

FEDERAL TRADE COMMISSION

I N D E X

IN RE POM WONDERFUL LLC, ET AL.

TRIAL VOLUME 15

PUBLIC RECORD

SEPTEMBER 14, 2011

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

Wednesday, September 14, 2011

12:03 p.m.

TRIAL VOLUME 15

PUBLIC RECORD

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

Reported by: Josett F. Whalen, RMR-CRR

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P R O C E E D I N G S

- - - - -

JUDGE CHAPPELL: Back on the record Docket 9344.

What's next?

MR. OSTHEIMER: Complaint counsel would like to call Dr. Michael Mazis.

JUDGE CHAPPELL: All right.

- - - - -

Whereupon --

MICHAEL BERNARD MAZIS, Ph.D.

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

DIRECT EXAMINATION

BY MR. OSTHEIMER:

Q. Good afternoon, Dr. Mazis.

Please state your name for the record.

A. Michael Bernard Mazis.

Q. If you would, to begin, please look at tab B of your binder, what has been marked as CX 1298, and tell me if that's a copy of your curriculum vitae.

A. Yes, it is.

Q. If you would, please give us a background --

JUDGE CHAPPELL: Hold on.

(Pause in the proceedings.)

Go ahead.

BY MR. OSTHEIMER:

Q. -- of your educational and professional life.

A. Well, let's see. Just starting with college, I had my BS degree in economics in 1964 from The Wharton School at the University of Pennsylvania. I earned an MBA degree from New York University Graduate School of Business in 1966. And in 1971 I earned a Ph.D. from Penn State University. I had a major in marketing, and I had minors in social psychology and quantitative business analysis.

And in terms of my work experience, when I graduated with an MBA, I worked as a marketing research analyst at the Warner-Lambert Pharmaceutical Company in New Jersey. They've since been bought out by Pfizer, and so then subsequent to that, I worked three years at Warner-Lambert. Then I went on and got my Ph.D.

And then after my Ph.D., my first academic job was assistant and then associate professor at the University of Florida's business school. I taught in the marketing department.

Then after five years I came to Washington on a sabbatical program. It was designed to bring business school faculty into the government, and the idea would be that business school would learn something about the government and bring it back into the classroom and then

government would also benefit from having some academics in various government agencies.

So I worked at the FDA for six months and then came over and worked at the FTC for six months, and then I extended my leave from Florida for another year and then, you know, finally another year, and so I wound up working at the Federal Trade Commission, primarily in the Office of Policy Planning, for two and a half years.

And then I wanted to stay in Washington. I was doing a lot of public policy-type research and marketing. I took a job at American University School of Business, and I was a professor there for 28 years. In May 2008 I retired, and so now I hold the title of professor emeritus of marketing at American University's business school.

Q. Were you the chair of the marketing department?

A. Yes. For about 10 out of those 28 years I was chair of the marketing department.

Q. And what courses have you taught?

A. I've taught courses in marketing research, both undergraduate and graduate, consumer behavior, principles of marketing to undergraduates, marketing management to graduate students. I've taught some other courses, but those are primarily the types of courses

that I've taught.

Q. During your career, have you engaged in scholarly research?

A. Yes, I have.

Q. Has your research resulted in published articles?

A. Yes.

Q. Have you authored papers that were published in peer-reviewed journals?

A. Yes, I have.

Q. About how many articles?

A. Over 60 articles.

Q. Do you have any experience as an editor of scholarly journals?

A. Yes.

For three years I was editor of the Journal of Public Policy and Marketing. That was from 1992 to 1995.

And then I was also associate editor for the Journal of Consumer Affairs from 1998 to 2001.

JUDGE CHAPPELL: I have a question. You left the University of Florida on a five-year sabbatical. That was the plan?

THE WITNESS: No. What I said was I taught five years at the University of Florida, and then I took what

I thought was going to be a one-year sabbatical to work with the government.

JUDGE CHAPPELL: Oh, the sabbatical was your plan. It wasn't the University of Florida, had nothing to do with the university.

THE WITNESS: No. It was my plan, that's correct.

JUDGE CHAPPELL: Thank you.

BY MR. OSTHEIMER:

Q. Could you tell us about your duties as the editor of the Journal of Public Policy and Marketing.

A. In that capacity I would review the scientific adequacy of various manuscripts that were submitted. Of course, like most journals, it was peer-reviewed, so the reviewers would give their reviews. And it was all blind-reviewed; in other words, they didn't know the author. And they would give me their judgments about these articles and these manuscripts, and then I would make a final decision would I accept or reject the manuscript, or sometimes it would be sent back for revision, so they'd have to resubmit it and go through the process again. You know, it is the typical process that all scholarly journals go through.

Q. Among other things, would you review and critique consumer surveys?

A. Yes. Many times.

Q. And could you tell us some of your duties as the associate editor of the Journal of Consumer Affairs.

A. There were similar duties. There were reviewers out there that reviewed manuscripts, and I looked at their reviews, and I made a decision on whether those manuscripts would be published and then -- of course I was an associate editor, so I didn't have the final decision. I would make a recommendation to the editor. Most of the time the editor would go with my decision.

Q. You have also consulted for numerous companies and government organizations, have you not?

A. Yes, I have.

Q. Could you give us a sampling, a flavor of those.

A. Well, in the government side, I've been a consultant for the Federal Trade Commission, Food and Drug Administration, Department of Justice, U.S. Mint, Bureau of Tobacco, Alcohol and Firearms. I've also testified in trials for the State of California and the State of Vermont.

And on the private side, I've testified for a lot of companies: Fisher-Price, Comcast, Johnson & Johnson, Perdue Farms. I've got a case coming

up now for Hershey chocolate.

So I've done a lot of work on the private side as well.

Q. Can you give me an approximation of how many consumer surveys you have designed over the years?

A. Be hundreds.

Q. Some of the surveys you have designed over the years have been for use in legal proceedings; correct?

A. Yes.

Q. Approximately how many?

A. I would say at least a hundred.

Q. In what types of proceedings have you been an expert witness?

A. Primarily cases involving false or deceptive advertising and Lanham Act cases, either advertising or a lot of trademark cases.

Q. Have most of the surveys you've designed for litigation been on behalf of private litigants?

A. Yes.

Q. Do you work for both plaintiffs and defendants?

A. Yes.

Q. In approximately how many proceedings have you been qualified as an expert witness?

A. I'd say at least 25.

Q. In what topics have you been qualified as an

expert witness?

A. Marketing research, consumer behavior, marketing. Those would be the main topics.

Q. Have you also served as an expert witness in false advertising cases before the National Advertising Division of the Better Business Bureau?

A. Yes, I have.

Q. Approximately how many times?

A. Maybe -- several times. Maybe five, six times.

Q. Have you ever done any work in which you have appeared in a proceeding where a government entity was on the other side?

A. Yes. It's happened a couple of times.

Q. Would you please describe those.

A. Well, one, a number of years ago the FTC had a rulemaking regarding funeral industry practices. And I testified for the AARP in that case, or I should say that matter. And the FTC had conducted a survey, and I critiqued the scientific adequacy of that survey, thought it had a lot of problems.

And a second case involving the State of Pennsylvania that had sued a company called Peoples Benefit Corporation. They were a mail-order company. And they were alleging that some of the mail solicitations that Peoples Benefit used were

misleading. I conducted a study for Peoples Benefit and found that in fact these solicitations really weren't misleading, and the judge seemed to agree with me in that case.

Q. Now, based upon the summary you've just given us of your education and training and experience, do you consider yourself to be an expert in marketing and marketing research?

A. Yes, I do.

MR. OSTHEIMER: Your Honor, I move that Dr. Mazis be considered an expert in marketing and marketing research.

MR. FIELDS: Your Honor, as long as he sticks with marketing and marketing research and doesn't give us legal conclusions, I have no objection.

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

BY MR. OSTHEIMER:

Q. Dr. Mazis, you testified earlier that you have designed over 100 consumer surveys for litigation.

What types of questions are used in these surveys?

A. Usually we divide these questions up between open-ended questions and closed-ended questions.

Q. What is an open-ended question?

A. An open-ended question is a question in which there aren't defined answers provided to the respondent.

So if we take the survey conducted by Dr. Reibstein, I think he asked a question something like "Why did you purchase POM Wonderful 100 percent pomegranate juice?"

So it was strictly open-ended. There were no response categories provided. People could say whatever came into their mind like "I bought it for the taste" or "I thought it was healthy," those kinds of answers.

Q. What are the potential advantages and disadvantages of open-ended questions?

A. Well, open-ended questions have a distinct advantage in that they tend to be unbiased because options aren't provided to the respondent, so the respondent just expresses himself or herself in his or her own words, so that's certainly an advantage. And most surveys I've been involved in do use open-ended questions to some extent.

But the disadvantage is -- and it depends on the matter, but certainly a disadvantage would be that sometimes you get very general answers that might not be useful or might not be probative. They might be too

general.

So, for example, if the respondent says, "Well, I drank or I purchased pomegranate juice because it's healthy," well, certainly it could be argued that "healthy" is a pretty general response. We don't know exactly why the person thought it was healthy. We don't really have a real understanding about what underlies "healthy."

Q. What does one do to account for or mitigate the potential disadvantages of open-ended questions?

A. Well, there are two approaches. One is to ask follow-up questions if necessary.

So if somebody says, "I purchased pomegranate juice because it's healthy," we could ask, "Well, what are some of the reasons why you think it's healthy?"

So we could try to probe more to get the underlying reasons for why they said "healthy."

The second approach that's often used in most of these studies is to also ask closed-ended questions.

Q. What is a closed-ended question?

A. A closed-ended question is a question in which respondents are given distinct answer options that are provided to them.

So, as an example, there's a study that's been introduced in this proceeding called the OTX study that

was commissioned by POM. And in that study there was a question something like "Tell me which of the following health reasons describe why you bought pomegranate juice." And then in that study there were different answer options, so the people were given a list of about 12 items, and they could check which of the ones they thought described why they bought pomegranate juice.

So there's, for example, helps -- helps protect me against prostate cancer or improves my heart health or promotes healthy bones and joints or protects against urinary tract infections, so there was a whole list of these items that were given, and people could go and check off the ones that they thought they -- what they meant by "healthy."

Q. What are the potential advantages and disadvantages of closed-ended questions?

A. Well, the big potential advantage is is that it allows the researcher to get some specificity as to why somebody said something, why they decided to purchase a product, for example.

So rather than just being stuck with "healthy" we get some understanding about what they meant by "healthy," what were the underlying motivations underlying "healthy." That's the clear advantage. And

that's why in most of these studies -- I'm not saying all of them, but in most of these studies closed-ended questions tend to be used.

The potential disadvantage is that by providing these answers it can be suggestive or leading. That is, maybe the person hadn't thought about a particular option, but by putting it as a list, that could create a certain bias, and you might have a certain upward bias. People might check more options than they would otherwise.

Q. What does one do to account for and mitigate for the potential disadvantages of closed-ended questions?

A. Well, the approach that's usually used -- and this was used in the POM's OTX survey -- is to give people a long list, so some of which were likely important, some of which were likely unimportant, and so even if there is some upward bias, at least you get a sense of the relative importance of the particular attributes that you care about.

So, for example, if you care about prostate cancer and you care about cardiovascular health or heart disease, if those are the things of issue, you can look at the relative importance of those compared to urinary tract infections or bone, joints and bones

or pregnancy or menopausal symptoms, those types of things, so you can get some relative sense of by giving people a long list.

Q. In your experience, how standard is it to ask closed-ended questions in consumer surveys for litigation to get at the issue of interest?

A. In most cases there's a combination of open and closed-ended questions.

Just, you know, some examples, I -- for the FTC, for example, I conducted studies in the FTC versus Novartis case and the FTC versus Telebrands case. And in both those cases -- they were both advertising cases -- I used open and closed-ended questions.

Also the Vermont case that I mentioned, which was a State of Vermont versus R.J. Reynolds, it was an advertising case. I used open and closed-ended questions.

