**TABLE OF CONTENTS**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>3</td>
</tr>
<tr>
<td>Genericness Surveys</td>
<td>4</td>
</tr>
<tr>
<td>Descriptiveness/Suggestiveness Surveys</td>
<td>13</td>
</tr>
<tr>
<td>Secondary Meaning Surveys</td>
<td>15</td>
</tr>
<tr>
<td>Likelihood of Confusion Surveys</td>
<td>29</td>
</tr>
<tr>
<td>False Advertising Surveys</td>
<td>66</td>
</tr>
<tr>
<td>Fame and Dilution Surveys</td>
<td>75</td>
</tr>
<tr>
<td>False Endorsement Surveys</td>
<td>83</td>
</tr>
<tr>
<td>Geographically Deceptively Misdescriptive Surveys</td>
<td>84</td>
</tr>
<tr>
<td>Scandalous/Disparaging Mark Surveys</td>
<td>85</td>
</tr>
<tr>
<td>Copyright Surveys</td>
<td>86</td>
</tr>
<tr>
<td>Patent Surveys</td>
<td>88</td>
</tr>
<tr>
<td>Daubert/Admissibility Issues</td>
<td>90</td>
</tr>
<tr>
<td>Procedural Issues</td>
<td>112</td>
</tr>
<tr>
<td>Bibliography: Lanham Act Surveys By Issue</td>
<td>115</td>
</tr>
<tr>
<td>Bibliography: Lanham Act Surveys By Circuit</td>
<td>149</td>
</tr>
</tbody>
</table>
INTRODUCTION

The following provides short excerpts of a number of selected opinions referencing survey evidence published in opinions from January 1998 through January 2006, which might be of interest to the Lanham Act litigator. For opinions referencing survey evidence prior to January 1998, see Phyllis J. Welter’s Trademark Surveys, West Group, 1999.

The bibliographies to this paper provide citations, by Circuit and by survey issue, for all identified opinions published during the January 1998 through January 2006 time period in which survey evidence was referenced.
GENERICNESS SURVEYS


...Plaintiff submitted evidence of a “Teflon survey” conducted [among] 313 women, ages 18 to 45, each of whom either had purchased a pair of boots or casual shoes (excluding athletic footwear) that cost $100 or more in the past 12 months or expected to do so in the next 12 months...Respondents were asked whether they considered the term “UGG” to be a “common name or a brand name.”...The data collected...demonstrate that...“58% of all survey respondents thought UGG was a brand name, whereas only 11% thought UGG was a common name...Among those survey respondents who had an opinion, 84% thought UGG was a brand name, and not a common name.”...Defendants’ genericness expert, reached conclusions similar to [Plaintiff’s expert]. [Defendants’ expert’s] survey indicated that 57% of respondents recognized “UGG” as a brand, while only 6% considered it a common name...


In addition, applicant introduced a survey to demonstrate that the term VIRUSSCAN is not generic for computer software...The survey asked the following relevant questions:

Q6 What do you call the type or category of computer software that is designed to protect and secure computer data, software, and computer communications networks?

Q7 What other name or names, if any, do you use when referring to this type or category of software?...

...At first glance, applicant’s survey results appear very impressive. Of 110 respondents to survey questions six and seven, only one responded that the term “virus scan” was a name for the software and another responded that “virus protection scan” was the generic name of the goods. On its face, these results of the survey would strongly support applicant’s argument that its mark was not generic.

However, upon closer analysis, the results are less impressive. Applicant’s survey asked “What do you call the type or category of computer software that is designed to protect and secure computer data, software, and computer communications networks.” The largest response (37 of 110) to the initial question identified “firewall,” “firewall software” or “firewall protection” as the generic name of the software. Another 14 responses identified “security” and “security protection” as the generic name, while 22 identified other names. The largest number of responses identified a generic term for a different type of computer protection product, i.e. a firewall, in response to applicant’s survey question No. 6... Applicant’s survey questions are more like a guessing game. The
questions provide just enough information so that participants can guess about applicant’s product but not enough information to understand what the specific product is. Applicant’s survey would be similar to asking prospective purchasers: “What do you drive that has four wheels and a motor?” While it is likely that the vast majority of responses would be “car,” “truck,” and “motor vehicle,” it would hardly demonstrate that unmentioned terms such as “SUV,” “subcompact,” or “sedan” were not generic terms also…A survey that establishes a generic name for a product not at issue…is not very relevant.

While we have reason to question the persuasiveness of the survey, we must give it some weight…

Robert Donchez v. Coors Brewing Company, 392 F.3d 1211, 1218 (10th Cir. 2004)

The last piece of evidence cited…concerns the results of a telephone survey conducted by defendants. Approximately 200 persons…were asked “whether nine (9) different names,” including the term “beerman,” were “‘common’ names or…‘brand’ names.”…The term “beerman” “was recognized as a common or generic name by 75.9% of the” respondents…[Plaintiff] however, attempts to interpret the results in his favor by noting that several other terms, including “draft beer,” “popcorn,” “vendor,” and “mascot,” were found by a higher percentage of the respondents (i.e., from 90.1% to 95.6%) to be common or generic terms. Further…[Plaintiff’s expert] opined “there is a statistically significant difference between the responses obtained for ‘beerman’ and the [other] so-called common names in the survey.” Again, however, we are not persuaded that a rational trier of fact could find, based on [Plaintiff’s] interpretation of the defendants’ survey results, that the term “beerman” is descriptive rather than generic. In particular, the number of survey respondents classifying the term “beerman” as generic was clearly substantial...

The Steak N Shake Company v. The Burger King Corporation, 323 F. Supp. 2d 983, 989, 993 (E.D. Mo. 2004)

[Plaintiff] presented survey evidence…to evaluate and quantify the level of consumer recognition of the term “steakburger.”…The [survey respondents] were read a list of items and asked whether they most often identified certain listed items as something that comes from more than one company or something that comes from only one company…

I do not agree with [Plaintiff’s] argument that the [Plaintiff’s experts’] surveys show the non-genericness of the term “steakburger.”… At most, the [Plaintiff’s first expert’s] study is directed at consumer awareness of the term and consumer familiarity with Steak n Shake, which advertises heavily that it is “Famous for Steakburgers.”

…[Plaintiff’s first expert] asked whether respondents “most often” associated the term with one company or more than one company. “Steakburger”
was highly associated with Steak n Shake in the markets tested, but this fails to advance an understanding of the public perception of what a steakburger is…


…the parties to these proceedings have each proffered a survey…on the question of genericness…

…petitioner points to a…survey [which] targeted individuals who had consulted a real estate agent in the past year or were planning to do so in the coming year, or were planning to buy, sell or rent real estate in the next year. Of the ninety-six individuals surveyed, only ten percent said that “Realtor” was a brand name.

By contrast, respondent’s telephone survey targeted real estate brokers and agents. Respondent argues that real estate professionals make up the proper survey universe, as they are actually the purchasers or prospective purchasers of membership in respondent and the services provided by respondent…

Accordingly, given…the deficiencies of petitioner’s survey, we accord it very little weight on the question of whether prospective purchasers of a real estate professional's service would view the term “Realtor” as indicating the services were being offered by a real estate association member (even if the association were unknown).

…We need not agree with respondent that real estate professionals are the sole group with whose perceptions we should be concerned in order to accord substantial weight to the results of the [Respondent’s expert’s] survey. For given the circumstances of the use of these collective service marks, we agree with respondent's fallback position that real estate professionals make up a significant subgroup of relevant consumers…

*Ty, Inc. v. Softbelly’s, Inc.*, 353 F.3d 528, 530-531 (7th Cir. 2003)

…A survey by [Plaintiff’s expert]…found that 60 percent of the respondents thought “Beanies” [was] a brand name…If 60 percent of the relevant consuming public thinks “Beanies” [is] a brand name, as many of 40 percent may think it generic…the legal test of genericness is “primary significance,”…and [Plaintiff’s expert’s] results are evidence that the primary significance of “Beanies” is still as the name of [Plaintiff’s] brand.

…A linguist testified that 98 percent of the references in news articles to the word “Beanie” were to [Plaintiff’s] products and that dictionaries do not list it as a generic (lower-case) word.

…A statistician sampled eBay and Yahoo auctions and found that more than 80 percent of all references to “beanie(s)” were to [Plaintiff’s] products.

…In a phone survey conducted in 1999, more than 60 percent of the respondents identified “Beanies” as relating to [Plaintiff] or Beanie Babies…

Applicants…have submitted convincing evidence that SWISS ARMY is [a] trademark…This…includes…the results of the telephone survey…conducted in 1997 to determine whether the term “Swiss Army” was perceived as a generic name or as a brand designation. The findings from the survey were: (1) of a cross-section of potential purchasers, 81% considered “Swiss Army” to be a brand name, not a common name; and (2) most consumers (92%) associated “Swiss Army” with knives or pocketknives, although 16% believed there was some association between the “Swiss Army” name and watches.

[The] survey utilized the generally approved “Teflon Methodology.” It involved men and women, ages 18 and older, who indicated an intention to purchase a pocketknife in the next six months…[Respondents] were asked a series of questions, including whether they thought “Margarine,” “Aspirin,” “Cellophane,” “Easy Spirit,” “Swiss Army,” “M & M,” and “Sony” were common names or brand names…

Opposer thoroughly cross-examined applicant’s survey expert witness regarding the type of survey, the interviewing, the analysis, etc…it is noteworthy that opposer did not retain a survey expert to critique applicants’ survey, and did not conduct its own survey (or elected not to submit such testimony or survey results)…

We have carefully considered the entire testimony…and we find no reason to discount [the] survey…


In the [Plaintiff’s survey], respondents were first shown a picture of a BIC Cookie wrapped in cellophane printed with the word “Big Island Candies.” They were then asked if they had seen the BIC Cookie before. If they stated that they had, they were asked, “Who makes this product?” In response to that question, 16.9% to 29.4% of respondents answered “BIC.”…

It is true that relevant survey data or statistics of some sort might assist this court…As [Plaintiff] contends, “the most important type of evidence used in evaluating genericness is consumer surveys.”…

Unfortunately…the [Plaintiff’s] Survey is of no help to it on the present motion. First, the [Plaintiff’s] Survey does not test for genericness. The survey asked the “Who are you?” question. That method cannot possibly test whether respondents view the BIC Cookie as answering the question “Who are you?” (rather than answering the question “What are you?”). The question is not which source consumers most often associate with the BIC Cookie, but whether the BIC Cookie design's primary significance to the consumer is that of source identification…
Second, no attempt was made to test consumers’ perceptions of the BIC Cookie design rather than the BIC Cookie packaging (or the combination of the BIC Cookie design and packaging). Survey respondents were never shown a plain BIC Cookie. Rather, the only way in which respondents saw the BIC Cookie was when it was wrapped in cellophane printed with the words “Big Island Candies.”

Finally, the court notes that [Plaintiff] misunderstands what percentage of respondents must respond in a certain way to establish nongenericness… [Plaintiff] suggests that, if more than 15% of survey respondents identified [Plaintiff] after viewing the BIC Cookie, that percentage was “sufficient to support a summary judgment finding of distinctiveness, so it is more than sufficient to show that the dress is not generic.”…That argument is incorrect because (1) the type of survey used to test for genericness differs from the type of survey used to test for distinctiveness, and (2) for a genericness survey, “majority usage controls.”…For a term to be held nongeneric, the seller must prove that the “primary significance of the term in the minds of the consuming public is not the product but the producer.”


Defendant has also provided a report…which determined that the term “NetBank” is not considered generic after surveying 400 random internet users and asking them certain questions regarding phrases that describe banking services…

In this case, the…survey asked, in relevant part:

1. Are you aware of a banking service that allows you to pay some or all of your bills by using your computer to communicate with your bank?
2. If you were to describe this process to a friend, what words or phrases would come to mind first? That is, what would you call this process?

…[Defendants’] report indicated that no one responded with the term “net bank” to describe the process of paying bills by using a computer. …the…Court finds that by posing such survey questions, Defendants attempt to confuse the separate industries or services of online banking and online bill payment. Both online bill payment and banking services are combined in the question. Defendants having initially occupied the capacity of an online bill payment company while seeking to assert its mark over Plaintiff in the field of banking services provided via the global computer network…the issue is whether “net bank” is generic for online banking services, for which Defendants seek to expand their trademark protection, not online bill payment services using electronic coupons, for which the mark was registered. Defendants’…questions…fail[ed] to reach the heart of the issue, which is whether the “net bank” term has reached genericness in the field of banking services provided via the global computer network…

…Here, [Defendant] has presented evidence in five of the six categories, omitting only consumer surveys, to support its claim that the Windows trademark is generic.

…

The Court first turns to the evidence submitted by [Plaintiff] consisting primarily of several consumer surveys that show a high degree of recognition of the Windows brand among the consuming public…The Ninth Circuit has emphasized that a trial court may consider factors such as “survey design, nature of the questions asked, and the experience and reputation of the surveyor” in determining the weight to accord a survey…

In support of its [m]otion…[Plaintiff] submitted the Declaration of…the current Director of Branding…The first survey mentioned was conducted for [Plaintiff] in 1999 and shows that 93% of personal computer users recognized the Windows brand…No exhibits are attached to demonstrate the methodology or explain the survey design, and without such a foundation, the Court has no alternative but to ascribe a bare minimum of weight to the result. The next survey [offered in the declaration of the Director of Branding] was conducted…[among] “on-line” consumers in early 2001 and concluded that Windows was the No. 1 brand overall and No. 3 in distinctiveness…The Declaration attaches a copy of the…survey results which displays the top twenty “Marks of Distinction” in ten countries…Based on the one page exhibit, it is impossible for the Court to analyze the…assertion that “Windows ranked No. 1 overall” because the submitted evidence lacks meaningful information about survey methodology…The Court finds it to be of little probative value in showing that Windows is a protectable trademark. The final survey [offered in the declaration of the Director of Branding] showed that “in the United States, almost 80% of the general public is aware of the Window (sic) brand.”…The Court therefore declines to give any substantial weight to this survey, or the others described in the [declaration of the Plaintiff’s Director of Branding].


[Plaintiff] has also commissioned a survey [where]…[r]espondents were interviewed in three shopping malls in three states between the geographical sites of the litigants, with 210 total interviews conducted…The survey was designed to investigate the issue of whether the existence of the alphanumeric telephone number, 1-800-THE OPRY, would convey the impression of an association with a particular company, namely “Grand Ole Opry,” or whether it referred to country music generally…

The survey indicated that 45.7% of the overall population associates the number with a particular company, namely the “Grand Ole Opry.”…Within the population of respondents who listen to country music, the relevant market, 60%
associated 1-800-THE OPRY with a particular company, specifically the Grand Ole Opry in Nashville, TN…

The survey results clearly support the conclusion that the general population, and the specific target market of country music listeners, expects an 800 number, 1-800-The Opry, to be associated with a particular company, specifically the Grand Ole Opry in Nashville, TN, and any other company utilizing the 800 number, 1-800-The Opry, would be misleading to the general population and the specific target market of country music listeners. The results reject any proposition that The Opry refers to country music generally or to a variety of country music shows.


Finally, the depositions of both parties’ experts raise genuine issues of material fact regarding the genericness of March Madness….In addition, Plaintiff’s expert…opined in his sworn declaration that “the primary significance of March Madness is a trademark that identifies a specific basketball-related sports event sponsored by a single source.”…the survey conducted by [Plaintiff] demonstrated that 61 percent of eligible consumers recognized March Madness as a trade name, as opposed to a common name…

The [Plaintiff’s] survey, discussed above, also raises questions about the protectability of March Madness. Just as the 61 percent figure might convince a juror that March Madness is not generic, the same figure could lead a juror to believe that [March Madness Athletic Association] does not hold a protected mark in the phrase. This conclusion becomes more likely when comparing the 61 percent result for March Madness with the 92 and 93 percent results for the terms “Kentucky Derby” and “Stanley Cup.” In addition, the fact that the survey did not ask which brand the participants associated with March Madness could lead a fact-finder to discount its results.


The respondent was then asked the following: “Now, for each of the following ten names, would you please tell me whether you understand the name to be a common name or a brand name?” The list was read randomly…[STP, Windsurfer, Margarine, Teflon, Jell-O, Refrigerator, Aspirin, Coke, American Airlines, Gas Station]. [Subsequently] the respondent was asked: “With respect to golf, for each of the following names, would you please tell me whether you understand the name to be a common name or a brand name?”…[n6 This follow-up question presents a twist on a typical “Teflon Survey.” In this connection, we take judicial notice of the dictionary definition of the term “steelhead”: “a large-sized silvery anadromous rainbow trout.” *Webster’s New International Dictionary* (unabridged ed. 1993) Given the fact that “steelhead” is a name of a fish, some
respondents may well have classified the term as a common name if the term appeared in the first list of terms. By way of example, the same likely would be true of the term “Arrow.” Although the term is a common name (as in “bow and arrow”), it is also a brand name as applied to shirts. Thus, inasmuch as “steelhead” is a dictionary term, we see no problem with the follow-up question that directs the respondents’ attention to the significance of “Steelhead” as it pertains to golf. [Steelhead, Footjoy, Graphite]…

The issues on appeal are whether the term STEELHEAD is merely descriptive or generic for applicant’s golf clubs and, alternatively, if such term is not generic but rather merely descriptive, whether it has acquired distinctiveness…

We turn first to the issues of whether the term STEELHEAD is generic, or whether it is just merely descriptive, when used on golf clubs…The United States Patent and Trademark Office has the burden of establishing by clear evidence that a mark is generic and thus unregistrable…Evidence of the relevant public’s understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers, and other publications…

We next turn to the second step of the…inquiry, that is, whether the relevant public understands the term STEELHEAD to refer primarily to the type or category of goods…

The Examining Attorney provided dictionary definitions of the words “steel” and “clubhead,” as well as examples of generic uses by the media…the survey, which shows results that are pretty evenly divided, establishes that it is not clear cut as to whether the relevant public views STEELHEAD as a brand name or a generic term.

Of considerable significance in the present case is the survey. As in the original “Teflon Survey,” the respondents in applicant’s survey were quite good at sorting out brand names from common names. Although the Examining Attorney is technically correct in viewing the survey results relating to STEELHEAD as a statistical tie (taking into account the precision variance), the simple fact is that a substantial part (over 48%) of the relevant purchasing public view the term STEELHEAD as a trademark, and not as a generic name. The survey by itself raises a doubt regarding genericness, and any doubt in determining registrability is resolved in favor of applicant…

Hunt Masters, Incorporated v. Landry’s Seafood Restaurant, Incorporated, 240 F.3d 251, 254-255 (4th Cir. 2001)

In support of its argument that “crab house” is not generic, [Plaintiff] offers a survey conducted of consumers in the Charleston area. [Plaintiff] asserts that the district court erred in failing to consider its survey evidence in assessing genericness…However, [Plaintiff] fails to recognize that there are two distinct
ways in which terms may be classified as generic: (1) where the term began life as a “coined term”; and (2) where the term was commonly used prior to its association with the products at issue…The notion that whether a word is generic depends upon consumers’ understanding of the word is based upon a scenario involving a coined word for a commercial product (such as “aspirin,” “teflon,” or “thermos”) that is alleged to have become generic through common usage…[Plaintiff] does not claim to have first coined the term “crab house.” Therefore, it is not necessary to determine whether the term has become generic through common use, rendering [Plaintiff’s] customer survey irrelevant.

Stuhlbarg International Sales Company, Inc. v. John D. Brush and Company, Inc., 240 F.3d 832, 840 (9th Cir. 2001)

…[Defendant] submitted excerpts from a consumer survey purportedly showing forty-four percent consumer awareness of the term “Fire-Safe.”…the district court noted that the survey excerpts do not indicate whether the consumers were asked to identify the term “firesafe” as a brand name or a common name, a critical issue in a case involving genericness. Simply asserting consumer awareness of the term begs the question. Nor did the submission address the format of the survey or its methodology. Without any information regarding the survey design, questions, or methodology, the district court did not abuse its discretion by ascribing little weight…
DESCRIPTIVENESS/SGGESTIVENESS SURVEYS


...while the Trademark Examining Attorney herein has successfully made out a *Prima Facie* case for MOSCONI being primarily merely a surname, we find that the present applicant has successfully rebutted this case with its showing. The record is replete with references to the legendary Willie Mosconi as being so famous at billiards during the last fifty years of his life that his name is synonymous with the game. In a survey of members of the relevant purchasing public [n2 Heads of households who were interested in sports, had household incomes of $50,000 per year or higher, who had purchased a pool table or intended to do so within the next five years...]...at least 21% of the respondents associated Willie Mosconi with the game of pool...It is this showing that demonstrates that MOSCONI would be viewed by the relevant purchasing public as a reference to Willie Mosconi when used in connection with applicant’s goods. This effectively rebuts the *Prima Facie* showing made by the Trademark Examining Attorney herein.


...[Plaintiff] offered a survey...designed to test whether “PocketMoney” is a descriptive or a suggestive mark...[Plaintiff’s expert] selected as its universe...all individuals aged eighteen or older...[Plaintiff’s expert] assumed that many individuals could be within the class of potential consumers of PDA products even if they were not currently aware of this...

The survey conducted by [Plaintiff’s expert] also provides some support for the conclusion that “PocketMoney” is suggestive. The survey does not provide strong evidence because it sampled the views of the general public rather than those known to be likely to purchase software for PDAs...Thus, the survey provides a small amount of additional evidence that Catamount's mark is suggestive.


[Plaintiff] offers [a] market survey...as evidence that the [BREAK & BAKE] mark should be classified as “suggestive” (and thus protected) instead of “generic”...[Plaintiff’s expert] has proffered his opinion, based on the results of his survey conducted on the BREAK & BAKE mark, that respondents found the mark to be suggestive, not merely descriptive...

In this case, the [Plaintiff’s] survey suffers from two substantial flaws...The first, and perhaps clearest, flaw is the uncontroverted definitional problems of the survey...The survey was submitted to show the mark should be
classified as “suggestive” instead of “generic” or “descriptive,” but it did not properly define any of the classifications. Because the classifications were not properly defined, the survey has no bearing on the issue it was submitted for.

…This Court had previously discussed in detail and with numerous citations to case law the proper definition of a descriptive term…Specifically, this Court explained that “descriptive marks describe the purpose, function or use of the product, a desirable characteristic of the product, or the nature of the product.”…Yet, the [Plaintiff’s expert’s] definition includes nothing that refers in any way to the correct, recognized and binding definition of a descriptive term under trademark law…

…As a result, the flawed definition permeated the entire survey to make its finding completely untrustworthy and unreliable…

The second flaw in the survey is that the universe chosen for the survey was improper…

…It is undisputed that [Plaintiff] sells all of its frozen cookie dough product with the “BREAK & BAKE” mark through its food service distributors to distributors who offer the product to fund raising organizations…As a result…[Plaintiff’s] study should have been limited to the commercial distributors in the food service industry who may have contact with frozen dough products…Instead, the universe here consisted of adults shopping at one of four malls in the United States who either “do at least some of the grocery shopping for their household,”…or “have purchased refrigerated cookie dough in the past and/or intend to purchase refrigerated cookie dough in the future,”…This universe renders the study unreliable as it ignores the fact that the ultimate consumer does not have any contact with the “BREAK & BAKE” mark on [Plaintiff’s] product. In addition, it only concerns the views of ultimate consumers who purchase or may purchase refrigerated dough when [Plaintiff’s] product is unquestionably frozen.

The improper sampling universe is further compounded by the survey’s design flaw of failing to disclose to respondents the context of the product with which the mark is connected. The [Plaintiff’s] survey instead asked shopping mall customers to guess about this context. Again, such a survey misses the mark where descriptiveness is sought to be ruled out. This is true because the survey must supply to “the hypothetical potential customer” the “amount of basic knowledge about the product that most people would have from news and advertising.”
SECONDARY MEANING SURVEYS


…The survey found that “sixty-one percent of the respondents associated the design of the [Plaintiff’s] watch with a single company.”…Defendants argue that the [Plaintiff’s survey] is “flawed” because it “did not test the perceptions of an ordinary observer.”…

[Plaintiff’s survey] shows that a majority of consumers who “reported owning a fine watch valued at $2,500 or more” or “were very likely to buy a fine watch in the next year” identify the [Plaintiff’s watch] with one source. “The Plaintiff is not required to establish that all consumers relate the product to its producer; it need only show that a substantial segment of the relevant consumer group makes this connection.”…


…[Plaintiff] commissioned…a survey…of 400 potential purchasers at malls in eight U.S. locations, where participants were shown [Plaintiff’s] commercial twice and were then able to browse a…computerized simulation of a grocery store frozen pizza aisle. The sample was randomly split into a control group and a test group…

[Plaintiff] argues that its…survey demonstrates secondary meaning by showing that between 13% and 14% of consumers believe there is an association between the [Plaintiff’s] and [Defendant’s] brands. But the…[s]urvey is not persuasive with regard to secondary meaning because participants were improperly shown [Plaintiff’s] product, thereby forcing their awareness of the product, rather than gauging the participants’ pre-existing awareness…[Plaintiff’s expert] agreed in his deposition that he is not aware of any court that has accepted or authorized his simulation’s methods…As such, [Plaintiff’s] survey is flawed and does not support a finding of secondary meaning.

[Plaintiff] next points to…a Teflon-type survey, in which respondents are first instructed on the definition of common names and brand names, pre-tested on their understanding of common names and brand names, and then asked to categorize certain test and control phrases or words as brand names or common names…

[Plaintiff] argues that the…[s]urvey demonstrates secondary meaning in that 61% of the respondents believed that BRICK OVEN was a brand name that originates from “one particular company.” But the…[s]urvey was conducted months after [Defendant’s] BRICK OVEN STYLE product had already entered the market…
Frosty Treats, Inc v. Sony Computer Entertainment America, Inc., 426 F.3d 1001, 1005 (8th Cir. 2005)

The record, when viewed in favor of [Plaintiff], demonstrates that [Defendant] is entitled to judgment as a matter of law on this issue. [Plaintiff] has failed to put forth more than a scintilla of evidence that the public recognizes its “Frosty Treats” mark and associates it with a single source. [Plaintiff] claims that its survey evidence demonstrates that the term “Frosty Treats” has acquired secondary meaning, but, if anything, it indicates the opposite. In the survey, respondents were shown images of the Frosty Treats ice cream van and asked, “Are you familiar with or have you ever seen or heard of this before?” Forty-seven percent responded affirmatively. They were then asked what they knew about the van. The respondents most frequently mentioned that it sold ice cream. Only one percent of the respondents in the survey mentioned Frosty Treats by name. There is no indication in the record that the survey respondents (apart from the one percent) were familiar with the vans because of the small nine-by-four-inch “Frosty Treats” decal on the rear portion of the side of the van, the only place where the phrase “Frosty Treats” appears on the vehicle…[Plaintiff’s] survey provides no basis to conclude that the respondents associated the van with a single source as opposed to simply a generic ice cream truck.

In re Steelbuilding.com, 415 F.3d 1293, 1300 (Fed. Cir. 2005)

The Board considered applicant’s Internet poll on name recognition. The poll…first asked visitors a few questions about current events or sports, e.g., “Who will win Election 2000? Who will win the NBA title?” then asked “which one of the following building manufacturers is the most recognizable?” In the poll, the applicant was more recognizable than the others on the list…This court agrees with the Board that this particular poll lacked sufficient signs of reliability. For instance, the poll results do not indicate the number of actual participants. The poll did not attempt to prevent visitors from voting more than once. The poll did not prevent interested parties, such as friends or associates or even employees of the applicant, from voting multiple times to skew the results. In sum, this poll does not even remotely follow the precepts of standard trademark name-recognition polls…the survey did not show sufficient reliability to constitute sufficient evidence of acquired distinctiveness...

Grupo Gigante v. Dallo & Co., Inc., 391 F.3d 1088, 1098-1099, 1106-1108 (9th Cir. 2004)

…The concurring opinion is incorrect in its suggestion that the case necessarily must go to trial because distinctiveness of a mark is a question of fact and defendants have contested the reliability of plaintiffs’ survey evidence. That conclusion flies in the face of the 1986 triumvirate of summary judgment cases. [n34 See Celotex, Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S.
Regardless of whether questions are factual, there is nothing to try unless there is a genuine issue of material fact. One survey that is impeachable, but still good enough to get to a jury, weighed against no survey evidence at all on the other side, along with all the other evidence in the record, does not necessarily add up to a genuine issue of fact. [Compare: Clicks Billiards Inc. v. Sixshooters Inc., 251 F.3d 1252 (9th Cir. 2001); Thane International, Inc. v. Trek Bicycle Corporation, 305 F.3d 894 (9th Cir. 2002; Playboy Enterprises, Inc. v. Netscape Communications Corporation, 354 F.3d 1020 (9th Cir. 2004).]

