ESTTA Tracking number: **ESTTA408318**
Filing date: **05/10/2011**

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

Proceeding	91184978
Party	Plaintiff McNeil-PPC, Inc.
Correspondence Address	LAURA POPP-ROSENBERG FROSS ZELNICK LEHRMAN & ZISSU, P.C. 866 UNITED NATIONS PLAZA NEW YORK, NY 10017 UNITED STATES lrosenberg@fzlz.com
Submission	Other Motions/Papers
Filer's Name	Giselle Woo
Filer's e-mail	gwoo@fzlz.com,lpopp-rosenberg@fzlz.com,mortiz@fzlz.com
Signature	/Giselle Woo/
Date	05/10/2011
Attachments	Pages from Stipulation re Simonson Trial Testimony - redacted for confidentiality (F0790065-3)(1).pdf (23 pages)(958684 bytes) Pages from Stipulation re Simonson Trial Testimony - redacted for confidentiality (F0790065-3)(2).pdf (25 pages)(1124376 bytes) Pages from Stipulation re Simonson Trial Testimony - redacted for confidentiality (F0790065-3)(3).pdf (23 pages)(1032891 bytes) Pages from Stipulation re Simonson Trial Testimony - redacted for confidentiality (F0790065-3)(4).pdf (25 pages)(981802 bytes) Pages from Stipulation re Simonson Trial Testimony - redacted for confidentiality (F0790065-3)(5).pdf (24 pages)(965481 bytes) Pages from Stipulation re Simonson Trial Testimony - redacted for confidentiality (F0790065-3)(6).pdf (24 pages)(751616 bytes)

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

McNEIL-PPC, INC., Opposer, -against- WALGREEN CO., Applicant.	**Opp. No. 91184978**

STIPULATION REGARDING TRIAL TESTIMONY

The parties, Walgreen Co. ("Walgreens") and McNEIL-PPC, Inc. ("McNEIL"), through their undersigned counsel, stipulate that the attached portions of the transcript of Dr. Alex Simonson, excerpted from his discovery deposition taken October 9, 2011, shall constitute the trial cross-examination and re-direct testimony of Dr. Simonson. Dr. Simonson's direct trial testimony was previously submitted by Walgreens through affidavit pursuant to a stipulation between the parties.

Dr. Simonson's testimony on cross-examination is attached as Exhibit A hereto, with the exhibit referenced therein attached as Exhibit B hereto. Dr. Simonson's testimony on re-direct is attached as Exhibit C hereto.

Dated: May 5, 2011

By: _____
Laura Popp-Rosenberg
Giselle C. Woo
Fross, Zelnick, Lehrman & Zissu, P.C.
866 United Nations Plaza
New York, NY 10017
Tel: (212) 813-5900
Email: lpopp-rosenberg@fzlz.com

Attorneys for Opposer, McNEIL-PPC, Inc.

Dated: May 10, 2011

By: _____
Mark J. Liss
Caroline L. Stevens
Michelle L. Calkins
Leydig, Voit & Mayer, Ltd.
Two Prudential Plaza, Suite 4900
Chicago, IL 60601-6731
Tel: (312) 616-5600
Email: mliss@leydig.com

Attorneys for Applicant, Walgreen Co.

EXHIBIT A

1 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
2 BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD
3
4
5 ----------x
6 McNEIL-PPC, INC.,
7 Opposer,
8 -against-
9 WALGREEN CO.,
10 Applicant.
11 ----------x
12
13
14 October 1, 2009
15 9:42 a.m.
16
17
18 Deposition of ALEX SIMONSON, Ph.D., taken
19 at the offices of Fross Zelnick Lehrman & Zissu,
20 P.C., 866 United Nations Plaza, at First Avenue and
21 48th Street, New York, New York 10017, before
22 Janet Hamilton, RPR, (1991), and Notary Public.
23
24
25

1 A p p e a r a n c e s:
2 FROSS ZELNICK LEHRMAN & ZISSU, P.C.
3 Attorneys for Applicant
4 866 United Nations Plaza
5 First Avenue & 48th Street
6 New York, New York 10017
7 BY: RICHARD Z. LEHV, ESQ.
8 LAURA POPP-ROSENBERG, ESQ.
9 (212) 813-5928
10 lrosenberg@frosszelnick.com
11
12 LEYDIG VOIT & MAYER, LTD.
13 Attorneys for Opposer
14 Two Prudential Plaza, Suite 4900
15 180 North Stetson Avenue
16 Chicago, Illinois 60601-6731
17 BY: TAMARA A. MILLER, ESQ.
18 (312)616-5600
19 tmiller@leydig.com
20
21
22
23
24
25

1 I N D E X

WITNESS	EXAMINATION BY	PAGE
ALEX SIMONSON, Ph.D.	Mr. Lehv	4

E X H I B I T S

NUMBER	DESCRIPTION	PAGE
1	Subpoena to Simonson Associates	11
2	Subpoena to Dr. Alex Simonson	11
3	Report of Simonson Associates	27
4	Photocopy of package labels	85

NOTE: Exhibits retained by reporter.

1 A. Simonson, Ph.D, 10/1/09

2
3
4 Non-Designated Portions Redacted
5
6
7

8 Q. Good morning, Dr. Simonson.
9 A. Good morning.
10 Q. I take it at some point you were asked
11 to do a survey for this case?
12 A. That's correct.
13 Q. When was that?
14 A. Somewhere in May of 2009.
15 Q. And who contacted you?
16 A. Caroline Stevens from Leydig Voit &
17 Mayer.
18 Q. Was that by telephone or e-mail? Some
19 other way?
20 A. I'm not sure if telephone or e-mails was
21 the first conversation.
22 Q. Do you remember what she asked you to
23 do?
24 A. I don't remember the first conversation.
25 But, generally, to design a survey to give her a

1 A. Simonson, Ph.D, 10/1/09
2 bid with respect to a survey concerning the
3 likelihood of confusion for a TTAB opposition.
4 Q. Did she tell you anything about the
5 opposition and the allegations in the case?
6 A. I don't remember that first
7 conversation. But she described for me the marks
8 in question.
9 Q. What were the marks in question?
10 A. Wal-Zyr and Zyrtec.
11
12
13
14
15
16
17 Non-Designated Portions Redacted
18
19
20
21
22
23
24
25

1 A. Simonson, Ph.D, 10/1/09

2
3
4
5
6 Non-Designated Portions Redacted
7
8
9
10
11

12 Q. Okay. Do you remember what you
13 discussed with her in terms of a survey design?
14 A. I discussed with her in general to do an
15 Eveready-type design.
16 Q. What do you mean by an "Eveready-type
17 design"?
18 A. Showing the -- well, there are a number
19 of aspects to it. But showing one of the marks,
20 which is the Wal-Zyr mark, without showing the
21 Zyrtec mark. And asking respondents questions with
22 respect to confusion vis-a-vis any other brands
23 that might come to mind. And various types of
24 questions with respect to confusion.
25 Q. What do you mean by "various types of

A. Simonson, Ph.D, 10/1/09

questions with respect to confusion"?

A. Questions to elicit source confusion, affiliation, and authorization or permission.

Q. Why did you suggest that you do an Eveready-type survey?

A. Because ~~TTAB~~ For TTAB, those are the surveys that have been accepted as the predominant method. And those are the -- that is method that I have used for TTAB purposes.

Q. Do you have any -- strike that.

Have you used other types of survey designs in cases outside the TTAB?

A. I have.

Q. What type of survey designs? I'm talking about likelihood of confusion surveys.

A. Most typically I've used Eveready. In some instances of used the Squirt-type design.

Q. What's the "Squirt-type design"?

A. Generally speaking, you're showing the defendant's mark and you have either shown previous to it or sequentially after the plaintiff's mark.

Q. And what's the purpose of that design?

A. That is a design that is most related to situations where you want to extract out a

1 A. Simonson, Ph.D, 10/1/09
2 confusion level without having any regard to
3 awareness levels in the current market. So it's
4 considered more of a leading design, but at certain
5 times it's -- it's more -- it may be more probative
6 if -- and I've given situations and articles where
7 a senior user, for example, has just entered the
8 market. And it's such a new product, a new brand,
9 that an Eveready would not have been able to
10 extract out a confusion level. Or a defendant or
11 potential defendant is moving into an area where
12 that previously they haven't been to. So in those
13 situations sometimes Squirt is the more appropriate
14 design.
15 Q. Is there a survey design you have used
16 where the issue is not so much confusion as to
17 source but simply confusing the two marks, thinking
18 that they're both one and the same?
19 A. In terms of sensory confusion? Seeing
20 one, thinking you're seeing the other? Is that the
21 question?
22 Q. Well, you see one mark. You don't
23 remember it all that well. And then you see the
24 other mark. You don't realize they're two
25 different marks.

1 A. Simonson, Ph.D, 10/1/09
2 A. That's sensory perception confusion.
3 Q. Right.
4 A. That is typically done through
5 Eveready-type design. Correct.
6 Q. And -- okay.
7 Would you say sensory confusion is the
8 same as source confusion?
9 A. No.
10 Q. Was your survey in this case designed to
11 assess source confusion or sensory confusion?
12 A. It was designed to assess source,
13 affiliation, or authorization confusion.
14 Q. But not sensory confusion?
15 A. Not sensory perception confusion, per
16 se.
17 I just want to clarify. By that, I mean
18 not testing when you see Wal-Zyr you actually think
19 you saw Zyrtec, and you are mistaken as to what you
20 saw. That's what I'm explaining right now.
21 Q. Right.
22 A. If that's your --
23 Q. That's one type of sensory confusion.
24 Another type of sensory confusion is you
25 might have seen Zyrtec, don't remember it

1 A. Simonson, Ph.D, 10/1/09
2 perfectly. You see Wal-Zyr later on. You think
3 that's what you saw earlier.
4 A. I think that's a strained possibility.
5 But I did not test for that.
6 Q. You did not test for that?
7 A. I did not test for that. I'd have to
8 think whether this design addresses that. But I
9 haven't thought of that.
10 Q. Do you know what kind of confusion the
11 opposer was alleging in the -- in this case?
12 A. Umm...
13 Q. In other words, sensory confusion or
14 source confusion or some other kind of confusion?
15 A. I don't recall now. My assumption going
16 in was source affiliation or authorization.
17
18
19
20 Non-Designated Portions Redacted
21
22
23
24
25

1 A. Simonson, Ph.D, 10/1/09

2
3
4
5
6
7 Non-Designated Portions Redacted
8
9
10
11
12
13

14 Q. Did you discuss with counsel the
15 universe of people you would be selecting a
16 response from?
17 A. I did.
18 Q. What did you say to her and what did she
19 say to you about that?
20 A. I don't recall the particular
21 conversation. But I described to her -- not
22 described. I probably read to her -- I don't
23 recall -- the question that I had in mind with
24 respect to defining the universe.
25 Q. What was the question you had in mind

1 A. Simonson, Ph.D, 10/1/09
2 with respect to defining the universe?
3 A. I can't remember it word for word. If
4 you provide me the screener, I'll be able to just
5 show you.
6 Q. Okay. Let's mark as Simonson Exhibit 3
7 your report.
8 (Exhibit Number 3 was marked for
9 identification.)
10 A. Would you like me to read the question?
11 Q. (By Mr. Lehv) Well, first, tell us where
12 you would be reading from. So we're all on the
13 same page.
14 A. These aren't stamped with Bates numbers.
15 So -- there are no page numbers throughout.
16 Q. This is the way we got it.
17 A. It's Appendix B.
18 Q. Appendix B. Okay.
19 A. The second page of Appendix B.
20 Q. All right.
21 A. Questions D and E.
22 Q. Okay.
23 A. Okay. A respondent had to have
24 purchased in the past six months or was likely to
25 purchase in the next six months over-the-counter

A. Simonson, Ph.D, 10/1/09

allergy relief medications.

Q. Did they have to be of any particular age or gender or have any other demographic characteristics?

A. There was a screening quota for age and gender to approach people in proportion to their population proportions. So that the various age and gender groups were approached to provide them the same opportunity they would have in the population to be interviewed here, in terms of the same proportion they have in the population. But their actual inclusion in the study was based on -- their qualifying based on Questions D and E of the screening questionnaire.

Q. When you talk about the proportion of the population, are you talking about the proportion of the population in general? Or the proportion of the population who purchases over-the-counter allergy relief medication?

A. The end result to the ~~screen~~ screening procedure is that you have people entering the survey in proportion to their purchasing in the past six months or likely to purchase in the coming six months over-the-counter allergy relief medications.

1 A. Simonson, Ph.D, 10/1/09
2 But in order to have that occur you need to
3 approach them in proportion to their underlying
4 census proportion.
5 So, in other words, if 50 percent of the
6 population is female, you approach 50 percent in
7 terms of screening 50 percent female. But if it
8 turns out that females don't purchase this produce,
9 you would end up with no females if your sample, if
10 they stated No to Questions D and E.
11 So you give them a chance to enter the
12 survey in proportion to their underlying
13 demographics. But the actual inclusion is based
14 upon the percentage who actually qualify based on
15 the screening questions.
16 Q. Did you look at any data to see what
17 percentage of the population purchases
18 over-the-counter allergy relief medications?
19 A. No, I didn't.
20 Q. So I take it you didn't do anything to
21 compare the demographics of your final sample with
22 the demographics of people who actually purchased
23 over-the-counter allergy relief medications, just
24 to see if the two were in sync with each other?
25 A. I didn't test that, per se.

1 A. Simonson, Ph.D, 10/1/09

2
3
4
5
6
7
8
9
10 Non-Designated Portions Redacted
11
12
13
14
15
16
17
18
19
20
21

22 Q. Did you consider making a distinction
23 between people who purchased these products for
24 themselves versus people who purchased them for
25 other family members? For example, a parent buying

1 A. Simonson, Ph.D, 10/1/09
2 for a child or for another family member.
3 A. The issue here was just simply purchase.
4 So whether they purchased for themselves and would
5 be likely to be confused at the point of purchase
6 because they were purchasing for themselves or they
7 were purchasing for their child. There was no
8 distinction.
9 Q. Let's jump ahead to the validation.
10 If you look at your report, Exhibit 3,
11 at Page 10, under the heading Validation. It
12 says there were two discrepancies found. Do you
13 know what those discrepancies were?
14 A. Yes.
15 Q. What were they?
16 A. They were people who, on Questions D and
17 E, when recontacted stated that they didn't
18 purchase in the past six months or were not likely
19 to in the coming six month.
20 Q. And how do you know that; that that's
21 what the discrepancies were?
22 A. Because in response to the document
23 production request, I had asked my field
24 coordinator to get the details with respect to the
25 validation. And she then produced that to me.

