

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Rocky Brands, Inc., et al.,

Plaintiffs,

-v-

Case No. 2:06-cv-00275
Judge Michael H. Watson

Red Wing Shoe Company, Inc., et al.,

Defendants.

OPINION AND ORDER

Plaintiffs assert claims of false advertising and false designation of origin under § 43(a)(1) of the Lanham Act, 15 U.S.C. § 1125(a)(1), and the Ohio Deceptive Trade Practices Act ("ODTPA"). Plaintiffs allege, *inter alia*, that defendants market and advertise their boots in a manner that falsely suggests the boots are made in the United States, when in fact some lines of defendants' boots are manufactured wholly or partially overseas.

Defendants move to exclude the testimony and survey evidence of plaintiffs' expert The Mantis Group, Inc., arguing that the methodology of the survey is so flawed that the survey lacks any probative value. (Doc. 132). Plaintiffs contend that the survey's alleged flaws go to the weight of the evidence, not its admissibility. For the reasons that follow, the Court denies defendants' motion to exclude the survey evidence.

I. Background

A. The Parties

Plaintiff Rocky Brands, Inc. (“Rocky Brands”) is an Ohio corporation with its principal place of business in Nelsonville, Ohio. Rocky Brands manufactures hunting and work boots overseas, and markets and sells the boots throughout the United States. Plaintiff Lehigh Safety Shoe Co. LLC (“Lehigh”) is a limited liability company organized under the laws of the State of Delaware with its principal place of business in Nelsonville, Ohio. Lehigh manufactures work boots and shoes overseas, and markets and sells the boots and shoes nationwide. Rocky Brands acquired Lehigh in January 2005. The Court will refer to Rocky Brands and Lehigh collectively as “Rocky.”

Defendant Red Wing Shoe Company, Inc. (“Red Wing Shoes”) is a Minnesota corporation with its principal place of business in Red Wing, Minnesota. Red Wing Shoes manufactures hunting and work boots in the United States and overseas. In some instances, certain components of the boots are manufactured overseas and are then assembled in the United States. Red Wing Shoes markets and sells its boots throughout the United States. Defendant Red Wing Brands of America, Inc. (“Red Wing Brands”) is likewise a Minnesota corporation with its principal place of business in Red Wing, Minnesota. Red Wing Brands is the wholly-owned subsidiary of Red Wing Shoes. Red Wing Brands markets and sells boots manufactured by Red Wing Shoes. The Court will refer to Red Wing Shoes and Red Wing Brands collectively as “Red Wing.”

B. The Mantis survey

Rocky's expert, George Mantis, holds a B.A. in economics from Carroll College, an M.B.A. from Indiana University, and a J.D. from the Illinois Institute of Technology, Chicago-Kent College of Law. Mantis has more than forty years of experience in the survey industry, and has conducted over 1000 surveys, including more than 200 as an expert. He has testified as an expert thirty-five to forty times.

Mantis states that the purpose of his survey in this case was "to determine whether and if so, to what extent relevant consumers believe that the Irish Setter brand and the Red Wing and Worx brands of footwear are made in the United States." Mantis Report at 1. The survey was also "designed to determine consumer choice between two boots that are identical in all respects except country of origin; one made in the USA or one made in another country." *Id.*

The Mantis survey was conducted at four knife and gun shows in Pennsylvania and Tennessee from July 2007 to October 2007 using three different questionnaires. Respondents were limited to individuals eighteen years old or older who had purchased hunting boots for Questionnaire Version 1 ("V1") and Questionnaire Version 2 ("V2"), or hunting or work boots for Questionnaire Version 3 ("V3") or those who were likely to do so in the next twelve months for all three versions. The survey included responses from 383 individuals.

Mantis's survey was conducted by way of face-to-face interviews. For V1, the respondents were shown an Irish Setter boot with labels and tags stating "made in the USA with imported materials." The respondents were then asked, "Where do you think this product is made?" As follow up respondents were asked, "Why do you say that?"

and "Anything else?"

For V2, the respondents were shown the same boot as in V1, but with references to "with imported materials" removed from the boot's labels and tags. The respondents were then asked the same questions as in V1.

For V3, the respondents were shown a page from one of Red Wing's catalogs that contained the words "Red Wing Shoe Company, Inc.," "Red Wing Shoes Since 1905," and "WORX by Red Wing Shoes." Respondents were then asked, "Where do you think shoes from this company are made?" Respondents were also asked the same follow-up questions as in V1 and V2: "Why do you say that?" and "Anything else?"

