

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
Atlanta Division

CHARLES SMITH,)	
)	
Plaintiff/Counterclaim-Defendant,)	
)	
v.)	Civil Action No.
)	1:06 CV 0526 (TCB)
WAL-MART STORES, INC.,)	
)	
Defendant/Counterclaim-Plaintiff.)	

**OPPOSITION TO WAL-MART’S MOTION
TO EXCLUDE TEACH TESTIMONY**

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MISCELLANEOUS

Federal Judicial Center, *Reference Guide on Survey Research* (2000) 9

Defendant/counterclaim-plaintiff Wal-Mart Stores has moved the Court to exclude the affidavit and testimony of Richard Teach, a rebuttal expert retained by plaintiff/counterclaim defendant Charles Smith to analyze survey research conducted by Wal-Mart's expert witness Jacob Jacoby. Wal-Mart argues that Teach is not an expert in the design or execution of surveys of apparel products and hence his report must necessarily be irrelevant in this case. Wal-Mart also hypothesizes that Smith offers Teach's expert testimony in support of his "case-in-chief," asks the Court to limit Teach's role to that of a rebuttal expert, and claims that he authored a second Report after discovery was closed.

In fact, Teach is offered solely as a rebuttal expert, whose function in this case is to testify as an expert on surveys generally, even though he is not a member of the elite club of trademark survey experts whose price resembles Jacoby's. There is no showing that the issues that Teach addresses are outside the limits of his undisputed expertise in survey research. Nor is Wal-Mart correct in charging that Teach is offered in support of Smith's case-in-chief, or that he authored a second Report. Accordingly, with one small exception, Wal-Mart's motion to exclude should be denied.¹

¹Smith agrees that the section of the Teach Affidavit that discusses data about the likelihood that respondents would buy Smith's shirt, an issue that Jacoby's report discussed but that is not included in Jacoby's Affidavit or referenced in Wal-Mart motion or summary judgment, need not be considered. *See* pages 13-14, *infra*.

1. Teach Has the Proper Expertise for the Issues He Addresses.

Wal-Mart's case for trademark infringement and dilution rests almost entirely on an affidavit from Jacob Jacoby, submitted with its motion for summary judgment, and attaching his Report on several surveys that he conducted during the summer of 2006. Jacoby's subcontractors posed a series of questions to respondents at several shopping malls across the county that were intended to test, respectively, post-purchase and point-of-sale confusion with respect to T-shirts bearing two specific parody designs, one using the word Wal★ocaust, and one using the word Wal-Qaeda. Jacoby's original report was not presented in affidavit form, but was simply a signed statement summarizing his research, and attaching various exhibits showing the work that was conducted. In support of Wal-Mart's motion for summary judgment, however, Jacoby has submitted an affidavit that both addresses several topics that were not specifically addressed in his original report, and omits matters that **were** discussed in his Report.

In his Memoranda supporting his Motion to Exclude Jacoby's Report ("SmithDaubert") as well as his Motion for Summary Judgment, Smith presented three principal arguments. The first was that the process of shopping for T-shirts (or other items) online depends on a process of Internet search and navigation that differs from

shopping in a physical store, and that Jacoby's "point-of-sale" study, and specifically his selection of respondents to be interviewed for that study, fails to account for these differences. Second, Smith argued that there were several flaws in the survey that applied both to the point-of-sale study and to the post-purchase study. In this regard, he contended that Jacoby breached the double-blind requirement by showing the interviewers that the sponsor of the study wanted respondents to identify Wal-Mart as the source or sponsor of the shirts, and that several questions in the survey – including the first question, which secured the bulk of the answers supporting a finding of likely confusion – were posed in a biased and misleading manner. Third, Smith argued that Jacoby's findings on the issue of dilution were not statistically significant.

