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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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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

**REPLY IN SUPPORT OF OPPOSER’S MOTION
TO REOPEN TIME FOR EXPERT DISCLOSURES**

Opposer Georgia-Pacific Consumer Products LP (“Georgia-Pacific”) submits this Reply to Applicant Global Tissue Group, Inc.’s (“Global Tissue”) Response in Opposition to the Motion to Reopen Time for Expert Disclosures as follows:

I. INTRODUCTION

The Board should grant Georgia-Pacific’s motion to reopen time for expert disclosures because Georgia-Pacific did not act with *any* neglect, much less inexcusable neglect, in the timing of its disclosure of its testifying survey expert, Dr. Gerald Ford.

In a response heavy with invective but short on substance, Global Tissue concedes that Dr. Ford’s survey on the secondary meaning of Georgia-Pacific’s QUILTED® marks did not become relevant until the Board permitted Global Tissue to petition for the cancellation of these marks in March 2010—long past the original deadline for expert disclosures in November 2009. Global Tissue also concedes, as it must, that this proceeding was stayed between June 3 (days after Georgia-Pacific filed its Answer to those Counterclaims) and October 6, 2010. Because Global Tissue cannot seriously argue that Georgia-Pacific should have disclosed Dr. Ford as a

testifying expert (a) months *before* his testimony even became relevant or (b) later, when the case was suspended by Board Order, Global Tissue resorts to accusing Georgia-Pacific of disclosing Dr. Ford as part of an “aggressive” “bad faith litigation strategy” intended to cause delay and added expense. These accusations are false and ignore the undisputed facts.

Georgia-Pacific disclosed Dr. Ford as a testifying expert *the very day* Georgia-Pacific determined that he would be offering testimony at trial, and Georgia-Pacific provided his full survey report to Global tissue *the next morning*. Georgia-Pacific clearly did not delay in making its expert disclosures, and Global Tissue will not suffer any real prejudice if Dr. Ford’s testimony is permitted. The Board should grant Georgia-Pacific’s motion because the *Pioneer* factors all clearly weigh in favor of allowing Georgia-Pacific’s expert disclosures.

II. TIMELINE OF KEY EVENTS

GTG’s claim that Georgia-Pacific delayed “eight months” misconstrues the actual course of proceedings in this case. The following timeline puts the matter into proper perspective:

- November 2, 2009: Expert disclosure deadline
- March 25, 2010: Board authorizes Global Tissue to file new Counterclaims
- April 23, 2010: Global Tissue files new Counterclaims
- May 26, 2010: Georgia-Pacific files Answer to new Counterclaims
- May 27, 2010: Global Tissue files Motion to Compel
- June 3, 2010: Board *suspends all proceedings* pending ruling on Motion to Compel
- October 6, 2010: Board reopens proceedings
- October 15, 2010: Georgia-Pacific consults with Dr. Ford regarding this case¹

¹ Details concerning the timing of Dr. Ford’s survey and retention are contained in the Declaration of R. Charles Henn Jr. (“Henn Dec.”), filed concurrently with this Reply.

- Oct. 20-Nov. 17, 2010: Dr. Ford designs and executes survey; tabulates results; drafts written report summarizing the survey
- November 18, 2010: Dr. Ford opines that survey results confirm secondary meaning
- November 18, 2010: Georgia-Pacific discloses Dr. Ford as testifying expert
- November 19, 2010: Georgia-Pacific provides Global Tissue with expert report

Against this backdrop, it is clear that Georgia-Pacific acted diligently in identifying a consulting expert as soon as proceedings and discovery re-opened, and promptly notified Global Tissue of that expert (and his opinions) immediately after determining that Dr. Ford would be a testifying expert.

III. ARGUMENT AND CITATION OF AUTHORITY

A. Georgia-Pacific Did Not Delay in Filing its Motion to Reopen.

It is undisputed that the original deadline for expert disclosures (November 2, 2009) had long passed before the Board granted Global Tissue leave to add its counterclaims on March 25, 2010. Thus, for Georgia-Pacific to make *any* expert disclosures related to these counterclaims, the Board must reopen the expert-disclosure deadline. The Board recognized in its Order allowing the late counterclaims that deadlines could be reset to avoid prejudice to Georgia-Pacific: “Any potential or significant prejudice to opposer in this regard can be mitigated by a *reopening or extension of discovery.*” (Dkt. 33) (emphasis added).

Although the Board granted GTG’s motion to amend on March 25, GTG did not file and serve its Amended Answer and Counterclaims until April 23. (Dkt. 35). Once served, Georgia-Pacific had to investigate, evaluate, and answer the sixteen counts contained in the 26-page, 123-paragraph pleading, and Georgia-Pacific timely filed its answer on May 26. (Dkt. 38). As noted in Georgia-Pacific’s opening brief, GTG filed a motion to compel *one day later* on May 27 (Dkt.

