Exhibit 4

Not Reported in F.Supp.2d, 2006 WL 6505346 (W.D.Tex.)
(Cite as: 2006 WL 6505346 (W.D.Tex.))

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Only the Westlaw citation is currently available.

United States District Court,
W.D. Texas,
San Antonio Division.
KINETIC CONCEPTS, INC., KCI Licensing, Inc. KCI USA, Inc. and Wake Forest University Health Sciences, Plaintiffs,
v.
BLUESKY MEDICAL CORPORATION, Medela AG, Medela, Inc., and Patient Care Systems, Inc., Defendants.

No. SA–03–CA–0832.
Aug. 11, 2006.

Named Expert: Brian C. Reisetter, Donald Lichtenstein

ORDER DENYING DEFENDANT MEDELA'S MOTION TO EXCLUDE

ROYAL FURGESON, District Judge.

***1** BEFORE THE COURT are Defendant Medela's Motion to Exclude Expert Testimony Based on the Surveys of Brian C. Reisetter and Donald Lichtenstein (Docket No. 469), filed April 21, 2006 and Plaintiff's Response (Docket No. 505), filed May 5, 2006. After due consideration of the written briefs and oral arguments of the parties, the Court is of the opinion that the Motion to Exclude should be DENIED.

Defendants move to exclude certain expert testimony and associated evidence of Dr. Reisetter. FN1 "[E]xpert testimony is admissible under *Daubert* if it is both relevant and reliable." FN2 An expert's testimony is sufficiently reliable only if it is based on sufficient facts or data, it is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case. FN3 "[O]therwise inadmissible [facts or data] shall not be disclosed to the jury ... unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." FN4 As such, this Court must discharge its " 'gatekeeping' obligation." FN5

FN1. Defendants do not impugn Reisetter's qualification as an expert. He received a doctorate in pharmacy administration from the, University of Mississippi and an M.B.A from Drake University. He is an adjunct faculty member at the University of Mississippi, teaching pharmaceutical sales, and a partner in Medical Marketing Economics, LLC, a company which advises medical device producers regarding marketing. *See* Shari Seidman Diamond, *Reference Guide on Survey Research, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 229, 238 (West 2000) (discussing factors to be considered in evaluating credibility of experts).

FN2. *Pipitone v. Biometrix, Inc.*, 288 F.3d 239, 244 (5th Cir.2002); *see Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 594–95, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

FN3. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed.R.Evid. 702.

FN4. Fed.R.Evid. 703.

FN5. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141, 119 S.Ct. 1167, 143 L.Ed.2d 238 (citing *Daubert*, 509 U.S. at 597).

Defendants contend that Plaintiffs' survey, offered for the false advertising [FN6] and unfair competition claims,[FN7] is fatally flawed and thus inadmissible.[FN8] In contrast to false statements which enjoy a presumption of deception, statements that are ambiguous or true, but misleading, require evidence of material impact on consumers.[FN9] Materiality is demonstrated by evidence of actual deception, a tendency to influence consumers' purchasing decisions.[FN10] Lanham Act liability is typically proven through survey evidence.[FN11]

FN6. 15 U.S.C. § 1125(a)(1)(B).

FN7. Plaintiffs allege both federal and common law unfair competition. 15 U.S.C. § 1125(a)(1)(A); *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 788 (5th Cir.1999).

FN8. *See* 2 MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 32:50 at 779 (2d ed. 1984) ("It is notoriously easy for one expert to appear to tear apart the methodology of a survey taken by another. However, one must keep in mind that there is no such thing as a 'perfect' survey.").

FN9. *See Pizza Hut v. Papa John's Intn'l*, 227 F.3d 489, 497 (5th Cir.2000) (reversing a jury verdict where plaintiff failed to show that the misleading advertisement "had the tendency to deceive customers so as to affect their purchasing decisions").

FN10. *Id.* at 502.

