

EXHIBIT A

1 IN THE UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 SAN JOSE DIVISION
4

APPLE, INC., a California
5 corporation,

6
7 Plaintiff,

8
9 -vs-

No. 11-CV-01846-LHK

10 SAMSUNG ELECTRONICS CO., LTD.,
11 a Korean business entity; et al.,
12 Defendants.

/

13 VIDEOTAPED DEPOSITION OF HAL PORET
14 CONFIDENTIAL
15 SAN FRANCISCO, CALIFORNIA
16 THURSDAY, APRIL 19, 2012
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21 Reported by: LOUISE MARIE SOUSOURES, CSR NO. 3575
22 Certified LiveNote Reporter

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THURSDAY, APRIL 19, 2012

8:56 A.M.

Deposition of HAL PORET,
held at the offices of Quinn Emanuel, 50 California
Street, San Francisco, California, before Louise Marie
Sousoures, a Certified Shorthand Reporter and a
Certified LiveNote Reporter

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A P P E A R A N C E S

FOR THE PLAINTIFF:

MORRISON & FOERSTER LLP
425 MARKET STREET
SAN FRANCISCO, CA 94105
BY: BROOKS M. BEARD,
TARYN RAWSON,
ATTORNEYS AT LAW

FOR THE DEFENDANT:

QUINN EMANUEL URQUHART & SULLIVAN, LLP
865 SOUTH FIGUEROA STREET, 10TH FLOOR
LOS ANGELES, CA 90017
BY: DAIVD W. QUINTO,
ATTORNEY AT LAW

THE VIDEOGRAPHER:

PETE SAIS

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IT IS HEREBY STIPULATED AND AGREED
by and between the attorneys for the
respective parties herein, that filing and
sealing be and the same are hereby waived.

IT IS FURTHER STIPULATED AND AGREED
that all objections, except as to the form
of the question, shall be reserved to the
time of the trial.

IT IS FURTHER STIPULATED AND AGREED
that the within deposition may be sworn to
and signed before any officer authorized
to administer an oath, with the same
force and effect as if signed and sworn
to before the Court.

- oOo -

P R O C E E D I N G S

-oOo-

08:29

1 THE VIDEOGRAPHER: Good morning. This is the 08:56
2 start of disk labeled number 1 for the videotaped 08:56
3 deposition of Hal Poret in the matter of Apple, 08:56
4 Incorporated versus Samsung Electronics Company, 08:56
5 Limited et al. in the United States District Court, 08:56
6 Northern District of California, San Jose Division, 08:56
7 civil action 11-CV-01846-LHK. 08:56

8 This deposition is being held at 50 08:56
9 California Street in San Francisco, California on 08:56
10 April 19th, 2012 at approximately 8:56 a.m. 08:56

11 My name is Pete Sais from TSG Reporting Inc. 08:56
12 and I'm the legal video specialist. 08:56

13 The court reporter is Louise Sousoures in 08:57
14 association with TSG Reporting. 08:57

15 Will counsel introduce yourself and the court 08:57
16 reporter can swear in the witness. 08:57

17 MR. QUINTO: David Quinto, Quinn Emanuel for 08:57
18 defendants. 08:57

19 MR. BEARD: Brooks Beard with Morrison & 08:57
20 Foerster for Apple. 08:57

21 MS. RAWSON: Taryn Rawson for Morrison & 08:57
22 Foerster for Apple. 08:57

1 Q. What all would you need to think about -- 12:38
2 let's focus on the first one which is the LG 2X -- 12:38
3 G2x. 12:38

4 What would you need to think about in 12:38
5 deciding whether this is too similar to be used as a 12:38
6 control? 12:38

7 A. A lot. I'd have to sit down with the 12:38
8 complaint and look at the trade dress elements again. 12:38
9 I'd want to get a good picture of this that I can 12:38
10 actually get a fair sense of it that doesn't have all 12:38
11 these other images blocking you from seeing it 12:38
12 cleanly. 12:38

13 I'd have to think about, you know, how it 12:38
14 would appear with the icons blurred and it's just not 12:38
15 the kind of thing I make a snap judgment about. 12:39

16 Q. As you sit here, are there any that you think 12:39
17 strike you immediately as something that -- as being 12:39
18 sufficiently dissimilar it could be used as a control? 12:39

19 MR. BEARD: Objection, incomplete 12:39
20 hypothetical. 12:39

21 THE WITNESS: There's nothing here that I 12:39
22 have a quick judgment on one way or the other. 12:39

23 BY MR. QUINTO: 12:39

24 Q. Something I forgot to ask you earlier, apart 12:39

25 from preparing for today's deposition and apart from 12:39

1 preparing the rebuttal report in response to Mazis's 12:40
2 survey regarding whether Apple icons required a 12:40
3 secondary meaning, have you done any work in relation 12:40
4 to this case since last August? 12:40

5 A. The only other thing that I've done is after 12:40
6 reading Dr. Jacoby's report I went back into my data 12:40
7 and looked at a number of things just to confirm for 12:40
8 myself these points he's raising are -- actually have 12:40
9 no impact on the survey results, but that's really the 12:40
10 only additional work that I've done. 12:40

11 Q. So it's your opinion that not one of his 12:40
12 criticisms has any bearing on the survey results? 12:40

13 A. Well, it's my -- what I'm saying is that of 12:40
14 the criticisms where you can actually go into the data 12:40
15 and confirm yes or no this criticism has any merit, 12:41
16 they don't. 12:41

