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

Proceeding	91213597
Party	Plaintiff Caterpillar, Inc.
Correspondence Address	CHRISTOPHER P FOLEY FINNEGAN HENDERSON FARABOW GARRETT & DUNNER LLP 901 NEW YORK AVENUE NW WASHINGTON, DC 20001 UNITED STATES christopher.foley@finnegan.com, laura.johnson@finnegan.com, boston-ttab-notifications@finnegan.com, docketing@finnegan.com
Submission	Opposition/Response to Motion
Filer's Name	Christopher P. Foley
Filer's e-mail	christopher.foley@finnegan.com, naresh.kilaru@finnegan.com, laura.johnson@finnegan.com, ttab-legal-assistants@finnegan.com, docketing@finnegan.com
Signature	/Christopher P. Foley/
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Attachments	2016.05.19 Opposition to TC Motion to Disclose and Rely on Sur-Rebuttal Expert.pdf(451989 bytes)

unfair and prejudicial to allow Tigercat to introduce a sur-rebuttal expert who intends to criticize Caterpillar's choice of survey design.

Second, Tigercat seeks to introduce a *different* expert as its sur-rebuttal expert witness, rather than rely on its initial survey expert. Not only is this a significant departure from the facts of *Newegg* (where the party's initial expert and sur-rebuttal expert were the same), Tigercat seeks to use a different expert to create a litigation advantage, as the new expert will not be bound by the positions and testimony of Tigercat's initial expert. Additionally, it is not clear when Tigercat's proposed sur-rebuttal expert could even testify, as the Board's procedures do not provide for a sur-rebuttal testimony period.

For these reasons, Tigercat's motion should be denied.

I. ARGUMENT

A. Tigercat Improperly Instructed its Initial Survey Expert Not to Answer Questions Regarding the Same Topics on Which it Now Seeks to Introduce a Sur-Rebuttal Expert

As Tigercat explains in its motion for leave, its new sur-rebuttal expert (Mr. William Kramkowski) "will explain how the Ever-Ready design chosen by Opposer's expert is inappropriate for the facts of this case and its methodology, particularly the use of the control cell and the sample size, is flawed." (Dkt. No. 62 at 2.) (emphasis added). Tigercat's initial survey expert, Mr. James Berger, chose to use a Squirt survey format rather than an Ever-Ready format. Obviously, Mr. Berger's own views as to why he chose a Squirt survey format rather than an Ever-Ready format are highly relevant considerations for the Board. When Mr. Berger was questioned regarding why he chose the Squirt format rather than an Ever-Ready format, however, Tigercat's counsel obstructed such questioning with repeated instructions not to answer:

Q. Mr. Berger, is it accurate to say that your survey follows the Squirt format?

A. Yes.

Q. You're familiar with an Eveready survey format?

A. Yes.

Q. Why didn't you use an Eveready format in this case?

MR. KIRSCH: Objection. And instruct the witness not to answer, calls for work product. Objection, instruct the witness not to answer, calls for work product.

MR. KILARU: So again, I'm going to ask questions. I want to get the instruction not to answer very clear on the record. What I'm asking—

MR. KIRSCH: It was very clear because I articulated it twice, but I'm happy again to instruct the witness not to answer regarding the choice of selection of survey formats as you just asked the question on the basis of work product.

MR. KILARU: Okay.

Q. So Mr. Berger, you testified earlier that you designed the survey; is that correct?

A. Yes.

Q. Can you tell me why you chose the Squirt format versus the Eveready format?

MR. KIRSCH: Objection. Instruct the witness not to answer on the basis of work product.

Q. Would the Eveready format have been an acceptable format in this case?

MR. KIRSCH: Objection. Instruct the witness not to answer on the basis of work product.

Q. What consideration did you make when you decided to use the Squirt format as opposed to the Eveready format?

MR. KIRSCH: Objection. Instruct the witness not to answer on the basis of work product.

Q. If you were to conduct this survey using an Eveready format, can you generally describe how you would go about doing that?

MR. KIRSCH: Objection. Instruct the witness not to answer on the basis of work product.

Q. If you were to conduct a survey using an Eveready format, could you describe to me how you would go about doing that?

MR. KIRSCH: Objection —

MR. KILARU: And that's a yes-or-no answer. I'm not asking for how he would do it. I'm going to repeat the question again because it's a yes-or-no question and I want to make sure that the record is very clear that counsel is instructing the witness not to answer a yes-or-no question.

MR. KIRSCH: I'm sure the court reporter is getting everything down. I'm very confident in her abilities, but if you want to state the question again so I can hear the question again and state the objection again so you have your sound bite, that would be fine.

MR. KILARU: Sure. Yes. I would like the record to be absolutely clear on this point. And the question is: If you were to conduct this survey using an Eveready format, could you describe to me how you would go about doing that, yes or no?

MR. KIRSCH: Could — the question is could he — could he describe it?

MR. KILARU: Yes, does he have the ability to do it.

MR. KIRSCH: You can answer that question.

THE WITNESS: Yes.

MR. KILARU: Okay. And am I correct in understanding that you could do it, but you are not going to do it based on the instruction you've received from counsel?

MR. KIRSCH: That is correct.

THE WITNESS: Yes. Yes.

MR. KILARU: Okay. Have you ever done surveys using the Eveready format?

A. Yes.

Q. When was the last time you did a survey using the Eveready format?

MR. KIRSCH: Objection. Instruct the witness not to answer on the basis of work product.

MR. KILARU: I'm not even asking about this case.

MR. KIRSCH: I understand that.

MR. KILARU: Okay. So Mr. Berger, let me ask you another question. Do you know when the last time you did a survey using the Eveready format?

A. Yes.

Q. Okay. And — but you are refusing to tell me when is the last time you did a survey using the Eveready format based on your instruction from counsel not to answer?

MR. KIRSCH: Right. I've instructed him not to answer that question. I believe I've made it abundantly clear.

MR. KILARU: Okay. And you could you clarify what ground even — since it's not relating to this case, I'm asking about his prior experience and knowledge, what is the ground for instructing him not to answer?

MR. KIRSCH: I said work product.

(*See* Exhibit A, Deposition of James Berger at 101:24-107:1.)

None of the above questions called for information that would be even remotely covered by the attorney work product doctrine. Fed. R. Civ. P. 26(b)(3)(A) (“Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial...”). Rather, the questions went directly to Mr. Berger’s choice of survey design, which lies

at the heart of discoverable matter for a survey expert. Having precluded Caterpillar from obtaining any information regarding Mr. Berger's reasons for choosing a Squirt format versus an Ever-Ready format, it would be highly unfair to now allow Tigercat to introduce a *different* expert who seeks to criticize Caterpillar's choice of survey design.

Given the improper instructions to answer, the remedy at trial would be a presumption that the answers would have been adverse to Tigercat's position (i.e., a presumption that an Ever-Ready survey format would have been unfavorable for Tigercat). *See Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 U.S.P.Q.2d 1464, 1466-67 (TTAB 1993) ("It is therefore the general, and as far as the Board is concerned, favored practice that questions are answered subject to any objection which has been made. Although a party's witness may refuse to answer a question or, as in the present case, be instructed by the party's attorney not to answer, a refusal to answer may, if the objection is not well taken, be construed against the non-answering party. ...Because we find opposer's objections to be not well taken, we must presume that the answers would have been adverse to opposer's position.") (citation omitted); *Data Packaging Corp. v. Morning Star, Inc.*, 212 U.S.P.Q. 109 (TTAB 1981) ("In view of the improper instruction, we regard the refusal to answer as an admission that the answer, if given, would have been unfavorable.") (citations omitted); *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 703 F.2d 1372, 217 U.S.P.Q. 505, 510 (Fed. Cir. 1983) (no error in drawing adverse inference where witnesses inappropriately refused to answer relevant questions).

Because the Board should presume—irrespective of Caterpillar's rebuttal survey—that an Ever-Ready survey format would have been unfavorable for Tigercat (as indeed it was), it would be a waste of the parties' time and resources to allow Tigercat to introduce a sur-rebuttal expert

criticizing Caterpillar’s choice of the Ever-Ready format.¹ Under the particular circumstances presented here, allowing a sur-rebuttal expert is not warranted. *Polaris Indus. Inc. v. H-D Michigan Inc.*, 43 U.S.P.Q.2d 1528 (TTAB 1997) (“Moreover, applicant can move for imposition of sanctions against opposer ... if opposer’s counsel makes unfounded objections and does not allow the witness to answer clearly proper questions.”); TBMP § 527 (“The sanctions which may be entered by the Board include... prohibiting the disobedient party from introducing designated matters in evidence.”).

B. Applicant’s Request to Disclose a Different Expert as its Sur-Rebuttal Expert Is a Significant Departure from *Newegg*

In *Newegg*, the Board made it clear that it allowed a sur-rebuttal expert report only under the specific circumstances of that case:

Under the particular circumstances of this case, i.e., the existence of two conflicting expert surveys, and based upon the Board’s interpretation of the Federal Rules of Civil Procedure, it would not only serve the interest of fairness but would benefit the Board in its ability to make a just determination of the merits of this case to allow Opposer to provide a sur-rebuttal by Dr. Kaplan, but only to the limited extent provided below.

In view of the foregoing, Opposer’s motion for leave to allow a sur-rebuttal expert report is GRANTED to the extent that Opposer is allowed until April 29, 2016 in which to serve on Applicant a sur-rebuttal expert report authored by Dr. Kaplan which solely rebuts and/or critiques the methodology of the survey conducted by Dr. Ericksen, as well as the analysis of the data resulting from the survey. Dr. Kaplan, however, is precluded from offering any corrections and/or amplifications to his original expert report or

¹ It is worth nothing that the Ever-Ready format has been recognized by the Board as the gold standard in likelihood-of-confusion cases. *Clear Choice Holdings LLC v. Implant Direct Int’l*, 2013 T.T.A.B. LEXIS 477, *31 (TTAB Aug. 26, 2013) (noting the Board’s acceptance of the Ever-Ready survey format and that it “has been called the ‘gold standard’ in likelihood of confusion cases”) (citations omitted); *Starbucks U.S. Brands, LLC v. Ruben*, 78 U.S.P.Q.2d 1741, 1753 (TTAB 2006) (stating “given the way in which this survey format carefully follows the *Ever-Ready* likelihood of confusion survey format, we find that it is reliable and therefore of probative value on the issue of likelihood of confusion herein”).

introducing any new evidence or consumer surveys. *See ProMark Brands*, 114 USPQ2d at 1241 (Fed. R. Civ. P. 26(e) does not permit expert to bolster previously disclosed opinions or add new opinions). In turn, Applicant is permitted, if it so chooses, to depose Dr. Kaplan again once it receives Dr. Kaplan's sur-rebuttal expert report. This deposition, however, must be limited to the subject matter of Dr. Kaplan's sur-rebuttal expert report, as restricted by this order. Furthermore, the parties are precluded from seeking any future rebuttal reports from experts.

Newegg Inc. v. Schoolhouse Outfitters, LLC, Opposition No. 91214178 (March 30, 2016, Dkt. No. 37 at 6) (emphasis added).

Significantly, in *Newegg* the Board allowed Opposer's initial survey expert (Dr. Kaplan) to submit a sur-rebuttal report, given that Applicant's expert (Dr. Ericksen) had introduced a rebuttal survey. The Board did not allow Opposer to introduce a *different* expert, which is what Tigercat seeks to do here. This fact alone makes the circumstances here materially different than those in *Newegg*. Additionally, Tigercat's purported justification for selecting a completely new expert (Mr. Kramkowski) when it could have presumably used its initial expert (Mr. Berger) does not pass muster. The reality is that Tigercat knew it could not have had Mr. Berger criticize Caterpillar's choice of survey design after repeatedly instructing Mr. Berger not to answer questions regarding his own choice of survey design. Tigercat also seeks to gain a litigation advantage by having a different expert who is not bound by any of Mr. Berger's prior testimony or the various infirmities of Mr. Berger's expert report.²

² Among other things, Mr. Berger acknowledged that the survey protocol attached to his expert report did not accurately reflect the survey as it was actually implemented. (Ex. A at 43:13-19.) Although Tigercat's counsel provided the correct survey protocol in the middle of the March 3, 2016 deposition, when Mr. Berger was asked the simple question of when he discovered the errors given that he issued his report almost a year earlier on April 13, 2015, Mr. Berger was again instructed by counsel not to answer, except for stating that Mr. Berger discovered the errors sometime after April 13, 2015. (*Id.* at 46:4-47:18.) Additionally, Mr. Berger acknowledged that his report did not even include the web screenshots that survey respondents

Tigercat's request to disclose a completely new sur-rebuttal expert is thus driven more than anything else by a desire to have someone with a "clean slate" who is not hampered by Mr. Berger. Granting Tigercat's motion for leave under these circumstances will likely embolden any party dissatisfied with its initial expert to introduce a different sur-rebuttal expert in an attempt to gain a litigation advantage. This is not what the Board intended in *Newegg*. While not explicitly discussed in *Newegg*, the factual circumstances there involved a situation where the sur-rebuttal expert would have been bound by the constraints of his initial report and deposition testimony (i.e., because the initial expert and sur-rebuttal expert were the same). Thus, in *Newegg*, the sur-rebuttal expert's positions regarding the initial survey he conducted and his criticisms of the rebuttal survey conducted by the adversary would have to be consistent. Those safeguards are not present here. Particularly in the context of critiquing a survey, it would be unfair for Tigercat's new sur-rebuttal expert to criticize Caterpillar's rebuttal survey without being constrained in any way by Mr. Berger's prior positions or testimony. For these reasons, the holding in *Newegg* should not be broadened to encompass the circumstances presented here.

Finally, even if the Board were to allow Tigercat's proposed sur-rebuttal expert, it is not clear when that expert could even testify. In *Newegg*, the facts were such that Opposer's initial survey expert (Dr. Kaplan) would testify about his initial survey during Opposer's testimony period, Applicant's rebuttal survey expert would testify about its rebuttal survey during the Applicant's testimony period, and then Dr. Kaplan's sur-rebuttal testimony would be offered during Opposer's rebuttal period. Here, the circumstances are significantly different. Tigercat's survey expert (Mr. Berger) would testify during the Applicant's testimony period and Caterpillar's rebuttal survey expert (Mr. Hal Poret) would testify during the Opposer's rebuttal

taking his survey would have actually seen, which was another critical omission. (*Id.* at 26:9-19.)

testimony period. The Board's rules do not provide for any further testimony periods. Thus, allowing Tigercat's proposed sur-rebuttal report under the circumstances of this case would potentially require the Board to take the unprecedented step of creating a new sur-rebuttal testimony period.

II. CONCLUSION

For all of the above reasons, Caterpillar requests that Tigercat's motion for leave to disclose the sur-rebuttal expert report of Mr. William Kramkowski be denied.

Dated: May 19, 2016

Respectfully submitted,

/Christopher P. Foley/
Christopher P. Foley
Naresh Kilaru
FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.
901 New York Avenue N.W.
Washington, DC 20001
Telephone: (202) 408-4000

Laura K. Johnson
FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.
2 Seaport Lane
Boston, MA 02210-2001
Telephone: (202) 408-4000

Attorneys for Opposer Caterpillar Inc.

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing OPPOSER CATERPILLAR INC.'S OPPOSITION TO APPLICANT'S MOTION FOR LEAVE TO DISCLOSE AND RELY ON SUR-REBUTTAL EXPERT was served via electronic mail and first-class mail, postage prepaid, on May 19, 2016 upon counsel for Applicant:

Candace Lynn Bell
ECKERT SEAMANS CHERIN & MELLOTT LLC
50 S. 16th Street, 22nd Floor
Philadelphia, PA 19102 2523
cbell@eckertseamans.com
rjacobsmeadway@eckertseamans.com
jmetzger@eckertseamans.com
wmcintyre@eckertseamans.com

/Jenny Macioge Reilly/_____
Case Manager

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

<p>CATERPILLAR INC.,</p> <p style="text-align: center;">Opposer,</p> <p style="text-align: center;">v.</p> <p>TIGERCAT INTERNATIONAL INC.,</p> <p style="text-align: center;">Applicant.</p>	<p>Opposition No. 91213597</p> <p>Application Serial No. 85/814,584 Mark: TIGERCAT Application date: January 3, 2013</p>
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EXHIBIT A

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

CATERPILLAR, INC.,	Opposition No.
Opposer,	91213597
vs.	
TIGERCAT INTERNATIONAL,	Application
Serial	
INC.,	No. 85/814,584
Applicant.	Mark: TIGERCAT

_____ /

ORAL DEPOSITION JAMES T. BERGER
CHICAGO, ILLINOIS
THURSDAY, MARCH 3, 2016

REPORTED BY:
DEBORAH HABIAN, RMR, CRR, CLR

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<p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: center;">INDEX</p> <p>WITNESS: PAGE</p> <p>JAMES T. BERGER</p> <p>Direct Exam by Mr. Kilaru 7</p> <p>Cross Exam by Kirsch 135</p> <p>Redirect Exam by Mr. Kilaru 143</p> <p>Recross Exam by Mr. Kirsch 144</p> <p>INSTRUCTIONS AND REQUESTS OF COUNSEL</p> <p>By Mr. Kirsch 7</p> <p>By Mr. Kirsch 18</p> <p>By Mr. Kirsch 25</p> <p>By Mr. Kirsch 25</p> <p>By Mr. Kirsch 46</p> <p>By Mr. Kirsch 63</p> <p>By Mr. Kirsch 75</p> <p>By Mr. Kirsch 76</p> <p>By Mr. Kirsch 102</p> <p>By Mr. Kirsch 103</p> <p>By Mr. Kirsch 103</p> <p>By Mr. Kirsch 103</p> <p>By Mr. Kirsch 104</p> <p>By Mr. Kirsch 106</p> <p>By Mr. Kirsch 117</p> <p>By Mr. Kilaru 146</p>
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<p style="text-align: center;">A P P E A R A N C E S</p> <p>ON BEHALF OF CATERPILLAR, INC.</p> <p>FINNEGAN HENDERSON FARABOW GARRETT & DUNNER, LLP BY: NARESH KILARU, ESQ. 901 New York Avenue, NW Washington, D.C. 20001-4413 (202) 408-4000 naresh.kilaru@finnegan.com</p> <p>ON BEHALF OF TIGERCAT INTERNATIONAL, INC. ECKERT SEAMANS CHERIN & MELLOTT, LLC BY: JOSHUA L. KIRSCH, ESQ. 50 South 16th Street, 22nd Floor Philadelphia, Pennsylvania 19102 (215) 851-8400 jkirsch@eckertseamans.com</p>	<p style="text-align: center;">CATERPILLAR EXHIBITS</p> <p>NUMBER DESCRIPTION PAGE</p> <p>Exhibit 1 Opposer's Amended Notice 9 of Deposition of James T. Berger No Bates numbering</p> <p>Exhibit 2 First Amended Report of 11 James T. Berger No Bates numbering</p> <p>Exhibit 3 Tigercat Squirt survey 40 No Bates numbering</p> <p>Exhibit 4 Datasheets, 2pp 40 No Bates numbering</p> <p>Exhibit 5 Printout from Rocky Road 58 Outfitters and Sam's Offroad LLC webpages No Bates numbering</p> <p>Exhibit 6 Excerpt from McCarthy on 67 Trademarks pp 32-385 through 32-387 No Bates numbering</p>

