

APPENDIX A POM Claims Appendix¹

Below we examine each of the advertisements and other promotional materials challenged by Complaint Counsel and explain our analysis of the net impression conveyed. We begin with a discussion of recurring elements² found in a number of these exhibits and then turn to our review of each challenged ad.

A. Recurring Elements

Medical Imagery, Symbols, and Terminology. Many of the challenged ads include images and symbols strongly associated with medicine, physicians, and equipment, among them the caduceus symbol of the medical profession or the “x” in POMx resembling the R_x abbreviation. These images and symbols contribute to a net impression that certain ads conveyed the disease-related claims challenged by Complaint Counsel. As discussed below, even the use of medical imagery in a humorous manner can buttress this message, such as a POM bottle turned upside down appearing as an intravenous drip bag (Figure 5), a POM bottle connected to electrocardiogram leads (Figure 6), and a POM bottle inside a blood pressure cuff (Figure 11). Medical terminology also contributes to a net impression that the ads conveyed the challenged claims. In several challenged exhibits, the use of the word “disease” as well as references to specific diseases and disease symptoms (*e.g.*, “cancer,” “prostate cancer,” “erectile dysfunction,” “coronary heart disease,” “atherosclerosis,” “high blood pressure,” “hardening of the arteries,” and “stroke”) conveyed that the Challenged POM Products treat, prevent or reduce the risk of disease.

References to Medical Professionals, Scientific Studies, and Medical Journals. References to physicians by name or to FDA approval or review also contribute to the net impression that the ads conveyed the challenged claims. Moreover, references to medical studies, particular medical journals, or other types of scientific evaluation helped convey the asserted efficacy and establishment claims, as did the use of statements quantifying the amount of money spent on research (*e.g.*, “backed by \$25 million in vigilant medical research”). Further, the characterization of the research specifically as “medical” (as opposed to simply “research” or even “nutritional research”) contributes to the net impression that the ads conveyed the challenged claims.

Performance Results Requiring Scientific Measurement. Several ads contain references to quantifiable results (*e.g.*, “eight ounces of POM a day can reduce plaque in the arteries by up to 30%!”). Such references tend to communicate that the product’s attributes are supported by scientific research because a reduction in the amount of plaque in an individual’s arteries cannot be known through casual observation, *i.e.*, it must be measured by a medical

¹ For most of the challenged advertisements, Commissioner Ohlhausen agrees with the majority of the Commission about the claims conveyed. However, as explained in her Concurring Statement, for some advertisements, Commissioner Ohlhausen either did not find certain claims were made or believes extrinsic evidence is necessary to determine whether consumers would take away such claims.

² The Commission reviewed each ad separately, however, and no individual element should be necessarily construed as sufficient to convey a claim. Instead, each element may contribute to an ad’s net impression in combination with other elements as described for each ad in this Claims Appendix.

professional.

Use of Humor. Contrary to Respondents' assertion, the use of lighthearted or humorous elements does not detract from the substance of the claims conveyed by the challenged ads. For instance, Figure 6 shows a bottle of POM Wonderful connected to leads for an EKG, along with the title, "Amaze your cardiologist." The ad text further reads, "Ace your EKG A glass a day can reduce plaque by up to 30%! Trust us, your cardiologist will be amazed." While the depiction of the bottle of pomegranate juice undergoing a medical test is meant to be humorous, the humorous element includes medical imagery that reinforces the claims conveyed by the text. Thus, the ad conveyed the net impression that drinking POM will reduce plaque by up to 30% and produce improvements measurable by an EKG that will be great enough in magnitude to impress a cardiologist. Likewise, Figure 7 depicts a bottle of POM in a noose, along with the headline "Cheat death" and additional text that says "Dying is so dead . . . POM Wonderful . . . has more antioxidants than any other drink and can help prevent premature aging, heart disease, stroke, Alzheimer's, even cancer" Again, while the depiction of the bottle in a noose is meant to be humorous, it does not undercut the net impression that drinking POM extends your life to the extent that the drinker will "Cheat death."

