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

Proceeding	91194974
Party	Defendant GFA Brands, Inc.
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**UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

PROMARK BRANDS INC.,

Opposer,

v.

GFA BRANDS, INC.,

Applicant.

**Opposition Nos. 91194974
91196358**

U.S. Trademark Application 77/864,305
For the Mark **SMART BALANCE**
Published in the Official Gazette on April 20, 2010

U.S. Trademark Application 77/864,268
For the Mark **SMART BALANCE**
Published in the Official Gazette on August 10, 2010

GFA BRANDS, INC.'S DISCLOSURE OF EXPERT, LEON B. KAPLAN, PH.D.

Pursuant to Federal R. Civ. P. 26(a)(2) and 37 C.F.R. § 2.120, GFA Brands, Inc. hereby discloses Leon B. Kaplan, Ph.D. as a witness that may be used to present expert testimony in the above-captioned matter. An expert report and the other required disclosures are set forth in the attachment, which were served on Counsel for Opposer on Friday, March 16, 2012, immediately after the telephone conference with Interlocutory Attorney, Cheryl S. Goodman.

Dated this 26th day of March, 2011.

/s/ Johanna M. Wilbert
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Marta S. Levine
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Attorneys for Applicant GFA Brands, Inc.

Critique of Likelihood of Brand Confusion Between Smart Ones and Smart Balance Resulting from the Introduction of Smart Balance Frozen Meals

by

Leon B. Kaplan, Ph.D.

1. I was asked by representatives of Quarles & Brady LLP, outside council for GFA Brands, Inc., the maker of Smart Balance branded products, to evaluate a study conducted by Barry A. Sabol, Ph.D. entitled "Likelihood of Brand Confusion Between Smart Ones and Smart Balance Resulting from the Introduction of Smart Balance Frozen Meals" (the study). The study was conducted on behalf of H.J. Heinz Company.
2. I have conducted marketing research surveys for over 40 years. I am the President and CEO of the Princeton Research & Consulting Center, Inc. (PRCC). I founded PRCC in 1979. Prior to that I was a Vice President at Opinion Research Corporation and before that a Research Psychologist in the Advertising Department of The DuPont Company. I have a BS in General Psychology from Brooklyn College, an MS and a Ph.D. in Consumer/Industrial Psychology from Purdue University, and an MBA from the Wharton School of the University of Pennsylvania. I have testified in intellectual property matters previously. See Exhibit A for my CV and a list of recent cases in which I was deposed or testified.
3. My work on this case is being billed at \$400 per hour.
4. In preparing this report I have considered the following documents:
 - Dr. Sabol's report.
 - The Manual for Complex Litigation, Fourth, Federal Judicial Center, 2004.
 - S. Diamond, *Reference Guide on Survey Research in Reference Manual on Scientific Evidence*, Second Edition, Federal Judicial Center, 2000.
 - J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, (September, 2007).

- Answers of GFA Brands, Inc. to Promark Brands, Inc.'s Notice of Opposition.
- The cases cited.

5. Dr. Sabol's study fails in numerous ways to meet the generally accepted standards for conducting research for litigation. As a result, I believe, its findings cannot be relied on in this matter.

6. To assist in evaluating the study I will refer to the guidelines found in *The Manual for Complex Litigation (Fourth)* prepared by the Federal Judicial Center (2004; at page 103). The four factors relevant to assessing the admissibility of a survey are:

- ✓ the population was properly chosen and defined;
- ✓ the sample chosen was representative of that population;
- ✓ the data gathered were accurately reported; and
- ✓ the data were analyzed in accordance with accepted statistical principles.

The factors relevant to assessing the validity of a survey are:

- ✓ whether the questions asked were clear and not leading;
- ✓ whether the survey was conducted by qualified persons following proper interviewing procedures; and
- ✓ whether the process was conducted so as to ensure objectivity (e.g., determine if the survey was conducted in anticipation of litigation and by persons connected with the parties or counsel or by persons aware of its purpose in the litigation).

