

ESTTA Tracking number: **ESTTA379598**

Filing date: **11/19/2010**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91184529
Party	Plaintiff Georgia-Pacific Consumer Products LP
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Date	11/19/2010
Attachments	Opposer's Motion to Reopen.pdf (11 pages)(35539 bytes) Exhibit 1.pdf (3 pages)(35003 bytes) Exhibit 2.pdf (2 pages)(66066 bytes) Declaration of Ford.pdf (16 pages)(210584 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

GEORGIA-PACIFIC CONSUMER
PRODUCTS LP,

Opposer,

v.

GLOBAL TISSUE GROUP, INC.

Applicant.

Opposition No.: 91184529

Serial No.: 77/364,616

**OPPOSER’S MOTION TO REOPEN TIME FOR EXPERT DISCLOSURES AND FOR
LEAVE TO PRESENT EXPERT TESTIMONY ON APPLICANT’S COUNTERCLAIMS**

Georgia-Pacific Consumer Products LP (“Georgia-Pacific”) moves pursuant to Fed. R. Civ. P. 6(b) and 37 C.F.R. § 2.116(a) to reopen time for expert disclosures and for leave to submit expert testimony concerning Applicant Global Tissue Group’s (“Applicant”) counterclaims.

I. INTRODUCTION

After the expert-disclosure deadline had expired and only one week before the close of fact discovery, Applicant sought and was granted leave to assert counterclaims seeking cancellation of sixteen of Georgia-Pacific’s QUILTED trademark registrations. Recognizing that the late timing of Applicant’s counterclaims could prejudice Georgia-Pacific, the Board made clear: “Any potential or significant prejudice to opposer in this regard can be mitigated by a reopening or extension of discovery.” (Dkt. 33.) To avoid such prejudice, the Board should grant Georgia-Pacific leave to rely on the Expert Declaration of Dr. Gerald Ford (and the accompanying consumer survey) establishing that Georgia-Pacific’s family of QUILTED marks has secondary meaning.

II. RELEVANT FACTS AND PROCEDURAL HISTORY

On June 11, 2008, Georgia-Pacific filed its Notice of Opposition, asking the Board to refuse registration of Applicant's QUILTY mark on the ground that the mark is likely to cause confusion with Georgia-Pacific's family of QUILTED marks.¹ (Dkt. 1.) Global Tissue filed its Answer on July 16, 2008, asserting no counterclaims. (Dkt. 4.) The Board originally set January 17, 2009, as the deadline for expert disclosures (Dkt. 2).

On June 30, Georgia-Pacific moved to amend its Notice of Opposition to assert the additional claim that Global Tissue lacked a bona fide intent to use the QUILTY mark. (Dkt. 14.) The Board granted Georgia-Pacific's motion on September 9, 2009, and reset the deadline for expert disclosures to November 2, 2009. (Dkt. 22.) Global Tissue filed an Answer to the Amended Notice of Opposition on October 7, 2009, and did not assert any counterclaims. (Dkt. 24.)

On November 25, 2009, **after the deadline for expert disclosures had passed** and only *one week* before the close of all discovery, Global Tissue filed a motion to amend its answer, asking the Board for leave to assert new counterclaims, seeking cancellation of sixteen of Georgia-Pacific's QUILTED registrations on the basis of descriptiveness. (Dkt. 27.) Georgia-Pacific opposed the motion, and the Board suspended proceedings. (Dkt. 29.)

On March 25, 2010, over Georgia-Pacific's objection, the Board granted Global Tissue's Motion to Amend and allowed Global Tissue thirty days in which to file and serve the amended answer and counterclaims. (Dkt. 33.) Georgia-Pacific had argued in its opposition that it would

¹ Georgia-Pacific owns twenty registrations for marks incorporating the formative "QUILTED" covering bath and facial tissue, including the mark QUILTED, three of which are incontestable: Reg. No. 2,209,027 for QUILTED NORTHERN, Reg. No. 2,663,438 for QUILTED NORTHERN, and Reg. No. 2,059,102 for QUILTED NORTHERN ULTRA. *See* Dkt 1 at pp. 1-2; Dkt. 35 at pp. 17-25.

be significantly prejudiced by the addition of the counterclaims at the end of discovery. (Dkt. 31 at p. 10-11). Acknowledging that concern, the Board stated in its Order that “[a]ny potential or significant prejudice to opposer in this regard can be mitigated by a reopening or extension of discovery.” (*Id.*) The Board reset the deadline for the close of *fact* discovery, but, in what appears to have been an oversight, did not set a new deadline for *expert* disclosures. (*Id.*)

Global Tissue filed and served its counterclaims on April 23, 2010, and Georgia-Pacific timely answered the counterclaims on May 26, 2010. (Dkt. 38.) *One day later*, on May 27, 2010, Global Tissue filed a motion to compel additional depositions of Georgia-Pacific’s witnesses (Dkt. 40), and the Board once again suspended all proceedings (Dkt. 41.) On October 6, 2010, the Board reopened proceedings, extending the discovery deadline to November 24, 2010. Again, however, the Board overlooked setting an expert disclosure deadline with regard to the counterclaims. (Dkt. 44.)

