

Surveys in Trademark Litigation: Likelihood of Confusion and Dilution

Leveraging Survey Evidence to Demonstrate Consumer
Perception in the Marketplace and Avoid Fatal Errors

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INTELLECTUAL PROPERTY SURVEYS: 2016

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I. INTRODUCTION

This paper is the annual follow-up to fourteen previous papers:¹

- (1) "Lanham Act Related Surveys: The Year In Review & Emerging Issues" published in the 1999 Practising Law Institute handbook Litigating Copyright, Trademark & Unfair Competition Cases for the Experienced Practitioner
- (2) "Lanham Act Surveys: 2000" published in the 2000 Practising Law Institute handbook Litigating Copyright, Trademark & Unfair Competition Cases for the Experienced Practitioner
- (3) "Lanham Act Surveys: 2001" published in the 2001 Practising Law Institute handbook Strategies for Litigating Copyright, Trademark & Unfair Competition Cases
- (4) "Lanham Act Surveys: 2002" published in the 2002 Practising Law Institute handbook Strategies for Litigating Copyright, Trademark & Unfair Competition Cases
- (5) "Lanham Act Surveys: 2003" published in American Intellectual Property Law Association annual proceedings, 2003
- (6) "Lanham Act Surveys: 2004" published in the Law Education Institute National CLE Conference proceedings, 2005
- (7) "Lanham Act Surveys: 2005" presented at a meeting of the Intellectual Property Law Section of the State Bar of Georgia, reprinted in the NAD Annual Conference proceedings, 2006, and in the Law Education Institute National CLE Conference proceedings, 2007
- (8) "Intellectual Property Surveys: 2006" published on the INTA website
- (9) "Intellectual Property Surveys: 2007" published on the INTA website
- (10) "Intellectual Property Surveys: 2008-2009" published on the INTA website
- (11) "Intellectual Property Surveys: 2010" published on the INTA website
- (12) "Intellectual Property Surveys: 2011-2012" published on the INTA website
- (13) "Intellectual Property Surveys: 2013-Mid 2014" published on the INTA website
- (14) "Intellectual Property Surveys: Mid 2014-2015" published on the INTA website

The following provides short excerpts of a number of selected opinions referencing survey evidence published in opinions from January 2016 through December 2016,² which might be of interest to the Lanham Act litigator. The bibliographies to this paper provide citations, by circuit and by survey issue, for all identified opinions published during this time period in which survey evidence was referenced.

¹ Copies of the previous papers published by the Practising Law Institute (PLI) are available from the PLI or Westlaw. The previous paper published in the Proceedings of the American Intellectual Property Law Association (AIPLA) is available from the AIPLA. A compilation of all these papers is available at INTA.org. Copies of these papers and the compilation are also available from Ford Bubala & Associates.

² The primary focus of this paper and prior annual reviews of survey evidence is on surveys related to Lanham Act claims. Notwithstanding this focus, this paper, as well as previous papers, may include reference to surveys in other intellectual property matters as they are identified.

II. THE YEAR IN REVIEW: 2016

A. GENERICNESS SURVEYS

VIP Products, LLC v. Jack Daniel's Properties, Inc., 2016 U.S. Dist. LEXIS 133387, *2-*3, *18-*19, (D. Ariz. 2016)

VIP designs, manufactures, markets, and sells chew toys for dogs...[Plaintiff's] Bad Spaniels toy has many similarities to the bottle design for Jack Daniel's Tennessee Sour Mash Whiskey ("Old No. 7 Brand")...

JDPI promptly demanded that VIP stop selling the new toy. VIP responded by filing this suit seeking a declaratory judgment...

...

...VIP argues that the JDTW bottle dress is only a generic identifier of Kentucky Bourbon/Tennessee Whiskey, not Jack Daniel's whiskey in particular.

...

The Court finds that the JDTW bottle dress is a source identifier for Jack Daniel's whiskey. The JDTW bottle dress is a combination bottle and label elements...Under Kendall-Jackson, the inquiry is not whether individual features of the trade dress are nondistinctive, but whether the whole collection of features taken together are nondistinctive.

In re Savvier, LP, 2016 TTAB LEXIS 115, *2, *35-*36, *41-*42 (TTAB 2016) This Opinion is Not a Precedent of the TTAB

Savvier, LP ("Applicant") seeks registration on the Principal Register of the proposed mark TABATA BOOTCAMP (in standard characters) for "Educational services, namely, conducting live classroom and on-line seminars and workshops for introducing professional fitness instructors to training protocols in the field of fitness" in International Class 41.

...

Applicant retained [Applicant's expert], identified as a psychologist and marketing expert, to conduct a Teflon double-blind survey. The survey sample comprised 339 certified fitness instructors or personal trainers who had been teaching in the United States for at least two years. All of the respondents were attendees interviewed at a fitness conference either in Ft. Lauderdale, Florida or in Danvers, Massachusetts. In response to the question about whether "Tabata Bootcamp" is a brand name or common name, 318 respondents (93.8%) indicated that it is a brand name. In response to the question about how they use the "Tabata Bootcamp" name, 225 of the respondents (65.5%) indicated that they use it mainly as a brand name and another 87 respondents (25.7%) indicated that they use it as both a brand name and a common name. According to [Applicant's expert], 91.2% of the respondents indicated that they use the "Tabata Bootcamp" name as a brand name at least some of the time.

...

First, it appears that the survey was conducted at fitness conferences where Applicant was also promoting its services...Second, [Applicant's expert], who conducted

the survey, should not have allowed respondents the option of stating that a term functions both as a common term and as a trademark...Third, [Applicant's expert] included individuals who indicated that the term "tabata bootcamp" functions both as a source indicator and as a term for particular services in his tally of persons who considered the proposed mark to be source indicator...For these reasons, the probative value of Applicant's survey on the question of whether prospective purchasers of Applicant's services view the term "Tabata Bootcamp" as a brand name is diminished.

Perfect Memorials LLC v. United Priority Distributors, 2016 TTAB LEXIS 95, *35-*36 (TTAB 2016) This opinion is not a precedent of the TTAB

As indicated in the results table, 60% of the participants found WEEPING ANGEL URN to be descriptive of Applicant's goods while another 10% found the designation to be generic. While the figures seem impressive on their face, we find the survey fundamentally flawed such that the results can be given only limited weight.

The critical defect lies in how Applicant's mark was set out in the survey. The name to be considered and tested by the survey participants should have been WEEPING ANGEL, Applicant's applied-for mark, and not WEEPING ANGEL URN. Given the structure and syntax of the phrase WEEPING ANGEL URN, as well as the uniform font, it is highly likely that the phrase WEEPING ANGEL was perceived by participants as modifying the word "urn," the generic identity of Applicant's goods, by imparting a fuller description of a significant characteristic of, as opposed to merely suggesting, the pictured product.

B. DESCRIPTIVENESS SURVEYS

Perfect Memorials LLC v. United Priority Distributors, 2016 TTAB LEXIS 95, *1, *22, *30-*31, *35-*36 (TTAB 2016) This opinion is not a precedent of the TTAB

...("Applicant") seeks registration of WEEPING ANGEL, in standard characters, as a mark for goods identified as "funerary urns"...

...

...Generally, where a claim of mere descriptiveness is asserted, it is sufficient for the plaintiff to establish that it is a competitor.

...

Here, Opposer has demonstrated that it sells funerary urns and is a competitor of Applicant.

...

Where a mark consists of multiple words, the mere combination of descriptive words does not necessarily create a nondescriptive word or phrase. If each component retains its merely descriptive significance in relation to the goods or services, the combination results in a composite that is itself merely descriptive. However, a mark comprising a combination of merely descriptive components is registrable if the combination of terms creates a unitary mark with a nondescriptive meaning, or a double

entendre with one meaning being non-descriptive, or if the composite has an incongruous meaning as applied to the goods or services.

...

As indicated in the results table, 60% of the participants found WEEPING ANGEL URN to be descriptive of Applicant's goods while another 10% found the designation to be generic. While the figures seem impressive on their face, we find the survey fundamentally flawed such that the results can be given only limited weight.

The critical defect lies in how Applicant's mark was set out in the survey. The name to be considered and tested by the survey participants should have been WEEPING ANGEL, Applicant's applied-for mark, and not WEEPING ANGEL URN. Given the structure and syntax of the phrase WEEPING ANGEL URN, as well as the uniform font, it is highly likely that the phrase WEEPING ANGEL was perceived by participants as modifying the word "urn," the generic identity of Applicant's goods, by imparting a fuller description of a significant characteristic of, as opposed to merely suggesting, the pictured product.

