

FEDERAL TRADE COMMISSION

I N D E X

IN RE POM WONDERFUL LLC, ET AL.

TRIAL VOLUME 18

PUBLIC RECORD

OCTOBER 14, 2011

WITNESS:	DIRECT	CROSS	REDIRECT	RE CROSS	VOIR
STEWART	3158	3223	3240		

EXHIBITS	FOR ID	IN EVID	IN CAMERA	STRICKEN/REJECTED
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(none)

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(none)

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(none)

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(none)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
)
POM WONDERFUL LLC and)
ROLL GLOBAL LLC,)
a co-owner in)
Roll International Corporation,)
company, and) Docket No. 9344
STEWART A. RESNICK,)
LYNDA RAE RESNICK, and)
MATTHEW TUPPER, individually)
and an officer of the)
company.)
)
-----)

Friday, October 14, 2011

11:02 a.m.

TRIAL VOLUME 18

PUBLIC RECORD

BEFORE THE HONORABLE D. MICHAEL CHAPPELL

Administrative Law Judge

Federal Trade Commission

600 Pennsylvania Avenue, N.W.

Washington, D.C.

Reported by: Joseph F. Whalen, RMR-CRR

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P R O C E E D I N G S

- - - - -

JUDGE CHAPPELL: Back on the record Docke 9344.
 Before I hear arguments on the pending motion, am
 I correct have respondents here?

MR. FIELDS: That correct, Your Honor. We
 hold have said so and we forgo the line.

JUDGE CHAPPELL: Complain counsel, are you
 ready to argue your motion?

MS. DAVIS: Yes.

JUDGE CHAPPELL: Go ahead.

MS. DAVIS: Good morning, Your Honor.

JUDGE CHAPPELL: Good morning.

MS. DAVIS: I am offering address
 respondents brief about the constitutionally proper
 relevance evidence.

No, in their brief they have had the proper
 function of relevance evidence is contradictory, impeach
 or define the impact --

(Admonition from the court reporter.)

(Discussion off the record.)

MS. DAVIS: -- the proper function of relevance
 evidence is contradictory, impeach or define the impact
 of the evidence offered by an adverse party. And we
 don't disagree with her definition.

Dr. Kanoff's deposition would be proper
 rebuttal deposition. We cannot call him to contradict,
 impeach or defend the impact of Dr. Heber's factual
 deposition at the hearing about whether there is a
 connection among the scientific work that ended
 respondent's scientific advisory meeting on the
 conclusion could be drawn from respondent's prostate
 cancer research.

No, just to back up a little bit, in 2010,
 respondent held a scientific advisory board meeting
 on prostate cancer -- on their prostate cancer research.
 The meeting was attended by a limited group of
 people, including the respondent, Mr. Renick,
 Mr. Tupper, Mr. Gillespie, the scientific director,
 Dr. Liker, the outside medical consultant, one of the
 researchers who conducted the POM product, and
 outside experts who were invited to provide feedback
 about POM prostate cancer research.

No, Dr. Kanoff is one of those people who
 is invited to attend the meeting.

The meeting was held in January 2010 and
 November 2010.

As Dr. Heber's deposition, which is in January
 of his hearing, would have been January 2011, Dr. Heber's
 deposition -- deposition deposition would have been here

a no scientific agreement among the people has
 ended the scientific advisory board meeting on
 prostate cancer. However, when he testified at the
 hearing on August 31, he recanted his testimony and
 affirmed the testimony he gave at the
 meeting.

Dr. Kanoff is being presented -- is being
 called or offered to present factual testimony as to
 whether or not there is an agreement. He is not being
 offered to present expert testimony. He is not being
 offered to rebut Dr. Heber's expert testimony.

Yes, he is an expert, but an expert in the room
 could testify as to whether -- as to the fact of whether
 there is an agreement or an agreement among the people
 in the room.

JUDGE CHAPPELL: So it is clear, is it
 requiring his testimony for fact only, no opinion.

MS. DAVIS: Exactly, for fact only, no
 opinion.

And he reacts and believes that his testimony --
 his testimony is like a real important one because it
 goes to the heart of the case. I go to the heart of
 the respondent's knowledge.

If there is an agreement as to the scientific
 advisory board meeting has POM prostate cancer

research proved that he had not been treated for cancer, the respondents would have a reasonable basis for making the claim they are challenging.

At the moment, we only have Dr. Heber's contradictory opinion on the record. And we only have his characterization of what occurred at that particular meeting.

Dr. Heber a amen are on he record a
 rial e imon . Dr. Heber i heir i ne .
 Re ponden le Dr. Heber con radic him elf on he
 and. The made no a emp o correc hi a amen
 on redirec .

So e ha e o a me re ponden in end o offer
 Dr. Heber e imon for he r h of he ma er
 a er ed. And if ha he ca e, hen e belie e e
 ho ld be allo ed o call Dr. Kan off o reb ha
 e imon .

And q i e frankl , Yo r Honor, i no an
 all-or-no hing i a ion. Yo co ld permi him o come.
 Yo co ld limi hi e imon . Een in he order, if
 o gran ed o r mo ion, o co ld e for h
 in r c ion abo ha hi e imon o ld be limi ed
 o.

In erm of legal ppor , ac all ome of he
 ca e e don ac all di agree i h he --

JUDGE CHAPPELL: Well, o re alking abo
 limi ing e imon . If o e een an hing I e done
 in he pa , an ime a reb al i ne i allo ed o
 e if , he re onl allo ed o im in a roped-off
 ea.

MS. DAVIS: Oka .

And in erm of ha o need o look a in

making a decision on whether or not to grant or
 motion, it is -- I believe it is in the cor-
 dictory ion that here are factors that would
 have weighed.

Or the case of Meier and Quinn and the en-
 respondents of the United Linen Wholesale
 North Company, and those cases for the factors
 that dictate the holding in making a
 determination about whether or not the rebal-
 ance is a requirement.

And I believe that in all those factors
 that the balance is in order because Dr. Heber
 is a witness, again, goes to the respondents' knowledge.
 And although his testimony remains in the record,
 respondents can have testimony to make a
 finding again.

And right now the only one is Dr. Heber

e imon , hi depo i ion e imon gge ed ha here
 a no con en , o ba ed on ha , e didn hink ha
 here a a need o call Dr. Kan off. We -- o kno ,
 ob io l , o kno , here -- i a a big ca e.
 There ere a lo of i ne e ho co ld be called or
 named. Reall , e j had no rea on o a me ha e
 o ld need o bring Dr. Kan off a hi la e da e o
 reb Dr. Heber e imon .

Do o ha e o her q e ion for me or --

JUDGE CHAPPELL: No.

MS. DAVIS: No? Oka .

JUDGE CHAPPELL: Mr. Field ?

MR. FIELDS: Thank o .

JUDGE CHAPPELL: Are o ri ing o arg e for
 re ponden ?

MR. FIELDS: I m ri ing.

Oka . Fir l , here no a in he real
 orld ha e can epara e Dr. Kan off a emen
 ha -- if he o ld a ha -- e don e en hink
 he ll a ha , b if he ere o a , I don hink
 here a a con en a hi mee ing, he o ld ha e o
 be a ing beca e I didn agree b an i el i h
 Dr. Heber or omebod didn agree b an i el .
 There no a o epara e ha from gi ing an opinion
 on he meri of he e die .

JUDGE CHAPPELL: Ac all here i a a .

MR. FIELDS: Ho i ha , Yo r Honor?

JUDGE CHAPPELL: If an opinion i ered b
omeone ho offered onl for fac , ha opinion ill
no be ed, ill no be con idered an opinion in
e idence.

MR. FIELDS: Well, he er fac ha he a
ha -- o can epara e i in hi en e, Yo r Honor.
Wha Dr. Heber aid a here -- ell, le me back p a
li le bi .

Dr. Heber in hi rial e imon aid -- and I m
going o ge o he fac ha here no incon i enc
and no rpri e --

JUDGE CHAPPELL: B le me a k o hi . Wha
if e re alking abo de ermining a fac of he her or
no here a a con en ?

No , I nder and ha o re a ing. If
omeone a , Well, I m a big- ho doc or, and here a
no con en and here h , hen o re going do n he
rong rail --

MR. FIELDS: Righ .

JUDGE CHAPPELL: -- if o re a fac i ne .

B omeone can a , I a er ing m ffin and
coffee, and I heard e er one in he room a e , e all
agree. Tha no an opinion.

MR. FIELDS: B e o ha , Yo r Honor? When
he a -- he -- nece aril hen he a , I didn
agree i h Dr. Heber, he nece aril e pre ing hi
o n opinion beca e ha Dr. Heber aid a ha he e
die ho a good re l -- I m paraphra ing --

JUDGE CHAPPELL: Well, if e ere fencing, I

p on e idence of a -- ha omebod a him climbing
 a ladder o pain hi ho e. And Wrigh and Miller a ,
 ell, e , o co ld offer impeachmen o a o re
 con radic ing hi e imon ha j a fac , b
 o re con radic ing ha he aid on he i ne and,
 b a he ame ime o re nece aril gi ing
 b an i e e idence, and o i had o be di clo ed and
 i a n .

Yo re alking here no -- hi i m ch ore
 han he ordinar i a ion beca e o re alking abo
 an e per . He no de igna ed. There no repor .
 There no oppor ni o depo e him, hich o ld
 normall be he ca e. He no e en on he i ne
 li .

No , he kne reb al e per ere o be
 de igna ed beca e he de igna ed Profe or S e ar a
 an reb al e per .

JUDGE CHAPPELL: B he re no -- according o
 heir mo ion, he re no offering hi per on for an
 e per ; herefore, he o ld no ha e li ed hi
 per on a an e per and follo ed all he di clo re
 r le req ired for an e per .

MR. FIELDS: E en if he ere no an e per , he
 ho ld ha e been li ed, and here h . Le me go o
 he ne poin .

Their entire motion is based on the premise
 that Dr. Heber's testimony in his deposition is
 inconsistent with his affidavit, that he
 recanted. That is the order he said. I am in their
 brief.

Well, let's look at his affidavit because he
 is the premise of their motion, that he didn't lie to him
 at a time, is right here in his deposition.

Can we put that up on the screen so that
 His Honor can see it.

JUDGE CHAPPELL: I don't see it. You might have
 to go old school and read it.

MR. FIELDS: Okay.

Oh, here it is.

Okay. No, here is his affidavit in his
 deposition.

He said, "No one told Mr. Renick that here at
 a body of scientific agreement has POM actually
 prevented prostate cancer."

That is his deposition. You'll see it down here
 at the bottom.

The question is: Has anyone heard anybody else
 say that Renick that here at a body of scientific
 agreement has pomegranate juice could
 actually -- here no "actually" -- could prevent

prostate cancer?

And he said, "I don't know," "No one made any comment about Mr. Rebeck of the people indicated."

