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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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Date	04/30/2012
Attachments	Johnson.pdf (57 pages)(1272753 bytes)

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

PROMARK BRANDS, INC.,)		**Opposition Nos. 91194974 and 91196358**
	)	
Opposer,	)	U.S. Trademark Application 77/864,305
	)	For the Mark **SMART BALANCE**
vs.	)	Published in the Official Gazette
	)	On April 20, 2010
GFA BRANDS, INC.,	)	
	)	U.S. Trademark Application 77/864,268
Applicant.	)	For the Mark **SMART BALANCE**
	)	Published in the Official Gazette
	)	On August 10, 2010

GFA BRANDS, INC.'S DISCLOSURE OF EXPERT, PHILIP JOHNSON

Pursuant to Fed. R. Civ. P. 26(a)(2) and 37 C.F.R. § 2.120, GFA Brands, Inc. hereby discloses Philip Johnson as a witness who 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 was served on Counsel for Opposer on Saturday, April 28, 2012.

Dated this 30th day of April, 2012.

By: /s/David R. Cross

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CERTIFICATE OF SERVICE

A copy of the foregoing GFA Brands, Inc. Disclosure of Expert Philip Johnson was served on this 30th day of April 2012, via regular U.S. Mail, with e-mail courtesy copies upon:

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LEO J. SHAPIRO & ASSOCIATES L.L.C.

PROMARK BRANDS, INC.

(OPPOSER)

VS.

GFA BRANDS, INC.

(APPLICANT)

A STUDY OF LIKELIHOOD OF CONFUSION

April 2012

TABLE OF CONTENTS

Page

I. BACKGROUND 1

II. INTRODUCTION 2

III. METHODOLOGY 3

IV. RESULTS 13

V. CONCLUSIONS AND OPINIONS 20

APPENDIX A

- Philip Johnson Curriculum Vitae
- Recent Cases In Which Philip Johnson Has Testified

APPENDIX B

- Questionnaire
- Interviewing Instructions
- Exhibits

APPENDIX C

- Validation Summary

APPENDIX D

- Verbatim from Respondents Who Identify Weight Watchers

REPORT OF PHILIP JOHNSON

I, Philip Johnson, state as follows:

I. BACKGROUND

1. I am Chief Executive Officer of Leo J. Shapiro and Associates, Inc., a Chicago-based market research and consulting firm that conducts surveys.

2. I have been with this firm since 1971. Over the past 41 years, I have designed and supervised hundreds of surveys measuring consumer behavior, opinion, and beliefs concerning brands and products, employing a wide range of research techniques. I have given lectures before the American Bar Association (ABA), the Practising Law Institute (PLI), the American Intellectual Property Law Association (AIPLA), and the International Trademark Association (INTA) on the use of survey research in litigation. I am a member of the American Marketing Association (AMA), the American Association for Public Opinion Research (AAPOR), and the International Trademark Association (INTA). I have a B.S. degree in Psychology from Loyola University and an M.B.A. degree from the University of Chicago. A description of my background and a list of cases in which I have offered survey evidence during the past four years are attached to Appendix A of this Report.

II. INTRODUCTION

3. During February 2012, I was contacted by counsel from the law firm, Quarles & Brady LLP. I was formally retained on behalf of its client, GFA Brands, Inc. ("GFA") pursuant to an engagement letter dated March 1, 2012. Counsel informed me of a dispute that has arisen between GFA and ProMark Brands Inc. ("ProMark").

4. This dispute concerns GFA's intent-to-use applications in the U.S. Patent and Trademark Office to register the term SMART BALANCE in connection with frozen meals, among other products. It is my understanding that ProMark opposes GFA's applications alleging that consumers who encounter Smart Balance frozen meal products may falsely believe that they come from or are related to Smart Ones.

5. Counsel asked whether I could design and conduct a study that would measure the extent, if any, to which the Smart Balance name that has been objected to by ProMark, is or is not likely to cause confusion when relevant consumers are exposed to it in connection with frozen meal products. I agreed and proceeded to design and conduct such a study. What follows is a report on the design, execution, results, and conclusions that one can draw from this research.

III. METHODOLOGY

6. Personal interviews were conducted between March 8 and 19, 2012 with 410[1] adults who are current or prospective purchasers of frozen meal products. These personal interviews were conducted in shopping mall-based research facilities located in 8 markets geographically distributed throughout the United States.

7. Specifically, interviewing was conducted in each of the four major U.S. Census Regions, as follows:

NORTHEAST	SOUTH	MIDWEST	WEST
New York, NY	Dallas, TX	Minneapolis, MN	Seattle, WA
Philadelphia, PA	Atlanta, GA	Chicago, IL	San Francisco, CA

8. The survey employed a "test" cell and a "control" cell. Each respondent was randomly assigned to either the test cell (i.e., viewed only the test cell exhibit) or the control cell (i.e., viewed only the control cell exhibit). One-half of the interviews were conducted in the test cell (205 cases), while the other half of the interviews were conducted in the control cell (205 cases).

9. Test cell respondents were exposed to an exhibit card bearing the name "SMART BALANCE," while control cell respondents were exposed to an exhibit card bearing the name "RIGHT BALANCE" in all capital letters. I selected "RIGHT BALANCE" as the

[1] A total of 414 interviews were conducted. However, four of these interviews have been excluded from the database due to failure in the validation process, leaving a total of 410 qualifying interviews. ID numbers for these 4 invalid interviews are #23, #42, #311, and #333.

control cell name because it is similar in meaning, but does not utilize the disputed word "SMART."

10. Reduced size images of the exhibit cards are shown below:

Test Cell Exhibit

Control Cell Exhibit

11. This approach of using both a test cell and control cell is the preferred survey methodology because there is a certain amount of error in any survey measurement that can be caused by sample error, guessing, the design of the study, or the construction of the questions asked. It is important to exclude these forms of error from the study results when assessing the degree of confusion that may be present. Specifically, the methodology used in this study allows one to accurately isolate and assess the effects of the alleged infringing word mark at issue when measuring any possible likelihood of confusion. Operationally, this is accomplished by taking the proportion of test cell respondents who falsely identify Smart Ones as the source or related source when shown the Smart Balance name in connection with frozen meals and then subtracting the corresponding proportion of control cell respondents who similarly falsely identify Smart Ones as the source or related source when shown the Right Balance name in connection with frozen meals.