Also true in some Lanham Act cases. The case that I conducted for Perdue Farms and Sanderson Farms that I mentioned earlier, I used both open and closed-ended questions in that one.

So it's -- it's the usual approach.

Q. And in the Novartis matter you also designed a belief study?

A. Yes, I did.

Q. And that used just closed-ended questions; correct?

A. That's correct.

Q. And the studies you've seen used by the other side in the over hundred litigations that you've done, has the other side usually used closed-ended questions?

A. In most cases I would say yes. And just like the OTX study in this matter, in business you almost always see closed-ended questions asked.

Q. Dr. Mazis, you reviewed the study designed by Dr. Reibstein in this matter; correct?

A. Yes.

Q. Who did he survey? What universe?

A. He surveyed people who had purchased POM -- people who had purchased pomegranate juice in the last six months.

Q. I'd like you to look at the survey questionnaire used by Dr. Reibstein, which has been marked as PX 237, the first page.

Could you briefly walk us through Dr. Reibstein's survey. And there's also a copy in your binder.

A. Okay. So I'll just go through the ones that are -- the questions that are relevant here or most relevant.

So this question A he asked: In the last six months, have you personally purchased pomegranate juice?

So if people said yes, then they got included in the survey; if they said no, they were terminated. I don't mean actually literally killed off, but I mean they were eliminated from the survey.

And then we go to -- on the next page to question D that he calls the main questionnaire, and sort of D, E and F are -- well, then he asks question D: In the last six months, have you personally purchased the brand POM Wonderful 100 percent pomegranate juice?

And if they said yes, they had purchased the POM juice, they got asked E, F and G. And if they said no, they hadn't purchased POM juice, they got asked H, I and J. The questions were pretty similar, but there was a slight difference in the wording.

So if they said yes, they had purchased POM Wonderful 100 percent pomegranate juice, they were then asked: Why did you purchase POM Wonderful 100 percent pomegranate juice? Please include as many specific details.

And this was the open-ended question that I had referred to earlier.

That was followed up by another open-ended -- or

another set of questions: Would you consider purchasing POM Wonderful 100 percent pomegranate juice again?

If they said yes, they were asked why did you purchase POM Wonderful 100 percent pomegranate juice; and then if they said no, they were also asked why not.

And then G, they were asked: Would you recommend POM Wonderful 100 percent pomegranate juice to a friend?

And if they said yes, then they were asked why, and then please include as many specific details as you would.

So his survey really consists primarily of these three -- answers to these three open-ended questions, why did you purchase POM juice, why would you consider purchasing it again and why would you recommend POM juice to a friend.

And then if we go on here and go down to H -- I think we missed H here. It's the last item on the -- yeah. Okay.

And then on H it says: You indicated that you have purchased pomegranate juice. Please include as many specific details as to why you purchased it.

So it's the same question as question E except instead of "POM juice" it has "pomegranate juice."

And so then H, and then I, if you go to the

next page, I and J are similar to the ones about POM juice except these refer to pomegranate juice in general.

And then finally there's a fourth question that Dr. Reibstein uses in some analyses, which is question K: Have you ever seen a POM Wonderful 100 percent pomegranate juice advertisement?

And if they say yes, then they're asked: Please include as many specific details as to what you remember about the ad. And then: Please be as detailed as possible.

And that's primarily -- so it's actually a fairly straightforward survey, has essentially those four questions that I mentioned, four open-ended questions.

Q. I would like to show you a quote from Dr. Reibstein's report, PX 223, page 3, and I'd like to zoom in on the entire second paragraph.

Dr. Reibstein writes in his report:

"The primary objective of the survey was to evaluate the main factors driving the purchasing decision for POM Wonderful 100 percent pomegranate juice buyers, including whether and to what extent POM Wonderful 100 percent pomegranate juice buyers purchase the product based on their belief that the

product cures or prevents a particular disease. My overall finding and opinion is that there is a very small percentage of people that bought, would buy again, or would recommend to a friend POM Wonderful pomegranate juice because they believed it was beneficial to any disease."

Dr. Mazis, is Dr. Reibstein's conclusion that a very small percentage of people that bought, would buy again or would recommend to a friend POM Wonderful pomegranate juice because of specific disease benefits a reliable conclusion?

A. No. I don't believe it is.

Q. Why not?

A. Well, one of the issues that I talked about earlier was that he's relying on these answers to these three open-ended questions. And what he gets to these -- the answers that he gets to these three open-ended questions he -- a number of people said "taste," but the answers of issue here are people who said "healthy." And the answers -- the percentage of people who said "healthy" varied from 35 percent to 47 percent.

So over a third or almost half of the people, depending on the question, said something about healthy, so you've got kind of -- I call it the

elephant in the room. You've got this kind of big elephant here or piñata here of "healthy." And what he needed to do is to explore what did people mean by "healthy," what was underlying "healthy," were there specific reasons or benefits that would underlie "healthy."

So we're kind of left here in this survey with a lot of people saying "healthy," so we get the impression that health issues are important, but the issues in the case revolve around whether certain specific health benefits were communicated and whether they were material.

So the case involves whether prostate cancer, cardiovascular health, erectile dysfunction, those types of issues, were actually important to people and whether people thought the ads communicated those, those types of issues, so there's this sort of disconnect between what Dr. Reibstein found, which is he found a lot of "healthys," but he didn't really drill down below, underlying what was meant by "healthy."

And so therefore -- and he got very few people that gave a specific health benefit. I think it was less than 1 percent said something about prostate cancer or said something about heart disease or whatever. Well, if he had drilled down more, he would

be in a better position to find out whether the number should be higher.

Q. I'd like to show you that paragraph from Dr. Reibstein's report again.

Dr. Reibstein also concludes, in the last sentence of that paragraph on page 3, that his overall finding about consumers' motivations directly addresses claims made in this legal case.

Do you agree with that conclusion?

A. No, I don't.

Q. Have you reviewed the FTC complaint in this matter?

A. Yes, I have.

Q. So do you have an understanding of the claims at issue in this case?

A. Well, my understanding is that the FTC is alleging that certain specific disease claims, like prostate cancer or cardiovascular health or heart disease, were communicated to consumers through the POM ads and that these claims in fact are material to consumers. And Dr. Reibstein didn't directly address either of those issues, either ad communication or materiality.

Q. In your capacity as a survey expert, have you addressed materiality in an FTC proceeding?

A. Yes.

Q. In what proceeding?

A. In the Novartis case, the expert on the other side, Dr. Jacob Jacoby, had offered some evidence, some survey evidence to -- that he thought measured materiality, and I was critical of that, the way he did that measurement, and the commission ultimately agreed with my opinion on that, that he really didn't measure materiality properly.

Q. Based on your experience, do you have an understanding of materiality?

A. Yes, I do.

Q. What is your understanding of materiality?

MR. FIELDS: Objection, Your Honor. If this man -- if this witness -- forgive me -- is giving his own understanding, I have no objection, but if he's purporting to give us something that is a legal definition, then I would object to it because that would call for a legal conclusion that's a matter of argument.

JUDGE CHAPPELL: The question was his understanding. That's the way it will be accepted.

THE WITNESS: My understanding of materiality is it refers to claim importance. That is, it measures what is the likelihood that a specific claim would be

important to purchase or usage behavior.

BY MR. OSTHEIMER:

Q. In your opinion, does Dr. Reibstein's assessment of consumer motivations provide a valid measure of the likely importance that the challenged claims would have to consumers' purchase or use decisions?

A. No. I don't believe so.

Q. Why not?

A. Well, because Dr. Reibstein purports to assess motivations for why people bought a product.

So, for example, let's say someone bought a product because -- or bought, let's say, POM juice. And let's say a person bought POM pomegranate juice and said, "Well, I bought it because of the price." That certainly could be a valid reason, but that doesn't mean that that individual doesn't believe that, for example, preventing heart disease wouldn't be important in terms of the purchase of pomegranate juice.

So there's kind of a, you know, sort of a disconnect between what Dr. Reibstein was assessing, which is why people bought, and the idea of how important a particular claim is to that person, would that claim affect decision-making if the person knew that claim.

Q. How should one measure the likely importance the

challenged claims in this matter would have to consumers' purchase or use decisions?

A. Well, there are different ways to do this, but certainly in this matter what I would have recommended is that Dr. Reibstein do it very much the way it was done in the POM-sponsored OTX study, which is to give people a list of, say, a dozen different health reasons that might people could comment on as to how important they thought these reasons would be in the purchase of pomegranate juice and then get people to say, well, do you think this is important.

You might use some scale. Often what I've done is to say, well, do you think this particular claim or attribute is very important, somewhat important, not important, get them to indicate their degree of importance of a whole range of different potential attributes or claims and essentially ask them a series of closed-ended questions the way it was done in the OTX study.

Q. Did Dr. Reibstein's survey ask consumers whether they were aware of the various purported health benefits of drinking POM juice at issue in this case?

A. No.

Q. Can one tell how many of the survey respondents in Dr. Reibstein's survey were aware of the various

purported health benefits of drinking POM juice at issue in this case?

A. No.

Q. Why not?

A. He never asked them.

Q. So do we know how many of the survey respondents in Dr. Reibstein's survey were reached and purportedly deceived by the challenged claims?

A. No.

Q. Have you ever designed a litigation survey to assess the importance of a challenged claim?

A. Yes.

Q. What case or cases? What case?

A. There was a case a few years ago that I was involved in. It was the -- the parties were The Laryngeal Mask Company -- let me spell that. L-A-R-Y-N-G-E-A-L -- Laryngeal Mask Company versus a company called Ambu, A-M-B-U. And I did a study.

There was an ad that was disseminated by The Laryngeal Mask Company that Ambu thought was misleading. I conducted -- the product -- the laryngeal masks are some sort of a device that's used in anesthesia. It's a way to administer the anesthesia and somehow put down somebody's throat.

And so the -- the -- Ambu felt that certain ads

were misleading that were communica- -- that were being sent to physicians and also to nurse anesthetists. That was the target audience for this -- these particular ads.

And so I conducted a study. It was an online study. I exposed a set of these ads to those two target audiences, and I asked them what the ad communicated, and then I gave them a list of specific attributes -- there were six or seven of those attributes -- and asked them how important they thought each of these attributes would be in terms of their decision to use a particular laryngeal mask.

Q. And did you evaluate the relative ranking of the various attributes?

A. Yes, I did.

Q. In his report and his testimony, Dr. Reibstein tries to compare the usage motivations of POM drinkers to the usage motivations of drinkers of other pomegranate juices whom he calls a control group.

Can one draw any reliable conclusions based on this analysis?

A. No.

Q. Why not?

A. Well, there's a couple reasons. One is, we have to remember that he found very few people who gave

specific health reasons. It was less than 1 percent of the sample.

So what he's trying to do is to divide people into these groups, the POM drinkers and the non-POM drinkers, and try to assess whether there are any differences in the number of specific health claim mentions. Well, there's so few to start with that dividing these between two groups doesn't really provide any benefit, so that's the first issue, too few to start with.

Second, there really isn't a clear distinction between the pomegranate juice drinkers and the non-pomegranate juice drinkers. And the reason for that is he only qualified people based on their last six months purchasing.

So a lot of people could have purchased pomegranate juice in the past. They could have purchased it a year ago, two years ago, five years ago. They could have had experience with POM brand pomegranate juice; and so therefore, the groups aren't really distinct.

And in addition, even if somebody was a non-POM drinker, the person could have been exposed to the challenged ads during the period I think it was from something like 2003 to 2009 that these ads appeared, you

know, in the marketplace, so the non-POM drinkers and the POM drinkers really aren't distinct groups. I mean, he calls the non-POM drinkers a control group, but I don't believe in any way that this qualifies as a control group.

Q. And the small number of people in both groups, you previously testified that that was -- could have been as a result of lack of probing; correct?

A. Yes.

Q. In his report Dr. Reibstein also tries to compare the usage motivations of pomegranate juice drinkers who claimed to have seen a POM ad to those who said they had not seen a POM ad.

Can you draw any reliable conclusions based on this analysis?

