

FEDERAL TRADE COMMISSION

I N D E X

IN RE POM WONDERFUL LLC, ET AL.

TRIAL VOLUME 18

PUBLIC RECORD

OCTOBER 14, 2011

WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS	VOIR
STEWART	3158	3223	3240		

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

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
)
POM WONDERFUL LLC and)
ROLL GLOBAL LLC,)
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.)
)
-----)

Friday, October 14, 2011

11:02 a.m.

TRIAL VOLUME 18

PUBLIC RECORD

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

Reported by: 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.
Before I hear argument on the pending motion, am
I correct that respondents rest?

MR. FIELDS: That's correct, Your Honor. We
should have said so and we forgot that line.

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

MS. DAVIS: Yes.

JUDGE CHAPPELL: Go ahead.

MS. DAVIS: Good morning, Your Honor.

JUDGE CHAPPELL: Good morning.

MS. DAVIS: I want to first address
respondents' brief about what constitutes proper
rebuttal evidence.

Now, in their brief they state that the proper
function of rebuttal evidence is to contradict, impeach
or defuse the impact --

(Admonition from the court reporter.)

(Discussion off the record.)

MS. DAVIS: -- the proper function of rebuttal
evidence is to contradict, impeach or defuse the impact
of the evidence offered by an adverse party. And we
don't disagree with that definition.

Dr. Kantoff's testimony would be proper rebuttal testimony. We want to call him to contradict, impeach or defuse the impact of Dr. Heber's factual testimony at the hearing about whether there was a consensus among the scientists who attended respondents' scientific advisory meetings on what conclusions could be drawn from respondents' prostate cancer research.

Now, just to back up a little bit, in 2010, respondents held two scientific advisory board meetings on prostate cancer -- on their prostate cancer research. These meetings were attended by a limited group of people, including the respondents, Mr. Resnick, Mr. Tupper, Mr. Gillespie, the scientific director, Dr. Liker, the outside medical consultant, some of the researchers who conducted studies on POM products, and outside experts who were invited to provide feedback about POM's prostate cancer research.

Now, Dr. Kantoff was one of those experts that was invited to attend these meetings.

These meetings were held in January 2010 and November 2010.

At Dr. Heber's deposition, which was in January of this year, would have been January 2011, Dr. Heber's testimony -- deposition testimony suggested that there

was no scientific agreement among the experts that attended these scientific advisory board meetings on prostate cancer. However, when he testified at the hearing on August 31, he recanted that testimony and affirmatively testified that there was consensus at the meeting.

Dr. Kantoff is being presented to -- is being called or offered to present factual testimony as to whether or not there was a consensus. He's not being offered to present expert testimony. He's not being offered to rebut Dr. Heber's expert testimony.

Yes, he's an expert, but any person in the room could testify as to whether -- as to the fact of whether there was a consensus or an agreement among the experts in that room.

JUDGE CHAPPELL: So we're clear, you're requesting this witness for facts only, not opinions.

MS. DAVIS: Exactly, for facts only, not opinion.

And the reason we believe that this issue is -- his testimony is like extremely important is because it goes to the heart of our case. It goes to the issue of respondents' knowledge.

If there was a consensus at those scientific advisory board meetings that POM's prostate cancer

research proved that it prevented or treated prostate cancer, the respondents would have a reasonable basis for making the claims we are challenging.

At the moment, we only have Dr. Heber's contradictory testimony on the record. And we only have his characterization of what occurred at those particular meetings.

We want to bring Dr. Kantoff to rebut that testimony. And as long as Dr. Heber's hearing testimony is in the record, we are vulnerable to the court giving his testimony weight and possibly making a finding against us. And before that happens, we'd like to have an opportunity to bring Dr. Kantoff to testify.

Now, the second argument respondents seem to be arguing is that Dr. Heber's testimony is not being offered by them because the testimony at issue was elicited in cross. And quite frankly, we don't understand that argument.

On page 3 the opposition respondents state, "Because the testimony provided by Dr. Heber was not offered by respondents, it is not within the proper scope of rebuttal evidence."

So are respondents representing that they are not going to use Dr. Heber's statement during cross to ask you to make a finding against us?

Dr. Heber's statements are on the record as trial testimony. Dr. Heber is their witness. Respondents let Dr. Heber contradict himself on the stand. They made no attempt to correct his statements on redirect.

So we have to assume respondents intend to offer Dr. Heber's testimony for the truth of the matter asserted. And if that's the case, then we believe we should be allowed to call Dr. Kantoff to rebut that testimony.

And quite frankly, Your Honor, it's not an all-or-nothing situation. You could permit him to come. You could limit his testimony. Even in the order, if you granted our motion, you could set forth instructions about what his testimony would be limited to.

In terms of legal support, actually some of the cases we don't actually disagree with the --

JUDGE CHAPPELL: Well, you're talking about limiting testimony. If you've seen anything I've done in the past, any time a rebuttal witness is allowed to testify, they're only allowed to swim in a roped-off sea.

MS. DAVIS: Okay.

And in terms of what you need to look at in

making a decision on whether or not to grant our motion, it's -- we believe it's in the court's discretion that there are factors that you would just have to weigh.

Our case cites to Meyers and Quinn and even respondents' case cites to United Linen Wholesale versus Northwest Company, and those cases set forth the factors that district courts should weigh in making a determination about whether to allow the rebuttal witness that we're asking for.

And we believe when you weigh all those factors that the balance tips in our favor because Dr. Heber's testimony, again, goes to the respondents' knowledge. And as long as his testimony remains in the record, respondents can use that testimony to ask you to make a finding against us.

And right now we only have Dr. Heber's characterization of what happened in that meeting on the record, and so we are asking, respectfully, that we be allowed to call Dr. Kantoff to give his version of what occurred.

JUDGE CHAPPELL: Tell me again why you did not anticipate Dr. Heber to say what he did about that meeting or those meetings.

MS. DAVIS: Right. Well, in his deposition

testimony, his deposition testimony suggested that there was no consensus, so based on that, we didn't think that there was a need to call Dr. Kantoff. We -- you know, obviously, you know, there's -- it was a big case. There were a lot of witnesses who could be called or named. Really, we just had no reason to assume that we would need to bring Dr. Kantoff at this late date to rebut Dr. Heber's testimony.

Do you have other questions for me or --

JUDGE CHAPPELL: No.

MS. DAVIS: No? Okay.

JUDGE CHAPPELL: Mr. Fields?

MR. FIELDS: Thank you.

JUDGE CHAPPELL: Are you rising to argue for respondents?

MR. FIELDS: I'm rising.

Okay. Firstly, there's no way in the real world that we can separate Dr. Kantoff's statement that -- if he would say that -- we don't even think he'll say that, but if he were to say, I don't think there was a consensus at this meeting, he would have to be saying because I didn't agree substantively with Dr. Heber or somebody didn't agree substantively. There's no way to separate that from giving an opinion on the merits of these studies.

JUDGE CHAPPELL: Actually there is a way.

MR. FIELDS: How is that, Your Honor?

JUDGE CHAPPELL: If an opinion is uttered by someone who's offered only for facts, that opinion will not be used, will not be considered an opinion in evidence.

MR. FIELDS: Well, the very fact that he says that -- you can't separate it in this sense, Your Honor. What Dr. Heber said was there -- well, let me back up a little bit.

Dr. Heber in his trial testimony said -- and I'm going to get to the fact that there's no inconsistency and no surprise --

JUDGE CHAPPELL: But let me ask you this. What if we're talking about determining a fact of whether or not there was a consensus?

Now, I understand what you're saying. If someone says, Well, I'm a big-shot doctor, and there was no consensus and here's why, then you're going down the wrong trail --

MR. FIELDS: Right.

JUDGE CHAPPELL: -- if you're a fact witness.

But someone can say, I was serving muffins and coffee, and I heard everyone in the room say yes, we all agree. That's not an opinion.

MR. FIELDS: But yes to what, Your Honor? When he says -- he's -- necessarily when he says, I didn't agree with Dr. Heber, he's necessarily expressing his own opinion because what Dr. Heber said was that these studies show a good result -- I'm paraphrasing --

JUDGE CHAPPELL: Well, if we were fencing, I would say "touché." But it will depend on what was heard and what was said. It may be as simple as someone bringing in muffins, or it may be, like you say, much more complicated.

MR. FIELDS: Well, I think we can assume it's not about bringing in muffins. I think it's got to be -- otherwise, it's irrelevant. If they disagreed about anything other than the substance of Dr. Heber's opinion, it would be irrelevant.

The only thing that could be relevant is if Dr. Kantoff comes in here and was to say, I disagreed with him on the merits of what he said, not I disagreed about some irrelevant thing. And if he disagreed on the merits, he is necessarily, necessarily giving an opinion. He has to be. There's no way to slice it any other way.

Wright and Miller talk about this, and they give the example of a man who testifies, a plaintiff who testifies that he's crippled, and the defendant then

puts on evidence of a -- that somebody saw him climbing a ladder to paint his house. And Wright and Miller say, well, yes, you could offer impeachment to say you're contradicting his testimony that's just a fact, but you're contradicting what he said on the witness stand, but at the same time you're necessarily giving substantive evidence, and so it had to be disclosed and it wasn't.

You're talking here not -- this is much worse than the ordinary situation because you're talking about an expert. He's not designated. There's no report. There's no opportunity to depose him, which would normally be the case. He's not even on the witness list.

Now, they knew rebuttal experts were to be designated because they designated Professor Stewart as an rebuttal expert.

JUDGE CHAPPELL: But they're not -- according to their motion, they're not offering this person for an expert; therefore, they would not have listed this person as an expert and followed all the disclosure rules required for an expert.

MR. FIELDS: Even if he were not an expert, he should have been listed, and here's why. Let me go to the next point.

Their entire motion is based on the premise that Dr. Heber's testimony at his deposition is inconsistent with what he said at the trial, that he recanted. That's the word they said. It's in their brief.

Well, let's look at what he said because the very premise of their motion, why they didn't list him as a witness, is right there in his deposition.

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

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

MR. FIELDS: Okay.

Oh, there it is.

Okay. Now, here's what he said in his deposition.

He said, "No one told Mr. Resnick that there was a body of scientific agreement that POM actually prevented prostate cancer."

That's his deposition. You'll see it down there at the bottom.

The question was: Have you heard anybody tell Stewart Resnick that there was a substantial body of scientific agreement that pomegranate juice could actually -- there's no "actually" -- could prevent

prostate cancer?

And he says, way down at the bottom, "No one made any comment to Mr. Resnick of the type you've indicated."

Now, firstly, that's talking about what was said to Mr. Resnick.

Secondly, it's talking about a substantial body of scientific agreement. It's not talking about what the people in that room decided or what their opinions were. It's talking about a totally different thing, did anybody tell Mr. Resnick there was a substantial body of agreement out there, that is, of the whole scientific community, not just the guys in that room.