To support these three points, Smith presented expert testimony from two individuals who, although not experts in conducting trademark surveys, have expertise on which they drew to identify the flaws in Jacoby's analysis. Alan Jay Rosenblatt, an expert on Internet navigation, addressed Jacoby's erroneous assumptions (or his failure to consider) the impact of Internet navigation on the self-selection of respondents who become "likely purchasers" of Smith's shirts; Wal-Mart has moved to exclude the Rosenblatt affidavit in a separate motion from the one presently under consideration. To address the other two points (as well as to help assess whether Rosenblatt's analysis

made sense from the perspective of a survey expert), Smith obtained expert opinions from Dr. Richard Teach, professor emeritus in the College of Management at the Georgia Institute of Technology, where he has taught for the past thirty-five years, as well as directing its masters degree program and serving as Associate Dean for all graduate business programs. Teach Aff. ¶¶ 2, 5. Teach has taught a variety of marketing courses during that time, including basic marketing, marketing research, business to business marketing and strategic marketing, and statistics. *Id.* ¶ 3. He has published many articles in professional journals, including a current paper, to be published later this year, on “reporting statistics in papers and presentations”; he has also served as a peer reviewer and editor on professional journals. *Id.* ¶ 5.

Turning specifically to his expertise on surveys, Teach’s research typically involves empirical studies, for which he has designed many questionnaires and survey instruments. According to his affidavit, over the years he has designed and conducted “a hundred or more surveys,” over fifty of which have been surveys of the buyers of goods and services. *Id.* ¶ 3. *See also* Teach Deposition at 86-87. His teaching assignments have directed students in his classes to conduct extensive interviews, *id.* ¶ 2, and he is currently assembling an international faculty consortium that involves interview procedures. *Id.* ¶ 3. In short, Teach states, although his experience does not

include surveys designed specifically to assess trademark confusion or dilution issues, “I am an expert in designing and conducting surveys.” *Id.* ¶ 6. There is no evidence to the contrary.

Wal-Mart’s motion to exclude Teach’s testimony ignores this undisputed expertise, choosing to focus instead on the fact that Teach has never conducted an “apparel” survey and has no expertise in apparel. Wal-Mart Mem. at 6, 8 n.4, 9 and n.5. But Wal-Mart provides no reason to believe that a survey expert must have experience conducting surveys concerning the precise product under study in order to analyze and criticize a survey about that particular product, or that the survey expert must have expertise in trademark surveys or in trademark law in order to analyze a survey that is devoted to answering questions that may be of interest in a trademark case. It cites cases holding that a person whose expertise is entirely in one area, such as political science, cannot testify as an expert on a completely different subject such as economics and statistics. *IMPACT v. Firestone*, 893 F.2d 1189, 1195 (11th Cir. 1990). That is not the case here, where the criticism seems to be that Teach’s survey expertise is too general to be applicable to the specific kind of survey at issue in this case. But physician may testify without being an expert in the same precise field as the opposing expert witness, *Rixey v. West Paces Ferry Hosp.*, 916 F.2d 608, 612 (11th

Cir. 1990); *Payton v. Abbott Labs*, 780 F.2d 147, 155 (1st Cir. 1985); *Walsh v. New London Hosp.*, 856 F. Supp. 22, 25 (D.N.H. 1994); *Smith v. Ortho Pharmaceutical Corp.*, 770 F.Supp. 1561, 1568 (N.D. Ga. 1991); *see also Harris v. Smith*, 372 F.2d 806, 813-814 (8th Cir. 1967); *Baerman v. Reisinger*, 363 F.2d 309, 310 (D.C. Cir. 1966), or an engineering professor may testify without being a specialist in design safety, *Holmgren v. Massey-Ferguson*, 516 F.2d 856, 858 (8th Cir. 1975), so a survey expert need not have specific familiarity with apparel surveys, or indeed with trademark law, in order to be able to criticize surveys such as the ones conducted by Jacob Jacoby. *See also* Deposition Testimony of Alan Jay Rosenblatt, at 27 (survey methodology does not differ across disciplines).