A. No, you can't.

Q. Why not?

A. Well, first of all, the first reason is the reason that I answered the other question the way I did, which is you had very few people to start with that mentioned any specific health claim, so that's the first problem.

So, again, you're trying to divide these people into two groups, and it doesn't -- there's so little to divide up that it really doesn't even matter because of

the lack of probing that Dr. Reibstein did.

The second issue has to do with the issue of consumer behavior, which is, okay, let's say I saw -- I'm a respondent and I saw a POM ad four years ago. Would I really remember that I saw it? People are exposed to hundreds of ads every day, and if you ask them what ads they saw yesterday, most people couldn't even tell you, so we don't know what -- whether people who said they didn't see a POM ad actually saw one, we have no idea, so those answers aren't reliable.

And in addition, you have the problem of that the ads, the ads in question, the challenged claims, had stopped more than a year before this survey was done, so if you ask people if they remember a POM ad, what they're more likely to remember are the current ads that weren't challenged if they remember anything.

So this whole question is totally unreliable. People -- people can't remember ads in the detail that Dr. Reibstein is expecting them to remember them.

Q. So you can't tell whether respondents were or weren't exposed to challenged ads.

A. That's correct.

Q. And if some of the ads that ran three or four years ago were challenged and some weren't, you can't tell which ads someone was exposed to.

A. No, you could not.

Q. Dr. Reibstein's states, in his report on page 20, "POM Wonderful's ads had no impact on buyers' beliefs that pomegranate juice can or will cure or prevent disease."

Did Dr. Reibstein measure the impact of POM advertising on consumer beliefs?

A. No. I don't believe that he did.

Q. Why not?

A. Well, you have the first issue of do people really remember what ads they saw. We discussed that.

But the second thing is -- and you can put that up for a second, back up, please. Yeah -- he uses the term "on buyers' beliefs." Well, that has a specific meaning in consumer behavior, and buyers' beliefs have to do with whether -- of the connection that people make between a brand and an attribute.

So, in other words, if I wanted to measure a consumer's belief about, let's say, heart disease, I would ask people, "Do you think that POM Wonderful 100 percent pomegranate juice prevents heart disease?"

And so it's a specific question about their beliefs, about a product related to an attribute. Dr. Reibstein never asked those questions, so I don't know why he used the term "buyers' beliefs," but he did

not measure buyers' beliefs in his study.

Q. Dr. Reibstein criticizes an attitudes and usage study conducted by OTX.

Did you review that study?

A. Yes, I did.

Q. When was the A&U study conducted?

A. I believe it was 2009. I forget the exact month, but I think maybe June 2009.

Q. Does that study address consumer motivations for drinking POM juice?

A. Yes, it does.

Q. I'd like to display a page from the questionnaire for the OTX A&U study, which has previously been marked PX 227, and I'm going to display page 6.

Can you walk us through the part of that study that deals with consumer motivations.

A. Okay. Let's see. All right.

So there are basically two parts to this study, and all the questions that they ask in this study were closed-ended, so after qualifying people who -- making sure that they were pomegranate juice drinkers, the -- they ask in the study: Below are reasons why some people drink pomegranate juice. Which of the following reasons are why you personally drink pomegranate juice?

Please select all that apply.

And there were a list of reasons listed: I like the taste; it's healthy/good for my health; it's a new/interesting food; it's all natural; I like pomegranates. And then there was an "other" category that people could indicate other reasons why they might personally drink pomegranate juice.

So then the study continues, and you can see it says, "Ask if 'It's healthy/good for my health.'" Then they get this -- if they said "healthy/good for my health," they get asked the following question: You said you drink pomegranate juice because it's healthy/good for your health. Which specific health reasons below describe why you personally drink pomegranate juice? Please select all that apply.

And there were a list, as I mentioned earlier, of about a dozen different reasons, health reasons why people might say that they drink pomegranate juice: Helps promote heart health; helps protect against prostate cancer, which is asked only of the male respondents; helps protect against other cancers, you know, and so on. It gives -- helps improve thinking and memory, good for bone and joint health, et cetera, et cetera. And then there was an "other" category where they could put in other reasons that they thought --

that they thought were important.

Q. I'd like to display page -- PX 224, which is the report of the OTX A&U study, page 11. I'd like you to look at this page.

What does it tell us about the primary reasons that POM users drank POM juice?

A. Well, the red bars are the POM bars, and so -- so we see the first red bar over on the left. It shows that 85 percent of the people said that a primary -- the primary reason for drinking pomegranate -- pomegranate juice, 85 percent said, "It's healthy/good for my health" and then -- which is slightly higher than the people that said, "I like the taste," which was 75 percent. 59 percent said, "I like pomegranates." 50 percent said, "It's all natural." 29 percent said, "It's a new/interesting food trend." And 4 percent gave another reason.

Q. Please look at the next page of the A&U report, page 12.

What does it tell us about the specific health benefit reasons that motivated POM juice users to drink it?

A. Okay. So of the people who said it's healthy -- and so 85 percent of the people said it was healthy, and those 85 percent then were asked a

follow-up question, so these are the -- the most common reason that was given is "contains naturally occurring antioxidants"; 91 percent said that. Then 57 percent said it helps promote heart health. 47 percent said it helps protect against prostate cancer. 45 percent said it provides immunity from colds and flu. 43 percent said it helps protect against other cancers beside prostate. 38 percent said it protects against urinary tract infections. And it keeps going down from there, and the ones kind of at the end were -- that the fewest people checked were "promotes menopausal/postmenopausal health"; only 14 percent checked that one. 6 percent said "promotes healthy pregnancy." And 2 percent provided some other reason.

Q. How do the A&U results for "helps protect against prostate cancer" compare to Dr. Reibstein's results?

A. Well, the results are dramatically different. I think Dr. Reibstein had testified only one person in his survey had said something about prostate cancer, and here we get 47 percent, which is actually 47 percent of the 85 percent that got asked the question, so of the whole sample it's around 40 percent, so it's .47 times .85, which equals around 40 percent, so this survey shows about 40 percent of the sample

said/agreed that "helps protect against prostate cancer" was an important reason why they decided to use/drink pomegranate juice. It's in stark contrast to Dr. Reibstein who only found one person in the whole survey out of about 400 respondents, so it's a clear disparity here.

Q. And did you personally review the verbatim responses to confirm there was only one person --

A. Yes, I did.

Q. -- who mentioned prostates?

A. Yes, I did.

Q. How do the A&U results for "promotes heart health" compare to Dr. Reibstein's results?

A. Again, in this study, 57 percent of the 85 percent that said "health," so it was .57 times .85, which equals around 50 percent of the sample, said "helps promote heart health." Dr. Reibstein -- I went through all the open-ended responses, and I think it was around five people had said something about -- something about heart health, in other words, heart disease or something related to the heart, so that was a little more than 1 percent, so there's a huge difference, 50 percent versus 1 percent.

Q. And if consumers are motivated to buy a product because its consumption promotes heart health, would you

expect them to also be motivated by a product whose consumption treats, prevents or reduces the risk of heart disease?

A. Yes.

Q. Let's look at those A&U results again.

What do you make of the relative ranking of the attributes "helps protect against prostate cancer" and "promotes heart health" as compared to the rankings for the other attributes?

A. Well, those are the second and third on the list, so those are obviously quite important to people as compared to "helps improve memory" or "promotes menopausal or postmenopausal health" or "promotes healthy pregnancy." Of about a dozen items, the heart health and the prostate cancer rank second and third, so they're -- I would take from that that those are pretty important health benefits to the drinkers of pomegranate juice generally and of POM Wonderful 100 percent pomegranate juice.

Q. And just to clarify, the prostate questions were only asked of men; correct?

A. Correct.

Q. And the results presented are just for men.

A. Correct.

Q. Are there some flaws with the methodology used

in the A&U study?

A. Yes. I would say so. I don't think it's a perfect study. I think it has, you know, certain flaws.

I think Dr. Reibstein mentioned and I tend to agree with him that there was some questions in the beginning of the survey that asked people about antioxidant juices. And the word "antioxidant" was repeated a few times. And Dr. Reibstein's comment was, well, people are being primed, that is, they're -- by the notion of antioxidants being mentioned that people might think more about health issues because that, you know, sort of put that suggestion in their minds.

And I mean, I don't think that's a big issue in this case, but it's certainly -- if I were to do this study, I wouldn't have asked people about antioxidant juices before I, you know, got to the specific health benefits, but I think he was right to point that flaw out.

Q. Would you expect that mention of antioxidants in the screener to impact the responses about specific health benefits such as heart health, prostate cancer, menopause, cancer, other cancers, would you expect to impact those answers?

A. I wouldn't think so. It certainly wouldn't

affect the rank ordering of these attributes.

You know, the one thing I did notice is the thing that people mentioned the most was antioxidants, you know, that pomegranate juice had antioxidants, so I could see that the mention of antioxidants in the preamble, the earlier questions, might have caused more people to say "antioxidants," but I don't see why it would have any effect particularly on the rank ordering of these attributes.

Q. Are there any other flaws with the A&U study? .

A. I don't think so. I thought it was a pretty reasonable study.

Q. Can you draw reliable conclusions from the OTX study?

A. Yes.

Q. In your opinion, does the A&U study show that consumers would find a claim that drinking POM juice treats, prevents or reduces the risk of heart disease to be material or important to their purchase or use decisions?

A. Yes.

Q. In your opinion, does the A&U study show that consumers would find a claim that drinking POM juice treats, prevents or reduces the risk of prostate cancer to be material or important to their purchase or use

decisions?

A. Yes, I do.

Q. Which do you find more reliable on the likely importance of the challenged claims would have to consumers' purchase or use decisions, Dr. Reibstein's survey or the A&U study?

A. Well, let me first say that no survey is perfect. Every survey has flaws in it. And -- but of the two, I would rely more on the A&U study. And the reason is is that in the A&U study they were asked about the specific attributes. In Dr. Reibstein's study, they were just asked why they purchased, and a lot of people said "healthy," and that question was never followed up.

So both studies have their weaknesses, but I think the Reibstein study is much more flawed than the A&U study.

Q. Dr. Reibstein criticized the A&U study sample size as too small.

Do you agree with his concerns?

A. No, I don't. I think the A&U study had about 200 POM users, and I think Dr. Reibstein had about 400 POM drinkers or purchasers in his study and -- now, granted, he had twice as many in his sample, but, statistically, a sample of 400 has a margin for error of

plus or minus 5 percent. If you have 200 respondents, the margin for error is plus or minus 7 percent. I mean, it's only a 2 percent increase in precision. It's not a huge difference.

And beside, in most studies, certainly studies I've conducted, a cell of 200 respondents is a fairly normal sample size.

Q. Dr. Mazis, as you explained earlier, Dr. Reibstein's survey included a question K. After he asked all the motivation questions, he asked consumers: Have you ever seen a POM Wonderful 100 percent pomegranate juice advertisement?

Those who said yes were told: Please include as many specific details as to what you remember about the ad. Please be as detailed as possible.

I would like to display a quotation from Dr. Reibstein's trial testimony in this courtroom, trial transcript page 2568.

Starting on line 20, Dr. Reibstein testified at trial:

"What I am able to conclude from question K is that I see no indication that people who claimed to have seen any POM advertising have a specific disease reference, and that's what I testified to earlier today.

"And so there is some reference about what people have taken away from those ads and if it has had any, you know, particular influence on their reference to specific diseases."

Dr. Mazis, can you draw any reliable conclusions about what consumer takeaway from the ads at issue in this case was based upon the lack of specific disease references in response to Dr. Reibstein's question K?

A. No. I don't think you can say anything from that question. It was a totally unreliable question.

Q. Why is that?

A. Well, as I mentioned earlier, my understanding is that the challenged POM ads ran from 2003 to 2009. Well, that was over a year before this survey was conducted. And of course, the FTC is alleging that in those ads there were specific health claims that were communicated.

Well, could people remember the specific details of an ad that they saw four years ago? I don't think so. As I said earlier, people can't even remember ads that they've seen a week ago or even last night. It's very hard for people to remember the specific details of ads because they see -- they're exposed to so many advertisements, so I don't see that question as being at

all probative.