Qualifying Language. Many of the ads also include adjectives attached to scientific claims (e.g., "emerging science suggests," "promising results," "preliminary studies," "initial scientific research") (emphasis added). However, the Commission does not find that these adjectives effectively qualify the claims conveyed in the challenged ads, when viewed in the context of each ad in its entirety.³ For example, Figure 20 states in part: "POM Wonderful 100% pomegranate Juice is supported by \$23 million of initial scientific research from leading universities, which has uncovered encouraging results" While the ad literally states that the research is "initial" and has produced "encouraging results," the references to the fact that the research has taken place at "leading universities" and that it cost \$23 million overwhelm these qualifiers. Moreover, in ads specifically discussing the results of scientific studies, simply stating that the studies are "initial" or "hopeful" or "promising" does not neutralize the claims made when the specific results are otherwise described in unequivocally positive terms. For instance, Figures 25 and 28-32 state that "an initial UCLA study on our juice found hopeful results for prostate health, reporting 'statistically significant prolongation of PSA doubling times,' according to Dr. Allen J. Pantuck in *Clinical Cancer Research*, 2006." In these examples, the words "initial" and "hopeful" do not undercut the message that the results of the study were statistically significant and positive for PSA doubling times. The application of these principles regarding qualifiers is consistent with the Commission's experience in other advertising contexts. See, e.g., Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.2 (ads with consumer endorsements will likely be interpreted as conveying that the endorser's experience is representative of what consumers will generally achieve, even when they include disclaimers such as "Results not typical" and "These testimonials are based on the experiences of a few people and you are not likely to have similar

³ Commissioner Ohlhausen's view is that, in the context of certain challenged ads, the use of these qualifiers warrant the introduction of extrinsic evidence before the Commission can find that an advertisement conveys establishment claims. See Commissioner Ohlhausen's Concurring Statement.

results”);⁴ and FTC Staff Report, *Effects of Bristol Windows Advertisement with an “Up To” Savings Claim on Consumer Take-Away and Beliefs*, (May 2012) available at <http://www.ftc.gov/opa/2012/06/uptoclaims.shtm> (when marketers use the phrase “up to” in their ads, such as making a claim that consumers will save “up to 47%” in energy costs by purchasing replacement windows, the qualifier does not affect consumers’ overall takeaway that the percentage savings depicted is typical of what they can expect to achieve).

B. Facial Analysis of Individual Exhibits

Figure 1. CX0013: 2003 press release

The Commission adopts the findings and conclusions of the ALJ with regard to CX0013. *See ID* at ¶¶ 416-420. Accordingly, we conclude that this press release conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily treats, prevents or reduces the risk of heart disease and that these claims have been scientifically established.

Figure 2. CX0016: “Drink and be healthy” print advertisement

The Commission adopts the findings and conclusions of the ALJ with regard to CX0016. *See ID* at ¶¶ 290-296. Accordingly, we conclude that CX0016 conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily prevents or reduces the risk of heart disease and that these claims have been scientifically established.

Figure 3. CX0029: “10 out of 10 People” print advertisement

The Commission adopts the findings and conclusions of the ALJ with regard to CX0029. *See ID* at ¶¶ 297-299, 301-305. Accordingly, we conclude that CX0029 conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily treats, prevents or reduces the risk of heart disease and that these claims have been scientifically established.

Figure 4. CX0031: “Floss Your Arteries” print advertisement

The Commission adopts the conclusions of the ALJ that CX0031 conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily treats, prevents or reduces the risk of heart disease. *See ID* at ¶¶ 440-445. The statement that just drinking eight ounces a day “can reduce plaque by up to 30%” contributes to the treatment, prevention, and risk reduction messages, because an elevated level of plaque in the arteries is associated with the heart disease.

Additionally, the Commission reverses the ALJ’s conclusion that the ad did not convey that the efficacy claims are clinically proven. *See ID* at ¶ 448. The Commission concludes that the precise language that “[j]ust eight ounces a day can reduce plaque by up to 30%,” within the context of the advertisement’s headline and imagery of the POM bottle on a medicine cabinet shelf, conveyed to at least a significant minority of reasonable consumers that the efficacy claims made in this advertisement have been scientifically established. A reduction in the amount of plaque in an individual’s arteries cannot be known through casual observation; it must be

⁴ In Commissioner Ohlhausen’s view, the use of qualified terms such as “preliminary studies,” or “initial studies” in the main text of an ad is significantly different than including a disclosure like “results not typical” in small print at the bottom of an ad.

measured by a medical professional. Thus, the use of language communicating this specific quantified result conveyed that the results were gauged through scientific measurement and that the claim is therefore scientifically established.