Once proceedings resumed, Georgia-Pacific promptly identified an appropriate survey expert, Dr. Gerald Ford, and engaged him as a consulting expert to design and implement a survey concerning whether the QUILTED trademark has secondary meaning. Dr. Ford’s survey was conducted during the month of October, results were tabulated in early November, and once the decision was made to have him testify, his expert report was finalized on November 18, 2010. That same day, Georgia-Pacific made its expert disclosure to Applicant and expressly agreed to permit Applicant to take Dr. Ford’s deposition, even if it must be scheduled after the close of fact discovery on November 24. *See Exhibit 1*. The following morning, Georgia-Pacific provided Applicant with an electronic copy of the full expert report. *See Exhibit 2*.

For the reasons shown below, Georgia-Pacific respectfully requests that the Board permit Georgia-Pacific's expert disclosure, which was made prior to the close of fact discovery.

III. ARGUMENT

A. Georgia-Pacific Did Not Act With "Neglect" At All.

As noted above, Applicant's counterclaims seeking cancellation of Georgia-Pacific's trademark registrations were not even filed until months after the expert disclosure deadline had passed. And, the day after Georgia-Pacific filed an Answer to the Counterclaims, Applicant filed a motion that caused all proceedings to be suspended. Thus, for all practical purposes, discovery as to the counterclaims did not open until October 6, 2010. Georgia-Pacific acted diligently to obtain a consumer survey concerning the issues raised in the counterclaims, and it provided Applicant with the expert report on November 19, 2010. Under these circumstances, Georgia-Pacific cannot be said to have acted with any "neglect" whatsoever.

The Office recognizes that there may be cases in which a party may not decide that it needs to present an expert witness at trial until after the deadline for expert disclosure. In such cases, disclosure must be made promptly when the expert is retained and a motion for leave to present testimony by the expert must be filed....The Board will decide on a case-by-case basis how to handle a party's late identification of experts.

Miscellaneous Changes to Trademark Trial and Appeal Board Rules, 72 Fed. Reg. 147, 42246 (Aug. 1, 2007) (to be codified at 37 C.F.R. pt. 2). Under the specific facts of this case, the Board should permit Georgia-Pacific's expert disclosure, which occurred within the short time period established for fact-discovery on the counterclaims.

B. At a Minimum, Georgia-Pacific's Actions Clearly Were "Excusable" and the Board Should Allow the Expert Disclosure.

In a typical motion to reopen an expired deadline, "[t]he movant must show that its failure to act during the time previously allotted therefore was the result of excusable neglect." T.M.B.P. § 509.01(b)(1) (citing FED. R. CIV. P. 6(b)). Here, where there has been no "neglect," it

certainly must be “excusable” for Georgia-Pacific to have provided its expert disclosure within the 49-day fact discovery period concerning the counterclaims. In determining whether Georgia-Pacific’s conduct was excusable, the Board should take into account all relevant circumstances surrounding the expert disclosure, including (1) the danger of prejudice to the non-movant, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith. *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 395 (1993).² All of these factors favor allowing Georgia-Pacific’s expert disclosure.

A. No Prejudice to Global Tissue Exists.

Permitting expert disclosures will not prejudice Global Tissue. Georgia-Pacific made its expert disclosure within the discovery period and offered Global Tissue an opportunity to depose Georgia-Pacific’s expert -- even after the close of fact discovery. *See* Exhibit 1. While allowing additional time for expert discovery may require a brief extension of the discovery period to accommodate a deposition of Georgia-Pacific’s expert, “[m]ere delay, without more, has not been found to constitute prejudice.” *Champagne Louis Roederer v. J. Garcia Carrion, S.A.*, No. 9115505, 2004 WL 839411, *4 (T.T.A.B. Apr. 15, 2004) (granting applicant’s motion to reopen time in which to respond to opposer’s discovery requests). *See also Intershop Software Entwicklungs GMBH*, No. 92041191, 2004 WL 1772118, *3 (T.T.A.B. Aug. 3, 2004) (“ordinary delay and expense associated with prosecuting a Board proceeding, without more, has not been held to constitute prejudice”).

² The Supreme Court’s standard for “excusable neglect” set forth in *Pioneer* was adopted by the Board in *Pumpkin Ltd. v. The Seed Corps*, 43 U.S.P.Q.2d 1582, 1587 (T.T.A.B. 1997).

Rather, the “prejudice” contemplated by the *Pioneer* test must be a resulting inability by the non-movant to litigate its case. *Pumpkin*, 43 U.S.P.Q.2d at 1587. As the Board in *Pumpkin* noted:

The “prejudice to the non-movant” contemplated under the first *Pioneer* factor must be more than the mere inconvenience and delay caused by the movant’s previous failure to take timely action, and more than the non-movant’s loss of any tactical advantage which it otherwise would enjoy as a result of the movant’s delay or omission. Rather, “prejudice to the non-movant” is prejudice to the non-movant’s ability to litigate the case, *e.g.*, where the movant’s delay has resulted in a loss or unavailability of evidence or witnesses which otherwise would have been available to the non-movant.

