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

Proceeding	91212477
Party	Plaintiff Balance Bar Company
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Signature	/r. glenn schroeder/
Date	12/03/2014
Attachments	Affidavit_of_Jacob_Jacoby_PHd.pdf(4961356 bytes)

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

In re Application Serial No. 85/751,520
Published for Opposition on March 19, 2013
Trademark: EARTH BALANCE

BALANCE BAR COMPANY, Opposer, v. GFA BRANDS, INC., Applicant.	:	Opposition No. 91212477

AFFIDAVIT OF JACOB JACOBY, PH.D.

The undersigned, Jacob Jacoby Ph.D., being first duly sworn on oath, does hereby state as follows:

1. I authored the May 27, 2014 Rebuttal Report that is attached hereto as Exhibit 1. This Rebuttal Report addresses the April 2014 expert report offered by Philip Johnson and entitled "A Study of Likelihood of Confusion", and reaches the conclusion that the survey described in the April 2014 Johnson report should not be relied on as evidence or given any weight in this proceeding.

2. My evaluation of the April 2014 Johnson report follows the same approach I used in preparing the two Rebuttal Reports that were offered in the co-pending SMART BALANCE opposition proceeding (Nos. 91196954 and 91197748), and which were marked as Opposer's Exhibits 50 and 51 during the trial testimony I gave in that proceeding.

3. I explained my approach, and the bases for my conclusions, in the trial testimony I gave in the mentioned SMART BALANCE opposition proceeding. If asked to explain my approach, and the bases for my conclusions, in this proceeding, my testimony would be the same.

4. For reference, my trial testimony deposition from the mentioned SMART BALANCE opposition proceeding is attached as Exhibit 2.

AFFIRMATION

I declare under penalty of perjury that the foregoing is true and correct.

Jacob Jacoby, Ph.D.

Subscribed and sworn to before me
this 09 day of December, 2014.

Notary Public, State of New York

Hyacinth Rose McFarlane
Notary Public, State of New York
No. 01MC6281893
Qualified in New York County
Commission Expires May 13, 2017

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing AFFIDAVIT OF JACOB JACOBY, PH.D. has been served via first-class mail and email this 3rd day of December, 2014 upon the following:

Johanna Wilbert, Esq.
Quarles & Brady LLP
411 East Wisconsin Avenue
Milwaukee, WI 53202
johanna.wilbert@quarles.com

R. Glenn Schroeder

EXHIBIT 1

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

BALANCE BAR COMPANY,	)	Opposition No. 912124-77
Opposer,	)	
- v-	)	REBUTTAL REPORT OF OPPOSER'S EXPERT JACOB JACOBY, Ph.D.
GFA BRANDS, INC.	)	
Applicant.	)	

I. PERSONAL INFORMATION

1. My full name is Jacob Jacoby. I reside at 160 West 66th Street, New York, New York 10023.

2. Appendix A provides a description of my qualifications. A copy of my Curriculum Vita is provided in Appendix B. Information responsive to the requirements of Rule 26 of the Federal Rules of Civil Procedure regarding my trial and deposition testimony during the past four years is provided in Appendix C.

II. CIRCUMSTANCES LEADING TO THIS REBUTTAL REPORT

3. I was contacted on April 27, 2014 by counsel for the Opposer, Balance Bar Company ("Balance Bar"), with the request that I evaluate the April 16, 2014 Expert Report of Philip Johnson entitled "A Study of Likelihood of Confusion" being proffered in the above-captioned opposition proceeding. That Expert Report describes a survey designed and conducted

by Mr. Johnson on behalf of the Applicant in this matter (hereinafter referred to as the "Johnson Report" or "Johnson Survey").

4. This Rebuttal Report represents my evaluation of the Johnson Survey.

5. Let me note at the outset that I have no opinion as to whether either party's allegations are valid and correct. My sole function is to evaluate the scientific adequacy of the Johnson Survey and the opinions and conclusions drawn therefrom.

6. Because it possesses significant fatal flaws, my opinion is that the Johnson Survey does not show what it purports to show, namely, that there is likely to be a lack of confusion in the relevant marketplace. Indeed, because of fatal flaws in the protocol, one cannot rule out the possibility that confusion is likely to be manifested in the marketplace between the marks BALANCE and/or BALANCE BAR and EARTH BALANCE for nutrition, energy or snack bars. Not being able to test and rule out this possibility, the survey provides no reliable, scientifically valid information regarding likelihood of confusion, or lack thereof.

7. My evaluation of the Johnson Survey and Report relies upon the seven factors cited in the Federal Judicial Center's *Manual for Complex Litigation* (4th, Section 11.493).

8. Having just referred to the Federal Judicial Center's *Manual for Complex Litigation*, the following disclosure is important. While I refer to or cite case law, legal treatises or other legal authority at some points, I am a social scientist, not an attorney. However, being tasked with designing and critiquing surveys proffered as evidence in litigated matters, and having written a treatise entitled *Trademark Surveys* (2013) at the invitation of the American Bar Association, it would be irresponsible of me to fail to study, understand, and be mindful of what

courts[1] and other authoritative sources[2] have said regarding what is required for survey research to be considered acceptable and accorded weight in litigated disputes.

III. EVALUATION OF THE JOHNSON SURVEY AND CONCLUSIONS

9. **An Insurmountable Problem with the Test Protocol.** There are two principal ways by which likely confusion is measured. One is called the Eveready protocol. The other is called the Squirt (or modified Squirt) protocol. In the Eveready protocol, respondents are only exposed to the junior user's mark and asked several questions to see if such exposure yields confusion with the senior user's mark. In the Squirt (or modified Squirt) protocol, respondents are exposed to both the senior and junior users' marks, after which they are asked several questions to see if such exposure yields confusion.

10. Mr. Johnson's survey used the Eveready protocol. However, at least since 1999, authorities have been pointing out that, for it not to significantly underestimate likely confusion, the Eveready protocol requires that there be some appreciable level of "unaided awareness" (i.e., unaided recall) of the senior user's mark among the relevant universe.[3] That is, the senior user's mark must be sufficiently strong so that, out of the tens of thousands of marks stored in the

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[1]Including *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 118 S. Ct. 512 (1997); *Kumho Tire Co., Ltd. et al. v. Carmichael et al.,* 526 U.S. 137 (1999); *Weisgram v. Marley Co*., 528 U.S. 440 (2000).

[2] Including the "Reference Guide on Survey Research" that appears in the Federal Judicial Center's *Reference Manual on Scientific Evidence* (disclosure: Jacob Jacoby served as a peer reviewer for both the 1994 and 2000 editions of this guide), and Professor J. Thomas McCarthy's treatise, *McCarthy on Trademarks and Unfair Competition.*

[3] Phyllis J., Welter, *Trademark Surveys,* Section 24.03[1][c]. "When an open-end question [is] used [in connection with] a mark that is not particularly well-known, it needs to be understood that the 'top-of-mind' awareness of the brand … required [by the Eveready format] may significantly underestimate [likelihood of] confusion."

individual's memory, it readily comes to mind on an unaided (as opposed to aided) basis. A more recent, influential[4] article by Jerre Swann gave this requisite greater emphasis. As Swann writes[5]:

> As befits the current conditions of marketplace clutter, almost two million marks are federally registered. Comparatively few have (or can hope to develop) sufficiently strong memory traces so as to be cued by pattern matching engendered by a monadic exposure to a similar junior use. The internal search of memory for a strong brand's schema that exists at the core of an Eveready study *is thus hostile to the general run of marks. For weak marks, an Eveready format will consistently produce negligible estimates of likelihood of confusion*. *Ergo* the Squirt format, with an external review of the marks at issue that flows from their side-by-side or sequential exposure inherent in the administration of a Squirt survey. [Italics supplied]

With particular reference to the instant matter, Footnote 5 which appears within Swann's paragraph, reads:

> An Eveready study should <u>not</u> thus be used to "disprove" confusion in a weak mark case, but courts frequently permit defendants to do so. (*See, e.g., National Distillers Products Co., LLC v. Refreshment Brands, Inc.,* 198 F. Supp. 2d 474, 482-84 (S.D. N.Y. 2002)). [Underscoring supplied]

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[4] Swann's analysis has begun appearing in U.S.D.C. opinions (e.g., Akiro LLC v. House of Cheatham, Inc. 946 F.Supp.2d 324, 239 S.D.N.Y.,2013), and in his treatise *McCarthy on Trademarks and Unfair Competition*, Prof. McCarthy, who cites and relies upon the Swann article, also writes: "To be confused, the customer must have the senior user's mark in mind." See *McCarthy on Trademarks and Unfair Competition §* 11.24.

[5] Jerre B. Swann, Likelihood of Confusion Studies and the Straitened Scope of Squirt, *Trademark Reporter,* 2008, Vol 98 (3), 739.

11. In a July 2012 *Study of Likelihood of Confusion* report proffered in a related TTAB matter (Opposition No. 91196954; Opposition No. 91197748), Mr. Johnson wrote: "In its oppositions, Balance Bar claims its trademark is famous and has been famous since before GFA's application filing date" [see paragraph 4; footnote omitted]. Presumably based upon this claim, Mr. Johnson designed and employed an Eveready format survey to test for likelihood of confusion in that matter. However, since that time -- and well before designing and conducting the survey he submitted in the instant matter – Applicant's counsel was supplied with data to indicate that the Balance Bar mark is far from being famous among the public in general (as are the marks Rolls Royce and Chevrolet), and also fails to possess high levels of *unaided awareness* among the more limited population of snack bar consumers. Specifically, upon information and belief, as of October 18, 2013, Applicant's counsel had been furnished with the following:

a. Balance Bar Awareness/Loyalty study BB10000171-BB10000186; see page BB10000174, Kraft Historic Tracker, Source: 2008 GfK Brand Vitality Tracker showing unaided awareness of Balance Bar among category users at 8%.

b. NBTY Millward-Brown Tracker April 2013 BB100001955-BB100001974; see pages BB100001959-60; showing unaided awareness of Balance Bar among category users at 4%.

c. NBTY Millward-Brown Tracker August 2013 BB100001975-BB100002013; see page BB100001979; showing unaided awareness of Balance Bar among category users at 4%.

Given unaided awareness levels of 4% places limits on the level of likely confusion that can be obtained by using the Eveready protocol; at most, it will be 4%. Under such circumstances, if

one is interested in conducting a fair test of likely confusion, then use of the Eveready protocol is contra-indicated.

12. It appears from page 3, paragraph 6 of the 2014 Johnson Report, Mr. Johnson may never have been provided with or been made aware of the reports and findings identified in paragraph 11, *supra*. This may explain why Mr. Johnson's 2014 Survey continued to rely on an Eveready protocol. Regardless, as I indicated during my deposition testimony in the previous matter (see page 107, lines 16-22, of the Jacoby Deposition of January 22, 2013) and in keeping with what the aforementioned authorities have written, unless there was reliable evidence that some substantial proportion of consumers in the product category were aware, on an unaided basis, of the Balance Bar mark, use of an Eveready protocol is inappropriate. Absent such evidence, the Eveready protocol is guaranteed to reveal either no, or very low and artificially depressed levels of likely confusion.

13. **The Johnson Survey Does Not Faithfully Follow the Eveready Protocol in a Critical Respect**. Even if the Eveready protocol were appropriate, which it is not, the Johnson survey departs from the Eveready protocol in a material respect. Paragraph 15 of the Johnson Report informs us that the "*methodology follows the general pattern of the 'Eveready' test, which is frequently used to measure likelihood of confusion.*" Comparing the Johnson Survey's protocol with the protocol used in Eveready reveals that the phrase "general pattern" likely is used to refer to a critical difference. At issue in *Union Carbide v. Ever-Ready*[6] was use of the

[6] *Union Carbide Corp. v. Ever-Ready Inc.,* 392 F.Supp. 280 (D.C.Ill. 1975). *Union Carbide Corp. v. Ever-Ready, Inc*., 531 F.2d 366, 188 U.S.P.Q. 623 (7th Cir. 1976), *cert. denied,* 429 U.S. 830, 191 U.S.P.Q. 416 (1976), superseded by statute as stated in *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 227 U.S.P.Q. 138 (7th Cir. 1985).

name Ever-Ready for lamps. Plaintiff introduced two surveys, a "bulb survey" and a "lamp survey," with the protocol being used in the latter then becoming known as the Eveready protocol for testing likely confusion. The protocol began by showing the respondent the test stimulus (an as-sold lamp) and, ***with the stimulus remaining in view***, asking:

Q1. Who do you think puts out the lamp shown here?

Q2. What makes you think so?

Q3. Please name any other products put out by the same concern which you think puts out the lamps shown here.

14. The Eveready test involved respondents examining and responding to an actual product, namely, a lamp. The Johnson Survey methodology differs from the Eveready protocol in that, after handing the respondents an exhibit card that contained either the test name (Smart Balance) or the control name (Smart Bar), the Johnson Survey's interviewers were instructed: "*When respondent is done looking at exhibit card,* ***take back exhibit card, and put it out of sight for the remainder of the interview***" [bolding supplied]. There was absolutely no reason to remove the card from view. Doing so only creates a problem that renders the Johnson Survey's findings uninterpretable. Having removed the card from view, it is entirely possible that some (perhaps a substantial number of) respondents were confused from the very outset, mis-remembering the name Earth Balance as Balance Bar. For those who were confused and mis-remembered Earth Balance as Balance Bar, the subsequent questions would be meaningless. Consider Question 3a: "*What <u>other</u> products or brands, if any, do you believe come from the same company who makes the nutrition or energy bar with a name that I showed you <u>OR</u> do you not have a belief?*" (underscoring of "other" supplied here for emphasis). With the name was removed from view, if a respondent was confused so that he mis-remembered the name Smart Balance as Balance Bar, because Q.3a asks "what *other* products or brands" – that is, *other*, aside

from Balance Bar -- they would never answer Balance Bar to Question 3a. The same applies to 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 nutrition or energy bar with the name that I showed you OR do you not have a belief?*"[7] (underscoring of "other" supplied here for emphasis). Yet such fundamental confusion would never be detected, given the subsequent questions.

15. As one of the factors gatekeepers are to consider, the Advisory Committee's Notes on the December 1, 2000 amendments to FRE Rule 702 identifies the following: "Whether the expert has accounted for *obvious* alternative explanations" (italics supplied). Ignoring for the moment the survey's other flaws, had the stimulus card remained in view, the findings would be interpretable. However, given that the Johnson Survey's protocol required the respondents to remember the brand name, it is entirely possible that some perhaps substantial number of respondents may have mis-remembered the name Earth Balance as Balance Bar, thereby being confused before being asked any questions whatever. Since this obvious alternative explanation was not then and cannot now be tested, the survey created a situation where an entirely plausible and important *obvious alternative explanation* for the obtained findings cannot be rejected. In my opinion, this alone is sufficient to render the survey scientifically unreliable and not entitled to any weight.

16. Another important departure from the Eveready format is that the Johnson Survey replaced the word "think" with the word "belief" in Questions 2a, 3a and 4a. As quoted in paragraph 12, *supra*, the Eveready format asks respondents what they *think* (e.g., Q1: "Who

[7] Recognize that Question 4a seeks to measure two types of confusion -- confusion as to association or affiliation and confusion as to sponsorship or authorization -- with one question. If one reads this question aloud, it becomes obvious how difficult Question 4a is for respondents to comprehend.

do you *think* puts out the lamp shown here?; Q2. What makes you *think* so?"). By replacing the word "think" with the word "believe," the Johnson Survey imposes a more stringent hurdle on respondents than does the Eveready format, or than do others (like myself) who use that format.

17. **Problem with the Universe**. The Johnson Report does not provide any explicit definition of the universe to which the findings are intended to be extrapolated. However, in paragraph 7 of his report, Mr. Johnson indicates that he tested "adults who are current or prospective purchasers of all-natural snack bars." Paragraph 14 of the Johnson Report correctly cites Prof. McCarthy for the following proposition: "*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"* (underscoring supplied here for emphasis) and case law supports the proposition that it is prospective purchasers, not past purchasers, of the goods whose states of mind need to be measured. Although Mr. Johnson did ask separate questions to determine whether individuals were past purchasers or prospective purchasers of "all-natural snack bars," the data are not provided separately for these two groups. Based upon Prof. McCarthy's summary of case law and my own experience, the only individuals whose states of mind would be relevant are those who indicated they were potential or prospective purchasers of the product.

18. **Problems with the Main Questionnaire.** Question 2a of the Main questionnaire asks: "*Based on what you just saw, who or what company do you believe makes the nutrition or energy bar with the name that I showed you OR do you not have a belief?*" Research shows that while consumers may know the brand name of a product (e.g., Vaseline Intensive Care Lotion), they often do not know the name of the company that makes that particular brand (Chesebrough

Ponds).[8] The question assumes that respondents know that Balance Bar products are made by the Balance Bar Company. If this assumption is incorrect (as was the case in Conopco, where 95% of the respondents did not know that Chesebrough Ponds was the company that made and sold Vaseline products) and respondents do not know who produces the Balance Bar products, then asking Question 2a is not likely to yield anything of probative value. In my opinion, since the brand name was removed from view, before being asked *what company* made the brand they just saw, respondents should have been asked *what was the brand name* of the nutrition or energy bar they just saw.

19. Having the phrase "…OR do you not have a belief" be what respondents hear at the end of Questions 2a, 3a and 4a is likely to lead some respondents to latch onto that last phrase and provide it as their answer. A less biased way of asking essentially the same thing is to place a phrase such as "If you have any opinions about …" at the beginning of these questions. For example: "If you have an opinion *based on what you just saw, who or what company do you believe makes the nutrition or energy bar with the name that I showed you?*" When asked this way, respondents are less likely to answer they do not have a belief – especially in response to a long and complicated question (such as Question 4a; see Footnote 4).

20. **Problems with Data Interpretation.** Describing the Survey's key findings, the Johnson Report finds only a 3% level of source confusion (see paragraph 31) and a 4% level of total confusion (see paragraph 34). Given that his survey employed in Eveready protocol, a finding of 4% confusion is hardly surprising. In essence, the deck was stacked against finding any higher level of likely confusion. Since Balance Bar's unaided awareness level among the universe of nutrition snack bar consumers is only 4% (see paragraph 11, supra), Mr. Johnson

[8] *Conopco, Inc. v. May Dept. Stores Co.* 784 F.Supp. 648 (E.D. Mo.1992).

survey suggests that everyone in his survey who could remember the Balance Bar name unaided was confused.

IV. CONCLUSIONS AND OPINIONS

22. For the reasons set forth above, in my opinion, the Johnson Survey and Report are invalid and cannot be relied upon as support for the conclusions and opinions being proffered therein. I firmly believe the Johnson Survey is not capable of establishing a *lack* of likelihood of confusion in the marketplace. For this reason, I believe it should not be relied on as evidence or given any weight in this proceeding.

23. I reserve the right to supplement or revise this report based on additional materials that may be forthcoming.

24. I am charging $900 an hour for preparing this rebuttal report and critique, which is my standard hourly rate for such services. Should it be necessary, I will be charging $1,000 an hour for any deposition or trial testimony, which is my standard hourly rate for such services. This compensation is for the value I place on my time; it is in no way related to the outcome of this matter.

Pursuant to 28 U.S.C. Section 1746, I declare under penalty of perjury that, based upon the information available to me, to the best of my knowledge, the foregoing is true and correct.

27 May 2014
Date

Jacob Jacoby
Jacob Jacoby, Ph.D.

APPENDIX A-1

QUALIFICATIONS

JACOB JACOBY, Ph.D.

From time to time, I am asked to describe my qualifications as an expert in surveys proffered as evidence in litigated matters and/or as a scholar. The information below seeks to be responsive to such requests.

Author:

I have authored or co-authored five books, including the following 1,064 page treatise:

Jacob Jacoby, *Trademark Surveys* (2013). Chicago: American Bar Association.

Qualifications as an Expert in Surveys Proffered as Evidence in Litigated Matters

Since 1978, I have been providing testimony in U.S. District Courts. Since 1980, I have been conducting surveys that have been proffered as evidence in U.S. District Courts. I have played a lead role in conducting well over 1,000 consumer, marketing and communication (including advertising) studies in support of litigation and provided oral testimony in more than several hundred matters. An incomplete list of my past and present corporate and organizational clients can be found at JacobyResearch.com

With relatively few exceptions, courts have admitted and given weight to my testimony. An incomplete list of court commentary is attached. My scholarly writings have been cited in *amicus* briefs filed with the United States Supreme Court and have been cited in Second Circuit opinions[9] as the basis for shifting the burden of proof in trademark disclaimer cases from plaintiff to defendant.

In 1995, at the invitation of the Federal Judicial Center, I presented a set of lectures on how to evaluate survey research to judges attending the FJC's workshops for District Court judges and Magistrates held in Atlanta and Seattle. In 1994 and again in 1998, I was invited by the Federal Judicial Center to serve as a peer reviewer for the "Survey Reference Guide" appearing in the 1994 and 2000 editions of its *Reference Manual on Scientific Evidence.*

Under contract to the Food and Drug Administration, I developed the definition of and approach to measuring deceptive advertising used by the FDA[10]. Based upon my research into

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[9]See*: Charles of the Ritz Group, Ltd. V. Quality King Distributors, Inc.* 832 F.2d 1317, 4 U.S.P.Q.2d 1778 (2d Cir. 1987*); Home Box Office, Inc. v. Showtime/Movie Channel, Inc.* 832 F.2d 1311, 4 U.S.P.Q.2d 1789 (2d Cir. 1987).

[10] Jacoby, J. and Small, C. B. (1975) The FDA approach to defining misleading advertising. *Journal of Marketing, 39 (*4), 65-68.

consumer use and comprehension of nutrition information, I also served as an expert on a U. S. Senate Office of Technology Assessment committee preparing nutrition education guidelines for the public.

I have been an invited speaker on the subjects of litigation surveys and consumer confusion/dilution/deception before various organizations, including the International Trademark Association, the International Bar Association, the American Intellectual Property Law Association, the Practicing Law Institute, the Federal Trade Commission, the National Association of Attorneys General, several law schools (e.g., New York University; Fordham University, Franklin Pierce Law Center; Roger Williams University; Benjamin Cardozo Law School; Santa Clara University) and a number of state (California, Virginia) and local (e.g., New York City) bar and intellectual property associations.

From 1993 through 2003, I served as a member of the Editorial Board of *The Trademark Reporter*.

Examination of J. Thomas McCarthy's treatise "*McCarthy on Trademarks and Unfair Competition*," particularly the "Survey Evidence" section of Chapter 32, reveals that I am the most cited survey researcher in that treatise.

My research and testimony have often been considered instrumental in achieving favorable decisions and settlements. In several instances, the monetary value at stake exceeded $1 billion dollars.

Additional information is available at www.JacobyIP.com

Qualifications as a Scholar

Since 1981, I have held an endowed chair as the Merchant's Council Professor of Consumer Behavior and Retail Management at New York University's Leonard N. Stern Graduate School of Business.

I have authored or co-authored five books, edited two other books and published more than 160 articles and book chapters, most in rigorously refereed scholarly journals. Based upon my scholarly publications in the field's most rigorously reviewed peer journals, two independently conducted surveys identified me as the most influential and most frequently cited individual in the field of consumer behavior for the twenty year period spanning 1968-1988.

1. The first study, conducted by Donna Hoffman and Morris Holbrook and published in the field's leading peer-reviewed scholarly journal showed that I had the highest "influence index" of any of the field's 42 most-published scholars whose work was accepted and published by the *Journal of Consumer Research* during the 15 year period spanning 1974-1989 (Hoffman & Holbrook "The

Intellectual Structure of Consumer Research," *Journal of Consumer Research*, 1993 (19), 507-517, at page 511).[11]

2. The second study[12] shows that, based on my scholarly publications in the *Journal of Marketing, Journal of Marketing Research* and *Journal of Consumer Research* (which, collectively, have traditionally been considered as the field's three most rigorous peer-reviewed journals), I was the second most often cited marketing (and first-most often cited consumer) scholar in the *Social Science Citation Index* for the 20 year period spanning 1969 through 1988. The *Social Science Citation Index* covers more than 1,400 journals worldwide.

I have been fortunate to have my research and scholarly writings accorded significant recognition. Among other honors and awards are the following:

1. In 1978, I received the American Marketing Association's Harold H. Maynard award for an article judged to have made "the most significant contribution to marketing theory and thought" during the preceding year.

2. In 1991, I received the American Academy of Advertising's first "Outstanding Contribution to Advertising" award for having made "a significant and sustained contribution to advertising research through a systematic program of research."

3. In 1995, I was the fifth recipient to be awarded the American Psychological Association's Society for Consumer Psychology bi-annual "Distinguished Scientist Award" for "sustained, outstanding contributions to the field of consumer psychology." (Basking in reflected glory, the third recipient was awarded a Nobel Prize in 2002.)

4. Based upon my research productivity, I have been elected a Fellow in the following organizations: American Psychological Association, American Psychological Society, Association for Consumer Research, Society for Consumer Psychology, Society for Law and Psychology, Society for Personality and Social Psychology. In each instance, the honor of being elected a Fellow is accorded to less than 10% of the membership. In the case of the Association for Consumer Research, it is 1%. I am also an Academic Fellow of the Center for Law and Business at New York University.

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[11] As an indication of its selectivity and rigor, the <u>*rejection*</u> rate at the *Journal of Consumer Research* tends to hover between 85% and 88% of the papers submitted.

[12] Joseph Cote, Siew Meng Leong and Jane Cote. "Assessing the Dissemination and Utilization of Marketing Research in the Social Sciences: A Citation Analysis Approach." School of Business, Oregon State University, August 10, 1990.

5. I am listed in numerous "Who's Who" compilations, including: *Who's Who in the World, Who's Who in America*[13], *Who's Who in Science and Engineering, Who's Who in Frontier Science and Technology*, *Who's Who in Advertising, Who's Who in American Education* and *Who's Who of Emerging Leaders in America.*

Approximately once every thirty years or so, an encyclopedia is published covering all the social and behavioral sciences. The third such compendium, the 24 volume *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier Science Ltd./Pergamon: Oxford, UK) was released in 2002. The fourth such compendium will be published in 2015. Of the thousands of scholars whose principal focus is the study of consumer decision making and behavior, I was the one invited to write the chapter on consumer psychology for both these editions.

I have been active in many scholarly and professional organizations, including serving as President of the American Psychological Association's Society of Consumer Psychology (in 1974) and President of the Association for Consumer Research (in 1975).

A list of selected publications in law journals and others pertinent to the legal arena is provided at the end of this document.

Last, I have served on the Editorial Boards of the leading peer reviewed scientific journals in my field (*Journal of Consumer Research, Journal of Marketing Research*) as well as journals in other disciplines (*Computers and Human Behavior, Trademark Reporter*). Until I no longer accepted such requests, I also served as an *ad hoc* reviewer for other scholarly journals (including the *Journal of Applied Psychology, Journal of Applied Social Psychology, Journal of Finance, Journal of Marketing, Journal of Nonverbal Behavior*, *Journal of Public Policy and Marketing*, *Organization Behavior and Human Performance, Public Opinion Quarterly*, and *International Journal of Research in Marketing*). The job of an Editorial Board member/reviewer is to evaluate the quality of the submitted research/writings and, for each paper, to render a "publish –do not publish" recommendation to the Editor. In the process, the reviewer determines whether and to what extent the research conforms to basic scientific standards. In this way, reviewers at peer reviewed journals serve as the "gatekeepers" of their science.

[13] The *New York Times* (November 13, 2005, Section 9, Page 1) reports that inclusion in *Who's Who in America* is based upon "position and accomplishment;" further, the two-volume set contains approximately 109,000 entries.

APPENDIX A2

ACADEMIC CURRICULUM VITA

ACADEMIC CURRICULUM VITA

Name: **Jacob (Jack) Jacoby**

Vita updated: January 1, 2014

Home address and phone:

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EDUCATION:

Ph.D. Michigan State University (1966)

Major: Social Psychology; Minors: Statistics, Sociology

M.A. Brooklyn College, The City University of New York

(1963) Psychology

B.A. Brooklyn College, The City University of New York

(1961) Psychology

PROFESSIONAL EXPERIENCE:

1981 - present:	**Merchants Council Professor of Consumer Behavior and Retail Management,** Stern School of Business, New York University.
1981 - 1985:	Merchants Council Professor of Marketing, New York University and Director of the Institute of Retail Management.
1975 - 1981:	Professor, Department of Psychology, Purdue University
1976 (Jun.-Jul.)	Guest Professor, SFB 24, University of Mannheim, Mannheim, Germany
1975 (May):	Guest Professor, SFB 24, University of Mannheim, Mannheim, Germany
1971 - 1975:	Associate Professor, Department of Psychology, Purdue University.
1968 - 1971:	Assistant Professor, Department of Psychology, Purdue University
1965 - 1968:	Active duty (1st Lieutenant, U.S. Air Force). Served as Chief, Behavioral Science Branch, the National Security Agency, Fort George G. Meade, Maryland. Duties were primarily to plan and conduct applied research in industrial/organizational psychology. Security clearance: Top Secret.
1966 - 1968:	(Part-time) Assistant Professorial Lecturer, Department of Business and Public Administration, George Washington Univ. Promoted to Associate Prof. Lecturer the semester I left.

MEMBERSHIPS IN PROFESSIONAL ORGANIZATIONS:

American Association for Public Opinion Research (1967-1968, 1972-1973; 1982-present)

American Marketing Association (1968-present)

American Psychological Association (Associate, 1963-1967; Member, 1968-1972; Fellow, 1973-present. Also elected to Fellow status by Divisions 8, 23 and 41.)

American Psychological Society (1996-present; Fellow 1998)

American Psychology-Law Society (1988-present; Fellow 1994)

Association for Consumer Research (1969-present; Fellow 1993)

International Trademark Association (1991-present)

Market Research Council (1989-present)

Midwestern Psychological Association (Member, 1968-1975)

Sigma Xi, The Scientific Research Society of North America (Associate Member, 1962-1968; Member, 1969-1981)

Society for the Psychological Study of Social Issues (Member, 1963-1968)

Society for Judgment and Decision Making (Member, 1986-1990)

ACTIVITIES IN PROFESSIONAL ORGANIZATIONS:

1. American Psychological Association

   - Member, Council of Representatives (governing body of APA), 1971-1973

   - Member, Committee on Student Aid (COSA), 1973.

2. **Society of Consumer Psychology** (Division 23) of the American Psychological Association

   - **PRESIDENT**, September 1973 to August 1974

   - Representative to APA Council of Representatives, 1971-1973

   - Member, Committee on Scientific and Professional Affairs, 1968-1971

   - Chairman, Convention Program Committee, 1970-1971

   - Contributing Editor, The Communicator, Division 23 Newsletter, 1970-1973

   - Chairman, Membership Committee, 1971-1971

   - Member, Membership Committee, 1972-73

   - Policy Board Representative to the Journal of Consumer Research, 1971-1974, 1976-1978; Alternate Representative, 1974-1975

   - Chairman, Fellowship Committee, 1975; 1980; Member, 1979, 1981

   - Chairman, Election Committee, 1975

3. **Association for Consumer Research**

- **PRESIDENT**, 1975

- Member, Advisory Council (ACR's governing body thru 1972), 1969-1972

- Member, Executive Committee, 1973-1974, 1976

- Member, Program Committee, 1970-1971

- Member, Publications Committee, 1970-1972

- Chairman, Publications Committee, 1973

- Editor, ACR Newsletter, 1973

- Chairman, Election Committee, 1976

- Member, Election Committee, 1975, 1977

- Policy Board rep., *Journal of Consumer Research,* 1981-1984

4. American Association of Public Opinion Research

- Member, Professional Standards Revision Committee, 1983-1984

- Policy Board rep., *Journal of Consumer Research*, 1984-1986

- Member, ad hoc committee on changing *P.O.Q*. publisher, 1986

5. Market Research Council

- Executive Committee, Member at Large, 1991-1992

- Chairman, Marketing "Hall of Fame" Award Committee 1991-1992

6. International Trademark Association

- Member, Editorial Board, *The Trademark Reporter*, 1993-2003
- Member, Advisory Board, Brand Names Educational Foundation,2004-6

OTHER PROFESSIONAL ACTIVITIES:

1. Editorial Board Memberships.

- *Journal of Consumer Research,* Founding member of JCR and Member, Editorial Board, 1973-1974.

- Member, Policy Board (group that selects editors and, initially established journal policies)

Representing APA-Division 23, 1971-1974, 1976-78; Alternate, 1974-1975

Representing ACR: 1981-1984

Representing AAPOR: 1984-1986

Vice Chairman of Policy Board: 1984-1986

- *Journal of Marketing Research*, Member, Editorial Board, 1972-1974.

- *Computers in Human Behavior*, Member, Editorial Board, 1984-1994.

- *Trademark Reporter*, member, Editorial Board, 1993-present.

2. Reviewer of Manuscripts

- American Psychological Association, Annual Conventions: 1970-1976

- Association for Consumer Research, Annual Conventions: 1971, 1972, 1974, 1978, 1979, 1986, 1989, 1990

- ACR European Conference, 1995

- *Organization Behavior and Human Performance* - 1971

- 1972 American Marketing Association, Fall Convention

- 1972 Research Design Competition, APA-Division 23

- *Journal of Applied Social Psychology* 1972, 1984

- *Journal of Applied Psychology* 1972

- *Public Opinion Quarterly*, 1973, 1974

- *Journal Supplement Abstract Service*, Am. Psych. Assn. 1975

- American Marketing Association, 1979 Ph.D. dissertation competition

- *Journal of Marketing* (1980)

- *Journal of Finance* (1985)

- *Journal of Nonverbal Behavior* (1988)

- *International Journal of Research in Marketing* (1988)

- "Marketing and Public Policy" conference 1995,

- *Journal of Public Policy and Marketing*, 1997-1999

- *Reference Manual on Scientific Evidence*. 1994 and 2000 editions. *F*ederal Judicial Center, Washington, D.C.

3. Reviewer of Proposals

National Science Foundation (1973, 1974, 1975, 1976, 1979, 1980, 1986, 1988)

- Social Science Research Council of Canada (1981)

- Food and Drug Administration (1975)

- Million Dollar Round Table (1979)

4. Reviewer of Advertising

- Judge, 1991 Effie Awards (annual award for Advertising effectiveness)

HONORS AND AWARDS:

1969 - Admitted into Sigma Xi, the National Honorary Society of Science.

1973 - Elected a Fellow of the American Psychological Association

1973 - Elected a Fellow of the Division of Consumer Psychology

1981 - Elected a Fellow of the Division of Personality and Social Psychology

1995 - Elected a Fellow of the Division of Law and Psychology

1973 - **President**, Division of Consumer Psychology, the American Psychological Association.

1975 - **President**, the Association of Consumer Research.

1978 – Recipient of the American Marketing Association's **Harold H. Maynard Award** for the article making the most "significant contribution of marketing theory and thought" in the *Journal of Marketing*, 1978.

1991 - First recipient, American Academy of Advertising's **Outstanding Contribution to Advertising Award** for having "made a significant sustained contribution to advertising research through a systematic program of research."

1993 - Elected a **Fellow** of the Association of Consumer Research

1995 – Recipient of the Society of Consumer Psychology's fifth bi-annual

Distinguished Scientific Research Award.

