

**ORIGINAL**

**UNITED STATES OF AMERICA  
THE FEDERAL TRADE COMMISSION**



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

**COMPLAINT COUNSEL’S MOTION, AND MEMORANDUM IN SUPPORT, FOR A  
DETERMINATION THAT ANY PRIVILEGES ASSOCIATED WITH THREE  
DOCUMENTS WERE WAIVED BY RESPONDENTS**

Complaint Counsel respectfully moves the Court for an order determining under Rule 3.31(g) of the Commission’s Rules of Practice that any privileges associated with three documents produced by Respondents in prior litigations were waived by Respondents.<sup>1</sup>

**I. BACKGROUND**

On April 19, 2011, Respondents telephoned Complaint Counsel asserting that documents listed on Complaint Counsel’s exhibit list were inadvertently produced. On April 22, 2011, Respondents sent an email citing Rule 3.31(g) of the Commission’s Rules of Practice, and requesting that Complaint Counsel replace eight documents with redacted versions and return or destroy a ninth document in its entirety. Neither the telephone call nor the email provided the

<sup>1</sup> By agreement, the Respondents will file their opposition to this motion on May 17, 2011.

bases for Respondents' asserted privileges or protections, as required by Rule 3.31(g)(1)(i)(C). On April 28, 2011, Complaint Counsel notified Respondents of their failure to assert the legal bases for their assertion and that we would not agree to their proposed redactions and document destruction.<sup>2</sup> On May 5, 2011, Complaint Counsel received Respondents' Objections to Complaint Counsel's Final Proposed Exhibit List which asserted the bases for their objections to the documents identified in the April 22nd email and identified several other documents for which they made privilege objections. On May 11 and 12, 2011 counsel for the parties met and conferred to discuss the bases for Respondents' assertions of privilege and were able to narrow the number of contested documents to three.

## **II. ARGUMENT**

The three documents at issue (CX230, CX278, and CX320) were produced by Respondents in other litigation, used in such litigation without claims of privilege, produced by or to Respondents in this proceeding, and used during depositions in this proceeding without assertions that the documents contained privileged information and/or without timely demands that the documents be returned. Complaint Counsel believes that any asserted privileges have been waived.

Having learned the bases for Respondents' assertions of privilege, Complaint Counsel will not use or disclose the information at issue until the claims are resolved and is presenting the information to the Court under seal for a determination of the claims as provided for in Rule 3.31(g)(1)(ii). We are providing the Court with both unredacted versions of the documents, *see*

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<sup>2</sup> Complaint Counsel has revised certain views expressed in its April 28th, 2011 email after further investigation of the facts and law surrounding the documents at issue and after consultation with counsel for Respondents regarding the bases for the claimed privileges.

Exhibit A, and the redacted versions provided by Respondents, *see* Exhibit B.<sup>3</sup>

Rule 3.31(g), as amended in 2009, provides that:

disclosure of privileged or protected information or communications during a Part 3 proceeding or during a Commission precomplaint investigation shall not operate as a waiver if:

- (A) the disclosure is inadvertent;
- (B) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (C) the holder promptly took reasonable steps to rectify the error, including notifying any party that received the information or communication of the claim and the basis for it.

Rule 3.31(g)(1)(i). In amending Rule 3.31(g), the Commission sought to adopt the “standards in Fed. R. Evid. 502(b) in combination with the incorporated provisions from Fed. R. Civ. P. 26(b)(5)(B).” 74 Fed. Reg. 20205, 20207 (May 1, 2009).<sup>4</sup>

Complaint Counsel is not aware of any Commission decisions applying Rule 3.31(g) since its amendment. We cite to decisions and precedent applying *Federal Rule of Evidence 502(b)*. The three requirements of Rule 502(b) for privilege not to be waived “are separate and should not be conflated in the analysis . . . . The burden of proving that the attorney-client privilege applies rests not with the party contesting the privilege, but with the party asserting it.”

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<sup>3</sup> One of the three documents (CX278) was not identified in Respondents’ April 22, 2011 email and Respondents did not provide a redacted version. Counsel for Respondents asserted during our meet and confer on May 12 that much, if not all, of the document would need to be redacted.

<sup>4</sup> *Federal Rule of Evidence 502(b)* was adopted in 2008 and provides that “disclosure does not operate as a waiver in a Federal or State proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).” Fed. R. Evid. 502(b).

*Datel Holdings Ltd. v. Microsoft Corp.*, No. C-09-05535 EDL, 2011 U.S. Dist. LEXIS 30872, at \*7 (N.D. Cal. Mar. 11, 2011); *see also, Luna Gaming – San Diego, LLC v. Dorsey & Whitney, LLP*, No. 06cv28042010, U.S. Dist. LEXIS 3188, at \*12 (S.D. Cal. Jan. 13, 2010) (the party asserting the privilege “has the burden of proving each element has been met”); *Comrie v. IPSCO, Inc.*, No. 08 C 3060, 2009 U.S. Dist. LEXIS 111965, at \*5-6 (N.D. Ill. Nov. 30, 2009) (“Although Defendants claimed they inadvertently produced documents, they failed, with the exception of stating the number of documents produced, to support that assertion with facts. Without such information, the Court cannot find that the Defendants met their burden to show either that the disclosure was inadvertent, or that Defendants took reasonable steps to prevent disclosure.”)

With respect to the first two elements of Rule 3.31(g)(1)(i), Complaint Counsel does not have enough information to contest Respondents’ recent assertions of inadvertent disclosure or whether the steps that they took to prevent disclosure in this and the prior proceedings were reasonable, but it is Respondents’ burden to demonstrate that they meet the elements for privileges not to be waived. Whether respondents can prove these two elements is of little consequence because the third prong clearly cannot be met and any privilege was waived. Respondents have failed to promptly take reasonable steps to rectify their errors. All three documents at issue were disclosed in previous litigations with competitors and became exhibits in those matters with no privileges asserted.

CX230 was previously produced by Respondents in *POM Wonderful LLC v. Ocean Spray Cranberries, Inc.*, No. CV 09-565 (C.D. Cal.). According to Respondents the document discloses advice of counsel, however, it was used during Ocean Spray’s deposition of Roll Global employee, Michael Perdigao, on October 1, 2010 (Perdigao Dep. Exh. 62), without

Respondents raising an objection of privilege.<sup>5</sup> See Exhibit C. Respondents waived any privilege by producing the document to Ocean Spray and not objecting to its privileged nature at Mr. Perdigao's deposition.

Rule 502(b)(3) requires that the holder of the privilege "promptly [take] reasonable steps to rectify the error . . ." When the privilege holder objects immediately upon discovery of the inadvertent disclosure, 502(b)(3) is satisfied. [citations omitted] But under both state and federal laws, if a privileged document is used at a deposition, and the privilege holder fails to object immediately, the privilege is waived.

*Luna Gaming*, 2010 U.S. Dist. LEXIS 3188, at \*12-15 (finding that failure to raise privilege at a deposition at which only three foundational questions about document were asked constituted waiver)<sup>6</sup>; See also *Martin v. State Farm Mut. Auto. Ins. Co.*, No. 3:10-cv-0144, 2011 U.S. Dist. LEXIS 36058, at \*13-14 (S.D. W. Va. Apr. 1, 2011) (party did not act promptly to rectify an inadvertent disclosure having become aware at a deposition that document was in the other party's possession and having failed to "immediately assert the privilege or request return of the letter."); *Pilot v. Focused Retail Prop. I, LLC*, No. 09 C 6879, 2011 U.S. Dist. LEXIS 33710, at \*16-17 (N.D. Ill. Mar. 30, 2011). Not only did Respondents fail to raise any privilege objections at Ocean Spray's deposition of Mr. Perdigao, but Respondents subsequently reproduced the document to Complaint Counsel in this matter, further waiving any privilege.

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<sup>5</sup> Moreover, during the deposition there was questioning regarding one of the sections of the document that Respondents wish to redact.

<sup>6</sup> One court, in *Datel Holdings*, sought to distinguish *Luna Gaming*, in holding that failure to "immediately" object to the introduction of a privileged document at a deposition did not waive the privilege. However, the court based its distinction upon the fact that "while the deposition was still ongoing, Defendant interrupted the deposition to put its privilege assertion on the record." *Datel Holdings*, 2011 U.S. Dist. LEXIS 30872, at \*14-16. Such circumstances are not present in this matter.

Although Respondents' counsel asserted that CX230 "was produced inadvertently" after it was introduced at the February 10, 2011 deposition in this proceeding of Diane Kuyoomjian, a former POM Wonderful, LLC employee (Kuyoomjian Dep. Exh. 11), *see* Exhibit D, this assertion was untimely based on the document's previous use in *Ocean Spray*. Moreover, Respondents did not ask for the document to be returned during the deposition and did not demand redaction of the document until April 2011. "Failing to take affirmative steps to retrieve the document, beyond merely asking for it at depositions, also waives the privilege." *Luna Gaming*, 2010 U.S. Dist. LEXIS 3188, at \*15-16 (when party "did not return the document soon after the request," the party asserting the privilege "should have petitioned the court.").<sup>7</sup>

Two of the documents at issue, CX278 and CX320, were previously produced by Respondents in *POM Wonderful LLC v. The Coca Cola Company*, No. CV 08-6237 (C.D. Cal.). Both documents appeared on the parties' March 8, 2010 "Amended Joint Trial Exhibit List" in that case (Exhibits 2321 and 2332) with no objection lodged by Respondents on the basis of privilege. *See* Exhibit E. Subsequently, on March 22, 2010, the parties in that matter filed a "Pretrial Exhibit Stipulation" in which they raised various objections to documents on the joint exhibit list. Again, Respondents made no objections with respect to the two documents. *See* Exhibit F. Respondents waived any privilege by producing the documents in the *Coca Cola* case

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<sup>7</sup> POM's inaction can be contrasted with the conduct of a Respondent who was found not to have waived attorney client privilege in a case decided prior to the adoption of Commission Rule 3.31(g). *Hoechst Marion Roussel, Inc.*, No. 9293, 2000 FTC LEXIS 155, at \*8-9 (Oct 17, 2000) (holding that Respondent "did not waive its privilege through the inadvertent disclosure" when "three weeks after production of the [privileged] letter, counsel for [Respondent] discovered its production and immediately thereafter called counsel for the Commission, requesting the return of the document . . . [and] repeated its request that Commission counsel return the [privileged] letter in several letters and in depositions.").

and allowing them to be placed on the joint exhibit list without objection.<sup>8</sup>

In addition, CX278 and CX320 were produced to Complaint Counsel by Coca Cola pursuant to a subpoena and were provided to Respondents by Complaint Counsel on October 25, 2010. The fact that the documents come from Coca Cola belies any notion that the Respondents held the documents close and protected their privilege to the extent it existed at one time.

Moreover, both documents were used by Complaint Counsel in multiple depositions in this proceeding without any assertion that they contained inadvertently produced, privileged information, each such use separately providing a basis for finding that any privilege was waived. CX278 was used at the January 14, 2011 Perdigao Deposition (Perdigao Dep. Exh. 36) and the Kuyoomjian Deposition (Kuyoomjian Dep. Exh. 22).<sup>9</sup> See Exhibits H and D, respectively. Similarly, CX320 was used at the Perdigao Deposition (Perdigao Dep. Exh. 37), the February 2, 2011 Tupper Deposition (Tupper Dep. Exh. 24), the February 4, 2011 Leow Deposition (Leow Dep. Exh. 43), and the Kuyoomjian Deposition (Kuyoomjian Dep. Exh. 29).<sup>10</sup>

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<sup>8</sup> Respondents may argue that paragraph 27 of the protective order in the *Coca Cola* case which provided that, “The inadvertent disclosure of information protected by the attorney-client, work product, or other applicable privilege . . . shall not constitute a waiver of any valid claim of privilege.” See Exhibit G. Even if the protective order’s provisions applied in this matter, which they do not, the protective order does not address under what circumstances failure to object to the use of inadvertently produced privileged documents waives the privilege. *Luna Gaming*, 2010 U.S. Dist. LEXIS 3188, at \*11. Furthermore, Respondents’ repeated failures to object to the use of these documents waives any protection they may have held. *Id.* at \*11-12.

<sup>9</sup> During the of Perdigao Deposition, in fact, there was extensive discussion of the identity of the Roll Law Group attorney referred to in the document.

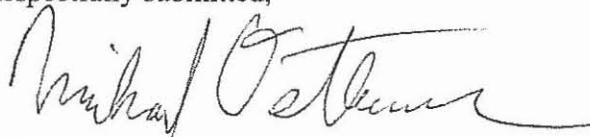
<sup>10</sup> During the of Tupper Deposition, he was, in fact, asked about language Respondents now propose redacting and he stated, “And this is all the discussions with lawyers or not involving discussions with lawyers. I guess I’m confused.” His counsel stated, “Then say you can’t comment on it because if it’s all in the presence of lawyers then you can’t comment on it.” Mr. Tupper then said, “I can’t comment.”

See Exhibits H, I, J, and D, respectively. The inadvertent production of CX320 was not asserted until Respondents' April 19, 2011 telephone call. CX278 was not even mentioned in Respondents' April 22, 2011 email, its privileged nature was first raised on May 5, 2011 in Respondents' Objections to Complaint Counsel's Final Proposed Exhibit List, and no demand for its return was raised until the May 12, 2011 meet and confer after Complaint Counsel had noted that a privilege had been asserted in the objections to our exhibit list.

### III. CONCLUSION

It is Respondents' burden to prove that the three elements of non-waiver are met. Respondents clearly failed to promptly take reasonable steps to rectify their errors. Any privileges attached to these documents were waived when utilized without objection in litigation with competitors. They were further waived by Respondents' inaction in this proceeding. Respondents' assertions of privilege are clearly untimely. The claim of privilege should be denied and Complaint Counsel's motion should be granted.

Respectfully submitted,



Dated: May 17, 2011

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Michael Ostheimer  
Federal Trade Commission  
601 New Jersey Avenue, NW  
NJ-3204  
Washington, DC 20580  
Telephone: (202) 326-2699  
Fax: (202) 326-3259  
Email: mostheimer@ftc.gov



**UNITED STATES OF AMERICA  
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.        | ) |                 |
|                                      | ) |                 |

**[Proposed] ORDER GRANTING COMPLAINT COUNSEL’S MOTION  
FOR A DETERMINATION THAT ANY PRIVILEGES ASSOCIATED WITH THREE  
DOCUMENTS WERE WAIVED BY RESPONDENTS**

On May 13, 2011, Complaint Counsel filed a motion for a determination that any privileges associated with three documents, RESP024872-73 (CX230), TCCC-0005472-74 (CX278), and TCCC5638-42 (CX320), were waived by Respondents. Based upon the parties’ arguments, there is good cause to find that any privileges associated with those documents were waived by Respondents. Therefore, pursuant to Rule 3.31(g), Complaint Counsel’s motion is GRANTED.