And it's talking about an agreement, not just a consensus, which is an ambiguous term that can mean everybody or mostly everybody.

And it's talking about actually preventing prostate cancer, did any -- is there a body of scientific knowledge -- scientific agreement -- pardon me -- that pomegranate juice can prevent prostate cancer, and nobody told that to Mr. Resnick.

Okay. Now, what did he say at trial, this supposed recantation? This is the whole foundation for their taking a three-week delay in this matter to bring in somebody to contradict because of this supposed

surprise. And here's what he said at trial.

He thinks -- he thinks, not even he knows -- he thinks there was a consensus among the men in the meeting, not about body of scientific agreement.

JUDGE CHAPPELL: But if he's your expert, you want me to follow what he thinks, don't you? He's your expert.

MR. FIELDS: Do I want you to follow what he thinks? Of course I do. But that doesn't mean that without listing a witness they have an excuse because of surprise.

JUDGE CHAPPELL: But it's your position that asking whether someone told Mr. Resnick is the same thing as asking whether there was a consensus.

MR. FIELDS: No. I think you're talking about two different things. It is not the same things.

On the one hand, you're talking about did somebody tell Mr. Resnick about what the scientific community as a whole thinks. It says basic -- "substantial body of scientific agreement."

JUDGE CHAPPELL: I misspoke. Your position is it is not the same thing.

MR. FIELDS: It is not the same thing. They're talking about two different subject matters.

JUDGE CHAPPELL: But it's your position that

they're not even related.

MR. FIELDS: They're not even related. There certainly is no inconsistency between saying, I didn't tell Mr. Resnick that the scientific community believed that pomegranate juice actually prevents cancer.

JUDGE CHAPPELL: Now, actually the question says "tell Mr. Resnick or the folks at" -- I guess the meetings -- so it goes beyond Mr. Resnick.

MR. FIELDS: Okay. I didn't tell Mr. Resnick or the folks at -- but if you see his answer, Your Honor, it says, "No one made any comment to Mr. Resnick of the type you've indicated," so he didn't talk about the other folks, but it wouldn't change anything.

He's talking about a totally different thing. He's not talking about was there a consensus in the room on these studies. He's saying is there scientific agreement in the scientific community, not the same thing, no recantation, no basis whatever for not listing this witness.

Now, let's talk about the -- I mean, I think that this must be excluded under the federal rule, but I'm not even going to argue that. Let's assume it's a totally discretionary matter and Your Honor has discretion to decide what are the factors you look to.

Well, let's firstly talk about the importance

of the testimony. The two cases they cite, in one, the court says this is essential testimony to the case, in the other, this goes to the very heart of the case.

Well, here you've got -- let's even assume they were right and it was the same subject matter and he's not talking about body of scientific agreement, he's talking about what happened in this room. And let's assume one guy says, Well, I think there was a consensus, which is what Heber says, and the other fellow comes in and he says, I don't think there was any consensus in that room. Is that really important? Can anybody say that goes to the heart of the case?

First of all, "consensus" is a hopelessly ambiguous term. Sometimes it means everybody agreed. Sometimes it means most of the people did. There was kind of a consensus. I think there was a consensus. That contradiction, which is what they say they want to establish because -- rather than seeking it as expert opinion, that contradiction cannot be important to this case.

Secondly, let's talk about prejudice. They're going to bring in this fellow. We have no opportunity to depose him. We have no report. We -- and Your Honor certainly realizes the difference between trying to cross-examine a witness from your seat of your

pants as opposed to when you have a deposition that pins him down. Well, we don't have that.

Is there delay involved? You bet. We're talking about three weeks before we can testify -- before he can testify, even if we do it by deposition in Boston, where he is, and that is a very substantial professional and personal burden on the people on our side. I can't speak for the court, but it sure is inconvenient for us.

But that isn't the only thing. I mean, another thing to consider is the behavior of the parties.

Think about this, Your Honor. They heard this supposed surprise from Dr. Heber, his recantation, they heard it six weeks ago, six weeks ago when he testified. Did they --

JUDGE CHAPPELL: I was looking at that timeline. Timelines matter to me.

I think the critical issue, though, is what's the triggering act here, and is that when he said what he did or is that when the government realized they had no agreement to call this rebuttal witness, that there would be no agreement.

MR. FIELDS: Well, it couldn't be later than six weeks ago, Your Honor. That's when the surprise happened. That's when Dr. Heber, they claim, recanted

and said, Wow, there was consensus. Then they heard it. Then they knew in his deposition, they say, he had done -- had said something inconsistent, which isn't true.

And they knew no later than six weeks ago. Did they six weeks ago say, Gosh, guys, your witness just recanted, and we have to call Kantoff now to rebut what he said? No. Did they say, You know, you fellows, we'll stipulate you can go up there and take Kantoff's deposition because we're going to call him to rebut this recantation that we just heard about? No. Did they even give us notice of any kind? No.

They didn't do anything. They waited six weeks and then decided to sandbag us by coming in in the last couple days of trial and say, Oh, we want to call a new witness in rebuttal, because of a supposed inconsistency that just is not there.

So if you look at the behavior of the parties, not only that, think about their position, Your Honor. They had an opportunity at the -- first at the deposition to ask him what he meant when he said, We didn't tell Mr. Resnick that there was no body -- that there was a body of scientific agreement. They had an opportunity to say, Well, okay, you didn't tell Resnick, but was there an agreement? No, never asked that

question. What do you mean, you didn't tell Mr. Resnick? Or they could have said, We asked if you told other folks, but you didn't answer that question.

JUDGE CHAPPELL: You strike me as a fellow that's cross-examined a lot of witnesses in your day.

MR. FIELDS: I have.

JUDGE CHAPPELL: If you heard an answer -- assume with me you heard an answer you didn't expect. Are you going to keep driving off that cliff or are you going to move on?

MR. FIELDS: I'll tell you one thing I would do, Your Honor. I would certainly pin him down. When I got an answer like nobody told this to Mr. Resnick, I would say, Well, are you saying there was no agreement, or are you just saying nobody told Mr. Resnick about an agreement?

And let me make another point, Your Honor.

Six weeks ago when Mr. Heber -- when Dr. Heber testified, six weeks ago, they had the opportunity when he supposedly recanted, they had his deposition right there in front of them, if they really thought there was this recantation, inconsistency, they tried in other instances to impeach him from his deposition, they would have immediately pulled out his deposition and said, Didn't you say that there was no agreement? And he

would have said, maybe, All I said was nobody told Mr. Resnick there was a substantial body of agreement, I didn't talk about this.

But they didn't push. They didn't attempt to impeach him. Your Honor, if they really thought that there was an inconsistency or, as counsel puts it, that he had recanted his prior testimony, you can be sure they would have hit him with that deposition in two minutes -- one minute -- thirty seconds. They didn't. They had every opportunity.

We, on the other hand, have no opportunity to depose this guy because this is brought up after the fact. That's why we have the designation of rebuttal experts, that's why we have reports from the rebuttal experts, so we're not put in that position.

So considering every factor, even if one assumes that this is discretionary and not foreclosed by their failure to list this fellow, the motion should be denied.

Thank you.

JUDGE CHAPPELL: Thank you.

MS. DAVIS: Your Honor, can I respond or --

JUDGE CHAPPELL: Briefly.

MS. DAVIS: Okay.

First of all, if you look at the trial

transcript --

JUDGE CHAPPELL: Did you cross-examine
Dr. Heber?

MS. DAVIS: Actually, I did not. My co-counsel
did.

But if you look at the trial record --

JUDGE CHAPPELL: Is the person who did in the
room?

MS. DAVIS: No.

JUDGE CHAPPELL: All right.

MS. DAVIS: When you look at the trial
transcript, we did use his deposition to impeach -- in
an effort to impeach Dr. Heber during the
cross-examination.

JUDGE CHAPPELL: Or attempted to.

MS. DAVIS: Or attempted to, right.

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

(Pause in the proceedings.)

JUDGE CHAPPELL: What about the delay
respondents are talking about? What about the fact
you've had six weeks?

MS. DAVIS: Okay.

August 31 was the date of Dr. Heber's testimony.

The case adjourned on the 2nd.

When we received the final transcript, we reviewed it, and we immediately went and contacted Dr. Kantoff, because we had to speak to him to see what he would say.

Dr. Kantoff is extremely busy. It took us another almost two weeks, two and a half weeks to get a date that we could sit down and actually talk with him about what occurred at the meeting, so we didn't actually interview Dr. Kantoff until September 26.

Between then and when we filed the motion, we had a meet-and-confer, but we were also trying to work out a date for when Dr. Kantoff could come that would not further delay the proceeding. Unfortunately, that has just not worked out. Dr. Kantoff is on travel today through all of next week. And because of his travel the early part of the month, he has all his patients, and so forth, the next -- the week of the 26th and the week of the 31st, but he is available on November 4.

JUDGE CHAPPELL: All right. You're talking about a meet-and-confer recently?

MS. DAVIS: This would have been September -- I

guess October 1, when we first talked to -- we called Mr. Graubert about our desire to bring in Dr. Kantoff.

JUDGE CHAPPELL: All right. I'm going to ask a question. I want you to listen closely before you answer.

Were you genuinely surprised that respondent would not agree to allow you to call this rebuttal witness?

MS. DAVIS: No. Not based on our past history of dealing with each other throughout the course of this litigation, no, I wasn't surprised.

JUDGE CHAPPELL: Then if you didn't expect respondents to agree, why did you not broach the subject sooner?

MS. DAVIS: Well, we didn't interview Dr. Kantoff until September 26, so at that time we were trying to work out a date that would hopefully be -- would not interfere with the court's schedule, so we were trying to get Dr. Kantoff to -- or find a date that would work -- that he could come and present live testimony without delaying the proceeding even further.

I do want to make one point about the importance of the testimony. If respondent is correct and Dr. Heber's testimony is not important, does not go to an important issue in this case, then why don't we --

why don't we agree to strike his testimony, and then that would totally eliminate the need to call a rebuttal witness, if it's really not that important.

But I have not heard them say that they don't plan to use that testimony to ask you to enter a finding against us.

JUDGE CHAPPELL: All right. You're repeating yourself now. Do you have anything else?

MS. DAVIS: Nope. That's it.

JUDGE CHAPPELL: Thank you.

Call your next witness.

MR. OSTHEIMER: Complaint counsel calls David Stewart.

JUDGE CHAPPELL: Is this a rebuttal witness called by agreement?

MR. OSTHEIMER: Yes. Thank you, Your Honor.

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Whereupon --

DAVID WAYNE STEWART, Ph.D.