[Concurring opinion]

I write separately to express my view that the evidence that Plaintiffs have presented thus far is insufficient as a matter of law to establish that their mark is famous or well-known. The survey population and the survey’s results establish little more than the fact that Plaintiffs’ customers are familiar with Plaintiffs’ stores…

The district court, relying entirely on survey evidence, concluded that Plaintiffs’ trademark had acquired secondary meaning and was thus entitled to protection from domestic users…The survey population consisted of only 78 people in San Diego County who were “Spanish-speaking, and had recently purchased Mexican-style food at a supermarket or other food store.”… However, the survey was conducted in 2000, nine years after Defendants first began using the Gigante name in the United States. When testing for awareness of the Gigante mark before Defendants’ entry into the San Diego market in 1991, the awareness level dropped to 20 to 22 percent of the respondents…

That evidence is insufficient in two important respects. First, the survey result is highly questionable in view of its narrowly defined survey population. Plaintiffs’ own description of their stores makes clear that the goods sold are little different from those available in any large retail grocery store…Further, Plaintiffs admit in their briefs that the clientele of their Mexican stores includes “both Hispanic and non-Hispanic” customers. Consequently, nothing about either the nature of the goods sold by Plaintiffs or its customer base warrants limiting the relevant public to Mexican-Americans.

We have rejected similar attempts to limit the relevant sector of the public. For instance, in Japan Telecom, Inc. v. Japan Telecom America Inc...a trademark dispute between two providers of telecommunications services, the plaintiff advertised only to “members of the Japanese and Japanese American business communities in Southern California.” Nonetheless, we concluded that “the relevant buying public consists at least of buyers of telephone and network installation services in that region.”…Thus, we emphasized the nature of the service provided, rather than the composition of the market to which the plaintiff actively targeted its services.

Because Plaintiffs sell widely-available, non-specialized goods to the general public, it is uninformative to focus exclusively on Mexican-Americans living in San Diego County. The district court’s reliance on Plaintiffs’ survey is especially problematic because its population was limited to Mexican-Americans
who had recently purchased Mexican-style food at a supermarket or grocery store. That survey is only very slightly more informative than the study whose probative value we dismissed entirely in *Avery-Dennison Corp. v. Sumpton*...because it focused exclusively on the plaintiff’s existing customers: “Avery Dennison’s marketing reports are comparable to a survey we discussed in *Anti-Monopoly, Inc. v. General Mills Fun Group, Inc.*...proving only the near tautology that consumers already acquainted with Avery and Avery Dennison products are familiar with Avery Dennison... 

...the relevant sector of the public consists of all residents of San Diego County, without qualification.


The plaintiffs present survey evidence to support their claim that WINCHESTER has a secondary meaning. “Survey evidence has become a well-recognized means of establishing secondary meaning.”...The defendant’s complaints about the survey evidence are that the methodology, questions, and data interpretation are flawed, but it offers no survey evidence to rebut it...The survey consisted of open-ended questions, such as asking respondents to identify financial institutions in Clark County and their location. Approximately 35% of the respondents identified [Plaintiff] in connection with the word “Winchester” as a bank in Clark County. Thus, the survey results support a finding that WINCHESTER is associated with the banking services provided by the plaintiff.


...In the survey, consumers who *both* (a) have purchased a no-calorie sweetener in the past three months, and (b) plan to do so again in the next three months, were shown one of two packages. One group -- the so-called “test” group -- was shown a package that contained the graphics used on the actual Splenda package, but with all textual references to Splenda, including the brand name, removed...and respondents were asked a series of questions [including]...

...“What do you think is the brand name of the No-Calorie Sweetener that I showed you?”...[and] “why do you think that?”... 

...A second group of...consumers -- the so-called “control” group -- was shown a different package that does not resemble the current Splenda trade dress...

...Consumers in the “control” group were asked the same questions as those in the “test” group...four respondents in the control group -- four percent -- said that they associated the control package with Splenda. This represents the “noise” level of the survey -- *i.e.*, the approximate percentage of respondents who answer “Splenda” for reasons unrelated to the package they are shown (*e.g.*, guessing, brand awareness or popularity, etc.)...Subtracting this four percent from
the 62.5 percent of respondents in the test group who associated the test package with only the Splenda brand, the survey shows a “net” level of recognition of the Splenda trade dress of 58.5 percent. This percentage is more than sufficient to establish secondary meaning…


On reply to their motion for summary judgment, Defendants submitted for the first time their Food and Beverage Study, a survey of potential consumers with regard to their recognition of the Meeker name…

Substantively, Plaintiff objects to the introduction of the survey evidence on three bases: (1) the survey is irrelevant, confusing and a waste of the Court’s time; (2) the survey is improper because it fails to comport with validly scientific methods; and (3) there is no authority to support introduction of the survey by Defendants for the purpose of disproving, as opposed to establishing the existence of, secondary meaning.

With regard to the contention that the survey is irrelevant and confusing, such blanket objections go to the weight of the survey, not its admissibility...

With regard to the contention that the methodology employed by Defendants’ expert was invalid, the Court finds that these challenges, for instance to the scope of the interviewed population or the failure to thoroughly analyze the data gathered, are challenges that similarly go to the weight of the survey evidence and not its admissibility…

Third, Plaintiff contends that survey evidence is not admissible for the purpose of disproving the existence of secondary meaning, but only for the purpose of affirmatively establishing the existence of secondary meaning. However, in Levi Strauss & Co. v. Blue Bell, Inc.…the Ninth Circuit favorably reviewed the district court’s admission of a survey conducted to support a finding of no secondary meaning. It is clear that using survey evidence to disprove the existence of secondary meaning is permissible.


While the survey is evidence that a very small group of potential purchasers (owners, presidents, vice-presidents, and general managers of health/racquet and fitness clubs) may recognize the applicant’s design as a trademark…we have little, if any, evidence of whether the broader group of prospective purchasers would recognize applicant’s design as a trademark. We note that applicant’s goods are identified as barbell plates without any limitation as to prospective purchasers…

…[Plaintiff] has produced a consumer survey…in support of its position that its implant has acquired secondary meaning…That survey does not support [Plaintiff’s] claims.

…the study does not filter out the non-functional features from those that are functional to evaluate which features consumers use to identify the source of the product…

…[Plaintiff’s] study on secondary meaning also suffers from an additional flaw which would lead me to exclude it from the jury’s consideration. The initial questions asked of the respondents were: “What company do you think puts out these products? If you do not know, please feel free to say so.”…These questions presume the existence of the key element in a secondary meaning inquiry, namely the association of the design with a single source…Hence, the [Plaintiff’s] study would not be helpful to a jury attempting to determine whether consumers associate the product features at issue with a single manufacturer, because the survey suggested to the respondents that the products did come from a single manufacturer…


…Plaintiff conducted a Teflon [type] survey, and concluded that the primary significance of March madness…is as a trade name relating to basketball…

The survey was a double-blind…[telephone] survey…based on a list of randomly generated residential phone numbers from the continental United States. The ‘next birthday technique’ was used to randomly select the actual respondent to the survey within each residence which was called…within the relevant sample of persons who knew March madness was related to basketball, over 60% classified it as a trade name. Based on this evidence, the Court finds that March madness has acquired secondary meaning as a trade name.


Boston Beer, as cited by [Defendant], is not dispositive of this issue…The Boston Beer court upheld the district court’s judgment that secondary meaning had not been sufficiently shown when only 36% of persons who participated in a secondary meaning survey associated the mark with the source. Here, [Defendant] argues that the fact that only 30% of survey participants matched [Plaintiff’s mark] is insufficient to show secondary meaning under Boston Beer…While the First Circuit in Boston Beer did state that “a positive response rate of 36% is
hardly overwhelming,” it did not hold that a positive response rate of approximately 36% is always insufficient to show secondary meaning as a matter of law…


Regardless of the awards, and as Defendants point out, survey evidence does not support [Plaintiff’s] claim to acquired distinctiveness…[Plaintiff] retained Group Plus, Inc. and Yahoo! to conduct surveys. According to its report, Group Plus conducted thirteen focus groups…not intended to measure brand awareness of [Plaintiff]; rather, it was designed to help [Plaintiff] increase awareness of its brand. Nonetheless, it found that: “There was a very low level of awareness of WeMedia among the people in these groups.”

Similarly, the Yahoo! survey was not designed to measure the precise question before the Court but…concluded…very few knew of WeMedia.com or We Magazine -- even within a community of people who know disabled friends or family, or have a disability there is not strong brand awareness yet.


…[Plaintiff] has failed to present any evidence that consumers associate the Cobra design with [Plaintiff], and [Plaintiff] alone as source…[Plaintiff’s expert] performed face-to-face interviews with sports-car hobbyists at one industry trade show. Although the survey establishes an association between the Cobra design and [Plaintiff]…[Plaintiff] must prove that the primary significance of the Cobra shape in the minds of consumers is to identify [Plaintiff] as the single producer…

The most troubling aspect of the report is…conclusory grouping of responses…When asked if they recognized the picture of a Cobra design, [Plaintiff’s expert] reports that over 50% of the people surveyed associated the picture with [Plaintiff]. Within this percentage, however, [Plaintiff’s expert] includes numerous different responses, such as “Cobra,” “Shelby Cobra,” and “Ford Shelby Cobra.” By grouping these responses into one “Shelby” category, [Plaintiff’s expert] assumes the answer to the very question at issue. Not only are [Plaintiff’s expert’s] conclusions illogical in a very basic sense, but they are also completely unreliable and bear no weight on [Plaintiff’s] secondary meaning argument…

**U.S. Search, LLC v. US Search.com Incorporated,** 300 F.3d 517, 526 (4th Cir. 2002)

…[Plaintiff] has failed to satisfy any of the factors relevant to secondary meaning…[Plaintiff] has spent minimal amounts of money on advertising and has enjoyed limited sales success…[Plaintiff] presented no evidence of attempts to plagiarize the mark, no evidence of any unsolicited media coverage, no consumer studies, and no evidence of exclusive use…On the other hand, [Defendant]
offered a consumer study commissioned of individuals in the plastics industry who used, or were likely to use a recruiting firm. [n13 Survey evidence is generally thought to be the most direct and persuasive way of establishing secondary meaning…] This study showed that only 2% of those queried appeared to know “U.S. Search,” the type of firm it is, and the services it provides.


…Survey respondents were asked whether they wear contact lenses; what companies they have seen or heard of that sell contact lenses by mail or on the Internet (unaided recall); whether they had heard of listed companies, including applicant (aided recall); and, if they wear contact lenses and purchased their last pair of contact lenses by mail or Internet, from whom did they make that purchase…results stated that, “among the representative sample of contact lens wearers, 1-800 Contacts measured 20.8% unaided awareness, 40.2% aided awareness and 61.0% total awareness.”…we find it to be probative of the issue of acquired distinctiveness.


The record shows that [Plaintiff’s] Beanie Babies have been extremely successful for a number of years and have been featured extensively in the media and in web sites. But is the word “Beanie” merely a common descriptive term for bean bag toys? [Plaintiff] points to a nationwide toy survey finding that over 70% of those surveyed identified the words “Beanies” and “Beanie” with Beanie Babies and [Plaintiff], while [Defendant] takes issue with the methodology used in the [Plaintiff’s] study. The court finds that the word “Beanie” is not purely descriptive and thus is not generic…the record shows that [Plaintiff’s] Beanie Babies mark is strong or, at the very least, that the precise strength of the mark is a material issue of disputed fact…


Consumer surveys conducted…at [Plaintiff’s] behest in 1995 and 1996, also established the existence of secondary meaning in the trade dress…The 1995 survey was performed in “weaker” Coach markets, areas in which [Plaintiff] did not sell its products at its own stores but rather through department stores. The 1996 survey was performed in “stronger” Coach markets, including cities where [Plaintiff] tends to perform well as well as in shopping malls where [Plaintiff] had stand-alone stores…found that 30 percent of women shown a Coach bag identified it as such in 1995, compared to 65 percent in 1996. In contrast, when shown a non-Coach control handbag, 3 percent of women in 1995, and 1 percent of women in 1996, identified it as a Coach bag.*
*It appears the same secondary meaning surveys reported here were also offered in a prior litigation. (See also Sara Lee Corporation v. American Leather Products, Inc., 1998 U.S. Dist. LEXIS 11914 (N.D. Ill. 1998).)

Clicks Billiards Inc. v. Sixshooters Inc., Ronald R. Forbes, Jane Doe Forbes, 251 F.3d 1252, 1262-1264 (9th Cir. 2001)

…In this survey, patrons at a [Plaintiff’s] establishment were asked, “Do you associate the visual look and appearance of this billiard parlor with Clicks Billiards only or with other billiard parlors too?” Eighty percent of respondents said that they associated the look and feel with [Plaintiff] only; eighteen percent said, “Other billiard parlors too.”

The district court stated, “This survey is not without flaws,” and ultimately concluded, “Put bluntly, the survey is of little or no value.” The court was troubled by the fact that in response to a follow-up question, respondents often used vague and general language in describing [Plaintiff’s] image and made reference to unprotectable features of [Plaintiff’s] interior, such as its cleanliness, upkeep, good service, and music. This is a valid observation and may indeed be true, but the issue is not one subject to resolution on summary judgment.

…

Ultimately these responses may not add up to much, and a reasonable juror might ultimately agree with the district court that the survey did not prove that [Plaintiff’s] trade dress had acquired secondary meaning. But the juror could only have done so after considering conflicting evidence and deciding what weight to accord the survey and the follow-up interviews. This undertaking describes the proper role for a trier of fact; it is not the role of a district court at the summary judgment stage where the issue is whether a triable issue of fact even exists…

Here, the district court did not exclude the survey on the ground that it was irrelevant or that it was undermined by some other fatal flaw. Rather, the court appeared to admit the survey into evidence and then to analyze what it considered to be its deficiencies. Treatment of surveys is a two-step process. First, is the survey admissible? That is, is there a proper foundation for admissibility… This threshold question may be determined by the judge. Once the survey is admitted, however, follow-on issues of methodology, survey design, reliability, the experience and reputation of the expert, critique of conclusions, and the like go to the weight of the survey rather than its admissibility… [Also see Schering Corp. v. Pfizer Inc., 189 F.3d 218, 230-238 (2d Cir. 1999).] These are issues for a jury or, in a bench trial, the judge. In laying this guide for analysis of survey evidence, we are not endorsing the survey here nor are we prejudging its fate at trial. Nor are we suggesting that the presence of a survey will always preclude summary judgment. We are simply saying that the survey admitted by the district court raises questions of material fact with respect to secondary meaning that may not be disposed of by the court alone.
America Online, Inc. v. AT&T Corp., 243 F.3d 812, 822 (4th Cir. 2001)

[Plaintiff] argues that its survey evidence indicates an association in the public’s eye between “You Have Mail” and [Plaintiff] and that this association is sufficient to permit a reasonable factfinder to conclude that “You Have Mail” is a trademark descriptive of its e-mail service that has acquired secondary meaning...

…[Plaintiff’s] evidence of association may establish what is called “de facto secondary meaning,” but such secondary meaning does not entitle AOL to exclude others from a functional use of the words...


…Plaintiffs also offer evidence that demonstrates a high marketplace recognition among its target consumers, the mothers of young children…A survey conducted in 1999 [prior to the litigation] revealed that ninety two percent of mothers of children aged 2-12 demonstrated an unaided brand awareness [of] Crayola…In the same survey, eighty four percent of mothers viewed Crayola as a high quality brand and eighty three viewed Crayola as a brand “I can trust.”... As a result, the Court concludes that Plaintiffs mark has a high level of commercial strength.


A consumer survey conducted by [Plaintiff] in 1999, prior to the initiation of this action, showed an 86% unaided brand awareness for the WITE-OUT name…


Plaintiff has not put forth evidence demonstrating that Greenpoint has achieved secondary meaning either in New York or nationally. While its survey, assuming its validity, may demonstrate some name recognition in the New York metropolitan area for the term “Greenpoint Bank,” this is insufficient to establish secondary meaning, for either federal or state infringement purposes, for the term “Greenpoint.” In addition, the flaws in the survey, from lack of objectivity in creation and determination of parameters because of the involvement of Plaintiff’s law firm, lack of a control group, and the addition of questions a third of the way into the sampling, cast serious doubts on the value of the survey and any conclusion the Plaintiff seeks to draw therefrom.
...[Plaintiff] also points to a recent customer satisfaction survey as evidence supportive of the District Court’s finding that the mark achieved secondary meaning. However,...[Plaintiff’s] reliance on that survey is misplaced because the survey is wholly irrelevant to whether...[Plaintiff] established secondary meaning in the “Commerce” mark as of 1983. First, based on the recency of the survey, it follows that it is not particularly probative of customer views in 1983. Second, and more importantly, customer surveys and customer testimony are relevant to the secondary meaning inquiry only insofar as they are probative of the strength of the “Commerce” mark in the collective consumer consciousness. The satisfaction of customers with ...[Plaintiff’s] services does little to demonstrate that when customers see the word “Commerce” they associate it with...[Plaintiff, apart from Plaintiff’s composite mark].


By virtue of Ford’s and Ford Credit’s long use, advertising, and promotion, the FORD Name and Marks are distinctive and famous, possessing a strong secondary meaning signifying Ford and the financial services it offers and provides. Survey results evidence this fame and secondary meaning. In a recent survey of individuals seeking or planning to seek investment and other financial information or advice, 54% of consumers throughout the United States stated that they believe Ford is responsible for the Internet site at www.fordfinancialsolutions.com.


The...Survey conducted by Plaintiff’s expert witness...in the summer of 1999, established Plaintiff’s use of its mark has resulted in the general public in the United States identifying the words “SEVENTH-DAY ADVENTIST” with the Plaintiff Church. Further, the...Survey showed that the Plaintiff’s mark has achieved secondary meaning in the minds of the general public throughout the United States as identifying the Plaintiff Church. Two prior surveys conducted by the Gallup Organization in 1970 and 1986 also support strong identification in the minds of the public between the mark SEVENTH-DAY ADVENTIST and the Plaintiff Church.


...The types of evidence relevant to the question of secondary meaning include: (1) customer surveys; (2) exclusivity, length, and manner of use; (3)
amount and type of advertising; (4) media coverage; (5) sales volume and market share…

Here, [Plaintiff] has produced substantial evidence of secondary meaning. First, [Plaintiff] has introduced survey evidence supporting the conclusion that consumers strongly associate canary yellow sticky notes with [Plaintiff] and the POST-IT product.


With respect to acquired distinctiveness…

Applicant has also relied upon certain material from…[a prior litigation]…pilot study…

…

For a variety of reasons, we have given little weight to applicant’s ten-year old pilot study. Among other things, the respondents in that study were shown applicant’s watch which contained allegedly origin-indicating matter other than the asserted mark herein sought to be registered. This reason alone is sufficient to give little weight to the study.


…[Plaintiff’s] survey expert, found that eighty-five percent of the professional power tool users that he polled identified yellow and black with Black & Decker or DeWalt…a level of consumer recognition that parallels the extent to which the public associates golden arches with the McDonald’s Corporation…

…

Although…Defendants’ survey expert, pointed out that…[Plaintiff’s expert] could only measure consumer perceptions in 1998…, the fact that brand identity takes time to develop…means that…[Plaintiff’s expert’s] conclusions inferentially support…how quickly consumers began to associate yellow and black with the DeWalt line…

In light of this evidence, the Court finds that the yellow and black color scheme on the DeWalt line achieved secondary meaning in the minds of professional power tools users by May, 1992…


In order to test for secondary meaning,…[Plaintiff’s survey] showed the respondents (women 18 years or older who would consider purchasing a handbag for more than $50) three COACH bags with the COACH hang tags removed…[Plaintiff’s survey] also showed these respondents three leather handbags manufactured by Kenneth Cole. These three bags are of comparable size to the COACH bags, but are in other respects-leather texture, hardware, and
overall design-dissimilar to COACH products...In half the instances,...the participants [were shown] the COACH bags first and, for the other half, he displayed the Kenneth Cole bags first... participants...were not allowed to touch the bags.

...[Plaintiff’s survey] then asked each respondent whether she believed each set of handbags looked like a particular brand of handbags or not, and, if yes, what brand of handbags she believed the handbags looked like...In the weaker COACH markets, 57 percent...responded by saying that the three COACH handbags looked like a particular brand...Further, close to 30 percent of all respondents identified COACH as the brand of the COACH bags; only 3 percent of the respondents identified COACH as the manufacturer of the Kenneth Cole bags...

In the stronger COACH markets, 75 percent...believed the COACH bags looked like a particular brand, and of these, close to 65 percent identified COACH as the brand...Only 1 percent of the respondents believed the Kenneth Cole bags looked like COACH bags...

...as shown by...[Plaintiff’s] survey, ...consumers have come to recognize the trade dress in COACH’s Classic Collection...


...out of 200 people interviewed in ...[Plaintiffs’] telephone survey, 42% of all respondents had heard of or seen a motion picture with the words “River Kwai” in the title...Seventy-four percent of those respondents identified that motion picture as Bridge...[Plaintiffs’] mall survey of 100 people disclosed that 51% of all respondents had heard of or seen a motion picture with the words “River Kwai” in the title...Again, approximately 73% of those respondents gave a description of Bridge...

Defendants...suggest that...[Plaintiffs’] survey is flawed because it posed leading questions to its respondents...The question posed by [Plaintiffs’ expert] was whether they had ever heard of any motion picture or motion pictures with the words “River Kwai” in the title. Defendants suggest that a better question would have been “with whom or what do you associate ‘River Kwai.’...Since Plaintiffs claim trademark protection in the title “The Bridge on the River Kwai” and in the words “River Kwai” when used in the title of a motion picture, this Court finds that [Plaintiffs’ survey] question was appropriate...Defendants’ suggested question might have been appropriate had Plaintiffs claimed a trademark in the phrase “River Kwai” for any purpose. Here, however, in the context of the narrower trademark claimed by Plaintiffs, Defendants’ suggestion is off the mark.

...Although...[Plaintiffs’] survey is not perfect, and thus is not conclusive evidence of secondary meaning, this Court finds that ...[Plaintiffs’] survey establishes some evidence that Plaintiffs’ marks have attained secondary meaning.
In order to indicate secondary meaning, consumer surveys must prove more than a “relatively small number of people” associate the mark with the source of the product. 2 McCarthy at §15:42. Often, consumer recognition below 25% fails to establish secondary meaning. See e.g., Zippo Mfg. Co. v. Rogers Imports, Inc., 216 F Supp 670 (S.D.N.Y. 1963) (25% insufficient); Roselux Chemical Co. v. Parsons Ammonia Co., 49 C.C.P.A. 931, 299 F.2d 855 (C.C.P.A. 1962) (10% insufficient)…

...[Plaintiff] has failed to submit its own consumer survey. Instead,...[Plaintiff] cites [Defendant’s] survey to prove that a sufficient percentage of consumers are familiar with a business by the name of “Yankee Spirits.”...[Plaintiff] explains that 29% of the participants in the survey (residents within an eight (8) mile radius of ...[Plaintiff’s] store) had heard of “Yankee Spirits” in June of 1996...

...[Defendant]...argues that 29% is not sufficient as a matter of law to warrant a finding of secondary meaning...[Defendant] argues...that “Plaintiff has proferred [sic] no direct evidence whatsoever on the issue of secondary meaning...[Defendant’s] failure to produce its own survey evidence and the fact that [Plaintiff] presents statistics taken from... [Defendant’s] survey are far from fatal to ...[Plaintiff’s] cause. Of particular importance is the fact that...[Defendant’s] survey was conducted within one month of the opening of...[Plaintiff’s] store...Given this limited time period...[the 29% is]... understandable...

Thomas & Betts Corp. v. Panduit Corp., 138 F.3d 277, 295 (7th Cir. 1998)

...[Defendant] argues...that the...survey was flawed because the interviewees were not consumers...when, as here, the relevant market includes both distributors and ultimate purchasers, the state of mind of dealers is important in determining if secondary meaning exists. While the fact that no ultimate consumers were surveyed may be relevant in determining the weight the survey should be given...

The district court...found that the...survey did not establish secondary meaning, since the 30% recognition was insufficient to establish secondary meaning. The court cited Spraying Systems, 975 F.2d at 394, for the proposition that “while a 50-percent figure is regarded as clearly sufficient to establish secondary meaning, a figure in the thirties can only be considered marginal.”...We noted that figures in the 30% range were marginal and did not establish secondary meaning as a matter of law. Such evidence is still probative of the issue of secondary meaning...the survey provides relevant evidence of secondary meaning which raises material questions of fact.
LIKELIHOOD OF CONFUSION SURVEYS


…[Plaintiff’s expert] conducted a survey…“to determine whether [Defendant’s] use of POWERHOUSE on its exercise equipment has confused consumers to erroneously think that the exercise equipment is affiliated, connected, or otherwise associated with the Plaintiffs.”…interview[ing] sites [were selected where] there were three or more [of Defendant’s] fitness centers within a twelve mile radius…surveyors interviewed…individuals…age eighteen years or older, who had worked out in a fitness center, club, or gym in the preceding five years…Those individuals were brought into a room in which five branded pieces of workout equipment were on display…After the individuals examined the equipment, they were asked “Which, if any, equipment brand that you see in this room do you believe is sponsored by, licensed by or associated with a particular fitness center, fitness club or fitness center chain?”…If the participant identified a particular piece of equipment, he or she was then asked: “What is the fitness center, fitness club or fitness chain?”…

First, “[i]dentification of the proper universe is recognized as a critical element in the development of a survey.”…In a case where the plaintiff alleges that the defendant’s use of the plaintiff’s marks causes customers to mistakenly think that the defendant’s goods or services are from the same source as or are connected with the plaintiff’s goods or services (referred to as “forward confusion”), “the proper universe to survey is the potential buyers of the junior user’s [i.e. defendant’s] goods or services.”…

[Plaintiff’s] survey did not focus on buyers of fitness equipment; rather the population…surveyed was limited to individuals who worked out at fitness centers, clubs, or gyms in the preceding five years. These are individuals who are customers or potential customers of [Plaintiff’s] products and/or services…

“A survey also is not reliable if it suggests to the respondents an answer that would not otherwise have occurred to them.”…“It is improper to suggest a business relationship where the respondent may previously have had no thought of any connection.”…In this case, [Plaintiff’s survey] asked respondents: “Which, if any, equipment brand that you see in this room do you believe is sponsored by, licensed by or associated with a particular fitness center, fitness club or fitness center chain?” This question clearly led respondents to find, not only a connection or association between the fitness equipment shown and some other product or service, but specifically a fitness center, club, or chain…

…the only evidentiary proffer as to actual confusion of [Defendant’s] product for one offered or sponsored by [Plaintiff] is a minuscule number of responses to one telephone survey item in which respondents were queried as to whether they could “name any company or store that [they] think might offer a product called ‘Charbucks.’”…In response to that question, only 3.1% of the 600 respondents named [Plaintiff] as a possible source of a “Charbucks” product…Particularly in light of the fact that this survey item was administered by telephone and did not present the term “Charbucks” in the linguistic or visual context in which Defendant uses it, this evidence is insufficient to make the actual confusion factor weigh in Plaintiff’s favor to any significant degree.


In the present case, the Board finds that defendant has established the absence of any genuine issue of material fact and that it is entitled to judgment as a matter of law…

…we find that plaintiff’s survey does not raise a genuine issue of material fact with respect to the similarities of the parties’ respective marks…

…We observe, too, that the survey, at a minimum, is not based on established or recognized survey techniques; was prepared and administered by a biased party; and was not analyzed in any statistically meaningful way…


…The evidence presented by Starbucks is sufficient to meet its burden or proving that [Defendant’s] use of the “Sambuck’s” mark infringes [Plaintiff’s] registered trademarks.

…[Defendant’s] use of the “Sambuck’s” mark need not be likely to confuse a majority of consumers. Rather, the defendant’s mark need only create a likelihood that an “appreciable number” of ordinary consumers would be confused…The percentage of consumers likely to be confused can be in the range of 10 to 15 percent or even lower.

…The likelihood of confusion that gives rise to trademark infringement liability need not involve the source or origin of the goods at issue. Rather, the “appropriate inquiry is whether the average purchaser would be likely to believe that the infringer’s product has some connection with the trademark owner.”…

…A likelihood of confusion need not exist at the time a consumer makes a purchase decision. Infringement occurs even if the likelihood of confusion terminates before a sale is made by the defendant. “Initial interest” confusion occurs when the defendant uses the mark in a manner that is likely “to capture
initial consumer attention, even though no actual sale is finally completed as a result of the confusion.”…

…[Defendant’s] use of the “Sambuck’s” mark creates initial interest confusion. Thus, [Defendant] has committed trademark infringement even if, as she claims, consumers who make purchases at her store have “no reason to believe that [it is] related to, or in any way sponsored by,” [Plaintiff] when they finally make a purchase.


Plaintiff…submitted a survey to show actual confusion…The survey was of 302 people who were employed by personal care physicians, their employment involved submission of medical claims to insurance companies, and the submission of those claims was done or prospectively would be done over the internet. The test group was composed of 202 people, and the remaining 100 people composed the control group. [n5 The purpose of the control group is to account for “noise,” that is, any external factors that may improperly influence participants’ opinions. In order to account for noise, the survey questioned participants in the control group about the association between plaintiff’s mark and a “fictitious mark, ‘ProxyMed.’”…Any confusion that the control group had would be considered noise because the comparison mark was presumably fictitious, and thus must be attributable to other factors. However, it came to light during the hearing on plaintiff’s motion that ProxyMed is not a fictitious name; it is an actual company that provides electronic claims to healthcare providers…This obviously casts tremendous doubt on the survey’s ability to account for noise.]