17 There are other ones that I, you know, 12:41
18 disagree with, but they're not really ones that it's a 12:41
19 matter of looking at data or not. 12:41

20 Q. Were there any criticisms that you took to 12:41
21 heart? 12:41

22 A. I need to go through it and remember what 12:41
23 they were specifically. 12:41

24 The only thing he says that I basically -- 12:41
25 that comes to mind that I agree with is that it is 12:41

1 difficult for people to remember exactly when they 12:41
2 formed a mental impression of something, such as when 12:41
3 they came to associate the look of a smartphone with 12:41
4 Apple. 12:41

5 However, while I agree with that as a general 12:41
6 proposition, I disagree with his whole take on it 12:42
7 because first of all, everything -- he's 12:42
8 misunderstanding the whole purpose and the way that 12:42
9 question was used and just using it for purposes that 12:42
10 don't make any sense and I think he's also missing the 12:42
11 point that it doesn't matter whether somebody can 12:42
12 accurately remember whether it was 2006 or 2007 or 12:42
13 what month it was in that time period, it's -- the 12:42
14 broad point is whether there was a meaningful trend of 12:42
15 people associating something with Apple before a 12:42
16 certain period of time and people did not need to have 12:42
17 a precise memory of when they formed their impression 12:42
18 for the survey to measure that. 12:43

19 Q. You said that you think that Dr. Jacoby's 12:43
20 missing the point, which is that it doesn't matter 12:43
21 whether somebody can accurately remember whether it 12:43
22 was 2006 or 2007 or what month it was and what time 12:43
23 period. 12:43

24 And yet your report attempts to pin it down 12:43
25 in relation to a particular month, does it not? 12:43

1 meaning. 13:30

2 So including people who owned mobile phones 13:30

3 but don't fall within the narrower category of 13:30

4 secondary meaning universe being the recent purchasers 13:30

5 or the likely future purchasers gave us a broader base 13:30

6 of relevant consumers to see what the recognition 13:30

7 level of the trade dress was there. 13:30

8 Q. Is it your testimony that the cellular 13:30

9 telephone survey you performed could be used both to 13:31

10 measure secondary meaning and in a dilution analysis? 13:31

11 A. No, that's not what I was saying. 13:31

12 What I mean is this -- by including somewhat 13:31

13 of a broader audience at least there are some results 13:31

14 just as you were asking me before what would the 13:31

15 results have been among people who bought a phone more 13:31

16 than 12 months ago, we have those results. 13:31

17 So if somebody is interested in getting a 13:31

18 sense of is the iPhone trade dress recognized amongst 13:31

19 a broader audience there's data on that. 13:31

20 Q. Anywhere in your report do you break out your 13:32

21 findings with respect to secondary meaning among just 13:32

22 the group of respondents who were likely to purchase a 13:32

23 cellular telephone in the coming 12 months? 13:32

24 A. I don't think so. I mean it's in the data 13:32

25 that's produced along with the report, but it's not 13:32

1 laid out like that in the body of the report. 13:32

2 Q. Why not? 13:32

3 A. Because I don't see the relevance of breaking 13:32

4 that out as a separate group to look at when that's 13:32

5 just one piece of the relevant universe. 13:32

6 Q. So in your view, looking at secondary meaning 13:33

7 among prospective purchasers is not relevant? 13:33

8 MR. BEARD: Objection, misstates and 13:33

9 mischaracterizes prior testimony. 13:33

10 THE WITNESS: No, that's not what I said. 13:33

11 BY MR. QUINTO: 13:33

12 Q. I'm sorry, would you explain it again, 13:33

13 please? 13:33

14 A. I just said the universe as I see it is -- 13:33

15 consists of recent and likely future purchasers. 13:33

16 So I don't see the reason for breaking out 13:33

17 the results based on only part of that being just the 13:33

18 future purchasers, but anybody who wants to do that, 13:33

19 it's in the data. 13:33

20 Q. Do you intend to analyze your data further 13:33

21 between now and trial, your data for either the cell 13:34

22 phone or the tablet computer surveys? 13:34

23 A. I don't know. Only if there's some reason 13:34

24 to. 13:34

25 Q. As you sit here today, you have no such 13:34

1) intention? 13:34

2 A. The only intention that I might have is, as I 13:34
3 said, I went back and looked at certain aspects in 13:34
4 response to the Jacoby report to check for myself is 13:34
5 there any merit to any of this. 13:35

6 As I said, I've looked at the data and found 13:35
7 there's not and I don't know if at some point I will 13:35
8 be -- I'll be asked to sort of put that data forward 13:35
9 to show how those points that he is raising have no 13:35
10 impact on the reliability of the results, but that's 13:35
11 not the only thing that comes to mind that I could end 13:35
12 up doing with the data. 13:35

13 Q. How many hours did you devote to considering 13:35
14 Dr. Jacoby's report and re-examining your data? 13:35

15 A. I'd have to check. I don't know, maybe six 13:35
16 to eight hours, maybe ten hours. 13:36

17 Q. Was that this week? 13:36

18 A. Yes. 13:36

19 Q. And as you sit here, there's no further work 13:36
20 that you intend to do as a result of looking at 13:36
21 Dr. Jacoby's report? 13:36

22 A. The only other thing is, as I mentioned, I 13:36
23 may be able to go and confirm through some 13:36
24 nonconfidential route that the respondents from the 13:36
25 Toluna and e-Rewards panels were not overlapping at 13:36