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

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DIRECT EXAMINATION

BY MR. OSTHEIMER:

Q. Good morning, Dr. Stewart.

Please state your name for the record.

A. My name is David Wayne Stewart.

Q. If you would to begin, please look at tab B of your binder, which has been marked as PX 295a01, and tell me if that's a copy of your curriculum vitae.

A. Yes, it is a copy.

Q. If you would, please give us a background of your educational and professional life.

A. Certainly.

I have an undergraduate degree in psychology from what was at the time Northeastern Louisiana University. It's now the University of Louisiana at Monroe.

I have a master's degree in psychology and a Ph.D. in personality psychology from Baylor University.

Upon completing my Ph.D., I spent some time working with the State of Louisiana doing program evaluation research.

Following that, I then took a position with a major advertising agency in Chicago, what was then Needham, Harper & Steers, is now DDB. There I was also doing program evaluation research, but it was in the context of marketing and advertising programs. Our clients at Needham at the time were McDonald's hamburgers, Anheuser-Busch, General Mills,

American Honda, among others.

From there, I moved into academics, where I've been since. I first moved to a small public university in Alabama, Jacksonville State University, where I held appointments in business and psychology.

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

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

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

While there, I also taught a wide array of courses, advertising, consumer behavior, marketing research, and I did that at the undergraduate and

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

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

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

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

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

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

A. I am.

Q. Could you describe some of those.

A. Certainly.

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

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

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

I'm a member of the Association for Consumer Research.

I'm a member of the American Academy of Advertising.

I'm a member of the Product Development Management Association.

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

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

A. I have, yes.

Q. And it appears that -- you mentioned writing books. I believe from your CV that you've written eight books. Is that correct?

A. That's correct.

Q. Can you give us a few examples?

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

investigated the elements of advertising that influence its effectiveness. The title of the book was Effective Television Advertising: A Study of 1000 Commercials.

Another book that I've written is a textbook in consumer behavior.

I've done a -- an edited book that focuses on nonverbal communication in advertising, that is, things that are not explicitly words, things like gestures, pictures, the way words are used, intonation, and so forth.

I've written a book on the use of secondary sources as aids in research.

I've written a book on focus groups, how they're done, what their place is in scientific methodology.

Again, among others.

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

A. I have.

Q. Approximately how many?

A. In peer-reviewed journals perhaps 125 to 150.

Q. What journals, if you could give us a few examples?

A. A wide range. Journal of Marketing, Journal of Marketing Research, Journal of Consumer Research,

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

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

A. That's correct.

Q. Can you give us a few examples?

A. I've received several awards for best papers that have been published in journals.

I've received an award from the academy -- American Academy of Advertising for a paper that was published in the Journal of Advertising.

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

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

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

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

Q. You've also consulted for numerous companies,

have you not?

A. I have.

Q. Can you give us a sampling of those?

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

Q. On what kinds of issues have you consulted?

A. Well, in addition to an issue that might relate to litigation or expert work, I've done a good deal of work in terms of executive education inside the firms. I've consulted on the design of marketing research and interpretation of that research. I've been involved in facilitating strategic planning exercises. And I've also been called on to address a wide range of rather specific marketing questions.

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

A. I lost count, but it's well into the hundreds, if not more.

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

A. That's correct.

Q. Approximately how many?

A. I've probably designed a couple of dozen for use in legal proceedings.

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

A. I have.

Q. In what topics have you been qualified as an expert witness?

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

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

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

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

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

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

A. Yes, I have.

Q. And in marketing research?

A. Yes.

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

A. Probably a couple of dozen in which I have

actually testified at trial.

Q. And in FTC matters both administrative and federal courts, you have appeared in various capacities; correct?

A. I have.

Q. Sometimes for the FTC and sometimes for a respondent or defendant?

A. That's correct.

Q. How many times have you actually testified in court for and against the FTC prior to this case today?

A. I believe in court it's -- prior to this case, I believe it's four times, twice I believe for the FTC and twice for the respondent.

Q. Would you please describe those where you've appeared on the other side of the FTC.

A. One involved a product or a company called Pantron. Pantron marketed a hair restorative product by infomercials. In that particular case, I was asked by the respondents to conduct a survey of consumer satisfaction, and my testimony revolved around describing that particular survey.

Q. And the other matter?

A. In the other matter -- you'll have to give me a moment. I'll recall.

Oh, and the other matter involved the company

Schering.

Schering had a product on the market called Fibre Trim. Fibre Trim was sold as a diet aid, an aid for losing weight. My role in the matter was really to look at a lot of research that had been done as a part of business by Schering, information related to marketing research, copy testing, information about markets, and so forth, and base my testimony on what consumers would infer from the term "Fibre Trim" based on that, that research.

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 consumer behavior, marketing, survey methodology and advertising?

A. I do.

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

MR. FIELDS: Your Honor, may we know the particulars of what he's going to testify about, what is his opinion about.

MR. OSTHEIMER: Dr. Stewart will be rebutting the testimony of Dr. Butters.

MR. FIELDS: As long as it's restricted, as his

report is, to rebutting Dr. Butters' testimony and he doesn't purport, as he said he wouldn't do at his deposition, to give an opinion on what these ads mean, we have no objection.

MR. OSTHEIMER: His testimony will be rebutting Dr. Butters. He will not be doing his own facial analysis to reach conclusions for our affirmative case on what the ads mean.

MR. FIELDS: No objection.

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

BY MR. OSTHEIMER:

Q. Dr. Stewart, what were you asked to do in this matter?

A. I was asked to read Dr. Butters' report and comment on that report, critique it, and reach a conclusion as to whether I agreed with his conclusions or not and, in any case, why.

Q. Have you read Dr. Butters' deposition testimony?

A. I have.

Q. And his trial testimony?

A. I have.

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

Is this a copy of your expert report?

A. Yes, it is.

Q. Okay. Could you summarize what you take to be Dr. Butters' overall conclusions in his expert report.

A. What I took from his report was that he concluded that there was no likelihood that any reasonable consumer could take away from the POM Wonderful advertising or the POMx advertising the claims that are at issue in this matter.

Q. You state in your expert report that in offering his opinions, Dr. Butters ignores an enormous body of theory and empirical research related to how consumers use information, process advertising messages and make a decision in the marketplace; is that correct?

A. That's correct.

Q. What does the academic literature tell us about how consumers process advertising?

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

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

things that they already know, beliefs that they may have, feelings they may have, prior experiences, the context in which the particular message may appear, and all comes together to create a net impression of what a particular message may be.

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

A. That's correct.

Q. What does this body of theoretical and empirical research say that is relevant to Dr. Butters' opinions?

A. Well, it says that in determining what a consumer would take away from the POM advertising, one should consider the characteristics of the audience, one should consider the characteristics of the viewer of the ads, their prior beliefs, what they regard as relevant, how they will process the information, generally what they will bring to the viewing situation.

Q. Can one determine all of the claims communicated by the advertisement based upon a linguistic analysis alone of the words and images in the ad?

A. No. Not at all.

JUDGE CHAPPELL: You just referred to what someone would take away from POM advertising. Did you look at specific ads, or does your answer really mean what a consumer would take away from any advertising?

THE WITNESS: Well, I did look at specific ads, but I'm also referring to how people would process any advertising.

JUDGE CHAPPELL: Not POM in particular.

THE WITNESS: Not -- I'm citing a general principle. That's correct.

JUDGE CHAPPELL: How someone listens to and receives and interprets something they read or hear.

THE WITNESS: That's correct.

BY MR. OSTHEIMER:

Q. I believe I just said that someone can't determine all the claims communicated by an advertisement based upon linguistic analysis of the words and images alone, and you agreed, and I was going to ask you why not.

A. Well, because by simply looking at only the stimulus, one is not taking into account the characteristics of the viewer or the listener. They're not taking into account prior beliefs. They're not taking into account prior knowledge. They're not

taking into account contextual factors that may have an influence on the particular text in an advertisement. They're not taking into account prior experiences.

All of those things are really important in understanding the totality of what people will take away from an advertising message.

Q. You wrote in your report that Dr. Butters deconstructs the POM Wonderful advertising, dismissing or discounting individual elements of the advertising to reach a conclusion about the communications of the advertising. Can you explain.

A. Yes. Dr. Butters tends to parse the text of the ads in analyzing individual elements or words or ways of presenting those words.

So, for example, he talks about humor, but largely in isolation from the larger advertisement. He talks about the meaning of individual words, "can" versus "will."

All of that is parsing individual elements. It's not getting at what is the totality of what a consumer, who's bringing a lot of information and knowledge and experience to the viewing situation, may actually do with those individual elements in the ad. Nor is he necessarily considering how the interplay of all of those different elements may come together to

create a particular impression or message for the consumer.

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

A. Certainly.

A few years ago I was involved in some work involving Kraft Singles, cheese slices, individually wrapped cheese slices. And if you look at the text of that advertising, it begins by saying, "Kraft Singles are made with five ounces of milk." And in fact, there's also a visual in one of the ads that shows a five-ounce cup of milk being poured into a slice of Kraft Singles.

It is factually correct that five ounces of milk are used to create Kraft Singles, so if we just parse that part of the ad and look only at that, then there doesn't seem to be a problem. But it goes on to then say, "So your children will get the calcium their little bodies need. Imitation slices are made with oil and water."

Now, when you begin to put that together in totality with the truthful statement, what you find is that consumers take away from that ad two other claims. One is that, well, Kraft singles must contain the same amount of calcium as five ounces of milk. That in fact

is not factually correct because some calcium is lost in the production process.

Another claim consumers would take away is, well, imitation slices, because they're made with oil and water, must not have calcium. Well, the reality is that many imitation slices have calcium added.

But what we see is, you know, an individual element that when taken apart may suggest something completely truthful but within a larger context, combined with what people know and reasonably infer, leads to something that's quite different and misleading.

Q. And how is Dr. Butters' approach different than a net impression approach?

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

Q. How is Dr. Butters' approach different than a net impression approach?

A. Well, Dr. Butters, as I said, parses the ads. He really doesn't take the totality of the advertising.

The net impression would be everything that an individual would take from the ad taken as a whole, not what individuals might take from this sentence or that sentence or this claim or that claim. And he doesn't really consider what people might infer based on the totality of the advertising.

Q. I'd like you to look at a POMx ad about which Dr. Butters testified at trial, CX 0348, which is also tab D in your binder.

Please look at this ad as a whole and then look at the paragraph about the prostate study.

(Pause in the proceedings.)

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

"QUESTION: Do you think it is reasonable for viewers to equate hopeful results for prostate health to mean hopeful results for preventing prostate cancer?

"ANSWER: No."

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

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

"ANSWER: Not necessarily, no.

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

"ANSWER: Mean -- and what is your question?

"QUESTION: That in this context, prostate health -- hopeful results for prostate health, a viewer could infer that it's hopeful results for prostate cancer.