No, first, he was talking about the aid of Mr. Rebeck.

Secondly, I was talking about a bipartisan body of scientific agreement. I was not talking about what the people in the room decided or their opinion here. I was talking about a whole different thing, did any body tell Mr. Rebeck here that a bipartisan body of agreement exists here, that is, of the whole scientific community, not just the group in the room.

And I was talking about an agreement, not just a contention, which is an ambiguous term that can mean either body or molecular body.

And I was talking about all preventing prostate cancer, did any -- I mean here a body of scientific knowledge -- scientific agreement -- pardon me -- that pomegranate juice can prevent prostate cancer, and nobody told him about Mr. Rebeck.

Okay. No, he did hear a trial, his proposed recantation? This is the whole foundation for their making a three-week delay in his matter to bring in somebody to contradict because of his proposed

rprise. And here has he said a trial.

He thinks -- he thinks, no one knows -- he thinks here a connection among the men in the meeting, no anybody of scientific agreement.

JUDGE CHAPPELL: But if he reports, or an memo follows has he thinks, don't you? He reports.

MR. FIELDS: Do I know or follow has he thinks? Of course I do. But has doesn't mean has in holding a line has has an effect because of rprise.

JUDGE CHAPPELL: But in opinion has a king has her someone old Mr. Renick is the same thing a king has her here a connection.

MR. FIELDS: No. I think is talking about different things. I know the same thing.

On the one hand, is talking about did somebody tell Mr. Renick about has the scientific committee a whole thing. I am basic -- "banal body of scientific agreement."

JUDGE CHAPPELL: I might poke. Your opinion is I know the same thing.

MR. FIELDS: I know the same thing. The talking about different subject matter.

JUDGE CHAPPELL: But in opinion has

he re no e en rela ed.

MR. FIELDS: The re no e en rela ed. There cer ainl i no incon i enc be een a ing, I didn ell Mr. Re nick ha he cien ific comm ni belie ed ha pomegrana e j ice ac all pre en cancer.

JUDGE CHAPPELL: No , ac all he q e ion a " ell Mr. Re nick or he folk a " -- I g e he mee ing -- o i goe be ond Mr. Re nick.

MR. FIELDS: Oka . I didn ell Mr. Re nick or he folk a -- b if o ee hi an er, Yo r Honor, i a , "No one made an commen o Mr. Re nick of he pe o e indica ed," o he didn alk abo he o her folk , b i o ldn change an hing.

He alking abo a o all differen hing. He no alking abo a here a con en in he room on he e die . He a ing i here cien ific agreemen in he cien ific comm ni , no he ame hing, no recan a ion, no ba i ha e er for no li ing hi i ne .

No , le alk abo he -- I mean, I hink ha hi m be e cl ded nder he federal r le, b I m no e en going o arg e ha . Le a me i a o all di cre ionar ma er and Yo r Honor ha di cre ion o decide ha are he fac or o look o.

Well, le fir l alk abo he impor ance

of the evidence. The case, in one, he
 corroborates the evidence in the case, in
 the other, he goes to the other side of the case.

Well, here we go -- let me be
 here right and let me be clear and let
 me not talk about the scientific agreement, he
 talking about what happened in his room. And let
 me be one again, Well, I think here is a
 concern, which is the Heber case, and the other
 fellow come in and he says, I don't think here is an
 concern in his room. Is that really important? Can
 anybody else go to the other side of the case?

First of all, "concern" is a hopelessly
 ambiguous term. Some time I mean everybody agreed.
 Some time I mean most of the people did. There is a
 kind of a concern. I think here is a concern.
 That contradiction, which is the case, the other
 established because -- rather than seeking it as a
 opinion, the contradiction cannot be important to his
 case.

Secondly, let me talk about prejudice. The
 going to bring in his fellow. We have no opportunity
 to depose him. We have no report. We -- and
 Your Honor certainly realize the difference between
 bringing a cross-examine a line from one side of the

and said, Well, here a confession. Then he heard it. Then he knew in his deposition, he said, he had done -- had said something inconsistent, which is necessary.

And he knew no later than a week ago. Did he a week ago say, Go home, or in the jury room, and he had to call Kanoff on the phone, had he said? No. Did he say, You know, my fellow,

q e ion. Wha do o mean, o didn ell
Mr. Re nick? Or he co ld ha e aid, We a ked if o
old o her folk , b o didn an er ha q e ion.

o ld ha e aid, ma be, All I aid a nobod old
 Mr. Re nick here a a b an ial bod of agreemen , I
 didn alk abo hi .

B he didn p h. The didn a emp o
 impeach him. Yo r Honor, if he reall ho gh ha
 here a an incon i enc or, a co n el p i , ha
 he had recan ed hi prior e imon , o can be re
 he o ld ha e hi him i h ha depo i ion in o
 min e -- one min e -- hir econd . The didn .
 The had e er oppor ni .

We, on he o her hand, ha e no oppor ni o
 depo e hi g beca e hi i bro gh p af er he
 fac . Tha h e ha e he de igna ion of reb al
 e per , ha h e ha e repor from he reb al
 e per , o e re no p in ha po i ion.

So con idering e er fac or, e en if one a me
 ha hi i di cre ionar and no foreclo ed b heir
 fail re o li hi fello , he mo ion ho ld be
 denied.

Thank o .

JUDGE CHAPPELL: Thank o .

MS. DAVIS: Yo r Honor, can I re pond or --

JUDGE CHAPPELL: Briefl .

MS. DAVIS: Oka .

Fir of all, if o look a he rial

ran crisp --

JUDGE CHAPPELL: Did you corroborate

Dr. Heber?

MS. DAVIS: Actually, I did not. My conclusion
did.

But if you look at the trial record --

JUDGE CHAPPELL: I believe you told me he was in the
room?

MS. DAVIS: No.

JUDGE CHAPPELL: All right.

MS. DAVIS: When you look at the trial
record, we did not have a deposition of impeachment -- in
an effort to impeach Dr. Heber during the
corroboration.

JUDGE CHAPPELL: Or a stipulation.

MS. DAVIS: Or a stipulation, right.

The second thing, again, we're not calling
Dr. Kanoff to rebut the balance of Dr. Heber
opinion. We're calling Dr. Kanoff to rebut his
characterization of what occurred in the meeting, and
that is a factal...

(Pause in the proceeding.)

JUDGE CHAPPELL: What about the delay
respondents are talking about? What about the fact
that we had a week?

MS. DAVIS: Oka .

A g 31 a he da e of Dr. Heber
e imon .

The ca e adjo rned on he 2nd.

When e recei ed he final ran crip , e
re ie ed i , and e immedia el en and con ac ed
Dr. Kan off, beca e e had o peak o him o ee ha
he o ld a .

Dr. Kan off i e remel b . I ook
ano her almo o eek , o and a half eek o ge a
da e ha e co ld i do n and ac all alk i h him
abo ha occ rred a he mee ing, o e didn
ac all in er ie Dr. Kan off n il Sep ember 26.

Be een hen and hen e filed he mo ion, e
had a mee -and-confer, b e ere al o r ing o ork
o a da e for hen Dr. Kan off co ld come ha o ld
no f r her dela he proceeding. Unfor na el , ha
ha j no orked o . Dr. Kan off i on ra el oda
hro gh all of ne eek. And beca e of hi ra el he
earl par of he mon h, he ha all hi pa ien , and o
for h, he ne -- he eek of he 26 h and he eek of
he 31 , b he i a ailable on No ember 4.

JUDGE CHAPPELL: All righ . Yo re alking
abo a mee -and-confer recen l ?

MS. DAVIS: Thi o ld ha e been Sep ember -- I

g e O c o b e r 1, h e n t h e f i r s t a l k e d o -- e c a l l e d
M r . G r a b e r a b o u t t h e o r d e r t o b r i n g i n D r . K a n o f f .

J U D G E C H A P P E L L : A l l r i g h t . I a m g o i n g t o a k a
q u e s t i o n . I a n t h e o p o r t u n i t y t o c o m m e n t b e f o r e t h e
a n s w e r .

W e r e t h e o p p o s i t e p a r t i e s r e p r e s e n t e d h e r e p o n d e n t
o r d o e s n o t a g r e e t o a l l o w t h e o p p o s i t e p a r t y t o c a l l h i s r e b u t t a l
i n t h e c o u r t ?

M S . D A V I S : N o . N o b a s e d o n t h e o r p a r t y h i s o r
o f d e a l i n g w i t h e a c h o t h e r p a r t y h o w e v e r t h e c o r e o f h i s
l i g a t i o n , n o , I a n t h e r e p r e s e n t e d .

J U D G E C H A P P E L L : T h e n i f t h e o p p o s i t e p a r t y d i d n o t
r e p o n d e n t t o a g r e e , h o w d i d t h e o p p o s i t e p a r t y b r o a c h t h e o b j e c t
o f t h e o p p o s i t e p a r t y ?

M S . D A V I S : W e l l , t h e o p p o s i t e p a r t y d i d n o t i n t e r f e r e
D r . K a n o f f o n S e p t e m b e r 26, t h e o p p o s i t e p a r t y h a s t h e r e
r e q u e s t t o o r k o u t a d a e h a o l d h o p e f u l l y b e --
o l d n o t i n t e r f e r e w i t h t h e c o r p o r a t i o n c h e d l e , t h e o p p o s i t e
e r e r i n g t o g e t D r . K a n o f f o r f i n d a d a e h a o l d o r k -- h a s t h e c o l d c o m e a n d p r e s e n t l i e
e v i d e n c e i n t h e d e l a t i n g t h e p r o c e e d i n g e n f o r t h e r .

I d o a n t h e o p p o s i t e p a r t y m a k e o n e p o i n t a b o u t t h e
i m p o r t a n c e o f t h e e v i d e n c e . I f t h e r e p o n d e n t i s c o r r e c t
a n d D r . H e b e r t h e e v i d e n c e i s n o t i m p o r t a n t , t h e n t h e o p p o s i t e p a r t y
o n t h e o p p o s i t e p a r t y i s i m p o r t a n t i n t h i s c a s e , t h e n t h e o p p o s i t e p a r t y

h don e agree o rike hi e imon , and hen
ha o ld o all elimina e he need o call a reb al
i ne , if i reall no ha impor an .

B I ha e no heard hem a ha he don
plan o e ha e imon o a k o o en er a finding
again .

JUDGE CHAPPELL: All righ . Yo re repea ing
o r elf no . Do o ha e an hing el e?

MS. DAVIS: Nope. Tha i .

JUDGE CHAPPELL: Thank o .

Call o r ne i ne .

MR. OSTHEIMER: Complain co n el call
Da id S e ar .

JUDGE CHAPPELL: I hi a reb al i ne
called b agreemen ?

MR. OSTHEIMER: Ye . Thank o , Yo r Honor.

