

FEDERAL TRADE COMMISSION

I N D E X

POM WONDERFUL, LLC

TRIAL VOLUME 16

PART 1, PUBLIC RECORD

OCTOBER 11, 2011

WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS	VOIR
PERDIGAO	2784	2791			
BUTTERS	2811	2830	2958	2963	

EXHIBITS	FOR ID	IN EVID	IN CAMERA	STRICKEN/REJECTED
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CX

Number2064		2957		
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PX

None

JX

None

DX

None

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
)
POM WONDERFUL LLC and)
ROLL GLOBAL LLC,)
as successor in interest to)
Roll International Corporation,)
companies, and) Docket No. 9344
STEWART A. RESNICK,)
LYNDA RAE RESNICK, and)
MATTHEW TUPPER, individually)
and as officers of the)
companies.)
)
-----)

TUESDAY, OCTOBER 11, 2011

9:30 a.m.

TRIAL VOLUME 16

PART 1

PUBLIC RECORD

BEFORE THE HONORABLE D. MICHAEL CHAPPELL

Administrative Law Judge

Federal Trade Commission

600 Pennsylvania Avenue, N.W.

Washington, D.C.

Reported by: Susanne Bergling, RMR-CRR-CLR

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P R O C E E D I N G S

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JUDGE CHAPPELL: Call to order Docket 9344.

Before we get started, I saw a written motion come in late Friday afternoon regarding a rebuttal witness. How much time does Respondent need to file a written response?

MR. GRAUBERT: Your Honor, that response is being filed as we speak. You should have it shortly.

JUDGE CHAPPELL: If it hasn't been filed yet, I am extremely interested in the time line of events.

MR. GRAUBERT: I'm sorry, Your Honor. I'm a little confused. The time line of which events?

JUDGE CHAPPELL: What people knew and when they knew it.

MR. GRAUBERT: Let me see if I can reconstruct that.

JUDGE CHAPPELL: Why don't you take a moment to think about it. When someone asks for a rebuttal witness, I like to know for sure when they first realized they might need a rebuttal witness.

MR. GRAUBERT: Maybe I should have Complaint Counsel --

JUDGE CHAPPELL: Well, you are responding to it, and it's going to be in writing. That's why I told you

I'm interested in the time line. You understand now what I'm talking about.

MR. GRAUBERT: Right. It was to be filed --

JUDGE CHAPPELL: I don't want to hear it. I want to see it.

MR. GRAUBERT: Oh, all right. We will get you a copy of the response. I thought you wanted to know when we became aware that they were going to request a rebuttal witness, which was I think the day before they filed their motion or maybe two days before.

JUDGE CHAPPELL: No. I'm just letting everybody know that I'm going to zero in on when Complaint Counsel should have known they needed a rebuttal witness in relation to when the motion was filed.

MR. GRAUBERT: Ah, that's a good question. And Your Honor will see from our response that we believe this is an issue that should have been addressed in their case in chief, and they have known for years about this issue. So, that's our position, Your Honor.

JUDGE CHAPPELL: All right. I saw another motion come in regarding an expert report or study, and I am sure you will be filing a response to that?

MR. GRAUBERT: That was our motion to exclude that piece of evidence, and I don't know what Complaint Counsel's planning on doing.

MS. HIPPSLEY: Your Honor, we will be filing a response. It was due Monday. Because it doesn't have anything to do with live testimony, we were just going to file it in the normal time, but if you need it earlier, we can file it earlier. They had not asked for expedited briefing on that, and --

JUDGE CHAPPELL: Right, but sometimes I do.

MS. HIPPSLEY: Okay.

JUDGE CHAPPELL: But I'll let you know later in the day if I want it before Monday. How's that?

MS. HIPPSLEY: All right, that's fine.

JUDGE CHAPPELL: If I don't say otherwise, Monday will be fine.

MS. HIPPSLEY: All right. That's fine, Your Honor.

JUDGE CHAPPELL: Next witness.

MR. FIELDS: Yes, Your Honor. We call Michael Perdigao.

MS. JOHNSON: Excuse me, Your Honor. This is Mary Johnson for Complaint Counsel.

We object to Mr. Perdigao's testimony to the extent that it's going to be offered as summary evidence of voluminous documents under Federal Rule 1006 and Section 19 of your scheduling order. We were just informed on Friday that part of Mr. Perdigao's testimony

will be offered under Rule 1006. And so as not to disrupt the flow of other testimony, I would like to --

JUDGE CHAPPELL: Well, let me hear their offer, then. If they are going to offer it under Rule 1006, let me hear their side of it, and then I will hear what you have got to say.

MR. FIELDS: Yes, Your Honor.

Six weeks ago, in opening statement, I specified in detail exactly what we would offer in this regard, and that is that there were 600 ads that ran and that we break them down into four categories. Your Honor may remember you asked if they had agreed upon those categories, and I said they hadn't.

I specified what the categories were six weeks ago. I specified in detail what we were putting into each category. There is no magic to the names we gave them. You could call them A, B, and C.

We provided them with all of the documents -- which had already been produced -- that are subject to Mr. Perdigao's summary, and Mr. Perdigao personally supervised the copying of the approximately 600 ads, which just about anybody can do. And the categories are simply his judgment as to how he categorizes the particular ads.

As I say, you could call them A, B, C, and D

instead of the names that he's going to give them, and they are clearly voluminous. There is 600 of them. The cases we cite -- we have a brief here that I will file with the Court, if it's necessary. The cases we cite, in one case, 161 documents was voluminous there. We have got 600 documents. They have got all 600.

JUDGE CHAPPELL: When were they provided?

MR. FIELDS: Oh, they have had them from the beginning, but we sent them the 600 that we're particularly talking about -- when were those? -- on Friday, Your Honor, as part of the motion. But they've been aware for over six weeks that -- how we categorized them, what we were offering, and how many there were.

There's no magic to this. There are 600 ads, and we think it would be helpful to the Court to know the volume of the ads in toto rather than just the ones that they're complaining about; although we still don't know which ones they're complaining about, because we can't get them to say specific things that are in and specific things that are out.

So, we simply want to provide the Court with voluminous -- what would otherwise be voluminous evidence. The Court can sit here and look at 600 individual ads, which would just be a terrible waste of time. Mr. Perdigao supervised the counting and

categorization of these ads in compliance with 1006, and that's all he's going to testify about.

JUDGE CHAPPELL: So, you are making an offer, under Rule 1006 --

MR. FIELDS: Yes, sir.

JUDGE CHAPPELL: -- that the summary should be allowed?

MR. FIELDS: Yes.

JUDGE CHAPPELL: All right.

Go ahead.

MS. JOHNSON: May I respond?

Yes, Your Honor. We did not find out until just this morning that the summary that Mr. Perdigao is going to offer is -- relates to the categories that Mr. Fields outlined in August. So, on Friday afternoon, we received this box of documents, which is in no order, other than alphabetical, by headline, and it included a cover letter indicating that they planned to call Mr. Perdigao and introduce his summary evidence of voluminous documents under Rule 1006 and Section 19 of your scheduling order. I have a stamped copy of their cover letter if you wish to see it.

JUDGE CHAPPELL: What's the difference in the box and the documents you were provided previously?

MS. JOHNSON: Well, these are supposedly all

documents that were produced during discovery; however, we have no way of verifying the accuracy of that. These are documents that go beyond what's in the record evidence.

There are also problems with the way in which they were produced. Some of them -- there are very few on here that have CX or PX numbers, although we believe some of them are, in fact -- should have been marked with CX and PX numbers.

It also appears that Respondents have put their own VMS Bates number on some of these, rather than using the Bates number that was already in evidence. So, there are significant problems with us trying to evaluate what's in this box.

Also, what's in this box is just alphabetical by headline. They are not grouped in any bundles that relate in any way to the groupings that Mr. Fields outlined in August or what we now understand, as of today, to be Mr. Perdigao's summary.

So, first of all, under -- under Section -- under Paragraph 19 of your scheduling order, we were never provided a summary exhibit within the 24 hours outlined under that paragraph. This is not -- a box of documents is not a summary exhibit.

JUDGE CHAPPELL: All right. Let me hear your

response to the scheduling order issue.

MR. FIELDS: Yes, sir. As far as not categorizing them, that would have been impossible, because as I said back in August and as Mr. Perdigao will testify, most of these fall into two or even three different categories. In other words, one ad may be in category A, category C, and category D.

JUDGE CHAPPELL: If it's impossible, how is he supposed to testify regarding this?

MR. FIELDS: How is he supposed to testify? He will testify, for example, that there are a number of ads that are what are called "money spent ads." They simply say the amount of money spent. And he would say some of those money spent ads also fall into the category of antioxidant ads, as they talk about what antioxidants can do. So, you can't have a separate bundling when you have an ad that falls into two or three different categories.

Now, back in August, I specifically delineated what these categories were; specifically gave examples of what would be put into each category. So, there was no surprise there.

As far as our not giving them a written summary -- and we have our brief here, Your Honor, which I would hand in -- it's over there -- and we cite cases

that say you may provide this based on oral testimony without a written summary. A written summary isn't necessary. All that we have --

JUDGE CHAPPELL: What's this brief you're talking about? Is this something that's been filed?

MR. FIELDS: Just got it here this morning, Your Honor. It hasn't been filed yet.

JUDGE CHAPPELL: It's a pleading?

MR. FIELDS: It's a pocket brief, sir.

JUDGE CHAPPELL: When were you planning on filing it?

MR. FIELDS: Pardon me?

JUDGE CHAPPELL: When were you planning on filing this brief?

MR. FIELDS: This morning, Your Honor.

JUDGE CHAPPELL: All right. What's the title of the brief? The title?

MR. FIELDS: The title of the brief is "Respondents' Brief in Support of Admissibility of Summary of Voluminous Advertisements."

JUDGE CHAPPELL: And this is a witness you're calling this morning?

MR. FIELDS: He's here right now, Your Honor.

JUDGE CHAPPELL: You don't think you should have filed that a little earlier?

MR. FIELDS: The brief?

JUDGE CHAPPELL: Yes.

MR. FIELDS: It would have been good if we had, but we only had their objection -- you tell me how long -- we got their objection on Friday, and today is Tuesday, and we prepared it over the weekend. So, this is not like, in their instance, something they have known for six weeks.

JUDGE CHAPPELL: All right. You are telling me that there are no summaries that you can provide?

MR. FIELDS: A written summary? We can --

JUDGE CHAPPELL: Whatever it is they're asking.

MR. FIELDS: Sure. We could provide a written summary, but it's the same as the oral summary. The cases say you don't need to provide a written summary as long as you put him on the stand and you give them the documents.

But the written summary -- my statement back in August, in opening statement, sets out in detail what the written summary would be. We have it attached to the motion so Your Honor can read it, if we may file it with the Court.

It goes on for two or three pages, stating exactly what we're going to show and what he will testify to. This is six weeks ago, Your Honor.

MS. JOHNSON: Your Honor, may I interject for a moment?

JUDGE CHAPPELL: Go ahead.

MS. JOHNSON: We -- we called -- when we received this box on Friday, we called opposing counsel to try to work this out ahead of time of today, because we thought we were sandbagged. We got this at the last minute, and there was no summary, and we had no idea of what Mr. Perdigao's testimony would be.

Now, when we spoke with opposing counsel on Friday, we specifically asked them to provide us with some kind of summary of what Mr. Perdigao will be testifying to, and they said that they refused to provide one, either written or oral. So, we did not know until -- although Mr. Fields may have outlined certain categories six weeks ago, we had no idea until this morning that those were the categories that Mr. Perdigao intends to talk about.

JUDGE CHAPPELL: So, is it Respondents' position that you have complied with Paragraph 19?

MR. FIELDS: Yes, sir. And it's our position regarding our compliance with Paragraph 19 as well as with Federal Rule 1006, in that we have provided the documents and that we gave advance -- six weeks ago -- notice that we were going to put on this evidence and in

that they have the same documents we have.

They couldn't be better bundled than we have bundled them because of the fact that documents are in two, three, or even four separate categories, each document. So, there isn't any simpler way to categorize them, but this is no surprise.

JUDGE CHAPPELL: All right. Give me your position. What language in the paragraph have they not complied with?

MS. JOHNSON: So, as to -- well, as to Section -- as to Paragraph 19 --

JUDGE CHAPPELL: That's what I'm talking about.

MS. JOHNSON: As to Paragraph 19 of the scheduling order, they have not provided, within 24 hours of presenting before a witness, a summary exhibit. Paragraph 19 talks about demonstratives, illustratives, or summary exhibits. All we received on Friday was this box of documents with -- and we asked specifically for some kind of summary exhibit or oral summary. Nothing was provided. So, we feel that they have failed to meet the requirements of Paragraph 19 of the scheduling order.

JUDGE CHAPPELL: It's your position that a summary needs to be provided even if it's not going to be offered as an exhibit?

MS. JOHNSON: Yes. Under the -- under -- under Paragraph 19, they needed to provide us with a summary exhibit.

JUDGE CHAPPELL: Are you offering an exhibit with this witness?

MR. FIELDS: No. We are not offering any exhibit. We are not offering any demonstrative, illustrative, or summary exhibit. We have samples of the ads, but we're not offering any -- any summary at all.

JUDGE CHAPPELL: Is he going to be testifying to a summary of the demonstratives that you --

MR. FIELDS: He will be testifying to a summary.

JUDGE CHAPPELL: And have you provided that summary?

MR. FIELDS: As to what he's going to testify to? No, we have not provided --

JUDGE CHAPPELL: If he is going to testify as to a summary, is it going to be on the screen? Is it going to be something he's looking at?

MR. FIELDS: No. He is simply going to say I counted the ads. There are 600 ads. There are four categories. I have put them into the four categories, period.

MS. JOHNSON: But, Your Honor, they are also

invoking Rule 1006 in this regard. So, they are saying that Mr. Perdigao's oral summary is going to be offered for the truth of the matter asserted, and we have not had an opportunity to -- first of all, apparently, they knew what his summary categories were going to be about, and they didn't tell us that until this morning. And we get this box on Friday, and we have no way of ascertaining or evaluating the accuracy of these documents in relation to what they want to offer into evidence by way of a summary.

MR. FIELDS: Six weeks ago, Your Honor, I said exactly what the categories were that we would be offering, exactly what would be put into in each category.

MS. JOHNSON: Your Honor, we have a suggestion.

JUDGE CHAPPELL: Show me where Rule 1006 it says you have to be provided with the actual summary rather than the underlying documents.

MS. JOHNSON: Now, the case law -- it is the case law interpreting Rule 1006.

JUDGE CHAPPELL: What court?

MS. JOHNSON: I'm sorry?

JUDGE CHAPPELL: In what court?

MS. JOHNSON: For example, in Eastern Trading Company versus Revco -- this is Northern District of

Illinois -- it speaks to the issue that the purpose of 1006 is to allow the opposing party reasonable opportunity to assess the accuracy and admissibility of the summaries. The purpose of 1006 is frustrated when the voluminous underlying documents are disclosed but the summary exhibits are withheld.

Also --

JUDGE CHAPPELL: But you're talking about exhibits. He told me they don't have exhibits. They don't have summary exhibits.

MS. JOHNSON: But they certainly knew and did not disclose to us what he -- what his summary was going to be about until just this morning.

JUDGE CHAPPELL: But that case you're citing talks about a summary exhibit.

MS. JOHNSON: Okay. Well, I mean --

JUDGE CHAPPELL: How does that apply here? He is not offering a summary exhibit, if I understood him correctly.

MS. JOHNSON: Well, he is offering an oral summary as -- as an exhibit. There are also -- in past FTC cases, where summaries of voluminous materials were expected, the parties were instructed, in scheduling orders, to serve copies of the summaries of voluminous materials sufficiently in advance of the commencement of

trial.

JUDGE CHAPPELL: What's your suggestion you have, rather than --

MS. JOHNSON: Our suggestion is that we not waste the Court's time any more on this matter today, that we be provided by Respondents -- since they know what the summary is, these bundles, we be provided with that summary; we be provided with the bundles of underlying documents that correspond to that summary; and we be given two weeks to examine these and to -- and have our -- it is only fair that we have our opportunity to examine the accuracy of the underlying documents in relation to the summary.

MR. FIELDS: Your Honor, I just want to read briefly -- because I have a whole raft of citations -- "Summary evidence need not be an exhibit but may take the form of the witness' oral testimony." That's Lorraine versus Markel American Insurance Company, 241 Federal Rules Decision 534, at page 581. That's the District Court in Maryland, a 2007 case, quoting Weinstein Federal Evidence, Section 1006.052. And to the same effect, there are other citations.

You don't have to come up with a written exhibit to satisfy Rule 1006, and if you're not offering the written summary in evidence, you don't have to provide a

draft of a summary in advance of the witness testifying. You simply have to say what you're going to do and give them copies of the documents. And they have known for six weeks. The summary would be exactly the same as what I said --

MS. JOHNSON: Your Honor --

MR. FIELDS: -- in August.

JUDGE CHAPPELL: All right. I have heard enough. Here's what we're going to do. Either we pull this witness, provide some information, bring the witness in later, or I allow the witness to testify on direct. I am going to allow Complaint Counsel to begin their cross-examination, and if they can demonstrate, through the witness, that they need more time to conduct the proper cross-exam into the details being offered by Respondent, I'll give them more time.

So, do you want to hold the witness or do you want to go ahead and do your direct today?

MR. FIELDS: Let's go ahead and do the direct.

JUDGE CHAPPELL: Because either way, I don't see the cross finishing today.

MR. FIELDS: It's entirely possible.

JUDGE CHAPPELL: And, again, Complaint Counsel is going to need to demonstrate that they can't conduct a proper cross, that they need time, and what they need,

and then I'll deal with it at that point.

MR. FIELDS: I understand, Your Honor.

JUDGE CHAPPELL: That's my ruling.

MR. FIELDS: Thank you.

JUDGE CHAPPELL: So, call your witness.

MR. FIELDS: Yes. Mr. Perdigao, would you take
the stand.

Whereupon--

MICHAEL PERDIGAO

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

DIRECT EXAMINATION

BY MR. FIELDS:

Q. Good morning, Mr. Perdigao.

A. Good morning.

Q. You previously testified in this case as a
witness called by Complaint Counsel. Is that correct?

A. Yes.

Q. Okay. And without being too repetitious, you're
the head of what's called Fire Station, the advertising
agency for Roll International?

A. I am the president, correct.

Q. All right. Would you get a little bit closer to
the mic? It might be a little hard to hear you.

All right.

JUDGE CHAPPELL: Hold on a second.

Ironsides can you see if they can fix that
clock?

THE BAILIFF: I've sent an email already.

JUDGE CHAPPELL: Thank you.

Go ahead.

(The remainder of Mr. Perdigao's testimony
contains certain redactions agreed to by the parties and
the Court based on Respondent's withdrawal of the
offered testimony.)

Now, as head of Fire Station, is it correct you were responsible for overseeing the preparation and dissemination of the ads for POM products?

A. Yes.

Q. All right. And as part of this process, do you review what's called the creative briefs?

A. Not generally, no.

Q. Okay. Do you generally even see the creative briefs?

A. Not usually, no.

Q. All right. Now, what part, if any, do the creative briefs play in the creation and production of the ads for POM and POMx?

A. In general, they are -- they initiate work within the agency, creative work. They initiate creative work within the agency, creative development.

Q. And is it true that the creative brief can be prepared by even a junior person in the marketing department?

A. Yes. And with POM, it most usually is.

Q. Okay. And after that junior person prepares a creative brief, what happens to it?

A. It's submitted to the agency, into our traffic department, and assigned to a creative team or creative teams to develop work.