"ANSWER: One could infer that hopeful results for prostate health have to do with any kind of health problem that one might with one's prostate.

"QUESTION: Any kind of health problem.

"ANSWER: Yes.

"QUESTION: Despite the context that they're giving you a report that was published in the Clinical Cancer Research and it's discussing statistically significant prolongation of PSA doubling times?

"ANSWER: Yes."

Dr. Stewart, do you agree with Dr. Butters' opinion that it is not reasonable for viewers to infer from the phrase "hopeful results for prostate health" that POMx provides some benefits for prostate cancer?

MR. FIELDS: Objection. Misstates the testimony. Dr. Butters, based on what counsel read, specifically says it refers to all kinds of prostate health. That would not exclude prostate cancer. He just said it's broader than prostate cancer.

MR. OSTHEIMER: Dr. Butters was asked whether he thought any reasonable consumer could infer it refers to prostate cancer, and he said no.

MR. FIELDS: Read the balance of his testimony which you read before. He says at the end, I think it means every kind of prostate health. It doesn't just mean prostate cancer.

JUDGE CHAPPELL: Step back, take a moment and determine whether you agree or disagree on this. He's talking about what the deposition says. Take a moment. Look at it.

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

(Discussion off the record.)

JUDGE CHAPPELL: I thought I heard you say that complaint counsel misstated or misquoted Dr. Butters.

MR. FIELDS: Counsel's question assumed that the witness said that this statement --

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

MR. OSTHEIMER: I'm -- I stated Dr. Butters' testimony correctly word for word, and my question -- yes, I can -- I can restate my question. I'll repeat my question.

MR. FIELDS: Well, if you repeat it, it's going to have the same objection.

JUDGE CHAPPELL: Repeat or restate? There is a difference.

MR. OSTHEIMER: I believe that Dr. Butters did state in his testimony that it is not reasonable for viewers to infer from the phrase "hopeful results" that POMx provides some benefit for prostate cancer. He said that in his trial testimony.

To quote, "But the term 'prostate health,' there would be an inference that 'prostate health' is inferring prostate cancer, that it's some benefit for prostate cancer." Dr. Butters said, "Not necessarily, no."

MR. FIELDS: "Not necessarily so."

MR. OSTHEIMER: "Not necessarily, no," N-O.

MR. FIELDS: Let me read what counsel is not rereading.

JUDGE CHAPPELL: First of all, you're reading from a draft transcript.

MR. FIELDS: That's correct.

MR. OSTHEIMER: No. He's reading from -- it is an accurate transcript, but it is from my outline.

MR. FIELDS: Let me read what the witness really said:

"One could infer that hopeful results for prostate health" -- that's what the ad said -- "may have to do with any kind of health problem that one might have with one's prostate."

"QUESTION: Any kind of health problem.

"ANSWER: Yes."

He's not excluding prostate cancer. He's saying it's broader than prostate cancer. Prostate health means, as he says, hopeful results for any kind of health problem one might have with one's prostate.

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

JUDGE CHAPPELL: You need to slow down when you're reading.

MR. OSTHEIMER: I'm sorry.

Your Honor, Mr. Fields skipped the question: "That in this context, prostate health -- hopeful results for prostate health, a viewer could infer that it's hopeful results for prostate cancer." And --

MR. FIELDS: Read the answer.

MR. OSTHEIMER: -- Dr. Butters didn't agree to that.

MR. FIELDS: Read the answer, please. Don't characterize it.

MR. OSTHEIMER: "One could infer that hopeful results for prostate health have to do with any kind of health problem that one might have with one's prostate."

JUDGE CHAPPELL: Are you -- and you're asking a question based on what Dr. Butters said?

MR. OSTHEIMER: Yes.

JUDGE CHAPPELL: This is direct exam. Why don't you tell the witness to read whatever you want him to read and then ask a follow-up question, and let's see if we have an objection.

BY MR. OSTHEIMER:

Q. Dr. Stewart, do you believe it's not reasonable for viewers to infer from the phrase "hopeful results for prostate health" that POMx provides some benefit for prostate cancer?

A. I believe it is not reasonable to conclude that it is not reasonable.

Q. And why is that?

A. Well, first of all, it's an overgeneralization. To simply state that no one would take away such a claim seems to me to be very, very sweeping, particularly in light of later testimony in which he says that it could be any number of prostate-related matters. Cancer would be one of those.

But also, as I look at the text itself and put the context together, there are very clearly things that should have suggested to Dr. Butters that it would be reasonable for at least some consumers to perhaps make an association with helping prostate cancer. There's a specific reference to a medical cancer journal. There's a specific reference to PSA testing, which is associated with a test for cancer.

So, in my view, there are some elements in the advertising itself that should have suggested to Dr. Butters that it's reasonable that at least some consumers would have taken away a message related to preventing or treating prostate health.

Q. Dr. Butters stated that he analyzed the challenged POM Wonderful product ads from the standpoint of contemporary speakers of American English.

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

A. No, it is not.

Q. Why not?

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

What we know in advertising and consumer behavior is that individuals who are in the target

market tend to be quite different in many ways than individuals who are the average consumer. They have experiences with the product. They've bought it. They've used it. They've paid more attention to advertising. They have greater knowledge.

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

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

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

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

Over time, that evolved to perhaps a somewhat broader group of individuals, individuals who would be sensitive to health and lead a healthy lifestyle, but it

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

Q. What are creative briefs?

A. I'm sorry?

Q. What are creative briefs?

A. Creative briefs are really planning documents.

A creative brief is simply a way of summarizing the many, many decisions and tasks that are associated with the creation and implementation of a single ad or a whole advertising campaign.

It includes discussion of who the target audience is, what benefits will be emphasized, what proof will be provided those benefits are offered. They'll generally include some discussion of the media that will be used to deliver the message, whether it's print, television, billboard, or what have you.

And it's really a way of organizing the entire campaign and the entire set of activities so that everyone understands -- that's involved in the process understands what the plan is.

Q. How do you know about creative briefs?

A. Well, I've spent some time in advertising where I saw creative briefs regularly and in fact was often

asked to do research to verify that the plans included in creative briefs were in fact viable.

So, for example, I might test particular claims and how people would respond to them. I might test the degree to which people regarded certain support statements as stronger or not so strong or credible or less credible in support of a particular benefit.

I did research looking at the demographics of target audiences. And we also did research that focused on what medium would be best for reaching those audiences.

Subsequently, since leaving advertising, I talk about creative briefs as a part of my advertising courses. It's a fundamental planning tool that advertising agencies and marketing departments use.

And I've also been involved in a variety of consulting activities where creative briefs have been a part of a product that we were creating.

Q. In your experience, is using creative briefs standard?

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

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

CX 1295-0013, you quote from POM's creative brief to describe POM's target audience for POM juice and POMx ads.

What do those briefs tell us about the target audience for POM juice ads?

A. Well, they tell us several things, and they're consistent with the opinion I've just given.

In 2004, 2005, 2006, the target audience was described in the creative briefs as likely to be affluent, professional, college grads who are very health-conscious, with a parenthetical that says "hypochondriacs," and live in urban areas.

By 2008, the definition of the target audience had been modified somewhat, although still very similar, and it was described as health-conscious, affluent adults age 25 to 49 hunting for authentic products that deliver real benefits they can trust, and it was noted that such individuals make up perhaps 5 to 15 percent of the U.S. population.

Q. And what do the creative briefs tell us about the target audience for POMx ads?

A. For POMx, the creative briefs tell us that the target audience is those who are seeking a natural cure for current ailments or to maintain health and prevent future ailments, household incomes in excess of

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

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

A. I believe so. Yes.

Q. Why is that?

A. Well, for several reasons.

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

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

general concern, they likely acquired a great deal of information about -- about their health and healthy lifestyles and their prostates than would probably be typical of the average consumer.

Q. Dr. Butters stated at trial that if those viewing the challenged ads were already sick, it wouldn't change the conclusions in his report one bit in that one would expect that people with serious diseases would be more skeptical, not less skeptical, of the ads in any way advocating a treatment or cure or prevention.

Do you agree with Dr. Butters?

A. I do not.

Q. Why is that?

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

Somebody who has already been diagnosed with an illness is very likely to be highly attentive to health claims that are relevant to them. They likely have talked to physicians or other healthcare professionals. They likely have done some reading. They likely have acquired a great deal of information that would be relevant to their condition.

In addition, they're likely to be looking for ways in which they can help themselves. Particularly we

know that more highly educated individuals tend to have high, what we call, self-efficacy, that is, a desire to control circumstances, to find ways in which they can assist themselves, even as they might be looking for help from physicians or other healthcare providers as well.

So there's every reason to believe that these will -- individuals will be very attentive, draw a great deal of -- a great number of inferences from advertising, and certainly there's no reason to conclude they will be more skeptical of the ads.

Q. Let's look at an ad with the headline "Floss your arteries," which has been marked as CX 0031 and which is also tab E in your binder.

Dr. Butters' report describes this ad as cautious in its language, says that it does not make definitive medical claims for the product, that it only indicates that a clinical pilot study found that the clinical subjects who were studied reduced plaque up to 30 percent and that it can have that specific beneficial effect, not that it will.

You say in your report that Dr. Butters asserts that the use of qualifiers and soft words such as "can" in this ad and other ads serve to diminish the effects of POM Wonderful product claims.

Is this consistent with the academic literature and empirical research on the impact of qualifiers?

A. No, it is not.

Q. Why do you believe that to be the case?

A. Qualifiers have the effect of what we sometimes refer to in psychology and marketing as two-sided claims. A two-sided claim involves one where one says something positive balanced by something that's negative. And they tend to be credible because they appear to be balanced.

Qualifiers have much the same effect, and there's empirical research that suggests as much, that by offering a qualifier, you actually increase the credibility because you appear to be being more balanced in offering the information.

Q. When testifying at trial about the POM "Floss your arteries" ad, Dr. Butters stated that a reasonable person would discern the difference between the word "can" and the word "will."

In the context of this ad, do you agree?

A. I do not agree.

Q. And why is that?

A. Because the members of the audience for this ad are processing the totality of the ad, not -- not individual words.

Now, perhaps if we had created a task where we asked them what does "can" mean versus "will," we might have gotten a different response. But that's not what the typical consumer is doing when they view an ad. They're looking at the totality of the illustration, the headline, the text, and they're carrying away a net impression based on all of that information, and the potential meaning of any one of those words is really defined by its context.

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

A. The typical consumer I think will have little understanding of what "initial" or "pilot" particularly with -- means, particularly in the context of something that is referred to as having been published in a major journal.

Q. If we could redisplay CX 0031.

Describing the "Floss your arteries" ad, Dr. Butters said it's properly cautious in part because it goes on to say it's a pilot study.