2001 - Appointed an Academic Fellow, the Center for Law and Business, New York University.

2011 - Based upon scholarly impact on the field of consumer behavior, Selected by editors at Sage Publication as a "Legend in Consumer Behavior." Sage will be publishing many of Jacoby's writings in 1214 as an 8 volume set.

Listed in:

Who's Who in the World

Who's Who in America

Who's Who in the East

Who's Who in Frontier Science and Technology

Who's Who of Emerging Leaders in America

Who's Who in Advertising

Who's Who in American Education

Men of Achievement

BOARD OF DIRECTORS:

1991-1994 - Advertising Educational Foundation. (New York)

MAJOR RESEARCH GRANTS AND CONTRACTS (Total: more than $1.1 million):

$148,000

from the National Science Foundation for studying: "Amount, type, and order of package information acquisition in purchasing decisions." For the period from June 1, 1974 to December 30, 1976. (GI-43687).

$155,000

from the Federal Trade Commission for: "Study of likely impact of disclosure of life insurance costs on agent and consumer behavior." For the period from January 1, 1977 to August 4, 1978. (L0226).

$181,000

from the American Association of Advertising Agencies for studying: "The Miscomprehension of Televised Communication". For the period from February 1978 through February 1980.

$353,000

from the National Science Foundation for studying: "Assessing the effects of science based information on consumer technological choices." (Co-authored with James J. Jaccard). For the period from February 15, 1980 through August 31, 1983 (PRA7920585).

$270,000

from The Advertising Educational Foundation, Ind. (Co-sponsored by the American Association of Advertising Agencies and the American Advertising Federation) for studying: "The Miscomprehension of Print Communication". For the period from January 1983 through December 1985.

M.S. THESIS AND Ph.D. DISSERTATION:

Jacoby, J. "Imprinting: An experimental approach to a biphasic interpretation." Unpublished Master's Thesis, Brooklyn College, 1963. (Major Professor: Howard Moltz)

Jacoby, J. "Situational anxiety and ordinal birth position as determinants of dogmatism and authoritarianism." Unpublished Doctoral Dissertation. Michigan State University, 1966. (Major Professor: Milton Rokeach) See: *Dissertation Abstracts A. Humanities and Social Science*, 1967, 27, p. 4338-A.

PUBLICATIONS

BOOKS

1. Jacoby, J. and Chestnut, R.W. (1978) *Brand loyalty: Measurement and management*. New York: John Wiley and Sons.

2. Jacoby, J., Hoyer, W.D. and Sheluga, D.A., (1980) *The miscomprehension of televised communication.* New York: American Association of Advertising Agencies.

3. Jacoby, J. and Craig, C.S. (Eds.), (1984) *Personal selling: Theory, Research and Practice.* Lexington Books, Lexington, Mass.

4. Jacoby, J. and Olson, J.C., (Eds.), (1984) *Perceived quality: How consumer view stores and merchandise.* Lexington Books, Lexington, Mass.

5. Jacoby J. and Hoyer, W.D., (1987) *The comprehension and miscomprehension of print communications: An investigation of mass media magazines*. Lawrence Erlbaum Associates, Hillsdale, New Jersey.

6. James Jaccard and Jacob Jacoby (2010) *Theory Construction and Model Building Skills: A Practical Guide for Social Scientists.* New York: Guilford Press.

7. Jacob Jacoby (2013) *Trademark Surveys*. The American Bar Association, Chicago. [Currently being updated for 2nd edition; anticipated publication date is 2015]

8. Jacob Jacoby and James Jaccard (In preparation) *Generalizing from Research: External validity and Generalizability.*

9. Jacoby, Jacob and Danilowski, Kim (book in preparation) *From Theory to Research: A Primer on Social Science Research Methods.*

SELECTED UNPUBLISHED MONOGRAPHS:

1. Uh1, J.N., Armstrong, J., Courtenay, H.V., Ishida, J.T., Kepner, K.W., Potter, H.C., and Jacoby, J. (1970) *Survey and evaluation of consumer education programs in the United States.* (2 volumes). Purdue Research Foundation, Lafayette, Indiana. March. 666 pages. Microfilm $2.50; hard copy $33.40 (Available from: ERIC Document Reproduction Service, ED-038-549, Fairmont Avenue, Bethesda, Maryland 20014).

2. Jacoby, J., Olson, J.C., Szybillo, G.J., and Hart, E.W. Jr. (1975) *Affirmative nutritional disclosure in advertising and selected alternatives: The likely impact on consumer*

behavior. Washington, D.C.: Consumer Research Institute (Grocery Manufacturers of America, Inc.), December.

3. Jacoby, J. and Olson, J.C. (1976) *Consumer reaction to price: An attitudinal, information-processing perspective*. Unpublished; 100 pages. (A 30-page condensation was published as article #69; see below).

4. Jacoby, J. and Chestnut, R.W. (1977) *Amount, type, and order of package information acquisition in purchasing decisions*. Final report to the National Science Foundation (GI-43687), June.

5. Jacoby, J. (1980) *Psychological foundations of consumer behavior: Lecture notes.* Bloomington, Indiana: TIS Incorporated, Publishing Division. (160 pages).

6. Jacoby, J. and Jaccard, J.J. (1984) *The influence of health and safety information on consumer decision making concerning new technological products*. Final report to the National Science Foundation, June.

PUBLISHED TEST:

Jacoby J. and Terborg, J.R. (1975) *The Managerial Philosophies Scale.* Teleometrics International, The Woodlands, Texas. Copyright. This is a 36-item Likert-type instrument designed to assess McGregor's Theory X-Theory Y managerial orientations. An Examiner's Manual is available (through Teleometrics), as is a manuscript describing the scale's empirical development (entitled: "Development and Validation of Theory X and Y scales for assessing McGregor's Managerial Philosophies").

ARTICLES:

1. Jacoby, J. (1967) The construct of abnormality: Some cross-cultural considerations. *Journal of Experimental Research in Personality, 2,* 1-15.

2. Jacoby, J. (1967) Open-mindedness and creativity. *Psychological Reports, 20, 822*.

3. Jacoby, J. (1968) Birth-rank and pre-experimental anxiety. *Journal of Social Psychology, 76,* 9-11.

4. Jacoby, J. (1968) Examining the *other* organization: A methodology for studying informal organizational structure of complex organizations. *Personnel Administration, 31*, 36-42.

5. Jacoby, J. (1968) Work music and morale: A neglected but important relationship. *Personnel Journal, 47*, 882-886.

6. Jacoby, J. (1968) Creative ability of task-oriented versus person-oriented leaders. *Journal of Creative Behavior, 2*, 249-253.

7. Jacoby, J. (1969) Time perspective and dogmatism: A replication. *Journal of Social Psychology, 7*, 281-82.

8. Jacoby, J. (1969) Accuracy of person perception as a function of dogmatism. *Proceedings, 77th Annual Convention*, American Psychological Association, 4, 347-348.

9. Jacoby, J. (1970) The plight of the uniformed Air Force Psychologist. *Professional Psychology, 1*, 383-387.

10. Jacoby, J. (1971) Personality and innovation proneness. *Journal of Marketing Research,* 8, 244-247. Reprinted in: H.H. *Kassarjian and T.S. Robertson (Eds.), Perspectives in Consumer Behavior* (2nd ed.). Glenview, Illinois: Scott Foresman, 1973, pp. 149-155. (A one-page abstract appears in David L. Sparks (Ed.). *Broadening the Concept of Marketing*. Chicago: American Marketing Association, 1970.)

11. Jacoby J. (1971) A model of multi-brand loyalty: Preliminary results and promotional strategies*. Journal of Advertising Research, 11(*3), 25-31.

12. Jacoby, J. (1971) Training consumer psychologists: The Purdue University program. *Professional Psychology, 2*, 300-302.

13. Jacoby, J. (1971) A multiple-indicant approach for studying new product adopters. *Journal of Applied Psychology, 55,* 384-388. Reprinted in M. Wallendorf and G. Zaltman (Eds.), *The Consumer Behavior of Individuals and Organizations.* N.Y.: John Wiley, 1979.

14. Jacoby, J. (1971) Interpersonal perceptual accuracy as a function of dogmatism. *Journal of Experimental Social Psychology, 7*, 221-236.

15. Jacoby, J. (1971) Brand loyalty: A conceptual definition. *Proceedings 79th Annual Convention*, American Psychological Association, 6, 655-656.

16. Jacoby, J. and Aranoff, D. (1971) Political polling and the lost letter technique. *Journal of Social Psychology, 83,* 209-212.

17. Jacoby, J. and Matell, M. (1971) Three point Likert scales are good enough. *Journal of Marketing Research, 8*, 495-500.

18. Jacoby, J., Olson, J.C., and Haddock, R.A. (1971) Price, brand name, and product composition characteristics as determinants of perceived quality. *Journal of Applied Psychology, 55,* 570-579.

19. Deering, B.J. and Jacoby, J. (1971) The effect of "alternative relationships" and "relative resources" on consumer decisions between mother and child. In David M. Gardner (Ed.) *Proceedings, Second Annual Conference*, The Association for Consumer research, 1, 135-142.

20. Matell, M.S. and Jacoby, J. (1971) Is there an optimal number of alternatives for Likert scale items? Study I: Reliability and validity. *Educational and Psychological Measurement, 31*, 657-674.

21. Olson, J.C. and Jacoby, J. (1971) A construct validation study of brand loyalty. *Proceedings, 79th Annual Convention*, American Psychological Association, 6, 657-658.

22. Jacoby, J. (1972) Opinion leadership and innovativeness: Overlap and validity. In M. Venkatesan (Ed.), *Proceedings, Third Annual Conference,* The Association for Consumer Research, 2, 632-649.

23. Jacoby, J. and Kaplan, L.B. (1972) The components of perceived risk, In M. Venkatesan (Ed.), *Proceedings, Third Annual Conference*, The Association for Consumer Research, 2 382-393.

24. Bowen, D.D., Perloff, R. and Jacoby, J. (1972) Improving manuscript evaluation procedures. *American Psychologist, 27,* 221-225.

25. Deering, B.J. and Jacoby, J. (1972) Price intervals and individual price limits as determinants of product evaluation and selection. In M. Venkatesan (Ed.), *Proceedings, Third Annual Conference*, The Association for Consumer Research, 2, 145-166.

26. Deering, B. J. and Jacoby, J. (1972) Risk enhancement and risk reduction strategies for handling perceived risk. In M. Venkatesan (Ed.), *Proceedings, Third Annual Conference*, The Association for Consumer Research, *2*, 404-416.

27. Heimbach, J.T. and Jacoby, J. (1972) The Zeigarnik effect in advertising. In M. Venkatesan (Ed.), *Proceedings, Third Annual Conference,* The Association for Consumer Research, *2,* 746-748.

28. Matell, M.S. and Jacoby, J. (1972) Is there an optimal number of alternatives for Likert scale items? Effects of testing time and scale properties. *Journal of Applied Psychology, 56*, 506-509.

29. Olson, J.C. and Jacoby, J. (1972) Cue utilization in the quality perception process. In M. Venkatesan (Ed.), *Proceedings, Third Annual Conference*, The Association for Consumer Research, 2, 167-179.

30. Szybillo, G.J. and Jacoby, J. (1972) The relative effects of price, store image, and intrinsic product differences on product quality evaluation. In M. Venkatesan (Ed.), *Proceedings, Third Annual Conference*, The Association for Consumer Research, 2, 180-186.

31. Jacoby, J., Kohn, C.A. and Speller, D.E. (1973) Time spent acquiring product information as a function of information load and organization. *Proceedings, 81st Annual Convention*, American psychological Association, 8 (2), 813-814.

32. Jacoby, J. and Kyner, D.B. (1973) Brand loyalty vs. repeat purchasing behavior. *Journal of Marketing Research*, 10, 1-9.

33. Hart, E.W. and Jacoby, J. (1973) Novelty, recency, and scarcity as predictors of perceived newness. *Proceedings, 81st Annual Convention*, American Psychological Association, 8 (2), 839-840.

34. Hollander, S.W. and Jacoby, J. (1973) Recall of crazy, mixed-up TV commercials. *Journal of Advertising Research, 13* (3), 39-42.

35. Kohn, C.A. and Jacoby, J. (1973) Operationally defining the consumer innovator. *Proceedings, 81st Annual Convention*, American Psychological Association, 8 (2), 837-839.

36. Szybillo, G.J., Jacoby, J. and Busato, J. (1973) Effects of integrated advertising on perceived corporate hiring policy. *Proceedings, 81st Annual Convention*, American Psychological Association, 8 (2), 815-816.

37. Jacoby, J. (1974) Consumer reaction to information displays: Packaging and advertising. In S.F. Divita (Ed.), *Advertising and the Public Interest.* Chicago: American Marketing Association, 101-118.

38. Jacoby, J. (1974) Consumer behavior: A neglected but fertile field for psychological research. *Contemporary Psychology, 19* (7), 543. (Review of S. Ward and T.S. Robertson, Eds., *Consumer Behavior: Theoretical Sources.* Englewood Cliffs, N.J., Prentice-Hall.)

39. Jacoby, J. (1974) The construct validity of opinion leadership. *Public Opinion Quarterly, 38* (1), 81-8

40. Jacoby, J. and Olson, J.C. (1974) An extended expectancy model of consumer comparison process. In S. Ward and P. Wright (Eds.), *Advances in Consumer Research,* 1 319-333. Urbana, Illinois: Association for Consumer Research.

41. Jacoby, J., Speller, D.E. and Kohn, C.A. (1974) Brand choice behavior as a function of information load. *Journal of Marketing Research, 11* (1), 63-69.

42. Jacoby, J., Speller, D.E. and Berning, C.A.K. (1974) Brand choice behavior as a function of information load: Replication and extension. *Journal of Consumer Research, 1* (1), 33-42.

43. Berning, C.A.K. and Jacoby, J. (1974) Patterns of information acquisition in new product purchases. *Journal of Consumer Research, 1* (2). 18-22.

44. Olson, J.C. and Jacoby, J. (1974) Measuring multi-brand loyalty. In S. Ward and P. Wright (Eds.), *Advances in Consumer Research,* 1, 447-448. Urbana, Illinois: Association for Consumer Research.

45. Kaplan, L.B., Szybillo, G.J. and Jacoby, J. (1974) Components of perceived risk in product purchase: A cross-validation. *Journal of Applied Psychology, 59* (3), 287-291.

46. Szybillo, G.J. and Jacoby, J. (1974) Intrinsic vs. extrinsic cues as determinants of perceived product quality. *Journal of Applied Psychology, 59* (1), 74-78.

47. Szybillo, G.J. and Jacoby, J. (1974) Effects of different levels of integration on advertising preference and intention to purchase. *Journal of Applied Psychology, 59* (3), 274-280.

48. Jacoby, J. (1975) Consumer psychology as a social psychological sphere of action. *American Psychologist, 30* (10), 977-987**.** ***APA-Division 23 Presidential Address*** (Reprinted in: M. Wallendorf and G. Zaltman (Eds.), *The Consumer Behavior of Individuals and Organizations,* New York: John Wiley and Sons.)

49. Jacoby, J. (1975) Perspectives on a consumer information processing research program. *Communication Research, 2* (3), 203-215. (Reprinted in: Michael Ray and Scott Ward (Eds.), *Communicating with Consumers: The Information Processing Approach.* Beverly Hills, Calif.: Sage, 13-25.)

50. Jacoby, J. (1975) A brand loyalty concept: Comments on a comment. *Journal of Marketing Research, 12* (4), 484-487.

51. Jacoby, J. (1975) Ruminations of a consumer psychologist on the emerging energy crisis. In R. N. Andrews (Ed.), *Can We Meet Our Energy Needs*? President's Council

Symposium, Purdue University. West Lafayette, Indiana: Purdue Research Foundation, 32-44.

52. Jacoby, J. and Small, C.B. (1975) The FDA approach to defining misleading advertising. *Journal of Marketing, 39* (4), 65-68. Reprinted In: Jeffrey S. Edelstein (Ed.)(1999) *Advertising Law in the New Media Age*. New York: Practicing Law Institute.

53. Jacoby, J., Speller, D.E. and Berning, C.A.K. (1975) Constructive criticism and programmatic research: Reply to Russo. *Journal of Consumer Research, 2* (2), 154-156.

54. Edel, E.C. and Jacoby, J. (1975) Examiner reliability in polygraph chart analysis: Identification of physiological responses. *Journal of Applied Psychology, 60* (5), 632-634.

55. Jacoby, J. and Terborg, James R. (1975) How to interpret your scores on the Managerial Philosophies scale. *Teleometrics International,* 1-7.

56. Jacoby, J. (1976) Consumer psychology: An Octennium. In P. Mussen and M. Rosenzweig (Eds.), *Annual Review of Psychology, 27*, 331-358.

57. Jacoby, J. (1976) Consumer and industrial psychology: Prospects for theory corroboration and mutual contribution. In M.D. Dunnette (Ed.), *The Handbook of Industrial and Organizational Psychology*. Chicago: Rand McNally, 1031-1061.

58. Jacoby, J. (1976) Consumer research: Telling it like it is. In B.B. Anderson (Ed.), *Advances in Consumer Research, 3, 1-11.* **Association for Consumer Research Presidential Address** (Reprinted in M. Wallendorf and G. Zaltman (Eds.), *The Consumer Behavior of Individuals and Organizations*. New York: John Wiley and Sons, 1979.)

59. Jacoby, J. (1976) Defining misleading advertising: Reply to Preston. *Journal of Marketing, 40(*3), 57-58.

60. Jacoby, J., Chestnut, R.W., Weigl, K.C. and Fisher, W. (1976) Pre-purchase information acquisition: Description of a process methodology, research paradigm, and pilot investigation. In B.B. Anderson (Ed.), *Advances in Consumer Research, 3*, 306-314.

61. Jacoby, J., Szybillo, G.J. and Berning, C.A.K. (1976) Time and consumer behavior: An interdisciplinary overview. *Journal of Consumer Research, 2* (3), 320-339. (Reprinted in: R. Ferber (Ed.), *Selected Aspects of Consumer Behavior: A Summary from the Perspective of Different Disciplines.* Prepared for the National Science Foundation. Directorate for Research Applications (RANN). NSF/RA 77-0013. Superintendent of Documents, U.S. Government Printing Office, Washington, D.C., 451-476.)

62. Bettman, J.R. and Jacoby, J. (1976) Patterns of processing in consumer information acquisition. In B.B. Anderson (Ed.), *Advances in Consumer Research, 3,* 315-320.

63. Kyner, D.B., Jacoby, J. and Chestnut, R.W. (1976) Dissonance resolution by grade school consumers. In B.B. Anderson (Ed.), *Advances in Consumer Research, 3*, 315-320.

64. Raffee, H., Hefner, M., Scholer, M., Grabicke, K. and Jacoby, J. (1976) Informationsverhalten und Markenwahl. *Die Unternehmung*, 2, 95-107.

65. Jacoby, J. (1977) Information load and decision quality: Some contested issues. *Journal of Marketing Research,* 14 (4), 569-573.

66. Jacoby, J. (1977) The emerging behavioral process technology in consumer decision making research. In W.D. Perrault, Jr. (Ed.), *Advances in Consumer Research, 4*, 263-265.

67. Jacoby, J. (1977) History and objectives underlying the formation of ACR's Professional Affairs Committee in W.D. Perrault, Jr. (Ed.) *Advance in Consumer Research 4*, 256-257.

68. Jacoby, J. (1977) Laboratory experiments: Faulty and necessary. *Journal of Consumer Policy, 1* (2), 183-185.

69. Jacoby, J., Berning, C.A.K., and Dietvorst, T.F. (1977) What about disposition? *Journal of Marketing, 41* (2) 22-28.

70. Jacoby, J., Chestnut, R.W. and Silberman, W. (1977) Consumer use and comprehension of nutrition information. *Journal of Consumer Research, 4* (2), 119-128.

71. Jacoby, J. and Olson, J.C. (1977) Consumer reaction to price: An attitudinal, information-processing perspective. In Y. Wind an M. Greenberg (Eds.), *Moving Ahead with Attitude Research*. Chicago: American Marketing Association, 73-86.

72. Jacoby, J., Szybillo, G.J. and Busato-Schach, J. (1977) Information acquisition behavior in brand choice situations. *Journal of Consumer Research, 3* (4), 209-216.

73. Chestnut. R.W. and Jacoby, J. (1977) Consumer information processing: Emerging theory and findings. In A. Woodside, P.D. Bennett, and J.N. Sheth (Eds.), *Foundations of Consumer and Industrial Buying Behavior*. New York: Elsevier, North-Holland, Inc., 119-133.

74. Jacoby, J. (1978) Consumer Research: A state of the art review. *Journal of Marketing,* 42 (2), 87-96.

75. Jacoby, J., Chestnut, R.W. and Fisher, W. (1978) A behavioral process approach to information acquisition in non-durable purchasing. *Journal of Marketing Research, 15,* 532-544.

76. Jacoby, J., Chestnut, R.W., Hoyer, W., Sheluga, D.A. and Donahue, M.J. (1978) Psychometric characteristics of behavioral process data: Preliminary findings on validity and reliability, In Keith Hunt (Ed.) *Advances in Consumer Research, 5*, 546-554.

77. Jacoby, J., Sheluga, D., and Major, B. (1978) Does format make a difference?: Three studies. In C. Leavitt (Ed.), *Proceedings of the Division 23 Program,* 85th Annual Convention of the American Psychological Association, 15-16.

78. Sheluga, D.A. and Jacoby, J. (1978) Do comparative claims encourage comparison shopping? -- the impact of comparative claims on consumers' acquisition of product information. In J. Leigh and C.R. Martin (Eds.), *Current Issues and Research in Advertising*. Ann Arbor, Michigan: University of Michigan Press, 5, 23-28.

79. Sheluga, D.A., Jacoby, J. and Major, B.N. (1978) Whether to agree disagree or disagree-agree: The effects of anchor order on item response. In Keith Hunt (Ed.) *Advances in Consumer Research, 5*, 109-113.

80. Jacoby, F. and Jacoby, J. (1979) You're twenty years behind your market. *1979 Proceedings of the Million Dollar Round Table, Volume II*. Des Plaines, Illinois: MDRT, 895-898.

81. Jacoby, F. and Jacoby, J. (1979) The psychology of persuasion. *1979 Proceedings of the Million Dollar Round Table, Volume II*. Des Plaines, Illinois: MDRT, 899-906.

82. Kulich, R.J., Curran, J.P., Jacoby, J. and Mariotto, M.J. (1979) The application of assertiveness training to the consumer-salesperson interaction. In F.M. Nicosia (Ed.), *Proceedings of the Division 23 program*, 86th Annual Convention of the American Psychological Association, 60-63.

83. Raffee, H., Jacoby, J., Hefner, M., Scholer, M. and Grabicke, (1979) K. Informationsentscheidungen bei unterschiedlichen Entscheidungsobjeckten (Information-decisions over different decision-objects). In H. Meffert, H.Steffenhagen, and H.Freter (Eds.), *Konsumenten-verhalton und Information (Consumer Behavior and Information)* Weisbaden, West Germany, 113-159.

84. Sheluga, D.A., Jaccard, J.J. and Jacoby, J. 1979, Preference, search and choice: An integrative approach. *Journal of Consumer Research, 6* (2), 166-176.

85. Chestnut, R.W. and Jacoby, J. (1980) Product comprehension: The case of permanent vs. term life insurance. In J.C. Olson (Ed.), *Advances in Consumer Research, 7,* 424-428.

86. Jacoby, J. (1981) Some perspectives on risk acceptance. In K.B. Monroe (Ed.), *Advances in Consumer Research*, 8 511-516.

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154. Jacob Jacoby (2002) Experimental Design and the Selection of Controls in Trademark and Deceptive Advertising Surveys. *The Trademark Reporter* 92 (4) 890-956.

155. Jacob Jacoby (2002) A critique of Rappeport's "Litigation Surveys – Social 'Science' as Evidence." 92 (5) *The Trademark Reporter.* 1480-1501.

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157. Gideon Mark and Jacob Jacoby (2006) Continuing Commercial Impression and its measurement. *Marquette Intellectual Property Law Review.* 10:3, 431-454. Copy also available at http://lsr.nellco.org/nyu_lewp/36. Article reprinted in ICFAI (Institute of Chartered Financial Analysts of India) University Press. Book entitled: "Trademarks: Concept and Context" 2008. Dr. A.V.N. Rao (Editor)Pages 221-250. Hyderabad, India (See: www.icfaipress.org.)

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GRADUATE STUDENTS SUPERVISED AS "MAJOR PROFESSOR"

Completed Ph.D.	**Last Known Position:**
1971 - Heimbach, James	Retired.
1971 - Kaplan, Leon B.	President, Princeton Research and Consulting Center Princeton, New Jersey
1972 - Haddock, Rafael A.	Organizational Psychologists, P.C. Chicago, Illinois
1972 - Hollander, Steven W.	Retired
1972 - Kyner, David B.	Private Business, New York City
1972 - Olson, Jerry C.	President, Olson Zaltman Associates
1973 - Deering, Barbara J.	U.S. West, Inc. Seattle, Washington

1973 - Szybillo, George J.	Executive Director Corporate Marketing Research and Client Insights, Morgan Stanley New York
1974 - Buck, Meera	Retired (formerly head of Advertising Research at Shell Oil) Houston, Texas
1974 - Hart, Edward W., Jr.	Deceased
1974 - (Berning) Kohn, Carol A.	Retired (formerly at Procter & Gamble Co.) Cincinnati, Ohio
1974 - Moreno, Nelson	Department of Psychology University of Puerto Rico
1977 - Chestnut, Robert	Chestnut Partners Tampa, Florida
1979 - Sheluga, David A.	The NPD Group, Inc. Rosemont, Ill 60018
1980 - Hoyer, Wayne D.	Department of Marketing (Chairman) University of Texas at Austin

1983 - Mazursky, David	Department of Marketing The Hebrew University Jerusalem, Israel
1991 - Handlin, Amy	School of Business Monmouth College
1992 - Johar, Gita	School of Business Columbia University (Vice Dean)
1994 - Morrin, Mimi	School of Business Temple University

Completed M.S.	**Last Known Position:**
1970 - Olson, Jerry C.	as above
1970 - Stolting, Richard	PERQ Research Wilton, CT
1971 - Deering, Barbara	as above
1972 - Hart, Edward W., Jr.	as above

1972 - (Berning) Kohn, Carol A.	as above
1972 - Szybillo, George J.	as above
1972 - Wolf, Robert N.	Cedarhurst, New York
1974 - (Schach) Busato, Jacqueline	Ontario, Canada
1974 - Williams-Jones, Joyce A.	Private Business Mexico
1974 - Speller, Donald E.	Donald Speller & Associates Toronto, Ontario, Canada
1975 - Chestnut, Robert W.	as above
1975 - Weigl, Karl	Unknown
1976 - Silva-McSorley, Rasario	Homestead, Florida
1978 - Sheluga, David A.	as above

1979 - Hoyer, Wayne D.	as above
1979 - Pite, Elizabeth	Pite Plus Marketing Hartford, Connecticut
1980 - Nelson, Margaret C.	Unknown
1981 - Zimmer, Mary R.	Department of Marketing University of Georgia
1984 - Troutman, Tracy	Director of Consumer Insights Hershey Foods Corp. Hershey, PA

APPENDIX A3

INFORMATION RESPONSIVE TO THE RULE 26 (Fed. R. Civ. P.) REQUIREMENTS

FEES

Fees for the Survey

Jacob Jacoby Research, Inc. will be invoicing $44,000 for designing, analyzing and reporting the survey.

Phi Power Communications Inc. (including all their subcontractors) will be invoicing $ _____ for their role in preparing and implementing the survey.

Fees for Post-Survey Activities

With the exception of oral testimony under oath, Jacob Jacoby Research, Inc. will be invoicing $850 per hour (plus out-of-pocket expenses) for all time devoted to this matter subsequent to providing attorneys for plaintiff with a copy of the final report. Oral testimony under oath will be billed at a rate of $1000 per hour (plus out-of-pocket expenses).

Jacob Jacoby -- Publications
2000 – 2014

Books:

James Jaccard and Jacob Jacoby (2010) *Theory Construction and Model Building Skills: A Practical Guide for Social Scientists.* New York: Guilford Press.

Jacob Jacoby, *Trademark Surveys: Designing, Implementing and Evaluating Surveys* (August 2013). Chicago: American Bar Association, Section of Intellectual Property Law.

Articles and Book Chapters:

Morrin, M. and Jacoby J. (2000) "Trademark dilution: Empirical measures for an elusive concept." *Journal of Public Policy & Marketing.* 19 (2) 265-276.

Jacoby, J. (2000) "Is it Rational to Assume Consumer Rationality? Some consumer psychological perspectives on Rational Choice Theory." *Roger Williams University Law Review.* Vol 6 (1), 81-161.

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Jacoby, J., Morrin, M., Jaccard, J. Gurhan, Z. & Maheswaran, D. (2002) "Attitude formation as a function of incremental information input: A procedure for studying on-line processing models of attitude formation." *Journal of Consumer Psychology*. 12 (1), 21-34.

Morrin, M., Jacoby, J., Johar, G., He, X., Kuss, A. and Mazursky, D. (2002). Taking stock of stock brokers: Exploring investor information accessing strategies via verbal protocols. In Susan Broniarczyk and Kent Nakamoto (Eds.) *Advances in Consumer Research, Vol. 29.* pages 164-165.

Morrin, M., Jacoby, J., Johar, G., He, X., Kuss, A. and Mazursky, D. (2002) Taking stock of stock brokers: Exploring investor information accessing strategies via process tracing. *Journal of Consumer Research.* 29 (2), 188-198.

Jacob Jacoby (2002) Experimental design and the selection of controls in trademark and deceptive advertising surveys. 92 (4) *The Trademark Reporter* 890-956.

Jacob Jacoby (2002) A Critique of Rappeport's "Litigation Surveys—Social 'Science' as Evidence" 92 (6) *The Trademark Reporter* 1480-1501.

Jacob Jacoby (2006) Sense and Nonsense in Measuring Sponsorship Confusion. *Cardozo Arts and Entertainment Law Journal.* 24:1 (June) 63-97.

Gideon Mark and Jacob Jacoby (2006) Continuing Commercial Impression and its Measurement. *Marquette Intellectual Property Law Review.* 10:3, 431-454.

Jacob Jacoby and Mark Sableman (2007) Keyword-Based Advertising: Filling in Factual Voids (*GEICO v. Google*). 97:3 *The Trademark Reporter*, 681-731.

Jacob Jacoby (2008) Considering the Who, What, When, Where and How of Measuring Dilution. *Santa Clara Computer & High Tech Law Journal*. 24:3, 601-639.

Wayne D. Hoyer & Jacob Jacoby (2010) "Consumer Psychology." In Irving Weiner and Edward Craighead (Eds.) *Corsini's Encyclopedia of Psychology* (Fourth Edition; Volume 1). NY: John Wiley & Sons. 397-400.

Jacob Jacoby (2012) "Closed-ended Questions in Litigation Surveys" In Shari S. Diamond and Jerre Swann (Eds.) *Trademark and Deceptive Advertising Surveys*. American Bar Association. 261-284.

Jacoby, J. (2012) Patent Infringement: Proving customer demand .. or a lack thereof. *Intelectual Property Today*. October. Pp.10-11.

Jacoby, J. (in press) Behavioral Process Technology (BPT): Origins and Evolution. In *Jacoby Jacoby: Legend in Consumer Behavior* (This original paper will appear in Volume 5, edited by James J. Jaccard, of an 8 volume series on Jacoby's works being published by Sage.)

Jacoby, J. and Morrin, M. (forthcoming) Consumer psychology. In: *The International Encyclopedia of the Social and Behavioral Sciences*. Elsevier Science Ltd./Pergamon: Oxford, UK.

JACOB JACOBY - 2009 COURTROOM TESTIMONY

Apr 14 Before Judge Marilyn L. Huff
U.S.D.C S.D. California
Brighton Collectibles, Inc. v. **Marc Chantal USA, Inc.**
Trade dress matter

Oct 7 Before Judge Ann D. Montgomery
U.S.D.C. Minnesota
Mooney et al. (class) v. **Allianz Life Ins. Co., No. America**
Deceptive sales practices matter

Nov 6 Before Judge Ann D. Montgomery
U.S.D.C. Minnesota
Fair Isaac Corp. (FICO) et al. v. **Experian, Equifax and TransUnion**
Likely confusion matter

JACOB JACOBY - 2011 COURTROOM TESTIMONY

Jan 18 Before an arbitration panel
Arbitration Services of Portland
Bibiji Inderjit Kaur Puri v. **Golden Temple of Oregon, LLC**
Secondary meaning/likely confusion matter
Arbitrators:
Jeff Edelson: http://www.mhgm.com/showattorney.asp?Show=45

Alan McCollum: http://www.techlaw.com/

Peter Staples:

http://www.chernofflaw.com/showbio.aspx?show=631

JACOB JACOBY - 2012 COURTROOM TESTIMONY

Mar 29	Before Judge Sidney H. Stein
and	U.S.D.C. S.D.N.Y.
Apr 2	**Fresh Del Monte Produce, Inc.** v. Del Monte Foods Co and
	Del Monte Corp.
	Deceptive advertising/packaging matter
May 14	Before Judge James Spencer
	U.S.D.C. E.D. Virginia (Richmond)
	Pennington Seed, Inc. v. **The Scotts Miracle-Gro Company**
	Deceptive advertising/packaging matter
Oct 19	Before Judge Andrew J. Guilford
	U.S.D.C. C.D. Ca.
	Mixed Chicks LLC v. Sally Beauty Supply et al.
	Trademark and trade dress confusion matter

JACOB JACOBY - 2013 COURTROOM TESTIMONY

May 22	Before Judge Jed Rakoff
	U.S.D.C. S.D.N.Y.
	Bayer Healthcare v. **Sergeant**
	Deceptive advertising matter
July 30	Before Judge James R. Spencer
	U.S.D.C. E.D.VA (Richmond)
	Scott's v. Pennington
	Deceptive advertising matter

JACOB JACOBY - 2009 DEPOSITION TESTIMONY

Jan 21 **Viacom et al**. v. Activision et al.
Likelihood of Confusion Issue
JAMS Arbitration Tribunal

Jan 23 Factory Five Racing, Inc. v. **Carroll Shelby & C. H. Shelby Trust**
Trade dress matter
U.S.D.C.

