

FEDERAL TRADE COMMISSION

I N D E X

IN RE POM WONDERFUL LLC, ET AL.

TRIAL VOLUME 14

PUBLIC RECORD

SEPTEMBER 2, 2011

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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.)
)
 -----)

Friday, September 2, 2011

9:34 a.m.

TRIAL VOLUME 14

PUBLIC RECORD

BEFORE THE HONORABLE D. MICHAEL CHAPPELL
 Administrative Law Judge
 Federal Trade Commission
 600 Pennsylvania Avenue, N.W.
 Washington, D.C.

Reported by: Josett F. Whalen, RMR-CRR

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P R O C E E D I N G S

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JUDGE CHAPPELL: Back on the record Docket 9344.

Before we begin with the witness, we're going to go over some scheduling issues.

I have a variance between what we talked about a couple days ago and what's in the e-mail that came in. When we discussed it the other afternoon, I think the proposal was to resume on the 14th and then on the 11th, but then I had written down that complaint counsel would come back on the week of the 17th with any rebuttal experts. That's at variance with the e-mail that came to my office.

MS. HIPPSLEY: That's right, Your Honor, because when we rediscussed it, respondents are fairly certain that their testimony will take two, two and a half days I guess at most, and so we then followed up with our rebuttal to finish that week. My understanding is Mr. Fields has a conflict with the week of the 17th, so we think that we'll be able to finish in one week, the week of the 11th.

JUDGE CHAPPELL: You can do that in four days?

MS. HIPPSLEY: I think we think we can.

MR. FIELDS: We think we can, Your Honor. My conflict is at the end of the chain. It's not that next

week.

In other words, if we start the chain running for when we will get to oral argument, those three days make a difference because I'm supposed to start a trial. I've forgotten how the schedule works with the 5 days and the 21 days, but we figured it out, and I'm troubled if we don't start -- if we don't end on the 14th. I mean, I can make it work if I have to, but it's very difficult.

MS. HIPPSLEY: Could I just ask a clarification --

JUDGE CHAPPELL: Sure.

MS. HIPPSLEY: -- of counsel?

So you would be available --

MR. FIELDS: I can be here, yes. If you have to go over to the 17th, I can do that. My problem is that starts the days running so that at the end I would be here making closing argument on the day I'm supposed to be in federal court in Los Angeles.

JUDGE CHAPPELL: Did you build in the days that

the new rule to do the argument. There's a five-day window there.

MS. HIPPSLEY: And doesn't the argument follow the last filing of the reply findings?

JUDGE CHAPPELL: Yes.

MS. HIPPSLEY: Okay. So it's not the close of the record from the hearing.

JUDGE CHAPPELL: Right. But the close of the record starts the time-space, Einstein-induced continuum that we have to deal with.

MR. GRAUBERT: Your Honor, I believe you would have discretion also to set the time between the

MR. FIELDS: I will certainly not stand in the way of counsel appearing on the 17th or even the 18th. I'll just have to try to find a way and ask Your Honor for some leeway.

JUDGE CHAPPELL: I don't see a problem working around the oral argument date for you to do what you need to do with the other case. I have discretion on a lot of things, and based on a joint motion I'm sure I can do something.

MS. HIPPSLEY: Okay.

JUDGE CHAPPELL: So right now what I'm going to say is we're going to come back -- I see. The 11th is a Tuesday. After Columbus Day on a

before I have to pick a jury in California.

JUDGE CHAPPELL: Right. And because I have a five-day window and I have a window at the front with oral argument I can -- we can find a date somewhere to get around the conflict.

MS. HIPPSLEY: Okay.

JUDGE CHAPPELL: All right.

Okay. Next witness.

MS. DIAZ: Respondents call Professor David Reibstein, who is already seated.

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Whereupon --

DAVID REIBSTEIN

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

DIRECT EXAMINATION

BY MS. DIAZ:

Q. Professor, I'm going to spend some time going over your background and qualifications.

Is it correct that you received a BS in business administration and a BA in statistics and political science from the University of Kansas?

A. That is correct.

Q. And you were in the master of business administration program, graduated business school at

Tulane University; is that right?

A. That is correct.

Q. And you received your Ph.D. from
Purdue University in industrial administration?

A. Yes.

Q. And there you had a major in marketing and a
minor in behavioral science?

A. Correct.

Q. Can you briefly explain what behavioral science
is and how that differs from marketing.

A. Behavioral science is in many ways a subset of
marketing, but it comes from a psychology perspective in
trying to understand the psychology and motivations and
attitudes that consumers have in what it is that they do
and how they consume.

Q. Okay. You've been on the faculty of
The Wharton School, University of Pennsylvania for over
thirty years now?

A. 31.

Q. 31. Okay.

And you are a chair, tenured professor there of
marketing at The Wharton School?

A. That is correct.

Q. And what courses are you teaching there?

A. I'm currently teaching the core marketing

course. It's a marketing management course. I also teach marketing strategy. And I have been teaching marketing research for many, many years, all under our MBA program, and also teach a marketing metrics course.

In addition, I teach several executive courses that are one-week-long courses, one on marketing metrics and another on competitive behavior, competitive marketing strategy.

And I also teach in our executive MBA program.

Q. And not to oversimplify this, but I just want to make it clear for the record, the marketing research category you've identified, that includes marketing surveys; is that right?

A. So in that course we spend a lot of time talking about the design of surveys, the use of surveys, sampling and how to analyze the data. And these are all students that are going to go off working for various different companies buying these types of services as well as employing this, these methodologies, and having to depend on them.

Q. And you've also served as the vice dean of The Wharton School and the dean of the Wharton Graduate Division at the University of Pennsylvania for many years; is that right?

A. That is correct.

Q. And you were also a full-time faculty member at the Harvard Business School?

A. Yes, ma'am.

Q. And you taught marketing courses there as well?

A. I did. I taught a -- the core marketing course, and I taught a marketing research course at Harvard.

Q. And you've taught marketing courses at Stanford as well?

A. Yes.

Q. And you've also taught marketing strategy and advanced industrial marketing strategy at INSEAD? I don't know if I'm pronouncing that accurately. It's the number one business school in Europe.

A. Yes. That's INSEAD. It's just outside of Paris. And I have taught there as well.

Q. Okay. And you were the executive director for the Marketing Science Institute; is that right?

A. Yes.

Q. Okay. What is that institute?

A. The Marketing Science Institute currently is capped with 72 companies as its members. It works closely with those companies trying to identify what are the major issues that they have confronting them. This information is disseminated globally to marketing

academics. And it helps fund and support those research activities and helps bring back reports to serve these member companies and then the general community at large. And for all practical purposes, Marketing Science Institute sets the research agenda for marketing academia globally.

Q. Okay. And you are currently chairman-elect of the American Marketing Association?

A. So I was just -- I'm the chairman-elect, and next year I'll be the chairman of the American Marketing Association.

Q. Okay. And is it true that you've authored or coauthored over forty articles on marketing and marketing research that have been published in the most prestigious marketing journals, such as the Journal of Consumer Research, Journal of Marketing Research, Marketing Science and Harvard Business Review?

A. I have published in all those journals.

Q. And you've also written over seven books and numerous chapters in books on marketing and marketing research; is that right?

A. That is correct.

Q. Okay. And you've also performed consulting research for a variety of firms, AT&T, General Electric, Merck Pharmaceuticals and others, to name a few; is that

right?

A. Yes.

Q. I'm trying to shortcut this a little bit.

You've provided management education in the field of marketing to more than 300 companies?

A. Yes.

Q. And you serve on a number of boards and advisory boards for -- including a Marketing Accountability Standards Board; is that right?

A. That is right.

Q. And what is that board?

A. The Marketing Accountability Standards Board is a board that tries to set the standards for all of the marketing practice, both in the United States as well as globally, of what -- what are the most important marketing metrics and what is the standard for how we go about trying to measure those.

I might also mention a book that I've got that is on marketing metrics, which also has been adopted by the Marketing Accountability Standards Board for trying to itemize all the different measures and what's the appropriate way to try and measure them.

Q. Okay. And you've actually designed, executed, supervised market research studies for over thirty years, including those concerning consumer behavior; is

that right?

A. That is correct.

Q. Okay. And you've designed, executed or supervised hundreds of surveys over the years.

A. That is correct.

Q. And you've prepared an expert report in this matter as well; is that right?

A. Say that again. Could you speak up just a little bit, please.

Q. Sure.

And you prepared an expert report in this matter as well?

A. Yes.

MS. DIAZ: Okay.

We ask Your Honor to accept Professor Reibstein as an expert witness in marketing and marketing research, and we offer his expert report and CV into evidence, although I think they're already in evidence as PX 0223 and his CV is already in I believe at PX 0356a1.

MR. OSTHEIMER: No objection, Your Honor.

JUDGE CHAPPELL: We need to be unequivocal on whether the CV and report are in evidence. Are you offering them or are they in evidence?

MS. DIAZ: They are already in evidence,

Your Honor.

JUDGE CHAPPELL: Okay. That deals with that.

Any opinions that meet the proper legal standards will be considered.

BY MS. DIAZ:

Q. Okay. Professor Reibstein, you've conducted a survey for POM Wonderful in this litigation; is that right?

A. That is correct.

Q. And what was the object of that survey?

A. The objective was to try and find what customers -- the customers of pomegranate juice drinkers and POM drinkers, what their motivations were for buying and as well as for whether they would repurchase, what would be their motivations, as well as for recommending to others. It was all trying to understand the underlying motivations that consumers had for purchasing pomegranate juice and POM in specific.

Q. Okay. And how was that survey conducted? Can you describe it.

A. So I went through a process of trying to identify who would be the appropriate sample. The percent of people that drink pomegranate juice is a relatively small percent, under 5 percent, more in the

vicinity of 3 to 4 percent, so I had to pick a very large universe to be drawing from. But I wanted to get

those that have not seen any ads, so I use those both as a control so we have some basis for comparison between those two groups.

Q. Okay. And why did you choose an online panel for the survey?

A. So an online panel was -- first of all, I needed to have a panel to be able to scan through all of that to find the small subset of 3 to 4 percent, so I needed to have a panel. Online is becoming more and more the dominant way for trying to collect data and was able to do it in a very effective way for gathering this type of information.

Q. And --

A. Let me also mention a real advantage of doing that is the online panel is not geographically constrained, and so it could be from a whole cross-section from throughout the country.

Q. Okay. Now, I think you mentioned previously some of the qualification criteria you used.

You did mention that the persons must have purchased pomegranate juice in the last six months; is that right?

A. That is correct.

Q. Okay. And then what were the other qualification criteria you used?

in the last six months. And if the answer was yes, they made it through that part of the screen.

Q. Okay.

A. Is that the question you asked me?

Q. Yes.

But why did you use the open-ended question format?

A. So -- so once we got through the screener, then there were a series of questions that each of the respondents received. And there were three questions all related to the objectives that I described earlier.

The first question was: Why did you purchase pomegranate juice? Or if they -- if they were users of POM, so asked them if they had purchased POM or if they've purchased pomegranate juice. If they were users of POM, why did you purchase POM? Or why did you use -- purchase pomegranate juice?

And it was an open-ended question. I did an open-ended question because I wanted to hear in their own words what their particular motivations were. And then I asked them to provide as many details as they could as to why it is that they purchased pomegranate juice or POM.

The next question that was asked was one about would you -- why would you purchase -- or would you

purchase pomegranate juice again; and if so, why, and please provide as many details as possible. And again, that was left as open-ended, and the intent was to try and get in their words as many of their motivations that they might have for why it is that they would purchase it again.

Similarly, there was the third question that was: Would you recommend POM or pomegranate juice to a friend? And if the answer was yes: Why? What were your motivations? And please provide as many details as possible.

Q. Okay. So you asked why they bought, if they would repurchase, and if they would recommend to a friend and why in three different sets of questions.

A. Right.

Q. Okay. So why did you ask so many similar-sounding questions with --

A. So I wanted to try and triangulate and to give them as many opportunities as possible to articulate what their motivations were for purchasing. And it is often common in doing marketing research that what you want to do is have multi-questions, not identical questions but sort of surrounding the same area so that you could gain some reliability in the answers that you have.

Q. Okay. And so what were the results of the survey?

A. The results were overwhelmingly the case that there were very, very few people, under 1 percent, of the 750 people that responded to the survey that mentioned that they purchased pomegranate juice or POM because of anything to do with specific -- helping heal or prevent any specific disease.

Q. Okay. And was there any difference between the control group, the non-POM drinkers, against the experimental group, the POM drinkers?

A. So what was very interesting in this is that if you look at those that drank POM versus those that drank other pomegranate juice, there was no significant difference between those two. Both had a very small percent, as I said, slightly under 1 percent, that made any reference to a specific disease, curing or preventing any specific disease.

Q. Okay. And if you were to combine the results of the two groups, that is, the non-POM drinkers and the POM drinkers, regarding their results on why they buy pomegranate juice, was the result still less than 1 percent of those who thought that --

A. So let me run you just through a couple of numbers.

There were 750 total people in the sample, 406 that were POM drinkers and 344 that were other drinkers of other pomegranate juice.

Across that 750 there were a total of 6 people that made any reference to their motivation being curing or preventing any disease.

Q. Okay. Now, did you show any of the participants in the survey, in either the control or the noncontrol group, any ads?

A. So I did not show them any ads. The purpose of this study was not to test any particular ads. The purpose of this study was to look at what their motivations were for buying POM.

Q. Okay. I'm going to show you an excerpt from your report, figure 1. I've taken it right out of your report, sir.

If we can get figure 1 up for him.

Are these the results to the question "Why did you purchase?"

A. So as you can see specifically -- the answer is yes, they are. And what you can see on this is the question that was asked is -- the preceding question is: Did you buy POM Wonderful and did you buy other pomegranate drinks? And you can see 406 people replied and said they did buy POM Wonderful and 344 bought other

pomegranate juice.

And if you go down below to the part that is encircled in red, you see that it says 1 percent mentioned a specific disease. That 1 percent is 4 people out of the 406, so it was rounded up to 1 percent. And we have 3 people out of the 344 that have mentioned anything about a specific disease from the other pomegranate buyers.

Q. Okay. And the -- do you know what numbers -- and we can go over this in another chart later on, but -- let me ask, as a preliminary matter, why are there so many people in this study?

A. I wanted to be able to say something with some degree of statistical significance, and generally you need to have more than 300 people in any study to be able to say anything with any degree of significance.

And what you see is within both cells we have more than that number in each of those particular cells.

Q. When you say "more than 300 people," do you mean 300 people --

A. 300 respondents.

Q. In both -- in each of the groups, or just combined is enough?

A. That's right.

So for me to be able to say anything with any degree of confidence and certainty, I have more than 300 in the POM Wonderful buyer group, and I have more than 300 in the other pomegranate buyers, so I need to have -- to say something about each one of those subgroups I need to have a large enough sample.

