

EXHIBIT 3

Robert Wallace
October 21, 2020

Page 1

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLORADO

3 -----X
4 OTTER PRODUCTS, LLC, et al.,

5
6 Plaintiffs,

7
8 -against-

Civil Action No.:
19-cv-00626-DME-KLM

9
10 BIG BIRD, LLC, et al.,

11
12 Defendants.

13 -----X
14

15 EXAMINATION BEFORE TRIAL HELD REMOTELY VIA ZOOM
16 OF ROBERT WALLACE

17
18 wednesday, october 21, 2020

19
20 9:05 a.m. - 5:35 p.m.

21
22 HELD At the Respective Parties'
23 locations

24
BEFORE Michelle L. Conero
Shorthand Reporter and Notary
Public in and for the State of
New York

1 A. Yes.

2 Q. All right. Let's go through your education if
3 you will. That appears in appendix 3 of Exhibit
4 1. True?

5 A. Yes.

6 Q. Do you have a BA in English from Gettysburg
7 College in Gettysburg, Pennsylvania, 1981. True?

8 A. Yes.

9 Q. And you have some MBA coursework from The New
10 School in New York, New York, but you did not
11 obtain an MBA. Correct?

12 A. Correct.

13 Q. You have not done any graduate-level studies.
14 Correct? You have not completed a graduate
15 degree? That's what I meant to say. I
16 apologize.

17 A. Correct. I do not have a graduate degree.

18 Q. You do not have any form of graduate degree,
19 whether it's a Ph.D., MBA? Anything above the
20 BA. True?

21 A. Correct.

22 Q. You do not have a degree in statistics. True?

23 A. I did coursework in statistics but it was part of
24 my MBA program, and I believe also my undergrad,

1 to my recollection.

2 Q. You did statistics as an undergrad obtaining a
3 degree in English?

4 A. Yes. It was a requirement to fulfill the general
5 mathematics requirements, to my recollection.

6 Q. And how many statistics classes did you take
7 while you were obtaining your English degree from
8 Gettysburg College?

9 A. I believe we took -- I took one mathematics and
10 statistics-based class.

11 Q. Okay. Mathematics and statistics-based class.
12 That doesn't sound to me like that's a class in
13 statistics. It sounds to mean like a class that
14 also had statistics addressed in it. I'm just
15 trying to be clear.

16 MR. JASON: Objection.

17 Q. Which is it?

18 A. I believe it was a class that included
19 statistics. I don't think it was exclusively
20 focused on statistics.

21 Q. Okay. That's one class. And then did you take a
22 statistics class as far as your MBA studies or a
23 class that also addressed statistics?

24 A. I believe it was a class that also addressed

1 statistics as part of my work at The New School.

2 Q. A single class?

3 A. To my recollection, yes.

4 Q. So two classes, one undergrad, one graduate that
5 were not statistics class but addressed
6 statistics in the class. Is that a fair
7 characterization of your statistics education
8 experience?

9 A. Well my statistics education experience comes
10 from my background for forty years as a brand
11 identity strategist and analyzing literally
12 thousands of consumer surveys involving
13 statistics.

14 Q. That wasn't my question.

15 A. I'm not finished answering your question. So
16 yes. Regarding my education, those were the two
17 classes that I took. But my education in the
18 real world is exceptionally comprehensive in the
19 work that I've done for leading consumer product
20 companies across the globe.

21 Q. But you do not have a degree in statistics,
22 whether it be undergrad, graduate or otherwise.
23 True?

24 A. Correct.

1 Q. And you surely don't consider yourself to be an
2 expert in statistics, do you?

3 MR. JASON: Objection.

4 A. I consider myself to be an expert in analyzing
5 surveys -- designing and analyzing surveys to
6 determine consumer perceptions and purchase
7 behavior. Yes.

8 Q. But are you an expert in statistical analysis?
9 Is that your testimony today, that you are an
10 expert statistician today?

11 A. I don't have an education in that but I have work
12 experience that probably exceeds many other
13 people when it comes to statistical analysis of
14 consumer surveys, yes.

15 Q. That wasn't my question. Are you -- do you hold
16 yourself out to be an expert in statistical
17 analysis?

18 A. I think I've answered that question.

19 Q. Answer it again.

20 A. Through my expertise in working with consumer
21 surveys for more than forty years, I have an
22 extraordinary understanding of statistical
23 analysis when it comes to consumer behavior and
24 purchase decisions. Yes.

1 Q. Okay. But you are not an expert statistician.

2 True?

3 MR. JASON: Objection.

4 A. I can repeat my same answer before. Through my
5 work experience I have had an extraordinary

6 ability to analyze and deconstruct survey data.

7 I don't have a background in my education as a

8 statistician. My expertise in analyzing

9 statistical results is significant.

10 Q. Okay. Are you a member of the American

11 Statistical Association or other statistics-based
12 groups?

13 A. No.

14 Q. Are you a member of the American Association of
15 Public Opinion Research?

16 A. No.

17 Q. Are you a member or are you involved in the
18 Research Industry Coalition?

19 A. No.

20 Q. Do you even know what those three entities are?

21 A. I imagine they're organizations in the statistics
22 industry.

23 Q. You imagine. Do you know?

24 A. That's my understanding of what those elements

1 are.

2 Q. Based upon the names. Anything else upon which
3 you base that?

4 A. Based upon their names and having heard them in
5 the past, yes.

6 Q. Okay. Do you have a degree in economics?

7 A. No.

8 Q. You have no formal training in economics. True?

9 A. Part of my coursework involved -- particularly in
10 the MBA course, involved economics. It was not
11 my sole focus in those studies.

12 Q. Okay. You didn't have any economic classes while
13 you were an English major at Gettysburg. Would
14 that be true or fair?

15 A. To my recollection, yes.

16 Q. Did you have an economics class when you were an
17 MBA student or was economics part of a class?

18 A. I believe economics was a study as part of the
19 general curriculum that I was involved in but not
20 a specific class.

21 Q. Okay. A single class?

22 A. To my recollection, yes.

23 Q. You claim to have an expertise in brand identity,
24 strategy and design. True?

1 A. Yes.

2 Q. Brand identity, please define that for me?

3 A. The association that consumers develop with a
4 product. Its name, its brand communications, its
5 core visual mnemonic, its logo, its package
6 design, its websites. All the consumer-facing
7 elements of brand communications.

8 Q. I pulled up this definition. Let me just read it
9 to you and see if you agree with it with regard
10 to brand identity. Brand identity is the visible
11 elements of a brand, such as color, design and
12 logo, that identify and distinguish the brand in
13 consumers' minds. Do you agree with that?

14 A. I do. It's not limited to -- it doesn't
15 accurately determine all of my expertise. As I
16 mentioned before, my expertise includes brand
17 communications, development, advertising, sales
18 promotion, merchandising. All the other elements
19 that go into developing perceptions between
20 brands and consumers.

21 Q. Okay. Brand image -- let me continue with what I
22 said about brand identity. It corresponds to the
23 intent behind the branding and the way a company
24 does the following, all to cultivate a certain

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1 image in consumers' minds. How a company chooses
2 its name, designs its logo, uses colors, shapes
3 and other visual elements in its products and
4 promotion, the language in its advertisements and
5 how it trains employees to interact with
6 customers. That's all part of brand identity.
7 Correct?

8 A. Correct. My expertise goes beyond that
9 definition.

10 Q. Okay. In brand identity, what haven't I -- I
11 thought that looked pretty broad. Is there
12 anything else you want to add to your expertise
13 that you put under the brand identity label?