12. During the course of the interview, each respondent was asked who they believe is the source and whether they believe the source is related to, associated with, or has a licensing agreement with any other brands, products, or companies. In order to understand the basis for their beliefs as well as exactly what company they are referring to, respondents were then asked open-ended questions that allowed them to explain their answers in their own words and clarify each survey response.

13. This methodology follows the general pattern of the "Eveready" test, which is frequently used to measure likelihood of confusion. This design produces a very direct measure of confusion as to source or relationship.

14. In disputes about likelihood of confusion, the appropriate universe for the survey is the junior user's market. In his treatise, Dr. Thomas McCarthy states that when designing a study to measure likelihood of confusion, the proper universe is potential consumers of the junior user's goods or services:[2]

> *In a traditional case claiming "forward" confusion, not "reverse" confusion, the proper universe to survey is the potential buyers of the junior user's goods or services.*

15. In order to reach the relevant universe, interviews were conducted with current and prospective consumers of frozen meal products. Specifically, qualified respondents were adults who are responsible for all or some of the grocery shopping for their household and have either purchased frozen meals in the past month for themselves or their household or plan to purchase frozen meals for themselves or their household in the next month.

16. In order to qualify, respondents must have also met all of the following criteria:

- Must not have participated in any market research survey in the past three months.
- The respondent, or any member of his/her household, must not work for a market research or advertising firm; a manufacturer, distributor, or retailer of frozen food; or a store in the mall where the interviewing took place.

---

[2] McCarthy, J. Thomas. McCarthy on Trademarks and Unfair Competition, Volume 5, 32:159, pg. 32-249. 2001.

- Must be wearing his/her eyeglasses or contact lenses at the time of the interview if he/she usually wears them when shopping or reading.

17. The screening interview proceeded as follows:

Question I:

"Before we begin, what is your age?"

Question II:

"RECORD GENDER FROM OBSERVATION:"

Question III:

"What proportion of the grocery shopping are you personally responsible for in your household? ***READ FIRST THREE ALTERNATIVES:***
...ALL OF IT
...SOME OF IT
...NONE
*...**IF SPONTANEOUS:** DON'T KNOW"*

Question IVa:

"Thinking about the past month, have you personally purchased... (ASK FOR EACH BELOW) from a supermarket or grocery store for yourself or your household?
... ice cream?
...frozen meals?
...frozen juice?"

Question IVb:

"Thinking about the next month, do you personally plan to purchase... (ASK FOR EACH BELOW) from a supermarket or grocery store for yourself or your household?
... ice cream?
...frozen meals?
...frozen juice?"

Question V:

"Have you participated in any market research survey in the past three months?"

Question VI:

"Do you, or does any member of your household, work for... (ASK FOR EACH)?
...a market research or advertising firm?
...a manufacturer, distributor, or retailer of frozen food?
...a store in this mall?"

Question VIIa:

"Before we continue, do you usually wear eyeglasses or contact lenses when you shop or read?"

Question VIIb:

***"IF 'YES' IN Q.VIIa, ASK:** Before continuing, would you please put them on?"*

Question VIII:

"I would like to ask you a few questions in our interviewing facility. The whole process will take about five minutes of your time. Would you be willing to help us out?"

18. Each screened and qualified respondent was escorted to a private room in the interviewing facility to conduct this interview.

19. Respondents were asked to be seated and then told:

"Before we begin, I would like you to know that your answers and identity will be kept strictly confidential. If you don't know the answer to any of the questions, it is okay to say so. Please do not guess."

20. Qualified respondents were then handed either the test cell exhibit or the control cell exhibit and told:

> *"**HAND RESPONDENT EXHIBIT CARD. SAY:** This is the name of a frozen meal product that you might see in the frozen food section of a grocery store. Feel free to comment, if you wish, on anything about this. **RECORD ANY SPONTANEOUS COMMENTS MADE.**"*

21. Once the respondent was done looking at the exhibit, the interviewer was instructed to take it away and put it out of sight for the remainder of the interview.

22. The exact questions used in the interview, and the sequence in which they occurred are as follows:

> *Question 2a:*
>
> *"Based on what you just saw, who or what company do you believe makes the frozen meal product with the name that I showed you OR do you not have a belief?"*
>
> *Question 2b:*
>
> *"What makes you say that <INSERT RESPONSE GIVEN IN Q.2a> makes the frozen meal product with the name that I showed you? **PROBE:** Anything else?"*
>
> *Question 3a:*
>
> *"What other products or brands, if any, do you believe come from the same company who makes the frozen meal product with the name that I showed you OR do you not have a belief? **PROBE:** Any others?"*

Question 3b:

*"**ASK FOR EACH PRODUCT OR BRAND GIVEN IN Q.3a:** What makes you say that <INSERT RESPONSE GIVEN IN Q.3a> comes from whoever makes the frozen meal product with the name that I showed you? **PROBE:** Anything else?"*

Question 4a:

*"What other brand or company, if any, do you believe is related to, associated with, or has a licensing agreement with whoever makes the frozen meal product with the name that I showed you OR do you not have a belief? **PROBE:** Any others?"*

Question 4b:

*"**ASK FOR EACH BRAND OR COMPANY GIVEN IN Q.4a:** What makes you say that <INSERT RESPONSE GIVEN IN Q.4a> is related to, associated with, or has a licensing agreement with whoever makes the frozen meal product with the name that I showed you? **PROBE:** Anything else?"*

23. Finally, classification information was secured and the interview completed. Copies of the questionnaire, interviewing instructions, and exhibits used are attached to Appendix B of this Report.

24. Based on the sample size of 205 cases per cell, the statistical error rate for the key measures in this study falls into the range of ±4.1% for a statistic such as 10% at the 95% confidence level. In other words, one would expect that 95 times out of 100, a measurement that was actually 10%, would accurately be represented in the data by a statistic as high as 14.1%, or as low as 5.9%.

