INTELLECTUAL PROPERTY SURVEYS: 2018

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I. INTRODUCTION

This paper is the annual follow-up to sixteen previous papers:[1]
(1) "Lanham Act Related Surveys: The Year In Review & Emerging Issues" published in the 1999 Practising Law Institute handbook Litigating Copyright, Trademark & Unfair Competition Cases for the Experienced Practitioner
(2) "Lanham Act Surveys: 2000" published in the 2000 Practising Law Institute handbook Litigating Copyright, Trademark & Unfair Competition Cases for the Experienced Practitioner
(3) "Lanham Act Surveys: 2001" published in the 2001 Practising Law Institute handbook Strategies for Litigating Copyright, Trademark & Unfair Competition Cases
(4) "Lanham Act Surveys: 2002" published in the 2002 Practising Law Institute handbook Strategies for Litigating Copyright, Trademark & Unfair Competition Cases
(5) "Lanham Act Surveys: 2003" published in American Intellectual Property Law Association annual proceedings, 2003
(6) "Lanham Act Surveys: 2004" published in the Law Education Institute National CLE Conference proceedings, 2005
(7) "Lanham Act Surveys: 2005" presented at a meeting of the Intellectual Property Law Section of the State Bar of Georgia, reprinted in the NAD Annual Conference proceedings, 2006, and in the Law Education Institute National CLE Conference proceedings, 2007
(8) "Intellectual Property Surveys: 2006" published on the INTA website
(9) "Intellectual Property Surveys: 2007" published on the INTA website
(10) "Intellectual Property Surveys: 2008-2009" published on the INTA website
(11) "Intellectual Property Surveys: 2010" published on the INTA website
(12) "Intellectual Property Surveys: 2011-2012" published on the INTA website
(13) "Intellectual Property Surveys: 2013-Mid 2014" published on the INTA website
(14) "Intellectual Property Surveys: Mid 2014-2015" published on the INTA website
(15) "Intellectual Property Surveys: 2016" published on the INTA website
(16) "Intellectual Property Surveys: 2017" published on the INTA website

The following provides short excerpts of a number of selected opinions referencing survey evidence published in opinions from January 2018 through December 2018,[2] which might be of interest to the Lanham Act litigator. The bibliographies to this paper provide citations, by circuit and by survey issue, for all identified opinions published during this time period in which survey evidence was referenced.

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

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

II. <u>THE YEAR IN REVIEW: 2018</u>

A. SECONDARY MEANING SURVEYS

Converse, Inc. v. ITC, 2018 U.S. App. LEXIS 30649, *3, *5, *24-27 (Fed. Cir. 2018)

> This case involves alleged infringement of Converse's rights in trade dress arising from the common law and its trademark registration…
>
> …
>
> A central issue was whether the mark had acquired secondary meaning. Converse asserted that it had acquired secondary meaning, the mark having been used by Converse since 1932. The intervenors, on the other hand, disputed secondary meaning, claiming that Converse's use of the mark had not been substantially exclusive and offering a survey (the [Intervenor's expert] survey) concluding that consumers did not associate the Converse mark with a single source…
>
> …
>
> The ITC also placed considerable weight on survey evidence submitted by the intervenors (the CBSC only [Intervenor's expert] survey) to support its determination that the mark had not acquired secondary meaning…
>
> We think the [Intervenor's expert] survey likely has little relevance with respect to the issue of secondary meaning for the intervenors. The intervenors' expert…surveyed respondents in the spring of 2015 to determine whether they associated the '753 trademark with a single source. Converse did not dispute that a survey taken two years after the registration is relevant to determining secondary meaning *as of the date of registration*. On remand, however, the ITC must consider whether Converse's mark had acquired secondary meaning as of each first infringing use by each intervenor, the earliest of which is more than ten years before the date of the [Intervenor's expert] survey and the latest of which is likely more than five years before the [Intervenor's expert] survey. Thus, with respect to Converse's claims of infringement against the intervenors, the ITC should give the [Intervenor's expert] survey little probative weight in its analysis, except to the extent that the [Intervenor's expert] survey was within five years of the first infringement by one of the intervenors…
>
> …
>
> [Intervenor's expert] concluded that the '753 trademark had a 21.5% net rate of association with a single source, a rate of association that the ALJ found "insufficient to establish secondary meaning" at the time of registration...The ITC found that the [Intervenor's expert] survey "weighs against a finding of secondary meaning,"…relying on the ALJ's conclusion that the survey was "insufficient to establish secondary meaning,"… We see no error in the conclusion that the survey does not establish secondary meaning, but we are unclear as to the ITC's reasoning as to why the survey supports the opposite—a lack of secondary meaning. On appeal the intervenors argue that the [Intervenor's expert] survey affirmatively supports their position—showing lack of secondary meaning. Converse argues that the [Intervenor's expert] survey is flawed and should be given no weight. We do not resolve this issue which is a matter for the ITC in the first instance. In any remand where secondary meaning as of the time of registration is a relevant issue, the Board should analyze whether the survey shows lack of secondary meaning as of the date of registration. Unless the survey affirmatively