Q. Okay. And so looking at your figure here, it looks like, for example, on the second bar from the top where it reads "healthy," it looks like from here that more of the non-POM Wonderful pomegranate juice buyers thought that -- purchased the product because it was healthy than the POM Wonderful buyers; is that right, or can you --

A. Yes. It's a very interesting result that came out. Many people bought POM because they thought it was healthy, 35.2 percent, but even a larger percent bought other pomegranate juice for health reasons. What you will see is that people would be buying POM for other reasons and other motivations more so.

So you will see, for example, I bought POM rather than buying other pomegranate beverages because it tastes -- because of the taste, and it could be because of the curiosity or it looked interesting to them. You see more people doing that. And in particular, you see on the bottle that they were

intrigued by the packaging and the bottle. And even more people recommended it.

But there were other motivations for buying POM other than just health. And the "healthy" was skewed towards the non-POM drinkers.

Q. Okay. Can we put on -- I'm going to put on the second figure from your report.

A. Okay.

Q. This is again taken from your report, and I believe this is the graphic in your report representing the responses to the question -- to the separate line of questions that lead to why would you buy again. Is that right?

A. That is correct.

Q. Okay. And what is notable here, if --

A. So looking at this -- at this, again, it's trying to get at the same sort of underlying objective of trying to understand people's motivations for buying.

What you see is very, very, very few people say they buy it because of it curing or preventing any specific disease or any specific disease reference, so you see again circled in red less than 1 percent, actually in this case it is one-half of 1 percent, mentioned that they would buy it because of any --

would buy it again because of any specific disease reference and zero of those from the other pomegranate buyers.

And also we'll go back up and look at the "healthy" reference. The "healthy" reference is lower for POM than it is for the other pomegranate juices.

Q. On why would you buy again.

A. On why would you buy again.

Q. So let's quickly put up figure 3. This is again from your report, sir.

And these are the responses or the summary of responses to the question "Why would you recommend?"

What's a -- do you recall what the complete question was or why would you recommend it to a friend, or do you remember specifically what the actual question was?

A. I think the -- again, I'd have to look at the specific question, but I think it says, "Would you recommend this to a friend?"

And so I've summarized on this table "Why would you recommend?" And what again we see is that less than 1 percent -- in this case it was three-tenths of 1 percent -- would recommend it to a friend because of any -- preventing or curing any specific disease, a little bit higher for the non-POM drinkers. And again,

going up above, you see on the "healthy" reference higher for the non-POM drinkers than for the POM drinkers.

I might also mention something just looking at the size of the samples. We had 406 POM users. Now what we've got is would you recommend it again. 380 of the 406 said they would -- excuse me -- would recommend it, so a very large percent would recommend it, and yet their motivations for doing it, it's -- we've got three-tenths of 1 percent that would do it because of any specific disease reference.

Q. Okay. And it looked like the results were relatively consistent across the three separate series of questions.

A. So the two main -- the major takeaway -- two major takeaways -- is specific disease reference is very, very, very small. And the second thing is the difference between the POM drinkers and the non-POM drinkers is very, very small, if not nonexistent, and it's even unclear what direction if there is any.

So there's no significant difference between the POM and the non-POM drinkers.

Q. And you also calculated the net percentage of responses across all three questions; is that right?

A. That's right.

On the columns I have the POM Wonderful juice buyers, and the next column is the percent of those people that are other pomegranate juice buyers.

You can see it was 406 people that were POM and 344 other POM -- pomegranate juice drinkers. And if we just look in that first numeric cell, we see that it was -- I have it labeled as 1 percent -- this was what was shown in those bar graphs -- which is 4 out of the 406 respondents fell in that category. And if we move to the right, it's 3 out of the 344 mentioned specific disease. And if we look at the difference between those two, it would be one-tenth of 1 percent that were more POM drinkers mentioned specific disease as their motivation for why it is that they did purchase.

We can do the same sort of analysis looking at the second and third rows. I think it's fairly obvious and redundant with what it is that I said, but let's go down to the very bottom.

What you see at the very bottom is that 6 out of the 406 ever mentioned any specific disease reference. Now, that may look like my addition is wrong because there is -- just going row by row within this, 4rh6e lnt that4, 2T†1I said6e lnt sea me those)TjT†sofell inappe thdT*tim

So there's a total of 6 people. And when I say one person appeared two times, that person appeared under why did you purchase and why would you repurchase and in both cases mentioned a specific disease reference.

But in total, out of the 406 POM drinkers, a total of 6 people under any one of the three questions had any reference to a specific disease, and that is slightly under 1-1/2 percent.

Q. Okay. Let's --

A. And then if we compare that to the next column, we can see there were 6 out of the 344 that had any specific disease reference, which is slightly under 1-3/4 percent. And those numbers are very, very, very small, and the difference between the two is not significant and certainly not higher for the POM Wonderful drinkers.

Q. Okay. Let me back up just a second.

A. Okay.

Q. And James, can you put on the first figure again, figure 1.

These labels here to the left of these bars -- okay -- taste, healthy, curiosity, looked interesting, et cetera -- these are the categories of responses that you received; correct?

A. That is correct.

Q. Okay. Now, how did you go about identifying what responses go where? How did you go about developing this list?

A. Actually I think the first question really is where do the categories come from.

Q. Yes.

A. And then how did the responses get categorized into those specific ones.

Q. Okay.

A. And I had a coder that worked with me that went through and categorized each of the specific responses. There was a -- all of these are really in the words of the respondents, so I did not have a finite set that was predescribed and say the respondents have to fall into one of these buckets.

It's one of the advantages of having open-ended questions, is it allows the respondents to come up with their own answers to why did they purchase. And if people said, I did it because of the taste, I thought -- I liked the flavor of it, it tasted good to me -- there could be a variety of ways -- the coder started putting these into particular what I'll call buckets or categories here.

And so the coder would go through and try and

identify and classify each one of the responses that was received by each individual. And each individual, by the way, could give more than one, so they could say, I did it because I liked the taste and I thought it was good for me and I liked the bottle, and so they would have three items. They'd be classified under three different categories.

So each one of these they came up with. I went over the coding, so I took and reviewed specific respondents with the coder to make sure I was comfortable with how the coding was done, and I had the coder go through it multiple times to make sure that they felt really comfortable.

So all of these that we see here were the result of the verbiage that was used by the respondents and a coder trying to make some decisions with my guidance as to which category they would fall in.

Truth be told, any one -- there's some judgment that has to go into this, and so someone could fall in one category when you say, "Aah, maybe," so what I tried to do was to be ultra-conservative and make sure that if there was any specific disease reference that we might put it in there.

So, for example, one individual said, "I purchase it because I thought it would be good for my

bowels." Now, I don't think that's really a disease, but that individual got coded in here under the specific disease reference.

Some other person said, "I thought it would be good for my urinary tract." They also got coded in here.

So what I wanted to do was to be really careful and, if anything, err in the direction of classifying people as specific disease reference, so I wanted to be conservative about it. But with that being said, I'm sure we could find one or two individuals, two or three individuals one way or the other, and if we would do this multiple times, we'd end up with numbers pretty darn close to what it is that we have right here.

Q. Okay. So you were fairly generous with regard to or conservative with respect to the disease category.

A. That is correct.

Q. And so if that's the fact, even the specific disease reference here of -- that you had identified as at 1 percent or .9 percent, that wouldn't necessarily include serious disease references, it could include things like bowel movements and other things of that nature; that's right?

A. That is correct.

Q. And if you did -- you just mentioned if you were off a few.

If you were off a few and in terms of categorizing and putting items or identifying where they should go in these categories, would this change substantively the results of your survey in any way, shape or form?

A. So in -- after having done this report, I continued to go back through and review the verbatim response that we got from the respondents, and I've tried to look and say could this individual go here or could that individual go there. And the reality is that one or two of those that ended up in the specific disease reference maybe shouldn't belong in there, and that would take that 1 percent down to .5 percent.

There were a couple others that maybe they could go in there, in all frankness, and that would change that to 1-1/2 percent. Maybe, you know, if they threw another -- if we threw a total of four in there, that might take it up to -- four additional ones, that might take it up all the way up to at most 2 percent.

But I think it could go either way, and I think this was a very conservative effort to try and be generous to specific disease reference.

Q. Okay. Now, you said you did not show any of the

participants any advertisements; is that right?

A. I did not show any ads. The purpose of the study was not to test ads. The purpose of the study was to understand why people purchased.

there any indication in your survey that anyone bought POM because of the amount of money POM has spent on its research?

A. If there was anyone who had that as their motivation, I would have expected it to show up on this list. There was no one that indicated that they purchased POM because of the amount of money they spent on their research.

Q. Okay. Complaint counsel, the FTC -- I'm going to switch gears a little bit and talk about now areas not relating to your specific survey you conducted, and instead I'm going to follow up on some questioning regarding some expert opinions you expressed in your report regarding some other surveys. Okay?

A. Okay.

Q. So the first is the Bovitz survey. The complaint counsel is relying on this Bovitz survey, if I can refresh your recollection, to suggest that POM's ads are -- convey the message of disease claims, convey disease claims.

Are you familiar with what survey I'm speaking to?

A. I am familiar with the Bovitz survey.

Q. And you've examined the so-called Bovitz survey?

A. Say that again.

Q. You have examined that survey?

A. I have.

Q. Okay. And in your expert opinion, does the Bovitz survey address consumers' motivations for purchasing pomegranate juice at all?

A. Absolutely not. They were not asking about motivations. It does not examine that.

Q. Okay. And in your expert opinion, can you rely on the results of the Bovitz survey?

A. You can not rely on the results of the survey to say anything about why it is that people purchase POM.

Q. And why is that?

A. They don't ask any of that.

Further -- let me get into what it is that they do, is they show, in a very controlled environment, specific ads. And it is what I will refer to as a forced exposure.

So they show them specific ads. They make them look at those particular ads, and then they ask them questions about those ads. This is in a very, very unnatural setting and not how it is that people normally see ads. And as such, you know, they're not getting at all why it is that people would be buying

POM.

Q. Why is it important that the ads not -- the survey not be done with that type of construct, this forced viewing, as you've described it?

A. Say that again and louder.

Q. Why is it important -- can you -- are you not hearing me very well? I'll move over here with the -- I'll move this a little bit (indicating).

Why is it that this forced viewing, as you've described it, impairs the reliability of the Bovitz survey?

A. Well, as I just said, this is not how people normally see ads, so we're taking people in a context and saying, Look at these ads. And they make some effort to surround the ads with other ads, but it is indeed -- you know, we normally are sitting there reading a magazine or reading the newspaper or, for other types of ads, watching television, not with the purpose necessarily of just looking at ads, and so it's a very, very artificial context, and as I said, it's not how people get exposed to advertising on a normal basis.

Q. Okay. And did the Bovitz study have a control?

A. And so the other thing is they had no control whatsoever.

have a group of respondents that are very, very health-focused. I consider myself a -- very health-oriented, and I would not have qualified to be a respondent on this survey.

As a result, it's not surprising -- you take this group that you've cued with these previous questions about health. You've taken a subset now of only those people that pass this hurdle of being extreme on the health side. You show them some ads in a forced context, and say: Okay. Now, what do you see in these ads? And surprisingly -- and I say that sarcastically, or I guess I shouldn't be in this context -- not surprisingly, they said, Oh, you know, these are health-oriented.

Q. What about the size of the sample drawn? Do you have any recollection about that?

A. So the sample was concerningly small that they have. They've got some people -- they have 200 people that are POM users, and they break those up into two groups, and then they have 300 that they break up into two groups and give different sort of exposures to.

So what they do have is now a sample of 100 and 150, and even if you combine those, you end up with 250 respondents. In the ideal, if you want to be 95 percent certain of your answers on a percentage

basis, plus or minus 5 percent, you want to have 384 respondents. They've got at most 250.

And I say "at most" because then what they do is they ask questions and say: We've shown you some ads. Which ads do you remember? And they've taken the subset of people that remember those ads.

I cannot determine from their report how small of a subset of the 250 it is, but we start getting into categories where it makes the results very, very unreliable.

Q. I see.

In your expert opinion, is the Bovitz survey a valid, reliable survey?

A. It is definitely not a valid and reliable survey for measuring customers' motivations for

that study to a normal viewing context, I think the answer is definitely not.

Q. Okay. Now, also in connection with the Bovitz survey, complaint counsel has suggested that in connection with particularly an advertisement -- we call it the "Decompress" advertisement -- that this court should look at that as some sort of indicia on how consumers perceived or interpreted the "Decompress" ad.

Can you tell me, sir, about that line of questioning and provide your opinion with respect to the reliability of the numerical -- with respect to the reliability of the survey results in connection with that "Decompress" ad.

A. So I believe it was question 9 on the Bovitz study, and I'm doing this from recall, so I believe it was question 9 on the Bovitz study that they said: Here are these collection of ads. What is the general idea from these ads? And I think it was 5 percent of the people, again, these very health-conscious people, said "lowers blood pressure."

The next question says: From this collection of ads, tell me the benefits that it communicates. Well, they may not have thought it communicated any benefits, but they are being directed to give me

benefits.

And so when you say what's the idea that's communicated and 5 percent said "lowers blood pressure," they're being sort of pressured or badgered to go ahead and use a -- come up with benefits and came up with that -- I think it was 21 percent of the people in that context came up with the benefit of lowers blood pressure.

But what it does for me is it severely calls

whatever it was.

A. Again, when you've asked the respondent what's the genu'vhal idea,ou'venut much, much low itperct w

and I believe their percentages were like over 90 percent.

Q. We're going to jump again to another survey.

A. Okay.

Q. It's the -- I'm going to ask you some questions about the attitudes and usages survey done by a company called OTX.

Do you remember that survey?

A. I do.

Q. Okay. And do you recall what the survey purported to address?

A. They -- this was a group -- obviously what they're trying to do is look at the attitudes and usage of pomegranate juice. They specifically asked people why it is that they did purchase. What they have done is they -- again, we've got some issues about the sample

A. So let me tell you what my major concern is that directly answers your question about whether or not it's reliable.

They have given people these closed-end answers: Why do you buy? Here's a list. I believe it was like six options as to why it is that they buy.

That sort of forces people to think about these things they may not have thought about, and it forces people into specific buckets that they have.

So, for example, one of the six options was: I buy -- I buy POM because I like pomegranates.

In contrast -- and that was one of the answers, and they had a significant percent that said, I like pomegranates.

In contrast, in the open-ended format that I used, nobody said, I bought POM because I like pomegranates.

So what they've done is they've provided people a set of answers that you need to have, and it really cues them. And I want to use the word repeatedly here about cuing. It's cued them here are your potential reasons, here's potentially why it is that you might have bought POM. And that cuing really inflates the particular numbers that you can have in this context.

So I believe one of the answers was it's

healthy, and they had 88 to 91 percent that answered the reason I bought was because it's healthy. In contrast to the open-ended where you could mention healthy or not, it was a much, much lower percent, as we showed in those charts earlier.

Q. When you mention "healthy," are you referring to the antioxidants --

A. Actually it was on the antioxidant -- in fact, I'm glad you corrected me on that. It was the antioxidants that they had cued people on repeatedly before the why did you buy, you know, do you drink antioxidants, how often do you drink antioxidants, what antioxidant beverages do you drink, questions like that that they've asked, and then they've said, Why do you buy pomegranate juice, one of them being it's an antioxidant. 88 to 91 percent said antioxidants. In an open-ended one, antioxidants was less than 10 percent as the motivation for why people ended up buying.

