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

Proceeding	91194974
Party	Plaintiff Promark Brands Inc. and H.J. Heinz Company
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Date	04/05/2013
Attachments	Opposers' Notice of Filing of Certified Dep. Transcript and Exhibits-Sabol.pdf (3 pages)(101197 bytes) Sabol Non-Confidential - Corrected - Full.pdf (99 pages)(3549348 bytes) Sabol Exhibit 1.PDF (18 pages)(507041 bytes) Sabol Exhibit 2.pdf (15 pages)(1039828 bytes) Sabol Exhibit 4.pdf (52 pages)(1923225 bytes) Sabol Exhibit 5.pdf (4 pages)(176928 bytes)

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

PROMARK BRANDS INC. and
H. J. HEINZ COMPANY,

Opposers,

vs.

GFA BRANDS, INC.,

Applicant.

**Opposition No. 91194974 (Parent)
and Opposition No. 91196358**

U.S. Trademark Application 77/864,305
For the Mark **SMART BALANCE**

U.S. Trademark Application 77/864,268
For the Mark **SMART BALANCE**

**OPPOSERS' NOTICE OF FILING OF
CERTIFIED DEPOSITION TRANSCRIPT AND EXHIBITS**

Pursuant to Rule 2.125(c) of the Trademark Rules of Practice and Section 703.01(k) of the Trademark Trial and Appeal Board Manual of Procedure (the "TBMP"), Opposers, ProMark Brands Inc. and H. J. Heinz Company, hereby file with the Board, and notify Applicant of the filing of, the corrected certified transcript and accompanying exhibits from the March 12, 2013, testimony deposition of Barry A. Sabol, Ph.D.

Pursuant to Section 703.01(n) of the TBMP, the transcript has been corrected by writing each correction above the original text that it corrects, each of which has been initialed by Dr. Sabol. (An Errata Sheet listing the corrections has also been included at the end of the transcript.)

Per the stipulated protective order filed on June 30, 2011, and approved by the Board on July 26, 2011, and pursuant to Rules 2.125(e) and 2.126(c) of the Trademark Rules of Practice

and Section 703.01(p) of the TBMP, Pages 49-66 and Opposers' Exhibit 3 Sabol have been designated as "Confidential – Attorney's Eyes Only" and are being filed with the Board under seal, under separate cover.

Dated this 5th day of April, 2013.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was sent by UPS, postage prepaid,
on this 5th day of April, 2013, to Counsel for Applicant:

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

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PROMARK BRANDS, INC. and H.J. HEINZ COMPANY,  
Opposers,