C. SECONDARY MEANING SURVEYS

LVL XIII Brands, Inc. v. Louis Vuitton Malletier SA, Louis Vuitton North America Inc., 2016 U.S. Dist. LEXIS 124109, *92-*93 (S.D.N.Y. 2016)

In this trademark lawsuit, two fashion companies go toe-to-toe over the right to affix a metal plate to the toe of "luxury" men's sneakers...[Plaintiff] claims that LV... infringed LVL XIII's trademark rights in a metal toe plate...

...

...The [Defendant's expert] survey sampled 587 men, ages 18-34, who had purchased in the past 12 months, or expected to purchase in the next 12 months, a pair of men's shoes costing \$500 or more. It showed that, at most, 3% of respondents associated the TP, shorn of the "LVL XIII" literal element, with a single source. None identified LVL XIII as that source. Those data unmistakably reveal a lack of secondary meaning.

...

In its motion to preclude [Defendant's expert's] report and testimony, LVL XIII identified a number of methodological flaws in the survey, which it claims reduce its probative value. As the Court noted in denying that motion, some of those objections, although not justifying preclusion, have merit. But given LVL XIII's failure to muster *any* contrary survey evidence, even if the factfinder were to afford the [Defendant's expert] survey only limited weight, this factor would still favor [Defendant]...

Verifone, Inc. v. Poynt Co., 2016 U.S. Dist. LEXIS 105950, *4, *11-*12, *17 (D. Del 2016)

...Defendant filed a trademark application for "POYNT" on October 15, 2014. Plaintiff filed trademark applications on December 31, 2014 for "POINT." and "VERIFONE POINT."

...

Secondary Meaning Surveys continued

Plaintiff argues that the Point marks are at the arbitrary or suggestive end of the spectrum, thus inherently distinctive. Defendant responds that the marks are descriptive...As to secondary meaning, defendant commissioned a survey to determine whether "relevant customers regard the term 'point' as an identifier of source in the context of credit card processing machines or services." The survey...included a test group of 250 respondents who were asked about the term "POINT." The respondents were "merchants who accept credit cards at retail stores/locations and who have responsibility for decisions about which credit card processing machine or service their business uses to accept in-person credit card payments." Pertinent findings included that 16.8% of test group respondents associated the term POINT with a particular company or companies that provided credit card processing machines or services. One respondent identified plaintiff as the company, resulting in a 0.4% level of association of the term POINT with plaintiff...

...

...Based on this, plaintiff's advertising and marketing evidence, along with defendant's survey results, the court concludes that the marks are not commercially strong.

Royal Crown Company, Inc. and Dr Pepper/Seven Up, Inc. v. The Coca-Cola Company
The Coca-Cola Company v. Royal Crown Company, Inc. and Dr Pepper/Seven Up, Inc., 2016 TTAB LEXIS 234, *2, *44-*46 (TTAB 2016) This Opinion is Not a Precedent of the TTAB

...Opposers Royal Crown Company, Inc. and Dr Pepper/Seven Up, Inc....oppose registration of 17 applications by The Coca-Cola Company...to register marks incorporating the term ZERO. RC asserts that ZERO is either generic for zero-calorie soft drinks or descriptive without acquired distinctiveness...

...

Finally, TCCC submitted the testimony deposition of [TCCC's expert], who conducted a survey of secondary meaning in the term ZERO for soft drinks in 2008, with exhibits pertaining to the study. In the survey, [TCCC's expert] found that 61% of respondents associated the term ZERO with one company, as opposed to 6% for the term DIET, yielding a net secondary meaning level of 55%; a second type of analysis of the data yielded net secondary meaning of 57%. Moreover, a majority of all 251 respondents -- 131, or 52% -- mentioned either COKE (or variants thereof) or SPRITE when asked with what company's products they associated the term ZERO.

...

...We note, however, that the survey was conducted approximately five years before the close of testimony in early 2014, somewhat diminishing its weight in assessing contemporary public perception. That is not to say it is without probative value in the present proceeding.

Secondary Meaning Surveys continued

Mini Melts, Inc. v. Reckitt Benckiser LLC 2016 TTAB LEXIS 151, *1-*2, *30-*31 (TTAB 2016) This Opinion is a Precedent of the TTAB

Reckitt Benckiser LLC ("Applicant") filed applications to register the marks MINIMELTS and MINI-MELTS (both in standard characters) for "pharmaceutical preparations for use as an expectorant" in International Class 5.

Mini Melts, Inc. ("Opposer") opposed registration...on the ground that Applicant's marks...so resemble Opposer's previously-used and registered mark MINI MELTS (in standard characters, "MINI" disclaimed) for "ice cream" in International Class 30 as to be likely to cause confusion.

...

...Opposer also points to a survey showing that 42% of those interviewed had heard of MINI MELTS ice cream.

...

...Applicant's expert explained that the survey was designed to reach the target geographic areas of Opposer's customer's base. Thus, while 42% of the respondents in those areas had heard of Opposer's brand, we are unwilling to extrapolate, as done by Opposer, the survey results to the consuming public at large.

Farouk Systems Inc. v. AG Global Products LLC, 2016 U.S. Dist. LEXIS 45689, *1-*2, *15-*17 (S.D. Tex 2016)

Farouk and AG both manufacture and sell hair care products.

...

...Farouk uses various red and black color combinations on many of its CHI products. AG sells a heated hair brush...that is black with a red oval along the edge of the handle. Farouk alleges that AG's use of the red and black color scheme constitutes trade dress infringement.

...

...Plaintiff admits that it has not offered any consumer-survey evidence, and provides no explanation for its failure to do so. Defendants, on the other hand, have presented the unchallenged results of a consumer survey...Only 5.9% of the 723 individuals interviewed in the survey associated a red and black color combination with any one company...

...

The Court has carefully considered the evidence presented by Plaintiff and Defendants on the secondary meaning factors. The Court concludes that Farouk has failed to raise a genuine issue of material fact regarding whether its asserted trade dress -- some combination of the colors red and black -- is recognized by the consuming public as an indication that a hair styling [sic] tool using that color combination is a Farouk product...

D. LIKELIHOOD OF CONFUSION SURVEYS

Isle of Capri Casinos, Inc. v. Flynt, 2016 U.S. Dist. LEXIS 152203, *4-*6, *17, *19-*20 (C.D. Cal.2016)

...[P]laintiff alleges that it owns several federal registrations with the United States Patent and Trademark Office relating to the mark "Lady Luck," and one federal registration for the mark "Lucky Lady."...[P]laintiff operates a casino called the "Lady Luck Casino" in Black Hawk, Colorado, plaintiff's nearest geographically to the Los Angeles area.

...
Plaintiff alleges that the operation of defendants' Casino infringes upon the aforementioned marks...On or around July 29, 2016, defendants' Casino opened in Gardena, California, under the name "Larry Flynt's Lucky Lady Casino." Plaintiff alleges that the goods and services offered at defendants' Casino are "identical or closely related to the goods offered" by plaintiff under several "Lady Luck" marks and it's [sic] "Lucky Lady" mark. Plaintiff further alleges that the name of defendants' Casino is "likely to cause confusion of source among consumers."

Plaintiff uses the following mark in association with it's [sic] Lady Luck Casinos:



Defendants use the following mark in association with defendants' Casino:



...
...[Plaintiff 's expert] Report presents...findings based on a survey of 400 consumers over 21 years old who reside in Southern California and either visited a casino in the past twelve months or planned to do so in the following twelve months. The survey followed what is known as the Squirt protocol...(n.6 Participants were first shown plaintiff's Lady Luck Casino mark followed by five other marks, namely, the Larry

Likelihood of Confusion Surveys continued

Flynt's Lucky Lady Casino logo; a Casino Royale logo; the Agua Caliente Casino, Resort, Spa logo; the Lucky Gem Casino logo; and the Winner Casino logo. Participants were then asked: Now thinking back to the first picture you saw, do you think that any of the logos on this screen are used by the same company or by a company that is affiliated, associated or connected with the company that uses the logo in the first picture you saw earlier? If you don't know please feel free to say so.) From the survey, [Plaintiff 's expert] concluded that there was a 31.5% net likelihood of confusion.

...

In this case, the survey is entitled to little weight because it did not replicate marketplace conditions. Unlike products sold side-by-side at a physical store, the parties' compete in a service industry across great distances...Even those consumers who might encounter both marks in close proximity to one another on the internet would still encounter dissimilar marketing and promotional webpages...

North Lock LLC v. C.V. Brewing Co., 2016 TTAB LEXIS 468, *1-*2, *33-*34, *36, *38 (TTAB 2016) This Opinion is Not a Precedent of the TTAB

Applicant, C.V. Brewing Co., seeks registration on the Principal Register of the mark MONUMENTOUS...for "Beer, ale and lager in International Class 32.

...

Opposer, North Lock LLC, has opposed registration of Applicant's mark on the ground that as used on Applicant's goods, the mark so resembles Opposer's previously used and registered mark MONUMENTAL...for "Beer and ale" in International Class 32, as to be likely to cause confusion...

...