ORDERED:

\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

## STATEMENT REGARDING MEET AND CONFER

In accordance with Paragraph 4 of the Court's Scheduling Order, the undersigned counsel certify that Complaint Counsel conferred in good faith with Respondents' Counsel regarding *Complaint Counsel's Motion, and Memorandum in Support, for a Determination That Any Privileges Associated with Three Documents Were Waived by Respondents*. On May 11, 2011, Complaint Counsel, Mary Johnson and Michael Ostheimer met and conferred with Respondents' Counsel Paul Rose and Skye Perryman. Mary Johnson, Michael Ostheimer, and Paul Rose again met and conferred on May 12, 2011. Counsel discussed the bases for Respondents' assertions of privilege and were able to narrow the number of contested documents to three. The parties agreed that Complaint Counsel would file and serve their opening papers by close of business Friday, May 13th and that Respondents will file opposition papers by close of business Tuesday, May 17th.

Dated: May 13, 2011



Michael Ostheimer  
Federal Trade Commission  
601 New Jersey Avenue, NW  
NJ-3204  
Washington, DC 20580  
Telephone: (202) 326-2699  
Fax: (202) 326-3259  
Email: mostheimer@ftc.gov

**CERTIFICATE OF SERVICE**

I certify that on May 17, 2011, I caused the filing and serving of the public version of *Complaint Counsel's Motion, and Memorandum in Support, for a Determination That Any Privileges Associated with Three Documents Were Waived by Respondents* as set forth below:

One electronic copy via the FTC E-Filing System to:

Donald S. Clark, Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Room H-159  
Washington, DC 20580

One paper copy via hand delivery and one electronic copy via email to:

The Honorable D. Michael Chappell  
Administrative Law Judge  
600 Pennsylvania Ave., NW, Room H-110  
Washington, DC 20580  
Email: oalj@ftc.gov

One electronic copy via email to:

John D. Graubert, Esq.  
Covington & Burling LLP  
jgraubert@cov.com  
Attorneys for Respondents

Kristina Diaz, Esq.  
Roll Law Group  
kdiaz@roll.com.  
Attorneys for Respondents

Bertram Fields, Esq.  
Greenberg Glusker  
bfields@greenbergglusker.com  
Attorney for Stewart and Linda Resnick

Date: May 17, 2011



Michael Ostheimer  
Complaint Counsel

## EXHIBIT A

UNREDACTED COPIES OF  
CX230, CX278, AND CX320

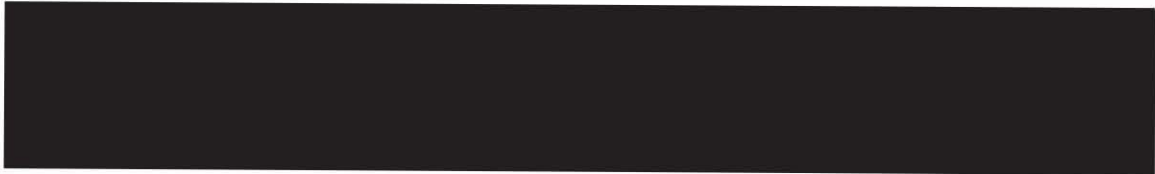
**Micorosoft Outlook**

**From:** Kuyoomjian, Diane  
**Sent:** Thursday, August 21, 2008 5:02 PM  
**To:** Mizrahi, Heather  
**Subject:** FW: UK print ad body copy  
**Importance:** High

----- Forwarded Message

**From:** <Kuyoomjian>, Diane <DKuyoomjian@PomWonderful.com>  
**Date:** Thu, 21 Aug 2008 09:08:20 -0700  
**To:** "Perdigao, Michael" <MPerdigao@FireStationAgency.com>, "Leow, Liz" <LLeow@FireStationAgency.com>, Andrea Hernandez <AHernandez@FireStationAgency.com>  
**Cc:** Claire Nelson <CNelson@PomWonderful.com>, Ericka Gettman <EGettman@Roll.com>, "Hamilton, Sarah" <SHamilton@PomWonderful.com>  
**Conversation:** UK print ad body copy  
**Subject:** Re: UK print ad body copy

Hello again.



Claire is contacting Andrea this morning about the materials sent last night to see if we can make the modification for that pub.

Thank you all.  
Diane

On 8/20/08 7:06 PM, "Kuyoomjian, Diane" <DKuyoomjian@PomWonderful.com> wrote:

All,

As you know, for the UK print ads, we were reviewing existing body copy to be sure it is 1) current info and 2) ok to use in the UK (given different/more stringent requirements).

We will provide the Agency with marked up versions of each ad, but I thought I'd also send a recap so everyone would understand the overall direction. More detail than some of you may need, but good reference for this and other projects where these same copy issues may surface.

1. Not that we have decided to use the "Heart Therapy" execution in outdoor only, so we will now have 7 print executions and 8 OOH for the UK.
2. Re body copy: Obviously the intro and ending lines change in each ad according to the headlines, but as far as the core copy points:

1

EXHIBIT 102  
Witness Perdigao  
Date 10/10 Total Pgs. 2  
Elizabeth Borrelli CSR 7844 RPR

CONFIDENTIAL, SUBJECT TO PROTECTIVE ORDER

EXHIBIT 11  
2-10-2011  
Kuyoomjian

POM-OS00011492

CONFIDENTIAL-FTC Docket NO. 9344

RESP024872

CX0230\_0001

A) All ads will carry a copy point about antioxidants which reads as follows:

"It has superior levels of naturally occurring antioxidants that help neutralise free radicals, harmful molecules that cause cell and tissue damage."

B) Beyond that, each ad will then speak to either the California-grown pomegranates or to the medical research. We did this based on the headlines (Liz, please advise if you think differently about any of these when you have them.)

For headlines *Extreme Makeover* and *Ancient Power*, the second point reads:

"And only POM Wonderful is made exclusively from California-grown, Wonderful variety pomegranates."

For headlines: *Antioxidant Superpower*, *Life Preserver*, *Forever Young*, *Cheat Death* and *Decompress*, the second point reads:

"Only POM is supported by £13 million in medical research from the world's leading universities, which has uncovered encouraging results in cardiovascular and prostate health." (That "L" is as close as I can come to a British pound sign on my computer :-)

4. Other info that will be worked into all ads:

- The Antioxidant Superpower. 100% Pure Pomegranate Juice. (Same as the OOH)
- Available in the chilled aisle (can we work this into OOH or is that asking too much???)
- pomwonderful.co.uk

5. One caveat (you knew there would be one, right?): Matt is doing a triple check re the medical research copy in the next couple of days. I know Claire and Andrea are also already double checking all our print deadlines. Based on that, we will know for sure if we need to get going on all of this copy (for some or all insertions) right away or if any of them can wait a day or two in case anything changes. I would like to save you the possibility of having to re-lay out the paragraph, if our timetables permit waiting a couple days.

I think that's everything. Shout if you have any questions.

Thanks,  
Diane

----- End of Forwarded Message

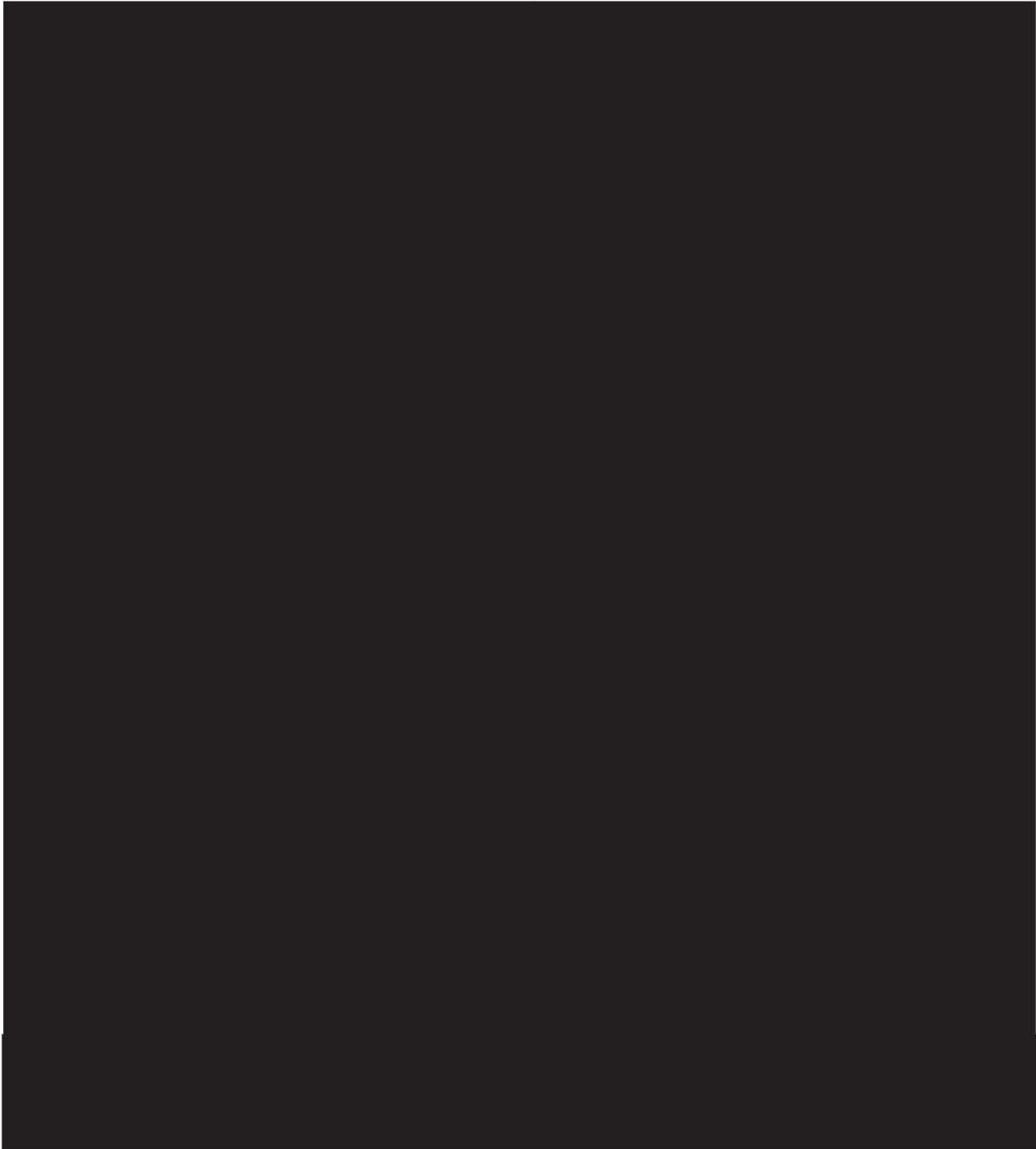
IT'S EXHIBIT 22  
2-10-204  
Kuyasnjian

CASE NO. CV-08-06237 SJO (FMOx)  
POM WONDERFUL LLC  
VS. THE COCA-COLA COMPANY  
DEFENDANT'S EXHIBIT 2321  
DATE \_\_\_\_\_ IDEN \_\_\_\_\_  
DATE \_\_\_\_\_ EVID \_\_\_\_\_  
BY \_\_\_\_\_  
Deputy Clerk  
AO 386-A

TCCC-0005472

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**From:** Kuyoomjian, Diane  
**Sent:** Wednesday, February 18, 2009 06:52 PM  
**To:** Perdigao, Michael; Hernandez, Andrea; Espinoza, Ray  
**CC:** Lewis, Scott  
**Subject:** Re: Boards Needed for POM Health Claims Meeting



**TCCC-0005473**

CX0278\_0002





**TCCC-0005474**

CX0278\_0003

\_\_\_\_ PLF \_\_\_\_\_ DEF \_\_\_\_\_  
EXHIBIT 43  
WITNESS 1 row  
DATE 2/4/11  
TONI COHEN

CASE NO. CV-08-06237 SJO JFM  
POM WONDERFUL LLC  
VS. THE COCA-COLA COMPANY  
DEFENDANT'S EXHIBIT 2332  
DATE \_\_\_\_\_ IDEN. \_\_\_\_\_  
DATE \_\_\_\_\_ EVID. \_\_\_\_\_  
BY \_\_\_\_\_  
Deputy Clerk  
AD 306-A

TCCC-0005638

CX0320\_0001

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**From:** Perdigao, Michael  
**Sent:** Thursday, June 11, 2009 05:14 PM  
**To:** Leow, Liz  
**CC:** Kuyoomjian, Diane; Tupper, Matt  
**Subject:** FW: Pom claims inventory  
**Attachments:** 2912140\_1.DOC

Liz-

[REDACTED]

Per the meeting today, we are still being asked to develop a humorous TV campaign (ideally, at least two commercials).

[REDACTED]

The consumer benefit is not nearly as compelling as we had hoped, but our focus should be on the fact that POM is healthy. It offers antioxidants that are good for you, as they reduce free radicals....and POM 100% pure pomegranate juice is the "Antioxidant Superpower."

The back-up support includes:

- The fruit has been around for at least 8000 years
- We have invested over \$28 MM in medical research examining
- 14 Published clinical studies on the health benefits

Lynda would like us to do our best, and based on the executions, she will decide whether she is comfortable proceeding with television.....or not.

We can discuss more in person, and I believe the POM Marketing team will craft into a more formal document.

Thanks.