vs. Opposition No. 91194974

GFA BRANDS, INC.,  
Applicant.

~~~~~

Deposition of
BARRY A. SABOL, PH.D.

THE FOLLOWING PAGES 49-66 HAVE BEEN DEEMED
CONFIDENTIAL & FOR ATTORNEYS' EYES ONLY

March 12th, 2013

9:09 a.m.

Taken at:

Jones Day

901 Lakeside Avenue, North Point Tower

Cleveland, Ohio

Kelly A. Hill, Notary Public

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NUMBER	DESCRIPTION	MARKED
Exhibit 1	Report Authored Barry Sabol, Ph.D.	10
Exhibit 2	Document Titled Critique of Likelihood of Brand Confusion between Smart Ones and Smart Balance Resulting from the Introduction of Smart Balance Frozen Meals	33
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1 BARRY A. SABOL, PH.D., of lawful age,
2 called for examination, as provided by the
3 Federal Rules of Civil Procedure, being by me
4 first duly sworn, as hereinafter certified,
5 deposed and said as follows:

6 EXAMINATION OF BARRY A. SABOL, PH.D.
7 BY MR. MEACHAM:

8 Q. Dr. Sabol, can you please state
9 your name for the record?

10 A. Barry Allan ^{Sabol} Sable.

11 Q. My name is Kevin Meacham and I
12 represent Heinz in this matter. I'll be asking
13 you a few questions today regarding the expert
14 report that you submitted.

15 A. Okay.

16 Q. Have you testified under oath
17 before?

18 A. Yes.

19 Q. So you realize you're under oath
20 and you have to tell the truth?

21 A. Yes.

22 Q. Can you please briefly describe
23 your education?

24 A. I have a bachelor's degree in
25 psychology from Thiel College in Greenville,

1 Pennsylvania, 1974. I got a master's degree
2 from Case Western Reserve University in 1976
3 and a Ph.D. also from Case Western Reserve
4 University in 1979.

5 Q. And now your master's degree, was
6 that in psychology as well?

7 A. Yes. All three were psychology.

8 Q. And so your Ph.D. was in psychology
9 as well?

10 A. Yes.

11 Q. And generally what types of classes
12 did you take when you -- in your graduate
13 program?

14 A. Well, my -- actually, my major
15 field of study was research, design and
16 quantitative analysis for my Ph.D.

17 Q. And after receiving your Ph.D.,
18 what did you do next?

19 A. Well, actually, while I was still
20 completing my doctoral studies, I started
21 working for an advertising agency here in
22 Cleveland, which was the largest agency at the
23 time, Fox & Associates, in 1978.

24 They asked me to come and start a
25 market research department at the ad agency,

1 which I did, from 78 to 82.

2 And in 1982 I left and started
3 Strategic Consumer Research, and I've been
4 doing that for the last 31 years.

5 Q. Okay. And your time at Fox &
6 Associates, what did you do as the director of
7 the market research department?

8 A. Primarily we did advertising
9 effectiveness research. We did customer
10 behavior studies, customer satisfaction
11 studies.

12 Those were the primary things that
13 -- you know, it's different when you're in an
14 ad agency. They -- you know, they do
15 advertising. So they always want to show the
16 client that the advertising is effective, and
17 that's what most of the studies were about.

18 Q. Were you involved in designing
19 studies?

20 A. Oh, yes.

21 Q. And were you involved in reviewing
22 studies?

23 A. Yes.

24 Q. What types of studies?

25 A. Advertising effectiveness

1 studies -- I mean, you want to know -- for
2 example, in a pre, post advertising
3 effectiveness study, you ask people a series of
4 questions prior to the advertising starting,
5 you ask them the same series of questions after
6 the advertising -- the first wave of the
7 advertising concludes, and you draw conclusions
8 whether your advertising had any effect on
9 anybody's opinions or behavior.

10 Q. And after you left Fox &
11 Associates, what did you do at Strategic
12 Consumer Research?

13 A. Well, I started the company from
14 scratch. In the 70s was kind of the infancy of
15 market research, and I had the background from
16 the ad agency and I left to start my own
17 company.

18 All of the clients that the ad
19 agency had were my first clients. And in 31
20 years we have never advertised. We have never
21 solicited a client. All of our clients have
22 come for the last 31 years by referral.

23 Q. And what does -- what would you say
24 Strategic Consumer Research's main business
25 purpose is?

1 A. We do full -- we're a full service
2 market research company. We do advertising
3 studies, brand awareness and equity studies,
4 customer satisfaction studies, loyalty studies.
5 We really run the whole gamut of types of work.

6 Every study is custom designed
7 specifically for the client. We don't have a
8 canned study or a canned methodology.
9 Everything is custom designed.

10 Q. And have you -- in your history
11 with -- or in your tenure with Strategic
12 Consumer Research, have you designed brand
13 awareness studies?

14 A. Yes.

15 Q. Have you designed -- have you
16 designed many brand awareness studies?

17 A. Very many.

18 Q. And have you interpreted many brand
19 awareness studies?

20 A. Yes.

21 Q. Have you -- in your career with
22 Strategic Consumer Research, have you designed
23 likelihood of confusion studies?

24 A. Yes.

25 Q. And have you interpreted likelihood

1 of confusion studies?

2 A. Yes.

3 Q. And would you say that the -- do
4 you primarily design studies for business
5 purposes or litigation purposes?

6 A. Business purposes by far.

7 Q. Okay. About approximately how much
8 of your business is actually for businesses as
9 opposed to litigation?

10 A. Business -- the business portion
11 would be probably at least 95 percent.

12 Q. Okay.

13 A. Five percent would be for
14 litigation over the years.

15 MR. MEACHAM: Can I have this
16 marked as Exhibit 1?

17 - - - - -

18 (Thereupon, Deposition Exhibit 1,
19 Report Authored Barry Sabol, Ph.D.,
20 was marked for purposes of
21 identification.)

22 - - - - -

23 Q. Dr. Sabol, I'm handing you the
24 document entitled Likelihood of Brand Confusion
25 Between Smart Ones and Smart Balance Resulting

1 from the Introduction of Smart Balance Frozen
2 Meals.

3 Do you recognize this document?

4 A. Yes, I do.

5 Q. What is it?

6 A. This is a report that summarizes
7 the results of a study that we conducted on
8 behalf of Heinz.

9 Q. So Exhibit 1 is a study you
10 authored?

11 A. Yes.

12 Q. Can you take a second and page
13 through the document, please?

14 A. Okay.

15 Q. Would you say that Exhibit 1 is a
16 complete and accurate copy of the report you
17 prepared in this case?

18 A. Yes.

19 Q. Okay. And have you ever provided
20 an expert report for Heinz before?

21 A. No.

22 Q. What were you asked to do for
23 Heinz?

24 A. To determine -- well, really two
25 things. The first one was to determine the

1 level of aided awareness of the Smart Ones
2 brand in relation to specific competitors.

3 And the second portion of the study
4 was designed to determined what level of
5 confusion, if any, or potential confusion, if
6 any, might result from the introduction of
7 Smart Balance frozen meals to the freezer cases
8 of supermarkets.

9 Q. Were you asked to produce certain
10 results?

11 A. No.

12 Q. And if your study had determined
13 that there was no likelihood of confusion?

14 A. That's what would have been
15 reported.

16 Q. Now, based on your study, were you
17 able to reach any conclusions to a reasonable
18 degree of professional certainty in the field
19 of marketing and advertising?

20 A. Yes.

21 Q. And what were those conclusions?

22 A. There were two primary conclusions.
23 The first one was that Smart Ones is an
24 extremely well-known brand. I guess in legal
25 terms that would qualify as a famous brand.

1 And the second conclusion we were
2 able to draw from the study is that there was a
3 significant likelihood of potential for
4 confusion if Smart Balance frozen meals were
5 introduced into the same freezer cases as Smart
6 Ones frozen meals.

7 Q. Now, I'll get back to those
8 conclusions in a minute, but I'd like to talk
9 through some of the background of the report.

10 How much time did you spend
11 preparing your report in the case?

12 A. Preparing the actual report was
13 only a day, but conducting the entire study was
14 about three weeks.

15 Q. And how much were you paid to
16 prepare the report?

17 A. \$15,000 was the cost of the study.

18 Q. Okay. Is that typical for a
19 likelihood of confusion survey?

20 MR. CROSS: Objection. Foundation.
21 Form.

22 Q. You can answer.

23 A. Oh, I can answer? Okay. It's hard
24 to say. It varies by the sample size that's
25 chosen.

1 There are a lot of factors that go
2 into it.

3 Q. And you've conducted likelihood of
4 confusion surveys in the past?

5 A. Yes.

6 Q. Is that a typical cost for a
7 likelihood of confusion survey that you've
8 prepared?

9 A. It's probably a little less
10 expensive than some.

11 Q. How much are you being paid for
12 your testimony today?

13 A. I'm not being paid anything for my
14 testimony.

15 Q. Okay. What do you know about the
16 Smart Ones brand?

17 A. The only thing I really know about
18 the Smart Ones brand is that it is a brand of
19 frozen meals that are sold in supermarkets in
20 the freezer section.

21 Q. Okay. And do you know what segment
22 of the consumer population that Smart Ones
23 targets?

24 A. I think they target anybody who
25 wants to -- you know, who is a purchaser of

1 frozen meals. I mean, I think they're also low
2 calorie -- or lower calorie frozen meals.

3 Q. And do you know where Smart Ones is
4 sold in the supermarket?

5 A. In the refrigerated -- or frozen
6 food cases.

7 Q. To your -- to the best of your
8 understanding, is it sold next to other frozen
9 food meals?

10 A. Yes.

11 Q. Do you have any knowledge regarding
12 the Smart Balance brand?

13 A. No.

14 Q. Do you have any idea as to what
15 segment of the consumer population that Smart
16 Balance will target?

17 A. In terms of frozen meals?

18 Q. Correct.

19 A. The same people that would be
20 targets for Smart Ones.

21 Q. Okay. And to the best of your
22 knowledge, if Smart Balance did introduce
23 frozen meals, would they likely be sold in the
24 same section of the supermarket as Smart Ones
25 frozen meals?

1 A. Yes.

2 Q. And is it possible that Smart
3 Balance frozen meals could be sold in the same
4 freezer case as Smart Ones frozen meals?

5 A. Yes.

6 Q. And so would a purchaser of frozen
7 food meals likely encounter both Smart Balance
8 frozen meals and Smart Ones frozen meals at the
9 point of purchase?

10 A. Yes.

11 Q. What was the purpose of the study
12 you prepared?

13 A. Well, it had two main purposes.
14 The first was to demonstrate the level of
15 awareness -- aided awareness, in this case, of
16 Smart Ones versus specific competitors.

17 And the second purpose of the study
18 was to determine whether there is any
19 likelihood at all of brand confusion between
20 Smart Ones and Smart Balance if Smart Balance
21 were to introduce frozen meals into the freezer
22 section of supermarkets.

23 Q. And can you describe for me how you
24 went about designing your study?

25 A. Well, the very first thing we

1 decided on, you know, given the budget, was
2 that we were going to conduct a telephone
3 survey. That's significantly less expensive
4 than other methods like mall-intercept.

5 But the primary thing was to
6 determine how -- determining the level of
7 awareness is really a very simple matter. It's
8 in virtually every study we've ever conducted;
9 questions of aided awareness are always asked.

10 The more important part of
11 designing this study is how we were going to
12 determine if there was a likelihood of brand
13 confusion between these two brands if they were
14 introduced side by side.

15 And the overriding goal of the ^{is,}
16 study was to mirror market conditions, that is
17 what would an ordinary consumer encounter in
18 the frozen food case, to then determine whether
19 there was any level at all of brand confusion
20 -- possibility of brand confusion.

21 Q. Okay. And what was the relevant
22 survey universe for your study?

23 A. For our study, we had -- we had two
24 criteria that were used to screen potential
25 respondents. The first one was that they had

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1 purchased frozen meals from a supermarket in
2 the past 30 days. The second requirement for
3 every respondent in the study was that they had
4 to have some nominal awareness of Smart Ones;
5 meaning, they answered yes to the question:
6 Have you ever heard of Smart Ones frozen meals?

7 Q. And why did the respondent have to
8 personally purchase a frozen meal?

9 A. Because we wanted the study
10 conducted among people who would be most likely
11 to be confused.

12 Q. Okay.

13 A. If you don't buy frozen meals, the
14 likelihood of confusion is -- they're just not
15 the relevant universe.

16 Q. Okay. And why did the respondent
17 have to purchase a frozen meal from the frozen
18 section of the supermarket?

19 A. Because that's where the product is
20 sold. We were trying to mirror the real world
21 here.

22 Q. Why did you limit your study to
23 those who had purchased the meal within the
24 last 30 days?

25 A. Well, I think the most important

1 reason is we wanted people that had recent
2 experience that we know that they are actually
3 -- actually purchasers of frozen meals.

4 Q. Okay. And within that universe,
5 you had included people whose -- who people in
6 their household had purchased meals as well,
7 correct?

8 A. Yes. But the actual respondent was
9 the person who actually purchased the meals.

10 Q. Okay. And why did you not include
11 prospective purchasers of the frozen meals?

12 A. The primary reason was that we feel
13 that it's always better to focus on people
14 whose behavior is known as opposed to
15 behavioral intentions.

16 For example, saying: Do you intend
17 to purchase a frozen meal in the next 30 days?
18 Behavioral intentions are not all that
19 reliable.

20 I mean, I'll give you an example:
21 I intended to quit smoking 35 times.
22 Behavioral intentions are not as solid as
23 actual behavior.

24 And while actual -- you know,
25 actual behavior is not a guarantee of future

1 behavior, it's the best predictor possible of
2 future behavior.

3 Q. And why did the respondent have to
4 possess a nominal awareness of Smart Ones
5 frozen meals?

6 A. The primary reason is that if
7 somebody has no awareness of Smart Ones
8 whatsoever, they have no possibility of being
9 confused between the two brands.

10 And we always design the study
11 looking out for -- I mean, I know this was done
12 for legal purposes, but if I were H.J. Heinz, I
13 would say the people that are going to be hurt
14 the most -- or not hurt the most, but sales
15 might be hurt the most would be from people who
16 are already buying Smart Ones or who were aware