...[Opposer's expert] concluded that...[a]fter subtracting the results from [a]...control...the net confusion result was 15.0%.

...

[Opposer's expert] reached this conclusion by "combin[ing] data from questions Q3, Q5, and Q7." Each of those questions show participants images of MONUMENTOUS and MONUMENTAL, both in block form, and ask

Q3: Do you believe the brand name of beer in the first image is produced by [a different brewing company; the same brewing company; don't know/no opinion] as the brand name of beer in the second image?

Q5: Do you believe that the two brewing companies [do not have an affiliation or connection; do have an affiliation or connection; don't know/no opinion]?

Q7: Do you believe that [one of the brewing companies needed permission or approval from the other; neither brewing company needed permission or approval from the other; don't know/no opinion] to use its name?

...

Likelihood of Confusion Surveys continued

...[W]e question whether [Opposer's expert] included in the 15% net confusion result participants who indicated they were confused in whole or in part because the marks appeared in the same block font...

...

...[I]n light of the flaw[] discussed above, we do not find that the [Opposer's expert] survey supports a finding of actual confusion. Nor is it particularly probative of the question of likelihood of confusion.

Citigroup, Inc. v. AT&T Services, Inc., 2016 U.S. Dist. LEXIS 106435, *1-*2, *31-*33 (S.D.N.Y. 2016)

...Citigroup, a leading financial services company, has offered a customer loyalty, reward, and redemption program using the term "THANKYOU" since 2004. AT&T, a telecommunications giant, began implementing a customer loyalty program using the term "AT&T THANKS" this summer, in 2016. Citigroup initiated this action seeking...an injunction prohibiting AT&T's continued use of this name...

...

...AT&T has...submitted affirmative evidence of a lack of confusion in the form of three Eveready surveys...Of these 600 survey participants, only one individual indicated that she believed the company that promoted the product in the commercial she had just witnessed had an association with Citigroup.

...

Citigroup's rebuttal report argues against the propriety of using an Eveready protocol for confusion testing in this case. The primary flaws Citigroup alleges are two-fold. First, because in an Eveready survey the senior user's mark is not shown, it can underestimate confusion if the senior user's mark has low "top-of-mind" awareness, which Citigroup's expert argues it does. (n.9 ...[T]he Court notes the tension between this critique of the Eveready survey design and Citigroup's argument that its advertising expenditures have created acquired distinctiveness for its marks.)

...

...courts have reasoned that where a plaintiff brings a trademark-infringement action, that party's "failure to offer a survey showing the existence of confusion is evidence that the likelihood of confusion cannot be shown."...Thus, the absence of anecdotal evidence of actual confusion, combined with AT&T's surveys demonstrating...no likelihood of confusion, jointly weigh against a finding of a likelihood of confusion.

Joules Limited v. Macy's Merchandising Group, Inc., 2016 U.S. Dist. LEXIS 101151, *1, *4, *10, *12-*15, *23-*29 (S.D.N.Y. 2016)

Plaintiff argues that [the "Maison Jules"] mark is confusingly similar to its own registered "Joules" mark, which is also used in connection with the sale of women's clothing.

...

[Plaintiff's mark:]

The logo for 'Joules' is written in a cursive, handwritten style. The letter 'j' is lowercase and has a long, sweeping tail that loops under the 'o'. The 'o' is lowercase and connected to the 'u'. The 'l' is lowercase and has a small loop at the top. The 'e' is lowercase and has a small loop at the top. The 's' is lowercase and has a small loop at the top.

[Defendant's mark:]

The logo for 'maison Jules' is written in a cursive, handwritten style. The word 'maison' is in a lowercase, sans-serif font. The word 'Jules' is in a cursive, handwritten style, with a capital 'J' and lowercase 'ules'. The 'J' has a long, sweeping tail that loops under the 'o'. The 'o' is lowercase and connected to the 'u'. The 'l' is lowercase and has a small loop at the top. The 'e' is lowercase and has a small loop at the top. The 's' is lowercase and has a small loop at the top.

...

[Plaintiff's expert] used a modified lineup survey [which]...presented respondents with a screen grab of the Joules webpage, with a modified screen grab of the Maison Jules section of the Macy's webpage that did not include the Macy's name or URL, and with a screen grab of a control webpage, in this case the webpage for the clothing brand "Michael Stars."

...

[Plaintiff's expert] found that 24.3% of respondents believed that JOULES and MAISON JULES products were made by the same company or owned by the same company, after accounting for "noise" attributable to the survey format, as measured by the third-party control brand.

...

[Defendant's expert] used an *Eveready* survey to test confusion between JOULES and MAISON JULES...

...

...[Defendant's expert] concluded that only 0.1% of respondents (1 out of 800) might confuse the MAISON JULES and JOULES marks.

...

Applying these considerations to the surveys administered by the parties, the Court concludes that the [Plaintiff's expert] survey suffers from several significant weaknesses that greatly limit its value for measuring actual consumer confusion.

First, the line-up methodology chosen by [Plaintiff's expert] does not accurately reflect the circumstances in which consumers encounter the JOULES and MAISON JULES marks in the marketplace. The line-up format is most appropriate in situations where two marks will appear in close proximity in the marketplace, i.e. in the same store or even on the same shelf. ("[A] sequential presentation of the two marks at issue (or array [including controls]) is appropriate only if it reflects a significant number of real world situations in which both marks at issue are likely to be evaluated sequentially or side-by-side."). But where, as here, the products at issue are not sold in the same stores or, for the most part, on the same websites, such a format may over-estimate confusion by forcing consumers to consider the marks in close proximity in a way they would not in the marketplace...(criticizing a line-up survey used when the products at issue did not appear together in the marketplace because of the "great likelihood that the back-to-back presentation of the parties' marks, followed by questions that asked respondents if they

Likelihood of Confusion Surveys continued

believed the marks were related, suggested to respondents that they *should* believe that a connection existed between the companies' marks"). (n.1 The line-up method is inappropriate even where there are isolated instances where the marks appear side-by-side, because the survey needs to replicate the conditions in which the consumer would ordinarily encounter the two marks...)

Second, the [Plaintiff's expert] study used a modified version of the Maison Jules portion of the Macy's website as its stimulus. By removing the Macy's logo and Macy's URL from the image shown to respondents, the study deprived respondents of context that they would unavoidably encounter in the actual marketplace...

Third, the [Plaintiff's expert] study made use of an inadequate control stimulus, namely the Michael Stars webpage. A control should be as close as possible to the stimulus being tested--in this case, the Maison Jules webpage--except for the allegedly infringing feature. But the control chosen by [Plaintiff's expert] differs in numerous ways from the Maison Jules stimulus. The name Michael Stars is neither acoustically nor semantically similar to Maison Jules...

Finally, the [Plaintiff's expert] study failed to limit its universe of respondents to those who had shopped at Macy's, either online or in store, or were potential Macy's customers. In general when alleging traditional or forward confusion, i.e. that consumers will be confused into believing that a junior user's products (here, MMG's) were made by or affiliated with a senior user (here, Joules), the proper survey universe consists of the junior user's potential customers. Here, because Maison Jules products are available primarily at Macy's stores and www.macys.com, people who have shopped at Macy's or who are likely to become Macy's customers represent the potential customers of Maison Jules who might encounter the mark and be confused.

For these reasons the Court finds that the [Plaintiff's expert] study is of extremely limited use in assessing consumer confusion, and thus gives little weight to its conclusions.

By contrast, the Court finds that the [Defendant's expert's] survey is reliable because it more closely replicates the market conditions...

By surveying 800 respondents, [Defendant's expert's] universe should have included approximately 100-150 respondents who had heard of Joules, based on [Plaintiff's expert's] estimate of 16.2% awareness within the target demographic. This larger sample size thus created a "survey within a survey" to test whether consumers with awareness of Joules were confused by the MAISON JULES mark as it appeared in the marketplace.

Cava Group, Inc. v. Mezeh-Annapolis, LLC, 2016 U.S. Dist. LEXIS 87822, *2,*32-*34 (D. MD. 2016)

In 2011, Cava Group opened its first fast-casual restaurant--Cava Mezze Grill--in Bethesda, Maryland, serving Greek-and Mediterranean-inspired food...

...

Cava Group relies primarily on an expert report...indicating that survey evidence demonstrates the existence of confusion in the marketplace between the Cava Mezze Grill and Mezeh marks...In the survey, respondents who live or work in close proximity to at least one of Cava's or Mezeh's locations were shown pictures of the storefront and

Likelihood of Confusion Surveys continued

takeout menu of only one restaurant and asked questions aimed at determining whether the respondent associated those pictures with the incorrect restaurant. Additionally, a control group of 60 respondents were shown images of an unaffiliated, third party Mediterranean restaurant and asked identical questions...According to [Plaintiff's expert's] results, taking into account any confusion demonstrated in the control group, there is a 12.3 percent net confusion level between Cava Mezze Grill and Mezeh Mediterranean Grill.