1 A. Simonson, Ph.D, 10/1/09

2
3
4 Non-Designated Portions Redacted
5
6
7
8

9 Q. (By Mr. Lehv) In that same paragraph it
10 says that 267 respondents or 66 percent were
11 successfully recontacted. A very high rate of
12 recontact.
13 What do you mean by "recontacted"?
14 A. "Recontacted" means the second contact.
15 The first ~~contact is the interview~~. The
16 second contact is ~~telephone the respondents when~~ telephoning the respondents when
17 ~~their back~~ they're back home after the interview, sometime --
18 you know. A week or two after.
19 Q. And what is your basis for saying that
20 this is "a very high rate of recontact"?
21 A. My experience and the articles and
22 treatises in the area that suggest that 10 to 15
23 percent is a standard rate. And for litigation, 50
24 to 100 percent. But most of the time in my
25 experience, you don't typically get more than

A. Simonson, Ph.D, 10/1/09

60 percent. 70 percent is usually the high. So 66 percent is a very high rate of recontact.

Q. That also means that 34 percent of the people were never recontacted. Is that true?

A. It means you attempt 100 percent. And you try three times. And you are able to get a significant percentage, but not all of them.

So if 66 percent were successfully recontacted, which is significantly above the norm, you still have a certain percentage -- in this case it would be 34 percent -- that were not able to be recontacted.

Q. But of the 34 percent who could be recontacted, how do you know they were ever interviewed in the first place?

A. Well, you go by patterns and signals.

If you find one or two discrepancies out of 66 percent, that would suggest to you that there are not systemic problems in the survey.

[redacted]

Non-Designated Portions Redacted

1 A. Simonson, Ph.D, 10/1/09
2
3 Non-Designated Portions Redacted
4
5 Q. Prior to doing the survey that's
6 described in your report, Exhibit 3, did you do any
7 pretests?
8 A. I did not.
9 Q. Did you do any pilot studies?
10 A. I did not.
11 Q. Did you do any field tests?
12 A. I'm not sure what that means, but I
13 don't believe I did.
14 Q. Well, did you test the questionnaire in
15 any way, shape, or form with somebody else before
16 you did the interviews in the field, the actual
17 interviews?
18 A. No. The answer to that is no.
19 Q. You never asked a question to somebody
20 in your office or somebody that you came in contact
21 with, just to see if it made any sense?
22 A. I did not ask the questions to
23 respondents. No. I asked them to myself, but not
24 to others.
25 Non-Designated Portions Redacted

1 A. Simonson, Ph.D, 10/1/09
2 Non-Designated Portions Redacted
3
4 Q. How did you decide to make the control
5 mark Wal-Zee, as opposed to something else?
6 A. There's no perfect control. But the
7 idea behind the Wal-Zee was to determine a level of
8 guessing.
9 If you provide respondents with a
10 Wal-hyphen-mark with the category name Allergy
11 Medication, and in this instance to have the same
12 number of letters, and to cue them with the Z,
13 which could be one of the reasons for guessing
14 Zyrtec.
15 So the idea was simply to provide a
16 reasonable way to assess guessing to Zyrtec.
17 Q. Why does it have to be the same number
18 of letters?
19 A. It doesn't have to be the same number of
20 letters. I was giving you some of the commonality.
21 When you pick a control, you try to pick
22 something that's reasonably close to the test, but
23 absent the alleged infringing elements.
24 And so in this instance it also happened
25 to be similar with respect to the number of letters

A. Simonson, Ph.D, 10/1/09

and the fact that it had the Z. But there's no magic to having the same number of letters, per se.

Q. What do you mean by "guessing to Zyrtec"?

A. The issue with respect to what I meant there was, if people were to respond to the question and stated Zyrtec, but it wasn't due to the fact that they're truly confused between Wal-Zyr and Zyrtec, but, in fact, anything that might cue them to Zyrtec that wouldn't be alleged infringing, just simply using the letter Z -- if that were to cause people to think of Zyrtec as an allergy medication, and it's related to Wal, either people thought it was a generic version or something like that, but they're getting confused.

In other words -- well, let me restate that.

Some people might think it's generic. Some people might be getting confused because they're guessing. Let me say this. Evidence of confusion, but they're really guessing. So we want to extract that out.

So the Wal-Zee is an attempt to extract that out.

1 A. Simonson, Ph.D, 10/1/09

2 Non-Designated Portions Redacted

3

4 Q. Continuing on with Question 1A. After
5 asking "Though you may or may not have seen or
6 heard of this specific brand name before," you
7 continue with "Do you have an opinion as to what
8 company makes or puts out the products using the
9 name shown on this card?"
10 Is there a different between "makes" and
11 "puts out"?
12 A. "Makes" or "puts out," again, is a
13 fairly standard way to phrase this. "Puts out" can
14 include distribution as opposed to manufacture.
15 That's probably the origins of why these two were
16 put together in the same kind of phrase.
17 Q. So my question was: What's the
18 difference -- is there a difference between "makes"
19 and "puts out"? Your answer is?
20 A. It's "makes or puts out." And the idea
21 is, if people believe it's manufactured, they would
22 be relevant for this. If they believe it's put
23 out, meaning it's distributed by a particular
24 company -- it may be manufactured in China. They
25 don't know who the manufacturer is. But they know

1 A. Simonson, Ph.D, 10/1/09
2 of a company that is the company that this is put
3 out for or under, then they would respond as well.
4 So it's to provide them the opportunity in a broad
5 sense to get at who is the maker of this. But in a
6 broad sense. Including "puts out," if the maker
7 happens to be some unknown company.
8 Q. So I take it you would agree that
9 "makes" and "puts out" are not the same thing?
10 A. In the legal sense they may not be the
11 same thing. From a respondent point of view, there
12 are various ways get the idea, a the general idea
13 of the origin of this product.
14 Q. I'll ask it one more time. Is there a
15 difference between "makes" and "puts out"? Yes or
16 no?
17 MS. MILLER: Objection. Asked and
18 answered.
19 A. Legally, there may be a difference.
20 Q. (By Mr. Lehv) How about just in general
21 parlance? Is there a difference between "makes"
22 and "puts out"? Yes or no?
23 MS. MILLER: Same objection.
24 A. Slight. I would say -- I would say
25 slight, potential variations. And, therefore, they

1 A. Simonson, Ph.D, 10/1/09
2 may not be 100 percent the same.
3
4
5
6
7
8
9
10
11
12 Non-Designated Portions Redacted
13
14
15
16
17
18
19
20
21
22
23
24
25

1 A. Simonson, Ph.D, 10/1/09

2
3
4
5
6
7
8
9
10 Non-Designated Portions Redacted
11
12
13
14
15
16
17
18

19 Q. (By Mr. Lehv) Let's go to Question 2A,
20 which is: "Do you believe that the company that
21 makes or puts out the products using the name shown
22 on this card makes or puts out any other products
23 or brands or not?"
24 What does the phrase "or not" refer to?
25 A. "Do you believe that they make or put

A. Simonson, Ph.D, 10/1/09

out products" --

"Do you believe that the company that makes or puts out the products using the name shown on this card makes or puts out any other products or brands or not?"

Q. Yeah. I'm asking you. What does the phrase "or not" refer to?

A. They don't put out any other products or brands.

Q. In other words, you're asking them that the only thing this company makes or puts out is allergy medications, and they don't make or put out anything else?

A. No. That's just a category. The question is brands or products. In other words, do they have anything besides Wal-Zyr?

The idea here is to determine whether respondents think that this brand that they're looking at may not be Zyrtec, but it might be from the same company as Zyrtec, because it sounds like Zyrtec, because it has the Z-y-r at the end of it. So the issue is whether that association that might be conveyed causes confusion or not, or whether it's just simply an association.

1 A. Simonson, Ph.D, 10/1/09
2 Q. Is there a difference between "products"
3 and "brands"?
4 A. "Products" can mean to people
5 categories. And "brands" typically can mean kind
6 of a combination of category and specific names.
7 So the idea of brand is to get at other brand
8 names. And products is more to get at categories
9 and other types of items.
10 Q. Is Question 2A getting at product
11 categories? Or brand names?
12 A. It's getting at both. It's getting at
13 whatever is salient to respondents in terms of
14 whether the company that puts out Wal-Zyr is
15 putting out any other things. And instead of using
16 the word "things," we use "brands" or "products."
17 And the idea is for them to volunteer Zyrtec, if
18 they're so confused.
19 Q. Is Question 2A ambiguous?
20 A. I don't believe it's ambiguous. If it
21 is ambiguous, then all the TTAB accepted surveys
22 would have suffered from the same ambiguity.
23 I don't believe it's ambiguous.
24 Q. You believe it's accepted TTAB practice
25 to combine "brands" and "products" in one question?

1 A. Simonson, Ph.D, 10/1/09
2 A. Yes. This is where the verbiage came
3 from.
4 Q. This phrase, "products or brands" came
5 from a TTAB case?
6 A. Yes.
7 Q. Do you know which case it was?
8 A. I believe either Starbucks,
9 Anheuser-Busch, or both. I'm not sure precisely.
10 But there are a number of cases I provided you from
11 my file.
12 Q. Do you know whether in that case the
13 question was raised this phrase "products or
14 brands" is ambiguous and the TTAB affirmatively
15 said, "No, it's not ambiguous. We accept this
16 phraseology"?
17 A. I don't recall that, precisely. I do
18 recall, however, that these were -- at least one of
19 them, if not more, were cases in which it was the
20 same product category and this was, nevertheless,
21 asked. So --
22 I don't recall if there were questions
23 with respect to ambiguity. I recall that this was
24 the accepted methodology.
25 Q. Did you consider before you conducted

1 A. Simonson, Ph.D, 10/1/09
2 this survey whether the phrase "products or brands"
3 was ambiguous?
4 A. Did I consider that?
5 Q. Yes. Did you stop and think, "Wait a
6 minute. "Products" or "brands" are two different
7 concepts. Maybe the question is ambiguous"?
8 A. I didn't ask it that way. I said to
9 myself, "'Products or brands' gets a variety of
10 possibilities." I didn't think it's ambiguous.
11 But the wording came from the cases, and I defer to
12 the cases.
13
14
15
16 Non-Designated Portions Redacted
17
18
19
20 Q. Continuing on now with our discussion of
21 Question 2A. What percentage of the respondents
22 answered Question 2A by saying that the company
23 does not make or put out any other brands or
24 products? In other words, they answered "No" to
25 that question.

1 A. Simonson, Ph.D, 10/1/09
2 A. In the ~~tests~~ test cell -- I'm looking at Page 11
3 of the report, 16 percent. And the control cell,
4 15 percent.
5 Q. Did you compare that to known companies?
6 In other words, what percentage of people -- what
7 percentage of companies make only one product or
8 brand?
9 A. That wouldn't be an appropriate -- the
10 answer is no, I didn't.
11
12
13
14
15
16
17 Non-Designated Portions Redacted
18
19
20
21
22
23
24
25

1 A. Simonson, Ph.D, 10/1/09

2 Non-Designated Portions Redacted

3

4 Q. In Question 2A, why did you include the
5 word "brands" at all? Why didn't you just limit it
6 to whether they believe the company "makes or puts
7 out any other products or not"?
8 A. Well, there's two answers. I think the
9 word "brand" is important, given that Zyrtec could
10 be construed as another brand.
11 And, second, this language, again, is
12 from the case law from --
13 Q. Sorry. Go ahead.
14 A. The case law from TTAB.
15 Q. The original Eveready case, what was the
16 wording in that case?
17 A. I don't have the wording in front of me
18 of the original Eveready case. In that case I
19 would be speculating. I don't know.
20 Q. So, if it was important to you to you
21 use the word "brands," why include "products" as
22 well? Why not just limit it to "brands"? "Does
23 the company that puts out this product put out any
24 brands as well?" Why not leave out the word
25 "product"?

1 A. Simonson, Ph.D, 10/1/09
2 A. The concern was that diverging from the
3 TTAB's accepted survey in terms of the wording of
4 this important question would be a source of
5 criticism.
6 I personally don't believe there would
7 have been a problem. But that is the -- that is
8 the reason.
9
10
11
12
13
14
15
16 Non-Designated Portions Redacted
17
18
19
20
21
22
23
24
25

1 A. Simonson, Ph.D, 10/1/09

2
3
4 Non-Designated Portions Redacted
5
6
7

8 Q. Question 2B was asked of people who said
9 "Yes" to Question 2A, and only people who said
10 "Yes" to Question 2A. Correct?
11 A. And people who responded "Does," which
12 is essentially an affirmative response to 2A.
13 Q. Well, what if the person, in response to
14 Question 2A said "Yes"? That's recorded as a
15 "Does"?
16 A. If you ask them, "Do you believe that
17 the company" -- you continue through that question,
18 and then you end it "or not?" and then they say
19 "Yes," that would be recorded as a "Does."
20 Q. So only people who said "Yes" or "Does"
21 would be asked Question 2B?
22 A. That's correct.
23 Q. And then for each product or brand
24 mentioned in Question 2B, they're asked, "What
25 makes you say that?"

1 A. Simonson, Ph.D, 10/1/09
2 A. That's correct.
3 Q. Was the question "What makes you say
4 that?" asked after each item? Or after the whole
5 list was exhausted?
6 A. After the entire list was exhausted.
7 Q. Was there any instruction to the
8 interviewer to probe? So, if the person listed one
9 thing, whether a product or a brand, did the
10 interviewer say "Anything else?" or "What else?" or
11 something like that to probe?
12 A. I'd have to check the instructions. My
13 recollection, without reviewing them right now, was
14 they were not supposed to be prompting for anything
15 else. But they were supposed to ask the question
16 and allow the respondents to speak. But I'd have
17 to check as to actually how that was instructed.
18 Q. Can you check?
19 A. (Reviews document.)
20 I was correct. I don't see anything in
21 the instructions to tell me contrary to my
22 understanding. So the interviewer does not ask
23 "What products or brands?" and then give the
24 respondent the opportunity to speak until the
25 respondent is finished.