FN11. *See Exxon Corp. v. Texas Motor Exchange of Houston*, 628 F.2d 500, 506–07 (5th Cir.1980); *Test Masters Educ. Servs. v. Singh*, 428 F.3d 559, 568 (5th Cir.2005) (stating "that there were a number of types of potentially helpful evidence Singh could have produced but that were missing from the record including ... importantly, survey evidence").

Survey evidence is not direct evidence of actual confusion; it is circumstantial evidence. Surveys are experiments that yield data from which inferences about the likelihood of actual confusion may be drawn. The methodology of the experiment, the objectivity with which it was designed, and the accuracy of the reporting and analysis of the results all affect the kinds of inferences that can be drawn from the survey results and the weight that should be given them.[FN12] Against this backdrop, Defendants move to exclude Reisetter's survey.[FN13]

FN12. *Sara Lee Corp. v. Kayser–Roth Corp.*, 1994 U.S. Dist. LEXIS 19198 at *157 (D.N.C.1994) (citing 3 McCarthy, *supra* note 8, § 32.54[1][a] at 32–235) (discounting reliability of proffered survey), *rev'd*, *Sara Lee Corp. v. Kayser–Roth Corp.*, 81 F.3d 455, 467 (4th Cir.1996) (stating "[t]he district court discounted the survey evidence on the ground that its reliability may have been in question, but even if the true figure were only half of the survey estimate, actual confusion would, in our view, nevertheless exist to a significant degree).

FN13. *See* Medela's Motion to Exclude Expert Testimony Based on the Surveys of Brian C. Reisetter and Donald Lichtenstein (Docket No. 469).

The Reisetter survey polled physicians and wound care nurses, contacted by e-mail and asked to participate in an Internet survey. Seventy-five physicians and 60 nurses completed the survey-

physicians received between $30 and $50 and nurses received between $30 and $100. The survey allegedly demonstrated that: (1) 73.3% of the physicians and 92% of the nurses believed that the BlueSky advertisements conveyed some level of cost savings of the accused device over Plaintiffs' product; and (2) 67.7% of the physicians and 35.5% of the nurses expected that the accused device provided the same therapy as Plaintiffs' product.

Defendants challenge the relevancy of the Reisetter survey, arguing first that by failing to ask the ultimate question of whether the questioned advertisements actually influenced decision makers, the survey failed to address the materiality of the advertisements. The Fifth Circuit has rejected experts who opine whether a misleading advertisement affects consumer behavior if the expert "offered no market research or tests to support his opinions ." FN14 Furthermore, no precedent "stands for the proposition that the subjective intent of the defendant's corporate executives to convey a particular message is evidence of the fact that consumers in fact relied on the message to make their purchases." FN15 Defendants point to Reisetter's deposition testimony in which he admitted that no survey question inquired as to whether the BlueSky advertisements would influence healthcare professionals in their decisions to prescribe the BlueSky product. FN16 Second, during argument, Defendants provided to the court, and relied in large part upon, a purportedly analogous case, *Mastercard Intn'l, Inc. v. First National Bank of Omaha, Inc.* FN17 There, the district court found the contested survey irrelevant because purchasing decisions would have been made based on more than the materials provided in the survey. FN18

FN14. *IQ Prods. Co. v. Pennzoil Prods. Co.*, 305 F.3d 368, 376 (5th Cir.2002).

FN15. *Pizza Hut*, 277 F.3d at 503.

FN16. Q. In your survey of the doctors, after showing them the ads and press releases, were the doctors asked a question to the effect of, "Does the information you have reviewed make you more or less likely to purchase a BlueSky product?" Were they asked a question like that?

A. No. They-the physicians wouldn't be ordering or purchasing that product, so I wouldn't ask that question.

Q. Were they asked a question to the effect, "Did the information you were presented in the ads or press releases, would it make you more or less likely to write a prescription for a BlueSky Medical device?"

