

BULKY DOCUMENTS

(exceeds 300 pages)

Proceeding/Serial No: 91161817

Filed: 3-19-07

Title: Opposer's Notice of Filing

of Testimony

Part 1 of 2

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

NEXTEL COMMUNICATIONS, INC.,)

Opposer,)

v.)

MOTOROLA, INC.,)

Applicant.)

Opp. No.: 91/161,817

App. No.: 78/235,618

Pot. Mark: SENSORY MARK
(911 Hz tone)

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

03-19-2007

U.S. Patent & TMO/TM Mail Rpt Ct. #11

OPPOSER'S NOTICE OF FILING OF TESTIMONY

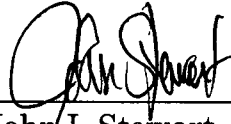
To: John T. Gabrielides
Thomas Williams
BRINKS HOFER GILSON & LIONE
P.O. Box 10395
Chicago, IL 60610

Opposer, Nextel Communications, Inc., herewith files the transcript of the
Evidence Deposition of Dr. Jack Jacoby taken in connection with this proceeding on
January 12, 2007, pursuant to 37 C.F.R. § 2.123.

This transcript has been certified by the officer taking the deposition and it
has been prepared for filing pursuant to 37 C.F.R. § 2.123(f).

March 15, 2007

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John Stewart", written over a horizontal line.

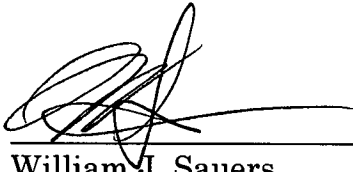
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the OPPOSER'S NOTICE OF FILING OF TESTIMONY was served on counsel for the Applicant, this 15th day of March, 2007, by sending same via e-mail and First Class Mail, postage prepaid, to:

John T. Gabrielides
Thomas Williams
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Chicago, IL 60610

A handwritten signature in black ink, appearing to read 'William J. Sauers', is written over a horizontal line.

William J. Sauers

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

3 NEXTEL COMMUNICATIONS, INC., :



ORIGINAL

4 Opposer, :

v

: OPP NO:

: 91/161,817

5 MOTOROLA, INC., :

6 Applicant :

7
8 Washington, D.C.

9 Friday, January 12, 2007

10 Deposition of:

11 DR. JACOB JACOBY

12
13 called for oral examination by counsel for
14 Opposer, pursuant to Notice, at the Law Offices of
15 Crowell & Moring, 1001 Pennsylvania Avenue,
16 Northwest, Washington, D.C., before Mary E. Warner
17 of Capital Reporting, sworn by a Notary Public in
18 and for the District of Columbia, beginning at
19 9:30 a.m.
20
21
22

by

January 12, 2007

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1 P R O C E E D I N G S

2 MR. STEWART: This is the testimony
3 deposition and rebuttal phase of Dr. Jacob Jacoby
4 on behalf of Opposer, Nextel Communications, Inc.,
5 in the matter of Opposition No. 91/161,817. I
6 want to have marked as Exhibit 1 the Notice of
7 testimonial deposition served by Opposer Nextel on
8 January 5, 2007.

9 (Jacoby Exhibit No. 1
10 was marked for identification).

11 WHEREUPON,

12 DR. JACOB JACOBY
13 called as a witness, and having been first duly
14 sworn, was examined and testified as follows:

15 EXAMINATION BY COUNSEL FOR OPPOSER

16 BY MR. STEWART:

17 Q Would you please state your name?

18 A Dr. Jacob Jacoby.

19 Q And what's your current position?

20 A I have two positions, actually. First I
21 have an endowed chair at the graduate business
22 school of New York University as a professor. And

1 second, I have my own firm. And I'm the president
2 of my own firm.

3 Q Now, in your -- how long have you held
4 your faculty position?

5 A At NYU I've been there since 1981.

6 Q And have you had prior teaching
7 positions?

8 A Yes, I've had two, one was part time when
9 I was on active duty here in Washington, I was an
10 adjunct professor at George Washington University
11 for two years. And then when I left active duty
12 in September of '68, I began as a professor, first
13 as assistant professor and all the way up to
14 professor of psychology at Purdue University. I
15 was at Purdue from '68 through '81 when I left
16 NYU.

17 Q What's your educational background?

18 A I have a doctorate in psychology and with
19 minors in statistics and sociology.

20 Q From whom did you receive those degrees?

21 A The doctorate was Michigan State
22 University.

1 Q What year was that?

2 A I left in '65, the doctorate was awarded
3 while I was in active duty in '66 I was finishing
4 writing it while I was in active duty but I left
5 Michigan State in '65.

6 Q I want to have marked as Exhibit 2 a
7 document that bears the title on the first page,
8 "Academic Curriculum Vita." And it's Bate stamped
9 at the bottom of the page Nextel J000001 through
10 you 14. Do you see that?

11 A Yes, I do.

12 Q Can you tell us what this is, Dr. Jacoby?

13 A Yeah, this is a -- actually a combination
14 of two things, it's the -- first five pages is
15 000001 through 000005 represents the beginning of
16 my academic curriculum vitae. And I note that the
17 date on 000001 at the very top says January 1,
18 2005 and we are now in 2007. This is all
19 accurate, everything here is accurate as stated
20 the pages as that are identified as 06 through 014
21 represents a list of my publications over the last
22 12 years, '94 through 2006 as well as lists of the

1 matters in which I've given testimony either at
2 trial or by a deposition since 2002, I believe.

3 Q Now, Dr. Jacoby, have you written on the
4 subject of survey research?

5 A I've used survey research and written on
6 the subject of survey research I relied on survey
7 research in much of the surveys I do in my
8 academic scholarly activities. And I rely on the
9 use of research on many activities I do as a
10 consultant. I've also written specifically on
11 survey research both for the scientific literature
12 and also for what might be called the professional
13 literature, articles appearing say in the
14 Trademark Reporter or a chapter on courtroom
15 evidence.

16 Q And those -- and articles you have
17 written within the past 12 years, I guess are
18 listed on pages 6 through 8 of this Exhibit No. 2?

19 A Yes.

20 Q And, Dr. Jacoby, in what areas do you
21 teach at NYU?

22 A I teach four basic courses actually. I

1 teach Consumer Behavior. And I teach at three
2 levels, the doctoral, the master's and
3 undergraduate. I teach research methodology.
4 Generally that's confined to the doctoral level
5 although occasionally -- 15 years ago I would
6 teach that to the Master's level. And at the
7 undergraduate level I will teach Introductory
8 Marketing and Advertising Management.

9 Q Now have you had occasion to review and
10 evaluate survey research studies?

11 A Yes, throughout my career and various
12 capacities.

13 Q Could you explain?

14 A Sure, well, clearly as a faculty member
15 with doctorate students I'm frequently reviewing
16 as part of my job responsibilities their work,
17 train them and review and critique and improve.
18 I've been a member of various editorial boards,
19 including the Trademark Reporter, but including
20 especially scientific journals. And in that
21 capacity your sole function is to evaluate the
22 scientific adequacy of research often since we're

1 talking about a social science, that being survey
2 research. I have also more particularly as an
3 expert witness been called upon to evaluate survey
4 research conducted by others.

5 Q Have you yourself designed and
6 implemented survey research studies?

7 A Yes, thousands.

8 Q Have they included studies in the
9 trademark area?

10 A Yes, they've included studies -- well,
11 this matter that we're here about involves
12 secondary meaning required distinctiveness. And
13 yes, I've designed and implemented and testified
14 regarding a number of such studies. And more
15 often than not, it's likelihood of confusion
16 surveys, genericism surveys, deceptive advertising
17 surveys, just to mention the principle survey
18 types that I've done in the litigation arena.

19 Q And have surveys that you have reviewed,
20 critiqued and designed and implemented included
21 surveys with regard to acquired distinctiveness or
22 secondary meaning in the trademark context?

1 A Yes.

2 Q Generally in the survey research studies
3 that you have done for what kinds of clients or
4 can you give us examples of clients you have
5 designed and implemented such studies?

6 A They range across the board from large to
7 small. Generally they are large. They are
8 industry category leaders. They are Fortune 500
9 firms from the top on down, including Wal-Mart,
10 including General Motors, General Electric,
11 Proctor and Gamble, Kraft, Phil Morris, GAF, Ford,
12 Chrysler. I mean, I can give you 50 names that
13 would be instant recognizable, Red Bull, for
14 example, of the overwhelming category leader in
15 energy drinks. I'll stop there but I could give
16 you many more.

17 Q Now, have you presented testimony
18 regarding surveys in the trademark area?

19 A Yes.

20 Q And are those surveys included within the
21 listing of courtroom testimony that you have that
22 appear at pages 9 through 14 of Exhibit 2?

1 A To invert your question, what appears on
2 those pages are included in a much broader corpus
3 of studies I've done. The ones that you see
4 listed are the ones where the matter actually has
5 reached court and testimony I was called for.
6 I've done many more during that period of time
7 that are indicated on those pages.

8 Q Have you presented testimony as an expert
9 witness in survey research?

10 A Yes, many times.

11 Q Have you been accepted as a qualified
12 expert in survey research in trademark proceedings
13 before the Boards and Federal Courts?

14 A Yes.

15 Q Have you ever been disqualified as an
16 expert on survey research and trademark
17 proceedings before the Board or Federal Courts?

18 A Never disqualified, no.

19 MR. STEWART: We will be offering
20 Dr. Jacoby as an expert on survey research in this
21 court proceeding.

22 BY MR. STEWART:

1 Q Dr. Jacoby were you retained on behalf of
2 Nextel to provide testimony in this proceeding?

3 A Yes.

4 Q When was that?

5 A I was actually retained on or shortly
6 after December 19th of last month.

7 Q All right. And what were you asked to
8 address for purposes of this testimony?

9 A I was asked to provide first my overall
10 opinion of a survey conducted and being proffered
11 by Dr. Michael Rappeport in this matter. And
12 specifically within that to focus on the
13 scientific adequacy, validity and reliability of
14 the questions that he developed, his
15 interpretation of the data that resulted in those
16 questions and the third thing was generally open
17 ended of the problems that I found with
18 Dr. Rappeport's survey and report.

19 Q Now what did you review in addressing
20 these three questions?

21 A Clearly I reviewed Dr. Rappeport's report
22 itself. I reviewed some supplementary sheets on

1 coding, two pages, actually that indicated the
2 numbers that were assigned for various categories
3 of information and what the numbers meant. I
4 reviewed photocopies of the answers provided by
5 164 respondents, those that he relied on. I
6 reviewed and have reviewed since then I've taken a
7 look at the -- I don't know if the -- I don't know
8 how you would call them, Opposer, whatever, you
9 call them. I would call them the Plaintiff and
10 the Defendant. Maybe that isn't -- the first
11 party, the one saying that the 911 Hz tone has
12 acquired distinctiveness that would be Motorola.
13 So I reviewed Motorola's -- I don't know a
14 pleading I guess.

15 Q Are you referring to the amended
16 opposition and the answer to the amended
17 opposition that were filed in this proceeding?

18 A Thank you, very much. That's a much more
19 precise way of describing. And I've seen the TTAB
20 opinion of last year of midyear 2006. And
21 evaluating in Rapoport's survey I also took a
22 look at some literature on the subject,

1 specifically three things, I looked at a very
2 influential article by Vincent Paladeno that
3 appeared in the Trademark Reporter, measuring
4 secondary meaning and genericism. I looked at
5 McCarthy on trademarks and what he suggests and
6 what he -- how he writes and talks about the
7 topic. And also a book that I believe is out of
8 print by Phyllis Wellter which came from West as
9 well, West Publishing entitled Trademark Surveys.
10 And there was a section in that tomb on measuring
11 whether or not a market has acquired secondary
12 meaning.

13 Q And did you review any deposition
14 transcripts?

15 A Yes, Dr. Rappeport has given two
16 depositions in this matter. I have a copy of one
17 of those from October, I believe of last year.
18 And I've reviewed several portions of that
19 deposition. I also have reviewed some pages from
20 the deposition by I believe it's a Mr. Klein, a
21 fact witness.

22 Q All right. I'd like to mark as Exhibit 3

1 a document entitled, "Study of the Chirp Sound,"
2 which the first page of which bears the Bate's No.
3 MOT 004675, which last page is MOT 004768. Is
4 this the survey that you reviewed in addressing
5 the questions you were asked to address for your
6 testimony here?

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1 A Yes.

2 (Jacoby Exhibit No.

3 was marked for identification).

4 MR. GABRIELIDES: John, if I could

5 interrupt, which this document is attorney eyes

6 only, I think the transcript should be consistent

7 with that.

8 MR. STEWART: Yes, I think we're happy to

9 agree that at least for the primarily we will

10 consider the remainder of the testimony regarding

11

12 these documents that have been labeled

13

14 confidential attorneys' eyes only as confidential

15

16 pending our agreement on finding that status.

17

18 MR. GABRIELIDES: That's fine.

19

20 BY MR. STEWART:

21

22 Q Next I would like to hand you a document

1
2 labeled Exhibit 4 that is a two page document the
3 first of which bears the Bate's No. MOT 004773 and
4 the second one 004774. Dr. Jacoby, in the coding
5 sheet -- are these the coding sheets that you say
6 you reviewed in addressing the questions you were
7 asked to testify about?

8 A Yes.

9 (Jacoby Exhibit No.
10 was marked for identification).

11 BY MR. STEWART:

12 Q Next I would mark as Exhibit 5 a
13 deposition transcript labeled on the first page
14 "Deposition of Michael Rappeport on the 19th day
15 of October, 2006," which bears the page No. 3 at
16 the bottom right-hand corner and this document
17 ends with page No. 70. Dr. Jacoby, is this the
18 deposition transcript of Michael Rappeport to
19 which you referred and described in your materials
20 that you reviewed in addressing the questions
21 you've been asked to provide testimony about?

22 (Jacoby Exhibit No. 6

1

2

3

4

5

6 A Yes.

7 was marked for identification).

8 BY MR. STEWART:

9 Q Next I would mark as Exhibit 6 four pages
10 of a deposition transcript that bears the legion
11 7/19/2005.

12 A Uh-huh.

13 Q I'm sorry, let me take this document back
14 from you. Excuse me for just a moment. I
15 apologize for the delay, we will have to prepare a
16 substitute for those pages of Mr. Klein's
17 testimonial deposition which we will introduce
18 when we have the correct pages. I'm going to
19 reserve the number for the replacement.

20 (Jacob Exhibit No. 7

21 was marked for identification).

22 BY MR. STEWART:

1 Q Next I'd like to hand you what's been
2 marked as Exhibit 7, which are a collection of
3 pages, the first of which bears the handwritten
4 code at the top right-hand side of 1-101 and bears
5 the Bates label at the bottom of page MOT 004799.
6 The last page of this collection of documents
7 bears the Bates label MOT 00549. And, Dr. Jacoby,
8 are these the 164 responses to the Rapoport
9 survey that you reviewed in addressing the
10 questions you've been asked to provide testimony
11 about?

12 A Yes.

13 MR. GABRIELIDES: Is this Exhibit 7?

14 MR. STEWART: This is Exhibit 7.

15 BY MR. STEWART:

16 Q Dr. Jacoby, turning to the first issue
17 that you were asked to address, have you reached
18 an opinion with respect to the validity of the
19 design of the Rapoport survey's critical
20 question?

21 A Yes, I have.

22 Q What is that opinion?

1 A The opinion is it's incapable of
2 providing any valid reliable information on the
3 question whether or not the 911 Hz sound has
4 acquired a distinctiveness of secondary meaning.

5 Q On what do you base that opinion?

6 A All one has to do is take a look at the
7 question itself and. I have a copy of it here.
8 And I'll direct you to let's take MOT Bates 4693,
9 which is the question itself that was asked.

10 Q This is a page in the document labeled as
11 Exhibit 3?

12 A Correct.

13 Q And that's the Rapoport study report, is
14 that correct?

15 A Correct.

16 Q All right. And you were at page 004693?

17 A Correct, that's the page in which they
18 ask about the fourth sound which was the 911 Hz
19 sound. And there are two questions essentially
20 here. The first is quote, "If you happen to know
21 what this sound is, please tell me what it is and
22 what if anything you know about it. Please be as

1 specific as positive well. If you don't happen to
2 know what the sound is, it's okay to say so,"
3 unquote. So this question asks about the sound
4 and really asks them what they know about it. It
5 tracks what Dr. Rappeport said had to be tested,
6 which by the way I disagree with, but it tracks
7 what he sets forth on -- within this Exhibit 3
8 Bates page 4677. So at the bottom he says as we
9 understand it, for sound source indicating
10 distinctness has two components, the first bullet
11 being that the public has come to recognize it as
12 indicating or associated with a particular event.
13 I disagree with that characterization of his but
14 let's just take it for what it's worth at this
15 moment. His first question tracks in my mind,
16 trying to determine the event that's associated
17 with the sound in the consumer's mind. The
18 consumer gives an answer. And then if they did
19 not give in that answer a company name, the
20 interviewer is told to ask a second question which
21 is, "You said that the sound comes from a blank,"
22 that blank is supposed to be filled in with the

1 answer from above. "Are you thinking of one
2 company who makes that blank or more than one
3 company who makes that blank?" What this question
4 does is totally shift the respondent's perspective
5 and mind from the sound to the implement or device
6 that makes the sound. And this shift is
7 intentional. If you take a look a little further
8 on in that document at Bates page No. 4697 toward
9 the bottom of these interviewer instructions,
10 Dr. Rappeport says quote, then again these are
11 instructions to the interviewer, quote, "For
12 instance, if the respondent says the sound is a
13 boiling tea kettle," the follow up question should
14 be within quotes, "You said that the sound comes
15 from a boiling tea kettle. Are you thinking of
16 one company who makes that tea kettle or more than
17 one company who makes that tea kettle?" Notice
18 the focus here is on the tea kettle, not on the
19 sound. So the interviewers are given guidance and
20 indeed instructions to focus not on the sound but
21 the device that makes the sound. And as I
22 understand it, that is not what is at issue here.

1 What is at issue is whether or not in the minds of
2 the relevant public, the sound has come to
3 associate -- to signify a single source, that is
4 the sound has acquired secondary meaning, not
5 whether or not the implement, the device, the
6 product has acquired or the name on that product
7 has acquired secondary meaning.

8 Q Now turning to Exhibit 7, the collection
9 of responses, do you have an illustration for us
10 of the effect that may have?

11 A Yeah, it's almost any one of these
12 questionnaires can be used to illustrate my point.
13 I have a particular favorite, actually, it's 5225,
14 Bates No. 5225. Let me point you to that. Here
15 again, let me condense what was asked as the first
16 question. It was, quote, "If you happen to know
17 what this sound is, please tell me what it is and
18 what if anything you know about it," unquote. And
19 here the respondent says, "Police radios when we
20 key the mic." And then the respondent is asked,
21 "Anything else?" Which is A/E. And that person
22 responds, "Really sounds like the Harris County

1 sheriff's radio." So at this point, we don't know
2 exactly what the interviewer asks about with the
3 second question because the respondent gave two
4 answers, the Respondent says police radios and
5 also said the Harris county sheriff radio but in
6 either case he said a radio. And let's just say
7 per the instructions that he was given, he or she,
8 in regard to the boiling tea kettle, instead of
9 asking about the sound made by the boiling tea
10 kettle, he's saying -- he's being asked the
11 question quoted, "You said that the sound comes
12 from a radio or the Harris County sheriff's radio.
13 Are you thinking of one company who makes that
14 radio or more than one company who makes that
15 radio?" Unquote. And what you have here is the
16 individual's mind has been shifted away from the
17 sound to the device that makes the sound. And
18 they are being asked about something that's
19 totally irrelevant, I believe, to the fundamental
20 issue before the tribunal.

21 Q Well, is it possible, Dr. Jacoby, that
22 this particular respondent when he or she answered

1 Motorola, might have had in his or her mind an
2 association of the sound with Motorola?

3 A You're asking me if it's possible. And I
4 think you know virtually anything is possible.

5 Q If -- is it possible to tell whether this
6 consumer had that association between the sound
7 and Motorola in his or her mind from the response
8 that's collected in this survey to this question?

9 A No, the answer to that is definitely not.
10 All we know is the individual has given you the
11 answer Motorola in answer but the answer is
12 Motorola in regard to the phone. That's what they
13 were asked about. That's what they had to be
14 asked about according to the instructions in the
15 second question. They were not asked about the
16 sound, they were asked about the Harris County
17 sheriff's radio.

18 Q Well, how -- strike that. Would the
19 presence or absence of markings on the radio
20 that's referred to in the first response
21 identifying the manufacturer of the radio effect
22 your evaluation of the meaning of the second -- of

1 the answer to the second question?

2 MR. GABRIELIDES: Object to the form.

3 THE WITNESS: Yeah, it would in the sense
4 that to the extent that there are visible
5 markings, prominent markings on the phone itself,
6 on device. When asked about the device, that's
7 likely to effect the response. If people know the
8 phone -- if the phone has Motorola on it and
9 Motorola is prominent and then they are asked --
10 you think of one company that makes that phone or
11 more than one company and the answer is one
12 company really which should be the answer written
13 down. That's the answer to the question but
14 instead you hear Motorola which would be a
15 subsequent question which is, "What is that
16 company?" Yeah, I think to answer your question
17 directly, I think, if -- or I should answer it
18 this way, to the extent that the device has brand
19 markings all over it that are very prominent, yes,
20 that will effect the response.

21 BY MR. STEWART:

22 Q Now based on your experience and

1 expertise, would there have been a way to avoid
2 the problem you identified with respect to the
3 design of the second question in the Rapoport
4 survey?

5 A Yes, it's a pretty standard approach for
6 assessing secondary meaning. And it doesn't
7 matter whether you're talking about word marks,
8 sound marks, the trade dress or whatever.
9 Basically you're asking the individual if they
10 have prior familiarity with it. A question could
11 have been asked like, "Before today had you heard
12 this sound?" If the individual said don't know or
13 no, then you wouldn't ask any further questions.
14 But let's presume the individual said yes and at
15 that point you say, "Well, do you associate this
16 sound with one company or more than one company?"
17 And that's it. It's clear, it's direct. It's
18 asking about the sound. It's not asking about the
19 device that creates the sound. It addresses
20 the -- what I believe, what I understand to be the
21 legal issues unlike the question you have here
22 which totally redirects the respondent's mind away

1 from the issue before the tribunal.

2 Q So in sum, what in your opinion is the
3 effect of the problem with the design of the
4 second question you've identified on the validity
5 or reliability of the results collected by this
6 survey?

7 A It makes it -- it makes the answers
8 totally unreliable, invalid. You cannot rely on
9 answers given to this question to either prove or
10 disprove the existence of secondary meaning or
11 acquired distinctiveness, it's just irrelevant.
12 The data are irrelevant.

13 Q Turning to the second issue that you were
14 asked to address, have you reached an opinion with
15 respect to Mr. Rappeport's interpretation of the
16 survey responses? And let me direct you in
17 particular in Exhibit 3 to pages Bates Nos. 4685
18 and 4686.

19 A Yes, I've reached an opinion regarding
20 the interpretations of Dr. Rappeport places upon
21 these data. And that opinion is that he cannot --
22 there's no foundation for arriving at his

1 interpretation -- at the interpretation that he
2 does of these data. And let me clarify that.
3 When a respondent -- oh, I should also mention and
4 I think this is pretty important that anyone who
5 reads Dr. Rappeport's report and comes here to
6 table two, say on page 4685, sees two questions in
7 italics, the first one being, "Please tell me what
8 it is and what if anything you know about this
9 sound," reasonably tracks the question that was
10 asked, that's the first question. The second
11 question, "Are you thinking about one company or
12 more than one company," does not track the
13 question that was actually asked and it should not
14 be taken as a representation of the question that
15 was asked. In fact, we don't even know what
16 question the consumer was asked because there's so
17 many different phrases. There was no entry of the
18 phrases. But disregarding that for the moment,
19 focusing only on the numbers, you have 14 percent
20 who said Motorola only. And I would accept that
21 14 percent as an answer to question two, which I
22 don't think is relevant but let's just take that

1 is as an aside now. He also lumps together and
2 aggregates Nextel only and Motorola and Nextel.
3 What he's doing in that regard is assuming what he
4 has to prove. He has to essentially prove that
5 consumer's don't view Nextel as some separate
6 entity but do view Nextel as being one in the same
7 as it were as Motorola, if they not, they've got
8 two sources. If they say Motorola and Nextel,
9 there are two separate independent sources, two
10 separate company names. If they say Nextel only,
11 that also is independent of Motorola and in my
12 mind until you check what's in the consumer's mind
13 you have no justification saying Nextel means
14 Motorola. There's lots of reasons why Nextel
15 could mean Nextel independent of Motorola.

16 Q Well, is there a general principle of
17 survey research that supports your view that it's
18 inappropriate to aggregate responses that say
19 Nextel only with those that say Motorola only?

20 A Yeah, the principles I would rely on, I
21 would think of two here, number one, you don't
22 know what's in the consumer's mind. In fact in

1 this instance, Dr. Rappeport should have known, he
2 did know, that there would be a number of
3 responses of Nextel. He so testifies in his
4 deposition. Given that there were responses of
5 Nextel, it was incumbent upon him to find out what
6 Nextel meant to the consumer. His deposition
7 tells me he says, "Well, since there was some
8 contractual arrangement between Nextel and
9 Motorola and consumers necessarily would think
10 them necessarily one in the same." My response is
11 consumers have no way of knowing whether there's a
12 contractual relationship. He's making an
13 assumption. He can not draw that as a conclusion.
14 He has to test out his assumption. He never did.
15 So I guess I'm saying two things, number one, he's
16 assuming what he has to prove, and number two, it
17 doesn't matter all of trademark laws about this,
18 it doesn't matter what the source of the trademark
19 says, insofar as likely confusion or intentions
20 not to confuse or deceive or in secondary meaning
21 or any of that stuff. What matters is what's in
22 the minds of the consumers. And Dr. Rappeport has

1 not told me or anyone and has not gathered any
2 data as he should have to tell me what is in the
3 mind of the consumer who answers Nextel only. He
4 hasn't told me whether they think it's the same as
5 the Motorola. He hasn't answered whether
6 consumers who answers Motorola and Nextel are
7 essentially saying there are two sources, not a
8 single source. I associate the sound with two
9 independent sources. So I think there's a more
10 general principle that's called garbage in,
11 garbage out. You can't interpret it.

12 Q Now based on your experience and
13 expertise, would there have been a way to gather
14 additional information necessary to interpret the
15 Nextel only response, the significance of the
16 Nextel responses and with regard to the purpose of
17 the study?

18 A Well, of course he could have asked
19 additional questions. And if he was going down
20 the line with the questions he asked, he should
21 have asked additional questions but that sort
22 of -- again, is besides the point. What he should

1 have done in my opinion is what virtually everyone
2 does, is ask the questions properly, "Have you
3 heard the sound before? If you have, do you
4 associate it with one company or more than one
5 company?" That's what he should have done but he
6 didn't.

7 Q Are you familiar with a principle that's
8 referred to as the anonymous source rule?

9 A Yes.

10 Q Is this an appropriate case for the
11 application of the anonymous source rule?

12 A Not as I see it here. They are giving
13 you not anonymous sources. They mention two, if
14 they we mention Motorola and Nextel. Those aren't
15 anonymous. They could even give you a wrong name.
16 Suppose they gave you a wrong name. He asked --
17 well, he didn't but in the traditional course the
18 question is usually Plaintiff asks the first
19 question and the second only but not only the
20 first question "are you aware of" and the second
21 question is "does it come from one source or more
22 than one?" Then the Plaintiff says I have

1 satisfied the burden. My burden is to demonstrate
2 people think it comes from one source, it doesn't
3 matter what source. And Defendant will usually go
4 further and ask, "Well, what source is it?" And
5 then Defendant will have evidence that says,
6 "Look, some people think it's a wrong source, not
7 an anonymous source." Dr. Rappeport didn't ask
8 that question directly but he interpreted the data
9 in terms of the third question. And, look, he
10 says first Motorola and Nextel are one source. He
11 says any other source, even in his deposition
12 testimony that could be totally incorrect.
13 Somebody says Westing House, if somebody said
14 General Electric, if somebody said General Motors.
15 The fact that they say only a single company, he
16 would count that as being correct because it's a
17 single source but none of those are anonymous
18 sources. To give you an illustration, if I would
19 take out -- and this is from a particular case --
20 if I were to take out and show consumers a bottle
21 of Vaseline Intensive Care Lotion and the trade
22 address and it wouldn't say Vaseline, and I would

1 ask consumers, "Do you recognize it?" And they
2 say yes and. I ask them what it was, and they
3 say, "Care lotion, the Vaseline brand care
4 lotion." I ask them, "Where does it come from,
5 who manufactures it?" You get about 95 a percent
6 of the users say, "I don't know. You know, but I
7 think this comes from one source, the company that
8 puts out Vaseline." Well that's an anonymous.
9 They don't know who it's Cheeseburo Pines who's
10 the source. Over here you don't have that. They
11 are naming sources, they are not anonymous and in
12 some cases they are completely wrong. And even
13 when they're ambiguous he never clarifies the
14 ambiguity. And by ambiguous I mean, what do you
15 mean by Nextel.

16 Q If it were the case that the sound being
17 tested were emitted by a device that was
18 co-branded with two names, Motorola and Nextel,
19 would it be appropriate in your view in that
20 context to aggregate the Nextel and Motorola
21 responses?

22 MR. GABRIELIDES: Objection to the form.

1 THE WITNESS: The answer is no.

2 BY MR. STEWART:

3 Q Why not?

4 A Again you're making an assumption, a very
5 fundamental assumption. The question is wrong.
6 The questions didn't ask. There's a lot of
7 reasons how I can answer your question. First the
8 questions, didn't ask what it needed to ask, which
9 is, "Do you associate it with one source or more
10 than one source?"

11 Q Associate what?

12 A The sound. Do you associate the sound
13 with one source or more than one source. That's
14 what needed to be asked. He didn't do that. The
15 fact there's co-branding in a way is almost
16 irrelevant but relevant to the extent that it
17 muddies up the interpretation of responses. He
18 didn't ask a clean, clear question that gets at
19 the heart of the issue.

20 Q Would it be possible for someone who
21 answered Nextel and in the hypothetical that I
22 gave you was referring to Motorola?