…

After tallying the responses and contrasting the test group with the control group,…[Plaintiff’s expert] estimates that approximately 25.7% of the participants expressed that they “thought that the two names…were affiliated or connected in some way because of their same or similar name.”…However, this survey is both procedurally and substantively flawed. First, plaintiff introduced the survey in its reply brief, not its moving brief. This maneuver deprived the defendants of a meaningful opportunity to respond within the normal course. As such, the Court will disregard this “newly minted” evidence…

Second, even if the Court were to consider the survey, it appears to suffer several flaws that render it unreliable, two of which the Court will address at this time. “Survey evidence can sometimes demonstrate evidence of actual confusion but only to the extent ‘that the survey mirrors the real world setting which can create an instance of actual confusion.’” “…Here, plaintiff’s survey does not mirror the “real world setting.” The marks in question identify the sources of web-based programs. And yet, this survey was done over the telephone, participants were not shown the marks, nor were they directed to websites that contained the marks. Thus, any alleged association the participants found between the marks was based on sound alone, and does not address how the marks might be viewed
in a commercial setting. By removing the marks from their proper commercial setting, plaintiff unjustifiably skewed the results.


In considering what weight to give a survey, the court may consider a variety of factors, including survey design, nature of the questions asked, and the experience and reputation of the surveyor…Qualified respondents viewed the displays side-by-side…They then answered four questions. Two focused on the likelihood of confusion between the products when they were displayed side-by-side. One focused on the likelihood of confusion if the products were sold in the same store, but were not placed side-by-side, while the last focused on the likelihood of confusion if the products were not sold in the same store…Having reviewed the survey, the court concludes that the methodology employed by [Plaintiff’s expert] raises serious questions regarding the reliability of her results…There is no evidence in the record, however, that [Plaintiff’s] and [Defendant’s] products are sold side-by-side other than in a single K-Mart display…As a consequence, [Plaintiff’s] survey did not replicated marketplace conditions…


The Court found that defendant’s cross examination…revealed a number of weaknesses in GEICO’s survey evidence. First, the control did not successfully demonstrate the source of the test group’s confusion. As the survey expert admitted, an effective control should have removed from the page viewed by the test group the allegedly infringing elements for which GEICO wanted to measure confusion…This would have allowed the evaluator to subtract any degree of confusion expressed by the control group from that expressed by the test group, with the resulting difference representing the confusion attributable to the eliminated elements—similar to the manner in which medical researchers subtract out the “placebo effect” of a drug or procedure under examination. However, the survey’s control…did not function as an accurate measure of the confusion caused by non-infringing elements…the control retained the use of “GEICO” as a keyword, which itself was alleged to be a source of confusion. Further, instead of removing only the references to GEICO in the Sponsored Links, which would have measured whether the use of the trademarked keyword to place relevant Sponsored Links or the appearance of the mark in the ads was responsible for respondents’ confusion, the survey removed all references to car insurance and replaced them with clearly unrelated NIKE ads. Thus, the control did not reveal which aspects of the insurance-related Sponsored Links caused respondents’ confusion—the use of GEICO’s mark in the ads or the ads’ mere reference to insurance. [n15 No respondent in the control group expressed confusion when
asked whether clicking on one of the NIKE Sponsored Links would direct him to GEICO’s Web site…]

Second, the survey design introduced “demand effects” and “order effects” that could have tainted respondents’ answers that appeared to indicate confusion. A demand effect results when the interviewer’s questions or other elements of the survey design influence participants’ responses by suggesting what the “correct” answers might be or by implying associations that might not otherwise occur to participants…order effect results when a participant’s answer to one question affects his answers to subsequent questions. For obvious reasons, both effects can significantly bias the survey results. In this instance…the interviewers repeatedly questioned respondents about their behavior and assumptions with regard to GEICO and obtaining GEICO quotes. Responses to subsequent questions, such as whether the participant thought the Sponsored Links were affiliated with any company, easily could have been influenced by the earlier questions about GEICO, making the participant more likely to assume that “GEICO” was the right answer or what the interviewer wanted to hear…the order effect, also undercut the assessment of confusion…Of the five Sponsored Links listed, only the last one did not refer to GEICO in its heading or text. By the time respondents considered this ad, they had already seen the four others that did contain the GEICO mark, calling into question whether they would have expressed similar confusion if faced only with insurance-related ads that appeared next to the organic results for “GEICO” but did not mention the mark itself.

Third, discrepancies between the Web page selected to be shown to the survey participants and the actual pages users are likely to see when searching on “GEICO” further weakened the reliability of the results…the page chosen included more Sponsored Links than the average Google results page. In addition…the overall appearance of the outdated screen shot shown to survey participants differed markedly from the Google results page that a user would encounter in running a real search…


[Plaintiff’s] survey also fails to create a genuine issue of material fact regarding the likelihood of confusion. In the survey, participants who had played the [Defendant’s] games were shown a picture of the [Plaintiff’s] ice cream truck and told, “Please take a look at this. Feel free to comment on anything that strikes you about it, positively or negatively.” Seventeen percent of the participants mentioned that it reminded them of or looked like images from the [Defendant’s] games. As a follow-up question they were asked, “Specifically, does this or does this not remind you in any way of an ice cream truck or character that you have seen before or are aware of?” Thirty-four percent of those surveyed indicated that it reminded them of something from the [Defendant’s] games. But these responses are not probative of confusion. A leading trademark treatise states, “‘Confusion’ means more than that the junior user’s mark merely ‘calls to mind’ the senior user’s mark…While the junior user’s mark may call to mind the senior user’s
famous mark, this alone is not sufficient for a likelihood of confusion.”…The
survey fails to address the relevant inquiry, which is whether consumers are
confused as to the existence of any sponsorship of or affiliation or association
[between Plaintiff and Defendant].


…[Plaintiff] conducted a survey of 350 consumers in an effort to
determine whether they were likely to confuse the parties’ marks…A test group
was shown the blue “MetBank” logo as photographed at the 99 Park Avenue
location and a control group was shown a similar blue logo with the name
“MetroBank.” The images were identical in size, quality, and manner of
depiction…The results of the survey were that 38% of the test group believed that
MetBank was owned, operated, associated with, or sponsored by [Plaintiff]. In
contrast, only 4% of the control group believed that “MetroBank” was owned,
operated, associated with or sponsored by [Plaintiff]….

In opposition, [Defendant] submits the declaration of…an expert in
consumer surveys, who has reviewed the [Plaintiff’s] survey…Notably,
[Defendant] did not offer evidence of any consumer study of its own.


…[Plaintiff’s] evidence of actual confusion was extremely weak while
[Defendants’] evidence, though not flawless, tended to prove that actual confusion
was minimal at worst and nonexistent at best. [Plaintiff’s] evidence of actual
confusion consisted entirely of testimony by several interested witnesses
recounting a handful of anecdotes, including a number of hearsay statements by
unidentified and unidentifiable declarants. [Defendants], on the other hand,
submitted consumer surveys tending to rebut charges of actual consumer
confusion. [Plaintiff] points out, and the district court noted, various flaws with
these surveys. But as [Defendants] correctly point out, [Plaintiff’s] failure to
present its own consumer survey weighs against a finding of consumer
confusion…

Survivor Media, Inc. v. Survivor Productions, 406 F.3d 625, 629-631 (9th Cir. 2005)

After Survivor aired, [Plaintiff] encountered a few people who wondered
whether his business was sponsored by Survivor. One retailer and one customer
mistook Survivor sunscreen for [Plaintiff’s] product, and one trade show attendee
thought that [Plaintiff’s] business was endorsed by Survivor’s producers.
…a survey commissioned by Survivor revealed that fewer than two
percent of four hundred and two sunscreen purchasers were confused by the two
marks…
We have recognized two distinct claims in the trademark infringement context: forward confusion and reverse confusion…Forward confusion occurs when consumers believe that goods bearing the junior mark came from, or were sponsored by, the senior mark holder…reverse confusion occurs when consumers dealing with the senior mark holder believe that they are doing business with the junior one…

We need not determine whether [Plaintiff] raised a material issue of fact on the forward confusion claim. [Plaintiff] may not proceed on this theory because he failed to reference it in his complaint…


I agree with [Defendant] that there are at least three significant problems with the [Plaintiff’s expert’s] survey. First, consumers were never shown any products. Instead, the survey was designed to determine whether the two logos were, in the abstract, confusingly similar. That two logos may be confusing when viewed in isolation, does not show that their use on two separate products is also confusing. Second, the survey did not use the entire trademarked logo for the Magna Doodle. [Plaintiff’s expert] left out two potentially distinguishing markers - the words “The Original” and the Magna Doodle slogan - even though those items have consistently been present on the actual Magna Doodle products. Third, the survey’s “internal control” seems inadequate. It does not account for the possibility that respondents could have relied on non-protected similarities such as similar colors…

*CareFirst of Maryland, Inc. v. First Care, P.C.*, 350 F. Supp. 2d 714, 725 (E.D. Va. 2004)

…This Court [finds] that two people out of 130 indicating actual confusion is de minimus…this number is far below ten percent of the survey respondents, a threshold that the United States Court of Appeals for the Fourth Circuit established in order for survey evidence to indicate likely actual confusion…


…[Plaintiff] had ample opportunity to conduct his own survey, but he chose not to…

[Plaintiff] was not required to conduct his own survey, but he presented no other evidence of actual confusion or likelihood of confusion…with one exception. That exception is a presentation showing the results of searches conducted on two automated search engines. The search engines retrieved web sites related to both the [Plaintiff] and the [Defendant]. This does not mean, however, that the search engine was “confused” as to the source of the sites…But those results just take us
back to the same point about confusion: would a consumer, looking at the
different web-sites, think that [Defendant] and the [Plaintiff] were
somehow from the same source?…

_In re Borysiewicz, 2004 T.T.A.B. LEXIS 622, *2 (T.T.A.B. 2004)_ This disposition is not citable
as a precedent of the T.T.A.B.

In addition, we note that in [the] reply brief, applicant refers for the first
time to the “results of a survey conducted as to whether consumers are likely to be
confused as to the marks CIELO and HEAVEN.”…inasmuch as the evidentiary
record in an application should be complete prior to the filing of an appeal, such
evidence is untimely…Moreover, the purported results are of no probative value
in any event given the absence of any information as to the methodology utilized
in conducting the consumer survey…

_Scott Fetzer Co. v. House of Vacuums Inc.,_ 381 F.3d 477, 487-488 (5th Cir. 2004)

…In assessing the validity of a survey, we look to two factors: first, the
manner of conducting the survey, including especially the adequacy of the
universe; and second, the way in which participants are questioned…

…In an infringement action, “the appropriate universe should include a
fair sampling of those purchasers most likely to partake of the alleged infringer’s
good or services.”…The universe in [Plaintiff’s] survey consisted entirely of
persons who purchased Kirby vacuum cleaners through [Plaintiff]. This group is
uniquely familiar with [Plaintiff’s] marketing and distribution techniques. Thus,
the survey says nothing about the ad’s effect on the class of potential consumers
of new Kirby vacuum cleaners, a class that includes a large proportion of persons
who have not yet purchased a Kirby…

In any event, flaws in the questions asked prevent the survey from proving
confusion even among potential consumers…first, the surveyors asked whether
[Defendant] “is in any way affiliated with, connected with, sponsored by,
associated with or authorized by” Kirby. The use of the phrase “in any way”
prodded survey participants to search for any connection, no matter how
attenuated, between the two companies. Second, the survey question suggested a
connection between [Defendant] and Kirby instead of permitting participants to
make their own associations. A survey question that begs its answer by
suggesting a link between plaintiff and defendant cannot be a true indicator of the
likelihood of consumer confusion…

2004)_

…The respondents in [Defendant’s] survey were…asked, “Based on what
you just saw, do you or don’t you know who or what brand or company makes or
puts out the sugar substitute that I showed you?”…
…the tortured wording of this question likely contributed to its extremely low response rate. The question uses the word “or” four times in a single sentence…Following the…“admonishment” to respond only if the [sic] they knew the correct answer, and not to guess, participants in [Defendant’s] survey overwhelmingly indicated that they did not know “who or what brand or company makes or puts out” the product they had just seen.

…[Defendant’s] expert…testified that, in formulating this question, he was guided by the survey conducted and approved by the Court in Union Carbide Corp. v. Ever-Ready Inc….The actual question asked in Ever-Ready was much simpler… “Who do you think puts out the lamp shown here?” …The differences between [Defendant’s expert’s] question and the question in Ever-Ready are material, and likely affected the responses.


… Plaintiff did not conduct a consumer survey to assess whether a likelihood of confusion would occur between easyedge SM and edgeWIRELESS® or plaintiff’s rate plan marks. Instead, plaintiff obtained the services of…a brand marketing consultant with over twenty years experience in advertising…

…Specifically, [Plaintiff’s expert] was asked to address three questions:

1. Does plaintiff have a viable brand in the marketplace?
2. If easyedge SM was introduced into plaintiff's markets, would there be a likelihood of confusion?
3. If so, what would be the likely effect on plaintiff?

…Plaintiff's expert report does not alter the court's conclusion that no confusion is likely to occur…

…[Plaintiff’s expert] did not base his opinion on survey evidence, marketing research, or other empirical data...Instead, [Plaintiff’s expert] testified that his conclusion was “an educated estimate based on my experience.”…

… I do not find that the lack of survey evidence warrants a presumption that the results would have been unfavorable to plaintiff…


… “[Plaintiff’s] strongest evidence purporting to show actual confusion would be [Plaintiff’s expert’s] Report concluding that one-third of his respondents believed [Defendant] and [Plaintiff] to be affiliated.”… However, the district court found that flaws in methodology meant that the Report carried little probative weight… We agree… The district court also declined to infer the possibility of confusion from the United States Patent and Trademark Office's refusal to register
[Defendant’s] mark. Therefore, the district court concluded that this element did not support [Plaintiff].


The 2000 survey conducted by [Plaintiff’s] expert also demonstrated a significant degree of confusion among consumers…approximately 15% of all premium cigar consumers were confused…

…Figures comparable to those in the 2000 survey have been found probative of a likelihood of confusion…


…participation in the administration of the survey by those with knowledge of the litigation and the use of leading questions raise the risk of insincerity in responses and cast doubt on the trustworthiness of the survey…The questions challenged as leading clearly are both in form and in context (i.e. considering the preceding questions). Furthermore, [Plaintiff’s expert] and his son should not have administered the survey.


…Respondent objects to this testimony on numerous grounds including that [Petitioner’s expert] is unqualified to render an expert opinion, the methodology of the survey is flawed, and the results are unreliable. We agree with respondent to the extent that we can give the survey little, if any, weight. [Petitioner’s expert] “works almost exclusively as a distributor for [Petitioner].”…He has “a two-year degree from what was called [H]eald Business College” and he has taken a course in Probability in Statistics…The witness indicated that he had no training or background in developing consumer surveys in likelihood of confusion cases…

The “survey” petitioner has submitted was really an Internet poll…Participants were instructed that: “If you don't know an answer to a question you are better off just taking your best guess and quickly moving on.”…Anyone who visited the witness’s website could take the test and there was no attempt made to exclude participants who were not potential purchasers of nutritional supplements…

…Because of the lack of screening of participants and the vagueness of the question, among other things, this survey offers little support for petitioner.

Plaintiff’s survey statistics rely on numerous leading questions that suggested their own answers…and that are therefore entitled to little weight in assessing consumer confusion...

Even if [the survey] questions are disregarded, the survey is burdened by other flaws. To have substantial probative value, Plaintiff’s survey must examine the impression of a junior mark on a potential consumer… Plaintiff’s expert… testified…that in the survey he did not show respondents an example of a SaveNow pop-up advertisement [and] also did not ask whether survey respondents had ever seen a SaveNow pop-up ad….did not attempt to distinguish between SaveNow pop-up ads and other pop-up ads,…and did not determine whether differences between SaveNow ads and other pop-up ads might have affected users’ perceptions of the advertisements provided by SaveNow…

… Accordingly, [Plaintiff’s] survey, as designed and carried out, is not dispositive of whether pop-up advertisements generated by the SaveNow software has caused actual confusion among SaveNow users, and is not evidence of actual confusion.


…[Defendant’s expert] admits that while his survey shows some “confusion,” it does not show what caused that confusion because he did not test causation… In addition, the [Defendant’s] survey failed to use any controls… Although the results of [Defendant’s] survey shows some confusion or some likelihood of confusion, it does not show that this confusion exists because the respondents are confused by the titles of the publications at issue…


…It is clear from a review of…the most critical factors that [Plaintiffs’ expert’s] surveys do not provide reliable evidence of likelihood of confusion…

“The To have substantial probative value, a survey…must…be designed to examine the impression presented to the consumer by the accused product…”

…at a minimum, survey respondents should have been shown the item that is said to be infringing or confusing…

Identification of the proper universe is recognized as a critical element in the development of a survey…

In this case, the relevant universe consists of people who are likely to bank or look for a mortgage online…
Because [Plaintiffs’ expert] failed to survey the appropriate universe of people, the results of his 1-800 [contacts] and Gator surveys cannot be extrapolated to this case regardless of whether those respondents were demographically representative of the general population of Internet users...Only a fraction of Internet users bank and obtain mortgages online; therefore, there is no way to know whether any of the Gator and 1-800 [contacts] respondents were users or potential users of plaintiffs’ websites...

A survey is not reliable if it suggests to the respondents an answer that would not otherwise have occurred to them. More specifically, “it is improper to suggest a business relationship where the respondent may previously have had no thought of any such connection.”

...The Court cannot find [Plaintiffs’ expert’s] conclusions on this subject reliable, because the survey questionnaire repeatedly suggested to respondents a link between pop-up ads and websites...

[Plaintiffs’ expert’s] surveys suffered from numerous other flaws, including the use of an Internet Panel...and the failure to use control questions to generate an error rate...Of even greater significance, [Plaintiffs’ expert] failed to employ an experimental design that established causation...

...Plaintiffs have...not established any likelihood of confusion in defendant’s “use” of their marks...


[Plaintiff] has submitted a survey which found “a substantial likelihood of source confusion” between [Plaintiff] and [Defendant] based on the use of the Billy Budd mark. The survey...revealed that a total of twenty-four percent of consumers who were shown a tap handle identical to that distributed with the kegs of [Defendant’s] product believed that [Plaintiff] put out the product or was affiliated or connected with, or had given permission to, whomever did...Each [respondent] was shown either a tap handle identical in all respects to that which had been distributed with the kegs of [Defendant’s] product, or one identical in all respects except the insertion of the word “Boy” for “Budd.”

...[Defendant] attempts to challenge [Plaintiff’s expert’s] conclusion with the testimony of its own expert...The fact that [Defendant] has procured an expert affidavit which purports to contradict that of [Plaintiff’s] expert, however, does not necessarily render summary judgment inappropriate...

...[Defendant’s expert] also calls [Plaintiff’s] survey “problematic” because the interviews occurred in the “artificial environment” of a shopping mall, rather than in a bar, restaurant, or store. [Defendant’s expert] opines that in such a “realistic purchase environment, the chances that a beer purchaser would be confused between Billy Budd and Budweiser are quite remote.” As an initial
matter, this testimony is insufficient to defeat summary judgment because it lacks any foundation, i.e., [Defendant’s expert] does not present the conflicting results of a consumer study which was actually conducted in a bar, restaurant, or other beer retail outlet or provide any other basis for his opinion. Furthermore, [Defendant’s expert’s] testimony runs afoul of settled law that mall-intercept surveys of the kind conducted by [Plaintiff’s expert] are acceptable proof of actual confusion…


The [Plaintiff’s] Survey also tested for consumer confusion in the marketplace regarding the parties’ packaging trade dress…[Plaintiff’s expert’s] description of the survey results goes on to conclude that, “in total,…10% of the respondents said that the similarity of [the parties’] packages was the basis for their belief that the Famous Squish candy was ‘put out’ or made by the same company as Original Swedish Fish candy or that it had obtained an approval or permission from Original Swedish Fish.”…

…this…conclusion of a 10% consumer confusion over packaging overstates the point since the underlying data show only a 9.5% confusion level which was rounded upward by [Plaintiff’s] expert to 10%…Even assuming that the [Plaintiff’s] Survey was conducted within the bounds of acceptable testing methodology…the survey’s report that only 9.5% of respondents expressed confusion over the parties’ packaging trade dress is too low to sustain [Plaintiff’s] contention of actual confusion…

This disposition is not citable as a disposition of the T.T.A.B.

…applicant argues that the survey was unfair because the shirts on which the marks were shown to the survey respondents were identical to shirts on which opposer’s mark is actually used…This argument conveniently overlooks the fact that as identified in the application, applicant’s goods encompass the goods on which opposer has used its mark…Because applicant shows its mark in typed format in the application, applicant would be free to adopt any style of lettering it chooses, so the fact that the shirts used in the survey present the marks in block letters does not invalidate the results of the survey. Similarly, in view of the absence in the application of restrictions or limitations as to the types of shirts, for example, the channels of trade through which they will move, and the purchasers applicant plans to target with its advertising for its goods, opposer was under no obligation to use only high-end items of apparel or to choose only well off, sophisticated consumers for its survey.
[In Plaintiff’s survey] the participants were randomly divided into two
groups. The test cell was exposed to a photograph of Cody Cow wrapped around
a computer monitor; the control cell saw a photo of the tiger stretch pet wrapped
around a monitor. The surveys were otherwise conducted identically... The
exposure to the photograph mimicked the overall commercial impression
consumers would receive in the marketplace. It also resembled how consumers
would view Cody Cow in advertising materials...

n4 While allowing the survey participants to look at the photograph, the
person conducting the survey stated:

Here is a picture of a product that is used to decorate or personalize a
computer monitor. As you can see from the picture, it stretches to fit
around the screen. Please take a look at this as you would if you saw it on
somebody’s computer or if you were shopping for personal computer
accessories either on the internet or in a computer store. Take as much
time as you normally would when looking at something like this or when
shopping for such products. Let me know when you are finished.

Participants were first asked, “Based on what you just saw, do you or do
you not have a belief as to who or what company or companies makes or puts out
the product in the picture that I just showed you?” Those who had a belief were
asked “Who or what companies do you believe makes the product in the picture
that I showed you?” They were also asked whether they knew of other products
made by whomever made the product in the picture, what those products were,
and whether they believed that whoever made the pictured product is or is not
related to, sponsored by, or associated with any other source or company. After
each question, they were asked to explain why they came to that conclusion...

...[Plaintiff’s expert] subtracted the percentage of people who identified
[Plaintiff] in the control group from the percentage of people who named
[Plaintiff] in the test group. This resulted in the adjusted likelihood of
confusion...

Displaying Cody Cow in the post-sale context, moreover, does not
invalidate the survey since the Lanham Act protects post-sale as well as point-of-
sale confusion...


...there is no evidence of any consumer confusion. The Defendants
commissioned a survey, which was performed in accordance with accepted
market testing techniques. This survey revealed that fewer than 3% of respondents
saw any connection between the Plaintiff’s magazine and [the magazine]
produced by the Defendants. This rate of confusion is not sufficient to demonstrate a likelihood of confusion. See *Cumberland Packing Corp. v. Monsanto Co.*, 140 F. Supp. 2d 241, 254 (E.D.N.Y. 2001) (finding survey’s confusion rate of 7.84% insufficient to raise material fact as to likelihood of consumer confusion); cf. *RJR Foods, Inc. v. White Rock Corp.*, 603 F.2d 1058, 1061 (2d Cir. 1979) (finding a consumer survey showing a fifteen to twenty percent rate of product confusion to be probative of a showing of confusion)…


[Plaintiff’s] survey results…concluded that [Defendant’s] ROCKLETS are mistaken by consumers as being a Mars product, or being a product authorized by Mars, because of the packaging. The survey used, in one “cell,” a package of ROCKLETS plain chocolate candy…respondents…were shown the ROCKLETS package and asked, “who, or what company, do you believe puts out these candies?”…37.80%, answered that the ROCKLETS candies in the brown package were put out by Mars or M&M’s®, despite the appearance of “ROCKLETS” and “Arcor” on the packages…When asked the follow-up question, “what other brand name or names, if any, do you believe are used by the company that puts out these candies,”…21.53%, answered either Mars or M&M’s®…

The survey also used two control cells, one which used a white paper package with the words Arcor and ROCKLETS on it…The package had a small clear window through which one could see colored lentils…The other control cell used a similar white package, but the candies seen through the small clear window in the package were all white lentils…

…[Plaintiff’s survey] shows that at least 29.22% of respondents were confused as to the origin of ROCKLETS candies based on the package alone…That is a significant number, especially when considering that the names ROCKLETS and Arcor appear on the ROCKLETS packages. Contrary to [Defendant’s] counsel’s suggestions, the Court finds that this survey, with the package in isolation, strongly shows that Arcor was successful in imitating the M&M’s® trade dress, albeit with a different name on the front…


…through the evidence of the double-blind survey, [Plaintiff] has demonstrated a triable issue of fact on the issue of post-sale confusion, which occurs when consumers other than the purchaser see the item after it has been purchased…

…A central problem with the survey, however, is that it compared the [Plaintiff’s] can and label to [Defendants’] can and label rather than comparing the [Defendants’] trademark to Defendants’ label. Thus, the results of the survey are geared to a trade dress infringement claim (which encompasses the entire packaging of the goods) rather than to a trademark infringement claim (which focuses on the actual mark). Given this problem, the survey does not provide evidence of actual confusion between the [Plaintiff’s] trademark and the Defendants’ products.


…There are several indicia of reliability a court can consider in assessing the validity of a consumer survey. These factors include whether: “the population was properly chosen and defined; the sample chosen was representative of that population; the data gathered were accurately reported; the data were analyzed in accordance with accepted statistical principles; the questions asked were clear and not leading; the survey was conducted by qualified persons following proper interview procedures; and the process was conducted to ensure objectivity.” (Sports Authority, Inc. v. Abercrombie & Fitch, Inc., 965 F. Supp. 925, 933 (E.D. Mich. 1997) (quoting the Manual for Complex Litigation, Third, § 21.493 (1995)).


…we have not relied upon opposer’s survey, which has certain deficiencies. Purportedly, “the survey resulted in a likelihood of confusion finding of 22.9%.”…

Opposer’s survey was a shopping mall intercept survey conducted in four cities all within opposer’s fourteen state region…A total of 420 respondents, age 18 or older, participated in the survey….the respondents were shown two cards at separate times. One card had U S WEST typed at the top, and the other card had US EAST typed at the top…Consumers were shown the U S WEST card, and then it was removed from their view. Consumers were shown the US EAST card, and it too was removed from their view…

When the first card was taken away, the respondents were then asked…“What company do you think provides the services mentioned in that card? If you do not know, please feel free to say so.” This question was repeated after the respondent was shown the second card. Again…only after the second card had been removed from the view of the respondent. Depending upon their responses to these two questions, certain respondents were then asked the following question: (1) Do you think the services provided in the exhibits I just
showed you are provided by the same company or by different companies? If you do not know, please feel free to say so. If a respondent said “different companies” or “don’t know” to question one above, he was asked…(2) Do you think the companies that provide the services in the exhibits I just showed you are associated with each other in any way or that they are not associated? If you do not know, please feel free to say so. If a respondent said “not associated” or “don’t know” to question two above, he was asked…(3) Do you think that either U S WEST received permission from US EAST to use the name U S WEST or that US EAST received permission from U S WEST to use the name US EAST or did not receive permission? If you do not know, please feel free to say so.

At the outset, we note that all four questions - the initial question which was repeated twice and the three follow-up questions - are in effect a test of the respondent’s memory in that the cards bearing the marks U S WEST and US EAST were removed from the respondent’s view prior to the questions being posed…

…the survey lacked a degree of “control”…

The final three pertinent questions are not only memory based questions, but…are somewhat convoluted…

In short, we have accorded no weight to opposer’s survey. Not only are the questions memory based and convoluted, but in addition, a respondent merely had to give a “wrong” answer to one of the four pertinent questions in order to be counted as part of the 22.9% of the respondents who were “confused.”