I will address these factors and show how Dr. Sabol's study fails to meet most of them.

Population

7. As Professor Diamond opined:

[The] target population consists of all elements (i.e., objects, individuals, or other social units) whose characteristics or perceptions the survey is intended to report. Thus, in trademark literature, the relevant population in some disputes may include all prospective and actual purchasers of plaintiff's goods and services and all prospective and actual of the defendant's goods and services.¹

8. On the same subject, McCarthy wrote

The [population] is that segment ... whose perceptions and state of mind are relevant to the issues in this case.²

9. As stated on page three of the study:

The primary objective of this study was to determine the level of potential brand confusion, if any, which may occur from the introduction of Smart Brands frozen meals....

There are several errors relating to how the population, also referred to as the "universe", was defined. I will discuss them below.

10. A universe can be considered under-inclusive if it omits individuals whose states of mind are relevant to the legal issues being studied. The universe definition can be inferred from the questionnaire. Screen B and Question 1 established whether or not a person belongs to the universe and can participate in the study. A member of the universe had to have shopped for frozen meals in the past 30 days (Screen B) and be aware of Smart Ones (Question 1). To qualify, a person had to answer "yes" to Screen B, "Have you personally purchased any frozen meals from the frozen food section of the supermarket in the past month/30 days?" and say he or she had ever heard of Smart Ones in Question 1. This second requirement is why I believe the universe is under-

¹ S. Diamond, *Reference Guide on Survey Research in Reference Manual on Scientific Evidence*, p. 239.

² J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, (September, 2007) at §32-307.

inclusive. It is notable that this is not the first time this criticism has been raised in a study conducted for Weight Watchers.³

11. I believe a purchaser of frozen meals is a member of the relevant universe regardless of whether that individual is or is not aware of Smart Ones brand frozen meals. Unless Smart Ones has no desire to expand its base of customers, purchasers of other brands of frozen foods should be an important part of Smart Ones target market. In addition, nowhere in GFA's applications does it indicate that it intends to limit its target market to those who are aware of Smart Ones brand frozen meals. Therefore making awareness of Smart Ones a part of the definition of the universe is inappropriate. As used in the study, the definition is under-inclusive because it excluded frozen meal purchasers who were not aware of Smart Ones.

12. In discussing the under-inclusive universe, Diamond concludes:

... the survey's value depends on the extent to which the excluded population is likely to react differently from the included population.⁴

13. Page two of the report confirms the problem when it states that 18% of past 30 day frozen meal purchasers were disqualified from the interview because they were not aware of Smart Ones brand.

14. Later in the same section, Diamond referenced a likelihood-of-confusion case with similar universe problems. The plaintiff limited its survey to past users of its product. The court found this universe to be under-inclusive because it should have

³ Weight Watchers Int'l, Inc. v. Stouffer Corp., 74 F. Supp. 1259, 19 U.S.P.Q.2nd 291, 1321,1331 (S.D.N.Y. 1990).

⁴ S. Diamond, *Reference Guide on Survey Research in Reference Manual on Scientific Evidence*, p. 241.

included users of other products in the category “so that the full range of potential customers for whom plaintiff and defendants would compete could be studied.”⁵

15. Based on Screen B, the universe was also limited to past-30-day purchasers of frozen meals. There are two problems with this. Past behavior is no guarantee of future intentions and individuals who may not have purchased a frozen meal in the past 30 days but may be likely to do in the future are excluded from the universe. Courts have been increasingly critical of studies that do not screen for purchase intention.⁶ Based on the above discussion, I believe the appropriate universe should have been expanded to include those likely to purchase a frozen meal in the next 30 days.