14 A. Yes. I've answered that. Brand communications
15 including advertising, website development,
16 social media, presence, merchandising at the
17 point of sale, retail relationships. All of
18 those things are inherent in my definition of
19 brand identity communications.

20 Q. Okay. And those communications are directed from
21 a particular company or organization to the
22 consumer or potential consumer. Would that be a
23 fair characterization?

24 A. Yes.

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1 think the conclusion is to be reached? I'm just
2 trying to understand the depth of your scientific
3 analysis.

4 A. No. I apply rigor in reviewing the data in order
5 to determine what the appropriate action steps
6 would be. I'm focused on the results and what
7 the action steps should be based on the insights
8 provided by the research.

9 Q. I understand you provide rigor. I'm trying to
10 understand -- statistics has full teachings on
11 mathematical assessments of surveys and
12 mathematical assessments of data. Are you able
13 to do those calculations? Do you understand
14 those calculations? Can you tell me the
15 mathematical calculations you do do, if any?

16 A. Yes. And those have been expressed, for example,
17 in my report, the analysis of the survey data.

18 Q. Okay. Tell me what you typically do as a
19 purported expert in the statistical analysis of
20 consumer surveys. List for me the specific
21 mathematical computations you do to determine
22 from a statistical level or statistics
23 perspective the results of any particular survey.
24 P-values, T-values. Tell me what you would use.

1 MR. JASON: Objection.

2 A. I'm not a trained statistician. I'm aware of P-
3 values. My goal is to analyze the data to
4 determine what the truth is, what the consumers'
5 perceptions are and how they would act on those
6 perceptions.

7 Q. I understand --

8 A. (Inaudible.)

9 Q. Can you repeat the last part? That was my bad.
10 I interrupted you. I apologize.

11 A. Not at all. Not at all. My apologies.

12 And that has been articulated in my
13 report.

14 Q. Okay. So it sounds to me like you have a great
15 deal of experience in marketing. We can agree on
16 that. True?

17 A. Correct. And that includes analysis of survey
18 data in order to make marketing-based decisions.

19 Q. But your analysis is based upon your training and
20 it isn't necessary hardcore what you would call
21 standard statistical analysis. You use your
22 knowledge to say I think this tells me what a
23 consumer is going to do or not do. Would that be
24 fair?

1 MR. JASON: Objection.

2 A. Yeah. I think the fair answer to that is I'm not
3 a trained statistician but I use the insights
4 created from statistics in order to determine the
5 actions taken by consumers or by people in
6 relation to brand communications.

7 Q. Okay. So we started to shift gears. Let's put
8 it up in the next gear and go to page 375 of
9 Exhibit 2, which is part of Ms. Diamond's paper
10 upon which you relied. Okay?

11 A. Yes.

12 Q. We're going to go to subsection C specifically.
13 This section involves Ms. Diamond addressing the
14 particular experts who designed the survey are
15 the experts who designed, conducted or analyzed
16 the survey are appropriately skilled and
17 experienced. Right?

18 A. Yes.

19 Q. So this is Ms. Diamond's view as to what an
20 expert must have from a background perspective to
21 do what needs to be done, in her opinion, to do
22 an appropriate consumer survey. Would that be a
23 fair characterization?

24 A. That's my analysis as we're sitting here and

1 real-world experience.

2 Q. And you do not have graduate training in
3 statistics. True?

4 A. The same answer, not from an academic standpoint
5 but most definitely from a real-world standpoint.

6 Q. Okay. So as that lists the things that she
7 believes are a prerequisite to an appropriate
8 experience for an expert, and it continues on.
9 "That training should include courses in survey
10 research methods." You do not have any
11 undergraduate course or graduate studies in
12 survey research methods. True?

13 A. Just going back to complete her quote, in all of
14 those elements which she's looking for training,
15 she's also mentioned "or a related discipline."
16 Again, I can reaffirm that I have extensive
17 expertise in related disciplines to each of those
18 elements.

19 Q. But you do not have graduate -- a graduate degree
20 or undergraduate degree in those related
21 disciplines? You have an English degree and
22 partial steps toward an MBA. Correct?

23 MR. JASON: Time out. Objection. I
24 also want to caution you, Rob and you, Bill. You

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1 are conflating graduate degree and graduate
2 training. Sometimes you say graduate degree,
3 sometimes you say graduate training. I think Mr.
4 wallace has testified that he does have graduate
5 training and took MBA courses. So there's a
6 difference between that and a graduate degree.
7 If you keep it consistent, I think that would
8 make things easier.

9 MR. KLOSS: Thank you.

10 Q. Then we go on. "That training should include
11 courses in survey research methods." How many
12 courses did you take on the undergraduate level
13 with regard to survey research methods?

14 A. To my recollection, I did one undergrad and one
15 in my MBA program.

16 Q. What was the name of that class?

17 A. I don't recall. It was regarding analyzing
18 surveys. Designing and analyzing survey data.

19 Q. That was its focus or that was part of a class?

20 A. It was part of the class.

21 Q. What class?

22 A. I mentioned I don't know the specific name of
23 that. To my recollection that was part of the
24 curriculum.

1 Q. Okay. A single class in undergrad. Do I have
2 that correct?

3 A. Correct. And then one in my MBA training.

4 Q. Okay. It goes on. "Survey research sampling,
5 measurement, interviewing and statistics."
6 Again, do you have any specific classes in your
7 undergrad that focused on any of those issues
8 solely?

9 A. They were certainly part of the curriculum that
10 we chatted about before. I don't think they were
11 the sole focus of those curriculums, no.

12 Q. Okay. "In some cases, professional experience in
13 teaching or conducting and publishing survey
14 research may provide requisite background." I
15 don't see any instances where you were teaching
16 survey research on your CV. Correct?

17 A. Not teaching from an academic standpoint but most
18 definitely consulting with, again, some of the
19 largest consumer product companies globally as
20 well as speaking on these topics more than fifty
21 times across the U.S., Europe, Asia, Latin
22 America.

23 Q. But you're not teaching in an academic situation.
24 would that be fair?

1 Otter markets the Otter brand. True?

2 A. Outside of the context of what was written in my
3 report, no. I did no additional analysis of the
4 marketing techniques.

5 Q. What you assessed in your report were Amazon
6 listings for Otter products. True?

7 A. Yes. I believe both the Defendants' and the
8 Plaintiffs' website in marketing the OtterBox
9 brand. Yes.

10 Q. Actually it was the Amazon website, was it not?

11 A. Correct.

12 Q. And it would involve the postings of the
13 Defendants, who are your clients, and the posting
14 of other entities who are authorized to sell
15 Otter products. True?

16 A. That was true, yes.

17 Q. Do you understand that Otter contends -- I'm not
18 asking to accept, but do you understand that
19 Otter contends that the Defendants, your clients,
20 are not authorized to sell Otter products on
21 Amazon?

22 A. I do not know what their awareness is. I'm
23 surprised that they would sell them products if
24 they were not authorized to resell them.

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1 Q. You believe your client, Big Birds, Helpful
2 Hippos, Frantic Frogs -- why don't we just call
3 your clients -- can we lump them together as Big
4 Birds, or what terminology would you like to use?

5 A. The Defendants. Whatever you feel is more
6 appropriate.

7 Q. Do you believe the Defendants in this action
8 purchased their Otter products from Otter?

9 A. I have no idea. I assumed that they purchased
10 them from Otter, but I have no idea where they
11 came from, no.

12 Q. Okay. So you don't know where they've come from?

13 A. Correct.

14 Q. I'll represent to you that in fact the Defendants
15 in this action do not purchase them from Otter or
16 an Otter authorized seller. Is that the first
17 you've learned of that? I'll represent that to
18 you as true.