In Sara Lee Corporation v. Kayser-Roth Corporation, 81 F.3d 455 (4th Cir. 1996), the Fourth Circuit noted that a survey estimate finding 15% confusion of similarity in marks would demonstrate actual confusion to a significant degree…On the other hand, the court suggested that “survey evidence clearly favors the Defendant when it demonstrates a level of confusion much below ten percent.”…(citing Henri’s Food Products Co., Inc. v. Kraft, Inc., 717 F.2d 352, 358 (7th Cir. 1983)). In addition, while “actual confusion can be demonstrated by survey evidence,…survey evidence is not necessarily the best evidence of actual confusion and ‘surveys are not required to prove liability of confusion.’”…


[Plaintiff] also offers the “professional study” it relied upon in its effort to show secondary meaning to support its claim of actual confusion…

[Plaintiff’s] survey reports that fifty-five percent of the twenty-five participants shown [Defendant’s] tray associated it with [Plaintiff]; thirty-three percent of those shown the [Plaintiff’s] tray were not sure whether the tray originated with [Plaintiff] or [Defendant]…However, once the participants were allowed to inspect the trays, there was little confusion. As [Plaintiff]
acknowledges, “upon closer inspection, respondents could see the [Defendant’s] logo on the back of their tray and most were able to identify the manufacturer.” …

…even if the survey were accepted as accurate…it is not particularly persuasive as to actual confusion: The trays were shown separate from their packaging at a significant distance, and the conditions appear to have been chosen to make it difficult for the participants to discern [Defendant’s] logo before being asked to identify the tray brand…

_Sally Beauty Company, Inc., Marianna Imports, Inc. v. Beautyco, Inc._, 304 F.3d 964, 979-980 (10th Cir. 2002)

…[Plaintiff] points to the survey…which reports that 51 out of 180 participants, or twenty-six percent of participants after adjusting for error, believed that [Defendant’s product] was manufactured by [Plaintiff] based solely on the products’ packaging or appearances. The survey concludes that “[a] significant number of respondents provide ‘package/appearance’ related reasons as a basis for their mistaken belief that [Defendant’s product] is put out by the same company that puts out [Plaintiff’s products]. . . . Even after adjusting for ‘noise,’ confusion remains high[,] accounting for more than one out of four respondents.” [Plaintiff’s] survey is strong evidence of actual confusion…


Due to flaws in its methodology, [Plaintiff’s] Report does not provide support for [Plaintiff’s] case…[Plaintiff’s expert] did not use pictures or advertisements that approximate what a potential customer would encounter in making her television-viewing choices. Thus, by presenting respondents with word lists, [Plaintiff] essentially measured respondents’ word associations devoid of context. Accordingly, the information within [Plaintiff’s] Report does not go to the issue at bar.


[Defendant] produced evidence in the form of a survey of the relevant population…of ophthalmologists and optometrists…

…

The…Survey tested for product source confusion. It asked a series of questions based on a stimulus that was mailed to respondents in a sealed envelope…There were two cells in the survey: (1) a test cell of 200 prescribers that used a[n]… advertisement [for the alleged infringing mark] as the stimulus; and (2) a control cell, also of 200 prescribers, that used an identical …advertisement [featuring a mark not alleged to infringe] as the stimulus…The stimulus was designed to focus the respondent’s attention primarily on the name of the product…

The questions…selected for the survey (“What company do you believe puts out the product whose advertisement you just saw?;” “Please tell me whether
or not you believe the company whose advertisement you just saw puts out any other medications for the eye;” and “Please tell me whether or not you believe that the company whose advertisement you just saw needs authorization, permission or approval from some other company in order to put out the product advertised.”) are a standard type and format of questions used to gauge confusion in trademark cases...[Defendant’s] survey expert...used virtually identical questions in a trademark confusion survey he designed in a prior infringement case...

Five percent of the test cell respondents confused the source of [Plaintiff’s mark] and [Defendant’s mark] and 3.5% of control cell respondents confused the source of [Plaintiff’s mark] and [the control mark], yielding net confusion of 1.5%...


[Plaintiff] offered a survey conducted...in various shopping malls...and is a so-called “two-room” survey. Subjects were...only those who indicated that they drink “liquor, such as gin, rum, tequila, or vodka” on average at least once a month...In the first “room,” the interviewer showed the subject the TETON GLACIER label, without the bottle to which it is normally attached. Then, in the second room, the subject was shown seven or eight empty cooler bottles...and told, “Some, all, or none of these alcoholic beverages may come from the same maker or company as the product on the card I showed you [in the first room]. Which, if any, of these alcoholic beverages do you think come from the same maker or company as the product on the card I showed you [in the first room]?...

... We find two major flaws in [Plaintiff’s] survey that persuade us that it does not reliably indicate the existence of actual confusion. First, we find that the “universe” was not properly defined. The proper universe in a forward confusion case is the universe of potential purchasers of the junior user’s product, here, the cooler drinkers who may purchase Glacier Bay...[Plaintiff] however, chose a universe of respondents who regularly consume “liquor, such as gin, rum, tequila, or vodka.” We are not convinced that this definition would generate a universe of potential Glacier Bay purchasers because the evidence adduced at trial demonstrated that the liquor and cooler markets are not coextensive...

The second major flaw...in [Plaintiff’s] Survey is that every respondent was exposed to the Teton Glacier product in the first room, thus acquainting them with a product that they would almost certainly have been unfamiliar with otherwise, due to Teton Glacier’s very limited distribution network and weak sales...

Apart from these two glaring flaws...there were other methodological errors...First, the respondents were shown the Teton Glacier label on a card, rather on a bottle...as they would encounter the label in the marketplace. Second, while the cooler bottles would obviously be full when sold in the marketplace, they were empty when shown to the subjects...In sum, the...Survey simply did not
sufficiently replicate marketplace conditions to make it a reliable indicator of actual confusion in the marketplace.

[Defendants] commissioned their own survey…subjects chosen were persons 21 years of age or older and who had purchased or consumed a cooler product within the previous ninety days, or who were likely to purchase such a product within the next ninety days. The [Defendant’s] Survey was not a “two-room” survey, but rather a “single exposure” design, similar to the well known Ever-Ready survey. See *Union Carbide Corp. v. Ever-Ready Inc.*, 531 F.2d 366, 385 n.11 (7th Cir. 1976). In the [Defendant’s] Survey, the subjects were shown either a bottle and four-pack of Glacier Bay, or a bottle and four-pack of a fictitious “Arctic Bay” product as a control. The Arctic Bay product was created by modifying the Glacier Bay product by changing the word “Glacier” to “Arctic,” the abbreviation “GB” to “AB,” and by removing the mountains from the Glacier Bay label. The subjects were shown either the Arctic Bay or Glacier Bay products and permitted to examine them for as long as they wished. The products were then taken away and the subjects were asked a series of questions, to wit: “What company or companies do you think makes or puts out this product?” “Whether you know the name of the company that makes this product, are you aware of any other products or brands put out by this company?” if yes, then, “What other products or brands do you think are put out by the company that makes this product?”, and “If you have an opinion, do you think that the company that makes this product did or did not get approval or permission from any other company or companies in order to put out this product?”…

[Defendant’s] Survey…is much more reliable because it more accurately approximates actual market conditions. For example, subjects were not made artificially aware of Teton Glacier or the TETON GLACIER trademark. Most importantly, however, [Defendant’s] Survey selected an appropriate universe of respondents, namely, cooler consumers. In short, we find the [Defendant’s] Survey to be more reliable than the [Plaintiff’s] Survey…


…A primary infirmity identified by [Defendant’s expert] was [Plaintiff’s expert’s] failure to ask respondents why they answered as they did…I find that because the respondents were not asked the reason for their answers, there is no indication how much influence was exercised by the choice of stimuli over the respondents’ perception and thus the survey data are infirmed.

…because of the infirmities in the survey… I reject the purported survey…as showing there is any likelihood of confusion between the two marks.

…opposers’ survey tends to bolster the conclusion we reach, we have not given much weight to it…survey involved…too much of a memory test...


Surveys are statistical evidence that can be an aid to the Board. It must be kept in mind, however, that survey evidence is only one factor to be considered in the overall determination of likelihood of confusion…In this case, both parties, with significant merit, have perceived flaws in the other’s survey. Our skepticism about the reliability of the parties’ surveys in this case is fueled by the virtually opposite results reached by each party, namely a confusion rate of forty percent (opposer’s) versus three percent (applicant’s). In view of the flaws noted above and the wide disparity in these surveys which purport to determine essentially the same thing, we find that neither survey is particularly reliable. All in all, neither survey is of any particular assistance to the Board in resolving the issue of likelihood of confusion.


The parties developed jointly a consumer survey to gather data about actual confusion. They selected [a single expert to design a survey and certify on behalf of both parties] as their expert…

…the parties approved the questions…

The results indicate a likelihood of confusion between Tiffany & Broadway’s shoes and Tiffany & Company merchandise. Approximately 15 percent of those surveyed said the shoe was put out by, affiliated with, or approved by Tiffany and that Tiffany also sells jewelry, purses, handbags, or perfume…. (finding strong evidence of likelihood of confusion in survey showing a 15 percent association rate between Texon sign and EXXON)…


The Court has before it…Motion to Exclude the Expert Report and Testimony of…and the materials submitted by the parties relating thereto...

…[Plaintiff] commissioned…a market research expert, to design and conduct a survey to determine whether or not there is a likelihood of confusion between Network’s “Learning Network” [website] and Discovery Communications, Inc.’s… “The Learning Channel” or “TLC.”

...
Each respondent was then shown one of two portfolios containing color pictures of what was said to be a website page. Two hundred thirty-two respondents were shown the “Test” Portfolio containing pages from Network’s “Learning Network” site. Two hundred twenty eight respondents were shown the “Control” Portfolio [n.2 The “control” portfolio was used to determine whether the use of the word “learning” contributed to any confusion.], which was identical to the “Test” Portfolio, but within which the name “Learning Network” had been replaced with “Learning.com.”

When respondents indicated that they had finished looking at the portfolio, it was removed. Respondents were asked [a] series of questions…

The question here presented is whether the asserted defects in the [Defendant’s] survey are so great as to warrant exclusion rather than gust (sic) for the mill of cross-examination, rebuttal evidence, and jury evaluation.

[Plaintiff] raises the question of whether the survey format is defective because the stimulus is presented through a medium different from that used by the consumer in the marketplace. Specifically, [Plaintiff] contends than a printed picture of a webpage has a different effect from the webpage as it appears on a computer monitor screen.

The Court concludes…it should not hold that the display of the stimulus on a paper page rather than on a computer monitor, is a determinative, or even significant, factor...

The Court finds that the survey is defectively designed in that it does not engender reasonable confidence that all, a majority, or even a substantial number, of the subjects…were answering the questions posed with the understanding that the stimulus was the website of, or presented by, “Learning Network.” If subjects did not have this understanding, their responses to the “substantive” questions would be meaningless.

…once the subject reached the portfolio pages purportedly depicting the website, he was denied significant location information that would be available to a real world consumer. Subjects were provided with a picture of the website which omitted the “title bar” at the very top of each website page. The “title bar” for the Learning Network home page includes the statement “Welcome to the Learning Network – your educational resource.”…

Moreover, the portfolio website pictures omitted…the location tool bar which would tell the consumer that he was connected to http://www.learningnetwork.com.

The Court finds that the survey was severely defective by virtue of its failure to ask any question that would test the critical question of what website it is that the subject thought they had seen.
The Court concludes that the subjects have not been shown to have known that they had seen the Learning Network website as distinct from real world consumers who would have had this knowledge. Accordingly, the survey evidence does not establish that the subjects were answering questions with critical knowledge equivalent to that possessed by the relevant universe of consumers…

…Motion to Exclude…GRANTED.


The report and testimony of…plaintiff’s expert…reinforces this conclusion…designed and conducted a survey to determine whether and to what extent individuals would likely believe that the Domain Name “harrodssouthamerica.com” is used or approved by [Plaintiff]…Between approximately twenty-three and thirty-one percent of those surveyed believed that “harrodssouthamerica.com” was used, approved, or permitted by [Plaintiff]…[S]urvey therefore confirms that the defendant Domain Names are confusingly similar because there is a significant likelihood of confusion between plaintiff’s HARRODS mark and defendant harrodssouthamerica.com…


Petitioner introduced the results of two shopping mall intercept surveys…In the original survey… The interviewer handed…qualified respondents a white card as shown below.

**GOLDEN LEGS**

**HOSIERY FOR WOMEN AND CHILDREN**

After viewing the card, each respondent was asked the following question: “What company do you think puts out that brand of hosiery?” Respondents who answered something other than “don’t know” to the first question were then asked: “Why do you say that?”

A second control group of…respondents saw a different control name (Golden Step, Golden Spirit, Golden Sheers, Golden Fit, Golden Touch or Golden Kicks), and then were asked the same two questions…the purpose of this control group was to control the survey for “noise,” that is, the tendency of consumers in this particular situation to attribute manufacture to L’EGGS because it is a familiar brand.

…Respondent countered with…testimony…essentially criticiz[ing] the methodology used in conducting the survey. More specifically, he stated that the survey’s instructions encouraged guessing; that the card bearing respondent’s
mark which was shown to the respondents omitted the category of men’s hosiery products…

In response to two of these criticisms, namely the encouragement of guessing and the perceived misidentification of the product category on the sample card, petitioner…undertook a replication survey. Accordingly, the stimulus card shown to respondents indicated that the GOLDEN LEGS product is “hosiery for men, women and children”…The instructions were modified in relevant part to read “For any of my questions please give me an opinion if you have one, but if you don’t know or have no opinion, that’s OK”…

The replication survey…shows results which are very similar to the results of the original survey…

…

Petitioner’s surveys employ a fairly standard format used in likelihood of confusion cases, the so-called Eveready format…This survey format has been approved by a number of courts…We find that the surveys here support petitioner’s position on the issue of likelihood of confusion.


A survey is probative and may be admitted into evidence to establish actual confusion if it is “fairly prepared and its results directed to relevant issues.” *Sterling Drug, Inc. v. Bayer AG*, 14 F.3d 733, 741 (2d Cir. 1994) (quotations omitted). Errors in methodology properly go to the weight of the survey evidence. See *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 227-28 (2d Cir. 1999); *Lois Sportswear*, 799 F.2d at 875. A survey, however, should be excluded under Fed.R.Evid. 403 where it is so flawed in methodology that its probative value is substantially outweighed by its prejudicial effect. See *Schering*, 189 F.3d at 228; *Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 297 (2d Cir. 1999); *Arche, Inc. v. Azaleia*, U.S.A., Inc., 882 F. Supp. 334, 336 (S.D.N.Y.1995).

The defendants challenge the methodology used in the plaintiff’s survey and argue that the survey does not support a showing of likelihood of confusion, but, despite the survey’s flaws, the survey does not appear to be devoid of all probative value on the issue of the likelihood of confusion…The survey results still have some relevance to the issue of how potential purchasers would react when presented with [Defendant’s] “CACHE” watches. Any flaws in the survey are factored into the weight to be given to the evidence. The survey results, together with the anecdotal evidence of actual confusion, lend support to the plaintiff’s argument of actual confusion, which supports the plaintiff’s contention of a likelihood of confusion.


The Court next considers plaintiffs’ trade dress claims…
defendants are entitled to summary judgment dismissing the trade dress claims because there are no facts in dispute sufficient to support a likelihood of confusion between the plaintiffs’ and defendants’ bottles. Comparing the bottles, with the labels properly on them, unlike plaintiffs’ survey comparison of the bottles with that very significant element of their trade dress removed, the Court holds that a reasonable jury properly considering the aforementioned factors, could not find a likelihood of confusion...


Finally, the evidence of actual confusion plaintiff repeatedly refers to is illusory. The survey conducted by plaintiff’s expert merely proved that there were significant visual similarities between Petoskey and Colonnade...[Plaintiff’s] survey did not, however, account for the reality that plaintiff’s and defendant’s products are bought using catalogs that, unlike the pictures used in the survey, clearly identify the manufacturer...


The survey concludes that 49.5% of the respondents “perceived that proceeds from, or authorization for, the sale of the advertised Diana, Princess of Wales memorabilia went to, or was authorized by, Diana, Princess of Wales and/or her family, estate, Foundation or other legal entity (other than the Franklin Mint).”...Without a specific percentage reflecting the number of respondents expressing confusion as to the plaintiffs’ endorsement of defendants’ product, the survey is not beneficial to the Court’s analysis.

...the...result was tabulated by counting any answer given by a respondent to a question that “reflected an understanding that the ‘family,’ ‘estate,’ ‘Foundation,’ or other similar entity was thought by respondent to have participated in the sale” of the product...Initially, this method is problematic because the “participation” of neither the “family” nor “other similar entity” is at issue in this case. Moreover, each question following the first dealt with who would receive proceeds from the sale of the product. Answers to the charity-related questions are irrelevant to determining actual confusion over the plaintiffs’ endorsement of defendants’ products...

Finally, respondents’ answers may have been tainted because they were shown three advertisements of [Defendant’s] products: an Elvis Presley statue, a Marilyn Monroe doll and the Princess Diana doll. The Presley advertisement states that it is “authorized by Graceland” and identifies Elvis Presely Enterprises as the trademark holder....The Monroe advertisement states that it is “Fully authorized by the Estate of Marilyn Monroe” and identifies trademark holders...These advertisements may have led respondents to assume that because the Presley and Monroe products were “authorized” and contained trademark protected aspects, that the Princess Diana doll required similar authorization or permission...the Court would attribute little weight to the results because the
survey method provided respondents with information that may have led them to assume that authorization or permission to use Princess Diana’s image was necessary.


The case is now before the court on SPG’s motion in limine asking the court to find in advance of trial that the results of proposed consumer surveys on possible consumer confusion will be admissible at trial.

Simon’s motion in limine also asks the court to perform before trial a variation of the gatekeeping function the court must perform for expert testimony under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 591, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)...

In...[Plaintiff’s proposed] survey, the respondent is first shown a card depicting...[Defendant’s] mySimon home page...the interviewer takes back the mySimon card, hands the respondent a card depicting...[Plaintiff’s] SPG home page...both cards are placed out of the respondent’s sight. The interviewer then asks “Do you believe that the two web pages just shown to you are put out by (a) Two unrelated sources, companies, or organizations;  (b) The same source, company, or organization; (c) Related but different sources, companies, or organizations;  or (d) Don’t know?” If the respondent answers (a), (b), or (c), the interviewer then asks “Why do you say that?” and “What else?”

...[Plaintiff’s] proposed...survey suffers from three serious flaws: (a) it grossly distorts the “marketplace conditions” in which Internet users might actually encounter the two parties’ marks together; (b) it fails to use the most basic control by failing to compare potential confusion with respect to other “Simon” web sites not related to either of these parties; and (c) it is designed to create “demand effects” that will appear to exaggerate unfairly any possible confusion about affiliation between SPG and mySimon. Although no survey is beyond criticism, these problems are so fundamental that the court does not believe it would be fair to treat them as matters going only to the weight of the evidence. They are so basic as to strip the proposed survey of any significant probative value. The court concludes under Rule 702 and Rule 403 that the proposed...survey should be excluded from evidence.

...the proposed survey [is] nothing more than a meaningless memory game or word association exercise that bears no relationship to the marketplace.

...[Plaintiff’s] experts have opined that a survey in the Eveready format would not be appropriate for this case. In the Eveready format... Union Carbide Corp. v. Ever-Ready, Inc., 531 F.2d at 385-86, a consumer would be exposed to only mySimon’s mark, home page, or other stimulus, and would then be asked “Who do you think puts out this service? What makes you think so? Name any
other products or services put out by the same concern that puts out this
service.”…

…[Plaintiff’s expert] asserts the Eveready format is most appropriate
where specific products are involved and would be “very difficult to adapt to an
extremely dynamic INTERNET service oriented marketplace.”…With all due
respect…this is simply not an explanation at all. It would seem to be a relatively
simple matter to design a survey that exposes a respondent only to mySimon’s
web site or advertising, to ask who the respondent thinks puts out that service and
what other services it provides, and then to see how many respondents come up
with SPG or a recognizable variation…

2000)

…The results indicated that approximately sixteen percent of those
surveyed were confused (net of control confusion) based on the common name of
the products…This survey evidence supports a finding of a likelihood of
confusion under Section 43(a) of the Lanham Act. See, e.g., Sara Lee, 81 F.3d at
467 n. 15 (stating that survey evidence showing a level of confusion between ten
and eleven percent is sufficient to demonstrate actual confusion) (citing Mutual of
Omaha Ins. Co. v. Novak, 836 F.2d 397, 400 (8th Cir. 1987)).

…Although Defendant presented an expert to challenge…[Plaintiff’s survey]
results… [Defendant’s expert] acknowledged that the best way to determine
whether the alleged design flaws… identified had any effect on the outcome
would be to conduct an alternate survey. However, [Defendant] did not present
any alternative survey…[Defendant] had ample opportunity to conduct a “proper”
survey on likelihood of confusion, since it had completed a survey purportedly
addressing secondary meaning by the end of July.

Paco Sport, Ltd. v. Paco Rabanne Parfums, 86 F. Supp. 2d 305, 322 & n.17 (S.D.N.Y. 2000)

…the defects of the…[Defendant’s] survey’s universe become
immediately apparent.

First, the universe was defined as persons who had purchased fragrances
in the preceding twelve months rather than persons who intended to purchase
fragrances in the future…Thus, the survey improperly excluded prospective
purchasers…

Second, the survey improperly focused on the fragrance market rather than
on the jeans or casual clothing market…traditional rather than reverse confusion
is at issue. Accordingly, the relevant market is the purchasers of jeans or casual
clothing, and not the purchasers of fragrances.

n.17…[Defendant] contends that a person who is not aware of Paco
Rabanne cannot be confused at all, and, therefore, is irrelevant to the actual
confusion analysis…The Court finds [Defendant’s] approach, limiting its universe
to consumers aware of its products, inappropriate because even a weak brand
could demonstrate a high degree of confusion because of the limited nature of the universe being surveyed…


…[Plaintiff] can only supply evidence of actual confusion in a contrived “survey” environment quite unlike those environments in which customers would actually encounter the marks at issue in this action. The pictures employed by…[Plaintiff’s expert] to conduct…[this] survey do not strike this Court as accurately replicating the environments in which consumers would encounter the parties’ marks…


At the Rule 16 Conference…[Plaintiff] presented a preliminary consumer survey that purported to measure the likelihood of product confusion among…consumers. [Defendant] suggested that the universe of consumers used by [Plaintiff] was underinclusive. Both parties have indicated that they will likely gather additional survey evidence. In order to conserve resources and focus discovery, we agreed to take briefs on the relevant universe of such consumer surveys.

Before reaching the merits…we must answer…[Plaintiff’s] procedural objection. [Plaintiff] correctly points out that neither party has brought a motion in limine. [Plaintiff] argues that, because we may not issue advisory opinions, we should not address the propriety of any particular survey design. We disagree. Because conducting consumer surveys often involves a great expense of both money and effort, we believe the court should be willing to provide guidance when requested to do so. Indeed, the Seventh Circuit has explicitly approved of this practice. See *Union Carbide Corp. v Ever-Ready Inc.*, 531 F.2d 366, 386 (7th Cir. 1976) …Because the parties cannot agree on survey methodology, we believe it is appropriate to offer our thoughts.

[Plaintiff] would like to survey only people who identify themselves as users of its product… [Defendant] suggests that only survey evidence drawn from a universe of all bathroom tissue consumers is appropriate.

…an examination of the plaintiff’s apparent theory of liability…suggests, quite clearly, that [Plaintiff’s] theory of the case involves confusion among all consumers of bathroom tissue. In order to determine whether confusion exists among all such consumers, the entire bathroom tissue consumer marketplace would be the logical universe from which to draw a sample…

To establish likelihood of consumer confusion, plaintiff relies on a survey [reflecting]…that sixty-seven percent of the respondents associated defendants’ device with The Club and thirty percent associated it with Global America…

…

The most significant flaw in this study is that it has nothing to do with trade dress. There is no way to tell whether those who answered “The Club” responded that way because “The Club” has become a generic name for steering wheel locking devices, because they do not know The Club has competitors, because they simply guessed at the name because it is a famous brand, or because the trade dress--the way the product was presented in the package--was confused with that of The Club. In other words, there is no way to determine whether respondents answered “The Club” for non-trade dress reasons…

…To be meaningful a survey should show the reason that each interviewee found confusion…


For…trial…[Defendant]…commissioned…[a] survey…to determine the percentage of consumers, if any, who are likely to believe that the New POLO Magazine is published by, sponsored by, authorized by, or affiliated with [Defendant]. The…survey respondents were…divided into two groups, one a test group, and one a control group. Interviewers showed the test group…a copy of the…New POLO Magazine, and the control group…was shown a copy of the July 1998 issue of Polo Players’ Edition…

In response to several open-ended… questions…53% of the test group believed that [Defendant] had authorized, approved, or produced the New POLO Magazine, as compared with only 22% of the control group, who believed that [Defendant] had authorized, approved, or produced Polo Players’ Edition… [Plaintiff’s] survey found an incremental rate of confusion of 31%…

…these rates of confusion were even more striking among those respondents who were familiar with publications which are said to compete directly with the New POLO Magazine…Among this group of readers, a higher level of incremental confusion, 34%, was present…[Additionally] among those… respondents who reported income of more than $70,000 per year, a 40% incremental confusion level was found. The court accepts [Plaintiff’s] assertion that it is that particular audience which it hopes to attract to its New POLO Magazine…

…

The court also concludes that…the… presentation of stimuli to the survey respondents [in Defendant’s survey] was suspect in several aspects…[Defendant’s expert]…asked the respondents to view an “array” of various goods in two different displays…In spite of…[Defendant’s expert’s] recitation that it is
desirable, in an array survey, to replicate actual market conditions… [Defendant’s expert] admitted that the product displays that…[were] used were quite different from the actual marketplace…

…In a survey which tests the likelihood of confusion, a control is used “to determine the noise--the inherent confusion in the market which exists independently of and thus is not caused by confusion between the products being tested.”


In the first confusion study submitted by [Plaintiff]…[a]pproximately 24 percent of those surveyed identified the pre-launch ROMANCE bottle as ETERNITY or as a Calvin Klein product…Despite this result, the survey’s probative value is quite limited given: (1) the survey’s universe, (2) the survey’s stimulus, and (3) the survey’s presentation of the stimulus and control bottles. ...The universe tested by [Plaintiff’s] expert…was flawed and led to skewed results for several reasons: (1) it excluded all men and women over the age of forty-five who represent a substantial portion of the total universe of the products’ potential consumers;...(2) it included past purchasers who were not necessarily future potential purchasers;...and (3) it failed to properly discriminate between purchasers of “prestige fragrance” brands as opposed to those who purchase just any fragrance...

To have substantial probative value, a survey…must also be designed to examine the impression presented to the consumer by the accused product...The ROMANCE bottle shown to the survey’s respondents was the “pre-launch bottle,” not the one consumers would eventually see with a collar label that reads “RALPH LAUREN ROMANCE.”...

Similarly, [Plaintiff’s] presentation of the various stimuli and controls,...including the accused bottle, failed to properly replicate marketplace conditions in which the respondents would encounter the products...[Plaintiff], in an effort to present the accused product in its proper marketplace context, should have, at the very least, presented to the participants, the various fragrance bottles with their respective boxes...


Finally, [Defendant] also asks for $20,600 for consumer survey costs... While other courts have disallowed the reimbursement of consumer survey costs, this Court will permit them. See Simon & Schuster, Inc. v. Dove Audio, Inc., 970 F. Supp. 279, 302 (S.D.N.Y. 1997); Imagineering, Inc. v. Van Klassens, Inc., 851 F. Supp. 532, 540; Gillette Co. v. Wilkinson Sword, Inc., No. 89-CV-3586, 1992 WL 30938, at *10 (S.D.N.Y. Feb.3, 1992). In Simon & Schuster, the court highlighted that “plaintiffs [did] not demonstrate that they [were] entitled to recover the costs of conducting their consumer survey” and that the survey was “minimally probative.” 970 F. Supp. at 302, n. 23. In Imagineering, of the two
surveys plaintiffs prepared, the court excluded one from trial while plaintiffs did
not introduce the other. 851 F. Supp. at 539. Here, this Court accepted consumer
surveys from both parties and found them to be informative and helpful in the
advancement of their claims. This Court also relied on the presented surveys in
adjudicating this case and specifically stated that “the market surveys entered into
evidence suggest actual confusion.” Unger, 14 F. Supp. 2d at 356. Thus, this
Court authorizes the recovery of [Defendant’s] consumer costs.

Hermès International v. Lederer de Paris Fifth Avenue Inc., 50 F. Supp. 2d 212, 221, 222 &
nn.20 & 21 (S.D.N.Y. 1999)

[Plaintiff] commissioned...[an expert] to conduct a post-sale confusion
survey. [Plaintiff’s expert] concluded that there was a strong association between
the Kelly bag design and its source (as well as a high probability of confusion
between defendants’ and [Plaintiff’s bags])...According to [Plaintiff’s expert], 70%
of the 47 respondents who were shown [Defendants’] Kelly bag (as carried by a
woman walking at a distance of four feet) identified [Plaintiff] as the
manufacturer...45% of the respondents who identified [Plaintiff] as the source of
the [Defendant] knock-off, explicitly and voluntarily mentioned the Kelly name...
n.20...[Plaintiff’s expert] used Coach and Ferragamo bags as controls.
These bags were mistaken for [Plaintiff’s] bags by only 9% of respondents. Only
4% of the respondents correctly identified [Defendant] as the maker...

...Defendants criticize the accuracy of the survey results on several
grounds, including the suggestibility of the survey and that...[Plaintiff’s expert]
incorrectly interpreted some responses...
n.21...Respondents were intercepted randomly on East 57th Street in
Manhattan (the [Plaintiff’s] boutique also happens to be located on East 57th
Street)...Eligible respondents were then invited to tea in a private room at the Four
Seasons Hotel and given $150 for their participation in the 15 minute survey...