17 of Smart Ones who might be confused by the
18 introduction of Smart Balance, and they might
19 buy Smart Balance thinking that it was in some
20 way connected with Smart Ones.

21 Q. Okay. And it's important for a
22 company to protect its customers that it
23 already has?

24 A. Oh, absolutely.

25 Q. In your study, how many potential

1 respondents were disqualified because they did
2 not purchase any frozen meals in the past 30
3 days?

4 A. It was a fairly large number. If
5 memory serves me, I think it was 216.

6 Q. I believe it's on page 2 of your
7 report.

8 A. Yeah, 216 people were disqualified
9 because they didn't buy frozen meals in the
10 past 30 days.

11 Q. And how many potential respondents
12 were disqualified because they had never heard
13 of Smart Ones brand frozen meals?

14 A. There were 54.

15 Q. Are those disqualifications a cause
16 for concern regarding the results of the
17 survey?

18 A. No.

19 Q. Why not?

20 A. Because once the relevant universe
21 is defined, that's just the -- that's the
22 result of saying, This is who we're focused on.
23 And to get to that point, these are the people
24 that were eliminated.

25 So it has no material effect on the

1 actual results of the study.

2 Q. Is it fair to say that most studies
3 involve people who have been disqualified or
4 screen out respondents to disqualify certain
5 people?

6 A. We have --

7 MR. CROSS: Objection to form.

8 A. We have never done a study that
9 didn't have screeners.

10 Q. Is it -- is it common to disqualify
11 certain people when conducting a survey?

12 A. Yes.

13 Q. What method did your survey
14 utilize?

15 A. A telephone survey.

16 Q. And what did that consist of?

17 A. Well, you start with -- you start
18 with sampling because this was a -- this was a
19 national sample in the United States, excluding
20 Hawaii and Alaska.

21 But the sample was purchased from
22 Survey Sampling. We buy replicant random
23 samples.

24 Survey Sampling is the -- really
25 the largest and the premier sample generation

1 company in the United States.

2 And our sample represented both
3 land line and cell phone numbers in proportion
4 to the rates of each in the general population.

5 Q. And what does Survey Sampling, LLC
6 do?

7 A. They basically provide samples --
8 two types of samples, telephone samples.
9 Meaning, we're purchasing telephone numbers,
10 and the second thing that they do is they have
11 a database of e-mail addresses, kind of an opt
12 in, and if you're going to do a web-based
13 survey, you can purchase e-mail addresses.

14 Q. And Survey Sampling has been
15 providing telephone samples for a long time?

16 A. At least for the 31 years that I've
17 been in business, because we've been a customer
18 for 31 years.

19 Q. After you obtained the telephone
20 samples, what happened next?

21 A. The next thing that happens is
22 interviewers are trained. We have a central
23 telephone interviewing facility in our offices.

24 I personally trained the
25 interviewers on this study, and, of course,

1 they utilized the samples that we purchased to
2 dial the telephone numbers.

3 And after everybody is trained, the
4 survey begins.

5 Q. Were the interviewers aware of the
6 purpose of the study?

7 A. No.

8 Q. And can you describe the training
9 process for the interviewers?

10 A. Essentially we review every
11 question -- first we start with the sampling of
12 how the sampling is going to progress. And
13 then the ^{questionnaire} questioner is reviewed in detail.
14 Sometimes interviewers have questions; those
15 questions are answered.

16 And then the first -- well, really,
17 all the surveys are monitored, but in the
18 beginning everybody -- every interviewer is
19 trained, but they also have to be taken off of
20 probation.

21 Our survey supervisors listen to
22 every interview that -- the first interview
23 that every single interviewer does. And then
24 if they're doing it absolutely correctly, then
25 they're turned loose to continue on the study.

BAS

1 Q. And forgive me, but were the
2 interviewers aware of the purpose of the study?

3 A. No.

4 Q. And when were the interviews
5 conducted?

6 A. From December 15th to the 20th,
7 2011. During the week, we interviewed from 5 to
8 9 p.m., and the one Saturday that was included
9 in the interview, it was noon to 5.

10 Q. And how many interviews of
11 qualified respondents were conducted?

12 A. 250.

13 Q. And how many total interviews were
14 conducted?

15 A. Well, 216, plus 250, plus 54.

16 Q. You're testing my math skills.

17 A. 530 I think that is.

18 Q. And the majority of people who were
19 disqualified from the survey were disqualified
20 because of?

21 A. They were disqualified because they
22 had not purchased the frozen meals in the past
23 30 days, and it was 216.

24 Q. What was the maximum error rate for
25 the survey?

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A. The maximum error rate was plus or minus 6.3 percent, and the 95 percent confidence interval.

Q. And what does that mean?

A. Essentially what it means is if the exact same survey were conducted 100 times, 95 times out of 100 the obtained results would be plus or minus 6.3 percent.

Q. Dr. Sabol, I'd like to ask you a few questions regarding the results of your survey.

First, I'd like to discuss the aided brand awareness portion.

As to aided brand awareness, what did your study find as to the Smart Ones brand?

A. That the aided brand awareness level for Smart Ones was 82 percent.

Q. Okay. And based on that result, are you able to reach any conclusions to a reasonable degree of professional certainty in the field of marketing and advertising?

A. Yes.

Q. And what are those conclusions?

A. That that is an extremely well-known brand -- Smart Ones is an extremely

1 well-known brand. In legal terms I guess it
2 would qualify as a famous brand.

3 Q. Okay. Of that -- of the qualified
4 respondents, how many had ever purchased Smart
5 Ones frozen meals before?

6 A. Fifty-one percent.

7 Q. And how many of those qualified
8 respondents had reported purchasing Smart Ones
9 most often?

10 A. It was 10 percent of the total
11 sample.

12 Q. Can you draw any conclusions from
13 these results?

14 A. Well, I think, again, it just
15 bolsters the fact that Smart Ones is a
16 well-known brand. Half of the population that
17 we studied had purchased it, and ten percent
18 purchase it most often.

19 And that is quite in line with
20 other brands that are well-known. For example,
21 being purchased most often at 10 percent was
22 higher than Swanson at 6, Healthy Choice at 8,
23 Banquet at 6.

24 And these are brands that have been
25 around for a long, long time. So it is

1 certainly in that same level.

2 Q. If your study found that 51 percent
3 of respondents had purchased Smart Ones
4 previously, if only 42 percent of respondents
5 had purchased Smart Ones previously, would that
6 have changed your conclusions?

7 A. No.

8 Q. Would that lower percentage have
9 changed the results of your study?

10 A. No.

11 Q. Let's move on to talk about the
12 likelihood of confusion aspect of your study.

13 A. Okay.

14 Q. Now, how did you determine whether
15 the qualified respondents were likely to be
16 confused between the Smart Balance and Smart
17 Ones brand?

18 A. We asked one question, and that
19 question was: If you were to see a brand of
20 frozen meals in the frozen meal section of the
21 supermarket named Smart Balance, would you
22 think it was associated with, licensed by,
23 owned by or in any way connected to Smart Ones?
24 *you may*
And they answer, yes, no or don't know.

25 Q. Why did you pose the question that

BAB

1 way?

2 A. Because it was the closest way of
3 mirroring the real life situation that an
4 ordinary consumer would be faced with in a
5 supermarket.

6 Q. And was it your intention to mirror
7 the marketplace conditions?

8 A. Absolutely.

9 MR. CROSS: Objection to form.

10 Q. Was it -- was it your intention to
11 replicate a supermarket -- excuse me, strike
12 that.

13 Was it your intention to replicate
14 the buying experience of frozen food meals?

15 MR. CROSS: Objection to form.

16 A. Yes.

17 Q. And what were the results of that
18 portion of the survey?

19 A. In total of the 250 qualified
20 respondents, 32 percent answered yes to that
21 question indicating that 32 percent of them
22 would be -- would think that the two brands
23 were associated, licensed, owned or in some way
24 connected to Smart Ones.

25 Q. And based on that result, are you

1 able to reach any conclusions to a reasonable
2 degree of professional certainty in the field
3 of marketing and advertising?

4 A. Yes.

5 Q. What are those conclusions?

6 A. Well, there's one primary
7 conclusion, and that is there's a significant
8 likelihood of confusion between the two --
9 between Smart Ones and Smart Balance if Smart
10 Balance were introduced into the freezer
11 section of the supermarket.

12 Q. Okay. Now, were levels of
13 potential brand confusion elevated for
14 different segments of the qualified
15 respondents?

16 A. Yes.

17 Q. How so?

18 A. Those respondents who had actually
19 purchased Smart Ones, their level of confusion
20 was 38 percent. Those people who bought Smart
21 Ones most often, their level of confusion was
22 10 percentage points higher at 42 percent. And
23 heavy users, those people who bought 11 or more
24 frozen meals in a month was 37 percent.

25 Q. Can you draw any conclusions from

1 those results?

2 A. Well, I think the conclusion to be
3 drawn from those elevated results, especially
4 -- well, primarily for Smart Ones is that --
5 that would be ^{Heinz's} Heinz' worst fear come true, that
6 the people actually purchasing their product
7 are the ones most likely to be confused by the
8 introduction of Smart Balance.

9 Q. And can you reach that conclusion
10 with a degree of professional certainty?

11 A. Yes.

12 Q. So in your opinion, are consumers
13 who frequently purchase Smart Ones more likely
14 to be confused than other consumers?

15 A. Yes.

16 Q. And are consumers who have
17 purchased Smart Ones in the past more likely to
18 be confused than other consumers?

19 A. Yes.

20 Q. How many respondents indicated they
21 would not be confused?

22 A. It was 39 percent.

23 Q. How many respondents indicated they
24 don't know if there would be potential
25 confusion?

BAS

1 A. It was 29 percent.

2 Q. What is the significance of the
3 don't know response?

4 A. The significance of a don't know
5 response is -- I would interpret it as meaning
6 I can't tell if the two are. Maybe they are,
7 maybe they aren't.

8 Q. Okay. Is it possible that someone
9 who's given a don't know response could later
10 experience confusion between brands?

11 A. Yes.

12 MR. CROSS: Objection to form and
13 foundation.

14 Q. So the likelihood of confusion
15 between the brands Smart Ones and Smart Balance
16 could be even larger?

17 MR. CROSS: Same objection.

18 A. It could be.

19 Q. Dr. Sabol, what were the two
20 primary conclusions of your study?

21 A. Well, the two primary conclusions
22 were -- the first one had to do with level of
23 awareness.

24 And in market research terms, I
25 would say Smart Ones is an extremely well-known

1 brand. In legal terms, that would qualify it
2 as a famous brand.

3 The second conclusion is that there
4 exists a significant likelihood of potential
5 brand confusion between Smart Ones and Smart
6 Balance if Smart Balance frozen meals were
7 introduced into the frozen meal section of
8 supermarkets.

9 Q. Did you reach those conclusions to
10 a reasonable degree of certainty within the
11 field of marketing and advertising?

12 A. Yes.

13 MR. MEACHAM: Let's have this
14 marked as Exhibit 2.

15 - - - - -

16 (Thereupon, Deposition Exhibit 2,
17 Document Titled Critique of
18 Likelihood of Brand Confusion
19 between Smart Ones and Smart Balance
20 Resulting from the Introduction of
21 Smart Balance Frozen Meals, was
22 marked for purposes of
23 identification.)

24 - - - - -

25 Q. Dr. Sabol, what's been handed to

1 you and marked as Exhibit 2 is a document
2 titled Critique of Likelihood of Brand
3 Confusion between Smart Ones and Smart Balance
4 Resulting from the Introduction of Smart
5 Balance Frozen Meals.

6 Do you recognize this document?

7 A. Yes, I do.

8 Q. What is it?

9 A. It is a critique that Dr. Kaplan
10 put together essentially criticizing the study
11 that we conducted.

12 Q. Okay. And have you reviewed this
13 document in the past?

14 A. Yes.

15 Q. I'd like to ask you a few questions
16 regarding Dr. Kaplan's criticisms.

17 A. Sure.

18 Q. Could you please turn to page 3,
19 paragraph 11?

20 MR. CROSS: I'm going to object to
21 this entire line of cross as not being
22 disclosed.

23 This is an undisclosed set of
24 expert opinions that I think we're about to
25 hear for the first time.

1 So if you want me to object to
2 every question I will. If you'd like me to
3 have a blanket objection, maybe that would be
4 easier, but I'll leave it up to you.

5 MR. MEACHAM: A standing objection
6 is fine.

7 I would just respond to the fact
8 that this -- Dr. Sabol's conclusions and
9 testimony regarding his -- his study is within
10 the realm of direct testimony.

11 MR. CROSS: Well, it has never been
12 disclosed. And under the rules, you are
13 supposed to disclose expert opinions in
14 writing, not at the trial.

15 And this is what you're doing right
16 now, and I object strenuously. But we'll have
17 that as a standing objection.

18 Q. Can you please turn to paragraph
19 11?

20 A. Okay.

21 Q. How is Dr. -- can you take a second
22 and review that?

23 A. Okay.

24 Q. How is Dr. Kaplan criticizing your
25 study in paragraph 11?

1 MR. CROSS: The document speaks for
2 itself.

3 A. Well, I think -- I mean, what Dr.
4 Kaplan is saying here is that -- his criticism
5 is that we excluded frozen meals purchasers who
6 were not aware of Smart Ones.

7 Q. And why did your study require
8 nominal awareness of Smart Ones?

9 MR. CROSS: That's been asked and
10 answered. It's accumulative.

11 A. Because if somebody doesn't even
12 have nominal awareness of Smart Ones, it's not
13 possible for them to be confused.

14 Q. And do you believe that requiring
15 nominal awareness of Smart Ones adversely
16 affected the validity of your survey or its
17 results?

18 A. No.

19 MR. CROSS: Objection to form and
20 foundation.

21 Q. Please turn to page 5, paragraph
22 15.

23 Can you take a second and review
24 paragraph 15 for me?

25 A. Okay.

1 Q. In your own words, how is Dr.
2 Kaplan criticizing your study in paragraph 15?

3 MR. CROSS: Objection. The
4 document speaks for itself.

5 A. He's criticizing the fact we
6 excluded potential purchasers of frozen meals.

