

No. 22-148

In the Supreme Court of the United States

JACK DANIEL'S PROPERTIES, INC.,
PETITIONER,

v.

VIP PRODUCTS LLC,
RESPONDENT.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

JOINT APPENDIX

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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

VIP Products, L.L.C., an
Arizona limited liability
company,

Plaintiff,

v.

Jack Daniel's Properties,
Inc., a Delaware corpora-
tion

Defendant.

No. CV 14-02057-PHX-
DGC

**AMENDED
COMPLAINT**

**(Declaratory Judgment;
Cancellation of PTO
Registration)**

Plaintiff, VIP Products, L.L.C. for its amended complaint against defendant Jack Daniel's Properties, Inc., by and through its undersigned counsel, Dickinson Wright PLLC, hereby alleges and states as follows:

I.

THE PARTIES

1. Plaintiff VIP Products, L.L.C. (“Plaintiff”) is an Arizona limited liability company corporation with its principal place of business at 16515 S. 40th Street, Suite 121, Phoenix, Arizona 85048.

2. Upon information and belief, defendant Jack Daniel’s Properties, Inc. (“Defendant” or “Jack Daniel’s”) is a Delaware corporation with its principal place of business at 4040 Civic Center Drive, Suite 528, San Rafael, California, 94903.

3. Defendant is a citizen of a state other than Arizona, within the meaning of 28 U.S.C. § 1332(c)(1). Defendant has caused events to occur in Maricopa County, Arizona out of which this complaint derives.

II.

JURISDICTION

4. This Court has subject matter jurisdiction over this claim for declaratory judgment pursuant to 28 U.S.C. § 2201 and Rule 57, Fed. R. Civ. P., as this is a case of actual controversy within the Court’s jurisdiction. The Court has subject matter jurisdiction over the underlying claim pursuant to (a) 28 U.S.C § 1331, as it involves the right to use a trademark and threatened claims under the Lanham Act.

III.

VENUE

5. Venue is proper in this district under 28 U.S.C. § 1391(a) and (c), as Defendant is subject to personal jurisdiction in this state.

IV.

JURY DEMAND

6. Plaintiff demands a trial by jury on all claims so triable.

V.

FACTS COMMON TO ALL CLAIMS

7. Plaintiff is engaged primarily in the business of designing, manufacturing, and marketing chew toys for dogs.

8. Plaintiff sells several lines of dog chew toys, including the “Tuffy’s” line (durable sewn/soft toys), the “Mighty” line (durable toys made of a different material than the Tuffy’s line), and the “Silly Squeakers” line (durable rubber squeaky novelty dog toys).

9. In approximately July of 2013, VIP introduced its “Bad Spaniels” durable rubber squeaky novelty dog toy.

10. Plaintiff is the owner of all rights in its “Bad Spaniels” trademark and trade dress for its durable rubber squeaky novelty dog toy.

11. Upon information and belief, Defendant is the owner of a number of United States trademarks that incorporate the words “Jack Daniel’s.” The Jack Daniel’s mark is primarily associated with Tennessee sour mash whisky.

12. VIP designed the “Bad Spaniels” label to incorporate a few elements of the Jack Daniel’s label design; for example VIP included a label with black background and white lettering. On the other hand, VIP included drastic differences from the Jack Daniel’s marks and label design in its “Bad Spaniels” label to make it clear that the

product is a parody. For example, VIP selected the words “Bad Spaniels” because they are clearly not “Jack Daniel’s”, included the phrase “Silly Squeakers” on the toy in three locations on the product hanger tag, and placed a prominent disclaimer on the packaging that plainly states: “The product and its design belong to VIP products. This product is not affiliated with Jack Daniel’s.”

13. On or about September 9, 2014, VIP received a demand letter from Defendant dated September 5, 2014 which demanded that VIP, among other things, stop all sales of its parody “Bad Spaniels” novelty dog toy.

14. Defendant claims that it owns “an iconic trade dress consisting of” the following elements, referred to collectively as the “Jack Daniel’s Trade Dress”: (1) “a square bottle with a ribbed neck,” (2) “a black cap,” (3) “a black neck wrap closure with white printing bearing the OLD NO. 7 mark,” and (4) “a black front label with white printing and a filigreed border bearing the JACK DANIEL’S mark depicted in arched lettering at the top of the label, the OLD NO. 7 mark contained within a filigreed oval design in the middle portion of the label beneath the JACK DANIEL’S mark and the words Tennessee Sour Mash Whiskey in the lower portion of the label, with the word ‘Tennessee’ depicted in script.”

15. The following is a depiction of what Defendant claims is the “Jack Daniel’s Trade Dress:”



16. Defendant alleges that “[t]he Jack Daniel’s Trade Dress is inherently distinctive, or acquired distinctiveness . . . by virtue of extensive sales and advertising of Jack Daniel’s Tennessee whiskey featuring the Jack Daniel’s Trade Dress, decades of consumption by the public of Jack Daniel’s Tennessee whiskey packaged in the Jack Daniel’s Trade Dress, extensive consumer recognition of the Jack Daniel’s Trade Dress, and association of the Jack Daniel’s Trade Dress with Jack Daniel’s Tennessee whiskey.”

17. Defendant alleges that “[t]he combination of elements comprising the Jack Daniel’s Trade Dress is non-functional because it is not essential to the use or purpose of Jack Daniel’s Tennessee whiskey and does not affect the cost of quality of the product.”

18. Defendant claims that the Jack Daniel’s Trade Dress is covered, in part, by a PTO registration (No. 4,106,178) “for the three-dimensional configuration of a square shape bottle container . . . for distilled spirits” (the “Jack Daniel’s Bottle Design”).

19. Defendant also claims the PTO registration of the Jack Daniel’s Bottle Design is “valid and subsisting” but admits that the PTO registration has not “become incontestable.”

20. The three-dimensional shape identified in the PTO registration of the Jack Daniel's Bottle Design is depicted as shown below:



21. The PTO registration of the Jack Daniel's Bottle Design states, in part, that: "The mark consists of the three-dimensional configuration of the square shaped bottle container for the goods, having an embossed ridge or scalloped design on the neck portion of the bottle, and an embossed signature design comprised of the words 'JACK DANIEL'."

22. The Jack Daniel's Trade Dress and Jack Daniel's Bottle Shape contain design features common in the industry for distilled spirits, particularly whiskey.

23. The following images depict bottles for bourbon or other corn based whiskey not originating from the Jack Daniels distillery:



24. The bottles depicted in the images above are used by competitors of Jack Daniel's in the sale of distilled spirits, and whiskey in particular.

25. The bottles depicted in the images above include one or more of the following features: (1) "a square bottle with a ribbed neck," (2) "a black cap," (3) "a black neck wrap closure with white printing" and (4) "a black front label with white printing."

26. The bottles depicted in the images above involve one or more of the following features identified as part of the Jack Daniel's Trade Dress: square shaped bottle container; an embossed ridge or scalloped design on the neck portion of the bottle, and an embossed signature on the bottle.

27. The features of the Jack Daniel's Trade Dress and Jack Daniel's Bottle Design are "essential to the use or purpose" or "affect the cost or quality" of the products sold using that trade dress and design and protecting the features of the Trade Dress and Bottle Design would significantly undermine a competitor's ability to compete with Jack Daniel's in the sale of distilled spirits.

28. Elements of the Jake Daniel's Trade Dress and Jack Daniel's Bottle Shape are merely ornamental or decorative and do not function as features signifying products from the Jack Daniels distillery.

29. A square bottle with a ribbed neck is a basic shape or design used for bottles of distilled spirits, including bourbon or other corn based whiskey, produced by more than one distillery owned by different persons.

30. A black cap is used for bottles of distilled spirits, including bourbon or other corn based whiskey, produced by more than one distillery owned by different persons.

31. A black neck wrap closure with white printing is used for bottles of distilled spirits, including bourbon or other corn based whiskey, produced by more than one distillery owned by different persons.

32. A black front label with white printing is used for bottles of distilled spirits, including bourbon or other corn based whiskey, produced by more than one distillery owned by different persons.

33. The following combination of features is used on bottles of distilled spirits, including bourbon or other corn based whiskey, produced by more than one distillery owned by different persons: (1) a square bottle with a ribbed neck, (2) a black cap, (3) a black neck wrap closure with white printing; and (4) a black front label with white printing.

34. The primary significance of the following combination of elements is to identify any distilled spirits, particularly bourbon or other corn based whiskey: (1) a square bottle with a ribbed neck, (2) a black cap, (3) a black neck wrap closure with white printing; and (4) a black front label with white printing.

35. The following combination of features used on bottles of distilled spirits, including bourbon or other corn based whiskey, produced by more than one distillery owned by different persons is generic for those distilled spirits, if not others: (1) a square bottle with a ribbed neck, (2) a black cap, (3) a black neck wrap closure with white printing; and (4) a black front label with white printing.

36. The combination of elements of the Jake Daniel's Trade Dress is generic because their primary significance is to identify any distilled spirits, particularly

bourbon or other corn based whiskey, rather than products from the Jack Daniels distillery.

37. Bottles used by competitors of the Jack Daniel's distillery in the sale of distilled spirits, and whiskey in particular, indicate that the following features of the Jack Daniel's Trade Dress are basic design features, common in the field of distilled spirits.

38. Bottles used by competitors of the Jack Daniel's distillery in the sale of distilled spirits, and whiskey in particular, indicate that the Jack Daniel's Trade Dress is a more refinement of or variation on the following existing trade dress within that field: (1) "a square bottle with a ribbed neck," (2) "a black cap," (3) "a black neck wrap closure with white printing" and (4) "a black front label with white printing."

39. The square-shaped bottle is used for bottles of distilled spirits, including bourbon or other corn based whiskey, produced by more than one distillery owned by different persons.

40. The embossed or scalloped bottle neck is used for bottles of distilled spirits, including bourbon or other corn based whiskey, produced by more than one distillery owned by different persons.

41. An embossed signature on the bottle is used for bottles for distilled spirits, including bourbon or other corn based whiskey, produced by more than one distillery owned by different persons.

42. The following combination of features is used on bottles of distilled spirits, including bourbon or other corn based whiskey, produced by more than one distillery owned by different persons: (1) a square shaped

bottle container; (2) an embossed ridge or scalloped design on the neck portion of the bottle, and (3) an embossed signature on the bottle.

43. The primary significance of the following combination of elements is to identify any distilled spirits, particularly bourbon or other corn based whiskey: (1) a square shaped bottle container; (2) an embossed ridge or scalloped design on the neck portion of the bottle, and (3) an embossed signature on the bottle.

44. The combination of elements of the Jack Daniels Bottle Design is generic because their primary significance is to identify any distilled spirits, particularly bourbon or other corn based whiskey, rather than products from the Jack Daniels distillery.

45. Bottles used by competitors of the Jack Daniel's distillery in the sale of distilled spirits, and whiskey in particular, indicate that the following features of the Jack Daniel's Bottle Design are basic design features, common in the field of distilled spirits.

46. Bottles used by competitors of the Jack Daniel's distillery in the sale of distilled spirits, and whiskey in particular, indicate that the Jack Daniel's Bottle Design is a mere refinement of or variation on the following existing trade dress within that field: (1) a square shaped bottle container; (2) an embossed ridge or scalloped design on the neck portion of the bottle, and (3) an embossed signature on the bottle.

VI.

CLAIMS FOR RELIEF

First Claim for Relief

(Declaratory Judgment)

47. Plaintiff incorporates and realleges herein by this reference Paragraphs 1 through 46, inclusive, as though set forth in full herein.

48. There is an actual and justiciable controversy between Plaintiff and Defendant regarding Plaintiff's use of its "Bad Spaniels" trademark and trade dress for its novelty dog toy.

49. As a matter of law, Plaintiff's use of its "Bad Spaniels" name and mark does not infringe or dilute any claimed trademark rights that Defendant may claim in any "Jack Daniel's" trademark for its Tennessee sour mash whiskey and/or any other product.

Second Claim for Relief

(Declaratory Relief)

50. Plaintiff incorporates and realleges herein by this reference Paragraphs 1 through 49, inclusive, as though set forth in full herein.

51. As a matter of law, the Jack Daniel's Trade Dress and Jack Daniel's Bottle Design are functional and not entitled to trademark protection.

52. As a matter of law, the Jake Daniel's Trade Dress and Jack Daniel's Bottle Design contain merely ornamental or decorative features that do not function as features signifying products from the Jack Daniels distillery and are not entitled to trademark protection.

53. As a matter of law, the combination of elements of the Jake Daniel's Trade Dress is generic and not entitled to trademark protection.

54. As a matter of law, the combination of elements of the Jake Daniel's Bottle Design is generic and not entitled to trademark protection.

55. As a matter of law, the combination of elements of the Jake Daniel's Trade Dress is non-distinctive and not entitled to trademark protection.

56. As a matter of law, the combination of elements of the Jake Daniel's Bottle Design is non-distinctive and not entitled to trademark protection.

Third Claim for Relief

(Cancellation of PTO Registration for Jack Daniel's Bottle Design)

57. Plaintiff incorporates and re-alleges herein by this reference Paragraph 1 through 56, inclusive, as though set forth in full herein.

58. The Jack Daniel's Bottle Design is a functional design and not entitled to PTO registration.

59. The Jack Daniel's Bottle Design contains merely ornamental or decorative features that do not function as features signifying products from the Jack Daniels distillery and are not entitled to PTO registration.

60. The combination of elements of the Jake Daniel's Bottle Design is generic and not entitled to PTO registration.

61. The combination of elements of the Jake Daniel's Bottle Design is nondistinctive and not entitled to PTO registration.

62. Plaintiff is entitled to, and hereby seeks, on Order of this Court pursuant to 15 U.S.C. § 1119 ordering the cancellation of the PTO registration (No. 4,106,178) "for the three-dimensional configuration of a square shape bottle container . . . for distilled spirits" that represents the Jack Daniel's Bottle Design.

WHEREFORE Plaintiff respectfully requests that the Court:

A. Issue a judgment declaring that Plaintiff's use of its "Bad Spaniels" name and mark for its novelty dog toy does not infringe or dilute any trademark rights claimed by Defendant in the name and mark "Jack Daniel's";

B. Issue a judgment declaring that the Jack Daniel's Trade Dress and Jack Daniel's Bottle Design are functional, generic and/or non-distinctive, merely decorative or ornamental and not entitled to trademark protection;

C. Issue an order pursuant to 15 U.S.C. § 1119 ordering cancellation of Defendant's PTO registration (No. 4,106,178) "for the three-dimensional configuration of a square shape bottle container . . . for distilled spirits"; and

D. Grant such additional or other relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED this 20th day of May, 2015.

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[1]

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

VIP PRODUCTS, LLC, an Arizona limited liability company,

Plaintiff and Counterdefendant,

vs.

JACK DANIEL'S PROPERTIES, INC., a Delaware corporation,

Defendant and Counterclaimant.

Case No.
14-cv-02057-PHX-DGC

DEPOSITION OF ELEANOR PHILLIPS

Phoenix, Arizona

April 21, 2015

8:58 a.m.

PREPARED BY:
BECKY BAUMERT
Certified Court Reporter
Certificate #50152

* * *

[48] A. Very few. I have never actually designed the bottle shape.

Q. Have you ever suggested a bottle shape or provided examples of bottle shapes for the Silly Squeaker line?

A. No.

Q. In describing the general process, you say typically starting with a call from Mr. Sacra with a name. Is that the name of a brand of alcoholic beverage?

A. No. A name for the next bottle that we are going to design.

Q. So in the case of the Bad Spaniels, that name is not just Jack Daniel's?

A. Correct.

Q. In the general process has Mr. Sacra typically given you more than simply the name of the next product?

A. Not usually, no.

Q. And when you have gotten these calls, is that the event that causes you to start a production file for each toy?

A. Yes.

Q. Who typically decides on the shape of the bottle on which the label for each toy will appear?

A. I'm not exactly sure who specifically picks that shape.

[49] Q. It's not you?

A. It's not me.

Q. And when Mr. Sacra has called you with a name for a new product, in addition to designing the labels, are there other elements or graphic materials that you anticipate you will be required to design for that product?

A. Yes. The hanging card that usually affixes to the bottle itself or a retail store sell sheet and eventual catalog integration and photographs.

Q. Let's turn now to the Bad Spaniels Product. When did the process of designing that product begin?

A. Roughly two years ago.

Q. What happened?

A. I got a call. I had a typical phone call from Steve. He said, "Bad Spaniels. You figure it out."

MR. LARKIN: I'm sorry. Can you read that back?

(Answer read.)

Q. BY MR. LARKIN: Is that what you recall happened during that call?

A. Yes.

Q. What did you understand Mr. Sacra to mean by "You figure it out"?

A. That's typically his indication that I need to design something, a product for Bad Spaniels.

[50] Q. How long did that first Bad Spaniels call last?

A. I can only guess, 10, 15 seconds.

Q. It was that short?

A. Yes.

Q. A very short --

A. Yes.

Q. Did you take any notes?

A. No.

Q. I guess you really wouldn't need to if it was that short. Did you know what alcoholic beverage he was referencing from Bad Spaniels?

A. It took me some time to figure it out, but, yes.

Q. What was that?

A. Jack Daniel's.

Q. How did you figure that out?

A. Because it rhymes with Bad Spaniels.

Q. Did he tell you anything else about what the label for the new Bad Spaniels product should look like during that first call?

A. No.

MR. LARKIN: Let's mark as Exhibit 9 a two-page document consisting of a sketch and an e-mail.

(Deposition Exhibit Number 9 was marked for 24 identification by the Reporter.)

Q. BY MR. LARKIN: I see you grinning there, so do [...]

* * *

[52]

* * *

Q. Do you recall doing several thumbnail sketches for the Bad Spaniels, the ultimate Bad Spaniels sketch?

A. I recall doing small sketches, but I don't recall specifically what they look like.

Q. Before you began work on the sketches, had you concluded that Bad Spaniels referenced Jack Daniel's?

A. Yes.

Q. Did you do anything to research what the label for Jack Daniel's whiskey looked like?

A. Yes.

Q. What did you do?

A. Pulled it out of my liquor cabinet.

Q. You read my mind. Are you a consumer of Jack Daniel's whiskey?

A. Not often, but sometimes.

Q. When did you first consume it?

A. I think I snuck some from my dad's cabinet when I was about 13.

Q. After you reached legal drinking age, did you from time to time purchase the product?

A. On occasion, yes.

Q. Did you drink it in bars?

A. Sometimes.

Q. Did you keep a bottle at your house?

[53] A. Yes.

Q. Have you seen Jack Daniel's television ads?

A. I don't recall any specifically.

Q. Did you see any Jack Daniel's print ads?

A. Yes.

Q. What do you recall seeing?

A. The black and white label.

Q. Do you work from your home, or do you have a separate office?

A. I now have a separate office.

Q. At the time when Mr. Sacra called on Bad Spaniels, were you working in your home?

A. Yes.

Q. You went to your liquor cabinet and retrieved a bottle of Jack Daniel's whiskey?

A. Yes.

Q. Do you recall what size it was?

A. (Indicating.) Whatever that size is. I'm not sure.

Q. You are indicating --

A. The medium-size bottle.

Q. 750 milliliters?

A. Sounds about right.

Q. Did you recall from memory what the Jack Daniel's label looked like when you went to retrieve the bottle?

[54] A. Yes.

Q. What did you recall it looked like?

A. The black and white label, sort of a cursive font for Tennessee, simple type.

Q. Do you recall what the bottle looked like?

A. Yes.

Q. What did you recall?

A. Sort of a square shape.

Q. Before you retrieved the bottle from your liquor cabinet, did you recall some of the text that was on the label?

A. Some, not all.

Q. What do you recall recalling?

A. That there was a number on it.

Q. Do you remember what the number was?

A. Not until I actually looked at the bottle.

Q. Do you remember where the number was positioned on the bottle from your memory?

A. I remember it was on the label on the neck.

Q. Did you remember any of the other text on the bottle before you retrieved it?

A. I can't say for sure what I remember before I retrieved it.

Q. After you retrieved it, what did you do next?

A. I looked at it, examined it.

[55] Q. Why did you do that?

A. To get inspiration.

Q. Did you then begin sketching what ultimately became the sketch in Exhibit 9?

A. Yes.

Q. Did you have the bottle in front of you when you did that?

A. I believe it was on my desk.

Q. Look at the sketch for a minute, please. Who came up with the notation in the middle in the oval, "Do Old No. 2"?

A. I did.

Q. During your short call with Mr. Sacra, did he tell you anything about how the bottle should be humorous or what the theme of the bottle would be?

A. He didn't need to.

Q. Why is that?

A. Because we have done lots of funny bottles in the past.

Q. Have all of the bottles that you have worked on for VIP had to do with urination or defecation or things of that sort?

A. Not specifically urination or defecation. Other various humorous elements of dog ownership.

Q. Do you remember any that you created that did [56] reference dog poop or urination?

A. Yes.

Q. Which ones?

A. Pissness comes to mind.

Q. You might want to spell that for the reporter.

A. P-i-s-s-n-e-s-s.

Q. Any others that come to mind?

A. Pawschitngo.

Q. We will dispense with that so we don't have to trouble your memory. Is it your understanding that a theme of that sort was what Mr. Sacra wanted for Bad Spaniels?

A. Not necessarily, no.

Q. Is that what you thought you would design and show him?

A. It just came out that way.

Q. You are the one who decided to use Do Old No. 2?

A. Yes.

Q. What did "Old No. 2" refer to there?

A. Going poop.

Q. And why Old No. 2?

A. I thought it was a fun play on Old No. 7 from the Jack Daniel's bottle, to change it to Old No. 2 referring to the dog.

Q. Why did you put "Do Old No. 2" in the sketch [57] inside an oval?

A. Because I wanted it to be similar to the Jack Daniel's bottle.

Q. Is that one of the places where the Old No. 7 mark appears on the Jack Daniel's bottle?

A. Yes.

Q. And the Old No. 7 mark appears within an oval in the Jack Daniel's bottle, correct?

A. Yes.

Q. Farther down is the text “On Your Tennessee carpet.” Do you see that?

A. Yes.

Q. You are the one who selected those words?

A. Yes.

Q. And what were they intended to mean?

A. That, along with the Do Old No. 2, is intended to be your dog taking a poop on your nice lovely carpet.

Q. Why did you use the word “Tennessee” there?

A. Because we wanted it to be a parody of the Jack Daniel’s bottle, and “Tennessee” is a very prominent piece of that.

Q. Do you recall that the word “Tennessee” appears on the Jack Daniel’s bottle in about the same place it appears on the sketch?

A. Yes.

[59] Q. Were there other sketches, what you referred to as thumbnails, that were done that you didn’t like as much as the one that you sent to Mr. Sacra?

A. Not to say that I liked or disliked them. Thumbnails are just sort of a composition, how things should be laid out, and they are not anything, no specific details.

Q. So not as detailed as this sketch?

A. Not at all.

Q. And not as useful, I guess, in the process of creating the product?

A. Correct.

Q. When you completed the sketch as part of Exhibit 9, did you compare it to the Jack Daniel's bottle that you said was sitting on your desk?

A. I didn't necessarily compare it.

Q. Did you believe that basically replicated some elements of the bottle?

* * *

A. BY THE WITNESS: I believe that it had some decent similarities.

* * *

[65] Q. BY MR. LARKIN: Ms. Phillips, do you recognize Exhibit 12?

A. Yes.

Q. What is this?

A. It's a second mock-up design of the Bad Spaniels label.

Q. When in the process did you create the second mock-up?

A. I think it was probably roughly around the same time as the first mock-up. I tend to make things as I go.

Q. The e-mail that's the first page of Exhibit 12, it was sent at 3:47 on Tuesday, June 11th. The e-mail that's the first page of Exhibit 10 with the first mock-up was sent at 3:13 on that day. Does that refresh your recollection -- did you create the two simultaneously?

[66] A. Yes.

Q. In your e-mail to Mr. Sacra you wrote, “Here’s one more version, just some different type treatment on ‘Bad Spaniels,’ maybe a bit closer to the JD label.” What did you mean by “different type treatment”?

A. Moving or taking the Bad Spaniels text out of the banner and just putting it directly on the black background.

Q. Did you do that on your own initiative, or did you have any sort of conversation or contact with Mr. Sacra?

A. I did that on my own.

Q. Is that what made this different type treatment maybe a bit closer to the JD label?

A. Yes.

Q. In what respect was it maybe a bit closer to the JD label?

A. Just in the way that the JD label does not have “Jack Daniel’s” inside the banner. It’s on its own.

Q. Did you go back and look at the bottle that you had pulled out of your liquor cabinet when you created the second mock-up?

A. I believe --

* * *

A. BY THE WITNESS: I believe I referenced it every [67] now and then throughout the process.

Q. BY MR. LARKIN: Was it important to you as the designer on the project to be close to the Jack Daniel’s label?

A. Yes.

Q. Or as you said in your e-mail, closer than your previous one. Was that important to you?

A. Yes.

Q. Why did you depict the words “Bad Spaniels” in your second mock-up in arched format?

A. Because that’s the only way it would really fit underneath the dog and above the oval.

Q. Do you remember that the mark “Jack Daniel’s” appears in arched format on the Jack Daniel’s whiskey label?

A. I don’t recall at this moment.

Q. Do you recall thinking about that at the time you created the second mock-up?

A. I assume.

* * *

Q. BY MR. LARKIN: Ms. Phillips, do you recognize what we have marked as Exhibit 13?

[79] A. Yes.

Q. That appears on the product where the cap would appear on an actual bottle holding liquid?

A. Yes.

Q. Does the cap on the Bad Spaniels product serve any function other than decoration?

A. Does it serve any other function?

Q. You can’t actually remove it or anything of that sort, can you?

A. No.

Q. How did you develop the neck art that appears at the bottom of the fourth page of Exhibit 15?

A. I pulled elements from the label design and made them into the neck design.

Q. And when you did that, did you go back and look at the Jack Daniel's whiskey bottle that you had used originally?

A. No.

Q. Why did a neck design appear on the Bad Spaniels product?

A. Steve requested it.

Q. Did he tell you why he requested it?

A. No. He usually has me create the neck and the bottle cap design for the bottle product.

* * *

[117]

* * *

Q. BY MR. LARKIN: Ms. Phillips, do you recognize Exhibit 42?

A. Yes.

Q. Do you recognize that to be a page from the 2014 VIP catalog?

A. Yes.

Q. Did you create Exhibit 42?

A. Yes.

Q. How did you do that?

A. Photoshop magic.

Q. What did you use -- strike that.

Well, tell me what you did in using Photoshop.

A. The background image of the bar is a stock photography image, and then I superimposed the Bad Spaniels bottles onto the top of the bar, and I also wiped out any recognizable brands that were displayed in the bar background.

[118] Q. Is the stock image that you started with an image of an actual bar?

A. I believe so, yes.

Q. Do you have any information about where it is?

A. No.

Q. Or what restaurant or bar it's in?

A. No.

Q. Some of the bottles and glasses appear in Exhibit 42 upside down. Was that how they appeared in the stock image that you started with?

A. Yes.

Q. Do you know whether the stock image was a shot of an actual bar that someone could enter and buy a drink?

A. I believe it was, yes.

Q. Do you see on the left-hand side hanging upside down a bottle with an oval design, a white on black label and a black neck design?

A. Yes.

Q. Was that a Jack Daniel's bottle in the original Photoshop stock photo -- I'm sorry -- the original stock photo?

A. I actually don't recall.

Q. Why did you excise the brand names?

A. Because that's the proper thing to do when you are not purchasing -- when you are purchasing royalty free [119] and you are going to be displaying it in a catalog with other products. It's a safer route so nobody can claim rights to it.

Q. Did you do that with every bottle that's shown on that bar?

A. With every bottle that had recognizable text, I did, yes.

Q. So looking at the bar as it appears in Exhibit 42, do you believe that no one can tell from viewing the products what they are?

MR. BRAY: Objection, form, foundation.

A. BY THE WITNESS: I believe that while the bottle could still be recognizable to people, there are no actual names that could be read on them.

Q. BY MR. LARKIN: Do you believe that the bottle hanging upside down with the oval and the white on black label could be recognized as a Jack Daniel's bottle, even though the mark has been removed?

A. It could be.

* * *

[1]

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

VIP PRODUCTS, LLC, an Arizona limited liability company,

Plaintiff and Counterdefendant

vs.

JACK DANIEL'S PROPERTIES, INC., a Delaware corporation,

Defendant and Counterclaimant.

Case No.
14-cv-02057-PHX-DGC

DEPOSITION OF STEPHEN SACRA

Phoenix, Arizona

April 23, 2015

8:52 a.m.

PREPARED BY:
GENE RICHARDS, BA, RMR
Certified Reporter
Certificate No. 50026

PREPARED FOR:
(Original)
DISTRICT COURT

[57] A. Page 89?

Q. Yeah.

A. Okay. It's actually page 32, reference VIP00089.

Q. It's catalog page 32. We probably ought to use that Exhibit number. So it's VIP 89 through -- well, is it correct that VIP 89 through VIP 93 showed the bottle toys that were available in 2014?

A. Correct.

Q. Is there a -- you consider each of the products shown in the bottle line to be humorous. Is that correct?

A. That is correct.

Q. Is there something that's -- is there some common humor to each of the products? Or do they -- in your mind, are they funny for different reasons?

MR. BRAY: Objection. Form.

THE WITNESS: There is commonality across the entire product line.

Q. BY MR. LARKIN: What is that?

A. Well, and that would speak to the parody. First of all, they're all parody products. And with the parody product, you realize that people, in their daily lives, take things, maybe, a little bit too seriously. Companies take themselves a little bit too seriously. And there's nothing wrong with people having -- taking a moment to look at the juxtaposition of elements of imagery that they [58] see in their daily lives, and take a moment to sit back and laugh at it and enjoy the humor in an otherwise pretty serious world that we live in.

And, further, you know, we created this line of Silly Squeaker dog toys to reflect things that people have in their everyday life; such as beer bottles, wine bottles, soda bottles, liquor bottles. These are all things that people interact with every single day. So it's something that they can relate to. But then it's also something where we can take imagery in their lives and create humor.

So we take these two elements and put them together. But then as I was talking about earlier about the humanization of the animal, that's been something that's increased over time.

If you remember back in the '70s, we had dogs playing poker. We had dogs playing pool. You had all this. And people, they found humor in those things. And, I mean, it's like a dog would never play pool, but it was funny to see. Or the idea of a dog carrying a product out of the -- out of the -- out of the fridge.

So we're doing a play on a dog who doesn't do a human habit; because a dog is not going to drink beer and you wouldn't feed a dog beer; but with the humanization of the animal, what makes this product funny is you're [59] getting your dog to do something that they normally, in real life, wouldn't be doing. And people find humor in that. Just like the dogs playing pool or the dogs playing poker.

And so you could have a product that's just a beer bottle that says "beer" on it, but that doesn't connect to the consumer. Because the con- -- a person in their daily lives doesn't sit there with a generic bottle that says "beer" on it and says, "Oh, drinking a beer." No. They drink beers, or sodas, or wines, or liquors that are being bombarded in the world around them through advertising, and marketing, and mass -- I don't know if you want

to call it the gray fuzz that surrounds us, that's everywhere.

And so by taking that imagery and putting it onto a product such as this, you're now making the connection back to the consumer with something that they're familiar with as part of their daily lives. And you're only incorporating certain small elements to spark that connection.

So on another level, the common aspect of all these products is that we -- you know, everyone who has a dog, or a cat, or whatever; they deal -- there's a wonderful positive side about how wonderful they are, and happy they are, and loving they are, and they're your [60] favorite, they're your pet, and you love them.

But the other side of a pet is, you know your dogs do things like they pee, and they poop, and lick themselves, and bite things, and do things that humans don't do. So you know there's the dog that is mad at you when you come home and goes poop in front of the door, and you open up the door and you smear it across the floor.

There's your friend that tells you the story about how they walked out of their bedroom and it was dark, and it's like "Oh, my gosh." And it's the dog is humiliating, if you will, the human back by saying, you know, "Hey, you left me alone all day. That wasn't very nice. So I'm going to do this." And maybe they do it just because they can.

But we take those aspects of a dog, and we make fun of the dog by putting them on there. And it opens up -- it's something that everybody talks about in their daily life. It happens every single day to people. And you're making another association with the dog to the bottle.

And as I said before, you know dogs don't drink beer, but if a dog did have a beer, what would it look like? Well, it would be fun and it would be funny, because dogs

are fun and funny. And it would poke fun at the human-dog relationship. So those different aspects [61] are what we put together on three different levels. So you have the dog doing something that is a human behavior.

Q. That would be urination or --

A. No. No. No. Let's take the dog drinking.

Q. Okay, fine. Sorry. Go ahead.

A. That's the dog being humanized. And then you have the dog -- sorry. I lost my train of thought there.

Q. You said there were three levels?

A. Well, I'm saying you have the humanization of the dog. Then you have the poking fun of the human-dog relationship. And bring that all together through using imagery in the human's everyday life and imitating what is a part of their life to make the actual parody work. So it's not just -- it's not just -- I mean, it's -- it's very complex.

But the last part which I talked to earlier is that all the products that we made prior to Silly Squeakers are serious products. And here we are as a serious company. But we're all fun people, and we're all trying to enjoy life and have fun and do things. And a way for us to share that with our consumers is to be able to create a line that is, in a way, kind of parodying us because we're serious and we're making fun now.

And we're doing this to, basically, take the world around you, put it into something small and [62] something fun where a human and a dog can interact, they can laugh at each other, they can laugh at their relationship. They can laugh at the fact that it's poking fun at not only the dog, but imagery and brands that they see in their

daily lives. And, honestly, it's a great thing because we could all use a little bit more humor in our life.

Q. Do you agree that all the bottle products shown on VIP 89 to 93 mimic well-known products?

MR. BRAY: Objection. Form.

THE WITNESS: Each one of them mimics imagery that people have seen in their daily lives at some point or other. Each one of them may reflect differently to each person, depending on the experiences that they've had.

Some person might -- one person may look at it and go, "All right, I get it." And then some people will look at it and go, "Oh, my gosh, this is hilarious," because I've seen this, or I know about this, or this product is awesome. And they see the imagery and --. But, once again, they reflect back on their dog's carrying a beer through the living room. Or it says something funny like "Deers Bite" on the front of it; where deers don't normally bite.

Q. BY MR. LARKIN: You mentioned earlier in you [...]

* * *

[216] [...] a lengthy quotation that ends about line 19 from the Tommy Hilfiger, Timmy Holedigger case. And I want to look at the portion of that quotation that begins on line 13 starting:

"Trademark parodies do convey a message. The message may be simply that business and product images need not always be taken too seriously; a trademark parody reminds us that we are free to laugh at the images and associations linked with the mark. The message also may

be a simple form of entertainment conveyed by juxtaposing the irreverent representation of the trademark with the idealized image created by the mark's owner."

Do you see what I just read?

A. Yes.

Q. What is the message that is conveyed by the Bad Spaniels toy?

A. (No response.)

Q. Is it simply that business and product images need not be always taken too seriously, or is there more?

A. Well, earlier, we went over the entire line of the Silly Squeakers dog toys and what creates a successful parody. And, yes, the message is that, in a very serious world, that we need to sit back and be able to laugh at ourselves and laugh at the humor of the constant bombardment of advertising and marketing that's going on [217] around us that's such a predominant part of our lives. And it's humorous to sit back and poke fun at that and laugh at people and laugh at ourselves.

Q. Well, farther down in your response, beginning on line 22, VIP stated: "So too in this case. The message of the Bad Spaniels parody dog toy is that business and product images of Jack Daniel's need not always be taken seriously." Semicolon. "VIP's trademark parody reminds the public that they are free to laugh at the images and associations linked with the mark." Do you see that?

A. Yep.

Q. What aspect of the business and product image of Jack Daniel's are you communicating need not be taken too seriously?

A. What aspects of the -- I'm sorry, could you repeat the question?

Q. You said the message of the Bad Spaniels parody dog toy is that business and product images of Jack Daniel's need not always be taken too seriously. I just want to know what aspect or --

A. It's the entire aspect. I mean, Jack Daniel's has created a culture around its product. As do all -- most products try to create a culture around that. And all people who are doing that take it pretty seriously, I mean. And by making fun of that or poking at them saying, [218] "Hey, you know what? I know that you are over here trying to be the best of everything and dominate the world. Well, here's something funny."

Q. Farther down, the last line of that page, line 27. Actually, let's start with the sentence on line 25. "The message is also a form of entertainment conveyed by juxtaposing the irreverent representation of defendant's trademark." What do you mean by "irreverent representation of defendant's trademark"?

A. We're taking small portions of identifiable parts of the trade dress that people have visual recognition with, and juxtaposing that. And "juxtaposition," by definition, means comparing two things against one another. And by making -- we're adding elements to that to make it funny and to relate it to dog owners by adding a dog and making it strictly relate to dog and dog products and things that dogs do.

Q. And your answer says, "In this case involving a common dog behavior." Is that going number two?

A. That is correct.

Q. And the juxtaposition you reference on the last line of page nine: "With the idealized image created by JDPI and Jack Daniels"; what are you referring to when you say "idealized image"?

A. Well, the idealized image are all the -- is the [219] imagery that is drawn up in a person's mind when they reference Jack Daniel's. So we take small elements of that to be able to key into the person's memory to trigger them to recognize this isn't Jack Daniels, but it's making fun at Jack Daniels.

Q. What is the idealized image? What does that constitute? How can you articulate it?

A. Idealized --

MR. BRAY: Objection. I think it was asked and answered, but go ahead.

THE WITNESS: Didn't I just answer that?

Q. BY MR. LARKIN: It's your words. I don't know what you meant by "idealized image." What does the image consist of?

A. You're asking for specific details?

Q. Yeah. You're the one who is juxtaposing the idealized image with a common dog behavior that all dog owners can relate to. And I want to know what the idealized image was?

A. No, that's saying I'm combining a dog behavior with the idealized image; meaning that there are elements of the Jack Daniel's bottle that are being combined with a common dog behavior. So "with the idealized image created by JDPI," means that you have an idealized

image of JDPI, and we're taking that image and we're combining that with [220] this other element.

Q. What goes into that image? High quality? Long heritage of sales? What is the image you're combining with the common dog behavior that all dog owners can relate to?

A. Well, the idealized image is -- image is something that you look at. You're talking about feelings, and emotions, and things that are not an image. The things that you're referencing

Q. Well, do you -- in the Bad Spaniels toy, are you commenting in any way on Jack Daniel's business practices?

A. No, absolutely not.

Q. Or the quality of their whiskey?

A. Absolutely not.

Q. Or the way they market the product?

A. Absolutely not.

Q. Or anything else that has to do with their actual business?

A. Absolutely not.

Q. You're not criticizing those in any of -- in anything of that sort. Is that correct?

A. I'm not attempting to disparage Jack Daniel's in any way.

Q. Why did you decide to use the idealized image of Jack Daniel's, rather than the idealized image of another [221] whiskey brand?

A. As we discussed earlier, when going through the creative process of trying to come up with different parodies, you start running them through your mind. And as I discussed earlier, this is the first one that pops up in my mind. It's not easy creating parody.

Q. Look at the next page, please. Numbered page ten.

A. Okay.

Q. Starting at line three, in italics, "Strength of the mark. Plaintiff does not dispute defendant's mark is widely recognized." Do you agree that the Jack Daniel's trademark is very well known in the United States?

MR. BRAY: Objection. Form.

THE WITNESS: I think that Jack Daniel's is more recognizable than other brands. But they've spent a lot of money to make that recognition.

Q. BY MR. LARKIN: Do you believe that the Jack Daniel's label is more recognizable than other brands?

MR. BRAY: Objection. Form, foundation.

THE WITNESS: It depends on the person. I mean, one person could look at it and go, "I don't know what that is." And someone else could look at it and go, "Oh, I know what that is." It's who you've gotten to with your marketing.

* * *

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

VIP Products, L.L.C., an Arizona limited liability company,

Plaintiff and Counterdefendant,

vs.

Jack Daniel's Properties, Inc., a Delaware corporation,

Defendant and Counterclaimant,

No. 2:14-cv-02057-DGC

DEPOSITION OF GERALD L. FORD

Huntington Beach, California

Wednesday, August 19, 2015

**REPORTED BY:
BARBARA R. SWENGEL
RPR, CSR NO. 7415**

[18] (The record was read as follows:

“Q What did Jack Daniel’s counsel want you to test in this case?”)

BY MR. BRAY:

Q Okay. I’ve given you Exhibit 61, which is your declaration, I think, to refresh your recollection. If you could go ahead and answer my question, either referring to the report or in your own words.

A I think that paragraph 2 specifically identifies what I was asked to do.

Q So Jack Daniel’s asked you to conduct a survey --

A Design and cause to conduct a survey to address the issue of likelihood of confusion. Excuse me.

Q Did --

A Specifically, the survey was designed to measure the degree, if any, to which Plaintiff’s Bad Spaniels dog toy is likely to cause confusion as to the source --

THE WITNESS: Am I going slow enough for you? Okay. Sometimes I don’t do that. So you can slap my hand when I do.

-- source, authorization, or approval of or business affiliation or business connection with Jack [...]

* * *

[20] [...] counterclaim and the list. I think Dr. Nowlis actually also lists them in his declaration.

Q We’ll come back to the opinions in this case, but let’s go back to your trial testimony --

A Sure.

Q -- which was Exhibit --

MR. LARKIN: 60.

THE WITNESS: 60.

BY MR. BRAY:

Q We actually haven't even hit any of the cases listed on Exhibit 60 yet --

A I don't think we have.

Q -- because we spent the whole time on the new Nike ITC case. PODS Enterprises versus U-Haul International --

A It was a fame survey.

Q How does a fame survey differ from a confusion survey?

A Generally -- well, I think you probably know the answer to this question. It's -- it's guided by the -- the new federal revision of the Dilution Act where there's a non -- non-exclusive list of factors for what's considered to be fame, and then there is another almost duplicate -- duplicate list of factors that are used to determine whether there's dilution by blurring.

* * *

[22] [...] And our -- our procedures for fame have not changed, really, at all since the Federal Dilution Act and the TDRA.

Q The survey that was conducted in this case, the VIP/Jack Daniel's case that you referred to in your declaration, which has been marked as Exhibit 61, is not a fame survey; correct?

A It's not being offered for that, no.

Q And generally speaking, you ask -- in your field, if -- you would ask different questions to test for fame than you would to test for likelihood of confusion; correct?

