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

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

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

Opposers,

v.

GFA BRANDS, INC.,

Applicant.

**Opposition Nos. 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**

**APPLICANT'S NOTICE OF FILING OF CORRECTED CERTIFIED TESTIMONY
DEPOSITION TRANSCRIPT AND EXHIBITS OF PHILIP JOHNSON**

Pursuant to 37 C.F.R. § 2.125(c) and Rule 703.01(k) of the Trademark Trial and Appeal Board Manual of Procedure ("TBMP"), Applicant GFA Brands, Inc. hereby files with the Board, and notifies Opposers of the filing of, the corrected certified testimony deposition transcript and accompanying exhibits of Philip Johnson, whose testimony deposition was taken on April 18, 2013.

Pursuant to Section 703.01(n) of the TBMP, the transcript has been corrected by the officer before whom the deposition was taken. The executed and notarized Errata Sheet listing the corrections has also been included at the end of the transcript.

Dated this 13th day of September, 2013.

/s/ Johanna M. Wilbert

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was sent by First Class U.S. Mail, postage prepaid, with a courtesy copy via e-mail, on this 13th day of September, 2013, to Counsel for the Opposers:

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

* * * * *

PROMARK BRANDS, INC., &
HJ HEINZ COMPANY,
Opposers,

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

v.

U.S. Trademark Application 77,864,304
For the Mark SMART BALANCE
U.S. Trademark Application 77,864,268
For the Mark SMART BALANCE

GFA BRANDS, INC.,

Applicant.

* * * * *

DEPOSITION OF PHILIP JOHNSON

TAKEN AT: Quarles & Brady
LOCATED AT: 300 North LaSalle Drive
Chicago, IL

April 18, 2013
9:25 a.m. to 11:42 a.m.
REPORTED BY ANITA K. FOSS
REGISTERED PROFESSIONAL REPORTER

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A P P E A R A N C E S

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I N D E X

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E X H I B I T S

Exhibit No.	Description	Page Identified
1	Dr. Sabol's survey.	4
2	Mr. Johnson's report.	5
3	Current CV and case list.10
4	Dr. Sabol's survey.15
5	Notice of opposition.97

(Original exhibits retained by Mr. Cross. Copies of exhibits attached to all transcripts.)

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TRANSCRIPT OF PROCEEDINGS

PHILIP JOHNSON, called as a witness
herein, having been first duly sworn on oath, was
examined and testified as follows:

E X A M I N A T I O N

BY MR. CROSS:

Q. What is your full name?

A. My name is Philip Johnson, J-O-H-N-S-O-N.

Q. How old a man are you?

A. I'm 65.

Q. Where do you work?

A. I work at Leo J. Shapiro & Associates,
which is a market research and consulting firm here
in Chicago.

Q. What's your title?

A. I'm the chief executive officer.

Q. Now, you've given us a little summary of
what Leo Shapiro does. Could you elaborate on the
nature of its business?

A. Well, we work by conducting primary
market research projects for clients in different
industries, including retail and consumer packaged
goods, finance, banking, new product development,
Internet, different things like that.

Q. When was it founded?

1 A. In 1950.

2 Q. How many employees does it have now?

3 A. We have about 80 employees currently.

4 Q. I'm going to show you what has been
5 marked as Johnson Applicant's Exhibit No. 1. Can
6 you identify that, please, as the brand confusion
7 survey performed by Dr. Sabol in this dispute,
8 December 2011?

9 A. Yes, this is a summary of an -- of a
10 survey that was offered in evidence. It's what you
11 first sent me when you first contacted me.

12 MS. GOTT: Counsel, I'm going to object
13 to any questioning on the Sabol survey to the
14 extent it's not -- Mr. Johnson's opinions on the
15 survey are not in his expert report.

16 BY MR. CROSS:

17 Q. And when we sent you Exhibit 1, the Sabol
18 survey, what did we ask you to do in response to
19 it?

20 A. You asked me if I could design and
21 conduct a survey that would essentially be in
22 rebuttal to the survey that was offered here.

23 Q. What is the typical rebuttal survey like?

24 A. Well, typically in a rebuttal survey what
25 you do is you take the survey that was offered,

1 usually by the other side, and you change one or
2 two elements in the survey that we'll call fatal
3 flaws, and then re -- redo that survey pretty much
4 how the original person who designed it did it,
5 except for those changes.

6 Q. Did you do that typical type of rebuttal
7 survey here?

8 A. No, I did not.

9 Q. Why not?

10 A. Because the survey was so flawed it was
11 impossible to work with as a template for doing a
12 proper survey.

13 Q. Now I'm going to show you what's been
14 marked as Johnson Applicant Exhibit 2. Could you
15 tell us what that is, please?

16 A. This is the report that describes the
17 survey that I designed and conducted in rebuttal in
18 this matter.

19 Q. Was your survey conducted in accordance
20 with generally-accepted survey methodology?

21 A. Yes, it was.

22 MR. CROSS: I'd like to offer Exhibit 2
23 into evidence.

24 BY MR. CROSS:

25 Q. Have you come to any opinions about the

1 likelihood of confusion in this dispute as a result
2 of your survey research reflected in Exhibit 2?

3 A. Yes, I have.

4 Q. What is your opinion?

5 A. My opinion is that there is no likelihood
6 of confusion whatsoever about the use of the Smart
7 Balance name as a name for frozen meal entrees that
8 are sold in a supermarket or other places that sell
9 frozen foods.

10 Q. Do you hold that opinion to a reasonable
11 degree of certainty in your field?

12 A. I do.

13 Q. Before we address the details of your
14 rebuttal survey, I'm going to ask you something
15 about your background. Do you have a college
16 degree?

17 A. Yes, I do.

18 Q. What is your degree in and where did you
19 get it?

20 A. My undergraduate degree was in psychology
21 from the Loyola University here in Chicago. It was
22 a BS in psychology. My graduate work was at the
23 University of Chicago, again, here in Chicago,
24 which is a master's in business administration.

25 Q. When did you start working at Leo

1 Shapiro?

2 A. I actually started working while I was
3 still an undergraduate in Loyola in 1971. So I got
4 a part-time job there while I was still in school.

5 Q. Have you worked anyplace else in your
6 career since then?

7 A. No, I have not. This is the only place
8 I've ever had a job.

9 Q. When you started at Leo Shapiro, you
10 obviously weren't CEO. What role did you play at
11 the firm when you first began?

12 A. Well, when I started, it was part-time as
13 what we call a coder, someone who takes surveys and
14 reduces the responses to their key elements or the
15 key theme of the responses. It's a clerical task.

16 Q. What else have you done in your career
17 progression at Leo Shapiro? What other positions
18 have you held?

19 A. Well, since then I've held literally
20 every position in the company, pretty much. I
21 became a project director after -- after I
22 graduated undergraduate, then a senior project
23 director, then a research analyst, then a senior
24 analyst. Finally I became vice president, then
25 executive vice president, then president, and then

1 chief executive officer.

2 Q. How long have you been CEO?

3 A. It's about ten years now.

4 Q. Have you had any notable mentors in your
5 career?

6 A. I have. I was fortunate enough to work
7 with a number of people in the field who were quite
8 famed for being leaders. One was Phillip Hauser,
9 who was a deputy director at the US Census Bureau.
10 Another was Leo Shapiro, who was the founder of the
11 company and a demographer of some reputation. He
12 worked at the Bureau of Labor Statistics for a long
13 time before founding the company. And then Hans
14 Zeisel, who was a pioneer in the use of
15 survey research and behavioral methodology in the
16 field of litigation.

17 Q. I remember hearing about Hans Zeisel when
18 I was a law student many years ago. In what
19 context did you work with Hans Zeisel?

20 A. Well, back in the early '80s Hans was at
21 the University of Chicago. And he and I got
22 together in terms of working together on projects
23 where I would do the field research and he would do
24 the design and the reporting for a number of
25 different projects that he had in mind.

1 At the time, most of those projects weren't
2 even useable in court. It was before courts
3 generally accepted survey data as being something
4 they could rely on and where it was not hearsay.
5 In other words, the person, the respondent, didn't
6 have to show up in court or sign an affidavit
7 saying this is what I said. A properly executed
8 survey by a proper expert was admitted as evidence
9 by the late '80s.

10 Q. What role did Professor Zeisel have in
11 getting courts to be willing to accept survey
12 research?

13 A. Well, he lobbied for it extensively, and
14 he testified in a number of cases about his own
15 opinions as well as what surveys said, as well as
16 bringing forth witnesses.

17 Q. Do you belong to any professional
18 associations or groups?

19 A. I do. I belong to the American Marketing
20 Association, the International Trademark
21 Association, and the AAPOR, which is the American
22 Association of Public Opinion Researchers.

23 Q. Have you been asked to lecture on the
24 topic of survey research methods and standards?

25 A. I have in a number of forums, including

1 various INTA association meetings, as well as some
2 continuing legal education forums in different
3 states for the bar associations.

4 Q. I'm going to show you what we have marked
5 as Johnson Exhibit 3, Applicant's Exhibit 3. Could
6 you tell us what that is, please?

7 A. This is a current CV and case list.

8 Q. And I know there was one incorporated
9 into your report, Exhibit 2. Is there any
10 significant differences between the updated one and
11 the one that was in your report?

12 A. Only that I've updated the case list,
13 both for trials and for depositions.

14 Q. I'd like now to focus specifically on the
15 types of work you have done while at Leo Shapiro.
16 What is the focus? What has the focus of your work
17 been?

18 A. I've worked in -- for a number of
19 different clients, both commercial clients and
20 litigation clients, but generally I've worked
21 heavily in the design of research projects, using
22 innovative research techniques and original
23 designs.

24 Q. Any of those research techniques involve
25 survey research?

1 A. They all did, yes.

2 Q. In the course of your career, how many
3 surveys have you designed?

4 A. I've designed thousands.

5 Q. And that would be in litigation and
6 outside of litigation?

7 A. That's correct.

8 Q. Could you give me some examples that you
9 can tell us that are public information about
10 companies that you have performed surveys for
11 either in litigation or outside of litigation?

12 A. Certainly. People like Coca-Cola,
13 Microsoft, eBay, Oracle; let's see, Nieman Marcus,
14 Bloomingdale's, Macy's, Target. Many, many others.

15 Q. That's fine. About how often has your
16 survey work involved litigation? Just ballpark
17 percentages of the total number of surveys you've
18 done, how many have been in the context of
19 litigation?

20 A. Maybe a third.

21 Q. And have you done any survey work in
22 connection with TTAB proceedings?

23 A. Yes, I have.

24 Q. In litigation surveys, what's the
25 approximate breakdown between times you've been

1 retained by the senior user as opposed to the
2 junior user or the plaintiff or the defendant?

3 A. It's split about 50/50 between plaintiff
4 and defendant.

5 Q. Are there authoritative texts that you
6 turn to or have relied upon in your work over the
7 years, including your work in this case?

8 A. There are a few, yes.

9 Q. What? Could you give me some examples?

10 A. Well, for instance, the Thomas McCarthy
11 tract or treatise on trademarks; the manual for
12 complex litigation from the federal judicial
13 system, the -- there's a discussion of survey
14 research methods and designs that was done by
15 Dr. Sherry Diamond that's part of the federal
16 judicial system manual.

17 Q. Have you read any of those?

18 A. Oh, yes.

19 Q. When did you first read these texts?

20 A. Pretty much when they were created.

21 Q. How often have you provided expert
22 testimony in a court proceeding? Not a discovery
23 deposition, but a court evidentiary hearing or
24 trial or in a TTAB trial testimony setting like
25 you're doing today? About how often have you --

1 A. I believe it's in the 80s at the moment.

2 Q. And of that 80 or so times you've
3 provided trial testimony or hearing testimony, how
4 much of that has focused on the issue of likelihood
5 of confusion?

6 A. Little more than half the time I think
7 the primary issue was likelihood of confusion.

8 Q. Have you ever been excluded on the
9 grounds that you are not an expert in survey
10 research methodologies?

11 A. No, I have not.

12 Q. Has any survey that you've performed for
13 litigation ever been excluded from being considered
14 as evidence?

15 A. No, it has not.

16 Q. Have you ever been criticized?

17 A. Yes.

18 Q. Let's get out your survey, which has been
19 marked Exhibit 2. Could you tell us generally the
20 type of format of survey that you use? Does it
21 have a particular name?

22 A. The survey follows a format that's
23 generally described as the Eveready format, which
24 it was -- is based on the original union carbide
25 case that involved Eveready batteries versus

1 Eveready lights.

2 Q. Had, before this case, you heard of
3 Eveready format surveys?

4 A. Oh, yes. They're quite well known. In
5 fact, Dr. McCarthy has talked about them even in
6 his treatise about being the gold standard for
7 measuring likelihood of confusion.

8 Q. Have you done Eveready format surveys
9 before this case?

10 A. Many times. It's the generally accepted
11 way to do surveys that involve likelihood of
12 confusion.

13 Q. What are the distinguishing
14 characteristics of an Eveready format confusion
15 survey?

16 A. The primary characteristics of an
17 Eveready style test is that the junior user is the
18 product or service or trademark that is identified
19 to the consumer, not the senior user. So the
20 question is, will the senior user come to mind as
21 the source when faced with the junior user's use of
22 a trademark or trade dress or product or name.

23 Q. Are there other generally recognized
24 confusion survey formats besides the Eveready
25 format?

1 A. There is another format that's sometimes
2 called a Squirt test, which is characterized by
3 identifying both the senior user and the junior
4 user to the respondent in a number of different
5 ways. You can just do one and one, or you can do
6 it in a -- what's called a two-room test, which is
7 essentially show an ad first and then a group of
8 products or services, or you can show an array,
9 which is just a group, and have people pick out
10 ones that appear similar or from the same source.

11 Q. What format, if any, did Dr. Sabol use
12 for his survey, which has been marked as Johnson
13 Exhibit 4?

14 A. Well, Dr. Sabol's test, or survey,
15 doesn't really correspond to either an Eveready
16 test or a Squirt test. It bears more similarities
17 to the Squirt format because it identifies both the
18 senior user and -- in this case, Smart Ones, and
19 the junior user, in this case, Smart Balance.

20 But it doesn't even follow the format of a
21 Squirt test in the way it does so, nor does it
22 expose it to the junior user's universe, which also
23 is the generally accepted way, even in a Squirt
24 test, is you focus on the junior user's universe,
25 not the senior user's. But he didn't do that; he

1 took the senior user's universe.

2 Q. We'll get to the distinctions between the
3 different universes that he had done and then the
4 one you did in response in a bit. But question for
5 you: Why, in response to the Sabol survey format,
6 did you select the Eveready format to perform?

7 A. Well, the Eveready format is the proper
8 format in most cases. And when you have two
9 products where the senior user's been on the market
10 for a while, in other words, you would expect it to
11 have been exposed to people in the market. Based
12 on my understanding, Smart Ones has been around for
13 a while and it is in distribution around the
14 country. So the senior user is out there, is the
15 one characteristic.