To be sure, a review of the reported trademark cases makes clear that there is a coterie of trademark survey specialists who testify in case after case, and Jacoby acknowledged at his deposition that the price for retaining such witnesses is steep. Jacoby himself earned \$47,500 just for designing his survey and writing up his report, not to speak of the time that he has spent since then, and the cost for his subcontractor was another \$126,680. Jacoby Deposition (“JacDep”) 66 and Exhibit 12. According to Jacoby’s deposition testimony, his hourly rates of \$600 for everything except testimony, which costs \$850 per hour, are on the **low** side among his cohort, with some

experts charging as much as \$1,200 to \$1,500 per hour. JacDep 66-68. When trademark cases are litigated between two large commercial enterprises, each of which has millions of dollars at stake, such that it makes good business sense to spend hundreds of thousands of dollars to hire narrow specialists both to conduct trademark surveys and to pick apart each others' work, perhaps one could say that the two sides deserve each other, although as a society we might worry about the transaction costs. But if the price of entry into the judicial arena for an individual like Smith, to defend himself against trademark claims directed at a handful of parody T-shirts, is well into the six figures for expert witness fees alone, then the result is going to be that free speech is unaffordable. Only by finding a non-trademark specialist can an individual like Smith stay in the case.²

²One solution that some courts have adopted is to order that a survey be conducted under the joint auspices of survey experts selected by both sides. *E.g.*, *SunAmerica Corp. v. Sun Life Assur. Co. of Canada*, 890 F. Supp. 1559, 1570 (N.D. Ga. 1994), *aff'd in part on other grounds*, 77 F.3d 1325 (11th Cir. 1996). *See also Indianapolis Colts v. Metropolitan Baltimore Football Club*, 34 F.3d 410, 415 (7th Cir. 1994) (recommending this approach). Smith cannot afford to pay for such a survey, although we expect that we could find a pro bono survey expert whom Jacoby and Wal-Mart would recognize as sufficiently qualified to participate in the design of such a survey. That still leaves the question whether a consumer survey is the proper way to decide whether a non-commercial parody violates trademark law and should be enjoined. But the approach of ordering a neutral survey at least provides the opportunity to ensure that empirical evidence of confusion or dilution is not infected by partisan application of the pseudo-scientific method.

Indeed, the basic standards for survey research that Jacoby himself cites as authoritative are provided by the Federal Judicial Center's *Reference Guide on Survey Research*. That Guide is not specifically devoted to "trademark surveys," or indeed more specifically to "apparel surveys"; instead, it sets forth considerations for assessing the validity and reliability of surveys generally. A survey expert such as Teach can look at the procedures employed and compare them with the standards set forth in the Reference Guide (or to other professional standards that may be accepted in the profession, such as the need for double blind conditions), and explain whether those standards have been met. Similarly, a general survey expert like Teach can look at the questions being asked and compare them with the stated objectives that the survey is supposed to be testing, and say whether there is a good fit between question and objective, or whether as compared to the purported objective the question is biased or misleading. Finally, Teach's background in teaching and writing about statistics in the area of marketing amply equips him to discuss whether, in light of the size of Wal-Mart's sample, the difference from the mean is large enough to provide confidence that the results would be replicated. Nothing in Wal-Mart's brief supports the proposition that a general survey or statistical expert is unqualified to advance such criticisms. Its motion to exclude Teach's testimony on that ground should, therefore, be denied.

Teach's Testimony Has Not Been and Will Not Be Offered in Support of Smith's Case-in-Chief, and His Affidavit Does Not Constitute a New "Report."

Wal-Mart also objects both to any consideration being given to Teach's testimony in support of Smith's case-in-chief, and to consideration being given to the affidavit that was filed in support of Smith's motion to exclude Jacoby's testimony, on the ground that it constitutes a "second report" or a "supplemental report" that was filed outside the discovery period. Neither argument is sound.