For all three versions, the respondents were asked a third question ("Q3"). Q3 asked respondents to assume that there were two brands of hunting boots (or hunting or work boots for V3) that were the same in every respect except that one was made in the USA and the other was made in another country. Respondents were then shown a card with four statements and asked to select the statement that described the boot they would purchase:

Statement 1 "I would purchase the boot made in the USA."

Statement 2 "I would purchase the boot made in another country."

Statement 3 "I have no preference and would purchase either boot."

Statement 4 "I don't know and have no opinion."

II. Standard of review

To be admissible, a survey should generally satisfy the following requirements:

(1) the "universe" was properly defined, (2) a representative sample of

that universe was selected, (3) the questions to be asked of interviewees were framed in a clear, precise and non-leading manner, (4) sound interview procedures were followed by competent interviewers who had no knowledge of the litigation or the purpose for which the survey was conducted, (5) the data gathered was accurately reported, (6) the data was analyzed in accordance with accepted statistical principles, and (7) objectivity of the process was assured.

Safe Auto Ins. Co. v. State Auto. Mut. Ins. Co., 2:07-cv-1121, 2009 WL 3150328, at *2 (S.D. Ohio Sept. 30, 2009) (quoting *Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.*, 452 F. Supp. 2d 772, 778 (W.D. Mich. 2006), *aff'd*, 502 F.3d 504 (6th Cir. 2007) (additional quotes omitted)).

“Because almost all surveys are subject to some sort of criticism, courts generally hold that flaws in survey methodology go to the evidentiary weight of the survey rather than its admissibility.” *Id.* (quoting *Leelanau*, 452 F. Supp. 2d at 778. “There are limits, however. The court need not and should not respond reflexively to every criticism by saying it merely “goes to the weight” of the survey rather than to its admissibility. If the flaws in the proposed survey are too great, the court may find that the probative value of the survey is substantially outweighed by the prejudice, waste of time, and confusion it will cause at trial.” *Id.* (quoting *Leelanau*, 452 F. Supp. 2d at 778-79 (additional quotes omitted)).

As the proponent of the evidence, Rocky bears the burden of demonstrating admissibility. *Leelanau*, 452 F. Supp. 2d at 778.

III. Discussion

With the above principles in mind, the Court will proceed to examine the alleged flaws asserted by Red Wing. The Court will then determine whether the survey evidence is admissible.

A. Alleged flaws

Red Wing asserts that the Mantis survey is so flawed and unreliable that any probative value it might have is substantially outweighed by the danger of unfair prejudice and confusion. Red Wing argues that the Court should therefore exclude the survey and evidence associated with it pursuant to Fed. R. Evid. 403. Red Wing asserts flaws which fall within the following categories: (1) the survey's universe is unrepresentative; (2) the survey is irrelevant and uses irrelevant stimuli; (3) the survey failed to replicate market conditions; and (4) the survey used leading, ambiguous, and suggestive questions.

1. Survey's universe

Red Wing argues that the survey's universe is overinclusive because it included respondents who were not potential purchasers. Rocky maintains that the inclusion of past purchasers does not render the survey overinclusive, and that in this instance Red Wing improperly attempts to impose standards applicable to the determination of consumer confusion in trademark infringement cases that do not apply in this false advertising/designation of origin case.

In trademark infringement cases, it is well-established that for a consumer confusion survey, the universe must consist only of potential purchasers, not past purchasers. *Malletier v. Dooney & Bourke*, 525 F. Supp. 2d 558, 604 (S.D.N.Y. 2007) (citing cases). Although there is a dearth of case law on the subject, it appears the same rule may not always apply in a false advertising case. See *Church & Dwight Co. v. S.C. Johnson & Son, Inc.*, 873 F. Supp. 893, 907 (D. N.J. 1994) (approving survey universe of past purchasers in false advertising case).

More importantly, Red Wing will have the opportunity to cross examine Mantis on the issue of alleged overinclusiveness. Red Wing's expert, Dr. Itmar Simonson, may also address the issue. To the extent the survey's universe is overinclusive as a result of including past purchasers, such overinclusiveness goes to the weight of the evidence rather than its admissibility. See *Univ. of Kansas v. Sinks*, No. 06-2341-JAR, 2008 WL 755065, at *5 (D. Kan. Mar. 19, 2008) (admitting survey despite use of universe consisting of past purchasers).