A Generally that's true, although I think you have to be cautious. If you get significant levels of likelihood of confusion, I think that a professional could easily say that that provides underlying evidence of fame -- secondary evidence of fame.

Q And counsel on this case did not ask you to conduct a fame survey on any of -- any element of Jack Daniel's intellectual property rights at issue in this case; correct?

A That's correct.

Q And if you had been asked to conduct a fame survey on any of the elements of Jack Daniel's trade -- or intellectual property at issue in this case, you [23] would have asked or you would have had the survey firm ask different questions than the questions that were presented to respondents in Exhibit 61?

A That's generally correct.

Q Okay. Do you agree that Jack Daniel's, the name, is a well-known mark in the United States?

A I have not done any empirical research on that, but I would -- I would -- I know you're not supposed to speculate in a deposition, but I would speculate that it probably is --

Q All right.

A -- well-known and probably a famous mark.

Q Sure. Barbie, that would be another example of a well-known famous mark. Would you agree with that?

MR. LARKIN: Calls for speculation, but if you can answer, go ahead.

THE WITNESS: You know, that's a closer call. There are lots of uses of Barbie that are not associated with toy dolls.

BY MR. BRAY:

Q When you say it's a closer call, is it your belief that Jack Daniel's is a stronger, more well-known mark than Barbie?

A If you restrict Jack Daniel's to -- to whiskey or Tennessee whiskey, then I don't think it's a closer [24] call than Barbie for a toy doll.

I think that Barbie is -- excuse me -- a little bit like Chanel. It's a crowded field, and other people use that mark. I don't think anyone else uses Jack Daniel's that I'm aware of.

Q Are you aware of any third party besides Mattel using Barbie for toys?

A As I sit here, no, but I'm aware of other people using Barbie for a variety of businesses. It was the subject of litigation that we were involved in in federal court in Canada that went up to the Canadian Supreme Court, where they found --

Q So when we're talking Barbie, we're not just totally speculating. It's a case that you had worked on --

A Well, yes.

Q -- at least some elements in the past?

A You know, our practice is not just limited to the United States. It's part of the problem, so --

Q What year were you retained for the Barbie case in Canada, ballpark?

A Probably five years ago.

Q Okay. And what was the issue or what were you asked to do in conjunction with the Barbie case?

A In that case, I was only a consulting expert.

* * *

[85] [...] capability of -- I'm -- will admit -- I'm the first person to admit, I do not have the technical capability, but Matt Ezell, who is here, sitting in this room, has the technical capability of kind of creating anything for an internet survey.

Q Is one possible advantage of a mall intercept survey is that the survey respondent gets a tactile experience with the surveyed product?

MR. LARKIN: Objection to form.

THE WITNESS: I think that that's an advantage if the -- the tactile experience was a source indicator. If it's not a source indicator, then it doesn't seem to me that it matters. It doesn't have any advantage.

BY MR. BRAY:

Q Would one possible advantage be that the -- the survey respondent would get to handle the product at any angle that he or she might like to handle the product?

A That could be an advantage if there were angles where you couldn't show the product adequately,

which I don't think was the case here. You have the product there.

Q Well --

A There's nothing on the back.

Q -- the internet survey that you did did not offer consumers a top view of the product where they [86] could see BS on the cap; correct?

A You could not.

Q And a mall intercept survey respondent would be able to turn the product and view the top, if he or she chose to?

A That's true.

Q And that's a potential advantage to a mall internet survey?

MR. LARKIN: You mean in this case or in general?

BY MR. BRAY:

Q In this case?

A If there was some evidence that the BS on the top was a source indicator or not source indicator, then that may be true. I assume that if you believed that the BS on top of the toy was a source indicator, that you would have done a replication survey to show that it made a difference.

Q In general, is it a potential advantage to mall intercept surveys that a consumer can view the product at any angle he or she chooses as opposed to the limited views that would be provided to him or her through an internet survey?

MR. LARKIN: Objection. Asked and answered.

THE WITNESS: I don't think so. It depends -- [...]

* * *

[126] Q And you didn't testify in either case at any kind of hearing; correct?

A That's correct. And most courts -- you know, like in New York, it's pretty typical to have live testimony, either in PI cases --

Q Sure.

A -- like -- and I don't know what it's like in Phoenix, but in the Central District of California, there's actually a rule that says you can't have live witnesses.

Q State court in Phoenix, you get a half day pretty quickly. In federal court you get typically more like a day, spread over a couple of days, and it takes longer --

A Okay.

Q -- in my experience.

What was the name of the parody -- the parody product was South Butt?

A That's my recollection.

Q And what was it?

A It -- it was South Butt.

Q But what was --

MR. LARKIN: What was the product?

BY MR. BRAY:

Q Was there a product associated with it?

* * *

[130] [...] testifying to at trial; correct?

A Not unless asked.

Q Okay. And you were not asked in -- when you conducted -- when Jack Daniel's or its counsel commissioned you as an expert, they did not ask you to opine as to whether any element of the Jack Daniel's trade dress had acquired distinctiveness; correct?

A No. We never tested any particular element. We tested the overall trade dress.

Q And when you tested the overall trade dress, you weren't testing it for acquired distinctiveness? You were testing likelihood of confusion; correct?

A Absolutely.

Q Have you ever conducted a survey in order to test acquired distinctiveness of one or more elements of the trade dress?

A Probably that would be true to all of the Adidas cases.

Q Okay.

A There were a variety of trade dress elements both in the shoe shape as well as in the stripes coming -- downward stripes from the laces to the sole.

Q And generally speaking, a survey that would test acquired distinctiveness would ask different questions than a survey you would use to test likelihood [131] of confusion; correct?

MR. LARKIN: Asked and answered.

THE WITNESS: You would generally ask an association question.

BY MR. BRAY:

Q Do you acknowledge -- well, Professor McCarthy, in his treatise, writes, quote, parody is a recognized form of free speech protected by the First Amendment, end quote.

Do you agree with that?

MR. LARKIN: That calls for a legal conclusion.

THE WITNESS: I agree he says that, but he makes exceptions to that when he says it's not covered when there's likelihood of confusion.

BY MR. BRAY:

Q Do you agree with the general principle that parody is a recognized form of free speech --

MR. LARKIN: Same objection.

BY MR. BRAY:

Q -- protected by the First Amendment?

MR. LARKIN: Sorry. Same objection.

THE WITNESS: I have read that. I'm not a lawyer, so I -- you're asking me really legal questions now.

BY MR. BRAY:

[....]

* * *

[142] [...] and the courts have recognized that, and they have relied on my surveys in the past.

Q Okay. At a 20,000 foot level, explain to me the importance of a control in a trademark -- in the trademark survey likelihood of confusion context.

A Okay. Well, it's kind of a more modern concept. You know, we went for about 25 years where we didn't do controls. We relied on the why do you say that question as the basis for determining why there was a likelihood of confusion. It's only maybe in the last ten years that surveys have become -- and I'll use the word -- more sophisticated, where they include a test cell and a control cell.

Have we done surveys without control cells that the courts have relied on in the last ten years? The one that pops to mind is the Nissan computer case in front of Judge Pregerson in the Central District that had no control. He relied on the survey.

So are they absolutely necessary? The answer is no.

Q Is state of the art today in your business to have a control?

A I think it is traditional.

Q Okay. What's the purpose of having a control?

A The purpose of having a control is to -- much [143] like a placebo is to eliminate the active ingredients that are in the test cell so that you're controlling for only the claimed elements.

MR. BRAY: Can I have your copy of the answer, because I wrote on mine.

MR. LARKIN: Yeah.

MR. BRAY: I'm going to mark this as Exhibit 63.

(Plaintiff's Exhibit 63 was marked for identification.)

THE WITNESS: Thank you.

BY MR. BRAY:

Q Can you explain to me, before I ask you about Exhibit 63 --

A Sure.

Q -- the concept of noise in a trademark survey?

A It's kind of a term of art, but it is generally mismeasurement error. It's when you allow -- the way I would explain it is when you allow the control to include elements that you're testing that you potentially could have noise in your control results. In other words, it's not true non-confusion. It's kind of confusion created by an improper control.

Q I'm going to have you look at Exhibit 62, which is the --

A I'm looking at it.

* * *

[146] [...] a likelihood of confusion survey, and you got one percent likelihood of confusion. Then I don't think the control would be necessary because you're not really controlling for anything at that point.

Q Was a control necessary in this case, the VIP/Jack Daniel's case?

A Well, I suspect if you got no likelihood of confusion, we probably wouldn't have executed the control, so --

Q So a short answer is in your expert opinion, a control was necessary in this case?

A In this case, I thought it was appropriate.

Q All right. In this chapter that you wrote of Exhibit 62, you went on to say that the control cells are designed to, quote, account for such things as market share, popularity, preexisting beliefs, et cetera -- factors oftentimes referred to as noise or mismeasurement error.

Is that still your belief today?

A Yes. You read correctly.

Q And is it your expert opinion, Dr. Ford, that a -- some of the noise that you might get in a survey can arise from preexisting beliefs?

A It's probably more common in false advertising cases than it is in trademark cases, but you would -- [147] you would want to eliminate from the control all the elements that you're trying to test for in the test cell.

Q Well, the noise that you talk about eliminating through a control isn't all regarding controlling for the claimed elements, but in certain cases, anyway, control cells could be used to account for such things as market share; correct? That's what you wrote in the treatise.

A Yes.

Q And in certain cases, the control could be used to account for preexisting beliefs; correct?

A In certain cases, that's correct.

Q And that's what you wrote in this treatise; correct?

A Yes.

Q And in certain cases, the control could be used to account for popularity; correct?

A Which is maybe another way of saying market share.

Q Okay.

A If I showed you a pair of athletic shoes and asked you who put them out, it doesn't matter whether they have a swoosh on them or not. You're liable to get some level of Nike because it's -- has such a high [148] market share. It's so popular. So you would want a control for that by showing another pair of athletic shoes that didn't have any of the claimed trademark or trade dress ingredients.

Q And you referred to the factors oftentimes referred to as noise or, quote, unquote, mismeasurement error. Are those synonymous concepts, noise and mismeasurement?

A I think they are. I mean I don't really know what noise is. I think we use both words because I think it communicates better to a fact finder what the control is intended to do.

This whole concept of noise is kind of a term of art -- term of survey art that I would expect most federal judges wouldn't understand what the heck noise is. They think it's somebody coughing in their courtroom or clearing their throat.

Q Or cell phones going off, which really upsets them.

A Oh, it makes them cranky.

Q The only people I see judges forgive are jury members.

A Are what?

Q Jurors.

MR. LARKIN: Jurors.

* * *

[150] [...] there.

BY MR. BRAY:

Q -- “are likely to result in an estimate net of noise.”

Do you see that?

A Yes.

Q So in this case -- well, I don’t want to talk about this case.

The North Face case that you gave as an example, there was one percent in the control and 29 percent or so in the test group?

A That’s correct.

Q The net of noise was the difference -- the delta between the two?

A Correct.

Q Okay. The net effect of using a control cell to eliminate noise typically is to reduce the percentage of respondents that you would say were confused by the two products?

MR. LARKIN: Objection to --

BY MR. BRAY:

Q I probably asked that --

A Probably that’s the wrong way to ask it, but it’s a way to -- it’s a means upon which you can reduce the

percentage of people that express confusion and [151] remove from those -- that portion of the mark to remove that portion of the population that is confused for reasons that don't have anything to do with the trademarks at issue.

Q And, again, one of those --

MR. BRAY: Can you read back his answer, please?

(The record was read as follows:

"A Probably that's the wrong way to ask it, but it's a way to -- it's a means upon which you can reduce the percentage of people that express confusion and remove from those -- that portion of the mark to remove that portion of the population that is confused for reasons that don't have anything to do with the trademarks at issue.")

BY MR. BRAY:

Q And the reasons that don't have anything to do with the trademark at issue are what constitute the noise; correct?

A Right. Market share of popularity, preexisting beliefs.

We're keeping you up?

Q It's my afternoon lull. Big lunch.

[152] A I want to see your highlighter. It's kind of buried here, so I'll --

Q Because you in your -- in this case, the -- the test cell had approximately a 29 percent response rate that you associate with confusion, because that number

was in that range, it's your opinion that it would be necessary to have a control cell to test for noise or mismeasurement errors?

A It would be our general practice, yes.

Q In fact, it would be state-of-the-art best practice for trademark survey experts, correct, to use a control cell?

A Well, I gave you an example of where it wouldn't matter.

Q Sure. What I'm asking is in this case, with 29 percent.

A In this case, with 29 percent, I guess you -- in fact, I shouldn't say I guess. I know you'd want to be assured that that confusion is attributable to the combination of elements that are claimed to be infringed.

Q And you have not -- you don't have any opinion in this case as to whether any of the elements of Jack Daniel's trade dress at issue or claimed by Jack Daniel's in this case have acquired secondary meaning; [153] correct?

MR. LARKIN: Asked and answered at least twice.

Go ahead.

THE WITNESS: Maybe three times.

I didn't check -- I didn't test for any particular element. I tested for a combination of elements that are identified in the answer and counterclaim, I think, on page 6.

Bless you.

MR. LARKIN: Thank you.

THE WITNESS: Exhibit 63.

BY MR. BRAY:

Q Okay. Let's turn to that. You said the purpose of the control cell is to control for only the claimed elements?

A Correct.

Q As well as to eliminate noise or mismeasurement as to market share, popularity, preexisting beliefs; correct?

A Correct.

Q And so what elements did you control for?

A I direct you to page 5 of the answer and counterclaims in paragraph 6.

Q Okay. So you controlled for a square bottle?

A Correct.

* * *

[242] A They can click to enlarge.

Q Would it be easier for a consumer to read the brand names if the consumer was actually in the store as opposed to viewing something on a computer monitor?

A You know, may or may not be. Depends upon how close they were, how interested they were in reading the brand names. There are a number of factors there that you would have to know the answer to.

Q And you can't see the back -- any words on the back of the Bad Spaniel product in the picture on page 7 of your report; correct?

A No, and there are no words on the back.

Q And -- well, there are words on the back of the hang tag; correct?

A But they saw the hang tag, both front and back, enlarged.

Q Would a consumer seeing the -- the products on page 7 of a report just on a computer screen have any way of knowing whether -- or how hard or soft or squeezable a product is?

MR. LARKIN: Objection to form. Compound question.

Do you understand?

THE WITNESS: No. They just knew it was a dog toy.

[243] BY MR. BRAY:

Q Okay. Would a consumer looking at the picture on Exhibit -- on page 7 of Exhibit 61 have any way of knowing which products displayed squeak when squeezed?

A No.

Q And they'd have no way of knowing whether any of the products pictured on page 7 of your report emit any sound when used; correct?

A That's correct.

Q And a consumer looking at the products displayed on page 7 of your report would not -- on a computer screen would not be able to determine what any of those products smelled like; correct?

A Smelled like?

Q Yeah.

A No.

Q And if a consumer actually saw the products in the store, if he or she was in the store at which the picture on page 7 was taken, he or she would be able to answer -- determine answers to all those questions if he or she was there in person; correct?

A If she chose -- if he or she chose to touch the products, yes.

Q Look at the pictures on page 8 of your report.

A I'm there.

[244] Q Can you read the entirety of the Silly Squeakers brand name on the front of the hang tag in the picture on Exhibit -- page --

A No.

Q -- 8 of your report?

A You can't.

Q And Squeakers is kind of covered up?

A Correct.

Q If a consumer saw the product in the store and moved the hang tag, would he or she be able to see the entire brand name?

MR. LARKIN: Calls for speculation.

You can answer.

THE WITNESS: They may or may not. I'm not sure.

BY MR. BRAY:

Q Is it -- if the product -- is it possible to maneuver the hang tag such that you can read Silly Squeakers if that product -- if you were in a store with that product?

A I guess it depends on whether or not you thought you would get in trouble with the store owner if you started messing around with the hang tags.

Q At least theoretically it's possible to move it around a little bit, and you can see Silly Squeakers or [245] the Squeakers part that's covered up; right?

A Correct.

Q Can -- looking at the pictures on page 8 of --

A You can read Silly Squeakers on the back of the hang tag, which --

Q But not the front?

A Because people had both the back and the front.

Q Sure. But on the front picture, you're not able to see Squeakers; right?

MR. LARKIN: Asked and answered.

THE WITNESS: That's correct.

BY MR. BRAY:

Q Okay. And on the picture -- on pictures on page 8 of your report, can you read any of the text on the front of the hang tag?

A No.

Q And, again, if a consumer actually handled the product at the store, would it be possible to maneuver

the hang tag such that he or she would be able to read at least some of the text on --

A I don't know about easily. You may be able to maneuver it.

Q Okay. Can you go back to Exhibit 64, which was the E-Mail? I think we marked it. It's a stack of E-Mails -- [...]

* * *

[251] A I think so. They were not asked that question. They were asked standard likelihood of confusion questions right out of the Lanham Act.

Q If somehow they were asked that question or they said to you unequivocally that, "The only reason I'm answering the affiliation or sponsorship question Jack Daniel's is because I know trademark law requires spoofs to have the permission of the trademark holder," in that instance, that hypothetical, would it be proper to code that respondent in the confused cohort?

MR. LARKIN: Objection to form. It's obviously a hypothetical, but if you understand the question, Dr. Ford, go ahead.

THE WITNESS: I generally understand what you're asking.

I think that McCarthy said it still is likelihood of confusion.

BY MR. BRAY:

Q So --

A Even if they have a misinterpretation of what the law might be, it's their state of mind. They were not asked whether they had to have permission or they

got permission. They were not asked either one of those questions.

Q Give me one minute, Dr. Ford. Thank you
for [...]

* * *

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

VIP Products, L.L.C., an
Arizona limited liability
company,

Plaintiff,

v.

Jack Daniel's Properties,
Inc., a Delaware corpora-
tion

Defendant.

No. 2:14-cv-02057-DGC

**EXPERT REBUTTAL
REPORT OF
STEPHEN NOWLIS**

Jack Daniel's Properties,
Inc., a Delaware corpora-
tion,

Counterclaimant,

v.

VIP Products, LLC, an Ari-
zona limited liability com-
pany,

Counterdefendant

I, Dr. Stephen M. Nowlis, state as follows:

QUALIFICATIONS

1. I am the August A. Busch Jr. Distinguished Professor of Marketing in the Olin Business School at Washington University in St. Louis. A copy of my curriculum vitae is attached as Appendix A, which includes a list of the cases where I have testified in the last four

years. I hold a Ph.D. in Marketing and a Master's degree in Business Administration (MBA) from the University of California at Berkeley, Haas School of Business, and a Bachelor's degree in Economics from Stanford University. My field of expertise is marketing, consumer behavior, survey methods, and decision making. I have acquired this expertise through my training as a doctoral student, my research and publications, my editorial duties, my work experience, past expert witness consulting work, and classes that I have taught.

2. I teach marketing management to Executive MBA students and consumer behavior to Ph.D. students. In my courses, I cover topics such as buyer behavior, developing marketing plans, advertising, sales promotions, retailing, marketing research, and product development. I also recently taught Brand Management to MBA students. After completing my undergraduate studies and before starting my MBA program, I worked for two years as an Assistant Buyer for a major retail chain. In this capacity, I analyzed customer purchase patterns to determine why some products sold better than others.
3. I have won several awards for my research. One of these awards was the 2001 Early Career Contribution Award from the Society for Consumer Psychology – Sheth Foundation, which is given annually to the most productive young scholar in the field of consumer behavior/marketing. Another of these awards was the 2001 O'Dell Award, given to the *Journal of Marketing Research* (the major journal for marketing research topics) article that has had the greatest impact on the marketing field in the previous five years. This paper

looked at the influence of new product features on consumer brand choice. I also was found to be one of the top 20 most productive marketing professors in the world in terms of my publications in the top-tier marketing and consumer behavior journals.

4. I currently serve as an Associate Editor at the *Journal of Marketing Research*. As an Associate Editor, I review many papers and help determine whether they are acceptable for publication. The criteria used to assess these papers include how much of a contribution a paper makes, whether its theoretical framework is sound, and whether the data were collected using a proper methodology. I also serve on the editorial review boards of the *Journal of Consumer Research*, *Journal of Marketing*, *Journal of Consumer Psychology*, and *Marketing Letters*. In this capacity, I act as a regular reviewer of papers submitted to these journals, to determine whether the papers are fit for publication.
5. I was asked by counsel representing VIP Products LLC in the matter of VIP Products LLC v. Jack Daniel's Properties and Jack Daniel's Properties v. VIP Products LLC to review the Expert Report submitted by Dr. Gerald R. Ford. I was asked to assess the claim made by Jack Daniel's Properties that the Ford survey tests and shows that the alleged Jack Daniel's trade dress (1) is famous and (2) has acquired distinctiveness or secondary meaning.¹ I was also asked to examine the Ford survey in terms of its conclusions

¹ Defendant and Counterclaimant Jack Daniels Properties, Inc.'s Responses to Plaintiff and Counter-Defendant's First Set of Non-Uniform Interrogatories, p. 8, 12, 15.

regarding likelihood of confusion. In addition, I was asked to examine the claim made by Jack Daniel's Properties that a different survey, conducted between February 5-8, 2015 by ORC, yielded similar likelihood-of-confusion results to the Ford survey.²

6. Please see Appendix B listing the documents I have reviewed. As I continue to receive and review additional information, I reserve the right to supplement, revise, or further explain the opinions contained in this report. I am being compensated for my work on this matter at the rate of \$650 an hour. My compensation is not contingent upon the conclusions I reach nor on the outcome of this matter.

SUMMARY OF OPINIONS

7. The purpose of the Ford survey was, in Dr. Ford's own words, to only "address the issue of likelihood of confusion."³ Since the Ford survey was designed to only test likelihood of confusion, it is therefore improper to claim that it also tests for fame and acquired distinctiveness. Thus, I do not agree with the claim by Jack Daniel's Properties that the Ford survey tests for both fame and acquired distinctiveness, and I do not agree that its results show that the alleged Jack Daniel's trade dress is both famous and has acquired distinctiveness. In addition, my analysis of Dr. Ford's survey on likelihood of confusion shows that its methodological flaws are so serious that they render its results

² Defendant and Counterclaimant Jack Daniels Properties, Inc.'s Responses to Plaintiff and Counter-Defendant's First Set of Non-Uniform Interrogatories, p. 17.

³ Ford Declaration, p. 2; see also, Defendant and Counterclaimant Jack Daniels Properties, Inc.'s Responses to Plaintiff and Counter-Defendant's First Set of Non-Uniform Interrogatories, p. 17, where it is noted that Dr. Ford's survey assesses likelihood of confusion.

meaningless for assessing the likelihood of confusion in this matter. In particular, Dr. Ford designed an improper Control stimulus, did not mimic marketplace conditions, and improperly analyzed his data. Finally, I do not agree with the claim made by Jack Daniel's Properties that the ORC study provides similar results to the Ford study regarding likelihood of confusion.

**The Ford Survey was Clearly Not Designed to Test
for Fame**

8. Jack Daniel's Properties claims that the Ford survey shows that the alleged Jack Daniel's trade dress is famous.⁴ However, Dr. Ford mentions that the purpose of his survey was only to "address the issue of likelihood of confusion."⁵ Indeed, as Dr. Ford himself notes in a published chapter, fame is a different issue, and is analyzed differently, than likelihood of confusion.⁶ In particular, as Dr. Ford notes, "Fame is addressed by a review of such factors as the duration, extent, and geographic reach of advertising and promotion of the mark; the amount, volume, and geographic extent of sales of goods or services offered under the mark; the extent of actual recognition of the mark; and whether

⁴ Defendant and Counterclaimant Jack Daniels Properties, Inc.'s Responses to Plaintiff and Counter-Defendant's First Set of Non-Uniform Interrogatories, p. 8, 15.

⁵ Ford Declaration, p. 2; see also, Defendant and Counterclaimant Jack Daniels Properties, Inc.'s Responses to Plaintiff and Counter-Defendant's First Set of Non-Uniform Interrogatories, p. 17, where it is noted that Dr. Ford's survey assesses likelihood of confusion.

⁶ Ford, Gerald L. (2012), "Survey Percentages in Lanham Act Matters," in *Trademark and Deceptive Advertising Surveys*, edited by Shari Seidman Diamond and Jerre B. Swann, American Bar Association, p. 322-323.

the mark is registered on the principal register. The issue of recognition of a mark can be addressed by a variety of factors, such as attitude and awareness studies from company files, third-party recognition of the mark, survey evidence, or other evidence.⁷ Clearly, these are different issues than what Dr. Ford tested in his likelihood of confusion survey.

9. The Ford survey was clearly not designed to test for the fame of the alleged Jack Daniel's trade dress. Such a survey would require an examination of the fame of the alleged Jack Daniel's trade dress on a whiskey bottle, and not on a dog toy which is spoofing it. Therefore, I do not agree with the Jack Daniel's Properties claim that the Ford survey shows that the alleged Jack Daniel's trade dress is famous.

**The Ford Survey was Clearly Not Designed to Test
for Acquired Distinctiveness**

10. Jack Daniel's Properties claims that the Ford survey also shows that the alleged Jack Daniel's trade dress has acquired distinctiveness or secondary meaning.⁸ However, here again, Dr. Ford mentions that the purpose of his survey was only to "address the issue of likelihood of confusion."⁹ Indeed, secondary meaning

⁷ Ford, p. 322; See also *Visa v. JSL*, which notes a fame survey conducted by Dr. Itamar Simonson.

⁸ Defendant and Counterclaimant Jack Daniels Properties, Inc.'s Responses to Plaintiff and Counter-Defendant's First Set of Non-Uniform Interrogatories, p. 12, 15.

⁹ Ford Declaration, p. 2; see also, Defendant and Counterclaimant Jack Daniels Properties, Inc.'s Responses to Plaintiff and Counter-Defendant's First Set of Non-Uniform Interrogatories, p. 17, where it is noted that Dr. Ford's survey assesses likelihood of confusion.

is a different issue, and is analyzed differently, than likelihood of confusion.¹⁰ A survey on the secondary meaning of the alleged Jack Daniel's trade dress would have a different set of questions than the Ford survey on likelihood of confusion.¹¹

11. The Ford survey was clearly not designed to test for the acquired distinctiveness or secondary meaning of the alleged Jack Daniel's trade dress. Such a survey would require an examination of the secondary meaning of the alleged Jack Daniel's trade dress on a whiskey bottle, and not on a dog toy which is spoofing it. Therefore, I do not agree with the Jack Daniel's Properties claim that the Ford survey shows that the alleged Jack Daniel's trade dress has acquired distinctiveness.

**The Ford Survey Does Not Properly Test
Likelihood of Confusion**

12. I will next analyze the design and results from the Ford study as they relate to likelihood of confusion, as that was the stated purpose of the survey. My analysis of the Ford survey shows that its methodological flaws are so serious that they render its results meaningless for assessing the likelihood of confusion in this matter. In particular, Dr. Ford designed an improper Control stimulus, did not mimic marketplace conditions, and improperly analyzed his data. I will next discuss each of these defects in more detail.

¹⁰ Palladino, Vincent N. (2012), "Secondary Meaning Surveys," in *Trademark and Deceptive Advertising Surveys*, edited by Shari Seidman Diamond and Jerre B. Swann, American Bar Association, p. 322-323.

¹¹ Palladino.

Failure to design an appropriate Control stimulus

13. Dr. Ford's survey respondents were assigned to either a Test group or a Control group. The Test group of respondents viewed an image of the Bad Spaniels dog toy at issue, and the Control group of respondents viewed a heavily modified image of a dog toy. The function of a Control group is, as stated by Dr. Ford: "Specifically, the control cell functions as a baseline and provides a measure of the degree to which respondents are likely to give a Jack Daniel's response to the test cell survey questions, not as a result of Plaintiffs Bad Spaniels dog toy, but rather because of other factors, such as the survey's questions, the survey's procedures, market share or popularity, or some other potential influence on a respondent's answers."¹² If the Control stimulus is designed properly, it can accurately measure the "baseline" response which captures the "noise" that can come from a survey. This "noise" can then be removed from the Test results to generate an accurate rate of net confusion. However, as detailed below, Dr. Ford's Control stimulus was not at all properly designed, thus making it incapable of removing the proper amount of survey "noise" from the Test group.
14. An extremely important principle of survey design is to ensure that the stimuli shown to the Test group and the Control group are as similar as possible, and differ only in terms of the characteristic whose influence is being tested.¹³ It is also important to have good reason for testing the influence of that particular characteristic. However, Dr. Ford's choice of a Control stimulus

¹² Ford, p. 10-11.

¹³ Diamond, p. 399.

did not adhere to these very important principles of proper survey methodology.

15. My understanding is that Plaintiffs allege the “Jack Daniel’s Trade Dress” supposedly consists of the combination of the following features: (1) A square bottle with a ribbed neck, (2) a black cap, (3) a black neck wrap closure with white printing bearing the Old No. 7 mark, and (4) a black front label with white printing and a filigreed border bearing the Jack Daniel’s mark depicted in arched lettering at the top of the label, the Old No. 7 mark contained within a filigreed oval design in the middle portion of the label beneath the Jack Daniel’s mark and the words ‘Tennessee Sour Mash Whiskey’ in the lower portion of the label, with the word ‘Tennessee’ depicted in script.¹⁴ However, as mentioned above, neither the Ford survey, nor to my understanding any survey, have shown that the combination of these particular features has acquired distinctiveness or secondary meaning. Thus, my understanding is that, given there is no evidence of acquired secondary meaning of the alleged Jack Daniel’s trade dress, it is improper to even test the influence of these characteristics on likelihood of confusion in the first place.
16. Furthermore, competing brands of whiskey also have the following features: (1) a ribbed neck, (2) a black cap, (3) a black neck enclosure with white lettering, (4) a black front label with white printing, and (5) arched lettering at the top of the label, and (6) the Old No. 8 in the middle portion of the label.¹⁵ Based on these

¹⁴ Amended Complaint, p. 3-4.

¹⁵ See Appendix C: Amended Complaint, p. 5, ¶23-24; Answer of Jack

facts, and based on, as just mentioned, Jack Daniel's has not established secondary meaning of its alleged trade dress, Dr. Ford's Control dog toy should not have eliminated all of these elements to create the Control dog toy.

17. Yet, Dr. Ford's Control stimulus (1) changed the bottle from a square shape with a ribbed neck to a shape with a rounded top and smooth neck that looks like a wine bottle, (2) changed the black cap with the letters BS on the top and a square neck label to a gold label that wraps around the neck of the bottle, (3) replaced the words "Old No. 2" on the neck of the bottle with the words "Poo Poo on your Tennessee Carpet," (3) completely removed the black front labeling, (4) replaced the words "The Old No. 2" on the front of the label with "Poo Poo," (5) removed the white filigreed border completely, (6) changed the font on the front of the label and replaced curved letters with straight letters, and (7) even changed the color of the hangtag from black to yellow and removed the white border around it.

Daniel's Properties to Amended Complaint, p. 3, ¶¶ 23 and 24; Jack Daniel's Responses to VIP's First Set of Requests for Admissions, pp. 3-6; Request Nos. 2-7.



In addition, the words “Limited Guarantee: For defects in workmanship. To read the full details of our Limited Guarantee, please visit www.vipproducts.com” and “This product is not affiliated with Jack Daniel Distillery” were also removed from the Test dog toy to create the Control toy. In fact, the only direct similarities between the Test and Control toys are the picture of the dog itself, the design of the “Silly Squeakers” brand name, and some of the words on the back of the hangtag.



18. Thus, the Control toy is drastically different from the Test toy. It does not even look like a whiskey bottle anymore,¹⁶ but now looks like, in my opinion, a wine bottle. The Control toy has also removed all black coloring from the bottle labels, completely changed the fonts, simply removed white borders without replacing them with other types of borders, removed mention of “The Old No. 2” without replacing it with something comparable, and even changed the design and color of the hangtag.

¹⁶ See, for example, Diamond, Shari Seidman (2012), “Control Foundations: Rationales and Approaches,” in *Trademark and Deceptive Advertising Surveys: Law, Science, and Design*,” edited by Shari Seidman Diamond and Jerre B. Swann, American Bar Association, p. 212: “A good control stimulus, if it is a control for an allegedly infringing mark, should appear to be a plausible member of the same product category.”

19. As mentioned above, Dr. Ford discusses the purpose of a Control stimulus in his report as, “Specifically, the control cell functions as a baseline and provides a measure of the degree to which respondents are likely to give a Jack Daniel’s response to the test cell survey questions....because of other factors, such as.....market share or popularity, or some other potential influence on a respondent’s answers.”¹⁷ And, Jack Daniel’s Properties is claiming that its alleged trade dress is famous. And yet, less than 1% of respondents seeing the Control dog toy thought that it was put out by Jack Daniel’s. This very low number indicates that the design of the Control dog toy is likely defective. In particular, this very low number indicates that respondents likely did not even think of the Control dog toy as a whiskey bottle because, if they did, more than 1% of respondents should have mentioned Jack Daniel’s, since the alleged Jack Daniel’s trade dress is supposedly a famous trade dress of whiskey.
20. In sum, Dr. Ford failed to adhere to very important survey design principles. First, he tested the influence of particular design features that are allegedly part of the Jack Daniel’s trade dress, and yet these design features have never, to my understanding, been shown to have acquired secondary meaning. This is improper, since Dr. Ford is testing an issue that, to my understanding, cannot be defended. In addition, even if Jack Daniel’s had been able to establish secondary meaning, the Control dog toy should not have been vastly different from the Test toy. Instead, the Control dog toy should have replaced the elements of the alleged trade dress with similar elements, and kept other elements that are not part of the trade dress

¹⁷ Ford, p. 10-11.

(such as, to my understanding, the color black on the labels or hangtag). As a result, the Control dog toy is defective and incapable of removing the appropriate level of “noise” from the Test results, thus making it impossible to determine the correct level of net confusion.

Failure to replicate marketplace conditions

21. It is important for any stimulus in a likelihood of confusion survey to resemble as closely as feasible what the survey respondent would be able to view in the actual marketplace.¹⁸ However, Dr. Ford deviated from this important principle in a number of very significant ways. In particular, Dr. Ford told respondents to “Please look at this dog toy as you would if you saw it in a store and were considering purchasing it.”¹⁹ However, Dr. Ford only allowed respondents to see two direct views of the product: a front view and the back of the hang tag.²⁰ Thus, the respondents could not see either side of the product, or the back of the product, or the top of the product (with the word BS on it), or the bottom of the toy (which has a little round button where a squeaking noise is emitted if someone squeezes the toy).

¹⁸ See, for example, Swann, Jerre B. (2012), “Likelihood of Confusion,” in *Trademark and Deceptive Advertising Surveys: Law, Science, and Design*,” edited by Shari Seidman Diamond and Jerre B. Swann, American Bar Association, p. 76.

¹⁹ Ford, Tab A, p. 6.

²⁰ Ford Appendix C, C-19 and C-22.



In addition, respondents could not read the front of the hang tag, because it was blocked by the toy and respondents had no way to manipulate the toy so that they could read it.²¹

This was true even if the respondent clicked on the survey image to enlarge the image of the toy, because the words on the front of the label were still too small and blurry to read.²² And, note that respondents 1001 even said, “The tag says ‘Silly S----S’ but because of

²¹ Ford, Appendix C, C-20.

²² Ford, Appendix C, C-20.

the toy, I cannot read the bottom word.”²³ Thus, respondents could not read either the details about the product on the front of the hang tag, nor even the brand name itself in some cases, because the toy blocked the brand name, and again respondents had no way to handle the product so that the front of the label could be read. And, it is even difficult to read all of the words that appear on the front of the toy itself, such as “43% poo by volume” and “100% smelly” even if the image is enlarged.²⁴ Thus, Dr. Ford’s survey clearly does not fulfill its objective to allow respondents to get the visual information they would be able to get if they were shopping in an actual store.

22. In addition, if a consumer were shopping for the Bad Spaniels dog toy in a store in the actual marketplace, the consumer would be able to touch the toy. This is important because the toy emits a squeaking noise if squeezed. The failure to allow consumers to have this tactile or auditory information is a major defect in the methodology of the Ford survey.
23. Finally, Dr. Ford showed respondents a picture of a display of products, and told respondents to “Please look at this display of products for dogs as you would if you saw it in a store and were considering purchasing a dog toy.”

²³ Ford, Appendix B, B-2.

²⁴ Ford, Appendix C, C-20.



However, the display that Dr. Ford showed to respondents featured both dog toys and dog treats, when it is more common for a display such as this to only feature one type of product (either toys or treats). In addition, it is more common for products to be organized together by brand, whereas Dr. Ford showed the Silly Squeaker products separated by other brands. Furthermore, it is more common for the same product to be on the same hanger rather than separated. And yet, there are two different images of the Bad Spaniels toy separated by other toys, and the Bad Spaniels toys appear to be covering up other types of toys. Finally, it is not possible to read all of the words on the many products shown on the display, whereas in the actual marketplace, consumers would be able to read these words. In sum, the image of the display that Dr. Ford showed to respondents also does not mimic marketplace conditions.

24. In conclusion, Dr. Ford wanted consumers to view the Bad Spaniels dog toy as they would if they were shopping at a store in the actual marketplace. However,

Dr. Ford's survey simply did not allow this, since he did not give respondents the opportunity to see, touch, or hear important information that is in fact available in the actual marketplace. This mistake is a very serious methodological problem, and as a result, in my opinion does not allow for the extrapolation of his results to what would likely happen in the actual marketplace.

Failure to properly code and analyze data

25. Dr. Ford believes that his survey results show that approximately 29% of respondents were confused between the Bad Spaniels dog toy and Jack Daniel's. However, the Bad Spaniels dog toy is a parody of a Jack Daniel's bottle, and Dr. Ford's results need to be analyzed with this in mind. First, I found that some respondents, in their explanations of their answers, explicitly stated that the product was a spoof while others realized that the Bad Spaniels toy was put out by a different company but were trying to interpret the questions in terms of whether a spoof needs to get permission or approval from the company it is spoofing. For example, respondent 1001 said, "Because they are creating a spoof of a real product so I think they would need permission so they don't get sued for copyrights or something like that" (and this respondent realized in an earlier response that this product was put out by 'Silly somethings.')

²⁵ Respondent 1001 said that the survey was set up such that he/she was unable to read the word coming after "Silly." Other examples of respondents noting the product was a spoof or trying to interpret what a spoof needs to do to get permission or approval from the company it is spoofing include respondent 1012: "Bottle design and name are plays on the Jack Daniel's brand," respondent 1015: "It mimics

26. Also, note that, of the four questions designed to test likelihood of confusion (made or put out, other products made or put out, authorization/approval, and affiliation/connection), the largest group who were counted by Dr. Ford as supposedly confused were those answering the question about authorization or approval.²⁶ In particular, 27 respondents, or 12.8%, believe that the company needed authorization or approval; 25 respondents, or 11.8%, believe that the dog toy was made or put out by Jack Daniels; 6 respondents, or 2.8%, believed that the company making the dog toy also makes whiskey; and 4 respondents, or 1.9%, believe that the company had a business affiliation or connection. Such results need to, again, be interpreted in light of the fact that the dog toy at issue

them,” respondent 1020: “It looks like they did a license deal with Jack Daniels” (and who also responded that the product was put out by VIP toys), respondent 1022: “I’m sure the dog toy company that made this toy had to get their permission and legal rights to essentially copy their product in dog toy form” (and who also responded that the product was put out by Bad Spaniels), respondent 1029: “Jack Daniel’s because the label resembles and is a play on their label” (and who also responded that the product was put out by Silly Squeakers), respondent 1033: “Because it is a spoof on their label,” respondent 1046: “It is similar to a Jack Daniel’s label but I do not believe they make any dog products.... If it is put out by Jack Daniel’s then they would have to give authorization for approval to copy their signature label,” and respondent 1194: “The bottle is mimicked after the Jack Daniel BBQ sauce. So they would hold the patent therefore you would have to ask permission to use the image.”

²⁶ 25 respondents, or 11.8%, believe that the dog toy was made or put out by Jack Daniels; 6 respondents, or 2.8%, believed that the company making the dog toy also makes whiskey; 27 respondents, or 12.8%, believe that the company needed authorization or approval; and 4 respondents, or 1.9%, believe that the company had a business affiliation or connection.

is a parody. In particular, the largest group of respondents (12.8%) were likely trying to figure out if a parody needs authorization or approval from the company it is spoofing (since the greatest alleged “confusion” from the four likelihood of confusion questions came from the question about authorization or approval).

27. In addition, I found that 20 respondents who were counted by Dr. Ford as supposedly confused (due to their responses to a later question) actually recognized, in response to the initial question about who made or put out the product, that the Bad Spaniels dog toy was in fact made or put out by VIP/Bad Spaniels/Silly Squeakers.²⁷ Thus, these respondents were counted as supposedly confused only because of their response to a latter question about authorization/approval or affiliation/connection, even though they did realize in their response to the initial made-or-put-out question who in fact made or put out the product. In other words, these respondents did in fact know that the product was made or put out by VIP/Silly Squeakers/Bad Spaniels, but likely only mentioned Jack Daniel’s to the latter questions about authorization/approval and affiliation/connection because they were trying to interpret these questions in response to their knowledge that the product was made by a different company (VIP) and was a spoof of Jack Daniel’s.
28. Thus, my analysis of Dr. Ford’s results shows that they need to be interpreted in light of the fact that the Bad Spaniels dog toy is a parody of a Jack Daniel’s liq-

²⁷ Respondents 1001, 1020, 1022, 1029, 1035, 1044, 1054, 1062, 1065, 1095, 1098, 1099, 1106, 1132, 1139, 1147, 1172, 1176, 1179, and 1210.

uor bottle. When this is done, it is clear that many respondents in fact recognized that the product is made or put out by VIP products, and yet were thinking that VIP would need to get authorization or approval from Jack Daniel's in order to sell such a parody product.

29. In conclusion, my analysis of the Ford survey as it relates to the issue of likelihood of confusion shows that its methodological flaws are so serious that they render its results meaningless for assessing the likelihood of confusion in this matter. In particular, Dr. Ford designed an improper Control stimulus, did not mimic marketplace conditions, and improperly analyzed his data.