1 A It's possible they may have been
2 referring to Motorola but it's also possible they
3 may have been referring to Nextel and not Motorola
4 whatsoever. Not all Nextel phones are made by
5 Motorola, number one. And I think during that
6 period of time, in so far as I know, there was a
7 certain amount of advertising that -- and the
8 reason why I know this is because I asked the
9 question as a result of examining the responses.
10 There was a number of the respondents that said,
11 "Hey, the advertisements are Nextel." And you
12 look through you'll see several who will say that.
13 And so there's no necessity for them to have
14 Motorola in mind, they may just be thinking it's
15 advertising with Nextel, and it's Nextel not
16 Motorola.

17 Q If you would go back to Exhibit 7 and
18 look at the page that's Bates No. 005377 but it's
19 clearer at the top, it's labeled with the code
20 8-206.

21 A Yeah.

22 Q Is this an example of what you were

1 referring to?

2 A It definitely is. In response to the
3 first question, which is, quote, "If you happen to
4 know what this sound is, please tell me what it is
5 and what if anything you know about it, unquote."
6 The respondent says, "It's the sound in the Nextel
7 commercial." Well, you can hear that sound. You
8 can listen to Nextel commercials but you wouldn't
9 necessarily see or know Motorola is co-branded on
10 the phone. And so this to me reflects a consumer
11 who got that sound associated only with the Nextel
12 and has no evidence whatever in the record that
13 this consumer associates Nextel with Motorola.

14 Q Now if it were true that Nextel provided
15 a service using telephones that emitted a tone
16 that was different from the tone that was tested
17 in Dr. Rappeport's survey, would that effect your
18 view as to whether it was appropriate to aggregate
19 the Nextel responses with the Motorola responses?

20 A If it were the same, there might be
21 justification. To the extent they are different,
22 I don't think you can aggregate them.

1 Q Turning to the third issue that you were
2 asked to address in providing testimony in this
3 proceeding which has to do with any other flaws,
4 do you have an opinion as to whether there were
5 other flaws in the Rapoport survey?

6 A Yeah, there were a number of other flaws
7 as I think about them. I would mention three
8 categories of flaws. There are many, many others
9 beyond the three categories. The three categories
10 I have in mind are his universe definition, the
11 testing protocol or the shielding or non-shielding
12 of the testing protocol during testing and third,
13 a whole range of factors associated with the
14 interviews themselves.

15 Q At this point I'd like to provide you
16 with a document that's been marked as Exhibit 6,
17 which is pages 18 through 21 of something that's
18 labeled at the top, "11-14-2006, Klein, David (911
19 Hz)." Do you see that?

20 A Yes.

21 Q Do these include the excerpts of
22 Mr. Klein's testimony that you previously said you

1 had reviewed in preparing this testimony for
2 today? And in particular let me direct your --

3 A Yes, I see it.

4 Q And going back to your comment, your
5 opinion regarding the universe selected by
6 Mr. Rappeport for your survey, on what do you base
7 your opinion?

8 A I base my opinion on the Klein deposition
9 in part and also upon my own personal experience.
10 Let me talk about the Klein deposition first.
11 He's asked in this deposition on page 20, line 19,
12 "Who are the users of the Motorola's two-way radio
13 products that emitted the 911 Hz tone?" And he
14 answers that, "They're varied. They vary from
15 United States Federal Law Enforcement, state and
16 local law agencies, emergency, fire, EMS." And
17 then he answers, "It also goes to the private
18 sector, whether it's private security,
19 construction, event management companies. Anybody
20 who is requiring immediate and reliable
21 communication methods, the two-way radio products
22 are an appealing solution."

1 Q You've just read from pages 20 to 21 of
2 Exhibit 6?

3 A Correct, and nowhere did Dr. Rappeport
4 try to get people in private security. And I can
5 tell you in New York, that's much more extensive
6 than you find here, that you can find walking into
7 your building, versus any building including my
8 apartment building in New York. Nowhere did he
9 try to get anyone in construction. Nowhere did he
10 try to get anyone in event management. And in
11 fact, from my own experience, I live in a
12 high-rise in Manhattan, A 60 story high rise.
13 There's a staff of 30 to 40 people, all of whom
14 are talking around with two-way radios for
15 communication. And there are many buildings like
16 that in New York and at least in a number of other
17 cities. And it doesn't have to be that high for
18 building management and building personnel to be
19 walking around with those kinds of two-way radios.
20 Dr. Rappeport specifically excluded those people
21 by only focusing on police, fire and EMT. So at
22 best he's obviously got a part of the universe and

1 we don't even know if that's the majority of the
2 universe. He claims it is but I've seen no data
3 to back that up. He may have totally under
4 represented the universe and clearly not
5 represented the states of mind of other categories
6 of individuals who are using that product.

7 Q In your opinion, what effect does that
8 have on the validity or reliability of the results
9 in the Rapoport report?

10 A Renders it totally unreliable. In fact,
11 it's not just my opinion, it's in your prior case
12 law, I think you'll see that.

13 Q Now you also mentioned problems with the
14 interviewers, do you recall that?

15 A Yes.

16 Q What did you have in mind?

17 A Well, a number of problems with the
18 interviewers. Number one, I find their training
19 to be totally inadequate.

20 Q How so?

21 A Their training is -- consists of simply
22 being told to read the interviewer instructions

1 and then to sally forth and conduct interviews.
2 Higher quality interviewer training involves
3 training the interviewers and not asking them to
4 read it and not knowing whether or not they do
5 read the instructions but actually having them
6 implement one or two test surveys, sometimes one
7 as an interviewer and one as a responder and so
8 they can get a feel for and can identify the
9 problems with the instrument itself or problems
10 they would have with administering the instrument.
11 There was no such training here. And that led to
12 what I think is a tremendous problem in their
13 administering this interview, particularly asking
14 that second or most critical questions of -- let
15 me pull out again Exhibit 7 and you can go through
16 these. We don't -- we don't know what they
17 actually asks as the second question because it
18 says at three points, they're supposed to use the
19 answer from the above. The answer from above can
20 be multiple answers. Let me just page through and
21 see. There were several that I saw that had
22 multiple answers. Here, I just happen to hit on

1 6-220.

2 Q Which is Bates page 005233?

3 A Correct. Okay. The interviewer is asked
4 the first question, "If you happen to know what
5 the sound is, please tell me what it is and what
6 if anything you know about it," unquote. The
7 answer is, quote, "When the circuit is busy." The
8 interviewer then asks, "Anything else?" The
9 Respondent says, "or when they put you on hold."
10 The interviewer asks, "Anything else?" And the
11 interviewer says, "Pager when you page them." And
12 the interviewer asks, "Anything else?" And the
13 respondent says, "That's it." So here the
14 interviewer is told that the Respondent identifies
15 the sound but does not mention a specific company
16 in his or her answer and the interviewer asks the
17 next question. Well, they didn't mention a
18 company name, so they are supposed to ask the next
19 question which is, "You said that sound comes from
20 a," and at this point they are supposed to insert
21 the answer from I above and again reinsert that at
22 two more points in the next line. What answer did

1 they insert from above? All four answers? Only
2 one? Which one? Condensations of one? We have
3 no idea -- by the way, when you have multiple
4 answers like this the customary practice is to ask
5 the follow up question about each of the answers.
6 And that wasn't done here. There's no way to
7 interpret the answers given to the second question
8 when there are multiple response, nor even when
9 there's a single response. In fact let's go back
10 to my favorite one, 5225. Although that's a
11 double response, I think it will illustrate it
12 nicely. That's the one where the respondent
13 answering the first question says, quote, "Police
14 radios when we key the mic." Here the second
15 question, they're suppose to put in a phrase, we
16 don't know what they've done there. Let's say
17 they answered only with that first answer, "Police
18 radios when we key the mic." The second question
19 would read, "You said that the sound comes from
20 police radios when we key the mic. Are you
21 thinking of one company who makes the police
22 radios when we key the mic or more than one

1 company who makes the police radio when we key the
2 mic?" I mean, the question becomes nonsensical.
3 The bottom line there's no clarity to the
4 interviewer as to what they should do. It's all
5 left up to them and shouldn't be left up to them.
6 This is a scientist's, the researcher's judgment.
7 There's no ability to unambiguously interpret the
8 answers and regardless of what they ask, the
9 question itself focusses them on the device and
10 not the sound. So the whole thing is a mishbosh,
11 in which the interviewer is instructed to be
12 complicit.

13 Q So when you talked about the interviewer
14 inserting in the brackets the answer from above,
15 did you mean that the interviewer inserted that
16 orally in the live questioning or inserted it in
17 the response form that we see before us as 5225?

18 A They inserted it orally but we don't know
19 what they inserted in its entirety or portions or
20 in paraphrase form, which wouldn't be exactly what
21 the respondent said. We just don't know what they
22 inserted.

1 Q And that's because they didn't record
2 what they inserted?

3 A Exactly.

4 Q And how does the training deficiency you
5 identified relate to this issue?

6 A Well, in the service I do, when we do
7 training of the sort that I described, when we
8 have the interviewer always act as an interviewer
9 in one instance or be interviewed in the second,
10 we would get feedback saying, "Wait a minute.
11 When we ask this question, it just doesn't make
12 sense. We can't ask it this way because here's
13 what we get. What do you want us to record? It's
14 unclear." None of that was possible here because
15 the interviewer said, "Hey, run with these
16 instructions and insert the answer from above and
17 make up your own mind as to what it should be, but
18 by the way, we will give you guidance and that
19 guidance is the boiling tea kettle example which
20 appears in Exhibit 3 on Bates page No. 4697,"
21 which instructs them, "Really we're interested in
22 the appliance, the device, the product and not the

1 sound."

2 Q And are there any instructions included
3 in the document you just referred to regarding how
4 to deal with multiple or ambiguous responses to
5 the first question?

6 A No, none whatever. By the way, when I
7 said the interviewers, there's another problem.
8 It's clear to me that the interviewers did not
9 follow their instructions. I mean, you have to go
10 through this whole set of 164 and you will see so
11 many cases where they weren't supposed to ask the
12 second question because there was not a name given
13 in response to the first question and they did ask
14 the second question. And I think there are
15 instances where they should have asked the second
16 question because no name was given and they
17 didn't. So you have interviewers not following
18 their direction, which again, destroys the ability
19 to rely on the interviewers and the data they
20 collect.

21 Q And the third area that you identified in
22 this final category, you referred to as shielding.

1 What do you mean by that?

2 A Yes, usually what you have to do is
3 shield the interview, which consists of the
4 interviewer and the respondent, from outside
5 extraneous events that might influence and impact
6 upon the interview. Say in a mall setting, you're
7 not allowed to conduct the interview in the mall
8 corridors because you don't know what effect
9 passerbys will have. You don't know what effect
10 commercial signage will have in the environment.
11 So you bring the -- there are testing facilities
12 around the country that we use, we bring people
13 into a shielded facility. You don't know what was
14 happening here. They are instructed and I could
15 try to find the words here but they are told they
16 the interviewers are told to bring the -- if they
17 conduct the interview at the place where the
18 interviewee works, they are told to take that
19 respondent to a private place. We don't know how
20 private that is. We don't know who might have
21 passed by. They are also permitted to interview a
22 second person at that place. We don't know if a

1 second person might have come by and let's say a
2 hypothetical, example, let's say a private place
3 is a cubical right next to the men's room, which
4 is empty because there's nobody there or the desk
5 right next to the men's room. And as you're
6 interviewing respondent A, a second person comes
7 by who goes to the men's rooms, hears, observes,
8 sees what's happening during a walk by and later
9 is himself asked to be a respondent. They have
10 been contaminated. They already know what's going
11 on. They have heard sounds. Another aspect of
12 the environment is these people are users of the
13 phone in their professional environment.

14 Q Of the two-way radio?

15 A I mean, in the radio, that technical -- I
16 have difficulty grasping that distinction. They
17 have two-way radio with them. We don't know if
18 it's on their hip when they are being interviewed.
19 We don't know for comfort sake if they pulled it
20 out of the holster and put it on the desk. Even
21 if they are interviewed in a private facility, we
22 might have that phone in front of them. We don't

1 know if it rings. We don't know any of that
2 stuff. Extraneous factors could be responsible for
3 the answers that they give. And that's the key
4 problem that I'm trying to discuss here.

5 Q All right. Now, in summary, in your
6 opinion, based upon your experience and expertise,
7 is it possible that the combination that any one
8 or any combination of these flaws you've
9 identified with respect to the selection of the
10 Universe, the interviewer training and
11 implementation and the shielding aspects of the
12 implementations of the survey could have a
13 material effect on the validity and reliability of
14 the results reported by Dr. Rappeport?

15 A The answer is yes, any one of those in
16 isolation could have a material impact and totally
17 degrade the reliability and validity of the
18 evidence gathered, independent of the major flaws
19 that I mentioned. These by themselves and
20 especially collectively would lead me to place no
21 weight whatever on the evidence gathered.

22 MR. STEWART: I'd like to take a brief

1 break at this point.

2 (Short break taken)

3 MR. STEWART: I have no further questions
4 at this time.

5 MR. GABRIELIDES: I'll need a few minutes
6 to prepare, so let's take another break.

7 (Short break taken).

8 EXAMINATION BY COUNSEL FOR APPLICANT

9 BY MR. GABRIELIDES:

10 Q Good morning, Dr. Jacoby. Before we
11 begin with the questioning, let me just handle a
12 procedural matter in which Mr. Stewart and I have
13 been corresponding.

14 MR. GABRIELIDES: We'd like to place on
15 the record our objection to some discovery issues
16 relating to Dr. Jacoby. We believe we should have
17 been given at least the written materials that
18 were just handed to me about 20 minutes ago
19 earlier, while prior to the deposition. As well
20 as we think there are other discovery deficiencies
21 with respect to the disclosure of Dr. Jacoby's
22 testimony that we feel we should have been given

1 earlier. Mr. Stewart and I have corresponded on
2 that. I'm just putting an objection on the
3 record.

4 MR. STEWART: Let me respond briefly by
5 saying the documents we handed you about 20
6 minutes ago were handed to us yesterday by the
7 witness. We had no knowledge of their existence
8 prior to yesterday.

9 BY MR. GABRIELIDES:

10 Q Dr. Jacoby, I believe you testified you
11 were retained by Nextel on December 19, 2006, is
12 that correct?

13 A As a testifying expert, that is correct.

14 Q When were you first contacted by Nextel
15 concerning this case?

16 A About a year or a little more ago,
17 probably a little more, maybe 14 months ago, a
18 rough guess, plus or minus two.

19 Q So perhaps Fall of '05?

20 A Probably, late fall, yeah.

21 Q And who contacted you at that time?

22 A I don't recall who contacted me. I think

1 it might have been Mr. Stewart, might have been
2 Mr. Sauers, I don't recall.

3 Q Was it a phone call?

4 A Yes.

5 Q Between the Fall of '05 when you had
6 received the first contact and being formally
7 retained in December 19th, '06, how many
8 communications did you have with Nextel concerning
9 this case?

10 A I couldn't tell you how many but I can
11 tell you they were minimal.

12 Q Less than five?

13 A I would say so, yeah.

14 Q Were they always phone conversations?

15 A Yes.

16 Q Are there any face to face meetings?

17 A I don't know. Well, there was clearly a
18 meeting this past December 19th.

19 Q Yes, I'm talking about before being
20 formally retained.

21 A On this matter, no, I don't recall any.
22 It's not to say there might not have been but I

1 don't recall any.

2 Q And do you recall the substance of the
3 communications between first being contacted and
4 your formal retention in December of '06?

5 A Yes.

6 Q What were they?

7 A They were essentially, "Would you please
8 take the time to review Dr. Rappeport's survey and
9 report and let us know what you find." And at a
10 time subsequent to that conversation, I was
11 provided with a copy of Dr. Rappeport's survey and
12 the pages of all the -- to be specific, what had
13 been marked as Exhibit 7, I received those copies.
14 I also received Exhibit 4. Let me see if I
15 received anything else here. Exhibit 3. And
16 that's what I had when I set about with reviewing.
17 And subsequent to my review I phoned Mr. Stewart
18 and gave him an oral report. I mean, that was the
19 last I heard of it until early December when they
20 wanted to come and talk with me.

21 Q So before you had the discussion in
22 December of '06, what was the earlier.

1 communication you had, rather the last
2 communication you had?

3 A As I said, there were -- there were at
4 least two and the two were the first one where I
5 was phoned and asked if I would review Rappeport's
6 survey. And a subsequent one where I provided my
7 reactions and evaluations of the Rappeport survey.
8 There might have been one or two more
9 administrative phone calls in between but my
10 recollection is after I orally communicated what I
11 thought were the flaws or with Dr. Rappeport's
12 survey, I really didn't hear anything until last
13 month.

14 Q Are the flaws that you communicated after
15 the first phone call from Mr. Stewart the same as
16 the flaws you identified here today?

17 A Pretty much, yes. They are in fact on
18 something that has not been marked on. I brought
19 my whole file yesterday which included my
20 marginalia on the report, which they made a copy
21 of, they being Crowell & Moring, and provided to
22 you early this morning, I should say.

1 Q And what happened on December 19? Were
2 you called by Mr. Stewart on the phone?

3 A No.

4 Q How did that happen?

5 A We met. I was called earlier that month.
6 I think it was about a week or so before, asked if
7 I could meet with them at their New York office.
8 And I did for several hours. I believe it was the
9 19th. And I met with Mr. Stewart, Mr. Sauers,
10 Mr. Jacobs and talked about my opinions in the
11 Rapoport survey.

12 Q And it was at that point that you were
13 retained to provide rebuttal testimony in this
14 case?

15 A I think it was understood at that point
16 or immediately shortly thereafter.

17 Q Were you ever requested to provide any
18 written work product setting forth your opinions?

19 A I was not.

20 Q Did you suggest doing so?

21 A I did not.

22 Q I notice that you've worked for Nextel in

1 the past, is that correct?

2 A Yes.

3 Q There's a case listed in Jacoby Exhibit 2
4 on page J 000013 that refers to Cellco Partnership
5 d/b/a Verizon Wireless v Nextel Communications.

6 Do you see that?

7 A Yes.

8 Q And I assume that because Nextel
9 Communication is in bold, that's your client?

10 A Yes.

11 Q What role did you play for Nextel
12 Communications in that case?

13 A If I recall that case correctly, it was
14 for a different firm. I think I did a survey.
15 Beyond that I don't have any specific
16 recollection.

17 Q Do you remember the mark involved --
18 well, strike that. I assume this is a trademark
19 case?

20 A Excuse me, I think it might have involved
21 the phrase push to talk. I'm not sure if I did a
22 survey but I think it involved that phrase.

1 Q Do you remember the issue that you worked
2 on.

3 MR. STEWART: Let me interject here that
4 I believe that case which we were not involved as
5 counsel on is subject to a protective order. And
6 I don't know that Dr. Jacoby has reviewed or is
7 aware of the terms of that, nor am I. I want to
8 make sure we don't inadvertently disclose
9 information covered by the protective order.

10 MR. GABRIELIDES: That's fair. If you
11 have any concerns about that, we'll work around
12 it. Right now I'm at a higher level.

13 BY MR. GABRIELIDES:

14 Q I just want to understand were you
15 retained as a survey expert in that case?

16 A I was retained as an expert. I don't
17 recall if I did a survey or evaluated one.

18 Q And do you recall whatever you did in the
19 survey arena, was it a trademark only, was it the
20 only push to talk mark or was there trademark
21 aspects?

22 A My recollection was it focused

1 exclusively on the push to talk phrase.

2 Q And were you the only expert -- strike
3 that. Is this case still pending?

4 A I don't believe so.

5 Q Okay. Now after you met with
6 Mr. Stewart, Sauers and Jacobs on December 19, you
7 said at that time or shortly thereafter were you
8 formally retained to provide rebuttal testimony?

9 A Yes.

10 Q And what did you do to prepare for that
11 rebuttal testimony?

12 A Basically I reviewed my marginalia on
13 Dr. Rappeport's survey. I also had occasion, for
14 another matter to review the Paladeno article.
15 And so that was recently fresh in my mind in
16 December.

17 Q And I believe you testified that in the
18 standard approach to secondary meaning questions
19 prior familiarity is a baseline requirement,
20 correct?

21 MR. STEWART: Objection, misrepresents
22 prior testimony.

1 THE WITNESS: I believe that it is, that
2 if you -- that it only makes sense to ask the
3 questions, "Do you associate X with one company or
4 more than one company?" To know if the people
5 have prior familiarity with X. If not, it's
6 essentially a guessing game. And I don't think
7 data would be valid or would be accepted by a
8 Court.

9 Q So in the example you gave earlier about
10 the Vaseline jar, do you remember that?

11 A Yes.

12 Q If the first question would have been
13 asked, "Are you familiar with this product
14 configuration?"

15 A "Had you seen this before?" Something
16 like that, "Had you seen this -- are you familiar
17 with this?" Something. I don't remember exactly
18 what the question was but something of that sort.

19 Q But it would be showing the shape of the
20 jar, correct?

21 A It was more than the shape. It was a
22 unique shape. It was the shape along with colors,

1 yellow, green and blue.

2 Q That would be a stimulus you show a
3 respondent and they say, "No, I have no idea what
4 that is," what would you do with the respondent?

5 A The respondent would be retained, the
6 response could not be used as evidence for
7 secondary meaning. If anything would account
8 against -- let me give you a hypothetical.

9 Q Please.

10 A Supposing they're are 100 respondents and
11 suppose 20 people said they weren't familiar and
12 they hadn't seen it. You would retain those 20
13 when you calculated those percentages and. Those
14 people could not possibly be relying upon the
15 trade dress to indicate a particular source
16 because they'd never seen it but they already had
17 been qualified as being users in the product
18 category, users of the hand cream. So you would
19 retain them and they would, as it were, depress
20 the calculations, the percentage you had of
21 acquired distinctiveness.

22 Q So they would be not be discarded from

1 this sample, they would be included as people who
2 do not support secondary meaning in the
3 configuration?

4 A Yes, I'm smiling because you just said
5 that much more concisely and articulately better
6 than I did.

7 Q And -- you mentioned the words the
8 standard approach in secondary meaning surveys.
9 And I'm trying to -- I'd like to know what a
10 standard question might be to establish that prior
11 familiarity. How would you phrase a standard
12 question?

13 A How would you? There are many ways to
14 phrase it. I mean, if we're talking here about
15 the sound, "Before today, had you ever heard this
16 sound before?"

17 Q Okay. And now, with that, if we go back
18 to question one in Dr. Rappeport's survey, which
19 is, "If you happen to know what this sound is,
20 please tell me what it is and what if anything you
21 know about it. Please be as specific as possible.
22 If you don't happen to know what the sound is, it

1 is okay to say so." Isn't that another way of
2 probing for familiarity with the sound?

3 A No.

4 Q Why?

5 A Because that's a totally different thing.
6 If you happen to know what it is, please tell me
7 anything that you know about it." It's not the
8 same as, "Hey, do you recognize it?" I could
9 recognize it but I know nothing about it. Yeah,
10 I've heard that sound before, I don't know what it
11 is. I don't associate it with anything but I have
12 heard it before." Totally different.

13 Q If somebody recognized it, wouldn't they
14 answer, "I recognize it" in response to this
15 question?

16 A No, they are not asking, "Did you
17 recognize it or didn't you?" The answer to which
18 is, "Yes, I did. I do recognize it" or "No, I
19 don't" or "I don't know." They are asked to
20 describe it, to associate it with an event. And
21 as I testified, that's sort of a cockamamy,
22 approach frankly. I've never seen anything like

1 that in my non-attorney like reading of trademark
2 law on the subject of secondary meaning and
3 acquired distinctiveness.

4 Q So you would not agree that this question
5 is another way of asking, "Have you heard this
6 sound before?"

7 A Correct, I would not agree.

8 Q But you would agree that there are many
9 different ways to ask that based on a familiarity
10 question, correct?

11 A Yes, I would agree there are a number of
12 ways to phrase that question but this is not one
13 of them.

14 Q And getting back to I believe Mr. Stewart
15 asked you about the single anonymous source rule.
16 Do you recall that?

17 A Yes.

18 Q In the hypothetical that you talked about
19 earlier with the Cheeseburo Pines and the Vaseline
20 jar, if 70 percent of the people identified
21 Proctor and Gamble as a single source that makes
22 that jar and nobody identified Cheeseburo Pines,

1 would that be evidence of secondary meaning?

2 A In my mind, lawyers would argue a
3 different way. Number one, that's obviously
4 incorrect, Cheeseburo Pines and Proctor and Gamble
5 are two different entities. The implication is if
6 you associated it with a single source, it's the
7 correct source. I mean, it just does not make any
8 logical sense to say if the consumer associates
9 the sound with a totally different company --
10 let's go back to -- the energizer bunny
11 advertising, a lot of people saw that and
12 associated it with the -- with the different
13 company than the one that manufactured it.
14 Totally wrong. It didn't identify the particular
15 source interest which it was coming from, it
16 identified an incorrect source. It just to me
17 defies logic to say you would accept that as a
18 source indicator, even if it's an incorrect source
19 indicator.

20 Q Isn't your personal view inconsistent
21 with the single anonymous source rule?

22 A No, because it's not anonymous. The

1 example you gave me was not anonymous. You said
2 they identified it's Proctor and Gamble. That's a
3 named source. If they say, "I don't know where it
4 comes from." And I associate this with a single
5 source. And you ask, "What's the name of the
6 source?" And they say, "I don't know," that's
7 anonymous to them. It's not like they say, "Yeah,
8 I know and it's Proctor and Gamble."

9 Q So then in this particular survey and I
10 understand your reservations about the design, but
11 only if respondents had answered Motorola in
12 response to question 2, would you credit those
13 answers as indicative of secondary meaning, again
14 subject to all the reservations you have with
15 methodology and so on?

16 A I would say wrong. I wouldn't credit any
17 answers given to the second question. Even if 100
18 percent of the people said Motorola, I wouldn't
19 sake take that as one iota of evidence that we
20 have established secondary meaning for the sound.

21 Q And is that because you think question
22 two is a question about the product as opposed to

1 the sound?

2 A Question two is in effect a question
3 about not the sound but the source of the sound,
4 not the sound of the boiling tea kettle but the
5 tea kettle.

6 Q Well, let's look at the second question
7 for a moment which reads, "You said that sound
8 comes from a blank. Are you thinking of one
9 company who makes that blank or more than one
10 company who makes that blank?" The first sentence
11 of that question, doesn't that adequately create a
12 connection between the sound and the product?

13 A Nope.

14 Q Why?

15 A That sound could come from any one of a
16 number of different products as well. It just
17 says the sound comes from a product. Now what
18 about that product, does that product come from a
19 single company or from more than one company? Not
20 the sound, it's totally misdirected.

21 Q Again, I understand your question. My
22 question is isn't it fair to say that the first

1 question creates a connection between the sound
2 and the product so that the second question which
3 asks about the product relates to the sound as
4 well?

5 A The answer is no. The answer is what you
6 are doing when you do that is -- you are making
7 inferences about the work that had to be done.
8 The work that had to be done is clarify what was
9 in the consumer's mind. And you're making
10 inferences about what you think must have been in
11 the consumer's mind when they heard and responded
12 to that question. And there's no foundation for
13 that.

14 Q Going back to your CV and professional
15 resume, I understand you've worked on trademark
16 cases involving word marks, correct?

17 A Yes.

18 Q And involving trade dress?

19 A Yes.

20 Q And have you done any work on any cases
21 involving sound marks?

22 A Yes.

1 Q Which cases?

2 A I worked on Harley Davidson's sound mark.

3 Q For which company?

4 A For Harley.

5 Q Any other cases?

6 MR. STEWART: I'm going to caution the
7 witness not to disclose any confidential
8 information regarding any other case in which he's
9 working with Nextel.

10 A I believe over the years I have. I don't
11 recall any. I just particularly enjoyed the
12 Harley case for a variety of reasons and I
13 remember that one.

14 Q That was a case that Harley Davidson
15 eventually abandoned its efforts to register the
16 exhaust sound of its motorcycles, correct?

17 A Yes, eventually, which is one of the
18 reasons why I found an interest in it because that
19 was like four or five years after I had done the
20 survey and I always wondered why they didn't just
21 go ahead and carpi diem.

22 Q As I tallied your criticisms of

1 Dr. Rappeport's study, there seemed to be five.
2 And let me just list them and see if you agree
3 with my at least characterization. One is the
4 validity of the design of the questionnaire, the
5 interpretation of the data that came from the
6 questions and respondent's answers, I should say,
7 the definition of the universe, shielding issues
8 and inadequate interview training. Does that
9 capture them?

10 A Nope, that really touches on, you know,
11 categories. Each one, like interviewers, training
12 was one aspect of it. Beyond the training which
13 was inadequate was the instructions they were
14 given, what should they do with an answer. You
15 have no idea. They were never told to copy down
16 what they placed in that answer from the above
17 phrase. So we have no idea what the question was
18 that was asked of the respondent.

19 Q Well, in question 2, the bracketed
20 information says, "Answer from above." Do you see
21 that?

22 A I certainly do.

1 Q What's ambiguous about that?

2 A What's -- that's not ambiguous. What
3 they copied down was ambiguous. As I tried to
4 point out in my earlier testimony today, if you
5 take a look at the responses given by people you
6 don't know in fact at times it would be
7 meaningless, rendering the question itself
8 nonsensical if you would include the full answer
9 and were to include it three times as is required
10 by the question in two lines.

11 Q So going back to Motorola 5225 within
12 Exhibit 7, which is I think one of the
13 questionnaires that we talked about earlier today
14 or rather responses we talked about earlier today.

15 A 5225, correct.

16 Q You're assuming that the insertions
17 within the bracket are not what is written down
18 above in response to question one, correct?

19 A Let's put it this way, we all have to
20 make assumptions as to what was inserted. You
21 don't know. I don't know. Dr. Rappeport doesn't
22 know. The tribunal doesn't know. If we make our

1 assumptions, "Hey, what could have they have done
2 in each and every case," you come out with a
3 question that is either directly off the point,
4 directs the respondent to go off point or
5 nonsensical.

6 Q My question is is there any reason that
7 you have to believe that the answer given in
8 response to question one was not inserted in the
9 brackets in question two?

10 A No, my answer to you is there any reason
11 to believe that the answer given to question one
12 was inserted in the brackets? You have no
13 foundation. And as I tried to point out, I
14 thumbed through, and I don't remember what that
15 number was, I found one where there was four
16 answers. It would be absolutely absurd to assume
17 that the interviewer inserted all four answers in
18 question two when asking question two and not only
19 inserted them once but as required by the question
20 inserted them three times.