7 Q. And, Dr. Sabol, why did you limit
8 the universe of your study to those who have
9 purchased frozen food meals within the past 30
10 days?

11 MR. CROSS: Objection. This is
12 accumulative. This has been asked and
13 answered.

14 A. Because we wanted to limit the
15 study to people that had actual recent
16 experience in purchasing frozen meals.

17 Q. And do you believe that limiting
18 your study to those who had purchased frozen
19 food meals adversely affected the validity of
20 your study or its results?

21 A. No.

22 MR. CROSS: Objection to form and
23 foundation.

24 Q. Dr. Sabol, do you believe the study
25 universe was under-inclusive?

1 A. No.

2 MR. CROSS: Same objection.

3 Q. And why was the universe of your
4 study appropriate?

5 MR. CROSS: This has been asked and
6 answered. This is accumulative.

7 A. It was appropriate because we
8 wanted, first of all, to limit the study to
9 people who had recent experience. And the
10 second thing is we wanted to limit it to people
11 that had some nominal awareness of Smart Ones,
12 because without that, there is no a priori --

13 THE WITNESS: That's A P R I O R I.

14 A. There is no a priori possibility of
15 confusion.

16 Q. Can I direct your attention to
17 paragraph 17?

18 A. Okay.

19 Q. Take a second and review that.

20 In your words, how is Dr. Kaplan
21 criticizing your study in paragraph 17?

22 MR. CROSS: Objection. Document
23 speaks for itself.

24 A. In marketing research, screens --
25 what he's referring to we generally refer to as

1 security screens.

2 He's objecting to the fact that we
3 did not exclude people -- actually, not that we
4 excluded them, that we didn't even know whether
5 somebody worked for an advertising or market
6 research company or a company that prepares or
7 distributes frozen foods.

8 Q. Why didn't you screen respondents
9 on those basis?

10 A. We didn't because we know from 31
11 years that the number -- that the percentage of
12 people who are eliminated by such screens,
13 especially a national sample, are less than
14 half of a percent. It just doesn't have any
15 material bearing on the study.

BAS

16 Q. And do you believe that not
17 screening respondents on those bases affected
18 the validity of your survey or its results?

19 MR. CROSS: Objection to form and
20 foundation.

21 A. No.

22 Q. And did you screen respondents for
23 recent participation in marketing research?

24 A. No.

25 Q. Why not?

1 A. In telephone surveys, if somebody
2 has participated in recent surveys and they're
3 tired of it, they hang up.

4 Q. Do you believe that not screening
5 respondents on those bases affected the
6 validity of your survey or its results?

7 A. No.

8 Q. Can I direct your attention to
9 paragraph 19? Take a second and review that
10 paragraph.

11 A. Okay.

12 Q. In your words, how is Dr. Kaplan
13 criticizing your study in paragraph 19?

14 MR. CROSS: Objection. Document
15 speaks for itself.

16 A. That there wasn't a don't know
17 option for screen A.

18 And screen A was -- if I'm not
19 mistaken, it was: Have you purchased a frozen
20 meals in the past 30 days?

21 Q. And why didn't you include a don't
22 know response for screen A question?

23 A. Because it really doesn't make any
24 sense. A person should know their own
25 behavior, and if they don't know if they

1 purchased a frozen meal, we have to exclude
2 them from the study.

3 So in this case, a don't know
4 response would be the exact same thing as a no
5 response.

6 Q. And do you believe that not
7 including a don't know response for the screen
8 A question affected the validity of your survey
9 or its results?

10 MR. CROSS: Objection to the form
11 and foundation.

12 A. No.

13 Q. Why not?

14 MR. CROSS: Same objection.

15 A. It has no material impact because
16 anybody that would have said don't know would
17 have been classified as no and eliminated from
18 the study.

19 Q. Can I direct your attention to
20 paragraph 21 on pages 6 and 7?

21 A. Okay.

22 Q. Can you please read paragraph 21
23 for the court reporter?

24 A. Question 3 is leading, suggestive
25 and by itself inadequate to ascertain relevant

1 confusion. If a respondent answers question 3
2 by saying yes, it is standard practice and
3 absolutely essential to follow up with a why do
4 you say that type question.

5 In a case involving trademark
6 confusion, the only relevant confusion is
7 trademark-related confusion. That statement
8 seems obvious.

9 If confusion for any reason was
10 accepted, then the percent confused would be
11 improperly inflated. People whose confusion
12 stem from non-trademark relevant beliefs would
13 be counted as confused ("I think one company
14 makes all frozen meals"), people who answered
15 yes just because the question was asked would
16 be counted as confused.

17 ("If they weren't associated, you
18 wouldn't be asking the question.")

19 People who guess would be counted
20 as confused ("Don't know, just a guess.")

21 It is not possible to know how many
22 of those classified as confused did not answer
23 question 3 yes for a trademark relevant reason.

24 McCarthy has commented on the
25 necessity for this type of question.

1 I believe this is a quote: "Often
2 an examination of the respondent's verbatim
3 responses to the why question are the most
4 illuminating and probative part of the survey
5 for they provide a window into consumer thought
6 processes in a way that mere statistical data
7 cannot."

8 The problem of question 3 being
9 leading and suggestive is compounded by the
10 failure to ask an open end why type question.

11 Q. Dr. Sabol, why didn't you include a
12 follow-up question for question 3?

13 A. In this case because there are only
14 two things to focus on here, Smart Ones and
15 Smart Balance. Those were the only two --
16 well, really, the only four relevant words that
17 people could focus on. There just wasn't
18 anything else.

19 Q. Okay. And do you believe that not
20 including a follow-up question after question
21 number 3 affected the validity of your survey
22 or its results?

23 A. No.

24 MR. CROSS: Objection to form and
25 foundation.

1 Q. Can you turn to -- please turn to
2 page 8?

3 A. Okay.

4 Q. And can you please review paragraph
5 24?

6 A. Okay.

7 Q. And can you please read paragraph
8 24 for the court reporter?

9 A. Absent a control group to correct
10 for noise and a question ^{to} the make sure
11 confusion is due to trademark-relevant reasons,
12 the results are completely meaningless. This
13 has proven to be a factor in excluding studies
14 in the past.

15 Q. Dr. Sabol, why didn't you utilize a
16 control group in your survey design?

17 A. Well, no study is perfect, and in
18 this case, that would have doubled the cost of
19 the study and there wasn't a whole lot of
20 appetite to do that.

21 The second thing is it has been our
22 -- our experience that -- I mean, you
23 essentially take whatever the control group
24 percentage is and subtract it from the test
25 group, from the test cell, and we have found in

6AS

1 the past that that is primarily necessary when
2 the results are going to be very small.

3 In this case, with an obtained
4 value of 32 percent for the level of confusion,
5 the control group really would have made no
6 difference whatsoever.

7 Q. And do you believe that not
8 including a control group affected the validity
9 of your survey or its results?

10 A. No.

11 Q. Can you please turn to page 9?
12 Can you review for me paragraph
13 number 26?

14 A. Okay.

15 Q. Okay. Can you please read for the
16 court reporter paragraph 26?

17 A. On page 8 of the report, it states
18 that, This (sic) data clearly qualifies Smart
19 Ones as a "famous" brand. For support, Dr.
20 Sabol relies on the results of the aided
21 awareness question (question 1).

22 Although I am not familiar with the
23 majority of the fame cases, I have never seen
24 or heard of the results of an aided awareness
25 question being used to support a claim of fame.

1 Q. Dr. Sabol, why did you rely on an
2 aided awareness question?

3 A. We wanted to find out how many
4 people had actually ever heard of Smart Ones
5 and several other brands.

6 Q. And people were not asked about
7 Smart Ones in isolation?

8 A. No.

9 Q. They were asked -- how was Smart
10 Ones presented?

11 A. They were asked about Smart Ones in
12 relation to several other brands: Which of the
13 following brands of frozen meals have you ever
14 heard of?

15 And they were asked about
16 Stouffer's, Swanson, Lean Cuisine, Smart Ones,
17 Marie Callender's and Healthy Choice.

18 Q. So the names of all of those brands
19 were presented to the consumer at once?

20 A. Yes.

21 Q. Dr. Sabol, do you believe it is
22 appropriate to rely on aided awareness for
23 studies such as the one you performed here?

24 MR. CROSS: Objection to form.
25 Foundation.

1 A. Yes.

2 Q. Finally, can you turn to page 10 --

3 A. Okay.

4 Q. -- paragraph 29?

5 A. Yes.

6 Q. Can you please read paragraph 29
7 for the court reporter?

8 A. Typically, an attempt is made to
9 validate some or all of the interviews in a
10 study used for litigation. This is done to
11 demonstrate that the interviewer actually
12 conducted the interview, that the interview was
13 conducted properly and that the respondent was
14 qualified to participate in the study.

15 The report does not discuss
16 validation so one cannot assume it was done.
17 Lack of validation calls into question the
18 reliability of a study.

19 Q. Dr. Sabol, did you validate the
20 results of your survey?

21 A. Yes.

22 Q. And how did you do so?

23 MR. CROSS: Objection to form.

24 A. We do it in two ways. One is --
25 well, in this case all 250 respondents were

1 called back by a survey supervisor to validate
2 that they actually participated in the study,
3 and that the answers that were recorded were
4 the answers that people gave.

5 Q. Okay. And that occurred after your
6 survey?

7 A. Well, it occurs almost in real
8 time.

9 Q. And why didn't you include that
10 validation as part of your survey?

11 A. That was an error. We should have
12 put it in the report. We validate every study.
13 It's just so routine that we didn't even -- we
14 don't put it in any reports that we write
15 because it's just a routine thing, as is noted
16 here by Dr. Kaplan, that that is typical. And,
17 in fact, we do it for every study.

18 Q. Okay. Thank you.

19 MR. MEACHAM: Can we take a
20 five-minute break?

21 (Discussion had off the record.)

22 THE FOLLOWING PAGES 49-66 HAVE BEEN DEEMED
23 CONFIDENTIAL & FOR ATTORNEYS' EYES ONLY

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MR. MEACHAM: Mark this as Exhibit

4.

- - - - -

(Thereupon, Deposition Exhibit 4, Study of Likelihood of Confusion, was marked for purposes of identification.)

- - - - -

Q. Dr. Sabol, what's been handed to you as Exhibit 4 is a document titled Promark Brands, Inc., opposer, v. GFA Brands, Inc., applicant, a Study of Likelihood of Confusion.

Do you recognize this document?

A. Yes, I do.

Q. What is it?

A. It's a study that was done by Leo J. Joe Shapiro & Associates to determine likelihood of confusion between Smart Ones and Smart Balance.

Q. And have you reviewed likelihood of confusion studies in the past?

A. Yes.

Q. Have you reviewed likelihood of confusion studies that have been conducted by other agencies in the past?

6/15

1 A. Yes.

2 Q. Have you done so frequently?

3 MR. CROSS: Objection to form and
4 foundation.

5 A. I don't know if I would say
6 frequently. As often as has been required. At
7 least a couple of dozen times.

8 Q. Okay. And have you designed and
9 implemented likelihood of confusion studies in
10 the past?

11 A. Yes.

12 Q. Okay. And have you interpreted the
13 results of likelihood of confusion studies in
14 the past?

15 A. Yes.

16 Q. Do you believe you can offer an
17 opinion on the design of Mr. Johnson's
18 likelihood of confusion study?

19 A. Yes.

20 Q. Do you believe that you can offer
21 an opinion on the significance of study's
22 results?

23 A. Yes.

24 Q. Do you believe you can offer an
25 opinion -- those opinions to a reasonable

1 degree of professional certainty?

2 A. Yes.

3 MR. CROSS: Before you start asking
4 about what his opinions are, I'm going to
5 object on familiar grounds.

6 These are -- we're about to have
7 elicited from this witness -- expert witness
8 expert opinions that have not been previously
9 disclosed.

10 I strenuously object to this
11 process. You are not following the rules.

12 And I can make an objection to
13 every question on those grounds, or we can
14 agree that I can have --

15 MR. MEACHAM: I believe the
16 standing objection is fine.

17 I would just like to respond that
18 Dr. Sabol -- within Dr. Johnson's reports are
19 criticisms of Dr. Sabol's report and his
20 methodology, and it's also a rebuttal report --
21 you know, it's packaged as a rebuttal report.

22 And Dr. Sabol certainly is allowed
23 to respond to the criticisms contained in such
24 a rebuttal report. And as long as that's a
25 standing response, we don't have to go through

1 that again.

2 Q. Dr. Sabol, do you have any concerns
3 with the design and implementation of Mr.
4 Johnson's study?

5 MR. CROSS: Objection to form and
6 foundation.

7 A. Yes.

8 Q. Could you please identify those
9 concerns for me?

10 A. Well, there are a number of
11 concerns that I have, but I would say they
12 could pretty much ^{be summarized} summarize into two main ones
13 with a lot of secondary ones.

14 But the primary -- the primary one
15 is that I feel that this study was
16 painstakingly designed to elicit don't know
17 responses.

18 Q. Okay. And do you have any other
19 concerns?

20 A. My other major concern is this
21 study in no way mirrors the real life situation
22 of an ordinary consumer standing in front of a
23 freezer case in a supermarket with -- freezer
24 case containing many products with different
25 names.

1 Q. And do you have any other concerns?

2 A. I have a lot of little concerns as
3 we go through, but those are the two primary
4 concerns that I have.

5 Q. Okay. And let's talk --

6 A. All of the other ones flow from
7 those.

8 Q. And you testified that the study
9 was painstakingly designed to elicit don't know
10 responses?

11 A. Yes.

12 Q. How was it painstakingly designed
13 to elicit don't know responses?

14 A. Well, let me start with -- these
15 pages aren't numbered unfortunately.

16 Q. They're numbered at the top.

17 A. I was looking in the appendix. Is
18 there somewhere elsewhere those appear?

19 Q. Yeah. Those are -- in the body of
20 the report there's numbers.

21 A. Okay. To begin with --

22 Q. What page are you on, Dr. Sabol?

23 A. Page 4.

24 And page 4 shows reduced size
25 images of the exhibit cards that were actually