While the...[Plaintiff’s] survey may not be reliable, a properly conducted
survey might result in some evidence of single source identification. Defendants’
failure to offer its own consumer study supporting its argument that [Plaintiff’s]
designs are generic weakens their abandonment defense...

Luigino’s Inc. v. Stouffer Corp., 170 F.3d 827, 829 (8th Cir. 1999)

By contrast...[Defendant’s] marketing and consumer research expert,
declared [Plaintiff’s] survey biased and invalid... Despite these criticisms,
however, [Defendant’s expert] offered no opinion about the likelihood of
confusion or possible association between Lean Cuisine and Michelina’s Lean ‘N
Tasty. Additionally, although [Defendant’s expert] advocated conducting a
competent survey, [Defendant] did not retain either [its expert] or another expert
to do so...

...The results of plaintiffs’ study indicate a 14% level of confusion between the products...

...The court finds that plaintiffs’ methodology was flawed because its study was not targeted to the specific question of confusion between “Ice Breakers” and “Dentyne Ice.” Plaintiffs’ study used advertisements of the products, instead of the actual products, which could have lead to unreliable results. Both “Ice Breakers” and “Dentyne Ice” use similar advertising themes that play off the cool, breath freshening qualities of their gums. Plaintiffs’ study did not control for this unintended consequence...

Cumberland Packing Corp. v. Monsanto Co., 32 F. Supp. 2d 561, 570, 572, 578 (E.D.N.Y. 1999)

To establish likelihood of consumer confusion, plaintiff relies on...three consumer surveys...

...the court finds the studies flawed and the survey results untrustworthy and unreliable.

First, ...[Plaintiff’s expert] selected a universe for the surveys that was over-inclusive. The survey universe for all three studies was defined as “users or buyers of sugar substitutes within the past six months.”...

...[Plaintiff’s expert] says that past users are good proxies for future purchasers. This may be true for some products. But in the case of sweeteners, the assumption is... questionable. Plaintiff’s...and... defendant’s...packets are available at most diners and coffee shops and many restaurants. A high percentage of past users of sugar-substitutes may never have purchased sugar substitutes and have no intention to do so in the future...

It was also improper to use all past “sugar-substitute” users without distinguishing between saccharin and aspartame users. As noted earlier, there is little overlap between saccharin and aspartame users. Despite EQUAL’s instant success upon introduction in 1982, Sweet’N Low sales remained relatively stable because demand for EQUAL came almost entirely from people who had previously never used sweeteners. Thus, past users of saccharin are unlikely to be potential purchasers of aspartame sweeteners and vice versa.

In addition,...[Plaintiff’s expert’s] choice of so-called “controls” in the first two surveys was inappropriate. Given the unreliability of his controls, a sounder analytical approach was to review the reasons respondents gave for thinking that NutraSweet was made by the same company that made NatraTaste and to disregard the people who said they were confused for reasons unrelated to trade dress...The third survey was flawed because, among other reasons, it failed to resemble actual market conditions. The leading nature of the questions asked and the lack of instructions against guessing flawed all three surveys.

...[Plaintiff’s expert] conducted a third survey to assess the likelihood of confusion...Respondents were shown a Sweetmate package from a distance of
three feet and not allowed to handle the box or to view it from a closer distance. Then the package was removed from view.

...In an actual market situation, the product would not disappear from the consumer’s eye just as he or she is about to make a purchase. Given the prominence of the name Sweetmate on its trade dress, it is highly unlikely that customers would think that the name of the product is “Sweet’N Low.” Question one was essentially a memory test.


First, the defendants assert that the survey results were not validated by a third party and therefore the survey is unreliable. That fact, however, does not affect the reliability of the survey because the method of validation did not violate industry practice...

Second, the defendants argue that the survey is unreliable because the interviewers were not professionals in the survey field. That argument fails because industry practice does not prohibit the use of non-professional interviewers...

Third, the defendants contend that the survey is invalid because it was conducted with reference to an inappropriate universe of survey participants...[T]he Court concludes that the limited universe of survey participants does not render the survey completely invalid. However, the failure to include in the survey persons who are in the market for both products rather seriously undercuts the credibility of the survey because it excludes those most likely to be aware that BAILEYS liqueurs are not made by a tobacco manufacturer. By excluding persons in the market for both kinds of products (tobacco and liqueur cordials), the survey contained a built in bias...

**Cairns v. Franklin Mint Co.,** 24 F. Supp. 2d 1013, 1040-1042 (C.D. Calif. 1998)

...defendants have presented the results of double-blind telephone survey...[in which] only 6.9% of respondents [indicated any level of a likelihood of confusion]...Consequently, defendants’ survey suggests that there is little likelihood of confusion.

...the survey ultimately provides useful evidence regarding whether plaintiffs have a fair chance of success in proving that defendants’ advertisements are likely to confuse consumers as to the source or endorsement by plaintiffs of defendants’ products.

...plaintiffs have not submitted survey results, despite the opportunity to conduct such research both before seeking injunctive relief and before the continued hearing on the pending motion...[Plaintiff’s] failure to do so undermines their position that the advertisements at issue are likely to confuse consumers as to plaintiffs’ endorsement.
It is Professor McCarthy’s opinion that surveys are not helpful on the issue of confusion in the present case which concerns primarily reverse confusion. In a situation where the junior user (Citigroup) has not yet commenced massive use of its name and there has been no advertising or promotion of products and services under that name reverse confusion cannot be measured because the triggering event of market place saturation has not yet occurred.

While this observation may be generally correct, it is not totally correct in the present case. The overwhelmingly dominant feature of Citicorp’s new mark, CITIGROUP, is CITI. That name alone and in combination with other names has saturated the market for many years without overwhelming The CIT Group name...

...Thus in the present case the survey evidence may be helpful in determining the likelihood of reverse confusion. It is unnecessary to decide whether it alone would be sufficient, because weighing the other factors led to the conclusion that adoption of the Citigroup name will cause neither forward nor reverse confusion in the market place.

[Defendant] argues that the survey was flawed because, by relying upon “permission,” it created the possibility that those surveyed believed that permission was required, thereby skewing the result. But the survey asked whether [Defendant] “did get” or “did not get” permission to use the Plaintiffs’ marks or to copy the Plaintiffs’ golf holes. This question asks what message [Defendant’s] use of the Plaintiffs’ marks and trade dress conveyed, rather than whether [Defendant] needed to get permission, which would focus on what those surveyed believed to be required. Although this latter form is more problematic because it allows for the consumer’s misunderstanding of the law...

n.10...the district court did not err in relying upon the Plaintiffs’ survey asking whether permission was obtained. However, we note that “approval” is a word with an easily understood everyday meaning that could have been used just as easily in the survey or in questions asked of the witnesses. We do not hold here that the unfettered use of “permission,” rather than “approval” or other less ambiguous language, is always acceptable, and we caution litigants to consider the language of the survey and questions so that the consumer’s belief that permission is required does not skew the results of the survey, thus decreasing its probative value...

Flaws in survey given to consumers in shopping malls, allegedly showing confusion over song that parodied fashion doll, went to survey’s weight, rather than its admissibility in toy manufacturer’s trademark infringement action; flaws included use of leading questions and absence of control group.
The...[Plaintiff’s] survey includes a number of questions that Circuits courts have found to be inherently leading or biased and therefore should be given little if any weight as evidence of actual confusion...

...It is unclear from the results of this question...[“3. Who or what company, if any, do you think is connected with or gave permission for the music video and CD (the music CD) you just saw?”]...how many individuals who answered Mattel thought the company was “connected” with the song and how many thought the company gave its permission. The use of the term “connected with” is not relevant in the context of parody, as parodies evoke the object that they are poking fun of and therefore...are often linked or connected to that object in the public’s mind...


...[Plaintiff’s expert] also conducted tests of post-sale confusion...In his post-sale confusion test, [Plaintiff’s expert] removed the Laura Leather hang tags from the handbags and allowed the respondents to view, but not touch the bags...then followed the same procedure with the Kenneth Cole handbags [control]...After showing these sets of handbags to the respondents,...[Plaintiff’s survey] asked who respondents believed to have manufactured the handbags.

...n.6...[Plaintiff’s expert] also conducted a point-of-sale confusion test, in which respondents were shown the Laura Leather and Kenneth Cole handbags with the Laura Leather and Kenneth Cole hang tags still attached and were permitted to touch and feel the bags and to look inside them at the names embossed therein...


...[Plaintiff] claims that showing the picture of the Hoover WINDTUNNEL alone to respondents, after taking away the portfolio showing a variety of vacuums, unfairly focused the respondents’ attention on Hoover. Certainly for the question about who manufactures the Hoover WINDTUNNEL, there is no bias in showing a picture of the WINDTUNNEL with the “by Hoover” featured on the vacuum. This indication of source is displayed on the vacuum and on the box of the vacuum, so consumers are exposed in a similar manner as the survey respondents...

...[Plaintiff] also objects that the question about connection or association is incomplete, as it fails to address whether the respondents might have believed that there was an “affiliation” between [Defendant’s WINDTUNNEL vacuum] and [Plaintiff] or that [Plaintiff] was involved in “sponsorship” or “approval” of [Defendant’s] WINDTUNNEL vacuum. While [Plaintiff] is correct that
[Defendant's] survey did not inquire as to all of the terms in 15 U.S.C. Section 1125, the questions about two of them, “connection” and “association,” yield probative results...The terms “connection” and “association” are sufficiently broad that, outside the hypertechnical readings of zealous attorneys, they are likely to reveal whether the respondents believe there is any relationship between [Plaintiff] and [Defendant].


n.16  [Plaintiffs’] confusion survey demonstrated confusion among consumers in that it found that 49% of telephone respondents answered affirmatively when asked whether they had heard of Return...Twenty-five of those respondents said they had seen Return while 40% either described Bridge or said Return was a sequel to Bridge...Defendants’ experts’ surveys indicated that consumer confusion was only approximately 7.3%,...a level that Defendants contend is too minimal to support a finding of a likelihood of confusion. However, Defendants’ contention ignores case law that has held otherwise. See Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons, 365 F. Supp. 707, 716 (S.D.N.Y. 1973), aff’d, 523 F.2d 1331 (2d Cir. 1975) (holding that a confusion level of 7.7% was sufficient to support a finding of a likelihood of confusion).


The Court finds merit in [Plaintiff’s] objections to the format of the questions, and concludes that the...[Plaintiff’s] survey did little more than “allow the respondents to advise whether, upon viewing the magazine, it brought anything else to mind.” Such surveys “are given little weight” because they do not adequately account for responses that are attributable only to the word at issue...[W]ithout pertinent follow-up [e.g., Why do you say that?] inquiries or preliminary questions, the court has little guidance as to exactly what the respondents were reacting to...


n.14. Defendants also point to [Plaintiff’s expert’s] failure to survey Midwest consumers, and failure to use third party products as a control.


...The district court found that the relevant consumer base was wholesale purchasers of empty bottles without lids or labels...the district court noted, the wholesale purchasers may be characterized as sophisticated buyers...
[Plaintiff] argues that [Plaintiff’s] relevant market includes the ultimate retail consumer...
The district court properly rejected this data on the basis that these consumers are buying juice, not plastic bottles...“the proper inquiry centers on the confusion of consumers in the market for the particular product at issue.”...
FALSE ADVERTISING SURVEYS


...[Plaintiff’s expert] conducted three consumer surveys in connection with this case, in malls and shopping centers in ten different locations throughout the United States...

In the first survey, consumers were shown [Defendant’s television advertisement] twice and then asked a series of questions about the ideas that were communicated to them by the commercial. The survey found that 50% of the respondents took away the message that “you can replace floss with Listerine.”...

In the second survey...consumers were shown a Listerine bottle with...the shoulder label. They were asked essentially the same questions as were asked in the first survey. Some 45% of the consumers took away the message that Listerine could be used instead of floss...

In the third survey, a control survey, consumers were asked their “pre-existing beliefs” regarding Listerine and floss; the intent was to determine the number of people who did not recall seeing [Defendant’s] commercials but who still believed that Listerine could be used instead of floss. A minority of those surveyed did not recall seeing [the allegedly false or misleading advertisement], and of those 19% stated the opinion that Listerine could be used in place of floss...

The surveyors then took the three surveys together, subtracted the 19% figure from the 50% and 45% figures, respectively, and concluded that 31% of those who saw the commercial and 26% of those who viewed the shoulder label took away a replacement message...

[Defendant] commissioned its own survey, which was conducted...in shopping malls in twelve markets throughout the United States...

...n21...[Defendant’s expert’s] testimony is rejected. First, [the control advertisement] was not a good control...it implied that Listerine is a good substitute if one does not have time to floss, a similar message to that sent by [the allegedly false or misleading advertisement]. Second, [Defendant’s expert] did not ask consumers what message they believed the commercials were conveying; instead, he asked them what their beliefs were...Third, the survey was poorly designed. Consumers were asked questions about Listerine and flossing...before they were shown the commercial and then they were asked the questions again. Hence, although [Defendant’s expert] acknowledged that it was important not to “clue” respondents in on the subject matter of the test before showing them a commercial, here the consumers were given an idea of what to look for in the commercials before they saw them...
American Italian Pasta Company v. New World Pasta Company, 371 F.3d 387, 393-394 (8th Cir. 2004)

...In its survey, [Defendant] asked consumers if the phrase “America's Favorite Pasta” conveyed a meaning. According to [Defendant], thirty-three percent of those surveyed allegedly perceived the phrase “America's Favorite Pasta” to mean [Plaintiff's] is the number one brand. Fifty percent of those surveyed allegedly perceived the phrase “America's Favorite Pasta” to mean [Plaintiff’s] is a national brand.

The Seventh Circuit confronted a similar question in Mead Johnson & Co. v. Abbott Laboratories, 201 F.3d 883 (7th Cir [2000])...Having concluded the phrase “1st Choice of Doctors” conveyed more doctors prefer this product over its rivals, the Seventh Circuit considered whether a consumer survey can assign a different meaning to a phrase...Mead Johnson’s survey indicated consumers perceived the phrase “1st Choice of Doctors” to mean a majority of doctors. Concluding the district court erred in using the survey to assign such a meaning, the Seventh Circuit noted, “never before has survey research been used to determine the meaning of words, or to set the standard to which objectively verifiable claims must be held.”...While acknowledging dictionaries are surveys by people who devote their entire lives to discovering the usage of words, the Seventh Circuit cogitated “it would be a bad idea to replace the work of these professionals with the first impressions of people on the street.”...

We agree with the Seventh Circuit. To allow a consumer survey to determine a claim's benchmark would subject any advertisement or promotional statement to numerous variables, often unpredictable, and would introduce even more uncertainty into the market place...


n5 [Plaintiff’s expert]...testified that he did not have access to any other commercials comparing NicoDerm to another product, so he could not have used one [a comparative commercial as a control] even if he had thought it appropriate...The Court disregards this excuse. [Defendant’s expert] testified that experts conducting consumer surveys often create new ads or alter existing ones...If [Plaintiff] wishes the Court to credit its survey evidence, that evidence must conform to generally accepted survey principles. Nothing prevented [Plaintiff] from designing its own mock comparative commercial for the purposes of [its] Survey.

n8 [Plaintiff] attempts to salvage the [Plaintiff’s expert’s] Survey by claiming that [Plaintiff’s expert’s] control question is a sufficient safeguard against any “noise.”...As noted supra, however, the control question only weeds out the "yea-sayers." It does not protect the survey from the bias brought by consumers' pre-existing beliefs about comparative commercials.
...When an advertisement is not literally false, but rather is ambiguous or implicitly false, a plaintiff can only establish a claim of false advertising through a survey...[Plaintiff] fails to present this Court with any survey...Accordingly, defendant’s motion for summary judgment on [Plaintiff’s] false advertising claim is granted.

The Scotts Company v. United Industries Corporation, 315 F.3d 264, 276-281 (4th Cir. 2002)

To show consumer confusion, [Plaintiff] presented evidence of two focus group[s]...and the results of a survey of forty consumers...

...We note that the very nature of a focus group seems, to some extent, to limit its ability to identify the message an advertisement conveys to an individual consumer. As the Defendants’ expert explained, focus groups “are a form of brainstorming where the participants are encouraged to ‘build on’ the thoughts of others.”...Thus, a participant who may have derived no false message from an advertisement viewed outside the context of the focus group might well change his opinion about the message conveyed by the advertisement after considering the views expressed by the other participants...we agree with the Defendants that, in this case, the focus group evidence was unreliable and cannot be considered probative on the question of whether the [Defendants’] packaging was likely to mislead consumers.

...We...conclude that the manner in which the focus groups were conducted destroyed the objectivity of the discussions, rendering the results utterly unreliable on the question of whether the...packaging conveys a false message...the deficiencies in the focus group evidence are so substantial that we are constrained to conclude that the district court abused its discretion by giving the evidence any weight...

...[Plaintiff’s other] evidence of consumer confusion comes from its survey of 40 do-it-yourself lawn care consumers...

As previously discussed, the express messages conveyed by the...packaging are literally true. Vigoro prevents crabgrass if it is applied up to four weeks after the crabgrass has emerged from the soil... By preventing crabgrass from even starting, Vigoro does prevent mature crabgrass. The critical question in this case, then, is whether the...packaging conveys the message that Vigoro kills mature crabgrass, a message that would be false. The survey, however, simply did not address that question.

The interviewer showed the respondents an empty Vigoro bag folded in quarters so that the lower left quadrant...was visible and asked: “Based on your review of this section of the bag, should this product prevent the growth of crabgrass that looks like the crabgrass pictured?”...Through the use of the word “prevent,” this question suffers from the same ambiguity as does the Vigoro packaging itself. That is, we cannot tell from this question whether the
respondents who answered yes believed that Vigoro could prevent mature crabgrass by stopping it before it started, or whether they believed that Vigoro could kill if applied to established, mature crabgrass.

Moreover, the manner in which the survey was conducted creates significant questions about its relevance and reliability. The purpose of consumer surveys in false advertising cases is to determine the message actually conveyed to consumers. But the interviewers conducted the survey in this case in a way that effectively required the respondents to express a specific opinion, even if they did not have an opinion, by specifically not offering the respondents the opportunity to give “not sure” as a response. In addition, the survey respondents were given an empty Vigoro bag folded into quarters so that only the quadrant with the crabgrass illustration was visible, thus obscuring the parts of the Vigoro packaging that emphasized its focus on stopping crabgrass before it started, and the respondents were asked to review only that portion of the bag. The survey thus elicited information about the consumer’s reaction to an isolated part of the packaging, when the relevant issue in a false advertising case is the consumer’s reaction to the advertisement as a whole and in context. We believe that these deficiencies in the survey’s design, particularly when considered in light of the survey’s failure to focus on the critical question, weaken the relevance and credibility of the survey evidence to the point that it sheds no light on the critical question in this case...

...We therefore conclude that the district court abused its discretion by crediting the survey evidence.


The District Court gave significant weight to the results of [Plaintiff’s] consumer survey...The [Plaintiff’s] survey was conducted in what is called a “double blind” fashion during which both the respondents and the interviewers are unaware of the purpose of the survey or its sponsor...432 respondents were split into two groups known as “cells.” The first cell was asked to focus on the [Mylanta Night Time Strength] product line as it would likely appear in retail stores. The second cell served as a control group that was asked to focus on the Mylanta Extra Strength product. In the [Mylanta Night Time Strength] cell, approximately 30% of the respondents expressed their belief that [Mylanta Night Time Strength] provided relief that lasted the whole night. By contrast, less than 5% of the respondents in the control cell believed that Mylanta Extra Strength provides relief that lasts all night. After netting out this “noise,”...[n.7 The responses of the control cell are called “noise.” They represent the percentage of people that would have found a message of “all-night relief” irrespective of the labeling claim.] the survey results indicated that a total of 25% of respondents received a message that the [Mylanta Night Time Strength] product provides all-night relief.
The District Court accepted this 25% figure as sufficient proof that the [Mylanta Night Time Strength] product name “deceives a substantial portion of the intended audience.”

...[Defendant] disputes the District Court’s use of its results...

...it is fair to conclude that at least 15% of the total number of respondents...derived a message of all-night relief from the product name...

Assuming arguendo that only 15% of respondents received a message of all-night relief from the [Mylanta Night Time Strength] name, we need not vacate the injunction. Relying upon Coca-Cola Co. v. Tropicana Prods., Inc., 690 F.2d 312, 317 (2d Cir. 1982), the District Court observed that even a 15.5% figure would be sufficient to demonstrate a likelihood of substantial consumer confusion...[n.12 Although the 15.5 figure that the District Court considered was proferred by J&J under a different rationale than the one used on appeal, the District Court did find that 15.5 would be sufficient to support a finding of substantial consumer confusion. 129 F. Supp. 2d at 367.]...In Coca-Cola the consumer survey evidence demonstrated only 7.5% consumer deception. Coca-Cola Co. v. Tropicana Prods., Inc., 538 F. Supp. 1091, 1096 (S.D.N.Y.), rev’d, 690 F.2d 312 (2d Cir. 1982). There, the District Court denied the injunction sought by the plaintiff because, inter alia, “a level of consumer confusion significantly below 15% does not indicate plaintiff’s probable success on the merits.” ...On appeal, the Second Circuit reversed, finding that “a significant number of consumers would be likely to be misled.” Coca-Cola, 690 F.2d at 317...[n.13 Although the Second Circuit’s holding was made before Federal Rule of Civil Procedure 52(a) was amended to provide that a district court’s findings of fact cannot be set aside unless clearly erroneous, its holding nevertheless supports the view that a 7.5 figure could sustain a finding of substantial consumer confusion.]

In an analogous context involving trademark cases under the Lanham Act, courts have held that survey evidence of 15% confusion is sufficient to demonstrate actual confusion. See Sara Lee Corp. v. Kayser-Roth Corp., 81 F.3d 455, 466-67 & n.15 (4th Cir. 1996) (15-20% confusion was sufficient to establish “actual confusion . . . to a significant degree”); Goya Foods, Inc. v. Condal Distros., Inc., 732 F. Supp. 453, 457 n.7 (S.D.N.Y. 1990) (9-10% confusion was sufficient to demonstrate “meaningful evidence of actual confusion”). Likewise we believe that survey evidence demonstrating that 15% of the respondents were misled by the [Mylanta Night Time Strength] name is sufficient to establish the “actual deception or at least a tendency to deceive a substantial portion of the intended audience,” Rorer, 19 F.3d at 129...


At best [Plaintiff’s] survey shows the “likelihood” of deception, as...stated in its summary judgment response. The [survey respondents] were not asked
about the message they perceived from the advertisements or what they thought
the message meant…[n.200 See Johnson & Johnson-Merck Consumer
Pharmaceutical Co. v. Rhone-Poulenc Rorer Pharmaceuticals, Inc., 19 F.3d 125,
134-36 (3d Cir. 1994) (affirming and discussing district court’s findings that
“well-designed consumer survey first asks ‘communication’ questions to see what
messages the viewer got…In the next step, the survey asks those who received a
particular message… questions to determine what the viewers thought the
message meant.”)] The physicians who participated in the survey were not even
asked to view the advertisements or any questions about their understanding of
the term “generic.” Therefore, [Plaintiff] has not established that a substantial
number of [physicians] were actually deceived by the advertisements…

* SmithKline Beecham Consumer Healthcare, L.P. v. Johnson & Johnson-Merck Consumer
2001)

While it is certainly true that courts considering Lanham Act challenges
base literal falsity determinations upon the explicit claims made by an
advertisement, courts may also consider any claims the advertisement conveys by
“necessary implication” through visual images or visual images combined with an
audio message…[n.14 The doctrine of “necessary implication” involves a finding
that a claim, as communicated by the visual and verbal representations of the
advertisement, is literally false. In such cases, no reference need be made to
consumer reaction and thus is distinct from a finding of implied falsity, where the
claim is literally true but deemed misleading.]…see also Gillette Co. v. Wilkinson
(holding that consumer survey evidence is not required when the allegedly false
claim is a “necessary implication” of the explicit language in the
advertisement)…

…

In considering a claim of implied falsity, a district judge cannot determine
whether the advertisement is deceptive based “solely upon his or her own intuitive
reaction.”…Thus, the success of a party’s implied falsity claim usually turns on
the persuasiveness of a consumer survey…

…

The consumer survey presented by [Defendant] purporting to gauge the
misleading message conveyed to consumers, suffers from a fatal flaw as to the
first factor, in that there were no controls in place to assure the accuracy of the
results. A control is a way of measuring and rooting out whatever error potential,
or “noise” exists, that is, something other than what is being measured in the first
place…

…

[Defendant’s expert’s] testimony that a control was simply impractical in
this context does not function to alleviate concerns regarding the survey’s
methodology…
Although consumer survey evidence is not required to establish materiality, probative evidence must support a trier of fact’s determination of materiality…

n.8 Defendants [argue]…that proof of the materiality element requires survey evidence…Deception and materiality are two distinct analyses: (1) whether a false advertisement is deceptive (actually or tending to), which analysis requires survey evidence and (2) whether the deception is material, which analysis requires probative, but not necessarily survey, evidence…


A well-designed consumer survey first asks “communication” questions to see what messages the viewer got and to “filter” or separate those viewers who received certain messages from those who did not. In the next step, the survey asks those who received a particular message, … “comprehension” questions to determine what the viewers thought the message meant…

…[Defendant] first criticizes the survey as containing questions that are result driven, leading or suggestive…

…None of the questions posed…are leading because they do not suggest an answer...

Additionally, bias…was eliminated by use of the control group…

[Defendant] further believes that…survey is flawed because products were left in front of the respondent for the entire interview. [Defendant] asserts that such a technique fails “to simulate with any remote realism how consumers actually” behave and turns the survey into “more [of] an open book test than a measure of realistic consumer reaction.”...the Court finds that leaving the products for the respondents to examine rather than taking the products away replicates market conditions.

…[Defendant] concludes that the net percentage of consumers who received an all night message from the label was only 15.5%, which J & J claims is an insufficient number for a finding of implied falsity.

…

Even assuming that [Defendant] is correct that only 15.5% of the respondents were misled, that percentage is sufficient to show that, under the Lanham Act, the “Night Time Strength” name tends to deceive or mislead a substantial portion of the intended audience.
Second, to establish the likelihood of commercial injury for the purposes of standing, [Plaintiff] argues that [Defendant’s] use of the “Havana Club” name will adversely affect [Plaintiff’s] current and future sales of its rum to U.S. visitors to Cuba. The fact that [Plaintiff] sells to Americans traveling in Cuba, however, does not necessarily demonstrate the likelihood that the distribution of [Defendant’s] “Havana Club” rum in the United States will hurt [Plaintiff’s] sales to those persons in Cuba. Although [Plaintiff] presented consumer surveys that reported that “33% of Americans think that it is legal to sell rum from Cuba in the United States and 9% do not know whether it is legal or illegal,” the District Court noted that “it is intuitively doubtful that these finding[s] would apply to U.S. travelers authorized to visit Cuba.” Havana Club Holding IV, 62 F.Supp.2d at 1100 n. 11…A district court has broad discretion concerning the weight of particular evidence, including consumer surveys…see Schering v. Pfizer, Inc., 189 F.3d 218, 230 (2d Cir. 1999); Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons, 523 F.2d 1331, 1341 (2d Cir. 1975)…In this case, the plaintiffs’ consumer surveys drew their sample from across the United States, without attempting to control for any likelihood that the participants would travel to Cuba. Under such circumstances, the District Court’s finding that these surveys did not show consumer confusion among the relevant class of travelers was not clearly erroneous.

Mead Johnson & Co. v. Abbott Laboratories, 201 F.3d 883, 884-886 (7th Cir. 2000)

…[Plaintiff] commissioned a survey…

…of consumers about their understanding of the phrase “1st Choice of Doctors.” It is a problematic exercise, for the survey assumes that “first” is a cardinal number—that is, a count such as “246” or “55” or a ratio of two such numbers, rather than a place in a series...

There is a deeper problem: the use of a survey in the first place. Surveys are accepted ways to probe for things such as confusion about the source of goods, for confusion depends on the effect of a phrase or trade dress on the consumer…So far as we can tell, however, never before has survey research been used to determine the meaning of words, or to set the standard to which objectively verifiable claims must be held. Dictionaries themselves are a form of survey; lexicographers determine how words have been used in both scholarly and popular texts. But philologists and others who contribute to dictionaries devote their lives to discovering usage and interpreting nuance. It would be a bad idea to replace the work of these professionals with the first impressions of people on the street, especially because consumers’ sketchy understanding of science means that survey results are apt to present firms with unrealistic demands for verification.
FN4. Federal courts have not established a numerical benchmark for determining when a claim is misleading for purposes of the Lanham Act. Circuit courts have written in terms of deceiving “a substantial portion of the intended audience,”...and deceiving “a not insubstantial number of consumers.”... (“deceived a significant portion of the recipients”)...(requiring plaintiff to demonstrate that “a statistically significant part of the commercial audience holds the false belief allegedly communicated by the challenged advertisement”)... (tendency to deceive 7.5% of consumers was not sufficient to prove deception). District courts have found a tendency to deceive where surveys indicated that a substantial minority of consumers was likely to be misled...(potential that between 22% and 57% of consumers will be misled is not insubstantial)...(deception rate of between 23% and 33% sufficient to warrant preliminary injunctive relief)...(23% not insubstantial number of consumers)...In this case, the tendency to deceive more than 40 percent of consumers is substantial…


The survey involved two studies. The first...is a study of consumers who saw “Summer” during its opening weekend...The second...is a study of consumers standing in line waiting to view “Summer”...Both surveys were directed to fifteen to forty year olds in the top 180 motion picture markets of the United States.”