6	<p>1 (CONTINUING)</p> <p>2 CATERPILLAR EXHIBITS</p> <p>3 NUMBER DESCRIPTION PAGE</p> <p>4 Exhibit 7 Intellectual Property Today 76</p> <p>5 January 2007 article titled</p> <p>6 "10 Easy Ways to Blow Away A</p> <p>7 Survey"</p> <p>8 No Bates numbering</p> <p>9</p> <p>10 Exhibit 8 Questions 14, 16, 18 from 79</p> <p>11 Berger Survey</p> <p>12 No Bates numbering</p> <p>13</p> <p>14 Exhibit 9 Questions 14, 16, 18 from 98</p> <p>15 Berger Survey and Alternative</p> <p>16 Formulations 1 - 6 of Berger's</p> <p>17 Questions</p> <p>18 No Bates numbering</p> <p>19</p> <p>20 Exhibit 10 Trademark Surveys, A 122</p> <p>21 Litigator's Guide by James</p> <p>22 T. Berger and R. Mark</p> <p>23 Halligan, no Bates numbering</p> <p>24</p> <p>25</p>	8	<p>1 BY MR. KILARU:</p> <p>2 Q. Business address is fine.</p> <p>3 A. Okay. 555 Skokie, S-K-O-K-I-E,</p> <p>4 Boulevard, Suite 500, Northbrook, one word,</p> <p>5 Illinois, 60062.</p> <p>6 Q. I know you've been --</p> <p>7 A. I'm going to turn my cell phone</p> <p>8 off.</p> <p>9 Q. Sure.</p> <p>10 A. No interruptions. Okay.</p> <p>11 Q. Appreciate that.</p> <p>12 I know you've been deposed before,</p> <p>13 so I'll just get right into it. I would just</p> <p>14 remind you to please speak slowly and audibly,</p> <p>15 and I'll try to do the same for the court</p> <p>16 reporter. Also, if you want to take a break at</p> <p>17 any time, just let me know and so long as</p> <p>18 there's no pending question, I'm happy to</p> <p>19 accommodate that.</p> <p>20 A. I understand.</p> <p>21 Q. And if you don't understand any of</p> <p>22 my questions, please just ask me to repeat it</p> <p>23 and I will.</p> <p>24 A. I will.</p> <p>25 Q. Now, is there any reason today why</p>
7	<p>1 (Oath administered at 9:47 a.m. CST.)</p> <p>2 MR. KIRSCH: I just want to put on</p> <p>3 the record that we're going to reserve the right</p> <p>4 to read and sign the transcript.</p> <p>5</p> <p>6 JAMES T. BERGER,</p> <p>7 called as a witness herein by the Opposer, having</p> <p>8 been first duly sworn, was examined and testified</p> <p>9 as follows:</p> <p>10 DIRECT EXAMINATION</p> <p>11 BY MR. KILARU:</p> <p>12 Q. Good morning, Mr. Berger.</p> <p>13 A. Good morning.</p> <p>14 Q. My name is Naresh Kilaru and I'm</p> <p>15 with Finnegan. We represent Caterpillar, which</p> <p>16 is the Opposer in this case.</p> <p>17 A. Yes, I know that.</p> <p>18 Q. Would you please state your full</p> <p>19 name and business address for the record.</p> <p>20 A. Yes. I have business cards for</p> <p>21 you --</p> <p>22 THE WITNESS: -- for you, and for</p> <p>23 you.</p> <p>24 James T. Berger. And my address --</p> <p>25 my home address you want or my business address?</p>	9	<p>1 you wouldn't be able to testify to the best of</p> <p>2 your abilities?</p> <p>3 A. No.</p> <p>4 MR. KILARU: Okay. I'd like to ask</p> <p>5 the court reporter to mark this as Exhibit No. 1.</p> <p>6 (Berger Exhibit No. 1 was</p> <p>7 marked for ID.)</p> <p>8 BY MR. KILARU:</p> <p>9 Q. And Mr. Berger, once you've had a</p> <p>10 chance to review the document, let me know.</p> <p>11 A. I have had a chance to review the</p> <p>12 document.</p> <p>13 Q. Have you seen this document</p> <p>14 before?</p> <p>15 A. I think I saw a document for</p> <p>16 another deposition date that was canceled, but</p> <p>17 I have not seen that document, per se.</p> <p>18 Q. Okay. Do you understand that</p> <p>19 you're here to testify pursuant to this notice</p> <p>20 of deposition?</p> <p>21 A. I understand.</p> <p>22 Q. Did you bring anything with you to</p> <p>23 help you testify today?</p> <p>24 A. No.</p> <p>25 Q. Apart from any discussions with</p>

10	<p>1 counsel, can you briefly describe what you did 2 to prepare for your deposition today? 3 MR. KIRSCH: Objection to the extent 4 that it calls for work product or anything that 5 we've discussed as Mr. Kilaru just noted. 6 Subject to that, you can answer. 7 THE WITNESS: I reviewed my report. 8 BY MR. KILARU: 9 Q. Okay. And when you say your 10 "report", is that -- is it accurate to say that 11 you reviewed your report and all of the 12 exhibits, which I believe are Exhibits A 13 through E? 14 A. That's correct. 15 MR. KIRSCH: That would be correct 16 with reference to the amended report which has 17 Exhibit E added to it. 18 THE WITNESS: Amended. Amended. 19 BY MR. KILARU: 20 Q. Okay. We'll put the report into 21 evidence in just a minute? 22 A. Okay. 23 Q. Mr. Berger, who's your current 24 employer? 25 A. I'm self-employed.</p>	12	<p>1 A. You mean Exhibit No. 2? 2 Q. Sorry, Exhibit No. 2. Thank you 3 for that correction. 4 A. (Reviewing document.) 5 It appears to be my first amended 6 report dated April -- no -- April 13th, 2015. 7 Q. And when you testified earlier 8 that you reviewed your report in preparation 9 for this deposition, is this the report that 10 you were referring to in Exhibit 2? 11 A. Yes. 12 MR. KIRSCH: And objection to the 13 extent it doesn't completely characterize the 14 context of the answer of his -- of that 15 testimony, but he -- he can answer as he did. 16 THE WITNESS: I answered "yes." 17 BY MR. KILARU: 18 Q. Okay. Does Exhibit 1 -- or sorry, 19 Exhibit 2? 20 Does Exhibit 2 contain the 21 entirety of your report in this case? 22 A. Does exhibit -- yes, it does. 23 Q. Okay. And attached, I believe, to 24 the first amended report are Exhibits A through 25 E and Exhibit A, I believe, is your CV; is that</p>
11	<p>1 Q. Self-employed, okay. And how long 2 have you been self-employed? 3 A. Hum... about 30 years. 4 Q. Do you have a name for your 5 company? 6 A. Yes. It's James T. Berger/Market 7 Strategies. It's on my business card. 8 Q. Okay. And are you the owner of 9 the company? 10 A. I am. 11 Q. And would it be accurate to say 12 that you've been the owner of that company for 13 approximately the last 30 years? 14 A. Yes. It started out as Market 15 Strategies, and then it became James T. 16 Berger/Market Strategies but -- about maybe ten 17 years ago. 18 MR. KILARU: I'd like to ask the 19 court reporter to mark Exhibit No. 2. 20 (Berger Exhibit No. 2 was 21 marked for ID.) 22 BY MR. KILARU: 23 Q. Mr. Berger, once you've had a 24 chance to review Exhibit No. 1, can you please 25 identify it?</p>	13	<p>1 correct? 2 A. That's correct. That was my CV as 3 of the date of that report. 4 Q. Okay. 5 A. Since that time, my CV has been 6 updated and I believe counsel has a copy of my 7 updated CV if you want to see that. 8 Q. Okay. Now, at the top of your CV, 9 it says "IP litigation services and surveys." 10 MR. KIRSCH: Are we looking at 11 Exhibit A, Naresh? 12 MR. KILARU: Yes. I'm referring 13 right now to Exhibit A of your report, which is 14 Mr. Berger's CV, and I'm referring to the top 15 portion which says "IP litigation services and 16 surveys." 17 BY MR. KILARU: 18 Q. Is the IP litigation services and 19 survey work part of the work you do as the 20 owner of Market Strategies? 21 A. Yes. 22 Q. Now, under "Professional 23 Experience" under "Market Strategies," is there 24 a reason that survey work is not mentioned in 25 that section of the document?</p>

14	<p>1 MR. KIRSCH: Objection to the extent</p> <p>2 the document is a writing that speaks for itself.</p> <p>3 Subject to that objection, you can</p> <p>4 answer the question.</p> <p>5 THE WITNESS: Repeat the question.</p> <p>6 BY MR. KILARU:</p> <p>7 Q. Is there a reason that your survey</p> <p>8 work is not mentioned under the section of your</p> <p>9 CV marked "Market Strategies"?</p> <p>10 A. No.</p> <p>11 Q. Is survey work a significant part</p> <p>12 of the work you do as the owner of Market</p> <p>13 Strategies?</p> <p>14 A. Yes.</p> <p>15 Q. Does Exhibit 2 contain the</p> <p>16 entirety of the opinions you intend to express</p> <p>17 in this case?</p> <p>18 MR. KIRSCH: This is what you've</p> <p>19 identified as Exhibit 2 in the course of the</p> <p>20 deposition?</p> <p>21 MR. KILARU: Correct.</p> <p>22 MR. KIRSCH: Okay.</p> <p>23 THE WITNESS: Yes. Unless I am</p> <p>24 asked things that I'm not -- are not in Exhibit 2</p> <p>25 and that my counsel thinks that I'm capable of</p>	16	<p>1 of knowledge in the marketing communications area</p> <p>2 and that is part of what I rely on when I do any</p> <p>3 kind of a report.</p> <p>4 BY MR. KILARU:</p> <p>5 Q. Okay. Understood. Apart from the</p> <p>6 report and Exhibits A through E and apart from</p> <p>7 your knowledge and experience in the field, did</p> <p>8 you rely on any other materials to arrive at</p> <p>9 the conclusions in your report?</p> <p>10 MR. KIRSCH: Objection to the extent</p> <p>11 it calls for work product.</p> <p>12 Subject to that objection, you can</p> <p>13 answer the question.</p> <p>14 THE WITNESS: The report itself</p> <p>15 covers the exhibits and reports on what is</p> <p>16 contained in the exhibits, yes. So the question</p> <p>17 is: Have I relied on anything else? And the</p> <p>18 question is no, I have not.</p> <p>19 BY MR. KILARU:</p> <p>20 Q. The answer is "no"?</p> <p>21 A. No.</p> <p>22 Q. So would it be accurate to</p> <p>23 conclude then that you did not conduct any</p> <p>24 Internet research in the course of designing</p> <p>25 the survey or preparing your report?</p>
15	<p>1 answering those questions, and I do reserve the</p> <p>2 right, as indicated in my report on page -- on</p> <p>3 page 6 under "Retention," "I reserve the right to</p> <p>4 amend this report as additional information</p> <p>5 becomes available." So I hope that answers your</p> <p>6 question.</p> <p>7 BY MR. KILARU:</p> <p>8 Q. Well, let me ask you the question</p> <p>9 this way: You know, after reviewing your</p> <p>10 report and all of the exhibits in preparation</p> <p>11 for your deposition, did you feel that your</p> <p>12 report should be revised or supplemented in any</p> <p>13 way?</p> <p>14 MR. KIRSCH: Objection to the extent</p> <p>15 it calls for work product.</p> <p>16 Subject to that objection, you can</p> <p>17 answer the question.</p> <p>18 THE WITNESS: No.</p> <p>19 BY MR. KILARU:</p> <p>20 Q. Now, apart from the Exhibits A</p> <p>21 through E contained in your first amended</p> <p>22 report, did you rely on any other materials?</p> <p>23 MR. KIRSCH: Objection, vague and</p> <p>24 ambiguous.</p> <p>25 THE WITNESS: I rely on a lifetime</p>	17	<p>1 MR. KIRSCH: Objection, calls for --</p> <p>2 for work product.</p> <p>3 To the extent it doesn't call for</p> <p>4 work product, you can answer the question.</p> <p>5 THE WITNESS: In the process of</p> <p>6 putting together the research methodology and</p> <p>7 protocol, I did rely on the Internet to some</p> <p>8 degree.</p> <p>9 BY MR. KILARU:</p> <p>10 Q. Okay. And did you make any</p> <p>11 printouts of Internet websites that you viewed?</p> <p>12 A. No.</p> <p>13 Q. Do you recall what Internet</p> <p>14 websites you viewed?</p> <p>15 A. I don't recall.</p> <p>16 Q. Do you recall what search terms</p> <p>17 you used for those searches?</p> <p>18 A. I don't recall.</p> <p>19 Q. Do you recall searching any</p> <p>20 specific company names during the course of</p> <p>21 that Internet research?</p> <p>22 A. I don't recall.</p> <p>23 Q. And you've kept no records of that</p> <p>24 research; is that correct?</p> <p>25 A. That's correct.</p>

18	<p>1 Q. Now, who actually implemented the</p> <p>2 survey?</p> <p>3 MR. KIRSCH: Objection, vague and</p> <p>4 ambiguous.</p> <p>5 Subject to that, you can answer.</p> <p>6 THE WITNESS: I have a general</p> <p>7 contractor called Precision Research that does</p> <p>8 all the field work for my -- for this -- did all</p> <p>9 the field work for this particular survey. I've</p> <p>10 used them many times in the past. Okay?</p> <p>11 They are in charge of the coding of</p> <p>12 the questionnaire, they are in charge of</p> <p>13 selecting the various subcontractors for the</p> <p>14 assignment, and they bill directly to the client</p> <p>15 that I -- they don't bill through me.</p> <p>16 BY MR. KILARU:</p> <p>17 Q. Now, you mentioned that Precision</p> <p>18 Research selected some subcontractors. Can you</p> <p>19 identify the subcontractors?</p> <p>20 A. Yes. The panel company was</p> <p>21 selected by Precision Research. Another list</p> <p>22 source was selected by --</p> <p>23 MR. KIRSCH: Objection -- or just --</p> <p>24 I'm just instructing the witness not to divulge</p> <p>25 work product as he answers the question, but he</p>	20	<p>1 A. Yes. I would be happy to. There</p> <p>2 are entities in the marketplace that have</p> <p>3 accumulated large, vast numbers of people who</p> <p>4 have indicated that they are willing to take</p> <p>5 surveys usually for some kind of compensation,</p> <p>6 and they are coded demographically,</p> <p>7 geographically by occupations, things like</p> <p>8 that, and generally, the panel companies have</p> <p>9 many different panels.</p> <p>10 So if you want to do a survey such</p> <p>11 as this, which -- where you're trying to reach</p> <p>12 a certain type of person, you find a panel</p> <p>13 company that's likely to have in their roster</p> <p>14 people who have that description. So that's</p> <p>15 why -- I mean, if I wanted to reach kids, for</p> <p>16 example --</p> <p>17 Q. Um-hum.</p> <p>18 A. -- I would reach a panel company</p> <p>19 that dealt with children. If I wanted to reach</p> <p>20 unmarried singles, I would find a panel company</p> <p>21 that has a preponderance of that. So these</p> <p>22 panel companies have various characteristics</p> <p>23 and you can reach them.</p> <p>24 Q. Okay.</p> <p>25 A. Okay.</p>
19	<p>1 can continue to answer.</p> <p>2 THE WITNESS: Another list source</p> <p>3 was selected by Precision Research. They</p> <p>4 selected the organization that did the</p> <p>5 tabulations and they selected the market research</p> <p>6 company that did the validation.</p> <p>7 BY MR. KILARU:</p> <p>8 Q. Okay. So I -- if I understood</p> <p>9 your answer correctly, I think you identified</p> <p>10 four different subcontractors, but please</p> <p>11 correct me if I'm wrong. The first one you</p> <p>12 mentioned was a panel company. What is the</p> <p>13 name of that company?</p> <p>14 A. Well, excuse me. It's in the</p> <p>15 report. We use lot of these, so... (reviewing</p> <p>16 document.)</p> <p>17 It's called Research Now based in</p> <p>18 Plano, Texas.</p> <p>19 Q. And what were the responsibilities</p> <p>20 of the panel company?</p> <p>21 A. To select a panel that had a high</p> <p>22 probability of reaching the target market that</p> <p>23 we designated for the survey.</p> <p>24 Q. And for a layperson, could you</p> <p>25 just briefly explain what a panel company is?</p>	21	<p>1 Q. And what was the certain type of</p> <p>2 person you were trying to reach in this case?</p> <p>3 A. Well, it's very --</p> <p>4 MR. KIRSCH: Objection, vague and</p> <p>5 ambiguous.</p> <p>6 Subject to that, you can go ahead</p> <p>7 and answer the question.</p> <p>8 THE WITNESS: It's very clearly</p> <p>9 identified in the case, and I would turn to</p> <p>10 Exhibit B --</p> <p>11 MR. KIRSCH: You mean Exhibit 2 or</p> <p>12 Exhibit B? I think it's Exhibit 2.</p> <p>13 THE WITNESS: ?? Is it 2?</p> <p>14 MR. KIRSCH: The first amended</p> <p>15 report is Exhibit 2.</p> <p>16 THE WITNESS: 2. Okay.</p> <p>17 -- page 1, "To qualify the survey,</p> <p>18 the person has to be age 18 and above who has</p> <p>19 been involved in the purchase, use or maintenance</p> <p>20 of heavy duty construction, logging or off-road</p> <p>21 equipment."</p> <p>22 BY MR. KILARU:</p> <p>23 Q. And for the record, could you just</p> <p>24 state where you read that from?</p> <p>25 A. I read that from Exhibit 2, page 1</p>

<p style="text-align: right;">22</p> <p>1 under "Targets."</p> <p>2 Q. Is that the first page of your</p> <p>3 report? You said Exhibit 2, page 1 or a</p> <p>4 page -- is that from an exhibit that you just</p> <p>5 read?</p> <p>6 A. Oh, I'm sorry. From Exhibit 2,</p> <p>7 Exhibit 2 of Exhibit 2.</p> <p>8 Q. So just to be clear, we've marked</p> <p>9 Exhibit 2 as Mr. Berger's first amended report,</p> <p>10 and to be clear moving forward, Exhibit 2</p> <p>11 contains five lettered exhibits which are</p> <p>12 Exhibits A, B, C, D and E.</p> <p>13 A. There you go.</p> <p>14 Q. And so, you know, with that in</p> <p>15 mind, could you just --</p> <p>16 A. It's Exhibit B.</p> <p>17 Q. Okay.</p> <p>18 So was there a specific list that</p> <p>19 Research Now had in order for you to reach this</p> <p>20 target market?</p> <p>21 A. I don't know for sure. The only</p> <p>22 thing I know is that Precision Research went</p> <p>23 out into the marketplace and looked at panel</p> <p>24 companies with the hope of finding a panel</p> <p>25 company that had a population that was what we</p>	<p style="text-align: right;">24</p> <p>1 Subject to that, you can answer the</p> <p>2 question.</p> <p>3 THE WITNESS: By e-mail and</p> <p>4 telephone.</p> <p>5 BY MR. KILARU:</p> <p>6 Q. Was counsel copied on all of those</p> <p>7 e-mails?</p> <p>8 MR. KIRSCH: Objection to the extent</p> <p>9 it calls for work product.</p> <p>10 THE WITNESS: Ah... I don't recall.</p> <p>11 I don't believe they were copied on all of them.</p> <p>12 BY MR. KILARU:</p> <p>13 Q. Do you still have those e-mails?</p> <p>14 A. Yes, I do.</p> <p>15 Q. So did you have any role in</p> <p>16 overseeing the implementation of the survey by</p> <p>17 Precision Research?</p> <p>18 MR. KIRSCH: Vague and ambiguous.</p> <p>19 Subject to that, you can answer the</p> <p>20 question.</p> <p>21 THE WITNESS: Precision Research was</p> <p>22 the general contractor and in -- so in being that</p> <p>23 they reported to me on the progress of their work</p> <p>24 periodically.</p> <p>25</p>
<p style="text-align: right;">23</p> <p>1 were looking for for our survey, and they found</p> <p>2 that with Research Now.</p> <p>3 Q. Okay. Did you communicate with</p> <p>4 Research Now directly at any point?</p> <p>5 A. No.</p> <p>6 Q. Okay. Your communications were</p> <p>7 only with Precision Research?</p> <p>8 A. Correct.</p> <p>9 MR. KIRSCH: Vague and ambiguous.</p> <p>10 You can answer as you did.</p> <p>11 BY MR. KILARU:</p> <p>12 Q. So just to be clear, do you have</p> <p>13 any knowledge regarding how Research Now</p> <p>14 selected the specific panel it did for this</p> <p>15 study?</p> <p>16 MR. KIRSCH: Objection, asked and</p> <p>17 answered, vague and ambiguous.</p> <p>18 You can answer again.</p> <p>19 THE WITNESS: The answer's no.</p> <p>20 BY MR. KILARU:</p> <p>21 Q. How did you communicate with</p> <p>22 Precision Research during the course of</p> <p>23 designing and preparing this study?</p> <p>24 MR. KIRSCH: Objection to the extent</p> <p>25 it calls for work product.</p>	<p style="text-align: right;">25</p> <p>1 BY MR. KILARU:</p> <p>2 Q. But in terms of the actual field</p> <p>3 implementation of the survey, did you have any</p> <p>4 particular role?</p> <p>5 MR. KIRSCH: Objection, vague and</p> <p>6 ambiguous as to "field implementation of the</p> <p>7 survey."</p> <p>8 Subject to that, you can answer the</p> <p>9 question if you're able.</p> <p>10 THE WITNESS: The only thing that I</p> <p>11 recall we did was before the survey went out on</p> <p>12 the Internet, we --</p> <p>13 MR. KIRSCH: Objection.</p> <p>14 Instruct the witness not to</p> <p>15 communicate any work product.</p> <p>16 Subject to that, the witness can</p> <p>17 answer the question.</p> <p>18 THE WITNESS: We, meaning myself and</p> <p>19 my client --</p> <p>20 MR. KIRSCH: Objection to the --</p> <p>21 again, instruct the witness not to divulge any</p> <p>22 work product.</p> <p>23 THE WITNESS: I'm not talking about</p> <p>24 any work product.</p> <p>25 We reviewed the survey as somebody</p>