**The ORC Survey Does Not Properly Test
Likelihood of Confusion**

30. Jack Daniel's Properties claims that an ORC survey conducted from February 5-8, 2015 yielded similar likelihood-of-confusion results to the results in the Ford survey.²⁸ However, this survey is so seriously and fatally flawed that it is impossible to draw any meaningful conclusions about likelihood of confusion. In particular, (1) there is no Control dog toy whatsoever with which to compare against the responses to the Test dog toy, (2) it does not mimic marketplace conditions because not all of the angles of the product can be seen, it is not known that the product makes a squeaking noise if squeezed, and the product images cannot even be enlarged so that the words can be properly read, (3) the question, "Who, or what company, if any, do you believe is sponsoring or promoting

²⁸ Defendant and Counterclaimant Jack Daniels Properties, Inc.'s Responses to Plaintiff and Counter-Defendant's First Set of Non-Uniform Interrogatories, p. 17; JDPI0355-0396.

this dog toy?” and, “What other products or services, if any, do you believe are made or put out by whoever is sponsoring or promoting this dog toy?” are the only questions asked, and improper questions at that, for assessing likelihood of confusion,²⁹ (4) respondents were not provided with the proper instructions, such as to not guess, and to wear eyeglasses as needed, and (5) the survey was not validated.³⁰

31. Because of these serious methodological defects, I do not agree with the claim that the ORC survey provides similar results to the highly flawed Ford survey. In fact, its methodology is so flawed that, in my opinion, it would be improper to rely on its results to form any conclusions about likelihood of confusion.

Dated: July 10, 2015

/s/ Stephen Nowlis
Dr. Stephen M. Nowlis, Ph.D.

²⁹ For example, note that Dr. Ford in his survey asked questions such as “Who or what company do you believe makes or puts out this product?”

³⁰ Whereas, for example, Dr. Ford did validate his survey. Validation occurs when it is ensured that survey respondents actually participated in the survey.

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

<p>VIP Products, LLC, an Arizona limited liability com- pany, Plaintiff, vs. Jack Daniel's Properties, Inc., a Delaware corporation Defendant.</p>	<p>No. 2:14-cv-02057-DGC</p>
<p>Jack Daniel's Properties, Inc., a Delaware corporation Counterclaimant, vs. VIP Products, LLC, an Arizona limited liability com- pany, Counterdefendant.</p>	

**RULE 26 EXPERT REPORT OF DR. ITAMAR
SIMONSON**

EXPERT REPORT OF DR. ITAMAR SIMONSON

1. I am the Sebastian S. Kresge Professor of Marketing at the Graduate School of Business, Stanford University. A copy of my curriculum vitae, which includes a complete list of my publications, is attached as Exhibit A.

2. I hold a Ph.D. in Marketing from Duke University, Fuqua School of Business, a Master's degree in business administration (MBA) from the UCLA Graduate School of Management, and a Bachelor's degree from The Hebrew University with majors in Economics and Political Science.

3. My field of expertise is consumer behavior, marketing management, trademark infringement from the consumer's perspective, study methods, and human judgment and decision making. Most of my research has focused on buyers' purchasing behavior, the effect of brand characteristics (such as brand name, price, and features), the competitive context, and marketing activities (such as promotions, advertising) on buying decisions, and trademark infringement from the buyer's perspective.

4. I have received several awards, including (a) the award for the Best Article published in the *Journal of Consumer Research* (the major journal on consumer behavior) between 1987 and 1989; (b) The Ferber Award from the Association for Consumer Research, which is the largest association of consumer researchers in the world; (c) the 1997 O'Dell Award, given for the *Journal of Marketing Research* (the major journal on marketing research issues) article that has had the greatest impact on the marketing field in the previous five years; (d) the 2001 O'Dell award (and a finalist for the O'Dell Award in 1995, 2002, 2004, 2005, 2007, 2008, and 2012); (e) the award for

the Best Article published in the *Journal of Public Policy & Marketing* (the major journal on public policy and legal aspects of marketing) between 1993 and 1995; (f) the 2007 Society for Consumer Psychology Distinguished Scientific Achievement Award; (g) the 2002 American Marketing Association award for the Best Article in the area of services marketing; (h) the 2012 elected Fellow of the Association for Consumer Research, and (i) winner in a competition dealing with research on the effectiveness of direct marketing programs, which was organized by the Direct Marketing Association and the Marketing Science Institute. In addition to these awards, my research has been widely cited by other researchers in the marketing, consumer behavior, and other fields, and my publication record has been ranked as one of the most prolific and influential.³¹

5. I have published many articles in my career, which are listed in my attached C.V. Among those are four articles relating to trademark surveys and trademark infringement from the buyer's perspective. Two of those articles were published in the *Trademark Reporter*: "The Effect of Survey Method on Likelihood of Confusion Estimates: Conceptual Analysis and Empirical Test,"³² and "An Empirical Investigation of the Meaning and Measurement of Genericness."³³ The third article, which

³¹ See, e.g., S. Seggie and D. Griffith (2009), "What does it take to get promoted in marketing academia? Understanding exceptional publication productivity in the leading marketing journals," *Journal of Marketing*, 73, 122-132.

³² Itamar Simonson (1993), "The Effect of Survey Method on Likelihood of Confusion Estimates: Conceptual Analysis and Empirical Test," *Trademark Reporter*, 83 (3), 364-393.

³³ Itamar Simonson (1994), "An Empirical Investigation of the Meaning and Measurement of Genericness," *Trademark Reporter*, 84

was published in *The Journal of Public Policy & Marketing* and titled “Trademark Infringement from the Buyer Perspective: Conceptual Analysis and Measurement Implications,”³⁴ was selected (in 1997) as the Best Article published in that journal between 1993 and 1995. I have also co-authored a chapter on “Demand Effects in Likelihood of Confusion Surveys,” in the ABA-published book entitled *Trademark and Deceptive Advertising Surveys*.³⁵

6. At Stanford University I have taught MBA and executive courses on Marketing Management, covering such topics as buyer behavior, developing marketing strategies, building brand equity, advertising, sales promotions, and retailing. I also taught an MBA course on Marketing to Businesses and a course on High Technology Marketing. In addition to teaching MBA courses, I have guided and supervised numerous MBA student teams in their work on company and industry projects dealing with a variety of markets.

7. I have taught several doctoral courses. One doctoral course examines methods for conducting consumer research. It focuses on the various stages involved in a research project, including defining the problem to be investigated, selecting and developing the research approach, data collection and analysis, and deriving conclusions. A second doctoral course that I have taught focused

(2), 199-223.

³⁴ Itamar Simonson (1994), “Trademark Infringement from the Buyer Perspective: Conceptual Analysis and Measurement Implications,” *Journal of Public Policy and Marketing*, 13(2), 181-199.

³⁵ Itamar Simonson and Ran Kivetz (2012), “Demand Effects in Likelihood of Confusion Surveys,” *Trademark and Deceptive Advertising Surveys*, Chapter 11, Shari Diamond and Jerre Swann, Eds., American Bar Association.

on buyer behavior, covering such topics as buyer decision making processes, influences on purchase decisions, and persuasion. A third doctoral course that I have taught deals with buyer decision making. Prior to joining Stanford University, during the six years that I was on the faculty of the University of California at Berkeley, I taught an MBA Marketing Management course, a Ph.D. course on buyer behavior, and a Ph.D. course on buyer decision making. I also taught in various executive education programs, including a program for marketing managers in high technology companies.

8. After completing my MBA studies and before starting the Ph.D. program, I worked for five years in a marketing capacity in a subsidiary of Motorola Inc., serving in the last two years as the product marketing manager for two-way communications products. My work included (a) defining new products and designing marketing plans for new product introductions, (b) buyer and competitor analysis, and (c) sales forecasting.

9. I have conducted, supervised, or evaluated well over 1,000 marketing research studies, including many related to consumer behavior and information processing, brand equity and strategies for building strong brands, trademark, branding, marketing strategies, and advertising-related issues. I serve on eight editorial boards, including leading journals such as the *Journal of Consumer Research*, *Journal of Marketing Research*, and the *Journal of Consumer Psychology*. I am also a frequent reviewer of articles submitted to journals in other fields, such as psychology, decision making, and economics. I received (twice) the Outstanding Reviewer Award from the *Journal of Consumer Research*. As a reviewer, I am asked to evaluate the research of scholars wishing to publish their articles in leading scholarly journals. I have

also worked as a consultant for companies and organizations on a variety of marketing and buyer behavior topics. And I have served as an expert in prior litigations involving various marketing and buyer behavior issues, class actions, trademark-related matters, false advertising, branding, and other areas. A list of cases in which I provided sworn testimony during the past four years is included in Exhibit B. I am being compensated at my standard rate of \$750 an hour.

10. I was asked by counsel for Jack Daniel's Properties, Inc. ("Jack Daniel's") to evaluate, based on principles of consumer psychology and consumer processing of information about brands/marks whether VIP Products', LLC ["VIP"] "Bad Spaniels – The Old No. 2" dog toy ("Old No.2") is likely to dilute through tarnishment the Jack Daniel's trade dress.

SUMMARY OF CONCLUSIONS

11. An analysis based on principles of consumer psychology and the manner in which brands and marks, such as the trade dress of Jack Daniel's "Old No.7," are represented in consumers' minds indicates that the association made by consumers between Jack Daniel's marks and VIP's "Old No. 2" is likely to dilute Jack Daniel's trade dress through tarnishment. In particular, regardless of Mr. Sacra's speculation that consumers share his view that Jack Daniel's takes itself too seriously and that associating the brand with the "Old No. 2" is funny and changes the brand's culture, the largely look-like trade dress associates Jack Daniel's trade dress with defecation; this added association effectively tarnishes and harms the brand by adding an unsavory association in consumers' minds.

12. To understand the dilution by tarnishment process in this case, I review the currently accepted principles of how marks such as a famous trade dress are represented in memory. This framework is known in the scientific literature as the associative network memory model, whereby the network includes the various brand associations in consumers' minds. There are a number of dimensions by which brand associations may be characterized, such as their (positive or negative) content. Because of the unmistakable (and intended) resemblance between VIP's Old No. 2 product and the Jack Daniel's trade dress, this unfavorable association is added to the mark's associative network in consumers' minds.

13. Although Mr. Sacra may not be an expert on consumer psychology and he has not tested his assumptions regarding the impact of his Old No. 2 product on consumers, his testimony suggests that changing how consumers think about Jack Daniel's brands was his intention. As he explained during his deposition, Jack Daniel's thinks that it is the best and has created a culture around that, so he decided to make fun of the brand by associating it with defecation.

14. This alleged "parody" targets those consumers familiar with Jack Daniel's (i.e., those likely to recognize the link between VIP's product and Jack Daniel's trade dress) and adds an unfavorable mental association in these consumers' minds, which is particularly damaging for a product that consumers drink. Thus, consciously and/or unconsciously, this added mental association is likely to create a less favorable affective reaction to the brand and harm the value of the mark's equity. Accordingly, while Jack Daniel's has invested great resources building a strong family of marks that provide important

benefits for Jack Daniel's in the marketplace, an association with the Old No. 2 is likely to lower its marks' value. It will also harm the value of brand extensions (i.e., other Jack Daniel's brands, which are associated with the brand's flagship brand – the “Old No. 7”) and interferes in Jack Daniel's ability to maintain and promote its favorable image and communications efforts.

INTRODUCTION

15. As I explain in this report, VIP's product and trade dress at issue (the “Bad Spaniels Label – the Old No. 2”), which was designed to resemble the trade dress of the classic “Jack Daniel's – Old. No.7” whiskey is likely to dilute and tarnish the brand equity of this and other Jack Daniel's products. In particular, as explained below, the association between Jack Daniel's brand with the “Bad Spaniels – the Old No. 2” damages the Jack Daniel's brand, creates an image that is likely to be aversive to Jack Daniel's buyers, and interferes in Jack Daniel's ability to maintain and promote its favorable image and communications efforts.

16. Prior research as well as court decisions have examined other cases involving dilution by tarnishment (whether or not they were formally filed as federal dilution by tarnishment cases), though typically not involving defecation. As Morrin and Jacoby (2000)³⁶ discussed:

³⁶ See *Grey v. Campbell Soup Co.* (1986), 650 F. Supp. 1166, 1175 (C.D. Cal.), *aff'd* 830 F.2d 197 (9th Cir. 1987); Maureen Morrin, Jacob Jacoby (2000), “Trademark Dilution: Empirical Measures for an Elusive Concept,” *Journal of Public Policy & Marketing*: Fall Vol. 19, No. 2, pp. 265-276. The subsequent analysis of dilution by tarnishment as it applies in the present and other cases builds on prior published research, including C. Pullig et al. (2006), “Brand Dilution: When Do

Consider a similar situation in which, without evoking consumer confusion, a name is used as a parody of the original mark. For example, a dog snack was introduced under the name Dogiva dog biscuits as a parody of Godiva chocolates (*Grey v. Campbell Soup Co.* 1986). Instances such as this one (which, like instances of blurring, do not involve consumer confusion), are also considered instances of dilution by the Dilution Act. They are distinguished from instances of blurring, however, because they generally have some derogatory connotations, and hence are referred to as cases of dilution by “tarnishment” (McCarthy 1992). Other examples of real-world tarnishment include a promotion for condoms using the American Express tag line “Don’t leave home without it” (*American Express Co. v. Vibra Approved Lab. Corp.* 1989), a poster reading “Enjoy Cocaine” (*Coca-Cola Co. v. Gemini Rising, Inc.* 1972), bubble gum trading cards featuring the Garbage Pail Kids (*Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc.* 1986), Roadkill Helper (*General Mills, Inc. v. Johnson* 1983), Mutant of Omaha Nuclear Holocaust Insurance (*Mutual of Omaha Insurance, Mutual of Omaha Ins. Co. v. Novak* 1987), and Michelob Oily (*Anheuser-Busch Inc. v. Balducci*

New Brands Hurt Existing Brands?” *Journal of Marketing*, 70, 52-66; Alexander Simonson (1993), “How and When Trademarks Dilute? ..”, *Trademark Dilution*, 83, 149-74; Boush et al. (1987), “Affect Generalization to Similar and Dissimilar Brand Extensions,” *Journal of Psychology & Marketing*, 4, 225-37; K. Keller (2003), *Strategic Brand Management*, 2nd ed., Pearson; S. Hoeffler and K. Keller (2003), “The Marketing Advantages of Strong Brands,” *Brand Management*, 10, 421-45; B. Loken and D. John (1993), “Diluting Brand Beliefs: ... ,” *Journal of Marketing*, 57, 71-84.

Publications 1994).

Similarly, the present case involves likelihood of dilution by tarnishment due to the unmistakable (and intended) resemblance of the allegedly diluting VIP product and Jack Daniel's flagship trade dress – the Old No. 7 (Black Label). It is different from most other dilution by tarnishment matters because the diluting image involves defecation, which is likely to be particularly aversive and even disgusting as it relates to a beverage.

17. My analysis is based on well-established principles and prior research concerning the roles of brands, brand associations and representation in memory, brand equity, and the factors that influence consumers' responses to brands. I begin with a general overview of the functions and benefits of strong brands or marks such as a famous trade dress that has favorable associations in consumers' minds. I also explain the general and specific psychological mechanisms by which VIP's product at issue is likely to create dilution by tarnishment of Jack Daniel's trade dress and brand regardless of the likelihood of confusion between them.

THE MEANING AND ADVANTAGES OF STRONG BRANDS

18. Brand equity has been defined in different ways. One accepted definition (Keller 2003³⁷) is that brand equity is the differential effect that brand knowledge has on consumer response to marketing activity. David Aaker (1991)³⁸ defined brand equity as including four key components: Brand awareness, brand associations, brand loyalty, and perceived quality.

³⁷ K. Keller (2003), *Strategic Brand Management*, 2nd ed., Pearson

³⁸ D. Aaker (1991), *Managing Brand Equity*, Free Press.

19. It is important to consider how knowledge about brands is organized and stored in memory. As explained in more detail below, a useful way to think about brand knowledge and organization is referred to in the scientific literature as the associative network memory model. According to this model, brand knowledge in memory can be represented as a network with various nodes. Different types of nodes may be linked to the brand to make up its network in memory. Moreover, there are a number of dimensions by which brand associations may be characterized, such as their positive or negative content and whether they are related to the brand or not. For example, the McDonald's brand network may be linked not just to fast food, hamburgers, and French fries, but also to children, Ronald McDonald's, the Golden Arches, the slogan "I'm loving it," and other mental associations. Some negative associations that were out of McDonald's control have likely harmed the brand. For example, at different times (including as recently as 2014), rumors have spread that McDonald's has used worms' meat in its hamburgers. One study found that marketing attempts to directly refute such rumors tend to be ineffective.³⁹ Just as is the case here, the favorability of the various associations of which consumers are aware is very important for consumers' evaluations of and responses to McDonald's services and communications efforts. I next elaborate on some of the advantages of strong brands.

³⁹ See A. Tybout, B. B. Calder, and Sternthal (1981), "Using Information Processing Theory to Design Marketing Strategies," *Journal of Marketing Research*, 18, 73-9 (see: http://www.cfs.purdue.edu/richardfeinberg/csr%20331%20consumer%20behavior%20%20spring%202011/grad/readings/7%20Using_Information_Processing_Theory_to_Design_Marketing_Strategies.pdf)

20. The reason that many companies spend great efforts and resources to build strong brands is that such brands have important advantages in terms of the manner in which consumers process information about them, respond to the brand, and respond to brand extensions that fall under the same brand umbrella, as well as in terms of consumers' willingness to pay for brands linked with the flagship brand. Also, consumers are more likely to pay attention to and later recall information about brands with favorable associations. Thus, it is easier for consumers to recognize, learn, and recall new information about high equity brands, including brand extensions.

21. Thus, strong, favorable brand equity has important implications for the in/effectiveness of key aspects of a brand's marketing activities. As indicated, favorable brand associations can affect consumer brand evaluations, perceptions of quality, purchase rates, and market share. This tendency may be especially apparent for difficult-to-assess "experience goods" whose quality can be assessed only after experience (or not even after experiencing it). Similarly, assuming a consumer cannot try an ice cream flavor before buying and trying it, favorable associations based on brand name, for example, can play an important role in the decision whether to purchase that product.

22. Furthermore, strong brand equity and recognition have been shown to increase consumer confidence in the brand and mitigate the potential long term impact of negative brand experiences. In addition, research has shown that that strong brands can extend more successfully and use the brand name to enter more diverse categories.

23. Consumers differ in terms of the price and any premium they are willing to pay for one brand compared to others, which depends (consciously or unconsciously) on brand associations in memory. Consumers may also differ in terms of how they respond to price increases. In particular, research has demonstrated that strong brands can command greater price premiums and are more immune from negative responses to price increases.

24. Marketing communications activities include advertising, consumer and trade promotions, public relations, event sponsorship, personal selling, and so on. Consumers often differ in their willingness to pay attention to a brand's message, the manner by which they process brand messages, and their later ability to recall the content brand messages. Strong brands rate highly on these dimensions. Furthermore, strong brands are better able to withstand interference from competitive advertisements. In addition, consumers who are highly loyal to a brand are more likely to increase purchases when advertising for the brand increases.

25. In the present case, given the strength of Jack Daniel's marks and trade dress, it has much to lose from this process of tarnishment. For example, one recent study compared the Jack Daniel's brand with other leading brands in the spirits category. The results showed that Jack Daniel's compares favorably with these brands. That is, Jack Daniel's compares favorably in terms of unaided awareness, the brand potential index, brand awareness, and advertising awareness.

THE IMPACT OF “BAD SPANIELS–OLD NO. 2” ON
JACK DANIEL’S “OLD NO. 7” AND OTHER JACK
DANIEL’S BRANDS

26. In general, dilution may take two broad forms: (1) tarnishment and (2) blurring. One way to define “tarnishment” is as a lowered evaluation of a senior brand (e.g., Jack Daniel’s) due to consumers’ exposure to the junior brand (e.g., VIP’s product at issue). Some of the damages of tarnishment are fairly obvious in that there is the attachment of a negative association to the senior brand. For example, in one case American Express slogan “Don’t leave home without it” was used to promote condoms by another firm (*American Express Co. v. Vibra Approved Lab. Corp.* 1989). American Express believed that the association of condoms with its slogan could create a negative association for its traveler’s check brand, even though there was likely no confusion that it was the maker of the condoms.

27. The process that causes dilution by tarnishment operates in multiple ways. First, as discussed above, one accepted and useful way to think about brand knowledge and organization is based on the “associative network memory model.” Suppose now that a prospective buyer of Jack Daniel’s flagship brand (the Old No. 7) is exposed to VIP’s product at issue; in that case, regardless of any confusion, the Jack Daniel’s brand is likely to acquire a new, negative mental association that becomes part of the brand’s associative network in memory. As a result, when the name Jack Daniel’s comes up or a consumer is considering Jack Daniel’s among other comparable brands, the Jack Daniel’s flagship and related brands are likely to have a negative association and the negative feeling associated with it. Such a consumer is less likely

to select the Jack Daniel's brands and may opt instead to choose an alternative.

28. To elaborate on this process, consider how brand information, including the affiliated brands' trade dress, is stored in and retrieved from memory. The associative network model that brand information is encoded in long-term memory as a pattern of linkages between concept nodes (e.g., associations between the brand and its aspects). In the present case, VIP's product is now linked in people's minds to Jack Daniel's flagship brand. Although the two brands may not be related from the perspectives of ownership, business affiliation, or sponsorship, they are now related by the similar trade dress.

29. A question that may arise is why would the consumer not simply use his or her knowledge that the brands are unrelated (assuming that were the case) to selectively "ignore" the junior ("Old No. 2") brand associations when thinking about the senior brand ("Old No. 7")? The answer has to do with the manner in which knowledge is retrieved from memory. When a stimulus such as a similar trade dress is encountered, its associations are activated according to their accessibility. Highly accessible associations contribute to an "automatic interpretation" of the construct. This automatic interpretation incorporates any associations of the similar junior trade dress. This automatic interpretation may be corrected through the consideration of less accessible associations or externally available information, such as the knowledge that the brands are unrelated. However, such correction requires cognitive effort, and as a result, under-correction is common (Jacoby 2001; Johar and Simmons 2000⁴⁰).

⁴⁰ Jacoby, Jacob (2001), "The Psychological Foundations of Trade-mark Law: Secondary Meaning, Genericism, Fame, Confusion, and

Thus, the accessibility of Jack Daniel's associations can be influenced by the associations of VIP's product, even if there is no confusion. Such a process of tarnishment negatively affects the likelihood that consumers consider and then choose the brand.⁴¹

30. There is probably no dispute in the present case that VIP relied on trade dress resemblance to associate its product with those of Jack Daniel's. For example, during her deposition (pages 56-59), Ms. Phillips testified that she designed the VIP product to be similar in many respects to Jack Daniel's Old No. 7 trade dress. Thus, there is apparently no dispute that VIP's "Old No. 2" toy was designed to capture key elements of Jack Daniel's "Old No. 7" trade dress.

31. As a result, VIP's product is likely to bring Jack Daniel's to mind. Furthermore, as explained above, consumers who are exposed to VIP's product add another mental association to the Jack Daniel's flagship brand and other Jack Daniel's brands. The new brand association – dog's No. 2 – is negative, for many it is likely to be even disgusting. Prior research has shown that a feeling of disgust leads consumers to avoid things that are associated in any way with that feeling.⁴² In the present case, this prior research supports the common sense conclusion that

Dilution," *The Trademark Reporter*, 91 (5), 1013-1071; Johar, Gita Venkataramani and Carolyn J. Simmons (2000), "The Use of Concurrent Disclosures to Correct Invalid Inferences," *Journal of Consumer Research*, 26 (March), 306-321.

⁴¹ C. Pullig et al. (2006), "Brand Dilution: When Do New Brands Hurt Existing Brands?" *Journal of Marketing*, 70, 52-66.

⁴² See, for example, S. Han et al. (2012), "The Disgust-Promotes-Disposal Effect," *J.O. Risk and Uncertainty*, 44, 101-113; S. Han et al. (2007), "Feelings and Consumer Decision Making ...," *J.O. Consumer Psychology*, 17, 158-68.

an association between a famous whiskey brand and a dog's no. 2 is likely, consciously or unconsciously, to diminish consumers' attraction to and interest in purchasing Jack Daniel's brands.

32. Although VIP has conducted no studies to confirm its claim that associating Jack Daniel's brands with defecation is just fun, it apparently recognized that this product was designed to affect Jack Daniel's perceived quality. As Mr. Sacra testified (Rough transcript, p. 111):

A. It's the entire aspect. I mean, Jack Daniel's has created a culture around its product. As do all -- most products try to create a culture around that. And all people who are doing that take it pretty seriously, I mean. And by making fun of that or poking at them saying, "Hey, you know what? I know that you are over here trying to be the best of everything and dominate world. Well, here's something funny."

Evidently, while Mr. Sacra assumed that associating Jack Daniel's marks with "Old No. 2" is pure fun, he recognized that this "fun" goes against Jack Daniel's attempts to build a strong brand and "culture." However, regardless of whether consumers find it funny, the added association is unquestionably inconsistent with Jack Daniel's attempts to maintain its strong brand associations (e.g., authenticity, masculinity).

33. It is especially inconsistent with the brand's objective of acquiring new buyers. Such prospective buyers are likely to be particularly susceptible to influence by exposure to negative brand associations such as those represented by VIP's product. Furthermore, while my understanding is that Jack Daniel's makes every effort not

to associate its brand with underage consumers, families with kids and dogs are likely to be a key target market of VIP's dog toy.

THE IMPACT OF VIP'S "OLD NO.2" ON JACK DANIEL'S BRAND EXTENSIONS

34. Jack Daniel's has already introduced a number of brand extensions, including the following:

- *Gentleman Jack*: Charcoal filtered twice, compared to once with Old No. 7 (80 proof/40% ABV).
- *Single Barrel*: Whiskey sourced from a single barrel in the company's warehouse (94 proof/46% ABV).
- *Tennessee Honey*: Honey liqueur blended with less than 20% whiskey (70 proof/35% ABV).
- *Tennessee Fire*: Cinnamon liqueur blended with less than 20% whiskey (70 proof/35% ABV).
- *Green Label*: A lighter-bodied bottling of Old No.7, not available everywhere (80 proof/40% ABV).
- *Silver Select*: For export only (100 proof/50% ABV).
- *Winter Jack*: Seasonal blend of apple cider liqueur and spices (30 proof/15% ABV).
- *No. 27 Gold*: Limited release (80 proof/40% ABV)^[46]
- Sinatra Select

35. As indicated, the negative associations of the "Old No. 2" are not limited to the trade dress of Jack Daniel's "Old No. 7" or just to the core Jack Daniel's brand. Rather, the negative effect likely influences the entire family of Jack Daniel's brands, which are naturally associated with Jack Daniel's flagship brand and trade

dress. Instead of being judged on their own merit or perceived characteristics, (for those who have been exposed to VIP's product) the "Old No. 2" is likely to come to mind. As a result, new and existing buyers are likely to be less receptive, not just to the Old No. 7, but also to new brand extensions. That is, Jack Daniel's will have less influence over perceptions of its brand extensions, because of tarnishment and tainting by VIP's Old No. 2. This further diminishes the value of Jack Daniel's trade dress.

Date: 5/7/2015

I. Simonson

Itamar Simonson, Ph.D.

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

<p>VIP Products, LLC, an Arizona limited liability company, Plaintiff, vs. Jack Daniel's Properties, Inc., a Delaware corporation Defendant.</p>	<p>No. 2:14-cv-02057-DGC DECLARATION AND RULE 26 REPORT OF DR. GERLAD L. FORD</p>
<p>Jack Daniel's Properties, Inc., a Delaware corporation Counterclaimant, vs. VIP Products, LLC, an Arizona limited liability company, Counterdefendant.</p>	

I, Dr. Gerald L. Ford, hereby declare as follows:

INTRODUCTION

1. I am a partner in the marketing research and consulting firm of Ford Bubala & Associates, located

in Huntington Beach, California, where I have been engaged in commercial marketing research and consulting for the past forty years. I am also an emeritus faculty member of the School of Business Administration, California State University, Long Beach, where I held a full-time teaching position for twenty-five years, prior to my retirement in 1994. My professional experience is further summarized below in paragraphs 34 through 44.

2. In the instant matter, at the request of Seyfarth Shaw LLP, counsel for counterclaimant, Jack Daniel's Properties, Inc. ("JDPI" or "Jack Daniel's"), I designed and caused to be conducted a survey to address the issue of likelihood of confusion. Specifically, this survey was designed to measure the degree, if any, to which Plaintiff's Bad Spaniels dog toy is likely to cause confusion as to the source, authorization or approval of, or business affiliation or business connection with, Jack Daniel's.

3. This likelihood of confusion survey, hosted by Issues & Answers Network, Inc. ("Issues & Answers"), employed an online internet protocol using an internet panel created and maintained by Survey Sampling International ("SSI").

4. The likelihood of confusion survey conducted in this matter employed a scientific experimental survey design consisting of two survey cells: (1) a test or experimental survey cell designed to measure likelihood of confusion, if any, with respect to the source, authorization or approval of, or business affiliation or business connection of Plaintiff's Bad Spaniels dog toy with, Jack Daniel's; and (2) a control survey cell designed to measure the extent of mismeasurement in the test cell survey results.

5. In total, four hundred eighteen (418) inter-

views were completed in this likelihood of confusion survey: two hundred eleven (211) interviews were completed in the test cell; and two hundred seven (207) interviews were completed with respect to the control cell.

6. The stimuli utilized in the survey's test cell were photographs of Plaintiff's Bad Spaniels dog toy. The stimuli utilized in the survey's control cell were photographs of a fictitious dog toy bearing the Bad Spaniels name, but none of the claimed Jack Daniel's indicia or trade dress.

7. In total, the results of the likelihood of confusion survey evidence, on a net basis, after adjusting the survey data for mismeasurement error based upon the control, that approximately twenty-nine percent ($29.38 - 0.47 = 28.91\%$) of the universe of potential purchasers of a dog toy are likely to be confused or deceived by the belief that Plaintiff's Bad Spaniels dog toy is made or put out by Jack Daniel's, or made or put out with the authorization or approval of Jack Daniel's, or that whoever makes or puts out Plaintiff's dog toy has a business affiliation or business connection with Jack Daniel's.

8. It is my opinion that the results of the survey support a finding of likelihood of confusion. The survey results evidence that potential purchasers of a dog toy are likely to be confused or deceived by the belief that Plaintiff's Bad Spaniels dog toy is made or put out by Jack Daniel's, or is made or put out with the authorization or approval of Jack Daniel's, or that whoever makes or puts out Plaintiff's Bad Spaniels dog toy has a business affiliation or business connection with Jack Daniel's, and that such confusion is due in particular to Plaintiff's use of Jack Daniel's indicia or trade dress on the Bad Spaniels dog toy.

SURVEY BACKGROUND

9. Attached hereto as Exhibit A are the results of the survey which addressed the issue of likelihood of confusion. Exhibit A provides photocopies of the survey exhibits, the survey screeners and questionnaires, survey screenshots, and a listing of the survey responses. The Appendix of Exhibit A contains an electronic copy of the source data, an incidence table, and other survey-related background materials.

10. The sample selection, questions, questionnaire design, and interviewing procedures employed in this survey were designed in accordance with the generally accepted standards and procedures in the field of surveys. The survey was also designed to meet the criteria for survey trustworthiness detailed in the Manual for Complex Litigation.¹

11. I was responsible for the design of the survey, the screener and test and control cell questionnaires, as well as for the procedures to be followed in conducting the interviews. Data gathering was carried out, under the direction of Ford Bubala & Associates, by Issues & Answers, an independent survey organization which hosted the online data survey using internet panelists obtained

¹ For the proffered poll or survey, "...Relevant factors include whether: the population was properly chosen and defined; the sample chosen was representative of that population; the data gathered were accurately reported; and the data were analyzed in accordance with accepted statistical principles...In addition, in assessing the validity of a survey, the judge should take into account the following factors: whether the questions asked were clear and not leading; whether the survey was conducted by qualified persons following proper interview procedures; and whether the process was conducted so as to ensure objectivity..." See Federal Judicial Center, Manual for Complex Litigation, Fourth, Section 11.493, at 102-104 (2004).

from SSI. Data gathering was conducted from April 10-21, 2015.

12. Ford Bubala & Associates conducted validation of approximately twenty percent (20.33%) of the interviews by contacting, by telephone, survey respondents to confirm their qualification and participation in the survey. JAK Research, an independent marketing research firm, conducted additional validation of approximately twenty percent (20.10%) of the interviews by contacting, by telephone, survey respondents to confirm their qualification and participation in the survey. In total, approximately forty percent (40.43%) of the interviews were validated. This level of validation exceeds industry standards.² None of the interviews failed to validate.

13. The survey conducted in this matter was administered under a double-blind protocol. Specifically, not only were the respondents not informed as to the purpose or sponsor of the survey, but similarly, both the staff of Issues & Answers and the staff of SSI were not informed as to the purpose or sponsor of the survey.

SURVEY STRUCTURE

14. This survey employed an internet panel created and maintained by SSI. Potential respondents were invited to fill out the screening portion of the interview to determine whether or not they met the universe definition. Subsequently, those potential respondents who met the universe definition were invited to complete the main survey.

15. The universe for this survey consisted of

² This level of validation exceeds CASRO (Council of American Survey Research Organizations) standards of 10% to 15%.

males and females twenty-one (21) years of age or older who were likely, within the next six months, to purchase a dog toy.³

16. The respondent selection procedure employed in this survey is referred to as a quota sampling method. This method provided a respondent base that is generally representative of the age and gender distribution of male and female adults twenty-one (21) years of age or older who reported that in the next six months they were likely to purchase a dog toy. This age and gender distribution was based upon an ORC International internet survey conducted between February 5-8, 2015, among a nationally representative sample of approximately one thousand (956) individuals across the United States.⁴

³ Additionally, the survey universe was also restricted to respondents (1) who were using a traditional desktop computer, a laptop/notebook computer, or a tablet computer to read and answer the survey questions; (2) who resided in the United States; (3) who did not, nor did anyone else in their household, work for an advertising agency or a market research company; or a retail store or company that makes, sells, or distributes any dog toys; (4) who agreed to answer the questions in the survey by themselves without the help or assistance of anyone else and without seeking information from any other source (e.g., internet search); (5) who, if they wore contact lenses or eyeglasses when using the device they were using, would wear them during the questionnaire; (6) who were willing to provide their name and telephone number for telephone validation purposes; and (7) who reported they could clearly see the dog toy and clearly read the hang tag.

⁴ Respondents in the ORC International survey were asked “Within the next six months, are you likely to purchase a dog a toy?” Based on the results of the ORC International survey, age and gender quotas of purchasers were established as follows: approximately 44% male and 56% female; among males, approximately 33% 21 to 34, 40% 35 to 54, and 27% 55 or over; and among females, approximately 35% 21 to 34, 36% 35 to 54, and 29% 55 or over.

17. As noted earlier, the likelihood of confusion survey conducted in this matter employed a scientific experimental survey design consisting of two survey cells: (1) a test or experimental survey cell designed to measure likelihood of confusion, if any, with respect to the source, authorization or approval of, or business affiliation or business connection of Plaintiff's Bad Spaniels dog toy with, Jack Daniel's; and (2) a control survey cell designed to measure the extent of mismeasurement in the test cell survey results.

18. Survey respondents in the test cell first saw a photograph of a retail display that included a variety of products for dogs, including Plaintiff's Bad Spaniels dog toy. See Exhibit A, page 11.



19. Next, survey respondents in the test cell saw a photograph of the front of the Bad Spaniels dog toy and a photograph of the back of the hang tag label that

included a disclaimer stating “This product is not affiliated with Jack Daniel Distillery.” See Exhibit A, page 12-13.



20. Survey respondents in the control cell first saw a photograph of a retail display that included a variety of products for dogs, including a fictitious dog toy bearing the name Bad Spaniels. See Exhibit A, page 70.



21. Next, survey respondents in the control cell saw a photograph of the front of a fictitious dog toy bearing the name Bad Spaniels, and a photograph of the back of a hang tag label that did not include the disclaimer, “This product is not affiliated with Jack Daniel Distillery.” See Exhibit A, page 71-72



22. The control cell provides a measure of the extent that mismeasurement exists in the likelihood of confusion test cell survey results. Specifically, the control cell functions as a baseline and provides a measure of the degree to which respondents are likely to give a Jack Daniel's response to the test cell survey questions, not as a result of Plaintiff's Bad Spaniels dog toy, but rather because of other factors, such as the survey's questions, the survey's procedures, market share or popularity, or some other potential influence on a respondent's answers.

23. In a fashion similar to the protocols employed in a pharmaceutical drug test, the test or experimental cell represents the drug or pill with the "active" ingredient(s) and the control cell represents the "placebo" that does not contain the active ingredient being tested.⁵

24. The test and control cells were separate surveys. The questions and procedures for the test cell

⁵ This methodology is consistent with the methodology discussed by Professor Diamond in the Federal Judicial Center's Reference Manual on Scientific Evidence, Third; "It is possible to adjust many survey designs so that causal inferences about the effect of a [stimulus]...become clear and unambiguous. By adding one or more appropriate control groups, the survey expert can test directly the influence of the stimulus.... Respondents in both the experimental and control groups answer the same set of questions.... The effect of the [stimulus]...is evaluated by comparing the responses made by the experimental group members with those of the control group members.... Both preexisting beliefs and other background noise should have produced similar response levels in the experimental and control groups. In addition, if respondents who viewed the [test cell stimulus]... respond differently than respondents who viewed the control [cell stimulus]..., the difference cannot be merely the result of a leading question, because both groups answered the same question..." See Shari Seidman Diamond "Reference Guide on Survey Research," in the Federal Judicial Center's Reference Manual on Scientific Evidence, Third, pages 398-399.

and the control cell were identical with the exception of the stimuli shown to respondents. As noted earlier, any single respondent participated in only one of the two survey cells.

25. In total, four hundred eighteen (418) interviews were completed in this likelihood of confusion survey: two hundred eleven (211) interviews were completed in the test cell; and two hundred seven (207) interviews were completed in the control cell.

SURVEY PROCEDURES AND QUESTIONS

26. Initially, potential respondents received an invitation to fill out the screening portion of the interview to determine whether or not they met the universe definition. See Exhibit A, pages 2-4. Subsequently, those respondents who met the universe definition were invited to complete the main survey. At the beginning of the main survey, respondents were shown a screen with a letter on it and were asked to record the letter they were shown. See Exhibit A, page 5, screen 15. This was done as a tracking mechanism to identify which stimuli respondents were exposed to.

27. Survey questions posed to test cell and control cell respondents were identical and are as follows:

In this survey, you are going to be shown a retail store display of products for dogs.

Please understand that we are only interested in your opinions or beliefs; and if you don't have an opinion or belief or don't know the answer to a question, that is an acceptable answer.

See Exhibit A, page 6, screen 16.

Next, respondents were told:

Please look at this display of products for dogs as you would if you saw it in a store and were considering purchasing a dog toy.

Please feel free to take as much time as you like looking at the picture of the retail store display before moving on to the survey questions.

See Exhibit A, page 6, screen 17.

Next, respondents were told:

This is a dog toy shown in the display you just saw.

Please look at this dog toy as you would if you saw it in a store and were considering purchasing it.

See Exhibit A, page 6, screen 18.

Next, respondents were asked:

Could you clearly see the dog toy?

See Exhibit A, page 6, screen 19.

Only respondents who answered 'yes' to this question were allowed to continue. Next, respondents were told:

Please look at the hang tag on this dog toy.

See Exhibit A, page 6, screen 20.

Next, respondents were asked:

Could you clearly read the hang tag?

See Exhibit A, page 6, screen 21.

Only respondents who answered 'yes' to this question were allowed to continue. Respondents were then asked:

Q7.0 Who or what company do you believe makes

or puts out this product?⁶ Please be as specific as possible.

See Exhibit A, page 7, screen 22.

Respondents were then asked the basis for their answer with the question:

Q7.1 Why do you say that?⁷ Again, please be as specific as possible.

See Exhibit A, page 7, screen 23.

Next, respondents were asked:

Q7.2 What else, if anything, makes you say that?⁸ Again, please be as specific as possible.

See Exhibit A, page 7, screen 24.

Respondents were then asked:

Q8.0 What other product or products, if any, do you believe are made or put out by whoever makes or puts out this product? Please be as specific as possible.

See Exhibit A, page 7, screen 25.

Respondents were then asked the basis for their answer

⁶ The first two principal survey questions (i.e., question series 7.0 and 8.0) were designed to address the issue of likelihood of confusion as to source or origin and were patterned after similar accepted questions. See Union Carbide Corp. v. Ever-Ready, Inc., 531 F.2d 366 (7th Cir. 1976), cert. denied, 429 U.S. 830, 50 L. Ed. 2d 94, 97 S. Ct. 91 (1976); and J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, Vol. 6 §32:174 @ 448-450, Rel. #72, 12/2014.

⁷ Respondents who answered 'don't know' to Q7.0 were not asked Q7.1.

⁸ Respondents who answered 'don't know' to Q7.1 were not asked Q7.2.

with the question:

Q8.1 Why do you say that?⁹ Again, please be as specific as possible.

See Exhibit A, page 7, screen 26.

Next, respondents were asked:

Q8.2 What else, if anything, makes you say that?¹⁰ Again, please be as specific as possible.

See Exhibit A, page 7, screen 27.

Next, respondents were asked:

Q9.0 Do you believe this product...

- _____ 1. is being made or put out with the authorization or approval of any other company or companies;
- _____ 2. is not being made or put out with the authorization or approval of any other company or companies; or¹¹
- _____ 3. don't know or have no opinion?

See Exhibit A, page 8, screen 28.

⁹ Respondents who answered 'don't know' to Q8.0 were not asked Q8.1.

¹⁰ Respondents who answered 'don't know' to Q8.1 were not asked Q8.2.

¹¹ To guard against any order bias, the first two alternatives in this list were rotated (i.e., approximately one half of the respondents saw the list with the first alternative being "...is being made or put out with the authorization or approval..." and approximately one-half of the respondents saw the list with the first alternative being" ...is not being made or put out with the authorization or approval...").

Respondents who indicated that they believed the dog toy is being made or put out with the authorization or approval of any other company or companies¹² were asked:

Q9.1 What company or companies do you believe gave the authorization or approval to make or put out this product?¹³ Please be as specific as possible.

See Exhibit A, page 8, screen 29.