16 And secondly, the -- what you're trying to
17 measure is the extent to which the junior user's
18 use today, given the market conditions that do
19 exist, would cause people to confuse it with the
20 senior user. It doesn't really matter how well
21 known or unknown the senior user is.

22 In this case, it's my understanding the
23 senior user is very well known, or at least there's
24 a high level of awareness, based on the Sabol
25 survey and based on the complaint. So the format

1 here is pretty much a choice of Eveready or
2 Eveready. There wouldn't be another way you would
3 do it given that circumstance.

4 Q. Why not do the Squirt format? What are
5 the drawbacks of doing a Squirt style format of the
6 sort -- of the general sort that Sabol did here,
7 where both the senior user's mark and the junior
8 user's mark are put in front of the respondents?

9 A. Well, what happens with a Squirt
10 test -- and the reputation of Squirt tests have,
11 and the criticism courts have made of it, is it's a
12 leading and suggestive exercise, because you're
13 bringing together for the consumer two things that
14 may or may not come together in their mind.

15 So by asking the question where you
16 identify these two particular people, you're
17 suggesting there may be a relationship, even if the
18 person, the consumer, never thought so. That puts
19 a burden -- an extraordinary burden on the designer
20 of the survey to have a proper control so that you
21 can tell if there's any causal relationship between
22 the two products other than the -- than the name
23 or -- specifically the name or the trade dress,
24 whatever it is the product attribute you're testing
25 for.

1 So if it's a trade dress study, you have to
2 be able to isolate the effect of the trade dress.
3 If it's a trademark study, you have to be able to
4 isolate the effect of the trademark. Without a
5 control, you can't do that, because there's so much
6 error caused -- or noise caused by the design
7 itself because it's suggestive, it's leading, that
8 you can't get an answer without a control.

9 Q. In the Sabol study -- and we'll get into
10 this in a bit more detail. The Sabol study, did it
11 have those particular drawbacks that you have
12 mentioned, the suggestiveness, the leadingness,
13 that are sometimes seen in Squirt surveys?

14 MS. GOTT: Counsel, I'm going to object
15 again to any criticism that Mr. Johnson may have of
16 the Sabol survey to the extent that it's not in his
17 expert report. And if you don't mind, I'll make
18 that a standing objection so I don't have to
19 interrupt you.

20 MR. CROSS: I'd like you to interject
21 when you feel it's appropriate.

22 MS. GOTT: Okay.

23 MR. CROSS: Go ahead.

24 THE WITNESS: Could you repeat the
25 question?

1 COURT REPORTER: "In the Sabol
2 study -- and we'll get into this in a bit more
3 detail -- the Sabol study, did it have those
4 particular drawbacks that you have mentioned, the
5 suggestiveness, the leadingness, that are sometimes
6 seen in Squirt surveys?"

7 THE WITNESS: Well, it had them, but it
8 had them more than even you'd find in a typical
9 Squirt survey. In the Sabol study, there were a
10 series of questions about Smart Ones first, before
11 even entering into the, we'll call it the pairing
12 or the question about relationships. By first
13 asking about awareness, then asking about
14 purchasing, and then finally a question, which was
15 a highly-structured and leading question, was asked
16 about whether people believe there could possibly
17 be some relationship between the two brands, where
18 both brands are named in the question itself.

19 Which is not only going to have all
20 the drawbacks of a typical Squirt survey, but much
21 more -- it's much more extreme than I've ever seen
22 before.

23 BY MR. CROSS:

24 Q. To respond to those problems, is that why
25 you -- is that one of the reasons why you chose the

1 Eveready format?

2 A. Well, first, the Squirt format is
3 inappropriate. So you would choose an Eveready
4 format anyway. But there was nothing in the Sabol
5 study that allowed you to fix things. For
6 instance, if you ask the wrong people the wrong
7 thing in the wrong way, you just can't go and fix
8 it without starting over.

9 Q. Was your -- did you conduct your survey
10 through in-person interviews, by phone, by
11 Internet? What was the general method of getting
12 information from the respondents?

13 A. I conducted the survey in a mall
14 intercept survey, which is a personal, face-to-face
15 survey where the interviewer and the respondent are
16 together in the same room.

17 Q. How did Sabol conduct his survey?

18 A. Well, it's my understanding he conducted
19 it by telephone from a facility that he controlled.

20 Q. Are there drawbacks in doing it that way?

21 A. Well, the typical drawback is if you need
22 to show someone something, you don't do it on the
23 telephone because it's all verbal. So the question
24 is, can you properly ask a question on the phone in
25 the particular case you're doing and not have any

1 drawbacks to it.

2 So, for example, if you're saying something
3 like Smart Balance, does it come across as one word
4 or two words to the respondent. Well, when you do
5 it on a piece of paper face-to-face, it's clearly
6 two words. There's no pronunciation issues based
7 on how the interviewer pronounces it, so there's no
8 misunderstandings about what you're saying, versus
9 doing it by phone, where there may be those
10 misunderstandings.

11 Q. In what markets did you conduct the
12 actual interviewing? And you can turn to page 3 of
13 your report Exhibit 2 if you'd like.

14 A. I covered the United States by conducting
15 the -- in eight different markets covering the four
16 major census regions, and included major
17 metropolitan areas like New York, Philadelphia,
18 Dallas, Atlanta, Minneapolis, Chicago, Seattle and
19 San Francisco.

20 Q. Why those markets?

21 A. Well, those are major metropolitan areas
22 that cover the large population centers throughout
23 the United States, so they give you a good
24 cross-section of typical consumers.

25 Q. Who actually did the in-person

1 interviewing?

2 A. Each of the shopping mall locations has
3 its own interviewing service. They're almost like
4 franchises, where they own the rights to do all the
5 interviewing that takes place in the mall. So you
6 contract individually with each mall. And there
7 are some services who, quote, own more than one
8 franchise. So sometimes it'll be the same
9 ownership group, sometimes they'll be independent
10 of one another.

11 Q. So the interviews were -- I believe you
12 said that Sabol's phone surveying was done by -- it
13 appeared as if they were phoners or interviewers
14 under his or his company's control; is that your
15 understanding?

16 A. Well, in my review of his deposition, he
17 described it as a phone group that he controlled
18 that was his phone group. In other words, his
19 company.

20 Q. And you didn't do it that way? It sounds
21 like your interviewers were completely independent
22 of Leo Shapiro; is that right?

23 A. Yeah. Part of what -- what you're
24 trying -- you're striving for when you do this kind
25 of a research is what we call a double blind survey

1 technique, where the people -- the interviewers who
2 actually do the survey don't know who it's being
3 done for or what the purpose of it is. So we try,
4 whenever possible, to use independent groups to do
5 that.

6 I have a liaison group called Survey
7 Center, Inc., which is one of our divisions, who's
8 also the in-between. In other words, their charge
9 is to carry out these field operations. So they're
10 the go-betweens. So I give instructions to the
11 survey center, they, in turn, instruct the shopping
12 malls, so that I don't have any influence or bias
13 that can translate to the end interviewer.

14 Q. I was going to ask you this, and I think
15 you mentioned it, what, if anything, were the
16 actual interviewers told about either the purpose
17 of the survey or who had commissioned the survey?

18 A. They don't know anything about it.

19 Q. And the reason for that is?

20 A. You're trying to keep it blind so there's
21 no possible influence or outcome on the way they
22 ask or answer questions.

23 Q. Now, one of the responses that you did in
24 your survey, as opposed to what Sabol had done, I
25 think you had talked about the particular people

1 who were selected to be included in this surveying
2 group. Is that something that you had that would
3 distinguish yours from Sabol's?

4 A. Yeah. It's called the survey universe.
5 In other words, the survey universe, which should
6 be properly comprised of people in the junior
7 user's market, which would be people who are
8 current and potential purchasers -- current or
9 potential purchasers of frozen meal entrees that
10 you might buy in the frozen food section of a
11 supermarket.

12 Q. Is that your opinion about the -- of what
13 the proper survey universe should be in this case
14 for testing?

15 A. Well, it's consistent with Dr. McCarthy's
16 view and the courts, generally, that it's the
17 junior user's universe that's at issue, which in
18 this case would be anyone who buys these products
19 and would be exposed to the Smart Balance use at
20 retail.

21 Q. Now -- and you can get out his report if
22 you'd like, but what did Dr. Sabol -- how did he
23 define the survey universe for his survey?

24 A. Well, instead of defining it based on the
25 junior user's use, he defined it based on the

1 senior user's awareness. In other words, he only
2 allowed people in a survey who claimed that they
3 were familiar with the Smart Ones brand.

4 Q. If you turn to page two of Sabol's
5 survey, Johnson Exhibit 1, he discusses relevant
6 survey universe. And you mentioned one of the
7 characteristics of how he had defined the universe,
8 and that is the people had to have awareness of the
9 senior user's mark; right?

10 A. Correct.

11 Q. And your response was not to do it that
12 way?

13 A. Well, it's improper to do it that way,
14 yes.

15 Q. And again, why is that?

16 MS. GOTT: Objection to the extent his
17 opinion is not revealed in his expert report.

18 BY MR. CROSS:

19 Q. Why is it that you did your survey the
20 way you did it, as far as selecting the universe is
21 concerned?

22 A. Because the proper universe is supposed
23 to be the junior user's universe, which are current
24 and potential users of the junior user's product.
25 Which means you wouldn't first -- Dr. Sabol only

1 took people who were Smart -- aware of Smart Ones,
2 which immediately made that universe overly narrow.

3 And secondly, he took people only who had
4 bought in the past; he didn't include people who
5 were potential purchasers, which I've never also
6 seen before in the likelihood of confusion survey.
7 There are times when people will only do potential
8 purchasers, but I've never seen it where they only
9 did past purchasers.

10 Q. Now, you read his trial testimony on why
11 he set up the survey the way he did with the
12 universe -- his universe selection. Do you recall
13 what his justification was for not interviewing
14 potential purchasers and just interviewing people
15 who had actually purchased them?

16 A. Well, I think he described it, and this
17 is in his own words, and this is maybe a poor
18 quote, 'cause I'm not reading it from the
19 deposition, but he said something like, "I wanted
20 to get the people most likely to be confused."

21 Q. Is that an appropriate approach, in your
22 opinion?

23 MS. GOTT: Objection to the extent it's
24 not revealed in his expert report.

25 BY MR. CROSS:

1 Q. Well, go ahead and answer.

2 A. No, it is not.

3 Q. And your opinion in that regard is
4 revealed in your survey report in what way?

5 A. Well, by defining the way to do it
6 properly, which is what I did in my report.

7 Q. What is the -- okay. Let me just -- how
8 many total respondents did you have in your survey?
9 And if you want to continue on, I believe this
10 would be at page three, where you're talking about
11 the methodology, and it lists the number of
12 respondents.

13 A. Yes, there's 410 adults who are current
14 or prospective purchasers of frozen meal products.

15 Q. Do you have an opinion about whether the
16 number of respondents that you had to your -- in
17 your survey is enough?

18 A. The number of respondents in my survey is
19 more than sufficient to measure the likelihood of
20 confusion in a situation like this.

21 Q. Can you turn to paragraph 24 of your
22 report? Could you -- and then explain the analysis
23 that you have there concerning statistical error
24 rate.

25 A. Well, the 410 people divide into two

1 groups: one is what we call the test cell, and one
2 is the control cell. For purposes of computing
3 statistical error, because the percentages are
4 within each of the cells, you compute the error
5 based on the 205 cases per cell, which produce an
6 error rate of plus or minus 4.1 for statistics such
7 as ten percent.

8 So for example, a number like ten could be,
9 in theory, as high as 14.1 or as low as 5.9 based
10 on statistical probability. In other words, that's
11 your level of confidence or level of possible error
12 of a number like ten.

13 Q. Where in your questionnaire, which is
14 attached as part of appendix B to your report, are
15 the screening questions? Where do they appear? At
16 least the screening questions that yielded you the
17 proper universe that you had described here as
18 you've defined it.

19 A. Well, the screening questions are located
20 on the first two pages of the questionnaire.

21 Q. Those would be questions one, two, three,
22 and at least 4A, those would be the ones that would
23 get you the people who have actually purchased or
24 would purchase in the future?

25 A. Yes. In other words, the Roman numeral

1 one, two, three and 4A give you the age, the
2 gender, whether or not they do any of the grocery
3 shopping for themselves or their household, and
4 whether they've purchased or plan to purchase
5 frozen meals.

6 Q. And is 4B part of the screening set of
7 questions?

8 A. 4B is simply the next month. In other
9 words, the past purchase is 4A, "Thinking about the
10 past month, have you personally purchased frozen
11 meals from a supermarket or grocery store for
12 yourself or your household." 4B would be,
13 "Thinking about the next month, do you personally
14 plan to purchase frozen meals from a supermarket or
15 grocery store for yourself or your household."

16 Q. Why in 4B are you asking about ice cream,
17 frozen juice, as well as frozen meals?

18 A. Well, in each of these cases you do
19 what's called blinders, by asking about ice cream,
20 frozen meals and frozen juice, so the respondent
21 doesn't know which product you're particularly
22 interested in. Again, it's a way to control for
23 bias in the survey.

24 Q. What are the purpose of questions Roman
25 five, six, and seven?

1 A. Okay, Roman five and six are what we call
2 security screens, which is getting rid of people
3 who, A, they've already participated in a market
4 research survey recently, which is five, or whether
5 they or a member of their household works for a
6 market research or advertising firm, a
7 manufacturer, distributor or retailer of frozen
8 foods or a store in this mall.

9 The first two, the market research and the
10 frozen food manufacturer, is because they have
11 specific product genre knowledge which makes them
12 not representative of the class. You're trying to
13 get a random representation. These people are
14 excluded from surveys, is the general practice.

15 A store in this mall is because you're
16 trying to get the shopping population in the mall,
17 not the people who work there, who oftentimes will
18 offer to do surveys 'cause they want to do
19 something during a break or lunch hour. But again,
20 they're not representative, so we exclude them.

21 Q. I want to ask you about that. Is there a
22 difference between doing a phone survey and a -- is
23 that another difference between doing a phone
24 survey and a mall intercept survey, you're getting
25 people in a particular mind-set in one versus the

1 other?

2 A. Well, one of the ideas about doing people
3 out in a shopping mall is they're out shopping, so
4 they're in a shopping frame of mind. And doing a
5 survey about consumer purchasing is considered to
6 be more appropriate than trying to get them into
7 such a frame of mind on the telephone. But it's
8 an -- it is an advantage to doing it in the
9 shopping mall.

10 Q. In your review of Sabol's survey
11 questionnaire, did he ask questions of the sorts
12 that appear in your Roman five, six?

13 A. No, he did not. He had no security
14 screenings at all.

15 Q. What is the generally accepted practice
16 concerning including security screens in likelihood
17 of confusion surveys used in litigation?

18 A. It's the standard way to do it.

19 Q. After the surveyors have gone -- the
20 interviewees have gone through the screening and
21 security questions, what's the next step in the
22 interview process?

23 A. Well, actually in Roman seven and eight
24 what we do is first make sure they have eyeglasses
25 or contact lenses if we're going to show them

1 something, so they can read the cards. So if not,
2 they wouldn't be qualified. And then we invite
3 them to go to the research facility.