Id.

No such prejudice to Global Tissue exists here, as Global Tissue had equal opportunity to obtain its own expert and now has the opportunity to depose Georgia-Pacific’s expert. *See Staphopolous v. MC MC S.R.L.*, Opp. No. 91187914, 2010 WL 3029531, *2 (T.T.A.B. July 21, 2010) (granting applicant’s motion to extend time to serve rebuttal expert report where “the danger of prejudice to [non-movant] is minimal”). This factor favors allowing Georgia-Pacific’s expert.

B. Expert Disclosures Will Not Delay Proceedings.

Allowing expert disclosures will not have a significant impact on the overall schedule of this case. Global Tissue cannot complain of any delay, as its own motion to add new sixteen new counterclaims at the close of discovery (and after the expert disclosure deadline) already resulted in substantial delays of this proceeding. In response to these new counterclaims, Georgia-Pacific “acted swiftly to file its motion to reopen” as soon as its survey was complete, avoiding any unnecessary delay. *See Champagne Louis Roederer*, 2004 WL 839411 at *4. The parties will be able to complete expert discovery in a short period of time, and there will not be any judicial impact. *See Intershop Software Entwicklungs GMBH*, 2004 WL 1772118 at *3

(“Respondent thus acted swiftly to file its motion to reopen upon discovering that its time to respond had passed. Thus, both the length of the delay and its judicial impact are minimal.”) The second *Pioneer* factor therefore also favors a reopening of time.

C. The Need to Reopen Time for Expert Disclosures was Outside of Georgia-Pacific’s Control.

The third *Pioneer* factor, the reason for the delay and whether it was in the reasonable control of the movant, is considered by the Board to be the most important factor. *Staphopolous v. MC MC S.R.L.*, Opp. No. 91187914, 2010 WL 3029531, *2 (July 21, 2010) (citing *Pumpkin*, 43 U.S.P.Q.2d at 1586 n.7). This factor clearly favors a reopening of time, as the Board permitted Global Tissue to file its counterclaims only *after* the expert disclosure deadline had passed, and in resetting the case schedule, the Board established a short (49-day) fact discovery period that did not include a separate expert disclosure deadline. The parties thus reasonably proceeded on the assumption that the close of fact discovery -- under these unique circumstances -- was a *de facto* expert disclosure deadline as well.

Georgia-Pacific owns numerous registrations covering its family of QUILTED trademarks, three of which are incontestable. Thus, until Applicant asserted its counterclaims for cancellation, expert survey evidence proving secondary meaning and acquired distinctiveness of the family QUILTED marks was not necessary, as Georgia-Pacific’s incontestable registrations are “conclusive evidence” of their validity and the non-incontestable registrations are presumed valid under 15 U.S.C. § 1115. *See Park ‘N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 196 (1985) (incontestable registration is “conclusive evidence of the registrant’s exclusive right to use the mark” and of its distinctiveness); *Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 1356 (Fed. Cir. 2009) (“A mark registered on the Principal Register is presumed to be valid.”).

The possibility that expert testimony may not be relevant until later in a proceeding after the expert disclosure deadline is contemplated in the comments to the new Board rules: “The Office recognizes that there may be cases in which a party may not decide that it needs to present an expert witness at trial until after the deadline for expert disclosure.” *Miscellaneous Changes to Trademark Trial and Appeal Board Rules*, 72 Fed. Reg. 147, 42246 (Aug. 1, 2007) (to be codified at 37 C.F.R. pt. 2). That is exactly what happened here.

Georgia-Pacific’s need to disclose its expert “late” was not the result of neglect. Rather, the disclosure was made promptly upon conclusion of the consumer survey and within the very short fact-discovery period for the counterclaims. The full presentation of evidence, including expert testimony, will assist the Board in determining the merits of Global Tissue’s counterclaim. *See Staphopolous*, 2010 WL 3029531 at *2.³

The Board previously noted in its order granting Global Tissue’s motion to amend that any prejudice to Georgia-Pacific as a result of the late addition of Global Tissue’s counterclaims “can be mitigated by a reopening or extension of discovery.” (Dkt. 33.) To now *prevent* Georgia-Pacific from offering expert testimony that the family of QUILTED marks have

³ The Board and numerous federal courts have found Dr. Ford’s survey work to be helpful in resolving complex trademark issues. *See, e.g. In re Callaway Golf Co.*, No. 75/389,003, 2001 WL 902004, at *7 (T.T.A.B. Aug. 9, 2001) (relying on consumer survey by Dr. Ford showing consumer perception of STEELHEAD mark was not generic); *Google Inc. v. Nikolaus Gubernator*, Opp. No. 91171014, 2009 WL 871660, at *4 (T.T.A.B. 2009) (relying on Dr. Ford’s survey to conclude that GOOGLE is a famous mark, and sustaining Google’s opposition to an applicant’s confusingly similar mark); *adidas-America, Inc. v. Payless Shoesource, Inc.*, 546 F. Supp. 2d 1029, 1044–45, 1055, 1059 (D. Or. 2008) (relying on Dr. Ford’s survey on likelihood of confusion to deny defendant’s motion for summary judgment as to trademark and trade dress infringement); *Phillips-Van Heusen Corp. v. Calvin Clothing Co.*, 444 F. Supp. 2d 250, 257 (S.D.N.Y. 2006) (relying on Dr. Ford’s survey to find likelihood of confusion sufficient to support claim of trademark infringement).

acquired distinctiveness would be substantially prejudicial to Georgia-Pacific and would constitute reversible error.