1 used in -- they were held up for a respondent
2 to view. One of them says Smart Balance, the
3 other one of them says Right Balance.

4 Smart Balance was used for the test
5 condition and Right Balance was used for the
6 control condition.

7 So essentially what happened in
8 this study, once somebody was recruited, is
9 they were taken to a separate room and then
10 they were read -- they were taken to a separate
11 room and the first instruction that they were
12 given before the beginning -- before the survey
13 actually began, they were read this: Before we
14 begin, I would like you to know that your
15 answers and identity will be kept strictly
16 confidential. If you don't know the answer to
17 any of the questions, it is okay to say so.
18 Please do not guess.

19 Next, this was held up and the
20 respondents were asked, Do you have any comment
21 about --

22 Q. Let the record reflect that --

23 A. They were held up a card that says
24 Smart Balance, and this probably approximates
25 the size that was actually used.

1 The instructions say, Hand
2 respondents exhibit card and say, This is the
3 name of a frozen meal product that you might
4 see in the frozen food section of a grocery
5 store. Feel free to comment, if you wish, on
6 anything about this.

7 Q. Dr. Sabol, what is wrong with how
8 that question was posed?

9 MR. CROSS: Objection to form and
10 foundation.

11 A. Well, I was getting to that.

12 There are two problems. First,
13 people are told not to guess. They're held up
14 this card, they're asked if they have any
15 comment about the name that they were shown,
16 which is Right Balance, but this statement is
17 really not a question in the survey. It's a
18 statement. A frozen meal product that you
19 might see in the frozen food section of a
20 grocery store I think indicates to the
21 respondent that this is an actual product that
22 exists in the frozen food section of a grocery
23 store.

24 That, coupled with the instruction,
25 If you don't know the answer to the question,

1 it's okay to say so. Please do not guess.
2 Those two things put the respondent in the
3 frame of mind that there is a right answer to
4 this question, this product exists in the
5 frozen food section and I'm not to guess about
6 any of the questions that I'm asked.

7 The very next question -- and then
8 this sign that says Smart Balance was taken
9 away and the respondent was not allowed to see
10 it for the remainder of the interview.

11 I've never heard of a study that
12 did that. That is totally counter to what you
13 would find in the real world. You're not
14 standing in front of the freezer case and after
15 you look at a certain brand it disappears.
16 It's there the entire time.

17 Question 2 A says --

18 Q. So before you get on -- why is it a
19 problem to take away the sign containing the
20 name Smart Balance?

21 A. There's absolutely no reason to do
22 that unless you are trying to have somebody,
23 number one, forget the name, not remember the
24 name, not be able to be reminded of what the
25 name is when other questions are asked. It's

1 all designed to elicit don't know responses.

2 Q. You had also mentioned that there
3 was an issue that the respondent was told not
4 to guess. Why is that an issue?

5 MR. CROSS: Objection to form and
6 foundation.

7 A. It's one thing if the respondent is
8 told not -- it's just completely unnecessary.
9 In -- if you're -- respondents can say, Well,
10 geez, I think those two things really are
11 alike. I don't know that they're the same.
12 They might be. They could be. I'm guessing
13 that they are.

14 There's nothing wrong -- I mean, I
15 think the intent of this was to have people not
16 answer the question in any way except don't
17 know if they weren't positive of the answers to
18 these questions.

19 Q. And do you believe such an
20 instruction might prevent people from
21 responding?

22 A. It might prevent them from
23 responding in any other way except to say don't
24 know.

25 Q. Following -- you had mentioned --

1 strike that.

2 Do you have any criticisms
3 regarding question 2 A on page 9 of Dr.
4 Johnson's report?

5 A. I do.

6 Q. And what are those criticisms?

7 A. Well, first of all, just consider
8 the fact that they were shown this for a brief
9 period of time, a few seconds, it was taken
10 away. Then this is the question which really
11 is a very important question in the way this
12 study was designed for likelihood of confusion.
13 Based on what you just saw, who or what company
14 do you believe makes the frozen meal product
15 with the name that I showed you, or do you not
16 have a belief?

17 My problem with that question is,
18 it is literally asking somebody: Who makes the
19 product - which actually doesn't exist, but
20 they were told does exist - from a few seconds
21 of looking at the name Right Balance and then
22 it was taken away, who makes this product --

23 Q. And, Dr. Sabol, why is that an
24 issue?

25 A. -- after being told not to guess.

1 Because I think this has -- this
2 doesn't mirror the real world situation that
3 somebody is going to be in.

4 It is also -- it, obviously -- I
5 think most people know somebody does make every
6 product. But this question is structured to
7 solicit a don't know answer; meaning, or do you
8 not have a belief, because you have to know,
9 not guess, what company you believe makes this
10 frozen meal product.

11 That doesn't even mirror the real
12 world situation of two products side by side.
13 But if you just took it on its face saying only
14 about Right Balance is problematic.

15 And I think the data that was
16 actually obtained corroborates that criticism.

17 Q. Is it fair to say that when a
18 person shops in a supermarket they're unaware
19 of what company makes certain products?

20 MR. CROSS: Objection to form and
21 foundation.

22 A. I think that's absolutely true. I
23 mean, an example I could give here, let's just
24 say that you held up a candy bar that everybody
25 knows, virtually, called Snickers, and you say,

1 Who makes -- what company makes Snickers? I
2 would say perhaps none of us in this room know
3 what company makes Snickers, but that's not
4 relevant.

5 What would be relevant is, there's
6 a candy bar right next to it called Sneakers,
7 and could they likely be confused between those
8 two products? Probably, yes. Whether they
9 know who makes either one.

10 I'm saying this question is not
11 relevant to whether or not somebody could be
12 confused by Right Balance.

13 Q. So in your opinion, is question 3 A
14 on page 9 -- is that capable of measuring the
15 likelihood of confusion between Smart Balance
16 and Smart Ones?

17 MR. CROSS: Objection to form and
18 foundation.

19 A. You mean question 2 A which is what
20 we're talking about?

21 Q. I believe -- yes.

22 A. You're talking ^{about} but 2 A?

23 Q. Yes.

24 A. I absolutely agree, that it is not
25 a good question. It is not a question that can

BAS

1 get at whether or not there's a likelihood of
2 confusion.

3 Q. Okay. Are there any other
4 questions that you have issues with, Dr. Sabol?

5 A. Question 3 A, I just -- I don't
6 understand why the questions weren't kept
7 consistent. Question 3 A introduces the word
8 brands or products and brands, what other
9 products or brands, if any, do you believe came
10 from the same company who makes the frozen meal
11 product with the name that I showed you.

12 That's a tough question for people
13 to remember, or do you not have a belief?

14 Again, this question is designed to
15 solicit don't know responses.

16 Q. In a survey, what are the -- what
17 is a problem or what is the problem with using
18 inconsistent language between questions?

19 MR. CROSS: Objection to form and
20 foundation.

21 A. Well, I think people are -- they're
22 thinking that you're asking them a different
23 question when, in fact, you're asking them the
24 same question. And the data bears that out;
25 you got the same results.

1 Q. Does it -- could it possibly
2 confuse respondents in a survey?

3 MR. CROSS: Objection to form.

4 A. It probably could.

5 Q. Are there any other questions
6 utilized in Mr. Johnson's survey that you have
7 an issue with?

8 A. Question 4 A, it's a tough
9 question. Now, remember, the one thing to keep
10 in mind about this is that just like in the
11 phone survey, this is an interview that's being
12 conducted. The respondent does not have these
13 questions in front of them. Even though
14 they're face to face with somebody, these
15 questions are being asked exactly the same way
16 they would be done in a telephone survey.

17 Question 4 A is: What other brand
18 or company, if any, do you believe is related
19 to, associated with or has a licensing
20 agreement with whoever makes the frozen meal
21 product with the name that I showed you?

22 I think that is a very confusing
23 question.

24 Q. Well, why do you --

25 A. Or do you not have a belief.

1 Q. Why do you believe that it's a
2 confusing question?

3 A. A person has to remember three or
4 four things. They have to remember what other
5 brand or company, and then they have to
6 remember, okay, now, what about this brand of
7 company, is it related to, associated with or
8 has a licensing agreement, with who, with
9 whoever makes the frozen meal product that I
10 already told you I didn't know with the name
11 that I showed you, or do you not have a belief?

12 I think that would be a very
13 challenging question for most people to keep it
14 all in their heads at one time.

15 And the data bears that out as the
16 don't know responses ^{keep} keeps increasing as the
17 survey goes on.

18 Q. Do you believe that question is
19 designed to get a don't know response?

20 A. I absolutely do. That's my major
21 objection with the study to begin with.

22 Q. Okay. Do you have any other issues
23 regarding the questions used that you can think
24 of at this time?

25 A. No. I think that's about it for

BHS

1 the questions.

2 Q. You had testified earlier that the
3 question -- or the statement that this is the
4 name of a frozen food meal that you might see
5 causes a problem. Can you explain why that
6 might be a problem?

7 A. Well, I think it suggests that this
8 product actually exists in the frozen food case
9 of a supermarket, which is obviously not the
10 case. But it would lend further credence to
11 the fact that the respondent was asked to know
12 the answer to the question, and I think it was
13 basically designed to say, We know this product
14 exists; I'm told not to guess, and do I really
15 know what company makes this product?

16 I mean, the answer is, GFA Brands.
17 Nobody said GFA Brands.

18 The next most obvious answer is,
19 Smart Balance.

20 I was shocked when I saw this data.
21 Why wouldn't 70 percent say Smart Balance?
22 Because they don't know.

23 Smart Balance is the obvious
24 answer.

25 Q. Dr. Johnson's study included

1 potential purchasers. Is there -- potential
2 purchasers of frozen food meals.

3 Is there any issue with including
4 that segment of the population?

5 MR. CROSS: Objection to form and
6 foundation.

7 A. There is not necessarily an issue,
8 but if you were -- if you were actually going
9 to do that, and he did, you would report the
10 results separately by those people who had
11 actually purchased frozen meals from those
12 people who think they're going to purchase a
13 frozen meal in the next 30 days.

14 Those two segments of the
15 population could be very, very different. The
16 results could be very, very different, and if
17 you've gone through the trouble to screen them
18 in on that basis, the data should have been
19 reported on that basis.

20 Q. Okay. So how did -- how did Dr.
21 Johnson construct his universe?

22 A. Dr. Johnson's universe was
23 constructed -- this was a mall-intercept
24 interview. So there were eight malls. People
25 are approached in each mall and they're asked

1 some screening questions, one of which was
2 their age, another one was their gender.

3 Then they were asked what
4 proportion of the grocery shopping they were
5 personally responsible for in their household:
6 all of it, some of it or none. If somebody
7 said all of it or some of it, they were allowed
8 to be in the study.

9 Then they were asked thinking about
10 the past month, have you personally purchased,
11 from a supermarket or grocery store for
12 yourself or your household, ice cream, frozen
13 meals, frozen juice?

14 Those people that said frozen meals
15 were in, those people that didn't say yes to
16 frozen meals were then asked: Thinking about
17 the next month, do you personally plan to
18 purchase essentially frozen meals from a
19 supermarket or grocery store for yourself, and
20 if they said yes to that, they were in.

21 Q. Okay. So Mr. -- or Mr. Johnson's
22 universe includes potential purchasers of
23 frozen food meals?

24 MR. CROSS: Objection to form and
25 foundation.

1 A. Yes.

2 Q. Can you please tell me why that's
3 an issue?

4 A. It's an issue for me because I
5 would prefer to have -- I would have preferred
6 to have people who had -- only who had actual
7 recent experience in purchasing frozen meals
8 rather than those who think they might.

9 And I think it's kind of a
10 deficiency that the results were not reported
11 in that way. We don't know how many people
12 were potential and how many people were actual
13 purchasers out of the 405 -- or 410 people that
14 he interviewed.

15 Q. And after the respondents were
16 screened, what did Dr. Johnson do next?

17 A. After people were screened and they
18 were qualified and they consented to
19 participate in the interview, they were taken
20 to a separate room and then we're back to where
21 we started a little while ago.

22 Q. And what did the interviewer do
23 then?

24 A. Then the interviewer conducted the
25 actual interview very similar to a telephone

1 survey.

2 In our survey we asked two
3 screening questions, the person said the
4 appropriate responses to those that would
5 qualify them to begin the sample and then
6 they're asked the actual survey questions. And
7 the same method was used here.

8 Q. And what was -- what were the
9 respondents shown?

10 A. The respondents were shown a card
11 -- I am assuming this looks like a 3 by 5 card
12 with -- either the test cell was shown a 3 by 5
13 card that said Smart Balance on it and the ^{or}
14 control group was shown a card that said Right
15 Balance on it.

16 Q. And were the cards taken away after
17 that?

18 A. The cards were immediately taken
19 away if the respondent did not have anything to
20 say -- did not have any comments to make about
21 the cards they were shown.

22 Q. What is the purpose of hiding the
23 name from the respondent?

24 A. Honestly, I don't know. The only
