but yes, we have produced hangtags for bottles, certainly.

Q. Okay. Maybe I could show you one. This is -- if you turn to CX 1426 in your book, or Will can put it on the screen for you. This is Complaint Exhibit A from September 2009.

Did the agency do any creative work for this hangtag?

A. Yes.

Q. Okay. And with regard to the copy, the content, who wrote the copy, "Backed by \$25 million in medical research"?

A. Wow. Who wrote? The facts were provided by POM marketing. I'm sure a copywriter within the agency wordsmithed it, and I'm sure our proofreader proofed it. So, to that degree, we wrote it.

Q. Okay. But the underlying information came from

POM marketing?

A. Correct.

Q. And then the sentence that comes after that, "Proven to fight for cardiovascular, prostate, and erectile health," would that also have come from POM marketing?

A. Yes.

Q. And then the final sentence there, "Committed to keeping you healthy for a good, long time!" Would that have been the agency that wrote that?

A. That's my guess. Yeah, that's more ad language, yeah.

Q. Okay. You can take that down.

And did the agency create in-store displays that were utilized by POM?

A. We have.

Q. Can you just tell me sort of a couple of examples of types?

A. Sure. We've done shelf toppers, shelf danglers, we have done floor graphics, we've done -- I don't know if we did it for POM, but occasionally we do big posters that sit up next to the product. Where permissible for some brands, we do balloons that we put on them, various things.

Q. And are those -- have those been just for POM

Juice?

A. Yes, because it's all grocery store stuff, and I -- I don't believe the other products are sold in the grocery store. We might have done some for coffee, POM coffee at one time.

Q. Okay. To your knowledge, is the POMx available in certain retail outlets?

A. At one time -- I don't know if it still is, but at one time it was available at GNC retail outlets, but I don't believe it's ever been in any other distribution centers.

Q. And would the agency have worked on any point-of-sale materials appearing at GNC?

A. Yeah, probably.

Q. Okay. And what about advertising placed on the outside of prescription drug bags?

A. We've done that, yes.

Q. The agency worked on that?

A. Yes.

Q. So, did the agency develop the final execution for that --

A. Um-hum.

Q. -- project?

A. Yes.

Q. And would the content of that have been based on

a creative brief from POM Wonderful?

A. Yes.

Q. And, in that case, the advertising on the prescription drug bags, would that have been for POM Juice or POMx?

A. On the prescription bag?

Q. Um-hum.

A. I believe that was for the pills.

Q. And do you recall what message appeared on the prescription drug bags?

A. Not specifically, no. There was a big shot of a pill bottle, but I don't remember what the headline was.

Q. Okay. But there was probably a headline and an image?

A. Yeah.

Q. And do you know where those were distributed, which stores?

A. Specifically, I don't, no.

Q. And, just generally, what -- what is prescription bag advertising?

A. Well, it's new to me, too. It was -- we found -- when you go to a drugstore and you pick up your prescription, they put it in their own little bag, and generally, it is a clean bag, right? There is no markings on it. So, our media department negotiated to

have advertising placed on one side of the bag.

Q. Okay. And would that appear on all of the bags or certain prescription bags?

A. I -- I'm not sure how they negotiated that.

Q. Okay.

A. I would guess all bags, though. I can't imagine pharmacies agreeing to self-fulfill by prescription. That would be a task that I'm sure no pharmacist would sign up for.

Q. Okay. And so when you started at -- as president of advertising in 2007, did you seek to familiarize yourself with some of the past ads that POM had run?

A. Yeah. There was a presentation where they showed me some of the past ads, uh-huh.

Q. And would that have been a presentation by POM -- people in POM marketing had done?

A. Yes.

Q. And would you ever see some type of notebook or a compilation of the ads?

A. No.

Q. So, let's talk a little bit about the personnel you interact with at POM. You have interacted with people that have served as the head of the marketing department at POM at various times. Is that right?

A. Correct.

Q. And those people have included Jan Hall?

A. Yes.

Q. And she is the current head of marketing?

A. She is.

Q. Okay. And before her, Paul Coletta, right?

A. Yes.

Q. And Diane Kuyoomjian, did I get that right?

A. Jenn Stein left to become head of marketing for Teleflora.

Q. Is she still with the company?

A. She is not.

Q. Okay. Grant Beggs?

A. Grant Beggs moved back East to take another job.

Q. Okay. And Mark Cregar?

A. I believe Mark was asked to leave.

Q. And Diane Kuyoomjian?

A. Kuyoomjian? She was also asked to leave.

Q. And do you know why they were asked to leave?

A. I don't.

Q. Paul Coletta?

A. Paul Coletta was never a full-time -- he was a consultant, on a consultant basis, and I assume his consultancy period ran out.

Q. Okay. And did you have any input into whether or not any of these individuals kept their jobs as head of marketing at POM?

A. No. That wasn't my call.

Q. And were there vacancies ever between heads of marketing, between when one person left and a new person was hired?

A. Occasionally, yes.

Q. Okay. And, during those gaps, who from POM took

the lead on communicating with the agency?

A. I don't know that anyone took the lead. It was -- it became more diverse. So, depending on what the subject matter was, it could have been Matt Tupper, at a high level, but it also could have been the junior employees or midmanagers, if you will, that worked underneath that position.

Q. Okay. And you've also had occasion to work with other POM marketing personnel sort of at the lower levels on specific projects related to POM Juice and POMx, right?

A. Yes.

Q. And would Claire Nelson be one of those individuals?

A. Yep.

Q. And who is she?

A. Claire -- who is she? She is a marketing person who was on -- also on a consultant basis. Excuse me. And -- but she no longer works there.

Q. Okay. And Roni Pfeffer?

A. Pfeffer?

Q. Pfeffer?

A. Yes.

Q. And she was also a marketing person. Did she have any particular area that she worked on?

A. She was more focused on the supplement area.
So, the pills and the liquid shot.

Q. And do you recall any people that were more on the POM Juice side, specific names of people?

A. Across the time I've been there?

Q. Yeah. That would be, let's say, at Roni's level.

A. I'm sorry?

Q. That would have been at Roni's level, a person we haven't already talked about.

A. Sure, there has been a number. I'm not sure if they were specifically at her level, because I'm not sure of all the titles and who's more senior than the others, but sure. There's been John Lee and Molly Flynn, Tina Wong, and that's all I can remember.

Q. Okay. And you do interact directly with Matt Tupper, president the of POM?

A. Yes.

Q. And how often would you say that you interact with Mr. Tupper, on average?

A. Once a week.

Q. Okay. And do you know Dr. Harley Liker?

A. I do.

Q. And what do you understand his role to be?

A. Well, his role's probably a little different

than me. He's a personal physician and consultant for the Resnicks, and so Harley and I have come to know each other because when me or members of my family have medical issues, the Resnicks allow me to work with Dr. Liker to address those issues.