21 Q Even though that's what the instructions
22 say?

1 A Let's read that question and you -- we
2 don't even have to read it. It becomes comical,
3 nonsensical.

4 Q And for that reason you think that
5 something else must have been done?

6 A I think not only something else must have
7 been done, I think they were instructed to do
8 something else. That's part of the problem here.
9 Go take a look -- if I can get a copy of his
10 report. Take a look again at Exhibit 3 Bates,
11 page 4697. I mean, the interviewer is instructed
12 to ask about the tea kettle, not the sound of the
13 tea kettle. So they are instructed to make a --
14 to condense what they've heard, to focus as it
15 were on a product. And not only that, if you look
16 at the wording right below that instruction, what
17 are they told? "There are no right or wrong
18 answers." Oh, wow, no right or wrong, so I guess
19 it's okay if the respondent guesses. I guess it's
20 okay as I do, as this instruction tells me to do,
21 if I make an interpretation, if I use my judgment
22 as to what should be included because whatever is

1 included that will be right.

2 Q So you're interpreting this last passage
3 on 4697 where the interviewer is told that there
4 are no right answers as somehow lending itself to
5 promoting guessing?

6 A Not to promote guessing on the part of
7 the respondent to promote inadequate,
8 inappropriate not fulsome response or
9 characterization of the consumers response in
10 question two. That in conjunction with the
11 immediately preceding instruction regarding a
12 boiling tea kettle.

13 Q Would you agree that the boiling tea
14 kettle example follows the format of question two?

15 A No.

16 Q Why?

17 A Well, we don't know what the respondent
18 actually said. The response says, "If you want to
19 say," quote, "the sound is a boiling tea kettle,"
20 all right, let's take that. If you'll agree with
21 me that that is the most plausible, then the
22 follow up question should read, "You said that

1 sound comes from -- you said that the sound comes
2 from -- is a boiling tea kettle" or you'd say
3 sound twice because we just said -- the sound --
4 if the respondent -- I'm going to -- I don't want
5 to mark these exhibits. But I want to write down
6 the words here and you can make this an exhibit
7 later if you wish. The respondent hypothetically
8 says, quote, "The sound is a boiling tea kettle,"
9 unquote. Now let's take that in its entirety.
10 "You said that the sound comes from a -- the sound
11 is a boiling tea kettle. Are you thinking of one
12 company who makes that the sound is a boiling
13 kettle or more than one company that makes that
14 the sound is a boiling tea kettle?" The question
15 doesn't make sense.

16 Q So what differs from what you said and
17 what's here on 4697 are the words, "the sound is
18 a," correct?

19 A That's what the respondent said, yes.

20 Q Okay.

21 A It's in the example what the respondent
22 supposedly said. And the interviewer is

1 instructed to use what the respondent said.

2 Q So even in this example, would you
3 contend that the instructions are not being
4 followed?

5 A Yeah, the interviewer has to condense
6 what the respondent said in order to make the
7 question meaningful.

8 Q And in this particular example, you don't
9 think that the condensation is proper?

10 A Well, I don't think it's proper because I
11 don't know. Here's the fundamental thing about
12 any research, especially scientific research, it's
13 got to be replicable some other independent
14 investigator has to be able to replicate or
15 evaluate what was done. We don't know what was
16 asked. No one does because. No record was made
17 of it so nobody can evaluate it.

18 Q Were you asked --

19 A Not only that, I'm sorry --

20 Q Go ahead.

21 A It doesn't cure the fundamental problem.
22 And the fundamental problem with that question is

1 that it focuses people on the device not on the
2 sound.

3 Q Were you asked to run a survey in this
4 case?

5 A Nope.

6 Q Did you suggest doing so?

7 A Nope.

8 Q Is there some reason why you didn't
9 suggest doing so?

10 A Two.

11 Q Yes.

12 A Number one, as I understand it, it's not
13 my client's burden of proof, it's your client,
14 okay? Number two, I'm just too busy right now to
15 take on that much more.

16 Q Does the burden of proof issue effect
17 your advice to clients on whether to run a survey
18 or not?

19 A Yes.

20 Q In what way?

21 A If it's not their burden, generally,
22 unless they are intent on providing affirmative

1 evidence to their point, I always think it makes
2 more sense to see what evidence is provided by the
3 party whose burden it is to provide such proof.

4 Q On the issues of the proper universe, I
5 believe your testimony is that the universe as
6 defined by Dr. Rappeport under represents the
7 relevant universe, is that accurate?

8 A Yes.

9 Q Okay. Do you have any reason to believe
10 that had the universe been expanded to include
11 private security, construction and event
12 management personnel that the results would have
13 been any different, flawed as you think they may
14 be?

15 A Here's the point, we don't know whether
16 they would have been different or not different.
17 We don't know. We know that Dr. Rappeport in
18 Exhibit 3, his report, page 4678 incorrectly
19 identifies his universe.

20 Q Where are you reading from?

21 A The bottom two lines. He says, "In
22 surveys designed for Lanham Act litigation, it is

1 generally accepted that an appropriate universe
2 consists of people who are" -- it's all people who
3 are. And yesterday when counsel asked me to
4 explain why I thought that was really important, I
5 said well, let's take a look. Let's take a look
6 at the Bush Kerry election of 2004. Suppose I was
7 a poster and I took states of mind of individuals
8 who were going to vote for from the west coast and
9 east coast but made my prediction based on that
10 but I totally neglected the whole middle of the
11 country, could I then argue well I've now examined
12 the minds of potential votes the people that said
13 they voted in the past and based on that make a
14 prediction as to who would win the election and be
15 accurate? The answer is no. You've got to
16 adequately represent the universe, all the entire
17 universe, in this case of actual potential users.
18 And he hasn't done that.

19 Q What if in your example 98 percent who
20 voted lived on the east and west and only two
21 percent in the valley in between?

22 A We know that's not the case.

1 Q I agree with you. Let's assume it is for
2 my purposes.

3 A Then we'd have more foundation but I
4 don't have any evidence on that. What I have, he
5 examined just police, fire and EMT. And he
6 ignored a wide swath of individuals who do use
7 these devices but who do not qualify as fire
8 police are or EMT.

9 Q Well, do you have any data that
10 quantifies what portion of private security
11 construction and event management people make up
12 this wider universe?

13 A Do you know what? That's not my burden.
14 It's his burden to say or your burden to say,
15 okay, out of all the -- let me give you an
16 example.

17 Q Before you do so, let me strike your
18 answer. You can give me the example. Please
19 understand my question. Do you have any
20 information to quantify the percentage of private
21 security construction and event management
22 personnel who make up what you consider to be the

1 private -- the proper universe?

2 A The answer is I don't but he needed to
3 have before he excluded them.

4 Q Would you agree that complete shielding
5 in an interview environment is impossible?

6 A No.

7 Q So you believe there are situations in
8 which the environment can be completely controlled
9 and shielded from all outside sources?

10 A Yes.

11 Q Can you give me an example?

12 A Sure, mall intercept sent studies where
13 you take people into a testing facilities and have
14 separate cubicles that are closed that are
15 shielded or separate rooms, done all the time
16 around the country every day.

17 Q Might they not have cell phones, for
18 instance, on their persons that could effect the
19 environment?

20 A Yes, they could and so under those
21 circumstances what you -- since they potentially
22 could have an effect, I would ask after the survey

1 has been conducted whether or not they had such
2 materials so one would know. I would instruct the
3 interviewer to make a record if the phone rang
4 during the interview. I would take precautions
5 that would better enable me to interpret the data
6 that I got.

7 Q And as I understand your point here is
8 that you don't know from the record the nature of
9 the environment in which these interviews were
10 conducted, correct, beyond they were conducted in
11 some private place, right?

12 A We don't even know that. We know the
13 interviewer were told to take the respondent to a
14 private place. We don't know if they did. We
15 don't know what in their mind is a private place.
16 We have no idea what constellation of cues and
17 other factors might have been available in that
18 environment.

19 Q Would wouldn't that be true in a mall
20 intercept study as well?

21 A No, I just told you.

22 Q Well, the instructions here instruct them

1 to take them to a private place. And if we assume
2 those were followed as we would assume a mall
3 interview would be followed, why wouldn't the same
4 result pertain?

5 A Because a private place in a place of
6 work is not the same as a private place in a place
7 of work as the mall intercept survey where the
8 facility we use has shielded facilities, where you
9 take the individuals into rooms, doors are shut
10 and they and the interviewer are the only one in
11 the room.

12 Q Have you ever run a survey in which the
13 environment was not a mall intercept?

14 A Yes.

15 Q And when I believe you were asked by
16 Mr. Stewart to summarize whether any of the
17 problems you mentioned -- let me set it up a
18 little differently. The last category of problems
19 came under what I called other flaws, is that
20 fair? I'm just trying to get a terminology that
21 makes the short hand easier for us, that's all.

22 A Yeah, maybe a more accurate description

1 is some other flaws. I didn't go through a number
2 of others that I think could have effected the
3 response.

4 Q Okay. And I believe Mr. Stewart asked
5 you if any of those "some other flaws" could have
6 had a material impact on the results of survey.
7 And you said, yes, they could have, do you recall
8 that?

9 MR. STEWART: Objection, mischaracterizes
10 his prior testimony.

11 THE WITNESS: I believe he asked me about
12 all the free things I was talking about in what I
13 would call an omnibus question.

14 BY MR. GABRIELIDES:

15 Q Perhaps I misunderstood. I'll withdraw
16 my question. In several times during your
17 testimony, Dr. Jacoby, you're talking about
18 phones. Are you aware that this case involves
19 two-way radios?

20 A Yes, as I think I said on the record I
21 sometimes mislabel them and describe them, phones
22 and two-way radios, I'll say one when I mean the

1 other and vice versa.

2 Q And those instances where you said
3 phones, did you intend to refer to two-way radios?

4 A I don't know all instances but at least
5 the majority of them, yes.

6 Q Well, you agree with me that the products
7 from which the tone at issue are being emitted is
8 properly referred to as two-way radios, correct?

9 A I will agree with you, that is correct.

10 Q You also testified about brand markings
11 and their effect on the survey results, correct?

12 A Correct.

13 Q Are you aware that the two-way radio that
14 Motorola manufactured was not shown to any of the
15 respondents in this survey?

16 A I'm aware it was not shown. I'm aware
17 they could have been wearing them at the time.
18 They could have had one on the -- in fact, I'm
19 aware of this both from my own belief but also
20 from Dr. Rappeport's testimony that he's not aware
21 of what was in front of the respondent at the
22 time.

1 Q Okay.

2 A They could have been there in the
3 situation, in the environment while the interview
4 was being conducted.

5 Q Right, but you don't know if they were?

6 A It's not important whether I know. It's
7 important whether Dr. Rappeport knows and can
8 inform the trier of the fact that they were or
9 were not. He can't. Since he can't, I can't. I
10 don't know.

11 Q One of the exhibits that was marked this
12 morning, here we go, was labeled Exhibit 6. And
13 it's pages 18 through 21 of Mr. Klein's deposition
14 given on November 14, 2006. Do you recall?

15 A Yes.

16 Q And do I understand that that was among
17 the materials that you reviewed in preparation for
18 your testimony here?

19 A Yes.

20 Q Were those specific pages given to you by
21 Nextel's counsel?

22 A No.

1 Q How did you come to obtain those pages?

2 A I was shown those pages yesterday because
3 I had told on December 19th I stressed to counsel
4 the fact that Dr. Rappeport had improperly, in my
5 opinion, defined his universe. He didn't talk
6 about all types of users. And I was, in my mind,
7 convinced there must be other categories of users
8 whom he neglected to include whom he neglected to
9 represent. And last night when I arrived, counsel
10 said, "Guess what, you were right, here's
11 testimony that essentially corroborates your
12 opinion."

13 Q Have you read any other portions of
14 Mr. Klein's testimony?

15 A I've read these four pages and nothing
16 else.

17 Q If we could go back to Exhibit 7 and
18 5233, the Bates number on the bottom right. I
19 believe you testified that this is an example of a
20 questionnaire or responses that lead to ambiguity
21 about what the interviewer should ask in question
22 two, is that correct?

1 A Yes.

2 Q Would you agree with me that this
3 particular respondent was not counted by
4 Dr. Rappeport among those that support Motorola's
5 position that a single source is associated with
6 the tone?

7 A I would agree but that's irrelevant. My
8 point was that across the board in all of the
9 questions, including those that Dr. Rappeport did
10 rely on, there's no way to know what specifically
11 was asked about. And I just happened in randomly
12 selecting one to come across this as an exemplar
13 of that. I do not believe he would have counted
14 this because he has four different names and he
15 wouldn't rely on it. But that's not the issue
16 that I was addressing.

17 Q And then I believe you -- it's your
18 opinion that there were situations in which the
19 interviewers did not follow the instructions where
20 a name was in fact given in response to question
21 one but the interviewers went on and asked
22 question two as well and then vice versa where a

1 name was not given in response to question one but
2 then failed to ask question two, is that correct?

3 A Yeah, I believe -- yes.

4 Q Could you identify those for me?

5 A Sure. Okay. I'm doing these in sequence
6 and I'm going to go through all 164 if you want.
7 Let's start with the third page which is Bates No.
8 04807. As you take a look in response to question
9 one the individual says, "Alert tone on the Nextel
10 phone." Okay? That means they gave a brand name,
11 a company name and they should not -- that
12 interviewer should not have been asking question
13 two. That interviewer did. The very next one is
14 another example, 04811. In response to the first
15 question the individual says, "It's a
16 Motorola/Nextel." They were then asked question
17 two. The very next one, respondent 04815. The
18 very first word out of the respondent's mouth is
19 "Nextel." They should not have been asked the
20 second question, they were. The next one I come
21 across is Bates No. 04843, "Beep from the Nextel
22 phone." They should not have been asked the

1 second question. They were. This is sort of
2 ambiguous but 4849, "Like the ringing sound when
3 conversation being taped, ex PSEG." I think that
4 refers to a named corporate entity but they just
5 leave it like that. The very next one, 4853 they
6 mention Atari. They should not have been asked.
7 Here's one with I just don't understand. 4865,
8 the answer to the first question is, "An answering
9 machine." And then the answer given to the second
10 one is not applicable, N/A. I don't understand
11 where that comes from. The same answer question
12 and answer on 4873. The same on 4877. I mean, I
13 just don't understand N/A not applicable. The
14 individual should have been asked. Let's take as
15 an example 4877. This is an example where the
16 individual did not give a name in the first
17 question and should have been asked the second
18 question yet then we have not applicable showing
19 the interviewer did not ask that question. The
20 next one I come across is 5027, where a brand name
21 is mentioned, a company name is mentioned in
22 response to the first question which the second

1 question which should not have been asked was
2 asked. I'm not sure. I'd have to go back and
3 clarify. I think Direct Connect is a mark of
4 Nextel. I'm not sure. But if it is, the
5 interviewer should have been apprised of this
6 fact. And when you get to -- a little muddled
7 here. I think it's 5034 but in any event but it
8 is respondent's 3-119. That would qualify as
9 another example where an entity with a mark was
10 given an answer, a name with a mark is given an
11 answer in response to the first question. You
12 should not have asked the second question. The
13 same applies on 5035. The same applies to 5059,
14 5063. And 5073 you have the answer, "Nextel, that
15 sounds like a Nextel direct phone." There should
16 not have been any question, second follow up
17 question asked of that individual. The same
18 applies to 5081, 5085 -- I'm not even halfway
19 through. I'll continue if you like but the basic
20 point is the interviewers are not following the
21 instructions they were given?

22 Q Let's take a look at 5085 where you

1 ended. Where in this one they answered -- they
2 identified Nextel in response to question 1,
3 correct?

4 A Yes.

5 Q And then they answered Nextel in response
6 to question two, correct?

7 A Yes.

8 Q There's no consistency there, right?

9 A Not between the first and the second
10 answer. We don't know what question they were
11 asked effectively in question two. We don't know
12 if they said that sound comes from a chirper or
13 whatever.

14 Q That gets back to the fact that there's a
15 bracketed blank in there that in your opinion is
16 not clear as to the instructions to the
17 interviewer, correct?

18 A I think in any reasonable person's
19 opinion it's not clear what the interviewer asked
20 about.

21 Q I understand that. All I'm trying to
22 establish is that even though in your opinion

1 question two should not have been asked, there's
2 no inconsistency?

3 A If by no inconsistency they answered
4 Nextel in response to the first and Nextel in
5 response to the second, the answer is yes.

6 Q All right. I understand. Let's take a
7 look at -- for now if we could just put the pile
8 of documents that was produced to us this morning
9 in front of you. I'd like to go through them one
10 by one. Perhaps we'll mark some as exhibits I
11 guess to make this understandable we're going to
12 have to.

13 MR. GABRIELIDES: Let me mark as Jacoby
14 Exhibit 8 the document that was produced, Nextel J
15 000015.

16 (Jacoby Exhibit No. 8
17 was marked for identification).

18 BY MR. GABRIELIDES:

19 Q What is this document, Dr. Jacoby?

20 A These are my handwritten notes based on a
21 phone conversation I had with somebody from
22 Crowell Moring regarding setting up the meeting on

1 December 19th.

2 Q So these notes were taken in mid December
3 '06, is that fair?

4 A Correct.

5 Q Were you speaking with Mr. Stewart in
6 this phone conversation?

7 A My recollection is muddled. I probably
8 was but I don't want to say it was.

9 Q His name is up at the top, that's the
10 reason I'm asking.

11 A Doesn't mean I was speaking with him. I
12 don't know who I was speaking with.

13 Q And it says "two issues" there on the
14 left-hand side, do you see that?

15 A Yes.

16 Q And who identified two issues, you or the
17 lawyer with whom you were speaking?

18 A I think the attorney with whom I was
19 speaking said there were two issues that they were
20 particularly interested in.

21 Q And what is under one say to the right
22 there?

1 A "Need evidence of sound associated with
2 company. He did do you associate with the
3 object." I mean, this is a terse condensed
4 description of what was said.

5 Q To you?

6 A Yeah, to me on the phone.

7 Q And then underneath that it says, is that
8 "Q, if you" -- I can't read that. I'm asking if
9 you can read that writing for us?

10 A Sometimes I can't read my own but it does
11 say Q, for question. "If you know what is sound?"
12 Answer, "I just have the letter I." I don't any
13 complete response there. So I don't know what the
14 answer was.

15 Q I see. And then under the -- there's a
16 little further down, second half of the page is
17 the No. 2, scrawled, what does it say under that,
18 responses to?

19 A "Responses to" and then it has 11 percent
20 Motorola only, 24 percent Nextel only, 7 percent
21 both and Rapoport added it all three." And I
22 recall I was asked -- I copied these down. I

1 didn't go back to my files. That was during the
2 call. I was asked what did I think about that and
3 could I think about that and tell them what I
4 thought about that.

5 MR. GABRIELIDES: Then I'd like to mark
6 as Jacoby Exhibit 9 the documents bearing Bates
7 No. Nextel J 16 through 30.

8 (Jacoby Exhibit No. 9
9 was marked for identification).

10 BY MR. GABRIELIDES:

11 Q And you might have to exclude the last
12 page of the paperclip.

13 A You don't want to do that. You want to
14 include 30.

15 MR. STEWART: That's 31.

16 THE WITNESS: You want to include 31.

17 BY MR. GABRIELIDES:

18 Q Well, for now let's keep it out for a
19 moment. I appreciate your help, but I think I
20 have a different idea here. So what do we see
21 here in Exhibit 9?

22 A What we see here is, I had requested -- I

1 had asked if Dr. Rappeport had been deposed. I
2 was told yes. I was asked if there was
3 information relevant to my points. That in fact
4 that almost tells me when that Exhibit 8 was
5 created. It was created early December,
6 immediately -- it might have been on December 7th,
7 which is the date on Exhibit 9 or immediately a
8 date or two before. I had asked if there was
9 relevant material from Rappeport, further material
10 I should look at. I was told there was a
11 deposition. I was asked to have that sent to me.
12 I also told whoever I spoke with at that point, I
13 believe it was Mr. Stewart, what I tell, and this
14 is easy to verify, virtually every client these
15 days, "I don't have time to read full depositions,
16 could you please let me know what you think would
17 be relevant for me in light of my previous
18 conversations?" Here Mr. Stewart is telling me
19 certain pages that he thinks I should look at and
20 be prepared to talk with him about. I then have
21 the remainder -- I got the full pdf file, the full
22 deposition. I then printed out the pages from the

1 pdf file that were identified in this cover letter
2 of Exhibit 9. And I took those with me. I forgot
3 where I was going but I remember I printed them
4 out and took them with me and didn't have paper so
5 I wrote on the back of two of the pages and one,
6 the back of page 17 of that exhibit was blank and
7 now has my handwritten scrolls, which is 18. And
8 the back of 30, which was blank is the handwritten
9 page 31 that you had asked I not include but I --

10 Q All right. Now I understand. And why
11 don't we amend Exhibit 9 to include 31 in light of
12 your explanation which I understand now. Okay.
13 So now my question is have you ever read the
14 entirety of Mr. Rappeport's deposition?

15 A No.

16 Q Okay. And as I understand it then, what
17 we see, the handwritten notations we see on
18 Exhibit 9 which now runs from Nextel J 16 through
19 J 31 are your notation, correct?

20 A Correct.

21 Q All right. Let's go to page 18, Bates
22 No. 18. Can you read for me what we see on this

1 page?

2 A I'm having difficulty on one word. No,
3 I'm not. First line, "Respondent is likely to be
4 answering tell us anything you know. Comes from a
5 two-way radio. Does that?" The answer to the
6 second question, "Doesn't necessarily mean it
7 comes from one source." This was some notes that
8 I was making. Question one, mid way down the page
9 it says Q1 and below that it says, "If in the
10 first question people named the company they
11 weren't supposed to ask question two." Next I
12 don't know what that is. I don't know if
13 that's -- it looks like connect but I'm not sure
14 from is. Then below that, "Zero mentioned only
15 more Motorola. Six mentioned Motorola and Nextel.
16 35 mentioned Nextel."

17 Q If you go to page 19 of the transcript.

18 MR. STEWART: Are you referring to Bates?

19 MR. GABRIELIDES: Thank you, Nextel J 21.

20 BY MR. GABRIELIDES:

21 Q You've underlined lines 17 through 20, do
22 you remember why you did that or at least portions

1 of those lines?

2 A As I was reading that for some reason
3 seemed something I should pay attention to and I
4 underlined it. Beyond telling you that, I have no
5 recollection of why I would have underlined it.

6 Q Are you aware that Nextel does not make
7 or sell two-way radios that emit the tone at issue
8 in this case?

9 A Yeah, I'm aware that Nextel does not make
10 two-way radios and it does not sell two-way radios
11 with a 911 Hz sound.

12 Q How does that effect your opinions as to
13 the validity of Dr. Rappeport's survey?

14 A I think it's irrelevant if I understand
15 the objective of his survey because we determine
16 whether or not the 911 tone is a -- has acquired
17 secondary meaning, is the sole source indicator.
18 The fact that Nextel makes a different sound is
19 irrelevant. The question is what about the 911 Hz
20 sound, have people come to associate that sound
21 with a single source?

22 MR. GABRIELIDES: And then let's mark as

1 Jacoby Exhibit 10 the last packet included in
2 today's production Bates No. Nextel J 32 through
3 56.

4 (Jacoby Exhibit No. 10
5 was marked for identification).

6 BY MR. GABRIELIDES:

7 Q Do you recognize this document?

8 A Yes, I do.

9 Q There are a number of handwritten
10 notations throughout this document. Are they all
11 yours?

12 A Yes.

13 Q And is this what you referred to earlier
14 as the marginalia that you had made on
15 Dr. Rappeport's study report?

16 A Yes.

17 MR. GABRIELIDES: Why don't we take a
18 five minute break? I may have a few follow-up
19 questions but otherwise we're close to done.

20 (Short break taken).

21 BY MR. GABRIELIDES:

22 Q I'm not sure if I neglected to ask one

1 question and I may have done so already, I'll just
2 do it again. Were you asked to run a survey in
3 this case?

4 A I was not.

5 MR. GABRIELIDES: I have no further
6 questions.

7 EXAMINATION BY COUNSEL FOR OPPOSER

8 BY MR. STEWART:

9 Q I just have a couple of follow-up
10 questions. If you would turn to Exhibit 7,
11 Dr. Jacoby. And turn to Bates page 4889. When
12 you were going through these pages with
13 Gabrielides, are you identifying situations in
14 which a company was named in response to the first
15 question but the question was asked anyway, is
16 that correct?

17 A Yes.

18 Q Is this an example of what you were
19 talking about?

20 A Yes, it is because the name boost, which
21 I understand is -- I think is a subsidiary or a
22 name used by Nextel.

1 Q And if one were to go through this whole
2 Exhibit 7, one would be able to identify all of
3 the responses to question number one that named
4 Motorola or Nextel or direct connect or boost, is
5 that right?

6 A Yes.

7 Q If you would turn to Exhibit 3 on page
8 4697. Looking at the bottom of the page there in
9 the example of the boiling tea kettle that you
10 discussed with Mr. Gabrielides, do you see that?

11 A Yes, I do.

12 Q Now assume that the complete answer given
13 in response to question one was not "the sound is
14 a boiling tea kettle" but just the words "boiling
15 tea kettle." Do you have that assumption in mind?

16 A Yes.

17 Q Now according to the instructions that
18 are on the questionnaire form itself, what would
19 be the version of question two that would follow
20 that response, quote, "boiling tea kettle" close
21 quote?

22 A The interviewer should include those

1 three words "boiling tea kettle," at each of the
2 three points where there were supposed to insert
3 what the respondent said in answer to question one
4 so that the question would have been and should
5 have been, quote, "You said that the sound comes
6 from a boiling tea kettle. Are you thinking of
7 one company who makes that boiling tea kettle or
8 more than one company who makes that boiling tea
9 kettle?" But the example provided here, my
10 testimony tried to point out, divorces the event
11 namely the boiling portion of the response from
12 the product or from -- it divorces the sound from
13 the appliance from which the sound emanates and it
14 now asks only about the appliance. That's an
15 incredible problem. That's what you see here in
16 these interviewer instructions. It focuses on the
17 interviewer on asking about the appliance and not
18 the event, not the sound.

19 Q And I want to be clear on something
20 because it's not -- I'm not certain exactly what
21 your words were and we will find out when we see
22 the transcript. In response to a question

1 Mr. Gabrielides asked you you may have said that
2 the second question on the questionnaire, this one
3 that we've been discussing focusses on the sound.
4 If indeed those were your words, is that your
5 opinion about the focus of the second question?

6 A If indeed those were my words and we have
7 to take a look at the context surrounding the
8 words because that would clarify it. But if that
9 was what I said, that is not what I meant. As I
10 testified repeatedly throughout, the second
11 question the key one about one or more company
12 doesn't focus on the sound, that's the problem.
13 What it does is focus on the appliance, the
14 product.

15 MR. STEWART: I have no further questions
16 at this time.

17 EXAMINATION BY COUNSEL FOR THE APPLICANT

18 BY MR. GABRIELIDES:

19 Q Dr. Jacoby, in the second question, let
20 us suppose that the first sentence was deleted.
21 In the second sentence -- well, let me restate
22 this. In the -- I'd like to reformulate the

1 second question and ask you for your opinion on
2 whether it would be proper. Instead of a two
3 sentence structure I'd like to delete the first
4 sentence and reformulate the second one. "Are you
5 thinking of one company who makes that tea kettle
6 from which the sounds comes or more than one
7 company who makes the tea kettle from which the
8 sound comes from?" Would that be a probative
9 question?

10 A That was an improvement of what was
11 asked. The bottom line that is not what was
12 asked.

13 Q I understand. My question is is that a
14 probative question of acquired distinctiveness?

15 A Would you rephrase it again? "Are you
16 thinking of one company who makes the tea kettle
17 from which the sound emanates?"

18 Q Correct, "or more than one company who
19 makes that tea kettle from which the sound
20 emanates?"

21 A No, because again you're asking them
22 about the tea kettle and not about the sound.

1 Q Even though the sound is specifically
2 referred to immediately after the tea kettle?

3 A Yeah, the question clearly asks them
4 about the tea kettle and not about the sound which
5 I understand is not the issue in this matter.

6 MR. GABRIELIDES: I have no further
7 questions.

8 MR. STEWART: No further questions.

9 (Whereupon, at 12:36 p.m., the
10 Deposition of DR. JACOB JACOBY
11 was concluded.)

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1 CERTIFICATE OF NOTARY PUBLIC

2 I, Mary E. Warner, the officer before whom
3 the foregoing deposition was taken, do hereby
4 certify that the witness whose testimony appears
5 in the foregoing deposition was duly sworn by me;
6 that the testimony of said witness was taken by me
7 in stenotype and thereafter reduced to typewriting
8 under my direction; that said deposition is a true
9 record of the testimony given by said witness;
10 that I am neither counsel for, related to nor
11 employed by and of the parties to the action in
12 which this deposition was taken; and, further,
13 that I am not a relative or employee of any
14 counsel or attorney employed by the parties
15 hereto, nor financially or otherwise interested in
16 the outcome of this action.

17 
18 MARY E. WARNER

19 Notary Public in and for
20 District of Columbia

21 My commission expires:
22 December 30, 2010

1 A C K N O W L E D G M E N T O F D E P O N E N T
2 I, DR. JACOB JACOBY, do hereby acknowledge
3 I have read and examined the foregoing pages of
4 testimony, and the same is a true, correct and
5 complete transcription of the testimony given by
6 me and any changes or corrections, if any, appear
7 in the attached errata sheet signed by me.

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1 E R R A T A S H E E T

2 Case Name: NEXTEL V MOTOROLA

3 Witness Name: DR. JACOB JACOBY

4 Deposition Date: January 11, 2007

5 _____

6 Page No. Line No. Change

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21 _____

22 Signature

Date

1 John I. Stewart, Jr., Esquire

2 Crowell & Moring

3 1001 Pennsylvania Avenue, NW

4 Washington, DC 20004

5 IN RE: NEXTEL V MOTOROLA

6 Dear Mr. Stewart:

7 Enclosed please find your copy of the
8 deposition of DR. JACOB JACOBY, along with the
9 original signature page. As agreed, you will be
10 responsible for contacting the witness regarding
11 signature.

12 Within 30 days of receipt, please forward
13 errata sheet and original signed signature page to
14 the counsel for Applicant, John T. Gabrielides.