<p style="text-align: right;">26</p> <p>1 who was taking the survey would look at it. We 2 wanted to make sure the questions were presented 3 in a way that were understandable, we wanted to 4 go through the survey and see how it navigated, 5 and once -- that was the only thing that I had to 6 do beyond the periodic reports that I received 7 from Precision. 8 BY MR. KILARU: 9 Q. Okay. Now, when you mentioned 10 that you reviewed the survey as someone would 11 be seeing it, is it correct to conclude that 12 those were web screenshots? 13 A. Correct. 14 Q. Okay. And have you included those 15 web screenshots as an exhibit to your report? 16 A. No. 17 Q. Do you have those web screenshots? 18 A. Ah... I don't know. Precision 19 Research possibly may have them. 20 Q. So am I correct in concluding that 21 apart from reviewing the web screenshots, you 22 didn't have any other role in the 23 implementation of the survey? 24 MR. KIRSCH: Objection to the extent 25 it doesn't fairly characterize the witness's</p>	<p style="text-align: right;">28</p> <p>1 A. What page are you on, sir? 2 Q. So I am -- right now, I am on 3 page 1 of Exhibit B of Exhibit 2. 4 A. Okay. 5 Q. First of all, when you said you 6 earlier wrote the questions for the survey, are 7 you referring to what is shown as Exhibit B? 8 A. Yes. I wrote the entire 9 Exhibit B. 10 Q. Okay. And I'd like to ask you 11 about the screening questions and I'll start 12 with the first one which asks whether the 13 respondents are over the age of 18; is that 14 right? 15 A. Yes. 16 Q. Is there a reason you didn't ask 17 the respondent to enter his or her specific 18 age? 19 MR. KIRSCH: Objection to the extent 20 it calls for work product. 21 Subject to that, you can answer the 22 question. 23 THE WITNESS: We didn't feel that 24 was necessary. We simply wanted to make sure 25 they were over the age of 18.</p>
<p style="text-align: right;">27</p> <p>1 testimony. 2 Subject to that, the witness can 3 answer the question. 4 THE WITNESS: I wrote all the 5 questions in the survey, and I gave the completed 6 survey to Precision Research for coding and for 7 implementation on the Internet. That was my role 8 in it. The only other thing was this prelaunch 9 exercise that we did to make sure that everything 10 was working correctly, and when we gave the final 11 okay on that, we launched it. 12 BY MR. KILARU: 13 Q. Apart from what you just said, did 14 you have any other role in overseeing Precision 15 Research and the implementation of the survey? 16 A. No, not in overseeing. They 17 provide- -- Precision Research obviously 18 provided me with reports. 19 Q. I'd like to ask you to turn to 20 Exhibit B, which you referred to as part of 21 your report, and this is Exhibit B of 22 Exhibit 2. 23 A. Okay. 24 Q. And I'd like to ask you about the 25 screening questions.</p>	<p style="text-align: right;">29</p> <p>1 BY MR. KILARU: 2 Q. And why didn't you feel it was 3 necessary? 4 MR. KIRSCH: Same objection. 5 THE WITNESS: Some surveys require 6 that. I don't believe the age of the respondent 7 had really very much to do with the survey 8 itself, only in the fact that they were over 18, 9 and that's the -- that's my rationale. I use 10 that rationale a lot. 11 BY MR. KILARU: 12 Q. Is it possible that everyone 13 taking the survey could have been over 70 years 14 old? 15 A. Yes, it's possible. 16 Q. If it turned out that everyone 17 taking the survey was over 70 years old, would 18 that have any impact on the reliability of the 19 survey results? 20 A. I don't know. 21 Q. In other surveys you've conducted, 22 have you ever asked for the specific age of 23 respondents? 24 A. Yes. 25 Q. Can you recall a specific case</p>

<p style="text-align: right;">30</p> <p>1 where you did that recently?</p> <p>2 A. I recall doing it a number of</p> <p>3 times on mall intercept surveys.</p> <p>4 Q. And did have you a specific</p> <p>5 rationale in those cases for asking the</p> <p>6 specific age?</p> <p>7 A. Possibly the behavioral</p> <p>8 characteristic that we were seeking to trace</p> <p>9 might have been a function of age.</p> <p>10 Q. I also had noticed you didn't ask</p> <p>11 the respondents to state their gender; is that</p> <p>12 correct?</p> <p>13 A. (Reviewing document.)</p> <p>14 Yes. Excuse me. I just want to</p> <p>15 see something.</p> <p>16 Q. Sure. Take your time.</p> <p>17 A. (Reviewing document.)</p> <p>18 Yeah, we didn't ask them to state</p> <p>19 their gender.</p> <p>20 Q. Is it possible that everyone</p> <p>21 taking your survey could have been female?</p> <p>22 A. It's possible.</p> <p>23 Q. If it turned out that everyone</p> <p>24 taking your survey was female, would that have</p> <p>25 any impact on the reliability of the survey</p>	<p style="text-align: right;">32</p> <p>1 anything to do with a very specific buyer</p> <p>2 behavior characteristic, then one might ask the</p> <p>3 gender.</p> <p>4 BY MR. KILARU:</p> <p>5 Q. Now, apart from the respondents</p> <p>6 answering whether or not they are over the age</p> <p>7 of 18 and the state of residence which is in</p> <p>8 Question No. 2, was any other demographic</p> <p>9 information collected about the respondents?</p> <p>10 A. (Reviewing document.)</p> <p>11 I don't believe so.</p> <p>12 MR. KIRSCH: Objection to the extent</p> <p>13 Exhibit B is a writing, it speaks for itself.</p> <p>14 BY MR. KILARU:</p> <p>15 Q. How many total people were invited</p> <p>16 to take the survey?</p> <p>17 A. I don't know.</p> <p>18 Q. Who would know that information?</p> <p>19 A. Precision might. Research Now</p> <p>20 probably does.</p> <p>21 Q. Do you have any sense of how many</p> <p>22 number of people were invited to take the</p> <p>23 survey?</p> <p>24 A. No.</p> <p>25 Q. And I take it that neither</p>
<p style="text-align: right;">31</p> <p>1 results?</p> <p>2 A. I don't know.</p> <p>3 Q. Is there any particular reason you</p> <p>4 didn't ask respondents to state their gender?</p> <p>5 A. It was not a quota survey. We</p> <p>6 weren't looking for X numbers of males or X</p> <p>7 numbers of females. We were simply looking for</p> <p>8 people who had the characteristics that we</p> <p>9 sought.</p> <p>10 Q. In other surveys you've conducted,</p> <p>11 have you ever asked respondents to state their</p> <p>12 gender?</p> <p>13 A. Yes.</p> <p>14 Q. And what was the rationale in</p> <p>15 those cases if you can recall?</p> <p>16 A. I don't recall.</p> <p>17 Q. Have you done that in any recent</p> <p>18 case?</p> <p>19 A. I don't recall exactly.</p> <p>20 Q. Generally speaking, under what</p> <p>21 circumstances is knowing the gender of</p> <p>22 respondents relevant?</p> <p>23 MR. KIRSCH: Vague and ambiguous.</p> <p>24 You can answer if you're able.</p> <p>25 THE WITNESS: If the gender has</p>	<p style="text-align: right;">33</p> <p>1 Research Now nor Precision Research ever</p> <p>2 communicated that number to you?</p> <p>3 A. That's correct.</p> <p>4 Q. Did you ever see the e-mail</p> <p>5 that -- well, scratch that. Let me back up.</p> <p>6 Was it Research Now that actually</p> <p>7 sent out the e-mails to people inviting them to</p> <p>8 take the survey?</p> <p>9 A. Yes.</p> <p>10 Q. Did you ever see a copy of the</p> <p>11 e-mail that Research Now sent to those people?</p> <p>12 A. I didn't.</p> <p>13 Q. Do you have any data as far as the</p> <p>14 number of people who started completing the</p> <p>15 survey and then actually qualified for the</p> <p>16 survey?</p> <p>17 A. No, I don't.</p> <p>18 Q. I'd like to ask you to turn to</p> <p>19 page 6 of the body of your report --</p> <p>20 A. (Witness complying.)</p> <p>21 Q. -- and ask you a question about</p> <p>22 Section 4, "Research Design."</p> <p>23 A. Okay.</p> <p>24 Q. Now, your report says that "An</p> <p>25 additional 4,000 names were provided by</p>

34

1 Hatton-Brown."
 2 So when it says "An additional
 3 4,000 names were provided by Hatton-Brown," do
 4 you have any sense of how many names were
 5 provided by Research Now?
 6 **A. No.**
 7 Q. Was it your decision to get the
 8 4,000 names from Hatton-Brown?
 9 MR. KIRSCH: Objection to the extent
 10 it calls for work product.
 11 THE WITNESS: I was -- Precision
 12 Research informed me that that list was available
 13 and wanted to know if I wanted to include that.
 14 And since it was clearly targeted to a segment of
 15 the market that we were interested in, I got the
 16 approval for them to go ahead and proceed with
 17 that.
 18 BY MR. KILARU:
 19 Q. So you approved Precision
 20 Research's use of the 4,000 names that were
 21 provided by Hatton-Brown?
 22 **A. I did.**
 23 Q. Have you ever seen the list of
 24 names that were actually provided by
 25 Hatton-Brown?

35

1 **A. No.**
 2 Q. Who has those lists besides
 3 Hatton-Brown?
 4 **A. I don't know.**
 5 Q. Would it be reasonable to conclude
 6 that Research Now would have those lists?
 7 MR. KIRSCH: Objection to the extent
 8 it calls for speculation.
 9 Subject to that, you can answer.
 10 THE WITNESS: I would think that
 11 Research Now would not have that list. I would
 12 think that if that list was available, it would
 13 be in the Precision Research file.
 14 BY MR. KILARU:
 15 Q. So I'm just trying to get a sense
 16 of who was invited to take the survey, and we
 17 know that there were 4,000 people from this
 18 Hatton-Brown list. And I'm just trying to get
 19 a sense of what information do you have
 20 regarding the other people who were invited to
 21 take the survey?
 22 MR. KIRSCH: Objection to the extent
 23 asked and answered. Objection to the extent it
 24 doesn't fairly characterize the prior testimony.
 25 Subject to that, the witness can

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1 answer the question.
 2 THE WITNESS: Research Now sent --
 3 apparently sent a message to its panel saying
 4 that "We are doing a survey and these are the
 5 types of people that we need to complete the
 6 survey," and they stated in their correspondence
 7 the characteristics that they were looking for.
 8 BY MR. KILARU:
 9 Q. Okay. So am I correct in
 10 understanding that beyond that, you don't know
 11 the specific panel that was used --
 12 **A. No, I don't.**
 13 Q. -- or the number of additional
 14 people beyond the Hatton-Brown list, that the
 15 e-mails inviting people to take the survey were
 16 sent out to?
 17 **A. No.**
 18 MR. KIRSCH: Subject -- objection to
 19 the extent compound and doesn't fairly
 20 characterize prior testimony and to the extent
 21 it's been asked and answered.
 22 THE WITNESS: Want me to answer the
 23 question?
 24 MR. KIRSCH: If -- you can go ahead
 25 and answer.

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1 THE WITNESS: Repeat the question,
 2 please.
 3 (Record read.)
 4 THE WITNESS: So you're asking me if
 5 I -- what specifically are you asking me?
 6 BY MR. KILARU:
 7 Q. Sure. Let me --
 8 **A. Why don't you rephrase it.**
 9 Q. Sure, I'd be happy to rephrase the
 10 question.
 11 **A. Thank you.**
 12 Q. All I'm trying to find out is
 13 beyond the Hatton-Brown list that was used, do
 14 you know anything else about other people who
 15 were invited to take the survey?
 16 **A. No.**
 17 MR. KIRSCH: Okay. Can we take a
 18 five-minute break here, please?
 19 MR. KILARU: Sure.
 20 MR. KIRSCH: Thank you.
 21 (Recess taken from 10:29 a.m.
 22 to 10:39 a.m.)
 23 BY MR. KILARU:
 24 Q. Mr. Berger, based on any of the
 25 information that was collected from the survey,

<p style="text-align: right;">38</p> <p>1 is it possible to tell whether any particular 2 respondent purchases, uses or leases equipment 3 in the forestry field? 4 MR. KIRSCH: Objection to the extent 5 that the report and the -- and its exhibits or 6 writings would speak for themselves. 7 Subject to that, the witness can 8 answer the question. 9 THE WITNESS: We didn't select for 10 people in specific industries. 11 BY MR. KILARU: 12 Q. So would the answer be "no"? 13 A. Yes, the answer would be no. 14 Q. And is it also correct that none 15 of the data shows what particular field or 16 industry any of the respondents works in? 17 MR. KIRSCH: Objection to the extent 18 that the report and its exhibits are writings 19 which speak for themselves. 20 Subject to that, the witness can 21 answer the question. 22 THE WITNESS: We did not screen per 23 specific occupation or job description. 24 BY MR. KILARU: 25 Q. Based on the data was collected,</p>	<p style="text-align: right;">40</p> <p>1 (Discussion off the record.) 2 MR. KILARU: I'd like to have the 3 court reporter mark this as Exhibit 3 and -- good 4 luck reading this, but mark this as Exhibit 5 No. 4. 6 (Berger Exhibit No. 3 and 7 Berger Exhibit No. 4 were 8 marked for ID.) 9 BY MR. KILARU: 10 Q. And if you need a question 11 repeated, I'm happy to have the court reporter 12 read it back. 13 A. Yeah, I know. 14 Q. Were you going to answer the 15 question or should I have the court reporter 16 read it back? 17 A. Great. Why don't you ask it again 18 and I'll answer. 19 MR. KILARU: Yeah. Will you read it 20 back just so we get the right phrase? 21 (Record read.) 22 BY MR. KILARU: 23 Q. And -- and -- 24 A. The answer to that is any one of 25 those questions required a "yes" answer, and if</p>
<p style="text-align: right;">39</p> <p>1 could you give any breakdown of how many 2 respondents work in construction versus 3 forestry versus another area? 4 MR. KIRSCH: Same objection. 5 The witness can answer. 6 THE WITNESS: The answers I gave to 7 the last question would hold for this. We did 8 not screen for occupation, industry, job 9 description. 10 BY MR. KILARU: 11 Q. Just so we're clear, with respect 12 to the screening questions 3 through 8 on 13 pages 1 and 2 of the survey protocol, which of 14 those questions had to be answered "yes" in 15 order for someone to qualify for the survey? 16 A. Well, at this point I would like 17 to defer to the actual PDF of the survey. This 18 is a written protocol, but the PDF has the -- 19 and that has been entered into evidence today, 20 I believe. It has the exact way that that -- 21 that they went. In the -- in the protocol -- 22 MR. KIRSCH: Well, stop for a 23 second. This is a document. You may want to 24 have -- off the record for a second. 25 MR. KILARU: Okay.</p>	<p style="text-align: right;">41</p> <p>1 any one of those questions received a "yes" 2 answer, they would qualify for the survey. 3 Q. Okay. Thank you. And just so 4 it's on the record, in the brief break we had, 5 I understand that there was a typographical 6 error in Exhibit B to your report; is that 7 correct? 8 A. Yes. 9 Q. Okay. And so we're clear, for the 10 record, Exhibit D to your report -- and I'll 11 specifically reference the questions that we're 12 talking about in Exhibit D. 13 The questions in Exhibit D that 14 are marked as Questions 3, 4, 5, 6, 7, and 8, 15 do those questions accurately reflect the 16 questions that were actually asked in the 17 survey? 18 MR. KIRSCH: Objection to the extent 19 the documents are writings which speak for 20 themselves, but -- 21 THE WITNESS: Yes. 22 MR. KIRSCH: -- the witness can go 23 ahead and answer. 24 BY MR. KILARU: 25 Q. And your testimony is that the --</p>

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1 a respondent who answered "yes" to any one of
 2 these questions, Question 3 through Question 8,
 3 qualified for the survey?
 4 **A. Yes.**
 5 **Q.** Now, the third screening question,
 6 Question 3 -- and I'll just use Exhibit D from
 7 now on since -- since there appears to be a
 8 typo in Exhibit B. So --
 9 **MR. KIRSCH:** No. I'm sorry. That's
 10 not actually -- I think there's a little bit of a
 11 misunderstanding then.
 12 What I was trying to explain was
 13 what you recently had marked as, but which is not
 14 in front of the witness -- or actually what is in
 15 front of the witness now as Berger No. 3 is once
 16 the computer bracketing is pulled out, the
 17 correct recitation of the verbiage, the survey
 18 participant would have seen in the course of
 19 conducting the survey.
 20 There is typo in -- there's a typo
 21 in -- a couple of typos in Exhibit D, and
 22 Exhibit B to Exhibit 2 is not 100 percent
 23 correlated to Berger 3, but Berger 3 -- what you
 24 have marked as Berger 3 but which you have not
 25 specifically presented as Berger 3 is the

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1 verbiage that the survey taker would have seen in
 2 the course of answering the questions.
 3 And if you want to take a break to
 4 review Berger 3 or make photocopies of Berger 3
 5 so you can have it back in front of you, that's
 6 completely fine.
 7 **MR. KILARU:** Yeah, let's take a
 8 break.
 9 **MR. KIRSCH:** Okay.
 10 (Recess taken from 10:53 a.m.
 11 to 11:00 a.m.)
 12 **BY MR. KILARU:**
 13 **Q.** So Mr. Berger, I just had
 14 conversation with your counsel and I was
 15 informed that the survey protocol that was
 16 attached as Exhibit B to your report does not
 17 accurately reflect the survey as it was
 18 actually implemented; is that correct?
 19 **A. Yes, that's correct.**
 20 **Q.** And I was also informed by counsel
 21 that the questions in Exhibit D to your report
 22 do not accurately reflect the questions that
 23 were asked either.
 24 **MR. KIRSCH:** I would say that
 25 they're not literal and that there are a couple

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1 of places where there are typos. In the table of
 2 contents and in the phrasing that's at the very
 3 top of the pages, for example, where it says
 4 "state" as opposed to where the actual survey, it
 5 would ask you, you know, which state or whatever
 6 the exact verbiage is, and I'll note that on the
 7 record for the benefit of everybody that what
 8 I've represented to you, Mr. Kilaru, is that what
 9 is now marked as Berger No. 3 reflects the
 10 language that the survey taker would have
 11 actually seen in the course of taking the survey,
 12 accounting for pulling out the computer coding
 13 that is present in what's now marked as Berger
 14 No. 3.
 15 **MR. KILARU:** Okay. And also just to
 16 reflect our conversation, in particular, it seems
 17 as though Question No. 18-A in Exhibit D, there
 18 is a specific typographical error and that
 19 word -- the word "affiliated" in that question
 20 should really have been "sponsored"; is that
 21 correct?
 22 **THE WITNESS:** Yes.
 23 **MR. KIRSCH:** And that is borne out
 24 in Berger No. 3, the actual test-taker would have
 25 seen in the actual corollary to Question 18-A,

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1 the word "sponsored" rather than "affiliated."
 2 **MR. KILARU:** Okay. All right.
 3 Understood. And I'll just say for the record
 4 that we're going to have to reserve our rights to
 5 object to Berger Exhibit 3 in terms of being
 6 introduced in this case, given that it was not
 7 produced by the expert report deadline but, you
 8 know, with that being said, we'll use it today as
 9 an exhibit to help Mr. Berger testify.
 10 **MR. KIRSCH:** And I'll just note for
 11 the record that I understand counsel's position.
 12 I would say that Berger 3 has now been provided
 13 to Counsel, that Berger 3 is available to counsel
 14 to review and ask any questions of Mr. Berger
 15 that he may like, and if counsel feels the need
 16 to continue the deposition in any way to ask
 17 Mr. Berger further questions about Berger 3 or
 18 what has also been marked in the course of the
 19 deposition as Berger 4, then we would absolutely
 20 make Mr. Berger available again for questioning
 21 so that Caterpillar's counsel and Caterpillar
 22 would not feel that they have suffered any
 23 prejudice whatsoever in the course of taking the
 24 deposition or in their case.
 25 **MR. KILARU:** Okay. Let's move

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1 forward with the deposition.
 2 MR. KIRSCH: Sure.
 3 BY MR. KILARU:
 4 Q. Mr. Berger, when did you become
 5 aware of the typographical errors in Exhibits B
 6 and D to your report?
 7 MR. KIRSCH: Objection to the extent
 8 that it calls for work product or our
 9 preparation.
 10 THE WITNESS: I defer to my client's
 11 objection.
 12 BY MR. KILARU:
 13 Q. Okay. And the question, just to
 14 be clear, only asks when. It doesn't ask for
 15 any substance. So I'm not asking for any
 16 substance of any communications between you and
 17 counsel.
 18 So it's just a question of when
 19 did you become aware of those typographical
 20 errors?
 21 MR. KIRSCH: What I'll -- I'm
 22 generally going to instruct the witness not to
 23 answer that question subject to if you want to
 24 ask if it was before or after his report issued,
 25 you can certainly ask that question.