25 conclusion that I can draw is that they -- this

1 study was designed to elicit don't know
2 responses.

3 I can't think of any reason why the
4 name would have been withdrawn. It doesn't
5 mirror the real life situation in front of a
6 freezer case.

7 Q. Is it normal to hide brand names
8 from a respondent in a market study?

9 A. No, it is not.

10 MR. CROSS: Objection to form and
11 foundation.

12 Q. Can I direct your attention to page
13 13 of this study?

14 A. Okay.

15 Q. What's on this page?

16 A. Essentially it is -- it is a chart,
17 a table -- a data table of the percentage of
18 people, how they responded to the first
19 question, which was: Who or what company do
20 you believe makes the frozen meal product with
21 the name that I showed you?

22 And they showed the data for both
23 Smart Balance and Right Balance, and the number
24 of people that said don't know and then the
25 number of people that named other brands.

1 Q. And how many respondents stated
2 that they didn't have a belief about the
3 source?

4 A. Seventy-three percent for the test
5 cell of Smart Balance, and 72 percent for Right
6 Balance. That was the control group.

7 Q. In your opinion, is that a high
8 level of I don't know responses?

9 A. It's an extremely high level.

10 Q. Does it confirm your suspicion that
11 the design was constructed to elicit don't know
12 responses?

13 A. Yes.

14 MR. CROSS: Objection to form.

15 Q. How many respondents testified in
16 the test cell that Smart Balance was the
17 company that made the frozen meal product?

18 A. Four percent.

19 Q. And -- how many respondents in the
20 control cell responded that Smart Balance was
21 the company that made the frozen meal product?

22 A. Nobody. Well, actually 0.5 percent
23 or fewer mentioned, so it probably was one
24 person, that's half a percent.

25 Q. Okay.

1 A. But for that cell, the obvious
2 answer for Right Balance for the control cell
3 isn't Smart Balance. It's Right Balance. And
4 only one percent said Right Balance.

5 Q. Okay. Could you turn to page 14 of
6 the study?

7 A. Okay.

8 Q. And what does that -- what does
9 this page reflect?

10 A. It's the same kind of --

11 MR. CROSS: Objection.

12 A. -- data table as we had on the
13 previous page, except it shows the responses to
14 question 3 A, What other products or brands, if
15 any, do you believe come from the same company
16 who makes the frozen meal product with the name
17 that I showed you, or do you not have a belief?

18 Q. Okay. And how many respondents in
19 the control cell -- excuse me, in the test cell
20 did not have a belief?

21 A. Eighty-two percent.

22 Q. Is that a high level of I don't
23 have a belief responses?

24 MR. CROSS: Objection to form and
25 foundation.

1 A. Extremely high.

2 Q. How many respondents in the control
3 cell responded that they don't have a belief?

4 A. Eighty-seven percent.

5 Q. And in your opinion, is that a high
6 level of don't know responses?

7 MR. CROSS: Objection to form and
8 foundation.

9 A. Extremely high level.

10 Q. Please turn to page 15.

11 A. Okay.

12 Q. And what's reflected on this page
13 of the study?

14 A. It's the exact same kind of data
15 table except it presents the results for
16 response to question 4 A, What other brand or
17 company, if any, do you believe is related to,
18 associated with or has a licensing agreement
19 with whoever makes the frozen meal product with
20 the name that I showed you, or do you not have
21 a belief?

22 Q. And how many respondents in the
23 test cell didn't have a belief?

24 A. Eighty-seven percent.

25 Q. And is that a high level of didn't

1 have a belief responses?

2 MR. CROSS: Objection to form and
3 foundation.

4 A. Yes.

5 Q. In the control cell, how many
6 respondents testified -- or stated that they
7 didn't have a belief?

8 A. Ninety-one percent.

9 Q. And in your opinion, is that a high
10 level of don't have a belief responses?

11 MR. CROSS: Objection to form and
12 foundation.

13 A. Yes. It's an extremely high rate.

14 Q. So in your opinion -- strike that.

15 Dr. Sabol, do you have any
16 criticisms of Dr. Johnson's study that we
17 haven't covered yet?

18 A. Well, I think my -- the only other
19 thing I would say is that I don't think that
20 this study in any way mirrored what an ordinary
21 consumer would encounter standing in front of a
22 freezer case trying to select a brand to
23 purchase.

24 I just don't think it's probative
25 at all of whether or not there is the

1 an expert in the last four years and then the
2 compensation conducting this study.

3 Q. Okay. And after reviewing that
4 document, do you believe that it's a fair and
5 accurate portrayal of your professional
6 experience?

7 A. I do.

8 Q. And is it an accurate resume?

9 A. Yes, it is.

10 Q. Okay. And is there anything on
11 your resume that we didn't discuss at the
12 beginning of this -- at your testimony that
13 would be relevant to your testimony here?

14 A. Relevant to my testimony, no.

15 MR. MEACHAM: Thank you.

16 CROSS-EXAMINATION OF BARRY A. SABOL, PH.D.

17 BY MR. CROSS:

18 Q. I get to ask some questions now.

19 A quick question about Exhibit 5.

20 I believe you had testified that you weren't
21 getting paid for your testimony, but you are
22 getting paid \$300 per hour for your time
23 testifying; is that correct, or is this resume
24 wrong?

25 A. Well, let me think about that for a

1 minute.

2 No, because we always include -- I
3 think somebody probably asked me what would you
4 charge if we weren't doing a study, and that's
5 \$300 an hour.

6 But whenever we do a study, it's --
7 here's our philosophy: We do a study for any
8 client, we present the results of that study.
9 This is the same as that, and we don't charge
10 for it.

11 Q. So it --

12 A. So, no, there is no charge.

13 Q. So Exhibit 5 is incorrect where it
14 states that, Dr. Sabol will charge an hourly
15 rate of \$300 plus expenses for any further
16 involvement in this case?

17 A. Yes, that is incorrect. That can
18 be stricken.

19 Q. Is it possible to slant the results
20 of a survey so that it would show more
21 confusion rather than less?

22 MR. MEACHAM: Objection. Form.

23 A. Yes, it's possible.

24 Q. And one way to do it would be to
25 ask questions in a leading form that would

1 suggest an answer that would give rise to a
2 showing of confusion, correct?

3 MR. MEACHAM: Objection. Form and
4 foundation.

5 A. That would be possible.

6 Q. And a leading -- you know what a
7 leading question is, right?

8 A. Yes.

9 Q. It's a question such as your
10 question 3, which states: If you were to see a
11 brand of frozen meals in a frozen food section
12 of a supermarket named Smart Balance, would you
13 think it was associated with, licensed by,
14 owned by or in any way connected to Smart Ones?

15 MR. MEACHAM: Objection. Compound.

16 Q. That's a leading question, right?

17 A. I disagree.

18 Q. It suggests a yes answer, doesn't
19 it?

20 A. It doesn't.

21 Q. Another way to increase the
22 likelihood that a survey would show results
23 tending to show confusion would be to exclude
24 people from the sample who are less likely to
25 give an answer that would indicate confusion,

1 correct?

2 MR. MEACHAM: Objection. Compound.

3 A. I don't think I'd put it that way.

4 Q. Well, there is a way to slant the
5 outcome of a survey by the -- by the way you
6 select the sample, correct?

7 A. I do agree with that.

8 Q. For example, in your case when you
9 were being questioned by counsel, you said that
10 you wanted to select people most likely to be
11 confused --

12 MR. MEACHAM: Objection.
13 Mischaracterize --

14 Q. -- when you conducted your study,
15 correct?

16 MR. MEACHAM: Objection.
17 Mischaracterizes testimony.

18 A. No, that's not what I meant, and
19 that's not what I said.

20 Q. Well, the record will reflect
21 exactly what you said.

22 MR. MEACHAM: Objection.

23 Q. But the way you stated and the way
24 you selected your sample indeed was intended to
25 select people most likely to be confused --

1 MR. MEACHAM: Objection.

2 Argumentative.

3 Q. -- isn't that true?

4 MR. CROSS: Wait until I'm done
5 with my question before you interrupt me.

6 MR. MEACHAM: Counsel, you
7 interrupted his response after your last
8 question.

9 MR. CROSS: He was done.

10 MR. MEACHAM: He was not done. He
11 was going to say -- he was going to respond
12 further.

13 MR. CROSS: Are you going to tell
14 him what he was going to say?

15 MR. MEACHAM: No, I'm not going to
16 tell him.

17 MR. CROSS: Good.

18 Q. Are you going to retract the
19 testimony that you gave previously?

20 A. No.

21 Q. All right. Then it stands.

22 Another way to reduce or to
23 increase the showing of confusion in a survey
24 is to not include a control, correct?

25 A. No, not necessarily.

1 Q. Well, the only purpose of a control
2 would either -- would be either to keep the
3 level of confusion at the same number as shown
4 or to reduce it, correct?

5 A. Correct.

6 Q. So by not having a control cell in
7 your test, you increase the likelihood that the
8 numbers would show more confusion rather than
9 less, didn't you?

10 A. I wouldn't put it that way.

11 Q. I know you wouldn't put it that
12 way, but that's the truth, isn't it?

13 A. No, it is not.

14 Q. But you do agree that a control
15 would either keep the numbers the same or
16 reduce the percentage of people --

17 MR. MEACHAM: Objection.

18 Q. -- who indicated confusion?

19 MR. CROSS: Would you wait until
20 I'm done with my question, Counsel?

21 MR. MEACHAM: Objection. Asked and
22 answered.

23 MR. CROSS: Let's have the question
24 read back so we don't have it interrupted.

25 (Record read.)

1 A. That is correct.

2 Q. And you did not include a control
3 in your study, did you?

4 A. That is correct.

5 Q. Now, you had mentioned something
6 about being on a budget when you were
7 testifying in response to counsel's questions.
8 You were on a budget, right?

9 A. There's always a budget for every
10 project.

11 Q. And the budget was set by the
12 people or the lawyers for Heinz here, correct?

13 MR. MEACHAM: Objection.

14 A. I have no idea who set the budget,
15 but that's what they decided they wanted to do.

16 Q. So they gave you a dollar number
17 with which to do this study, correct?

18 A. No, that's not correct.

19 MR. MEACHAM: Objection. Form.
20 Foundation.

21 Q. Well, who imposed a budget on you?

22 A. They were given choices of
23 different sample sizes and designs and they
24 picked the one that they decided that they --
25 that's the amount of money that they wanted to

1 spend.

2 Q. And one of the options was to
3 either do a control or not to do a control,
4 correct?

5 MR. MEACHAM: Objection.
6 Mischaracterizes testimony.

7 A. Honestly, I don't recall.

8 Q. But you said that the people who
9 were in charge of the budget didn't have an
10 appetite to do a control; isn't that correct?

11 A. They didn't have an appetite to
12 double the sample size and double the cost.

13 Q. And therefore, there was no
14 control?

15 A. I don't know if I would say
16 therefore there was no control.

17 There was no control. I don't know
18 if the two things were related in their minds.
19 I mean, I don't know what anybody was thinking.

20 Q. But they are the ones that
21 indicated they had no appetite for that
22 additional expense?

23 MR. MEACHAM: Objection.

24 A. They had no appetite for the
25 additional expense.

1 Q. Of doing a control?

2 A. I don't know if it was related to
3 doing the control or not.

4 Q. You said in your testimony that
5 every study you do is custom designed. I do no
6 canned studies. And that's true, right?

7 A. That is true.

8 Q. Before this case, did you know what
9 an Ever-Ready survey format was?

10 A. No.

11 Q. You had never heard of that before
12 this case?

13 A. I've never heard of it before.

14 Q. Before this case -- when you were
15 retained for this, did you know that your study
16 was going to be used in a litigation?

17 A. Yes.

18 Q. Have you ever read McCarthy on
19 trademarks?

20 A. No.

21 Q. Have you ever heard of that
22 treatise?

23 A. I've heard of it.

24 Q. Have you ever heard of Shari
25 Diamond?

1 A. Yes.

2 Q. What do you know about her?

3 A. I've read a good part of her work.

4 Q. And have you read the part of her
5 work that talks about the standards for
6 admissibility of survey evidence in litigation?

7 MR. MEACHAM: Objection.

8 Foundation.

9 A. I don't know. I don't recall.

10 Q. You don't recall ever reading that?

11 A. I don't recall -- I've read some of
12 the stuff. I don't recall specifically what
13 I've read.

14 Q. So do you today know what an
15 Ever-Ready format is for a survey?

16 A. I do not.

17 Q. You do not?

18 A. I do not.

19 Q. Do you recognize Phil Johnson's
20 survey as being in the Ever-Ready format?

21 A. I do not.

22 Q. And you're not aware, then, that
23 the McCarthy treatise on trademarks states that
24 the standard format for surveys that are going
25 to be used in litigation involving trademark

1 confusion is the Ever-Ready format?

2 MR. MEACHAM: Objection.

3 Foundation.

4 A. I do not.

5 Q. Now, you had a criticism of
6 something that Mr. Kaplan had written in his
7 report in paragraph 19. So could you please
8 get out Exhibit 2?

9 And I'd like you to take a look at
10 paragraph 19 with the following question in
11 mind or observation: When he was talking about
12 having a statement such as, "There are no right
13 or wrong answers to my questions. If you do
14 not know an answer or you have no opinion for
15 any question, simply say that you do not know
16 or have no opinion and we will go on to the
17 next question."

18 When he was talking about the
19 absence of that statement, he was not talking
20 about it specifically in connection with
21 screening question A, but instead he was
22 talking about it in connection with it -- a
23 statement of that sort appearing before
24 questions were answered by the respondent --

25 MR. MEACHAM: Objection. Form.

1 Foundation. Speaks for itself.

2 Q. -- correct?

3 A. No, that's not correct.

4 Q. So you believe he was referring
5 solely to needing a statement of that sort
6 before screen question A; is that your
7 statement?

8 MR. MEACHAM: Objection.
9 Mischaracterizes the testimony.

10 A. It would appear that Dr. Sabol was
11 aware of the explicit need for a don't know
12 option.

13 Q. Correct.

14 A. And there was a don't know option
15 in question 3, the only question where it could
16 possibly be relevant.

17 I don't understand what your
18 question is.

19 Q. Well, you were criticizing him for
20 making a don't know option available for people
21 who are answering screen question A; that was
22 your criticism, right?

23 MR. MEACHAM: Objection.
24 Mischaracterizes testimony.