Q. And are there then discussions of the ideas in the creative brief?

A. I'm sorry. Can you ask me that again?

Q. Yeah. Are there then discussions of the ideas that are expressed in the creative brief?

A. Sure. There's -- there's -- yeah, discussions happen all the time about the work that's developed. Yeah.

Q. And are those ideas very frequently modified, altered, sometimes rejected?

A. Yes.

Q. All right. Are the creative briefs typically seen by Mrs. Resnick?

A. No.

Q. Are they typically seen by Mr. Resnick?

A. No.

Q. Are they typically seen by the other officers of the company?

A. No.

Q. Are they typically seen by the legal department?

A. No.

Q. Do the ads that actually are run typically reflect the creative brief that started the process by this junior person writing a creative brief?

A. Not generally with POM, no.

Q. All right. If I wanted to determine the intention of the company or the people that run the company, would I look to the creative briefs to show that intention?

A. No.

Q. All right.

That's all I have for this witness, Your Honor.

JUDGE CHAPPELL: Any cross?

MS. JOHNSON: Yes.

CROSS-EXAMINATION

BY MS. JOHNSON:

Q. Mr. Perdigao, good morning.

A. Good morning.

MR. FIELDS: Our next witness is Professor
Butters, Your Honor.

JUDGE CHAPPELL: Come up, sir. We're ready.

MR. GRAUBERT: Could we approach the bench for one moment? Heather?

Go ahead, doctor.

(Discussion off the record.)

MR. GRAUBERT: Another housekeeping matter for the record, Your Honor. I understand Respondents' opposition with respect to this rebuttal witness was filed this morning. I have a -- if it is for some reason not in your office when you get there, I will be happy to hand it up to you.

JUDGE CHAPPELL: If you have an extra copy, I'll take it.

Thank you.

Whereupon--

RICHARD BUTTERS

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

JUDGE CHAPPELL: Go ahead.

MR. FIELDS: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. FIELDS:

Q. Would you state your full name, please, Professor.

A. Ronald Richard Butters.

Q. And is it correct, Professor Butters, that you are a professor emeritus at Duke University in Durham, North Carolina?

A. That is correct.

Q. You have been on the faculty at Duke for over 40 years?

A. Yes.

Q. Is it correct that you served as chairman of the linguistics program at Duke and chairman of the university's English department?

A. Yes, I did.

Q. All right. And is it correct that you are a member of the advisory board of the New Oxford American Dictionary?

A. Yes. Yes, I am. My involvement was primarily with the first edition. We are now in the third edition, but I am still on the advisory board, and they do consult me occasionally.

Q. Is it correct that for 25 years, you were the editor of peer-reviewed scientific publications of the American Dialect Society?

A. Yes.

Q. And that's a society that studies the American English usage?

A. Yes.

Q. Okay. And is it correct you were coeditor of the International Journal of Speech, Language, and Law?

A. I finished a three-year term about a year ago.

Q. Okay. And you remain on the editorial board of that organization?

A. Yes.

Q. Okay. And is it correct that you also just completed your term as president of the International Association of Forensic Linguists?

A. I'm sorry. I didn't hear the question.

Q. Yeah. Did you just finish a term as president of the International Association of Forensic Linguists?

A. Yes, in July.

Q. All right. And is it correct that you've taught courses in linguistics, modern English usage, discourse analysis, pragmatics, semantics, and other related courses at Duke?

A. Yes.

Q. What is the science of linguistics?

A. Linguistics is the study of human language in all its forms and manifestations.

Q. All right. And does that include what we call semantics?

A. Yes.

Q. And what does semantics mean?

A. Well, semantics is the study of meaning within the technical framework of linguistics. Semantics usually refers to the meanings of words, particularly as they are construed in sentences.

Q. Okay. And does the study of linguistics also include what's called semiotics?

A. Semiotics is a part of a larger subdivision of linguistics, which is called pragmatics. Semi -- pragmatics is the study of language -- of the meaning of language in context, and semiotics would include what are usually called nonlinguistic signs, graphics, pictures, colors.

A stop sign is a great example. Even if it doesn't say "stop" on it, the shape of it informs people that they're supposed to stop; or a red light means stop, a green light means go. These can be -- so, this is the larger pragmatic context of -- of our life and a part of the meaning.

Q. In arriving at a -- an analysis or a conclusion as to the meaning of any communication, do you imply all of those subjects as semiotics, pragmatics, and

linguistics?

A. In arriving at conclusions about the meanings of any kind of linguistic expression, one would take into account really all of the subdivisions of linguistics.

Q. And that would include semiotics, that is, the context --

A. Yes, and --

Q. Go ahead. Don't let me interrupt you.

A. I'm sorry. That would include the whole -- the whole range of things, really, from the sound structured language, on up to pragmatics and semiotics.

Q. And is it correct that you have written textbooks and other books in the fields in which you've taught and on related subjects?

A. Yes.

Q. And your CV lists page after page of articles, monographs, book chapters you've written, and even more pages and directives you've written on those subjects. Are those listings correct?

A. Yes.

Q. All right. Is it correct that you have been accepted by a court or other tribunal as an expert in linguistic analysis of written or spoken communications in more than 20 cases?

A. I -- I haven't counted. It's somewhere in

the -- it's approximately 20.

Q. Okay.

A. That would be my best guess.

MR. FIELDS: We would offer Professor Butters as an expert, Your Honor, and his report and CV in evidence.

MS. HIPPSLEY: Your Honor, again, we would ask, as an expert in what, to make the record clear? And I believe his report and CV are already on our joint exhibit list and in evidence.

MR. FIELDS: Okay. He is an expert in linguistics and on the meaning of language and symbols and the context in which they appear. He's an expert in both written and oral communications, although here, he will testify only as to written communications.

JUDGE CHAPPELL: To the extent any opinions meet the proper legal standards, they will be considered.

MR. FIELDS: All right.

BY MR. FIELDS:

Q. Professor Butters, did you conduct an analysis on how consumers would understand the ads for POM products?

A. My analysis didn't -- didn't take -- I didn't think in terms of -- just of consumers, but my analysis was with respect to the -- the meanings that an ordinary

speaker of contemporary American English would --
participant in American culture would take from the ads.

Q. You said what an ordinary person in America,
speaking English, would take from the ads. Do you
include what the ads implied as well as what the ads
actually said?

A. The -- yes.

Q. Okay. And did you examine all the ads in the
complaint?

A. I did.

Q. And did you also examine all the ads that you
were told were in evidence, even though they were not in
the complaint?

A. I was given a supplementary computer disk with a
large number of --

Q. All right.

A. -- of ads of various sorts on it, and I looked
at those.

Q. Now, in forming your opinion, did you exclude
any aspect of the individual ads or did you consider the
ads in totality?

A. I considered the ads in totality.

Q. All right. Did you also include the nature of
the product in making your analysis of what these ads
meant?

A. Yes. That's part of the context.

Q. Okay. Is that because what people might imply with reference to a food product might be different from what they would imply about a five-syllable drug?

A. Yes, sir.

Q. Before we get to what the ads say or imply, let's establish a meaning of the terms that you're going to use.

In common usage, what does it mean to say that a product prevents a disease?

A. Prevent -- prevent a disease would mean that it would keep the disease from happening.

Q. All right. And what does it mean, in common usage, that a product actually cures a disease?

A. A cure would address itself to -- to the disease and eliminate it.

Q. Would eliminate the disease?

A. Yes.

Q. Okay. Now, do any of the ads that you've examined either state or imply that any POM product actually prevents any disease?

A. No.

Q. Do any of the ads that you've examined either state or imply that any POM product actually cures the disease?

A. No.

Q. All right. Now, does any ad that you've seen for any POM product say or imply that anyone should use a POM product instead of having proper medical treatment?

A. Certainly not.

Q. Okay. Now, in your deposition -- do you remember taking your deposition some time ago?

A. Yes, sir.

Q. All right. Do you remember Complaint Counsel put to you, a number of times, questions that included three different questions embedded in one question: Whether POM prevented, cured, or reduced the risk of a disease. Do you remember that series of questions in your deposition?

MS. HIPPSLEY: Objection, Your Honor. I think it's mischaracterizing the questions that were asked during the deposition. I believe the three words used were prevented, treat, or reduce the risk, not cure.

MR. FIELDS: I'll accept that amendment, Your Honor.

JUDGE CHAPPELL: All right. Do you want to restate?

MR. FIELDS: Yes.

BY MR. FIELDS:

Q. Do you remember the triple-barrelled questions that said prevent -- did they prevent, treat, or reduce the risk of disease; in other words, asking you if it did any one of those things? And you said it could, and then you corrected your answer to say it could with reference to reduce the risk, but not prevent or cure.

Do you recall that?

A. Yes, I do.

MS. HIPPSLEY: Again, Your Honor, just for clarification, not prevent or cure, but, rather, prevent or treat.

MR. FIELDS: I'm sorry. I accept that amendment, Your Honor.

BY MR. FIELDS:

Q. You recall --

JUDGE CHAPPELL: All right. Then let's have the question restated and an answer restated.

MR. FIELDS: All right. Okay.

BY MR. FIELDS:

Q. Sir, do you recall correcting your answer to say that when you said it could, you were referring to it could refer to lowering or reducing the risk, but not that it could prevent or treat the disease? Is that correct?

A. That's correct.

Q. Okay. And is it still your opinion that the ads you saw do not state or even imply that POM actually prevents or cures any disease?

A. That's correct.

Q. All right. Now, what do you mean by "treat" a disease? Do you mean it's a medical treatment?

A. I didn't hear the question.

Q. Yeah. What do you mean by "treat" a disease? By that, do you mean in medical treatment?

A. Yes.

MS. HIPPSLEY: Objection, Your Honor, it's leading, if he had asked treat as an open-ended question, rather than leading his witness.

MR. FIELDS: When we began this proceeding, Your Honor, I understood Your Honor to say that there would be no objections based on leading questions or I would not have asked a leading question.

JUDGE CHAPPELL: I'm not sure I know what you're speaking of there, that I said there could be leading questions?

MR. FIELDS: Yeah. I may have understood -- misunderstood, Your Honor. I thought Your Honor said, at our very first session, that leading questions would not be objectionable, or words to that effect, or I would not have asked them. We have been doing that, I

think both sides, all along. I will be glad -- if Your Honor prefers me not to have leading questions, I will try to shape my questions otherwise.

JUDGE CHAPPELL: Well, first of all, one thing I would have said was a leading question suggests an answer.

MR. FIELDS: Yes.

JUDGE CHAPPELL: Your question clearly did. I don't generally stop leading questions unless there is an objection. We have an objection; ergo, restate.

MR. FIELDS: Okay.

BY MR. FIELDS:

Q. What do you mean by "treat," Professor Butters?

A. Treat, in the context of the investigation that I undertook, would refer to medical treatment.

Q. All right. Now, in that context, did you see any ad that stated or implied that any POM product treated any disease?

A. No, I did not.

Q. Okay. Now, when an ad uses the term "may," as in something "may help" produce a particular result, is that the same or different from saying that it will produce that result?

A. That is different.

Q. All right. When you say "may" produce a result

or a product "may" produce a result, would a reasonable person believe that that is a statement that it will produce that result?

A. No. "May" is an open-ended auxiliary, and it could just -- it -- it's a shortening for "may or may not."

Q. All right. Now, let's assume that an ad says three things. First, that antioxidants help fight free radicals, and second, that free radicals can cause disease, and three, that a product contains antioxidants. Can you tell me whether or not that kind of three-part statement or advertisement either states or implies that the product prevents a disease?

A. The -- the --

Q. Do you want me to repeat it?

A. The answer is no. I mean, it doesn't -- it doesn't do that.

Q. All right. Now, suppose an ad says something like, "Outlive your 401(k)." Do you remember seeing an ad like that when you looked through the ads?

A. Yes, I do.

Q. All right. How would you describe that kind of ad?

A. Well, the -- I'm not sure whether this is the hypothetical or not, but it's just taking -- divorced

from context, it's really difficult to say what that would mean. Within the framework of the ads that I saw, this is a -- a hyperbolic statement, an extreme, obvious exaggeration.

Q. Um-hum. Is that what's called hyperbole or sometimes puffery?

A. Hyperbole is the term I would refer to as far as linguistics is concerned. Puffery is not really a linguistic term of art. I think I understand it, but as I understand it, it's a legal term, and if you don't mind, I'd rather not use the legal terminology. It's a hyperbolic term.

Q. Okay. And hyperbole, does that mean something that is not meant literally?

A. Yes. Hyperbole is an extreme exaggeration.

Q. Is it or is it not meant literally?

A. It's not meant literally, that's correct.

Q. All right.

JUDGE CHAPPELL: When you were asking earlier, Dr. Butters, you were asking him, for example, what does the word treat or prevent convey -- you asked what those words conveyed, were you asking him what it conveys to him, Dr. Butters, or to an ordinary person?

MR. FIELDS: I hope I asked him to an ordinary person, but let me ask him.

BY MR. FIELDS:

Q. Do you believe that the word "treat," to an ordinary person, a reasonable person, means a medical treatment?

A. Yes. These are the definitions that one would find prominently in an authoritative dictionary.

Q. Would you say, for example, that if an ad said "Eat spinach, it's really good for you," is that a treatment, as you think a reasonable person would use the term?

A. No.

Q. What if they said, "Here's a drug called phizohexadrine" -- something or other -- "and it is really good for you," might that not be a treatment?

A. The -- it would be much more likely to be inferred as -- as a treatment, yes.

Q. All right. Now, what function does humor have in advertising?

A. Well, humor has been employed in advertising for -- for a long time. One of the things I read most recently suggested that approximately a third of all ads make use of humor. So, it's a common -- a common vehicle.

Q. Does it make a reader feel more friendly toward the ad or the advertiser?

A. The -- the -- the short answer is, of course, it always depends on the ad. You have to look at the ad itself --

Q. Right.

A. -- to know just what kind of effect it will have, and sometimes it backfires with at least -- with at least some individuals. But the -- the conventional wisdom seems to be that humor in advertising makes the readers of the ad -- if the humor works, it makes the readers of the ad like the company better.

Q. All right. It doesn't change the meaning of the ad, though, does it?

A. It's a -- it becomes a part of the -- of the meaning of the ad. By meaning, you mean how does it work. Yes, it -- it can affect the ultimate communication of the ad.

Q. All right. When you say an ad doesn't imply something, what do you mean by "imply"?

A. When I say that -- what?

Q. An ad doesn't imply something, what do you mean by "imply"?

A. By "imply," I mean take away, essentially. If an ad implies something, then it -- that -- that something is what the reader takes away from the ad in terms of meaning.

There is some technical, grammatical or lexicographical distinction between implication and inference. Implication is -- is sometimes -- means what -- what is intended, and inference is what people take away. But in ordinary conversation, we use them interchangeably, and if I say "imply," ordinarily -- if I say "imply" here, I ordinarily mean infer.

Q. You're talking about what a reasonable person could take away from the ad? Is that what you mean?

A. That's correct.

Q. Okay.

JUDGE CHAPPELL: Are you talking about an obvious implication? What I mean by that is, are you referring to implications where the meaning or the intent to imply is easily discernible by the reasonable -- or I think as Mr. Fields says -- the regular person?

THE WITNESS: I'm sorry, Your Honor. I don't understand the question.

JUDGE CHAPPELL: Is an implication something -- when you refer to an ad and say it implies something, are you saying that the implication is easy to identify by a person reading the ad?

THE WITNESS: Well, there's going to be a continuum, I suppose, from really easy to -- to

relatively arcane. And it could be -- the implication or the inference could be based upon some complex knowledge that a certain sort of -- that a special type of reader might have, and it would still be a reasonable reader.

But if you're talking about an ordinary person, then I'm saying that -- that the implication or the inference would be something that would be reasonably easy to -- to understand, yes.

JUDGE CHAPPELL: Could you look at an ad and identify what implications were intended merely by looking at the ad?

THE WITNESS: That's a hard question, because we can never really know what's in the minds of the speaker or the writer. That's -- we can never really get inside people's heads and find out what's going on. Nonetheless, that's always what we're trying to do when we communicate. We're trying -- we're trying to infer what that person is implying, and that's the distinction I was trying to get at earlier.

So, the answer is no. We can never know for certain what it is that the speaker was implying, but -- or what was intended by the writer or the speaker, but we can make -- what we're always doing in conversation is we're making our best -- our best -- our best guess,

really; that's the way we communicate with each other. And the -- the inferences that we draw are what we attribute to the implications that the speaker or writer puts there.

JUDGE CHAPPELL: When it comes to advertising, do you believe that the person creating the ad has an idea of what the reasonable person will infer when they read the ad?

THE WITNESS: If they're doing their job, yes.

BY MR. FIELDS:

Q. So, is it correct that -- if I understand your responses to the Judge's questions, you're looking for what a reasonable person would take away from the words and the context of the ad rather than trying to guess at what the person who wrote the ad intended? Is that fair?

A. That's correct.

Q. Okay. Did you attempt to ascertain what the subjective intention was of the people who wrote these ads?

A. No.

Q. Now, did you -- strike that.

Professor Stewart, in his criticism of your methodology, said that the profile of POM buyers was people who are college-educated, affluent, and

interested in health, and that that was a relatively small part of the population, and that you were talking about the entire population rather than that profile.

Would your answers be any different, that is, the answers you gave me today, if we were talking about college-educated, affluent people who were interested in health?

A. No. Only -- only to the extent that one would expect those people to be more discerning and more careful readers.

Q. All right. Now, you talked about individual ads. Would the answers you have given us today be any different if you looked at the totality, that is, all of the ads that you saw? Would your answer to all the ads be any different than the answers you have given us earlier?

A. No.

Q. All right.

That's all I have, Your Honor.

JUDGE CHAPPELL: Cross?

MR. GRAUBERT: Excuse me one minute.

(Pause in the proceedings.)

CROSS-EXAMINATION

BY MS. HIPPSLEY:

Q. Good morning, Mr. Butters.

A. Good morning.

Q. I'm sorry. Do you prefer Dr. Butters?

A. It doesn't matter.

Q. Okay. Now, you were retained by POM, and in preparing your report, did you ask anyone at POM about the target audience for POM advertising, who the target audience was?

A. No.

Q. And, again, you analyzed the ads, I believe as you said, from the perspective of the ordinary user of English language in America today. Is that correct?

A. Yes.

Q. Okay. And that would be adult users or -- of language?

A. Yes.

Q. And what would be the age range that you would consider?

A. It may -- the upper -- the upper range is 125, I suppose, however old you are when you stop reading -- reading ads and watching television, but the younger age would be, you know, somewhat flexible. We usually consider adult speakers to be females at about 17 to 19 and males maybe a year or so older.

Q. Okay.

A. It really depends on what your purposes are, but

that --

Q. And for your purpose in this report, where would the lower range have started?

A. I -- I'd say roughly 18 or 19.

Q. Okay. And I believe that you said that you did not account for the viewer's level of education in your analysis. Is that correct?

A. I did not attempt to -- I'm sorry, I didn't hear your verb.

Q. You did not account for the viewer's level of education in your analysis.

A. I did not attempt to do what?

Q. You did not account for the viewer's level of education in your analysis.

A. Oh, the viewer's level of education.

Q. Right.

A. Thank you.

I would take into account -- insofar as they were written, the person had to be reasonably literate, and most of the ads were print ads or ads that made use of a good deal of writing.

Q. Okay. But you did not take into account whether the viewer had a high school education, college education, or postgraduate education. Is that correct?

A. That's correct.

Q. Okay. And you did not take into account the viewer's income level. Is that correct?

A. Not specifically, no.

Q. So, you did not take it into account?

A. That's correct.

Q. And you did not account for whether the individuals had health conditions. Is that right?

A. Not specifically.

Q. And you did not account for their level of concern about health issues. Is that right?

A. Not in preparing my report.

Q. Okay. And, for example, you would not have taken into account whether the viewer was a male worried about prostate cancer. Is that correct?