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1 MR. KILARU: Okay. Just to be
 2 clear, because I want to get your instruction not
 3 to answer on the record --
 4 MR. KIRSCH: Well, it's on the
 5 record. I just said it.
 6 MR. KILARU: I don't think the
 7 record is clear on that point.
 8 BY MR. KILARU:
 9 Q. The question is: Mr. Berger, when
 10 did you become aware of the typographical
 11 errors to your reports in Exhibits B and D?
 12 MR. KIRSCH: And my instruction to
 13 the witness was on the basis of work product not
 14 to answer with the exception that he could
 15 certainly answer in terms of whether it was
 16 before or after his report was published.
 17 THE WITNESS: After my report was
 18 published.
 19 BY MR. KILARU:
 20 Q. So for purposes of this
 21 deposition, I'm going to refer to Exhibit D,
 22 the one that is attached to your report just
 23 as -- for simplicity as I ask you questions.
 24 Obviously, I realize there is that one
 25 typographical error in Question 18 as well as

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1 in the table of contents, and some of the
 2 headings may not be accurate, but if there's
 3 any portion of the deposition where you feel
 4 like I'm asking about a question that was
 5 different than what was actually asked, if you
 6 would like to refer to your -- what has been
 7 now marked as Berger Exhibit 3, you're
 8 absolutely -- feel free to do so.
 9 **A. Thank you. I appreciate that.**
 10 MR. KIRSCH: Where is Berger 3?
 11 MR. KILARU: I have it here.
 12 MR. KIRSCH: Okay.
 13 MR. KILARU: And if you want to have
 14 it in front of you, that's fine.
 15 MR. KIRSCH: That's a good idea.
 16 MR. KILARU: And you have Berger 4
 17 as well?
 18 THE WITNESS: I have that. It's
 19 right here.
 20 MR. KILARU: Okay.
 21 BY MR. KILARU:
 22 Q. Now I'm -- right now I'm looking
 23 at Question 3 of Exhibit D, and if you could
 24 turn to that.
 25 **A. (Witness complying.)**

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1 **The screening question?**
 2 Q. Yes, the screening question.
 3 MR. KIRSCH: For purposes of
 4 clarity, maybe counsel could refer to a specific
 5 page reference on Exhibit D.
 6 MR. KILARU: Sure. Absolutely.
 7 Right now I would like to ask a question about
 8 page 5 of Exhibit D.
 9 THE WITNESS: (Reviewing document.)
 10 BY MR. KILARU:
 11 Q. And let me know when you're --
 12 **A. I'm here.**
 13 Q. Okay. Great. Now, first of all,
 14 just so the record's clear, does this question
 15 accurately reflect what was asked in the
 16 survey?
 17 MR. KIRSCH: Objection to the extent
 18 that Berger 3 and Exhibit D to are Berger 2 are
 19 writings that speak for themselves.
 20 Subject to that, the witness can
 21 answer the question.
 22 MR. KILARU: And again, I'll just
 23 respond to that. The witness is absolutely free
 24 to -- if he feels there's any discrepancy, he has
 25 Berger 3 in front of him and he's absolutely free

<p style="text-align: right;">50</p> <p>1 to look at Berger 3 to answer the question. But 2 for this question, the purposes of this 3 deposition, I'm going to use the exhibit that was 4 attached to his report. 5 MR. KIRSCH: And again, what I'm 6 going to suggest to counsel on the record is that 7 we take a moment and we make multiple photocopies 8 of Berger -- what's been marked as Berger 3 so 9 counsel can have it in front of him and counsel 10 can avail himself of Berger 3 as well, rather 11 than asking Mr. Berger to do side-by-side 12 comparisons of Berger 3 to what is marked as -- 13 or what is Exhibit D to Berger 2. 14 MR. KILARU: And thank you for the 15 recommendation, but I would like to, for our 16 purposes, stick with asking questions based on 17 Exhibit D because that's what was produced to us. 18 I realize that there are a couple of 19 discrepancies, but for purposes -- you know, 20 counsel has represented that besides those 21 discrepancies, everything else is the same. So 22 hopefully it's not too burdensome to do this. 23 MR. KIRSCH: Well -- and our -- the 24 conversation that we had and it's -- I think 25 we've already stated that in substance on the</p>	<p style="text-align: right;">52</p> <p>1 MR. KIRSCH: Objection to the extent 2 that the language speaks for itself. 3 THE WITNESS: Yes, I would say the 4 language speaks for itself. That's what the 5 respondents saw, the respondent perceives what 6 "maintenance" is based on their own frame of 7 reference. 8 BY MR. KILARU: 9 Q. Okay. But you wrote the question, 10 correct? 11 A. Yes, I did. 12 Q. What did you intend to cover by 13 the term "maintenance"? 14 A. What I intended? 15 Q. (Nodding.) 16 A. People take care of the equipment. 17 Q. Would that, for instance, include 18 someone whose only job is to clean the 19 equipment? 20 A. Possibly, yes. 21 Q. So is somebody whose only job is 22 to clean heavy duty construction, logging or 23 other off-road equipment part of the universe 24 you intended to capture in the survey? 25 A. If that's what they did, yes.</p>
<p style="text-align: right;">51</p> <p>1 record. What I will say is what I've said 2 before, that we have -- you have the opportunity 3 to ask Mr. Berger any questions about Berger 3 or 4 Berger 4 that you would like, and we would again 5 present Mr. Berger for deposition. So if you are 6 making the choice not to ask Mr. Berger specific 7 questions now, that is certainly your 8 prerogative, but you absolutely have the 9 opportunity to do so. 10 MR. KILARU: Okay. I think we've 11 made our positions clear for the record. 12 BY MR. KILARU: 13 Q. So Mr. Berger, I'll just ask you 14 the question again. 15 Was Question 3, as it's shown on 16 page 5 of Exhibit D to your report, the same 17 question that respondents answered? 18 A. Yes. 19 MR. KIRSCH: Objection to the extent 20 the documents are writings which speak for 21 themselves. 22 THE WITNESS: The answer's yes. 23 BY MR. KILARU: 24 Q. Thank you. Now, in that question, 25 what do you mean by the term "maintenance"?</p>	<p style="text-align: right;">53</p> <p>1 Q. Is there a reason you didn't limit 2 the universe of survey respondents to people 3 who just purchased, used or leased equipment? 4 MR. KIRSCH: Objection to the extent 5 it calls for work product. 6 Subject to that, you can answer the 7 question. 8 THE WITNESS: I believe that was the 9 best verbiage that I could come up with for that 10 question. 11 BY MR. KILARU: 12 Q. And why is that? 13 MR. KIRSCH: Objection. Same 14 objection. 15 THE WITNESS: I thought out the 16 question and it's what -- what I wrote. 17 BY MR. KILARU: 18 Q. What were you specifically trying 19 to cover by including the word "maintenance" in 20 that question? 21 MR. KIRSCH: Objection, asked and 22 answered. 23 The witness can answer again. 24 THE WITNESS: Familiarity with the 25 equipment.</p>

<p style="text-align: right;">54</p> <p>1 BY MR. KILARU: 2 Q. Now, with respect to the terms 3 "Heavy duty construction, logging or other 4 off-road equipment" which appears in screening 5 Question Nos. 3 through 8, I'm going to try to 6 get just some sense of what you meant by those 7 terms. 8 A. Certainly. 9 Q. What did you mean by "heavy-duty 10 construction equipment"? 11 A. Well, things like bulldozers and 12 things like that. 13 Q. Any other examples you can think 14 of? 15 A. I don't know. I'm not an expert 16 on that kind of equipment. But it's the kind 17 of equipment you'd see in road construction, 18 for example. 19 Q. What did you mean by "logging 20 equipment"? 21 A. Logging equipment is any kind of 22 equipment used to cut down trees and to prepare 23 the wood for the mill. 24 Q. Can you give me any examples of 25 logging equipment that would be covered under</p>	<p style="text-align: right;">56</p> <p>1 know, these absolutely enormous trucks that 2 have huge wheels and -- you know, that's what I 3 think of when I think of off-road. I don't 4 know. Again, I'm not an expert. 5 Q. Right. 6 A. And I'm not a construction expert. 7 Q. Right. 8 A. I know about as much about 9 construction as any person. When I see 10 construction sites, I see roadwork being done, 11 I see the kinds of equipment that's being used 12 in it. 13 Q. Is it possible that someone could 14 consider snowmobiles to be off-road equipment? 15 MR. KIRSCH: Objection to the extent 16 it calls for speculation. 17 You can answer. 18 THE WITNESS: I don't think that's 19 possible. 20 BY MR. KILARU: 21 Q. And why not? 22 A. It's recreational equipment and 23 we're not -- we're not considering this as 24 recreation equipment. 25 Q. Is it possible that someone could</p>
<p style="text-align: right;">55</p> <p>1 that category? 2 A. Again, if you are -- did that work 3 and you saw that phrase, you would know that 4 you are involved with it. So I have no qualms 5 about using that word. It means people who 6 have to do with cutting woods in forest and the 7 machinery that helps them do that. 8 Q. What did you mean by "other 9 off-road equipment"? 10 A. Off-road equipment is these huge 11 trucks. They use them in coal mines and they 12 use them in various places. They're huge 13 trucks that you don't generally see on the 14 highway, or I don't think you could see them on 15 the highway. They're simply used in the 16 construction area. And again, off-road 17 equipment" is a term that if you are in that 18 trade or in that business, you would understand 19 what it means. 20 Q. And I'm just trying to get a sense 21 of what you meant by it. So you gave me some 22 examples of things that might be considered 23 off-road equipment. Can you give me any other 24 examples? 25 A. The biggest -- the best example I</p>	<p style="text-align: right;">57</p> <p>1 consider ATVs to be off-road equipment? 2 A. Um, again, there is a specific 3 category called "Recreational equipment," and I 4 believe ATVs, snowmobiles, you know, the things 5 that go in the water, the motorcycles -- what 6 do they call those things? -- those would be 7 recreational kinds of things as opposed to 8 business type products such as what we're 9 talking about. 10 Q. Is it possible that someone could 11 consider Jeeps to be off-road equipment? 12 MR. KILARU: Objection to the extent 13 it calls for speculation. 14 THE WITNESS: If the Jeep was used 15 on a construction site and its function was the 16 area of construction or forestry or mining, 17 whatever, then you might possibly go into that 18 gray area. 19 BY MR. KILARU: 20 Q. Is it possible that someone could 21 consider pickup trucks to be off-road 22 equipment? 23 A. Same answer. 24 MR. KIRSCH: Same objection. 25</p>

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1 BY MR. KILARU:
 2 Q. Are you aware that the term
 3 "off-road equipment" is commonly used to refer
 4 to Jeeps and pickup trucks?
 5 A. No.
 6 MR. KIRSCH: Objection.
 7 MR. KILARU: I'd like to ask the
 8 court reporter to mark this as Exhibit 5.
 9 (Berger Exhibit No. 5 was
 10 marked for ID.)
 11 MR. KILARU: And just for ease of
 12 reference, I'm going to mark what is about to be
 13 marked as Exhibit 5, the specific language I'm --
 14 I want to ask the question about just for
 15 simplicity.
 16 Let's go off the record.
 17 (Discussion off the record.)
 18 BY MR. KILARU:
 19 Q. So Mr. Berger, you've been handed
 20 Exhibit No. 5. Please let me know once you've
 21 had a chance to review it.
 22 A. (Reviewing document.)
 23 Okay.
 24 Q. Looking at -- you want --
 25 A. You want it back?

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1 Q. You can keep it.
 2 Looking at Exhibit 5, would you
 3 agree that the term "off-road equipment" is
 4 sometimes used to refer to Jeeps?
 5 MR. KIRSCH: Objection to the extent
 6 it's a writing which speaks for itself and to the
 7 extent that it is taken out of context.
 8 THE WITNESS: I see "off-road
 9 equipment" in this website. I don't know exactly
 10 what it means other than words. I don't know.
 11 BY MR. KILARU:
 12 Q. And do you see any other types of
 13 vehicles on those websites besides Jeeps?
 14 MR. KIRSCH: Again, objection to the
 15 extent that the document is a writing which
 16 speaks for itself and is a printout of a website
 17 which may or may not be complete.
 18 THE WITNESS: A "Rocky Road Rock
 19 Slider," I don't know what that is. (Reviewing
 20 document.)
 21 It's really hard for me to first --
 22 it's really hard for me to understand what is
 23 being sold in this website to be perfectly
 24 honest.
 25

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1 BY MR. KILARU:
 2 Q. Well, what types of vehicles do
 3 you see on the website?
 4 A. I see vehicles, but I also see
 5 parts. They seem to be wanting to sell parts
 6 rather than actual vehicles, winches and shock
 7 absorbers and gears and axles. Okay. Same for
 8 the next one, they're selling parts. It's a
 9 part. The second one had "offroad" as one
 10 word. This one had "off-road" as two words
 11 with a hyphen. So the way I refer to
 12 "off-road" is two words with a hyphen. So --
 13 Q. Could perhaps a truck --
 14 A. What is the question?
 15 Q. I'll try to simplify the question.
 16 A. Yes. Let's get to the -- let's
 17 cut to the chase.
 18 Q. Could "off-road equipment" with or
 19 without the hyphen be used to refer to Jeeps?
 20 MR. KIRSCH: Objection, calls for
 21 speculation, vague and ambiguous.
 22 Subject to that, the witness can
 23 answer the question.
 24 THE WITNESS: I don't know.
 25 Apparently -- and I'm not guessing, but I'm

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1 observing, I'm surmising. Apparently the word
 2 "Off-road" is used in more than one context.
 3 BY MR. KILARU:
 4 Q. And which contexts would those be?
 5 A. The off-road that I assume it to
 6 be and the off-road that these websites assume
 7 it to be in the process of selling their parts.
 8 Both of these websites sell parts, not -- not
 9 completed vehicles.
 10 MR. KIRSCH: Are we done with 5?
 11 MR. KILARU: Yeah.
 12 BY MR. KILARU:
 13 Q. Is it possible that the all of the
 14 respondents for your survey could have
 15 qualified because they owned a pickup truck or
 16 Jeep?
 17 A. Is it possible? Yes.
 18 THE WITNESS: Can I have some more
 19 coffee?
 20 MR. KILARU: Sure. Why don't we
 21 take a break, actually.
 22 (Recess taken from 11:29 a.m.
 23 to 11:40 a.m.)
 24 BY MR. KILARU:
 25 Q. So Mr. Berger, based on the data

<p style="text-align: right;">62</p> <p>1 that was collected from the survey, do you have 2 any way of identifying the specific type of 3 equipment that any respondent purchased or 4 used? 5 A. We didn't go individually and ask 6 individual questions about the type of 7 equipment they contemplated purchasing, 8 purchased, used, maintained, whatever. All we 9 wanted were people who were involved with that 10 equipment to some degree and were able to 11 understand what that equipment was all about. 12 Q. Do you have any understanding as 13 to what "skidders" are? 14 A. No, I don't. 15 Q. Do you have any understanding as 16 to what "carrying aerial devices" are? 17 A. No. 18 Q. Do you have any understanding as 19 to what "mulchers" are? 20 A. Mulchers? 21 (Nodding.) 22 A. Yeah, I believe a mulcher is like 23 what we use in my -- my grass, when I cut 24 grass. It takes the actual cuttings and 25 mulches them and it reduces the size of them,</p>	<p style="text-align: right;">64</p> <p>1 understanding as to what "purpose-built prime 2 movers" are? 3 A. No. 4 Q. Have you ever heard that term 5 before? 6 A. No. 7 Q. Is there any way that you can tell 8 from your a survey whether any of the 9 respondents who qualified were people who had 10 purchased, used, or leased a skidder, carrying 11 aerial device, mulcher, sprayer or 12 purpose-built prime mover? 13 MR. KIRSCH: Objection, asked and 14 answered. The survey speaks for itself. 15 And the witness can answer the 16 question. 17 THE WITNESS: And the answer to that 18 would be no. 19 BY MR. KILARU: 20 Q. Now, did your survey attempt to 21 test forward confusion or reverse confusion? 22 MR. KIRSCH: Objection to the extent 23 it calls for a legal conclusion. 24 The witness can answer if the 25 witness knows the answer to the question.</p>
<p style="text-align: right;">63</p> <p>1 grinds them. 2 Q. Do you have any understanding as 3 to who typically purchases mulchers? 4 MR. KIRSCH: Objection, vague and 5 ambiguous, calls for speculation. 6 THE WITNESS: I -- no. I think I 7 would only guess and since I don't have to guess, 8 I'll say no. 9 BY MR. KILARU: 10 Q. Okay. Do you have any 11 understanding as to who uses mulchers? 12 MR. KIRSCH: Same. 13 THE WITNESS: Other than a consumer 14 product mulcher, no. 15 BY MR. KILARU: 16 Q. Do you have any understanding as 17 to what "sprayers" are? 18 A. Again, I can surmise what these 19 things are, but I don't know for sure. 20 MR. KIRSCH: And I'm going to 21 instruct the witness not to guess. 22 THE WITNESS: Okay. So I'm going to 23 say no to that. 24 BY MR. KILARU: 25 Q. Okay. Do you have any</p>	<p style="text-align: right;">65</p> <p>1 THE WITNESS: Based on my knowledge 2 as a nonlawyer -- 3 MR. KIRSCH: I don't want the 4 witness to guess. 5 THE WITNESS: I'm not guessing. 6 MR. KIRSCH: So if the witness 7 doesn't know the answer to the question, don't 8 answer the question. 9 THE WITNESS: I'm not guessing. I 10 would say forward confusion. 11 BY MR. KILARU: 12 Q. Do you have an understanding -- 13 MR. KIRSCH: Could you hold on one 14 second? 15 MR. KILARU: Sure. 16 (Recess taken from 11:45 a.m. 17 to 11:46 a.m.) 18 BY MR. KILARU: 19 Q. Mr. Berger, do you have any 20 understanding as to the terms "junior user" and 21 "senior user" in trademark law? 22 A. I know senior and junior but not 23 in terms of "user." Senior maker and junior 24 maker or senior marketer and junior marketer, 25 that I understand --</p>

66

1 Q. Okay.

2 **A. -- but not the senior or junior**

3 **user.**

4 Q. So if I use the term "senior

5 mark," is that -- do you have an understanding

6 of what that term means?

7 **A. That would be the first company**

8 **that used the mark.**

9 Q. Okay. Okay. And the junior user

10 would be the party that used the mark later,

11 after the senior --

12 **A. Correct.**

13 Q. -- mark?

14 **A. Correct.**

15 Q. In a forward confusion case --

16 scratch that.

17 In a forward confusion case, is

18 the proper universe the buyers of the goods

19 bearing the junior mark or the senior mark?

20 MR. KIRSCH: Objection to the extent

21 that it calls for a legal conclusion.

22 If the witness is able to answer the

23 question, the witness can answer the question.

24 THE WITNESS: Well, in many cases

25 the purchaser of -- is the same who purchases the

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1 junior and the senior. So the relevant target

2 market is the same.

3 BY MR. KILARU:

4 Q. Have you heard of the McCarthy's

5 trademark treatise?

6 **A. Yes.**

7 Q. Have you ever read portions of it?

8 **A. Yes.**

9 Q. Do you consider McCarthy's to be

10 an authoritative source in the field?