So let me point out two aspects of having closed-form answers. One is, it overinflates those answers because these are the set of choices and the cuing that it provides. The other thing is, there are potential answers that are not there that they could have mentioned, and those end up going away because they

don't really have an option.

So, for example, in the open-ended survey, not knowing, people could put down whatever it is that they wanted, 8.4 percent of the people said, I bought POM because of the appearance or the bottle. Zero in the A&U study mentioned that. Zero.

So we've got these two problems, what's included being in 0 g.0.

were in non-ad markets.

So there were five or six cities that the POM ads ran in; let's see what those results are in those particular cities. And then we have these other cities where the ads were not shown. And if you look at those results, what it is that you see is more people in the cities where the ads were not shown thought of POM as healthy.

So if, you know, one wants to say, well, "healthy" might be a proxy for "specific disease," more people that didn't see the ads are referring to this as POM as being healthy.

Q. Thank you.

Now we're going to address yet another survey, also a part of your written expert report referenced there, the Accent Health survey.

Do you recall the Accent Health survey?

A. I do.

Q. Okay. And did the Accent Health survey address consumer motivations for purchasing pomegranate juice?

A. It did not.

Q. Okay. And in your expert opinion, is that a valid survey, the Accent Health survey?

A. I've got major concerns with this one as well.

What it is that they had is they had people that

are in urologists' offices, and they're capturing them just as they're leaving the office, and they're showing them a print ad, and they're -- this ad has been sitting there in the doctor's office. And they're showing them this print ad. Their heightened awareness, having just been in their urologist's office, having just now walked out from whatever diagnosis it is that they've had, in this context I think is very concerning. It certainly would heighten whatever issues it is that they had about helping one's prostate.

A second issue is that they -- there's no control here at all, so again people might have, before they've seen the ad, had a belief that POM was very good for your prostate before seeing any ad. Here they've got this forced exposure to a particular ad and in a moment of great sensitivity about one's prostate that I think really biases the particular results that we have.

This was done by Accent, which has a motivation. They're in the business of getting companies to place ads in doctors' offices, and so they have all the motivation to try and show that there is a positive effect. And not surprisingly, they took all the steps to try and show some positive impact of these ads on people's perceptions of helping one's prostate.

criticisms in connection with the statements made in
that report?

A. I do.

Q. Okay.

A. So if I recall, one of the issues that he had
is very germane to this whole discussion as to whether
the Commission's report was a shaving open-ended questions
my survey, had

(As I've talked on a number of occasions, it's a particular data

(Is my survey, his issues there. I've had to ask the respondents,

time. They're not now. And I've asked, you know, what is your motivation for buying POM, what's your motivation for buying this other -- of those that are the POM drinkers, what's your motivation for buying POM; of these non-POM drinkers, what's your motivation for buying the non-POM pomegranate juice. And what I'm able to do is look at these two different groups.

But even if we combine these two groups together and we say that, okay, Dr. Mazis, let's assume these are all at one point POM drinkers, the total population has under 1 percent that make any specific disease reference.

So I don't see that as a concern at all.

And I think one of the other things that he argues for is showing people the ads. And what I have been saying up here is I did not do a study to measure an ad. I did a study to find out what it is that was -- that led people to purchase POM, and that's what it is that I was extracting, and there's no need to be showing people ads to be doing that.

And then I think the last thing he raises is a question of materiality. And frankly, "materiality" is a legal term, and it's not one that I use in my daily life. But ad testing, which is what it is that he was sort of proposing, would not be around materiality. And

instead, what I did was I looked at why it is that people buy, what was their motivation for purchasing POM.

And I'll apologize to him for not using the term "materiality."

MS. DIAZ: Thank you, sir.

No further questions.

JUDGE CHAPPELL: Cross?

MR. OSTHEIMER: Yes, Your Honor.

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CROSS-EXAMINATION

BY MR. OSTHEIMER:

Q. Good morning, Dr. Reibstein. It's a pleasure to see you again.

A. Good morning.

Q. You designed a survey to try and determine the motivations for why consumers might have selected POM Wonderful juice; correct?

A. That is correct.

Q. Your survey did not explicitly ask survey respondents to evaluate the importance that any specific health benefit claim regarding POM juice would have on the purchase decisions; correct?

A. Say that again?

Q. Your survey did not explicitly ask survey

respondents to evaluate the importance that any specific health benefit claim regarding POM juice would have on the purchase decisions.

A. That is correct, my survey did not explicitly ask that specific question.

Q. And your survey did not explicitly ask survey respondents to evaluate the importance that any of the specific health claims at issue in this case would have on the purchase decisions; correct?

A. That is correct, my survey did not ask that explicit question.

Q. And I'm going to go through the six claims at issue in this case and ask you about each of those.

You did not explicitly ask consumers about the importance to their purchase decision of a claim that drinking POM juice would treat cardiovascular disease; correct?

A. That is correct, my survey did not ask that explicit question.

Q. You did not explicitly ask consumers about the importance to their purchase decision of a claim that drinking POM juice would prevent or reduce the risk of cardiovascular disease; correct?

A. That is correct.

Q. You did not explicitly ask consumers about the

importance to their purchase decision of a claim that drinking POM juice would treat prostate cancer; correct?

A. That is correct.

Q. You did not explicitly ask consumers about the importance to their purchase decision of a claim that drinking POM juice would prevent or reduce the risk of prostate cancer; correct?

A. Correct.

Q. You did not explicitly ask consumers about the importance to their purchase decision of a claim that drinking POM juice would treat erectile dysfunction; would you agree?

A. I would agree.

Q. And would you agree that you did not explicitly ask consumers about the importance to their purchase decision of a claim that drinking POM juice would prevent or reduce the risk of erectile dysfunction?

A. That is correct.

Q. Dr. Reibstein, you would expect that a consumer in POM's target audience for advertising who is concerned about heart disease would find important a claim that drinking a bottle of POM juice a day would prevent or treat heart disease; isn't that so?

MS. DIAZ: Objection, Your Honor. Assumes facts

whether or not a consumer in POM's target audience for advertising who was concerned about heart disease would find important a claim that drinking a bottle of POM juice a day would prevent or treat heart disease?

A. No.

Q. Dr. Reibstein, do you remember being deposed in this matter on April 18, 2011?

A. Do I remember what?

Q. Being deposed in this matter --

A. Yes.

Q. -- in your office on April 18, 2011.

A. That was not in my office, but I do -- I recall being deposed on this matter.

Q. In a conference room in your offices.

A. That's right.

Q. And on page 117 of your deposition, question starting on line 16 -- Will, could you bring that up --

"QUESTION: In your opinion, if a consumer in POM's target audience for advertising was concerned about heart disease, would the claim that drinking a bottle of POM juice a day would prevent or treat heart disease be important to him or her?

"ANSWER: It might be. I would think so."

MS. DIAZ: Objection, Your Honor. That's not impeachment. He asked the witness to assume if, "In

A. No problem.

Q. Would you expect -- you would expect that a consumer in POM's target audience for advertising who was concerned about heart disease would find important a claim that drinking a bottle of POM juice a day would prevent or treat heart disease; correct?

A. So, first of all, I don't know why my opinion is even relevant on this. I'm here to be testifying about the study that I had done in understanding people's motivations.

So you're asking me as -- not as a marketing research expert, you're asking me as an individual what my opinion about whether or not people were -- people concerned about heart disease would react to a particular claim?

Q. Dr. Reibstein -- Reibstein, would you expect that a consumer of POM's target audience for advertising --

JUDGE CHAPPELL: You're going to need to slow down.

MR. OSTHEIMER: Sorry.

BY MR. OSTHEIMER:

Q. You would expect that a consumer in POM's target audience for advertising who was concerned about prostate cancer would find important a claim that

drinking a bottle of POM juice a day would prevent or treat prostate cancer; correct?

A. So I'm going to repeat my last question to you that I didn't hear your answer on.

Q. Is it your opinion -- could you answer the question. Do you have an opinion?

A. Is it my opinion that someone who has prostate disease --

Q. Or was concerned about prostate cancer.

A. -- or is concerned about it --

Q. Would find important a claim that drinking a bottle of POM juice a day would prevent or treat prostate cancer.

A. I don't know.

I mean, are you asking me to speculate on that?

Q. Have you -- do you have an opinion --

A. I have not done research nor am I here to testify about any research that I've done on that question, but are you asking me to speculate on that as a marketing research expert?

Q. I'm asking if you have an opinion.

A. I could speculate. I don't know if it's relevant to this court.

Q. Dr. Reibstein, on page 18 of your -- 118 of your deposition, starting on line 3, you were asked:

"QUESTION (as read): In your opinion, if a consumer in POM's target audience was concerned about prostate cancer, would the claim made by POM that drinking a bottle -- would the claim made by POM that drinking a bottle of POM juice a day would prevent or treat prostate cancer be important to him or her?"

After an objection, you said:

"ANSWER: So same answer, too. It might be, and I would expect so."

You would also expect that a consumer in POM's target audience for advertising who was concerned about erectile dysfunction would find important a claim that drinking a bottle of POM juice a day would prevent or treat erectile dysfunction; correct?

A. So I'm going to give the same answer, and I will
s corrs said:knowa

this.

Q. And those questions I just asked you, your survey did not explore those questions; correct?

A. That is what you had asked me previously, and the answer is yes, that is correct.

Q. At the time you designed your survey, you were not familiar with a Reference Guide on Survey Research by Shari Diamond; correct?

A. Again, say that again louder.

Q. Sure.

At the time that you designed your survey, you were not familiar with a Reference Guide on Survey Research by Shari Diamond; correct?

A. Correct.

Q. There were 406 POM juice purchasers in your survey I believe you testified earlier. Isn't that correct?

A. That is correct.

Q. I'd like you to look at a table 4 -- figure 4 from your expert report, which is PX 223. It's on page 9.

Only 170 of the 406 POM juice purchasers claimed to have ever seen a POM juice ad; correct?

A. That's what it appears, yes.

Q. The people who said yes, they had seen POM juice

advertising, we don't know whether they saw some POM juice ad the prior week, the prior year or three years before; correct?

A. Correct.

Q. They might have only seen one POM ad; correct?

A. Correct.

Q. They might have seen POM juice ads that are not challenged in this action; correct?

A. They might have seen what?

Q. They might have seen POM juice ads that are not challenged in this action.

A. That is correct.

Q. You don't know which POM juice ads are and are not being challenged by the FTC; correct?

A. Correct.

Q. You don't know what proportion of POM juice ads are and are not being challenged; correct?

A. Correct.

Q. So you don't know how many of the respondents in your survey were exposed to the challenged advertisements; correct?

A. When they -- when they replied to this particular question; is that what you're asking me about?

Q. No. I'm asking you generically.

You don't know how many of the respondents in your survey were exposed to the challenged advertisements, the advertisements challenged --

A. That is correct.

Q. And if survey respondents did not see any of the challenged ads, there would be no potential impact from those ads; correct?

A. If they did not see those ads -- other than maybe through word of mouth.

Q. But other than word of mouth, it's correct.

A. That is correct.

Q. And just because a consumer was not exposed to a challenged claim, like drinking POM juice reduces the risk of heart disease, that does not mean that the claim would not be important to him or her; correct?

A. Say that again.

Q. Sure.

Just because a consumer was not exposed to a challenged claim, for example, drinking POM juice reduces the risk of heart disease, just because a consumer was not exposed to that claim, one can't conclude that the claim would not be important to that consumer; correct?

A. Correct.

Q. Please look at your expert report figure 4,

which is part of -- which is part of the report, PX 223 on page 6.

Of the POM Wonderful juice buyers in your survey who said they had seen an ad, 20 percent were coded as saying the ad contained, quote, people or objects like a snake, a woman or Aphrodite; correct?

A. Correct.

Q. Are you aware that none of those objects are in any of the challenged ads in this matter?

A. No.

Q. Looking back at figure 4, 8 percent of POM Wonderful juice buyers who said they had seen an ad were coded as having seen a TV ad; correct?

A. Correct. 8.2 percent.

Q. Are you aware that no POM TV ads are being challenged in this action?

A. I am.

Q. Looking back at figure 4, some POM Wonderful juice buyers were coded as having seen a billboard; correct?

A. Correct. Or that says billboards as well --in fact, it says "other media (print, billboards)," so some could have been billboards.

Q. And this is based on coding of open-ended questions; correct?

A. And it's based on?

Q. Coding of open-ended questions?

A. Yes.

Q. So for the word "billboard" to show up someone had to have seen -- said they saw a billboard; correct?

A. No.

Do you want me to explain that?

Q. Sure. Yes.

A. So someone would have to say -- so you're asking someone would have to have seen a billboard?

No. Someone would have had to have said "billboard."

So they may have thought they had seen a billboard, they may have thought they had seen, you know, what they would call a billboard, but it -- and they -- so I thought I heard your question they would have had to have seen a billboard, and I wanted to correct that to they would have had to have said "billboard."

Q. And are you aware that no POM billboard ads are being challenged in this action?

A. No billboard ads?

Q. Yes.

A. Yes.

Q. You're aware of that.

A. Yes.

Q. Your survey was put in the field around the end of October 2010; correct?

A. Correct.

Q. Are you aware that POM launched a \$10 million national TV campaign a few weeks before your survey was put in the field?

A. No.

Q. I'd like to show you a paper document that has been marked as CX 2055.

Permission to approach the witness, Your Honor?

JUDGE CHAPPELL: Yes.

BY MR. OSTHEIMER:

Q. This document is a complaint that POM Wonderful filed against Backside Beverages LLC. I'd like you to look at paragraph 28 on page 6 of this document.

According to paragraph 28, in the fall of 2010, POM began its first television advertisement campaign for the POM brand.

That's what the paragraph says; correct?

MR. OSTHEIMER: This is relevant to -- if you let me proceed, Your Honor, this is relevant to which ads the respondents answering Dr. Reibstein's survey actually saw.

JUDGE CHAPPELL: All right. Based on that representation, I'll allow it.

MR. OSTHEIMER: I'm trying to lay a foundation, Your Honor.

BY MR. OSTHEIMER:

Q. According to paragraph 30, POM's television commercials aired during such highly popular shows as CSI Miami, Criminal Minds, Grey's Anatomy, Top Chef, Real Housewives, Survivor, The Amazing Race, Larry King, Anderson Cooper 360, The Daily Show, The Stephen Colbert Report, MythBusters --

JUDGE CHAPPELL: I believe it's "Colbert Report."

MR. OSTHEIMER: Oh. Thank you, Your Honor.

JUDGE CHAPPELL: The T is silent.

BY MR. OSTHEIMER:

Q. I don't know how to pronounce the next one actually, Your Honor -- Chelsea Lately, E! News, Barefoot Contessa, Modern Marvels, MS Morning Joe, Biggest Loser and 30 Rock.

Is that what the paragraph says, Doctor?

A. Yes.

Q. And according to paragraph 31, POM's television ads in the United States resulted in over 600 million consumer impressions; correct, according to the paragraph?