19 A. It's the first I've known of that, but it does
20 not affect my opinions whatsoever as expressed in
21 my report.

22 Q. Okay. As far as marketing or promotional, the
23 only thing you assessed is the Amazon listings
24 for Otter products that were done by a variety of

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1 surveys you've conducted in the past that you can
2 recall?

3 A. Given more time I might be able to go through
4 them, but that is typical of the work that I've
5 been doing.

6 Q. Fair enough. As you sit here today, you can't
7 recall any others. Fair?

8 A. Deceptive advertising would be possibly among
9 them, if consumers perceived that brands were
10 affiliated because of advertising communications
11 or relations. I'd have to go back and analyze
12 those to give you a final answer. At the top of
13 my mind, those might be additional components.

14 Q. You didn't, in this case, assess or analyze any
15 deceptive advertising issues. Fair?

16 A. Correct. It was exclusively around the stimuli
17 analyzed in the surveys.

18 Q. Let's go to -- stay on page 4. Subsection 3,
19 growth and acceptance of Amazon marketplace
20 retailers. Do you see that?

21 A. I do.

22 Q. It talks about -- in the second paragraph, the
23 last couple sentences, it's talking about Amazon,
24 the quantity of purchases on Amazon. "The

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1 company reports that Amazon marketplace accounts
2 for more than 40 percent of all (Amazon products)
3 sold. This is most certainly an indication that
4 consumers have a broad understanding and a wide
5 acceptance of purchasing products through Amazon
6 marketplace." I want to focus on how you
7 conclude that consumers understand all of the
8 elements of the Amazon purchase process. Is
9 there any other thing that you used to conclude
10 that other than the sheer quantity of products
11 purchased on Amazon?

12 MR. JASON: Objection.

13 A. Well certainly if this represents
14 \$230,000,000,000 in consumer sales, that's a very
15 strong indication that consumers are aware and
16 have a wide acceptance of purchasing products
17 through the Amazon marketplace. In addition,
18 certainly my survey also confirms that fact.

19 Q. Okay. Consumers are aware of the ability to
20 purchase on Amazon, and in fact do. But my
21 question was a little deeper than that. What
22 information do you have upon which you base the
23 conclusion that people understand precisely all
24 of the elements of the Amazon purchase, --

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1 MR. JASON: Objection.

2 Q. -- other than, of course, the quantity of
3 business?

4 A. I believe my statement is accurate. It's my
5 opinion that most certainly the \$230,000,000,000
6 in annual sales is an indication that consumers
7 have a broad understanding and a wide acceptance
8 of purchasing products through the Amazon
9 marketplace. I don't think you need any
10 additional information to validate that fact.

11 Q. Have you ever read any of Amazon's 10K
12 publications or other corporate publication that
13 Amazon has put out and reported in the past?

14 A. Not to my awareness, no.

15 Q. Are you aware that Amazon has made clear to the
16 public that there are significant instances of
17 fraud and deception that take place on the Amazon
18 platform?

19 MR. JASON: Objection.

20 A. I'm not aware of that.

21 Q. Okay. Tell me what the buy box is in Amazon, if
22 you know?

23 A. I'm not familiar. I think -- is that literally
24 during checkout, being able to analyze the

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1 elements that you've ordered before you finalize
2 the purchase? I'm not sure what the buy box
3 refers to.

4 Q. Okay. You don't know what it is. All right. Do
5 you know how a product ends up in a buy box?

6 A. I'm not familiar.

7 MR. JASON: Objection.

8 Q. Okay. Do you know what sellers -- excuse me.
9 what information -- excuse me. Do you know what
10 a 1P -- what's referred to as a 1P seller on
11 Amazon?

12 A. No.

13 Q. Do you know what a 3P seller is on Amazon?

14 A. No.

15 Q. Do you know your clients, what their status is,
16 what type of sellers they are on Amazon?

17 A. No.

18 Q. Are you aware of what -- have you ever seen the
19 Amazon -- excuse me. Have you ever seen any of
20 the warranties that are offered by Amazon to
21 purchases of products from Amazon?

22 A. I believe I have seen one or two, such as my own
23 existing purchases. Yes.

24 Q. What warranties have you seen?

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1 A. warranties for products that I've purchased.

2 Q. Okay. Are you able to tell me what warranties
3 apply to a purchase from Amazon?

4 A. No. As I'm sitting here, I'd have to look
5 through my purchases to determine which came with
6 warranties and which did not.

7 Q. Suffice to say, you did not review any warranties
8 that may be offered by Amazon in connection with
9 your assignment here. Fair?

10 A. Unless it's been outlined in my report, I don't
11 believe any specific studies were done to analyze
12 Amazon warranties.

13 Q. Okay. Do you know whether any Amazon warranty
14 applied to products sold by your clients?

15 A. I am not aware of that. In conversations with
16 counsel, I believe that OtterBox still honors
17 warranties from products sold by my client.
18 That's my understanding.

19 Q. Okay. We'll get to that. Are you aware as to
20 whether any warranty is offered by Amazon in
21 association with your clients' sale of Otter
22 products on the Amazon platform?

23 A. I'm not aware of that.

24 Q. Okay. And have you ever seen the OtterBox

1 recent purchasers of the cellphone protection

2 devices. Correct?

3 A. Yes.

4 Q. That's a little narrower than prospective
5 purchasers solely. It is recent purchasers?

6 A. Correct. As is required by the Shari Diamond
7 Reference Guide on Survey Research.

8 Q. Okay. So is it safe to say, as a general
9 proposition, that you suggest a narrower -- the
10 participants should have been defined more
11 narrowly than Dr. Cowan defined them?

12 MR. JASON: Objection.

13 A. Yes. More narrowly and more accurately to
14 reflect the people who should be surveyed, whose
15 opinions are relevant in this case, and not the
16 overinclusive audience that Dr. Cowan included.

17 Q. Okay. So your position is Cowan's --
18 participants in the Cowan's survey was
19 overinclusive and you suggested it should have
20 been narrower. Fair?

21 A. It should have been narrower based on only
22 selecting people who were prospective and recent
23 purchasers of the products in question. Yes.

24 Q. Actually, yours doesn't say anything about

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1 prospective purchasers. Yours says recent

2 purchasers. Right?

3 A. Certainly someone who has purchased a product is
4 a prospective purchaser. They're inclusive of
5 each other.

6 Q. You're aware of the popularity of cellphones.
7 Correct?

8 A. I'm somewhat aware of the popularity, yes.

9 Q. And you would agree that folks who shop online,
10 or frankly folks that shop in brick and mortar
11 stores, are potential consumers of cellphone
12 cases, whether it be for their own use, or a
13 gift, et cetera. A cellphone case is not a high-
14 dollar item and it is a popular item used by
15 consumers as a whole. Fair?

16 A. I agree with that, but Dr. Cowan did nothing to
17 include and specify those people that were
18 interviewed. He did not confirm that they were
19 recent and prospective purchasers as the
20 doctrines that we've cited require.

21 Q. All right. So let's go -- the second sentence
22 says, "The failure to include those who have
23 recently purchased products in question." The
24 products in question means that the Cowan's

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1 that's been used throughout that source.

2 Q. What does that mean, a description that's been
3 used? A quotation means you've used the words of
4 the particular source, otherwise there's no
5 reason to have quotation marks. Right?

6 A. No. It may be a direct quotation from the cited
7 source or it can be an expression used in the
8 cited source without those specific words.

9 Q. Okay. So your quotations that you put in
10 quotation marks don't necessarily indicate that
11 that's what your source actually says. That's
12 your testimony?