Sample

16. The questions used to screen potential respondents define much of the sampling procedure for a study. As noted above, the population definition was seriously flawed and although that contaminates the sampling procedure it will not be discussed again here. There are other shortcomings with the sampling procedure:

17. The screening procedure also lacked several questions typically asked of respondents. It is common practice in studies to be used for litigation to screen for and exclude individuals who work in or live in households where anyone works in marketing research, advertising or the industries related to the subject of the inquiry (a company that prepares and/or distributes frozen foods and a company that retails prepared foods). It is equally common to ask about recent participation in a market research

⁵ S. Diamond, *Reference Guide on Survey Research in Reference Manual on Scientific Evidence*, p. 242.

⁶ *Jordache Enterprises Inc. v. Levi Strauss Co.*, 841 F. Supp 506, 518, 30 U.S.P.Q.2d 1721 (S.D.N.Y. 1993).

study. Individuals having recent experience should be eliminated from further consideration for the study.

Questions and Methodology

18. The issue of whether the questions were clear and not misleading requires a review of the entire questionnaire. As discussed above, the questionnaire had three screening questions, Screen A, Screen B and Question 1. It had one question that dealt with likelihood of confusion, Question 3. The other questions in the interview were not relevant to this matter. The questionnaire had problems with omissions in wording and in the sequence in which the questions were asked. They will be discussed below:

19. In litigation research a “don’t know” answer is a legitimate and valid answer. Since respondents often are reluctant to admit that they do not know an answer to a question, for fear of appearing uninformed, it is standard practice to tell respondents that it is acceptable if they don’t know the answer to a question. A statement such as “There are no right or wrong answers to my questions. If you do not know an answer, or you have no opinion for any question, simply say that you do not know or have no opinion and we will go on to the next question,” should always be included in a questionnaire. There was no statement of that type before Screen A. It would appear that Dr. Sabol was aware of the explicit need for a “don’t know” option because don’t know was offered as a legitimate response in Question 3.

20. Question 2 serves no purpose other than to try to enhance awareness of Smart Ones and if retained should have been moved to after the current Question 3.

21. Question 3 is leading, suggestive and, by itself, inadequate to ascertain relevant confusion. If a respondent answers Question 3 by saying “yes”, it is standard practice

and absolutely essential to follow up with a "Why do you say that?" type question. In a case involving trademark confusion, the only relevant confusion is trademark-related confusion.⁷ That statement seems obvious. If confusion for any reason was accepted, then the percent confused would be improperly inflated. People whose confusion stemmed from non-trademark relevant beliefs would be counted as confused. ("I think one company makes all frozen meals." People who answered "yes" just because the question was asked would be counted as confused. ("If they weren't associated you wouldn't be asking the question.") People who guess would be counted as confused. ("Don't know, just a guess.") It is not possible to know how many of those classified as confused did not answered Question 3 "yes" for a trademark-relevant reason. McCarthy has commented on the necessity for this type of question.

Often, an examination of the respondent's verbatim responses to the 'why' question are the most illuminating and probative part of a survey, for they provide a window into consumer thought processes in a way that mere statistical data cannot.⁸

The problem of Question 3 being leading and suggestive is compounded by the failure to ask an open-end "why-" type question.

22. The study design used is not capable of satisfactorily answering the question it was supposed to answer, that is, what is the level of potential brand confusion that would be due to the introduction of Smart Balance frozen foods. Dr. Diamond discusses the problem at length.

Most surveys... are intended to show how a trademark...influences respondents' perceptions or understanding of a product.... The difficulty is that the consumer's response to any question on the survey may be the result of information or misinformation from sources other than the trademark the respondent is being shown.

⁷ ConAgra, Inc. v. Hormel & Co., 784 F. Supp. 700, 726 (D. Neb. 1992).

⁸ J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, (September, 2007) at §32-356.

