

ORIGINAL

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



_____)
In the Matter of)
)
)
POM WONDERFUL LLC and ROLL)
GLOBAL LLC, as successor in interest)
to Roll International Corporation,)
companies and)
)
STEWART A. RESNICK,)
LYNDA RAE RESNICK, and)
MATTHEW TUPPER, individually and)
as officers of the companies.)
_____)

Docket No. 9344

PUBLIC

**COMPLAINT COUNSEL’S OPPOSITION TO
RESPONDENTS’ MOTION TO STRIKE THE BOVITZ SURVEY**

Complaint Counsel opposes Respondents’ untimely motion to strike from the record a May 2009 consumer survey conducted for POM Wonderful (“POM”) by the Bovitz Research Group (“Bovitz”), which was entered without objection. Respondents make two arguments. They argue that because the survey (“the Bovitz Survey”) examined billboard ads, which are not challenged, it is not relevant. Respondents also assert that they only became aware that the Commission is not challenging billboard ads during Complaint Counsel’s cross-examination of their expert, Dr. Reibstein. Both arguments are wrong. First, as to relevance, the Bovitz Survey provides probative evidence about challenged advertisements for POM juice. It also rebuts unfounded assertions by Respondents’ linguistic expert, Dr. Butters. Second, Respondents have been on notice for months that Complaint Counsel is not challenging the specific billboard ads used in the Bovitz Survey. Respondents’ motion to strike the Bovitz Survey after the deadline

for motions *in limine*, after the deadline for objecting to exhibits, and after the study and related documents were admitted into evidence should be denied.

FACTS

I. The POM Wonderful Campaign Evaluation Study.

In March 2009, POM asked Bovitz to design a consumer survey to evaluate the then-running “Super Hero” advertising campaign against POM’s earlier “Dressed Bottle” campaign. (CX0286_0001) (*See* Attachment A). POM provided Bovitz with full-text print ads, including the challenged “I’m off to save PROSTATES!” ad from the “Super Hero” campaign, to inform the survey design. (CX0286_0004-05, 09-14). With POM’s approval, Bovitz used five “Dressed Bottle” billboards and five “Super Hero” billboards to draw conclusions about ad meaning for both campaigns. (PX0295a15_0010-11) (*See* Attachment B). Five of the tested billboards included the exact headlines and imagery featured in print ads challenged in this action: CX0109_0001 (“Heart therapy.”), CX0103_0001 (“Decompress.”), CX0036_0001 and CX0188_0001 (“Cheat Death.”), and CX0274_0001 (“I’m off to save PROSTATES!”) (*See* Attachment C). The headline of one test billboard included a reference to “\$25 million in medical research,” similar to references used in numerous challenged print ads. (*See, e.g.*, CX0274_0001).

Through the Bovitz Survey, POM received the following information about its two advertising campaigns: In response to an open-ended question, significant numbers of surveyed consumers stated that according to the ads, the benefits of drinking POM juice included, “good for prostates,” “good for your heart,” and “helps/lowers blood pressure.” (PX0295a15_0020). In addition, when shown individual ads with the headlines “Holy Health! \$25 million in medical research!,” “I’m off to save PROSTATES!,” and “Decompress,” in response to an open-ended

question, significant numbers of surveyed consumers stated that the main idea of these advertisements was “\$25 million spent on research/research based,” “good for prostates,” and “helps/lowers blood pressure,” respectively. (PX0295a15_0017-18).

Respondent Lynda Resnick used the Bovitz Survey to determine that POM would continue the “Super Hero” advertising campaign in 2009, including several of the challenged ads. (PX0295a15_0002).

II. Discovery.

On March 11, 2011, Complaint Counsel provided a Second Supplemental Response to Respondent POM’s First Set of Interrogatories, which identified advertisements that Complaint Counsel contended were deceptive. (PX0267_0002-29, 31-33) (*See* Attachment D). None of these ads were billboards. (*See* Hipsley Declaration, Attachment E). Thus, Respondents had notice that Complaint Counsel was not challenging billboard ads.¹ On March 16, 2011, Respondents objected to three of Complaint Counsel’s Requests for Admission with respect to the Bovitz Survey, stating “The May 2009 POM Wonderful Ad Campaign Evaluation by Bovitz Research Group (‘Bovitz Campaign Evaluation’) has no relevance to the current administrative proceeding.” (CX1379_0030, 32, 34) (*See* Attachment F). Respondents, however, took no further action.

No billboard ads appeared on Complaint Counsel’s March 29, 2011 Final Proposed Exhibit List, nor were any added. (*See* Hipsley Declaration). The list did include two versions

¹ Complaint Counsel did “reserve[] the right to include on its trial exhibit list, and introduce, additional ads with the same or substantially similar text or claims, including clearer or more legible versions.” (PX0267_0030, 34). A May 5, 2011 supplementation of the interrogatories responses cited in Respondents’ motion was pursuant to this Court’s March 16, 2011 Order and supplemented a response to a question about science, **not** the ads at issue. (*See* Hipsley Declaration).

of the Bovitz Survey report (CX0310 and CX0368) and one of the questionnaires (CX0369). (See Complaint Counsel's Final Proposed Exhibit List, Attachment G). On April 4, 2011, Complaint Counsel provided Respondents with its Rebuttal Report by Dr. Stewart, which included a discussion of the Bovitz Survey. (CX1295_0009-11). (See Attachment H). Respondents placed the Bovitz Survey report (PX0225) and questionnaire (PX0236) on their own April 11, 2011 exhibit list. (Respondents' Final Proposed Exhibit List, Attachment I).

On April 20, 2011, the deadline for filing motions *in limine* passed without Respondents filing any motion with respect to the Bovitz Survey. On May 5, 2011, Respondents provided objections to Complaint Counsel's exhibit list. They did not object to the Bovitz Survey exhibits. (See Respondents' Objections to Complaint Counsel's Final proposed Exhibit List, Attachment J). On May 21, 2011, those exhibits were admitted into evidence. (JX-0002_000001, 26, 29, 141) (See Attachment K).

ARGUMENT

I. The Bovitz Survey Is Relevant, Material, and Reliable.

The Bovitz Survey provides relevant, material, and reliable evidence that informs the Court about claims communicated by challenged advertisements, including the "Decompress" print advertisement. It also undermines assertions of Dr. Butters. The admission of evidence is governed by Commission Rule 3.43, which states in part: "Relevant, material, and reliable evidence shall be admitted." 16 C.F.R. §3.43(b)(1).²

² When copies of documents are the business records of respondents and obtained from an authentic source, the competence, trustworthiness and reliability of such documents are sufficiently established to admit them into evidence. *See Resort Car Rental Sys.*, 83 F.T.C. 234, 288 (1973).

Respondents' argument that the Bovitz Survey is only relevant if the Commission challenges the specific billboards used as test stimuli is belied by POM's use of the survey in its business. As set forth above, the conclusions drawn from the survey were relied on by Respondents to evaluate the effectiveness of ad communication across all media formats for both of their print ad campaigns and was **not** limited to a narrow analysis of campaign billboards. As Respondent Lynda Resnick wrote in her book, *Rubies in the Orchard*,

A concise, potent message travels well. You can publish it in a magazine and mount it on a billboard. ... The shorter the message, the more easily it adapts to different circumstances – and the more easily it travels between different media.

(CX0001_0020) (*See* Attachment L). Thus, Complaint Counsel's use of the Bovitz Survey is consistent with Respondents' use of the Bovitz Survey results to evaluate the effectiveness of all ads associated with the campaigns, including the challenged "Decompress" and "I'm off to save PROSTATES!" ads.³

Moreover, Commission law supports the idea that the Bovitz Survey's analysis of headlines and imagery is relevant to understanding the ad meaning in the challenged advertisements. In granting partial summary judgment as to ad meaning, the ALJ in *Automotive Breakthrough Sciences, Inc.*, 1996 FTC LEXIS 252, *44-45 (F.T.C. 1996) ("*ABS*") found the challenged claims from ad headlines, even when the body of the ads sought to qualify the claims citing *Thompson Medical Co.*, which states:

[P]ersons reading a print ad often will read only the headline, and will take their sole impression of the ad from it. The special significance of headlines has previously been recognized in Commission cases, which hold that even an

³ Respondents' statement that the billboards are presumptively lawful because Complaint Counsel in its prosecutorial discretion has challenged the more fulsome print ads instead is absurd.

express disclosure in the text of an ad may not be enough to change the ad's net impression upon consumers.

Thompson Medical Co., 104 F.T.C., 648, 799 (1984).

Thus, for example, Respondents' argument that the survey evidence showing a 14% to 17% main idea communication of "helps/lowers blood pressure" by consumers who were shown the "Decompress" headline and blood pressure cuff imagery⁴ used in the challenged "Decompress" print ad is irrelevant flies in the face of Commission law on ad communication.⁵ Moreover, unlike in *ABS* and *Thompson Medical*, the additional copy of the challenged Decompress advertisement does not qualify the message in the headline and in fact bolsters the message by touting the cardiovascular benefits of POM juice and the \$20 million in scientific research. (CX0103) (*See* Attachment C).

Respondents' motion ignores the fact that Complaint Counsel is also using the Bovitz Survey to rebut Respondents' ad interpretation evidence set forth by their expert Dr. Butters.

Dr. Butters testified at his deposition that the "Decompress" print ad "says nothing about lowering blood pressure" and does not "communicate to reasonable consumers who are not

⁴ This open-ended main idea communication of "lowers blood pressure" likely is an underestimate. *See Telebrands Corp.*, 140 F.T.C. 278, 319 (2005) (open-ended results likely understated consumer take-away because consumers are unlikely to volunteer all of the messages they glean from an ad)(citing *Sears Roebuck & Co.*, 95 F.T.C. 406, 451 (1980) (Initial Decision), *aff'd*, 676 F.2d 385 (9th Cir. 1982)) and also expert testimony from *Stouffer Foods Corp.*, 118 F.T.C. 746, 805 (1984) that often a researcher must rely on open-ended responses in the magnitude of 8 percent to 10 percent as being meaningful.)

⁵ Today, Respondents submitted an improper letter to the Court arguing that without a control, the results of the Bovitz Survey do not prove strict causality. Commission law holds that credible evidence can be obtained from responses to open-ended questions without controls. *See Telebrands*, 140 F.T.C. at 318 ("We agree with the ALJ that it is appropriate to consider the open-ended responses without netting out any controls. ID 58 (*citing Stouffer*, 118 F.T.C. at 808).") Dr. Stewart, whom respondents cite in their letter, testified that he would be comfortable drawing conclusions about ad communication from open-ended questions without controls. (Stewart, Rough Tr. Vol. 18 at 103) (*See* Attachment N).

simply outliers that drinking pom juice lowers blood pressure.” (PX0350-0153-54, PX350a12-0001) (*See* Attachment M). The Bovitz Survey’s open-ended playback of “helps/lowers blood pressure” contradicts Dr. Butters’s opinion. (Stewart, Rough Tr. Vol. 18 at 82-84) (*See* Attachment N).

In addition, Dr. Butters asserted at trial that the headlines and imagery, including “I’m off to save PROSTATES!,” are absurd and will not be viewed as indicating claims. (Butters, Rough Tr. Vol. 16 at 194) (*See* Attachment O). In rebuttal, Dr. Stewart testified that responses to multiple questions in the Bovitz Survey show that the humorous headlines and images tested were seen as making specific claims, including “good for prostates,” “helps/lowers blood pressure,” and “good for your heart.” (Stewart, Rough Tr. Vol. 18 at 75-82) (*See* Attachment N).

II. Respondents’ Motion is Untimely.

Respondents’ assertion that they just recently became aware that the Commission is not challenging billboard ads is disingenuous in light of the facts set forth in the Discovery section above. In addition, Respondents’ own motion highlights that based on Complaint Counsel’s opening statement, Respondents understood and, in fact, addressed in their own opening statement the use of the Bovitz Survey to assist in interpreting at least one of the challenged print ads. (Fields, Tr. 1847-48) (*See* Attachment P). Moreover, since April, Respondents have known that Complaint Counsel was relying on the Bovitz Survey to rebut Dr. Butters. Respondents’ motion to strike the Bovitz Survey after the deadline for motions *in limine*, after the deadline for objecting to exhibits, and after the documents were admitted into evidence is without a factual or legal basis.

CONCLUSION

For the reasons set forth above, the court should deny Respondents' motion.

Respectfully submitted,

Dated: October 17, 2011

/s/ Michael Ostheimer
Michael Ostheimer
Federal Trade Commission
601 New Jersey Avenue, NW
NJ-3212
Washington, DC 20580
Telephone: (202) 326-2699
Fax: (202) 326-3259
Email: mostheimer@ftc.gov

CERTIFICATE OF SERVICE

I certify that on October 17, 2011, I caused the filing and service of Complaint Counsel's Opposition to Respondents' Motion to Strike the Bovitz Survey as set forth below:

One electronic copy of the redacted, public document via the FTC E-Filing System, and the paper original and paper copies of the full confidential document via hand delivery to:

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

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

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

One electronic copy via email to:

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

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

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

Date: October 17, 2011

/s/ Michael Ostheimer
Michael Ostheimer
Complaint Counsel

ATTACHMENT A

THIS EXHIBIT 35
2-10-2011
Kuyosmjan

CASE NO. CV-08-06237 SJO (FMOx)

POM WONDERFUL LLC

VS. THE COCA-COLA COMPANY

DEFENDANT'S EXHIBIT 1860

DATE _____ IDEN.

DATE _____ EVID.

BY _____
Deputy Clerk

AO 386-A

TCCC-0004674

From: Nelson, Claire
Sent: Wednesday, March 18, 2009 10:11 AM
To: Greg Bovitz; Vincent Moy
CC: Kuyoomjian, Diane
Subject: POM Research
Attachments: superhero print Risk your health in this economy Never.pdf; Superhero print 100% pure pomegranate juice to the rescue.pdf; Superhero print BACK OFF...imposter juices!.pdf; Superhero print Have no health fear POM is here.pdf; Superhero print HOLY HEALTH \$25mil in medical research.pdf; superhero print I'm off to save prostates.pdf; Heart therapy.jpg; The antioxidant superpower.png; Cheat death.jpg; Decompress.jpg; Bride Ad.jpg; Bikini Ad.jpg

Greg and Vince,

Thanks so much for your time to talk about doing the POM advertising research project. Per our conversation, here's some additional information and direction to help structure the research design. Attached are print examples from both campaigns. You may think of other possible areas/questions - if so, please let us know.

Background and objectives

For the past several years POM Wonderful has been running the "Dressed Bottle" campaign, which was originally designed to introduce the brand - and pomegranate juice. Over the years, we believe it has successfully accomplished those objectives, and has been instrumental in also establishing the brand personality - a key dimension for POM. However, due to POM's initial success, many competitive pomegranate juices have now entered the market. Most of those are not pure pomegranate juice like POM, but instead include filler juices, sugar or other additives. Also, only POM has conducted a significant amount of medical research to confirm the specific health benefits of our product, and all those other brands are attempting to ride on our coattails. For all of these reasons, the company became increasingly concerned that this campaign may not be sufficiently proprietary, but rather selling the overall benefits of pomegranate juice (i.e., drink this and live longer).

The new "Comic Book" campaign was introduced in Q1 2009 to address the new business realities. It was intended to build on the Antioxidant Superpower equity, and reclaim/reinforce POM's superiority: POM is 100% pure pomegranate juice - no fillers, added sugar or other additives (i.e., beware of imposter juices!)

Only POM is backed by \$25 million in medical research with specific health benefits (primarily for cardiovascular and prostate health)

At the same time, it is also important that we maintain our quirky and witty brand personality.

The questions on the table now:

How do the two campaigns stack up, given the current marketplace and business objectives?
Is the Comic Book campaign, in fact, the better campaign now?
Have we lost something that we had with the "Dressed Bottle" campaign?
Are there important insights we can glean about each that might help us refine and strengthen our advertising?

Areas we would like to explore

Understand the overall communication of each campaign on factors such as what it communicates about POM, memorability, relevance, motivation, likeability

Understand what campaign cues, messages or other factors are driving those perceptions

Are we effectively conveying key messages about the brand, product and health benefits?

Pros and cons for each campaign on all dimensions

Any insight into whether some concepts/headlines/messages are more effective than others

Other considerations

How to structure given that the Dressed Bottle campaign has been around for several years, while the Comic Book campaign is just out (so neither may be completely "new" to potential respondents)

Can we understand differences in reactions among current POM drinkers vs potential users? How do current users perceive and like the campaign change/new campaign?

Understand any differences in each campaign in terms of driving intent to try and/or drink more frequently

As you'd expect, our print ads carry more information. Need to factor that into research design. (samples provided)

POM Target User

Higher HH income \$75k+

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

PW02374325

TCCC-0004675

CX0286_0002

2 person households
Heavy users skew 45+, 55+ but we would want to get a read with consumers from 25 to perhaps 64ish?
Concerned about their health and willing to buy premium, health products

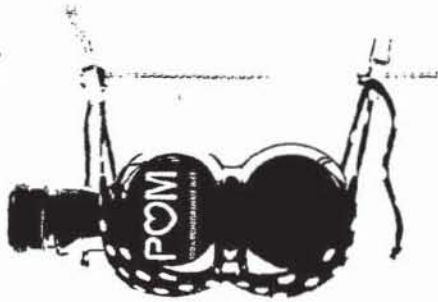
Claire Nelson
POM Wonderful
11444 W. Olympic Blvd.
Suite 200
Los Angeles, CA 90064
310.966.5878

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

PW02374326

TCCC-0004676

CX0286_0003



What gets your heart pumping?

Supports an healthy 262x262 O omega healthy omega? 262x262 POM Wonderful Pomegranate Juice. It has been naturally recognized for its rich, antioxidant, polyphenols, which can help lower blood pressure, improve blood flow, and more. Right across a day is enough to keep your heart pumping, even if you're not using a supplement.

POM
wonderful.com

POM Wonderful Pomegranate Juice. The Antioxidant Superpower.

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

PW02374327

TCCC-0004677

CX0286_0004

Outlive your spouse.



Take a new life in charge. Drink POM Wonderful pomegranate juice. It has more naturally occurring antioxidants than any other drink. Antioxidants fight free radicals, molecules that can cause heart disease, premature aging, Alzheimer's, even cancer. Fight cancer a day is all you need to outlive nearly anything, even a spouse.

POM Wonderful Pomegranate Juice. The Antioxidant Superpower.



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

PW02374328

TCCC-0004678

CX0286_0005

Cheat death.

The antioxidant power of
pomegranate juice:



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

PW02374329

TCCC-0004679

CX0286_0006

Decompress.

POM Wonderful Pomegranate Juice.
The Antioxidant Superpower.



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

PW02374330

TCCC-0004680

CX0286_0007

Heart therapy.

POM Wonderful Pomegranate Juice.
The Antioxidant Superpower.



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

PW02374331

TCCC-0004681

CX0286_0008

100% PURE
 pomegranate juice
 to the rescue!



©2009 Pom Wonderful LLC. All rights reserved. POM Wonderful and Juice of Life are registered trademarks of Pom Wonderful LLC.

Will POM Wonderful's 100% purity be enough to help save your health? Does its lack of sugar, colorants and cheap filler juices make it superior to its competitors? Can its \$25 million in medical research truly make a difference in the current state of your health? Do superheroes wear lights?

pomwonderful.com

The Antioxidant Superpower.®

PJ0680_MnsHthApr09_f.indd 1

12/12/08 4:27:06 PM

JOB NO.: PJ0680	TRIM: 8.25" x 10.675"	COLOR: 4/C PROCESS	DATE IN: 12-5-08
PROJECT: MensHth April09 - 100% Pure POM	LIVE: 7.75" x 10.375"	TRIM, BLEED (DO NOT PRINT)	DATE OUT: 12-12-08
SCALE: 1:1	BLEED: 8.5" x 11.125"	PRINTOUT SIZE: 100%	PROOF ROUND: 1

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

PW02374332

TCCC-0004682

CX0286_0009

**BACK OFF...
impostor juices!**



There's only one true Antioxidant Superpower[®] on the planet: POM Wonderful[®] 100% pure pomegranate juice. Backed by \$25 million in medical research, it wouldn't dare be tainted with cheap filler juices, sugar or unnecessary colorants. It leaves that to its villainous foes... or should we say faux.

pomwonderful.com

The Antioxidant Superpower.[®]

PJ0674_Winnst09Apr09_Etc01_F.indd 1

12/2/08 3:34:55 PM

JOB NO.: PJ0674	TRIM: 8" x 10.875"	COLOR: 4/C PROCESS	DATE IN: 12-5-08
PROJECT: Woman's Health April 09 "Back Off..."	LIVE: 7.5" x 10.375"	TRIM, BLEED (DO NOT PRINT)	DATE OUT: 12-12-08
SCALE: 1 : 1	BLEED: 8.25" x 11.125"	PRINTOUT SIZE: 100%	PROOF ROUND: F

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

PW02374333

TCCC-0004683

CX0286_0010

Have no health fear...
POM IS HERE!



It's a champion of superior health... It's a medical marvel... It's the Antioxidant Superpower.[®] POM Wonderful[®] 100% pure pomegranate juice. Unpolluted by cheap filler juices, added sugars or colorants. Backed by \$25 million in medical research. Devoted to keeping you alive and well for a good, long time!

pomwonderful.com

The Antioxidant Superpower.[®]

PJ0673_ShapeAd 08_L11031 1

12/11/08 5:40:26 PM

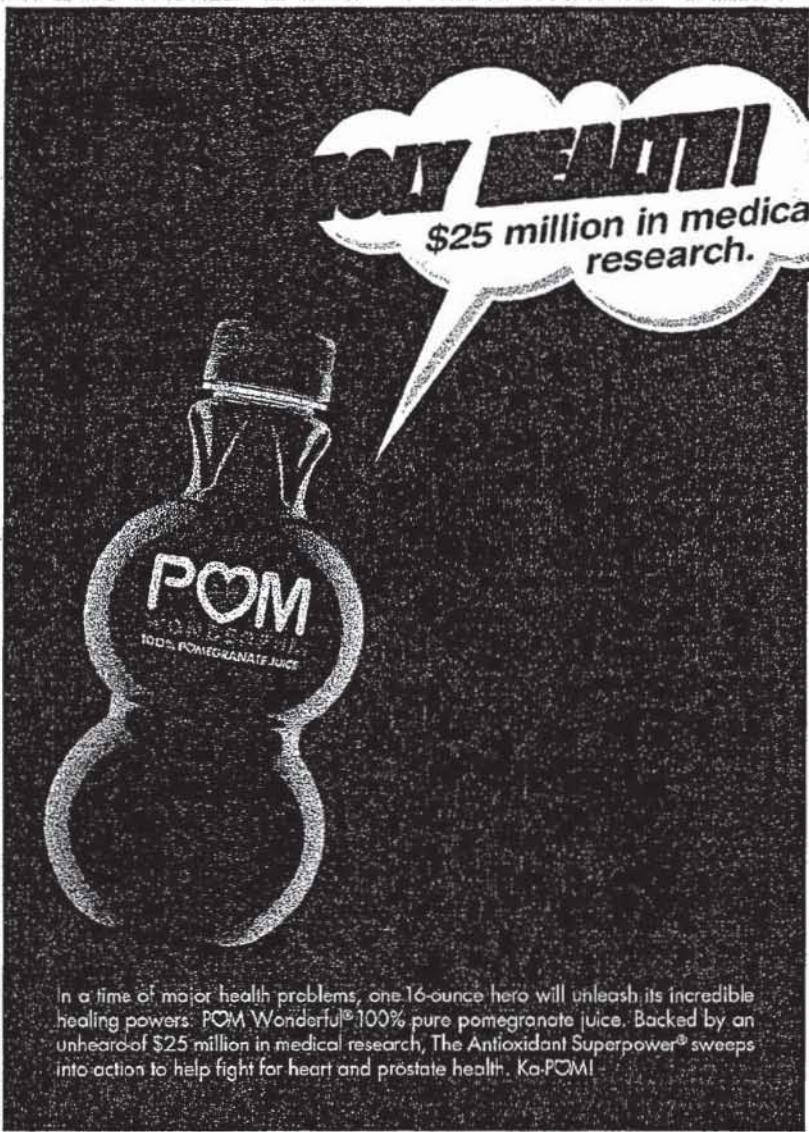
JOB NO.: PJ0673	TRIM: 7.75" x 10.5"	COLOR: 4/C PROS	DATE IN: 12-05-08
PROJECT: March '09 Shape Ad	LIVE: 7" x 9.75"	TRIM, BLEED (DO NOT PRINT)	DATE OUT: 12-11-08
SCALE: 1:1	BLEED: 8" x 10.75"	PRINTOUT SIZE: 100%	PROOF ROUND: F

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

PW02374334

TCCC-0004684

CX0286_0011



In a time of major health problems, one 16-ounce hero will unleash its incredible healing powers: POM Wonderful® 100% pure pomegranate juice. Backed by an unheard-of \$25 million in medical research, The Antioxidant Superpower® sweeps into action to help fight for heart and prostate health. Ka-POM!

pomwonderful.com

The Antioxidant Superpower.®

PJ0741_FitnesMar09_HolyHealth_F.indd 1

12/12/08 10:25:19 AM

JOB NO.: PJ0741	TRIM: 7.875" x 10.5"	COLOR: 4/C PROCESS	DATE IN: 12-10-08
PROJECT: Fitness Mag Merch 09 "Holy Health"	LIVE: 7.375" x 10"	TRIM BLEED (DO NOT PRINT)	DATE OUT: 12-12-08
SCALE: 1 : 1	BLEED: 8.125" x 10.75"	PRINTOUT SIZE: 100%	PROOF ROUND: F

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

PW02374335

TCCC-0004685

CX0286_0012

**I'm off to save
PROSTATES!**



Man by man, gland by gland. The Antioxidant Superpower® is 100% committed to defending healthy prostates. Powered by pure pomegranate juice... backed by \$25 million in vigilant medical research*... there's no telling just how far it will go to improve prostate health in the future.

*Prostate study details at http://www.pomwonderful.com/health_benefits.html

pomwonderful.com

The Antioxidant Superpower.®

PJ0679 AdvctMer09 Prost F.indd 1

12/12/08 3:15:48 PM

JOB NO.: PJ0679	TRIM: 7.875" x 10.875"	COLOR: 4/C PROCESS	DATE IN: 12-05-08
PROJECT: Mar '09 Advocate Ad	LIVE: 7.125" x 10.125"	TRIM, BLEED (DO NOT PRINT)	DATE OUT: 12-12-08
SCALE: 1:1	BLEED: 8.125" x 11.125"	PRINTOUT SIZE: 100%	PROOF ROUND: F

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

PW02374336

TCCC-0004686

CX0286_0013

Risk your health
in this economy?
NEVER!



In a time of financial distress, one 16-ounce hero has devoted itself to maintaining the world's health: POM Wonderful®, The Antioxidant Superpower®. Using the full force of its 100% pure pomegranate juice strength and \$25 million in bulletproof medical research, it will protect. And you will survive.

pomwonderful.com

The Antioxidant Superpower.®

E:\0277_MensFitnessMar09_Risk_1.indd 1		12/11/08 5:58:05 PM	
JOB NO.: P10678	TRIM: 7.75" x 10.5"	COLOR: 4/C PROS	DATE IN: 12-05-08
PROJECT: Mens Fitness Mar09 - Risk your Health	LIVE: 7" x 10"	TRIM, BLEED (DO NOT PRINT)	DATE OUT: 12-11-08
SCALE: 1:1	BLEED: 8" x 10.75"	PRINTOUT SIZE: 100%	PROOF ROUND: 1

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

PW02374337

TCCC-0004687

CX0286_0014

The Antioxidant Superpower.

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

PW02374338

TCCC-0004688

CX0286_0015

ATTACHMENT B

CASE NO. CV-08-06237 SJO (FMOx)
POM WONDERFUL LLC
VS. THE COCA-COLA COMPANY
DEFENDANT'S EXHIBIT 2330
DATE _____ IDEN.
DATE _____ EVID.
BY _____
Deputy Clerk

AO 386-A

TCCC-0005569

PX0295a15-0001

From: Nelson, Claire
Sent: Wednesday, May 27, 2009 09:54 AM
To: Kuyoomjian, Diane
Subject: FW: Report - POM Wonderful Campaign Copytest.
Attachments: POM Report_5.26.09.ppt

Diane-

It would be worthwhile to have them come in and present to the marketing team, the creative team (Kim, Sakol, Mike, Liz, Brian), consulting partners (Jeremy, Danielle, Ericka), and Paul & Karolina; do you agree? If so, I'll get it organized.

Thanks,
Claire

From: Vincent Moy [mailto:VMoy@bovitzresearchgroup.com]
Sent: Tuesday, May 26, 2009 6:02 PM
To: Nelson, Claire; Kuyoomjian, Diane
Cc: Michelle Dayton; Adrienne Portillo; Greg Bovitz; Jeremy Netka
Subject: Report -- POM Wonderful Campaign Copytest.

Dear Claire,

See attached for the full report of the POM Wonderful Campaign copytest. We understand that you presented the topline to Lynda and that POM will continue using the Super Hero campaign based on the positive results gleaned from those preliminary findings. The key points of the full report are as follows:

Executive Summary

- Both campaigns effectively communicate their intended messages about the brand and establish POM Wonderful's overall brand equity as healthy, unique and authentic.
 - The Super Hero campaign positions POM Wonderful as premium brand that is a market leader, while the Dressed Bottle campaign comes across as more witty and youthful.
 - Among the General Population, the Super Hero campaign is better able to communicate that POM Wonderful is good for prostate health, backed by medical research and 100% pure pomegranate juice.
 - Among POM Users, purchase intent is higher for the Super Hero campaign than the Dressed Bottle advertising.
- Key Subgroups:
- Age:
- Both campaigns do equally well across consumers age groups and contrary to on-going concerns, the Super Hero campaign does not alienate younger consumers.
- Gender:
- Males respond more favorably to the Super Hero ads whereas Females are more motivated by the Dressed Bottle campaign.

We'd be happy to present the results to the marketing and creative teams. I'll give you a call tomorrow to determine a date that works best for you.

Best regards,
Vince

Vincent Moy | Vice President of Insights
BovitzResearchGroup
16133 Ventura Blvd. | Ste. 820 | Encino, CA 91436
p: 818.990.8180 x 20
e: vmoy@bovitzresearchgroup.com



POM Wonderful Campaign Evaluation – Report

May 26, 2009



BovitzResearchGroup
16133 Ventura Boulevard Suite 820
Encino, CA 91436
Tel 818.990.8180 Fax 818.990.8338
www.bovitzresearchgroup.com

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

PW01031972

TCCC-0005571

PX0295a15-0003

Background & Objectives

POM Wonderful recently launched a new advertising campaign extolling the virtues of their 100% pomegranate juice. The *Super Hero* ads make explicit mention of POM's superiority over new market entrants, its specific health benefits, and the supporting medical research; the new campaign's direct claims are in stark contrast to the previous *Dressed Bottle* campaign's primary objective of building brand awareness and promoting overall healthiness. Bovitz Research Group has been asked to evaluate the relative effectiveness of the two campaigns, and their ability to broaden POM's brand equity and establish its superiority vs. the competition.

Identify ads with greatest stopping power and message recall through clutter

Evaluate different health benefit claims and their ability to differentiate POM vs. other juices

Measure the likeability, relevance and purchase interest generated by the new *Super Hero* campaign ads

Compare the brand personality created vs. established equity from *Dressed Bottle* campaign

Provide a clear understanding of the new *Super Hero* campaign's pros and cons vs. the *Dressed Bottle* campaign, including stopping power, optimal health messaging that supports POM's brand personality and distinguishes it from other brands

Bovitz Research Group



Methodology

Methodology

- BRG evaluated POM Wonderful's advertising by testing ads from the recently launched *Super Hero* campaign, as well as the long-running *Dressed Bottle* campaign. A total of 150 target consumers and 100 POM Users were recruited and exposed to each campaign.