11 **A. One of them, yes.**

12 MR. KILARU: I'd like to ask that

13 this be marked as Exhibit 6.

14 (Berger Exhibit No. 6 was

15 marked for ID.)

16 BY MR. KILARU:

17 Q. And I'll just represent to you

18 that this is an a printout from the McCarthy's

19 trademark treatise and Mr. Berger, feel free to

20 review the entire three pages, but the question

21 I'll be asking is about -- is on the second

22 page in that first full paragraph.

23 **A. Where did this come from? Which**

24 **one of the McCarthy's treatises did this come**

25 **from?**

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1 Q. This --

2 **A. Is this the likelihood of**

3 **confusion or --**

4 Q. For the record, this came from

5 Chapter 32 of the treatise called McCarthy's on

6 Trademarks and Unfair Competition.

7 **A. And what is Chapter 32?**

8 Q. Chapter 32 is the chapter on

9 trademark surveys.

10 **A. Okay. (Reviewing document.)**

11 **Okay.**

12 Q. Okay. So I'm just going to ask

13 you a question about the first full paragraph

14 on the second page and the question is going to

15 be: Do you agree, disagree or have no opinion

16 regarding whether or not these statements are

17 accurate?

18 MR. KIRSCH: Object.

19 MR. KILARU: And for the record,

20 I'll just read the sentence -- the two sentences

21 into the record. And the sentences state "In a

22 traditional case claiming forward confusion, not

23 reverse confusion, the proper universe to survey

24 is the potential buyer of the junior user's goods

25 or services. However, in a reverse confusion

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1 case, it is appropriate to survey the senior

2 user's customer base."

3 MR. KIRSCH: And I'm just going --

4 MR. KILARU: I haven't finished my

5 question.

6 MR. KIRSCH: I thought you were

7 done.

8 BY MR. KILARU:

9 Q. And my question is: Do you agree

10 with that statement, disagree with that

11 statement or have no opinion?

12 MR. KIRSCH: And my -- my objection

13 for the record is that the witness has only been

14 presented with a partial portion of what is

15 Section 32:159 of the treatise that counsel

16 refers to, and it is not the entire section or

17 the -- and the remaining -- and the related

18 sections haven't been provided to the witness to

19 add additional context.

20 THE WITNESS: The answer to that

21 question is that I believe that more context

22 would be needed to answer that question, No. 1,

23 and, No. 2, I believe it calls for a legal

24 conclusion which I'm incapable of offering

25 because I'm not a legal expert.

70	<p>1 BY MR. KILARU:</p> <p>2 Q. Let's ask the question this way:</p> <p>3 When you were designing the survey, was it your</p> <p>4 intent to capture the buyers of Caterpillar's</p> <p>5 goods or Tigercat's goods or both?</p> <p>6 MR. KIRSCH: To the extent calls for</p> <p>7 work product, I object.</p> <p>8 Subject to that, the witness can</p> <p>9 answer.</p> <p>10 THE WITNESS: I believe that the</p> <p>11 marketplace includes present prospective buyers</p> <p>12 of either or both Caterpillar or Tigercat</p> <p>13 products. Does that answer your question?</p> <p>14 BY MR. KILARU:</p> <p>15 Q. The answer would be both, okay?</p> <p>16 A. (Nodding.)</p> <p>17 Q. Okay. Was that a nod? I saw a</p> <p>18 head nod, but I didn't see --</p> <p>19 MR. KILARU: Did you get a verbal</p> <p>20 "yes"?</p> <p>21 THE REPORTER: (Shaking head.)</p> <p>22 MR. KIRSCH: What's the question</p> <p>23 that's before the witness?</p> <p>24 MR. KILARU: Could you repeat the</p> <p>25 last question?</p>	72	<p>1 BY MR. KILARU:</p> <p>2 Q. So Mr. Berger, I'd like to move to</p> <p>3 the portion of the survey that respondents take</p> <p>4 after they pass the screening questions.</p> <p>5 A. Yes.</p> <p>6 Q. First, how many people qualified</p> <p>7 to take the survey in this case?</p> <p>8 A. 214.</p> <p>9 Q. And the first question in the</p> <p>10 survey that was asked after they pass the</p> <p>11 screening questions is Question No. 12 on</p> <p>12 page 18 of Exhibit D to your report and is also</p> <p>13 reflected on Berger Exhibit 3, which I'll hand</p> <p>14 you in just a second, and that question is:</p> <p>15 "Are you familiar with any of these logos?"; is</p> <p>16 that correct?</p> <p>17 A. Yes.</p> <p>18 Q. And these -- by the term "these</p> <p>19 logos," am I correct in understanding that the</p> <p>20 logos shown in Exhibit C to your report were</p> <p>21 the logos that the respondents saw?</p> <p>22 A. Yes, that's correct.</p> <p>23 Q. What did you intend the word</p> <p>24 "familiar" to mean?</p> <p>25 A. Well, the way it would be</p>
71	<p>1 THE REPORTER: Sure.</p> <p>2 (Record read.)</p> <p>3 THE WITNESS: In other words, I</p> <p>4 believe that people who answered that question</p> <p>5 might have been former or prospective purchasers</p> <p>6 of either or both the products of the two</p> <p>7 manufacturers in question.</p> <p>8 BY MR. KILARU:</p> <p>9 Q. And just to make sure I understood</p> <p>10 that correctly, did you intend to capture,</p> <p>11 within the universe of the survey that you</p> <p>12 designed, both buyers of both Caterpillar's and</p> <p>13 Tigercat's products?</p> <p>14 MR. KIRSCH: Asked and answered.</p> <p>15 THE WITNESS: Yes.</p> <p>16 BY MR. KILARU:</p> <p>17 Q. Okay.</p> <p>18 A. Either -- either one or both of</p> <p>19 them.</p> <p>20 Q. Okay.</p> <p>21 A. Either or both, I think that's the</p> <p>22 terminology I want.</p> <p>23 MR. KILARU: Go off the record.</p> <p>24 (Recess taken from 11:56 a.m.</p> <p>25 to 12:17 p.m.)</p>	73	<p>1 interpreted by the respondent, "familiar" would</p> <p>2 be that I suppose "Have you ever seen it</p> <p>3 before?"</p> <p>4 Q. So is it possible someone could</p> <p>5 answer "yes" to this question if their</p> <p>6 familiarity was limited to seeing one of the</p> <p>7 logos on a T-shirt somewhere?</p> <p>8 MR. KIRSCH: Objection, calls for</p> <p>9 speculation and to the extent it doesn't fairly</p> <p>10 represent the survey objection.</p> <p>11 THE WITNESS: That is remotely</p> <p>12 possible and highly unlikely because of the fact</p> <p>13 that these people were all screened prior to</p> <p>14 getting to this point, and they were screened to</p> <p>15 the point that they had either bought, intended</p> <p>16 to buy, operate, maintain, whatever. They are</p> <p>17 involved with equipment. So -- and it says "Are</p> <p>18 you familiar with any of these logos" which</p> <p>19 means -- there are seven of them there. You</p> <p>20 could be familiar with any of them.</p> <p>21 BY MR. KILARU:</p> <p>22 Q. Do you ever ask anywhere in your</p> <p>23 survey whether or not the respondents have seen</p> <p>24 any of those logos on a piece of heavy</p> <p>25 equipment?</p>

<p style="text-align: right;">74</p> <p>1 MR. KIRSCH: Objection to the extent 2 the survey speaks for itself. 3 THE WITNESS: That question was not 4 asked. 5 BY MR. KILARU: 6 Q. And why wasn't that question 7 asked? 8 MR. KIRSCH: Objection to the extent 9 it calls for work product. 10 THE WITNESS: A lot of questions can 11 be asked in a survey. You have to select those 12 questions that you think are relevant to the 13 survey, and that question was not a question that 14 we considered to be a relevant or important 15 question in the survey. 16 BY MR. KILARU: 17 Q. So when you presented the logos to 18 the respondents, you considered it irrelevant 19 to provide them with any category of equipment 20 within which to view those marks? 21 MR. KIRSCH: Objection to the extent 22 it doesn't fairly characterize the witness's 23 testimony. Objection to the extent it's asked 24 and answered, and objection to the extent it's 25 vague.</p>	<p style="text-align: right;">76</p> <p>1 Q. Um-hum. Okay. And that's Eckert 2 Seamans? 3 A. That's the one. 4 Q. And am I correct in understanding 5 that the logos were selected jointly by you and 6 Eckert Seamans? 7 A. Yes. However, I do believe Eckert 8 Seamans had some contact with its lawyers. 9 MR. KIRSCH: Do not -- instruct the 10 witness again not to reveal communications 11 between counsel and the witness. 12 THE WITNESS: All right. 13 BY MR. KILARU: 14 Q. Is selecting the logos part of the 15 survey design? 16 MR. KIRSCH: Objection, vague and 17 ambiguous to the extent it calls for a legal 18 conclusion. 19 THE WITNESS: Yes, of course. 20 MR. KILARU: I'd like to mark this 21 as Exhibit No. 7. 22 (Berger Exhibit No. 7 was 23 marked for ID.) 24 BY MR. KILARU: 25 Q. Mr. Berger, I'll just ask you, is</p>
<p style="text-align: right;">75</p> <p>1 Subject to that, the witness can 2 answer. 3 THE WITNESS: The logos were 4 suggested in conjunction with my client. We 5 selected them together. And we wanted logos that 6 had -- 7 MR. KIRSCH: Do not -- I instruct 8 the witness not to discuss conversations or 9 communications with counsel. 10 THE WITNESS: Okay. 11 Logos were selected because they 12 included the word "cat" and they had something to 13 do with some kind of a durable good, and in 14 virtually every case, some of the durable goods 15 that were produced had something to do with 16 business use. 17 BY MR. KILARU: 18 Q. Now, just to be clear, your 19 previous response, you referred to your client 20 and could you just clarify what you meant by 21 that? 22 A. Client -- my client is, as 23 indicated in my report, the company that 24 retained me, the law firm that retained me, the 25 law firm that this fine gentleman works for.</p>	<p style="text-align: right;">77</p> <p>1 this one of the more poplar articles you've 2 written? 3 A. It is in terms of depositions. 4 Q. So feel free to review it if you 5 need to, but I'm only going to ask you about 6 the second page. 7 A. Okay. 8 Q. And where you have "Flaw No. 9," 9 the first sentence which says "The involvement 10 of an attorney in the survey design will always 11 be viewed with suspicion," do you agree with 12 that statement? 13 MR. KIRSCH: I'm just going to 14 instruct the witness to read all of that section 15 before answering the question. 16 THE WITNESS: I think that's the 17 answer to the question, "While the expert 18 develops the survey, the attorney is needed to 19 review as to make sure factual accuracies have 20 been addressed. The attorney can even suggest 21 rewording questions in an effort to better 22 reflect the wishes of the expert. The key is the 23 intent and the control of the survey. It's a 24 fine line. The attorney knows what facts are 25 needed to help him prove or disprove a complaint.</p>

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1 The expert's role is" to -- is draft a survey
 2 that fulfills that intent."
 3 So that con- -- that answers the
 4 question.
 5 BY MR. KILARU:
 6 Q. Did you write this article?
 7 **A. Yes, I did.**
 8 Q. Okay. And did you write that
 9 first sentence, "The involvement of an attorney
 10 in the survey design will always be viewed with
 11 suspicion"?
 12 **A. I did.**
 13 Q. Now I'm going to move to the three
 14 confusion questions and if you have Exhibit --
 15 do you have Exhibit 3?
 16 **A. Yeah, I have it.**
 17 MR. KIRSCH: It's over there.
 18 BY MR. KILARU:
 19 Q. Okay. And just for ease of
 20 reference, I have these questions on the same
 21 page. I put those three questions on what I'm
 22 going to ask the court reporter to mark as
 23 Exhibit 8.
 24 THE WITNESS: Okay.
 25

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1 (Berger Exhibit No. 8 was
 2 marked for ID.)
 3 MR. KILARU:
 4 Q. And I'd like to just ask you,
 5 Mr. Berger, if you could confirm, you know,
 6 whether or not Exhibit 8 is an accurate
 7 representation of the three questions that were
 8 asked. Obviously, I realize they were
 9 follow-up questions that were asked in these,
 10 but in terms of questions that were asked --
 11 MR. KIRSCH: I'll just object to the
 12 extent that they're -- it's a writing that speaks
 13 for itself.
 14 THE WITNESS: (Reviewing documents.)
 15 Somebody ought to take a yellow
 16 thing and go through this and just mark the...
 17 Okay. "Do you believe that one or
 18 more of these equipment brands are owned by the
 19 same company?"
 20 MR. KIRSCH: He's reading to
 21 himself.
 22 THE WITNESS: I'm reading to myself.
 23 Okay, Question 14's okay. Question
 24 16's okay. And Question 18's okay.
 25

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1 BY MR. KILARU:
 2 Q. Okay. I don't know if that was
 3 captured on the record or not but --
 4 **A. I'll make a statement.**
 5 Q. Sure.
 6 **A. The three renditions or the three**
 7 **things that were given are accurate.**
 8 Q. And just so the record is clear,
 9 can you please refer to the exhibit number?
 10 **A. No. 8 is an accurate exhibit.**
 11 Q. Okay. And just so -- for our own
 12 purposes, so the record is absolutely clear,
 13 does Exhibit 8 accurately reflect Questions 14,
 14 16 and 18 as they were administered in
 15 connection with your survey?
 16 **A. Yes.**
 17 Q. And this is the way the questions
 18 were actually asked?
 19 **A. Yes.**
 20 Q. From the data that was collected,
 21 are you able to tell how many unique
 22 respondents answered "yes" to any one of these
 23 questions?
 24 **A. Yes.**
 25 Q. And how many is that?

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1 **A. It's in --**
 2 Q. And I'll just state for the record
 3 that it is somewhere in the body of your
 4 report.
 5 **A. It's in Exhibit D.**
 6 Q. It's in Exhibit D, okay.
 7 **A. (Reviewing document.)**
 8 **Do you have a question? Is there**
 9 **a question now?**
 10 Q. Oh, so just to repeat my
 11 question...
 12 MR. KILARU: Maybe you can just
 13 repeat it.
 14 THE REPORTER: Okay.
 15 (Record read.)
 16 THE WITNESS: Question 14, 55
 17 respondents answered "yes," 34 respondents
 18 answered "no" and 124 respondents answered they
 19 didn't know -- "don't know."
 20 BY MR. KILARU:
 21 Q. And where are you looking to get
 22 that information?
 23 **A. Exhibit D, page 21.**
 24 Q. Okay. Okay.
 25 MR. KIRSCH: I'm going to make an

<p style="text-align: right;">82</p> <p>1 objection because I don't think the wit- -- the 2 question must not have been sufficiently clear 3 for the witness to understand it, because what I 4 understand what counsel asked, counsel asked "Can 5 you determine -- where can you determine the 6 number of unique respondents across each of the 7 three questions, and I don't think that the 8 witness has appreciated the question that counsel 9 has asked. 10 THE WITNESS: Did you ask that 11 question? 12 MR. KILARU: Yes. 13 THE WITNESS: I'm sorry, I didn't 14 understand that question. 15 BY MR. KILARU: 16 Q. Okay. 17 A. How many unique respondents? 18 Q. Correct. 19 A. How do you define "unique"? 20 Q. Are you able to tell which 21 respondents answered "yes" to all of the 22 questions? 23 A. "All the questions" meaning? 24 Q. Questions 14, 16 and 18. 25 A. I'm able to do that, but not on</p>	<p style="text-align: right;">84</p> <p>1 after the report to fill in information that 2 somebody might have felt was missing. 3 BY MR. KILARU: 4 Q. Does the number of unique 5 respondents who answered "yes" to any -- to 6 Questions 14, 16 and 18 have any value in the 7 survey? 8 MR. KIRSCH: Objection to the word 9 "value," vague and ambiguous. 10 The witness can answer if he's able. 11 THE WITNESS: When one analyzes 12 Exhibit 4 -- and I sure can't do it because I 13 can't see it -- but when one does it with a 14 magnifying glass or something else, they will 15 find that the Tigercat and the Caterpillar, the 16 CAT logo, those two logos had one unique 17 respondent in Question 14 and one unique 18 respondent in Question 16. 19 It was not the same one, a total of 20 two unique respondents in the entire survey. So 21 if I was -- if I was, and I was testing 22 likelihood of confusion, it certainly was clearly 23 evident that in this survey, there was no 24 confusion between Tigercat and Caterpillar. 25</p>
<p style="text-align: right;">83</p> <p>1 the basis of this report. It's do-able by 2 doing cross tabulations. 3 Q. Okay. 4 MR. KIRSCH: And that's, Naresh, 5 what I was pointing out to you, that here's 6 (indicating) a data sheet by which you could, if 7 you wanted to, run cross tabulations. 8 MR. KILARU: And just so the record 9 is clear, I think counsel was referring to 10 Exhibit No. -- 11 MR. KIRSCH: Exhibit 4. 12 MR. KILARU: -- 4. 13 MR. KIRSCH: That is correct. 14 BY MR. KILARU: 15 Q. Is there a reason that you didn't 16 include that information in your report, 17 Mr. Berger? 18 A. I included in my report the 19 answers to the basic questions. I did not 20 include cross tabs in my report. 21 MR. KIRSCH: And counsel's question 22 to you was "why," though. He asked you why. 23 THE WITNESS: Ah... we generally do 24 not include cross tabulations in a basic report. 25 Cross tabulations are generally created sometime</p>	<p style="text-align: right;">85</p> <p>1 BY MR. KILARU: 2 Q. Okay. And I understand that's the 3 conclusion in your report. 4 A. Yes. 5 Q. And you -- when you talked about 6 this one survey respondent, could you -- can 7 you point to where in the report that's shown? 8 A. Yes. 9 MR. KIRSCH: Objection, vague -- 10 THE WITNESS: Let's go back to. 11 MR. KIRSCH: -- to the extent it 12 doesn't fairly characterize what the witness just 13 said. 14 THE WITNESS: As I understand what 15 you're asking me -- let's go back to 16 Exhibit 3 [sic]. 17 BY MR. KILARU: 18 Q. And just to be clear for the 19 record, I believe you're looking at Exhibit 2 20 which is your first amended report? 21 A. Yeah, Exhibit C. Here it is. 22 Yes, I'm looking at Exhibit C in Exhibit 2, and 23 we have the array of products. 24 Q. Um-hum. 25 A. And on the array of products, you</p>

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1 **see that each one of these logos has a letter**
 2 **attached to it where "K" is Tigercat and "S" is**
 3 **the logo for Caterpillar, okay? So if I were**
 4 **looking for people for the -- in answer to your**
 5 **question, for the unique person, I would take a**
 6 **look on page 22 of my report -- of the**
 7 **Exhibit D and I would look for those two**
 8 **peep -- those two -- those two marks, those two**
 9 **letters which were -- I keep forgetting -- "K"**
 10 **and -- "K" and "S". And the third line from**
 11 **the bottom of page 23 --**
 12 MR. KIRSCH: 22 or 23?
 13 THE WITNESS: 22, I'm sorry, is "SK"
 14 which means that one respondent --
 15 BY MR. KILARU:
 16 Q. Okay.
 17 **A. -- put Tigercat and Caterpillar**
 18 **together --**
 19 Q. Thank you. That's helpful.
 20 **A. -- uniquely.**
 21 Q. Okay.
 22 **A. All right? A number of**
 23 **respondents had "S" and "K" put together, but**
 24 **when they did it, they did it with more than**
 25 **two respondents, which I believe shows**

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1 **confusion. That's all.**
 2 Q. Now, are you able -- with
 3 respect -- I'm looking at page 22 of Exhibit D.
 4 MR. KIRSCH: Hold on. Wait, wait,
 5 wait.
 6 THE WITNESS: Shows not confusion,
 7 excuse me. Shows guessing. I'm sorry.
 8 Go ahead.
 9 BY MR. KILARU:
 10 Q. Okay. So I'm looking at the
 11 bottom of page 22 where you just referred to
 12 the respondent who answered "S" and "K."
 13 **A. Yes.**
 14 Q. Are you able to tell from your
 15 report what verbatim response that specific
 16 person gave?
 17 **A. Yes. It's available in the**
 18 **report.**
 19 Q. And could you direct me to that?
 20 **A. Ah, I don't know which one it was.**
 21 **Is it on the spreadsheet?**
 22 MR. KIRSCH: Right, so he -- if I
 23 can help you along, I think that Counsel,
 24 Mr. Kilaru was asking you if just based on the
 25 contents of Exhibit 2 and the exhibits to