- - - - -

Where pon --

DAVID WAYNE STEWART, Ph.D.

a i ne , called for e amina ion, ha ing been fir
d l orn, a e amined and e ified a follo :

- - - - -

DIRECT EXAMINATION

BY MR. OSTHEIMER:

Q. Good morning, Dr. S e ar .

Plea e a e o r name for he record.

A. M name i Da id Wa ne S e ar .

Q. If o o ld o begin, plea e look a ab B of o r binder, hich ha been marked a PX 295a01, and ell me if ha a cop of o r c rric l m i ae.

A. Ye , i i a cop .

Q. If o o ld, plea e gi e a backgro nd of o r ed ca ional and profe ional life.

A. Cer ainl .

I ha e an ndergrad a e degree in p cholog from ha a a he ime Nor hea ern Lo i iana Uni er i . I no he Uni er i of Lo i iana a Monroe.

I ha e a ma er degree in p cholog and a Ph.D. in per onali p cholog from Ba lor Uni er i .

Upon comple ing m Ph.D., I pen ome ime orking i h he S a e of Lo i iana doing program e al a ion re earch.

Follo ing ha , I hen ook a po i ion i h a major ad er i ing agenc in Chicago, ha a hen Needham, Harper & S eer , i no DDB. There I a al o doing program e al a ion re earch, b i a in he con e of marke ing and ad er i ing program . O r clien a Needham a he ime ere McDonald hamb rger , Anhe er-B ch, General Mill ,

American Honda, among others.

From here, I moved into academic, here I have been since. I first moved to a small public university in Alabama, Jacksonville State University, here I held appointments in business and psychology.

After a year here, I then moved to Vanderbilt University in the Owen Graduate School of Management. There I earned tenure, also served as chairman of the senior associate dean while I was here.

While I was here, I taught a variety of courses in marketing, the introductory marketing class, both at the undergraduate level and the graduate level, courses in advertising, consumer behavior, marketing research, product development, and some Ph.D. seminars.

From here, I moved to the University of Southern California, here I subsequently stayed for 21 years. At the University of Southern California, I held the Robert E. Brooker professorship in marketing, an endowed chair. I served as chairman of the department chair of the Department of Marketing. I also served for five years as the department dean of the school, and also held a number of other administrative appointments.

While here, I also taught a wide array of courses, advertising, consumer behavior, marketing research, and I did have the undergraduate and

graduate level and MBA level and the Ph.D. level. I also participated in a variety of nondegree executive education programs in those same areas.

I also continued to write and publish in academic journals and write books.

For a period while I was at USC, I was also the editor of the Journal of Marketing, which is a leading academic journal in the field of marketing.

And also, as I was a leading USC colleague at the University of California at Riverside, I was also the editor of the Journal of the Academy of Marketing Science, which is another leading journal in marketing.

And from here, I then moved to the University of California at Riverside, where I took the role of dean. I continued to teach, I continued to write, I continued to edit the journal for a time, and just recently, in July, I stepped down as dean to return to the faculty at the University of California at Riverside.

Q. Are you currently affiliated with any professional organization in your field?

A. I am.

Q. Could you describe some of those?

A. Certainly.

I'm a member and a former member of the board of

the American Marketing Association. I have also served as the president of the academic council of the organization and as vice president for finance of the organization.

I am a former president and a continuing member of the Society for Consumer Psychology.

I am a member of the Association for Consumer Research.

I am a member of the American Academy of Advertising.

I am a member of the Production Development Management Association.

I am a member of the Psychometric Society, a member of the Academy of Management, American Academy of Management, among others.

Q. Okay. Now, during your career, have you engaged in scholarly research?

A. I have, yes.

Q. And it appears that you have mentioned writing a book. I believe from your CV that you have written eight books. Is that correct?

A. That is correct.

Q. Can you give a few examples?

A. One book that I wrote is a report of some empirical research that I had done in which I

Journal of the Academy of Marketing Science, Journal of Advertising, Journal of Advertising Research, among others.

Q. And you have received academic awards; is that correct?

A. That's correct.

Q. Can you give a few examples?

A. I have received several awards for my paper that have been published in journals.

I have received an award from the American Academy of Advertising for a paper that was published in the Journal of Advertising.

I have received an award from the American Marketing Association for a paper that was published in the Journal of Public Policy and Marketing, dealing with warning labels.

I have been awarded a lifetime contribution award by the American Academy of Advertising.

I have been given the Vecor/Coca award by the Association for Marketing Advances -- I'm sorry -- by the Academy of Marketing Science. That's a lifetime contribution award.

And the Academy of Marketing Advances has given me the Eleanor lifetime award.

Q. You are also consulted for numerous companies,

have or no?

A. I have.

Q. Can you give a sampling of how?

A. Some examples are: Hewlett-Packard, Agilent Technologies, AT&T, Procter & Gamble, Coca-Cola, among others.

Q. On what kind of issues have you consulted?

A. Well, in addition to an issue that might relate to litigation or a particular work, I have done a good deal of

Q. Have you ever been qualified as an expert in a
 context of law?

A. I have.

Q. In that topic have you been qualified as an
 expert in law?

A. In areas related to advertising and marketing
 and more specifically in areas related to deceptive
 advertising and unfair business practices.

I have been qualified as an expert in areas
 related to intellectual property, more specifically
 in areas related to likelihood of consumer confusion,
 brand dilution.

I have been involved in issues related to
 advertising, among others.

Q. Have you been qualified as an expert in consumer
 behavior?

A. I'm sorry? I didn't hear.

Q. Have you been qualified as an expert in consumer
 behavior?

A. Yes, I have.

Q. And in marketing research?

A. Yes.

Q. In the hypothetical human proceeding have you
 been qualified as an expert in law?

A. Probably a couple of dozen in which I have

ac all e ified a rial.

Q. And in FTC ma er bo h admini ra i e and federal co r , o ha e appeared in ario capaci ie ; correc ?

A. I ha e.

Q. Some ime for he FTC and ome ime for a re ponden or defendan ?

A. Tha correc .

Schering.

Schering had a product on the market called Fibre Trim. Fibre Trim is sold as a diet aid, an aid for losing weight. My role in the matter is really to look at a lot of research that had been done as a part of business by Schering, information related to marketing research, copying, information about the market, and so forth, and basically determine on that consumer would infer from the term "Fibre Trim" based on that, that research.

Q. Now, based upon the manner of the given of the education and training and experience, do you consider yourself to be an expert in consumer behavior, marketing, remedial and advertising?

A. I do.

MR. OSTHEIMER: Your Honor, I move that Dr. Seear be considered an expert in consumer behavior, marketing, remedial and advertising.

MR. FIELDS: Your Honor, may I know the particular of that he is going to testify about, that is his opinion about.

MR. OSTHEIMER: Dr. Seear will be testifying about the determination of Dr. Berer.

MR. FIELDS: A long time ago, I testified, a high

report, and regarding Dr. Berenson and he
 doesn't report, and he said he wouldn't do a
 deposition, to give an opinion on what he meant,
 and he has no objection.

MR. OSTHEIMER: His testimony will be regarding
 Dr. Berenson. He will not be doing his own facial
 analysis to reach a conclusion for or affirm a case
 on what he meant.

MR. FIELDS: No objection.

JUDGE CHAPPELL: An opinion that meets the
 proper legal standard will be considered.

BY MR. OSTHEIMER:

Q. Dr. Seaver, have you asked to do in his
 matter?

A. I asked to read Dr. Berenson's report and
 comment on his report, criticize it, and reach a
 conclusion as to whether I agreed with his conclusion
 or not and, in any case, hear.

Q. Have you read Dr. Berenson's deposition
 testimony?

A. I have.

Q. And his trial testimony?

A. I have.

Q. Please turn to tab A in your binder, which has
 been marked as CX 1295.

I think a copy of your report?

A. Yes, it is.

Q. Okay. Could you summarize what you take to be Dr. Berger's overall conclusion in his report?

A. What I took from his report is that he concluded that there is no likelihood that an unreasonable consumer could take advantage from the POM Wonderful advertising or the POM advertising the claim that are a lie in his matter.

Q. You are in your report that in offering his opinion, Dr. Berger ignores an enormous body of peer and empirical research related to his consumer information, proceeding advertising message and make a decision in the marketplace; is that correct?

A. That's correct.

Q. What does the academic literature tell us about his consumer proceeding advertising?

A. The marketing literature, which is also consistent with the literature in other fields, such as psychology, indicates that the meaning of a particular communication really resides in the recipient, not in the actual symbol, the actual phrase, that is, that consumers are not implicit passive recipients of messages, rather, they are active processors.

And so as they see a message, they bring to bear

hing has he already known, beliefs that he may have, feelings that he may have, prior experience, the context in which the particular message may appear, and all come together to create a new impression of that particular message.

Q. You say that the body of theoretical and empirical research ignored by Dr. Berger is interdisciplinary in nature and includes work in marketing, advertising, communication, social psychology, cognitive psychology, consumer psychology, and even linguistics; is that correct?

A. That is correct.

Q. What does this body of theoretical and empirical research say about the relevance of Dr. Berger's opinion?

A. Well, it says that in determining how a consumer would take a cue from the POM advertising, one should consider the characteristics of the audience, one should consider the characteristics of the speaker of the ad, their prior beliefs, how they regard a relevant cue, how they will process the information, generally how they will bring together the information.

Q. Can one determine all of the claims communicated by the advertiser based upon a linguistic analysis alone of the word and image in the ad?

A. No. No at all.

JUDGE CHAPPELL: You just referred to someone who would take a page from POM advertising. Did you look at a specific ad, or does your answer really mean that a consumer would take a page from an advertiser?

THE WITNESS: Well, I did look at a specific ad, but I'm alluding to how people would process an advertisement.

JUDGE CHAPPELL: No POM in particular.

THE WITNESS: No -- I'm citing a general principle. That's correct.

JUDGE CHAPPELL: How would someone listen to and receive and interpret something he read or hear.

THE WITNESS: That's correct.

BY MR. OSTHEIMER:

Q. I believe I just said that someone can determine all the claim communicated by an advertiser based upon linguistic analysis of the word and image alone, and I agreed, and I am going to ask you now.

A. Well, because by simply looking at only the image, one is not taking into account the characteristics of the advertiser or the listener. There is no taking into account prior belief. There is no taking into account prior knowledge. There is no

aking in o acco n con e al fac or ha ma ha e an
infl ence on he par ic lar e in an ad er i emen .
The re no aking in o acco n prior e perience .

All of ho e hing are reall impor an in
nder anding he o ali of ha people ill ake a a
from an ad er i ing me age.

Q. Yo ro e in o r repor ha Dr. B er
decon r c he POM Wonderf l ad er i ing, di mi ing
or di co n ing indi id al elemen of he ad er i ing o
reach a concl ion abo he comm nica ion of he
ad er i ing. Can o e plain.