Red Wing also contends that the survey's universe is underinclusive because it was conducted only at gun and knife shows in two states. Red Wing argues that gun and knife show patrons represent only a narrow segment of the relevant market. In addition, Red Wing suggests the survey should have been conducted in states such as California, Florida, Texas, or New York which have larger, more diverse populations. Rocky maintains that Red Wing's arguments go to the weight of the survey evidence, and not its admissibility.

Red Wing's criticisms amount to second-guessing. Red Wing presents no evidence to demonstrate that gun and knife show patrons do not adequately represent likely purchasers of Red Wing's boots. The same is true with the suggestion that the survey should have been conducted in other states. Moreover, to the extent Mantis's choice of venue was deficient, it goes to the weight of the evidence, not its admissibility.

Red Wing next asserts that the universe for V3 is irrelevant because it utilizes a page from a catalog designed for viewing only by retailers, not end consumers. Rocky points out that the wholesale and retail catalog pages are identical. In addition, Rocky maintains that Red Wing's argument confuses the concepts of universe and stimuli.

Rocky is correct that the catalog page is stimuli, and does not even implicate the survey's universe. The Court therefore rejects Red Wing's argument that the use of a catalog page for V3 renders that portion of the survey's universe irrelevant.

For the above reasons, the Court finds that the survey's universe is neither overinclusive or underinclusive. In the alternative, to the extent the survey's universe is either overinclusive or underinclusive, the flaw goes to the weight of the evidence, not its admissibility.

2. Relevance

Red Wing maintains that V1 and V2 are irrelevant because eighty-five to ninety percent of Irish Setter boots are clearly labeled "made in China." Rocky concedes that the results of V1 and V2 cannot be extrapolated to Irish Setter boots with different labeling.

Red Wing's argument amounts to a tacit acknowledgment that ten to fifteen percent of Irish Setter boots are labeled in the same manner as the boot in V1. Accordingly, the Court finds V1 relevant to that ten to fifteen percent of the Irish Setter line.

Red Wing also contends that the V2 stimuli is irrelevant because it uses a "defaced" product that the respondents would never encounter in the marketplace. The V2 boot is the same as V1 except that any reference to "with imported materials" was removed from the boot's tags and labels. As noted above, comparing the results of V1 with V2 measures the effect of the words "with imported materials" on consumers' perceptions of the country of origin. Hence, V2 is relevant because it measures the difference in response, if any, between shoes labeled "made in USA with imported

materials” and “made in USA.”

Red Wing argues the stimuli used in V3 is irrelevant because it contains no designation of manufacturing origin and does no more than test the respondents’ assumptions about Red Wing and/or WORX. Rocky explains that the purpose of using the catalog page as stimuli for V3 was simply to place before respondents the language “Red Wing Shoe Company, Inc.,” “Red Wing Shoes Since 1905,” and “WORX by Red Wing Shoes.”

V3 tests whether consumers believe that Red Wing and WORX brands of footwear are made in the United States. This issue is “of consequence to the determination of the action.” Fed. R. Civ. P. 401. V3 is, therefore, relevant.

Red Wing further asserts that Q3 is irrelevant because it does not test an allegedly false statement and assumes what it seeks to prove – that country of origin is material. Rocky argues that Q3 goes to the heart of this case, and measures whether country of origin is a relevant consideration in consumers’ purchasing decisions.

Q3 tests whether consumers prefer boots that are made in the United States to otherwise indistinguishable boots made overseas. Moreover, the design of Q3 does not force respondents to conclude that country of origin is material because it provides the choices of “no preference” and “no opinion.” Whether consumers prefer boots made in the United States over boots made overseas is a central issue in this case. Q3 is relevant.

For the foregoing reasons, the Court rejects all of Red Wing’s arguments concerning relevance.

3. Market conditions

Red Wing also faults the Mantis survey because it was not conducted in a retail setting, such as a shopping mall. Red Wing suggests the survey should have used a pair of boots, and that respondents should have been given the opportunity to try them on. It maintains that other footwear should have been on hand for comparison, and that a sales staff should have been present to answer questions. Red Wing further contends that V3, which used a single page from a catalog designed for retailers, bears no relationship to real world purchasing conditions.

Relying on Mantis's deposition testimony, Rocky argues that testing for country of origin preference does not require the same degree of replication of marketplace conditions as testing for consumer confusion in an infringement case. (Mantis Dep. At 213-14). In addition, Rocky points out that in V1 and V2 the boot was located on a table. Rocky also notes that respondents were allowed to pick up and examine the boot, and were afforded as much time as they needed to do so. Rocky asserts that the survey therefore adequately approximated market conditions.