...

The Fourth Circuit has indicated that it may be "infer[red] from the case law that survey evidence clearly favors the defendant when it demonstrates a level of confusion much below ten percent." Although the evidence here exceeds that threshold, the Court will not give decisive weight to it at the summary judgment stage in light of the close questions presented by various other factors related to likelihood of confusion.

Mini Melts, Inc. v. Reckitt Benckiser LLC, 2016 TTAB LEXIS 151, *1-*2, *37- *38, *39-*40, *43 (TTAB 2016) This Opinion is a Precedent of the TTAB

Reckitt Benckiser LLC ("Applicant") filed applications to register the marks MINIMELTS and MINI-MELTS (both in standard characters) for "pharmaceutical preparations for use as an expectorant" in International Class 5.

Mini Melts, Inc. ("Opposer") opposed registration...on the ground that Applicant's marks...so resemble Opposer's previously-used and registered mark MINI MELTS (in standard characters, "MINI" disclaimed) for "ice cream" in International Class 30 as to be likely to cause confusion.

...

...Opposer relies upon a survey commissioned by Applicant...In Opposer's view...the survey leads to a conclusion, not of a confusion rate of 7%-8.5% as asserted by Applicant's expert, but rather a rate of 31.5%...

...

The survey results show that 7%-8.5% of the respondents responded "yes" to at least one of four questions regarding "source"...Opposer, in arguing that the survey results actually support its likelihood of confusion claim, adds up the separate response rates to arrive at its conclusion that the survey shows a likelihood of confusion rate of 31.5%...

...

...[W]e agree with Applicant's assessment of its survey...that is, the survey shows a likelihood of confusion rate of 7%-8.5%. Thus, the survey shows, at worst, a *de minimis* level of confusion as to the source of the parties' respective products...

...

...[W]e find that, if anything, the survey supports Applicant's position of no likelihood of confusion.

Likelihood of Confusion Surveys continued

Ate My Heart, Inc. v. Ga Ga Jeans Limited, 2016 TTAB LEXIS 122, *11-*17, *23, *36 (TTAB 2016) This Opinion is Not a Precedent of the TTAB

Ga Ga Jeans Limited ("Applicant") seeks registration on the Principal Register of the mark GAGA JEANS...for "Jeans"...Ate My Heart, Inc. ("Opposer") opposes the application based on likelihood of confusion...

...

Opposer introduced a consumer survey conducted by its expert...to show likely confusion. This online likelihood of confusion survey included 401 participants. The survey respondents consisted of males and females at least 13 years of age who are likely within the next year to purchase jeans. Roughly half were in a test group who were shown and asked about GAGA JEANS and the other half were in a control group who were shown and asked about a fictitious control mark, ZAZA JEANS, and all inquiries were in connection with the product description "jeans." The survey results indicated that when asked who makes or puts out the GAGA JEANS jeans, approximately 66% of respondents identified Lady Gaga as the source or sponsor.

...

Applicant criticizes Opposer's consumer survey on numerous grounds and contends that it lacks probative value. First, Applicant asserts a flaw in the survey population because it did not target Applicant's prospective customers, alleged to be female "children and youngest teenagers," ages 7 to 13 years old. However, Applicant's identification of "jeans" in its application provides no basis to so limit its prospective customers...[W]here the identification is unrestricted, "we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods." *Cunningham, 55 USPQ2d at 1846*.

...

Second, Applicant argues that the sample size is too small, but again relies on its incorrect premise about its narrow target customer base, alleging that only the small subset of responses from very young females may be considered.

...

Next, Applicant alleges biased language in the survey questions about source because of the use of "who" and "whoever" rather than something "more business oriented" such as "which company" or "which manufacturer." Applicant argues that the use of these pronouns rendered it more likely that survey respondents would think of Lady Gaga the performer, an individual, rather than a business entity. Opposer responds that the use of "who" in this manner falls in line with accepted survey formats and points to supporting case law as well as *McCarthy on Trademarks and Unfair Competition* § 32:174 (4th ed. 2015). In addition, Opposer points out that even with the use of "who" and "whoever," a significant portion of control group respondents responded by identifying the fictitious company "Zaza Jeans," rather than an individual, thereby disproving Applicant's claim of bias. Our precedent credits this so-called *Ever-Ready* survey format that uses these pronouns in the survey questions.

...

Finally, Applicant maintains that the approximately 20% validation rate of Opposer's survey falls below the recommended level for litigation surveys...Given that this survey was conducted online with written questions asked in a uniform way, the

Likelihood of Confusion Surveys continued

decreased opportunity for bias or failure by interviewer personnel to follow instructions regarding selection and questioning decreases the degree of validation necessary. Moreover, [Opposer's expert] declaration indicates that the validation level used here exceeds that recommended by the Council of American Survey Research Organizations standards for online data surveys. Accordingly, we find the survey interviews in this case sufficiently validated to accomplish the intended purposes of validation.

...

...Again, given the unrestricted identifications, which control the analysis, Applicant's assertions about alleged actual trade channels that find no basis in the Registration's identification lack merit.

International IP Holdings, LLC v. Green Planet, Inc., 2016 U.S. Dist LEXIS 41778, *2-*3, *27, *29, *31-*33, *36 (E.D. Mich. 2016)

Plaintiffs sell an "energy shot" beverage, "5-hour ENERGY," in two-ounce cylindrical bottles with screw top lids in varying flavors and strengths...

Defendant also sells an energy shot, "8 HR BUZZ," but sells its product in a one-ounce paper pouch with a paper seal that can be snapped or torn off. The two products are shown below.



...

...[Plaintiff's expert's] survey purportedly showing a 16-18% confusion rate—the court finds that these survey results are unreliable, would be excluded from trial, and should not be considered here. [Plaintiff's expert] used questionable controls and an unexplained and flawed method in applying the control results...

...

Here, [Plaintiff's expert] chose controls dramatically different from both 5-hour ENERGY and 8 HR BUZZ. First, only one of the five controls was in the energy-shot market (Vital4U Liquid Energy), and it was a coffee-flavored product, which neither Plaintiffs nor Defendant make. Thus no control fell within the specific product market that the relevant products fit within--fruit (or at least non-coffee) energy-shot products. The other controls were even worse: the mentioned chocolate chip peanut crunch nutritional bar (the Cliff [sic] Bar), a water flavoring drop with some energy component (the Mio Energy Liquid Water Enhancer), an energy-imparting dissolvable mint-flavored sheet that is placed on the tongue (Mint Extra Strength Energy Sheets), and an energy gel (GU Energy Gel). Aside from this product-market problem, none of the other controls

Likelihood of Confusion Surveys continued

included any durational or time aspect to their naming scheme, which both of the test stimuli do.

...

Illuminating the chosen controls, in a section of [Plaintiff's expert's] expert report, "One Factor Affecting the Choice of Appropriate Controls for This Study," he notes that Defendant's product is sold in a pouch and states, "based on advice from counsel, we understand that any confusion related primarily to the package type is not relevant in this case. Because of this, the controls in this case were selected to include products that came in different types of packaging." This instruction from counsel reflects the legal flaw, discussed above, in Plaintiffs' theory of the case. Plaintiffs have failed to appreciate the importance of the packaging to this case.

...

That many other products in the energy-shot market are packaged in small, round plastic bottles, and that Defendant's flat, paper-pouch packaging is so dramatically different, are market realities substantially lessening any likelihood of confusion here. The [Plaintiff's expert] survey does not even attempt to grapple with that reality because Plaintiffs' counsel instructed him not to do so. By giving that instruction, and guiding the expert to shape his study around an incorrect proposition of law, Plaintiffs have rendered their survey unreliable.

Select Comfort Corporation and Select Comfort SC Corporation v. John Baxter; Dires, LLC, 2016 U.S. Dist. LEXIS 147715, *24-*26 (D. Minn.)

Plaintiffs design, manufacture, and market adjustable air beds and related products...under the "Sleep Number" brand...Comfortaire also markets and sells adjustable air beds, marketed under the "Comfortaire" mark.

...

...[T]he Court disagrees with Defendants' assertion that [Plaintiff's expert's] survey is methodologically flawed. First, Defendants take issue with one question that asks about where one could purchase Plaintiffs' bed, arguing that the question is irrelevant as it does not elicit information about the source or affiliation of the beds at issue. The Court disagrees. Instead, the Court finds that the question is relevant to the question of source, affiliation, connection, and sponsorship confusion and, in particular, to the question of whether a customer believes that Plaintiffs' products can be purchased through Defendants (who are not authorized to sell Plaintiff's beds). Second, Defendants argue that this survey question is flawed because it is prefaced with a disclaimer--"[a]side from the results you just selected"--before asking about the location of websites where mattresses could be purchased...Because a prior question touched on who made the mattresses, Defendants argue that participants' responses after the disclaimer (carving out responses on who made mattresses) only relate to where a mattress can be purchased and shed no light on actionable confusion. Again, questioning participants about where one could purchase Plaintiffs' beds is relevant to the issue of source, affiliation, connection, and sponsorship confusion. In addition, any irregularity in the question could be addressed by the test and control groups. Defendants can cross-examine [Plaintiff's expert's] on this point and challenge the weight of his testimony at trial.