25 A. I interpreted this paragraph to

1 mean that I needed a don't know response for
2 screen A.

3 Q. And that's it?

4 A. Exactly. That's it.

5 Q. Okay. And you don't read this
6 fairly as being a statement that should be
7 given to the respondents before they answer the
8 series of questions?

9 MR. MEACHAM: Objection.

10 A. That's not how I read it.

11 Q. All right. I guess Mr. Kaplan will
12 have to explain exactly what it meant if you
13 didn't understand it.

14 Do you know who Ms. Sabrina Hudson
15 is?

16 A. No.

17 Q. She testified earlier in this case
18 and she said she believed that Heinz has hired
19 your firm to do work for it in the past; is
20 that correct?

21 A. That is not correct.

22 Q. You have never done any kind of
23 work for Heinz?

24 A. Absolutely none.

25 Q. You've done no work for Promark

1 Brands, Inc.?

2 A. I have not ever.

3 Q. You testified before that you
4 believed you'd never done an expert report, but
5 you're saying you've never done any type of
6 market survey research for Heinz in the past?

7 A. Correct.

8 Q. So you're saying her testimony is
9 wrong?

10 A. I can't speak to her testimony. I
11 have no idea who that person is, and I know
12 that we have never done -- our company has
13 never done any work for Heinz.

14 Q. Did you check your records?

15 A. Did I check my records?

16 Q. Yes.

17 A. No. I know every project we've
18 ever conducted. We've never worked for Heinz.

19 Q. For how many years have you been in
20 business?

21 A. Thirty-one years.

22 Q. And you remember 31 years of
23 business?

24 A. I know who our clients are. If we
25 had Heinz as a client, that would be the number

1 one name in our brochure. We've never done any
2 work for Heinz.

3 Q. Heinz is a good client to have,
4 right?

5 A. I would say so.

6 Q. You wish you had done work for them
7 in the past?

8 A. I wish I had done work for them in
9 the past, but we have not.

10 Q. And you would like to continue
11 doing work for them in the future, wouldn't
12 you?

13 MR. MEACHAM: Objection. Form.

14 A. I have no control of that
15 whatsoever.

16 Q. You don't think that your work in
17 this case might lead to additional work for
18 Heinz in the future?

19 A. I can't imagine that that would be
20 the case.

21 MR. CROSS: Neither can I.

22 I have no more questions.

23 MR. MEACHAM: I have a few
24 follow-up questions.

25 MS. GOTT: Can we take break,

1 please?

2 MR. MEACHAM: Sure.

3 (Discussion had off the record.)

4 Q. Dr. Sabol, I only have a few
5 follow-up questions.

6 What are the -- what's the majority
7 of the reasons you do surveys? Why are you
8 hired to do surveys?

9 A. Well, we're hired mainly by private
10 companies, private industry to -- to get
11 accurate market research data.

12 Q. And the purpose is to be accurate,
13 correct?

14 A. Oh, absolutely.

15 Q. And you do so in order to -- for
16 business purposes, correct?

17 A. Correct.

18 Q. And you don't -- and the majority
19 of your business is for business purposes?

20 A. Absolutely.

21 Q. Okay. Not for litigation purposes?

22 A. Correct.

23 Q. When you were designing your
24 survey, did anyone ever tell you not to include
25 a control test?

1 A. No.

2 Q. That was your decision, correct?

3 A. Yes.

4 Q. You were never told how to develop
5 your survey or design your --

6 MR. CROSS: Objection to form.

7 Q. -- one way or the other?

8 MR. CROSS: Objection to form.

9 A. No.

10 Q. Did anyone ever tell you how to
11 design your survey?

12 A. No.

13 Q. Did anyone ever tell you how to
14 implement your survey?

15 A. No.

16 Q. You did so yourself?

17 A. Correct.

18 Q. And in constructing your survey,
19 was it ever your intention to please Heinz?

20 MR. CROSS: Objection to form.

21 A. No.

22 Q. And in constructing and
23 implementing your survey, was it ever your
24 intention to gain more business from Heinz?

25 MR. CROSS: Objection to form.

1 A. No, sir. I've never met anybody
2 from Heinz and it was never something that
3 entered my mind.

4 Q. What was the purpose of designing
5 this survey?

6 A. To determine whether there was
7 brand confusion between Smart Ones and Smart
8 Balance and to determine the level of aided
9 awareness of Smart Ones versus key competitors.

10 MR. MEACHAM: Thank you. That's
11 all I have.

12 MR. CROSS: I have nothing more.
13 Thank you.

14 MR. MEACHAM: We reserve the right
15 to review and sign.

16
17 (Deposition concluded at 11:41
18 a.m.)

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REPORTER'S CERTIFICATE

The State of Ohio,)

SS:

County of Cuyahoga.)

I, Kelly A. Hill, a Notary Public within and for the State of Ohio, duly commissioned and qualified, do hereby certify that the within named witness, BARRY A. SABOL, PH.D., was by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid; that the testimony then given by the above-referenced witness was by me reduced to stenotypy in the presence of said witness; afterwards transcribed, and that the foregoing is a true and correct transcription of the testimony so given by the above-referenced witness.

I do further certify that this deposition was taken at the time and place in the foregoing caption specified and was completed without adjournment.

I do further certify that I am not a relative, counsel or attorney for either party, or otherwise interested in the event of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Cleveland, Ohio, on this 19th day of MARCH, 2013.



Kelly Hill

Kelly A. Hill, Notary Public within and for the State of Ohio

My commission expires February 6th, 2016.

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DEPOSITION REVIEW
CERTIFICATION OF WITNESS

ASSIGNMENT NO: 1617488
CASE NAME: Promark Brands, Inc v. Gfa Brands, Inc.
DATE OF DEPOSITION: 3/12/2013
WITNESS' NAME: Barry A. Sabol, Ph.D.

In accordance with the Rules of Civil Procedure, I have read the entire transcript of my testimony or it has been read to me.

I have made no changes to the testimony as transcribed by the court reporter.

_____ Barry A. Sabol, Ph.D.

Sworn to and subscribed before me, a Notary Public in and for the State and County, the referenced witness did personally appear and acknowledge that:

They have read the transcript;
They signed the foregoing Sworn Statement; and
Their execution of this Statement is of their free act and deed.

I have affixed my name and official seal
this _____ day of _____, 20_____.

Notary Public

Commission Expiration Date

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DEPOSITION REVIEW
CERTIFICATION OF WITNESS

ASSIGNMENT NO: 1617488
CASE NAME: Promark Brands, Inc v. Gfa Brands, Inc.
DATE OF DEPOSITION: 3/12/2013
WITNESS' NAME: Barry A. Sabol, Ph.D.

In accordance with the Rules of Civil Procedure, I have read the entire transcript of my testimony or it has been read to me.

I have listed my changes on the attached Errata Sheet, listing page and line numbers as well as the reason(s) for the change(s).

I request that these changes be entered as part of the record of my testimony.

I have executed the Errata Sheet, as well as this Certificate, and request and authorize that both be appended to the transcript of my testimony and be incorporated therein.

3/29/13 [Signature]
Date Barry A. Sabol, Ph.D.

Sworn to and subscribed before me, a Notary Public in and for the State and County, the referenced witness did personally appear and acknowledge that:

- They have read the transcript;
- They have listed all of their corrections in the appended Errata Sheet;
- They signed the foregoing Sworn Statement; and
- Their execution of this Statement is of their free act and deed.

I have affixed my name and official seal this 29 day of March, 20 13.

[Signature]
Notary Public SABINA AKHUNDOV
Notary Public, State of Ohio
My Comm. Expires 09-25-2017
9-25-13
Commission Expiration Date

ERRATA SHEET

RENNILLO DEPOSITION & DISCOVERY - A VERITEXT COMPANY
ASSIGNMENT NO: 1617488

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28/24	and they to you may	correct quote
31/5	Heinz, to Heinz's	Spelling
38/12+14	a priori to apriori	Spelling
39/13	especially a to especially in	understanding
44/10	the to to	Spelling
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54/4	basing to making	meaning
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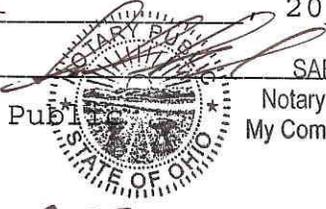
3/29/13

BA Sabol

Date Barry A. Sabol, Ph.D.

SUBSCRIBED AND SWORN TO BEFORE ME THIS 29

DAY OF March 20 13



SABINA AKHUNDOV
Notary Public, State of Ohio
My Comm. Expires 09-25-2017

9-25-17

Commission Expiration Date

ERRATA SHEET

RENNILLO DEPOSITION & DISCOVERY - A VERITEXT COMPANY

ASSIGNMENT NO: 1617488

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78/22	but to about	spelling
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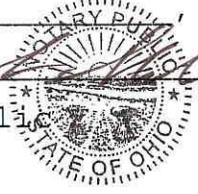
BA Sabol

Barry A. Sabol, Ph.D.

SUBSCRIBED AND SWORN TO BEFORE ME THIS 29

DAY OF March, 20 13.

Sabina Akhundov
 Notary Public, State of Ohio
 My Comm. Expires 09-25-2017

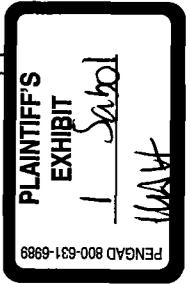


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Commission Expiration Date



Strategic
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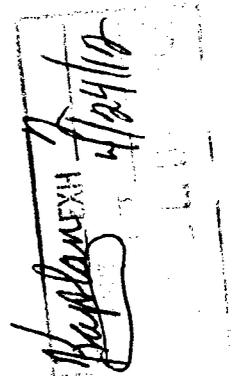
H.J. Heinz Company

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

A Brand Confusion Survey

December 2011

26250
Euclid Avenue
Cleveland Ohio
44132-3602
216.261.0308 tel
216.261.3546 fax



Study Background and Objective

- The Smart Ones brand of packaged frozen meals is sold nationally in the frozen food section of supermarkets.
- Recently, Smart Balance announced plans to sell packaged frozen meals under the brand name Smart Balance in the same frozen food section of supermarkets as where Smart Ones packaged meals are sold.
- 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 Balance frozen meals in the same frozen meal section of supermarkets where Smart Ones frozen meals are already sold.

Study Method

The data comprising this study was collected using telephone survey research.

Relevant Survey Universe

- To qualify for survey inclusion, a potential respondent had to meet two screening criteria:
 1. Had personally purchased any frozen meals from the frozen food section of a supermarket in the past 30 days.
 - and –
 2. Possessed at least nominal awareness of Smart Ones frozen meals as indicated by an affirmative response to the question – “Have you ever heard of the Smart Ones brand of frozen meals?”
- Thus, every survey respondent was a recent purchaser of frozen meals who possessed nominal awareness of the Smart Ones brand of frozen meals.
- A total of 216 potential respondents were disqualified because they did not purchase any frozen meals in the past 30 days (46% of all screened respondents).
- In addition, 54 potential respondents were disqualified because they had never heard of Smart Ones brand frozen meals (18% of past 30 day frozen meal purchasers).

Study Method

Survey Sampling Plan

- This survey utilized a national (lower 48 states) replicate random sampling plan:
 1. Replicate random telephone samples were purchased from Survey Sampling, LLC, the premier sample generator firm in the United States.
 2. Each replicate random sample included both landline and cell phone telephone numbers in proportion to U.S. national rates of each in the general population.
- From these replicate random samples, potential respondents were screened to ensure that they met the criteria set for the relevant survey universe described earlier.

Study Method

Survey Instrument

- The survey instrument used in this study was developed by Dr. Barry A. Sabol, President of Strategic Consumer Research, Inc. This questionnaire appears in Appendix A.

Survey Execution

- This survey was conducted using the central telephone interviewing facility of Strategic Consumer Research, Inc. All interviews were conducted by experienced SCR, Inc. telephone interviewers.
- All interviewers were trained specifically for this survey by Dr. Barry A. Sabol. Interviewers were not made aware of the purpose of this study.
- All interviews were conducted from December 15-20, 2011. Weekday interviews were conducted from 5 p.m. to 9 p.m. and from Noon to 5 p.m. on Saturday in all U.S. time zones. No interviews were conducted on Sunday.

Study Method

Level of Survey Precision

- A total of 250 interviews were conducted among qualified respondents who met the survey criteria. This sample size yields a maximum error rate of $\pm 6.3\%$ at the 95% confidence interval.

Summary of Study Findings

This section is organized on a topic-by-topic basis.

Aided Brand Awareness

- In the course of screening potential respondents, records were kept of those respondents who met the purchase requirement, but who were disqualified due to lack of awareness of the Smart Ones brand of frozen meals. This data, when combined with the qualified survey sample, made it possible to calculate the level of aided brand awareness for each of six brands measured in this study.

Aided Brand Awareness

- Shown below in Table 1 are the aided brand awareness levels for the six brands included in this study as measured by affirmative responses to the “Have you ever heard of . . . ?” question.

Table 1
Total (Aided) Brand Awareness

Brand	Aided Awareness Level (304) %
Lean Cuisine	90
Stouffer's	88
Healthy Choice	85
Swanson	85
Smart Ones	84
Marie Callender's	79

Aided Brand Awareness

- This data clearly indicates that the Smart Ones brand of frozen meals is very well known and comparable in aided awareness levels to all five of the other brands measured.
- This data clearly qualifies Smart Ones as a “famous” brand.

Brand Purchase Rates

- The 250 qualified respondents who indicated awareness of the Smart Ones brand of frozen meals were asked “Which of the following brands of frozen meals have you ever purchased?” They were also asked on an unaided basis which brand of frozen meals they purchased most often.
- This data is shown below in Table 2.

Table 2
Brand Purchase Rates

Brand	Ever Purchased (250) %	Purchase Most Often (250) %
Stouffer's	73	26
Lean Cuisine	73	18
Marie Callender's	62	15
Swanson	60	6
Healthy Choice	57	8
Smart Ones	51	10
Banquet	N/A	6
All others (19)	N/A	10

Brand Purchase Rates

- Overall, 51% reported having purchased the Smart Ones brand of frozen meals at some point in the past, and 10% reported having purchased Smart Ones brand frozen meals most often.
- These purchase rates are significant and add further evidence that Smart Ones frozen meals represent a “famous” brand.

Past 30 Day Purchase Volume

- All qualified respondents were asked how many packages of frozen meals they had purchased in the past 30 days.
 - The average number of packages purchased (mean value) in the past 30 days was 8.5, with a median value of 6 packages.