...17% of [the consumers in the first study and]...

...20% of [the consumers in the second study] thought that the advertising for “Summer” communicated that “Summer” was “the sequel to ‘Scream,’” that the creator of “Summer” produced “Scream,” that the creator of “Summer” directed “Scream,” or that the creator of “Summer” was Wes Craven...

...Plaintiff is likely to succeed on its claim that the “Scream” catchphrases are misleading and are likely to mislead potential viewers of horror films to believe that “Summer” comes from the same source as “Scream.”

First, plaintiff has shown that an appreciable number of consumers hold false beliefs as to the connection between the two films...
FAME and DILUTION SURVEYS


[Plaintiff’s] second argument - that the [Plaintiff’s] survey provides evidence of actual dilution - is no more convincing. As noted above, the [Plaintiff’s] survey was designed to measure likelihood of confusion, not dilution…Thus, the survey at best measured whether consumers believe that [Defendant] is associated with [Plaintiff], not whether [Defendant’s] mark has “reduced the capacity of the [Plaintiff’s] mark to identify the [services] of its owner.” …The survey’s results provide no forecast of actual dilution… Accordingly, the district court did not err in granting [Defendant] summary judgment on [Plaintiff’s] dilution claim.


Here there is no showing of actual dilution of Plaintiff’s Starbucks Marks as a unique identifier of its goods. Although Plaintiff’s survey results indicate that 39.5% of people associate the term “Charbucks” with “Starbucks” or coffee…there is no indication that that is attributable to any usage of that term by Defendant, or that such usage affects the ability of the Starbucks Marks to serve as a unique identifier of Plaintiff’s products… Nor is there sufficient evidence of dilution by tarnishment to warrant the grant of injunctive relief. Plaintiff again relies on the survey results in this connection. Although the Plaintiff’s summary of the survey results indicates that 43.3% of the respondents, when queried as to whether they “would…have a positive impression or negative impression of a coffee called ‘Charbucks,’” indicated that they would have a “negative” impression of such a coffee…the reported responses to the open-ended query that preceded the positive/negative question -- “If the name ‘Charbucks’ were used for a type of coffee, how would you describe the coffee?” -- are much less indicative of any potential for tarnishment. There, only 6.3% of the respondents provided what was characterized as “generally negative” response to the query, 15.2% described such a hypothetical coffee as “charred,” “burnt,” “bitter” or “smokey” (at least five of those providing this description are reported to have made a “positive” response to the negative/positive impression question…and 34.9% of the respondents described the hypothetical flavor as “strong,” “dark,” “black” or “rich-flavored” coffee…Many of those describing the taste as strong or rich are also reported to have made “positive” responses to the two-pronged question that followed…Plaintiff also proffers its expert’s conclusory assertion that negative perceptions of “Charbucks” would have a negative impact on Starbucks’ brand name recognition…However, that opinion carries little weight in light of the paucity of evidence of such negative impressions and linkage.
Accordingly, Plaintiff has failed to demonstrate that Defendant’s use of the term “Charbucks” as part of the name of one of its lines of coffee has tarnished Starbucks’ reputation, or is likely to lead the public to associate a lack of quality or prestige of Defendant’s product with Plaintiff’s good. Plaintiff has failed to sustain its burden of proof under the FTDA and New York antidilution statute.


…Oregon’s dilution statute requires only that a plaintiff prove a “likelihood” of dilution…This burden is met by evidence that the defendant used a variant mark that “has created some mental association between the protected mark and the alleged diluter.”…

…Dilution can occur in two distinct manners: by “blurring” or “tarnishment.” Dilution by “blurring” occurs when the defendant’s use of a variant of the plaintiff’s mark creates “at least some subliminal connection in a buyer’s mind between the two parties’ use of their marks.”…Blurring is actionable even before the defendant’s use becomes widespread and before the mark suffers significant injury.

…“Tarnishment” of a trademark occurs when the defendant creates an association in the minds of consumers that is inconsistent with the pre-existing reputation of the plaintiff’s mark.

…[Plaintiff’s expert’s] testimony and survey provided direct evidence that [Defendant’s] use of the name “Sambuck’s” creates a likelihood of both types of dilution. [Plaintiff’s expert’s] consumer survey establishes, among other things, that: (1) Eighty-five percent of respondents shown the “Sambuck’s Coffeehouse” name immediately thought of “Starbucks” (twice the percentage of persons who were shown the placebo name, “Sammy’s Coffeehouse”); (2) over seventy percent of respondents who were shown the “Sambuck’s Coffeehouse” name indicated that the name brought Starbucks to mind because of the high degree of similarity between the two terms; and (3) no respondent who saw only the “Sammy’s Coffeehouse” name indicated that they thought of “Starbucks” because of similarities between the marks.

…[Defendant’s] use of the “Sambuck’s” mark is likely to dilute the distinctive quality of the Starbucks mark…


…Defendants have produced evidence that a significant percentage of consumers surveyed believed that a beer called “Starbock” or “Star Bock” was put out by, affiliated or connected with, or approved or sponsored by Defendants. This evidence goes beyond a mere mental association. It shows that Plaintiff’s mark lessens Defendants’ ability “to identify and distinguish goods and services.”…
Therefore, Plaintiff’s use of “Star Bock” and “Starbock” does dilute Defendants’ marks under federal law…

*Playtex Products, Inc. v. Georgia-Pacific Inc. and Fort James Operating Co.*, 390 F.3d 158, 167-168 (2nd Cir. 2004)

Plaintiff’s federal dilution claim fails also because no evidence of actual dilution exists…This does not mean that a plaintiff must show the actual consequences of dilution, such as lost profits…Plaintiffs may rely on consumer surveys and other circumstantial evidence. Here…plaintiffs…rely heavily on a survey conducted by [Plaintiff’s expert]. That survey, however, did not use any [of Defendant’s] packaging, but rather used index cards with the words “Moist-Ones” and “Wet Ones” placed out of context. Moreover, the index cards did not contain the words “Quilted Northern.” The survey therefore cannot be offered as evidence that the mark “Quilted Northern Moist-Ones,” as it is presented and packaged, has actually diluted the mark “Wet Ones.”…


…[Plaintiff’s expert] found that [Defendant’s] It-bags “cause dilution by blurring at [twenty-three] percent…”

This finding merits little weight for several reasons. First, screening questions used in this study rely on respondents’ understanding of [an] ambiguous word…Second, the study lacks objectivity. Having failed to obtain satisfactory responses (i.e., no dilution) from his first fifty-eight respondents, [Plaintiff’s expert] terminated the original survey and started over…Third, [Plaintiff’s expert] expanded the scope of “dilution” (by blurring) under the FTDA beyond “distinctiveness,”…by asking questions relating to “desirability.”…Because desirability is unrelated to a mark’s ability to identify and distinguish [Plaintiff’s] handbags, inclusion of these questions was erroneous…


…[Plaintiff] relied on a survey…to support its contention that the [Defendant’s] mark dilutes the [Plaintiff’s] mark.

… According to [Plaintiff, Plaintiff’s] survey demonstrated a 14% dilution of the [Plaintiff’s] mark…

[In Plaintiff’s] survey…ophthalmologists were shown a box [bearing Defendant’s mark] and asked what other “products,” if any, were brought to mind…

…

Even fully crediting [Plaintiff’s] survey, it is insufficient on its face to support a preliminary injunction for trademark dilution. That survey shows at best
a dilution level of 14%... That is less than half of the lowest percentage of dilution in any reported decision basing a finding of dilution on a survey... Without dictating that any particular level of dilution is necessary at a minimum, it is plain that 14% is not adequate to sustain the extraordinary remedy sought here—a preliminary injunction against an FDA-approved prescription drug...


The Crayola color scheme qualifies as... famous... This is evidenced by the market research surveys...[n.2 Defendant claims that Plaintiffs rely on several surveys that must be disregarded because there is no evidentiary basis for their admission into the record... Plaintiffs assert that their surveys were performed by an outside firm in the ordinary course of their business, none of which were conducted for the purposes of litigation. Based on these representations, the Court finds that the surveys have the Circumstantial guarantees of trustworthiness...]... The Crayola mark has acquired virtually universal recognition among consumers in this county... survey conducted for Plaintiffs found that 92% of mothers of children aged 2-12, who are the primary purchasers of children’s art products, think of the Crayola mark without prompting when asked to name a brand of crayons... The same survey found that 80% think of the Crayola mark with [and] without prompting when asked to name a brand of markers... Also, in a 1987 market research survey that asked mothers to draw a Crayola package from memory, all 450 mothers surveyed drew a green and yellow box...


n.18... we find that the [Plaintiff’s] marks is famous...

The report and testimony of plaintiff’s expert... supports this finding... concluded that the [Plaintiff’s] trademark is known to approximately fifty-three percent of the Internet users who would be exposed to the defendant... and fifty-seven percent of the international travelers who would be exposed to the [Plaintiff’s] trademark. See 4 J.T. McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 24:92, at 24-169 (2001 ed.) (trademark may be characterized as famous if it is known to more than fifty percent of the defendant’s potential customers)... [the] survey also shows that the [Plaintiff’s] trademark is known to approximately forty-five percent of the United States public as a whole. See *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. Of Travel Dev.*, 955 F. Supp. 605, 613 n. 4 (E.D. Va. 1997), aff’d, 170 F.3d 449 (4th Cir. 1999) (survey showing that over forty percent of United States general public recognized trademark supported conclusion that the mark was famous).
Courts that have held that the FTDA requires a showing of only a “likelihood of dilution” criticize focusing on the phrase “causes dilution” as using “excessive literalism to defeat the intent of the statute.” …They primarily argue that it will be difficult for trademark owners to provide evidence of actual dilution, even by such common means as revenue data and consumer surveys:…

…to that end, [Plaintiff] has submitted the results of a survey…

…that...suffices as proof that [Defendant’s] use of the Cartoon Tiger to market convenience food products causes dilution “by blurring.”…

…survey provides evidence that [Plaintiff’s] Tony the Tiger has been “linked” to [Defendant’s] Cartoon Tiger…

Marketing surveys conducted for opposer demonstrate that more than 50% of the consumers in the United States are aware of the NESCAFE brand of instant coffee.

…As a result of opposer’s sales and promotional activity, and the survey demonstrating recognition of the mark, we find opposer’s NESCAFE mark is a famous mark…

The only evidence of the strength or distinctiveness of the plaintiffs’ Gigante mark in 1991 is the…[r]eport. According to that report, as of the time the defendants began using the name Gigante, 22% of Mexican-Americans in San Diego had heard of the plaintiffs’ Gigante mark…

…the…[r]eport shows that, as of 1991, 22% of Mexican-Americans in San Diego were aware of the plaintiffs’ Gigante mark. Although this level of recognition is sufficient to protect the plaintiffs’ mark from infringement, the Court finds that it is not sufficient to establish that the plaintiffs’ mark is famous enough to be protectable from dilution. See, e.g., McCarthy, supra, § 24:92 at 24-168 (stating that mark should not be considered famous unless it is known to more than 50% of defendant’s potential customers); Ringling Brothers--Barnum & Bailey Combined Shows, Inc., v. Utah Div. of Travel Dev., 955 F.Supp. 605, 613 n. 4 (E.D.Va.1997) (finding mark was famous, in part, because survey evidence
shows that mark was recognized by over 40% of nationwide class of respondents).


A[n]…independent telephone survey of subscribers to several magazines showed that petitioner had both the highest unaided and aided brand awareness amongst both businesses (33% and 71%, respectively) and resellers (52% and 79%, respectively)…

…petitioner has established that its mark is a famous one in the computer storage product field…


Applicant has also objected to the entire testimony… as being beyond the scope of proper rebuttal. This testimony relates to a survey taken by opposer with respect to public awareness of the HARD ROCK CAFE restaurants. Because evidence of such awareness goes to the fame of the mark, it is properly part of opposer’s case-in-chief. The objection is sustained.


[Plaintiff] also relies on a November 1997 survey as evidence that its mark was famous among consumers. The survey…[i]n a test for unaided awareness of mall management companies, respondents were asked: “When thinking of companies that manage shopping malls or shopping centers, which one comes to mind first? What others?”…This question was presented to 685 respondents, 498 of who stated that they shopped at Simon DeBartolo Group malls most often while 187 shopped most often at other malls.

[Plaintiff] boldly asserts that “Simon was recognized by 15% of the respondents as the mall management company.”…That is not an accurate representation of the survey results. The survey results state that 15 percent of respondents named either DeBartolo, Simon DeBartolo, or Simon… DeBartolo, Simon DeBartolo, and Simon are different marks. Evidence of consumer awareness of the DeBartolo name or the Simon DeBartolo name is not evidence of consumer recognition of the Simon mark.

In fact, [Plaintiff’’s] survey shows that only a meager 3 percent of respondents, or approximately 21 people out of 685 polled, named Simon as a shopping mall management company without prompting from the interviewer… While this survey shows that a small percentage of consumers are familiar with the Simon mark, it is not evidence from which a reasonable trier of fact could conclude that the Simon mark was famous among consumers prior to October 1998. It is powerful evidence to the contrary…these survey results…[fall] far
short of establishing anything recognizable as “fame” for purposes of the Anti Dilution Act. [Plaintiff’s] own survey shows as a matter of law that all these efforts have not generated fame sufficient to warrant protection under the FTDA…


Defendants properly point out that plaintiff has failed to submit survey evidence or any proof that “an appreciable number of reasonably prudent purchasers exercising ordinary care” have been confused as to the source of plaintiff’s product…

…

Defendants offer survey evidence that the [Plaintiff’s] trademark is not famous. A survey was conducted telephonically with 501 random respondents. The [Plaintiff’s] mark received “a very low-level awareness” according to defendants’ expert…The awareness factor was 12% on an aided basis. The expert notes that 11% responded favorably to completely fictitious marks, and that a broad range of products were connected with the [Plaintiff’s] mark. Only 1% connected [Plaintiff] with CD’s or music videos.

Plaintiff’s mark is not famous, and more importantly, it was not famous at the time defendants entered the market…Defendants are entitled to summary judgment on plaintiff’s dilution claims.


The Plaintiff relies on survey evidence…to show consumer recognition of the “Fun Ship” mark. The Plaintiff points out that when asked if they had heard of the “Fun Ship” slogan, 68% of respondents stated that they had. When asked which cruise line uses the “Fun Ships” slogan, 58% said Carnival. The Defendant challenges the results of the survey as biased and aided by specific identification of seven cruise line names. It is also noteworthy that one of the qualifications for the respondents was that they be “very or somewhat interested in taking a cruise ship vacation in the next three years.” Therefore, it is evident that the respondents do not represent the general public.

…

Given the weaknesses of the survey evidence and the fact that [Plaintiff] and [Defendant] do not operate in the same market, the Court finds that even if the “Fun Ship” mark is somewhat well-recognized among individuals planning to take a cruise in the near future, this does not render the mark “famous” for purposes of the dilution analysis.

\textit{Avery Dennison Corporation v. Sumpton,} 189 F.3d 868, 879 (9th Cir. 1999)

[Plaintiff] submitted three market research studies regarding perceptions of the “Avery” and “Avery Dennison” brands. Discussion groups through which
one study was conducted were formed “using [Plaintiff] client lists,” and produced the conclusion that the “Avery” name has “positive associations ... among current customers.” Surveyed persons in the other two studies were mostly “users and purchasers of office products” and “[o]ffice supply consumers.” The one consumer group that did not necessarily include office supply purchasers for businesses was still required to be “somewhat” or “very” familiar with [Plaintiff’s] products in order to be counted.

[Plaintiff’s] marketing reports are comparable to a survey we discussed in Anti-Monopoly, Inc. v. General Mills Fun Group, Inc., 684 F.2d 1316 (9th Cir. 1981), proving only the near tautology that consumers already acquainted with Avery and Avery Dennison products are familiar with [Plaintiff]…The marketing reports add nothing to the discussion of whether consumers in general have any brand association with “Avery” and “Avery Dennison,” and no evidence of product awareness…[related] specifically to the “Dennison” trademark. Although proper consumer surveys might be highly relevant to a showing of fame, we reject any reliance on the flawed reports submitted by [Plaintiff].

Ringling Bros.-Barnum & Bailey Combined Shows Inc. v. Utah Division of Travel Development, 170 F.3d 449, 463 (4th Cir. 1999)

We affirm as not clearly erroneous the district court’s assessment that the consumer survey evidence does not support a finding of dilution under the federal Act. While we might have some concern with the implicit finding that this evidence does not even show the requisite threshold “mental association” of the two marks within the consumer market surveyed, we have no concern respecting the specific finding that the survey evidence does not show that use of [Defendant’s] junior mark had caused any actual harm to [Plaintiff’s] mark in the form of a lessening of that mark’s former capacity to identify and distinguish [Plaintiff’s] circus as its subject. And that, of course, suffices to support the court’s ultimate conclusion.


A manufacturer of peanut butter candy failed to show likelihood of success on its claim that a competitor’s trade dress created a “blurring” of that portion of its trade dress...as required to obtain a preliminary injunction against the competitor’s continued use of the competitor’s trade dress in a trademark dilution action, even though there was a survey showing that...participants...misidentified the candy as coming from the manufacturer; the survey was flawed...
FALSE ENDORSEMENT SURVEYS


[Plaintiff] has not presented any survey evidence as to the existence of consumer confusion regarding Ms. Giove’s continued affiliation with [Defendant]. Several courts have held that a plaintiff’s failure to conduct a consumer survey, assuming it has the financial resources to do so may lead to an inference that the results of such a survey would be unfavorable…
With regard to the Examining Attorney’s objections, we do agree…that an insufficient number of survey respondents was included in applicant’s survey. Moreover…When survey respondents were asked if they thought the hotels shown in the material provided “are connected or affiliated with the country or principality of Monaco,” we believe it possible, if not likely, that many of the survey respondents may have interpreted “connected or affiliated with” to mean some sort of official or governmental ownership or sponsorship by the principality of Monaco. The more appropriate question…would have been whether the survey respondents believed that applicant’s hotels (or hotel services) have their origin in or come from Monaco…Because we cannot, of course, determine how the question was interpreted by the survey respondents, and because of the insufficient number of survey respondents, we do not find the survey results to be persuasive or probative.
SCANDALOUS/DISPARAGING MARKS SURVEYS


…[Petitioner] also placed in evidence a public opinion study conducted in 1990…with respect to prevalent social attitudes toward certain ethnic groups including Italian-Americans…

…While in the public opinion study made of record by petitioner a general association was found to exist between Italian-Americans and organized crime, no mention was made of the term “Mafia,” or whether its use, regardless of context, would automatically trigger this association.
COPYRIGHT SURVEYS

Mattel Inc. v. Walking Mountain Productions, 353 F.3d 792, 801 (9th Cir. 2003)

...In support of this argument, [Plaintiff] offered into evidence a survey in which they presented individuals from the general public in a shopping mall with color photocopies of [Defendant’s] photographs and asked them what meaning they perceived. Relying on this survey, [Plaintiff] asserts that only some individuals may perceive parodic character.

The issue of whether a work is a parody is a question of law, not a matter of public majority opinion...

We decline to consider [Plaintiff’s] survey in assessing whether [Defendant’s] work can be reasonably perceived as a parody. Parody is an objectively defined rhetorical device. Further, because parody is “a form of social and literary criticism,” it has “socially significant value as free speech under the First Amendment.”...While individuals may disagree on the success or extent of a parody, parodic elements in a work will often justify fair use protection...Use of surveys in assessing parody would allow majorities to determine the parodic nature of a work and possibly silence artistic creativity. Allowing majorities to determine whether a work is a parody would be greatly at odds with the purpose of the fair use exception and the Copyright Act...

A & M Records v. Napster, Inc., 239 F.3d 1004, 1016-1017 (9th Cir. 2001)

...plaintiffs’ expert...conducted a survey...using a random sample of college and university students...The court recognized that the [Plaintiff’s expert] focused on just one segment of the Napster user population and found “evidence of lost sales attributable to college use to be probative of irreparable harm for purposes of the preliminary injunction motion.”...

...As for defendant’s expert...The district court found problems in [Defendant’s expert’s] minimal role in overseeing the administration of the survey and the lack of objective data in his report...


...Plaintiffs’ expert...opined that forty-one percent of her college-student survey respondents “gave a reason for using Napster or described the nature of its impact on their music purchases in a way which either explicitly indicated or suggested that Napster displaces CD sales.”...[Plaintiff’s expert’s] overall conclusion was that “[t]he more songs Napster users have downloaded,” the more likely they are to admit or imply that such use has reduced their music purchases...
For the reasons discussed in the court's separate order, the report by defendant's expert... does not provide credible evidence that music file-sharing on Napster stimulates more CD sales than it displaces...

n.15... Among the shortcomings the court noted are... [Defendant’s expert’s] heavy reliance on journalistic articles and studies that he did not conduct, the fact the centerpiece of his report is a survey that he only distantly supervised, and the lack of tables offering statistical breakdowns of survey respondents and their answers.

... [Plaintiff’s expert] reached the overarching conclusion that the more songs Napster users download, the more likely they are to reveal that such use reduces their music buying... evidence suggests that sampling and building a free music library through unauthorized downloading are not mutually exclusive: it is likely that survey respondents who sample are primarily direct infringers...
PATENT SURVEYS


A review of [Plaintiffs’ expert’s] surveys…reveals rigorous methodological standards applied by an experienced survey researcher using a double blind survey protocol…and clear, precise, and predominately non-leading questions…In addition, the questions pertained in part to experiences learned by direct perception and to events that are unlikely to be forgotten, namely the usage of thermal cyclers in respondent’s lab during a period not exceeding six years, and were posed to individuals who by self-report were the most knowledgeable in the lab about such usage.

With respect to the notice prong of Rule 807, defendants had all three surveys since September 2002. Defendants provided in discovery their invoice database from which [Plaintiffs’ expert] selected respondents and thus [Defendants] could have conducted its own survey of [Defendants’] customers to test the reliability of [Plaintiffs’ expert’s] methodology and/or results. In fact…researchers are prohibited by ethical rules from disclosing the actual individual identities of the survey respondents and instructed to defend against Court orders compelling disclosure…The Reference Manual for Scientific Evidence published by the Federal Judicial Center instructs that, because of such ethical obligations, identifying information such as names and addresses should be removed from survey data before it is provided to opposing counsel…

Under the circumstances of record here, the Court believes the name and address requirement of Rule 807 has been satisfied. To hold otherwise would require exclusion of trustworthy evidence on material facts in this case and violate the mandate of Fed. R. Evid. 102…


…[Plaintiff’s] survey purports to find the approximately 62% of patients who use portable oxygen units would consider the ESCORT’s design similar to that of the ‘056 patent. However, the hypothetical “ordinary observer” in the Gorham test both speaks to “purchasers” and must be “objective.”…[Plaintiff] admits that the “purchaser” of the portable oxygen units in question is not the patient…The purchaser of portable oxygen units is the medical equipment distributor…[Plaintiff] admits that physicians and medical equipment distributors were their first targets when it introduced [its oxygen tank] because those groups made the purchasing decision…It follows then that any survey of “ordinary observers” in this case must include medical equipment distributors, at the least, and possibly, hospitals and physicians, at best, to ensure that all relevant purchasers’ views are considered. [Plaintiff’s] survey simply misses these key “ordinary observer” groups, and as a result, is not nearly broad enough to create an issue of fact on infringement.
[Plaintiff] introduced survey evidence that purportedly shows that purchasers of the hangers erroneously identified the [Defendant’s] hanger as being the same as the design depicted in the ‘246 design patent. In the survey, six buyers for garment manufacturers were shown a drawing from the ‘246 design patent and were then shown a collection of hangers including [Defendant’s] hanger with a size cap and asked, “Do you think any of these hangers are the same as the hanger in the drawing?” However, the survey is severely flawed and does not assist in the infringement determination because all the hangers shown in the survey, other than the [Defendant’s] hanger, did not have upswept arms. As such, the only hanger remotely related to the dominant feature of the patent (the upswept arms), was the [Defendant’s] hanger. (For example, the survey did not include a non-[Defendant] design with upswept arms that would not infringe upon the ‘246 design patent such as any of the alternative designs proposed by [Plaintiff] in Exhibit 1473.) Moreover, as explained above, the confusion must be related to the ornamental aspects of the design. Accordingly, the survey is not probative of confusion…
DAUBERT/ADMISSIBILITY ISSUES


...nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion offered."

Plaintiffs’ motions in limine rely on the declarations of plaintiffs’ expert...[Plaintiffs’ expert’s] opinions in her declarations are generally not supported by citation to authorities relied on by survey experts...[Plaintiffs’ expert] has not offered any survey results of her own in support of the opinions. She expresses in her declarations. This is despite her claimed expertise in “the design and implementation of trademark, design patent, unfair competition, right of publicity, and other consumer surveys.”...She has designed and supervised the implementation of over 500 surveys, including over 150 trademark, design patent and unfair competition surveys...She has been retained as an expert witness for litigation regarding surveys over 150 times, and has “testified as an expert at trial in Federal Court in thirteen cases in which [she] had conducted surveys for trademark cases...”...Here, [Plaintiffs’ expert] was not retained by plaintiffs to conduct a survey, but only “to review and offer an opinion” regarding a survey conducted by defendants’ [first] expert...and “to review and offer [an] opinion” regarding a survey conducted by defendants’ [second] expert...Although plaintiffs’ approach of limiting their expert's assignment in this fashion is not unusual...the absence of competing survey evidence from [Plaintiffs’ expert] showing divergent survey results significantly undermines the efficacy of plaintiffs’ arguments that defendants’ evidence is so unreliable that it must be excluded. In other words, plaintiffs’ criticisms of the methodology used by the defense experts would have been substantially aided by proof that the “correct” methodology would have led to a different result.

Plaintiffs’ expert...characterizes the universe [Defendant’s first expert] selected and his sampling from it as “questionable.”...In somewhat hyperbolic terms, plaintiffs’ brief transforms “questionable” into an argument that [Defendant’s first expert’s] universe was “fatally flawed” and “hopelessly broad” and compounded by his “improper sampling.”...Plaintiffs’ expert believes that the two-year periods selected by [Defendant’s first expert] were too long. She

believes that, “A more recent past time frame such as three months would have been more appropriate…” None of [Plaintiffs’ expert’s] criticisms is supported by reference to written authority in the area of survey research or objective evidence.

[Plaintiffs’ expert] also suggests additional screening questions that she believes [Defendant’s first expert] should have asked. [Plaintiffs’ expert] believes that questions should have been added to determine if the potential respondents were serious shoppers for laundry equipment such as, “had they looked at advertising for laundry equipment or had they actually shopped for laundry equipment.” …She criticizes [Defendant’s first expert] for not including screening questions about price points…She believes that screening questions should have been asked “about whether potential respondents had previously purchased higher priced, higher quality home appliances such as KitchenAid or were ‘home enthusiasts’ who spend time and effort on creating the perfect home.” …She states without any supporting evidence that, “These are the types of consumers who would be more likely to be knowledgeable about KitchenAid’s Whisper Quiet mark because this is the type of equipment they purchase.” …Again, her opinions are devoid of reference to supporting authorities…[Plaintiffs’ expert] did not conduct any survey demonstrating that her suggested modifications to [Defendant’s first expert’s] survey would produce different or more accurate results. In essence, she is claiming that she could have conducted a more accurate survey but did not do so…

…[Plaintiffs’ expert] states that interviewers provided respondents with a “poor quality” photo of an LG washer or dryer…[Plaintiffs’ expert] provides no explanation how these purported deficiencies render [Defendant’s first expert’s] survey unreliable.

…[Defendant’s first expert’s] survey had the interviewer point to the bottom line of a photograph, where it said “Whisper Quiet” …The respondent was then asked, “Now, looking at this picture of just the side of the control panel, if you were in a store shopping for an appliance and you saw this washer [dryer] with the words, “Whisper Quiet…on it, would this tell you anything about the washer [dryer].” …[Plaintiffs’ expert] states, that “there was no reason to preface ‘Whisper Quiet’ with ‘the words,’ or with anything at all.” …She states that, “This proves that the respondents could hear, see, read, and ultimately come to a conclusion about what ‘Whisper Quiet’ means because it includes the word quiet.” …[Plaintiffs’ expert’s] criticisms are captious and unpersuasive. If [Plaintiffs’ expert] had conducted a similar survey omitting the purportedly offending phrase “the words,” and achieved significantly different results, her criticism might be more persuasive. As it is, there is no evidence that if the challenged phrase had been omitted that the survey results would have been any different.