1 A. Simonson, Ph.D, 10/1/09
2 Q. Are they affirmatively instructed not to
3 probe?
4 A. In general, from my studies, I'd, again,
5 have to look at that. In general, from my studies,
6 I advised them that anything else, any type of
7 probe for product or brand names are not to be
8 conducted. But probes for clarity are. Or
9 ambiguity.
10 So in the probing section in the
11 instructions, they are advised that they're
12 supposed to only probe when an answer -- well,
13 excuse me.
14 They are advised to probe when an answer
15 is not clear to them. And I don't see it written
16 here, but, in general, when these field services
17 conduct surveys for me, they know that they're not
18 supposed to probe for anything else unless they're
19 specifically advised to do that.
20 Q. Where does it say that?
21 A. It doesn't say that.
22 Q. And it also says under the heading
23 Probing, "We cannot accept vague or incomplete
24 responses."
25 What is an "incomplete response"?

1 A. Simonson, Ph.D, 10/1/09
2 A. That refers mostly to open-ended
3 questions that are calling for answers. And
4 sometimes people don't give you something that
5 makes sense. And so it's up to the interviewer's
6 discretion as to what makes sense to them.
7 An incomplete response. That is not
8 meant to say -- if you ask people for some products
9 or brands and they give you two, that is not
10 incomplete. Incomplete is the respondent is asked
11 "Why do you say that?" and the answer is, let's
12 say, a one-word answer that doesn't make sense to
13 an interviewer. And I can't think of an example at
14 this point. But interviewers sometimes see it,
15 don't feel it's clear, and they ask further, "What
16 do you mean by that?"
17 Q. The distinction that you just made is
18 not spelled out in the instruction on probing, is
19 it?
20 A. That distinction that I just gave you is
21 not spelled out.
22
23 Non-Designated Portions Redacted
24
25

1 A. Simonson, Ph.D, 10/1/09

2
3
4
5
6
7
8
9 Non-Designated Portions Redacted
10
11
12
13
14
15
16
17
18
19

20 Q. In response to Question 2B, did you want
21 the interviewers to probe or prompt for further
22 brands or categories? Or did you not want them to
23 do that?
24 A. It was not my deliberate intention for
25 them to continue saying "Anything else?" until

1 A. Simonson, Ph.D, 10/1/09
2 exhaustion, if that's your question.
3 It was my -- the design of this was to
4 allow them, the respondents, to speak until they're
5 finished, and then to continue on. Not the former.
6 Q. Are there cases where you want the
7 interviewer to say "Anything else?" until the
8 respondent has exhausted all their thoughts on the
9 subject?
10 A. Sometimes in dilution surveys, where
11 you're interested in association. And association
12 is different in cognitive structure from confusion.
13 Sometimes with associations, the procedure in
14 psychology might be to continue until exhaustion.
15 But, other than that, I don't -- I don't see any
16 need for it.
17 Q. So in this case --
18 A. But there might be occasions. I don't
19 want to exclude it entirely.
20 Q. All right. In this case you didn't see
21 any need for them to exhaust the list in that
22 manner?
23 A. My thoughts were -- that's correct.
24 That's right.
25 Q. As you sit here today, do you have an

1 A. Simonson, Ph.D, 10/1/09
2 affirmative recollection of saying to yourself
3 should the respondents exhaust the list or should
4 they not?
5 A. I do not have a recollection of that
6 question; that I somehow, for example, had
7 forethought of inserting data and then didn't
8 insert. No.
9 Q. As you sit here today, do you know
10 whether, in fact, the interviewers exhausted the
11 list in that manner?
12 A. I can't say that every interviewer at
13 all times doesn't forget and probe "Anything else?"
14 "Anything else?" is the standard
15 approach in marketing research. They also use an
16 "Anything else?" or a "What else?" almost as a
17 matter of course. So if it were to surprise me, it
18 wouldn't trouble me.
19 It wouldn't surprise me.
20 Q. But as you sit here today you don't know
21 which interviewers said "Anything else?" and which
22 interviewers didn't say "Anything else?"
23 A. That's correct. I know that they're
24 supposed to follow instructions. And if they're
25 not following instructions, I'm supposed to be

1 A. Simonson, Ph.D, 10/1/09
2 advised of it. So you're kind of hypothesizing
3 something that's, where there might be some issue
4 of some variation of divergence and making it sound
5 as though there could be a mass divergence, I don't
6 believe that's a correct characterization.
7 However, any interviewer you may pick out, I may
8 not know if that were the particular interviewer
9 who would have said an "Anything else?"
10
11
12
13
14 Non-Designated Portions Redacted
15
16
17
18
19
20 Q. Your Question 3A begins, "Do you believe
21 that the company that makes or puts out the
22 products using the name shown on this card..."
23 Why did you use the word "name" in
24 Question 3A when you had used "brand name" in the
25 instructions or the introduction?

1 A. Simonson, Ph.D, 10/1/09
2 A. The first time I referred to "name" I
3 said "brand name." I didn't continue using "brand
4 name." They understood we were speaking about
5 brand name. So, thereafter, I used "name."
6 I don't think there's magic to it. And
7 I don't think it's unclear. So -- that's the
8 answer.
9 Q. Question 1A refers to "brand name" and
10 "name." Correct?
11 A. Well, "brand name" is the first time I
12 refer to "name." And from there on I just refer
13 to, it after they've already been exposed to the
14 concept that it was a brand name, as "name."
15 Q. Question 2A first uses "name."
16 "...the name shown on this card." And then it
17 refers back to "brands." It says, "...or puts out
18 any other products or brands..." Correct?
19 A. That's correct.
20 Q. And then Question 2B uses the word
21 "brand" again. Correct?
22 A. That's correct.
23 Q. And then Question 3A goes back to using
24 "name"?
25 A. No. I think you're mischaracterizing.

1 A. Simonson, Ph.D, 10/1/09
2 The issue is "name shown."
3 "Name shown."
4 Q. "...name shown on this card..."
5 A. And it's always "name shown." We don't
6 say "brand shown."
7 It's "brand name" the first time I
8 introduce them to the concept of "name." But it's
9 then consistent "name shown."
10 If there were multiple names shown, you
11 know, I'd wonder whether there's some difference in
12 application. But that's not the case here. So --
13 you're showing a distinction. But I think you need
14 to speak to respondents colloquially. And I don't
15 think the distinction has any impact on how it
16 would be understood.
17
18
19
20
21 Non-Designated Portions Redacted
22
23
24
25

1 A. Simonson, Ph.D, 10/1/09

2
3
4
5
6
7
8
9
10
11 Non-Designated Portions Redacted
12
13
14
15
16
17
18
19
20
21
22
23
24

25 Q. Did you consider the possibility that

1 A. Simonson, Ph.D, 10/1/09
2 people may think that the active ingredients in
3 Zyrtec comes from the same supplier as the active
4 ingredients in Wal-Zyr?
5 A. No. My understanding -- my assumption
6 going in was that this is not -- I may be wrong,
7 but I thought it's not a patented medication. My
8 understanding was Wal-Zyr does have the active
9 ingredients of Zyrtec, whatever that might be. And
10 that's not a measure of confusion. But -- no.
11 The short answer is no.
12 Q. I'm asking you a different question.
13 I'm not talking about an ingredient with the same
14 chemical formula. I'm talking about some supplier
15 of the active ingredient supplies it to both
16 entities.
17 MS. MILLER: Is there a question
18 pending?
19 MR. LEHV: Yes.
20 Q. (By Mr. Lehv) Did you consider that
21 possibility?
22 A. That hypothesis should come out in
23 Question 3. That should be some affiliation.
24 If they believe, for example, that
25 there's some factory out there that's supplying, a

1 A. Simonson, Ph.D, 10/1/09
2 similar supplier, that's an affiliation. And they
3 would then suggest that there's an affiliation
4 between the makers of Zyrtec and this. Because
5 they're getting their ingredients from the same
6 company. That's the purpose of Question 3, in
7 part.
8 Q. You believe that, when people hear the
9 word "affiliation," they would think that covers
10 the situation where two companies both buy
11 ingredients from the same supplier?
12 A. If they're buying ingredients from the
13 same supplier without an agreement, per se, then I
14 think it would not.
15 But if what your -- my understanding of
16 your hypothesis was they're buying from the same
17 supplier, meaning there's some authorization by
18 Zyrtec to say "You can buy this ingredient from the
19 company that we have our manufacturing capabilities
20 with." That's an authorization or affiliation.
21 If that's not your hypothesis, then I
22 misunderstood it.
23 Q. My hypothesis is that people believe
24 there's an active Ingredient Y in Wal-Zyr that's
25 made by a third party. And that third party sells

1 A. Simonson, Ph.D, 10/1/09
2 it to Wal-Zyr and then also sells it to the maker
3 of Zyrtec.
4 A. My understanding is -- that's a very
5 similar, if not the same, situation where consumers
6 might believe that generic brands are actually made
7 by the same companies that make the well-known
8 brands. Ketchup. Stop & Shop ketchup is actually
9 made by Hines, they might think. Or they might be
10 getting their ingredient from the distributor of
11 the Hines. That's under the concept of
12 affiliation.
13 Q. I'm not talking about making the product
14 itself. I'm just talking about making the active
15 ingredient.
16 A. I'm saying that, as well. If they
17 believe that there's some sort of active ingredient
18 that is linked to Zyrtec, then they would have to
19 believe that Wal-Zyr has the right to get the
20 active ingredient from that source. That would be
21 an authorization question.
22 If they don't believe that it's
23 authorized and they think, well, maybe Wal-Zyr got
24 it from the same company without Zyrtec's
25 authorization, then that would not cover it. But

1 A. Simonson, Ph.D, 10/1/09
2 that's not my understanding of "confusion." They
3 would have to --
4 Q. Well, why is that not confusion? Why do
5 you say that's not your understanding of confusion?
6 A. Well, my understanding of "confusion" is
7 they either believe there's source relationship,
8 affiliation, or authorization.
9 So if they believe, for example, that
10 Zyrtec had to authorize the use of the term Zyr,
11 that would be confusion.
12 If they just believe it sounds like
13 Zyr --
14 But if they believe it sounds like
15 Zyrtec, and they know that it's cueing for them
16 Zyrtec, but they don't believe it's actually
17 authorized, that wouldn't be confusion.
18 So I juxtaposed the person that makes,
19 comes to a conclusion of affiliation or
20 authorization versus the one that doesn't.
21 You're kind of asking a separate
22 question, different from trademark confusion. It's
23 almost an advertising question.
24 Do they have a false impression of
25 something that's unrelated to trademark confusion?

1 A. Simonson, Ph.D, 10/1/09
2 I didn't test this as a false advertising suit.
3 That wasn't the purpose of this test. In other
4 words -- well...
5
6
7
8
9
10
11 Non-Designated Portions Redacted
12
13
14
15
16
17
18
19
20 Q. Have you ever seen the phrase "Compare
21 to Zyrtec active ingredient" on Walgreens package?
22 A. I believe I have. Yes.
23 Q. Would you ever give any consideration to
24 the use of the name Wal-Zyr in connection with the
25 phrase "Compare to Zyrtec active ingredient" --

A. Simonson, Ph.D, 10/1/09

that it might enhance confusion or the likelihood of confusion?

A. Can you repeat the question? Did I consider it, you asked?

Q. Did you consider whether the use of the phrase "Compared to Zyrtec active ingredient" in combination with the brand name Wal-Zyr might enhance the likelihood of confusion?

A. This study was solely focused on the name Wal-Zyr, and not focused on package cues.

1 A. Simonson, Ph.D, 10/1/09

2
3
4
5
6
7 Non-Designated Portions Redacted
8
9
10
11
12
13
14

15 Q. Did you make an assessment of how many
16 of the respondents in your survey were confused?
17 A. Yes.
18 Q. What was your assessment?
19 A. Approximately 4.5 percent overall,
20 including those -- including 1 percent that said
21 it's unclear; there's some ambiguity.
22 Q. How did you determine that? First of
23 all, what steps did you take to determine who was
24 confused and who was not confused?
25 A. In looking at the responses to the

1 A. Simonson, Ph.D, 10/1/09
2 open-ended questions and tallying up those that
3 refer to Zyrtec or Johnson & Johnson in each of the
4 sets of questions, with double-counting in both the
5 test and the control cells.
6 Q. Okay. What would be an example of
7 somebody who was -- or you deemed to be confused in
8 response to Question 1B?
9 A. 37054, on Page 4 of the tabular data.
10 Q. 37054. What was the respondent's answer
11 to Question 1B?
12 A. Zyrtec.
13 Q. So this is somebody who said that Zyrtec
14 is the company that makes the product shown on the
15 card?
16 A. Yes.
17 Q. "Makes or puts out the product shown on
18 the card"?
19 A. That's correct.
20 I don't have the exact wording. I'm
21 assuming you're quoting from the question. If
22 you're quoting from the question, that's correct.
23 Q. Well, Question 1B is "What company?" So
24 the response to Question 1B was "Zyrtec."
25 A. So Question 2A then, that is the company

1 A. Simonson, Ph.D, 10/1/09
2 that they believe -- that person says "What
3 company" in 1B, not 2A. I misheard you.
4 Then the question was "Do you have an
5 opinion as to what company makes or puts out the
6 products using the name shown on this card?" And
7 they responded, "Yes. Zyrtec." After saying yes,
8 they do have an opinion. This is a female, age 50
9 plus.
10 Q. Okay. How about respondent 26908? Is
11 that person confused?
12 A. Not -- not in my understanding.
13
14
15
16
17
18
19
20
21
22
23
24
25

REDACTED FOR CONFIDENTIALITY

1 A. Simonson, Ph.D, 10/1/09

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

1 A. Simonson, Ph.D, 10/1/09

2
3
4
5
6
7
8 REDACTED FOR CONFIDENTIALITY
9
10
11
12
13
14
15
16
17
18

19 Q. Well, you talked before about the
20 possibility that some people believe that the maker
21 of a national brand product also makes a store
22 brand for the store. Correct?
23 A. Yes.
24 Q. Some people believe that.
25 A. Yes.

1 A. Simonson, Ph.D, 10/1/09
2 Q. That the maker of the national brand
3 also makes a store brand?
4 A. Right. Yes.
5 Q. How do you know that this person, 26908,
6 doesn't believe that?
7 A. I don't see any indication of that.
8
9
10
11
12
13
14
15 REDACTED FOR CONFIDENTIALITY
16
17
18
19
20
21
22
23
24
25

1 A. Simonson, Ph.D, 10/1/09

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

1 A. Simonson, Ph.D, 10/1/09

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

1 A. Simonson, Ph.D, 10/1/09

2
3
4
5
6
7
8 REDACTED FOR CONFIDENTIALITY
9
10
11
12
13
14
15
16

17 Q. Is there someplace we could go in your
18 report to find the particular questionnaires that
19 you believe were confused? I know you gave us an
20 overall percentage. But is there any indication on
21 the report or any of the appendices that say, "This
22 one I've included in that percentage. This one I
23 think is confused"?
24 A. You know. I didn't find that. So I,
25 yesterday, went over it. Went over the entire data

A. Simonson, Ph.D, 10/1/09

set again and counted the same exact number of respondents. I had to do it manually.