15 If you have any questions, please do not
16 hesitate to call. Thank you.

17 Yours,

18

19 MARY E. WARNER

20 Reporter/Notary

21

22 CC: John T. Gabrielides Esq.

A			
abandoned 70:15 ability 46:7 48:18 able 77:14 104:2 absence 25:19 absolutely 73:16 absurd 73:16 academic 3:9 6:8,16 7:8 accept 29:20 66:17 accepted 11:11 61:7 80:1 account 62:7 accurate 6:19,19 79:7 80:15 84:22 acknowledge 110:2 acquired 9:21 13:12 14:11 20:4 23:4,6,7 28:11 62:21 65:3 101:16 107:14 act 47:8 79:22 action 109:11,16 active 5:9,11 6:3,4 activities 7:8,9 actual 80:17 added 96:21 additional 32:14,19,21 address 12:8 15:5 19:17 27:8 28:14 34:22 39:2 addresses 27:19 addressing 12:19 15:4 17:6,20 19:9 89:16 adequacy 8:22 12:13 adequately 68:11 80:16 adjunct 5:10 administering 43:10,13 administrative 56:9 advertisements 37:11 advertising 8:8 9:16 37:7,15 66:11 advice 78:17 affirmative 78:22 agencies 40:16 aggregate 30:18 35:20 38:18,22 aggregates 30:2 ago 8:5 52:18 53:6,16 53:17	agree 16:9 65:4,7,8,11 71:2 75:13,20 81:1 82:4 86:6,9 89:2,7 agreed 112:9 agreement 16:16 ahead 70:21 77:20 Alert 90:9 allowed 49:7 ambiguity 35:14 88:20 ambiguous 35:13,14 48:4 72:1,2,3 91:2 amend 99:11 amended 13:15,16 amount 37:7 anonymous 33:8,11,13 33:15 34:7,17 35:8 35:11 65:15 66:21,22 67:1,7 answer 13:16 21:18,19 22:1 25:9,11,11,11 26:1,11,12,13,16,17 29:21 36:1,7 43:19 43:19 44:7,16,21,22 45:17 46:14 47:16 51:15 64:14,17 69:5 69:5 71:14,16,20 72:8 73:7,10,11 80:15 81:18 82:2 91:8,9,11,12 92:10,11 92:14 93:10 94:5 96:12,14 100:5 104:12 105:3 answered 24:22 32:5 36:21 45:17 67:11 93:1,5 94:3 answering 45:13 91:8 100:4 answers 13:4 24:4 28:7 28:9 32:3,6 40:14,17 43:20,22 45:1,4,5,7 46:8 51:3 67:13,17 71:6 73:16,17 74:18 75:4 Anybody 40:19 anyway 103:15 apartment 41:8 apologize 18:15 APPEAL 1:1 appealing 40:22 appear 10:22 110:6	appeared 14:3 appearing 7:13 appears 11:1 47:20 109:4 appliance 47:22 105:13 105:14,17 106:13 applicable 91:10,13,18 Applicant 1:6 2:6 3:4,6 52:8 106:17 112:14 application 33:11 applies 92:13,13,18 appreciate 97:19 apprised 92:5 approach 27:5 60:18 63:8 64:22 appropriate 33:10 35:19 38:18 80:1 area 9:9 10:18 48:21 areas 7:20 arena 9:18 59:19 argue 66:2 80:11 arrangement 31:8 arrived 88:9 arriving 28:22 article 14:2 60:14 articles 7:13,16 articulately 63:5 aside 30:1 asked 12:7,9 15:5 17:7 17:21 19:10,17 20:9 23:15,20 24:10,18 25:13,14,15,16 26:6,9 27:11 28:14 29:10,13 29:15,16 32:18,20,21 33:16 36:14 37:8 39:2 40:11 44:3 48:15 50:9 56:5 57:6 61:13 64:19 65:15 71:18 77:16,18 78:3 80:3 84:15 85:4,11 89:11,21 90:16,19,22 91:6,14,17 92:1,2,12 92:17 93:11,19 94:1 96:22 97:2 98:1,2,8 98:11 99:9 103:2,15 106:1 107:11,12 asking 24:9 25:3 27:9 27:18,18 43:3,13 64:16 65:5 73:18 90:12 95:10 96:8	105:17 107:21 asks 21:3,4 24:2 33:18 43:17 44:8,10,12,16 69:3 105:14 108:3 aspect 50:11 71:12 aspects 51:11 59:21 assessing 27:6 assigned 13:2 assistant 5:13 associate 23:3 27:15 32:8 33:4 36:9,11,12 61:3 64:11,20 67:4 96:2 101:20 associated 21:12,16 38:11 39:13 66:6,12 89:5 96:1 associates 38:13 66:8 association 25:2,6 assume 58:8,18 73:16 81:1 84:1,2 104:12 assuming 30:3 31:16 72:16 assumption 31:13,14 36:4,5 104:15 assumptions 72:20 73:1 Atari 91:6 attached 3:21 110:7 attention 101:3 attorney 16:5 95:18 109:14 attorneys 16:14 available 83:17 Avenue 1:15 2:4 112:3 avoid 27:1 awarded 6:2 aware 33:20 59:7 85:18 86:13,16,16,19,20 101:6,9 a.m 1:19 A/E 23:21
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JACOBY DEPOSITION ERRATA SHEET

Nextel Communications v. Motorola, Inc.,

Opp. No.: 91/161,817

App. No.: 78/235,618

Mark: Sensory Mark (911 Hz tone)

ERRATA SHEET

Case Name: NEXTEL V MOTOROLA

Witness Name: DR. JACOB JACOBY

Deposition Date: January 12, 2007

Page No.	Line No.	Change
0009	12	Original: reacquired Correct: or acquired
0014	2	Original: Paladeno Correct: Palladino
0014	10	Original: tomb Correct: tome
0020	4	Original: a distinctiveness of Correct: distinctiveness or
0021	9	Original: for sound source Correct: for a sound, source
0021	10	Original: distinctness Correct: distinctiveness
0022	10	Original: then Correct: and
0025	21	Original: effect Correct: affect
0026	7	Original: effect Correct: affect
0026	20	Original: effect Correct: affect
0027	8	Original: the trade address Correct: trade dress
0030	5	Original: consumer's Correct: consumers

0030	6	Original: in Correct: and
0030	7	Original: , if they Correct: . If they're
0031	17	Original: matter all of trademark laws about this, Correct: matter – all of trademark law is about this –
0031	18	Original: trademark Correct: trademarks
0031	19	Original: says Correct: is
0032	22	Original: besides Correct: beside
0034	13	Original: Westing House Correct: Westinghouse
0034	22	Original: address Correct: dress
0035	5	Original: 95 a percent Correct: 95 percent
0035	6	Original: say Correct: saying
0035	9	Original: Cheeseburo Pines Correct: Cheeseborough Ponds
0041	14	Original: talking Correct: walking
0046	9	Original: focusses Correct: focuses
0046	10	Original: mishbosh Correct: mishmash
0047	6	Original: service Correct: surveys

0048	12	Original: was not a Correct: was a
0049	9	Original: passerbys Correct: passersby
0051	2	Original: Extraneus Correct: Extraneous
0060	14	Original: Paladeno Correct: Palladino
0062	7	Original: anything would account Correct: anything it would count
0062	10	Original: they're Correct: there
0064	21	Original: cockamamy Correct: cockamamie
0065	19	Original: Cheeseburo Pines Correct: Cheeseborough Ponds
0065	22	Original: Cheeseburo Pines Correct: Cheeseborough Ponds
0066	4	Original: Cheeseburo Pines Correct: Cheeseborough Ponds
0066	10	Original: energizer bunny Correct: Energizer Bunny
0066	12	Original: with the different Correct: with a different
0070	21	Original: carpi Correct: carpe
0075	7	Original: respondent to Correct: respondent. To

0075	9	Original: consumers Correct: consumer's
0075	18	Original: says, "If Correct: says, if
0075	19	Original: say," quote, Correct: say, quote,
0077	16	Original: because. No Correct: because no
0080	7	Original: poster Correct: pollster
0080	12	Original: votes the Correct: voters – the
0080	13	Original; past and Correct: past – and
0085	2	Original: effected Correct: affected
0085	12	Original: free Correct: three
0087	8	Original: trier of the fact Correct: trier of fact
0088	3	Original: told on December 19th Correct: told – on December 19th
0106	3	Original: focusses Correct: focuses


Signature

Feb 6, 2007
Date

JACOBY DEPOSITION EXHIBIT 1

Nextel Communications v. Motorola, Inc.,

Opp. No.: 91/161,817

App. No.: 78/235,618

Mark: Sensory Mark (911 Hz tone)

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

NEXTEL COMMUNICATIONS, INC.,)

Opposer,)

v.)

MOTOROLA, INC.,)

Applicant.)

Opp. No.: 91/161,817
App. No.: 78/235,618
Pot. Mark: SENSORY MARK
(911 Hz Tone)

**OPPOSER'S NOTICE OF TESTIMONIAL DEPOSITION OF DR. JACOB
JACOBY**

PLEASE TAKE NOTICE that pursuant to 37 C.F.R. § 2.123 and the Federal Rules of Civil Procedure, Opposer Nextel Communications, Inc. will take the testimonial deposition of Dr. Jacob Jacoby upon oath and before a notary public or other duly authorized officer authorized to administer oaths at the offices of CROWELL & MORING LLP, 1001 Pennsylvania Avenue, N.W., Washington D.C. 20004-2595, commencing on January 12, 2007 at 10am, and continuing thereafter until completed.

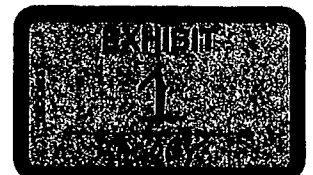
You are invited to attend and cross-examine.

Dated: January 5, 2007

By: _____

John I. Stewart, Jr.
Attorney for Opposer


CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone No.: (202) 624-2500
Facsimile No.: (202) 628-5116



CERTIFICATE OF SERVICE

I hereby certify that a true copy of the OPPOSER'S NOTICE OF
TESTIMONIAL DEPOSITION OF DR. JACOB JACOBY was served on counsel for
the Applicant, this 5th day of January, 2007, by sending same via e-mail and First
Class Mail, postage prepaid, to:

John T. Gabrielides
Thomas Williams
BRINKS HOFER GILSON & LIONE
P.O. Box 10395
Chicago, IL 60610



William J. Sauers

JACOBY DEPOSITION EXHIBIT 2

Nextel Communications v. Motorola, Inc.,

Opp. No.: 91/161,817

App. No.: 78/235,618

Mark: Sensory Mark (911 Hz tone)

ACADEMIC CURRICULUM VITA

Name: Jacob (Jack) Jacoby

Vita updated: January 1, 2005

Home address and phone:

N.Y.U. office address and phone:

160 West 66th Street
Apartment PHA
New York, N.Y. 10023

Stern School of Business
New York University
44 West 4th Street, Room 9-82
New York, NY 10012

212-721-9005

212-998-0515

EDUCATION:

- Ph.D. Michigan State University (1966 -
Major: Social Psychology; Minors: Statistics, Sociology)
M.A. Brooklyn College, The City University of New York
(1963 - Psychology)
B.A. Brooklyn College, The City University of New York
(1961 - Psychology)

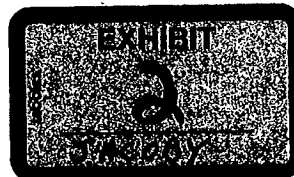
PROFESSIONAL EXPERIENCE:

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

VITA

Section 1; General: Page 1 of 5

Nextel v. Motorola
Opp. No. 91/161,817
Nextel Testimony
Jacoby Ex. 2



NEXTEL J 000001

MEMBERSHIPS IN PROFESSIONAL ORGANIZATIONS:

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

American Marketing Association (1968-present)

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

American Psychological Society (1996-present; Fellow 1998)

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

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

International Trademark Association (1991-present)

Market Research Council (1990-present)

Midwestern Psychological Association (Member, 1968-1975)

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

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

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

ACTIVITIES IN PROFESSIONAL ORGANIZATIONS:

1. American Psychological Association
 - Member, Council of Representatives (governing body of APA), 1971-1973
 - Member, ad hoc Committee on Student Aid (COSA), 1973.
2. Society of Consumer Psychology (Division 23) of the American Psychological Association
 - **PRESIDENT**, September 1973 to August 1974
 - Representative to APA Council of Representatives, 1971-1973
 - Member, Committee on Scientific and Professional Affairs, 1968-1971
 - Chairman, Convention Program Committee, 1970-1971
 - Contributing Editor, The Communicator, Division 23 Newsletter, 1970-1973
 - Chairman, Membership Committee, 1971-1971
 - Member, Membership Committee, 1972-73
 - Policy Board Representative to the Journal of Consumer Research, 1971-1974, 1976-1978; Alternate Representative, 1974-1975
 - Chairman, Fellowship Committee, 1975; 1980; Member, 1979, 1981
 - Chairman, Election Committee, 1975

3. Association for Consumer Research

- PRESIDENT, 1975
- Member, Advisory Council (ACR's governing body thru 1972), 1969-1972
- Member, Executive Committee, 1973-1974, 1976
- Member, Program Committee, 1970-1971
- Member, Publications Committee, 1970-1972
- Chairman, Publications Committee, 1973
- Editor, ACR Newsletter, 1973
- Chairman, Election Committee, 1976
- Member, Election Committee, 1975, 1977
- Policy Board rep., *Journal of Consumer Research*, 1981-1984

4. American Association of Public Opinion Research

- Member, Professional Standards Revision Committee, 1983-1984
- Policy Board rep., *Journal of Consumer Research*, 1984-1986
- Member, ad hoc committee on changing P.O.Q. publisher, 1986

5. Market Research Council

- Executive Committee, Member at Large, 1991-1992
- Chairman, Marketing "Hall of Fame" Award Committee 1991-1992

6. International Trademark Association

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

OTHER PROFESSIONAL ACTIVITIES:

1. Reviewer of Manuscripts and Editorial Board Memberships.

- *Journal of Consumer Research*, Member, Editorial Board, 1973-1974.
 - Member, Policy Board
 - Representing APA-Division 23, 1971-1974, 1976-78
 - Alternate, 1974-1975
 - Representing ACR: 1981-1984
 - Representing AAPOR: 1984-1986
 - Vice Chairman of Policy Board: 1984-1986
- *Journal of Marketing Research*, Member, Editorial Board, 1972-1974.
- *Computers in Human Behavior*, Member, Editorial Board, 1984-1994.
- *Trademark Reporter*, member, Editorial Board, 1993-present.
- American Psychological Association, Annual Conventions: 1970-1976
- Association for Consumer Research, Annual Conventions: 1971, 1972, 1974, 1978, 1979, 1986, 1989, 1990
- ACR European Conference, 1995
- *Organization Behavior and Human Performance* - 1971
- 1972 American Marketing Association, Fall Convention
- 1972 Research Design Competition, APA-Division 23
- *Journal of Applied Social Psychology* 1972, 1984

- *Journal of Applied Psychology* 1972
 - *Public Opinion Quarterly*, 1973, 1974
 - *Journal Supplement Abstract Service*, Am. Psych. Assn. 1975
 - American Marketing Association, 1979 Ph.D. dissertation competition
 - *Journal of Marketing* (1980)
 - *Journal of Finance* (1985)
 - *Journal of Nonverbal Behavior* (1988)
 - *International Journal of Research in Marketing* (1988)
 - "Marketing and Public Policy" conference 1995,
 - *Journal of Public Policy and Marketing*, 1997-1999
 - *Reference Manual on Scientific Evidence*.
Federal Judicial Center 1994 and 1999
2. Reviewer of Proposals
- Food and Drug Administration (1975)
 - National Science Foundation (1973, 1974, 1975, 1976, 1979, 1980, 1986, 1988)
 - Social Science Research Council of Canada (1981)
 - Million Dollar Round Table (1979)
3. Reviewer of Advertising
- Judge, 1991 Effie Awards

HONORS AND AWARDS:

- 1969 - Admitted into Sigma Xi, the National Honorary Society of Science.
- 1973 - Elected a Fellow of the American Psychological Association
- 1973 - Elected a Fellow of the Division of Consumer Psychology
- 1981 - Elected a Fellow of the Division of Personality and Social Psychology
- 1995 - Elected a Fellow of the Division of Law and Psychology
- 1973 - **President**, Division of Consumer Psychology, the American Psychological Association.
- 1975 - **President**, the Association of Consumer Research.
- 1978 - Recipient of the American Marketing Association's **Harold H. Maynard Award** for the article making the most "significant contribution of marketing theory and thought" in the *Journal of Marketing*, 1978.
- 1991 - First recipient, American Academy of Advertising's **Outstanding Contribution to Advertising Award** for having "made a significant and sustained contribution to advertising research through a systematic program of research."
- 1993 - Elected a **Fellow** of the Association of Consumer Research
- 1995 - Recipient of the Society of Consumer Psychology's fifth **Distinguished Scientific Research Award**.

VITA

Nextel v. Motorola
Opp. No. 91/161,817
Nextel Testimony
Jacoby Ex. 2

Section 1; General: Page 4 of 5

NEXTEL J 000004

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

Listed in:

Who's Who in the World
Who's Who in America
Who's Who in the East
Who's Who in Frontier Science and Technology
Who's Who of Emerging Leaders in America
Who's Who in Advertising
Who's Who in American Education
Men of Achievement (13th edition)

MAJOR RESEARCH GRANTS:

\$148,000

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

\$155,000

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

\$181,000

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

\$353,000

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

\$270,000

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

BOARD OF DIRECTORS (Non-academic):

1991-1994 - Advertising Educational Foundation. (New York)
Member, Board of Directors

Jacob Jacoby -- Publications
1994 – 2006

Jacoby, J. (1994) Misleading research on the subject of misleading advertising. *The Food and Drug Law Journal*, 49 (1), 21-36. Reprinted in: *Advertising Law Anthology*. Volume 17, Part II (July-December 1994). International Library, Arlington, VA. Pages 231-248. Also reprinted In: Jeffrey S. Edelstein (Ed.; 1996) *False Advertising and the Law: Coping with Today's Challenges*. New York: Practicing Law Institute.

Jacoby, J. (1994) Erratum and supplementary data for "Scholarly impact in consumer research." *ACR News* (March) p. 12.

Jacoby, J. (1994) Ethical issues in consumer research. In C.T. Allen and D. Roedder-John (Eds) *Advances in Consumer Research*. 21, p. 565.

Jacoby, J., Handlin, A.H. and Simonson, A. (1994) Survey evidence in deceptive advertising cases under the Lanham Act: An historical review of comments from the bench. *The Trademark Reporter*, 84 (5), 541-585. REPRINTED IN: *Advertising Law Anthology*. 17, Part II (July-December 1994). International Library, Arlington, VA. Pages 857-904. REPRINTED IN: Jeffrey S. Edelstein (Ed.; 1996) *False Advertising and the Law: Coping with Today's Challenges*. New York: Practicing Law Institute. Reprinted in: Jeffrey S. Edelstein (Ed.; 1999) *Advertising Law in the New Media Age*. New York: Practicing Law Institute.

Jacoby, J., Jaccard, J.J. Currim, I., Kuss, A., Ansari, A., & Troutman, T. (1994) Tracing the impact of item-by-item information accessing uncertainty reduction. *Journal of Consumer Research*, 21 (2), 291-303.

Jacoby, J. and Szybillo, G.J. (1994) Why disclaimers fail. *The Trademark Reporter*, 84 (2), 224-244.

Jacoby, J. (1995) Ethics, the dark side of ACR: Implication for our future. In Frank Kardes and Mita Sujan (Eds.) *Advances in Consumer Research*, Association for Consumer Research. 22, 21-47.

Jacoby, J. and Szybillo, G.J. (1995) The FTC v. Kraft: A case of Heads we win, Tails you lose? *Journal of Public Policy and Marketing*, 14 (1), 1-14. Reprinted In: Jeffrey S. Edelstein (Ed.; 1996) *False Advertising and the Law: Coping with Today's Challenges*. New York: Practicing Law Institute. Also reprinted In: Jeffrey S. Edelstein (Ed.; 1999) *Advertising Law in the New Media Age*. New York: Practicing Law Institute.

Johar, J., Jeddidi, K. and Jacoby, J. (1997) A varying parameter averaging model of on-line brand evaluations. *Journal of Consumer Research*. 24 (2), 232-247.

Jacoby, J. (1997) Beyond brand equity: Marketing warfare in the '90s. *Stern Business*. Fall 13-15.

Jacoby, J., Johar, J. and Morrin, M. (1998) Consumer Behavior: A Quadrennium. *Annual Review of Psychology*, 49, 319-344.

Jacoby, J. and Morrin, M. (1998) "Not manufactured or authorized by..." : Recent federal cases involving trademark disclaimers. *Journal of Public Policy and Marketing*, Spring 1998, 17 (1), 97-107.

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

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

Jacoby, J. (2001) The Psychological Foundations of Trademark Law: Secondary Meaning, Genericism, Fame, Confusion and Dilution. *The Trademark Reporter*, 91 (5), 1013-1071.

Jacoby, J. (2001) "Consumer psychology." In: *The International Encyclopedia of the Social and Behavioral Sciences*. Elsevier Science Ltd./Pergamon: Oxford, UK. 2674-2678.

Jacoby, J., Morrin, M., Johar, G., Gürhan, Z., Kuss, A. and Mazursky, M. (2001) "Training novice investors to become more expert: The role of information accessing strategy." *Journal of Psychology and Financial Markets* (since renamed the *Journal of Behavioral Finance*) 2 (2), 69-79.

Jacoby, J. (2002). "Stimulus-Organism-Response Reconsidered: An evolutionary step in modeling (consumer) behavior." *Journal of Consumer Psychology*. 12 (1), 51-57.

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

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

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

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

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

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

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

JACOB JACOBY - 2003 COURTROOM TESTIMONY

Mar 11 Before Senior Judge Samuel A. Crow
 USDC, D. Kansas (Topeka)
 Hill's Pet Nutrition, Inc. v. **Nutro Products, Inc.**
 Deceptive advertising/packaging

Apr 8 Before Judge Deborah A. Batts
 USDC, SDNY
 1-800-Contacts v. **WhenU.com, Inc.**
 Likelihood of confusion

Sep 8 Before Judge Nancy G. Edmunds
 USDC, ED Michigan
 Wells Fargo et al. v. **WhenU.com, Inc.**
 Likelihood of confusion

JACOB JACOBY - 2004 COURTROOM TESTIMONY

Jan 22 Before Judge Preston Huff
 Louisiana State Court (New Orleans)
 A. O. Smith et al. v. **Perfection Corp. et al.**,
 No. 99-15646
 Business reputation survey

Mar 31 TTAB (testimony given via expert report)
 Jacob Zimmerman v. **National Ass'n of Realtors**

May 5 Before Administrative Law Judge Stephen J. McGuire
 Federal Trade Commission
 In the Matter of **Telebrands Corp. et al.**
 Deceptive advertising matter

June 15 Before Judge Catherine Perry
 USDC, EDMo
 Steak n Shake v. Burger King
 Genericness/secondary meaning matter

Aug 2, 5 Before Judge Shira Scheindlin
 USDC, SDNY
 Louis Vuitton Malletier v. Dooney & Bourke
 Trademark matter

JACOB JACOBY - 2005 COURTROOM TESTIMONY

Mar 2 Before Judge William E. Smith
 USDC, D. Rhode Island
 The Beacon Mutual Insurance Company v.
 OneBeacon Insurance Group
 Trademark matter

Jun 24 Before Judge Thomas Mcavoy
 U.S.D.C. N.D.N.Y.
 FiberMark Inc. v.
 Brownville Specialty Paper Products, Inc
 Trade dress matter

Sep 21-22 Before Judge A. Howard Matz
 U.S.D.C. C.D. California (Western Div)
 Hill's Pet Nutrition, Inc. v. **Nutro Products, Inc.**
 Deceptive advertising matter

Nov 18 Before Judge John F. Walter
 U.S.D.C. C.D. California (Western Div)
 Red Bull, Inc. v. Matador Concepts, Inc.
 Trade dress matter

JACOB JACOBY - 2006 COURTROOM TESTIMONY

Apr 11 Before Judge Denise Cote
 U.S.D.C. S.D.N.Y.
 Juicy Couture, Inc. et al. v.
 L'Oreal USA, Inc., Lancome, et. al.
 Trademark matter

**JACOB JACOBY
2000 DEPOSITION TESTIMONY**

Feb 28 **Mark Bric Inc. v. Joseph Struhl Inc. et al.**
 In re "Flexiframe"
 (Trade dress matter)

May 26 **Ciba Vision Corp et al. v. Bausch & Lomb Inc.**
 In re "Pur/Pure" as a mark
 (Trademark matter)

July 18 **JMYZ, Inc. v. The Gap, Inc. and Old Navy, Inc.**
 In re "woody + surfboards" logo
 (Trade dress matter)

Aug 25 **Bacou USA Safety, Inc. and Uvex Safety Manufacturing, Inc. v.**
 Crews, Inc. (matter at the International Trade Commission)
 In re safety glasses
 (Trade dress matter)

Sep 13 **American Tool Companies, Inc. v. Wolfcraft, Inc.**
 (matter at the International Trade Commission)
 (Trade dress matter)

Oct 30 **Northern States Power Co. v. PECO Energy Co**
 & Excel Energy Co. (USDC D Minnesota)
 (Trademark matter)

Nov 21 **PRL Holdings v. U.S. Polo Association, Jordache, Ltd. et al.**
 Trademark Matter

JACOB JACOBY - 2001 DEPOSITION TESTIMONY

Jan 15 **Cache, Inc. v. M.Z. Berger & Co.**
 Trademark matter (USDC SDNY)

Jan 23 **Chatham v. Grolsch**
 Trademark matter (USDC SDNY)

Apr 25, 26 **Learning Network, Inc. & Headland Digital Media, Inc. v.**
 Discovery Communications, Inc.
 Trademark matter (USDC Md.)

Apr 27 **F.Y.I. Incorporated v. Identitech, Inc.**
 Trademark matter (USDC ND Texas)

- Jun 21 **Morrison Entertainment Group, Inc. v. Nintendo of N.A., et al.**
 Trademark matter (USDC CA)
- Oct 25 **MasterCard International v. Time Warner (HBO)**
 Parody matter (USDC SDNY)

JACOB JACOBY - 2002 (December) DEPOSITION TESTIMONY

- Dec 11 Air Turbine Technology, Inc. v. **Atlas Copco Tools AB, and Atlas Copco North America, Inc.** Trade dress and false advertising matter (U.S.D.C. S.D. Florida)
- Dec 13 Quantum Capital Corp. et al. v. **MBNA America Bank, N.A.** Trade dress matter (U.S.D.C. S.D.N.Y.)

JACOB JACOBY - 2003 DEPOSITION TESTIMONY

- Feb 18 1-800-Contacts v. **WHENU.COM** and Vision Direct, Inc. Trademark matter (U.S.D.C. S.D.N.Y.)
- Aug 8 Julie Turner, et al. v. **R.J. Reynolds Tobacco**
 Third Judicial Circuit, Madison County, Illinois
-
- Aug 27 American Water Heater Co., A. O. Smith Corporation, Bradford White Corporation, and Rheem Manufacturing Co. V. **Perfection Corp.** Circuit Court Of Cook County, Illinois
- Sep 24 Medical Mutual of Ohio v. **American Medical Security Group, Inc.** Trademark matter USDC No. District of Ohio, Eastern Div.

JACOB JACOBY - 2004 DEPOSITION TESTIMONY

- Feb 26 Federal Trade Commission v. **Telebrands**
 Deceptive advertising matter
 Washington, D.C.
- Apr 22 Diarama Trading Co. v. **J. Walter Thompson, USA, Inc. et al.**
 Trademark matter
 USDC SDNY

May 17 **Robert P. Heffner, Jr. et al. v. Blue Cross/Blue Shield of Alabama**
ERISA document comprehension matter
USDC Middle District of Alabama, Northern Division

June 8 **Kubota Corp. v. Daedong (Kloiti)**
Trade dress matter

June 10 **Verizon Directories Corp. v. Yellow Book USA, Inc.**
Advertising matter
U.S.D.C. E.D.N. Y.

June 13 **Louis Vuitton Malletier v. Dooney & Burke, Inc.**
Trademark matter U.S.D.C. S.D.N. Y.

July 22 **Cellco Partnership dba Verizon Wireless v. Nextel Communications**
Genericism-descriptiveness-secondary meaning matter
U.S.D.C. D. Delaware, Civ Action 03-725-KAJ

Sep 14 **Chicago Mercantile Exchange, Inc. v. Commodities Management**
Exchange, Inc.
Trademark confusion matter
U.S.D.C. N.D. Illinois, Civ Action 03-C 4919

Nov 18 **GEICO v. Google and Overture**
Trademark confusion matter
U.S.D.C. E.D. VA. (LBrinkema)

Dec 10 **Fibermark, Inc. v. Brownville Specialty Paper Products, Inc.**
Trade dress matter
U.S.D.C. N.D.N.Y.

JACOB JACOBY - 2005 DEPOSITION TESTIMONY

Feb 9 **Mylan Pharmaceuticals, Inc. v. The Procter & Gamble Company**
Deceptive Advertising matter
U.S.D.C. S.D.N.Y. 03-CV-10150

Mar 9 **Mag Instrument, Inc. v. Dollar Tree Stores, Inc.**
Trademark matter
U.S.D.C. Central District of California #03-6215 RSWL

June 7 **Hill's Pet Nutrition, Inc. v. Nutro Products, Inc.**
Advertising matter
U.S.D.C. C.D. CA (Western Division)

June 28 **City of New York (and NYPD) v. Elowitz**
Trademark matter
U.S.D.C. S.D.N.Y.

July 14 **E.T. Browne Drug Co., Inc. v. Cococare Products, Inc.,**
Genericism matter
U.S.D.C. D.N.J.

JACOB JACOBY - 2006 DEPOSITION TESTIMONY

Jan 23 **Liz Claiborne v. L'Oreal (Lancome)**
Trademark matter
U.S.D.C. S.D.N.Y.

Jan 30 **FTC v. QVC and VitaQuest**
Deceptive advertising matter
U.S.D.C. E.D. PA

Apr 7 **Red Bull et al. v. Mon Chong Loong Trading Co & Foodmart Int'l.**
Trademark and Trade dress matter
U.S.D.C. C.D. CA

June 22 **K-Swiss, Inc. v. Payless Shoe Source, Inc.**
Trade dress matter
U.S.D.C. C.D. CA (Western Division)

Aug 29 **Hansen Bev. Co. v. Rockstar, Inc. et al**
Trade dress matter
U.S.D.C. D. Nevada

Sep 28 **WG Security Products et. al. v. Tyco Int'l Ltd, et al.**
Deceptive advertising matter
U.S.D.C. C.D. CA (Western Div.)