13 A. It could be --

14 MR. JASON: Objection.

15 THE WITNESS: I apologize, Marc. My
16 apologies.

17 Q. You can answer.

18 A. I'd have to go back through this document and
19 determine if they were actual words that were
20 referenced. But most certainly the expression of
21 the relevant consuming public is used over and
22 over and over again in this document.

23 Q. Okay. So show me on page 394 where "relevant
24 consuming public of the products in question",

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1 existing survey is relevant is to identify the
2 target population of the universe." I think you
3 cite that in your report. "The target population
4 consists of all elements, individuals or other
5 units, whose characteristics or perceptions the
6 survey is intended to represent. Thus, in
7 trademark litigation the relevant population in
8 some disputes may include all prospective and
9 past purchasers of plaintiff's goods or services
10 and all prospective and past purchasers of the
11 defendant's goods or services." Diamond doesn't
12 says -- she doesn't say they must be actual
13 purchasers. They must be -- they can include some
14 actual and some prospective. Are you aware that
15 this was contained in Ms. Diamond's publication?
16 A. I believe so. Let me just point out that my
17 screening criteria selected all prospective and
18 all past purchasers. Dr. Cowan neglected to
19 include past purchasers, and that failure alone
20 invalidates the entire purpose of his study.
21 Q. I know that's your position. Let's be clear. You
22 don't include in your survey any prospective
23 purchasers that have not been past purchasers.
24 That's what you previously told me. You told me

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1 if you were not a past purchaser, you're out.

2 Right?

3 A. And I mentioned earlier that all past purchasers
4 are also prospective purchasers.

5 Q. And I understand that.

6 A. Let me finish, Bill, please. There's no better
7 way to define what a prospective purchaser would
8 be than by defining someone who got what was
9 purchased, the product, in the past.

10 Q. You may think that. Ms. Diamond says it may
11 include all prospective and past purchasers. She
12 indicates that prospective purchasers could be a
13 broader class than past purchasers.

14 MR. JASON: Objection. That's not what
15 it says at all.

16 Q. You don't agree that what Ms. Diamond here says,
17 prospective and past purchasers, that prospective
18 can be -- could be a broader group and may
19 include people who were not necessarily past
20 purchasers? You're an English major. That's not
21 what you understand this sentence to mean?

22 A. All prospective and past purchasers of the
23 plaintiff's goods or services. That's what I'm
24 focused on.

1 Q. Right.

2 A. I included that. Dr. Cowan did not.

3 Q. But this -- you included only past purchasers.

4 A. No, Bill. I have to reemphasize that I did not
5 just include those people. I answered that now
6 several times. Prospective purchasers are also
7 defined by past purchasers. People are much more
8 likely to purchase a product again once they've
9 purchased a product the first time. I need you
10 to understand that and accept it.

11 Q. I understand it and I accept it. But you did not
12 include anyone in your survey who hadn't
13 purchased a phone protection device in the past.
14 That may be prospective purchasers. Indeed one
15 would argue if you haven't purchased one in the
16 past, you may have a greater need for purchasing
17 one in the future than someone who just recently
18 purchased one.

19 A. That's not how this sentence reads.

20 Q. Okay.

21 A. I would agree with you that it's imperative that
22 the audiences must be selected from prospective
23 and past purchasers. It's as clear as day and it
24 continues to be mentioned as clear as day

1 A. You survey, you make sure those survey questions
2 are compliant, you analyze the results according
3 to statistical significance, and you draw
4 conclusions based on that.

5 Q. Okay. How is the margin of error defined in
6 statistics?

7 A. So that's statistical significance. My
8 understanding is the definition is that the
9 results of the survey mirror what the results of
10 a survey could be if you were surveying the
11 entire universe of all potential candidates. So
12 95 percent confidence level means that the
13 results are accurate within 5 percent of what the
14 results would be if you were able to survey
15 literally every single respondent that qualifies
16 for the survey.

17 Q. So you equate margin of error with the term
18 statistical significance. Do I have that
19 correct?

20 A. Equating a 95 percent confidence level as being a
21 way of measuring statistical significance.

22 Q. No --

23 A. My understanding, and again from a marketing
24 perspective, is that results are statistically

1 significant on a bell curve. For example, the 50
2 percent margin, when you have a result of 50
3 percent of the consumers, your margin of error is
4 about 12.9 percent. Meaning if you have a 50
5 percent response and then a 37.1 percent
6 response, then being 12.9 percent off from each
7 other, that 50 percent response is statistically
8 significant.

9 Q. Okay.

10 A. And that changes on either side of the bell
11 curve.

12 Q. From a statistical analysis perspective, do you
13 know what an acceptable margin of error is?

14 A. I believe from a court's perspective they're
15 looking for 95 percent confidence level, which I
16 believe would be a 5 percent acceptable level of
17 variation.

18 Q. So you believe from a court's perspective. So
19 you're offering an opinion as to what a court
20 finds acceptable. Can you cite to me a source for
21 that or a treatise for that?

22 A. I could. I probably can't do so right now. I
23 could do that as part of the errata process. But
24 that's certainly an industry standard that again

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1 has been used not just in my work as an expert
2 witness but my work as a brand identity
3 strategist.

4 Q. Do you know what a T-score is in connection with
5 the margin of error?

6 A. I'm not familiar with that statistical term, no.

7 Q. Do you know what a Z-score is in connection with
8 a margin of error?

9 A. No.

10 Q. Do you know what margin of error that was
11 actually utilized by Dr. Cowan?

12 A. I'd have to go back and look at his report --

13 MR. KLOSS: Let's mark --

14 A. -- and look at each of his responses.

15 Q. Do you have the Cowan report there?

16 A. I do.

17 MR. KLOSS: Let's just go ahead and
18 mark that.

19 (Whereupon, Wallace Exhibit 8 was
20 marked for identification.)

21 Q. Just feel free to use the paper version of it.

22 A. My recollection, it was in one of his appendices
23 when he reviewed the -- when he showed the actual
24 data and he listed a margin of error on the

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1 Q. Let me get that. I'm still waiting for Brigitte
2 to come back. Let's just hold on a second.

3 MR. KLOSS: why don't we go off the
4 record for a second.

5 (Whereupon, a recess was taken from
6 1:23 p.m. until 1:26 p.m.)

7 Q. You're referring to what? I'm sorry. Page 44
8 you said?

9 A. Page 44 of the Cowan report.

10 Q. Okay. You're talking about the column beginning
11 on page 44 that says, "Test of DIFF
12 significance"? Is that what you're talking
13 about?

14 A. Correct. If you go above that, to describe what
15 should be in the column, it reads, "If test in
16 right-most column is greater than .05, no
17 statistical difference. If test is less than
18 .05, cells that differ are highlighted."

19 Q. Okay. So he does in each instance, it looks
20 like, a computation to determine the statistical
21 significance with regard to the questions in the
22 survey. Correct? Is that your interpretation?

23 A. That's my understanding. You would have to ask
24 Dr. Cowan to confirm that.

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1 Q. Did you do any such computations to determine
2 statistical significance in the responses to your
3 survey?

4 A. Yes, I believe I did.

5 Q. Okay. So we'll be able to find those when we get
6 to your report, the actual computations? We
7 didn't find them anywhere in your notes or the
8 back-up information.

9 A. I'm not sure I provided the computations. I
10 believe, and I could go back and review this one
11 when we get to it, that my results prove to be
12 statistically significant.

13 Q. And you believe -- strike that. Have you made
14 any -- in your analysis of Dr. Cowan's report,
15 have you made any check to determine if his
16 calculations are correct?

17 A. No, I have not.

18 Q. Okay. So are you able to do that? For example,
19 let's just take, on page 44, Q3/Q20 and then you
20 say test of significance, which is the last
21 column on the right. It says 0.724. Are you
22 able to tell me how that calculation is derived?