A. Ye . Dr. B er end o par e he e of he
ad in anal ing indi id al elemen or ord or a of
pre en ing ho e ord .

So, for e ample, he alk abo h mor, b
largel in i ola ion from he larger ad er i emen . He
alk abo he meaning of indi id al ord , "can"
er " ill."

All of ha i par ing indi id al elemen .
I no ge ing a ha i he o ali of ha a
con mer, ho bringing a lo of informa ion and
kno ledge and e perience o he ie ing i a ion, ma
ac all do i h ho e indi id al elemen in he ad.
Nor i he nece aril con idering ho he in erpla of
all of ho e differen elemen ma come oge her o

create a particular impression or message for the consumer.

Q. Can you give me an example of such an approach and tell me what's wrong with it?

A. Certainly.

A few years ago I was involved in some work involving Kraft Single, cheese slices, individual wrapped cheese slices. And if you look at the end of the advertising, I begin by saying, "Kraft Single are made with five ounces of milk." And in fact, there also is a claim in one of the ads that a five-ounce cup of milk being poured into a slice of Kraft Single.

In fact all correct five ounces of milk are used to create Kraft Single, so if you just compare the part of the ad and look only at that, then there doesn't seem to be a problem. But if you go on to hear a, "So our children will get the calcium their little bodies need. Individual slices are made with oil and water."

No, then you begin to put the two together in relation with the other half of the ad, you find that the consumer takes a lot from the ad to support her claim. One is that, well, Kraft Single must contain the same amount of calcium as five ounces of milk. That in fact

i no fac all correc beca e ome calci m i lo in
he prod c ion proce .

Ano her claim con mer o ld ake a a i ,
ell, imi a ion lice , beca e he re made i h oil
and a er, m no ha e calci m. Well, he reali i
ha man imi a ion lice ha e calci m added.

B ha e ee i , o kno , an indi id al
elemen ha hen aken apar ma gge ome hing
comple el r hf l b i hin a larger con e ,
combined i h ha people kno and rea onabl infer,
lead o ome hing ha q i e differen and
mi leading.

Q. And ho i Dr. B er approach differen han
a ne impre ion approach?

A. I m orr . I didn hear o .

Q. Ho i Dr. B er approach differen han a
ne impre ion approach?

A. Well, Dr. B er , a I aid, par e he ad .
He reall doe n ake he o ali of he ad er i ing.

The ne impre ion o ld be e er hing ha an
indi id al o ld ake from he ad aken a a hole, no
ha indi id al migh ake from hi en ence or ha
en ence or hi claim or ha claim. And he doe n
reall con ider ha people migh infer ba ed on he
o ali of he ad er i ing.

Q. I'd like to look at a POM ad about which Dr. Berger testified a trial, CX 0348, which is also attached in your binder.

Please look at his ad at a hole and then look at the paragraph about the prostate.

(Pause in the proceeding.)

Now I'd like to read to you from the draft trial testimony of Dr. Berger testimony about his ad, which appeared at page 177 of the draft testimony, starting at line 24:

"QUESTION: Do you think it is reasonable for a doctor to recommend prostate surgery for prostate health or mean to recommend prostate surgery for preventing prostate cancer?"

"ANSWER: No."

And then starting at line 17 -- page 179, which is also displayed, line 11:

"QUESTION: But the term prostate health, there would be an inference that prostate health is inferring prostate cancer, has it some benefit for prostate cancer.

"ANSWER: No necessarily, no.

"QUESTION: Even though it's reporting about PSA doubling time and citing the Clinical Cancer Research journal? What else do you think he would recommend for prostate health could mean in his context?"

"ANSWER: Mean -- and has it or question?

"QUESTION: That in his conclusion, prostate health -- hopeful result for prostate health, a physician could infer has it hopeful result for prostate cancer.

"ANSWER: One could infer has hopeful result for prostate health has to do with a kind of health problem that one might wish one prostate.

"QUESTION: A kind of health problem.

"ANSWER: Yes.

"QUESTION: Despite his conclusion has he registered a report has published in the Clinical Cancer Research and its indicating a statistically significant prolongation of PSA doubling time?

"ANSWER: Yes."

Dr. Seear, do you agree with Dr. Berger's opinion has it is not reasonable for physician to infer from the phrase "hopeful result for prostate health" has POM provide some benefit for prostate cancer?

MR. FIELDS: Objection. My name is the physician. Dr. Berger, based on his conclusion read, specifically a physician refer to all kind of prostate health. That would not include prostate cancer. He just said it broader than prostate cancer.

MR. OSTHEIMER: Dr. B... asked her whether an reasonable conclusion could infer a referral to pro a e cancer, and he said no.

MR. FIELDS: Read the balance of his deposition which I read before. He said at the end, I think I mean the other kind of pro a e health. I don't just mean pro a e cancer.

JUDGE CHAPPELL: Step back, take a moment and determine whether to agree or disagree on his talking about his deposition. Take a moment. Look at it.

MR. OSTHEIMER: I read the trial transcript differently than Mr. Field. I read it literally correct.

(Discussion off the record.)

JUDGE CHAPPELL: I thought I heard you ask him to complain to the mediator or to Dr. B... .

MR. FIELDS: Complain to the mediator here in the hearing --

JUDGE CHAPPELL: Before we go any further, are you prepared or willing to read or question?

MR. OSTHEIMER: I'm -- I asked Dr. B... deposition correct or not, and my question -- well, I can -- I can read the deposition. I'll read the deposition.

MR. FIELDS: Well, if o repea i , i going
o ha e he ame objec ion.

JUDGE CHAPPELL: Repea or re a e? There i a
difference.

MR. OSTHEIMER: I belie e ha Dr. B er did
a e in hi e imon ha i i no rea onable for
ie er o infer from he phra e "hopef l re l " ha
POM pro ide ome benefi for pro a e cancer. He aid
ha in hi rial e imon .

To q o e, "B he erm pro a e heal h, here
o ld be an inference ha pro a e heal h i
inferring pro a e cancer, ha i ome benefi for

"One could infer that hopeful relief for
 prostate health" -- that is, that the aid -- "that is, that
 to do with any kind of health problem that one might
 have with one prostate."

"QUESTION: Any kind of health problem.

"ANSWER: Yes."

He is not excluding prostate cancer. He is saying
 it is broader than prostate cancer. Prostate health
 means, that is, hopeful relief for any kind of
 health problem one might have with one prostate.

MR. OSTHEIMER: Mr. Field is skipping a
 question: "That is, in this context, prostate health --
 hopeful relief for prostate health" --

JUDGE CHAPPELL: You need to look down when
 you are reading.

MR. OSTHEIMER: I am sorry.

Your Honor, Mr. Field skipped the question:
 "That is, in this context, prostate health -- hopeful
 relief for prostate health, that is, one could infer that
 it is hopeful relief for prostate health."
 ng.

But also, as I look at the evidence itself and particularly the consumer together, there are several things that hold have suggested to Dr. Berger that it would be reasonable for a manufacturer to perhaps make an association with helping prostate cancer. There is a specific reference to a medical cancer journal. There is a specific reference to PSA testing, which is associated with a test for cancer.

So, in summary, there are some elements in the advertising itself that hold have suggested to Dr. Berger that it is reasonable for a manufacturer to have taken a same age related to preventing or treating prostate health.

Q. Dr. Berger stated that he analyzed the challenged POM Wonderful product ad from the standpoint of contemporary speaker of American English.

In your expert opinion, is that the correct perspective to take?

A. No, it is not.

Q. Why not?

A. Well, the average consumer or the average speaker is not really representative of the target market of the advertising.

What are known advertising and consumer behavior issues that are in the target

market and to be quite different in many ways than individual who are the average consumer. They have experience with the product. They are sophisticated. They are educated. They are paid more attention to advertising. They have greater knowledge.

There are just many, many, many different characteristics associated with many members of the target audience for a particular advertisement, whether it is POM or some other advertisement, than would be the case for the average speaker of the language.

Q. Who are the various target audiences for POM juice and POM ads?

A. In various documents that I have seen, primarily creative briefs, the audience for the advertisement is variously described. There are a number of common elements over time, but there is some variation over time.

But in general, the audience is described as individual who are affluent, more educated, who are highly concerned about their health. In fact, in some of the early creative briefs I have seen they have been described as hypochondriac.

Over time, they have evolved to perhaps a somewhat broader group of individual, individual who would be interested in health and lead a healthful life, but

also included men who were concerned about prostate health, their wives or women in their lives who were concerned about the prostate health of their -- the men in their lives.

Q. What are creative briefs?

A. I'm sorry?

Q. What are creative briefs?

A. Creative briefs are really planning documents. A creative brief is simply a summary of the man, man decision and what has associated with the creation and implementation of a single ad or a whole advertising campaign.

I include discussion of how the target audience is, what benefits will be emphasized, what proof will be provided how the benefits are offered. They all generally include some discussion of the media that will be used to deliver the message, whether it's print, television, billboard, or whatever.

And it's really a matter of organizing the entire campaign and the entire sequence of activities to have everyone understand and -- have involved in the process and have the plan.

Q. How do you know about creative briefs?

A. Well, I've spent some time in advertising here. I do a creative brief regularly and in fact a lot of them.

asked to do research to verify that the plan included in creative brief were in fact viable.

So, for example, I might see particular claim and how people would respond to them. I might see the degree to which people regarded certain proposition as more or less credible or believable in support of a particular benefit.

I did research looking at the demographic of target audience. And we also did research that focused on how medium would be best for reaching those audience.

Subsequently, in developing advertising, I talk about creative brief as a part of marketing core. It's a fundamental planning tool that advertising agencies and marketing departments use.

And we also been involved in a variety of consulting activities where creative brief have been a part of a product that we're creating.

Q. In your experience, is there a standard for creative brief?

A. The use of creative brief is a standard tool. It's regularly employed, especially by more sophisticated, larger advertisers and advertising agencies.

Q. In your report, on page 12, which is

CX 1295-0013, o q o e from POM crea i e brief o de cribe POM arge a dience for POM j ice and POM ad .

Wha do ho e brief ell abo he arge a dience for POM j ice ad ?

A. Well, he ell e eral hing , and he re con i en i h he opinion I e j gi en.

In 2004, 2005, 2006, he arge a dience a de cribed in he crea i e brief a likel o be affl en , profe ional, college grad ho are er heal h-con cio , i h a paren he ical ha a "h pochondriac ," and li e in rban area .

B 2008, he defini ion of he arge a dience had been modified ome ha , al ho gh ill er imilar, and i a de cribed a heal h-con cio , affl en ad l age 25 o 49 h n ing for a hen ic prod c ha deli er real benefi he can r , and i a no ed ha ch indi id al make p perhap 5 o 15 persen of he U.S. pop la ion.