Nov 20 **Wal-Mart Stores, Inc. v. Charles Smith**
Trademark matter

Dec 18 **Republic Tobacco, L.P. v. North Atlantic Trading Co., Inc. et al.**
Trade dress matter

JACOBY DEPOSITION EXHIBIT 3

Nextel Communications v. Motorola, Inc.,

Opp. No.: 91/161,817

App. No.: 78/235,618

Mark: Sensory Mark (911 Hz tone)

A STUDY OF THE "CHIRP" SOUND

CONDUCTED FOR
BRINKS HOFER GILSON & LIONE

SEPTEMBER 2005

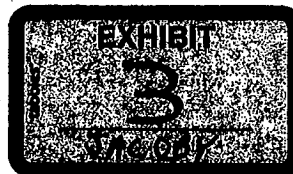
Nextel v. Motorola
Opp. No. 91/161,817
Motorola Testimony
Rappeport Exhibit 2

RL ASSOCIATES

601 EWING STREET SUITE A-11
PRINCETON, NEW JERSEY 08540
(609) 683-9200
(609) 683-0855 FAX

MOT 004675

Nextel v. Motorola
Opp. No. 91/161,817
Nextel Testimony
Jacoby Ex. 3



Confidential - Attorneys' Eyes Only -
Subject to Protective Order in TTAB
Opp. No. 91/161,817

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MOT 004676

I - INTRODUCTION

Background

Motorola, Inc. ("Motorola") manufactures and sells a wide variety of communications equipment, including, but not limited to, two-way radios. We have been informed that Motorola's two-way radios are commonly used by a wide variety of public safety personnel, such as police officers, fire fighters, ski patrollers, and emergency medical technicians (EMTs). We understand that to avoid having people speak over one another, the radio has a built-in feature that signals when one person has finished speaking. Specifically, the radios signal a speaker is finished by emitting a "chirp" sound. On page 2 of Motorola's Answer to Notice of Opposition, this chirp sound is described as an "electronic sound consisting of a tone at 911 Hz played at a cadence of 25 milliseconds (ms) on, 25 ms off, 25 ms on, 25 ms off, 50 ms on."

Goal of the Study

In the spring of 2003, Motorola filed an application for registration of the chirp sound. The application was subsequently opposed by Nextel Communications, Inc. ("Nextel"). We understand that Nextel opposed the registration because they claim the chirp sound is not inherently distinctive, nor has it acquired distinctiveness. In partial response to Nextel's concerns, Brinks Hofer Gilson & Lione, (counsel for Motorola) commissioned RL Associates to design and carry out a fair and unbiased test of whether the chirp sound has or has not acquired source indicating distinctiveness (secondary meaning). As we understand it, for sounds (or similar sensory stimuli such as smells) source indicating distinctiveness has two components¹

- The sound is distinctive in that members of an appropriate public have come to recognize it as indicating (associated with) a particular event.
- It is source indicating, in that, when used to indicate a particular event, members of the appropriate public recognize it as being indicative of a single, albeit possibly anonymous source.

To test whether the chirp sound has in fact acquired source indicating distinctiveness, we designed and carried out a survey of members of the appropriate public of public safety personnel. This is a report on the results of that study.

¹ In this case we think it valuable to distinguish between these two components of source indicating distinctiveness, so in this report we will use that term rather than the more common term secondary meaning.

II – METHODOLOGY

Introduction

Before beginning our discussion of the specific methodology used in this survey, we think it is important to note that the methodology used in any survey research project involves some degree of compromise between conflicting objectives. For instance, on the one hand, there is a desire to completely control the survey process, and on the other hand, a desire to replicate actual market conditions. It is therefore important to keep in mind throughout our discussion of methodology that, of necessity, the procedures used incorporated such compromises.

General Approach

The primary objective in this case is to determine whether a sound has acquired source indicating distinctiveness among those people who routinely use the equipment that make the sound. Thus, it was obviously necessary to design a study in which respondents were able to hear the sound at issue. Theoretically, one could present the sound to respondents either in person or over the telephone. While a telephone approach is lower cost, in order to present the sound in as clear a way as possible we decided to interview respondents in person.

To a substantial degree, the sound at issue is employed in a piece of equipment (two-way radios) whose use is concentrated in a limited segment of the population, primarily, people who work in one aspect or another of public safety. By far the most cost-effective way to reach a random sample of such individuals is at the respondent's workplace. Such interviews are a common way of doing such surveys, and are generally accepted in the field as valid survey methodology.

Universe and Sample

There are two issues related to drawing an appropriate sample:

1. Defining the proper universe from which to draw the sample.
2. Assuring the sample is drawn in such a way as to be representative of this universe.

Universe – In surveys designed for use in Lanham Act litigation, it is generally accepted that an appropriate universe consists of people who are likely to be actual or potential users of the

product at issue. Since the product at issue in this case is a two-way radio used primarily by people in the field of public safety, we defined the appropriate universe for this study as police officers, fire fighters, and emergency medical technicians (EMTs).

Sample Frame – The methodology used in this study was in-person interviews conducted with police officers, fire fighters, and EMTs at their workplace. The interviewing firms we selected to conduct the interviews were geographically distributed throughout the United States.²

Sample Selection – The interviewers were instructed to use their local phone book to call police, fire, and EMT stations in their area. Interviews were done either at the workplace of the respondent or in the interviewing firm's offices. They were told to attempt to conduct interviews with 14 different workplaces. At the workplace, as long as each interview was conducted in private (i.e. with only the respondent able to hear the interview), interviewers were permitted to conduct up to two interviews per workplace. If respondents were asked to come to the interviewing firm's office, they were to interview no more than two respondents per workplace.

Honoraria – Both because offering respondents a small honoraria increases the response rate (and thus improves the reliability of the survey), and because we believe that there is an emerging understanding that there is an ethical responsibility to pay willing respondents for their time, respondents were offered \$25.00, either as a donation to their local Police Benevolent Board or their station, or as a cash payment to themselves.

² Interviews were conducted in each of the nine census regions except the East South Central region (KY, TN, AL, and MS).

Study Design

a) Introduction – The Need for “Controls”

As is true in virtually every perception survey, the design of this survey has to take into account potential sources of error. One type of error is artifacts arising from the survey procedure itself. This type of potential source of error is commonly referred to as “noise”. The most common, although not the only, source of “noise” is that rather than admit they don’t have an answer to a question, at least some respondents will “guess” in their desire to get the “right answer.” Because no matter how well designed a survey it is generally impossible to guarantee that such noise has been eradicated, there is a general need to provide a mechanism to estimate the noise. In the great majority of cases, this mechanism(s) is the use of one form or another of controls.

b) The Controls Used

Aside from the chirp, respondents were presented with three other “control” sounds. The controls were chosen in such a way that we believed that the three control sounds would reflect three of the possible alternatives (single source identifying, event but not source identifying, neither event nor source identifying), and so provide a variety of useful estimates of the underlying tendency of respondents to guess (i.e. of the noise).

a) The chime sound played at startup of a computer running the Windows operating system.

In designing the survey, we believed that a majority of people would be able to identify this sound, and would think it comes from one company (and in particular Microsoft).

b) A doorbell – In designing the survey, we believed that a majority of people would be able to identify this sound, but would think that it comes from more than one company.

c) A paper cutter cutting paper – In designing the survey, we believed that a majority of people would not be able to identify this sound.

It is clearly desirable for respondents to hear the sounds in a consistent, controlled manner. To accomplish this, a high quality CD or cassette containing the four sounds described above was produced in a recording studio. To limit any possible order bias, the sounds were presented in two sequences – half the respondents heard the sounds in the sequence: Windows, doorbell, paper cutter, chirp, the other half heard the sequence: doorbell, chirp, paper cutter, Windows.

MOT 004680

Questionnaire

Once the respondent was alone with the interviewer, they were told:

*I am going to have you listen to a few recorded sounds.
You will then be asked some questions.*

The interviewer then started the CD player. With the exception of probe questions and two demographic questions at the end of the questionnaire, the questions and sounds were recorded on the CD. This was done to ensure that everyone clearly heard the same set of instructions. Interviewers were instructed to follow along with the script, pausing the CD when told to do so, and recording the respondent's answers in the appropriate spaces.

The recording began with the following instructions:

You are going to hear four sounds one after another. You will hear each sound three times. After you have heard all four sounds, you will then hear each sound individually, and I will ask if you can identify the sound.

Each sound was then identified by a number and played three times, and the recording then continued:

Now you will hear each of the sounds again. After you hear each sound there will be an opportunity for you to tell the interviewer what, if anything, you know about the sound. This is the first sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

The interviewer pressed pause and recorded the respondent's answer in the space provided. The interviewer was instructed to probe once with, "Is there anything else?" If the respondent identified the sound, but did not mention the name of a specific company in his or her answer, the interviewer asked a follow-up question:

You said that sound comes from a [ANSWER FROM PREVIOUS QUESTION]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

The interviewer then resumed the CD and the same procedure was repeated for three other sounds. The interviewer then completed the interview by asking two demographic questions:

*Finally, what is your job title?
Is your position paid or volunteer? (Not asked of Police)*

MOT 004681

At the conclusion of the interview, respondents were asked to complete a brief honorarium form specifying the charity they wanted their \$25 honorarium donated to, or acknowledging that they received \$25. A complete copy of the questionnaire used in this study is included in Appendix A.

Interviewing

Courts have consistently held that surveys conducted for use in litigation require that the interviewing be done by professional interviewers who are shielded from the client sponsoring the work, from the purpose of the study, and even from the fact that the study is being conducted for litigation. That is, the interviewing procedures must be "double blind." For this reason, in this study the interviewers and their supervisors were never told for whom the study was being conducted, nor that it was being conducted for litigation purposes. Furthermore, we believe that in this study the interviewer instructions and, more importantly, the test procedures themselves are transparent, in the sense that an independent observer could not tell who had commissioned the survey.

A total of 180 interviews³ were conducted by 8 interviewing firms. Each firm was instructed to conduct one to two interviews at each of 14 different stations. The name and location of each interviewing firm, and the number of interviews conducted by that firm, appears below:

- 13 Quick Test/Discovery NQN in Natick, MA (Ballot numbers starting "1")
- 27 Northeast Data in West Nyack, NY (2)
- 28 Quick Test/Discovery NQN in Olympia Fields, IL (3)
- 10 Helen Nelson Market Research in Rosemount, MN (4)
- 28 Quick Test/Discovery NQN in Atlanta, GA (5)
- 25 Quick Test in Houston, TX (6)

³ Sixteen interviews conducted in Atlanta, GA by Kimberly Dunn are not included in the results presented in the next chapter of this report. Based on a careful review of her work, we believe that at least some of her interviews were not conducted correctly, if at all. For one thing, the answers in two of her interviews (Ballot numbers 5-113 and 5-114) are exactly the same. In both interviews the four sounds are identified as follows: Computer program – Windows; Doorbell; Door closing – Heavy door scrubbing; Cell phone – Nextel. More important, when a member of the RL Associates professional staff attempted to validate these two interviews, in one case she was told the respondent did not work at that station, and in the other case the number was disconnected. We attempted to validate the remaining 14 of Kimberly's interviews. We were told that there was no such person at 6 of the numbers we tried, and one number was for a fax machine. For these reasons, we decided to exclude all of the work done by Kimberly Dunn. We believe that, if anything, discarding the interviews was conservative from the point of view of Motorola (that is, these interviews would have been slightly beneficial to Motorola). Copies of the 16 interviews conducted by Kimberly Dunn are included in Appendix C.

25 C & C Market Research in Westminster, CO (7)
24 Consumer Pulse in Redondo Beach, CA (8)

All interviews were conducted in August and September 2005 by professional interviewers employed by firms that we consider reliable and trustworthy. Aside from their general training and experience as interviewers, each interviewer was provided with a copy of written instructions, which specifically instructed them in the proper procedures for this study. A copy of the instructions is included in Appendix B.

Validation

In order to ensure that the interviewing was carried out as reported, two members of the RL Associates professional staff independently read all of the interviews. This practice allows us to look for patterns in the questionnaires conducted by a particular interviewer (e.g., repetition of an unusual phrase) that indicate that the questionnaires were not completed correctly, or were simply made up by the interviewer.

A second source of validation is the honorarium sheet the respondent was asked to complete at the end of the interview.

In addition, at least 20% of each interviewer's work (other than Kimberly Dunn's) is currently being formally validated by AVC Research, an independent interviewing service located in Belvidere, New Jersey. The purpose of this formal validation is to determine whether the respondent recalled participating in the interview, not to verify a respondent's answers to any particular question. As of this date, it is our opinion that all interviews were carried out according to our instructions.

MOT 004683

III – DATA AND DISCUSSION

This survey was designed to provide information as to whether or not:

- The sound is distinctive in that members of an appropriate public have come to recognize it as indicating (associated with) a particular event.
- It is source indicating, in that when used to indicate a particular event, members of the appropriate public recognize it as being indicative of a single, albeit possibly anonymous source.

The results of the 164 interviews are shown in three tables. Table I shows the results relevant to the first issue tested – whether each sound is recognizable as indicating a particular event. The results show figures for the four different sounds each respondent heard:

TABLE I

Please tell me what it is and what, if anything, you know about this sound.

	<u>Chirp</u>	<u>Paper Cutter</u>	<u>Doorbell</u>	<u>Windows Start-up</u>
Radio	21	0	0	0
Walkie-talkie	27	0	0	0
Radio and walkie-talkie	4	0	0	0
Telephone	13	0	0	4
Paper Cutter	0	21	0	0
Doorbell	0	0	96	0
Computer	3	1	0	87
Any Other	25	67	3	7
Don't Know	7	12	1	2

ALL FIGURES ARE PERCENT OF 164 INTERVIEWS

The 28% (3+25) who said either computer or some other product or service in response to the “chirp” sound clearly indicate some guessing was going on with respect to this sound. However, the fact that not one individual mentioned either radio or walkie-talkie with respect to any of the other sounds shows that those respondents who said either radio or walkie-talkie with respect to the “chirp” sound were not guessing. While there was significant mention of “telephone”, and some people may have been referring to the walkie-talkie feature of a telephone, this is not clear in the responses. Therefore, to be conservative (from Motorola's point of view), we did not count telephone answers as indicating a radio/walkie-talkie device. We conclude that net of noise 52% (21+27+4) recognize the “chirp” sound as that made by a radio and/or walkie-talkie.

Table II shows the results relevant to the second issue tested – whether each sound is identified with a specific source, or if not whether it is identified with one company or more than one company. As in Table I, the results are shown for the four different sounds.

TABLE II

*Please tell me what it is and what, if anything, you know about this sound.
Are you thinking of one company or more than one company?*

	<u>Chirp</u>	<u>Paper Cutter</u>	<u>Doorbell</u>	<u>Windows Start-up</u>
Motorola only	14	0	0	0
Nextel only	29	0	0	0
Motorola and Nextel	9	0	0	0
Motorola and/or Nextel total	52	0	0	0
Microsoft/Windows	0	1	0	66
Any other specific single source	10	13	11	13
Unknown single source	2	1	3	2
Any specified multiple sources	5	4	2	3
Unknown multiple sources	5	13	20	3
Don't know number of sources	19	56	63	10
Don't know what sound is	7	12	1	2

ALL FIGURES ARE PERCENT OF 164 INTERVIEWS

The 22% (10+2+5+5) who either gave a non-Motorola/Nextel source or multiple sources in response to the "chirp" sound clearly indicate some guessing was going on. However, (and this is roughly true for each of the four sounds) the 12% (10+2) who said single source (other than Motorola or Nextel) just about balanced the 10% (5+5) who said multiple sources. Moreover, no respondent said Motorola and/or Nextel for any of the other sounds. We conclude that all of the guessing with regard to the specific source of the "chirp" sound is reflected in the respondents who gave a non-Motorola/Nextel single source – in other words, those respondents who said Motorola and/or Nextel with respect to the "chirp" sound were not guessing. We conclude that net of noise 52% (14+29+9) associate the "chirp" sound with Motorola and/or Nextel.

MOT 004685

The tables on the previous two pages show the proportions of people who met each of the two components of source indicating distinctiveness. Table III shows the proportion of people who gave answers that met both of the two criteria.

TABLE III

Motorola only and radio only	7%
Motorola only walkie-talkie only	3
Motorola only and radio and/or walkie-talkie	11
Nextel only and walkie-talkie only	20
Nextel only and radio only	3
Nextel only and radio and/or walkie-talkie	24
Motorola and Nextel – radio and/or walkie-talkie	7
Motorola and/or Nextel – radio and/or walkie-talkie	42

As discussed on the previous two pages, because respondents were only counted who were not guessing either with respect to the event (i.e. radio and/or walkie-talkie) or with respect to the source (Motorola and/or Nextel) these results are essentially "net of noise". Thus the data shows that approximately 42% of the relevant population recognize the "chirp" sound as that made by a Motorola and/or Nextel radio and/or walkie-talkie.

MOT 004686

IV – PERSONNEL AND REMUNERATION

Michael Rappeport was responsible for all aspects of this survey. Dr. Rappeport's resume, including cases and publications, is attached as Appendix D.

RL Associates is being compensated \$65,400 for this survey. Dr. Rappeport's hourly compensation rate for time spent subsequent to this report is \$500/hour.

Michael Rappeport Sept 14, 2005
Michael Rappeport

MOT 004687

APPENDIX A
QUESTIONNAIRE

MOT 004688

Nextel v. Motorola
Opp. No. 91/161,817
Nextel Testimony
Jacoby Ex. 3

**Confidential - Attorneys' Eyes Only -
Subject to Protective Order in TTAB
Opp. No. 91/161,817**

**RL ASSOCIATES
SOUND STUDY - RG682
SCREEN SHEET**

INTERVIEW DATE: _____
START TIME: _____
END TIME: _____

INTRODUCTION: Hello, this is _____ from _____. We're conducting a brief survey among various professionals. I want to emphasize that we are not selling anything, and we will not ask any questions about your work.

Our survey takes less than 10 minutes to complete. The survey involves listening to something on a cd, so it must be conducted in person, either at your station, or our office, whichever is most convenient for you. We will donate \$25 to your...

IF POLICE, SAY: local PBA for your participation in this study.

IF FIRE/EMT, SAY: station for your participation in this study.

IF THE PERSON IS NOT AVAILABLE NOW, DETERMINE A TIME TO CALL BACK.

RESULT IF CANNOT CONTINUE NOW:

- () Agreed to participate - Date and time of appointment: _____
- () Call back to arrange appointment: _____
- () Refused to participate - Terminate and tally

INTERVIEWER INDICATE: 1 POLICE 2 FIRE 3 EMT

RESPONDENT NAME: _____

STATION ADDRESS: _____

CITY: _____ STATE: _____ ZIP CODE: _____

STATION PHONE NUMBER: (____) _____ - _____

MOT 004689

TAKE THE RESPONDENT SOMEWHERE PRIVATE TO BE INTERVIEWED. SEAT THE RESPONDENT. SAY: I am going to have you listen to a few recorded sounds. You will then be asked some questions.

INTERVIEWER: BEGIN THE CD/TAPE PLAYER. DO NOT READ THE FOLLOWING SCRIPT, JUST FOLLOW ALONG WITH IT. WHEN THE VOICE TELLS YOU TO PAUSE THE CD/TAPE, PLEASE DO SO AND RECORD THE RESPONDENT'S ANSWER IN THE SPACE PROVIDED. THE SCRIPT IS IN BOLD PRINT.

VOICE: You are going to hear four sounds one after another. You will hear each sound three times. After you have heard all four sounds, you will then hear each sound individually, and I will ask if you can identify the sound.

VOICE: This is Sound Number 1 (Sound x 3)

VOICE: This is Sound Number 2 (Sound x 3)

VOICE: This is Sound Number 3 (Sound x 3)

VOICE: This is Sound Number 4 (Sound x 3)

VOICE: Now you will hear each of the sounds again. After you hear each sound there will be an opportunity for you to tell the interviewer what, if anything, you know about the sound.

VOICE: This is the first sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #1

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #1 HERE. PROBE ONCE WITH: Is there anything else?

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

VOICE: This is the second sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #2

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #2 HERE. PROBE ONCE WITH: Is there anything else?

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

VOICE: This is the third sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #3

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #3 HERE. PROBE ONCE WITH: Is there anything else?

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004692

VOICE: This is the fourth sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #4

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #4 HERE. PROBE ONCE WITH: Is there anything else?

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

Finally, what is your job title?

IF FIRE/EMT, ASK:

Is your position...

- 1 paid or
- 2 volunteer?

I (INTERVIEWER PRINT FULL NAME) _____

verify that I conducted this interview on (date) ____ / ____ / ____ at (time) ____: ____.

Nextel v. Motorola
Opp. No. 91/161,817
Nextel Testimony
Jacoby Ex. 3

INTERVIEWER SIGNATURE: _____

MOT 004693

APPENDIX B

MEMO TO SUPERVISORS AND INTERVIEWER INSTRUCTIONS

MOT 004694

Nextel v. Motorola
Opp. No. 91/161,817
Nextel Testimony
Jacoby Ex. 3

**Confidential - Attorneys' Eyes Only -
Subject to Protective Order in TTAB
Opp. No. 91/161,817**

RL ASSOCIATES

601 EWING STREET SUITE A-11
PRINCETON, NEW JERSEY 08540
(609) 683-9200
(609) 683-0855 FAX

SOUND STUDY - RG682
MEMO TO SUPERVISORS

PLEASE CALL ME AFTER YOU HAVE CAREFULLY REVIEWED THESE INSTRUCTIONS. I WOULD LIKE TO TALK TO YOU BEFORE YOU START THIS JOB.

The respondents for this study are police officers, fire fighters, and emergency medical technicians (EMTs). You are going to have to pre-recruit the respondents, using your local phone book. This is an in-person interview. It can be conducted either at the respondent's station, or at your interviewing facility, whatever is most convenient for you and the respondent. We would like you to conduct at least one interview at 14 different stations (or - if you are conducting the interviews at your facility - with people from 14 different stations). You may conduct up to 2 interviews per station, so, you should end up conducting between 14 and 28 interviews in all.

We are offering to make a \$25 donation to the police officer's Police Benevolent Association (PBA) or the fire fighter's/EMT's station for their participation in this study.

The study involves playing a CD (or cassette) that has four sounds on it, and finding out what, if anything, the respondent knows about those sounds. Most of the instructions to the respondent have been recorded on the CD, so the interviewer just has to follow along with what is written on the questionnaire. During the interview, the interviewer's primary responsibilities include:

- Starting and stopping the CD/tape at the appropriate time
- Writing down the respondent's answers
- Asking the probe question, Is there anything else?
- Asking a follow-up question that is specified on the questionnaire
- Asking two questions at the end of the survey
- Having the respondent fill out the honorarium sheet

If possible, we ask that a MINIMUM OF TWO interviewers work on this project.

Each interviewer is to have his or her own set of interviewer instructions:

*** Before conducting any interviews, ALL interviewers working on this study must read and sign a copy of the interviewer instructions. The signed interviewer instructions must be returned to RL Associates at the end of the study. Work will not be accepted from interviewers who did not sign the interviewer instructions prior to conducting interviews.**

We ask that you carefully review the questionnaire and the interviewer instructions with the interviewers before they start interviewing. It is essential that all interviews be conducted completely and correctly.

MOT 004695

MEMO TO SUPERVISORS – PAGE 2

The Screen Sheet can be filled out in pencil, but the rest of the questionnaire should be completed in black or blue PEN. We do not want the interviewer to erase or "white out" ANYTHING that he or she writes. If the respondent changes his or her mind, the change should be recorded verbatim. If the interviewer makes a mistake, he or she should cross out the mistake, and put their initials by the change.

Please be sure the interviewer fills in ALL of the information that is asked for at the end of the questionnaire. We are going to look at this information to verify that the interviews were done correctly. Interviewers are to print their full name, enter the date and time the interview was conducted, and sign the bottom of the interview.

Do not edit the questionnaires. We want to see the questionnaires exactly as the interviewer records them and submits them to you. This is why it is crucial that the interviewer carefully follow the instructions.

We WILL NOT PAY for work that is incomplete, incorrectly completed, or unreadable. If you or the interviewers have ANY questions about this study, please call me!

Please ship the completed study back to our office as soon as it is complete.

- We would like you to fax us the first two interviews you do as soon as they are completed.
- We would like you to send us all of your completed interviews on Friday, September 9 so that we receive them on Monday, September 12. If you are not going to be able to meet this deadline, please let us know.

As soon as you have finished the study, please return all of the materials, including:

- Completed questionnaires
- Signed interviewer instructions
- Signed honoraria sheets
- CD and cassette

You can ship the study back to us in one of two ways:

- a) UPS NEXT DAY AIR – Our UPS shipping number is
- b) FEDERAL EXPRESS P1 – Our Federal Express account number is

If you have any questions or concerns, please call me. Thank you very much.

MOT 004696

RL ASSOCIATES

601 EWING STREET SUITE A-11
PRINCETON, NEW JERSEY 08540
(609) 683-9200
(609) 683-0855 FAX

SOUND STUDY - RG682 INTERVIEWER INSTRUCTIONS

PLEASE TAKE THE TIME TO CAREFULLY REVIEW THESE INSTRUCTIONS.

*** Before conducting any interviews, you must read AND SIGN a copy of the interviewer instructions (see the bottom of Page 2 of these instructions). It is essential that the interviews be conducted COMPLETELY and CORRECTLY. If you have any questions, please ask your supervisor.**

The Respondents

The respondents for this study are police officers, fire fighters, and emergency medical technicians (EMTs) that have been pre-recruited to participate in this study.

The Questionnaire

This study involves playing a CD (or cassette) that has four sounds on it, and finding out what, if anything, the respondent knows about those sounds. Most of the instructions to the respondent have been recorded on the CD, so you just have to follow along with what is written on the questionnaire. During the interview, your primary responsibilities include:

- Starting and stopping the CD/tape at the appropriate time
- Writing down the respondent's answers
- Asking the probe question, Is there anything else?
- Asking a follow-up question that is specified on the questionnaire (see note below)
- Asking two questions at the end of the survey
- Having the respondent fill out the honorarium sheet

*** The Follow-Up Question**

After the respondents hear each sound, they are asked what it is and what, if anything, they know about it. If the respondent identifies the sound, but does not mention the name of a specific company in their answer, be sure to ask the follow-up question:

You said that sound comes from a [ANSWER GIVEN]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

For instance, if the respondent says the sound is a boiling tea kettle, the follow up question should be:

You said that sound comes from boiling tea kettle. Are you thinking of one company who makes that tea kettle or more than one company who makes that tea kettle?

IT IS IMPORTANT TO NOTE THAT THERE ARE NO "RIGHT" ANSWERS. WHAT WE ARE INTERESTED IN IS WHAT THE RESPONDENT THINKS. TO US, WHATEVER THE RESPONDENT SAYS IS "RIGHT."

MOT 004697

INTERVIEWER INSTRUCTIONS – PAGE 2

The Screen Sheet can be filled out in pencil, but the rest of the questionnaire should be completed in black or blue PEN. We do not want you to erase or "white out" ANYTHING that you write. If the respondent changes his or her mind, record the change verbatim. If you make a mistake, cross out the mistake, and put your initials by the change.

Please be sure to carefully fill in ALL of the information that is asked for at the end of the questionnaire. We are going to look at this information to verify that the interviews were done correctly. You must print your full name, enter the date and time the interview was conducted, and sign your full name.

If you have ANY questions about any aspect of this study, please ask your supervisor!

* * * SIGN AND RETURN AT THE END OF THE STUDY * * *

I _____ have read the above interviewer instructions on _____ (date)

at _____ (time). INTERVIEWER SIGNATURE:

MOT 004698

APPENDIX C

INTERVIEWS CONDUCTED BY KIMBERLY DUNN

MOT 004699

TAKE THE RESPONDENT SOMEWHERE PRIVATE TO BE INTERVIEWED. SEAT THE RESPONDENT. SAY: I am going to have you listen to a few recorded sounds. You will then be asked some questions.

INTERVIEWER: BEGIN THE CD/TAPE PLAYER. DO NOT READ THE FOLLOWING SCRIPT, JUST FOLLOW ALONG WITH IT. WHEN THE VOICE TELLS YOU TO PAUSE THE CD/TAPE, PLEASE DO SO AND RECORD THE RESPONDENT'S ANSWER IN THE SPACE PROVIDED. THE SCRIPT IS IN BOLD PRINT.

VOICE: You are going to hear four sounds one after another. You will hear each sound three times. After you have heard all four sounds, you will then hear each sound individually, and I will ask if you can identify the sound.

VOICE: This is Sound Number 1 (Sound x 3)

VOICE: This is Sound Number 2 (Sound x 3)

VOICE: This is Sound Number 3 (Sound x 3)

VOICE: This is Sound Number 4 (Sound x 3)

VOICE: Now you will hear each of the sounds again. After you hear each sound there will be an opportunity for you to tell the interviewer what, if anything, you know about the sound.

VOICE: This is the first sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #1

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #1 HERE. PROBE ONCE WITH: Is there anything else?

Computer program

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Windows

VOICE: This is the second sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #2

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #2 HERE. PROBE ONCE WITH: Is there anything else?

Doorbell

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

VOICE: This is the third sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #3

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #3 HERE. PROBE ONCE WITH: Is there anything else?

Door Closing -

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Heavy door scrubbing

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004702

VOICE: This is the fourth sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #4

VOICE: Please press pause now.

2-4

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #4 HERE. PROBE ONCE WITH: Is there anything else?

Cell Phone

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Nextel

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

Finally, what is your job title?

IF FIRE/EMT, ASK:

Is your position...

1 paid or

2 volunteer?

I (INTERVIEWER PRINT FULL NAME)

Kimberly Dunn

verify that I conducted this interview on (date) 9/16/00 at (time) 1:30.

Nextel v. Motorola
Opp. No. 91/161,817
Nextel Testimony
Jacoby Ex. 3

INTERVIEWER SIGNATURE:

Kimberly C. Dunn

MOT 004703

5-114

- 1 -

TAKE THE RESPONDENT SOMEWHERE PRIVATE TO BE INTERVIEWED. SEAT THE RESPONDENT. SAY: I am going to have you listen to a few recorded sounds. You will then be asked some questions.