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1 Exhibit 2, you could pair a particular response
 2 to a verbatim as opposed to whether or not you
 3 need to look at what's Exhibit 4 to pair a
 4 particular response to a verbatim.
 5 THE WITNESS: You can. That's
 6 possible to do that.
 7 BY MR. KILARU:
 8 Q. And just to clarify what counsel
 9 just asked, to be absolutely clear, can you
 10 make that pairing based on your first amended
 11 report alone?
 12 **A. No.**
 13 Q. Okay. Can you make that pairing
 14 based on Exhibit No. 4 which was produced
 15 today?
 16 **A. (Reviewing document.)**
 17 **Yes.**
 18 Q. And can you please circle on
 19 Exhibit No. 4 --
 20 **A. No, I won't do that. I don't know**
 21 **where it is and I can't see that well and I**
 22 **don't have a magnifying glass, and all I could**
 23 **tell you is it's there and what do you --**
 24 **what --**
 25 Q. All I'm asking for is I would like

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1 to know the verbatim of the response -- the
 2 verbatim response of the person who answered
 3 "S" and "K" on page 22.
 4 MR. KIRSCH: If you want me to point
 5 it out to you, I will point it out to you what
 6 their verbatim responses were on the data sheet.
 7 THE WITNESS: May I defer to
 8 counsel's response on that?
 9 MR. KILARU: Well, if you would like
 10 to help the witness and have the witness verify
 11 that, that's fine.
 12 THE WITNESS: Okay.
 13 MR. KIRSCH: The data sheet says
 14 what the data sheet says, but I don't want you to
 15 feel you're disadvantaged in seeing it now or you
 16 can have Mr. Berger back, as I've offered. It's
 17 up to you. How do you want to do it?
 18 MR. KILARU: As long as you -- I
 19 don't have any problem with you assisting
 20 Mr. Berger, given the very small print of
 21 Exhibit 4, and so if you would like to point out
 22 where that information is on Exhibit 4 and have
 23 Mr. Berger verify that, that is fine.
 24 MR. KIRSCH: What I don't want to do
 25 is I don't want to testify for Mr. Berger who

<p style="text-align: right;">90</p> <p>1 said he can't actually see the sheet himself. So 2 I would be happy to, either on or off the record, 3 point it out to you, but otherwise, we can just 4 continue on with the questions. 5 MR. KILARU: Okay. Well, I think we 6 should do it on the record, because I may have a 7 follow-up question once I see the verbatim 8 response. And I'd like to know what that 9 response is because obviously we -- until right 10 now, we have never been given that information, 11 and this is the first time where it seems like we 12 do have that information, and I would like to 13 know what that is. So if you could help 14 Mr. Berger, I would appreciate it. 15 THE WITNESS: Please -- please help 16 me in this if you know where it is. 17 MR. KIRSCH: Are we on the record 18 right now? 19 THE REPORTER: We are. 20 MR. KIRSCH: I just want to instruct 21 everybody that everyone understands that we are 22 on the record. So I'll go into my folder. 23 I just want to remind everyone that 24 Mr. Berger has already said that he can't read 25 this document. So I am pointing out to</p>	<p style="text-align: right;">92</p> <p>1 MR. KILARU: No, that's fine. 2 BY MR. KILARU: 3 Q. Going back to Exhibit No. 8, which 4 has Questions 14, 16 and 18 -- do you have that 5 in front of you, Mr. Berger? 6 A. Yes. 7 Q. I notice that there was a slight 8 variation in the questions. So Question 14 9 says "Do you believe that one or more of these 10 equipment brands are owned by the same 11 company?" 12 Question 16 says "Do you believe 13 that one or more of these equipment brands is 14 affiliated with the same company?" 15 And then Question 18 goes back to 16 "Do you believe that one or more of these 17 equipment brands are sponsored by the same 18 company?" 19 Was there a reason that you 20 decided to vary the form of the verb "to be" 21 and use "are" in Question 14, "is" in Question 22 16 and "are" in Question 18? 23 A. No, there's no reason. 24 Q. Are both grammatically correct in 25 your opinion?</p>
<p style="text-align: right;">91</p> <p>1 Mr. Berger at the request of counsel following my 2 offer -- sorry -- my understanding of -- with 3 respect to the question of "Do you believe that 4 one or more of these equipment brands are owned 5 by the same company," the particular respondent 6 who singularly paired just Caterpillar and 7 Tigercat together (indicating) to document. 8 THE WITNESS: Okay. Is that the 9 one? 10 MR. KIRSCH: (Nodding.) 11 THE WITNESS: What does it say? 12 MR. KIRSCH: And are you not able to 13 read that, Mr. Berger? 14 THE WITNESS: Uh-uh. 15 MR. KIRSCH: So the verbatim that 16 corresponds to that response appears to be "Big 17 equipment." 18 MR. KILARU: Okay. Could you just 19 circle that on the document so that we have that 20 for the record or underline, mark it in some way? 21 MR. KIRSCH: (Counsel complying.) 22 I've circled it. 23 MR. KILARU: Okay. 24 THE WITNESS: Did you initial it? 25 MR. KIRSCH: No.</p>	<p style="text-align: right;">93</p> <p>1 MR. KIRSCH: Objection to the extent 2 it calls for a conclusion regarding grammar. 3 THE WITNESS: I'm not a grammar 4 expert. I believe they all communicate what I 5 was trying to communicate. 6 BY MR. KILARU: 7 Q. Is the choice of wording important 8 in a survey? 9 MR. KIRSCH: Objection, vague and 10 ambiguous. 11 THE WITNESS: Is it -- what are you 12 trying to tell me? Choice of wording important? 13 BY MR. KILARU: 14 Q. Is the choice of wording 15 important? 16 A. Of course it is, yeah. 17 Q. Yeah. And you can't tell me the 18 reason why you switched between "are," "is" -- 19 "are" in Question 14, "is" in Question 16 and 20 "are" in Question 18? 21 MR. KIRSCH: Objection, asked and 22 answered. 23 The witness can answer the question 24 again. 25 THE WITNESS: I've given my answer</p>

<p style="text-align: right;">94</p> <p>1 to that question. I don't know the reason. 2 BY MR. KILARU: 3 Q. Do you have any understanding as 4 to what it means to decompose a sentence? 5 MR. KIRSCH: Objection, vague and 6 ambiguous. 7 The witness can answer if he's able 8 to. 9 HE WITNESS: To decompose a 10 sentence? 11 BY MR. KILARU: 12 Q. Yeah. 13 A. No, I don't know what you mean. 14 Q. All right. So I'll give you an 15 example. So the example I'll give is: Do you 16 believe that A or B is yellow? Okay? And so 17 what I am talking about, decomposing a 18 sentence, what I mean by that is that the 19 sentence, "Do you believe that A or B is 20 yellow," can be decomposed to "Do you believe 21 that A is yellow," or "Do you believe that B is 22 yellow?" 23 MR. KIRSCH: Objection, vague, 24 ambiguous and difficult to discern. 25 If the witness is able to answer the</p>	<p style="text-align: right;">96</p> <p>1 themselves. 2 THE WITNESS: And I agree with that 3 entirely, they speak for themselves. 4 BY MR. KILARU: 5 Q. Okay. So let me ask it this way: 6 Is one of the things that you're asking in 7 Question 14: "Do you believe that one of these 8 equipment brands are owned by the same 9 company?" 10 MR. KIRSCH: Objection. 11 BY MR. KILARU: 12 Q. Is that one of the things that 13 you're asking? 14 MR. KIRSCH: Objection, asked and 15 answered. The last time the witness can answer 16 the question. 17 MR. KILARU: I'm just trying to 18 understand what the question means. So this is 19 obviously the heart of the survey, and I'm just 20 trying to get a sense of what the question was 21 intended to mean. It's obviously a compound 22 question and I assume there's an explanation for 23 what Mr. Berger meant, and I'm just trying to 24 find out what he meant by the question that he 25 himself wrote.</p>
<p style="text-align: right;">95</p> <p>1 question, he can answer the question. 2 THE WITNESS: I hear what you're 3 saying, but I don't understand the relevance of 4 what you're saying. 5 BY MR. KILARU: 6 Q. Okay. So you understand now when 7 I talk about decomposing a sentence, do you 8 have an understanding of what I mean? 9 A. (Nodding.) 10 Q. All I'm talking about is -- 11 THE REPORTER: Yes? 12 THE WITNESS: Yes, I do. 13 BY MR. KILARU: 14 Q. Okay. If I were to decompose your 15 Question 14, would it be accurate to say that 16 that question could be decomposed into the 17 following two questions: Question No. 1: Do 18 you believe that one of these equipment brands 19 are owned by the same company? Question 2: Do 20 you believe that more of these equipment brands 21 are owned by the same company? 22 MR. KIRSCH: Objection to the extent 23 the witness has already testified that he's not a 24 grammarist and to the extent that the question -- 25 the survey questions are in writing and speak for</p>	<p style="text-align: right;">97</p> <p>1 MR. KIRSCH: And I think that you're 2 trying to ask a question which puts ambiguity 3 into something that's not ambiguous, and I think 4 he already answered the question, but if he wants 5 to answer again one more time, he can answer the 6 question. 7 THE WITNESS: I agree with that. I 8 think you're trying to place ambiguity into a 9 question that is not ambiguous. It's clear and 10 it's very understandable and that's how people 11 talk. 12 MR. KIRSCH: If you've answered the 13 question, then wait for the next question. 14 BY MR. KILARU: 15 Q. Can one equipment brand be owned 16 by the same company? 17 MR. KIRSCH: Objection, harassing. 18 THE WITNESS: The question speaks 19 for itself. It's a very clear question. It was 20 answered properly. It was -- I've asked this 21 question many times in surveys. I don't know 22 where you're coming from on this, seriously. 23 MR. KILARU: Okay. I want to ask 24 the court reporter to mark as Exhibit 9, and I'll 25 represent for the record that the top portion of</p>

98	<p>1 Exhibit 9 is identical to the questions that are</p> <p>2 shown on Exhibit 8, but Mr. Berger, you're free</p> <p>3 to verify that.</p> <p>4 THE WITNESS: Okay.</p> <p>5 MR. KIRSCH: I'd like a second to</p> <p>6 look at the document too.</p> <p>7 THE WITNESS: For sure.</p> <p>8 (Berger Exhibit No. 9 was</p> <p>9 marked for ID.)</p> <p>10 BY MR. KILARU:</p> <p>11 Q. And let me know once you've had a</p> <p>12 chance to review the document.</p> <p>13 A. (Reviewing document.)</p> <p>14 Okay. Go ahead.</p> <p>15 Q. In your opinion does -- is your</p> <p>16 Question 14 equivalent in meaning to</p> <p>17 alternative formulation No. 1?</p> <p>18 MR. KIRSCH: Objection to the extent</p> <p>19 that the questions are writings which speak for</p> <p>20 themselves, that the language of counsel's</p> <p>21 proposed alternative formulations speak for</p> <p>22 themselves, and the witness has already testified</p> <p>23 that he's not a grammarist.</p> <p>24 Subject to that, the witness can</p> <p>25 answer the question.</p>	100	<p>1 BY MR. KILARU:</p> <p>2 Q. Okay. And would that answer also</p> <p>3 be true if you compared Question 14 with</p> <p>4 alternative formulation No. 4?</p> <p>5 MR. KIRSCH: Same objections as</p> <p>6 before.</p> <p>7 THE WITNESS: Same answer as before,</p> <p>8 I don't know.</p> <p>9 BY MR. KILARU:</p> <p>10 Q. Do you -- sitting here today, do</p> <p>11 you see any difference between Question 14,</p> <p>12 alternative formulation No. 1 and alternative</p> <p>13 formulation No. 4?</p> <p>14 MR. KIRSCH: Objection, vague and</p> <p>15 ambiguous. And again, in terms of the questions</p> <p>16 that are here, they are writings which speak for</p> <p>17 themselves. I don't know what counsel means by</p> <p>18 "Do you see any difference?"</p> <p>19 THE WITNESS: I don't know.</p> <p>20 MR. KILARU: And just for the</p> <p>21 record, I want to make clear that we get the</p> <p>22 witness's answers on the record.</p> <p>23 BY MR. KILARU:</p> <p>24 Q. Do you see any difference between</p> <p>25 the meaning of Question 16 in your survey and</p>
99	<p>1 THE WITNESS: There are many ways to</p> <p>2 ask questions. My God, I was a copy editor for</p> <p>3 years. We used to say you could edit the Lord's</p> <p>4 Prayer if you wanted to. But the fact of the</p> <p>5 matter is we asked a question and we got an</p> <p>6 answer. I am not trying to -- I don't think it's</p> <p>7 relevant to ask questions in different ways and</p> <p>8 say that they mean different things. I am not a</p> <p>9 linguistics expert, and I'm not capable of</p> <p>10 answering these things.</p> <p>11 BY MR. KILARU:</p> <p>12 Q. Okay. Well, I'm not asking you in</p> <p>13 your expertise as a linguist because obviously</p> <p>14 I know you're not a linguist. I'm just asking</p> <p>15 you in your experience and as a layperson who</p> <p>16 can read English, obviously, I'm just asking</p> <p>17 for your opinion as to whether or not you</p> <p>18 believe that Question 14 in Exhibit No. 9 is</p> <p>19 equivalent in meaning to alternative</p> <p>20 formulation No. 1?</p> <p>21 MR. KIRSCH: Objection, asked and</p> <p>22 answered. Same objections as before.</p> <p>23 THE WITNESS: I'm going to say I</p> <p>24 just don't know. Okay?</p> <p>25</p>	101	<p>1 alternative formulation No. 2 and alternative</p> <p>2 formulation No. 5?</p> <p>3 MR. KIRSCH: Same objections.</p> <p>4 THE WITNESS: Same answer, I don't</p> <p>5 know.</p> <p>6 BY MR. KILARU:</p> <p>7 Q. Okay. And for the record, do you</p> <p>8 see any difference between the Question 18 in</p> <p>9 your survey and alternative formulation No. 3</p> <p>10 and alternative formulation No. 6?</p> <p>11 MR. KIRSCH: Same objections.</p> <p>12 THE WITNESS: Same answer, don't</p> <p>13 know.</p> <p>14 MR. KIRSCH: Do you need to take a</p> <p>15 break to use the restroom or anything like that?</p> <p>16 THE WITNESS: No. Let's just keep</p> <p>17 going.</p> <p>18 MR. KILARU: I'm happy to take a</p> <p>19 break whenever.</p> <p>20 THE WITNESS: No. I don't need to</p> <p>21 take a break.</p> <p>22 MR. KILARU: Okay.</p> <p>23 BY MR. KILARU:</p> <p>24 Q. Mr. Berger, is it accurate to say</p> <p>25 that your survey follows the Squirt format?</p>

102	<p>1 A. Yes.</p> <p>2 Q. You're familiar with an Eveready</p> <p>3 survey format?</p> <p>4 A. Yes.</p> <p>5 Q. Why didn't you use an Eveready</p> <p>6 format in this case?</p> <p>7 MR. KIRSCH: Objection.</p> <p>8 And instruct the witness not to</p> <p>9 answer, calls for work product.</p> <p>10 Objection, instruct the witness not</p> <p>11 to answer, calls for work product.</p> <p>12 MR. KILARU: So again, I'm going to</p> <p>13 ask questions. I want to get the instruction not</p> <p>14 to answer very clear on the record.</p> <p>15 BY MR. KILARU:</p> <p>16 Q. What I'm asking --</p> <p>17 MR. KIRSCH: It was very clear</p> <p>18 because I articulated it twice, but I'm happy</p> <p>19 again to instruct the witness not to answer</p> <p>20 regarding the choice of selection of survey</p> <p>21 formats as you just asked the question on the</p> <p>22 basis of work product.</p> <p>23 MR. KILARU: Okay.</p> <p>24 BY MR. KILARU:</p> <p>25 Q. So Mr. Berger, you testified</p>	104	<p>1 MR. KIRSCH: Objection.</p> <p>2 Instruct the witness not to answer</p> <p>3 on the basis of work product.</p> <p>4 BY MR. KILARU:</p> <p>5 Q. If you were to conduct a survey</p> <p>6 using an Eveready format, could you describe to</p> <p>7 me how you would go about doing that?</p> <p>8 MR. KIRSCH: Objection --</p> <p>9 MR. KILARU: And that's a yes-or-no</p> <p>10 answer. I'm not asking for how he would do it.</p> <p>11 I'm going to repeat the question again because</p> <p>12 it's a yes-or-no question and I want to make sure</p> <p>13 that the record is very clear that counsel is</p> <p>14 instructing the witness not to answer a yes-or-no</p> <p>15 question.</p> <p>16 MR. KIRSCH: I'm sure the court</p> <p>17 reporter is getting everything down. I'm very</p> <p>18 confident in her abilities, but if you want to</p> <p>19 state the question again so I can hear the</p> <p>20 question again and state the objection again so</p> <p>21 you have your sound bite, that would be fine.</p> <p>22 MR. KILARU: Sure. Yes. I would</p> <p>23 like the record to be absolutely clear on this</p> <p>24 point.</p> <p>25</p>
103	<p>1 earlier that you designed the survey; is that</p> <p>2 correct?</p> <p>3 A. Yes.</p> <p>4 Q. Can you tell me why you chose the</p> <p>5 Squirt format versus the Eveready format?</p> <p>6 MR. KIRSCH: Objection.</p> <p>7 Instruct the witness not to answer</p> <p>8 on the basis of work product.</p> <p>9 BY MR. KILARU:</p> <p>10 Q. Would the Eveready format have</p> <p>11 been an acceptable format in this case?</p> <p>12 MR. KIRSCH: Objection.</p> <p>13 Instruct the witness not to answer</p> <p>14 on the basis of work product.</p> <p>15 BY MR. KILARU:</p> <p>16 Q. What consideration did you make</p> <p>17 when you decided to use the Squirt format as</p> <p>18 opposed to the Eveready format?</p> <p>19 MR. KIRSCH: Objection.</p> <p>20 Instruct the witness not to answer</p> <p>21 on the basis of work product.</p> <p>22 BY MR. KILARU:</p> <p>23 Q. If you were to conduct this survey</p> <p>24 using an Eveready format, can you generally</p> <p>25 describe how you would go about doing that?</p>	105	<p>1 BY MR. KILARU:</p> <p>2 Q. And the question is: If you were</p> <p>3 to conduct this survey using an Eveready</p> <p>4 format, could you describe to me how you would</p> <p>5 go about doing that, yes or no?</p> <p>6 MR. KIRSCH: Could -- the question</p> <p>7 is could he -- could he describe it?</p> <p>8 MR. KILARU: Yes, does he have the</p> <p>9 ability to do it.</p> <p>10 MR. KIRSCH: You can answer that</p> <p>11 question.</p> <p>12 THE WITNESS: Yes.</p> <p>13 BY MR. KILARU:</p> <p>14 Q. Okay. And am I correct in</p> <p>15 understanding that you could do it, but you are</p> <p>16 not going to do it based on the instruction</p> <p>17 you've received from counsel?</p> <p>18 MR. KIRSCH: That is correct.</p> <p>19 THE WITNESS: Yes. Yes.</p> <p>20 BY MR. KILARU:</p> <p>21 Q. Okay. Have you ever done surveys</p> <p>22 using the Eveready format?</p> <p>23 A. Yes.</p> <p>24 Q. When was the last time you did a</p> <p>25 survey using the Eveready format?</p>