1 anything more than a negligible level and, again, I 13:36
2 don't know how things will transpire, but if I'm asked 13:37
3 to do a more formal response to the Jacoby report or 13:37
4 if there are motions related to the surveys, I need to 13:37
5 do a more formal analysis of data on certain points to 13:37
6 address some of these criticisms that really have no 13:37
7 merit, then I would do that, but I don't know if that 13:37
8 will be necessary. 13:37

9 Q. In the cellular telephone survey, what 13:37
10 percentage of respondents were likely to purchase a 13:37
11 cellular telephone within the next 12 months? 13:37

12 A. I'd have to check the data. 13:37

13 Q. Can you tell from looking at the report? 13:37

14 A. I don't think so. 13:38

15 No, I can't tell that specifically. 13:38

16 Q. With respect to the tablet -- strike that. 13:38

17 With respect to the tablet computer report, 13:38

18 were all the respondents likely purchasers of tablet 13:38

19 computers in the next 12 months? 13:38

20 A. All of them? 13:38

21 Q. Right. 13:38

22 A. No, some of them would have been recent 13:38

23 purchasers. 13:38

24 Q. Do you know what percentage were likely 13:38

25 purchasers in the next 12 months? 13:38

1 So if anybody is interested in seeing who 14:33
2 composes any of these categories they can see that for 14:33
3 themselves in the data. 14:34

4 I did go out of my way to list respondent 14:34
5 numbers in the body of the report to be helpful in the 14:34
6 instances where I thought that was most significant, 14:34
7 but it would be a pretty tedious, long, absurd report 14:34
8 if I was calling out respondent ID numbers for 14:34
9 everything that was discussed throughout the report. 14:34

10 Q. Looking at paragraph 77 on page 50, the first 14:34
11 sentence refers to a particular group of 16 14:34
12 respondents. 14:34

13 If I wanted to look them up in the data, 14:34
14 would they be identified? 14:34

15 A. Yes. 14:34

16 Q. Turning to paragraph 91, are the control 14:34
17 percentages subtracted from the data here? 14:35

18 A. No. 14:35

19 Q. Why is that? 14:35

20 A. Because it would make no sense to do that. 14:35

21 Q. Why do you say that? 14:35

22 A. Because these numbers are not stating 14:36
23 secondary meaning percentages. 14:36

24 I can tell -- I can tell what you're thinking 14:36

25 because Dr. Jacoby was confused about this, but these 14:36

1 numbers are not stating that this was the secondary 14:36
2 meaning percentage at a certain time. 14:36

3 So the control has no applicability to what 14:36
4 these numbers mean and it would make no sense. 14:36

5 Q. So explain to Dr. Jacoby and to me what 14:36
6 you're doing here and why it would make no sense. 14:36

7 A. So Dr. Jacoby seems to think I'm stating here 14:36
8 that the secondary meaning level is 84.4 percent and 14:36
9 he is then saying no, that shouldn't be right. That 14:36
10 isn't what I'm saying here. 14:36

11 I'm literally reporting there were 270 people 14:36
12 who associated the trade dress with Apple and gave a 14:36
13 time period when they thought that happened and 84.4 14:37
14 percent of those people said it was before July 2010. 14:37

15 So that -- all this means is if one were to 14:37
16 look at the secondary meaning level of the survey, 14:37
17 which shows secondary meaning, let's say well, isn't 14:37
18 it possible that that really just happened later in 14:37
19 2010 or after the Samsung products already came out, 14:37
20 this tends to suggest no, that is a very far-fetched 14:37
21 scenario because the large majority of people said 14:37
22 that they associated this with Apple before that. 14:37

23 Q. If you were to consider only the responses of 14:37
24 people planning to buy within the next 12 months, and 14:38
25 subtract out the control percentages, would the 14:38

1 secondary meaning percentages here be in the 30s? 14:38

2 MR. BEARD: Objection, misstates, 14:38

3 mischaracterizes prior testimony and the report. 14:38

4 THE WITNESS: So the first answer has to be, 14:38

5 again, these are not secondary meaning percentages. 14:38

6 So the whole question is based on an 14:38

7 incorrect understanding. 14:38

8 None of these numbers are secondary meaning 14:38

9 percentages. So the whole idea of subtracting 14:38

10 anything out or comparing it to the control to arrive 14:38

11 at a secondary meaning level makes no sense. 14:38

12 BY MR. QUINTO: 14:38

13 Q. So using these numbers you cannot -- you 14:38

14 cannot get to secondary meaning; is that what you're 14:38

15 saying? 14:38

16 A. Yes, these numbers are not -- they are not 14:38

17 usable to tell you -- well, let's back up. 14:39

18 So we came out with an iPhone secondary 14:39

19 meaning level something like 64 percent as of the time 14:39

20 of the survey and the question is well, what was it as 14:39

21 of July 2010. 14:39

22 These numbers here on page 57 do not in any 14:39

23 way allow you to say here's what the exact percentage 14:39

24 would have been in July 2010, it's just telling you a 14:39

25 fairly broad common sense point that is there any 14:39

1 reason to question that this 64 percent secondary 14:39
2 meaning level is a new phenomenon or is it likely at 14:39
3 least a substantial portion of that already existed 14:39
4 and these numbers are telling you there's no evidence 14:39
5 that this high level of secondary meaning is just a 14:39
6 very recent phenomenon. 14:39