25. Interviewing was administered and supervised, under my direction, by Survey Center, L.L.C., a company that specializes in the administration of market research surveys. Survey Center is the data collection division of Leo J. Shapiro and Associates and is a member of the Market Research Association. Interviewing in each market was conducted by independent research firms who specialize in personal interviewing in shopping malls. Interviewers in each market were trained in proper interviewing techniques and were briefed specifically on this project.

26. The survey used a "double-blind" approach, where neither the respondent nor the interviewers conducting the study were aware of the purpose of the research or the identity of the party who commissioned it. The methodology, survey design, execution, and reporting were all conducted in accordance with generally accepted standards of objective procedure and survey technique.

27. Independent validation was conducted by telephone, which involved re-establishing contact with the persons who were interviewed in the study. Based on this re-contact, overall, four of the 414 interviews failed during the validation procedure, leaving a total of 410 qualifying interviews. These four interviews have been excluded from the study sample, and there is no significant change in any of the study results based on this exclusion. A detailed summary of the survey validation is attached to Appendix C of this Report.

28. The work performed to design, carry out, and report this study is covered by a billing of $100,000. Additional time required for trial testimony or deposition, will be billed at a rate of $7,000 per day, plus expenses.

IV. RESULTS

Source Question

29. Only 1% of test cell respondents (i.e., 2 individuals) report the false belief that Smart Ones is the source of a frozen meal product called Smart Balance. None of the control cell respondents name Smart Ones in response to this question.

Question 2a:

"Based on what you just saw, who or what company do you believe makes the frozen meal product with the name that I showed you OR do you not have a belief?"

	EXHIBIT SHOWN	
	SMART BALANCE (205)	RIGHT BALANCE (205)
ALL RESPONDENTS	100%	100%
All Who Have A Belief About Source:	27%	28%
Smart Balance	4	*
Lean Cuisine	3	5
Weight Watchers	3	5
Healthy Choice	3	3
Stouffer's/Corner Bistro	2	1
Name Frozen Food Products	1	--
Smart Ones	**1**	--
Banquet	*	2
Jenny Craig	*	1
Tyson	--	2
Right Balance	--	1
Other**	7	7
Don't Have A Belief About Source:	73	72

* 0.5% or fewer mentions.

** Net of single mentions.

NOTE: Table may sum to more than total due to multiple mentions by some respondents.

Related Products or Brands Question

30. In addition, there is one test cell respondent (0.5%) who reports the false belief that Smart Ones is a related product or brand. None of the control cell respondents name Smart Ones in response to this question.

Question 3a:

"What other products or brands, if any, do you believe come from the same company who makes the frozen meal product with the name that I showed you OR do you not have a belief? ***PROBE:*** *Any others?"*

	EXHIBIT SHOWN	
	SMART BALANCE (205)	RIGHT BALANCE (205)
ALL RESPONDENTS	100%	100%
All Who Have a Belief About Related Products/Brands:	18%	13%
Grocery Products	5	1
Smart Balance Products (e.g., milk, butter, eggs, mayo, peanut butter, etc.)	5	1
Lean Cuisine	2	2
Stouffer's/Corner Bistro	2	2
Frozen Meals	2	1
Frozen Food Products	2	--
Healthy Choice	1	1
South Beach Diet	1	*
Weight Watchers	*	2
Smart Choice	*	1
Smart Ones	*	--
Banquet	--	2
Other**	3	4
Don't Have A Belief About Related Products/Brands:	82	87

* 0.5% or fewer mentions.

** Net of single mentions.

NOTE: Table may sum to more than total due to multiple mentions by some respondents.

Relationship Question

31. Finally, one test cell respondent (0.5%) reports the false belief that Smart Balance is related to, associated with, or is licensed by Smart Ones. None of the control cell respondents name Smart Ones in response to this question.

Question 4a:

"What other brand or company, if any, do you believe is related to, associated with, or has a licensing agreement with whoever makes the frozen meal product with the name that I showed you OR do you not have a belief? ***PROBE:*** *Any others?"*

	EXHIBIT SHOWN	
	SMART BALANCE	RIGHT BALANCE
	(205)	(205)
ALL RESPONDENTS	100%	100%
All Who Have a Belief About Related Source:	13%	9%
Weight Watchers	3	1
Lean Cuisine	2	2
Healthy Choice	2	1
Jenny Craig	1	*
Kraft	1	*
Hungry Man	1	*
Special K	1	--
Swanson	*	*
Dannon/Activia	*	*
Smart Ones	*	--
Smart Balance	--	*
Other**	4	4
Don't Have A Belief About Related Source:	87	91

* 0.5% or fewer mentions.

**Net of single mentions.

NOTE: Table may sum to more than total due to multiple mentions by some respondents.

Confusion Summary Table for "Smart Ones"

32. When the results to all survey questions relating to source, related products/brands, and relationship are considered together on an unduplicated basis, just 2% of test cell respondents report the false belief that Smart Ones is the source or a related source when they are exposed to the Smart Balance name in connection with frozen meals. This 2% statistic is below the standard error rate for the survey (±4.1%) such that it is not significant. None of the control cell respondents report the false belief that Smart Ones is the source or a related source when they are exposed to the Right Balance name in connection with frozen meals.

	EXHIBIT SHOWN				
	SMART BALANCE		RIGHT BALANCE		
ALL RESPONDENTS	(205) 100%		(205) 100%		
Total "Smart Ones" Identification (Net):	**2%**		**--%**		
In Source Question	1		--		
In Related Products/Brands, But Not Source Question	*		--		
In Relationship, But Not Source or Related Products/Brands Questions	*		--		
Adjusted Findings					
Adjusted Net of Test – Control	**2%**	-	**0%**	=	**2%**

* 0.5% or fewer mentions.

33. When asked to explain the reasons for their belief, those test cell respondents (n=4) who report the false belief that Smart Ones is the source or a related source of a frozen meal called Smart Balance give the following reasons:

Question 2b/3b/4b:

"What makes you say that?"

ID 00231

Source Qstn:	Smart Ones. Because they make diet food and it has "smart" in the name.

ID 00413

Spontaneous Comments:	It resembles the name Smart Ones.
Source Qstn:	Smart Ones. Because of the similarity of the names.

ID 00083

Related Products Qstn:	Smart Ones. How it was displayed.

ID 00100

Relationship Qstn:	Smart Ones. I saw it at the store. It just had the name Smart Balance on there. They make the best quality dinners for Smart Ones if you want to lose weight. Really good stuff.