E. FALSE ADVERTISING SURVEYS

Vincent D. Mullins, et al. v. Premier Nutrition, 2016 U.S. Dist. LEXIS 51139, *2,*18-*20, *90 (S.D. Cal. 2016)

Plaintiff Kathie Sonner contends defendant Premier Nutrition Corporation peddles what amounts to worthless snake oil: Joint Juice, a liquid dietary supplement containing glucosamine hydrochloride ("glucosamine") and chondroitin sulfate ("chondroitin").

...

As part of this litigation, Premier retained [Defendant's expert] to conduct a consumer survey. His online survey directed questions to 400 respondents--200 of whom had purchased Joint Juice before, and 200 of whom had purchased a product containing glucosamine, but not Joint Juice. The survey began with an open-ended question: "[T]ell us why you decided to purchase Joint Juice."...The respondents had the option to list up to twenty reasons for their purchasing decision, including an option to select "I don't know." Next, [Defendant's expert] asked respondents to select from a list of choices the "reasons or factors that influenced your decision to purchase Joint Juice[.]" The respondents who purchased another glucosamine product answered identical open and closed questions.

...

Based on the survey results, [Defendant's expert] contends the consumer survey results reveal that consumers purchase Joint Juice for myriad reasons, and only 5.5% chose to buy the product because of the statements on the label.

...

Numerous triable issues of fact remain...Sonner's motions to exclude [Defendant's] experts...are denied.

Playtex Products, LLC et al. v. Munchkin, Inc., 2016 U.S. Dist. LEXIS 42261, *4-*6, *25-*29 (S.D.N.Y 2016)

Playtex sells Diaper Genie refill cartridges under its own branded name ("Playtex Refills"), and, starting in early 2013, Munchkin began selling its own brand of refill cartridges designed to fit Playtex's Diaper Genie under the brand name "Nursery Fresh"...At all times relevant to this litigation, Munchkin's packaging plainly stated that the Nursery Fresh Refills "fit[]" certain models of the Diaper Genie...[referred to] as the "Fit Claims."

...

Starting in the fall of 2013, Playtex began redesigning the product...

...

In light of the launch of the Redesigned Diaper Genies, Munchkin informed Playtex that, beginning on March 17, 2014, it would place on its Nursery Fresh Refills packaging an orange sticker that stated:

FIT GUARANTEED: Guaranteed to fit all Diaper Genie® II and Diaper Genie® II Elite pails, and guaranteed to fill all Diaper Genie® Essentials and Diaper Genie® Elite pails purchased prior to March 1, 2014. New

False Advertising Surveys continued

and improved Nursery Fresh[™] refills will be coming out soon to fit the new Diaper Genie® Essentials and Elite pails.

...

Here, Plaintiffs retained [Plaintiff's expert]...to conduct a survey of 406 women, aged 18 years and older, who currently owned a Diaper Genie or planned to purchase one in the next six months, to determine "the extent to which relevant consumers took away an understanding that these Nursery Fresh refills fit all Diaper Genie branded pails, regardless of when they were purchased."...To answer this question, [Plaintiff's expert] divided the women into two groups...the "Test Group," was shown Nursery Fresh Refills packaging with the Fit Claims and Fit Disclaimer...The second group, known as the "Control Group," was shown packaging that was identical to the Test Group, except that the phrase "FIT GUARANTEED"...was replaced with the phrase "Only Fits Diaper Genie Pails Purchased Before March 1, 2014"...

...

Both groups were taken through the same procedure and asked the same eleven questions. First, respondents in the Test Group and the Control Group were given an opportunity to look at and review the packaging relevant to that group...Next, the packaging was covered and respondents were asked several questions about the packaging, including (i) what was the main idea that the packaging communicated, (ii) whether the packaging conveyed anything about whether the refills would or would not fit in the Diaper Genie, and (iii) whether the packaging conveyed anything about whether the refills would or would not fit in the Diaper Genie purchased before or after a particular date.

...

...[Plaintiff's expert] reported that only 36.7% of the Test Group answered yes to whether the packaging communicated whether the refills would or would not fit into the Diaper Genie purchased before or after a particular date, whereas 57.7% of the Control Group answered yes to this question...From these results, [Plaintiff's expert] concluded that "a significant proportion of reasonable consumers" believe that the Nursery Fresh Refills fit the Diaper Genie "regardless of the date on which they were purchased."

...

...the survey elicited responses on whether the packaging communicated *anything* about whether the refills *would* or *would not* fit Diaper Genies purchased before or after a specific date. By phrasing the question in this way, the survey only evaluated the percentage of respondents who took away the message that there is a date restriction on the fit of the Nursery Fresh Refills without providing any information about consumers who might take away the *false* message that the Nursery Fresh Refills would fit pails purchased after March 1, 2014, which is the relevant issue in this case.

...

Because the survey offers no insight into whether "a statistically significant part of the commercial audience holds the false belief allegedly communicated by the challenged advertisement" -- here, that the Nursery Fresh Refills would fit pails purchased after March 1, 2014 -- the Court concludes that the survey is irrelevant.

Themis Bar Review, LLC v. Kaplan, Inc., 2016 U.S. Dist. LEXIS 38920, *1, *11-*13, *15-*17 (S.D. Cal 2016)

Themis and Kaplan are both in the business of preparing law students to take the bar examination...

...

...[T]he question presented is whether Themis' advertising has a tendency to mislead law students.

...

Each party has submitted consumer survey evidence to support its position...[Defendant's expert's] study involved giving an advertisement to 331 current law students, allowing them to look at it for as long as they wanted, and then taking it away from them before asking various questions. Half of the students (the test group) received the actual Themis Ad. The other half (the control group) received a modified version that displayed the footnote text more prominently. After viewing the advertisement, both groups were asked whether the pass rates on the advertisement represented all Themis test takers or only a certain subgroup of test takers. In the test group, 15.7% of the students answered correctly (that the pass rate represented only a subgroup of Themis test takers) and 69.3 % answered incorrectly. In the control group, by contrast, 64.8% of students answered correctly and only 17.6% answered incorrectly.

Themis submitted a study conducted by [Plaintiff expert]. [Plaintiff expert's] study essentially followed the same design as [Defendant's expert's] study save three major modifications. Unlike [Defendant's expert's] study, [Plaintiff expert's] study did not utilize a control group and it allowed respondents to keep the advertisement and reference it while answering the questions. Furthermore...the [Plaintiff expert] study tested two different ads that each contained a significantly more prominent footnote than the Themis Ad Kaplan sued upon. About 84.5% of the 801 students tested correctly answered that the pass rates referred to a certain subgroup of Themis students. About 12% of the students answered incorrectly that the pass rates referred to the entire population of Themis students.

...

...After reviewing...literature on consumer surveys and considering the [Defendant's expert's] report, the Court finds it highly probative on the issue of the Themis Ad's tendency to mislead.

...

...The [Plaintiff expert] study is not probative of whether the Themis Ad sued upon is misleading because it did not test the Themis Ad at issue here. The footnotes in the advertisements presented...were significantly larger...than the footnote contained in the actual Themis Ad that [Defendant expert] tested and Kaplan sued upon.

F. DILUTION SURVEYS

VIP Products, LLC v. Jack Daniel's Properties, Inc., 2016 U.S. Dist. LEXIS 133387, *35-*36, (D. Ariz. 2016)

...VIP claims its parody product, which satirizes JDPI's product, is not actionable under an anti-dilution statute because of its fair use defense.

...

The Court finds that the language of the statute...is directly applicable here and compel the result that the fair use defense is not available to VIP and its alleged parody product. Under the facts here, VIP did use its Bad Spaniels trademark and trade dress as source identifiers of its dog toy, which takes its alleged parody product outside the fair use defense under the TDRA.

Adidas America, Inc., v. Skechers USA, Inc., 2016 U.S. Dist. LEXIS 17371, *6, *45, *47*, *49 (D. OR 2016)

...adidas has identified three current Skechers shoes that adidas believes bear confusingly similar imitations of adidas's trademarks and trade dress.

...

adidas also asserts that Skechers' shoes are diluting the distinctiveness of adidas's Three-Stripe mark and Stan Smith trade dress.

...

...The Three-Stripe mark is unquestionably famous...

...

...adidas's expert survey showed that more than twenty percent of respondents believed that the Skechers Onix shoe was made or approved by adidas, evidence that a substantial number of consumers actually associate the Skechers shoe with adidas.