Mike

----- Forwarded Message

Highly Confidential - Attorneys' Eyes Only, Subject to a Protective Order

PW01033358

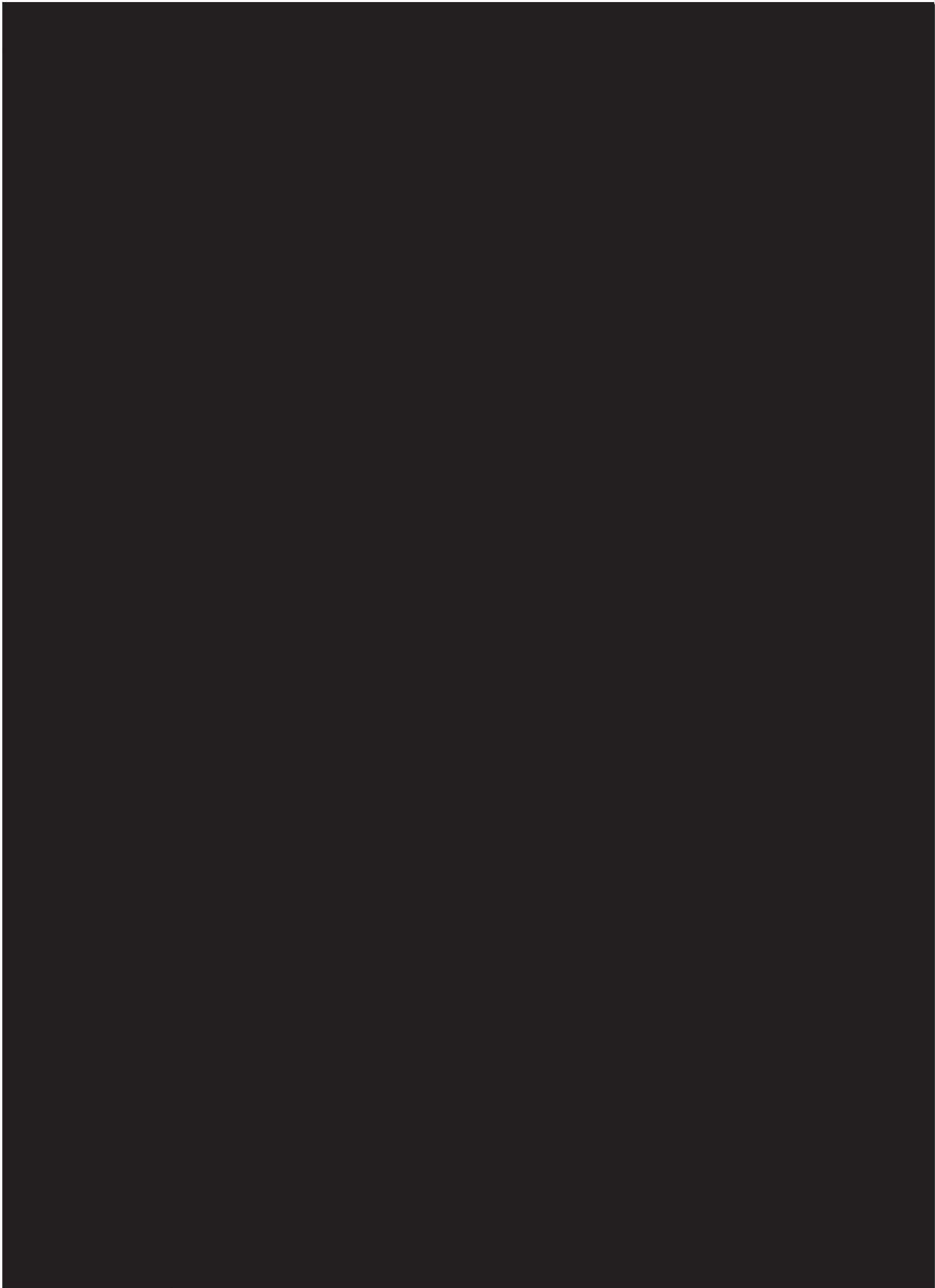
**TCCC-0005639**

CX0320\_0002



**TCCC-0005640**

CX0320\_0003



**TCCC-0005641**

CX0320\_0004



**TCCC-0005642**

CX0320\_0005

## EXHIBIT B

RESPONDENTS' PROPOSED REDACTED VERSIONS OF  
CX 230 AND CX320

Micorosoft Outlook

From: Kuyoomjian, Diane  
Sent: Thursday, August 21, 2008 5:02 PM  
To: Mizrahi, Heather  
Subject: FW: UK print ad body copy  
  
Importance: High

----- Forwarded Message

From: <Kuyoomjian>, Diane <DKuyoomjian@PomWonderful.com>  
Date: Thu, 21 Aug 2008 09:08:20 -0700  
To: "Perdigao, Michael" <MPerdigao@FireStationAgency.com>, "Leow, Liz" <LLeow@FireStationAgency.com>, Andrea Hernandez <AHernandez@FireStationAgency.com>  
Cc: Claire Nelson <CNelson@PomWonderful.com>, Ericka Gettman <EGettman@Roll.com>, "Hamilton, Sarah" <SHamilton@PomWonderful.com>  
Conversation: UK print ad body copy  
Subject: Re: UK print ad body copy

Hello again.

REDACTED

Claire is contacting Andrea this morning about the materials sent last night to see if we can make the modification for that pub.

Thank you all.  
Diane

On 8/20/08 7:06 PM, "Kuyoomjian, Diane" <DKuyoomjian@PomWonderful.com> wrote:

All,

As you know, for the UK print ads, we were reviewing existing body copy to be sure it is 1) current info and 2) ok to use in the UK (given different/more stringent requirements).

We will provide the Agency with marked up versions of each ad, but I thought I'd also send a recap so everyone would understand the overall direction. More detail than some of you may need, but good reference for this and other projects where these same copy issues may surface.

1. Not that we have decided to use the "Heart Therapy" execution in outdoor only, so we will now have 7 print executions and 8 OOH for the UK.
2. Re body copy: Obviously the intro and ending lines change in each ad according to the headlines, but as far as the core copy points:

EXHIBIT 42  
Witness Perdigao  
Date 10/10 Total Pgs. 2  
Elizabeth Barrelli CSR 7844 RPR

ITS EXHIBIT 11  
2-10-2011  
Kuyoomjian



A) All ads will carry a copy point about antioxidants which reads as follows:

"It has superior levels of naturally occurring antioxidants that help neutralise free radicals, harmful molecules that cause cell and tissue damage."

B) Beyond that, each ad will then speak to either the California-grown pomegranates or to the medical research. We did this based on the headlines (Liz, please advise if you think differently about any of these when you have them.)

For headlines *Extreme Makeover* and *Ancient Power*, the second point reads:

"And only POM Wonderful is made exclusively from California-grown, Wonderful variety pomegranates."

For headlines: *Antioxidant Superpower*, *Life Preserver*, *Forever Young*, *Cheat Death* and *Decompress*, the second point reads:

"Only POM is supported by £13 million in medical research from the world's leading universities, which has uncovered encouraging results in cardiovascular and prostate health." (That "£" is as close as I can come to a British pound sign on my computer :-)

REDACTED

4. Other info that will be worked into all ads:

- The Antioxidant Superpower. 100% Pure Pomegranate Juice. (Same as the OOH)
- Available in the chilled aisle (can we work this into OOH or is that asking too much???)
- pomwonderful.co.uk

5. One caveat (you knew there would be one, right?): Matt is doing a triple check re the medical research copy in the next couple of days. I know Claire and Andrea are also already double checking all our print deadlines. Based on that, we will know for sure if we need to get going on all of this copy (for some or all insertions) right away or if any of them can wait a day or two in case anything changes. I would like to save you the possibility of having to re-lay out the paragraph, if our timetables permit waiting a couple days.

I think that's everything. Shout if you have any questions.

Thanks,  
Diane

----- End of Forwarded Message

\_\_\_\_ PLF \_\_\_\_\_ DEF \_\_\_\_\_  
EXHIBIT 43  
WITNESS LEOW  
DATE 2/4/11  
TONI COHEN

CASE NO. CY-08-08237-0001 (MGT)  
POM WONDERFUL LLC  
VS. THE COCA-COLA COMPANY  
DEBENDANT'S EXHIBIT 2132  
DATE \_\_\_\_\_ IDENT \_\_\_\_\_  
DATE \_\_\_\_\_ EVID \_\_\_\_\_  
BY \_\_\_\_\_  
Deputy Clerk  
AO 386-A

TCCC-0005638

---

**From:** Perdigo, Michael  
**Sent:** Thursday, June 11, 2009 05:14 PM  
**To:** Leow, Liz  
**CC:** Kuyoomjian, Diane; Tupper, Matt  
**Subject:** FW: Pom claims inventory  
**Attachments:** 2912140\_1.DOC

REDACTED

Liz-

Per the meeting today, we are still being asked to develop a humorous TV campaign (ideally, at least two commercials),

The consumer benefit is not nearly as compelling as we had hoped, but our focus should be on the fact that POM is healthy. It offers antioxidants that are good for you, as they reduce free radicals...and POM 100% pure pomegranate juice is the "Antioxidant Superpower."

The back-up support includes:

- The fruit has been around for at least 8000 years
- We have invested over \$28 MM in medical research examining
- 14 Published clinical studies on the health benefits

Lynda would like us to do our best, and based on the executions, she will decide whether she is comfortable proceeding with television....or not.

We can discuss more in person, and I believe the POM Marketing team will craft into a more formal document.

Thanks.

Mike

----- Forwarded Message

---

REDACTED

TCCC-0005640

---

REDACTED

TCCC-0005641

REDACTED

---

TCCC-0005642

## EXHIBIT C

EXCERPTS FROM THE OCTOBER 1, 2010 DEPOSITION OF  
MICHAEL PERDIGAO  
IN *POM WONDERFUL LLC V. OCEAN SPRAY CRANBERRIES, INC.*

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

POM WONDERFUL LLC, a Delaware )  
limited liability company, )  
 )  
Plaintiff, )  
 )  
vs. ) No. CV09-00565  
 ) DDP (RZx)  
OCEAN SPRAY CRANBERRIES, INC., a )  
Delaware corporation; and DOES )  
1-10, inclusive, )  
 )  
Defendants. )  
 )  
 )  
AND ALL RELATED CROSS-ACTIONS. )  
 )  
 )

C O N F I D E N T I A L

VIDEOTAPED DEPOSITION OF MICHAEL PERDIGAO  
FRIDAY, OCTOBER 1, 2010  
LOS ANGELES, CALIFORNIA

REPORTED BY:  
Elizabeth Borrelli CSR No. 7844  
Job No. 19910



CONFIDENTIAL - MICHAEL PERDIGAO

6

|    |            |                                                                                                                                                                |     |
|----|------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| 1  | Exhibit 58 | E-mail to Liz Leow from Michael Perdigao, dated July 18, 2008, Bates Nos. POM-OS5326 through POM-OS5327, 2 pages                                               | 62  |
| 2  |            |                                                                                                                                                                |     |
| 3  | Exhibit 59 | E-mail to Michael Perdigao from Heather Mizrahi, dated July 28, 2008, with attachment, Bates Nos. POM-OS14407 through POM-OS14408, 2 pages                     | 72  |
| 4  |            |                                                                                                                                                                |     |
| 5  |            |                                                                                                                                                                |     |
| 6  | Exhibit 60 | E-mail to Michael Perdigao from Liz Leow, dated August 13, 2008, Bates Nos. POM-OS186 through POM-OS188, 3 pages                                               | 86  |
| 7  |            |                                                                                                                                                                |     |
| 8  |            |                                                                                                                                                                |     |
| 9  | Exhibit 61 | E-mail chain dated August 13, 2008, Bates Nos. POM-OS13338 through POM-OS13339, 2 pages                                                                        | 90  |
| 10 |            |                                                                                                                                                                |     |
| 11 | Exhibit 62 | E-mail chain dated August 21, 2008, Bates Nos. POM-OS11492 through POM-OS11493, 2 pages                                                                        | 91  |
| 12 |            |                                                                                                                                                                |     |
| 13 | Exhibit 63 | E-mail to Michael Perdigao from Liz Leow, dated August 27, 2008, Bates No. POM-OS5496, 1 page                                                                  | 95  |
| 14 |            |                                                                                                                                                                |     |
| 15 | Exhibit 64 | E-mail to Michael Perdigao from Andrea Hernandez, dated September 2, 2008, Bates Nos. POMOS13602 through POM-OS13605, 4 pages                                  | 96  |
| 16 |            |                                                                                                                                                                |     |
| 17 |            |                                                                                                                                                                |     |
| 18 | Exhibit 65 | E-mail to Michael Perdigao from Diane Kuyoomjian, dated September 5, 2008 with attached forwarded message, Bates Nos. POM-OS14229 through POM-OS14230, 2 pages | 100 |
| 19 |            |                                                                                                                                                                |     |
| 20 |            |                                                                                                                                                                |     |
| 21 |            |                                                                                                                                                                |     |
| 22 | Exhibit 66 | E-mail to Michael Perdigao from Liz Leow, dated September 25, 2008, Bates Nos. POM-OS013502 through POM-OS13503, 2 pages                                       | 105 |
| 23 |            |                                                                                                                                                                |     |
| 24 |            |                                                                                                                                                                |     |
| 25 |            |                                                                                                                                                                |     |

DAVID FELDMAN WORLDWIDE, INC.  
 450 Seventh Avenue - Ste 2803, New York, NY 10123 (212)705-8585

1 12:14 Yeah. This is just back-and-forth  
2 exchange related to some body copy that would go in  
3 a print ad to make sure that the copywriter was  
4 being accurate.

5 12:14 BY MR. HORVATH:

6 Q. Is this talking about the same study that  
7 was provided to NBC in the exchange we saw earlier  
8 from May of 2008?

9 A. I don't know because I don't know what  
10 12:14 they submitted to NBC.

11 Q. Who is Josh Bloomberg?

12 A. He was a copywriter at the agency.

13 MR. HORVATH: Okay.

14 This will be Exhibit No. 62.

15 12:15 This will be our last one before lunch.  
16 And this is a document marked POM-OS11492  
17 to 93.

18 (Whereupon Exhibit 62 was marked for  
19 identification.)

20 12:16 BY MR. HORVATH:

21 Q. And did you receive this e-mail from Diane  
22 Kuyoomjian?

23 MS. ALLAYEE: Are you referring to the  
24 middle e-mail? The second e-mail?

25 12:16 THE WITNESS: It looks like the first one

1 12:16 just went to Heather.

2 BY MR. HORVATH:

3 Q. Fair point.

4 Let's take the -- let's take the part

5 12:16 under where it says "Forwarded Message" there.

6 Did you receive what is under "Forwarded  
7 Message" from Diane?

8 A. Yes.

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10 12:16

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25 12:17



DAVID FELDMAN WORLDWIDE, INC.  
450 Seventh Avenue - Ste 2803, New York, NY 10123 (212)705-8585

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25 12:18



DAVID FELDMAN WORLDWIDE, INC.  
450 Seventh Avenue - Ste 2803, New York, NY 10123 (212)705-8585

1 12:19

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13 MS. ALLAYEE: Calls --

14 THE WITNESS: -- for certain.

15 12:19 MS. ALLAYEE: -- for speculation.