A. These -- the demographics were not -- were not my concern.

Q. Okay. And so, again, you would not have taken into account whether the viewer was a female worried about heart disease. Is that also correct?

A. Not specifically.

Q. You would not have specifically taken it into account.

A. That is correct.

Q. Okay. So, your analysis didn't do anything in terms of analyzing the ads from the perspective of POM's

target audience. Is that right?

A. I don't know what POM's target audience was.

Q. Okay.

A. That was not a concern of mine.

Q. Okay. And your report is not based on showing ads to actual viewers and testing the ad's communication with those viewers. Is that right?

A. That was not my methodology.

Q. Okay. Did you ask POM or any of the folks that brought you here today whether there were any documents that reflected or discussed the testing of ad communication for POM ads on actual viewers?

A. I had no communications with anyone from POM.

Q. About the issue of whether they had any actual testing on viewers of ad communication for their ads. Is that right?

A. Perhaps I'm not understanding you. I had no communication with anyone from POM about any issues involving anything. I spoke only with the attorneys in this case.

Q. Okay. And in speaking with the attorneys, did you request any documents that the companies would have which reflected or discussed the testing of ad communication on actual viewers for POM products?

A. No, I did not.

Q. Okay. And if such materials existed, would you be interested in seeing them?

A. The -- the short answer is, yes, I would be interested in seeing them. I don't think they would necessarily -- I don't think they would alter my -- my view of -- that they would alter my analysis, but I can't be sure.

Q. All right. And, in fact, you have relied, in other research you've conducted, on empirical research about what viewers of certain advertising say about the advertising or about terms that will be used in the advertising. Isn't that correct?

A. I can't specifically recall any.

Q. Well, in fact, you used empirical research on the target audience for certain advertising in your research, where I read the article -- the write-up was in an article called "Semantic and Pragmatic Variability in Medical Research Terms: Implications for Obtaining Meaningful Informed Consent." And in that article, you relied on some empirical research that had been conducted on the target audience for the ads you were analyzing. Isn't that correct?

A. We were not analyzing ads there at all.

Q. I'm --

A. We were not analyzing ads there at all.

Q. Okay. You were -- what was the purpose of that article?

A. This is the article that I wrote with Jeremy Sugarman? Yes.

Q. Why don't we call it up so you can see it and get on the same page.

A. Yes, thank you.

Q. This has been marked as CX 2067, and page 1 gives the title, and yes, it was authored with Mr. Sugarman.

A. Dr. Sugarman.

Q. I'm sorry. Dr. Sugarman.

If I could turn your attention to page 2, which is page 2 of CX 2067, and it's also page 150 of the article. And if you look in the middle paragraph there, there's a sentence that starts, "Our methods." And I'll call that up for you so you can read it more easily.

A. I see most -- oh, yes, there it is.

Q. Okay. "Our methods involve two familiar modes of linguistic inquiry." And then 1 is "analysis of dictionary entries for important terms, and second, linguistic research based on data collected in structured interviews in which actual research subjects defined and discussed informed-consent terminology in light of their previous participation experiences."

So, perhaps I had slightly mischaracterized it, but, in essence, you have relied, in this article, on empirical work that was done with the research subjects that informed your analysis for this article. Is that correct?

A. Yes. The purpose of this article was to attempt to, as the title suggests, to make it -- Dr. Sugarman is a professor of ethics -- medical ethics at Duke and a colleague and former student of mine, and he had -- he was very interested in making sure that informed consent documents were as fair as possible. So, he wanted to make sure that they neither stampeded people into involving themselves in medical tests or frightened them away unduly.

So, as I recall, we were testing -- this article was a number of years ago, but what we were doing was testing to find out what sorts of words were the most neutral and most ethically sound to use in informed consent documents.

Q. Right.

A. So, it had nothing to do with advertising.

Q. Are you sure that it also wasn't looking at how to advertise to the public to recruit subjects for research?

A. You know, I believe you're correct. I simply

had forgotten the purpose of the ads.

Q. That's okay.

A. It was a long time ago. Yes, right.

Q. Okay. So, it did involve ads in that context, of making sure that the terminology used in the ads to recruit people to participate in studies, as you say, you were analyzing the impact and meaning for the --

A. Yes.

Q. Okay. Thank you.

A. So, we were trying to ascertain how we would construct ads that would be fair and -- and neutral. That's correct.

Q. Okay, to recruit subjects for clinical studies, correct?

A. Yes.

Q. Okay. Now, I think you've seen enough of the POM ads -- hopefully you can rather -- that the letter O in the POM logo is in a heart symbol. Do you recall that?

A. It is pink or red, I believe.

Q. And they shape the O in the shape of a heart. Is that right?

A. Yes.

Q. Okay. And at your -- you would -- you believe it would be unreasonable for viewers to think POM Juice

was heart healthy based on that product logo. Is that correct?

A. The product logo appears every time that -- that the word "POM" appears on a bottle or in an ad, whether it has anything to do with heart or not. The heart symbol in American culture, and one sees this on T-shirts all the time, the heart -- or bumper stickers -- the heart comes out of the playing cards, and it's the symbol that means heart or love. And so I think that that's -- the primary significance of the heart for the -- for an ordinary, reasonable person would be the love. You will love POM Wonderful.

Q. Okay. Have you heard of the book Rubies in the Orchard, the POM Queen's Secrets to Marketing Just About Anything, that was written by Lynda Resnick?

A. Yes.

Q. And have you read it?

A. No, I haven't read that book.

Q. And you are aware that Mrs. Resnick, together with her husband, own POM Wonderful. Is that right?

A. That's my understanding.

Q. And are you aware that Mrs. Resnick designed the POM logo with the heart replacing the O?

A. No.

Q. Okay. I'd like to show you an excerpt from her

book, and this is CX 1, at page 11. And I wanted to focus on her paragraph where she stated that, in her view, "The heart symbol in the POM logo will immediately tell consumers it's heart healthy."

Do you see that sentence?

A. Yes.

Q. Okay. Does that change your opinion as to whether the heart symbol would convey to viewers, the POM logo, that it indicates the product is heart healthy?

A. It doesn't change my opinion that that's what people would -- that doesn't change my opinion with respect to what the heart will mean to -- to the ordinary viewer.

Q. Okay. And are you familiar with the term "unique" -- you can take that down. Thanks.

Are you familiar with the term "unique selling proposition"?

A. "Unique selling proposition"?

Q. Yes.

A. This doesn't resonate with me as a catch phrase.

Q. Okay. And do you know what is meant by the intrinsic value of a product?

A. These words have meaning for me in the English language.

Q. Do you know it as a term of art, what the intrinsic value of a product is?

A. It's not a term of art in my field.

Q. Okay. And do you have any understanding of what, as common language on -- in your linguistics expertise, using your linguistics expertise, what that term means, "intrinsic value" of a product?

A. Are you asking for a paraphrase?

Q. Right, or -- would it have any -- well, strike that.

Mrs. Resnick has stated in her book that "the intrinsic value of POM Juice is its ability to heal people and that it's health in a bottle." And I wanted to show you also some other statements she's made at her deposition in this matter.

If we could show CX 1359, page 0019, I believe. Okay, if you could just take a minute and look through that. And I just want to lay the foundation that Mrs. Resnick stated that "the intrinsic value for POM Juice was that it was shown to reduce arterial plaque and factors leading to atherosclerosis and that studies suggested that pomegranates had a powerful effect against prostate cancer."

So, just let me know when you have had an opportunity to review that.

A. I am not -- am I supposed to be reading the green or the yellow or --

Q. The yellow through until the end of the lines there, to the bottom of the page.

A. To the bottom of the page?

Q. Yes, please.

A. (Document review.) I'm finished.

Q. Okay. And we can take that down now.

Now, do you think Mrs. Resnick succeeded in communicating to consumers that POM Juice has the ability to heal people?

A. This is -- the -- ah, communicated to whom?

Q. Communicated to viewers of her ads, that POM Juice had the ability to heal people.

A. I -- I have no idea that she had anything to do with making of the ads or this -- that -- that viewers read the transcript of the deposition. I don't really understand the question.

Q. Well, do you think that POM, the company, succeeded in communicating to viewers that POM Juice has the ability to heal people?

A. No.

Q. Okay. And do you think that POM, the company, succeeded in communicating to viewers that POM Juice is health in a bottle?

A. That POM Juice is health in a bottle? That's -- that's -- that, in itself, is a hyperbole that's relatively meaningless. What it -- what it would mean to the ordinary, reasonable person is pomegranate juice is healthy for people to drink.

Q. And if that's your definition, do you think she succeeded -- do you think the company succeeded in communicating that to viewers of the ads?

A. The -- the inference that the ordinary, reasonable person would take from the ads that I looked at, that make, you know, any reference to health at all, would be that pomegranate juice is -- is good for you.

Q. Okay. And do you think the company succeeded in marketing that touched on the subject of heart health benefits to convey that POM Juice is shown to reduce arterial plaque and factors leading to atherosclerosis?

A. Those are not the -- the inferences that one would take away from the ad -- from the ads.

Q. Thank you.

And do you think that POM, the company, succeeded in communicating to viewers of ads that touched on the subject of prostate health benefits, that studies suggest that pomegranates have a powerful effect against prostate cancer?

A. No.

Q. Okay.

Your Honor, I'm sorry, I think I'll have about two hours of cross. So, just knowing that, I don't know what your schedule is for breaks or whatnot. I'm at a point where I'm sort of switching gears here, but we can keep going if people want to. That's fine.

JUDGE CHAPPELL: Right. I was just looking at the clock here -- not the one on the wall, of course, which doesn't work. Why don't we take a break now. We will reconvene at 11:50. We're in recess.

(A brief recess was taken.)

JUDGE CHAPPELL: Back on the record. Next question.

BY MS. HIPPSLEY:

Q. Dr. Butters, I'd like to show you a page from your report that you prepared in this matter, and it's been marked as PX 158. And I wanted to direct your attention to page 3 of the report, paragraph 4.

And here, your -- one of your conclusions is that the POM Wonderful communications do not expressly convey -- nor by implication do they convey -- that recommended amounts and frequencies of POM products have the medical effects that the products -- and then we'll go back to the three words in our complaint -- treat, prevent, or reduce the risk of heart disease, prostate

cancer, or erectile dysfunction.

Is that correct? That's your conclusion? One of the conclusions, sorry.

MR. FIELDS: Objection, compound, Your Honor.
Asks three different questions.

JUDGE CHAPPELL: Do you want to restate?

MS. HIPPSLEY: Okay.

BY MS. HIPPSLEY:

Q. Looking at paragraph 4 and the conclusion there, you state that "POM Wonderful communications do not convey that, one, recommended amounts and frequencies of POM Wonderful products have the medical effects indicated in (a) through (c) above." And, as you recall, (a) through (c) above were your recountings of the complaint claims that we had in this matter, which were that "the products treat, prevent, or reduce the risk of heart disease, prostate cancer, or erectile dysfunction."

So, in your view, "The POM ads do not convey that there's a medical effect on those diseases." Is that correct?

MR. FIELDS: Again, Your Honor, compound. It's asking three separate questions, do they prevent, do they cure, do they treat, three questions.

MS. HIPPSLEY: Well, the -- I'm paraphrasing the

report, indicated in (a) through (c) above, and instead of going all the way back through those, Dr. Butters in his report listed in (a) through (c) the FTC complaint claims.

MR. FIELDS: The reason I object is there may be a different answer to do they prevent or do they cure or do they treat. I don't --

MS. HIPPSLEY: Well, he --

JUDGE CHAPPELL: Well, let's see if the witness can answer the question that followed what she read: "In your view, the POM ads did not convey that there is a medical effect on those diseases, correct?"

THE WITNESS: Is it correct that this is my opinion, as expressed in paragraph 4?

BY MS. HIPPSLEY:

Q. Yeah. Is that your opinion as expressed in your report?

A. My opinion has not changed since I wrote the report. That is my opinion, yes.

Q. Your opinion, yes.

A. My opinion as expressed in paragraph 4.

Q. Okay. And, as you stated in paragraph 4, you do consider the complaint claims -- if they were made, you've characterized them as having no medical effect. Isn't that correct? The term of art you used.

A. I used the term "medical effects," plural.

Q. Okay. Now, to perform the analysis in your report, you selected a sampling of the POM ads, that are at issue in this matter, to analyze. Is that correct?

A. Yes.

Q. And you have selected what you believe are representative types of material that the FTC has offered in this matter. Is that correct?

A. Yes.

Q. Okay. Now, returning to the report, at page 3, and we will look at paragraph 5 this time. And here, starting with the second sentence, you state that, "At best, POM communications convey that," and skipping down to the number 2 point, "POM Wonderful products contain 'antioxidants,' for which there has been preliminary scientific research regarding their potential beneficial properties."

Is that right? Have I stated that correctly?

A. That's what it says.

Q. All right. And let's talk about the potential beneficial properties. What do you mean in that sentence are the potential beneficial properties?

A. The potential beneficial properties are the beneficial properties that were tested in the pilot studies and medical research that are outlined elsewhere

in the -- are outlined in some of the ads and on the POM Wonderful Web site.

Q. Okay. And so that would be, for example -- in advertisements where a study dealing with prostate cancer, for example, is stated in the ad, that would be a potential beneficial property, that POM Juice had the potential to provide benefits for prostate cancer. Is that correct?

A. There has been preliminary scientific research regarding that potential benefit, with respect to the PSI doubling rates.

Q. Okay. And so beneficial property in that context would -- would be if there's a study on the Web site discussing -- if there's, on the Web site, a discussion of a prostate cancer study conducted by POM Wonderful, for example. That would be the type of beneficial property you're referring to.

A. Would you re- -- I don't understand the question. Would you repeat the question, please.

Q. I'm just trying to clarify when you said the beneficial properties would be benefits that were outlined when a study about the benefit was put into an ad or on the Web site. Is that correct?

A. Or referred to in the -- in the ads themselves.

Q. Okay. That's fine. Thanks.

Now, I'd like to show you -- oh, strike that.

Do you recall that in your deposition in this matter, you agreed that contemporary speakers of English would include heart disease within their understanding of heart trouble?

MR. FIELDS: Could we have a page and line before --

MS. HIPPSLEY: I'm asking if he recalls.

JUDGE CHAPPELL: Well, that's a foundational question, if he recalls. Let's see what he says. She didn't ask for a specific line in the depo. It was a general question.

THE WITNESS: Can you repeat the question, please?

BY MS. HIPPSLEY:

Q. All right.

Could you repeat it, please?

(The record was read as follows:)

"QUESTION: Do you recall that in your deposition in this matter, you agreed that contemporary speakers of English would include heart disease within their understanding of heart trouble?"

THE WITNESS: I don't remember that specifically, no.

BY MS. HIPPSLEY:

Q. All right. I'd like to then show you the deposition line where we can find that reference, and the deposition has been marked as PX 350, and we're looking at page 52, and it's lines 10 through, page 53, line 2.

The question was:

"QUESTION: How do contemporary speakers of American English interpret the phrase 'heart trouble'?"

There was an objection, and then the answer:

"ANSWER: Heart trouble is what their cardiologist would tell them is some abnormality of the heart, some abnormality of the heart that again isn't in some sense pathological.

"QUESTION: Would it include heart disease?"

There is some colloquy.

And then you state, at line 23:

"ANSWER: Would I include heart disease as a heart condition?

"QUESTION: Heart trouble.

"ANSWER: As heart trouble? Generally speaking, yes."

So, does that help your recollection, that at your deposition, you agreed that contemporary speakers of English would include heart disease within their understanding of heart trouble?

A. I assume this is a correct transcript.

Q. Yes. And if it is, that's the statement, correct?

A. Correct.

Q. All right. And would you agree that contemporary speakers of American English would interpret the phrase "erectile function" to relate to the ability of men to achieve and maintain erections?

A. Yes.

Q. Okay. And you would also agree that erectile function and the absence of erectile dysfunction are closely related. Isn't that right?

A. Closely related, yes.

Q. And you would also agree that contemporary speakers of American English would interpret the phrase "prostate health" to mean a condition of not being diseased. Is that right?

A. Yes.

Q. Okay. And you would also agree that contemporary speakers of American English would interpret the phrase "heart health" to mean a condition of not being diseased, correct?

A. Yes.

Q. And you would agree that these terms, "heart health, erectile function" -- well, let's take them one

at a time. I'll stop your objection ahead. Strike that.

You would agree that the term "heart health" is contained in some of POM's communications, correct?

A. POM's communications?

Q. Um-hum, to viewers, some of the ads you reviewed.

A. Yes.

Q. I'm sorry. Could you say the answer? In some of the advertisements.

A. My memory is that that's correct.

Q. Okay. And that the term "erectile function" is contained in some of POM's advertisements that you reviewed. Is that correct?

A. I remember the phrase "erectile dysfunction." I don't specifically remember the phrase "erectile function," but I would not be surprised if it were there.

Q. All right. And the term "prostate health" was also contained in some of POM's ads that you reviewed, correct? "Prostate health"?

A. That -- my memory is that that is correct.

Q. Okay. Now, I'd like to turn again to your report and look at one of your conclusions on page 33.

Could we approach the witness, Your Honor, and

give him a hard copy? It might be easier. We'll also show it on the screen.

JUDGE CHAPPELL: Go ahead.

MS. HIPPSLEY: Okay.

THE WITNESS: Thank you.

BY MS. HIPPSLEY:

Q. And we're looking at page 33, paragraph 34, and I just wanted to draw your attention to -- in paragraph 34, the sentence that starts, leading into the bullets, "The advertisements depend upon parody, exaggeration, and humor to bring their message to the potential purchaser." And then there's bullets listed.

One of the messages that you state is brought to the potential purchaser is that "medical research has suggested that antioxidants combat free radicals, which are unhealthy, and may contribute to disease of the heart, arteries, and prostate, as well as erectile dysfunction."

Is that a correct reading of the paragraph here?

A. Yes, it is.

Q. Okay. And that, also, a message that is brought to the potential purchaser that you note is that "pomegranate juice is arguably the best source of antioxidants of any of the comparable beverages available."

Is that right?

A. Yes.

Q. Okay. And so the beginning of that sentence says, "The advertisements depend upon parody, exaggeration, and humor to bring these messages." And I know that Dr. Fields discussed, briefly, humor in the direct. So, your conclusion here is that the use of parody, exaggeration, and humor can bring the bulleted messages forward to the viewer in the ad communication. Is that correct?

A. Bring it forward?

Q. Well, can bring their message to the potential purchaser. Is that correct? That they depend on humor to bring the message forward.

A. Yeah. I don't say it depends exclusively on parody, exaggeration, and humor, but parody, exaggeration, and humor is an intrinsic part of a large number of the ads.

Q. Okay. And it can bring the message -- the messages that you've bulleted there to the potential purchaser, correct?

A. It is certainly a part of the process.

Q. Okay. Okay. Now, turning back in your report to page 3, and, again, the report is PX 158. I wanted to draw your attention to paragraph 5, at the bottom of

page 3, the third point there. You've got a number 3 in parens. It's the sentence that starts there and continues on to page 4, states, "Readers and hearers are generally encouraged to investigate that scientific research and draw their own conclusions."

This is your view of what the -- some of the communications convey to the readers and hearers, that they are encouraged to investigate the scientific research and draw their own conclusions?

A. Yes.

Q. All right. Are you suggesting that POM's ads told consumers -- or, I'm sorry, told viewers that they should do independent research?

A. Did you -- was your word "told"? Could you step a little closer to the mic, maybe, or --

Q. Yeah.

Are you suggesting that POM's ads communicated to viewers that they should do their own independent research?

A. If by "independent research" you mean they should set up their own medical lab, certainly not. If it means that they are encouraged, I think is what I said, to investigate the scientific research as -- as summarized or in some cases documented -- otherwise documented on the Web site.