If the respondent provided a response, he/she was asked the basis for the belief with the question:

Q9.2 Why do you say that?¹⁴ Again, please be as specific as possible.

See Exhibit A, page 8, screen 30.

Next, respondents were asked:

Q9.3 What else, if anything, makes you say that?¹⁵ Again, please be as specific as possible.

See Exhibit A, page 8, screen 31.

¹² The last two principal survey questions (i.e., question series 9.0 and question series 10.0) were designed to address likelihood of confusion as to authorization or approval or business affiliation or business connection and were also patterned after similarly accepted questions. J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, Vol. 6 §32:175 at 450-451, Rel. #72, 12/2014.

¹³ Only respondents who answered 'is being made or put out...' were asked Q9.1.

¹⁴ Respondents who answered 'don't know' to Q9.1 were not asked Q9.2.

¹⁵ Respondents who answered 'don't know' to Q9.2 were not asked Q9.3.

Next, respondents were asked:

Q10.0 Do you believe that whoever makes or puts out this product...

1. has a business affiliation or business connection with any other company or companies;
2. does not have a business affiliation or business connection with any other company or companies; or¹⁶
3. don't know or have no opinion?

See Exhibit A, page 9, screen 32.

Respondents who indicated that they believed that whoever makes or puts out the dog toy has a business affiliation or business connection with any other company or companies were asked:

Q10.1 What company or companies do you believe

¹⁶ Again, to guard against any order bias, the first two alternatives in this list were rotated (i.e., approximately one half of the respondents saw the list with the first alternative being "...has a business affiliation or business connection..." and approximately one-half of the respondents saw the list with the first alternative being "...does not have a business affiliation or business connection...").

As an additional guard against order bias, approximately one-half of the respondents were first queried in question 9.0 about authorization or approval, and approximately one-half of the respondents were first queried in question 9.0 about business affiliation or business connection. Similarly, approximately one-half of the respondents were first queried in question 10.0 about authorization or approval, and approximately one-half of the respondents were first queried in question 10.0 about business affiliation or business connection. All respondents were asked both question series 9.0 and 10.0 as noted above.

has a business affiliation or business connection with whoever makes or puts out this product?¹⁷ Please be as specific as possible.

See Exhibit A, page 9, screen 33.

If the respondent provided a response, he/she was asked the basis for the belief with the question:

Q10.2 Why do you say that?¹⁸ Again, please be as specific as possible.

See Exhibit A, page 9, screen 34.

Next, respondents were asked:

Q10.3 What else, if anything, makes you say that?¹⁹ Again, please be as specific as possible.

See Exhibit A, page 9, screen 35.

Finally, respondents were asked:

Q11.0 Do you, or does anyone else in your household, work for a company that makes, sells, or distributes any food products, clothing, fragrance, jewelry, [or] alcoholic beverages?

See Exhibit A, page 9, screen 36.

Respondents were then shown a screen that said:

Thank you for your time and participation.

¹⁷ Only respondents who answered 'has a business affiliation or business connection...' were asked Q10.1.

¹⁸ Respondents who answered 'don't know' to Q10.1 were not asked Q10.2.

¹⁹ Respondents who answered 'don't know' to Q10.2 were not asked Q10.3.

See Exhibit A, page 9, screen 37.

SURVEY RESULTS

Test Cell

28. In the test cell, the results of the likelihood of confusion survey evidence that approximately twenty-nine percent (29.38%) of the universe of potential purchasers of dog toys expressed the belief that Plaintiff's Bad Spaniels dog toy is being made or put out by Jack Daniel's, or that Plaintiff's Bad Spaniels dog toy is being made or put out with the authorization or approval of Jack Daniel's, or that Plaintiff has a business affiliation or business connection with Jack Daniel's due to Plaintiff's use of Jack Daniel's indicia or trade dress on its Bad Spaniels dog toy. See Exhibit A, page 15.

TABLE 1
TEST CELL

<u>Response Categories</u>	<u>Response Distribution</u>	
	<u>Number</u>	<u>Percent</u> (n=211)
1. Jack Daniel's	62	29.38
2. Silly Squeakers, VIP Products, Bad Spaniels, Tennessee Carpet	74	35.07
3. Other	30	14.22
4. Don't know	45	21.33
Total	211	100

29. Following are the verbatim responses of respondents in the test cell whose beliefs are included in the "Jack Daniel's" category. Spelling has been corrected in the following listing for readability.

Test Cell Survey Results

<u>RESPONDENT NUMBER</u>	<u>RESPONSE</u>
1001	Q9.0 IS being made or put out with authorization/approval.
	Q9.1 I believe they would have to get the approval of Jack Daniel's whiskey because the design and name is so closely related.
	Q9.2 Because they are creating a spoof of a real product so I think they would need permission so they don't get sued for copyrights or something like that.
	Q9.3 Don't know.
1003	Q9.0 IS being made or put out with authorization/approval.
	Q9.1 Jack Daniel's.
	Q9.2 Design and wording style.
	Q9.3 Shape looks like a bottle of JD.
1005	Q7.0 Jack Daniel's.
	Q7.1 The bottle looks similar to No. 7.
	Q7.2 It is a black label.
	Q10.0 HAS a business affiliation or business connection.
	Q10.1 Jack Daniel's.
	Q10.2 The bottle looks identical.
	Q10.3 Don't know.
1008	Q9.0 IS being made or put out with authorization/approval.
	Q9.1 Jack Daniel's.

Test Cell Survey ResultsRESPONDENTNUMBERRESPONSE

	Q9.2	Sounds like it.
	Q9.2	Appearance.
1012	Q9.0	IS being made or put out with authorization/approval.
	Q9.1	Jack Daniel's.
	Q9.2	Bottle design and name are plays on the Jack Daniel's brand.
	Q9.3	Nothing else.
1015	Q7.0	Jack Daniel's.
	Q7.1	Jack Daniel's.
	Q7.2	It mimics them.
	Q8.0	Jack Daniel's.
	Q8.1	It looks like their bottle.
	Q8.2	It looks like their bottle and logo.
1016	Q9.0	IS being made or put out with authorization/approval.
	Q9.1	Jack Daniel's.
	Q9.2	Because the product looks like a Jack Daniel's bottle/logo.
	Q9.3	Don't know.
1020	Q8.0	It looks like a Jack Daniel's whiskey bottle.
	Q8.1	It has the similar label and colors as a Jack Daniel's bottle.
	Q8.2	Nothing. That is what I see.
	Q9.0	IS being made or put out with authorization/approval.

Test Cell Survey Results

<u>RESPONDENT</u>	<u>NUMBER</u>	<u>RESPONSE</u>
		Q9.1 Jack Daniel's distilleries.
		Q9.2 It has the very same label and colors as s Jack Daniel's whiskey bottle.
		Q9.3 Nothing. It says it all.
		Q10.0 HAS a business affiliation or business connection.
		Q10.1 It looks like they did a license deal with Jack Daniel's.
		Q10.2 As I said, label type and colors on the bottle and the shape.
		Q10.3 Nothing.
	1022	Q9.0 IS being made or put out with authorization/approval.
		Q9.1 Jack Daniel's liquor company.
		Q9.2 Because since the dog toy is resembling a Jack Daniel's I'm sure the dog toy company that made this toy had to get their permission and legal rights to essentially copy they product in dog toy form.
		Q9.3 Don't know.
		Q10.0 HAS a business affiliation or business connection.
		Q10.1 Jack Daniel's.

Test Cell Survey Results

<u>RESPONDENT NUMBER</u>	<u>RESPONSE</u>
	Q10.2 Because the dog toy resembles Jack Daniel's liquor.
	Q10.3 Don't know.
1029	Q9.0 IS being made or put out with authorization/approval.
	Q9.1 Jack Daniel's because the label resembles and is a play on their label.
	Q9.2 It has the colors and design of the Jack Daniel's label.
	Q9.3 Nothing.
1030	Q7.0 Jack Daniel's.
	Q7.1 Because of the logo on the toy.
	Q7.2 Don't know.
1033	Q7.0 Jack Daniel's.
	Q7.1 Because it is a spoof on their logo.
	Q7.2 Just the look of the label.
	Q9.0 IS being made or put out with authorization/approval.
	Q9.1 My best guess is that in order to use this design you would have to have permission from the Jack Daniel's brand.
	Q9.2 Don't know.
1035	Q9.0 IS being made or put out with authorization/approval.
	Q9.1 Jack Daniel's.
	Q9.2 It is the same look.

Test Cell Survey Results

<u>RESPONDENT</u>	<u>NUMBER</u>	<u>RESPONSE</u>
	1037	Q9.3 Don't know. Q9.0 IS being made or put out with authorization/approval.
	1044	Q9.1 Jack Daniel's. Q9.2 The name and shape. Q9.3 Don't know. Q9.0 IS being made or put out with authorization/approval.
	1046	Q9.1 Jack Daniel's. Q9.2 Jack Daniel's name is on the front of the package. Q9.3 Don't know. Q8.0 It is similar to a Jack Daniel's label but I do not believe they make any dog products. Q8.1 Just that it looks, from a distance, like a Jack Daniel's label that is on a bottle of liquor. Q8.2 Don't know.
	1047	Q9.0 IS being made or put out with authorization/approval. Q9.1 If it is put out by Jack Daniel's then they would have to give authorization for approval to copy their signature label. Q9.2 Don't know. Q9.0 IS being made or put out with authorization/approval.

Test Cell Survey Results

<u>RESPONDENT</u>	<u>NUMBER</u>	<u>RESPONSE</u>
		Q9.1 Jack Daniel's.
		Q9.2 This label has been a trade mark for Jack Daniel's whiskey for a century.
		Q9.3 I have no other reason to believe this other than the label is a Jack Daniel's trademark.
	1054	Q8.0 Jack Daniel's whiskey.
		Q8.1 The toy looks like a Jack Daniel's bottle.
		Q8.2 Don't know.
		Q9.0 IS being made or put out with authorization/approval.
		Q9.1 Jack Daniel's Inc.
		Q9.2 Don't know.
	1056	Q7.0 Jack Daniel's.
		Q7.1 It is their bottle shape.
		Q7.2 It looks like it.
		Q9.0 IS being made or put out with authorization/approval.
		Q9.1 Jack Daniel's.
		Q9.2 It is their type of bottle.
		Q9.3 It is their type of logo.
		Q10.0 HAS a business affiliation or business connection.
		Q10.1 Jack Daniel's.
		Q10.2 It is their type of bottle.
		Q10.3 It is their company logo.
	1062	Q8.0 Jack Daniel's.
		Q8.1 It has the same sort of label.

Test Cell Survey ResultsRESPONDENT

<u>NUMBER</u>	<u>RESPONSE</u>
	Q8.2 But then it was made in China.
1063	Q7.0 Jack Daniel.
	Q7.1 It look likes alcohol.
	Q7.2 Nothing it just looks like Jack Daniel.
	Q10.0 HAS a business affiliation or business connection.
	Q10.1 Jack Daniel.
	Q10.2 I just do.
	Q10.3 Nothing.
1065	Q7.0 Bad Spaniels. It closely resembles a Jack Daniel's bottle.
	Q7.1 The main name on the toy was Bad Spaniels. On the back of the tag was also listed Bad Spaniels.
	Q7.2 Don't know.
	Q9.0 IS being made or put out with authorization/approval.
	Q9.1 Jack Daniel's is what the bottle resembles.
	Q9.2 This is what a Jack Daniel's bottle looks like. Other than the name and some details, it's a mirror image.
	Q9.3 Don't know.
1067	Q7.0 Jack Daniel's.
	Q7.1 Looks like an alcohol bottle.
	Q7.2 Don't know.

Test Cell Survey Results

<u>RESPONDENT</u>	<u>NUMBER</u>	<u>RESPONSE</u>
		Q10.0 HAS a business affiliation or business connection.
		Q10.1 Jack Daniel's.
		Q10.2 Looks just like a bottle of Jack Daniel's.
		Q10.3 Don't know.
	1076	Q9.0 IS being made or put out with authorization/approval.
		Q9.1 Jack Daniel's.
		Q9.2 It's obvious. It's a knockoff of Jack D's.
		Q9.3 Don't know.
	1077	Q9.0 IS being made or put out with authorization/approval.
		Q9.1 Jack Daniel's.
		Q9.2 It looks like a Jack Daniel's bottle.
		Q9.3 It looks like one.
		Q10.0 HAS a business affiliation or business connection.
		Q10.1 Jack Daniel's.
		Q10.2 Looks like their bottle.
		Q10.3 It just does.
	1082	Q7.1 It is a copy of a Jack Daniel's bottle.
		Q7.2 It is confusing.
		Q8.0 Jack Daniel's.
		Q8.1 It looks just like it.
		Q8.2 Don't know.
	1083	Q7.0 Brown-Forman group.
		Q7.1 The play on Jack Daniel's.

Test Cell Survey Results

<u>RESPONDENT</u>	<u>NUMBER</u>	<u>RESPONSE</u>
		Q7.2 Jack Daniel's is made by the Brown-Forman group.
		Q8.0 Whiskey, Southern Comfort.
		Q8.1 The play on Jack Daniel's.
		Q8.2 Jack Daniel's is made by the Brown-Forman group.
		Q9.0 IS being made or put out with authorization/approval.
		Q9.1 Brown-Forman group.
		Q9.2 Brown-Forman makes Jack Daniel's.
		Q9.3 The products play on Jack Daniel's.
		Q10.0 HAS a business affiliation or business connection.
		Q10.1 Brown-Forman group.
		Q10.2 Brown-Forman makes Jack Daniel's.
		Q10.3 The play on Jack Daniel's whiskey.
	1092	Q7.0 Jack Daniel's.
		Q7.1 Looks like a whiskey bottle.
		Q7.2 Label and colors.
	1095	Q9.0 IS being made or put out with authorization/approval.
		Q9.1 I believe that Jack Daniel distillery wanted to help out.
		Q9.2 It is, because it is a good product.

Test Cell Survey Results

<u>RESPONDENT</u>	<u>NUMBER</u>	<u>RESPONSE</u>
		Q9.3 Nothing else makes me say that.
1098		Q9.0 IS being made or put out with authorization/approval.
		Q9.1 Jack Daniel's.
		Q9.2 It's similar to the bottle design for Jack Daniel's and Jim Beam.
		Q9.3 Just it looks like the liquor bottle.
1099		Q8.0 Jack Daniel's.
		Q8.1 Not sure.
		Q8.2 Not sure.
1100		Q7.0 Jack Daniel's.
		Q7.1 The logo replica.
		Q7.2 Don't know.
1106		Q9.0 IS being made or put out with authorization/approval.
		Q9.1 Jack Daniel's.
		Q9.2 Because its Jack Daniel's.
		Q9.3 It looks like Jack Daniel's.
1108		Q7.0 JD.
		Q7.1 Don't know.
		Q8.0 Jack.
		Q8.1 Don't know.
1110		Q7.0 Jack Daniel's.
		Q7.1 The bottle.
		Q7.2 The bottle design looks like the Jack bottle.

Test Cell Survey Results

<u>RESPONDENT</u>	<u>NUMBER</u>	<u>RESPONSE</u>
		Q10.0 HAS a business affiliation or business connection.
		Q10.1 Jack.
		Q10.2 Again the bottle.
		Q10.3 Same reasons.
	1114	Q7.0 Jack Daniel's.
		Q7.1 Because that's what it looks like.
		Q7.2 Just the looks of it.
		Q9.0 IS being made or put out with authorization/approval.
		Q9.1 Jack.
		Q9.2 It looks like there brand, bottle.
		Q9.3 Don't know.
	1115	Q9.0 IS being made or put out with authorization/approval.
		Q9.1 Jack Daniel's.
		Q9.2 Because the label is based on a Jack Daniel's label.
		Q9.3 Just the label.
		Q10.0 HAS a business affiliation or business connection.
		Q10.1 Jack Daniel's.
		Q10.2 Because of the label.
		Q10.3 They would have had permission to copyright the Jack Daniel's label.
	1120	Q9.0 IS being made or put out with authorization/approval.
		Q9.1 Jack Daniel's.

Test Cell Survey ResultsRESPONDENTNUMBERRESPONSE

	Q9.2	The print, font and bottle looks like Jack Daniel's.
	Q9.3	Don't know.
	Q10.0	HAS a business affiliation or business connection.
	Q10.1	Jack Daniel's.
	Q10.2	Looks like the bottle.
	Q10.3	Don't know.
1121	Q9.0	IS being made or put out with authorization/approval.
	Q9.1	Jack Daniel's Tennessee whiskey.
	Q9.2	It has a very similar label.
	Q9.3	I don't drink that particular brand of whiskey, but I know the label.
1132	Q9.0	IS being made or put out with authorization/approval.
	Q9.1	Jack Daniel's.
	Q9.2	The "label" on the toy is in the same design as the label on a bottle of Jack Daniel's whiskey.
	Q9.3	Nothing.
1139	Q9.0	IS being made or put out with authorization/approval.
	Q9.1	Jack Daniel.
	Q9.2	That label.
	Q9.3	That logo.
1141	Q10.0	HAS a business affiliation or business connection.

Test Cell Survey ResultsRESPONDENTNUMBERREPOSE

	Q10.1	Jack Daniel's.
	Q10.2	The product seems really similar.
	Q10.3	Don't know.
1147	Q8.0	Jack Daniel's.
	Q8.1	It looks like their products.
	Q8.2	The appearance.
	Q9.0	IS being made or put out with authorization/approval.
	Q9.1	Jack Daniel's.
	Q9.2	It uses their brand image.
	Q9.3	It looks like their product.
	Q10.0	HAS a business affiliation or business connection.
	Q10.1	Jack Daniel's Tennessee whiskey.
	Q10.2	They are using their brand image.
	Q10.3	It looks like their product.
1148	Q10.0	HAS a business affiliation or business connection.
	Q10.1	It looks like packaging from Jack Daniel's sauces.
	Q10.2	The label and color looks like it.
	Q10.3	The label looks like Jack Daniel's drink, as well as the sauces.
1154	Q9.0	IS being made or put out with authorization/approval.

Test Cell Survey Results

<u>RESPONDENT</u>		
<u>NUMBER</u>		<u>RESPONSE</u>
	Q9.1	Jack Daniel's.
	Q9.2	Because the font of the text used for the product tag looks just like the package design on their products.
1155	Q9.3	Don't know.
	Q7.0	Jack Daniel's.
	Q7.1	It looks like the Jack Daniel bottle.
1156	Q7.2	Don't know.
	Q7.0	Jack Daniel's Tennessee whiskey.
	Q7.1	While I didn't specifically look on the hand tag for the maker, I saw it was made in China, where the manufacturer would really be, but as the toy was designed to look like Jack Daniel's Tennessee sour mash whiskey, I assume that company is the one that designed it, and had it manufactured.
	Q7.2	Basically it's subliminal advertising. someone will see the dog toy shaped and labeled to look fairly close to a Jack Daniel's whiskey bottle, that in their subconscious if they are individuals

TEST CELL SURVEY RESULTSRESPONDENTNUMBERRESPONSE

- that drink alcoholic beverages (and I assume they would or they wouldn't have bought that specific dog toy), that they'll quite likely go to a alcoholic beverage store and purchase a bottle of that product.
- Q8.0 Jack Daniel's Tennessee sour mash whiskey.
- Q8.1 Jack Daniel Tennessee sour mash whiskey.
- Q8.2 Bottle shape, label color, printing on label has a font that is identical to that (though wording is not exact, but similar) of a Jack Daniel's whiskey black label Tennessee sour mash whiskey.
- Q9.0 IS being made or put out with authorization/approval.
- Q9.1 Jack Daniel's.
- Q9.2 Jack Daniel's.
- Q9.3 The simile is intended to depict a whiskey bottle made by Jack Daniel's. Basically a subliminal way to delve into the subconscious of someone, see it to put in their mind to go out and buy some

Test Cell Survey Results

<u>RESPONDENT NUMBER</u>	<u>RESPONSE</u>
	Jack Daniel's whiskey.
	Q10.0 HAS a business affiliation or business connection.
	Q10.1 Jack Daniel's.
	Q10.2 Jack Daniel's distillery.
	Q10.3 I've already stated the answer to that exact question several times over, and I know I'm not inebriated on Jack Daniel's whiskey and seeing double or triple, as I don't drink alcoholic beverages.
1159	Q9.0 IS being made or put out with authorization/approval.
	Q9.1 Jack Daniel's.
	Q9.2 It resembles a bottle of Jack Daniel's whiskey.
	Q9.3 Don't know.
1160	Q7.0 Jack Daniel's.
	Q7.1 It looks like a Jack Daniel's bottle.
	Q7.2 No other reason.
	Q10.0 HAS a business affiliation or business connection.
	Q10.1 Jack Daniel's.
	Q10.2 Don't know.
1162	Q9.0 IS being made or put out with authorization/approval.
	Q9.1 Jack Daniel's.

Test Cell Survey Results

<u>RESPONDENT</u>	<u>NUMBER</u>	<u>RESPONSE</u>
		Q9.2 Because the logo looks similar.
		Q9.3 Don't know.
1172	Q10.0	HAS a business affiliation or business connection.
	Q10.1	Jack Daniel's.
	Q10.2	Don't know.
1176	Q9.0	IS being made or put out with authorization/approval.
	Q9.1	Jack Daniel's.
	Q9.2	It looks like a dog version of a Jack Daniel's bottle.
	Q9.3	Don't know.
1179	Q9.0	IS being made or put out with authorization/approval.
	Q9.1	Jack Daniel's.
	Q9.2	The toy looks like a Jack Daniel's bottle.
	Q9.3	Nothing.
1182	Q7.0	Jack Daniel's.
	Q7.1	It is designed like their bottle.
	Q7.2	Nothing else.
	Q9.0	IS being made or put out with authorization/approval.
	Q9.1	Jack Daniel's.
	Q9.2	Don't know.
	Q10.0	HAS a business affiliation or business connection.
	Q10.1	Jack Daniel's.
	Q10.2	Don't know.

Test Cell Survey ResultsRESPONDENTNUMBERRESPONSE

1184	Q7.0	Jack Daniel's.
	Q7.1	Because the bottle looks like it.
	Q7.2	There is nothing else.
1191	Q7.0	Jack Daniel's.
	Q7.1	The look of the bottle, said so on the tag.
	Q7.2	Nothing else.
1194	Q7.0	Jack Daniel's.
	Q7.1	That's what I remember seeing.
	Q7.2	The actual toy is a bottle of a Jack Daniel sauce.
	Q9.0	IS being made or put out with authorization/approval.
	Q9.1	Jack Daniel's.
	Q9.2	The bottle is mimicked after the Jack Daniel BBQ sauce. So they would hold the patent therefore you would have to ask permission to use the image
	Q9.3	It is made to look like a Jack Daniel bbq sauce bottle.
	Q10.0	HAS a business affiliation or business connection.
	Q10.1	Jack Daniel's.
	Q10.2	The bottle, the back of the label, the play on words.
	Q10.3	Don't know.
1198	Q7.0	Jack Daniel's.

Test Cell Survey Results

<u>RESPONDENT NUMBER</u>	<u>RESPONSE</u>
	Q7.1 It looks like a Jack Daniel's bottle.
	Q7.2 The label.
	Q9.0 IS being made or put out with authorization/approval.
	Q9.1 Jack Daniel's.
	Q9.2 The label.
	Q9.3 The name.
	Q10.0 HAS a business affiliation or business connection.
	Q10.1 Jack Daniel's.
	Q10.2 The bottle.
	Q10.3 The label.
1199	Q7.0 Jack Daniel's.
	Q7.1 Looks like it.
	Q7.2 Design and look.
	Q8.0 Jack Daniel's.
	Q8.1 Don't know.
	Q10.0 HAS a business affiliation or business connection.
	Q10.1 Jack Daniel's.
	Q10.2 Looks like it.
	Q10.3 Don't know.
1200	Q9.0 IS being made or put out with authorization/approval.
	Q9.1 Jack Daniel's.
	Q9.2 Jack Daniel's IPR/copy-right.
	Q9.3 Nothing more to add.
1204	Q7.0 Jack Daniel's.
	Q7.1 It looks like the bottle.

Test Cell Survey Results

RESPONDENT

NUMBERRESPONSE

	Q7.2	Nothing.
	Q9.0	IS being made or put out with authorization/approval.
	Q9.1	Jack Daniel's.
	Q9.2	Because it says raw Daniel's and looks like a Jack bottle.
	Q9.3	Nothing.
	Q10.0	HAS a business affiliation or business connection.
	Q10.1	Jack Daniel's.
	Q10.2	Because it looks just like the bottle.
	Q10.3	Don't know.
1210	Q10.0	HAS a business affiliation or business connection.
	Q10.1	Jack Daniel's.
	Q10.2	Because of similarity of names.
	Q10.3	It looks like a bourbon bottle.

Control Cell Survey Results

30. In the control cell, the results of the likelihood of confusion survey evidence that approximately one half of one percent (0.48%) of the universe of potential purchasers of dog toys expressed the belief that the fictitious Bad Spaniels dog toy is being made or put out by Jack Daniel's, or that the fictitious Bad Spaniels dog toy is being made or put out with the authorization or ap-

proval of Jack Daniel's, or that whoever put out the fictitious Bad Spaniels dog toy has a business affiliation or business connection with Jack Daniel's. See Exhibit A, page 74.

TABLE 4
CONTROL CELL

<u>Response Categories</u>	<u>Response Distribution</u>	
	<u>Number</u>	<u>Percent</u> (n=207)
1. Jack Daniel's	1	0.48
2. Silly Squeakers, VIP Products, Bad Spaniels, Tennessee Carpet	112	54.11
3. Other	42	20.29
4. Don't know	52	25.12
Total	207	100

31. Following is the verbatim response of the respondent in the control cell whose beliefs are included in the "Jack Daniel's" category. Spelling has been corrected in the following listing for readability.

Control Cell Survey Results

RESPONDENT

NUMBER

RESPONSE

2131

Q10.0 HAS a business affiliation or business connection.

Q10.1 Jack Daniel's.

Q10.2 Looks similar to their whiskey bottles.

Q10.3 The coloration of the bottle packaging.

Summary of Survey Results

32. The results of the likelihood of confusion survey evidence that, on a net basis after adjusting the survey data for mismeasurement error in the test cell survey results, based upon the control cell, approximately twenty-nine percent (28.90%)²⁰ of the universe expressed the belief that Plaintiff's Bad Spaniels dog toy is made or put out by, or is made or put out with authorization/approval of, or that whoever makes or puts out the Bad Spaniels dog toy has a business affiliation or business connection with Jack Daniel's. See Exhibit A, page 126.

TABLE 7
TEST AND CONTROL CELL
Composite Response Analysis

<u>Response Categories</u>	<u>Response Distribution</u>	
	<u>Test Cell</u> <u>Percent</u> (n=211)	<u>Control Cell</u> <u>Percent</u> (n=207)
1. Jack Daniel's	29.38	0.48

CONCLUSION

33. It is my considered opinion, based upon my education, background, and professional experience, and based upon my review and analysis that the survey results support a finding of likelihood of confusion. The survey

²⁰ The adjustment for mismeasurement error is accomplished by reducing the percent of Jack Daniel's responses in the test cell by the percentage of Jack Daniel's responses in the control cell. In this case, 29.38% of the survey respondents in the test cell indicated they believed that Plaintiff's Bad Spaniels dog toy is made or put out by, or is authorized or approved by, or has a business affiliation or business connection with Jack Daniel's. Thus, the likelihood of confusion level would be calculated as $29.38 - 0.48 = 28.90\%$.

results evidence that potential purchasers of a dog toy are likely to be confused or deceived by the belief that Plaintiff's Bad Spaniels dog toy is made or put out by Jack Daniel's, or is made or put out with the authorization or approval of Jack Daniel's, or that whoever makes or puts out Plaintiff's Bad Spaniels dog toy has a business affiliation or business connection with Jack Daniel's, and that such confusion is due in particular to Plaintiff's use of Jack Daniel's indicia or trade dress on the Bad Spaniels dog toy.

QUALIFICATIONS

34. I hold a Bachelor's Degree in Advertising (B.A.) from San Jose State University, a Master's Degree in Business Administration (M.B.A.) from the University of Southern California, and a Doctoral Degree in Business Administration (D.B.A.) from the University of Southern California.

35. During my twenty-five year academic appointment, my teaching responsibilities included both graduate and undergraduate level courses in a variety of subject areas. My teaching responsibilities included courses in marketing (e.g., marketing, marketing management, advertising, promotion, consumer behavior, and marketing research) and management (e.g., principles of management; business policy and strategy; business policies, operations, and organizations; and integrated analysis).

36. I am a member of the American Marketing Association (AMA), the American Academy of Advertising (AAA), the American Association of Public Opinion Research (AAPOR), the Council of American Survey Research Organizations (CASRO), and the International Trademark Association (INTA).

37. As a partner with Ford Bubala & Associates, I have been retained by a variety of firms engaged in the consumer product, industrial product, and service sectors of the economy to provide marketing consulting and research services. Approximately one-half of Ford Bubala & Associates' consultancies in which I have participated have involved the design and execution of marketing research surveys.

38. During the past forty years, I have been retained in a number of litigation-related consultancies involving intellectual property matters, including matters before federal and state courts, the Trademark Trial and Appeal Board of the U.S. Patent and Trademark Office, and the International Trade Commission. I have designed and executed surveys relating to intellectual property matters, including trademark, false advertising, patent, and other related matters. I am familiar with the accepted principles of survey research, as well as the tests for trustworthiness of properly conducted surveys or polls.²¹

39. During the past thirty-five years, I have addressed a variety of groups on the subject of surveys or polls and their use in the measurement of the state of mind of consumers, with respect to Lanham Act matters. Specifically, I have spoken at meetings of the American Bar Association, the American Intellectual Property Law Association, the American Marketing Association, the International Trademark Association, the Marketing Research Association, the Intellectual Property Law Institute of Canada, Marques, and the Practising Law Institute.

²¹ Supra note 1.

40. I have also written on the subject of the design and execution of litigation-related surveys in Lanham Act matters. Attached hereto as Exhibit B is a list of papers and book chapters that I have written since 2004.

41. Since 1998 I have served as a member of the Editorial Board of The Trademark Reporter, the scholarly legal journal on the subject of Lanham Act matters, published by the International Trademark Association.

42. I have been qualified and accepted as an expert in marketing and marketing research in more than sixty (60) trials before federal and state courts and administrative government agencies, including the Trademark Trial and Appeal Board.

43. Attached hereto as Exhibit C is a list of cases in which I have provided trial and/or deposition testimony since 1992.

44. Attached hereto as Exhibit D is a copy of my professional history, describing my qualifications and professional background.

MATERIALS CONSIDERED

45. Complaint; Answer and Counterclaims of Defendant and Counterclaimant Jack Daniel's Properties, Inc.; Plaintiff VIP Products, LLC's Answer to Jack Daniel's Properties, Inc.'s Counterclaim; an online omnibus study conducted by ORC International, February 5-8, 2015; Bad Spaniels dog toy with its hang tag; display photo of a retail display that includes a variety of products for dogs; Rough Draft of Deposition Transcript of Eleanor Phillips, April 21, 2015; and Rough Draft of Deposition Transcript of Stephen Sacra, April 23, 2015.

COMPENSATION

46. Ford Bubala & Associates' fees for this engagement consist solely of billable time and expenses. Standard time is billed at the rate of \$600.00 per hour for the services of a Partner and \$300.00 per hour for the services of a Research Associate. Deposition and trial time are billed at the rate of \$750.00 per hour plus expenses.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 7th day of May, 2015, in Huntington Beach, California.

/s/Dr. Gerald L. Ford
Dr. Gerald L. Ford

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Vip Products
Product Design and Manufacturing
PRODUCT CATALOG

MYDOGTOY.COM™

TUFFY
WORLD'S TUFFEST
SOFT DOC TOY

SQUISH
Squishers

MIGHTY
Rethink Durability

ROCKET DUCK

Bentley & Bunny

DEPOSITION EXHIBIT
4-1115
Date: 4-11-15
BECKY BAUMERT, CPE 3912

VIPW0056

TUFFY

Silly Squeakers

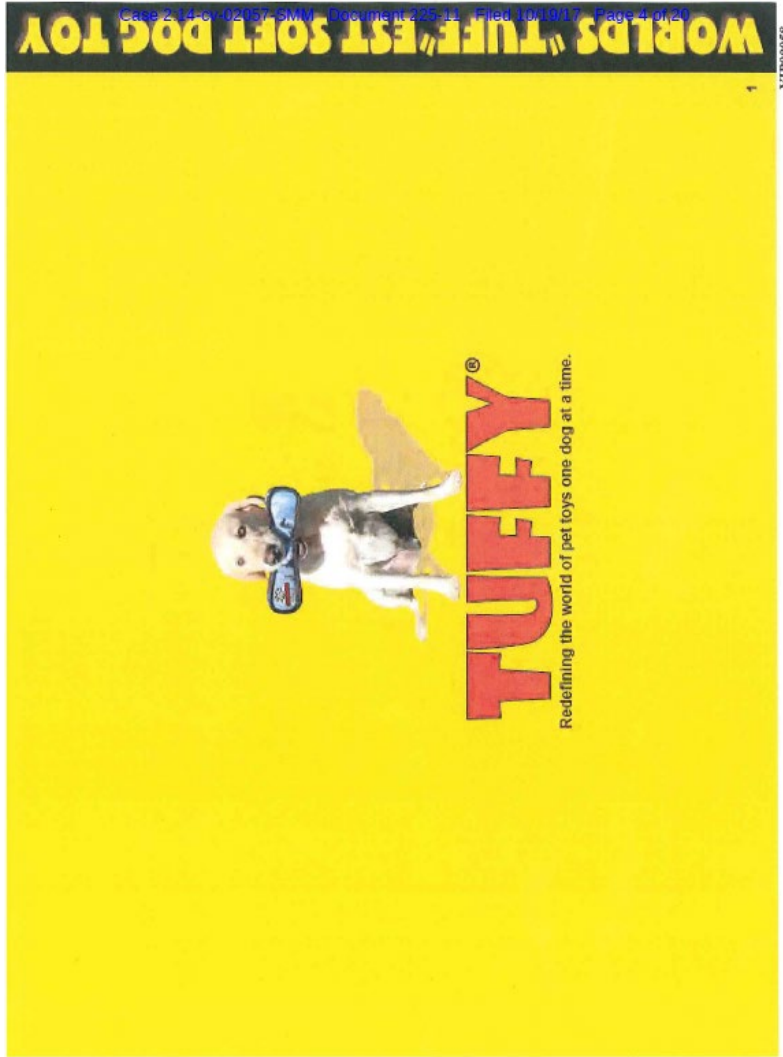
MIGHTY

B

Where's Mr. Poops?
Mr. Poops is making his rounds throughout this catalog.
Can you find all of Poops Mr. Poops is making?

88 B Dog Beds

Tuffscale	2
How Are They Made?	3
J.S.	4-5
Ultimate's	6-8
NO STUFF	9
Magics	10-13
Ocean Creatures	14-17
Dinosaurs & Dragons	18-19
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Desert Creatures	22-23
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Barn Yards	25-27
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Mighty Dog Beds	58-59
Pack 'n Go Dog Pack	60
88 B Dog Beds	61



TUFFY® TUFFSCALE

ALL TOYS ARE NOT CREATED EQUAL

...that is why we created the TUFFSCALE™. The TUFFSCALE is designed to give you insight on how tuff the toy you're buying compares against another. Some dogs are aggressive and can only have the tuffest toys ranked 8 and above. Other dogs may not be as aggressive or may be older and their chewing habits have slowed. If this sounds like your dog, you can consider toys ranked 5 and above.

OUR GOAL:

Our goal is to help you purchase a toy suited for your dog's needs. All of our Tuffy® and Mighty® toys are made with the same extreme durable construction, but the shape of the toy can impact a dog's ability to penetrate the toy over time.

Use the TUFFSCALE™ to help you with your purchase. If you aren't 100% sure which toy is right for your dog call us at 1-888-4-DogToy.

We strive to make our toys the TUFFest on the market. We are continually testing and creating new toys to be both stronger and safer for your dog. As loving dog owners, we only want the best toys for our dogs and yours. Indestructible is impossible... But we will keep trying!

MEGA 10

EXTREME 9

SUPER 8

VERY TUFF 7

Durable 6

Strong 5

wakest

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YTP00059

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TUFFY®

HOW ARE THEY MADE?

7

SEVEN ROWS OF STITCHING

Tuffy® toys can have up to 7 rows of stitching. The number of rows of stitching depends on the shape, size and style of the toy. Two directions of cross stitching hold the multiple layers together. Rows of stitching hold webbing around the materials edge, and the toys parts are sewn together with up to 3 rows of stitching. When possible, a protective webbing is added around the outer edge and sewn up to 3 more times.

4

FOUR LAYERS OF MATERIAL

Tuffy® toys can have up to 4 layers of material depending on the shape, size and style of the toy. Our Ultimate series (depicted here) can have up to 2 layers of Luggage grade material. Certain layers of material are coated with a layer of plastic to hold the material fibers together. Finally, we use soft fleece for the outside layer.



Different toys by shape and size is made differently, and because all toys are safety tested, the materials used in two toys are identical.

PROTECTIVE WEBBING

For our Ultimate series we add an additional layer of webbing, whenever possible, around the outside edge to cover the seams of the toy. This is sewn multiple times, for added durability.

SQUEAKER SAFETY POCKETS

Squeakers are sewn into material pockets inside the toy. This additional layer of safety can give you the time you need to safely remove the toy in the event your dog reaches the core of the toy.

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TUFFY JR'S
They Float, Squeak & Are Machine Washable
For Dogs 4-78lbs

JR RING (9)
The Ring has three squeakers and can be used for fetch or as a tug toy. Its soft edges won't hurt your dog's teeth or gums.

JR ODBALLS (7)
For dogs that LOVE to fetch and catch!

JR BONE 2 (8)
Same great bone with a new design!

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Product labels include: T.JR.R.1, T.JR.R.2, T.JR.R.3, T.JR.R.4, T.JR.R.5, T.JR.R.6, T.JR.R.7, T.JR.R.8, T.JR.R.9, T.JR.O.1, T.JR.O.2, T.JR.O.3, T.JR.O.4, T.JR.O.5, T.JR.O.6, T.JR.O.7, T.JR.B.1, T.JR.B.2, T.JR.B.3, T.JR.B.4, T.JR.B.5, T.JR.B.6, T.JR.B.7, T.JR.B.8, T.JR.B.9.

VP000061

WORLD'S TUFFEST SOFT DOG TOY

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VIP00002

5

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1-888-4-DogToy (354-889) • (480) 704-1700

JR BONE (8) TUFFSALES
For dogs that like to play, tug and whip their toys back and forth.
T-JR-B-01P T-JR-B-01R T-JR-B-02 T-JR-B-03

JR GEAR (8) TUFFSALES
The fun "gear" shape of these toys makes for a fun game of tug-a-pull with multiple partners!
T-JR-G-01P T-JR-G-01R T-JR-G-02 T-JR-G-03

JR BOOMERANG (8) TUFFSALES
Multiple squeakers make this a great toy for dogs that like to play, tug and whip their toys back and forth.
T-JR-B-01P T-JR-B-01R T-JR-B-02 T-JR-B-03

JR 3 WAY TUG (8) TUFFSALES
For dogs that like to play together! Get your doggie friends together for a fun-filled day.
T-JR-3-01P T-JR-3-01R T-JR-3-02 T-JR-3-03



TUFFY[®] ULTIMATES
 They Float, Squeak & Are Machine Washable

RING (9) TUFFSCALE
 #1 SELLER
 The Ring has four squeakers and has soft edges so it won't hurt your dog's teeth or gums, making it a great toy for fetch or a game of tug.

FLYER (8) TUFFSCALE
 This Flyer has one squeaker and is the perfect toy for training your dog to catch and fetch. Its soft fleece and durable construction make it the safest disc you'll find.

BONE (9) TUFFSCALE
 For dogs that like to fetch, tug and whip their toys back and forth.

ODDBALLS (8) TUFFSCALE
 For dogs that LOVE to fetch and catch!

MYDOGTOY.COM[™]
 1-866-4-DogToy (354-389) • (800) 704-1700

6

VTP00063

WORLD'S "TUFF"EST SOFT DOG TOY

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WORLDS "THE BEST SOFT DOG TOY"

TUG-O-WAR (9)
TWISTABLE

Great fun for everyone, and it squeaks. Two dogs can play all day with this two-ended toy. Also great for dog owners that like to play ruff and keep their hands out of harms way.

3 WAY TUG (9)
TWISTABLE

The 3 Way Tug will easily become your dog's favorite toy! Push, pull, toss and fetch have never been so fun, so bring a friend!

4 WAY RING (9)
TWISTABLE

The 4 Way Ring is a new twist on a pooch's favorite toys - the ball and the ring! Its soft edges won't hurt your dog's teeth or gums.

MYDOGTOY.COM™
1-888-4-DogToy (384-883) • (480) 704-4700

7

VTP00064

TUFFY MEGA TOYS

TIGER TESTED - DOG APPROVED!

By doing TUFFY, a toy around the Mega Toys is our strongest, most durable toy... Tiger tested and dog approved. Especially for some of the strongest tug-toys, these toys keep even the biggest dogs happy!

SEVEN ROWS OF STITCHING

Tuffy MEGA toys can have up to 7 rows of stitching. The number of rows of stitching depends on the shape, size and style of the toy. Two directions of cross stitching hold the multiple layers together, rows of stitching are added to the inner edge of the toy. The outer edge toy parts are sewn together with up to 3 rows of stitching. When possible, a protective webbing is added around the outer edge and sewn up to 3 more times.

SEVEN LAYERS OF MATERIAL

Tuffy MEGA toys can have up to 7 layers of material depending on the shape, size and style of the toy. Our MEGA series (depicted here) can have up to 3 layers of luggage grade material. Certain layers of material are coated with a layer of plastic to make the material stronger. Finally, we use ball bearings for the rubber layer.