A. I don't know if that's correct.

Q. But according to the paragraph, that's what the paragraph says?

A. That's what the paragraph reads.

Q. Okay. And I'd like to show you a document that has been marked as CX 2011. It's a PR Newswire press release issued by POM, dated October 4.

The release describes the then new TV ad campaign for POM; correct?

A. It does talk about that.

Q. And if you look at the first paragraph, it describes it as a \$10 million campaign; correct?

A. And -- say that again?

Q. If you look at the first paragraph, it describes the campaign as a \$10 million campaign; correct?

A. That is what it says.

Q. And if you'll look at the second paragraph, it says that this was POM's first television campaign; correct?

A. It does say that.

Q. And if you continue looking down the release, it -- according to the release, one of the ads depicts Eve with a snake?

Isn't that correct?

A. Uh-huh.

Q. And if you look further down the release, it describes one of the ads as depicting Aphrodite; correct?

A. Correct.

Q. Did you watch the POM TV ads?

A. I did not.

Q. I'd like to show you two of the TV ads.

(Whereupon, two videos were played.)

Wouldn't you agree that these ads would be memorable to recent viewers?

A. Say that again.

Q. Wouldn't you agree that these ads would be memorable to recent viewers?

MS. DIAZ: Objection, Your Honor. This is outside the scope of his expert testimony.

MR. OSTHEIMER: It goes to which ads consumers saw when he conducted the survey three weeks after these ads began running.

JUDGE CHAPPELL: That's what you told me

earlier, Counselor, but I haven't heard the connection. You'll need to get to the connection or move on.

BY MR. OSTHEIMER:

Q. Dr. Reibstein, you earlier testified that 20 percent of the consumers in your survey referred to objects like a snake, a woman or Aphrodite; correct?

A. Correct.

Q. And you said that 8 percent of the respondents in your survey responded to TV ads; correct -- said that they mentioned a TV ad?

A. I think I said 8.2 percent.

Q. 8.2 percent.

Wouldn't you agree that some of the respondents in your survey who claimed to have seen POM ads saw these three ads that I just showed you?

A. It's possible. It's likely.

JUDGE CHAPPELL: You haven't demonstrated that he knows what ads they saw. You need to do that or move on.

And if you're asking the man wouldn't it have been important to see this ad, yet he hasn't told you what ads he's aware of, you're not getting anywhere.

MR. OSTHEIMER: Okay. Your Honor, I'm done with this line of questioning.

BY MR. OSTHEIMER:

Q. What is an open-ended survey question?

A. What is an open-ended question? It's a question where you don't provide a -- fixed answers for them to reply to.

Q. And what is a closed-ended survey question?

A. What is a what?

Q. Closed-ended --

A. It's where you do provide them a set of choice answers to select from.

Q. To assess the purchase motivation of past POM Wonderful juice purchasers you simply asked three open-ended questions about why they had previously purchased POM juice, why they would repurchase it and why they would recommend it to a friend; correct?

A. There were more questions, but those were the three central questions, correct.

Q. You did not follow up the answers to each of those questions by asking if there were any other reasons; correct?

A. I think that in specific it also said please provide the detail.

Q. But once somebody had begun answering each of those questions and given an answer, you didn't ask them if there were any other reasons; correct?

A. That is correct.

Q. You served as an expert witness in a case involving Aerus LLC and Protein, Inc.; correct?

A. Correct.

Q. You conducted a survey in that matter; correct?

A. Correct.

Q. The objective of that survey was to determine whether the Aerus commercial upright vacuum cleaner design had a secondary meaning; correct?

A. Correct.

Q. I would like to show you a copy of a document that has been marked as CX 2012.

Permission to approach, Your Honor?

JUDGE CHAPPELL: Go ahead.

MR. OSTHEIMER: Thank you.

BY MR. OSTHEIMER:

Q. This is the expert report you wrote in that matter; correct?

(Pause in the proceedings.)

A. I don't fully recall, but it does look familiar.

Q. If you -- there's a conclusion page with your signature.

Page 16 of the report has your signature; correct?

(Pause in the proceedings.)

A. This is my signature page.

Q. And attached to this report is a questionnaire you designed for the survey; correct, starting at page 32, CX 2012-32?

A. Are you talking about appendix D? Yeah.

Q. And let's look at the next page, which is page 33.

Question 1-B asks who is the maker; correct?

A. What was that about this question?

Q. Question 1-B asks who is the maker; correct?

A. Correct.

Q. And question 1-C asks why do you say that; correct?

A. Correct.

Q. Question 1-C is an open-ended question; isn't that so?

A. Correct.

Q. And you followed question 1-C with a probe asking whether there was anything else; isn't that correct?

A. Correct.

Q. And your survey in that matter asked approximately 13 open-ended "what do you remember" or "why do you say that" questions; correct?

A. I'd have to count.

Q. You can take a minute and look -- or two and look through. If you'd like, I can tell you which questions I'm talking about or you can --

A. I don't -- I'll trust you.

Q. Okay. And every single one was followed by a probe regarding whether there was anything else; isn't that so?

(Pause in the proceedings.)

A. Correct.

Q. And in your POM juice survey you did not ask consumers who'd given an initial answer whether there was anything else; isn't that so?

A. So in this case they were asked -- they were probed in the POM study. They were asked anything else that's there.

Q. I'm sorry. You said that in the POM juice study you did ask whether there was anything else?

A. There was no subsequent probe.

Q. Okay. Your survey for POM might not have elicited all of the respondents' purchase motivations; correct?

A. So -- I'm sorry?

Q. Your survey for POM might not have elicited all of the respondents' purchase motivations; correct?

A. So one major distinction is on this survey it was a telephone interview. You're interacting with the respondents. The POM one was an Internet one where you're not directly interacting, and so you're asking people, Please provide all the detail that you can.

If you're asking me is it the case that perhaps they did not provide all of the answers, it is the case that perhaps they did not provide all of the answers, but they were given every opportunity to provide all of their answers.

Q. So, for example, someone who answered your survey that they bought POM juice because of its taste might have also cared about its health benefits; correct?

A. And they also had the opportunity and many of them did say "taste" and "health." If you add those percentages up, you'll see it is much greater than a hundred percent, indicating that the respondents gave multiple answers.

Q. But someone who answered just -- just gave the answer "taste," they might have also cared about the product's health benefits; correct?

A. So someone might have said just "taste" and had other things and didn't answer that. What we do know, what we do know, what we factually know, is that many,

many people listed multiple items.

Q. Would you agree that the response alternatives used in closed-ended questioning may remind respondents of options that simply do not come to mind easily?

A. I think what it is that I've stated is it cues them and leads them.

Q. The response alternatives used in closed-ended questioning may remind respondents of options that simply do not come to mind easily; isn't that correct?

A. So it cues them, reminds them, and it limits them, as I gave the example of other people who had other answers like finding the bottle attractive and it wasn't one of the options that they had available for them.

Q. Closed-ended questions you said were used for motivation in the A&U study, which was conducted in the ordinary course of business; correct?

A. So it is not uncommon under certain circumstances to use closed-ended questions, depending on the purpose of what the study is. Within my study, the POM study, I do have a closed-ended question.

Q. You don't know how common it is for consumer surveys conducted for litigation to ask closed-ended questions; correct?

A. I'm not an expert on litigation.

Q. You believe that the use of closed-ended questions may endanger the reliability of a survey; correct?

A. It depends on the nature of the question and the nature of the study as well.

So, for example, in the POM study, I do have a closed-ended question, as I said earlier. That question is: What is your gender? You have two choices. It's not open-ended. You're given "male" and "female." I do not believe that that led to a biased answer.

So I'm not going to give you the generalizable response that says closed-ended questions lead to biased results.

Q. What about a closed-ended question to assess purchase motivation in a survey conducted for litigation? Would you find that to be unreliable?

A. I think it often could, yes.

JUDGE CHAPPELL: How much time do you think you need to finish your cross?

MR. OSTHEIMER: Probably an hour and a half.

JUDGE CHAPPELL: Okay. We're going to break.

We'll reconvene at 11:45.

(Recess)

JUDGE CHAPPELL: We're back on the record.

Next question.

BY MR. OSTHEIMER:

Q. Consumers' belief that pomegranate juice is a healthy drink is a major reason they purchase the juice; correct?

A. So I hate to do this, but repeat that last half of that sentence. Consumers' belief that pomegranate juice is a healthy?

Q. Drink is a major reason they purchase the juice; correct?

A. Correct.

Q. Your study reports that 35.2 percent of POM juice purchasers volunteered that they bought it for health-related reasons; correct?

A. Correct.

Q. Do you believe that 35.2 percent accurately represents the percentage of POM juice purchasers who are motivated by health reasons?

A. Within a narrow band around that, correct.

So I say that because we've got sampling, and there's going to be some statistical errors around that, but I'm pretty confident it's in that general range, yes.

Q. Without follow-up questions and without closed-ended questions, your 35.2 percent may be a very low estimate of the percentage of purchasers who are

motivated by health reasons; correct?

A. I don't think that is really a fair way to characterize what I believe because I -- you said "without follow-up questions." There really are follow-up questions. And the follow-up questions are, you know, I ask why do you buy, and then I also ask sort of related questions that are follow-ups.

So, first of all, I ask why do you buy and please provide all the detail, and then I ask follow-up questions that say would you buy again and why, and so that's giving them more opportunity to be expansive, and would you recommend this to a friend and why, and so in each of those cases it really is follow-up and follow-up with an opportunity for them to be expansive without saying, Well, you're wrong in your previous answer and you're going to have to be providing us some more.

So I'm going to say that's incorrect as you characterized it of having no follow-up questions.

Q. Do you think that your 35.2 percent may be a very low estimate of the percentage of purchasers who are motivated by health reasons?

A. No.

Q. Okay. When you designed your survey for POM, you anticipated that "healthy" was one likely response

that you would elicit from respondents; correct?

A. Actually what's interesting is I went into it with no pre-notions of what were going to have to be the answers. It was designed with a full discovery and for letting the consumers let me know what it is that was important to them.

So I did not have a bucket predesigned saying "healthy" that I knew I was already going to put people into, so I think the answer to your question is "incorrect."

Q. Okay. I'm going to read from your deposition page 104 starting at line 21:

"QUESTION: When you designed the survey, did you anticipate that a healthy coding category was one likely response that you would elicit from respondents?

"ANSWER: Did I anticipate that, yes."

A. So I did not presuppose that. Could I have guessed that it was going to be healthy and taste and others? Yes.

Q. It is possible that some people who were coded as saying POM juice was healthy could have had a "prevents or cures disease" reason in mind; correct?

A. If you're asking the question is it possible, the answer is it is possible. They were given ample opportunity to provide additional answers, as most

people did, and they were given ample opportunity in subsequent questions to provide other answers as well.

Q. You could have set up the questionnaire on the POM survey in a way that would have probed the reason or reasons why respondents gave a healthy-type response; correct?

A. I could have designed the survey in multiple different ways. Correct.

Q. During your direct testimony, you referred to an attitude and usage study that was commissioned in June 2009.

Just to be clear, that survey was commissioned in the ordinary course of business; correct?

A. Are you referring to the OTX attitude and usage study?

Q. Yes.

A. I am presuming so. I was not there nor involved with the company at the time.

Q. But just to be clear, it was not commissioned by the FTC.

A. That is my understanding.

Q. And an attitude and usage study is sometimes referred to as an A&U study; right?

A. Correct.

Q. And POM's A&U study asked consumers about their

purchase motivations for selecting POM Wonderful juice; correct?

A. Correct.

Q. And POM didn't show you the A&U study before you designed your survey; correct?

A. State that again slowly.

Q. POM did not show you the A&U study before you designed your study for --

A. That is correct.

Thank you for...

Q. You reviewed the A&U questionnaire after you designed your survey; correct?

A. That is correct.

Q. I would like to show you POM's Exhibit PX 227. It is the A&U questionnaire. And I'd like to direct you to page 6.

On the screen.

The A&U survey's question B-1 asks consumers why they personally drank pomegranate juice; correct?

A. Well, "Which of the following reasons are why you personally drink pomegranate juice?" And by the way, this focuses on drink and not buy, but "Which of the following reasons are why you personally drink pomegranate juice?" is what it says.

Q. And one of the choices offered was "It's

healthy/good for my health"; correct?

A. Correct.

Q. You also reviewed the report for the A&U study; correct?

A. I did.

Q. I would like you to look at POM's Exhibit PX 224, which was submitted to the FTC with your expert report.

This is the report of the A&U study; correct?

Actually let -- permission to approach the witness with a full copy?

JUDGE CHAPPELL: Go ahead.

BY MR. OSTHEIMER:

Q. This is the report of the A&U study; correct?

A. I'm presuming it is. Yeah.

Q. I'd like you to look at page 11.

It reports that 85 percent of POM juice users surveyed stated that a reason they personally drank pomegranate juice was "It's healthy/good for my health"; correct?

A. Correct.

Q. Let's look back at the A&U questionnaire page 6.

POM juice users -- drinkers in the A&U study who said in B-1 that they personally drank pomegranate juice because it's healthy/good for my health were asked, in

question B-2, "Which specific health reasons below describe why you personally drink pomegranate juice?"

Correct?

A. I do see that as question B-2.

Q. And if you look at page 12 of the A&U report, PX 224 page 12, of the POM juice users who are in the -- who are in the red column, surveyed in the A&U study who said that they drink pomegranate juice because it's healthy/good for your health, 57 percent stated that a specific health reason why they personally drink pomegranate juice is that it, quote, helps promote heart health; isn't that correct?

A. That's what it says.

So when you say "isn't that correct," you're saying isn't that what it says?

Q. Yes.

A. That is what it says.

Q. And of the male pomegranate POM juice users surveyed in the A&U study who said that they drink pomegranate juice because it's healthy/good for your health, 47 percent stated that a specific health reason why they personally drink pomegranate juice is that it helps protect against prostate cancer. That's what it says; correct?

A. That is what it says.

Q. No one in the survey you designed for POM gave protecting against prostate cancer as a motivation for using POM juice; correct?

A. There may have been one individual that said something about their prostate, but nowhere near the 47 percent of the males.

Q. I'd like you to look at -- I'd like to give you a copy of your report, PX 223.

A. So while you're on that last one, could we go back to that last one just for a second?

Q. Sure.

A. So what it is that I do see here, and it sort of is referring to this chart that you have, so we've got 91 percent and 88 percent it says "contains naturally occurring antioxidants" and -- in this survey -- and this -- and the reason I wanted to go to this is because I have raised concerns with this survey about how it did all this priming about antioxidants, and then here we are right here on this question and immediately, you know, what we see is they ask about antioxidants, they ask about antioxidants, and then they have a question in there with a closed-ended answer that says "contains naturally occurring antioxidants," and we do see the impact of having this cuing from the answers and then from the priming that happened from all the

survey.

And I thought it was just opportune to be able to have that, and then it's not surprising that as we have contains all these naturally occurring antioxidants that there would be other health-related and preventing disease-related commentary that comes associated with it.

So I think much of this is a derivative of having all the antioxidant priming that's there.