Figure 5. CX0033: “Life Support” print advertisement

The Commission adopts the findings and conclusions of the ALJ with regard to CX0033. *See ID at ¶¶ 449-455.* Accordingly, we conclude that this ad conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily prevents or reduces the risk of heart disease.

Figure 6. CX0034: “Amaze Your Cardiologist” print advertisement

The Commission adopts the findings and conclusions of the ALJ that CX0034 conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily, treats, prevents or reduces the risk of heart disease. *See ID at ¶¶ 456-464.*

The statement that the antioxidants in POM fight free radicals that “can cause sticky, artery clogging plaque” helped convey that POM prevents or reduces the risk of heart disease. The statement that a glass a day “can reduce plaque by up to 30%” bolsters this prevention and risk reduction message and also contributes to a claim that POM treats existing heart disease, as an elevated level of plaque in the arteries is associated with heart disease. Further, the ad makes two references to being able to “amaze[]” a cardiologist, a physician specializing in heart disorders such as coronary disease. Most consumers would not have any reason to visit a cardiologist except for diagnosis or treatment of heart disease. Thus, the statement “amaze your cardiologist” along with the remaining text implies that drinking POM will produce significant results for a consumer with reason to visit a cardiologist, *i.e.*, with heart disease.

The Commission reverses the ALJ’s finding that this advertisement did not include an establishment claim. *See ID at ¶¶ 465-468.* The Commission concludes that the precise language that a “glass a day can reduce plaque by up to 30%,” within the context of the advertisement’s headline, medical imagery, and text conveyed to at least a significant minority of reasonable consumers that the efficacy claims made in this advertisement have been scientifically established. A reduction in the amount of plaque in an individual’s arteries cannot be known through casual observation; it must be measured by a medical professional. Thus, the use of language communicating this specific quantified result conveyed that the results were gauged through scientific measurement, and that the claim is therefore scientifically established.

Figure 7. CX0036: “Cheat Death” print advertisement

The Commission adopts the findings and conclusions of the ALJ that CX0036 conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily reduces the risk of heart disease. *See ID at ¶¶ 469-476.* We also find that the advertisement conveyed to a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily prevents heart disease. The Commission reverses the ALJ to the extent that he did not make this finding. *ID at ¶ 474.* We make this finding based on the net impression of the advertisement, including the statements that drinking eight ounces of POM Juice a day “can help prevent ... heart disease,” and “[t]he sooner you drink it, the longer you

will enjoy it,” as well as imagery of the POM Juice bottle with a noose around the neck of the bottle.

Figure 8. CX0044: September 2005 press release

The Commission adopts the findings and conclusions of the ALJ with regard to CX0044. Accordingly, we conclude that this exhibit conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily, treats, prevents or reduces the risk of heart disease, and that these claims have been scientifically established. *See* ID at ¶¶ 421-427.

Figure 9. CX0065: July 2006 press release

The Commission adopts the findings and conclusions of the ALJ that CX0065 conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats prostate cancer, and that this claim has been scientifically established. *See* ID at ¶¶ 428-431. We also conclude that the press release conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily prevents or reduces the risk of heart disease, and that these claims are scientifically established. In this regard, the decision of the ALJ is reversed. *See* ID at ¶¶ 585-586. Several factors contribute to this overriding message regarding the impact of POMx Pills and POM Juice on heart disease and prostate cancer. First, the press release references scientific research specifically indicating that POMx and POM Juice “may protect against cardiovascular ... disease[.]” Likewise, the press release refers specifically to published research from the American Association for Cancer Research, which claimed that daily consumption of pomegranate juice significantly prolonged PSA doubling time, which is a protein marker for prostate cancer. In addition, the press release quoted comments by a “Professor of Medicine” and “Director, UCLA Center for Human Nutrition” about “the effects” of POMx and POM Juice on prostate cancer.

Figure 10. CX1426 Ex. I: Antioxidant Superpill Brochure

The Commission adopts the findings and conclusions of the ALJ with regard to CX1426 Ex. I. Accordingly, we conclude that this exhibit conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats, prevents or reduces the risk of heart disease and prostate cancer, and that these claims have been scientifically established. *See* ID at ¶¶ 328-342.