A. No, we did not ask that question directly, no.

Q. And were the nurses asked a question along the lines of, "Well, after reviewing these written materials, would you be more or less likely to recommend that a BlueSky Medical device be used with one of your patients?" Were they asked a question like that?

A. No.

See Medela's Motion to Exclude Expert Testimony Based on the Survey's of Brian C. Reisetter and Donald Lichtenstein (Docket No. 469).

FN17. 2004 U.S. Dist. LEXIS 2485 (S.D.N.Y. Feb. 23, 2004).

FN18. *Mastercard*, 2004 U.S. Dist. LEXIS 2485 at *29.

***2** While the Reisetter survey did not ask the ultimate question, any potential ambiguity on that score does not obfuscate the survey's results into irrelevancy. Instead the Reisetter survey could assist the jury in deciding the question of whether the advertisements mislead a potential class of customers. Reisetter conformed his opinion testimony to the

survey, and as Plaintiffs contend, the survey is plainly relevant to whether the advertisements contain misleading or confusing statements, demonstrating that the advertisements generated allegedly false comparisons between the two products at issue. The determinations as to whether the advertising claims and subsequent perceptions are indeed false and whether those claims and perceptions altered purchasing habits remained hotly contested questions of fact soundly within the providence of the jury. Thus, the survey was relevant to the requisite analysis.

Defendants also assert methodological errors in the survey design that arguably render it unreliable and, thus, inadmissible. First, due to difficulties in obtaining a probability sample,[FN19] Reisetter's survey employed a convenience sample,[FN20] and Defendants, therefore, assail the reproducibility of the survey with any degree of certainty. Reisetter himself admits that he has no way of knowing whether the results of his survey could be duplicated with exactitude.[FN21]

FN19. Probability sampling endeavors to "selec[t] a sample that accurately represents [a] population," requiring that every "element in the population has a known, equal opportunity of being included in the sample and all possible samples of a given size are equally likely to be selected" *See* Diamond, *supra* note 1, at 242–43. "Probability sample surveys can be expensive" when "in-person interviews are required, the target population is dispersed widely, or qualified respondents are scarce." *Id.* at 244.

FN20. Convenience sampling, or nonprobability sampling, is a nonrandom method of selection based on ease of accessibility.

FN21. "I cannot give you a *statistical* confidence that [future survey results using the exact same survey] would be the same or similar from my experience in doing this" (emphasis added). *See* Medela's Motion to Exclude Expert Testimony Based on the Surveys of Brian C. Reisetter and Donald Lichtenstein (Docket No. 469), Ex. A, Reisetter Depo. at 38:8–39:8.

However, this potential variability did not altogether preclude admissibility. Reisetter testified both that he was "confident that the numbers would be very similar" in a duplicated survey and that his corporate clients relied on his nonprobability surveys.[FN22] Plaintiffs also provided evidence of additional professionals who verified the survey methodology.[FN23] Most persuasively, convenience sampling is an accepted survey method, according to the REFERENCE MANUAL ON SCIENTIFIC EVIDENCE promulgated by the Federal Judicial Center:

FN22. Trial Transcript 1793, l. 25; 1790 ll. 21–25.

FN23. Response to Medela's Motion to Exclude Surveys (Docket No. 505), Ex. D, Stewart Report at 3; Ex. E, Supp. Stewart Report at 3.

A majority of consumer surveys conducted for Lanham Act litigation present results from nonprobability convenience samples. They are admitted into evidence based on the argument that nonprobability sampling is used widely in marketing research and that "results of these studies are used by major American companies in making decisions of considerable consequence." Nonetheless, when respondents are not selected randomly from the relevant population, the expert should be prepared to justify the method used to select respondents. Special precautions are required to reduce the likelihood of biased samples. In addition, quantitative values computed should be viewed as rough indicators rather than as precise quantitative estimates. Confidence intervals should not be computed .[FN24]

FN24. Diamond, *supra* note 1, at 259–60

(quoting *National Football League Properties, Inc. v. New Jersey Giants Inc.*, 637 F.Supp. 507, 515 (D.N.J.1986)).