Non-Designated Portions Redacted

Q. 42429. Was that counted as confused?

A. It was not.

Non-Designated Portions Redacted

1 A. Simonson, Ph.D, 10/1/09

2
3
4
5
6
7
8
9
10
11
12 Non-Designated Portions Redacted
13
14
15
16
17
18
19
20
21
22
23
24 Q. Okay. 48568. Was that person counted
25 as confused?

1 A. Simonson, Ph.D, 10/1/09
2 A. They were counted in the ambiguous
3 category. No.
4
5
6
7
8
9
10
11
12
13
14 Non-Designated Portions Redacted
15
16
17
18
19
20
21
22
23 REDACTED FOR CONFIDENTIALITY
24
25 Non-Designated Portions Redacted

1 A. Simonson, Ph.D, 10/1/09

2
3 Non-Designated Portions Redacted
4

5 Q. Number 67638. Was that person counted
6 as confused?
7 A. No.
8 Q. So, although this person didn't know who
9 makes or puts out the Wal-Zyr product, but they
10 also thought the same company put out NyQuil. Who
11 makes NyQuil?
12 A. I don't know who makes NyQuil. If it's
13 J&J, then I would have included this.
14
15
16
17
18
19 Non-Designated Portions Redacted
20
21
22
23
24
25

1 A. Simonson, Ph.D, 10/1/09

2
3
4
5
6
7
8
9
10 Non-Designated Portions Redacted
11
12
13
14
15
16
17
18
19
20

21 Q. Okay. Number 81147. Was that person
22 counted as confused?
23 A. Lilly and Cialas. No.
24 Q. Do Lilly or Cialas make Wal-Zyr?
25 A. My understanding is they don't. But my

1 A. Simonson, Ph.D, 10/1/09
2 understanding is also that this case is not about
3 confusion vis-a-vis other brands, but solely with
4 respect to Zyrtec.
5
6
7
8 REDACTED FOR CONFIDENTIALITY
9
10
11
12 Q. Well, how did you take into account the
13 possibility that somebody may know about Zyrtec but
14 just not know who makes it or may be mistaken as to
15 the correct company? They may think Lilly makes
16 Zyrtec and not Johnson & Johnson.
17 A. In that hypothesis, why wouldn't they
18 just say Zyrtec instead of trying to think to
19 themselves "Who's making this thing? I'm not quite
20 sure." It's an odd speculation. I don't know that
21 that's a likely scenario. Otherwise, they would
22 have said Zyrtec. Even if they didn't say Zyrtec
23 in 1B, they said Lilly and Cialas. Now, I don't
24 know who makes Cialas.
25 Non-Designated Portions Redacted

1 A. Simonson, Ph.D, 10/1/09

2
3
4
5
6
7
8
9
10
11
12 Non-Designated Portions Redacted
13
14
15
16
17
18
19
20
21
22
23
24
25 Q. Number 83225. Was that person counted

1 A. Simonson, Ph.D, 10/1/09
2 as confused?
3 A. I believe this would have been in the
4 ambiguous category.
5 Q. Number 83354. Was that person also in
6 the ambiguous category?
7 A. Yes.
8
9 Non-Designated Portions Redacted
10
11 Q. Number 89839. Was that person in the
12 ambiguous category?
13 A. Yes.
14 Q. Number 91044. Was that person
15 considered confused?
16 A. 9 --
17 Q. 91044.
18 A. I have to check. I believe so. But I'd
19 have to check to be sure. My understanding is
20 Tylenol is a J&J brand. So I believe this was
21 included.
22
23 REDACTED FOR CONFIDENTIALITY
24
25

1 A. Simonson, Ph.D, 10/1/09

2
3
4
5
6
7
8
9
10 Non-Designated Portions Redacted
11
12
13
14
15
16
17
18
19
20
21

22 Q. If you could turn to Appendix E of your
23 report and look at the data for Respondent
24 ID 23280. It's on Page 2 of 60.
25 A. Yes.

1 A. Simonson, Ph.D, 10/1/09
2 Q. Respondent 23280 was in Cell RR, which
3 is a test cell?
4 A. Yes.
5 Q. That person should have been shown a
6 card that said Wal-Zyr on it. Right?
7 A. Correct.
8 Q. But in response to Question 1C, the
9 answer is "Because it states the name Wal-Zee"?
10 A. Yes. I notice -- this is an error in
11 showing the wrong card.
12 Q. How do you know it was an error in
13 showing the wrong card?
14 A. Because it states so.
15 Q. Right. So what did you do when you
16 noticed that it was an error?
17 A. You don't destroy the data. So it's in
18 the results. But in situations like this you rely
19 on the fact that you have stop-gap measures to try
20 to deal with this.
21 Most interviewers don't have -- for
22 example, telling the interviewer to check which one
23 they're showing and enter it. That was done as a
24 measure to avoid this. However, one got through.
25 Q. Well, how do you know it's one? How do

1 A. Simonson, Ph.D, 10/1/09
2 you know it wasn't more than one?
3 A. There's no indication to suggest it's
4 more than one.
5 In the vast majority of studies, we
6 simply rely on interviewers to show the correct
7 stimuli without having this step additional step
8 saying record the number. There are some surveys
9 I've seen which do that. Most don't. We did that
10 here. And this happens to be one that fell
11 through.
12 But because of the steps taken, I
13 believe it's a unique instance.
14
15
16
17
18
19 Non-Designated Portions Redacted
20
21
22
23
24
25

1 A. Simonson, Ph.D, 10/1/09

2
3
4
5 Non-Designated Portions Redacted
6
7
8

9 Q. Well, did you go back and look at all
10 the other interviews that were conducted by this
11 particular interviewer to see if there was any
12 pattern that could be discerned?
13 A. I don't recall doing that, as we sit
14 here. But my field coordinator speaks to the field
15 services frequently to admonish them to follow
16 instructions. And, nevertheless, you sometimes
17 have an error that creeps in.
18 So I don't see it as a systemic problem,
19 although it does indicate that this particular
20 interview had an error.

21
22
23 Non-Designated Portions Redacted
24
25

1 A. Simonson, Ph.D, 10/1/09

2
3
4 Non-Designated Portions Redacted
5
6

7 Q. The interviewing was conducted in how
8 many cities?
9 A. Twelve cities.
10 Q. In shopping malls?
11 A. Correct.
12 Q. How many of those shopping malls had a
13 Walgreens store in them?
14 A. As we sit here, I don't know the answer
15 to that. My suspicion would be that most, if not
16 all, would not have a Walgreens, per se. But I
17 have to check to be sure.
18 Q. Why do you suspect that?
19 A. Because these are regional shopping
20 malls. These are not strip malls. These are
21 places that have Sears and in Nordstroms, etcetera.
22 These are the enclosed malls.
23 Q. Are you saying a regional -- go ahead.
24 A. Well, I don't know the extent of
25 Walgreens penetration in closed malls. So I would

A. Simonson, Ph.D, 10/1/09

have to say I'm speculating.

Non-Designated Portions Redacted

1 A. Simonson, Ph.D, 10/1/09

2
3
4
5 REDACTED FOR CONFIDENTIALITY
6
7
8
9

10 Q. Have you done any survey research work
11 for Walgreens, other than this survey that brings
12 us here today?
13 A. Yes.
14 Q. On how many occasions?
15 A. On one occasion.
16 Q. Was that Walgreens versus Wyeth that's
17 in your CV?
18 A. Yes.
19 Q. What was that case about?
20 A. That is about a likelihood of confusion
21 issue with respect to Wal-Vert. V-e-r-t.
22 Q. Wal-Vert. And what was -- that's a TTAB
23 opposition, or a lawsuit in court?
24 A. That's a federal -- I believe an appeal
25 from a TTAB decision.

1 A. Simonson, Ph.D, 10/1/09
2 Q. You conducted a survey in that case?
3 A. Yes.
4 Q. What was the survey design in that case?
5 A. An Eveready-type design.
6 Q. Did you use the same questions that you
7 used here, substituting Wal-Vert for Wal-Zyr?
8 A. Yes.
9 Q. What did you use as a control in that
10 case?
11 A. Wal-Alert.
12 Q. Alert?
13 A. Alert.
14 And Wal-24HR. Twenty-four hours.
15 Q. You used two controls?
16 A. I used two controls.
17 Q. Why did you use two controls?
18 A. One was to determine guessing with
19 respect to the sound of it. Vert/Alert. And one
20 was just guessing with respect to 24-hour relief.
21 Allergy medicine, in general.
22
23 REDACTED FOR CONFIDENTIALITY
24
25

1 A. Simonson, Ph.D, 10/1/09

2
3
4
5 REDACTED FOR CONFIDENTIALITY
6
7
8
9
10
11
12
13
14
15
16 Non-Designated Portions Redacted
17
18
19
20
21
22
23
24
25

1 A. Simonson, Ph.D, 10/1/09

2
3
4
5
6
7
8
9
10
11
12 Non-Designated Portions Redacted
13
14
15
16
17
18
19
20
21
22
23
24 Q. How do you keep track as you're doing
25 this? You're going through 404 questionnaires.

1 A. Simonson, Ph.D, 10/1/09
2 A. I highlight them.
3 Q. You highlight on the screen?
4 A. Highlight them on the screen in yellow.
5 And then count them.
6 Q. So you don't do anything on paper? Do
7 you put hatch marks on a piece of paper?
8 A. No.
9 Q. And once you shut down your computer,
10 the highlighting disappears?
11 A. If I saved it, then it doesn't
12 disappear. If I didn't save it, it does disappear
13 and I need to redo it.
14 Q. Did you save it?
15 A. I didn't save it, or I would have
16 produced it.
17 That's why yesterday I looked for it and
18 I had to recalculate from scratch. And I did that.
19 Q. When you recalculated from scratch, did
20 you get the same numbers as in your report?
21 A. I got the same numbers. And I wrote
22 them down.
23
24 Non-Designated Portions Redacted
25

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

McNEIL-PPC, Inc.	)	In re Trademark Application
	)	Serial No. 76/682,070
Opposer,	)	Opposition No. 91184978
	)	Trademark: WAL-ZYR
v.	)	
	)	
WALGREEN COMPANY,	)	
	)	
Applicant.	)	

DECLARATION

I hereby certify that I have read the foregoing transcript of my deposition given on October 1, 2009 in New York, New York, consisting of pages 1 through 128, inclusive, and I do again subscribe and make oath that the same is a true, correct, and complete transcript of my deposition so given as aforesaid, and includes changes, if any, so made by me.

ALEX SIMONSON, PH.D.

Subscribed and sworn to before me
this 22 day of January 2010.

Notary Public

KENDRIA T FRANCIS
Notary Public
State of New Jersey
My Commission Expires Jul 29, 2014

EXHIBIT B

simonson associates, inc.

Brand Building and Protection Research and Consulting

560 Sylvan Avenue
Englewood Cliffs, New Jersey 07632
www.simonsonassociates.com

REPORT OF A SURVEY TO DETERMINE THE LIKELIHOOD OF CONFUSION, IF ANY, BETWEEN WAL-ZYR ALLERGY MEDICATIONS AND ZYRTEC

July 2009

PENGAD 800-631-6989
DEPOSITION EXHIBIT
SIMONSON 2
3 10/1/09

CONFIDENTIAL

TABLE OF CONTENTS

	Page
BACKGROUND AND PURPOSE	1
SUMMARY OF METHODOLOGY	2
CONCLUSIONS	3
DETAILED METHODOLOGY	4
FINDINGS	10

APPENDIX A: BRIEF BIO OF AUTHOR AND FULL CV OF AUTHOR

APPENDIX B: QUESTIONNAIRE (SCREENING QUESTIONNAIRE AND MAIN QUESTIONNAIRE)

APPENDIX C: INTERVIEWER AND SUPERVISOR INSTRUCTIONS

APPENDIX D: VALIDATION QUESTIONNAIRE AND LETTER

APPENDIX E: DATA

APPENDIX F: CARDS SHOWN TO RESPONDENTS FOR EACH CELL

BACKGROUND AND PURPOSE

The law firm of Leydig, Voit & Mayer, Ltd. commissioned Simonson Associates, Inc. to conduct a survey to determine the likelihood of confusion, if any, between the name WAL-ZYR for allergy medications and ZYRTEC. The study was conducted in the context of an opposition to a registration of the WAL-ZYR name in the U.S. Patent and Trademark Office.

The survey was designed and implemented by Simonson Associates, Inc. under the supervision of Dr. Alex Simonson. A brief bio and a full C.V. of Dr. Simonson are attached hereto as Appendix A.

SUMMARY OF METHODOLOGY

The survey was conducted via mall-intercept interviews across 12 markets in the continental United States. Respondents were screened on the mall floor and brought to interviewing rooms at the malls to be interviewed.

An Eveready-type approach was used in that respondents in the test group were provided the WAL-ZYR name and asked a series of questions designed to assess confusion as to source, affiliation or authorization. Those in the test group were shown a card with the term WAL-ZYR and beneath it the category "Allergy medications" and asked questions.

The survey employed a control group in addition to the test group. The control group was designed to determine any level of noise, that is, confusion caused by factors other than the WAL-ZYR name, such as guessing. The control stimulus was designed to have the "Wal" prefix but a suffix other than "zyr," with the same product category description ("Allergy medications") and the ending ZEE (as having the same first letter as ZYRTEC and a meaning of the letter Z, the first letter in ZYRTEC) . The control stimulus shown to the control group was WAL-ZEE.

Once respondents were provided with the name-cards, questions were asked to determine confusion as to source, as to affiliation and as to authorization or permission. The respondents in the control group were asked the identical questions to those in the test group.

CONFIDENTIAL

CONCLUSIONS

The results of the survey indicate that 3% of respondents (to 3.5% depending on rounding), net of noise, confuse the name WAL-ZYR for allergy medications with ZYRTEC or the makers of ZYRTEC. An additional 1% of respondents may or may not be confused as discussed later in this report. The study was conducted in accordance with generally accepted standards and practices and indicates that there is a low percentage of confusion between the WAL-ZYR brand name and the ZYRTEC brand name.

CONFIDENTIAL

In engaging in this project, I was guided by standards typically used and cited in our field with regard to the admissibility of surveys (including the underlying data, analysis and conclusions), contained in the Manual for Complex Litigation, 4th ed., 2004, Federal Judicial Center and the "Reference Guide on Survey Research" by Shari S. Diamond, J.D., Ph.D., in the Reference Manual on Scientific Evidence, 2d ed., 2000, Federal Judicial Center.

Briefly stated, these guidelines set forth that surveys for litigation are designed to comport with the generally accepted standards and practices in the industry for designing and implementing survey research. These various standards and practices all converge on the following essential set of conditions that describe a proper survey:

- The proper universe be identified and examined.
- A representative sample be drawn from that universe.
- The study design be probative and valid including that the questioning of respondents be correct and unbiased and that there are proper and probative control mechanisms to be able to arrive at valid and meaningful conclusions.
- The questions be framed in a clear, precise, non-leading manner, and the instrument for data collection should be properly designed to be free of design-induced biases.
- The interviewing be conducted properly; the interviewers be well trained, have no knowledge of any pending litigation or purposes for which the data would be used and administer the questionnaire properly in accordance with the study directions.
- Once gathered, the data be accurately and fully analyzed and reported.

Adherence to these guidelines provides the best assurance that the data collected are valid and can be relied upon to draw conclusions regarding the state of mind of relevant consumers.

The Relevant Universe of Interest

The relevant universe for this study was defined as adult males and females 18 years of age and older who purchased in the past 6 months or were likely to purchase in the coming 6 months an over-the-counter allergy-relief medication. As is typical in survey methodology, the survey excluded those few persons who are, or who have household members who are, employed in fields that would give them special knowledge or insight about this subject, namely those employed in advertising or marketing research; as doctors or pharmacists; those who work for a company that makes or distributes over-the-counter allergy relief medications; or

CONFIDENTIAL

those who work as a manager of a store that sells over-the-counter allergy-relief medications. Those who participated in another survey in a mall in the past 30 days were also excluded from participation, as were people who needed eyewear when they view brand names but did not have any present. These are also generally accepted procedures. The actual wording of the screening questions is shown in the questionnaire, set forth in Appendix B.

Sampling Plan and Sample Size

Shopping malls were used as a means of identifying relevant consumers. This method has been widely used and relied upon by market researchers. Numerous business decisions are made based on results derived from studies that employ such plans. These kinds of studies have also been accepted for use by courts (in Lanham Act cases) and various adjudicatory and regulatory bodies (like the F.T.C., the NAD and the TTAB).

A multi-stage sampling plan was executed in interviewing facilities located in shopping malls as follows:

Metropolitan Area and Mall Selection

Twelve markets were selected, three in each of the four U.S. census regions. The markets and actual malls were selected based on our experience that the facilities employ competent and professional interviewers and managers. Interviewing was conducted in the following markets:

East

Boston
Massapequa
Philadelphia

Midwest

Chicago
Minneapolis
St. Louis

South

Charlotte
Nashville
Tampa

West

Denver
Los Angeles
Portland

CONFIDENTIAL

Screening Quotas per Mall and Sample Size

To ensure against skewing toward any particular age group or gender, a *screening quota* was employed in which males and females, aged 18 years and older, were approached in six age groupings (three for each gender) proportionate to their presence in the population (based on census data) (called a "screening quota"). Screening quotas are a well-accepted method of sampling.

In this manner, these age and gender groups were proportionately approached in the screening process for the purpose of determining eligibility. While screening was in proportion to population, actual inclusion in the sample was not necessarily, and need not be, proportional to census demographics. Once a respondent met age screening needs, inclusion in the study was based on the fact that he or she met all the stated qualifying criteria. Screening quotas were provided equally to markets, with completed interviews falling naturally based on incidence of qualification in each of the markets. A total of 400 respondents (200 in each cell) was the targeted sample size.

Double-Blind Interviewing

The study was administered under "double-blind" conditions. That is, neither respondents nor interviewers were informed of the purpose or sponsor of the study.

Interviewing Procedures

Both the screening questionnaire (or "screener") and the main questionnaire were conducted on computer (CAPI, Computer Assisted Personal Interviewing). This eliminates skip-pattern errors (i.e., not asking the proper questions or asking questions that one should not have been asked due to a full-filter question), erasures, and other administrative errors and allows for automated rotation of specified questions to avoid order biases and randomization of questions as specified. CarbonView programmed and hosted the CAPI questionnaire. Data were entered by professional interviewers directly into the computer contemporaneously with interviewing.

I prepared detailed field supervisor and interviewer instructions that appear in Appendix C. They set forth guidelines for the interviewing procedures including items like probing instructions to ensure only neutral probes and no interpretation of questions to ensure uniformity in interviewing. To ensure proper administration of the study, a representative from each interviewing facility was briefed by our field supervisor and required to contact our field supervisor daily with updates, questions or concerns.

CONFIDENTIAL

Stimuli

Respondents were assigned to one of two groups or "cells," the test cell or the control cell. The test cell respondents (designated cell RR) were shown a card with the WAL-ZYR name and the category "Allergy medications."

Control groups are designed to measure a level of noise (a placebo effect by analogy) caused by guessing, yea-saying, or other factors like similarity of product category, etc. Thus, so as to identify a level of noise, it is a standard and generally accepted practice that a control stimulus shown to a control group should be similar to the test stimulus but absent the alleged infringing elements. The control-cell respondents (here, randomly designated as cell "QQ") were shown the identical WAL prefix, the identical category of products, the identical prefix-suffix composition of the name, but absent the "ZYR" suffix, as follows:

- The respondents in the control cell were shown a card with the name WAL-ZEE and the category "Allergy medications."

(Copies of the cards shown to respondents are set forth in the final appendix, Appendix F.)

Questionnaire

In accordance with generally accepted standards and practices, respondents were advised that they had the option of responding not sure for any question that they were unable to answer because they had formed no opinion. The main questionnaire (set forth with the Screening Questionnaire in Appendix B) provided respondents with these instructions as read by interviewers as follows:

> In this survey, I'm going to be asking for your beliefs and understanding. There are no right or wrong answers so please do not guess. If for any question I ask, you haven't formed a belief or understanding, or you just don't have an opinion, please just tell me so.

Respondents were then shown a physical card for that particular cell (one card per cell). To assure that the correct card was provided, the interviewer was required to punch in the letters on the top right of the card to assure they matched the cell for that particular interview.

The respondents were then told:

CONFIDENTIAL

I will now be handing you a card that has on it a brand name along with a description of the products that you would find bearing the brand name. Please take a look at the brand name and the description of the products taking as much time as you need to see the brand name and product category and when you are finished, please let me know.

Respondents were then provided with four separate opportunities to evidence any confusion.

Confusion as to Source (first inquiry)

Q1a Though you may or may not have seen or heard of this specific brand name before, do you have an opinion as to what company makes or puts out the products using the name shown on this card?

If a respondent indicated "yes," two follow-up open-ended questions were asked and responses recorded verbatim:

Q1b What company? ***(record verbatim)***
Q1c What makes you say that? ***(record verbatim)***

Confusion as to Source (second inquiry)

Respondents were asked another question to assess confusion as to source even if they were unaware of the company that makes or puts out the products using the name shown on the card:

Q2a Do you believe that the company that makes or puts out the products using the name shown on this card makes or puts out any other products or brands, or not?

If a respondent indicated that it "does," two follow-up open-ended questions were asked and responses recorded verbatim:

Q2b What products or brands? ***(record verbatim)***
[each recorded on separate line]

[Asked for each mention:]
Q2c What makes you say **[respondent's answer]**? ***(record verbatim)***

CONFIDENTIAL

Confusion as to Affiliation and Authorization

Respondents were then asked a question to assess confusion as to affiliation or authorization:

Q3a	Do you believe that the company that makes or puts out the products using the name shown on this card is affiliated with or authorized by any other company or brand, or not affiliated with or authorized by any other company or brand?

If a respondent indicated that it is "affiliated or authorized," two follow-up open-ended questions were asked and responses recorded verbatim:

Q3b	What company or brand? ***(record verbatim)***
Q3c	What makes you say that? ***(record verbatim)***

Respondent Verification

Independent telephone follow-up "validation" calls were attempted for 100% of the sample by a company called Park Research to verify that the interview did in fact take place and that only qualified respondents were interviewed. A listing of each respondent's name and phone number was sent to them for verification.

The validation questionnaire appears in Appendix D. The independent validating service was given the responsibility of making a minimum of three attempts to re-contact each respondent by phone to confirm that:

- Such a person actually existed.
- He/she met the universe requirements for this study.
- He/she was actually interviewed for this study.

Interviewing Period

Interviewing was conducted from June 9, 2009 through June 24, 2009.

CONFIDENTIAL

FINDINGS

Sample. A total of 404 interviews were conducted, 203 respondents in the test cell designated "RR" (WAL-ZYR), and 201 respondents in the control cell designated "QQ" (WAL-ZEE).

Validation. 100%-attempted validation was conducted (by a third-party independent validation company). Of the 404 completed surveys, 404 provided phone numbers (100%). Of these, 267 respondents (66%) were successfully recontacted, a very high rate of recontact. (This percentage of validation is far in excess of the 10-15% used in marketing research studies for commercial purposes.) Of those contacted, there were two discrepancies found. These interviews were removed from the data set (Resp ID #s 23676 Los Angeles, and 89721, Boston). The validation questionnaire and letter are set forth in Appendix D hereto and the data is set forth in Appendix E.

Gender and Age. The gender and age composition of the respondents by cell is set forth below in Table 1.

TABLE 1

			Age			
	Gender		18-34	35-49	50+	Total
WAL-ZYR (cell RR)	Male	Count	39	27	27	93
		% of Total	19.4%	13.4%	13.4%	46.3%
	Female	Count	37	32	39	108
		% of Total	18.4%	15.9%	19.4%	53.7%
	Total	Count	76	59	66	201
		% of Total	37.8%	29.4%	32.8%	100.0%
WAL-ZEE (cell QQ)	Male	Count	42	28	24	94
		% of Total	20.9%	13.9%	11.9%	46.8%
	Female	Count	39	31	37	107
		% of Total	19.4%	15.4%	18.4%	53.2%
	Total	Count	81	59	61	201
		% of Total	40.3%	29.4%	30.3%	100.0%

CONFIDENTIAL

Confusion as to Source. Between 41% and 45% of respondents in each cell had an opinion as to what company makes or puts out the products using the names shown on the cards, as set forth below in Table 2.

TABLE 2

Q1A: Though you may or may not have seen or heard of this specific brand name before, do you have an opinion as to what company makes or puts out the products using the name shown on this card?

		Yes	No	Don't Know/Not sure	Total
WAL-ZYR	Count	90	73	38	201
(cell RR)	%	44.8%	36.3%	18.9%	100.0%
WAL-ZEE	Count	82	75	44	201
(cell QQ)	%	40.8%	37.3%	21.9%	100.0%

REDACTED FOR CONFIDENTIALITY

Four respondents in the test cell (2%) and 2 respondents in the control cell (1%) mentioned ZYRTEC or Johnson & Johnson, the makers of ZYRTEC.

Between 31% and 33% of respondents believed that the company that makes or puts out the products using the name shown on the card makes or puts out any other products or brands, as set forth below in Table 3.

TABLE 3

Q2A: Do you believe that the company that makes or puts out the products using the name shown on this card makes or puts out any other products or brands, or not?

		Yes	No	Don't Know/Not sure	Total
WAL-ZYR	Count	62	33	106	201
(cell RR)	%	30.8%	16.4%	52.7%	100.0%
WAL-ZEE	Count	67	31	103	201
(cell QQ)	%	33.3%	15.4%	51.2%	100.0%

When asked to state the other products or brands, there were a myriad of responses. Four respondents in the test cell (2%) and 2 respondents in the control cell (1%) did not specify a company in response to Q.1b but mentioned allergy relief products without stating particular brand names. This may or may not indicate confusion.

CONFIDENTIAL

Five respondents in the test cell (less than 3%) and one respondent in the control cell (1%) mentioned ZYRTEC (or J&J) in response to the question "what products or brands." A full list of the verbatim responses to "what products or brands" is set forth in the data Appendix.

Confusion as to Affiliation or Authorization. Table 4, below, sets forth the responses to the questions assessing confusion as to affiliation or authorization. Between 15% to 19% of respondents mentioned that that the company that makes or puts out the products using the name shown on the card shown to them is affiliated with or authorized by any other company or brand.

TABLE 4

Q3A: Do you believe that the company that makes or puts out the products using the name shown on this card is affiliated with or authorized by any other company or brand, or not affiliated with or authorized by any other company or brand?

		Yes	No	Don't Know/Not sure	Total
WAL-ZYR	Count	39	59	103	201
(cell RR)	%	19.4%	29.4%	51.2%	100.0%
WAL-ZEE	Count	31	50	120	201
(cell QQ)	%	15.4%	24.9%	59.7%	100.0%

2% of respondents in the test cell (4 respondents) and none in the control cell mentioned ZYRTEC (or J&J).

Summary of Confusion

Aggregating the mentions of ZYRTEC, J&J without double-counting respondents yields a net of 3% to 3.5% confusion (10 respondents (5%) in the test cell and 3 respondents (1.5%) in the control cell) between WAL-ZYR and ZYRTEC or the makers of ZYRTEC. An additional 1% of respondents, as discussed above, mentioned allergy medication and this may or may not evidence confusion.

CONFIDENTIAL

The total cost for the study was $55,000, from which all project and research expenses were paid by Simonson Associates, Inc. The cost for testimony is $750/hr plus any expenses.

Executed this 7th day of July, 2009.

Signed: _____

CONFIDENTIAL

APPENDIX A

BRIEF BIO OF AUTHOR AND FULL CV OF AUTHOR

simonson associates, inc.

Brand Building and Protection Research and Consulting

560 Sylvan Avenue
Englewood Cliffs, New Jersey 07632
www.simonsonassociates.com

Brief Bio of Dr Alex Simonson

Dr. Alex Simonson is President and founder of Simonson Associates, Inc., a brand strategy and research firm specializing in brand protection – communications perception and trademark infringement. Formerly, he was co-head of Guideline Research Corporation's division in charge of brand protection strategy and research. Dr. Simonson has consulted for many of the Fortune 100 companies, numerous law firms, agencies, and communications firms across numerous industries.