D. Georgia-Pacific Has Acted in Good Faith.

Finally, Georgia-Pacific has acted in good faith in retaining and disclosing its expert once the need for survey evidence arose. Georgia-Pacific does not seek a competitive advantage in reopening time, as it promptly disclosed its expert once the survey was complete and has offered to make the expert available for deposition at any time that is convenient for Applicant -- even if after the close of discovery. *See Champagne Louis Roederer*, 2004 WL 839411 at *4 (“[W]ith regard to the fourth *Pioneer* factor, the Board finds that there is no evidence of bad faith on the part of applicant.”); *Staphopolous*, 2010 WL 3029531 at *2 (“there is no indication that applicant delayed or withheld its expert report in bad faith or for the purpose of gamesmanship”); *Intershop Software Entwicklungs GMBH*, 2004 WL 1772118 at *3 (“[T]he record in this case simply does not support a finding that respondent's failure to timely respond to petitioner's summary judgment motion was the result of bad faith on the part of respondent or its counsel. Accordingly, the fourth *Pioneer* factor favors respondent.”). Thus, the fourth *Pioneer* factor also favors a reopening of time.

IV. CONCLUSION

Applicant first sought the cancellation of Georgia-Pacific's registrations for its family of QUILTED marks after the expert disclosure deadline expired. Georgia-Pacific has acted promptly and in good faith to conduct a survey and make expert disclosures to Applicant. Under these circumstances, and because all four *Pioneer* factors show that a reopening of time is appropriate, Georgia-Pacific respectfully requests that the Board reopen time to permit Georgia-

Pacific's expert disclosure and to rely on the expert testimony and survey report of Dr. Gerald Ford.

This 19th day of November, 2010.

/s/ R. Charles Henn Jr.

R. Charles Henn Jr.

Charlene R. Marino

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Atlanta, Georgia 30309-4530

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Attorneys for Opposer Georgia-Pacific

Consumer Products LP

CERTIFICATE OF SERVICE

This is to certify that the OPPOSER'S MOTION TO REOPEN TIME FOR EXPERT DISCLOSURES AND FOR LEAVE TO PRESENT EXPERT TESTIMONY ON APPLICANT'S COUNTERCLAIMS has been served on counsel for Applicant, by email and by depositing a copy thereof by first class mail, postage prepaid, and addressed as follows:

This 19th day of November, 2010.

/s/Charlene R. Marino
Charlene R. Marino
KILPATRICK STOCKTON LLP
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309-4530
Telephone: (404) 815-6500
Fax: (404) 815-6555

EXHIBIT 1

November 19, 2010

direct dial 404 815 6386
direct fax 4045414736
cmarino@kilpatrickstockton.com

Via Email and Overnight Mail

Mr. R. Glenn Schroeder
Hoffmann & Baron, LLP
6900 Jericho Turnpike
Syosset, New York 11791-4407

Re: *Georgia-Pacific Consumer Products, LP v. Global Tissue Group, Inc.*
Opposition No. 91184529

Dear Glenn:

Pursuant to Fed. R. Civ. P. 26(a), please be advised that Georgia-Pacific intends to rely on the expert testimony of Dr. Gerald Ford of Ford Bubala & Associates in this matter. Dr. Ford recently conducted a consumer survey evaluating the secondary meaning of Georgia-Pacific's QUILTED® mark. We expect to receive Dr. Ford's expert report tomorrow, and we will provide it to you immediately.

As you will recall, Global Tissue filed its counterclaims seeking cancellation of Georgia-Pacific's QUILTED registrations in April.¹ But, because Global Tissue filed a motion to compel the day after Georgia-Pacific filed its Answer to those counterclaims, proceedings immediately were suspended and the parties did not conduct counterclaim-related discovery. The suspension was not lifted until October, and at that point Georgia-Pacific worked diligently to identify an expert who could design and field a nationwide survey before the close of fact discovery. As noted above, Dr. Ford is now preparing an expert report summarizing that work and it should be in your hands no later than tomorrow.

In light of the current schedule, we recognize that it would be difficult for you to conduct Dr. Ford's deposition before the close of discovery. If you would like to take his

¹ The counterclaim was filed after the expert disclosure deadline, but when the Board reopened discovery relating to the counterclaim, it omitted a new expert deadline for reports relating to the counterclaim. Per the Board's rules, we intend to file a short motion to correct this oversight in the schedule and ask the Board for leave to submit the Ford survey report prior to the close of fact discovery.

deposition before November 24, we can accommodate that; but because we recognize that may be inconvenient in light of the Thanksgiving holiday, we also are willing to consent to a deposition of Dr. Ford outside the fact-discovery period during the weeks of November 29 or December 6. Please let us know when you would like to depose him.

