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Filing date: **08/09/2012**

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

Proceeding	91200575
Party	Plaintiff Hershey Chocolate & Confectionery Corporation, The Hershey Company
Correspondence Address	PAUL C LLEWELLYN KAYE SCHOLER 425 PARK AVENUE NEW YORK, NY 10022 UNITED STATES pllewellyn@kayescholer.com, jeischeid@kayescholer.com
Submission	Motion to Strike
Filer's Name	Paul C. Llewellyn
Filer's e-mail	pllewellyn@kayescholer.com, jeischeid@kayescholer.com
Signature	/paul c llewellyn/
Date	08/09/2012
Attachments	Motion to Strike.pdf (9 pages)(163902 bytes) Motion to Strike - Declaration in Support.pdf (15 pages)(5517967 bytes)

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

X

HERSHEY CHOCOLATE & CONFECTIONERY CORPORATION and THE HERSHEY COMPANY,	:	
	:	
Opposers,	:	Opposition No. 91200575
	:	
v.	:	
	:	
KENNETH B. WIESEN,	:	
	:	
Applicant.	:	
	:	
-----	X	

MOTION TO STRIKE APPLICANT’S EXPERT DISCLOSURE

Applicant Serial No: 85/221,585
Filed: January 19, 2011
Published for Opposition: June 14, 2011
Mark: MILKSHAKE

Applicant Serial No: 85/210,942
Filed: January 5, 2011
Published for Opposition: June 14, 2011
Mark: MILK SHAKE

TO: Commissioner for Trademarks
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Pursuant to Federal Rule of Civil Procedure 37(c), Opposers Hershey Chocolate & Confectionery Corporation (“HC&CC”) and The Hershey Company (“Hershey Company,” and, together with HC&CC, “Hershey”) hereby move to strike Applicant Kenneth B. Wiesen’s (“Applicant”) Expert Disclosure of Steve Rotterdam.

II. INTRODUCTION & BACKGROUND

On July 9, 2012, the deadline for expert disclosures, Hershey disclosed its expert witness, Dr. Geoffrey Nunberg, to Applicant Kenneth B. Wiesen, in accordance with 37 C.F.R. § 2.120(a)(2) and Fed. R. Civ. P. 26(a)(2), by serving upon Applicant Hershey's expert disclosure with a complete expert report signed by Dr. Nunberg (with exhibits thereto) by first class mail and electronic mail.¹ Declaration of Paul C. Llewellyn dated August 9, 2012 ("Llewellyn Decl.") ¶ 2. Three minutes before the end of the July 9 deadline, at 11:57 p.m., counsel for Hershey received an email from Applicant attaching a purported disclosure of a purported expert witness, Steve Rotterdam. Llewellyn Decl. ¶ 3 & Ex. A. Applicant's "Expert Witness Disclosure" did not contain an expert report signed by the purported expert. To the contrary, it provided only the name of the purported expert, a "Curriculum Vitae" that consisted of information apparently copied from Mr. Rotterdam's LinkedIn profile, statements that the expert would not be compensated for his testimony and the expert had not testified in the last four years, and a brief paragraph -- later confirmed to have been written by Applicant, and never seen by the purported expert -- summarizing Applicant's basic argument in these proceedings. *Id.* Thus, Applicant did not submit an expert report written or signed (or even seen) by Mr. Rotterdam, nor did Applicant specify Mr. Rotterdam's expert qualifications. *Id.*

On July 23, 2012, counsel for Hershey advised Applicant of the deficiencies in his purported expert disclosure and demanded that Applicant withdraw the disclosure. Llewellyn

¹ The Board's March 8, 2012 Order directs that all service in this proceeding be made concurrently by mail and electronic mail. Applicant apparently served his purported expert disclosure by mail on the July 9 deadline, and, as noted above, by electronic mail three minutes before midnight on the deadline (hours after receiving Hershey's expert disclosure by email).

Decl. ¶ 4 & Ex. B. To date, Applicant has yet to respond to Hershey's notification or provide a supplementary expert disclosure of any kind.