G. DAUBERT/ADMISSIBILITY ISSUES

Nationwide Mutual Insurance Company v. Nationwide Realty, LLC, 2016 TTAB LEXIS 551, *1, *8-*10 (TTAB 2016) This Opinion is Not a Precedent of the TTAB

Nationwide Mutual Insurance Company ("Petitioner") seeks cancellation of...the mark NATIONWIDE REALTY in standard characters for "real estate brokerage" services...owned by Nationwide Realty, LLC.

...

Petitioner objected...and moved to strike...A survey created by [Respondent's expert] and conducted through the website at SurveyMonkey.com...and her related trial testimony...

[Respondent's expert] testified at trial about a survey that she created and had conducted by SurveyMonkey..."[T]he one question that I asked was: What type of business do you associate this logo with? And then had a copy of the Nationwide insurance...logo that they use everywhere..."[T]he three responses that I gave people an

option for was (sic) insurance, real estate, and banking." She testified that more than 90% of the 203 respondents in the survey associated the logo with insurance...

...

Petitioner objected to the admissibility of [Respondent's expert's] testimony and the survey on the grounds that the survey was not disclosed by Respondent prior to the deadline for expert disclosures, and that it was not conducted in accordance with accepted principles of survey research... We sustain Petitioner's objections on both grounds, and have given the survey no consideration in our decision.

Koninklijke Philips Electronics N.V. v. Hunt Control Systems, Inc., 2016 U.S. Dist. LEXIS 84299. *24-*25 (D.N.J. 2016)

...Hunt asserts that the Court should exclude the [Plaintiff's expert] survey because it does not use proper control methodologies. Philips asserts that controls were not needed for this survey, given that the survey did not have actionable levels of confusion and thus concerns about "noise from preexisting beliefs, yea-saying, and guessing (both random and biased)" are minimal... The only function of a control in this survey would have been to further reduce the number of respondents whose mention of Philips would be considered in the likelihood of confusion analysis, and here, that exclusion would have been pointless...

...

If the lack of a control is problematic in this survey, and the Court is not convinced that it is, this is a technical deficiency which goes to the weight that should be given to the survey, not its admissibility.

International IP Holdings, LLC v. Green Planet, Inc., 2016 U.S. Dist LEXIS 41778, *29-*30 (E.D. Mich. 2016)

...[Plaintiff's expert] used questionable controls and an unexplained and flawed method in applying the control results. Additionally, [Plaintiff's expert's] study was designed around counsel's legally unsupported conclusion that packaging is irrelevant in this case.

...

...[T]he trial court is to act as a gatekeeper by excluding unsupported, unreliable, and speculative expert opinion from trial...

H. PROCEDURAL ISSUES

CTB, Inc. v. Hog Slat, Inc., 2016 U.S. Dist. LEXIS 39024, *37-*39 (E.D.N.C. 2016)

As to the 2013 survey data, CTB's survey expert...conducted surveys in 2013 regarding acquired distinctiveness and secondary meaning of CTB's trade dress, but did not preserve the underlying data, and all that remains now is portions of the data that were apparently manipulated.

...

The court concludes that, as with the competitor advertising materials, CTB had an obligation to preserve the 2013 survey data and that it failed to do so in violation of that obligation. Hog Slat's motion for sanctions is therefore ALLOWED as to the competitor advertising materials. The court further concludes that, given the manifest relevance of this evidence and applicability of the duty to preserve, CTB's destruction of it was willful.

Newegg Inc. v. Schoolhouse Outfitters, LLC, 2016 TTAB LEXIS 96, *2,*8-*9 (TTAB 2016)
This Order is a Precedent of the TTAB

...[Opposer's Expert] conducted a consumer survey on the issue of likelihood of confusion and opined that confusion was likely between Opposer's pleaded NEWEGG marks and Applicant's involved EGGHEAD marks.

...
...Applicant served Opposer with a rebuttal expert report of [Applicant's Expert].

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

...
...Opposer's motion for leave to allow a sur-rebuttal expert report is GRANTED to the extent that Opposer is allowed until April 29, 2016 in which to serve on Applicant a sur-rebuttal expert report authored by [Opposer's Expert] which solely rebuts and/or critiques the methodology of the survey conducted by [Applicant's Expert], as well as the analysis of the data resulting from the survey. [Opposer's Expert], however, is precluded from offering any corrections and/or amplifications to his original expert report or introducing any new evidence or consumer surveys. *See ProMark Brands, 114 USPQ2d at 1241 (Fed. R. Civ. P. 26(e))* does not permit expert to bolster previously disclosed opinions or add new opinions). In turn, Applicant is permitted, if it so chooses, to depose [Opposer's Expert] again once it receives [Opposer's Expert's] sur-rebuttal expert report. This deposition, however, must be limited to the subject matter of [Opposer's Expert's] sur-rebuttal expert report, as restricted by this order. Furthermore, the parties are precluded from seeking any future rebuttal reports from experts.

Select Comfort Corporation v. Tempur Sealy International, Inc., 2016 U.S. Dist. LEXIS 133828, *47-*48 (D. Minn. 2016)

...Plaintiff...contends that [Plaintiff's expert] has not asserted any opinion as to the truth or falsity of any of the claims he asserted and that he confirmed as much in his deposition. Instead, Plaintiff submits that [Plaintiff's expert's] survey tests the materiality and meaning of statements Plaintiff has alleged are false and misleading, and in particular whether certain statements, if found to be false and misleading, convey a particular message that is material or important to consumers. Plaintiff also represents that

[Plaintiff's expert] will not testify at trial as to the truth or falsity of the statements at issue.

Because Plaintiff has represented that [Plaintiff's expert] will not testify as to the truth or falsity of the statements at issue, Defendants' motion on this point is moot. Defendants are correct that experts are not permitted to offer legal conclusions. The Court finds that [Plaintiff's expert's] testimony is presumptively admissible assuming proper foundation is laid. However, should [Plaintiff's expert] attempt to testify as to the truth or falsity of the challenged statements, the Court will entertain appropriate objections at trial.

I. OTHER SURVEY ISSUES

VIP Products, LLC v. Jack Daniel's Properties, Inc., 2016 U.S. Dist. LEXIS 133387, *2-*3, *16, *17 (D. Ariz. 2016)

VIP designs, manufactures, markets, and sells chew toys for dogs...[Plaintiff's] Bad Spaniels toy has many similarities to the bottle design for Jack Daniel's Tennessee Sour Mash Whiskey ("Old No. 7 Brand")...

JDPI promptly demanded that VIP stop selling the new toy. VIP responded by filing this suit seeking a declaratory judgment...

...

...the Bad Spaniels dog toy is not an expressive work for purposes of the application of the Rogers test because VIP makes trademark use of its adaptations of JDPI's trademarks and the Jack Daniel's trade dress to sell a commercial product, its novelty dog toy.

Art Cohen v. Donald J. Trump, 2016 U.S. Dist. LEXIS 117059, *13-*14 (S.D. Cal. 2016)

...Where a company uses "broad marketing techniques...the general adult population may well be a sufficient proxy for the relevant market." *Cairns v. Franklin Mint Co.*, 24 F. Supp. 2d 1013, 1041 (C.D. Cal. 1998).

III. BIBLIOGRAPHY
INTELLECTUAL PROPERTY SURVEYS: 2016
BY CIRCUIT

This appendix contains citations, by issue, for all identified opinions published from January 2016 through December 2016, in which survey evidence was referenced.