The Court is persuaded that the standards for replicating market conditions for a consumer confusion survey in a trademark infringement case cannot be applied wholesale to this false advertising/designation of origin case in which the survey was designed to measure consumer perceptions about country of origin. Given the purposes for which it was designed, the Mantis survey satisfactorily replicates marketplace conditions. In the alternative, to the extent it does not, the flaw goes to the weight to be given the survey evidence rather than its admissibility.

4. Leading, ambiguous, and suggestive questions

Red Wing argues that the questions asked in V1 and V2 are both leading and suggestive because the respondents were shown boots with tags that included the words "made in USA." In this sense, Red Wing contends V1 and V2 shows only that a respondent can read English.

Rocky maintains that Red Wing has failed to present evidence or data to support its assertion. It argues that Red Wing fails to indicate what response the allegedly leading questions were supposed to suggest.

The questions in V1 and V2 are not leading. Nonetheless, the Court agrees with Red Wing that the answer to the first question in V1 and V2 ("Q1") is suggested by the text on the labels and tags of the stimuli boot. Q1 asks the respondent, "Where do you think this product is made?" A boot which is marked "made in USA with imported materials" or "made in USA" suggests that the correct answer to Q1 is the United States. Accordingly, the Court finds that V1 and V2 are suggestive.

Moreover, Red Wing contends V3 is leading and suggestive because its use of the ambiguous "this company" did not permit the respondents to distinguish among Red Wing the company, Red Wing the brand, and the WORX brand. Rocky argues that the use of "this company" in V3 does not suggest any connection between Red Wing and WORX that has not already been suggested by Red Wing, noting Red Wing's use of the phrase "WORX by Red Wing Shoes."

V3 is suggestive. Although Red Wing may have itself intimated the connection between WORX and the Red Wing brand, the extent to which it may have done so is a question of fact for the jury which cannot be determined from V3 alone.

Red Wing further asserts that the entire survey is ambiguous because Mantis failed to define the word “made.” Rocky argues that the word “made” is not ambiguous because the FTC has determined that “made in USA” means that all or virtually all of a product is made in the United States.

The Court has not yet decided whether it will instruct the jury on the FTC’s “all or virtually all” standard for “made in USA.” It strikes the Court that the FTC standard is not so much a legal definition as it is a measurement of what the FTC determined consumers believed “made in USA” meant when the FTC conducted its research more than a decade ago. Furthermore, the Court has already determined that the FTC standard is not binding on the Court or the jury. Thus, for purposes of the trial, the FTC standard is simply evidence of a federal commission’s opinion on the subject, which the jury may give whatever weight, if any, it deems appropriate in light of all of the other evidence in the case. In any event, the Court will make its final ruling on the use of the FTC standard as the basis for a jury instruction prior to charging the jury, but not before the beginning of the trial.

Nevertheless, Red Wing’s argument concerning the lack of a definition for the word “made” misses the mark. Undoubtedly, if the Mantis survey had attempted to define “made,” Red Wing would have asserted the definition was incorrect, since Red Wing has argued from the beginning that the term “made in USA” is subject to varying interpretations. The Mantis survey did not ask respondents what “made in USA” meant to them, so the survey does not provide an answer to that question. That does not, however, render the survey unreliable or inadmissible. The survey is still probative at least to show the difference, if any, between consumers’ perceptions of “made in USA”

and “made in USA of imported materials.”

Lastly, Red Wing argues that Q3 is leading and suffers from demand effects and order bias. Rocky contends that Red Wing’s argument improperly suggests that Q3 forced respondents to choose between a boot “made in the United States” and one “made in another country.” It points out that Q3 also includes the alternatives “I have no preference and would purchase either boot,” and “I don’t know and have no opinion.”

Given that the first answer to Q3 is “I would purchase the boot made in the USA,” the Court tends to agree that Q3 exhibits some degree of order bias. The Court does not view this as a particularly serious flaw, however, and does not render Q3 unreliable. Thus, the flaw goes to the weight of the evidence as opposed to its admissibility.

Based on the above, the Court finds that the Mantis survey was suggestive in certain respects.