Q. Okay. So, your interaction with him would not have been on POM marketing projects, then?

A. No.

Q. Okay. Do you know whether, after the agency created advertisements for POM, whether those ads were sent to Dr. Liker for review?

A. I have -- not that I know of.

Q. Do you know -- so, typically, once the agency prepared an ad and routed it to POM, who would it go to at POM?

A. I'm going to answer that by asking you a question, because I need to understand what your -- when you say an ad, there are concepts that we develop that are pretty general in nature and aren't necessarily finished products, and then there's the final materials that are meant to go to an actual publication, if we're talking about a print ad.

Q. Okay.

A. So, what are you referring to?

Q. Okay. Let's start with -- well, let's start

with concepts. So, if the agency had come up with a concept that they were satisfied with, is there a particular point person that it would go to at POM?

A. Well, generally it would go first to the person who might have opened the creative brief or the work order for that particular assignment. So, we would --

on something and allocate hours against it, they need to formally open a -- either a work order or a creative brief, yeah.

Q. Okay. And how does the work -- how does the creative brief differ from a work order?

A. Well, a work order is less specific, and it might be all that's necessary for a very simple job. For instance, I'd like a high-res download of the photograph that we used for that recipe last year. That doesn't really take any creative work. That's really a traffic and production job. But we have to have a work order to assign a number to it to bill time against.

When it's an actual creative development project, we generally ask for a creative brief to understand the concept more.

Q. Okay. And a creative brief could be either for a particular execution or an entire campaign, right?

A. Correct.

Q. And when -- what department would receive the creative brief and work order at the agency?

A. Initially, generally, the traffic -- they would give it to the traffic department.

Q. And then would that be communicated -- would that be routed via email to traffic or how does it --

A. No, I'm not sure. I'm not sure how -- if they

hand it off or if they email it. I'm not sure.

Q. Okay. And do -- do you receive copies of -- if it's something that required a creative brief, do you see the creative briefs when they come in?

A. Not generally, no.

Q. But there have been times when you have been sent one?

A. I have.

Q. Under what circumstances would that happen?

A. Generally, if it's a campaign, there might be -- or a big project, there generally wouldn't just be a creative brief. There would be follow-up meetings, face-to-face briefings, let's everybody interact and ask questions and have a little Q&A about it, so everybody's clear about what is being asked.

Also, if I happen to get some work back across my desk and it doesn't make sense to me, creative work, creative concepts, I might say, "What is this? Can I -- somebody bring me the creative brief so I can see what -- how this work was developed, why it was developed this way." So, in those instances, I might look at it.

Q. Okay. So, you said after the creative brief and/or work order comes in -- I'm sorry, would a creative brief automatically have a work order, also?

A. Yes.

Q. And then sometimes it's just a work order?

A. Yes.

Q. Okay. So, you mentioned that these are assigned a project number for billing purposes or record keeping purposes?

A. Yes.

Q. Is that what's referred to as the P-number?

A. I think all the POM jobs start with a P.

Q. Okay.

A. I am pretty sure, yeah.

Q. Okay. And then at that point, after traffic assigns the project number, they route it to the creative team at the agency? Is that right?

A. Kind of. First, they would talk to Liz Leow and say, "These assignments came in over the last couple days. Who do you want to disseminate this work to?" So, based on what the project is or her individual team member's workload, she will say, "I want that team or that person to work on this." And, then from there, the traffic person would deliver those creative briefs to those individual creative people.

Q. And, during your time at the agency, has the traffic department maintained copies of the creative briefs that have come in from POM?

A. They certainly have some. I don't know if they have all of them. There's not, like, a folder of creative briefs.

Q. Okay. So, they're not, like, kept on the server, for example?

A. No. And, you know, the one thing -- the agency is constructed almost identically to a typical outside advertising agency, but one big exception is we don't have any account management layer.

And I don't want to get into too much detail about the ad industry, but it's the layer that's kind of the liaison between the agency and the client. But they work for the agency generally. At the Roll Company, the account management position or responsibilities are handled by the individual marketing teams.

Q. Okay.

A. So, they may have --

Q. The client's marketing team? Is that correct?

A. Correct, yeah. So, they may have a binder or they may have an aggregated list of briefs. I'm not sure.

Q. So, if I went to someone, Andrea Hernandez in the traffic department, and said, "I really want to see, you know, the creative briefs from June of '08 to June of '09," would she be able to pull those up for me?

A. She might have some. I don't think she would be able to, because she works within the agency. I don't think she would have them all, although I -- I recall that through the discovery phase of this, I think our counsel did go to all the traffic people and ask them to give them all their -- all the creative briefs that they had copies of.

Q. Okay. So, turning to the concept development or the strategic development phase of the process, what does the creative team do once they receive the assignment? What would the next steps be?

A. They would ideate around how they could deliver a compelling piece of communication.

Q. And would those be -- but those would be internal meetings with the team at the agency?

A. Are you talking about the creative process as a whole? It's not a -- the creative process is pretty iterative. So, a team might or an individual might be working on the assignment in isolation, right? Then at some point, if more than one person or more than one team are working on something, they would then gather with Liz, the executive creative director, and share those thoughts and concepts and ideas with her.

She would then, you know, subjectively evaluate which were good, which weren't, and maybe help shape and

mold those ideas and give them further direction to continue their development. So, it's -- it's, you know, it's not like it's -- you get a creative brief, a guy goes in a room, and then comes out with an ad. It's not quite that simple.

Q. It's collaborative?

A. It's collaborative and it's -- and it's -- yeah, it's a process.

Q. And during this concept development stage, are there meetings with POM Wonderful's marketing team as well?

A. It's possible. I mean, if -- for instance, if a creative brief came in and was confusing or poorlas

would that person look like? What would be the psychographics of that person? So, there could be a lot of questions.

A. Well, certainly at a macro level, sure. She's -- you know, she's a world-famous marketer, and that's her primary role with the Roll Corporation. So -- but not to a granular level where she's looking at creative briefs or anything like that, but...

Q. And how does she typically participate? For example, you mentioned -- we talked about email, face-to-face communications. What's the typical way that she would participate?

A. Well, she uses those methods, too. She -- you know, she's on the -- on email quite a bit, and she's not hesitant to pick up the phone. But we also have -- and I'm sure we'll get to that at some point -- LRR meetings, where Lynda's a participant.

mostly the highest levels of the individual areas that might be involved in marketing, and we're all sharing updates from our various disciplines, and then we are discussing, brainstorming, ideating around how we can better market the products.

Q. And you mentioned there's usually high-level executives that are at these meetings. So, Liz Leow would be one of those people at the products1711knngsYeucts.

Q. And after the meetings, after the LRR meetings, were there typically notes distributed of next steps?

A. Yes.

Q. And would those notes have gone to the meeting attendees?

A. Hmm. They went to me. I don't know who else they went to.

Q. Okay. So, I would like to show you an example of some notes from one of those meetings and ask you a few questions about it. This is CX 185.