23 A. No.

24 Q. Did you compute -- mathematically compute the

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1 margin of error in your study?

2 A. Yeah. I believe we just answered that question.

3 I believe that my findings are statistically

4 significant.

5 Q. This is the issue. Statistically significant and

6 margin of error. Did you actually do the --

7 first of all, do you know how to mathematically

8 compute margin of error associated with a

9 statistical study? Do you know how to do that?

10 And, if so, give me the equation.

11 A. Yes. I believe I highlighted that a minute ago.

12 Q. What is the equation?

13 A. The equation is a bell curve. If you get a 50

14 percent response, to determine that that response

15 is 95 percent accurate with a 5 percent level of

16 variation. The spread between that number and

17 the next number adjacent to it, or the next

18 number that was in the findings, needs to be more

19 than 12.9 percent.

20 Q. What are you reading from?

21 A. I'm just reading from my notes regarding how to

22 create a substantial --

23 Q. When did you create those notes?

24 A. Oh, I've had these for a very long time to

1 determine how to create statistical significance.

2 Q. So you're reading from notes that you brought to
3 your deposition today?

4 A. And notes that I used in creating my report.

5 Q. Those notes have not been -- those notes have not
6 been produced for us. Let me get this correct.
7 You've come to your deposition today with notes
8 that have not been produced prior to this, and
9 we've now determined, we're doing this remotely,
10 you're reading from your notes during your
11 testimony. Do I have that right?

12 A. I have a note on the calculations for statistical
13 significance.

14 Q. Okay. So you talk about bell curves. What is
15 the formula? Can you tell me the mathematic
16 formula? Saying it's 50 percent, or a bell
17 curve, or this or that is not a mathematical
18 formula that you can apply. Can you tell me the
19 specific statistical mathematical formula to
20 compute the margin of error? Not the principle.

21 MR. JASON: Objection.

22 A. No. I've mentioned before I'm not a
23 statistician. I focus on the results of the
24 statistics. I do know what the results are in

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1 order to determine statistical significance.

2 Q. There you go using a statistics term again.

3 where do we find, because I didn't see them in

4 what you produced. I didn't see them in your

5 report. I didn't see them in the underlying

6 data, and we checked it. where do we find the

7 actual computations to which your survey data --

8 the computations to which your survey data was

9 subjected? Is it in your materials that you

10 actually did the computations?

11 A. I did the computations but it's not listed in my

12 materials. I see, for example, in Dr. Cowan's

13 report the results of his studies but I don't

14 understand their computation formula either.

15 Q. well there's one formula to determine, in the

16 world of statistics, the margin of error. You've

17 professed to know that. You've claimed that

18 you've done this in connection with your survey.

19 where is that?

20 MR. JASON: Objection.

21 A. As I've mentioned, I don't know the formula

22 itself. I know the results. I know the table to

23 which you measure those things. I'm not sure

24 about how that table -- what mathematical

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1 calculation is used to create that table. I

2 focus exclusively on the results.

3 Q. What table are you referring to, because I don't
4 see that either?

5 A. The table that I was just mentioning earlier, the
6 notes that I took and have been using for many
7 years to determine the statistical significance
8 of result findings.

9 Q. Where do I find your information in which you
10 took that table and applied the results of your
11 survey to it? Where do I see that work?

12 A. That work is not listed in my report.

13 Q. Okay. It's not listed in your report. I
14 understand that. We can agree on that. Clearly
15 you've been an expert witness for twenty-plus
16 years now. You understand that when you do
17 computations you need to keep that material. So
18 I understand it's not in your report. That's
19 fine. Where do I find it in your documents that
20 you have, the back-up information that you've
21 produced in association with the report? I
22 didn't find it. Are you telling me it's not in
23 there?

24 A. Yes. I've answered that question.

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1 Q. It's not in there. Okay. Do you have those
2 computations that you had to determine the margin
3 of error -- the computed margin of error in your
4 study, applying this table that you brought with
5 you at your deposition today? Do you have those
6 anywhere?

7 A. No.

8 Q. No. So in other words, you didn't do it?

9 A. No.

10 Q. True?

11 A. You're misstating my testimony.

12 Q. I surely don't want to do that. These --

13 A. If you'd repeat your question, I'd appreciate
14 that.

15 Q. Yeah. These are complex computations. They're
16 not things you can do in your head. My question
17 is where are they? You're saying you didn't do
18 them. Did you? You eyeballed it?

19 MR. JASON: Objection.

20 A. No, that's not what I stated.

21 Q. Okay. Then where are they?

22 A. I have a chart that shows you the difference in
23 spreads between responses and whether those
24 differences in spreads determine if the result is

1 statistically significant. It's not on the
2 mathematics. I've been given the chart to follow
3 in order to determine those results.

4 Q. Do you have that chart with you?

5 A. I do.

6 Q. Show it to me.

7 A. Can you see that (indicating)?

8 Q. Yes. That's the computation you used? You used
9 a bell curve and then what did you do? Plop
10 responses on a bell curve?

11 A. No. I analyzed the spreads between each response
12 to determine if those spreads met the criteria
13 for achieving a 95 percent level of confidence.

14 Q. No, no. We're not talking about level of
15 confidence. We're talking about margin of error.
16 Those are different. Where is your margin of
17 error computation?

18 A. I think I just showed it to you.

19 Q. That's what you believe is a margin of error
20 computation?

21 A. That is the bell curve based on the statistical
22 -- establishing statistical significance, and the
23 margin of error that we're achieving is a 5
24 percent variation between what the survey found

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1 and what a survey would find if we had the
2 opportunity to interview all potential
3 candidates, a 5 percent margin of error.

4 Q. Do you believe the utilization of a 95 percent
5 confidence level is appropriate?

6 A. Yes.

7 Q. So you're saying that that document there that
8 you just showed us that I want you to provide to
9 me unchanged. Do I have your commitment on that?

10 A. You do.

11 Q. If you have a scanner, you can send it to me now.
12 If you have a fax machine, you can send it to me
13 now.

14 That is the sole basis upon how you
15 computed the margin of error? I just want to
16 make sure we're communicating.

17 A. Yes. I used that chart to determine if the
18 spread between numbers resulted in the result
19 being statistically significant.

20 Q. Okay. Again, I'm using a specific term that you
21 are using. You're using statistical terms here.
22 You're shifting. Is that the document that
23 qualifies as your computation of the margin of
24 error? That's a yes or no.

1 A. I'm not familiar with that term.

2 Q. Okay. Are you aware that a null hypothesis is
3 necessary to statistically compare two things?

4 A. I believe it's a statistical term that talks
5 about the rationale or the ethos of a survey.
6 The purpose of a survey.

7 Q. Okay. No survey is conducted without a purpose.
8 Can we agree with that?

9 A. Correct. Using statistical terms is to confirm
10 or disconfirm the null hypothesis.

11 Q. Okay. So are you aware of a notion that -- in
12 statistical analysis that a null hypothesis is
13 necessary to statistically compare two things?

14 A. That is my understanding, yes.

15 Q. So in your report you say Dr. Cowan suggests that
16 the null hypothesis be incorrect and that this
17 would be the conclusion from the examples 95
18 percent of the time. You say, "To my knowledge,
19 the null hypothesis is not generally accepted by
20 expert witness industry standards." You just
21 told me a null hypothesis is necessary to
22 statistically compare two things, but your report
23 says something different. Does it not?