Q. I see. And so you had in mind that the ads would -- would have the viewers go to the POM Web sites to look at the scientific research. Is that correct?

A. Yes.

Q. Okay. Now, do you know what scientific research was made available to viewers on the POM Web site?

A. Do I know -- I guess the answer is yes, I have a general sense of what was available.

Q. Okay. And do you have any idea what proportion of the totality of POM research was available on POM Web sites for viewers to look at?

A. Well, the -- the research was ongoing, so I suppose at different times, there would have been different amounts that were available on the Web site I've seen.

Q. Okay. So, at one point in time, all the research that had been conducted to that point in time, do you know what proportion of that research was available on POM's Web site for viewers to look at?

A. No.

Q. Okay. And if some of the research was not available on the Web site, would you agree that it's hard for the viewers to then investigate and draw their own conclusions?

A. No.

Q. And why not?

A. I think it's possible to investigate and draw your own conclusions from the material that was present.

Q. But they wouldn't know about the material that was absent, would they?

A. I don't know that there was any material that was absent.

Q. And if material was absent, they wouldn't know the totality of science that was available to reach a conclusion. Isn't that correct?

A. They certainly wouldn't -- I mean, to that extent, they would not know the totality.

Q. Okay. And then, again, looking at your report on page 4, and, again, I'm looking at the second sentence that begins, "Moreover," at the top of page 4. And it states, "Moreover, POM Wonderful Communications often announce that the scientific research that readers and hearers are presented with has been sponsored by POM Wonderful, thus suggesting that the reader or hearer should weigh them for possible bias."

That was your conclusion, as I've stated?

A. Yes.

Q. Okay. Now, can you give me an example of where in POM's communications it was suggested that the viewer should weigh the research on POM for bias?

A. I -- I don't have any --

Q. What types of phrases --

A. -- any ads before me. What kind of phrases
might be --

Q. Um-hum.

A. I -- I don't recall any particular phrases.

Q. All right. Now, there were references into the
POM ad -- I'm sorry. Strike that.

There were references in the POM ads that the
products are backed, let's say, by 23 million in --
dollars of medical research. Do you recall that kind of
phrase?

A. Yes.

Q. Okay. And is that the type of phrase that you
think suggests to viewers that they need to weigh the
research for bias?

A. What type of phrase?

Q. A phrase that the POM Juice, for example, or the
products, as I just stated, are backed by 23 million in
medical research.

A. Well, that brings to mind the -- the -- the
obvious implication that -- or inference, I guess, that
they are reporting research that they have -- that they
have sponsored. And this is a -- a warning flag to any
reasonable reader.

Q. It's a warning flag about what to the reasonable reader?

A. It's a warning flag of -- of the potential for possible bias; that is, if they were paying for the research that then demonstrated the positive effects of antioxidants, and the antioxidants were communicated to the people by -- were distributed to the subjects by pomegranate juice, this is at least potential for -- for collusion or bias.

I don't think it's a very important part of my report, but it is -- it is part of the total effect or the total -- the total -- the total possible inferences that one could draw from the ads.

Q. Okay. And what is the basis for that conclusion, that consumers -- I'm sorry, that viewers of the ad would take the inference that there's bias?

A. There's a -- a long-standing sort of cultural, deeply rooted suspicion of people who use their own money to investigate their own products. I think a lot of this may have come out of the tobacco industry in the days when the tobacco industry was investigating the relationship between tobacco products and -- and health.

The -- a completely unbiased -- above-suspicion, unbiased approach would be to have your research done by somebody who's totally independent. Now, that doesn't

mean that this wasn't. It just means that this is a possible -- this is one possible red flag that could come up in the minds of someone reading a -- the ads.

Q. I see. And is your basis about the long-rooted cultural -- I'm sorry, I don't have the realtime in front of me -- is that based on any academic literature discussing, for example, tobacco ads and statements about studies they had conducted or something like that?

A. No. I didn't -- I didn't do -- I didn't do my own study, and I didn't con -- consult any other scholarship particularly on what people might believe about people who sponsor ads on their own -- sponsor research on their own products. This is an assumption I made as a member of -- of our culture.

Q. Okay. Now, if I could show you -- it's Volume 2 of the trial transcript in this matter, to lay a foundation. This is the testimony of Mrs. Resnick on page 251 of the trial transcript, and we're looking at lines 13 through 21.

The question that was put to Mrs. Resnick (as read):

"QUESTION: What was the purpose of putting the amount of money that the companies had spent in medical research into the ad?"

And her answer:

"ANSWER: There was a shorthand way, which you always look for in advertising, a very direct way of communicating to consumers that there was a natural food that had gone through rigorous scientific testing and that we cared enough to do this and we wanted to tell people that we had and continue to do scientific research."

And so looking at her testimony, does that in any way change your opinion about the -- what a viewer would take from seeing a sentence in an ad that said, for example, "Backed by 23 million in medical research"?

A. No. What Mrs. Resnick's motivation was is totally irrelevant to what someone might -- whether her -- and whether her goal was successful or not, whether her goal was successful or not. I'm looking at the ads. I'm not looking at what she may or may not have thought that she was doing.

Q. Okay. And the bias is your inference that's drawn from the express phrase "backed by 23 million in medical research," as an example?

A. Right.

Q. Okay. Okay. And then if we could look at page 43 of your report. And here, I want to look at the first full sentence on that page that begins with the word, "POM Wonderful communications voice a sense of

responsibility for promoting health, an assertion that they back up by pointing to the millions of dollars they have spent on medical research."

And so here it seems that your conclusion is that actually, the inference from backed by, say, 23 million in medical research, is that POM is voicing a sense of responsibility for promoting health.

Is that also an inference that one can take from the "backed by 23 million in medical research"?

A. That's what the -- that's what they -- what they are saying, and that is another possible inference from this, yes. I think it cuts both ways.

Q. Okay. And this is what you're saying in your conclusion, that POM communications voice a sense of responsibility, correct?

A. They -- they voice a sense of responsibility in saying that we put all this money into medical research. At the same time, someone can look at that statement and say, "Well, yeah, this is -- there is a chicken in this -- there is a wolf in this" -- whatever the phrase is, "There's a fox in this henhouse," I guess.

Q. Okay. But you would agree that one of the inferences is, as you've stated here, that it provides responsibility for promoting health in terms of what a viewer would take away from "backed by 23 million in

medical research," as an example?

A. That's a possible inference as well. It certainly -- one can infer that that's their claim. Whether one is going to be cynical about it or not is another matter.

Q. Okay. But in your sentence on page 43, you're giving the opinion that it creates a sense of responsibility. That's the inference, correct?

A. No. I say they are voicing the sense of responsibility, I think, don't I?

Q. Right. Meaning a viewer would understand that to be the case?

A. I think a viewer could say, "Well, they're voicing a sense of responsibility, but then, you know, after all, they are sponsoring this research about their own product."

Q. Okay. Now, do you recall at your deposition that you stated that you believed that humor and parody in POM ads blocks any communication to reasonable consumers that drinking POM Juice treats, prevents, or reduces the risk of heart disease, prostate cancer, or erectile dysfunction?

A. I don't remember the specific details of my deposition. That sounds quite reasonable.

Q. Okay. Well, let's make sure we're on the same

page.

A. Sure.

Q. And so we'll put up PX 350, which is the deposition transcript, and if we could look at page 62, and this is line 17 through 22. The question is:

"QUESTION: Is it your opinion that the humor and parody in POM ads blocks any communication to reasonable consumers that drinking POM Juice treats, prevents, or reduces the risk of heart disease, prostate cancer or erectile dysfunction?

"ANSWER: Yes."

So, that's basically your opinion, that the humor blocks these messages to the viewer. Is that correct?

A. Yes.

Q. Okay. And, again, I want to show you a page from Mrs. Resnick's book, Rubies in the Orchard, which is CX 1 at page 20 of the exhibit.

And here, Mrs. Resnick states, "If we can make you chuckle, we have an opportunity to connect with a more serious message grounded in our brand's identity and intrinsic value."

Do you see that statement?

A. Yes.

Q. Okay. And then I wanted to show you one more

statement that she had. This is from her deposition, CX 1359, page 242. Let's see, is it page 242? Yeah, on page 242.

Here, she states that "If you can make someone laugh or cry, you've broken through, and you know how many tens of hundreds of thousands of messages you're bombarded with every day of your life. So, if you can elicit an emotion from someone, their guard goes down a little and they listen to you."

So -- have you had a chance to look at that?

Okay.

A. Yes, I have.

Q. All right. So, do you agree with Mrs. Resnick's views that humor can get a message through to consumers in her marketing, breakthrough the clutter, so to speak?

A. Are you talking about the second quote now?

Q. And her first quote, where she said that if she can make you chuckle, we have an opportunity to connect with a more serious message grounded in the brand's identity.

A. Could you put that back on the screen?

Q. Sure.

A. It would be a lot easier for me to answer your question if you ask them one at a time.

Q. Okay. We can go back to the first one.

So, her statement here about making you chuckle, it gives an opportunity to connect with a more serious message, do you disagree with her view that that's how humor can be utilized in advertising, in her ads?

A. In the ads that I've looked at, I think the humor has the effect of -- one of the effects of the humor is to capture the -- the attention of -- of the viewer --

Q. Um-hum.

A. -- and to help them connect with a more serious message that's grounded in -- in the ads, which are -- which is what comes in the printed portion of most of the ads, and basically -- well, it tells us that pomegranate juice contains antioxidants, and antioxidants fight free radicals, and free radicals are known to -- are thought to -- heart disease -- to cause -- to cause disease.

Q. Okay. So, that's one example of the body copy --

A. Yeah.

Q. -- that you would see, because her humor would allow you to breakthrough and then draw your attention to the body copy in the ad. Is that correct?

A. I think that's how they work, yes.

Q. Okay. I want to look at a couple examples now

of advertisements that you analyzed, and -- in your report. And the first one is a hangtag, which is marked in this matter as CX 1426-00027. 1416? No, 1426. So, it's 1426-00027.

What I'd also like to do, if I could approach the witness, Your Honor, and give him the actual -- the original hangtag, because all of the copies have been difficult to read, and I think it would help the witness if he could have the actual original bottle and hangtag.

JUDGE CHAPPELL: Go ahead. Is that a new, full bottle?

MS. HIPPSLEY: Yes. And it's not refrigerated, so don't drink it. It's been out of the refrigerator for a few days.

THE WITNESS: Okay.

BY MS. HIPPSLEY:

Q. Okay. And so CX 1426-00027, this is the hangtag that you analyzed in your report, correct? And if you want, you can compare it to your report at page 8 of PX 158.

A. Page 10?

Q. Page 8, I believe. Let's see. It's the -- ah, the picture is on page 10. I'm sorry.

A. Yeah, okay. All right. This is approximately the same one. I'm not -- there was a little bit of a

problem with the -- the fourth -- the fourth page, whether I -- I actually reproduced the right thing or not, but that's --

Q. Okay.

A. It's generally the same thing, yeah.

Q. Okay. All right. So, let's start with the statement in your report, at page 8, at the bottom of page 8, where you start the discussion on the POM Wonderful hangtag, and the statement, if we could put that up on the screen. Okay.

The sentence starts -- that I'm drawing your attention to, the "Because." It starts on page 8 and goes on to page 9. "Because hangtags are small and will engage the concerted attention of relatively few potential purchasers," and it goes on on page 9 to say, "a hangtag offers somewhat limited opportunity for public communication (as compared to, say, newspaper ads or television commercials)."

And what is the basis for that statement?

A. The basis for saying that hangtags are small?

Q. And will engage the concerted attention of relatively few potential purchasers, et cetera.

A. I -- I certainly did not do any research on how many people read the hangtags before they bought bottles of POM Wonderful or anything else. This is really

pretty much just common sense.

Q. All right. And are you familiar with the term, in your role as a linguist, of "POS" or point-of-sale marketing?

A. I'm familiar with that term from -- as it -- as a term that's often used in trademark litigation. I don't know whether that's a term of art in the law or whether that's a term of art in marketing, but I have some sense of what that means, yes.

Q. Okay. And the hangtag would be considered point-of-sale marketing, right?

A. I assume so, yes.

Q. Okay. And do you know anything about the use of point-of-sale marketing and its effectiveness in engaging the attention of potential purchasers?

A. I have no professional knowledge.

Q. Okay. So, let's -- in your opinion, if the company's objective in using hangtags is to influence purchase selection at point of sale in order to increase sales of POM Wonderful Juice, you're saying you don't think it will work, because relatively few purchasers will look at it?

A. No. That isn't what my paragraph says. It's basically just a concession that what I'm looking at may be less important than -- may be less important -- than

print media, which would be seen by thousands of people or maybe less important than television commercials, which potentially might be seen by millions of persons, but I'm not saying it's unimportant. I think it would -- it's just a concession that I'm beginning with something that may be less important than some of the other things that I'm going analyze, or it may not.

Q. Okay. All right. And, again, you don't have any basis for your assessment that it might be less important than print advertisements.

A. It -- it doesn't change my opinion one bit.

Q. But you don't have any basis for that statement.

A. Any basis for my statement that?

Q. That it's less important than print advertisements.

A. I have no scientific evidence.

Q. Okay. Now, are you aware that POM Wonderful had an entire ad campaign that was centered around POM Juice as the superhero?

A. Yes.

Q. All right. And now, if you look at the cover of the hangtag -- and if we could put it up back, CX 1426 -- the cover of the hangtag shows -- and I think, as you stated in your report, that POM Juice has super health powers and that this is the dominant theme

of the hangtag. Is that correct?

A. Yes.

Q. Okay. And, in fact, the overall messaging of the hangtag reflects the tone and spirit of POM's superhero advertising campaign. Would that be a fair statement?

A. Yes.

Q. Now, if you look at the inside top panel of the hangtag, where it states, "100% pure pomegranate juice," you would agree that the messaging in that panel is expressly that it's 100 percent pure, 100 percent authentic POM Juice. Is that right?

A. That's what it says.

Q. Okay. And that is what's being communicated to viewers of the tag.

A. Well, you didn't mention that it says it's heroically healthy.

Q. I was just about to get there.

And it also expressly states that it's "heroically healthy." Is that right?

A. That's what it states, yes.

Q. Okay. And I believe that you state in your report that the hangtag -- if you look at the bottom of page 9 of your report, paragraph 14 -- that basically the hangtag is stating -- describing POM Wonderful Juice

as extremely healthy and identifying a commitment to providing healthy products to the public, that sort of thing, correct?

A. I don't see that particular language, but perhaps you --

Q. It says, "providing -- thus, in describing POM Wonderful juice as extremely 'healthy' and identifying a commitment to providing healthy products to the public as a company 'commitment.'"

So, in other words, it's conveying that it's an extremely healthy juice. Is that right?

A. Well, you skipped around here or something. "Thus, in describing POM Wonderful juice as extremely 'healthy' and identifying a commitment to provide healthy products to the public as a company 'commitment,' the hangtag merely repeats and references conventional wisdom with respect to fruit juices in general, albeit in hyperbolic language: 'Super health powers!' -- and highlighted by an eye-catching red background."

Is that the sentence --

Q. Yes. So, in other words, you chose the words "extremely healthy." Those aren't on the hangtag, correct? It says "heroically healthy," and you translated that, I presume -- and that's what I'm asking

you -- that in your view, viewers would say that the juice is being described as extremely healthy.

A. I mean, heroically healthy is really a metaphor. This is an anomalous -- semantically anomalous sentence, in a way. So, yes, it has to be translated into something --

Q. And you translated it into a message of extremely healthy, correct?

A. Yes.

Q. Okay. All right. So, now, let's look at the next phrase on the hangtag, which is the next panel, the inside panel, that starts, "Backed by 25 million in medical research." So, you can see that on the hangtag, which is 1426-00027. And I wanted to turn to page 12 of your report, where you go into some analysis.

So, first, let's just make sure we're on the same page. The second part of the hangtag there, the inside panel, states, expressly, "Backed by \$25 million in medical research," correct?

A. Yes.

Q. Okay. And on page 12 of your report, you state that the -- in paragraph 16, that "in three sentence fragments, the hangtag continues its explanation that POM Wonderful is socially 'committed' to promoting health in America, averring that the company is 'proven'

to have engaged in the 'fight for cardiovascular, prostate, and erectile health' by 'back[ing],'" and you've got the I-N-G in parens there, and "'sponsoring \$25 million in medical research.'"

Now, you have quotes around the word "backing," but the tag says "backed." Isn't that correct?

A. Yes.

Q. Okay. So, what did you mean when you put quotes around backing? That's not a direct quote from the hangtag, correct?

A. Well, the "ing" is in square brackets, which indicates that I merely made a grammatical emendation in order to fit into the syntax in my sentence. It doesn't -- it doesn't change anything. I mean, it's quite clear with the brackets there that I made an emendation, and that's just sort of standard orthographic procedure.

Q. Okay. So, you're changing backed to backing?

A. Yeah.

Q. Okay. And then the next quoted word choice there in your report on page 12 is "sponsoring \$25 million in medical research." And sponsoring 25 million in medical research is not anywhere on the hangtag, correct?

A. \$25 million in medical research is -- as I

explained at my deposition, I'm sure that I remember this -- there is a typographical error here, and the quotation mark should come before the dollar sign in the fourth line, rather than before the word "sponsoring." Sponsoring is a paraphrase.

If you back something or if it's backed by you, then you're sponsoring it. It's a paraphrase, but it -- it is not in the -- it is not actually on the hangtag. And I just simply made a typo there, and I apologize for that, but it was -- it doesn't really change anything.

Q. Well, you then go on in this paragraph to state that the terms that you just paraphrased, "backing" and "sponsoring," means that the reader of the tag would know the medical research is ongoing.

Backed is the past tense, correct?

A. Well, actually, backed is the past participle or present -- past participle there. It doesn't -- it doesn't indicate that it's not ongoing.

Q. But it doesn't indicate that it is ongoing, correct?

A. Well, I guess I -- a slightly more technically accurate rendering of the tense would be by having backed and having sponsored \$25 million in medical research. But the -- there is certainly nothing there that suggests that the \$25 million in medical research

is not ongoing.

Q. But there's nothing to suggest it is either.

A. That's correct.

Q. Okay.

A. That's correct.

Q. And is it your view that viewers of this ad could interpret "backed by 25 million in medical research" as communicating that the research is complete?

A. Well, it -- it could -- it could be -- it could be taken to mean that there would never be any more research and it's -- that it's complete.

Q. Okay. And could it also be interpreted that if it's complete, an inference would be that there are final results from the research? Wouldn't that be correct?

A. Well, not necessarily. I mean, the research could -- the -- people could have stopped the research, I suppose, at some kind of -- at some stage.

Q. Right. But the term "backed," wouldn't that infer to a viewer of this ad that there's a result? They didn't say "stopped 25 million in medical research." They said "backed." And wouldn't backed -- a reasonable inference be that there is completed research with final results?

A. I think you could infer either one. It's either backed -- that there will never be any more, or you could certainly infer that this is -- that this is ongoing; that is, it just says up to this point, at this time, the research that we have is -- is at the extent of \$25 million. It doesn't really tell us what comes next.

Q. Okay.

A. It's just up to this point, this is what has happened.

Q. All right.

If I could have the court reporter read the question back, and if you could listen to the question again and see if you could answer the question I'm asking.

(The record was read as follows:)

"QUESTION: But the term 'backed,' wouldn't that infer to a viewer of this ad that there's a result? They didn't say 'stopped 25 million in medical research.' They said 'backed.' Wouldn't 'backed,' a reasonable inference be that there is completed research with final results?"

THE WITNESS: No.

BY MS. HIPPSLEY:

Q. Okay. And you think -- your answer would be

that no viewer would interpret the "backed by 25 million in medical research" as having completed results?