B. Admissibility

The Court will proceed to determine whether, in light of its flaws, the Mantis survey and evidence associated with it should be admitted at trial. The Court must determine whether the survey evidence is sufficiently reliable to warrant admission pursuant to Fed. R. Evid. 702 and 703. The Court must also assess whether the survey evidence is probative of any factual issue of consequence to this action. Fed. R. Evid. 401. Finally, the Court must decide whether any probative value the survey evidence has is substantially outweighed by the danger of unfair prejudice or confusion. Fed. R. Evid. 403.

Leelanau is illustrative. There, the court found three significant flaws in the survey. First, the court found that the survey's universe was substantially overbroad. *Leelanau*, 452 F. Supp. 2d at 782-84. In addition, the court concluded that the survey failed to approximate actual market conditions, and was "little more than a memory test." *Id.* at 783-84 (quoting *Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 297 (2d Cir. 1999)). Lastly, the court held that "the entire survey was suggestive." *Id.* at 785. Stating that the case was "close," the court in *Leelanau* ruled that despite "substantial flaws," "the better course is to admit the survey" *Id.* at 785-86. See also *Telemac Cellular Corp. v. Topp Telecom, Inc.*, No. 98-CV-22, 1999 WL 33471891, at *21-22 (N.D. Cal. July, 1, 1999) (survey admitted despite serious questions concerning methodology); *Franklin Resources, Inc. v. Franklin Credit Mgmt. Corp.*, No. 95 CIV. 7686, 1997 WL 543086, at *5-6 (S.D.N.Y. Sept. 4, 1997) (survey admitted notwithstanding significant flaws in survey's universe); but see *Vista Food Exchange, Inc. v. Vistar Corp.*, No. 03-CV-5203DRHWDW, 2005 WL 2371958, at *7 (E.D.N.Y. Sept. 27, 2005) (excluding survey because it did not correctly identify universe, used too small of a sample, failed to replicate market conditions, and failed to use a control product); *Simon Prop. Group L.P. v. mySimon, Inc.*, 104 F. Supp. 2d 1033, 1052 (S.D. Ind. 2000) (excluding survey that failed to replicate market conditions, used highly suggestive and leading questions, and failed to use any form of control).

Here, the Court has found that the survey's universe is not significantly unrepresentative. Moreover, the Court has determined that the survey adequately replicated marketplace conditions given the scope and purpose of the survey in this false advertising/false designation of origin case. The Court has also concluded that

various aspects of the survey are suggestive.

In light of these findings, in contrast to *Leelanau*, this is not a close case. Many of the alleged flaws advanced by Red Wing are not flaws at all. The actual flaws are few, and do not so undermine reliability as to render the survey evidence inadmissible. Rather, as Rocky suggests, the flaws go to the weight of the evidence, not its admissibility. Indeed, the Mantis survey's methodology appears to be significantly more reliable than that of the substantially flawed survey admitted into evidence in *Leelanau*. Accordingly, the Court finds that the survey evidence is sufficiently reliable to meet the requirements of Fed. R. Evid. 702 and 703.

The Court has already rejected Red Wing's specific arguments on the issue of relevance. In sum, the Court finds that the survey evidence is probative, at least to some degree, as to "whether and if so, to what extent relevant consumers believe that the Irish Setter brand and the Red Wing and Worx brands of footwear are made in the United States." Moreover, the survey is relevant to the determination of "consumer choice between two boots that are identical in all respects except country of origin; one made in the USA or one made in another country." The Court concludes that these factual issues are "of consequence to the determination of the action." Fed. R. Evid. 401. Accordingly, the Court holds that the survey evidence meets the relevancy requirement of Fed. R. Evid. 401.

Lastly, the Court must consider whether the probative value of the survey evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Fed. R. Evid. 403. Although the survey evidence may be prejudicial to Red Wing, the Court does not detect any danger of *unfair* prejudice.

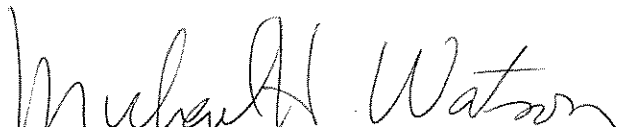
This is especially so given that Red Wing will be afforded an opportunity to challenge the survey evidence when it cross examines Mantis, as well as when it presents the testimony of its own expert.

For these reasons, the Court holds that Rocky may introduce the Mantis survey evidence at trial.

IV. Disposition

Based on the above, the Court **DENIES** Red Wing's motion to exclude the Mantis survey and the evidence associated with it. (Doc. 132).

IT IS SO ORDERED.



MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT