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 8 **UNITED STATES DISTRICT COURT**
 9 **CENTRAL DISTRICT OF CALIFORNIA**

10
 11 DON HENLEY and MIKE CAMPBELL,
 and DANNY KORTCHMAR,

12 Plaintiffs,

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 14 v.

15 CHARLES S. DEVORE and JUSTIN
 HART,

16 Defendants.

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 18 CHARLES S. DEVORE and JUSTIN
 HART,

19 Counterclaimants,

20 v.

21 DON HENLEY, MIKE CAMPBELL and
 ROES 1-10 inclusive,

22 Counter-defendants.
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Case No. SACV09-0481 JVS (RNBx)

**DECLARATION OF SUZANNE B.
 SHU**

1 I, Suzanne B. Shu, declare as follows:

2 1. I am an Assistant Professor of Marketing at the Anderson Graduate School of
3 Management of the University of California, Los Angeles. I hold a Ph.D. in Behavioral
4 Science from the University of Chicago Graduate School of Business. I also received a
5 Master of Business Administration from the University of Chicago, a Master of
6 Engineering from Cornell University, and a Bachelor of Science in Electrical Engineering
7 from Cornell University. I have taught courses on Marketing Strategy and Management,
8 Consumer Behavior, Behavioral Decision Theory, and Managerial Decision Making to
9 students in undergraduate and graduate education programs at UCLA, Southern Methodist
10 University, INSEAD, and University of Chicago. I also have published numerous journal
11 articles, research reports, and book chapters on Consumer Behavior, Marketing Research,
12 Judgment and Decision Making, and other marketing topics, a complete list of which is
13 included in my Curriculum Vitae, which is attached to my report. (The report is attached to
14 this declaration as Exhibit 1.) I have served as an ad-hoc editor for the Journal of Consumer
15 Psychology, Marketing Science, Management Science, Marketing Letters, the Strategic
16 Management Journal, Psychological Science, and the Journal of Consumer Research.

17 2. I have reviewed the expert report of Hal Poret, along with the underlying data
18 he gleaned from his consumer confusion survey. I have overseen many dozens of consumer
19 confusion surveys in my research, and I have reviewed and written some of the key
20 academic literature in the field. I have concluded that Mr. Poret's conclusions are badly
21 flawed, both because his study is flawed and therefore generates flawed data, and because
22 Mr. Poret's draws untenable conclusions from the data he has collected.

23 3. Poret's alleged core finding is that "[c]lose to half of the respondents (48%)
24 who identified Henley indicated that they believed Henley endorsed the video(s), or
25 authorized or approved the use of his music in the video(s)." Plaintiffs' Motion at 24. This
26 statement is patently and provably inaccurate.
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1 4. Poret gave his survey to 572 people. He excluded from his results any answers
2 by respondents who did not identify Don Henley (or the Eagles, though that answer is
3 technically inaccurate) as the performers of the songs in question. This led to the exclusion
4 of the vast majority (about 80%) of the total respondents. Poret then focused his analysis
5 on the remaining 114 respondents. He arrives at his 48% figure—the percentage of people
6 who he asserts believed Henley endorsed the video(s), or authorized or approved the use of
7 his music in the video(s)—by first interpreting and then aggregating responses from three
8 different questions or sets of questions. The first set, questions 1 through 4, are based
9 around an open-ended question designed to identify which respondents believe Henley
10 endorsed or approved Defendants’ videos. The second set, questions 5 through 8, are based
11 around an open-ended question designed to identify which respondents believe Henley
12 permitted or authorized the videos. And the final set, question 9, is a close-ended question
13 designed to determine whether respondents believe Henley gave permission or approval for
14 the use of the music in Defendants’ videos.