shows a lack of secondary meaning, there is simply a lack of survey evidence of secondary meaning—which is a neutral factor favoring neither party.

Royal Crown Company, Inc. v. The Coca-Cola Company, 2018 U.S. App. LEXIS 16670, *1, *5-6, *23-25 (Fed. Cir. 2018)

Royal Crown Company, Inc. and Dr Pepper/Seven Up, Inc. (together, "Royal Crown") appeal a decision of the Trademark Trial and Appeal Board ("the Board") dismissing Royal Crown's opposition to the registration of The Coca Cola Company's ("TCCC") trademarks for various soft drinks and sports drinks including the term ZERO.

…

…TCCC…submitted the deposition of [Appellee's expert], who conducted a consumer survey in 2008 asking respondents if they "associated" the mark ZERO with one or more particular companies. The Board explained that [Appellee's expert's] survey found that 61% of respondents associated the term ZERO with one company, but only 6% of respondents associated the control term DIET with one company. And, a majority of respondents (52%) mentioned COKE, COCA-COLA, or SPRITE when asked with which company's products they "associated" the term ZERO. Although it noted that the weight of the survey was somewhat diminished because approximately five years had passed between when the survey was conducted and the close of testimony in this proceeding, the Board concluded that the survey evidence supported TCCC's sales and advertising evidence and indicated that TCCC's ZERO marks had acquired distinctiveness. The Board also found that TCCC's use of the ZERO term in connection with soft drinks was substantially exclusive, because third-party use of ZERO in a mark for soft drinks was inconsequential given the "magnitude of TCCC's use."

…

The Board's reliance on [Appellee's expert's] survey to find that TCCC had acquired distinctiveness in its ZERO marks is…troubling. As the Board acknowledged, this survey is not contemporaneous with the question of whether registration should be permitted here—[Appellee's expert] conducted the survey more than five years before the close of testimony before the Board…But "[s]econdary meaning is a time-related concept: it exists at a specific time, in a specific place, among a specific group of people who recognize that specified matter indicates commercial origin of a specified type of product or service from one unique commercial source."…"Therefore, a survey is only probative if it deals with conditions at the appropriate time."...The Board gave this survey "somewhat diminish[ed]" weight for this reason, but nonetheless used its findings to "validate[] the significant sales and advertising numbers discussed supra."…But, as it cannot disclose contemporary public perception, the probativeness of this survey, even merely to support other evidence, is questionable. This is particularly true in the face of Royal Crown's evidence of substantial and increased use of ZERO by third parties in connection with beverages in the intervening years.

The framing of the survey questions also reduces the probative value of the results. [Appellee's expert] asked consumers whether they "associated" the term ZERO with the products of one or more companies…But this question is not sufficient to demonstrate the public's perception of the term ZERO; association does not imply that a

consumer would be confused by seeing a ZERO branded product under a different label, nor does it address what meaning consumers attach to the term ZERO. The Board's reliance on the survey evidence here at least seems inconsistent with any heightened level of inquiry, if the Board intended to apply one.