16 Sorry.

17 THE WITNESS: Yep.

18 BY MR. HORVATH:

19 Q. Okay.

20 12:19 You can go ahead and answer. I didn't  
21 catch that.

22 A. No, I don't know for certain --

23 Q. Okay.

24 A. -- what she was referring to.

25 12:19 Q. Okay.

1           12:19           We can take our lunch break.  
2                           Off the record.  
3                           THE VIDEOGRAPHER: This marks the end of  
4 videotape No. 1 in the deposition of Michael  
5           12:19           Perdigao. We are off the record at 12:19 p.m.  
6                           (Lunch taken.)  
7                           THE VIDEOGRAPHER: We are back on the  
8 record at 1:26 p.m. This marks the beginning of  
9 videotape No. 2 in the deposition of Michael  
10          13:26           Perdigao.  
11                           BY MR. HORVATH:  
12                           Q.    Hi again.  
13                           A.    Hello.  
14                           MR. HORVATH: We'll now mark as Exhibit  
15          13:26           No. 62 [sic] a single page numbered POM-OS5496.  
16                           (Discussion off the record.)  
17                           (Whereupon Exhibit 63 was marked for  
18 identification.)  
19                           BY MR. HORVATH:  
20          13:27           Q.    Did you receive this e-mail from Liz Leow?  
21                           A.    Yes.  
22                           Q.    Who's Ken Younglieb?  
23                           A.    Copywriter in the agency.  
24                           Q.    Do you remember this copy that he wrote?  
25          13:27           A.    Not specifically, but he writes lots of

## EXHIBIT D

EXCERPTS FROM THE FEBRUARY 10, 2011 DEPOSITION OF  
DIANE KUYOOMJIAN

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES

|                              |   |                 |
|------------------------------|---|-----------------|
| In the Matter of,            | ) |                 |
|                              | ) |                 |
| POM WONDERFUL LLC and        | ) |                 |
| ROLL INTERNATIONAL CORP.,    | ) |                 |
| companies, and               | ) |                 |
|                              | ) | DOCKET NO. 9344 |
| STEWART A. RESNICK,          | ) |                 |
| LYNDA RAE RESNICK, and       | ) |                 |
| MATTHEW TUPPER, individually | ) |                 |
| and as officers of the       | ) |                 |
| companies                    | ) |                 |
|                              | ) |                 |
|                              | ) |                 |
| Respondents.                 | ) |                 |
| _____                        | ) |                 |

CONFIDENTIAL DEPOSITION OF  
DIANE KUYOOMJIAN

DATE & TIME: Thursday, February 10, 2011  
11:55 a.m. - 7:51 p.m.

LOCATION: 10877 Wilshire Boulevard  
Suite 700  
Los Angeles, California

REPORTER: Christina Kim-Campos, CSR  
Certificate No. 12598

For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555



## E X H I B I T S

(Continued)

## PLAINTIFF'S

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| 1  |                                                                                   |      |
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| 3  | PLAINTIFF'S                                                                       | PAGE |
| 4  | 11 - Documents Bates stamped RESP024872 to<br>RESP024873                          | 135  |
| 5  |                                                                                   |      |
| 6  | 12 - Document Bates stamped VMS-0000052                                           | 143  |
| 7  |                                                                                   |      |
| 8  | 13 - Documents Bates stamped RESP024495 to<br>RESP024498                          | 145  |
| 9  | 14 - Document Bates stamped POM00170972                                           | 151  |
| 10 | 15 - Documents Bates stamped TCCC-0001643 to<br>TCCC-0001644                      | 157  |
| 11 |                                                                                   |      |
| 12 | 16 - Documents Bates stamped POM-MDREHER04316<br>to POM-MDREHER04335              | 158  |
| 13 | 17 - Documents Bates stamped<br>POM-DKUYOOMIJIAN00273 to<br>POM-DKUYOOMIJIAN00277 | 173  |
| 14 | 18 - Documents Bates stamped POM-MTUPPER02123<br>to POM-MTUPPER02127              | 183  |
| 15 |                                                                                   |      |
| 16 | 19 - Documents Bates stamped TCCC-0005477 to<br>TCCC-0005478                      | 186  |
| 17 | 20 - Documents Bates stamped TCCC-0005479 to<br>TCCC-0005481                      | 189  |
| 18 |                                                                                   |      |
| 19 | 21 - Documents Bates stamped<br>POM-DKUYOOMIJIAN00245 to<br>POM-DKUYOOMIJIAN00251 | 192  |
| 20 |                                                                                   |      |
| 21 | 22 - Documents Bates stamped TCCC-0005472 to<br>TCCC-0005474                      | 194  |
| 22 | 23 - Documents Bates stamped TCCC-0001660 to<br>TCCC-0001661                      | 196  |
| 23 |                                                                                   |      |
| 24 | 24 - Document Bates stamped RESP005347                                            | 200  |
| 25 |                                                                                   |      |

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## E X H I B I T S

(Continued)

## PLAINTIFF'S

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|    |                                              |      |
|----|----------------------------------------------|------|
| 1  |                                              |      |
| 2  |                                              |      |
| 3  | PLAINTIFF'S                                  | PAGE |
| 4  | 25 - Documents Bates stamped FTC0000022,     |      |
| 5  | FTC0000034, FTC0000045, FTC0000068,          |      |
| 6  | FTC0000086 to FTC0000091                     | 202  |
| 7  | 26 - Documents Bates stamped RESP032011 to   |      |
| 8  | RESP032017                                   | 209  |
| 9  | 27 - Documents Bates stamped TCCC-0001654 to |      |
| 10 | TCCC-0001655                                 | 211  |
| 11 | 28 - Documents Bates stamped RESP006990 to   |      |
| 12 | RESP006991                                   | 215  |
| 13 | 29 - Documents Bates stamped TCCC-0005638 to |      |
| 14 | TCCC-0005642                                 | 218  |
| 15 | 30 - Documents Bates stamped                 |      |
| 16 | POM-DKUYOOMIJIAN00374 to                     |      |
| 17 | POM-DKUYOOMIJIAN00378                        | 221  |
| 18 | 31 - Documents Bates stamped                 |      |
| 19 | POM-DKUYOOMIJIAN00384 to                     |      |
| 20 | POM-DKUYOOMIJIAN00385                        | 223  |
| 21 | 32 - Documents Bates stamped KUY000432 to    |      |
| 22 | KUY000435                                    | 227  |
| 23 | 33 - Document Bates stamped KUY000446        | 231  |
| 24 | 34 - Documents Bates stamped TCCC-0001509 to |      |
| 25 | TCCC-0001514                                 | 233  |
|    | 35 - Documents Bates stamped TCCC-0004674 to |      |
|    | TCCC-0004688                                 | 236  |
|    | 36 - Documents Bates stamped TCCC-0005488 to |      |
|    | TCCC-0005499                                 | 242  |
|    | 37 - Documents Bates stamped TCCC-0005569 to |      |
|    | TCCC-0005627                                 | 245  |

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1 (Plaintiff's Exhibit 11 was marked  
2 for identification by the court  
3 reporter and is attached hereto.)

4 BY MS. NACH:

5 Q. The court reporter has handed you what's  
6 been marked as Exhibit 11, and it's Bates stamped  
7 RESP024872 through 73.

8 A. Okay.

9 Q. Do you recognize this e-mail chain?

10 A. Yes.

11 Q. And so it pertains to U.K. print ad body  
12 copy; correct?

13 A. Yes.

14 Q. And the date is August 21st, 2008?

15 A. (Witness shakes head up and down.)

16 Q. So I'd like to direct your attention to, on  
17 the first page of this Exhibit 11, starting on the  
18 second half, it's an e-mail dated August 20th, 2008.

19 Are we on different --

20 MS. DOMOND: No.

21 BY MS. NACH:

22 Q. So you stated:

23 "As you know, for the UK print  
24 ads, we were reviewing existing body  
25 copy to be sure it is 1) current info

1           and 2) ok to use in the UK (given  
2           different/more stringent  
3           requirements)."

4           Do you recall which UK print ads you were  
5           referring to?

6           A.    My -- I -- I would have to interpret that,  
7           infer that based on what's referred to in the memo.

8           Q.    Mm-hmm. Or which campaign in general?

9           A.    Which campaign?

10          Q.    Was it the Dressed Bottle campaign?

11          A.    Yes, it would be the Dressed Bottle  
12          campaign.

13          Q.    And when you say "current info," what do you  
14          mean by "current info"?

15          A.    I'm sorry. Where is that?

16          Q.    Oh, sorry. In the first line of this  
17          e-mail, on the second half of the first page.

18

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23          Q.    And then the second point, "ok to use in the  
24          UK (given different/more stringent requirements,"  
25          when you say "different/more stringent

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THE WITNESS: Okay.

MS. NACH: I don't know if I had a question

1 recollection is these -- at the time, that these  
2 would have looked different than the way that same  
3 study would have been referenced in other places,  
4 and therefore, you know, is this accurate and the  
5 best way we could do it.

6 Q. Okay.

7 (Plaintiff's Exhibit 22 was marked  
8 for identification by the court  
9 reporter and is attached hereto.)

10 BY MS. NACH:

11 Q. The court reporter has handed you what she's  
12 just marked as Exhibit 22, and this is a document  
13 Bates stamped TCCC, hyphen, 0005472 through 5474.  
14 Let me know when you've had a chance to look it  
15 over.

16 A. Mm-hmm. Okay.

17 Q. Do you recognize this document?

18 A. Yes.

19 Q. And is this an e-mail that you sent on  
20 February 18th, 2009, to Michael Perdigao, Andrea  
21 Hernandez, Ray Espinoza, and Scott Lewis, on "Boards  
22 Needed for POM Health Claims Meeting"?

23 A. Yes.



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(Plaintiff's Exhibit 23 was marked  
for identification by the court  
reporter and is attached hereto.)

///



1 correct? And so would he lead, you know, the sort  
2 of collaboration on determining messaging possible  
3 health claims when you worked with him?

4 A. Your question was would he lead?

5 Q. Yeah.

6 A. He would be involved.

7 Q. Okay.

8 (Plaintiff's Exhibit 29 was marked  
9 for identification by the court  
10 reporter and is attached hereto.)

11 BY MS. NACH:

12 Q. Do you recognize this document?

13 A. Yes.

14 Q. And what is it?

15 A. It is a -- an e-mail [REDACTED]  
16 from Mike Perdigao to Liz Leow as well as Matt and  
17 myself, discussing some questions around deciding  
18 how to approach doing a -- a television campaign for  
19 POM.

20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

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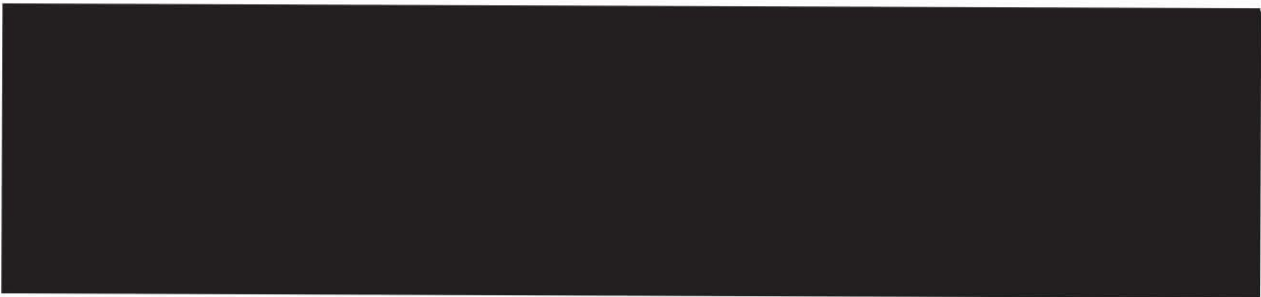


A. Well, it was before my time, so I don't remember any specifics.

Q. Okay. If you could turn back to the e-mail, first page, and the second paragraph reads:

"The consumer benefit is not nearly as compelling as we had hoped, but our focus should be on the fact that POM is healthy."

Do you know what Mike Perdigao is referring to when he states that "The consumer benefit is not nearly as compelling as we had hoped"?



Q. And what is the consumer benefit?

A. That he's referring to?

Q. Mm-hmm. Yes.

A. Well, I think the -- the benefit that he's referring to is the idea of POM being healthy because it has antioxidants.

1 Q. Okay. So that POM is healthy?

2 MR. ROSE: Yeah, let me -- let me object  
3 that the question about this lacks foundation as to  
4 the witness's knowledge about the author's meaning  
5 of this e-mail.

6 MS. NACH: Okay.

7 BY MS. NACH:

8 Q. Yeah, I'm just asking for your understanding  
9 of what that means.

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[REDACTED] at the  
end of the e-mail he states, "We can discuss more in  
person, and I believe the POM Marketing team will  
craft into a more formal document."

Let me back up, actually. Do you know what  
he's referring to when he says the POM Marketing  
team will craft into a more formal document?

A. Yes.

Q. And what was he referring to?

A. He was intending asking, assuming that this  
information that he was relaying here would be  
turned into a more formal creative brief.

Q. The information in the body of this e-mail,  
you're saying?

1 A. Yes.

2 Q. Okay.

3 (Plaintiff's Exhibit 30 was marked  
4 for identification by the court  
5 reporter and is attached hereto.)

6 BY MS. NACH:

7 Q. The court reporter has just handed you what  
8 she's just marked as Exhibit 30. This is a document  
9 Bates stamped POM, hyphen, DKUYOOMIJIAN00374 through  
10 378. Let me know when you've had a chance to look  
11 at it.

12 A. I have.

13 Q. Do you recognize this document?

14 A. Yes.

15 Q. And what is it?

16 A. It is a note and attachment from Martin  
17 Shreeves, and the attachment is a health benefits  
18 kind of recap that was a piece of collateral that  
19 Martin used in medical marketing outreach.

20 Q. And the subject line of the e-mail says,  
21 "POM sales Sheet used at Medical Conferences."

22 Is that what you mean by collateral?

23 A. Yeah. I -- I wouldn't refer to it as a  
24 sales sheet --

25 Q. Oh, okay.

For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

## EXHIBIT E

EXCERPTS FROM THE “AMENDED JOINT TRIAL EXHIBIT LIST”  
IN *POM WONDERFUL LLC V. THE COCA COLA COMPANY*

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12 Facsimile: 310-966-8810

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Telephone: 408-998-8500  
16 Facsimile: 408-998-8503

17 Attorneys for Plaintiff,  
POM WONDERFUL LLC

18  
19 UNITED STATES DISTRICT COURT  
20 CENTRAL DISTRICT OF CALIFORNIA

21 POM WONDERFUL LLC, a Delaware  
22 limited liability corporation,

23 Plaintiff,

24 vs.