Mar 3 **Kerzner International Ltd. et al.** v. Monarch Casino & Resort
Likely confusion matter
U.S.D.C. D. Nevada

Jul 18 Picture Me Press v. Portrait Corp. of America, **CPI Corp. and CPI Images.**
Trademark matter
U.S.D.C. Northern District of Ohio

Aug 12 **Laryngeal Mask Co, Ltd. & LMA NA, Inc.** v. Ambu A/S, et al.
Deceptive advertising matter
U.S.D.C. S.D. CA

Oct 16 **j2 Global Communication et al.** v. Zilker Ventures et al.
Trademark matter
U.S.D.C. S.D. CA

JACOB JACOBY - 2010 DEPOSITION TESTIMONY

Jun 30 **Mirror Worlds**, Inc. v. Apple Inc.
Patent matter
U.S.D.C. E.D. TX (Tyler Div.) 08cv88

Oct 7 **Fresh Del Monte** v. Del Monte Corp.
Deceptive packaging matter
U.S.D.C. S.D.N.Y 08 Civ-8718 (SHS)

JACOB JACOBY - 2011 DEPOSITION TESTIMONY

May 6 Am. Express Marketing & Development Corp. et al. v. **Black Card LLC**
Secondary Meaning
U.S.D.C. S.D.N.Y. 10 CIV 1605 (DLC)

May 7, 19 **Dongguk University** v. Yale University
Reputational damage
U.S.D.C. D.Conn 308CV00441 RNC

June 2 Louis Vuitton v. **Hyundai**
Trademark confusion
U.S.D.C. S.D.N.Y. 10 CIV 1611 (PKC)

JACOB JACOBY - 2012 DEPOSITION TESTIMONY

Apr 24 Munchkin, Inc. v. **The First Years, Inc.,** et al.
Materiality of patent markings
U.S.D.C. C.D. CA, CV10-2219-GW(AGRx).

Apr 26 Apple Inc. v. **Samsung Electronics et al.**
Secondary meaning
U.S.D.C. N.D.Ca Case No. 11-cv-01846-LHK

May 4 **FLIR Systems, Inc.** v. Sierra Media, Inc. and Fluke Corp.
Confusion and deception matter
U.S.D.C. D. Oregon (Portland Division) CV 10-971-HU

May 23 **Mixed Chicks LLC** v. Sally Beauty Supply et al.
Trademark and trade dress confusion matter
U.S.D.C. C.D.Ca Case No. SACV11-452-AG (FMOx)

July 26 Moldex v. **McKeon**
Trade dress matter
U.S.D.C. C.D. Calif (Western Division) CV11-01742 GHK (AGR)

Dec 6 **J.T. Colby et al**. v. Apple, Inc.
Likelihood of confusion matter
U.S.D.C. S..D.N.Y

JACOB JACOBY - 2013 DEPOSITION TESTIMONY

Jan 22 **Balance Bar Co** v. GFA Brands

Likelihood of confusion matter

U.S.P.T.O. T.T.A.B.

May 16 **Stonefire Grill, Inc**. v. FGB Brands D/B/A Stonefire Authentic Flatbreads

Likelihood of confusion matter

U.S.D.C. C.D. California

June 4 Pennington Seed, Inc. v. **The Scotts Co., Inc.**

Deceptive Advertising Matter

U.S.D.C. E.D. VA (Richmond Div.)

Sep 11 Paleteria La Michoacana et al. (cross-defendants) v.
Productos Lacteos Tocumbo S.A. de C.V. (PROLACTO) (cross-plaintiff)

Likely confusion and deceptive advertising matter

U.S.D.C. District of Columbia

Sep 16 **Jackson Family Wines** v. Diageo

Likely confusion matter

U.S.D.C., N.D. California

JACOB JACOBY - 2014 DEPOSITION TESTIMONY

Apr 30 **Sweet Street Desserts, Inc**. v: Chudleigh's Ltd. :
Likely confusion matter
E..D.C., Pennsylvania

EXHIBIT 2

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

---------- X

In re Application Serial Nos. 77/864,206 and 77/864,268
Published for Opposition on April 20,2010 and August 10, 2010
Trademark: SMART BALANCE

----------X

BALANCE BAR COMPANY,

Opposer. Opposition No. 91196954

Vs. Opposition No. 91197748

GFA BRANDS, INC.,

Applicant.

---------- X

488 Madison Avenue
New York, New York 10022

August 27, 2014
11:10 a.m.

Deposition of the Opposer, JACOB JACOBY, on behalf of Balance Bar Company, taken before, Krystina Kornak, a Notary Public within and for the state of New York.

A P P E A R A N C E S:

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BY: DAVID R. CROSS, ESQ.

1 - JACOB JACOBY -
2 D-I-R-E-C-T E-X-A-M-I-N-A-T-I-O-N
3 DIRECT EXAMINATION BY
4 MR. SCHROEDER:
5 Q. Please state your full name.
6 A. Jacob Jacoby.
7 Q. Are you currently employed?
8 A. I am.
9 Q. Have you been retained by the
10 Balance Bar company to provide expert
11 testimony in this proceeding?
12 A. I have.
13 MR. SCHROEDER: Let's go ahead
14 and mark the first two exhibits as
15 Opposer's Exhibit 50 and Opposer's
16 Exhibit 51.
17 (Whereupon, Mr. Jacoby's rebuttal
18 report was marked as Opposer's Exhibit
19 50 for identification.)
20 (Whereupon, Mr. Jacoby's
21 supplemental rebuttal report was marked
22 as Opposer's Exhibit 51 for
23 identification.)
24 Q. I'm handing you what's been
25 marked as Opposer's 50 and 51. Look at

- JACOB JACOBY -

Opposer's 50, and just identify that document for me; Opposer's Exhibit 50.

A. This is rebuttal report that I prepared and submitted on November 30, 2012.

Q. Thank you. Could I ask you to refer to Opposer's Exhibit 50, turn to page 21 which is Appendix B.

A. Yes.

Q. If we start with your educational background which is listed there on page 22, can you confirm that's an accurate description of your education background?

A. It is.

Q. Is there anything missing?

A. No.

Q. Right below there is your professional experience. Can you confirm that that's an accurate description of your academic professional experience that dates back to August 1966?

A. It is.

Q. Is there anything missing that should be added?

A. No.

1 - JACOB JACOBY -
2 Q. Could I ask you to turn to page
3 23 and on that page appears a listing of your
4 professional organizations to which you
5 belong. Do you see that?
6 A. I do.
7 Q. Is this an accurate listing of
8 your professional organizations to which you
9 have belonged or currently belonged?
10 A. It is.
11 Q. Is there anything missing that
12 should be added?
13 A. Not that I could think of.
14 Q. Can you now turn to page 27, and
15 on page 27 it appears the title Honors and
16 Awards; do you see that?
17 A. I do.
18 Q. Is that an accurate listing of
19 honors and awards that you received during
20 your career?
21 A. It is. Something on page 28
22 should be updated, though.
23 Q. Which would be?
24 A. The last entry of Sage
25 Publication. Everything has been delayed, the

publication ~~fabrica~~tion will come out 1215 as an eight-volume set.

Q. Thank you. I ask you to now turn to page 30, beginning on page 30 are a list~~s~~ of your publications, and it actually runs from page 30 to page 46, and then it continues from page 50 to 52.

Can you briefly review that and confirm that that's an accurate listing of the publications that you're either authored or coauthored?

A. It is up to date for the time at which this report was submitted. For example on page 30, it lists under Books item number seven, a book titled Trademark Surveys, that was published in August 2013. The book I wrote would be the invitation of The American Bar Association. Then on page 46, I should have gone back and reviewed a more current version of my vita, but I know that there are at least two more publications that should be added and I don't recall what they are.

Q. Thank you. I ask you to turn to page 52, on page 52 it appears to be a listing

- JACOB JACOBY -

of your courtroom testimony -- actually, page 52 and 53; do you see that?

A. Yes.

Q. Is this an accurate listing of the cases in which you have provided courtroom testimony?

A. It is for the years 2009 through, I think, 2012. There may have been an additional item in '12 or '13 which I may not recall, but it was accurate at that point in time in which I submitted this report.

Q. Would there have been testimony earlier than 2009?

A. Most assuredly.

Q. And you're not required to list testimony earlier than four or five years under, correct?

A. According to the Federal Rules of Evidence, that's correct.

Q. Thank you. I ask you to now turn to page 54, and I see on pages 54 to 55 is a listing of your deposition testimony; do you see that?

A. I do.

- JACOB JACOBY -

Q. Is this an accurate listing of the cases in which you have provided deposition testimony?

A. It is for the years indicated in 2008 through, I guess, the first half of 2012, and I know there have been others since then, but I don't recall if there are.

Q. Again, that would have been deposition testimony earlier than 2008, correct?

A. A considerable number, yes.

Q. Thank you. Let's turn back to page 11, which is Appendix A. Can you briefly explain what Appendix A is?

A. Well, according to the -- I think it's a Handbook of Recommended Practices put out by the Federal Judicial Center, one has to indicate one's qualifications or at least that's something triers of fact should consider, so in Appendix A what I have are my relevant qualifications ~~of~~ for conducting, and critiquing, evaluating surveys, in litigated matters, as well as my qualifications as an Academician, which I thought appeared mid way

- JACOB JACOBY -

in that appendix.

Q. Thank you. Have you ever been excluded from testifying on the grounds that you're not an expert ~~inspector~~ with respect to survey evidence?

A. No.

Q. Have you represented both plaintiffs and defendants in trademark matters?

A. Yes.

Q. Do you know the breakdown between cases where you represented the plaintiff and in cases where you represented the defendant?

A. I think they're roughly 50/50.

Q. Are you aware that during his testimony in this proceeding, Mr. Johnson, criticized you for not performing your own survey?

A. I am.

Q. Have you prepared rebuttal expert reports in the past without having performed your own survey?

A. Definitely.

Q. Is there any scientific reason why you cannot ~~complete~~ critique Mr. Johnson's survey

- JACOB JACOBY -

without performing your own survey?

A. No.

Q. Would you like to elaborate on that at all?

A. Well, sure. I have been conducting surveys for litigat~~ing~~ed matters since 1980, I conducted well over a thousand. I participated in hundreds of litigated matters, both as somebody who designed his own surveys, and who has critiqued surveys of others. I have written somewhere in the order of 20 articles on survey research in litigation, and in fact, as I mentioned a moment ago, the American Bar Association, though they could have asked any number of people, they invited me to write what ended up being a 1,064 page book entitled Trademark Surveys in which I had to review case law and surveys that were accepted as evidence, critiqued as evidence, etc. So I would say I have probably as much as anyone else and possibly more than anyone else experience in the realm, designing, conducting, evaluating surveys being conducted for the purpose of being

- JACOB JACOBY -

offered as evidence in litigated matters.

Q. Thank you. Just a little background, so we all know ~~where~~ why we are here. As you know, Dr. Jacoby, the Balance Bar Company and GFA are involved in a present dispute which involves Smart Balance. We marked two reports already that have been filed in this case. Now, your rebuttal expert report addressed the July 18, 2012 report of Philip Johnson, correct?

A. Yes.

Q. Mr. Johnson's July 18th report was previously marked as Applicant's Exhibit 26 and I have a copy in case you need to refer to it at any point in your testimony. You were deposed back in January of ~~2014~~ 2013 in connection to Smart Balance dispute, correct?

A. Yes.

Q. Are you aware that the parties are involved in a second dispute involving the Earth Balance mark?

A. Yes.

Q. And you prepared a rebuttal report in that second dispute involving Earth

- JACOB JACOBY -

Balance, correct?

A. Yes.

Q. And your rebuttal report prepared in connection with the Earth Balance dispute was directed to the second study performed by Mr. Johnson, correct?

A. Yes.

Q. And you have given deposition testimony in the Earth ~~Smart~~ Balance dispute, correct?

A. Yes.

Q. Are you aware that Mr. Johnson prepared a response ive report in the Earth Balance dispute?

A. Yes.

Q. Have you seen that response Smart Balance report?

A. I have.

Q. I think that summarizes the various reports and testimony that have been provided in these proceedings. Before we get into the particulars, I'd like to ask you for your overall opinion. Before discussing individual criticisms of Mr. Johnson's report, can you tell us if you reached an overall

- JACOB JACOBY -

opinion as to the validity of the conclusions in Mr. Johnson's report?

A. I have.

Q. What would that be?

A. My conclusion is that Mr. Johnson's surveys and reports cannot be relied on to indicate that there is an absence or likelihood of an absence of confusion between marks at issue in the present matters.

Q. Let's now look at some particular positions. Let's take a look at Opposer's Exhibit 51 and can I first ask you to identify that document for us?

A. That was a second rebuttal report or a supplemental rebuttal report that I filed in this matter on October 2, 2013.

Q. Dr. Jacoby, looking at what's been marked as Opposer's Exhibit 51, can you explain to us the basis ~~where~~ for the criticism ~~is~~ is set forth in this supplemental report?

A. I'm not sure if I understand the question, "the basis".

Q. Let me rephrase. Can you walk us through your criticisms that are set forth in

- JACOB JACOBY -

this supplemental rebuttal report?

A. My initial criticism, and actually principal criticism in this report, is that Mr. Johnson, in my opinion, and I think in the opinion of other authorities, used the wrong protocol for trying to access the likelihood of confusion. The, what is known as the "Eveready" protocol -- E-V-E-R-E-A-D-Y, it's one word with only one "R".

Maybe I should note this for the record: The court reporter is doing an incredible job putting up with drillings, which is immediately outside of this room, and is struggling to hear my soft tones and I appreciate her efforts.

So, what I was about to say is that, Mr. Johnson used an Eveready approach, that then leading authorities are now I think, including courts, are coming around to believing that, that is an improper protocol and should not be used for testing an absence of confusion between two marks, and by leading authorities I'm referring to -- well, there

1 - JACOB JACOBY -
2 was a recent case of Akiro, A-K-I-R-O, versus
3 -- I forgot the second party's name, but here
4 in the Second Circuit by his Honor Jed Rakoff,
5 R-A-K-O-F-F, in which he goes through the
6 analysis provided by Mr. Jerre, J-E-R-R-E,
7 Swann, S-W-A-N-N, as to why an Eveready format
8 would be inappropriate to trying to test the
9 absence of confusion or even test the presence
10 of confusion, but especially the absence of
11 confusion. That is really my criticism, that
12 in light of this very insightful paper by
13 Jerre Swann being cited among other persons by
14 Professor McCarthy in his Trademarks and
15 Unfair Competition, now being cited by courts
16 seems to be very influential when people no
17 longer use Eveready formats under certain
18 circumstances, but to definitely use Eveready
19 formats under other circumstances.
20 Q. Okay. In Mr. Johnson's
21 testimony, there are two documents marked as
22 Applicant's Exhibit Number 27 and 28. This
23 may help us explain further some of your
24 criticisms about the Eveready format.
25 First, have you seen these

- JACOB JACOBY -

documents before, Dr. Jacoby?

A. I have.

Q. And were these the same documents that you referenced in your most recent rebuttal report in ~~your~~ the Earth Balance dispute?

A. They are.

Q. Let me ask you to refer to Applicant's Exhibit 27, and in particular to page that's stamped BB000174.

If you can explain to us the significance of the numbers that are shown on this particular page.

A. This is a table from a study conducted -- let me see who the author of this is. It's historic data from Kraft, and it shows on this table the brand awareness of the name Balance as compared to Balance Gold, Balance Bar, Balance 100-Calorie, and with respect to Balance it shows an unaided awareness level of eight percent, a total awareness level, which would be unaided plus aided of 63 percent. What that shows is that most people, 92 percent, of users and nonusers in the category who have consumed, according

1 - JACOB JACOBY -
2 to the legend here, the past three months
3 consumption of nutrition slash NE, which I
4 believe to be nutritional energy bars,
5 92 percent did not on an unaided basis recall
6 the name Balance.
7 Q. Now, let's take a quick look at
8 Applicant's Exhibit 28 and ask you to take a
9 look at the page marked BB0001979.
10 A. This being Applicant's Exhibit 28
11 is an August 2000 tracker study by Millward
12 Brown, one of the leading research firms in
13 the industry, which also speaks to the issue
14 of awareness, both aided and unaided, and on
15 page BB0001979 it shows that as of March 2013
16 the unaided awareness level for Balance Bar
17 was four percent.
18 Q. That's even lower than the eight
19 percent we saw in Applicant's Exhibit 27,
20 correct?
21 A. Yes.
22 Q. How do these unaided numbers that
23 we just looked at factor into your analysis
24 that you performed and discussed here in
25 Opposer's Exhibit 51?

- JACOB JACOBY -

A. I mentioned Jerre Swann. He wrote in 2008 what has become a very influential article. Comparing the two principal ways in which likely confusion tends to be assessed, those two ways being the Eveready format and the second way being the Squirt format, with a capital "S". In that paper, in that article, Swann points out that the Eveready format should be considered, in his words, the gold standard. When it comes to assessing likely confusion for strong marks that are readily -- I think he uses the words that are readily ~~assessable~~ accessible in memory. When you don't have strong marks that on an unaided basis are readily ~~assessable~~ accessible in memory, the Eveready format will underestimate likely confusions. In fact, he points out that in his conclusions that where he says, "The Eveready format should never be used to show lack of confusion." His analysis, as I say, has been picked up by others including Professor McCarthy, including some courts. All of that is relevant to Applicant's Exhibits 27 and 28, which you just showed me and

- JACOB JACOBY -

show unaided awareness levels of around four percent.

Q. And do you agree with Professor Swann or Mr. Swann with respect to those conclusions that he reached in his article?

A. I do. In fact, I've changed my approach when I designed likelihood of confusion studies. As he indicates in a footnote, I believe on the first page of his own article, his analysis had caused him to change his approach to whether or not he uses an Eveready format in the likelihood of confusion matter.

Q. If you just refer back briefly to Applicant's Exhibit 28, again, to that same page, BB0001979. You see here that there is an aided awareness level of 49 percent. Does that number in any way change your opinion as to whether the Eveready format is appropriate?

A. It doesn't. By the way, I indicated the date March of 2013, which would be the first quarter of 2013. He also has the second quarter data for 2013 and unaided awareness remains constant at four percent.

1 - JACOB JACOBY -
2 The aided awareness goes up to 53 percent, but
3 as I just stated, aided awareness would have
4 no bearing on whether one should or should not
5 use the Eveready format.
6 Q. If I ask you to look at paragraph
7 six of your report here, which is Opposer's
8 Exhibit 51, which is your final conclusion.
9 Can I ask you to confirm that you still stand
10 by the statements made here in paragraph six?
11 A. I do.
12 Q. Now, thinking back to
13 Mr. Johnson's original report of July 18,
14 2012, do you recall whether Mr. Johnson ever
15 referred to any of Opposer's documents or to
16 the levels of unaided awareness?
17 A. He did not.
18 Q. Do you consider that type of
19 information to be relevant to the design of
20 the likelihood of confusion study?
21 A. Absolutely.
22 Q. Is that the type of information
23 you would have wanted to have been told prior
24 to designing a study?
25 A. Yes. In fact, these days I don't

- JACOB JACOBY -

wait to be told, I ask for such data from my clients.

Q. Along the same lines, let's talk a little bit about fame. Now, in Mr. Johnson's report he stated that the Balance Bar mark was famous. Do you recall that?

A. I think Mr. Johnson stated that it was based upon something he had read in the record from the Opposers, and he used that to say it was famous. I don't think either of them really used the word "famous." I understand it being used these days in trademark law. To be famous, one has to be famous across the general population and that's according to the, I think, 2005 or 2006 re-statement of the dilution statutes.

Q. Do you recall whether Mr. Johnson did any independent study to determine the fame of the Balance Bar marks?

A. Based on my recollection, he did not and based on my recollection nobody has done a study to demonstrate the fame across the general public of the Balance Bar mark.

- JACOB JACOBY -

Q. Let's take a look now at Opposer's Exhibit 50. I'd like to walk you through some of your specific criticisms that were set forth in this report. Let's first turn to page three, paragraph nine, which addresses the universe identified in Mr. Johnson's report.

Can you briefly explain to us the criticism set forth in paragraph nine of your report?

A. Yes. Mr. Johnson in his report correctly indicates that in a traditional case of 'forward' confusion, the proper universe to study would be potential buyers of the junior user's goods or services. In his first study, what Mr. Johnson did was to ask a question that combined whether people of past purchasers and potential future purchasers, and he didn't parse out the data separately. In fact, he couldn't in his first study parse out the data separately to see what the potential purchasers where they were confused. Now, admittedly in a product category like this, there's a high overlap between past and

- JACOB JACOBY -

potential future purchasers. It might be as high as 90 percent, maybe even higher, but I think he used the 90 percent figure in some of his testimony, and I may as well, so let's use that. What that means is that ten percent of past purchasers may no longer be prospective purchasers, and so they are no longer relevant. What this means is you want to eliminate those individuals from your analysis, actually being included in the study, because you only want to look at the mind set of potential purchasers. He was unable to do that in its first study.

Q. So, that means that within that study group there are participants who are not potential purchasers?

A. We don't know. It could be. There may have been -- everyone may have been a potential purchaser, maybe 20 percent may not have been potential purchasers, may have tried the product and decided not to have any more. We don't know, and that's the problem. Because whatever percentage he may have obtained as likelihood of confusion, even

1 - JACOB JACOBY -
2 using his Eveready format, it could have been
3 that some of these people's states of mind
4 were irrelevant.
5 Q. With that uncertainty or that
6 unknown would introduce uncertainty into his
7 findings; is that correct?
8 A. That's essentially the point.
9 Q. Let's take a look at paragraph
10 11, and can you briefly explain to us your
11 criticisms with respect to the sample
12 described in Mr. Johnson's report?
13 A. It occurs to me, by the way, I
14 had another criticism with respect -- hang on.
15 Yeah. You just asked me about paragraph nine
16 of page three, which is problems with the
17 universe. This is something I realized later.
18 He never really defined the universe. I had
19 to infer universe definition, and when you --
20 the universe is the target to which you want
21 to generalize your findings, and one of the
22 ways in which you evaluate a survey is to see
23 how well the sample maps onto the universe
24 definition. Without the universe definition,
25 you have no target to map onto, so that was

- JACOB JACOBY -

another point I have in a later report.

The problem you asked me about in paragraph 11, usually what one tries to do when one conducts a ~~more~~ mall intercept survey is to be able to get a sample of that is representative ~~as a~~ of the country, as a whole. Mr. Johnson here, I think based on his testimony, sought to get two malls within each of the four U.S. Census Divisions. As he said later on, he couldn't get them all in one division, so he ended up -- now I understand why, he ended up getting three testing sites in the west where we have 23 percent of the population, and one site in the south where we have 37 percent of the population. That brings up the question of whether or not this study is truly representative. Now, I saw in his testimony that he says he compared the findings across the different geographic divisions and he doesn't give an actual number, but he says they were essentially the same.

Q. How could you know that?

A. I don't know, because I didn't

1 - JACOB JACOBY -
2 see any numbers, but you can compare and see
3 it.
4 Q. You can or you can't?
5 A. You can. I'm sorry, if I'm being
6 indistinct.
7 MR. CROSS: I'm sorry, I missed
8 it. You said you can?
9 THE WITNESS: You can compare.
10 MR. CROSS: Thank you.
11 A. If he is indeed correct, that
12 moderates to some extent my criticism, but the
13 fundamental point remains you still don't know
14 if it's representative. It may be adequately
15 representative, but it would in fact moderate
16 the criticism that I have.
17 Q. If you were conducting a study
18 and you could not obtain a mall location in a
19 geographic region you wanted to be in, would
20 you have conducted an additional study within
21 another geographic region?
22 A. My practice has been not to do
23 that. My practice has been to -- I mean,
24 there are sufficient number of malls across
25 the country that have these testing sites. My

1 - JACOB JACOBY -
2 practice would have been to go to another mall
3 or to wait for another mall so I have that
4 representation.
5 Q. Thank you. Let's take a look at
6 paragraph 12 in your report where you discuss
7 the control stimulus described in
8 Mr. Johnson's report.
9 A. Do you have a question?
10 Q. Explain to us or walk us through
11 your criticism in paragraph 12.
12 A. Okay. What he did is he did not
13 use the word "Balance," which is a common
14 element in both parties' marks. He didn't use
15 a word that was equivalent to Balance in
16 sight, sound, or meaning. He selected a
17 generic term, "Bar." I think that is a
18 control, but it's not a rigorous control. In
19 my experience, more rigorous controls are ones
20 that are similar in sight, sound, or meaning
21 to the test word, the word that is at issue.
22 Q. And how would something like that
23 affect his results?
24 A. Actually, given his results, it
25 wouldn't affect it very much at all, and

- JACOB JACOBY -

that's because he used the Eveready format, so there's nothing to subtract it.

Q. Let's turn to paragraph 13, and can you briefly explain to us the criticism you had set forth in paragraph 13?

A. Yeah. With 13, he says the methodology he used to follow the general pattern of the Eveready test. We're disregarding the issue that I think is very important, mainly that the Eveready test is not appropriate, but as it turns out he didn't follow the general pattern. The general pattern of the Eveready test was to lead the stimulus in view when he asked his questions. He did not. He showed the stimulus, then he removed it from view before asking his questions. Now, that is not the way the original Eveready was done, but that's not the important thing. The important thing is by removing the stimulus from view he now opens up the possibility that people may have misremembered or been confused in seeing that remembered a different name, so when he asked his subsequent questions they're no longer

- JACOB JACOBY -

meaningful. As I explained in my report, for those who are confused and remembered Smart Balance as Balance Bar, the subsequent questions would be meaningless. For example, question 3-A, "What other products or brands, if any, do you believe comes from the same company who makes the nutritional energy bar with the name that I showed you or do you not have a belief?" By saying, "What other products," if they're thinking now of Balance Bar in their minds because they're not seeing it, it's not in front of them, they're directed to think of other things other than Balance Bar, which is a much more difficult test.

Q. Let me ask you, we discussed earlier that the Eveready test would not be appropriate in situations where the mark has a very low unaided awareness in the marketplace. But more generally, would an Eveready test be appropriate in a situation where you have the same products? In the Eveready test itself, you had -- you were talking about a lamp. Does it even make sense to use the test in a

- JACOB JACOBY -

situation where you have identical products?

A. No. Because whatever answer~~s~~ they give you is not dis positive. In the original Eveready, the respondents looked at a lamp and were asked what other products, and if they said batteries, it indicated confusion. But if both parties in a dispute make the same products, then you ask what are the products, and in the response they give you a product that both makes, it has no probative value.

MR. CROSS: Objection. Move to strike.

That statement was previously undisclosed.

MR. SCHROEDER: I'll just note for the record that that is actually discussed in paragraph 13.

Q. Let's move onto, "Problems with the Main Questionnaire" discussed in paragraph 17. Can you briefly walk us through your criticism set forth in paragraph 17?

A. Yes. The first subsequent question after showing the stimulus and

- JACOB JACOBY -

removing it from view was, "Based on what you just saw, who or what company do you believe makes the nutrition or energy bar with the name that I showed you, or do you not have a belief?"

In many cases the stimulus may know the name of the brand, but may not know who the manufacturer is, who the source is. For example, in one trademark study regarding Vaseline Intensive Care Lotion, 94 percent or 95 percent of women who used hand lotion could identify the bottle, the package as coming from Vaseline Intensive Care Lotion. But when asked who made the product I think it was only 6 percent or 4 percent, something in that order, could tell you that it was Chesebrough Pond's that was the source.

So this question, I mean, they may not be able to tell you the company that made it, but they may be able to tell you the name of the product. Now, they removed -- let me back up. The issue here is: Are they confused into thinking that Balance Bar is associated with or comes from a company that

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makes -- is it Smart Balance in this case? Let me see what the issues were here; Smart Balance, I think.

What Mr. Johnson did, is he showed the name, he asked people to look at it, and then he removed the name. Now, what he showed was Smart Balance, then he removed the name and asked this question about "What company do you believe made the nutrition bar having the name that you just saw?" Now, the first criticism I had was: Well, wait a moment. If you removed the name and people have already misremembered it and been confused, and thought it was Balance Bar, when you ask what company makes that energy bar, they don't necessarily know who makes Balance Bar. They don't know that it would be NBTY or whatever. They don't know the name of the company. They just know the name of the brand, so that question doesn't get at the issue. Then once they already have the name Balance Bar in their mind, the subsequent questions three and four, asking about other products, they no longer are going to mention

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Balance Bar.

So I suggested that one way to eliminate that problem was to just ask them what was the name of the brand of nutrition or energy bar that you just looked at? If they were confused, they would at that point have said Balance Bar. If they weren't confused, they would have said Smart Bar. There would be no problem in pinning them down as to what the name of the bar was. I understand from ~~a~~ his subsequent testimony, Mr. Johnson said that they would have ~~partitive~~ parroted back ~~to~~ the name on the ~~bar~~ card. ~~A.~~ I don't believe that, because that was the name of the bar not the name of the source, and the question asks what company do you believe made this bar. But even if they did give back the name Smart Balance, there would have been no harm, as it were, for the applicants here, because there would have been no confusion. It would have been a sounder test, in my opinion, of likely confusion under those circumstances. So either he should have asked that question, which he did not. Mainly, what is the name of the energy

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bar that you just looked at? If he took the name away, he should have asked that question, or he should have left the name in view to avoid the difficultly in interpreting the answers to ~~the~~ questions ~~the~~ three or four. I know that is not the most eloquent description of the problem, but I would hope that the reader of the transcript would go read my report, which is Exhibit 50 for a clearer explanation.

Q. Thank you. Now, you have another criticism set forth in paragraphs 18 to 19. Can you briefly explain those criticisms to us?

A. Right. Another way in which Mr. Johnson's wording departs from the original Eveready study is that it used, "What company do you think makes -- he changed the word "think" to "believe." Now, my point is -- and I remember learning this point from a now deceased trademark attorney by the name of John Paul Reiner who used to be at Townley & Updike for many years, who passed away about five, eight years ago. He was a very

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religious man, very good catholic man, and he pointed out to me that when you think it's an easier threshold than when you believe. As his example, "I think there is a God, do you agree or disagree with that statement," is very different from agree to disagree with I believe there is a God. Belief is a higher level, and I think by changing in his study the word "think" from the Eveready study to the word "believe" in his study, Mr. Johnson provides a more stringent -- a subtle, but more stringent level of difficulty for the respondent to use.

Q. In your opinion, what would be the result of using a more stringent standard?

A. That would [illegible] levels of confusion.

Q. Thank you. If I ask you now to take a look at paragraph 50, can you briefly describe --

MR. CROSS: I'm sorry. I literally cannot hear a word. The drilling is driving me crazy and I couldn't hear a word of that last

1 - JACOB JACOBY -
2 question. This is really -- I thought
3 at some point we would have breaks in
4 the drilling, but this has been
5 continuous. I want to say on the record
6 that this examination is being conducted
7 under an extremely difficult situation
8 for me, I don't know about you two or
9 the court reporter, but just to note for
10 the record, we're operating under very
11 bad circumstances here. I'll do the
12 best I can.
13 THE WITNESS: I agree with
14 Mr. Cross. Would it make sense, I don't
15 know if I'm authorized to ask you to
16 move forward closer to me?
17 MR. CROSS: Being closer to you
18 is not going to stop the drilling. I
19 did not choose this location, I know you
20 did not do this deliberately, Glenn, but
21 I simply have to put on the record that
22 I'm here under protest, so let's
23 continue and do the best we can. The
24 drilling has stopped for the moment,
25 please continue.

1 - JACOB JACOBY -
2 MR. SCHROEDER: Let's ask a
3 couple more questions before we take a
4 break.
5 Q. Let's take a look at paragraph
6 20, Dr. Jacoby. Can you briefly describe for
7 us the criticism set forth in paragraph 20?
8 A. Yes. It was simply with the way
9 in which Mr. Johnson described the validation.
10 In his reporting, as I explained in paragraph
11 20, he left the impression that if one runs
12 the numbers, about 98 percent of the response
13 was validated, when if you do the actual
14 numbers it was only about 55 percent. It's a
15 matter of, you know, how someone looks at the
16 numbers and how someone could be misled by the
17 numbers. I don't believe he did it
18 deliberately, I just believe this was here.
19 My criticism here was to alert the reader of
20 the report to this problem.
21 Q. Thank you. Now, I'd like to
22 discuss with you some of Mr. Johnson's
23 testimony that he gave earlier in this
24 proceeding. You have gotten a chance to look
25 at Mr. Johnson's testimony, correct?

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A. Correct.

Q. I'd like to ask you some specific points that he discussed in his testimony. Mr. Johnson was asked about removing the stimulus from view as we discussed earlier and in response to that line of questioning he testified that, "It's always been my practice of removing it, because you're trying to measure the overall commercial impression that ~~when it~~ was made when a properly identified respondent is exposed to the mark at issue." This appears on page 40, lines 1 to 4 of the Johnson transcript. "It's always been my practice," is that a scientific basis of doing something?

A. No.

Q. I guess you testified earlier that, that is not your practice to remove the stimulus?

A. That's correct.

Q. All right. At page 40, lines 4 to 8, of Mr. Johnson's testimony he states: "So, if you leave it in front of them, all they do is read it back to you, which doesn't

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show what impression was made, and even were they confused, they may dis-confuse themselves of the confusion by reading it back to you." Is there any way Mr. Johnson would know that a respondent would read the card back to them?

A. No. He's assuming they read it back to them, but when you show them the name and it says Smart Balance, say for example, and you ask -- you're not asking what's the name of the bar and then they read it back, they're asking who or what company made the product? He's asking for the source, and at that point the respondent could say, "I don't know." The respondent could say, "Smart Balance," for example. They could say any number of the things and they might in fact say the people who make Smart Bar. But they're not necessarily reading back -- the question doesn't ask them to read back the name of the name of the brand, it asks them who made the brand?

Q. Thank you. At page 41, lines 14 to 18, ~~under~~ of Johnson's testimony, when Mr. Johnson was asked about adding that

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additional question you testified to earlier regarding the brand name, he testified that it would quote, "Destroy the whole Eveready protocol, because you're now asking them for a different kind of information, and you're focusing on it, not on who the source was, but on the name of itself, which doesn't make any sense to me." Do you agree with those statements?

A. Absolutely not.

Q. Can you explain further?

A. Sure. If you leave the card in front of them with that name and you ask them who the source is. It doesn't ask them to parrot back, the question is directing them what to do. The question remains the same whether you leave it in front or you take it away. The question is not destroying the Eveready format. I disagree entirely.

Q. At page 43, lines 16 to 18 of the Johnson testimony, Mr. Johnson states, quote, "The Eveready survey is a standard survey for the likelihood of confusion, the standard survey." Is that the same position that

1 - JACOB JACOBY -
2 Professor McCarthy has ~~made~~ taken with respect to
3 the Eveready study?
4 A. It is not. If you take a look at
5 McCarthy, he has a section which says, I think
6 the words are "two common approaches for
7 measuring the likelihood of confusion," then
8 he goes first into the Eveready and then the
9 Squirt. With respect to the Eveready, he
10 says, "A now standard approach." He doesn't
11 say "the" standard. It's one of two. Also, I
12 remember reading Mr. Johnson's testimony and
13 if you read that testimony I think he's
14 implying that Professor McCarthy in his work
15 Trademarks and Unfair Competition called the
16 Eveready the "gold standard." No. If you
17 take a look at what McCarthy actually did is
18 he said Swann, and then he gives the direct
19 quote from Swann who calls it the "gold
20 standard."
21 Q. Thank you. At page 44, lines 1
22 to 6 of the Johnson testimony, Mr. Johnson
23 testifies that quote, "The Squirt format is
24 criticized for being leading and suggestive,
25 because it brings together two things side by

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side and asks people to speculate on whether or not there's a relationship between them, and it puts people in a sort of classic matching or quiz taking situation." Do you agree with those comments?