Uncommon, LLC v. Spigen, Inc., 2018 U.S. Dist. LEXIS 48806, *4, *11, *52-54 (N.D. Ill. 2018)

The parties make and sell cell phone cases…

In September 2012, Plaintiff applied to register the name "Capsule" as a trademark for one of its lines of cases…

…

The parties cross-filed for summary judgment in June 2017…

…

…Defendant produced the only consumer survey in the record. The survey shows that among consumers of cell phones and cell phone cases—excluding employees in the industry—only 6 percent of respondents were familiar with "Capsule" as a brand name (compared with over 60 percent familiar with the competing case brand "OtterBox")… Only 14 percent of respondents could connect "Capsule" to cell phone cases when prompted. As such, the survey indicates that, far from "Capsule" having "come to mean" a cell phone case in the minds of consumers, it has barely registered with consumers. Thus, Plaintiff's product does not enjoy "a mental association in buyers' minds between the alleged mark and a single source of the product."…Based upon the record, Plaintiff's mark has not acquired a secondary meaning.

In sum, Defendant meets its burden of showing that Plaintiff's mark is merely descriptive and lacks secondary meaning. The date of registration for Plaintiff's mark is May 21, 2013; it therefore has not been in continuous use for five years and has not become incontestable. Accordingly, descriptiveness remains a valid basis upon which Defendant may seek cancellation of Plaintiff's mark…Because Plaintiff's mark is merely descriptive and lacks secondary meaning, it is invalid,

This Court therefore grants summary judgment to Defendant…and orders the USPTO to cancel U.S. Trademark Registration No. 4,338,254.

B. LIKELIHOOD OF CONFUSION SURVEYS

Alzheimer's Disease & Related Disorders Association v. Alzheimer's Foundation of America, Inc., 2018 U.S. Dist. LEXIS 67108, *3, *29-31, *34, *37-38, *44-45 (S.D.N.Y. 2018)

> In September 2017, the Court held a bench trial between two Alzheimer's charities — Counterclaim Plaintiff Alzheimer's Disease and Related Disorders Association (hereafter, "Alzheimer's Association" or the "Association" or "Counterclaim Plaintiff) and Counterclaim Defendant Alzheimer's Foundation of America (hereafter, "Alzheimer's Foundation" or "AFA" or "Counterclaim Defendant") — on certain Lanham Act claims. Specifically, the Association contends that AFA's purchase of Association trademarks as search engine keywords and use of the two-word name "Alzheimer's Foundation" constitute trademark infringement and false designation of origin under the *Lanham Act*.
>
> …
>
> …the Association also presented the survey evidence and opinion testimony of [Plaintiff's expert]…
>
> …
>
> In his first study, [Plaintiff's expert] conducted a lineup, or "Squirt" style study meant to gauge the likelihood of confusion between the standard character marks "Alzheimer's Association" and "Alzheimer's Foundation."
>
> Through [Defendant's expert's] testimony, AFA makes three criticisms of Study 1…
>
> …
>
> …AFA questions [Plaintiff's expert's] choice of and process in choosing "Alzheimer's Trust" as a control, arguing that the choice artificially inflated the net confusion numbers. The Court agrees.
>
> …
>
> …"Alzheimer's Trust" is a weak control term.
>
> While the Court recognizes that the perfect control may not exist, as a measure of consumer confusion between two marks, Study 1 — a test of mere words, shown sequentially, and with the unique word "trust" in the control term — is not particularly persuasive, especially in light of evidence that other potential controls, including those comprised of three or five words ("National Foundation for Alzheimer's Research" and "Alzheimer's Awareness Foundation") and one that sounds artificially generic ("Alzheimer's Charity"), registered substantially higher levels of confusion.
>
> …
>
> Study 2's control stimulus was flawed…By failing to control for the presence of sponsored ads, Study 2 ends up inflating any net confusion because the first search result in the control *is* the Association's website, that is, the correct answer, while the first search result in the test condition is the allegedly infringing AFA advertisement…A better control stimulus would have contained non-infringing sponsored ads at the top that, if clicked, counted towards the confusion rate for the control…what is "at issue" is the allegedly infringing AFA ad, and not sponsored ads in general. Accordingly, only the offending item should have been removed or replaced.