4 The screening usually takes place in the
5 mall traffic areas. But to actually do the survey,
6 you want them out of any distraction or noise, so
7 you bring them back to a freestanding facility or
8 office where the actual interview takes place. So
9 then at that point you would administer the
10 interview.

11 Q. And how does the interview proceed at
12 that point?

13 A. Well, the introduction is before we
14 begin, I would like you to know that your answers
15 and identity will be kept strictly confidential.
16 If you don't know the answer to any of the
17 questions, it is okay to say so; please do not
18 guess.

19 So you give them an admonition before they
20 start that's intended to tell them that they're
21 not -- they shouldn't feel pressured, they
22 shouldn't have to feel they have to give a response
23 if they don't have a legitimate one. But it's,
24 again, the generally accepted way to do this.

25 Q. You read Sabol's testimony, and it -- I

1 believe he said something of the sort that he
2 believed that you had designed your survey
3 intentionally to push respondents toward a "don't
4 know" or "have no opinion" response. Do you recall
5 that criticism of his?

6 A. I do. It was something he spoke of in
7 his deposition.

8 Q. And what's your response to that?

9 A. Well, it's absolutely wrong. The
10 opposite is the case. In other words, courts will
11 criticize you, properly, for not allowing people to
12 say "don't know." You don't try to force them to
13 make a choice, because what happens then is you'll
14 force them to guess or they'll try -- they will
15 feel under pressure to make a choice when they
16 don't have a legitimate choice. So there's always
17 the stricture.

18 And, again you'll find it in the Sherry
19 Diamond article about how to properly design a
20 survey for litigation, that you have to give people
21 a "don't know" alternative, or else you're forcing
22 them to guess.

23 Q. After they're given this prefatory
24 instruction, what's the next step in the interview
25 process?

1 A. Well, they're handed an exhibit card.
2 Exhibit cards are depicted on page four of my
3 report, paragraph ten.

4 Q. And is the actual size of the card
5 elsewhere in your report? Would that be in
6 appendix B?

7 A. It is. That's the actual size of the
8 card in appendix B.

9 Q. All right. Take me through this process
10 of the card showing, please.

11 A. So they're handed the card, it's roughly
12 a four-by-six card, that says either Smart Balance
13 in the test cell, Right Balance in the control
14 cell. People are randomly assigned to test and
15 control, so they don't know which one they're in.
16 And they have no idea which is the test cell, which
17 is the control cell. In fact, the interviewer
18 doesn't know which is the test cell and which is
19 the control cell.

20 For the interviewer, that distinction is
21 only whether they've given them an exhibit called
22 MM on their back or TT. So they don't know which
23 is test and which is control.

24 In this case, the Smart Balance is the test
25 cell, Right Balance is the control cell. Now,

1 Right Balance takes the name Smart, which is the
2 name that's at issue in the dispute, replaces it
3 with the name Right, R-I-G-H-T, so that you have
4 the same number of letters, it has sort of the same
5 look and feel, both end in a T, five letters; Right
6 and Smart can construe sort of the same meaning in
7 terms of the Right Balance versus Smart Balance for
8 a frozen food entree. So that's the control.

9 It's also my understanding that Right
10 Balance is not a brand that's currently in use in
11 the frozen food section that sells ready-to-eat
12 entrees.

13 Q. What's your opinion about that mark Right
14 Balance as a control -- as an adequate control in
15 this survey?

16 A. I think it's a very good control.

17 Q. What is the purpose for having this
18 separate set of interviewers, as many as are shown
19 the actual test cell card are also shown this
20 control stimulus, or exhibit? What's the purpose
21 for doing that?

22 A. Well, whenever you do a survey, you're
23 going to have a certain amount of guessing, or
24 noise, that simply occurs because people will make
25 sort of random answers to something or answers that

1 don't make sense, or you'll get what we call market
2 share mentions, which are if, for example, I was to
3 hold up a clear glass with brown cola in it and I
4 ask people what this is, I'm going to get a lot of
5 Coke and Pepsis because those are the brand leaders
6 in the brown cola market.

7 That doesn't mean that brown cola in itself
8 has any trademark significance, it just means that
9 people, when given an opportunity to guess and
10 asked a question like that, some people will guess.

11 So one of the things a control does is
12 controls for market share. It also controls for
13 random guessing or noise, and it also controls for
14 any leading or suggestiveness in the questions
15 being asked. So the control cell is asked exactly
16 the same questions using exactly the same screening
17 to get a parallel sample of people, but they're
18 seeing a product or service or trademark that's not
19 at dispute, versus the test cell, that's seeing the
20 one that's in dispute so that we can make a causal
21 inference.

22 The whole point in doing a likelihood of
23 confusion survey is we're trying to determine what
24 the causal effect is of the trademark or trade
25 dress in terms of causing the junior user's

1 population to be confused and believe it is somehow
2 related to the senior user.

3 Q. What's the generally accepted practice
4 for whether or not a control should be used in a
5 likelihood of confusion survey?

6 A. Well, there's really two issues in terms
7 of control. First is if you're the defendant in a
8 case and you choose not to do a control, let's say,
9 for example, to save money, you're hurting
10 yourself, because you're not being able to subtract
11 it from the level of confusion that would be found
12 in the test cell.

13 So if you wish to do that to save
14 money, you can do that, knowing that you're going
15 to overstate the likelihood of confusion. Because
16 logically, you can't subtract it. Now, the only
17 time I've ever seen that done is in an Eveready
18 style test, where the defendant is pretty sure
19 there's not going to be any significant level of
20 confusion, so they save the money.

21 That doesn't apply to a Squirt test.
22 I've never seen a Squirt test done without a
23 control, because the suggestiveness of bringing the
24 products together and asking about a possible
25 relationship is so high, that without a control,

1 you're always going to have a significant level of
2 confusion.

3 Q. Did Sabol do a control?

4 A. No, he did not.

5 Q. Do you recall his testimony about why he
6 didn't do one?

7 A. Well, it was a little ambiguous about
8 whether it was his decision that he didn't need one
9 or that it was simply to save money.

10 Q. Would it have cost more money for Sabol
11 to do -- to follow the generally accepted practice
12 of having a control, especially when you do a
13 Squirt format-type survey?

14 A. Well, it would have cost more money, but
15 not necessarily double what he had charged before.

16 Q. What is your opinion about his use of
17 cost as an excuse for not using a control?

18 MS. GOTT: Objection to the extent his
19 opinion is not in his expert report.

20 BY MR. CROSS:

21 Q. Well, he didn't say -- Sabol didn't say
22 in his expert report that the reason he didn't do a
23 control was because of cost. He brought that up at
24 his trial testimony, which we've just heard. So go
25 ahead.

1 A. The -- in his deposition he talked about
2 it being an attempt to save money, but essentially
3 it completely invalidates any possible measurement
4 he could have. So saving money to invalidate your
5 own survey doesn't seem, to me, to be a rational
6 thing to do.

7 Q. Could you turn -- while we're on the
8 topic of cost, could you turn to paragraph 28 of
9 your report, where you explain the cost of this
10 survey was \$100,000. In your experience, is that
11 cost of this survey high, low, in between
12 someplace?

13 A. Based on my experience, it's very typical
14 of what a survey like this costs.

15 Q. Does your experience involve information
16 not only about the costs of surveys that you have
17 conducted, but that your opponents have conducted
18 in litigation?

19 A. Absolutely. In most of the cases that
20 I'm involved in, both sides have survey evidence or
21 survey experts.

22 Q. And in the course of that you find out
23 how much they're charging?

24 A. Absolutely.

25 Q. And what, in your experience, is the

1 typical charge by your opponents?

2 A. It's about the same. It's about \$100,000
3 for a survey like this.

4 Q. And you -- what's your reaction to the
5 amount that Sabol charged here? I believe he said
6 it was \$15,000.

7 A. Well, that's very low for a survey like
8 this.

9 Q. Now, you -- getting back to the survey
10 process, the interviewing process, you said that
11 the interviewees -- the respondents are shown
12 cards. The answer to this is probably obvious, but
13 why show them cards? Why not show actual products
14 that have the marks on them?

15 A. Well, first, they're -- at the time I did
16 the survey, anyway, there was no product from Smart
17 Balance in the marketplace. But secondly, and most
18 importantly, what you're trying to test for is the
19 name and the name alone; you're not testing trade
20 dress or color or stylized marks, you're testing
21 the conveyance of the mark Smart Balance. Does it
22 in fact identify the senior user by mistake or does
23 it just identify the junior user to people who
24 encounter it in the context of the way it would be
25 used in the marketplace. So the proper way to do a

1 survey like this is to show the mark by itself.

2 Q. What are the respondents allowed to do
3 with the cards? Do they get to hold them, are they
4 held at a distance? What are they allowed to do
5 with them?

6 A. They're handed the card and they hold it
7 and look at it and they're instructed that this is
8 the name of a frozen meal product that you might
9 see in the frozen food section of a grocery store,
10 feel free to comment, if you wish, on anything
11 about it. And then they're allowed to look at it
12 and say hey, I've seen it before, I haven't seen it
13 before, good name or bad name. But they look at it
14 and they react to it as they encounter it in the
15 marketplace.

16 Q. And then what happens with the card after
17 they're done looking at it?

18 A. Well, then you take the card away and
19 then you ask them questions, the Eveready battery
20 of questions, or -- bad use of the word "battery,"
21 but there are three essential levels of questions
22 in an Eveready survey. And then you ask those to
23 people after you remove the card from sight.

24 Q. I want to focus on the removal of the
25 card from sight. Do you recall Dr. Sabol's

1 testimony about how he had never heard of such a
2 thing happening before and that he could, if I
3 recall this correctly, could think of no reason to
4 remove the card from the sight of the respondents.
5 Do you recall that testimony?

6 A. I do.

7 Q. What's your response to that?

8 A. Well, he's incorrect. The generally
9 accepted practice in an Eveready survey is to
10 remove the stimulus or the card from sight, because
11 you're trying to avoid the parroting or what we
12 call the reading test elements of it. So, for
13 example, if someone were confused, and when you
14 showed them the card that said Smart Balance for a
15 frozen food entree in a supermarket, what they
16 registered was the name Smart Ones, because that's
17 what came to their mind.

18 If you had the card in front of them when
19 you ask them the source question, they're going to
20 say oops, it didn't say Smart Ones, it says Smart
21 Balance, and they would correct themselves. So
22 you'd never know if they were confused.

23 Q. Well, Sabol, I believe, said that he
24 thought that removing the cards from view made it
25 so that you were not replicating the buying

1 experience, the marketplace experience. What's
2 your view on that?

3 A. Again, it's wrong, 'cause what you do is
4 you look at the product name when you buy the
5 product, okay, then you put it in your cart and you
6 forget about it. The cashier rings it up, it goes
7 home, you may look at it again when you get it
8 home, but you're not sitting there staring at it
9 the entire time. And no one's asking you questions
10 about source with it in your hand.

11 So the question is, what was the overall
12 commercial impression that the name made when you
13 encountered it in the context of the marketplace.
14 And then the question is, what was that commercial
15 impression, what do you believe you saw.

16 Q. What are the respond -- what happens
17 after the card is put away? What's the next
18 sequence of questions to the respondent?

19 A. Well, then they're asked the series of
20 Eveready questions. The first one is about the
21 source, which is, based on what you just saw, who
22 or what company do you believe makes the frozen
23 meal product with the name that I showed you, or do
24 you not have a belief. And if they have a belief,
25 they're asked, what makes you say that. So we have

1 an open-ended question that explains why they said
2 what they said.

3 Q. The open-ended question, were there any
4 open-ended questions in Sabol's survey of the
5 confusion -- in the confusion-type sequence of
6 questions, that you recall?

7 A. No, there was not. And the reason you
8 have the open-ended question in the first place is
9 you want to know, from the consumer's perspective
10 in their own mind, what it is they think makes them
11 give the response they did. So if they say no, I'm
12 not confused, or yes, I'm confused, why becomes
13 because a very important thing.

14 If you're trying to say well, because you
15 showed me two things, or well, because, based on
16 the question you asked me, they're all sold in the
17 supermarkets, well, they're all frozen foods or
18 anything like that, you get that sort of answer
19 from the open-ended question. Without it, you have
20 no clue as to why people say what they say.

21 Q. What's the generally accepted practice or
22 standard for conducting likelihood of confusion
23 surveys and the asking or not asking of an
24 open-ended question of that sort?

25 A. Well, over the last 20 years, given --

1 and a number of courts have made the comment that
2 the trier of fact needs that information so that
3 they can see why people were giving the responses
4 also, but it's the generally accepted practice to
5 have the open-ended question.

6 Q. And again, why didn't you do it the way
7 Sabol did it in your response of survey? Why
8 didn't you ask just the close-ended question?
9 Doesn't that make it go faster, the process, make
10 it less expensive?

11 A. It makes the process faster and less
12 expensive, but it also invalidates the survey. So
13 again, it's not something you would ever do.

14 Q. After the respondents are asked questions
15 2A and 2B, what's the next step in the --

16 A. Well, so first they're asked about the
17 source of what they're seeing. Next they're asked
18 the question, again in the Eveready format, what
19 other products or brands, if any, do you believe
20 comes from the same company that makes the frozen
21 meal product with the name that I showed you, or do
22 you not have a belief.

23 And that gets a sister product or line
24 extension or something you believe, well, it's not
25 the same name, but I'm sure it comes from the same

1 company because it uses the word "smart," for
2 example.

3 Q. And then the last question 4A and 4B in
4 this sequence of questions?

5 A. Well, this is the third tier that you
6 seek out in the Eveready study, which is what other
7 brand or company, if any, do you believe is related
8 to, associated with, or has a licensing agreement
9 with whoever makes the frozen meal product with the
10 name I showed you, or do you not have a belief.

11 And again, on this third level you're
12 saying well, is there a licensing relationship or
13 something else that says because of the name that
14 they saw, they believe it to be related in some way
15 to Weight Watchers or Smart Balance or Smart Ones.

16 Q. In your opinion, is the format of the
17 questions and the way they were administered,
18 questions two, three, and four, are they in
19 compliance with generally accepted surveying
20 standards?

21 A. They are in my study, yes.

22 Q. There is another page in the
23 questionnaire which is appendix B. It's called
24 Classification Page. What is that?

25 A. Well, that is to record contact data, so

1 that you can recontact the people who were in the
2 survey after the survey has been completed and
3 they've gone home, to validate the survey, that
4 they participated in the survey.

5 Q. And was a validation process followed in
6 your survey?

7 A. Yes, it was.

8 Q. What is appendix C?

9 A. Appendix C shows the result of that
10 validation. That of the 414 respondents, 227 were
11 actually reached. All of them were dialed, but you
12 never reach all of them again. Of which 223
13 admitted that they did the survey, four said they
14 were invalid, they didn't -- but that's pretty
15 typical. In other words, you never get a hundred
16 percent of the people saying I did the survey,
17 because they don't want to be bothered again.