25 THE COCA COLA COMPANY, a  
26 Delaware corporation; and DOES 1  
through 100,

27 Defendants.  
28

NELSON L. ATKINS (SBN 036752)  
nelson\_atkins@gshllp.com  
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Attorneys for Defendant,  
THE COCA COLA COMPANY

Case No. CV08-06237 SJO (FMOx)

**PLAINTIFF POM WONDERFUL  
LLC'S AND DEFENDANT THE  
COCA COLA COMPANY'S  
AMENDED JOINT TRIAL EXHIBIT  
LIST**

1 Plaintiff Pom Wonderful LLC (“Pom”) and defendant The Coca-Cola  
2 Company (“TCCC”) (collectively, the “Parties”) respectfully submit the following  
3 Amended Joint Exhibit List. The inclusion of a document on the Parties’ schedules  
4 of exhibits is not an admission that the document is either relevant or admissible.  
5 The Parties specifically reserve their right to object to or move to exclude any of the  
6 identified documents. In addition to the listed documents, the Parties reserve the  
7 right to use any of the documents identified on each other’s schedule of trial  
8 exhibits.

9 Pom believes the Parties should abide by the procedures and scheduling set  
10 forth in the Local Rules and the Court’s Civil Standing Order for the identification  
11 and submission of exhibits to the Court for use at trial. Pom objects to the extent  
12 TCCC purports to ‘amend’ or ‘supplement’ its exhibit list after the deadlines set by  
13 the Local Rules and the Civil Standing Order. Pom further objects to TCCC’s  
14 attempt to add exhibits Nos. 2246-2468 following the initial Joint Exhibit List filed  
15 by the Parties on February 8, 2010 [Docket No. 236]. Finally, Pom submits that the  
16 same procedural limitations on identifying new exhibits will apply equally to both  
17 Parties, and are not affected by a purported reservation of rights. Accordingly, Pom  
18 objects to TCCC’s reservation of rights in the paragraph below. To the extent that  
19 adding new exhibits is appropriate in limited circumstances, those circumstances  
20 apply equally to both Parties.

21 TCCC reserves its right to amend and supplement these exhibits for any  
22 reason, including but not limited to ongoing investigation, ongoing discovery,  
23 review of discovery or other materials not yet reviewed or available for review,  
24 receipt and review of exhibit lists and objections from the other Party, rulings from  
25 the Court, proceedings at trial, or otherwise. With respect to Pom’s objection to  
26 addition of exhibits following February 8, TCCC observes that Pom itself added  
27 exhibits in the intervening time period, Nos. 501-509, and that the addition of

1 exhibits by both parties prior to filing of this Amended Joint Exhibit List was  
2 compliant with all rules and orders, as the pretrial dates were reset when the Court  
3 adjourned the trial date from March to April.

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| TRIAL EXH. NO. | DESCRIPTION                                                                                                                       | Date Identified | Date Admitted |
|----------------|-----------------------------------------------------------------------------------------------------------------------------------|-----------------|---------------|
| 2312           | 2006 Juice Web Survey POM Wonderful (PW03411495-523)                                                                              |                 |               |
| 2313           | Online Juice Survey August 2007 (PW03411524-554)                                                                                  |                 |               |
| 2314           | Email from R. Calderon to J. Regal and others re Rina's transition document (04/28/2006) (PW00562337-340)                         |                 |               |
| 2315           | Email from L. Resnick to mitthoo@aol.com re Profile on POM Wonderful (04/21/2009) (PW00649613-616)                                |                 |               |
| 2316           | Email from M. Dreher M. Tupper and others re Phenol Conferences Report (12/12/2007) (PW00809824-827)                              |                 |               |
| 2317           | Email from H. Liker to M. Tupper re honorarium (05/27/2009) (PW00820773-775)                                                      |                 |               |
| 2318           | Email from M. Tupper to M. Aviram re FTC meeting (06/03/2009) (PW00831656)                                                        |                 |               |
| 2319           | Email from P. Sheppard to J. Rosenzweig re "Cheat Death" fruit juice advertisement banned (04/08/2009) (PW00950330)               |                 |               |
| 2320           | Email from M. Perdigao to A. Hernandez and others re Board's Needed for POM Health Claims Meeting (02/18/2009) (PW00993434-435)   |                 |               |
| 2321           | Email from D. Kuyoomijian to M. Perdigao and others re Board's Needed for POM Health Claims Meeting (02/18/2009) (PW00999207-208) |                 |               |
| 2322           | Email from A. Hernandez to D. Kuyoomijian and others re POM Health Claims Meeting Preparation (01/22/2009) (PW01002668)           |                 |               |

| TRIAL EXH. NO. | DESCRIPTION                                                                                                                      | Date Identified | Date Admitted |
|----------------|----------------------------------------------------------------------------------------------------------------------------------|-----------------|---------------|
| 2323           | Email from D. Kuyoomijian to M. Tupper re Prostate ad "facts" (01/14/2009) (PW01005917)                                          |                 |               |
| 2324           | Email from D. Kuyoomijian to M. Perdigao and others re POM Health Claims Meeting Preparation (01/22/2009) (PW01006594-595)       |                 |               |
| 2325           | Email from J. Rushton D. Kuyoomijian and others re 6/11/2009 meeting (06/05/2009) (PW01030069)                                   |                 |               |
| 2326           | Email from J. Kalan to R. Bryant re Reminder – Detailed Project Updates (04/06/2009) (PW00598212-216)                            |                 |               |
| 2327           | Email from D. Kuyoomijian M. Tupper and others re POM Wonderful Campaign Evaluation- Topline (05/18/2009) (PW00821374-384)       |                 |               |
| 2328           | Email from D. Darnault to M. Tupper and others re Welch's Research (04/20/2009) (PW00828549-584)                                 |                 |               |
| 2329           | Email from M. Aviram to M. Tupper re FTC June 2 2009 Aviram POM presentation (05/08/2009) (PW00831395-425)                       |                 |               |
| 2330           | Email from C. Nelson D. Kuyoomijian re Report – POM Wonderful Campaign Copytest (05/27/2009) (PW01031971-1032028)                |                 |               |
| 2331           | Email from M. Dreher to M. Tupper and others re Pre-read and discussion guide (06/20/2008) (PW00793389-397)                      |                 |               |
| 2332           | Email from M. Perdigao to L. Leow and others re POM claims inventory (06/11/2009) (PW01033358-361)                               |                 |               |
| 2333           | Email from D. Kuyoomijian to M. Perdigao and others re Boards Needed for POM Health Claims Meeting (02/18/2009) (PW01368591-592) |                 |               |

## EXHIBIT F

EXCERPTS FROM THE “PRETRIAL EXHIBIT STIPULATION”  
IN *POM WONDERFUL LLC V. THE COCA COLA COMPANY*

1 ALLEN J. RUBY (SBN 047109)  
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16 Attorneys for Plaintiff  
POM WONDERFUL LLC

17 UNITED STATES DISTRICT COURT  
18 CENTRAL DISTRICT OF CALIFORNIA

19 POM WONDERFUL LLC, a Delaware )  
20 limited liability company, )  
21 Plaintiff, )  
22 v. )  
23 THE COCA COLA COMPANY, a )  
24 Delaware corporation; and DOES 1-10, )  
25 inclusive, )  
26 Defendants. )

Nelson L. Atkins (SBN 036752)  
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THE COCA-COLA COMPANY

Case No. CV-08-06237 SJO (FMOx)  
**PRETRIAL EXHIBIT  
STIPULATION**  
Hon. S. James Otero  
Pretrial Conference:  
Date: March 29, 2010  
Time: 9:00 a.m.  
Trial  
Date: April 6, 2010  
Time: 8:30 a.m.

28

1 Pursuant to Paragraph 24(b)(4)(i) of the Court's Civil Standing Order, the  
2 parties respectfully submit this Pretrial Exhibit Stipulation. The parties reserve  
3 their rights to amend or supplement their objections and responses for any reason,  
4 including but not limited to the proposed use of the exhibit at trial, rulings from the  
5 Court, proceedings at trial, or otherwise.

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PRETRIAL EXHIBIT STIPULATION  
# 6439

| EX#  | DESCRIPTION                                                                                                                | OBJECTION                                          | RESPONSE                                                      |
|------|----------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------|---------------------------------------------------------------|
| 2322 | Email from A. Hernandez to D. Kuyoomijian and others re POM Health Claims Meeting Preparation (01/22/2009) (PW01002668)    |                                                    |                                                               |
| 2323 | Email from D. Kuyoomijian to M. Tupper re Prostate ad "facts" (01/14/2009) (PW01005917)                                    |                                                    |                                                               |
| 2324 | Email from D. Kuyoomijian to M. Perdigao and others re POM Health Claims Meeting Preparation (01/22/2009) (PW01006594-595) |                                                    |                                                               |
| 2325 | Email from J. Rushton D. Kuyoomijian and others re 6/11/2009 meeting (06/05/2009) (PW01030069)                             |                                                    |                                                               |
| 2326 | Email from J. Kalan to R. Bryant re Reminder – Detailed Project Updates (04/06/2009) (PW00598212-216)                      |                                                    |                                                               |
| 2327 | Email from D. Kuyoomijian M. Tupper and others re POM Wonderful Campaign Evaluation- Topline (05/18/2009) (PW00821374-384) |                                                    |                                                               |
| 2328 | Email from D. Darnault to M. Tupper and others re Welch's Research (04/20/2009) (PW00828549-584)                           |                                                    |                                                               |
| 2329 | Email from M. Aviram to M. Tupper re FTC June 2 2009 Aviram POM presentation (05/08/2009) (PW00831395-425)                 | See Pom's Motion in Limine No. 6, FRE 402, FRE 403 | See Minute Maid's Opposition to Pom's Motion in Limine No. 6. |
| 2330 | Email from C. Nelson D. Kuyoomijian re Report – POM Wonderful Campaign Copytest (05/27/209) (PW01031971-1032028)           |                                                    |                                                               |

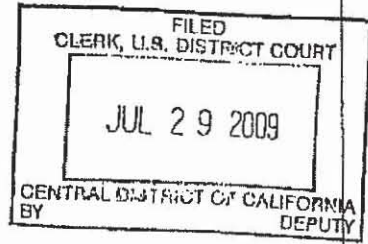
PRETRIAL EXHIBIT STIPULATION  
#0440

| EX#  | DESCRIPTION                                                                                                                      | OBJECTION                                           | RESPONSE                                                                                                                                                                                                  |
|------|----------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 2331 | Email from M. Dreher to M. Tupper and others re Pre-read and discussion guide (06/20/2008) (PW00793389-397)                      |                                                     |                                                                                                                                                                                                           |
| 2332 | Email from M. Perdigao to L. Leow and others re POM claims inventory (06/11/2009) (PW01033358-361)                               |                                                     |                                                                                                                                                                                                           |
| 2333 | Email from D. Kuyoomijian to M. Perdigao and others re Boards Needed for POM Health Claims Meeting (02/18/2009) (PW01368591-592) |                                                     |                                                                                                                                                                                                           |
| 2334 | Email from M. Ali to M. Tupper and others re Notes from Management Offsite (01/30/2007) (PW02106647-652)                         |                                                     |                                                                                                                                                                                                           |
| 2335 | Email from M. Tupper to G. Beggs and others re Animal testing (11/01/2007) (PW03309153-160)                                      |                                                     |                                                                                                                                                                                                           |
| 2336 | Video of Lynda Resnick February 8, 2010 appearance on Fox Business News                                                          | FRE 402, FRE 403, FRE 802, FRE 901 lacks foundation | Relevant to damages; non-hearsay party admission; any hearsay not subject to a hearsay exception is not being admitted for the truth of the statement; self-authenticating news publication under FRE 902 |
| 2337 | Tropicana 100% Juice Orange Strawberry Banana Flavored Blend of 5 Juices From Concentrate (photo and product)                    |                                                     |                                                                                                                                                                                                           |
| 2338 | Welch's Berry Pineapple Passion Fruit Flavored Blend of 5 Juices Fruit Juice Cocktail From Concentrate (photo and product)       |                                                     |                                                                                                                                                                                                           |
| 2339 | 5 Hour Energy Pomegranate (photo and product)                                                                                    |                                                     |                                                                                                                                                                                                           |

## EXHIBIT G

EXCERPTS FROM THE PROTECTIVE ORDER  
IN *POM WONDERFUL LLC V. THE COCA COLA COMPANY*





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6 Attorneys for Plaintiff  
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7 a Delaware Limited Liability Company

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10 MUNGER, TOLLES & OLSON LLP  
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11 San Francisco, CA 94105  
Telephone: 415-512-4000  
12 Facsimile: 415-512-4077

NOTE CHANGES MADE BY THE COURT.

13 Attorneys for Defendant  
THE COCA-COLA COMPANY,  
14 a Delaware Corporation

15 UNITED STATES DISTRICT COURT  
16 CENTRAL DISTRICT OF CALIFORNIA

18 POM WONDERFUL LLC, a Delaware  
Limited Liability Corporation,

19 Plaintiff,

20 vs.

21 THE COCA COLA COMPANY, a  
22 Delaware Corporation; and DOES 1  
through 100,

23 Defendants.

Case No. CV08-06237 SJO (FMOx)

Courtroom of the Hon. S. James Otero

**[REDACTED] PROTECTIVE ORDER**

NOTE CHANGES MADE BY THE COURT.

Complaint filed: Sept. 22, 2008  
Pretrial Conference: March 1, 2010  
Trial Date: March 9, 2010

1 Action may be retained by counsel of record for each party, and shall be sealed,  
2 designated and stored as **“Confidential or Highly Confidential Information**  
3 **Pursuant to Court Order”** and shall remain subject to the terms of this Order.

4 25. The designation of any information, documents, or things as  
5 Confidential or Highly Confidential Information pursuant to this Protective Order  
6 shall not, in and of itself, raise any inference as to the confidentiality of any  
7 information, documents, exhibits, or things marked for identification purposes or  
8 introduced into evidence at the trial of this litigation. Nothing in this Protective  
9 Order shall preclude any party from seeking confidential treatment from the Court  
10 with respect to such information, documents, exhibits, or things or from raising any  
11 available objections, including without limitation objections concerning  
12 admissibility, materiality, and privilege. The parties to this Protective Order  
13 expressly reserve at this time a determination as to the manner in which  
14 Confidential or Highly Confidential Information may be used in an evidentiary  
15 hearing or at trial. Special procedures or in camera treatment, if any, shall be  
16 determined in the future.