Q. So is there any basis for concluding how many, if any, of the survey respondents saw any of the challenged ads?

A. No. We have no idea.

Q. And did an approximately 60 percent of the surveyed consumers not recall seeing a POM ad?

A. That's what they said. Yes.

Q. And if consumers could recall POM juice advertising, what advertising would you expect them to recall?

A. Well, certainly we would expect them to recall more recent advertising. It's my understanding that POM had launched a major TV campaign right before the survey was conducted. And certainly my examination of the open-ended responses showed that of the 40 percent who said they had seen a POM ad that 25 percent of them played something back about a current ad.

So, for example, they said they saw it on TV. Well, POM hadn't run TV ads before this current set of ads that they had run. And some people said it had to do with Eve, which is there was some ad that showed Eve with a serpent, and so on.

So there was quite a bit of playback about the current POM ads, which, you know, makes sense. If

people are going to remember anything, they're going to remember the current ads much more than they would remember ads that they were exposed to four years ago.

Q. And didn't 20 percent say they couldn't remember anything or not respond to that question about what they remembered?

A. Yes.

Q. The survey asked respondents, "Please include as many specific details as to what you remember about the ad."

Assuming that a consumer did see one or more of the challenged ads, would you expect that question to adequately evoke recall of the messages from the challenged ads?

A. No. I don't think so. I don't think that that's going -- that admonition or that -- the idea that people would say -- provide specific details. If you can't remember the ad, asking people to provide specific details isn't really going to help you much.

Q. If one had wanted to ascertain consumer takeaway from the ads at issue, how should one go about measuring ad claim communication?

A. Well, the way it's typically done, the way I did it in the Novartis case and the Telebrands case and the Vermont case, which is to show people an

advertisement. After you show them an ad, you typically take it away, and then you ask them a series of open and then closed-ended questions to find out what the ad is communicating to them. That's the -- that's the standard way that you assess ad communication.

Q. And would you also use some controls?

A. Yes. And typically you have a control group as well.

Q. What universe of survey respondents would you use for such a survey?

A. Whatever the target audience is.

Q. And would you do a forced exposure study?

A. That's the way these studies are always done, to my knowledge. All the cases that I cited -- by "forced exposure" we mean you bring people into a laboratory environment, usually in a shopping mall. You sit them down in front of a TV or in this case probably print ads. And you show them the print ads. You let them read the print ads. You take the print ads away. And then you ask them some questions. That's what's referred to as forced exposure.

That's the way these studies are typically done. And certainly this forced exposure environment has been accepted by the FTC. It's been accepted in Lanham Act

cases. It's the way ad communication is typically measured.

MR. OSTHEIMER: Thank you, Dr. Mazis.

No further questions, Your Honor.

JUDGE CHAPPELL: Are you ready?

MR. FIELDS: I am ready, Your Honor. Do you want to take a break or go right through?

JUDGE CHAPPELL: How much time do you think you'll need.

MR. FIELDS: About an hour and a half.

THE WITNESS: I'm sorry. I don't mean to interrupt. May I have some water?

MR. FIELDS: I have no objection to that.

THE WITNESS: Okay. Thank you.

(Discussion off the record.)

JUDGE CHAPPELL: Let's take a break. Just for planning purposes, we're not going to take a long break today, take a couple of short ones, maybe twenty minutes now.

(Discussion off the record.)

JUDGE CHAPPELL: All right. We'll reconvene at 1:35.

(Whereupon, at 1:06 p.m., a lunch recess was taken.)

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

(1:39 p.m.)

JUDGE CHAPPELL: Back on the record.

Cross?

MR. FIELDS: Thank you, Your Honor.

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CROSS-EXAMINATION

BY MR. FIELDS:

Q. Good afternoon, Dr. Mazis -- is it "Mazis" or "Mazis"?

A. "Mazis."

Q. "Mazis." Okay. Good afternoon anyway.

Is it correct that you, in the period of years you've described where you worked for the FTC, you were the chief of marketing and consumer research in the Office of Policy and Planning?

A. Yes. For two years.

Q. Right.

And after that, for several years you continued to work for the FTC one day a week; isn't that correct?

A. It wasn't -- I think there was a break there, and then -- then I picked up some years later, and I think it was primarily in the '90s I believe that I worked a day a week for I'm just guessing maybe six or seven years, something like that.

Q. And you also worked for the FDA at one time?

A. That was the six-month period I was mentioning about where I had the sabbatical, was that six-month period that I worked with the FDA.

Q. Yes, sir.

And you've been consultant to a number of federal agencies; is that correct?

A. Yes.

Q. And that included the -- not only the FTC, the FDA, but also the Consumer Product Safety Commission, the Department of Justice, the FDIC, the Bureau of Alcohol, Tobacco and Firearms, and the U.S. Mint. Am I right about that?

A. Yes.

Q. Okay. And you've done false advertising surveys for the FTC on numerous occasions; isn't that correct?

A. Yes.

Q. And I think you told us you've done work for various pharmaceutical companies. Is that correct?

A. Yes.

Q. All right. And your report says you've testified as an expert in 24 cases in the last four years; is that correct?

A. I didn't count them up, but that sounds about

right.

Q. Yeah.

So that you really testified as an expert in I guess it's a case every other month, every two months if it's 24 over four years; right?

A. Yes.

Q. So your present profession is to be a witness; isn't that correct?

A. Well, it's sort of a part-time job. I -- when I retired in May 2008, when I retired from the university, I moved to Philadelphia, so my wife and I, we're the nannies for our one-year-old granddaughter, so in my mind that's my primary job, but I certainly do some consulting as well, maybe a couple -- I figure it's around two days a week I do this consulting work.

Q. But, as you say, your primary job is being a witness, and you testify as a witness in a case just about every other month; right?

A. Right. Yes, as I said, you know, which takes about two days, two days a week of my time.

Q. All right. Let's talk about your understanding of materiality.

Is it correct that materiality is that which affects a consumer's choice of product?

A. No. I wouldn't define it that way.

Q. Well, could we give Dr. Mazis a copy of his report in this case. I think you have it. Yes.

May we approach the witness, Your Honor, from time to time?

JUDGE CHAPPELL: Yes.

MR. FIELDS: Thank you.

BY MR. FIELDS:

Q. Mr. -- Dr. Mazis, would you look at paragraph 17 of your report on page 8, and I quote:

"A 'material' misrepresentation or practice is one which is likely to affect a consumer's choice of or conduct regarding a product."

So isn't it correct that, as to your understanding, a material misrepresentation is one that affects a consumer's choice of product?

A. Well, what you've said isn't the same thing as the quote there. You omitted the word "likely" to affect.

Q. I see.

So it was the "likely to affect a consumer's choice of product" that you disagree with; is that correct?

A. Yeah, that's right. I mean, it's -- you know, it's essentially would this practice affect a consumer's choice.

Q. Uh-huh.

Choice to purchase the product; isn't that correct?

A. Purchase or use.

Q. Yeah. Well, in this case we're talking about purchase I think, so it's not a question of how we use the product but why we purchase it. Right?

A. I believe that's correct.

Q. Okay. Now, the appropriate measure of materiality, as you understand it, is the potential impact of the challenged claim on purchase behavior; isn't that correct?

A. Yes.

Q. Okay. And advertising claims may involve information important to consumers, but to be material, it has to be important in terms of their decision to buy; isn't that correct?

A. Yes.

Q. Okay. And a person may believe a product has a certain effect, but that may not be why he purchases the product. Those are two different questions; isn't that right?

A. I'm sorry. Could you repeat that again.

Q. Yes.

A person may believe that a product has a

certain effect, but that may not be why he purchases the product. Those are two different questions; isn't that correct?

A. Okay. I agree with that.

Q. Okay. Now, to be important in determining materiality, a product's characteristics must be important in a way that affects a consumer's purchasing decision; isn't that also correct?

A. Yes. I think, you know, the idea is that it has to be likely to affect the purchase decision, correct.

Q. Okay. And what Dr. Reibstein inquired into was what affected the purchase decision; isn't that correct?

A. Yes. According to his way of doing it. I don't agree with his methodology, but I agree that that was his intent.

Q. You attended the University of Pennsylvania; is that correct?

A. Yes.

Q. And The Wharton School is there?

A. Yes.

Q. And that's a famous and distinguished institution; isn't that correct?

A. I believe so.

Q. You're aware that Dr. Reibstein is a chair and tenured professor at Wharton and dean of the graduate division at that institution?

A. Right.

Q. Now, in his study, Dr. Reibstein concluded that a very small percentage of POM buyers would buy POM because they believed it cures or prevents a specific disease; isn't that correct?

A. That's what he claims.

Q. Okay. And you agree that Dr. Reibstein's statement is true, that that's what his study showed; isn't that right?

A. No. I don't think his study showed that at all.

Q. Oh. Well, let's take a look at your deposition at page 66.

And I begin at line 2.

A. Okay.

Q. My desk lowered.

Let's go ahead.

Have you folks had time to find that?

MS. HIPPSLEY: Yes.

MR. FIELDS: Thank you.

BY MR. FIELDS:

Q. All right.

(As read) "QUESTION:" -- and unfortunately it's a long answer, but I'll read the whole thing -- "Do you see the next sentence that you say that based on the results of the survey, Dr. Reibstein concludes a very small percentage of POM Wonderful juice buyers believed it was beneficial to any disease?"

"ANSWER: Yes.

"QUESTION: And you disagree with that?"

"ANSWER: Well, it depends on what you mean by 'disagree.' I don't -- as I discussed before, based on the methodology, I -- I don't think he got a very good assessment of these disease issues.

"Now, I mean, the fact that he concluded this, I mean, I guess that's true. But that's what he found. So, I mean, the statement is true because Dr. Reibstein found that in his study. So I'm not disagreeing with what he found. I'm just disagreeing with the methodology he used to find that out."

Right?

A. That's what it says, yes.

Q. So you don't disagree with his conclusion, you disagree with his methodology; right?

A. Well, what I was trying to say there was that -- yeah, did Dr. Reibstein conclude that a very small percentage of POM Wonderful juice buyers believed that

it was beneficial to any disease. Yes, that's what he concludes. But I wouldn't agree with that because the premise of his study was way off, so yeah, did he conclude that, yes. But I don't think that's a valid statement.

Q. So when you said "... the fact that he concluded this, I mean, I guess that's true... So, I mean, the statement is true because Dr. Reibstein found that in his study," you didn't mean that the statement was true; you just meant that he said it was true. Is that --

A. Correct.

Q. -- your explanation?

A. Yes, that's correct.

Q. All right. Now, is it correct that you did not disagree with his conclusion?

A. No. I do disagree with it. I don't think he can make that statement. He doesn't have data to support that statement.

Q. All right. Well, take a look at the same page, beginning at line 20 (as read):

"Do you disagree with his drawing that conclusion from the data his survey generated? Do you agree that conclusion was impermissible to draw from the data the survey produced?"

"ANSWER: No. No. Based on the questions he asked, I mean, I think he tabulated them appropriately as far as I could see. So, I mean, I think that's --"

And you didn't conclude your answer.

So when you said you did not disagree with his drawing that conclusion, is that different from what you're saying now, that you -- are you now saying you do disagree with his drawing that conclusion?

A. No. I think the point here is is that he did this study and he came up with certain conclusions based on his data. I think, based on his data, he reported the data properly. I don't see anything wrong with how he reported it, but -- but his study is so flawed that the conclusions that he reaches aren't tenable. They're not reliable conclusions.

Q. Well, the question was (as read): "Do you disagree with his drawing that conclusion from the data his survey generated?"

"ANSWER: No. No."

So today your answer is somewhat different, it's yes, yes; right?

A. I don't think so. I think what I'm saying is is that he did this study. He reported the results of his study. I think he tabulated the results fine. You know, he found very few people took specific --

reported specific disease motivations. I think all that was done properly as far as I could tell. But -- but any conclusion that he could draw from what he did, I don't agree with any of his conclusions because his methodology is so flawed. He didn't ask the appropriate follow-up questions.