In light of the fact that Applicant failed to provide any expert report written or signed by his purported expert, as expressly required by 37 C.F.R. § 2.120(a)(2) and Fed. R. Civ. P. 26(a)(2); and failed to identify the purported expert's qualifications, if any, Hershey respectfully requests that the Trademark Trial and Appeal Board (the "Board") strike Applicant's purported expert disclosure from this proceeding.

III. ARGUMENT

A. Standard for Rule 37(c) Motion to Exclude

Pursuant to Federal Rule of Civil Procedure 37(c),² "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." F.R.C.P. 37(c); see also *Gen. Council of the Assemblies of God d/b/a Gospel Publ'g House v. Heritage Music Found.*, 97 U.S.P.Q.2d 1890, 2011 WL 481340, at *1 (T.T.A.B. Feb. 3, 2011) (citing F.R.C.P. 37(c)(1)). Evidence that has not been provided, "either initially or by supplementation, generally and automatically is excluded under Fed. R. Civ. P. 37(c)." *Gen. Council of the Assemblies of God*, 97 U.S.P.Q.2d at 1892.

B. Rule 26(a)(2)(B) Written Report Requirement

Federal Rule of Civil Procedure 26(a)(2)(B) states, in relevant part, that expert disclosures "must be accompanied by a written report—prepared and signed by the witness—if

² The Federal Rules of Civil Procedure are applicable to proceedings before the Board pursuant to 37 C.F.R. § 2.116(a).

the witness is one retained or specially employed to provide expert testimony in the case....”

F.R.C.P. 26(a)(2)(B) (emphasis added). Specifically, the expert’s report “must” contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness’s qualifications, including a list of all publications authored in the previous 10 years;
- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

Id. (emphasis added).

C. Applicant Failed to Provide the Disclosure and
Information Required by Federal Rule of Civil Procedure 26(a)

Applicant’s “Expert Witness Disclosure” fails to satisfy several fundamental requirements of Federal Rule of Civil Procedure 26(a)(2)(B). To begin with, the disclosure was neither prepared by nor signed by Mr. Rotterdam. Rather, Applicant has admitted that Applicant himself prepared and signed the Expert Witness Disclosure that he served on Hershey.

Llewellyn Decl., ¶ 5 Ex. C.³ Indeed, Applicant concedes that Mr. Rotterdam never even saw the

³ “Q. If you look at the portion of Plaintiff’s Exhibit 19 that says expert witness disclosure, do you see that?

A. Yeah.

Q. Did you draft this?

A. Yes.

Q. It’s your signature on page -- on the second page of it, right?

(continued...)

purported expert disclosure that Mr. Wiesen prepared and signed. *Id.* In light of these facts, the disclosure cannot be viewed as expressing *Mr. Rotterdam's* opinions, nor the facts or data that Mr. Rotterdam considered. It also means that Applicant failed to satisfy the most basic and fundamental requirement of Rule 26(a)(2)(B), that the report be “prepared and signed by” the expert witness. To the contrary, the disclosure consists of a cursory paragraph summarizing Mr. Wiesen’s argument in this matter.

Based on the foregoing, the Board should strike Applicant’s purported Expert Witness Disclosure.

D. Applicant’s Failure Is Neither Substantially Justified Nor Harmless

An inadequate expert disclosure must be excluded, “unless the failure was substantially justified or is harmless.” F.R.C.P. 37(c).

Applicant (who is acting pro se but who is a practicing lawyer) is aware of the expert disclosure requirements, but chose not to adhere to them and chose to ignore Hershey’s objection to his disclosure. As such, Applicant’s failure to adequately disclose his purported expert cannot be justified, much less substantially justified.

Applicant’s Expert Witness Disclosure, signed by Applicant, attested that the disclosure is made “pursuant to Trademark Rule 2.120(a)(2) and Federal Rule of Civil Procedure 26(a)(2).” Llewellyn Decl. Ex. A. Thus, as of the deadline for expert disclosures, July 9, 2012, Applicant acknowledged being aware of the expert disclosure requirements, and yet chose not to satisfy

A. Yes.

Q. Did Mr. [Rotterdam] see this before you served it on Hershey’s lawyers?

A. No.”

Llewellyn Decl. Ex. C.