18 Q. What is the generally accepted practice
19 for conducting validations of surveys, likelihood
20 of confusion surveys, used in litigation?

21 A. Well, typically surveys are conducted to
22 at least the point of 30 or 40 percent having been
23 recontacted. But when you do a validation, you
24 have to use a separate company to do the validation
25 or else you haven't really done a validation.

1 In other words, you don't have the people
2 who did the surveys validate their own work,
3 because if there was a problem in what they did,
4 they're sort of disincentivized from finding such
5 problems because it was their work. So you always
6 use an independent company.

7 In this case, for example, we used a
8 telephone field research service located in
9 Colorado that will call all of the people in all of
10 the malls who were surveyed and validate the
11 results. But they're an independent third party.

12 Q. Doesn't that add an additional layer of
13 expense?

14 A. Of course.

15 Q. Now, did you see any -- any written
16 explanation of a validation or verification process
17 in Sabol's report?

18 A. There was nothing in his written report
19 that talked about validation. He did talk about it
20 in his deposition.

21 Q. What do you recall about him saying
22 concerning -- well, let me ask you this. Is
23 it -- is it standard practice for -- for a survey
24 expert to actually have a written record of the
25 validation practice -- of the validation process,

1 if there was one done?

2 A. It's normally in every report I've ever
3 seen.

4 Q. But it wasn't in Sabol's report?

5 A. No, it was not.

6 Q. What do you recall his explanation of the
7 validation process that he claims to have conducted
8 in his survey to have been? Bad question, but I
9 think you can understand it.

10 A. Well, he claims to have done validation
11 sort of real-time, on the spot, by his own people.
12 But again, that fails the first step of validation,
13 which is to have an outside group do it. And
14 secondly, it sounds more like a monitoring. In
15 other words, when you do -- many phone centers who
16 do phone calls have a monitoring, where a
17 supervisor can monitor the calls. But that's not
18 validation. So it's unclear from his testimony
19 what he actually did. But it certainly wasn't done
20 by an objective, outside validating party.

21 MR. CROSS: Could we take a short break
22 right now? We've been going about an hour.

23 MS. GOTT: Sure.

24 MR. CROSS: Let's go off the record.

25 (Break taken.)

1 BY MR. CROSS:

2 Q. We can go back on the record. I believe
3 we've covered the process and methods that you have
4 used for your responsive survey. Now let's turn to
5 the results. I think the results begin being
6 reported on page 13; is that correct?

7 A. That's correct. Paragraph 29 shows the
8 results of the first question in the Eveready
9 series, which has to do with who do you believe
10 makes the frozen meal product with the name that I
11 showed you.

12 Q. And what do the results show?

13 A. Well, it shows that four percent named
14 Smart Balance, three percent Lean Cuisine, three
15 percent Weight Watchers, three percent Healthy
16 Choice, two percent Stouffer's, one percent named
17 Smart Ones in the test cell; no one named Smart
18 Ones in the control cell.

19 Q. What about the number of people that
20 didn't have a belief about source? The 73 percent
21 and 72 percent under the control cell, is that --
22 is that high, low, expected, unexpected?

23 A. When you're dealing with a product that
24 isn't in the marketplace yet, this is about exactly
25 what you would expect. And in my experience, this

1 is what usually happens when you ask about such a
2 product, unless there's a significant likelihood of
3 confusion. This shows basically market share
4 mentions and no confusion to the source question.

5 Q. And then what's the -- what are the
6 results of the next question, question 3A there
7 reported on page 14?

8 A. So the next question about what other
9 products or brands, if any, do you believe come
10 from the same company who makes the frozen meal
11 product with the name that I showed you, or do you
12 not have a belief, shows that about 18 percent will
13 name something else, either a product or another
14 brand, of which five percent named grocery products
15 generally, five percent named a product that is
16 associated at least in terms of what they make with
17 Smart Balance products, for example, Smart Balance
18 makes milk, butter, eggs, mayonnaise, peanut
19 butter, those kind of things under the Smart
20 Balance trademark. That's five percent;
21 two percent Lean Cuisine.

22 And again, we have one person naming Smart
23 Ones in the test cell, no one in the control cell.
24 So again, no likelihood of confusion to that
25 question.

1 Q. On page 15 you report the results of
2 question 4A. Could you take us through those
3 results?

4 A. When asked about what other brand or
5 company, if any, do you believe is related to,
6 associated with, or has a licensing agreement with
7 whoever makes the frozen meal product with the name
8 that I showed you, or do you not have a belief,
9 13 percent named something. So between the three
10 levels, the 27 percent for source, 18 percent for
11 belief and 13 percent for related source, you have
12 roughly about half of the people have named
13 something that they associate with the Smart
14 Balance name.

15 But again, you have three percent Weight
16 Watchers, two percent Lean Cuisine, two percent
17 Healthy Choice, one percent Jenny Craig, etcetera,
18 and one mention of Smart Ones in the test cell,
19 none in the control. Again, no likelihood of
20 confusion.

21 Q. Back to the "don't have a belief" answers
22 for questions 3A and 4A. Are those levels out of
23 the ordinary?

24 A. No. Again, they're very typical when we
25 have a new product offering from a brand like Smart

1 Balance, where they're not in the frozen food case.
2 So this is about what you'd expect to find.

3 Q. Take us to the confusion summary table
4 that appears in paragraph 32 of your report. What
5 does this reflect and how is it compiled?

6 A. Well, this is compiled by what we call
7 netting the three questions. So we've now asked
8 three separate questions of everyone about source,
9 sister kinds of brands or line extensions, and then
10 about licensing or other relationships that might
11 exist. And some people would -- could have named
12 Smart Ones to more than one of those questions.

13 So we do what is called a net, which is you
14 only want to count everybody once, because we're
15 counting how many consumers, out of the total 205
16 in the test cell or control cell, actually named
17 Smart One somewhere.

18 So in this case it's two percent
19 overall in the test cell, zero in the control cell.
20 Typically you then adjust the test cell with the
21 control cell by subtraction. Here there's zero to
22 subtract, so the end result would be two percent.
23 And the two percent number is a diminimus kind of
24 confusion. And it's lower than the standard error
25 we talked about before, the plus or minus 4.1. So

1 the conclusion would be that there's no significant
2 likelihood of confusion.

3 Q. You have an analysis that begins on page
4 18 of Weight Watchers. It continues onto page 19.
5 What's the -- what's the purpose of this section of
6 the report and the Weight Watchers analysis?

7 A. Because in this particular case, it's my
8 understanding that the Smart Ones brand is
9 primarily used as what's called a sub-brand, where
10 Weight Watchers is the primary brand on the frozen
11 food entree product. So the question would be, as
12 a way of checking, is well, maybe they didn't name
13 Smart Ones because it was a Smart brand, but maybe
14 they named Weight Watchers.

15 So we compared mention of Weight Watchers
16 in the test cell/control cell also. And again, on a
17 net basis, just six percent in the test cell, which
18 would be attributable to, again, what you'd expect
19 based on market share mentions; you have seven
20 percent in the control cell, which would confirm
21 the notion that those are just market share
22 mentions.

23 And if you adjusted the test cell with the
24 control cell, again, you'd have zero percent would
25 be the answer, because it's six minus seven, which

1 is minus one, or zero for our purposes.

2 Q. On page 20 you have a statement of your
3 final conclusions and opinions. And I'm going to
4 ask you the following question: Based on your
5 survey results, do you have an opinion about the
6 likelihood of confusion in this case caused by
7 GFA's intended use of Smart Balance?

8 A. Yes, I do.

9 Q. What is that opinion?

10 A. When you do a properly designed research
11 study that controls for random mentions or other
12 biases in the world, so that you're looking at
13 whether there's a causal relationship between the
14 use of the word Smart Balance for frozen food
15 entrees and some likelihood of confusion that
16 people would relate it to Smart Ones, there's no
17 likelihood of confusion in the marketplace.

18 Q. Do you hold that opinion to a reasonable
19 degree of certainty in your field?

20 A. I do.

21 Q. What is -- what percentage -- at what
22 percent level would you consider there to be a
23 likelihood of confusion? Two percent, obviously
24 not. But at what point would it approach a
25 possibility of confusion?

1 A. It's been my experience and my testimony
2 in other cases as an expert witness that 20 percent
3 or more after adjustment. In other words, after
4 you subtract the control results from the test
5 results in a properly designed study, is
6 indicative, generally, of some significant level of
7 likelihood of confusion.

8 Q. Now, the Sabol report, do you recall what
9 percentage of confusion he concluded there was?

10 A. I think -- may I look?

11 Q. Feel free to look at it if you'd like.

12 A. According to the Sabol report, he found a
13 level of 32 percent for the total sample of
14 respondents, which was limited to Smart Ones,
15 people who were aware of Smart Ones. But that's
16 with no adjustment or with no control.

17 Q. Because he had no control?

18 A. Because he had no control.

19 Q. So is there any way you can draw any
20 conclusions about the level of confusion based on
21 the Sabol study?

22 MS. GOTT: Objection to the extent his
23 opinion is not revealed in his expert report.

24 BY MR. CROSS:

25 Q. Go ahead.

1 A. No, the Sabol number is only part of the
2 number. You have to subtract the control results
3 from his test result, especially in light of the
4 fact that he has no open-ended questions and he's
5 got a Squirt format that requires a control.

6 Q. Could you -- you can set aside your
7 report and please pick up, if you have it there --
8 maybe you don't. I'll give it to you. The -- here
9 it is. I'm going to show you what's been marked as
10 Johnson Applicant Exhibit 4. And can you identify
11 this as the report that was submitted in this case
12 by Leon Kaplan?

13 A. Yes, this is a report that I've
14 previously seen from Leon Kaplan.

15 Q. About when did you see it in the sequence
16 of events in this case, do you recall?

17 A. Well, I saw it after I had begun my field
18 work. In other words, I had designed and
19 conducted -- began to conduct the study. I think
20 it was before I produced my final report, but I'm
21 not sure.

22 Q. Is there -- do you agree or disagree with
23 anything in his -- or, I mean, do you disagree with
24 anything in his report?

25 MS. GOTT: Objection to the extent it's

1 not revealed in his expert report.

2 BY MR. CROSS:

3 Q. Do you disagree with anything in
4 Dr. Kaplan's report?

5 A. No, I do not.

6 Q. Do you have anything to add that you
7 haven't already addressed to what Dr. Kaplan had to
8 say?

9 MS. GOTT: Objection again to the extent
10 his opinion is not revealed in his expert report.

11 THE WITNESS: Well, I think there was at
12 least one point that, I think, if he talked about
13 the leading and suggestive question that was asked
14 in the Sabol survey.

15 BY MR. CROSS:

16 Q. On page 12?

17 A. It's page 12. But I think that he
18 was -- in his discussion he didn't go to the
19 ultimate point I think of -- if you look at the
20 question that Dr. Sabol asked --

21 Q. Just a second. I want to make sure we're
22 looking at the right thing. This is -- now you're
23 looking at Sabol's report Exhibit 1, and on page
24 12?

25 A. That's correct.

1 Q. Okay. Go ahead. What is your view of
2 that question?

3 A. On page 12, Sabol's report sets out what
4 he did in terms of his potential brand confusion
5 question or the question he asked. And Dr. Kaplan
6 did talk about the fact this was a leading and
7 suggestive question and improperly phrased.

8 But to be a little more specific, it is
9 unusual, in fact, I've never seen anything like
10 this, that -- so the way this question now is
11 worded, "If you were to see a brand of frozen meals
12 in the frozen food section of a supermarket named
13 Smart Balance, would you think it was associated
14 with, licensed by, owned by, or in any way
15 connected to Smart Ones." And then they're only
16 allowed to answer "yes," "no," or "don't know."
17 There's no open end.

18 The notion that they would say "any
19 way connected" is just unheard of and -- during a
20 likelihood of confusion survey. Because "any way"
21 could be oh, they're both sold in supermarkets,
22 they're both frozen foods, you know, they're both
23 red. "Any way" is literally asking the person to
24 speculate.

25 Q. In your opinion, what is the effect on

1 the numbers the Sabol report came up with of a
2 question that is so -- that is worded in that way,
3 "in any way connected to Smart Ones." What is the
4 likely bias?

5 MS. GOTT: Objection to the extent
6 Mr. Johnson's opinion is not reflected in his
7 expert report.

8 BY MR. CROSS:

9 Q. Go ahead.

10 A. Well, it appears to be calculated simply
11 to increase the number of people who say yes. But
12 without actually taking it apart, changing the word
13 and repeating it, you can't tell exactly.

14 MR. CROSS: I have no more questions.
15 And I offer all the exhibits that were referenced
16 today into evidence. Thank you very much. Do you
17 want to switch places?

18 MS. GOTT: Sure.

19 E X A M I N A T I O N

20 BY MS. GOTT:

21 Q. Good morning, Mr. Johnson.

22 A. Good morning.

23 Q. It's possible to slant the results of a
24 survey so that they would show less confusion
25 rather than more; isn't that correct?

1 A. In theory, you could slant anything you
2 do to be more or less or plus or minus if you were
3 trying to slant something.

4 Q. So it is possible, then, to slant the
5 results of a survey so that it would show less
6 confusion rather than more; correct?

7 A. Well, I don't know specifically. I've
8 never tried to do that, so -- without actually
9 making an experiment, I don't know.

10 MS. GOTT: Can you read back his answer
11 to the question just previous to that?

12 COURT REPORTER: "In theory, you could
13 slant anything you do to be more or less or plus or
14 minus if you were trying to slant something."

15 BY MS. GOTT:

16 Q. So Mr. Johnson, in theory it's possible
17 to slant the results of a survey so that it would
18 show less confusion rather than more; is that
19 correct?

20 A. Well, what I'm saying is in theory you
21 should -- in -- theoretically, if you try to slant
22 something either plus or minus, you should be -- it
23 should be something that could be done.

24 Q. So your answer is yes?

25 A. In theory.

1 Q. Yes, in theory. Would you prefer if I
2 used the word manipulate? That it's possible to
3 manipulate the results of a survey so that they
4 would show less confusion rather than more?

5 A. As I said, in theory, the idea that you
6 would manipulate a survey -- I'm sure that
7 theoretically you could manipulate a survey. I've
8 just never done it. But less rather than more is
9 nonspecific. In other words, slanting or
10 manipulating is independent of direction.

11 Q. Well, one way to affect the results of a
12 survey is how you design it; correct?

13 A. Well, designing a survey, you either
14 design something properly or you design something
15 improperly. It's binary.

16 Q. So surveys can be designed improperly,
17 yes?

18 A. That's correct.

19 Q. Okay. And one way to design the survey
20 improperly, to use your words, is to define the
21 universe improperly; correct?

22 A. If you define the universe improperly,
23 that is going to influence the result.

24 Q. And defining the universe improperly
25 could influence the result by causing it to show

1 more confusion or less confusion; correct?

2 A. Well, a universe is either overbroad or
3 overly narrow or correct.

4 Q. So if you have an overly broad universe,
5 that is going to decrease the results, showing a
6 likelihood of confusion; correct?