A convenience or "non-probability survey ... is sufficiently reliable to be admitted into evidence and accorded substantial weight ... and non-probability survey evidence has been accepted by courts in many trademark and unfair competition cases." FN25 Moreover, the Fifth Circuit has tacitly recognized the value of convenience sampling in Lanham Act cases. FN26 Other courts have likewise admitted surveys using convenience samples. FN27

FN25. *National Football League Properties, Inc.*, 637 F.Supp. at 518.

FN26. *Exxon Corp.*, 628 F.2d at 507 (affirming the admission of a mall-intercept survey).

FN27. *See Henri's Food Products Co. Inc. v. Kraft Inc.*, 717 F.2d 352 (7th Cir.1983); *Brooks Shoe Mfg. Co. Inc. v. Suave Shoe Corp.*, 533 F.Supp. 75 (S.D.Fla.1981), *aff'd*, 716 F.2d 854 (11th Cir.1983); *Textron Inc. v. Handlin Trade Commission*, 753 F.2d 1019 (Fed.Cir.1985).

***3** Yet there does exist an inherent tension to the admissibility of nonprobabihty surveys. Though nonprobabihty sampling is commonly performed and generally admitted into evidence in Lanham Act cases, the results "cannot be statistically extrapolated to the entire universe." FN28 To allay this concern, the Court instructed the jury as follows:

FN28. 3 MCCARTHY, *supra* note 8, § 32.48[2][b], at 32–207. "Therefore, while 'nonprobability survey results may be admissible, they are weak evidence of behavior patterns in the test universe.' *American Home Prods., v. Barr Lab., Inc.*, 656 F.Supp. 1058, 1070 (D.N.J.), *aff'd*, 834 F.2d 368 (3d Cir.1987)). Surveys like these are, moreover, quite sensitive 'to irrelevant factors and, as a result, [courts] need to be quite careful when determining what the surveys actually show.' *ConAgra, Inc. v. Geo. A. Hormel & Co.*, 784 F.Supp. 700 (D.Neb.1992), *aff'd*, 990 F.2d 368 (8th Cir.1993)). Flaws in the surveys further reduce their probative value." *Sara Lee Corp.*, 1994 U.S. Dist. LEXIS 19198 at *158–159. "When nonprobabihty sample surveys are utilized, courts are encouraged to take special care in determining whether special precautions are in place to reduce the likelihood of biased samples." *Chavez v. IBP, Inc.*, 2004 U.S. Dist. LEXIS 28838 at *24 (E.D.Wash.2004) (citing Diamond, *supra* note 1, at 246–47).

The survey that Dr. Reisetter conducted in this case utilized what is known as a convenience sample which means that the physicians and nurses who participated in the survey were not selected at random. You've heard about these other surveys that have been conducted by physicians and scientists where they do the random, controlled study which has a great degree of scientific backing where it can be replicated with exactitude time after time after time.

This kind of convenience survey is not that kind of survey which can be replicated with exactitude time-after-time.

Still, however, I have concluded that the survey's use of a convenience sample does not prevent the survey's admission into evidence and I have allowed Dr. Reisetter to testify about it, and that's because surveys such as this are widely used by businesses across this country and indeed across the world to make important decisions and so I have allowed Dr. Reisetter's survey to be admitted through his testimony.