15 5. It is important to understand that the three sets of questions are not entitled to
16 equal weight. Poret conceded that if no respondents had identified Henley in response to
17 the two sets of open ended questions, the survey results would counsel strongly against a
18 conclusion that the respondents were confused as to Henley’s endorsement, sponsorship or
19 approval. In Poret’s words: “[T]he open-ended questions are integral to my evaluation of
20 what’s going on in the analysis ... [b]ecause the best indication of what people truly believe
21 is what they give in response to these open-ended questions before anything specific is
22 suggested to them. And there’s a long, clear tradition of interpreting responses to surveys
23 like this. And if nobody is mentioning an idea or a specific type of confusion on their own,
24 then you would not accept that there’s a meaningful amount of confusion going on based
25 just on a question like Question 9.” Supp. Arledge Decl., Exh. B at 185:19 to 187:17.

26 6. The open-ended questions do not support Poret’s conclusions. In response to
27 the first open-ended set, only about 3% of the respondents said that they believed Henley
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1 endorsed or approved Defendants' videos. This is, of course, a low percentage, as Poret
2 himself admits. Indeed, one of the ways he tested for "noise" in the survey was to measure
3 how many people in response to the first open-ended set of questions identified Barack
4 Obama, Al Gore, and others. His theory was that "[a]s the videos are critical of these
5 figures, one would expect only a very low percentage of viewers to believe that any of these
6 figures endorsed or gave authorization for any aspect of the videos." Poret's Appendix C.
7 Thus, if a small percentage of respondents named figures like Barack Obama and Al Gore,
8 the results would show "that the survey design and questions caused only a minimal
9 tendency for respondents to guess or to express beliefs that would be unlikely to be held by
10 real world viewers." *Id.* What Poret found is that about 3% of respondents named Barack
11 Obama as someone who endorsed or approved Defendants' videos. For Poret, this showed
12 very little evidence of noise in the survey. He described this three percent response rate as
13 "a very low response rate," "within the statistical error rate" of seven to eight percent, and
14 therefore "basically equivalent to zero." Supp. Arledge Decl., Exh. B at 47:21 to 48:7 and
15 50:11 to 52:8.

16 7. Based on Poret's own testimony, then, the percentage of people who responded
17 that Henley endorsed or approved Defendants' videos in response to the first open-ended set
18 of questions – about 3% – was "a very low response rate," "within the statistical error rate,"
19 and therefore "basically equivalent to zero." Poret is right. A response rate in which 3% of
20 respondents identify Don Henley is sufficiently small that an expert cannot conclude that
21 viewers of the videos are likely confused as to Henley's involvement in, endorsement, or
22 permission for the videos.

23 8. Because question nine is insufficient to establish confusion, and because the
24 first open-ended set does not support a conclusion that viewers are confused as to Henley's
25 endorsement, Poret's conclusion must rest on the second open-ended set, questions 5
26 through 8. Question 5 asks respondents whether they believe that "the politician who put
27 out the videos got permission or authorization for any particular aspect or aspects of either
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1 or both of the videos.” Poret report at 7. Those respondents who said “yes”—a decided
 2 minority—were asked in question 7b, “Who do you think gave permission or
 3 authorization...?” *Id.* at 8. Poret concludes that 20 people identified Henley in response to
 4 this second open-ended set. (Poret report at 18, Appendix D). Poret’s conclusion is
 5 provably false.

6 9. Below is a chart showing the answers to Question 7b given by the 20
 7 respondents who Poret claims “answered that Henley gave authorization for his music to be
 8 used in the video(s)” (Poret Report at 18):
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10 Respondent	11 Code Number	Answer(s) to question 7b
12 11	25	don’t know
13 50	221	1. I would believe that it would have to be the 14 songwriter and maybe the record company. 15 2. The news agency or photographer agency or 16 photographer who owns the rights to the pictures.
17 85	350	Don Henley or his recording company
18 96	417	[No response]
19 97	418	the person who owns the song
20 110	468	whoever holds the copyright...writers I assume
21 126	595	The music artists
22 162	885	1. him 23 2. the producer and writer
24 196	1025	The song writer/performer
25 205	1063	1. Both parties (video clips/songs) 26 2. The recording company or current owner to the 27 rights of those songs 28