Q. Uh-huh.

A. That's what I meant then and that's what I mean now.

Q. Okay. When I say "okay," I mean I'm asking my next question.

In fact, Dr. Reibstein's result was that out of 406 people who bought POM, less than 1 percent even mentioned a disease as the reason for their purchase; isn't that correct?

A. Yes. That's my understanding.

Q. Yeah. Four out of 406 mentioned a disease.

A. Yeah, that's -- yeah, that was his conclusion. I went back, and I think it might be a little bit higher than that, but it's a very low number.

Q. Yeah.

And he asked the reason people bought POM and asked them to give all the specific details on that; isn't that correct?

A. Yeah. Let's see.

His question was: Why did you purchase POM Wonderful 100 percent pomegranate juice? Please include as many specific details.

Q. Yeah. I thought that's pretty much what I said, but --

A. It's close.

Q. Okay. Thank you.

And then he went on and asked follow-up questions, didn't he?

A. By -- by "follow-up questions" you mean additional questions?

Q. Well, I guess you could say -- do you see a distinction between follow-up questions and additional questions?

A. Well, there are two ways one could do this. You know, typically a follow-up question means that you -- you follow up on the original question, which is, if you say, "Why did you purchase POM Wonderful 100 percent pomegranate juice?" and people give an answer, and then you might say, "Well, do you have any other reasons?" That's what I would consider a follow-up.

Q. So when he went on to ask would you buy it again after they said they would buy it and why and gave their specific reasons, that wasn't a follow-up

question, that's just an additional question; right?

A. In terms of my terminology, you know, that I would typically use in talking about survey questions, right. A follow-up question usually is a follow-up to the original question that asks for clarification.

So he didn't do that, but he did ask a subsequent question on a related but not exactly the same subject.

Q. Yeah.

He asked them would you buy it again, and if you would, why would you buy it again, and to give again all the specific details; correct?

A. Yes.

Q. Okay. And again less than 1 percent mentioned a specific disease, even mentioned a disease; isn't that correct?

A. Right.

Q. Okay. And then he asked a third question, whether you want to call it follow-up or additional. The third question was would you recommend it to a friend for purchase, and please again, if you would, give all the details -- pardon me -- why would you recommend it and give all the details; isn't that correct?

A. Yes.

Q. Okay. And again, something a little bit less than 1 percent said that they would recommend it because of some disease reason; correct?

A. Yes.

Q. So that's a total of 1200 separate answers, almost none of which mentioned a disease claim; isn't that correct?

A. Yes.

Q. All right. But you dismiss that as something we shouldn't consider even as probative evidence?

A. No. I didn't -- I don't think I ever said that. I said that it's kind of like the elephant in the room here, that between 37 and 45 percent of the respondents said something related to health. That's the elephant in the room. He never followed up on what they meant by health benefits.

So a lot of people were concerned about health, and he needed to use the appropriate follow-up questions. That would have been the appropriate methodology. He didn't do that.

Q. He did his -- he, Dr. Reibstein, did a separate analysis of the responses of those who saw POM ads and those who did not see POM ads; isn't that correct?

A. Yes. He did attempt that analysis, yes.

Q. Right. And let's take the people who did see

POM ads.

Even among those people, the report shows again less than 1 percent of people who actually saw POM ads bought for a specific disease reason, so you've got again 1200 answers by those people; right?

A. Right.

Q. Okay. Now, I think you said that, well, they might have forgotten that they saw an ad or something; right?

A. Is that a question?

Q. Are you really claiming that all three or four hundred people forgot the real reason they were buying POM?

A. I'm sorry. Is that a question?

Q. Yeah.

I mean, there were 300 out of the 400, approximately, said they had seen a POM ad, and I understood your answer was, well, maybe they forgot the ad they saw, and so the real reason they were buying was something other than what they said. Isn't that your position here?

A. I think you're very confused about what I said. You're mixing up -- your question is extremely confusing. Let me see -- could I try to clarify it? Or do you want to ask me a different question?

Q. Why don't you try to answer my question.

A. Well, it's hard to answer your question because it's a confusing question, but I'll do the best I can.

Q. I'll rephrase it.

Is it your position that a substantial number of the 300 people who saw a POM ad and did not mention disease as the reason they bought it, that that's because they forgot the POM ads they had seen?

A. I'm sorry. I don't mean to be critical of someone's question, but that question doesn't make any sense.

Q. Well, do you contend that --

A. I would say -- I would say no because the question is extremely confusing. When you're talking -- you either have to talk about the POM ads or you have to talk about the reasons for purchase. You're conflating those two issues in a way that make no sense.

Q. Well, didn't you testify that perhaps one of the reasons people didn't give disease as the reason for their purchase that they had seen the ad that mentioned disease and forgot about it?

A. No. I think what you're confusing is what I said was that people may have seen an ad four years ago.

Q. Uh-huh.

A. And people can't remember what they saw four years ago. I mean, it's such a long time ago. How could you possibly remember what ads you saw four years ago?

And so the question makes no sense because it it's asking people to try to remember facts that they can't possibly remember. And also, even if they did see an ad four years ago, there's no way of knowing if that was one of the challenged claims, you know, was one of the challenged ads or it was an ad that wasn't challenged, so this idea of dividing people up into people who had seen ads and people who didn't see ads makes no sense because the question is totally unreliable.

Q. So I want to get what you just said very clearly.

It makes no sense to divide people into who saw an ad and who didn't see an ad; is that your testimony?

A. That's correct. Because people can't -- people can't recall ads that they had seen three or four years ago.

Q. So then is it your testimony that the reason less than 1 percent of the 300 people who said they had seen an ad did not mention disease as the reason they

purchased that they had forgotten the ads? Is that your testimony?

A. I don't think so.

Q. Okay. Good. Good. We agree on that.

Now, if a higher percentage of people who never even saw a POM ad mentioned disease as a reason for buying POM than the percentage of people who did see the POM ad, wouldn't that tell you that something other than POM ads is creating the impression that it helps disease?

A. No. I don't think so.

The big flaw in this whole study is that Dr. Reibstein didn't ask specific follow-up questions about -- if people said "health," he didn't follow up with specific questions about what they meant by "health," what reasons underlied their -- were underlying their health reason, so very few people mentioned anything -- any specific health claims. I mean, that's a fact. And so therefore -- and I maintain that's because of totally inappropriate methodology.

So any additional analysis that Dr. Reibstein tries to do, people who look at -- who saw -- claim they saw ads versus people who didn't see ads, people that are POM buyers or people that are non-POM buyers,

any of those analyses make no sense because the -- the number of mentions of specific diseases is so low that subsequent analyses are totally meaningless.

Q. Well, sir, a lot of people talked about health reasons; isn't that right?

A. Correct.

Q. And didn't the survey that you place so much weight on, the O&X (sic) survey -- I call it the A&U survey -- didn't that test responses in areas where the ads ran and areas where the ads didn't even run? Do you remember that?

A. I believe that was one element of it. Yes.

Q. Yes.

And didn't they find that more people gave health as the reason in areas where the ads didn't run than where the ads did run?

A. I don't recall that specific --

Q. Page 24 if you have it there.

A. Do you have the document?

Q. We'll show it to you right now.

A. I have it actually in my binder.

Q. Yeah. Okay. If you'd take a look -- I think it's page 24. I think there's a chart showing where the ads ran and where the ads didn't run. And I believe -- let me dig it out myself -- that people said it's

healthy in a greater percentage where the ads did not run than said it was healthy where the ads did run.

A. What specific line are you referring to?

Q. Let me get the page and I will tell you.

A. I have page 24.

Q. Okay. And I'll put on my glasses and -- all right. If you look in the ad markets, "It's healthier," do you see that, "It's healthier than other brands," three from the bottom?

A. Okay. So 10 percent?

Q. Yeah.

A. Okay. So --

Q. And in the non-ad markets 15 percent of the people thought it was healthier; is that correct?

A. That's what it says.

Q. Well, so you don't know whether it's correct or not, but that is what it says.

A. Well, that's what it says, but that doesn't -- that really isn't the issue. I mean, the issue is were people exposed to the challenged ads versus people that weren't exposed to the challenged ads. We don't know from this whether people were exposed to the challenged or not challenged ads. This isn't a -- this comparison to me doesn't show anything.

Q. It doesn't show that more people where the ads

didn't run thought it was healthy than people where the ads did run? Doesn't that tell you that perhaps they're getting the idea it's healthy from something other than just the ads?

A. Not necessarily.

Q. I didn't say necessarily, but doesn't it tell you that's likely? When more people come up with that idea where the ads don't run than where the ads do run, it kind of leads you to question that the ads are telling people it's healthy and that's the reason they're buying it, doesn't it?

A. Well, I think the -- my understanding is that POM's whole campaign was based on health issues.

Q. That really wasn't what I asked you, was it?
All right. Let's move on.

Let's look at the people who bought juices other than POM.

It's likely that they were not induced to buy by POM advertising; isn't that correct?

A. I'm sorry. What page are you on?

Q. I'm not on a page now. I've moved on to another subject.

A. Oh, okay.

Q. We're talking about the people in the Reibstein study who bought juices other than POM.

A. Right.

Q. And I'm saying, isn't it likely that because they bought a juice other than POM that they were not induced to buy by POM ads?

A. No. That's definitely not true at all. And the reason is that the dividing line in the Reibstein study was six months, so a non-POM user would be someone who didn't buy POM in the last six months.

Now, we don't know what happened before the six-month period, in fact when the challenged ads were run, so these people who are the non-POM drinkers, first of all, they could have been POM drinkers a year ago or two years ago, and they could have been exposed to the POM ads a year ago, two years ago, four years ago, so the comparison between the POM drinkers and the non-POM drinkers, that's a meaningless comparison because it only covers the latest six-month period.

Q. So it's meaningless because you think there might have been some people in the non-POM drinker group who drank POM in the past; is that right?

A. I think that's a certainly reasonable hypothesis. POM is a leading pomegranate juice seller. Of course, it's certainly reasonable.

Q. Well, where do you get the information that POM is the leading pomegranate juice seller? Did you ever

hear of a company called Ocean Spray?

A. I have, yes.

Q. And isn't Ocean Spray a much bigger seller than POM?

A. Of pomegranate juice?

Q. Of what they call pomegranate juice, sir, that has 2 percent pomegranate in it.

It's a much bigger seller, isn't it?

A. That, I'm not sure about.

Certainly POM, if it's not the leading seller, it's certainly one of the main brands in the category.

Q. You didn't mean to tell us it was the leading seller when you said that, though.

A. It's one of the leading brands in the category.

Q. All right. Let's come back to where we were.

You don't have any reason to believe that any substantial number of the people in the non-POM drinking group actually were former users of POM who quit; isn't that right?

A. Well, I don't have --

Q. You're speculating that --

A. I don't have any evidence of that, but Dr. Reibstein doesn't have any evidence that they weren't.

Q. Except that they haven't had it in the last six

months, which sort of suggests that they're not POM drinkers, doesn't it, to you?

A. No.

Q. In fairness, it doesn't.

So you think probably of the 300 people who didn't answer listing a disease that perhaps they were really previous POM drinkers, all 300?

A. Probably not all 300, but we don't know which ones were and which ones weren't. I mean, that's a flaw in Dr. Reibstein numbers.

Q. We don't know if any of them were former POM drinkers, do we?

A. We don't know if any of them were and we don't know that whether all of them were. Dr. Reibstein didn't collect any evidence on that. That's a flaw in his study.

Q. Wouldn't you have separated the people into people who drank in six months, drank POM in the last six months and people who didn't?

A. I never would have done that analysis. It's a totally flawed analysis. I never would have done it that way.

Q. I want to get that very clear, sir. You never would have done that analysis of dividing people into people who drank for the last six months and people who

did not; right, you never would have done that?

A. If I were Dr. Reibstein, I wouldn't have done the study in the way he did it. No, I wouldn't have asked that question and divided people up in that way.

Q. Now, is it correct that your principal criticism of Dr. Reibstein's study, in addition to the fact that he asked closed-ended -- pardon me -- open-ended questions, was that you say his study isn't even relevant to the issues of the case based on the legal standards of the FTC? Isn't that what you said?