INTERVIEWER: BEGIN THE CD/TAPE PLAYER. DO NOT READ THE FOLLOWING SCRIPT, JUST FOLLOW ALONG WITH IT. WHEN THE VOICE TELLS YOU TO PAUSE THE CD/TAPE, PLEASE DO SO AND RECORD THE RESPONDENT'S ANSWER IN THE SPACE PROVIDED. THE SCRIPT IS IN BOLD PRINT.

VOICE: You are going to hear four sounds one after another. You will hear each sound three times. After you have heard all four sounds, you will then hear each sound individually, and I will ask if you can identify the sound.

VOICE: This is Sound Number 1 (Sound x 3)

VOICE: This is Sound Number 2 (Sound x 3)

VOICE: This is Sound Number 3 (Sound x 3)

VOICE: This is Sound Number 4 (Sound x 3)

VOICE: Now you will hear each of the sounds again. After you hear each sound there will be an opportunity for you to tell the interviewer what, if anything, you know about the sound.

VOICE: This is the first sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #1

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #1 HERE. PROBE ONCE WITH: "Is there anything else?"

Computer Program

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:
You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Windows

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

-2-

5-119

VOICE: This is the second sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #2

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #2 HERE. PROBE ONCE WITH: Is there anything else?

Door bell

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

-3-

5-114

VOICE: This is the third sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #3

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #3 HERE. PROBE ONCE WITH: Is there anything else?

Door Closing

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Heavy door scrubbing

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

- 4 -

5-114

VOICE: This is the fourth sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #4

2-4

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #4 HERE. PROBE ONCE WITH: Is there anything else?

Cell phone

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Nextel

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

Finally, what is your job title?

IF FIRE/EMT, ASK:

Is your position...

1 paid or

2 volunteer?

I (INTERVIEWER PRINT FULL NAME)

Kimberly Dunn

verify that I conducted this interview on (date) 9/7/05 at (time) 1:00

Nextel v. Motorola
Opp. No. 91/161,817
Nextel Testimony
Jacoby Ex. 3

INTERVIEWER SIGNATURE:

Kimberly C. Dunn

MOT 004707

- 1 -

5-115

TAKE THE RESPONDENT SOMEWHERE PRIVATE TO BE INTERVIEWED. SEAT THE RESPONDENT. SAY: I am going to have you listen to a few recorded sounds. You will then be asked some questions.

INTERVIEWER: BEGIN THE CD/TAPE PLAYER. DO NOT READ THE FOLLOWING SCRIPT, JUST FOLLOW ALONG WITH IT. WHEN THE VOICE TELLS YOU TO PAUSE THE CD/TAPE, PLEASE DO SO AND RECORD THE RESPONDENT'S ANSWER IN THE SPACE PROVIDED. THE SCRIPT IS IN BOLD PRINT.

VOICE: You are going to hear four sounds one after another. You will hear each sound three times. After you have heard all four sounds, you will then hear each sound individually, and I will ask if you can identify the sound.

VOICE: This is Sound Number 1 (Sound x 3)

VOICE: This is Sound Number 2 (Sound x 3)

VOICE: This is Sound Number 3 (Sound x 3)

VOICE: This is Sound Number 4 (Sound x 3)

VOICE: Now you will hear each of the sounds again. After you hear each sound there will be an opportunity for you to tell the interviewer what, if anything, you know about the sound.

VOICE: This is the first sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #1

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #1 HERE. PROBE ONCE WITH: Is there anything else?

The computer program windows.

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

-2-

5-115

VOICE: This is the second sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #2

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #2 HERE. PROBE ONCE WITH: Is there anything else?

Door bell

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Don't know

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004709

- 3 -

5-115

VOICE: This is the third sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #3

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #3 HERE. PROBE ONCE WITH: Is there anything else?

The old roller stamp

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Dont know

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004710

-4-

5-115

VOICE: This is the fourth sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #4

3-1

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #4 HERE. PROBE ONCE WITH: Is there anything else?

Nextel, radear, signal for a call.

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Nextel - Motorola

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

Finally, what is your job title?

IF FIRE/EMT, ASK:

Is your position...

- 1 paid or
- 2 volunteer?

I (INTERVIEWER PRINT FULL NAME)

Kimberly Dunn

verify that I conducted this interview on (date) *9/7/05* at (time) *8:45*.

Nextel v. Motorola
Opp. No. 91/161,817
Nextel Testimony
Jacoby Ex. 3

INTERVIEWER SIGNATURE:

Kimberly C. Dunn

MOT 004711

Confidential - Attorneys' Eyes Only -
Subject to Protective Order in TTAB
Opp. No. 91/161,817

TAKE THE RESPONDENT SOMEWHERE PRIVATE TO BE INTERVIEWED. SEAT THE RESPONDENT. SAY: I am going to have you listen to a few recorded sounds. You will then be asked some questions.

INTERVIEWER: BEGIN THE CD/TAPE PLAYER. DO NOT READ THE FOLLOWING SCRIPT, JUST FOLLOW ALONG WITH IT. WHEN THE VOICE TELLS YOU TO PAUSE THE CD/TAPE, PLEASE DO SO AND RECORD THE RESPONDENT'S ANSWER IN THE SPACE PROVIDED. THE SCRIPT IS IN BOLD PRINT.

VOICE: You are going to hear four sounds one after another. You will hear each sound three times. After you have heard all four sounds, you will then hear each sound individually, and I will ask if you can identify the sound.

VOICE: This is Sound Number 1 (Sound x 3)

VOICE: This is Sound Number 2 (Sound x 3)

VOICE: This is Sound Number 3 (Sound x 3)

VOICE: This is Sound Number 4 (Sound x 3)

VOICE: Now you will hear each of the sounds again. After you hear each sound there will be an opportunity for you to tell the interviewer what, if anything, you know about the sound.

VOICE: This is the first sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #1

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #1 HERE. PROBE ONCE WITH: Is there anything else?

*The Computer opening up a new
application*

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

VOICE: This is the second sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #2

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #2 HERE. PROBE ONCE WITH: Is there anything else?

Standard door bell

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004713

VOICE: This is the third sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #3

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #3 HERE. PROBE ONCE WITH: Is there anything else?

Un not sure

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004714

VOICE: This is the fourth sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #4

1-1

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #4 HERE. PROBE ONCE WITH: Is there anything else?

Oh yeah, the Motorola.

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Our radio.

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

Finally, what is your job title?

Office

IF FIRE/EMT, ASK:

Is your position...

1 paid or

2 volunteer?

I (INTERVIEWER PRINT FULL NAME)

Kimberly Dunn

verify that I conducted this interview on (date) 9/6/05 at (time) 6:30.

Nextel v. INTERVIEWER SIGNATURE: Kimberly Dunn
Opp. No. 91/161,817
Nextel Testimony
Jacoby Ex. 3

MOT 004715

TAKE THE RESPONDENT SOMEWHERE PRIVATE TO BE INTERVIEWED. SEAT THE RESPONDENT. SAY: I am going to have you listen to a few recorded sounds. You will then be asked some questions.

INTERVIEWER: BEGIN THE CD/TAPE PLAYER. DO NOT READ THE FOLLOWING SCRIPT, JUST FOLLOW ALONG WITH IT. WHEN THE VOICE TELLS YOU TO PAUSE THE CD/TAPE, PLEASE DO SO AND RECORD THE RESPONDENT'S ANSWER IN THE SPACE PROVIDED. THE SCRIPT IS IN BOLD PRINT.

VOICE: You are going to hear four sounds one after another. You will hear each sound three times. After you have heard all four sounds, you will then hear each sound individually, and I will ask if you can identify the sound.

VOICE: This is Sound Number 1 (Sound x 3)

VOICE: This is Sound Number 2 (Sound x 3)

VOICE: This is Sound Number 3 (Sound x 3)

VOICE: This is Sound Number 4 (Sound x 3)

VOICE: Now you will hear each of the sounds again. After you hear each sound there will be an opportunity for you to tell the interviewer what, if anything, you know about the sound.

VOICE: This is the first sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #1

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #1 HERE. PROBE ONCE WITH: Is there anything else?

*Elevator down from the fancy ones
when you get to your floor.*

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

I don't know that

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

VOICE: This is the second sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #2

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #2 HERE. PROBE ONCE WITH: Is there anything else?

A door bell

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Un sure

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004717

5-117

VOICE: This is the third sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #3

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #3 HERE. PROBE ONCE WITH: Is there anything else?

Not a clue

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004718

5-117

VOICE: This is the fourth sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #4

1-1

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #4 HERE. PROBE ONCE WITH: Is there anything else?

Our radios

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

McAreda

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

Finally, what is your job title?

IF FIRE/EMT, ASK:

Is your position...

- 1 paid or
- 2 volunteer?

I (INTERVIEWER PRINT FULL NAME)

Kimberly Dunn

verify that I conducted this interview on (date) *9/16/05* at (time) *3:30*.

Nextel v. ~~INTERVIEWER~~
Opp. No. 91/161,817
Nextel Testimony
Jacoby Ex. 3

INTERVIEWER SIGNATURE:

Kimberly Dunn

MOT 004719

TAKE THE RESPONDENT SOMEWHERE PRIVATE TO BE INTERVIEWED. SEAT THE RESPONDENT. SAY: I am going to have you listen to a few recorded sounds. You will then be asked some questions.

INTERVIEWER: BEGIN THE CD/TAPE PLAYER. DO NOT READ THE FOLLOWING SCRIPT, JUST FOLLOW ALONG WITH IT. WHEN THE VOICE TELLS YOU TO PAUSE THE CD/TAPE, PLEASE DO SO AND RECORD THE RESPONDENT'S ANSWER IN THE SPACE PROVIDED. THE SCRIPT IS IN BOLD PRINT.

VOICE: You are going to hear four sounds one after another. You will hear each sound three times. After you have heard all four sounds, you will then hear each sound individually, and I will ask if you can identify the sound.

VOICE: This is Sound Number 1 (Sound x 3)

VOICE: This is Sound Number 2 (Sound x 3)

VOICE: This is Sound Number 3 (Sound x 3)

VOICE: This is Sound Number 4 (Sound x 3)

VOICE: Now you will hear each of the sounds again. After you hear each sound there will be an opportunity for you to tell the interviewer what, if anything, you know about the sound.

VOICE: This is the first sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #1

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #1 HERE. PROBE ONCE WITH: Is there anything else?

Micro soft windows

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

VOICE: This is the second sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #2

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #2 HERE. PROBE ONCE WITH: Is there anything else?

Doorbell

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

All of them every body makes that Keao

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004721

5-118

VOICE: This is the third sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #3

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #3 HERE. PROBE ONCE WITH: Is there anything else?

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004722

5-118

VOICE: This is the fourth sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #4.

VOICE: Please press pause now.

1-1

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #4 HERE. PROBE ONCE WITH: Is there anything else?

Motorolas the company the radios
that we use.

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

Finally, what is your job title?

fireman

IF FIRE/EMT, ASK:

Is your position...

- 1 paid or
- 2 volunteer?

I (INTERVIEWER PRINT FULL NAME)

Kimberly C. Dunn

verify that I conducted this interview on (date) 9/6/05 at (time) 1:15.

INTERVIEWER SIGNATURE

Kimberly C. Dunn

MOT 004723

TAKE THE RESPONDENT SOMEWHERE PRIVATE TO BE INTERVIEWED. SEAT THE RESPONDENT. SAY: I am going to have you listen to a few recorded sounds. You will then be asked some questions.

INTERVIEWER: BEGIN THE CD/TAPE PLAYER. DO NOT READ THE FOLLOWING SCRIPT, JUST FOLLOW ALONG WITH IT. WHEN THE VOICE TELLS YOU TO PAUSE THE CD/TAPE, PLEASE DO SO AND RECORD THE RESPONDENT'S ANSWER IN THE SPACE PROVIDED. THE SCRIPT IS IN BOLD PRINT.

VOICE: You are going to hear four sounds one after another. You will hear each sound three times. After you have heard all four sounds, you will then hear each sound individually, and I will ask if you can identify the sound.

VOICE: This is Sound Number 1 (Sound x 3)

VOICE: This is Sound Number 2 (Sound x 3)

VOICE: This is Sound Number 3 (Sound x 3)

VOICE: This is Sound Number 4 (Sound x 3)

VOICE: Now you will hear each of the sounds again. After you hear each sound there will be an opportunity for you to tell the interviewer what, if anything, you know about the sound.

VOICE: This is the first sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #1

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #1 HERE. PROBE ONCE WITH: Is there anything else?

Windows

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

VOICE: This is the second sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #2

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #2 HERE. PROBE ONCE WITH: Is there anything else?

The door bell

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Not sure

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004725

5-119

VOICE: This is the third sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #3

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #3 HERE. PROBE ONCE WITH: Is there anything else?

*The old credit card machine
things*

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Don't have a clue

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004726

VOICE: This is the fourth sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #4

1-6

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #4 HERE. PROBE ONCE WITH: Is there anything else?

Motorolas low battery

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

Finally, what is your job title?

IF FIRE/EMT, ASK:

Is your position...

1 paid or

2 volunteer?

I (INTERVIEWER PRINT FULL NAME)

Kimberly Dunn

verify that I conducted this interview on (date) *9/6/05* at (time) *2:00*

Nextel v. ~~INTERVIEWER~~ SIGNATURE
Opp. No. 91/161,817
Nextel Testimony
Jacoby Ex. 3

Kimberly C. Dunn

MOT 004727

- 1 -

5-120

TAKE THE RESPONDENT SOMEWHERE PRIVATE TO BE INTERVIEWED. SEAT THE RESPONDENT. SAY: I am going to have you listen to a few recorded sounds. You will then be asked some questions.

INTERVIEWER: BEGIN THE CD/TAPE PLAYER. DO NOT READ THE FOLLOWING SCRIPT. JUST FOLLOW ALONG WITH IT. WHEN THE VOICE TELLS YOU TO PAUSE THE CD/TAPE, PLEASE DO SO AND RECORD THE RESPONDENT'S ANSWER IN THE SPACE PROVIDED. THE SCRIPT IS IN BOLD PRINT.

VOICE: You are going to hear four sounds one after another. You will hear each sound three times. After you have heard all four sounds, you will then hear each sound individually, and I will ask if you can identify the sound.

VOICE: This is Sound Number 1 (Sound x 3)

VOICE: This is Sound Number 2 (Sound x 3)

VOICE: This is Sound Number 3 (Sound x 3)

VOICE: This is Sound Number 4 (Sound x 3)

VOICE: Now you will hear each of the sounds again. After you hear each sound there will be an opportunity for you to tell the interviewer what, if anything, you know about the sound.

VOICE: This is the first sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #1

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #1 HERE. PROBE ONCE WITH: Is there anything else?

Opening an app. on the computer

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Bluei (that) windows

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

-2-

5-120

VOICE: This is the second sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #2

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #2 HERE. PROBE ONCE WITH: Is there anything else?

Door beep

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

N/A

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004729

- 3 -

5-120

VOICE: This is the third sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #3

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #3 HERE. PROBE ONCE WITH: Is there anything else?

Don't know

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:
You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004730

- 4 -

5-120

VOICE: This is the fourth sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #4

VOICE: Please press pause now.

3-1

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #4 HERE. PROBE ONCE WITH: Is there anything else?

Our Rader's at the nextel

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

both by Motorola

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

Finally, what is your job title?

IF FIRE/EMT. ASK:

Is your position...

- 1 paid or
- 2 volunteer?

I (INTERVIEWER PRINT FULL NAME)

Kimberly Dunn

verify that I conducted this interview on (date) *9/7/05* at (time) *7:20*.

Nextel v. Motorola
Opp. No. 91/161,817
Nextel Testimony
Jacoby Ex. 3

INTERVIEWER SIGNATURE:

Kimberly Dunn

MOT 004731

- 1 -

5-121

TAKE THE RESPONDENT SOMEWHERE PRIVATE TO BE INTERVIEWED. SEAT THE RESPONDENT. SAY: I am going to have you listen to a few recorded sounds. You will then be asked some questions.

INTERVIEWER: BEGIN THE CD/TAPE PLAYER. DO NOT READ THE FOLLOWING SCRIPT, JUST FOLLOW ALONG WITH IT. WHEN THE VOICE TELLS YOU TO PAUSE THE CD/TAPE, PLEASE DO SO AND RECORD THE RESPONDENT'S ANSWER IN THE SPACE PROVIDED. THE SCRIPT IS IN BOLD PRINT.

VOICE: You are going to hear four sounds one after another. You will hear each sound three times. After you have heard all four sounds, you will then hear each sound individually, and I will ask if you can identify the sound.

VOICE: This is Sound Number 1 (Sound x 3)

VOICE: This is Sound Number 2 (Sound x 3)

VOICE: This is Sound Number 3 (Sound x 3)

VOICE: This is Sound Number 4 (Sound x 3)

VOICE: Now you will hear each of the sounds again. After you hear each sound there will be an opportunity for you to tell the interviewer what, if anything, you know about the sound.

VOICE: This is the first sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #1

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #1 HERE. PROBE ONCE WITH: Is there anything else?

Computer start up

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Windows

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

-2-

5-121

VOICE: This is the second sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #2

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #2 HERE. PROBE ONCE WITH: Is there anything else?

*Motor detector at the store
or one of those regular door bells*

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

*No I don't know its probably
the door bell but I don't know who
did make it*

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004733

-3-

5-121

VOICE: This is the third sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #3

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #3 HERE. PROBE ONCE WITH: Is there anything else?

*Hand copy machine with the
2 or three copies*

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Couldnt tell you!

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004734

-4-

5-121

VOICE: This is the fourth sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #4

8-6

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #4 HERE. PROBE ONCE WITH: Is there anything else?

The radio going dead at the cell phone

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

Finally, what is your job title?

Volunteer fireman

IF FIRE/EMT, ASK:

Is your position...

1. paid or
2. volunteer?

I (INTERVIEWER PRINT FULL NAME)

Kimberly Dunn

verify that I conducted this interview on (date) *9/7/05* at (time) *3:45*

INTERVIEWER SIGNATURE:

Kimberly C Dunn

- 1 -

5-122

TAKE THE RESPONDENT SOMEWHERE PRIVATE TO BE INTERVIEWED. SEAT THE RESPONDENT.. SAY: I am going to have you listen to a few recorded sounds. You will then be asked some questions.

INTERVIEWER: BEGIN THE CD/TAPE PLAYER. DO NOT READ THE FOLLOWING SCRIPT, JUST FOLLOW ALONG WITH IT. WHEN THE VOICE TELLS YOU TO PAUSE THE CD/TAPE, PLEASE DO SO AND RECORD THE RESPONDENT'S ANSWER IN THE SPACE PROVIDED. THE SCRIPT IS IN BOLD PRINT.

VOICE: You are going to hear four sounds one after another. You will hear each sound three times. After you have heard all four sounds, you will then hear each sound individually, and I will ask if you can identify the sound.

VOICE: This is Sound Number 1 (Sound x 3)

VOICE: This is Sound Number 2 (Sound x 3)

VOICE: This is Sound Number 3 (Sound x 3)

VOICE: This is Sound Number 4 (Sound x 3)

VOICE: Now you will hear each of the sounds again. After you hear each sound there will be an opportunity for you to tell the interviewer what, if anything, you know about the sound.

VOICE: This is the first sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #1

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #1 HERE. PROBE ONCE WITH: Is there anything else?

Computer prompt

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:
You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Windows

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

-2-

5-122

VOICE: This is the second sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #2

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #2 HERE. PROBE ONCE WITH: Is there anything else?

Door bell

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Any one its a regular doorbell

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004737

- 3 -

5-122

VOICE: This is the third sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #3

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #3 HERE. PROBE ONCE WITH: Is there anything else?

I don't know

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004738

-4-

5-122

VOICE: This is the fourth sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #4

8-1

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #4 HERE. PROBE ONCE WITH: Is there anything else?

Radio battery

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

I don't know

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

Finally, what is your job title?

Officer

IF FIRE/EMT. ASK:

Is your position...

☒ paid or
☐ 2 volunteer?

I (INTERVIEWER PRINT FULL NAME) Kimberly Debn

verify that I conducted this interview on (date) 9/7/05 at (time) :

Nextel v. Motorola
Opp. No. 91/161,817
Nextel Testimony
Jacoby Ex. 3

INTERVIEWER SIGNATURE: Kimberly C. Debn

MOT 004739

TAKE THE RESPONDENT SOMEWHERE PRIVATE TO BE INTERVIEWED. SEAT THE RESPONDENT. SAY: I am going to have you listen to a few recorded sounds. You will then be asked some questions.

INTERVIEWER: BEGIN THE CD/TAPE PLAYER. DO NOT READ THE FOLLOWING SCRIPT, JUST FOLLOW ALONG WITH IT. WHEN THE VOICE TELLS YOU TO PAUSE THE CD/TAPE, PLEASE DO SO AND RECORD THE RESPONDENT'S ANSWER IN THE SPACE PROVIDED. THE SCRIPT IS IN BOLD PRINT.

VOICE: You are going to hear four sounds one after another. You will hear each sound three times. After you have heard all four sounds, you will then hear each sound individually, and I will ask if you can identify the sound.

VOICE: This is Sound Number 1 (Sound x 3)

VOICE: This is Sound Number 2 (Sound x 3)

VOICE: This is Sound Number 3 (Sound x 3)

VOICE: This is Sound Number 4 (Sound x 3)

VOICE: Now you will hear each of the sounds again. After you hear each sound there will be an opportunity for you to tell the interviewer what, if anything, you know about the sound.

VOICE: This is the first sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #1

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #1 HERE. PROBE ONCE WITH: Is there anything else?

*The sound when you log onto
the computer.*

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Windows

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

VOICE: This is the second sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #2

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #2 HERE. PROBE ONCE WITH: Is there anything else?

Simple dark beep

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

*I can't think of one alone
quite a few people use this kind.*

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004741

VOICE: This is the third sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #3

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #3 HERE. PROBE ONCE WITH: Is there anything else?

Stand computer .

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Just the little hand calculator

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004742

VOICE: This is the fourth sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #4

VOICE: Please press pause now.

8-1

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #4 HERE. PROBE ONCE WITH: Is there anything else?

Dead battery in the radio ..

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

Finally, what is your job title?

Fire fighter

IF FIRE/EMT, ASK:

Is your position...

- 1 paid or
2 volunteer?

I (INTERVIEWER PRINT FULL NAME) Kimberly Dunn

verify that I conducted this interview on (date) 9/16/05 at (time) 12:25.

INTERVIEWER SIGNATURE: Kimberly C. Dunn

MOT 004743

TAKE THE RESPONDENT SOMEWHERE PRIVATE TO BE INTERVIEWED. SEAT THE RESPONDENT. SAY: I am going to have you listen to a few recorded sounds. You will then be asked some questions.

INTERVIEWER: BEGIN THE CD/TAPE PLAYER. DO NOT READ THE FOLLOWING SCRIPT, JUST FOLLOW ALONG WITH IT. WHEN THE VOICE TELLS YOU TO PAUSE THE CD/TAPE, PLEASE DO SO AND RECORD THE RESPONDENT'S ANSWER IN THE SPACE PROVIDED. THE SCRIPT IS IN BOLD PRINT.

VOICE: You are going to hear four sounds one after another. You will hear each sound three times. After you have heard all four sounds, you will then hear each sound individually, and I will ask if you can identify the sound.

VOICE: This is Sound Number 1 (Sound x 3)

VOICE: This is Sound Number 2 (Sound x 3)

VOICE: This is Sound Number 3 (Sound x 3)

VOICE: This is Sound Number 4 (Sound x 3)

VOICE: Now you will hear each of the sounds again. After you hear each sound there will be an opportunity for you to tell the interviewer what, if anything, you know about the sound.

VOICE: This is the first sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #1

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #1 HERE. PROBE ONCE WITH: Is there anything else?

Computer

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

I'm not sure probably Windows

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

5-124

VOICE: This is the second sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #2

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #2 HERE. PROBE ONCE WITH: Is there anything else?

Door bell.

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Not sure

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004745

5-124
VOICE: This is the third sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #3

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #3 HERE. PROBE ONCE WITH: Is there anything else?

Dont Know

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004746

5-124

VOICE: This is the fourth sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #4

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #4 HERE. PROBE ONCE WITH: Is there anything else?

Call Radio.

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

M Audio.

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

Finally, what is your job title?

Officer

IF FIRE/EMT, ASK:

Is your position...

- 1 paid or
2 volunteer?

I (INTERVIEWER PRINT FULL NAME)

Kimberly Dunn

verify that I conducted this interview on (date) 9/16/05 at (time) 3:50

INTERVIEWER SIGNATURE:

Kimberly C. Dunn

Nextel v. Motorola
Opp. No. 91/161,817
Nextel Testimony
Jacoby Ex. 3

MOT 004747

TAKE THE RESPONDENT SOMEWHERE PRIVATE TO BE INTERVIEWED. SEAT THE RESPONDENT. SAY: I am going to have you listen to a few recorded sounds. You will then be asked some questions.

INTERVIEWER: BEGIN THE CD/TAPE PLAYER. DO NOT READ THE FOLLOWING SCRIPT, JUST FOLLOW ALONG WITH IT. WHEN THE VOICE TELLS YOU TO PAUSE THE CD/TAPE, PLEASE DO SO AND RECORD THE RESPONDENT'S ANSWER IN THE SPACE PROVIDED. THE SCRIPT IS IN BOLD PRINT.

VOICE: You are going to hear four sounds one after another. You will hear each sound three times. After you have heard all four sounds, you will then hear each sound individually, and I will ask if you can identify the sound.

VOICE: This is Sound Number 1 (Sound x 3)

VOICE: This is Sound Number 2 (Sound x 3)

VOICE: This is Sound Number 3 (Sound x 3)

VOICE: This is Sound Number 4 (Sound x 3)

VOICE: Now you will hear each of the sounds again. After you hear each sound there will be an opportunity for you to tell the interviewer what, if anything, you know about the sound.

VOICE: This is the first sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #1

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #1 HERE. PROBE ONCE WITH: Is there anything else?

The Computer music

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

uhm not sure.

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

5-125

VOICE: This is the second sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #2

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #2 HERE. PROBE ONCE WITH: Is there anything else?

Door beep

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Don't know

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004749

5-125

VOICE: This is the third sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #3

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #3 HERE. PROBE ONCE WITH: Is there anything else?

Don't Know

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004750

VOICE: This is the fourth sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #4

1-1

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #4 HERE. PROBE ONCE WITH: Is there anything else?

CB our Radio signal

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Motorola

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

Finally, what is your job title?

Officer

IF FIRE/EMT, ASK:

Is your position...

- 1 paid or
2 volunteer?

I (INTERVIEWER PRINT FULL NAME)

Kimberly Dunn

verify that I conducted this interview on (date) 9/6/05 at (time) 6:40.

INTERVIEWER SIGNATURE

Kimberly Dunn

MOT 004751

- 1 -

5-126

TAKE THE RESPONDENT SOMEWHERE PRIVATE TO BE INTERVIEWED. SEAT THE RESPONDENT. SAY: I am going to have you listen to a few recorded sounds. You will then be asked some questions.

INTERVIEWER: BEGIN THE CD/TAPE PLAYER. DO NOT READ THE FOLLOWING SCRIPT, JUST FOLLOW ALONG WITH IT. WHEN THE VOICE TELLS YOU TO PAUSE THE CD/TAPE, PLEASE DO SO AND RECORD THE RESPONDENT'S ANSWER IN THE SPACE PROVIDED. THE SCRIPT IS IN BOLD PRINT.

VOICE: You are going to hear four sounds one after another. You will hear each sound three times. After you have heard all four sounds, you will then hear each sound individually, and I will ask if you can identify the sound.

VOICE: This is Sound Number 1 (Sound x 3)

VOICE: This is Sound Number 2 (Sound x 3)

VOICE: This is Sound Number 3 (Sound x 3)

VOICE: This is Sound Number 4 (Sound x 3)

VOICE: Now you will hear each of the sounds again. After you hear each sound there will be an opportunity for you to tell the interviewer what, if anything, you know about the sound.

VOICE: This is the first sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #1

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #1 HERE. PROBE ONCE WITH: Is there anything else?

The computer start up sounds

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Don't know

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

- 2 -

5-126

VOICE: This is the second sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #2

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #2 HERE. PROBE ONCE WITH: Is there anything else?

Door bell

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Don't know

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

-3-

5-126

VOICE: This is the third sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #3

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #3 HERE. PROBE ONCE WITH: Is there anything else?

Don't Know

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004754

- 4 -

5-126

VOICE: This is the fourth sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #4

1-1

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #4 HERE. PROBE ONCE WITH: Is there anything else?

*This ones the ball & chain the ladies
call when you have a cell*

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Motorda

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

Finally, what is your job title?

Officer

IF FIRE/EMT, ASK:

Is your position...

- 1 paid or
- 2 volunteer?

I (INTERVIEWER PRINT FULL NAME)

Kimberly Dunn

verify that I conducted this interview on (date) *9.17.05* at (time) _____.

INTERVIEWER SIGNATURE:

Kimberly Dunn

MOT 004755

- 1 -

5-127

TAKE THE RESPONDENT SOMEWHERE PRIVATE TO BE INTERVIEWED. SEAT THE RESPONDENT. SAY: I am going to have you listen to a few recorded sounds. You will then be asked some questions.

INTERVIEWER: BEGIN THE CD/TAPE PLAYER. DO NOT READ THE FOLLOWING SCRIPT, JUST FOLLOW ALONG WITH IT. WHEN THE VOICE TELLS YOU TO PAUSE THE CD/TAPE, PLEASE DO SO AND RECORD THE RESPONDENT'S ANSWER IN THE SPACE PROVIDED. THE SCRIPT IS IN BOLD PRINT.

VOICE: You are going to hear four sounds one after another. You will hear each sound three times. After you have heard all four sounds, you will then hear each sound individually, and I will ask if you can identify the sound.

VOICE: This is Sound Number 1 (Sound x 3)

VOICE: This is Sound Number 2 (Sound x 3)

VOICE: This is Sound Number 3 (Sound x 3)

VOICE: This is Sound Number 4 (Sound x 3)

VOICE: Now you will hear each of the sounds again. After you hear each sound there will be an opportunity for you to tell the interviewer what, if anything, you know about the sound.

VOICE: This is the first sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #1

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #1 HERE. PROBE ONCE WITH: Is there anything else?

The microsoft; window tones

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:
You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Windows

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

-2-

5-127

VOICE: This is the second sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #2

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #2 HERE. PROBE ONCE WITH: Is there anything else?