So thank you for letting me do that.

MR. OSTHEIMER: Permission to approach the witness?

JUDGE CHAPPELL: Go ahead.

BY MR. OSTHEIMER:

Q. If you'd turn to page 14 of your report and the surrounding pages.

No POM juice user in your survey gave "prostate cancer" as the motivation for using POM juice; correct?

A. So, first of all, let's be clear on what it is that we're looking at. These -- what I did in my report is I took those individuals that were very -- that had said anything about specific disease, and I spelled out what their particular answers were and let you be able to see specifically what it is they have,

and that's what it is that's contained here. Okay.

Q. You didn't spell out any as referring to prostate cancer; correct?

A. I did what?

pomegranate juice from seeing advertising.

That's what the A&U survey report says;
correct?

A. What I see it's saying right here is that they saw an advertising -- they saw advertising. That's what it is that I see being reported here.

Q. If you read the question at the very bottom, if you could zoom in on that, next to the heart on the bottom, I think it is --

A. That question says -- do you want me to read it for you -- "How did you learn about the health benefits of pomegranate juice?"

Q. Yes.

A. And what it is that we see is that 48 percent said "saw advertising."

Q. In answer to that same question, 64 percent said they learned about it, quote, in the news or in the news/online; correct?

A. That's what it says.

Q. In your testimony today you identified what you described as flaws that you say bias the outcome of the A&U study with respect to the motivations of POM users; correct?

A. Correct.

Q. But you would not completely disregard the

"helps to protect against prostate cancer" responses in the A&U study as reasons for consumption; correct?

A. I would not completely disregard is correct.

Q. You expected survey respondents to have taken in the vicinity of about ten minutes to complete your main survey questionnaire; correct?

A. Correct.

Q. In fact, 78 percent of the POM Wonderful purchasers who completed your survey completed it in three minutes or less; correct?

A. I'd have to go back and look at that data to see that.

Q. I'd like you to look at data tables from your report, PX 233.

Permission to give the witness a copy of that data table, Your Honor?

JUDGE CHAPPELL: Go ahead.

BY MR. OSTHEIMER:

Q. I'd like you to look at the first tab of that report, ADUR, which is page 3 of that POM Exhibit 233.

The table reports survey duration in minutes; correct?

A. That is correct.

Q. It reports how long it took survey respondents to complete the survey.

A. That is correct.

Q. And 78 percent of POM Wonderful purchasers completed your survey in three minutes or less; correct?

A. I'm adding it up, but that's about right.

Q. More than half completed it in two minutes or less; correct?

A. That's correct.

Q. Less than 5 percent took eight minutes or more; correct?

A. As you pointed out earlier, there were three simple questions. But that is correct.

Q. Hardly anyone took the ten minutes you expected; correct?

A. Hardly anyone took more than ten minutes.

Q. Your survey did not ask past purchasers of POMx pills or POMx liquid extract about their purchase motivations for purchasing POMx; correct?

A. Correct.

Q. Your survey did not ask about POMx advertisements; correct?

A. That is correct.

Q. Your survey did not ask any questions about POMx pills or liquid; correct?

A. POMx -- POM what?

Q. Your survey did not ask any questions about POMx pills or liquid; correct?

A. That is correct.

Q. You are not extrapolating your survey results to consumer motivations to purchase POMx pills or liquid; correct?

A. That is correct.

Q. You are not extrapolating your survey results to POMx advertisements; correct?

A. That is correct.

Q. Did you ever discuss with counsel or anyone else at POM the possibility of conducting a copy test to determine what messages POM ads communicated to consumers?

A. First of all, is conversations with counsel privileged?

MS. DIAZ: Yes, they are, according to our agreement with the parties.

MR. OSTHEIMER: I'm not asking about the substance of those conversations, Your Honor.

MS. DIAZ: Your Honor, this is outside the scope of his testimony, and it's encroaching on attorney-expert conversations which the parties agreed are off-limits.

JUDGE CHAPPELL: I don't know anything about

your agreement, but you two need to get together and work it out, and then we'll continue.

MR. OSTHEIMER: I'm going to move on,
Your Honor.

BY MR. OSTHEIMER:

Q. You did not design a copy test to determine what messages POM ads communicate to consumers; correct?

A. I did not design a copy test.

Q. Your survey included a question K, "Have you ever seen a POM Wonderful 100 percent pomegranate juice advertisement?" Correct?

A. Correct.

Q. People who indicated they had seen a POM juice ad were asked, "Please include as many specific details as to what you remember about the ad." Would you agree?

A. Correct.

Q. You are not drawing any conclusions regarding what claim or claims were or were not communicated by specific POM juice advertisements from the responses you obtained in question K; correct?

A. Actually what's interesting is being able to see any ads in the context of all their other communications, and so one of the difficulties that I

have in particular with the Bovitz study is it gets people to look just at those ads in the absence of a context of any other forms of communication and asks people what their takeaway is. In this question, have

people have taken away from those ads and if it has had any, you know, particular influence on their reference to specific diseases.

Q. You are not drawing any conclusions regarding what claim or claims were communicated by specific POM juice advertisements from the responses you obtained to question K; correct?

A. I'm sorry. Repeat that.

Q. Let me repeat that question.

You are not drawing any conclusions regarding what claim or claims were communicated by specific POM juice advertisements from the responses you obtained to question K; correct?

A. Not any -- go ahead.

MS. DIAZ: Objection, Your Honor. Asked and answered. That was the previous question.

That was the last question that the professor had answered.

MR. OSTHEIMER: The question was slightly different, Your Honor. I asked him only about what claims were communicated by specific ads.

JUDGE CHAPPELL: All right. I'll allow it.

THE WITNESS: So I'm not saying anything about any specific ads, and I'm not drawing any conclusions around any specific ads.

BY MR. OSTHEIMER:

Q. Were the surveys mentioned in your report or that you testified today the only ones provided to you by POM?

A. Again, the last part?

Q. Were the surveys mentioned in your report the only ones provided to you by POM?

A. By the counsel?

Q. Yes.

A. In this case?

Q. Involving POM Wonderful.

MS. DIAZ: If I may clarify, Your Honor, I object to vague and ambiguous. I can tell from the witness' response. We have retained this witness in two different pieces of litigation. I believe the question only pertained to what has been provided to the witness in this litigation with the FTC.

JUDGE CHAPPELL: Well, that's what it should be limited to.

Do you want to rephrase?

BY MR. OSTHEIMER:

Q. Were the only surveys mentioned -- were the surveys mentioned in your report the only ones provided to you by POM in connection with your litigation -- in connection with your expert report and opinions in this

matter?

A. Yes. Yes, I believe so. And -- oh, did we -- okay. We did include also the -- it wasn't a study, but we did include the Mazis report in there, too.

Is that what you meant?

In terms of studies, there were the three studies that we have already talked about, and those were the three studies that were provided to me in this case.

To the best of my recollection.

Q. And the Bovitz report that you testified about earlier, that was conducted in the ordinary course of business on behalf of POM Wonderful; correct?

MS. DIAZ: Objection, Your Honor. Foundation.

JUDGE CHAPPELL: He talked about the report. To the extent the witness has knowledge, he can answer.

Overruled.

THE WITNESS: So do you want to repeat your question again? I'm sorry.

BY MR. OSTHEIMER:

Q. The Bovitz research report and study that you testified about earlier, it was commissioned in the ordinary course of business for POM Wonderful; correct?

A. So I wasn't involved when it was commissioned and I wasn't doing anything for POM or involved in this

case, so I don't know all of the origins of that.

Q. It was not conducted by the FTC; correct?

A. I was not involved at the time that it was commissioned and was not involved with POM at that time, so I can't fully answer that question with certainty. But, you know, I presume you're right.

Q. I'd like to show you a document PX 225, which is a presentation of the results of the Bovitz survey.

Permission to approach?

JUDGE CHAPPELL: Go ahead.

BY MR. OSTHEIMER:

Q. This is a presentation of the results of the Bovitz survey that you reviewed; correct?

A. By looking at the front page, it looks like it is.

Q. And if you look at page 4 of the report, the universe for the study consisted of 500 individuals, 300 from the general population and 200 POM users; correct?

A. So there were 500 in total tisT(9ltp3Rsocf0Hltudn wo diffisTg agro

on that, it shows you what the open-ended questions were?

A. Okay. And this is actually what I referred to earlier in my testimony.

Q. So is the answer yes, this is based upon open-ended questions?

A. I'm -- I have to trust that that's what it is, yes. That's what it says here.

Q. And none of those questions being summarized on this page are -- ask anything about the benefits of POM juice; correct?

MS. DIAZ: Your Honor, objection. The objection is based on relevance now. The counsel for the FTC has indicated in this line of questioning that the -- that billboards are not part of this case, and the Bovitz survey was on billboards, so now there is a question about the relevance of this survey at all.

MR. OSTHEIMER: Your Honor, one of the billboards -- many of the billboards at issue in this study have the same headlines and images also repeated in text ads, magazine ads, that are at issue in this case, so the study sheds some light upon how consumers would react to the longer, more detailed ads that contain the same images and same headlines.

MS. DIAZ: Your Honor, if I may, these

billboards do not contain any text, and that is the issue in looking at these ads. I mean, it's certainly an overwhelming issue, so given that the billboards, which we didn't understand, were -- are out, then Bovitz is no longer -- is not relevant.

MR. OSTHEIMER: Your Honor, the witness testified on direct about this survey and the open-ended questions in the survey.

MS. DIAZ: We had assumed -- we did not realize that billboards were out, and it was not clear that -- the FTC has not made its position clear what the scope of the ads are at issue in this case yet. We are still trying to get a handle on that.

I'm not going to get into discovery disputes regarding interrogatories.

You need to lay a foundation and connect with this witness to the direct, to the billboards, to make it relevant. I heard your argument, but I haven't heard the witness make it within the scope or make it relevant.

BY MR. OSTHEIMER:

Q. Dr. Reibstein, do you have an opinion -- you testified earlier today about the communication of -- about the -- your opinions about the reliability of the Bovitz study as a measure of communication from the billboards shown in the study; correct?

A. I did testify earlier about the Bovitz study and the reliability of the data.

Q. As a measure of communication of the billboards shown to consumers in the study; correct?

A. I did not say anything about billboards when I testified about this.

Q. About the images shown to consumers. About the reliability of the study for measuring the communication of the ads in the study shown to consumers.

A. About the ads that were shown specifically -- specifically the ads that were shown in the Bovitz study.

Q. Yes.

A. I did testify about that.

Q. Okay.

MS. DIAZ: Your Honor, the objection, I just want to re-raise it now because I think you had given counsel an opportunity to address the relevance. The witness has identified that he did testify about the Bovitz survey. However, again, that was prior to us understanding that these billboards are not at issue in this case.

JUDGE CHAPPELL: We're not going to take a major turn right now, Counsel, as to what's included and what's not. If that's not evident by this point in time, that's a bigger problem than some objection on relevance. Do you understand me?

MS. DIAZ: Understood. Understood, Your Honor.

JUDGE CHAPPELL: Go ahead. And you need to wrap this up. We've wasted enough time on this issue.

BY MR. OSTHEIMER:

Q. I'd like to put up on the screening touesu6vj4yulog tounT(abcT.givjns

Mrud

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A. Say that again.

Q. You raised concerns about the sample sizes of the cells in the study; correct?

A. That is correct.

Q. And I believe you said that to be able to say anything with confidence you need to have 300 people in each cell of a study; correct?

A. More than 300 in those. Yes.

population was very concerned about their health;
correct?

A. Say that again.

Q. You raised concerns that the Bovitz sample
population was very concerned about their health;
correct?

A. That is correct.

Q. In your opinion, a very health-conscious
population is much more likely than the general
population to focus on health issues in their evaluation
of advertising content; correct?

A. That seems like a reasonable conclusion.

Q. Are you aware that POM approved the survey
design?

A. That POM approved the survey design?

No. But that -- it would not be surprising to
me to hear that.

Q. You don't know whether the Bovitz sample was
based on POM's target audience, do you?

A. I haven't seen any detailed documents about who
their target market is.

Q. You criticized the forced exposure of the Bovitz
study; right?

A. I did criticize forced exposure to evaluate ads
in terms of -- so this is not a general criticism of

forced exposure. I did criticize for evaluating the overall impact of advertising and the implications that come from that, so in this context, absolutely. Absolutely. And if you want, I'll be more expansive on that, but I'll let you direct.

Q. You're criticizing the forced exposure as a way of measuring ad communication; correct?

A. No.

Q. Do you think forced exposure is an appropriate way to measure ad communication?

A. Some aspects of ad communication, yes.

Q. Respondents in your survey who said they did not remember having seen a POM juice ad may nonetheless have seen one but just not remembered it; correct?

A. That is correct.

Q. It is possible that survey respondents who had been exposed to more than one POM juice ad answered the question about what they remembered from the ad with regard to just one ad that they had seen; correct?

A. So the way you phrased that is it is possible.

Q. Yes.

A. And the answer is it is possible.

In the same sense, it is possible that they reported what it is they had seen in multiple ads.

Q. Advertising can influence beliefs; correct?

A. What about beliefs?

Q. Advertising can influence beliefs; correct?

A. It can influence perceptions.

Q. Exposure to Internet Web sites can influence consumer perceptions; correct?

A. Again, the way you phrased that is it could, and the answer is yes, it could.

Q. And so can public relations and word-of-mouth discussions; correct?

A. Again, it is with that they could, and the answer is yes, they could.

Q. Identifying the proper universe for a survey is important to know whether or not the sample that is ultimately drawn is representative of the population to which you want to draw some conclusions; correct?

A. So that is a concern.

Now, you raise an interesting question when you talk about the Web site and the PR could influence people's motivations and perceptions, and that is actually the whole point, is I want to look at the array of communications and get some sense of what it is that people might have been extracting from that array that led to their motivations for purchasing rather than forcing them to focus on just a finite set of ads in the absence of all the other forms of

communication that they have which leads to their particular perceptions.

And hence, one might get information from a whole variety of different sources which allows one to discount or reinforces any information they might have gotten from any particular ad. And that's what's important about not having just that forced exposure that one has.

Q. Your survey does not provide any information with regard to whether any of the respondents in your survey were exposed to POM Wonderful's Web site or public relations; correct?

A. So I'm going to try and repeat your question, and tell me if I've got it correct.

My survey does not say anything about whether or not people have been exposed to Web sites or other forms of communication, and if that's your question, that is correct.

Q. In your study it would not have been appropriate to included all adult Americans in your survey universe; correct?

A. All adult Americans?

Q. Yes.

A. I -- so the universe that we started with was a broad spectrum. It got narrowed down to only including

A. Yes.

So the -- yeah. There are -- there's more than one case that I'm involved with, and some of what it is that I've done is relevant for both cases, and I have not made any effort to try and separate what goes to which case, nor have I been asked to.

Q. The cost of hiring a company -- well, your total pay involving POM Wonderful in both cases for your reports was \$89,000; correct?

A. So -- so there were lots of other things that were involved that weren't just putting together that report, and there has been other things like being here today which are not included in that fee.

So I need to better understand your question, where you're going with that.

Q. Let me -- I'm almost done, Your Honor.

Let me just see if this refreshes your recollection.

I'd like to read from page 186 of your deposition in this matter starting on line 7.

And it says, starting on line 7, "You indicate that your fee for the marketing research report was \$89,000; correct?"

And your answer was: "That is what it says."

And then if we could go to your next question, I

mean, the lawyer's next question, it says: "You said 'in preparation for this testimony.' The time that you spent yesterday, is that included in the \$89,000?"

And you answered, "It is not."

So does the \$89,000 -- your fee for preparing the survey and the reports for POM was \$89,000; correct?

A. So you're talking about this case -- so, as I look at that, by the way, that's what it is that I had charged POM prior to that deposition, and the reality was that was for this case and some of it was to be used in another case in which I'm involved, and so it was probably a mischaracterization to give a hundred percent attribution simply to this particular case.

So I'm not trying to conceal anything; I'm just trying to be very complete and trying to answer this for you.

Q. Sure.

And just to try to be clear, the \$89,000 did not include the cost of hiring the company that implemented the study; correct?

A. It did not include the money that was paid to the market research firm.

Q. And in addition to that \$89,000, you're also being paid \$16,000 per day of testimony, including your

deposition and your testimony here today; correct?

A. I sure hope so.

Q. And that includes the time to prepare for your testimony; correct?

A. There is some time to prepare for testimony.

MR. OSTHEIMER: Can I have one moment,
Your Honor?

JUDGE CHAPPELL: Go ahead.

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

JUDGE CHAPPELL: Redirect?

MS. DIAZ: Just a few questions, Your Honor.

- - - - -

REDIRECT EXAMINATION

BY MS. DIAZ:

Q. Professor, does speculating as to how a hypothetical ad might affect a person with heart disease or prostate cancer alter your testimony as to why people actually buy POM?

A. So, Counselor, in the study that was done, there was ample opportunity for people to articulate their motivations for why it is that they bought POM or pomegranate juice. And if their motivation was to prevent or deal with their prostate disease or heart disease or erectile dysfunction, they had opportunity to

do so, and they were asked in multiple ways what their motivations were.

Q. So in your expert opinion, if heart disease, prostate cancer or erectile dysfunction was a reason why any of the participants in your study purchased pomegranate juice, that would have been apparent in your survey; is that right?

A. I fully anticipated that if that was the motivation for anybody as to why it is that they bought POM that they would have articulated that in any one of those three questions.

Q. Okay. And so did anything by counsel for FTC, did anything he asked, alter your testimony today as to why people actually buy and purchase POM?

A. No. I absolutely stand by the results that I've got, and there's nothing in the questions that he raised that change any of that perspective.

MS. DIAZ: Thank you, Professor.

No further questions.

MR. OSTHEIMER: No recross.

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

THE WITNESS: Thank you.

JUDGE CHAPPELL: Regarding scheduling, how long do you anticipate the next witness will take?

MR. FIELDS: I have about I would guess
40 minutes of -- or less of direct.

MS. HIPPSLEY: A half hour to 40 minutes for
cross.

JUDGE CHAPPELL: So we will not go late today.

I graduated from undergraduate school at Brown University from 1971 to 1975 and then proceeded to -- well, 197' -- 1967 to '71 and then '71 to '75 at McGill University, yes.

Q. So you went to Brown, got out of Brown and then went McGill and then came back here.

And is it correct you did your residencies in surgery and urology at Boston University medical school?

A. Yes.

Upon completion of the 1975 medical school degree, I did an internship in Montreal at the Royal Victoria Hospital in Montreal and then moved to the United States, in Boston, at Boston University School of Medicine.

Q. And you did a fellowship in surgery and urology?

A. So it's a residency training program, and it was a year of internship in surgery and then three years of residency training in the field of urology.

Q. And did you receive the clinical investigation award for your research at that time?

A. Yes.

Upon completion of training in 1980, I applied for and received an NIH grant for three years called Clinical Investigator Award, and this allowed me to do

research in the field of sexual medicine.

Q. Thank you.

And is it correct you're board certified as a urologist by the American Board of Urology?

A. Correct.

Two years later, in 1982, I was awarded the certification as a urologist.

Q. And you have been practicing medicine for about 35 years; is that correct?

A. Correct.

Q. And for about twenty of those years you were a professor of urology at Boston University medical school?

A. Correct.

So I did instructor, assistant, associate, and by 1990 I was full professor, and by the to8psdeateral lyTjT† bleftdeahad8AQ school?

Yesorrect.

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this institute within the School of Medicine in Boston University.

Q. Thank you.

And in about 2007 you went out to California and became director of the San Diego Sexual Medicine and director of sexual medicine at Alvarado Hospital, as well as clinical professor of surgery at the University of California San Diego medical school; is that correct?

A. That's correct.

In order to start a separate directorship and department of sexual medicine, we moved to San Diego.

Q. And is it correct that your medical practice has involved treatment of many patients with sexual health problems, including erectile dysfunction?

A. That is correct, yes.

Q. Is it correct that you are the president of the Sexual Medicine Society of North America, editor in chief of the Journal of Sexual Medicine, editor in chief of the International Journal of Impotence Research?

A. Those are all correct, yes.

Q. Okay. What role, if any, did you play, Doctor, in the development of Viagra?

A. I was part of the original advisory board to Pfizer that engaged in a very extensive drug development

sponsored by the National Institutes of Health, the NIH?

A. Yes. True to all of that.

For 25 consecutive years we received funding from the NIH to study physiology of erectile function and pathophysiology of erectile dysfunction.

Q. Thank you.

And is it correct that you've published over 250 peer-reviewed articles on sexual medicine?

A. That is correct, yes.

MR. FIELDS: All right. Your Honor, we offer Dr. Goldstein as an expert, and I think his report and CV are already in evidence.

MR. WONE: For the record, an expert in what?

MR. FIELDS: As an expert in sexual medicine and the effects of -- the studies that have been done on sexual medicine and the impact of pomegranate juice and antioxidants and nitric oxide on erectile function and dysfunction.

MR. WONE: No objection.

JUDGE CHAPPELL: They're probably just seeing if you can remember it. When they say "expert in what," you probably can say "those issues in the expert report."

MR. FIELDS: Yes.

JUDGE CHAPPELL: They might be testing you,
but...

MR. FIELDS: Those issues in the expert report.

JUDGE CHAPPELL: So the expert report and the CV
are in evidence?

MR. FIELDS: They're in evidence, Your Honor.

MR. WONE: Yes, Your Honor.

JUDGE CHAPPELL: Any opinions that meet the
proper legal standards will be considered.

MR. FIELDS: Thank you.

BY MR. FIELDS:

Q. Dr. Goldstein, Dr. Burnett of Johns Hopkins
already testified about the basic science, so I'm not
going to take you through that, how an erection works
and why sometimes it doesn't.

Are you familiar with the in vitro studies done
on the effect of pomegranate juice on nitric oxide and
on the antioxidant systems that promote erectile
function?

A. Very, very familiar, yes.

Q. All right. For example, are you familiar with
Dr. Ignarro's studies on the increase in nitric oxide
caused by pomegranate juice?

A. Yes.

So Dr. Ignarro is a Nobel Prize laureate from

and injure the lining of those arteries. We would then feed the animals cholesterol, and we would identify this condition of artery blockage called atherosclerosis in the arteries leading from the aorta to the leg, which included the arteries going to the penis.

So with this model we created an atherosclerotic model for erectile dysfunction, so Dr. Azadzoi has published extensively with me and others on this topic.

In the year 2005, he used the antioxidant pomegranate juice to study the effects of this therapy on his animal model. He broadened the research to engage in in vitro experiments as well, and he broadened the experiment to test, for example, the antioxidant effect of pomegranate juice compared to, say, blueberry juice and grape juice and orange juice and other -- and green tea and red wine and found many things.

Of the most important things for this, Dr. Azadzoi found that pomegranate juice had the highest antioxidant activity of any natural product that he tested. He found that in the in vitro testing many of the adverse effects, such as scarring of tissue, such as smooth muscle changes, such as

measuring oxidative stress, biochemical measures, were completely reversed by the pomegranate juice administration.

Q. And those are all things that cause erectile dysfunction?

A. Yes.

Q. Okay. Now, are you familiar with the -- by the way, are there any other studies, either in vitro or animal studies, of pomegranate juice or POM products

samples for them. Those blood samples were then shown in control and after pomegranate juice to have far less action in causing atherosclerosis. He looked in particular at macrophages, which are healing cells. He looked at atherosclerosis. He looked at LDL and HDL -- these are good and bad cholesterol -- actions.

Q. I particularly meant with reference to sexual function and dysfunction.

A. Well, it's just that endothelial function is particularly, as Dr. Burnett I'm sure brought up, essential to erectile function.

There's just one on other study that's very important, and that's Dr. Azadzo's animal study. In the animal study that we helped develop together, you can identify the nerve to the penis and actually electrically stimulate it and identify how rigid it gets and how good an erection quality it is.

What he was able to do was to show that the atherosclerotic state developed an erection problem. Less hard erections were identified. Given pomegranate juice, amazingly enough and with amazing science, he found increased blood flow to the penis, he found much better erection function, far less scarring in the erection tissue. And this was really pretty, pretty exciting animal data.

Q. Are you familiar with the human study done by Dr. Padma-Nathan on the effect of pomegranate juice on erectile function?

A. Yes, I am.

Q. And would you -- by the way, that was a placebo-controlled, double-blind, random study, what we call an RCT study?

A. It's a single site, it's small numbers of people, short duration of treatment, but it is a double-blind and placebo-controlled trial.

I have to state that in fact as editor in chief of the journal, that is the first and only nutraceutical clinical trial that is randomized and double-blind that I've ever come across in our field.

Q. Oh.

And is it correct that Dr. Padma-Nathan's study using the GAQ questionnaire reached a p-factor of .058?

A. That is correct.

Q. And the line or I guess it's an imaginary line of statistical significance is .05 p-value?

are two standard deviations from the center point and comes to point -- P .05 as representing that.

I think if you read Fisher's data, which I did, Fisher will be the first one to state that this is just a choice, this is just a -- something that appears to be an agreeable point, but in specific situations a different value could be utilized.

Q. .058, which is a hair short of .05, is the equivalent of a 94 percent probability of accuracy; isn't that correct?

A. That's 100 percent correct, yes.

Q. And the statistical significance line would be 95 percent rather than 94 percent.

A. The traditional accepted clinical -- excuse me -- the statistically significant point is P .05.

Q. Do you disqualify Dr. Padma-Nathan's study because it got 94 percent instead of 95 percent?

A. I certainly would not disqualify that study.

Q. It still provides valuable information to the clinician, does it not?

A. It provides very valuable information, yes.

Q. Now, Doctor -- well, let me back up a little bit.

This was an RCT study, but in your opinion, when we're studying pomegranate juice and its effect on

erectile function, do we need RCT studies; that is, are they necessary?

A. That's a great question.

Pharmaceutical agents, drugs, are synthetic, unnatural and are developed in laboratories and have specific pharmacological action on tissues. Since they're new molecules to human beings, a Food and Drug Administration strategy is to develop a series of preclinical animal toxicity studies, phase I trials just to see for safety, phase II to get dosing, and phase III to get very, very large pivotal trials in human beings to effect -- or to assess for safety and efficacy.

In contrast, the fascinating story of pomegranate juice goes back arguably to the Garden of Eden I was just reading that -- I mean, that's 5,700 years ago in history. The safety of this product, this natural fruit juice, is not questionable. It's been given for decades without issue.

Should something that has safety, therefore no risk, have benefit as defined by in vitro and in vivo studies of excellent quality published in high-ranking -- in high-ranking, peer-reviewed journals -- Proceedings of the National Academy of Sciences is what Ignarro published in. That's an

extremely high journal, and Ignarro is not anything but a Nobel laureate, so we're looking here at genuine preclinical science here. And given the fact that nutraceuticals aren't really historically studied in our field, I would argue the need for a randomized clinical trial.

Placebo issues are extremely complicated. How do you make a placebo pomegranate juice?

Q. Let me interrupt you for a minute because we may have an ambiguity on the record.

You said you would argue the need for a randomized clinical trial. Does that mean you would say we don't need it or we do need it?

A. No, no, no. I would say you would need it in a pharmaceutical product so that at best you'd find out safety.

The concept of thalidomide is the reason why we do randomized clinical trials (indicating). We want to avoid that. But we don't need to do that when we have a natural fruit juice that's been available for over 5,000 years showing us all the safety on earth.

And we have plenty of preclinical basic science data showing benefit. We know erectile dysfunction is highly, highly associated with oxidative stress problems. We have an antioxidant that's a natural fruit

juice.

So I'm saying to you, I don't know that we actually do need to use the standards for pharmacologic drug development with natural fruit juice nutraceutical --

Q. Thank you.

Now, Dr. Padma-Nathan used the GAQ questionnaire, and Dr. Melman, an expert for the FTC, criticized the GAF questionnaire.

Is that questionnaire widely used?

A. In every Viagra, Levitra and Cialis study that I was involved in and every publication in the Journal of Sexual Medicine on these, GAQ is widely used. For Dr. Melman to say that is a little embarrassing.

Q. All right. Now, are there disadvantages to the other questionnaire, the longer IIEF questionnaire?

A. The International Index of Erectile Function questionnaire is a PRO, which means a patient-reported outcome. It has multiple domains. There's five domains. There's 15 questions. It takes somewhere around 15-20 minutes to complete. There are six questions related to erectile function.

For example, one question deals with are you confident with the ability to have a -- to obtain and maintain an erection, nothing to do with hardness and

been the basis for the FDA's acceptance of Viagra, Levitra and Cialis for the treatment of erectile dysfunction. But it's designed for a pharmaceutical. It's not necessarily designed for a nutraceutical.

Q. Dr. Melman testified that no study can claim improvement in erectile function unless the men achieve orgasm.

Do you agree with that?

A. I couldn't disagree more with that statement, but that's just what anyone who understands the IIEF would answer. The basis upon which granting Viagra, Levitra and Cialis acceptance was the erectile function domain of the IIEF. There isn't a single word called "orgasm" in any of those six questions.

Q. Okay. Have studies been done on the effect of antioxidants other than pomegranate juice?

A. Yes.

As editor in chief of the journal, I have access to of course very contemporary, vibrant literature in our field.

Q. Just in general, without getting into detail, what have those studies shown?

A. So, in general, it's easy to say that oxidative stress is a huge problem with cells that line blood vessels and that antioxidant therapies, of which there

are now several published, have the ability to improve the erectile function of those people who take the antioxidant.

Q. Now, Doctor, considering the basic science dealing with antioxidants and their effect on erectile function and all the studies on the point, is it your opinion that there is competent and reliable science showing that pomegranate juice provides a benefit to erectile function?

A. Yes. I would say without question that's true.

Q. All right. Now, there are various causes of erectile dysfunction; isn't that correct?

MR. WONE: Yes, Your Honor.

JUDGE CHAPPELL: We're going to take a break
before the cross.

We'll reconvene at 2:20.