24 A. Yes. That is an error in my report. I'm, again,

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1 not familiar with these terms. I'm working
2 primarily on the results and not on the
3 mechanics. My concern was Cowan implying that
4 his reference of the null hypothesis in the
5 report, that the test cells that he selected were
6 identical and representational of the general
7 consuming public, which in fact are not. My
8 testimony I stand behind.

9 Q. Okay. So the statement that you're retracting
10 from your report is the one that says, "To my
11 knowledge, the null hypothesis is not generally
12 recognized by expert witness industry standards."
13 You're taking that statement back?

14 A. It comes from my misunderstanding or my lack of
15 understanding of technical terms in statistics.
16 My understanding now is that the null hypothesis
17 is a term used to define the purpose behind
18 developing a survey.

19 Q. Okay. That didn't answer my question. Let's
20 start here. When did you acquire that
21 understanding? Is that sometime after Dr.
22 Cowan's deposition but before yours?

23 A. No. I believe it was prior to Dr. Cowan's
24 deposition, after I filed my report. My

1 recollection.

2 Q. Okay. So prior to filing your report, you
3 learned what a null hypothesis is? I'm unclear.

4 A. Between the time of filing my report and Dr.
5 Cowan's testimony, I believe I was made more
6 aware of what the null hypothesis term means. I
7 still believe it's irrelevant to use that term in
8 equating the two cells that Dr. Cowan used in his
9 survey.

10 Q. So what you're quibbling with is the application
11 that Dr. Cowan did in his report, but you're now
12 -- but you have now determined, since you wrote
13 your report, that this statement "To my
14 knowledge, the null hypothesis is not generally
15 recognized by expert witness industry standards,"
16 you're taking back that statement? That's an
17 incorrect statement?

18 A. Correct. I've never encountered this in my forty
19 years as a brand identity strategist and
20 designer, nor in my twenty years as an expert
21 witness. That was my initial comment. Having
22 done additional research on that now, I know it's
23 a technical term that I wasn't aware of that
24 relates to the ethos of a survey.

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1 Q. If you weren't aware of the term until you saw
2 Dr. -- after you filed your report I should say,
3 what was the null hypothesis? Where is that
4 statement and what is it in your report? Do you
5 have a null hypothesis statement in your report?

6 A. I believe that my survey is created to either
7 confirm or deny the null hypothesis that these
8 two cells are identical until there's
9 confirmation that they're different.

10 Q. Okay.

11 A. That's how I would use that technical term to
12 describe not just my survey but all surveys.

13 Q. What was the null hypothesis that you used in
14 your survey, do you believe? That was a bad
15 question. What null hypothesis do you believe
16 you used in your survey?

17 A. Again, my understanding of the term is that it
18 refers to all surveys. The purpose behind the
19 survey is to differentiate between the results of
20 two different cells, assuming that they are
21 identical until they're proven differently.

22 Q. And your two different cells here involve, on one
23 hand, a phone case. Correct?

24 A. Correct.

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1 Q. And on the other hand, gaming headphones. True?

2 A. That could be. Again, I'm not familiar with the
3 term. I'm not a lawyer nor am I a statistician.
4 I'm not familiar with these technical terms.
5 From the application of surveys, I stand
6 completely behind the integrity of my report and
7 its findings.

8 Q. I understand that. You offered an opinion
9 counterbalancing Dr. Cowan's use of a null
10 hypothesis. You offered that in your report. Are
11 you now retracting that opinion?

12 A. I have a better understanding of the null
13 hypothesis. I am still in agreement with my
14 comment that you cannot apply the null hypothesis
15 to his result findings because those survey
16 elements were different and distinctive. Again,
17 it's a technical term --

18 Q. Did you --

19 A. I apologize. It's a technical term that I'm just
20 not familiar with. I'd have to do more studying
21 in order to answer these questions more
22 specifically.

23 Q. Why can't you use a null hypothesis in his
24 survey? Succinctly state that for me.

1 A. Again, I feel it would be better for me to be
2 more educated on this before I answer those
3 questions.

4 Q. So you can't answer it today. Correct?

5 A. I would like to get more information before I
6 answer.

7 Q. So you can't answer for me today. Correct?

8 A. Based on the knowledge that I have sitting here,
9 I would like to get more information.

10 Q. So you can't answer -- you're unable to answer my
11 question. Yes?

12 A. The answer is I don't know. I would like to --

13 Q. Okay. You're not able to articulate the null
14 hypothesis -- the specific null hypothesis of
15 your survey. True?

16 A. No. According to my understanding, as I believe
17 I stated before, the purpose of a survey is to
18 prove or disprove this hypothesis. In the
19 branding industry, in the marketing industry, as
20 an expert witness we don't hypothesize, we prove.
21 with the whole concept and this technical term
22 without focusing on the results of these surveys
23 and what they prove. That's the intent of my
24 report, and I stand behind it.

1 can tell the difference between those products,
2 correct, in some of the attributes including the
3 warranty as we discussed and the presale handling
4 quality controls? Correct?

5 A. Correct. But there's an absence of any control
6 there so we cannot extract the survey.

7 Q. Okay. The bottom line is what you concluded --
8 we talked about this earlier. I don't want to go
9 through this again. You agree as a result a
10 large percentage of the respondents did not
11 understand that Alwayz on sale is one of
12 plaintiff's authorized retailers. In other words,
13 Cowan's survey, whether you agree with its
14 methodology or not, whether you agree that the
15 survey noise issue or not, the conclusion is the
16 purchasers, the customers can't tell the
17 difference between an unauthorized and an
18 authorized seller of Otter products in the Amazon
19 space. True?

20 A. Hypothetically, if his processes were accurate,
21 that would be the conclusion. Since his
22 processes were not accurate, I don't believe any
23 reasonable conclusions were determined.

24 Q. And what was improper or inappropriate on his

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1 confusion.

2 Q. Okay. So Dr. Cowan's report, as you understood,
3 does not seek information on the entire purchase
4 experience, does it, as you phrase it?

5 A. I do not. As a result, I believe his survey is
6 invalid.

7 Q. Okay. I understand that. Bias in a survey
8 involves posing questions that suggest the answer
9 or response. Correct?

10 A. Correct.

11 Q. Let's go to -- you identified the flawed
12 screening questions. "Cowan's first question is
13 who is selling the product on the Amazon
14 website." That's what it says. Correct?

15 A. Correct. A very leading question.

16 Q. Well how is that leading? The leading question
17 is your name is Rob wallace. That's a leading
18 question. Can we agree on that? Can we agree on
19 that?

20 MR. JASON: Objection.

21 Q. That's a leading question. Can we agree on that?

22 A. I don't know if I'm going to go through the
23 analysis of that question. I believe --

24 Q. What is a leading -- let me ask you this. It's

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1 your term. You used the term leading question.
2 I know what a leading question is, a question
3 that has the answer built right in it. Right?
4 Your name is Rob Wallace is a leading question.
5 You don't need to assess that, do you? That's a
6 leading question.

7 MR. JASON: Objection.

8 A. I'll follow your logic.

9 Q. Okay. What is your name? That's not a leading
10 question, is it?

11 A. Correct. If I'm going to follow your logic, I
12 agree with that.

13 Q. Okay. Well here it doesn't say the seller of
14 this product is X. Correct? It says, "who is
15 selling the product on the Amazon website?"
16 Where in that question is the answer, whether it
17 be Helpful Hippos, Frantic Frogs, Joe Bag of
18 Doughnuts. Where is the answer suggested in that?

19 A. The question itself leads to the demand effect.
20 It focuses the consumer specifically on this
21 issue. My report confirms that that issue of the
22 manufacturer is exceptionally low in the
23 consumers' consideration. So you've elevated
24 that issue from the very onset. Everyone knows

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1 that's taking this test from that point forward
2 they're going to be asked questions about the
3 warranty or other elements that in this case
4 don't affect their purchase decisions.