Door bell

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Havent got a clue!

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004757

- 3 -

5-127

VOICE: This is the third sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #3

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #3 HERE. PROBE ONCE WITH: Is there anything else?

*I'm not sure sounds like some kind
of lever going back and forth*

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

definitely don't know

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004758

- 4 -

5-127

VOICE: This is the fourth sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #4

2-6

~~Deer~~

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #4 HERE. PROBE ONCE WITH: Is there anything else?

Nextel chirp

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:
You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

Nextel

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

Finally, what is your job title?

Officer

IF FIRE/EMT, ASK:

Is your position...

☒ paid or

☐ volunteer?

I (INTERVIEWER PRINT FULL NAME)

Kimberly Dunn

verify that I conducted this interview on (date) 9/7/05 at (time) 6:00

INTERVIEWER SIGNATURE:

Kimberly C. Dunn

-1-

5-128

TAKE THE RESPONDENT SOMEWHERE PRIVATE TO BE INTERVIEWED. SEAT THE RESPONDENT. SAY: I am going to have you listen to a few recorded sounds. You will then be asked some questions.

INTERVIEWER: BEGIN THE CD/TAPE PLAYER. DO NOT READ THE FOLLOWING SCRIPT, JUST FOLLOW ALONG WITH IT. WHEN THE VOICE TELLS YOU TO PAUSE THE CD/TAPE, PLEASE DO SO AND RECORD THE RESPONDENT'S ANSWER IN THE SPACE PROVIDED. THE SCRIPT IS IN BOLD PRINT.

VOICE: You are going to hear four sounds one after another. You will hear each sound three times. After you have heard all four sounds, you will then hear each sound individually, and I will ask if you can identify the sound.

VOICE: This is Sound Number 1 (Sound x 3)

VOICE: This is Sound Number 2 (Sound x 3)

VOICE: This is Sound Number 3 (Sound x 3)

VOICE: This is Sound Number 4 (Sound x 3)

VOICE: Now you will hear each of the sounds again. After you hear each sound there will be an opportunity for you to tell the interviewer what, if anything, you know about the sound.

VOICE: This is the first sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #1

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #1 HERE. PROBE ONCE WITH: Is there anything else?

Micic Soft

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

-2-

5-128

VOICE: This is the second sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #2

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #2 HERE. PROBE ONCE WITH: Is there anything else?

Door keel

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004761

-3-

5-128

VOICE: This is the third sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #3

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #3 HERE. PROBE ONCE WITH: Is there anything else?

*I'm not sure it sounds like a Manuox
Copier*

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

No I'm not sure what it is

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

MOT 004762

-4-

5-128

VOICE: This is the fourth sound. If you happen to know what this sound is, please tell me what it is and what, if anything, you know about it. Please be as specific as possible. If you don't happen to know what the sound is, it is okay to say so.

SOUND #4

1-1

VOICE: Please press pause now.

INTERVIEWER: PRESS PAUSE AND RECORD VERBATIM WHAT THE RESPONDENT SAYS ABOUT SOUND #4 HERE. PROBE ONCE WITH: Is there anything else?

Motorda Radio

IF THE RESPONDENT IDENTIFIES THE SOUND, BUT DOES NOT MENTION A SPECIFIC COMPANY IN HIS OR HER ANSWER, ASK:

You said that sound comes from a [ANSWER FROM ABOVE]. Are you thinking of one company who makes that [ANSWER] or more than one company who makes that [ANSWER]?

INTERVIEWER: PRESS PAUSE TO RESUME CD/TAPE

Finally, what is your job title?

IF FIRE/EMT, ASK:

Is your position...

1 paid or

2 volunteer?

I (INTERVIEWER PRINT FULL NAME) Kimberly Davis

verify that I conducted this interview on (date) 9/8/05 at (time) 3:50.

MOT 004763

Nextel v. Motorola
Opp. No. 91/161,817
Nextel Testimony
Jacoby Ex. 3

INTERVIEWER SIGNATURE: Kimberly Davis

Confidential - Attorneys' Eyes Only -
Subject to Protective Order in TTAB
Opp. No. 91/161,817

APPENDIX D
RESUME OF MICHAEL RAPPEPORT

MOT 004764

DR. MICHAEL RAPPEPORT

Dr. Rappeport has worked in market and survey research areas for more than 35 years, the last 27 as a partner of R L Associates. As part of his function he has made more than 200 appearances as an expert witness in legal cases at trial and/or through deposition. His testimony has dealt with statistics and statistical analysis, marketing, and public opinion in cases in such disparate areas as trademark infringement, libel, damages for failure to fulfill a contract, and reapportionment. He has also testified as an expert in a number of quasi-legal proceedings before a range of public boards, agencies and regulatory bodies.

Education

B.S. Physics, RPI, Troy, New York 1957

M.S. Electrical Engineering, Yale University, New Haven 1958

PH.D. Statistics, New York University, 1968

Professional positions

1975 - present: Founding partner, R L Associates, survey research and consulting firm

Dr. Rappeport has had wide experience both in the direction of all kinds of surveys of human populations and as a consultant in statistical, strategy planning and survey research areas. Two areas in which he has been particularly active are studies on public policy, and studies for use in litigation. Along with responsibility for the management of the firm, Dr. Rappeport has direct responsibility for all statistical aspects of the firm's work. In the main this encompasses sample design and the use of a wide variety of statistical analysis techniques. He has designed projectable national and regional probability samples of all civilian non-institutional telephone households, and a very wide range of specialized samples of all types.

1969 - 1972; 1973 - 1975: Vice president and chief statistician, Opinion Research Corporation, Princeton, New Jersey

1972 - 1973: Vice president, Response Analysis Corp. Princeton, New Jersey

1959 - 1969: Supervisor, Bell Telephone Laboratories, Holmdel, New Jersey

MOT 004765

Teaching

At various times, Dr. Rappeport has taught or conducted guest lectures in a number of colleges and universities. He has been an adjunct instructor in both Research Methods and Political Public Opinion at Rutgers University, and taught a course in Marketing at Rider College.

Articles and Speeches

Over the course of the last 25 years, Dr. Rappeport has written approximately 40 published articles, and given more than 70 speeches. He has spoken at a number of meetings of legal organizations including:

Faculty member – ABA-ALI seminar on Dilution – February 2004

Participation in a 2003 panel of the Amer. Intellectual Property Law Assoc.

Participation in a 2001 panel of the Advanced Practitioners Prog of the Intl. Trademark Assoc.

A 1998 speech to the Bar for the Federal Circuit

Witness at a mock trial at the Feb. 1998 Meeting - American Bar Association Antitrust Section

A 1996 speech to the New Jersey Intellectual Property chapter of the Inns of Court.

A 1995 panel presentation for the CLE program, American Bar Assoc. - Antitrust Section.

A 1995 speech to the CLE program, American Bar Assoc. - Intellectual Property Section

Witness at a mock trial at the 1995 meeting of the American Intellectual Property Law Assoc.

Among the wide cross-section of other types of organizations where he has spoken at an annual or other major meeting are Planned Parenthood Federation of America, United States Trademark Association, Travel and Tourism Research Association, Newspaper Research Council, Pennsylvania Hospital Association, and New Jersey Political Science Association.

Other

Dr. Rappeport is currently listed in Who's Who in the East, and several other similar publications dealing with the Legal Profession, Social Sciences and Marketing. He has served on a variety of civic and professional boards. Among those most directly related to his professional activities:

Editorial Board of the "Trademark Reporter" 1993 - 1996, 1997 - 2004

Board of Advisors - Citizens Committee on Bio-Medical Ethics 1986 - 1994

New Jersey State Bio-Ethics Task Force on Public and Professional Education - 1989- 1992

Board of Directors, American Association for Public Opinion Research, 1976 - 1980; Standards

Chairman 1979 - 1980

MOT 004766

Cases in which Michael Rapoport has appeared either by deposition or in trial as an expert witness 2001-2005. Date shown is first appearance. Unless noted all cases listed were in United States District Courts.

2005

June Deposition - The City of New York v. Albert Elovitz - Southern District New York
April Deposition and August Trial - Dosatron Intl v Agri-Pro - Middle District Florida
April Testimony Deposition - Franklin Loufrani v Wal-Mart Stores - Trademark Trial and Appeal Board
March Deposition - In the Matter of Certain Ink Markers - U.S. International Trade Commission
March Deposition - Mylan v Procter & Gamble - Southern District New York
Feb. and June Depositions - Toyota Motor Sales v Aliments Lexus - Eastern District New York

2004

August Trial - Catamount v Microsoft - District of Vermont
Feb. Deposition - Weight Watchers v Luiginos - Southern Dis NY
Feb. Trial - Trettco v HDS New England - Dis. of Massachusetts

2003

Dec. Deposition - Georgia Pacific v Procter & Gamble - No. Dis. of Georgia
Dec. Deposition and Feb 2004 Trial - Trettco v HDS New England - Dis. of Massachusetts
Sept. Deposition - Winn v. Eaton - Central Dis. of California
Aug. Deposition - In the matter of certain Agricultural Vehicles - Intl. Trademark Commission
Feb. Deposition - Microsoft v Lindows.com - West. Dis. Of Washington
Jan. Deposition and Feb. Trial - Pharmacia v GlaxoSmithKline II - District of New Jersey
Jan. Trial - Ardex v Chemrex - Western District Of Pennsylvania
Jan Deposition and Feb. Trial - Inliten v Santa's Best - Southern District Ohio

2002

Dec Deposition - Pharmacia v GlaxoSmithKline - District of New Jersey
Nov. Deposition - Maui v Del Montc - Central District California
Oct. Deposition and Nov. Trial - Spotless v A&E - E.D.N.Y.
Sept. Deposition - Twentieth Century Fox v Marvel Enterprises, Tribune Entertainment - SDNY
July Deposition - Philips Oral Healthcare v Salton - Western District of Washington
June Deposition and July Trial - Scotts v United Industries - So. District Florida
June Deposition - Eurotech v Cosmos European Travel - E. D. Virginia
April Testimony and December rebuttal Deposition - QVC v Weick Family Inc. - TTAB
April Deposition - Astra Zeneca v Ferndale - Eastern District Michigan
Feb. Deposition and August 2004 trial - Catamount v Microsoft - District of Vermont
February Trial - Koala Corp v Prince Lionheart - District of Colorado
February Trial - Morelli v Tiffany - Eastern District of Pennsylvania

2001

November Deposition - J&J Snackfoods v Earthgrains - District of New Jersey
November Deposition - Nissan Motors v Nissan Computer - Central District of California
November Trial Affidavit - ABC (Ford West) v Autonation - Central District of California
October Deposition - Qwest Communications v Worldquest Networks - Eastern District of Virginia
October Deposition and February 2002 Trial - National Distillers v Refreshment Brands - SDNY
July Deposition and Nov. Testimony - Sara Lee v Kayser-Roth - Trademark Trial & Appeal Board
May Trial - SBCH v J&J Merck - Southern District of New York
February Deposition - Isenbeck v Beck - Southern District of New York
January Deposition - Cache v M.Z. Berger - Southern District of New York

MOT 004767

List of publications of Michael Rappeport 1992-2005

The Democratic Ethos and the Positive Sum Society – Society – July-August 2003

A Rejoinder to a Critique – The Trademark Reporter; November-December 2002

Litigation Surveys – Social Science as Evidence – The Trademark Reporter; July-August 2002

Applying Daubert; National Law Journal, January 21, 2002

When Consumer Beliefs are Based on a Court's Intuition - One More Issue Arising From
Conopco (with Sandra Kornstein-Cohen): The Trademark Reporter; March-April 1997

Is Judaism Splitting Into Two religions; Sh'ma; April 1996

The Role of the Survey "Expert" - A Response to Judge Posner; The Trademark Reporter, March-
April 1995

The Future of the American Jewish Community; Sh'ma; December 1994

The Patient Self Determination Act; Implementation of the Law in Nursing Homes; (co-author);
Paper presented at the 122nd Annual Meeting of the American Public Health Association
November, 1994

Condition Critical; (co-author); Paper presented at the 1994 Annual Meeting of the American
Society of Law, Medicine and Ethics; October 1994

Statistically Based Evidence; National Law Journal, Op-ed Page; August 1993

Prognosis Good for Lower Medical Care Inflation; Wall Street Journal Op-Ed page;
February, 1993

Predicting the Election - Why Clinton Will Win; The Sunday Record (Bergen County, New
Jersey); August 1992. In addition Dr. Rappeport was a columnist on a weekly basis for the
Bergen Record throughout much of 1991. Columns dealt with a wide range of statistical and
public opinion issues from crime in New Jersey to the proper reporting of retail sales.

MOT 004768

JACOBY DEPOSITION EXHIBIT 4

Nextel Communications v. Motorola, Inc.,

Opp. No.: 91/161,817

App. No.: 78/235,618

Mark: Sensory Mark (911 Hz tone)

SOUND STUDY (RG682) - BALLOT NUMBERS

Each questionnaire has a unique four digit ballot number.

The FIRST digit of the ballot number indicates the general area in which the interview was conducted:

- 1 - Natick, MA
- 2 - West Nyack, NY
- 3 - Olympia Fields, IL
- 4 - Rosemount, MN
- 5 - Atlanta, GA
- 6 - Houston, TX
- 7 - Westminster, CO
- 8 - Redondo Beach, CA

The SECOND digit of the ballot number indicates the order in which the four sounds were presented to the respondent:

- 1 - Windows, doorbell, paper cutter, chirp (Compact disk A)
- 2 - Doorbell, chirp, paper cutter, Windows (Compact disk B)

The THIRD and FOURTH digits of the ballot number are consecutive numbers within each location-based sub-group of questionnaires.



SOUND STUDY (RG682) - CODES

There is a 2 digit code (#-#) written in the upper right-hand corner of the page on which the respondent answered questions about the chirp sound (specifically, page 4 in locations 1, 3, 5, 7; page 2 in locations 2, 4, 6, 8).

The first digit indicates how the respondent identified the company or companies that make the chirp sound:

- 1 - Motorola only
- 2 - Nextel only
- 3 - Motorola and Nextel
- 4 - Any other specific single source
- 5 - Unknown single source
- 6 - Any specified multiple sources
- 7 - Unknown multiple sources
- 8 - Don't know the number of sources / No answer
- 9 - Don't know what the sound is

The second digit indicates how the respondent identified the chirp sound:

- 1 - Radio
- 2 - Walkie-talkie
- 3 - Radio and walkie-talkie
- 4 - Telephone
- 5 - Computer
- 6 - Any other answer
- 9 - Don't know what the sound is

JACOBY DEPOSITION EXHIBIT 5

Nextel Communications v. Motorola, Inc.,

Opp. No.: 91/161,817

App. No.: 78/235,618

Mark: Sensory Mark (911 Hz tone)

10/19/2006 Rapoport, Michael (911 Hz)

DEPOSITION OF
MICHAEL RAPPEPORT

On the 19th day of October, 2006

EXAMINATION

PAGE

BY MR. GABRIELIDES:

4

BY MR. STEWART

41

BY MR. GABRIELIDES

61

BY MR. STEWART

64

* * * * *

EXHIBITS

PAGE

Exhibit 1

8

Exhibit 2

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Exhibit 3

44

Exhibit 4

46

* * * * *



1 MICHAEL RAPPEPORT,
2 called as a witness herein, having been first duly
3 sworn, was examined upon oral interrogatories and
4 testified as follows:

5 DIRECT EXAMINATION

6 BY MR. GABRIELIDES:

7 Q Would you please state your name.

8 A Michael Rappeport.

9 Q Mr. Rappeport, where do you work?

10 A I'm sorry?

11 Q Where do you work?

12 A R.L. Associates which is a firm in Princeton,
13 New Jersey.

14 Q When was R.L. Associates founded?

15 A 1975.

16 Q And did you found the company?

17 A With a partner; two of us found it.

18 Q Are you still a partner there?

19 A I'm the partner there. I'm senior partner
20 because the person who founded it with me has since
21 deceased.

22 Q What is the business of R.L. Associates?

23 A Survey research in various forms.

24 Q And can you give me an idea of some of the

1 clients that R.L. Associates does work for?

2 A Current or whenever?

3 Q Current is fine.

4 A Proctor and Gamble, GlaxoSmithKline, Gillette
5 which is part of the Proctor Gamble, Rexel,
6 R-E-X-E-L.

7 Q And across various industries?

8 A Yes, sir.

9 Q Before founding R.L. Associates, can you give
10 me a general outline of your background?

11 A Bachelor's degree from Rensselaer, master's
12 degree from Yale University, and a Ph.D. in
13 statistics from Courant, C-O-U-R-A-N-T, Institute of
14 New York University; worked for 10 years at Bell
15 Telephone Laboratories when it was still Bell
16 Telephone Laboratories, that was in the 60s, doing
17 beta communication simulation and general engineering
18 kinds of jobs, systems engineering; went to a firm
19 called Opinion Research Corporation in 1968 as chief
20 statistician.

21 Opinion Research was and is one of the
22 largest survey research firms in the United States
23 and I was the VP and chief statistician responsible
24 for all internal work on opinion research. I spent

1 one year at a firm called Response Analysis and went
2 back to Opinion Research.

3 Response Analysis is also a large firm. We
4 had a disagreement over the direction the firm should
5 be taking. People are still friends of mine, but it
6 didn't make any sense for me to stay there, so I went
7 back to Opinion Research.

8 And I was at Opinion Research when my partner
9 and I left Opinion Research and founded R.L.
10 Associates.

11 Q While you were at Opinion Research were you
12 involved in surveys for outside companies?

13 A Yes, a thousand a year or so.

14 Q Does the business of R.L. Associates include
15 running surveys for outside companies?

16 A That's what the business is.

17 Q And over your years of work at R.L.
18 Associates and Opinion Research, could you estimate
19 how many surveys you've been involved in?

20 A 10,000, I'm guessing. But it's surely many,
21 many more than three or four thousand. I don't think
22 it's 100,000.

23 Q And did those surveys include involvement in
24 court proceedings?

1 A About 750 of them did.

2 Q And did any of them involve TTAB proceedings?

3 A Yes.

4 Q And would the surveys include issues of
5 likelihood of confusion?

6 A Yes.

7 Q Acquired distinctiveness?

8 A Yes.

9 Q Secondary meaning?

10 A Yes.

11 Q Dilution?

12 A Yes.

13 Q And have you ever given testimony in court on
14 surveys that you have run?

15 A Yes.

16 Q And have you ever given testimony in
17 proceedings before the Board on surveys you have run?

18 A Yes.

19 Q And have you been disqualified from giving
20 any expert opinion in any court proceeding or board
21 proceeding?

22 A As an individual or as a surveyor itself?

23 Q As an individual.

24 A No.

1 Q All right.

2 MR. GABRIELIDES: Now, Mr. Stewart, I'm going to
3 be offering Mr. Rappeport as a survey expert in this
4 Board proceeding.

5 MR. STEWART: (No verbal response.)

6 BY MR. GABRIELIDES:

7 Q In this case Mr. Rappeport, were you asked to
8 perform a survey?

9 A That's not what I was originally asked to do.
10 What I was asked to do was to look at a problem and
11 say whether I should perform a survey.

12 Q And what was that problem that you were asked
13 to look at?

14 A The question was whether a chirp, C-H-I-R-P,
15 had an acquired distinctiveness and -- or if it were
16 a word mark, would it be called secondary meaning
17 except it's an unusual type of mark because it's a
18 sound.

19 Q I'm going to insert a disc into this computer
20 that I have here and the disc is labeled Rappeport
21 Exhibit 1.

22 (Exhibit 1 marked as requested.)

23 And I'm going to play what's on the disc and
24 I'm going to ask you to -- whether or not it's the

1 chirp you were asked to investigate in this case.

2 (Whereupon the disc was played.)

3 A As far as I can tell; I mean, one can
4 certainly have a chirp that is just slightly
5 different that I wouldn't be able to tell the
6 difference.

7 MR. GABRIELIDES: Well, let me represent to
8 Mr. Stewart that that is, in fact, the chirp from the
9 application at issue here in this case.

10 MR. STEWART: (No verbal response.)

11 BY MR. GABRIELIDES:

12 Q All right. Now, after you were asked to
13 investigate that issue, what did you first do?

14 A Do what's called qualitative work in which we
15 take -- try to take ourselves up the learning curve,
16 understand who other people are involved, how do they
17 hear the sound, what do they associate with the
18 sound, if anything; that is, we try to understand
19 enough so that we can say to a client, here's the
20 survey we would propose to do or we don't propose to
21 do a survey -- which happens once, 6 or 7 times.

22 But if we think we can be useful, here's the
23 survey we propose to do; here's in general terms what
24 we think we'll learn; is this helpful to you or not

1 helpful to you. Or if it's not helpful to you, we'll
2 go away. If it's helpful to you, tell us and we'll
3 go do the survey.

4 Q And did you do that kind of qualitative work
5 in this case?

6 A Yes, sir, we always do.

7 Q And at the end of that qualitative work, what
8 did you conclude?

9 A We proposed to do a survey to Motorola -- or
10 actually to you. We really deal with lawyers, not
11 with Motorola. I gave a list of clients -- they are
12 our ultimate clients, but our real clients are major
13 law firms all over the United States. And we
14 proposed to do the survey that we eventually did.

15 Q After the qualitative phase of your work was
16 completed, what did you next do?

17 A Well, we drew up the survey questionnaire and
18 we went to you and said, here's what we think we
19 should do, in general terms. At that point we didn't
20 have the details of the survey. We just had how we
21 would do it in general terms. We didn't have the
22 exact wording of the questions, that kind of thing;
23 proposed it and said here's what in general terms we
24 think we will get. If this is useful to you in this

1 case, we will be happy to do it. Here's -- do you
2 want us to do it or not.

3 And you said, yes, you did want us to do it.
4 So we went and got the details of the questions;
5 passed them by you and the samples -- excuse me --
6 both; passed them by you for purposes of again only
7 the question is this useful information in this case.
8 You said it was; we then went and did the survey.

9 Q So after you executed the survey did you come
10 to prepare any written report based on your results
11 from the survey?

12 A Yes.

13 Q I'd going to mark as Motorola Testimony
14 Rappeport Exhibit 2 a document bearing Bates numbers
15 MOT004675 through 4768.

16 (Exhibit 2 marked as requested.)

17 I'll place that before you. Mr. Rappeport,
18 is this the report that you authored from the survey
19 that we just talked about?

20 A It appears to be. I can't check every word,
21 but it certainly appears to be.

22 Q Could you turn to the page that bears Bates
23 Number MOT004687?

24 A Yes, sir.

1 Q Is that your signature that we see there on
2 that page?

3 A I believe it is, yes, sir.

4 Q I'd like us to walk through your survey and
5 it's methodology and results using this written
6 report as a guide, if we could.

7 A Sure.

8 Q If we could turn to 4678?

9 A Yes.

10 Q Which is Page 2 of the report.

11 And can you explain to me what the universe
12 was of potential respondents in this particular
13 survey?

14 A The universe of those people who in the
15 ultimate sense have some say in the buying or
16 deciding on product, the nature of the product is
17 such that users would have such a say even if they
18 themselves funneled it through a purchasing agency.

19 You define the universe essentially as users
20 of the product in this case, actual potential users.
21 And from our point of view that was public police
22 officers, fire fighters, EMTs. There are other
23 people who use it, but that's the great majority of
24 people. And we knew how to reach such people, which

1 is an important characteristic.

2 We know, for example, that ski patrollers use
3 these, but, A, it was August and, B, they're not
4 going to be scattered across the country randomly the
5 way police and fire and EMTs would be everywhere. So
6 they provide a useful universe for us.

7 So we define the universe as users for the
8 equipment or potential users for the equipment and in
9 particular it was police officers, firefighters, and
10 EMTs.

11 Q And when you say EMTs, can you define that?

12 A Emergency medical technicians.

13 Q Thank you. You'll see on page bearing Bates
14 Number 4679 you refer to something called the "sample
15 frame" in that first complete paragraph. Can you
16 explain what a "sample frame" is and what it was in
17 this case?

18 A You need to get a distribution across the
19 United States. We wanted a national sample. So the
20 sample frame was the interviewing firms
21 geographically distributed across the United States
22 qualified to do this kind of work.

23 Q Is the U.S. divided into particular regions
24 for this purpose?

1 A The United States has nine census regions
2 defined by the Bureau of the Census, the Commerce
3 Department, I believe, and we use eight of them as a
4 sample frame.

5 There were several reasons why we left the
6 ninth one out, which is Kentucky, Tennessee, Alabama,
7 and Mississippi. But it was arbitrary and it
8 wouldn't have mattered.

9 Q And so is there a total of nine census
10 regions?

11 A There are nine census regions.

12 Q And you used eight of them?

13 A Yes.

14 Q And in the next paragraph you are talking
15 about "sample selection." Can you tell us what that
16 was and how it was executed here?

17 A Yes. We now need individual people to
18 interview. We had eight interviewing firms in eight
19 locations across the country. We asked each of them
20 to use their local phonebook to call police, fire and
21 emergency medical technician, which basically means
22 rescue squads and that type of people, in their area.
23 And they were to get interviews in 14 different work
24 places of that type; no more than two interviews to a

1 work place, sometimes only one.

2 Q And did I understand you to say that the
3 interviews were taken at the respondents' work
4 places?

5 A A great majority. In some cases the
6 respondents came. At least it was -- I don't really
7 remember whether any actually came to the
8 interviewing location, but they were all done in
9 person either at the work place, and the great
10 majority were that; and maybe all and some were at
11 the interviewing firms' location.

12 Q So were any interviews performed over the
13 phone?

14 A No, sir, not in the quantitative stage. We
15 had talked to some people over the phone in the stage
16 we talked about earlier, the qualitative stage, but
17 not the quantitative.

18 Q Were any interviews conducted over the
19 Internet?

20 A No, sir, they were all in person.

21 Q Were the respondents, did they receive any
22 remuneration for their efforts?

23 A Yeah, we gave them \$25 that they either take
24 themselves or they could give to a charitable

1 organization, usually the Police Benevolent
2 Association or the fire station itself. Many of them
3 are non-profits. So it was \$25, but they didn't have
4 to take it themselves.

5 Q And what was the purpose of the \$25
6 honorarium?

7 A We believe there's two things: One, it
8 increases response rate; that is, more people want to
9 talk to you if you pay them; and, two, we believe
10 that in fairness to the people we're dealing with,
11 we're taking their time and we ought to compensate
12 them.

13 Q Now, are you familiar with the concept of a
14 control in this survey?

15 A Yes, sir.

16 Q And what is a control?

17 A A control is a device put into any kind of
18 experiment with human beings to control for guessing,
19 control for things that are a function of the survey
20 as opposed to things that are a function of the real
21 world.

22 People can have other kinds of errors in
23 surveys, but a major course of error is, was the
24 survey artifact -- and the control is there to try to

1 estimate the survey artifact effect. And the primary
2 survey artifact effect is people guessing. They want
3 to give an answer to a question so they guess.

4 Q Did you use controls in this survey?

5 A Yes, sir.

6 Q And what were those controls?

7 A There were three other sounds.

8 Q And what were they?

9 A The sound a Windows Operating System makes
10 when it turns on, a chime sound, a standard American
11 doorbell, and a paper cutter cutting paper.

12 Q And why was each of those controls chosen
13 here?

14 A Well, there are three possibilities which is
15 that it's source identifying the sound, it's event
16 identifying. What I mean by that is it's not source
17 identifying and it's neither event nor source
18 identifying.

19 We believe the chime sound, and the data
20 bears this out, would turn out to be source
21 identifying; that is, it's Microsoft, not just a
22 computer turning on. We believe the doorbell was an
23 event; that is, it's a doorbell, but not source
24 identifying since all doorbells we thought people

1 would think sounded the same. They wouldn't know who
2 made it. And it's possible that it doesn't do either
3 of them. People can't even identify the sound. And
4 that's the paper cutter and it turns out most people
5 cannot identify the paper cutter.

6 Q Now, how were these sounds, the controls as
7 well as the stimulus that was being tested here, how
8 were they presented to the respondents?

9 A We created a high quality CD or a cassette,
10 depending on where we were, containing the four
11 sounds in a prescribed sequence. There were two
12 possible prescribed sequences: One was Windows,
13 doorbell, paper cutter, chirp; the other was
14 doorbell, chirp, paper cutter, Windows. Each sound
15 appeared on a CD, for example, with a break between
16 them so that the interviewer could stop it.

17 Q You mentioned you had two sequences. Why
18 were there two different sequences?

19 A Well, there's all kinds of discussions of
20 rotation effects. People are more likely to do
21 something and depending on the order you do them.
22 And in particular it's clear that people are less
23 likely to guess if they've already gotten some
24 answers they think of as right.

1 If I asked you four questions and you get
2 answers to the first three, you are less likely to
3 guess on the fourth. So the order you present things
4 in affects how people guess, for example.

5 Q Do you have an understanding as to what the
6 chirp at issue, what product it is used in connection
7 with?

8 A It's used in connection with a
9 walkie-talkie/two-way radio.

10 Q And did any of the respondents have physical
11 two-way radios in front of them during the surveys?

12 A Not that we provided. I don't know whether
13 any of them had a radio they use all the time
14 themselves. I wouldn't be surprised if someone did,
15 but we didn't provide them.

16 Q Let me ask it this way: In running the
17 survey, were the interviewers given two-way radios to
18 use to transmit the sounds to the interviewees?

19 A No, sir. We did not provide anything but the
20 CD.

21 Q Now, I'd like to turn your attention to the
22 page bearing Bates Number MOT4690.

23 A Okay.

24 Q And can you tell -- this looks to be -- I'm

1 going to refer to this and the subsequent three pages
2 as a single document, 4690 through 4693. Can you
3 tell me what this document is?

4 A It's the questionnaire.

5 Q What does the questionnaire do?

6 A Well, it tells the interviewer what do to,
7 which appears in bold. And it provides the questions
8 to be asked and it provides space for the interviewer
9 to fill in the respondent's answer.

10 Q Can you take us through the actual -- an
11 actual interview using this questionnaire?

12 A Sure. I'm not going to read it all, but the
13 interviewer begins the CD player and doesn't read
14 anything. The voice comes on the CD and the
15 interviewer himself is not saying anything. The
16 voice says: You're going to hear four sounds one
17 after another; you'll hear each sound three times.
18 After you've heard all four sounds, you'll then hear
19 each sound individually, et cetera. Goes through
20 this; plays the sounds three times each.