FCA US LLC In re, 2018 TTAB LEXIS 116, *1-2, *43-50 (TTAB 2018) This Opinion Is a Precedent of the TTAB

> FCA US LLC ("Applicant") filed an application for registration on the Principal Register of the mark MOAB in standard characters for "Motor vehicles, namely, passenger automobiles, their structural parts, trim and badges, " in International Class 12. The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the registered mark MOAB INDUSTRIES in standard characters as to be likely to cause confusion or mistake, or to deceive, when used in connection with Applicant's goods. The cited mark is registered in the name of Moab Industries, LLC ("Registrant" for "Automotive conversion services, namely, installing specialty automotive equipment," in International Class 37…
>
> …
>
> Applicant has also made of record [Plaintiff's expert's] expert report, based upon the results of a survey that he conducted. [Plaintiff's expert] found:
>
> > After controlling for noise, my survey shows that the net level of confusion between the MOAB INDUSTRIES word mark and Chrysler Group's MOAB mark used in connection with the Jeep brand is 2.33%. Stated another way, I find that the level of confusion between the MOAB INDUSTRIES word mark and Chrysler Group's MOAB mark used in connection with the Jeep brand is de minimis when tested in realistic marketplace conditions.
>
> After careful consideration, we find that, for numerous reasons, the survey upon which [Plaintiff's expert] based his opinion does not provide reliable guidance for our purpose. As we noted above in our discussion of customer care and sophistication, [Plaintiff's expert's] survey did not consider the entire universe of customers for automobiles, trim and structural parts; rather he limited his survey to customers for vehicles capable of off-road driving, a universe of customers that is much more limited than the one that concerns us in this case. For this reason alone, the [Plaintiff's expert's] survey is of limited probative value here.
>
> In determining registrability, we must consider the mark that Applicant actually seeks to register. The [Plaintiff's expert's] survey, however, did not test the public's reaction to that mark, MOAB, but instead to the "MOAB mark used in connection with the Jeep brand." [Plaintiff's expert] described the purpose of the survey as follows:
>
> > Specifically, I was asked to conduct a consumer survey to provide an expert opinion concerning whether or not relevant consumers are confused as to source, affiliation, sponsorship or approval regarding the Jeep brand's use of the MOAB mark on the 2013 Jeep Wrangler Moab Edition vehicle.
>
> Applicant does not now seek to register the mark JEEP MOAB or the mark MOAB as "used in connection with the JEEP brand." The mark at issue is MOAB. Considering Applicant's contention that JEEP is a famous mark, the display of the mark MOAB in association with or in close proximity to the JEEP mark would create a very

different commercial impression than MOAB alone. In the [Plaintiff's expert's] survey, subjects were shown the following stimulus:

Survey subjects would very likely be influenced by the above display to perceive the MOAB product as originating from the same source as JEEP products.

Another aspect of the [Plaintiff's expert's] survey that raises doubt is that it was designed to test *forward* confusion, rather than reverse confusion. "My survey was designed to assess the likelihood that ordinary purchasers of certain vehicles would, upon encountering the Jeep Wrangler Moab Edition vehicle in the marketplace, believe that the Jeep Wrangler Moab Edition is associated with or sponsored or approved by Moab Industries." The assumption that this was the type of confusion most likely to arise is counterintuitive, considering the fame of the JEEP brand (as well as the WRANGLER brand, another mark that Applicant characterizes as famous), with which the MOAB brand would be associated in the survey. Indeed, in *MIL v. Chrysler*, Registrant asserted a claim of reverse confusion. The District Court's explanation of the distinction is illuminating:

> Forward confusion occurs when consumers believe that goods bearing the junior mark [here defendant] came from, or were sponsored by, the senior mark holder [here plaintiff]. By contrast, reverse confusion occurs when consumers dealing with the senior mark holder [here plaintiff] believe that they are doing business with the junior one [here defendant]. In such a case, the smaller senior user, such as [plaintiff], seeks to protect its business identity from being overwhelmed by a larger junior user who has saturated the market with publicity.