(Whereupon, at 1:19 p.m., a lunch recess was
taken.)

A F T E R N O O N S E S S I O N

(2:22 p.m.)

JUDGE CHAPPELL: Back on the record.

Cross-exam?

MR. WONE: Yes, Your Honor.

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CROSS-EXAMINATION

BY MR. WONE:

Q. Good afternoon, Dr. Goldstein.

A. Good afternoon.

Q. Dr. Goldstein, you believe that pomegranate juice promotes erectile health and that pomegranate juice has antioxidants, and these antioxidants help maintain endothelial health, which in turns affects erectile health; correct?

A. That's a lot of -- there was a lot in that sentence. If you could slow it down, I think I agree, but let me just hear it one more time.

Q. Sure. I'll repeat it.

Dr. Goldstein, you believe that pomegranate juice promotes erectile health in that pomegranate juice has antioxidants, and these antioxidants help maintain endothelial health, which in turn affects erectile health.

A. Yes.

Q. And Dr. Goldstein, you've described this mechanism of how pomegranate juice acts as a prophylactic in promoting erectile health as hypothetical; correct?

A. It's hypothetical to the extent that it does have antioxidant properties. It has very potent antioxidant properties. Antioxidant properties follow this pathway of helping endothelial cells. But to the extent that it is not hypothetical, there are basic science and in vitro and in vivo studies and human studies which support the hypothesis that pomegranate juice promotes erectile health.

Q. Dr. Goldstein, you stated earlier today that for people who have erectile dysfunction caused by endothelial dysfunction that there's enough science to show that pomegranate juice reduces the risk or ameliorates that erectile dysfunction, but you stated in your report that you would use pomegranate juice in your practice for a specific subgroup of people who have erectile dysfunction but for whom PDE5 inhibitors do not work and they don't want to try more invasive treatments; correct?

A. Again, your sentences are extremely long, and I want to answer it correctly. I think what you said was correct. This morning I did say the first part of your

sentence, and I think I heard correctly what your -- second part of your sentence. In my deposition with you, I said there are a certain group of patients for whom I personally recommend pomegranate juice as therapy, and those are men who have failed in more traditional, standard pharmaceutical strategies for erectile dysfunction.

Q. And you also would recommend pomegranate juice in your practice for people who don't have erectile dysfunction yet but drink pomegranate juice as a prophylactic to maintain erectile health; correct?

A. For men who walk into my office and say they are observing changes, lessening of their erectile performance, but haven't yet a degree of erectile dysfunction or have a degree of erectile function, which is not consistent with the accepted terminology of erectile dysfunction, these people do not qualify for pharmacologic treatment. Pharmacologic treatment is indicated for men who have erectile dysfunction, so it's a logical and rational strategy for me as a practitioner to recommend an agent where we have some basic science to improve their erectile health.

Q. And Dr. Goldstein, erectile dysfunction can be caused by psychological reasons?

A. Without a question, that's correct.

Q. And there are also many physiological reasons that can cause erectile dysfunction; correct?

A. True. Yes.

Q. And cardiovascular disease is one possible cause of erectile dysfunction; correct?

A. Cardiovascular disease is one of the more common causes of what we call vasculogenic form of erectile dysfunction, yes.

Q. And neurologic diseases can cause erectile dysfunction; correct?

A. Clearly, yes.

Q. And endocrine problems can cause erectile dysfunction?

A. Without a question, yes.

Q. And treating a person's underlying disease, like cardiovascular disease, doesn't necessarily treat their erectile dysfunction; correct?

A. Sadly, most of the treatments for cardiovascular disease worsen erectile dysfunction. Taking, for example, medications to lower blood pressure, which is a common treatment for a man with cardiovascular disease, actually worsens the erectile function.

Q. And Dr. Goldstein, in your expert report you defined a nutraceutical as, quote, naturally occurring

botanical product with health-promoting characteristics;
correct?

A. Yeah. An easier way would be a natural food
product with health benefits I guess, same thing.

Q. And pomegranate juice is a nutraceutical;
correct?

A. No doubt, in my mind, yes.

Q. And a dietary supplement such as a pomegranate

in articles evaluating the evidence concerning the efficacy of nutraceuticals or alternative treatments in preventing or treating erectile dysfunction; correct?

A. If you could remind me of the article, that would be helpful to me.

Q. Sure.

I'd like to take a look at Exhibit CX 2002.

May we approach, Your Honor?

JUDGE CHAPPELL: Go ahead.

BY MR. WONE:

Q. CX 2002 is an article titled Prevention and Treatment of Erectile Dysfunction Using Lifestyle Changes and Dietary Supplements: What Works and What Is Worthless, Part I and was published in the Urologic Clinics of North America in 2004.

You were one of the six authors of this article; correct, Dr. Goldstein?

A. That is correct.

Q. And the authors were from different universities?

A. The authors were part of a working committee for the society called the Sexual Medicine Society of North America to better understand the -- these types of treatment.

Q. And it was the nutraceutical committee?

A. It says on the title "nutraceutical committee."

Q. And what is the purpose of the Sexual Medicine Society, Dr. Goldstein?

A. So all subspecialties of medicine that share common interests and goals and want to foster ideas seem to join into groups that allows exchange of ideas and publications. The Journal of Sexual Medicine, for which I'm the editor, has different regions, and one of the regions is the Sexual Medicine Society of North America.

Q. And if I could turn your attention to page 4 of CX 2002, the section titled Placebo Effects in Erectile Dysfunction Supplement Use, in the left column, the first sentence reads, "Randomized, controlled clinical trials are considered the criterion standard for determining causality"; correct?

A. That is what's written, yes.

Q. So you distinguish the standard for evaluating the efficacy of dietary supplements that was articulated in the article from the standard you state is needed in this case for POMx and pomegranate juice; correct?

A. You're going to have to repeat that.

Q. Sure.

So you distinguish the standard for evaluating

the efficacy of dietary supplements that was articulated in this article from the standard you state as needed in this case for pomegranate products; correct?

A. I think the context in which that was written was the context of the pharmaceutical industry having pharmaceutical drugs like Viagra, Levitra and Cialis that have used the randomized clinical trial for their determination of safety and efficacy. I think that if there could be randomized clinical control data for nutraceuticals involving thousands of people, involving multiple sites, involving an appropriate placebo, I think that would be a real ideal. I think in reality that's not going to happen or it's not possible, and so I would say that that sentence is an ideal and I think the reality is not going to happen.

Q. And if I could go to Exhibit CX 2003.

A. What page is that, please?

Q. It's a different exhibit, Dr. Goldstein. One more minute.

A. Oh, okay.

MR. WONE: May we approach, Your Honor?

JUDGE CHAPPELL: Yes.

MR. WONE:

Q. CX 2003 is an article titled Prevention and

Treatment of Erectile Dysfunction Using Lifestyle Changes and Dietary Supplements: What Works and What Is Worthless, Part II, published in the Urologic Clinics of North America in 2004; correct, Doctor?

A. That is correct, yes.

Q. And similar to CX 2002, you were one of the six authors on this article; correct?

A. It's the same subgroup. We had a part I and a part II.

Q. And if I could turn your attention to page 10 of CX 2003.

In the last paragraph, in discussing dietary supplements and erectile dysfunction, the article concluded that "Randomized clinical trials are the best method of determining which dietary supplements will become a part of conventional medicine"; correct?

A. So I think -- that's what it states, and my answer is it's -- the context and the dream and the hope is that in fact that be the case. I think more experience and more knowledge -- this is now seven years old -- this manuscript is -- would say that in the seven years since writing this paper there hasn't been any large-scale, randomized clinical control with a nutraceutical.

The only nutraceutical publication in humans has

been a paper of 43 people who completed the trial. It's just a -- one is the ideal dream, and one is the reality that these are incredibly expensive and very complicated to perform, and placebo issues get in the way, et cetera.

Q. And on page -- CX 2003 page 9, the first few lines in the left column, even when a supplement has "demonstrated initial promising results" for erectile dysfunction, the article noted that, quote, larger randomized trials are required to confirm efficacy and determine --

MR. FIELDS: I haven't objected to this point, Your Honor, but I am going to register an objection now to "dietary supplement" as to ambiguity because a dietary supplement can be simply an herbal concoction, and we don't know whether it's talking about a plain food like fruit juice or not. And if counsel will clarify that and distinguish between dietary supplements, the generic, and pure food, I have no objection.

MR. WONE: I'm using "dietary supplement" as Dr. Goldstein intended in the title of his article, which uses the word "dietary supplement."

MR. FIELDS: But he hasn't defined it and you haven't asked him.

JUDGE CHAPPELL: Right. You can clarify that with the witness.

BY MR. WONE:

Q. Dr. Goldstein --

A. It just disappeared, whatever was there. Are we done with this or --

Q. No.

A. Okay. Could you -- I'd like to see it in the context of this page. That's page 9. Where is this? I can't find it in the page.

Q. Oh. The -- well, I'm going to --

A. There it is. I now see it. Thank you.

Q. Dr. Goldstein, can you define "dietary supplements" as you used it in CX 2003 and 2002?

A. Seeing how it's seven years ago, I would have to see specifically what we said, but in my best recall at the moment is that it engages natural fruit juices, it engages herbals, it engages -- it engages dietary supplements. The nonpharmaceuticals I guess would be the issue.

But the point is, if you -- the reason why I wanted to see it in context is, if you go in, the sentence -- because you're just starting with the word "minerals" -- the diagnosis of zinc-promoted copper deficient -- no. What am I doing -- other ED

THE WITNESS: Am I allowed to answer?

MR. WONE: Your Honor, I asked Dr. Goldstein to define "dietary supplements" as used in CX 2003 and 2002. He said:

"ANSWER (as read): Seeing how it's seven years, I would have to see specifically what we said, but in my best recall at the moment is that it engages natural fruit juices, it engages herbals, it engages -- it engages dietary supplements. Nonpharmaceuticals I guess would be the issue."

And then he continues on to --

JUDGE CHAPPELL: That's fine. But I think you'll agree that the case we're here for is about pomegranate juice, so can you at least keep us on point?

MR. WONE: Sure.

JUDGE CHAPPELL: Thank you.

THE WITNESS: And am I allowed to answer or --

JUDGE CHAPPELL: Nothing is pending right now. No question is pending.

THE WITNESS: No question. Thank you.

BY MR. WONE:

Q. So, Dr. Goldstein, as an author, you agree that larger randomized trials were needed to confirm efficacy, safety and mechanisms of action in the dietary supplements in this article, but you don't require such

randomized trials for pomegranate juice or POMx in this case; correct?

A. We've gone over this, and I'll be very happy to go over this again.

In my direct, it came out that pomegranate juice is a substance. It's a natural fruit juice. It's been available on our planet documented by written word for over 5,000 words (sic). I do not think a randomized clinical trial is needed to establish safety. We have -- we have 5,000 years of safety. We don't need a randomized clinical control trial for safety.

Q. Thank you, Doctor.

And if I could go back to Exhibit CX 2002, page 6.

In the first full paragraph on the right column, in discussing a pilot study on the treatment of erectile dysfunction with acupuncture, the article noted that this pilot study had some positive results but concluded that this small preliminary study requires a larger randomized trial to validate these results; correct?

A. You'll have to give me a few seconds to --

Q. Sure. Take your time, Doctor.

A. We're talking about acupuncture here?

Q. CX 2002.

A. Page 6?

Q. Yes. It's the first part -- it's Part I of those two articles.

A. But the reference 77 is talking about acupuncture, acupuncture in the treatment of erectile dysfunction.

Why are we talking about acupuncture?

Q. I'm asking you a question about acupuncture which you discussed on page 6 of CX 2002.

MR. FIELDS: That would seem to be outside the scope, Your Honor, and I object on that ground, about acupuncture.

MR. WONE: It goes to his credibility, Your Honor.

JUDGE CHAPPELL: How?

MR. WONE: Acupuncture is -- the article states that acupuncture is a safe product. Dr. Goldstein has stated that pomegranate juice is a safe product. I'm asking about his standard for acupuncture versus the standard that he's articulated for pomegranate juice.

JUDGE CHAPPELL: Then why don't you ask him that question.

BY MR. WONE:

Q. In the article, Dr. Goldstein, it was stated that acupuncture is safe and adverse effects were

minimal with a well-trained or licensed practitioner;
correct?

A. I'm trying to find where I said that. Could you specifically point that out.

Q. Sure. It's on CX 2002 page 6, the left-hand column.

A. Is what's emphasized here (indicating)?

Q. Yes, Doctor.

The first full paragraph, Doctor.

A. "A preliminary pilot study"; is that what it starts with?

Q. The left-hand column, Doctor. It starts with "Adverse effects."

It's on the screen, Doctor.

A. I can't find it.

Consensus taken concludes that the evidence supports needle acupuncture's effectiveness?

Keep going.

No large, randomized study demonstrated the effectiveness -- no large, randomized studies demonstrate the effectiveness of acupuncture in patients --

Q. The next --

A. Is that what you're saying?

Q. The next sentence, Doctor.

A. "Adverse effects from acupuncture are minimal with a well-trained or licensed practitioner. A larger investigation has demonstrated that forgotten needles and transient hypotension were some of the more common side effects."

Is that what you're talking about?

Q. Yes.

I'm asking, the article stated that acupuncture is safe and that its adverse effects were minimal with a well-trained or licensed practitioner; correct, Doctor?

A. Where does it say that it's safe? Could you just point that out one more time, because I don't see that.

Q. The sentence said, "Adverse effects from acupuncture are minimal with a well-trained or licensed practitioner."

A. So you've translated that into being I said it was safe?

So even for a therapy with minimal side effects, like acupuncture, there was a need for a larger, randomized trial in order to prove efficacy in treating erectile dysfunction, and you couldn't rely on preliminary pilot studies; correct?

A. I -- honestly, I mean, I don't want to be rude or anything here, but the translation of pomegranate juice safety to acupuncture safety is -- there's no -- it's oil and water. There's no parallel here. I don't even know where you're going.

Q. And if you could go back to Exhibit 2003 page 8, in the first paragraph on the right column, in discussing the use of oat bran and soy to treat erectile dysfunction, the article noted that there is an absence of evidence from clinical trials supporting the efficacy of treating erectile dysfunction in humans; correct, Doctor?

A. I'm not seeing that specific sentence, so maybe whoever is running this can broaden that sentence.

Could you repeat what you want me to look at to move this along?

Q. Sure.

In discussing the use of oat bran and soy for erectile dysfunction, the article concluded that there was an absence of evidence from clinical trials

supporting efficacy in treating erectile dysfunction in humans; correct?

A. So in the middle of this paragraph it states --

Q. It's not a quote, Doctor. I'm paraphrasing the paragraph.

A. The problem is, I haven't seen this in seven years and I've not seen this until this minute, so you're paraphrasing, and I want to be accurate, so I need to see the sentence from which you're deriving your paraphrase.

Q. It's the first full paragraph on the right-hand side. You can take your time to read it, Doctor.

A. The first full paragraph.

Q. Right under the heading Other Dietary Supplements: The Present and Future.

A. So you're looking at a mixture of wild oats, oat bran and oatstraw, and we're talking that they have been used to reduce cholesterol. No specific trials of this wild oat, oat bran, oatstraw combination have been published for ED, so that's what you're asking?