7 The evidence shows the opposite, it's likely 14:39
8 an older phenomenon. 14:40

9 Q. Okay. So you cannot get from the chart in 14:40
10 paragraph 91 to secondary meaning; is that right? 14:40

11 A. You cannot get -- you cannot use that chart 14:40
12 to say what the secondary meaning level was in July of 14:40
13 2010 nor can you do anything that Dr. Jacoby did with 14:40
14 these numbers in his report. 14:40

15 It's just a broad brush common sense look at 14:40
16 the pattern. 14:40

17 Q. Let me ask you to look at paragraph 95 of 14:41
18 your report. 14:41

19 A. Okay. 14:41

20 Q. Where you state the 55.0 percent result is on 14:41
21 its own sufficient to establish that the overall 14:41
22 appearance of the iPad has acquired secondary meaning. 14:41

23 Has the 55 percent there been adjusted to 14:41
24 reflect the control group percentage? 14:41

25 A. Not yet, which is why I put that footnote 14:41

1 there noting that that is going to happen once you get 14:42
2 to the control and I show what the net figure is 14:42
3 there, but at this point, I'm just discussing the test 14:42
4 group results and I'm in no way suggesting you don't 14:42
5 need to use the control group. 14:42

6 Q. Your footnote indicates that the true figure 14:42
7 is 38 percent. 14:42

8 Dr. Jacoby came up with 36.4 percent. 14:42

9 Do you understand why there's a discrepancy? 14:42

10 A. I don't know where you're getting that 36.4 14:42
11 percent. What exactly does he say? 14:42

12 Q. Well, when he attempted to adjust this for 14:42
13 the control group data his result was 36.4 percent. 14:42

14 Did you review his figures when you went 14:43
15 through his report? 14:43

16 A. I reviewed everything in his report, but I 14:43
17 can't remember where he got -- there were lots of 14:43
18 numbers in his report that, you know, were based on 14:43
19 misunderstandings, the wrong data, incorrect analyses. 14:43

20 So I can't remember where every random number 14:43
21 in his report came from. 14:43

22 Q. Okay. Let me ask you to look at paragraph 14:43
23 117. 14:44

24 A. Okay. 14:44

25 Q. Does the chart here reflect any adjustment 14:44

1 for the control percentages? 14:44

2 A. This is the same discussion we just had for 14:45

3 the iPhone chart. 14:45

4 These are not showing secondary meaning 14:45

5 levels at all. 14:45

6 Q. I was afraid you were going to tell me that. 14:45

7 Have you ever had an expert report rejected 14:45

8 in whole or in part by a court on Daubert grounds? 14:46

9 A. No. 14:46

10 Q. Have you ever had an expert report held 14:46

11 inadmissible for any reason in whole or in part by a 14:46

12 court? 14:46

13 A. The only thing that might qualify for that, 14:46

14 I'm not sure, is I had a case where I did one survey 14:46

15 at the beginning of a case in a reverse confusion case 14:46

16 where I couldn't really do it the way I would want to 14:46

17 because in a reverse confusion situation when the mark 14:47

18 has just started being used it hasn't been out there 14:47

19 long enough to test whether reverse confusion has 14:47

20 happened. 14:47

21 So I then did a second survey later in the 14:47

22 case after the mark had been out for a couple of years 14:47

23 and the judge accepted my survey and, in fact, gave 14:47

24 summary judgment to the defendant who my survey had 14:47

25 been for which showed a lack of confusion, but the 14:47

1 I, LOUISE MARIE SOUSOURES, duly
2 authorized to administer oaths pursuant to Section
3 2093(b) of the California Code of Civil Procedure, do
4 hereby certify: That the witness in the foregoing
5 deposition was by me duly sworn to testify the truth
6 in the within-entitled cause; that said deposition was
7 taken at the time and place therein cited; that the
8 testimony of the said witness was reported by me and
9 was hereafter transcribed under my direction into
10 typewriting; that the foregoing is a complete and
11 accurate record of said testimony; and that the
12 witness was given an opportunity to read and correct
13 said deposition and to subscribe the same.

14 Should the signature of the witness not be affixed
15 to the deposition, the witness shall not have availed
16 himself or herself of the opportunity to sign or the
17 signature has been waived.

18 I further certify that I am not of counsel, nor
19 attorney for any of the parties in the foregoing
20 deposition and caption named, nor in any way
21 interested in the outcome of the cause named in said
22 caption.

23 DATE: 4-19-12

24 LOUISE MARIE SOUSOURES, CSR. #3575
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INDEX OF EXAMINATIONS

		PAGE
BY MR. QUINTO		6

INDEX OF EXHIBITS

NUMBER	DESCRIPTION	PAGE
Exhibit 1	Five-page printout from Internet	105
Exhibit 2	Expert report of Hal Poret in the matter of Apple, Inc. versus Samsung Electronics Company Limited et al.	129
Exhibit 3	Document entitled "Mobile phone secondary meaning survey" dated May 2011	146
Exhibit 4	Expert rebuttal report of Hal Poret in the matter of Apple Inc. versus Samsung Electronics Company Limited et al.	169

1 ERRATA SHEET FOR THE TRANSCRIPT OF:

2 Case Name: Apple vs Samsung

3 Dep. Date: THURSDAY, APRIL 19, 2012

4 Deponent: HAL PORET

5 CORRECTIONS:

6	Pg.	Ln.	Now Reads	Should Read	Reason
7	_____	_____	_____	_____	_____
8	_____	_____	_____	_____	_____
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11	_____	_____	_____	_____	_____
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16	_____	_____	_____	_____	_____
17	_____	_____	_____	_____	_____

18 _____

19 Signature of Deponent

20 SUBSCRIBED AND SWORN BEFORE ME

THIS ____ DAY OF _____, 2011.