…[Defendant’s first expert’s] survey asked, “Do you believe that a washer [dryer] that uses these words, ‘Whisper Quiet…’ comes from, is associated with, or is put out by one company only? or More than one company?” [Plaintiffs’ expert] again objects to “these words” appearing in [Defendant’s first expert’s]
question…[Plaintiffs’ expert] states that she finds the question to be confusing. She states that asking this question with the LG brand name on the depicted washer or dryer panel is not accepted survey methodology and that in a secondary meaning survey, the mark must be shown on the product with all brand names (indicia of origin) redacted…There is no legal or professional survey authority cited for these propositions…

*M2 Software, Inc. v. Madacy Entertainment*, 421 F.3d 1073, 1087 (9th Cir. 2005)

Admissibility of a survey is a threshold question that must be resolved by a judge…(“Treatment of surveys is a two-step process. First, is the survey admissible? That is, is there a proper foundation for admissibility, and is it relevant and conducted according to accepted principles? This threshold question may be determined by the judge.”…) Surveys in trademark cases are to be admitted as long as they are “conducted according to accepted principles.”…

[Plaintiff’s] survey was twice excluded by the district court because it was not created or conducted in a manner that complied with appropriate standards…

Both district judges properly rejected the [Plaintiff’s] survey because the survey’s creator “did not qualify as an expert on designing or analyzing consumer surveys.” Moreover, [Plaintiff] failed to “show that the survey was conducted in accordance with generally accepted survey principles…”[Plaintiff’s] arguments regarding the weight of the survey are misplaced because [Plaintiff] first failed to provide a proper foundation for admissibility of its survey…(“Once the survey is admitted, however, follow-on issues of methodology, survey design, reliability, the experience and reputation of the expert, critique of conclusions, and the like go to the weight of the survey rather than its admissibility.”)…


n4 [Defendant] retained the services of [a survey expert] to determine whether there was a likelihood of confusion between [Defendant] and [Plaintiff] among [Defendant’s] agents in Rhode Island who produce commercial insurance policies. [Defendant] seeks to have the testimony…admitted as expert testimony to the effect that the results of the survey…conducted demonstrate a lack of likelihood of confusion among [Defendant’s] agents…[Plaintiff] filed a motion to exclude this testimony and the Court conducted a *Daubert* hearing in the course of the trial… This Court grants [Plaintiff’s] motion for the following reasons: First, the Court does not need an expert to testify to the non-startling conclusion that [Defendant’s] agents…are not confused between [Defendant] and [Plaintiff]…Second, [Defendant’s expert’s] methodology raises a number of questions as to the reliability of her conclusions…
In *Daubert v. Merrell...* “the Supreme Court held that when expert testimony is offered, the trial judge must perform a screening function to ensure that the expert’s opinion is reliable and relevant to the facts at issue in the case.”... Federal Rule of Evidence 702 provides the standard for admissibility of expert testimony in federal court...

“... The requirement that the testimony assist the trier of fact means the evidence must be relevant.”... “The expert testimony must be relevant, not simply in the sense that all testimony must be relevant... but also in the sense that the expert’s proposed opinion would assist the trier of fact to understand or determine a fact in issue.”... Simply put, to be relevant there must be a valid connection between the expert testimony and the issue(s) in controversy...

The final inquiry in determining the admissibility... is the reliability of the testimony... In analyzing the reliability of an expert’s testimony, the Supreme Court in *Daubert* provided an “illustrative list of factors that may aid a court in evaluating reliability.”... The *Daubert* factors are flexible and they “may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert’s particular expertise, and the subject of his testimony.”...

... An analysis under *Daubert* and its progeny is not intended to replace the adversary system... In its role as gatekeeper, the court should not determine the merits of the case, but instead determine whether the evidence at issue is admissible...

“... A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule.” FED. R. EVID. 702, Advisory Committee Notes to 2000 Amendments. The [Defendant’s expert’s] Report appears to meet the standard for admissibility under Rule 702 and thus the court will consider it in determining [Defendant’s] motion for summary judgment...

[Defendant’s] argument that any problems of [Defendant’s expert’s] survey should have affected only its evidentiary weight but not its admissibility is also unpersuasive. The District Court excluded the survey because [Defendant’s expert’s] methodology was fundamentally flawed and because the danger of undue prejudice far outweighed the limited probative value of the survey, especially for a jury. The courts have held generally that mere technical unreliability goes to the weight accorded a survey, not its admissibility... The Court in this case concluded that [Defendant’s expert’s] survey did not suffer from mere technical flaws, but from fatal flaws.
Subject to proper foundation being laid, and in light of the Federal Rules of Evidence and *Daubert*, the Court finds that [Plaintiff’s expert] is a qualified survey expert. [Plaintiff’s expert] is a trained social scientist with 20 years of experience in the marketing communications industry. [Plaintiff’s expert] serves as president of [his company] where he designs, administers, and analyzes market research for companies. In addition, [Plaintiff’s expert] has experience providing testimony at trials and depositions in this district.

While the Court does not accept the [Defendant’s] invitation to reject [Plaintiff’s Expert’s] consumer survey, the Court does not agree with all aspects of the methodology of the survey or the interpretation given to the survey results by [Plaintiff’s expert]. In particular, the Court finds that the format of the questions, if not leading, certainly suggested to the respondents the “correct” answer to some of the questions being asked. The Court also finds that some of the questions asked had little probative value...In light of these findings, the Court will give the survey results and their interpretation less weight when considering the issues before it on the motions for summary judgment.

*Scott Fetzer Co. v. House of Vacuums Inc.*, 381 F.3d 477, 488 (5th Cir. 2004)

 Usually, methodological flaws in a survey bear on the weight the survey should receive, not the survey’s admissibility...[Plaintiff] argues that its presentation of survey evidence precludes summary judgment because a court may not weigh evidence or make credibility determinations when reviewing a motion for summary judgment...In some cases, however, serious flaws in a survey will make any reliance on that survey unreasonable...Otherwise, any survey, no matter how tendentious, would force the parties to trial. Thus, although minor methodological flaws will affect weight rather than admissibility, a survey can be “so badly flawed that it cannot be used to demonstrate the existence of a question of fact on the likelihood of consumer confusion.”... No reasonable jury could view the proffered survey as evidence of confusion among relevant consumers...


...It is true, of course, that the Supreme Court’s holdings in *Daubert v. Merrell Dow Pharms.*...which require that certain standards be met before expert scientific testimony can be accepted and relied upon by a tribunal, apply to survey research as well as other types of expert testimony. But in general, courts are loathe to exclude consumer surveys from evidence. “The majority rule is that while technical deficiencies can reduce a survey’s weight, they will not prevent the survey from being admitted into evidence.”...So long as the survey is
conducted according to accepted principles, “survey evidence should ordinarily be
found sufficiently reliable under Daubert.”(...“Technical and methodological
deficiencies in the survey...bear on the weight of the evidence, not the survey’s
admissibility.”)...(flaws in surveys go to the weight the trier of fact should place
on the survey’s results)...(survey will rarely be so flawed as to be completely
unhelpful to the trier of fact and therefore inadmissible)...(“Even if the court finds
deficiencies in the proponent’s showing” that the population was properly chosen
and defined, that the sample was representative of that population, that the data
was accurately reported and properly analyzed, “the court may receive the
evidence subject to argument going to its weight and probative value.”)...
Defendants criticize [Plaintiff’s expert’s] procedures and conclusions… Their critique of [Plaintiff’s expert] methods and interpretations formed the basis of a motion to exclude his expert testimony and report before the district court. The district court denied that motion, however, and allowed the introduction of the evidence.

Defendants may have valid criticism of [Plaintiff’s expert’s] methods and conclusions, and their critique may justify reducing the weight eventually afforded [Plaintiff’s expert’s] expert report… Because actual confusion is at the heart of the likelihood of confusion analysis…[Plaintiff’s expert’s] report alone probably precludes summary judgment.

Under *Daubert v. Merrell Dow Pharmaceuticals*… the Court must ensure that expert testimony “is not only relevant, but reliable.”…[Plaintiff’s expert] failed to satisfy fundamental principles of survey research in seven major ways:

(a) The surveys did not sample the appropriate universe of respondents;
(b) The surveys did not use any demonstrative stimuli or otherwise replicate actual market conditions;
(c) The survey questionnaires were biased and leading;
(d) [Plaintiff’s expert] drew unwarranted inferences and failed to take into account obvious alternative explanations;
(e) The surveys did not ask the kind of control questions needed to generate an error rate;
(f) The surveys were not administered properly, including the use of a panel of regular survey respondents;
(g) The surveys did not employ a design that established causation, rendering the surveys results uninterpretable…

While every survey, including the one at issue here, may contain some flaws, this Court sees no reason to ignore the survey at the summary judgment stage. Instead, the alleged infirmities can be examined in a motion to exclude or at trial by “vigorous cross-examination [and] presentation of contrary evidence.”… *Daubert v. Merrell Dow Pharms., Inc*….see also *McCarthy* § 32:170, at 32-274-275 (“The majority rule is that while technical deficiencies can reduce a survey’s weight, they will not prevent the survey from being admitted into evidence.”); *Callmann* § 19.27.50, at 244 (noting that the “methodological deficiencies which result from failing to follow [the framework for such
surveys…usually go to the probative weight which the survey is accorded, not to its admissibility.


Defendants move to bar any reference to the consumer survey…claim[ing] that [Plaintiff’s] survey must be excluded because he failed to: (1) differentiate functional from non-functional product features; and (2) take into account the effect of the expired patents. Defendant’s objections go to the weight of the evidence, but do not necessarily preclude admissibility.

First, Defendants claim that “[a] survey which asks consumers to identify the source of a product based on its overall configuration when most of the product’s configuration is functional is utterly worthless in determining whether certain features have acquired secondary meaning.”…In making this argument, Defendants’ argument assumes the overall configuration of [Plaintiff’s] chair is entirely functional, in contrast with the opposing assumption made by [Plaintiff’s expert]…[Plaintiff’s expert’s] reliance on [Plaintiff’s] assertion of non-functionality may be explored on cross-examination…

Second, Defendants’ argue that “it is highly probable that the connection between the product design and [Plaintiff] comes from the patents.”…This argument goes to the necessity of establishing a sufficient foundation for the admission of the survey. Accordingly, Defendants’ second motion *in limine* must be denied.


This Court finds that Plaintiff’s initial filing of this action was justified and was not exceptional, but also finds that its continued pursuit of the action after it was aware that [Plaintiff’s] survey lent no credence to its position, in light of the Court’s clear guidance in the preliminary injunction opinion upon principles of well-settled law, made the case exceptional.

…

Plaintiff should have been aware after the deposition testimony of [Plaintiff’s expert] was taken that its case was meritless. The flaws in [Plaintiff’s expert’s] survey were patent on its face; the very definitions on which it was based were clearly legally incorrect in light of this Court’s preliminary injunction opinion…

Instead of acknowledging the flaws in their case, Plaintiff pressed forward and required Defendants to file, brief, and argue their summary judgment motion…This Court finds that after [Plaintiff’s expert’s] deposition testimony was taken…Plaintiff should have reconsidered its position and determined that it was unable to present the evidence that the Court determined was necessary to show that their case had merit. Therefore, this Court finds that Plaintiff’s case
became an “exceptional case” the following day…and finds that Defendants may seek reasonable fees for the period from [that date] forward.


…Here, the survey did not sample the correct group, and did not permit those sampled to view all of the relevant evidence bearing on the relevant issue. Moreover, the survey’s conclusion - that a reasonable consumer might believe that Plaintiff and Defendant are associated - does not meet the correct standard of whether reasonable consumers were likely to intimate an association. For all of these reasons, the Court concludes that the survey is not admissible.


Pursuant to *Daubert*, [Plaintiff] seeks to exclude [Defendant’s] likelihood of confusion survey…

…[Plaintiff’s] main objection is that the study is conducted in an improper universe and,…when conducting a survey in a trademark case the first crucial step is determining the proper universe…the propriety of a survey can turn on the geographical area covered…The burden of proving that the universe is proper is on the proponent of the survey…

In reverse confusion cases, like this one, the appropriate universe is the “senior user’s customer base.”…

…While it is true that the appropriate universe consists of individuals who have access to both litigants and are a customer or a potential customer, when conducting a survey in a reverse confusion case, the universe is further limited to the senior user’s “customer base.”…

Even assuming, *arguendo*, that the study was conducted in the proper universe, the survey would have necessarily excluded those individuals that were likely to be customers or potential customers of [Senior User]. As mentioned previously,…relevant factors used to assess reliability and trustworthiness of a survey are whether the sample chosen was representative of that universe and whether the questions asked of the interviewees were framed in a clear, precise and nonleading manner…Here, screener question A asked the following question: “But first, do you live or work in this general area or are you just visiting?” “…General area” and “just visiting” were not defined by the study. This is not a clear and precise question. Furthermore, if the individual answered “just visiting,” then the interview was terminated without any further questioning and the individual was excluded from the questionnaire…many of the individuals that should have been included in the proper universe…would have been automatically excluded from the survey. Therefore, because of the location of the study and the screener question asked, few (if any) participants were likely to be part of [Senior User’s] customer base. Consequently, the failure to conduct the
survey within [Senior User’s] customer base and then to exclude those individuals who may potentially come from within the customer base is fatal.

...Although I recognize that no survey is beyond criticism and there is no perfect survey, the problems with the [Senior User’s] Survey are so fundamental and basic that the survey is stripped of any significant probative value. Therefore, I am convinced that the...survey is not simply [well]-tailored (so as to go to the weight), but is fatally flawed due to an irrelevant and improper universe, such that it must be excluded from evidence at trial.


The Supreme Court’s ex cathedra pronouncements in Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) and Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) offer district courts guidance in assessing the admissibility of expert testimony. Under Daubert, the district court undertakes a “gate-keeping” function, and determines “whether the reasoning or methodology underlying the testimony is scientifically valid and...whether that reasoning or methodology properly can be applied to the facts in issue.”...

In Kumho Tire, the Supreme Court held that the gate-keeping function applies to technical and other specialized knowledge in addition to scientific testimony...The court stressed that the district court must have “considerable leeway” in both “how to determine reliability” and “its ultimate conclusion.”...Most importantly for the instant motion, “the ultimate credibility determination and the testimony’s accorded weight are in the jury’s province.”...“Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” Daubert, 509 U.S. at 596.

...It is true that the admissibility of market surveys as evidence in trademark cases is a thorny question...

Courts have stated many reasons for excluding survey evidence due to fatal flaws in methodology of design or implementation...

Likewise, surveys have been upheld and accepted by courts, notwithstanding attacks on their methodology...

All this serves to show that the decision whether to admit [Plaintiff’s] survey evidence ultimately rests in the Court’s discretion. Bearing in mind the Daubert/Kumho analytical scheme...Defendant’s[’]...criticisms, valid as they may be, are not sufficiently weighty to justify exclusion of the survey altogether under the applicable gate-keeper standard. The alleged infirmities [Defendant] identifies are best challenged by the type of “vigorous cross-examination (and) presentation of contrary evidence” envisioned by Daubert...

Plaintiffs’ moving papers did not offer any evidence of actual confusion; indeed, Plaintiffs conceded that they did not have any such evidence. In connection with their reply, however, they submitted a survey of 200 professional mortgage brokers which they claim demonstrates initial interest confusion. This new evidence is stricken. Plaintiffs have offered no justification for their failure to submit their survey evidence in connection with their initial moving papers…

In any event, even if the Court were to consider the untimely evidence, Plaintiffs’ survey has several substantive flaws. First, the survey did not target Defendants’ market (homeowners) and therefore is not a representative sample. Second, the individual who conducted Plaintiffs’ survey opines that the brokers polled will be confused that World Lending Group is connected with World Savings. The survey, however, makes no specific reference to Defendants’ marks; rather, it asks the respondents generically if they have a belief about a website owner who uses the term “world” among other terms. The survey’s failure to refer to Defendants’ marks makes it insufficient to establish any actual initial confusion.


Consumer survey results must be presented through experts. Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), the court must act as a “gatekeeper” to ensure that expert testimony satisfies the admissibility requirements of Federal Rule of Evidence 702. *Daubert* requires the court to ensure that expert testimony is “not only relevant, but reliable.”…

Moreover, Rule 403 requires us to consider the probative value of a survey in relation to circumstances such as the danger of unfair prejudice, confusion of the issues, misleading the jury, or waste of time. Methodological deficiencies often go to the weight rather than to the admissibility of a survey, but if the flaws are sufficiently serious, “the court may find that the probative value of the survey is substantially outweighed by the prejudice, waste of time, and confusion it will cause at trial.”…

[Defendant] contends that [Plaintiff’s] survey…is so flawed that we should exclude it from evidence. [Defendant] first argues that the survey conditions failed to replicate actual marketplace conditions, in two ways: first, respondents were exposed to only 8- or 9-second portions of the parties’ 30-second television commercials and 10-second radio advertisements…and second, the ads were shown consecutively, making the survey little more than a word association test.

We agree with [Defendant] that the survey distorted marketplace conditions by taking the advertisements out of context…
Another major flaw of the [Plaintiff’s] survey is that it failed to ask respondents a very important question—namely, a follow-up…question…McCarthy discusses the rationale for the necessity of this follow-up question as follows: (Questions eliciting responses regarding both source confusion and confusion as to sponsorship, affiliation and connection) should be followed up by the importation question: ‘Why do you say that?’ Often, an examination of the respondents’ verbatim responses to the ‘why’ question are the most illuminating and probative part of a survey, for they provide a window into consumer thought processes in a way that mere statistical data cannot.

The [Plaintiff’s] survey improperly distorted marketplace conditions by lifting portions of the commercials out of context; it contained a highly leading question; and it failed to ask respondents a crucial state-of-mind question regarding perceived association. It did not accurately gauge likelihood of confusion and thus fails to meet the standards set forth in Daubert. The [Plaintiff’s] survey is also excluded under Rule 403 because the results are likely to create unfair prejudice, confuse the issues, waste time, and, most importantly, mislead the jury.

For the foregoing reasons, Defendant’s motion in limine to exclude the survey and expert testimony of [Plaintiff’s expert] is granted.

Integrity Incorporated v. Integrity Online International Holdings, Inc., Civ. No. 1:00-CV-1291-WCO, 2-6 (N.D. Ga. 2002)

…[Defendant’s expert] has not conducted a survey on this issue…Defendants wish to use [their expert’s] testimony to attack the credibility and reliability of the [Plaintiff’s] survey.

…The Supreme Court has imposed a “special gatekeeping role on the trial judge in Daubert to ensure that scientific evidence is both reliable and relevant before being admitted as evidence.”…This gatekeeping role was extended in Kumho Tire Co., Ltd. v. Carmichael to apply to all expert testimony, not solely scientific testimony…This gatekeeping role, however, is not intended to supplant the adversary system or the jury’s role: “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”…

…The determination of likelihood of confusion is a question of fact…The issue of which standards should be considered when evaluating the reliability of survey evidence is a matter of law…Because the characteristics of reliable survey evidence are dictated as a matter of law as set forth in the parties requests to charge on this issue, the testimony of [Defendant’s expert] is not likely to assist the trier of fact…[Defendant’s expert’s] testimony consists solely of criticisms of the survey’s alleged defects, which are capable of being brought out through cross-
examination. In addition, the court will instruct the jury with regard to the standards it should consider in determining the weight the jury decides to give to [Plaintiff’s] survey. It is then up to the jury to decide whether the survey was conducted in accordance with those standards and if not, what effect, if any, this failure would have on reliability of the survey results.

Permitting [Defendant’s expert’s] testimony would allow him to testify to the legal issue of the standards that should be considered in evaluating the survey evidence, which is for the court to determine. Permitting his testimony would also allow him to testify as to the credibility and reliability of [Plaintiff’s] survey, which is for the jury to decide…


…The Second Circuit in Schering made clear that such a survey’s “errors in methodology…properly go only to the weight of the evidence” -- not to its admissibility…

The only other potential limitation on the survey’s admissibility is Fed. R. Evid. 403’s provision that a court may exclude otherwise relevant evidence on the ground that the probative value of the evidence is substantially outweighed by the danger of such matters as unfair prejudice or jury confusion…Thus, a survey should be excluded where it is so flawed in methodology that its probative value is substantially outweighed by its prejudicial effect…In order to determine a survey’s “probative” value under Rule 403, however, it would seem that at least some attention must still be paid to the methodology of the survey because a court determines whether a survey is probative under Rule 403 by examining whether it was “fairly prepared and its results directed to the relevant issues.”…

Thus, in considering the probative value of a survey, it is tempting to look to longstanding case law that provides a detailed framework for evaluating a survey’s trustworthiness…(under a Rule 403 analysis, a court must conduct a detailed examination of the trustworthiness of survey evidence)…An in-depth analysis of trustworthiness, however, is contrary to the admonition in Schering that “methodological” errors in a survey based on the present sense impressions of the respondents bear exclusively on the weight to be given the survey rather than bearing on an admissibility determination under Fed. R. Evid. 403. It is perhaps for this reason that where Rule 403 alone is at issue, courts have typically not performed an extensive analysis of the survey…Instead courts have focused on whether the survey is so far out of the realm of relevance that a jury should not even be permitted to consider it. Thus in Cache [2001 U.S. Dist. LEXIS 226], the court admitted a survey because, despite its “flaws,” it did not “appear to be devoid of all probative value on the issue of the likelihood of confusion.”…Obviously, with the application of this relaxed standard, many surveys that might be accorded little weight after an analysis of their methodology would still pass muster under Rule 403. Indeed, the Seventh Circuit has noted that “while there will be occasions when the proffered survey is so flawed as to be completely
unhelpful to the trier of fact and therefore inadmissible, such situations will be rare.”

In the present case, the flaws proffered by [Defendant] are not so obvious and egregious that the Court can conclude that the probative value of the survey (even if it could be characterized as minimal) is outweighed by its prejudicial effect…


The Court must thus determine as a threshold issue whether [Plaintiff’s expert’s] opinion and report are admissible…the issue here is whether [Plaintiff’s expert’s] survey design and execution are sufficiently reliable and appropriate to the facts in this case so that his resulting opinion is admissible under Rule 702 of the Federal Rules of Evidence…This threshold determination of the admissibility of proposed expert testimony is governed by the principles of Daubert v. Merrill Dow Pharm., Inc.…. 

This Court recognizes that methodological deficiencies in a survey generally relate to the weight given the survey’s conclusions rather than to its admissibility…

In this case, the [Plaintiff’s] survey suffers from two substantial flaws that show that it is not trustworthy and is not admissible. The first, and perhaps clearest, flaw is the uncontroverted definitional problems of the survey…

The second flaw in the survey is that the universe chosen for the survey was improper…

…this Court finds that [Plaintiff’s] survey suffers from substantial flaws, it is unreliable and inadmissible under Rule 702, Federal Rules of Evidence…


Defendants oppose admitting the…survey of [Plaintiff], claiming that the survey is seriously flawed, would not be helpful to the trier of fact, and would violate the spirit of Daubert v. Merrell Dow Pharmaceuticals…Defendants point to many alleged flaws in the study, arguing that the composition of the sample, the tone and content of the questions, and the method of tabulation all favor [Plaintiff]. Defendants cite numerous cases in which courts have excluded surveys due to errors similar to those that allegedly plague [Plaintiff’s] report…

…Defendants make several allegations about [Plaintiff’s expert’s] survey, which, if true, would seriously undermine his credibility. [Plaintiff] likewise offers explanations which, if true, would demonstrate that some deficiencies are inevitable, while other alleged deficiencies are in fact strengths. The relative
merits of each argument can be borne out on cross-examination, with credibility determinations and weighing of the evidence left to the trier of fact. See generally J. Thomas McCarthy, 5 McCarthy on Trademarks § 32:178 (4th ed.) ("The proper approach is to view (survey) evidence with some understanding of the difficulty of devising and running a survey and to use any technical defects only to lessen evidentiary weight, not to reject the results out-of-hand.") Therefore, the Court will deny Defendants’ motion to exclude [Plaintiff’s expert’s] testimony.


[Defendant] asserts that the testimony of [Plaintiff’s] expert…is unreliable and should be excluded under Federal Rule of Evidence 702 and the principles contained in Daubert…

In assessing the reliability of a proffered expert’s testimony, a district court’s inquiry under Daubert must focus, not on the substance of the expert’s conclusions, but on whether those conclusions were generated by a reliable methodology…

The test of reliability, however, is a “flexible” one, and the factors set forth in Daubert do not constitute a “definitive checklist or test.”… a “review of the case law after Daubert shows that the rejection of expert testimony is the exception rather than the rule.” Advisory Committee Notes, 2000 Amendments, Fed. R. Evid. 702.

In his…report [Plaintiff’s expert] wrote that, “it is very evident that there is a vast amount of confusion between [the] brands…To reach this conclusion, [Plaintiff’s expert] visited several of the parties’ stores, looked at their products, and reviewed [Plaintiff’s] confusion logs…Reviewing the “Background and Qualifications” section of his report, it appears that [Plaintiff’s expert] has neither experience assessing the likelihood of confusion between names and marks nor other experience that would qualify [Plaintiff’s expert] as an expert on this issue. Without such experience, [Plaintiff’s expert’s] opinion on confusion is merely conjectural.

Furthermore, it is hard to determine what methodology, if any, [Plaintiff’s expert] used to reach his conclusion...


It is well established that a district court must act as the “gatekeeper” for expert witness testimony in a jury trial…The instant motion relates to survey evidence which is intrinsically different from the types of evidence most frequently encountered in a Daubert or Kumho context.

As stated by Professor McCarthy: One must keep in mind that there is no such thing as a “perfect” survey…
Nevertheless, it is, and has been even before *Daubert*, necessary for a
district court to pass upon the threshold question of the validity of a survey before
submitting the results to a jury for their consideration…

…
The Court finds that the survey was severely defective by virtue of its
failure to ask any question that would test the critical question of what website it
is that the subject thought they had seen.

…Motion to Exclude…Granted.

*Sony Pictures Entertainment, Inc. v. Fireworks Entertainment Group, Inc.*, 137 F. Supp. 2d
1177, 1197 n.32 (C.D. Calif. 2001)

n.32…Defendants objected to…the Survey based on hearsay, failure to
authenticate, and lack of reliability…

…Defendants informed the Court that Plaintiffs had refused to produce the
videotape used to conduct the Survey. Plaintiffs confirmed their refusal to
produce it, and they offered the Court no explanation for their refusal. Because
Plaintiffs have not provided the videotape at issue in the Survey, thus depriving
Defendants of another basis upon which to meaningfully oppose it, the Court in
its discretion declines to consider the Survey…

*Simon Property Group L.P. v. mySimon, Inc.*, 104 F. Supp.2d 1033, 1039-1041, 1043, 1045,
1051, 1052 (S.D. Ind. 2000)

No survey is beyond criticism, especially in the context of litigation.
Courts therefore recognize that many criticisms of surveys used in litigation are
appropriate topics of cross-examination and contrary evidence to reduce the
weight of the survey without requiring that the [sic] it be excluded…

There are limits, however. The court need not and should not respond
reflexively to every criticism by saying it merely “goes to the weight”…

[Plaintiff’s] motion in limine…asks the court to perform before trial a
variation of the gatekeeping function the court must perform for expert testimony
under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*…Consumer survey results
must be presented through expert witnesses. Under *Daubert*, the gatekeeping
function requires the court to ensure that expert testimony “is not only relevant,
but reliable.” *Kumho Tire Co. v. Carmichael*…The court’s responsibility is to
ensure that an expert “employs in the courtroom the same level of intellectual
rigor that characterizes the practice of an expert in the relevant field.”…

…The gatekeeping inquiry must be “tied to the facts” of a particular
case…

…The question here under Rule 702 is whether the results of [Plaintiff’s]
proposed surveys will be sufficiently reliable to use in court and whether they are
likely to assist the trier of fact decide an issue in the case…

[Plaintiff] proposes to conduct…three separate survey[s]…
The court considers [the] first…survey and then turns to the [other] surveys…

[Plaintiff’s] proposed…survey suffers from three serious flaws: (a) it grossly distorts the “marketplace conditions” in which Internet users might actually encounter the two parties’ marks together; (b) it fails to use the most basic control…(c) it is designed to create “demand effects” that will appear to exaggerate unfairly any possible confusion…

…They [survey defects] make the proposed survey nothing more than a meaningless memory game or word association exercise that bears no relationship to the marketplace.

…By failing to use…controls, [Plaintiff’s] proposed survey amounts to little more than a meaningless word association or memory exercise.