However, you as members of the jury, are entitled to determine what weight, if any, is to be given the survey and to its findings. As you review the findings of Dr. Reisetter's survey and

consider the weight that should be accorded to the findings, I do want you to keep in mind that because the survey used a convenience sample, the quantitative values or the percentages that you saw determined by the survey should not be viewed as precise quantitative estimates. Instead, you should view such values only as rough indicators. For example, you remember that Dr. Reseter's survey showed that 73.3% of the physicians that viewed one of the advertisements thought that they indicated that there were the same kind of cost comparability or whatever as-cost economy as between the two machines, the Versatile 1 and the V.A.C., and so he said his survey showed that 73 .3% of the physicians thought the two machines were basically equivalent from an economical point of view. You should view that 73 .3% figure only as a rough indicator of what the general physician population might feel. It may well be that the actual percentage of the physician population that feels the same way as the survey indicated could be either substantially smaller of larger than that 73.3%. I just wanted you to know surveys like this do not have the same kind of exactitude that other kinds of research instruments that we've talked about in this court have. I just wanted to make that clear and I appreciate your attention to that instruction. FN29

FN29. Trial Transcript 2045,1. 9–2047,1.12.

With this limiting instruction, the survey, based on convenience sampling, was properly before the jury.

***4** Second, Defendants contend that the universe of pollees does not adequately represent the purchasers of the products at issue—if not wholly inapplicable at least underinclusive. FN30 "The appropriate universe should include a fair sampling of those purchasers most likely to partake of the alleged infringers goods or services." FN31 Reisetter surveyed physicians and nurses, but they arguably do not represent the entire class of customers which necessarily decide which wound care products the healthcare provider procures. FN32 The Defendants elicited evidence during trial to support this contention. Donna Lockhart testified that hospital or nursing home administrative bodies often make the purchasing decisions instead of the physicians. FN33 Dr. Miller and Marie McGregor testified that physicians and nurses, respectively, do not rely on advertisements to make their decisions, intimating that healthcare professionals, at least, influence purchasing decisions in the wound care market. FN34

FN30. *See Scott Fetzer Co. v. House of Vacuums Inc.*, 381 F.3d 477, 487 (5th Cir.2004) (reviewing "the manner of conducting the survey, including especially the adequacy of the universe"); Diamond, *supra* note 1, at 239–242 (stating "[i]f the [sampling frame] is underinclusive, the survey's value depends on the extent to which the excluded population is likely to react differently from the included population").

FN31. *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d, 264 (5th Cir.1980) (finding surveys flawed for failure to include relevant population).

FN32. The prescribing/purchasing disparity created by applying the relevant facts involving the healthcare delivery system to the applicable jurisprudence understandably invites argument as to the adequacy of the survey population. Yet, it could be argued that the class of pollee in the contested survey would tend to be less likely mislead by the advertisements than those administrators who purchase but do not use or prescribe the products, rendering a result more favorable to the Defendants.

FN33. Trial Transcript 3757,1. 22–3758,1. 1; 3776, ll. 1–4.

FN34. Trial Transcript 4621, ll. 5–9.

Ultimately, this objection, as do most technical deficiencies, went to the weight and not to the admissibility of the evidence.[FN35] "The trier of fact evaluates ... the appropriateness of the definition of the population used to guide sample selection."[FN36] Tellingly, BlueSky's advertising campaign targets the very healthcare professionals it contends not to be the appropriate universe. While the "subjective intent of defendant's corporate executives to convey a particular message" does not establish reliance on that message,[FN37] it does logically presume that the target audience has some influence on purchasing decisions. "While this universe is not perfect, it is close enough so that, when combined with the format of the questions, it is clear that the survey is entitled to [some degree of] weight."[FN38] Physicians and nurses make the decisions to prescribe the therapy on individual patients and are, thus, particularly germane to the goal of the survey. Though not determinative, the confusion reported by the participating physicians and nurses certainly bears on the ultimate issues concerning false advertising and unfair competition in this case, and the survey was appropriately before the jury.

FN35. *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 228 (2d Cir.1999) (stating "errors in methodology thus properly go only to the weight of the evidence-subject, of course, to Rule 403's more general prohibition against evidence that is less probative than prejudicial or confusing").

FN36. *See* Diamond, *supra* note 1, at 238.

FN37. *See supra* note 15.

FN38. *Exxon Corp.*, 628 F.2d at 507.