A. No. I agree partially and disagree partially. I agree that the Squirt format is more criticized than the Eveready format, or I should say has been in the past. I think what's evolving now is as a result of the Swann analysis is a better appreciation of when it should be used and when it should not be used. When Mr. Johnson says, "It's been criticized for having a side by side presentation." That's correct, but that's why people no longer use the actual Squirt, they use, what's called, the modified Squirt approach, which is where they provide both marks sequentially not side by side, and usually, when sequentially separated, by something that cleanses the cognitive work space so to speak. So I disagree with those elements of Mr. Johnson's criticism.

Q. Along those same lines,

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Mr. Johnson testified at page 44, lines 12 to 14 of his testimony that the Squirt format quote, "Tends to measure much higher levels of confusion that actually exists in the marketplace, and it is heavily criticized, and usually given very little weight." Do you agree with those comments?

A. No -- I should say yes in part and then no in part. Yes, it is likely to give you higher levels of likely confusion, so I agree with him on that, because now you're working with aided as opposed to relying on unaided awareness. What I disagree with him on is that -- what is the last couple of words?

Q. "Heavily criticized and usually given very little weight."

A. No. I think it has been criticized in the past, and given little weight by some courts, and as McCarthy notes, "given weight by other courts." It depends on, I guess, all the other factors that are operating in the survey and the court's analysis of those other factors.

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Q. Thank you. On page 45, lines 1 to 3 of Mr. Johnson's testimony. When referring to you, Mr. Johnson testifies that quote, "He's speculating that the Eveready test would underreport confusion if the product were not known." Were you speculating when you criticized the usage of the Eveready format by Mr. Johnson?

A. No.

MR. CROSS: I object to this being Mr. Johnson's entire testimony, but go ahead.

A. I don't agree with that. Swann has said so, I have said so, that's what the findings will show, so no, I disagree with him.

Q. At page 46, lines 4 to 6, Mr. Johnson was asked, "Do you agree with focusing solely on unaided brand awareness to determine the appropriateness of an Eveready survey format?" Mr. Johnson responded, line 7 to 9, "Absolutely not, unaided brand awareness is only kind of -- If you want to look at it at all, it would suggest what a noise level would

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be ~~at~~ of random guessing." Do you agree with those statements?

MR. CROSS: Again, you're not reading the entire question and answer, and I object to this.

Q. You can answer if you understand the question.

A. He's essentially in that equating unaided awareness to random noise or guessing. That's absolutely incorrect, no question about that. And I think you do have to pay attention these days in light of the Swann analysis which is gaining greater and greater weight and understanding ~~of~~ or appreciation among all parties. I mean, it's changed what he does, it's changed what I do, it changed the way the courts have appraised various surveys, it's changed the way McCarthy, who cites that article, ~~as~~ in discussing ways to measure likelihood of confusion. It's an article that will be a classic or it already is, and is having impact.

Q. At page 46, lines 17 to 19, Mr. Johnson further testifies that quote, "The

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aided awareness level is useful to tell you what the market penetration is of ~~the~~ a product, which is very high in the case of Balance Bar." Do you agree with that statement?

A. Not at all. I think I illustrated this to you the other day, yesterday, when I asked you if you drank and you said, "Yes." I asked you if you heard of Dos Equis, and you said, "Yes." I asked you, "How often do you drink Dos Equis?" You said, "You haven't had one in ten years." Just because I'm aware of a brand name, I'm aware of Post Grape-Nuts, I tried that only once, and that was more than 30 years ago, but I'm still aware of it. Awareness does not translate to penetration in the marketplace.

Q. On page 49, lines 13 to 18, Mr. Johnson testifies that when asked about Eveready surveys and unaided brand awareness he testified that, quote, "It shouldn't depend on unaided brand awareness at all, because what you're showing people in an Eveready test is a brand name, in this case Smart Balance, so you're showing them the name, so you're

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essentially aiding them. So, if you're going to draw a parallel, it would be with an aided not an unaided brand." Do you agree with those statements?

A. No. First, he showed them a name and then he took it away, right? He didn't leave it up there. I mean, aiding, as I testified last time, when asked, I believe by Mr. Cross, how I would do aided and unaided, and I gave him an example of -- with another case, now that I remember, it was a golf case asking about famous 18-hole golf courses. The original question is an open-ended question. "What in your opinion, essentially, are the most famous 18-hole golf courses in the United States?" And after people were asked that question they were asked the follow-up question. Essentially, "which, if any, of the following five courses would you consider being among the top 100 golf courses of the United States?" And then asked them about each name. It gave them the name, the name is there present for them. The name was not present in Mr. Johnson's survey. He took it away, so he

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didn't really have an aided format. He definitely didn't have an unaided format, in the sense that he didn't factor that in his decision to which protocol to use.

Q. Thank you. At page 60, lines 19 ~~and~~ to 21, Mr. Johnson testified that, quote, "Based on my knowledge of consumer behavior and what I'm measuring when I'm measuring likelihood of confusion, unaided awareness is irrelevant." Do you know if Mr. Johnson has any credentials in the area of consumer behavior?

MR. CROSS: Again, I object to the snippets with questions and answers not being put in the record completely. Go ahead.

A. No. I believe he's a member of the American Market Research Association and that would touch on consumer behavior.

Q. Do you have any credentials in this area?

A. I do. But let me put it this way. The two most prominent organizations in the field of consumer behavior and consumer

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behavior research are the Association of Consumer Research, and the Society of Consumer Psychology. Those are the preeminent organizations. I have never seen Mr. Johnson as a member of either of those organizations, and by the way, I'm not only a past president of both of those organizations, but received the highest honors and awards each of those organizations can provide. I'm also a member and have been since, I believe, 1971 and '72, the American Marketing Association, and, yes, they do occasionally -- well, I wouldn't say occasionally. They touch on consumer behavior, but not with the same rigor as do the people that belong to the other two organizations I mentioned.

Q. With that said then, do you agree with Mr. Johnson's conclusion that unaided awareness is irrelevant?

MR. CROSS: Objection to form. It misstates his testimony.

A. I disagree entirely, and I would point you again to the conclusions that Swann in his seminal article that we've been talking

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2 about, and over there he is absolutely clear
3 that an Eveready protocol should not be used
4 to demonstrate lack of confusion as it was
5 being used by Mr. Johnson in this matter.
6 MR. SCHROEDER: Thank you. Let's
7 take a short break now, if we could.
8 MR. CROSS: Okay.
9 (A short break was taken.)
10 MR. SCHROEDER: Back on the
11 record. No further questions from me.
12 C-R-O-S-S E-X-A-M-I-N-A-T-I-O-N
13 CROSS EXAMINATION BY
14 MR. CROSS:
15 Q. The issue in this case is whether
16 Smart Balance used in connection with
17 Nutrition Bars is likely to cause confusion
18 with Balance Bar, right?
19 A. Correct.
20 Q. And you know that it is the
21 Opposer's burden to prove confusion?
22 A. I don't know what it is in TTAB
23 proceedings.
24 Q. So, you don't know?
25 A. In TTAB proceedings, I don't

1 - JACOB JACOBY -
2 know.
3 Q. Well, this is a TTAB proceeding,
4 so the answer is you do not know?
5 A. I'm not sure.
6 Q. And in your first report, which
7 was dated November of 2012 in paragraph five,
8 you made it clear that you have no opinion on
9 the issue in this case about whether there is
10 a likelihood of confusion?
11 A. That's correct.
12 Q. You have done no survey of your
13 own as you said?
14 A. Correct.
15 Q. And you conducted no empirical
16 studies in this case at all?
17 A. Correct.
18 Q. You are here instead to criticize
19 the confusion study performed by Phillip
20 Johnson, right?
21 A. Correct.
22 Q. You agree there is no such thing
23 as a perfect survey?
24 A. Correct.
25 Q. And that's because of trade-offs

1 - JACOB JACOBY -
2 that must be made when designing and
3 implementing them?
4 A. Correct.
5 Q. Virtually every survey can be
6 criticized?
7 A. Correct.
8 Q. As yours has been over the years?
9 A. Correct.
10 Q. I want to talk about the timing
11 of the two reports that you authored in this
12 case. The first one, which is Exhibit 50, is
13 as we said signed in November of 2012. The
14 second one, Exhibit 51, was signed almost a
15 year later, correct?
16 A. Correct.
17 Q. You're aware that when you submit
18 an expert report in a case it is to be a full
19 complete and truthful statement of all the
20 opinions you have?
21 A. At that time, correct.
22 Q. And it took you a full year to
23 come up with this additional opinion that's
24 based on a 2008 article --
25 MR. SCHROEDER: Objection.

1 - JACOB JACOBY -
2 Q. From Jerre Swann, correct?
3 A. Well, it took an additional year
4 almost to provide the report, but I don't know
5 if --
6 MR. SCHROEDER: Objection.
7 Let me note for the record that
8 the case has been suspended for a long
9 period of time and that likely is part
10 of the reason why this report is dated
11 almost a year later.
12 Q. But the basis for your opinion
13 about how the Eveready format is wholly
14 inappropriate in this case, or words to that
15 effect, is an article by Jerre Swann dated
16 2008, correct?
17 A. In essence, yes, but let me
18 understand the meaning of your question.
19 You're making something out of the fact that
20 the article is published in 2008 and that I
21 wrote my first report in 2012, and didn't
22 mention the article, and in October 2013 there
23 was mention of the article. Is that
24 essentially what you're asking about?
25 Q. Yes. In Exhibit 51, your second

1 - JACOB JACOBY -
2 report, was an afterthought, wasn't it?
3 A. Well, in a sense that it came
4 afterward, yes, it was an afterthought.
5 Q. Again, this article that you say
6 is seminal and important work had been
7 published for three to four years before you
8 authored your first report, correct?
9 A. That's correct.
10 Q. Now, although you are here to
11 criticize Phil Johnson's study, there are
12 aspects of his study that you did not
13 criticize, correct?
14 A. Of course. By the way, you could
15 use the word "criticize," I use the word
16 "evaluate." I'm here to evaluate Mr.
17 Johnson's study. Criticize has a connotation,
18 but if you want to use it, I understand what
19 you mean, please go ahead.
20 Q. You agree that he's an
21 accomplished survey expert, Mr. Johnson?
22 A. I do.
23 Q. You agree that the questions he
24 used in his survey were not leading?
25 A. Well, I don't think they were

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appropriate given the circumstances.

Q. Please listen to my question and answer it, and we'll get along just fine. You agree that the questions that he asked in his survey were not leading?

A. Mr. Cross, your demeanor has changed ~~depreciably~~ appreciably from all our prior interactions. It was rather friendly before and it seems to be for some unknown reason, rather hostile now. We will get along fine as long as you and I continue to be friendly. I would like to do that. I'm answering your questions, I will do so to the best of my ability, but I will not tolerate hostility.

Q. There has been nothing hostile about my questions. You seem to be getting very defensive when you're under cross examination. My question to you is simply this: You said nothing in either of your two reports about Mr. Johnson using leading questions?

A. That's correct, and I said I didn't think they were appropriate.

Q. And you agree that the

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interviewer --

A. Well, excuse me. That's not quite correct. I think I had a concern regarding believe versus think, which translates into leading towards one direction of an answer than another. I think I had a concern as to whether or not you have an opinion being placed at the beginning of a question or the end and how that might affect an answer, so yes, I've had some criticisms, evaluations that do focus on whether or not the questions lead in one direction rather than another.

Q. You never described any of his questions as leading, have you?

A. I didn't use the word leading, but I indicated their impact, which was a leading impact.

Q. We'll get to those specific criticisms in a second. You agree that his interviewers did not know the purpose for which they were conducting an interview?

A. I agree that he says that his interviewers did not know the purpose for

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which the interview was being conducted.

Q. And you have no basis to disagree with that, do you?

A. I haven't, and I haven't disagreed with it.

Q. And you're aware that his interviewers did not know who commissioned the survey, correct?

A. I agree he says his interviewers did not know, and I have no basis for disagreeing with them.

Q. And it's proper to conduct surveys in that way?

A. It is.

Q. You agree that the respondents did not know who was conducting the survey?

A. There's always a possibility that respondents may have hypotheses. I have no idea -- these are called, in part, demand characteristics. I have no idea what the respondents may have had in mind, but at this point, I have no evidence that any respondent had any idea who was conducting the survey or for what purpose it was being conducted.

1 - JACOB JACOBY -
2 Q. And that is the appropriate way
3 to conduct a survey?
4 A. Absolutely.
5 Q. And you agree that his use of a
6 non-probability sample was appropriate?
7 A. I do.
8 Q. And you agree that his sample
9 size was appropriate?
10 A. I agree.
11 Q. And you agree that Mr. Johnson
12 analyzed the data in accordance with accepted
13 statistical practices?
14 A. I agree.
15 Q. And you agree that he properly
16 validated his survey, although you had some
17 criticism of how he described that validation?
18 A. Correct.
19 Q. And you agree that he actually
20 surveyed the appropriate universe, although
21 you have a minor criticism that's reflected in
22 paragraph nine about how he described the
23 universe?
24 A. Well, my criticism is more
25 correctly is that he didn't describe his

1 - JACOB JACOBY -
2 universe, although in his testimony of the
3 other day he did describe his universe, and
4 really what he described was a sample, not the
5 universe.
6 Q. Well, at your deposition -- do
7 you have a copy of it?
8 A. I do not.
9 Q. I'll get copies out.
10 Q. At your 2013 deposition, turn to
11 page 83, beginning at line one.
12 Did I ask you the following
13 questions and did you give the following
14 answers?
15 "QUESTION: Paragraph nine, could
16 you put into words the criticism that
17 you have stated in paragraph nine, and
18 that I am referring to Exhibit 50, which
19 was the only report we had that time,
20 and if you need to take a break, let me
21 know.
22 "ANSWER: Put into words my
23 paragraph nine?
24 "QUESTION: Put it without
25 reading it to me. Just kind of

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elaborate on what you mean.

"ANSWER: Sure. What I'm saying, he didn't correctly, in my opinion, describe what he did, and that's what I'm pointing out. There's a discrepancy between what he actually tested and how he describes it. He didn't ask questions -- if you look at his actual questions about what people are currently purchasing, he asked about past purchaser/s and prospective purchaser/s. He didn't ask if they were currently purchasing, currently using. So what I'm saying, when ~~you~~ he write/s that his sample consisted of, 'Adults who are current or prospective purchasers of nutrition or energy bars,' it would have been more accurate to say, 'Adults who are past or prospective purchasers of nutrition or energy bars.' It's a matter of accuracy in describing what he actually did and the question he actually asked.

"QUESTION: My question about

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this criticism again is, this criticism in it of itself, would it... did it entitle Mr. Johnson's survey to no weight?

"ANSWER: Absolutely not."

Q. Objection by the counsel at the time that was representing you.

"QUESTION: It's a relatively minor --"

Q. And then you interjected.

"ANSWER: Compared to the other ones, clearly relatively minor."

Q. Another objection by your counsel at the time.

"QUESTION: Now, in his situation he asked to find people who are potential buyers, correct?

"ANSWER: Yes.

"QUESTION: And people who had purchased in the recent past?

"ANSWER: Correct.

"QUESTION: Correct. And that was all appropriate?

"ANSWER: Yes."

Q. Did you give those answers to

1 - JACOB JACOBY -
2 those questions at your deposition?
3 A. I did. The record speaks for
4 itself.
5 Q. Thank you. Now, a focus of your
6 first report, which was Exhibit 50, was your
7 criticism of Mr. Johnson removing the stimulus
8 before asking confusion questions, correct?
9 A. Correct.
10 Q. And you addressed that in
11 paragraphs 15, 16, and 17 of your report,
12 correct?
13 A. Yes. If you want I'll make sure,
14 but I'm assuming you're not going to
15 misrepresent. I forget your question.
16 Q. Paragraphs 15, 16 and 17 are
17 parts of your report where you criticized his
18 procedure where he removed the stimulus before
19 asking the confusing questions?
20 A. Yes.
21 Q. Now, before we dive into that
22 criticism, I want to make sure we're on the
23 same page about what Mr. Johnson's protocol
24 required here. You understand the respondents
25 were handed a card in the interview room,

1 - JACOB JACOBY -
2 right?
3 A. Yes.
4 Q. And the card was as shown in his
5 report, which had been previously marked as
6 Exhibit 26, correct?
7 A. Yes.
8 Q. And the cards, I haven't measured
9 them, but they appear to be five by eight
10 inches?
11 A. Correct.
12 Q. And each card had on it two
13 words, right?
14 A. Yes.
15 Q. For the test cell, those two
16 words were "Smart Balance," correct?
17 A. Yes.
18 Q. And those two words were in block
19 letters?
20 A. Yes.
21 Q. Clear?
22 A. Yes.
23 Q. And those block letters are a
24 half to three quarters to an inch high, right?
25 A. Well, closer to the latter.

1 - JACOB JACOBY -
2 Maybe even an inch.
3 Q. Maybe an inch higher. And the
4 respondents under the protocol were allowed to
5 actually handle the card. It was handed to
6 them, correct?
7 A. Yes.
8 Q. And the respondents were allowed
9 to look at the card as long as they wanted?
10 A. Yes.
11 Q. And that meant in your
12 estimation, based on what you gave me at your
13 deposition, that the respondents had the card
14 with these two words on it in their view for
15 between 10 and 20 seconds?
16 A. I don't know how long they had it
17 in front of them. That could be a reasonable
18 estimate.
19 Q. Thank you. Now, these two words,
20 block letters, in view for 20 seconds -- 10 to
21 20 seconds, and then the card was given back
22 to the interviewer, right?
23 A. Yeah. Now, let me clarify.
24 Q. Can you please? Your
25 clarification can come when your lawyer asks

1 - JACOB JACOBY -
2 you questions.
3 A. Well, you keep going on 10 to
4 20 seconds. All right, show me where I said
5 10 to 20 seconds, and I'll tell you what I
6 meant by 10 to 20 seconds.
7 Q. All right. Get out your
8 deposition. Are you going to change your
9 testimony you just gave today about how 10 to
10 20 seconds is a reasonable approximation?
11 A. I didn't say that. Lets take a
12 look from the record what I just said.
13 MR. CROSS: What did he just say?
14 (The requested portion of the
15 record was read back.)
16 A. It could be it, it could not be.
17 I didn't say it was.
18 Q. Well, you just testified it was a
19 reasonable estimate under oath. Would you
20 like to take out your deposition, Mr. Jacoby?
21 This is going to take a while, if you keep
22 getting so defensive. Take out your 2013
23 deposition and turn to page 129, beginning at
24 line eight.
25 I'm going to ask you if I asked

1 - JACOB JACOBY -
2 you the following questions and you gave me
3 the following answers.
4 "QUESTION: Handed the card?
5 "ANSWER: The interviewer hand
6 respondent exhibit card.
7 "QUESTION: Right?"
8 A. Excuse me. On what line?
9 Q. Page 129, line eight.
10 A. Okay.
11 Q. Should I start again?
12 A. Please.
13 "QUESTION: Handed the card?
14 "ANSWER: The interviewer hand
15 respondent exhibit card.
16 "QUESTION: Right?
17 "ANSWER: Okay. And then the
18 interviewer reads 'This is the name of a
19 nutrition or energy bar that you might
20 see if you were shopping for such
21 products in a store. Feel free to
22 comment if you wish on anything about
23 this.' That took about, according to my
24 watch, eight seconds, so it's up for at
25 least eight seconds. And the individual

- JACOB JACOBY -

then can comment regarding spontaneous comments made, and then the interviewer is instructed when respondent is done looking at the exhibit card, take back the exhibit card, put it out of sight for the remainder of the interview, so I would say maybe it's been up for say ten, maybe 15, maybe 20 seconds while the respondent is commenting."

Q. Did I accurately read those questions and answers that you gave me at your deposition?

A. You did, but that answer says nothing about the individual looking at the card. It's saying the card is available for him to look at it. The card could be put down, he could be listening to the interviewer. It says nothing about the individual looking at the card. Might he have been, yes, he might have been.

Q. For as long as ten to 20 seconds?

A. I agree, he might have been looking at it.

Q. And then as soon as the card is

1 - JACOB JACOBY -
2 handed back, the confusion questions are
3 answered, correct?
4 A. Are asked.
5 Q. Are asked and answered, correct?
6 A. Hopefully answered, correct.
7 Q. And during the course of this
8 interview process, the respondents are shown
9 one and only one thing; that five by eight
10 card with two words on it, correct?
11 A. Yes.
12 Q. And because the respondents know
13 they will get asked questions about that one
14 card, they are even more likely to pay
15 attention to the stimulus card than they
16 otherwise might, correct?
17 A. They might or might not.
18 Q. This book that you just wrote
19 that came out in August of 2013, you stated as
20 a fact that they are even more likely to pay
21 attention to the stimulus card than they
22 otherwise might, correct?
23 A. Well, could you show me the
24 context?
25 Q. Sure. This actually was borrowed

1 - JACOB JACOBY -
2 from another law library in Milwaukee, so I
3 cannot mark it as an exhibit, but can you
4 recognize and identify for us what I'm handing
5 you as the first volume of the August 2013
6 publication that you had referenced during
7 your direct testimony?
8 A. It is.
9 Q. Now, if you could turn please to
10 page 571, and for this one I apologize, but I
11 have to look over your shoulder.
12 I'm going to read the following
13 and you correct me if I read it incorrectly.
14 This appears on page 571: "Having agreed to
15 participate in a survey, respondents are aware
16 they will be asked questions regarding the
17 items shown to them during the course of
18 interview. If anything, this suggests they
19 are more likely to pay attention to the
20 stimuli than they ordinarily might."
21 Did I read that correctly?
22 A. You did.
23 Q. Thank you. And your criticism
24 after this protocol is followed is based on a
25 concern that you have that respondents might

1 - JACOB JACOBY -
2 misread the two words that they were looking
3 at on that card, Smart Balance, correct?
4 A. I said in my report misread or
5 misremember, and that is correct.
6 Q. Okay. And you have no data about
7 how often people would have actually misread
8 or misremembered those two words, correct?
9 A. Yes.
10 Q. You agree?
11 A. Yes, I agree.
12 Q. You could have done testing for
13 that, correct?
14 A. Yes.
15 Q. And you didn't?
16 A. Correct.
17 Q. And of these two issues,
18 misremembering or misreading, or
19 misperceiving, you'd agree that the
20 misperceiving is the less likely to occur?
21 A. I suspect that's correct.
22 Q. And you have to say "suspect"
23 because you have no data on that, correct?
24 A. That's correct.
25 Q. Now, this issue of misperception,

- JACOB JACOBY -

it could not be cured by leaving the stimulus in front of the respondent, correct?

A. It could be cured, because the question would focus the individual's attention back on the card.

Q. I'm going to have you get out your January 22, 2013 deposition again, please turn to page 126, beginning at line 21. My question will be, did I ask you the following questions and did you give the following answers?

"QUESTION: So, there is that type of thing that can occur ~~that~~ yet it would not necessarily be cured ~~by~~ through what you say should have been done here and that is leave the card in front of the respondent, correct?

"ANSWER: What we have are two scenarios.

"QUESTION: Can you answer my question?

"ANSWER: Yes. I'm trying to answer it accurately, so it does not misrepresent. What we have are two

1 - JACOB JACOBY -
2 scenarios that we've identified. One,
3 where somebody is looking at the card,
4 and one where the card is removed. You
5 could have misperception and mis-memory.
6 The mis-memory is more likely than
7 misperception, although the
8 misperception exists. If the card were
9 there, you would not remove the
10 misperception problem, you would remove
11 the problem of mis-memory by leaving the
12 card there."
13 Q. Did I read it correctly, read the
14 questions and the answers you gave to those
15 questions?
16 A. You did, but --
17 Q. Thank you. You are aware that
18 there is a debate among experts in the survey
19 field about whether to ask questions of
20 respondents while stimuli are in front of them
21 or not, correct?
22 A. Correct.
23 Q. And it's referred in the
24 literature as a debate between those who see
25 it as a reading test versus those who see it

- JACOB JACOBY -

as a memory test, correct?

A. Correct.

Q. And that debate is reflected among other things in an article, cited in that Jerre Swann article, about the debate between reading and memory tests, right?

A. Correct.

Q. You agree that the reading problem should be considered and should be avoided, right?

A. I do.

Q. Because leaving the stimulus in view may end up biasing the respondent's answer?

A. Yes. In a reading test, if that's the answer to the question being asked then all the respondent has to do is read it and give the answer. But if that's not the answer to the question being asked, that's not the problem.

Q. Well, in the book that we just looked at, you have actually written that removing the stimulus should be preferred?

A. May I see exactly what I said?

1 - JACOB JACOBY -
2 Q. Yes, you may. And for this one,
3 we're going to have it marked as an exhibit.
4 Again, you could look at the book, but I'm
5 going to have this marked as an exhibit.
6 (Whereupon, a portion of Mr.
7 Jacoby's book was marked as Applicant's
8 Exhibit 45 for identification.)
9 Q. Now, Mr. Jacoby, you have before
10 you the actual book, but could you please
11 confirm that the exhibit that I'm going to
12 hand you is, at least the pages that are
13 numbered, begin with page 564 and then
14 continue through page 577?
15 A. That's correct.
16 Q. Now, you have written in this
17 book, beginning at page 571, the first full
18 paragraph as follows, and I'm going to read it
19 and you correct me if I'm wrong. "Having
20 agreed to participate in a survey, respondents
21 are aware they will be asked questions
22 regarding the items shown to them during the
23 course of the interview; if anything, this
24 suggests they are more likely to pay attention
25 to the stimuli than they ordinarily might."

1 - JACOB JACOBY -
2 You go on to write: "While it is true that in
3 an actual market situation, the product would
4 not disappear from the consumer's eye just as
5 he or she is about to make a purchase. It is
6 also true that consumers ~~and~~ in actual market
7 situations do not consider products and
8 product information with the expectation that
9 they will be asked questions regarding these
10 items immediately afterward. The pressure to
11 consider more aspects of the stimulus than
12 they normally would are likely to be
13 accentuated when the survey is being
14 administered by an interviewer. If, when they
15 anticipate being asked questions on what they
16 were shown immediately afterward, respondents
17 neglect to consider, or consider
18 insufficiently, the information associated
19 with the stimulus, then asking them questions
20 with the stimulus in front of them likely
21 encourages them to search for and consider
22 information they had not considered prior to
23 being asked those questions. Having the
24 product disappear from the respondent's eye
25 prior to being asked the critical question

1 - JACOB JACOBY -
2 ensures that they answer the question based on
3 what they remember having seen and attended to
4 when exposed to the stimulus, not based on
5 what, as a result of having been prompted by
6 the question, they then are led to look at and
7 consider. This suggests that, because it
8 guarantees that the answer is not biased by
9 the question being asked, the memory test
10 approach should be more preferred."
11 Did I read your words correctly?
12 A. You did, but you took them out of
13 context and didn't interpret properly what the
14 middle of the paragraph you read refers to.
15 If I could describe that to you, I would be
16 happy to.
17 Q. You will have that opportunity
18 when you are questioned by your lawyer.
19 A. Which I hope he does.
20 Q. And page 573 is another passage
21 where you explain that especially a
22 defendant's survey should not ask questions of
23 respondents while the stimulus remains in
24 front of the respondent.
25 A. All this refers to defendant's

1 - JACOB JACOBY -
2 goods and advertising. In that very sentence,
3 and that's what all this is referring to, not
4 a card where you have just two words. I'm
5 talking about and stimuli where you have an
6 entire product, not two words, where we'll ask
7 questions of these individuals that can go
8 back and look at all the other words and
9 answer your questions. I'm not referring to a
10 stimulus, I'm referring to a stimulus that is
11 tested for Federal District Courts. I'm not
12 referring to a stimulus as a two-word card~~s~~
13 tested for a TTAB proceeding.
14 Q. So, your view is that when the
15 questions require looking at more complex or
16 detailed information, then the stimulus should
17 be left in front or removed from that
18 respondent?
19 A. If the answer to the question is
20 on the stimulus it should be removed, because
21 when you ask the question it becomes a reading
22 test. If the answer is not on the stimulus,
23 it could be left in front. All of this refers
24 to what's done in traditional trademark
25 testing for Federal District Courts. This

1 - JACOB JACOBY -
2 book is written primarily for that. It does
3 indicate at some point, and I could find it
4 for you, that things are different in TTAB
5 proceedings where names are provided on cards
6 absent all of the real world authentic
7 information.
8 Q. So, is it your testimony today
9 that when we're talking about brand names then
10 the critical questions should be asked with
11 the stimulus remaining in view or should not
12 be asked with the stimulus remaining in view?
13 A. What I said earlier today was if
14 you leave something which is not the brand
15 name in view and you ask for the brand name,
16 you don't have a problem. When you leave
17 something that is not the source's name and
18 you leave it in view and you ask what the
19 source was, you don't have a problem.
20 Q. Let's take a look at what you
21 wrote on page 569 of this book that came out
22 in 2013. First full paragraph I'm going to
23 read and you let me know if I read it
24 incorrectly. "A reasonable supposition from
25 the findings and opinions in Union Carbide v.

1 - JACOB JACOBY -
2 Eveready; Goya Foods v. Condal; Franklin
3 Resources v. Franklin Credit; and Malletier v.
4 Dooney & Bourke is that when something as
5 prominent and obvious as the brand name is
6 involved, critical questions should not be
7 asked with the stimulus remaining in view.
8 The question remains what to do when the issue
9 concerns content that is detailed, complex, or
10 subtle, such as may be the case when drawing
11 inferences from advertising or in regards to
12 trade dress.
13 Did I read that paragraph
14 accurately?
15 A. Absolutely.
16 MR. CROSS: Thank you. Why don't
17 we take a break and go have some lunch.
18 MR. SCHROEDER: Great.
19 (Whereupon, a lunch break was
20 taken at this time.)
21 (Time noted: 1:10 p.m.)
22 (Back on the record.)
23 (Time noted: 2:00 p.m.)
24 MR. CROSS: Let's go back on the
25 record.

1 - JACOB JACOBY -
2 Q. I'd like to run through some of
3 the other criticisms that you addressed in
4 your first report, Exhibit 50. In paragraph
5 18, you criticized the use of "believe"
6 instead of "think," because you think or
7 believe that believe is a higher threshold,
8 right?
9 A. Yes.
10 Q. And you have no data to show if
11 at all using "think" versus "believe,"
12 affected the results here?
13 A. Correct.
14 Q. In fact, you're not aware of any
15 data any place that would support your view
16 that "believe" sets a higher threshold than
17 "think"?
18 A. If by "any data," you mean
19 empirical gathered from respondent, the answer
20 is correct.
21 Q. That is something that you could
22 test for, correct?
23 A. That is something that could be
24 tested for.
25 Q. And you have said that, that was

1 - JACOB JACOBY -
2 something that you were planning to test for?
3 A. I would like to test for it given
4 time.
5 Q. But you haven't tested for it?
6 A. Correct.
7 Q. You agree that this is a
8 relatively minor criticism by itself?
9 A. By itself, I would agree.
10 Q. In paragraph 19, you criticize
11 the placement of the phrase "Do you not have a
12 belief." You believe it should be at the end
13 of the question as opposed to the beginning or
14 is it the other way around?
15 A. It's the other way around.
16 Q. There is a debate about primacy
17 versus recency, correct?
18 A. Yeah, but it doesn't apply to
19 this.
20 Q. But you have no data to show if
21 at all the placement of the phrase or do you
22 not have a belief affected the results here?
23 A. I predicate my criticism and I
24 wish I could remember the source, but on one
25 of the early tomes on questionnaire

- JACOB JACOBY -

construction where ~~in~~ a highly respected authority on questionnaire construction said that if you put the qualification at the end of a question it can be disregarded, people can prematurely get the meaning of the question and then give an answer, where as if you put a qualification at the beginning of the question they have no idea what the question is and they have to hear the qualification. I've always abided by that, and when I say "always" I'm presuming about 99 percent. I've pretty much abided by that and I think that's a better way to proceed.

Q. I understand, but I asked a different question. You have no empirical data that shows there is an affect caused by the placement of the phrase or do you not have a belief?

A. Correct. I'm sorry I misanswered your question.

Q. This criticism again by itself is not a big thing?

A. It's a little bigger than the "think" or "believe," but by itself, no. I

1 - JACOB JACOBY -
2 agree with you, it's not a big thing.
3 Q. Thank you. In paragraph 11, you
4 criticized the geographic distribution, but
5 you agree that you have no proof that it
6 mattered to the results, correct?
7 A. I would agree with that.
8 Q. And that again is a relatively
9 minor criticism in itself?
10 A. In this context, since there's no
11 difference across, or what Mr. Johnson says,
12 there's virtually no different across on
13 various geographic sites, I would agree. In
14 instances where there would be differences, I
15 would not agree.
16 Q. So, you took it as your job in
17 this case to look for any basis to criticize
18 Mr. Johnson's report, whether it had an affect
19 on the results or not?
20 A. No.
21 Q. In paragraph 12 you address the
22 control that was used here, and as I
23 understand it, a control cell is used in
24 surveying to help to eliminate what's commonly
25 referred to as noise?

- JACOB JACOBY -

A. To help to identify and measure noise, so that it could be subtracted from the effect.

Q. For example, if some people in the population that's being surveyed think that there is a single source for all nutritional bars, they are going to say that there is an affiliation between the junior users mark and the senior users mark or names no matter what the names are, correct?

A. If they believe that all these bars come from a single source, yes.

Q. And in the survey protocols that are the user control cell, the results of the control cell, the people that show confusion with the control cell, that is subtracted from the results that show confusion in the test cell, correct?

A. Correct.

Q. So that you end up with a -- the goal is to end up with a result that at least tries to identify and eliminate noise?

A. Correct. So the result ~~in~~ are findings are more reliable.

- JACOB JACOBY -

Q. And testified that the control used here which was Smart Bar was correct in the sense that -- it was good in the sense that it eliminated the common element alleged to cause confusion, right?

A. Yes.

Q. And that element in this case is Balance?

A. The word "Balance," correct.

Q. So, he replaced Balance with Bar?

A. Correct.

Q. Now, you have testified that you thought that this was a weak control, correct?

A. Correct.

Q. Do you have an idea of what would have been a stronger control?

A. What I would have done is -- well, the control is usually that a stronger tend to be similar to the test either in sight, sound, or meaning. I would have gone to ~~the source~~ a thesaurus to take a look to see what words are equivalent to Balance or similar to Balance, as the sheer meaning of Balance that might have -- for example, I'm working on a

- JACOB JACOBY -

study now where the test word is "mingle." I went to the dictionary yesterday in working out -- the source yesterday and working out a control which would be "merge." In this context, it has to do with the name of collaborative software. Merge begins ~~beginnings~~ with "M," has essentially the same overlapping meaning as ~~of~~ mingle. That way it's a tougher test as a control than if I would of used some other name.

Q. Tougher is the same as a stronger control?

A. Yeah.

Q. The question for you here is: You'd agree that the meaning of Smart Balance is similar to the meaning of Smart Bar?

A. No, I wouldn't agree.

Q. You wouldn't?

A. No.

Q. What is the word "smart" mean to you?

A. No. It's the word "Bar" versus "Balance."

Q. I'm talking about the two words

- JACOB JACOBY -

together?