And so this is an email from February of 2008, from Claire Nelson, who I think you spoke about, to a variety of people at POM and Roll, including yourself. Do you see that?

A. I do.

Q. Okay. I think we'll just turn to page -- and I just want to confirm, this -- this is an example of LRR meeting notes?

A. This -- yes. Yes.

Q. Okay. And so the first bullet there reads, "Agreed that we need to start over like we've never advertised before."

And then there are a couple more bullets, you know, "Be pre-emptive and develop an edge." And "Go back to the old campaign and pick the hard-hitting executions like 'Cheat Death.'"

So, my question is, what was the reason at this time for a hard-hitting approach?

A. Well, we had been dark -- POM Wonderful had been dark with their advertising for -- I don't know, a long period of time, some time before I arrived and some time after I arrived. So, you know, from a consumer mind-set, pretty silent. So, I think they wanted to get out there and be -- create some attention.

Q. And by "dark," does that just mean --

A. Oh, just -- we weren't running any advertising for a while.

Q. And was that around the same time that there had been a juice shortage?

A. I believe so. It happened -- it started before I got there, but I believe so.

Q. Okay. So, you wanted to -- the idea was to rebuild demand, rebuild advertising?

A. Correct.

Q. And were you aware at that time of a desire by the company to double the juice sales of POM Juice or to significantly increase them?

A. Well, every client I have wants to significantly increase their sales, but I don't remember any specific metric that was laid out, no.

Q. Okay. And so this 2008 plan that's referenced here resulted in POM and the agency bringing back some of the old Dress Bottle executions. Is that right?

A. It appears that way.

Q. And that approach to bringing those executions would have been agreed to by Mrs. Resnick?

A. Yes.

Q. And by Mr. Tupper?

A. Yes.

Q. Okay. We can take that one down. You're ahead of me. We can take that down.

So, the concepts that the creative team developed, I think you mentioned they were reviewed by Ms. Leow before they go out to the client?

A. Correct, and myself.

Q. And by you.

A. Yes.

Q. And would Mrs. Resnick review concepts before they go out to POM Wonderful?

A. No.

Q. Were those -- were the concepts of the creative team ever -- were there occasions where they would want to show the concepts to Mrs. Resnick?

A. Yes.

Q. And so those might have been shown to her before going to POM?

A. No, after.

Q. Okay.

A. After.

Q. Oh, after. Okay.

So, the decision to show a concept to Mrs. Resnick would have been originated by your client?

A. Certainly. Listen, Liz and I would have a point of view about which work that we developed should be shown, but it was -- it was POM's call to decide which work she would see.

Q. Okay. And in what form do the concepts that are sent to POM, what form do they take? Let's just take, for example, a print concept. Does it include headlines at this point?

A. Yeah. Generally, the headline and the visual, yeah, and maybe brief body copy.

Q. And if POM marketing wanted to share this concept that it had generated with Mrs. Resnick, would

that happen at one of the LRR meetings?

A. Usually.

Q. So, once POM marketing agrees with a concept, am I correct that the agency would then begin the ad execution phase?

A. You mean the actual writing of the copy and getting deeper into the -- yeah.

Q. Correct.

A. Right.

Q. And is that -- am I using the correct terminology? That would be called the ad execution phase?

A. Sure.

Q. Okay. And at that point in the process, does the agency receive input from POM marketing on the copy?

A. Well, sure, but I think we would have received

A. Yes.

Q. So, I'm going to show you a couple of documents related to this turning a concept into an execution -- into an ad execution.

If you would turn to or look on the screen, it's going to be CX 0214. So, this is an email exchange between you and Ms. Leow from July of -- July 18th, 2008, regarding some proposed lines for a POM Juice Honest to POM Campaign. Do you see that?

A. I do.

Q. And by "lines," I think she references "lines," is that headlines?

A. Headlines, correct.

Q. Okay. And so it appears that you and Ms. Leow are confirming which proposed headlines Lynda Resnick has approved at this stage in the process. Is that right?

A. Yeah. I want to just clarify, at this stage of the process, that doesn't mean that these were actually made into actual ads.

Q. Right. This is --

A. At that moment in time, at that meeting with Lynda, these were still alive.

Q. Okay. And so from the middle of that first page, under the heading "Lines," and spilling onto the

next page, it looks like there are about, you know, 16 or so lines that are alive still at that point. Is that right?

A. Yes.

Q. And so is the purpose here in this email to make sure everyone's on the same page about, you know, what's live at this moment to move on to the next step?

A. It's an internal document, within Fire Station, to say -- because various people might have worked on various lines -- various teams or various creative people might have worked on various lines.

It sounds like, based on this, that they should all be executed in the dark, rich burgundy background, that was kind of -- just aesthetically, that was the look. So, I think the point Liz is trying to make is let's lay out all these still-alive headlines in that look and then take another look at it.

Q. Okay. Okay. And so now I'd like to show you another email that's from about a week later, July 24th of 2008. So, this is CX 215.

And -- I'll just wait to give you a chance to look at it. Okay.

So, this is an email from you to Ericka Gettman and Diane -- I am going to get a lot of practice with this -- Kuyoomjian.

A. Kuyoomjian, yeah.

Q. And with a copy to Matt Tupper and Curt Vetter, and it looks like it's about some outdoor -- approved outdoor headlines for the campaign, again, approved at this particular phase.

Who is Ericka Gettman?

A. She originally was hired by Roll in the consulting group. There's a separate department within Roll that has a number of consultants, and she was hired there. The individual businesses sometimes cherry-pick people out of the consulting group to help them with projects.

And I think for this, they were about to start marketing POM Juice in the UK, and I guess Ericka had some past international experience at Nestle or something, and they were asking her to help on this project. So, that's who Ericka Gettman is.

Q. Okay. And so, am I right, these were headlines that were approved at this particular point in the process for use in the U.S., but you were sharing it with the UK team in case, you know, they were interested?

A. Correct.

Q. Okay. And so this email references 11, and the email from, you know, six or so days prior that we just

looked at had 16, so it seems that these have been whittled down. Is that fair?

A. Yeah, I guess. I don't know what happened, but yeah.

Q. Okay. So, if we look at the first execution, which is 215 -- the next page -- 2, and we don't have a color copy, so it could be this was on the dark burgundy, but I don't know.

At the bottom, it says, "Trust in POM." And was that the name of the campaign?

A. At this point, I think we were calling it the Trust in POM Campaign, but I don't know if that -- that's a tagline. I don't know if that tagline ever made it to the light of day. There was a pomegranatetruth.com campaign. So, it might have been -- it might have evolved into that.

Q. Okay. And so do you know sort of what the theme of the -- did -- was this tagline associated with a particular theme for a campaign?

A. Well, in general, there was a desire at this time to combat some of the adulterated juices that were out there, whether they be Minute Maid or Ocean Spray or Welch's or whoever's pomegranate juice, which we understood had very little pomegranate juice in them.