39), resulting in the suspension of proceedings.² Thus, Georgia-Pacific was prohibited from seeking leave to reopen the deadline for expert disclosures until the Board ruled on the motion. The Board’s suspension order was clear: “The parties should not file any paper which is not germane to the motion to compel.” (Dkt. 41).

A mere nine days after discovery re-opened on October 6, Georgia-Pacific consulted with Dr. Ford about designing and conducting a survey on the issue of secondary meaning. That survey was designed and executed during the remainder of the month of October and the results were tabulated in November. Prior to the tabulation of the results and a corresponding discussion with Dr. Ford about his conclusions and opinions about those results, he was serving entirely in a “consulting expert” capacity, because Georgia-Pacific (obviously) did not anticipate calling him as a witness at trial if the survey did not show secondary meaning. (Declaration of R. Charles Henn Jr. (“Henn Dec.”) ¶ 7.) On November 18, counsel for Georgia-Pacific and Dr. Ford spoke via telephone, and Dr. Ford explained his opinion that the survey results supported a finding of secondary meaning. (*Id.* ¶ 5.) Dr. Ford also explained that he was preparing a written report setting forth those opinions. (*Id.*) The very same day counsel for Georgia-Pacific had that conversation with Dr. Ford—and thus determined that he would be a testifying expert—Georgia-Pacific notified Global Tissue of its intent to offer testimony from Dr. Ford. (*Id.* ¶ 6, Ex. 1.) Georgia-Pacific served a full written expert report on Global Tissue the following day. (*Id.* ¶ 8, Ex. 2.)

Global Tissue is wrong when it suggests that Georgia-Pacific impermissibly delayed by failing to disclose Dr. Ford in October—such an argument ignores the unambiguous distinction

² Although Global Tissue argues in hindsight that Georgia-Pacific should have filed its motion to reopen before May 27, it is unreasonable to expect Georgia-Pacific to have predicted in advance that Global Tissue would file the motion to compel on that date, thereby suspending proceedings for several months.

in Federal Rule of Civil Procedure 26 between *testifying* experts and *consulting* experts. Under this rule, a party is only required to disclose “the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.” FED. R. CIV. P. 26(a)(2)(A). A party is *not* obligated to disclose an expert “who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and *who is not expected to be called as a witness at trial.*” FED. R. CIV. P. 26(b)(4)(D) (emphasis added). *See also FMC Corp. v. Vendo Co.*, 196 F. Supp. 2d 1023, 1044, 1048 (E.D. Cal. 2002) (applying Rule 26(b)(4)(B) to grant motion to quash subpoenas of non-testifying experts); *Moore U.S.A.Inc. v. Standard Register Co.*, 206 F.R.D. 72, 74-75 (W.D.N.Y. 2001) (denying motion to compel discovery of documents relating to an expert not designated as a testifying expert).

Until Georgia-Pacific decided to rely on Dr. Ford’s survey and testimony at trial, it was not obligated to disclose him as an expert witness. *See Ager v. Jane C. Stormont Hosp. and Training School for Nurses*, 622 F.2d 496, 503 (10th Cir. 1980) (applying Rule 26(b) in holding that “the identity, and other collateral information concerning an expert who is retained or specially employed in anticipation of litigation, but not expected to be called as a witness at trial, is not discoverable”); *Plymovent Corp. v. Air Tech. Solutions, Inc.*, 243 F.R.D. 139, 143 (D.N.J. 2007) (quashing subpoena served on non-testifying expert).

In *Starbucks U.S. Brands, LLC v. Ruben*, 78 U.S.P.Q.2d 1741 (T.T.A.B. 2006), the Board rejected the applicant’s argument that the opposers’ survey evidence should be stricken because opposers failed to disclose its survey expert during the discovery period, noting “[W]e find that [applicant] had notice of [opposers’] testimony and report as soon as those reports were available to [opposers] and as soon as [opposers] made the decision to use [the expert] as a trial expert.” *Id.* at 1745 n. 20. The Board concluded that “opposers complied with all their obligations to

produce for applicant survey results as soon as they became available.” *Id.* at 1745. *See also Re/Max Int’l, Inc. v. Gurley*, Opp. No. 109,631, 2001 WL 422988, at *2 (T.T.A.B. Apr. 23, 2001) (denying motion to exclude testimony of an expert disclosed after the close of opposer’s testimony period, noting that “applicant did not engage his expert witness until after the close of opposer’s testimony period so there was no witness for applicant to disclose during the discovery period.”).