A. Smart and smart means smart.

Q. And you also look at the meaning in the context of the product?

A. Correct.

Q. So, a smart balanced nutritional bar is a sensibly nutritional bar?

A. Could be. That's obviously the way you're interpreting it, could be.

Q. And that is essentially the same meaning a nutritional bar called a Smart Bar?

A. In a study I did for Verizon against AT&T, where AT&T was saying they had more bars. The question was: What does more bars mean? And it's interesting, people thought more bars meant more places where you could buy more liquor, some people thought it meant all kinds of things, so what we think may actually occur, appear to you as apparently, this isn't what necessarily will occur at the end. You've been stressing the point and I've been agreeing with you that one needs empirical evidence.

Q. And you have no empirical

1 - JACOB JACOBY -
2 evidence, do you?
3 A. I do not.
4 Q. You have no empirical evidence
5 for the number of opinions you've given here
6 today, do you?
7 A. That is correct.
8 Q. Now, you'd agree that your
9 criticism about Mr. Johnson using a weak
10 control had no affect on the results at all?
11 A. In this case, because the
12 Eveready protocol it would have no affect at
13 all.
14 Q. No, actually it would have a
15 different reason it would have no affect at
16 all, isn't there?
17 A. I can't read your mind.
18 Q. You've read your book, haven't
19 you?
20 A. Well, I wrote it.
21 Q. Take a look at page 507 of your
22 book. The point is this: A stronger control
23 would yield a higher number that would be
24 subtracted from the test cell, correct?
25 A. Yes.

- JACOB JACOBY -

Q. Therefore, by using a weaker control, Mr. Johnson's results ended up showing more confusion than there would have been had he used a stronger control, agreed?

A. Yes.

Q. Now, we've talked about the strength of a mark, and you know that in evaluating the likelihood of confusion, one of factors to be considered is the strength of the users mark?

A. Yes.

Q. And in a mark strength is judged not only on unaided awareness, it is also judged on aided awareness as well?

A. I know it is sometimes done that way, yes.

Q. It always is.

A. You know, I'd have to go back and check that. It may in fact be that it always is. In fact, I don't know as I sit here now. I have to go back and check that.

Q. Let's go back and see how you testified at your deposition in 2014. Please turn to page 52.

- JACOB JACOBY -

A. Page?

Q. 52. Now, follow along with me beginning on page 52, line 15.

"QUESTION: Now, why is that a significant? Doing an analysis of likelihood of confusion, the strength of the senior~~s~~ user's mark?"

Q. And that was my question. It was terrible or terribly transcribed, and I will not blame the court reporter.

"ANSWER: Well, I'm not a trier of fact and I have not been schooled in being ~~a~~ district court judge or a ~~ministate~~ magistrate, but I can make certain assumptions. This is beyond my pay grade and you're asking me a question for which some counsel would object saying he's not qualified to answer that.

"QUESTION: But Mr. Schroeder is going to let you go.

"ANSWER: But apparently a weak mark, from what I understand, may deserve lesser protection under certain

1 - JACOB JACOBY -
2 circumstances, but the strength of the
3 mark is judged not only by unaided
4 awareness, but by awareness aided plus
5 unaided."
6 Did I read that correctly?
7 A. You did. What I'm saying is
8 that, that was my understanding then, and I
9 may have been correct, but as I sit here now I
10 want to go back and check.
11 Q. And a mark can be considered
12 strong if it has high levels of aided
13 awareness and low levels of unaided awareness?
14 A. Well, as I'm looking at the
15 testimony here --
16 Q. I want you to tell me what you
17 think is true today, because there seems to be
18 some variation on what you say on one day,
19 what you write on one day, and what you say
20 under oath on another day. I want you to
21 testify about what you believe to be the truth
22 today.
23 A. The truth today is that I would
24 have to go back to check and see what people,
25 like McCarthy and courts have written. I may

- JACOB JACOBY -

have been more confident of my thoughts on the day I was deposed two years ago -- or not two years ago. Three months ago in June, but as I sit here now, I'm not that confident. I'd have to go back and take a look. The record is what it is. You have my statements here.

Q. But I have statements from you that are all over the place, sir. I have statements from a book that you issued in August of 2013 that contradict what you've said under oath today.

MR. SCHROEDER: Objection.

Is there a question?

Q. There is a question. I want him to answer the last question I gave him, and if he can't, you should just say that.

A. I did say that. I answered the question by saying I'm not as confident now and I would have to go back and check that, by reading the authority. That is my answer. You want to continue asking question, please go ahead.

Q. Your confidence level has slipped within the last three months?

- JACOB JACOBY -

MR. SCHROEDER: Objection.

A. In the last three months, I haven't seen that recently. I may have seen that ~~most~~ more recently when I testified then.

Q. Well, turn to page 63 of the deposition that I took of you just three months ago, in June of 2014. Beginning at line 11.

"QUESTION: But you just said under oath earlier today that you can have a strong mark if it has high levels of aided awareness and low levels of unaided awareness; correct?

"ANSWER: Yes, I did."

Q. Did I read that correctly?

A. You did.

Q. Thank you. Now, let's go into this concept of aided versus unaided awareness. Unaided awareness, as I understand it, means top of mind awareness; is that an equivalent term?

A. Sometimes it is, sometimes it isn't, and I can give you an example if we go back to one of the exhibits that you had me

- JACOB JACOBY -

look at previously. I'm looking at Applicant's Exhibit 28. If you go to Applicant's Exhibit 27 [sic] and you look at page BB0000174, you'll notice under the left hand column of brand awareness they have top of mind then all unaided. So there's a differentiation there between top of mind and unaided. And I'm saying to you and to answer your question, sometimes people use top of mind as unaided equivalent and sometimes they obviously don't.

Q. So, you can't really be sure what people mean by top of mind?

A. Well, if it's true unaided I generally see top of mind as being equivalent unaided, but having seen this, I'm pointing to you that there are obviously other ways to look at it.

Q. Well, let's talk about unaided brand awareness and leave aside the possible ambiguity of the phrase top of mind. So unaided brand awareness would be a situation where if I asked a respondent, "Please name for me some beers." The names they came up

- JACOB JACOBY -

with would be names of which they have unaided brand awareness?

A. Right. Can I clarify your question. You said "some beers." I would want to know all the beers that they could give me an unaided way, and if they gave you some beers, I would then ask "any others?"

Q. In other words, they aren't given any clue about particular names?

A. Correct.

Q. If you give a clue about particular names, that would be a form of aiding?

A. Well, there's a continuum from aided to unaided. It would be somewhere on that continuum.

Q. So for example, if I asked a respondent to name all the beer names they could think of and they did not give me the name of Schlitz, but then I asked them if they are aware of a beer that sounds like blitz, and they say, "Oh, yes, Schlitz." That would be aided brand awareness?

A. That would be somewhere on the

- JACOB JACOBY -

continuum. It wouldn't be fully aided, because fully aided would be where you provide the name Schlitz and you would ask, "Are you aware of Schlitz?"

Q. So, we have a continuum that goes from no awareness whatsoever to partial awareness?

A. Well --

Q. I mean, partially aided brand awareness?

A. When you are asking me, you're asking me what's in the consumer's mind or the kinds of questions we ask. I'm referring to kinds of questions we ask. The questions could be completely unaided as your first question, or completely aided which is providing a list of brand names, and by the way, you would provide with authentic name and you would also have some ringers ~~on~~ in there as controls which are not authentic brand names. In between would be things such as you just mentioned where you would give a clue or hint, you know, "Are you aware of a beer whose name rhymes with blitz?"

1 - JACOB JACOBY -
2 Q. And people can be confused if
3 they have only aided awareness of a senior
4 users mark?
5 A. People could be confused anywhere
6 along the continuum, correct.
7 Q. When surveying for confusion, the
8 survey should be designed to try to measure
9 confusion that the respondent might have
10 whether it is aided or unaided awareness of
11 the senior users mark?
12 A. Well, here we're getting back to
13 the issue of the Eveready versus the modified
14 Squirt, and we're getting back to Swann's
15 insightful analysis. If you want to really
16 know the level of confusion, then you wouldn't
17 use an Eveready format which relies on aided
18 awareness -- I'm sorry, which relies on
19 unaided awareness, because there's very low
20 levels of unaided awareness.
21 Q. We're going to get to what
22 Mr. Swann said about the Eveready format.
23 Right now, I want to simply ask you if I asked
24 you the following question at your deposition
25 in June of 2014 and did you give me the

1 - JACOB JACOBY -
2 following answer?
3 A. Do you have a page?
4 Q. It's page 51. There is some
5 digression, but the question begins on line
6 14.
7 "QUESTION: It's possible for a
8 consumer to be confused in the real
9 world even if the consumer has only
10 aided awareness of the senior users mark
11 and not unaided awareness?
12 "ANSWER: Yes.
13 "QUESTION: Now, and when
14 surveying, you want to find that out
15 too, right? You want to find out
16 whether people are confused, whether
17 they have aided awareness or unaided
18 awareness of the senior users mark,
19 right?
20 "ANSWER: Yes."
21 Q. Did I read that correctly?
22 A. You did.
23 Q. Back to my example about Schlitz.
24 With the respondent who had no unaided
25 awareness of the Schlitz mark, but when he was

- JACOB JACOBY -

given a clue, have you heard of a beer that sounds like blitz, he came up with Schlitz. That scenario. Now, if that respondent were actually shown a card that said blitz on it and asked what the source of the beer is with that name and if because it sounds like Schlitz he says Schlitz, that would be a situation where there is confusion caused by the junior users mark, yet the respondent had only aided brand names?

A. Is blitz a junior user's mark of beer?

Q. Correct.

A. And you're saying in your hypothetical scenario, they would have shown a card with the word blitz in on it?

Q. Correct.

A. Well, that I don't see ~~as~~ being similar to what we have in this situation.

Q. I just want to make sure that I understand the scenario. It's certainly possible that a person with aided brand awareness of Schlitz could be confused into thinking that blitz beer is related, agreed?

1 - JACOB JACOBY -
2 A. That's possible.
3 Q. And that is true even if the
4 respondent's awareness of Schlitz is only
5 aided awareness, agreed?
6 A. Well, you found confusion under
7 those circumstances, agreed.
8 Q. Now, Swann, whose article you
9 referred to, we have a copy of it right here
10 that I'm going to hand you. This is the
11 article, Likelihood of Confusions Studies and
12 the Straightened Scope of Squirt, correct?
13 A. Correct.
14 Q. Now, Swann, says in footnote 40
15 that "The Eveready format is a partially aided
16 test for confusion." Correct?
17 A. That's what he says.
18 Q. And you find Mr. Swann to be
19 persuasive and authoritative, right?
20 A. Yes. Not in all respects. I
21 don't even find myself authoritative in all
22 respects.
23 Q. In fact, Mr. Swann is, as you
24 pointed out in the past, a lawyer?
25 A. He is.

1 - JACOB JACOBY -
2 Q. Not trained as a social
3 scientist?
4 A. That's correct.
5 Q. And Mr. Swann's article that
6 we're looking at here, he has no empirical
7 statistics of his own that he developed to
8 support the conclusions in this article,
9 correct?
10 A. Correct. This is a conceptual
11 piece.
12 Q. It's a conceptual piece, meaning
13 there is no data that supports it, correct?
14 A. Correct.
15 Q. Now, you have seen data in this
16 case, in the form of exhibits 27 and 28, that
17 shows combined aided and unaided awareness of
18 Balance Bar in its category to be a strong
19 brand, correct?
20 A. To be in the order of around
21 50 percent, if I recall correctly.
22 Q. Which is a strong brand, correct?
23 A. Could be a strong brand.
24 Q. Well, you called it a strong
25 brand.

- JACOB JACOBY -

A. It could be. As I said in my testimony last time, I believe, relative to its competitors it seems to be a strong brand.

Q. And again, it's a strong brand among the consumers that matter, mainly consumers of nutritional or energy bars, right?

A. That's correct.

Q. That is the marketplace realty concerning the strength of the Balance Bar brand, correct, based on the data you've seen?

A. When you look at both of them and you combine aided and unaided and you come up with around ~~a realm of~~ 50 percent, yes. And relative to competitors that have a low percent, yes.

Q. It's strong?

A. It's stronger than the competitors.

Q. And you're aware of the Phil Johnson's survey, survey of just respondents who are in the relevant market namely category purchasers of nutritional or energy bars?

A. Yeah.

Q. And you're also aware that

1 - JACOB JACOBY -
2 Balance Bar in this opposition has submitted
3 signed documents claiming that Balance Bar is
4 in fact a strong mark, you're aware of that?
5 MR. SCHROEDER: Objection.
6 What documents are you referring
7 to?
8 Q. Go ahead and answer. You're
9 aware of that, right?
10 A. Wait a moment. I'm aware that
11 Mr. Johnson has said some documents have
12 claimed that Balance Bar is famous, and
13 there's no dispute of that. That's what I'm
14 aware of. I've read and seen that document.
15 I'm also aware that at some point he testified
16 that a witness, and I presume it was a Balance
17 Bar witness, said it was a strong mark. I'm
18 not sure if he had that information when he
19 designed a study, but that's the extent of my
20 awareness.
21 Q. So, you haven't asked for, as I
22 think you said you always do when giving
23 opinions in cases, evidence concerning the
24 strength of the Balance Bar mark?
25 A. You know, you've said before you

1 - JACOB JACOBY -
2 have me going various ways, and you just asked
3 me, "As I always do." I said as I always do
4 when I design surveys, not necessarily when I
5 critique. I'd love for you to show me where
6 I'm conflicting, because I don't believe I am,
7 so to answer your question, if I could have
8 the question back directly.
9 Q. Let me restate it. Are you aware
10 of Balance Bar witnesses stating under oath
11 that their mark is stronger?
12 A. I have read some stuff to that
13 affect, yes.
14 Q. And you're aware that Balance Bar
15 has submitted dollar figures concerning
16 promotional expenditures and sales levels to
17 support their claim of having a strong mark?
18 A. I'm not aware of what Balance Bar
19 submitted.
20 Q. Are you taking a position that
21 you know the Balance Bar brand's strength
22 better than the Balance Bar's own witnesses
23 do?
24 A. No. I'm looking at the data that
25 has been provided in Applicant's Exhibits 27

1 - JACOB JACOBY -
2 and 28. That's the only data that I know of
3 that bear directly on that question. I've had
4 people in the past tell me that their brand
5 was famous and go back to find out it wasn't
6 famous. In their minds it was famous, because
7 they were so close to it. That has happened
8 throughout my career. In 1969 when I started
9 consulting for General Electric, they thought
10 some of what they were doing was famous and
11 the general public knew it, and when we went
12 out and tested what the general public knew,
13 it was nothing like the GE marketing
14 executives thought were true.
15 Q. You're not aware of Balance Bars
16 advertising expenditures, correct?
17 A. Correct.
18 Q. You're not aware of Balance Bar's
19 sales figures?
20 A. Correct.
21 Q. But you are aware that parties
22 and triers of fact look at such dollar figure
23 numbers to assess the strength of a market?
24 A. I'm aware that they use those as
25 surrogates to assess the strength of a mark,

- JACOB JACOBY -

but I think the strength of a mark is defined by how it resides in the mind of the consumer, and that may be independent of dollars spent on advertising. People may waste dollars on advertising, and those are used as surrogates, when there's nothing based on what the test of consumers, but here in this matter we have actual test of consumers and those are as described in Applicant's Exhibits 27 and 28.

Q. The modified Squirt format that you said you would have preferred using in this case, involves showing the respondents the senior user's mark, correct?

A. Yes.

Q. And in a TTAB proceeding that would be shown on a card, right?

A. Yes.

Q. And that card then may be shown to respondents who had no prior awareness of Balance Bar, correct?

A. It is a possibility, yes.

Q. And thereby giving them some awareness of the brand that they would not otherwise have in the real world, correct?

- JACOB JACOBY -

A. That's possibly but one could have always asked the question at the end to ask them -- because it wouldn't have shown only that name, it would have shown a bunch of others as well. Which one of these have you had awareness before today? And you might include on there some control names as well to get a better estimate.

Q. Now, as I understand the modified Squirt format that you're talking about, how many different stimuli are being shown to the respondent?

A. Well, you would show both plaintiffs and defendants, or in this case, Opposers and Applicants stimuli, and there are different ways to show these. You could show separate groups. Say, the applicant and the opposer, either in that order or reverse order, and the applicant and a control, or you could show either of these within sets of other stimuli, so the cards you could have two or three cards in phase one for say applicant, and two or three cards in phase two for say the opposers.

- JACOB JACOBY -

Q. And in your preferred format, would you show the stimuli independent of other stimuli in the array or would you just show the senior users and the junior users?

A. What I generally do is I show -- I rarely do stuff with TTAB, but you're asking me about a TTAB contents, so I don't know how to answer to the TTAB.

Q. So, you're not an expert in TTAB surveying procedures?

A. I'm an expert in litigation survey procedures, to the extent that TTAB uses cards, and I've occasionally done stuff, and I mean occasionally, but primarily I get involved with matters involved in U.S. District Courts.

Q. My question is: You don't consider yourself an expert in the survey techniques that are specific to the TTAB?

A. I think there's a 95 percent overlap with survey techniques that are used and relied upon by triers of fact of the TTAB and those in the Federal District Courts, but there are unique variations such as -- and I

understand why the TTAB wants just the names on cards, not looking at the stimuli, there are different considerations that apply there. But question wording is the same, sampling is the same, validation is the same. You could go on and on. Most of the other elements of research are the same in regards to which venue the matter is heard.

Q. But generally speaking in your experiences, you have relatively little experience doing confusion surveys using stimuli where the brand names are on cards, correct?

A. That is correct.

Q. Which is the type of survey Mr. Johnson did here?

A. Yes.

Q. Would you agree that he has more experience in doing surveys with cards before the TTAB?

A. I have no idea how much experience he's had.

Q. You would be willing to see that some people have more expertise than you do

- JACOB JACOBY -

and in at least certain discreet areas in survey research?

A. Yeah. My wife has more experience in many areas that she continues to tell me.

MR. CROSS: Could we take a short break?

MR. SCHROEDER: Sure.

(Whereupon, a short recess was taken.)

MR. CROSS: Back on the record.

Q. Now, one of the criticisms of the Squirt format is the fact that it gives respondents additional information about the senior users mark that they would not have in the real world of the market realties?

A. I wouldn't qualify by senior users, by a users, because it depends on whether it's photo reversed, etc.

Q. Understood. But that is one of the criticisms of Squirt?

A. Correct, it is.

Q. It departs from market realties?

A. Well, I don't necessarily agree

- JACOB JACOBY -

with that, because in the market, as you walk down an aisle, you could see something and all of a sudden have your memory refreshed. It would be aided. I disagree with that criticism.

Q. So you're agreeing that an Eveready format that shows a junior users mark to a respondent can stimulate aided brand awareness of the senior users mark?

A. Well, that is the essence of the beginning of trying to test for confusion. Is that not? I mean, if you see the senior users or any users, and it reminds you of the other -- if you see the senior users and it reminds you of the subsequent user or if you see the second comer it reminds you of the first comer, that begins to get you toward confusion.

Q. Back to the modified Squirt protocol that you suggested here. You could be in a situation where you show a respondent a senior users mark and now they are aware of it, because you showed it to them, but in the realty of the marketplace they had no

- JACOB JACOBY -

awareness of the senior user's mark?

A. That's a possibility.

Q. And that possibility increases artificially the strength among the respondent population of the senior user's mark?

A. I think I answered this question in the earlier deposition when I gave you an example of work I've done for Red Bull. Where I said in that matter, I used a modified Squirt where first I showed Red Bull, and then I asked people what they had heard of or come across, I forget the exact question, and about 95 percent said they did, but the 5 percent who said they didn't, I didn't ask them any more questions. I put them in a dominator where they could only count against me, so yes, you can check.

Q. One of the criticisms of the Squirt format is that it can artificially enhance the strength among the respondent population of the senior user's mark?

A. Yes, because what it does it then aids the person, it reminds them of it. As I did in Red Bull, but then you could ask to see

- JACOB JACOBY -

if they had known it previously, and the assumption throughout survey research is that people are answering these things honestly and presumably they would answer that question honestly as well.

Q. You agree that as a general proposition a survey should as much as possible attempt to recreate market realties?

A. Yes. In the surveys that are done in the District Courts. Clearly that's not the case for TTAB, where what you do is you divorce the name from any logo or script that might be used, from any trade dress or coloring that might be used, you take it off the product. I understand the rationale for doing that for TTAB, but that's not the real world when you start doing that.

Q. Because there is the emphasis on just the word marks themselves?

A. Correct.

Q. That's why the surveys are done typically with cards?

A. That's another reason. It may be that the actual brand or product has not been

- JACOB JACOBY -

yet introduced in the market.

Q. Understood. But all other things remaining equal, the surveyor should try to design and conduct a survey to as close as possible mirror marketplace realties, correct?

A. Absolutely correct.

Q. Now, in the modified Squirt format that you had discussed while you were being questioned by Mr. Schroeder, you said that the senior users name would be shown first, correct?

A. If we're talking about forward confusion, which is this matter here.

Q. In a forward confusion situation, which is what we have in this case, a claim of, you would show the senior users name on a card first, correct?

A. Yes. As I said also in my testimony, it might be along with a set of other cards, and you might ask them which of these have you heard of before today.

Q. And then you would remove the senior users card from view?

A. Correct.

- JACOB JACOBY -

Q. And then you would show the junior user's card after the senior user's card is removed from view?

A. And again, that might be in a set, and that would be half the people, the other half would be shown a control set of cards, yes.

Q. And then when the junior user's card is in view under your proposed protocol, then the respondent is asked the confusion questions?

A. Correct.

Q. This modified Squirt protocol that you had described relies on memory, right?

A. Yes. It relies on memory of the senior user's mark that was shown earlier.

Q. And because it relies on memory there is, I guess, a possibility that someone could have misremembered what they saw on the senior user's card, right?

A. There is that possibility.

Q. And you don't have a protocol in place to address that in the modified Squirt

1 - JACOB JACOBY -
2 format that you spelled out for us, do you?
3 A. Insofar as I know from the
4 surveys, and I'm not talking about those that
5 I do, I'm talking about the ones I reviewed,
6 I've never seen anything in place to address
7 that issue.
8 Q. That's because it isn't an issue
9 of significant concern, the memory issue?
10 A. I'm not sure of why that is.
11 Q. Now, you during questioning by
12 Mr. Schroeder testified that you have never
13 been excluded as an extra on surveys based on
14 your qualifications?
15 A. That is correct.
16 Q. You're aware that Phil Johnson
17 has testified that he has never been excluded
18 on any grounds, that even his reports have
19 never been excluded?
20 A. I've read that.
21 Q. Yet, your reports have been
22 excluded from evidence, correct?
23 A. Two or three out of a couple of
24 hundred, close to a thousand, yes, correct.
25 Q. How much are you getting paid for

1 - JACOB JACOBY -
2 your time today?
3 A. $900 an hour.
4 Q. How much are you getting paid for
5 your work in your reports?
6 A. $900 an hour.
7 MR. CROSS: I have no more
8 questions at this time. Although, I do
9 note that I have an exhibit number for
10 the exhibit that I have marked, but not
11 had put a number on it yet, and that
12 were pages 564 through 577 of
13 Mr. Jacoby's book and that should be
14 Applicant's Exhibit 45.
15 MR. SCHROEDER: Let's take a
16 short break and I have a few redirect
17 questions.
18 (Whereupon, a short recess was
19 taken.)
20 R-E-D-I-R-E-C-T E-X-A-M-I-N-A-T-I-O-N
21 RE-DIRECT EXAMINATION BY
22 MR. SCHROEDER:
23 Q. I just have a couple of quick
24 questions for you Dr. Jacoby.
25 You were asked a little earlier

1 - JACOB JACOBY -
2 by Mr. Cross about some testimony you gave in
3 your earlier deposition back on January 22,
4 2013, and in particular, Mr. Cross referred
5 you to page 127, lines 1 through approximately
6 13. Can I ask you to reread that, and you
7 don't have to reread it out loud, and just
8 comment on what you were referring to in that
9 paragraph with respect to that answer.
10 A. Okay.
11 Q. Can you comment as to what you
12 were referring to there and what you meant by
13 that answer?
14 A. Yeah. There's an error here.
15 Either I misspoke and didn't recognize it when
16 I read the transcript, or there's a
17 typographical error that I didn't catch. Let
18 me read this so I can explain it. "What we
19 have are two scenarios that we've identified.
20 One where somebody is looking at the card, and
21 one where the card is removed. You can have
22 misperception and mismemory. Mismemory is
23 more likely than the misperception, although
24 the misperception exists. If the card were
25 there, you would -- it says, "Not removed the

1 - JACOB JACOBY -
2 misperception problem." But it doesn't make
3 sense by not, it should be you would remove
4 the misperception problem, because the
5 individual could be able to read it right off
6 the card, so there wouldn't be any
7 misperception if the card were there, and you
8 would remove the problem of mismemory by
9 leaving the card there as well. It's only
10 when the card is removed that can't get a
11 handle on misperception and mismemory.
12 Q. Let me ask you one follow up
13 question regarding the chapter in your book,
14 which was marked as Applicant's Exhibit 45.
15 In particular, Mr. Cross asked you about the
16 paragraph beginning on page 571 extending
17 through the first part of 572, and if you want
18 to take a minute to review that paragraph,
19 please do, but the gist of the question that
20 Mr. Cross was asking you was getting at
21 whether or why here it talks about removing
22 the stimulus. Can you comment on that for me?
23 A. Yes. Again, I think I explained
24 before. This is written with respect to
25 authentic real world stimuli. A real world

- JACOB JACOBY -

product including its packaging, its ~~laboring~~ labeling, etc, where there's all kinds of information, and when I refer to say critical question --

Q. Where do you see that?

A. On line 3, on page 572. If you're asking them who's the manufacturer, like, who put out this product and the answer is on that label, or on that package, or in that ad, then they could go back and review what's on the ad, or on the package~~d~~ label. That's what I'm referring to if the question which asks them something that they can go back and readily get the answer to from a stimulus. If they can't get the answer to a question, such as who put out Smart Bar from looking at the word Smart Bar, that doesn't apply to that situation.

MR. SCHROEDER: Thank you very much. No further questions from me.

MR. CROSS: Nothing further from me.

(Time noted: 3:10 p.m.)

A C K N O W L E D G M E N T

STATE OF NEW YORK)
:ss
COUNTY OF NEW YORK)

I, Jacob Jacoby, hereby certify that I have read the transcript of my testimony taken under oath in my deposition of August 27, 2014; that the transcript is a true, complete and correct record of my testimony, and that the answers on the record as given by me are true and correct.

Jacob Jacoby

Signed and subscribed to before me, this 17th day of October, 2014.

Notary Public, State of New York

EVELYN I. CAPELLAN
NOTARY PUBLIC-STATE OF NEW YORK
No. 01CA6261443
Qualified in Bronx County
My Commission Expires November 14, 2015

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----------EXHIBITS----------

OPPOSER'S		I.D.
50	Fifty-six-page document of a Rebuttal Report of Opposer's expert Jacob Jacoby, Ph.D.	3
51	Four-page document of a Supplemental Rebuttal Report of Opposer's expert Jacob Jacoby, Ph.D.	3`
APPLICANT'S		
45	Sixteen-page copied document of Jacob Jacoby's book entitled Trademark Surveys, Volume I	74

C E R T I F I C A T E

STATE OF NEW YORK)
) ss.:
COUNTY OF ORANGE)

I, KRYSTINA KORNAK, a Notary Public within and for the State of New York, do hereby certify:

That Jacob Jacoby, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 20th day of September, 2014.

KRYSTINA KORNAK

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

In re Application Serial Nos. 77/864,206 and 77/864,268
Published for Opposition on April 20, 2010 and August 10, 2010
Trademark: SMART BALANCE

BALANCE BAR COMPANY, Opposer, v. GFA BRANDS, INC., Applicant.	Opposition Nos. 91196954/91197748

ERRATA SHEET TO TRIAL TESTIMONY TRANSCRIPT OF JACOB JACOBY, Ph.D.

PAGE	LINE	CORRECTION	REASON
4	19	From "your" to "your academic"	Transcription Error
6	2	From "fabrication" to "publication"	Transcription Error
6	5	From "lists" to "list"	Transcription Error
6	13	From "for which" to "for the time at which"	Transcription Error
7	10	From "12 or 13" to "'12 or '13."	Punctuation Error
8	17	From "handbook of recommended practices" to "Handbook of Recommended Practices"	Punctuation Error
8	21	From "of" to "for"	Transcription Error
9	5	From "not expert inspector" to "not an expert with respect to"	Transcription Error
9	25	From "complete" to "critique"	Transcription Error
10	7	From "litigating" to "litigated"	Transcription Error
10	14	From "fact, I" to "fact, as I"	Transcription Error
10	21	From "etc. so" to "etc. So"	Transcription Error
11	4	From "where" to "why"	Transcription Error
11	17	From "2014" to "2013"	Transcription Error
11	22	From "Balance?" to "Balance mark?"	Transcription Error
12	10	From "in Smart" to "in the Earth"	Transcription Error
12	13	From "response" to "responsive"	Transcription Error

PAGE	LINE	CORRECTION	REASON
13	20	From "where the criticism is" to "for the criticism's"	Transcription Error
14	20	From "then" to "that"	Transcription Error
15	4	From "second circuit" to "Second Circuit"	Punctuation Error
16	6	From "your Balance" to "the Earth Balance"	Transcription Error
16	9	From "and particular" to "and in particular"	Transcription Error
18	11	From "standard. When" to "standard when"	Transcription Error
18	14	From "assessable" to "accessible"	Spelling Error
18	16	From "assessable" to "accessible"	Spelling Error
18	17	From "under estimate" to "underestimate"	Spelling Error
18	18	From "confusions" to "confusion"	Transcription Error
18	25	From "show me" to "showed me"	Transcription Error
19	8	From "designed" to "design"	Transcription Error
19	13	From "the" to "a"	Transcription Error
21	13	From "'famous,' I" to "'famous' as I"	Transcription Error
21	18	From "of the statement of the dilution statutes." to "re-statement of the dilution statute."	Transcription Error
22	20	From "separately," to "separately."	Transcription Error
22	21	From "in fact" to "In fact"	Transcription Error
22	24	From "in product" to "in a product"	Transcription Error
22	25	From "higher" to "high"	Transcription Error
23	23	From "problem," to "problem."	Transcription Error
23	24	From "because" to "Because"	Transcription Error
25	5	From "more" to "mall"	Transcription Error
25	6	From "sample of that" to "sample that's"	Transcription Error
25	7	From "as a" to "of the"	Transcription Error
25	22	From "essential" to "essentially"	Transcription Error
28	3	From "subtract it" to "subtract from it"	Transcription Error
28	8	From "used to follow" to "used follows"	Transcription Error
28	14	From "lead" to "leave"	Transcription Error
28	23-24	From "that remembered" to "that name, and remembered"	Transcription Error
29	14	From "things other" to "things -- other"	Punctuation Error
30	3	From "answers" to "answer"	Transcription Error
30	4	From "positive" to "dispositive"	Transcription Error
30	8	From "confusion but" to "confusion. But"	Transcription Error
30	11	From "makes" to "makes,"	Transcription Error
31	10	From "study of" to "study"	Transcription Error
31	15	From "Lotion, but" to "Lotion. But"	Punctuation Error
32	5	From "As what" to "What"	Transcription Error
32	18	From "NYE" to "NBTY"	Transcription Error
32	21-22	From "it. If he did that, then" to "the issue. Then"	Transcription Error

PAGE	LINE	CORRECTION	REASON
32	24	From "question" to "questions"	Transcription Error
33	11	From "a" to "his"	Transcription Error
33	13	From "partitive back to" to "parroted back"	Transcription Error
33	14	From "the bar. A," to "the card."	Transcription Error
33	19	From "no harm as it were" to "no harm, as it were,"	Punctuation Error
33	22	Fro "test in my opinion" to "test, in my opinion,"	Punctuation Error
34	6	From "the questions in" to "questions"	Transcription Error
35	3	From "when you think it's an" to "'when you think' is"	Transcription Error
35	7	From "agree to disagree" to "'Do you agree or disagree"	Transcription Error
35	8	From "God." to "God.'"	Punctuation Error
35	17	From "oppress" to "supress"	Transcription Error
37	12	From "numbers" to "numbers,"	Transcription Error
38	10	From "when" to "that"	Transcription Error
39	8	From "them, but" to "them. But"	Transcription Error
39	10	From "you're" to "You're"	Punctuation Error
39	24	From "under Johnson" to "of Johnson's"	Transcription Error
40	4	From "Eveready" to "Eveready Test"	Transcription Error
40	7	From "focusing on" to "focusing them on"	Transcription Error
40	15	From "is, it" to "is. It"	Punctuation Error
40	23	From "a" to "the"	Transcription Error
40	24	From "the likelihood of confusion, the standard" to "likelihood of confusion." The standard"	Transcription Error
40	25	From "survey."' to "survey."	Punctuation Error
41	2	From "made" to "taken"	Transcription Error
42	3	From "the relationship" to "there's a relationship"	Transcription Error
42	4	From "classic, matching," to "classic matching"	Punctuation Error
42	11	From "resolving" to "evolving"	Transcription Error
42	21	From "usually when sequentially separated" to "usually, when sequentially separated,"	Punctuation Error
43	5	From "that actually exists" to "than actually exist"	Transcription Error
43	6	From "it is" to "it's"	Transcription Error
43	24	From "courts" to "court's"	Punctuation Error
44	4	From "you Mr." to "you, Mr."	Punctuation Error
44	23	From "not, unaided" to "not. Unaided"	Punctuation Error
44	24	From "kind of. If" to "kind of -- If"	Punctuation Error
45	2	From "at" to "of"	Transcription Error

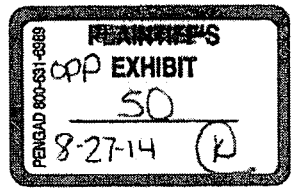
PAGE	LINE	CORRECTION	REASON
45	15	From "of" to "or"	Transcription Error
45	20	From "as" to "is"	Transcription Error
46	3	From "the" to "a"	Transcription Error
47	15	From "What" to "'What"	Punctuation Error
47	17	From "States?" to "States?'"	Punctuation Error
47	19	From "Essentially, which" to "Essentially, "'which"	Punctuation Error
47	22	From "States? And then asked them each" to "States?" And then asked them about each"	Transcription Error
48	7	From "and 21" to "to 21,"	Transcription Error
48	19	From "Market" to "Marketing"	Transcription Error
49	11	From "'72," to "'72, of"	Transcription Error
49	17	From "organizations as I" to "organizations I"	Transcription Error
55	8	From "depreciably" to "appreciably"	Transcription Error
56	5	From "a believe versus think," to "'believe' versus 'think,'"	Transcription Error
57	22	From "have in mind" to "have had in mind"	Transcription Error
60	9	From "questions. If" to "questions -- if"	Punctuation Error
60	12	From "purchasers" to "purchases"	Transcription Error
60	13	From "purchasers" to "purchases"	Transcription Error
60	15	From "when you write" to "when he writes"	Transcription Error
61	3	From "itself, did it" to "itself, would it…did"	Transcription Error
61	22	From "And" to "Correct. And"	Transcription Error
67	5	From "at exhibit" to "at the exhibit"	Transcription Error
71	14	From "occur that" to "occur that yet"	Transcription Error
71	15	From "cured by" to "cured through"	Transcription Error
73	19	From "answer, but" to "answer. But"	Punctuation Error
73	21	From "the problem" to "a problem"	Transcription Error
75	6	From "and" to "in"	Transcription Error
77	12	From "cards" to "card"	Transcription Error
82	2	From "in" to "a"	Transcription Error
82	7	From "where as" to "whereas"	Spelling Error
84	4	From "affect" to "effect"	Spelling Error
84	10	From "users mark and the senior users" to "user's mark and the senior user's"	Punctuation Error
84	24	From "result in" to "resultant"	Transcription Error
85	22	From "the source" to "a thesaurus"	Transcription Error
86	6	From "name" to "name of"	Transcription Error
86	7	From "beginnings" to "begins"	Transcription Error
86	9	From "of" to "as"	Transcription Error
87	19	From "things so" to "things. So"	Punctuation Error
87	20	From "occur appear to you as apparently" to "occur, appear to you as apparently,"	Punctuation Error

PAGE	LINE	CORRECTION	REASON
87	23	From "need" to "needs"	Transcription Error
89	11	From "users" to "user's"	Punctuation Error
90	8	From "seniors users mark" to "senior user's mark"	Punctuation Error
90	15	From "ministate" to "magistrate"	Transcription Error
92	21	From "authority" to "authorities"	Transcription Error
93	5	From "most" to "more"	Transcription Error
94	11	From "sometimes" to "sometimes they"	Transcription Error
95	8	From "any others" to "'any others?'"	Punctuation Error
96	20	From "on" to "in"	Transcription Error
99	12	From "users" to "user's"	Punctuation Error
99	19	From "as to" to "as being similar to"	Transcription Error
102	15	From "with a realm of 50" to "with around 50"	Transcription Error
106	7	From "the" to "a"	Transcription Error
106	8	From "consumers," to "consumers reveals,"	Transcription Error
106	14	From "users" to "user's"	Punctuation Error
107	2	From "That's possibly, but" to "That's a possibility. But"	Transcription Error
107	6	From "Which" to "'Which"	Punctuation Error
107	7	From "awareness before today, and" to "awareness of before today?'. And"	Transcription Error
107	15	From "plaintiffs and defendants" to "plaintiff's and defendant's"	Punctuation Error
107	16	From "Opposers and Applicants" to "Opposer's and Applicant's"	Punctuation Error
108	5	From "users and the junior users" to "user's and the junior user's"	Punctuation Error
108	13	From "procedures to" to "procedures. To"	Transcription Error
108	23	From "of" to "at"	Transcription Error
109	4-5	From "there but" to "there. But"	Transcription Error
110	2	From "discreet" to "discrete"	Spelling Error
110	16	From "users" to "user's"	Punctuation Error
110	19	From "users, by a users" to "user's, by a user's"	Punctuation Error
111	10	From "users" to "user's"	Punctuation Error
111	13	From "users" to "user's"	Punctuation Error
111	14	From "users" to "user's"	Punctuation Error
111	15	From "users" to "user's"	Punctuation Error
111	23	From "users" to "user's"	Punctuation Error
112	2	From "users" to "user's"	Punctuation Error
112	6	From "users" to "user's"	Punctuation Error
112	22	From "users" to "user's"	Punctuation Error
113	13	From "logo script" to "logo or script"	Transcription Error

PAGE	LINE	CORRECTION	REASON
113	20	From “work” to “word”	Transcription Error
114	11	From “users” to “user’s”	Punctuation Error
114	17	From “users” to “user’s”	Punctuation Error
114	24	From “users” to “user’s”	Punctuation Error
115	3	From “users card after the senior users” to “user’s card after the senior user’s”	Punctuation Error
115	9	From “users” to “user’s”	Punctuation Error
115	18	From “user” to “user’s”	Punctuation Error
115	22	From “users” to “user’s”	Punctuation Error
120	2	From “laboring” to “labeling”	Transcription Error
120	11	From “ad, on the packaged” to “ad, or on the package”	Transcription Error
120	12	From “to if” to “to -- if"	Transcription Error

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD



BALANCE BAR COMPANY,	)	Opposition No. 91196954
	)	Opposition No. 91197748
Opposer,	)	
	)	
- v-	)	REBUTTAL REPORT
	)	OF OPPOSER'S EXPERT
	)	JACOB JACOBY, Ph.D.
GFA BRANDS, INC.	)	
	)	
Applicant.	)	

I. PERSONAL INFORMATION

1. My full name is Jacob Jacoby. I reside at 160 West 66th Street, New York, New York 10023.

2. Appendix A provides a description of my qualifications. A copy of my Curriculum Vita is provided in Appendix B. Information responsive to the Rule 26 (Fed. R. Civ. P.) requirements regarding my trial and deposition testimony during the past four years is provided in Appendix C.