And so, yeah, there was a halo effort to start

asking consumers to be more alert and aware of what you're purchasing, because when you compared our products to their adulterated products, ours were a lot more expensive. So, we believed that that was potentially hurting our sales.

Q. Okay. And so the -- the proposed headline here

Q.18yievveryou mSpaetialvcckb8 ehe -- the proposed h Q.18yievyeris y

attention-getting. This ad never ran, but --

Q. Oh, okay.

A. -- this was just a concept.

Q. Okay. And I'm just trying to understand sort of what the thinking was at that time.

Would the reference to prostate cancer, would that have come from a creative brief?

A. Hmm. I don't know.

Q. Okay. Okay. And then just the last one, which is on page 4, "Erectile dysfunction got you down?" And what was the agency trying to communicate here?

A. That -- as we understood, there were some initial learnings that pomegranate juice was helpful for erectile dysfunction.

Q. Okay. And when you say "learnings," you mean a study, for example?

A. I -- I don't know what level it was. We had a very general understanding that, you know, they were finding some -- some good stuff about it. So, we were developing ads in the event that they were comfortable running them.

Q. Okay.

A. This never ran either, though.

Q. Okay. But the information would have been provided to you by POM marketing?

A. Yeah. Yes.

Q. Okay. So, we can take this one down.

So, let's just turn back to the ad process. So, once the agency was satisfied with an execution, I think you mentioned that the traffic department would then send the finished execution to POM for approval -- for review and approval?

A. The concepts? No, generally we would present those.

Q. Oh, I'm sorry. I meant a final execution.

A. Oh, when it's final, final, ready to go out to a media resource?

Q. Yes, um-hum.

A. Yeah, we would send it for signature to somebody at POM. Somebody would have to sign for it before it goes out. Yeah, and traffic would probably get that signature, yes.

Q. Okay. I think you said at that point, it could have been -- well, maybe I'll just ask again, because I can't remember.

But who at that point reviews the final execution at POM?

A. Oh, I don't -- I'm not certain who -- who reviews it. All I know is that someone from the POM marketing department signs for it.

Q. Okay. And so is it a POM -- I'm turning now to the dissemination, the media department and the dissemination. Is it POM marketing that provides the approval for whether an ad runs in a particular media resource?

A. I'm not sure I understand the question, but I'll try to answer it and you tell me if this is the answer you want -- I mean, that you're asking.

The POM marketing team approves a media plan that we developed, which for television would include the networks and shows that it would be on; for a print campaign, it would include the magazines and the dates of those magazines that we would be in. Is that what you --

Q. Okay. Yeah, that helps.

And in terms of -- when you say they approve the media plan, it will -- the media plan will articulate which proposed magazines, for example, it's going to run in.

A. It would -- yeah. It will have a list of magazines and the dates, the issue dates of those magazines.

Q. Okay. And is the topic of ad placement, is that a topic that would be discussed at an LRR meeting?

A. Ad placement meaning I've got an insertion

coming up in Men's Health and I want you to run that ad in it rather than that ad? Is that what you mean?

Q. Well, let's talk at a more broader level first. Let's say the media plan. Would the media plan come up at the LRR meeting?

A. Sometimes.

Q. And then at a more detailed level, would there -- would there be occasion to have discussion about a particular ad and where we want that ad to run?

A. Occasionally. Rarely, though.

Q. And would Mrs. Resnick express an opinion about where she would really like to see an ad run?

A. She might.

Q. And so -- and now turning back to the traffic department, the traffic department is the part of the agency that actually physically sends the final executions out to media resources?

A. Correct.

Q. Okay. But it's the agency's media department that buys the space for the various media.

A. Correct.

Q. So that the traffic department knows where to send the executions.

A. Correct.

Q. Okay. And how does the agency confirm where an

ad has been disseminated?

A. It varies. What media vehicle do you want to talk about?

Q. Well, let's, I guess, start with print.

A. Print. We -- the media team themselves gets copies of all the issues that we were scheduled to run in to ensure that they actually did run as purchased.

Q. So, someone physically goes through and looks at it?

A. Yes.

Q. That the ad is where it was supposed to be.

A. Yes.

JUDGE CHAPPELL: Let's go ahead and take our lunch break now.

MS. JOHNSON: Okay.

JUDGE CHAPPELL: Everyone needs to note that tomorrow, Tuesday, we will end no later than 5:15 p.m., 5-1-5. That's tomorrow.

We will break until 2:00 p.m. We're in recess.

(Whereupon, at 1:00 p.m., a lunch recess was taken.)

AFTERNOON SESSION

(2:03 p.m.)

JUDGE CHAPPELL: Okay. Back on the record,
Docket 9344.

Go ahead.

and the traffic person just carries it away.

Q. nyy see

did it run on the right-hand page, which we deem better than a left-hand page placement? Was it in the front of the book versus the back of the magazine, because we think people sometimes don't get all the way to the end of a magazine, so that's better.

So, it's just -- you know, did they live up to whatever guarantees they made when they sold us the space? It's just a recap saying, did we get what we paid for and who performed better among those magazines, for future reference.

Q. Okay. And so the -- the net guarantee would be the column that says basically did we get what we asked for?

A. Right.

Q. Okay. In the third column, entitled "Ad," it appears to have a headline that would correspond to the advertisement that ran. Is that correct?

A. Correct.

Q. And so the question is, how do you know -- well, let me back up.

It's my understanding that POM often interchanged headlines with different body copy. Is that correct?

A. That doesn't -- I mean, certainly copy gets revised on occasion, but generally, when ads finish, you

copy went with these headlines?

A. How would -- I wouldn't.

Q. Okay. And in terms of verifying that a particular ad ran, would it be someone's responsibility to, once they find out whether the guarantee was met, to go back and look at the actual ad to see exactly what the body copy looked like?

A. Well, first of all, it's unlikely that the body copy would have changed in such a short time frame, but let's -- for example, let's just say that it's possible that it did. I don't think that was the purpose of this document.

I think this is just to let them know, in general, which ad was it and did it get -- did they get what they paid for, from a media perspective. It's not to ensure that the body copy was version A or version B.

Q. Okay. So, for purposes of this document, the body copy is not necessarily relevant to --

A. No. This is just -- and that's why it's entitled "Print Positioning Report."

Q. Um-hum.

A. It's just reporting on what kind of positioning did these publications give POM.

Q. Okay. And what department generates this report?

A. I don't know who generated this. It could have

you know.

Q. And online ads, such as banner ads? Would the agency maintain copies of those that ran?

A. Not in quite such a -- an aggregated manner, but you can always get or usually get copies of past online banner and digital ads through DART. DART is a third-party vendor that disseminates most online ads for most agencies, in this country at least.