17 **I. NO WAIVER**

18 26. The disclosure of Confidential or Highly Confidential  
19 Information pursuant to discovery or the procedures set forth in this confidentiality  
20 order shall not constitute a waiver of any trade secret or any intellectual property,  
21 proprietary, privacy or other rights to or in such information.

22 27. The inadvertent disclosure of information protected by the  
23 attorney-client, work product, or other applicable privilege or protection in this  
24 litigation shall not constitute a waiver of any valid claim of privilege. Further,  
25 failure to assert a privilege in this litigation as to one document or communication  
26 shall not be deemed to constitute a waiver of the privilege as to any other document  
27 or communication allegedly so protected, even involving the same subject matter,  
28 unless the producing party seeks to rely on the privileged material in this litigation.

1 A party that discovers that it has inadvertently produced privileged information  
2 shall promptly request its return. The privileged documents together with all copies  
3 thereof shall be returned forthwith to the party claiming privilege. Any notes or  
4 other work product made from the documents in question shall be returned along  
5 with the documents themselves or destroyed, as appropriate. The party claiming  
6 privilege shall thereafter promptly produce a privilege log listing the documents in  
7 question and any other party shall thereafter have the right to challenge the  
8 assertion of privilege by motion or any other appropriate means.

9 28. A party who receives apparently privileged materials from the  
10 producing party, upon understanding that the document may be privileged or  
11 contain confidential attorney work product, must act as follows:

12 (a) Cease review of the document.

13 (b) Immediately notify opposing counsel by phone and email  
14 of the potentially privileged document, taking all reasonable measures to reach  
15 opposing counsel. The reviewer must follow such counsel's instructions regarding  
16 the disposition of the material. The reviewer must also completely refrain from  
17 using the material until instruction by opposing counsel is received, which may  
18 include returning the document and all copies, and removal of the document from  
19 electronic databases with confirmation by the producing party.

20 (c) Until such time that the reviewer receives instructions by  
21 opposing counsel, the reviewer may not share the document or its contents with  
22 other persons. The reviewer may notify supervising attorneys that a potentially  
23 privileged document may exist, without sharing its contents, and otherwise advise  
24 them or receive advice from them regarding the circumstances.

25 (d) If the producing party claims the privilege it shall  
26 thereafter promptly add the document(s) in question to its privilege log and any  
27 other party shall thereafter have the right to challenge the assertion of privilege by  
28 motion or any other appropriate means.

## EXHIBIT H

EXCERPTS FROM THE JANUARY 14, 2011 DEPOSITION OF  
MICHAEL PERDIGAO

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES

|                              |   |                 |
|------------------------------|---|-----------------|
| In the Matter of,            | ) |                 |
|                              | ) |                 |
| POM WONDERFUL LLC and        | ) |                 |
| ROLL INTERNATIONAL CORP.,    | ) |                 |
| companies, and               | ) |                 |
|                              | ) | DOCKET NO. 9344 |
| STEWART A. RESNICK,          | ) |                 |
| LYNDA RAE RESNICK, and       | ) |                 |
| MATTHEW TUPPER, individually | ) |                 |
| and as officers of the       | ) |                 |
| companies                    | ) |                 |
|                              | ) |                 |
|                              | ) |                 |
| Respondents.                 | ) |                 |
| _____                        | ) |                 |

CONFIDENTIAL DEPOSITION  
OF MICHAEL PERDIGAO

DATE & TIME: Friday, January 14, 2011  
9:05 a.m. - 6:06 p.m.

LOCATION: 10877 Wilshire Boulevard  
Suite 700  
Los Angeles, California

REPORTER: Christina Kim-Campos, CSR  
Certificate No. 12598

| E X H I B I T S |                                                |      |
|-----------------|------------------------------------------------|------|
| (Continued)     |                                                |      |
| PLAINTIFF'S     |                                                | PAGE |
| 1               |                                                |      |
| 2               |                                                |      |
| 3               |                                                |      |
| 4               | 26 - Documents Bates stamped                   |      |
|                 | MPERDIGAO_TCCC-0000220 to                      |      |
| 5               | MPERDIGAO_TCCC-0000228                         | 182  |
| 6               | 27 - Documents Bates stamped RESP004548 to     |      |
|                 | RESP004551                                     | 186  |
| 7               |                                                |      |
| 8               | 28 - Documents Bates stamped RESP005314 to     |      |
|                 | RESP005317                                     | 189  |
| 9               | 29 - Documents Bates stamped TCCC-0001676 to   |      |
|                 | TCCC-0001684                                   | 191  |
| 10              |                                                |      |
| 11              | 30 - Documents Bates stamped TROPICANA-0001109 |      |
|                 | to TROPICANA-0001112                           | 200  |
| 12              | 31 - Documents Bates stamped TROPICANA-0000640 |      |
|                 | To TROPICANA-0000642                           | 207  |
| 13              |                                                |      |
| 14              | 32 - Documents Bates stamped RESP005967 to     |      |
|                 | RESP005969                                     | 216  |
| 15              | 33 - Documents Bates stamped                   |      |
|                 | POM-DKUYOOMIJIAN00273 to                       |      |
| 16              | POM-DKUYOOMIJIAN00277                          | 218  |
| 17              | 34 - Documents Bates stamped POM-MTUPPER02123  |      |
|                 | to POM-MTUPPER02127                            | 222  |
| 18              |                                                |      |
| 19              | 35 - Documents Bates stamped TCCC-0005479 to   |      |
|                 | TCCC-0005481                                   | 229  |
| 20              | 36 - Documents Bates stamped TCCC-0005472 to   |      |
|                 | TCCC-0005474                                   | 237  |
| 21              |                                                |      |
| 22              | 37 - Documents Bates stamped TCCC-0005638 to   |      |
|                 | TCCC-0005642                                   | 247  |
| 23              | 38 - Federal Trade Commission Complaint,       |      |
|                 | Docket No. D-9344                              | 258  |
| 24              |                                                |      |
| 25              | 39 - Document Bates stamped VMS-0000089        | 271  |

For The Record, Inc.

(301) 870-8025 - [www.ftrinc.net](http://www.ftrinc.net) - (800) 921-5555

1 attend LRR meetings?

2 A. No.

3 (Plaintiff's Exhibit 36 was marked  
4 for identification by the court  
5 reporter and is attached hereto.)

6 BY MR. WONE:

7 Q. I've handed to the court reporter what's  
8 been marked as Exhibit 36. If you could please  
9 review that, Mr. Perdigao, and let me know when  
10 you're finished.

11 A. Okay.

12 Q. And on page TCC, dash, 0005473 of  
13 Exhibit 36, there's an e-mail from Ms. Kuyoomjian to  
14 you and Andrea Hernandez and Ray Espinoza, dated  
15 February 18th, 2009; correct?

16 A. Correct.

17 Q. And the subject line reads "Re: Boards  
18 needed for POM Health Claims Meeting;" correct?

19 A. Correct.

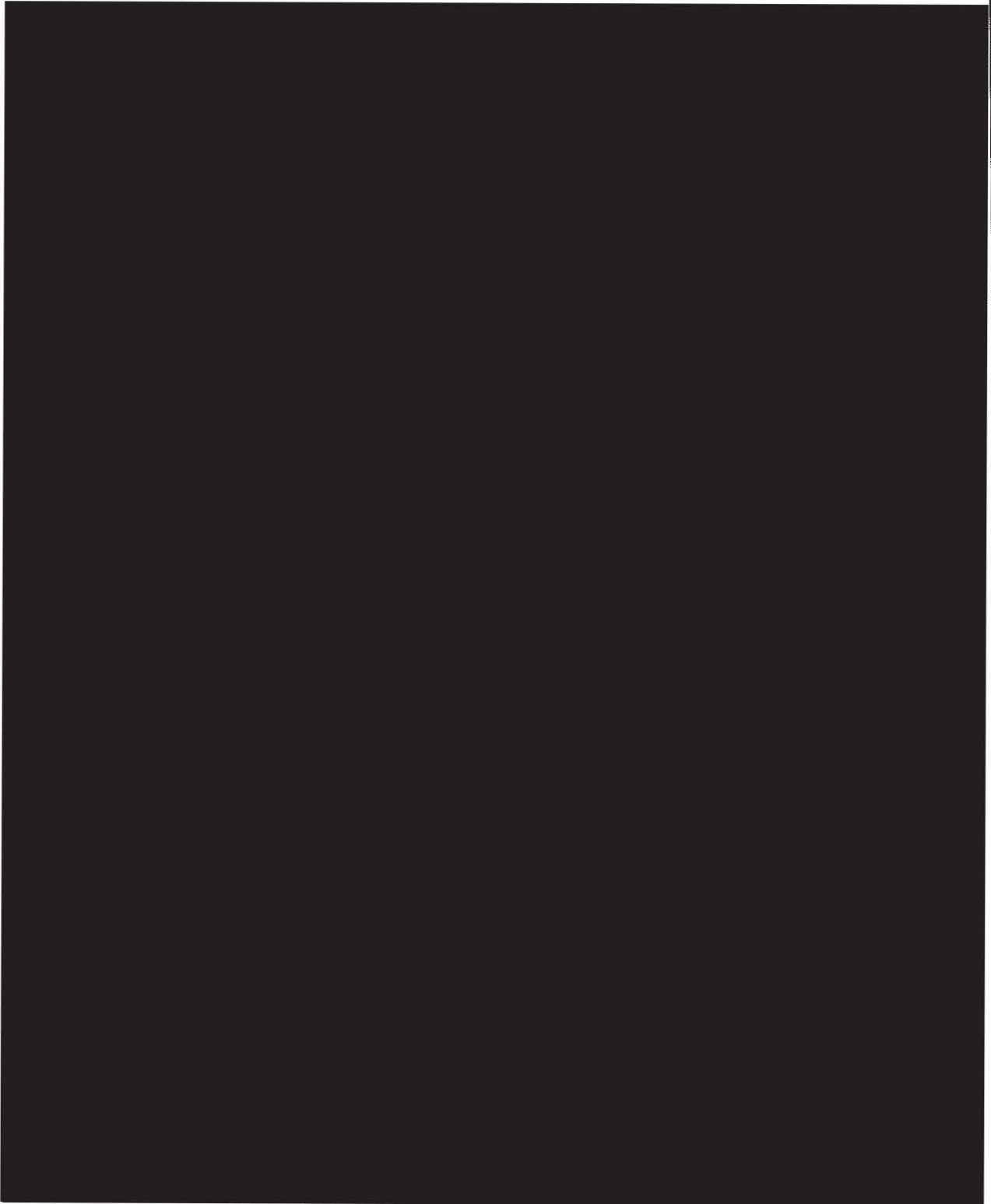


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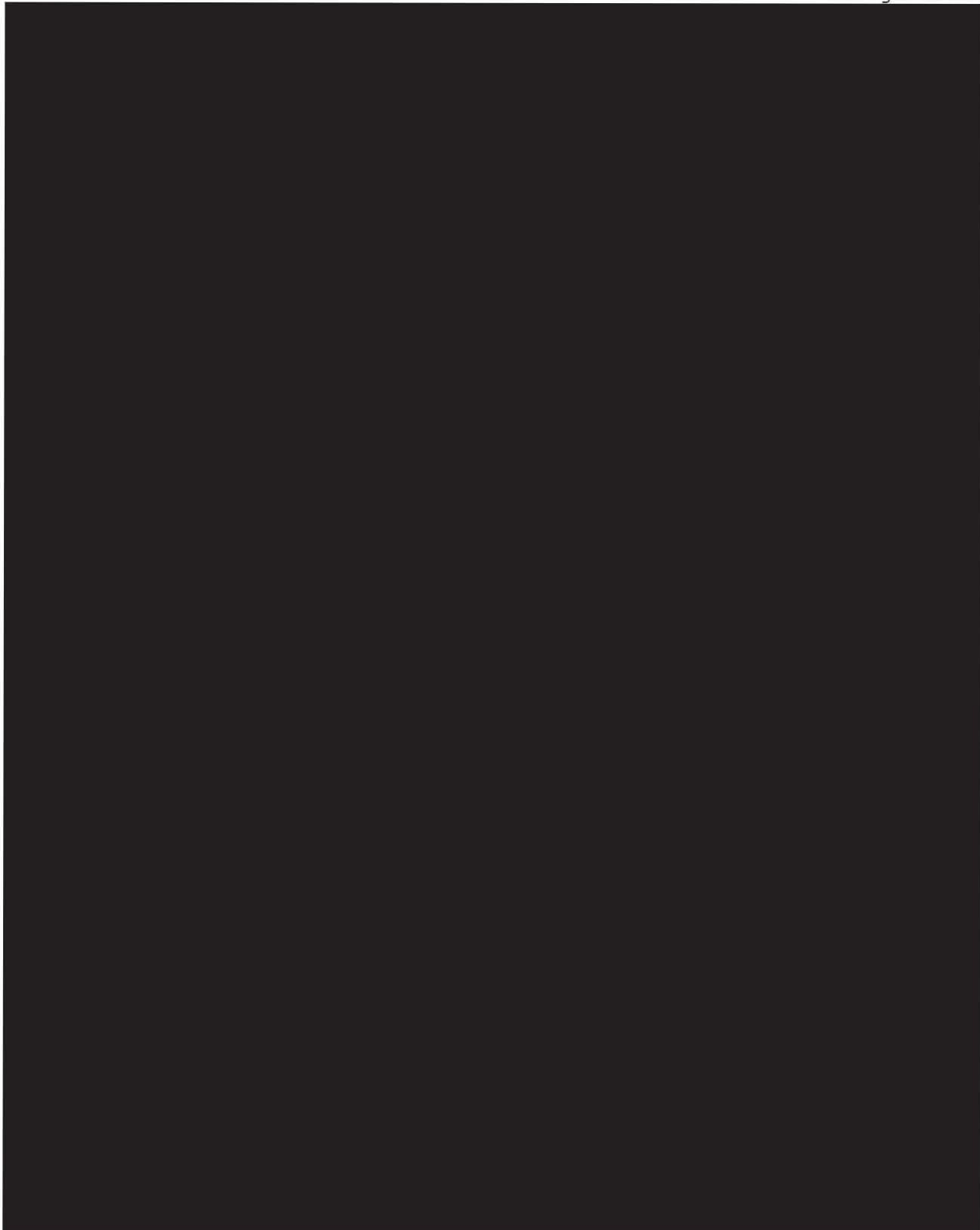