Georgia-Pacific properly and timely disclosed Dr. Ford as a testifying expert *the very same day* it made the decision to rely on his testimony at trial. For Global Tissue to allege that the timing of its expert disclosure—within the discovery period—was part of an “overall aggressive litigation strategy” of delay is unfounded.

B. Permitting Expert Testimony Would Not Prejudice Global Tissue.

The “prejudice” claimed by Global Tissue—that discovery has concluded and it would be required to conduct depose Dr. Ford and potentially retain its own expert—is nothing more than an ordinary discovery expense associated with Board proceedings. The Board has held such inconvenience is not “prejudice” sufficient to deny Georgia-Pacific’s motion. *See Champagne Louis Roederer v. J. Garcia Carrion, S.A.*, No. 9115505, 2004 WL 839411, *4 (T.T.A.B. Apr. 15, 2004) (“Mere delay, without more, has not been found to constitute prejudice.”); *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”).³

³ GTG’s criticism of these cases that they are not designated as precedential is misplaced, as the Board changed its previous policy with respect to non-precedential opinions. *See* J. David Sams, *Citation of Opinions to the Trademark Trial and Appeal Board*, OFFICIAL GAZETTE NOTICES (Jan. 23, 2007) (“The TTAB is changing its policy with respect to the citation of opinions not

Global Tissue failed entirely to show that, as a result of the timing of Georgia-Pacific's expert disclosures, "any of [Global Tissue's] witnesses and evidence have become available as a result of the delay in proceedings." *Pumpkin Ltd. v. The Seed Corps*, 43 U.S.P.Q.2d 1582, 1587 (T.T.A.B. 1997). Global Tissue clearly is able to depose Dr. Ford and may retain its own rebuttal expert if it so chooses. The Board consistently has found that no unfair prejudice exists when an expert is disclosed later in the proceedings—even after the close of discovery and during the testimony period—if the party still has the opportunity to conduct further discovery or retain its own expert. *See, e.g., Starbucks*, 78 U.S.P.Q.2d at 1745 (finding no prejudice to applicant where he had sufficient time leading up to the testimony period for him to conduct his own survey, or to engage an expert to critique or rebut opposer's survey); *Re/Max Int'l, Inc. v. Gurley*, Opp. No. 109,631, 2001 WL 422988, at *2 (T.T.A.B. Apr. 23, 2001) (no prejudice where the Board could allow opposer time to take discovery depositions before the witnesses at issue could testify for applicant).

Permitting expert testimony at this time would also not substantially delay the resolution of this proceeding. Under the current schedule, Georgia-Pacific's 30-day testimony period for Global Tissue's counterclaims does not open until May 23, 2011 (*see* Dkt. 44), *six months from now*, and because the survey relates to those counterclaims, Georgia-Pacific does not intend to introduce Dr. Ford's testimony until that time. Therefore, the parties have plenty of time to conduct discovery related to Dr. Ford's survey.

C. Georgia-Pacific Acted in Good Faith At All Times.

While not germane to the motion before the Board, Georgia-Pacific feels compelled to address Global Tissue's baseless accusations that Georgia-Pacific has "acted in bad faith

designated as precedential. Accordingly, . . . [a] decision designated as not precedential is not binding upon the TTAB but may be cited for whatever persuasive value it might have.").

throughout this entire proceeding” (*see* Global Tissue’s Response Brief, at 12). It was entirely Global Tissue’s choice to seek leave to add sixteen new counterclaims at the very end of the original discovery period. It cannot now complain that its own poor timing resulted in expert discovery related to these counterclaims, and it is not a sign of an improperly “aggressive” or “bad faith litigation strategy” that Georgia-Pacific is defending an attack on the validity of one of its most valuable and famous trademarks with an expert survey.

As discussed above, Georgia-Pacific disclosed Dr. Ford as a testifying expert as soon as practicable and even offered to permit Global Tissue to depose Dr. Ford outside of the discovery period, as well as retain its own expert. That is not “bad faith litigation.”

Global Tissue’s brief makes several references to Georgia-Pacific having produced thousands of documents in this case, including up to the end of the discovery period. Again, far from being evidence of “bad faith,” this is proof that Georgia-Pacific has complied with the Federal Rules. The fact is that Georgia-Pacific is a large corporation, and thus has a number of individuals with responsive documents concerning the QUILTED NORTHERN® brand.