A. I believe that's correct, that it doesn't really address ad communication and it doesn't really address materiality directly.

Q. But you're not an expert on FTC law, are you?

A. No. Of course not. I'm not an attorney. But I've been involved in a lot of FTC cases, so I think I know what the FTC studies and people who do studies in FTC cases, what those studies are designed to do.

Q. Isn't it correct that you don't know how the FTC determines materiality?

A. No, I don't. That's a job for the commissioners.

Q. Okay. That's a legal issue beyond the scope of your expertise; isn't that correct?

A. Yes.

Q. And you're not an expert on what survey evidence the FTC considers relevant in assessing materiality; isn't that correct?

A. No, I'm not.

Q. You mean it is correct.

A. Yeah, that's correct. I'm not -- I'm not an FTC expert. I'm not a legal expert. I just know that I've conducted a lot of surveys in FTC matters, and so I have a pretty good idea what kinds of surveys researchers tend to conduct and submit in those types of cases.

Q. Now, you've never researched what kind of survey the FTC does or doesn't accept in assessing materiality; isn't that correct?

A. That's right.

Q. And of all the surveys you've done for the FTC, you've never done a survey on materiality; isn't that right?

A. Yes.

Q. All right. Now, just a moment ago, I understood you to testify that you would never, in Dr. Reibstein's position, have divided the respondents into two groups, those who purchased POM in the last six months and those who didn't. Isn't that what you just said?

A. Yes.

Q. Never would have done that?

A. I wouldn't have done it that way.

Q. Didn't you testify that that is exactly what you would have done, that you would have selected people who bought pomegranate juice in the last six months and divided them into POM buyers and non-POM buyers in the last six months?

Isn't that exactly what you said you would do?

A. I don't -- I don't think so.

Q. Well, let's look at page 230 line 13.

JUDGE CHAPPELL: When you're asking the witness if he testified?

MR. FIELDS: Yes.

JUDGE CHAPPELL: Let's make it clear whether you're talking about testifying in this courtroom or previously in a deposition.

MR. FIELDS: A deposition, Your Honor. I'm sorry. I should have made that clear.

BY MR. FIELDS:

Q. Isn't that what you said in your deposition, you would have divided them into --

A. I'm sorry. Where are you referring to? What line?

Q. Oh, all right.

Page 230 line 13 (as read):

"Do you know what, in your opinion, the relevant universe would have been to survey in this case?

"Well, I'm thinking about this now from Dr. Reibstein's point of view, you know, based -- if I were Dr. Reibstein, which is the only way I can really answer the question, if I'm in his shoes, the universe I would think would be the universe of people who have purchased POM Wonderful juice in the last six months and -- well, from his point of view, people who didn't purchase POM Wonderful -- well, let me take a step back.

"It would be people who purchased before or maybe people" --

A. No. Wait a second. I'm sorry. I can't see the rest of that.

Q. (As read): "It would be people who purchased pomegranate juice in the last six months and then subdividing them into two groups of people who purchased pomegranate (sic) juice and people who didn't purchase pomegranate (sic) juice.

"So the whole -- the basic universe is people who purchased pomegranate juice in the last six months. That would be the universe that would you be projecting to."

Now, a minute ago you said you never would have said that, never.

A. Oh, I wouldn't. If we go back -- go back to the beginning of that, that paragraph, that statement.

Now, what I said was (as read): "Well, I'm thinking about this now from Dr. Reibstein's point of view, you know, based -- if I were Dr. Reibstein, which is the only way I can answer this question..."

So what I was saying was, based on Dr. Reibstein's approach and what he was trying to show, he did it in the way of subdividing people between POM drinkers and non-POM drinkers. I wouldn't have done it that way. Dr. Reibstein, he had a particular point of view. He had -- he was designing a study in a particular way. But I don't agree with what he did at all.

Q. Even though you said if you were Dr. Reibstein it's exactly what you would have done; right?

A. No. I'm saying if I were Dr. Reibstein from his point of view. I mean, he has a point of view in this case and he has a way of doing this study, so he conducted it in a certain way from his perspective. I would never have done it that way ever.

Q. And I understood you to say that -- on the witness stand rather than in the deposition, that if you

were Dr. Reibstein you wouldn't have done it that way. Isn't that what you said?

A. I said if I were Dr. Reibstein and I was hired to -- I was hired by POM to do the study and I had certain marching orders and certain ways that I was thinking about doing the study, I would do it in a certain way, and that's what I said, from Dr. Reibstein's point of view. Actually I think this is what I said, if I were Dr. Reibstein, which is the only way I can really answer this question, if I'm in his shoes, this is the way I would do it. But if I'm in my own shoes, Dr. Mazis' shoes, I would never have done this study the way he did it, ever.

Q. Now, is it correct that you don't have to show respondents the actual ads in order to do a survey on materiality?

A. Yes, that's correct.

Q. Now, I think you told us sometime earlier that an ad can communicate a health benefit, and yet that may not be the reason the consumer -- for the consumer's decision to purchase the product. Do you recall that testimony?

A. Yes. If I'm understanding what your question is, it's that the -- an ad could communicate a certain message, but it isn't necessarily the reason why people

buy.

Q. But in your analysis you focused on what the ads say, you focused on whether they communicated certain health benefits; isn't that correct?

A. I'm not following you. Dr. Reibstein -- his study focused on what he says are the reasons why people purchased, and he reports certain figures, and then he also has an analysis on question K of what the ads communicated, so he did those two things.

So I'm not sure what your question is.

Q. Okay. Well, I'll move on to another one.

I understood you to say that somehow there's a difference between the reasons people buy a product and what you think is materiality? Is there some distinction between the two?

A. Yes, there is. There is.

And what I said in my direct was that, for example, people could decide -- could be motivated to purchase a juice because of the price, let's say, or because of the taste. But that doesn't mean that if they -- if they knew that the product, let's say -- or let's say the claim was that it protects against prostate cancer. That doesn't mean that if they knew that, they wouldn't buy the juice based on that claim.

So they're really two different things as to the

motivations why people buy and the importance of a particular claim to consumers, given that they're exposed to that claim.

Q. Well, sir, we began this examination by your agreeing with me that the only important thing to materiality was the impact on the purchase decision, not the different question of what people took away from an ad; isn't that right?

A. Yeah. But I never said anything what they took away from an ad. You're throwing in extra issues that I never -- I never said that. You're -- you haven't stated my testimony properly.

Q. Isn't it your testimony, sir, that the important thing in determining materiality is the reason for the purchase decision? That's what you said.

A. No.

Q. It's not?

A. I'm sorry. I didn't. I didn't say that. What I said was that materiality refers to the fact that whether a claim would be likely to affect purchase behavior. "Would be likely" is a totally different issue than whether it's a purchase motivation. They could overlap, but they're not the same thing.

Q. Well, what would likely impact the purchase decision is, in your view, the issue; isn't that right?

A. Yes. Whether a claim, a particular claim, is likely to affect the purchase decision, but people have to be exposed to that claim in order for them to know whether it would be likely to affect their purchase behavior.

Q. I thought you just said a moment ago that you don't have to show them the actual ad in order to do a survey on materiality.

A. You don't. But you have to tell them what the claim is. You have to tell them what the issue -- in other words, prostate cancer, preventing prostate cancer -- okay -- that's an attribute or a claim. But you don't have to show them an ad. You can ask people if you -- do you think that preventing prostate cancer would be important in your purchasing pomegranate juice.

They didn't -- you don't have to show them the ad, but you have to give them a statement about what the claim was and you have to ask them how important they think that claim would be in their potential purchase decision.

Q. So you're actually testifying that asking them why you purchased is not relevant to the issue of whether something was likely to induce the purchase.

A. What I'm saying is that there is some overlap

there. They're not the same thing.

Let me give you an example. Let's say in Dr. Reibstein's study, let's say 30 percent of the people said the reason that they purchased POM pomegranate juice was because to prevent prostate cancer. Let's say that they said that. Then if it's a purchase motivation, it's likely to be important. But if they don't mention prostate cancer, it doesn't mean that it's not important so that they're really -- they're overlapping issues, but they're not the same thing.

Q. Sir, you're saying that they know that the purchase -- the reason for purchase is prostate cancer, but they're not saying it deliberately? Is that what you're saying?

A. No. I never said that. You just made that up.

Q. Excuse me?

A. You just made that up. I never said that.

Q. Pardon me, sir. I don't make things up.

A. Well, I didn't say that.

Q. Didn't you just say that these people are buying because they have -- they think it cures prostate cancer, but they don't answer a question saying why you buy for that reason?

A. No. I just gave you a hypothetical.

Q. Oh, it was just a hypothetical.

A. Yeah. Of course.

Q. Okay. You're not really saying that people don't give their real reasons when you ask them why they buy, are you?

A. No. They would give their real reasons if you ask them properly. Unfortunately, Dr. Reibstein didn't ask them properly.

Q. And let's get this because we're going to come back to it later.

Are you saying you would never conduct a survey or even suggest a survey that simply asked open-ended questions as to why you buy a product?

A. No, I'm not saying I would never do that study. There could be cases where that would make sense. It didn't make sense in this particular case.

Q. Wouldn't it make sense when you're trying to show materiality to ask people why they bought the product?

A. No.

Q. It would not, and you wouldn't ever suggest that.

A. That -- in this case, that isn't the study I would have done.

Q. I'm not talking about in this case.

I'm saying, you would never suggest that to test materiality we ask people an open-ended question why did you buy it; is that right? You would never suggest that?

A. Under some circumstances, that might be appropriate.

Q. What are the circumstances under which you would suggest that?

A. I don't know. I really have to think about that. I -- because I can't say categorically that I would never do that, but in this case asking the open-ended question about why did you purchase and getting people -- 35 to 47 percent of the people saying it's because of health and never following that up, that's a flaw.

Q. You have actually suggested following that very procedure as a way of proving that a product was -- that claims were not material, haven't you?

A. I don't recall, but it's possible. But in this particular case where health is so important you really need to follow that up with specific questions, and that's -- that's the big flaw.

Q. Well, we'll come back to what you recommended in the past.

All right. Now, you criticized Dr. Reibstein

for asking open-ended questions rather than closed-ended questions that directly ask if respondents bought POM to cure a specific disease.

Isn't it true that open-ended questions make it significantly less likely that the respondents will be led into giving a particular answer?

A. Yes.

Q. Now, I'm going to, in one minute -- give me just a moment. Oh, yes.

I'm going to read you, since you've referred frequently -- not frequently but a couple of times to the Telebrands case, a quotation from that case and ask you if you agree with it and if it affects your testimony.

"Open-ended questions allow survey participants themselves to articulate the central claim or claims in the ad -- those that first come to mind. Marketing experts have found that credible evidence can be obtained from the responses to open-ended questions." Citation. "We agree with the ALJ that it is appropriate to consider the open-ended responses without netting out any controls."

Do you agree with that quotation?

A. Well, I agree with it up to the sentence -- up to the last sentence.

Q. In other words, you think that the Federal Trade Commission got it wrong.

A. In my opinion, yes.

Q. Okay. And you -- in other words, where they say it's appropriate to consider open-ended responses without netting out controls, that's what you disagree with?

A. Yes.

Q. So you think you have to net out controls for both open and closed-ended questions?

A. Yes. And that's been my practice. And that's what I actually did in the Telebrands case.

Q. All right. And now, let me read you a little bit farther on from the same opinion and ask if you agree or disagree:

"Closed-ended questions, however, have the potential to direct participants to certain aspects of an ad. Consequently, participants may respond to such questions based upon yea-saying, inattention, preconceptions or other 'noise.' Thus, closed-ended questions require the use of some type of control mechanism."

Do you agree with that?

A. I agree with that in -- if it's an ad communication study, and that's what this was. In an

ad communication study because it's a causal study and -- but I don't agree with it as a general proposition.

Q. Well, it's stated here, isn't it, as a general proposition, closed-ended questions require the use of some type of control mechanism?