"Weight Watchers" Analysis

34. It is my understanding that the Weight Watchers brand is also present on most, if not all, of the Smart Ones products. Given this dispute, it is prudent to consider whether Weight Watchers mentions significantly vary when comparing test cell and control cell results. It is also important to consider whether these Weight Watchers mentions are based in any way on consumer knowledge of the Smart Ones brand.

35. When the results to all survey questions are considered together on an unduplicated basis, just 6% of test cell respondents report the false belief that Weight Watchers is the source or a related source when they are exposed to the Smart Balance name in connection with frozen meals. Similarly, 7% of control cell respondents report the false belief that Weight Watchers is the source or a related source when they are exposed to the Right Balance name in connection with frozen meals. When the control cell result is subtracted from the test cell result, it yields a zero result (6% - 7% = -1%).

	EXHIBIT SHOWN		
	SMART BALANCE	RIGHT BALANCE	
	(205)	(205)	
ALL RESPONDENTS	100%	100%	
Total "Weight Watchers" Identification (Net):	**6%**	**7%**	
In Source Question	3	5	
In Related Products/Brands, But Not Source Question	*	1	
In Relationship, But Not Source or Related Products/Brands Questions	3	1	
Adjusted Findings			
Adjusted Net of Test – Control	**6%** -	**7%** =	**0% (-1%)**

* 0.5% or fewer mentions.

36. Hence, there is no significant difference between the test cell and the control cell for Weight Watchers mentions. Further, the Weight Watchers mentions that occur are not related to the names at issue (i.e., Smart Balance and Smart Ones), but generally reflect the similarity in health and diet-conscious product offerings from Smart Balance and Weight Watchers.[3]

37. In fact, respondents name other frozen meal brands who compete with Weight Watchers in this genre at a similar level that they name Weight Watchers (e.g., Lean Cuisine mentioned by 7% test cell respondents and 10% control cell respondents; Healthy Choice mentioned by 6% test cell respondents and 5% control cell respondents).

[3] Verbatim comments for respondents who identify Weight Watchers are attached to Appendix D of this Report.

V. CONCLUSIONS AND OPINIONS

38. Based on the results of this research, when current or prospective purchasers of frozen meals are exposed to the Smart Balance word mark in connection with frozen meals, there is no significant likelihood of confusion that these consumers will falsely believe this frozen meal comes from or is related to Smart Ones.

39. Moreover, even when considering Weight Watchers mentions, rather than the Smart Ones mark at issue, there is no likelihood of confusion.

40. Overall, it is my opinion that GFA's use of the Smart Balance name in connection with frozen meals causes no likelihood of confusion with Smart Ones frozen meals.

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

Executed on April 26, 2012 at Chicago, Illinois.

Philip Johnson

APPENDIX A

- Philip Johnson Curriculum Vitae
- Recent Cases In Which Philip Johnson Has Testified

LJS
STRATEGIC
RESEARCH
LEO J. SHAPIRO & ASSOCIATES L.L.C.

PHILIP JOHNSON

CURRICULUM VITAE

Philip Johnson is the Chief Executive Officer of Leo J. Shapiro and Associates, a Chicago-based market research and behavioral consulting company. Mr. Johnson has been with this firm since 1971 and has held a number of positions. In recent years, he has concentrated his efforts in the areas of study design and the development of innovative research techniques.

Over the past years, Mr. Johnson has designed and supervised hundreds of surveys measuring consumer behavior and opinion, employing a wide range of research techniques. His area of expertise is in the use of survey research as a tool in litigation, including jury selection and trademark disputes.

Mr. Johnson has offered testimony regarding survey evidence on over fifty occasions in both Federal and State courts. In addition, he has offered survey research in matters before the Federal Trade Commission, The Food and Drug Administration, the Patent and Trademark Office, and the Trademark Trial and Appeal Board. Mr. Johnson has designed, conducted, and reported survey evidence on behalf of both plaintiffs and defendants in various cases. The topics covered in these litigation related surveys include matters related to likelihood of confusion, secondary meaning, genericness, dilution, false advertising, change of venue, and unfair competition.

Part of Mr. Johnson's training has been through working with Dr. Leo J. Shapiro, the Founder of the company; the late Dr. Philip M. Hauser, a former Director of the U. S. Census Bureau; and the late

Dr. Hans Zeisel, who made significant contributions in the application of social science to the solution of legal questions.

Mr. Johnson has given lectures before the American Bar Association (ABA) and the Practising Law Institute (PLI) on the use of survey research in litigation. He is a member of the American Marketing Association (AMA), the American Association for Public Opinion Research (AAPOR), and the International Trademark Association (INTA).

Mr. Johnson has a B.S. degree in Psychology from Loyola University and an M.B.A. degree from the University of Chicago.

RECENT CASES IN WHICH PHILIP JOHNSON HAS TESTIFIED OR OFFERED SURVEY EVIDENCE AT TRIAL...

NOVEMBER 2009	FAIR ISAAC CORPORATION v. EQUIFAX, INC., ET AL. United States District Court for the District of Minnesota Secondary Meaning
JULY 2009	THE SCOTTS COMPANY LLC v. CENTRAL GARDEN & PET COMPANY AND GULFSTREAM HOME & GARDEN, INC., United States District Court for the Southern District of Ohio False Advertising
JULY 2009	LUMBER LIQUIDATORS, INC., v. STONE MOUNTAIN CARPET MILLS, INC. d/b/a THE FLOOR TRADER United States District Court for the Eastern District of Virginia Likelihood of Confusion
NOVEMBER 2008	BRIGHTON COLLECTIBLES, INC. v. COLDWATER CREEK, INC. United States District Court for the Southern District of California Secondary Meaning
OCTOBER 2008	EL DIABLO, INC. v. MEL-OPP & GRIFF, LLC., ET AL. In the Superior Court of the State of Washington in and for the County of King Trade Dress Infringement
AUGUST 2008	EXPERIENCE HENDRIX, LLC. AND AUTHENTIC HENDRIX, LLC., v. ELECTRIC HENDRIX, LLC., ET AL. United States District Court for the Western District of Washington at Seattle Likelihood of Confusion
JANUARY 2008	PEDINOL PHARMACAL, INC. v. RISING PHARMACEUTICALS, INC. United States District Court for the Eastern District of New York Therapeutic Equivalence