21 _____

22 (Notary Public) MY COMMISSION EXPIRES: _____

23

24 HAL PORET 17:23

24 17:23

25 17:24

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

APPLE INC., a California corporation

Plaintiff,

v.

SAMSUNG ELECTRONICS CO., LTD., a
Korean business entity; SAMSUNG
ELECTRONICS AMERICAN, INC., A New York
Corporation; SAMSUNG
TELECOMMUNICATIONS AMERICA, LLC, a
Delaware limited liability company

Defendants.

Case No. 11-cv-01846-LHK

**CORRECTED REBUTTAL REPORT OF DEFENDANT'S EXPERT,
JACOB JACOBY, Ph.D.**

I. PERSONAL INFORMATION

1. My full name is Jacob Jacoby. I am the Merchants Council Professor of Consumer Behavior and Retail Management at New York University's Leonard Stern School of Business and also President of Jacob Jacoby Research, Inc. A description of my qualifications and credentials is attached hereto as Appendix A1. My Curriculum Vita is attached hereto as Appendix A2. Identification of my trial and deposition testimony during the past four years is attached hereto as Appendix A3. At the invitation of the American Bar Association, I recently completed a treatise entitled *Trademark Surveys* that is expected to be published later this year by Thomson Reuters.

II. CIRCUMSTANCES LEADING TO THIS REBUTTAL REPORT

2. On March 28, 2012, counsel for defendant e-mailed a copy of the "Expert Report of Hal Poret in the Matter of Apple Inc. v. Samsung Electronics Co., Ltd. et al." with the request that I evaluate said report. Additionally, I was provided with the following materials:

- * The Amended Complaint For Federal False Designation Of Origin And Unfair Competition, Federal Trademark Infringement, Federal Trade Dress Dilution, State Unfair Business Practices, Common Law Trademark Infringement, Unjust Enrichment, And Patent Infringement.
- * Samsung Entities' Answer, Affirmative Defenses, And Counterclaims To Apple Inc.'s Amended Complaint.
- * Various data sets that resulted from Mr. Poret's survey

3. I am being compensated at the rate of \$900 per hour, which is my standard rate for such services. This compensation is my customary current rate; it is in no way related to the outcome of this matter.

III. PRELIMINARY CONSIDERATIONS

4. Among other items, my review of Mr. Poret's survey and report relies upon the seven factors cited in the Federal Judicial Center's *Manual for Complex Litigation* (4th, Section 11.493). These factors are quoted verbatim below in an order that corresponds, generally, to the sequence followed by the research process itself. According to the *Manual for Complex Litigation*, a properly conducted survey would contain and conform to the following:

- a. The population was properly chosen and defined.
- b. The sample chosen was representative of that population.
- c. The questions asked were clear and not leading.
- d. The survey was conducted by qualified persons following proper interview procedures.
- e. The data gathered were accurately reported.
- f. The data were analyzed in accordance with accepted statistical principles.
- g. The process was conducted so as to ensure objectivity.

5. Having just cited portions from the Federal Judicial Center's *Manual for Complex Litigation*, the following disclosure is important. While at some points I refer to or cite case law, legal treatises or other legal authority, I am a social scientist, not an attorney. However, being tasked with designing and critiquing surveys proffered as evidence in litigated matters, it would be irresponsible of me to fail to study, understand, and be mindful of what courts¹ and other authorities² have said regarding what is required for survey research to be considered acceptable

¹Including *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 118 S. Ct. 512 (1997); *Kumho Tire Co., Ltd. et al. v. Carmichael et al.*, 526 U.S. 137 (1999); *Weisgram v. Marley Co.*, 528 U.S. 440, 120 S. Ct. 1011, at 1021, 145 L. Ed. 2d 958, 972-73 (2000).

² Including the "Reference Guide on Survey Research" that appears in the Federal Judicial Center's *Reference Manual on Scientific Evidence* (disclosure: Jacob Jacoby served as a peer reviewer for both the 1994 and 2000 editions of this guide), and Professor J. Thomas McCarthy's treatise, *McCarthy on Trademarks and Unfair Competition*.

and accorded weight in litigated disputes. Similarly, having been invited by the American Bar Association to write the *Trademark Surveys* treatise, it also stands to reason that I would need to familiarize myself with what case law and other authorities have to say regarding this subject.

IV. EVALUATION OF MR. PORET'S SURVEY AND REPORT

6. The purpose of Mr. Poret's survey was "to determine whether the iPhone and iPad trade dress have acquired secondary meaning" (Poret Report, Paragraph 3). For the reasons discussed in this Section, Mr. Poret's survey is incapable of providing any reliable or scientifically valid data to answer this stated objective, as it contains numerous methodological flaws – including, but not limited to, defining and measuring the proper universe, constructing the questionnaire, administering the study, validating the responses, and analyzing and reporting the data. The flaws in Mr. Poret's survey and report are discussed below in a sequence that generally corresponds to the seven factors identified in Paragraph 5, *supra*, not in any order of implied importance.