It is possible to adjust many survey designs so that causal inferences about the effect of a trademark...become clear and unambiguous. By adding an appropriate control the survey expert can test directly the influence of the stimulus.⁹

23. A Control Group is an additional group of respondents who met the same screening criteria and go through the same interview as the Test Group (those asked about Smart Balance) except they would have been asked in Question 3 about a different brand, one that was not alleged to infringe on the Smart Ones name. Any confusion observed in the Control Group would be attributed to noise and that percentage would be subtracted from the level of confusion observed in the Test Cell.¹⁰ Since the study did not have a Control Group, it lacked a mechanism to estimate and adjust for “noise” or error in the data. Noise can take many forms, among them the interview experience itself, aspects of the questionnaire, guessing, etc. Noise would inflate the level of confusion measured in the Test Cell. Assuming everything else was acceptable, the resulting value would be the level of confusion, corrected for noise.
24. Absent a control group to correct for noise and a question the make sure confusion is due to trademark-relevant reasons, the results are completely meaningless. This has proven to be a factor in excluding studies in the past¹¹.

Data Analysis and Reporting

25. Due to the under-inclusiveness of the sample, the estimates in the report were inflated. On page 2 of the report it states that “...54 potential respondents were disqualified because they had never heard of Smart Ones....” This means that the base

⁹ S. Diamond, *Reference Guide on Survey Research in Reference Manual on Scientific Evidence*, p. 256-257.

¹⁰ J. Jacoby, *Experimental Design and Selection of Controls in Trademark and Deceptive Advertising Surveys*, 92 *Trademark Rptr.* 890, 905 (2002).

¹¹ *National Football League Properties, Inc. v. Prostyle, Inc.*, 57 F.Supp. 2d 665, 668-70 (E.D. Wisc. 1998).

for further calculations should have been (250 + 54=) 304 not 250.¹² As the table below shows, this would reduce the statistics on Smart Ones.

	From Report	As corrected
Base=	(250) %	(304) %
Confusion	32	26
Ever purchased	51	42
Purchased most often	10	8

26. On page 8 of the report, it states that “This (sic) data clearly qualifies Smart Ones as a “famous” brand.” For support, Dr. Sabol relies on the results of the aided awareness question (Question 1). Although I am not familiar with the majority of the Fame cases, I have never seen or heard of the results of an aided awareness question being used to support a claim of fame.

27. On page 10, he uses the results of the aided ever-purchase question (Question 2) as the basis for saying that Smart Ones is a famous brand. I also have never seen or heard of the results of an aided ever-purchase question used to support a claim of fame.

28. In commenting about closed-ended versus open-ended questions, Dr. Diamond shows how closed-ended (aided) questions will produce bigger results than will open-ended (unaided) questions.

Most responses are less likely to be volunteered by respondents who are asked an open-ended question than they are to be chosen by respondents who are presented with a closed-ended question.¹³

¹² If the universe had also included potential purchasers, the base likely would have even been larger.

¹³ S. Diamond, *Reference Guide on Survey Research in Reference Manual on Scientific Evidence*, p. 252.

That is why the distinction between open-ended versus closed-ended (unaided versus aided) questions is very important in this context. In addition, the questions do not contain a false answer to send a signal to respondents that not all of the answers are correct. In summary, claims about the famousness of the Smart Ones brand are meaningless because they are based on the wrong questions and not corrected for noise.

Validation

29. Typically, an attempt is made to validate some or all of the interviews in a study used for litigation. This is done to demonstrate that the interviewer actually conducted the interview, that the interview was conducted properly and that the respondent was qualified to participate in the study. The report does not discuss validation so one can not assume it was done. Lack of validation calls into question the reliability of a study.¹⁴

SUMMARY

30. As described above, this study has numerous shortcomings that keep it from meeting the minimum standards for an acceptable survey for litigation. There were mistakes with the population, sample, wording of questions, order of questions, omission of questions, lack of a control, failure to correct for noise and mischaracterization of some results. I believe the study does not have probative value in this matter.¹⁵



Leon B. Kaplan, Ph.D.