Q. Okay. And the magazine wraps, like the Time wraps --

A. Um-hum.

Q. -- we discussed that with Ms. Leow during her testimony, but would those be archived as well?

A. I'm sure we have copies of them, but -- I think it was only that one time that we did it, so a small box.

Q. Okay. That would probably fall into the print category?

A. Yeah.

Q. And are they -- going back to the archives, are those maintained by year?

A. By who?

Q. By -- by -- are they organized by year, typically?

A. I have no idea.

Q. Okay. Who would usually handle that in the media group?

A. That would be -- there's a junior person in our media group that probably is responsible for boxing up those print ads.

Q. Okay. And are the ads that are run -- earlier you mentioned that you get -- let's say if you sent an ad out to be placed in Health Magazine, the publication would send you the actual ad as it ran in the publication to confirm that it ran. Is that right?

A. They generally send you the entire publication, the magazine.

Q. Okay. And is that what you archive?

A. Usually.

Q. Okay.

A. I mean, I'm not that close to it. I think that's what they do. I think they stack up all the magazines that we've run in into boxes and put them in storage.

Q. Okay. I want to go on to another topic, actually the first two pages of the document you have, CX 435, pages 1 and 2, and it's the "POM Media Archive, 2004 to 2008."

Are you familiar with this?

A. No.

Q. Are you familiar with reports like in your experience in the advertising business?

A. Yeah, in general. Sure.

Q. So, do you know what department at the agency would generate this?

A. I -- I don't. And I don't know that it was generated in the agency.

Q. Okay. So, it could have been POM marketing or someone at POM?

A. Right.

Q. And, based generally on your experience with these types of reports, what's the goal of this type of report?

A. To have a history of the creative rotation of the ads.

Q. So, essentially, it appears to be a project number, a description of the creative, which I guess is, again, the headline?

A. These look to be headlines, yeah.

Q. And then the publication and what issue -- what monthly issue it ran in.

A. Right.

Q. And I wanted to ask you a little more about the project job number in that last column. If you look at, actually, the second page of this document, 435-2 --

it's very hard to read -- but the last column, if you just kind of glance down, you'll see some of these are PJ numbers and some of them are PM numbers and some of them are blank in 2006.

A. Um-hum.

Q. Do you know why they would have different -- what the different numbers represent, PJ versus PM?

A. Well, I can't speak authoritatively, because I didn't get there until 2007, but my assumption is that there weren't multiple subbrands within POM in 2004, 2005, that probably the only advertising they were doing was related to juice, and then as things evolved, they probably went to a new numbering system, and PJ probably is referring to POM Juice, and I'm sure all the others, POM Pills, POM Coffee, POM Tea, blah-blah-blah, all have different starting codes.

Q. Okay. And then it looks like in 2006, it was blank, and I know you had mentioned that at one point, they went dark with advertising. Do you think that is the -- could be the reason for the blank at that point?

A. That's -- that would not be my guess. My guess is it's just poor record keeping, and they lost track. But I don't know. It was before me.

Q. Okay. So, in addition to the advertising that ran, does the company -- does the agency also keep

records of ads that are not used?

A. Ads that were not used? Ads that were in the concept phase and never made it to the light of day? Is that what you mean?

Q. Well, we could start there, yeah.

A. Well, sure. I mean, you pulled up some earlier where you were showing me some ads --

Q. Um-hum.

A. -- and those were just concepts. It's possible that there are concepts on our server, but it's not in an organized fashion like here's some concepts from January 2007 that we presented and no one liked. You know, it's not -- it's not quite that defined. It gets more -- more organized, hopefully, with each of the individual marketing groups, as work actually is disseminated.

Q. Okay. Okay, I want to show you -- let's see, if you could turn to CX 269, and this really starts on page 2, and I just wanted to focus on the bottom half of this first page. This is an email from -- that appears to be from you to Andrea. Would that be Andrea Hernandez?

A. Andrea Hernandez, yes.

Q. And Ray.

A. Um-hum.

Q. And who is Ray?

A. I believe it was Ray Espinoza. He was somebody in the production department -- print production department of the agency.

Q. Okay. And the email -- at least the subject line appears to be "POM Health Claims Needing Preparation." So, this bottom portion, after you mention Andrea and Ray, talks about a meeting on health claims that's scheduled for February 25th, 2009, with Stewart and Lynda Resnick, right?

A. Right.

Q. Okay. And the meeting is going to include -- it appears there are three items here, presentations on each of these three items. Is that right? Do you see that?

A. I do.

Q. Okay. And so here you're asking Andrea and Ray to give Diane K, Kuyoomjian, copies of all the final ads that have ever run.

Do you see that at the -- that looks to be the last paragraph on this page?

A. Number 3?

Q. No, sorry, below that, two paragraphs below.

A. Okay, sure.

Q. Starting, "As a first step."

A. Yes.

Q. And so in asking them to get all of the ads that have run, would this refer to -- how would they go -- do you know how they would go about doing that?

A. How they would collect them?

Q. Correct.

A. Not specifically.

Q. Okay. And what prompted the meeting on February 25th that you were preparing for?

A. I -- I am not sure. It was a request from POM, that they wanted to have this meeting, or that -- I think Matt organized -- Matt probably organized this meeting, but I don't know what the impetus for -- how it got generated.

Q. And that would be Matt Tupper?

A. Right.

Q. Okay. And do you know what the purpose of the meeting was going to be?

A. Yeah, sure, to have a discussion about, you know, what -- what were we comfortable saying in consumer communication.

Q. And did that meeting actually take place?

A. There was a meeting. I don't know if it was on this date or with all these people, but there was a meeting where we did discuss and reviewed ads, yeah.

Q. Okay. Did -- did the -- you mentioned in your

email three presentations. Was there a presentation on the overview on the extent of the research and the conclusions?

A. I said there were three presentations?

Q. Oh, I'm sorry. In the email here --

A. Oh.

Q. -- the bottom portion, you mention, "In that meeting, there will be three primary presentations."

A. Yeah. I don't think it -- well, at least the part that I was involved in didn't include 1 and 2.

Q. Okay.

JUDGE CHAPPELL: Hold on a second.

(Pause in the proceedings.)

JUDGE CHAPPELL: Go ahead.

BY MS. JOHNSON:

Q. And so at the meeting, do you recall who else attended the meeting besides yourself?

A. I believe Craig Cooper was there and Diane Kuyoomjian and Liz Leow.

Q. Would Mrs. Resnick have been there?

A. I'm trying to think. I don't believe Stewart was, and I'm trying to remember if Lynda was. I don't think either one of them were there, but I can't -- I can't be sure.

Q. And Mr. Tupper, was he there?

A. He might have been, but I don't -- I don't remember him being there.

Q. You said you don't remember whether Mrs. Resnick was there. Is that right?

A. I don't remember her being there, no.

Q. I'd like to see if some of your prior testimony might refresh your recollection on that point. Do you recall, no.

remember that meeting being part of a meeting in the -- Teleflora's design studio. So, I was thinking about two different meetings, and I can visualize both of them, but I don't know if you're telling me that it's the same meeting and I -- and the content led me to both things. I don't know what to say.