those requirements in making such disclosure. Moreover, Hershey advised Applicant of his incomplete expert disclosure and reminded Applicant of the requirements for such disclosure in Hershey's counsel's July 23, 2012 e-mail. Llewellyn Decl., Ex. B.⁴ Nevertheless, over two weeks after that July 23, 2012 e-mail – and over four weeks after Applicant disclosed his expert – Applicant has not even acknowledged or responded to Hershey's objection to the substantive or the technical deficiencies in his expert disclosure. In light of the foregoing and the fact that Applicant served his bare-bones disclosure just three minutes before the disclosure deadline, it may be reasonably inferred that Applicant is not engaging in good faith discovery practices, but is seeking only to hinder Hershey's right to the timely disclosure of information under the discovery rules.

Applicant's continuing failure to meet the expert disclosure requirements under Federal Rule of Civil Procedure 26(a)(2)(B) is harmful to Hershey. The circumstances in this case are unlike those in General Council of the Assemblies of God, where the deficiencies in the expert disclosure were merely technical in nature,⁵ "respondent supplemented its expert disclosure as soon as the deficiencies were brought to its attention," respondent didn't make any "last-minute changes," and "the discovery period [was] still open." 97 U.S.P.Q.2d at 1892 (emphasis added). In the present case, Applicant failed to provide substantive components of an expert disclosure—

⁴ "Your disclosure is deficient in several respects. Under Fed. R. Civ. P. 26(a)(2), an expert disclosure must be 'accompanied by a written report – prepared and signed by the witness.' The rule sets out very specific requirements for the written report, including, inter alia, a complete statement of all opinions the witness will express and the basis and reasons for them; the facts or data considered by the witness in forming them; and the witness's qualifications." Llewellyn Decl. Ex. B.

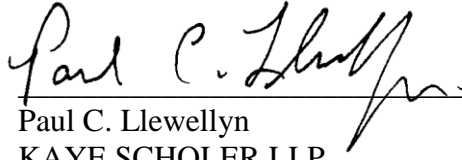
⁵ Respondent in the General Council of the Assemblies of God provided the substantive portions of the expert disclosure, namely, the expert's report and a copy of the facts and data the expert considered in preparing the report. 97 U.S.P.Q.2d at 1892.

indeed, failed to provide any expert report within the meaning of Rule 26 – failed to supplement his deficient disclosure for a month despite knowing and even after being reminded of the deficiencies thereof, and any supplementation of Applicant’s disclosure at this point would be well past the deadline for disclosures and the close of discovery. In addition, any extension of the discovery period would unfairly prejudice Hershey, which not only complied fully and in a timely manner with its expert disclosure obligations, but also advised Applicant of the defects of Applicant’s Expert Witness Disclosure well in advance of the discovery deadline. Hershey should not be forced to prolong this proceeding and forego a determination of its trademark rights just because Applicant has failed to, and declined to, engage in proper discovery practices.

IV. CONCLUSION

Hershey properly and timely disclosed its expert and expert report to Applicant. Several hours later, Applicant served an at-the-wire and knowingly and substantively deficient purported expert disclosure. Despite being aware of the federal and Board rules governing such expert disclosures, and being reminded of same by Hershey weeks before the close of discovery, Applicant has yet to supplement his expert disclosure in any way or provide any justification for the deficiency thereof. Extending the discovery deadline would unfairly delay the proceeding to determine Hershey’s trademark rights, and give Applicant a second bite at the apple that he does not deserve. As such, Hershey respectfully requests that the Board strike Applicant’s purported expert disclosure from this proceeding pursuant to Federal Rule of Civil Procedure 37(c) in light of Applicant’s willful and continuing failure to provide information required under Rule 26(a)

Date: August 9, 2012
New York, New York

A handwritten signature in dark ink, appearing to read "Paul C. Llewellyn", written over a horizontal line.