Fielding Dates

- May 4, 2009 – May 12, 2009

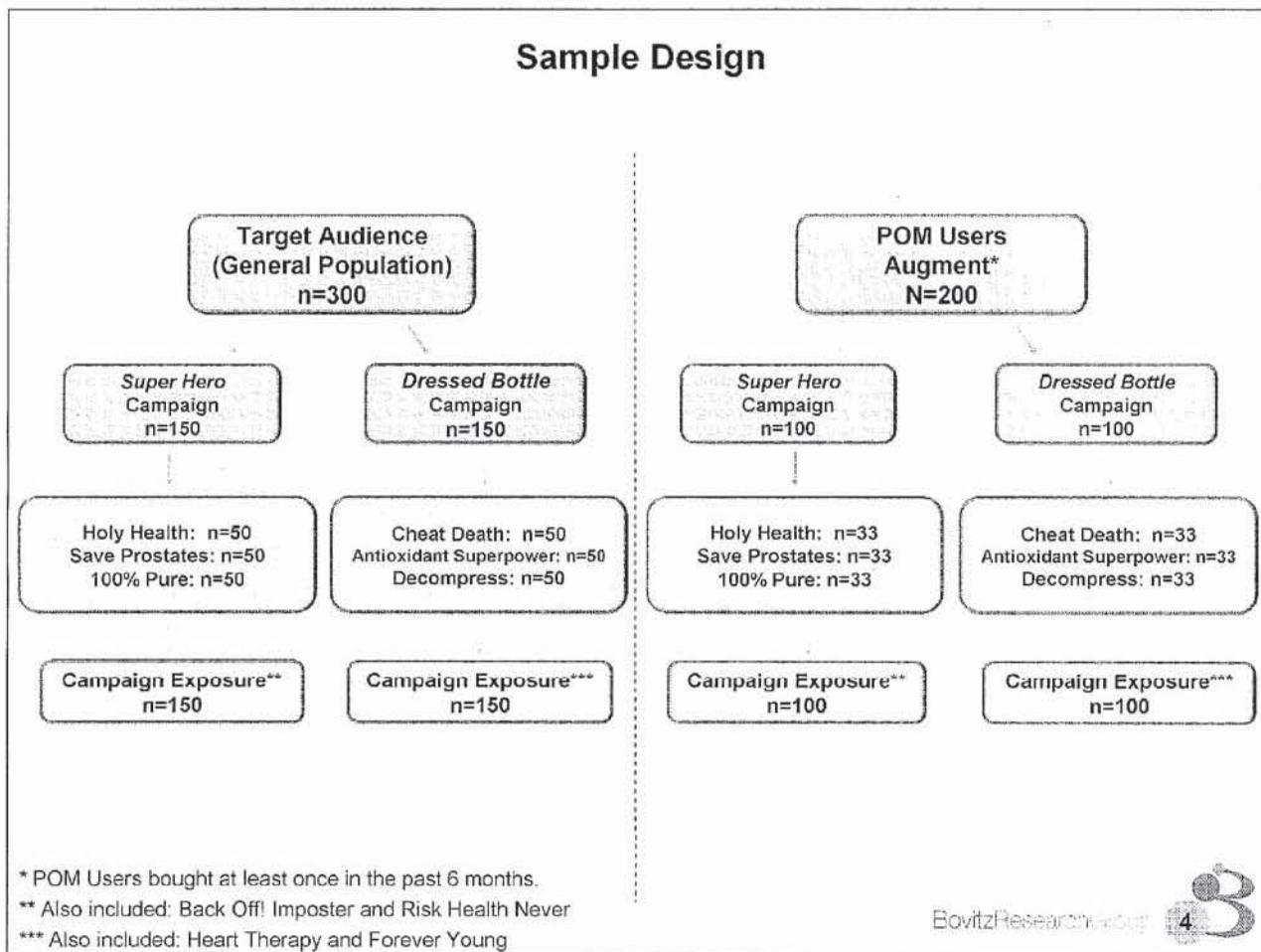
Respondent Qualifications

- 50% Male/50% Female
- 25 to 70 years old
- Minimum household income of \$75K
- Must engage in health-conscious lifestyle and/or hold attitudes toward improving their overall health

Note

- Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

Sample Design



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

PW01031975

TCCC-0005574

PX0295a15-0006

Executive Summary

- Both campaigns effectively communicate their intended messages about the brand and establishes POM Wonderful's overall brand equity as *healthy, unique and authentic*.
- The *Super Hero* campaign positions POM Wonderful as *premium* brand that is a *market leader*, while the *Dressed Bottle* campaign comes across as more *witty and youthful*.
- Among the General Population, the *Super Hero* campaign is better able to communicate that POM Wonderful is *good for prostate health, backed by medical research and 100% pure pomegranate juice*.
- Among POM Users, purchase intent is higher for the *Super Hero* campaign than the *Dressed Bottle* advertising.
- Key Subgroups:
 - Age:*
 - Both campaigns do equally well across consumers age groups and contrary to on-going concerns, the *Super Hero* campaign does not alienate younger consumers.
 - Gender:*
 - Males respond more favorably to the *Super Hero* ads whereas Females are more motivated by the *Dressed Bottle* campaign.

Key Findings

Ad Recall through Clutter

•Both campaigns are similarly effective at breaking through clutter. Although top of mind recall of POM Wonderful in both campaigns is slightly lower than some of the other brands tested, total unaided and aided recall does equally as well or outperforms those same brands.

Campaign Comprehension

- Both campaigns communicate the main idea that POM Wonderful is *healthy and contains antioxidants*.
 - Main ideas that are specific to the *Super Hero* campaign pertain to POM Wonderful's detailed health claims that it is *good for prostates* and backed by *\$25 million in medical research*.
 - The main ideas of the *Dressed Bottle* advertisements are that POM Wonderful is *good for the heart* and helps to *extend lives and keep consumers young*.

•The overall messages in both campaigns are highly relevant; that said, the messages featured in the *Dressed Bottle* campaign are seen as slightly more so.

Campaign Likeability

- Both campaigns are highly likeable for their overall presentation.
 - Key "likes" of the *Super Hero* campaign are that it is *concise, simple*, and has a *super hero/comic book* theme.
 - The *bottle*, being *clever/creative*, and *funny* are commonly mentioned "likes" of the *Dressed Bottle* campaign.
- Although the overall presentation and messages of each campaign are equally well liked, consumers prefer the *Dressed Bottle* campaign to the *Super Hero* campaign, but this differs by gender.
 - Males like the *Super Hero* campaign more than females, whereas, females prefer the *Dressed Bottle* advertisements.

Key Findings (continued)

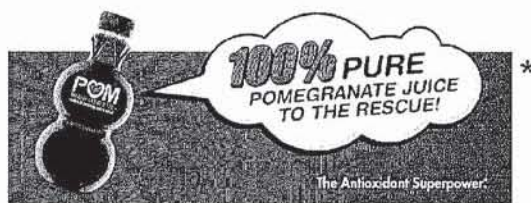
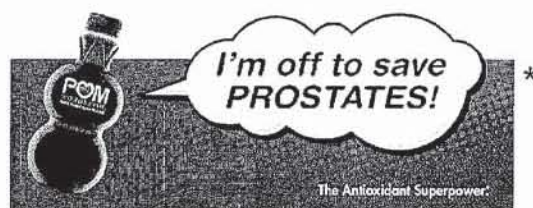
Response to Campaign

- The new advertising performs on par with the more established *Dressed Bottle* campaign on key measures such as purchase intent, overall impression of POM Wonderful and fit with the brand.
 - Males are most likely to purchase POM Wonderful after viewing the *Super Hero* ads, while Females are more influenced by the *Dressed Bottle* campaign. This may be linked to the male-specific *Save Prostates* ad and can be maximized in media planning by specifically targeting male media channels with this particular ad.
- Both campaigns effectively communicate that POM Wonderful is *healthy, unique* and *authentic* as well as their intended health benefit messages about the brand.
 - The *Super Hero* campaign outperforms the *Dressed Bottle* as being:
 - *good for prostate health*
 - *backed by medical research*
 - *100% pure pomegranate juice*
 - *better than other pomegranate juices*
 - *the original pomegranate juice*
 - The *Dressed Bottle* campaign influences consumers in a more general sense, conveying that POM Wonderful is:
 - *good for cardiovascular health*
 - *helps consumers live longer*
 - *helps consumers stay healthy*
- The *Super Hero* campaign overall, helps to establish POM Wonderful as *premium* brand that is a *market leader*, while the *Dressed Bottle* campaign comes across as more *witty* and *youthful*.

Eovitz Research Group



Super Hero Campaign Stimuli




*Ads shown in clutter

BovitzResearchGroup 


Dressed Bottle Campaign Stimuli

Cheat death.
The antioxidant power of pomegranate juice.



© 2008 POM Wonderful LLC

The Antioxidant Superpower.
The power of pomegranate juice.




© 2008 POM Wonderful LLC

Decompress.
POM Wonderful Pomegranate Juice.
The Antioxidant Superpower.




© 2008 POM Wonderful LLC

Heart therapy.
POM Wonderful Pomegranate Juice.
The Antioxidant Superpower.



© 2008 POM Wonderful LLC

Forever young.
The antioxidant power of pomegranate juice.



© 2008 POM Wonderful LLC

*Ads shown in clutter

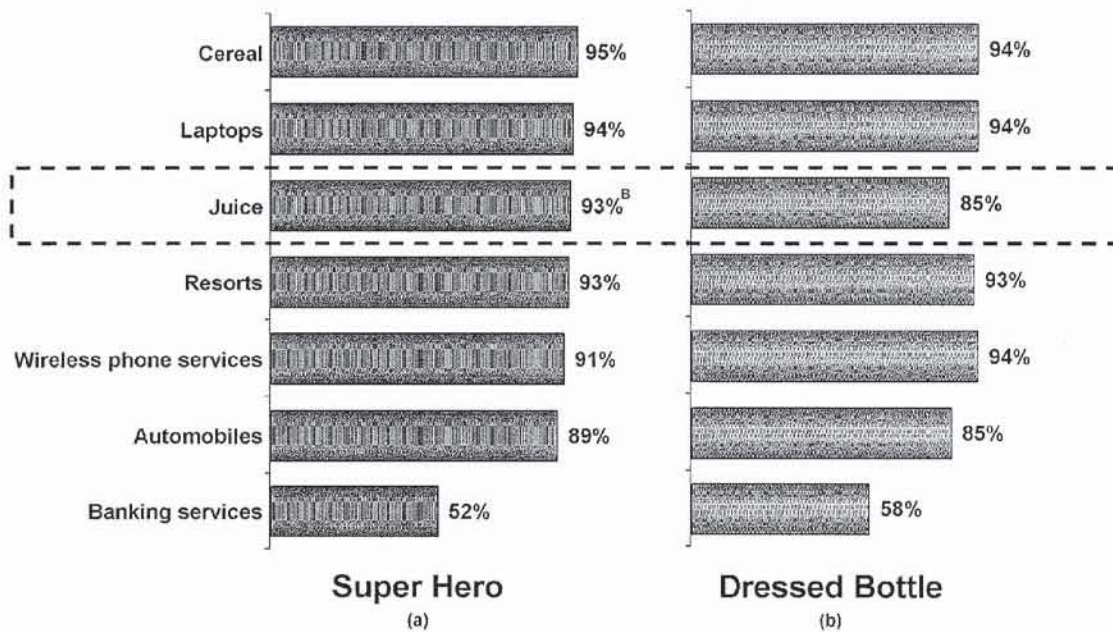
Bovitz Research Group 9

General Population

Ad Recall Through Clutter

Aided Product Recall

- The *Super Hero* campaign's focus on the juice breaks through clutter better, relative to the *Dressed Bottle*'s clever visual emphasis on the container's shape.



Base: General Population

Q3. Which of the following types of products do you remember seeing in the group of ads? Please select all the products that you recall.

Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

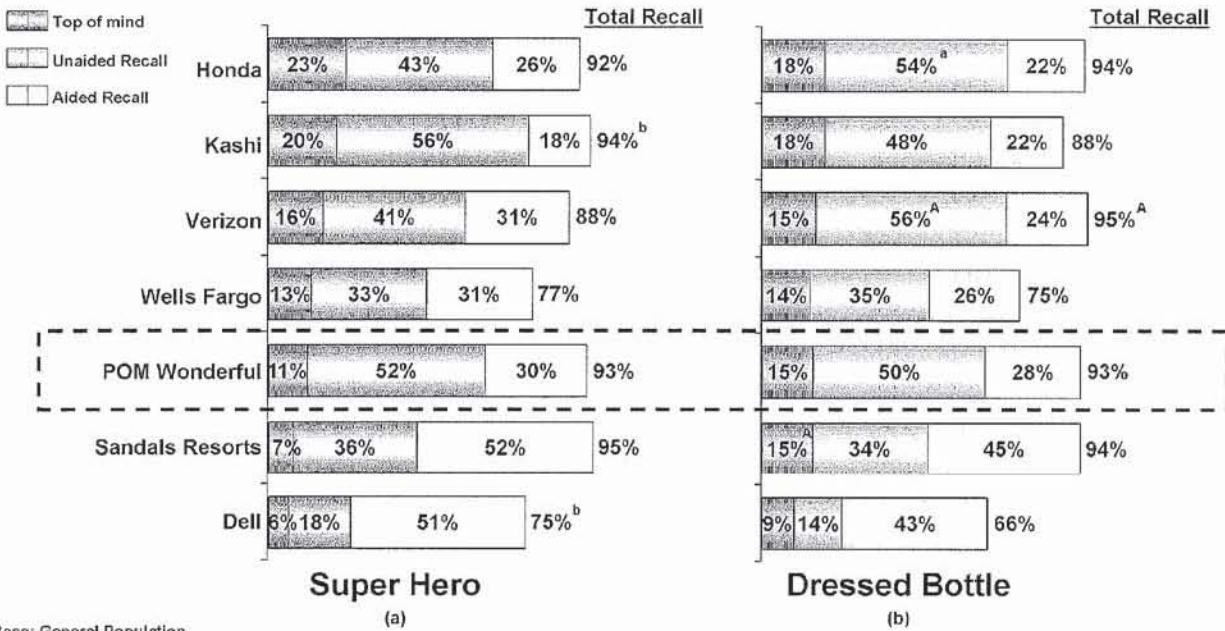
* POM ads were always shown in the forth, most disadvantaged, position.

BovitzResearchGroup



Clutter Breakthrough (Brand Recall)

- Both campaigns break through clutter at similar levels, exceeding 90% total mentions.
- Total recall is on par with the other ads in clutter, although the top of mind recall of POM Wonderful is modest relative to the other brands.



Base: General Population

Q1. First, please type in the space below as much information as you can recall about the ad that comes to mind first among the ones you just saw.

Q2. Next, please type in the spaces below as much information as you can recall about each of the other ads you just saw.

Q4. Which of the following brands do you remember seeing in the group of ads? Please select all the brands that you recall.

Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

Bovitz Research Group 13

Campaign Comprehension

Main Ideas

- The *Super Hero* campaign effectively conveys POM Wonderful's more general benefits like being *healthy* and containing *antioxidants*, as well as specific claims that it is *good for prostates* and backed by *\$25 million in research*.

	Super Hero Campaign	Individual Ads		
		Holy Health (a)	Save Prostates (b)	100% Pure (c)
<u>Healthy/health benefits (net)</u>	92%	67%	86% ^A	86% ^A
<i>Healthy/health benefits/juice is good for you</i>	78%	57% ^B	31%	72% ^B
<i>Antioxidants</i>	22%	12%	12%	14%
<i>Good for prostates</i>	13%	-	43% ^{AC}	-
<i>Natural/100% natural/no additives/pure juice</i>	5%	-	4%	2%
<u>Slogan/message (net)</u>	17%	22% ^{BC}	-	6% ^b
<i>\$25 million spent on research/research based</i>	11%	22% ^{BC}	-	-
<i>The best/great product/better than others</i>	6%	-	2%	2%
<i>Super power/supercharged/powerful</i>	5%	-	-	6% ^{ab}

Base: General Population

Q9. Other than trying to get you to buy the product, what do you think is the main idea these ads are trying to get across to you?

Q5. You mentioned that you recalled seeing an ad for [INSERT 1]. Other than trying to get you to buy the product, what do you think is the main idea that the [INSERT 2] ad is trying to get across to you?

Q6. Other than trying to get you to buy the product, what do you think is the main idea that this ad is trying to get across to you?

Dashes indicate a percentage less than 1%.

Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

Bovitz Research



Main Ideas

- The primary idea that consumers take away from the *Dressed Bottle* campaign is that POM Wonderful is *healthy*.
- Other notable main ideas of the campaign are that it contains *antioxidants*, *is good for the heart* and helps to *extend lives and youth*.

	Dressed Bottle Campaign	Individual Ads		
		Cheat Death (a)	Antioxidant Superpower (b)	Decompress (c)
Healthy/health benefits (net)	90%	76%	69%	88% ^B
<i>Healthy/health benefits/juice is good for you</i>	64%	56%	41%	64% ^B
<i>Antioxidants</i>	23%	24%	18%	16%
<i>Good for your heart</i>	16%	2%	6%	8%
<i>Live longer/extends your life</i>	13%	14% ^{BC}	-	-
<i>Stay young/keeps you young</i>	11%	-	-	-
<i>Helps/lowers blood pressure</i>	5%	-	-	14% ^{AB}
<i>Calming/relieves stress/relaxing</i>	4%	-	-	6% ^{BD}
<i>Strength/keeps you strong</i>	2%	-	8% ^A	2%
Super power/supercharged/powerful	6%	2%	22% ^{AC}	-
New/different/unique	-	6% ^C	2%	-

Base: General Population

Q9. Other than trying to get you to buy the product, what do you think is the main idea these ads are trying to get across to you?

Q5. You mentioned that you recalled seeing an ad for [INSERT 1]. Other than trying to get you to buy the product, what do you think is the main idea that the [INSERT 2] ad is trying to get across to you?

Q6. Other than trying to get you to buy the product, what do you think is the main idea that this ad is trying to get across to you?

Dashes indicate a percentage less than 1%.

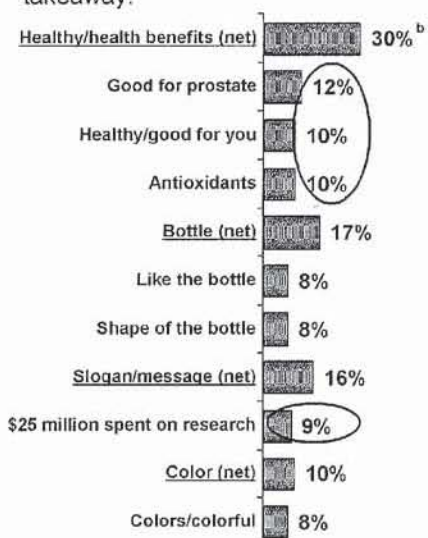
Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

BovitzResearchGroup



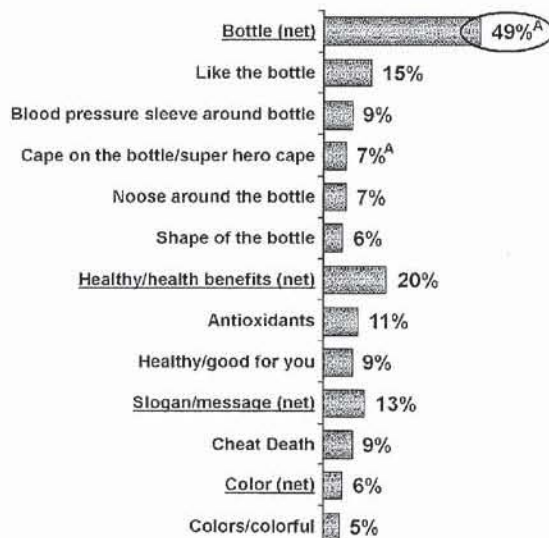
Campaign Message Recall

- For both campaigns, key mentions are that POM Wonderful is *healthy* and contains *antioxidants*.
- Content specific to the *Super Hero* campaign relates to its health benefit messages as *good for prostates* and backed by *medical research*. In contrast, the bottle itself is the primary focus of the *Dressed Bottle* takeaway.



Super Hero

(a)



Dressed Bottle

(b)

Base: General Population – Those who Recalled Seeing Juice or POM Wonderful (SH: n=103, DB: n=102)

Q1. First, please type in the space below as much information as you can recall about the ad that comes to mind first among the ones you just saw.

Q2. Next, please type in the spaces below as much information as you can recall about each of the other ads you just saw.

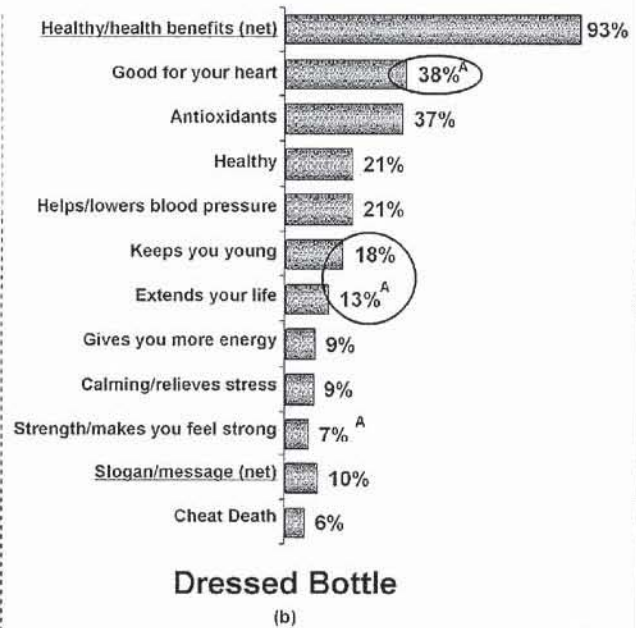
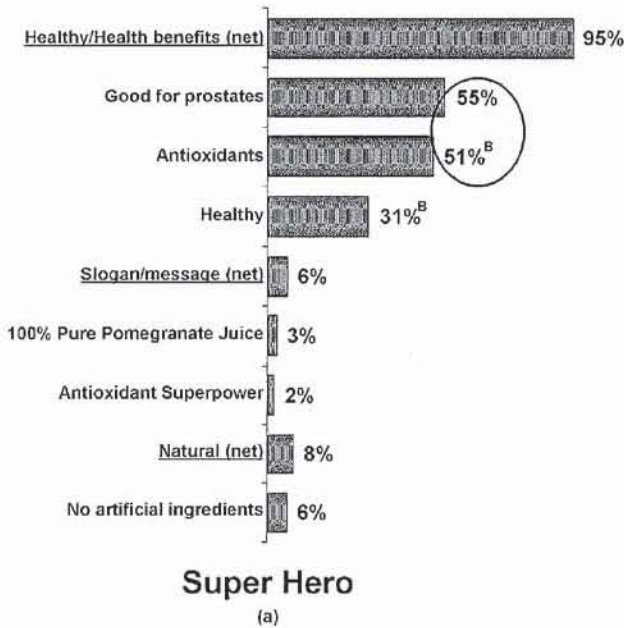
Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

Eovitz Research Group



Benefits of Drinking POM Wonderful

- The *Super Hero* advertising conveys dual messages to over half of its audience: *good for prostates* and contains *antioxidants*.
- The *Dressed Bottle*'s benefits are less focused and specific: *good for your heart*, and helping consumers to *stay youthful* and *live longer*.



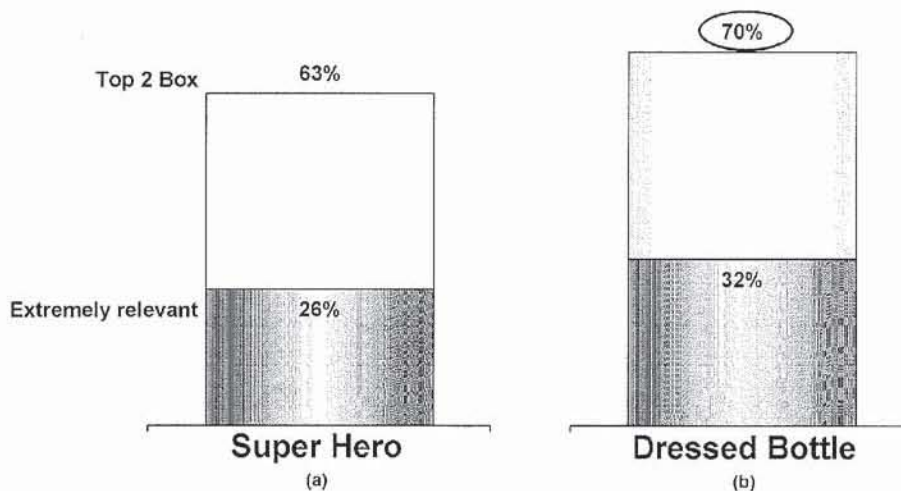
Base: General Population

Q10. Based on the ads you just saw, what are the specific benefits, if any, of drinking POM Wonderful?
 Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

BovitzResearchGroup 18

Message Relevance

- The *Super Hero* campaign's message is highly meaningful to the majority of viewers, but *Dressed Bottle's* broad-based general health claims are naturally more inclusive.



Base: General Population

Q11. How relevant are the messages in these ads to you?

Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

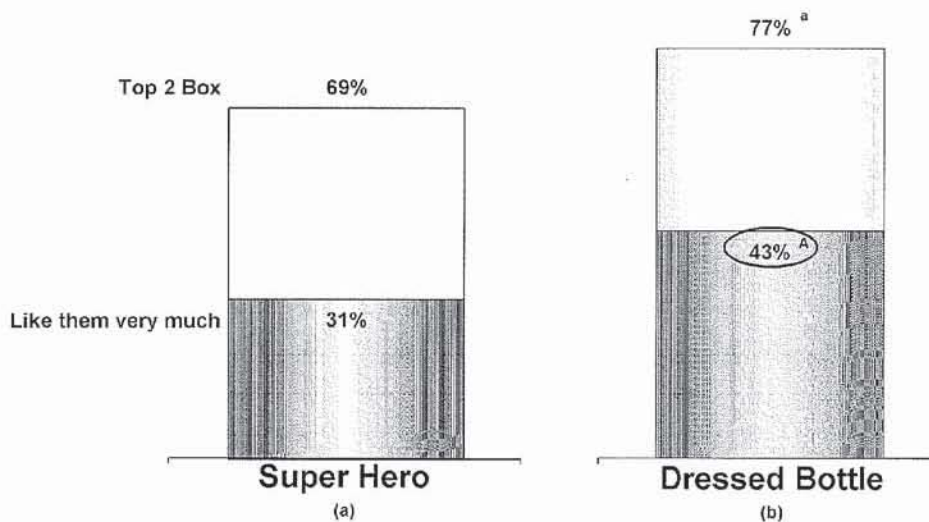
Eovitz Research



Campaign Likeability

Likeability

- Overall, the *Dressed Bottle* campaign is better liked than the *Super Hero* ads, although viewer reactions are largely favorable to both campaigns.



Base: General Population

Q12. Overall, how much do you like or dislike these ads?

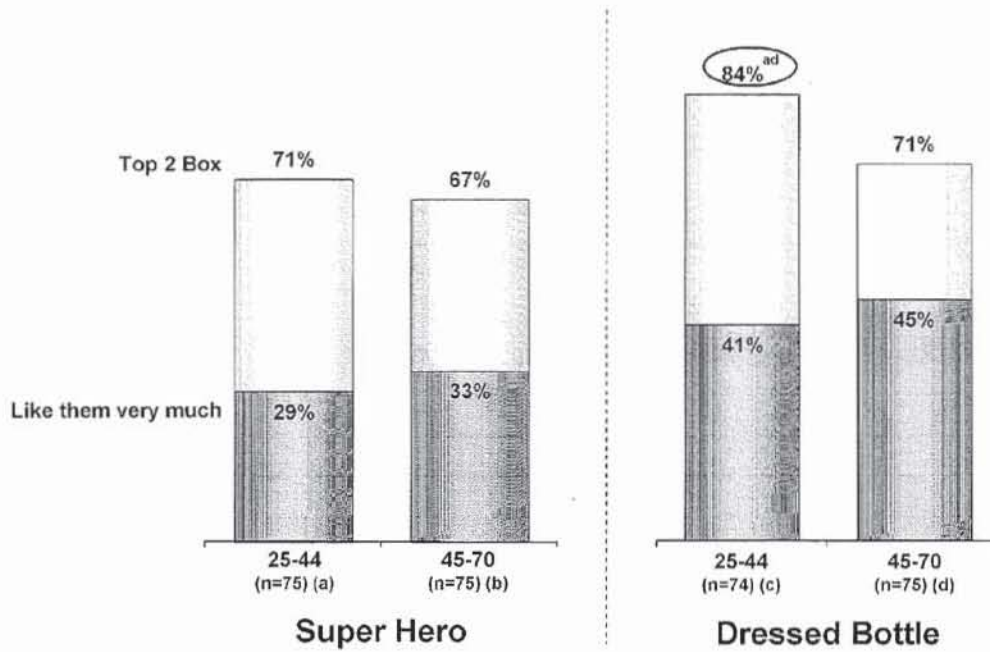
Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

Eovitz Research Group



Likeability – by Age

- The *Super Hero* campaign is equally well-liked across age groups.
- Younger consumers like the *Dressed Bottle* advertising more than their older counterparts on a top 2 box level.



Base: General Population

Q12. Overall, how much do you like or dislike these ads?

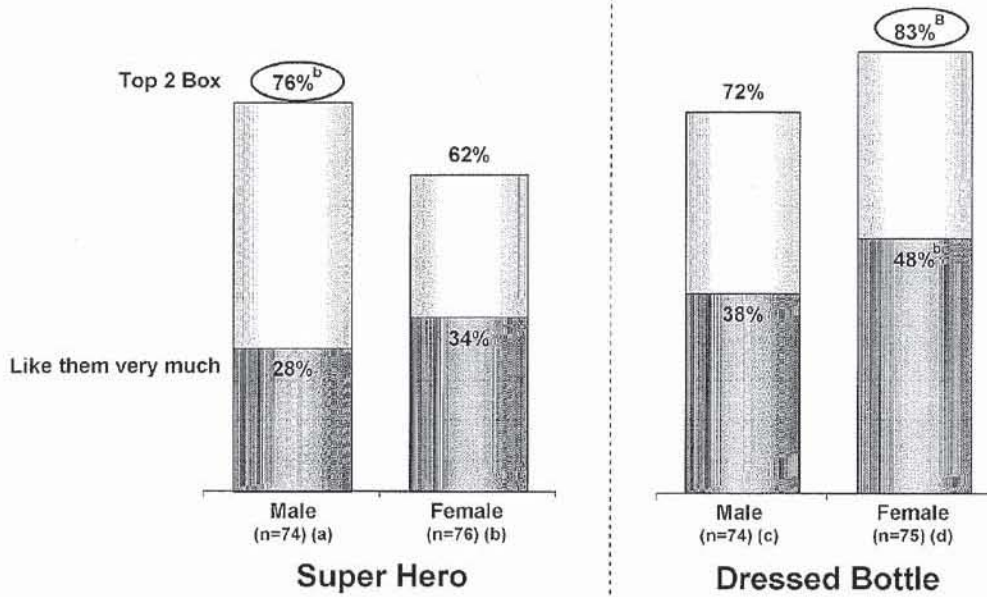
Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

EovitzResearchGroup



Likeability – by Gender


- Males like the ads featured in the *Super Hero* campaign significantly more than Females.
- *Dressed Bottle's* campaign likeability is stronger among Females than *Super Hero's*, and is directionally stronger than their Male counterparts.



Base: General Population

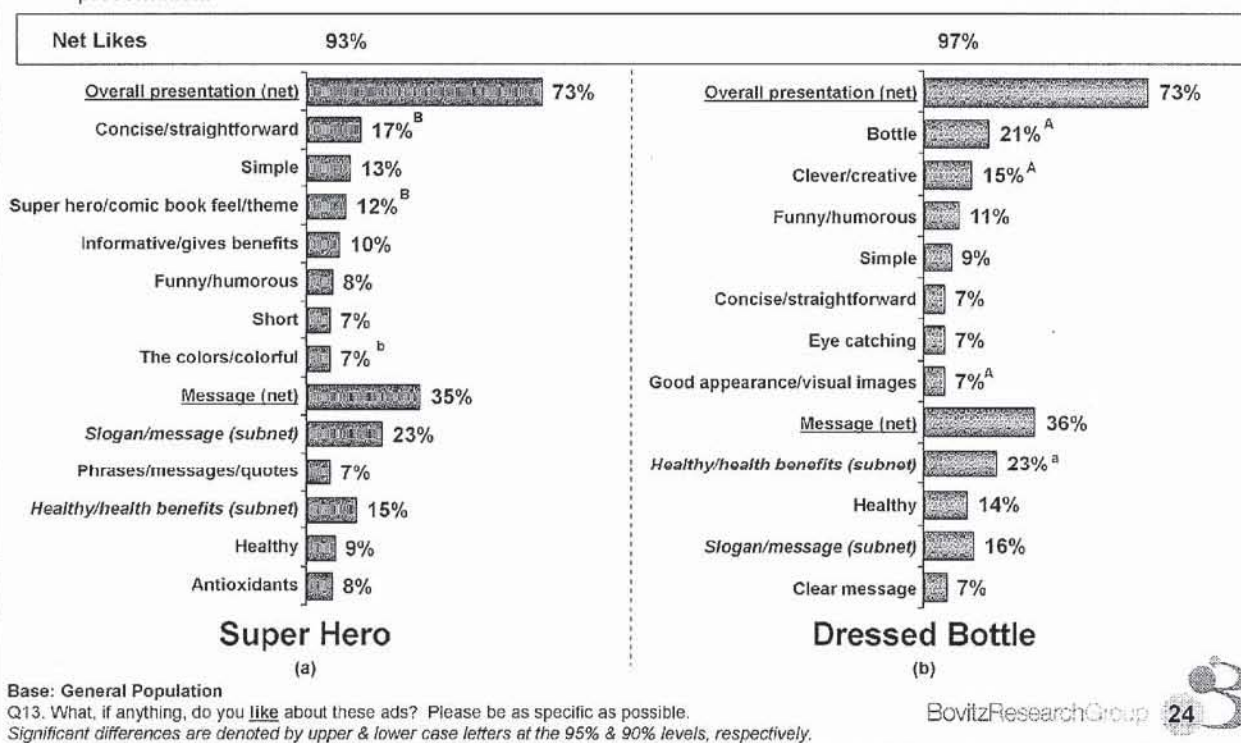
Q12. Overall, how much do you like or dislike these ads?

Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

Bovitz Research Group  23

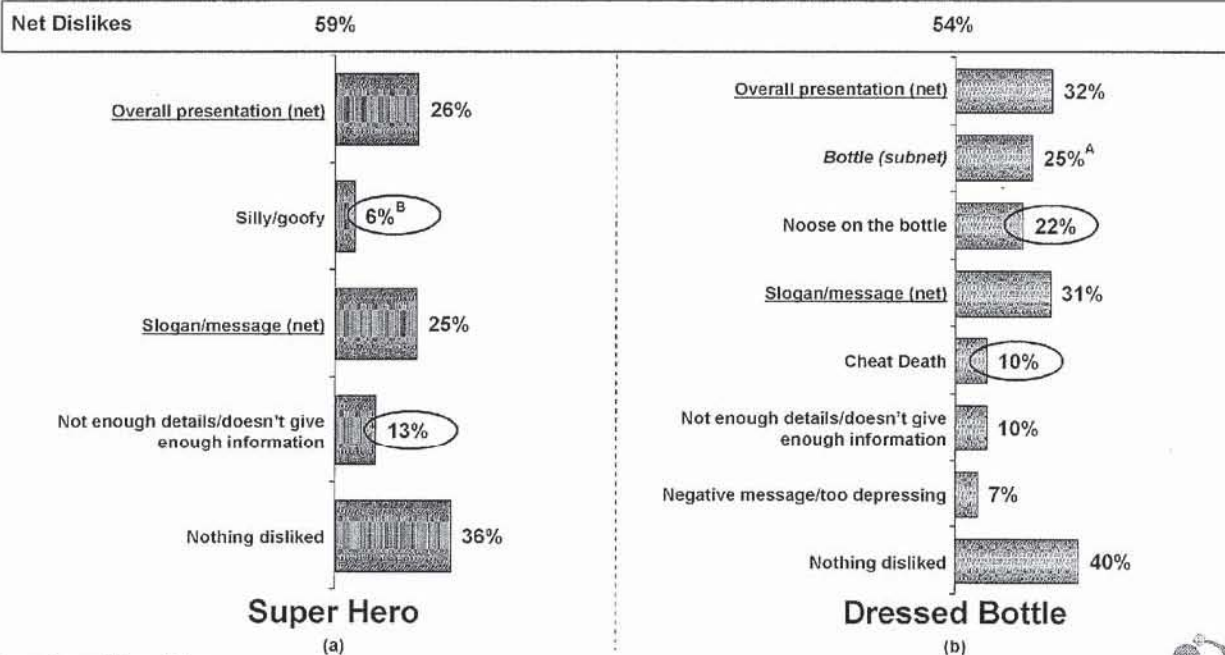
Campaign Likes

- The overall presentation and message are equally well liked for both campaigns.
- *Conciseness, simplicity* and the *super hero/comic book theme* are commonly mentioned "likes" for the *Super Hero* campaign. Whereas, the *Dressed Bottle* ads are liked for the bottle's role in the *clever, funny, and simple* presentation.



Campaign Dislikes

- Although some *Super Hero* consumers mentioned elements of the campaign that they disliked, these comments actually reflect an expression of interest in learning more about POM Wonderful. Remarks that the ads are *silly/goofy* and not informative indicate curiosity more than criticism.
- The visually arresting *noose on the bottle* and the *Cheat Death* slogan are the most common "dislikes" of the *Dressed Bottle* advertising.



Base: General Population

Q14. What, if anything, do you **dislike** about these ads? Please be as specific as possible.

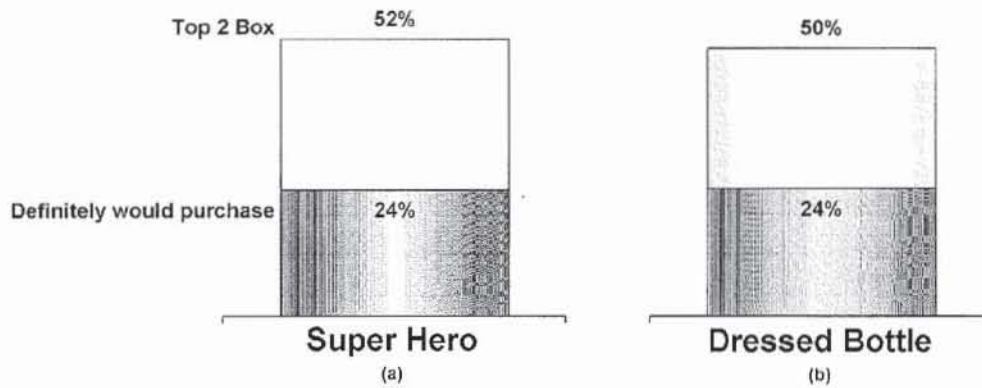
Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

Eovitz Research Group 25

Response to Campaign

Purchase Intent

- Purchase intent for the *Super Hero* ads is on par with the well-established *Dressed Bottle* campaign.



Base: General Population

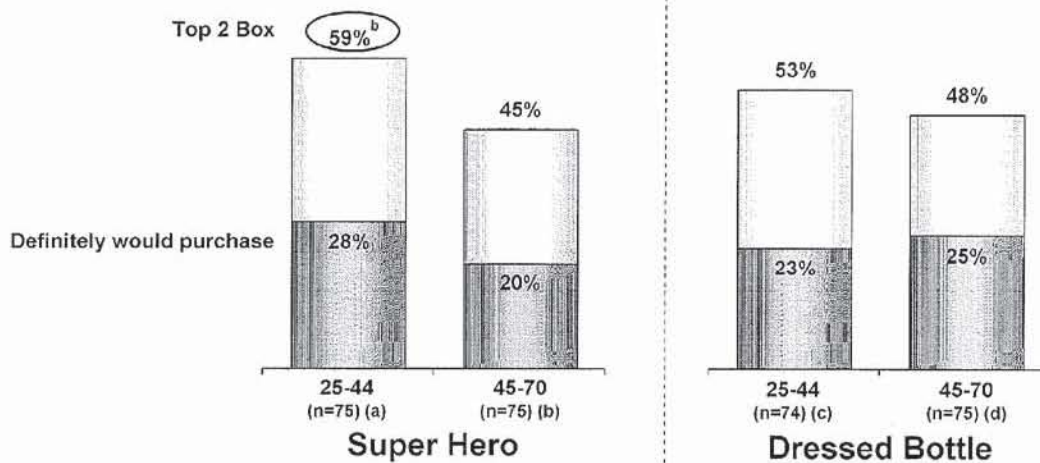
Q7. Based on the ads you just saw, how likely are you to purchase POM Wonderful the next time you shop for juice? Evoitz Research Group



Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

Purchase Intent – by Age

- Consumers ages 25-44 express higher purchase intent of POM Wonderful after viewing the *Super Hero* ads vs. their older counterparts. There is no evidence that the older-skewing prostate message is off-putting to younger consumers.
- POM Wonderful purchase intent is similar across age groups who saw the *Dressed Bottle* campaign.



Base: General Population

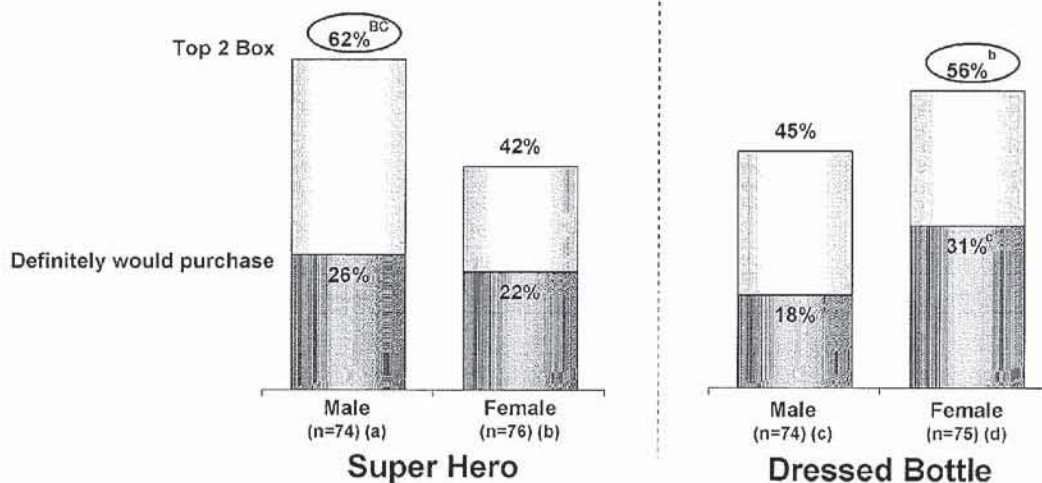
Q7. Based on the ads you just saw, how likely are you to purchase POM Wonderful the next time you shop for juice? BovitzResearchGroup



Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

Purchase Intent – by Gender

- *Super Hero* Males are more likely to purchase POM Wonderful than Females who saw that campaign, as well as outperforming *Dressed Bottle* Males.
- *Dressed Bottle* Females show higher purchase in POM Wonderful than their Males counterparts.



Base: General Population

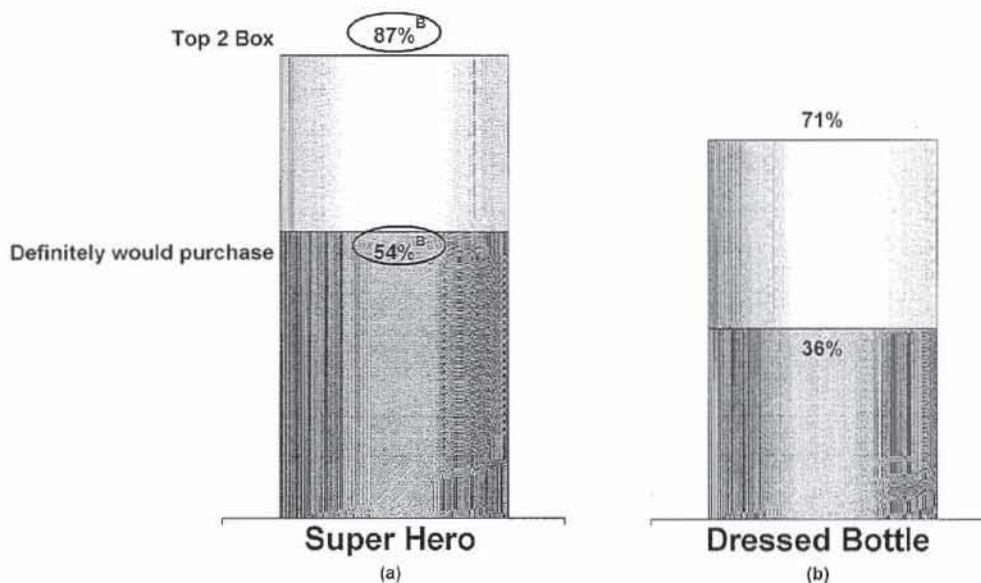
Q7. Based on the ads you just saw, how likely are you to purchase POM Wonderful the next time you shop for juice? Eovitz Research Group

Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.



Purchase Intent – POM Users

- Among current POM Users, the *Super Hero* campaign generates stronger purchase intent than the *Dressed Bottle* does.



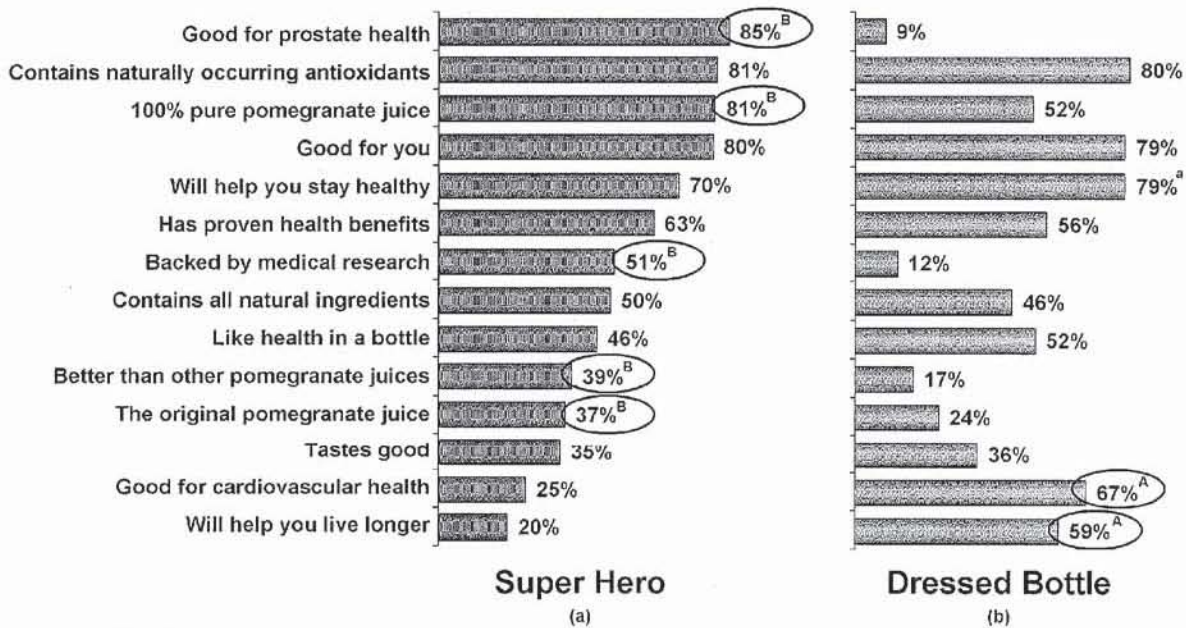
Base: POM Users

Q7. Based on the ads you just saw, how likely are you to purchase POM Wonderful the next time you shop for juice? BovitzResearchGroup 30

Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

POM Wonderful Brand Imagery

- The *Super Hero* campaign effectively communicates POM Wonderful's specific health benefits and superiority over other pomegranate juices.
- The *Dressed Bottle* advertising impacts POM Wonderful's brand imagery in a more general way, as being good for cardiovascular health and living longer.



Base: General Population

Q16. 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.

Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

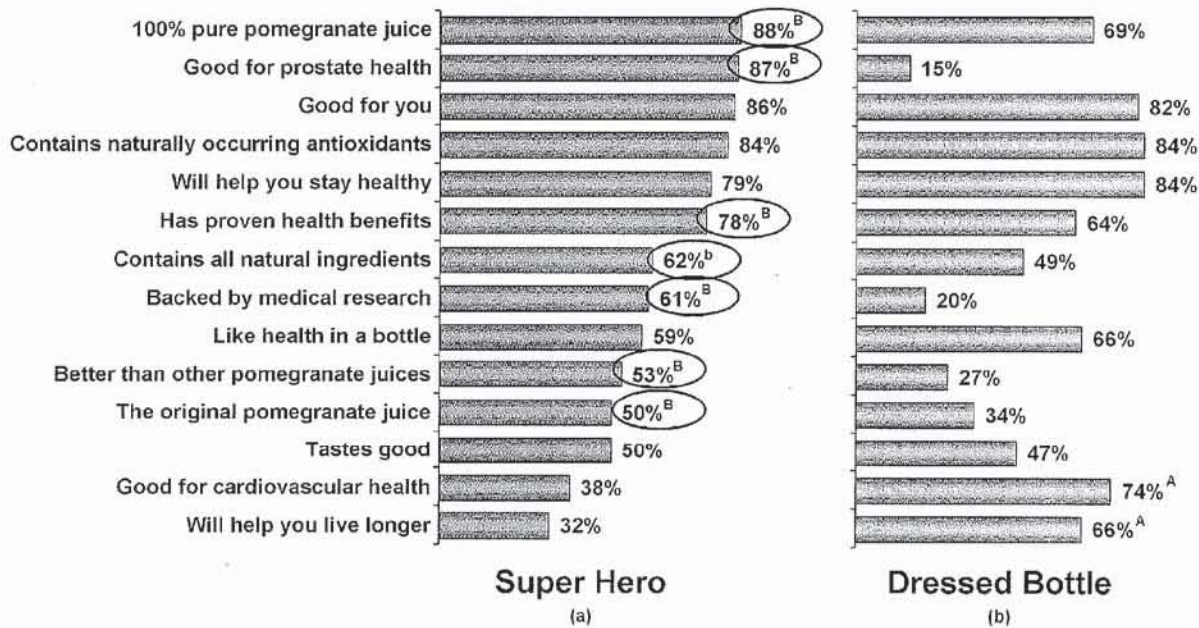
Eovitz Research



31

POM Wonderful Brand Imagery – POM Users

- The *Super Hero* advertising creates differentiated brand imagery among POM Users vs. the *Dressed Bottle* ads. Impressions of POM Wonderful's *proven health benefits, all natural ingredients* and superiority over other brands are all higher for the new campaign.



Base: POM Users

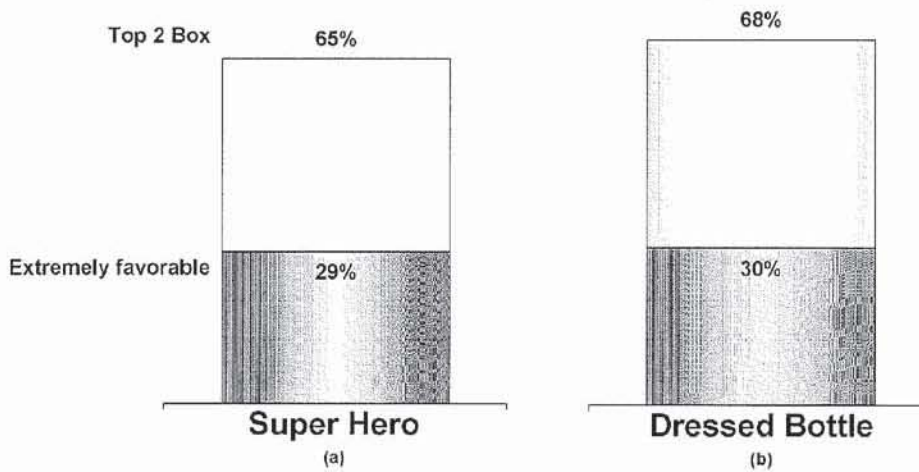
Q16. Based on the ads you just saw, which of the following do you think are true about POM Wonderful? Please select as many or as few as you feel apply.

Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

BovitzResearchGroup 32

Overall Impression of POM Wonderful

- The impression of POM Wonderful is equally favorable, regardless of the campaign that was seen.



Base: General Population

Q8. Based on the ads you just saw, please indicate your overall impression of POM Wonderful, regardless of whether or not you have ever used their products.

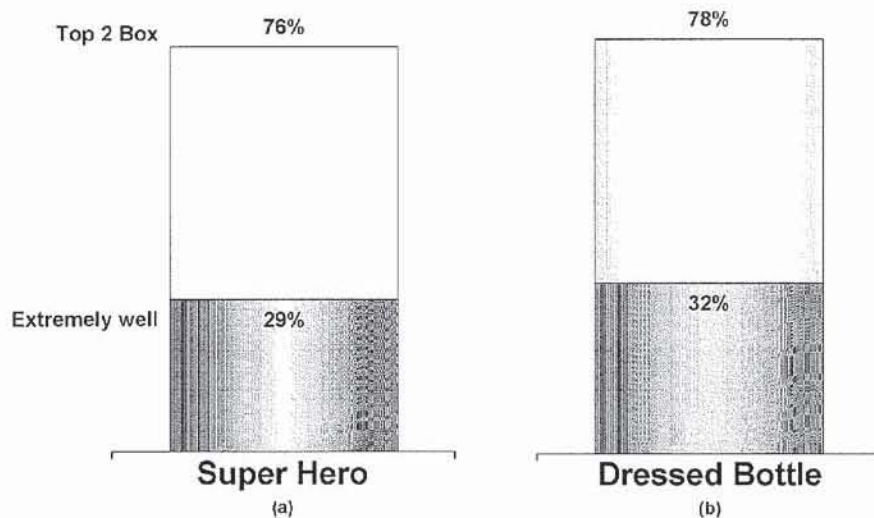
Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

Bovitz Research Group



Fit with the POM Wonderful Brand

- Both campaigns are perceived as a good fit with the POM Wonderful brand, with 3 out of 4 consumers feeling they fit *extremely* or *very well*.



Base: General Population

Q17. Overall, how well do you think these ads fit with your perception of POM Wonderful?

Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

BovitzResearchGroup

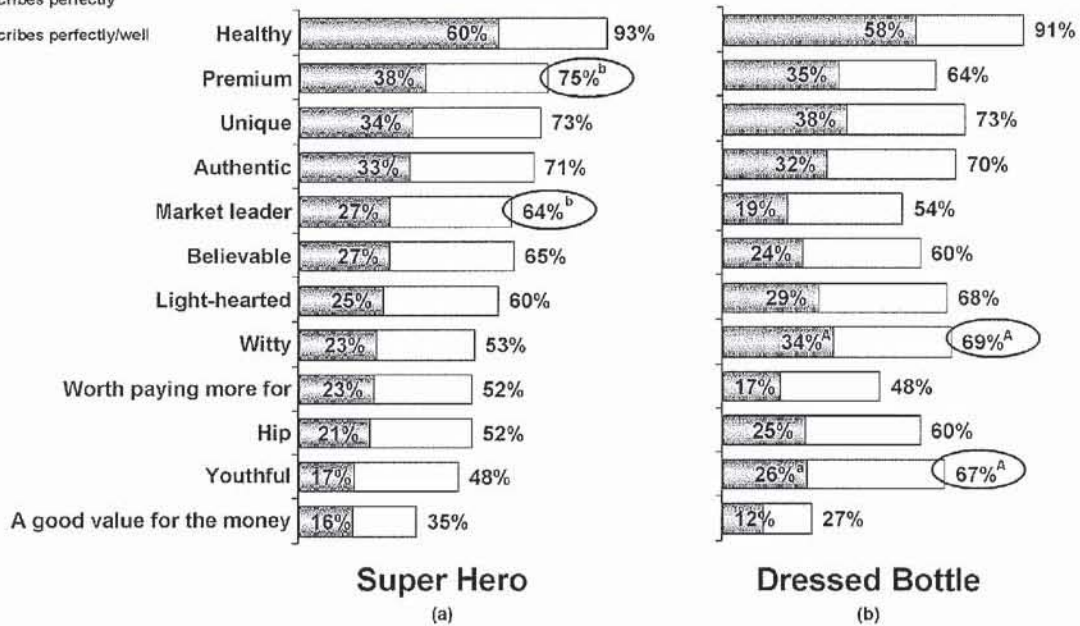


POM Wonderful Brand Personality

- The *Super Hero* ads do a good job of achieving POM Wonderful's desired *premium* and *market leader* positioning, while the *Dressed Bottle* continues to position POM Wonderful as a *witty* and *youthful* brand.
- Both campaigns convey POM Wonderful's *healthy*, *unique* and *authentic* brand equities.

 Describes perfectly

 Describes perfectly/well



Base: General Population

Q18. Based on the ads you just saw, please indicate the extent to which each of the following statements describes POM Wonderful.

Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

Bovitz Research Group



Demographic Profile Table

- The *Super Hero* campaign is more compelling to Males.
- Besides this skew, both campaigns are equally motivating to different demographic groups.

	Super Hero	Dressed Bottle
	Definitely/Probably would purchase (n=78) (a)	Definitely/Probably would purchase (n=75) (b)
Male/Female	59% ^b /41%	44%/56% ^a
25-44	56%	52%
45-70	44%	48%
Avg. Age	44.6	44.8
Married	76%	79%
Avg. # in HH	3.10	2.89
Avg. # of Children in HH	1.02	0.79
Caucasian/White	79%	84%
Asian-American	18% ^b	8%
Spanish, Hispanic or Latino	4%	7%
African-American/Black	4%	3%
Other	1%	2%

Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

Demographic Profile Table

	Super Hero	Dressed Bottle
	Definitely/Probably would purchase (n=78) (a)	Definitely/Probably would purchase (n=75) (c)
High School Graduate or Less	0%	4%
Some College	27%	17%
College Grad +	72%	76%
Employed / Full or Part Time	87%	91%
Occupation Type		
Managerial and professional	71%	74%
Service	9%	4%
Sales and office	13%	16%
Construction/maintenance	1%	3%
Production/transportation	6%	3%
\$75K > \$100K	40%	44%
\$100K > \$150K	38%	37%
\$150K > \$200K	18%	15%
\$200K +	4%	4%
Avg. Income	\$122.9K	\$119.8K

Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

POM Users Appendix



BovitzResearchGroup 38 

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

PW01032009

TCCC-0005608

PX0295a15-0040

Ad Recall Through Clutter

Bovitz Research Group



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

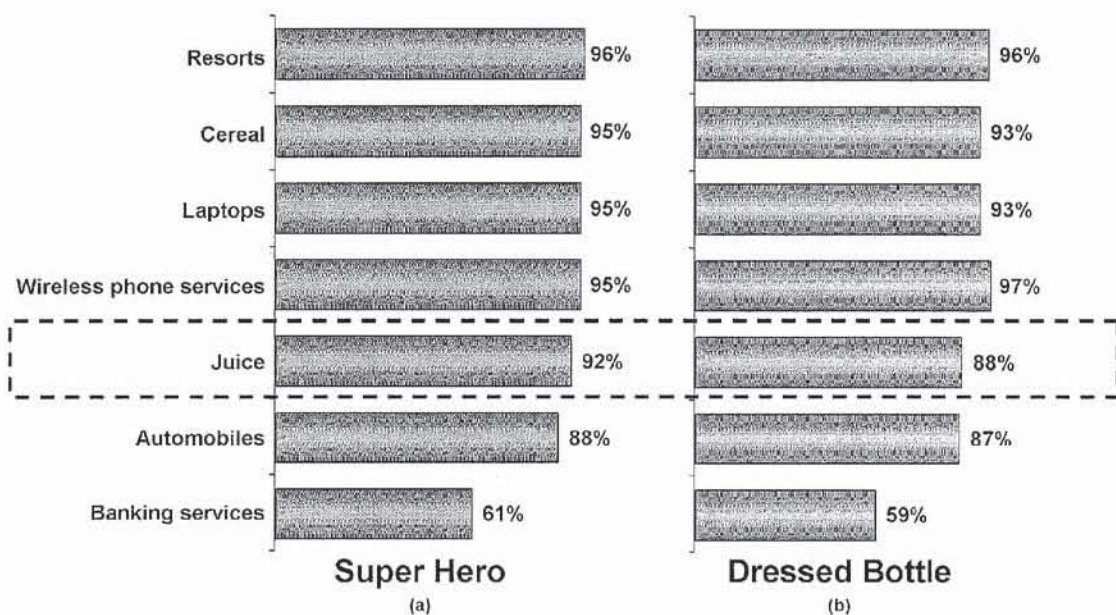
PW01032010

TCCC-0005609

PX0295a15-0041

Aided Product Recall

- Similar to the General Market, the *Super Hero* campaign's focus on juice breaks through clutter better, relative to the *Dressed Bottle*'s visual emphasis on the container's shape.



Base: POM Users

Q3. Which of the following types of products do you remember seeing in the group of ads? Please select all the products that you recall.

Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

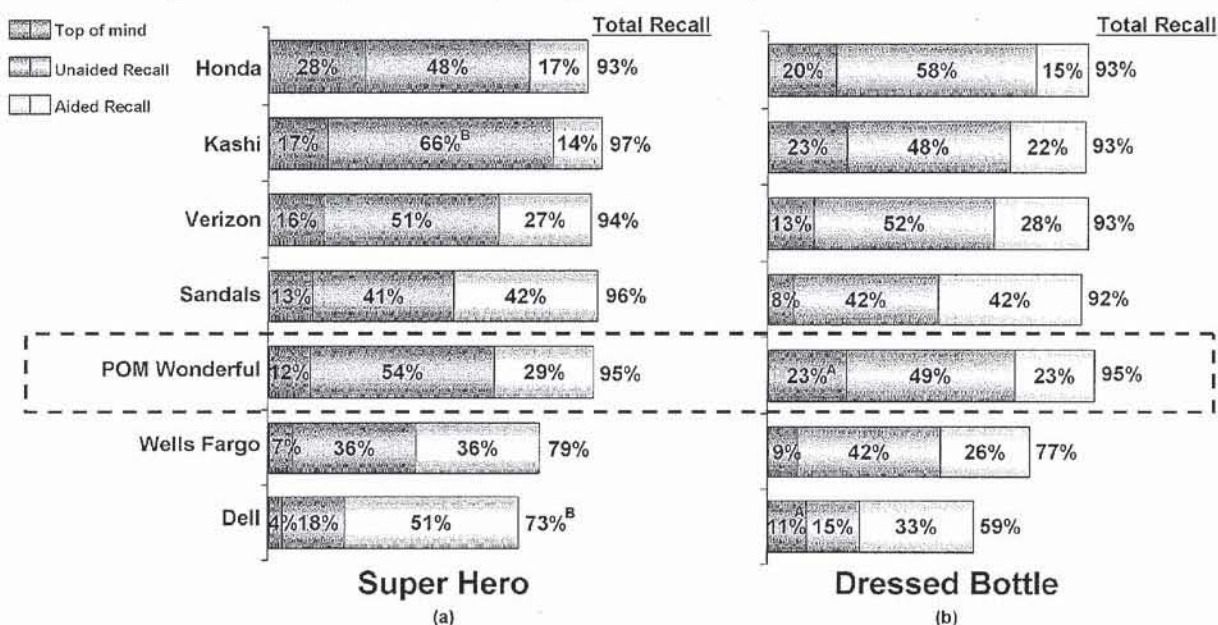
BovitzResearchGroup



Clutter Breakthrough (Brand Recall)



- Total recall of POM Wonderful is equal for both campaigns. However, the *Dressed Bottle* advertising does a better job at breaking through clutter on a top of mind level.



Base: POM Users

Q1. First, please type in the space below as much information as you can recall about the ad that comes to mind first among the ones you just saw.

Q2. Next, please type in the spaces below as much information as you can recall about each of the other ads you just saw.

Q4. Which of the following brands do you remember seeing in the group of ads? Please select all the brands that you recall.

Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

Bovitz Research Group 41



Campaign Comprehension

Main Ideas



- The idea that POM Wonderful is *healthy and good for you* is the primary message taken away from the *Super Hero* campaign by current POM Users.

	Super Hero Campaign	Individual Ads		
		Holy Health (a)	Save Prostates (b)	100% Pure (c)
<u>Healthy/health benefits (net)</u>	87%	57%	90% ^{AC}	67%
<i>Healthy/health benefits/juice is good for you</i>	75%	46%	48%	53%
<i>Antioxidants</i>	18%	9%	28% ^{AC}	6%
<i>Saves/helps/good for prostate</i>	8%	-	48% ^{AC}	-
<i>Natural/100% natural/no additives/pure juice</i>	4%	3%	-	11% ^B
<i>Good for your heart</i>	-	3%	-	6%
<u>Slogan/message (net)</u>	19%	34% ^{BC}	-	8%
<i>\$25 million spent on research/research based</i>	7%	31% ^{BC}	-	-
<i>100% pure pomegranate juice</i>	6%	-	-	6%
<i>Super power/supercharged/powerful</i>	7%	-	-	3%
<i>Its pomegranate juice/made from pomegranates</i>	1%	6%	3%	-
<i>Tastes good</i>	-	6%	7%	6%

Base: POM Users

Q9. Other than trying to get you to buy the product, what do you think is the main idea these ads are trying to get across to you?

Q5. You mentioned that you recalled seeing an ad for [INSERT 1]. Other than trying to get you to buy the product, what do you think is the main idea that the [INSERT 2] ad is trying to get across to you?

Q6. Other than trying to get you to buy the product, what do you think is the main idea that this ad is trying to get across to you?

Dashes indicate a percentage less than 1%.

Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

Bovitz Research



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

PW01032014

TCCC-0005613

PX0295a15-0045

Main Ideas

- Among POM Users, the main idea taken away from the *Dressed Bottle* campaign is that it is *healthy*. Other main idea mentions are that it contains *antioxidants*, and is *good for your heart*.



	Dressed Bottle Campaign	Individual Ads		
		Cheat Death (a)	Antioxidant Superpower (b)	Decompress (c)
<u>Healthy/health benefits (net)</u>	92%	81%	71%	90% ^b
<i>Healthy/health benefits/juice is good for you</i>	72%	68%	53%	73% ^b
<i>Antioxidants</i>	30%	19%	21%	20%
<i>Good for your heart</i>	18%	3%	-	3%
<i>Live longer/extends your life</i>	13%	14% ^{BC}	-	-
<i>Stay young/keeps you young</i>	7%	-	-	-
<i>Helps/lowers blood pressure</i>	3%	-	-	17% ^{AB}
<i>Calming/relieves stress/relaxing</i>	3%	-	-	13% ^{AB}
<i>Natural/100% natural/no additives/pure juice</i>	1%	-	-	7% ^b
<u>Slogan/message (net)</u>	8%	3%	-	-
<i>Super power/supercharged/powerful</i>	8%	-	16% ^{AC}	-

Base: POM Users

Q9. Other than trying to get you to buy the product, what do you think is the main idea these ads are trying to get across to you?

Q5. You mentioned that you recalled seeing an ad for [INSERT 1]. Other than trying to get you to buy the product, what do you think is the main idea that the [INSERT 2] ad is trying to get across to you?

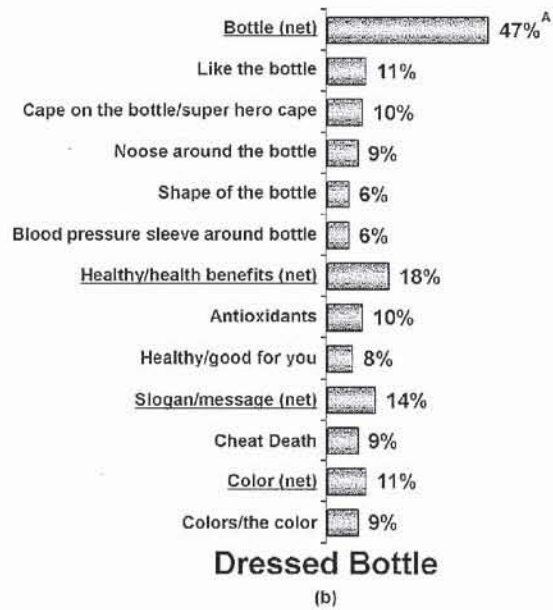
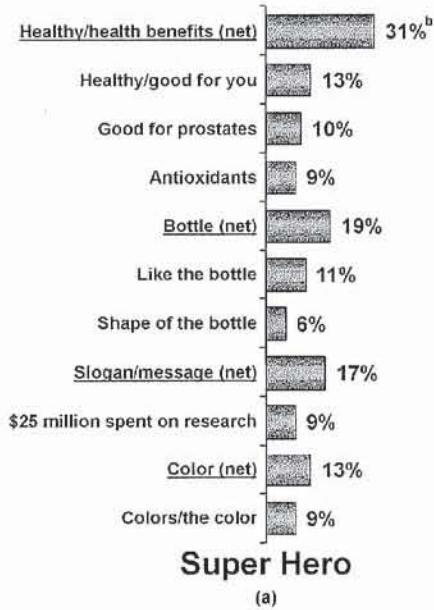
Q6. Other than trying to get you to buy the product, what do you think is the main idea that this ad is trying to get across to you?
Dashes indicate a percentage less than 1%.

Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

BovitzResearchGroup 44

Campaign Message Recall

- POM Users' top takeaways for both campaigns are the health benefits and the bottle, although the bottle is a more predominate takeaway from the *Dressed Bottle* campaign.



Base: POM Users – Those who Recalled Seeing Juice or POM Wonderful (SH: n=70, DB: n=79)

Q1: First, please type in the space below as much information as you can recall about the ad that comes to mind first among the ones you just saw.

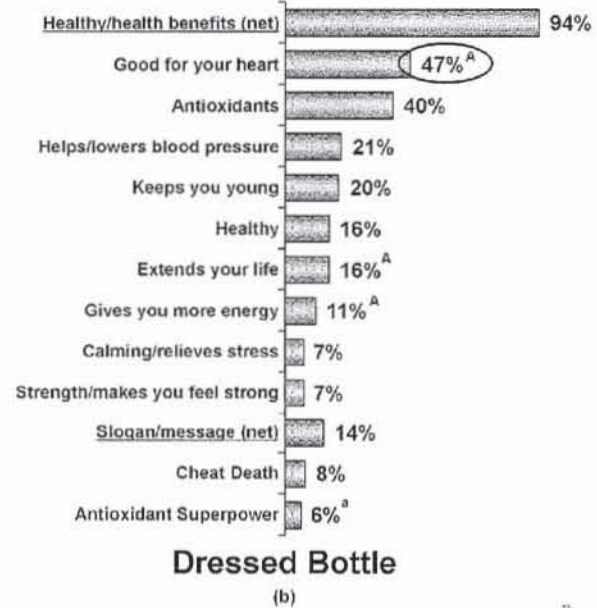
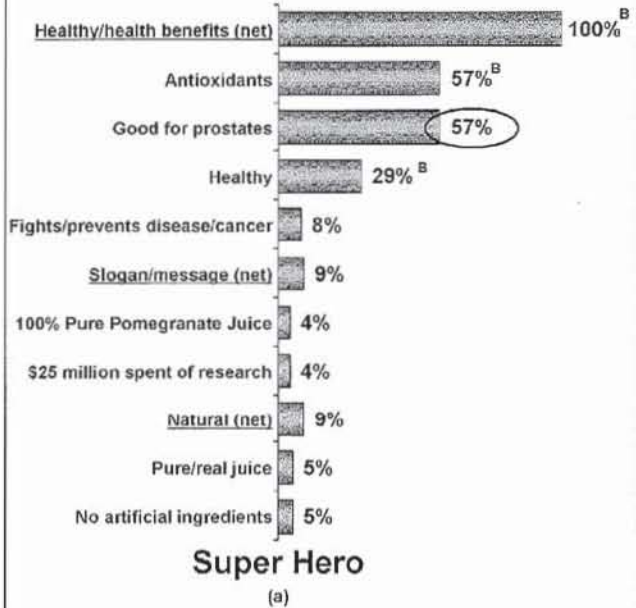
Q2: Next, please type in the spaces below as much information as you can recall about each of the other ads you just saw.

Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

Eovitz Research Group 45

Benefits of Drinking POM Wonderful

- Both campaigns convey POM Wonderful's general *healthy* and *antioxidant* benefits to POM Users.
- The *Super Hero* ads also communicate that POM is *good for prostates*, whereas the *Dressed Bottle*'s main benefit is that it is *good for the heart*.



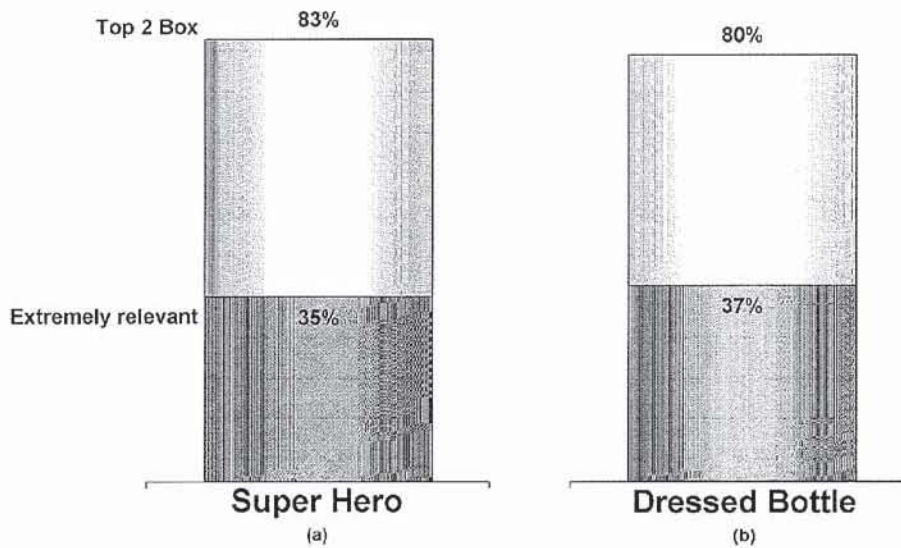
Base: POM Users

Q10. Based on the ads you just saw, what are the specific benefits, if any, of drinking POM Wonderful?
 Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

BovitzResearchGroup 46

Message Relevance

- The messages in each campaign are equally relevant to POM Users.



Base: POM Users

Q11. How relevant are the messages in these ads to you?

Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

Eovitz Research





Campaign Likeability



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

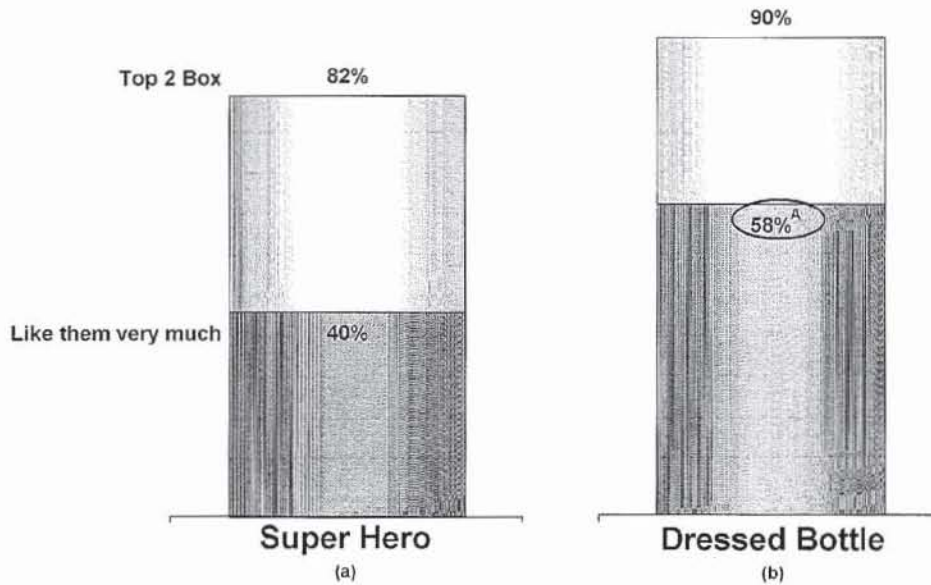
PW01032019

TCCC-0005618

PX0295a15-0050

Likeability

- POM Users like the *Dressed Bottle* campaign significantly more than the *Super Hero* advertising.



Base: POM Users

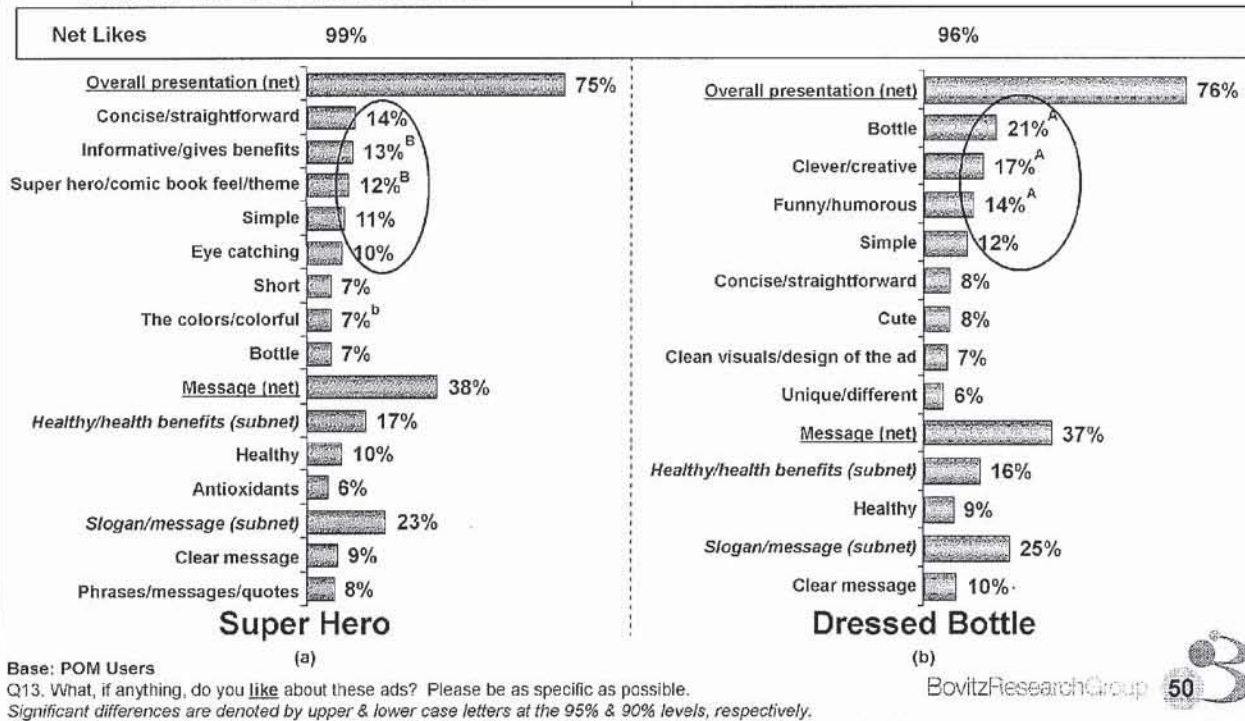
Q12. Overall, how much do you like or dislike these ads?

Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

Bovitz Research 49

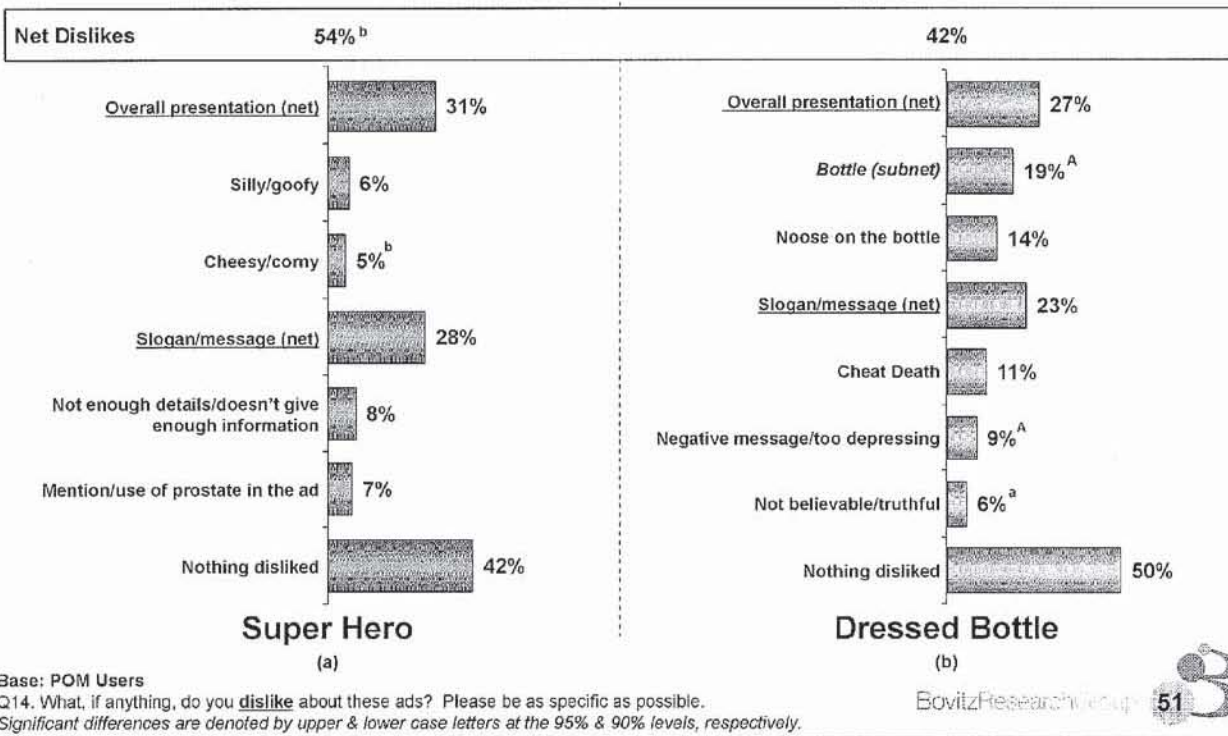
Campaign Likes

- For both campaigns POM Users like the *overall presentation* and *message* equally.
- POM Users like the *Super Hero* campaign because it is *concise, informative*, has a *super hero/comic book theme* while being *simple* and *eye-catching*.
- In contrast, the *bottle* in the ads and the *clever, funny* and *simple* presentation are the most commonly mentioned "likes" of the *Dressed Bottle* ads.



Campaign Dislikes

- Among POM Users, the *Super Hero* ads draw some criticism for *not containing enough information, mentioning prostate in the ad and being silly and cheesy.*
- Commonly mentioned "dislikes" of the *Dressed Bottle* campaign are the *noose on the bottle* and the *Cheat Death* slogan featured in the same ad.

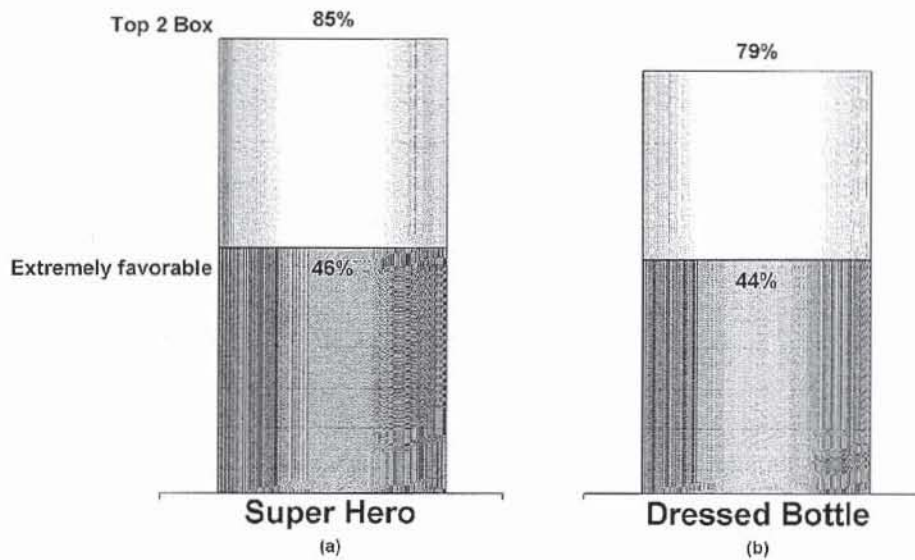




Response to Campaign

Overall Impression of POM Wonderful

- The overall impression of POM Wonderful among POM Users is equally favorable across the two campaigns.



Base: POM Users

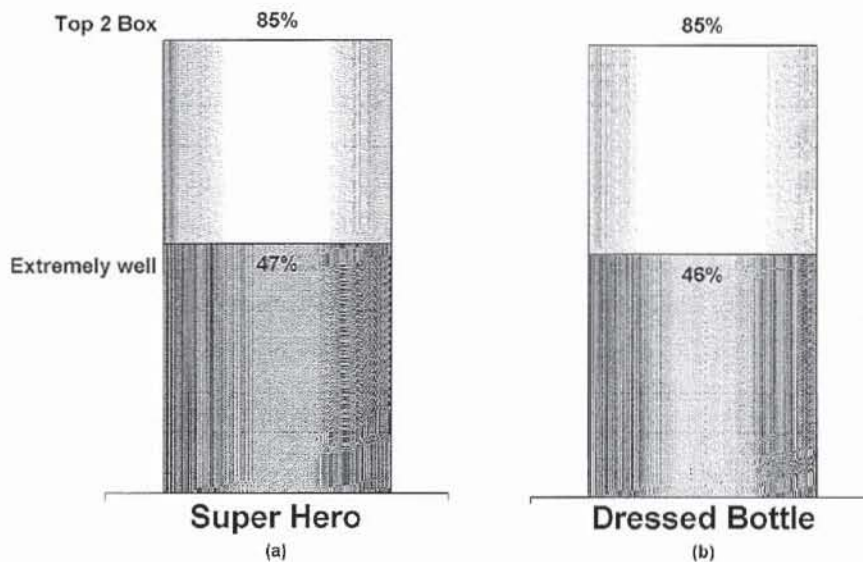
Q8. Based on the ads you just saw, please indicate your overall impression of POM Wonderful, regardless of whether or not you have ever used their products.

Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

Bovitz Research 53

Fit with the POM Wonderful Brand

- POM Users perceive both campaigns as a good fit with the brand, as nearly one-half feel the ads fit with POM Wonderful *extremely well*.



Base: POM Users

Q17. Overall, how well do you think these ads fit with your perception of POM Wonderful?

Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

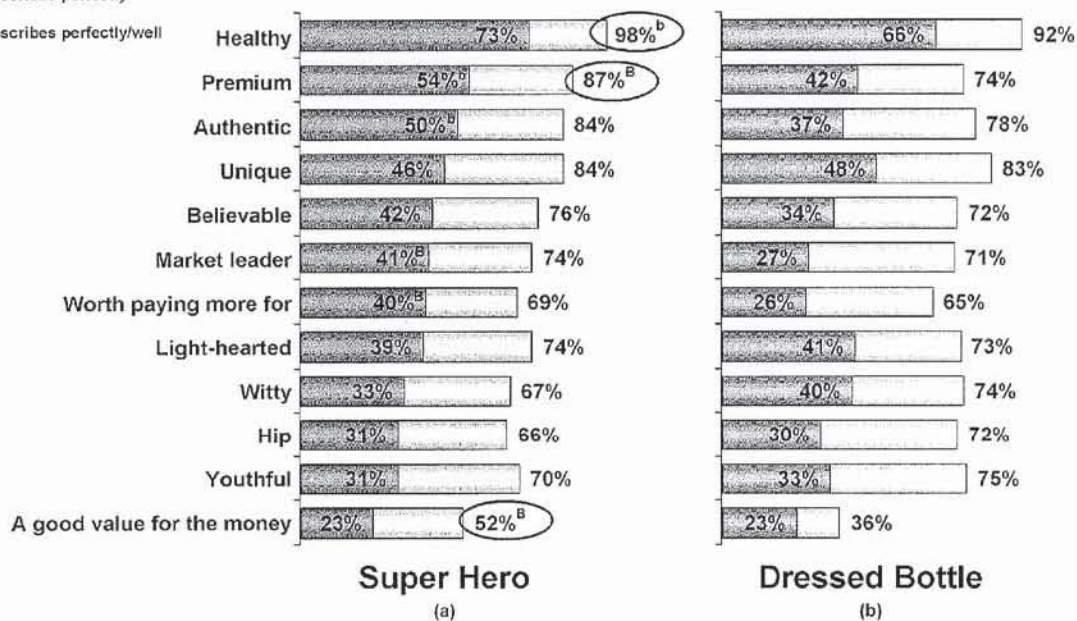
POM Wonderful Brand Personality

- Compared to the *Dressed Bottle* campaign, the *Super Hero* campaign is more effective at conveying to POM Users that the POM Wonderful brand is *healthy, premium* and a *good value for the money*.



Describes perfectly

Describes perfectly/well



Base: POM Users

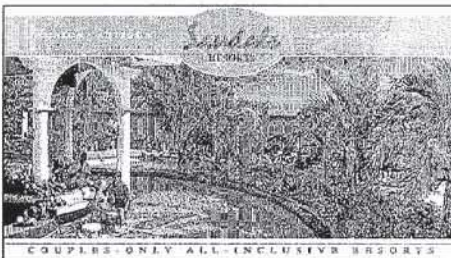
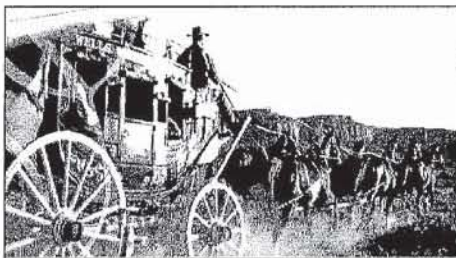
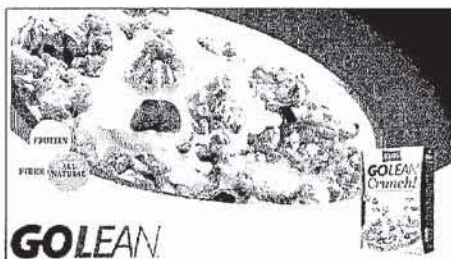
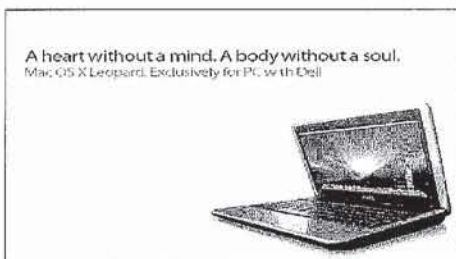
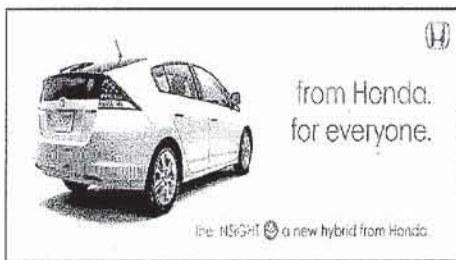
Q18. Based on the ads you just saw, please indicate the extent to which each of the following statements describes POM Wonderful.

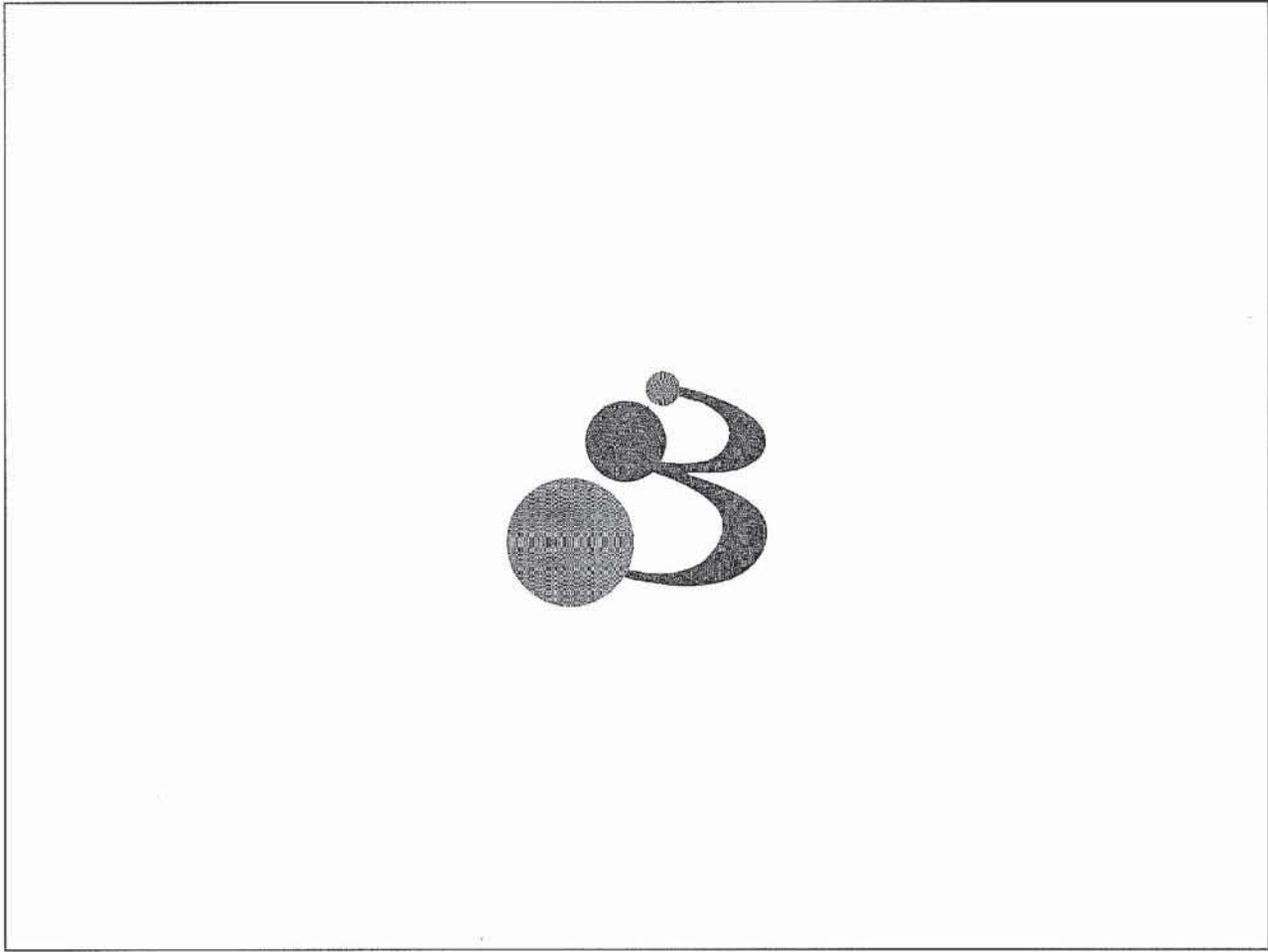
Significant differences are denoted by upper & lower case letters at the 95% & 90% levels, respectively.

Eovitz Research Group



Ads Shown in Clutter





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

PW01032028

TCCC-0005627

PX0295a15-0059

ATTACHMENT C



Heart therapy.

Seek professional help for your heart. Drink POM Wonderful Pomegranate Juice. It helps guard your body against free radicals, unstable molecules that emerging science suggests aggressively destroy and weaken healthy cells in your body and contribute to disease. POM Wonderful Pomegranate Juice is supported by \$20 million of initial scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health. Keep your heart healthy and drink 8 ounces a day.

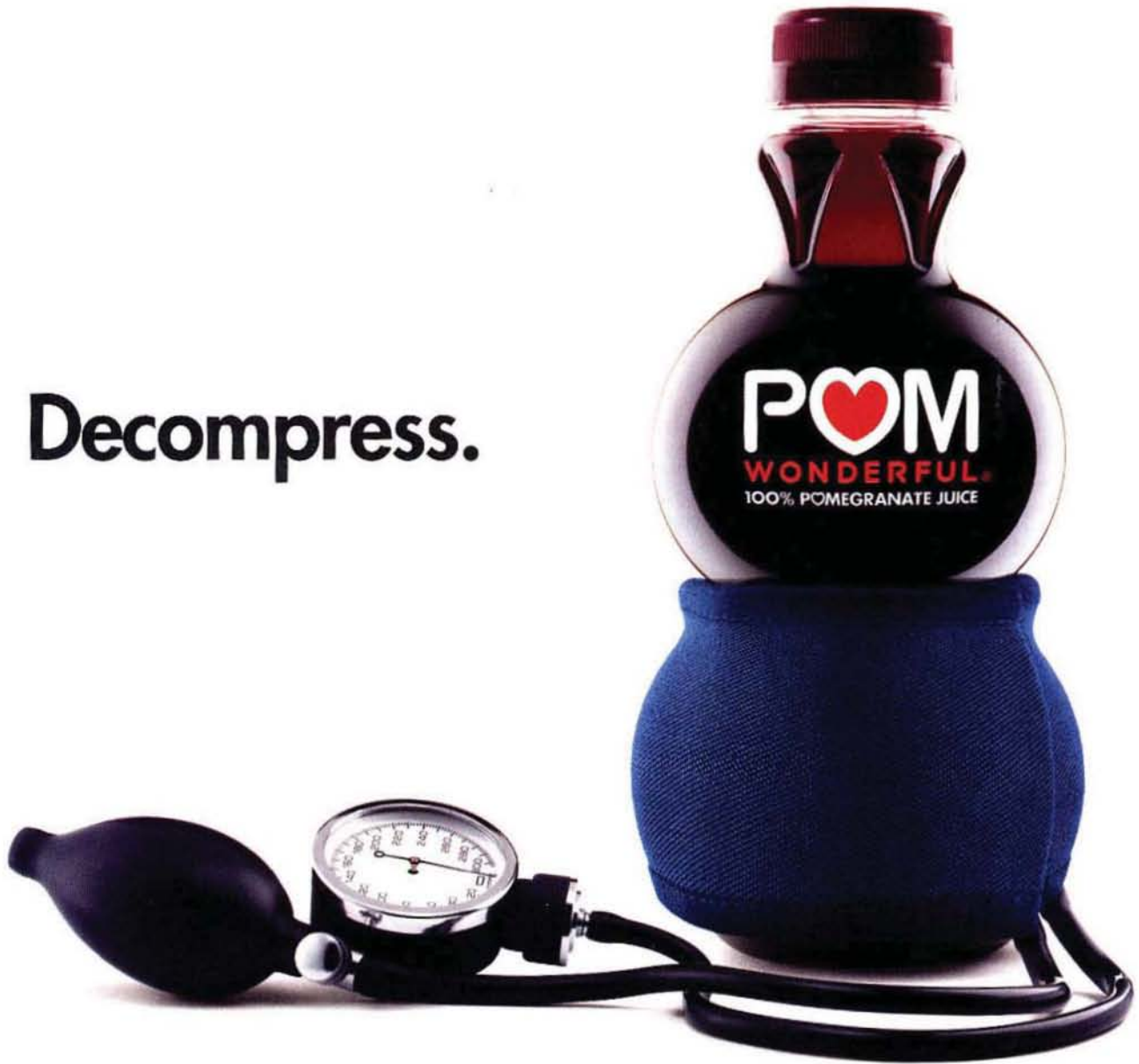
POM Wonderful Pomegranate Juice. The Antioxidant Superpower.™

©2007 PomWonderful LLC. All rights reserved. POM Wonderful and "The Antioxidant Superpower" are trademarks of PomWonderful LLC.

POM
WONDERFUL
pomwonderful.com

VMS-0000245

Decompress.



Amaze your cardiologist. Drink POM Wonderful Pomegranate Juice. It helps guard your body against free radicals, unstable molecules that emerging science suggests aggressively destroy and weaken healthy cells in your body and contribute to disease. POM Wonderful Pomegranate Juice is supported by \$20 million of initial scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health. Keep your ticker ticking and drink 8 ounces a day.

POM Wonderful Pomegranate Juice. The Antioxidant Superpower.™

©2007 Pom Wonderful LLC. All rights reserved. POM Wonderful, and The Antioxidant Superpower™ are trademarks of Pom Wonderful, LLC.

POM
WONDERFUL
pomwonderful.com

VMS-0000242

Cheat death.



©2005 POM Wonderful, LLC. All rights reserved. POM Wonderful and Antioxidant Superpower are trademarks of POM Wonderful, LLC.

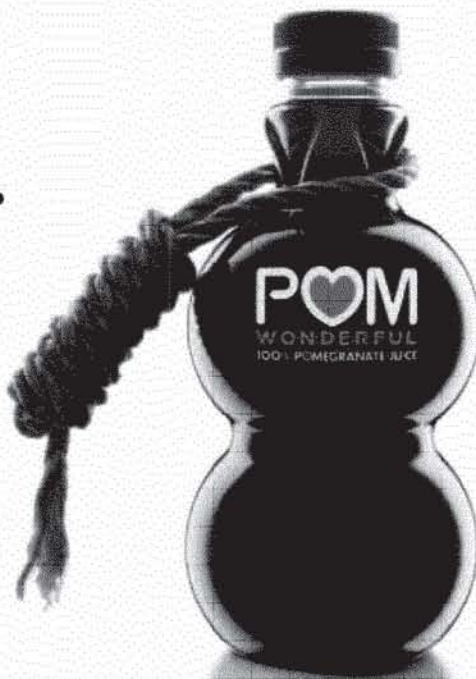
Dying is so dead. Drink to life with POM Wonderful Pomegranate Juice, the world's most powerful antioxidant. It has more antioxidants than any other drink and can help prevent premature aging, heart disease, stroke, Alzheimer's, even cancer. Eight ounces a day is all you need. The sooner you drink it,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

POM Wonderful Pomegranate Juice. The Antioxidant Superpower.™

POM
WONDERFUL
pomwonderful.com

VMS-0000221

Cheat death.