Best regards.

Sincerely,



Charlene R. Marino

CRM/

cc: R. Charles Henn Jr.

EXHIBIT 2

Marino, Charlene

From: Henn, Charlie
Sent: Friday, November 19, 2010 8:16 AM
To: 'Schroeder, R. Glenn'
Cc: Marino, Charlene
Subject: GP v. GTG
Attachments: GP_v_Global_Tissue_Group_Ford_declaration_and_exhibits_11-18-2010_1600.pdf

Glenn-
Per Charlene's letter yesterday, attached is the Declaration and Report of Dr. Gerald Ford. We'll send a hard copy out via overnight mail, but wanted you to get this electronic version as soon as possible. Let us know when you'd like to depose Dr. Ford.
Thanks,
Charlie



Charlie Henn

Kilpatrick Stockton LLP

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

GEORGIA-PACIFIC CONSUMER PRODUCTS LP,)	
)	Opposition No.: 91184529
Opposer,)	Serial No.: 77/364,616
)	
v.)	Declaration and Rule 26 Report
)	of Dr. Gerald L. Ford
)	
GLOBAL TISSUE GROUP, INC.)	
)	
Applicant.)	
<hr/>		

DECLARATION OF DR. GERALD L. FORD

I, Gerald L. Ford, declare as follows:

INTRODUCTION

1. I am a partner in the marketing research and consulting firm of Ford Bubala & Associates, located in Huntington Beach, California, where I have been engaged in commercial marketing research and consulting for the past thirty-five years. I am also an emeritus faculty member of the School of Business Administration, California State University, Long Beach, where I held a full-time teaching position for twenty-five years, prior to my retirement in 1994. My professional experience is further summarized below in paragraphs 27 through 37.

2. In the instant matter, at the request of Kilpatrick Stockton LLP, counsel for Georgia-Pacific Consumer Products LP, I designed and caused to be conducted a survey to address the issue of secondary meaning or acquired distinctiveness with respect to the "Quilted" mark for Georgia-Pacific's Quilted Northern bath tissue. Specifically, the survey reported herein was designed to measure the level or degree, if

any, to which the "Quilted" mark is associated with bath tissue emanating from the named source "Northern" or a sole, yet anonymous, source.

3. The secondary meaning survey conducted in this matter employed a standard shopping center intercept methodology. Respondents in the survey were interviewed at shopping centers in metropolitan markets in eight (8) states, two states located in each of the four (4) U.S. Census Regions.

4. The secondary meaning survey conducted in this matter employed a scientific experimental survey design consisting of two survey cells: (1) a test or experimental survey cell designed to measure secondary meaning, if any, with respect to the "Quilted" mark; and, (2) a control survey cell designed to measure the extent of mismeasurement error in the test cell survey results.

5. In the test cell, survey respondents were asked about their association of "Quilted" for bath tissue, and, in the control cell, survey respondents were asked about their association of "Flushable" for bath tissue.

6. The results of the secondary meaning or acquired distinctiveness survey evidence, on a net basis after adjusting the survey data for mismeasurement error based upon the control cell, that approximately twenty-nine percent (28.70%) of the relevant universe associate "Quilted" with the named source, Northern, or a sole, yet anonymous, source.

7. It is my opinion that the results of the survey conducted in this matter establish the necessary threshold to support a finding of secondary meaning or acquired

distinctiveness for Georgia-Pacific's "Quilted" mark for bath tissue. The results of the survey evidence that a substantial segment of the relevant universe associate "Quilted" with the named source, Northern, or a sole, yet anonymous, source.

SURVEY BACKGROUND

8. Attached hereto, as Exhibit A, are the results of a survey which addressed the issue of secondary meaning or acquired distinctiveness with respect to the "Quilted" mark for bath tissue. Exhibit A provides a synopsis of the survey methodology, the survey screeners and questionnaires, response frequencies, and a listing of respondents' verbatim responses to the survey. The Appendix to Exhibit A contains a sequential listing of all of the survey responses and copies of the Supervisor and Interviewer Instructions, which provide additional details of the survey protocols, and other survey-related background materials.