Dr. Simonson holds a Ph.D. in marketing, *with distinction*, from Columbia Business School, 1994, a J.D. from New York University School of Law, 1987, and A.B., *magna cum laude*, from Columbia College, Columbia University, 1984. He is Associate Professor of Marketing at Seton Hall University, Stillman School of Business and a member of the Editorial Board of *The Trademark Reporter*, a leading intellectual property law review, the *Journal of Public Policy and Marketing*, a leading academic refereed journal published by the American Marketing Association and the *Intellectual Property Strategist*, a legal newsletter.

CONFIDENTIAL

simonson associates, inc.

Brand Building and Protection Research and Consulting

560 Sylvan Avenue
Englewood Cliffs, New Jersey 07632
Phone: 201.503.9620,3
Fax: 201.503.9621
Email: alex@simonsonassociates.com
www.simonsonassociates.com

(As of Jun 09)

Alex Simonson, Ph.D., J.D.

SYNOPSIS

Affiliations:
President Simonson Associates, Inc., a marketing research firm and consultancy
Associate Professor of Marketing, Seton Hall University, Stillman School of Business
Education:
Ph.D. in Marketing, Columbia, 1994.
JD, NYU, 1987.

EDUCATION

Ph.D., *with distinction,* Marketing, February 1994
Columbia Business School
Dissertation: *The Impact of Identical Brand Names on the Strength of New Brands and Original Brands: A Study of Brand Appropriation and Dilution*

J.D., May 1987
New York University School of Law

A.B., *magna cum laude,* Political Science, May 1984
Columbia University, Columbia College

EXPERIENCE

Simonson Associates, Inc., Englewood Cliffs, N.J. (2000-Current)
President and Founder. See www.simonsonassociates.com for full description of firm offerings.

Guideline Research Corporation, New York, N.Y. (1997-2000)
Vice President and Co-Head of division in charge of legal-related marketing research and brand equity research and consulting

Alex Simonson, Ph.D., Washington, D.C. (1994-1997)
Consultant/Researcher

Sorensen Marketing/Management Corp., New York, N.Y. (1990-1991)
Researcher (Project basis only): Designed & conducted primary survey research to determine brand, logo and ad perceptions, confusion, attitudes, brand awareness, and brand dilution. (Work included questionnaire design, sampling strategy, research design, content analysis, etc.)

International Business Development Corp., New York, N.Y. (1990-1991)
Research Associate (Part-time): Conducted secondary and primary customer, competitor and industry analyses (for OEM markets) using CD-based and on-line data bases such as Lexis/Nexis, Disclosure, DJNS, ABI/Inform, BPO, etc., in-depth interviews, and telephone surveys. (IBDC is a consulting firm headed by former Booz, Allen and Hamilton principals.)

ACADEMIC EXPERIENCE

Fall 2008-Present
Seton Hall University, South Orange, N.J.
Associate Professor of Marketing (Exec/Scholar in Residence).

Fall 2000-Spring 2004 (visitor in year 2000-2001)
Seton Hall University, South Orange, N.J.
Associate Professor of Marketing (full time).

Fall 1995-Spring 2001 (on leave in 2000-2001)
Georgetown University School of Business, Washington, D.C.
Assistant Professor of Marketing (full time).

1993-1995
Fairleigh Dickinson University, Teaneck, N.J.
Assistant Professor of Marketing (full time).

Fall 1992
Baruch College, City University of New York, New York, N.Y.
Adjunct Lecturer of Business (undergraduate capstone course).

RESEARCH EXPERTISE

Brand strategy, identity and image including conceptualizations, managing identity, branding and design, empirical structure of "image," research for protection of brands.

Bridging legal theories of brand and advertising protection with marketing strategy and research (brand confusion, dilution, false advertising, deception, disparagement, warranties).

PUBLICATIONS

Books

Marketing Aesthetics: The Strategic Management of Brands, Identity and Image, 1997, The Free Press, Simon & Schuster (9th printing) (coauthored with B. Schmitt) (managerial business book presenting a new conceptual framework for understanding consumer responses to trade dress and how to manage trade dress). Foreign Translations and Editions: German, Japanese, Spanish, Chinese (2), Korean, Polish, Portuguese, Thai, Turkish, Romanian, Russian.

Edited Books

Proceedings of the 1998 Marketing & Public Policy Conference, American Marketing Association, 1998 (edited with A. Andreasen and N. C. Smith).

Book Chapters

"The Effectiveness of Intellectual Property Laws," in *The Handbook of Marketing and Society*, P. Bloom and G. Gundlach, eds., Sage Publications, pp. 312-334, 2001.

"Survey Evidence in False Advertising Cases," *Advertising Law in the New Media Age*, Practising Law Institute, pp. 309-347, October 2000.

Refereed Articles

"Coupling Brand or Organizational Identities through Partnering," Keynote Article, *Design Management Journal, 9 (1). 9-14,* 1998 (coauthored with B. Schmitt).

"Managing Corporate Image and Identity," *Long Range Planning*, 28 (5), 82-92, 1995. (coauthored with B. Schmitt and J. Marcus).

"Processes for Managing Image, Identity, and Design Within the Corporation," *Design Management Journal*, 6 (1), 60-63, 1995. (coauthored with B. Schmitt and J. Marcus).

" 'Unfair' Advertising and the FTC: Structural Evolution of the Law and Implications for Marketing and Public Policy," *Journal of Public Policy and Marketing*, 14 (2), 321-327, 1995.

"Survey Evidence in Deceptive Advertising Cases Under the Lanham Act: An Historical Review of Comments From the Bench," *The Trademark Reporter*, 84 (5), 541-585, 1994. (coauthored with J. Jacoby and A. Handlin). Reprinted in Practising Law Institute Course (B4-7167) "False Advertising and the Law: Coping with Today's Challenges," September 1996.

"How and When do Trademarks Dilute: A Behavioral Framework to Judge `Likelihood' of Dilution," *The Trademark Reporter,* 83 (2), 149-174, 1993.

"Permissible Puffery Versus Actionable Warranty in Advertising and Salestalk: An Empirical Investigation," *Journal of Public Policy and Marketing,* 12 (2), 216-234, 1993. (coauthored with M. B. Holbrook).

"Examining Consumer Losses and Dissatisfaction Due to Broken Sales and Service Agreements," *Journal of Consumer Satisfaction, Dissatisfaction and Complaining Behavior*, 4, 50-61, 1991.

CONFIDENTIAL

Other Articles

"Limits and Considerations in Control Groups," *The Intellectual Property Strategist,* Vol. 14, #9 (June) 2008, pp. 3-4.

"Survey Power," *The Intellectual Property Strategist,* Vol. 14, #3 (December) 2007, pp. 3-4.

"Online Interviewing For Use in Lanham Act Litigation," *The Intellectual Property Strategist,* Vol. 14, #2 (November) 2007, pp. 3-4.

"Survey Design and Methodology in False Advertising Cases," IP Review, (Spring), 2006, pp. 20-22.

"How Control Groups Can Help IP Attorneys to Meet Their Evidentiary Needs," *The Intellectual Property Strategist*, Vol. 8 #3 (December), pp. 5-6, 2001.

"How to Enhance Trademark Survey Evidence," *The Intellectual Property Strategist*, Vol. 6 #1 (October), pp. 1-3, 1999.

"Surveys on Trademark Confusion: Basic Differences," *The Intellectual Property Strategist*, Vol. 5 #2 (November), pp. 1,9-10, 1998.

"The 'Experiential Landscape'," *Marketing Review,* 53 (3), 1997.

Notes & Book Reviews

Review of "Brand Warfare" by David D'aLessanro with Michele Owens, submitted March 2003, *The Trademark Reporter.*

Review of "Essentials of Intellectual Property," by Poltorak and Lerner, forthcoming, *The Trademark Reporter.*

Review of "Intellectual Property in the Global Marketplace," by Simensky, Bryer, and Wilkof, April 2000, *The Trademark Reporter.*

Review of "Intellectual Property Infringement Damages: A Litigation Support Handbook," by Russell L. Parr, September 1999, *The Trademark Reporter.*

Review of *Defending Your Brand against Imitation*, by Judith Lynne Zaichkowsky, *Journal of Public Policy and Marketing, 17, 1 (Spring), 1998, pp. 143-146.*

Review of *The Impact of Advertising Law on Business and Public Policy*, by Ross Petty, *Journal of Marketing*, 58, 4 (October), 123-125, 1994.

"Warranties and the Law: Use Caution," comment on "Leverage Your Warranty Program" (Menezes and Quelch 1990): *Sloan Management Review*, 32, 2 (winter) 7-8, 1991.

CONFIDENTIAL

PRESENTATIONS

Corporate, Academic and Executive Presentations

"Advanced Issues in Claims Substantiation", American Conference Institute, Advertising Law Conference, Advanced Claim Substantiation Workshop, New York, January 2009.

"Comparisons and Assessments of Online, Computer-Based and Traditional Methods for Advertising Perception Studies for use in Litigation and Self-Regulation," in *Consumer Perception: The Fine of the Consumer Survey*, *NAD Annual Conference*, "What's New in Comparative Advertising, Claim Support and Self-Regulation," New York, September 2007.

"Puffery: Marketing and Research Issues," in *Successful Comparative Advertising, NAD Annual Conference*, New York, Oct 2004.

"Can Actual Dilution Really Be Reliably and Validly Measured," in *Using and Defending Consumer Surveys in Advertising and Trademark Cases*, 2003 AMA Forum on Marketing and the Law, May 2003.

"Cognitive Psychology: Storage and Retrieval," in *Battle for the Brand, An Advanced Symposium on Trademarks and Marketing,* International Trademark Association (INTA and BNEF), March 2002.

"Survey Research in the Courtroom: An Introduction to Legal Research," American Association for Public Opinion Research, January 2002

"Empirical Evidence in NAD Proceedings," *2001 Marketing and Public Policy Conference,* May 2001.

"Brand Strategy and Experiential Marketing," Helsingin Sanomat (the largest media co. in Finland) and JOKO Executive Education, January 11-12, 2001, Helsinki, Finland.

"Claims and Communications Research for Legal Protection," co-taught with Robert Reitter at Guideline, to companies including American Home Products, Kraft and Bayer, 1998-2000.

"Experience the Experience," presentation to Long Haymes Carr Advertising Agency, Winston-Salem, N.C., August 1998.

"Experiential Marketing," *The Experiential Roundtable '98: Bringing Marketing & Corporate Communications to Life*, sponsored by The Jack Morton Company, New York City, member of brand expert roundtable, May 15, 1998.

"Protecting Brands and Identity," *Seminar in Corporate Identity*, Columbia Business School MBA Program, March 12, 1998.

"Integrated Brand Communications," *Council of Corporate Communications Executives and Council on Corporate Communications Strategy*, (council of most senior level communication executives from Fortune 500 companies), January 5-6, 1998, Miami Beach, Florida, The Conference Board.

"Developing a Corporate Image that is Positive, Enduring and Resilient," general session, one of 5-person panel, *1998 Corporate Image Conference -- Advancing Your Image, Building Your Brand and Managing Your Reputation*, January 27-28, 1998, New York City, The Conference Board.

"Creating Brand Identities," *Executive Seminar* sponsored by Desgrippes Gobé & Associates Image and Identity Consulting, December 1997. (coauthored with B. Schmitt).

"Brand Management Through Aesthetics," *Brand Management Day,* Georgetown University School of Business, September 26, 1997.

"Protecting Brands and Trade Dress," *Seminar in Corporate and Brand Identity*, Columbia Business School MBA Program, March 13,1997.

"Consumer Perceptions of Trade Dress," 1996 *Association for Consumer Research Annual Conference*, October 1996. (coauthored with B. Schmitt).

"Corporate Aesthetics Management: A General Framework for Managing Identity, Image and Consumer Impressions," 1994 *Association for Consumer Research Asia Pacific Conference*, Singapore, June 13-16, 1994. (coauthored with B. Schmitt and J. Marcus).

COURSES AND SEMINARS

Executive Teaching

"Brand Strategy," Executive MBA Program, Helsinki School of Economics and Business, April, 2001, Helsinki, Finland.

"Branding Strategy," In-House MBA Program, Pharmacia Upjohn, January 9-10, 2001, Helsinki, Finland.

"Branding and Communications," In-House MBA Program, UPM-Kymmene, September 2000, Hilton Fort Lee, New Jersey.

"Building and Maintaining Strong Brands," Executive Certificate Program, Georgetown University, McDonough School of Business, Washington, DC, April 2000.

"Corporate Branding Strategy," Executive MBA Program, Helsinki University of Technology, Washington, DC, March 2000.
"Brand and Identity Strategy," Executive MBA Program, Helsinki School of Economics and Business Administration, New York, October 1999.

"Marketing Experiences," Executive MBA Program, Helsinki School of Economics and Business Administration, New York, October 1998.

"Marketing Strategy through Aesthetics," Executive MBA Program, Helsinki School of Economics and Business, New York, October 1997.

Co-author of executive program session entitled "*Managing a Brand's Aesthetic Identity*," for Columbia Business School Executive Marketing Program, Arden House, 1995.

CONFIDENTIAL

Graduate and Undergraduate Courses Taught

Corporate Branding Strategy (MBA);
Building Strong Brands (MBA);
Marketing Strategies (MBA);
Building and Maintaining Strong Brands (undergraduate);
Consumer Behavior (MBA and undergraduate);
Marketing and Public Policy (MBA);
Marketing Research (MBA and undergraduate);
Marketing Research Seminar (MBA);
Principles of Marketing (undergraduate); and
Product Policy (undergraduate).

PROFESSIONAL POSITIONS AND HONORS

Editorial Board Memberships

Editorial Board Member, *Journal of Public Policy & Marketing*, (a refereed scholarly journal published by the American Marketing Association), 1998-current.

Editorial Board Member, *The Trademark Reporter,* (a refereed scholarly journal on intellectual property published by the International Trademark Association), 1999-current.

Editorial Board Member, *The Intellectual Property Strategist* (an intellectual property newsletter published by Law Journal Newsletter), 1998-2004; 2007-current.

Other Professional Activities

Ad-hoc reviewer for the *Journal of Business Research*, Spring and Summer 2006.

Ad hoc reviewer for the *Journal of Macromarketing*, 2005.

Co-chair of conference entitled *Using and Defending Consumer Surveys in Advertising and Trademark Cases*, 2003 AMA Forum on Marketing and the Law, May 2003.

Ad-hoc reviewer for the *Journal of consumer Affairs, Fall 2002, Spring 2003.*

Co-Chair for session entitled "The 'Unknown Worlds' of Self-Regulation" What About This! Novel Advertising Appeals," Marketing and Public Policy Conference, May 2001.