Q. And ha do he crea i e brief ell abo he arge a dience for POM ad ?

A. For POM , he crea i e brief ell ha he arge a dience i ho e ho are eeking a na ho ha he

75,000 per year, primarily men who are concerned about prostate cancer, men 40-plus who are concerned about their prostate health and are either interested in preventative measures or healing options, and women who have an acute interest in the health of their men and specifically their prostate.

Q. Would such consumers give a different level of attention to health claims or be any more or less likely to draw specific inferences about the benefits of POM Wonderful products than the general consumer of American packaged in English?

A. I believe so. Yes.

Q. Why is that?

A. Well, for several reasons.

First, they are a more educated group of consumers who are -- who are likely to do a great deal more in the area of educating themselves, reading, finding information.

Secondly, they are individuals who have been identified as having an interest in their health, either in their general level or more specifically in their prostate, a prostate. Such individuals are likely to have spent a good deal of time reading the popular media, listening to television or radio about their health. Because of their general interest and their

general concern, he likely acquired a great deal of information about -- about their health and health care life style and their professional history would probably be typical of the average consumer.

Q. Dr. Berger asked a question that if he were interviewing the challenged advertiser already, it wouldn't change the conclusion in his report one bit in that one would expect that people in this era of disease would be more skeptical, not less skeptical, of the advertisement in advertising a treatment or cure or prevention.

Do you agree with Dr. Berger?

A. I do not.

Q. Why not?

A. Well, his is another example of his understanding the target audience is so important.

Somebody who has already been diagnosed with an illness is more likely to be highly attentive to health claims that are relevant to them. The likely have talked to a physician or other health care professional. The likely have done some reading. The likely have acquired a great deal of information that would be relevant to their condition.

In addition, they're likely to be looking for a physician in which they can help them out. Particularly

knows that more highly educated individuals tend to have higher health care utilization, self-efficacy, health insurance, and desire to control circumstances, so find a physician in which he can advise him else, even as he might be looking for help from physician or other health care provider as well.

So here we see reason to believe that the evidence -- individual evidence -- draws a great deal of -- a great number of inferences from advertising, and certainly here no reason to conclude that he will be more skeptical of the ad.

Q. Let's look at an advertisement with the headline "Flora for arthritis," which has been marked as CX 0031 and which is also attached in our binder.

Dr. Berger reports describe his advertisement in lay language, and that he does not make definitive medical claim for the product, that it only indicates that a clinical pilot study found that the clinical subjects who were treated had reduced plaque by 30 percent and that it can have a specific beneficial effect, not that it cures.

You also in our report that Dr. Berger also has the use of a qualifier and of the word "can" in his ad and other advertisements to diminish the effect of POM Wonderful product claim.

I hi con i en i h he academic li era re
and empirical re earch on he impac of q alifier ?

A. No, i i no .

Q. Wh do o belie e ha o be he ca e?

A. Q alifier ha e he effec of ha e ome ime
refer o in p cholog and marke ing a o- ided
claim . A o- ided claim in ol e one here one a
ome hing po i i e balanced b ome hing ha
nega i e. And he end o be credible beca e he
appear o be balanced.

Q alifier ha e m ch he ame effec , and
here empirical re earch ha gge a m ch, ha
b offering a q alifier, o ac all increa e he
credibili beca e o appear o be being more balanced
in offering he informa ion.

Q. When e if ing a rial abo he POM
"Flo o r ar erie " ad, Dr. B er a ed ha a
rea onable per on o ld di cern he difference be een
he ord "can" and he ord " ill."

In he con e of hi ad, do o agree?

A. I do no agree.

Q. And h i ha ?

A. Beca e he member of he a dience for hi ad
are proce ing he o ali of he ad, no -- no
indi id al ord .

No, perhaps if we had created a link here we asked them how does "can" mean or "ill," we might have gotten a different response. But he has no other typical comment doing when he is an ad. They're looking at the quality of the illustration, the headline, the text, and the recarr ing a a a ne impression based on all of the information, and the potential meaning of an one of those words is really defined by its context.

Q. What about the impact of terms such as "initial" or "pilot" noted by Dr. Berger?

A. The typical comment I think will have to do with the understanding of the "initial" or "pilot" particularly in the context of something that is referred to as having been published in a major journal.

Q. If we could redisplay CX 0031.

Describing the "Florence" ad, Dr. Berger said it's proper to call it in part because it goes on to say it's a pilot.

Where in his ad does it connect to the advertisement based upon a pilot?

A. Well, here we are, we're all for none in kind of grape has really difficult to see has provide information both about here he did a

published and is based on clinical pilot study."

Q. No. I'd like to display a similar ad, CX 0034.

In describing his ad, "America's
cardiologist," Dr. Berger said, "It is a clear
highlight for the scientific pilot study, no
established medical fact."

Where in his ad does it contain the
scientific based pilot study?

A. Again, his is in her, overall,
difficult-to-read footnote has included the name of the
journal in which he published and then
indicates "based on clinical pilot study."

Q. What does the academic literature about
her fine print or footnote disclose are clear and
effective?

A. Well, in general, consumers tend to ignore, and
not read fine print and footnote and disclose.

Q. I'd like to display a document that has been
marked as CX 0409-0010.

Here is a creative brief that is cited in our
report. It is for a women's life line
product concept. I'd like to direct our
attention to the Beneficial and the Reason of
Belief section.

How do you believe that his creative brief is relevant to Dr. B's conclusion?

A. Well, his creative brief describes an advertising campaign that is similar to one that ran. The headline "Flo or ar erie dail " which appears in the brief in fact is a headline in one of the ads that ran.

I think it is relevant because it goes on to have the intention of the advertiser. The intention is to create, at least in part, the benefit of heart health; that is, if you drink POM Wonderful daily, you will have clean and healthy arteries, that is, flo or ar erie dail .

And then it goes on to offer a number of statements that could be included in the ad that would provide support for the benefit, that would increase the credibility that the benefit could be delivered.

One of those is "More independent power than other drinks."

Another is "The powerful antioxidant in POM Wonderful guards your body against harmful free radicals that can cause chronic diseases, such as heart disease, premature aging, Alzheimer's disease, and even cancer."

And then here is a statement about "Drinking

POM Wonderful daily can help reduce plaque in our arteries by 30 percent." That advertisement has appeared in one of the ads.

And finally, "I like flowing our arteries daily."

All reasons that the beneficiaries should be believed to be delivered to the consumer.

Q. Are there other creative briefs that you looked at under the messaging of POM Wonderful?

A. Yes.

Q. You quote from one of them appearing on page 14 of your expert report; is that correct?

A. That is correct.

Q. I'd like to display CX 1295-0015, which is page 14 of Dr. Sear's expert report.

Can you talk through one of the creative briefs and explain how they support your conclusion.

A. Certainly.

There is a 2008 creative brief which basically describes a campaign that has ended, quote, "opposite the audience --" opposite the target audience dead in their tracks. I would fire in pipe them to make noise... "Realizing the production expense, they should be more willing to pay the price and more."

One of the reasons to believe, in a word,

"In the last decade, there have been over 35 medical studies (eight on humans) that have been published in recognized medical journals showing a correlation between drinking POM Wonderful pomegranate juice and improving heart health, prostate health, diabetes, erectile dysfunction, and a host of other diseases associated with aging."

Q. How does this contradict Dr. Berger's statement that the POM juice advertisement make no health claim that is beyond the general received notion that making fruit products a regular part of one's diet is a health thing to do?

A. Well, he's clearly ignoring the intent of the reader of the advertisement. I would deem someone in offering an opinion about what is likely to be communicated in a particular advertisement, one would assume to have not only an understanding of the characteristics of the recipient but also of the intention of the creator of the advertisement.

Q. Could you talk through the creative brief to quote regarding POM?

A. A 2007 creative brief for POM pill described the benefits as "POM juice has been clinically studied to improve prostate and heart health. POM has the same antioxidant and polyphenol content of the juice. Therefore, e

similar copy of his ad.

Can you read the body of the ad, please.

A. The body of the ad reads:

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

Q. Now, I'd like to display an excerpt from
Dr. Berger's deposition transcript, PX 0350-0102,
starting at line 21 and through line 25:

"QUESTION: In your opinion, could the
Chancellor had communicated to an reasonable consumer
that drinking eight ounces a day of POM juice prevent
or reduce the risk of heart disease?

"ANSWER: No."

Do you agree with Dr. Berger that his ad could
not communicate to an reasonable consumer that
drinking POM juice prevent or reduce the risk of heart
disease?

A. No, I do not agree with him.

Q. And how is that?

A. Well, this is a mere opinion. The

opinion he dra ing i ha no rea onable con mer
 co ld po ibl carr a a ha me age. Tha in fac
 incon i en i h ha e e een a he in en of he
 comm nica ion in ome of he comm nica ion brief ha
 e en ed he ame lang age, and i al o incon i en
 i h ha I belie e man con mer o ld infer ba ed on
 he con e of he ord ha are ed.

Q. On page 4 of hi e per repor , Dr. B er
 a e , "Finall , he e of h mor and parod i
 pre alen in he POM Wonderf l comm nica ion , h mor
 hich ork o block an inference ha he
 POM Wonderf l comm nica ion are in ended o make
 defini i e heal h claim i h re pec o ch i e a
 hear di ea e, ar erial di ea e, h per en ion, pro a e
 di ea e, and erec ile d f nc ion."

Do o agree?

A. I do no .

Q. D ring hi depo i ion, he e pre ed he ie
 ha he h mor and parod in POM ad block an
 comm nica ion o rea onable con mer ha drinking POM
 j ice rea , pre en or red ce he ri k of hear
 di ea e, pro a e cancer or erec ile d f nc ion, and he
 reaffirmed ha ie d ring hi direc e imon a
 rial.

Do o agree i h ha opinion?

MR. FIELDS: Objec ion.

Co ld e ha e a page and line if e re reading
from a depo i ion.

MR. OSTHEIMER: S re.

Thi depo i ion a ac all di pla ed o
Dr. B er d ring hi e imon . I doc men
PX 0350- -- page 62 -- -0062, line 17 o line 22.

MR. FIELDS: Wha page i ha , plea e?

MR. OSTHEIMER: emeY ki line 22.

redirec , redirec e imon , he aid: "The -- he --
 he h perbole in he ad and he h mor in he i al
 repre en a ion block li eral in erpre a ion of man of
 he -- of he heading , ch a I m off o a e
 pro a e . The e are ab rd erm and ill no be --
 ill no be ie ed a -- a indica ing claim ."

If o kip ahead a li le bi , he hen aid
 he h mor -- ha he h mor doe n block he erio
 a emen ha are made in he e and foo no e .

Do o agree i h Dr. B er abo ho h moro
 headline and i al repre en a ion ill be
 in erpre ed?

A. No, I do no .

Q. Wha doe he academic li era re a abo he
 effec of h mor in ad er i ing?

A. Well, here er rich li era re on he e of
 h mor in ad er i ing, and ha li era re gge ha ,
 hen appropria el ed, h mor ha e eral effec .