9. The sample selection, questions, questionnaire design, and interviewing procedures employed in this survey were designed in accordance with the generally accepted standards and procedures in the field of surveys and were designed to meet the

criteria for survey trustworthiness detailed in the Federal Judicial Center's Manual for Complex Litigation, Fourth.¹

10. I was responsible for the design of the survey, the survey's questionnaires, and the instructions given to the survey's supervisors and interviewers, as well as for the procedures to be followed in conducting the interviews. Interviewing, data gathering, and response recordation were carried out, under the direction of Ford Bubala & Associates, by professional interviewers employed by independent professional interviewing organizations. Supervisors working on this survey were personally trained by Ford Bubala & Associates with respect to the design, procedures, and related protocols for the survey; and daily shipments of completed interviews from each professional interviewing service were reviewed by Ford Bubala & Associates to confirm that the questionnaires were being properly executed. In addition, approximately sixty-seven percent (67.13%) of the survey interviews were validated, in person, by the survey supervisors personally meeting the survey respondents and confirming their qualification and participation in the survey. Ford Bubala & Associates conducted validations of approximately twenty-one percent (20.60%) of the interviews by

¹ For the proffered poll or survey, "...Relevant factors include whether: the population was properly chosen and defined; the sample chosen was representative of that population; the data gathered were accurately reported; and the data were analyzed in accordance with accepted statistical principles... In addition, in assessing the validity of a survey, the judge should take into account the following factors: whether the questions asked were clear and not leading; whether the survey was conducted by qualified persons following proper interview procedures; and whether the process was conducted so as to ensure objectivity..." See Federal Judicial Center, Manual for Complex Litigation, Fourth, Section 11.493, @ 102-104 (2004).

recontacting, by telephone, survey respondents to confirm their qualification and participation in the survey. Net nonduplicated validations totaled approximately seventy-four percent (73.61%) of all survey interviews.² None of the interviews failed to validate.

11. The survey conducted in this matter was administered under a double-blind protocol. Specifically, not only were the respondents not informed of the purpose or sponsor of the survey, but similarly, both the survey's supervisors and interviewers were not informed of the purpose or sponsor of the survey.

SURVEY STRUCTURE

12. As noted above, the secondary meaning survey conducted in this matter employed a scientific experimental survey design consisting of two survey cells: (1) a test or experimental survey cell designed to measure secondary meaning, if any, with respect to the "Quilted" mark for bath tissue; and, (2) a control survey cell designed to measure the extent of potential mismeasurement error in the test cell survey results.

13. In the test cell, survey respondents were asked about their association of "Quilted" for bath tissue, and, in the control cell, survey respondents were asked about their association of "Flushable" for bath tissue.

14. The test and control cells were separate cells in the survey. In particular, although the questions and procedures for the test cell and the control cell were identical with the

² This level of validation exceeds industry standards of 10% to 15%.

exception of the mark respondents were asked about, any single respondent participated in an interview in only one of the two survey cells.

15. The control cell provides a measure of the extent of mismeasurement error that may exist in the test cell survey results that is not reflective of secondary meaning for the mark "Quilted," but rather is reflective of some other reason. Specifically, the control survey cell functions as a baseline and provides a measure of the degree to which respondents are likely to report that they associate "Quilted" with bath tissue from the named source Northern or from a single anonymous source, not as a result of the secondary meaning or acquired distinctiveness of the Quilted mark for bath tissue but rather because of other factors such as the survey questions, survey procedures, the market share or brand popularity or some other potential influence on the respondents' answers.

16. In a fashion similar to the protocols employed in a pharmaceutical drug test, the test or experimental cell represents the drug or pill with the "active" ingredient and the

control cell represents the "placebo" that does not contain the active ingredient being tested.³

17. In total, four hundred thirty-two interviews were conducted in the survey: two hundred sixteen (216) in the test cell and two hundred sixteen (216) in the control cell.

18. As noted earlier, the secondary meaning survey in this matter employed a standard shopping center intercept methodology. Respondents in the survey were interviewed by interviewers employed by professional interviewing services at shopping centers in metropolitan markets in eight (8) states (i.e., Arizona, California, Florida, Illinois, New Jersey, New York, Texas, and Wisconsin), with two (2) shopping centers located in each of the four (4) U.S. Census Regions. Interviewing occurred between October 20 and November 1, 2010.

19. The relevant universe, for both the test cell and the control cell, was the same and was defined as males and females, eighteen (18) years of age or older, who are the primary

³ This methodology is consistent with the methodology discussed by Professor Diamond in the Federal Judicial Center's Reference Manual on Scientific Evidence, Second; "It is possible to adjust many survey designs so that causal inferences about the effect of a [stimulus]...become clear and unambiguous. By adding an appropriate control group, the survey expert can test directly the influence of the stimulus.... Respondents in both the experimental and control groups answer the same set of questions. The effect of the [stimulus]...is evaluated by comparing the responses made by the experimental group members with those of the control group members.... Both preexisting beliefs and other background noise should have produced similar response levels in the experimental and control groups. In addition, if respondents who viewed the [test cell stimulus]...respond differently than respondents who viewed the control [cell stimulus]..., the difference cannot be the result of a leading question, because both groups answered the same question..." Shari Seidman Diamond "Reference Guide on Survey Research," in the Federal Judicial Center's Reference Manual on Scientific Evidence, Second, pages 257-258.

grocery shopper in their household or share the responsibility equally with someone else, and who reported that within the past month they had purchased or within the next month they were likely to purchase any bath tissue.⁴

20. The age distribution of survey respondents was based upon the known age distribution of the United States population eighteen (18) years of age or older, based upon the U.S. Census, and approximately eighty percent (80%) of the respondents were female and approximately twenty percent (20%) of the respondents were male.