Q. Okay. Well, let's -- I'll move on, then, to the third paragraph of your -- the third bullet in your email, and there, you say, "an advertising" -- that there was going to be "an advertising review of ads that ran in support of Juice and Pills, ads that resulted in legal or other challenges, ads that were created but were never allowed to run, and ads that were created that are considered on edge but marketing/legal is willing to run."

What did you mean by "okay" versus "challenged"?

A. "Okay" versus "challenged"?

Q. Or what did you mean when you were categorizing them into those four categories? What would you consider the ones that were on edge, for example?

A. I can't tell you the specific executions off the top of my head, but there might have been headlines that were a little bit edgy in terms of their content, and being discussed is whether they were -- went too far in terms of, you know, the health claims that we made.

Q. Okay. And do you recall what decisions, if any, were made after that meeting?

A. Not specifically. But we came out of there with, you know, some definitive guidelines about, hey, we need to stay away from this general area of content; this general area is -- well, we'll review each one and make a call at that time; and these -- yeah, this is fair territory and we're -- we feel perfectly good and solid about. So, it was kind of divided up.

Q. Okay. And this was specifically with regard to health claims. Is that correct?

A. Primarily, yeah. Primarily health claims, yeah.

Q. Okay. And would those be in the areas of heart?

A. It could be all, but I have a question, because this was all taking place with Craig Cooper, you know, our chief counsel. Does that make it attorney-client privilege?

Q. Well, I am not interested --

MS. DIAZ: Yes, Your Honor. Objection, Your Honor. It is not clear to me from his previous testimony if Craig Cooper is at this meeting, who is our general counsel for POM Wonderful, and they're discussing legal issues, including health claim issues. So, it wasn't -- it's not clear to me that -- and it

was at those meetings, okay, or if we had outside counsel at those meetings --

JUDGE CHAPPELL: Why don't you two step back and discuss it and see if she's going to pursue getting into anything that's privileged. Have a little chat, and let me know.

MS. DIAZ: Okay.

(Pause in the proceedings.)

MS. JOHNSON: And I am moving on at this point.

JUDGE CHAPPELL: Okay.

BY MS. JOHNSON:

Q. So, Mr. Perdigao, during your time at Roll, POM has provided the agency with the medical research information to use in the advertising. Is that correct?

A. No, that's not correct.

Q. Okay. When we spoke earlier about, for example, the hangtag --

A. Uh-huh.

Q. -- and you had mentioned that certain information, like 25 million in medical research, that would come from the POM creative brief?

A. Sure. The specific sentence or paragraph that was probably culled from some medical research was provided to us, but your question, I thought, was did they provide you with the medical research? And, no, I

have never seen any of that medical research.

Q. Okay. So, they didn't provide you with the actual underlying studies.

A. Right.

Q. Correct, okay. But they provided -- POM marketing provided some information to the agency about -- and maybe at a more general level -- about the scientific research, correct?

A. Either summarizations or factoids or something taken from it, culled from it, yep.

Q. And before a POM ad goes out to the media, does someone from the agency review any of the medical claims for accuracy?

A. No.

Q. And, during your time at Roll, has the agency had an in-house medical expert?

A. No.

Q. Or perhaps employed a medical writer?

A. There's been -- we've helped POM source a medical writer for some newsletters that they were doing, but they were not -- they were not a part of the agency.

Q. Okay.

A. I have more writing contacts than they did, so that's why we helped them with that.

Q. And it would have been employees of POM working with that person?

A. Yeah, correct.

Q. Not employees of the agency?

A. Correct.

Q. Okay. And have you ever discussed any of the medical research information with scientists at POM?

A. No.

Q. And there have been instances in the past in which a media resource has sought information from the agency to support claims in POM advertising. Is that right?

A. Yes.

Q. Okay. And so I wanted to show you CX 194, if you could turn to that. This is a four-page email chain from May of 2008 that's between a representative at NBCUniversal and Jake Sugarman, who I think you said had left the agency. Is that right?

A. Correct.

Q. And then the message on the first page of -- well, see, the message has been forwarded to you. Do you see that?

A. I do.

Q. So, there seems to be some back and forth between Mr. Sugarman and the NBC representative for some

voice-over lines for a proposed TV ad. Is that right?

A. Yes.

Q. And so, in general, if a media resource had questions about a claim, would it be someone in the traffic -- I'm sorry. Let me back up. Scratch that.

Is Jake Sugarman in the traffic department?

A. He was.

Q. He was, okay. So, if a media outlet had questions about a claim, would they typically ask someone in the traffic department those questions?

A. Typically, because -- whenever you're about -- you're considering developing a television commercial, that's a pretty large investment, right? A lot of out-of-pocket money goes into that. So, before you would invest any of that money, you would submit scripts to networks to get their reaction, to make sure that if we go ahead and make this, will you run it?

So, it's a normal course of duty; and the traffic people generally send those out, so the people, at NBC in this instance, I believe, but at any network, if they have any questions.

And that can go from -- listen, we have to prove that it's 100 percent pomegranate juice. We have to prove that the pomegranates come from California. Whatever the claims might be in the commercial, the

networks generally send you something back and say, "These are the things you need to quantify for us before we are going to rubber-stamp this as okay."

Because what they don't want to do, they don't want to get into a situation where a company makes a commercial and then they can't run it anywhere, and they're worried about legal issues related to that.

Q. Okay. So, whoever gets this inquiry at the agency would go back to somebody at POM, if it's related to a POM advertisement?

A. Yeah. Ultimately, they might ask me, "What do I do now?" And I would say, "Go talk to your client and get the backup that's required from them." Yep.

Q. Okay. And as a matter of general practice, you didn't ask for more information about the underlying studies from the client, in general, did you?

A. Did I or --

Q. Yes. Did you?

A. No. No.

Q. But in this instance, where this issue was raised by NBC, the agency -- not you specifically -- did get a study from POM and forward it to NBC? Is that right?

A. That's what it appears. I didn't see the study, but it looks like they sent something off to NBC, yeah.

Q. And do you recall any conversations with Mr. Sugarman about NBC's request for substantiation?

A. Just that they wanted more.

Q. Did you talk at all with Mark Cregar about the issue?

A. No.

Q. So, if you look again on the second page, the top portion, where the NBC representative is writing back to Mr. Sugarman, he or she writes that "The study is inadequate, as it does not meet our clinical testing guidelines. It is not randomized or controlled."

Do you see that?

A. I do.

Q. Okay. And, in response, Mr. Sugarman -- so now we are at the top of the page -- offers to have our in-house medical expert walk NBC through the research.

Do you see that at the top?