One effec i ha i dra a en ion o he ad f li e /e and

di arm he con mer. Wha e find i ha of en in
proce ing arg men , he her he are in ad er i ing or
el e here, con mer ill engage in ome hing e call
co n er-arg ing; ha i , he ll come p i h rea on
h ha he re reading can be r e or i incomple e

hole consequence of the advertisement.

In your opinion, can the headline like "America's cardiologist," "Florence" and "I'm off to a professional" be seen as making a claim?

A. Yes. I believe so.

Q. Why is that?

A. Because, as I indicated earlier, once you have considered the people bringing the information. To the extent that people already have a belief, the experience, the knowledge, a headline may implicitly evoke the belief, opinion and it may have a significant commercial and therefore can effectively create or reinforce belief.

Q. Is there empirical evidence from POM files that contradicts Dr. Berger's assertion regarding redirecting the headline and image will not be seen as making a claim?

A. Yes, there is.

Q. What research is that?

A. There are some researches that have been done by the Bionutrition organization, which is a copying company, that --

JUDGE CHAPPELL: You need to hold the answer. Someone is bringing the objection.

MR. FIELDS: Well, I am going to allow him to finish his objection here because he has made a motion to exclude the Boyer ad. I will direct only the billboard. I do not include the full text of the ad, only the picture and the headline. And complain counsel has been explicitly told that they are not attacking the billboard.

If his line is going to be a reason from the Boyer ad, the text of which has been seen by Mr. Boyer, has some relevance, based upon all the reasons I gave in my motion, it is not relevant.

MR. OSTHEIMER: Dr. Berger testified on redirect that the humor headline and the actual representation will not be used as an indicating claim. The Boyer ad looks like a humor headline and the actual representation and the contrast to Dr. Berger's assertion that the headline and image themselves will not be used as an indicating claim.

So it is clearly relevant to rebutting Dr. Berger's claim about the communication of the headline and image.

JUDGE CHAPPELL: I am not going to rule on the pending motion on the basis of his objection, but if his motion is granted, his will affect the response that

are made during the trial.

MR. FIELDS: Thank you, Your Honor.

MR. OSTHEIMER: Thank you, Your Honor.

BY MR. OSTHEIMER:

Q. I believe you were in the middle of asking something about the Boies bid?

A. Yes. The Boies bid there in ended on the billboard which are essentially the more image and headline, and on the other hand a lot of the more image and headline can communicate, it goes directly to the question of can he do anything communicate and if he can, then he can raise the Dr. Berenson.

Q. The Boies bid is the POM ad from the advertising campaign; correct?

A. That's correct.

Q. And the Boies bid is in your binder as tab C. Is a document that has been marked as PX 0225.

Do page 5 and 6 of the report have the ad that were referred?

A. Yes. That's correct.

Q. If we could display page 6, which is PX 0225-0006.

On page 6, are the ads from the direct boyle campaign that were referred?

A. Yes, they are.

Q. Do these advertisements have the headline and image?

A. Yes, they do.

Q. Does one of these ads have the headline "Decompress" and depict a POM justice boyle in a blood pressure cuff?

A. Yes, it does.

Q. Does one of these ads have the headline "Hear Herap" and depict a POM justice boyle on a herapi couch?

A. Yes, it does.

Q. On page 5, which is PX 0225-005, are those the ads from the perhero campaign that were used?

A. Yes, they are.

Q. And one of those ads has the headline "I'm off to a great place"; correct?

A. Yes.

Q. And I believe you already explained that, but I'll ask you again.

Would any of the headline and image in the content of a billboard be displayed on the same headline and image would contain lengthier printed?

A. Yes, they would.

Q. What is it?

A. Well, the evidence that the image has been used and the headline has been used are also used in advertising, we would gain some insight into how the message was communicated by the image and the headline from a review of the advertising. I may be the case that another evidence has added to the advertisement modification, but it is certainly a good place to begin in reviewing the headline and the image communication.

Q. I'd like to display PX 0225-0003, which is page 3 of his report.

Does his page 3 describe the criteria for the study?

A. I describe the methodology. Yes.

Q. What are the criteria for the study?

A. I'm sorry?

Q. What are the criteria for the study?

A. The criteria for the study are male and female 20 to 50 year old with a minimum household income of 75,000. The men may be individual who engage in health-conscious lifestyle or who hold a position of improving their overall health. And at least a portion of the individuals included in the study had to be over 18 years of age.

Q. And for the rest of the record on about Boi, in the order anding has the only ad has people were exposed to the billboard ad?

A. Well, no. A part of the procedure at all in the old proceeding -- well, there were only billboard ad, but the procedure in the old proceeding on her ad a lot of clutter for other products. That's a part of the procedure. But there were all billboard.

Q. Okay. Were some respondents initially exposed to the "Decompre" billboard ad?

A. Yes, there were.

JUDGE CHAPPELL: Hold on a second. Your previous answer seems to be contradictory. You were asked were billboard the only ad people were exposed to. You said, "Well, no." And then he's asking you said a "But there were all billboard." Which is it?

THE WITNESS: I'm sorry. What I heard him say was a POM billboard, and I implied an effort to clarify that there were other billboard for other products. There were all billboard, but there were also some billboard for other products and a part of the procedure.

BY MR. OSTHEIMER:

Q. I'd like to display PX 0225-0012.

Does page 12 present the main idea communication

of the "Off to a new pro a e " billboard ad?

MR. FIELDS: Excuse me, Your Honor. So has I don't pop people's question, may I have a ruling objection to all of the questions about the billboard ad? I will be making a motion to strike later, but I don't like the record not to show that I failed to object.

JUDGE CHAPPELL: Okay. And I am going to overrule the objection.

MR. FIELDS: The objection of my objection is that I ask Your Honor to become a ruling objection to I don't jump and don't ever come on the stand to ask a question --

JUDGE CHAPPELL: I understand the concept of a ruling objection.

MR. FIELDS: Okay.

JUDGE CHAPPELL: I am going to hear that the precise objection is --

MR. FIELDS: The precise objection is relevance in that the ad -- his relevance entirely to billboard, billboard are not being attacked, and it does not include the text of the ad.

(Admonition from the court reporter.)

MR. FIELDS: My objection is relevance. This relevance to billboard, only the heading and the picture in each instance, not the accompanying text.

Consumer has old he are not attacking billboard .

The issue has identified one must look at the hole ad. The billboard do not have the effect. According to the percentage of the people draw a health message from the particular billboard is irrelevant .

Thank you .

MR. OSTHEIMER: May I proceed, Your Honor?

JUDGE CHAPPELL: Do you agree with the representation of --

MR. OSTHEIMER: No, I do not --

JUDGE CHAPPELL: -- has consumer has old respondents has consumer, complain consumer, is not attacking billboard ?

MR. OSTHEIMER: None of the ads that are being challenged in this proceeding are billboard ads . But -- and that is the subject of a pending motion to strike which will be responding to on Monday . And -- on general ground .

Today, the issue is that the effect of the billboard message directly rebuts the opinion of Dr. Berger . He said that the headline and its actual representation themselves, just the headline and its actual representation, would not be considered an indicating claim .

JUDGE CHAPPELL: B o nder and -- and

o ge acro .

Q. And he re l pre en ed on hi page for he "Off o a e pro a e " ad, are ho e he re l of j one open-ended q e ion abo he main idea?

A. Ye , ha correc .

Q. I ch a q e ion reliable?

A. Ye , i i .

Q. Wha ere he re l for he "Off o a e pro a e " billboard ad main idea?

A. Well, ome 86 persen of he re ponden ake a a ome pe of heal h or heal h benefi claim, b he ne mo freq en men ion of a benefi i "good for pro a e ," hich 43 persen of he re ponden offered in re pon e o an open-ended q e ion.

Q. And if e co ld look a page 13 of he repor , PX 0225-0013.

Doe page 13 pre en he main idea comm nica ion of he "Decompre " billboard ad?

A. Ye , i doe .

Q. Wha ere he re l of he -- for he "Decompre " ad main idea?

A. Again, a er high le el of general comm nica ion of heal h or heal h benefi , 86 persen , b ha e ee i ha 14 persen indica e ha i help or lo er blood pre re, and ano her 8 persen

alk abo i -- or gi e a re pon e ha i good for
o r hear .

Q. Wha do he re l from ho e q e ion ell
abo he her he h moro headline and image can be
een a making claim ?

A. Well, clearl in re pon e o j he h moro
headline and he image, here i a comm nica ion of
benefi ha range from er general o q i e
pecific.

JUDGE CHAPPELL: I an o clarif he record.

Mr. Field , o r req e for a r nning
objec ion i gran ed. I migh ha e mi a ed and aid
he objec ion a gran ed. Tha o ld ha e been
prema re.

MR. FIELDS: No. I nder and.

BY MR. OSTHEIMER:

Q. And ere here imilar re l among he POM
er in he d ?

A. Ye , here ere.

Q. A ome poin in he d r e , re ponden
ere e po ed o all fi e ad from a campaign; i ha
correc ?

A. Tha correc .

Q. Were he hen a ked --

MR. FIELDS: E c e me, Yo r Honor. I a lo

o ge p. I kno I ha e a r nning objec ion, b here
i a differen objec ion.

Again, he ord "ad " i ho "billboard," and
again, here ere no ad ha ere he bjec of hi
r e o her han billboard , and co n el keep ing
"ad " epara el . Unle e can ip la e ha hen he
a "ad " he onl alking abo billboard , hich i
oka i h me, e ho ld no ha e a q e ion ha alk
abo ad beca e i i ambig o .

MR. OSTHEIMER: Pre io l I a emp ed o a
lea clarif i h he i ne ha hen I referred o
ad I mean billboard ad , b I d be happ o
ip la e, in an f r her di c ion of he d , ha
I m alking abo billboard ad being e ed.

JUDGE CHAPPELL: All righ . Thank o . And
hen le kno hen o re no longer alking abo he
d and he ad rela ed o he d .

MR. OSTHEIMER: I ill.

BY MR. OSTHEIMER:

Q. Were r e re ponden in hi d hen a ked
an open-ended comm nica ion q e ion abo POM
benefi ?

A. Ye , he ere.

Q. I d like o di pla PX 0225-0014.

If o look a page 14 of he repor , ha a

has a question has asked?

A. This is a closed-ended question.

Q. I'm sorry?

A. I said he is a closed-ended question I believe. No, I think I'm right. I am an open-ended question. Based on the ad -- in fact, "Based on the ad on job, what are the specific benefits, if any, of drinking POM Wonderful?"

Q. And again, is this an open or closed-ended question?

A. I believe he is an open-ended question.

Q. Is this question leading?

A. I'm sorry?

Q. Is this question leading?

A. No, it's not leading.

Q. Where were they from for this question?

A. Well, in the case of the superhero billboard, again, we see a very high level of communication of general health benefits, but we see 55 of the respondents -- 55 percent of the respondents mentioned the product is good for prostate, a very specific benefit claim.