SURVEY PROCEDURES AND QUESTIONS

21. Initially, a potential survey respondent was stopped by an interviewer in the public area of a shopping mall and screened (i.e., asked questions) to determine if the potential respondent met the criteria to be included in the survey universe (i.e., during the past month had purchased or within the next month were likely to purchase bath tissue, etc.). See Exhibit A, pages 5-6 and 28-29.

22. If a potential respondent fulfilled the screening criteria, also known as the survey universe definition, he/she was then invited to return with the interviewer to the

⁴ Additionally, the survey universe was also restricted as follows: (1) to respondents who did not, nor does anyone else in their home, work for an advertising agency or marketing research firm; or a retail store or company that makes, sells, or distributes any grocery store products; (2) to respondents who, during the past three months, had not participated in any marketing research surveys other than a political poll, including online surveys; (3) to respondents who, during the past month, had not heard anything about the subject of any of the interviews being conducted at the mall; and (4) to respondents who, if the respondent wore contact lenses or eyeglasses when reading would be willing to wear them during the interview.

professional interviewing service facility located within the shopping mall to complete the interview. See Exhibit A, pages 7-8 and 30-31. The interviewer then escorted the survey respondent into a private interviewing area. In the private interviewing area, the respondent was told:

In a moment, I will ask you a couple of questions.

Please understand that we are only interested in your opinions; and if you don't have an opinion or don't know the answer to a question, that is an acceptable answer.

The respondent was then asked:

7.0 Now, thinking about bath tissue...
Do you associate Quilted with any particular brand or brands of bath tissue?⁵

Respondents who reported that they associated "Quilted" with any particular brand or brands of bath tissue were asked:

7.1 What brand or brands of bath tissue?

Respondents who reported an association in question 7.0 but could not identify the brand or brands by name were asked:

7.2 Do you associate Quilted with one brand or more than one brand of bath tissue?⁶

See Exhibit A, Appendix B and C, for additional details of the survey protocols.

⁵ Respondents who said "no/don't know" to question 7.0 were not asked questions 7.1 through 7.2.

⁶ To guard against any order bias, the first two alternatives in this list were rotated (i.e., approximately one-half of the respondents were read the list with the first alternative being "one brand" and approximately one-half of the respondents were read the list with the first alternative being "more than one brand").

SURVEY RESULTS

Test Cell Survey Results

23. In the test cell, approximately thirty percent (30.09%)⁷ of the survey respondents reported that they associated "Quilted" with bath tissue emanating from the named source Northern (27.31%) or a sole, yet anonymous, source (2.78%). See Exhibit A, Table 1, page 9.

⁷ To provide perspective with regard to the significance of this percentage, it should be recognized that Georgia-Pacific's Quilted Northern brand bath tissue enjoys approximately a twelve percent (11.6%) dollar share of the bath tissue market.

TABLE 1⁸
TEST CELL

- Q7.0 Do you associate Quilted with any particular brand or brands of bath tissue?
 Q7.1 What brand or brands of bath tissue?
 Q7.2 Do you associate Quilted with one brand or more than one brand of bath tissue?

<u>Response Categories</u>	<u>Response Distribution</u>	
	<u>Number</u>	<u>Percent</u> (n=216)
Association - Quilted Northern/ One Brand		
1. Quilted Northern	59	27.31
2. Don't know brand - One brand	6	2.78
Subtotal	<u>65</u>	<u>30.09</u>
Association - Other		
3. Quilted Northern plus other brand(s)	17	7.87
4. Other brand(s)	52	24.07
5. Don't know brand - More than one brand	1	0.46
6. Don't know brand - Don't know/no opinion	1	0.46
No Association		
7. No association	80	37.04
Total	<u>216</u>	<u>100.00</u>

Control Cell Survey Results

24. In the control cell, approximately one percent (1.39%) of the survey respondents reported that they associated "Flushable," with bath tissue emanating from Northern (1.39%) and no respondent reported associating the control mark with a sole, yet anonymous, source. See Exhibit A, Table 5, page 32.

⁸ Table numbers in this declaration correspond to the table numbers in Exhibit A and therefore may not be sequential.

TABLE 5
CONTROL CELL

- Q7.0 Do you associate Flushable with any particular brand or brands of bath tissue?
 Q7.1 What brand or brands of bath tissue?
 Q7.2 Do you associate Flushable with one brand or more than one brand of bath tissue?