106	<p>1 MR. KIRSCH: Objection.</p> <p>2 Instruct the witness not to answer</p> <p>3 on the basis of work product.</p> <p>4 MR. KILARU: I'm not even asking</p> <p>5 about this case.</p> <p>6 MR. KIRSCH: I understand that.</p> <p>7 MR. KILARU: Okay.</p> <p>8 BY MR. KILARU:</p> <p>9 Q. So Mr. Berger, let me ask you</p> <p>10 another question.</p> <p>11 Do you know when the last time you</p> <p>12 did a survey using the Eveready format?</p> <p>13 A. Yes.</p> <p>14 Q. Okay. And -- but you are refusing</p> <p>15 to tell me when is the last time you did a</p> <p>16 survey using the Eveready format based on your</p> <p>17 instruction from counsel not to answer?</p> <p>18 MR. KIRSCH: Right. I've instructed</p> <p>19 him not to answer that question. I believe I've</p> <p>20 made it abundantly clear.</p> <p>21 MR. KILARU: Okay. And you could</p> <p>22 you clarify what ground even -- since it's not</p> <p>23 relating to this case, I'm asking about his prior</p> <p>24 experience and knowledge, what is the ground for</p> <p>25 instructing him not to answer?</p>	108	<p>1 with the survey question "Are you familiar with</p> <p>2 any of these logos?"</p> <p>3 A. Yes.</p> <p>4 Q. Why did you choose these</p> <p>5 particular logos to include in the survey?</p> <p>6 A. I believe I answered that question</p> <p>7 already.</p> <p>8 THE WITNESS: Shall I answer it</p> <p>9 again?</p> <p>10 MR. KIRSCH: Yeah. I mean, asked</p> <p>11 and answered.</p> <p>12 You can answer it again.</p> <p>13 THE WITNESS: Yeah, they all have</p> <p>14 the word "cat" in them.</p> <p>15 BY MR. KILARU:</p> <p>16 Q. Okay.</p> <p>17 A. And they all have to do with a</p> <p>18 durable good having to do with -- generally</p> <p>19 with equipment or commercial -- commercial</p> <p>20 equipment. They have some division that has a</p> <p>21 commercial equipment division.</p> <p>22 Q. Did you conduct any research on</p> <p>23 the companies using these logos?</p> <p>24 MR. KIRSCH: Objection to the extent</p> <p>25 it calls for work product.</p>
107	<p>1 MR. KIRSCH: I said work product.</p> <p>2 MR. KILARU: Okay.</p> <p>3 BY MR. KILARU:</p> <p>4 Q. Now, return to Exhibit C in your</p> <p>5 report.</p> <p>6 A. (Witness complying.)</p> <p>7 I'm there.</p> <p>8 Q. Okay, just one second.</p> <p>9 (Pause in proceedings.)</p> <p>10 MR. KIRSCH: You know, Naresh, while</p> <p>11 no question is pending, let's take five. I can</p> <p>12 use the restroom.</p> <p>13 MR. KILARU: Okay. Sure.</p> <p>14 MR. KIRSCH: Thanks.</p> <p>15 (Recess taken from 1:05 p.m.</p> <p>16 to 1:08 p.m.)</p> <p>17 BY MR. KILARU:</p> <p>18 Q. Mr. Berger, are you ready?</p> <p>19 A. Yes.</p> <p>20 Q. Okay. Mr. Berger, are you looking</p> <p>21 at Exhibit C to your report?</p> <p>22 A. Yes.</p> <p>23 Q. And I think you testified earlier</p> <p>24 that Exhibit C accurately shows the logos that</p> <p>25 were presented to respondents in connection</p>	109	<p>1 You can otherwise answer.</p> <p>2 THE WITNESS: Shall I answer the</p> <p>3 question?</p> <p>4 MR. KIRSCH: To the extent you're</p> <p>5 able to without revealing -- he asked: Did you</p> <p>6 conduct any research?</p> <p>7 THE WITNESS: I visited all the</p> <p>8 websites.</p> <p>9 BY MR. KILARU:</p> <p>10 Q. Okay. And when you say you</p> <p>11 visited all the websites, are you referring to</p> <p>12 the websites of Arctic Cat®, Bear Cat®,</p> <p>13 Bobcat®, CAT®, Factory Cat, Tigercat® and</p> <p>14 Wildcat?</p> <p>15 MR. KIRSCH: Objection to the extent</p> <p>16 that it's vague and ambiguous in terms of</p> <p>17 particularly when counsel refers to the "website</p> <p>18 of CAT" or as opposed to whatever the corporate</p> <p>19 name for a particular entity might be.</p> <p>20 But the witness can otherwise answer</p> <p>21 the question.</p> <p>22 THE WITNESS: Yes.</p> <p>23 BY MR. KILARU:</p> <p>24 Q. Okay. What kind of products does</p> <p>25 Arctic Cat® make?</p>

<p style="text-align: right;">110</p> <p>1 A. I don't remember. 2 Q. What kind of products does Bear 3 Cat® make? 4 A. I don't remember. 5 Q. What kind of products does Bobcat® 6 make? 7 A. I don't remember. 8 Q. What kind of products does Factory 9 Cat make? 10 A. I don't remember. 11 Q. What kind of products does Wildcat 12 make? 13 A. I don't remember. 14 Q. If I told you that Arctic Cat® 15 makes snowmobiles and motorized sleds, would 16 you have any understanding as to whether 17 Caterpillar makes anything that competes with 18 those products? 19 MR. KIRSCH: Objection to the extent 20 it doesn't fully or fairly reflect all the 21 products that Arctic Cat® makes. 22 Subject to that, the witness can 23 answer the question. 24 THE WITNESS: I don't know. 25</p>	<p style="text-align: right;">112</p> <p>1 in different places every time, every -- in 2 different places when people saw them, so it 3 doesn't make any difference. 4 MR. KIRSCH: I'm not sure that the 5 witness heard the question correctly. 6 THE WITNESS: Why don't you repeat 7 the question. 8 THE REPORTER: Yes. 9 MR. KILARU: Sure. If the witness 10 believes that he wants to clarify his answer, I'm 11 absolutely fine with that. 12 MR. KIRSCH: Well, the court 13 reporter is going to read the question back to 14 you. Listen to the question. 15 (Record read.) 16 MR. KIRSCH: And I'm just going to 17 add the objection as vague as to "marketplace 18 conditions," and then the witness can answer 19 however the witness wants. 20 BY MR. KILARU: 21 Q. Mr. Berger, do you have anything 22 to add to your previous answer? 23 A. No. 24 Q. Mr. Berger, do you consider Shari 25 Diamond's treatise on trademark surveys to be</p>
<p style="text-align: right;">111</p> <p>1 BY MR. KILARU: 2 Q. If I told you that Factory Cat 3 makes industrial floor scrubbers and sweepers, 4 would you have any understanding as to whether 5 Caterpillar makes anything that competes with 6 those products? 7 A. I don't -- I don't know. 8 MR. KIRSCH: Objection, vague as to 9 the term "competes." 10 The witness can answer the question. 11 THE WITNESS: I said "I don't know." 12 BY MR. KILARU: 13 Q. Is it important in your opinion 14 that the line-up in a Squirt survey try and 15 replicate marketplace conditions? 16 MR. KIRSCH: Objection to the extent 17 vague and ambiguous. 18 If the witness is able to, he can 19 answer the question. 20 THE WITNESS: In this kind of a 21 survey, no. 22 BY MR. KILARU: 23 Q. And why not? 24 A. It just doesn't matter. The logos 25 were rotated through the survey, so they were</p>	<p style="text-align: right;">113</p> <p>1 an authoritative source in the field? 2 MR. KIRSCH: Objection to the extent 3 it calls for a legal conclusion. 4 THE WITNESS: One of them, yes. 5 BY MR. KILARU: 6 Q. Do you have any factual basis to 7 support that products bearing the logos shown 8 in Exhibit C are sold together in the 9 marketplace? 10 MR. KIRSCH: Objection, vague and 11 ambiguous as to "sold together" or "in the 12 "marketplace." 13 THE WITNESS: Will you repeat that 14 question, please? 15 THE REPORTER: Sure. 16 (Record read.) 17 THE WITNESS: I don't know. 18 I'd like to take a break. 19 MR. KIRSCH: Sure. 20 MR. KILARU: Sure. 21 (Recess taken from 1:15 p.m. 22 to 1:22 p.m.) 23 BY MR. KILARU: 24 Q. Mr. Berger, before the break, we 25 were looking at Exhibit C to your report. Are</p>

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1 you still -- do you still have that in front of
 2 you?
 3 **A. I'm there, yes.**
 4 Q. Okay. Do you have any factual
 5 basis to support that products bearing the
 6 logos shown in Exhibit C are competitive with
 7 one another?
 8 MR. KIRSCH: Objection, vague and
 9 ambiguous as to the term "competitive."
 10 Subject to that, the witness can
 11 answer the question if he has knowledge.
 12 THE WITNESS: The only ones I know
 13 for sure are apparently Tigercat and Caterpillar
 14 are competitive.
 15 BY MR. KILARU:
 16 Q. And so is it fair to say with the
 17 others, you don't know?
 18 **A. I don't know.**
 19 Q. Do you have any factual basis to
 20 support that products bearing the logos shown
 21 in Exhibit C are directed to the same
 22 consumers?
 23 **A. I don't know.**
 24 Q. Do you have any factual basis to
 25 support that when consumers are considering

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1 purchasing Tigercat products, they would
 2 consider Factory Cat or Arctic Cat products as
 3 alternatives?
 4 **A. I don't know.**
 5 Q. Are you aware of any companies
 6 that make products that are competitive with
 7 equipment sold by Tigercat which do not have
 8 "cat" in their name?
 9 MR. KIRSCH: Objection, vague and
 10 ambiguous as to the term "competitive."
 11 Subject to that, the witness can
 12 answer.
 13 THE WITNESS: Yes.
 14 BY MR. KILARU:
 15 Q. Can you name some of those
 16 companies?
 17 **A. Komatsu is one. Ah... there's a**
 18 **whole bunch of other equipment manufacturers**
 19 **that don't have "cat" in their name.**
 20 Q. And why didn't you include any of
 21 those -- why didn't you include the logos of
 22 any of those companies in your survey?
 23 **A. I simply wanted to include logos**
 24 **that had the word "cat."**
 25 Q. Okay. And do you think the

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1 typical purchaser of heavy equipment considers
 2 only products that have "cat" in their name?
 3 MR. KIRSCH: Objection, vague and
 4 ambiguous as to the term "typical purchaser" and
 5 to the extent that the question doesn't fully
 6 encompass the scope of the survey.
 7 THE WITNESS: Yes, it doesn't
 8 encompass the scope of the survey. We're just
 9 testing logos, that's all.
 10 BY MR. KILARU:
 11 Q. Okay. I'm just going to ask the
 12 question again because I don't think I got an
 13 answer. So I'll ask it again.
 14 Do you think the typical purchaser
 15 of heavy equipment considers only products that
 16 have "cat" in their name?
 17 MR. KIRSCH: Same objection.
 18 THE WITNESS: No.
 19 BY MR. KILARU:
 20 Q. And I apologize if you already
 21 answered this, but I just want to ask it again.
 22 Was the decision to include all of
 23 these logos in the survey driven by the fact
 24 that they all contained the term "cat"?
 25 MR. KIRSCH: Objection.

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1 Instruct the witness not to answer
 2 to the extent it calls for work product.
 3 Subject to that, the witness can
 4 answer the question.
 5 THE WITNESS: Yes.
 6 BY MR. KILARU:
 7 Q. Does the fact that all of these
 8 logos have "cat" in their name signal to the
 9 respondent that the term "cat" is in some way
 10 the focus of the survey?
 11 **A. I don't know.**
 12 Q. Did you test the survey before
 13 implementing it?
 14 **A. I did not.**
 15 Q. Did you use a control in the
 16 survey?
 17 **A. The controls are within the**
 18 **survey.**
 19 Q. Is that -- oh, go ahead.
 20 **A. The other brands, those are**
 21 **internal controls.**
 22 Q. Okay.
 23 MR. KIRSCH: Are you feeling okay,
 24 Mr. Berger?
 25 THE WITNESS: I'm fine.

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1 BY MR. KILARU:
 2 Q. And just for -- I'm almost done.
 3 Just for the layperson, could you explain what
 4 an "internal control" is?
 5 **A. Internal control are these other**
 6 **extraneous products that have the word "cat,"**
 7 **so with the idea being that if there was**
 8 **confusion between Tigercat and CAT, it would**
 9 **show up, and if there wasn't confusion, then**
 10 **the other extraneous brands would show up.**
 11 Q. Could you have used an external
 12 control in the survey?
 13 MR. KIRSCH: Objection, vague and
 14 ambiguous.
 15 You can answer.
 16 THE WITNESS: I don't know. I don't
 17 think so.
 18 BY MR. KILARU:
 19 Q. Okay. And I'd like you to -- ask
 20 you to turn to Exhibit E in your report, which
 21 is the last page --
 22 **A. Yes.**
 23 Q. -- of Exhibit 2.
 24 **A. Yes. (Witness complying.)**
 25 **Yes, here it is.**

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1 Q. Okay. So I'm looking at the
 2 second paragraph. Under the second sentence,
 3 it says "Seventy-seven of the respondents had
 4 phone numbers (after deducting one duplicate
 5 and one fake number)."
 6 **A. Your question?**
 7 Q. Were all of the respondents not
 8 required to give phone numbers?
 9 **A. Yes, they were not required to**
 10 **give phone numbers. It was optional.**
 11 Q. Okay. Now, I noticed in the third
 12 paragraph, it says "We reached someone at a
 13 total of 27 of the phone numbers" and then in
 14 the fourth paragraph, it says "We reached 22 of
 15 the respondents." Can you explain the
 16 discrepancy there?
 17 **A. Well, you can reach the phone**
 18 **number but not necessarily the respondent. It**
 19 **could be the wife or the son or the daughter or**
 20 **something.**
 21 Q. Oh, I see. Thank you for
 22 clarifying that.
 23 So is it accurate to say that 22
 24 of the respondents were validated?
 25 MR. KIRSCH: Objection to the extent

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1 it's a writing that speaks for itself.
 2 THE WITNESS: Well, the survey was
 3 validated. Twenty-two of the respondents -- as
 4 it says, "We reached 22 of the respondents, and
 5 we are satisfied that all of them completed the
 6 survey correctly." That's what it's -- that's
 7 what it says and that's what it means.
 8 BY MR. KILARU:
 9 Q. Okay. And when it says "all of
 10 them," it's referring to the 22?
 11 **A. Yes.**
 12 Q. And how many total people were --
 13 took the survey?
 14 **A. 214.**
 15 Q. Is 214 the number of people that
 16 qualified for the survey or the number of
 17 people that took entire the survey?
 18 **A. Took the survey.**
 19 Q. So 214 people took the entire
 20 survey?
 21 **A. Yes.**
 22 Q. Can I ask you to turn to page 18
 23 of Exhibit D of your report?
 24 **A. (Witness complying.)**
 25 **There's 18. Yeah.**

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1 MR. KIRSCH: This is it -- page 18,
 2 you said, right?
 3 MR. KILARU: Page 18, right.
 4 THE WITNESS: Yeah.
 5 BY MR. KILARU:
 6 Q. So based on the tabulation here on
 7 page 18 of Exhibit D, was there one person who
 8 didn't complete the entire survey because they
 9 answered they were not familiar with any of the
 10 logos shown?
 11 **A. I don't believe that was a**
 12 **knock-out question. I think once you got**
 13 **beyond the screener, you're still able to**
 14 **complete the survey. Ah, let me see the**
 15 **protocol. (Reviewing document.)**
 16 **Here it is. Sorry. Well, they**
 17 **were able to complete the survey. They hadn't**
 18 **seen the logo.**
 19 Q. Okay. So the one person who
 20 hadn't seen any of the logos was still counted
 21 in your results?
 22 **A. That's right.**
 23 Q. So is it accurate to say that 22
 24 of the 214 respondents were validated by
 25 Suburban Marketing Research?

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1 **A. No. I think I answered that**
 2 **question already. I said the survey was**
 3 **validated by --**
 4 Q. Okay.
 5 **A. -- by Suburban. You don't**
 6 **validate the particular people you talk to.**
 7 **You try to validate the survey.**
 8 Q. Okay.
 9 **A. And they believed that they --**
 10 **they believed that they were "satisfied the**
 11 **surveys were completed with properly qualified**
 12 **respondents and were conducted as instructed."**
 13 **That's the essence of the validation report.**
 14 Q. And what percentage of the
 15 respondents do you try to validate?
 16 **A. Well, if you read Shari Diamond,**
 17 **as you mentioned, you can read what she said in**
 18 **her third edition about validation. She says**
 19 **10 to 15 percent.**
 20 MR. KILARU: I'd like to have this
 21 marked as Exhibit 10.
 22 (Berger Exhibit No. 10 was
 23 marked for ID.)
 24 BY MR. KILARU:
 25 Q. And I'll state for the record that

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1 Exhibit No. 10 consists of portions of a book
 2 authored by James Berger and Mark Halligan and
 3 specifically, it contains Chapters 2, 3, and 5
 4 of that book.
 5 **A. Okay.**
 6 Q. Mr. Berger, did you co-author this
 7 book?
 8 **A. Yes.**
 9 Q. I'd like to ask you to turn to
 10 page 56.
 11 **A. (Witness complying.)**
 12 **Okay.**
 13 Q. And I'd like to draw your
 14 attention to Section 2.12, which actually
 15 starts at the bottom of page 55. And I'd just
 16 like to read the portion of the book that I'm
 17 referring to, and the portion reads as follows:
 18 "Once the survey has been completed, a final
 19 step in the process is to make sure the
 20 research vendors have provided valid
 21 information. An independent research company
 22 should be retained and given the questionnaire
 23 and the telephone numbers of the respondents.
 24 "A sample, a minimum of 25 percent
 25 or so, depending on the numbers of people

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1 interviewed, should be recontacted and asked
 2 questions as do they recall participating in
 3 the study, do they remember where the study
 4 took place, do they recall the nature of the
 5 study."
 6 MR. KIRSCH: And -- I'm sorry.
 7 Continue.
 8 BY MR. KILARU:
 9 Q. And my question is, do you agree
 10 with those statements?
 11 MR. KIRSCH: And I'm just going to
 12 instruct the witness to read all of 2.12,
 13 Step 11, validating the data before answering the
 14 question.
 15 THE WITNESS: Go ahead. Read it.
 16 You want me to read it?
 17 MR. KIRSCH: Yeah. I'm -- I want
 18 you to read it to yourself.
 19 THE WITNESS: Oh, okay.
 20 MR. KIRSCH: And I'm going to put an
 21 objection on the record to the extent that
 22 counsel has only read a part of what's contained
 23 in Section 2.12 and that portion takes out of
 24 context the part that counsel read from the
 25 balance of 2.12.

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1 MR. KILARU: And if you believe I've
 2 taken anything out of context, obviously please
 3 let me know the portion that you think is
 4 relevant.
 5 MR. KIRSCH: I think the witness
 6 will do that.
 7 THE WITNESS: (Reviewing document.)
 8 As -- as I say in my book,
 9 "Everybody will not be able to be contacted nor
 10 will everybody usually recall participating in
 11 surveys. Validation numbers should be very high;
 12 however, if there are not, additional people have
 13 to be contacted."
 14 We -- in this situation, Suburban
 15 contacted well over 25 percent of the people.
 16 They attempted to contact 77 people and, again,
 17 it's very hard to get anybody at home, it's very
 18 hard to get through voice -- voicemails and
 19 caller IDs and stuff like that.
 20 The reason for validation is an
 21 outgrowth of the time when most of the research
 22 was done by shopping malls, and some shopping
 23 malls were very unscrupulous in that they were
 24 compensated by the number of interviews, and some
 25 produced interviews that were bogus. So that's

<p style="text-align: right;">126</p> <p>1 how validation came about and because they were 2 getting a lot of money and they weren't doing 3 their work. So that's how this whole thing was 4 born.</p> <p>5 Since we have Internet research, 6 we've kind of given new life to the validation 7 process because these surveys are done -- are 8 administered by a computer, and it's very 9 important that people recall that they -- it's 10 very important that we make sure they were 11 qualified and, No. 2, that they recall taking the 12 survey.</p> <p>13 And in this particular survey, I'm 14 very pleased with the validation. I think we did 15 a -- I think Suburban did a fine job, and I think 16 that unquestionably, those people who said they 17 took the survey were qualified to take the survey 18 and, for the most part, recalled taking the 19 survey.</p> <p>20 BY MR. KILARU: 21 Q. Is one of the things that the 22 validation company is supposed to do is ask the 23 questions to determine whether or not these 24 people in fact qualify for the survey? 25 A. Yes.</p>	<p style="text-align: right;">128</p> <p>1 the panel company also received an incentive. 2 The only incentive given to the people from 3 the -- from the list source was the 4 hundred-dollar drawings.</p> <p>5 Q. So when you say "the panel," you 6 mean -- you're talking about -- remind me the 7 name of the company again. Is it Research Now? 8 A. Yes, Research Now.</p> <p>9 Q. Research Now. So Research Now 10 offered the hundred-dollar drawing; is that 11 correct? 12 A. This is in addition to the 13 Research Now incentive.</p> <p>14 Q. I see. 15 A. Research Now had their own 16 incentives.</p> <p>17 Q. Do you know what the incentives 18 were -- 19 A. No. No, I don't. 20 Q. -- that were offered by Research 21 Now? 22 A. No.</p> <p>23 Q. Okay. Did you exclude from the 24 survey sample people who had taken a survey 25 within the past six months?</p>
<p style="text-align: right;">127</p> <p>1 Q. And I see in the third paragraph 2 of Suburban Marketing Research's letter, it 3 says "Finally, we asked if they had any 4 involvement with the purchase or lease of 5 heavy-duty construction logging or other 6 off-road equipment or operated that type of 7 equipment for the company." 8 Does that statement accurately 9 capture your screening questions? 10 MR. KIRSCH: Objection to the extent 11 that the screening questions are written which 12 speak for themselves. Exhibit E is a writing 13 which speaks for itself. 14 The witness can answer the question. 15 THE WITNESS: I think they did an 16 adequate job of determining that the people who 17 were taking the survey qualified. 18 BY MR. KILARU: 19 Q. Was there an incentive offered to 20 respondents in the survey? 21 A. Yes. There was a drawing of a 22 cash prize of a hundred dollars, which four of 23 the people who took the survey would be 24 eligible for the drawing, a random drawing, and 25 also, the people who took the survey through</p>	<p style="text-align: right;">129</p> <p>1 A. No, we didn't. 2 Q. Do you have any understanding as 3 to whether Caterpillar has opposed a word mark 4 or a logo in this particular proceeding? 5 A. No.</p> <p>6 Q. Would that have been relevant to 7 the design of your survey? 8 MR. KIRSCH: Objection to the extent 9 it calls for work product. 10 You can answer otherwise. 11 THE WITNESS: Ah, I don't know. I 12 don't think so. 13 BY MR. KILARU: 14 Q. I'd like to turn to -- 15 MR. KIRSCH: How much more do you 16 have, Naresh? 17 MR. KILARU: Probably another ten 18 minutes. 19 MR. KIRSCH: Are you okay? 20 THE WITNESS: (Nodding.) 21 BY MR. KILARU: 22 Q. I'd like to turn to Exhibit D in 23 your report where -- and I'll just tell you the 24 page number in a second. It's -- 25 MR. KIRSCH: I'm sorry, where are</p>

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1 we?