For the dressed bottle billboard, again, a very high level of communication of general healthcare or health benefit claim, but 38 percent indicate that it

good for our health, and 21 percent indicate that it helps lower blood pressure.

Q. What do they rely on from the question itself about the health-related headline and image themselves can be seen as making a claim?

A. Well, clearly the respondents are drawing some inference or belief from just the appearance of the image and the headline, and they're drawing some very specific inference about benefits, as well as some very general health-related benefits.

Q. And are there any similar results among the POM users in the study?

responding to another individual, to give a response or to give a response has a more socially desirable or likely to create a sense of tension in the interview. It is an effort to be agreeable, if possible.

Q. How would you account for eating in analyzing a diet that is already conducted?

A. Well, one might account for eating in order to look for a question or a response has a clear relevance to the content of a particular advertisement.

Q. How would you apply such an approach here?

A. Well, in this case we could look at the directed body campaign, which makes no reference to prostate health, and we will see that some 9 percent of individuals said something about prostate health.

No, however, all be eating, or it may be some eating and it may be individual knowledge about the characteristics of an individual, he has a prior belief, so he may not implicitly reflect eating. But we could be ever consider a tie and all 9 percent of the respondents were engaged in eating, to be considered a tie, in which case we could take 9 percent away from, let's say, the 67 percent who said "good for cardiovascular health" in response to

hi campaign.

So 67 million would be 58 percent, which has a correction for eating, certainly a considerable correction for eating, would still have 59 percent of individuals making a message "good for cardiac health."

Q. What do we learn from the question above whether the headline and image can be seen as making a claim?

A. Again, as I said, this is -- this is a headline and image alone, independent of any other evidence, can affect communication benefits that range from general to specific.

Q. I'd like to know if the document has been marked as CX 0103, which is in our report.

This is the -- a "Decompression" print ad.

I'd like to know -- I'd just like to take a quick look at the ad.

As his deposition, which is a document has been marked as PX 0350, appearing on page 153, which is -- which would be 000153, line 23, continuing on 154 line 3, Dr. Berber said that he -- a Dr. Berber -- said that he had a nothing about lowering blood pressure and could not communicate

A. No hing ha I ee.

MR. OSTHEIMER: Thank o .

JUDGE CHAPPELL: Are o fini hed?

MR. OSTHEIMER: No f r her q e ion ,

Yo r Honor.

JUDGE CHAPPELL: Thank o .

Ho m ch ime do o hink o ll need,

Mr. Field ?

MR. FIELDS: An ho r or le .

JUDGE CHAPPELL: All righ . Le ake a l nch

break.

We ll recon ene a 2:00 p.m.

(Where pon, a 12:58 p.m., a l nch rece a
aken.)

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

(2:04 p.m.)

JUDGE CHAPPELL: Back on the record.

Cross-examination?

MR. FIELDS: Thank you, Your Honor.

- - - - -

CROSS-EXAMINATION

BY MR. FIELDS:

Q. Good afternoon, Professor.

A. Good afternoon.

Q. On direct examination, you said that you had
elected to be a dean at UC Riverside.At all times were asked to resign; in that
correct, sir?A. No, I was not asked. I was in a mutual agreement
with the chancellor and I.

Q. The chancellor did not ask you to resign?

A. We agreed mutually that I would resign.

Q. Did he ask you to resign, sir?

A. No, he did not.

JUDGE CHAPPELL: Irony?

Go ahead.

BY MR. FIELDS:

Q. All right. Did you see the report that came out
in which the chancellor asked you to resign (indicating)?

A. I did.

Q. And doesn't it appear as though you were asked to report on that?

A. I think that's the ordering that was made. Yes.

Q. Let me ask you, in the Honorable Court.

(Pause in the proceeding.)

Could the reporter read the last question and answer back.

(The record is read as follows:)

"QUESTION: And doesn't it appear as though you were asked to report on that?"

"ANSWER: I think that's the ordering that was made. Yes."

BY MR. FIELDS:

Q. Are you saying that ordering a false, that in fact the chancellor didn't ask you to report on that?

A. The chancellor and I had an agreement in which we expected some budgeting, and I -- I referred to some budgeting, and he essentially indicated that I would probably be needed to report on a dean in that case.

Q. Yes.

So just a moment ago when you said that in a way, you were asked to report on that, that's a correct statement, and you were in fact asked to report on that; in

Q. Oka . Thank o .

No , i i correc , ir, ha o are no gi ing
an opinion on ho con mer nder and or in erpre
he me age of he POM ad ?

A. I m no gi ing o a pecific opinion, no, onl
a i rela e o Profe or B er e imon .

Q. Yeah. Oka .

And o ere no e en a ked o addre he
impre ion con mer ake a a from he ad ; i n ha
correc ?

A. Tha i correc .

Q. And in fac , o don kno of an e idence on
ho con mer percei e he ad ; i n ha correc ?

A. I A. I 82ad dencdi efkjT1jTmOambe o Q i n I per Yephi ie o

ho con mer percei correc ?

I no e rin ncdi efkjTc opin o ,1jTmOambe o Q i n I pal e abo e

perceived the advertisement as the level of a negative impression?

A. I do recall that, yes.

Q. Okay. And you said you do not know of any other evidence; is that correct?

A. That is correct.

Q. Okay. Thank you.

No, you criticized Professor Berger for not focusing on that so-called the general of the advertisement, the G-E-S-T-A-L-T; is that correct?

A. That is correct.

Q. Okay. And if you were going to interpret the advertisement or itself, you would look at the advertisement to make that so-called a holistic judgment; is that correct?

A. That is correct.

Q. All right. And in your other words, you contend that Professor Berger didn't look at that so-called the, quote, pragmatic implication from an advertisement; is that right?

A. That -- among other things, that is correct.

Q. Okay. And the pragmatic implication that so-called he didn't look for can be something that is neither explicitly stated nor necessarily implied from the advertisement; is that correct?

A. That is correct.

Q. Okay. I am meaning that it neither stated nor implied, is something beyond that; right?

A. That's generally the definition. Yes.

Q. And it may not be followed logically from that advertisement all that is implied; is that right?

A. It may or may not be followed logically, that's correct.

Q. Thank you.

And it is correct or didn't ask of Professor Berger about his case?

A. I'm sorry?

Q. You did not ask of Professor Berger about his case?

A. No, I did not.

Q. So you don't actually know what is in Professor Berger's mind when he gave his opinion about that people would take it from that advertisement?

A. I do not.

Q. Okay. It is correct, is it, that it takes three good people to an advertisement for the message of the advertisement to be effective on the consumer?

A. There is a general rule of thumb that says that three people is an optimal number of people.

Q. Is that three good people, is it?

A. It's three good people, that is correct.

Q. And in fact, have we required more than three actual people; is that right?

A. That's correct.

Q. Thank you.

All right. Now, we talked a little bit about humor.

In your research, have you seen an increase in the comprehension of an ad?

A. Humor can have the effect of increasing the comprehension of an ad, yes.

Q. That means people understand and are more readily; is that correct? That's what "comprehension" means?

A. That's correct.

Q. Okay. And comprehension is not the same as belief; is that right?

A. That's correct.

Q. In other words, humor makes people understand and the ad does not necessarily believe in; right?

A. That can be one effect. That's correct.

Q. Okay. It's also correct that humor induces processing of the ad message?

A. I'm certain. Yes.

Q. Okay. And in inducing a search for further supporting information; is that right?

A. I certainly can.

Q. Okay. No, turning for a moment to puffery and hyperbole, didn't you see if the reader did not puffery and hyperbole because on the face of an exaggeration, something has no literal reference?

A. That is correct.

Q. Okay. As a general matter, do you believe that puffery and hyperbole might lead consumers, do you?

A. Well, that would depend on the context. I certainly have the ability to do so.

Q. And in that context does it lead?

A. Well, if hyperbole or -- or humor or exaggeration or puffery really in my leading belief, then the consumer would be misled.

Q. Okay. No, to give "lie forever" in an advertisement a good example of puffery and hyperbole that would not be taken literally; is that correct?

A. I would agree with that.

Q. Well, do you think -- like that.

Can I see the ability to lead?

flow their articles, do you?

A. No, I do not.

Q. Okay. In the article named in the body of our report on humor, do you rely on an article by

Hasan Shabbir -- H-A-S-E-E-B, S-H-A-B-B-I-R -- and Debra Thibault, T-H-W-A-I-T-E-S; is that right?

A. I believe that is correct.

Q. And that was published in England, is that correct?

A. That is correct.

Q. And is it correct that neither of those gentlemen had attained professional rank, were they lecturers in English in addition?

A. The main theme here is the title of lecturer. Their titles are really quite different than ours in terms of their titles.

Q. Is it correct that you did not agree with that he said about humor?

A. I would have to see that you're talking about in terms of that he said about humor.

Q. Well, didn't you say that you didn't agree with that he said about humor?

A. You'll have to tell me specifically or how me specifically that you're referring to.

Q. All right. Which thing did you agree with that

he said about him?

A. Again, we all have to look at what we are referring to.

Q. Well, I'm not referring to anything now. I'm just asking you if there is anything in their article about him that you agreed with.

A. I think there is, yes.

Q. All right. For example, when he said that -- when he gave the hypothetical of women in a bar, and one man runs over to her -- and this is a commercial -- one man runs over to her and says, "Boy, I wish I had the abdomen of a male, when I could have brand X beer," and Shabbir and Thaine said that was an outright lie, did you agree with that?

A. I probably would not agree with that.

Q. Would an intelligent, reasonable person believe -- agree with that?

A. Probably not.

Q. Okay. In fact, you said that Thaine and Shabbir were exaggerating to get their paper published; is that correct?

A. I said they were making an exaggerated position. Yes.

Q. Did you say they were exaggerating to get their paper published, sir?

in ended either; right?

A. That's correct.

Q. Okay. You don't know whether he really in ended; right?

A. I do not.

Q. Okay. And when you rely on the creative brief, is it correct that you have no idea who prepared the creative brief?

A. I do not.

Q. Would your opinion relying on the creative brief that he was typically prepared by some junior person in the marketing department?

A. That would not change my belief.

Q. Okay. And would you change your belief if typically there were not even in the people who on the company or the officer of the company even in the head of the advertising agency who are responsible for them? Would that affect your answer?

A. No, that's fact alone.

Q. Okay. Would it affect your answer if there were that the creative brief was typically -- that the idea in the creative brief was typically modified, rejected or ignored in meeting after the creative brief was written?

A. That certainly happens.

Q. And that would certainly affect our reliance on the creative brief here; right?

A. If I had access to that information, yes.

Q. Thank you.

No, in fact, I don't know if an creative brief actually relied in an advertisement that actually presented to the public; in that respect, is that correct?