SQUEAKER SAFETY POCKETS

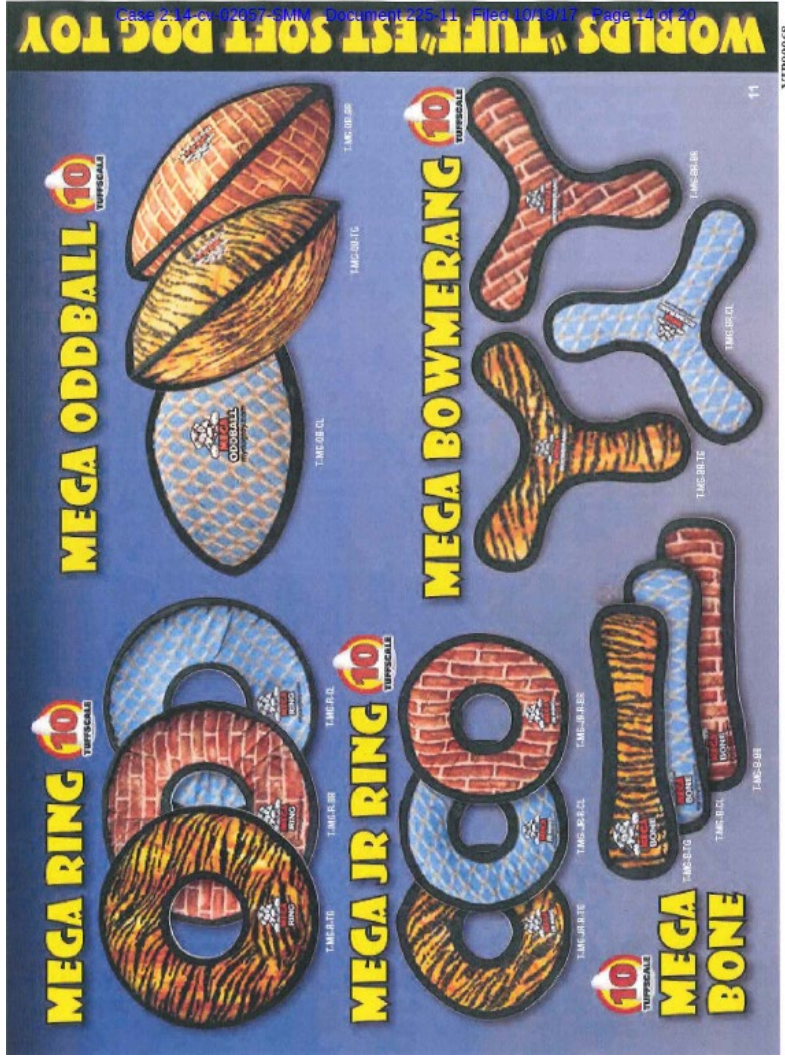
Each Squeaker is safe and quiet because they are sewn into a safety pocket between four other layers of material.



MYDOGTOY.COM
1-888-4-DogToy (264-385) • (410) 794-1700

VIP00067

WORLD'S "TUFF"EST SOFT DOG TOY



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TUFFY MEGA TOYS
TIGER TESTED - DOG APPROVED!
MEGA TIRE IRON
MEGA GEAR RING

10 TUFFSALES
10 TUFFSALES

MYDOGTOY.COM™
1-888-4-DogToy (354-885) • (800) 704-1700

YIP00069

The advertisement features a tiger in the background. In the foreground, there are two large dog toys: a 'MEGA TIRE IRON' with a blue and yellow tire tread pattern, and a 'MEGA GEAR RING' with a blue and yellow gear pattern. Both toys have a '10 TUFFSALES' logo. The text 'TIGER TESTED - DOG APPROVED!' is written in a bold, yellow font. The website 'MYDOGTOY.COM' and phone number '1-888-4-DogToy (354-885) • (800) 704-1700' are also present. The product code 'YIP00069' is located in the bottom right corner.

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MEGA TUG-OVAL

MEGA TUG-OVAL



TIME 10:15

MEGA TUG-OVAL

MEGA TUG-OVAL



TIME 10:10



TIME 10:17:16

JERSEY SHORE PETE

This tough guy can outlast any dog. He's got a great fake orange tan with jet black stripes. Pete will take on multiple dogs in a game of tug-o-war. Or head back one at a time! Soft edges won't hurt gums, and it floats!



TIME 10:15:16

OSCAR SCHWARZACREATURE

Oscar's rock hard foot can take on any dog in a game of fetch or tug-o-war! He'll be back... for more play time. Soft edges won't hurt gums, and it floats!

13

VIP00070

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TUFFY OCEANCREATURES
Washable & They Float!

7 TUFFCALLS
PURPLE PETE & LIL OSCAR
If a Pet-A-Tug and Odoggas are perfect for training your dog to fetch, Purple Pete and Lil Oscar are perfect for training your dog to hold the tug. When you throw them and they are great for multiple dog tug-o-war. Just ask Pete and Oscar to lend a hand.

8 TUFFCALLS

7 TUFFCALLS
NEELMO
Throw it and your dog will love to bring it back. If you have two dogs each one can pull on each end and you can safely hold the middle.

9 TUFFCALLS
THE 'GENERAL'
Throw it and your dog will love bringing it back. This "Super Starfish" won't hurt your dog when thrown and is definitely backyard approved.

5 TUFFCALLS
GARY-GATOR
"Captain Toothless" is the toy that won't bite back. Soon to be your dog's best friend. Fun for every dog. When your dog is done playing, it makes a great pillow.

MYDOGTUG.COM™
1-866-9DogToy (964-639) / (888) 704-1700

14

VIP000071

WORLD'S "TUFFEST" SOFT DOG TOY

8 TUFFSCALE

BURTLE-TURTLE

His friends call him Burt, and this is one guy your dog will want to be friends with! Great as a pillow and all around play toy, your dog will enjoy keeping him close at all times.

100% TURTLE

8 TUFFSCALE

LARRY LOBSTER

Larry is your dog's "Maine" Man. Since he is a Lobster, he is ready to play all day in and out of the water. Larry can't wait for the fun to begin!

100% LARRY LOBSTER

7 TUFFSCALE

KING CRAB

This soft-shell crab has what it takes to keep your dog coming back for more. Fun to fetch, tug and whip around at your dog's leisure.

100% KING CRAB

8 TUFFSCALE

KILLER WHALE

This killer will give your pouch a "whale" of a time! Struggle, tug, toss and fetch for optimum enjoyment!

100% KILLER WHALE

7 TUFFSCALE

RAY-RAY

Great fun for everyone! This cross-eyed Stingray has a big head and wing span for your dog and a tail for you to enjoy in a game of tug.

100% RAY-RAY

8 TUFFSCALE

LARRY LOBSTER

Larry is your dog's "Maine" Man. Since he is a Lobster, he is ready to play all day in and out of the water. Larry can't wait for the fun to begin!

100% LARRY LOBSTER

MYDOGTOY.COM
1-888-4dogtoy (dog toys) • 800-765-1700 • 15

VIP00072

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TUFFY OCEAN CREATURES
Washable & They Float!

OCEAN FISH
One fish, two fish...
red fish, orange fish!
And millions more!
A school of
fish for you!

WESLEY WHALE
You'll have a blast playing "catch and release" with this Titan of the Ocean!
Great for backyard or water play.

HADY HAMMERHEAD
Grab your boat and float to the deep to hunt for the HADY HAMMERHEAD!
Great fun for everyone!

SWACK SHARK
Keep your legs up when this Shark hits the water and you'll have a blast!
Shack The Shark is perfect for a game of fetch in or out of water!

TIGER SHARK
Frightening in the water, but fun in the living room! Tiger Shark will keep your pooch happy as the creams of days at the ocean.

MYDOGTOY.COM
1-800-8-DOGTOY (634-6264) 704-4700

16

VIP00073

TROUT
A prize catch that will make your dog proud to be your best friend!

MEGA SQUIDS
You won't need to give 25,000 leques to get your dog's attention. The Mega Squids are perfect for fetching and playing. Multiple layers of stitching and "MEGA" construction methods with up to 7 layers of material for extra durability.

JR SQUIDS
Little pups love squids too! Keep your active pooch happy and at play with luggable, fetchable JR Squids! Multiple layers of stitching and material makes this one "Jr" toy!

ULTIMATE SQUIDS
Ultimate Squids are the perfect pool toy for your pooch! Swim, dive, pull and play all day with these silly squids. Made using regular construction methods with up to 4 layers of material.

MYDOGTOY.COM

WORLD'S "TUFFEST" SOFT DOG TOY

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WORLDS "TUFF"EST SOFT DOG TOY

8 TRICERATOPS
 Along the shadows of the mountains walks a legend in armor plate protection. The tri-horned dinosaur, better known as Triceratops, forages on berries, grass and household shrubbery. Allow your pup to set up a protective barrier and spare your plants from this menacing plant eater.

7 TRICERATOPS
 TOY

8 STEGOSAURUS
 Beyond the massive highlands on a damp summer day, along the banks of a mountain stream, stands in threat the amazing Stegosaurus. Though it may feast only for household plants and backyard greens, it can defend its own against an attack from its smaller canine rivals.

7 STEGOSAURUS
 TOY

8 MOOSAURUS
 Fair across the desert plain wanders a mighty one-horned wonder. Stronger than any beast of its kind, the Moosaurus seeks off-world adventures journey to greener pastures. Your backyard lawn is just what he's going before unwaveringly forced to report by none other than his canine foe. Playtime will be filled with amusement when you bring this prehistoric Moosus to your home.

7 MOOSAURUS
 TOY

8 DRAGONS
 Everyone knows the REAL dragons of old were made of stone. But now, you can have the real dragons of old in your home. Based on the most popular breed of dragon, the Dragons are the most fun and ultimate companionship!

7 DRAGONS
 TOY

WORLDS "TUFF"EST SOFT DOG TOY
 (855) 445-1100 (855) 445-1100 (855) 445-1100

VLP00076

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TUFFY ZOOANIMALS

8 TUFFY GIRARD GIRAFFE
 This Giraffe is larger than most dogs and will present a challenge to any canine who dares to go up against it! The Giraffe will be a lifetime companion and will withstand even the "tuffest" of dog breeds!

8 TUFFY EMERY ELEPHANT
 Move over for this King of the elephants or he'll certainly topple you! Emery may look like a pachyderm, but he'll stand up to your pooch any time, any day, anywhere.

7 TUFFY MORRIS MONKEY
 Everyone beat your fists against your chest for Morris Monkey! Your best pal will go bananas over this mischievous monkey!

7 TUFFY PEABODY PENGUIN
 Pull up your britches for this perfectly prim penguin! He'll teach your pooch proper play behavior - a perfect pal for any pup.

7 TUFFY

MYDOGTOY.COM
 1-888-4-Dog Toy (364-453) • (409) 333-1700

20

VTP00077

WORLD'S "TUFFEST" SOFT DOG TOY

7 HILDA HIPPO
 TUFFSCALE
 This herbivorous Hippo is full of love and laughter for your carnivorous canine! Brighten your dog's day with a good game of tug and active play.

8 PEYTON PEACOCK
 TUFFSCALE
 The Peacock is Easy to toss and floats! Soft edges won't hurt game.

8 TATTERS TIGER
 TUFFSCALE
 This terrifying Tiger is a match for just about any pooch! Tatters is all about strength and endurance, so make sure your pup is in for the long-haul.

7 TOGO TOUCAN
 TUFFSCALE
 Move over Sam and get a load of Togo! This "tuff" tropical tweeter makes a colorful companion for your canine.

7 BEAUFORT BEAR
 TUFFSCALE
 Beaufort is a beautiful black bear with a big, big heart! A bit shy, your dog will need to befriend this beast for an assured best friend for life!

MYDOGTOY.COM
 1-2-3-4-5-6-7-8-9-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-100

VIP00078

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TUFFY DESERT CREATURES

7 RANT THE ANT
 Ants work best as a team, so pair up your pooch with Rant the Ant. Add Rant to the team and you'll have a boundless, bouncy, rebbong-hip.

8 PHINEAS PHROG
 Your "phinitely" pooch will simply adore Phineas Phrog! So easy to toss around and catch, your pup will have a phinend for him!

8 VURN THE VULTURE
 Vurn search out for Vurn-able circles overhead, but he's not targeting your dog, your dog is targeting him! Toss and Tug have never been so much fun!

7 TATE TABANYULA
 Little Mice: 1 set in a tree, 2 on some logs and 1 on a branch. Along with the hand played wanders right on hand played tug with Miss T's legs.

8 LIZZY THE LIZARD
 The easy-to-grab shape of Lizzy the Lizard is all your canine will need to make her his very best friend! Perfect for play with other dogs, or as a comfy chin rest.

Masters of the Mojave unite to make Desert Creatures a MUST for your dog! Battle the Scorpion, the Spider, the Lizard, creep and crawl with Harry the Hobo Spider, or bounce around with the finicky Phineas Phrog for a playful time with your canine.

MYDOGTOY.COM
 22 1-800-4-Dog Toy (364-4663) • (408) 704-5700

WORLD'S "TUFF"EST SOFT DOG TOY

YIP00079

WORLD'S "TUFFEST" SOFT DOG TOY

MYDOGTOY.COM™
 Introducing the world's toughest soft dog toy.

7 BELLA THE BAT
 Hold on to your spidee! This bloodthirsty vampire bat is ready to battle your little wolf any day (or night!).

7 HARRY THE HOBO SPIDER
 This is one Hobo spider you and your pooch don't have to be afraid of! Toss and tumble, yank and tug for hours of fantastic play!

8 PHROG LEAPING
 Leap Frogs! Leap Frogs! where shall you play today? Hop up and down, and all day long! Introducing the world's new best-selling Phrog Leaping Frog!

7 ARNIE THE ARMADILLO
 See if your pooch can soften the exterior of this "Tuff" Armadillo! Watch out - Arnie might give back a little bit of attitude.

8 SCORCH THE SCORPION
 One of the smallest, yet most fearsome creatures of the desert wants to come to your home! Put your dog on high alert for this super-tan sting!

8 HARRY THE HOBO SPIDER
 This is one Hobo spider you and your pooch don't have to be afraid of! Toss and tumble, yank and tug for hours of fantastic play!

7 ARNIE THE ARMADILLO
 See if your pooch can soften the exterior of this "Tuff" Armadillo! Watch out - Arnie might give back a little bit of attitude.

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 Leap Frogs! Leap Frogs! where shall you play today? Hop up and down, and all day long! Introducing the world's new best-selling Phrog Leaping Frog!

7 BELLA THE BAT
 Hold on to your spidee! This bloodthirsty vampire bat is ready to battle your little wolf any day (or night!).

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VIP00080

TUFFY ALIENS

WORLDS "TUFF"EST SOFT DOG TOY

G-6 ALIEN
 This tricky fri-pood is ready to take your canine on a GC Adventure like they've never experienced before! Don't let the crossed eyes and bad dentistry fool you, G6 is an intelligently designed alien to maximize enjoyment for your pooch!

ALIEN BALLS
 You've never seen space balls like these in a ball! These crazy aliens have two eyes on two sides - you can even pop your fingers through one mouth and have them come out the other, which means double trouble for your pet's alternate enjoyment! Check for yourself - you'll always be heads-up for an alien!

G3 ALIENS
 These little fri-poods may appear to be cute and cuddly, but they're as "tuff" as the next guy! Tough sand tumble pups will be a jerk-out of the G3's!

ALIEN BALL WITH LEGS
 Lanky and lanky, this alien has a face on both sides and is perfect for a multi-dog tug-of-war! Grab him by the legs for better throwing momentum or taze your pup with wobbly legs for a fun pounce!

MYDOGTOY.COM
 24 1-866-4-DogToy (364-489) • (480) 704-1700

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YIP00081

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WORLD'S "TUFFEST" SOFT DOG TOY

8 **CAPTAIN KURKLOPS**
UNIVERSITY

Take your pup to a new dimension with Captain Kurklops, the 8-legged, cyclops alien! Fly him through your backyard galaxy, and watch your dog race to pick him out of the air. Get all your dogs involved in a squeaky game of Tip, or simply lay him down for comfort to keep all the monsters away. Your pooch is sure to be pleased with this fun and adventurous toy!

TA-SALL-ALIEN

8 **ADMIRAL O'FURY**
UNIVERSITY

Take your pup to a new dimension with the classiest of toys. Admiral O'Fury is a fierce and fiery alien of the planet Bolla. Your dog will love Admiral O'Fury's high-pitched barks with this fun and adventurous toy!

TA-SALL-ALIEN

8 **LIEUTENANT SPLOCK**
UNIVERSITY

Take your pup to a new dimension with the ever-favorite Lieutenant Splock - the fiery cyclops alien! Your pooch is sure to be pleased with this fun and adventurous toy!

TA-SALL-ALIEN

8 **ALIEN SUNS & FLOWERS**
UNIVERSITY

There's nothing better on a warm, sunny day than...Ali-Aliets! That's right, and they're here to remind your best friend that summer is the very best time to bounce around with these fun alien balls!

TA-SALL-ALIEN

8 **ALIEN SUNS & FLOWERS**
UNIVERSITY

TA-SALL-ALIEN

8 **ALIEN SUNS & FLOWERS**
UNIVERSITY

TA-SALL-ALIEN

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VLPW0082

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TUFFY BARNYARDS

MYDOGTOY.COM™
 (888-4-DogToy) (888-4262) • (408) 794-1100

7 POLLY PIGGY
 TUFFNESS

Polly Piggy is a playful pig practicing practically all day long, and you won't find a more perfect playmate for your pup. With her favorite piggyback ride, Polly Piggy makes the most particular and precocious piggybacker.

7 MOLLY & MO MOUSE
 TUFFNESS

Enjoy the best of both worlds with Molly and Mo. Molly will be catching these mice by their tails a day long. "Tuff" is more than your average chew mouse. Molly and Mo will be a joy to have around.

8 HOWIE HORSE
 TUFFNESS

This character thought he'd try being a dog and a horse, but he hasn't been a dog for long. With his canine pal Howie is always willing to pop up against your pooch on next day, and they're sure to be neck and neck every time!

7 BULL
 TUFFNESS

There's no bull when it comes to this Bull! Even comes from the best of all long horn, stock and is ready to take on your canine. With super strength and durability, Even will be a friend for life.

WORLD'S "TUFF"EST SOFT DOG TOY

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VIP00083

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WORLDS "TUFFEST" SOFT DOG TOY

SHERMAN Sheep (8) TUFFSCALE

I'm not the black sheep of the flock, but somehow I landed this gig. I no longer have my wool turned into sweaters, nor do I get any more woolly hugs from my grandma. I'm better suited as a lazy friend to dogs who prefer to tug and slobber on me. Baaa.

TEX: 4888P TON: 48 SHEEP 7

Dudley Duck (8) TUFFSCALE

There's no time to dilly-dally with Dudley Duck! Fly him through the air with a game of fetch, or pull him through the pool with a game of tug. This daring duck loves it all!

TEX: 4888P TON: 48 DUCK 7

Talulah TURKEY (7) TUFFSCALE

If you sometimes wonder if your dog is a turkey, then it's time to bring Talulah into your life. This silly bird will become a friend for life.

TEX: 4888P TON: 48 TURKEY 7

Rutabaga & Radish RABBIT (9) TUFFSCALE

Watch out for your garden! These happy bunnies are ready to take everything you've got... unless your pouch can stop 'em! Get these rabbits on the run and show your dog what it means to guard the garden.

TEX: 4888P TON: 48 RABBIT 7

MYDOGTOY.COMTM

1-800-4-DogToy (284-825) • (409) 704-1709

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VIPO0084

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RUGGED TUFFEY RUBBER ALLIGATOR

Insert Treat Here!

RUGGED TUFFEY RUBBER

Made with 100% pure new rubber, these fiery demon skulls are built to be tons of powerful fun! Each is equipped with a durable rope so they can be thrown and whipped to great distances.

THE CATS-IN

THE TEXAS WHITE

THE TEXAS WHITE

THE TEXAS WHITE

THE TEXAS WHITE

THE TEXAS WHITE

THE TEXAS WHITE

28

VIP00085

WORLD'S "TUFF"EST SOFT DOG TOY

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MYDOGTOY.COM™
1-888-4-DogToy (84-883) • (480) 704-1700

RUGGED AND TUFFY™ RUBBER

Made with 100% pure new rubber, these rugged toys are built to be tons of powerful fun!

BOMB TIR-BB-AM TIR-BB-SS TIR-BB-LS

DYNAMITE TIR-DC-AM TIR-DC-SS TIR-DC-LS

WORLD'S TUFFEST SOFT DOG TOY

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VIP00086

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Silly Squeakers

Tennis BALLS

Fun Designs To Choose From!
Squeaky fun four-packs of your favorite tennis balls! Skulls or flowers, whatever your dog's desire. These fun balls will keep your poodles wanting (and running) for more!

Who will have more fun with them...

The advertisement features a black dog on the left and a brown dog on the right, both sitting on a green lawn under a blue sky with clouds. In the center, two packs of tennis balls are displayed. The top pack is labeled 'Silly Squeakers Tennis Balls' and contains four balls with different designs: a skull, a flower, a paw print, and a heart. The bottom pack is labeled 'Silly Squeakers Tennis Balls' and contains four balls with different designs: a skull, a flower, a paw print, and a heart. A small '36' is visible in the bottom right corner of the advertisement.

36

VIP00087

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Large Tennis BALLS

Extra Fun with Extra Large Balls!
For those pooches who need all the fun of a tennis ball in a larger package! The larger size will help prevent chewing. Just as easy to toss, flip and sail away for the very best games of fetch!

Silly Squeakers

Silly SQUEAKY BALLS

Silly SQUEAKY BALLS

SET 1B - 10/10 US \$7.95

SET 1B - 10/10 US \$7.95

SET 1B - 10/10 US \$7.95

YIP000088

Silly Squeakers

Who will have more fun with them...

Add some fun to your house hold with Silly Squeakers' toasty beer and Soda Bottles! These sort squeaky toys come in six flavors: Catanao, Heine-Saffin, Drools, Mountain Drool, Killer Bira and Bark's, and they're a barrel of laughs! Collect all six for your canine companion, and please play responsibly.

Fourteen Fun Bottles To Choose From!

Next time you're out picking up a bottle for yourself, bring one home for the dog too! Your choice of fourteen different bottles to please all tastes.

These products are in no way affiliated with Anheuser-Busch, Inc., Heineken International, Group Modelo S.A. de C.V., Miller Brewing Company, PepsiCo, Inc. or Coca-Cola Corporation.

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YIP00089

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Silly Squeakers

Fourteen Fun Bottles To Choose From!

Next time you're out picking up a bottle for yourself, bring one home for the dog too! Your choice of fourteen different bottles to please all tastes.

These products are in no way affiliated with Pilsner Brewing Company, General Motors, Guinness & Co., Anheuser-Busch InBev, S.A.

33

YIP000090

Silly Squeakers

Who will have more fun with them...

Fourteen Fun Bottles To Choose From!

Measure your squeaking on a scale by your Silly Squeakers. Some are for the dog and some are for the cat. Your choice of fourteen different bottles is to please all bases.

These Products are brewed with 100% malted barley with American-Brewed Lager. Brewed in Mexico. Imported by Grupo Modelo S.A. de C.V. Miller Brewing Company, Madison, Wis. Pacific Greening & Co. Papaya, Mexico. Cerveza Especial.

ESB017 ESB018 ESB019 ESB020 ESB021

VIP00091

 An advertisement for Silly Squeakers beer. The background is a beach scene with palm trees and a blue sky. In the foreground, a silver cooler is filled with ice and several beer bottles. A wooden handle is attached to the cooler. To the right of the cooler, four more beer bottles are lined up on the sand. The bottles have various labels: 'LICKNATE', 'PANSCHETTA', 'HAMSTER', and 'SILE'. The Silly Squeakers logo is in the top left corner. The text 'Who will have more fun with them...' is written in a cursive font. The text 'Fourteen Fun Bottles To Choose From!' is in a bold, sans-serif font. A small paragraph of text is in the middle. At the bottom, there are five small bottle icons labeled ESB017 through ESB021. The code 'VIP00091' is in the bottom right corner.

You or your dog?

Silly Squeakers

Add some fun, and class, to your household with **Silly Squeakers®** Novelty Wine Bottles! These soft squeaky toys come in four fun styles: **Kennel Relax'n Chardonnay**, **Grrrobert Slobbery Pinot Noir**, **Meow Chased One** Champaign (large and small) and **Chewy Breeder's and Chewy Champion's Collect** all four styles in the **Chewy Paw** and **Chewy Paws** please play responsibly.

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VIP000092

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Silly Squeakers

Who will have more fun with them...

Silly Squeakers

Now Ol' Grand Papa Pooch has a Silly Squeakers® Novelty Liquor Bottle made just for him! Please play responsibly.

The product artwork design belongs to VIP Products. This product is not affiliated with, nor is it owned by, the trademarked entity.

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VIP000093

Mr. POOPS & Mini Poo

No longer does your dog have to suffer with boring squeaky animal shapes or cutesy-tootsy toys that have been around forever. Your dogs need some fun and laughter in their lives too! Sillly Squeakers® are a line of fun, creative and hilarious squeaky toys that are sure to have everyone talking. We pushed the limits of our imagination to bring you this series of one-of-a-kind toys. They are sure to bring you and your dog tons of fun and laughter! Mr. Poops and Mini Poo are a perfectly unique addition to your family. With faces on both sides, they are two-faced pieces of crap!

Mr. Poops
10" High x 2" Diameter

Mini Poo
5" High x 1.25" Diameter

Sillly Squeakers

I Squeak!

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VTPW0094

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Silly Squeakers

iballs™

“Pink-i”

Although she may appear dainty, “Pink-i” can rough and tumble with the best of dogs! With quality construction, she’s sure to give your pooch hours and hours of enjoyment.

“Black-i”

Want a sure way to please your best friend? Give him a “Black-i”! This soft and durable iBall will please you AND your dog by giving you both play-time and laughter.

“Brown-i”

Play a fun game of fetch and laugh as your dog happily brings back Brown-i! Sure to please all dogs!

Look for our tri-pack of extra small iBalls! The perfect gift for a pooch with many personalities!

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02-03-17-ET 02-04-17-ET 02-05-17-ET 02-06-17-ET 02-07-17-ET 02-08-17-ET 02-09-17-ET 02-10-17-ET 02-11-17-ET 02-12-17-ET 02-13-17-ET 02-14-17-ET 02-15-17-ET 02-16-17-ET 02-17-17-ET 02-18-17-ET 02-19-17-ET 02-20-17-ET 02-21-17-ET 02-22-17-ET 02-23-17-ET 02-24-17-ET 02-25-17-ET 02-26-17-ET 02-27-17-ET 02-28-17-ET 02-29-17-ET 02-30-17-ET

YIP00005

Silly Squeakers

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MIGHTY®

Dog Toys

Mighty® Dog Toys *rethink durability* and approach it from a new angle.

Durability is created for each toy with multiple layers of flexible materials that move with the dog's teeth instead of tearing. Compared to other toys, Mighty® dog toys have no hard edges. The result is that these toys do not promote chewing – great when you're trying to discourage chewing habits. These toys may seem plush on the outside, but all the durability features are internal making these toys soft, yet MIGHTY® strong.



HIGH DURABILITY AND QUALITY
Each toy incorporates quality materials that provide the highest level of durability.

MULTIPLE ROWS OF STITCHING
Vulnerable areas are covered and sewn with a structural backing that can be torn along a seam edge. This design allows for extra rows of stitching to hold the seams together.

DURABLE SEAMS
All seams are located inside the toy to discourage chewing. Vulnerable seams are protected by sewing a layer of denim material around the edge of the seams.

2 LAYERS OF MATERIAL
Each toy has a plush outer material and a layer of heavy fleece underneath. The fleece underneath is what gives this toy its strength. The fleece also holds the body of the toy together when playing games like Tag.

UP TO FOUR ROWS OF STITCHING
All material seams have multiple rows of stitching, are covered with a layer of soft, flexible material and sewn together with more rows of stitching, creating a soft and durable toy with no hard edges!

UP TO TWO LAYERS OF MATERIAL
Outside layer is made of a soft, woven sherpa-style fleece – the result is good flexibility with high durability. Inside material is made of high-woven brushed fleece of the heaviest weight and highest durability.

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VIP00096

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MIGHTY MICRO-FIBER

SMART DOGS KNOW STUFF!



Components of Micro-Fiber



Cotton Fiber




Specific characteristics of micro-fiber include softness, toughness, water repellency, and electrostatics.

MIGHTY

Green Micro-Fiber Frog and Lizard
Mighty Super Soak and Mighty Super Tough.
This Mighty Micro-Fiber Toy is perfect for your Mighty Dog.

MIGHTY

VIP000097



Exhibit No. 41
Disposition of Ex. 41
Date 12-15-15
Reby Baumert
Certificate 00152

ELLE0005

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

VIP Products, LLC, Plaintiff, vs. Jack Daniel's Properties, Inc., Defendants. And Related Counter- claims.	CV-14-02057-PHX-SMM Phoenix, Arizona October 2, 2017 8:53 a.m.
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**BEFORE: THE HONORABLE STEPHEN M.
MCNAMEE, JUDGE**

REPORTER'S TRANSCRIPT OF PROCEEDINGS
TRIAL – DAY 1

Official Court Reporter:
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Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

[9] MR. HARVEY: Thank you, Your Honor.

THE COURT: Go ahead.

MR. CRUM: Isaac Crum for defendant, just real quick. One thing that the clerk had asked, maybe we read into the record the stipulated exhibits, but they are the same as what was filed with the Court on the 22nd. So I don't know if you want that, or we will just proceed. Any exhibit that was not objected to in our August 22nd filing, the parties have stipulated to entry, is my understanding.

THE COURT: Let me just give you an idea. All these books up here are stipulated exhibits and things like that. I have approximately five or six more volumes of equal width of things that everybody seems to be objecting to, which I find to be a little odd at this stage of the proceedings, but that's okay.

So if it's something that's been admitted into evidence by stipulation, just say, it's admitted into evidence, and the clerk will catch it if someone makes a misstep, or one of the parties will. Other than that, you have to lay the foundation obviously to get them into evidence, or we had just a trial last week. We had about five or six demonstrative evidence exhibits only for demonstrative evidence, but they had no other admissible value.

MR. CRUM: That sounds great, Your Honor.

MR. HARVEY: We have an agreement also with counsel, [10] Your Honor, that with respect to demonstratives, we will share those in advance, just very -- so the counsel has an opportunity to see them as we are beginning to present them.

THE COURT: Okay.

MR. CRUM: Your Honor, if you would like a hard copy of the demonstratives, we can bring those up as well.

THE COURT: We going to do those right now? If you are going to use them, you may.

MR. CRUM: Great.

THE COURT: You may proceed, Counsel.

MR. HARVEY: Thank you. Thank you, Your Honor. Before doing so, I know we all share the feeling this morning that here we are doing our business, but in Las Vegas there's a terrible tragedy that has happened. Our hearts go out to the victims and their families. And we also are grateful for the response by law enforcement in Las Vegas last night.

THE COURT: Obviously, I have missed something on the morning news. What happened?

MR. HARVEY: There was a terrible shooting. Crazy man went up on the 13th floor of a hotel or something and opened fire on a concert, killed 50 people, that we know of.

THE COURT: Very tragic, thank you for your thoughts. Just so everyone knows, now that you have raised that, Marshals Service, which was developed in 1789 out of the Judiciary Act are primarily responsible for security within [....]

* * *

[49] [...] information?

A. U.S. is the largest market still. We probably sell about 47, 48 percent of our total global sales still go through the U.S.. The UK is the second biggest market.

We then have France, Germany and Australia. They would be the five biggest markets for us.

* * *

Q. So let's focus on Jack Daniel's, and in particular, in the U.S.. How long has Jack Daniel's been sold in the U.S., please?

A. Well, the Jack Daniel's distillery was originally registered in 1866, making it the oldest registered distillery in the U.S.. We just celebrated our 150th anniversary of that last year, and Jack Daniel's has been sold ever since then.

Q. So -- well, not continuously, I assume. There was a period of time when it wasn't?

A. Prohibition obviously had a say in that, but other than Prohibition, yes.

Q. And can you tell us the size of the brand in terms of volume and scope?

A. Sure. So I think you have already mentioned it earlier, but Jack Daniel's is the largest American whiskey in the world. Jack Daniel's Tennessee whiskey, as we think about that individual Jack Daniel's expression, is actually the largest individual whiskey brand in the world. So it's bigger than all other individual expressions of Scotch whiskey, which we are [50] very proud of.

Between the dates of 1997 and 2015, we sold approximately 75 million cases with a revenue of about \$10 billion.

Q. Does Brown Forman track consumer awareness of the brand?

A. We do. We have what we call an ongoing tracking study that we work with global research partners on. The

latest data we've got from that, which is from the period, I want to say, May through to the end of July this year, our total brand awareness is 89 percent.

Q. In terms of consumer recognition and the value of the brand, there's been a recent award, I believe you told me yesterday, maybe you could inform the Court about?

A. Yes, there's a company called Interbrand, which is a global kind of marketing consultancy strategy company. They have been doing a survey since 2000 where they rank the top 100 brands in the world by value.

They have a methodology where they track the financial performance of the ability to attract consumers, and then also the ability to come on to premium price. We were just awarded the -- we came 82nd in that list of the top 100 brands, making us the highest-placed spirit brand, and the second-highest-placed alcohol brand.

So the brands that you would have at the top of the list would be your Apples and your Googles and Coca-Colas and [51] things, but we are very proud to be in that top 100 list.

Q. So can you tell us the story of the brand, a short history of the brand and about Jack Daniel's beginnings?

A. Yes. With a brand of over 150 years of history, it is always difficult to do this quickly, but I will try. As I said, the -- Jack Daniel was a real person. He was born around 1850. He registered his distillery in Lynchburg, Tennessee in 1866.

THE COURT: 16 years old?

THE WITNESS: Yep, and so --

THE COURT: Just curious.

THE WITNESS: I tell you we believe he was born in 1850. His gravestone says 1850, but actually we've seen documents in recent years where he was probably born in, we think, 1848. So I don't know if 18 is better than 16.

MR. HARVEY: Can't quite get him to 18.

THE WITNESS: So he was a real man. He registered his distillery in Lynchburg, Tennessee. Water is a vital ingredient to whiskey making, and the reason that he established and had his distillery in Lynchburg was because of the Cave Spring, and that's why we still make every drop of Jack Daniel's there today to this day.

Jack Daniel's, he created the brand. He was a whiskey maker. He was a salesperson. He was a marketer. He was the person who put Jack Daniel's originally in that square bottle, [52] in the black and white label. He won his first gold medal. It was at the St. Louis World Fair in 1904, and that was the first of seven gold medals that the whiskey won. And Jack, eventually he passed way in 1911, and he passed the distillery on to his cousin, Lem Motlow. And it was Lem Motlow who oversaw the distillery and brand through Prohibition.

Lem eventually passed away and passed the distillery and the brand on to his sons, and it was the Motlow brothers who sold Jack Daniel's to Brown Forman in 1956. At that time, Jack Daniel's was about 200,000 cases, and today, as I said, we sell a lot more than that.

MR. HARVEY: Your Honor, we have couple of physical exhibits, 1 and 2, with your permission, may I retrieve these and hand them up to the witness?

THE COURT: Certainly.

BY MR. HARVEY:

Q. May I ask you, Mr. Epps, to take Exhibit 2, which is the Jack Daniel's bottle, please. What size bottle is that?

A. This is a 750-milliliter.

Q. And is all Jack Daniel's sold in a 750-milliliter bottle or are there other sizes?

A. There are other sizes.

Q. Do most all of the others carry the same labeling?

A. Yes, all of them carry the same labeling.

Q. And could you describe for the Court the elements of the [53] brand that you feel would be the most significant on that bottle, please?

A. Yes, I will kind of start on the outside. I mean, we talk about a number of pieces of the iconography of this package. It kind of starts off with a square bottle. It is obviously a core element of the brand, and as I said, one that Mr. Jack started himself.

We then have what we call the filigree running around the outside. And it is also worth mentioning that the color black with the white lettering and marks on it, we talk about this being the blackest black that we can get. And part of that creates this iconic nature of the label.

On top of the filigree, you've then got -- I would call this the eyebrow, or the arched logo at the top where it says "Jack Daniel's." Below that we have what we call the cartouche, where you have old No. 7 brand, with part of that kind of filigree design around the outside.

And then moving further down, you have Tennessee, which has a very specific font, which is -- we call this -- excuse me -- a lock up where it says Tennessee sour mash whiskey, this piece of area here. And then of course you then can see the other elements below. So to summarize it, it would be the square bottle, the black and white, the filigree, the eyebrow or arched logo, the cartouche, and then this element here where it says, Tennessee sour mash whiskey.

[54] Q. And I would ask you to look at Exhibit 1, which is the Bad Spaniels toy. What elements do you see or do you recognize there that you feel replicate the key brand elements you have just told us about on the Jack Daniel's bottle?

Q. So as you kind of look at this and hold it at arm's length, you have the square bottle, almost an exact replica of the shape. You have the color of the whiskey itself, which of course isn't ownable to us, but it suggests that it's a whiskey.

You then have the black and white, and it's predominantly black with the white lettering, and the other elements of that design. You have the piece on the neck where it says, Bad Spaniels up here, which is similar to the neck wrap that we have.

And then of course you have the arch of the Bad Spaniels, or the eyebrow, as I was calling it. And then you have the old No. 2. We obviously say old No. 7. And that's in an oval shape, which isn't exactly the same as the cartouche, but it is in the same position as our cartouche.

Then you have "Tennessee" written, not in the same font but a similar font. And then of course you have kind of an effort at the filigree. So it is not the exact same way lines, but it's in a similar shape around the outside,

so at first glance, it's obvious that this is kind of trying to be a take-off on Jack Daniel's.

[55] Q. Thank you. So you mentioned that you have responsibility, overall global responsibility for the marketing of the Jack Daniel's Tennessee Whiskey black label product?

A. Yes.

Q. And what is the strategy that you guide. What is the -- in your head as you direct this effort to market this product?

A. Yeah, one thing that we are trying to do and that we have done for many years is to really reinforce the specialness of Jack Daniel's, especially as we get bigger and bigger. You know, we are unashamedly popular and big, and the downside of that is that some consumers, drinkers, as you get bigger and bigger, people think you are mass produced and not special. And that couldn't be further from the truth from us.

Every single drop of Tennessee whiskey that is sold anywhere in the world is still distilled, matured, and bottled in Lynchburg, Tennessee, a town, which has kind of doubled in size over the past 15 or 20 years and is just over 600 people. So we are very proud that we still do that.

And so my efforts and my team's efforts is that as we communicate the brand and what it stands for, we want people to realize that this is a special brand that's made in a special place by real people.

Q. How does the packaging on the Jack Daniel's black label product figure into that strategy?

A. It is one of the most important elements of the brand. I [56] think we are going to see a little bit later how

this brand has found its way naturally into pop culture, into movies, and has been adopted by musicians.

That bottle and that label says something just by being how it looks. We used to have an advertising executive who worked for us who said, the best advertisement that's ever been created for Jack Daniel's wasn't an advertisement at all, it was just the bottle. So I don't know if he was trying to talk himself out of a job, but for that reason, we use the packaging in pretty much everything that we do. And if we don't show the full bottle, which we do normally, we will definitely at least have that label and that distinctive iconic black and white label.

Q. I believe you were present in court for opening statements and we have some ads, some print ads up there. Each one of them finished -- or at least certainly included a picture of the bottle. Is that an intentional strategy of the company?

A. Absolutely, absolutely.

Q. We sometimes hear the phrase "brand values" and that gets kicked around a lot. What does that mean to you? And can you identify the brand values that you espouse as a Jack Daniel's person?

A. I can. One of the strengths of Jack Daniel's over the years, and you showed it earlier with the kind of consistency of messaging that we have, our brand values have been very [57] consistent over time as well.

We use brand values to help with the creation of advertising and communications, and it helps us stay on the right track in terms of staying true to what the brand stands for.

We have four brand values: Authenticity, independence, integrity, and loyalty. And we stay true to

those in all that we do. And we believe even, you know, the packaging conveys some of those brand values as well.

Q. How much does Jack Daniel's spend annually on advertising for the Jack Daniel's black label brand? Just in the U.S.?

A. In the U.S.? So in the U.S., we do what we would call above-the-line advertising, which would be traditional advertising. So TV advertisements, digital and social, out-of-home billboards. In the past, we did a lot of press advertising. We would call that above-the-line. In the U.S. we spent about 15, 16, million dollars a year at the moment on that.

And then we have below-the-line advertising, which is more around promotions, at point of purchase. So that might be in grocery stores or liquor stores or in bars and restaurants, where we would create promotions and what we would call point-of-sale to drive awareness in purchase.

* * *

[60]

* * *

Q. Next one, please. I like this one, served in fine establishments and questionable joints everywhere.

What's the message there?

A. You will see here again the dominance of the package. And the idea here is that Jack Daniel's is a really unique brand where it appeals to many different people. And we quite often use the phrase that it appeals from bikers to bankers, and this is just a nice way to bring that to light.

We are proud for the fact that you can find Jack [61] Daniel's in a top end bar or restaurant, or you can find it in a questionable joint.

* * *

[64] [...] coming out of there for 160 years, we are not too worried about it.

And is that still the case. It is where all of the water comes from, is that one spring?

A. It is. It is. There was a drought in Tennessee four or five years ago, and we are okay.

Q. Which as a Californian I find it hard to understand, but there it is. Let's look at one final video, which, I believe, relates to a celebrity, if we can show 4431.

(Commercial played for the Court.)

BY MR. HARVEY:

Q. What was the relationship of Frank Sinatra to Jack Daniel's during his life?

A. So in the '60's, Frank Sinatra was a fan of Jack. He adopted the brand as his own. It was his drink. And this was an example of where we never ever exchanged any money with Frank Sinatra. We may have supplied him with a few cases here and there, but he became, you know, one of the brand's biggest advocates. And actually, as it said in the ad, he -- I think he got buried with five things. I think it was a pack of cigarettes, a roll of dimes, a miniature of Jack Daniel's, and a couple of other things.

So the idea of this commercial was to -- it was just to celebrate that relationship in a way that we could. It was around -- it would have been around his hundredth birthday.

* * *

[72]

A. Vice President Global Brand Director.

Q. And back in July of 2015, I think you were Global Brand Director. Did you get a promotion since then?

A. No, it's the same job.

Q. Same job, just a different title? In your position as global -- or sorry, Vice President of Jack Daniel's brand, you are not aware of any licensing of the Jack Daniel's mark for use on a pet toy, correct?

A. Correct.

Q. Okay. And, in fact, in your position as vice president in charge of the brand, you would not license the Jack Daniel's mark for a pet toy, correct?