II. CIRCUMSTANCES LEADING TO THIS REBUTTAL REPORT

3. I was contacted on August 22, 2012 by counsel for the opposer, Balance Bar Company ("Balance Bar"). Counsel requested that I evaluate the July 18, 2012 Expert Report of Philip Johnson entitled "A Study of Likelihood of Confusion" being proffered in the above-captioned opposition proceeding. This Expert Report describes a survey designed and conducted

by Mr. Johnson on behalf of the Applicant in this matter (hereinafter referred to as the "Johnson Report" or "Johnson Survey").

4. This Rebuttal Report represents my evaluation of the Johnson Survey and documents associated with same, those being the only items I was provided with as a basis for preparing this report.

5. Let me note at the outset that I have no opinion as to whether either party's allegations are valid and correct. My sole function is to evaluate the scientific adequacy of the Johnson Survey and the opinions and conclusions drawn there from.

6. Because it possesses significant fatal flaws, my opinion is that the Johnson Survey does not show what it purports to show, namely, that there is likely to be a lack of confusion in the relevant marketplace. Indeed, because of fatal flaws in the procedures employed, one cannot rule out the possibility that confusion is likely to be manifested in the marketplace between the marks BALANCE and SMART BALANCE for nutrition or energy bars. Not being able to test and rule out this possibility, the survey provides no reliable, scientifically valid information regarding likelihood of confusion, or lack thereof.

7. My evaluation of the Johnson Survey and Report relies upon the seven factors cited in the Federal Judicial Center's *Manual for Complex Litigation* (4th, Section 11.493). Section II of this Rebuttal Report is organized around these factors.

8. Having just referred to the Federal Judicial Center's *Manual for Complex Litigation*, the following disclosure is important. While I refer to or cite case law, legal treatises or other legal authority at some points, I am a social scientist, not an attorney. However, being tasked with designing and critiquing surveys proffered as evidence in litigated matters, and being

invited by the American Bar Association to author its treatise entitled *Trademark Surveys*, it would be irresponsible of me to fail to study, understand, and be mindful of what courts[1] and other authoritative sources[2] have said regarding what is required for survey research to be considered acceptable and accorded weight in litigated disputes.

III. EVALUATION OF THE JOHNSON SURVEY AND CONCLUSIONS

9. **Problem with the Universe.** The Johnson Report does not provide any explicit definition of the universe to which the findings are intended to be extrapolated. However, in paragraph 14, the Johnson Report correctly cites Prof. McCarthy for the following proposition: "*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.*" (underscoring supplied here for emphasis) Paragraph 6 of the Johnson Report claims the sample consisted of "adults who are *current* or prospective purchasers of nutrition or energy bars." (emphasis added) This mischaracterizes the questions that were asked and what was found. The respondents were not asked any questions regarding their *current* purchases; they were only asked about their *past* purchases and *prospective* purchases. Hence, we do not know how many, if any, qualified as *current* purchasers of nutrition or energy bars.

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[1] Including *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 118 S. Ct. 512 (1997); *Kumho Tire Co., Ltd. et al. v. Carmichael et al.*, 526 U.S. 137 (1999); *Weisgram v. Marley Co.*, 528 U.S. 440 (2000).

[2] Including the "Reference Guide on Survey Research" that appears in the Federal Judicial Center's *Reference Manual on Scientific Evidence* (disclosure: Jacob Jacoby served as a peer reviewer for both the 1994 and 2000 editions of this guide), and Professor J. Thomas McCarthy's treatise, *McCarthy on Trademarks and Unfair Competition*.

10. Without providing any data on the composition of the market for nutrition or energy bars, the Johnson Survey limited testing to individuals aged 21 and older. It is reasonable to think that individuals below the age of 21 buy such products. Thus, at the very least, the Johnson Survey should have tested individuals age 18 through 21 as well.

11. **Problem with the Sample.** Paragraph 7 of the Johnson Report informs us that "interviewing was conducted in each of the four major U.S. Census Regions." The U.S. Bureau of the Census estimated that, as of July 1, 2011, the U.S. population was 311,591,917. As of that date, the four Census Regions accounted for the following percentages of the population: Northeast 17.82%, Midwest 21.55%, South 37.24%, and West 23.38%. The Johnson Survey used two sites in the Northeast region, two sites in the Midwest region, three sites in the West, but only one site (Jacksonville, FL) in the South. Unanswered is (a) why the West, with only 23% of the population, merited three testing sites while the South, representing 37% of the population, merited only one testing site, and (b) why seven sites were used for 63% of the population, but only one site for the remaining 37% of the population. Such disproportionality raises questions regarding the representativeness of the study and the ability to generalize its findings to the population at large.

12. **Problems with the Control Stimulus.** Paragraph 9 of the Johnson Report states that 'SMART BAR' was selected as the control name "*because it is similar in meaning, but does not utilize the word 'BALANCE,' which is a common element in both parties' marks.*" Notwithstanding this assertion, as reference to any thesaurus will clearly indicate, the word "Bar" is not at all similar in meaning to the word "Balance." As such, the term "Bar" fails to qualify as a control that possesses either sight, sound, or meaning in common with the test word "Balance." Thus, it fails to adequately serve the function of a control stimulus.

13. **Problems with the Test Protocol.** Paragraph 13 of the Johnson Report informs us that the "*methodology follows the general pattern of the 'Eveready' test, which is frequently used to measure likelihood of confusion.*" Comparing the Johnson Survey's protocol with that used in Eveready reveals this assertion to be erroneous in a very critical respect. At issue in *Union Carbide v. Ever-Ready*[3] was use of the name Ever-Ready for lamps. Plaintiff introduced two surveys, a "bulb survey" and a "lamp survey," the latter then becoming a template for subsequent surveys looking to test for likelihood of confusion. The approach began by showing the respondent the test stimulus (an as-sold lamp) and, *with the stimulus in view*, asking:

Q1. Who do you think puts out the lamp shown here?

Q2. What makes you think so?

Q3. Please name any other products put out by the same concern which you think puts out the lamps shown here.

14. Note that the Eveready test involved respondents examining and responding to an actual product, namely, a lamp. The Johnson Survey diverges from the Eveready test in this regard. Instead of having respondents consider an actual product, the respondents in the Johnson Survey were only shown names on cards. Even if it can be argued that this was an appropriate change, as described immediately below, other departures from the Eveready test format render the Johnson Survey findings uninterpretable.

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[3] *Union Carbide Corp. v. Ever-Ready Inc.*, 392 F.Supp. 280 (D.C.Ill. 1975). *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366, 188 U.S.P.Q. 623 (7th Cir. 1976), *cert. denied*, 429 U.S. 830, 191 U.S.P.Q. 416 (1976), superseded by statute as stated in *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 227 U.S.P.Q. 138 (7th Cir. 1985).

15. After handing the respondents an exhibit card that contained either the test name (Smart Balance) or the control name (Smart Bar), the Johnson Survey's interviewers were instructed: "*When respondent is done looking at exhibit card, take back exhibit card, and put it out of sight for the remainder of the interview.*" There was absolutely no reason to remove the card from view, as doing so creates a critical problem that renders the Johnson Survey's findings uninterpretable. Having removed the card from view, it is entirely possible that a substantial number of respondents remembered the name Smart Balance as Balance Bar, and were confused at the very outset. Importantly, this fundamental confusion would never be detected, given the subsequent questions. Indeed, for those who were confused and remembered Smart Balance as Balance Bar, the subsequent questions would be meaningless. Consider Question 3a: "*What other products or brands, if any, do you believe come from the same company who makes the nutrition or energy bar with a name that I showed you OR do you not have a belief?*" (underscoring of "other" supplied here for emphasis). If, because the name was removed from view, a respondent was confused and remembered the name Smart Balance as Balance Bar, because it asks "what *other* products or brands" – that is, other, besides Balance Bar -- they would never answer Balance Bar to Question 3a. The same applies to 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 nutrition or energy bar with the name that I showed you OR do you not have a belief?*"[4] (underscoring of "other" supplied here for emphasis).

16. As one of the factors gatekeepers are to consider, the Advisory Committee's Notes on the December 1, 2000 amendments to FRE Rule 702 identifies the following: "Whether

[4] Recognize that Question 4a seeks to measure two types of confusion -- confusion as to association or affiliation and confusion as to sponsorship or authorization -- with one question. If one reads this question aloud, it becomes obvious how difficult Question 4a is for respondents to comprehend.

the expert has accounted for *obvious* alternative explanations" (italics supplied). Ignoring for the moment all of the survey's other flaws, had the stimulus card remained in view, the findings would be interpretable. However, given that the Johnson Survey's protocol required the respondents to retain the brand's name in memory, it is entirely possible that a substantial number of respondents may have been confused at the outset, mis-remembering the name Smart Balance as Balance Bar. Since this obvious alternative explanation was not then and cannot now be tested, the survey created a situation where an entirely plausible and important *obvious alternative explanation* for the obtained findings cannot be rejected. This fact alone is sufficient to render the survey scientifically unreliable and not entitled to any weight.

17. **Problems with the Main Questionnaire.** Question 2a of the Main questionnaire asks: "*Based on what you just saw, who or what company do you believe makes the nutrition or energy bar with the name that I showed you OR do you not have a belief?*" Research shows that while consumers may know the brand name of a product (e.g., Vaseline Intensive Care Lotion), they often do not know the name of the company that makes that particular brand (Chesebrough Ponds).[5] If respondents do not know that Balance Bar products are made by the Balance Bar Company, asking Question 2a is not likely to yield anything of probative value. Moreover, since the brand name was removed from view, in my opinion, the question that should have been asked is not what company made the brand they just saw, but what was the brand name of the nutrition or energy bar they just saw.

18. Another important departure from the Eveready format is that the Johnson Survey replaced the word "think" with the word "belief" in Questions 2a, 3a and 4a. As quoted in paragraph 12, *supra*, the Eveready format asks respondents what they *think* (e.g., Q1: "Who do

[5] *Conopco, Inc. v. May Dept. Stores Co.* 784 F.Supp. 648 (E.D. Mo.1992).

you *think* puts out the lamp shown here?: Q2. What makes you *think* so?"). By replacing the word "think" with the word "believe," the Johnson Survey imposes a more stringent hurdle on respondents than does the Eveready format, or than do others (like myself) who use that format.

19. Having the phrase "...OR do you not have a belief" be what respondents hear at the end of Questions 2a, 3a and 4a is likely to lead some respondents to latch onto that last phrase and provide it as their answer. A less biased way of asking essentially the same thing is to have a phrase such as "If you have any opinions about ..." at the beginning of these questions. For example: "If you have an opinion *based on what you just saw, who or what company do you believe makes the nutrition or energy bar with the name that I showed you?*" When asked this way, respondents are less likely to answer they do not have a belief – especially in response to a long and complicated question (such as Question 4a; see Footnote 4).

20. **Problems with the Validation Description**. Paragraph 27 of the Johnson Report states: "*Based on this re-contact, overall, eight of the 415 interviews failed during the validation procedure, leaving a total of 407 qualifying interviews.*" This leaves the misleading impression that the Johnson Survey's validation rate was 98.1% (407/415). Anyone coming away with this impression would have been misled. As examination of Appendix C of the Johnson Report reveals, in addition to the eight respondents (1.9%) reached and found to be invalid, 188 respondents (45.3%) were not reached, but were presumed to be valid. Thus, only 227 of the 415 respondents (or 54.7%) were actually reached and found to be valid, not 98.1%, as implied.

21. Describing the Johnson Survey's key findings, the Johnson Report states:

In regard to Question 2a (see Paragraph 29) - "There is only one test cell respondent (0.5%) who reports the false belief that Balance Bar is the source of the nutrition or energy bar called Smart Balance."

In regard to Question 3a (see Paragraph 30) - "No respondent in either the test or control cell names Balance Bar as a related product or brand."

In regard to Question 4a (see Paragraph 31) - " No respondent in either the test or control cell names Balance Bar as a related source."

Given the fatally flawed testing protocol and biased nature of the questions used, these findings are hardly surprising.

IV. CONCLUSIONS AND OPINIONS

22. For the reasons set forth above, in my opinion, the Johnson Survey and Report are scientifically invalid and cannot be relied upon as support for the conclusions and opinions being proffered therein. I firmly believe the Johnson Survey is not capable of establishing a lack of likelihood of confusion in the marketplace. Based on this survey, there is no support for the conclusion that there is no likelihood of confusion. For this reason, I believe it should not be relied on as evidence or given any weight in this proceeding.

23. I reserve the right to supplement or revise this report based on additional materials that may be forthcoming.

24. I am charging $900 an hour for preparing this rebuttal report and critique, which is my standard hourly rate for such services. Should it be necessary, I will be charging $1,000 an

hour for any deposition or trial testimony, which is my standard hourly rate for such services. This compensation is for the value I place on my time; it is in no way related to the outcome of this matter.

Pursuant to 28 U.S.C. Section 1746, I declare under penalty of perjury that, based upon the information available to me, to the best of my knowledge, the foregoing is true and correct.

Nov 30, 2012

Date

Jacob Jacoby

Jacob Jacoby, Ph.D.

APPENDIX A

RELEVANT QUALIFICATIONS OF JACOB JACOBY

July 2012

From time to time, I am asked to describe my qualifications as an expert in surveys proffered as evidence in litigated matters and/or as a scholar. The information below seeks to be responsive to such requests.

Qualifications as an Expert in Surveys Proffered as Evidence in Litigated Matters

Author: Jacob Jacoby, *Trademark Surveys* (Forthcoming 2013). Sponsored by the American Bar Association. Published by Thomson/West.

Since 1978, I have been providing testimony in U.S. District Courts. Since 1980, I have been conducting surveys that have been proffered as evidence in U.S. District Courts. I have played a lead role in conducting well over 1,000 consumer, marketing and communication (including advertising) studies in support of litigation and provided oral testimony in more than several hundred matters. An incomplete list of my past and present corporate and organizational clients can be found at JacobyResearch.com

With relatively few exceptions, courts have admitted and given weight to my testimony. An incomplete list of court commentary is attached. My scholarly writings have been cited in *amicus* briefs filed with the United States Supreme Court and have been cited in Second Circuit opinions[6] as the basis for shifting the burden of proof in trademark disclaimer cases from plaintiff to defendant.

At the invitation of the American Bar Association, I have written a treatise entitled *Trademark Surveys* to be published in 2013 by Reuters-Thomson/West under the ABA imprimatur.

In 1995, at the invitation of the Federal Judicial Center, I presented a set of lectures on how to evaluate survey research to judges attending the FJC's workshops for District Court judges and Magistrates held in Atlanta and Seattle. In 1994 and again in 1998, I was invited by the Federal Judicial Center to serve as a peer reviewer for the

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[6]See: *Charles of the Ritz Group, Ltd. V. Quality King Distributors, Inc.* 832 F.2d 1317, 4 U.S.P.Q.2d 1778 (2d Cir. 1987); *Home Box Office, Inc. v. Showtime/Movie Channel, Inc.* 832 F.2d 1311, 4 U.S.P.Q.2d 1789 (2d Cir. 1987).

"Survey Reference Guide" appearing in the 1994 and 2000 editions of its *Reference Manual on Scientific Evidence.*

Under contract to the Food and Drug Administration, I developed the definition of and approach to measuring deceptive advertising used by the FDA[7]. Based upon my research into consumer use and comprehension of nutrition information, I also served as an expert on a U. S. Senate Office of Technology Assessment committee preparing nutrition education guidelines for the public.

I have been an invited speaker on the subjects of litigation surveys and consumer confusion/dilution/deception before various organizations, including the International Trademark Association, the International Bar Association, the American Intellectual Property Law Association, the Practicing Law Institute, the Federal Trade Commission, the National Association of Attorneys General, several law schools (e.g., New York University; Fordham University, Franklin Pierce Law Center; Roger Williams University; Benjamin Cardozo Law School; Santa Clara University) and a number of state (California, Virginia) and local (e.g., New York City) bar and intellectual property associations.

From 1993 through 2003, I served as a member of the Editorial Board of *The Trademark Reporter.*

Examination of J. Thomas McCarthy's 7-volume treatise "*McCarthy on Trademarks and Unfair Competition*," particularly the "Survey Evidence" section of Chapter 32, reveals that I am the most cited survey researcher in that treatise.

My research and testimony have often been considered instrumental in achieving favorable decisions and settlements. In several instances, the monetary value at stake exceeded $1 billion dollars.

Attached are selected U.S. District and Circuit court comments regarding my research and testimony. Also attached are citations to selected publications pertaining to issues that surface in litigated matters.

Qualifications as a Scholar

Since 1981, I have held an endowed chair as the Merchant's Council Professor of Consumer Behavior and Retail Management at New York University's Leonard N. Stern Graduate School of Business.

Based upon my scholarly productivity and impact, in 2011, Sage Publications identified me as one of a handful of "Legends in Consumer Behavior" and will be publishing most of my articles and book chapters as an eight volume set

[7] Jacoby, J. and Small, C. B. (1975) The FDA approach to defining misleading advertising. *Journal of Marketing, 39* (4), 65-68.

I have published six books and more than 160 book chapters and articles, most of the latter in rigorously refereed scholarly journals. Based upon my scholarly publications in the field's most rigorously reviewed peer journals, two independently conducted surveys identified me as the most influential and most frequently cited individual in the field of consumer behavior for the twenty year period spanning 1968-1988.

1. The first study, conducted by Donna Hoffman and Morris Holbrook and published in the field's leading peer-reviewed scholarly journal showed that I had the highest "influence index" of any of the field's 42 most-published scholars whose work was accepted and published by the *Journal of Consumer Research* during the 15 year period spanning 1974-1989 (Hoffman & Holbrook "The Intellectual Structure of Consumer Research," *Journal of Consumer Research*, 1993 (19), 507-517, at page 511).[8]

2. The second study[9] shows that, based on my scholarly publications in the *Journal of Marketing, Journal of Marketing Research* and *Journal of Consumer Research* (which, collectively, have traditionally been considered as the field's three most rigorous peer-reviewed journals), I was the second most often cited marketing (and first-most often cited consumer) scholar in the *Social Science Citation Index* for the 20 year period spanning 1969 through 1988. The *Social Science Citation Index* covers more than 1,400 journals worldwide.

I have been fortunate to have my research and scholarly writings accorded significant recognition. Among other honors and awards are the following:

1. In 1978, I received the American Marketing Association's Harold H. Maynard award for an article judged to have made "the most significant contribution to marketing theory and thought" during the preceding year.

2. In 1991, I received the American Academy of Advertising's first "Outstanding Contribution to Advertising" award for having made "a significant and sustained contribution to advertising research through a systematic program of research."

3. In 1995, I was the fifth recipient to be awarded the American Psychological Association's Society for Consumer Psychology bi-annual "Distinguished Scientist Award" for "sustained, outstanding contributions to the field of consumer psychology." (Basking in reflected glory, the third recipient was awarded a Nobel Prize in 2002.)

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[8] As an indication of its selectivity and rigor, the <u>rejection</u> rate at the *Journal of Consumer Research* tends to hover between 85% and 88% of the papers submitted.

[9] Joseph Cote, Siew Meng Leong and Jane Cote. "Assessing the Dissemination and Utilization of Marketing Research in the Social Sciences: A Citation Analysis Approach." School of Business, Oregon State University, August 10, 1990.

4. Based upon my research productivity, I have been elected a Fellow in the following organizations: American Psychological Association, American Psychological Society, Association for Consumer Research, Society for Consumer Psychology, Society for Law and Psychology, Society for Personality and Social Psychology. In each instance, the honor of being elected a Fellow is accorded to less than 10% of the membership. In the case of the Association for Consumer Research, it is 1%. I am also an Academic Fellow of the Center for Law and Business at New York University.

5. I am listed in numerous "Who's Who" compilations, including: *Who's Who in the World, Who's Who in America*[10], *Who's Who in Science and Engineering, Who's Who in Frontier Science and Technology, Who's Who in Advertising, Who's Who in American Education* and *Who's Who of Emerging Leaders in America*.

Approximately once every thirty years or so, an encyclopedia is published covering all the social and behavioral sciences. The third such compendium, the 24 volume *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier Science Ltd./Pergamon: Oxford, UK) was released in 2002. The fourth such compendium will be published in 2015. Of the thousands of scholars whose principal focus is the study of consumer decision making and behavior, I was the one invited to write the chapter on consumer psychology for both these editions.

I have been active in many scholarly and professional organizations, including serving as President of the American Psychological Association's Society of Consumer Psychology (in 1974) and President of the Association for Consumer Research (in 1975).

A list of selected publications in law journals and others pertinent to the legal arena is provided at the end of this document.

Last, I have served on the Editorial Boards of the leading peer reviewed scientific journals in my field (*Journal of Consumer Research, Journal of Marketing Research*) as well as journals in other disciplines (*Computers and Human Behavior, Trademark Reporter*). Until I no longer accepted such requests, I also served as an *ad hoc* reviewer for other scholarly journals (including the *Journal of Applied Psychology, Journal of Applied Social Psychology, Journal of Finance, Journal of Marketing, Journal of Nonverbal Behavior, Journal of Public Policy and Marketing, Organization Behavior and Human Performance, Public Opinion Quarterly*, and *International Journal of Research in Marketing*). The job of an Editorial Board member/reviewer is to evaluate the quality of the submitted research/writings and, for each paper, to render a "publish –do not publish" recommendation to the Editor. In the process, the reviewer determines whether and to what extent the research conforms to basic scientific standards. In this way, reviewers at peer reviewed journals serve as the "gatekeepers" of their science.

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[10] The *New York Times* (November 13, 2005, Section 9, Page 1) reports that inclusion in *Who's Who in America* is based upon "position and accomplishment;" further, the two-volume set contains approximately 109,000 entries.

JACOB JACOBY, Ph.D.

SELECTED DISTRICT AND APPELLATE COURT COMMENTS REGARDING JACOB JACOBY

"...the Court is impressed with the steps plaintiff took to insure the reliability of the survey. It was well-designed, meticulously executed and involved some of the very best experts available....plaintiff's survey results were essentially uncontroverted." *National Football League Properties, Inc. v. Wichita Falls Sportswear, Inc.*, 532 F. Supp. 651, 658 (W.D. Wash. 1982).

"Dr. Jacob Jacoby...has extensive knowledge and experience in the design and interpretation of consumer surveys, and is an expert in those areas." *National Football League Properties, Inc. v. New Jersey Giants, Inc.*, 637 F. Supp. 507, 513 (D.N.J. 1986).

"... Dr. Jacoby [is] a nationally recognized expert on consumer research. Most of the points made in his testimony...are reflected in the above discussion [by the Court]." *Frisch's Restaurant, Inc. v. Elby's Big Boy of Steubenville, Inc.*, 661 F. Supp. 971, 985 (S.D. Ohio 1987).

[Jacoby's survey provides] "very persuasive evidence of the tendency to abbreviate the Schering names and persuasive evidence of confusion." *Schering Corporation v. Schering Aktiengesellschaft*, 667 F. Supp. 175, 189 (D.N.J. 1987).

"...the court finds [Jacoby's survey] evidence thorough and convincing..." *Ferrari S.p.A. Esercizio v. McBurnie*, 11 U.S.P.Q. 2d 1843, 1846-47 (S.D. Cal. 1989), 1989 U.S. Dist. LEXIS 13442*11.

The survey "demonstrates that among consumers of alcoholic beverages a high awareness of the mark "BEAM" exists." *Jim Beam Brands Co. v. Beamish & Crawford Ltd.*, 18 U.S.P.Q. 2d 1486 n.2 (S.D.N.Y. 1990), 1990 U.S. Dist. LEXIS 13759*7n2.

"We also agree with the district court...the survey evidence...amount[s] to abundant evidence that the exterior design features...have acquired secondary meaning." *Ferrari S.p.A. Esercizio v. Roberts*, 944 F.2d 1235, 1240 (6th Cir. 1991). See also *Ferrari Esercizio S.p.A. v. Roberts*, 739 F. Supp. 1138 (E.D. Tenn. 1990).

"The court finds that Dr. Jacoby made a good faith effort to, and did, conduct fair, unbiased consumer studies using methodology consistent with both industry standards and the requirements set forth by courts for evaluating what is communicated by advertisements." *The Gillette Co. v. Wilkinson Sword, Inc. and Friedman Benjamin, Inc.*, No. 89 3586 (S.D.N.Y. 1991), 1991 U.S. Dist. LEXIS 21006*22-23C.[11]

"The results...are overwhelmingly supported by Dr. Jacoby's secondary meaning study....This court awards substantial weight to properly conducted surveys." *Conopco, Inc. v. May Department Stores Company*, 784 F. Supp. 648, 677 (E.D. Mo. 1992).

"The two [Jacoby] surveys are probative evidence of lack of confusion between the two marks." *Smartfoods, Inc. v. Hunt-Wesson, Inc.*, No. 3:92-CV-2061-D (N.D. Tex. Dec. 30, 1992).

"The consumer survey commissioned by the plaintiff....was conducted by Professor Jacob Jacoby....Dr. Jacoby conducted the consumer survey relied upon by the Court of Appeals...in...the leading trade dress case in this circuit....[T]he consumer survey conducted [in the present case]....effectively establishes that there is a likelihood of confusion." *P.T.C. Brands, Inc. v. Conwood Company L.P.*, 28 U.S.P.Q. 2d 1895, 1902, 1905, 1993 (W.D. Ky. 1993).

"The plaintiff's study, conducted by Jacob Jacoby, was far more substantial and the district judge found it on the whole credible." "Jacoby's survey was not perfect, and this is not news. Trials would be very short if only perfect evidence were admissible." Despite minor shortcomings, the Seventh Circuit concurred with the district judge "in crediting the major findings of the Jacoby study and inferring from it...that the defendant's use of the name 'Baltimore CFL Colts'...was

[11] In part, based on the three surveys we conducted for Gillette and our criticisms of the surveys offered by Wilkinson Sword, the Court (Hon. Kimba M. Wood) took the unprecedented action of determining that the advertiser (Wilkinson) and its advertising agency (Friedman Benjamin) were jointly and severally liable for the amount of the damages.

likely to confuse a substantial number of consumers." *Indianapolis Colts et al v. Metropolitan Baltimore Football Club et al*, Seventh Circuit. #94-2578. Decided Aug. 12, 1994.

"The survey evidence, whether considered direct or indirect evidence of actual confusion, tilts the analysis in favor of Anheuser Busch." "Our review of...the survey evidence convinces us that the court erred in finding no likelihood of confusion." We have considered Balducci's argument attacking the survey's findings because of alleged shortcomings in its methodology; however, like the district court, we have 'no quarrel with the [survey's] design or execution." *Anheuser-Busch, Inc. v. Balducci Publications, et al.* Eighth Circuit. #93-2196. Filed June 30, 1994.

"As will become apparent in the court's findings of fact and conclusions of law, we are persuaded that the survey, testimony and opinions of Dr. Jacoby are credible and correctly establish that the term 'air door' was generic in 1962 and remains generic. Based on case law and treatises recited in the Conclusions of Law which follow, as well as the testimony of Dr. Jacoby, the court has ruled that Plaintiff need not prove majority usage in order to establish genericness." *Berner International Corporation v. Mars Sales Company*. U.S.D.C. W.D. Penn., #89-1999. May 16, 1996.

"The Court finds that the Jacoby survey constitutes reliable evidence of actual confusion. This survey, in combination with plaintiffs' four actual confusion witnesses, is substantial evidence in favor of plaintiffs on the likelihood of confusion issue." "The Court's finding that Tour 18's written disclaimers are ineffective at reducing confusion is also supported by the Jacoby survey. The Court first notes that Jacoby is one of the leading experts in the field of consumer disclaimers. His treatise, Jacoby & Raskoff, Disclaimers as a Remedy for Trademark Infringement Litigation: More Trouble than they are Worth?, 76 *Trademark Rept.* 35 (1986), has been relied upon by many courts facing the issue of consumer disclaimers. See *Charles of the Ritz Group*, 832 F.2d at 1324; *Home Box Office*, 832 F.2d at 1315. From: *Pebble Beach Compan, Resorts of Pinehurst, Inc., and Sea Pines Company, Inc. v. Tour 18 I, L.T.D.*, U.S.D.C. S.D. Texas; No. 93-3875; Filed Sept. 10, 1996.

"However, [Jacob Jacoby,] defendants expert has raised significant issues regarding the accuracy and reliability of the survey questioning." *Aztar Corporation v. N.Y. Entertainment, L.L.C., d.b.a. Big Apple Casino Cruises, Jubilee of the Bahamas, Inc., a Bahamian Corporation, and Fred Collins, Jr.* U.S.D.C., E.D. N.Y., Memorandum and Order 97-CV-3674.

Indicating it was relying at least in part on the testimony of "defendant's expert, Dr. Jacob Jacoby" (p.575), the court found plaintiff's "studies flawed and the survey results untrustworthy and unreliable" (p.571). *Cumberland Packing Corp. et al. v. Monsanto Co., The Nutrasweet Co., et al. 32 F. Supp. 2d 561*, Filed Jan 12, 1999.

"Apple also presents survey evidence [from its survey experet, Jacob Jacoby] showing that its efforts have established an association between the trade dress and Apple in the minds of the public.... This evidence is sufficient to establish a likelihood of success in proving that the trade dress has acquired distinctiveness through secondary meaning." USDC, NDCalifornia (San Jose Division) Case #C-99-20612-JF. Filed November 5, 1999.

"... the jury was entitled to consider Dr. Jacoby's consumer survey study, which lent some support to Braun's claim that the public was confused by the ad." USDC SDNY 98 Civ 4070 (RCC). *Braun Inc. and The Gillette Company v. Optiva Corporation.* From the Memorandum decision filed February 25, 2000.

"Dr. Jacob Jacoby...conducted a consumer survey to determine the likelihood of confusion... This survey evidence supports a finding of a likelihood of confusion under Section 43(a) of the Lanham Act." USDC, ED Virginia (Alexandria Division). CA No. 99-454-A. *The Teaching Company Limited Partnership v. Unapix Entertainment, Inc.* From the "Memorandum Opinion and Final Judgment." Filed March 3, 2000.

"Nor are we persuaded by Far Eastern's contention that expert testimony by Jacoby as to the efficacy of disclaimers on its packaging should have been excluded on the basis that Jacoby was not qualified to give that testimony. Given the evidence as to Jacoby's credentials, we see no error in the court's admission of that testimony." *Bic Corp. and Wite-Out Products Inc. v. Far Eastern Source Corp.* 23 Fed Appx. 36, 2001 WL 1230706 (2nd Cir. (NY)) at 4. (Oct 12, 2001)

"DotCom offered a consumer study it commissioned of individuals in the plastics industry who used, or were likely to use a recruiting firm. This study [conducted by Jacob Jacoby] showed that only 2% of those queried appeared to know 'U.S. Search,' the type of firm it is, and the services it provides." *U.S. Search, LLC. v. U.S. Search.Com Inc.* (2002 WL 1880250 (4th Cir.(Va.))