A. I do.

Q. So, is Mr. Sugarman referring to an in-house medical expert at the agency?

A. No. I think he's referring to Mark Dreher.

Q. Okay. And Mark Dreher would have been the in-house medical expert at POM?

A. Correct.

Q. Okay. So, after May 2008, when this took place,

do you recall having any conversations with anyone at POM about the level of substantiation needed to make -- to support a prostate health claim?

A. No. And one fundamental reason is because these concepts died pretty soon after. These never went much further.

Q. Okay. But you didn't -- you didn't have any conversation at a more macro level about substantiation for the prostate health claims?

A. No.

Q. Okay.

A. You know, that's pretty -- that's pretty standard, though. I mean, most agencies have to rely on the clients to give them the facts, and we trust that the facts they give us are correct. We have done lots of ads for cars and motorcycles and whatnot, and they tell me a horsepower, and I put that in the ad.

I have to believe that -- I have no idea if that's really the horsepower of the car, but I believe it to be, based on our client. So, in these instances, if they tell us that pomegranate contains powerful antioxidants to keep you healthy, I believe them.

Q. Okay. Next, I wanted to have you look at CX 265. This is an email from January of 2009, and I want to direct your attention first to the -- page 2,

the middle to lower half of the document, where Diane Kuyoomjian has -- it looks like they first forwarded an email to herself and then sent it to you and Matt Tupper. Do you see that?

A. I do.

Q. And it appears she's writing to you and Mr. Tupper to seek input about a brief that she's writing for POMx Pills. Does that seem correct?

A. That seems correct, yes.

Q. And by "brief," would that be creative brief?

A. Yes.

Q. Okay. So, it appears that she's looking for input on how specific to get with regard to medical research for the POMx Pills, noting that -- in that large paragraph, noting that LRR, which is Mrs. Resnick, would like a cute headline, but also, Mrs. Resnick thinks the POM mailing inserts need to look more medical.

Do you know what Diane meant when she said that Mrs. Resnick wants the inserts to look "more medical"?

A. They were talking about -- the debate was do you -- how much of the footnoting of the studies that had been done, how much of that content do you include in either ads or inserts or newsletters or whatnot? And there was a difference of opinion.

Some people thought, oh, just -- you know, you don't have to give all those -- those details in the ad itself. You can reference a Web site or a -- footnote a study, and then the consumer can go find it.

But then other people thought it would be valuable to have more of that content in the documents. So, we were going to develop layouts that did it both ways, and then a determination would be made.

Q. Okay. And then in the last sentence of that large paragraph from Diane, she also notes that "when we tested shorter pill ad copy with less information, less info about the research, the ad pulled less."

What did -- do you know what she meant by the reference to "the ad pulled less"?

A. Well, she's referring to -- most of the Pills ads have a direct-response code in them, so when you call or go online to order or to get your discount or whatever it might be, it has a code that you punch in, and that's how they track the effectiveness or one way of tracking the effectiveness of an ad.

And, apparently, when they did this before, the one with shorter copy did not get as many buys; not as many consumers bought using that code as the other one.

Q. Okay. And then if you skip the next short paragraph and move to the one below it, where it starts,

"Also, Mike."

A. Okay.

Q. She writes to you that "We can't do a prostate specific ad -- because the research is on juice, it's a bit of a stretch to get to pills."

Is that -- do you see that?

A. I do.

Q. Okay. And, then if you move up to the top of the page, in your response back to her, you write, "I agree that prostate on pills is tricky."

And what did you mean by that?

A. Well, I was agreeing with her comment that if that was, in fact, true, that the research that you would reference was on the juice, then it would be difficult to say it about the pills.

Q. Okay. So, now I want to have you turn to CX 1426-44. This is Complaint Exhibit K, which is a January 2010 ad for POMx Pills that Respondents have admitted ran in January of 2010.

And I'd like to direct your attention to the large paragraph in the middle, if we can blow that up. All right.

So, here, in the middle of this paragraph, there's reference to the UCLA study by Allen Pantuck regarding prostate -- it was a prostate study. Do you

see that?

A. I do.

Q. And is this the same prostate -- you know, prostate research that you and Diane were discussing in your email of January 2009, when you said it was on the juice?

A. I don't know the specific prostate study or research that she was talking about.

Q. Are you aware of any other published studies that POM has on the prostate?

A. No. But I'm not intimately -- if you had asked me before you let me look at this if I was aware of this one either, I would have said no.

Q. But you would agree that the content in the advertisement is discussing a study about pomegranate juice, correct?

A. Yeah. I think it even -- it denotes that.

Q. Okay. And whose decision was it that the company could still reference POM Juice research in a POMx ad?

A. That, I don't know.

Q. Okay. And if you look further down in that paragraph, there are also references, in this 2010 ad, to two heart-related studies on POM Juice. Do you see that? One is from 2004 and one is from 2005.

A. I do.

Q. And the one in 2004 talks about pomegranate juice consumption resulting in a significant IMT reduction after one year. So, at that time, in 2010, the -- is it fair to say the agency and POM thought it was appropriate to utilize heart studies on POM Juice in the advertising of POMx?

A. I would not say it's fair that the agency decided that. I would say that it's fair that POM marketing decided that if you clearly reference and denote that the studies were done on juice, that it would be okay for this particular ad, at this particular time.

Q. Okay. We can take that down.

And so now I wanted to just turn your attention to CX 320 at page 2. And this is an email from June of 2009, an email from you to Liz Leow and copying Diane Kuyoomjian and Matt Tupper. Is that right?

A. Yes.

Q. Okay. And I really just want to look at the second and third paragraphs, and maybe we can just blow up those two paragraphs.

A. Okay.

Q. Okay. And so here you write, "Liz: Per the meeting today, we are still being asked to develop a

humorous TV campaign, but we cannot reference:
Heart/cardio health or prostate health."

Is that right?

A. Yes.

Q. And did someone from POM marketing tell you that you could not reference cardio health or prostate health?

A. I assume. I don't remember who specifically told me that, but somebody from POM.

Q. Did you understand that to mean you would not -- you would no longer be able to use the cardiovascular studies information that had been previously referenced in advertising?

A. That's not how I interpreted it, no. I interpreted it for this TV campaign that we were developing, that they didn't want to use them.

Q. Okay. And is the same true for prostate?

A. Yes.

Q. You were interpreting it for the TV?

A. Yes.

Q. Okay. So, that deci oGy. wtcn So You wcgTpseTane5fe ciu ww it use

the less interesting it is to develop provocative advertising. I like to have specific content and specific claims, that's ideal, and you can -- the creative people tend to have a better -- if you close the box a little bit, it gets a little bit more fertile for creative development.

And when you're just talking so vague and so wide, generally, it's hard to keep creative ideation focused. So, I like more specific briefs. So, I was -- this is me subjectively saying, you know, I'm -- I wish it was not so vague.

Q. I see. Okay. And, Mr. Perdigao, were you ever directed by anyone at POM Wonderful to prepare advertisements indicating that drinking eight ounces of POM pomegranate juice has been shown to reduce cancer?