Date: 3/12/2012

¹⁴ Paco Sports, Ltd. V. Paco Rabanne Parfums, 86 F. Supp 2d 305, 54 U.S.P.Q2d 1205 (S.D. N.Y. 2000), judgment aff'd. 234 F.3d 1262 (2d Cir. 2000).

¹⁵ Ralston Purina Co. v. Quaker Oats Co., 169 U.S.P.Q. 508, 1971 WL 16472 (T.T.A.B. 1971).

EXHIBIT A

LEON B. KAPLAN, Ph.D

EDUCATION

- M.B.A. The Wharton School, University of Pennsylvania,
1979 Philadelphia, Pennsylvania (Advanced Management Studies in
Marketing, Strategic Planning, and Business Policy)
- Ph.D. Purdue University, Lafayette, Indiana (Major-
1971 Consumer/Industrial Psychology; Minor-Social Research Methods and
Personnel Selection) Dissertation: Predicting Consumer Preference
Using a Two-Factor Attitudinal Model: An Experimental Test
- M.S. Purdue University, Lafayette, Indiana (Major-
1970 General Industrial Psychology; Minor-Consumer Behavior, Psychological
Measurement) Thesis: Differential Perceptions as a Source of Error in
Concept Testing
- B.S. *Cum laude*, Brooklyn College, Brooklyn, New York
1966 (Major-Psychology; Minor-Physics)

PROFESSIONAL EXPERIENCE

- 1979 - President, Princeton Research & Consulting Center, Inc., Princeton, New
Present Jersey.
- 1975 - 1979 Vice President, Custom Research Group, Opinion Research Corporation,
Princeton, New Jersey.
- 1971 - 1975 Senior Research Psychologist, Behavioral Research Group, Marketing
Research Section, Advertising Department, E.I. duPont de Nemours and
Company Inc., Wilmington, Delaware.
- 1971 Post-Doctoral Research Fellow, Consumer Research Institute,
Washington, D.C.
- 1969 - 1970 Consultant to Proctor & Gamble Company, Cincinnati, Ohio, and the
Pillsbury Company, Minneapolis, Minnesota.
- 1969 Research Psychologist, Behavioral Research Group, Marketing Research
Section, Advertising Department, E.I. duPont de Nemours and Company,
Inc., Wilmington, Delaware.
- 1968 Summer Intern Marketing Research Department, General Mills, Inc.,
Minneapolis, Minnesota.
- 1966 Interviewer, United States Public Health Services.

ACADEMIC EXPERIENCE

- Oct. 2002 Guest Speaker, School of Business, Montclair State University, Upper Montclair, New Jersey. Lectured about surveys for litigation.
- 1971 - 1976 Adjunct Faculty, Graduate School of Business, University of Delaware, Newark, Delaware. Taught Consumer Behavior, Marketing Research, and Industrial Psychology.
- 1967 - 1970 Teaching Assistant, Department of Psychology, Purdue University, Lafayette, Indiana. Taught Consumer Psychology, Industrial Psychology, and Educational Psychology.

PAPERS AND SYMPOSIA

- Kaplan, L.B. Shopping for a Job: Recruiting College Graduates for the Private Sector. Paper presented at American Psychological Association's 97th Annual Convention, New Orleans, Louisiana, August 1989.
- Boren, M., & Kaplan, L.B. Marketing Research - Strategies and Payoffs. Paper presented at Association of Science - Technology Center's Annual Convention, Boston, Massachusetts, October 1988.
- Kaplan, L.B. Symposium Participant. On the Stand: The Role of Consumer Psychologists in Litigation. Presented at American Psychological Association 94th Annual Convention, Washington, D.C. August 1986.
- Kaplan, L.B. Research: Key to Newspaper Change. Presented at Pennsylvania Associated Press Managing Editors Conference, Scranton, Pennsylvania, June 1986.
- Kaplan, L.B. In Search of Profit Excellence. Presented at Adhesive and Sealant Council, Fall 1984 Seminar, Indianapolis, Indiana, October 1984.
- Kaplan, L.B. Symposium Chairman. Theoretical & Empirical Issues in the Measurement of Trademark Infringement. Presented at American Psychological Association 91st Annual Convention, Anaheim, California, August 1983.
- Kaplan, L.B. Symposium Chairman. Perspectives on the Consumer Psychologist in "The Real World". Presented at American Psychological Association 89th Annual Convention, Los Angeles, California, August 1981.
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Kaplan, L.B. affiliations: Responses to a Division 23 survey of its membership.
Presented at the Business Meeting, Division 23, American Psychological
Association 78th Annual Convention, Miami, Florida, September 1970.