A. Correct.

Q. You testified this morning regarding certain brand values: Authenticity, independence, integrity, loyalty. And then you also mentioned that -- I guess this isn't a brand value, but you want Jack Daniel's to be perceived as a premium brand, correct?

A. Yeah, we talk about the brand specialness as being an overall strategy.

Q. And one of your brand values is loyalty. I assume that Jack Daniel's has loyal Jack Daniel's drinkers, like apparently Frank Sinatra, right?

A. We do.

Q. So when they go to buy a bottle of Jack Daniel's, they are [73] familiar with it, they know what they are buying, right? Would you assume?

A. Yes.

Q. Okay. And I will just ask you, do you think purchasers of premium liquor use an exercise -- or exercise a reasonable degree of care before buying a \$40 bottle of liquor?

A. So it's not \$40. I think on average a bottle of Jack Daniel's Tennessee Whiskey, 750ml would range in California from about \$20. Whereas in New York it could be much closer to \$30. So it is a bit lower in price than that. But then also remember that consumers do buy Jack Daniel's in bars, like a drink of Jack Daniel's, you know, you could probably get it as cheap as \$6.

Q. Okay. But you don't disagree that people that -- either in a bar or a liquor store purchase a premium brand like Jack Daniel's, they are exercising at least some degree of care to make sure they're getting what they want, right?

A. They are.

Q. And with regard to -- you testified a minute ago that Jack Daniel's would not license the Jack Daniel's trade dress or mark for use on a pet toy. Is one of the reasons a concern about potentially marketing to underage consumers?

A. Correct.

Q. You referred to or maybe it was your counsel referred to the Jack Daniel's brand as "iconic"?

* * *

[76] Q. You would agree with me that pet products don't fit within the premium focus of Jack Daniel's advertising and promotion efforts?

A. I would still agree with that.

Q. Okay. And, you know, we mentioned George Dickel No 8. Brown Forman, you personally didn't have a problem with that? You are not claiming, or Brown Forman, to your knowledge, is not claiming exclusive rights in the ordinal numbers 1 through 9, other than number 7, correct?

A. Correct.

Q. And you looked at Exhibit 1 and 2, and you identified for counsel some similarities between the Jack Daniel's black label product and the Bad Spaniels toy, correct?

A. I did.

Q. And I don't need to go -- have you go into all of them, I just want to ask you a general question. Would you agree that there are differences in the labeling and packaging of these two products, correct?

A. I would.

Q. And I think you testified that with regard to the eyebrow of the Jack Daniel's, is the fact that it is arched in the lettering?

A. Yes.

Q. Do I have that lingo right? It's the eyebrow?

A. Yeah, I call it the eyebrow. Some people call it the arch, [...]

* * *

[81] [...] remember that?

A. I do.

Q. I had a cheat sheet, but I am not going to hunt for it. The 2011 bottle is called the evolution bottle?

A. That's right.

Q. And then there was a bottle in use between 2008 and 2011, and what was the name of that? Is that the business I will bottle or something with a B?

A. I don't know if we gave that a name at all. I am not sure. Sorry.

Q. How about the bottle used before that bottle? I think we called that the old bottle?

A. Yeah, maybe, yeah.

Q. Okay.

A. I'm really not sure that we gave any of them --

Q. And maybe none of that is terribly relevant. I want to talk about the development of the evolution bottle in 2011. As part of the process of developing the evolution bottle, Jack Daniel's employed focus groups to gauge consumers reactions to the Jack Daniel's product and trade dress, correct?

A. We did, yes, in all of our major markets and major cities around the world.

Q. In fact, as vice president in charge of the brand, it's true that Brown Forman would never make a significant change to its Jack Daniel's black label whiskey label or bottle without [82] conducting a consumer focus group first, correct?

A. Yes. As long as those focus groups are representative of our drinkers and our potential drinkers in all of our major markets.

Q. Sure. And the focus groups provide to -- or provide to Jack Daniel's valuable feedback, vis-a-vis consumers emotional reactions to trade dress, trademark, advertising, correct?

A. They do.

Q. You testified in your deposition that the second-biggest component of Jack Daniel's black marketing, at least back in 2015, was something called digital; is that correct?

A. Correct.

Q. And digital included a social media component advertising on Twitter, Facebook, Instagram, that sort of thing?

A. That's correct.

Q. And I think we saw an example of Twitter, a Valentine's Day ad?

A. We did.

Q. Do you know if VIP advertises its Bad Spaniels product on social media?

A. I am not aware.

Q. And you are not aware of any advertising that Brown Forman has done for the Jack Daniel's black label product in any pet industry trade publications, correct?

A. That's correct.

* * *

[85] [...] bottle shape with any whiskey or bourbon product, correct?

A. I think I said that in my deposition, yes.

Q. Okay. And you were testifying truthfully, at that time?

A. I was.

Q. And while I asked you about focus groups, vis-a-vis the Bad Spaniels product alone or in conjunction with the Jack Daniel's product, I just want to confirm, you have no real world experience in terms of how a consumer actually reacts to the Bad Spaniels product, correct?

A. Not me personally, no.

Q. And as to you personally, I am glad you said that, the Bad Spaniels product does not in any way make you think that the Jack Daniel's black label product contains dog excrement, correct?

A. It does not.

Q. And as the global brand manager for Jack Daniel's black label, you don't believe that a consumer, after interacting with the Bad Spaniels toy would think that Jack Daniel's Tennessee Whiskey actually contains dog excrement, correct?

A. Correct.

Q. It probably takes a Ph.D. from Stanford to make that connection?

THE COURT: That's an editorial comment.

MR. BRAY: I withdraw the question.

* * *

[87] [...] view of the Bad Spaniels product, doesn't it?

A. I am very protective of the Jack Daniel's brand, yes.

Q. And as vice president in charge of the Jack Daniel's black label brand, you are not aware of any lost sales that Jack Daniel's has experienced as a result of the Bad Spaniels product, correct?

A. In the short term, no.

Q. And you, from time to time, Brown Forman assesses the brand equity and value of the Jack Daniel's trademark, correct?

A. We do.

Q. And none of those internal assessments done by Brown Forman has indicated there has been any diminution of value or brand equity in the Jack Daniel's product as a result of the Silly Squeakers Bad Spaniels toy, correct?

A. Correct, we haven't seen that.

Q. As global -- as the vice president in charge of the Jack Daniel's black label brand product, you would never license or approve the licensing of the Jack Daniel's mark for any product that you found in bad taste, right?

A. Correct.

Q. And to your knowledge, you are not aware of any licensed products ever being offered by Jack Daniel's that you would consider in bad taste?

A. Could you ask that question again?

Q. To your knowledge, you are not aware historically of any [88] licensed products being offered by Jack Daniel's, or with the Jack Daniel's mark or trade dress, that you would consider in bad taste, right?

A. Correct.

Q. Now, in terms of your personal belief that the Bad Spaniels product diminishes the Jack Daniel's brand, you could be wrong, right?

A. I could.

Q. Okay. And I think you would agree that focus group would be the main kind of study that could be done

to get the best consumer interpretation of the Bad Spaniels product, correct?

A. If there was significant numbers and it was representative of the -- kind of the Jack Daniel's drinking community, yes.

Q. Okay. So done a way that you would agree with, you would agree that that would be the best way to get best consumer interpretation of the Bad Spaniels product, correct?

A. Yes.

Q. And to your knowledge, Jack Daniel's has not undertaken that kind of study, correct?

A. We haven't.

Q. And I think you testified at your deposition that a focus group done along the lines of how you would prefer a focus group would be done, would be one of the things that could possibly change your mind as to whether the Bad Spaniels product might diminish the value of the Jack Daniel's brand, [89] right?

A. I don't remember saying that.

Q. Let's take a look at your deposition in front of you. 121, starting at page 10.

A. Sorry. Did you say page 121?

Q. Page 121, sorry, line 10. I asked you: Is there anything that you could think of, any study that could be done, any survey that could be done, anything that could be done that could change your mind that the Bad Spaniels product somehow diminishes the Jack Daniel's brand? You answered: The focus groups would be the main one, where you get the best interpretation of it. You would agree that was your testimony?

A. I do.

Q. Now, briefly on sales channels, which you sat through the opening, you saw that's one of the, quote, unquote, Sleekcraft factors. You already said the obvious, that Jack Daniel's doesn't sell its black label liquor in pet specialty retailers, right?

A. Right.

Q. And you are not aware of any plans by Brown Forman to sell any licensed Jack Daniel's goods in a pet specialty retailer, correct?

A. Correct.

Q. Okay. And in the United States anyway, Brown Forman sells [...]

* * *

[92] [...] humorous to you?

A. Well, Captain Morgan is a separate product to Bacardi. And I think that -- we talked about brand values earlier and tone of voice, and I think there's great examples there of how different brands and categories of different tone of voice --

Q. And you have not done -- again, almost done, Mr. Epps. You have not done any study or talked to any real world consumers or focus group to see if the Bad Spaniels toy was perceived as humorous in a way that would create a positive association to Jack Daniel's, correct?

A. Not that I am aware of.

Q. And similarly, you haven't done a study to see if it created a negative association with Jack Daniel's, correct?

A. Well, we have done a study about the potential for misalignment and confusion.

Q. Sure.

A. We have done that one.

Q. That was the late Mr. Ford --

A. Right.

Q. -- and that was confusion, but that was not a study to say --

A. Correct, correct.

Q. And one last question, again, as vice president -- well, I took your deposition in July of 2015. You have been involved in this matter for now a number of years, correct?

[93] A. Correct.

Q. Okay. And in all that time, to your knowledge, Jack Daniel's has never received a communication from any real world consumer that they thought that Jack Daniel's put out the Bad Spaniels product instead of my client, right?

A. Correct.

MR. BRAY: No further questions, Your Honor.

THE COURT: Thank you, counsel. Redirect.

MR. HARVEY: Thank you, Your Honor. Just a couple of questions.

REDIRECT EXAMINATION

BY MR. HARVEY:

Q. Mr. Epps, how many visitors are there annually at the Lynchburg General Hardware store?

A. I am not sure of the exact number to the hardware store, but the number of visitors that we have to the Jack

Daniel's distillery, which is situated very close to the hardware store, I think last year we had about 270,000 in one year.

Q. Do you say -- I think your testimony was that the general store functions as a gift shop for the distillery; is that correct?

A. It does, and you don't have to go to the distillery to visit the hardware store, so I think the retailer sales that we do is around about \$6 million a year. So for a small property, it does a lot of business.

* * *

[96] Q. But in terms of any of your licensed products, you don't have plans to license anyone to sell pet toys or toys generally; is that right?

A. No.

Q. Why not?

A. Because the word "toy" suggests it is appealing to someone who is under the legal drinking age, and, you know, we are a very responsible brand and a very responsible company.

Q. And does the existence of a product like the VIP dog toy give you any concern on that score?

[97] A. It does. I mean, even the fact that it's considered, you know, a toy, because of the humor, you could argue is childish, so, yes, it does cause concern.

Q. And it might be played with by children with a dog?

A. Potentially

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[101]

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Q. You said licensing manager for all brands in North and South America. Tell us, what does that entail? What is the scope of your job?

A. What it entails is negotiating and identifying products that will extend the brands beyond our core trademark class, which is trademark class 33. And when we see a fit, we will extend those brands through products that are not core to our competency or capability; i.e, t-shirts, barbecue sauces, et cetera.

Q. The Court referred to those as supplemental products. Would you agree with that as a characterization of what you are doing with those?

A. Yes, sir.

Q. In what sense does it supplement the core brand to have those products be licensed?

A. Well, those products can, especially in the instance of Jack Daniel's, extend the brand and the emotional feel that the consumer might have for the brand and let them show their pride and passion through products beyond our core product.

Let's say they are not a core drinker or like to drink, but they love what the brand stands for, they might want a Jack Daniel's black label T-shirt.

* * *

[108]

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Q. Okay. Why does Jack Daniel's license its trademarks?

A. One, we want to give consumers and fans of the brand an opportunity to associate with the iconic brand outside of the drinking occasion. We are very proud of our product; however, we recognize not everybody that loves Jack Daniel's drinks. We also recognize they are not going to drink all the time.

So when you love a brand like that, you usually want to show your pride in a way or through an association of merchandise. Our core competency is making Tennessee whiskey and distilled spirits.

[109] So in doing that, we recognize that our brand has a lot of equity, and we don't have the capability or the competency to make apparel or to make barbecue sauce or ready-to-eat meats, so we look for best in class vendors that can help us extend the brand out to consumers that want to associate with the brand.

Q. And what would you say the policy of Jack Daniel's is in approaching licensing, the philosophy that it follows?

A. We are a very conservative brand. We want to make sure that the products that we decide to go into, that it is on brand, it fits the brand, and that we are not logo slapping, as I referred to earlier.

Short of T-shirts and hats, we really look at our products, whether it be culinary or barrel wood, and we want to make sure that product is authentic. If it is a culinary product, we require the licensee to infuse in some way or form the Jack Daniel's Tennessee Whiskey into that product. So we really take a methodical approach, and I am confident that should we want to logo slap, we could make much more than we currently do, but we take a lot of pride in how we approach the brand and how we approach licensed products so we don't go license every category out there.

Q. I heard you use the term “authentic” just a minute ago, and I am sure you heard the discussion about brand values when Mr. Epps was testifying.

[110] What does that mean to you, “brand values”?

A. Well, to me, an iconic brand like Jack Daniel’s evokes emotion. And although Mr. Epps is the brand strategy and has those brand values, I look at it from a personal perspective and what the brand means to me as an icon. So to me it is authenticity. It is independence and strength.

And every individual, every consumer is going to have their own emotions, evoke their own emotions when it comes to that. You will get similar things when you come to Harley-Davidson, Coca Cola or John Deere. So when you do that, you have a very special brand, and you want to make sure that you nurture that and make sure the license products are reminiscent or reflect those values.

Q. And do you feel you have been successful in doing that?

A. I do, but we challenge ourselves every day as to whether the products we are doing, the products that we have licensed are continuing to reflect those values.

Q. Are there categories in which Jack Daniel’s will not license as just a policy, a flat policy we won’t license there?

A. Yes, sir, definitely. Jack Daniel’s takes a very hard approach about targeting underage demographics. We won’t do anything that we believe targets underage demographics, whether that be toys, whether that be things that might be of interest to kids, skateboards. Certainly would never go into a toilet paper or do anything that we believe is not on brand or [111] degrading to the brand.

Q. I think at one point you told me that you have a zero tolerance policy with respect to some of these categories, is toys one of those?

A. Yes, sir, it is.

Q. What do you mean “zero tolerance”?

A. I have been with Brown Forman for five and a half years, and not at any moment has a toy been a consideration, and I don’t see that ever happening. Again, we take responsible marketing, and that extends to responsible licensing. So toys is not something that we would ever consider. There’s no amount of money that is going to benefit us when it comes to that.

* * *

[113]

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Q. Is Jack Daniel’s currently selling any dog-related license products or licensing others to make them, I should say?

A. Yes, sir. We have licensed our Lynchburg Hardware and General Store. We have two collars and a leash or lead, depending on how you refer to it. We also have a very unique barrel dog house and what I refer to as a quarter of a barrel where you could put a dog bed in it.

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[123]

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BY MR. HARVEY:

Q. Okay. So thank you for giving us this overview, Mr. Roush. What is the size, the overall size of the licensing program for Jack Daniel’s?

A. In consumer retail sales, it's in excess of \$100 million.

Q. And I think you said it could be much bigger, but that's not the point. That you have different strategies involved than simply making money on this?

A. Yes, sir. It's, one, protecting the brand and how the brand is represented. So, again, we could -- we have had consumer research done where we have been told we could put the brand on just about anything, but that's not how we believe it is going to help us or help the brand -- to protect the brand.

Q. We talked a bit about your licensee, the general store in Lynchburg. How many items are offered for sale in the store?

A. We have in excess of 300 SKUs or products in the store.

Q. 300?

A. Yes, sir. And that's before you get into the different size and different item. So if you wanted to go into sizes, you would probably have well over a thousand.

* * *

[148] [...] all likelihood a spoof product, she would go off and design something and send him a sketch.

And so here was the testimony in the general process. Was there a general process, she was asked, whereby the idea for one of those toys is taken by you and worked up?

And her answer was: Usually I get a call from Steve with a name for the next toy. And he will say, come up with something very brief. And then I will often sketch. If I need to come up with a creative idea. Then I

will put it to the computer and come up with one, two, or three or however many mock-ups that need to be done until he approves it.

This is just the process that they generally followed. That's at page 47.

Now, what happened in the case of Bad Spaniels? Let's look at that. Question: When did the process of designing Bad Spaniels begin, she is asked. Roughly two years ago. What happened? I got a call. I got a typical phone call from Steve. He said, 'Bad Spaniels, you figure it out.' Question: What did you do in response? I sketched out an idea. And that's the sketch that appears in Exhibit 9. Yes.

And here is Exhibit 9, which was at the drawing board, the first sketch of the label for the Bad Spaniels product. And you will see some elements there already that look very familiar.

We have -- well, it's not yet arched. It's kind of[...]

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[154]

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BY MR. HARVEY:

Q. Good afternoon, Dr. Simonson. Would you state your full name for the record, please, sir?

A. Itamar Simonson. Good afternoon.

Q. Where do you live?

A. I live in Burlingame in the bay area. It is very close to San Francisco airport.

Q. And are you currently employed?

A. Yes, I am a professor at Stanford University. I am a professor of marketing at the graduate school of business at Stanford.

Q. Can you give us -- and how long has that been true that you have been at Stanford?

A. Since 1993.

Q. And can you please give us in headlines, your educational history, please?

A. I did my Ph.D. at Duke University. That was from 1983 until 1987. I got an MBA at UCLA. That was 1976 to '78. And I did my undergraduate degree at The Hebrew University in [155] economics and political science, 1973 to 1976.

THE COURT: Where is that located?

THE WITNESS: That's in Jerusalem.

THE COURT: Thank you.

BY MR. HARVEY:

Q. Your current position at Stanford is a titled professorship?

A. I am the Sebastian S. Kresge chaired professor of marketing at Stanford.

Q. Is that Kresge the same Kresge we came to love as a marketing company?

A. You know, that's my understanding, but it was subsequently turned into Kmart, but that was before my time. I understand that it was originally called Kresge.

Q. The money to fund the professorship came from that family or that foundation?

A. Right.

Q. Great. What is your field of expertise?

A. My expertise includes consumer decision-making, marketing management, advertising, branding, various influences on the decisions that consumers make, such as branding and adding product features and a variety of other things. I am also an expert on surveys, and I have done work on trademarks from the customer perspective.

Q. Does buyers' purchasing behavior factor into the kind of [156] work and expertise that you have, is that a field of study?

A. Yes, that's my main area. If you look at my publications, I would say most of them fall within the domain of consumer decision-making or consumer purchase decisions.

Q. Can you briefly take us through any of the awards that you might have won in your position?

A. Let me just list a few. I received the award or the scientific achievement award from the Society of Consumer Psychology. I received the award for the best book in marketing from the American Marketing Association.

I received an honorary doctorate from the Sorbonne University, which is also the University of Paris. I received the award for the best article published in the Journal of Consumer Research.

I received twice the award for Most Influential Article in the Field of Marketing that was published in the Journal of Marketing Research, and various other awards.

Q. And you teach courses at Stanford?

A. I do.

Q. Give us a list of those, please?

A. I teach at the MBA level and at the doctoral level. At the MBA level, I have taught for many years the marketing management course. That's a course that every MBA student has to take that covers all aspects of marketing and consumer behavior.

[157] I have taught a course on marketing of high tech products. I currently teach. I taught last spring, and will teach again next spring, a course titled Applied Behavior Economics that talks about the manner in which people, consumers included, make decisions. In other words, the psychology of decisions.

And I have taught some other MBA classes. At the doctorate level, I taught courses about consumer psychology, how to design studies, consumer decision-making in general, decision-making.

I have taught executive classes, where I teach executives about consumers and the psychology of consumers. I have often lectured to managers, but that would be separate from my teaching load at Stanford.

Q. So your lecturing to managers is consulting with businesses and companies?

A. Yes. I often consult with companies, assisting them to better understand their customers. I think the advantage is that I study general principles that apply to any product category or service category.

So in some cases I teach specific companies. I went and lectured about consumer decision-making to Amazon, with all the top management, including the founder, Mr. Bezos. And I lectured in various other companies.

I lecture to managers. I lecture to marketing [157] consultants. I lecture to advertising managers. These are people who may have work experience in a particular

area, but they do not understand the fundamental principles about the psychology of consumers that are essential to make better decisions.

In fact, in this course on applied behavior economics that I am teaching now, I have a whole section, or a whole lecture, I should say, talking about the problem with people who perceive themselves to be experts based on work experience.

And the problem there is that, just because you have a work experience in a particular area, doesn't make you an expert on the fundamentals of consumer decision-making.

And the problem with people with work experience is that not only are they as susceptible to errors as the rest of us, but they are overconfident. They think, well, I have work experience, so I know it all, even though they don't. And we have conducted many studies showing how susceptible to errors experts are.

Q. Have you written any articles, Dr. Simonson?

A. I have published numerous articles.

Q. Can you give us couple of examples of articles that you have written?

A. It is kind of hard to choose. Let me give you a simple -- quick simple examples of a study that I conducted many years ago. I asked some consumers to choose between \$6 and a nice, [159] elegant Cross pen. Then I took a separate group of consumers and asked them to choose between \$6, the same Cross pen, and another pen that didn't look very attractive, like a cheap Bic pen.

Well, no one chose the cheap pen, but those who saw the cheap pen were significantly more likely to take the Cross pen over the \$6.

In other words, by showing them an unattractive pen, which they didn't choose, they were able to make a comparison and to look and say, wow, what a bargain, for \$6 I can either get this nice pen or the not so nice pen, I will take the nice pen.

And that illustrates one particular principle that consumers do have difficulty assessing products in absolute sense. It is very hard, if you ask me what's the value of a particular pen or other products to you, it is hard to put an absolute dollar value. But people are very good at making comparisons, which means that depending on which options you show them, you can influence the decisions they make. This is just one unrelated example, but obviously I conduct thousands of studies on many different topics.

Q. You told me about one with respect to alcohol that you did year to year in your class?

A. Yes. In the MBA class, I would ask my MBA students that are over the drinking age, I should say, and say, who are the [160] Vodka experts here? And I would always get many hands. I said, okay, I want to you try a port -- they didn't know which is which, but I poured some into paper cups like this, I poured Absolut Vodka, which is a pretty good Vodka, kind of a midrange, I would say. And I poured in the other cups a very cheap Vodka, called Wolfschmidt.

Well, I let them taste from each one, and then I said, tell me which is which and which one do you like more? Well most of them -- and that happened year after year. Most of them picked what was really Wolfschmidt, which costs about a third of the Absolut, and thought that was the Absolut.

Q. Does that say something about Vodka, I am not sure of the point of the experiment?

A. I think it tells you something about the importance of the Absolut brand. Because if you told those people that this is Absolut, that would change completely how they experience the product. But in a blind taste test, when they didn't know, they didn't know what brand -- they just decided based on the taste.

So it just illustrates, and that's how I used it in class, to illustrate the importance of brand name, because in many case, for many companies, brand name is the most important assets, which they must protect.

Q. Just to finish your resumé, if we could, have you published any books, Dr. Simonson?

[161] A. Yes. I published a book about consumer decision-making in today's age, Internet and so on. In fact, that's the book that I mentioned earlier, which received the award for the best book in marketing. And -- so that's the book. It's called What Really Influences Customers in the Age of Nearly Perfect Information.

Q. Have you been recognized as an expert by courts in other matters than this?

A. I have, many times.

Q. And you have done work, I think you said, with respect to trademark surveys and examined the question of likelihood of confusion?

A. Both likelihood of confusion and likelihood of dilution, and in some cases, genericness or secondary meaning. Different issues.

Q. And have you conducted research studies with respect to proving likelihood of confusion?

A. I have.

Q. Are you familiar with a term called, the Eveready model or methodology for such studies?

A. Yeah, that's the methodology that I've used most often. It's the, as they say, I believe Professor McCarthy referred to it as the Gold Standard, or maybe it's the courts that used that term.

Q. Yeah, I think both actually. Okay. Thank you. So that's [162] good background. We may come back to the consumer survey questions later, but I want to focus on your assignment in this case. What were you asked to do in this case?

A. I was asked to determine whether there's a likelihood that this product (squeezes toy) the Bad Spaniels Old No. 2 product will dilute the Jack Daniel's Old No. 7 and other Jack Daniel's product through tarnishment.

Q. Have you been involved in other dilution matters than this one?

A. I have, a number of times. I'm happy to give you an example.

Q. You mentioned dilution by tarnishment. Is there another kind of dilution?

A. Yes, there's also dilution by blurring, which is that -- that refers not to, if you will, the reputation of the brand or damaging the reputation of the brand, but instead it's diminishing the distinctiveness of the brand. I think it was referred to as whittling away, kind of it's a long process that blurs the distinctiveness of the mark.

Q. With respect to dilution by tarnishment, what was the question that you were seeking to answer here, in this case?

A. The question was, or maybe I should say, in dilution matters, there's two questions. One is, will the allegedly diluting product bring to mind or call to mind the allegedly diluted mark?

[163] That question, to my understanding, has been answered. The whole point of this product is to bring Jack Daniel's Old No. 7 to mind.

Q. And then you said there's a second element?

A. Now, the second is -- and that, I should say that part, whether it calls to mind, that is something that you can use a survey for and I have done that. Because in most other dilution cases, it wasn't so obvious that the allegedly diluting mark calls to mind the allegedly diluted marks, and that's something that I know how to conduct surveys for, and I have.

Now, there's a second part which, okay, assuming that it does call to mind, how does it affect the brand equity and brand association of the likely to be diluted or tarnished brand? Here, you must rely on principles of consumer psychology that have been based on a great deal of prior research.

In other words, people have conducted numerous empirical studies which led to certain conclusions that apply to all products and services with respect to the impact of adding a negative association on the association of the existing brand.

That requires specific expertise, like what I have and what I have learned and continue to learn and what I teach managers and my MBA students.

[164] Q. Is there a model of how brands and ideas are represented in memory?

A. Yes, there is. Since the early 70's, researchers, one of them at Stanford, discovered the Associative Network Model. Some people I saw refer to it simply as the Cognitive Association Model, but I prefer the original term, Associative Network Model, which indicates that when we have things in mind, such as brands, it could also be people we know.

But in context here, we are talking about brands. What comes to mind and what are the associations. For example, I think we have an example for McDonald's.

Q. Right. Why don't we call up as a demonstrative, something that we have labeled McDonald's Associative Network, and ask you to maybe bring the lights slightly down.

A. So this is -- when you hear about McDonald's, it calls certain associations to mind, right? At first you see the famous golden arches. You think about hamburgers. You think about family. McDonald's always was kid oriented. There was social involvement with their Ronald McDonald House. They have been offering Big Mac for a long time. So in other words, just the mention of McDonald's brings all kinds of associations in mind, in our mind, based on our prior knowledge and experience.

That's an example of associative network. That has been supported by many studies. In fact, more recently, researchers have used actual, what's called fMRI studies. [165] These are imaging of the brain that presented evidence that is consistent with the Associative Network Model.

* * *

Q. So looking at this slide, you are explaining to us how it is that the notion if the word McDonald's is evoked,

how the notion of McDonald's is stored in the brain, in the memory?

A. Right. The term, not to use too much jargon but we are talking about how it is represented in the brain. What comes to mind, and those circles that you see around McDonald's are referred to as nodes. So these are the different mental associations. Of course it may vary from one person to another, but by and large, these are the mental associations of [166] McDonald's.

Q. And where do they come from?

A. Well, based on experience, based on what McDonald's has been doing for many years, based on their advertising, based on what they sell --

Q. And people's experience with the brand themselves, personally?

A. Of course, yes. And you know, obviously personal experience, what they hear from friends.

Q. And you are saying the Associative Network Model is something that has been around since the 70's?

A. Since the early 70's. So it's been tested numerous times. It's one of those things that by now are beyond dispute, and if I were to conduct today another research on Associative Network, well we would say, we already know that because that has been established for so long.

Q. How has it been tested?

A. It has been tested in numerous ways very carefully. For example -- just an example of the top of my mind. Let's say that you have -- you are a company and you use the celebrity endorser. Let's say that that celebrity endorser misbehaves in some way. And as we know, unfortunately, that happens now and then.

Now it becomes a problem, because now that negative association is linked, is linked with the brand. You may [167] recall, Your Honor, you asked Mr. Roush I think about golf. And you will remember the great Tiger Woods, and there were some issues with him. And I think that most of his sponsors, actually, I believe dropped him, but Nike decided to keep him, even during the toughest periods, and they recognized the risk that they are taking that will contaminate or tarnish the entire Nike brand, despite the fact that Nike generally is a very strong brand.

Q. Has McDonald's had any issues like this?

A. Unfortunately, for them, they have. Since going back to the 70's, there has been a rumor, you probably can still find it today on the Internet, that their hamburgers are made of worms.

Well, initially, they tried to convince people that's not true, until they discovered actually through academic research and research that they did, that saying, no, that's not true, actually causes more harm than good. It is better to just ignore it.

Having said that, it's still going on. Just a couple of years ago I read, again, there was the rumor spread that McDonald's hamburgers are made of worms. So, yeah, that's a real problem that affects the entire brand and the associations. And there is research that -- where we talk about interference. Because if you add in negative things, it makes it harder for consumers to remember some of the good [168] things.

Q. Chipotle has had a similar issue in the last couple of years, as I understand it. Same problem, is it?

A. That was, you know, the variety, I think, yeah.

Q. So if something negative like, these hamburgers are made of worms, is introduced, how does that show up in memory? How is that stored by the consumer?

A. Well, it's another node that's linked in consumers' minds with McDonald. And it affects -- it diminishes the brand equity, it tarnishes the brand, and I want to emphasize we are talking here about largely an unconscious process.

When we think about McDonald's, all of those things come to mind, but we don't make a list of those. These are things that are largely unconscious and are traumatic. In other words, we cannot control them, we cannot say, well, actually, it doesn't make sense that McDonald's would use worms. In fact, it would have cost them more if they were to use worms, but it just doesn't make sense that McDonald's would do that. And that has a negative affect on the entire brand that you add something that is clearly negative.

Q. So it would be like popping into this slide, this demonstrative 10,000, another node that would say, worms in hamburgers, or something like that?

A. That's correct.

Q. And then would the totality of the picture of the image of [169] McDonald's in the brain be contaminated -- as your word was, contaminated by that?

A. That's exactly right. That affects my response to the brand, how I perceive the brand, even though it's largely automatic.

Q. So let's go back then to your assignment in this matter. I believe you told us that your assignment was to evaluate, based upon principles of consumer psychology and the processing of information in the brain about

brands, whether the Bad Spaniels Old No. 2 product had an effect and tarnished the Jack Daniel's brand. Did you apply this Associative Memory Network Model to that problem, to that question?

A. I did.

Q. So let's take a look at demonstrative 10,001. Is this the Associative Network Model that you sketched for the Jack Daniel's product before the introduction of the VIP product.

A. It is. Based on my review of all kinds of Jack Daniel's commercials and advertisements over the years, what I read about Jack Daniel's, that's what I came up with in terms of associations of the Jack Daniel's brand.

Q. So each of these nodes you've got a label on, can you tell us where some of these come from, again, please?

A. Well, I think we heard from Mr. Epps and Mr. Roush about, I think especially Mr. Epps, about the history of the brand and the key messages they were trying to communicate about what the [170] Jack Daniel's brand stands for. And they are very -- they try to be very consistent.

So when they talk about authenticity, integrity, independence, you see that thing, these things, throughout their advertisements and other means of promoting the brand. So you see that these are -- that's exactly textbook example of how you create a consistent brand equity and you communicate to consumer what the brand means.

Q. And so you applied the Associate Network Model to this situation, this was the model that you came up with pre-introduction of the VIP toy. Did you have a model or a schematic showing what it looked like after the introduction of the dog toy?

A. Yes.

Q. Let's take a look at 10,002. Is this your sketch and your scheme of what it looks like?

A. It is. And this product has some specific characteristics. I notice that someone referred to it as parody or spoof, which I guess to some degree are legal issue, defecation, feces, poop, these are terms that we are all familiar with. These are very -- I hate to say it. We are all normal people. But it is not something that you would like to associate any -- anything you eat or drink with.

In fact, there has been a great deal of research specifically on that issue. The disgust generated by this [171] combination of whether they say here, poo by weight, Old No. 2, and things of that nature, or defecation more generally, and food and beverages.

And this is the most extreme example of disgust being created, and I should know, Judge, that this feeling of disgust has a long history, turns out but none other than Charles Darwin was the first one to recognize disgust as one of the most fundamental emotions that people feel and it starts at a relatively young age.

It is not clear yet if babies can experience disgust, but it evokes fairly quickly. And so this is very specific, and I think that it's self exploratory. Here we take something individuals drink that has well-established associations, and we add to that, Old No. 2, defecation, poo by weight. That is an extreme example of likelihood of tarnishment. In other words, consumers who are exposed to this product (squeezes toy).

And I assume that it is specifically targeted to people who are familiar with Jack Daniel's, because if you are not familiar with Jack Daniel's, what's the point of this

product? The whole product is designed for people who recognize the resemblance.

Q. So you are saying the association of a consumable, in this case, the Jack Daniel's whiskey, with Old No. 2, or poo or defecation, would generate in most consumers a notion of [172] disgust.

A. It will generate the disgust. And obviously, people are not stupid. Consumers are not stupid. No one would think that there's poo in the Jack Daniel's product, but you created a mental association between Jack Daniels and poo, or Old No. 2, and therefore, for those people exposed to this product, you diluted or more specifically, tarnished the Jack Daniel's whiskey.

Q. What affect does that have on brand value, in this case Jack Daniel's brand value?

A. Well, it lowers the value. I think Mr. Epps also discussed, brand is, for many companies, especially where you are dealing with products that it's hard to taste the precise taste. So brand name, so what you are drinking is really important, and your mental associations are extremely important. That means if you have a strong brand, that you have established over a century, that's your main asset, it means -- it has implications with respect to whether consumers will pay attention to your advisements.

How will they respond if you raise the price? All kind of things. In other words, a strong brand that's not tarnished allows you to do many things, and it's a strong determinant of your performance in the market place.

Q. Would you characterize McDonald's -- I'm sorry -- Jack Daniel's as a strong brand?

[173] A. Without a doubt.

Q. What are the factors that go into your assessment in that regard?

A. There have been different definition of -- people have used different definitions of brand, brand equity. I like one that describes brand equity in terms of four key components. Awareness, and we know in this case that there's extremely high awareness of the Jack Daniel's product.

Second, is brand associations. We have talked about that. The third one is customer loyalty, and my understanding, Jack Daniel's has many loyal customers. And the fourth component is specifically the perception of product quality. That's where all this heritage, history, authenticity and the fact that the water are from Lynchburg, Tennessee, and so that goes into perceptions of quality. And that together, determines the brand equity of Jack Daniel's, which is clearly very strong.

Q. If it's such a strong brand, Dr. Simonson, what does it have to fear from this little dog toy product?

A. I think it would be a very big mistake for Jack Daniel's or any strong mark for that matter, to say, oh, that's not a big deal, we can ignore it. I think there is this term, death by a thousand cuts. I think that's an example. If you allowed that to be sold, sooner than later there will be other products that may try to associate Jack Daniel's with defecation and [174] similarly, disgusting things. And then the brand, as strong as it is today, will become much weaker. It is not going to happen over night, but gradually, that's what will happen.

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[175]

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[Q.] [...] We were talking earlier about your experience doing research in other dilution matters, and I believe you worked on a case involving Starbucks; is that correct?

A. That's correct.

Q. Did you do -- what kind of research did you do there and what was your conclusions?

A. As I said earlier, there are two stages in determining whether there's likelihood of dilution. The first phase, which often does involve a survey, is the phase in which you are trying to determine whether the allegedly diluting mark calls to mind the allegedly diluted mark.

Now, the second phase, as I explained, requires specific expertise in consumer psychology, as I discussed before the break. So in the Starbucks matter, there was a coffee shop in Oregon, I believe, that was called Sambucks?

Q. Sambucks?

A. Sambucks. And Starbucks was concerned about it, so I conducted a survey in which I showed the store front of this coffee shop to consumers, and I asked them, what comes to mind? [176] Most of them said Starbucks. Now, that was not enough. You also -- and I needed -- or I needed to include a control, because it is possible that regardless of what's the specific name of the coffee house, just seeing coffee house will lead some people to name Starbucks because they're such a large and famous chain of coffee houses.

Therefore, I had a control group, which was -- looked the same, but it was called Sammy's Coffee House, so I could compare what we call the test group with the control group, to see to what extent Sambucks Coffee

House is more likely to call to mind Starbucks than the control, which was Sammy's Coffee House.

In addition, I asked respondents, what makes you say that? Why do you say Starbucks? And I found that most of those naming Starbucks said, well, the name was very similar. So that was the survey I used to establish that indeed Sambucks Coffee House calls to mind Starbucks.

Now, there was a second phase. And the Court in that case relied on my opinion in determining that there was a likelihood of dilution. For the second phase, as I said, it is not amenable to conducting a survey because dilution, the process of dilution is a slow process. It doesn't happen overnight. There is no survey that can establish the process of confusion. That's exactly why you need specific expertise that I believe I have.

[177] Q. You said confusion just a moment ago. I think you meant --

A. I said confusion and I meant dilution. I am talking here about dilution. So for the second phase, once I established in that case that Sambucks Coffee House calls to mind Starbucks Coffee House, I then relied on my expertise and my understanding of brands, as I discussed here, to reach the conclusion that Sambucks Coffee House was likely to dilute the Starbucks brand.

Q. Okay. So now I understand, and you are contrasting the work you did in the Starbucks case with what you did here. You didn't do a survey here, because I think you told us, it already was established that the calls to mind element was established -- in your view?

A. Exactly. As I said earlier, I understand -- there's no dispute in this case that this product was designed to call to mind this product. That's the whole point of this

product. Why else would you design it in a manner that is so reminiscent or so similar to Jack Daniel's?

So there's no dispute about the fact that it calls to mind, and I just listened and I read previously the deposition of Ms. Phillips and how she came up with the design and she looked at the bottle and so on. I don't think there's any dispute that it calls to mind, so there was really no need for survey, because this phase one that is suitable for survey, has already been determined and is not in dispute.

[178] Q. And the dilution question, the second half, that was where you brought your expertise?

A. Exactly.

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[180]

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[Q.] [...] You testified that you thought most people would agree with your view that the Old No. 2 toy would evoke feelings of disgust. But as Mr. Silverman says, you never tested that, did you? Why not? You didn't conduct a survey about it, why not?

A. As I indicated, it so happened there's been a great deal of research, which indicates that if you associate any food or beverage with defecation, you are creating disgust with respect to that food or beverage that is being now associated with defecation.

There's a great deal of research. Many articles have been written about this particular point. There's really no need to conduct another study. And it really doesn't matter whether it's on this thing that looks very

much like a Jack [181] Daniel's bottle, or any other product that creates an association between Jack Daniel's and defecation.

Q. Mr. Silverman says, well, you didn't test it, but I did, and I talked to 19 people, and all of them did not feel it was disgusting, rather, they just thought it was funny.

Do you disagree with his methodology in testing that question? And how do you reconcile what he is saying with your conclusion?

A. I think that what he did -- I am trying to look for a nicer word than referring to it as a joke, but it was incredibly unreliable and I am surprised that Mr. Silverman, in the context of litigation, was trying to use that as evidence.

And I think in general, I am not aware, and apparently he is not either, in any -- not aware of any situation, any other court case where someone conducted a focus group for the purpose of the litigation. And there is a good reason for that.

Focus groups have their limitations. They can also sometimes give you ideas that you can pursue in more quantitative studies. However, in the context of litigation, litigation, needless to say, is an adversarial process.

And if he is conducting the focus group, let's say he has five people sitting around a table, the problem is that the way this free-flying discussion is going can be biased in such a way that it produces predetermined results.

[182] And the focus groups, in this particular case, represent, and I find astonishing example of bias where the moderator of those focus groups, a gentleman by the name of Mr., I think, Hirsch. So he has five people around the table, and he starts to focus the group and says, today,

we are going to talk about spoof products. So he told them right away, this is about spoof products.

* * *

[183]

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Q. So you were commenting on the methodology that Mr. Hirsch asked a, I think you called it, leading question, it's a spoof product? What's wrong with that methodology?

A. He started -- I mean, the question is whether this is seen by consumers as just a spoof product, nothing -- okay, they mention poo, they mention Old No. 2, not a big deal, it's just a spoof product.

Well, by beginning this focus group with telling them, this is a study about -- I want to talk to you about spoof products, that by itself made this focus group meaningless, because you told them what you want them to say.

It went on and this -- the moderator, who I understand from Mr. Silverman's deposition, they talked about how to conduct it, he said he would show the product or show the ad [184] for the product and say something like, that's funny, right? Isn't that funny?

Again, this is an extreme example of a super leading and uninformative focus group. That is the reason why, to my knowledge, no one tried to conduct a focus group specifically for the purpose of litigation. And I think what happened here is an illustration of why not using it, not running focus group for litigation is indeed a good idea.

Q. He says that you offer no reason why you believe that the Bad Spaniels toy would elicit disgust that would

somehow carry over to Jack Daniel's. He says it is strictly your opinion.

A. I think that he may misunderstand how knowledge is acquired. It's based -- as I said earlier, it's based on dozens and dozens of studies that prove beyond a doubt, the tarnishment or the negative association created by taking a food product or a beverage and associating it with defecation. There have been many studies on that. It is beyond dispute.

Now, he may say, well, maybe that's true, but you didn't show it specifically here that it tarnishes. As I said, the process of tarnishment is a long process. There is no study, nor did he propose any study, in fact I believe he said he was never involved in any dilution matter before this one, nor did he ever design or conduct the focus group before this case.

But I am relying on general principles that apply to [185] any product or service or beverage or food, based on a great deal of research that is not in dispute. That's generally recognized. That's exactly why managers from a wide range of companies come to me and want me to teach them how does general principles apply to them.

They may have expertise in the specific product that they are selling, but I can bring the general principles and explain how that applies to them, which is why they hired my services or invite me to lecture.

Same as here. The combination of defecation with a beverage or a drink leads to tarnishment. That's based on a great deal of research. There's no need to conduct one more study.