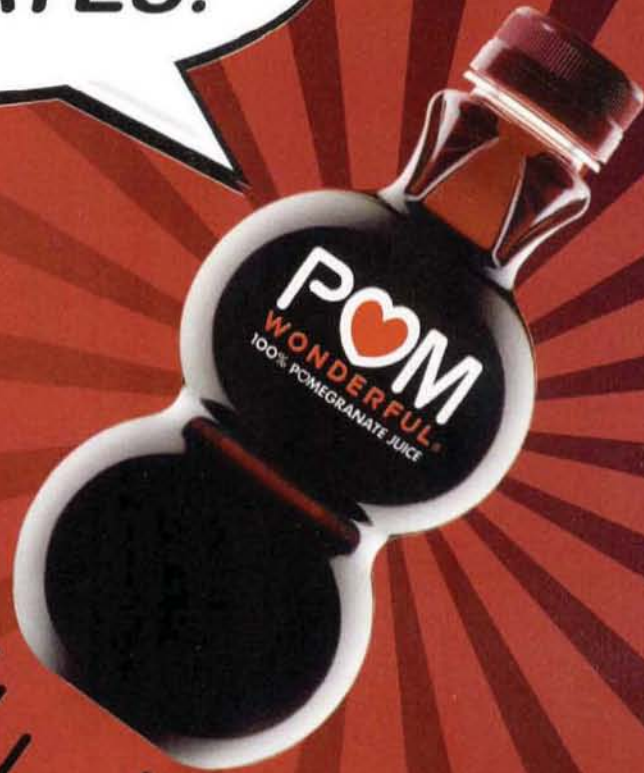
You need more than luck to live longer. You need antioxidants. And POM Wonderful 100% Pomegranate Juice is loaded with them. It helps guard your body against free radicals, unstable molecules that emerging science suggests aggressively destroy healthy cells in your body and contribute to disease. POM Wonderful 100% Pomegranate Juice is supported by \$23 million of medical scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health. So drink a glass a day and cheat death. Live life.

POM Wonderful 100% Pomegranate Juice. The Antioxidant Superpower.



JOB NO.: PJ8516	TRIM : 7" x 10.125"	COLOR : 4/C PROC	DATE IN : 03-27-08
PROJECT: PJ Advocate Print Ad CheatDeath June08	LIVE : n/a	TRIM (DO NOT PRINT)	DATE OUT : 04-1-08
SCALE : 1 : 1	BLEED : n/a	PRINTOUT SIZE : 100%	PROOF ROUND : F

*I'm off to save
PROSTATES!*



Man by man, gland by gland, The Antioxidant Superpower[®] is 100% committed to defending healthy prostates. Powered by pure pomegranate juice... backed by \$25 million in vigilant medical research*... there's no telling just how far it will go to improve prostate health in the future.

*Prostate study details at http://www.pomwonderful.com/health_benefits.html

pomwonderful.com

The Antioxidant Superpower.[®]

VMS-0000281

ATTACHMENT D

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

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

**COMPLAINT COUNSEL’S SECOND SUPPLEMENTAL RESPONSE
TO RESPONDENT POM WONDERFUL LLC’S
FIRST SET OF INTERROGATORIES**

Pursuant to Rule 3.35 of the Commission’s Rules of Practice, Complaint Counsel hereby submits the following objections and second supplemental responses to Respondent POM Wonderful LLC’s First Set of Interrogatories.

GENERAL OBJECTIONS

1. Complaint Counsel objects to the Interrogatories to the extent they seek information that is subject to the attorney-client privilege, the attorney work-product privilege, the investigative privilege, the non-testifying expert privilege, the deliberative privilege, the law enforcement privilege, the informant privilege, the joint prosecution privilege, that is exempt from disclosure pursuant to confidentiality provisions set forth in the FTC Act, that is protected from disclosure by the privilege for information given to the FTC on a Pledge of Confidentiality, that is protected from disclosure under principles of financial privacy, that is subject to a protective order from another litigation or subject to other applicable legal protection or

privilege.

2. Complaint Counsel objects to the Interrogatories to the extent they seek information that is not relevant to the subject matter of the litigation and/or not reasonably calculated to lead to the discovery of relevant information.

3. Complaint Counsel objects to the Interrogatories to the extent they are vague and ambiguous.

4. By providing information in response to the Interrogatories, Complaint Counsel does not concede that such information is relevant, material, or admissible in evidence.

5. Complaint Counsel's objections and responses to these Interrogatories are based on information now known to Counsel. Complaint Counsel has not yet completed its discovery of the facts in this lawsuit or prepared for trial and therefore reserves its rights under the Commission's Rules of Practice to amend, modify, or supplement its objections and responses if it learns of new information.

Subject to and without waiving these objections, Complaint Counsel provides the following responses.

OBJECTIONS AND SUPPLEMENTAL RESPONSES TO INTERROGATORIES

Interrogatory 1: Identify every representation that you contend the Respondents expressly made in their advertisements, publications, marketing materials, promotional materials, and/or media appearances that you contend is a violation of Section 5 of the FTC Act for any reason and state the basis for your contention. Your response should include reference to the specific materials that you contend contained such representations and should describe the claims

that you contend were made by such materials.

Response to Interrogatory 1:

Complaint Counsel objects to Interrogatory 1 to the extent that the interrogatory implies that there is a distinction between express and implied representations in terms of legal liability. The case law is clear that “[b]oth express claims and implied claims can be deceptive. Advertisers can be liable for misleading consumers by innuendo as well as by outright false statements.” *Kraft, Inc.*, 114 F.T.C. 40, 121 (1991) (citations omitted). Moreover, “[m]erely removing false express claims will not protect an advertisement where the same claims are implied.” *Telebrands Corp.*, 140 F.T.C. 278, 2005 WL 2395791 (Sept. 19, 2005).

Subject to and without waiving its General and foregoing objections, Complaint Counsel sets forth below a list of representations that Respondents expressly made in their advertisements, publications, marketing materials, promotional materials, and/or media appearances:

1. **“Cardiovascular**

A 2005 study published in the American Journal of Cardiology showed improved blood flow to the heart in patients drinking 8oz [sic] daily of POM Wonderful 100% Pomegranate Juice for 3 months.

Researchers studied a total of 45 patients with coronary heart disease who had reduced blood flow to the heart.

Patients drinking POM Wonderful 100% Pomegranate Juice experienced a 17% improvement in blood flow, compared to an 18% worsening in patients drinking a placebo.”

See exhibits referenced in Complaint, ¶ 9.H. Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice daily prevents, reduces the risk of, or treats heart disease by improving blood flow to the heart

and (2) that drinking 8 ounces of POM Juice daily prevents, reduces the risk of, or treats heart disease by improving blood flow to the heart.

2. [Quote from Mr. Tupper] “In addition, there have been a number of studies published on cardiovascular disease in which sick patients again consuming eight ounces of pomegranate juice every day saw dramatic improvements in things like atherosclerosis, which is plaque in the arteries, the amount of blood flow delivered to the heart.”

See exhibit referenced in Complaint, ¶ 9.J. Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and improving blood flow to the heart and (2) that drinking 8 ounces of POM Juice daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and improving blood flow to the heart.

3. **“Heart health.**

In two groundbreaking preliminary studies, patients who drank POM Wonderful 100% Pomegranate Juice experienced impressive cardiovascular results. A pilot study at the Rambam Medical Center in Israel included 19 patients with atherosclerosis (clogged arteries). After a year, arterial plaque decreased 30% for those patients who consumed 8 oz of POM Wonderful 100% Pomegranate Juice daily. [footnote omitted]

An additional study at the University of California, San Francisco included 45 patients with impaired blood flow to the heart. Patients who consumed 8 oz of POM Wonderful 100% Pomegranate Juice daily for three months experienced a 17% improvement in blood flow. Initial studies on POMx share similar promise for heart health, and our research continues.”

See exhibit referenced in Complaint, ¶ 10.A. Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and improving blood flow to the heart and (2) that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats heart disease by

decreasing arterial plaque and improving blood flow to the heart.

4. **“Promising results from studies on POM Wonderful Juice.**

One pilot study on 19 patients with atherosclerosis (clogged arteries) at the Technion Institute in Israel demonstrated a reduction in arterial plaque growth. After one year, arterial plaque decreased 30% for those patients who consumed 8oz [sic] of POM Wonderful 100% Pomegranate Juice daily, compared to a 9% worsening for patients who drank a placebo.

A recently published study at the University of California, San Francisco (UCSF) included 45 patients with impaired blood flow to the heart. Patients who consumed 8oz [sic] of POM Wonderful 100% Pomegranate Juice daily for 3 months experienced 17% improved blood flow; those who drank a placebo experienced an 18% decline.

POMx and heart health.

Initial research on POMx also shows promise for promoting heart health. In his 2006 POMx study, Dr. Michael Aviram, one of the world’s preeminent cardiovascular researchers, remarked that *‘POMx is as potent an antioxidant as pomegranate juice and just like pomegranate juice, POMx may promote cardiovascular health.’*”

See exhibits referenced in Complaint, ¶ 10.D. Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and improving blood flow to the heart and (2) that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and improving blood flow to the heart.

5. **“NEW RESEARCH OFFERS FURTHER PROOF OF THE HEART-HEALTHY BENEFITS OF POM WONDERFUL JUICE**

30% DECREASE IN ARTERIAL PLAQUE

After one year of a pilot study conducted at the Technion Institute in Israel involving 19 patients with atherosclerosis (clogged arteries) . . . those patients who consumed 8 oz of POM Wonderful 100% Pomegranate Juice daily saw a 30% decrease in arterial plaque.

17% IMPROVED BLOOD FLOW

A recent study at the University of California, San Francisco (UCSF) included 45 patients with impaired blood flow to the heart. Patients who consumed 8 oz of POM Wonderful 100% Pomegranate Juice daily for three months experienced 17% improved blood flow. Those who drank a placebo experienced an 18% decline.”

See exhibit referenced in Complaint, ¶ 10.H. Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and improving blood flow to the heart and (2) that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and improving blood flow to the heart.

6. **“Floss your arteries. Daily.**

[Image of POM Juice bottle]

Clogged arteries lead to heart trouble. It’s that simple. That’s where we come in. Delicious POM Wonderful Pomegranate Juice has more naturally occurring antioxidants than any other drink. These antioxidants fight free radicals – molecules that are the cause of sticky, artery clogging plaque. Just eight ounces a day can reduce plaque by up to 30%! [footnote - Aviram, M., Clinical Nutrition, 2004. Based on clinical pilot study.] So every day: wash your face, brush your teeth, and drink your POM Wonderful.”

From POM Juice print ad disseminated as early as 2004 (VMS-0000212; RESP023587).

Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and (2) that drinking 8 ounces of POM Juice daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque.

7. **“Amaze your cardiologist.**

[Image of POM Juice bottle]

Ace your EKG: just drink 8 ounces of delicious POM Wonderful Pomegranate Juice a

day. It has more naturally occurring antioxidants than any other drink. Antioxidants fight free radicals . . . nasty little molecules that can cause sticky, artery clogging plaque. A glass a day can reduce plaque by up to 30%! [footnote - Aviram, M., Clinical Nutrition, 2004. Based on clinical pilot study.] Trust us, your cardiologist will be amazed.”

From POM Juice print ad disseminated as early as 2005 (VMS-0000219; RESP059840).

Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and (2) that drinking 8 ounces of POM Juice daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque.

8. **“Our Research: Heartening.**

We’ve been working with a number of top scientists, including a Nobel Laureate, for 6 years now and our seven published, peer-reviewed papers reveal heartening results. Here’s the story: Free radicals are the culprits that turn LOL – or “bad” cholesterol – into that sticky stuff that becomes the plaque that clogs your arteries. Our scientific research shows that pomegranate is 8 times better than green tea at preventing formation of oxidized (sticky) LDL. [footnote - Aviram, M., Drugs Under Experimental and Clinical Research, 2002. Indexed values, based on relative amount of oxidized LDL created.] And a clinical pilot study shows that an 8 oz. glass of POM Wonderful 100% Pomegranate Juice, consumed daily, reduced plaque in the arteries up to 30%. [footnote - Aviram, M., Clinical Nutrition, 2004.]

The Heart Stopping Truth.

Remember: heart disease is America’s number one killer. For women as well as men. 98% of heart attacks are due to atherosclerosis, or too much plaque in the arteries. That same plaque increases your chance of stroke. One final scary statistic: half of patients who have a severe heart attack have normal cholesterol levels. In other words, we’re all at risk.

Just a Glass a Day.

To keep your heart healthy: exercise regularly. Eat a healthy diet. And drink 8 ounces of POM Wonderful Pomegranate Juice. Make every day a good day to be alive.”

From a POM Juice ad disseminated as early as 2004 (VMS-0000205-VMS-0000206,

RESP023604). Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and (2) that drinking 8 ounces of POM Juice daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque.

9. **“Drink to prostate health.**

[image of POM Juice bottle]

Sometimes, good medicine can taste great. Case in point: POM Wonderful. A recently published preliminary medical study followed 46 men previously treated for prostate cancer, either with surgery or radiation. After drinking 8 ounces of POM Wonderful 100% Pomegranate Juice daily for at least two years, these men experienced significantly longer PSA doubling times. Want to learn more about the results of this study? Visit pomwonderful.com/prostate. **Trust in POM.**”

See exhibit referenced in Complaint, ¶ 9.B. Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice daily treats prostate cancer, including by prolonging prostate-specific antigen doubling time (“PSADT”) and (2) that drinking 8 ounces of POM Juice daily treats prostate cancer, including by prolonging PSADT.

10. [Quote from Ms. Resnick]: “You have to be on pomegranate juice. You have a 50 percent chance of getting it. Listen to me. It is the one thing that will keep your PSA normal. You have to drink pomegranate juice. There is nothing else we know of that will keep your PSA in check. Ask any urologist—your father should be on it. Your father should be on it. I’m sorry to do this to you, but I have to tell you. We just did a study at UCLA, on 43 men ... It arrested their PSA.”

See exhibit referenced in Complaint, ¶ 9.G. Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice daily prevents or reduces the risk of prostate cancer; (2) that clinical studies, research, and/or

trials prove that drinking 8 ounces of POM Juice daily treats prostate cancer, including by prolonging PSADT; (3) that drinking 8 ounces of POM Juice daily prevents or reduces the risk of prostate cancer; and (4) that drinking 8 ounces of POM Juice daily treats prostate cancer, including by prolonging PSADT.

11. **“Prostate**

A preliminary UCLA medical study, published by The American Association for Cancer Research, found hopeful results for prostate health.

The study tested 45 men with recurrent prostate cancer who drank 8 oz of POM Wonderful 100% Pomegranate Juice daily for two years. **Post-prostate surgery PSA average doubling time increased from 15 to 54 months.** PSA is a protein marker for prostate cancer, and a slower PSA doubling time indicates slower disease progression.”

See exhibits referenced in Complaint, ¶ 9.H. Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice daily treats prostate cancer, including by prolonging PSADT and (2) that drinking 8 ounces of POM Juice daily treats prostate cancer, including by prolonging PSADT.

12. [Quote from Ms. Resnick]: “And if you know a man that you care about or you are a man, make him drink eight ounces of pomegranate juice a day because what it does for prostate cancer is amazing.”

See exhibit referenced in Complaint, ¶ 9.I. Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice daily treats prostate cancer and (2) that drinking 8 ounces of POM Juice daily treats prostate cancer.

13. [Quote from Mr. Tupper]: “There’s actually been a study published recently on prostate cancer. Men suffering from advanced stages of prostate cancer drinking eight ounces a day saw the progression of the prostate cancer actually slow dramatically.”

See exhibit referenced in Complaint, ¶ 9.J. Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice

daily treats prostate cancer and (2) that drinking 8 ounces of POM Juice daily treats prostate cancer.

14. **“Time pill.**

Stable levels of prostate-specific antigens (or PSA levels) are critical for men with prostate cancer. Patients with quick PSA doubling times are more likely to die from their cancer. [footnote omitted] According to a UCLA study of 46 men age 65 to 70 with advanced prostate cancer, drinking an 8oz [sic] glass of POM Wonderful 100% Pomegranate Juice every day slowed their PSA doubling time by nearly 350%. [footnote omitted]

83% of those who participated in the study showed a significant decrease in their cancer regrowth rate. [footnote omitted]”

See exhibit referenced in Complaint, ¶ 10.A. Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx Pill daily treats prostate cancer and (2) that drinking 8 ounces of POM Juice or taking one POMx Pill daily treats prostate cancer.

15. **“Prostate Health**

A preliminary UCLA medical study on POM Wonderful 100% Pomegranate Juice showed hopeful results for men with prostate cancer who drank an 8oz [sic] glass of pomegranate juice daily. And every POMx capsule provides the antioxidant power of an 8oz glass [sic] of POM Wonderful 100% Pomegranate Juice.”

See exhibits referenced in Complaint, ¶ 10.C. Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx Pill daily treats prostate cancer and (2) that drinking 8 ounces of POM Juice or taking one POMx Pill daily treats prostate cancer.

16. **“Promising News**

A preliminary UCLA medical study involving POM Wonderful 100% Pomegranate Juice revealed promising news. Men who had been treated surgically or with radiation for prostate cancer were given 8oz [sic] of POM Wonderful 100% Pomegranate Juice. A majority of the 46 men participating in the study experienced a significantly extended

PSA doubling time.

PSA (prostate-specific antigen) is a marker that is thought to be associated with the progression of prostate cancer; a slower PSA doubling time may reflect slower progression of the disease.

Before the study of pomegranate juice, the average PSA doubling time for the participants was 15 months. After drinking 8oz [sic] of juice daily, the average PSA doubling time increased to 54 months. That's a 350% increase. Learn more.

According to Dr. David Heber, Director of UCLA's Center for Human Nutrition, *'The most abundant and most active ingredients in Pomegranate Juice are also found in POMx. Basic studies in our laboratory so far indicate that POMx and Pomegranate Juice have the same effect on prostate health.'*

See exhibits referenced in Complaint, ¶ 10.E. Complaint Counsel contends that this is an express claim that (1) clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx Pill daily treats prostate cancer and (2) that drinking 8 ounces of POM Juice or taking one POMx Pill daily treats prostate cancer.

17. **“NEW POMEGRANATE RESEARCH OFFERS HOPE TO PROSTATE CANCER PATIENTS**

A preliminary UCLA medical study involving POM Wonderful 100% Pomegranate Juice revealed promising news. 46 men who had been treated for prostate cancer with surgery or radiation were given 8oz [sic] of POM Wonderful 100% Pomegranate Juice to drink daily.

Patients with prostate cancer showed a prolongation of PSA doubling time, coupled with corresponding lab effects on reduced prostate cancer as well as reduced oxidated stress.

A majority of the patients experienced a significantly extended PSA doubling time. Doubling time is an indicator of prostate cancer progression – extended doubling time may indicate slower disease progression.

Before the study, the mean doubling time was 15 months. After drinking 8oz [sic] of pomegranate juice daily for two years, the mean PSA doubling time increased to 54 months. Testing on patient blood serum showed a 12% decrease in cancer cell proliferation and a 17% increase in cancer cell death (apoptosis).”

See exhibit referenced in Complaint, ¶ 10.I. Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx Pill daily treats prostate cancer and (2) that drinking 8 ounces of POM Juice or taking one POMx Pill daily treats prostate cancer.

18. **“Erectile Function**

A pilot study released in the International Journal of Impotence Research in 2007 examined 61 male subjects with mild to moderate erectile dysfunction. Compared to participants taking a placebo, **those men drinking 8oz [sic] of POM Wonderful 100% Pomegranate Juice daily for four weeks were 50% more likely to experience improved erections.**”

See exhibits referenced in Complaint, ¶ 9.H. Complaint Counsel contends that this is an express claim that (1) clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice daily treats erectile dysfunction and (2) that drinking 8 ounces of POM Juice daily treats erectile dysfunction.

19. **Drink and Be Healthy.** Medical studies have shown that drinking 8 oz. of POM Wonderful pomegranate juice daily minimizes factors that lead to atherosclerosis (plaque buildup in the arteries), a major cause of heart disease.

From a POM Juice ad disseminated as early as 2004 (VMS-000198; RESP059826). Complaint Counsel contends that this is an express claim that (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and (2) that drinking 8 ounces of POM Juice daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque.

20. **Studies show that 10 out of 10 people don't want to die.** . . . Our scientific research shows that pomegranate juice is 8 times better than green tea at preventing formation of oxidized (sticky) LDL. And a clinical pilot study shows that an 8 oz. glass of POM Wonderful 100% Pomegranate Juice, consumed daily, reduces plaque in the arteries up to 30%.

From a POM Juice ad disseminated as early as 2004 (VMS-0000205-206; RESP023604).

Complaint Counsel contends that this is an express claim that (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and (2) that drinking 8 ounces of POM Juice daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque.

21. **Floss your arteries. Daily.** Clogged arteries lead to heart trouble. It's that simple. That's where we come in. Delicious POM Wonderful Pomegranate Juice has more naturally occurring antioxidants than any other drink. These antioxidants fight free radicals -- molecules that are the cause of sticky, artery clogging plaque. Just eight ounces a day can reduce plaque by up to 30%! [footnote - Aviram, M. Clinical Nutrition, 2004. Based on a clinical pilot study.]

From a POM Juice ad disseminated as early as 2004 (VMS-0000212; RESP023587). Complaint Counsel contends that this is an express claim that (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and (2) that drinking 8 ounces of POM Juice daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque.

22. **Amaze your cardiologist.** Ace your EKG: just drink 8 ounces of delicious POM Wonderful Pomegranate Juice a day. It has more naturally occurring antioxidants than any other drink. Antioxidants fight free radicals ... nasty little molecules that can cause sticky, artery clogging plaque. A glass a day can reduce your plaque by up to 30%! [footnote - Aviram, M. Clinical Nutrition, 2004. Based on a clinical pilot study.] Trust us, your cardiologist will be amazed.

From a POM Juice ad disseminated as early as 2004 (VMS-000219; RESP023597; RESP059840). Complaint Counsel contends that this is an express claim that (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and (2) that drinking 8 ounces of

POM Juice daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque.

23. **The power of POM, in one little pill.**

Backed by science. POMx is made from the only pomegranates supported by \$23 million in medical research. Emerging science suggests that free radicals aggressively destroy healthy cells in your body -- contributing to premature aging and even disease. The good news is POM Wonderful pomegranate antioxidants neutralize free radicals. An initial UCLA MEDICAL STUDY on POM Wonderful 100% Pomegranate Juice found hopeful results for prostate health. "Pomegranate juice delays PSA doubling time in humans," according to AJ Pantuck, et al in Clinical Cancer Research, 2006. Two additional preliminary studies on our juice showed promising results for heart health. "Pomegranate juice improves myocardial perfusion in coronary heart patients," per D. Ornish, et al, in the American Journal of Cardiology, 2005. "Pomegranate juice pilot research suggests anti-atherosclerosis benefits," according to M. Aviram, et al, in Clinical Nutrition, 2004.

From a POMx ad disseminated as early as 2008 (VMS-0000067; VMS-0000255; RESP060158).

Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and improving blood flow to the heart and (2) that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and improving blood flow to the heart. Complaint Counsel also contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents or reduces the risk of prostate cancer and (2) that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents or reduces the risk of prostate cancer.

24. **The antioxidant superpill.**

POMx is made from the only pomegranates supported by \$23 million in medical research, the same pomegranates we use to make our POM Wonderful 100% Pomegranate Juice. An initial UCLA MEDICAL STUDY on POM Wonderful 100% Pomegranate Juice found hopeful results for prostate health. The study reports “statistically significant prolongation of PSA doubling times,” according to Dr. Allen J. Pantuck in *Clinical Cancer Research*, 2006. [footnote 3 - 45 men with rising PSA after surgery or radiotherapy drank 8oz 100% pomegranate juice daily for two years.] Two additional preliminary studies on our juice showed promising results for heart health. “Stress-induced ischemia decreased in the pomegranate group,” Dr. Dean Ornish reported in the *American Journal of Cardiology*, 2005. [footnote 4 - 45 patients with coronary heart disease and myocardial ischemia (insufficient blood flow to the heart) drank 8oz 100% pomegranate juice daily for three months] “Pomegranate juice consumption resulted in a significant IMT reduction [footnote 5 - study measured intima-media thickness (IMT), which indicates plaque buildup in the carotid artery] by up to 30% after one year,” said Dr. Michael Aviram, referring to reduced arterial plaque in *Clinical Nutrition*, 2004. [footnote 6 - 19 patients aged 65-75 years with severe atherosclerosis drank 8oz 100% pomegranate juice daily for one year]

From POMx ads disseminated as early as 2008 (VMS-0000070, VMS-0000073; VMS-0000261; VMS-0000269; RESP060117; RESP060123; RESP060147; RESP060165; RESP060170).

Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and improving blood flow to the heart and (2) that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and improving blood flow to the heart. Complaint Counsel also contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats prostate cancer and (2) that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats prostate cancer. Complaint Counsel contends that the following ads make the same express claims: VMS-0000140, VMS-0000142; VMS-0000270; VMS-0000282; RESP060057;

RESP060068; RESP060088; RESP060069; RESP060070; RESP060022; RESP060157.

25. **Drink to prostate health.**

A recently published preliminary medical study followed 46 men previously treated for prostate cancer, either with surgery or radiation. After drinking 8 ounces of POM Wonderful 100% Pomegranate Juice daily for at least two years, these men experienced significantly longer PSA doubling times.

From POM Juice ads disseminated as early as 2008 (VMS-0000091; VMS-0000276; RESP060318; RESP060426; RESP060428). Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice daily prevents, reduces the risk of, or treats prostate cancer and (2) that drinking 8 ounces of POM Juice daily prevents, reduces the risk of, or treats prostate cancer.

26. **Science, not fiction.**

Made from the only pomegranates backed by \$25 million in medical research.

POMx is made from the only pomegranates backed by \$25 million in medical research, the same pomegranates we use to make our POM Wonderful 100% Pomegranate Juice. An initial UCLA MEDICAL STUDY on POM Wonderful 100% Pomegranate Juice found hopeful results for prostate health. The study reports “statistically significant prolongation of PSA doubling times,” according to Dr. Allen J. Pantuck in Clinical Cancer Research, 2006. [footnote 3 - 45 men with rising PSA after surgery or radiotherapy drank 8oz 100% pomegranate juice daily for two years.] Two additional preliminary studies on our juice showed promising results for heart health. “Stress-induced ischemia decreased in the pomegranate group,” Dr. Dean Ornish reported in the American Journal of Cardiology, 2005. [footnote 4 - 45 patients with coronary heart disease and myocardial ischemia drank 8oz 100% pomegranate juice daily for three months] “Pomegranate juice consumption resulted in a significant IMT [footnote 5 - study measured intima-media thickness (IMT)] reduction by up to 30% after one year,” said Dr. Michael Aviram, referring to reduced arterial plaque in Clinical

Nutrition, 2004. [footnote 6 - 19 patients aged 65-75 years with severe atherosclerosis drank 8oz 100% pomegranate juice daily for one year]

From POMx ads disseminated as early as 2009 (VMS-0000119; VMS-0000291; RESP060134; RESP060058). Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and improving blood flow to the heart and (2) that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and improving blood flow to the heart. Complaint Counsel also contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats prostate cancer and (2) that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats prostate cancer.

27. **Live long enough to watch your 401(k) recover.**

\$25 million in medical research. A sound investment. POMx is made from the only pomegranates backed by \$25 million in medical research at the world's leading universities. Not only has this research documented the unique and superior antioxidant power of pomegranates, it has revealed promising results for prostate and cardiovascular health.

An initial UCLA MEDICAL STUDY on POM Wonderful 100% Pomegranate Juice found hopeful results for prostate health, reporting “statistically significant prolongation of PSA doubling times,” according to Dr. Allen J. Pantuck in Clinical Cancer Research, ‘06. [footnote - 46 men with rising PSA after surgery or radiotherapy drank 8oz 100% pomegranate juice daily for two years.] Two additional preliminary studies on our juice showed promising results for heart health. “Stress-induced ischemia (restricted blood flow to the heart) decreased in the pomegranate group,” Dr. Dean Ornish reported in the

American Journal of Cardiology, '05. [footnote - 45 patients with coronary heart disease and myocardial ischemia drank 8oz 100% pomegranate juice daily for three months] "Pomegranate juice consumption resulted in a significant reduction in IMT (thickness of arterial plaque) [footnote - study measured intima-media thickness (IMT)] by up to 30% after one year," said Dr. Michael Aviram, referring to reduced arterial plaque in Clinical Nutrition, '04 [footnote - 19 patients aged 65-75 years with severe atherosclerosis drank 8oz 100% pomegranate juice daily for one year]

From POMx ads disseminated as early as 2009 (VMS-0000121; VMS-0000293; RESP060073; RESP060092; RESP060098). Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and improving blood flow to the heart and (2) that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and improving blood flow to the heart. Complaint Counsel also contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats prostate cancer and (2) that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats prostate cancer. Complaint Counsel contends that the following ads make the same express claims: VMS-0000132; VMS-0000300; RESP060059; RESP060091; RESP060094; RESP060096; RESP060089; RESP060090; RESP060097.

28. **Healthy, Wealthy. Wise.**

Backed by science.

POMx is made from the only pomegranates backed by \$25 million in medical research at the world's leading universities. Not only has this research documented the unique and superior antioxidant power of pomegranates, it has revealed promising results for prostate and cardiovascular health.

Medical studies reveal promising results.

An initial UCLA MEDICAL STUDY on POM Wonderful 100% Pomegranate Juice found hopeful results for prostate health, reporting “statistically significant prolongation of PSA doubling times,” according to Dr. Allen J. Pantuck in Clinical Cancer Research, 2006. [footnote - 45 men with rising PSA after surgery or radiotherapy drank 8oz 100% pomegranate juice daily for two years.] Two additional preliminary studies on our juice showed promising results for heart health. “Stress-induced ischemia (restricted blood flow to the heart) decreased in the pomegranate group,” Dr. Dean Ornish reported in the American Journal of Cardiology, 2005. [footnote - 45 patients with coronary heart disease and myocardial ischemia drank 8oz 100% pomegranate juice daily for three months] “Pomegranate juice consumption resulted in a significant reduction in IMT (thickness of arterial plaque) by up to 30% after one year,” said Dr. Michael Aviram, referring to reduced arterial plaque in Clinical Nutrition, 2004 [footnotes - study measured intima-media thickness (IMT); 19 patients aged 65-75 years with severe atherosclerosis drank 8oz 100% pomegranate juice daily for one year]

From POMx ads disseminated as early as 2009 (VMS-0000123; VMS-0000295; RESP060055; RESP060080). Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and improving blood flow to the heart and (2) that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and improving blood flow to the heart. Complaint Counsel also contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats prostate cancer and (2) that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats prostate cancer. Complaint Counsel contends that the following ads make the same express claims: VMS-0000126; VMS-0000299; VMS-0000127; VMS-0000298; RESP060071; RESP060095; RESP060074; RESP060087; RESP060061; RESP060085;

29. **Your New Health Care Plan (No Town Hall Meeting Required).**

\$32 million in medical research. Zero deductible.

POMx is made from the only pomegranates backed by \$32 million in medical research at the world's leading universities. Not only has this research documented the unique and superior antioxidant power of pomegranates, it has revealed promising results for prostate and cardiovascular health.

A health care plan for a healthy future.

An initial UCLA MEDICAL STUDY on POM Wonderful 100% Pomegranate Juice found hopeful results for prostate health, reporting “statistically significant prolongation of PSA doubling times,” according to Dr. Allen J. Pantuck in Clinical Cancer Research, 2006. [footnote - 46 men with rising PSA after surgery or radiotherapy drank 8oz 100% pomegranate juice daily for two years.] Two additional preliminary studies on our juice showed promising results for heart health. “Stress-induced ischemia (restricted blood flow to the heart) decreased in the pomegranate group,” Dr. Dean Ornish reported in the American Journal of Cardiology, ‘05. [footnote - 45 patients with coronary heart disease and myocardial ischemia drank 8oz 100% pomegranate juice daily for three months] “Pomegranate juice consumption resulted in a significant reduction in IMT (thickness of arterial plaque) by up to 30% after one year,” said Dr. Michael Aviram, referring to reduced arterial plaque in Clinical Nutrition, ‘04 [footnotes - study measured intima-media thickness (IMT); 19 patients aged 65-75 years with severe atherosclerosis drank 8oz 100% pomegranate juice daily for one year]

From a POMx ad disseminated as early as 2009 (VMS-0000137; VMS-0000303; RESP060109).

Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and improving blood flow to the heart and (2) that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and improving blood flow to the heart. Complaint Counsel also contends that this is an express claim (1) that

clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats prostate cancer and (2) that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats prostate cancer.

30. **The first bottle you should open in 2010.**

\$32 million in medical research. Cheers.

POMx is made from the only pomegranates backed by \$32 million in medical research at the world's leading universities. Not only has this research documented the unique and superior antioxidant power of pomegranates, it has revealed promising results for prostate and cardiovascular health.

Our bottle. Your health.

An initial UCLA MEDICAL STUDY on POM Wonderful 100% Pomegranate Juice found hopeful results for prostate health, reporting “statistically significant prolongation of PSA doubling times,” according to Dr. Allen J. Pantuck in *Clinical Cancer Research*, ‘06. [footnote - 46 men with rising PSA after surgery or radiotherapy drank 8oz 100% pomegranate juice daily for two years.] Two additional preliminary studies on our juice showed promising results for heart health. “Stress-induced ischemia (restricted blood flow to the heart) decreased in the pomegranate group,” Dr. Dean Ornish reported in the *American Journal of Cardiology*, ‘05. [footnote - 45 patients with coronary heart disease and myocardial ischemia drank 8oz 100% pomegranate juice daily for three months] “Pomegranate juice consumption resulted in a significant reduction in IMT (thickness of arterial plaque) by up to 30% after one year,” said Dr. Michael Aviram, referring to reduced arterial plaque in *Clinical Nutrition*, ‘04 [footnotes - study measured intima-media thickness (IMT); 19 patients aged 65-75 years with severe atherosclerosis drank 8oz 100% pomegranate juice daily for one year]

From POMx ads disseminated as early as 2010 (VMS-0000139; VMS-0000304; RESP060108).

Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents,

reduces the risk of, or treats heart disease by decreasing arterial plaque and improving blood flow to the heart and (2) that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and improving blood flow to the heart. Complaint Counsel also contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats prostate cancer and (2) that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats prostate cancer.

31. **Take out a life insurance supplement.**

\$32 million in medical research. No deductible.

POMx is made from the only pomegranates backed by \$32 million in medical research at the world's leading universities. Not only has this research documented the unique and superior antioxidant power of pomegranates, it has revealed promising results for prostate and cardiovascular health.

Get the maximum benefits.

An initial UCLA MEDICAL STUDY on POM Wonderful 100% Pomegranate Juice found hopeful results for prostate health, reporting “statistically significant prolongation of PSA doubling times,” according to Dr. Allen J. Pantuck in Clinical Cancer Research, 2006. [footnote - 46 men with rising PSA after surgery or radiotherapy drank 8oz 100% pomegranate juice daily for two years.] Two additional preliminary studies on our juice showed promising results for heart health. “Stress-induced ischemia (restricted blood flow to the heart) decreased in the pomegranate group,” Dr. Dean Ornish reported in the American Journal of Cardiology, 2005. [footnote - 45 patients with coronary heart disease and myocardial ischemia drank 8oz 100% pomegranate juice daily for three months]

From POMx ads disseminated as early as 2010 (VMS-0000141; VMS-0000146; VMS-0000306;

VMS-0000311; RESP060013; RESP060016; RESP060026; RESP060027; RESP060050).

Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats heart disease by improving blood flow to the heart and (2) that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats heart disease by improving blood flow to the heart. Complaint Counsel also contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats prostate cancer and (2) that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats prostate cancer. Complaint Counsel contends that the following ads make the same express claims: VMS-0000157; VMS-0000158; VMS-0000320; VMS-0000321; RESP060028; RESP060036; RESP060040; RESP060043; RESP060044; RESP060047.

32. **24 Scientific Studies Now in One Easy-to-Swallow Pill**

\$32 million in medical research. Science, not fiction.

POMx is made from the only pomegranates backed by \$32 million in medical research at the world's leading universities. Not only has this research documented the unique and superior antioxidant power of pomegranates, it has revealed promising results for prostate and cardiovascular health.

Complicated studies. Simplified.

An initial UCLA study on our juice found hopeful results for prostate health, reporting “statistically significant prolongation of PSA doubling times,” according to Dr. Allen J. Pantuck in Clinical Cancer Research, 2006. [footnote - 46 men with rising PSA after surgery or radiotherapy drank 8oz 100% pomegranate juice daily for two years.]

Additional preliminary study [sic] on our juice showed promising results for heart health. “Stress-induced ischemia (restricted blood flow to the heart) decreased in the pomegranate group,” Dr. Dean Ornish reported in the American Journal of Cardiology, 2005. [footnote - 45 patients with coronary heart disease and myocardial ischemia drank 8oz 100% pomegranate juice daily for three months]

From POMx ads disseminated as early as 2010 (VMS-0000147; VMS-0000154; VMS-0000312; RESP060012; RESP060014; RESP060015; RESP060019; RESP060021). Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx pill daily prevents, reduces the risk of, or treats heart disease by improving blood flow to the heart and (2) that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats heart disease by improving blood flow to the heart. Complaint Counsel also contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx pill daily prevents, reduces the risk of, or treats prostate cancer and (2) that drinking 8 ounces of POM Juice or taking one POMx pill daily prevents, reduces the risk of, or treats prostate cancer. Complaint Counsel contends that the following ads make the same express claims: VMS-0000149; VMS-0000159; VMS-0000313; VMS-0000322; RESP060025; RESP060029; RESP060030; RESP060035; RESP060045.

33. **The only antioxidant supplement rated X.**

\$32 million in research. We're not just playing doctor.

POMx is made from the only pomegranates backed by \$32 million in medical research at the world's leading universities. Not only has this research documented the unique and superior antioxidant power of pomegranates, it has revealed promising results for prostate and cardiovascular health.

Is that POMx in your pocket?

In a preliminary study on erectile function, men who consumed POM Juice reported a 50% greater likelihood of improved erections as compared to placebo. “As a powerful antioxidant, enhancing the actions of nitric oxide in vascular endothelial cells, POM has potential in the management of ED... further studies are warranted.” International Journal of Impotence Research, '07. [footnote - 53 men with mild/moderate erectile dysfunction drank 8oz 100% pomegranate juice for one month] An initial UCLA study on our juice found hopeful results for prostate health, reporting “statistically significant prolongation of PSA doubling times,” Clinical Cancer Research, '06. [footnote - 46 men with rising PSA after surgery or radiotherapy drank 8oz 100% pomegranate juice daily for two years.] A preliminary study on our juice showed promising results for heart health. “Stress-induced ischemia (restricted blood flow to the heart) decreased in the pomegranate group,” American Journal of Cardiology, '05. [footnote - 45 patients with coronary heart disease and myocardial ischemia drank 8oz 100% pomegranate juice daily for three months]

From POMx ads disseminated as early as 2010 (VMS-0000143; VMS-0000156; VMS-0000160; VMS-0000319; RESP060010). Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx pill daily prevents, reduces the risk of, or treats heart disease by improving blood flow to the heart and (2) that drinking 8 ounces of POM Juice or taking one POMx pill daily prevents, reduces the risk of, or treats heart disease by improving blood flow to the heart. Complaint Counsel further contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx pill daily prevents, reduces the risk of, or treats prostate cancer and (2) that drinking 8 ounces of POM Juice or taking one POMx pill daily prevents, reduces the risk of, or treats prostate cancer. Complaint Counsel also contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx pill daily treats erectile dysfunction and (2) that drinking 8 ounces of POM Juice or taking one POMx pill daily treats erectile dysfunction. Complaint Counsel contends that the following ads make the same

express claims: VMS-0000160; VMS-0000163; VMS-0000323; VMS-0000326; RESP060031;
RESP060034; RESP060038.

34. **Drink to prostate health.**

A recently published medical study involving POM Wonderful 100% Pomegranate Juice followed 46 men previously treated for prostate cancer either with surgery or radiation. After drinking eight ounces of POM Wonderful 100% Pomegranate Juice daily for at least two years, these men experienced significantly slower average PSA doubling times. PSA (Prostate-Specific Antigen) is a biomarker that indicates the presence of cancer. "PSA doubling time" is a measure of how long it takes PSA levels to double. A longer doubling time may indicate slower progression of the disease. At the beginning of the study, PSA levels doubled on average every 15 months. By the end of the study, doubling time had slowed to 54 months -- nearly a four-fold improvement. "This is a big increase. I was surprised when I saw such an improvement in PSA numbers," said Dr. Allan Pantuck, lead author of the UCLA Study. In addition, in-vitro testing using blood serum from the patients who drank pomegranate juice showed a 17% increase in prostate cancer cell death and a 12% decrease in cancer cell growth.

Backed by science.

Only POM is backed by \$25 million in medical research conducted at the world's leading universities. Clinical studies have documented the benefits of drinking POM Wonderful 100% Pomegranate Juice, including improved cardiovascular and prostate health.

From a Time Magazine wrap disseminated in Fall 2009 (RESP024719-RESP024728).

Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx pill daily prevents, reduces the risk of, or treats prostate cancer and (2) that drinking 8 ounces of POM Juice or taking one POMx pill daily prevents, reduces the risk of, or treats prostate cancer.

35. **Lucky I have super HEALTH POWERS.**

Holy Health! \$32 million in medical research.

A recently published pilot study involving POM Wonderful 100% Pomegranate Juice followed 46 men previously treated for prostate cancer either with surgery or radiation. After drinking eight ounces of POM Wonderful 100% Pomegranate Juice daily for at least two years, these men experienced significantly slower average PSA doubling times. PSA (Prostate-Specific Antigen) is a biomarker that indicates the presence of cancer. PSA doubling time is a measure of how long it takes PSA levels to double. A longer doubling time may indicate slower progression of the disease. At the beginning of the study, PSA levels doubled on average every 15 months. By the end of the study, doubling time had slowed to 54 months -- nearly a four-fold improvement. "This is a big increase. I was surprised when I saw such an improvement in PSA numbers," said Dr. Allan Pantuck, lead author of the UCLA Study. One important note: All the patients drank the same POM Wonderful 100% Pomegranate Juice which is available in your supermarket produce section.

Backed by Science.

Only POM products are backed by \$32 million in medical research conducted at the world's leading universities, primarily in the areas of cardiovascular, prostate and erectile function.

From a Time Magazine wrap disseminated in Fall 2009 (RESP023808-RESP023812; RESP023813-RESP023816). Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx pill daily prevents, reduces the risk of, or treats prostate cancer and (2) that drinking 8 ounces of POM Juice or taking one POMx pill daily prevents, reduces the risk of, or treats prostate cancer. Complaint Counsel contends that the following ads make the same express claims: RESP023821-RESP023827; RESP023828-RESP023831.

36. **POM Emerging Science Heart Health Report.** Why are antioxidants good for your health?

Research has shown that the naturally occurring polyphenol antioxidants in pomegranates

have extraordinary health benefits -- and that pomegranate antioxidants neutralize free radicals, helping to prevent the damage that can lead to diseases such as atherosclerosis and hypertension.

Clinical Studies show that polyphenol Antioxidants in Pomegranate Juice Provide Cardiovascular Benefits.

During the past 10 years, leading academic research scientists around the globe have studied the effects of pomegranate juice on cardiovascular health. These scientists discovered that pomegranate juice may help counteract factors leading to arterial plaque buildup, as well as inhibit a number of factors associated with heart disease. Research highlights include:

30% Decrease in Arterial Plaque. A pilot study conducted at the Technion Institute in Israel involving 19 patients with atherosclerosis (clogged arteries) showed that those patients who consumed 8oz of POM Wonderful 100% Pomegranate Juice daily for one year saw a 30% decrease in arterial plaque.

17% Improved Blood flow. A recent study conducted by Dr. Dreon Ornish, Professor of Medicine at the University of California, San Francisco (UCSF), included 45 patients with impaired blood flow to the heart. Patients who consumed 8oz of POM Wonderful 100% Pomegranate Juice daily for three months experienced 17% improved blood flow. Those who drank a placebo experienced an 18% decline.

Promotes Healthy Blood Vessels. An in vitro study at the University of California Los Angeles (UCLA) showed that pomegranate juice uniquely protects nitric oxide, an important biochemical that helps maintain healthy blood vessels for proper blood flow.

From a POM direct mail piece disseminated in Fall 2009 (RESP060083-RESP060084; RESP060126-RESP-60127). Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and improving blood flow to the heart and (2) that drinking 8 ounces of POM Juice or taking one POMx Pill daily prevents, reduces the risk of, or treats heart disease by decreasing arterial plaque and improving blood flow to the heart.

37. **POM Emerging Science Prostate Health Report.**

Why are antioxidants good for your health?

Research has shown that the naturally occurring polyphenol antioxidants in pomegranates have extraordinary health benefits -- and that pomegranate antioxidants neutralize free radicals, helping to prevent the damage that can lead to diseases such as atherosclerosis and hypertension.

Science, not fiction.

POM Wonderful Pomegranates backed by \$32 million in research.

New pomegranate research offers hope to prostate cancer patients.

POM Juice and Prostate Health. A preliminary UCLA study involving POM Wonderful 100% Pomegranate Juice revealed promising news. This study included 46 men who had been treated surgically or with radiation for prostate cancer. These men drank 8oz of POM Wonderful 100% Pomegranate Juice daily for a year and a half. A majority of patients experienced a significantly increased PSA doubling time. PSA (prostate-specific antigen) is a marker thought to be associated with the progression of prostate cancer; a slower PSA doubling time may reflect slower progression of the disease. Before the study, average PSA doubling time was 15 months. After a year and a half, average doubling time increased to 54 months. In addition, testing on patient blood serum showed a 12% decrease in cancer cell proliferation and a 17% increase in cancer cell death (apoptosis). [print illegible]

From a POMx direct mail piece disseminated in Fall 2009 (RESP060081– RESP060082; RESP060124-RESP-060125). Complaint Counsel contends that this is an express claim (1) that clinical studies, research, and/or trials prove that drinking 8 ounces of POM Juice or taking one POMx pill daily prevents, reduces the risk of, or treats prostate cancer and (2) that drinking 8 ounces of POM Juice or taking one POMx pill daily prevents, reduces the risk of, or treats prostate cancer.

Complaint Counsel has endeavored to set forth above a sufficiently representative list of

express representations that it contends violated Section 5 of the FTC Act. Given the thousands of ads in various media disseminated by Respondents, many of which were very similar or identical to the ads identified in these Responses, it is unduly burdensome for Complaint Counsel list every express misrepresentation in every ad disseminated by Respondents, nor is it required. Complaint Counsel has made a good faith effort to identify the types of claims that it is challenging, and has provided more than ample notice to Respondents of the conduct that is challenged as a violation of the FTC Act. Complaint Counsel reserves the right to include on its trial exhibit list, and introduce, additional ads with the same or substantially similar text or claims, including clearer or more legible versions.

Regarding the basis that the challenged claims are a violation of Section 5 of the FTC Act, Complaint Counsel charges Respondents with making claims that are false and/or unsubstantiated. To prevail, Complaint Counsel must demonstrate that “first, there is a representation, omission or practice, that second, it is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material.” *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994) (citing *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 164-65 (1984)); *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001). To prevail under a falsity theory, Complaint Counsel must show “either that the express or implied message conveyed by the ad is false,” *i.e.*, that Respondents’ clinical studies, research, and/or trials do not prove the challenged benefits claimed. *FTC v. National Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1190 (N.D. Ga. 2008), *aff’d*, 356 Fed. Appx. 358 (11th Cir. 2009), *cert. denied*, 131 S. Ct. 505 (2010). To prevail on its lack of substantiation charge, Complaint Counsel must demonstrate that Respondents lacked a reasonable basis for their claims. *See, e.g., Schering Corp.*, 118 F.T.C. 1030 (1994) (consent order) (requiring that tests and studies relied upon as

reasonable basis must employ appropriate methodology and address the specific claims made in ad); *Pantron I Corp.*, 33 F.3d at 1088 (holding consumer satisfaction surveys and studies demonstrating the placebo effect are insufficient to meet “competent and reliable scientific evidence” standard).

What constitutes a reasonable basis depends on what claims are being made, how they are presented in the context of the entire ad, and how they are qualified. A number of factors determine the appropriate amount and type of substantiation, including the type of product, the type of claim, the benefits of a truthful claim and the cost/feasibility of developing substantiation for the claim, the consequences of a false claim, and the amount of substantiation that experts in the field believe is reasonable. Complaint Counsel’s contention that the claims challenged in the complaint are false and/or unsubstantiated is based on an evaluation of the documents that have been produced in this case, including the Respondents’ substantiation documents or lack thereof, and Complaint Counsel’s expert opinions, which will be set forth as required by the Commission’s Rules of Practice.

Interrogatory 2: Identify every representation that you contend the Respondents made by implication in their advertisements, publications, marketing materials, promotional materials, and/or media appearances that you contend is a violation of Section 5 of the FTC Act for any reason and state the basis for your contention. Your response should include reference to the specific materials that you contend contained such representations and should describe the claims that you contend were made by such materials.

Response to Interrogatory 2: Complaint Counsel objects to Interrogatory 2 to the extent that it requests a catalog of individual, out-of-context statements, as such a list is inconsistent with Complaint Counsel’s theory of the case. When reviewing advertising claims,

case law under the FTC Act establishes that courts and the Commission review the overall net impression that is created by the interaction of various elements in the challenged advertising, including, without limitation, statements, depictions, and omissions made in conjunction with every other statement, depiction, and omission in the advertisement. It does not necessarily derive from any single element of the advertisement. *See, e.g., FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963) (“It is . . . necessary in [FTC advertising] cases to consider the advertisement in its entirety and not to engage in disputatious dissection. The entire mosaic should be viewed rather than each tile separately.”) This approach is particularly necessary when reviewing the advertising claims made in magazine ads, websites, and other media. Accordingly, it is neither Complaint Counsel’s burden nor a necessary element of Complaint Counsel’s proof in this litigation to demonstrate that any individual statement (word, phrase, clause, sentence, photograph, illustration, or other portion of the advertising at issue) contained in a challenged advertisement for Respondents’ products is false or misleading.

Regarding whether Complaint Counsel contends that any individual representation or statement contained in the challenged advertisements for Respondents’ products is implied, it is not Complaint Counsel’s contention that any individual statement contained in the challenged advertisements is an implied claim. Rather, as previously discussed, Complaint Counsel’s allegations against Respondents are based upon claims derived from the overall net impression created by the interaction of various elements in the challenged advertising.

Subject to and without waiving its General and foregoing objections, Complaint Counsel contends that the implied claims made by Respondents include, but are not limited to, all representations specified in the response to Interrogatory 1 to the extent they are not express, and all other representations set forth in Complaint Paragraphs 9 and 10 and the advertisements,

promotional and other material attached to the Complaint. Furthermore Complaint Counsel contends that Respondents made implied claims in the following additional advertisements, in addition to those identified in Interrogatory 1 and the Complaint: FTC-0005195-FTC0005196; FTC-0005727; FTC-0005753; FTC-0005754-FTC0005777; FTC-0005778; FTC-0005779-FTC-0005785; FTC-0005816-FTC-0005844; FTC-0005894-FTC0005897; FTC-0005898; FTC-0006165; FTC-0006180; VMS-0000024; VMS-0000031; VMS-0000049; VMS-0000052; VMS-0000055; VMS-0000056; VMS-0000057; VMS-0000063; VMS-0000064; VMS-0000071; VMS-0000072; VMS-0000080; VMS-0000089; VMS-0000093; VMS-0000094; VMS-0000096; VMS-000099; VMS-0000100; VMS-0000101; VMS-0000109; VMS-0000110; VMS-0000115; VMS-0000131; VMS-0000134; VMS-0000162; VMS-00000266; VMS-0000214; VMS-0000221; VMS-0000239; VMS-0000242; VMS-0000245; VMS-0000246; VMS-0000247; VMS-0000251; VMS-0000253; VMS-0000259; VMS-0000260; VMS-0000274; VMS-0000279; VMS-0000280; VMS-0000281; VMS-0000363; RESP023594; RESP060537; RESP060883; RESP060886; RESP060561; RESP060576; RESP060592; RESP060605; RESP060608; RESP060618; RESP060882; RESP060560; RESP060572; RESP060587; RESP060615; RESP060491; RESP060178; RESP060188; RESP060189; RESP060190; RESP060192; RESP060574; RESP060577; RESP060588; RESP060596; RESP060557; RESP060461; RESP059941; RESP060221; RESP059945; RESP059946; RESP059947; RESP059950; RESP060897; RESP060571; RESP060585; RESP060609. Complaint Counsel contends that the overall net impressions created by these representations convey the claims specified in Paragraphs 12, 14, 16, 19, and 20 of the Complaint.

Given the thousands of ads in various media disseminated by Respondents, many of which were very similar or identical to the ads identified in these Responses, it is unduly

burdensome for Complaint Counsel to list every misrepresentation in every ad disseminated by Respondents, nor is it required. Complaint Counsel has made a good faith effort to identify the types of claims that it is challenging, and has provided more than ample notice to Respondents of the conduct that is challenged as a violation of the FTC Act. Complaint Counsel reserves the right to include on its trial exhibit list, and introduce, additional ads with the same or substantially similar text or claims, including clearer or more legible versions.

Regarding the basis that the challenged claims are a violation of Section 5 of the FTC Act, Complaint Counsel charges the Respondents with making claims that are false and/or unsubstantiated. Complaint Counsel refers to the response to Interrogatory 1 for the legal standard to prevail on a charge of falsity or lack of a reasonable basis under the FTC Act. Complaint Counsel's evaluation of the claims challenged in the complaint includes an evaluation of the documents that have been produced in this case, including the Respondents' substantiation documents or lack thereof, and Complaint Counsel's expert opinions, which will be set forth as required by the Commission's Rules of Practice.

Interrogatory 3: For each item of advertising, marketing or other promotional material referenced in or attached to the Complaint, identify the particular claim or claims that you contend are being made that violate the Federal Trade Commission Act and the basis for your contention, including the particular language or image on which your contention is based.

Response to Interrogatory 3: As stated in the responses to Interrogatories 1 and 2, above, Complaint Counsel's allegations against Respondents are based upon claims derived from the listed express representations (see response to Interrogatory 1) or from the overall net impression created by the interaction of various elements in the challenged advertising (see responses to Interrogatories 1 and 2). Specifically Complaint Counsel contends that the exhibits

ATTACHMENT E

ATTACHMENT F
REDACTED

ATTACHMENT G
REDACTED

ATTACHMENT H

Expert Report of David W. Stewart

Prepared by:

Professor David Stewart, Ph.D.

April 4, 2011

Qualifications

I am the Dean of the School of Business Administration and the A. Gary Anderson Graduate School of Management (“AGSM”) at the University of California, Riverside and Professor of Management and Marketing. Prior to joining the faculty at AGSM I was the Robert E. Brooker Professor of Marketing and Chairman of the Department of Marketing in the Marshall School of Business at the University of Southern California. I also served as Deputy Dean of the Marshall School for five years. I am a former editor of the Journal of Marketing and the Journal of the Academy of Marketing Science. I presently serve on the editorial boards of the Journal of Marketing, the Journal of Public Policy and Marketing, the Journal of the Academy of Marketing Science, the Journal of Advertising, the Journal of Advertising Research, the International Journal of Advertising Research, and the Journal of Interactive Marketing, among others. I was previously the senior associate dean and associate professor of marketing at the Owen Graduate School of Management, Vanderbilt University.

I hold three academic degrees in psychology: a B.A. from the University of Louisiana at Monroe, an M.A. in general experimental psychology from Baylor University, and a Ph.D. in personality psychology from Baylor University. I have authored or co-authored more than 225 publications and eight books. I have written extensively about market analysis, consumer behavior, market definition and structure, branding, marketing communication, marketing research, and marketing management. My research has examined how consumers and managers search for and use information in decision making, how to effectively communicate with consumers, how to study consumers and their behavior, and how to effectively design marketing programs. In addition to my work on consumer behavior related to commercial products and services I have also examined the influences of warnings and disclosures on consumers. My

scholarship has been widely cited and has been recognized and honored in a number of venues including the receipt of the Award for Outstanding Contribution to Advertising Research by the American Academy of Advertising and lifetime contribution awards from the Academy of Marketing Science and the Society for Marketing Advances.

I am a member of the American Marketing Association, the American Statistical Association, the Association for Consumer Research, the Society for Consumer Psychology, the American Academy of Advertising, the American Psychological Association, the American Psychological Society, the American Association for Public Opinion Research, the Psychometric Society, and the Institute for Operations Research and Management Sciences, among others. I have also served two terms as a member of the United States Census Bureau's Advisory Committee of Joint Professional Associations and I am a past-chairman of this committee.

I have served as Vice President for Finance and as a member of the Board of Directors of the American Marketing Association. I am a past-president of the Society for Consumer Psychology, a past-chair of the Section on Statistics in Marketing of the American Statistical Association, and a past-president of the Academic Council of the American Marketing Association. I am a Fellow of both the American Psychological Association and the American Psychological Society.

I have taught marketing courses to undergraduates, MBA students, Ph.D. students, and practicing managers for more than thirty years. I have taught courses on principles of marketing, consumer behavior, advertising and promotion management, product development and management, marketing research, marketing management, and marketing strategy, among others. I have taught both qualitative and quantitative approaches to marketing research, including the design and use of in-depth personal interviews, customer visits, focus groups, survey research,

choice modeling, and marketing experiments to both university students and practicing professionals. I have offered executive education courses on marketing topics, including marketing research, in twenty countries on four continents.

I have served as a consultant for a wide array of companies and government organizations. In this work I have studied marketing activities and consumer behavior and have advised companies, not-for-profit organizations, government agencies, and regulators. Among the companies for which I have consulted are Coca-Cola, General Motors, Visa Services, Hewlett Packard, Agilent Technologies, Hughes, Honeywell, Texas Instruments, Samsung, NCR, IBM, and Cadence Design Systems, among others. I have served as a consultant to and expert witness for the Federal Trade Commission and the Office of Consumer Protection of the California Attorney General.

I have offered testimony regarding marketing issues, including issues related to consumer behavior, branding, marketing communications, marketing strategy, deceptive advertising, and intellectual property before the Federal Trade Commission and in Federal and State Courts. I have served as an expert witness for a mixture of plaintiffs and defendants over time.

In the conduct of my work as scholar, teacher, consultant, and expert witness I rely on well-accepted principles and theories in marketing and the behavioral sciences. I also place great reliance on properly designed and well-executed empirical research, such as survey research, to inform my opinions. Such research may be of my own design but may also be research published in refereed journals or conducted to inform business decisions with important economic and/or social consequences.

A copy of my *Curriculum Vitae*, including a list of my testimony over the prior 4 years, is attached as Appendix A. I do not have in my possession transcripts of any of my prior testimony listed in Appendix A.

Scope of Assignment

I have been retained by the Federal Trade Commission to read, review, and offer comments regarding the opinion of defendants' expert, Ronald R. Butters, Ph.D. As a part of this assignment I have reviewed the Complaint in the present matter and various marketing and advertising materials related to POM Wonderful products.

I am being compensated at a rate of \$250 per hour for my work on this project. My compensation is not dependent on the outcome of this particular matter.

At the end of this report is a list of the academic references cited herein.

Opinions

Based on my review of the materials and my expertise in marketing and advertising, I have reached the following conclusions:

1. Marketing, and the sub-area of advertising, is a well-established discipline that has existed for more than 100 years. There is an extensive and established body of literature and professional practice characterized by: (1) more than 50 journals devoted to research in the area, (2) undergraduate and graduate degrees offered in the field, and (3) numerous general and specialized organizations among both academics and practicing professionals. There is a well-established body of research related to marketing and public policy that addresses the practical issues of regulation of deceptive advertising,

among other issues. The field includes a well-accepted body of knowledge about how consumers respond to advertising, as well as well-accepted methodological approaches for the analysis of consumer response to advertising. Professor Butters' opinions not only show no evidence of being informed by this very robust area of research and practice, but also are quite contrary to both that body of literature and internal POM Wonderful documents.

2. In offering his opinions Professor Butters ignores an enormous body of theory and empirical research related to how consumers use information, process advertising messages, and make decisions in the market place. This body of theory and research is interdisciplinary in nature and includes work in marketing, advertising, communication, social psychology, cognitive psychology, consumer psychology, and even linguistics. However, it is not possible to determine that an advertisement does or does not communicate certain implied messages simply from linguistic analysis.

3. Professor Butters deconstructs the POM Wonderful advertising, dismissing or discounting individual elements of the advertising to reach a conclusion about the communication of the advertising. He ignores that both experts in the field of marketing and the law in this area have long used a criterion of the "net impression" created by the synthesis of all elements of an advertising message when making determinations of what messages consumers are likely to take away. Indeed, the standard of "net impression" is not only supported by substantial research in marketing and advertising (Richards 1990), it is also supported by scholars with a strong linguistic background. For example, Stern

(1992) concludes that literary theory can “help clarify the border between art and craftiness, in order to minimize the **deception by implication** that results from a convergence not only of content but also of the *gestalt* that includes form.” (p. 79).

4. Professor Butters offers the conclusion that the “Pom Wonderful Communications do **not** ‘expressly’ convey – **nor** ‘by implication’ do they convey – that (1) recommended amounts and frequencies of Pom Wonderful products have the medical effects indicated...; nor do the Pom Wonderful Communications ‘expressly’ convey or ‘by implication’ do convey that there exists unequivocal scientific support or ‘reasonable basis’” for the conclusions alleged by the FTC (Butters Report at 3). Yet, Professor Butters provides no citation to the vast body of marketing literature and offers no empirical evidence of actual consumer response to support this assertion.

5. Professor Butters may be defining an “implication” as a necessary logical inference from a more explicit message. For example, Professor Butters distinguishes between the words “can” and “will” (Butters Report at 23-24). This view represents an old, long ago rejected view of message recipients as passive. Modern research on consumer behavior recognizes the consumer as an active processor of messages. Consumers bring their own knowledge to their interpretation of messages (Richards 1990). The discipline of marketing has a well-established line of empirical research and well-developed theory that can and should be brought to bear in any examination of consumer response to marketing communications such as the POM Wonderful communications. Marketing experts have

long accepted that consumers take away implied messages from ads that are far “softer” than those that Professor Butters would recognize.

6. Indeed, at a conceptual level, Professor Butters fails to consider the well-established empirical evidence related to pragmatic implications that demonstrates that statements can and often do lead a consumer to believe something that is neither explicitly asserted nor necessarily implied (Harris 1977; Harris, Dubitsky, and Bruno 1983). Pragmatic implications are the outcome of an interaction between the actual content of a communication and the receiver’s knowledge of the world (Searleman and Carter 1988). For example, “John forced Bill to rob the bank” implies that Bill robbed the bank even though this conclusion is not stated explicitly (Harris and Monaco 1978). Harris (1977) found no differences in the likelihood of purchase of products by subjects as a function of whether the claims regarding the product were explicit or pragmatically implied. Given the emphasis of the POM Wonderful product marketing communications on health, on specific disorders (erectile dysfunction, prostate disorders, heart disease, and blood pressure, among others), on the presence of antioxidants, on the amount of funded research supporting specific health related claims, and the references to specific research studies, a reasonable consumer would draw various pragmatic implications based on the totality of these communications.

7. I also disagree with Professor Butters’ assertion that the use of humor and parody has the effect of diminishing the credibility of POM Wonderful’s claims (See e.g., Butters Report at 4). This assertion is contrary to research on the use of humor in advertising. Humor can

serve to break through advertising “clutter,” to catch the consumer’s attention, and to disarm the consumer and reduce counter-arguing (Shabbir and Thwaites 2007). From the “insulting” ads for the Volkswagen Beetle to the “Where’s the Beef?” campaign for Wendy’s, humor has been used as part of compelling advertising messages. There is a rich literature on the use of humor in advertising that clearly demonstrates its power to attract attention and increase message comprehension (Duncan, Nelson, and Frontczak 1984; Sternthal and Craig 1973). Moreover, there is no evidence in the marketing literature that consumers would be skeptical of claims that employ humor and parody and Professor Butters cites no published research to support his conclusions. In fact, the literature suggests exactly the opposite of what Professor Butters argues. For example, Eisend (2010) concludes “affective reactions triggered by humor can increase positive cognitions related to the ad, but reduce brand-related cognitions. By this, humor may help overcome weaknesses in advertising messages such as weak brand arguments or even negative information such as those provided in two-sided messages.” (p. 17).

8. As one example of unsupported and unsupportable conclusions, Professor Butters describes an ad that depicts a flying POM Wonderful juice bottle as a “parody of those ads that do truly intend to convey serious, specific medical information and advice.” (Butters Report at 17). The ad reads,

I’m off to save prostates. Man by man, gland by gland. The Antioxidant Superpower is 100% committed to defending healthy prostates. Powered by pure pomegranate juice... backed by \$25 million in vigilant medical research*... there’s

no telling just how far it will go to improve prostate health in the future. (Butters Report at 15.)

There is a footnote which reads, “*Prostate study details at http://www.pomwonderful.com/health_benefits.html.” Professor Butters concludes:

the reader is not explicitly informed or induced to infer from this ad that specific, definite health benefits are known to exist for Pom Wonderful—beyond the culturally received notions that antioxidants and fruit juices are generally “healthy.” (Butters Report at 16-17).

It is hard to imagine that this ad does not communicate **any** health benefits beyond the fact that antioxidants and fruit juices are generally healthy. Perhaps Professor Butters’ conclusion rests on his willingness only to recognize claims of “definite” health benefits.

9. POM Wonderful’s ordinary course of business research counter’s Professor Butters’ assertion that humor and parody have the effect of diminishing the credibility of POM Wonderful’s claims. In May of 2009, the Bovitz Research Group conducted an advertising evaluation study for POM Wonderful. During the study consumers were shown five billboard ads for POM Wonderful juice. Half of the consumers were shown the “Cheat Death,” “The Antioxidant Superpower,” “Decompress,”¹ “Heart Therapy,”

¹ Some respondents were initially shown the “Decompress” ad and asked its main idea using open-ended questioning. Fourteen percent of the general target and seventeen percent of POM Wonderful juice users were coded as having said “Helps/lowers blood pressure.” (TCCC-0005586 and TCCC-0005614). This empirical evidence contradicts Professor Butters’ opinion that “parodic” ads for POM Wonderful juice do “not make definitive medical claims for the product.” Butters Report at 23.

and “Forever Young” billboard ads. Besides the headline and a humorous picture of a POM Wonderful juice bottle,² each ad also included a tagline along the lines of “The antioxidant power of pomegranate juice.” (TCCC-0005574 and TCCC-0005579; *see also* Bovitz Ad Effectiveness Presentation - 6-10-09.pdf and Bovitz Ad Evaluation Questionnaire.pdf attached to Professor Reibstein’s report). These ads all employed the kind of humor that Professor Butters says works against the communication of a genuine medical benefit. None of the ads mentioned clinical studies or scientific proof. Nevertheless, 56% of target consumers surveyed and 64% of POM Wonderful juice users surveyed agreed that “[b]ased on the ads [they] just saw” they thought it was “true” that POM Wonderful juice “Has proven health benefits.” (TCCC-0005601 and TCCC-0005602). If one uses the response “good for prostate health” as a control question to account for potential yea-saying (as none of the five billboards explicitly addressed prostate health), the net results are 47% of target consumers surveyed and 49% of POM Wonderful juice users surveyed thought that POM Wonderful juice “Has proven health benefits” based on the ads. This shows strong communication of a message of proven efficacy and does not appear to show a negative impact resulting from the ads’ humorous elements.³ Furthermore, when respondents were asked, “Based on the ads you just saw”

² The “Cheat Death” ad showed a POM Wonderful juice bottle with a noose around its neck, “The Antioxidant Superpower” ad showed a POM Wonderful juice bottle wearing a super hero cape, the “Decompress” ad showed a POM Wonderful juice bottle inside a blood pressure cuff, the “Heart Therapy” ad showed a POM Wonderful juice bottle reclining on a couch, and the “Forever Young” ad shows a POM Wonderful juice bottle spinning two hula hoops. (TCCC-0005579).