A. I think the context is that this is an ad communication study. In that context, you do need to have a control mechanism. And of course in Telebrands I did have a control group.

Q. Well, you said that both open-ended and closed-ended questions require a control. That was your answer just a couple of minutes ago; right?

A. Yeah, it is. In ad communication studies where it's a causal study, which is different than, say, what Dr. Reibstein did and is different from the OTX study, because those are not ad communication studies.

Q. Well, isn't -- aren't we talking here about what's the cause for the purchase decision?

A. Dr. Reibstein and the OTX study is attempting to come up with what -- what factors motivate consumers' purchasing, but that's not really a causal study.

Q. Isn't that the cause of the purchase decision, sir?

A. It could be, but that's not a causal study.

A causal study is a study in which there's a manipulation where you're trying to assess why a particular factor causes something. It's an experimental study. And what OTX did in the OTX study and what Reibstein did were not -- in terms of my field, those are not called causal studies or experimental studies.

Q. And do you see the word "causal studies" here in the quotations that I read you where it says "closed-ended questions require the use of some type of control mechanism"?

A. No, it's not here, but they're talk -- the context is that it's the Telebrands case, it's an ad communication study, and it's a causal study. They're trying to -- in that case you're trying to isolate the reasons for possible advertising deception or having people misled.

Q. Well, let me read you a further quotation, and then I'll stop with this.

"Responses to the control question or questions -- like a control group -- measure the number of participants who answered based upon yea-saying, inattention, the halo effect, or other 'noise.'" Citation. "To eliminate the effect of such external factors, the responses to the control or masking

questions are subtracted from responses to the test questions."

Do you agree with that?

A. Right. That's what I did in the Telebrands case.

Q. Yes.

A. But, again --

Q. It's not what you've done in this case.

A. Well, I didn't do any study in this case.

Q. No, but you didn't subtract, did you?

A. It's a different -- it's a different study.

Q. Sir, you didn't --

A. It's a different -- you know, it's a different context. What the FTC is talking about here are ad communication studies where there's a test group and a control group.

What Dr. Reibstein did and what the OTX study did was to ask people what their motivations were. It's not a causal study. It's not an ad communication -- it's a different kind of study.

So what the FTC is talking about is one type of study; what Dr. Reibstein attempted to do is another type of study.

Q. Well, let me read it again to make sure we have your answer.

What the FTC says is: "To eliminate the effect of such external factors," that is, noise, et cetera, "the responses to the control or masking questions are subtracted from responses to the test questions," and that is something you did not do in this case; isn't that correct?

MR. OSTHEIMER: Objection. Asked and answered.

MR. FIELDS: I don't think I got an answer other than that the FTC is talking about something else. And my question was did you do this in this case, did you subtract, and I think the answer is no, but I haven't gotten that answer yet.

THE WITNESS: No, I didn't subtract --

JUDGE CHAPPELL: Hold on a second.

THE WITNESS: I'm sorry.

JUDGE CHAPPELL: Do you think you've answered the question he just asked?

THE WITNESS: Yes.

MR. FIELDS: Well, we disagree.

MR. OSTHEIMER: Your Honor, he answered that he did not do a study.

MR. FIELDS: That isn't the answer either. I've just asked him simply did he subtract or did he not.

JUDGE CHAPPELL: It requires a yes or no. To the extent it's already asked and answered, it's not

worth this much time. Overruled.

Answer the question.

THE WITNESS: No, I didn't do that in this case.
It wasn't necessary.

BY MR. FIELDS:

Q. Okay. Now, you also criticized Dr. Reibstein's study for not asking if some of the non-POM drinkers were drinkers of former -- were former POM drinkers who stopped. I think we already covered that, so I'm not going to ask you that again.

You criticized Dr. Reibstein's study in your report because you said most people took less than ten minutes to answer. Do you recall that?

A. Yeah. I think most people took about two minutes to answer.

Q. But actually saying "I like the taste" takes about two seconds; isn't that right?

MR. OSTHEIMER: Objection. I don't believe Dr. Mazis ever testified previously of how much time it took respondents to answer the survey.

MR. FIELDS: Well, if he is not -- I'll ask him.

BY MR. FIELDS:

Q. Do you criticize his survey because people took less than ten minutes to answer?

A. No.

Q. Okay. Good. Then we can pass on.

You said that some people might have given as a reason for buying "price" and thus left out some other reason; is that your testimony?

A. I'm sorry. I didn't quite get that.

Q. I understood you to say some people may have given as a -- you used it hypothetically -- people could give "I bought it for price" as a reason, and that was the reason for their purchase. You said that.

A. Yes. I said as a hypothetical, you know, that some people could have given that reason.

Q. But actually nobody in any of these surveys gave that, did they, that they just bought it for price and for no other reason?

A. Yeah. I could substitute another hypothetical, you know, people saying that I bought it because of the taste. A lot of people said that.

Q. But nobody would buy it for price if they didn't want it for some other reason; isn't that correct, sir?

A. I'm sure there would be other reasons other than price, of course.

Q. Okay. Good.

Now, you referred to the OTX survey, and you

told us about at least one of the flaws, the fact that it began by talking over and over again about antioxidants and thus focusing people on health and such and health issues; isn't that right?

A. Yeah. I said I think that's -- you know, that's a potential flaw. I don't think it's a huge flaw, but I think Dr. Reibstein was correct in pointing that out.

Q. Yeah.

That's what's called priming, isn't it?

A. Yes.

Q. And priming is mentioning a fact that sort of sets the person up to be influenced into giving a particular kind of question (sic). As in this case if you say antioxidants, antioxidants several times, they're focusing on health and health issues; correct?

A. It's possible. Yes.

Q. All right. Now, did the A&U survey fail to have a control, or was its control the responses of people who bought different drinks than POM?

A. In my view, it didn't have a control, just like Dr. Reibstein's study doesn't have a real control.

Q. Well, Dr. Reibstein did have -- did measure the people who drank POM against the people who didn't drink POM; isn't that correct?

A. He -- he attempted to do that, yes. I don't consider that an adequate control, but he attempted to do that.

Q. And he also measured the people who drank POM and had seen an ad against the people who had not seen an ad; isn't that correct?

A. He also conducted that analysis, yes.

Q. And again, you don't think that's an adequate control either.

A. No. Because these aren't causal studies. You know, causal studies are ones that have controls where you're trying to -- you manipulate an attribute. You manipulate the presence or absence of something, and you put somebody in an experimental situation.

Neither of these studies, the Reibstein study nor the OTX study -- and they're pretty similar in what they're trying to do -- neither of those are really -- have true controls because they're not what I call causal studies. There's no experimental manipulation.

Q. Well, the A&U did measure not only people who drank pomegranate juice, but they also measured -- pardon me -- drank POM but also people who drank other kinds of pomegranate juice and people who simply drank other antioxidant juices; isn't that correct?

A. Right. Yes, they did.

Q. Okay. And in fact, in looking at the chart that you presented to the court, in some of these instances the people who drank other antioxidant juices had a much, much higher percentage of people who thought it prevented prostate cancer -- or it didn't prevent, it said "helps with prostate cancer," whatever the words were; isn't that correct?

A. I have to go back and look at the data.

Q. Well, let's look at the data and then we'll -- we'll see.

I think it's page 12.

A. Right. I have it.

Q. You'll see that, for example, helps protect against prostate cancer, even more people who didn't buy POM but instead bought other antioxidant drinks thought that was something, that was one of the boxes they checked; isn't that right?

A. Well, it's 48 percent versus 47 for POM. I mean, it's not a statistically significant difference. I mean, those bars are all pretty similar. They're really -- basically I would say there's no difference across those three, those three bars.

Q. And doesn't the fact that all of these people in all of these various categories have the same kind of reaction as the POM drinkers have, doesn't that suggest

to you that maybe they're getting their information from someplace other than POM ads?

A. Well, that -- there's two parts to that. You know, certainly those numbers are very similar across those three types of products, POM product -- POM pomegranate juice, other pomegranate juice and other antioxidant juices. Those numbers are quite similar. And I'm sure other information out in the marketplace, on the Internet and other places certainly influenced all of those people, but it doesn't really say anything about what the influence of specific POM claims would be on consumers exposed to those claims.

Q. Well, there's nothing in this survey that says POM ads even caused the people who drink POM to have that viewpoint; isn't that correct, on these various health conditions?

A. No. I don't think -- I don't think this survey really is useful in that.

Q. So this survey doesn't tell us at all that POM ads were material to the purchase decision; right?

A. I agree.

Q. Okay. And if we were to follow what the court in Telebrands says, that is, that closed-end questions require the use of some type of control mechanism and to eliminate the effect of external factors the responses

to the control or masking questions are subtracted from the responses to the test questions, you'd have to subtract the, let's say, promotes heart disease 48 percent of people in the control group, meaning the non-pomegranate drinkers, from the 57 percent who thought it among pomegranate drinkers; isn't that right, if you followed what the Telebrands quote says?

A. No. That's not -- that -- that has no research validity. You could not do that.

Q. Well, you say you couldn't do it, but they tell you to subtract the control responses from the test responses in order to get the net amount that you can definitely attribute to the test response.

So if you followed that, you'd subtract 48 percent for non-pomegranate juice drinkers and 49 percent for pomegranate juice drinkers who didn't drink POM from the 57 percent, and you'd get something like 8 or 9 percent net effect on POM; isn't that right, if you followed what I quoted from the Telebrands opinion?

A. I think you're totally taking the Telebrands statement totally out of context. As I said before, with Telebrands -- in the Telebrands case, which is they're referring to the survey I did, which was that there were two groups. There was a test group and a

control group. And what they're talking about is subtracting the results of the test group -- of the control group from the test group. That's an experimental study. It's a causal study.

You can't apply that to this OTX study because it's not a causal study. You could subtract all kinds of numbers here, but it's not -- it's not methodologically sound to do that. It's totally inappropriate.

Q. Well, isn't the idea of subtracting that if the people who don't even drink POM and the people who drink another antioxidant juice come up with pretty much the same idea about health that you ought to really just look to see if there's any difference between their reactions and the POM reactions to see whether POM ads really have any impact on the purchase decision? Isn't that the theory?

A. No. I think it's total -- totally inappropriate analysis. I would never do that kind of analysis. It's a total misuse, a mischaracterization of the commission opinion in Telebrands.

Q. So "To eliminate the effect of such external factors, the responses to the control or masking questions are subtracted from the responses to the test questions" doesn't have anything to do with what I've

just said, huh? Is that your testimony?

A. It has nothing to do with this OTX study. It makes perfect sense in the study that I did in Telebrands, which had a test group and a control group, and it was an ad communication study. It makes perfect sense there. You're trying to extrapolate the results of an ad communication study that was done as an experiment and trying to extrapolate it to this study. It doesn't make any sense.

Q. So it doesn't --

A. Totally inappropriate.

Q. Wholly inappropriate and doesn't make sense where the Federal Trade Commission says closed-end questions require the use of some type of control mechanism. That makes no sense to you, huh?

A. In a causal study for ad communication. That's the context. You can't pull things out of context and just throw them around. That's just not appropriate.

Q. Well, there's nothing in that sentence that says in this kind of case or in a noncausal, to use your -- in a causal case; is that right?

A. I understand it doesn't say that specifically, but you have to really understand anything that's written in context.

Q. Uh-huh.

Now, I think you already agreed that there's a very substantial amount of advertising out there about health benefits of various drinks other than the POM ads; correct? We've had some before this court.

I think counsel --

MR. OSTHEIMER: Objection. Misstating prior testimony.

JUDGE CHAPPELL: I'm overruling that. This man is presented as an expert witness. I believe he can handle the question. Overruled.

BY MR. FIELDS:

Q. You know there's a great deal of advertising out there on the health benefits of various antioxidants?

A. I'm sure there is.

Q. Okay. Good.

Now, you notice that in this OTX survey, a very substantial number of people say that they think that POM and the other juices help protect against urinary tract infections.

Now, if the POM people never had an ad that talked about urinary tract infections, that could hardly be coming from a POM ad; isn't that correct?