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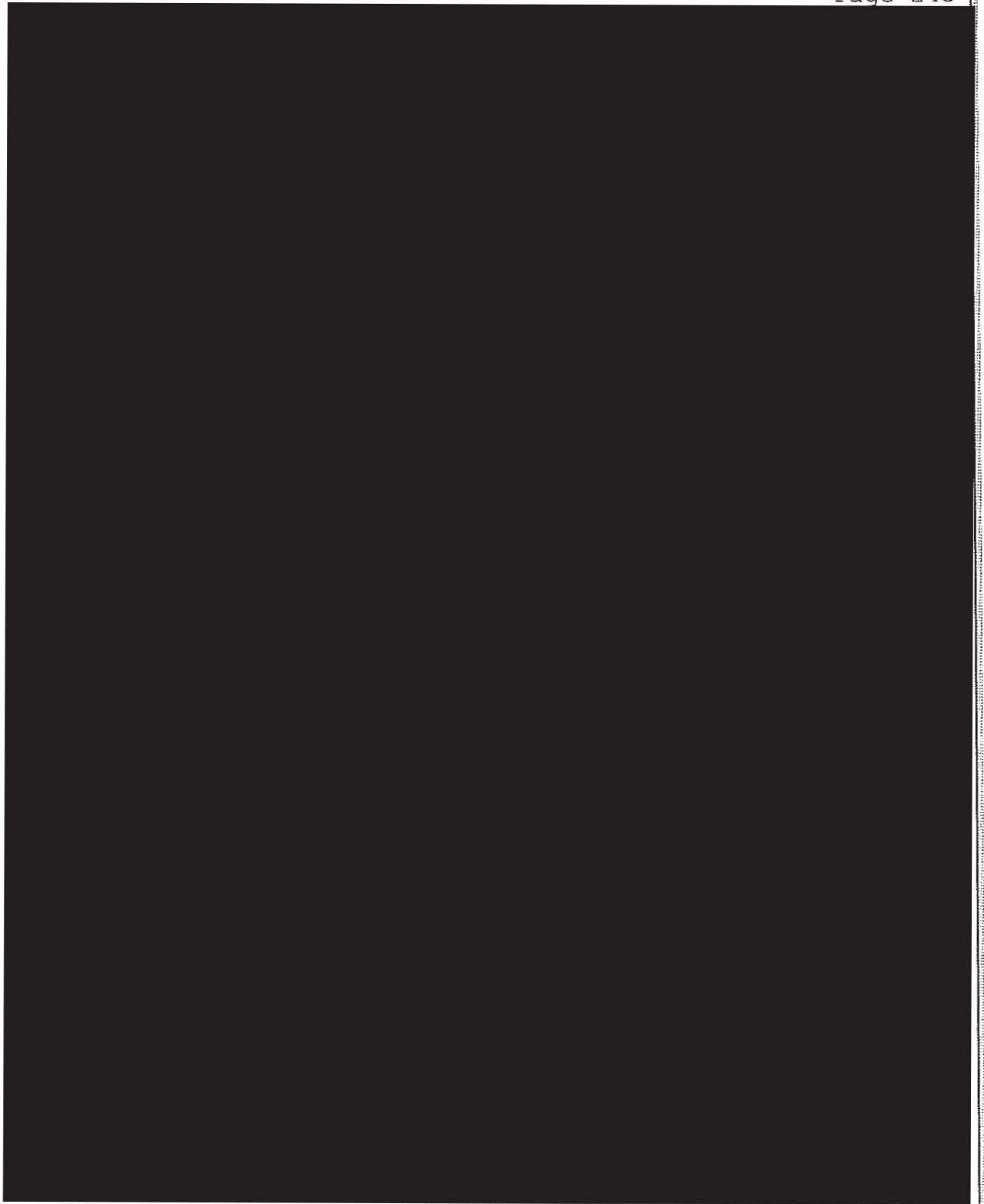
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For The Record, Inc.

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1 A. I don't know.

2 (Plaintiff's Exhibit 37 was marked  
3 for identification by the court  
4 reporter and is attached hereto.)

5 BY MR. WONE:

6 Q. I've handed the court reporter what's been  
7 marked as Exhibit 37. Please review that,  
8 Mr. Perdigao.

9 A. Okay.

10 Q. And in Exhibit 37 on page TCC, dash,  
11 0005639, there's an e-mail from you to Ms. Leow,  
12 dated June 11th, 2009, with a carbon copy to  
13 Ms. Kuyoomjian and Mr. Tupper; correct?

14 A. Correct.

15 Q. And can you please read the second sentence  
16 starting with "Per the meeting today"?


17 A. "Per the meeting today, we are  
18 still being asked to develop a  
19 humorous TV campaign" in parentheses,  
20 "(ideally, at least two commercials),  
21

22 

23 Q. Can you continue reading the next sentence,  
24 please?

25 A. "The consumer benefit is not

1           nearly as compelling as we had hoped,  
2           but our focus should be on the fact  
3           that POM is healthy. It offers  
4           antioxidants that are good for you,  
5           as they reduce free radicals...and  
6           POM 100% pure pomegranate juice is  
7           the 'Antioxidant Superpower.'"

8           Q.    When you stated that the consumer benefit is  
9           not nearly as compelling as we had hoped, were you  
10          referring 

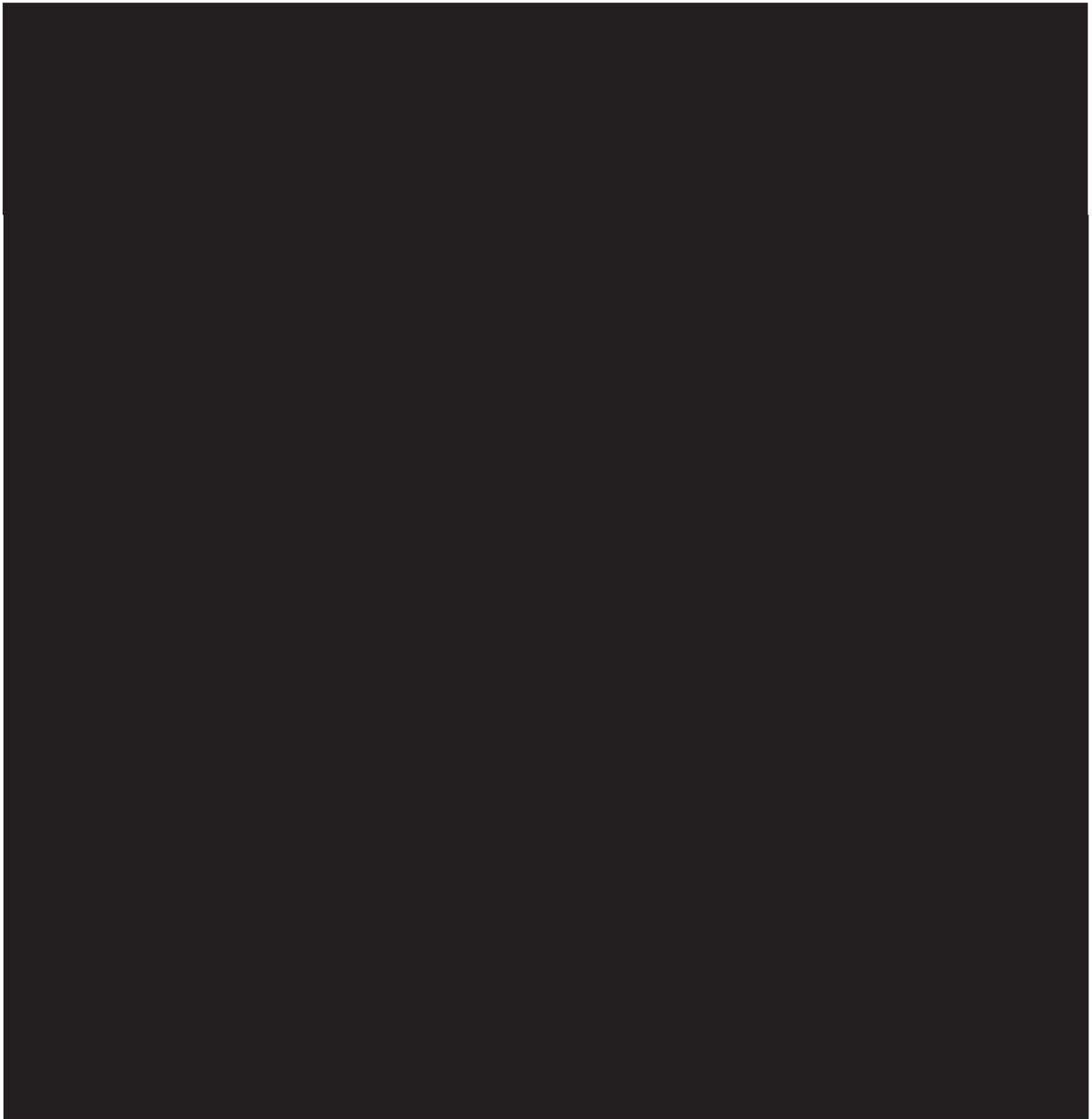
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19          A.    Oh, that's just my opinion.

20          Q.    And how did you reach that opinion,  
21          Mr. Perdigao?

22          A.    Well, in advertising you always like to have  
23          something that -- the more specific you can be, the  
24          more compelling you can create the communication.  
25          The more vague you get, the harder it becomes to do

1 something that's provocative and interesting and  
2 cuts through the clutter.

3 Q. Can you explain why the consumer benefit to  
4 you was not nearly as compelling?



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Q. And if you could please read the sentence starting with "Lynda would like us to do," on the page ending in 5639, Exhibit 37.

9

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A. "Lynda would like us to do our best, and based on the executions, she will decide whether she is comfortable proceeding with television... or not."

12

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16

Q. And what did you mean when you stated that Ms. Resnick would decide whether she is comfortable proceeding with television or not?

17

18

19

A. Just whether she thought the -- both the creative and the media made sense. Whether she subjectively thought that creative was good enough to invest our budget in television.

20

21

22

23

Q. Are you are -- were you referring to Ms. Resnick's comfort with scientific research --

24

25

A. No.

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1 Q. -- to support the ad claims?

2 A. No.

3 Q. Do you know what factors Ms. Resnick would  
4 consider in determining whether she's comfortable  
5 seeing a television --

6 MR. ZAFFOS: Objection. Calls for  
7 speculation.

8 THE WITNESS: I don't.

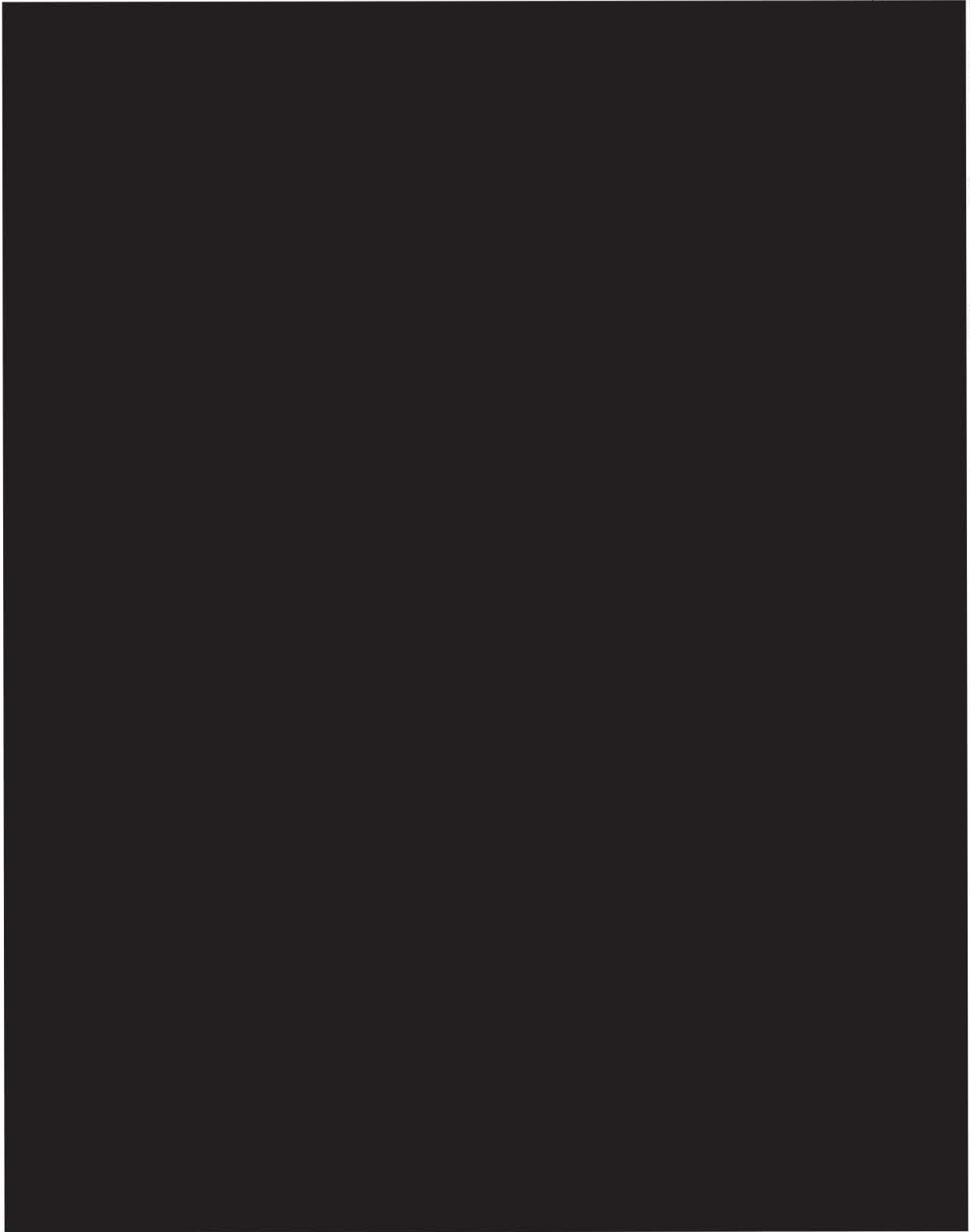
9 BY MR. WONE:

10 Q. Do you recall who asked you to develop a  
11 humorous TV campaign?

12 A. Well, initially, that was the initial brief  
13 for that particular television assignment, and that  
14 hadn't been changed.



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Q. What places -- POM -- strategically in 2010?

A. Well, from a media standpoint we're primarily in television right now. And also, it's -- television message is more focused on the historical reverence of pomegranates throughout time and referencing those and tying it back to our product.