The efficacy and establishment claims for treatment of prostate cancer and heart disease are conveyed through language describing scientific studies purportedly showing that drinking POM slows PSA doubling time by 350% and causes a significant decrease in cancer regrowth rate for men with advanced prostate cancer, and that drinking POM caused a 30% decrease in arterial plaque for patients with atherosclerosis and a 17% improvement in blood flow for patients with impaired blood flow to the heart.

The ad also conveyed prevention and risk reduction claims for these two diseases. The ad underscores the importance of taking an antioxidant supplement by identifying the underlying problem of free radicals, which may be linked to “serious health threats like cancer and heart disease. In fact, scientists have already linked free radicals to as many as 60 different types of

diseases.” The ad also states that: “Science tells us that pomegranate antioxidants neutralize free radicals, helping to prevent the damage that can lead to disease,” and that POM “promotes heart and prostate health” and “guards your body against free radicals.” These statements contributed to the net impression that the POMx Pill or POM Juice will prevent or reduce the risk of heart disease and prostate cancer in addition to treating these diseases.

Figure 11. CX0103: “Decompress” print advertisement

The Commission adopts the findings and conclusions of the ALJ that the evidence fails to show that CX0103 conveyed to a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily treats heart disease. *See* ID at ¶ 587. However, we find that this exhibit conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily prevents or reduces the risk of heart disease and that these claims have been scientifically established. In this regard, the decision of the ALJ is reversed. The ad containing medical imagery depicts the POM Juice bottle wrapped in a blood pressure cuff. Moreover, express language in the ad establishes a link between POM Juice, which “helps guard . . . against free radicals [that] . . . contribute to disease,” and the \$20 million of “scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health.” The ad also states that POM Juice will help “[k]eep your ticker ticking.” In combination, these elements communicate the message that POM Juice prevents or reduces the risk of heart disease, and that those efficacy claims are scientifically established.

Figure 12. CX0109: “Heart Therapy” print advertisement

The Commission finds that CX0109 conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily prevents or reduces the risk of heart disease. This exhibit is analogous to CX0103 (Figure 11 above) in that the text of the advertisement states that drinking eight ounces of POM Juice will “[k]eep your heart healthy,” and that scientific evidence “has uncovered encouraging results in . . . cardiovascular health.” We also note the bold headline touting “Heart Therapy.” In this regard, the decision of the ALJ is reversed. ID at ¶ 587. Additionally, the Commission finds that this advertisement conveyed to at least a significant minority of reasonable consumers that the efficacy claims have been scientifically established. The text stating that POM Juice “is supported by \$20 million of initial scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health” contributes to this net impression. In this regard, the decision of the ALJ is also reversed.

Figures 13-14. CX0120: “One small pill for mankind;” and CX0122: “Science Not Fiction” print advertisements

The Commission adopts the findings and conclusions of the ALJ with regard to CX0120 and CX0122 that the evidence fails to demonstrate that these exhibits conveyed to a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily prevents or reduces the risk of prostate cancer. *See* ID at ¶ 587.

However, the Commission finds that these exhibits conveyed to at least a significant minority of consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats prostate cancer. The text in CX0120 and CX0122 specifically states that a study showed “hopeful results for men with prostate cancer.” Further, in CX0120, the advertising copy, indicating that it is a

quote from the *New York Times*, states that “[f]indings from a small study suggest that pomegranate juice may one day prove an effective weapon against prostate cancer.” While the ads include language that attempts to qualify the claims conveyed, the Commission finds that these attempts to qualify fail to counteract the net impression conveyed through the use of strong descriptive language such as “incredibly powerful,” “astonishing levels of antioxidants,” and “so extraordinary, it’s patent pending.” In this regard, the decision of the ALJ is reversed.

Additionally, the Commission finds that the claims made in these exhibits conveyed to at least a significant minority of reasonable consumers that the prostate cancer treatment claims have been scientifically established. Both exhibits state that “an initial UCLA medical study ... showed hopeful results for men with prostate cancer.” Further, the subtitle in CX0122 states that the product is “backed by \$20 million in medical research.” In this regard, the decision of the ALJ is also reversed.

Figure 15. CX0128: June 2007 press release

The Commission adopts the findings and conclusions of the ALJ with regard to CX0128. Accordingly, we conclude that this exhibit conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats erectile dysfunction and that this claim has been scientifically established. *See* ID at ¶¶ 432-439.