Paul C. Llewellyn
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022
Telephone: (212) 836-8000

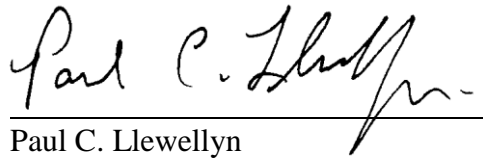
John P. Rynkiewicz
KAYE SCHOLER LLP
The McPherson Building
901 Fifteenth Street, N.W.
Washington, DC , N.Y. 10022
Telephone: (202) 682-3500

Attorneys for Opposers

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused the foregoing MOTION TO STRIKE APPLICANT'S EXPERT DISCLOSURE to be served this 9th day of August, 2012, by e-mail and by U.S. first class mail, postage prepaid, upon the following correspondent of record for Applicant:

KENNETH B. WIESEN
1 OLD COUNTRY RD.
SUITE 360-B
CARLE PLACE, NY 11514
wiesenlaw@gmail.com


Paul C. Llewellyn

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

	X	
HERSHEY CHOCOLATE & CONFECTIONERY	:	
CORPORATION and THE HERSHEY COMPANY,	:	
	:	
Opposers,	:	Opposition No. 91200575
v.	:	
KENNETH B. WIESEN,	:	
	:	
Applicant.	:	
	:	
	X	

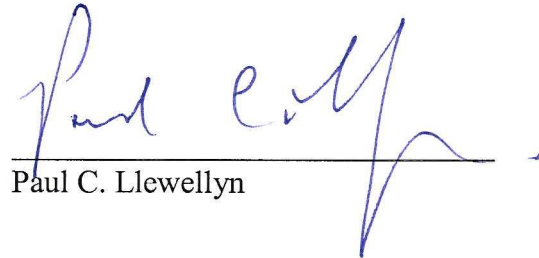
**DECLARATION OF PAUL C. LLEWELLYN IN SUPPORT OF OPPOSERS’
MOTION TO STRIKE APPLICANT’S EXPERT DISCLOSURE**

I, Paul C. Llewellyn, declare:

1. I am a partner at the law firm of Kaye Scholer LLP and counsel for Opposers Hershey Chocolate & Confectionery Corporation and The Hershey Company (“Hershey”). I make this declaration based upon my personal knowledge and the documents attached hereto.
2. On July 9, 2012, Hershey served its expert disclosure (including an expert report signed by its expert, Dr. Geoffrey Nunberg), upon Applicant by first class mail and by electronic mail.
3. Attached hereto as **Exhibit A** is a true and correct copy of Applicant’s email dated July 9, 2012 at 11:57 p.m., attaching Applicant’s ”Expert Witness Disclosure” signed by Applicant himself and the Curriculum Vitae of Steve Rotterdam.
4. Attached hereto as **Exhibit B** is a true and correct copy of my July 23, 2012 e-mail to Applicant advising him of the deficiencies in his Expert Witness Disclosure.

5. Attached hereto as **Exhibit C** are true and correct copies of pages 121 and 122 of the rough transcript of the deposition of Applicant, taken on July 31, 2012.

I declare under penalty of perjury that the foregoing is true and correct. Executed in New York, New York, this 9th day of August, 2012.


Paul C. Llewellyn

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 2012, I caused a true and correct copy of this DECLARATION OF PAUL C. LLEWELLYN IN SUPPORT OF OPPOSERS' MOTION TO STRIKE APPLICANT'S EXPERT DISCLOSURE to be served by email and by United States first class mail, postage prepaid, upon the following:

KENNETH B. WIESEN
1 OLD COUNTRY RD.
SUITE 360-B
CARLE PLACE, NY 11514
wiesenlaw@gmail.com

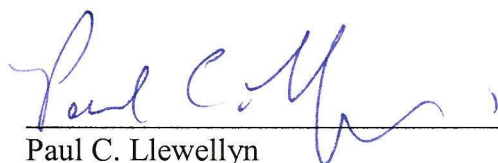

Paul C. Llewellyn

EXHIBIT A

Llewellyn, Paul

From: KENNETH WIESEN [wiesenlaw@gmail.com]
Sent: Monday, July 09, 2012 11:57 PM
To: Co, Jennifer
Cc: Llewellyn, Paul
Subject: Re: Hershey v. Wiesen - Expert Disclosures
Attachments: Steve Rotterdam Curriculum Vitae.docx; Expert witness disclosure.pdf

Dear Jennifer and Paul,

Attached is Applicants Expert Witness Disclosure, including Mr. Rotterdam's CV.