First Circuit

Ferring Pharmaceuticals, Inc. v. Braintree Laboratories, Inc., 2016 U.S. Dist. LEXIS 131489 (D. Mass. 2016) (False Advertising)

Second Circuit

LVL XIII Brands, Inc. v. Louis Vuitton Malletier SA, Louis Vuitton North America Inc., 2016 U.S. Dist. LEXIS 124109 (S.D.N.Y. 2016) (Secondary Meaning) (*Daubert*/Admissibility)

Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmbH, 2016 U.S. Dist. LEXIS 16625 (S.D.N.Y. 2016) False Advertising)

Citigroup, Inc. v. AT&T Services, Inc., 2016 U.S. Dist. LEXIS 106435 (S.D.N.Y. 2016) (Likelihood of Confusion)

Joules Limited v. Macy's Merchandising Group, Inc., 2016 U.S. Dist. LEXIS 101151 (S.D.N.Y. 2016) (Likelihood of Confusion)

Playtex Products, LLC et al. v. Munchkin, Inc., 2016 U.S. Dist. LEXIS 42261 (S.D.N.Y. 2016) (False Advertising)

Third Circuit

Verifone, Inc. v. Poynt Co., 2016 U.S. Dist. LEXIS 105950 (D. Del 2016) (Secondary Meaning)

Koninklijke Philips Electronics N.V. v. Hunt Control Systems, Inc., 2016 U.S. Dist. LEXIS 84299 (D.N.J. 2016) (Likelihood of Confusion) (*Daubert*/Admissibility)

Fourth Circuit

BMG Rights Management (US) LLC v. Cox Communications, Inc., 2016 U.S. Dist. LEXIS 105981 (E.D. Va. 2016) (Copyright)

Cava Group, Inc. v. Mezeh-Annapolis, LLC, 2016 U.S. Dist. LEXIS 87822 (D. Md. 2016) (Likelihood of Confusion)

CTB, Inc. v. Hog Slat, Inc., 2016 U.S. Dist. LEXIS 39024 (E.D.N.C. 2016) (Secondary Meaning) (Procedural)

Fifth Circuit

Farouk Systems Inc. v. AG Global Products LLC, 2016 U.S. Dist. LEXIS 45689 (S.D. Tex 2016) (Secondary Meaning)

Sixth Circuit

Louisville Marketing, Inc. d/b/a/ as Jewelry In Candles v. Jewelry Candles, LLC, 2016 U.S. Dist. LEXIS 153328 (W.D. Ky. 2016) (Genericness)

International IP Holdings, LLC v. Green Planet, Inc., 2016 U.S. Dist LEXIS 41778 (E.D. Mich. 2016) (Likelihood of Confusion) (*Daubert*/Admissibility)

Seventh Circuit

There were no citations from the Seventh Circuit during the time period of this article.

Eighth Circuit

Select Comfort Corporation. v. Tempur Sealy International, Inc., 2016 U.S. Dist. LEXIS 133828 (D. Minn. 2016) (False Advertising) (Procedural)

Select Comfort Corporation and Select Comfort SC Corporation v. John Baxter; Dires, LLC, 2016 U.S. Dist. LEXIS 147715 (D. Minn. 2016) (Genericness) (Secondary Meaning) (Likelihood of Confusion)

Ninth Circuit

Isle of Capri Casinos, Inc. v. Flynt, 2016 U.S. Dist. LEXIS 152203 (C.D. Cal.2016) (Likelihood of Confusion)

Suja Life, LLC v. Pines International, Inc., 2016 U.S. Dist. LEXIS 147014 (S.D. Cal. 2016) (Likelihood of Confusion)

VIP Products, LLC v. Jack Daniel's Properties, Inc., 2016 U.S. Dist. LEXIS 133387 (D. Ariz. 2016) (Genericness) (Dilution) (Other)

Art Cohen v. Donald J. Trump, 2016 U.S. Dist. LEXIS 117059 (S.D. Cal. 2016) (False Advertising) (Other)

Vincent Mullins/Sooner, et al. v. Premier Nutrition, 2016 U.S. Dist. LEXIS 51139 (N.D. Cal. 2016) (False Advertising)

Themis Bar Review, LLC v. Kaplan, Inc., 2016 U.S. Dist. LEXIS 38920 (S.D. Cal 2016) (False Advertising)

Adidas America, Inc., v. Skechers USA, Inc., 2016 U.S. Dist. LEXIS 17371 (D. Or. 2016) (Likelihood of Confusion) (Dilution)

Bauer Bros. LLC v. Nike, Inc., 2016 U.S. Dist. LEXIS 13012 (S.D. Cal. 2016) (Likelihood of Confusion)

Tenth Circuit

There were no citations from the Tenth Circuit during the time period of this article.

Eleventh Circuit

Git-R-Done Prods. v. Giterdone C Store, LLC, 2016 U.S. Dist. LEXIS 179201 (S.D. Miss. 2016) (Dilution)

Ass Armor, LLC and Casey Taryn, LLC, Plaintiffs, Vs. Under Armour, Inc., 2016 U.S. Dist. LEXIS 169999 (S.D. Fla. 2016) (Likelihood of Confusion)

Jaime Faith Edmondson v. Velvet Lifestyles, LLC, 2016 U.S. Dist. LEXIS 167564 (S.D. Fla. 2016) (Likelihood of Confusion)

District of Columbia Circuit

Paeteria La Michoacana, Inc. et al. v. Productos Lacteos Tocumbo S.A. De C.V. 2016 U.S. Dist. LEXIS 69621 (D.D.C. 2016) (Likelihood of Confusion)

Trademark Trial & Appeal Board

Nationwide Mutual Insurance Company v. Nationwide Realty, LLC, 2016 TTAB LEXIS 551 (TTAB 2016) This Opinion is Not a Precedent of the TTAB (Likelihood of Confusion)

North Lock LLC v. C.V. Brewing Co., 2016 TTAB LEXIS 468 (TTAB 2016) This Opinion is Not a Precedent of the TTAB (Likelihood of Confusion)

North Atlantic Operating Company, Inc., v. DRL Enterprises, Inc., 2016 TTAB LEXIS 282 (TTAB 2016) This Opinion is not a Precedent of the TTAB (Secondary Meaning)

Royal Crown Company, Inc. and Dr Pepper/Seven Up, Inc. v. The Coca-Cola Company
The Coca-Cola Company v. Royal Crown Company, Inc. and Dr Pepper/Seven Up, Inc., 2016 TTAB LEXIS 234 (TTAB 2016) This Opinion is Not a Precedent of the TTAB (Secondary Meaning)

Mini Melts, Inc. v. Reckitt Benckiser LLC, 2016 TTAB LEXIS 151 (TTAB 2016) This Opinion is a Precedent of the TTAB (Secondary Meaning) (Likelihood of Confusion)

In re Savvier, LP, 2016 TTAB LEXIS 115 (TTAB 2016) This Opinion is Not a Precedent of the TTAB (Genericness)

Ate My Heart, Inc. v. Ga Ga Jeans Limited, 2016 TTAB LEXIS 122 (TTAB 2016) This Opinion is Not a Precedent of the TTAB (Likelihood of Confusion)

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Perfect Memorials LLC v. United Priority Distributors, 2016 TTAB LEXIS 95 (TTAB 2016) This opinion is not a precedent of the TTAB (Genericness)

Monster Energy Company v. Li-Wei Chih, 2016 TTAB LEXIS 43 (TTAB 2016) This Opinion is Not a Precedent of the TTAB (Secondary Meaning)

IV. BIBLIOGRAPHY

INTELLECTUAL PROPERTY SURVEYS: 2016 **BY ISSUE**

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Genericness Surveys

Louisville Marketing, Inc. d/b/a/ as Jewelry In Candles v. Jewelry Candles, LLC, 2016 U.S. Dist. LEXIS 153328 (W.D. Ky. 2016) (Genericness)

VIP Products, LLC v. Jack Daniel's Properties, Inc., 2016 U.S. Dist. LEXIS 133387 (D. Ariz. 2016) (Genericness) (Dilution) (Other)

In re Savvier, LP, 2016 TTAB LEXIS 115 (TTAB 2016) This Opinion is Not a Precedent of the TTAB (Genericness)

Perfect Memorials LLC v. United Priority Distributors, 2016 TTAB LEXIS 95 (TTAB 2016) This opinion is not a precedent of the TTAB (Genericness) (Descriptiveness/Suggestive)

Select Comfort Corporation and Select Comfort SC Corporation v. John Baxter; Dires, LLC, 2016 U.S. Dist. LEXIS 147715 (D. Minn.) (Genericness) (Secondary Meaning) (Likelihood of Confusion)

Descriptiveness/Suggestive Surveys

Perfect Memorials LLC v. United Priority Distributors, 2016 TTAB LEXIS 95 (TTAB 2016) This opinion is not a precedent of the TTAB (Descriptiveness/Suggestive) (Genericness)

Secondary Meaning Surveys

LVL XIII Brands, Inc. v. Louis Vuitton Malletier SA, Louis Vuitton North America Inc., 2016 U.S. Dist. LEXIS 124109 (S.D.N.Y. 2016) (Secondary Meaning) (*Daubert*/Admissibility)

Verifone, Inc. v. Poynt Co., 2016 U.S. Dist. LEXIS 105950 (D. Del 2016) (Secondary Meaning)

North Atlantic Operating Company, Inc., v. DRL Enterprises, Inc., 2016 TTAB LEXIS 282 (TTAB 2016) This Opinion is not a Precedent of the TTAB (Secondary Meaning)

Royal Crown Company, Inc. and Dr Pepper/Seven Up, Inc. v. The Coca-Cola Company
The Coca-Cola Company v. Royal Crown Company, Inc. and Dr Pepper/Seven Up, Inc., 2016 TTAB LEXIS 234 (TTAB 2016) This Opinion is Not a Precedent of the TTAB (Secondary Meaning)

Mini Melts, Inc. v. Reckitt Benckiser LLC, 2016 TTAB LEXIS 151 (TTAB 2016) This Opinion is a Precedent of the TTAB (Secondary Meaning) (Likelihood of Confusion)