A. That is -- that it's over and done with and that there may -- that there be no more --

Q. That's not what I'm asking, sir.

A. Okay. What are you asking?

Q. I'm not asking over and done with and not any more. I'm asking if a reasonable viewer of the ad could infer that there is completed research with results available at that moment in time.

A. If there is completed results available at that time?

Q. Um-hum, backed by 25 million in medical research. Not that it's over for all time. That's your inference.

A. Okay.

Q. My inference is backed by 25 million in medical research, could that infer, to a reasonable viewer, that there is completed research with results?

A. It -- it -- a reasonable reader could infer that there are studies that have been completed.

Q. And have results?

A. And have results. Whether they're preliminary or not, it doesn't say, but has results, yes.

Q. Okay. And then going back to your report on

page 13, the middle of the page. It's the sentence just above paragraph 18, if we could show that.

And here, you have a statement, "In addition, the suggestion that the 'medical research' (as reported on the indicated website) is funded by POM Wonderful itself induces a note of amused skepticism."

Are you with me on where I'm looking at in the report?

A. Yes.

Q. Okay. Now, first of all, on our hangtag, where is it that you get the sentence -- where is it that you get the interpretation that the suggestion that the medical research, as reported on the indicated Web site, is funded by POM? There is nothing on the hangtag that indicates backed by 25 million in medical research is funded by POM in that little circle there, is there?

A. You're talking about the third quadrant or are you talking about the fourth quadrant?

Q. The "backed by 25 million in medical research" quadrant.

A. Well, you're right. It doesn't say "backed by our \$25 million in medical research" or "backed by \$25 million that we've put up," you're absolutely right. It doesn't say that.

Q. Now, in your view, does medical research have a

positive connotation for viewers of that term, based on that research you had done in the article we had looked at earlier today about informed consent for medical research?

A. Well, I don't -- I don't remember that article very well. That was a long time ago.

Q. Okay. Well, we -- we can --

A. My -- my --

Q. Do you want -- I can bring it up to refresh your recollection.

A. I think that might be useful.

Q. All right. So, again, the article was CX 2067.

Can I provide a hard copy of the article, Your Honor?

JUDGE CHAPPELL: Go ahead.

BY MS. HIPPSLEY:

Q. Okay.

A. Thank you.

Q. And if we look at CX 2067, page 14, and it's actually page 162 of the article. And if you look at the first paragraph of the article there, at the top of the page, it's a spillover paragraph, so it starts with "subtle," and if you go back midway through the paragraph, it states, "Second" -- do you see where I am?

A. Yes.

Q. Okay. "Second, medical research and medical studies carry favorable connotations that would predispose subjects towards research participation." It then goes on to say, "All three words -- medical, research, and study -- have highly positive connotations, and as a modifier, 'medical' especially seems to be strongly associated with treatment."

So, does that refresh your recollection that medical research has a positive connotation for viewers of that term?

A. Yes.

Q. Okay.

And, in fact, in this article you also noted that the term "medical research" had no negative associations. Isn't that correct?

A. That seems reasonable. I -- again, I haven't reviewed the article, but I've -- I am sure your summary is --

Q. Okay.

A. -- I am sure your reading of my work has been exemplary.

Q. It's a very good article. All right.

And, again, looking at that article, if I could have you look at page 11, which is article page 159. And if you could look at the -- let's see, one, two --

the third paragraph, the sentence -- I'm sorry.

The third paragraph, the sentence that starts, "Therefore, the use of the term medical research" --

A. I'm sorry. Is this page 11?

Q. CX 2067, page 11, but it's page 159 at the top.

A. Yeah. I'm not finding the third paragraph.

Q. Okay, let me see. The -- I guess I should say the second full paragraph.

A. Oh, thank you.

Q. All right. And at the last sentence of that third paragraph, it starts with the word "Therefore, the use of the term medical research" -- do you see that?

A. Yes, I do.

Q. Okay, thanks.

"Therefore, the use of the term medical research by persons attempting to gain truly informed consent from research subjects should be viewed with caution except in situations where the outcome is highly predictable and the risks are decidedly minimal."

And so the positive connotation of using medical research is that the viewers see medical research as having a highly predictable outcome. Isn't that also correct?

A. No. That isn't what this says.

Q. All right.

A. This says that the -- if the researcher feels that the study that he or she is trying to get subjects for has minimal re -- minimal risks and has highly predictable outcome, then using the term "medical research" is perhaps justifiable, but otherwise, it might be sucking people in to using -- into enrolling in a study that was really quite dangerous or that the outcomes of which were not predictable.

Q. Okay.

A. So, it has to do with the attitude of the -- of the researcher.

Q. The attitude of the researcher or the attitude of the viewer, understanding the term of "medical research"?

A. Yeah, whether the -- the phrase "outcome" is highly predictable and the risks are decidedly minimal. This doesn't mean the subjects are going to see medical research as highly predictable where the risks are decidedly minimal. It only means that people see medical research as a positive -- as a positive term.

Q. Um-hum. Okay. And so the researchers should be cautious if it doesn't sort of meet -- the research doesn't meet a certain parameter. Is that correct?

A. You don't want to use really positive phrases if you're getting people to take -- to get enrolled in

studies that are -- are not very likely to succeed.

Q. Okay. Okay. Now, if we could go to the next phrase of the little hangtag there. And it says, on that quadrant, "Backed by \$25 million in medical research," and it says, "Proven" -- I want to focus on the sentence that states, "Proven to fight for cardiovascular, prostate, and erectile health," okay?

And, again, proven is the past participle use of the verb prove, correct?

A. Yes.

Q. Okay. And so, again, isn't it a fair interpretation that here, with these two sentences together, "Backed by \$25 million in medical research. Proven to fight for cardiovascular, prostate, and erectile health," that there is 25 million in research that has results completed that have proven that POM Juice fights for cardiovascular, prostate, and erectile health?

A. That's what the two sentences say.

Q. Okay.

A. "Backed by \$25 million in medical research" --

Q. Okay. All right. And, again, you agreed that the theme of the hangtag is personification of the juice as a superhero, right?

A. Yes.

Q. Okay. But is it also your view that it's unlikely that any viewer would take from this phrase, "Proven to fight for cardiovascular, prostate, erectile health," that they're unlikely to take away from that that there's proof that POM Juice has these benefits?

A. You're leaving out the -- well, two things. One is that you have to look at the tag as a -- as a whole and not just isolate sentences, and the -- the --

Q. Right.

A. -- theme, once again, is the theme of the -- of the superhero. So -- and then this phrase "to fight for" in itself -- it doesn't say proven to improve cardiovascular, doesn't say proven to treat, doesn't say any of -- doesn't make any medical claims.

What it makes is it's claims within the framework of the superhero and the verb "fight for," which is not something that people are going to take as anything other than -- than hyperbolic, so that the -- so you don't take away from this that it is proven that if you drink pomegranate juice, it's going to treat cardiovascular, prostate, and erectile disease, or even give you cardiovascular, prostate, and erectile health. It will merely fight for.

Q. Okay. Could you -- could a viewer -- a reasonable viewer interpret that phrase to mean that it

improves your odds against -- well, let's -- strike that.

That the phrase could mean it improves your odds of maintaining your prostate health?

A. I think that's a little -- I think that's close to a possible inference; that is, if -- pomegranate juice is like any -- you know, any -- anything else that's good for you. It could -- it could improve your -- it could improve the odds of -- of some people for having better cardiovascular health in some -- in some -- in some general way.

It doesn't say that it's going to do it for everybody, and it doesn't necessarily say it's going to do it for the person who buys this -- this pomegranate juice. But we do know that pomegranate juice is healthy and that it has antioxidant powers, as we've seen in the previous quadrant, and that it -- it's a -- you know, it's a very, very healthy substance, better than blueberry juice or whatever else they have over there in the --

Q. On the back of the hangtag?

A. -- on the back of the hangtag.

Q. Okay. And do you think you could interpret -- a viewer could interpret the phrase "fight for prostate health" as reducing the risk of or reducing the risk of

prostate cancer?

A. Well, there are all kinds of things that can go wrong with your prostate, and cancer is certainly one of the worst ones, but it fights -- it just says that it fights for prostate health.

Q. Okay. And did you do a Google search on the term "fight for prostate health," as you did on some of these other phrases when you did your analysis?

A. I can't remember. The -- I have one footnote here where I did do a Google search of -- I thought it was fight, fight for -- no, I'm sorry. It was defend.

Q. Okay.

A. So, I did not do a Google search for "fight for." "Fight for" means if -- you may win or you may lose, but if I -- if a senator says he's going to fight for a certain bill, that doesn't mean that he's guaranteeing that he's going to get it.

Q. Okay. And is it your view that POM Juice, as the noun for "fight for prostate health," doesn't make much sense, because it's an inanimate object? I believe that's what you stated in your report.

A. That's one of the -- yeah.

Q. But isn't it a personification, so that it's just a turn of phrase and -- not literally, but that POM Juice could provide benefit, let's see, to reduce the

risk of prostate cancer?

A. It is a personification, and within the framework of the personification, that's why you have the words "fight for."

Q. Right.

A. And I guess I don't understand the question.

Q. Well, POM Juice fighting for prostate health could infer a benefit. Isn't that correct?

A. One can -- one can infer some kind of a health benefit, yes. It's healthy stuff.

Q. Okay. All right. And so if I could show you, we actually did a Google search on the phrase "fight for prostate health," and I'd like to show you that. We've marked it as CX 2086.

And as you can see, there were about 14.9 million results when we put in the term "fight for prostate health." And if you just want to glance through that --

Could we approach with a hard copy, Your Honor?

JUDGE CHAPPELL: Go ahead.

MS. HIPPSLEY: Okay.

BY MS. HIPPSLEY:

Q. Just take a minute to glance through it, and then I'll ask a couple questions.

A. (Document review.)

Q. And have you had a chance to look through it?

A. I glanced at it, yes.

Q. Okay. And so you can see that with all these hits, 14.9 million, that this turn of phrase, "fight for prostate health," is fairly commonly used to personify products that fight for prostate cancer. Wouldn't you agree?

A. No.

Q. And why not?

A. Well, I don't see any examples, at least on the first page, of "fight for prostate health," or cardiovascular health or any of the other "fight fors." They say fighting against prostate health -- fighting against prostate cancer, which is a somewhat different use of a metaphor and somewhat more common, perhaps. I don't know. But I don't see -- you Googled for "fight for prostate health," and you don't --

Q. And it turns up -- for example, on page 1, it turns up, for example, "Ten foods that fight prostate cancer," and actually, there is a reference on the same page, "Can pomegranate pills fight prostate cancer?"

A. Well, that's a --

Q. And, again, "broccoli and tomatoes fight prostate cancer." So, Google and its algorithms have associated "fight for prostate health" with foods that

fight for prostate cancer. Isn't that correct?

A. That's a -- that really is pretty much irrelevant to the use of the word -- of the phrase "fight for health." You've got "fight against cancer." I admit that the term -- I mean, it's obvious that the word "fight" is being used in one sense here and in one sense here. And the Google search -- I think it's significant that your Google search for "fight for prostate health" turns up very few examples of "fight for prostate health." I don't see --

Q. And do you think it's significant that it turns up many uses of the term "fight prostate cancer," that that's what is associated in common culture with the term "fight for prostate health"?

A. Like I say, Google is -- Google doesn't do its searches on the basis of common culture.

Q. But that's why you used the Google search yourself in your report -- isn't that correct? -- to see what kind of common cultural understanding there is of these terms?

A. I used the Google search once to try to -- to try to find evidence for "defend," and in -- in the context of -- I forget --

Q. We will get to that.

A. Yeah, I would have to refresh on that. And it

turned up very -- you know, almost no -- almost no evidence of that particular phrase. Here, it turns up no evidence of that particular phrase. The fact that it may be associated with -- I mean, you could also find "fight tooth decay," but you won't find "fight for tooth health." It's a different -- it's a different image.

Fight against or fight in the sense of fight against, you can probably find in the dictionary a definition, but fight for is a metaphor, which is -- which is -- the Google -- the Google search that you've done is informative only to the extent that it turns up negative results.

Q. And it's not informative that "fight for prostate health" becomes, apparently with the Google search, a synonym -- if I'm using that word correctly -- for "fight prostate cancer"?

A. That's not a synonym.

Q. Okay. An analogy, to fight prostate cancer? But the point is when you put in "fight for prostate health," most of the 14.9 million returns have "fight" -- not fight against -- "fight prostate cancer" associated with that search term.

A. I -- I don't --

Q. And you don't find that significant?

A. I don't think that's significant with respect to

this hangtag, no.

Q. Okay. And then just so we can show that it did actually turn up an interesting return on page 4, there is an entry there, "The Top Tomato in the Fight for Prostate Health" was the headline in 1995 of the Baltimore Sun article explaining that tomatoes may be good preventative medicine for the prostate. And, of course, we all know about the lycopene studies that were being reported at that time. You can see the subtext there is, "Beta-carotene, prostate cancer," et cetera.

So, would a Baltimore Sun use of that headline, again, have some import on the use of that term as being commonly understood by viewers of the hangtag, that, yeah, POM Juice is fighting for prostate health, and that means that it could have some benefit for prostate cancer?

A. And what is your question?

Q. Would seeing the use by a newspaper of your term -- or, I'm sorry, of POM's term, "fight for prostate health," as a headline for an article discussing tomatoes as being beneficial in terms of prostate cancer, would that have any impact on your opinion as to what the hangtag could be interpreted to say by viewers?

A. Well, it's -- it's another use of the -- of the

metaphor that they -- that they are using here. And you have to keep in mind that this hangtag, you know, the sentence in the hangtag is within the context of the superhero -- the words heroically are used, super health powers are used on the front of the hangtag, and you can't interpret it just outside the context of the -- of the entirety. You have to look at the whole ad.

Q. Right. And I guess my point is that using personification and the superhero theme doesn't block any messages that are coming through the hangtag. It's just the tone that they chose for the ad campaign.

A. I think that the -- what was the question? I'm sorry.

Q. Well, you keep referring to the fact that the hangtag has a tone of a superhero campaign, but that's not necessarily negative in terms of what a viewer is going to take away as the message, is it?

A. No. The message that one -- what I'm suggesting or what I'm indicating or what my report, I think, concludes is that the phrase "proven to fight for cardiovascular, prostate, and erectile health" is one that says -- not that we have a cure; that "fight for" doesn't necessarily mean that you are going to win it, and that it -- that it also -- it doesn't even, you know, mean that it's going to necessarily -- doesn't

mean it's going to treat it, doesn't mean it's going to cure it.

It may, as we agreed earlier, suggest that your health -- your cardiovascular, prostate, and erectile health, you may have a lower risk of having bad cardiovascular health or it may -- it may -- it may have you have a better cardiovascular, prostate, and erectile health. It may help you. It doesn't say that it will. It just says it's going to fight for. I don't think -- I didn't say that it blocked a reading, but it certainly doesn't -- doesn't give us a reading of treatment or --

Q. Okay.

A. -- curing or anything, other than maybe it will increase your chances.

Q. Okay.

Your Honor, I'm about to move to a new ad. I don't know if you --

JUDGE CHAPPELL: All right. Let's take a break. We will reconvene at 2:25.

(Whereupon, at 1:20 p.m., a lunch recess was taken.)

AFTERNOON SESSION

(2:25 p.m.)

JUDGE CHAPPELL: Back on the record. Next question.

BY MS. HIPPSLEY:

Q. Good afternoon, Dr. Butters.

A. Good afternoon.

Q. All right. So, I'd like to show you another POM ad, and this is identified as CX 1426-00029. And it's the "I'm off to save prostates!" ad.

Are you familiar with this ad, Dr. Butters?

A. Yes, I am.

Q. Now, with this ad, do you recall at your deposition when you were asked whether reasonable speakers of English language could think saving prostates means protecting or guarding them from disease, you answered, "I do believe 'I'm off to save prostates' could mean I'm somehow going to protect them or rescue them from disease."

Do you recall giving that answer at your deposition?

A. I don't recall that answer.

Q. If we could look at PX 350, and it's page 185, lines 11 through 19, and the question was:

"QUESTION: So you don't think reasonable

speakers of English language could think saving
prostates means protecting or guarding them from
disease?"

And there were some objections, and answer, at
line 17:

"ANSWER: I do believe 'I'm off to save
prostates' could mean I'm going to somehow protect them
or rescue -- rescue them from disease."

That's what you stated during your deposition,
right?

MR. FIELDS: This is an answer that's been
corrected, Your Honor.

MS. HIPPSLEY: I am going to go through the
errata sheet, Your Honor. I am asking, right now,
during the deposition, was this his answer?

JUDGE CHAPPELL: Well, if he found an error,
then it wasn't his answer.

MS. HIPPSLEY: I am laying the foundation for
how he corrected it. I am definitely going through the
correction.

JUDGE CHAPPELL: Well, then, make it clear
you're going through the first version, okay?

MS. HIPPSLEY: Right.

BY MS. HIPPSLEY:

Q. So, during the deposition, this was your answer,

the first version of your answer, before you submitted an errata sheet. Is that correct?

A. That appears to be correct, yes.

Q. Okay. And now I'm going to show you the errata sheet for your deposition, which we have marked CX 2064, at page 1. It was not attached to PX 350 by the Respondents, but I do want to go through it anyway.

And so the errata sheet is CX 2064, if we could show that. All right, and at page 1, this is your signature. Is that right?

A. Yes.

Q. Okay. And then we'll turn to page 4, which is the relevant correction, and at page 4, we have got page 185, line 19, and there's a correction about where to put the sentences. "After 'disease' add 'but I think that that is unlikely.'" And we have actually created a slide so we could put it all together.

So, if we could show our demonstrative of page 185. So, here we have the corrected, changed version of your testimony, where you added to your answer, "I do believe 'I'm off to save prostates' could mean I'm going to somehow protect them or rescue -- rescue them from disease but I think that is unlikely."

MR. FIELDS: Correction. There is also a change in the line before that, as well, of the same answer.

After could, it says, "could be interpreted by outliers."

MS. HIPPSLEY: Oh, I'm sorry. Right.

BY MS. HIPPSLEY:

Q. So, the full correction is, "'I'm off to save prostates' could be interpreted by outliers to mean I am going to somehow protect them or rescue -- rescue them from disease but I think that is unlikely."

That's your testimony, how you want it to read after you changed it through the errata sheet, correct?

A. Yes.

Q. Okay. And by outliers, you mean unreasonable viewers of the ad?

A. Yes.

Q. All right. So, now, your view is that with the ad you're looking at, "I'm off to save prostates" -- just so we're clear, your view is that only unreasonable viewers would take a message that somehow it's going to protect or rescue -- rescue them from disease, and even that is unlikely. Is that what you mean?

A. Yes.

Q. Okay. Did you initiate this change in your testimony independent of counsel?

A. I don't remember. I just -- I don't remember.

Q. Counsel provided you, obviously, with your

deposition, and you had an opportunity to read through it and make changes. Isn't that right?

A. That's correct.

Q. Did they send you the errata sheet with the changes already on it, or did you go through and decide what you wanted to change?

A. I went through and decided what I wanted to change.

Q. Okay. Now, if we could put the ad back up, CX 1426-00029. And if I could draw your attention to the body copy, where it says, "Man by man, gland by gland, The Antioxidant Superpower is 100% committed to defending healthy prostates."

And you stated in your report that defend could also mean protect from harm. Isn't that correct?

A. I said that in my deposition?

Q. In your report.

A. Can you show me where, please?

Q. Sure. And so if we turn in your report to -- which is PX 158, at page 17, and if you look at the bottom bullet on page 17 in paragraph 22, you have a phrase there, according to NOAD, which I presume is the New Oxford Dictionary. Is that right?

A. Yes.

Q. "Defend means 'resist an attack made on (someone

or something)' and 'protect from harm or danger.'"