Third, Defendants criticize Reisetter's failure to use a control group. The Fifth Circuit has recognized the unreliability of consumer surveys that do not utilize control groups,[FN39] and some courts have excluded surveys for this deficiency.[FN40] This safeguard, however, may be realized using either a control group or control questions:

FN39. *Pizza Hut*, 277 F.3d at 503 (finding a survey unreliable where it "failed to indicate whether the [consumer's] conclusions resulted from the advertisements at issue, or from personal [ ] experience, or from a combination of both").

FN40. *See National Football League Properties, Inc. v. Prostyle, Inc.*, 57 F.Supp.2d 665, 668 (E.D.Wis.1999) ("The main problem with the survey ... is that it essentially asks only one question ... without further probing ... and without showing any "control' shirt to any survey respondents or asking any control questions"); *Major League Baseball Properties Inc. v. Sed Non Olet Denarius Ltd.*, 817 F.Supp. 1103, 1123–24 (S.D.N.Y.1993) (holding that "both surveys contain a complete lack of controls rendering the data meaningless and having no evidentiary value").

> Another more common use of control methodology is a control question. Rather than administering a control stimulus to a separate group of respondents, the survey asks all respondents one or more control questions abou the product or service.[FN41]

FN41. Diamond, *supra* note 1, at 256–60.

Though Reisetter did not utilize a control group, he did employ control questions to screen pre-existing impressions that might have skewed the results. Initial questions assessed the familiarity of the physicians and nurses with the various wound care products.[FN42] Defendants' objection therefore is not persuasive.

FN42. Alternatively, Plaintiffs cite cases in

which courts have accepted surveys with a lack of any control method. *See Ironclad, L.P. v. Poly–America, Inc.*, 2000 WL 1400762 at *7 (N.D.Tex. Jul.28, 2000) (stating "... the Court need not exclude the survey due to the lack of control, as generally, technical deficiencies affect the weight rather than the admissibility"); *Jellibeans, Inc. v. Skating Clubs of Georgia, Inc.*, 716 F.2d 833, 846 n. 24 (11th Cir.1983) (technical deficiencies of survey go to weight rather than to admissibility).

***5** Fourth, Defendants assert that the survey impermissibly failed to employ a "quasi-filter," an "I don't know" option.[FN43] Defendants cite a Fourth Circuit opinion holding that the district court abused its discretion when it considered a survey that failed to give respondents an opportunity to give "not sure" as a response and noting that this failure "creates significant questions about [the survey's] relevance and reliability."[FN44] "When the "don't know" option is omitted, participants may tend to guess rather than admit that they do not know."[FN45] The Reference Manual on Scientific Evidence states that the lack of a filter "tends to overestimate the number of respondents with opinions."[FN46] This concern is diminished, in part, due to the sophistication and education of the participants in the instant survey. Also, many of the closed-ended questions had follow-up open-ended questions for further explanation. Reisetter explained his choice to forgo a filter, stating he feared an underreporting of opinions, a characteristic that the REFERENCE MANUAL ON SCIENTIFIC EVIDENCE ascribes only to "full-filters." Still, the Reference Manual on Scientific Evidence does not demand the use of filters but is written in the permissive. This Court is not convinced that Defendant's argument precluded admissibility.

FN43. *See* Diamond, *supra* note 1, at 249–51.

FN44. *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 280 (4th Cir.2002).

FN45. *Sara Lee Corp.*, 1994 U.S. Dist. LEXIS 19198 at *164–65; *see also* Diamond, *supra* note 1, at 250.

FN46. Diamond, *supra* note 1, at 251.

Fifth, Defendants contest the manner in which the advertisements were presented to the pollees; the two advertisements that formed the subject of the analysis were shown simultaneously. Contrary to Reisetter's presumption, Defendant's contend that no evidence demonstrates that a physician or nurse would have seen both advertisements contemporaneously or would have had both in mind when evaluating the contents and message of the advertisements. Defendants also argue that there is no way to know whether the targeted healthcare physicians, themselves, actually completed the survey.[FN47] Again, these assertions are appropriate for argument to the jury and, as the finders of fact, the jury would be entitled to accord whatever weight to the survey it deemed appropriate. Defendants' arguments are not an absolute bar to admissibility; the Reisetter survey provides sufficiently relevant and reliable data so as to pass through the eye of the needle in the gate bulwarked by the rules of evidence.