Kenneth Wiesen

On Mon, Jul 9, 2012 at 8:12 PM, Co, Jennifer <Jennifer.Co@kayescholer.com> wrote:

Dear Mr. Wiesen,

Pursuant to 37 C.F.R. § 2.120(a)(2) and Fed. R. Civ. P. 26(a)(2), attached please find the Expert Report of Geoffrey Nunberg, and Exhibits thereto.

Please advise if you have any questions. Thank you.

Best regards,

Jennifer

Jennifer Co

KAYE SCHOLER LLP

Two Palo Alto Square

3000 El Camino Real | Suite 400

Palo Alto, California 94306

T: +1 650.319.4507 | F: +1 650.319.4907

jennifer.co@kayescholer.com | www.kayescholer.com

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* * * *

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

-----X
HERSHEY CHOCOLATE & CONFECTIONERY
CORPORATION and THE HERSHEY COMPANY,

Opposition No. 91200575

Opposers,

Serial Nos.
85/221,585 & 85/210,942

v

KENNETH B. WIESEN,

Applicant
-----X

EXPERT WITNESS DISCLOSURE

PLEASE TAKE NOTICE that Applicant KENNETH B. WIESEN (Wiesen)
pursuant to Trademark Rule 2.120(a)(2) and Federal Rule of Civil Procedure 26(a)(2),
hereby discloses his expert witness information:

Expert Witness plaintiff plans to present: Steve Rotterdam

The witness's qualifications: Curriculum Vitae attached

The witness's compensation for his position and any future testimony: Zero

The witness has not testified in the last four years

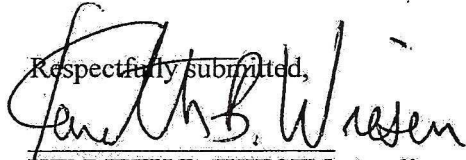
The facts or data to be considered by the witness in preparing the opinion:

A. The documents served by Applicant and the documents served by Opponent.

The witness is expected to testify that the word milkshake used on the candy wrappers claimed by Opponent to be examples of a trademark are rather examples of a word or term commonly used in the advertising and food industry of a common flavor characteristic. Such word or terms in the examples presented by Opponent are instances of a word and term that relates a flavor or characteristic of the candy to the

buying public. The term milkshake is a common term used to describe a flavor characteristic and has been used on many different types of food products including Opponents examples to describe a creamy and frothy milked milkshake flavor and characteristic. The expert is further expected to testify to the advertising considerations used by opponent in adding the word milkshake to iconic candies that bear long standing trademarks such as Kit Kat and Whoppers. The expert is further expected to testify that the Opponents own internal advertising, marketing and promotional departments and/or personnel clearly intended and conceded in their own documents to be used as a flavor indicator on the wrappers.

Date: July 9, 2012
Carle Place, New York

Respectfully submitted,

KENNETH B. WIESEN, Applicant
1 Old Country Road, Ste. 360B
Carle Place, NY 11514
(516) 742-2212

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she caused the foregoing APPLICANT'S FIRST EXPERT WITNESS DISCLOSURE to be served this 9th day of July, 2012, by email, upon the following correspondent of record for Applicant:

Paul C. Llewellyn
KAYE SCHOLER, LLP
425 Park Avenue
New York, NY 10022
(212) 836-8000

Attorneys for Opposers

A handwritten signature in black ink, appearing to read "Kenneth B. Wiesen". The signature is fluid and cursive, with the first name "Kenneth" and last name "Wiesen" clearly distinguishable.

Kenneth B. Wiesen

EXHIBIT B

Llewellyn, Paul

From: Llewellyn, Paul
Sent: Monday, July 23, 2012 9:18 AM
To: 'wiesenlaw@gmail.com'
Cc: Co, Jennifer
Subject: Hershey v. Wiesen

Dear Ken –

I write to object to, and to request that you withdraw, the purported expert disclosure of Steve Rotterdam that you emailed to me at 11:57 pm on July 9, 2012 (which was three minutes before the end of the deadline date, and several hours after you received Hershey's expert disclosure).