So, again, in your report, you gave us this definition of what defend means. Is that right?

A. The -- in the report, on page 17, I quote the New Oxford American Dictionary with respect to the meaning of defend.

Q. Okay. And you're talking about the ad "I'm off to save prostates" and the phrase "defending healthy prostates."

So, in your view, would -- defending would mean protecting from harm, right? That's what viewers could mean -- could take as the meaning from I'm off to save prostates?

A. "Resist an attack made on (someone or something) and protect from harm or danger."

Q. So, that could be seen by viewers as protecting from harm or danger?

A. That defend could be seen by viewers -- I mean, that's what it literally means.

Q. Okay. And so that could be a reasonable viewer's interpretation of that word in the advertisement.

A. Which part of the advertisement?

Q. The "defending healthy prostates." That it would mean protecting healthy prostates from harm,

correct?

A. "The Antioxidant Superpower was 100% committed to defending healthy prostates." It's committed to defending healthy prostates. It's committed to resisting and protecting -- resisting an attack and protecting from harm or danger.

Q. Okay. So, isn't it possible that this ad communicates to viewers that POM Wonderful Juice is protecting or defending prostates from disease?

A. Will you repeat the question, please?

Q. Yes. So, isn't it possible that this "off to save prostates" ad communicates to viewers that POM Wonderful Juice is protecting or defending prostates from disease?

A. It's committed to defending healthy prostates from attack or harm or danger.

Q. Right. And I'm asking you a yes-or-no question. Isn't it possible that this "off to save prostates" ad communicates to viewers that POM Wonderful Juice is protecting or defending prostates from disease?

A. Among other things, yes.

Q. Okay. Now, looking at page 18 of your report, I wanted to draw your attention to the first sentence on page 18, where you state, "Defend is not normally used to describe protecting health or curing health

problems."

Do you see that sentence?

A. Yes.

Q. All right. And then if you go to Footnote 13, which is at the end of that sentence, I think we alluded to this earlier, that you've got a footnote where you did a Google search for "defend healthy" as the search term. Is that correct?

A. Yes.

Q. Okay. And that turned up only 2700 hits, right?

A. Right.

Q. Okay. Did you do a Google search for "defend healthy prostates"?

A. No.

Q. All right. Well, we did, and so we'll put that up. It's CX 2085.

Could I approach the witness, Your Honor?

JUDGE CHAPPELL: Go ahead.

MS. HIPPSLEY: Thank you.

BY MS. HIPPSLEY:

Q. And if you just want to take a minute to look through that, and let me know when you're done.

A. (Document review.)

MR. GRAUBERT: Pardon me, Your Honor. Could I ask if the witness has his glasses? I see you're

squinting.

THE WITNESS: Oh, thank you.

MR. GRAUBERT: Okay. Excuse me.

THE WITNESS: (Document review.) All right.

BY MS. HIPPSLEY:

Q. Okay. So, first of all, when we use the term "defend healthy prostates" instead of "defend healthy," we got 89,100 results, as opposed to your 2700.

Don't you think it would be a better search to use the full phrase that you were trying to ascertain, you know, what's commonplace and how it relates -- when you did your Google search at Footnote 13, that it would be better to use the noun "defend healthy prostates," rather than just search "defend healthy"?

A. No, actually not, because what I was looking for was the relationship between defend and healthy more globally, and what happens when you use all three terms is you -- you get a lot of -- you get a lot of garbage, which is what you've got here.

Q. And so in your footnote, though, you juxtaposed another Google search you did, "defend the victims," and you did use a search where you had defend a noun. So, wouldn't it be better to then have done the Google search "defend prostates," rather than just "defend healthy," using the adjective, to juxtapose against the

amount of searches you say you received when you did "defend the victims"?

A. I don't -- no. No.

Q. Okay. And if you look at the Google search that we did, CX 2085, again, most of the items deal with a prostate defense product -- isn't that correct? -- what was pulled up with the search?

A. I'm sorry. What was the question again?

Q. That with the CX 2085 search, many of the items that were pulled up are products that claim to be a prostate defense product?

A. If you -- if you Google for healthy and -- in the context of prostate, that -- that's what you're going to turn up. If you notice, at least in the search box up above, you don't have "defend healthy prostates" in quotation marks, which is what you need to do if you want to elicit a search for "defend healthy prostates." So, you are going to get a lot of things that don't have anything to do with -- with "defend" or with "healthy" at all.

Q. Um-hum, okay.

A. So, it's really a kind of irrelevant, pointless search.

Q. Did you have quotes around the "defend for victims" search when you did it?

A. Yes.

Q. Okay. And looking again at your report on page 18, and, again, we're talking about the analysis you did of the "off to save prostates" ad. I want to show you at the top of page 18, it's the third bullet there, you state, "The expression 'there's just no telling how far...'" and the full statement in the ad is, "There is no telling just how far it will go to improve prostate health in the future," you're stating that that expression is casual -- light and humorous.

Is that right? Is that how I should read that bullet?

A. Yes.

Q. Okay. And then you go through a couple of the other phrases and, again, is basically your point through these bullets that because of the lightheartedness of these phrases, such as "There's just no telling how far... vigilant associated with Superheroes... and man by man, gland by gland," those various bullets you have, is the point that, because of the humor in those phrases, that the reader cannot discern a specific message being imparted through those phrases?

A. No.

Q. Okay. What is the conclusion?

A. The conclusion is that -- that the use of the humor indicates to the reader that this is not serious medical advice; that this is a general suggestion that the pomegranate juice is -- is healthy, is good for one's health. If you look at the context of the entire -- of the entire ad, this is -- this is the communication.

Q. Okay. And the superhero and superpower, would you agree that that's to personify superpowers, super benefits?

A. The personification is literally the personification of the pomegranate bottle, which is acting as a -- which is being compared frivolously and extravagantly to -- to a superhero, which in itself doesn't -- is a -- is a work of fiction.

Q. Right. But isn't the idea that a superhero has super powers and heroic attributes, unlike us ordinary women and men?

A. Exactly, yes. That's the exaggeration of the -- of the -- of the ad.

Q. Okay. And so in terms of the context of the ad, that this is about POM Juice, and I'm off to save prostates, this POM Juice has extraordinary powers and benefits relative to its rather ordinary antioxidant other fruit juice cousins. Wouldn't you agree?

A. The extraordinary powers of POM Wonderful has to do with the high level of antioxidants.

Q. This ad, I don't think, uses the word "antioxidants." Isn't that right?

A. Yes, it does. "The Antioxidant Superpower is 100% committed to defending healthy prostates."

Q. Oh, okay. And the antioxidant superpower is defending healthy prostates. So, again, POM Juice is a superpower relative to other rather ordinary antioxidant juices. Wouldn't you agree that's what the viewer should take from this advertisement?

A. That -- that the -- that POM Wonderful Pomegranate Juice is superior to other juices with respect to antioxidants.

Q. Right. And with superior benefits, such as, in this ad, referring to prostates.

A. Such as, in this ad, doing what?

Q. Referring to prostate benefits.

A. Insofar as antioxidants are protective of -- are beneficial to the -- to the prostate.

Q. Okay. And then looking, again, at page 18 of your report, there's a bullet -- after you discuss the vigilant -- and this bullet states, "The only note of seriousness is introduced by the footnote, about the scientific report."

And then I wanted to draw your attention to this sentence: "Indeed, the full phrase 'there's just no telling how far it will go to improve prostate health in the future,'" that phrase, which you have previously described as casual and light and humorous, strongly conveys the sense that at the present time, just what benefits POM may offer for 'prostate health' is, in reality, undecided.

So, in your view, the viewer would tease all that out of the lighthearted phrase, as you stated at the top of 18, "that it strongly conveys that the benefits are, in reality, undecided?"

A. "Just -- there's just no telling how far it will go" is certainly a suggestion of -- a strong suggestion that what is going on has been undecided.

Q. Okay. So, would you agree, then, that the statement "backed by 25 million in vigilant medical research" strongly conveys that there's 25 million in medical research on the issue of POM Juice and its prostate benefits?

A. Where -- where in this ad does it say it's backed by --

Q. Can we put the ad back up? In the body copy, it states, "backed by \$25 million in vigilant medical research."

So, just as you said the last sentence strongly conveys something about the research being, in reality, undecided, wouldn't you agree that the "backed by 25 million in vigilant medical research" strongly conveys that there is 25 million in top research, backing this claim "I'm off to save prostates"?

A. I don't -- I don't think there's any doubt that "backed by \$25 million in vigilant medical research" means backed by \$25 million in vigilant medical research. I don't think this is -- I don't think that's questionable. The word "vigilant" is an odd word to put in there, because vigilant is -- is, again, something that refers to the superhero rather than to the -- what you would normally say about medical research, and, therefore --

Q. Right.

A. -- and, therefore, that --

Q. But within that con --

A. -- that keeps us from seeing this as any kind of a definitive medical statement.

Q. So, there's -- so, the last statement is definitive, in your view, that in reality, the research is undecided, but "backed by 25 million in vigilant medical research" provides no context of the strength of the research in the context of our superhero?

A. I don't think that's what I said.

Q. I'm sorry. So, would the "backed by 25 million in vigilant medical research" connote to the viewers of this superhero ad that the medical research is strong?

A. The medical research is wrong?

Q. Is strong.

A. Is strong? It's -- it's \$25 million worth, and it's -- it's as vigilant as a superhero -- as one might expect that a -- of a superhero. The -- this -- this doesn't -- this doesn't suggest that the \$25 million in vigilant medical research is -- is anything other than what it is when you look at the -- when you look at the Web site or when you look at the footnote.

Q. Okay.

A. I don't know -- I guess I don't understand the question.

Q. All right. Okay, let's go on to another ad. If we could look at CX 34, which is the ad "Amaze your cardiologist."

All right. And do you recall that in your report, you stated that the caption, "Amaze your cardiologist," makes explicit the theme of the importance of heart health in advertising cliché language?

A. In advertising -- I didn't hear, advertising --

Q. I'm sorry.

A. -- what?

Q. In advertising cliché language.

A. And where is this statement?

Q. We can go to it. It's PX 158, page 19. And in your paragraph 24, it's sort of midway through the paragraph. It states, "The caption, 'Amaze your cardiologist,' makes explicit the theme of the importance of heart health in advertising-cliché language."

Isn't that right?

A. That's what it says.

Q. All right. And so -- all right. And then, also, if you look at the ad again, which is CX 34, you agree that the ad contains the express claim, the last sentence of the body copy, "A glass a day can reduce plaque by up to 30%!", right?

A. That's what it says.

Q. All right. And then if we could look at CX 31, which is the "Floss your arteries. Daily," ad. Again, I want to direct your attention to the body copy. This ad contains the express claim, "Just eight ounces a day can reduce plaque by up to 30%!", right?

A. Well, you're calling it an express claim. I don't know if that's a technical term or not, but it

says "Just eight ounces a day can reduce plaque by up to 30%!" So, it certainly has qualifiers.

Q. Well, let's look at that. It has an exclamation point, right?

A. Yes.

Q. And those are the express words, maybe, would be a better choice?

A. Those are the exact words?

Q. The exact words, yes.

A. Those are the exact words of the ad as you hear them, yes.

Q. Okay. Now, if we turn to your report on page 23, and if you look at paragraph 25, and it's the phrase that starts just above the bullets, that the "advertisement is properly cautious when it comes to the actual language describing the potential medical effect benefits" and -- I'm sorry, "medical effects."

Do you see that phrase?

A. Yes.

Q. Okay. All right. So, let's work our way through this. And your first bullet is that these exact words, a glass or eight ounces a day can reduce plaque by up to 30 percent, are properly cautious because they use the term "can" instead of "will."

Is that right?

A. It's properly cautious, in part, because it uses the term "can," rather than "will." And it also uses -- because it also uses the phrase "up to" other than an actual number, and it goes on to say that it's a pilot study.

Q. Okay. Well, we will get to the pilot study in a minute. But here, in your first bullet, you are referring to the "can" and "will" and the "up to" are what make it cautious.

A. Yes.

Q. Okay. And so you think that there's a discernible difference to the viewer, looking at this ad, between "can" and "will"?

A. Yes. There's a discernible difference between what -- the meaning of the word "can" and the meaning of the word "will."

Q. And in the context of the ad and the phrase about a glass or eight ounces a day can reduce plaque by up to 30 percent, in that context, you think a viewer will find a discernible difference between "can" and "will," how it's used in the ad?

A. A reasonable -- a reasonable person would discern the difference between the words "can" and the words "will" and will realize that "up to" is a qualifier. And they will also more see that this is

embedded in an ad that's -- that's absolutely hyperbolic; that the phrase "Amaze your cardiologist" is a phrase that cannot be taken literally.

No reasonable person would look at this ad and think I am going to drink eight ounces of pomegranate juice every day, and my heart will change so much that I will amaze my cardiologist. The whole context of the ad is important.

Q. Right. And you stated in your report, where we just went through a couple minutes ago, that "Amaze your cardiologist actually makes explicit the theme of the importance of heart health in the advertisement." Isn't that right?

A. I think that's correct, yes.

Q. So, looking at the whole context, you have got importance of heart health, and then you've got a very specific percentage benefit, but you think that just because the advertiser used the word "can" instead of "will," that will alter the entire meaning of the ad?

A. Not just because of "can" instead of "will," but also because of "up to" and also because of the pilot study comment in the footnote, and also because the "Amaze your cardiologist," while it does introduce the theme of -- of the importance of heart health, it nonetheless is -- is an absurd, hyperbolic way of

presenting that information, so that no reader would think that it's to be taken literally.

Q. Okay. And you are not aware of any academic research that supports your proposition that the word "can" is discernible and will reduce the effectiveness of the statement about plaque from "will."

A. I would begin with any desktop dictionary that will tell you that "can" does not mean "will" and "will" does not mean "can."

Q. But I was asking not about dictionary definitions but academic research on the subject of "can" and "will" and how it affects the ad claims in advertising.

A. Dictionary definitions are based upon rigorous academic research.

Q. And if you could answer my question. I asked, are you aware of any academic research -- journals in marketing or advertising -- that support your position that there's a difference between "can" and "will" and how it will affect people associating the strength of the benefit in the ad claim?

A. Are you talking about academic research beyond lexicographical research of the sort that I -- I mean, I thought I had answered the question --

Q. We are going to do both.

A. -- when I said I am aware of dictionary research.

Q. Okay. How about -- how about linguistic academic research?

A. There's -- I -- I don't know of any research that would directly answer this particular question. You have to look at how -- one of the -- one of the fundamental learnings of linguistic pragmatics is that you have to look at the word as used and the actual context in which it's used. And I am talking about how this is used in the context of this advertisement.

Q. Okay. Now, when you were a professor you taught a course on introduction to linguistics in which you usually covered at least a small section on advertising. Isn't that correct?

A. The -- the -- in one of the textbooks that I used, there was usually a section on advertising, yes.

Q. Okay. And I believe at your deposition, you even mentioned that you frequently used a textbook called Language Files, published by the Ohio State University.

A. Ohio State University linguistics department actually publishes that textbook, yes.

Q. And that you frequently used that textbook in your course.

A. Yes.

Q. Okay. And it had a section on language in advertising. Isn't that correct?

A. It has in the past. I don't think I've seen the most recent edition, but...

Q. Okay. Well, let's look at that document. We've marked it as CX 2068.

Could we approach, Your Honor?

JUDGE CHAPPELL: Go ahead.

THE WITNESS: Thank you.

BY MS. HIPPSLEY:

Q. And this is just the first page so that we are grounded in the -- what the exhibit looks like here, and if we could then go to page 9, CX 2068, page 9. And this section is titled "File 16.4, Language in Advertising."

So, I just want to make sure we're both working our way through the document. So, there you are. Okay, great.

And then if I could direct your attention to page 12, which was -- which is in this chapter on language in advertising. So, if we skip to CX 2068, page 12.

Here, I want to draw your attention to the first paragraph, the third line, the sentence that starts,

"There."

Do you see where I am?

A. The one -- the paragraph that begins, "One way to implicate"?

Q. No. I'm sorry. The top paragraph on page 2068-0012. It's also called page 628 at the top of the document. And the first words are, "Law to be accurate."

A. Yes.

Q. Okay. And then if you go down to the third line, there's a sentence that starts, "There is a question, then, as to how to determine the accuracy of a message in advertising: Should advertisers be responsible only for what their claims entail, or should they also be responsible for what they implicate? Usually, advertisers are held legally responsible only for the entailments. Much of the art of advertising, then, revolves around formulating claims that implicate a lot but entail little."

Okay. So, then, it goes on to state, "We will investigate some of the common techniques in accomplishing this goal." The next paragraph states, "One way to implicate a lot and entail little is to qualify very strong claims with adverbs or with modal auxiliaries (e.g. can, could, might, et cetera)."

It goes on to have you cross-reference some of these sections down here, "Where the qualifying word or words are underlined," and it gives several examples. "It could save up to 15 percent," is example number 8. Example number 6, "up to ten times stronger." These are examples of the modal auxiliaries.

And then the paragraph concludes, "In each of these cases, the maxim of quantity will encourage the audience of the advertisements to infer that a stronger claim is intended than the one that is actually entailed."

Now, do you agree with the author of this section on advertising that you've used in your classes -- you had used in your classes?

A. I would largely disagree with the -- with the ultimate concepts here. I would largely disagree with those.

Q. All right. And are you an expert in advertising, sir?

A. No. I'm an expert in linguistics.

Q. Okay. All right. And we can put that aside.

Now, in fact, if Respondents were to use cautious language, there might be other ways to go about it rather than just a "can" or "will," correct? Stronger qualifiers about the reduced plaque, 30 percent

was found in a study that had only nine patients taking the juice, for example, that would be a stronger qualifier, correct?

A. I -- you are asking me to speculate about something that's -- that I'm --

Q. I'm assuming these facts and asking if that would be a stronger qualifier.

A. There would be stronger ways of qualifying it than -- than the qualifiers that one finds here. The question is, would a reasonable viewer, a reasonable reader, ignore the difference between "can" and "will" in these -- in these particular ads and --

Q. And your personal opinion is --

A. -- and my answer is no.

Q. Okay.

A. A reasonable reader would not do that. In fact, even the -- the implications of -- of this passage in the textbook, I think, are linguistically wrong; that is, to say that the readers will overlook the language because of the Gricean maxim of quantities.

It says, "Encourage the audience of the advertisements to infer that a stronger claim is intended." Why would they infer that a stronger claim is intended than the one that is actually made? That -- that doesn't -- that's just a wrong interpretation of

the Gricean maxim of quantity.

Q. Okay. Now, I want to turn to the footnote issue for these ads. And, again, I'm looking at the "Amaze your cardiologist" and "Floss your arteries," and why don't we put up "Amaze your cardiologist," CX 34.

And I believe that you stated that part of your view on how they had cautiously presented the medical information about a cup or eight ounces a day can reduce 30 percent plaque is because the ad clearly states that the source of this statistic is a pilot study, not established medical fact, right? That's your analysis in your report? Is that right, sir, that that's one of the bases for the caution?

A. Is that what I say in my report?

Q. If you want to look back, it's on page 23, paragraph 25, in the second bullet. "The ad is properly cautious," and your second bullet is, "It states clearly that the source for the statistic is a pilot study, not established medical fact." Right? Isn't that what your report states?

A. That's what the report states on that page. I'm just --

Q. Okay. And -- and so you believe the footnote is clear, and it is not inconspicuous, because that's where the information is provided, right, that it's a pilot

study?

A. Yes. But you -- could you show me the footnote, because it is not coming out clearly on this -- it says, "Based on clinical pilot study."

Q. Right. And it's an extremely small font relative to the rest of the fonts used in the advertisement, right?

A. It's a -- it's a smaller font than the rest of the advertisement. Footnotes usually have a smallish font.

Q. Right. And this one is substantially smaller than the other fonts used, such that we both had to squint to see it, right?