Throughout the course of this proceeding, Georgia-Pacific has continued to supplement its production with responsive documents in compliance with Rule 26, which requires parties to supplement discovery responses “in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect.” FED. R. CIV. P. 26(e)(1)(A); *see also* T.B.M.P. § 408.03 (stating that Rule 26(e)’s obligation to supplement discovery responses applies to Board proceedings); *Vignette Corp. v. Marino*, 77 U.S.P.Q.2d 1408, 1412 (T.T.A.B. 2005) (refusing to exclude documents not produced in discovery and disclosed for the first time as exhibits to an affidavit in response to a summary judgment motion; holding “discovery responses may be supplemented at any time, even during trial”); *see also H.D. Lee Co. v.*

Dragon Sourcing, No. 91180251, 2010 WL 1791180, at *2 (T.T.A.B. Apr. 20, 2010) (overruling objection to admission of exhibit at trial not produced during discovery). The most recent supplemental production, still made within the discovery period, contained such documents. Although counsel for Global Tissue initially objected to the timing of Georgia-Pacific's supplemental production (and suggests in its Brief that it will be filing a motion to exclude), the parties have resolved that dispute and no motions will be filed.

III. CONCLUSION

The Board should grant Georgia-Pacific's motion and allow it leave to present the expert testimony of Dr. Ford.

This 22nd day of December, 2010.

/s/ R. Charles Henn Jr.

R. Charles Henn Jr.

Charlene R. Marino

KILPATRICK STOCKTON LLP

1100 Peachtree Street, Suite 2800

Atlanta, Georgia 30309-4530

Telephone: (404) 815-6500

Facsimile: (404) 815-6555

Attorneys for Opposer Georgia-Pacific
Consumer Products LP

CERTIFICATE OF SERVICE

This is to certify that the OPPOSER'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO REOPEN TIME FOR EXPERT DISCLOSURES 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:

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

This 22nd day of December, 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

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

DECLARATION OF R. CHARLES HENN JR.

I, R. Charles Henn Jr., make the following Declaration:

1. I am a partner at the law firm of Kilpatrick Stockton LLP, counsel for Opposer Georgia-Pacific Consumer Products, LP (“Georgia-Pacific”) in this Opposition proceeding. I have personal knowledge of the facts stated in this declaration, which are true and correct to the best of my knowledge.

2. On October 15, 2010, I telephoned Dr. Gerald Ford of Ford Bubala & Associates and asked him if he would consult with our law firm in connection with this proceeding. In particular, I asked him to consider designing and conducting a consumer survey to test whether Georgia-Pacific’s QUILTED® trademark had achieved secondary meaning. He agreed to review the pleadings and consider serving as an expert consultant.

3. The following week I spoke again with Dr. Ford and he agreed to serve in a consulting capacity with our firm and to design a secondary-meaning study. Dr. Ford proceeded to design such a survey, which was conducted in various shopping malls across the country beginning on October 20, 2010 and continuing through November 1, 2010.

4. During the first two weeks of November, Dr. Ford and his staff collected and tabulated the survey results, completed “verifications” of the survey responses, and began preparing a written report summarizing the results of the survey.

5. On November 18, 2010, I spoke with Dr. Ford via telephone regarding the final tabulation of the survey and, in particular, his expert opinion. He explained that in his opinion, the survey results were evidence that the QUILTED trademark had secondary meaning among relevant consumers. He further explained that his written report and a Declaration summarizing the survey design and his opinions would be completed later that day (pacific time).

6. The very same day, my colleague Charlene Marino notified counsel for Global Tissue of Georgia-Pacific’s intent to offer testimony from Dr. Ford. She further explained that Dr. Ford was in the process of finalizing his written report. A true and correct copy of Ms. Marino’s Nov. 18, 2010 letter is attached as **Exhibit 1**.

7. Prior to receiving the tabulation of the results from Dr. Ford, as well as his conclusions and opinions about those results, he was serving entirely in a “consulting expert” capacity, because we obviously would not have asked him to testify as an expert witness at trial if the survey did not evidence secondary meaning. We did not make a determination that Dr. Ford would testify as an expert witness for Georgia-Pacific until November 18, 2010.

8. I served Dr. Ford’s full written expert report on Global Tissue’s counsel via email first thing in the morning on November 19, 2010. A true and correct copy of my November 19 email is attached as **Exhibit 2**.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

This 21st day of December, 2010.

A handwritten signature in blue ink, appearing to read "R. Charles Henn Jr.", written in a cursive style.

R. Charles Henn Jr.

EXHIBIT 1



Suite 2800 1100 Peachtree St.
Atlanta GA 30309-4528
t 404 815 6500 f 404 815 6555
www.KilpatrickStockton.com

November 18, 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,

A handwritten signature in cursive script that reads "Charlene R. Marino".

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	65	30.09
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	216	100.00

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> <u>Percent</u> (n=216)	<u>Control Cell</u> <u>Percent</u> (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