Reviewer for the *American Marketing Association Summer Educator's Conference*, 1999.

Reviewer for the *Asia Pacific Journal of Management,* Special issue entitled "Marketing in the Asia Pacific," Spring 1998.

CONFIDENTIAL

Conference co-chair of the 1998 *Marketing and Public Policy Conference*, (a refereed academic conference sponsored by the Marketing Science Institute, the *Journal of Public Policy and Marketing* and the American Marketing Association).

Chair for session entitled "What About This! Novel Advertising Appeals," *Association for Consumer Research Annual Conference,* 1998.

Reviewer for the *Association for Consumer Research,* 1997, 1998 Annual Conferences (a refereed academic conference for scholars of consumer behavior).

Reviewer for the *Journal of Public Policy and Marketing,* Special Issue on International Issues in Law and Public Policy, 1997 (a refereed scholarly journal of the American Marketing Association).

Reviewer for the *American Marketing Association Winter Educator's Conference*, 1997.

Reviewer for the *Marketing and Public Policy Conference,* 1997, 1999, 2001-2003 (a refereed academic conference sponsored by Marketing Science Institute, AMA, and the Journal of Public Policy & Marketing, an AMA publication).

Chair of session entitled "Affecting Consumers Through Identity and Design," *Association for Consumer Research Annual Conference,* 1996.

AWARDS & HONORS

Round Table Group Scholar (2001-Current).

Visiting Professor, Bozell Advertising, New York City. (1996).

MSI-Designated Top Research Priority Grant for "Visual Aspects of Corporate Identity", (1995 with Bernd H. Schmitt and Jin K Han)

Awarded Ph.D. degree "*with distinction*" (1 or 2 Graduate School of Business Ph.D.s per year (i.e., 10% approx.)). (1994).

Passed Ph.D. Oral Exam "*with honors*" (highest level) (June 1992).

Fellowship from Columbia University (1989 - 1993).

Appointed by Dean to the Integrity Board of Columbia Business School (1989 - 1993).

Appointed to the Board of Directors of the Association of Doctoral Candidates, Columbia Graduate School of Business (1991 - 1993).

Appointed as an editor of the *Journal of International Law and Politics,* New York University School of Law (1985-1986).

CONFIDENTIAL

MEDIA MENTIONS

Harvard Business Review
"Tom Peters" Web Site
Business Week
NPR Morning Edition
FoxNews Channel
BBC Television
The Washington Post
Forbes
Forbes ASAP
Advertising Age
Women's Wear Daily
The Conference Board (Various Reports and Publications)
Jack Morton & Co. – an Interpublic Company
Georgetown Business
Journal of Business Strategy
The Forward
Numerous leading marketing textbooks – (see Google books for list)
Numerous leading executive marketing books such as "legendary brands," creative breakthrough products," etc.
Kellogg on Branding: The Marketing Faculty of The Kellogg School of Management

PROFESSIONAL ASSOCIATIONS

International Trademark Association
Association for Consumer Research
American Marketing Association
American Forensic Association

RECENT TESTIMONY

Within the preceding *four years* I have provided deposition or trial testimony as an expert witness in connection with the following cases:

1. *Schick v. Gillette (Dist. Conn., 3:03CV1668) (8/05);*
2. *Enterprise v. U Haul (E.D. Missouri) (6/06);*
3. *Static Control v. Lexmark (E.D. Kentucky) (11/06);*
4. *Patsy's v. Banas (E.D.N.Y) (1/07);*
5. *Dyson v. Maytag (D. Del. 05-434-GMS) (2/07);*
6. *Cartier v. Allied Marketing (S.D.N.Y., 06 Civ. 4698) (6/07);*
7. *Johnson & Johnson v. Actavis (S.D.N.Y.) (10/07);*
8. *Schiller v. Welch Allyn (S.D. Fl.) (11/07);*
9. *Johnson & Johnson v. Perrigo (S.D.N.Y.) (11/07);*
10. *Brighton v. Coldwater (S.D.Ca. 06 CV 01848 H-POR) (2/08);*
11. *Componentone LLC v. Componentart Inc.* (W.D.Pa 2:05-CV-01122) (2/08);
12. *Gary Stevens v. Southern States Cooperative, Inc.* (E.D. Va Civ #. 3:07-cv-648) (5/08);
13. *Safe Auto v. State Auto* (S.D. Ohio, 2:07-cv-01121) (10/08);
14. *Walgreen Co. v. Wyeth (N.D. Ill, 08-cv-5694) (06/09);*
15. *Charter v. DirecTV (E. Dist. Missouri, 4:09-cv-00730-RWS) (06/09).*

APPENDIX B

QUESTIONNAIRE (SCREENER AND MAIN)

CONFIDENTIAL

SIMONSON ASSOCIATES, INC.
Englewood Cliffs, New Jersey 07632

June 2009
Job #: 383-09.06.05

ID #_____

NAME PERCEPTION STUDY
- CAPI SCREENER –

MARKET:	INTERVIEWER ID#:.....
East Boston Massapequa Philadelphia **Midwest** Chicago Minneapolis St. Louis **South** Charlotte Nashville Tampa **West** Denver Los Angeles Portland	1 2 3 4 5 6 7 8 9 0 X Y

Sight screen for women/men 18 years of age or older

Hello, I'm_____ of Simonson Associates, a nationwide marketing research firm. We're conducting a study and I'd like to ask you a few questions. We have nothing to sell, but are only asking for your opinions.

A. *Record Gender:* ***(circle response)***

Male	1
Female	2

CONFIDENTIAL

B. Which of the following groups includes your age? ***(Read list and circle response)***

Under 18	1	► ***Record and terminate***
18-34	2	► ***Check age and gender quotas. Circle correct response if within quota. If over quota, record and terminate.***
35-49	3	
50+	4	
(Do Not Read)-> Refused	5	► ***Record and terminate***

C. Have you been interviewed for a survey in a research facility in a mall with the past month?

Yes ..... 1 ► ***(Record and terminate)***
No ..... 2 ► ***(Continue)***

(HAND RESPONDENT CARD D/E AND SAY:)

D. Please read back to me which of the items on this card, if any, you have purchased in the past six months? (***Circle all items mentioned under col D "Purchased in Past 6 months.")***

E. Now please read back to me which of the items on this card, if any, you are likely to purchase in the next six months?
(***Circle all items mentioned under col E "Likely to Purchase Next 6 months.")***

	Q.D Purchased in Past 6 months	**Q.E** Likely to Purchase Next 6 months
Nutrition/meal replacement bars	1	1
Energy drinks	2	2
Vitamin/Mineral Supplements	3	3
Over-the-counter allergy relief medications	4	4
Protein Powders	5	5

(Respondent must mention "over-the-counter allergy relief medications" in Q.D or Q.E to continue. Otherwise, record and terminate.)

(Take Back Card D/E)

CONFIDENTIAL

F.. Do you or does any member of your immediate household work ...
(read list; record each answer by circling)?

	Yes	No
In market research	1	2
In advertising	1	2
As a doctor or pharmacist	1	2
For a company that makes or distributes over-the-counter allergy relief medications	1	2
As a manager of a store that sells over-the-counter allergy relief medications	1	2

(If "Yes" to any of the professions, record and terminate.)

G. Do you usually wear eyeglasses or contact lenses when seeing brand names? ***(Circle response)***

Yes.....	1	▶	***(Continue)***
No	2	▶	***(Skip to Q.I)***

H. Do you have them with you? ***(Circle response)***

Yes	1	▶	***(Continue)***
No	2	▶	***(Record and terminate)***

I. Invite qualified respondent to interviewing facility. Go to main questionnaire. If qualified but refused, record and terminate.

Willing to participate	1	▶	***(Continue)***
Not willing to participate	2	▶	***(Record and terminate)***

CONFIDENTIAL

SIMONSON ASSOCIATES, INC.
Englewood Cliffs, New Jersey 07632

June 2009
Job #: 383-09.06.05

ID #_____

NAME PERCEPTION STUDY
- CAPI MAIN -

In this survey, I'm going to be asking for your beliefs and understanding. There are no right or wrong answers so please do not guess. If for any question I ask, you haven't formed a belief or understanding, or you just don't have an opinion, please just tell me so.

I will now be handing you a card that has on it a brand name along with a description of the products that you would find bearing the brand name. Please take a look at the brand name and the description of the products taking as much time as you need to see the brand name and product category and when you are finished, please let me know.

Interviewer: Record here the 2-digit code on the card you are now showing to respondent:

*****PROGRAMMER: IF 2-digit code is not the cell being worked on, terminate.*****

RR= WAL-ZYR

QQ= WAL-ZEE

(Hand respondent LABELED CARD – SAME AS CELL LETTERS – RR, QQ.)

(Allow enough time for respondent to see the information on the card and let you know when he/she is finished. When respondent indicates being finished, leave card in sight for the remainder of the interview. Then say:)

Q1a Though you may or may not have seen or heard of this specific brand name before, do you have an opinion as to what company makes or puts out the products using the name shown on this card?

Yes	Ask Q1b
No	Skip to Q2a
DK/NS	Skip to Q2a

Q1b What company? ***(record verbatim)***
Q1c What makes you say that? ***(record verbatim)***

Q2a Do you believe that the company that makes or puts out the products using the name shown on this card makes or puts out any other products or brands, or not?

Does	Ask Q2b
Does NOT	Skip to Q3a
DK/NS	Skip to Q3a

Q2b What products or brands? ***(record verbatim) (List each on separate line)***

Q2c **[ASK FOR EACH MENTION]** What makes you say **[respondent's answer]**? ***(record verbatim)***

CONFIDENTIAL

Q3a Do you believe that the company that makes or puts out the products using the name shown on this card is affiliated with or authorized by any other company or brand, or not affiliated with or authorized by any other company or brand?

Is affiliated or authorized	Ask Q3b
Is NOT affiliated or authorized	Skip to cert
DK/NS	Skip to cert

Q3b What company or brand? ***(record verbatim)***

Q3c What makes you say that? ***(record verbatim)***

[CERT]

CONFIDENTIAL

APPENDIX C

INTERVIEWER AND SUPERVISOR INSTRUCTIONS

SIMONSON ASSOCIATES, INC.
Englewood Cliffs, New Jersey 07632

June 2009
Job #: 383-09.06.05

NAME PERCEPTION STUDY
-INTERVIEWER INSTRUCTIONS-

MATERIALS

- Screener
- Tally Sheet for terminates
- Main Questionnaire (CAPI)

Follow instructions carefully – we've limited your instructions to the most important points. We will be conducting 100% independent validation of this study.

Overview

This is a two-cell survey to be conducted in a permanent enclosed mall facility. Screening will be conducted on the mall floor, and then re-screening and the main will be entered directly via CAPI. After screening, a respondent will be brought to a room and administered the questionnaire.

Quota

You will be sight screening in the mall for: males and females **18** *years of age and older.* Then you will administer the screener. Your supervisor will provide you with your screening quotas.

Quality Assurance in Screening

- All of the respondent's answers must be circled on screener. Do not proceed with a qualified respondent unless you are sure that you have circled all responses by that respondent.
- Tally terminates on the separate tally sheets provided to you.
- Do not interview friends, relatives or acquaintances.
- When screening for this study you must not screen for any other study at the same time.
- Only one potential respondent in a group of people may be screened.
- No incentives for participation are to be given.
- Only one potential respondent is to be in the interviewing room at the time of the interview.
- Anyone accompanying the respondent must wait for the respondent in the waiting room.
- Do not proceed to interview anyone who has a hearing, visual or English language problem.

CONFIDENTIAL

MAIN QUESTIONNAIRE

- Make sure that the respondent cannot see or hear the stimuli until you administer the questionnaire for that particular respondent.
- Be sure to show stimulus with letter-designations corresponding to the cell you're working on.
- Read introductions and all questions exactly as written.
- Always allow respondent time to respond.
- But, you should never allow a respondent to change his/her mind for an earlier question once he/she is answering a later one.

Open-Ended Questions

- Read open-ended questions slowly and *tell respondent to slow down* if you cannot write quickly enough. **WE NEED VERBATIM RESPONSES BUT YOU SHOULD BE SURE TO PROBE IF A THOUGHT IS NOT CLEAR OR COULD BE INTERPRETED DIFFERENT WAYS.**
- Capture comments exactly as the respondent states them -- never summarize or paraphrase. Capture comments in the words of the respondent. **Do not say "she said..." or "she felt..."** rather, just write down exactly what the respondent says.
- Give the respondent sufficient time to think and answer a question before continuing.
- Never reword the questions. Simply repeat the question if the respondent indicates that he/she does not understand. DO NOT attempt to explain any questions.
- If the respondent says "I have already answered the question", ask him/her to repeat the answer.
- At the end of the interview, complete the information on the Certification Page.

Probing

- You should always probe for clarity when an answer is not clear to you. We cannot accept vague or incomplete responses. You should be sure that each response is clear and that you understand it before proceeding to the next question. Therefore, you must always probe in a neutral manner to clarify any response that you feel is unclear.

- You should only probe in a **neutral manner for any vague or incomplete responses** like:
  - "Can you explain what you mean by X ?" or "Can you be more specific?"

- When you are probing for clarification, write in a (P) or some other notation.

SECURITY:
- You are responsible for all materials being used on this study.
- All materials are to be kept out of sight of anyone not directly involved in the study
- All materials related to this study are the property of Simonson Associates, Inc. and our client.
- No one representing Simonson Associates or our client is to be admitted to the facility or have access to the materials without your first calling us to confirm (201.503.9620). Further, no one is to be permitted access to the facility or materials without showing satisfactory identification.

Upon Completion of Interview

1. With respondent, fill out all respondent information on the certification page. You and the respondent must read and sign the certification page.
2. Be sure to transfer the respondent ID from the computer to match up with the signed certification page.

SIMONSON ASSOCIATES, INC.
Englewood Cliffs, New Jersey 07632

June 2009
Job #: 383-09.06.05

NAME PERCEPTION STUDY
-SUPERVISOR INSTRUCTIONS-

Dear Supervisor:

Attached are the interviewer instructions that explain the important aspects of this study. This is a two-cell study.

Staff

All interviewers while screening and interviewing for this study are not to be screening or interviewing for any other study.

Interviewer Numbers

Interviewers are to be assigned interviewer numbers. A separate sheet should be provided to us with the interviewer numbers and corresponding names. These interviewer numbers must be recorded by the interviewer in the box on the front of the screener.