Figure 16. CX1426 Ex. M: POMx Heart Newsletter

The Commission adopts the findings and conclusions of the ALJ with regard to CX1426 Ex. M. Accordingly, we conclude that this exhibit conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats, prevents or reduces the risk of heart disease, and that these claims have been scientifically established. *See* ID at ¶¶ 346-350.

Figure 17. CX1426 Ex. N: POMx Prostate Newsletter

The Commission adopts the findings and conclusions of the ALJ with regard to CX1426 Ex. N. Accordingly, we conclude that this exhibit conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats, prevents or reduces the risk of prostate cancer, and that these claims have been scientifically established. *See* ID at ¶¶ 351-354. The Commission finds, as the ALJ did, that this newsletter draws a clear link between antioxidants and a reduction in the risk of prostate cancer. After noting that prostate cancer is “the second leading cause of cancer related to death in the United States,” the newsletter addresses “risk factors” for prostate cancer, including “diet,” and advises a diet that is rich in antioxidants. The newsletter also expressly informs readers of medical research in “top peer-reviewed medical journals that document the pomegranate’s antioxidant health benefits such as heart and prostate health.”

Figure 18. CX0169/CX1426 Ex. L: “The Power of POM” print advertisement

Based on the overall net impression of CX0169/CX1426 Ex. L, the Commission finds that this exhibit conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking a POMx Pill daily treats, prevents or reduces the risk of heart disease and prostate cancer, and that these claims are scientifically established. This ad includes

a discussion of the effects of antioxidants on “free radicals [that] aggressively destroy healthy cells in your body – contributing to premature aging and even disease. The good news is POM Wonderful pomegranate antioxidants neutralize free radicals.” The ad also describes \$23 million in medical research including a study published in *Clinical Cancer Research*, in which pomegranate juice “delays PSA doubling time in humans.” In addition, the ad discusses two studies showing “promising results for heart health,” including improvement in “myocardial perfusion in coronary heart patients,” and the beneficial effect of pomegranate juice on atherosclerosis. Although the ad attempts to qualify the discussion of the medical research by using the words “promising,” “hopeful,” and “preliminary,” the Commission finds that these adjectives are ineffective, especially where the references to the studies are introduced with a bolded “**Backed by Science**” statement. We also find that the “results” of the studies are made especially notable by being presented in red text.

In addition, the medical imagery of the prominent caduceus symbol and the use of the subscript “x” in POMx, as well as the reference to \$23 million dollars in medical research published in named medical journals all combine to convey to at least a significant minority of reasonable consumers that the claims have been scientifically established. Finally, we note that the text and imagery indicate equivalence between eight ounces of POM Juice and one POMx Pill. Therefore, we reverse the findings of the ALJ with regard to this exhibit.

Figures 19 and 24. CX0180/CX1426 Ex. K: “The antioxidant Superpill;” and CX0279: “Science, Not Fiction” print advertisements

Based on the overall net impression of CX0180/CX1426 Ex. K and CX0279, the Commission finds that these exhibits conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking a POMx Pill daily treats, prevents or reduces the risk of heart disease and prostate cancer, and that these claims are scientifically established. These ads include references to \$23 million and \$25 million in medical research including a study published in *Clinical Cancer Research* that reports “statistically significant prolongation of PSA doubling times.” The ads also describe two studies showing a decrease in “stress-induced ischemia,” and “[p]omegranate juice consumption resulted in a significant IMT reduction by up to 30% ,” referring to arterial plaque.

In addition, the medical imagery of the caduceus symbol and the use of the subscript “x” in POMx, the references to millions of dollars in medical research published in named medical journals, and the attribution of results to three specific named doctors, all combine to convey to at least a significant minority of reasonable consumers that the claims have been scientifically established. Finally, we note that the text and imagery indicate equivalence between eight ounces of POM Juice and one POMx Pill. Therefore, we reverse the findings of the ALJ with regard to these exhibits.

Figure 20. CX0192: “What Gets Your Heart Pumping” print advertisement

The Commission concludes that the express language of this ad referring to “healthy arteries,” the fact that pomegranate juice “helps guard your body against free radicals” that “aggressively destroy healthy cells in your body and contribute to disease,” and that “[e]ight ounces a day is enough to keep your heart pumping,” created the net impression to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily prevents or reduces the

risk of heart disease. In addition, we find the specific reference to “\$23 million of initial scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health,” signals that this beneficial effect has been scientifically established. We therefore reverse the findings of the ALJ with regard to this exhibit.