5 Q. Okay. Where in that question would anyone know
6 that this is going to have to do with warranty,
7 quality control or the existence of Christ
8 himself? Where would that be? This simply asks
9 who is selling the product. What suggestion is
10 made? Please identify it for me.

11 MR. JASON: Objection.

12 A. Bill, I was referring to the additional questions
13 which are specific to warranty, to usage -- to
14 storage and the handling procedures. This
15 question is also leading in that it's directing
16 the focus of people's attention to the seller of
17 the product which is not one of the criteria that
18 they use in making the purchase decision.

19 Q. Okay. But that's what Dr. Cowan wanted to test,
20 to see if somebody could determine who is selling
21 the product. We talked about that. How else
22 would you ask that if that's what you're seeking
23 to test? I'm not asking you to agree. We will
24 agree that you think Dr. Cowan missed the boat

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1 should be sold as used, not new." So that person
2 a manufacturer's warranty is important to because
3 she says "Always be a manufacturer's warranty."
4 Correct?

5 A. Correct. And that data was calculated along with
6 the data of all the other 400 respondents.

7 Q. I think you told me earlier that you don't
8 believe you received any comments that indicated
9 to you that warranty was any significance
10 whatsoever in the decision. That's what you told
11 me earlier. So I want to test that here.

12 A. Okay. In reality I mentioned more than several
13 times now the impact of warranty, and the usage,
14 and shipping protocols is exceptionally low.
15 There are certainly people who have -- these one
16 or two you recognize here, for whom the warranty
17 has an impact. It's not stating that the
18 warranty is more important than price, than
19 function, brand or any of the other criteria. We
20 have to analyze their responses to the hierarchy
21 of purchase decisions to determine where they
22 place the warranty in relation to those other
23 items.

24 Q. I understand that. What you're saying is that the

1 warranty is not wholly immaterial to it, it just
2 may be less material than other characteristics
3 of the eight you put on your list. True?

4 A. Among the elements we're discussing, warranty,
5 usage or shipping protocols and so forth, they're
6 the least impactful. They're the least important
7 to consumers. They have the least impact on
8 purchase decisions among all the other purchase
9 considerations that we've tested.

10 Q. That's on a relative scale. They are not wholly
11 immaterial as you suggested earlier. There are
12 some consumers that it is in fact important to.
13 Correct?

14 A. This person is stating there should be a
15 manufacturer's warranty, but we don't know what
16 the response was to listing that warranty in
17 comparison to the other purchase considerations.
18 I agree with you. There are people that have
19 listed the warranty as having some materiality.
20 But in relation to all of the other elements, the
21 warranty, the shipping protocols are
22 significantly lower.

23 Q. I get that. You keep giving me the relative. I
24 want to make sure we're clear. It's not wholly

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1 immaterial to the purchase decision, which is
2 what your survey is measuring as opposed to
3 consumer confusion which Dr. Cowan is measuring.
4 Correct?

5 MR. JASON: Objection.

6 A. I believe I've answered that question.

7 Q. And the answer is correct?

8 A. Yes.

9 Q. It's not wholly immaterial. It may be less
10 material than other items but it's not wholly
11 immaterial. Some consumers in fact find it
12 important. Maybe a small number, but some do.
13 Correct?

14 A. No. It is -- to my understanding I don't think
15 -- I have to go back and analyze that. I don't
16 believe that anyone recognized warranty or
17 shipping/handling as being number one, number two
18 or number three. All of the respondents listed
19 them well below price, brand, functionality and
20 the more important attributes. That's my
21 recollection of the data itself.

22 Q. Okay. But again, it's not wholly immaterial.
23 It's just less material on a relative basis which
24 is what your tests determine. True?

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1 MR. JASON: Objection.

2 A. It has significantly less relevance at a multiple
3 of the survey results.

4 Q. But it does have relevance? It has some
5 materiality? True?

6 MR. JASON: Objection.

7 A. Go back and analyze and look at the data and
8 you'll have a firm answer to that question.
9 There are -- there is some materiality, but that
10 materiality is so significantly lower than the
11 primary purchase decisions that it's irrelevant
12 in my opinion.

13 Q. Let's go through the comments, though. Let's go
14 down to 376. This person, when discussing the
15 follow-up question to the effect on the Otter
16 brand says, "I would like to have a warranty on
17 the product because it might end up I'm paying
18 more than the cheap retail price." Correct?

19 A. Yes, that's what that states there.

20 Q. Okay. So warranty is of significance to this
21 particular consumer?

22 MR. JASON: Objection.

23 A. I think that they're determining that the retail
24 price might be affected by having a warranty and

1 understanding of warranty or presale, quality
2 control, handling. You would offer the same
3 answers with regard to the control group. Is
4 that fair?

5 A. Yeah. The questions are identical.

6 Q. So just allow me to work this out. So if I had
7 asked you you didn't ask this question or you
8 didn't ask about this concept in the primary
9 group and you said I did not, that would be the
10 same answer with regard to the control group.
11 True?

12 A. Yes. The questions between the control group and
13 the primary group are identical.

14 Q. Okay. You said, under page 17, "The results and
15 analysis" -- excuse me. Accuracy of results,
16 that's on page 16. "The survey follows all
17 court-accepted protocols to ensure that its
18 results were reliable to the 95 percent
19 confidence level." Are you aware in statistics
20 that you can compute a 95 percent confidence
21 level for a sample size of 2?

22 A. That is a possibility. I understand that to be
23 the theory in statistics. However, the practice
24 of doing analytics for the market is to get as

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1 many respondents as possible so that you can have
2 more clarity around the implication of the test
3 in relationship to everyone in the marketplace.
4 The larger your sample size, the higher you are
5 replicating or likely to replicate the responses
6 of everyone in the universe, the global universe,
7 were tested.

8 Q. The analysis you did, you specifically analyze in
9 your report the 200 that were involving the Otter
10 product. Correct? The 200 survey respondents?
11 You provided a full analysis in your report here?

12 A. Yes. As well as those 200 in the control group.

13 Q. Okay. Well I only find mention of this that you
14 generalized it. It verifies but I don't see any
15 testing or computations or otherwise, or like
16 analysis. Where would I find that as it relates
17 to the control group which was the gaming
18 headphones?

19 A. That possibly is listed -- let's just find the
20 paragraph. It's the latter section of my report.

21 Q. Under page 14, proper control segment.

22 A. On page 22, paragraph E of my report.

23 Q. 22. I'm sorry. Page 22 -- Exhibit 1, page 22,
24 E, that paragraph is the sum total of your

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1 analysis of the control group. would that be
2 fair?

3 A. It's just a brief review of my analysis to find
4 that the answers of both the experimental and
5 control group were highly similar. According to
6 Shari Diamond, the pre-existing beliefs and other
7 background noise should have produced similar
8 response levels in the experimental control
9 groups.

10 Q. My point is you did charts and tables and
11 breakdowns for the primary group. I don't see
12 those -- you didn't do those in connection with
13 the control group?

14 A. Correct.

15 Q. would that be fair?

16 A. Correct. If you go to the appendices that we
17 were just on, they will break out all of those
18 answers under the B version. So 13 through 17b.
19 I did analyze that and didn't find them relevant
20 to include in this context.

21 Q. And we already covered this, but you did not
22 compute using the statistical formulas the actual
23 competence level of your own survey. Correct?

24 A. Again, I might get tripped up by terminology that

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1 I'm not familiar with. I did follow the
2 protocols that I've used both in my work as an
3 expert witness and as a brand identity
4 consultant. I've analyzed those products and
5 found very little differences between the control
6 groups and the primary groups, and nothing that
7 showed us statistical -- significant statistical
8 difference.