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

Q. Yes.

One of the things that people in this OTX survey said was a reason to buy the various products is it helps protect against urinary tract infections, and if POM never advertised that, then neither of the three groups could have gotten that information from a POM ad; isn't that right?

A. I assume that that would be correct. Yes.

Q. Okay. And the same would be true about -- I mean, 49 percent said that POM and these other juices provide immunity from colds and flu.

Do you see that?

A. Yes.

Q. Well, if POM never advertised that they provided immunity from colds and flu, none of those three groups could have got that information from a POM ad; isn't that correct?

A. Yes.

Q. Doesn't that suggest to you that the information in all of these groups comes from sources other than POM advertising, such as news, word of mouth, many, many other ways?

A. As I said before, I'm sure that there's a lot of information in the environment that people would be exposed to and could influence them, but that doesn't indicate that POM advertising might not communicate

specific health benefits to consumers. It's a different issue.

Q. Yeah, I agree it's a different issue, but there's nothing in this survey that indicates it's POM, and I think you already told us that --

A. Yes, I agree.

Q. -- POM ads that cause any of this.

A. I agree.

Q. Okay. All right. In addition to the various numbers here, do you see the -- you referred to a 95 percent confidence level? That refers to a p-value of .05; isn't that correct?

A. Right.

Q. Right.

And I'm not beginning to suggest that something has to have a 95 percent confidence level, but these numbers in the OTX survey didn't even reach a 90 percent confidence level, did they?

If you look at almost every page, it tells you that the only time where there's a particular letter did it even reach 90 percent confidence.

Do you see that?

A. Yeah. I think what they're referring to is the differences across the different attributes. That's a different issue than the way I refer to --

Q. If you're looking, you'll see that where there's a particular letter, it reached 90 percent. If the letter is D, it's the POM group.

But in any event, most of the figures in this survey, according to the survey itself, did not reach a 90 percent confidence level. You can turn page after page --

A. It did not reach a 90 percent confidence level when you compare one -- one attribute versus another.

There's two ways to look at that when I refer to it, that if you looked at, say, the 57 percent that say "helps promote heart health" --

Q. Uh-huh.

A. -- now, there would be a confidence level around that number of about plus or minus 7 percent at the 95 percent confidence level, so 95 percent of the people would -- the true mean would be somewhere between, let's say, 50 and 64 percent, so -- I mean, that's one way to look at the confidence level. The way you're referring to it, which is what they do in this chart, is referring to it, referring between different bars on the chart.

Q. Well, you see that, for example, the 57 percent does not have a D over it. D refers to POM having a 90 percent, so it doesn't give a 90 percent. Almost

none of these -- and it's page after page -- reaches a 90 percent figure. You can go through the pages and check me on that. It could be as low as 50 percent as far as --

A. I'm trying to -- this is not something that I really studied before. I'm trying to understand what the differences are here, because if we take F here -- let's take F -- there's a 91 percent and an 88 percent. There's Fs over those. And then there's an F over the 57 percent, so I'm assuming that it's saying that the 57 percent is significantly different at the 90 percent level than the 88 or the 91. But there's no other Fs, so it seemed to me that the 57 percent would be significantly different than, say, 14 percent that promotes menopausal or postmenopausal health. It seems to me there should be an F there.

So I have to confess, I don't exactly understand what they're doing here, but I think there should be more -- there should be more Fs here. This doesn't make sense what they did here.

Q. Well, it says only where there is a letter is there -- and if the letter is D, it's for POM --

A. Yeah.

Q. -- doesn't reach a 90 percent level of confidence. That's on every page.

A. Yeah, I understand what it says, but I don't -- I don't really have a full understanding of what they did here, and I don't think they did this properly.

Q. Okay. Well, I agree they didn't do it properly.

Isn't it correct, sir, that a couple of exposures to an ad are probably not going to affect people's belief about a product?

A. I would say in general that's true but not -- I don't think it's a hundred percent. I mean, sometimes one exposure can influence people, influence people's beliefs, but I would say as a general rule the -- if you have repetition, that tends to influence people a lot more.

Q. So a couple of exposures to an ad are probably -- I have the word "probably" in there -- not going to affect people's belief about a product; isn't that true?

A. I agree, probably.

Q. Now, you have no idea how many times any POM or POMx ad was run; isn't that correct?

A. Correct.

Q. No survey shows that that you've seen.

A. None of the surveys that have been introduced show that.

Q. So you really can't say that it's probable that any POM or POMx ad was likely to affect anyone's belief about POM; isn't that correct?

A. I don't think there's any evidence in the record on that.

Q. Okay.

A. That I know of.

Q. All right. Now, you were -- I'm almost done, Your Honor.

You were informed by complaint counsel that the FTC was only challenging advertising that ran at least 22 months prior to the conduct of the Reibstein survey; isn't that correct?

A. Yes. That's in my report, in my expert report.

Q. So that's about three years ago.

A. Right.

Q. So according to what counsel told you, which they haven't told us, they're not challenging any ad that ran in the last three years; correct?

A. I would think that's correct.

Q. Okay. And they said -- told you they were not challenging any Web site entry in the 14 months prior to your deposition; isn't that right?

A. I think it was -- was that 14 months prior to the Reibstein study I think it was?

Q. Well, that could be.

In any event, if so, by this time it's a couple of years that they're not challenging any Web site.

A. Right.

Q. Okay. And that's what counsel told you.

A. Correct.

Q. Okay. Now, give me one moment, and we will be done.

Is it correct you wrote an article called the Use of Consumer Surveys in FTC Advertising Cases?

A. Yes.

Q. All right. And in that article is it correct you made suggestions as to the types of survey that could prove that a claim was not material?

A. You know, I don't remember.

Could I see that article?

Q. Could we -- may we approach again, Your Honor?

JUDGE CHAPPELL: Go ahead.

BY MR. FIELDS:

Q. You have it in front of you?

A. Yes, I do.

Q. All right. I'm going to ask you some questions about it very briefly.

Didn't you suggest that one way of proving that a claim wasn't material would be by a survey asking why

consumers bought the product?

A. Could you direct me to the page.

Q. Yes. Page 22.

A. 22?

Q. Yes.

A. Okay.

Q. Do you see where it says, "There are three approaches to presenting evidence that the disputed claim is immaterial to consumers"? Immaterial.

A. Right.

Q. And then you say as one of the ways to present this that you suggest is the respondent might conduct a survey to determine the relative importance to consumers of the advertised attribute or characteristic.

A. Right.

Q. "For example" -- and then you give an example in which somebody did exactly what Dr. Reibstein did in this case.

"For example, in Kraft, respondent's survey asked three open-ended questions. First, consumers were asked '...what are the reasons you buy cheese?'" And they give the percentage response. "Second, consumers were queried 'What are the reasons for your buying individually wrapped cheese food slices?'" And then the

third question, "Third, in response to a question that asked for 'all the reasons you can think of as to why you buy Kraft Singles,' only 1.7 percent..."

So those are three questions why did you buy the product, and you suggest that, those three open-ended questions, as a way of -- and I quote -- "presenting evidence that the disputed claim is immaterial to consumers"; isn't that right, sir?

A. Right. But I -- you know, I -- also you should refer to the rest of it that says, "Although such open-ended questions might understate the importance of calcium in selecting a cheese product, these results have some probative value."

Q. Yes, these results have probative value, and they are exactly the approach taken by Professor Reibstein, and it's one of the ways you suggest to go about having this kind of survey; isn't that right?

A. Well, that's fine, but Dr. Reibstein didn't --

MR. FIELDS: That's all I have, Your Honor.

THE WITNESS: -- he didn't ask the appropriate follow-up question of -- for people to explain why they said "health" or "healthy."

BY MR. FIELDS:

Q. Sir, he did exactly what you're suggesting in

this article. He asked the same three questions you've suggested, only slightly different language; isn't that right?

A. They were similar questions but a different circumstance. Dr. Reibstein -- when people got -- responded with "healthy," Dr. Reibstein needed to follow that up to get the reasons that underlie, would under underlie why people said "healthy," a different situation.

Q. The questions you give are the very questions, without follow-up -- you don't list follow-up questions, and you say here's what you ought to do to show that something is not material, ask them why they bought it, ask them if they'd buy it again, and where a low percentage like something like 4 percent here answers, you said that's the way to show nonmateriality. Isn't that what you did?

A. No. I just said it's one approach.

Q. Yes. It is one approach which you recommended.

A. If it's done properly.

MR. FIELDS: Yeah.

That's all I have.

JUDGE CHAPPELL: Do you have any redirect?

MR. OSTHEIMER: Just four or five questions,

Your Honor.

JUDGE CHAPPELL: We're going to take a short break before that.

We'll reconvene at 3:15.

(Recess)

JUDGE CHAPPELL: Back on the record.

Redirect?

- - - - -

REDIRECT EXAMINATION

BY MR. OSTHEIMER:

Q. Dr. Mazis, do you still have your article, Use of Consumer Surveys in FTC Advertising Cases, before you?

A. Yes.

Q. And I believe that respondents' counsel read to you a quote from page 22 and you continued reading that sentence on page 23.

Could you read the last sentence of the first paragraph on page 23.

A. Is that the sentence that begins with "Of course"?

Q. Yes.

A. "Of course, consumers might rely on an ad making a calcium claim, but they might not volunteer 'calcium' in response to these open-ended questions."

Q. Thank you.

I'd like to -- respondents' counsel asked you about when the ads ran and what you said in your report, and I'd like to direct you to page 10 of your report, paragraph 25.

A. Okay.

Q. And the first sentence says, "I am informed that the last challenged POM juice print advertisement in this case was disseminated approximately 22 months ago..."

Were you talking about 22 months before you wrote your report in March 2011?

A. I believe I was referring to the Reibstein survey.

Q. I believe you testified earlier that the challenged ads ran between 2003 and 2009.

A. Correct.

Q. And is it your understanding that Dr. Reibstein's survey was conducted in October 2010?

A. That sounds -- I could look that up, but that sounds about right.

Q. So doesn't it make more sense that you were talking about 22 months from when you wrote -- when you wrote your report six months ago rather than the 22 months prior to Dr. Reibstein's survey in October 2010?

A. That makes sense. I can't remember when I -- when I wrote it what I had in mind, but that makes sense.

Q. And your statement here in paragraph 25 is talking about POM juice print advertisements; correct, not POMx ads?

A. Yes.

Q. I believe you testified on cross-examination that the A&U survey doesn't tell us POM ads were material to consumers' purchase decisions.

What I'd like to ask you, though, is: Does the A&U study show us that the challenged claims about heart disease and prostate cancer would likely be material to consumers' purchase decisions?

A. Yes. As I testified on direct testimony, that would be true.

Q. I believe that counsel asked you numerous questions about comparing POM juice -- the responses for various attributes for POM juice drinkers to drinkers of other pomegranate juices.

Hypothetically, if 100 percent of POM juice drinkers said that they cared about heart disease and also a hundred percent of drinkers of other pomegranate juice drinkers -- juices said they cared about heart disease, would that affect your conclusion that heart

disease is material to POM drinkers?

A. No. Not at all.

MR. OSTHEIMER: No further questions,

Your Honor.

MR. FIELDS: I have no questions.

JUDGE CHAPPELL: No recross?

Thank you, sir. You're excused.

THE WITNESS: Thank you.

JUDGE CHAPPELL: Anything further before we reconvene?

MR. GRAUBERT: No, sir.

JUDGE CHAPPELL: All right. Until October 11 at 9:30 a.m. -- correct?

MR. GRAUBERT: Correct.

MS. HIPPSLEY: Correct.

JUDGE CHAPPELL: -- we're in recess.

(Whereupon, the foregoing hearing was adjourned at 3:22 p.m.)

C E R T I F I C A T I O N O F R E P O R T E R

DOCKET/FILE NUMBER: 9344

CASE TITLE: In Re POM Wonderful LLC, et al.

HEARING DATE: September 14, 2011

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: SEPTEMBER 16, 2011

JOSETT F. WHALEN, RMR

C E R T I F I C A T I O N O F P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

ELIZABETH M. FARRELL