7. **Problems with the Universe Definitions.** With respect to the iPhone survey, the universe defined by Mr. Poret is impermissibly overbroad. While the iPhone is a smart phone, not all mobile phones are smart phones; the market for smart phones is not one and the same as the market for mobile phones. Defining the market as prospective purchasers/owners of all mobile phones rather than as prospective purchasers of smart phones renders the universe too broad.

8. Mr. Poret is inconsistent in defining the universes for his iPhone and iPad surveys. While individuals were allowed to complete the iPhone survey merely based on currently owning a mobile phone, “[r]espondents were not allowed to complete the [iPad] survey merely based on currently owning a tablet computer” (Poret Report, Paragraph 51). No explanation is provided for this inconsistency.

9. Instead, Mr. Poret inexplicably and improperly expanded his iPad universe to include individuals who had purchased a mobile phone or notebook or laptop computer in the past 12 months or were likely to do so in the next 12 months. He goes on to describe such *non-tablet* devices as “products related to tablet computers,” (Poret Report, Paragraph 52), yet nowhere provides a rationale for not using *tablet* owners, as would have paralleled his iPhone universe. Even stranger is that this impermissibly overbroad universe was chosen for only half the cells in the iPad study (those in Cells 4 and 5, who were exposed to the angled, exposed-button view).

10. As a further inconsistency and in direct contradiction to his assertion in Paragraph 51, Mr. Poret states in Footnote 45 that the iPad data “*includes results* among 36 Test Cell respondents and 34 Control Cell respondents who answered that they currently owned a tablet computer but had not personally purchased a tablet computer and were not likely to personally purchase a tablet computer in the next 12 months.” (Poret Report, page 61, footnote 45 (emphasis supplied).) How did these current tablet owners find their way into the study?³

³ Mr. Geoff Huntington, President of Phi Power Communications, who ran the computer analyses for me, commented as follows: “I don’t know how Poret got those numbers. When I look in the crosstabs, Banner 1 for all respondents, I see 167 respondents in the Test conditions who own a tablet, and 128 in the Control conditions. Looking at the narrower universe of Total Buyers (Banner 2), the numbers are 113 and 83, respectively. The difference (54 and 45, respectively) would be the non-buyers who currently own a tablet but did not buy one in the

36. Even if one were to disregard the problem noted in Paragraphs 19 and 35, *supra*, it can be shown that the 84.4% figure reported in the table within Paragraph 91 is grossly inflated for two reasons. First, the calculations were based upon the wrong base. Second, the findings were never adjusted by subtracting the corresponding control percentage. When one takes these two factors into consideration, one finds that the correct percentage is not 84.4%, as claimed, but 21.9%, as discussed in the following paragraphs.

37. *Mr. Poret's Calculations were Based Upon the Wrong Base.* In all, Mr. Poret reports there were 582 respondents across the various iPhone Test groups. In response to Question 215, 335 of these respondents said they associated the iPhone stimulus with a single company. When asked in Question 220 to identify that company, 317 answered Apple/iPhone. When these 317 respondents were asked (in Q270/275) when they first came to associate the appearance of the tablet with Apple/iPhone, 295 were able to provide a time when they formed their association. Of these 295 respondents, 172 gave a date between January 2007, when publicity regarding the iPhone commenced, and July 2010, when Samsung introduced its contested phone. These 172 respondents represent 29.6% of all 582 Test respondents.

38. It is important to recognize that secondary meaning percentages need to be based upon **all** qualified respondents who pass the Screener questions and who complete the Main questionnaire, not upon some whittled down fraction thereof. To illustrate the problem with using a whittled down base, consider the following hypothetical example. Suppose Mr. Poret's survey had obtained the following findings: Of a total of 582 respondents in the various iPhone Test groups, 15 had said they associated the iPhone stimulus with a single company. When asked to identify that company, 12 answered Apple/iPhone. When asked when they first came to associate the appearance of the phone with Apple/iPhone, 10 respondents across all iPhone Test

Cells were able to provide a time when they formed their association. Of these 10 respondents, 9 gave a date between January 2007 and July 2010. Given such findings, it would be ludicrous to claim that 90% (9/10) of the relevant sample “indicate that the iPhone trade dress had already become widely associated with Apple/iPhone prior to July 2010” – which essentially is the claim made for the 84.4% figure in Paragraph 91. The correct base is all 582 Test respondents who were properly qualified by the Screener questions and who participated in the study. When this base is used, we find that the correct percentage for the Test groups is not 84.4%, but 29.6% (172/582).

39. *Mr. Poret’s Calculations Were Not Adjusted By the Control Group Data.* Because it has not been adjusted by the corresponding Control percentage, even the 29.6% noted at the bottom of Paragraph 38, *supra*, is inflated. The corresponding percentage for all 299 Control group respondents is 7.7% (23/299). Subtracting this 7.7% from the 29.6% found for the Test groups, we arrive at a percentage of 21.9%, this being the correct adjusted percentage. A summary of these findings is provided in Table 1, below.

TABLE 1: Secondary Meaning for the iPhone.

Phone Survey Poret's Universe					
	Test Ns	Test %s	Control Ns	Control %s	
Total n (completed survey)	582	100.0%	299	100.0%	
Q215 Associated stimulus with only one company	335	57.6%	54	18.1%	
Q220 Associated stimulus with Apple/Mac/"i"(device)	317	54.5%	13	4.3%	Includes respondents who said iPhone in conjunction with a service provider.
Q270/275 Answered question	295	50.7%	13	4.3%	Accepted if answered one of the questions
Using date range:	January 2007-July 2010			Test minus Control %	
Made during this time-frame	172	29.6%	23	7.7%	21.9%

Universe includes past-12-month and next-12-month buyers, and current owners (who may or may not be 12-month buyers).