³ One would expect even stronger playback of communication of proven efficacy in the longer print ads the FTC is challenging that include the same headlines and imagery, but which also have statements such as:

how well does “believable,” describe POM Wonderful juice, 60% of target consumers surveyed and 72% of POM Wonderful juice users agreed that the term fit well or perfectly.⁴ (TCCC-0005605 and TCCC-0005625).

10. Professor Butters also appears to have not considered POM Wonderful’s creative briefs. Creative briefs provide a statement of the creative strategy that guides the development of specific communications and advertising executions. Such briefs define the target audience for the communication(s), establish the primary message, and identify supporting propositions that reinforce the primary messages.
11. Professor Butters states that he analyzed the challenged POM Wonderful product ads from the standpoint of “contemporary speakers of American English.” (Butters Report at 2). This total population framework ignores POM Wonderful’s practice of specifically targeting consumers who are very concerned about or already have health problems, a

... 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, even cancer. Eight ounces a day is all you need. . . . (“Cheat death” print ad, VMS-0000221; *see also* “The Antioxidant Superpower” print ad, RESP024724).

or

... POM Wonderful Pomegranate Juice is supported by \$20 million of initial scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health. Keep your heart healthy and drink 8 ounces a day. . . . (“Heart Therapy” print ad, VMS-0000245; *see also* “Decompress” print ad, VMS-0000242).

⁴ Five other humorous billboard ads, which included “I’m off to save prostates,” were shown to the other half of the survey respondents and were found even more believable. (TCCC-0005574, TCCC-0005578, TCCC-0005605, and TCCC-0005625). Some respondents were initially shown “I’m off to save prostates” ad and asked its main idea using open-ended questioning. Forty-three percent of target consumers were coded as having said “Good for prostates” and forty-eight percent of POM Wonderful juice users were coded as having said “Saves/helps/good for prostate.” (TCCC-0005585 and TCCC-0005613).

much narrower swath of the U.S. population. Creative briefs for POM Wonderful juice ads from 2004, 2005, and 2006 described the target audience as “likely to be affluent, professional, college grads who are very health-conscious (hypochondriacs) and live in urban areas.” (RESP061412, RESP061416, and RESP061418). In 2008, the target audience for juice ads was described as “health conscious affluent adults age 25-49 . . . hunting for authentic products that deliver real benefits they can trust” and it was noted that such individuals make up “perhaps 5-15% of the U.S. population.” (TROPICANA-0000544). The target for the POM Wonderful products’ website’s health section included those who “have a medical condition that Pomegranates may help.” (RESP024849). At various times, the audience for POMx pills was described as being or including someone “who is seeking a natural cure for current ailments or to maintain health and prevent future ailments,” “HH income \$75K+, primarily men who are scared to get prostate cancer,” “Men 40+ 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.” (HLIK-042535, POM_Q9-0003134, RESP024613). Such consumers are likely to be both more attentive to health claims and more likely to draw specific pragmatic inferences about the benefits of POM Wonderful products than the general universe of American speakers of English.

12. POM Wonderful’s creative briefs also appear to show an intent to convey specific health benefit claims, contrary to Professor Butter’s opinion that the ads make no such claims. For example, in describing a “Floss your arteries. Daily.” advertisement,⁵ Professor

⁵ The language which Professor Butters describes as cautious reads:

Butters writes that the ad “is cautious in its language; it does not make definitive medical claims for the product, it only indicates that a clinical **pilot study** found that the clinical subjects who were studied reduced plaque ‘up to 30%,’ and that use ‘**can**’ have that specific beneficial effect—**not that it will.**” (Butters Report at 23-24). (Professor Butters’ emphasis). Two creative briefs contradict Professor Butters. They propose as a possible “Benefit,” “Heart Health: If you drink **POM Wonderful DAILY**, you will have clean & healthy arteries (i.e., Floss Your Arteries Daily).” (RESP061412 and RESP061416) (emphasis in originals).

13. A creative brief also sheds light on POM Wonderful’s intentions in using an image that Professor Butters considers comic. Professor Butters dismisses the communication of citations to scientific studies on the POM Wonderful product’s website in part based on an image that he found to be absurd, that is, “the absurd, comic, frivolously, exaggerated image that opens the discussion of the summary of preliminary medical research: the Pom Wonderful bottle being used as an IV container that pipes pomegranate juice directly into a patient’s veins.” (Butters Report at 29). A creative brief for the health section of the website considered the IV bottle to be an important health message. One of the brief’s three “Mandatories” was: “POM Juice Health images (IV, heart monitor or other new creative).” (RESP024849-50).

Floss your arteries. Daily. Clogged arteries lead to heart trouble. It’s that simple. That’s where we come in. Delicious POM Wonderful Pomegranate Juice has more naturally occurring antioxidants than any other drink. These antioxidants fight free radicals – molecules that are the cause of sticky, artery clogging plaque. Just eight ounces a day can reduce plaques by up to 30%!* So every day: wash your face, brush your teeth, and drink your POM Wonderful. (Butters Report at 21).

14. Professor Butters characterizes a statement on the POM Wonderful product's website, "keep in mind that all of the research had been done on Pom Wonderful 100% Pomegranate Juice." as a "warning." (Butters Report at 29). By "warning," Professor Butters apparently means an "announce[ment] that the scientific research . . . presented . . . has been sponsored by Pom Wonderful, thus suggesting that the reader or hearer should weigh them for possible bias." (Butters Report at 4). A 2008 creative brief suggests the contrary, that POM Wonderful viewed the quoted statement as a selling point. That brief describes as a "Benefit" that "POM is the only pomegranate juice that is truly revolutionary and life affirming - because only POM... is backed by \$25 million in health research." (TROPICANA-0000544-45) (emphasis and ellipse in original). As a "Reason to Believe" it listed that the "over 35 medical studies (8 on humans)" in the prior decade "were conducted exclusively using POM Wonderful pomegranate juice."
15. It is clear from the creative briefs that underlie the POM Wonderful advertising that there was a clear intent to communicate specific, serious health claims to consumers and to support them with citations to medical research:

A 2008 creative brief wanted a campaign to "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 than willing to pay the price- and more." One of the "Reasons To Believe" was that "In the last decade, there have been over 35 medical studies (8 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.” (TROPICANA-0000544-45).

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 was “Backed by \$20 million in medical research.” (POM_Q9-0006396).

A 2007 brief for a welcome letter insert for POMx pills said to “remind them this is a long term proposition. (They don’t get illnesses 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 is nothing else like it available).” (POM_Q9-0002757)

16. Professor Butters asserts that the use of qualifiers and soft words such as “can” rather than “will” serve to diminish the effects of the POM Wonderful product claims. (Butters Report at 23-24).⁶ This assertion is contrary to empirical research on the influence of qualifiers and soft words. Searleman and Carter (1988) offer empirical evidence that the presence of qualifiers increases the credibility of claims relative to the absence of a similar claim without a qualifier. Indeed, these researchers found that the use of the hedge word “may” rather than the stronger term “will” created greater credence for the claim.

⁶ In numerous other places, Dr. Butters couches his assertions that POM Wonderful ads do not communicate certain claims by characterizing the claims as ones that the products “will” do something.

They also found that “piecemeal” claims and juxtaposed claims of different benefits increased the credence of claims relative to a more explicit claim. There are several reasons these results may occur: (1) softer claims may suggest greater objectivity and fairness, (2) unqualified claims may make the message recipient more skeptical, and (3) the weight of multiple juxtaposed but incomplete comparisons may suggest an overall superiority. For example, the use of terms such as “initial study” or “pilot study” is followed by mentions of a well-respected medical school (UCLA), “leading universities,” reference to professional journals in which support of the claims is found, reference to a Nobel laureate, and reference to the sum of money spent on research that is represented as supporting the advertising claims (e.g., \$25 million). The juxtaposition of these various elements has the effect of establishing the credibility of claims for POM Wonderful products.

17. Describing a POM Wonderful juice print ad, Professor Butters states, “It states clearly that the source for the statistic is a **pilot study**, not established medical fact.” (Butters Report at 23). (Professor Butters’ emphasis). The only reference to a clinical study is a fine print footnote that states, “Based on clinical pilot study.” As reproduced in Professor Butters’ report, the footnote is miniscule and barely legible. (Butters Report at 20). To describe this disclosure as clear ignores well-established literature on the practice of fine print disclosures. (Muehling and Laczniak 1996).

Conclusions

In summary, Professor Butters’ conclusions are inconsistent with the extant literature on consumer response to advertising, POM Wonderful’s own internal planning documents, and

empirical evidence. Therefore, those conclusions have no merit with regard to the determination of what claims are communicated by any challenged POM Wonderful ad.

References

Duncan, C., J. Nelson and N. Frontczak (1984), "The Effect of Humor on Advertising Comprehension," in Advances in Consumer Research Volume 11, eds. Thomas C. Kinnear, Provo, UT : Association for Consumer Research, Pages: 432-437.

Eisend, M. (2010), "How Humor in Advertising Works: A Meta-analytic Test of Alternative Models," Marketing Letters (DOI 10.1007/s11002-010-9116-z).

Harris, R. J. (1977), "Comprehension of Pragmatic Implications in Advertising," Journal of Applied Psychology, 62, 603-608.

Harris, R. J., T. M. Dubitsky, and K. J. Bruno (1983), "Psycholinguistic Studies of Misleading Advertising," in R. J. Harris (Ed.), Information Processing Research in Advertising, (Hillsdale, NJ: Erlbaum).

Harris, R. J. and G. E. Monaco (1978), "Psychology of Pragmatic Implications: Information Processing Between the Lines," Journal of Experimental Psychology: General, 107, 1-22.

Muehling, D. and R. Laczniak (1996), "The Effects of Fine-print Disclosure Type and Involvement on Brand Attitude Formation," Journal of Marketing Communications, 2: 2, 67 — 82.

Richards, J. (1990), Deceptive Advertising: Behavioral Study of a Legal Concept, (New York: Routledge).

Searleman, A. and H. Carter (1988), "The Effectiveness of Different Types of Pragmatic Implications Found in Commercials to Mislead Subjects," Applied Cognitive Psychology, 2, 265-272.

Shabbir, H. and D. Thwaites (2007), "The Use of Humor to Mask Deceptive Advertising: It's No Laughing Matter," Journal of Advertising, 36, 75-85.

Stern, B. B. (1992), "Crafty Advertisers: Literary versus Literal Deceptiveness," Journal of Public Policy and Marketing, 11, 72-81.

Sternthal, B. and C. S. Craig (1973), "Humor in Advertising," Journal of Marketing, 37, 12-18.

Signed on April 4, 2011

A handwritten signature in cursive script that reads "David W. Stewart". The signature is written in dark ink and is positioned above a solid horizontal line.

Professor David W. Stewart. Ph.D.

ATTACHMENT I
REDACTED

ATTACHMENT J
REDACTED

ATTACHMENT K

**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,)	PUBLIC
LYNDA RAE RESNICK, and)	
MATTHEW TUPPER, individually and)	
as officers of the companies.)	

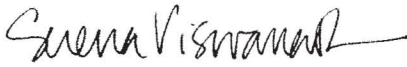
JOINT STIPULATIONS ON ADMISSIBILITY OF EXHIBITS

1. The parties hereby stipulate and agree that the Joint Exhibits listed hereto in Attachment A are admitted without objection.

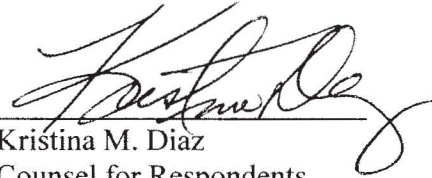
2. The parties stipulate and agree that all deposition designations and counter-designations, and all exhibits that are listed hereto in Attachment B, may be conditionally admitted to the record. The parties reserve all objections previously asserted as to these materials. If such materials are relied upon in post-trial briefing of findings of fact or conclusions of law, any party may re-assert an objection to such material at that stage of the proceeding. The objection may be made in reply briefs or in any appropriate form. If such material is used during the Hearing for any reason, a party may elect to seek a ruling on an objection at that time or defer asserting the objection until post-trial briefing and such objections are not waived if not asserted during the Hearing. The parties further stipulate that any evidentiary material not identified in post-trial briefing shall not be considered part of the record in this proceeding, i.e. not admitted into evidence.

3. The parties also stipulate and agree that the joint exhibit list does not include information that may be used solely as a basis for impeachment.

So stipulated this 24th day of May, 2011:



Serena Viswanathan
Complaint Counsel
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room NJ-3212
Washington, DC 20580
Phone: 202-326-3244
Email: sviswanathan@ftc.gov



Kristina M. Diaz
Counsel for Respondents
ROLL LAW GROUP P.C.
11444 West Olympic Boulevard,
10th Floor
Los Angeles, CA 90064
Phone: 310-966-8775
Email: kdiaz@roll.com

ATTACHMENT A
JOINT EXHIBITS

EXHIBIT #	EXH. TITLE	DOC DATE	BEG BATES #	END BATES #	ADMISSIBILITY
CX0304	Email from C. Nelson to A. Gold, et al. re: market research and POM lapsed purchasers	4/30/2009	RESP061313	RESP061319	3.43(b); 3.43(d)
CX0305	Email From D. Kuyoomjian to A. Gold et al. re POM Household incidence	5/1/2009	RESP032108	RESP032110	3.43(b); 3.43(d)
CX0306	Email from A. Gold to D. Kuyoomjian re: market research, defining POM users and lapsed purchasers	5/1/2009	RESP061320	RESP061336	3.43(b); 3.43(d)
CX0308	Email from P. Kimery to D. Kuyoomjian re Knowledge Base 2009 Health Benefits with attachment	5/4/2009	RESP032011	RESP032017	3.43(b); 3.43(d)
CX0309	POM LRR Meeting Notes - May 7, 2009 (conference call)	5/7/2009	RESP005347	RESP005347	3.43(b); 3.43(d)
CX0310	D. Kuyoomjian to M. Tupper, et al. re: POM Wonderful campaign evaluation (Bovitz research)	5/18/2009	TCCC-0005488	TCCC-0005499	3.43(b) 3.43(c) 3.43(d) 3.43(e)
CX0311	POM Juice Print Ad - Decompress (\$20M)	5/21/2009	RESP060886	RESP060886	3.43(b) 3.43(d)
CX0312	K. Green to D. Kuyoomjian email re: using "Cheat Death" style headline in comic book campaign	5/26/2009	TCCC-0001654	TCCC-0001655	3.43(b); 3.43(c); 3.43(d); 3.43(e)
CX0313	C. Nelson to D. Kuyoomjian email attaching Final Report - POM Wonderful Campaign Copy test	5/27/2009	TCCC-0005569	TCCC-0005627	3.43(b) 3.43(c) 3.43(d) 3.43(e)
CX0314	Email from A. Hernandez to C. Nelson re: US Comic Risk and Time Magazine Wrap - Drink to prostate health with attachments	6/2/2009	RESP024719	RESP024728	3.43(b) 3.43(d)
CX0315	Email from D. Kuyoomjian to J. Rushton, et al. re: L. Resnick Meeting, 2009 Marketing Plan Recap	6/3/2009	RESP061285	RESP061303	3.43(b); 3.43(d)

ATTACHMENT A
JOINT EXHIBITS

EXHIBIT #	EXH. TITLE	DOC DATE	BEG BATES #	END BATES #	ADMISSIBILITY
CX0368	Reibstein Expert Report - Bovitz Ad Effectiveness Presentation	3/11/2011			3.43(b); 3.43(c); 3.43(d)
CX0369	Reibstein Expert Report - Bovitz Ad Evaluation Questionnaire	3/11/2011			3.43(b); 3.43(c); 3.43(d)
CX0370	Reibstein Expert Report - POM A&U Study.pdf	3/11/2011			3.43(b); 3.43(c); 3.43(d)
CX0372	Magazine Wrap - Lucky I have super health powers	12/2009	RESP023828	RESP023831	3.43(b); 3.43(d)
CX0375	POM Organizational Chart	02/2007	KMARTIN-0001541	KMARTIN-0001541	3.43(b); 3.43(c); 3.43(d)
CX0377	POM Juice Print Ad - Heart therapy (\$20M)	1/19/2007	RESP060618	RESP060618	3.43(b); 3.43(c); 3.43(d)
		5/21/2009	RESP060882	RESP060882	3.43(b); 3.43(d)
		1/26/2010	RESP060012	RESP060012	
		2/9/2010	RESP060014	RESP060014	
		2/9/2010	RESP060015	RESP060015	
		3/10/2010	RESP060019	RESP060019	
CX0378	POMx Print Ads - 24 scientific studies (\$32M)	3/15/2010	RESP060021	RESP060021	3.43(b); 3.43(d)
CX0379	TIME Magazine Wrap - Lucky I have super health powers	10/2009	RESP023813	RESP023816	3.43(b); 3.43(d)
CX0380	Magazine Wrap - Lucky I have super health powers	11/0/2009	RESP023821	RESP023827	3.43(b); 3.43(d)
CX0381	POM Juice Print Ad - Holy Health (\$25M)	11/20/2008	RESP059945	RESP059945	3.43(b); 3.43(d)
		11/24/2009	RESP059946	RESP059946	3.43(b); 3.43(d)
CX0382	POM Juice Print Ad - I'm off to save prostates	11/20/2008	RESP059950	RESP059950	3.43(b); 3.43(d)
		2/2/2009	RESP060897	RESP060897	3.43(b); 3.43(d)
		11/23/2009	RESP060070	RESP060070	
		11/24/2009	RESP060088	RESP060088	
		12/17/2009	RESP060068	RESP060068	
CX0383	POMx Print Ads - The antioxidant superpill (\$32M)	12/21/2009	RESP060069	RESP060069	3.43(b); 3.43(d)
		11/28/2007	RESP060596	RESP060596	
		1/2/2008	RESP060588	RESP060588	
		1/24/2008	RESP060574	RESP060574	
CX0384	POM Juice Print Ads - Self-preservation	1/10/2008	RESP060577	RESP060577	3.43(b); 3.43(d)
		11/28/2007	RESP060608	RESP060608	
		11/28/2007	RESP060605	RESP060605	
		12/28/2007	RESP060592	RESP060592	
CX0385	POM Juice Print Ad - Decompress (\$23M)	1/10/2008	RESP060576	RESP060576	3.43(b); 3.43(d)
		2/29/2008	RESP060561	RESP060561	3.43(b); 3.43(d)

ATTACHMENT A
JOINT EXHIBITS

EXHIBIT #	EXH. TITLE	DOC DATE	BEG BATES #	END BATES #	ADMISSIBILITY
PX0222	Walczak JR, Carducci MA. Prostate cancer: a practical approach in current management of recurrent disease. Mayo Clin Proc 2007; 82: 243-249	2007			3.43(b)
PX0223	Expert Report and Attached Exhibits or Appendices of David J. Reibstein, Survey of POM wonderful 100% Pomegranate Users, Survey Analysis, re In the Matter of Pom Wonderful LLC and Roll International Corp and Stewart A. Resnick, Lynda Rae Resnick, and Matt	3/18/2011			3.43(b) 3.43(d)
PX0224	Pom Wonderful A&U study Full Report, June 2009	Jun-09			3.43(b) 3.43(d)
PX0225	POM Wonderful Ad Campaign evaluation-Presentation by Bovitz Research Group	6/10/2009			3.43(b) 3.43(d)
PX0226	Esomar 26 Sample				3.43(b) 3.43(d)
PX0227	POM A&U Study Questionnaire				3.43(b) 3.43(d)
PX0228	Reibstein Table E with Text and ID for Responses	Mar-11			3.43(b) 3.43(d)
PX0229	Reibstein Table F2I2 with Text and ID for Responses	Mar-11			3.43(b) 3.43(d)
PX0230	Reibstein Table G2J2 with Text and ID for Responses	Mar-11			3.43(b) 3.43(d)
PX0231	Reibstein Table K1 with Text and ID for Responses	Mar-11			3.43(b) 3.43(d)
PX0232	Reibstein Verbatim Responses	Mar-11			3.43(b)
PX0233	Reibstein Data Tables	Mar-11			3.43(b) 3.43(d)
PX0234	December 2008 AccentHealth Panel Ad Effectiveness	Dec-08			3.43(b) 3.43(d)
PX0235	Accent Health POM Wonderful Ad Impact & Effectiveness Study March 2009	Mar-09			3.43(b) 3.43(d)
PX0236	Bovitz FINAL POM Campaign Evaluation	4/27/2009			3.43(b) 3.43(d)
PX0237	Reibstein Survey Questionnaire	Mar-11			3.43(b) 3.43(d)

ATTACHMENT L

THE POM QUEEN'S SECRETS TO
MARKETING JUST ABOUT ANYTHING

"Whether you're in the business of selling products or ideas, *Rubies in the Orchard* is full of indispensable advice. Even better, it manages to delight even as it instructs." —MICHAEL POLLAN

Rubies in the Orchard



NATIONAL
BEST
SELLER

Lynda Resnick
with Francis Wilkinson

INCLUDING NEW MATERIAL FROM THE AUTHOR

EX |

hero's triumph or last-minute escape from danger on the movie screen.

Empathy is a powerful social adhesive, so we try to elicit that natural feeling for our product/hero. When talking to our young female audience, we show the POM bottle under a hair dryer with the headline "Extreme Makeover." The audience understands that POM antioxidants make you over from the inside out. If we can make you chuckle, we have an opportunity to connect with a more serious message grounded in our brand's identity and intrinsic value. We can also go too far. When we used an image of a POM bottle in a bridal veil with the message "Outlive your spouse," it took only a few complaints posted on our message board for me to pull the campaign. I realized that for some people, it could never be funny.

Brevity is an essential principle of message creation. Remember Tom Peters's slogan from the late 1980s? "Keep it simple, stupid." Consumers didn't have the patience for a harangue then, and they have even less tolerance for one today. If your message is a paragraph long, you need to go back to the drawing board because you don't have a message—you have a paragraph. A concise, potent message travels well. You can publish it in a magazine and mount it on a billboard. You can put it on a Web site or embroider it on a baseball cap. The shorter the message, the more

If your message is a paragraph long, you don't have a message—you have a paragraph.

easily it adapts to different circumstances—and the more readily it travels between different media.

At best, most advertising skims the surface of our consciousness before we move right past it. That's hardly surprising. Estimates of the number of messages the average consumer confronts vary from about 250 to 5,000 a day. The low range is overwhelming; the high range is downright abusive. A recent report by the market research firm Yankelovich put a hard number on a common assumption: it found that 69 percent of Americans expressed interest "in ways to block, skip or opt out of being exposed to advertising."

Successful advertising makes us register the moment and take notice. If you can generate a reaction in consumers, you've already achieved a major goal; you've become a part of their life in that small but very critical moment. If you use that moment to land a solid message somewhere on the brain—a message grounded in your brand identity and value—then you've truly achieved a great deal.

Whatever you say in your ad and however you deliver the message, it had better be true. Don't put yourself—or your product—in the position of selling old-fashioned lemonade with no lemons in it.

If you're Ford or Procter & Gamble, I guess you see the benefit of spending tens of millions of dollars on thirty-second television spots, but the value of that approach has never been so obvious to me. According to Jeffrey Cole at the USC Annenberg School Center for the Digital Future, television viewers actually watch only between 5 and 10 percent of the commercials on TV. It's astounding but true.

ATTACHMENT M

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

FEDERAL TRADE COMMISSION
I N D E X

WITNESS	PAGE
RONALD BUTTERS	
(By Mr. Ostheimer)	5
(By Mr. Graubert)	214

EXHIBITS	DESCRIPTION	PAGE
1	Expert report of Dr. Butters	7
2	Document entitled Exhibit 1	7
3	Handwritten document	51
4	Typed document	54
5	Advertisement	101
6	Advertisement	111
7	Advertisement	119
8	Complaint	133
9	Advertisement	136
10	Advertisement	139
11	Advertisement	148
12	Advertisement	153
13	"The Truth about Pomegranates"	154
14	Typed document	206
15	Typed document	207
16	Expert report of David W. Stewart	210

POM Wonderful

Butters

4/8/2011

1 case?

2 MR. GRAUBERT: In this form, in this document?

3 MR. OSTHEIMER: I don't know whether it's been
4 produced in this form or not.

5 MS. PERRYMAN: I don't believe it has.

6 MR. GRAUBERT: Where did it come from?

7 MR. OSTHEIMER: It came from VMS I believe.

8 MR. GRAUBERT: I noticed that -- I haven't seen
9 it before, and it doesn't have any identifying marks on
10 it. That's why I asked. Thank you.

11 MR. OSTHEIMER: All right. I would like to have
12 marked as Exhibit 12 a print ad for Pom Wonderful juice.

13 (Butters Deposition Exhibit Number 12 was marked
14 for identification.)

15 BY MR. OSTHEIMER:

16 Q. In your opinion, could this ad communicate to
17 reasonable consumers who are not outliers that drinking
18 pom juice lowers blood pressure?

19 MR. GRAUBERT: Objection.

20 THE WITNESS: Will you repeat the question,
21 please?

22 BY MR. OSTHEIMER:

23 Q. In your opinion, could this ad communicate to
24 reasonable consumers who are not simply outliers that
25 drinking pom juice lowers blood pressure?

For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

POM Wonderful

Butters

4/8/2011

1 MR. GRAUBERT: Same objection.

2 THE WITNESS: It says nothing about lowering
3 blood pressure so the answer is no.

4 BY MR. OSTHEIMER:

5 Q. In your opinion, could this ad communicate to
6 reasonable consumers who are not outliers that drinking
7 pom juice provides proven health benefits?

8 MR. GRAUBERT: Objection.

9 THE WITNESS: It says nothing about proven
10 health benefits, so the answer is no.

11 BY MR. OSTHEIMER:

12 Q. Okay.

13 MR. OSTHEIMER: I would like to have marked as
14 Exhibit 13 a page from the www.pomegranatetruth.com
15 website. I will represent that this print ad is --
16 printout page is the same as Exhibit E 1 of the FTC
17 complaint as quoted on page 4 of the FTC complaint.

18 (Butters Deposition Exhibit Number 13 was marked
19 for identification.)

20 BY MR. OSTHEIMER:

21 Q. I would like you to look at this page. Does the
22 web page simply convey that fruit juices in general are
23 healthy?

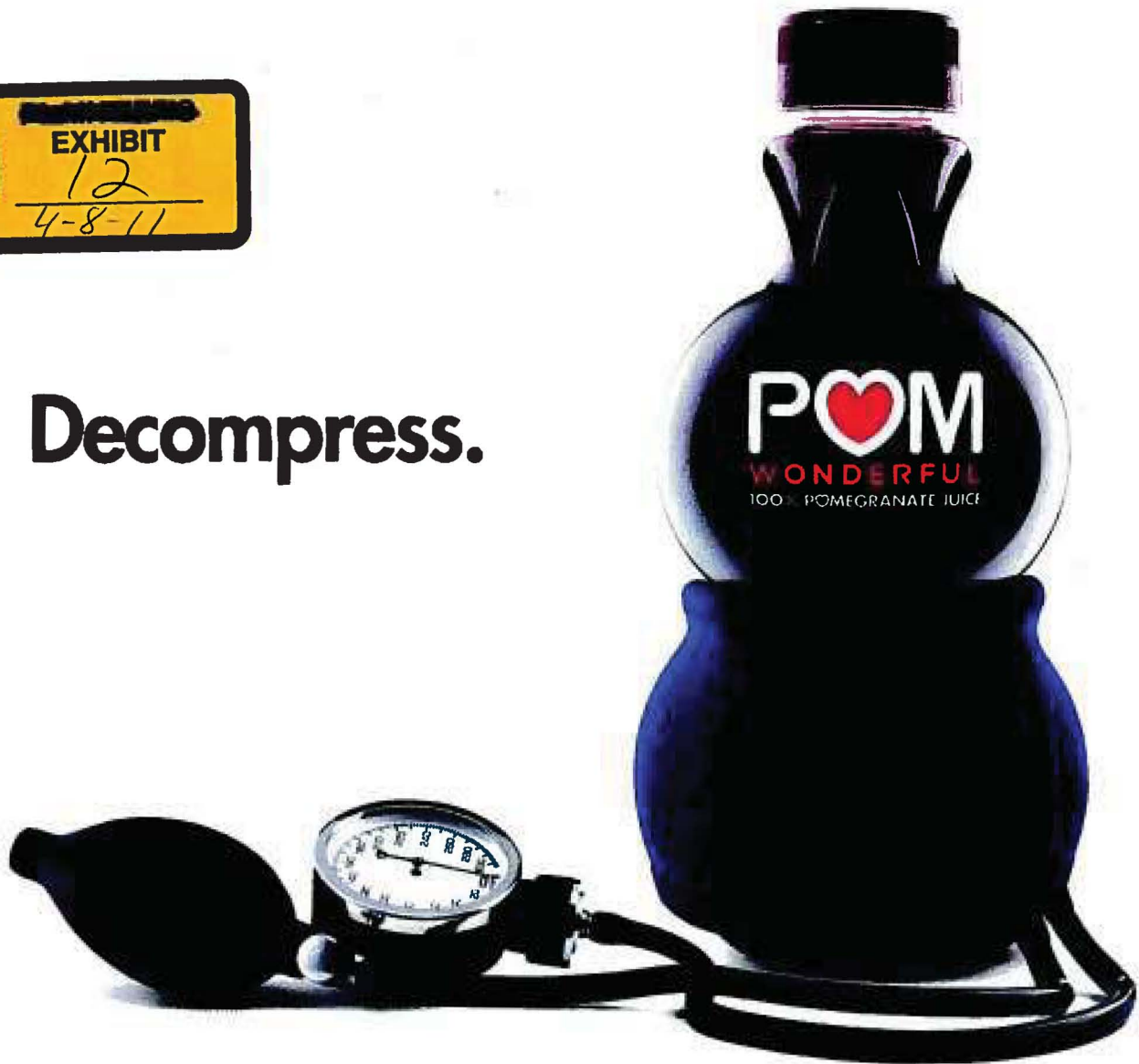
24 MR. GRAUBERT: Objection.

25 THE WITNESS: I'm sorry, what was the question,

For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555



Decompress.



Amaze your cardiologist. Drink POM Wonderful Pomegranate Juice. It helps guard your body against free radicals, unstable molecules that emerging science suggests aggressively destroy and weaken healthy cells in your body and contribute to disease. POM Wonderful Pomegranate Juice is supported by \$20 million of initial scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health. Keep your ticker ticking and drink 8 ounces a day.

POM Wonderful Pomegranate Juice. The Antioxidant Superpower.®



ATTACHMENT N

THIS IS AN
UNCERTIFIED ROUGH DRAFT
OF TRIAL VOLUME 18 IN RE POM WONDERFUL LLC,
TAKEN OCTOBER 14, 2011.

THE FINAL TRANSCRIPT MAY VARY
WITH REGARD TO PAGE/LINE NUMBERING
AS WELL AS SUBSTANTIVE CONTENT.

THE COURT REPORTER RESERVES THE
RIGHT TO MAKE ANY AND ALL CHANGES
NECESSARY TO PROVIDE AN ACCURATE
FINAL TRANSCRIPT.

THEREFORE, THIS DRAFT IS FOR
INTERNAL LAW FIRM PREPARATION ONLY
AND SHOULD NOT BE CITED TO THE COURT,
COUNSEL, OR OTHER WITNESSES WITHOUT
APPROPRIATE DISCLOSURES.

ACCEPTANCE OF THIS DRAFT TRANSCRIPT
CONSTITUTES A FINAL TRANSCRIPT ORDER.

Draft Copy

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

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

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

14 I do want to make one point about the importance
15 of the testimony. If respondents is correct and
16 Dr. Heber's testimony is not important, does not go to
17 an important issue in this case, then why don't we --
18 why don't we agree to strike his testimony and then that
19 would totally eliminate the need to call a rebuttal
20 witness, if it's really not that important. But I have
21 not heard them say that they don't plan to use that
22 testimony to ask you to enter a finding against us.

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

25 MS. DAVIS: Nope. That's it.

1 JUDGE CHAPPELL: All right. Thank you.
2 Call your next witness.

3 MR. OSTHEIMER: Complaint counsel calls David
4 Stewart.

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

7 MR. OSTHEIMER: Yes, Your Honor.

8 JUDGE CHAPPELL: Thank you.

9 - - - - -

10 DIRECT EXAMINATION

11 BY MR. OSTHEIMER:

12 Q. Good morning, Dr. Stewart.

13 Please state your name for the record.

14 A. My name is David Wayne Stewart.

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

18 A. Yes, it is a copy.

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

21 A. Certainly.

22 I have an undergraduate degree in psychology
23 from what was at the time Northeastern Louisiana
24 University. It's now the University of Louisiana at
25 Monroe. I have a master's degree in psychology and a

1 Ph.D. in personality psychology from Baylor University.

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

5 Following that, I then took a position with a
6 major advertising agency in Chicago, what was then
7 Needham, Harper, and Steers, is now DDB. There I was
8 also doing program evaluation research, but it was in
9 the context of marketing and advertising programs. Our
10 clients at Needham at the time were McDonald's
11 hamburgers, Anheuser-Busch, General Mills, American
12 Honda, among others.