9 Q. But that's your opinion from a marketing
10 perspective. My question is did you do the
11 computations from a statistical analysis
12 perspective? I believe you previously answered
13 no, but I just want to add that.

14 A. I did them to the level that they have been
15 reported in my report. I'm not a statistician
16 and so I don't know if I met that level. There's
17 no significant differences between the control
18 and the primary group which is how we confirm
19 that survey noise is expected.

20 Q. Other than doing the ranking in which you used a
21 mean calculation, an average calculation on the
22 elements that you put forth, did you do any other
23 further analysis to explore the warranty effects
24 on the consumer decision?

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- 1 A. Yeah. we had specific questions about that very
2 issue.
- 3 Q. I'm talking about the data. You received the
4 responses. we saw the fill-in-the-blank
5 responses. Other than reviewing those, or at
6 least reviewing them today, did you do any
7 further analysis, other than a mathematical
8 computation, of the ranking system and coming up
9 with the mean of that?
- 10 A. I mean I filled -- I completed the results in the
11 charts that you've seen and then did a
12 computation and comparison to the average ranking
13 of each element. Yes.
- 14 Q. Page 20 of your report, it talks about, in the
15 last paragraph, "These average ranking
16 calculations are statistically significant for
17 the top six purchases." Right? Do you see it?
- 18 A. Where on the page are we looking?
- 19 Q. 20.
- 20 A. Where on page 20?
- 21 Q. The last paragraph. "These average ranking
22 calculations" --
- 23 A. Yes.
- 24 Q. What do you mean when you say these averaging

1 ranking calculations are statistically
2 significant? Statistically significant to what?
3 what does that mean?

4 A. I'm referring, I believe, to the paragraph above
5 that. More than seven times the number of
6 respondents believe that the size and fits your
7 phone is the most important consideration than
8 believe the way the product is inspected, and
9 handled, and stored is a consideration.

10 Q. Okay.

11 A. The difference between those two responses, 70
12 respondents for example in size and fits your
13 phone versus 9 respondents. That spread is
14 statistically significant.

15 Q. When you say statistically significant, that
16 again is a very specific term in statistics.
17 where did you do your computation to determine
18 that, or did you?

19 A. I did.

20 Q. Where is it?

21 A. It's based on that same Bell curve that we talked
22 about earlier, the spread between those responses
23 and what the -- how big those spreads are going
24 to be to determine if they're statistically

1 significant.

2 Q. But you don't have any worksheet or work product
3 that you can show me other than that chart you
4 carry around with you?

5 A. Correct. So for example, at the 70 percent
6 level, which was -- we get to the percentages
7 rather than the number of respondents. Let's
8 assume they were 70 percent level. The spread to
9 determine statistical significance would be 9.8
10 percent. The difference between 70 and 9 is way
11 more than 9.8 percent.

12 Q. Okay. What was your null hypothesis that you
13 used for the statement the average ranking
14 calculations are statistically significant? Did
15 you have one?

16 A. Yeah. We've been through this. I'm comfortable.
17 I don't know the definition from a statistician's
18 standpoint of the null hypothesis. My
19 understanding is that the hypothesis is based on
20 the rankings of two elements to be the same until
21 the survey proves them to be different. So if
22 that is in fact the proper definition of the null
23 hypothesis, then I approached this with no bias,
24 with open arms, seeking to determine that each of

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1 these eight rankings could be equal to one
2 another until the survey proved that there
3 actually was a hierarchy to them, and some were
4 much more important and some were less important.

5 Q. The statistical significance, you're opining on
6 here, is the mathematical difference in the mean
7 for these responses that are set forth in this
8 table that begins attribute above. Correct? The
9 size, fits your phone. You're saying because of
10 the difference in those numbers, the means, the
11 average, those signify statistical significance?

12 A. I believe, if we're talking about page 20, I was
13 referring again to the paragraph above, the
14 difference between 70 respondents and 9
15 respondents, that being --

16 Q. Okay.

17 A. -- much, much larger than the spread that
18 determines the statistical significance.

19 Q. Okay. What is the number that determines
20 statistical significance? If there's a number,
21 I'm assuming you can compute it. So what is it?

22 A. Assuming -- let's say we had a 70 percent
23 response. The number is 9.8 percent spread.
24 Anything lower than that would be 62. -- excuse

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1 me. 60.2. Please forgive me. I'm not good at
2 math at this hour of the day. 60.2 would be
3 statistically significant.

4 Q. Okay. "These average ranking calculations are
5 statistically significant for the top six
6 purchase considerations." That's on page 20. I
7 don't understand what you mean by that.

8 A. Can you just point me where on page 20 we're
9 talking?

10 Q. Last paragraph, "These average ranking
11 calculations are statistical significant for the
12 top six purchase considerations." what does that
13 mean?

14 A. Page 20 of my report?

15 Q. Yes.

16 A. I'm not seeing it.

17 MR. JASON: It was the paragraph
18 you were just looking at, Rob.

19 A. 21, actually, of my report, underneath the
20 attribute chart. Is that what we're referring
21 to?

22 Q. Correct. "These average ranking calculations are
23 statistically significant for the top six
24 purchase considerations." what does that mean?

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1 A. The top -- the differences -- the spread between
2 the top six responses are statistically
3 significant.

4 Q. What does that mean?

5 A. The difference between 3.1 as an average ranking
6 is statistically significant versus a 3.22
7 ranking on price. If you then combine the first
8 number of attributes and compare them to the last
9 number of attributes, for example size, fits your
10 phone, price and function versus manufacturer's
11 warranty, Amazon retailer to which it sold, and
12 the way the product is inspected, handled and
13 stored, those are almost two times the
14 difference. The spread is almost two times the
15 actual rating. So those are again determined to
16 be statistically significant.

17 Q. According to you, from a marketing perspective.
18 Correct?

19 A. That's correct. And my understanding of the
20 science of statistics.

21 Q. But you refer to the top six purchase
22 considerations as statistically significant.
23 Statistically significant to what? I still am
24 not clear what you're saying.

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1 A. I believe statistically significant to each
2 other.

3 Q. Okay.

4 A. I believe that the lower ranking versions might
5 not be statistically significant to each other.
6 Not to say that they're not affirmatively the
7 lowest ranking elements, but the significance of
8 their spread, the differences between them, may
9 not be enough to determine if they're
10 statistically significant.

11 Q. So when you say statistically significant, do you
12 mean having some impact on the consumer decision?
13 Is that what you mean by statistical
14 significance?

15 A. Yeah. To my point, it's just a proving element.
16 That the results are so apparent that they are
17 validated. They're so different from each other
18 then there's a level of validation in what they
19 state as being accurate, not just to the survey
20 but to a 95 percent competence level with all
21 potential consumers.

22 THE WITNESS: Folks, I hate to do
23 this. I do have a 6:00 meeting, if you can
24 believe that. If it's possible we can wrap this

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1 up now, I'd really appreciate it.

2 MR. KLOSS: I'm not done. I don't know
3 what to tell you. I'm not going to pitch a
4 hissy. I'll have to take it up with the court,
5 but I'm not done.

6 MR. JASON: We'll call it a day for
7 now. You can take it up with the court if you'd
8 like, Bill.

9 MR. KLOSS: Note my objection. I
10 appreciate it. Thank you.

11 (Whereupon, wallace Exhibits 9, 10 and
12 11 were marked for identification.)

13

14 (Whereupon, the Examination of ROBERT
15 WALLACE, was adjourned at 5:35 p.m.)

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