 - Respondents were then classified as Light (1-5 packages), Medium (6-10 packages) or Heavy (11+ packages) users.
 - This data is shown below in Table 3.

Table 3
Purchasing Volume Classification

Purchase Volume Classification	Segment Size (250) %	Mean Package Volume
Light	35	7.2
Medium	33	8.3
Heavy	22	9.9
Total	100	8.5

Level of Potential Brand Confusion

- All qualified respondents were asked:
 “If you were to see a brand of frozen meals in the frozen food section of a supermarket named Smart Balance, would you think it was associated with, licensed by, owned by or in any way connected to Smart Ones? You may answer yes, no or don’t know.”
- Response data is shown below in Table 4.

Table 4
Potential Brand Confusion

Likely to be Confused?	Total (250) %	Segment				
		Smart Ones Purchasers (128) %	Buy Smart Ones Most Often (24) %	Heavy Users (54) %	Med. Users (82) %	Light Users (114) %
Yes	32	38	42	37	33	29
No	39	43	46	50	40	33
Don't Know	29	19	12	13	27	38

Level of Potential Brand Confusion

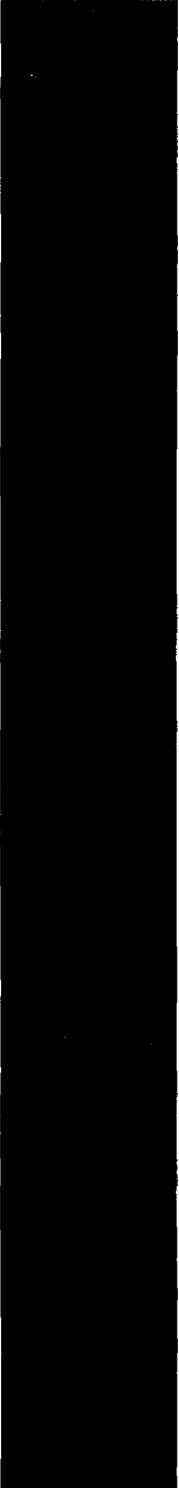
- The level of potential brand confusion was found to be 32% for the total sample of respondents. This means that the actual level of potential brand confusion could be between 38% and 26% if all members of the relevant universe were surveyed.
- Levels of potential brand confusion were elevated for:
 - Smart Ones purchasers (38%)
 - Primary Smart Ones purchasers (42%)
 - Heavy frozen meal users (37%)
- This represents a significant level of potential brand confusion. Only 39% indicated no potential confusion, while 29% chose the “Don’t Know” response.

Sample Demographics

- Overall, 28% of respondents were male and 72% were female.
- The breakdown of respondent ages were as follows:
 - Under 35 (20%)
 - 35 – 54 (31%)
 - 55+ (49%)
- Interviews were conducted with respondents in 45 of 50 states.
The exceptions were:
 - Wyoming
 - West Virginia
 - South Dakota
 - Hawaii
 - Alaska

Study Conclusions

- Two primary and relevant conclusions can be drawn from this study:
 1. Smart Ones is a well known, “famous” brand of frozen meals.
 2. There exists a significant likelihood of potential brand confusion between Smart Ones and Smart Balance if Smart Balance introduced frozen meals under the Smart Balance brand name into the frozen meal section of supermarkets.



Appendix A: Survey Instrument

SMART ONES BRAND CONFUSION SURVEY

Good evening. My name is _____ from SCR, Inc., a national public opinion polling firm. Tonight we are conducting a survey about frozen meals sold in supermarkets and would like to include your opinions. We are not selling anything. This is strictly a survey which will take less than three minutes.

SCREEN A: First, have you or anyone in your household purchased any frozen meals from the frozen food section of a supermarket in the past month/30 days?

- 1 Yes (CONTINUE)
- 2 No (THANK AND TERMINATE)

SCREEN B: Have you personally purchased any frozen meals from the frozen food section of a supermarket in the past month/30 days?

- 1 Yes (CONTINUE)
- 2 No (ASK TO SPEAK TO PURCHASER -- REPEAT INTRO)

1. Which of the following brands of frozen meals have you ever heard of: (READ LIST BELOW. CIRCLE ALL MENTIONED)

	Rotate Order	YES	NO
A.	Stouffer's	-1	-2
B.	Swanson	-1	-2
C.	Lean Cuisine	-1	-2
D.	Smart Ones	-1	-2
E.	Marie Callender's	-1	-2
F.	Healthy Choice	-1	-2

(IF HEARD OF SMART ONES -- CONTINUE. IF NOT, THANK AND TERMINATE)

2. Which of the following brands of frozen meals have you ever purchased: (READ LIST BELOW. CIRCLE ALL MENTIONED)

	Rotate Order	YES	NO
A.	Stouffer's	-1	-2
B.	Swanson	-1	-2
C.	Lean Cuisine	-1	-2
D.	Smart Ones	-1	-2
E.	Marie Callender's	-1	-2
F.	Healthy Choice	-1	-2

3. If you were to see a brand of frozen meals in the frozen food section of a supermarket named Smart Balance, would you think it was associated with, licensed by, owned by or in any way connected to Smart Ones? You may answer yes, no or don't know.

- 1 Yes
- 2 No
- 3 Don't know

4. Which brand of frozen meals do you purchase most often? (DO NOT READ LIST. CIRCLE OR WRITE IN ONE BRAND ONLY)

- 1 Stouffer's
- 2 Swanson
- 3 Lean Cuisine
- 4 Smart Ones
- 5 Marie Callender's
- 6 Healthy Choice
- 7 Other (Specify) _____

5. In the past month, about how many packages of frozen meals of any brand have you purchased from the frozen food section of a supermarket?

_____ (# Packages)

6. Finally, which of the following categories contains your age:

- 1 Under 35
- 2 35 - 54
- 3 55 or older

Thank you very much for your help tonight!

7. Interviewer, record gender: -1 Male -2 Female

8. Interviewer, record state: _____

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 to 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.

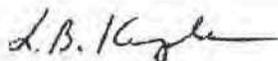
That is why the distinction between open-ended versus closed-ended (unaided versus aided) questions is very important in this context. In addition, the questions do not contain a false answer to send a signal to respondents that not all of the answers are correct. In summary, claims about the famousness 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).

LEON B. KAPLAN, Ph.D

EDUCATION

- M.B.A.
1979 The Wharton School, University of Pennsylvania,
Philadelphia, Pennsylvania (Advanced Management Studies in
Marketing, Strategic Planning, and Business Policy)
- Ph.D.
1971 Purdue University, Lafayette, Indiana (Major-
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.
1970 Purdue University, Lafayette, Indiana (Major-
General Industrial Psychology; Minor-Consumer Behavior, Psychological
Measurement) Thesis: Differential Perceptions as a Source of Error in
Concept Testing
- B.S.
1966 *Cum laude*, Brooklyn College, Brooklyn, New York
(Major-Psychology; Minor-Physics)

PROFESSIONAL EXPERIENCE

- 1979 -
Present President, Princeton Research & Consulting Center, Inc., Princeton, New
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.
- Kaplan, L.B. Symposium Chairman. The Consumer Psychologist and the Future. Presented at American Psychological Association 87th Annual Convention, New York. New York, September 1979.

- Pion, G.M., Membership Opinions about APA: A Recent Snapshot. *American Cordray, D.S., Psychologist*, December, 1988.
Sechrest, L.B.,
Molaison, V.,
Hall, J.,
Kaplan, L. &
Perloff, R.
- Howard, A., Membership Opinions about reorganizing APA. *American Psychologist*,
Pion, G.M., 42, 1987, pp.763- 779.
Sechrest, L.B.,
Cordray, D.S.,
Kaplan, L, Hall, J.,
Perloff, R.
& Molaison, V.
- Cooper, M.R., Changing employee values: deepening discontent. *Harvard Business
Morgan, B.S., Review*, January- February 1979, pp. 117-125.
Foley, P.M.
and Kaplan, L.B
- Kaplan, L.B. What's a nice psychologist like you doing in a place like this? Presented
at American Psychological Associate 86th Annual Convention, Toronto,
Ontario, Canada, September 1978.
- Kaplan, L.B., Components of Perceived Risk in Product Purchase: A Cross-Validation.
Szybillo, G.J. *Journal of Applied Psychology*, 1974, 59, 298-291.
& Jacoby, J.
- Jacoby, J., & The Components of Perceived Risk. In M. Venkatesan (Ed.),
Kaplan, L.B. *Proceedings*, Third Annual Conference, Association for Consumer
Research, University of Chicago, 1972, 382-393.
- Schmidt, F.L., Composite vs. multiple criteria: A review and resolution of the
& Kaplan, L.B. controversy. *Personnel Psychology*, Fall 1971, 419-434.
- Jacoby, J., & A profile of the Division 23 member's interests, concerns and
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 infringement. Taken 3/17/8. Conducted research for Plaintiff.
- 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.



PROMARK BRANDS, INC.
(OPPOSER)

VS.

GFA BRANDS, INC.
(APPLICANT)

A STUDY OF LIKELIHOOD OF CONFUSION

April 2012



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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 410¹ 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:

<u>NORTHEAST</u>	<u>SOUTH</u>	<u>MIDWEST</u>	<u>WEST</u>
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.

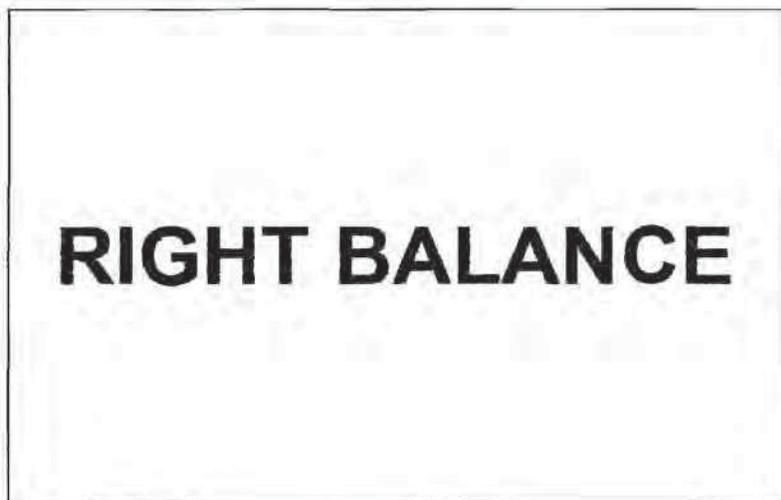
control cell name because it is similar in meaning, but does not utilize the disputed word "SMART."

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 $\pm 4.1\%$ 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?"

	<u>EXHIBIT SHOWN</u>	
	<u>SMART BALANCE</u> (205) <u>100%</u>	<u>RIGHT BALANCE</u> (205) <u>100%</u>
ALL RESPONDENTS		
<u>All Who Have A Belief About Source:</u>	<u>27%</u>	<u>28%</u>
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
<u>Don't Have A Belief About Source:</u>	<u>73</u>	<u>72</u>

* 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?"*

	<u>EXHIBIT SHOWN</u>	
	<u>SMART BALANCE</u>	<u>RIGHT BALANCE</u>
ALL RESPONDENTS	(205) <u>100%</u>	(205) <u>100%</u>
<u>All Who Have a Belief About Related Products/Brands:</u>	<u>18%</u>	<u>13%</u>
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
<u>Don't Have A Belief About Related Products/Brands:</u>	<u>82</u>	<u>87</u>

* 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	
	<u>SMART BALANCE</u>	<u>RIGHT BALANCE</u>
ALL RESPONDENTS	(205) <u>100%</u>	(205) <u>100%</u>
<u>All Who Have a Belief About Related Source:</u>	<u>13%</u>	<u>9%</u>
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
<u>Don't Have A Belief About Related Source:</u>	<u>87</u>	<u>91</u>

* 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 ($\pm 4.1\%$) 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.

	<u>EXHIBIT SHOWN</u>	
	<u>SMART BALANCE</u>	<u>RIGHT BALANCE</u>
ALL RESPONDENTS	(205) <u>100%</u>	(205) <u>100%</u>
<u>Total “Smart Ones” Identification (Net):</u>	<u>2%</u>	<u>-%</u>
In Source Question	1	--
In Related Products/Brands, But Not Source Question	*	--
In Relationship, But Not Source or Related Products/Brands Questions	*	--
<u>Adjusted Findings</u>		
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%).

	<u>EXHIBIT SHOWN</u>	
	<u>SMART BALANCE</u>	<u>RIGHT BALANCE</u>
	(205)	(205)
	<u>100%</u>	<u>100%</u>
ALL RESPONDENTS		
<u>Total “Weight Watchers” Identification (Net):</u>	<u>6%</u>	<u>7%</u>
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
<u>Adjusted Findings</u>		
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.

A handwritten signature in cursive script, appearing to read "Philip Johnson", is written over a solid horizontal line.

Philip Johnson

APPENDIX A

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



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

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: _____

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
	<u>52</u>
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	<u>104</u>

- 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 N^{th} 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.

SMART BALANCE

RIGHT BALANCE

APPENDIX C

- Validation Summary



Frozen Foods Study
Validation Summary

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

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**

<u>Total "Weight Watchers" Identification in Test Cell</u>		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%

<u>Total "Weight Watchers" Identification in Control Cell</u>		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.

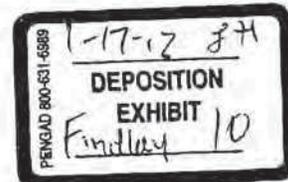
It just sounds like something that is related to Weight Watchers.

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

BARRY A. SABOL, PH.D.
PRESIDENT
STRATEGIC CONSUMER RESEARCH, INC.

CURRICULUM VITAE
EXPERT TESTIMONY
COMPENSATION



Barry Allan Sabol, Ph.D.

President
Strategic Consumer Research, Inc.
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Cleveland, Ohio 44132
216-261-0308
bsabol@scr-research.com

Professional Experience

President – Strategic Consumer Research, Inc.

1982 – Present

- Founded firm in 1982
- Responsible for all phases of project design, analysis and reporting
- Responsible for client development and support
- Expertise in many types of research including:
 - Advertising Effectiveness
 - Awareness and Image Assessment
 - Competitive Positioning
 - Customer Satisfaction and Loyalty Measurement
 - Market and Store Performance Assessment Tracking
 - Market/Customer Segmentation
 - New Concept Testing
 - New Product/Service Evaluation
 - Website Navigation Evaluation

Research Director – Fox and Associates, Inc.

1978 – 1982

- Responsible for the design, development and execution of quantitative consumer attitude, opinion, image, awareness and demographic research studies for clients of this full-service advertising agency.

Research Specialist – Psychological Research Services

1975 – 1978

- Responsible for the development and execution of projects within the areas of training needs assessment, training, training program evaluation, performance appraisal, organizational analysis, testing, test validation and survey research.

Professional Organizations/Activities

- 1995 – 2006 Member of the Thiel College Board of Trustees
Greenville, Pennsylvania
Vice Chairman 2001-2002
- 1979 – Present Member of the American Marketing Association
Cleveland Chapter President in 1989-1990
- 1983 – 1990 Board Officer for the Cuyahoga County Drug Abuse Services
Chairman in 1990
- 1991 – 2000 Board Officer for The Cleveland Treatment Center, a Cleveland area
heroin-addiction treatment center

Publications

Sirdeshmukh, Deepak, Singh, Jagdip and Sabol, Barry (2002), "Consumer Trust, Value and Loyalty in Relational Service Exchanges, *Journal of Marketing*, 66 (January): 15-37.

The preceding was also published by the Marketing Science Institute as working paper and Report No: 01-116 for distribution worldwide to managers, researchers and companies affiliated with the MSI.

Wilcott, R.C., Sabol, B.A. and Yurchesen, R.P., Frontal Cortex and Response Suppression in the Rat. *Brain. Behavior and Evolution*, 1976, 13, 116-124.

Wilcott, R.C. & Sabol, B.A., Response Suppression Produced by Electrical Stimulation in the Neocortex of the Cat, *Neuropsychologia*, May 1976.

Teaching Experience

Guest Lecturer – MBA Marketing Research 2006 - 2010
Weatherhead School of Management
Case Western Reserve University, Cleveland, Ohio

Academic History

Ph.D. Quantitative Design and Research Analysis 1979
Case Western Reserve University, Cleveland, Ohio

Masters Psychology 1976
Case Western Reserve University, Cleveland, Ohio

Bachelors Psychology 1974
Thiel College, Greenville, Pennsylvania

EXPERT TESTIMONY

Dr. Barry A. Sabol has testified as an expert witness in only one case in the past four years:

Atlas Equipment Co. Inc. V. Weir Slurry Group, Inc. et al.
Case Number 2:07-cv-01358
- By deposition, May 15, 2009

COMPENSATION

Strategic Consumer Research, Inc. charged the sum of \$15,000 to conduct the research study outlined in this report. Dr. Sabol is President of Strategic Consumer Research, Inc.

Dr. Sabol will charge an hourly rate of \$300 plus expenses for any further involvement in this case.