1	265	1342	record company/whoever owns the rights
2	285	1718	[No Response]
3	291	1741	1. whoever handles the royalties for the artist
4			2. don't know
5	391	2290	1. I am not sure if Don Henly owns the rights or not
6			to his song.
7			2. already answered
8			3. already answered
9	417	2458	1. writer of the song or the person that holds the
10			music rights to it
11			2. photographer/photographer's employer
12	424	2487	1. Composer
13			2. Owner
14	459	2673	The person/people owning the music.
15	488	2782	Who every controls the rights for that particular song
16	552	3235	The artist who made the song or whoever has the
17			rights to the music
18	556	3254	1. obama
19			2. gore
20			3. The original groups that recorded the music

22 10. What is striking about the list is that only two of the respondents actually
23 identified Henley. Needless to say, the percentage of people who actually identified Henley
24 in response to question 7b (two) is, in Poret's own words, "very low," "within the statistical
25 error rate," and "basically equivalent to zero." And even including the people who gave
26 responses such as "the songwriter" or "performer" still results in a small percentage of the
27 total respondents in this pool. So how does Poret arrive at his conclusion that all 20 of the
28 people in the above chart identified Henley as someone who endorsed or gave authorization

1 for the videos? By ignoring the actual results and “interpreting” the responses in a way
2 favorable to Henley.

3 11. For example, respondent No. 97 (who was assigned code number 418) is one
4 of the people Poret identifies as believing Henley endorsed or gave authorization for the
5 videos. That respondent did not identify Henley in response to the first open-ended set. He
6 also did not identify Henley in response to the second open-ended set; that is, in response to
7 question 7b. But this is problematic. The respondent clearly knows Henley’s name,
8 because the respondent identifies Henley as the artist “whose music was used in the videos”
9 in response to question 10. But when asked to identify who they believe gave permission or
10 authorization for the videos, respondent No. 97 said, “The person who owns the song.”
11 This response seems to imply that the respondent is unsure whether Henley was involved or
12 not, for if the respondent believed Henley gave permission or authorization, he or she knew
13 Henley’s name and could have identified him clearly. The response, then, betrays that the
14 person is unsure who granted permission. In fact, Poret seems to admit as much in his
15 deposition: “We don’t know who they think is actually the one giving the authorization....”
16 Poret Deposition at 99:21-22. But despite the fact that the respondent did not identify
17 Henley as a person who gave permission or authorization for the videos, and despite the fact
18 that Poret must concede that nobody knows who the respondent believes gave permission or
19 authorization, Poret still counts this particular respondent (No. 97 or code number 418) as a
20 respondent who “believed Henley approved or authorized the use of his music in the
21 videos.” Poret Decl., ¶ 7.

22 12. This seems to be a recurring pattern with Poret. Having not received actual
23 responses helpful to his position, he simply asserts that unfavorable answers actually
24 support the conclusion that most helps Henley. For another example, see Poret’s deposition
25 at 89:24 to 96:15 (Poret again concluding that the respondent answered that Henley
26 approved or authorized the use of the music in Defendants’ videos even though the
27 respondent actually answered that he didn’t know who gave permission or authorization).
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1 13. Based on the data collected in Poret's survey, it is impossible to conclude that
2 viewers of the videos will be confused as to Henley's endorsement or sponsorship of the
3 videos.

4 14. In addition to flaws in interpreting the data, I believe Poret's survey suffered
5 from methodological errors that tainted the data he received. These arguments are laid out
6 at length in my report (Exhibit 1), so I simply incorporate my report into this declaration.

7 I declare under penalty of perjury under the laws of the United States that the
8 foregoing is true and correct. Executed this 26 day of April, 2010, at
9 Los Angeles, California.

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12 Suzanne B. Shu
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