7 A. Not necessarily, no.

8 Q. So you're saying if you have an overly
9 broad universe, that could show more confusion?

10 A. Yes, could.

11 Q. How would that happen?

12 A. Whether it's overly broad or overly
13 narrow doesn't determine whether it's more or less
14 confusion. They're independent of one another. It
15 depends on the particular product and the
16 particular circumstance.

17 Q. Can you give me an example where you
18 would have an overly broad universe and increase
19 the likelihood of confusion, have a high likelihood
20 of confusion?

21 A. If, theoretically, we were dealing
22 with -- for example, we wanted to understand
23 confusion among people who buy Hummers, and instead
24 of doing people who would pay \$100,000 for an SUV,
25 we did people who -- anybody who might buy a car in

1 the next 20 years, that's an overly broad universe.

2 And the question is, would confusion be
3 lower or higher among those and something else. It
4 may well be higher, because the person spending
5 \$100,000 may have more specific knowledge of what a
6 real Hummer looks like. So when shown a fake
7 Hummer, they -- maybe to the general car buyer that
8 all things that are big and bulky are Hummers. So
9 you may have a greater likelihood of confusion
10 because you have an overbroad universe.

11 Q. In general, is it your experience that
12 when you have an overbroad universe, you have a
13 higher likelihood of confusion than with a properly
14 defined universe?

15 A. The two things don't relate. It depends
16 on the particular product and the particular
17 circumstance and in what way it's overly broad and
18 in what way it's overly narrow.

19 Q. For the survey you conducted, I believe
20 the respondents in your survey identified Hungry
21 Man, Swanson, Stouffer's and Banquet as brands of
22 frozen meal products; is that correct?

23 MR. CROSS: Would you be able to give us
24 a page?

25 MS. GOTT: Sure. Page 13 and 15.

1 THE WITNESS: Okay. On page 13 I see a
2 Stouffer's, which is "what company do you believe
3 for source." And on 15, when you're asked about
4 relation, association, or some licensing agreement,
5 in other words a tertiary relationship, you have
6 Hungry Man and Swanson.

7 BY MS. GOTT:

8 Q. And Hungry Man and Swanson are identified
9 there as a brand or company; correct?

10 A. Well, they're a source of some sort, yes.

11 Q. Right. Your question, I believe, says
12 "what other brand or company"; isn't that correct?

13 A. That is correct.

14 Q. So the responses here should be a brand
15 or a company; correct?

16 A. Well, to the extent that a consumer
17 understands Hungry Man or Swanson to be a brand or
18 a company, yes.

19 Q. And so the response to this question,
20 Hungry Man and Swanson have been identified as
21 brands or companies that make frozen meal products?

22 A. No, they're ones that are related to,
23 associated with, or have a licensing agreement with
24 whoever makes the frozen meal products. Doesn't
25 say they make frozen meal products.

1 Q. Is it your understanding that Hungry Man
2 makes frozen meal products or is a brand of frozen
3 meal products?

4 A. I don't know.

5 Q. You've never seen Hungry Man frozen meal
6 products?

7 MR. CROSS: Objection.

8 THE WITNESS: I haven't seen Hungry Man
9 frozen meal products one way or the other, yeah.

10 BY MS. GOTT:

11 Q. You're not aware of Hungry Man brand
12 frozen meal products?

13 A. Personally, no.

14 Q. Are you aware of Swanson brand frozen
15 meal products?

16 A. Yes.

17 Q. Okay. Are you aware of Stouffer's brand
18 frozen meal products?

19 A. Yes.

20 Q. And are you aware of Banquet brand frozen
21 meal products?

22 A. Yes.

23 Q. These frozen meal products that we just
24 identified, Swanson, Stouffer's and Banquet as
25 brands of frozen meal products, these are generally

1 high in fat and calories as frozen meal products;
2 isn't that correct?

3 A. I don't know.

4 Q. Would you agree that they generally
5 aren't the kind of frozen meal products one would
6 purchase if one were trying to maintain a healthy
7 weight?

8 A. I don't know.

9 Q. Would you agree that they generally
10 aren't the type of frozen meal that one would
11 purchase if one were trying to improve one's
12 cholesterol levels?

13 A. I don't know.

14 Q. Would you agree that they aren't the type
15 of frozen meal products that one would purchase if
16 one was trying to lose weight?

17 A. I don't know.

18 Q. Smart Balance considers itself to be a
19 health and wellness brand; correct?

20 A. I consider Smart Balance to be a, quote,
21 healthy or welfare brand. I don't know what they
22 consider themselves to be.

23 Q. Okay. Smart Balance products are
24 generally healthful products; correct?

25 A. My experience, and in my opinion, that's

1 correct. I don't know what they believe.

2 Q. It's your impression that someone who
3 values the quality and healthfulness of the product
4 that they're using would be likely to value Smart
5 Balance's products; correct?

6 A. I don't know.

7 Q. Mr. Johnson, you remember coming to Jones
8 Day office a few months ago; correct?

9 A. I don't remember it specifically, but I'm
10 sure I did.

11 Q. On December 18, 2012, Jones Day Chicago
12 office. Does that ring a bell?

13 A. Okay.

14 Q. You came there for your discovery
15 deposition; correct?

16 A. That's correct.

17 Q. And GFA Brands' attorney was there,
18 wasn't he --

19 A. Yes.

20 Q. -- Mr. Cross? And when you came for your
21 discovery deposition, we met in a conference room
22 similar to this; correct?

23 A. Yes.

24 Q. GFA Brands' lawyer sat next to you during
25 the deposition; isn't that correct?

1 A. I believe so.

2 Q. And there was a court reporter who gave
3 you the same oath that you took here this morning;
4 correct?

5 A. Yes.

6 Q. And you promised to tell the truth?

7 A. That's correct.

8 Q. And you did tell the truth in your
9 answers, didn't you?

10 A. Yes, I did.

11 Q. I'm going to show you the transcript of
12 your deposition, Mr. Johnson. Have you seen the
13 transcript before?

14 A. I have.

15 Q. Okay. You reviewed it?

16 A. I did.

17 Q. And you had an opportunity to make
18 corrections to the transcript?

19 A. And I did.

20 Q. You sent those corrections to your
21 attorney?

22 A. I did.

23 MS. GOTT: Do you have a list of those
24 corrections with you?

25 MR. CROSS: Looking at me?

1 MS. GOTT: Anyone.

2 MR. CROSS: I don't.

3 MS. GOTT: Okay. Is that something that
4 we can get a copy of? We never received any
5 corrections.

6 MR. CROSS: I believe we had sent them in
7 to the court reporter, and then the court reporter
8 never sent them in. As I recall it was --

9 THE WITNESS: They were minimal.

10 MR. CROSS: -- minimal. I don't think
11 we're going to have a problem on substance.

12 MS. GOTT: That's fine. Let me see here.

13 THE WITNESS: They were generally more
14 grammatical or clarifying than they would change
15 anything substantive.

16 BY MS. GOTT:

17 Q. So if you turn to page 45 of your
18 deposition transcript --

19 A. Yes.

20 Q. -- at line 46, the question. I'm going
21 to read you the question here and the answer. Line
22 46 starts, "QUESTION: How would you describe Smart
23 Balance's target customer."

24 A. I'm sorry, page 46 or --

25 Q. I'm sorry, I apologize. Page 45, line

1 six.

2 A. Yes.

3 Q. The question is, "How would you describe
4 Smart Balance's target consumer -- customer?"

5 Excuse me. "ANSWER: I don't know. QUESTION:

6 Would you agree that they target health-conscious

7 consumers? ANSWER: My impression is that someone

8 who values the quality and healthfulness of the

9 product that they're using would be likely to value
10 their product." Did I read that correctly?

11 A. Yes, you did.

12 Q. So is that still your opinion today, is
13 that your impression is that someone who values the
14 quality and healthfulness of the product that
15 they're using would be likely to value Smart
16 Balance's products?

17 A. Yes. As I thought I said a few minutes
18 ago. Yes, that's my opinion or my impression.

19 MR. CROSS: Objection, improper attempt
20 at impeachment.

21 BY MS. GOTT:

22 Q. Smart Balance products do not contain
23 hydrogenated or partially hydrogenated oils;
24 correct?

25 A. I don't know.

1 Q. Smart Balance products are naturally
2 zero grams trans fat; correct?

3 A. I don't know.

4 Q. Many Smart Balance products are designed
5 to improve customers' cholesterol ratios; correct?

6 A. I don't know.

7 Q. Many Smart Balance products have added
8 vitamins and nutrients; correct?

9 A. I don't know.

10 Q. You understand that GFA Brands intends to
11 introduce a line of frozen entrees under the Smart
12 Balance brands; correct?

13 A. I do.

14 Q. These frozen entrees are likely to be
15 healthful frozen entrees; correct?

16 A. I don't know.

17 Q. The universe studied by your survey was
18 not limited to purchasers or potential purchasers
19 of healthful frozen entrees; correct?

20 A. That is correct.

21 Q. Some of the respondents in your survey
22 may not have purchased healthful frozen entrees in
23 the month prior to the survey; is that correct?

24 A. That's correct.

25 Q. Some of the respondents in your survey

1 may not have planned -- purchased healthful frozen
2 entrees in the month following the survey; isn't
3 that correct?

4 A. That's correct, there was no screening
5 for healthful or not.

6 Q. In evaluating the results of a likelihood
7 of confusion survey, "don't know" responses do not
8 tend to show confusion; correct?

9 A. I'm sorry, a "don't know" response is the
10 same as a "no" response, if that's what you're
11 asking me, for purposes of confusion. In other
12 words, the pos -- there's an affirmative response,
13 there's a negative response, and there's a "don't
14 know." You count the affirmative responses.

15 Q. Right. And the "no" responses, the
16 negative responses, or the "don't know" response,
17 they do not tend to show confusion; correct?

18 A. Well, I think generally you wouldn't
19 count them as being confused, no.

20 Q. So another way to slant the results of a
21 survey would be to ask questions that suggest
22 "don't know" responses; correct?

23 A. No.

24 Q. Why not?

25 A. Because the "don't know" alternative is

1 one that you have to give people when you ask them
2 a structured question.

3 Q. The "don't know" alternative, the "don't
4 know" response, is an alternative you have to give
5 them when you give a structured question, but
6 suggesting a "don't know" response would lead to
7 results not likely to show confusion; correct?

8 A. No. You don't suggest a "don't know"
9 result. You offer people a no, a yes, an
10 affirmative and a negative, and a "don't know"
11 response to every structured question on the
12 survey. It's the generally accepted practice and
13 the correct way to offer a survey.

14 Q. There would be a way to design the
15 survey, though, where the wording of the question
16 would -- would lead respondents to indicate "don't
17 know" rather than an affirmative or negative
18 response, wouldn't you agree?

19 A. Offering someone the "don't know" option
20 as part of the survey question is the generally
21 accepted practice when you're conducting a survey.
22 It's not suggestive if you offer them the "no," the
23 "yes" and the "don't know." It would be suggestive
24 if you only offered them a "don't know" and the
25 "no" or "yes" were spontaneous, for example.

1 Q. The way that you designed the survey, the
2 words that you use and the questions, can suggest a
3 response; isn't that correct?

4 MR. CROSS: Objection to form.

5 THE WITNESS: Well, as the question, for
6 example, what you just asked me, which is a leading
7 question. If you ask a leading question, it has
8 the effect of being a leading question.

9 BY MS. GOTT:

10 Q. So leading questions could suggest a
11 "don't know" response; isn't that correct?

12 A. Leading questions are, by definition,
13 leading questions. They suggest whatever they
14 suggest.

15 Q. And so you can lead someone to respond
16 "don't know" to the question; correct?

17 A. Well, theoretically you can lead someone
18 to say "yes," you could lead someone to say "no."
19 So theoretically, you should be able to lead
20 someone to say "don't know" if you in fact are
21 trying to lead them or ask a leading question.

22 Q. Mr. Johnson, would you agree with me that
23 when surveys are used to prove the state of mind of
24 a prospective purchaser, the closer the survey
25 methods mirror the situation in which the ordinary

1 person would encounter the trademark, the more
2 reliable the survey?

3 A. Well, generally I think you try, when you
4 design a likelihood of confusion survey, to put
5 people into the context of the marketplace, which
6 is what I always do.

7 Q. And your survey in this case was designed
8 to test point of sale confusion; correct?

9 A. It was designed to test confusion when
10 people encounter the brand. It could be point of
11 sale or someplace else.

12 Q. Your survey didn't replicate the
13 marketplace conditions in which consumers encounter
14 GFA Brand as Smart Balance products; isn't that
15 correct?

16 A. That is not correct.

17 Q. Your survey didn't replicate the shopping
18 experience to test the extent to which the mark
19 Smart Balance in connection with frozen entrees was
20 likely to cause confusion, did it?

21 A. Yes, it did.

22 Q. It replicated the shopping experience?

23 A. Yes.

24 Q. In what respect?

25 A. It took people who were out shopping in a

1 shopping mall, with them in a shopping frame of
2 mind, and presented them with a product name in the
3 context of shopping for a frozen food entree.

4 Q. People shopping in a shopping mall don't
5 purchase frozen entrees at a shopping mall, do
6 they?

7 A. Well, most shopping malls, unless they
8 have a grocery store on the premises, wouldn't
9 immediately have it. But they certainly can do it
10 on the same trip.

11 Q. Your survey did not show any actual
12 products to the respondents, either through a
13 picture or display; correct?

14 A. The survey presented them, as I
15 testified, with the name on the card, not with the
16 product in a package.

17 Q. So it did not show any actual products to
18 the respondents?

19 A. It showed the name on a card.

20 Q. But not the actual products?

21 A. There is no actual product.

22 Q. So it did not show actual products;
23 correct?

24 A. There is no actual product. There is a
25 name on a card, and that is what was being tested.

1 Q. Your survey was essentially a word
2 association test in which respondents were shown a
3 card with the words Smart Balance or Right Balance;
4 isn't that correct?

5 A. No.

6 Q. They were shown a card with the words
7 Smart Balance or Right Balance; correct?

8 A. They were shown a card with the name
9 Smart Balance or Right Balance. It's not a word
10 association test, however, it's a likelihood of
11 confusion test.

12 Q. The Eveready survey format is especially
13 appropriate when the senior mark is strong and
14 widely recognized; correct?

15 A. Well, it's a question of it is
16 appropriate under that circumstance as it is
17 appropriate under most circumstances.

18 Q. You testified that, earlier, Dr. McCarthy
19 is an authority in trademark law; is that correct?

20 A. That is correct.

21 Q. So if he said the Eveready survey -- the
22 Eveready survey format is especially appropriate
23 when the senior mark is strong and widely
24 recognized, would you have any reason to doubt
25 that?

1 A. I would not.

2 Q. Mr. Johnson, would you agree with me that
3 Smart Ones is a strong mark?

4 A. I don't know.

5 Q. If Smart Ones is not a strong mark,
6 wouldn't it have been more appropriate to conduct
7 your survey in the Squirt format?

8 A. No.

9 Q. The reason you don't know whether Smart
10 Ones is a strong mark is because you have never
11 done any surveys or studies to determine the
12 strength of the Smart Ones mark; correct?