"[T]he court begins by noting that Dr. Jacoby is a thoroughly trained and experienced market researcher, and that his survey methods and practices have been admitted by numerous courts throughout the country.... For the foregoing reasons, OneBeacon's Motion to Exclude Testimony of Jacob Jacoby is Denied." *The Beacon Mutual Insurance Co. v. OneBeacon Insurance Group.* U.S.D.C. D R.I. 253 F. Supp. 2d 221, 226; 2003 U.S. Dist. Lexis 5068, 14

"The court finds the credentials and testimony of Dr. Jacoby to be impeccable, and his rationale thoroughly persuasive. Dr. Jacoby's critique of Mr. [X's] survey, as set forth above in the findings of fact, convince the court that Mr. [X's] conclusions lack scientific validity." *Hill's Pet Nutrition, Inc. v. Nutro Products, Inc.* USDC, D Kansas (#03-4001 SAC), Memorandum and Order, March 25, 2003.

In holding for plaintiffs (and, in effect, reversing the Trademark Trial and Appeals Board), the U.S. District Court for the District of Columbia wrote: "First, the TTAB's opinion presents no defense to the critique by Dr. Jacoby that the survey improperly extrapolated the views of its respondents to the Native American population as a whole.... Instead of explaining why Dr. Jacoby's critique was flawed, the Board concludes – with no explanation – that the survey 'represents the views of the two populations sampled.' Dr. Jacoby's criticisms, while listed by the TTAB, are never engaged. ... The Court, therefore, concludes that the TTAB's decision to extrapolate the results of [defendants'] survey ... was not supported by substantial evidence. Critiques by Dr. Jacoby went unanswered in the TTAB opinion." *Pro-Football, Inc. v. Susan Shown Harjo, et al.* Civ. Action No. 99-1385 (CKK), Memorandum Opinion of September 30, 2003, at pages 39 – 41.

Plaintiff's expert's "methodology was severely criticized by defendant's witness, Dr. Jacob Jacoby, an extremely well qualified expert in consumer behavior and research methodology." [Footnote 14 appended to the word "methodology" reads, in part:] "Counsel also cross-examined Dr. Jacoby on the handful of cases in which his findings had been criticized, suggesting that Dr. Jacoby had intentionally 'rigged a survey to get a particular result.' I have read those cases, and I have read cases that laud Dr. Jacoby's credentials and research. I do not find it surprising that a witness who has testified in over 100 cases has been criticized from time to time, and find Dr. Jacoby is a highly qualified and well-recognized expert in consumer confusion and survey evidence" [citations omitted]. *Wells Fargo & Co., et al. v. WhenU.com, Inc.* U.S.D.C., E. D. MI (Southern Division). Case No. 03-71906 (NGM). Memorandum Opinion and Order Denying Plaintiff's Motion for Preliminary Injunction. Nov. 19, 2003.

"... Defendant WhenU.com produced Dr. Jacob Jacoby. Dr. Jacoby attacked [Plaintiff's survey] on a number of fronts." *1-800-Contacts, Inc. v. WhenU.com and Vision Direct USDC, SDNY*, Decided Dec 22, 2003, Filed Dec 23, 2003. *U.S. Dist. LEXIS 22932*, * (at page 10). The court then adopted many of these criticisms (see pages 23-25).

"Based upon Dr. Jacoby's testimony, his expert report, the evidence regarding the methodology and questions employed in conducting the survey, and answers given by the survey respondents, the Court finds that Dr. Jacoby's survey results are persuasive evidence that actual confusion is likely." *Red Bull GmBH and Red Bull North America, Inc. v. Matador Concepts, Inc. and Leslie A. Gilmer*. U.S.D.C. CD CA. Decided Jan 13, 2006, Filed Jan 13, 2006. Case No. CV 04-9006-JFW (PLAx).

"There was a second survey that was offered into evidence. Lancome chose a renowned expert to design its study. Jacoby designed a survey for Lancome to test the extent to which use of the word Juicy in connection with Lancome was likely to cause confusion.... It found negligible, if any, evidence of confusion. [FN 33: "It is unnecessary to spend time addressing Couture's attacks on the Jacoby survey... Suffice it to say that the attacks on Jacoby's well-designed survey were strained and unpersuasive."] From the Opinion and Order, *Juicy Couture, Inc. and L.C. Licensing, Inc. v. L'Oreal USA, Inc. and Luxury Products, LLC*. U.S.D.C. S.D.N.Y. April 19, 2006. 04 Civ. 7203 (DLC).

APPENDIX B

CURRICULUM VITA OF JACOB JACOBY

ACADEMIC CURRICULUM VITA

Name: **Jacob (Jack) Jacoby**

Home address and phone:

160 West 66th Street

Apartment PHA

New York, N.Y. 10023

212-721-9005; 212-769-2700

Vita updated: January 1, 2012

N.Y.U. office address and phone:

Stern School of Business

New York University

40 West 4th Street, Room 909
New York, NY 10012

212-998-0515

EDUCATION:

Ph.D. Michigan State University (1966)

Major: Social Psychology; Minors: Statistics, Sociology

M.A. Brooklyn College, The City University of New York

(1963) Psychology

B.A. Brooklyn College, The City University of New York

(1961) Psychology

PROFESSIONAL EXPERIENCE:

1981 - present: **Merchants Council Professor of Consumer Behavior and Retail Management,** Stern School of Business, New York University.

1981 - 1985: Merchants Council Professor of Marketing, New York University and Director of the Institute of Retail Management.

1975 - 1981: Professor, Department of Psychology, Purdue University

1971 - 1975: Associate Professor, Department of Psychology, Purdue University.

1968 - 1971:	Assistant Professor, Department of Psychology, Purdue University
1976 (Jun.-Jul.)	Guest Professor, SFB 24, University of Mannheim, Mannheim, Germany
1975 (May):	Guest Professor, SFB 24, University of Mannheim, Mannheim, Germany
1965 - 1968:	Active duty (U.S. Air Force). Served as Chief, Behavioral Science Branch, the National Security Agency, Fort George G. Meade, Maryland. Duties were primarily to plan and conduct applied research in industrial/organizational psychology. Security clearance: Top Secret.
1966 - 1968:	(Part-time) Assistant Professorial Lecturer, Department of Business and Public Administration George Washington Univ. Promoted to Associate Prof. Lecturer the semester I left.

MEMBERSHIPS IN PROFESSIONAL ORGANIZATIONS:

American Association for Public Opinion Research (1967-1968, 1972-1973; 1982-2008)

American Marketing Association (1968-present)

American Psychological Association (Associate, 1963-1967; Member, 1968-1972; Fellow, 1973-present. Also elected to Fellow status by Divisions 8, 23 and 41.)

American Psychological Society (1996-present; Fellow 1998)

American Psychology-Law Society (1988-present; Fellow 1994)

Association for Consumer Research (1969-present; Fellow 1993)

International Trademark Association (1991-present)

Market Research Council (1989-present)

Midwestern Psychological Association (Member, 1968-1975)

Sigma Xi, The Scientific Research Society of North America (Associate Member, 1962-1968; Member, 1969-1981)

Society for the Psychological Study of Social Issues (Member, 1963-1968)

Society for Judgment and Decision Making (Member, 1986-1990)

ACTIVITIES IN PROFESSIONAL ORGANIZATIONS:

1. American Psychological Association

- Member, Council of Representatives (governing body of APA), 1971-1973
- Member, Committee on Student Aid (COSA), 1973.

2. **Society of Consumer Psychology** (Division 23) of the American Psychological Association

- PRESIDENT, September 1973 to August 1974
- Representative to APA Council of Representatives, 1971-1973
- Member, Committee on Scientific and Professional Affairs, 1968-1971
- Chairman, Convention Program Committee, 1970-1971
- Contributing Editor, The Communicator, Division 23 Newsletter, 1970-1973
- Chairman, Membership Committee, 1971-1971
- Member, Membership Committee, 1972-73
- Policy Board Representative to the Journal of Consumer Research, 1971-1974, 1976-1978; Alternate Representative, 1974-1975
- Chairman, Fellowship Committee, 1975; 1980; Member, 1979, 1981
- Chairman, Election Committee, 1975

3. **Association for Consumer Research**

- PRESIDENT, 1975
- Member, Advisory Council (ACR's governing body thru 1972), 1969-1972
- Member, Executive Committee, 1973-1974, 1976
- Member, Program Committee, 1970-1971

- Member, Publications Committee, 1970-1972

- Chairman, Publications Committee, 1973

- Editor, ACR Newsletter, 1973

- Chairman, Election Committee, 1976

- Member, Election Committee, 1975, 1977

- Policy Board rep., *Journal of Consumer Research,* 1981-1984

4. American Association of Public Opinion Research

- Member, Professional Standards Revision Committee, 1983-1984

- Policy Board rep., *Journal of Consumer Research*, 1984-1986

- Member, ad hoc committee on changing *P.O.Q.* publisher, 1986

5. Market Research Council

- Executive Committee, Member at Large, 1991-1992

- Chairman, Marketing "Hall of Fame" Award Committee 1991-1992

6. International Trademark Association

- Member, Editorial Board, *The Trademark Reporter*, 1993-2003
- Member, Advisory Board, Brand Names Educational Foundation,2004-6

OTHER PROFESSIONAL ACTIVITIES:

1. Editorial Board Memberships.

- *Journal of Consumer Research,* Founding member of JCR and Member, Editorial Board, 1973-1974.

- Member, Policy Board (group that selects editors and, initially,established journal policies) Representing APA-Division 23, 1971-1974, 1976-78; Alternate, 1974-1975; Representing ACR: 1981-1984; Representing AAPOR: 1984-1986; Vice Chairman of Policy Board: 1984-1986;

- *Journal of Marketing Research*, Member, Editorial Board, 1972-1974.

- *Computers in Human Behavior*, Member, Editorial Board, 1984-1994.

- *Trademark Reporter*, member, Editorial Board, 1993-present.

2. Reviewer of Manuscripts

- American Psychological Association, Annual Conventions: 1970-1976

- Association for Consumer Research, Annual Conventions: 1971, 1972, 1974, 1978, 1979, 1986, 1989, 1990

- ACR European Conference, 1995

- *Organization Behavior and Human Performance* - 1971

- 1972 American Marketing Association, Fall Convention

- 1972 Research Design Competition, APA-Division 23

- *Journal of Applied Social Psychology* 1972, 1984

- *Journal of Applied Psychology* 1972

- *Public Opinion Quarterly*, 1973, 1974

- *Journal Supplement Abstract Service*, Am. Psych. Assn. 1975

- American Marketing Association, 1979 Ph.D. dissertation competition

- *Journal of Marketing* (1980)

- *Journal of Finance* (1985)

- *Journal of Nonverbal Behavior* (1988)

- *International Journal of Research in Marketing* (1988)

- "Marketing and Public Policy" conference 1995,

- *Journal of Public Policy and Marketing*, 1997-1999

- *Reference Manual on Scientific Evidence*. 1994 and 2000 editions. Federal Judicial Center, Washington, D.C.

3. Reviewer of Proposals

- National Science Foundation (1973, 1974, 1975, 1976, 1979, 1980, 1986, 1988)
- Social Science Research Council of Canada (1981)
- Food and Drug Administration(1975)
- Million Dollar Round Table (1979)

4. Reviewer of Advertising

- Judge, 1991 Effie Awards (annual award for Advertising effectiveness)

HONORS AND AWARDS:

1969 - Admitted into Sigma Xi, the National Honorary Society of Science.

1973 - Elected a Fellow of the American Psychological Association

1973 - Elected a Fellow of the Division of Consumer Psychology

1981 - Elected a Fellow of the Division of Personality and Social Psychology

1995 - Elected a Fellow of the Division of Law and Psychology

1973 - **President**, Division of Consumer Psychology, the American Psychological Association.

1975 - **President**, the Association of Consumer Research.

1978 – Recipient of the American Marketing Association's **Harold H. Maynard Award** for the article making the most "significant contribution of marketing theory and thought" in the *Journal of Marketing*, 1978.

1991 - First recipient, American Academy of Advertising's **Outstanding Contribution to Advertising Award** for having "made a significant sustained contribution to advertising research through a systematic program of research."

1993 - Elected a **Fellow** of the Association of Consumer Research

1995 – Recipient of the Society of Consumer Psychology's fifth bi-annual **Distinguished Scientific Research Award.**

2001 - Appointed an Academic Fellow, the Center for Law and Business, New York University.

2011 - Based upon scholarly impact on the field of consumer behavior, selected by editors at Sage Publication as a "Legend in Consumer Behavior." Sage will be publishing many of Jacoby's writings in 1213 as an 8 or 9 volume set.

Listed in:

Who's Who in the World

Who's Who in America

Who's Who in the East

Who's Who in Frontier Science and Technology

Who's Who of Emerging Leaders in America

Who's Who in Advertising

Who's Who in American Education

Men of Achievement

BOARD OF DIRECTORS:

1991-1994 - Advertising Educational Foundation. (New York)

MAJOR RESEARCH GRANTS AND CONTRACTS (Total: more than $1.1 million):

$148,000

from the National Science Foundation for studying: "Amount, type, and order of package information acquisition in purchasing decisions." For the period from June 1, 1974 to December 30, 1976. (GI-43687).

$155,000

from the Federal Trade Commission for: "Study of likely impact of disclosure of life insurance costs on agent and consumer behavior." For the period from January 1, 1977 to August 4, 1978. (L0226).

$181,000

from the American Association of Advertising Agencies for studying: "The Miscomprehension of Televised Communication". For the period from February 1978 through February 1980.

$353,000

from the National Science Foundation for studying: "Assessing the effects of science based information on consumer technological choices." (Co-authored with James J. Jaccard). For the period from February 15, 1980 through August 31, 1983 (PRA7920585).

$270,000

from The Advertising Educational Foundation, Ind. (Co-sponsored by the American Association of Advertising Agencies and the American Advertising Federation) for studying: "The Miscomprehension of Print Communication". For the period from January 1983 through December 1985.

M.S. THESIS AND Ph.D. DISSERTATION:

Jacoby, J. "Imprinting: An experimental approach to a biphasic interpretation." Unpublished Master's Thesis, Brooklyn College, 1963. (Major Professor: Howard Moltz)

Jacoby, J. "Situational anxiety and ordinal birth position as determinants of dogmatism and authoritarianism." Unpublished Doctoral Dissertation. Michigan State University, 1966. (Major Professor: Milton Rokeach) See: *Dissertation Abstracts A. Humanities and Social Science*, 1967, 27, p. 4338-A.

PUBLICATIONS

BOOKS

1. Jacoby, J. and Chestnut, R.W. (1978) *Brand loyalty: Measurement and management.* New York: John Wiley and Sons.

2. Jacoby, J., Hoyer, W.D. and Sheluga, D.A., (1980) *The miscomprehension of televised communication.* New York: American Association of Advertising Agencies.

3. Jacoby, J. and Craig, C.S. (Eds.), (1984) *Personal selling: Theory, Research and Practice.* Lexington Books, Lexington, Mass.

4. Jacoby, J. and Olson, J.C., (Eds.), (1984) *Perceived quality: How consumer view stores and merchandise.* Lexington Books, Lexington, Mass.

5. Jacoby J. and Hoyer, W.D., (1987) *The comprehension and miscomprehension of print communications: An investigation of mass media magazines.* Lawrence Erlbaum Associates, Hillsdale, New Jersey.

6. James Jaccard and Jacob Jacoby (2010) *Theory Construction and Model Building Skills: A Practical Guide for Social Scientists.* New York: Guilford Press.

7. Jacob Jacoby (2013, forthcoming) *Trademark Surveys.* Chicago: The American Bar Association

8. Jacob Jacoby and James Jaccard (In preparation) *Generalizing from Research: External validity and Generalizability.*

SELECTED UNPUBLISHED MONOGRAPHS:

1. Uh1, J.N., Armstrong, J., Courtenay, H.V., Ishida, J.T., Kepner, K.W., Potter, H.C., and Jacoby, J. (1970) *Survey and evaluation of consumer education programs in the United States.* (2 volumes). Purdue Research Foundation, Lafayette, Indiana. March. 666 pages. Microfilm $2.50; hard copy $33.40 (Available from: ERIC Document Reproduction Service, ED-038-549, Fairmont Avenue, Bethesda, Maryland 20014).

2. Jacoby, J., Olson, J.C., Szybillo, G.J., and Hart, E.W. Jr. (1975) *Affirmative nutritional disclosure in advertising and selected alternatives: The likely impact on consumer behavior.* Washington, D.C.: Consumer Research Institute (Grocery Manufacturers of America, Inc.), December.

3. Jacoby, J. and Olson, J.C. (1976) *Consumer reaction to price: An attitudinal, information-processing perspective.* Unpublished; 100 pages. (A 30-page condensation was published as article #69; see below).

4. Jacoby, J. and Chestnut, R.W. (1977) *Amount, type, and order of package information acquisition in purchasing decisions.* Final report to the National Science Foundation (GI-43687), June.

5. Jacoby, J. (1980) *Psychological foundations of consumer behavior: Lecture notes.* Bloomington, Indiana: TIS Incorporated, Publishing Division. (160 pages).

6. Jacoby, J. and Jaccard, J.J. (1984) *The influence of health and safety information on consumer decision making concerning new technological products.* Final report to the National Science Foundation, June.

PUBLISHED TEST:

Jacoby J. and Terborg, J.R. (1975) *The Managerial Philosophies Scale.* Teleometrics International, The Woodlands, Texas. Copyright. This is a 36-item Likert-type instrument designed to assess McGregor's Theory X-Theory Y managerial orientations. An Examiner's Manual is available (through Teleometrics), as is a manuscript describing the scale's empirical development (entitled: "Development and Validation of Theory X and Y scales for assessing McGregor's Managerial Philosophies").

ARTICLES:

1. Jacoby, J. (1967) The construct of abnormality: Some cross-cultural considerations. *Journal of Experimental Research in Personality, 2,* 1-15.

2. Jacoby, J. (1967) Open-mindedness and creativity. *Psychological Reports, 20, 822.*

3. Jacoby, J. (1968) Birth-rank and pre-experimental anxiety. *Journal of Social Psychology, 76,* 9-11.

4. Jacoby, J. (1968) Examining the *other* organization: A methodology for studying informal organizational structure of complex organizations. *Personnel Administration, 31,* 36-42.

5. Jacoby, J. (1968) Work music and morale: A neglected but important relationship. *Personnel Journal, 47,* 882-886.

6. Jacoby, J. (1968) Creative ability of task-oriented versus person-oriented leaders. *Journal of Creative Behavior, 2*, 249-253.

7. Jacoby, J. (1969) Time perspective and dogmatism: A replication. *Journal of Social Psychology, 7*, 281-82.

8. Jacoby, J. (1969) Accuracy of person perception as a function of dogmatism. *Proceedings, 77th Annual Convention*, American Psychological Association, 4, 347-348.

9. Jacoby, J. (1970) The plight of the uniformed Air Force Psychologist. *Professional Psychology, 1*, 383-387.

10. Jacoby, J. (1971) Personality and innovation proneness. *Journal of Marketing Research*, 8, 244-247. Reprinted in: H.H. *Kassarjian and T.S. Robertson (Eds.), Perspectives in Consumer Behavior* (2nd ed.). Glenview, Illinois: Scott Foresman, 1973, pp. 149-155. (A one-page abstract appears in David L. Sparks (Ed.). *Broadening the Concept of Marketing*. Chicago: American Marketing Association, 1970.)

11. Jacoby J. (1971) A model of multi-brand loyalty: Preliminary results and promotional strategies. *Journal of Advertising Research, 11*(3), 25-31.

12. Jacoby, J. (1971) Training consumer psychologists: The Purdue University program. *Professional Psychology, 2*, 300-302.

13. Jacoby, J. (1971) A multiple-indicant approach for studying new product adopters. *Journal of Applied Psychology, 55*, 384-388. Reprinted in M. Wallendorf and G. Zaltman (Eds.), *The Consumer Behavior of Individuals and Organizations*. N.Y.: John Wiley, 1979.

14. Jacoby, J. (1971) Interpersonal perceptual accuracy as a function of dogmatism. *Journal of Experimental Social Psychology, 7*, 221-236.

15. Jacoby, J. (1971) Brand loyalty: A conceptual definition. *Proceedings 79th Annual Convention*, American Psychological Association, 6, 655-656.

16. Jacoby, J. and Aranoff, D. (1971) Political polling and the lost letter technique. *Journal of Social Psychology, 83*, 209-212.

17. Jacoby, J. and Matell, M. (1971) Three point Likert scales are good enough. *Journal of Marketing Research, 8*, 495-500.

18. Jacoby, J., Olson, J.C., and Haddock, R.A. (1971) Price, brand name, and product composition characteristics as determinants of perceived quality. *Journal of Applied Psychology, 55*, 570-579.

19. Deering, B.J. and Jacoby, J. (1971) The effect of "alternative relationships" and "relative resources" on consumer decisions between mother and child. In David M. Gardner (Ed.) *Proceedings, Second Annual Conference*, The Association for Consumer research, 1, 135-142.

20. Matell, M.S. and Jacoby, J. (1971) Is there an optimal number of alternatives for Likert scale items? Study I: Reliability and validity. *Educational and Psychological Measurement, 31*, 657-674.

21. Olson, J.C. and Jacoby, J. (1971) A construct validation study of brand loyalty. *Proceedings, 79th Annual Convention*, American Psychological Association, 6, 657-658.

22. Jacoby, J. (1972) Opinion leadership and innovativeness: Overlap and validity. In M. Venkatesan (Ed.), *Proceedings, Third Annual Conference*, The Association for Consumer Research, 2, 632-649.

23. Jacoby, J. and Kaplan, L.B. (1972) The components of perceived risk, In M. Venkatesan (Ed.), *Proceedings, Third Annual Conference*, The Association for Consumer Research, 2 382-393.

24. Bowen, D.D., Perloff, R. and Jacoby, J. (1972) Improving manuscript evaluation procedures. *American Psychologist, 27*, 221-225.

25. Deering, B.J. and Jacoby, J. (1972) Price intervals and individual price limits as determinants of product evaluation and selection. In M. Venkatesan (Ed.), *Proceedings, Third Annual Conference*, The Association for Consumer Research, 2, 145-166.

26. Deering, B. J. and Jacoby, J. (1972) Risk enhancement and risk reduction strategies for handling perceived risk. In M. Venkatesan (Ed.), *Proceedings, Third Annual Conference*, The Association for Consumer Research, *2*, 404-416.

27. Heimbach, J.T. and Jacoby, J. (1972) The Zeigarnik effect in advertising. In M. Venkatesan (Ed.), *Proceedings, Third Annual Conference*, The Association for Consumer Research, *2*, 746-748.

28. Matell, M.S. and Jacoby, J. (1972) Is there an optimal number of alternatives for Likert scale items? Effects of testing time and scale properties. *Journal of Applied Psychology, 56*, 506-509.

29. Olson, J.C. and Jacoby, J. (1972) Cue utilization in the quality perception process. In M. Venkatesan (Ed.), *Proceedings, Third Annual Conference*, The Association for Consumer Research, 2, 167-179.

30. Szybillo, G.J. and Jacoby, J. (1972) The relative effects of price, store image, and intrinsic product differences on product quality evaluation. In M. Venkatesan (Ed.), *Proceedings, Third Annual Conference*, The Association for Consumer Research, 2, 180-186.

31. Jacoby, J., Kohn, C.A. and Speller, D.E. (1973) Time spent acquiring product information as a function of information load and organization. *Proceedings, 81st Annual Convention*, American psychological Association, 8 (2), 813-814.

32. Jacoby, J. and Kyner, D.B. (1973) Brand loyalty vs. repeat purchasing behavior. *Journal of Marketing Research*, 10, 1-9.

33. Hart, E.W. and Jacoby, J. (1973) Novelty, recency, and scarcity as predictors of perceived newness. *Proceedings, 81st Annual Convention*, American Psychological Association, 8 (2), 839-840.

34. Hollander, S.W. and Jacoby, J. (1973) Recall of crazy, mixed-up TV commercials. *Journal of Advertising Research, 13* (3), 39-42.

35. Kohn, C.A. and Jacoby, J. (1973) Operationally defining the consumer innovator. *Proceedings, 81st Annual Convention*, American Psychological Association, 8 (2), 837-839.

36. Szybillo, G.J., Jacoby, J. and Busato, J. (1973) Effects of integrated advertising on perceived corporate hiring policy. *Proceedings, 81st Annual Convention*, American Psychological Association, 8 (2), 815-816.

37. Jacoby, J. (1974) Consumer reaction to information displays: Packaging and advertising. In S.F. Divita (Ed.), *Advertising and the Public Interest.* Chicago: American Marketing Association, 101-118.

38. Jacoby, J. (1974) Consumer behavior: A neglected but fertile field for psychological research. *Contemporary Psychology, 19* (7), 543. (Review of S. Ward and T.S. Robertson, Eds., *Consumer Behavior: Theoretical Sources.* Englewood Cliffs, N.J., Prentice-Hall.)

39. Jacoby, J. (1974) The construct validity of opinion leadership. *Public Opinion Quarterly, 38* (1), 81-8

40. Jacoby, J. and Olson, J.C. (1974) An extended expectancy model of consumer comparison process. In S. Ward and P. Wright (Eds.), *Advances in Consumer Research*, 1 319-333. Urbana, Illinois: Association for Consumer Research.

41. Jacoby, J., Speller, D.E. and Kohn, C.A. (1974) Brand choice behavior as a function of information load. *Journal of Marketing Research, 11* (1), 63-69.

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1972 - Hart, Edward W., Jr.	as above
1972 - (Berning) Kohn, Carol A.	as above
1972 - Szybillo, George J.	as above
1972 - Wolf, Robert N.	Cedarhurst, New York
1974 - (Schach) Busato, Jacqueline	Ontario, Canada
1974 - Williams-Jones, Joyce A.	Private Business Mexico
1974 - Speller, Donald E.	Donald Speller & Associates Toronto, Ontario, Canada
1975 - Chestnut, Robert W.	as above
1975 - Weigl, Karl	Unknown
1976 - Silva-McSorley, Rasario	Homestead, Florida
1978 - Sheluga, David A.	as above

1979 - Hoyer, Wayne D.	as above
1979 - Pite, Elizabeth	Pite Plus Marketing Hartford, Connecticut
1980 - Nelson, Margaret C.	Unknown
1981 - Zimmer, Mary R.	Department of Marketing University of Georgia
1984 - Troutman, Tracy	Hershey Foods Corp. Hershey, PA

Jacob Jacoby -- Publications
2000 – 2012

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APPENDIX C

JACOB JACOBY - 2009 COURTROOM TESTIMONY

Apr 14	Before Judge Marilyn L. Huff U.S.D.C S.D. California Brighton Collectibles, Inc. v. **Marc Chantal USA, Inc.** Trade dress matter
Oct 7	Before Judge Ann D. Montgomery U.S.D.C. Minnesota Mooney et al. (class) v. **Allianz Life Ins. Co., No. America** Deceptive sales practices matter
Nov 6	Before Judge Ann D. Montgomery U.S.D.C. Minnesota Fair Isaac Corp. (FICO) et al. v. **Experian, Equifax and TransUnion** Likely confusion matter

JACOB JACOBY - 2011 COURTROOM TESTIMONY

Jan 18	Before an arbitration panel Arbitration Services of Portland Bibiji Inderjit Kaur Puri v. Golden Temple of Oregon, LLC Secondary meaning/likely confusion matter Arbitrators: Jeff Edelson: http://www.mhgm.com/showattorney.asp?Show=45 Alan McCollum: http://www.techlaw.com/ Peter Staples: http://www.chernofflaw.com/showbio.aspx?show=631

JACOB JACOBY – 2012 COURTROOM TESTIMONY

Mar 29 and Apr 2	Before Judge Sidney H. Stein U.S.D.C. S.D.N.Y. **Fresh Del Monte Produce, Inc.** v. Del Monte Foods Co and Del Monte Corp. Deceptive advertising/packaging matter
May 14	Before Judge James Spencer U.S.D.C. E.D. Virginia (Richmond) Pennington Seed, Inc. v. **The Scotts Miracle-Gro Company** Deceptive advertising/packaging matter
Oct 19	Before Judge Andrew J. Guilford U.S.D.C. C.D. Ca. **Mixed Chicks LLC** v. Sally Beauty Supply et al. Trademark and trade dress confusion matter

JACOB JACOBY - 2008 DEPOSITION TESTIMONY

Jan 24	Brighton Collectibles v. **Marc Chantal** Trade dress confusion matter USDC, SD CA
May 1	Polaroid v. **Hewlett-Packard** Patent matter U.S.D.C. D. Delaware C.A. No 06-738 (SLR) (2007).
Jul 5	The Evercare Co. v. **3M Company** Materiality and deceptive labeling matter USDC, ND GA
Nov 20	Ameritox, Ltd. v. **Aegis Sciences Corp.** Deceptive advertising matter USDC, SD FL
Dec 15	Fair Isaac Corp. v. **Equifax et al.** Likely confusion & deceptive advertising matter U.S.D.C. D. Minnesota

JACOB JACOBY - 2009 DEPOSITION TESTIMONY

Jan 21	**Viacom et al.** v. Activision et al. Likelihood of Confusion Issue JAMS Arbitration Tribunal
Jan 23	Factory Five Racing, Inc. v. **Carroll Shelby & C. H. Shelby Trust** Trade dress matter U.S.D.C.
Mar 3	**Kerzner International Ltd. et al.** v. Monarch Casino & Resort Likely confusion matter U.S.D.C. D. Nevada
Jul 18	Picture Me Press v. Portrait Corp. of America, **CPI Corp. and CPI Images.** Trademark matter U.S.D.C. Northern District of Ohio
Aug 12	**Laryngeal Mask Co, Ltd. & LMA NA, Inc.** v. Ambu A/S, et al. Deceptive advertising matter U.S.D.C. S.D. CA
Oct 16	**j2 Global Communication et al.** v. Zilker Ventures et al. Trademark matter U.S.D.C. S.D. CA

JACOB JACOBY - 2010 DEPOSITION TESTIMONY

Jun 30	**Mirror Worlds**, Inc. v. Apple Inc. Patent matter U.S.D.C. E.D. TX (Tyler Div.) 08cv88
Oct 7	**Fresh Del Monte** v. Del Monte Corp. Deceptive advertising/packaging matter U.S.D.C. S.D.N.Y 08 Civ-8718 (SHS)

JACOB JACOBY - 2011 DEPOSITION TESTIMONY

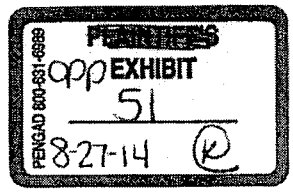
May 6	Am. Express Marketing & Development Corp. et al. v. **Black Card LLC** Secondary Meaning U.S.D.C. S.D.N.Y. 10 CIV 1605 (DLC)
May 7, 19	**Dongguk University** v. Yale University Reputational damage U.S.D.C. D.Conn 308CV00441 RNC
June 2	Louis Vutton v. **Hyundai** Trademark confusion U.S.D.C. S.D.N.Y. 10 CIV 1611 (PKC)

JACOB JACOBY - 2012 DEPOSITION TESTIMONY

Apr 24	Munchkin, Inc. v. **The First Years, Inc.**, et al. Materiality of patent markings U.S.D.C. C.D. CA, CV10-2219-GW(AGRx).
Apr 26	Apple Inc. v. **Samsung Electronics et al.** Secondary meaning U.S.D.C. N.D.Ca Case No. 11-cv-01846-LHK
May 4	**FLIR Systems, Inc.** v. Sierra Media, Inc. and Fluke Corp. Confusion and deception matter U.S.D.C. D. Oregon (Portland Division) CV 10-971-HU
May 23	**Mixed Chicks LLC** v. Sally Beauty Supply et al. Trademark and trade dress confusion matter U.S.D.C. C.D.Ca Case No. SACV11-452-AG (FMOx)
July 26	Moldex v. **McKeon** Trade dress matter U.S.D.C. C.D. Calif (Western Division) CV11-01742 GHK (AGR)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD



BALANCE BAR COMPANY, Opposer, - v- GFA BRANDS, INC. Applicant.	)	Opposition No. 91196954 Opposition No. 91197748 SUPPLEMENTAL REBUTTAL REPORT OF OPPOSER'S EXPERT <u>JACOB JACOBY, Ph.D.</u>

1. My full name is Jacob Jacoby. I am the same Jacob Jacoby that submitted an earlier Rebuttal Report in this matter. Appendices A, B and C to the earlier Rebuttal provide information responsive to my qualifications and the Rule 26 (Fed. R. Civ. P.) requirements. The only material changes in my qualifications since then are noted here in Appendix A to this Supplemental Rebuttal report.

2. The purpose of this Supplemental Rebuttal is to express in clear and cogent fashion a criticism of the Leo Shapiro/Johnson Survey I noted, and was questioned about at length (see page 6, line 2 through page 27, line 18), during my January 22, 2013 deposition.

3. Specifically, in paragraph 4 of his July 2012 *Study of Likelihood of Confusion*, Mr. Johnson writes: "In its oppositions, Balance Bar claims its trademark is famous and has been famous since before GFA's application filing date" [footnote omitted]. Presumably based upon

this claim, Mr. Johnson decided to design and employ an Eveready format survey to test for likelihood of confusion.

4. Other than accepting Opposer's claim, Mr. Johnson never supplies any data to support the contention that the mark truly is famous in the minds of consumers. Without such data, use of the Eveready format is contra-indicated and completely inappropriate. As explained in an influential article by Swann:

> If, however, the senior mark is not accessible, it obviously cannot be cued irrespective of mark and product similarity. "When an open-end question [is] used [in connection with] a mark that is not particularly well known, it needs to be understood that the 'top-of-mind' awareness of the brand ... required [by the Eveready format] may significantly underestimate [likelihood of] confusion.'"[1]

5. That is, unless a mark is readily accessible in memory (i.e., can easily be recalled by respondents without being aided or cued), there is little chance that when exposed to the allegedly infringing mark, the first-comer's mark will come to the fore in respondents' minds. Such circumstances call for the use of a modified Squirt format. As Swann writes:

> Over time, the Squirt format has come to be used in cases where the accessibility of the senior mark in consumers' memory is low to non-existent, so that it must be made *externally available* to respondents as part of the survey design.[2]

---

[1] Jerre B. Swann, Likelihood of Confusion Studies and the Straitened Scope of Squirt. *The Trademark Reporter*, 98:3, May-June 2008, at 745. Similarly, Prof. McCarthy writes: "To be confused, the customer must have the senior user's mark in mind." See *McCarthy on Trademarks and Unfair Competition* § 11.24.

[2] Swann, at 740.