Where in this ad does it convey that the statistic is based upon a pilot study?

A. Well, there's a very, very small footnote in kind of gray type that's really difficult to see that provides information both about where the study was

published and states "based on clinical pilot study."

Q. Now I'd like to display a similar ad, CX 0034.

In describing this ad, "Amaze your cardiologist," Dr. Butters stated, "It states clearly that the source for the statistic is a pilot study, not established medical fact."

Where in this ad does it convey that the statistic is based upon a pilot study?

A. Again, this is in the very, very small, difficult-to-read footnote that includes the name of the journal in which the study was published and then indicates "based on clinical pilot study."

Q. What does the academic literature say about whether fine print or footnote disclosures are clear and effective?

A. Well, in general, consumers tend to ignore, tend not to attend to fine print and footnotes and small disclosures.

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

Here's a creative brief that you cited in your expert report. It's for a women's lifestyle print/outdoor concept. I'd like to direct your attention to the Benefit section and the Reasons to Believe section.

How do you believe that this creative brief is relevant to Dr. Butters' conclusions?

A. Well, this creative brief describes an ad or advertising campaign that's very similar to some that ran. The headline "Floss your arteries daily" which appears in the brief in fact was a headline in one of the ads that ran.

I think it's relevant because it goes to what the intention of the advertiser was. The intention was to create, at least in part, the benefit of heart health; that is, if you drink POM Wonderful daily, you will have clean and healthy arteries, that is, floss your arteries daily.

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

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

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

And then there's a statement about "Drinking

POM Wonderful daily can help reduce plaque in your arteries up to 30 percent." That's a statement that appears in one of the ads.

And finally, "It's like flossing your arteries daily."

All reasons why the benefit should be believed to be delivered to the consumer.

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

A. Yes.

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

A. That is correct.

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

Can you walk us through some of the creative briefs and explain how they support your conclusions.

A. Certainly.

There's a 2008 creative brief which basically describes a campaign that was intended to, quote, stop the audience -- "stop the target audience dead in their tracks. It should first inspire them to take notice... "Realizing the product is expensive, they should be more willing to pay the price and more."

One of the reasons to believe, it was stated as,

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

Q. How does this contradict Dr. Butters' view that the POM juice ads make no health claims whatever beyond the generally received notions that making fruit products a regular part of one's diet is a healthy thing to do?

A. Well, he's clearly ignoring the intent of the readers of the advertising. It would seem to me that in offering an opinion about what is likely to be communicated in a particular advertisement, one would want to have not only an understanding of the characteristics of the recipient but also of the intention of the creator of the advertising.

Q. Could you walk us through the creative briefs you quote regarding POMx.

A. A 2007 creative brief for POMx pills described the benefit as "POM juice has been clinically tested to improve prostate and heart health. POMx has the same antioxidants and potency of the juice. Therefore, we

believe the health benefits may be the same" and gave as one of the reasons to believe that it is backed by \$20 million in medical research.

Q. And there's one more creative brief you discuss in your report. If you could --

A. Yes.

Q. -- describe that.

A. Yes.

This is a 2007 brief or actually a welcome letter that was an insert in the POMx pills, and it said the purpose was to remind them that this is a long-term proposition, they don't get illness in a day, they cannot expect to heal in a day, and reinforce health benefits and the fact that POMx is very potent and powerful, there's nothing else like it available.

Q. How do these briefs contradict Dr. Butters?

A. Well, again, to the extent that the intent of the creators was to communicate specific health benefits, it would seem to me that that would be a relevant piece of information for Dr. Butters to consider as he thinks about what was actually communicated to the relevant audience.

Q. I'd like you to look at a "Cheat death" ad that is CX 0036. It's also tab G in your binder. It appeared in Dr. Butters' expert report, a copy -- a

similar copy of this ad.

Can you read the body of the ad, please.

A. The body of the ad states:

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

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

"QUESTION: In your opinion, could the 'Cheat death' ad communicate to any reasonable consumers that drinking eight ounces a day of POM juice prevents or reduces the risk of heart disease?

"ANSWER: No."

Do you agree with Dr. Butters that this ad could not communicate to any reasonable consumers that drinking POM juice prevents or reduces the risk of heart disease?

A. No, I do not agree with him.

Q. And why is that?

A. Well, this is a very extreme opinion. The

opinion he's drawing is that no reasonable consumer could possibly carry away that message. That's in fact inconsistent with what we've seen was the intent of the communication in some of the communication briefs that even used the same language, and it's also inconsistent with what I believe many consumers would infer based on the context of the words that are used.

Q. On page 4 of his expert report, Dr. Butters states, "Finally, the use of humor and parody is prevalent in the POM Wonderful communications, humor which works to block any inference that the POM Wonderful communications are intended to make definitive health claims with respect to such issues as heart disease, arterial disease, hypertension, prostate disease, and erectile dysfunction."

Do you agree?

A. I do not.

Q. During his deposition, he expressed the view that the humor and parody in POM ads blocks any communication to reasonable consumers that drinking POM juice treats, prevents or reduces the risk of heart disease, prostate cancer or erectile dysfunction, and he reaffirmed that view during his direct testimony at trial.

Do you agree with that opinion?

MR. FIELDS: Objection.

Could we have a page and line if we're reading from a deposition.

MR. OSTHEIMER: Sure.

This deposition was actually displayed to Dr. Butters during his testimony. It's document PX 0350- -- page 62 -- -0062, line 17 to line 22.

MR. FIELDS: What page is that, please?

MR. OSTHEIMER: 0062.

MR. FIELDS: Is that page 62 of the deposition?

MR. OSTHEIMER: Yes, it's page 62 of the deposition, page 62 of the exhibit.

BY MR. OSTHEIMER:

Q. And he was asked: "Is it your opinion that the humor and parody in POM ads blocks any communication to reasonable consumers that drinking POM juice treats, prevents or reduces the risk of heart disease, prostate cancer or erectile dysfunction?"

"ANSWER: Yes."

Do you agree with that opinion?

A. I do not.

Q. Now I'd like to display a page from the draft trial testimony of Dr. Butters, page 194 line 14 through page 195 line 4.

During direct, he said -- I'm sorry -- during

redirect, redirect testimony, he said: "The -- the -- the hyperbole in the ads and the humor in the visual representations blocks literal interpretation of many of the -- of the headings, such as 'I'm off to save prostates.' These are absurd terms and will not be -- will not be viewed as -- as indicating claims."

If you skip ahead a little bit, he then said the humor -- that the humor doesn't block the serious statements that are made in the text and footnotes.

Do you agree with Dr. Butters about how humorous headlines and visual representations will be interpreted?

A. No, I do not.

Q. What does the academic literature say about the effects of humor in advertising?

A. Well, there's very rich literature on the use of humor in advertising, and that literature suggests that, when appropriately used, humor has several effects.

One effect is that it draws attention to the ad. It draws the consumer in.

A second effect is that it creates a liking for the ad. If it's humorous, it's likely it will create an emotional state that creates liking not only for the ad but that is transferred then to the product.

The third effect that humor tends to have is to

disarm the consumer. What we find is that often in processing arguments, whether they are in advertising or elsewhere, consumers will engage in something we call counter-arguing; that is, they'll come up with reasons why what they're reading can't be true or is incomplete or is otherwise not to be believed.

What humor tends to do is to reduce the amount of counter-arguing that occurs in response to an ad and therefore, as I said, tends to disarm the consumer, and because there's less counter-arguing, the ad is more persuasive. We find that counter-arguing and the amount of counter-arguing is actually directly related to lessening persuasion. Less counter-arguing would increase persuasion of an ad.

Q. Dr. Butters testified at trial about the "Amaze your cardiologist" ad. He said a reasonable person would see that the phrase about a glass a day can reduce plaque by up to 30 percent is embedded in an ad that's absolutely hyperbolic, that the phrase "Amaze your cardiologist" is a phrase that cannot be taken literally.

He also said no reasonable consumer would look at this ad and think that I'm going to drink eight ounces of pomegranate juice every day and my heart would change so much that I will amaze my cardiologist. The

whole context of the ad is important.

In your expert opinion, can humorous headlines like "Amaze your cardiologist," "Floss your arteries" and "I'm off to save prostates" be seen as making claims?

A. Yes. I believe so.

Q. Why is that?

A. Because, as I've indicated earlier, you have to consider what people bring to the viewing situation. To the extent that people already have beliefs, they have experiences, they have knowledge, a headline may simply elicit that or evoke those beliefs, opinions and issues that exist within the consumer and therefore can very well create or reinforce beliefs.

Q. Is there empirical evidence from POM's files that contradicts Dr. Butters' assertion during redirect that humorous headlines and images will not be seen as making claims?

A. Yes, there is.

Q. What research is that?

A. I've seen some research that was done by the Bovitz organization, which is a copy testing company, that --

JUDGE CHAPPELL: You need to hold your answer. Someone is rising to object.

MR. FIELDS: Well, I was going to allow him to finish his answer except that we have made a motion to exclude the Bovitz survey. It is directed only to billboards. It does not include the full text of the ad, only the picture and the headline. And complaint counsel has been very explicit that they are not attacking billboards.

If this witness is going to try to reason from the Bovitz survey that an ad, the text of which wasn't even seen by Mr. Bovitz, that it's somehow relevant, based upon all the reasons we gave in our motion, it is not relevant.

MR. OSTHEIMER: Dr. Butters testified on redirect that humorous headlines and visual representations will not be viewed as indicating claims. The Bovitz study looks at humorous headlines and visual representations and is contrary to Dr. Butters' assertion that the headlines and images themselves will not be viewed as indicating claims.

So it's clearly relevant to rebutting Dr. Butters' testimony about the communication of headlines and images.

JUDGE CHAPPELL: I'm not going to rule on your pending motion on the basis of this objection, but if that motion is granted, that will affect responses that

are made during the trial.

MR. FIELDS: Thank you, Your Honor.

MR. OSTHEIMER: Thank you, Your Honor.

BY MR. OSTHEIMER:

Q. I believe you were in the middle of saying something about the Bovitz study?

A. Yes. The Bovitz studies were intended to test billboards which are essentially humorous images and headlines, and so to the extent that it's a test of what humorous images and headlines can communicate, it goes directly to the question of can those things communicate and is -- if they can, then that's contrary to Dr. Butters' assertion.

Q. The Bovitz study tested POM ads from two advertising campaigns; correct?

A. That's correct.

Q. And the Bovitz study is in your binder at tab C. It's a document that has been marked as PX 0225.

Do pages 5 and 6 of that report show us the ads that were tested?

A. Yes. That's correct.

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

On page 6, are these the ads from the dressed bottle campaign that were tested?