Farouk Systems Inc. v. AG Global Products LLC, 2016 U.S. Dist. LEXIS 45689 (S.D. Tex 2016) (Secondary Meaning)

Monster Energy Company v. Li-Wei Chih, 2016 TTAB LEXIS 43 (TTAB 2016) This Opinion is Not a Precedent of the TTAB (Secondary Meaning)

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Likelihood Of Confusion Surveys

Ass Armor, LLC And Casey Taryn, LLC, Plaintiffs, Vs. Under Armour, Inc., 2016 U.S. Dist. LEXIS 169999 (S.D. Fla. 2016) (Likelihood of Confusion)

Jaime Faith Edmondson, et al. v. Velvet Lifestyles, LLC, 2016 U.S. Dist. LEXIS 167564 (S.D. Fla. 2016) (Likelihood of Confusion)

Nationwide Mutual Insurance Company v. Nationwide Realty, LLC, 2016 TTAB LEXIS 551 (TTAB 2016) This Opinion is Not a Precedent of the TTAB (Likelihood of Confusion)

Isle of Capri Casinos, Inc. v. Flynt, 2016 U.S. Dist. LEXIS 152203 (C.D. Cal.2016) (Likelihood of Confusion)

Suja Life, LLC v. Pines International, Inc., 2016 U.S. Dist. LEXIS 147014 (S.D. Cal. 2016) (Likelihood of Confusion)

VIP Products, LLC v. Jack Daniel's Properties, Inc., 2016 U.S. Dist. LEXIS 133387 (D. Ariz. 2016) (Genericness) (Dilution) (Other)

North Lock LLC v. C.V. Brewing Co., 2016 TTAB LEXIS 468 (TTAB 2016) This Opinion is Not a Precedent of the TTAB (Likelihood of Confusion)

Citigroup, Inc. v. AT&T Services, Inc., 2016 U.S. Dist. LEXIS 106435 (S.D.N.Y. 2016) (Likelihood of Confusion)

Joules Limited v. Macy's Merchandising Group, Inc., 2016 U.S. Dist. LEXIS 101151 (S.D.N.Y. 2016) (Likelihood of Confusion)

Cava Group, Inc. v. Mezeh-Annapolis, LLC, 2016 U.S. Dist. LEXIS 87822 (D. Md. 2016) (Likelihood of Confusion)

Koninklijke Philips Electronics N.V. v. Hunt Control Systems, Inc., 2016 U.S. Dist. LEXIS 84299 (D.N.J. 2016) (Likelihood of Confusion) (*Daubert/Admissibility*)

Paeteria La Michoacana, Inc. et al. v. Productos Lacteos Tocumbo S.A. De C.V. 2016 U.S. Dist. LEXIS 69621 (D.D.C. 2016) (Likelihood of Confusion)

Mini Melts, Inc. v. Reckitt Benckiser LLC, 2016 TTAB LEXIS 151 (TTAB 2016) This Opinion is a Precedent of the TTAB (Likelihood of Confusion) (Secondary Meaning)

Ate My Heart, Inc. v. Ga Ga Jeans Limited, 2016 TTAB LEXIS 122 (TTAB 2016) This Opinion is Not a Precedent of the TTAB (Likelihood of Confusion)

International IP Holdings, LLC v. Green Planet, Inc., 2016 U.S. Dist LEXIS 41778 (E.D. Mich. 2016) (Likelihood of Confusion) (*Daubert/Admissibility*)

Adidas America, Inc., v. Skechers USA, Inc., 2016 U.S. Dist. LEXIS 17371 (D. OR 2016) (Likelihood of Confusion) (Dilution)

Bauer Bros. LLC v. Nike, Inc., 2016 U.S. Dist. LEXIS 13012 (S.D. Cal. 2016) (Likelihood of Confusion)

Select Comfort Corporation and Select Comfort SC Corporation v. John Baxter; Dires, LLC, 2016 U.S. Dist. LEXIS 147715 (D. Minn.) (Likelihood of Confusion) (Secondary Meaning) (Genericness)

False Advertising Surveys

Select Comfort Corporation. v. Tempur Sealy International, Inc., 2016 U.S. Dist. LEXIS 133828 (D. Minn. 2016) (False Advertising)

Ferring Pharmaceuticals Inc. v. Braintree Laboratories, Inc., 2016 U.S. Dist. LEXIS 131489 (D. Mass. 2016) (False Advertising)

Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmbH, 2016 U.S. Dist. LEXIS 16625 (S.D.N.Y. 2016) (False Advertising)

Art Cohen v. Donald J. Trump, 2016 U.S. Dist. LEXIS 117059 (S.D. Cal. 2016) (False Advertising) (Other)

Vincent D. Mullins, et al. v. Premier Nutrition, 2016 U.S. Dist. LEXIS 51139 (N.D. Cal. 2016) (False Advertising)

Playtex Products, LLC et al. v. Munchkin, Inc., 2016 U.S. Dist. LEXIS 42261 (S.D.N.Y. 2016) (False Advertising)

Themis Bar Review, LLC v. Kaplan, Inc., 2016 U.S. Dist. LEXIS 38920 (S.D. Cal 2016) (False Advertising)

Fame Surveys

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Dilution Surveys

Git-R-Done Prods. v. Giterdone C Store, LLC, 2016 U.S. Dist. LEXIS 179201 (S.D. Miss. 2016) (Dilution)

VIP Products, LLC v. Jack Daniel's Properties, Inc., 2016 U.S. Dist. LEXIS 133387 (D. Ariz. 2016) (Genericness) (Dilution) (Other)

Adidas America, Inc., v. Skechers USA, Inc., 2016 U.S. Dist. LEXIS 17371 (D. OR 2016) (Dilution)

Copyright Surveys

BMG Rights Management (US) LLC v. Cox Communications, Inc., 2016 U.S. Dist. LEXIS 105981 (E.D. Va. 2016) (Copyright)

Daubert/Admissibility Issues

Nationwide Mutual Insurance Company v. Nationwide Realty, LLC, 2016 TTAB LEXIS 551 (TTAB 2016) This Opinion is Not a Precedent of the TTAB (*Daubert/Admissibility*) (Likelihood of Confusion)

LVL XIII Brands, Inc. v. Louis Vuitton Malletier SA, Louis Vuitton North America Inc., 2016 U.S. Dist. LEXIS 124109 (S.D.N.Y. 2016) (Secondary Meaning) (*Daubert/Admissibility*)

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Procedural Issues

CTB, Inc. v. Hog Slat, Inc., 2016 U.S. Dist. LEXIS 39024, (E.D.N.C. 2016) (Procedural) (Secondary Meaning)

Newegg Inc. v. Schoolhouse Outfitters, LLC, 2016 TTAB LEXIS 96 (TTAB 2016) (Procedural) (Likelihood of Confusion)

Other Survey Issues

VIP Products, LLC v. Jack Daniel's Properties, Inc., 2016 U.S. Dist. LEXIS 133387 (D. Ariz. 2016) (Genericness) (Dilution) (Other)

Art Cohen v. Donald J. Trump, 2016 U.S. Dist. LEXIS 117059 (S.D. Cal. 2016) (Other) (False Advertising)

V. BIOGRAPHICAL INFORMATION

MATTHEW G. EZELL **Ford Bubala & Associates**

Matthew G. Ezell is a partner in the marketing research and consulting firm of Ford Bubala & Associates, located in Huntington Beach, California. As a partner at Ford Bubala & Associates, Matt has been engaged in commercial marketing research and consulting projects in a variety of areas in the consumer product, industrial product, and service sectors of the economy.

For sixteen years, Matt has participated in litigation-related consultancies involving intellectual property matters, including matters pending before U.S. federal courts, the Trademark Trial and Appeal Board of the U.S. Patent and Trademark Office, and the International Trade Commission. He has also participated in litigation-related consultancies involving intellectual property matters in Canada.

In 2015, Matt authored a paper entitled Intellectual Property Surveys: Mid 2014 – 2015, which is a compendium of excerpts from case opinions covering surveys on genericness, descriptiveness/suggestiveness, secondary meaning, likelihood of confusion, false and/or misleading advertising, fame, and dilution. This paper was published by Ford Bubala & Associates and was also published electronically by the INTA.

Matt holds a Bachelor's Degree in Japanese (B.A.) from California State University, Fullerton and a Master's Degree in Linguistics (M.A.) from California State University, Long Beach. Matt also has a Graduate Certificate in Survey Research from the University of Connecticut.

Matt is a member of Insights Association (a merger of The Marketing Research Association (MRA) and the Council of American Survey Research Organizations (CASRO)), the American Marketing Association (AMA), the American Association for Public Opinion Research (AAPOR), and the International Trademark Association (INTA).

Matt is also a member of the Article Solicitation and Development Sub-Committee of the Trademark Reporter (TMR).