The very modest size of Registrant's operations (Registrant upfitted "53 vehicles in 2011, 70 in 2012, and 92 in 2013") strongly suggests that, in a confrontation between the goods and services of Applicant and Registrant in the marketplace, the more likely

type of confusion would be reverse confusion, *i.e.*, a mistaken perception of the commercially weaker brand emanating from the source of the commercially stronger brand.

The *Eveready* format of the [Plaintiff's expert's] survey also gives rise to doubt. In an *Eveready* survey, respondents are shown one party's mark and are asked open-ended questions about its source. Accordingly, any response indicating confusion with the other party's mark must result from the respondent's unaided recollection of the other mark. In the [Plaintiff's expert's] survey, respondents were shown the stimulus reproduced above, in which the mark JEEP was prominently displayed in proximity to MOAB, and were asked questions about the source of the pictured vehicle, including:

> If you have an opinion, which company do you think makes or puts out this vehicle?
>
> What other products or services, if any, are offered by the company that makes the vehicle in front of you?
>
> If you have an opinion, does or doesn't the company that makes the vehicle in front of you have a business connection or affiliation with another company? [3 optional answers offered]
>
> With which other company does the company that makes the vehicle in front of you have a business connection or affiliation?
>
> If you have an opinion, did or didn't the company that makes the vehicle in front of you receive permission or approval from another company to make the vehicle? [3 optional answers offered]
>
> From which other company did the company that makes the vehicle in front of you receive permission or approval?

The stimulus shown to subjects contains many strong suggestions of the source of the MOAB brand: prominent display of the assertedly famous mark JEEP; repeated references to the assertedly famous mark WRANGLER; and references to MOAB as an "Edition" of JEEP and WRANGLER. Considering the modest scope of Registrant's operations, the likelihood that survey respondents would have knowledge of the MOAB INDUSTRIES brand is small. We find that this survey does not fairly test whether relevant customers, exposed to both marks, would experience confusion as to source.

Overall, as the [Plaintiff's expert's] survey did not test the impact of the mark that Applicant seeks to register; addressed an underinclusive universe of relevant customers; and was ill-suited to test the type of confusion that is most likely to occur, we give little weight to the survey's results.

[Citations omitted]

Solofill, LLC v. Rivera, et al., 2018 U.S. Dist. LEXIS 116848, *10-12 (C.D. Cal. 2018)

Defendants' first motion in limine seeks to exclude the expert testimony of…Plaintiff's expert retained "to assist in ascertaining the likelihood of confusion between…SOLOFILL and ECO-FILL…" In her report, [Plaintiff's expert] presents the results of a survey in which a target demographic was presented with three reusable K-

Cup products lined up side-by-side and asked if they "believe[d] that any of these come from the same affiliated companies?"

Defendants first challenge [Plaintiff's expert's] decision to survey only 42 consumers—all women—at a single mall outside of Houston, Texas. They note that even [Plaintiff's expert] herself acknowledged that she "considered this a pilot study because it was limited to one mall in one city." …She explains that "[t]here was no way to ascertain in the time frame available, less than one week, whether the degree of confusion shown in this pilot survey would be more or less than would be the case among a survey population projectable to the U.S. population." …Because the parties' products compete in a nationwide market, [Plaintiff's expert's] admission that her results cannot be projected to the entire U.S. population renders this preliminary and limited survey inadmissible. The fact that [Plaintiff's expert] limited her study to only female consumers only serves to underscore the unreliability of her findings.

Superior Consulting Services, Inc. v. Shaklee Corporation, 2018 U.S. Dist. LEXIS 75444, *2, *6, *7-8, *9-11 (M.D. Fla. 2018)

…Superior has registered the mark "Healthprint" twice with the United States Patent and Trademark Office ("USPTO")…

On June 8, 2016, Shaklee, a corporation that manufactures and distributes nutrition supplements, beauty products, and household-cleaning products, filed a trademark application with the USPTO claiming a similar "Healthprint" mark…

…

…Superior and Shaklee each describe their own experts' surveys as *Squirt* surveys. However, the methodologies of the two surveys are extraordinarily different…

Although *Squirt* surveys are generally accepted by the courts, the [Plaintiff's expert's] survey does not comply with the basic tenants [sic] of a *Squirt* survey, and the methodology he used is not reliable.