You should have only experienced interviewers working on the job. No more than about 20-30% of your interviews should be conducted by one interviewer.

Total screening quota provided by our field coordinator.

Briefing

Field supervisors must have read and examined all materials to be completely prepared for the study. The field supervisor must be present at the briefing and be present for all days of interviewing on the study. A field kit of all paper materials must be supplied for each participant at the briefing.

Each interviewer is to read his/her Interviewer Instructions. Also, a personal briefing is required. If possible, one briefing should be conducted. All interviewers must do at least one Practice Interview.

PLEASE KEEP AN EYE ON:

READING INTRODUCTIONS AND QUESTIONS EXACTLY AS WRITTEN AND RECORDING RESPONSES PRECISELY.

SHOWING LETTER-DESIGNATED CARD TO CORRESPOND WITH THE CELL.

All Practice Interviews must be looked over by you-- and any problem areas cleared up -- before any actual interviewing is begun.

Editing

Do not "edit" work. You should check it for errors and alert any interviewer when you find errors. Replace any work immediately if the interviewer did not follow instructions.

If an interviewer appears not to be following instructions exactly, please alert him/her to that as soon as possible and take remedial action if needed.

Quotas

Your quotas will be assigned by our field coordinator.

Progress Reports

Enclosed are Progress Report Sheets for your convenience. Accurate cumulative reports are to be received by us each day the study continues. We are to RECEIVE them by 11:00 AM OUR TIME (or 12:30 PM our time if you are on the West coast). . **Do not use a cover sheet. Just fill in all the required information on the Progress Report Sheet. Be sure to write your city and contact name on each sheet of the report.**

Shipment and Charges

- All shipments of ID sheets, tally sheets and certification pages are to be sent **only after speaking with our field coordinator**. They should be shipped **Federal Express** EXPRESS SAVER **using the overnight letter pak. Do not use the federal express envelope or your own box.** Charge to our Federal Express Account # 2269-9458-0 unless otherwise specified be her.

Send to the address specified by our field coordinator:

- Do not insure.
- Indicate the ENTIRE Job number "383-09.06.05" on airbill for all shipments.

- Important
  Since we will not incur additional shipping charges, make sure that all items specified above are included with your completed questionnaires, unless otherwise specified. If you "forget" we will have to deduct the additional shipping charges from your bill.

Billing

Submit all bills under separate cover to the attention of our Accounting Department.

Quality Control Procedures

ANY WORK RECEIVED BY OUR OFFICE WHICH HAS NOT BEEN SUBJECT TO THE FOLLOWING PROCEDURES WILL BE SUBJECT TO A PAYMENT ADJUSTMENT.

Strict quality control is a primary Supervisor responsibility. We require that the following quality controls be strictly followed:

- This study must be screened by itself, not along with any other projects.
- No more than one respondent per shopping group should be screened.
- Friends, relatives or acquaintances must NOT be interviewed.
- No one is to be in the interviewing room with the respondent.
- Anyone accompanying the respondent must wait for the respondent in the waiting room.
- No incentives are to be given.
- Interviewing should not be conducted with anyone who has a hearing, visual or English language problem.

Security Instructions

- All materials related to this study are the property of Simonson Associates, Inc. and our client.
- You are responsible for all materials being used on this study; all materials are to be kept out of sight of anyone not directly involved in the study.
- No one representing Simonson Associates or our client is to be admitted to the facility or have access to the materials without your first calling us to confirm (201.503.9620). Further, no one is to be permitted access to the facility or materials without showing satisfactory identification.

Validation

- We will be conducting 100% validation for this study.
- You are not to phone validate, since we will be independently validating 100% of every interviewer's work.
- You must, however, monitor or do in-site validation for at least 10% of each interviewer's work.

- Handling "No Phone" or "Refused Phone"

  The Supervisor must attempt to do a telephone look-up for all respondents who do not give a phone number. If a number is not found, indicate that you have attempted a look-up by writing "L.U.".

Thank you for your help with this survey.

APPENDIX D

VALIDATION QUESTIONNAIRE AND LETTER

SIMONSON ASSOCIATES, INC.
Englewood Cliffs, New Jersey 07632

June 2009
Job #: 383-09.06.05

NAME PERCEPTION STUDY
- VALIDATION QUESTIONNAIRE -

- ASK TO SPEAK TO THE PERSON WHOSE NAME IS LISTED ON THE VALIDATION LIST
- QUALIFIED RESPONDENTS ARE THOSE WITH BOXED RESPONSES

Hello (Miss/Mrs.) _____, I'm from Simonson Associates. We recently conducted a survey and we're calling simply to confirm some points and to thank you for your participation. We are not selling anything and this will be the last contact from us – your cooperation is greatly appreciated.

1. Did you participate in a recent survey where you were shown a card with a name on it starting with WAL- and asked some questions about it?

Yes	[1]	***Continue***
No	2	***Terminate***

2. Are you 18 years of age or older?

18+	[1]	***Continue***
Under 18.....	2	***Terminate***

3. Have you purchased in the past six months, or are likely to purchase in the next six months, over-the-counter allergy relief medications?

Yes	[1]	***Continue***
No.....	2	***Terminate***

Thank respondent

CONFIDENTIAL

Park Research
290 Union Blvd. Ste. #7
Totowa, NJ 07512

June 29 2009

Dr. Alex Simonson
Simonson Associates, Inc.
560 Sylvan Avenue
Englewood Cliffs, NJ 07632

Dear Alex,

The validation results of your Name Perception Study #383-09.06.05 are as follows:

Out of the listed 404 respondent names, 404 had telephone numbers. Of these, 267 were successfully contacted (66%). Of those not reached, a minimum of three attempts were made on different days of the week and at different times of the day.

Of those contacted, there were two discrepancies found in interviewing procedures. For each interviewer where there was a discrepancy found, there were no further discrepancies found in any of their work. All results of this phase of the study were reported to Simonson Associates.

If you have any questions regarding this study, please call me.

Sincerely,

Jodi Cohen

Jodi Cohen

CONFIDENTIAL

APPENDIX E

DATA

CONFIDENTIAL

APPENDIX E IS REDACTED FOR CONFIDENTIALITY

APPENDIX F

CARDS SHOWN TO RESPONDENTS FOR EACH CELL

CONFIDENTIAL

WAL-ZYR

Allergy medications

WAL-ZEE

Allergy medications

CONFIDENTIAL

EXHIBIT C

1 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
2 BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD
3
4
5 ----------x
6 McNEIL-PPC, INC.,
7 Opposer,
8 -against-
9 WALGREEN CO.,
10 Applicant.
11 ----------x
12
13
14 October 1, 2009
15 9:42 a.m.
16
17
18 Deposition of ALEX SIMONSON, Ph.D., taken
19 at the offices of Fross Zelnick Lehrman & Zissu,
20 P.C., 866 United Nations Plaza, at First Avenue and
21 48th Street, New York, New York 10017, before
22 Janet Hamilton, RPR, (1991), and Notary Public.
23
24
25

1 A p p e a r a n c e s:
2 FROSS ZELNICK LEHRMAN & ZISSU, P.C.
3 Attorneys for Applicant
4 866 United Nations Plaza
5 First Avenue & 48th Street
6 New York, New York 10017
7 BY: RICHARD Z. LEHV, ESQ.
8 LAURA POPP-ROSENBERG, ESQ.
9 (212) 813-5928
10 lrosenberg@frosszelnick.com
11
12 LEYDIG VOIT & MAYER, LTD.
13 Attorneys for Opposer
14 Two Prudential Plaza, Suite 4900
15 180 North Stetson Avenue
16 Chicago, Illinois 60601-6731
17 BY: TAMARA A. MILLER, ESQ.
18 (312)616-5600
19 tmiller@leydig.com
20
21
22
23
24
25

1 I N D E X

WITNESS	EXAMINATION BY	PAGE
ALEX SIMONSON, Ph.D.	Mr. Lehv	4

E X H I B I T S

NUMBER	DESCRIPTION	PAGE
1	Subpoena to Simonson Associates	11
2	Subpoena to Dr. Alex Simonson	11
3	Report of Simonson Associates	27
4	Photocopy of package labels	85

NOTE: Exhibits retained by reporter.

1 A. Simonson, Ph.D, 10/1/09

2
3
4
5
6 Non-Designated Portions Redacted
7
8
9
10

11 Q. Why did you ask about over-the-counter
12 allergy relief medications as opposed to
13 prescription allergy relief medications or just
14 allergy relief medications in general?
15 A. Because my understanding is that Wal-Zyr
16 is a nonprescription product.
17 Q. Any other reason?
18 A. Well, the application -- I don't recall
19 right now what the exact wording was. My
20 understanding of the application was it would be
21 for an over-the-counter product, not prescription.
22 Q. And why did you pick the six-month time
23 window as opposed to some other time frame?
24 A. It's actually six months past or six
25 months future. So for allergy-type studies, you're

1 A. Simonson, Ph.D, 10/1/09
2 capturing people within a year's period of time who
3 suffer from seasonal allergies.
4 But the general answer to the six-month
5 period is, for most disposable goods and frequently
6 purchased products as opposed to durable goods, six
7 months past or six months future is a very common
8 time frame.
9
10
11
12
13
14
15
16 Non-Designated Portions Redacted
17
18
19
20
21
22
23
24
25

1 A. Simonson, Ph.D, 10/1/09

2
3
4
5
6
7
8
9 Non-Designated Portions Redacted
10
11
12
13
14
15
16
17
18

19 Q. I'm sorry. 15 or 16 percent. Does that
20 seem high to you? 16 percent of the respondents
21 thought the company puts out or makes only one
22 product or brand?
23 A. I don't see that as particularly high or
24 low. I have no benchmark by which to question this
25 data. When I look at it on its face, it doesn't

A. Simonson, Ph.D, 10/1/09

seem ~~to~~ too high. So 16 or 15 percent seems completely fine.

Non-Designated Portions Redacted

1 A. Simonson, Ph.D, 10/1/09
2 Q. In Question 3A, you use the phrase
3 "affiliated with" and the phrase "authorized by."
4 Is there a difference between "affiliated with" and
5 "authorized by"?
6 A. There's a legal distinction there.
7 They're two ways of connection. They're two
8 methods of possible confusion.
9 Q. If somebody says "Yes" or "No" to
10 Question 3A, are they saying they're not affiliated
11 with or they're not authorized by or neither?
12 A. If a respondent -- well, let me say it
13 this way.
14 If a respondent distinguished between
15 them in his or her mind -- and I'm not sure if
16 respondents do. But if they did, it wouldn't be
17 relevant to this survey.
18 But if the issue were to determine
19 affiliation confusion versus authorization
20 confusion, you would not have likely asked -- I
21 would not have likely asked Question 3A as it's
22 phrased.
23 But the aggregation of them was the
24 issue here, not the separation of them.
25 Non-Designated Portions Redacted

1 A. Simonson, Ph.D, 10/1/09

2
3
4
5
6
7
8
9
10
11 Non-Designated Portions Redacted
12
13
14
15
16
17
18
19
20
21
22
23
24

25 Q. Well, you also have got "allergy

1 A. Simonson, Ph.D, 10/1/09
2 medication."
3 A. Not with that respondent.
4 Q. Yes. Person Number 81147. You asked
5 them do they have an opinion as to what company or
6 manufacturer puts it out. And they said Lilly.
7 Because they think -- I'm hypothesizing -- they
8 think Lilly makes Zyrtec. And then, when you asked
9 them what makes you say that, they say "allergy
10 medication."
11 A. That's what they make.
12 I thought -- I thought you meant that
13 was the other products. But you're asking if
14 that's in response to why they're saying Lilly?
15 Q. Yes.
16 A. That's correct.
17 Q. Right.
18 A. And I don't believe that's an indication
19 of Zyrtec. I think, if you take the approach that
20 anything is possible, then it could be. But I
21 don't think that's the way to read data
22 appropriately. I think, to construe this as a
23 Zyrtec mention, is a very strained reading of the
24 data.
25 Non-Designated Portions Redacted

1 A. Simonson, Ph.D, 10/1/09

2
3
4
5
6
7 Non-Designated Portions Redacted
8
9
10
11
12
13

14 Q. Well, the one right before it, 22649.
15 The person's response to question 1C was, "The
16 first three letters."
17 How do you know what the last three
18 letters of the card were in that case?
19 A. The question is: Do we have steps in
20 place to prevent interviewer error? And we do.
21 Then the question is: If you have
22 evidence that one has an error, that indicates that
23 that one was not correctly administered.
24 Simply because you don't have evidence
25 of an error in all others but you also don't have

1 A. Simonson, Ph.D, 10/1/09
2 evidence that it was done correctly, that doesn't
3 suggest that it wasn't done correctly. You then
4 have to look at the procedures that were used to
5 ensure it was done correctly.
6 There are many of these that don't
7 suggest Z-y-r, per se. But that doesn't indicate
8 to you that they were shown the wrong card.
9
10
11
12
13
14 Non-Designated Portions Redacted
15
16
17
18
19
20
21 Q. Is there any way -- yes? Go ahead.
22 A. With every interview they had to type in
23 what card they were going to show. So it's not as
24 though if they had this error once it's going to
25 repeat ad nauseam. So...

1 A. Simonson, Ph.D, 10/1/09

2
3
4 Non-Designated Portions Redacted
5
6

7 Q. Have you ever talked to Walgreens about
8 this survey or corresponded with Walgreens itself
9 about this survey?
10 A. No.
11 Q. Have you ever done any market research
12 for Walgreens for purposes other than litigation?
13 Just for business purposes?
14 A. I've never worked for Walgreens, except
15 for the two cases we discussed here.

16
17
18
19
20 Non-Designated Portions Redacted
21
22
23
24
25

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

McNEIL-PPC, Inc.	)	In re Trademark Application
	)	Serial No. 76/682,070
Opposer,	)	Opposition No. 91184978
	)	Trademark: WAL-ZYR
v.	)	
	)	
WALGREEN COMPANY,	)	
	)	
Applicant.	)	

DECLARATION

I hereby certify that I have read the foregoing transcript of my deposition given on October 1, 2009 in New York, New York, consisting of pages 1 through 128, inclusive, and I do again subscribe and make oath that the same is a true, correct, and complete transcript of my deposition so given as aforesaid, and includes changes, if any, so made by me.

ALEX SIMONSON, PH.D.

Subscribed and sworn to before me
this 22 day of January 2010.

Notary Public

KENDRIA T FRANCIS
Notary Public
State of New Jersey
My Commission Expires Jul 29, 2014