FN47. *Cf.* Diamond, *supra* note 1, at 264 (discussing shortcomings of mail-based surveys).

Last, Defendants again rely on *Mastercard*,[FN48] this time in arguing for the unreliability of the survey; that case, however, is distinguishable. Of critical importance to the district court there, the proposed survey universe of 914 was whittled down to only 52 participants, 27 of whom formed the test group.[FN49] Only one of the sixteen who expressed confusion over the approval or sponsorship of the advertisement materials documented confusion based on the similarity of the relevant trademarks.[FN50] Moreover, a difference in opinion of only five respondents, as between the test and control groups, formed the basis of the expert's conclusions.[FN51] Also, there was no assurance that the

52 participants were statistically representative of the original universe.[FN52] Due to the insufficient sample size, the district court therefore concluded that the prejudice substantially outweighed the probative value of the survey.[FN53] In contrast, the panel used in the Reisetter survey, 75 physicians and 60 nurses—all in a test group—is sufficiently large to provide meaningful results.[FN54]

FN48. 2004 U.S. Dist. LEXIS 2485.

FN49. *Id.* at *24–26.

FN50. *Id.* at *26.

FN51. *Id.*

FN52. *Id.* at *28.

FN53. *Id.* at *27–28.

FN54. *See* Trial Transcript 1790, 1.8–1791, 1. 9.

***6** In the instant case, however, Reisetter testified that he could not estimate the size of the relevant physician universe, which was those physicians who have recently provided negative pressure wound care, but he did place the universe of wound care nurses at 650. Defendants argue that an unknown response rate and a response rate of ten percent, respectively, create an impermissible nonresponse bias[FN55] rendering a fatal blow to the reliability and, consequently, to the admissibility of the survey because the results are not projectable to the entire universe.[FN56] However, certain procedures may be enacted to reduce the likelihood of bias.[FN57] Reisetter took additional precautions, ensuring that the distribution of physician participants correlated with the percentage of users of the technology by specialty.[FN58] The instruction given to the jury also was designed to have a curative effect as to this issue. Thus, Defendant has not persuaded this Court that its arguments defeat admissibility but, rather, are more appropriately made before the jury, eminently capable of assessing the survey's weight.

FN55. *Chavez v. IBP, Inc.*, 2004 U.S. Dist. LEXIS 28838 at *28 (citing Diamond, *supra* note 1, at 245 (stating "[i]f the response rate drops below 50%, the survey should be regarded with significant caution as a basis for precise quantitative statements about the population from which the sample was drawn")); *see also Beacon Mut. Ins. Co. v. OneBeacon Ins. Group*, 376 F.Supp.2d 251, 261 n. 4 (D.R.I.2005) (concluding that the survey methodology was not significantly rigorous where the response rate was 34% and no meaningful effort was made to verify the representativeness).

FN56. *Schering Corp.*, 2000 U.S. Dist. LEXIS 7071, *23–24 (stating "[p]rojectability refers to the ability to project a sample of a relevant universe or population of individuals to the entire universe or population").

FN57. *See* Diamond, *supra* note 1, at 246–47.

FN58. Plaintiffs' attorneys provided the original distribution data for its customers, and Defendants object to what they characterize as attorney involvement in the participant selection process. "However, some attorney involvement in the survey design is necessary to ensure that relevant questions are directed to a relevant population." *See* Diamond, *supra* note 1, at 237–38.

CONCLUSION

For the foregoing reasons, the Court is of the opinion that Defendant Medela's Motion should be DENIED.

It is so ORDERED.

W.D.Tex.,2006.
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