Figures 21 and 27. CX0314: “Drink to Prostate Health;” and CX0372, CX0379, CX0380: Super Health Powers series, magazine wraps

The Commission adopts the findings and conclusions of the ALJ with regard to CX0314, CX0372, CX0379, CX0380. *See* ID at ¶¶ 306-320. Accordingly, we conclude that these exhibits conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily treats, prevents or reduces the risk of prostate cancer, and that these claims have been scientifically established.

Figure 22. CX0260/CX1426 Ex. B: “Drink to Prostate Health” print advertisement

The Commission finds that this exhibit conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily treats prostate cancer and that this claim is scientifically established. Factors contributing to this net impression include the language “Drink to prostate health,” and express language equating POM Juice to “good medicine.” Furthermore, the ad describes a “recently published preliminary medical study [that] followed 46 men previously treated for prostate cancer” which found that “[a]fter drinking 8 ounces of POM Wonderful 100% Pomegranate Juice daily for at least two years, these men experienced significantly longer PSA doubling times.” Therefore, we reverse the findings of the ALJ with regard to this exhibit.

Figure 23. CX0274/CX1426 Ex. C: “I’m Off to Save Prostates” print advertisement

Based on the overall net impression, the Commission finds that this exhibit conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily prevents or reduces the risk of prostate cancer, and that these claims are scientifically established. The headline “I’m off to save PROSTATES” when read in conjunction with the text that POM Juice “is committed to defending healthy prostates” and will “improve prostate health,” implies that POM Juice protects men from prostate cancer. In particular, the word “defend[]” in conjunction with “save” gives the impression that the ad is conveying information about a serious threat to prostates — prostate cancer. The message of “defense” is one of warding off this danger, *i.e.*, preventing or reducing the risk of prostate cancer. In addition, the language that POM Juice is “backed by \$25 million in vigilant medical research” communicates that these claims are scientifically established. Therefore, we reverse the findings of the ALJ with regard to this advertisement.

Figures 25 and 28-32. CX0280: “Live Long Enough;” CX0331/CX1426 Ex. J: “Healthy Wealthy;” CX0328: “Your New Health Care Plan;” CX0337: “First Bottle You Should Open;” CX0342/CX0353: “Life Insurance Supplement;” and CX0348/CX0350: “24 Scientific Studies” print advertisements

The Commission concludes that these exhibits conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats, prevents or reduces the risk of heart disease and prostate cancer and that these claims have been scientifically established. These ads begin with the general proposition that “antioxidants

are critically important to maintaining good health because they protect you from free radicals, which can damage your body,” and that POMx is an “ultra-potent antioxidant extract,” that will “help protect you from free radicals.” Further, the ads state that research has “revealed promising results for prostate and cardiovascular health.” In combination, these statements contribute to the net impression that POM prevents and reduces the risk of prostate cancer and heart disease.

Each of these ads describe a UCLA study on POM juice in *Clinical Cancer Research* that found “statistically significant prolongation of PSA doubling times.” Because PSA doubling time is associated with prostate cancer, this statement implies that POM juice treats prostate cancer. In addition, the ads cite a medical study in the *American Journal of Cardiology* that showed a reduction in stress-induced ischemia, which the ad explains means restricted blood flow to the heart. Four of the six ads (CX0280, CX0331, CX0328, and CX0337) also discuss a study that showed consumption of pomegranate juice “resulted in significant reduction in IMT (thickness of arterial plaque) by up to 30% after one year.”

Several elements create the net impression that the above claims are scientifically established, including: the express references to \$25 million and \$32 million in “medical research at the world’s leading universities;” the findings of studies regarding POM Juice’s impact on PSA doubling times and stress-induced ischemia published in *Clinical Cancer Research* and the *American Journal of Cardiology*, respectively; and the attribution of these test results to several specifically-named doctors. We note that the text and imagery indicate equivalence between eight ounces of POM Juice and one POMx Pill.

Accordingly, we reverse the ALJ’s findings with regard to these ads.

Figure 26. CX0475/CX1426 Ex. A: Juice Bottle Hang Tag

The Commission adopts the findings and conclusions of the ALJ with regard to CX0475/CX1426 Ex. A that the evidence fails to establish that the juice bottle hang tag conveyed to a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily treats, prevents or reduces the risk of heart disease, prostate cancer, or ED, or that such claims are clinically established.