…

First, instead of presenting respondents with the two Healthprint marks that are in dispute, [Plaintiff's expert's] survey simply included questions that inquired about the word "Healthprint," asking, for example, in question 14, whether respondents believed it was from one company, more than one company, or no company at all. (n. 1 Notably, [Plaintiff's expert's] sixth survey question lists "Healthprint" as though it were the name of a single company…Shaklee contends that listing "Healthprint" as a single company tainted the results of the survey…The sixth question was certainly suggestive, and could very well have tainted later responses to the question about whether "Healthprint" was from a single company.)…Superior maintains that this was appropriate because "most of Superior's consumers do not have their first interaction with Superior's Healthprint mark visually."…But the mere use of the word "Healthprint" is not a reliable means of depicting the way in which consumers would be exposed to Superior or Shaklee's Healthprint in the marketplace…

…With no control group and no legitimate control question, the Court cannot determine whether it was the infringing mark that was the source of confusion among respondents. Although [Plaintiff's expert's] report opines that controls were not necessary because the survey assessed the presence of confusion, and not the cause of confusion,

the presence of confusion is meaningless for purposes of this case if it does not come from the allegedly infringing mark…

Adding to its reliability problems, [Plaintiff's expert's] survey fails to actually describe Shaklee's Healthprint service…A respondent can only compare and contrast two services if they are first given two services to compare and contrast. [Plaintiff's expert's] survey gave only one, so if any of the respondents rightfully believed that that the described service came from one entity, it is unremarkable.

After considering [Plaintiff's expert's] report it in its entirety…the Court finds that [Plaintiff's expert's] expert testimony is fatally flawed…

C. *DAUBERT*/ADMISSIBILITY ISSUES

Hain Blueprint, Inc. v. Blueprint Coffee, LLC, 2018 U.S. Dist. LEXIS 201886, *9-12 (E.D. Mo. 2018)

> …[Plaintiff's expert] explains that her survey "was conducted to determine whether consumers at Whole Foods Markets [emphasis omitted] would believe that a product bearing the BluePrint Coffee Mark is affiliated with the BLUEPRINT line of beverages." The scope of this objective lays bare that it targets only one venue and one aspect of BPC's business—its bagged whole-bean coffee goods sold at Whole Foods Markets. Given that the parties agree that BPC's primary business is its coffee shop services (with some online sales for its bagged whole-bean coffee), the survey is simply too narrow to be sufficiently relevant to BPC's primary business…
>
> The survey suffers from other defects as well…[T]he survey provides no contextual reference to how consumers would see the word "BLUEPRINT" in the grocery store setting…Because the survey fails to adequately consider actual marketplace conditions, it is an unreliable indicator of consumer confusion…
>
> Defendant also argues the survey is too suggestive in comparing Hain's and BPC's products. The survey begins by mentioning that "BLUEPRINT produces non-alcoholic beverages using plant-based ingredients." It goes on to ask "On your next grocery shopping trip, you notice a product"—only the label of "BLUEPRINT COFFEE" is shown without the assistance of any pictures or product models—"would you think that this coffee is part of the BLUEPRINT beverage family?" The questions suggests that the "coffee" referred to is a "beverage" (perhaps a pre-bottled beverage akin to Hain's goods) or else is in beverage form. But, again, BPC's only "product" at grocery stores is its bagged whole-bean coffee. By asking whether "this coffee is part of the BLUEPRINT beverage family," the question inappropriately suggests to the reader that "coffee" refers to some sort of drink or beverage, not necessarily coffee found in the form of beans. The question, therefore, appears to ease readers into finding a correlation based strictly on a similarity of name, rather than a similarity of products. Thus, this further renders the survey an unreliable indicator of consumer confusion.
>
> …The survey does too little to capture the perceptions and opinions of those actual buyers of BPC's goods and services, and the actual marketplace conditions faced by those buyers, so as to meaningfully assist the jury in determining likelihood of confusion. BPC's motion to exclude will be granted.