13 A. I have not done such a study.

14 Q. Are you aware of any such studies?

15 A. The only one I know of is the Sabol
16 study, which shows that there's a very high aided
17 awareness for the Smart Ones mark, similar to what
18 other marks in the category have.

19 Q. So a high aided awareness, would that
20 indicate that a mark is a strong mark?

21 A. No, it does not by itself.

22 Q. What other information is considered in
23 determining whether a mark is a strong mark?

24 A. Well, first it's -- that's a legal
25 conclusion, not a survey conclusion. And it

1 includes things like sales, history of sales, the
2 standing of the brand, the spontaneous awareness of
3 the brand, the degree to which there is product
4 preference, the degree to which consumers recognize
5 it when they see it, the degree to which the name
6 itself is used on more than one product or is on
7 one product, the degree to which it has what we
8 call the brand share mentions. There's many, many
9 factors that go into strength of the mark.

10 Q. But as you sit here today, you don't know
11 whether Smart Ones is a strong mark?

12 A. Well, they claim to be a strong mark, we
13 know that from the complaint. But whether or not
14 they are, I have no other data to go by.

15 Q. Would you agree with me that Smart Ones
16 is a widely recognized mark?

17 A. Well, Dr. Sabol's study claims that it
18 is.

19 Q. Do you agree with Dr. Sabol's study that
20 that is a widely recognized mark?

21 A. The only information I have is what's in
22 the complaint in which Dr. Sabol, quote, measured
23 would suggest that it has high awareness, which
24 would be consistent with being a widely known mark.

25 Q. So as you sit here today, do you have an

1 opinion as to whether Smart Ones is a widely
2 recognized mark?

3 A. As I said, the only information I have is
4 Dr. Sabol's information, which says that it has a
5 high awareness level, which would make it a -- I
6 have no reason to disbelieve that.

7 Q. You yourself, though, have not done any
8 studies or surveys to determine the degree of
9 recognition of the Smart Ones mark; correct?

10 A. That is correct.

11 Q. According to your report on page 16,
12 paragraph 32, just two percent of test cell
13 respondents report that false belief -- report the
14 false belief that Smart Ones is the source or a
15 related source when they are exposed to the Smart
16 Balance name in connection with frozen meals; is
17 that correct?

18 A. That's correct.

19 Q. There's no way to tell from your report
20 or your study whether the other 98 percent of test
21 cell respondents were aware of the Smart Ones mark;
22 isn't that correct?

23 A. We don't know from the study. We only
24 know that because they're current and potential
25 purchasers of frozen entrees, they're familiar with

1 the frozen entree section of a supermarket. So the
2 extent to which Smart Ones is out there, they've
3 been exposed to it.

4 Q. There are many different brands of frozen
5 meal products; correct?

6 A. Correct.

7 Q. Are you aware that there is a specialty
8 segment of frozen meal products known as frozen
9 nutritional entrees?

10 A. I don't think I've heard the term "frozen
11 nutritional entrees." There are many specialty
12 sections within different supermarket venues that
13 they use for frozen foods.

14 Q. Are you familiar with Nielsen data
15 reporting grocery purchases, grocery store
16 products?

17 A. Yes.

18 Q. Are you familiar with the fact that
19 Nielsen has a category in its reporting that
20 identifies frozen nutritional entrees?

21 A. I'm not familiar with that offhand, but
22 that has nothing to do with what a consumer would
23 call it, that's an industrial institutional
24 classification. And so you'd have to look at how
25 that is defined by Nielsen to understand what it

1 means.

2 Q. The consumers who are looking for frozen
3 nutritional entrees or healthful frozen entrees
4 could be different than the consumers who purchase
5 frozen entrees generally; correct?

6 A. Well, again, now you've just changed
7 frozen nutritional entrees to frozen healthful
8 entrees. Is that what you mean by frozen
9 nutritional entrees?

10 Q. Would you not consider those terms to be
11 interchangeable? You would consider them two
12 different things?

13 A. Absolutely different things, yes.

14 Q. So frozen healthful entrees -- would the
15 purchasers of frozen healthful entrees be
16 potentially different than frozen entrees, full-fat
17 and full-calorie frozen entrees?

18 A. Over the product life cycle, people who
19 buy frozen entrees tend to go through a cycle where
20 given -- whether they're for themselves or their
21 family, they'll vary whether they buy full-fat,
22 part-fat, or what you're calling healthful entrees,
23 for themselves or some other member of their
24 household. So they tend to buy all of those at
25 some point.

1 Q. At some point your survey was focused on
2 people who bought frozen entrees 30 days before the
3 survey date, or a month -- I suppose a month before
4 the survey date and a month after the survey date.
5 It's possible that those respondents were
6 purchasing full-fat and full-calorie frozen entrees
7 and not frozen healthful entrees; correct?

8 A. It's possible that they bought any of
9 them, full-fat and healthful.

10 Q. Or full-fat and not healthful; correct?

11 A. Well, I think full-fat is non-healthful.
12 So they would buy both healthful and full-fat would
13 be a possibility, or they can buy one or the other.

14 Q. Right. So as you're sitting here today,
15 you can't tell me how many of the other 98 percent
16 of the healthful respondents were aware of the
17 Smart Ones mark; isn't that correct?

18 A. Again, all we know is that they've been
19 exposed to it at retail. We don't know what their
20 awareness and whether it's spontaneous or the
21 top-of-mind awareness is for that mark.

22 Q. And the way that you know that they were
23 exposed to it at retail is just your assumption
24 based on the fact that Smart Ones is available
25 nationwide in the frozen food section?

1 A. That's correct.

2 Q. Okay. Mr. Johnson, page two of your
3 report, you give some background information about
4 this survey.

5 A. Yes.

6 Q. And I'm sorry, actually on page two you
7 give an introduction in paragraph three; you
8 indicate that you were contacted by counsel from
9 Quarles --

10 MR. CROSS: Quarles.

11 BY MS. GOTT:

12 Q. -- Quarles & Brady in February 2012
13 regarding this dispute; correct?

14 A. That's correct.

15 Q. In paragraph five, you state, "Counsel
16 asked whether I could design and conduct a study
17 that would measure the extent, if any, to which the
18 Smart Balance name that has been objected to by
19 ProMark is or is not likely to cause confusion when
20 relevant consumers are exposed to it in connection
21 with frozen meal products." Did I read that
22 correct?

23 A. You did.

24 Q. Is paragraph five accurate?

25 A. I believe so.

1 Q. You testified during your discovery
2 deposition that when you were contacted by counsel,
3 you were asked if you could do a proper survey in
4 response to the Sabol or solo survey that had been
5 submitted in this matter; isn't that correct?

6 A. Yes.

7 Q. Mr. Johnson, can you tell me where in
8 your report it says that you were contacted by
9 counsel to prepare a rebuttal survey?

10 A. It doesn't mention it in the report, but
11 factually, I was.

12 Q. In fact, you don't mention Dr. Sabol's
13 survey or his report anywhere in your report, do
14 you?

15 A. I don't believe so.

16 Q. I believe you testified earlier typically
17 when you do a rebuttal survey you do an analysis of
18 the other person's survey and you identify the
19 fatal flaws and then you recreate that survey
20 without the flaw; is that correct?

21 A. That's typically what you do.

22 Q. Typically, the fatal flaws are one, maybe
23 two things; correct?

24 A. Typically that's what happens.

25 Q. And that's typically a rebuttal survey;

1 correct?

2 A. Well, that has been what I typically call
3 a rebuttal survey. This was unusual, because
4 essentially I had to conduct a study that was new
5 because I needed to conduct a proper study because
6 the Sabol study was not something you could repeat.

7 Q. So what you just said was that's not what
8 you did here? You did not identify the fatal flaws
9 and recreate Dr. Sabol's survey without the fatal
10 flaws; correct?

11 A. Well, no. What I'm saying is the whole
12 survey was flawed fatally. It was a completely
13 corrupt survey, irrelevant from the beginning and
14 improperly designed, so I could not use it as a
15 basis for conducting another study. Instead, I had
16 to conduct a relevant, correct in rebuttal to his
17 study.

18 Q. So you did not recreate the survey
19 without the fatal flaws in this case?

20 A. Well, I did in the sense that I recreated
21 the whole survey properly, because the whole survey
22 was fatally flawed.

23 Q. You created your survey from scratch;
24 correct?

25 A. I created it from scratch so that I would

1 have a proper survey without any of the fatal flaws
2 of the Sabol study.

3 Q. Mr. Johnson, you mentioned earlier that
4 you used a telephone research company in Colorado
5 for validation of your survey?

6 A. Yes.

7 Q. What's the name of that company?

8 A. I believe I produced a validation report
9 as part of the production here.

10 MR. CROSS: Yes.

11 THE WITNESS: I think it was from Luce,
12 L-U-C-E. But that's memory, so -- could be wrong.

13 MR. CROSS: I believe that was produced
14 to you as part of the document production.

15 BY MS. GOTT:

16 Q. You also testified earlier about double
17 blind surveys, and you testified that you used
18 outside interviews, independent interviews, to
19 conduct your survey here to ensure that the
20 surveyors were blind and who sponsored the survey
21 and what the survey was about; correct?

22 A. Yes, that's correct.

23 Q. Is it possible to use in-house
24 interviewers that are not aware of who the source
25 of the survey is or what the purpose of the survey

1 is?

2 A. Theoretically, yes.

3 Q. And just because they're in-house doesn't
4 mean that they are influenced or biased,
5 necessarily?

6 A. Necessarily, no.

7 Q. If you'll turn to your report on pages
8 13, 14 and 15. When you were explaining the data
9 that's reported here in your report in paragraphs
10 29, 30, and 31, I believe you stated earlier that
11 in paragraph 29, all who have a belief about source
12 is 27 percent, all who have a belief about related
13 products is 28 -- I'm sorry, is 18 percent, and all
14 who have a belief about related source is
15 13 percent.

16 So I believe your testimony was that about
17 half of the people who participated in the survey
18 had a belief in response to one of those three
19 questions; is that correct?

20 A. That's correct.

21 Q. Is it possible that the 18 percent who
22 are identified as having a belief about related
23 products in question 30 are subsumed in the
24 27 percent who had a belief about source in
25 question 29?

1 A. I based that statement on a net of those
2 three numbers. In other words, 27 plus 18 plus 13
3 is more than 50 percent, but it's -- the actual
4 number if you net those three numbers I think is
5 46 percent, which is about half.

6 Q. Okay. So -- and you're simply just
7 adding those numbers together; is that --

8 A. No, I'm netting them. In other words, so
9 you don't double count people. If we added them
10 together, we'd have 27 plus 18, which is 45, plus
11 13, which would be 58. But there's actually only
12 46, because some people would have answered these
13 questions positively and more than one of the
14 questions.

15 Q. Right. And so that information that
16 you're saying there now, 46 percent, is that
17 something that you just recalled offhand or is that
18 something that appears in your report somewhere?

19 A. No, I recalled it from when I did the
20 analysis of the data.

21 Q. Okay. You also said earlier that Smart
22 Ones is a sub-brand of Weight Watchers?

23 A. I said that was my understanding, that it
24 generally is. I don't know that it always is
25 uniquely.

1 Q. On what do you base that understanding?

2 A. Looking at the Internet and in stores.

3 Q. Have you seen the packaging for the Smart
4 Ones products?

5 A. Yes.

6 Q. Are you aware that the Smart Ones mark
7 appears in much larger font and type than the
8 Weight Watchers mark on the products?

9 A. Yes, I am.

10 Q. Is that generally how sub-brands are
11 marketed, in your experience?

12 A. It depends on the particular brand and
13 sub-brands. Weight Watchers is what we call a
14 well-established or heavy brand, so it's used as an
15 imprimatur to tell people who makes it. And then,
16 within the Weight Watchers family, there are a
17 number of brands, of which Smart Ones, at least, is
18 one of them.

19 Q. Have you ever conducted any other
20 consumer surveys or market research involving the
21 Smart Balance trademark that did not relate to this
22 proceeding?

23 A. There's another proceeding that involves
24 Balance Bar versus Smart Balance.

25 Q. And what is your role in that proceeding?

1 A. I conducted a likelihood of confusion
2 survey in that matter.

3 Q. When did you conduct a likelihood of
4 confusion survey in that matter?

5 A. I don't recall.

6 Q. Have you provided testimony on your
7 likelihood of confusion survey in that matter?

8 A. If I can look at my case list one minute.
9 Balance Bar versus GFA. In January, I did a
10 deposition, yes.

11 Q. And in that case you are
12 representing -- you're an expert for GFA Brands; is
13 that correct?

14 A. That is correct.

15 Q. Who represents GFA Brands as attorneys in
16 that matter?

17 A. Mr. Cross.

18 Q. And what are the marks involved in that
19 case?

20 A. Balance Bar and Smart Balance.

21 Q. And what, generally, were the results of
22 that study? You conducted a likelihood of
23 confusion study regarding Balance Bar; is that
24 correct?

25 A. That's correct.

1 Q. And what, generally, were the results of
2 that study?

3 A. I believe it showed there was no
4 likelihood of confusion.

5 Q. What are the products involved in that
6 case?

7 A. Nutritional bars.

8 Q. And what was your survey universe in that
9 case?

10 A. I don't recall offhand. It would have
11 been appropriate to that category.

12 Q. Are there any other cases in which you
13 have conducted surveys or market research involving
14 the Smart Balance trademark?

15 A. No.

16 Q. When were you retained by GFA Brands to
17 provide testimony in the Balance Bar case?

18 A. I don't recall.

19 Q. Was it before you were retained in this
20 case?

21 A. I don't recall.

22 Q. Which survey did you conduct first, this
23 survey for Smart Balance and Smart Ones or the
24 Balance Bar/Smart Balance survey?

25 A. I don't know from memory.

1 Q. What was the cost of the study in the
2 Balance Bar/Smart Balance survey?

3 A. I don't recall.

4 Q. Would it have been similar to the cost of
5 this study, about \$100,000?

6 A. I would assume so.

7 Q. Mr. Johnson, have you ever heard of a
8 company called Ipsos, I-P-S-O-S?

9 A. Yes.

10 Q. Ipsos is an internationally recognized
11 market research company, is it not?

12 A. I don't know how recognized it is. It's
13 an international market research company.

14 Q. Isn't it true that Ipsos has a good
15 reputation among others in the market research
16 industry for the quality of its research?

17 A. Ipsos is a well-known research company.
18 I don't know what the general consensus is of the
19 quality of their work. I've not heard that it's in
20 some way shoddy.

21 Q. So you haven't had any personal
22 interactions with Ipsos or professional
23 interactions with Ipsos?

24 A. We compete with Ipsos.

25 Q. Do some of your clients also use Ipsos,

1 or generally they use you or Ipsos?

2 A. Or both.

3 Q. Both.

4 MS. GOTT: Can we take a break for a few
5 minutes?

6 MR. CROSS: Sure.

7 (Break taken.)