A. That is correct.

Q. So there is no effecting that the creative brief actually had an effect on POM advertisement; right?

A. I'm not sure.

Q. Okay. No, in that respect, did that help a person understand that advertisement?

A. I'm not sure. Yes.

Q. Would you agree that an educated person has a better chance of correctly interpreting an advertisement than an uneducated person?

A. That's more likely true in most circumstances.

Q. And that's likely to be misled by that advertisement; is that right?

A. No necessarily.

Q. So you think an educated person would be less likely to be misled?

A. It would depend on the topic of the ad, depend on the message of the ad.

Q. So could you agree with me that, in general, a person who is educated has a better chance of correctly understanding an advertisement than a person who is not educated?

A. Well, understanding is different from being misled.

Q. I see.

So the older reader and the ad, but more recently has a more educated person would still be misled; right?

A. That -- that could certainly happen.

Q. Okay. Do not the literate readers in our field generally have better educated people are more skeptical than the public at large?

A. That is -- that is the case in general. Yes.

Q. Okay. And in describing POM target audience, sir, didn't you say that POM ads are very much focused on people who are affluent, professional, college-educated and health-conscious?

A. That is certainly what I took from the creative brief that I was provided.

Q. No, when the FTC conducted its study or its expert opinion in this case, did you agree to do it?

A. I agreed to look at Professor Berger's report.

Q. I see.

So before I agreed to take on the responsibility, I looked at his report.

A. I indicated that I needed to know that I was going to be opening on.

Q. Did you in fact look at his report before you agreed to take on the assignment?

A. I agreed to look at his report. I didn't agree to take on the assignment.

Q. No. I have a different question. Perhaps I'm hoarse and you maybe didn't hear me.

Did you actually read his report before you agreed to take on the assignment?

A. Well, I'm not sure that I mean by "take on the assignment." I agreed before I got the report that I would look at it. If you mean by I -- did I -- did I agree to develop a report before I saw the report of Professor Berger, that's different.

briefly -- about the Beer test.

MR. OSTHEIMER: For clarification, do you mean the Boi test?

MR. FIELDS: Pardon me. About the test. I mean Boi test.

When you get old, you get forgetful.

JUDGE CHAPPELL: Do you want to make a motion and make the test go have a proper?

MR. FIELDS: I agree. Thank you.

BY MR. FIELDS:

Q. Okay. Now, when you're doing a test, in the beer test do you have a control for the question asked?

A. That depends on the purpose of the test.

Q. Okay. And if it is a casual test and you have the case of something, you certainly want a control, don't you?

A. We would generally like to have a control in the case of a test or an experiment designed to have a result.

Q. And you deduct the control group response from the test group response in order to eliminate the noise or bias; is that correct?

A. That is correct.

Q. Now, in the case of the Boi test, had he really didn't have a control -- had the effect of old

be of an particular ad; in ha righ ?

A. Tha correc .

Q. So e en ho gh he e people regi ered
par ic lar percen age , here a no hing in ha d
o ho ha ha a ca ed b he Bo i ad; i n
ha righ ?

A. No hing ha a ca al, ha i correc ,
onl -- onl he pro imi of he ie ing of he ad o
he ime in hich he q e ion ere a ked.

Q. Ye .

B de pi e he pro imi , ha r e o ld no
ho o ha in fac i a ho e billboard ha
ca ed ho e percen age of percep ion; i n ha
righ ?

A. Tha o ld be correc .

MR. FIELDS: Tha all I ha e, Yo r Honor.

MR. OSTHEIMER: Co ld I ha e o min e ,
Yo r Honor?

JUDGE CHAPPELL: To con l or redirec ?

MR. OSTHEIMER: To con l i h m colleag e
for j --

JUDGE CHAPPELL: Go ahead.

(Pa e in he proceeding .)

- - - - -

o ercome ch kep ici m?

A. Q i e concei abl . In fac , one of he rea on
for belief a emen or belief propo i ion in ppor
of benefi i in fac o o ercome kep ici m.

Q. And hen o ere alking abo he Bo i
d , o aid ha i didn ho he effec of an
par ic lar ad.

I ha beca e o belie e ha open-ended
q e ion don ho ca a ion?

MR. FIELDS: Objec ion. Leading.

THE WITNESS: No, ha no h .

JUDGE CHAPPELL: Hold on.

Yo need o rephra e.

BY MR. OSTHEIMER:

Q. When o aid ha he Bo i d didn ho
he effec of an par ic lar ad, ere o con idering
he open-ended q e ion a ked abo he indi id al ad
a he beginning like "Decompre " and "Off o a e
pro a e "?

A. Tha no ha I a referring o.

Wha I a referring o a he general
andard for pro ing ca a ion, hich o ld in ol e
ha ing a con rol, and here a no a -- here a no a
con rol condi ion in ol ed. A I aid, he pro imi
be een pre en a ion and he q e ion o ld be

con i en i h ca ali , b in he ab ence of a
con rol, o co ldn dra a firm inference.

Q. Are o comfor able dra ing concl ion abo ad
comm nica ion from open-ended q e ion i ho
con rol ?

A. I am.

MR. OSTHEIMER: No f r her q e ion ,
Yo r Honor.

MR. FIELDS: No q e ion , Yo r Honor.

JUDGE CHAPPELL: Thank o , ir. Yo re
e c ed.

THE WITNESS: Thank o .

JUDGE CHAPPELL: We re going o ake a hor
break, and hen I m going o come back and deal i h he
pending mo ion.

We ll recon ene a 2:45.

(Rece)

JUDGE CHAPPELL: Back on he record.

MR. FIELDS: Thank o .

I ha e o poil he pen e, b in order o
a oid an po ibili of dela -- and e don kno ho
Yo r Honor i going o r le -- e o ld agree o
co n el recommenda ion or gge ion ha e j
rike Dr. Heber an er ha here a a con en .
We don feel i impor an , e don need i , and

ere illing o, a conel gge ed, rike i , and
 ha elimina e he need o impeach him on ha
 a emen .

MS. DAVIS: Tha agreeable o , Yo r Honor.

JUDGE CHAPPELL: Then o re going o le he
 co r repor er kno ?

MR. FIELDS: Ye . The q e ion and an er --
 ell, and he an er in hich he aid --

JUDGE CHAPPELL: Well, here here e are.
 I e go a pending mo ion.

MR. FIELDS: Righ .

JUDGE CHAPPELL: And nle i i hdra n, I m
 going o make a r ling, o h don o alk abo
 hi , I ll gi e o a min e, I ll i here, and decide
 if o re going o i hdra o r mo ion or no .

MR. FIELDS: I hink e j did.

MS. DAVIS: I hink e ha e o agree pon he
 line .

MR. FIELDS: Oh, oka .

(Pa e in he proceeding .)

MR. FIELDS: Yo r Honor, nfor na el , conel
 no an o go a be ond he q e ion and an er ha
 he repor er -- a i e hi morning, and I can
 agree o ha . She an o rike m ch more han ha
 an er, hich ho o , I hink, ha hi i abo .

JUDGE CHAPPELL: I thought that he began by
addressing his argument.

MR. FIELDS: Well, like my last argument.

JUDGE CHAPPELL: I think that the evidence
is old quality.

All right. So the motion is still alive?

MS. DAVIS: Yeah. I don't think we can come to
an agreement. There's another section that he believes
related to his cited in the brief, but he
disagrees.

JUDGE CHAPPELL: Okay. Anything further?

MR. FIELDS: I'm finished. I'm done.

JUDGE CHAPPELL: You may have a seat.

MR. FIELDS: Thank you.

JUDGE CHAPPELL: Like a false start here at the
starting line in the hundred-meter dash.

All right.

On October 7, complainant filed a motion
for leave to call a rebuttal fact issue,
Dr. Philip W. Kanoff.

Respondent filed an opposition on October 11.

The parties presented oral arguments in support
of their position this morning.

Pursuant to commission rule 3.43(d), in the
discretion of the administrative judge, a party

en i led o bmi reb al e idence a ma be req ired
for a f ll and r e di clo re of he fac .

Ho e er, he cope of reb al ill be limi ed
o repel or di pro e he e idence of he ad er e par .

Upon con idera ion of he arg men in he
brief and pre en ed a he hearing, here i m r ling:

A ming he repre en a ion made b complain
co n el in he mo ion o be correc and acc ra e and in
order o addre he concern rai ed b re ponden ,
complain co n el ill be allo ed o call Dr. Kan off a
a reb al fac i ne b onl for he limi ed p rpo e
ha follo :

To reb Dr. Da id Heber e imon gge ing
ha a mee ing among POM and i cien ific ad i er ,
hich Dr. Kan off and Dr. Heber a ended, here a
cien ific agreemen among he ad i er a o he
concl ion ha can be dra n from re ponden pro a e
cancer re earch.

Thi reb al ma onl incl de a emen ha
ere made b Dr. Kan off a he mee ing and he her
here a agreemen or no among re earcher he ob er ed
d ring he e mee ing .

In addi ion, fo nda ional e imon i allo ed
o demon ra e ha Dr. Kan off a pre en and ha
per onal kno ledge of he fac al percep ion for hich

he is being called on if .

Complainant has represented that Dr. Kanoff will be called on to rebut fact and not to offer expert opinion . Accordingly , complainant will not be allowed to elicit an opinion from Dr. Kanoff. To the extent an amendment made by Dr. Kanoff at the meeting contains his opinion , rather than his factual observation , his opinion will not constitute evidence of expert opinion in this case.

Specifically , complainant will not be allowed to elicit an opinion from Dr. Kanoff as to whether Dr. Kanoff agreed or disagreed with the conclusion that the prostate cancer disease is curable or has a curable scientific agreement in the scientific community at large -- as opposed to at the meeting at issue -- regarding conclusion of respondent that the role of pomegranate in prostate health.

To address a point raised by respondent , although the information at issue regarding Dr. Hebermano has been raised in the direct examination, Dr. Hebermano has not been asked by respondent . Thus , an opinion he gave as a direct result of him being called as a witness by respondent .

Respondent will be permitted to conduct a deposition of Dr. Kanoff prior to complainant calling Dr. Kanoff a trial.

Based upon the availability of Dr. Kanoff, as stated in the motion, we will reconvene at 11:00 a.m. on Friday, November 4, 2011, for the appearance of his witness.

To the extent the parties mediated and deal of his ruling, we may refer to the draft transcript, which will be filed soon.

Anything further?

MS. DAVIS: No, Your Honor.

No, Your Honor.

MR. FIELDS: Nothing further, Your Honor.

JUDGE CHAPPELL: Okay. Hearing nothing further, until November 4 at 11:00 a.m. we are in recess.

(Whereupon, the foregoing hearing is adjourned at 2:56 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: October 14, 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 case before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: OCTOBER 20, 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