The [other] surveys suffer from two fundamental and related flaws. First, they are obviously highly suggestive and leading. In fact, they are so suggestive and leading that it is astonishing [Plaintiff] is even proposing them… [The] survey formats therefore test nothing more than the memory and common sense of a respondent…

Second, the…surveys also fail to include any meaningful controls…

…the results of the surveys, therefore, would have little or no probative value on the questions relevant to the case, and they will be excluded under Rule 702 and the principles of Daubert and Kumho Tire. In addition, the results are likely to create unfair prejudice, confuse the issues, waste time, and mislead the jury. The court will also exclude them under Rule 403…


In order to determine the admissibility of expert witness testimony, the Supreme Court has set forth a two-prong relevance/reliability inquiry. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 [27 U.S.P.Q.2d 1200] (1993)…

In Kumho Tire Co. v. Carmichael (526 U.S. 137, 119 S.Ct. 1167), the Court expanded Daubert’s holding to all expert testimony, rather than just the scientific testimony challenged in the Daubert case…

…The standard governing the administration of a proper likelihood of confusion survey originally was set forth in this district in Toys R Us…and has been repeatedly used and cited by courts throughout the country. See Schering, 189 F.3d at 225…
Aside from this holding, the Second Circuit also held that “regardless of the basis cited for admitting these surveys, errors in methodology properly go only to the weight of the evidence.” This holding is limited only by the Court’s balancing of the probative value of the evidence as opposed to its likely prejudice or confusion under Rule 403.


[Defendant] also contends that the jury’s verdict cannot stand because [Plaintiff] failed to present consumer survey evidence. The record reflects that the only evidence of consumer surveys consisted of the three studies. These studies tested the effect of two of [Defendant’s] taste test television commercials and the [Defendant’s] pizza delivery box.

n.13 The court excluded from the jury’s consideration the testimony of…[Plaintiff’s expert] with reference to the…surveys…on Daubert grounds, but admitted it with respect to Pizza Hut’s prayer for injunctive relief.

… In a number of opinions from other Circuits, cited by [Defendant] in its motion and brief, courts have stated that consumer surveys are necessary… Despite the frequent pronouncements of sister Circuit courts, the court has found no cases holding as a matter of law that a consumer survey is a sine qua non for establishing liability under the Lanham Act where the advertising at issue is not literally false…

Under some circumstances a consumer survey may be necessary where the consumers to whom the advertising was addressed have specialized training beyond the knowledge and expertise of lay persons… However, it is clear that the targeted audience of [Defendant’s] advertising, i.e., potential purchasers of chain pizza products, do not constitute a group which has some higher level of expertise or knowledge than that possessed by the consuming public in general. Similarly, given the nature of the advertising at issue, there is no reason to believe that it conveyed esoteric messages which would not be understood by the consumer population at large.

… Under the circumstances of this case, the evidence presented to the jury and the instructions given to the jury, [Plaintiff] was not required to prove its claims with consumer surveys…


…[Defendant] moved to exclude the [Plaintiff’s] Report from evidence… the district court found that the [Plaintiff’s] Report fell short of establishing secondary meaning for the following reasons: (1) it failed to address the relevant time period…; (2) it focused unjustifiably on license and gun permit buyers; and (3) it excluded substantial portions of the relevant population…
After careful review of the [Plaintiff’s] Report, this court finds that the district court would have abused its discretion had it admitted the report into evidence…”


According to the recent Supreme Court decision *Kumho Tire Company, Ltd. v. Carmichael*…the district court has a special “gatekeeping obligation” to ensure that all expert testimony “is not only relevant, but reliable.”…(*Daubert v. Merrell Dow Pharmaceuticals, Inc.*). In this spirit, defendants ask the court to exercise its “gatekeeping obligation” to exclude [Plaintiff’s expert’s] report and the opinions stated therein…”

The court concludes that [Plaintiff’s] survey…is seriously flawed. The main problem with the survey…is that it essentially asks only one question…and without…any “control”…or…any control questions…see…McCarthy…(explaining need for controls to account for “background noise”); [and] Shari Seidman Diamond, Reference Guide on Survey Research, in *Reference Manual on Scientific Evidence*…

[Plaintiff’s expert’s] failure to include a control group or question in his [survey] is puzzling for several reasons. [Plaintiff’s expert] has emphasized in both his testimony in other cases and in his academic writing [the necessity of] a control…

Thus, pursuant to *Daubert* and *Kumho Tire*, the court will exclude [Plaintiff’s expert’s] survey evidence and any conclusions he has reached based on that evidence…”

…the court will grant defendant’s motion in limine to exclude the…report of [Plaintiff’s expert] and the opinions stated therein. Because Rule 37(c)(1) and Rule 26(a)(2) the Federal Rules of Civil Procedure preclude an expert from testifying at trial regarding opinions not previously disclosed in an expert report…the court will preclude [Plaintiff’s expert] from offering expert testimony at trial.

*Starter Corporation v. Converse, Inc.*, 170 F.3d 286, 297 (2d Cir. 1999)

…the district court granted [Defendant’s] motion to exclude [Plaintiff’s] survey and expert testimony thereon. The court reasoned (1) that the survey was not relevant because it did not test or demonstrate likelihood of consumer confusion, if any, and (2) that the slight probative value was outweighed by its prejudicial effect under Rule 403. At trial, the district court reaffirmed its exclusion, finding that the survey was little more than a memory test, testing the ability of the participants to remember the names of the shoes they had just been
shown and gave no indication of whether there was a likelihood of confusion in the marketplace.

We hold that the district court did not abuse its discretion in finding that any probative value of the survey was outweighed by its potential to confuse the issues in the case. As long as expert survey evidence possesses sufficient “Circumstantial guarantees of trustworthiness,” a court may properly rely upon it to establish the likelihood or remoteness of confusion in a trademark dispute...


Furthermore, defendants correctly point out that [Plaintiffs’ expert’s] conclusion regarding confusion was not stated in terms of what consumers believed should have happened, as the survey question was stated, but instead was phrased in terms of what actually happened…Therefore, the court will grant defendants’ motion in limine regarding all survey answers to the above question and any conclusions based on those answers. Because all four conclusions of the [Plaintiffs’ expert’s] study…must be excluded from trial, the court will exclude his entire report and survey.

…the court at this time will not preclude [Plaintiffs’ expert] from testifying.


…The methodological defects in the other surveys, however, are so significant that they render the remaining survey evidence inadmissible for the purposes for which it was offered.

The court recognizes that methodological deficiencies generally relate to the weight given to a survey’s conclusions rather than to its admissibility…but if those deficiencies are so substantial as to render the survey’s conclusions untrustworthy, a court should exclude the survey from evidence…the Supreme Court underscored a trial judge’s responsibility to examine expert testimony critically to ensure that it is both reliable and relevant before admitting it. This responsibility extends to the survey evidence at issue here.

…

Multiple flaws mar the value of the consumer survey evidence…First, the surveyors always handed the consumer the [Plaintiff’s] jacket first. This creates an order effect…By always handing the [Plaintiff’s] jacket…first, [Plaintiff’s expert] created an order effect of undeterminable magnitude.

Second, [Plaintiff’s expert’s] definition of the consumer market is fatally underinclusive…

…

The flaws in…[the] surveys are so substantial and pervasive that they render the survey evidence inadmissible…The most substantial flaws…are that
the surveys [were] underinclusive, select[ed] [respondents] using a biased method, and [did not] present the overall look of the [product].


...The matter is before the Court on defendants’ motions in limine. Defendants seek to exclude plaintiff’s consumer survey...on the added ground that the methodology employed in the survey renders it so unreliable that it should not be placed before the jury...

The methodology employed here bears little resemblance to the more scientifically conducted surveys often seen in litigation such as this. Plaintiff’s counsel designed a questionnaire and sent one of their employees,...a part-time typist, drama student and actress, into Washington Square Park, which is located within blocks of one of plaintiff’s retail stores. Over a two day period, she approached a number of people who, she said, looked as if they could afford plaintiff’s shoes, which sell at prices considerably higher than defendants’. [The lawyer’s assistant], who was shod in defendants’ shoes, asked the well-to-do passersby whether they could identify the shoes she was wearing. Although she had a questionnaire designed by counsel, she did not necessarily ask the questions as written. All told, she interviewed forty-six people...

While methodological defects in surveys usually go to the weight rather than the admissibility of the evidence...there comes a point where the probative value of the survey is exceeded substantially by its prejudicial effect and potential for confusion and waste of time. See Federal Rule of Evidence 403...Given the lack of a proper universe and sample, the lack of reproducibility, the poor choice of location, and the potential bias introduced by the choice of interviewer, among other methodological defects, this survey in my view has no significant value in establishing the proportion of consumers, if any, likely to confuse defendants’ products with plaintiff’s. Accordingly, the cumulative survey results and any opinion evidence based upon them is excluded...


At trial, [Plaintiff] offered three surveys which it had commissioned...The court ruled the surveys were inadmissible because they were hearsay not falling within any exception under Federal Rule of Evidence 803...[Plaintiff] urges again that the surveys are admissible because they fall within the business records exception of Rule 803(6)...  

There was inadequate foundation as to Exhibits 8, 9, and 10 that [Plaintiff’s witness] was a “person with knowledge” within the meaning of the Rule. The trustworthiness of the documents is also unclear because of the foundation that was laid...There was no testimony that [Plaintiff’s witness] saw
the original data or that he had any knowledge of the steps that [someone else in Plaintiff’s Marketing Department] took in preparing the report. The fact that [Plaintiff] may have relied upon the report in marketing makes no difference. The court cannot be assured of the accuracy of the document. Nor can the court or opposing counsel investigate the accuracy of the material…
PROCEDURAL ISSUES


Another issue concerns a survey that applicant introduced to show that there was no likelihood of confusion. Opposer objects to the survey on the ground that applicant has not shown that the survey’s designer...is an expert. In addition, even if the survey is admitted into evidence, opposer argues that it includes many flaws and should be given little or no weight...

We start by noting that opposer’s objection should have been raised earlier. Opposer did not raise these objections to the survey in his opening brief, and for that reason, opposer’s objection to the survey will not be sustained.


...This Court declines to consider any survey or expert report, including the Pilot Survey, offered to defendants for the first time on a summary judgment motion and inexplicably not produced during discovery...


...[Plaintiff]...asked for all expert reports from cases in which [Defendant’s expert] testified in the last five years. In response to this request, [the company employing Defendant’s expert] concedes that it has the expert reports but objects to producing them for plaintiffs.

The issue before the court is whether plaintiffs are entitled to the [Defendant’s expert’s] reports prepared in cases in which [Defendant’s expert] testified in the last five years...

...plaintiffs’ request for [Defendant’s expert’s] expert reports from all cases in which he was an expert in the last five years is beyond the scope of Rule 26.

...The plain language of Rule 26 directs parties to provide a list of cases, not the expert reports relied upon in those cases...


The issue is whether opposer’s survey and the testimony that explains it were proper rebuttal as responsive to applicant’s asserted defenses, or, as applicant asserts, this testimony and these exhibits could only have been presented as part of opposer’s case in chief.
The survey was designed to determine whether the third-party uses shown by applicant during its testimony period have diluted the fame of opposer’s “DUKE” mark for clothing, and whether, as applicant argues its testimony and evidence shows, such third-party uses of similar marks have created a marketplace in which confusion between opposer’s mark and the mark applicant seeks to register would not be likely.

There is no question that [Opposer’s expert’s] testimony and the survey he conducted would have been appropriate to present as part of opposer’s case in chief. Neither party contests this fact. Applicant argues that once opposer failed to conduct and introduce the survey during its testimony period, however, opposer could not thereafter introduce it…

After careful consideration of the arguments of both parties, we have decided to consider this testimony and evidence because it is proper rebuttal under the circumstances presented by this case. During its initial testimony period, opposer had the burden of establishing its standing; of establishing its ownership of the marks with which it contends applicant’s mark would be likely to cause confusion; of establishing use of these marks before applicant filed the application to register the mark it seeks to register; and of establishing a prima facie case of likelihood of confusion based on the similarity of the marks and the relationship between opposer’s goods and the goods with which applicant intends to use the mark it seeks to register.

…opposer was not required to anticipate or guess what grounds of defense might be raised by applicant, or to counter those grounds of defense prior to their assertion. Dilution was not raised by applicant as a defense in its answer to the Notice of Opposition. When applicant presented testimony concerning the alleged dilution of opposer’s marks, opposer properly rebutted the dilution defense asserted by applicant with three depositions, one of which is the deposition of [Opposer’s expert] to which applicant objects. Under these circumstances, his testimony and the exhibits to it are admissible as rebuttal testimony.


[Defendant’s use of copyrighted business letter in survey conducted for discovery in trademark infringement action is fair use since defendant]…has only used [Plaintiff’s] letter in a survey, as part of its preparation for litigation [and is not]…profiting from the survey it is conducting...

…[and since Plaintiff’s letter] is not meant to be creative or original...

…[and] there is no potential market for [Plaintiff’s] letter…and no one would be interested in buying it...

[Defendant’s use of business letters, which are very similar to plaintiff’s letter to its potential customers, in survey conducted for discovery in trademark
infringement action did not constitute “false or misleading” description or representation of fact in violation of Lanham Act’s Section 43(a), 15 USC 1125(a) since defendant’s first letter is exact copy of plaintiff’s letter...except that the date matched the date of the survey.
This appendix contains citations, by issue, for all identified published opinions from January 1998 through January 2006, in which survey evidence was referenced.

**Genericness Surveys**

**Second Circuit**


**Third Circuit**


**Fourth Circuit**

*BellSouth Corp. v. White Directory Publishers Inc.*, 42 F. Supp. 2d 598 (M.D. N.C. 1999) (Genericness)

*Hunt Masters, Incorporated v. Landry’s Seafood Restaurant, Incorporated*, 240 F.3d 251 (4th Cir. 2001) (Genericness)

**Fifth Circuit**


*Sugar Busters LLC v. Brennan*, 177 F.3d 258 (5th Cir. 1999) (Genericness) (Secondary Meaning)

**Sixth Circuit**

Seventh Circuit


_Ty Inc. v. Softbelly’s, Inc._, 353 F.3d 528 (7th Cir. 2003) (Genericness)

_Ty, Inc. v. Softbelly’s, Inc._, 2001 U.S. Dist. LEXIS 1341 (N.D. Ill. 2001) (Genericness) (Secondary Meaning)

Eighth Circuit

_The Steak N Shake Company v. The Burger King Corporation_, 323 F. Supp. 2d 983 (E.D. Mo. 2004) (Genericness) (Secondary Meaning)

Ninth Circuit

_Big Island Candies, Inc. v. The Cookie Corner_, 269 F. Supp. 2d 1236 (D. Haw. 2003) (Genericness)


_Stuhlbarg International Sales Company, Inc. v. John D. Brush and Company, Inc._, 240 F.3d 832 (9th Cir. 2001) (Genericness)


Tenth Circuit

_Robert Donchez v. Coors Brewing Company_, 392 F.3d 1211 (10th Cir. 2004) (Genericness)

T.T.A.B.


In re Callaway Golf Company, 2001 T.T.A.B. LEXIS 599 (T.T.A.B. 2001) (Genericness) This disposition is not citable as precedent of the T.T.A.B.


Descriptiveness/Suggestiveness Surveys

Second Circuit


Third Circuit


Fifth Circuit


Seventh Circuit

Peaceable Planet, Inc. v. Ty, Inc., 362 F.3d 986 (7th Cir. 2004) (Descriptiveness)


T.T.A.B.

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The Beacon Mutual Insurance Company v. OneBeacon Insurance Group, 376 F.3d 8 (1st Cir. 2004) (Secondary Meaning)


Second Circuit


Coach, Inc. v. We Care Trading Co., Inc., 2002 U.S. App. LEXIS 28143 (2nd Cir. 2002) (Secondary Meaning)


Nabisco, Inc. v. PF Brands, Inc. and Pepperidge Farm, Inc., 50 F. Supp. 2d 188 (S.D.N.Y.1999) (Secondary Meaning)


Third Circuit


Fourth Circuit

*America Online, Inc. v. AT&T Corp.*, 243 F.3d 812 (4th Cir. 2001) (Secondary Meaning)


Fifth Circuit


*Pebble Beach Co. v. Tour 18 I Ltd.*, 155 F.3d 526 (5th Cir. 1998) (Secondary Meaning) (Likelihood of Confusion)

*Sugar Busters LLC v. Brennan*, 177 F.3d 258 (5th Cir. 1999) (Genericness) (Secondary Meaning)

Sixth Circuit

*AutoZone, Inc. and Speedbar, Inc. v. Tandy Corp.*, 373 F.3d 786 (6th Cir. 2004) (Secondary Meaning)


Seventh Circuit

AM General Corporation and General Motors Corporation v. DaimlerChrysler Corporation, 311 F.3d 796 (7th Cir 2002) (Secondary Meaning) (Likelihood of Confusion)


Thomas & Betts Corp. v. Panduit Corp., 138 F.3d 277 (7th Cir. 1998) (Secondary Meaning)


Eighth Circuit


*Frosty Treats, Inc v. Sony Computer Entertainment America, Inc.*, 426 F.3d 1001 (8th Cir. 2005) (Secondary Meaning) (Likelihood of Confusion)


*The Steak N Shake Company v. The Burger King Corporation*, 323 F. Supp. 2d 983 (E.D. Mo. 2004) (Genericness) (Secondary Meaning)

Ninth Circuit


*Clicks Billiards Inc. v. Sixshooters Inc.*, 251 F.3d 1252 (9th Cir. 2001) (Secondary Meaning)

*Gruppo Gigante v. Dallo & Co., Inc.*, 391 F.3d 1088 (9th Cir. 2004) (Secondary Meaning) (Fame)


Tenth Circuit


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Federal Circuit

In re Steelbuilding.com, 415 F.3d 1293 (Fed. Cir. 2005) (Secondary Meaning)

T.T.A.B.


Anvil Knitwear, Inc. v. Success Ware Inc., 2004 T.T.A.B. LEXIS 361 (Secondary Meaning) This disposition is not citable as precedent of the T.T.A.B.


Likelihood of Confusion Surveys

First Circuit


Second Circuit

1-800 Contacts, Inc. v. Whenu.Com, Inc. and Vision Direct, 414 F.3d 400 (2nd Cir. 2005) (Likelihood of Confusion)


24 Hour Fitness USA, Inc. v. 24/7 Tribeca Fitness, LLC, 2005 U.S. Dist. LEXIS 7462 (S.D.N.Y. 2005) (Likelihood of Confusion)


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Mattel, Inc. v. Robarb’s, Inc., 139 F. Supp. 2d 487 (S.D.N.Y. 2001) (Likelihood of Confusion)


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Weight Watchers International, Inc. v. Luigino’s, Inc., 423 F.3d 137 (2nd Cir. 2005) (Likelihood of Confusion)

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CareFirst of Maryland, Inc. v. First Care, P.C., 350 F. Supp. 2d 714 (E.D. Va. 2004) (Likelihood of Confusion)


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Scott Fetzer Co. v. House of Vacuums Inc., 381 F.3d 477 (5th Cir. 2004) (Likelihood of Confusion) (Daubert/Admissibility Issues)


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Sixth Circuit


Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP, 325 F. Supp. 2d 841 (M.D. Tenn. 2004) (Likelihood of Confusion) (Daubert/Admissibility Issues)


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Ninth Circuit


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M2 Software, Inc. v. Madacy Entertainment, 421 F.3d 1073 (9th Cir. 2005) (Likelihood of Confusion) (Daubert/Admissibility Issues)


Playboy Enterprises, Inc. v. Netscape Communications Corporation, 354 F.3d 1020 (9th Cir. 2004) (Likelihood of Confusion) (Daubert/Admissibility Issues)


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Thane International, Inc. v. Trek Bicycle Corporation, 305 F.3d 894 (9th Cir 2002) (Likelihood of Confusion)


Tenth Circuit


Eleventh Circuit


Carnival Corp. v. SeaEscape Casino Cruises, Inc., 74 F. Supp. 2d 1261 (S.D. Fla. 1999) (Likelihood of Confusion) (Fame/Dilution)

Integrity Incorporated v. Integrity Online International Holdings, Inc., Civ. No. 1:00-CV-1291-WCO (N.D. Georgia 2002) (Likelihood of Confusion) (Daubert/Admissibility Issues)


Federal Circuit


T.T.A.B.


**False Advertising Surveys**

First Circuit

Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co., 228 F.3d 24 (1st Cir. 2000) (False Advertising)

Second Circuit


Schering Corp. v. Pfizer Inc., 189 F.3d 218 (2d Cir. 1999) (False Advertising)


Third Circuit


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Fourth Circuit


The Scotts Company v. United Industries Corporation, 315 F.3d 264 (4th Cir 2002) (False Advertising)
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*Pizza Hut, Inc. v. Papa John’s International, Inc.*, 227 F.3d 489 (5th Cir. 2000) (False Advertising)


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Seventh Circuit


*Mead Johnson & Co. v. Abbott Laboratories*, 209 F.3d 1032 (7th Cir. 2000) (False Advertising)

*Mead Johnson & Co. v. Abbott Laboratories*, 201 F.3d 883 (7th Cir. 2000) (False Advertising)

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Tenth Circuit


Eleventh Circuit


Hickson Corporation v. Northern Crossarm Co., Inc., 357 F.3d 1256 (11th Cir. 2004) (False Advertising)

Fame and Dilution Surveys

First Circuit


Second Circuit

Playtex Products, Inc. v. Georgia-Pacific Inc. and Fort James Operating Co., 390 F.3d 158 (2nd Cir. 2004) (Dilution)


Third Circuit


Fourth Circuit

CareFirst of Maryland, Inc. v. First Care, P.C., 2006 U.S. App. LEXIS 588 (4th Cir. 2006) (Likelihood of Confusion) (Dilution)


Ringling Bros.-Barnum & Bailey Combined Shows Inc. v. Utah Division of Travel Development, 170 F.3d 449 (4th Cir. 1999) (Fame) (Dilution)

Fifth Circuit


Sixth Circuit

Kellogg Co. v. Exxon Mobil Corporation, 192 F. Supp. 2d 790 (W.D. Tenn. 2001) (Dilution)

Seventh Circuit

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Avery Dennison Corp. v. Sumpton, 189 F.3d 868 (9th Cir. 1999) (Fame)

Grupo Gigante v. Dallo & Co., Inc., 391 F.3d 1088 (9th Cir. 2004) (Secondary Meaning) (Fame)


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Carnival Corp. v. SeaEscape Casino Cruises, Inc., 74 F. Supp. 2d 1261 (S.D. Fla. 1999) (Likelihood of Confusion) (Fame)

T.T.A.B.


Motion Picture Association of America, Inc. v. Respect Sportswear, Inc., 2005 T.T.A.B. LEXIS 223 (T.T.A.B. 2005) (Fame) This disposition is not citable as a precedent of the T.T.A.B.


False Endorsement Surveys

Tenth Circuit


Geographically Deceptively Misdescriptive Surveys

T.T.A.B.

(Geographically Deceptively Misdescriptive)

Scandalous/Disparaging Marks Surveys

D.C. Circuit

(Scandalous/Disparaging)

T.T.A.B.


(Scandalous/Disparaging)

Copyright Surveys

Seventh Circuit

(Copyright)

Ninth Circuit

A & M Records v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (Copyright)


Mattel Inc. v. Walking Mountain Productions, 353 F.3d 792 (9th Cir. 2003) (Copyright)
Patent Surveys

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Seventh Circuit


D.C. Circuit


Breach of Contract

Fifth Circuit


Daubert/Admissibility Issues

First Circuit


Second Circuit


Starter Corporation v. Converse, Inc., 170 F.3d 286 (2d Cir. 1999) (Likelihood of Confusion) (Daubert/Admissibility Issues)


Third Circuit


Fourth Circuit


Fifth Circuit


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Tenth Circuit


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T.T.A.B.


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BY CIRCUIT

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Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co., 228 F.3d 24 (1st Cir. 2000) (False Advertising)


Second Circuit

1-800 Contacts, Inc. v. Whenu.Com, Inc. and Vision Direct, 414 F.3d 400 (2nd Cir. 2005) (Likelihood of Confusion)


24 Hour Fitness USA, Inc. v. 24/7 Tribeca Fitness, LLC, 2005 U.S. Dist. LEXIS 7462 (S.D.N.Y. 2005) (Likelihood of Confusion)


Coach, Inc. v. We Care Trading Co., Inc., 2002 U.S. App. LEXIS 28143 (2nd Cir. 2002) (Secondary Meaning)


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Mattel, Inc. v. Robarb’s, Inc., 139 F. Supp. 2d 487 (S.D.N.Y. 2001) (Likelihood of Confusion)


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Paco Sport, Ltd. v. Paco Rabanne Perfumes, 86 F. Supp. 2d 305 (S.D.N.Y. 2000) (Likelihood of Confusion)


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Schering Corp. v. Pfizer Inc., 189 F.3d 218 (2d Cir. 1999) (False Advertising)


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157


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Fifth Circuit


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159

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Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP, 325 F. Supp. 2d 841 (M.D. Tenn. 2004) (Likelihood of Confusion) (Daubert/Admissibility Issues)


Kellogg Co. v. Exxon Mobil Corporation, 192 F. Supp. 2d 790 (W.D. Tenn. 2001) (Dilution)


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Mead Johnson & Co. v. Abbott Laboratories, 209 F.3d 1032 (7th Cir. 2000) (False Advertising)

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**Eighth Circuit**


American Italian Pasta Company v. New World Pasta Company, 371 F.3d 387 (8th Cir. 2004) (False Advertising)

Everest Capital Limited, v. Everest Funds Management, 393 F.3d 755 (5th Cir. 2005) (Likelihood of Confusion)


Frosty Treats, Inc v. Sony Computer Entertainment America, Inc., 426 F.3d 1001 (8th Cir. 2005) (Secondary Meaning) (Likelihood of Confusion)

Gateway, Inc. v. Companion Products, Inc., 384 F.3d 503; 2004 (8th Cir. 2004) (Likelihood of Confusion)


The Steak N Shake Company v. The Burger King Corporation, 323 F. Supp. 2d 983 (E.D. Mo. 2004) (Genericness) (Secondary Meaning)


Ninth Circuit

A & M Records v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (Copyright)


Avery Dennison Corp. v. Sumpton, 189 F.3d 868 (9th Cir. 1999) (Fame)

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Clicks Billiards Inc. v. Sixshooters Inc., 251 F.3d 1252 (9th Cir. 2001) (Secondary Meaning)


GoTo.com, Inc. v. Walt Disney Co., 202 F.3d 1199, (9th Cir. 2000) (Likelihood of Confusion)

Grupo Gigante v. Dallo & Co., Inc., 391 F.3d 1088 (9th Cir. 2004) (Secondary Meaning) (Fame)


Kendall-Jackson Winery Ltd. v. E. & J. Gallo Winery, 150 F.3d 1042 (9th Cir. 1998) (Likelihood of Confusion)


M2 Software, Inc. v. Madacy Entertainment, 421 F.3d 1073 (9th Cir. 2005) (Likelihood of Confusion) (Daubert/Admissibility Issues)


Mattel Inc. v. Walking Mountain Productions, 353 F.3d 792 (9th Cir. 2003) (Copyright)


Nissan Motor Co. v. Nissan Computer Corp., 378 F.3d 1002 (9th Cir. 2004) (Fame)


Playboy Enterprises, Inc. v. Netscape Communications Corporation, 354 F.3d 1020 (9th Cir. 2004) (Likelihood of Confusion) (Daubert/Admissibility Issues)


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Survivor Media, Inc. v. Survivor Productions, 406 F.3d 625 (9th Cir. 2005) (Likelihood of Confusion)

Thane International Inc. v. Trek Bicycle Corporation, 305 F.3d 894 (9th Cir 2002) (Likelihood of Confusion)


**Tenth Circuit**


Robert Donchez v. Coors Brewing Company, 392 F.3d 1211 (10th Cir. 2004) (Genericness)


**Eleventh Circuit**


*Carnival Corp. v. SeaEscape Casino Cruises, Inc.*, 74 F. Supp. 2d 1261 (S.D. Fla. 1999) (Likelihood of Confusion) (Fame)


*Hickson Corporation v. Northern Crossarm Co., Inc.*, 357 F.3d 1256 (11th Cir. 2004) (False Advertising)

*Integrity Incorporated v. Integrity Online International Holdings, Inc.*, Civ. No. 1:00-CV-1291-WCO (N.D. Georgia 2002) (Likelihood of Confusion) *(Daubert/Admissibility Issues)*


**D.C. Circuit**


Federal Circuit


In re Steelbuilding.com, 415 F.3d 1293 (Fed. Cir. 2005) (Secondary Meaning)

Trademark Trial & Appeal Board


Anvil Knitwear, Inc. v. Success Ware Inc., 2004 T.T.A.B. LEXIS 361 (Secondary Meaning) This disposition is not citable as precedent of the T.T.A.B.


In re Callaway Golf Company, 2001 T.T.A.B. LEXIS 599 (T.T.A.B. 2001) (Genericness) This disposition is not citable as precedent of the T.T.A.B.

In re DaimlerChrysler AG, 2001 T.T.A.B. LEXIS 557 (T.T.A.B. 2001) (Descriptiveness) This disposition is not citable as precedent of the T.T.A.B.


*Motion Picture Association of America, Inc. v. Respect Sportswear, Inc.*, 2005 T.T.A.B. LEXIS 223 (T.T.A.B. 2005) (Fame) This disposition is not citable as a precedent of the T.T.A.B.


*Societe Des Produits Nestle S.A. v. La Cibeles, Inc.*, 2001 T.T.A.B. LEXIS 93 (T.T.A.B. 2001) (Fame) This disposition is not citable as precedent of the T.T.A.B.