Your disclosure is deficient in several respects. Under Fed. R. Civ. P. 26(a)(2), an expert disclosure must be "accompanied by a written report – prepared and signed by the witness." The rule sets out very specific requirements for the written report, including, inter alia, a complete statement of all opinions the witness will express and the basis and reasons for them; the facts or data considered by the witness in forming them; and the witness's qualifications. Your disclosure includes no such report, utterly fails to set forth any opinions of or the facts and the bases relied upon by your purported expert, does not even identify the "expert" qualifications of Mr. Rotterdam, and is not even signed by Mr. Rotterdam. Indeed, by all appearances, you received Hershey's expert report on July 9, and decided then to serve your own "expert" opinion (not that of Mr. Rotterdam), drafted and signed by you and accompanied by a CV of Mr. Rotterdam that appears to have been obtained from his LinkedIn page.

Because the deadline for service of expert reports has passed, the only acceptable remedy to these multiple deficiencies is the withdrawal of your purported expert disclosure. If you do not agree to withdraw the disclosure, we intend to raise the issue with the Board and, if necessary, to move to strike the disclosure as deficient. Should you seek at this time to amend or supplement the disclosure now that the deadline for disclosures has passed, we intend to object and to oppose any effort to serve late disclosures.

Please let me know by Monday, July 23 if you will agree to withdraw your purported disclosure of Mr. Rotterdam, so that we can promptly raise the issue with the Board if necessary.

Thank you,

Paul Llewellyn

KAYE SCHOLER LLP

425 Park Avenue | New York, New York 10022

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PLlewellyn@kayescholer.com | www.kayescholer.com

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EXHIBIT C

2 HERSHEY V. WIESEN

3 JULY 31, 2010

4 ROUGH TRANSCRIPT OF KENNETH B. WIESEN

5 no stips. Pursuant to fed rules of civil

6 procedure.

7 EXAMINATION BY

8 MR. LLEWELLYN:

9 Q. Can you state your name and
10 address for the record, please?

11 A. Kenneth Wiesen. Thirty-six farms
12 sted lane. That's F A R M S T E A D lane,
13 Brookville one word, New York 11545.

14 Q. Mr. Wiesen have you ever been
15 deposed before?

16 A. Yes.

17 Q. More than once?

18 A. Yes.

19 Q. Were these with respect to
20 business matters or purge matters?

21 A. Personal.

22 Q. And I don't need to get into the
23 details of them except I'm just going to ask did
24 they have anything to do with trademarks or
25 intellectual property?

9 that I had produced in response to Hershey's
10 demand for documents.

11 Q. Do you remember giving him
12 anything else?

13 A. I don't think so.

14 Q. Did you correspond with him by
15 e-mail?

16 A. No, by phone.

17 Q. How did you send the documents to
18 him?

19 A. By mail.

20 Q. Have you ever e-mailed or received
21 e-mails from Steve rod detail?

22 A. In relationship to Hershey's?

23 Q. Yes.?

24 A. No.

25 Q. Or in relationship to this

□

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1 Rough Transcript Kenneth B. Wiesen
2 proceeding?

3 A. No tape.

4 Q. If you look at the portion of
5 Plaintiff's Exhibit 19 that says expert witness
6 disclosure, do you see that?

7 A. Yeah.

8 Q. Did you draft this?

9 A. Yes.

10 Q. It's your signature on page -- on

11 the second page of it, right?
 12 A. Yes.
 13 Q. Did Mr. Rod dam see this before
 14 you served it on Hershey's lawyers?
 15 A. No.
 16 Q. You said no?
 17 A. No.
 18 Q. Have you discussed with Mr. Rod
 19 dam his claimed credentials to serve as an
 20 expert in this case?
 21 A. Yes.
 22 Q. What is his expertise in?
 23 A. I think that his expertise is
 24 described in his Curriculum Vitae.
 25 Q. His Curriculum Vitae lists his

□

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1 Rough Transcript Kenneth B. Wiesen
 2 employment history right?
 3 A. Right.
 4 Q. Is there a particular field in
 5 which you're claiming that Mr. Rodder dam is an
 6 expert?
 7 A. I think that he is an expert in
 8 advertising, an expert in pro motions, an expert
 9 in consumer relation, an expert in graphic
 10 design and creation of products for consumers.
 11 These October Leon tape.
 12 Q. Is there anything else that you
 13 claim that he is an expert in with respect to