A. I am not sure that I would have to squint to see it in the original, but it's blurry here, because this is a screen capture taken from a -- it's a blow-up of the screen capture taken from a -- from somebody else's ad, because this was stuck into my report.

Q. Um-hum.

A. So, it's blurry, but I don't know --

Q. And it's also in much smaller print.

A. But, I mean, we can fight about what size type it is, and I would say it's -- it's smaller.

Q. Okay.

A. It's different in size.

Q. Okay. Let's look at the other ad, CX 41. Oh, I'm sorry, that's what we had? Let's look at the "Amaze your cardiologist," CX 34.

And, again, the same point. This is where the information about -- strike that.

In "Amaze your cardiologist," the information that you rely on for caution in describing the potential medical effects is that it's a pilot study, and that information is found in the footnote. Is that right?

A. On page 20?

Q. On page 34 of -- CX 34, on the ad itself. The information about pilot study is found in the footnote, correct?

A. I'm still not sure what you're talking about, which ad.

Q. If you look on the screen, it's the "Amaze your cardiologist," CX 34, and the information that the study is a pilot study is contained in the footnote, and nowhere else. Is that correct?

A. On page 20 of my report?

Q. No. On the ad itself, if you look at the --

A. Well, I can't see which ad you're looking at. You've got -- it's blown up on the screen. You have just --

Q. Well, we can take it back to --

A. Is this the "Amaze your cardiologist" one?

Q. Yeah. We will take it back to the first page.

Yeah.

A. Okay.

Q. All right. And then we blew up the body copy.

Let's do that again.

And, again, my question is that the information that a glass a day can reduce plaque by up to 30 percent, the information that that's based on a pilot study is in the footnote.

A. Yes. The information about -- that it's based on a pilot study is in the footnote. I'm sorry. I thought I had already answered that question.

Q. Okay. I wanted to make sure we had both ads covered.

A. Well, what was the other ad?

Q. "Floss your arteries." It was "Floss your arteries" and "Amaze your cardiologist."

A. Okay, yes. They are both in the footnote --

Q. In the footnote?

A. -- that's correct.

Q. Okay. And you have not read any academic literature about advertising disclosures, such as footnotes, and their impact on the ad. Is that correct?

A. I had not at the time of -- of the preparation

of my report.

Q. Okay. And how about before your deposition?

A. I had not before my deposition.

Q. All right. And if a pilot study is described in an ad as having been published in a medical journal, that could affect how the consumer views it in the context. Isn't that correct?

A. Yes.

Q. Okay. And you have not conducted any independent research on whether and if -- so, how consumers understand a phrase, such as "preliminary" in front of the term "medical research." Is that correct?

A. I have not done any research on how the word "preliminary" is understood in the phrase "preliminary medical research."

Q. Okay, thanks.

And if there were quotes from the researchers who conducted the study alongside a description of the study, and so now we have the study, the results of the study in the ad, and quotes from the researchers explaining what the study means, could that affect how the consumers view the study and its implications?

A. It could.

Q. Okay.

A. Any time you change the context, you change the

potential of -- of interpretation.

Q. Okay. All right. And going to your report, on page 24 -- actually, the sentence begins on page 23. I want to direct your attention to your conclusion about these two ads we just went through.

So, we have the express statement, "A glass or eight ounces a day can reduce plaque by up to 30%." And your conclusion, that starts on 23 and goes on to 24, is that, "That statement only indicates that a clinical pilot study found that the clinical subjects who were studied reduced plaque up to 30% and that use 'can' have that specific beneficial effect -- not that it will."

So, you think that a viewer would be able to pull all of that inference out of looking at the ad and seeing the express statement, "A glass of POM Juice can reduce plaque by up to 30%"?

A. I think a reasonable -- a reasonable reader, a reasonable person would, yes.

Q. Okay. Okay. Moving on to another ad, I am going to show you the "Drink and be healthy" ad, and this is CX 16.

Okay, here I just wanted to draw your attention to the third bullet in the ad, with the bold print, "Medical studies have shown that drinking 8oz of POM Wonderful pomegranate juice daily minimizes factors that

lead to atherosclerosis (plaque buildup in the arteries), a major cause of heart disease."

Now, you would agree that this ad does communicate this potential benefit, right, that POM Juice "minimizes factors that lead to atherosclerosis (plaque buildup in the arteries) a major cause of heart disease," right?

A. Well, this is not an ad that I analyzed in my report, and I haven't seen it for some time. I believe that -- I mean, you have taken this passage out of context, and it says what it says.

Q. Okay.

A. I don't know how this affects the -- you know, how this fits into the rest of the ad, but it says what it says.

Q. All right. It says what it says, but I believe you testified on direct that you can also draw inferences from what statements say in an ad, not just the literal words in an ad. Isn't that correct?

A. That I can draw inferences from --

Q. Express words in an ad.

A. I -- people can draw inferences from -- both what they literally say and what they imply.

Q. Okay. And in your deposition, with the changes that you made on the errata sheet, your view is from

this statement about -- that we just looked at in CX 16, that it's unlikely that reasonable consumers will take away from this ad that drinking eight ounces of POM Juice daily would reduce the risk of heart disease. Is that correct?

A. Will you repeat the question, please?

Q. Right.

Could you read it for us?

(The record was read as follows:)

"QUESTION: And in your deposition, with the changes that you made on the errata sheet, your view is from this statement that we just looked at in CX 16, that it's unlikely that reasonable consumers will take away from this ad that drinking eight ounces of POM Juice daily would reduce the risk of heart disease. Is that correct?"

THE WITNESS: Well, I don't remember saying that in my deposition, and that's been some time ago.

BY MS. HIPPSLEY:

Q. Would you agree with that statement today, that it's unlikely that reasonable viewers will take away from this ad that drinking eight ounces of POM Juice daily could reduce the risk of heart disease?

A. I have -- I haven't -- you know, I haven't seen the whole ad. From just this one piece taken in

isolation, is that --

Q. Well, you can look at the whole ad. We can put it back up.

A. Okay.

Q. It's CX 16 that we're looking at, "Drink and be healthy." So, let me know after you have had a chance to look at it.

A. (Document review.) And so --

Q. So, I'll repeat the question.

A. Thank you.

Q. Is it your view that it is unlikely that reasonable viewers will take away from this ad that drinking eight ounces of POM Juice daily could reduce the risk of heart disease?

A. Could reduce the risk of --

Q. Heart disease.

A. -- major heart disease?

Q. Of heart disease.

A. It says that it would minimize the factors that lead to, and it talks about this in terms of antioxidants.

Q. Um-hum.

A. A reasonable viewer could take from this entire ad, I would conclude, that pomegranate juice, in general, and POM Wonderful, in particular, can reduce --

can help to reduce the risk of -- of heart disease.

Q. Okay. And the next question is, could a reasonable viewer take from this entire ad that pomegranate juice, POM Wonderful in particular, can treat atherosclerosis?

A. No.

Q. Okay. All right. Now, if we --

A. Excuse me. I am going to need to take a break fairly soon.

Q. Oh, okay.

I'm switching to a new ad, if that works, Your Honor.

JUDGE CHAPPELL: Okay. We will take a break and reconvene at 3:45.

(A brief recess was taken.)

JUDGE CHAPPELL: Back on the record. Next question.

MS. HIPPSLEY: All right.

BY MS. HIPPSLEY:

Q. Dr. Butters, I'd like to show you another ad, and this is CX 103. And if you could look at this advertisement that we're showing on the screen.

This ad shows a POM bottle inside a blood pressure cuff. Isn't that right?

A. Yes.

Q. All right. And what do you think speakers of English language understand a blood pressure cuff to be used for?

A. A blood pressure cuff is used to measure blood pressure.

Q. All right. For example, if they went in for a medical checkup, it would be in that context that you would have your blood pressure measured?

A. Some people do it daily at home.

Q. Okay. But it would also be associated with a physical or a checkup?

A. That would be one of the -- almost any time one goes to see the doctor, blood pressure is taken, yes.

Q. Okay. And do you think that speakers of English language understand that when a doctor tells them that the blood pressure is high, that that's a bad thing for their health?

A. Yes.

Q. All right. And do you think that when speakers of English language go to the doctor and the doctor tells them that the blood pressure is low, that that is better for their health?

A. Low blood pressure can be very bad.

Q. But what do you think is the common understanding when a doctor would tell a speaker of

English language that their blood pressure is -- is low?

A. If the doctor says your blood pressure is low, that would be bad.

Q. Okay. And it could not ever be associated with good as opposed to the high blood pressure, which was bad?

A. High blood pressure is bad. Low blood pressure is bad. Normal blood pressure is good.

Q. Okay. Okay. And then if you look at the headline of this advertisement, "Decompress." Is one meaning of "decompress," a cultural meaning, to become less tense, take one's ease, have less stress? Would you agree with that?

A. Yes.

Q. And would you agree that stress is known by English speakers to be commonly related to high blood pressure?

A. Stress is one of the factors that is commonly known to raise the blood pressure.

Q. Okay. So, wouldn't it be a logical inference from the blood pressure cuff around the POM Juice bottle in this ad and the headline, "Decompress," that POM Juice can help keep your blood pressure in the normal range?

A. Would you repeat the question, please. I missed

the first part.

Q. Okay.

If you could read it. I'm sorry about the acoustics. I know they're terrible.

(The record was read as follows:)

"QUESTION: So, wouldn't it be a logical inference from the blood pressure cuff around the POM Juice bottle in this ad and the headline, 'Decompress,' that POM Juice can help keep your blood pressure in the normal range?"

THE WITNESS: The -- I think that's the -- that's an unlikely inference to draw as the primary meaning of this -- of this image, with this particular headline. To the extent that one might see "Decompress" as a pun on, you know, relax, have a good time, enjoy yourself, drink POM Wonderful Pomegranate Juice, but -- but it's -- it's a gross exaggeration for anybody to think that this could literally mean drink a glass of pomegranate juice and your blood pressure will go down.

BY MS. HIPPSLEY:

Q. Okay.

A. It's not literal, in other words; it's figurative.

Q. And could it be a figurative inference, just a general inference, not literal, but indicating to the

viewer that the POM Juice would have this benefit of potentially bringing their high blood pressure back into a normal range?

MR. FIELDS: Objection, Your Honor. Is counsel asking about the whole ad or just the picture?

MS. HIPPSLEY: The headline and the POM Juice in the cuff.

MR. FIELDS: Omitting the text.

MS. HIPPSLEY: I'm focusing just on that, yes.

THE WITNESS: An apple could do it. A banana could do it. It doesn't -- it doesn't really matter what is in the image.

BY MS. HIPPSLEY:

Q. Okay. All right. And if we could blow up the body copy. And there's the text. You can read through it there. Just let me know when you're done.

A. (Document review.) All right. I've read it.

Q. All right. Would anything in the body copy change your view about whether or not this ad could infer to viewers that POM Juice could reduce someone's high blood pressure back into the normal range?

A. No.

Q. Okay. All right. If we could look at another ad, it's CX 348. And this is a POMx Pill ad. We've been talking about juice ads. The headline here is (as

read): "24 scientific studies in one easy-to-swallow pill."

Have you seen this POMx Pill ad before?

A. I'm sure I've seen it before.

Q. All right.

A. I don't think this is the one I analyze in my report.

Q. Okay. But I believe this is one that you were asked to analyze at your deposition. Is that correct?

A. I don't know.

Q. Okay. We'll get there if we need it.

So, in this ad, there's a statement right below the jar, "\$32 million in medical research. Science. Not fiction."

And then it goes on to say that "POMx is made from the only pomegranates backed by \$32 million in medical research at the world's leading universities," correct?

A. That's what I'm reading on this screen, yes.

Q. Okay. And, again, would this -- would a reasonable inference for viewers be that there is 32 million in completed research that's been done at the world's leading universities?

A. Well, again, the backed is -- is a past participle, but, you know, what's the deleted auxiliary

verbs? Has been backed by? Is being backed by? Is currently being backed by? It's -- it's --

Q. Does the next couple sentences --

A. -- it's ambiguous.

Q. All right. And what about the next few sentences there? Does that clarify it? "Not only has this research documented," past tense, "the unique and superior antioxidant power of pomegranates, it has revealed," past tense, "promising results for prostate and cardiovascular health."

A. Well, again, those are not past tense, those are past participles, and the -- the passé composé, the -- I've forgotten the name of this term for some reason, but it means up to this point, this is what has been determined, but the temporal -- the temporal context is very ambiguous. It has been -- this is the research that's been done so far. It's -- it's --

Q. So, would you agree that --

A. -- it is now backed by \$32 million in medical research.

Q. Okay. So, backed by 32 million in medical research, not only has this research documented, et cetera.

Would you agree that viewers, then, could say, up to this point, there's been 32 million in research,

and the results from the research at these leading universities reveals promising results for prostate and cardiovascular health?

A. It says that it has "documented the unique and superior antioxidant power of pomegranates."

Q. Um-hum. And it "has revealed promising results," correct?

A. And it has revealed promising results, yes. But the antioxidant power is, you know, right there in the middle, and that's certainly something that the reader is not going to blink and miss.

Q. No, of course not. But the "it" refers to the research, correct? The research has revealed promising results.

A. Yes. Promising results as a result of the documentation of the unique and superior antioxidant power of pomegranates.

Q. Okay. And then there are two studies that are discussed in the next column: an initial UCLA study on our juice, et cetera, and a preliminary study promising -- that shows promising results for heart health.

A. Is this where it says, "Antioxidant 101, emerging science suggests?"

Q. Under the column "Complicated studies.

Simplified."

A. Oh, so you are skipping the first column and going to the third?

Q. Right.

A. Okay.

Q. If you look there, I just wanted to point out that the ad discusses two studies. Is that correct?

A. It does an initial study and an additional preliminary study. But this -- I mean, this column is also in the context of the second column, also in the context of the first column. We begin with a discussion of antioxidants.

Q. Right. Okay.

A. So, I mean, you can't divorce the third column from the first or the second.

Q. No. But my question is that the third column contains two studies and the results are summarized for the two studies, "affording significant prolongation of PSA doubling times," for the initial UCLA study, is one piece of information, correct?

A. One is the initial study, and one is the preliminary study.

Q. Right. And both paragraphs are reporting out results, correct, of those studies?

A. They're summarizing results.

Q. Okay. And so this ad does not simply convey that pomegranate juice, in general, is healthy, correct?

A. It's not talking about pomegranate juice here, I guess.

Q. I'm sorry. Strike that.

This ad does not simply convey that POMx Pills, and the information about the studies on POM Juice, it does not simply convey that, in general, POMx Pills are healthy, does it?

A. It conveys that -- the sense that pomegranate juice is healthy and that pomegranate juice contains the same antioxidants that are found in the POMx super pill, the antioxidant super pill.

Q. Um-hum. And, again, the ad provides more information than simply that POMx or POM Juice is a healthy product.

A. That's -- that's what it is conveying, that it is a health product.

Q. Okay. Isn't more conveyed; for example, that there are 24 scientific studies?

A. Twenty-four?

Q. In the headline.

A. Well, I can't see the headline from what's on my screen right now.

Q. I'm sorry.

A. And what is the question?

Q. This ad does more than just talk about the products being generally healthy, correct?

A. It talks about more than being generally -- than the -- that the product is more than just generally healthy. It gives some suggestion of what the product could do; and that is it could supply anti -- antioxidants, which emerging science suggests is good for you.

Q. Um-hum. And it -- and doesn't it also convey that there are 24 scientific studies on the products?

A. The headline says "24 Scientific Studies," yes.

Q. And wouldn't a viewer find it reasonable to believe that the headline is accurate, that there must be 24 scientific studies on POMx?

A. Yes.

Q. Okay. And the ad also conveys specific health benefits that are being studied in these results -- study results that are reported here, right? That there is an initial study that would show benefits for prostate health. Isn't that correct?

A. The juice -- the UCLA study on the juice found hopeful results for prostate health, statistically significant prolongation of PSA doubling times.

Q. Right. So, isn't it reporting out results for

prostate health?

A. It's reporting out --

Q. Potential -- the ad conveys information about a potential benefit for this product. One of the benefits of POMx is hopeful results for prostate health, correct?

A. One of the results --

Q. Benefits.

A. -- that it is reported as promising?

Q. One of the benefits of POMx is hopeful results for prostate health.

A. One of the benefits of POMx is that it may help with prostate health.

Q. Okay. And there's a cite, it explains, "Significantly significant prolongation of PSA doubling times, according to Dr. Allen Pantuck, in Clinical Cancer Research."

Do you think it is reasonable for viewers to equate hopeful results for prostate health to mean hopeful results for preventing prostate cancer?

A. No.

Q. Even though it discusses the results as prolongation of PSA doubling time and the journal as Clinical Cancer Research? You don't think there's any inference about what prostate health means?

A. What it says is that it statistically

significantly prolonged the PSA doubling times in this initial study, which suggests that there will be other studies to confirm or disconfirm this finding. The relationship between that and preventing prostate cancer is -- is -- is not inferrable from this particular passage that's filled with all of these qualifiers.

Q. But the term "prostate health," there would be an inference that "prostate health" is inferring prostate cancer, that it's some benefit for prostate cancer.

A. Not necessarily, no.

Q. Even though it's reporting about PSA doubling times and citing the Clinical Cancer Research journal? What else do you think the results for prostate health could mean in this context?

A. Mean -- and what is your question?

Q. That in this context, prostate health -- hopeful results for prostate health, a viewer could infer that it's hopeful results for prostate cancer.

A. One could infer that hopeful results for prostate health have to do with any kind of health problem that one might have with one's prostate.

Q. Any kind of health problem.

A. Yes.

Q. Despite the context that they're giving you a

report that was published in the Clinical Cancer Research and it's discussing statistically significant prolongation of PSA doubling times?

A. Yes.

Q. Okay. All right. And then I wanted to show you -- it's CX 351. This is another POMx ad. In this ad, you --

A. Excuse me. Did you say 351?

Q. CX 351, and it's the POMx ad, "The only antioxidant supplement rated X."

A. Right.

Q. Okay. And you analyzed this ad as part of your expert report, correct?

A. That's correct.

Q. Okay. And I believe if we could go to page 24 of PX 158 and look at the very last couple of sentences there, your conclusion about the POMx advertisement is -- part of the conclusion is that "preliminary initial studies suggest that pomegranate extract, a strong source of antioxidants, could help alleviate erectile dysfunction," right?

A. That's what my report says, yes.

Q. Okay. Okay. And I want to show you another ad, which is labeled CX 0260, and this ad is "Drink to prostate health." And if we could blow up the body

copy. And just let me know when you have had an opportunity to read through the body copy.

A. (Document review.) I'm finished.

Q. Okay. Now, is it your opinion that it's unlikely that reasonable viewers will think this ad conveys that POM Juice is beneficial for prostate cancer?

A. My conclusion is that -- that the -- the ad will convey the -- the inference will be drawn that POM Wonderful Pomegranate Juice may be beneficial for people who have -- who have had prostate cancer.

Q. Okay. All right. Now, switching gears, I'm done with the ads, you'll be happy to know.

Is it your opinion that the caduceus symbol is a symbol that people associate with medicine?

A. The caduceus?

Q. I'm sorry. The caduceus -- how do you say it? -- caduceus symbol.

A. Could you show it to me, please?

Q. I don't have one in front of me, but it's the symbol with the snakes curling around the staff, C-A-D-U-S-E-U-S.

JUDGE CHAPPELL: Associated with doctors and hospitals.

THE WITNESS: Yes.

MS. HIPPSLEY: Thank you, Your Honor.

THE WITNESS: The answer is yes.