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

17 After two years there, I then moved to
18 Vanderbilt University in the Owen Graduate School of
19 Management. There I earned tenure, also served a term
20 as the senior associate dean while I was there. While I
21 was there, I taught a variety of courses in marketing,
22 the introductory marketing class, both at the
23 undergraduate level and the graduate level, courses in
24 advertising, consumer behavior, marketing research,
25 product development, and some Ph.D. seminars.

1 From there, I moved to the University of
2 Southern California, where I subsequently stayed for
3 21 years. At the University of Southern California I
4 held the Robert E. Brooker professorship in marketing,
5 an endowed chair. I served two terms as a department
6 chair of the department of marketing. I also served for
7 five years as the deputy dean of the school, as well as
8 held a number of other administrative appointments.
9 While there I also taught a wide array of courses,
10 advertising, consumer behavior, marketing research, and
11 I did that at the undergraduate and graduate level and
12 MBA level and Ph.D. level. I also participated in a
13 variety of nondegree executive education programs in
14 those same areas. I also continued to write and publish
15 in academic journals and write books.

16 For a period while I was at USC I was also the
17 editor of the Journal of Marketing, which is the leading
18 academic journal in the field of marketing. And also as
19 I was leaving USC to go to the University of California
20 Riverside I also was the editor of the Journal of the
21 Academy of Marketing Science, which is another leading
22 journal in marketing. And from there I then moved to
23 the University of California at Riverside where I took
24 the role of dean. I continued to teach, I continued to
25 write, I continued to edit the journal for a time, and

Page 74

1 JUDGE CHAPPELL: -- that counsel has told
2 respondent that counsel, complaint counsel, is not
3 attacking billboards?
4 MR. OSTHEIMER: None of the ads that are being
5 challenged in this proceeding are billboard ads. But --
6 and that is the subject of a pending motion to strike
7 which will be responded to on Monday. And -- on several
8 grounds.
9 Today, the issue is that these -- the test of
10 these billboard messages directly rebuts opinions of
11 Dr. Butters. He said that the headlines and visual
12 representations themselves, just the headlines and
13 visual representations, would not be viewed as
14 indicating claims.
15 JUDGE CHAPPELL: But you understand and again I
16 haven't memorized the motion but I believe it's to
17 strike the study.
18 MR. OSTHEIMER: Yes.
19 JUDGE CHAPPELL: And having not seen a response,
20 I have no idea how I will rule, but if that study is
21 stricken, you're putting at risk any question you ask
22 about that study. You understand that.
23 MR. OSTHEIMER: Absolutely. And it's perfectly
24 agreeable, Your Honor.
25 JUDGE CHAPPELL: All right. Your running

Page 75

1 objection is granted.
2 Go ahead.
3 BY MR. OSTHEIMER:
4 Q. I believe you agreed that page 12 presents the
5 main idea communication of the "off to save prostates"
6 billboard ad.
7 How was that communication measured?
8 A. Well, the communication was measured in several
9 ways. One way in which it was measured was with an
10 open-ended question, actually a sequence of open-ended
11 questions following various exposures. That simply
12 asked people what benefits or what are the main ideas
13 that are being communicated or that the ads are trying
14 to get across.
15 Q. And the results presented on this page for the
16 "off to save prostates" ad, are those the results of
17 just one open-ended question about the main idea?
18 A. Yes, that's correct.
19 Q. Is such a question reliable?
20 A. Yes, it is.
21 Q. What were the results for the "off to save
22 prostates" billboard ads main idea?
23 A. Well, some 86 percent of the respondents take
24 away some type of healthier or health benefits claim,
25 but the next most frequent mention of a benefit is good

Page 76

1 for prostates, which 43 percent of the respondents
2 offered in response to an open-ended question.
3 Q. And if we could look at page 13 of the report,
4 PX 02250013. Does page 13 present the main idea
5 communication of the "Decompress" billboard ad?
6 A. Yes, it does.
7 Q. What were the results of the for the
8 "Decompress" ads main idea?
9 A. Again, a very high level of general
10 communication of healthy or health benefits, 86 percent,
11 but what we see is that 14 percent indicate that it
12 helps or lowers blood pressure. And another 8 percent
13 talk about it or give a response that it's good for your
14 heart.
15 Q. What do the results from those questions tell us
16 about whether the humorous headlines and images can be
17 seen as making claims?
18 A. Well, clearly in response to just the humorous
19 headline and the image, there is a communication of
20 benefits that range from very general to quite specific.
21 JUDGE CHAPPELL: I want to clarify the record.
22 Mr. Fields, your request for a running objection is
23 granted. I might have misstated and said the objection
24 was granted. That would have been premature.
25 MR. FIELDS: No. I understand.

Page 77

1 BY MR. OSTHEIMER:
2 Q. And were there similar results among the POM
3 users in the study?
4 A. Yes, there were.
5 Q. At some point in the study survey respondents
6 were exposed to all five ads from a campaign; is that
7 correct?
8 A. That's correct.
9 Q. Were they then asked?
10 MR. FIELDS: Excuse me, Your Honor I was slow to
11 get up there is a different objection again the word
12 "ads" without billboard and again there were no ads that
13 were the subject of this survey other than billboards
14 and counsel keeps using "ads" separately. Unless we can
15 stipulate that when he says ads he's only talking about
16 billboards, which is okay with me, we should not have a
17 question that talks about ads because it is ambiguous.
18 MR. OSTHEIMER: Previously I attempted to at
19 least clarify with the witness that when I refer to ads
20 I meant billboard ads but I'd be happy to stipulate in
21 any further discussion of the study that I'm talking
22 about billboard are board ads being tested.
23 JUDGE CHAPPELL: All right. Thank you. And
24 then let us know when you're no longer talking about the
25 study and the ads related to the study.

1 MR. OSTHEIMER: I will.
 2 BY MR. OSTHEIMER:
 3 Q. Were survey respondents in this study then asked
 4 an open-ended communication question about POM's
 5 benefits?
 6 A. Yes, they were.
 7 Q. I'd like to display PX 0225-0014.
 8 If you look at page 14 of the report, what was
 9 that question that was asked?
 10 A. This was a closed-ended question.
 11 Q. I'm sorry?
 12 A. I said this is a closed-ended question I
 13 believe. No I think you're right it's an opened ended
 14 question. It's based on the ads -- it says based on the
 15 ads you just saw, what are the specific benefits, if
 16 any, of drinking POM Wonderful?
 17 Q. And again, is that an open or closed-ended
 18 question?
 19 A. I believe this is an open-ended question.
 20 Q. Is that question leading?
 21 A. I'm sorry?
 22 Q. Is that question leading?
 23 A. No, it's not leading.
 24 Q. What were the results from that question?
 25 A. Well, in the case of the superhero billboards,

1 again, we see a very high level of communication of
 2 general health benefits, but we see 55 of the
 3 respondents -- 55 percent of the respondents mentioned
 4 the product is good for prostates, very specific benefit
 5 claim. For the dressed bottle billboards, again, a very
 6 high level of communication of general healthcare or
 7 health benefit claims, but 38 percent indicate that it's
 8 good for your heart and 21 percent indicate that it
 9 helps or lowers blood pressure.
 10 Q. What do the results from that question tell us
 11 about whether humorous headlines and images themselves
 12 can be seen as making claims?
 13 A. Well, clearly the respondents are drawing some
 14 inferences or beliefs from just the exposure to the
 15 images and the headlines and they're drawing some very
 16 specific inferences about benefits, as well as some very
 17 general health-related benefits.
 18 Q. And were there similar results among the POM
 19 users in the study?
 20 A. I'm sorry?
 21 Q. I'm sorry. And were there similar results among
 22 the POM users in the study?
 23 A. Yes, there were.
 24 Q. Were the survey respondents asked any additional
 25 questions that bear upon whether humorous headlines and

1 images can be seen as making claims?
 2 A. Yes, there were.
 3 Q. I'd like to display PX 0225-0025, which is page
 4 25 of the report.
 5 Are the results of one such question presented
 6 on page 25?
 7 A. Yes, they are.
 8 Q. What was the question? That was asked?
 9 A. This question is a closed-ended question and it
 10 states: Based on the ads you just saw, which of the
 11 following do you think are true about POM Wonderful?
 12 Please select as many or as few as you feel apply. And
 13 then the respondent was given a list of items that they
 14 could select from.
 15 Q. And what were the results?
 16 A. Well, in the case of the superhero campaign,
 17 85 percent of the individuals in response to this
 18 question indicated that it had something to -- a
 19 characteristic of the POM Wonderful product was good
 20 prostate health. And in the case of the dressed bottle
 21 campaign, some 67 percent indicated that it's good for
 22 cardiovascular health.
 23 Q. That's from a closed-ended question; correct?
 24 That is from a closed-ended question; is that
 25 correct?

1 A. That is from closed-ended questions, that is
 2 correct.
 3 Q. What is yea-saying?
 4 A. Yea-saying is a tendency most often in the
 5 context of personal interviewing, an individual
 6 responding to an another individual, to give a yes
 7 response or to give a response that is more socially
 8 desirable or less likely to create a sense of tension
 9 with the interviewer. It's an effort to be agreeable,
 10 if you will.
 11 Q. How would you account for yea-saying analyzing a
 12 study that was already conducted?
 13 A. Well, one way you might account for yea-saying
 14 is to look for a question or a response that is clearly
 15 not relevant to the content of a particular ad or set of
 16 ads.
 17 Q. How would you apply such an approach here?
 18 A. Well, in this context we can look at the dressed
 19 bottle campaign, which makes no reference to prostate
 20 health, and we still see that some 9 percent of
 21 individuals said something about prostate health. Now,
 22 that may all be yea-saying or it may be some yea-saying
 23 and it may be individuals know something about the
 24 characteristics of antioxidants, they have other prior
 25 beliefs, so this may not simply reflect yea-saying. But

1 we could be very conservative and say all 9 percent of
 2 the respondents were engaged in yea-saying to be
 3 conserve stiff, in which case we could take 9 percent
 4 away from, let's say, the 67 percent who said good for
 5 cardiovascular health in response to this campaign.
 6 So 67 minus 9 would be 58 percent, so with that
 7 correction for yea-saying, certainly a conservative
 8 correction for yea-saying, you'd still have 59 percent
 9 of individuals taking away a message good for cardiac
 10 health.
 11 Q. What do the results from that question tell us
 12 about whether humorous headlines and images can be seen
 13 as making claims?
 14 A. Again, as I've said, this is -- this study and
 15 this particular set of results demonstrates that
 16 headlines and images alone independent of any other text
 17 can affect communicate benefits that range from very
 18 general to very specific.
 19 Q. I'd like to show you a document that has been
 20 marked as CX 0103, which is tab H in your report.
 21 This is the -- a "Decompress" print ad.
 22 I'd like to then -- I'd just like you to take a
 23 quick look at that ad.
 24 At his deposition, which a document that has
 25 been marked as PX 0350, starting on page 153, which

1 is -- so it would be 0000153, line 23, continuing to 154
 2 line 3, Dr. Butters said that the -- was Dr. Butters --
 3 said that this ad -- says nothing about lowering blood
 4 pressure and could not communicate to reasonable
 5 consumers who are not simply outliers that drinking POM
 6 juice lowers blood pressure.
 7 Can you blow that up? Actually I guess it's
 8 hard because it carries over.
 9 Do the results of the Bovitz study contradict
 10 Dr. Butters?
 11 A. Yes, I believe they do.
 12 Q. Why is that?
 13 A. Well, the Bovitz study actually studied,
 14 included in the study a billboard that had exactly the
 15 headline and image in the ad that -- the print ad that
 16 we're talking about and to the extent that the Bovitz
 17 study demonstrates that the ad -- that the image and the
 18 head align alone is sufficient to communicate to a
 19 substantial number of consumers specific claims, that
 20 contradicts his view that it could not do so.
 21 Q. So it contradicts his view that no reasonable
 22 consumers who are not simply outliers could think from
 23 this ad that drinking POM juice lowers blood pressure.
 24 A. I disagree with that and indeed the Bovitz study
 25 found a significant number -- far more than you could

1 count as outliers, as taking away the message about
 2 lowers blood pressure.
 3 Q. Is there anything the body of the ad that
 4 contradicts the lower blood pressure message?
 5 A. Nothing that I see.
 6 MR. OSTHEIMER: Thank you.
 7 JUDGE CHAPPELL: Are you finished?
 8 MR. OSTHEIMER: No further questions,
 9 Your Honor.
 10 JUDGE CHAPPELL: Thank you. How much time do
 11 you think you'll need, Mr. Fields?
 12 MR. FIELDS: An hour or less.
 13 JUDGE CHAPPELL: All right. Let's take a lunch
 14 break.
 15 We'll reconvene at 2:00 p.m.
 16 (Whereupon, at 12:58 p.m., a lunch recess was
 17 taken.)
 18
 19
 20
 21
 22
 23
 24
 25

1 A F T E R N O O N S E S S I O N
 2 (2:04 p.m.)
 3 JUDGE CHAPPELL: Back on the record.
 4 Cross-exam?
 5 MR. FIELDS: Thank you, Your Honor.
 6 - - - - -
 7 C R O S S - E X A M I N A T I O N
 8 B Y M R . F I E L D S :
 9 Q. Good afternoon, Professor.
 10 A. Good afternoon.
 11 Q. On direct examination, you said that you had
 12 stepped down as dean at UC Riverside. Actually you were
 13 asked to step down; isn't that correct, sir?
 14 A. No, I was not asked. It was a mutual agreement
 15 between the chancellor and I.
 16 Q. The chancellor did not ask you to step down?
 17 A. We agreed mutually that I would step down.
 18 Q. Did he ask you to step down, sir?
 19 A. No, he did not.
 20 JUDGE CHAPPELL: Ironsides?
 21 Go ahead.
 22 B Y M R . F I E L D S :
 23 Q. All right. Did you see the report that came out
 24 in which the chancellor was quoted (indicating)?
 25 A. I did.

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

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

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

12 Q. And are there elements of ads that could
13 overcome such skepticism?

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

17 Q. And when you were talking about the Bovitz
18 study, is that when you said it didn't show the effect
19 of any particular ad is that because you believe that
20 open-ended questions don't show causation?

21 MR. FIELDS: Objection. Leading.

22 THE WITNESS: No that's not why.

23 JUDGE CHAPPELL: Hold on. You need to rephrase.

24 BY MR. OSTHEIMER:

25 Q. When you said that the Bovitz study didn't show

1 the effect of any particular ad, were you considering
2 the open-ended questions asked about the individual ads
3 at the beginning like "Decompress" and "off to save
4 prostates"?

5 A. That's not what I was referring to. What I was
6 referring to was the general standard for proving
7 causation, which would involve having a control, and
8 there was not a -- there was not a control condition
9 involved. As I said, they're proximity between
10 presentation and the question would be consistent with
11 causality, but in the absence of a control you couldn't
12 draw a firm inference.

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

16 A. I am.

17 MR. OSTHEIMER: No further questions,
18 Your Honor.

19 MR. FIELDS: No questions, Your Honor.

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

22 THE WITNESS: Thank you.

23 JUDGE CHAPPELL: We're going to take a short
24 break. Then I'm going to come back and deal with the
25 pending motion. We'll reconvene at 2:45.

1 (Recess)

2 JUDGE CHAPPELL: Back on the record.

3 MR. FIELDS: Thank you.

4 I hate to spoil the suspense, but in order to
5 avoid any possibility of delay, we don't know how
6 Your Honor is going to rule, we would argue to counsel's
7 recommendation or suggestion and we just strike
8 Dr. Heber's answer that there was a consensus. We don't
9 feel it's important. We don't need it and we're willing
10 to, as counsel suggested, strike it, and that eliminates
11 the need to impeach him on that statement.

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

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

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

17 JUDGE CHAPPELL: Here's where we are. I've got
18 a pending motion.

19 MR. FIELDS: Right.

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

25 MR. FIELDS: I think we just did.

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

3 MR. FIELDS: Oh, okay.

4 (Pause in the proceedings.)

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

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

12 MR. FIELDS: Well, strike my last argument.

13 JUDGE CHAPPELL: I think that last sentence
14 would qualify.

15 All right. So the motion is still alive.

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

20 JUDGE CHAPPELL: Okay. Anything further?

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

22 JUDGE CHAPPELL: You may have a seat.

23 MR. FIELDS: Thank you.

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

ATTACHMENT O

THIS IS AN
UNCERTIFIED ROUGH DRAFT
POM WONDERFUL, VOL. 16
OCTOBER 11, 2011

THE FINAL TRANSCRIPT MAY VARY
WITH REGARD TO PAGE/LINE NUMBERING
AS WELL AS SUBSTANTIVE CONTENT.

THE COURT REPORTER RESERVES THE
RIGHT TO MAKE ANY AND ALL CHANGES
NECESSARY TO PROVIDE AN ACCURATE
FINAL TRANSCRIPT.

THEREFORE, THIS DRAFT IS FOR
INTERNAL LAW FIRM PREPARATION ONLY
AND SHOULD NOT BE CITED TO THE COURT,
COUNSEL, OR OTHER WITNESSES WITHOUT
APPROPRIATE DISCLOSURES.

ACCEPTANCE OF THIS DRAFT TRANSCRIPT
CONSTITUTES A FINAL TRANSCRIPT ORDER.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

TUESDAY, OCTOBER 11, 2011
9:30 a.m.
TRIAL VOLUME 16
PART 1
PUBLIC RECORD

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

Reported by: Susanne Bergling, RMR-CRR-CLR

APPEARANCES: (continued)

ON BEHALF OF THE RESPONDENTS:
BERTRAM FIELDS, ESQ.
Greenberg Glusker
1900 Avenue of the Stars
21st Floor
Los Angeles, California 90067
(310) 201-7454
-and-
KRISTINA M. DIAZ, ESQ.
BROOKE HAMMOND, ESQ.
JOHNNY TRABOULSI, ESQ.
Roll Law Group P.C.
11444 West Olympic Boulevard
10th Floor
Los Angeles, California 90064
(310) 966-8775
kdiaz@roll.com

APPEARANCES:

ON BEHALF OF THE FEDERAL TRADE COMMISSION:
HEATHER HIPPSLEY, ESQ.
MARY L. JOHNSON, ESQ.
SERENA VISWANATHAN, ESQ.
DEVIN WILLIS DOMOND, ESQ.
JANET EVANS, ESQ.
Federal Trade Commission
Bureau of Consumer Protection
601 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 326-3285
hhippsley@ftc.gov

ON BEHALF OF THE RESPONDENTS:
JOHN D. GRAUBERT, ESQ.
SKYE LYNN PERRYMAN, ESQ.
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-5938
jgraubert@cov.com

PROCEEDINGS
- - - - -
JUDGE CHAPPELL: Call to order docket 9344.
Before we get started, I saw a written motion come in
late Friday afternoon regarding a rebuttal witness. How
much time does Respondent need to file a written
response?
MR. GRAUBERT: Your Honor, that response is
being filed as we speak. You should have it shortly.
JUDGE CHAPPELL: If it hasn't been filed yet, I
am extremely interested in the time line of events.
MR. GRAUBERT: I'm sorry, Your Honor. I'm a
little confused. The time line of which events?
JUDGE CHAPPELL: What people knew and when they
knew it.
MR. GRAUBERT: Let me see if I can reconstruct
that.
JUDGE CHAPPELL: Why don't you take a moment to
think about it. When someone asks for a rebuttal
witness, I like to know for sure when they first
realized they might need a rebuttal witness.
MR. GRAUBERT: Maybe I should have Complaint
Counsel --
JUDGE CHAPPELL: Well, you are responding to it
and it's going to be in writing. That's why I told you

1 you referred to?

2 MS. HIPPSLEY: That was the deposition that

3 Respondents admitted into the record in our joint

4 exhibits, the deposition of Dr. Butters.

5 JUDGE CHAPPELL: All right. So the record is

6 clear, CX 2064 is admitted.

7 MR. FIELDS: Thank you, Your Honor.

8 REDIRECT EXAMINATION

9 BY MR. FIELDS:

10 Q. Are you okay, Professor Butters?

11 A. Yes, sir.

12 Q. Okay. Let us know if you're not.

13 All right. I just have four or five questions.

14 Firstly, Ms. Hipsley read you a section from your

15 report about humor and hyperbole and blocking the

16 inferences from other parts of the ad. Were you talking

17 about blocking the humorous and hyperbolic parts or were

18 you talking about blocking the serious representations

19 in the ad?

20 A. The -- the -- the hyperbole in the ads and the

21 humor in the visual representations blocks literal

22 interpretation of many of the -- of the headings, such

23 as "I'm off to save prostates." These are absurd terms

24 and will not be -- will not be viewed as -- as

25 indicating claims.

1 Q. Okay. Ms. Hipsley --

2 A. As far as the second part of your question is

3 concerned, the humor doesn't block the serious

4 statements that are made in the text and footnotes.

5 Q. Thank you.

6 Ms. Hipsley also read you parts of your report

7 equating health with freedom from disease. I'm

8 paraphrasing. Does that mean that if an ad says

9 "promising results for health" or "We promote health,"

10 that a reasonable person would take away from that a

11 message that it prevents disease?

12 A. No. It's possible for things to contribute to

13 our health that simply make us feel better and, you

14 know, make us healthier. If I start running three miles

15 every day, I may be no -- I may be no freer from disease

16 at the end of that than I was before, but I think I

17 would be healthier.

18 Q. Thank you.

19 You were also asked about if you had specially

20 considered that some of the people who answered --

21 looked at these ads might have been sick, might have

22 actually had, let's say, prostate cancer.

23 What difference, if any, would it make to your

24 responses on direct examination if the people who saw

25 these ads were sick or had cancer?

1 A. That wouldn't change the conclusions in my

2 report one bit. One would expect that people with

3 serious diseases, who were confronted with these ads,

4 who wanted to investigate them further would do so. In

5 other words, this would -- would make them more

6 skeptical, not less skeptical of the -- of the ads as in

7 any way advocating a treatment or cure or prevention.

8 Q. Thank you.

9 In the "I'm off to save prostates" ad, and I

10 don't remember the number of it, but counsel asked you a

11 number of questions about the word "defend," defend

12 against certain diseases, but the actual sentence was

13 "committed to defend" against those things.

14 Now, when you say a product is committed to

15 defend against something, would a reasonable person

16 infer that they definitely succeed in eliminating that

17 something, that disease?

18 A. No. "Committed" is a -- is a word like "fight

19 for," which doesn't necessarily guarantee the success of

20 the outcome.

21 Q. Okay. Is it correct that you -- I think I

22 understood you to say this -- that you do not feel that

23 it is necessary to take a survey to opine on the

24 reasonable meaning or implication from these ads?

25 A. That's -- that's correct. It would -- given the

1 huge quantity of data in this case, it would be very

2 difficult to do survey work. I guess one could do --

3 but -- but apart from that, survey methodology, while

4 sometimes employed in linguistics, is not -- is not

5 necessary, nor necessarily appropriate.

6 Q. Thank you.

7 All right, I think this is the last question.

8 There were some questions asked to you about \$25 million

9 in research. I think that was also in the "Off to save

10 prostates" ad.

11 When a statement, like in that ad, says "Backed

12 by \$25 million in research," and that ad happened to be

13 about prostate health, as I recall it, would a

14 reasonable person understand that that entire \$25

15 million was spent on research about the prostate, as

16 opposed to general research on various aspects of

17 health?

18 A. I'd have to look at the ad more closely to -- to

19 be sure about the -- we know that the -- I mean,

20 independently, I guess we know that POM's research

21 covered a number of different things.

22 Q. Yes.

23 Could we have the -- I've forgotten the number,

24 I'm afraid, Counsel. If you have handy the -- the "I'm

25 off to save prostates" ad that has the 25 million in

ATTACHMENT P

In the Matter of:

POM Wonderful, et al.

August 30, 2011

Public Record

Trial Vol. 11

Condensed Transcript with Word Index



For The Record, Inc.

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

FEDERAL TRADE COMMISSION

I N D E X

IN RE POM WONDERFUL LLC, ET AL.

TRIAL VOLUME 11

PUBLIC RECORD

AUGUST 30, 2011

WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS	VOIR
S. RESNICK	1852	1871			
LIKER	1873	1906			
HEBER	1936	2013			

EXHIBITS FOR ID IN EVID IN CAMERA STRICKEN/REJECTED

CX

(none)

RX

(none)

JX

(none)

DX

(none)

For The Record, Inc.

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

Page 1797

1 UNITED STATES OF AMERICA
 2 BEFORE THE FEDERAL TRADE COMMISSION
 3
 4 In the Matter of)
)
 5 POM WONDERFUL LLC and)
 ROLL GLOBAL LLC,)
 6 as successor in interest to)
 Roll International Corporation,)
 7 companies, and) Docket No. 9344
 STEWART A. RESNICK,)
 8 LYNDA RAE RESNICK, and)
 MATTHEW TUPPER, individually)
 9 and as officers of the)
 companies.)
 10)
 -----)
 11
 12 Tuesday, August 30, 2011
 13 9:34 a.m.
 14 TRIAL VOLUME 11
 15 PUBLIC RECORD
 16
 17
 18 BEFORE THE HONORABLE D. MICHAEL CHAPPELL
 19 Administrative Law Judge
 20 Federal Trade Commission
 21 600 Pennsylvania Avenue, N.W.
 22 Washington, D.C.
 23
 24 Reported by: Josett F. Whalen, RMR-CRR
 25

Page 1798

1 APPEARANCES:
 2
 3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:
 4 HEATHER HIPPSLEY, ESQ.
 5 MARY L. JOHNSON, ESQ.
 6 SERENA VISWANATHAN, ESQ.
 7 DEVIN WILLIS DOMOND, ESQ.
 8 TAWANA E. DAVIS, ESQ.
 9 JANET EVANS, ESQ.
 10 Federal Trade Commission
 11 Bureau of Consumer Protection
 12 601 New Jersey Avenue, N.W.
 13 Washington, D.C. 20001
 14 (202) 326-3285
 15 hhippsley@ftc.gov
 16
 17
 18 ON BEHALF OF THE RESPONDENTS:
 19 JOHN D. GRAUBERT, ESQ.
 20 Covington & Burling LLP
 21 1201 Pennsylvania Avenue, N.W.
 22 Washington, D.C. 20004-2401
 23 (202) 662-5938
 24 jgraubert@cov.com
 25

Page 1799

1 APPEARANCES: (continued)
 2
 3 ON BEHALF OF THE RESPONDENTS:
 4 BERTRAM FIELDS, ESQ.
 5 Greenberg Glusker
 6 1900 Avenue of the Stars
 7 21st Floor
 8 Los Angeles, California 90067
 9 (310) 201-7454
 10 -and-
 11 KRISTINA M. DIAZ, ESQ.
 12 BROOKE HAMMOND, ESQ.
 13 JOHNNY TRABOULSI, ESQ.
 14 Roll Law Group P.C.
 15 11444 West Olympic Boulevard
 16 10th Floor
 17 Los Angeles, California 90064
 18 (310) 966-8775
 19 kdiaz@roll.com
 20
 21
 22 ALSO PRESENT:
 23 VICTORIA ARTHAUD, ESQ.
 24 HILLARY SLOANE GEBLER, ESQ.
 25

Page 1800

1 P R O C E E D I N G S
 2 - - - - -
 3 JUDGE CHAPPELL: Back on the record Docket 9344.
 4 Good morning, everyone.
 5 MR. FIELDS: Good morning, Your Honor.
 6 JUDGE CHAPPELL: Are you ready to call your next
 7 witness?
 8 MR. FIELDS: We have our opening statement that
 9 we reserved, Your Honor, if I may go ahead with that
 10 with your permission.
 11 JUDGE CHAPPELL: Before you do, and I'm not sure
 12 who is going to speak to this, but were the IT issues
 13 resolved?
 14 I'm talking about the flurry of e-mail coming in
 15 last week about some exhibits that may or may not be
 16 clear on the screens.
 17 MR. GRAUBERT: Right. Yes. Thank you,
 18 Your Honor. And I want to express our appreciation to
 19 the FTC IT staff, who have substantially improved the
 20 image, and I think it's as good as it's going to get.
 21 And we have of course hard copy backups.
 22 The main problem is, when the entire page is on
 23 the screen, it's not really the highest quality, but
 24 when the selections are blown up, they're perfectly
 25 legible. I don't think it's going to be a big problem.

Page 1845

1 taken literally by anybody. I don't think any
 2 reasonable person would think that you're really saying,
 3 if you drink pomegranate juice, you'll outlive your
 4 401(k), whatever that may mean. And there are a bunch
 5 of those that Your Honor has seen.
 6 So putting aside those headings and putting
 7 aside the original "Cheat death" text, not the text
 8 that followed the "Cheat death" ad, moving on -- and I
 9 should stop here and say that there is evidence and
 10 there will be evidence that the profile of the POM
 11 buyer -- and this comes up in a lot of cases about --
 12 you know, like Lanham Act cases -- the profile of the
 13 POM buyer is a generally well-educated person,
 14 reasonably well off, relatively knowledgeable about
 15 health products, not the kind of person who is going to
 16 take it literally when you say "Outlive your 401(k),"
 17 not the kind of person who would think that when you
 18 say "We have encouraging results" we mean we can cure
 19 cancer, not the kind of person who would think that
 20 when you say "We can reduce the factors that cause
 21 plaque buildup" that we're saying we can prevent a
 22 heart attack, you won't get a heart attack if you drink
 23 pomegranate juice. These people who are the profile
 24 and buyers of POM are not going to think things like
 25 that, even if some outlier might think it, but no

Page 1846

1 reasonable person is going to think it.
 2 Now, next you have a blood pressure ad early on
 3 based on Aviram's --
 4 JUDGE CHAPPELL: I think I might have just
 5 heard you make the argument that all POM buyers are
 6 reasonable people?
 7 MR. FIELDS: I didn't say all. I said the
 8 profile. I'm sure there's a guy out there who's a
 9 maniac who buys POM, but he's not our profile group.
 10 The profile group are generally well-educated
 11 people, reasonably well off, pretty knowledgeable about
 12 health products and interested in health. That's true.
 13 But they're not going to say and think that these ads
 14 about promoting health, about reasonable results, about
 15 encouraging results, that these are telling them that
 16 they can't get a heart attack if they drink POM. And no
 17 reasonable person is going to think that. That maniac
 18 that I referred to could, but that's -- I can't account
 19 for maniacs.
 20 JUDGE CHAPPELL: So that outlier is now a
 21 maniac?
 22 MR. FIELDS: I absolutely said he was a maniac,
 23 Your Honor. I think I was pretty clear on that.
 24 JUDGE CHAPPELL: But those people are let inside
 25 the store?

Page 1847

1 MR. FIELDS: They don't let them in some stores,
 2 but they're sometimes inside stores.
 3 Then we get to the -- oh, I already started
 4 talking about the blood pressure ad. That was based
 5 upon Dr. Aviram. It wasn't a blood pressure study
 6 specifically, but it found that blood pressure was
 7 reduced. And they advertised that early on and stopped
 8 because subsequent studies didn't. They didn't show it
 9 doesn't lower blood pressure; they just didn't prove it
 10 does. And again, a null result is not a negative
 11 result, but it doesn't matter. They wanted to stop the
 12 blood pressure ads, and they did, so those aren't
 13 running. We'll be talking about that in a moment.
 14 Now, there's a "Decompress" ad. Remember the
 15 bottle with the blood pressure cuff around it? And that
 16 ran, and it was stopped about three years ago. And what
 17 they meant by that was not that we reduce blood pressure
 18 because if you -- the text that goes with the ad is
 19 clearly not about blood pressure, doesn't have anything
 20 to do with blood pressure, so if you read the text, it's
 21 saying that.
 22 Now, complaint counsel says, Well, people will
 23 think it's about blood pressure. Well, we found in a
 24 study -- a year after the ad was stopped, there was a
 25 study, because we will have evidence that the ad was

Page 1848

1 stopped in May of '08, and a year after the ad was
 2 stopped there was a survey. We don't agree with the
 3 survey, but the people just saw the picture of the
 4 bottle with the decompressed cuff -- by the way, which
 5 was meant to say relax, the way that a blood pressure
 6 cuff goes down, ch-ch-ch-ch-ch-ch, goes down, relax.
 7 But in this survey, a small percentage of
 8 people -- well, we disagree about the percentage, and
 9 we can get into that if we have to later on -- but that
 10 some minority of the people who saw just the picture
 11 without the text -- because if they read the text, they
 12 had to know it was not about blood pressure -- just the
 13 picture thought it was about blood pressure. Okay. It
 14 was stopped. It was stopped a year before that survey.
 15 Complaint counsel suggested that we continued to run it
 16 after we saw the survey. We didn't. We stopped it not
 17 because of the survey but a year -- it's been out for
 18 three years. And there is no more ad that talks about
 19 blood pressure. That hasn't happened since, well,
 20 six -- five or six years.
 21 So you're talking about a -- really a -- oh, I
 22 should say complaint counsel has also disagreed with the
 23 ad -- the specific study ad that said a 30 percent
 24 reduction in plaque by Dr. Aviram and then told how many
 25 people were in the study. And that was all truthful.