H.I.S.C., Inc. v. Franmar International Importers, Ltd., 2018 U.S. Dist. LEXIS 174670, *11-13 (S.D. Cal. 2018)

> The [Plaintiff's] expert report fails to comply with *Federal Rule of Civil Procedure 56(c)(4)* in several material respects: it does not contain [Plaintiff's expert's] signature under penalty of perjury, and it does not contain her attestation that she is competent to testify to the report's conclusions and opinions. Nor is the report accompanied by any separate sworn declaration by [Plaintiff's expert]. Instead, Plaintiffs attach to the report only Plaintiffs' counsel's expert witness disclosure. Expert disclosures signed under penalty of perjury by a party's attorney, however, do not satisfy the

"functional concerns" of *Federal Rule of Civil Procedure 56(c)(4)* — that [Plaintiff's expert] is competent to testify to the conclusions and opinions in the report.

…

Further, Plaintiffs do not offer [Plaintiff's expert's] report to show a *dispute* of fact. Rather, as the moving party, they offer the report to show the absence of any dispute of fact and their entitlement to judgment as a matter of law. Because Plaintiffs are the moving party, shouldering the burden on summary judgment, Plaintiffs' evidence is held to a slightly higher standard than that of the non-movant…

Naimi, et al. v. Starbucks Corp., 2018 U.S. Dist. LEXIS 110398, *4, *7, *13 n.2, n.3, *14 n.4 (C.D. Cal. 2018)

…Plaintiff Naimi, on behalf of himself and others similarly situated, filed a putative class action complaint alleging consumer claims regarding Defendants' Doubleshot® Espresso—branded products…

…

Plaintiffs then cite "[a] recent national survey…

…

…The survey, which according to the SAC, was conducted by an "independent market research company" (n.2 Defendants have also pointed out that Plaintiff's counsel stated during the *Local Rule 7-3* meet-and-confer discussion that Plaintiff's counsel commissioned the "independent" survey, but declined to provide further details about the survey on account of attorney-client privilege…) among "a demographically representative U.S. sample of over 400 consumers of the Product demonstrated that based on the name and complete label of the Product, over 89 % of those consumers believe the Product contains two shots of Starbucks brand espresso." This is the extent of the detail regarding the survey provided in the SAC; the SAC fails to include information regarding the name of the survey, how it was conducted, what questions the survey contained, how the "independent market research company" arrived at its conclusion, or any other details that would tend to suggest that the survey is reliable (n.3 In their Opposition, Plaintiffs cite several cases in which district courts accepted survey and laboratory test results to bolster their argument that the Court must "accept Plaintiffs' survey allegations as true "[e]ven if their truth seems doubtful."…These cases, however, are distinguishable, as none of them include an allegation as bare and unsupported as what Plaintiffs ask the Court to accept here. The Court will not deviate from its obligation to assess allegations under the well-established standard set forth in Twombly and Iqbal.). The lack of factual detail regarding the survey leaves the Court no choice but to regard it as an unsupported conclusory allegation that fails to cross the line from conceivable to plausible…Here, the Court's judicial experience and common sense dictate rejection of Plaintiff's survey allegation. (n.4 At the hearing, Plaintiff's counsel pointed out that in Shalikar v. Asahi Beer U.S.A., Inc., the court found sufficient the plaintiff's allegation regarding survey evidence that "more than 86% of the 'demographically representative U.S. sample of over 1,000 adults' who viewed the Product or its packaging, believed that it was produced in Japan," and found that the plaintiff had sufficiently alleged that a significant portion of the general public could be misled…Asahi, however, is distinguishable from this case because the court's conclusion was premised upon the complaint's other allegations

regarding the "words, pictures, [and] diagrams," and the prominent display of Japanese characters and script, which in their totality, permitted a reasonable inference that the product's label was misleading. The Asahi court then noted that this conclusion was "also supported by the survey evidence alleged in the SAC."…Here, the allegations regarding the Product's label and packaging do not permit such an inference, and the survey allegation alone is too conclusory to be entitled to the presumption of truth.)