NOVEMBER 2007	SKECHERS U.S.A., INC. v. VANS, INC. United States District Court for the Central District of California Likelihood of Post-Sale Confusion
AUGUST 2007	SAINT-GOBAIN CORPORATION v. 3M COMPANY United States Patent and Trademark Office Trademark Trial and Appeal Board Secondary Meaning
APRIL 2007	NIKE, INC. v. NIKEPAL INTERNATIONAL, INC. United States District Court for the Eastern District of California Likelihood of Initial Interest Confusion and Dilution
FEBRUARY 2007	JOHNSON & JOHNSON VISION CARE, INC. v. CIBA VISION CORPORATION United States District Court for the Southern District of New York False Advertising
NOVEMBER 2006	HASBRO, INC. v. MGA ENTERTAINMENT, INC. United States District Court for the District of Rhode Island Secondary Meaning
OCTOBER 2006	CLASSIC FOODS INTERNATIONAL CORPORATION v. KETTLE FOODS, INC. United States District Court for the Central District of California (Southern Division) Likelihood of Confusion
JUNE 2006	GROCERY OUTLET INC. v. ALBERTSON'S, INC., AMERICAN STORES COMPANY, L.L.C., AND LUCKY STORES, INC. United States District Court for the Northern District of California (San Francisco Division) Likelihood of Confusion and Fame
JUNE 2006	DE BEERS LV TRADEMARK LTD. AND DE BEERS LV LTD. v. DEBEERS DIAMOND SYNDICATE INC. AND MARVIN ROSENBLATT United States District Court for the Southern District of New York Awareness
APRIL 2006	24 HOUR FITNESS USA, INC. v. 24/7 TRIBECA FITNESS, L.L.C., 24/7 GYM, L.L.C., ET AL. United States District Court for the Southern District of New York Likelihood of Confusion

APRIL 2006	JUICY COUTURE, INC. AND L.C. LICENSING, INC. v. LANCÔME PARFUMS ET BEAUTE & CIE AND LUXURY PRODUCTS, L.L.C. United States District Court for the Southern District of New York Likelihood of Confusion
JANUARY 2006	WHIRLPOOL PROPERTIES, INC., ET AL., v. LG ELECTRONICS U.S.A., INC., ET AL. United States District Court for the Western District of Michigan (Southern Division) Likelihood of Confusion
OCTOBER 2005	PRL USA HOLDINGS, INC. v. UNITED STATES POLO ASSOCIATION, ET AL. United States District Court for the Southern District of New York Likelihood of Confusion
SEPTEMBER 2005	HILL'S PET NUTRITION, INC. v. NUTRO PRODUCTS, INC. AND JOHN DOES #1-20 United States District Court for the Central District of California (Western Division) False Advertising
SEPTEMBER 2005	PERFUMEBAY.COM, INC. v. EBAY, INC. United States District Court for the Central District of California (Western Division) Likelihood of Dilution and Initial Interest Confusion
JUNE 2005	METROPOLITAN LIFE INSURANCE CORPORATION v. METBANK United States District Court for the Southern District of New York Likelihood of Confusion
MARCH 2005	PACIFIC MARKET INTERNATIONAL v. THERMOS L.L.C. United States District Court for the Western District of Washington (Seattle Division) Likelihood of Confusion
MARCH 2005	JADA TOYS, INC. v. MATTEL, INC. United States District Court for the Central District of California Likelihood of Confusion

DEPOSITION TESTIMONY OF PHILIP JOHNSON
THAT HAS NOT BEEN OFFERED AT TRIAL...

NOVEMBER 2011	SHEETZ OF DELAWARE, INC. v. DOCTOR'S ASSOCIATES, INC. United States Patent and Trademark Office Before the Trademark Trial and Appeal Board
AUGUST 2011	MCDONALD'S CORPORATION v. MCSWEET, LLC United States Patent and Trademark Office Before the Trademark Trial and Appeal Board
APRIL 2011	SHEETZ OF DELAWARE, INC. v. DOCTOR'S ASSOCIATES, INC. United States Patent and Trademark Office Before the Trademark Trial and Appeal Board
JANUARY 2011	TECHNOLOGY PATENTS LLC v. DEUTSCHE TELEKOM AG, ET AL United States District Court for the District of Maryland
DECEMBER 2010	BLAIN SUPPLY, INC. v. RUNNING SUPPLY, INC. United States District Court for the Western District of Wisconsin
DECEMBER 2010	LUCENT TECHNOLOGIES, INC. v. MICROSOFT CORPORATION United States District Court for the Southern District of California
JULY 2010	ROSETTA STONE LTD. v. TOPICS ENTERTAINMENT, INC. United States District Court for the Eastern District of Virginia
APRIL 2010	LA QUINTA WORLDWIDE, LLC v. QUINTA REAL PROMOCION, S.A. de C.V. United States District Court for the District of Arizona (Tucson Division)
MARCH 2010	THE NORTH FACE APPAREL CORPORATION v. THE SOUTH BUTT, LLC United States District Court for the Eastern District of Missouri (St. Louis)

MARCH 2010	THINK VILLAGE-KIWI, LLC v. ADOBE SYSTEMS, INC., AND ADOBE MACROMEDIA SOFTWARE LLC United States District Court for the Northern District of California
SEPTEMBER 2009	FLOWERS BAKERIES BRANDS, INC. v. INTERSTATE BAKERIES CORPORATION United States District Court for the Northern District of Georgia
FEBRUARY 2009	CRICKET COMMUNICATIONS, INC. v. HIPCRICKET, INC. United States District Court for the Western District of Washington
APRIL 2008	SEXY HAIR CONCEPTS, LLC v. VICTORIA'S SECRET STORES BRAND MANAGEMENT, INC. United States District Court for the Southern District of New York
APRIL 2007	IDT TELECOM, INC. AND UNION TELECARD ALLIANCE, LLC v. CVT PREPAID SOLUTIONS, INC., ET AL. United States District Court for the District of New Jersey
NOVEMBER 2006	STATIC CONTROL COMPONENTS, INC. AND WAZANA BROTHERS INTERNATIONAL, INC. D/B/A MICRO SOLUTIONS ENTERPRISES v. LEXMARK INTERNATIONAL, INC. United States District Court for the District of Columbia

APPENDIX B

- Questionnaire
- Interviewing Instructions
- Exhibits

QUESTIONNAIRE

Hello, my name is _____. I work for Survey Center, and we are doing an opinion study. Let me assure you that we are not selling anything. This is strictly for research purposes only.