Source: iPhone_04162012, Banner 1, Columns 2 and 3

Note that the Mr. Poret did not provide cross-tabs along with his report. Obtaining his data, we were able to create what should have been provided. This source is identified at the bottom of Table 1 as "iPad_04162012" and is provided as Appendix B to this report.

40. Problems with the Reporting and Analyses for the iPad Trade Dress Survey.

In Paragraph 95 of his Report, Mr. Poret misleadingly asserts: "The 55% result is on its own sufficient to establish secondary meaning." But, for two reasons, the 55% cannot stand on its own with any degree of scientific accuracy. First, this 55% percentage was not adjusted by subtracting the control group percentage. The adjusted percentage is buried in Footnote 41: "[A]fter subtracting the parallel Control Cell result, the net figure is 38%;" in Paragraph 102, Mr. Poret states that this net percentage of 38% supports a finding of secondary meaning. As is described below, even this 38% figure is inflated.

41. The second reason why the 55% (and even the adjusted 38%) figure cannot be relied upon is because it has been inflated by including three types of respondents (in the

numerator) who should not have been included. First, the 55% figure is arrived at by including individuals who answered Question 215 “more than one company or brand” and then when asked Q235 (“with what companies or brands do you associate the overall appearance of this mobile phone?”) provided the name of only a single company or brand, namely, Apple/iPad/iPhone. There is no justification for including individuals who answered Question 215 “more than one company or brand” but could only remember the name of one company or brand. Given that they had answered “more than one company or brand,” simply because they could not remember the name of a second or third company provides no scientifically sound basis for concluding that they believed the appearance was associated with one company or brand. Second, the 55% figure is arrived at by including individuals who say they have not purchased a tablet, nor are likely to purchase a tablet. Third, it includes respondents who work in the industry or say they live with someone who does (see Question 340). Removing these three types of respondents yields a sample of 369 Test respondents and 275 Control respondents.

43. The 55% figure is improperly inflated in yet another way. As Mr. Poret writes in Paragraph 94: “When the respondents who answered ‘yes’ *or don't know* were asked whether they associate the overall appearance of the tablet computer with any particular company or companies or brand(s), 205 ... answered yes” (Italics supplied). In the very next sentence, Mr. Poret writes: “When the 205 respondents who answered ‘yes’ ...,”; this mischaracterization slides over the fact that some of these respondents did not answer “yes” but answered “don't know.” For anyone operating conservatively, if a respondent answers *don't know*, that would be the end of the inquiry. There is no justification for pushing any further by converting the respondent’s “don't know” into an “unsure,” as in Question 255 (“What makes you *unsure* about whether you associate the overall appearance of this mobile phone with any particular

company/companies or brand(s)?”). As discussed in Paragraph 17, *supra*, Question 210 is unorthodox and, to the best of my recollection, has never been used in any other of the more than 100 secondary meaning studies I have conducted or reviewed. As used in Mr. Poret’s study, the only purpose served by this question is to generate additional -- but unreliable -- answers of Apple/iPad/iPhone so as to inflate the estimated level of secondary meaning. Given the attendant publicity that comes with being the first to market, it is not surprising that, when pushed to provide an answer, respondents would answer Apple/iPad/iPhone, as that would be the brand name uppermost in their minds.

44. Although Mr. Poret understands that individuals who associate the trade dress with two or more entities cannot be counted as reflecting secondary meaning even if they mention that one of these was the plaintiff (see Paragraph 80 on page 51 of his report and Paragraph 98 on page 60), and in spite of such non-exclusive mentions being irrelevant, he nonetheless boosts “the total level of association with Apple/iPad to 65%” for Cells 1 and 2 (Paragraph 98) and for Cells 4 and 5, “the total level of association with Apple/iPad to ... 78.1% among tablet purchasers,” (Paragraph 112) by *including* such respondents. Because secondary meaning is measured only by referencing a single source, the 65% and 78.1% gross figures are meaningless and serve only to cloud and confuse the issue. They also do not reflect any adjustment by the corresponding control data. Mr. Poret has not reported net percentages based on correct responses for determining secondary meaning.

45. In Paragraph 116, Mr. Poret acknowledges: “The results did vary significantly depending upon the differing presentations of the tablets in Cells 1-3 versus Cells 4-7” He attributes this to viewing the tablets at an angle rather than frontally. Other explanations that would have to be considered and ruled out are any source-identifying properties in the button

(which was covered in the head-on-view of Test Cells 1 and 2 but exposed in the angled-view of Test Cells 4 and 5), as well as differences across the panels and panel providers.

46. In a section entitled “Timing of Secondary Meaning,” Mr. Poret concludes that his “results indicate that the iPad trade dress had already become widely associated with Apple/iPad prior to November of 2010” (Paragraph 117). For reasons discussed in Paragraph 19, *supra*, the question (Q270) and data upon which he predicates this conclusion are scientifically invalid and cannot be relied upon. Hence, the data cannot and do not “indicate” what Mr. Poret claims they indicate.