THE COURT: Well, my question is, did you, in your report list those, as you say, undisputed authorities in support of your opinion?

THE WITNESS: I did.

THE COURT: Okay. I'm just curious. Go ahead.

MR. HARVEY: Fair enough. Thank you, Your Honor.

BY MR. HARVEY:

Q. So finally, among his other collection of criticisms Mr. Silverman says you didn't have any basis for your opinion. You don't have the requisite expertise, he says, in understanding consumers who own dogs and/or who own dogs and who drink whiskey.

[186] He says you don't own a dog yourself, so therefore, you can't possibly understand it, and that you can't make any judgments. How do you respond to this?

A. I think it, again, demonstrates his misunderstanding of what it takes to be able to know or to understand what creates consumer -- mental processes in consumers. That's what I teach. That's what I have done research on, and that's why I am reviewing the literature to see what other people have studies.

Whether I have a dog or not, whether I drink this or that, it makes no difference. And work experience, let's say if I worked on another case that relates to dog food, it has nothing to do with it. Here, we are dealing with general principles of the association between defecation and a drink. That's a general principle. That's -- we know that. Whether I have a dog or not, or whether I worked on an advertising campaign for dogs or for liquor, has nothing to do with it.

I was just recently involved in another matter pertaining to bourbon and wine. And in that case, I came to the conclusion that there was no confusion between, in

that case, it was called Buffalo Trace bourbon and 1000 Stories, which is some kind of zinfandel wine. And I conducted a survey, evaluated a survey and reached a conclusion, based on my experience. There was no confusion, and I was glad to see that the Court accepted my opinion and relied on my opinion. [187] But, again, I had no experience. In fact, I don't think I ever tried bourbon. I have tried zinfandel wine, not my favorite, but putting that aside, I often opine on many different things. The key is that I apply general principles, and I don't need to own every product that I opine about, as long as I know that -- the general principles that have been supported in many studies.

Q. And that's the case here, is it not?

A. Absolutely.

* * *

[191] [...] there's no control group. So that's why qualitative studies have obvious limitations, but they could give you some ideas that you can pursue further?

THE COURT: Thank you. Go ahead, Mr. Bray. I'm sorry.

MR. BRAY: Thank you, Your Honor.

BY MR. BRAY:

Q. Almost all of your research is quantitative in nature, correct?

A. Yes.

Q. And as you explained to the court qualitative research is associated with smaller samples?

A. Yes.

Q. And qualitative research, I think you will agree, can be useful to companies like Jack Daniel's for making some important decisions related to advertising and promotion or development of their brands?

A. They could provide them some ideas to pursue, assuming those focus groups are properly conducted without bias, just in the course of making business decisions to learn about consumers.

Q. Okay. And qualitative study using a focus group can be useful to understand how consumers feel about a product in a layman's term, their emotional reactions to a product, right?

A. No. I mean, you can get -- I mean, you have five people in [192] the room. And you can find that a particular person feels -- says that he or she feels this way or that way, so in that regard, you can get some tiny pieces of emotions or anything else so it could happen, but, it doesn't allow you to reach any general conclusions about the emotions triggered by say, advertising.

Q. So if Mr. Epps or another brand manager at Jack Daniel's would testify that, or did testify that it is useful to Jack Daniel's to gauge emotional reactions to the products, you would say that they are just not -- they don't have the scientific understanding that you have, right?

A. No, I wouldn't say that. As I said just now, focus groups can give you ideas, especially if properly conducted in the course of making business decisions, not for litigation. And I believe they conducted over 50 focus groups.

Q. And in fact, they provided exemplars of focus group that they had done, to you, correct?

A. They did.

Q. You didn't think Jack Daniel's was wasting its time doing these focus groups, did you?

A. As I said, my impression is they conducted proper focus group, many of them, which is no comparison to what was done by Mr. Silverman.

Q. Your opinion in this case is not based on any quantitative study that you have done, correct?

* * *

[195] A. I do.

Q. None of those studies are quoted in this report, are they?

A. You know, I didn't memorize the report, but let me check.

Q. While you are looking through the report, would you agree with me, Dr. Simonson, that referring to the No. 2, or a No. 2 is about the gentlest way, the gentlest euphemism you can refer to, that bodily function? It is what you use with small children?

A. I have no particular expertise in ranking the most gentle ways.

Q. Would you agree that there would be much harsher ways to express the same concept?

A. Well, I think defecation sounds -- feces sounds maybe overly academic, but, you know, poo, I think appears here. That's not particularly gentle.

Q. No, no, I wasn't asking about that, sir. I was asking about the No. 2.

A. But do you want me to look for --

Q. Yes, please.

A. -- this or answer the answer, or do you want me to answer your fallout question.

Q. My question is with regard to your report, that's been marked as Exhibit 3, can you point out where you have quoted any study for the proposition that you explained to the Court that any reference to defecation leads to tarnishment in the [196] food and beverage area?

A. As I said, I didn't memorize the report. I sat here --

THE COURT: Which page is that, if you could help us out?

THE WITNESS: Which page?

THE COURT: Of your report, yes, sir.

THE WITNESS: Based on page 12, paragraph 31. Consumers who are exposed to VIP's product had another mental association to the Jack Daniel's flagship brands and other brands. The new brand association, the dog's No. 2, is negative, for many it is likely to be even disgusting. Prior research has shown that a feeling of disgust leads consumers to avoid things which are associated in any way with that feeling. And I cite here some articles.

Q. I can stop you there, Dr. Simonson.

A. In the present case, this prior research supports the common sense conclusion that famous whiskey brand and dog's number two, is likely, consciously or unconsciously, to diminish consumers attraction to and interest in purchasing Jack Daniel's brands.

Q. I want to drill down on that a little more, because I asked you if there's any study quoted that said, any reference, no matter how gentle to excrement leads to tarnishment or negative feelings regarding a brand in the food or

beverage category. Would you agree with me there's no quote from a study for that [197] proposition? Yes or no?

A. There's no quote to a study, but if you go to the sources that I did cite, they do include studies.

Q. Okay. And in terms of what you stated there, and I saw that in your report, I highlighted it. That feelings of disgust lead to consumers to avoid things that are associated in any way with that feeling. That's a much broader proposition than what you articulated to Mr. Harvey, that, again, any reference to excrement, no matter how gentle, leads to tarnishment of a food or beverage brand? You would agree with me there, right?

A. I am not sure I followed your question.

Q. That was a very long question. That sentence, the feeling of disgust leads to consumers to avoid things. Nothing in that sentence refers to excrement or a euphemism, a gentle euphemism for excrement, correct?

A. In my sentence, maybe not.

Q. And you referred to many, many, many, many studies where any reference, no matter how gentle to excrement, leads to tarnishment in the food or beverage category. You would agree with me that footnote 12 references two studies, right?

A. Well, they reference various other studies. So if you go to those cited articles, they cite many studies and prior articles that talked about the disgust creating when you associate defecation with whiskey, as I said here.

[198] Q. They may or may not, but you didn't quote any of them or bring any of them to the Court's attention, correct?

A. You mean other than quoting them here as a footnote?

Q. You didn't quote anything in the footnote. You provided a footnote for an unquoted statement. In terms of whatever studies are being referred to in the two reports in footnote 12, you don't quote those studies anywhere, do you?

A. I didn't quote those studies. I quoted articles that talk about those studies.

Q. Okay. And you didn't perform any of those studies, right, that you are quoting, or that you are referring to?

A. Of course not, because there was no need to prove that it calls to mind Jack Daniel's.

MR. BRAY: Can I get Exhibit 234?

BY MR. BRAY:

Q. Dr. Simonson, I put up demonstrative exhibit 10,000, I believe, the McDonald's Associative Network. Is this something that you created for this litigation?

A. No, actually it was adopted from a book by David Aaker, who is a well-known branding expert, and that was based on a study, I believe.

Q. I would like to have you look at exhibit -- well, again, with regard to your opinion in this case, you didn't perform any quantitative study, correct?

A. You talking about this case?

* * *

[220] [...] beverages, correct?

A. Alcoholic beverage is something people consume. In combination with feces, that's something I have learned and I rely on.

Q. Dr. Simonson, I think we are going around in circles?

THE COURT: I would agree with that.

BY MR. BRAY:

Q. The point has been made, and I don't want to irritate anybody, especially Your Honor. Let me wrap it up. Your opinion is that there was an unfavorable mental association, consciously or unconsciously, created in this case, correct?

A. Yes.

Q. Okay. You have no opinion as to how much harm or alleged harm the Bad Spaniels has done to the Jack Daniel's product, correct?

A. Correct.

Q. It could be miniscule harm, correct?

A. It's not something you can measure. As I said, it's a process.

Q. And regarding the assessment of Bad Spaniels is likely to lower the value of Jack Daniel's trade dress, you didn't specifically factor in your assessment the likely intersection between purchases of VIP Products and Jack Daniel's products, correct?

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

VIP Products, LLC,

Plaintiff,

vs.

Jack Daniel's Properties,
Inc.,

Defendants.

And Related Counterclaims.

CV-14-02057-PHX-
SMM

Phoenix, Arizona
October 3, 2017
9:58 a.m.

**BEFORE: THE HONORABLE STEPHEN M.
MCNAMEE, JUDGE**

REPORTER'S TRANSCRIPT OF PROCEEDINGS
TRIAL – DAY 2

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Proceedings Reported by Stenographic Court Reporter

Transcript Prepared by Computer-Aided Transcription

* * *

[31] BY MR. HARVEY:

Q. How important to Jack Daniel's are the trademarks and the trade dress that we just looked at?

A. There's two answers to that. If you think about the brand itself, you -- in order to have a brand, you have to have the trademarks that support it. It is the crown jewels. I mean, if you look at our company as a whole, Jack Daniel's is the most significant part of it. It is immensely valuable.

I think you heard testimony yesterday that, according to Interbrand, it's the 82nd or 83rd most valuable brand in the world of any category. I mean, that puts it in pretty rarefied, and if you don't have the trademark portfolio, the registrations to back that up, you will get chipped away at and that valuation just drops.

So one of the first things I had to do when I came to Brown Forman was, we had 225 registrations for the whole world, and I was pretty shocked as a lawyer to see that. But, again, it was a company operating in a very comfortable industry with lots of partners and friends and neighbors, and it didn't really -- it hadn't been exposed to a lot of the rough and tumble of a lot of the world.

We now have, you know, a portfolio in the thousands, because you just can't have a brand that big, that valuable, and not protect it. So it is hugely important. We have an expression in the company, if Jack Daniel's sneezes, the whole [32] company gets a cold. And that's very true from a brand perspective and a trademark perspective. That's why we're --

Q. And apart from the registrations themselves, the marks have huge value, I think you are saying,

and why? Why is that? What is it that makes them so valuable?

A. Well, they -- trademarks and the brand reflect the personality and the values and the goodwill of the product or a company or whatever happens to be attached to it. It can be even a person.

And in Jack Daniel's instance, it was a person. And so those values get reflected. And that's what people identify with. That's what the shorthand -- you know, if you read some of the literature of what is a trademark, it is that shorthand way of communicating to a consumer, what does that brand mean? What does it stand for? And that's why it is so valuable. You know when you see a particular brand on a shelf whether that brand is something you can trust, you like, it says something about who you are, et cetera.

Q. And we have heard the term "brand values" mentioned a few times?

A. Yes.

Q. How would you describe the brand values of the Jack Daniel's mark?

A. To me they are authenticity, integrity, the honesty, the quality of it, the consistency, the masculinity. Even [33] though -- it's interesting, its masculinity, but in a way that is appreciated and connected with women as well. It is not just guys, I think, it's both.

* * *

[51] [...] there, right?

A. Yes, I said that.

Q. But before I circle back to that, with regard to the Americans that so identify with the Jack Daniel's brand

that when it's harmed they feel harmed, they bring that to your attention, that's not what happened in this case, right?

A. No.

Q. Okay. In fact, to your knowledge, no consumer has communicated to anybody at Jack Daniel's that they feel harmed by the Bad Spaniels toy, correct?

A. Let me make sure I understand your question. No consumer has -- ask your question again, please.

Q. To your knowledge, no consumer has told Jack Daniel's that they feel harmed by the Bad Spaniels toy?

A. Who do you mean by Jack Daniel's? Do you mean JDPI? Do you mean brown Forman? Do you mean the distillery? You used the word "Jack Daniel's," he's dead but --

Q. Well, I don't know if I need to have that level of precision.

A. The big sense of Jack.

Q. Yeah, consumers being so protective of the brand that they alert Jack to things that they think are harming the brand because it harms them?

A. None that I know of.

Q. And that is not how this case came to Jack Daniel's [52] attention?

A. Correct.

Q. And my next follow-up question is, in fact, no consumer has communicated any such thing to your knowledge to Brown Forman, Jack Daniel's?

A. Not to us.

Q. Okay. And you talked about the Boozin' Gear site. I believe it was Mr. Roush yesterday testified that there were thousands of e-commerce sites that offer licensed Jack Daniel's products, correct?

A. I believe that's what he said.

Q. And you don't have any reason to disagree with him, do you?

A. Nope.

Q. And there are probably millions of e-commerce sites taken as a whole, correct?

A. I am no expert on the number of e-commerce sites out there, but from what I see, that's probably not far off.

Q. So out of the millions of e-commerce sites that exist over all, and the thousands of e-commerce sites where Jack Daniel's license products are available for sale, to your knowledge, the only e-commerce sale where licensed Jack Daniel's goods are sold, and also the Bad Spaniels product was sold, was the one Boozin' Gear site, correct?

A. No, that's not true.

Q. What other sites?

* * *

[59] [...] a couple of them. But, no, I didn't find humor in "Buttwiper."

Q. Cataroma and Heinie Sniff'n, Barks?

A. We had seen the Heineken one also, and that's what led us to the Budweiser one, and I didn't find that --

Q. You don't believe the drawing of the cocker spaniel on the Bad Spaniels bottle is disgusting, do you?

A. No.

Q. And you agree with me that at least as to pet owners, having a depiction of a dog can create a positive association with a product, or brand?

A. Depending on the dog, yeah.

Q. Sure. And you are not aware of any actual instances where the Bad Spaniels dog toy has actually harmed Jack Daniel's reputation, correct?

A. No, it's not true.

Q. Okay. Again, if you could look at the deposition, page 72, Mr. Gooder, line 2.

A. Sorry, line what?

Q. Line 2. You recall me asking this question?

A. Sorry, you said page 72?

Q. 74, line 2. I apologize. Are you there?

A. Yes.

Q. Well, you recall me asking this question: Well, the complaint refers to imagery that harms the reputation. So are you aware of any harm to the reputation of JDPI, or Jack [60] Daniel's, by the Bad Spaniels toy? Actual harm to the reputation?

Your answer was: If you are referring to instances of actual harm, no.

That was your testimony in June of 2015, correct?

A. Correct. I said, instances of actual harm.

Q. And you are also not aware of any evidence that Jack Daniel's has lost any sales because of the Bad Spaniels toy, correct?

A. Sorry. Ask the question again?

Q. You are not aware, Mr. Gooder, of any evidence that Jack Daniel's has lost any sales as a result of the Bad Spaniels toy, correct?

A. I am not aware of any specific instances, no.

Q. Okay. And I almost hate to revisit Dr. Simonson, but you are not aware of Jack Daniel's performing any survey of actual customers to determine if the Bad Spaniels product creates any consumer aversion to Jack Daniel's?

A. I am not aware of any, and I don't believe he would do one or could do one.

Q. Okay. But --

A. Is that too close to the line?

Q. Do you agree with Dr. Simonson that VIP should have done one before it launched the product?

A. I don't have an opinion on -- I am not qualified to have [...]

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

VIP Products, LLC, Plaintiff, vs. Jack Daniel's Properties, Inc., Defendant. And Related Counterclaims.	2:14-cv-2057-SMM Phoenix, Arizona October 4, 2017 9:55 a.m.
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**BEFORE: THE HONORABLE STEPHEN M.
MCNAMEE, JUDGE**

REPORTER'S TRANSCRIPT OF PROCEEDINGS
TRIAL – DAY 3

Volume A

(Pages 1-82)

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* * *

[22] [...] criticisms.

MR. BRAY: We now are having Dr. Ford's testimony in my case in chief?

THE COURT: That would have to be rebuttal, correct? If you are now going back to Dr. Ford to object to Dr. Nowlis' report, that's really rebuttal, and, therefore, this would go outside of the testimony of Dr. Nowlis. You would have to bring that in, in a rebuttal fashion.

MR. HARVEY: I should bring it in the rebuttal case?

THE COURT: Yes.

MR. HARVEY: That's fine. I will do that. Thank you very much.

THE COURT: All right.

MR. BRAY: Briefly, only because I had a misunderstanding of the agreement of counsel, and this relates directly to the question that you posed shortly.

Yesterday we submitted the highlighted portions of Dr. Ford's deposition. We just didn't read them for the Court. They are not extensive. But I asked Dr. Ford yesterday, and this will be the sole part of my rebuttal: Would one of the -- is one possible advantage of a mall intercept survey, is that the survey respondent gets a tactile experience with the survey product? The answer is: I think that's an advantage if the tactile experience was a source indicator.

That's on page 85 of Dr. Ford's deposition.

[23] THE COURT: Can you help me out on what is a tactile --

MR. BRAY: I would say it is a source indicator, because Jack Daniel's does not make any products that squeak, whereas VIP makes a whole line of products called Silly Squeakers. So somebody that could -- and you saw on Dr. -- the summary of Dr. Nowlis' there was many people that couldn't read the Squeakers, so if you can't read the Squeakers and you can't touch and squeak the bottle, the title of the product is Silly Squeaker, so the squeak, the tactile experience is a source indicator in this case. Dr. Ford admitted that could be relevant in this case.

THE COURT: Thank you.

MR. BRAY: With that I conclude the presentation of Dr. Nowlis, and I would call Mr. Sacra next, unless you have any questions.

THE COURT: Thank you very much. Mr. Sacra, if you could come forward and be sworn as a witness please. I would appreciate it.

STEPHEN M. SACRA, PLAINTIFF'S WITNESS,
SWORN

THE CLERK: Do you want the lights down low or back up?

MR. BRAY: I would like the ELMO, instead of the computer, and the lights on full would be fine.

THE CLERK: Okay. Thank you.

* * *

[31] BY MR. BRAY:

Q. I next want to have you explain to the Court the different lines -- different types of toys that VIP makes. And I will just put up the -- zoom in. Is Exhibit 270, or I am sorry, Exhibit 31, the front page of an older VIP product catalog?

A. Yes, it is an older catalog.

Q. And I will just leave this up to guide your discussion, but can you explain to the Court the types of dog toys that VIP designs and sells?

A. Yeah. The first dog toy that we came out with is called the Tuffy. It's a product that is made with multiple levels of polyester. It is sewn together. Then it's edged with polyester again, and then sewn, with those parts sewn multiple times.

The theory is that it's much like a jawbreaker in the sense that you have multiple layers that you to have work through to get to the core of the toy. When we first started making dog toys, there was nothing on the market that was really designed to be a soft dog toy, but yet durable for play.

At that time, most people were buying dog toys for 7.99, 5.99 or less, and you just couldn't tap into that market.

And that's an example of what one of the products looked like. And it shows the multiple layers. The squeakers are actually sewn into individual pockets for safety, so that in the event that a poor parent of a pet let their dog chew on [32] a toy, which you are not supposed to do, it will give them a safe time to possibly remove the product before they could possibly ingest part of the squeaker.

Q. I just want to show you one more Tuffy picture out of the catalog. What is the --

A. So that's the Mega Tuffy, and the Mega Tuffy is our most durable one, and it is made with up to seven layers of material. So you have a layer of polyester, a plastic coating on that layer of polyester. Another layer of polyester, and so on. And then it is coated with fleece on the outside so it's soft in the mouth, but it's durable through the different layers.

And that one is actually -- we've tested it on tigers and bears and all different types of animals, and they have done extremely well. They are used at most animal wild-life sanctuaries as the product of choice that they can leave in their cage for them to play with.

Q. Did you used to sell Tuffy products on QVC?

A. Yes, I used to sell products on QVC for way too long.

Q. Did you get feedback in terms of the video with the tiger testing?

A. Any time -- well, when you are on QVC, you have an earpiece on in your head and you're trying to sell dog toys, and you are on a stage and you have dogs running around on the stage.

And as soon as they roll this B roll of the tigers [33] the mathematical computer that they watch with the little line goes up. And as soon as they see it, they start talking in your ear going, roll that B footage again. And you could -- when that tiger footage would roll, we would sell -- they would sell a 53-foot truckload in about four and a half minutes. It's crazy. And then when you are done, you just kind of like, let me see the computer screen. What happened?

Q. We are going to talk about Silly Squeakers obviously later, but the Court mentioned its experience with dog toys. And just, can you give the Court an idea where the Tuffy line of products are sold?

A. So the Tuffy line of products is sold, actually it's distributed into almost 30 different countries, and it's considered the leading durable soft dog toy on the market.

It's sold in stores like Walmart, Target, Petco, PetSmart. Almost every pet specialty retailer in the United States at least carries one of them in their store, even Bed Bath and Beyond.

Q. And just a few pictures from the catalog. You do the Tuffy toys in a variety of shapes?

A. We do the Tuffy toys in any possible shape we can conceive. The difficulty with the Tuffy product is that with the black edging that goes around the outside of the toy, in the manufacturing process, limits us on the cuteness of the shapes that we can make.

[34] And it's a challenge to come up with some of the more creative shapes, only because of the fact that at some point the machinery can't sew through the corners or through the number of layer of materials.

Q. How many -- well, I will just show you one more page and then we will move on from Tuffy.

These are additional Tuffy toys?

A. Yes.

Q. And do you -- you have designed all of these toys?

A. Yes, sir.

Q. And how many different, you know, across all lines, how many different types of dog toys does VIP Products sell?

A. When I last checked the other day, it was 598 SKUs.

Q. And you designed all of them?

A. Yes. With the help of my wife.

THE COURT: I am glad you answered that in case she happens to read your transcript.

MR. BRAY: She is supposed to be joining us shortly after the doctor.

THE COURT: He is covering his bases because she is not here right now. I understand that.

BY MR. BRAY:

Q. All right. We are going to do Silly Squeakers last and then have you talk about the Mighty line.

What's the Mighty line of dog toys?

[35] A. So Mighty is another line of toys that we created from what we learned from Tuffy. Tuffy has this hard edge, sewn edge that goes along the outside. And as I spoke earlier, it is difficult to produce a lot of unique shapes.

So we rethought how we could make a toy durable and also looked at different types of materials. So in the Mighty line, we use a layer of fleece on the inside, which is a nonwoven material so when a dog bites down on it, the material stretches and moves with the teeth, instead of actually, like in a woven, where your teeth would get between the two different threads and pull it apart.

And then we cover that with different types of fleece or, sorry, fur on the outside. And then just like we do the Tuffy, we reinforce all of the seams that we can on the inside, so that it's inside of the toy itself.

And we actually got a patent on that to protect the actual construction of how it's made. And that's an example of some of our microfiber toys that are in the Mighty line.

Q. Okay. We are going to do Silly Squeakers last. We can cover the next two probably pretty quickly. The Rugged Tuffy Rubber?

A. Yeah. So we wanted to expand into the different types of toys that are on the market, and so we created rubber dog toys in different shapes. And some of the shapes that we did -- this is where we actually were able to look at something and [36] say, okay, how can we be a little more creative than our competitor, and yet how can we bring fun into making dog toys? And this was one of the areas that we had a little bit more flexibility.

So I don't know if you have pictures of it, but one of our first line was actually a little stick of dynamite, an acme bomb and a little grenade that mimicked what we saw growing up on the cartoons.

Q. I don't have a picture handy, and I am afraid of tearing apart the exhibit. And then just lastly cover the Bentley and Bunny?

A. Bentley and Bunny. That is the name of my two dogs. They are Italian greyhounds, and there was no good bedding available for that size dog for the way that they like to sleep. So we created the Bunny and Bentley dog beds that are multiple layers.

Once again, so that you could take the cover off and wash it with the removal core. Because in the pet industry, you buy a dog bed, and then as soon as it gets worn out, you have to throw it away. This allowed people to buy a replacement cover for the outside so that they could continue to use the core, and it's less expensive.

Q. And just for the purposes of completeness, I did find the Rugged Tuffy Rubber.

A. You found two of them.

[37] Q. All right. Let's get organized. And lastly, the Silly Squeakers. What is that line?

A. So Silly Squeakers is a line of -- well, it's several types of toys. One of the things that, as a company making durable dog toys, it is difficult to, you know -- when durable -- I mean, you are controlled by the shape that you are able to make.

And Silly Squeakers was a chance for us to say, all right, we have all these funny cute ideas that we want to do, and we want to do them in greater detail, and we want to be able to share the humor that we have in this world with people in the pet industry.

Because all of the toys that we make are serious, and so this gives us a chance to actually show, hey, you know what, we actually are fun people and we can make really cute things, and it's indicative, of like our culture, kind of who we are. Because we are fun people that sit around and laugh and spend time with our dogs.

So Silly Squeakers is a -- it's -- the predominant material is vinyl, and that's another segment of the pet industry. So you have injection molding. You have different types of balls and different shapes that you can make it in.

So our first ones that we had were eye balls, which were, I don't know if you know Star Trek. They looked like the Terrible Tribbles. They had eyes on the front of them, and [38] then we did ones with -- that look like funny feet, which have been disconnected, but it made it look like your dog had a foot of an animal in their mouth. It was covered with soft fur on one side, and then it had a plastic injection foot on the other. But a cartoon foot, not to look like a real one.

Q. We are going to go into more detail about Silly Squeakers a little further in your testimony, but is this a page from your catalog?

A. Yes, this is one of our pages from our catalog.

Q. And I guess more pertinent, is this also a page from your catalog?

A. That's also a page from our catalog.

Q. What are the biggest sellers VIP has of its dog toys?

A. By far the biggest sellers are all of our durable products. Tuffy being hands down the most sought after, number one product we make, and it has been around the longest.

MR. HARVEY: Forgive me, Your Honor. Could we ask counsel to identify the last photo that you showed on the ELMO?

THE COURT: If you would, please.

MR. HARVEY: I think it is the one with the bar.

MR. BRAY: That's page 36 of the catalog.

MR. HARVEY: Thank you.

BY MR. BRAY:

Q. Biggest customers for the Tuffy line?

A. Yeah, so the biggest customers for the Tuffy line are [...]

* * *

[45] [...] where everybody launches their new products.

Q. All right. Let's transition to Silly Squeakers. What types of Silly Squeakers products do or does VIP offer today?

A. So today we still offer the eye balls. We offer squeaking tennis balls, and then we also offer our parody line of beer bottles, wine bottles, and most recently, liquor bottles.

Q. So what was the original idea behind Silly Squeakers?

A. So the original idea behind Silly Squeakers really comes from the fact that, as I was saying earlier, we can't make shapes with our other toys with more intricate detail in the durable category.

And so we wanted to branch off into plastic injection molding because we would be able to make more creative shapes with more detail and do more intricate graphics for our consumers, but it would also give us a chance to convey more of the humorous side of the dog industry.

Q. Is that humorous side a reflection of VIP's culture?

A. 100 percent.

Q. Can you describe for the Court how the Silly Squeakers line has evolved over time?

A. Well, the Silly Squeakers line, which mostly is reflected by the parody products that we make, reflects back on the humanization of the dog in our lives, and if we all reflect back, we all remember the picture of dogs playing poker, and we have -- you know -- well, people who take videos of their dogs [46] who can actually bring them beers and have them say, hey, you know, Fido, go get me a beer. And he goes over to the refrigerator and pulls it out. People embrace that. They think it's funny. They enjoy it, and it's part of their -- it's part of dog culture.

So with that humanization, we thought, all right, how can we take this funny part of what everybody wants to do with dogs playing poker and people bringing them beers and stuff like that, and make that into a product?

So we looked back and we said, all right, plastic injection. Let's make beer bottles and see where that takes us. And so that's when we realized, all right, so if you are going to take a beer bottle and make it effective and kind of play on this humanization, what are you going to do?

So we reflected on the fact that, you know, all day, every day, you wake up, you look at your toothpaste, you have a brand name on it. You turn on your TV, you are being bombarded with commercials.

You hop in your car, you see billboards. Your car steering wheel is advertising to you. Your watch is advertising to you. Your clothes are advertising to you. Your radio, when you turn it on, it's advertising to you. You have magazines that you read that are advertising to you.

You are constantly being bombarded with advertisements all day, all day, all day. With everything you do. Your pen [47] that you write with, it's got a logo on it. It's telling you, hey, this is the brand that you need to be. And

everywhere you go in the grocery store, everything is a brand.

So there's this gray fog out there that these companies are constantly pushing into your head. And so what we do, in our concept with saying, all right, if you are getting all of this imagery, and it is all getting pumped into your head, let's do a parody. Let's take those little tiny bits of information, take a few of them, reorganize them in a way that you haven't seen, and put them out there in a funny way for you to laugh at.

Because as you know, every -- corporations take themselves very seriously, and obviously, you can see from this room that everyone here doesn't think Silly Squeakers is funny, even though a lot of people do.

And if you read the Amazon reviews, they all start with, hilarious, funniest dog toy I ever owned.

Q. Okay. Well -- we will come back to your intent, both with Silly Squeakers and the Bad Spaniels toy later on.

I am sorry, I misplaced -- here we are.

This is a page from a catalog a few years ago, 14 fun bottles to choose from. How many Silly Squeakers products are available today?

A. Available today, there is, I believe, 20.

Q. And I'm talking about the parody?

* * *

[50] BY MR. BRAY:

Q. What percentage of VIP's business is the Silly Squeakers line?

A. Sorry, could you repeat the question?

Q. Out of all VIP's business, what percentage is the Silly Squeakers?

A. The Silly Squeakers line is less than 10 percent of our total business.

Q. What has been your experience with how most major brands have dealt with the Silly Squeakers parody line?

A. Are you saying how most major brands that we have been parodying?

Q. Exactly. The major -- let me rephrase it.

What's been your experience with how the major brands that have been the subject of the Silly Squeakers parody products have responded?

A. Most of the brands ignore our products. Four of them -- let me go through this -- have sent letters to us which would be Kendall-Jackson, Pabst Blue Ribbon, Heineken, and I might be missing one.

Those examples are people who have sent us a letter, who we have responded back to in form of letter. In our return letter, which we send, it states the existing case law that was concluded in the Chewy Vuitton case and the Timmy Holedigger case, to allow the person who is the subject of the parody to [...]

* * *

[55] [...] counsel.

THE COURT: Well, I want to be sure we have the ground rules straight, that's all. You may move along.

BY MR. BRAY:

Q. Okay.

A. So I believe that they ruled that they did not find a likelihood that that would succeed.

Q. You read the decision yourself, right?

A. Correct.

Q. And were you satisfied with the non-trial resolution that you reached with Anheuser-Busch through settlement?

A. Yeah, I think so. I think it was a great resolution, and we can, you know -- obviously, we have continued to grow our parody line of dog toys substantially since then, and with fair success.

Q. All right. Let's move on to -- um, again, this is one of the Sleekcraft factors, the intent behind your creation of the Bad Spaniels product in particular.

Can you describe for the Court how you thought of Bad Spaniels? Where you were? How it happened? We heard a little bit through Elle Phillips' deposition.

A. Me and my wife, we go out to dinner every night, and we sit at restaurants, but we normally sit at the bar. And I am sitting there staring, thinking, all right, what's -- you know, what new product can we come up with? And I'm looking around, [56] and I'm like, you know what, I think I got something. And so I pick up the phone and I call Elle in my -- which I am still laughing about, my secret code.

Elle and I have done enough of these that it's kind of fun for us to say, hey, I got one for you, and then just say what it is. Because if she gets it and understands what I am saying, then I am positive that if I am going to elicit different parts of a brand to someone and get them to get a parody, then she is going to need to get it too.

And so she's like, hey, you know what, got it. I will go work on it right now, and that was the phone call. So it was a matter of 15 seconds, and then I went and finished my dinner.

Q. Was your intent in creating Bad Spaniels to create a parody product?

A. Absolutely.

Q. And what is it your intent to amuse the public?

A. Undoubtedly.

Q. Did you have any intent to confuse the public into thinking that Jack Daniel's was putting out one of your Silly Squeaker toys, which is an integral part of your business?

A. Absolutely not.

Q. And you want, Mr. Sacra, the public to know that VIP is behind the Silly Squeakers line, I assume?

A. Absolutely.

* * *

[62] [...] at this stage it's too late.

MR. BRAY: Oh, I understand that, and it's possible that Mr. Sacra could make further changes to any of his products after the trial is over.

THE COURT: I understand that.

BY MR. BRAY:

Q. What was -- did you have an intended message for the Bad Spaniels parody toy?

A. The intended message for the Bad Spaniels parody toy, as the same with all of ours, is just saying, the world around you is constantly advertising to you, and we are

coming back and saying, look, you need to -- and the world is so serious about all of this marketing and advertising and getting sales and all that.

And we are coming back and saying, look, you can't be so serious in this world all the time. You need to be able to sit back and laugh at yourself. Whether it is someone making fun of me, or someone else, or another brand or whatever. The goal of that, of all of the parodies, is to convey that you shouldn't take yourself so seriously, especially, I mean, with the fact that that's all you do is take everything seriously.

Q. Was it your intent to elicit disgust?

A. No.

Q. I am going to show the witness two demonstrative exhibits. And let's do -- I think we had a number for you, 10003. So [...]

* * *

[64] MR. BRAY: I am not offering the report, I am offering pages, two pages that are demonstrative that have been previously disclosed to counsel.

THE COURT: He can testify to them as to his understanding and his impression. His reports do not come into evidence, just like -- other than the fact you stipulated to these other doctors' reports, the reports don't come in. I know a lot of courts use them, but they are the ultimate hearsay testifiers, and that's wrong.

MR. BRAY: Just to be clear, Your Honor, I am not intending to offer Mr. Sacra's report. That was the subject of the motion in limine. Mr. Harvey said that he hadn't seen these two demonstrative exhibits before. They had. These are being used purely for demonstrative

purposes to show the differences between the two products.

THE COURT: Go ahead.

BY MR. BRAY:

Q. When you designed the Bad Spaniels product with Elle Phillips, were you intending to make an exact copy of the Jack Daniel's label?

A. No, there was no intent to make a copy.

Q. And I have shown you -- let me get this -- can't do any better than that.

This is demonstrative exhibit 10003. Is this -- does this help you explain to the Court some of the differences [65] between the elements of the Bad Spaniels product and the Jack Daniel's black label product?

A. Yes, it does.

Q. And can you identify some of those differences for the Court that were included as part of your design process?

A. So if you -- there are red lines that go across this image, just to show you where the top of the bottle of the label is, the middle of the label, and the bottom of the label is.

So in your question of whether or not there was an intent to copy, our goal is to just grab enough elements of information that has been put into your mind. I mean, you see commercials all day long sitting in here, and you grab little bits of information and you put them into your head.

And then we draw on those little bits and put just enough for you to recall the brand that we're parodying, but not to copy. And as you can see, Jack Daniel's logo is

in the top -- upper top portion, which would be the upper quarter portion of the label, whereas our arched lettered "Bad Spaniels" is actually in the middle of our label.

At the top of our label, we have a dog. Clearly Jack Daniel's doesn't have a dog on their bottle.

You can see that the cartouche, that the Old No. 7, is in the upper half, which is the bottom quarter of the label. The No. 2 in the cartouche on the Bad Spaniels label has been pushed down into the lower quadrant.

[66] The word "Tennessee" on the Jack Daniel's label is in the middle of the label. On ours, it's on the bottom of the label. There are over 50 different instances of variances in the Jack Daniel's bottle and the Bad Spaniels bottle design.

MR. BRAY: Your Honor, may I approach the witness?

Just because it's difficult for him to read this.

THE COURT: You may.

THE WITNESS: So --

MR. BRAY: Let me ask you a question, Mr. Sacra.

BY MR. BRAY:

Q. Is demonstrative exhibit 10005, does it demonstrate more than 50 differences between your product and the Jack Daniel's product?

A. Yes, it does demonstrate that.

Q. And can you highlight -- I don't think we want to take the Court's time to go through all 50 differences, but can you highlight several of them?

A. Well, as the ones -- beyond the ones I just mentioned, obviously our product has a hangtag on it. This product does not have a hangtag on it. You can see that the filigree we use is completely different and is in a complete enclosed shape versus the Jack Daniel's one.

The Jack Daniel's label has a three-sided label that wraps around the entire bottle. They have a black shrink-wrapped enclosure over the top of their bottle with the [67] Old No. 7 on it. Our is a black cap with an actual label on the front that's square. But probably one of the biggest things that -- ours is a squeaking plastic bottle, and theirs a glass bottle that's designed to hold a fluid.

But each of these instances on here represent things that are completely different. They have -- sorry, I have a hard time reading this. When you get in -- there's something different, as far as with the header card artwork. There's something different with the fact that it's a glass bottle versus a plastic bottle. There are several differences in that.

And then the label itself, and then the actual wording itself. And you can say, it doesn't say -- if you had an intent to copy, you would put the word "Jack Daniel's" on there. There's no word "Jack Daniel's" on the bottle at all. It says, Bad Spaniels. There's no embossed "Jack Daniel's" written on the bottle.

And there's an intricate number -- like I said, there's an intricate number, 50 different differences which are noted in this. And I can read them all if you wanted to, but I don't think the Judge really wants to go through all of them.

Q. Thank you, Mr. Sacra. And with regard to, I think this was demonstrative exhibit 10003, would you agree

that there are similarities between the Bad Spaniels product and other well-known whiskey and bourbon products, other than Jack [68] Daniel's?

A. Yes.

Q. And I am going to show you what's been marked as Exhibit 3, which was discussed during Mr. Gooder's testimony. This is the trademark registration for the bottle shape. Are you aware of what International Class 33 goods are?

A. I believe International Class 33 is for alcoholic beverages.

Q. Okay. Does VIP sell any alcoholic beverages?

A. We do not sell any alcoholic beverages.

Q. And with regard to Exhibit 3, you will look -- part of the element being claimed is the Jack Daniel's signature on the -- each of the four sides of the top of the bottle?

A. Yes, I see that.

Q. Does VIP include any signature of Jack Daniel's or anybody else --

A. No, we do not.

Q. -- on the Bad Spaniels product?

Let's turn to one of the other factors that is relevant in this case. The sales channels of the Silly Squeakers products. Who does VIP sell the Bad Spaniels Silly Squeakers parody dog toy to?

A. We sell to independent special -- I am sorry -- independent pet retailers. And then we sold it into PetSmart, and then Petco as well, which would be a larger box store.

* * *

[75] [...] shipping and Amazon and Walmart. If you look at Exhibit 271A it seems like, without a scientific review of it, it looks like the bulk, the majority of your sales are to pet specialty retailers?

A. Absolutely. I mean, Amazon and third-party seller sites, it's miniscule. You will see listings, but sales, I mean, even using Boozin' Gear as an example that we keep talking about over and over and over.

Last time they purchased from us or any of our distributors was back, I believe, in 2016, like early 20 -- or 2015. So they have the listing up. I am not even sure you can buy one.

Q. And is Boozin' Gear one of -- is Boozin' Gear a significant retail customer?

A. They purchase 34 units.

Q. So out of the 55,000 units sold, Boozin' Gear has purchased 34 Bad Spaniels units?

A. Right.

Q. Let's switch gears a little bit, Mr. Sacra, and talk about marketing channels for Bad Spaniels. With regards to -- well, maybe I will ask these broader for VIP and then we can narrow it down.

Does VIP do any social media advertising today?

A. We discontinued our social media advertising, only because when you make durable dog toys, people like to use the dog toys [76] inappropriately. So you would get postings of just crazy stuff. So it was so much work to try to control it, that we just discontinued it all.

Q. When was that?

A. We discontinued probably 2014, '15, something like that. It was quite a while ago.

Q. And so if there were ever any social media advertising done for the Bad Spaniels, it would have been at the very, very beginning, or none at all?

A. We don't social advertise any of our products.

Q. And does VIP do any billboard marketing?

A. No.

Q. Does VIP advertise on television?

A. No.

Q. What marketing does VIP do for the Bad Spaniels product?

A. The only marketing that we do is our two trade shows once a year. We have an email marketing campaign where we email directly to our retailers, just basic information. We don't actually send any information about products, we just say, hey, come check us out. We have new items. And then we send catalogs twice a year to their mailing address. So it's nothing significant.

Q. Other than the fact that VIP has an Internet presence and Jack Daniel's has an Internet presence, is there any overlap, to your knowledge, between the marketing channels that VIP uses [77] and the marketing channels that Jack Daniel's uses?

A. I don't believe there are any.

Q. Let's turn to the next Sleekcraft factor, proximity of goods. What types of goods is the Jack Daniel's black label?

A. It is an alcoholic beverage.

Q. And what type of good is the Bad Spaniels product?

A. It is a squeaking dog toy.

Q. Are these similar kind of goods?

A. No.

Q. How are they different?

A. One is a dog toy that's not regulated, and the other one is alcohol, which is a regulated product.

Q. Is it your understanding that the sale of alcohol is heavily regulated in the United States?

A. Heavily regulated.

Q. Is the sale of dog toys regulated in the United States?

A. No, it is not. There are no regulations for dog toys of any kind.

Q. So even when you think of Consumer Product Safety Commission or the Food and Drug Association -- or Administration, with regard to human products, no regulations?

A. The Product Safety Commission, the CPSIA or -- they have regulations for children, which we have adopted as our measures for safety in dog toys, because we know that there's a -- dog toys sit on the floor and children's toys sit on the floor. So [...]

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

VIP Products, LLC, Plaintiff, vs. Jack Daniel's Properties, Inc., Defendant.

2:14-cv-2057-SMM
Phoenix, Arizona
October 4, 2017
1:30 p.m.
AMENDED CASE
NUMBER

**BEFORE: THE HONORABLE STEPHEN M.
MCNAMEE, JUDGE**

REPORTER'S TRANSCRIPT OF PROCEEDINGS
TRIAL – DAY 3

Volume B

Official Court Reporter:
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Transcript Prepared by Computer-Aided Transcription

[86]

P R O C E E D I N G S

(Proceedings resume at 1:30 p.m.)

THE COURT: Thank you.

Please be seated.

Okay. You may now continue -- and welcome back. We're glad you're with us, Ms. Sacra. Thank you very much. We're ready to go.

Go right ahead.