SCREEN:

I. Before we begin, what is your age? **RECORD AGE:** _____

( )UNDER 18 YEARS…**TALLY AND TERMINATE.**

( )BETWEEN 18 AND 34 YEARS…**CHECK SCREENING QUOTAS AND CONTINUE.**

( )BETWEEN 35 AND 54 YEARS…**CHECK SCREENING QUOTAS AND CONTINUE.**

( )55 YEARS AND OLDER…**CHECK SCREENING QUOTAS AND CONTINUE.**

( )REFUSED…**TALLY AND TERMINATE.**

II. **RECORD GENDER FROM OBSERVATION:**

( )MALE…**CHECK SCREENING QUOTAS AND CONTINUE.**

( )FEMALE…**CHECK SCREENING QUOTAS AND CONTINUE.**

III. What proportion of the grocery shopping are you personally responsible for in your household? **READ FIRST THREE ALTERNATIVES:**

( )ALL OF IT…**CONTINUE.**

( )SOME OF IT…**CONTINUE.**

( )NONE…**TALLY AND TERMINATE.**

IF SPONTANEOUS: ( )DON'T KNOW…**TALLY AND TERMINATE.**

RESPONDENT MUST BE PERSONALLY RESPONSIBLE FOR "ALL" OR "SOME" OF THE GROCERY SHOPPING IN THEIR HOUSEHOLD IN ORDER TO QUALIFY FOR INTERVIEW; OTHERWISE, TALLY AND TERMINATE.

IVa. Thinking about the past month, have you personally purchased…**(ASK FOR EACH BELOW)** from a supermarket or grocery store for yourself or your household?

b. Thinking about the next month, do you personally plan to purchase…**(ASK FOR EACH BELOW)** from a supermarket or grocery store for yourself or your household?

	IVa. Past Month Purchase?		IVb. Next Month Purchase?	
…ice cream?	( )NO	( )YES	( )NO	( )YES
…frozen meals?	**( )NO**	**( )YES**	**( )NO**	**( )YES**
…frozen juice?	( )NO	( )YES	( )NO	( )YES

IF RESPONDENT SAYS "NO" TO PURCHASING FROZEN MEALS IN Q.IVa AND Q.IVb, TALLY AND TERMINATE. IN ORDER TO QUALIFY FOR INTERVIEW, RESPONDENT MUST HAVE EITHER PERSONALLY PURCHASED FROZEN MEALS IN THE PAST MONTH OR MUST PLAN TO PERSONALLY PURCHASE FROZEN MEALS IN THE NEXT MONTH.

V. Have you participated in any market research survey in the past three months?

( )NO…**IF NO, CONTINUE.** ( )YES…**IF YES, TALLY AND TERMINATE.**

VI. Do you, or does any member of your household, work for…(ASK FOR EACH)?

…a market research or advertising firm?	( )NO	( )YES…**IF YES, TALLY AND TERMINATE.**
…a manufacturer, distributor or retailer of frozen food?	( )NO	( )YES…**IF YES, TALLY AND TERMINATE.**
…a store in this mall?	( )NO	( )YES…**IF YES, TALLY AND TERMINATE.**

VIIa. Before we continue, do you usually wear eyeglasses or contact lenses when you shop or read?

( )NO…**IF NO, SKIP TO Q.VIII.** ( )YES…**IF YES, CONTINUE WITH Q.VIIb.**

b. **IF "YES" IN Q.VIIa, ASK:** Before continuing, would you please put them on?

( )NO…**IF NO, TALLY AND TERMINATE.** ( )YES…**IF YES, CONTINUE WITH Q.VIII.**

VIII. I would like to ask you a few questions in our interviewing facility. The whole process will take about five minutes of your time. Would you be willing to help us out? ( )NO…**IF NO, TALLY AND TERMINATE.** ( )YES…**IF YES, CONTINUE.**

QUESTIONNAIRE:

ESCORT RESPONDENT TO INTERVIEWING FACILITY.

SAY: Before we begin, I would like you to know that your answers and identity will be kept strictly confidential. If you don't know the answer to any of the questions, it is okay to say so. Please do not guess.

ROTATE WHICH EXHIBIT CARD IS SHOWN IN BETWEEN RESPONDENTS.

"X" HERE WHICH EXHIBIT CARD IS SHOWN: ( )MM ( )TT

1. **HAND RESPONDENT EXHIBIT CARD. SAY:** This is the name of a frozen meal product that you might see in the frozen food section of a grocery store. Feel free to comment, if you wish, on anything about this. **RECORD ANY SPONTANEOUS COMMENTS MADE.**

_____

_____

_____

( )NO SPONTANEOUS COMMENTS

WHEN RESPONDENT IS DONE LOOKING AT EXHIBIT CARD, TAKE BACK EXHIBIT CARD, AND PUT IT OUT OF SIGHT FOR THE REMAINDER OF THE INTERVIEW.

2a. Based on what you just saw, who or what company do you believe makes the frozen meal product with the name that I showed you OR do you not have a belief?

( )DON'T HAVE A BELIEF...**SKIP TO Q.3a.**

_____

_____

_____

b. What makes you say that <INSERT RESPONSE GIVEN IN Q.2a> makes the frozen meal product with the name that I showed you? **PROBE:** Anything else?

_____

_____

_____

3a. What other products or brands, if any, do you believe come from the same company who makes the frozen meal product with the name that I showed you OR do you not have a belief? **PROBE:** Any others?