Figure 33. CX0351/CX0355: “Only Antioxidant Supplement Rated X” print advertisement

The Commission adopts the ALJ’s findings and conclusions that these exhibits conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats, prevents or reduces the risk of, erectile dysfunction, and that these claims are clinically proven. *See* ID at ¶¶ 321-327.

The Commission also concludes that these nearly identical advertisements convey to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats, prevents or reduces the risk of heart disease and prostate cancer, and that these claims have been scientifically established. These ads begin with the general proposition that “antioxidants are critically important to maintaining good health because they protect you from free radicals, which can damage your body,” and that POMx is an “ultra-potent

antioxidant extract,” that will “help protect you from free radicals.” Further, the ads state that research has “revealed promising results for . . . prostate and cardiovascular health.” In combination, these statements contribute to the net impression that POM prevents and reduces the risk of prostate cancer and heart disease.

Each ad describes a UCLA study on POM juice in *Clinical Cancer Research* that found “statistically significant prolongation of PSA doubling times.” Because PSA doubling time is associated with prostate cancer, this statement implies that POM juice treats prostate cancer. In addition, the ads cite a medical study on POM Juice in the *American Journal of Cardiology* showing a reduction in stress-induced ischemia, which the ad explains means restricted blood flow to the heart. We note that the text and imagery indicate equivalence between eight ounces of POM Juice and one POMx Pill.

Several elements create the net impression that the prostate cancer and heart disease claims are scientifically established. Each ad explicitly references \$32 million or \$34 million in “medical research at the world’s leading universities” and then goes on to elaborate on the findings of studies regarding the impact of POM Juice on PSA doubling times, as published in *Clinical Cancer Research*, and POM Juice’s impact on stress-induced ischemia, as published in the *American Journal of Cardiology*.

Accordingly, we reverse the ALJ’s findings insofar as we find the ads convey efficacy and establishment claims of prostate cancer and heart disease treatment, risk reduction, and prevention.

Figure 34. CX0463: “Heart Therapy” Animated Online Ad

The Commission adopts the findings and conclusions of the ALJ with regard to CX0463 that the evidence fails to establish that this online advertisement conveyed to a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily prevents or reduces the risk of heart disease. *See* ID at ¶ 587.

Figure 35. CX0466/CX1426 Ex. H “Off to Save Prostates” Animated Online Ad

The Commission adopts the findings and conclusions of the ALJ with regard to CX0466/CX1426 Ex. H that the evidence fails to establish that this advertisement conveyed to a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily prevents or reduces the risk of prostate cancer. *See* ID at ¶ 587.

Figures 36 and 37. CX0473: Video Captures of POMWonderful.com Website, including the “Community” Section of the Site; CX0336: Printout of portions of POMWonderful.com “Community” Section of the Site

CX0473 contains video captures of the POMWonderful.com website, including the “Community” section the site, on various dates in 2009 and 2010. CX0336 is a printout of several pages from the “Community” section of the POMWonderful.com website from December 2010. It is unclear whether the ALJ considered the Community section of the POMWonderful.com site separately from the rest of the site. *See* IDF ¶¶ 368-85. Here, we address the site in its entirety.

In the video captures, textual references, graphs, medical imagery, commentary from POM executives and “POM experts” with medical backgrounds, and citations to scientific studies in combination convey the following claims:

Prevention and Risk Reduction Claims. Some examples of the elements that contribute to the message that POM prevents or reduces the risk of heart disease and prostate cancer are:

- One video on the site opens with a voiceover stating that “Pomegranate contains powerful antioxidants needed to prevent cancer and diseases” Videotape: PomWonderful Ads at 00:23-1:03 (Apr.-May 2009). A page on the site titled “Cancer – Emerging Science” states that: “Emerging science has shown that diets rich in fruits and vegetables that contain antioxidants, along with regular exercise, might slow or prevent the development of cancer. [A] great source[] of antioxidants [is] POM Wonderful Pomegranate Juice” Videotape: PomWonderful Ad Health Benefits at 03:44 (April-May 2009). The one specific type of cancer highlighted on the website is prostate cancer. For example, the website features a video nearly seven minutes in length titled “Let’s Talk About Prostate Cancer with David Heber, MD” Videotape: PomWonderful Ad at 00:14-07:07 (Dec. 2009). A portion of the “Community” portion of the website titled “POM’s Health Benefits: Fact or Fiction” quotes Dr. Bradley Gillespie, identified as POM’s Vice President of Clinical Development, as stating: “Some of our research areas are beginning to accumulate quite impressive clinical data. For example, I think the human evidence in prostate health is one of the strongest areas, and we continue to fund more research here.” CX0336 at 1.
- The site states that the antioxidant activity in POM Juice decreases inflammation, and that along with oxidative stress, inflammation has been implicated in a number of identified diseases, including atherosclerosis, heart failure, hypertension, and cancer. Videotape: PomWonderful Ad at 02:22-02:32 (Oct. 2009).
- In addition, on a page of the website titled “Other protective effects,” it states that “Pomegranate juice has a superior ability to prevent LDL cholesterol from being oxidized by free radicals,” and that LDL oxidation “may be a precursor to atherosclerosis or arterial plaque.” Videotape: PomWonderful Ad at 01:45-02:02 (Oct. 2009).

Treatment Claims. The site describes in detail studies of patients with heart disease, prostate cancer, and erectile dysfunction who experienced positive effects from drinking POM juice, thereby conveying that POM products treat these three diseases.

Establishment Claims. Through a variety of means the site conveys that all of these disease prevention, risk reduction, and treatment claims are clinically proven, such as citation to clinical studies, reference to specific named physicians – including one identified as a winner of the Nobel Prize in medicine – and statements that POM is backed by tens of millions of dollars in scientific research and “backed by science.” We also note the statement from Defendant Tupper that: “When you look at the medical research that has been conducted on POM and compare it to research that’s been done on other foods and beverages, what’s been done on POM is way, way

more extensive. It's almost more akin to research being done on pharmaceutical drugs.” CX0336 at 0001.

Figure 38. CX0473: Video Capture of PomegranateTruth.com Website

CX0473 contains a video capture of the PomegranateTruth.com website from April-May 2009. The Commission adopts the findings and conclusions of the ALJ that the PomegranateTruth.com website conveys to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats, prevents or reduces the risk of heart disease and that these claims have been scientifically proven. See ID at ¶¶ 411-414. The Commission also adopts the findings and conclusions of the ALJ that the PomegranateTruth.com website fails to establish that a significant minority of reasonable consumers would interpret the website to claim that drinking eight ounces of POM Juice or taking one POMx Pill daily prevents or reduces the risk of prostate cancer or erectile dysfunction. See ID at ¶ 591.

However, the Commission also finds that the PomegranateTruth.com website conveys to a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats prostate cancer and erectile dysfunction and that these claims have been scientifically proven. In this regard, the decision of the ALJ is reversed.

With regard to the prostate cancer treatment claim, the Commission notes the description of the UCLA study of men with prostate cancer who drank POM Juice and experienced an increase in PSA doubling time from 15 to 54 months. The site states, “PSA is a protein marker for prostate cancer, and slower PSA doubling time indicates slower disease progression.” This description of the study constitutes both an efficacy and an establishment claim for prostate cancer treatment, although the establishment claim is bolstered through other elements, such as the statement that POM products are “Backed by science” and \$25 million in medical research, alongside the prominent depiction of a caduceus.

With regard to the erectile dysfunction treatment claim, the Commission notes the description of a study published in the *International Journal of Impotence Research* regarding 61 subjects with mild to moderate erectile dysfunction who drank POM Juice and were 50% more likely to experience improved erections. This description constitutes both an efficacy and an establishment claim, although the establishment claim is bolstered by the same elements described above.

Figure 39. CX0473: Video Captures of POMPills.com Websites

CX0473 contains video captures of the POMPills.com website from April-May 2009 and January 2010.

The Commission adopts the findings and conclusions of the ALJ that the POMPills.com website conveys to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats, prevents or reduces the risk of heart disease and prostate cancer, and that these claims have been scientifically proven. See ID at ¶¶ 386-410. The Commission also adopts the findings and conclusions of the ALJ that the POMPills.com website conveys to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats erectile dysfunction and that this

claim have been scientifically proven. *See also* ID at ¶¶ 387, 408. To the extent that the ALJ's decision can be read to state that the ALJ found that the website conveyed claims that POMx prevents and reduces of risk for erectile dysfunction, *see* ID ¶ 387, that finding is reversed.