MR. BRAY: Thank you, Your Honor.

(STEPHEN SACRA, Plaintiff's witness, resumes the witness stand.)

DIRECT EXAMINATION (continued)

BY MR. BRAY:

Q. Mr. Sacra, I told you before the lunch break we're in the homestretch.

You -- you testified before lunch that when you observed consumers at trade shows purchasing or looking to purchase the Silly Squeaker products, you observed them exhibiting that they thought the products were funny.

Do you recall that testimony?

A. Yes.

Q. Have you ever observed a consumer at one of the trade shows or when you walked the stores exhibiting behavior that would indicate to you they felt disgusted?

A. I have not.

Q. As the -- I understand you are a jack of all trades because [87] you are a small business, but would you say

one of the things that -- one of the roles you perform for VIP is to be their brand manager?

A. Absolutely.

Q. Okay. As brand manager, would you market a product that consumers that purchase your products thought was disgusting?

A. I would not.

Q. Have you ever received any feedback from any consumers that any of the Silly Squeaker products were disgusting?

A. I have not.

Q. Mr. Gooder testified yesterday morning about the initial demand letter that Rachel Andrews, special counsel for Jack Daniel's, sent to VIP Products.

Do you recall that testimony?

A. I do recall.

MR. BRAY: And, Your Honor, I'll state that it's Exhibit 87 that's in evidence.

Oops. Why did that...

If you could do the lights half, Lisa.

COURTROOM DEPUTY: Sure.

Do you have the original exhibit?

MR. BRAY: I got it out already before lunch. I'm sorry.

COURTROOM DEPUTY: Okay.

* * *

[102] [...] process earlier for us to view on the monitor over there.

Q. You don't have any disagreement with the recounting of the process that -- that I engaged in there. That was an accurate depiction of how it was designed; correct?

A. Other than the use of the word "secret code," you are correct.

Q. Right. And that was meant in jest.

But you called her and just said the words "Bad-Spaniels," you figure it out, Elle; something to that effect. Correct?

A. Something to that effect, but not -- not that.

Q. And that was your -- well, how -- how were your instructions different?

A. Well, I -- I call Elle, and she'll pick up the phone, and she's, like, what do you got? I'm, like, I got something for you. And she'll go okay, what is it? And I go, Bad Spaniels. And she's, like, okay, I got it. And then I'm, all right, I'm going back to dinner, talk to you later. Click. That's it.

Q. And the next thing you saw was this sketch that she sent?

A. Yeah, she gets to it in a couple days.

Q. Okay. And you made some comments about the sketch to her and -- and refined it to a place that you were happy; correct?

A. No. The next step, as you pointed out on your slide, I told her, mock it up. Our conversations are pretty short. She'll send something over. If I see something that really [...]

* * *

[120] Q. Those two -- do you want to remind us of the two cases?

A. I think it was -- all right. So Heini Sniff'n reached out to us, and then they reached out to us a second time years later. It was, like, two years later. Pabst Blue Ribbon reached out to us, and Kendall Jackson reached out to us. And I'd have to look to see if I -- if there was another. But I --

Q. Fair enough. That's fine. Three is fine.

A. Yeah.

Q. Kendall Jackson. What was the problem?

A. They just looked at it and said, hey, this -- we think this looks -- the imagery is drawing up the recognition of our bottle, and we think there might be an issue there, and we'd like to discuss it.

Q. What bottle; is it a wine product?

A. It's a -- it's a bottle that looks like a wine bottle, just a generic wine bottle, and it says, Kennell-Relax'n, and it has a dog sitting, I believe, on a leaf.

Q. Okay. And Heini Sniff'n, we know about. What about about Pabst Blue Ribbon; what was the product at issue there?

A. It says Blue Cats Trippin, and it has two cats on the front of it with, like, crazy-looking eyes, like they've been eating catnip, and they're just kind of like crazy-looking. That's it.

Q. Now, you said that in your response letters to them you cited two cases.

* * *

[139] A. I -- if this toy was in someone's household and there was a family there, parent's discretion, it could possibly be played with, correct.

Q. And that doesn't concern you --

A. That doesn't concern me.

Q. -- the exposure of children to this product?

A. It does not.

Q. And you heard testimony from the Jack Daniel's executives about their policies with respect to marketing to underage children. Do you understand their concern about this being exposed to children, the toy that you've put together that --

A. I understand concern, but I feel that they kind of pretend to be one way, but then become off another way because a child can eat Jack Daniel's family meats and sit down do great ol' Jack Daniel's, you know, meat dinner, and you're not exposing it? You're asking me the same thing, but they're doing the same thing. How is that different?

Q. And we've heard some testimony, Your Honor and sir, about your message that this product is sending. And I -- I'll -- at least one of my notes, and in your deposition, you said that the message of the Bad Spaniels toy is that the business and product images of Jack Daniel's need not always be taken seriously.

Is that the message?

A. That's correct.

[140] Q. You're not commenting in any way on Jack Daniel's business practices; correct?

A. I'm making a comment, and that comment is that you're being bombarded with advertisement all the time. And I'm taking that information and juxtaposing it away, that people can look at it and laugh and say, hey, you know what, we shouldn't take ourselves so seriously, especially these companies who are taking themselves so seriously.

Q. Well, that's a general message; right? Is that specific to Jack Daniel's, or is it a general message?

A. It's specific to Jack Daniel's and all the parodies that we do.

Q. You think they take themselves too seriously?

A. You've watched all the testimony. I mean, everybody up here is, like, I can't find anything funny about this. And do you find any of these funny? No, I have not -- not one of the Silly Squeakers is funny. But yet contradictory to that, when you look at our Amazon reviews: Hilarious, funny, this is the funniest toy we've ever had, people are putting it with the dogs at their dog's 21st birthday. I mean, I kind of disagree.

Q. You say you're not commenting in any way on Jack Daniel's business practices; correct?

A. If business practices involves advertising and having consumer influence over another person, that would be making a comment about the fact that you're advertising to people and [141] taking it very seriously. And we're putting it in such a way that we want you to look at it in a humorous way and juxtaposing it.

Q. And you're not commenting at all on the quality of the Jack Daniel's whiskey here with your product?

A. The quality?

Q. Correct.

A. Quality is something that -- I mean -- I -- I guess I'm trying to understand. Are you -- are you asking if I'm making a negative comment towards the quality?

Q. Correct.

A. I am not making a negative comment --

Q. Any comment, negative or positive?

A. But I'm making a comment about Jack Daniel's, yes.

Q. But you're not commenting about the way they market their products.

A. I am commenting about the way they market their products.

Q. Or anything else to do with their actual business?

A. That is their business, is marketing products.

MR. HARVEY: Could we look at page 220 from the deposition of the witness, please.

And starting about halfway down the page.

BY MR. HARVEY:

Q. Here is your testimony, sir. Are you changing your testimony now?

[142] A. If that was my testimony, then that's my testimony.

THE COURT: You should read the question and answer and see if he agrees with that now or not. That's the way it's done, rather than him just looking at it.

BY MR. HARVEY:

Q. Do you -- my question is: In the Bad Spaniels toy, are you commenting in any way on Jack Daniel's business practices?

Answer: No, absolutely not.

Or the quality of their whiskey?

Absolutely not.

Are you changing your testimony now?

A. (Reading) The business practices of advertising and promoting to people?

THE COURT: Well, excuse me. That's the next question.

MR. HARVEY: Correct.

THE COURT: Correct?

MR. HARVEY: Yes.

THE WITNESS: Correct.

THE COURT: And that's your answer given there.

BY MR. HARVEY:

Q. And now you're saying you are making a comment.

A. I'm making a comment to Jack Daniel's about the product, yes.

Q. And you were asked: Or anything else that has to do with [143] their actual business?

Answer: Absolutely not.

And knew you're making a comment. Not when your deposition was taken, but now here in court, you're making a comment; is that right?

A. Our product as a parody is making a comment about the Jack Daniel's product. So -- I mean, those are my answers.

Q. On page -- sorry.

If you could look at Exhibit 169. A copy of Boozin' Gear website pages.

We've looked at these pages earlier in the case. I know you saw them, Mr. Sacra. I don't mean to prolong the agony, but --

A. That's all right.

Q. The concern here is we have Jack Daniel's authorized licensed merchandise. And as you see here, we have references to Jack Daniel's licensed merchandise. If we go then to the last page -- well, here we go. We see the -- your product being sold on the same page online as licensed Jack Daniel's merchandise. You're aware of that?

A. I can see it in front of me.

Q. And you have no concern about the nature of that being misleading?

A. I don't control that website, nor the practices of that website. I don't control how their search engines or

* * *

[171] [...] buy one or two.

Q. Okay. There were -- there was a portion of your deposition transcript that was displayed regarding questions about commenting on Jack Daniel's. When you were deposed, did you interpret those questions as being directed, or are you negatively commenting on Jack Daniel's?

A. I'm sorry. Could you repeat the question?

Q. When you were deposed, did you interpret counsel's questions to mean, are you negatively commenting on Jack Daniel's?

A. Yes.

Q. And is it your intention to negatively comment on the Jack Daniel's brand?

A. I would not want to negatively comment on the Jack Daniel's brand, or any brand, for that matter, that we parody.

Q. And again, just to refresh, what comment are you trying to make across the Silly Squeakers line, including Bad Spaniels?

A. Our intent -- I'm sorry, could you -- repeat the question.

Q. What comment are you intending to make with the entire Silly Squeakers line, including the Bad Spaniels?

A. That there should be fun in this world, and that we should have an opportunity to laugh at ourselves and laugh at the things around us. It's just to have humor at the end of the day, just like when the judge gives us trivia questions.

Q. And do you also intend the message that large, well-known [172] brands shouldn't take themselves so seriously?

A. Absolutely.

Q. Okay. I'm going to put up on the screen Exhibit 174, which is in evidence. It's actually my copy of 174.

May I approach, Your Honor?

THE COURT: You may.

MR. BRAY: Thank you.

BY MR. BRAY:

Q. I'm going to focus on a number of the reviews.

Do you recognize Exhibit 174 in evidence as reviews that the Bad Spaniels toy has received on Amazon?

A. Yes, I do.

Q. First I'd like you to identify for the Court how the -- how they, on Amazon, the bottle -- what source is listed for the bottle?

A. Silly Squeakers liquor bottle, Bad Spaniels by Silly Squeakers.

Q. Okay. And with regard to the consumer comment that Mr. Harvey pointed out, did that consumer indicate she found the product hilarious?

A. Absolutely.

Q. And that she loves the Silly Squeakers toy?

A. Yes.

Q. Another comment at the bottom: Perfect for my dog's 21st birthday.

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

VIP Products, LLC, Plaintiff, vs. Jack Daniel's Properties, Inc., Defendant.

2:14-cv-2057-SMM
Phoenix, Arizona
October 5, 2017
8:58 a.m.
AMENDED CASE
NUMBER

**BEFORE: THE HONORABLE STEPHEN M.
MCNAMEE, JUDGE**

REPORTER'S TRANSCRIPT OF PROCEEDINGS
TRIAL – DAY 4

Volume A

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Transcript Prepared by Computer-Aided Transcription

* * *

[7] MR. BRAY: I just wanted to make sure I gave counsel and the Court the courtesy of --

THE COURT: And I appreciate that. Thank you.

MR. BRAY: And I will try to read slower:

Question: Is one of the things that you find focus groups useful at Brown Forman is to determine whether consumers are likely to have a positive emotional reaction to a planned product or extension as opposed to maybe some sort of negative reaction?

Answer: Yes. And purchase intent.

Question: Okay. And again, that feedback that you get in focus groups, positive versus negative, emotional reactions to proposed products, is that, from your perspective as the director of global design, useful to Brown Forman?

Answer: Yes.

THE COURT: Okay.

MR. BRAY: That's the extent of Mr. Hungerford's deposition we'll read.

THE COURT: Thank you.

Mr. Harvey, do you have anything else to read from that deposition or --

MR. HARVEY: No, Your Honor. Thank you.

THE COURT: Okay. Thank you.

Okay. Bring your next witness up, please.

MR. FERRUCCI: Good morning, Your Honor.

[8] VIP calls Bruce G. Silverman.

THE COURT: Thank you.

THE WITNESS: Bruce G. Silverman, S-I-L-V-E-R-M-A-N.

(BRUCE G. SILVERMAN, plaintiff's witness, is sworn.)

DIRECT EXAMINATION

BY MR. FERRUCCI:

Q. Good morning, Mr. Silverman.

A. Good morning.

Q. Can you please state your name for the Court.

A. Bruce G. Silverman.

Q. And Mr. Silverman, what is it that you do for a living?

A. I am an advertising, marketing, and branding consultant. I work with companies in the U.S., in the UK, in China, both companies that manufacture or produce goods and services, and advertising and public relations agencies.

Q. And where do you currently work?

A. I work for a company I own called Silverman Consulting, LLC. It's in Los Angeles.

Q. And how long have you been in the world of advertising?

A. I have now been in the world of advertising nearly half a century.

Q. Fifty years?

A. It's a long time. Fifty years.

Q. And Mr. Silverman, could you explain your background for the Court?

[9] A. Sure. I grew up in New York City. I attended New York City public school system. I graduated from a college called Adelphi University, which is in the suburbs of New York. I went to law school at Albany Law School in Albany, New York, and I was only there for a year. I -- I like to read, and I used to go to used bookstores a lot, and I came across a book about advertising called Confessions of an Advertising Man. And I thought that would be a fun read because of the word "confessions." And it turned out to be anything but. But for me it was an epiphany. It just hit me. I needed to be in that business, and I really wanted to work for the guy who wrote the book. His name was David Ogilvy.

THE COURT: What was the name?

THE WITNESS: David -- the book is Confessions of Advertising Man, and the author was David Ogilvy, O-G-I-L-V-Y.

THE COURT: Okay. Thank you.

THE WITNESS: And I went to work for him. And so during spring break, I went to the offices of what was then Ogilvy Benson & Mather -- that's M-A-T-H-E-R -- and I didn't have the résumé to -- because I hadn't done anything. I went to the personnel department and I spoke to the receptionist, and I think she took pity on me because I told her I was there because I read this book. But she actually had somebody interview me, and they offered me a job for the summer as a mail boy. And I stayed at Ogilvy & Mather [10] for the next 13 years. I did get out of the mailroom.

BY MR. FERRUCCI:

Q. And where did you go next?

A. I became a junior copywriter. Originally I think my first assignments were on the industrial parts of the Shell Oil Company account. I wrote ads about different kinds of lubricating oils and chemicals and things like that.

And I must have done okay on that because they gave me a chance to work on a consumer product, albeit a very unimportant one, because that's what you do in the ad business with junior people. And the unimportant one was the American Express card. In those days, very, very few people had credit cards. And -- but the CEO of American Express had just bought an IBM 360. They were going to be able to process credit cards quickly. And he decided he wanted to do a television commercial, and so I had a chance of doing a television commercial. And we came, my partner and I, the art director partner and I came up with a idea, we showed it to our supervisor, and went to the next supervisor, and we got to present it to the client, and we got to make it. And it won every award that you could win in the advertising business that year. And that sort of set me on a good track.

Q. And that was the Don't Leave Home Without It campaign?

A. Actually it was the predecessor of Don't Leave Home Without It. I did that too, because I worked on American Express for [11] about 10 years. Don't Leave Home Without It was an outgrowth of a campaign called Do You Know Me, which featured people who should be viewed as important, but maybe weren't. The first commercial featured William E. Miller, who had run as vice president -- for vice president with Barry Goldwater for

Arizona. Miller was from upstate New York. And at the end of the commercial, he held up the card and he said: With this, they treat me as though I'd won. And that commercial led to 100 more Do You Know Me commercials that were enormously successful for American Express.

So I worked on American Express, I created the Great American Chocolate Bar campaign for Hershey's, and the Hershey's jingle. I have a musical background, so I can write jingles, as well. I created the Best Engineered Car in the World campaign for America -- for Mercedes Benz, and a variation of that is still running. Their theme line now is The Best Or Nothing.

So that led to me being promoted from junior copywriter to copywriter to associate creative director. And then O&M shipped me off to London for a year, where I got involved in the Shell account. Shell is an Anglo-Dutch company. And I was appointed worldwide creative director on the Shell account. At that time, I think the world was smaller than it is today. I know we were handling the account in about 35 or 40 countries. And that -- that was wonderful. I loved [12] that. Except then they said, well, you know, 50 percent of the billing is in the U.S., so you have to come back to the U.S., specifically to our Houston office. So that was, to me, a bad joke.

But I then spent three years of my life in Houston, which worked out very well. And then I got transferred to Los Angeles, which was O&M's second largest office in the U.S., as -- I was creative director. I was also general manager. Our largest account there was Mattel. I continued working on American Express. I kept my hand in on Shell. Some of the other accounts we handled out there, Universal movies, things like that.

And then they sent me back to New York, and I guess I made it to the top. I was named executive creative director of O&M New York, at that time was the fifth largest agency in the world. We were probably number four or five in the U.S. There were about 800 people there, 200 of whom reported to me. Our biggest accounts were American Express, the General Foods Company, Maxwell House, and products like that; Lever Brothers, Dove soap, and products like that; TWA airlines; Hershey was still there, Nabisco was there, Panasonic. And I was in charge of all of that. And it was a great job, probably the best job I ever had.

Q. So you had -- so you had 13 years at Ogilvy & Mather?

A. Correct.

[13] Q. And you went from mailroom to creative -- executive creative director.

A. Yeah. And then I was also on the board of directors. O&M was a public company.

Q. What did you do after that?

A. I was -- an agency called Bozell & Jacobs made me an offer I couldn't refuse. That does happen, I guess, in all businesses, but it's pretty common in the ad business. And they recruited me to be executive creative director.

It was kind of an odd agency. They split the agency north and south. Most agencies do it east and west. So I was in charge of their offices in Dallas, Atlanta, Houston, Phoenix, and Los Angeles. And when I got there, our accounts were Greyhound lines -- Greyhound was based here in Phoenix at that time. Let's see. Minolta cameras, Zale Corporation, Quaker Oats, that kind of stuff.

But the real reason that they wanted to get me was that I had a pretty strong background in travel advertising because of American -- excuse me -- because of TWA and American Express, and a number of other travel accounts. And they were trying to get the American Airlines account, which had recently moved to Dallas from New York.

And we had the opportunity to pitch American. And I met with the chairman of American, Bob Crandall, and he made me a challenge -- I like challenges -- and the challenge was -- [14] I'll never forget these words: We fly the same airplanes from the same airports to the same airports, we serve the same food, and we show the same movies as our competitors. Come up with a way that a passenger will wait 20 or 30 minutes for our flight instead of taking United or TWA or Delta or Braniff, and you'll get the account.

And I left the room, and I knew the answer was not going to be an advertising answer. It wasn't going to be as simple as a clever slogan or a clever jingle, though I wrote a pretty good jingle for American ultimately. It had to be bigger than that. My mother had collected green stamps, and I said, boy, if we could do something like green stamps, it would be great. Maybe that would do it. And it hit me that if we could track American's passengers by miles and make each mile a point, and that you collect enough points you get free trips, that would be a big win. Nobody had ever done that before. It probably would not have been legal during the period that airlines were regulated, but this was well after deregulation.

And I called Crandall, and I asked if he could connect me with their head of -- their computer system, Saber. And I asked him if this was possible, and he said, well, we really already do it. And the next thing I knew, I

came up with a name, it was called Advantage AA. It was the first airline frequent flyer program, and it led to many other loyalty programs. I -- I get points because I like a particular [15] steakhouse today. And that got us the American Airlines account. We subsequently won Armour, which was also owned by Greyhound, we won AVIS. I actually did a house ad that said we have American, Armour, and AVIS, and now it's time to work on the Bs. And I was there for three years.

Q. And what did you do after -- that was with Bozell. What did you do --

A. I probably would have stayed there the rest of my career. It was a good agency, and we had wonderful clients. But my wife hated Dallas, and I love my wife. So, you know, at that point, I knew a lot of people in the business. I was on the board of directors in the American Association of Advertising Agencies, I was well connected, and I worked out a deal with an agency called BBDO, and they just go by those letters. And I became head of their western operations. We had offices in Los Angeles and San Francisco and Denver and Honolulu, and I was in charge of all of those based in Los Angeles. We had some pretty good accounts. We had Apple Computer, I did a lot of work on Pepsi, I did the campaign. I did one of the campaigns that involved Michael Jackson; unfortunately, it was the one where we burned his head in a big fire. And I was at Bozell -- excuse me -- BBDO for about three years.

Q. Were you on the set when Michael Jackson had his hair caught on fire?

A. I was on the set. I was horrified. We had paid the [16] Jacksons \$10 million, but I was also thinking, we may

have just destroyed the career of the most important figure in pop music. But he was fine. At the end, he was fine. He -- there happened to be very good hospitals in the L.A. area, and good burn units.

Q. And so what did you do after BBDO?

A. I kind of caught the entrepreneurial bug. To that point in my career, I had worked for big agencies. I had done well with them. I had senior positions and I was very well compensated. But I really got the urge to try to build something, and I kind of -- I knew not real well a couple of fellows who owned an agency called Asher/Gould, A-S-H-E-R, G-O-U-L-D. And they offered to give me a third of the agency and make me president, and make me executive -- and be creative head. I didn't realize they were also offering me the chance to make the coffee every morning and lock the door every night. But I joined them, and I was there for the next 11 years. When I started, the agency was billing \$12 million. When we sold it 11 years later, we were doing 155 million. Our clients included Suzuki cars, Pizza Hut, Baskin-Robbins Ice Cream, the California Department of Health Services' tobacco use prevention campaign, which was the campaign I cared most about, to be truthful. We were very successful, and the strategies we created have been successfully used all over the world and were emulated. So we had lots and lots of different kinds of [17] accounts, and we were really very successful. And sold the agency to New York Stock Exchange listed, communications holding company called Interpublic. And, you know, as is typical in these kind of deals, it was an earn-out, so I had a three-year contract to be committed to continue to work for Interpublic.

They sort of surprised me. About six months after the deal, they asked me to take over a company called Western International Media that they had purchased

about six months before they bought us. And it was America's largest advertising media planning and buying agency. At that time, it did nine or \$10 billion a year in business. Its largest client was the Walt Disney Company. It also had the Home Depot and the United States Navy, and they had big accounts, small accounts. And they were just bleeding money. They -- they were not making money. They were losing money at an -- an alarming clip. My agency had been very profitable, and Western was based in Los Angeles. So Interpublic figured maybe I could figure it out. And I went there, and I ended up staying for six years, stayed well beyond my contract -- original contract period. And it was a little bit different for me because the focus there was on the media planning side, the strategy side, as opposed to the creative side, which actually for me I found fascinating. Was learning a lot of new things. And I like to learn things.

[18] Q. So during the course of this week, Mr. Silverman, we've discussed both Southwest chili and Midwest chili. You had an opportunity to work on the Pace Picante?

A. I did. And I had the Pace account because I got it when it was a tiny account. It was a family-owned business in San Antonio, and they wanted to get into supermarkets. And to do that, they needed to advertise, do consumer advertising. And I wrote this commercial for Pace that involved a group of cowboys at a chuck wagon, and the cook at the chuck wagon is using -- he wasn't using Pace. And the -- one of the cowboys picks up the bottle and says: This stuff is made in New York City. And all the cowboys, they're not happy. And one cowboy says: Get a rope. And that commercial ran, amazingly, for 15 years, the same commercial.

I -- I actually ran into the actor that played the lead cowboy at the supermarket we go to, while it was still running, but probably 10 or 12 years after it was done. And I said: I know you won't remember me, but I was the guy who wrote and did this Pace commercial. And he went, oh, man you are paying for my kids' college education, because of residuals. But that -- that commercial all by itself put Pace on the map, and it became by far the largest selling salsa, second only to Heinz in the condiment -- Heinz Ketchup in the condiment business. And the family sold the business, ironically, to the Campbell's Soup Company, which is in New [19] Jersey, or \$1.1 billion. Pretty good for them.

Q. So, Mr. Silverman, I think we're up to Initiative Partners?

A. Yes.

Q. What did you do next?

A. Well, after Initiative, I actually thought I retired. That was my plan. We had done well on the sale, and my wife was one of only two female general managers of radio stations in the Los Angeles market. There was 75 stations, so she must have been pretty good at her job. And we had done well. And so I -- I was interested in teaching. I thought maybe I'd write a book or two. We wanted to travel a lot.

And in fact, we were on a flight to Seattle to visit my -- my nephew, who is also my Godson, who is a Deputy Attorney General up there, and I ran into an old friend named Tracy Wong on the plane. He owned an agency with the strange name Wong Doody. And it had been very successful as a creative agency, but it really got mauled when the dot com bubble exploded in the early 2000s. And by the time I got off the plane, I was president of Wong

Doody. And -- but my job, really, was to try to fix it. And we did that. They already had some really good accounts. They had Alaska Airlines, they had Nordstrom, they had T-Mobile. But we went out on -- we got a lot of new business, and new business in the advertising business can heal a lot of things. We picked up really important assignments from Coca-Cola, from Sony, from MGM. We [20] got the Los Angeles Dodgers baseball team. You may have heard of them. I think they're going to play your team starting this week.

THE COURT: I believe so.

THE WITNESS: Last night's game was amazing.

And so, you know, once the agency was stable, I decided to go back to retirement. And then former clients started calling me and asking if I could assist them in some way or other. And I realized that I really loved the business. I didn't love running a big company. I think there's a point at which you reach a point where you're not doing what you love, you're doing what you have to do. You end up dealing with lawyers. I want to deal with people who make commercials. And accountants. And all of that kind of technical stuff.

So I went back to doing what I think I do real well, and that's branding and advertising, et cetera, providing advice and counsel, and sometimes -- and I still create ads. I have -- one of my largest clients is a healthcare system in Pennsylvania, and I'm their ad agency. And they're big. They have 35,000 employees. They operate 10 hospitals.

BY MR. FERRUCCI:

Q. And now you deal with lawyers for a different reasons.

A. Excuse me?

Q. Now you deal with lawyers for a different reason.

A. Now I deal with lawyers for a different reason. I -- the [21] first time I was ever asked to be an expert witness, I didn't even know what it was. But it was explained to me, and I found it interesting, so I do that from time to time, as well.

Q. So Mr. Silverman, earlier you said you had an interest in teaching. Did you -- have you held any academic positions?

A. Yes. I taught for a couple of semesters, two semesters -- maybe three -- in the late 1970s at Pepperdine University. I taught advertising, introduction to advertising. And I also taught a number of quarters at UCLA extension, which is basically an adult education program. It's the largest one in the world. And again, I taught courses related to advertising.

But I've also been a guest lecturer at many universities across the United States, and even outside the U.S., including both Arizona State and the University of Arizona, and Thunderbird here in Phoenix. I always teach what the instructor asks me to teach, so it might be an emphasis on creative, it might be an emphasis on strategy, it might be an emphasis on branding or media. But the main reason I do it is because I really like interacting with the students, and I also think that it's very important for people studying advertising to get a real world perspective, because try as they might, academics are not operating in the real world. They don't have access to the kind of information that people who really do advertising for a living have.

Q. Well, Mr. Silverman, you've worked at both the real world [...]

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[33] Dr. Simonson testified are caused by the Bad Spaniels product.

Do you see that?

A. I do.

Q. Now, in your rebuttal report, you're not taking issues with Dr. Simonson's use of the associative memory network; correct?

A. That's correct.

Q. What are you taking issue with?

A. He makes an assumption.

Q. What is that assumption?

A. His assumption is that consumers would become disgusted if they were -- if they were -- if they actually looked at one of these bottles of the toy -- actually, it's a toy, I shouldn't call it a bottle -- if they saw Bad Spaniels, that that Bad Spaniels, the labeling on it, would elicit feelings of disgust. And that leads to everything he then says about how it affects Jack Daniel's.

The -- he's, in my opinion, he's making this incredible leap that it would elicit feelings of disgust. It's just his opinion. I -- I didn't see anything in his report that demonstrated there was any empirical evidence that that would happen. That's just one man's opinion.

Q. So I take it you do not agree with Dr. Simonson's opinion that the Bad Spaniels product would tarnish the Jack Daniel's brand?

A. No, I do not believe that.

[34] Q. And just to make this clear, Mr. Silverman, why do you not agree?

A. Well, I'm going to go back to my experience. Number one, I have never known consumers to buy products that disgust them. They just don't do that. I'm sure there are products out there that might do that, but I have not encountered any personally. I've worked on hundreds of -- hundreds and hundreds of products. In my CV, there are page after page listed of -- in the accounts and brands that I've done advertising for. I've never seen it. And I've worked on products, pet products that we've discussed. And during the course of working on these pet product accounts, I interviewed -- either -- either I've looked at qualitative research, quantitative research. The thing I learned most is that when it comes to dogs, people love their dogs. I've had dogs all my life, and so that's personal experience. But from a business standpoint, people love their pets. Dogs, especially. Frequently they're treated like children. And you don't buy things for your dog that disgust you. You just don't do that.

So I -- I look at this, and it's -- I think it's -- personally, I happen to think it's funny, and -- but I don't think it would elicit feelings of disgust, based on my business experience, my professional experience. I just don't believe that would happen. I don't believe people would buy that product if it did. And therefore, if it doesn't disgust [35] people, how is it going to cast a negative shadow on Jack Daniel's? I don't see how that could happen.

Q. So there's been testimony in this case that 55,000 units of the Bad Spaniels products has been sold. I take it your opinion would be that those 55,000 customers were not disgusted by the Bad Spaniels product?

A. Yes, that would be my opinion.

Q. Mr. Silverman, I want to take a look at Dr. Simonson's report.

Your Honor, may I approach?

THE COURT: You may.

BY MR. FERRUCCI:

Q. Mr. Silverman, let's turn to page 12 and look at paragraph 31.

A. Yes, I'm there.

Q. Now, Dr. Simonson was asked on Monday to locate in his report the studies he used to support his contention that the Bad Spaniels toy would elicit disgust. What is he really saying in this paragraph?

A. Well, as I look at this, the first sentence -- he writes -- we're talking paragraph 31?

Q. Yes.

A. (Reading) As a result, VIP's product is likely to bring Jack Daniel's to mind.

And I don't disagree with that. It certainly would, I [36] think, would come to mind by people who are familiar with Jack Daniel's. And for people who aren't familiar with Jack Daniel's, I don't think it would.

Q. And that would be the second step in his associative memory network process?

A. Yeah, that's my understanding of it.

But then he goes on: Furthermore, as explained above, consumers who are exposed to VIP's product add another mental association. The new brand association is negative, and that's -- he's speaking there of defecation. And that leads to this whole idea of disgusting. But I don't see anything where he has any support that the contention that the product elicits disgust. If a product elicits disgust, he may be right, but I see where -- how he comes

to say that this product elicits disgust in anything other than a personal opinion.

THE COURT: Just out of curiosity, he punctuates that with a footnote.

THE WITNESS: Yes, sir.

THE COURT: So my question is, if he drew from things punctuated in that footnote, is he not supporting his opinion, or did you -- did you read those articles?

THE WITNESS: I didn't read the articles. But the footnote, Your Honor, is really important because what he's -- the footnote goes to the -- it's -- the article he's citing, The Disgust Promotes Disposal Effect, which appears in feelings [37] and consumer decision-making, I think in a magazine called Consumer Psychology.

But that doesn't speak to the product. It doesn't speak to Jack Daniel's -- to Bad Spaniels, it doesn't -- there's nothing -- I would presume there's nothing in that article, I would presume, about a dog toy named Jack Daniel's -- called Bad Spaniels -- excuse me -- that would elicit disgust. It's about the general concept that you can become disgusted.

But you have to have -- you have to have a reason to become disgusted for that to work. So he -- there's nothing in that paragraph, anywhere else in his report that I can see where he's got real evidence that Bad Spaniels disgusts people. I haven't seen it, I don't believe that would happen, and I, at least, asked 19 people. That certainly wasn't elicited with these people.

BY MR. FERRUCCI:

Q. Mr. Silverman, I think the judge's point was really well-taken.

I think it's your testimony that the sentence that begins with the new brand association, that's not footnoted. So the sentence that begins: The new brand association of dog's No. 2 is negative. For many, it's likely to even be disgusting.

That's not source; correct?

[38] A. That's not source.

Q. In fact, the footnotes for the next sentence, the sentence that starts: Prior research has shown that a feeling of disgust leads consumers to avoid things that are associated in any way with that feeling.

And then that's where we see the footnote; correct?

A. That's correct. And that's about that whole idea, which I wouldn't necessarily disagree with, that if you're -- if something disgusts you, you're not likely to want to purchase it. But there's nothing here that points to any empirical evidence about this specific product. He -- he makes an assumption, and it's his opinion. And I've studied his CV. He does not have experience, that I can see, dealing with pet products, at least in any meaningful way. So I don't see how he gets there. I read his deposition. I don't know if he likes dogs.

MR. FERRUCCI: I'm finished with the ELMO. We can turn the lights back up.

Thank you.

BY MR. FERRUCCI:

Q. So Mr. Silverman, in the course of this trial, we've talked about the idea of projectability and consumer research studies. Can you refresh our recollection of what projectability is?

A. Yes. In survey research, quantitative survey research, you use the statistical -- what -- reliability is a synonym for [...]

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[40] [...] to be funny. I happen to do a lot of advertising for toys. I ran the Mattel toy account for many years. You know -- you know, beauty is in the eyes of the beholder, and so is humor.

Q. So Dr. Simonson's central premise, or as you call it in your report, his linchpin, that the Bad Spaniels dog toy elicits disgust, you don't share that opinion. How did you arrive at your opinion?

A. Well, number one was my own experience. My experience -- professional experience dealing with products, you know, pet products, people buying pets, et cetera. And what -- and really what I -- my takeaway there is that people love their pets, especially dogs. Dogs can be very lovable. If you think about dogs, what they do all day; they eat, they sleep, they poop. Every once in a while they'll lick you on the face and that makes everything else worthwhile, and that's a personal experience. But this is what people tell us over and over and over. They love their dogs.

When it comes to something like poop, if you're a dog owner, you know, you can't be disgusted by it because you're picking up after your dog all day. One of the -- one of the products that I did advertising for -- it was a very small account -- they made the plastic bags that come in rolls that you rip off the roll, you put it on your hand like a glove, you pick up -- you pick up your dog's stuff, you unfurl it so it's now in a bag, and you throw it away. I just don't think that [41] dog owners are easily disgusted by funny references to poop.

Q. And you --

A. And that's based on my experience.

Now, the second part of it was, I just took the opportunity, while working on this case, I thought it would be interesting to see how consumers, just a group of consumers, would feel about this issue, very specifically about this product, as it related to to Jack Daniel's. So with your permission, the clients' permission, we conducted a series of focus groups, four focus groups.

Q. Well, let's talk about the focus groups that were conducted here.

But before we do that, let's talk first generally about the types of consumer research that advertising professionals conduct in the real world of advertising.

So first, please explain, remind us again, what do advertisers want to know about consumer behavior? What's important to them?

A. Well, let's -- the number one thing you want to know is what's important to them. What are they looking for in a product or service? But you use research for a lot of different purposes. People doing creative work, and this could be everything from creating advertising to creating packaging, use -- they use research to see if there's any mistakes. Are you not communicating properly? Is there confusion? Is the [...]

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[45] [...] groups: I hired a company that specializes in doing focus groups. It's owned by a fellow named Jeff Hirsch. He's been doing focus groups his entire career. In fact, I -- I believe he actually either worked for Jack -- for Brown Forman or conducted many focus groups for Brown Forman over the years. Very experienced guy.

He, in turn, hired a company called Schlesinger Research, which is a global company that fields research, including focus groups. They have a facility in Los Angeles where focus groups are held, and they do the recruiting. So you give them the specs and they go out and get the people.

So we recruited -- what we were after were either dog owners who drank Jack Daniel's, dog owners who didn't drink Jack Daniel's -- we -- we wanted adults, and we very specifically -- about the only limit we really put in was we only -- we didn't want more than 50 percent people with Spanish surnames, simply because that would be, you know, these days, in the U.S., the Latino population is fairly significant. We didn't want to go overboard on that, especially in Los Angeles, which has a very large Latino population.

Q. So you were attempting to test this idea that the Bad Spaniels dog toy would elicit disgust. Why did you not decide to do a more quantitative study?

A. Well, there are two reasons. The first, and to me the most important reason, was if we could have done it, I don't think [46] we would have gotten the information we were trying to get. You use -- I'm going to quote Ogilvy, if you don't mind. Ogilvy said: There are two ways to use research. You can use it the way a drunk does. He leans on a lamp post for support; a wise man uses a lamp post to illuminate things. And I'm interested in illumination.

And what we wanted to learn was, did Bad Spaniels elicit feelings of disgust. So that is what we wanted to do. But that's a feeling. It's an emotional reaction. And in our -- my opinion, the only way we could do that was actually put the product in people's hands where they could touch it and feel it and squeak it and -- it's very loud -- and look

at the label for as long as they wanted, within reason. And check it out. And we were interested in their feelings. And people are going to verbalize that in different ways. And they can elicit physically in different ways. And that's what we were interested in. You can't do that in a quantitative study. You can't get 1200 people to do that. You can't put the toy in the hands of 1200 people affordably. I think recruiting would have been a nightmare.

And quantitative studies are really expensive, and I don't think, even if -- I mean, there was -- I don't believe it would have been effective -- an effective way to learn what we were trying to learn, but it also would have been prohibitively expensive.

* * *

[51] [...] of the ordinary about how this focus group was conducted?

A. Conducted? No. I think the only -- as far as conducted -- they ended up being shorter than we anticipated. That was a little unusual. But there was a lot of clarity. And we weren't trying to find out enormous amounts of information, you know, which sometimes happens in focus groups. This one -- these turned out to be simple. We had scheduled each one for an hour, knowing that they would probably only last about 50 minutes. And, you know, as the evening went on, group after group after group, each one got shorter because we realized we didn't want to waste their time or our time.

Q. So you had -- you had 19 participants. What was their reactions to the Bad Spaniels toy generally?

A. Generally positive. They -- I mean, I think if I was just to use one word to describe it, they thought it was funny.

Q. And what was their reaction specifically to the disgust issue?

A. They thought that was ludicrous.

Q. Any exceptions to the group?

A. No. And that -- I have to say this. You know, focus groups are not projectable, but they're directional. That's how marketing people refer to it. I don't think in my whole career I have ever seen a series of focus groups where everybody had the same opinion. Everybody. And it was unanimous here. It was -- nobody came away with disgust. [52] Everybody throughout it was -- everybody but one person thought it was funny. There was one fellow who just hated the squeak. It's very loud. And this guy, it really irritated him. He was in the group of non dog owners, so this guy probably will never own a dog; if he does, he'll never own a squeaky toy.

Q. So you know, I think you answered this. Did anyone share Dr. Simonson's opinion that the Bad Spaniels toy would elicit disgust or is disgusting?

A. No, sir. Not one.

Q. So you said earlier that one of the things that focus groups allow is for the researcher to note the physical reactions of the participants.

Do you remember that?

A. Yes.

Q. And you were behind the one-way mirror at these focus groups?

A. I was.

Q. And you observed their physical reactions?

A. I did.

Q. And what were their physical reactions?

A. Well, you know, there were smiles, there were nods. You know, the engagement with the toy, particularly by dog owners, was marked. I mean, they -- they got a kick -- I guess the best way to describe it -- I don't think this is maybe legal language, but it certainly works in my business -- they really [53] engaged with it. They -- they thought it was fun. We -- I don't -- maybe it's because Los Angeles is such a big city, there were a number of dog owners that had Chihuahuas, and they sort of complained that it was too big -- it was just too big for their dogs. And I -- I understand that. But they thought it was funny. They -- I mean, literally, the physical looks were the kind of looks that you hope for.

Now, I haven't worked on many products that are necessarily supposed to be funny, but what it reminded me most of was when I was dealing with products, such as toy products made by Mattel, and sometimes candy products, and things like that, which kind of elicit delight. And that's what was happening here.

Q. Did you note any physical reactions when the participants -- when the participants were specifically asked questions about the disgust question?

A. Yeah. They were shaking their head. I think they frankly thought that -- that -- I mean, I think somebody actually used the word "ludicrous." They just shook their heads. They just said no; you know, I mean, that's silly. You know -- I mean, you know, we're grownups.

You know, there is such a thing as potty humor, but it's not going to disgust people, especially in the context of a dog toy.

MR. FERRUCCI: Well, the Court wants us to be finished [...]

* * *

[69] [...] beverage in negative terms because of the way it's affected them. But very specifically, I -- I don't know about people. I don't think people who buy Jack Daniel's think it's disgusting.

Q. Now, I think you said one of your criticisms of Dr. Simonson was that his evidence was not empirical, it was simply just one man's opinion.

That was your phrase; right?

A. Correct.

Q. Did you read any of the literature on which Dr. Simonson relied in his report? The Court mentioned one of the footnotes. I think you said you hadn't read the references there. Did you read any of them?

A. No, I did not, because the references were not to the product. They were to the associative concept. And, you know, I'm not going to argue about that concept. The issue is, is -- does -- does Bad Spaniels elicit feelings of disgust that might be -- that might then cast a shadow on Jack Daniel's? I didn't see it, based on my experience. We did the focus groups. They clearly didn't come away with anything like that. And in my experience, one of the great things about focus group research that makes it really useful is that you're getting to the -- you're getting to where people's hearts are, where their feelings are, where their thinking are. In my opinion, the people that took the dog toy home -- not all of them did -- the [70] people who took the dog toy home, they took it home and it certainly didn't affect their thinking about Jack Daniel's in any way. Not likely to happen, because they saw the joke.

Q. Well, that's what they said. We saw the videos that --

A. That's what they said. And you could also see the way they felt.

Q. But you're not familiar with the science behind the associative network model, are you?

A. Well, I wouldn't say I'm not familiar with it because the chart -- the first chart that he showed, the one before he added the notes about what he felt was disgust, that's very commonly used in my business, in the advertising business -- not that one, the other one -- where, you know, what you're trying to do is to come up with ways -- and you do it usually by asking questions of consumers, how do they think and feel about a product? Here, he didn't ask anybody. He didn't have any research at all about this product.

Q. But you --

A. Zero. So everything he put on here is just his opinion on how that would happen if this product elicited feelings of disgust.

Q. So --

A. That, you know, it's -- it's a nice chart. But in my opinion, it's a chart that tells us nothing because it's not based on fact.

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