8 BY MS. GOTT:

9 Q. Back on the record. Mr. Johnson, in the
10 Balance Bar proceeding, that's a TTAB proceeding?
11 It's an opposition proceeding; is that correct?

12 A. I think it is.

13 Q. What survey method did you employ in that
14 proceeding?

15 A. It would have been an Eveready study.

16 Q. And you said that case involves
17 nutritional bars?

18 A. Yes.

19 Q. Does Smart -- is there a Smart Balance
20 brand nutritional bar on the market right now?

21 A. Good question. I don't know. I think it
22 was an intent-to-use application.

23 Q. Was there at the time you conducted your
24 survey in that case?

25 A. There was not when I conducted a survey,

1 no.

2 Q. So did you also use index cards or
3 four-by-six cards in conducting that survey?

4 A. I believe so.

5 Q. And what marks did you test in that
6 survey?

7 A. Well, it would have been Smart Balance
8 for the test cell. I don't remember what the
9 control was.

10 Q. Did you use Right Balance for the control
11 in that case?

12 A. No, I wouldn't have, because "balance"
13 was the word at issue there, not "smart."

14 Q. I believe you testified earlier that when
15 you conducted your survey in this case, Smart
16 Balance did not have any frozen meals in the
17 market; is that correct?

18 A. Smart Balance did not have any frozen
19 meals on the market when I conducted my survey
20 would be correct, yes.

21 Q. Do they now have frozen meals on the
22 market?

23 A. I don't know.

24 Q. In the Balance Bar case did you show the
25 respondents in that survey the Balance Bar mark, or

1 was only the Smart Balance mark, the junior user's
2 mark, shown in that survey?

3 A. It was an Eveready study, so you would
4 only show the Smart Balance mark, the junior user's
5 mark.

6 Q. An Eveready study when you're showing
7 only the junior user's mark, you're not testing for
8 reverse confusion; is that correct?

9 A. That's generally correct, yes.

10 MS. GOTT: I don't have any further
11 questions.

12 MR. CROSS: I have a few. Let's have
13 this marked as, I guess, Johnson Exhibit 5. We can
14 put the full boat of stickers on it now, I guess.

15 (Exhibit 5 marked for identification.)

16 E X A M I N A T I O N

17 BY MR. CROSS:

18 Q. Could you identify Exhibit 5 as one of
19 the notices of oppositions that were filed in this
20 case?

21 A. Yes.

22 Q. And had you seen this or a version of
23 this at some point during your retention in this
24 case?

25 A. Yes.

1 Q. In looking at the goods and services
2 listed for the Smart Ones registrations that are
3 the basis of the notice of opposition, do you see
4 any limitation to low fat, health, dietary type at
5 all products?

6 A. No, I do not.

7 Q. How about in connection with the
8 intent-to-use application filed by GFA Brands?
9 Where in here -- and I direct you to paragraph
10 three -- what is the scope of goods that are the --
11 that are at issue given the application?

12 A. This is frozen appetizers primarily
13 containing poultry, meat, seafood or vegetables;
14 frozen entrees primarily containing poultry, meat,
15 seafood or vegetables in international class 29,
16 and frozen entrees consisting primarily of pasta or
17 rice in international class 30. There's no
18 limitation as to -- or definition as to the
19 nutritional content.

20 Q. When counsel was asking you questions on
21 cross-examination about whether you had looked for
22 respondents who were in a health market or a
23 dietary restriction market or anything of that
24 sort -- do you remember that sequence of questions?

25 A. I do.

1 Q. Did the nature of the application at
2 issue here play any role in helping you decide what
3 the appropriate survey universe should be?

4 A. Absolutely.

5 Q. And in what way?

6 A. The intention-to-use application tells
7 you the breadth of the marketplace that's being
8 served. If they're -- and there normally are
9 particular target markets that people make or shoot
10 for when they produce products. But they're not
11 limited in using the brand to just those target
12 markets. They're allowed to use the brand
13 throughout this class, is my understanding anyway.

14 Q. And because of that, what impact does
15 that have on the nature of the universe you select
16 for your survey?

17 A. Well, it would be improper to
18 artificially narrow this universe to a more narrow
19 one when it's not limited by the intention-to-use
20 application.

21 Q. Different set of questions that were
22 asked you by counsel on cross, and that has to do
23 with whether Smart Ones is a strong mark.
24 Let's -- you've noted that Sabol had concluded it
25 was a strong mark; correct?

1 A. Correct.

2 Q. You noted that the -- the Heinz ProMark
3 witnesses have claimed it was a strong mark, I
4 believe, and you've noted that at least their
5 lawyers have alleged that it is a strong mark in
6 the notice of opposition; correct?

7 A. That is correct.

8 Q. Now, let's say that they're all wrong,
9 that Sabol's wrong, their lawyers are wrong,
10 they're just wrong, that Smart Ones is not a strong
11 mark. Would it be appropriate to conduct an
12 Eveready format survey in those circumstances,
13 under that hypothetical set of circumstances?

14 A. Yes, it would -- it's still the -- the
15 standard way in which you measure what actually
16 exists. So, you know, the exceptions are if, for
17 example, Smart Ones was a brand-new mark, let's say
18 was out one week ahead of Smart Balance, or
19 something strange like that, or where the products
20 and the names are identical. But neither is true
21 in this case.

22 MR. CROSS: Thank you. I have no more
23 questions.

24 MS. GOTT: Nothing further.

25 (Deposition concluded at 11:42 a.m.)

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STATE OF WISCONSIN)
) ss.
COUNTY OF MILWAUKEE)

I, ANITA KORNBURGER-FOSS, Registered Professional Reporter and Notary Public in and for the State of Wisconsin, do hereby certify that the preceding deposition was recorded by me and reduced to writing under my personal direction.

I further certify that said deposition was taken at 300 North LaSalle Drive, Chicago, Wisconsin, on April 18, 2013, commencing at 9:25 a.m. and concluding at 11:42 a.m.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

In witness whereof, I have hereunto set my hand and affixed my seal of office at Milwaukee, Wisconsin, this 1st day of May, 2013.

ANITA KORNBURGER-FOSS, RPR - Notary Public

My commission expires June 24, 2013.

[& - analysis]

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Strategic
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Research
Inc

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

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HWH

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) %
Brand A	35%
Brand B	28%
Brand C	22%
Brand D	18%
Brand E	15%
Brand F	12%

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

- 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		
Medium		
Heavy		
Total	100	

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	19	19	21	22	20	18
No	79	79	77	78	80	82
Don't Know	2	2	2	0	0	0

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 CONFESSION SURVEY

Good evening. My name is _____ from SCRI, 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 HEARD OF)

Brand Name	YES	NO
A. Souffler'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 RECORDED)

Brand Name	YES	NO
A. Souffler'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 Souffler's
- 2 Swanson
- 3 Lean Cuisine
- 4 Smart Ones
- 4 Marie Callender's
- 4 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: _____



PROMARK BRANDS, INC.

(OPPOSER)

VS.

GFA BRANDS, INC.

(APPLICANT)

A STUDY OF LIKELIHOOD OF CONFUSION

April 2012

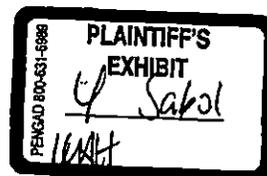
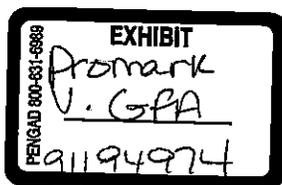


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REPORT OF PHILIP JOHNSON

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

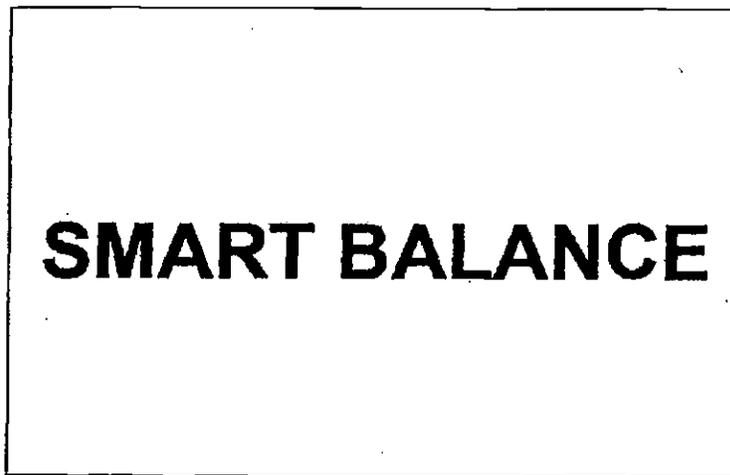
8. The survey employed a “test” cell and a “control” cell. Each respondent was randomly assigned to either the test cell (i.e., viewed only the test cell exhibit) or the control cell (i.e., viewed only the control cell exhibit). One-half of the interviews were conducted in the test cell (205 cases),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

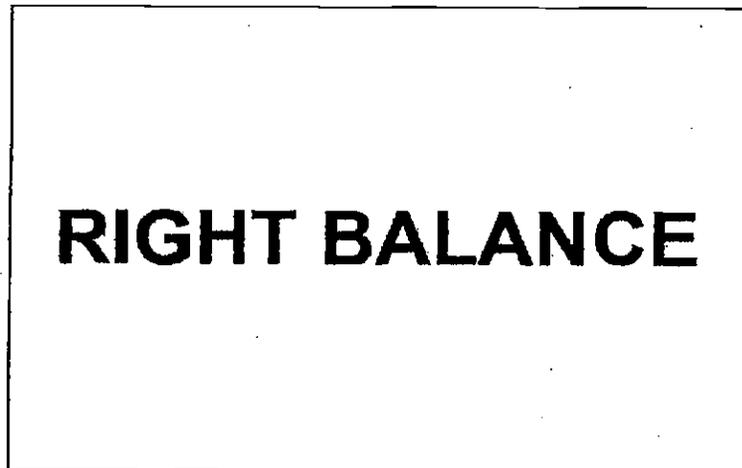
control cell name because it is similar in meaning, but does not utilize the disputed word "SMART."

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 QR 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 QR 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>	<u>RIGHT BALANCE</u>
	(205)	(205)
	<u>100%</u>	<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</u> <u>BALANCE</u> (205) <u>100%</u>	<u>RIGHT</u> <u>BALANCE</u> (205) <u>100%</u>
ALL RESPONDENTS		
<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?"*

	<u>EXHIBIT SHOWN</u>	
	<u>SMART BALANCE</u>	<u>RIGHT BALANCE</u>
	(205)	(205)
	<u>100%</u>	<u>100%</u>
ALL RESPONDENTS		
<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>
	(205)	(205)
	<u>100%</u>	<u>100%</u>
ALL RESPONDENTS		
<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> (205) <u>100%</u>	<u>RIGHT BALANCE</u> (205) <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 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?	<input type="checkbox"/> NO	<input type="checkbox"/> YES	<input type="checkbox"/> NO	<input type="checkbox"/> YES
...frozen meals?	<input type="checkbox"/> NO	<input type="checkbox"/> YES	<input type="checkbox"/> NO	<input type="checkbox"/> YES
...frozen juice?	<input type="checkbox"/> NO	<input type="checkbox"/> YES	<input type="checkbox"/> NO	<input type="checkbox"/> 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 ()IT

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
	52
Exhibit MM	26
Exhibit TT	26

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

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

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

GENERAL INTERVIEWING INSTRUCTIONS

- Respondents may be screened on the mall floor, but must be interviewed in a private room in the interviewing facility.
- Interviewer must use the Nth systematic sampling process to determine which respondent to approach. Interviewer should count the number of people that walks past him/her within a 30-second time frame. Take the number of people and divide by two; this quotient will be your Nth select record. Interviewer must approach and screen every Nth 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**

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

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

* 0.5% or fewer mentions.

Total "Weight Watchers" Identification in Test Cell

- Source Question
- Related Products Question
- Relationship Question

Source Question

ID 00015

Q2a.

Weight Watchers

Q2b.

Because it just seems like what their logo would be. It just sounds healthy.

ID 00122

Q2a.

Weight Watchers

Q2b.

Because it makes me think of weight loss and a smarter way of eating.

ID 00170

Q2a.

Weight Watchers

Q2b.

It looks like something they would make.

ID 00193

Q2a.

Weight Watchers

Q2b.

Sounds like a Weight Watchers product.

ID 00331

Q2a.

Weight Watchers

Q2b.

Looks like their packaging.

ID 00346

Q2a.

Weight Watchers

Q2b.

Because the words "smart" and "balance" make you think of healthy foods.

Q4a1.

Weight Watchers

Q4b1.

Because they are very predominant within the smart and healthy diet plans.

Related Products Question

ID 00324

Q3a1.

South Beach Diet

Q3b1.

They are also focused on healthy options.

Q3a2.

Weight Watchers

Q3b2.

They too are focused on healthy alternatives.

Relationship Question

ID 00016

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

ID 00087

Q4a1. Weight Watchers
Q4b1. They are similar brands.

ID 00174

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

ID 00185

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

ID 00268

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

ID 00412

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

Total "Weight Watchers" Identification in Control Cell

- Source Question
- Related Products Question
- Relationship Question

Source Question

ID 00075

Q2a.

Q2b.

Weight Watchers

The names are similar and I know they have other products that are healthy.

ID 00094

Q2a.

Q2b.

Weight Watchers

The name implies balanced nutrition.

ID 00139

Q2a.

Q2b.

Weight Watchers

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

ID 00167

Q2a.

Q2b.

Weight Watchers

Because the emphasis is on a balanced menu.

ID 00205

Q2a.

Q2b.

Weight Watchers

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.

Q2b.

Weight Watchers

Because they are concerned about weight and nutrition. It sounds like it has the right calories and nutrition needed.

Q3a1.

Q3b1.

Weight Watchers

Because they are concerned about nutrition and would try to get the proper balance of proteins and nutrients.

ID 00308

Q2a.

Q2b.

Weight Watchers

Because it is saying Right Balance so it has to do with balancing your meals.

ID 00310

Q2a.

Q2b.

Weight Watchers

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.