( )DON'T HAVE A BELIEF...**SKIP TO Q.4a.**

b. **ASK FOR EACH PRODUCT OR BRAND GIVEN IN Q.3a:** What makes you say that <INSERT RESPONSE GIVEN IN Q.3a> comes from whoever makes the frozen meal product with the name that I showed you? **PROBE:** Anything else?

a. What Product or Brand?	b. What Makes You Say That?
_____	_____
	_____
	_____
_____	_____
	_____
	_____
_____	_____
	_____
	_____

4a. What other brand or company, if any, do you believe is related to, associated with, or has a licensing agreement with whoever makes the frozen meal product with the name that I showed you OR do you not have a belief? **PROBE:** Any others?

( )DON'T HAVE A BELIEF...**SKIP TO "CLASSIFICATION PAGE."**

b. **ASK FOR EACH BRAND OR COMPANY GIVEN IN Q.4a:** What makes you say that <INSERT RESPONSE GIVEN IN Q.4a> is related to, associated with, or has a licensing agreement with whoever makes the frozen meal product with the name that I showed you? **PROBE:** Anything else?

a. What Brand or Company?	b. What Makes You Say That?

CLASSIFICATION PAGE

In order to be counted as a complete survey, I need to have a phone number where you can be reached if a verifier calls to confirm that you participated in the study. May I please have a phone number where you can be reached? This verification call would take less than a minute of your time.

Is this your ( )HOME ( )BUSINESS or ( )CELL phone? Thank you.

NAME:_____ PHONE:_____

ADDRESS:_____ CITY/STATE:_____

ZIP CODE:_____ INTERVIEWER:_____ DATE:_____

FIELD SERVICE:_____ MALL:_____

INTERVIEWER CERTIFICATION

This certifies I have personally conducted this interview with the above named respondent to the best of my ability and in compliance with the interviewing instructions. I have recorded, as fully as possible, the respondent's complete answers to the above questions.

SIGNATURE OF INTERVIEWER:_____

PRINTED NAME OF INTERVIEWER:_____

INTERVIEWING INSTRUCTIONS

Survey Center

Marketing Research

FROZEN FOOD STUDY

INTERVIEWING INSTRUCTIONS

March 2012

Each interviewer working on this job must be briefed by a supervisor. The briefing must consist of having these instructions read in their entirety. The supervisor must then witness each interviewer conducting a practice run-through on the questionnaire.

MATERIALS:

- 104 Hard Copy Screeners
- Terminate Tally Sheet
- Exhibit Cards:
  - Exhibit Card MM
  - Exhibit Card TT

SCREENING CRITERIA

- Respondent must be 18 years of age and older.
- Respondent must be personally responsible for "all" or "some" of the grocery shopping in their household.
- Respondent must have either personally purchased frozen meals in the past month or must plan to personally purchase frozen meals in the next month.
- Respondent must not have participated in any market research survey in the past three months.
- Respondent, or any member of his/her household, must not work for a market research or advertising firm; a manufacturer, distributor or retailer of frozen food; or a store in the mall.
- Respondent must be wearing his/her eyeglasses or contact lenses if he/she usually wears them while shopping or reading.

QUOTA

- Your quota is **52** completed interviews divided evenly by exhibit card as shown below.

	Total 52
Exhibit MM	26
Exhibit TT	26

- Each respondent sees only one Exhibit Card during the interview: either Exhibit Card MM or Exhibit Card TT. The other exhibit card not being shown must be out of respondent's sight during the interview. The exhibit card shown is rotated between respondents.
- There are no hard age/gender quotas in this study. You must screen respondents according to the screening quotas shown below.
- If you have not reached your quota of 52 completed interviews after 104 screened respondents, continue screening by age group and gender in the proportion shown below.
- Your **screening quota** DIVIDES BY Age Group and Gender as follows:

	SCREENING NUMBERS
18-34 Male	15
18-34 Female	15
35-54 Male	20
35-54 Female	20
55+ Male	17
55+ Female	17
TOTAL	**104**

- No interviewer should complete more than 8 completed interviews using Exhibit Card MM or 8 completed interviews using Exhibit Card TT.

GENERAL INTERVIEWING INSTRUCTIONS

- Respondents may be screened on the mall floor, but must be interviewed in a private room in the interviewing facility.

- Interviewer must use the Nth systematic sampling process to determine which respondent to approach. Interviewer should count the number of people that walks past him/her within a 30-second time frame. Take the number of people and divide by two; this quotient will be your N^{th} select record. Interviewer must approach and screen every N^{th} visitor.

- Upon reaching the screening site, screen each person, regardless of race, dress, appearance, or any other consideration, who appears to meet the quota requirements. Once a qualified respondent has been interviewed, repeat the screening process described above to locate the next qualified respondent.

- Interview only one respondent in a group.

- Interview only one respondent at a time.

- No respondent may be present while another respondent is being interviewed.

- Do not interview respondents who do not understand English.

- Do not interview respondents who have difficulty hearing.

- Do not interview anyone who you know personally.

- There is no smoking, eating, or gum chewing allowed while interviewing.

- Follow all instructions on the questionnaire.

- Read all questions and record all responses verbatim. No paraphrasing is allowed. Be sure to record every word of a response exactly the way it is spoken.

- Probe and clarify where indicated for a complete response.

- If a respondent does not hear or understand a question, simply repeat it.

- Complete the questionnaire on a computer using the website link we have provided.

- Each interviewer's work will be independently validated. Attempt to secure a name and phone number from every respondent.

- Interviewer must type his/her full name in the space indicated for the interviewer certification. No interviews will be accepted that are not certified.

- Ask the respondent to put on eyeglasses if he/she usually wears them while shopping or reading. If he/she wears eyeglasses or contact lenses when shopping or reading but doesn't have them with him/her at the time of the interview or refuses to put them on, the interview must be terminated.

SPECIFIC INTERVIEWING INSTRUCTIONS

- Escort respondent to interviewing facility. Ask respondent to put on his/her eyeglasses or contact lenses if he/she normally wears them while shopping or reading.

- Each respondent sees only one exhibit card during the course of the interview: either Exhibit Card MM or Exhibit Card TT. The other exhibit card not being shown must be out of respondent's sight during the interview.

- Rotate which exhibit card is shown between respondents and record in survey.

- In Question 1, hand respondent the exhibit card and allow him/her to look at it for as long as he/she would like. Record any spontaneous comments the respondent makes. When respondent is done looking at exhibit card, take back exhibit card, and put it out of sight for the remainder of the interview. Respondent should not refer to exhibit card when answering subsequent questions.