First, Teach has been offered solely as a rebuttal expert, whose function in this case is **not** to testify about whether any of Smith's designs are likely to cause either confusion or dilution, but rather to impeach the adequacy of Jacoby's surveys. His affidavit was filed in support of Smith's motion for summary judgment because it is apparent that Wal-Mart's claims turn, in part, on the validity of Jacoby's supposedly scientific conclusions, and Smith argues that the Jacoby survey is not sufficiently probative to create a genuine issue of fact material to the issues of likely confusion or likely dilution. If Jacoby's testimony were out of the case, Smith would have no need to present Teach as a witness. Accordingly, Wal-Mart's motion to exclude Teach's affidavit from consideration in support of Smith's case-in-chief should be denied as moot.

Nor is Teach's Affidavit a second or supplemental report. Like Jacoby, Teach's

report in this case was submitted unsworn, and both experts addressed a number of issues on which the parties that retained their services do not rely in support of their respective motions for summary judgment. Like Jacoby, Teach then submitted an affidavit that amplified some issues slightly and omitted many of the details contained in the Report itself. The affidavit is not a supplemental report but simply a revised version of the report, submitted in affidavit form.

For example, comparing the Jacoby Affidavit (“JacAff”) with the Jacoby Report, Jacoby addresses in the former a number of issues not mentioned at all in his Report, such as the difference between post-purchase and point-of-sale confusion, and his attribution of those concepts to his different surveys. JacAff ¶¶ 10-12. Jacoby’s Affidavit also provides an explanation of the supposed reasons for his selection of the specific Wal-Qaeda shirt to be tested, *id.* ¶ 14, a discussion that is nowhere to be found in his Report. Indeed, Jacoby worded the conclusions in his report quite narrowly, to express opinions only about “the tested tee-shirts designed by Mr. Charles Smith,” Report at 31, but his Affidavit expresses significantly broader opinions, applying them to “products of the type represented by Test Shirts #1 and #2.” *Id.* ¶ 32. On the other hand, Jacoby’s Affidavit eliminates a number of the details that he included in his Report. For example, an entire set of numbers discussed in the Report as showing a

what Jacoby claimed was a form of dilution, pertaining to whether respondents were “more likely to buy [the tested] shirt” because of its perceived association with Wal-Mart, Report at 29-30, makes no appearance in Jacoby’s Affidavit. Jacoby has also submitted a Second Affidavit dated May 24, 2007, 61 pages long, that provides a detailed critique of Teach’s Report (but nothing about the Teach Affidavit), as well as making some comments about Rosenblatt’s sworn Report. None of this Second Affidavit was provided to Smith or his counsel before discovery expired on April 5, 2007.

Similarly, the Teach Affidavit, which is 28 pages double-spaced in 14-point type, is shorter than the Teach Report, which was presented on Georgia Tech letterhead, slightly more than seventeen pages, single-spaced and in 12-point type. The Affidavit expands slightly on some of the points made in the Report, but omits many of the details of the Report and also omits several points that Teach considered significant but on which Smith does not reply in support of his motion for summary judgment, or in opposition to Wal-Mart’s motion for summary judgment. Many of the details that were in the Report but are not in the Affidavit are the focus of Jacoby’s Second Affidavit and of the final section of Wal-Mart’s motion to exclude Teach’s Report, at 13-17.

There are only two respects in which the Teach Affidavit presents significant

new material. First, spurred by questioning during his deposition about inconsistencies between the numbers in Jacoby's statistical tables and his own, Teach went back to the original verbatim answers to the questionnaires (Exhibit 14, Part 3 to the Jacoby Affidavit, Docket Entry No. 77-17 pages 17 to 177), revised the numbers in his tables as appropriate, and recalculated the statistical significance of the resulting figures on which Jacoby relied to express his opinion that the tested T-shirts were likely to result in dilution by tarnishment. To show the basis for these new numbers, his affidavit attaches Exhibit B, a PDF version of the Excel spreadsheets on which he recorded the numerical values drawn from the verbatim answers. Moreover, in the course of revisiting the verbatim answers in order to double-check his own tables, Teach noticed that Jacoby's subcontractor had apparently made a series of transcription errors that resulted in some incorrect numbers being reported in Jacoby's tables.³ Teach reviewed