<u>Response Categories</u>	<u>Response Distribution</u>	
	<u>Number</u>	<u>Percent</u> (n=216)
Association - Quilted Northern/ One Brand		
1. Quilted Northern	3	1.39
2. Don't know brand - one brand	--	0.00
Subtotal	<u>3</u>	<u>1.39</u>
Association - Other		
3. Quilted Northern plus other brand(s)	5	2.31
4. Other brand(s)	87	40.28
5. Don't know brand - more than one brand	3	1.39
6. Don't know brand - don't know/no opinion	1	0.46
No Association		
7. No association	117	54.17
Total	<u>216</u>	<u>100.00</u>

SUMMARY OF SURVEY RESULTS

25. The results of the secondary meaning or acquired distinctiveness survey evidence, on a net basis after adjusting the survey data for mismeasurement error based upon the control cell, that approximately twenty-nine percent (28.70%)⁹ of the

⁹ The adjustment for mismeasurement error in the survey results is accomplished by reducing the percentage of Quilted Northern and one brand responses in the test cell by the percentage of Quilted Northern and one brand responses in the control cell. In this case, 30.09% of the survey respondents in the test cell reported that they associated "Quilted" with Quilted Northern or one brand of bath tissue; and, 1.39% of the survey respondents in the control cell reported that they

relevant universe associates "Quilted" with bath tissue emanating from Northern or a sole, yet anonymous, source. See Exhibit A, Table 9, page 49.

TABLE 9
TEST CELL AND CONTROL CELL
Composite Response Analysis

<u>Response Categories</u>	<u>Response Distribution</u>	
	<u>Test Cell</u> Percent (n=216)	<u>Control Cell</u> Percent (n=216)
1. Quilted Northern	27.31	1.39
2. Don't know brand - one brand	2.78	---
Total	<u>30.09</u>	<u>1.39</u>

CONCLUSION

26. It is my considered opinion, based upon my education, background, and professional experience, and my review and analysis of the survey conducted with respect to the issue of secondary meaning or acquired distinctiveness, that the results of the survey conducted in this matter establish the necessary threshold to support a finding of secondary meaning or acquired distinctiveness for Georgia-Pacific's "Quilted" mark for bath tissue. The results of the survey evidence that a substantial segment of the relevant universe associate "Quilted" with the named source, Northern, or a sole, yet anonymous, source.

QUALIFICATIONS

27. I hold a Bachelor's Degree in Advertising (B.A.) from San Jose State University, a Master's Degree in Business

associated the control with Quilted Northern or one brand of bath tissue. Thus, the net secondary meaning would be calculated as 30.09% - 1.39% = 28.70%.

Administration (M.B.A.) from the University of Southern California, and a Doctoral Degree in Business Administration (D.B.A.) from the University of Southern California.

28. During my twenty-five year academic appointment, my teaching responsibilities included both graduate and undergraduate level courses in a variety of subject areas. My teaching responsibilities included courses in marketing (e.g., marketing, marketing management, advertising, promotion, consumer behavior, and marketing research) and management (e.g., principles of management; business policy and strategy; business policies, operations, and organizations; and integrated analysis).

29. I am a member of the American Marketing Association (AMA), the American Academy of Advertising (AAA), the American Association of Public Opinion Research (AAPOR), the Council of American Survey Research Organizations (CASRO), and the International Trademark Association (INTA).

30. As a partner with Ford Bubala & Associates, I have been retained by a variety of firms engaged in the consumer product, industrial product, and service sectors of the economy to provide marketing consulting and research services. Approximately one-half of Ford Bubala & Associates' consultancies in which I have participated have involved the design and execution of marketing research surveys.

31. During the past thirty-five years, I have been retained in a number of litigation-related consultancies involving intellectual property matters, including matters before federal and state courts, the Trademark Trial and Appeal Board of

the U.S. Patent and Trademark Office, and the International Trade Commission. I have designed and executed surveys relating to intellectual property matters, including false advertising, trademark, patent, and other related matters. I am familiar with the accepted principles of survey research, as well as the tests for trustworthiness of properly conducted surveys or polls.¹⁰

32. During the past thirty years, I have addressed a variety of groups on the subject of surveys or polls and their use in the measurement of the state of mind of consumers, with respect to Lanham Act matters. For example, I have spoken at meetings of the American Bar Association, the American Intellectual Property Law Association, the Intellectual Property Owner's Association, the American Marketing Association, the International Trademark Association, the Marketing Research Association, the Intellectual Property Law Institute of Canada, and the Practising Law Institute.

33. I have also written on the subject of the design and execution of litigation-related surveys in Lanham Act matters. Attached hereto as Exhibit B is a list of papers I have written since 1987.

34. Since 1998 I have served as a member of the Editorial Board of The Trademark Reporter, the scholarly legal journal on the subject of trademarks, published by the International Trademark Association.

35. I have been qualified and accepted as an expert in marketing and marketing research in more than fifty (50) trials

¹⁰ Supra note 1.

before federal and state courts and administrative government agencies, including the Trademark Trial and Appeal Board.

36. Attached hereto as Exhibit C is a list of cases in which I have provided trial and/or deposition testimony since 1992.

37. Attached hereto as Exhibit D is a copy of my professional history, describing my qualifications and professional background.

COMPENSATION

38. Ford Bubala & Associates' fees for this engagement consist of billable time and expenses. Standard time is billed at the rate of \$500.00 per hour for the services of a Partner and \$250.00 per hour for the services of a Research Associate. Deposition and trial time are billed at the rate of \$600.00 per hour plus expenses.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 18th day of November, 2010, in Huntington Beach, California.



Dr. Gerald L. Ford