BY MS. HIPPSLEY:

Q. Okay. And the symbol with a cap "R" and a little "x" stands for prescription in America. Is that right?

A. That's correct.

Q. Okay. And during your deposition -- well, let's put it up on the screen. Let's look at PX 350, page 195, line 16.

All right. And during the deposition -- let's see, we're at line 13, the question -- do you see where I'm -- I just want to make sure we're together here. Okay, so the question on 195, line 13.

"QUESTION: In your opinion, could reasonable consumers familiar what the Rx symbol in America associate it with the POMx logo?

"ANSWER: Yes," during the time of your deposition, before you did your errata sheet.

Is that correct?

A. If the transcript is correct here, yes.

Q. Okay. But then you actually corrected and changed this yes, and if we could put up our slide showing the correction. Yeah, go ahead.

You added, "Yes, but it is unlikely," that

consumers could associate the Rx with the POMx logo, right?

A. That's correct.

Q. What changed your mind?

A. Nothing -- nothing changed my mind. What changed my answer was, thinking about this, I wanted to make it clear that in the abstract, obviously, anything with an "x" on the subscript could be related to the concept of prescription.

However, within the context of the ad itself, this seemed far less significant than the other meanings of the "x" that I believe I discussed in my -- in my deposition, perhaps in -- and in my report, that "x" stands for extreme in American culture.

And the ad -- within the context of the ad, "x" would stand for pomegranate extract and pomegranate extreme. And in the particular ad I believe that I analyzed, it was also -- there was sort of a play on pornography, if you will. So, it could also be kind of X-rated, because it was supposed to correct erectile dysfunction.

Q. Okay.

A. So, all of those meanings seemed much more important than prescription within the framework of this particular ad. And that's what changed my -- you know,

that's what caused or that's what prompted my emendation.

Q. Okay. So, weighting the importance, then, here the question was simply whether viewers could make an association and whether it's likely or not, not the relative importance.

A. I didn't hear you.

Q. Here, when you corrected, the context is would reasonable consumers make an association between the Rx and the -- and the POMx logo, not about the relative importance, but simply would they associate it with the POMx logo, and you changed it to say it's unlikely.

A. Yes. I wanted to make clear that I wasn't discussing this in the abstract, but rather, in the -- in the context of the ad.

In addition, an R and an M are quite different characters.

Q. Okay. Now, can an IV drip bottle be a symbol for drugs and medicine?

A. Excuse me just one second. Will you repeat the question, please?

Q. Sure. Can the visual of an IV drip bottle be a symbol for drugs and medicine?

A. In the -- in the proper context, it could, yes.

Q. Okay. And now I wanted to show you a couple

definitions and just make sure that you agree with these dictionary definitions.

If we could put up CX 2091. And would you agree that the dictionary definition for dose is a definite quantity of medicine or drug given or prescribed to be given at one time, that that's the medical definition?

A. And I -- I agree that the Oxford English Dictionary's definition is -- is correct.

Q. And one that you would think common -- would be common knowledge to speakers of the English language? Common understanding, I'm sorry. Common understanding of the word "dose" for English speakers?

A. Well, dose has more than one -- more than one meaning, particularly in American English.

Q. Um-hum.

A. It doesn't always refer to -- to medicine. This is, as it says, the medical definition.

Q. Um-hum. But it -- okay. But wouldn't it most commonly be associated with a quantity of medicine in the medical definition, let's say as opposed to the given quantity of an x-ray?

A. Within the framework of medicine, dose would -- well, it would depend on the context.

Q. Okay.

A. Could it -- it could -- it could depend. It

could mean x-rays. It could mean medicine. But it also has meanings outside of a medical context as well.

Q. Okay. Let's look at page 2 of CX 2091. Do we have that? Okay. And going on into the dictionary definitions, dose, under 2(a), "A definite quantity or amount of something regarded as analogous in some respect to a medical prescription, or to medicine in use or effect; a definite amount of some ingredient," is the example, "added to wine to give it a special character."

Do you think that would be a better definition of dose when used and understood by common speakers of the English language?

A. It's not any -- it's not any better. As the dictionary says, this is -- if you scroll down the page, I'm sure you'll find that it goes beyond 1894, although their last definition -- their last example is 1894, which is -- which is really -- which is a bit out of date. I think it's still used in the sense of the thought of treating Peter with a dose of his own medicine, in the figurative sense, is certainly current today as well. But it always depends upon the context.

Q. Okay.

A. And this, it says, is a transferred and figurative meaning; that is, it's somewhat -- somewhat metaphorical.

Q. Right. And so either consumers would be -- I'm sorry, either viewers of information where dose was utilized, it would either be discussing an actual dose or be a metaphor for a certain amount analogous to a -- analogous to medicine. Isn't that right?

A. Well, as you can see, there is also the unpleasant experience.

Q. Okay. Which one do you think is most commonly understood by English speakers?

A. What is most commonly understood would depend entirely upon the context in which it's used.

Q. All right.

A. Dog can mean an ugly young man in the right context.

Q. All right. Well, let's look at one context. And I'd like to show you another bottle of a POM product. This is POM Lite with its hangtag, and I wanted to direct your attention to the statements on the back of the bottle.

If I could, Your Honor, give him the actual bottle, and then we will put the slide up as well.

And, basically, the slide -- what we have done with the slide is blow up the statement on the -- not on the hangtag, sir, but on the book of the bottle. I just wanted to keep it all intact, how I found it at the

grocery store.

Directing your attention to the text on the back of the POM Lite bottle, it states, "50% POM Juice. No sugar added. Lite POM is the refreshing cousin of POM Wonderful pure pomegranate juice. An all-natural blend of pomegranate juice and water, Lite POM is for everyone who's been looking for something lighter and crisper.

"Plus, just one bottle provides all the antioxidants of a daily dose of POM pure pomegranate juice. It's Lite done right." And we added the bolding just so I could make sure you see what I'm talking about. It's all the same bolding on the bottle.

So, in that context, what would be the meaning of dose?

MR. FIELDS: Objection, Your Honor. As I understand it, POM Lite is not at issue in this case. Sometimes it's hard to know whether it is, but I thought POM Lite was not.

MS. HIPPSLEY: Your Honor, the statement is referring to a daily dose of POM pure pomegranate juice, which is definitely part of our case.

JUDGE CHAPPELL: So, you're not asking about POM Lite?

MS. HIPPSLEY: I'm asking what the use of the term "daily dose of POM pure pomegranate juice" would

mean in that sentence.

JUDGE CHAPPELL: The title says Lite POM.

MS. HIPPSLEY: Right. It's on Lite POM, and on the Lite POM label, they are referencing viewers, I guess, or consumers back to POM pure pomegranate juice. It provides all the antioxidants of a daily dose of POM pure pomegranate juice.

JUDGE CHAPPELL: Is it your position that this slide is part of the case?

MS. HIPPSLEY: It's a demonstrative, because I am trying to elicit -- in the context of the juices, Dr. Butters was saying that he's not sure which definition in the Oxford Dictionary is applicable. And this is what's on the market today by Respondents, and I'm trying to ascertain how daily dose is understood in the context. He said it depended on the context, and so I am providing him a context.

MR. FIELDS: Your Honor, as long as it's understood that POM Lite itself is not in the case. If that's clarified, I have no objection to asking about the use in reference to POM itself.

JUDGE CHAPPELL: All right.

BY MS. HIPPSLEY:

Q. So, again, the question would be, what would viewers of this sentence -- what would be the context

and meaning of a "daily dose of POM pure pomegranate juice"?

A. That means ingestion.

Q. Does it refer to a specific quantity of POM Pomegranate Juice that should be taken?

A. No. I'm sorry. I guess it does say that if -- if you drink the whole bottle, then you will -- you will have had all of the antioxidants that you would get from a similar quantity of POM pure pomegranate juice.

Q. All right.

A. It doesn't tell us -- dose here does not mean medication. "Dose" here does not mean an amount of -- of prescription drug. It's just a semimetaphorical way of saying a daily amount. One of the things these ads consistently, throughout, really love to do is use alliteration. Daily dose is really a part of that. It means nothing more than daily amount or ingestion.

Q. And the context of dose, making an inference with the term "antioxidants," again, that has no analogy to you're taking something that has a medicinal purpose?

A. Absolutely not.

Q. And is it common, in your opinion, that food products are discussed in terms of dose by the advertisers of those products?

A. I haven't researched that. I think that if

alliteration is important, daily dose is -- is a good -- kind of poetic license, if you will.

Q. Okay. All right. Dr. Butters, you are not a marketing expert. Is that correct?

A. I am not a marketing expert.

Q. Okay.

A. I'm a linguistics expert.

Q. All right. And you have not written any peer-reviewed articles on marketing or consumer behavior. Is that right?

A. I have not written any articles purely on --

Q. I'm sorry, peer-reviewed.

A. Peer-reviewed.

Q. -- articles on marketing. Let's start with that.

A. I've written articles that have touched upon marketing issues. I don't think -- but they haven't been published in marketing or psycho -- psychology of language journals.

Q. Okay. And you have not written peer-reviewed articles on consumer behavior, correct?

A. Again, I think my article on -- on the lottery tickets dealt with computer -- computer -- excuse me, it's late in the day, and I have a headache --

Q. I know. We're almost done.

A. -- consumer behavior.

Q. Okay. And, aside from that article, are there any articles that you would say touch on consumer behavior?

A. I -- I've written a fair amount on trademark issues and interpreting trademarks with respect to likelihood of confusion, linguistic likelihood of confusion, not point-of-sale likelihood of confusion, on genericness issues, issues involving trademarks with respect to whether consumers would be -- would find the trademarks scandalous or defamatory.

Q. Okay.

A. So, within the context of trademark issues, I have written a fair amount that touches upon, at least, consumer issues.

Q. All right. And -- but you don't have any expertise in advertising consumer products. Is that correct?

A. That's not my specialty.

Q. Okay. And you do not have any expertise in consumer buying behavior. Is that correct?

A. That's fair to say.

Q. All right. And you do not have any expertise -- strike that.

And you do not have any expertise with respect

to consumers specifically. Is that right? You like to refer to them as speakers of the English language.

A. Speakers of the English language or readers of -- you know, reasonable persons who are reading and interpreting texts.

Q. Okay. But when -- I believe when Dr. Fields spoke of consumers, you corrected him that you're looking at things from the perspective of an adult speaker of the English language. The term "consumer" is not something that you use in your linguistic analysis. Is that correct?

A. That's correct.

Q. Okay. And you have never previously testified as an expert in a case which involved alleged deceptive advertising, correct?

A. No. I mean, that is correct.

Q. Okay. And before preparing your report in this matter, you did not read the FTC's deception policy statement, correct?

A. That's correct.

Q. And -- strike that.

And before preparing your report in this matter, you did not have any understanding of the term "reasonable consumer" as used in the context of an FTC law enforcement matter, correct?

A. Within that context, I had not studied that.

Q. Okay.

I don't have any further questions, Your Honor. But I would ask if we could admit the errata sheet, which we marked as CX 2064, because it was not attached to PX 350, to the deposition.

MR. FIELDS: I have no objection, Your Honor.

JUDGE CHAPPELL: So admitted.

(CX Exhibit Number 2064 was admitted into evidence.)

JUDGE CHAPPELL: Redirect?

MR. FIELDS: Yes, Your Honor, briefly.

JUDGE CHAPPELL: This errata sheet, how are you going to label it?

MS. HIPPSLEY: I'm sorry?

JUDGE CHAPPELL: You just offered something into evidence. What's the number?

MS. HIPPSLEY: Oh, I'm sorry. I thought I stated it. It's CX 2064.

JUDGE CHAPPELL: And then what was the PX 350 you referred to?

MS. HIPPSLEY: That was the deposition that Respondents admitted into the record in our joint exhibits, the deposition of Dr. Butters.

JUDGE CHAPPELL: All right. So the record is

clear, CX 2064 is admitted.

MR. FIELDS: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. FIELDS:

Q. Are you okay, Professor Butters?

A. Yes, sir.

Q. Okay. Let us know if you're not.

All right. I just have four or five questions. Firstly, Ms. Hipsley read you a section from your report about humor and hyperbole and blocking the inferences from other parts of the ad. Were you talking about blocking the humorous and hyperbolic parts or were you talking about blocking the serious representations in the ad?

A. The -- the -- the hyperbole in the ads and the humor in the visual representations blocks literal interpretation of many of the -- of the headings, such as "I'm off to save prostates." These are absurd terms and will not be -- will not be viewed as -- as indicating claims.

Q. Okay. Ms. Hipsley --

A. As far as the second part of your question is concerned, the humor doesn't block the serious statements that are made in the text and footnotes.

Q. Thank you.

Ms. Hipsley also read you parts of your report equating health with freedom from disease. I'm paraphrasing. Does that mean that if an ad says "promising results for health" or "We promote health," that a reasonable person would take away from that a message that it prevents disease?

A. No. It's possible for things to contribute to our health that simply make us feel better and, you know, make us healthier. If I start running three miles every day, I may be no -- I may be no freer from disease at the end of that than I was before, but I think I would be healthier.

Q. Thank you.

You were also asked about if you had specially considered that some of the people who answered -- looked at these ads might have been sick, might have actually had, let's say, prostate cancer.

What difference, if any, would it make to your responses on direct examination if the people who saw these ads were sick or had cancer?

A. That wouldn't change the conclusions in my report one bit. One would expect that people with serious diseases, who were confronted with these ads, who wanted to investigate them further would do so. In other words, this would -- would make them more

skeptical, not less skeptical of the -- of the ads as in any way advocating a treatment or cure or prevention.

Q. Thank you.

In the "I'm off to save prostates" ad, and I don't remember the number of it, but counsel asked you a number of questions about the word "defend," defend against certain diseases, but the actual sentence was "committed to defend" against those things.

Now, when you say a product is committed to defend against something, would a reasonable person infer that they definitely succeed in eliminating that something, that disease?

A. No. "Committed" is a -- is a word like "fight for," which doesn't necessarily guarantee the success of the outcome.

Q. Okay. Is it correct that you -- I think I understood you to say this -- that you do not feel that it is necessary to take a survey to opine on the reasonable meaning or implication from these ads?

A. That's -- that's correct. It would -- given the huge quantity of data in this case, it would be very difficult to do survey work. I guess one could do -- but -- but apart from that, survey methodology, while sometimes employed in linguistics, is not -- is not necessary, nor necessarily appropriate.

Q. Thank you.

All right. I think this is the last question. There were some questions asked to you about \$25 million in research. I think that was also in the "Off to save prostates" ad.

When a statement, like in that ad, says "Backed by \$25 million in research," and that ad happened to be about prostate health, as I recall it, would a reasonable person understand that that entire \$25 million was spent on research about the prostate, as opposed to general research on various aspects of health?

A. I'd have to look at the ad more closely to -- to be sure about the -- we know that the -- I mean, independently, I guess we know that POM's research covered a number of different things.

Q. Yes.

Could we have the -- I've forgotten the number, I'm afraid, Counsel. If you have handy the -- the "I'm off to save prostates" ad that has the 25 million in research. You probably have it there, Professor.

If you could give me the number, because I --

A. There it is.

Q. Mr. Graubert has the number. It is CX 1426.

A. Well, the ad says, "Backed by \$25 million in

vigilant medical research." It doesn't say in medical research on prostates or medical prostate research. So, it's -- it's not -- it's not clear that it's -- that it's beyond the framework of -- of prostates alone, but it's not clear that it's not either, just that \$25 million, to date, has been spent on medical research, investigating the antioxidant superpower, the antioxidant properties of POM Wonderful.

Q. And antioxidant properties go beyond the prostate, as you understand it. Isn't that correct?

A. That's correct.

Q. Heart, erectile dysfunction, the other studies?

A. Yes.

Q. All right. Is there anything in that statement that tells the reasonable viewer that somehow that research is limited to the prostate?

A. One of the things you have to keep in mind is that these ads have an intertextuality; that is, they are related one to the other. I can imagine people seeing one and thinking -- and almost wondering when the next one would come out, because they're so funny, and so that the text of one and the text of the other would inform each other in the minds of many people.

So, the fact that this one is about prostates and about antioxidants with respect to prostates, for

anyone who had seen any of the other ads, one would be quite explicitly clear that the antioxidant power would extend beyond prostate research.

Q. Thank you.

That's all I have.

JUDGE CHAPPELL: Recross?

RE CROSS-EXAMINATION

BY MS. HIPPSLEY:

Q. Dr. Butters, I have just one question. In referring to health and the definition of health as the absence of disease, wouldn't you have to -- and we were just discussing this -- wouldn't you have to look at the con -- at the ad, a specific ad, to know if in the context of the ad, viewers would understand health to mean the absence of disease?

A. Yes.

Q. Okay.

No further questions.

MR. FIELDS: No further questions, Your Honor.

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

Let's talk about scheduling. How much time is needed for Mr. Tupper?

MS. DIAZ: Your Honor, somewhere between one and two hours.

JUDGE CHAPPELL: And how much is anticipated for Dr. deKernion?

MR. FIELDS: I think the direct of Dr. deKernion would be about an hour, Your Honor, but Dr. deKernion is arriving this evening. We had thought we would be the entire day with these three witnesses. I still think we will.

JUDGE CHAPPELL: You mean today?

MR. FIELDS: Today, yes, sir.

JUDGE CHAPPELL: I'm considering moving Mr. Tupper until tomorrow. It's almost 5:00.

MR. FIELDS: Oh, all right. Got it.

MS. HIPPSLEY: I think the cross on Dr. --

JUDGE CHAPPELL: We are confusing the consumers and computers, so it's been a long day.

MR. FIELDS: It sure has.

MS. HIPPSLEY: I think Dr. deKernion -- I believe we only have about two hours of cross. I can't imagine him going more than a half day between the two of us, and the same with Dr. Tupper -- I mean with Mr. Tupper.

MR. FIELDS: I'm sure that's right, Your Honor. I do have one brief housekeeping matter, if Your Honor is about to excuse us.

JUDGE CHAPPELL: Well, we could go ahead and

start Mr. Tupper, although it sounds like you wouldn't finish your direct tonight if we stop at 5:30.

MS. DIAZ: No, Your Honor.

MR. FIELDS: Counsel seems to have a vocal problem that I hope is not insurmountable.

MS. DIAZ: I have some lozenges and --

MR. FIELDS: Maybe that's a good reason for starting tomorrow.

JUDGE CHAPPELL: That's more than a tacit objection, to leave that until tomorrow.

All right. What's your housekeeping matter? Mr. Tupper, we will start with you tomorrow. You can ride it out, if you like.

MR. FIELDS: A brief housekeeping matter, Your Honor. Over the lunch hour, we considered the question of Mr. Perdigao's categories.

JUDGE CHAPPELL: Yes.

MR. FIELDS: Rather than delay these proceedings, which was counsel's suggestion, to have them examine the box and have us make categories and have them come back and cross-examine him and bring him back again, we will withdraw his testimony about the categories. That's not the rest of his testimony, but the testimony about his four categories.

JUDGE CHAPPELL: All right. So, I will need

both sides to get together when you get the draft transcript and look at page and line numbers and agree on what stays and what goes and let the court reporter know by Friday.

MR. FIELDS: That's fine. Thank you, Your Honor.

JUDGE CHAPPELL: Anything else today?

MS. HIPPSLEY: No, Your Honor.

MR. FIELDS: No, Your Honor.

JUDGE CHAPPELL: We will reconvene at 9:30 in the morning.

(Whereupon, at 4:49 p.m., trial was adjourned.)

C E R T I F I C A T I O N O F R E P O R T E R

DOCKET/FILE NUMBER: 9344

CASE NAME: POM WONDERFUL LLC

DATE: OCTOBER 11, 2011

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: 11/18/2011

SUSANNE BERGLING, RMR-CRR-CLR

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.

MARY CLARE OCHSNER-HAMMOND