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...**

DECEMBER 2012	MOBILEMEDIA IDEAS LLC v. APPLE INC. United States District Court for the District of Delaware Patent Infringement
OCTOBER 2012	MIXED CHICKS LLC v. SALLY BEAUTY SUPPLY LLC United States District Court for the Central District of California Likelihood of Confusion
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



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

MARCH 2013	FAGE USA DAIRY INDUSTRY, INC., ET AL. v. GENERAL MILLS, INC., ET AL. United States District Court for the Northern District of New York
MARCH 2013	GENERAL MILLS, INC. ET AL. v. FAGE USA DAIRY INDUSTRY, INC. ET AL. United States District Court for the District of Minnesota
FEBRUARY 2013	SEXY HAIR CONCEPTS, LLC v. CONAIR CORPORATION United States District Court for the Central District of California
JANUARY 2013	BALANCE BAR COMPANY v. GFA BRANDS, INC. United States Patent and Trademark Office Before the Trademark Trial and Appeal Board
DECEMBER 2012	PROMARK BRANDS INC. v. GFA BRANDS, INC. United States Patent and Trademark Office Before the Trademark Trial and Appeal Board
NOVEMBER 2012	LUV N' CARE, LTD. AND ADMAR INTERNATIONAL, INC. v. MAYBORN USA, INC. United States District Court for the Southern District of New York
NOVEMBER 2012	LUV N' CARE, LTD. v. JACKEL INTERNATIONAL LIMITED Fourth Judicial District Court for the State of Louisiana
OCTOBER 2012	EMERSON ELECTRIC CO. v. ANAHEIM MANUFACTURING CO. United States International Trade Commission Washington, D.C.
OCTOBER 2012	FARM FLEET SUPPLIES, INC. v. BLAIN SUPPLY, INC. United States Patent and Trademark Office Before the Trademark Trial and Appeal Board

SEPTEMBER 2012	THE REINALT-THOMAS CORPORATION d/b/a DISCOUNT TIRE v. AKH COMPANY, INC. United States District Court for the District of Arizona
APRIL 2012	SEXY HAIR CONCEPTS, LLC v. CONAIR CORPORATION United States District Court for the Central District of California
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

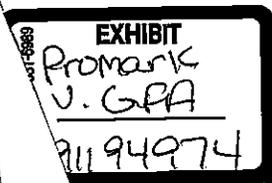
SEXY HAIR CONCEPTS, LLC v. VICTORIA'S SECRET STORES
BRAND MANAGEMENT, INC.
United States District Court for the
Southern District of New York

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

PROFESSIONAL EXPERIENCE

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

ACADEMIC EXPERIENCE

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

PAPERS AND SYMPOSIA

- Kaplan, L.B. Shopping for a Job: Recruiting College Graduates for the Private Sector. Paper presented at American Psychological Association's 97th Annual Convention, New Orleans, Louisiana, August 1989.
- Boren, M., & Kaplan, L.B. Marketing Research - Strategies and Payoffs. Paper presented at Association of Science - Technology Center's Annual Convention, Boston, Massachusetts, October 1988.
- Kaplan, L.B. Symposium Participant. On the Stand: The Role of Consumer Psychologists in Litigation. Presented at American Psychological Association 94th Annual Convention, Washington, D.C. August 1986.
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- 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.
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and Kaplan, L.B
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at American Psychological Associate 86th Annual Convention, Toronto,
Ontario, Canada, September 1978.
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Research, University of Chicago, 1972, 382-393.
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& Kaplan, L.B. controversy. *Personnel Psychology*, Fall 1971, 419-434.
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Kaplan, L.B. affiliations: Responses to a Division 23 survey of its membership.
Presented at the Business Meeting, Division 23, American Psychological
Association 78th Annual Convention, Miami, Florida, September 1970.

Authored over 1,500 proprietary reports for clients.

AFFILIATIONS

American Psychological Association
Member, Opinion Survey Task Force, 1986

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

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

AWARDS

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

REVIEWER

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

DIRECTOR/BOARD MEMBER

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

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

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

DEPOSITIONS PAST FOUR YEARS

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

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

Opposition Nos. 91194974 (Parent) and 91196358
 PROMARK BRANDS INC., & H.J. HEINZ COMPANY v. GFA BRANDS, INC.
 Offered by Applicant GFA Brands, Inc.

Trademark Trial and Appeal Board Electronic Filing System. <http://estta.uspto.gov>

ESTTA Tracking number: **ESTTA348661**

Filing date: **05/20/2010**

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

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	PROMARK BRANDS INC.		
Entity	Corporation	Citizenship	Idaho
Address	2541 North Stokesberry Place Suite 100 Meridian, ID 83642 UNITED STATES		

Attorney information	Timothy P. Fraelich JONES DAY 901 Lakeside Avenue Cleveland, OH 44114 UNITED STATES tfraelich@jonesday.com, jwalworth@jonesday.com, pcyngier@jonesday.com Phone:216-586-1247
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Applicant Information

Application No	77864305	Publication date	04/20/2010
Opposition Filing Date	05/20/2010	Opposition Period Ends	05/20/2010
Applicant	GFA Brands, Inc. Suite 260 115 W. Century Rd. Paramus, NJ 07652 UNITED STATES		

Goods/Services Affected by Opposition

Class 029. All goods and services in the class are opposed, namely: Frozen appetizers primarily containing poultry, meat, seafood or vegetables; frozen entrees primarily containing poultry, meat, seafood or vegetables
Class 030. All goods and services in the class are opposed, namely: frozen entrees consisting primarily of pasta or rice

Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
Dilution	Trademark Act section 43(c)

Marks Cited by Opposer as Basis for Opposition

U.S. Registration No.	1911590	Application Date	05/20/1994
Registration Date	08/15/1995	Foreign Priority	NONE

EXHIBIT
 Promark
 v. GFA
 91194974
 PENDING 800-631-6889

EXHIBIT
 Johnson
 5
 Applicant
 PENDING 800-631-6889

		Date	
Word Mark	SMART ONES		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 029. First use: First Use: 1992/05/01 First Use In Commerce: 1992/05/01 frozen entrees consisting primarily of chicken, beef, fish and/or vegetables Class 030. First use: First Use: 1992/05/01 First Use In Commerce: 1992/05/01 frozen entrees consisting primarily of pasta and/or rice alone or in combination with other foods		

U.S. Registration No.	2204080	Application Date	01/08/1998
Registration Date	11/17/1998	Foreign Priority Date	NONE
Word Mark	SMART ONES		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 030. First use: First Use: 1997/11/03 First Use In Commerce: 1997/11/03 Frozen desserts consisting of milk based or milk substitute based desserts, cakes, pies and mousses		

U.S. Registration No.	2916539	Application Date	01/14/2004
Registration Date	01/04/2005	Foreign Priority Date	NONE
Word Mark	SMART ONES		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 030. First use: First Use: 2001/04/01 First Use In Commerce: 2001/04/01 Pre-cooked ready-to-eat frozen bread or wrap having a meat and/or vegetable filling with or without cheese		

U.S. Registration No.	2916538	Application Date	01/14/2004
Registration Date	01/04/2005	Foreign Priority Date	NONE
Word Mark	SMART ONES		

Design Mark	SMART ONES		
Description of Mark	NONE		
Goods/Services	Class 030. First use: First Use: 1997/11/30 First Use In Commerce: 1997/11/30 Pizza		

U.S. Registration No.	3462182	Application Date	01/10/2008
Registration Date	07/08/2008	Foreign Priority Date	NONE

Word Mark	SMART ONES
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Design Mark	SMART ONES		
Description of Mark	NONE		
Goods/Services	Class 030. First use: First Use: 1997/12/31 First Use In Commerce: 1997/12/31 Frozen foods, namely, breakfast sandwiches and muffins		

Attachments	78352011#TMSN.jpeg (1 page)(bytes) 78351994#TMSN.jpeg (1 page)(bytes) 77368176#TMSN.jpeg (1 page)(bytes) DOC156.pdf (8 pages)(229509 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Timothy P. Fraelich/
Name	Timothy P. Fraelich

Date	05/20/2010
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of

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

PROMARK BRANDS INC.,

Opposer,

Opposition No. _____

v.

GFA BRANDS, INC.,

Applicant.

Commissioner of Trademarks
Box TTAB
P.O. Box 1451
Alexandria, Virginia 22313-1451

NOTICE OF OPPOSITION

1. Opposer, ProMark Brands Inc. ("Opposer"), a corporation duly organized and existing under the laws of Idaho and having a place of business at 2541 North Stokesberry Place, Suite 100, Meridian, ID 83646, believes that it will be damaged by the registration of the mark SMART BALANCE ("Applicant's Mark") shown in trademark application Serial No. 77/864,305 (the "Application") and hereby opposes same pursuant to 15 U.S.C. §§ 1052 and 1063.

2. To the best of Opposer's knowledge, the name and address of the current owner of the Application is GFA Brands, Inc. ("Applicant"), 115 W. Century Rd., Suite 260, Paramus, NJ 07652, United States.

As grounds for opposition, it is alleged that:

The Application

3. Applicant filed the Application on an intent-to-use basis to register the mark SMART BALANCE to identify:

- a. Frozen appetizers primarily containing poultry, meat, seafood or vegetables; frozen entrees primarily containing poultry, meat, seafood or vegetables in International Class 29; and
- b. Frozen entrees consisting primarily of pasta or rice in International Class 30.

4. The Application was published in the Official Gazette on April 20, 2010.

5. Applicant has not filed an amendment to allege use as of May 20, 2010.

Opposer's Registered Marks

6. Opposer is the owner of the following registrations in the United States Patent and Trademark Office for SMART ONES ("Opposer's Marks"), which registrations have not been cancelled, are valid and in full force and effect:

Trademark	Registration/ Serial No.	Registration/ Filing Date	International Class/Goods
SMART ONES	1,911,590	August 15, 1995	29 – Frozen entrees consisting primarily of chicken, beef, fish and/or vegetables.
SMART ONES	2,204,080	November 17, 1998	30 – Frozen desserts consisting of milk based or milk substitute based desserts, cakes, pies and mousses.
SMART ONES	2,916,539	January 4, 2005	30 – Pre-cooked ready-to-eat frozen bread or wrap having a meat and/or vegetable filling with or without cheese.
SMART ONES	2,916,538	January 4, 2005	30 – Pizza.

Trademark	Registration/ Serial No.	Registration/ Filing Date	International Class/Goods
SMART ONES	3,462,182	July 8, 2008	30 – Frozen foods, namely, breakfast sandwiches and muffins.

Registration Nos. 1,911,590 and 2,204,080 have become incontestable as a matter of law under 15 U.S.C. § 1065.

7. Opposer's ownership in Registration Nos. 1,911,590 and 2,204,080 results from the following chain of title:

Assignment	by Weight Watchers International, Inc. to H.J. Heinz Company (recorded at Reel 1971/Frame 0642);
Assignment	by H.J. Heinz Company to ProMark International, Inc. (recorded at Reel 2327/Frame 0405);
Merger	of ProMark International, Inc. with H.J. Heinz Company (recorded at Reel 2633/Frame 0413);
Assignment	by H.J. Heinz Company to ProMark Brands Inc. (recorded at Reel 2631/Frame 0678).

Opposer's Use Of Its Famous Marks

8. Opposer, through its predecessors and licensee, since at least as early as May 1, 1992, has been, and is now, using the mark SMART ONES throughout the United States in connection with the goods described above.

9. Opposer's use of Opposer's Marks, as described above, has been valid and continuous since the date of first use.

10. Opposer's continuous, exclusive and commercially-successful use of the mark SMART ONES is symbolic of extensive good will and consumer recognition built up by Opposer through substantial amounts of time, money and effort in manufacturing, advertising and promotion.

11. Upon information and belief, Applicant's SMART ONES mark is widely and highly recognized by the general, consuming public of the United States as a designation of source of Opposer's goods.

12. Upon information and belief, the mark SMART ONES has come to serve as a unique and famous identifier of Opposer's goods.

Dilution And Confusion Are Likely

13. Opposer's use of the mark SMART ONES predates any alleged use by Applicant for Applicant's Mark.

14. Opposer's use of the mark SMART ONES predates the filing date of the Application.

15. Opposer's Marks were well established and famous long before the filing date of the Application and at the time that Applicant filed the Application.

16. Upon information and belief, Applicant's Mark SMART BALANCE, to be used in connection with the goods covered by Application No. 77/864,305, is confusingly similar to Opposer's Marks as used and registered by Opposer.

17. Upon information and belief, the products to which Applicant's Mark SMART BALANCE will be used are related to, or identical to, various products on and in connection with which Opposer and its predecessors-in-interest have used, and are using, the mark SMART ONES.

18. Upon information and belief, the goods to which Applicant's Mark SMART BALANCE will be applied, and the products on and in connection with which Opposer uses its mark SMART ONES, are products that are offered for sale and sold in identical channels of trade.

19. Upon information and belief, the goods to which Applicant's Mark SMART BALANCE will be applied, and the products on and in connection with which Opposer uses its mark SMART ONES, are products that are offered for sale and sold to the same class of purchasers.

20. Upon information and belief, both Opposer's goods and Applicant's goods are relatively low-priced and may be purchased on impulse by consumers.

Applicant Has Essentially Admitted That Dilution And Confusion Are Likely

21. In numerous proceedings before the Trademark Trial and Appeal Board, Applicant has challenged applications arguing that its registrations and applications for "smart" related marks that predate other "smart" related marks should bar registration.

22. Specifically, Applicant has argued that permitting other "smart" marks to register would interfere with its use of its marks and would seriously damage Applicant.

23. Opposer's use of the mark SMART ONES predates any alleged use by Applicant for Applicant's Mark. Further, Opposer's SMART ONES mark became famous before Applicant filed the Application. Thus, based upon Applicant's own admissions, as set forth in multiple pleadings before the Trademark Trial and Appeal Board, in this instance, permitting Applicant's Mark to register would interfere with Opposer's use of Opposer's Marks and would seriously damage Opposer.

COUNT I
LIKELIHOOD OF CONFUSION

24. ProMark incorporates each and every allegation of Paragraphs 1-23 of this Notice as though fully set forth herein.

25. In view of the fame of Opposer's Marks, the similarity of the respective marks, similarity of the channels of trade, related nature of the goods and the relatively low-priced

nature of the goods, the mark shown in the Application so resembles Opposer's Marks so as to be likely to cause confusion, or to cause mistake, or to deceive as to source by suggesting that Applicant's goods are associated with or approved, endorsed, affiliated, authorized or sponsored by Opposer.

26. In view of the fame of Opposer's Marks, the similarity of the respective marks, similarity of the channels of trade, related nature of the goods and the relatively low-priced nature of the goods, the mark shown in the Application so resembles Opposer's Marks so as to be likely to cause confusion, or to cause mistake, or to deceive as to source by suggesting that Opposer's goods are associated with or approved, endorsed, affiliated, authorized or sponsored by Applicant.

COUNT II
TRADEMARK DILUTION

27. ProMark incorporates each and every allegation of Paragraphs 1-26 of this Notice as though fully set forth herein.

28. SMART ONES has become famous in accordance with the standard set forth in 15 U.S.C. § 1125(c).

29. Applicant filed the Application for SMART BALANCE after Opposer's SMART ONES mark became famous.

30. Applicant's Mark is likely to cause the dilution of the distinctiveness of the Opposer's famous SMART ONES mark.

WHEREFORE, Opposer prays that Application Serial No. 77/864,305 be rejected in its entirety on the basis of: (1) likelihood of confusion and (2) likelihood of dilution; and that no

registration be issued thereon to Applicant and that this Opposition be sustained in favor of
Opposer.

Dated this 20th day of May, 2010.

Respectfully submitted,

By: /James W. Walworth, Jr./
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Attorneys for Opposer
ProMark Brands Inc.

CERTIFICATE OF SERVICE

A copy of the foregoing was served on this 20th day of May, 2010, via first-class mail upon the Attorney of Record for Applicant:

Patrick M. Bergin
DAVIS & KUELTHAU, S.C.
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STE 1400
Milwaukee, WI 53202-6613

/James W. Walworth, Jr./
Attorney for Opposer