A. No.

cancer the finger" earlier. That was developed by somebody in the creative department, but that's -- you know, that's one individual's or one team's interpretation of what they were expected to communicate, but it ultimately was not right and never ran.

Q. And are you aware of any medical studies supporting that drinking eight ounces of POM Wonderful pomegranate juice can reduce cancer?

A. No.

Q. And I think you mentioned that you -- as president of the agency, that you rely on the clients to provide you with accurate information about the medical claims for the advertising. Is that right?

A. Correct.

Q. And so the agency itself doesn't do independent due diligence on whether POM's claims are substantiated, correct?

A. No.

Q. Okay, thank you. I have no further questions.

JUDGE CHAPPELL: Cross?

MS. DIAZ: Just one moment, Your Honor.

(Pause in the proceedings.)

MS. DIAZ: No additional questions, Your Honor.

JUDGE CHAPPELL: No cross?

Next witness.

MS. HIPPSLEY: Your Honor, I apologize. We do not have another witness. We --

JUDGE CHAPPELL: This is becoming a habit.

MS. HIPPSLEY: Well, I -- I am very sorry for that. We thought that Dr. Dreher, being a third party, would be crossed.

JUDGE CHAPPELL: I don't know why you don't have another witness standing by.

MS. HIPPSLEY: Mr. Tupper is the respondent, he's coming from California, and we did not schedule him for today. We asked that he be here for tomorrow morning. So, I apologize. We do not have him available.

JUDGE CHAPPELL: Well, I can tell you this. This case is going to finish, because I've got another case starting in September.

MS. HIPPSLEY: Oh, I understand.

JUDGE CHAPPELL: And whatever it takes. And it is not my responsibility to have witnesses sitting here. Perhaps I should make it my responsibility since it's not being managed.

MS. HIPPSLEY: No, I completely understand. We -- tomorrow, we have our expert, Dr. Stampfer, and we will start Mr. Tupper, who's the president. He'll

continue on to the next day. We have experts after that through Thursday.

JUDGE CHAPPELL: Looking at the schedule, I usafteDasEc,5e hgookiBis

four-day trial schedule, yes.

JUDGE CHAPPELL: All right. And, Mr. Graubert, are you at a position where you can give me an estimate? Do you believe you will be going -- how far into September?

MR. GRAUBERT: Excuse me. Give me one minute, Your Honor.

JUDGE CHAPPELL: All right. Go ahead.

MR. GRAUBERT: It's a little difficult to predict, Your Honor, but I believe that we will be up through September 22nd. September 22nd.

JUDGE CHAPPELL: That's not going to happen. I have another trial that starts the 19th.

MR. GRAUBERT: All right. We will have to look at the calendar to figure this out.

JUDGE CHAPPELL: So, I don't know if you have anybody you can bring in before the 30th, but you need to think about what you can do.

MR. GRAUBERT: The 30th of August, sir?

JUDGE CHAPPELL: Yes. You can see what you can do to finish up by the 18th of August.

MR. GRAUBERT: We'll see what we can do, Your Honor.

MS. HIPPSLEY: 18th of August?

JUDGE CHAPPELL: I'm sorry, September.

September. That is a Sunday. Let's make that the 16th of September.

Here's where I am at. I have a merger case that starts on the 19th of September, unless it settles.

MR. GRAUBERT: That's the Phoebe case?

JUDGE CHAPPELL: Yes.

MR. GRAUBERT: Is ProMedica still scheduled to go into August?

JUDGE CHAPPELL: I have no different than the emails the parties sent me. Right now, I'm showing them finishing up the 18th, and we're clipping along in that case. We knocked out a bunch of witnesses last week.

MR. GRAUBERT: All right. Well, we're certainly willing, Your Honor, to take a hard look at this and perhaps start earlier in August if that --

JUDGE CHAPPELL: Well, I have another case, sir. I have an out-of-town commitment the 24th, the 25th, the 26th of August, that does leave us a few days in August, the 22nd and 23rd, a Monday and Tuesday, but it could be that as we go along, you will find that you don't need as much time as you thought.

MR. GRAUBERT: That's always possible.

JUDGE CHAPPELL: I've always found that the number of witnesses dwindle by the time we get near the end, but maybe this is different.

MR. GRAUBERT: All right. Let us give this a little thought, Your Honor. I'm sure we can accommodate your schedule.

JUDGE CHAPPELL: The other alternative is I will go to trial in Phoebe for a week and we will reconvene, like, the 26th of September. If we have to do that, we can do that.

MR. GRAUBERT: I think we, frankly, should keep that option on the table, because I haven't accounted for Complaint Counsel's rebuttal case. So, let us do a little work on this, Your Honor.

JUDGE CHAPPELL: All right. It's -- I just am not sure what happens once we get to September 19th, but like I say, I can -- you know, we can do what we're doing with these current two cases. I can try Phoebe for a week and then we can wrap this one up.

MR. GRAUBERT: Right, you have done that.

JUDGE CHAPPELL: All right.

MR. GRAUBERT: We have to have a word with the Commission to ask them to stop issuing complaints.

I have one housekeeping matter, Your Honor.

JUDGE CHAPPELL: All right.

MR. GRAUBERT: I'm sorry, are you finished?

MS. HIPPSLEY: Yes.

MR. GRAUBERT: It is likely that when Complaint

Counsel starts putting on its experts, there will likely be more cross-examination, and we will likely have some impeachment material. It depends, of course, what happens on direct.

But based on my understanding of this Court's practice and the practice in Part 3s for some time, in terms of physically handing up any of that material, we are going to mark it in advance just to keep track of it all, and we will have a separate series of numbers that won't conflict with any of the other exhibit numbers.

JUDGE CHAPPELL: Well, material used for impeachment doesn't necessarily become an exhibit. It doesn't become evidence.

MR. GRAUBERT: That is true, although depending on the circumstances, it may be -- it may become important to move it into evidence. But just for document handling purposes, Your Honor, our idea is to give it a number so we can all refer to it.

JUDGE CHAPPELL: You can have it marked for identification.

MR. GRAUBERT: Yes, that's what we're planning.

JUDGE CHAPPELL: Okay.

MR. GRAUBERT: Thank you.

JUDGE CHAPPELL: Did that answer your question?

MR. GRAUBERT: Yes, it does. I just wanted to

make sure we were on the same wavelength.

JUDGE CHAPPELL: You can have a seat.

MS. HIPPSLEY: Okay.

JUDGE CHAPPELL: So, we are going to reconvene at 9:30 in the morning, correct?

MS. HIPPSLEY: Yes.

JUDGE CHAPPELL: All right. We're in recess.

(Whereupon, at 3:09 p.m., trial was adjourned.)

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 NAME: POM WONDERFUL LLC

DATE: JUNE 6, 2011

I HEREBY CERTIFY that the transcript contained
herein is a full and accurate transcript of the notes