2 MR. KILARU: Exhibit D, and the

3 first page I'd like to look at is page 29.

4 THE WITNESS: (Witness complying.)

5 BY MR. KILARU:

6 Q. Now, does Exhibit -- oh, I'll wait

7 for you to get there. Actually, you know,

8 sorry, I meant to say please turn to page

9 No. 24.

10 **A. (Witness complying.)**

11 Q. Are you there?

12 **A. Yes.**

13 Q. Okay. Now, looking at the

14 verbatim responses, and I'm looking at the

15 sixth response down where the person answered

16 "Good guess" in response to "Why do you say

17 that?" And the prior question is "Which brands

18 do you believe are owned by the same company?"

19 And this particular respondent, as the response

20 to the follow-up question "Why do you say

21 that," answered "Good guess"; is that correct?

22 **A. Yes.**

23 Q. And -- and then eight entries

24 down, there is another respondent that says

25 "Not sure why I think that." Do you see that?

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1 **A. Yes.**

2 Q. And turning the page to page 25 --

3 **A. Yeah.**

4 Q. -- in the second line, it's --

5 another respondent says "Just guessing." Do

6 you see that?

7 **A. Yes.**

8 Q. And then eight lines down from

9 that, someone responds "Guess." Do you see

10 that?

11 **A. Yes.**

12 Q. Did you remove the "guess"

13 responses from the survey?

14 **A. No.**

15 MR. KIRSCH: And I'm just going to

16 say vague and ambiguous as to the question.

17 BY MR. KILARU:

18 Q. Did you remove the "I don't know"

19 responses from the survey?

20 MR. KIRSCH: Could -- I'm just going

21 to -- again, vague and ambiguous. Do you mean --

22 I would just ask counsel to say verbatims, for

23 example, if that's what he's asking as opposed to

24 parenthetically referencing them without actually

25 articulating it in his question.

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1 BY MR. KILARU:

2 Q. Mr. Berger, did you understand the

3 question?

4 **A. Yeah. I didn't remove anything**

5 **from the survey.**

6 Q. Okay. So is it accurate to say

7 that people, who in response to the follow-up

8 questions, who answered "I don't know" or "I

9 guessed," those people were counted as people

10 who were not confused?

11 MR. KIRSCH: Objection that --

12 THE WITNESS: They were just --

13 MR. KIRSCH: -- that's not even --

14 wait. It's objection, doesn't fairly

15 characterize the survey. The survey is a writing

16 which speaks for itself.

17 Now the witness can answer the

18 question.

19 THE WITNESS: That's exactly right.

20 The survey speaks for itself.

21 BY MR. KILARU:

22 Q. Okay. So let me just ask the

23 question again because I don't think I got an

24 answer.

25 How were the "I don't know" and

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1 "guess" responses counted in the survey toward

2 your conclusion?

3 MR. KIRSCH: And I'm just going to

4 say vague and ambiguous.

5 THE WITNESS: I didn't --

6 MR. KIRSCH: And there's something

7 that's being assumed in the question which isn't

8 being articulated.

9 The witness can answer the question

10 if he knows the answer.

11 THE WITNESS: I did tabulate the

12 verbatims. They were not tabulated. They were

13 just there.

14 BY MR. KILARU:

15 Q. Okay. So you did not exclude

16 anyone based on the verbatims?

17 **A. No, sir.**

18 Q. Were people in your survey

19 specifically told not to guess?

20 **A. They were advised not to guess in**

21 **the survey.**

22 Q. What does it tell you that some

23 people guessed when they were specifically told

24 not to?

25 **A. They read something and they**

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1 **didn't -- they -- they didn't necessarily read**
 2 **it. They were asked to read something, and**
 3 **they apparently disregarded it.**
 4 Q. Mr. Berger, have any Courts
 5 excluded surveys that you have conducted?
 6 **A. Yes.**
 7 Q. On how many occasions?
 8 **A. I don't remember.**
 9 Q. More than five or less than five?
 10 MR. KIRSCH: Don't guess.
 11 THE WITNESS: I'm not sure.
 12 MR. KILARU: Okay. I don't have any
 13 further questions subject to any redirect if you
 14 have any questions.
 15 MR. KIRSCH: Can I have five
 16 minutes?
 17 MR. KILARU: Sure.
 18 THE WITNESS: Thank you.
 19 MR. KILARU: Thank you.
 20 (Recess taken from 1:49 p.m.
 21 to 1:56 p.m.)
 22
 23
 24
 25

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1 Q. Okay. And do you understand this
 2 printout to be a true and accurate
 3 representation of the raw data from the survey?
 4 **A. Yes.**
 5 Q. Okay. Where's Berger 3?
 6 **A. Here it is.**
 7 Q. All right. Good. I'm going to
 8 put in front of you what's been premarked as
 9 Berger Exhibit 3 in the course of your
 10 deposition. Are you familiar with what's
 11 marked as Berger 3?
 12 **A. Yes.**
 13 Q. Okay. What is Berger 3?
 14 **A. It is the PDF of the survey with**
 15 **the codings indicated.**
 16 Q. All right. And do you understand
 17 Berger 3 with the language of the computer
 18 coding pulled out to faithfully represent the
 19 questions that were asked to survey
 20 participants in the survey?
 21 **A. Yes.**
 22 Q. Okay. All right. Mr. Berger, do
 23 you consider yourself to be an expert in the
 24 construction industry?
 25 **A. No.**

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1 **CROSS EXAMINATION**
 2 **BY MR. KIRSCH:**
 3 Q. Mr. Berger, as you know, my name
 4 is Joshua Kirsch. I'm counsel for Tigercat.
 5 I'm going to ask you some follow-up to the
 6 questions that counsel for Caterpillar asked
 7 you just a few moments ago.
 8 The first is -- actually, what I'm
 9 going to do is put what has been premarked as
 10 Berger Exhibit 4 in front of you and can you --
 11 I'm just going to ask you if you know what that
 12 document is.
 13 **A. Yes.**
 14 Q. What is that document?
 15 **A. It's a spreadsheet.**
 16 Q. And what does the spreadsheet
 17 show?
 18 **A. The spreadsheet shows the survey.**
 19 Q. Does it show the data from the
 20 survey?
 21 **A. Yes.**
 22 Q. The raw data from the survey in
 23 connection with the questions that were asked
 24 in the survey?
 25 **A. Yes.**

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1 Q. Do you consider yourself to be an
 2 expert in the heavy-duty construction industry?
 3 **A. No.**
 4 Q. Do you consider yourself to be an
 5 expert in the logging industry?
 6 **A. No.**
 7 Q. Do you consider yourself to be an
 8 expert in the off-road equipment industry?
 9 **A. No.**
 10 Q. Is it common, Mr. Berger, in
 11 arriving at the universe of survey participants
 12 taking a survey, to select that universe in
 13 consultation with counsel?
 14 **A. Yes.**
 15 Q. Did you do that in that case?
 16 **A. Yes.**
 17 Q. Is that consistent with generally
 18 accepted survey standards?
 19 **A. Yes.**
 20 Q. Sorry. Let me back up. Did you
 21 do that in this case?
 22 **A. Yes.**
 23 Q. Is that consistent with generally
 24 accepted survey standards?
 25 **A. Yes.**

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1 Q. Is it common, Mr. Berger, in
 2 selecting the array -- strike that.
 3 Is it common, Mr. Berger, in
 4 selecting the array of marks or logos or goods
 5 to be used in a survey to do that in
 6 consultation with counsel?
 7 MR. KILARU: Objection, vague as to
 8 the term "common."
 9 MR. KIRSCH: Okay.
 10 THE WITNESS: Is it commonly
 11 accepted professional --
 12 BY MR. KIRSCH:
 13 Q. That's not the question. My
 14 question is: Is it common to do that in
 15 consultation with counsel?
 16 A. Yes.
 17 Q. Did you do that in this case?
 18 A. Yes.
 19 Q. Is that consistent with generally
 20 accepted survey standards?
 21 A. Yes.
 22 Q. Do you, Mr. Berger, claim any
 23 expertise regarding Arctic Cat®, Bobcat® and
 24 Factory Cat, Wildcat, Tigercat®, Caterpillar®
 25 or Bear Cat®?

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1 A. No.
 2 Q. I'm going to ask you to turn to
 3 what was marked as Exhibit No. 2 in the course
 4 of your deposition, Mr. Berger.
 5 A. (Witness complying.)
 6 Q. Okay. There was some prior
 7 testimony, Mr. Berger, in terms of how the
 8 survey's participants received communication
 9 regarding taking the survey, and particularly,
 10 counsel for Caterpillar asked you whether or
 11 not Research Now e-mailed the sample regarding
 12 taking the survey. Do you recall that?
 13 A. Research Now reached out into its
 14 panel to determine who was qualified to take
 15 the survey and presented the survey to them.
 16 Q. Okay. Now, there's reference
 17 in -- on page 6, which I'll ask you to turn to
 18 of your report, your amended report. Let me
 19 know when you're there.
 20 A. Okay.
 21 Q. And -- let me know when you're
 22 there.
 23 A. Yes.
 24 Q. So under Section 4, "Research
 25 Design," towards the middle of the paragraph it

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1 says "An additional 4,000 names were provided
 2 by Hatton-Brown, a trade magazine publishing
 3 company whose magazines include timber
 4 processing and timber harvesting."
 5 In terms of the additional 4,000
 6 names that were provided by Hatton-Brown, do
 7 you know how many of those 4,000 names were
 8 actually contacted to participate in the
 9 survey?
 10 A. No, but I assume that all 4,000
 11 were contacted.
 12 Q. And who do you understand
 13 contacted that additional group of names that
 14 was provided by Hatton-Brown?
 15 A. Precision Research.
 16 Q. Thank you. Do you understand this
 17 survey to be a double-blind survey?
 18 A. Yes.
 19 Q. What is that based on?
 20 A. Based on the entity that presents
 21 the survey -- neither the entity that presents
 22 the survey nor the entity that takes the survey
 23 has any idea who -- the purpose of the sponsor
 24 or the sponsorship of the survey.
 25 Q. So the people who were taking the

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1 survey in this particular -- the people who
 2 took the survey that is discussed in the first
 3 amended report that you prepared and what's
 4 marked as Exhibit 2, they didn't know the
 5 purpose of the survey, correct?
 6 MR. KILARU: Objection, calls for
 7 speculation.
 8 THE WITNESS: Right.
 9 BY MR. KIRSCH:
 10 Q. You can answer the question.
 11 A. Yes.
 12 Q. Okay. And in terms of the
 13 administrator of the survey, is it accurate to
 14 state that it was the computer program with
 15 which they were -- with which the participant
 16 took the survey that was administering the
 17 survey?
 18 A. Yes, that was the questioner.
 19 Q. Okay. So is that on -- is that
 20 how you base -- is that a -- strike that.
 21 Do you base your conclusion that
 22 it was a double-blind survey?
 23 A. That is consistent with the
 24 execution of the double-blind survey.
 25 Q. Thank you. Do you have any reason

142	<p>1 to believe that every individual taking the</p> <p>2 survey was over the age of 70?</p> <p>3 A. No, I have no reason to believe</p> <p>4 that.</p> <p>5 Q. And did you test for age in the</p> <p>6 survey?</p> <p>7 A. No, we did not.</p> <p>8 Q. And why is that?</p> <p>9 A. Because the criteria for selection</p> <p>10 was sufficient enough that age was not deemed</p> <p>11 to be a factor.</p> <p>12 Q. And do you have any reason to</p> <p>13 believe that every person taking this survey</p> <p>14 was female?</p> <p>15 A. No.</p> <p>16 Q. And did you test for the gender of</p> <p>17 the survey participants?</p> <p>18 A. No.</p> <p>19 Q. And why didn't you do that?</p> <p>20 A. Again, because the purpose, the</p> <p>21 criteria for selection was not gender-specific</p> <p>22 and didn't matter what gender they were.</p> <p>23 Q. Do you feel confident that the</p> <p>24 survey was conducted in accordance with</p> <p>25 generally accepted survey standards?</p>	144	<p>1 I'm assured by the people that I work with that</p> <p>2 that is -- is correct.</p> <p>3 MR. KILARU: Okay. No further</p> <p>4 questions.</p> <p>5 MR. KIRSCH: And I'll just follow up</p> <p>6 on that briefly.</p> <p>7</p> <p>8 RE CROSS EXAMINATION</p> <p>9 BY MR. KIRSCH:</p> <p>10 Q. Who generated not the printed</p> <p>11 document but the data that is contained on the</p> <p>12 printed document of Exhibit 4?</p> <p>13 A. It's generated by the survey.</p> <p>14 Q. Okay.</p> <p>15 MR. KIRSCH: Okay. Well, let me do</p> <p>16 it this way: I'm going to make a representation</p> <p>17 on the record as counsel that Exhibit 4 is a</p> <p>18 printout of data, of an Excel spreadsheet that we</p> <p>19 received from an individual at Precision</p> <p>20 Research.</p> <p>21 THE WITNESS: Yeah, we received it</p> <p>22 from Precision Research.</p> <p>23 MR. KIRSCH: From Precision</p> <p>24 Research, okay. So I'm representing as counsel</p> <p>25 that Precision Research forwarded an Excel</p>
143	<p>1 A. Absolutely.</p> <p>2 Q. Do you stand behind the conclusion</p> <p>3 that is expressed in your amended report, what</p> <p>4 we see at what's been marked as Berger 2?</p> <p>5 A. I do.</p> <p>6 Q. That conclusion being that the</p> <p>7 results of the survey show absolutely no</p> <p>8 confusion between Tigercat and Caterpillar?</p> <p>9 A. Yes.</p> <p>10 MR. KIRSCH: Subject to any further</p> <p>11 questions by counsel, I don't have any further</p> <p>12 questions.</p> <p>13 MR. KILARU: Yeah, I just want to</p> <p>14 have -- I have one question and it's regarding</p> <p>15 Exhibit 4, the spreadsheet.</p> <p>16</p> <p>17 REDIRECT EXAMINATION</p> <p>18 BY MR. KILARU:</p> <p>19 Q. Now, you testified just now that</p> <p>20 Exhibit No. 4 is an accurate representation of</p> <p>21 the survey's raw data; is that correct?</p> <p>22 A. Yes.</p> <p>23 Q. Have you personally verified the</p> <p>24 data on that spreadsheet?</p> <p>25 A. No, because I can't read it, but</p>	145	<p>1 spreadsheet and we printed up that Excel</p> <p>2 spreadsheet and that that printout is what you</p> <p>3 see here at Exhibit 4.</p> <p>4 BY MR. KIRSCH:</p> <p>5 Q. So what I'm going to ask you,</p> <p>6 Mr. Berger, is again, just generally tell me,</p> <p>7 who is Precision Research?</p> <p>8 A. My general research contractor.</p> <p>9 Q. Okay. And do you re- -- do you</p> <p>10 commonly rely on your general research</p> <p>11 contractor?</p> <p>12 A. I do.</p> <p>13 Q. Okay. And is it standard in the</p> <p>14 survey community to rely on entities such as</p> <p>15 Precision Research?</p> <p>16 A. Yes.</p> <p>17 Q. And you did that in this case?</p> <p>18 A. Yes.</p> <p>19 Q. Do you have any reason to doubt</p> <p>20 that Precision Research faithfully has -- that</p> <p>21 the document that is contained in --</p> <p>22 A. I have no reason to doubt that</p> <p>23 they -- that the document here is a fair and</p> <p>24 accurate representation.</p> <p>25 Q. Okay. And it would be common for</p>

<p style="text-align: right;">146</p> <p>1 a survey expert such as yourself to rely on the 2 type of document that we see at Exhibit 4? 3 A. Yes. 4 MR. KIRSCH: I don't have anything 5 further. 6 MR. KILARU: Okay. I'll just state 7 for the record that we're going to reserve our 8 objections to Exhibit No. 4 on the ground that it 9 wasn't produced with the original survey by the 10 survey report deadline. 11 MR. KIRSCH: Okay. And I'll just go 12 back to what I previously said on the record, 13 that I'm willing to let you ask Mr. Berger any 14 further questions he has on it and that we would 15 make Mr. Berger available again to deal with any 16 concerns of any prejudice whatsoever that you or 17 Caterpillar might have in connection with 18 Exhibit 4 or Exhibit 3. 19 MR. KILARU: I don't have anything 20 further. 21 MR. KIRSCH: Okay. Thank you. 22 (Deposition concluded at 2:10 p.m. CST.) 23 24 25</p>	<p style="text-align: right;">148</p> <p>1 STATE OF ILLINOIS) 2) ss: 3 COUNTY OF COOK) 4 I, Deborah Habian, a Certified 5 Shorthand Reporter within and for the State of 6 Illinois, do hereby certify: 7 That previous to the commencement of 8 the examination of the witness, the witness was 9 duly sworn to testify the whole truth concerning 10 the matters herein; 11 12 That the foregoing deposition was 13 reported stenographically by me, was thereafter 14 reduced to printed transcript by me, and 15 constitutes a true record of the testimony given 16 and the proceedings had; 17 18 That the said deposition was taken 19 before me at the time and place specified; 20 That the reading and signing by the 21 witness of the deposition transcript was agreed 22 upon as stated herein; 23 That I am not a relative or employee 24 of attorney or counsel, nor a relative or 25 employee of such attorney or counsel for any of the parties hereto, nor interested directly or indirectly in the outcome of this action. IN WITNESS WHEREOF, I do hereunto set my hand this ____ day of _____, 20__.</p> <p style="text-align: right;">DEBORAH HABIAN, CSR, RMR, CRR, CLR Notary Public CSR No. 084-02432</p>
<p style="text-align: right;">147</p> <p>1 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE 2 BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD 3 4 CATERPILLAR, INC., Opposition No. 5 Opposer, 91213597 6 vs. 7 TIGERCAT INTERNATIONAL, Application Serial 8 INC., No. 85/814,584 9 Applicant. Mark: TIGERCAT 10 _____/ 11 12 I hereby certify that I have read the 13 foregoing transcript of my deposition given at 14 the time and place aforesaid, consisting of pages 15 1 to 146, inclusive, and I do again subscribe and 16 make oath that the same is a true, correct, and 17 complete transcript of my deposition so given as 18 aforesaid and includes changes, if any, so made 19 by me. 20 21 _____ 22 JAMES T. BERGER 23 SUBSCRIBED AND SWORN TO 24 before me this ____ day 25 of _____, A.D. _____.</p> <p>_____ Notary Public</p>	

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