D. OTHER SURVEY ISSUES

Church & Dwight Co. v. SPD Swiss Precision Diagnostics GmbH, 2018 U.S. Dist. LEXIS 151961, *1-2, *23-24 (S.D.N.Y 2018)

> Plaintiff Church & Dwight Co. ("C&D") and Defendant SPD Swiss Precision Diagnostics, GmbH ("SPD") are manufacturers of home pregnancy tests. Following a bench trial on liability in 2015, the Court found that SPD engaged in false advertising in violation of the *Lanham Act* with respect to its "Clearblue Advanced Pregnancy Test with Weeks Estimator" (the "Product" or "Weeks Estimator"), that SPD engaged in intentional deception, and that C&D was entitled to a permanent injunction.
>
> Now before the Court is the issue of appropriate monetary damages…
>
> …
>
> …[Defendant's expert] utilizes the December 2014 survey conducted during the liability phase by C&D's survey expert…, which was designed to identify the level of consumer confusion, as a measurement of the portion of SPD's sales of the Weeks Estimator that is attributable to the at-issue advertising. Putting aside whether the adoption of the exact percentages from the [Plaintiff's expert's] Survey is a fair way to "apportion" SPD's sales, which is discussed below, [Defendant's expert] pointed to the [Plaintiff's expert's] Survey as additional proof of his general point that the core assumption that all Weeks Estimator sales were attributable to false advertising was incorrect. For reasons elaborated below, while [Defendant's expert] is likely correct that not each and every Weeks Estimator purchaser was misled by the false advertising, the [Plaintiff's expert's] Survey is not intended to be used and cannot fairly be used to project how many actual buyers were deceived.

III. BIBLIOGRAPHY
INTELLECTUAL PROPERTY SURVEYS: 2018
BY CIRCUIT

This appendix contains citations, by issue, for all identified opinions published from January 2018 through December 2018**,** in which survey evidence was referenced.

First Circuit

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

Second Circuit

Alzheimer's Disease & Related Disorders Association v. Alzheimer's Foundation of America, Inc., 2018 U.S. Dist. LEXIS 67108 (S.D.N.Y. 2018) (Likelihood of Confusion) (Fame)

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Third Circuit

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

Fourth Circuit

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Fifth Circuit

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Sixth Circuit

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Eighth Circuit

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Marketquest Group, Inc. v. BIC Corporation, 2018 U.S. Dist. LEXIS 62360 (S.D. Cal. 2018) (Likelihood of Confusion)

Marketquest Group, Inc. v. BIC Corporation, 2018 U.S. Dist. LEXIS 62361 (S.D. Cal. 2018) (Likelihood of Confusion)

Monster Energy Company v. Integrated Supply Network, LLC, 2018 U.S. Dist. LEXIS 117494 (C.D. Cal. 2018) (Likelihood of Confusion)

Naimi, et al. v. Starbucks Corp., 2018 U.S. Dist. LEXIS 110398 (C.D. Cal. 2018) (False Advertising) (*Daubert*/Admissibility)

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Tenth Circuit

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Eleventh Circuit

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IV. BIBLIOGRAPHY
INTELLECTUAL PROPERTY SURVEYS: 2018
BY ISSUE

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Genericness Surveys

Leadership Studies, Inc. v. Blanchard Training and Development, Inc., 2018 U.S. Dist. LEXIS 71383 (S.D. Cal. 2018) (Genericness)

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Superior Consulting Services, Inc. v. Shaklee Corporation, 2018 U.S. Dist. LEXIS 75444 (M.D. Fla. 2018) (*Daubert*/Admissibility) (Likelihood of Confusion)

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V. BIOGRAPHICAL INFORMATION

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

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

In 2018, Matt authored a paper entitled Intellectual Property Surveys: 2017, which is a compendium of excerpts from case opinions covering surveys on genericness, descriptiveness/suggestiveness, secondary meaning, likelihood of confusion, false and/or misleading advertising, fame, and dilution. This paper was published by Ford Bubala & Associates and was also published electronically by the INTA.

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

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

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