47. Even if one were to disregard the problem noted in Paragraphs 19 and 46, *supra*, it can be shown that the 65.5% figure reported in the table within Paragraph 117 is grossly inflated for three reasons. First, the calculations are based upon the wrong base. Second, the findings were never adjusted by subtracting the corresponding control percentage. Third, the sample inappropriately included 15 respondents who freely indicated (in response to Q.340) that they, or someone living in their household, works for a tablet manufacturer, distributor, or wireless provider (including Amazon, 3; Apple, 4; AT&T, 2; Barnes & Noble, 1; IBM, 4; Motorola, 1; Samsung, 1; Sony, 2; Sprint, 2; and Verizon). In a very curious pattern, all of them were found in the Control conditions, but none were in the Test conditions. They should have been removed from the sample entirely, and that was done as part of this re-analysis. But this raises questions about (a) why they were not removed from the Control conditions, (b) whether cases were selectively removed from the Test conditions that were not reported (none were listed as removed due to company affiliation), and (c) whether other cases were selectively removed and not documented. When one takes these three factors into consideration, one finds that the correct percentage is not 65.5%, as claimed, but 24.4% for those who qualified as past or

prospective tablet purchasers who do not work for, or live with someone who works in the tablet industry.

48. *Mr. Poret's Calculations Were Based Upon the Wrong Base.* In all, there were 700 respondents across the various iPad Test groups. In response to Question 215, 455 of these 700 respondents said they associated the iPad stimulus with a single company. When asked to identify that company (Q220), 443 answered Apple/iPad. When these 443 respondents were asked when they first came to associate the appearance of the tablet with Apple/iPad (Q270/275), there were 377 respondents across all iPad Test Cells who were able to provide a time when they formed their association. Of these 377 respondents, 247 gave a date before July 2010.

49. It is important to recognize that secondary meaning percentages are based upon all qualified respondents who complete the Main questionnaire, not upon some whittled down fraction thereof. To illustrate this fundamental fact, consider the following hypothetical. Suppose Mr. Poret's survey had obtained the following findings: Of the 700 respondents across the various Test groups, 15 said they associated the iPad stimulus with a single company. When asked to identify that company, 12 answered Apple/iPad/iPhone. When asked when they first came to associate the appearance of the tablet with Apple/iPad/iPhone, 10 respondents across all iPad Test Cells were able to provide a time when they formed their association. Of these 10 respondents, 9 gave a date before November 2010. Given such findings, it would be ludicrous to claim that 90% (9/10) "indicate[s] that the iPad trade dress had already become widely associated with Apple/iPad prior to November 2010" – which essentially is the claim made for the 65.5% figure in Paragraph 117. The correct base is all 369 respondents who, in answer to Q.135 and Q.140, said they had purchased a tablet computer in the past 12 months or were likely to purchase a tablet computer in the next 12 months. When this correct base is used, and when

respondents who work in the industry of live in households where others work in the industry, we find that the correct percentage for the Test groups is not 65.5%, but 31.7% if we rely on respondents who said they became familiar with the appearance of the iPad during the expanded date range of January 2007 through November 2010 (which includes years before the iPad was even publicized or released), or 16.8% if we rely on respondents who said they became familiar with the appearance of the iPad during the date range of January 2010 through November 2010 (which represents the time period between when the iPad was publicized and when the Samsung tablet was released). These findings are summarized in Table 2, below.

TABLE 2: Secondary Meaning for the iPad.

Tablet Survey					
Buyer Universe					
Cleaned **					
	Test Ns	Test %s	Control Ns	Control %s	
Total n (completed survey)	369	100.0%	275	100.0%	
Q215 Associated stimulus with only one company	227	61.5%	60	21.8%	
Q220 Associated stimulus with Apple/Mac/"i"(device	223	60.4%	39	14.2%	
Q270/275 Answered question	221	59.9%	14	5.1%	
Using date range:	January 2010-November 2010				Test minus Control %
Made during this time-frame	62	16.8%	10	3.6%	13.2%
Using date range:	January 2007-November 2010				Test minus Control
Made during this time-frame	117	31.7%	20	7.3%	24.4%
** Removed respondents who work in the industry, or live with someone who does. Includes only respondents who have purchased a tablet and/or are likely to buy a tablet.					
Source: iPad_04162012 (COMPANYOUT) Banner 2, Columns 2 & 3					

50. *Mr. Poret's Calculations Were Not Adjusted By the Control Group Data.*

Because it has not been adjusted by the corresponding Control percentage, even the 31.7% and 16.8% figures noted at the end of Paragraph 49 are inflated estimates of secondary meaning. When the corresponding control group percentages are subtracted, we see that the secondary meaning estimates are 24.4% if we rely on respondents who said they became familiar with the appearance of the iPad during the expanded date range of January 2007 through November 2010 (which includes years before the iPad was even publicized or released), or 13.2% if we rely on respondents who said they became familiar with the appearance of the iPad during the date range of January 2010 through November 2010 (which represents the time period between when the iPad was publicized and when the Samsung tablet was released).

V. CONCLUSION AND OPINION

51. For the reasons set forth above, in my opinion, Mr. Poret's Survey and Report cannot be relied upon as providing scientifically acceptable support for the conclusions and opinions being proffered therein.

52. I reserve the right to supplement or revise this report based on additional materials that may be forthcoming.

Pursuant to 28 U.S.C. Section 1746, I declare under penalty of perjury that, based upon the information available to me, to the best of my knowledge, the foregoing is true and correct.

23 April 2012

Date


Jacob Jacoby, Ph.D.