A. Yes, they are.

Q. Do these ads employ humorous headlines and images?

A. Yes, they do.

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

A. Yes, it does.

Q. Does one of the ads have the headline "Heart therapy" and depict a POM juice bottle on a therapist's couch?

A. Yes, it does.

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

A. Yes, they are.

Q. And one of those ads has the headline "I'm off to save prostates"; correct?

A. Yes.

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

Would a test of headlines and images in the context of a billboard shed light on what the same headlines and images would convey in lengthier print ads?

A. Yes, they would.

Q. Why is that?

A. Well, to the extent that the images that are tested and the headlines that are tested are also used in advertising, we would gain some insight into what messages were communicated by the image and the headline from a test of just those things. It may be the case that other text that's added to the ads might modify that, but it's certainly a good place to begin in trying to understand what the headline and the image communicates.

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

Does this page 3 describe the survey universe for the study?

A. It describes the methodology. Yes.

Q. What was the survey universe for the study?

A. I'm sorry?

Q. What was the universe for the study?

A. The universe for the study are males and females 20 to 50 years old with a minimum household income of 75,000. They must be individuals who engage in health-conscious lifestyle or who hold attitudes toward improving their overall health. And at least a portion of the individuals used in the survey had to be users of the POM product.

Q. And other individuals were general audience people who met those characteristics of the income and --

A. That's correct. They were otherwise in that -- in that target market characterized by those demographic characteristics and an interest in a healthy lifestyle or improving overall health.

Q. Is that an appropriate universe to test ad communication?

A. Based on my understanding of the target audience for the POM product, I think it's a very appropriate audience.

Q. To what were survey respondents initially exposed?

A. Well, they were exposed to billboards that were shown actually on a computer screen, and it was actually a rather elaborate presentation. They were shown a single ad and asked some questions. Then ultimately they were shown all five ads together.

Q. And when you say "a single ad," you mean a single POM ad?

A. A single POM ad, that's correct.

Q. And then they were later shown five POM ads together?

A. That's correct.

Q. And those five POM ads were from one campaign; is that correct?

A. That is correct.

Q. Some of the respondents were initially exposed to the "Off to save prostates" ad; is that correct?

A. That's correct.

Q. And were some of the respondents --

MR. FIELDS: Excuse me one moment.

Objection. Ambiguity. He continues to use the word "ads," Your Honor. These were billboards. These were not ads. I think that's what we've established. I don't think that the witness' testimony should be responding to what was -- to what these people saw in ads. They only saw the headline.

JUDGE CHAPPELL: We have a pending motion regarding billboards, so would you please clarify when your question regards a billboard ad and not merely some other ad.

MR. OSTHEIMER: Certainly. And billboards are clearly ads, and we're not -- we're just not challenging billboard ads in this case, but certainly.

BY MR. OSTHEIMER:

Q. Were some of the respondents initially exposed to the "Off to save prostates" billboard ad?

A. Yes, they were.

Q. And for the rest of our discussion about Bovitz, is it your understanding that the only ads that people were exposed to were billboard ads?

A. Well, no. A part of the procedure actually involved presenting -- well, they were only billboard ads, but the procedure involved presenting other ads as sort of clutter for other products. That was a part of the procedure. But they were all billboards.

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

A. Yes, they were.

JUDGE CHAPPELL: Hold on a second. Your previous answer seems to be contradictory. You were asked were billboards the only ads people were exposed to. You said, "Well, no." And then the last thing you said was "But they were all billboards." Which is it?

THE WITNESS: I'm sorry. What I heard him to say was POM billboards, and I simply wanted to clarify that there were other billboards for other products. They were all billboards, but there were also some billboards for other products used as a part of the procedure.

BY MR. OSTHEIMER:

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

Does page 12 present the main idea communication

of the "Off to save prostates" billboard ad?

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

JUDGE CHAPPELL: Okay. And I want you to restate the exact point of your objection.

MR. FIELDS: The exact point of my objection is that I ask Your Honor to become a running objection so I don't jump up and down every time counsel asks a question --

JUDGE CHAPPELL: I understand the concept of running objection.

MR. FIELDS: Okay.

JUDGE CHAPPELL: I want to hear what the precise objection is.

MR. FIELDS: The precise objection is relevance in that these ads -- this survey relates entirely to billboards, billboards are not being attacked, and it does not include the text of the ad.

(Admonition from the court reporter.)

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

Counsel has told us they are not attacking billboards.

The witness has testified one must look to the whole ad. These billboards do not have the text. Accordingly, what percentage of what people drew a health message from these particular billboards is irrelevant.

Thank you.

MR. OSTHEIMER: May I proceed, Your Honor?

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

MR. OSTHEIMER: No, I do not --

JUDGE CHAPPELL: -- that counsel has told respondent that counsel, complaint counsel, is not attacking billboards?

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

Today, the issue is that these -- the test of these billboard messages directly rebuts opinions of Dr. Butters. He said that the headlines and visual representations themselves, just the headlines and visual representations, would not be viewed as indicating claims.

JUDGE CHAPPELL: But you understand -- and again, I haven't memorized the motion, but I believe it's to strike the study.

MR. OSTHEIMER: Yes.

JUDGE CHAPPELL: And having not seen your response, I have no idea how I will rule, but if that study is stricken, you're putting at risk any question you ask a witness about that study. You understand that.

MR. OSTHEIMER: Absolutely. And it's perfectly agreeable, Your Honor.

JUDGE CHAPPELL: All right. Your running objection is granted.

Go ahead.

BY MR. OSTHEIMER:

Q. I believe you agreed that page 12 presents the main idea communication of the "Off to save prostates" billboard ad.

How was that communication measured?

A. Well, the communication was measured in several ways. One way in which it was measured was with an open-ended question -- actually a sequence of open-ended questions, following various exposures, that simply asked people what benefits or what are the main ideas that are being communicated or that the ads are trying

to get across.

Q. And the results presented on this page for the "Off to save prostates" ad, are those the results of just one open-ended question about the main idea?

A. Yes, that's correct.

Q. Is such a question reliable?

A. Yes, it is.

Q. What were the results for the "Off to save prostates" billboard ad's main idea?

A. Well, some 86 percent of the respondents take away some type of healthy or health benefits claim, but the next most frequent mention of a benefit is "good for prostates," which 43 percent of the respondents offered in response to an open-ended question.

Q. And if we could look at page 13 of the report, PX 0225-0013.

Does page 13 present the main idea communication of the "Decompress" billboard ad?

A. Yes, it does.

Q. What were the results of the -- for the "Decompress" ad's main idea?

A. Again, a very high level of general communication of healthy or health benefits, 86 percent, but what we see is that 14 percent indicate that it helps or lowers blood pressure, and another 8 percent

talk about it -- or give a response that it's good for your heart.

Q. What do the results from those questions tell us about whether the humorous headlines and images can be seen as making claims?

A. Well, clearly in response to just the humorous headline and the image, there is a communication of benefits that range from very general to quite specific.

JUDGE CHAPPELL: I want to clarify the record.

Mr. Fields, your request for a running objection is granted. I might have misstated and said the objection was granted. That would have been premature.

MR. FIELDS: No. I understand.

BY MR. OSTHEIMER:

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

A. Yes, there were.

Q. At some point in the study survey, respondents were exposed to all five ads from a campaign; is that correct?

A. That's correct.

Q. Were they then asked --

MR. FIELDS: Excuse me, Your Honor. I was slow

to get up. I know I have a running objection, but here is a different objection.

Again, the word "ads" without "billboard," and again, there were no ads that were the subject of this survey other than billboards, and counsel keeps using "ads" separately. Unless we can stipulate that when he says "ads" he's only talking about billboards, which is okay with me, we should not have a question that talks about ads because it is ambiguous.

MR. OSTHEIMER: Previously I attempted to at least clarify with the witness that when I referred to ads I meant billboard ads, but I'd be happy to stipulate, in any further discussion of the study, that I'm talking about billboard ads being tested.

JUDGE CHAPPELL: All right. Thank you. And then let us know when you're no longer talking about the study and the ads related to the study.

MR. OSTHEIMER: I will.

BY MR. OSTHEIMER:

Q. Were survey respondents in this study then asked an open-ended communication question about POM's benefits?

A. Yes, they were.

Q. I'd like to display PX 0225-0014.

If you look at page 14 of the report, what was

that question that was asked?

A. This was a closed-ended question.

Q. I'm sorry?

A. I said this is a closed-ended question I believe. No. I think you're right. It's an open-ended question. Based on the ads -- it says, "Based on the ads you just saw, what are the specific benefits, if any, of drinking POM Wonderful?"

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

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

Q. Is that question leading?

A. I'm sorry?

Q. Is that question leading?

A. No, it's not leading.

Q. What were the results from that question?

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

For the dressed bottle billboards, again, a very high level of communication of general healthcare or health benefit claims, but 38 percent indicate that it's

good for your heart, and 21 percent indicate that it helps or lowers blood pressure.

Q. What do the results from that question tell us about whether humorous headlines and images themselves can be seen as making claims?

A. Well, clearly the respondents are drawing some inferences or beliefs from just the exposure to the images and the headlines, and they're drawing some very specific inferences about benefits, as well as some very general health-related benefits.

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

A. I'm sorry?

Q. I'm sorry.

And were there similar results among the POM users in the study?

A. Yes, there were.

Q. Were the survey respondents asked any additional questions that bear upon whether humorous headlines and images can be seen as making claims?

A. Yes, there were.

Q. I'd like to display PX 0225-0025, which is page 25 of the report.

Are the results of one such question presented on page 25?

A. Yes, they are.

Q. What was the question that was asked?

A. This question is a closed-ended question, and it states: "Based on the ads you just saw, which of the following do you think are true about POM Wonderful? Please select as many or as few as you feel apply."

And then the respondent was given a list of items that they could select from.

Q. And what were the results?

A. Well, in the case of the superhero campaign, 85 percent of the individuals in response to this question indicated that it had something to -- that a characteristic of the POM Wonderful product was good prostate health.

And in the case of the dressed bottle campaign, some 67 percent indicated that it's good for cardiovascular health.

Q. That's from a closed-ended question; correct?

That is from a closed-ended question; is that correct?

A. That is from closed-ended questions, that is correct.

Q. What is yea-saying?

A. Yea-saying is a tendency, most often in the context of personal interviewing, an individual

responding to another individual, to give a yes response or to give a response that is more socially desirable or less likely to create a sense of tension with the interviewer. It's an effort to be agreeable, if you will.

Q. How would you account for yea-saying in analyzing a study that was already conducted?

A. Well, one way you might account for yea-saying is to look for a question or a response that is clearly not relevant to the content of a particular ad or set of ads.

Q. How would you apply such an approach here?

A. Well, in this context we could look at the dressed bottle campaign, which makes no reference to prostate health, and we still see that some 9 percent of individuals said something about prostate health.