Q. I'm asking whether first that the article concluded that there was an absence of clinical trials supporting the efficacy of treating erectile dysfunction.

A. For the wild oat bran?

Q. For oat bran and soy.

A. Well, I mean, I can only read the sentence: No specific trials of Avena sativa -- which is wild oats, oat bran and oatstraw -- and ED have been published.

Does it answer your question?

Q. And the paragraph also mentions soy further down, Dr. Goldstein, starting with "Other potential cholesterol-lowering"?

A. Okay. So I'll read it: Other potential cholesterol-lowering products or supplements such as soy may be found in some supplements.

Okay.

Q. And the article also noted at the last sentence that it was -- or the article looked for evidence from clinical trials regarding oat bran and soy; correct?

Or supplements like -- products like oat bran and soy.

A. From my contemporary recall, these were supplements that had been used to alter cholesterol, and they hadn't had clinical trials for erectile dysfunction, and we're commenting that if in fact someone would be interested in studying these to see how they affected erectile function, then clinical trials assessing that would be beneficial.

Q. And if I could go to CX 2001.

May we approach, Your Honor?

JUDGE CHAPPELL: Go ahead.

BY MR. WONE:

Q. Dr. Goldstein, you were an author of a review article titled Erectile Dysfunction which was published in Clinical Evidence 2011 and has been labeled as CX 2001; correct?

A. Correct.

Q. And this article, CX 2001, reviewed RCTs pertaining to different products used to treat erectile dysfunction; correct?

A. RCTs concerning pharmaceutical products, Viagra, Levitra and Cialis.

Q. And "RCT" stands for randomized clinical trial, Doctor?

A. We've been using "RCT" for the last half hour. I hope we understand it to mean randomized clinical trials. Yes.

Q. And this article evaluated RCTs that met certain requirements such as blinding or the number of human participants?

A. For pharmaceutical products such as Viagra, Levitra and Cialis we have relied extensively on randomized clinical trials.

Q. And this article, CX 2001, included analyzing

predictive validity; correct?

MR. FIELDS: Objection, Your Honor. Could we know what counsel is reading from and if it's a deposition what page and line and if it's a report what page and line.

MR. WONE: It's a question. I'm not quoting anything. I'm asking if he's participated as an author in an article that gave that description regarding patient-reported outcomes.

MR. FIELDS: Well, I think the witness at least is entitled to see the article, and we'd like to see the article, too, Your Honor, if he's quoting from it and asking the witness if he participated in an article that said that.

JUDGE CHAPPELL: I'll overrule that to the extent the witness can answer the question. If he needs to see it, he can ask for it.

THE WITNESS: I would like to see the article so I can be accurate.

BY MR. WONE:

Q. Dr. Goldstein, do you recall agreeing at your deposition that rigorous assessment of patient-reported outcomes is necessary to ensure reliability, responsiveness and discriminant and predictive validity?

MR. FIELDS: Objection. Could we see the page and line and the deposition we're talking about.

JUDGE CHAPPELL: That's overruled. He's asking him if he recalls. We're not at the point yet where he's showing him anything.

MR. FIELDS: Okay. I'm sorry.

THE WITNESS: It was an almost seven-hour deposition, so I don't -- I mean, if you -- I would be very happy and be cooperative if you'd just show me what you're saying I'm saying.

BY MR. WONE:

Q. I'm referring to Dr. Goldstein's deposition in this case on April 11, 2011. The depo transcript is PX 0352.

Starting at line 18 --

MR. FIELDS: What page?

MR. WONE: I'm sorry. 55.

BY MR. WONE:

Q. "QUESTION: And if you could turn to page 1627, starting at the last sentence at the bottom left-hand column. You wrote, 'Rigorous assessment of patient-reported outcomes is necessary to ensure reliability, responsiveness and discriminant and predictive validity. These attributes ensure that the instrument measures what it states it measures and that

the results are reproducible and sensitive to change.'

"And do you still agree with those two sentences about the validation -- about what validation of a measure means, Dr. Goldstein?"

MR. FIELDS: Objection, Your Honor. The counsel did not read the answer to that question. He completely changed what counsel read.

MR. WONE: I didn't get a chance to read the answer.

MR. FIELDS: Well, I think just to ask the question and say "did you say this" and then he explains what he said without reading the answer is not correct and proper.

MR. WONE: Dr. Goldstein said he didn't recall. I just read the question. I haven't gotten to reading the answer yet.

MR. FIELDS: Well, fine. Read the answer then.

THE WITNESS: It also got eliminated from my screen, so --

JUDGE CHAPPELL: Hold on a second.

You need to give the witness a copy of what you're reading.

MR. WONE: If we could approach with a copy, Your Honor?

JUDGE CHAPPELL: Go ahead.

THE WITNESS: And it's page 55 I think you
said?

BY MR. WONE:

Q. Yes, Dr. Goldstein.

A. Thank you.

It's on the bottom of page 55?

Q. Yes, Dr. Goldstein, starting on line 18.

A. Okay. So that is what it states in the
deposition, yes.

Q. And then continuing on to page 56 where your
response is, Dr. Goldstein?

Your response is, during the deposition, that
you agree that patient-reported outcomes should be --

psychometrically sound and relatively easy to administer with a high degree of sensitivity and specificity to the effects of treatment across all five domains in patients with ED?

A. And what page is this on in the deposition, please?

Q. My question is if you recall saying that.

A. It's possible I recall. If it's appropriate to actually see it so I could be verifying.

JUDGE CHAPPELL: Doctor, you were just asked if you recall. In trial practice it's common to ask the witness if they recall; and if they don't, then we have various foundational methods to assist you in recalling.

THE WITNESS: So I would love to be assisted in recalling, if that's possible.

BY MR WONE:

Q. If you could turn to page 66 of your deposition transcript that's PX 0352.

Starting at line 20 and continuing on to page 66.

A. Now that I read it, again, it comes from an article dealing with the methodology of establishing a treatment of erectile dysfunction which is a pharmaceutical, for which pomegranate juice is not.

Q. The GAQ is not a validated measure; correct, Dr. Goldstein?

A. The --

MR. FIELDS: Objection as to "validated."
Validated for what purpose? Ambiguity. I don't know what "validated" --

JUDGE CHAPPELL: The doctor is presented to the court as an expert witness.

MR. FIELDS: Right.

JUDGE CHAPPELL: I think he can handle it; if not, he can let us know.

Overruled.

THE WITNESS: The question, please.

BY MR. WONE:

Q. The GAQ is not a validated measure for measuring erectile function; correct, Dr. Goldstein?

A. I think the best way to answer the GAQ is that its simplicity, its yes/no opportunity to answer, its -- its -- its clinical meaningfulness based on its simplicity makes it extremely widely used and very important in assessing erectile function.

"Validity" is a psychometric term. It involves measures of sensitivity, reliability, specificity. And the GAQ is a single-sentence question that hasn't gone through that systematic review, but it is widely used

and very important and for many points of view is much more important than the IIEF because it's understandable by the patient.

I suspect if it was not important it wouldn't be used.

Q. So the GAQ is widely used but not -- but not validated or -- but nonvalidated, as you stated at your deposition; correct?

A. So the issue of validation is what's in the discussion here, and the validation process is important from the Food and Drug Administration in the context of pharmaceutical agents. And patient-reported outcomes are the basis for a pharmaceutical product being approved by the FDA.

From the perspective of GAQ, it's a secondary outcome measure, whereas something like a validated scale could be a primary outcome measure upon which everything is based. But GAQ is obtained routinely in pharmaceutical drug studies, which are a very critical and important piece of information.

Q. And Dr. Goldstein, are you familiar with a Dr. Jacob Rajfer at UCLA?

A. Yes.

Q. And is Dr. Rajfer well-respected by experts in the erectile dysfunction community?

sentence that he writes. I think what Rajfer is missing here is the totality of evidence of pomegranate juice and he's only focusing on a single Forest trial in a small number of patients, not even taking into account his own research from UCLA, his colleagues Ignarro and De Negris and others. And I would disagree in his statement that this was negative.

Q. And Dr. Goldstein, you have discussed earlier that you would recommend pomegranate juice to patients who fit two subpopulations; correct?

A. I would recommend pomegranate juice to men who we've discussed don't meet the criteria for erectile dysfunction and are not candidates for classic treatments of pharmacologic agents indicated for men who have erectile dysfunction.

And I would also have conversations with patients and recommend the use of pomegranate juice to individuals who had classic erectile dysfunction and were not achieving the benefits from traditional, FDA-approved pharmaceutical substances and were faced with decisions to engage in invasive therapies, devices, surgery, needles, pellets down urethras, and would bring out the concept that this nutraceutical has had very interesting basic science data in vitro and in vivo and has a clinical trial where 94 percent of patients stated

reliably that they had improved erections taking this drug.

Q. Thank you, Doctor.

And for patients in those two subpopulations who you would recommend pomegranate juice to, this would be in the context of a dialogue with the patient's physician who understands the sexual issues of that person; correct?

A. It would be in the context of a conversation with the patient about his unique, individual circumstances, yes.

Q. And because a doctor can evaluate the patient's overall health; correct?

A. A doctor should have the opportunity to put the individual patient's issues in context.

Q. And because it's in the doctor-patient relationship, the doctor can also monitor the patient's progress after they start drinking pomegranate juice; correct?

A. Among many other things a doctor can monitor, that would be one, yes.

Q. And the doctor could advise patients as to any potential side effects or interactions with other medications the patient might be taking; correct?

A. That would be an obvious yes. There are no

recognized pomegranate juice-drug interactions or side effects that I'm aware of.

Q. And if I could go to Dr. Goldstein's deposition transcript, PX 0352, page 158.

In the last paragraph of a response starting at

the Mediterranean diet in relation to erectile function; correct?

A. It absolutely did.

Q. And the Mediterranean diet is a low-fat diet based on eating fruits and vegetables, fish, nuts, whole grains and wine?

A. Absolutely.

Q. And the Mediterranean diet is not just drinking pomegranate juice; correct?

A. That is correct.

Q. And the Esposito review didn't and -- did not investigate the efficacy of pomegranate juice in treating, reducing the risk or preventing erectile dysfunction in humans; correct?

A. That's correct.

Q. And the Esposito review did not prove that the Mediterranean diet treats, prevents or reduces the risk of erectile dysfunction in men?

A. Wrong. The Esposito diet -- could you repeat the sentence, please.

Q. Sure.

I asked, the Esposito review did not prove that the Mediterranean diet treats, prevents or reduces the risk of erectile dysfunction in men?

MR. FIELDS: Objection. Compound.

Can we break down treats and prevents and reduces the risk? They're all three different questions.

JUDGE CHAPPELL: He has a point. If the answer is yes, you don't know which of the three the witness is responding to. And if he answers no, the same thing.

MR. WONE: I'll break it up, Your Honor.

BY MR. WONE:

Q. The Esposito review did not prove that the Mediterranean diet treats erectile dysfunction in men; correct?

A. Wrong. The Esposito paper shows that in men who have erectile dysfunction who for two years engage in the Mediterranean diet compared to a control population who do not utilize the Mediterranean diet that in fact erectile dysfunction scores are statistically significantly improved in those who take the Mediterranean diet, basically implying that things that have perhaps antioxidant activity is beneficial.

Q. But the Esposito review concluded that it was the Mediterranean diet along with exercise as part of a healthy lifestyle that was linked to helping erectile function; correct?

A. Well, the Mediterranean diet engages in

exercise and activity, a daily form of exercise.

But they actually did find dropping of inflammatory markers consistent with oxidative stress and improved erectile function scores, statistically significantly -- they had large -- this was funded by the Italian government. They had large numbers of patients, and they definitely showed statistically improved erectile function scores.

Q. And during your direct exam, Dr. Goldstein, you discussed in vitro and animal studies; correct?

A. Used the -- involving pomegranate juice?

Q. Yes.

A. Yes.

Q. And Dr. Goldstein, a product may work differently in a laboratory test tube than in a person; correct?

A. Well, a rat is not a person, I think is a fair and simple statement. But given our world of investigating mechanisms of action, it is a very routine thing to do preclinical investigations involving tissues and animal studies. And in general, in the field of erectile function and dysfunction, preclinical studies have managed to mimic how agents work in a human being.

Q. But you noted in your deposition,

Dr. Goldstein, that there had never been in the Annals of Medicine an animal body that has proved something in humans and that you have to study humans to make statements about humans; correct?

MR. FIELDS: Objection.

Could we have a page and line. I don't think that was a "do you recall" question, Your Honor.

MR. WONE: I can rephrase.

JUDGE CHAPPELL: You need to rephrase because you're assuming he noted in the deposition without asking.

MR. WONE: I'll rephrase it.

BY MR. WONE:

Q. Dr. Goldstein, do you recall saying in your deposition that there's never been in the Annals of Medicine an animal body that's proved something in humans because you have to study humans to make statements about humans?

A. Could you show me that, please.

What page is that?

Q. If you could turn to page 124, please.

A. 124?

Q. Yes, Doctor.

Line 18.

Actually the question starts at line 13.

The question was: "But because the Azadzoi study used an animal model, it wouldn't prove that pomegranate juice treats erectile dysfunction in men; correct?"

"ANSWER: There has never been in the Annals of Medicine an animal body that has proved something in humans. So it's a question that you can't answer. But in and of itself it has shown huge pieces of information that will be helpful in understanding how it would work in humans, but you have to study humans to make statements about humans."

A. Yes.

So I think putting it in context, what I said in the deposition is essentially what I said to you when you discussed the rat and the human. In the tradition of our field, we go through the in vitro/in vivo investigation process and then end up with humans, but I think it's fair to say that humans -- human information is more appropriate and accurate.

MR. WONE: No further questions, Your Honor.

MR. FIELDS: I have no questions, Your Honor.

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

THE WITNESS: Thank you.

JUDGE CHAPPELL: All right. Let's talk about

the 14th of September.

How much time do you think we'll need for that witness?

MS. HIPPSLEY: Your Honor, on the 14th we are just bringing in our rebuttal witness to Dr. Reibstein, and I don't think it will take more than -- certainly not more than a half day, maybe only two hours for both direct and cross I'm guessing, but a half day.

JUDGE CHAPPELL: Comment on cross?

MR. FIELDS: I think that's accurate, Your Honor. I don't anticipate a huge, long cross-examination.

JUDGE CHAPPELL: How about a noon start on that day?

MS. HIPPSLEY: That's fine, Your Honor.

JUDGE CHAPPELL: So until 12:00 noon on September 14 we're in recess.

(Whereupon, the foregoing hearing was adjourned at 3:24 p.m.)

C E R T I F I C A T I O N O F R E P O R T E R

DOCKET/FILE NUMBER: 9344

CASE TITLE: In Re POM Wonderful LLC, et al.

HEARING DATE: September 2, 2011

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: SEPTEMBER 12, 2011

JOSETT F. WHALEN, RMR

C E R T I F I C A T I O N O F P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

ELIZABETH M. FARRELL