- Ask Question 2a of all respondents.

- If respondent says "Don't Have A Belief" in response to Question 2a, then skip to Question 3a.

- If respondent names a company in response to Question 2a, continue with Question 2b. Probe and clarify for a complete response.

- Ask Question 3a of all respondents.

- If respondent says "Don't Have A Belief" in response to Question 3a, then skip to Question 4a.

- If respondent names a product or brand in response to Question 3a, continue with Question 3b. Probe and clarify for a complete response.

- Ask Question 3b for each product or brand respondent gives in Question 3a.

- Ask Question 4a of all respondents.

- If respondent says "Don't Have A Belief" in response to Question 4a, then skip to "Classification Page."

- If respondent names a brand or company in response to Question 4a, continue with Question 4b. Probe and clarify for a complete response.

- Ask Question 4b for each brand or company respondent gives in Question 4a.

- Secure classification information and thank respondent for participating.

EXHIBITS

SMART BALANCE

RIGHT BALANCE

APPENDIX C

- Validation Summary

LJS STRATEGIC RESEARCH

LEO J. SHAPIRO & ASSOCIATES LLC

Frozen Foods Study
Validation Summary

Total # of Respondents:	414
Attempted/Reached:	227
Valid:	223
Invalid:	4
Attempted/Not Reached:	187

The Bates ID Numbers for the invalid respondents are as follows: #23, #42, #333, and #311.

APPENDIX D

- Verbatim from Respondents Who Identify Weight Watchers

Verbatim From Respondents
Who Identify Weight Watchers

Total "Weight Watchers" Identification in Test Cell	**n = 13**	**6%**
- In Source Question	n = 6	3%
- In Related Products/Brands, But Not Source Question	n = 1	*
- In Relationship, But Not Source or Related Products/Brands Questions	n = 6	3%

Total "Weight Watchers" Identification in Control Cell	**n = 14**	**7%**
- In Source Question	n = 10	5%
- In Related Products/Brands, But Not Source Question	n = 2	1%
- In Relationship, But Not Source or Related Products/Brands Questions	n = 2	1%

* 0.5% or fewer mentions.

Total "Weight Watchers" Identification in Test Cell

- Source Question
- Related Products Question
- Relationship Question

Source Question

ID 00015

Q2a.	Weight Watchers
Q2b.	Because it just seems like what their logo would be. It just sounds healthy.

ID 00122

Q2a.	Weight Watchers
Q2b.	Because it makes me think of weight loss and a smarter way of eating.

ID 00170

Q2a.	Weight Watchers
Q2b.	It looks like something they would make.

ID 00193

Q2a.	Weight Watchers
Q2b.	Sounds like a Weight Watchers product.

ID 00331

Q2a.	Weight Watchers
Q2b.	Looks like their packaging.

ID 00346

Q2a.	Weight Watchers
Q2b.	Because the words "smart" and "balance" make you think of healthy foods.
Q4a1.	Weight Watchers
Q4b1.	Because they are very predominant within the smart and healthy diet plans.

Related Products Question

ID 00324

Q3a1.	South Beach Diet
Q3b1.	They are also focused on healthy options.
Q3a2.	Weight Watchers
Q3b2.	They too are focused on healthy alternatives.

Relationship Question

ID 00016

Q4a1.	Kashi
Q4b1.	They typically deal with stuff involving health foods.
Q4a2.	Weight Watchers
Q4b2.	It sounded like they would be involved with health as well.

ID 00087

Q4a1.	Weight Watchers
Q4b1.	They are similar brands.

ID 00174

Q4a1.	Weight Watchers
Q4b1.	Because it said "balance."
Q4a2.	Swanson
Q4b2.	Don't Know/Not Answering

ID 00185

Q4a1.	Weight Watchers
Q4b1.	Because both products are related to diet and exercise.

ID 00268

Q4a1.	Jenny Craig
Q4b1.	Just because of the "smart" and the "balance" and this program tends to have the nutrition and balance that you need.
Q4a2.	Weight Watchers
Q4b2.	Because they really seem to be about "smart" and "balanced" choices with their approach to a person's eating.

ID 00412

Q4a1.	Weight Watchers
Q4b1.	Because Smart Balance is nutritional and Weight Watchers is in that same line.

Total "Weight Watchers" Identification in Control Cell

- Source Question
- Related Products Question
- Relationship Question

Source Question

ID 00075

Q2a.	Weight Watchers
Q2b.	The names are similar and I know they have other products that are healthy.

ID 00094

Q2a.	Weight Watchers
Q2b.	The name implies balanced nutrition.

ID 00139

Q2a.	Weight Watchers
Q2b.	I've seen them with a name like that. Also I associate it with healthy eating.

ID 00167

Q2a.	Weight Watchers
Q2b.	Because the emphasis is on a balanced menu.

ID 00205

Q2a.	Weight Watchers
Q2b.	I thought that they made a calorie system where you have certain points for the day reminding you of the calories you take in.

ID 00208

Q2a.	Weight Watchers
Q2b.	Because they are concerned about weight and nutrition. It sounds like it has the right calories and nutrition needed.
Q3a1.	Weight Watchers
Q3b1.	Because they are concerned about nutrition and would try to get the proper balance of proteins and nutrients.

ID 00308

Q2a.	Weight Watchers
Q2b.	Because it is saying Right Balance so it has to do with balancing your meals.

ID 00310

Q2a.	Weight Watchers
Q2b.	Because it sounds like something they make.

ID 00318

Q2a.	Weight Watchers
Q2b.	It sounds like something they would make.

ID 00367

Q2a.	Weight Watchers
Q2b.	Because they want you to eat healthy.

Related Products Question

ID 0095

Q3a1.	Weight Watchers
Q3b1.	Looks like healthy food.

ID 00381

Q3a1.	Lean Cuisine
Q3b1.	They are all associated with healthy foods.
Q3a2.	Weight Watchers
Q3b2.	They make healthy products.

Relationship Question

ID 00103

Q4a1.	Weight Watchers
Q4b1.	I know Weight Watchers is in the frozen food section.

ID 00376

Q4a1.	Weight Watchers
Q4b1.	It just sounds like something that is related to Weight Watchers.