21 Then says: Now, you will hear the first
22 sound again. After you hear each sound, they'll be
23 an opportunity to tell the interviewer what, if
24 anything, you know about the sound. This is the

1 first sound. If you happen to know what the sound
2 is, please tell me what it is -- that's really the
3 question -- and what, if anything, you know about it.
4 Please be as specific as possible. If you don't
5 happen to know what the sound is, it's okay to say
6 so.

7 The first sound, and then the interviewer is
8 instructed basically, please press pause now. And
9 the interviewer presses pause and records what the
10 respondent says about Sound Number 1 and then probes
11 once with: Is there anything else.

12 Q Let me just stop you there. What is the
13 purpose of this question that reads: If you happen
14 to know what the sound is, please tell me what it is
15 and what, if anything, you know about it?

16 A We're trying to understand whether they can
17 identify the sound as being representative of a
18 particular thing. Suppose I was playing the doorbell
19 to them, the obvious answer for most, not all people,
20 would be it's a doorbell.

21 Q And the question: Is there anything else;
22 what is that intended to do?

23 A That's just intended to get a full answer.

24 Q Can you continue then, please?

1 A If the respondent -- this is an instruction
2 to the interviewer because it's in cap letters.

3 There's three forms here. There's bold which
4 is what's on the tape; cap letters which is the
5 instructions to the interviewer; and regular print
6 which is what the interviewer is supposed to ask the
7 respondent.

8 The respondent identifies the sound but
9 doesn't mention a specific company in his or her
10 answer ask, and there's another question, and the
11 question is basically: Are you thinking of one
12 company or more than one company that makes that.

13 Q And what was the purpose of that question?

14 A That's to see whether it's -- even if you can
15 identify what it is, that is the event, that you can
16 also identify the source as a single source. I mean,
17 the question really has -- it's basically to identify
18 whether it's a single source or more than one source
19 because I'm not really concerned whether they can
20 tell me what the specific source is. I want to know
21 whether they think it's one source or more than one.

22 Q And was this sequence of questions asked for
23 each of the four sounds?

24 A That's the next three pages.

1 Q And these sequence of questions were asked of
2 all the respondents; is that correct?

3 A Except that, of course, we don't go back and
4 say, you're going to hear four sounds one after
5 another. It starts at where it says: This is the
6 first sound. The next one starts: This is the
7 second sound and so on.

8 Q If we could flip back in your report to page
9 bearing Bates Number MOT004682, let me know when you
10 get there.

11 A Yes.

12 Q All right. In the interviewing process how
13 many respondents were, in fact, interviewed?

14 A 180.

15 Q And were these interviews run on a
16 double-blind basis?

17 A Yes, sir.

18 Q And what does double-blind mean?

19 A Neither the interviewer nor the respondent
20 knows what we're testing. They know nothing about it
21 except what they've been given. They don't know who
22 our client is. They don't know what the case is
23 about. They don't even know it's a case; although,
24 in a situation like this many of these interviewers

1 by now could guess it was a case or their supervisors
2 would. But they don't know which side we're on and
3 they don't know what the case is about.

4 Q I'd like to -- again, before we get into the
5 results and your interpretation, I'd like to move to
6 the validation portion of your work and if we could
7 flip to the next page, 4683, first could you tell me
8 what it means to validate a survey?

9 A You're trying to find out whether the
10 interviewer actually did the work and recorded it and
11 followed the instructions and did the work.

12 Q And how do you validate surveys?

13 A There are really three ways of which we used
14 all three; although, one of them is much less
15 substantial than the other two. First, is simply to
16 take all of the interviewers work, array it
17 chronologically and read it, looking for pattern and
18 looking for places where the interviewer seemed to
19 make a consistent error or if they made any errors
20 and so on.

21 The second is to call back respondents, ask
22 if they were interviewed, what the subject matter
23 was, not the exact questions, but just the general
24 subject matter.

1 And the third is because we give them an
2 honorarium of \$25 and much of it is in checks, to see
3 if the check has been cashed. If the respondent
4 said, give it to my Police Benevolent Association and
5 the check comes back cashed to the Police Benevolent
6 Association, we have good reason to believe the
7 interview was probably done.

8 Q The first method you mentioned about checking
9 for patterns. Is that done by RL Associates
10 employees?

11 A Yes.

12 Q The second validation method you mentioned
13 about calling back, is that done by an outside
14 company?

15 A In most cases, although in this case for a
16 particular reason, which I'm sure we'll talk about,
17 we did some of the call-backs. But usually it's done
18 by an outside firm, a separate firm not the ones who
19 did the interviews.

20 Q Then let's go back to the first form. The
21 in-house work, did R.L. Associates perform that in
22 this case?

23 A Yes.

24 Q As far as the second form, did an outside

1 service perform that work?

2 A Most of it. We did a little bit ourselves.

3 Q And what was that outside service?

4 A AVC Research.

5 Q Has that work been completed by AVC Research?

6 A Yes, sir.

7 Q And did it clear?

8 A Everything except for one interviewer that
9 we'll talk about.

10 Q And I'd like to talk about that one right
11 now. Was there one particular event during the
12 validation procedure that caused you concern?

13 A Yes, sir.

14 Q What happened?

15 A Actually, there were three, but two of them
16 worked out so it wasn't a problem, but one was a
17 problem. A woman named Kimberly Dunn who had done 16
18 interviews in Atlanta, Georgia and we don't believe
19 they were done, at least not all of them were done.
20 We believe she may have done some of them, but that
21 she did not do all of them and maybe didn't do any of
22 them.

23 Q What did you do with her work in this survey?

24 A We removed it from the survey because it

1 was -- removing it was favorable to Nextel, not to
2 Motorola. Our policy is if it's favorable to the
3 client we're working for, we leave them in, but make
4 a footnote explaining what's going on and maybe
5 separate tables with or without. If it's favorable
6 to the opposing side, we remove them -- I mean, if
7 removing them is favorable to the opposing side.

8 Q Earlier I believe you testified that there
9 were 180 respondents in this survey; is that right?

10 A Yes.

11 Q And after removing Ms. Dunn's interviews,
12 what did that leave?

13 A 164.

14 Q All right. Now, I'd like to move Page 4684.

15 A Yes, sir.

16 Q And there are two bullet points there at the
17 top and I'd like to ask you, just generally, what
18 each bullet point means, and then we'll get into the
19 tables in your report. Can you explain the first
20 bullet point?

21 A Right. These are the two things we've been
22 talking about when I talked about the three
23 alternatives. First is is it indicative of a
24 particular event; second is is it indicative of a

1 particular source. By event I mean something like
2 it's a doorbell or it's a computer; I mean, the
3 Microsoft sound that comes when you turn on a
4 Microsoft computer is indicative of an event, turning
5 on a computer and a particular source; the second
6 bullet point, Microsoft. The doorbell is indicative
7 of an event, it's a doorbell, but it's not indicative
8 of a particular source. Nobody thinks it comes from
9 one place.

10 So those are what those two bullet points
11 are.

12 Q And from the data in your survey as reflected
13 in Table 1, can you tell us what that shows?

14 A Okay. What we show here is a column for each
15 of the sounds. The numbers are all percentages.
16 They're not numbers. They're percentage on a basis
17 of 164 interviews and, for instance, 21 of the
18 percent of the people who heard the chirp identified
19 it as a radio, as the event being a radio, two-way
20 radio. 27% identified it as walkie-talkies; and 4%
21 of them said both radio and walkie-talkies; 13%
22 identified it as just a telephone; 3% said it was a
23 computer; and 25% had a huge variety of other things;
24 none coming up with any substantial amount of time;

1 and 7% said they just didn't know.

2 For the paper cutting going through the same
3 way, it's maybe -- nobody identified it as a radio,
4 so on for walkie-talkie and radio and walkie-talkie
5 combined and telephone; 21% called it a paper cutter;
6 1% said it was a computer; 67% was scattered over a
7 wide variety of other answers and so on. That's what
8 the table says.

9 Q So from the data in the surveys reflected in
10 the table, what percent of those respondents were
11 able to identify the chirp at issue here as coming
12 either from a radio, walkie-talkie or both?

13 A Well, 21, plus 27, plus 4 which is 52%.

14 Q And we talked earlier about noise and the
15 fact that the controls were put in place to measure
16 noise. What was the noise in this particular part of
17 the survey?

18 A Well, the noise can be -- there are two ways
19 that a noise can occur. The noise can be guessing a
20 particular answer for the chirp. Or the noise can be
21 guessing in general and for -- for all of the
22 different sounds.

23 Now, the first -- if the particular answer of
24 interest is radio walkie-talkie and radio and

1 walkie-talkies, the control for that is how many
2 people said that for any of the other sounds. And
3 there were none, so in essence there was no noise in
4 the sense of guessing that.

5 But there was a second kind of noise which is
6 guessing other kinds of things. We considered the
7 telephone even as noise, but basically what we see is
8 perhaps 28% of the people, 3% plus 25%, were guessing
9 answers for the chirp that didn't know what it was --

10 Q And --

11 A -- and that's consistent with the guessing on
12 others.

13 I mean, on the paper cutter the guessing was
14 higher because fewer people knew what it was. And on
15 the doorbell and the Window start-up there wasn't
16 much guessing because almost everybody knew what it
17 was.

18 Q When you said earlier that you did not see
19 any guessing where people identified radio
20 walkie-talkies or radio and walkie-talkie, what data
21 showed the lack of guessing on the table?

22 A That's the zeros in the first three rows
23 under paper cutter, doorbell and Window start up.

24 Q So if you net out any noise here --

1 A You're left with the same number as if you
2 didn't net out the noise which is unusual but not
3 unprecedented.

4 Q I'd like to turn now to the next page, and am
5 I correct that Table 2 relates to the question that
6 asks, are you thinking of one company or more than
7 one company?

8 A Well, it actually incorporates information
9 where they said in answer to the first question as
10 well, please tell me what, if anything, you know
11 about the sound, but it incorporates both questions,
12 heavily on the second question.

13 Q Now, what does this table show based on the
14 data in the survey?

15 A Well, this shows that for the chirp 14% the
16 only company they named was Motorola; 29% the only
17 company they named was Nextel; another 9% said both
18 Motorola and Nextel or a total of 52% said Motorola
19 and/or Nextel. Nobody said that for any of the other
20 three sounds, the paper cutter the doorbell or the
21 Window start up; that's reading across the first
22 three rows. Then Microsoft Windows was said by 66%
23 of the people in the Windows start up. Basically one
24 other person I think said it.

1 But other specific single sources from 10 to
2 13% of the people on each of the four sounds, we
3 assume that that's fairly consistent guessing.
4 People who don't know what it really is, any given
5 sound, and they're trying to show that they're smart
6 so they guess or they just plain guess in any case.

7 Similarly between 1 and 3% said, I don't know
8 what it is, but I think it only comes from one
9 company. That was a rare answer. Between 2 and 5%,
10 reading across the columns, gave more than one source
11 and specified them. More likely when they gave more
12 than one source they just said, I don't know who it
13 is, but it comes from a lot of sources and that's not
14 surprising. For example, under doorbell where there
15 were 20% of people think that comes from a lot of
16 sources, but I don't know who they are.

17 And then there were varying numbers of people
18 who said, I don't know how many sources it comes
19 from. Paper cutter, the doorbell had much higher
20 than Windows or chirp. And then there were people
21 who just didn't know what it was.

22 Q So did the data show that 52% of the
23 respondents associated the chirp with Motorola and/or
24 Nextel?

1 A Even net of the number they would have
2 associated with any of the other sounds with Motorola
3 and/or Nextel.

4 Q And what about the controls in this portion
5 of --

6 A That's what I'm saying. Nobody -- again, the
7 control answers nobody said Motorola and/or Nextel to
8 any of the other sounds.

9 Q And is that reflected in the zeros underneath
10 the --

11 A First three -- the zeros in the second, third
12 and fourth column, the first, second, third and
13 fourth row.

14 Q Okay. If we can now turn to the next page of
15 your report, can you tell me what Table 3 reflects?

16 A Yeah. Table 3 just takes Table 1 and 2 and
17 looks at a whole response or an individual
18 respondent, which I think is a proper way to look at
19 it in the first place, and essentially looks at the
20 whole questionnaire and categorizes those people who
21 we think can be realistically said to be identifying
22 both event and source; that is, you have to do both
23 to be in this column.

24 For example, first line said, 7% of the

1 people said it was Motorola and a radio. That's all
2 they said. 3% said it was Motorola and a
3 walkie-talkie. 11% said it was Motorola and either a
4 radio and/or walkie-talkie.

5 Now, that 7 plus 3 plus actually a couple of
6 people who said radio and walkie-talkie and Motorola,
7 but it's really -- it adds up to get the first two
8 lines plus one or two extra people. Similarly the
9 next three lines are for Nextel the same way. Then
10 the next line said both Motorola and Nextel and said
11 radio and/or walkie-talkie. And the final line just
12 adds up all the previous lines -- excuse me -- it
13 adds up the third line, the sixth line and the
14 seventh line.

15 Q Let's just do quick math here: In the first
16 three figures, 7, 3, and 11, they don't add up
17 because there are a couple extra people here and --

18 A Right. There are people who say Motorola and
19 then they say radio and walkie-talkie.

20 Q The same explains the 20 and 3 comes to 24,
21 correct?

22 A Yes, sir.

23 Q And before I forget our mathematical
24 exercise, if you'll turn back to Table 2, I believe

1 you conclude here that 52% associate the chirp with
2 Motorola and/or Nextel, correct?

3 A Yes, sir.

4 Q And if you turn to Table 1, you conclude that
5 52% recognize the chirp as made by a radio and/or
6 walkie-talkie, correct?

7 A Yes, sir.

8 Q Is there a correlation between those two
9 52% --

10 A No. That's an accident. And it turns out
11 42% of each of those 52% are in both categories.
12 And that is there -- in the first category there are
13 10% of people say -- this is looking at the first
14 table on 684 -- of the 52% who say radio and/or
15 walkie-talkie, 42% of them also say Motorola and/or
16 Nextel, 10% don't. Similarly of the 52% who say
17 Motorola and/or Nextel, 10% of them don't say radio
18 and/or walkie-talkie.

19 So the third table is a summary of those who
20 say both; that is, give answers both Motorola and/or
21 Nextel radio and/or walkie-talkie.

22 Q And so from the survey that you ran, do you
23 have an opinion as to what percentage of the
24 respondents recognized the chirp as a sound that

1 comes from a single source?

2 A No. A single source or a specific source?

3 Q A specific source.

4 A Yeah, I have -- I believe 42% of this
5 population recognizes this sound as being both the
6 specific event of a radio and/or walkie-talkie and
7 the specific source of Motorola and/or Nextel.

8 Q And are the data from the survey in your
9 opinion projectable?

10 A Yes, sir.

11 Q And why is that?

12 A Because projectable depends upon that we do a
13 random sample. We do random locations in the first
14 place across the country. We do random people within
15 those -- random interviewing locations within those;
16 that is, random police stations, fire stations, EMTs.
17 And then we do random respondents within those fire
18 stations. We do random police officers or random
19 fire officers.

20 And projectability is a concept that requires
21 randomness. It doesn't require anything else. It's
22 not a function of sample size. It's not a function
23 of -- it requires that you randomly select it from
24 the entire universe.

1 And let me say more clearly: Projectability
2 is whatever random group you selected from, assuming
3 everybody had an equal chance of being selected from
4 that in a random procedure, it's projectable to that
5 universe. So, for example, this data is not
6 projectable to ski patrolmen because we didn't do any
7 ski patrolmen. And so it's a universe of police,
8 fire and EMTs that this data is projectable to.

9 MR. GABRIELIDES: I'd like to take a short break
10 and speak with my client and then we'll get back on
11 line.

12 (A recess was taken.)

13 BY MR. GABRIELIDES:

14 Q Mr. Rappeport, earlier we had a discussion
15 about Kimberly Dunn; do you remember that?

16 A Yes, sir.

17 Q And I want to understand, am I correct that
18 Ms. Dunn's work was excluded from the survey results,
19 correct?

20 A That's correct, sir.

21 Q And why did you find it appropriate to
22 exclude those results in this case?

23 A Because both of the major validations that's
24 indicated to us that she hadn't done all the

1 interviews.

2 Q And do you have an understanding as to
3 whether the exclusion of her results favored or
4 disfavored the -- Motorola's position in this matter?

5 A By excluding her results we disfavored
6 Motorola's position. We favored Nextel. If we left
7 the results in, the numbers would have gone up to 42
8 to a slightly higher number.

9 Q And is that your general practice when doing
10 survey work?

11 A We do one of two things: If it disfavors the
12 people we're working for, our client, we will take
13 them out and show a note. And if it disfavors the
14 opponent, we'll leave them in and show a note.

15 Q So --

16 A -- so whether we take them out depends on who
17 it favors.

18 Q I think you said if it disfavors the
19 opponent --

20 A We will -- let me say it differently.

21 Q Please.

22 A Let me use Motorola and Nextel and I won't
23 get in trouble.

24 Q All right.

1 A If taking her out made it better for
2 Motorola; we would not have taken them out. If
3 taking them out makes it worse for Motorola, that is
4 it disfavors Motorola, we do take them out.

5 Q And does that follow your general practice?

6 A Yes, sir. In either case we make a note of
7 it and show what happened. I mean, we don't just do
8 it or not do it. We take them out of the results,
9 but we do preserve the information.

10 Q I'd like to turn back to Table 2 of your
11 report on 4685.

12 A Yes, sir.

13 Q And as I understand it from the second line,
14 second row, you included the 29% of respondents who
15 identified Nextel as the single source of the chirp
16 there in the table, correct?

17 A Yes, sir.

18 Q And there were also 9% who identified
19 Motorola and Nextel as the single source of the
20 chirp, correct?

21 A Yes, sir.

22 Q Why were those included in the 52% composite?

23 A Because our understanding of the rule is
24 single source albeit negative, albeit unknown, albeit

1 even wrong, as long as there's a rationale for that
2 single source; that is, it's noise -- if one person
3 says Continental Airlines, another one says Microsoft
4 and the third one says McDonald's, but if there's a
5 rational reason of believing it's connected to
6 Nextel -- and our understanding is that the systems
7 are akin to -- some of them, in fact, do use Nextel
8 systems, so there's a rational reason and they're
9 telling us it's a single source. And our charge was
10 to find out how many people thought it was a single
11 rational source, not whether they thought it was
12 Motorola.

13 Q And when you say if there was a rational
14 reason, was there such a reason in this particular
15 case?

16 A We understand that there is.

17 Q And what is that?

18 A We understand Nextel makes an akin product;
19 that is, a telephone system with a walkie-talkie
20 option where their name appears on the thing and uses
21 a different -- that system uses a different frequency
22 chirp, but it's also used as a chirp.

23 Q And you understand there would be a business
24 relationship between Motorola and Nextel as well?

1 A Yeah, we understand that Motorola makes the
2 phones that Nextel sells and markets in their phone
3 system.

4 MR. GABRIELIDES: Okay. I have no further
5 questions. Why don't we go off the record.

6 (Discussion had off the record.)

7 CROSS EXAMINATION

8 BY MR. STEWART:

9 Q Good morning, Mr. Rapoport.

10 A Good morning.

11 Q I'm John Stewart. I'm representing the
12 opposer, Sprint Nextel in this proceeding.

13 A All right. Good morning, Mr. Stewart. I've
14 met you before; pleasure to meet you again.

15 Q In fact, you were deposed previously in this
16 proceeding, correct?

17 A Yes, sir.

18 Q That was November 9th, 2005?

19 A I don't remember the date, but I'll take your
20 word for it.

21 Q Since that time have you done anything, any
22 further surveys with respect to the chirp sound?

23 A No, I hadn't done anything at all with regard
24 to this project until 10 days ago when I started

1 reviewing the work and that was what I've done simply
2 since, that is review my own deposition.

3 Q So you reviewed the transcript of your prior
4 deposition in this proceeding?

5 A Yes.

6 Q Have you performed any further analyses of
7 the data that you previously presented?

8 A No, sir.

9 Q Earlier this morning you testified that when
10 you were asked by Mr. Gabrielides to look at
11 approaches to answering the problem and you took an
12 initial look at it, you came back to him with a
13 proposal for a survey and also you said -- and I
14 think I got these words correct, you told him,
15 "here's what we think we'll get"?

16 A In general terms. We told him what we
17 thought the answers -- based on the qualitative work,
18 we gave them a general -- for example, I didn't say
19 it was going to be 52%, but I was willing to say
20 we'll get a significant number of people saying
21 Motorola; we'll get a significant number of people
22 saying Nextel. We weren't sure when anybody would
23 say both, but we weren't surprised by that and,
24 similarly, on whether they would identify it as a

1 walkie-talkie radio.

2 Q So did you --

3 A And, again, it will be more than 25 or 30; it
4 won't be 100%. It will be what we understand to be
5 numbers significant in such cases, but we weren't
6 sure of that. We just thought that's what we'd get.

7 Our problem is we don't like to do a survey
8 that turns out to be useless or detrimental to the
9 client, so we try and understand what we might get in
10 general terms.

11 Q Why did you tell Mr. Gabrielides that you
12 thought a significant number of people would identify
13 Nextel?

14 A Because in the qualitative work we had done,
15 some people had identified Nextel.

16 Q And the qualitative work you did -- I believe
17 you described it in prior deposition -- included
18 playing the chirp sound for people in your office; is
19 that right?

20 A People in my office, people on a ski patrol,
21 some EMTs. I have a personal friend who is an EMT.
22 I spend a lot of time with her trying to understand
23 how they use it. That was very early in the game.

24 Q And I believe you testified in your prior

1 deposition that you played the chirp sound at that
2 point by having your son or someone on the ski patrol
3 up in Vermont play it over the telephone; is that
4 right?

5 A No. No. I may have said something like
6 that, but not exactly. My son is on -- captain of
7 the ski patrol. He played it to me over the
8 telephone, but the ski patrollers -- he was using the
9 chirp that they -- but he was doing qualitative. He
10 was trying to understand. In some cases he would
11 simply -- he didn't play them anything. He would
12 simply say to some of the patrollers, what's the
13 sound that's made; do you know what it is; do you
14 hear it anyplace else; is this a sound you identify
15 with one thing.

16 We're going up the learning curve and we're
17 not trying -- I don't introduce anything from that as
18 something I'm relying on. I relied purely on the
19 survey, quantitative survey.

20 MR. STEWART: I would like to have marked as
21 Rappeport Exhibit 3 this collection of
22 documents.

23 (Exhibit 3 marked as requested.)

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

1 (Discussion had off the record.)

2 Back on the record.

3 BY MR. STEWART:

4 Q I'm handing you what I've marked Rappeport
5 Exhibit 3. And this is a collection of documents
6 that were produced by Motorola in discovery in this
7 proceeding and they encompass pages that are marked
8 on the bottom right-hand corner MOT004796 through
9 MOT005451.

10 A I guess.

11 Q And do you see, Mr. Rappeport, in the upper
12 right-hand corner there are handwritten notations
13 that begin with 1-101 on the first page and when you
14 go through the last page, which is --

15 A Should be 8104 I guess.

16 Q 8224.

17 A 8224.

18 Q Now, can you tell me what these documents
19 are?

20 A These are the questionnaires that were filled
21 out by the interviewers and sent back to us with the
22 exception of a page in which they had their own name
23 and the name of the respondent which we do not
24 provide names of respondents.

1 Q So these are the survey interview results
2 that you used in your report?

3 A Yes, sir.

4 Q And I'd like to show you next what I've
5 marked Rappeport Exhibit 4.

6 (Exhibit 4 marked as requested.)

7 And this is a two-page document labeled on
8 the bottom right-hand corner, MOT004773 and 4774.
9 And as you'll see, it also bears a label which was
10 the exhibit number from your deposition in November
11 of 2005. Do you recognize these documents?

12 A Yes, sir.

13 Q What are they?

14 A First is how the balance were numbered in
15 indicating where the respondent was in geography and
16 which order they heard the sounds in. First digit is
17 where they were; second is where they heard the
18 sound; third and fourth digits are the number we
19 pointed out 1-101 is just balancing respondents in
20 consecutive number order for no specific reason. The
21 second is the coding that we did on each respondent
22 which is our code for what the respondent's whole
23 questionnaire says in effect -- excuse me -- our code
24 for what the respondent said with regard to a

1 particular sound.

2 Q Right. If you can go back to Exhibit 3 and
3 turn to the fourth page, it has got a Bates label of
4 MOT004799; do you see that?

5 A Yes, sir.

6 Q There's a handwritten code above the box
7 there 8-6; do you see that?

8 A Yes, sir.

9 Q And is that the code that is described on the
10 second page of Rapoport Exhibit 4?

11 A Yes, sir.

12 Q And looking at the code at the top of the
13 Page 1-101, the second digit, which is a 1, indicates
14 the order of Number 1 -- the order in which you
15 presented the sounds to the respondents, correct?

16 A Yes, sir.

17 Q And that was Order Number 1 which has the
18 chirp sound as the fourth sound?

19 A Windows, doorbell, paper cutter, chirp.

20 Q And back to Exhibit 3, looking at this fourth
21 page here, the sound of Number 4 is the question next
22 to which this Code 8-6 has been written, right?

23 A That's correct.

24 Q And that code was written based on the

1 responses provided by the person being interviewed as
2 recorded by their responding in that box below where
3 the --

4 A Yes.

5 Q And then let's just flip through to the first
6 questionnaire --

7 A 2-201.

8 Q -- 2-201, yes, which is the Bates 004848 at
9 the bottom. And that would indicate -- because the
10 second digit is a 2 that the order was a different
11 one and the chirp was Sound Number 2, correct?

12 A Right.

13 Q And so if you turn over to Page MOT004849,
14 you see that the handwritten Code 8-6 is written near
15 the Sound Number 2 question; is that right?

16 A That's correct.

17 Q And that code was written -- was applied
18 based on what was written by the interviewer
19 according to the interviewees responses in the box?

20 A He put the code on, but it was our
21 interpretation or understanding of what the
22 interviewer recorded of what the respondent said.

23 Q And those handwritten codes with respect to
24 either Sound Number 2 or Sound Number 4 were the

1 codes on which you based the categorization of the
2 responses that you presented in Table 3 of your
3 report; is that correct?

4 A Yes, sir. Actually on the first column each
5 of Tables 1 and 2 as well.

6 Q Yes. And you did not apply those handwritten
7 categorizations -- you did not apply handwritten
8 categorization codes to the responses for any sounds
9 other than the chirp on this questionnaire; is that
10 right?

11 A No, no, we just counted them.

12 Q So if one were to go through this big pile of
13 papers that is the complete set I've shown you as
14 Rapoport Exhibit 3 and collect just the pages on
15 which either Sound 2 or Sound 4 appears with a
16 handwritten code applied, one would have the complete
17 set of 164 responses that you compiled to report your
18 results and gave --

19 A Yes, sir.

20 Q And by reviewing the responses recorded in
21 the box on each of those pages, one could evaluate
22 the coding decisions and categorization decisions
23 that were represented by the two-digit code that's
24 applied there as well, correct?

1 A I think it's the same question. Yes, I agree
2 with you.

3 Q Let's go back to Rappeport Exhibit 2 which is
4 the report that Mr. Gabrielides handed you earlier
5 this morning.

6 A Yeah.

7 Q And turn to Page 8 of the report which is
8 Bates labeled MOT004684.

9 A I see.

10 Q And I'm looking at the two bullet points at
11 the top of that page; do you see that?

12 A Yes.

13 Q Now, in your prior deposition, you testified
14 that you identified these two separate elements based
15 on your understanding of what was necessary to
16 measure acquired distinctiveness with respect to the
17 sound mark; is that correct?

18 A To this kind of sound mark. I mean, I can
19 conceive of sound marks where it wouldn't play, but
20 in this case it would, yes.

21 Q And you testified earlier that your
22 understanding of -- the fact that these two
23 components were required in measuring this kind of
24 require distinctiveness was based on your

1 understanding of court decisions; is that right?

2 A My understanding of what decisions say and
3 what people have told me about the court decisions.
4 That's my understanding of what the lawyers I've
5 worked with say the law requires.

6 Q Without asking you to name case names, those
7 court decisions you were referring to and on which
8 you base your analysis were decisions having to do
9 with product design and trade dress; is that correct?

10 A Well, it's product configuration trade dress.
11 It was a specific case on product configuration trade
12 dress. But also the colored cases the court has
13 dealt with, which is a different kind of thing but
14 like this, especially single colors. The fact that
15 it gets more complicated is shown by clearly the
16 court's treat combination of colors different than
17 they treat single colors.

18 But mostly on -- what people have told me
19 about -- I mean, I've read the court decisions, but
20 I'm not claiming to be a lawyer that understands it
21 in that sense. But I do claim that lawyers have told
22 me this is what's going on and it's my understanding
23 as well.

24 Q And the specific words that are in these two

1 bullet points here were written by you, correct?

2 A They were approved by me. I'm not sure
3 whether Chad or one of the other people in my office
4 may have written them down that way, but I believe
5 these if that's what you're asking.

6 Q And they represent --

7 A They represent my view.

8 Q Your views --

9 A Without question.

10 Q Your views as to what's required by the law
11 based on prior court decisions to establish a
12 required distinctiveness with respect to this kind of
13 sound mark?

14 A My understanding of what's required. If it's
15 wrong, it's wrong, but this isn't any case what I
16 went and test -- I mean, my understanding of what the
17 law requires is -- my understanding of whether I've
18 done this is where I claim to become an expert.

19 Q And you designed, as you testified
20 previously, the study to include these two questions
21 that we've looked at before and we'll go back and
22 look at in detail, in order to gather information
23 with respect to each of these two bullet points,
24 correct?

1 A Yes.

2 Q And let's just go back and look at this first
3 questionnaire in the big pile that I've given you.

4 A Sure.

5 Q Look at the fourth page, MOT004799. The
6 first question of the two that you designed to answer
7 this issue is what -- is what follows the word voice
8 at the top of the page there; is that right?

9 A Yes, sir.

10 Q And the responses handwritten in the top
11 of -- top section of the box there in the middle of
12 this page were the responses recorded to that first
13 question, correct?

14 A Yes, sir.

15 Q Okay. Then the second question which was
16 designed to collect information with respect to the
17 second bullet is what is indicated in the middle of
18 that box, is that correct, after the instruction?

19 A Yes, sir.

20 Q So that the question reads -- second question
21 reads, "you said that sound comes from A," and then
22 there's a bracketed answer from above. Continuing:
23 "Are you thinking of one company who makes that?"
24 Bracketed answer. Continuing "or more than one