³ As Professor Teach explains in his affidavit, at ¶ 24, the problem arose from the process of converting the answers to Jacoby's two original dilution questions, which were respectively about "likelihood of shopping at Wal-Mart" and "likelihood of buying the shirt," into columns that could be summed to develop accurate fractions of supposed "dilution" shown by answers to each question. The subcontractor staff who were responsible for data entry apparently neglected the fact that the questions were rotated, so that sometimes one question was posed as 5A and sometimes the same question was posed as 5B. But in order to calculate the totals for 5A and 5B, it was necessary to treat each question uniformly as being either 5A or 5B. Teach color-coded the values in the spreadsheet attached to his Affidavit as Exhibit B, using red to show transcription errors, thus showing how he arrived at his determination of the total values that had been incorrectly entered on Jacoby's own master list of entries.

each of the verbatims and redid the transcriptions, showing in Exhibit B to his affidavit the differences between what he recorded and what Jacoby recorded.⁴ Rather than being excluded as “new” work, it is respectfully submitted that Teach has done just what he should have done when possible flaws in his work were pointed out.

Second, the Teach Affidavit performs an entirely new calculation whose exclusion may be appropriate. Teach noted the calculations in Jacoby’s affidavit that purported to show the impact of respondents’ association of the two Smith designs that were tested on the likelihood that the respondents would buy the shirt. In his original Report, Jacoby characterized the fraction of all respondents in each of the point-of-sale and post-purchase studies who reported an increase likelihood of buying the shirt as a form of dilution.⁵ Although these numbers were not mentioned in the conclusion section of Jacoby’s Report, Smith was concerned that a discussion of those numbers might appear in Wal-Mart’s summary judgment papers, and hence Teach’s analysis of

⁴Jacoby’s Second Affidavit, ¶ 47, takes note of a statement in Teach’s report to the effect that there were keying errors in his Report. Jacoby claims that his subcontractor reviewed the raw data for keying errors and found some that had slightly understated the extent of dilution. However, Jacoby does not provide the raw spreadsheets that would show the basis for these statements about what his subcontractor found.

⁵During his deposition, Jacoby testified that this calculation was intended to show a form of dilution, beyond blurring and tarnishment, that Jacoby claimed had been discussed in an opinion by Judge Posner. JacDep 283-284.

the statistical significance of the “more likely to buy the shirt” figures was included in the Teach Affidavit. However, as noted above on page 10, that data is ignored in the Jacoby Affidavit, and Wal-Mart’s motion for summary judgment does not seek relief from this other form of dilution. Accordingly, Smith agrees that this aspect of the Teach Affidavit, ¶¶ 36-40 and Tables 4-6 on pages 23 through 27, are properly excluded from evidence. The rest of the Teach Affidavit, however, should be admitted.

In sum, like Jacoby, Teach submitted his report in unverified form and only averred his analysis and conclusions in an affidavit for submission in support of the summary judgment papers of the party that retained him as an expert witness. Indeed, Jacoby went even further by submitting an entirely new set of analyses that was never made available to Smith or his counsel during the discovery period. If the Teach Affidavit is to be stricken on the ground that it is an impermissible new report, the same treatment should be accorded to both of Jacoby’s Affidavits. In that case, of course, Wal-Mart will not have the benefit of **any** expert evidence under oath, and in light of the fact that Wal-Mart’s position on the cross-motions for summary judgment rests entirely on Jacoby’s conclusions, summary judgment should then be granted in Smith’s favor for that reason alone.

CONCLUSION

Wal-Mart's motion to exclude from evidence Teach' report and testimony should be denied with the exception of the portion of the Teach Affidavit from paragraphs 36 to 40 and Tables 4, 5, and 6. Wal-Mart's motion to limit Teach's testimony to bar its use in support of Smith's case-in-chief should be denied as moot.

Respectfully submitted,

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