Now, that may all be yea-saying, or it may be some yea-saying and it may be individuals know something about the characteristics of antioxidants, they have other prior beliefs, so this may not simply reflect yea-saying. But we could be very conservative and say all 9 percent of the respondents were engaged in yea-saying, to be conservative, in which case we could take 9 percent away from, let's say, the 67 percent who said "good for cardiovascular health" in response to

this campaign.

So 67 minus 9 would be 58 percent, so with that correction for yea-saying, certainly a conservative correction for yea-saying, you'd still have 59 percent of individuals taking away a message "good for cardiac health."

Q. What do the results from that question tell us about whether humorous headlines and images can be seen as making claims?

A. Again, as I've said, this is -- this study and this particular set of results demonstrates that headlines and images alone, independent of any other text, can affect communicate benefits that range from very general to very specific.

Q. I'd like to show you a document that has been marked as CX 0103, which is tab H in your report.

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

I'd like to then -- I'd just like you to take a quick look at that ad.

At his deposition, which is a document that has been marked as PX 0350, starting on page 153, which is -- so it would be 000153, line 23, continuing to 154 line 3, Dr. Butters said that the -- was Dr. Butters -- said that this ad says nothing about lowering blood pressure and could not communicate to

reasonable consumers who are not simply outliers that drinking POM juice lowers blood pressure.

Can you blow that up? Actually I guess it's hard because it carries over.

Do the results of the Bovitz study contradict Dr. Butters?

A. Yes, I believe they do.

Q. Why is that?

A. Well, the Bovitz study actually studied -- included in the study a billboard that had exactly the headline and image in the ad that -- the print ad we're talking about, and to the extent that the Bovitz study demonstrates that the ad -- that the image and the headline alone is sufficient to communicate to a substantial number of consumers specific claims, that contradicts his view that it could not do so.

Q. So it contradicts his view that no reasonable consumers who are not simply outliers could think from this ad that drinking POM juice lowers blood pressure.

A. I disagree with that. And indeed, the Bovitz study found a significant number, far more than you could count as outliers, as taking away the message about lowers blood pressure.

Q. Is there anything the body of the ad that contradicts the "lowers blood pressure" message?

A. Nothing that I see.

MR. OSTHEIMER: Thank you.

JUDGE CHAPPELL: Are you finished?

MR. OSTHEIMER: No further questions,

Your Honor.

JUDGE CHAPPELL: Thank you.

How much time do you think you'll need,

Mr. Fields?

MR. FIELDS: An hour or less.

JUDGE CHAPPELL: All right. Let's take a lunch
break.

We'll reconvene at 2:00 p.m.

(Whereupon, at 12:58 p.m., a lunch recess was
taken.)

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

(2:04 p.m.)

JUDGE CHAPPELL: Back on the record.

Cross-exam?

MR. FIELDS: Thank you, Your Honor.

- - - - -

CROSS-EXAMINATION

BY MR. FIELDS:

Q. Good afternoon, Professor.

A. Good afternoon.

Q. On direct examination, you said that you had stepped down as dean at UC Riverside.

Actually you were asked to step down; isn't that correct, sir?

A. No, I was not asked. It was a mutual agreement between the chancellor and I.

Q. The chancellor did not ask you to step down?

A. We agreed mutually that I would step down.

Q. Did he ask you to step down, sir?

A. No, he did not.

JUDGE CHAPPELL: Ironsides?

Go ahead.

BY MR. FIELDS:

Q. All right. Did you see the report that came out in which the chancellor was quoted (indicating)?

A. I did.

Q. And doesn't it say that you were asked to step down?

A. I think that's the wording that was used. Yes.

Q. Let's wait until His Honor is done.

(Pause in the proceedings.)

Could the reporter read the last question and answer back.

(The record was read as follows:)

"QUESTION: And doesn't it say that you were asked to step down?

"ANSWER: I think that's the wording that was used. Yes."

BY MR. FIELDS:

Q. Are you saying that wording was false, that in fact the chancellor didn't ask you to step down?

A. The chancellor and I had a disagreement with respect to some budget-cutting issues, and I -- I refused to do some cutting, and he essentially indicated that I would probably be need to step down as dean in that case.

Q. Yes.

So just a moment ago when you said that it wasn't, you weren't asked to step down, that wasn't correct, and you were in fact asked to step down; isn't

that right, sir?

A. Well, I was asked in the context of a disagreement with the chancellor. Yes, sir.

Q. And you were not even allowed to remain long enough to appoint an interim dean; isn't that right?

A. It was an acting dean that was appointed.

Q. Yes.

And you were not allowed to remain even long enough to allow the new interim dean to take office; isn't that correct?

A. That's correct.

Q. Okay. Now, do you remember testifying in the Newport Electronics case at 157 F. Supp. 202?

A. I'm sorry. I did not hear you.

Q. The Newport Electronics case at 157 F. Supp. 202?

A. Yes, I'm aware of that case.

Q. And do you remember the federal court rejected your testimony by declaration as not supported by the facts?

A. Well, I ended up testifying in that court, in that particular case.

Q. And -- but can you answer my question. Did he reject your --

A. Initially there was a rejection, yes.

Q. Okay. Thank you.

Now, is it correct, sir, that you are not giving us any opinion on how consumers understand or interpret the messages of the POM ads?

A. I'm not giving you a specific opinion, no, only as it relates to Professor Butters' testimony.

Q. Yeah. Okay.

And you were not even asked to address the impression consumers take away from the ads; isn't that correct?

A. That is correct.

Q. And in fact, you don't know of any evidence on how consumers perceive the ads; isn't that correct?

A. I don't have any direct, specific evidence beyond what I've testified to today.

Q. Well, you say beyond what you've testified today.

Is it correct that you don't know of any evidence on how consumers perceive the ads?

A. I have no extrinsic evidence, no, I do not, beyond what I've talked about today.

Q. Do you know of -- I'm going to read you what you -- well, first let me ask you, do you recall testifying that you do not know if the FTC has any evidence in this action that shows how consumers

perceived the ads at the level of a net impression?

A. I do recall that, yes.

Q. Okay. And you said you do not know of any such evidence; isn't that correct?

A. That is correct.

Q. Okay. Thank you.

Now, you criticize Professor Butters for not focusing on what you called the gestalt of the ads, the G-E-S-T-A-L-T; isn't that correct?

A. That's correct.

Q. Okay. And if you were going to interpret the ads yourself, you would look at the ads' gestalt to make what you call a holistic judgment; isn't that correct?

A. That's correct.

Q. All right. And put in other words, you contend that Professor Butters didn't look at what you call the, quote, pragmatic implication from an ad; is that right?

A. That's -- among other things, that's correct.

Q. Okay. And the pragmatic implication that you say he didn't look for can be something that is neither explicitly asserted nor necessarily even implied from the ad; isn't that correct?

A. That's correct.

Q. Okay. It's a meaning that is neither stated nor implied, it's something beyond that; right?

A. That's generally the definition. Yes.

Q. And it may not even follow logically from what the ad actually states or implies; isn't that right?

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

Q. Thank you.

And is it correct you didn't talk to Professor Butters about this case?

A. I'm sorry?

Q. You did not talk to Professor Butters about this case?

A. No, I did not.

Q. So you don't actually know what was in Professor Butters' mind when he gave his opinions about what people would take away from the ads?

A. I do not.

Q. Okay. Is it correct, sir, that it takes three good exposures to an ad for the message of the ad to be effective on the consumer?

A. There's a general rule of thumb that suggests that three exposures is an optimal number of exposures.

Q. Isn't that three good exposures, sir?

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

Q. And in fact, that may require many more than three actual exposures; isn't that right?

A. That's correct.

Q. Thank you.

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

Isn't it true that humor actually increases the comprehension of an ad?

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

Q. That means people will understand it more readily; isn't that correct? That's what "comprehension" means?

A. That's correct.

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

A. That is correct.

Q. In other words, humor makes people understand the ad but not necessarily believe it; right?

A. That can be one effect. That is correct.

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

A. It certainly can. Yes.

Q. Okay. And it induces a search for further supporting information; isn't that right?

A. It certainly can.

Q. Okay. Now, turning for a moment to puffery and hyperbole, didn't you testify that readers discount puffery and hyperbole because on its face it's an exaggeration, something that's not literally true?

A. That is correct.

Q. Okay. As a general matter, you don't believe that puffery and hyperbole misleads consumers, do you?

A. Well, that would depend on the context. It certainly has the ability to do so.

Q. And in what context does it mislead?

A. Well, if hyperbole or -- or humor or exaggeration or puffery results in misleading beliefs, then the consumer would be misled.

Q. Okay. Now, you give "live forever" in an ad's headline as a good example of puffery and hyperbole that would not be taken literally; isn't that correct?

A. I would agree with that.

Q. Well, you don't think -- strike that.

Is it correct that you believe that headlines like "Amaze your cardiologist" are also similarly not to be taken literally?

A. I agree that they're not to be taken literally.

Q. And would the same be true of "Floss your arteries"? You don't think people are really going to

floss their arteries, do you?

A. No, I do not.

Q. Okay. In the article named in the body of your report on humor, you rely on an article by Haseeb Shabbir -- that's H-A-S-E-E-B, S-H-A-B-B-I-R -- and Des Thwaites, T-H-W-A-I-T-E-S; is that right?

A. I believe that is correct.

Q. And that was published in England, isn't that correct?

A. That is correct.

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

A. They may have the title of lecturer. Their system is really quite different than ours in terms of their titles.

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

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

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

A. You'll have to tell me specifically or show me specifically what you're referring to.

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

they said about humor?

A. Again, we'll have to look at what you're referring to.

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

A. I think there was, yes.

Q. All right. For example, when they said that -- when they gave the hypothetical of two men in a bar, and one man turns to the other -- and this is a commercial -- one man turns to the other and says, "Boy, I wish I had the taste buds of a whale, then I could taste brand X better," and Shabbir and Thwaites say that's an outright lie, did you agree with that?

A. I probably would not agree with that.

Q. Would any sensible, reasonable person believe -- agree with that?

A. Probably not.

Q. Okay. In fact, you said that Thwaites and Shabbir were exaggerating to get their paper published; isn't that correct?

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

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

A. Those may have been my words. I don't recall the specific words.

Q. Okay. And you're aware that the test applied in this country to determine whether an ad is deceptive is whether a reasonable person would rely on it; isn't that right?

A. That is correct.

Q. And is it also correct that Shabbir and Thwaites did not use that criterion?

A. That is correct.

Q. They were not applying the acceptable standard of deception; right?

A. That's correct.

Q. All right. Now -- strike that.

Let's talk briefly about a couple of other things.

Professor Butters wasn't opining on POM's intention, was he?