6. As I indicated during my deposition testimony (page 107, lines 16-22), I would not use an Eveready protocol unless there was reliable evidence of consumers being aware, on an unaided basis, of the Balance Bar mark. Without that, if you use an Eveready protocol, you are virtually guaranteed to get either no, or very low, artificially depressed levels of likely confusion.

Pursuant to 28 U.S.C. Section 1746, I declare under penalty of perjury that, based upon the information available to me, to the best of my knowledge, the foregoing is true and correct.

Oct 2, 2013
Date

Jacob Jacoby, Ph.D.

APPENDIX A

NEW PUBLICATION

Jacob Jacoby, Trademark Surveys: Designing, Implementing and Evaluating Surveys (August 2013). Chicago: American Bar Association, Section of Intellectual Property Law.

2013 COURTROOM TESTIMONY

May 22	Before Judge Jed Rakoff U.S.D.C. S.D.N.Y. Bayer Healthcare v. **Sergeant** Deceptive advertising matter
July 30	Before Judge James R. Spencer U.S.D.C. E.D.VA (Richmond) **Scott's** v. Pennington Deceptive advertising matter

2013 DEPOSITION TESTIMONY

Jan 22	**Balance Bar Co** v. GFA Brands Likelihood of confusion matter U.S.P.T.O. T.T.A.B.
May 16	**Stonefire Grill, Inc**. v. FGB Brands D/B/A Stonefire Authentic Flatbreads Likelihood of confusion matter U.S.D.C. C.D. California
June 4	Pennington Seed, Inc. v. **The Scotts Co., Inc.** Deceptive Advertising Matter U.S.D.C. E.D. VA (Richmond Div.)
Sep 11	Paleteria La Michoacana et al. (cross-defendants) v. **Productos Lacteos Tocumbo S.A. de C.V.** (PROLACTO) (cross-plaintiff) Likely confusion and deceptive advertising matter U.S.D.C. District of Columbia
Sep 16	**Jackson Family Wines** v. Diageo Likely confusion matter U.S.D.C., N.D. California

Jacob Jacoby

TRADEMARK SURVEYS Volume I

Designing, Implementing, and Evaluating Surveys

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must involve an array either in the first instance, in the second instance, or in both; showing respondents one mark in isolation followed by the second mark in isolation would not qualify the survey to be considered a *Squirt* variant. Sometimes, the first and second arrays are shown in the same room (with both being covered at the outset of the interview and both never being uncovered at the same time) or in different rooms, the latter sometimes being called a two-room survey. Another modification is that, unlike using commercials for Lysol disinfectant and Kraft cheese as distracters as was done in the original survey, to make the task more realistic and difficult, the distracter stimuli are generally different brands from within the same product category.

For various reasons, some courts have been more critical of *Squirt* surveys than of *Eveready* surveys. Their criticisms generally have to do with making respondents aware of plaintiff's mark when they might not have been prior to the survey,[224] and the failure of sequential arrays to adequately reflect marketplace conditions.[225]

7.54 Testing Dilution

No widely accepted protocols have evolved for testing fame, dilution by blurring, or dilution by tarnishment. A discussion of different procedures for measuring these concepts is provided elsewhere.[226]

7.60 Fundamental Respondent Tasks

Regardless of where the survey takes place or how it is administered, respondents are asked to participate in two fundamental tasks—experience stimuli and react to these stimuli. As discussed earlier (section 7.20), the stimuli include the questions the respondents are asked, and the test, filler, comparison, and control items (which may be products, advertisements, marks, trade dress, brochures or other forms of communication, etc.) they are shown, the interviewer if one is part of the survey, and so on. Chapter 8 focuses on the questions asked; chapter 9 covers interviewers and other aspects of administration. Here we focus on the two fundamental respondent tasks.

224. Nat'l Distillers Prods. Co. v. Refreshment Brands, Inc., 198 F. Supp. 2d 474, 484 (S.D.N.Y. 2002).

225. *See, e.g.*, THOIP v. Walt Disney Co., 690 F. Supp. 2d 218, 240 (S.D. (N.Y. 2010); THOIP v. Walt Disney Co., 788 F. Supp. 2d 168, 182 (S.D.N.Y. 2011); Kargo Global, Inc. v. Advance Magazine Publishers, Inc., 2007 WL 2258688 (S.D.N.Y. 2007).

226. *See* Jacob Jacoby, *Considering the Who, What, When, Where and How of Measuring Dilution*, 24(3) SANTA CLARA COMPUTER & HIGH TECH L.J. 601 (2008).

7.61 Experiencing Stimuli

7.61.1 Simulating the Marketplace Mindset

The manner in which test stimuli appear in the marketplace generally governs how they should be exposed to respondents in a trademark survey has been discussed. Not yet discussed is the need to provide respondents with a proper *cover story* or rationale for considering the stimuli to which they are exposed.

For obvious reasons, respondents in trademark surveys should not know the survey's true purpose. However, upon being exposed to a stimulus, unless given some framework or guidance, they would have no idea of how, why or for what purpose they are to consider it. Permitting respondents to impose their own hypotheses guarantees that different respondents will apply different mindsets. Some may think that, after reviewing the stimulus, they will be asked whether they like or dislike its functions, colors, illustrations, or whatever. The same applies to respondents shown advertisements. Some may think the purpose of the survey is to determine whether people like the advertisement, the slogans, the spokespersons in the advertisement, and so on. Others may not know what to think. Since different respondents are likely to arrive with different ideas about what they should be considering and why, it is important that all respondents be provided with the same cover story.

Moreover, the cover story needs to be consistent with simulating marketplace conditions, a factor appreciated since Judge Wyzanski opined as follows.

> Another and most significant reason why the evidence of the poll is inadmissible . . . is that under the substantive law the issue is not whether the goods would be confused by a casual observer . . . but . . . whether the goods would be confused by a prospective purchaser at the time he considered making the purchase. If the interviewee is not in a buying mood but is just in a friendly mood answering a pollster, his degree of attention is quite different from what it would be had he his wallet in his hand.[227]

The teaching from this is that, when surveying likely point-of-sale confusion or likely deception, the cover stories need to be realistic and place the respondents into a buying frame of mind. (Instead of placing respondents into a buying frame of mind, cover stories for postsale confusion surveys have respondents imagine seeing someone else wearing or using the goods in question.)

227. Am. Luggage Works, Inc. v. U.S. Trunk Co., 158 F. Supp. 50, 53, 116 U.S.P.Q. 188 (D. Mass. 1957).

Another component of the cover story concerns the amount of time respondents should be given to consider the stimulus. Giving respondents as much time as they wanted to study the marks in question was criticized by at least one court as not reflecting marketplace conditions.[228] In an effort to better simulate marketplace conditions, instead of permitting respondents to take as long as they wish, they should be given instructions such as "please take as long as you *normally* (*typically*, *usually*, *ordinarily*) would when considering whether or not to purchase this item." Additionally, when testing point-of-sale confusion, respondents should be instructed to feel free to handle the product, it that's what they normally would do. When testing postsale confusion, respondents should be instructed not to handle the product.

7.61.2 Reading Test versus Memory Test

When surveying likely confusion, likely dilution, or deceptive advertising, after exposing respondents to a test or control stimulus,[229] the researcher has two basic options: either remove the stimulus from view before asking the critical substantive questions, those designed to shed light on the legal issues being tested, or leave it in full view of the respondent while asking these questions.[230] Though every likelihood of confusion or deceptive advertising survey must have used one or the other of these approaches, most courts opining on such matters provide neither favorable nor unfavorable comments on either approach. Those that have provided commentary are divided on which of these procedures to support. As Swann writes:

> Some courts have rejected the first approach [removing the stimulus from view] as a memory test, noting that "[i]n an actual market situation, the product would not disappear from the consumer's eye just as he or she is about to make a purchase," and that removing the stimulus before asking questions may lead to guessing. Other courts have rejected the second approach [leaving the stimulus with the respondent] as a "reading" test, noting that "consum-

228. ConAgra, Inc. v. George A. Hormel & Co., 784 F. Supp. 700, 734 (D. Neb. 1992).

229. The "reading test" versus "memory test" issue applies to static stimuli, such as products, labels, advertisements, and so on. It does not apply to dynamic stimuli, such as TV or radio commercials, where one does not normally ask questions while the respondent is actively attending to the stimulus.

230. A practice sometimes used in advertising and marketing research conducted outside the litigation arena is for the stimulus to be removed from view while some questions are asked, then returned to view so that additional questions can be asked. *See, e.g.*, Hill's Pet Nutrition, Inc. v. Nutro Prods., Inc., 258 F. Supp. 2d 1197, 1203 (D. Kan. 2003). Using such a "refresher" procedure, one needs to be careful that the questions asked while the stimulus is out of view do not provide clues to respondents as to what they should look at once the stimulus is returned to view.

> ers do not normally meditate over . . . details for any appreciable . . . time" and that the approach often merely results in the repeated . . . playback of the contents of the stimulus.[231]

In opinions not cited by Swann, some courts have approved of removing stimuli from view (memory tests),[232] while others have disapproved of doing so.[233] Some courts have considered leaving stimuli in view (reading tests) favorably,[234] while other courts have considered them unfavorably.[235]

Union Carbide v. Ever-Ready,[236] the case presenting us with the *Ever-eady* protocol, provides a classic example of where a court found problems with leaving the stimulus in view while the respondent was asked questions.

> Carbide introduced in evidence two surveys to establish the likelihood of confusion caused by the term 'Ever-Ready' with its mark EVEREADY. . . . I conclude that the surveys are entitled to little, if any, weight.
>
> First Carbide introduced the minibulb survey in evidence. . . . Each interviewee, after qualifying for the survey, was shown a blister pack of Every-Ready miniature bulbs and asked:

---

231. Jerre Swann, *A "Reading" Test or a "Memory" Test: Which Survey Methodology Is Correct?*, 95 TRADEMARK REP. 876 (2005) (citing Starter Corp. v. Converse, Inc., 170 F.3d 286, 297 (2d Cir. 1999); Cumberland Packing Corp. v. Monsanto Co., 32 F. Supp. 2d 561, 578 (E.D.N.Y. 1999); Coty US, Inc. v. Frontier Coop. Herbs, 2002 TTAB LREXIS 144, at *21 (T.T.A.B. 2002); Isaly Co. v. Kraft, Inc., 619 F. Supp. 983 (M.D. Fla. 1985), *rev'd in part*, 812 F.2d 1531 (11th Cir. 1986); Am. Home Prods. Corp. v. Procter & Gamble Co., 871 F. Supp. 739, 748 (D.N.J. 1994)).

232. Conopco v. Cosmair, 49 F. Supp. 2d 242, 255 (S.D.N.Y. 1999); E. & J. Gallo Winery v. Pasatiempos Gallo, S.A., 905 F. Supp. 1403, 1409 (E.D. Cal. 1994).

233. Simon Prop. Group L.P. v. mySimon, Inc., 104 F. Supp. 2d 1033, 1052 (S.D. Ind. 2000); Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck, 129 F. Supp. 2d 351, 367 (D.N.J. 2000). *Cumberland*, 32 F. Supp. 2d at 578; Barre Nat'l Inc. v. Barr Labs., Inc., 733 F. Supp. 735, 745 (D.N.J. 1991).

234. McNeil PPC v. Merisant Co., 2004 WL 3316380 (D.P.R. 2004); Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co., 129 F. Supp. 2d 351, 366 (D.N.J. 2000), *aff'd*, 290 F.3d 578, (3d Cir. 2002) ("the Court finds that leaving the products for the respondents to examine rather than taking the products away replicates market conditions"); *Barre Nat'l Inc.*, 773 F. Supp. at 745 n.20.

235. Malletier v. Dooney & Bourke, Inc., 525 F. Supp. 2d 558, 595, 634 (S.D.N.Y. 2007); Malletier v. Dooney & Bourke, 340 F. Supp. 2d 415, 445 (S.D.N.Y. 2004); Franklin Res. v. Franklin Credit Mgmt. Corp., 988 F. Supp. 322, 335 (S.D.N.Y. 1997); Am. Home Prods. v. Procter & Gamble Co., 871 F. Supp. 739, 748 (D.N.J. 1994); Quality Inns, Int'l. v. McDonald's Corp., 695 F. Supp. 198, 219 (D. Md. 1988); Isaly Co. v. Kraft, Inc., 619 F. Supp. 983 (M.D. Fla. 1985), *rev'd in part*, 812 F.2d 1531 (11th Cir. 1986); Am. Greetings Corp. v. Dan-Dee Imps., Inc., 619 F. Supp. 1204, 1216 (D.N.J. 1985), *modified on other grounds*, 807 F.2d 1136 (3d Cir. 1986).

236. Union Carbide Corp. v. Ever-Ready Inc., 392 F. Supp. 280 (D.C. Ill. 1975), *rev'd*, Union Carbide Corp. v. Ever-Ready, Inc., 531 F.2d 366, 188 U.S.P.Q. 623 (7th Cir.), *cert. denied*, 429 U.S. 830 (1976), *superseded by statute as stated in* Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 227 U.S.P.Q. 138 (7th Cir. 1985).

> Question 1: Who do you think puts out these mini-bulbs?
> Question 2: What makes you think so? . . .
>
> Next Carbide introduced the lamp survey in evidence. Again, the purpose was to establish that the use of the term 'Ever-Ready' on the lamps sold by Ever-Ready was likely to confuse the public into believing that the lamps were produced by Carbide. Like the bulb survey, each interviewee was shown the product marked 'Ever-Ready' [and asked]:
>
> Question 1: Who do you think puts out the lamp shown here?
> Question 2: What makes you think so? . . .
>
> Question 1 and 2 of the bulb and lamp surveys establish nothing. The evidence shows that in the bulb survey, approximately 600 interviewees who responded 'ever ready' to Question 1 answered 'because it says so on the pack' or 'because I can read it on the blister pack.' At best, such responses show the reading ability of the interviewee. Certainly, the responses are equivocal on the issue of the product's source . . . and to the follow-up Question (2), 'Because it says so' or 'I can read it on the packet,' how does that prove anything other than that the respondent can read the name 'Ever-Ready' on the packet?[237]

Respondents in defendant's survey in *Goya Foods v. Condal*[238] were handed an empty as-sold-and-branded bag of defendant's product and asked "What brand of rice is this?" The survey found a de minimis level of confusion; the court found the study not probative. With the product in front of them, prompted by the questions, respondents are able to scrutinize the product package and label in ways that they might normally not, thereby coming across a feature that might dispel confusion.

Removing the stimulus from view before asking questions is not necessarily a panacea, especially when testing for likely confusion between prominent marks as names. Commenting regarding a situation where respondents were first shown some booklets, then shown some correspondence, the court commented that the survey "proves most of the respondents could read the name 'Franklin' in the booklet and remember it long enough to recognize the name when shown one of the three letters immediately thereafter. . . . Surveys which do nothing more than demonstrate the respondents' ability to read [and remember] are not probative on the likelihood of confusion."[239]

One opinion parses out conditions that make for an acceptable versus unacceptable "reading test."

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237. *Id.* at 293 (emphasis added).
238. Goya Foods, Inc. v. Condal Distribs., Inc., 732 F. Supp. 453, 456–57 (S.D.N.Y. 1990).
239. Franklin Res., Inc v. Franklin Credit Mgmt. Corp., 988 F. Supp. 322, 45 U.S.P.Q.2d 1872, 1883 (S.D.N.Y. 1997).

> Louis Vuitton also defends . . . [the] choice of stimulus on the ground that if [the expert] had used a legible close-up of the Dooney & Bourke Multicolor Monogram Mark, then his survey "would not be a real world test. Rather, it would have been merely an irrelevant reading test of the type previously rejected by this Court" in the context of the 2004 confusion survey. . . . However, in that survey, a "heart shaped brass name sign" bearing the name "Dooney & Bourke" in full was prominently featured on the bag during the respondent's initial, close-up viewing of the bag. Here, by contrast, a legible close-up of the Dooney & Bourke Multicolor Monogram Mark would have exposed respondents to a monogram that is at the heart of this case. This would not constitute the kind of reading test that courts traditionally reject.[240]

A reasonable supposition from the findings and opinions in *Union Carbide v. Eveready*, *Goya Foods v. Condal*, *Franklin Resources v. Franklin Credit*, and *Malletier v. Dooney & Bourke* is that when something as prominent and obvious as the brand name is involved, critical questions should not be asked with the stimulus remaining in view. The question remains what to do when the issue concerns content that is detailed, complex, or subtle, such as may be the case when drawing inferences from advertising or in regards to trade dress.

To test the impact of a stimulus on a respondent, the respondent has to be exposed to that stimulus. At that point, the survey researcher has only two options before asking any substantive questions—either leave the stimulus in view or remove it from view. If the stimulus is left in view, the researcher risks being criticized for using a "reading test." If the stimulus is removed from view, the researcher risks being criticized for using a "memory test."[241] How should the researcher proceed? The following comments are intended to provide perspective, not necessarily guidance.[242]

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240. Malletier v. Dooney & Bourke, Inc., 525 F. Supp. 2d 558, 595 (S.D.N.Y. 2007) (citing Malletier v. Dooney & Bourke, 340 F. Supp. 2d 415, 445 (S.D.N.Y. 2004)).

241. Although it has become customary to distinguishing between reading tests and memory tests, it should be appreciated that interpreting (or misinterpreting) anything we perceive in the outside world, including the meaning of the words we read, necessarily requires using information we have stored in memory. Thus, regardless of whether it is left in front of the respondent or removed from view, interpreting any stimulus impinging upon our senses is, by definition, a memory test. Without using what we have stored in our memories, we could not begin to interpret the outside world. With that in mind, henceforth, the term *memory test* is used here to mean a situation where, *without the benefit of having the stimulus available for review*, respondents are asked questions regarding that stimulus.

242. For other perspectives, see Jerre Swann, *A "Reading" Test or a "Memory" Test: Which Survey Methodology Is Correct?*, 95 TRADEMARK REP. 876 (2005); H.D. Ostberg, *Response to the Article Entitled a "Reading" Test or a "Memory" Test: Which Survey Methodology Is Correct?*, 95 TRADEMARK REP. 1446 (2005).

First, appreciate that reading tests are not the same as tests of comprehension, and it is generally an aspect of comprehension (or miscomprehension) that is at issue. Comprehension, not reading, is the psychological process underlying confusion and deception, and determining likely confusion and likely deception involve testing the accuracy and degree to which consumers comprehend (or miscomprehend) the stimulus they have experienced. Although reading or hearing something is a prerequisite for understanding it, it does not follow that reading or hearing something produces comprehension. Consider the following sentence: "The curve for a polynomial regression using three power terms in which the mean value was regressed onto the trial number is superimposed onto the data to suggest a smoothed function relating impact to order of information acquisition (and giving equal weights to each mean value)."[243] Though able to read the words and thus pass a reading test, many readers are likely unable to comprehend the meaning of this sentence.

Given that they form the backbone for assessing confusion and deception, how are comprehension and miscomprehension generally measured? Not surprisingly, the contrasting views found in court opinions are reflected outside the litigation context. From grade school though graduate school, comprehension is most often measured via closed-book examinations. This also applies to how practitioners and scholars most typically measure advertising comprehension and miscomprehension.[244] That said, comprehension is also tested via open-book exams, such as the reading comprehension section of the Law School Admission Test (LSAT). This suggests that, while open- and closed-book approaches are both acceptable and used for testing comprehension outside the litigation arena, they may not be equally appropriate under all circumstances.

Also pertinent is that, while trademark surveys strive to emulate the marketplace, in one important respect they are more akin to consumers taking tests rather than reaching decisions in the marketplace. Consumers operating in the real world rarely review all the information on a product or product package, even for expensive products. Rather, considerable

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243. J. Jacoby, M. Morrin, J. Jaccard, Z. Gurhan & D. Maheswaran, *Attitude Formation as a Function of Incremental Information Input: A Procedure for Studying On-line Processing Models of Attitude Formation*, 12(1) J. CONSUMER PSYCHOLOGY 21, 27 (2002).

244. In a nationwide scale investigation of the comprehension and miscomprehension of advertising and nonadvertising in national magazines funded by the advertising industry (whose methodology was reviewed and approved by panels of applied researchers from the advertising industry, scholars from academia, and researchers and policy makers at the Federal Trade Commission and Food and Drug Administration *prior to* the study being implemented), the test stimuli were removed from view prior to testing message comprehension/miscomprehension. *See* JACOB JACOBY & WAYNE D. HOYER, THE COMPREHENSION AND MISCOMPREHENSION OF PRINT COMMUNICATIONS 88 (1987).

empirical evidence reveals that when making real-world purchasing decisions, to avoid information overload, consumers generally look at only small proportions of the available information,[245] spending perhaps five seconds on frequently purchased products.[246] Given such circumstances, having an interviewer ask questions with the product or advertisement in view could easily lead respondents to search for information they had not looked at prior to the questions being asked.

Having agreed to participate in a survey, respondents are aware they will be asked questions regarding the items shown to them during the course of the interview; if anything, this suggests they are more likely to pay attention to the stimuli than they ordinarily might. While it is true that "[i]n an actual market situation, the product would not disappear from the consumer's eye just as he or she is about to make a purchase,"[247] it also is true that consumers in actual market situations do not consider products and product information with the expectation that they will be asked questions (tested) regarding these items immediately afterward. The pressure to consider more aspects of the stimulus than they normally would are likely to be accentuated when the survey is being administered by an interviewer. If, when they anticipate being asked questions on what they were shown immediately afterward, respondents neglect to consider, or consider insufficiently, the information associated with the stimulus, then asking them questions with the stimulus in front of them likely

245. J. Jacoby, R.W. Chestnut & W. Silberman, *Consumer Use and Comprehension of Nutrition Information*, 4(2) J. CONSUMER RESEARCH 119 (1977); J. Jacoby, G.J. Szybillo & J. Busato-Schach, *Information Acquisition Behavior in Brand Choice Situations*, 3(4) J. CONSUMER RESEARCH 209 (1977); R.W. Chestnut & J. Jacoby, *Consumer Information Processing: Emerging Theory and Findings*, *in* FOUNDATIONS OF CONSUMER AND INDUSTRIAL BUYING BEHAVIOR 119 (A. Woodside, P.D. Bennett & J.N. Sheth eds., 1977); J. Jacoby, R.W. Chestnut & W. Fisher, *A Behavioral Process Approach to Information Acquisition in Non-Durable Purchasing*, 15 J. MKTG. RESEARCH 532 (1978); D.A. Sheluga, J.J. Jaccard & J. Jacoby, *Preference, Search and Choice: An Integrative Approach*, 6(2) J. CONSUMER RESEARCH 166 (1979); J. Jacoby, A. Kuss, D. Mazursky & T. Troutman, *Effectiveness of Security Analyst Information Accessing Strategies: A Computer Interactive Assessment*, 1 COMPUTERS IN HUMAN BEHAVIOR 95 (1985); J. Jacoby et al., *Tracing the Impact of Item-by-Item Information Accessing on Uncertainty Reduction*, 21(2) J. CONSUMER RESEARCH 291 (1994); J. Jacoby et al., *Training Novice Investors to Become More Expert: The Role of Information Accessing Strategy*, 2(2) J. PSYCHOLOGY & FIN. MKTS. (since renamed JOURNAL OF BEHAVIORAL FINANCE) 69 (2001); J. Jacoby, M. Morrin, J. Jaccard, Z. Gurhan & D. Maheswaran, *Attitude Formation as a Function of Incremental Information Input: A Procedure for Studying On-line Processing Models of Attitude Formation*, 12(1) J. CONSUMER PSYCHOLOGY 21 (2002).

246. W.D. Hoyer, *An Examination of Consumer Decision Making for a Common Repeat Purchase Product*, 11(3) J. CONSUMER RESEARCH 822 (1984).

247. Cumberland Packing Corp. v. Monsanto Co., 32 F. Supp. 2d 561, 578 (E.D.N.Y. 1999); *see* Barre Nat'l Inc. v. Barr Labs, Inc., 773 F. Supp. 735, 745 n.20 (D.N.J. 1991) (a pharmacist would not put away a card bearing product information prior to placing an order).

encourages them to search for and consider information they had not considered prior to being asked those questions. Having the product disappear from the respondent's eye prior to being asked the critical question ensures that they answer the question based on what they remember having seen and attended to *when exposed to the stimulus*, not based on what, as a result of having been prompted by the question, they then are led to look at and consider. This suggests that, because it guarantees that the answer is not biased by the question being asked, the memory test approach should be more preferred.

Because it would obviously bias the what respondents would look at and consider, no one advocates asking the critical question *before* presenting the stimulus to the respondent. For the very same reason (namely, because it would obviously bias the what respondents would look at and consider), researcher, counsel, and court might ask, "What justifies asking the question while the stimulus remains in view and accessible by the respondent?" In most instances, the justification will be "because, as in the marketplace, the item is present and can be viewed by the consumer while reaching a purchase decision." However, where no reasonable justification can be proposed, removing the stimulus from view before asking the critical substantive questions may be the proper research approach.

Importantly, suggesting that memory tests may be more likely to yield valid and reliable data than are reading tests should not be interpreted as proposing that, in sequential presentations, the second stimulus or stimulus array should be removed from view while the respondent is being asked the critical substantive questions. Questions such as "If you have any thoughts about this, do any of these items come from the same company as the item I showed you earlier, or do you think none of these items come from the same company as the item I showed you earlier?" ask the respondent to rely upon the information they considered and retained from having been exposed to the first stimulus or stimulus array. As long as the respondent cannot return to and reconsider the first item(s), such questions seem relatively free of the particular validity and reliability issues that infect reading tests.[248]

Nor should this discussion be interpreted as holding that useful information cannot be obtained by asking respondent questions while the stimulus remains in front of them or after it has been returned to them. In point of

248. This is not to say that sequential arrays are free of all validity and reliability concerns. "[A] sequential presentation of materials removed prior to asking the substantive survey question(s) may not replicate the marketplace either. It may merely show the respondents' ability to read and remember the same name as having been in both sets of material." Franklin Res. Inc. v. Franklin Credit Mgmt. Corp., 988 F. Supp. 322, 45 U.S.P.Q.2d 1872 (S.D.N.Y. 1997).

fact, marketing and advertising researchers find that valuable information often can be obtained from such refocus and reexposure protocols. Rather, the purpose is to say that open-book tests have the potential to undermine the possibility of gathering valid data regarding the information consumers actually consider under naturalistic circumstances, and the understandings they take away from this information.

A last factor to consider is the way in which the findings can be expected to cut. In situations where defendant's goods or advertising is alleged likely to cause confusion, deception or to mislead, it seems obvious that *defendant's* survey should not ask questions of respondents while the stimulus remains in front of the respondent. If there was a propensity for the respondent to be confused or deceived, guided by the questions being asked, they could review the stimulus for information that pertains to the question and, in this way, disabuse themselves of any confusion or deception they might otherwise have experienced. Yet suppose *plaintiff* chose to conduct a survey where defendant's stimulus remained in front of the respondents. Assuming defendant had no intent to confuse or deceive then, having paid a goodly sum to develop and disseminate its advertising, defendant should be delighted when consumers pay attention to, read, and seek to understand every word and nuance of that communication. If, using an open-book reading-test procedure—where everything favors the consumer being able to revisit, study, and correctly understand the communication—plaintiff's survey reveals actionable levels of confusion or deception, what better or more direct evidence can there be of the item's capacity to confuse or deceive? Since plaintiff elected to use a protocol that presumably cut against its own interests, it might be reasonable for a court to accept and accord weight to such a survey.

7.61.3 Duration of the Experience

When stimuli are left with respondents while they are being questioned regarding those stimuli, what is a reasonable amount of time for respondents to be permitted to view the stimulus? One court accorded a survey "no weight" because, among numerous other flaws, it "allowed respondents to view the test samples for 8–10 minutes while being questioned."[249] Once having been singled out for judicial attention, one can anticipate future courts to consider this issue as well. Various factors might be considered when determining what would be a reasonable amount of time for respondents to be permitted to view a stimulus while being questioned regarding that stimulus. One factor meriting consideration is the density

249. U.S. Polo Ass'n Inc. v. PRL USA Holdings Inc., 101 U.S.P.Q.2d 1487, 1503 (S.D.N.Y. 2011).

of the material, that is, how much content and how long would it take the average respondent to read/review that content. Another factor that might be considered is the level of detail being examined, perhaps permitting less time when the detail is macro in nature (e.g., a brand name, a prominently displayed slogan) than when it is micro in nature (e.g., a phrase buried in the middle paragraph on the back of the package).

7.62 Reacting to Stimuli

Survey respondents have two basic ways of reacting to the stimuli they are shown: behaviorally or verbally.

7.62.1 Behavioral Response

Behavior speaks louder than words, especially when it takes place in the marketplace. Yet with rare exception, trademark surveys rely on verbal responses to survey questions, not the respondents' purchasing behavior. It might be argued that, rather than relying on what respondents *say* in response to survey questions, the best way to determine if respondents truly are confused is to rely on what they actually *do* in the marketplace.

Two trademark surveys were located that used a behavioral approach and two others that relied on recall of behavior. In the first matter, it was alleged that defendant's shelf-stable microwaveable food product packaged in a green and white Styrofoam tub bearing the name *Health Selections* was likely to cause confusion with plaintiff's shelf-stable microwaveable food product packaged in a green and white styrofoam tub bearing the name *Healthy Choice*. As described by the court:[250]

> The . . . study was designed to try to examine confusion . . . as to product, as to source, and as to sponsorship. To test for these various possibilities, a consumer survey was designed wherein potential respondents were intercepted on their way into a supermarket that carried one or both of the Healthy Choice or Health Selections products. After being "screened" for eligibility and agreeing to participate, the respondents were shown three products . . . French's Mustard, Heinz Tomato Paste and either Healthy Choice or Health Selections. Respondents were told to look at the products as they would if they saw them in the supermarket and were thinking about buying them.
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> When the respondents indicated they were finished looking at the products, the interviewer put the products away and asked each respondent to purchase the three products while doing his or her normal shopping in the supermarket. The respondent was

250. ConAgra, Inc. v. George A. Hormel & Co., 784 F. Supp. 700, 724 (D. Neb. 1992).

> given 7 dollars to buy the products. They were also told that they would receive 10 dollars when they returned and answered some questions. Respondents were instructed that if the supermarket was out of the particular brand they had seen, "please don't substitute another. Just come back with the change."
>
> When the respondents returned to the interviewer, the specific brand names of the products were recorded. . . . After all the products were taken from each respondent, the respondent was asked various additional questions [these latter questions being used to assess as to source and sponsorship].

At the time the survey was conducted, both plaintiff's and defendant's products were being test marketed, with each being available in only a few locales nationwide. There were five test conditions, four of which were structured as follows. One hundred fifty consumers in Group 2 were shown Healthy Choice and sent into a supermarket that carried only Health Selections. Thirty consumers in Group 3 were shown Healthy Choice and sent into a supermarket that carried both Healthy Choice and Health Selections. One hundred fifty consumers in Group 4 were shown Health Selections and sent into a supermarket that carried only Healthy Choice. Thirty consumers in Group 5 were shown Health Selections and sent into a supermarket that carried both Healthy Choice and Health Selections. Respondents were tallied as being "confused as to product" if they were told to buy Healthy Choice and brought back Health Selections, or were told to buy Health Selections and brought back Healthy Choice. Although product confusion ranged from 6 percent to 84 percent across these four groups, with the weighted average being approximately 40 percent, because the study was held to be flawed in other respects, the court accorded little weight to these findings.

The second matter to rely on actual consumer behavior rather than verbal reports is described as follows:

> In a store, two adjacent displays [are] set up, one with the original product, the other with the alleged infringer. Entering customers [are] given a coupon for the purchase, at a reduced price of the original product. At the checkout counter, where the coupons are redeemed, an inspector determine[s] which of the two products, the original or the infringer, the consumer selected from the shelf. The frequency with which the customer mistakenly selected the infringer [is taken] as the measure of confusion.[251]

251. Hans Zeisel & David Kaye, Prove it With Figures 156–57 (1997).

Discussed in *SquirtCo. v. Seven-Up Co*, the third survey measured respondents' recall of their purchase behavior.[252] As described by the circuit court:

> The . . . Study was conducted at grocery stores in Phoenix, after QUIRST soft drink had been on the market in Phoenix, for about six weeks. Persons who had used coupons for non-cola soft drinks were asked to recall, without looking, what brand of soft drink they had purchased.
>
> Of the 98 who said they bought QUIRST soft drink, all 98 had QUIRST soft drink. One who said she bought 7-UP soft drink had QUIRST soft drink, one who said she bought SPRITE soft drink had QUIRST soft drink, and one who said she bought SHASTA soft drink had QUIRST soft drink. Of the 70 who said they bought SQUIRT soft drink, 65 had SQUIRT soft drink, two had SPRITE soft drink, and three had QUIRST soft drink. Two who said they bought 7-UP soft drink had SQUIRT soft drink, and two who said they bought SPRITE soft drink had SQUIRT soft drink.
>
> Seven-Up argues that only those three who said they bought SQUIRT soft drink but had QUIRST soft drink were confused between those two marks. Seven-Up also put on expert testimony that the correct base number was 175, or all the respondents because the confusion ran both ways. Three out of 175 is 1.7%. (Seven-Up points out that on that basis the confusion between SQUIRT soft drink and SPRITE soft drink was 3.1%.) The trial court, however, decided that only those 70 respondents who said they bought SQUIRT soft drink made up the relevant base. Three out of 70 is 4.3%, which is the figure the court used.
>
> On the other hand, SquirtCo argues that the three who said they bought SQUIRT soft drink but had QUIRST soft drink were instances of actual confusion. Not only was the methodology of the study novel, but also the admission of survey-type interviews as evidence of actual confusion was without legal precedent. The trial court refused to treat this as actual confusion but rather as indications of likelihood of confusion. The court was particularly concerned that the three respondents were not available for cross-examination. In short, the court gave the investigation the same weight as an opinion survey.

In the fourth matter, *Kroger Co. v. Johnson & Johnson*,[253] plaintiff's survey provided respondents with five seconds to view a shelf containing

252. SquirtCo. v. Seven-Up Co., 628 F.2d 1086, 1090 (8th Cir. 1980).

253. Kroger Co. v. Johnson & Johnson, 570 F. Supp. 1055, 223 U.S.P.Q. 29 (S.D. Ohio 1983).

defendant's products. When a substantial percentage of respondents said they saw plaintiff's Tylenol on the shelf when in fact it was not there, the court accorded the survey weight as evidence of likely confusion.

Though seemingly not relevant for testing genericism, secondary meaning or dilution, surveys focusing on behavioral responses hold great promise for measuring actual or likely confusion, as well as for testing issues in related domains.[254]

7.62.2 Verbal Response

Virtually all trademark surveys rely on respondents' answers to survey questions. For that, we turn to chapter 8.

254. Surveys focusing on respondent behavior have been used to resolve, prior to trial, a patent infringement matter, Polaroid Corp. v. Hewlett Packard Co., C.A. No. 06-738 (D. Del. 2007), and a class action matter, Taylor v. JVC Ams. Corp., No. 07-4059 (D.N.J. 2008). The behavioral approach is particularly well suited to address the kind of proof called for by the Federal Circuit in *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301 (Fed. Cir. 2009): "For the 'entire market value' rule to apply as the measure of damages for patent infringement, the patentee must prove that the patent-related feature is the basis for customer demand of the accused product."