Authored over 1,500 proprietary reports for clients.

AFFILIATIONS

American Psychological Association
Member, Opinion Survey Task Force, 1986

American Psychological Association--Division 23 (Consumer Psychology)
Divisional Representative to American Psychological Association
Council of Representatives, 1983-1986
President, 1981-1982
Chair, Election Committee, 1980
Editor, Newsletter, 1978-1979
Chair, Membership Committee, 1977
Chair, Governmental Affairs and Public Policy Committee, 1975, 1973
Chair, Program Committee, 1974

Member, American Psychological Society
Member, American Psychology -Law Association
Member, Marketing Research Association
Psi Chi (National Psychology Honorary)
Alpha Kappa Delta (National Sociology Honorary)

AWARDS

Post-Doctoral Research Fellowship, Consumer Research Institute, Inc., 1971
National Science Foundation Fellowship, 1970
New York State Regents Scholarship, 1960-1966

REVIEWER

Division of Consumer Psychology,
Association for Consumer Research,
Journal of Applied Psychology

DIRECTOR/BOARD MEMBER

School Board, Lawrence Township Public Schools, Lawrence, New Jersey
Member, 2004 to Present
Vice President, 2007 to Present
Chair, Negotiations Committee, 2007 to Present
Chair, Personnel Committee, 2010 to Present
Co-Chair, Community Relations & Legislative Affairs Committee, 2011 to Present
Chair, Curriculum, Instruction, Assessment and Professional Development
Committee, 2008 to 2010
Chair, Facilities & Finances Committee, 2005 to 2006

New Jersey School Boards Association, Trenton, New Jersey
Director, 2005 to 2011
Member, Board of Directors Audit Committee, 2007 to 2011
Chair, Board of Directors Audit Committee, 2010 to 2011

New Jersey School Boards Association Insurance Group, Burlington, New Jersey
Trustee, 2009 to Present
Vice Chair, Board of Trustees, 2011 to Present

DEPOSITIONS PAST FOUR YEARS

Silicon Graphics, Inc. v. ATI Technologies ULC and Advanced Micro Devices, Inc.,
USDC, Western District, Wisconsin, Civil Action No. 06-C-0611-C. Damages
estimation. Conducted research for Defendant.

Champagne Louis Roederer (CLR) v. J. Garcia Carrion, S.A. and Friend Wine
Marketing, Inc. d/b/a CIV US, Civil Action No. 06-213 JNE/SRN. Trademark
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American Association for Justice a/k/a Association of Trial Lawyers of America v.
American Trial Lawyers Association, Inc. a/k/a The ATLA and J. Keith Givens.
Civil File No. 07-cv-04626 JNE/JJG (USDC MN). Trademark Infringement.
Taken July 15, 2009. Evaluated report of Plaintiff's expert.

Jamdat Mobile, Inc. v. Jamster International SARL Ltd., USDC, Central District,
California, Case No. CV-05 3945 PA. Trademark infringement. Evaluated report
of Plaintiff's expert. Replicated with different control.

TRIAL TESTIMONY PAST FOUR YEARS

Champagne Louis Roederer (CLR) v. J. Garcia Carrion, S.A. and Friend Wine
Marketing, Inc. d/b/a CIV US, Civil Action No. 06-213 JNE/SRN. Trademark
infringement. Expert witness for Plaintiff.