A. I'm sorry. He was not?

Q. Professor Butters was not opining on POM's intention; isn't that correct?

A. He was not opining on their intention, that is correct.

Q. Right.

And you're not opining on what POM actually

intended either; right?

A. That's correct.

Q. Okay. You don't know what they really intended; right?

A. I do not.

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

A. I do not.

Q. Would it affect your opinion relying on the creative briefs that they were typically prepared by some junior person in the marketing department?

A. That would not change my belief.

Q. Okay. And would it change your belief if typically they were not even seen by the people who own the company or by the officers of the company or even by the head of the advertising agency who was responsible to put them out? Would that affect your answer?

A. Not those facts alone.

Q. Okay. Would it affect your answer if it were true that the creative briefs were typically -- that the ideas in the creative briefs were typically modified, rejected or ignored in meetings after the creative briefs were written?

A. That certainly happens.

Q. And that would certainly affect your reliance on the creative briefs here; right?

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

Q. Thank you.

Now, in fact, you don't know if any creative brief actually resulted in any ad that was actually presented to the public; isn't that correct, sir?

A. That is correct.

Q. So you're not testifying that these creative briefs actually had any effect on POM's ads; right?

A. I'm not.

Q. Okay. Now, is it true that education helps a person to understand what an ad says?

A. It certainly can. Yes.

Q. Wouldn't you agree that an educated person has a better chance of correctly interpreting an ad than an uneducated person?

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

Q. And they'd be less likely to be misled by what an ad says; isn't that right?

A. Not necessarily.

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

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

Q. So you wouldn't agree with me that, in general, a person who is educated has a better chance of correctly understanding an ad than a person who is uneducated?

A. Well, understanding is different from being misled.

Q. I see.

So they would understand the ad, but you're not sure that a more educated person wouldn't still be misled; right?

A. That -- that could certainly happen.

Q. Okay. Doesn't the literature in your field suggest that better educated people are more skeptical than the public at large?

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

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

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

Q. Now, when the FTC contacted you to give your expert opinion in this case, did you agree to do it?

A. I agreed to look at Professor Butters' report.

Q. I see.

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

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

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

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

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

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

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

Q. Did you agree to testify as an expert in this case before you read his report?

A. I agreed that I would consider doing so.

Q. You agreed you would consider doing so.

Did you tell them you would be an expert before you read his report, sir?

A. I don't believe that I did.

Q. Okay. Now, let's talk briefly -- and I mean

briefly -- about the Butters survey.

MR. OSTHEIMER: For clarification, do you mean the Bovitz survey?

MR. FIELDS: Pardon me. Absolutely. I mean Bovitz.

When you get old, you get forgetful.

JUDGE CHAPPELL: Do you want to take a moment and make sure you've got that set up right?

MR. FIELDS: It is set up. Thank you.

BY MR. FIELDS:

Q. Okay. Now, when you're doing a survey, isn't it better to have a control for the questions you ask?

A. That depends on the purpose of the survey.

Q. Okay. And if it is a causal survey and to show the cause of something, you certainly want a control, don't you?

A. We would generally like to have a control in the context of a survey or an experiment designed to show causality.

Q. And you deduct the control group response from the test group response in order to eliminate what we call noise or yea-saying or bias; isn't that correct?

A. That is correct.

Q. Now, in the case of the Bovitz study, that study really didn't show at all how -- what the effect would

be of any particular ad; isn't that right?

A. That's correct.

Q. So even though these people registered particular percentages, there was nothing in that study to show that that was caused by the Bovitz ad; isn't that right?

A. Nothing that was causal, that is correct, only -- only the proximity of the viewing of the ads to the time in which the questions were asked.

Q. Yes.

But despite the proximity, that survey would not show you that in fact it was those billboards that caused those percentages of perception; isn't that right?

A. That would be correct.

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

MR. OSTHEIMER: Could I have two minutes, Your Honor?

JUDGE CHAPPELL: To consult or redirect?

MR. OSTHEIMER: To consult with my colleagues for just --

JUDGE CHAPPELL: Go ahead.

(Pause in the proceedings.)

- - - - -

REDIRECT EXAMINATION

BY MR. OSTHEIMER:

Q. Dr. Stewart, I believe you testified that the headlines such as "Amaze your cardiologist" and "Floss your arteries" are not to be taken literally.

Does that mean that those claims -- that those headlines would not make serious claims?

A. No. Just because they're not taken literally doesn't mean that they aren't making some serious claims.

Q. Could they communicate significant cardiovascular health benefits?

A. They could very well.

Q. And I believe you testified that better-educated people would be more skeptical in general and that, at least based on the target audience, POM users are better-educated.

Does that mean that you believe that POM users should be skeptical of the challenged ads?

A. They may very well be skeptical as well, but they also bring a lot of beliefs and a lot of information to -- to the task of viewing the ads that will also have an effect on the degree to which they believe the claims.

Q. And are there elements of ads that could

overcome such skepticism?

A. Quite conceivably. In fact, one of the reasons for belief statements or belief propositions in support of benefits is in fact to overcome skepticism.

Q. And when you were talking about the Bovitz study, you said that it didn't show the effect of any particular ad.

Is that because you believe that open-ended questions don't show causation?

MR. FIELDS: Objection. Leading.

THE WITNESS: No, that's not why.

JUDGE CHAPPELL: Hold on.

You need to rephrase.

BY MR. OSTHEIMER:

Q. When you said that the Bovitz study didn't show the effect of any particular ad, were you considering the open-ended questions asked about the individual ads at the beginning like "Decompress" and "Off to save prostates"?

A. That's not what I was referring to.

What I was referring to was the general standard for proving causation, which would involve having a control, and there was not a -- there was not a control condition involved. As I said, the proximity between presentation and the question would be

consistent with causality, but in the absence of a control, you couldn't draw a firm inference.

Q. Are you comfortable drawing conclusions about ad communication from open-ended questions without controls?

A. I am.

MR. OSTHEIMER: No further questions, Your Honor.

MR. FIELDS: No questions, Your Honor.

JUDGE CHAPPELL: Thank you, sir. You're excused.

THE WITNESS: Thank you.

JUDGE CHAPPELL: We're going to take a short break, and then I'm going to come back and deal with the pending motion.

We'll reconvene at 2:45.

(Recess)

JUDGE CHAPPELL: Back on the record.

MR. FIELDS: Thank you.

I hate to spoil the suspense, but in order to avoid any possibility of delay -- and we don't know how Your Honor is going to rule -- we would agree to counsel's recommendation or suggestion that we just strike Dr. Heber's answer that there was a consensus. We don't feel it's important, we don't need it, and

we're willing to, as counsel suggested, strike it, and that eliminates the need to impeach him on that statement.

MS. DAVIS: That's agreeable to us, Your Honor.

JUDGE CHAPPELL: Then you're going to let the court reporter know?

MR. FIELDS: Yes. The question and answer -- well, and the answer in which he said --

JUDGE CHAPPELL: Well, here's where we are. I've got a pending motion.

MR. FIELDS: Right.

JUDGE CHAPPELL: And unless it's withdrawn, I'm going to make a ruling, so why don't you talk about this, I'll give you a minute, I'll sit here, and decide if you're going to withdraw your motion or not.

MR. FIELDS: I think we just did.

MS. DAVIS: I think we have to agree upon the lines.

MR. FIELDS: Oh, okay.

(Pause in the proceedings.)

MR. FIELDS: Your Honor, unfortunately, counsel now wants to go way beyond the question and answer that the reporter -- at issue this morning, and I can't agree to that. She wants to strike much more than that answer, which shows you, I think, what this is about.

JUDGE CHAPPELL: I thought that you began by saying this wasn't argument.

MR. FIELDS: Well, strike my last argument.

JUDGE CHAPPELL: I think that last sentence would qualify.

All right. So the motion is still alive?

MS. DAVIS: Yeah. I don't think we can come to an agreement. There's another section that we believe related to what we cited in the brief, but they disagree.

JUDGE CHAPPELL: Okay. Anything further?

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

JUDGE CHAPPELL: You may have a seat.

MR. FIELDS: Thank you.

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

All right.

On October 7, complaint counsel filed a motion for leave to call a rebuttal fact witness, Dr. Philip W. Kantoff.

Respondents filed an opposition on October 11.

The parties presented oral argument in support of their positions this morning.

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

entitled to submit rebuttal evidence as may be required for a full and true disclosure of the facts.

However, the scope of rebuttal will be limited to repel or disprove the evidence of the adverse party.

Upon consideration of the arguments in the briefs and presented at the hearing, here is my ruling:

Assuming the representations made by complaint counsel in the motion to be correct and accurate and in order to address the concerns raised by respondents, complaint counsel will be allowed to call Dr. Kantoff as a rebuttal fact witness but only for the limited purpose that follows:

To rebut Dr. David Heber's testimony suggesting that at meetings among POM and its scientific advisers, which Dr. Kantoff and Dr. Heber attended, there was scientific agreement among the advisers as to the conclusions that can be drawn from respondents' prostate cancer research.

This rebuttal may only include statements that were made by Dr. Kantoff at the meetings and whether there was agreement or not among researchers he observed during these meetings.

In addition, foundational testimony is allowed to demonstrate that Dr. Kantoff was present and has personal knowledge of the factual perceptions for which

he is being called to testify.

Complaint counsel has represented that Dr. Kantoff will be called only to rebut facts and not to offer expert opinions. Accordingly, complaint counsel will not be allowed to elicit any opinions from Dr. Kantoff. To the extent any statements made by Dr. Kantoff at the meetings contain his opinions, rather than his factual observations, those opinions will not constitute evidence of expert opinions in this case.

Specifically, complaint counsel will not be allowed to elicit any testimony from Dr. Kantoff as to whether Dr. Kantoff agreed or disagreed with the conclusion that the prostate cancer studies were successful or that there was or was not scientific agreement in the scientific community at large -- as opposed to at the meetings at issue -- regarding conclusions of respondents' studies or the role of pomegranates in prostate health.

To address a point raised by respondents, although the information at issue regarding Dr. Heber may not have been raised in the direct examination, Dr. Heber is a witness who was presented by respondents. Thus, any testimony he gave was a direct result of him being called as a witness by respondents.

Respondent will be permitted to conduct a deposition of Dr. Kantoff prior to complaint counsel's calling Dr. Kantoff at trial.

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

To the extent the parties missed any details of this ruling, you may refer to the draft transcript, which will be issued soon.

Anything further?

MS. DAVIS: No, Your Honor.

No, Your Honor.

MR. FIELDS: Nothing further, Your Honor.

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

(Whereupon, the foregoing hearing was adjourned at 2:56 p.m.)

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

DOCKET/FILE NUMBER: 9344

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

HEARING DATE: October 14, 2011

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

DATED: OCTOBER 20, 2011

JOSETT F. WHALEN, RMR

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

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

ELIZABETH M. FARRELL