Q. And do you know what prompted this shift to focus on historical aspects of pomegranate?

A. It was one of many different areas that we explored and developed. And ultimately, subjectively, it was chosen as the most compelling piece of communication by POM Marketing, and so we were asked to produce those commercials.



1 THE WITNESS: I wouldn't word it like that.  
2 Has she approved the current strategy and  
3 executions? Yes.

4 MR. WONE: If we could take a break for a  
5 couple minutes.

6 (Recess.)

7 MR. WONE: We'll go back on the record.

8 BY MR. WONE:

9 Q. Mr. Perdigao, before when you were  
10 discussing the new advertising direction POM took,  
11 described the current strategy as the most  
12 compelling, why was this strategy the most  
13 compelling?

14 A. I said that the current ads were the most  
15 compelling.

16 Q. You said, I believe -- and if I'm  
17 paraphrasing incorrectly, do let me know. You  
18 described the changes in strategy that POM took in  
19 2010, the new direction --

20 A. Yeah.

21 Q. -- as the most compelling choice.

22 I was interested in if you could explain why  
23 this new direction was the most compelling.



24  
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1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED] The one that was ultimately produced and  
4 run was the one that has been running in 2010, and  
5 it was strategically more focused on historical uses  
6 and benefits of pomegranates.

7 Q. And do you know why POM decided to adopt a  
8 campaign focusing on historic uses of  
9 pomegranates --

10 MR. ZAFFOS: Objection.

11 BY MR. WONE:

12 Q. -- instead of one of the other campaign  
13 possibilities you referenced?

14 MR. ZAFFOS: Objection. Calls for  
15 speculation.

16 THE WITNESS: Yeah, you'd have to ask them  
17 why they chose that.

18 BY MR. WONE:

19 Q. Who decided that this campaign should be the  
20 direction that POM would take in 2010?

21 MR. ZAFFOS: Objection. Calls for  
22 speculation.

23 THE WITNESS: Again, I don't know that  
24 anybody made a conscious choice to make that  
25 directional shift. They chose a creative execution

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1 that happened to be focused on that strategic shift,  
2 but POM Marketing approved that. Certainly, Lynda  
3 approved that. Television campaigns get, you know,  
4 certainly, an elevated look.

5 BY MR. WONE:

6 Q. What do you mean by an elevated look?

7 A. Well, more attention. It's a bigger  
8 investment. So certainly more attention is brought,  
9 the higher the investment level. So more people  
10 would have input.



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24 That being said, to answer your question, I  
25 think that the current television campaign is pretty

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1 specific. I mean, we're talking about some pretty  
2 specific claims about moments in history that  
3 everyone's -- or a lot of people are familiar with.

4 Q. And if we could return to Exhibit 37, which  
5 is page number TCCC, dash, 0005639, you read the  
6 sentence starting -- stating that "The consumer  
7 benefit is not nearly as compelling as we had hoped,  
8 but our focus should be on the fact that POM is  
9 healthy."

10 Who decided that the focus -- or how did you  
11 know that the focus should be on the fact that POM  
12 is healthy?

13 MR. ZAFFOS: Objection to form.

14 THE WITNESS: It was decided in that meeting  
15 that day, that the focus would be more general in  
16 the fact that POM is healthy and focused on the  
17 antioxidant properties.

18 BY MR. WONE:



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(Plaintiff's Exhibit 38 was marked  
for identification by the court  
reporter and is attached hereto.)

BY MR. WONE:

Q. I've handed to the court reporter what's

EXHIBIT I

EXCERPTS FROM THE FEBRUARY 2, 2011 DEPOSITION OF  
MATTHEW TUPPER

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UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of  
POM WONDERFUL, LLC and  
ROLL INTERNATIONAL CORP., Docket No. 9344  
companies, and  
STEWART A. RESNICK,  
LYNDA RAE RESNICK, and  
MATTHEW TUPPER, Individually and  
as officers of the companies  
Defendants.

---

DEPOSITION OF  
MATTHEW TUPPER

FEBRUARY 2, 2011  
9:11 A.M. - 6.43 P.M.

10877 Wilshire Boulevard  
Los Angeles, California

Toni Cohen, CA CSR No. 9871

|    |                      |                                             |
|----|----------------------|---------------------------------------------|
| 1  | EXHIBITS (CONTINUED) |                                             |
| 2  | No. 13               | Creative Brief 223                          |
| 3  | No. 14               | January 12, 2009 E-mail from Diane 228      |
| 4  |                      | Kuyoomijan                                  |
| 5  | No. 15               | Pomegranate Juice Consumption for 3 235     |
| 6  |                      | Years by Patients With Carotid Artery       |
| 7  |                      | Stenosis Reduces Common Carotid             |
| 8  |                      | Intima-media thickness, Blood Pressure      |
| 9  |                      | and LDL Oxidation, Article                  |
| 10 | No. 16               | August 5, 2007 E-mail from Harley Liker 240 |
| 11 |                      | to Lynda Resnick                            |
| 12 | No. 17               | Current Medical Studies 243                 |
| 13 | No. 18               | Medical Research Portfolio Review 246       |
| 14 |                      | January 13, 2009                            |
| 15 | No. 19               | February 14, 2003 e-mail from Germaine 252  |
| 16 |                      | Tupper                                      |
| 17 | No. 20               | April 17, 2007 letter Health Canada 256     |
| 18 | No. 21               | January 17, 2008 letter from FTD 257        |
| 19 | No. 22               | March 25, 2008 letter from Matt Tupper 260  |
| 20 | No. 23               | April 18, 2008 letter from Hogan & 263      |
| 21 |                      | Hartson                                     |
| 22 | No. 24               | June 11, 2009 letter from Michael 269       |
| 23 |                      | Perdigao                                    |
| 24 | No. 25               | June 16, 2008 Report - Tropicana 272        |
| 25 | CONFIDENTIAL PORTION | 260                                         |

1 yesterday, but -- whenever I saw it, but I do recall  
2 seeing that just now.

3 MS. DIAZ: I think your time is up, Heather.

4 MS. HIPPSLEY: I've got two documents and I'm  
5 done. Avoid the motion. Just two documents, 15 minutes  
6 max.

7 MS. DIAZ: I'm not going to give you 15  
8 minutes.

9 MS. HIPPSLEY: Okay. I'll remember that.

10 MS. DIAZ: I'm not going to give you 15  
11 minutes. I'll give you a couple of minutes.

12 MS. HIPPSLEY: Really it's just these two.

13 And -- let's just show the document, that will  
14 be faster.

15 (Exhibit No. 24 marked)

16 BY MS. HIPPSLEY:

17 Q This Exhibit 24 is a document that was used in  
18 the Coca-Cola case apparently and it's TCC 5638 through  
19 5642. And if you just look at the first page of this,  
20 it's an e-mail from Mr. Perdiago and you're copied on  
21 this.

22 And do you recall any discussions in this time  
23 frame of June 2009 about the consumer benefits -- I  
24 presume of your products -- not nearly as compelling as  
25 we had hoped?



1 MS. DIAZ: Objection as to form.

2 BY MS. HIPPSLEY:

3 Q Do you see where I'm reading on the third  
4 paragraph there?

5 A I see where you're reading. I'm not sure  
6 exactly what Mark is getting at with that comment.

7 Q And you don't remember any discussions where  
8 you participated assessing whether or not the consumer  
9 benefit of the product was as compelling as you had  
10 hoped?

11 A I don't know what that phrase means. So I  
12 can't comment.

13 Q After -- you know, you recall seeing that  
14 honorarium and the scientists came to Washington to meet  
15 with us in early June, do you recall when they returned  
16 from meeting with the FTC any discussions with anyone at  
17 Pom Wonderful about the science Pom Wonderful had in the  
18 consumer benefit in the context of what was presented to  
19 the Federal Trade Commission or feedback from the Federal  
20 Trade Commission?

21 MS. DIAZ: Objection as to form. Vague and  
22 ambiguous. Huge question. Compound.

23 BY MS. HIPPSLEY:

24 Q When the folks got back from Washington, did  
25 they provide you with any feedback as to the FTC's

1 assessment as to benefits of the products?

2 MS. DIAZ: Objection as to form. To the extent  
3 that make sure your answer is outside the presence of  
4 counsel.


5 THE WITNESS: If my only information or summary  
6 from the meeting with the FTC came through counsel, then  
7 my answer would be no.

8 MS. DIAZ: Forget it. Your answer will be not  
9 outside the presence of the counsel.

10 THE WITNESS: Not outside the presence of  
11 counsel.

12 BY MS. HIPPSLEY:

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10 BY MS. HIPPSLEY:

11 Q Okay. One last document.

12 (Exhibit No. 25 marked)

13 BY MS. HIPPSLEY:

14 Q Exhibit 25, the Bates stamp is Tropicana 355  
15 through 386. If you can just flip through this and tell  
16 me if you've seen it before?

17 A I believe I was shown this at another  
18 deposition. I don't recall that.

19 Q Okay. And in the context of your work at Pom  
20 Wonderful prior to that deposition had you seen this  
21 before?

22 A As of now I don't recall. And I assume that's  
23 consistent with the answer I gave before. I don't think  
24 my memory has deteriorated that badly; so I don't recall  
25 ever having seen this.

EXHIBIT J

EXCERPTS FROM THE FEBRUARY 4, 2011 DEPOSITION OF  
ELIZABETH LEOW

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

POM WONDERFUL, LLC and  
ROLL INTERNATIONAL CORP.,  
companies, and

Docket No. 9344

STEWART A. RESNICK,  
LYNDA RAE RESNICK, and  
MATTHEW TUPPER, Individually and  
as officers of the companies

Defendants.

---

DEPOSITION OF  
ELIZABETH LEOW

FRIDAY, FEBRUARY 4, 2011  
9:11 A.M. - 4:49 P.M.

10877 Wilshire Boulevard  
Los Angeles, California

Toni Cohen, CA CSR No. 9871

|    |        |                                               |     |
|----|--------|-----------------------------------------------|-----|
| 1  |        | Perdigao                                      |     |
| 2  | No. 36 | October 21, 2008 e-mail from Kim Genkinger    | 148 |
| 3  |        |                                               |     |
| 4  | No. 37 | Advertisement                                 | 150 |
| 5  | No. 38 | November 24, 2008 e-mail from Lynda Resnick   | 152 |
| 6  | No. 39 | January 22, 2009 e-mail from Andrea Hernandez | 159 |
| 7  |        |                                               |     |
| 8  | No. 40 | POM LRR Meeting Notes - February 10, 2008     | 162 |
| 9  | No. 41 | POM Juice Business Brainstorm 4/13/09         | 165 |
| 10 | No. 42 | March 30, 2009 e-mail from Roni Pfeffer       | 166 |
| 11 | No. 43 | June 11, 2009 e-mail from Michael Perdigao    | 169 |
| 12 |        |                                               |     |
| 13 | No. 44 | Advertisement                                 | 173 |
| 14 | No. 45 | Advertisement                                 | 175 |
| 15 | NO. 46 | Advertisement                                 | 177 |
| 16 | No. 47 | Advertisement                                 | 184 |
| 17 | No. 48 | Advertisement                                 | 194 |
| 18 | No. 49 | Deposition of Jeff Rushton                    | 198 |
| 19 | No. 50 | Exhibit from the Deposition of Jeff Rushton   | 199 |
| 20 | No. 51 | Exhibit 2 to Jeff Rushton's deposition        | 200 |
| 21 |        |                                               |     |
| 22 |        |                                               |     |
| 23 |        |                                               |     |
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| 25 |        |                                               |     |

1           A     Not specifically, no.  
2                     (Exhibit No. 43 marked)

3 BY MR. WONE:

4           Q     Ms. Leow, I've handed what's been marked as  
5 Exhibit 43 to the court reporter. Please let me know  
6 when you're finished.

7           A     Okay.

8           Q     On page TCCC-0005639 there's an e-mail dated  
9 June 11, 2009 from Mike Perdigao to you with carbon  
10 copies to Diane Kuyoomjian and Matt Tupper, correct?

11          A     That's what the document says.

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BY MR. WONE:

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Q Can you generally describe any conversations you had with Mr. Perdigao after you received this e-mail?

10

11

12

MS. MEW: Objection. Assumes facts not in evidence. I don't know that she testified she had any conversations, she recalled any specific -- any conversations with Mr. Perdigao.

13

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THE WITNESS: That's correct.

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1 BY MR. WONE:

2 Q In the second paragraph of Mr. Perdigao's  
3 e-mail paragraph starting with, Per the meeting today,  
4 did you attend that meeting with Mr. Perdigao?

5 A I don't know which meeting you're referring  
6 to.

7 Q The meeting that Mr. Perdigao referred to in  
8 the second paragraph, it says, Per the meeting today?

9 MS. MEW: Objection. Vague and ambiguous.  
10 There could have been more than one meeting on June  
11 11th.

12 BY MR. WONE:

13 Q Do you know what meeting Mr. Perdigao is  
14 referring to?

15 A No. I mean, honestly, I'm in the meetings  
16 every day from 9:00 till 5:00.

17 Q Did you see the next paragraph, the third  
18 paragraph on Exhibit 43 starting with, The consumer  
19 benefit?

20 A Yes, I see it.

21 Q What was your understanding of the phrase that  
22 Mr. Perdigao used, "The consumer benefit is not nearly as  
23 compelling as we had hoped"?

24 MS. MEW: Objection. Vague and ambiguous.  
25 Calls for speculation. Lacks foundation. Document

1 speaks for itself.

2 THE WITNESS: Mike would have to speak to his  
3 intent.

4 BY MR. WONE:

5 Q What was your understanding of the consumer  
6 benefit that Mr. Perdigao was referring to?

7 MS. MEW: Same objections.

8 THE WITNESS: I don't know. I only know what's  
9 in the document.

10 BY MR. WONE:

11 Q Do you recall any further conversations with  
12 Mr. Perdigao regarding consumer benefits after receiving  
13 this June 11, 2009 e-mail?

14 MS. MEW: Objection. Misstates prior  
15 testimony. Assumes facts not in evidence. She never  
16 stated she had any conversations regarding consumer  
17 benefits with Mike Perdigao?

18 THE WITNESS: It's possible I did. I don't  
19 recall specifically.

20 (Exhibit No. 44 marked)

21 BY MR. WONE:

22 Q Ms. Leow, I've handed to the court reporter  
23 what's been marked as Exhibit 44. If could you please  
24 review that and let me know when you've finished.

25 A Okay.

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