

1 MORRISON & FOERSTER LLP  
 JACQUELINE C. CHARLESWORTH (*pro hac vice*)  
 2 JCharlesworth@mofocom  
 CRAIG B. WHITNEY (CA SBN 217673)  
 3 CWhitney@mofocom  
 TANIA MAGOON (*pro hac vice*)  
 4 TMagoon@mofocom  
 1290 Avenue of the Americas  
 5 New York, New York 10104  
 Telephone: 212.468.8000  
 6 Facsimile: 212.468.7900

7 PAUL GOLDSTEIN (CA SBN 79613)  
 PGoldstein@mofocom  
 8 559 Nathan Abbott Way  
 Stanford, California 94305-8610  
 9 Telephone: 650.723.0313  
 Facsimile: 650.327.0811

10 Attorneys for Plaintiffs  
 11 DON HENLEY, MIKE CAMPBELL and DANNY  
 KORTCHMAR

12  
 13 **UNITED STATES DISTRICT COURT**  
 14 **CENTRAL DISTRICT OF CALIFORNIA**  
 15

16 DON HENLEY, MIKE CAMPBELL  
 17 and DANNY KORTCHMAR,

Case No. SACV09-0481 JVS (RNBx)

18 Plaintiffs,

**SUPPLEMENTAL DECLARATION OF  
 HAL PORET IN SUPPORT OF  
 PLAINTIFFS' MOTION FOR PARTIAL  
 SUMMARY JUDGMENT**

19 v.

Date: June 1, 2010  
 Time: 10:00 A.M.  
 Ctrm: Hon. James V. Selna

21 CHARLES S. DEVORE and  
 JUSTIN HART,

22 Defendants.

1 I, Hal Poret, pursuant to 28 U.S.C. § 1746, hereby declare:

2 1. This declaration is being submitted in further support of Plaintiffs' motion  
3 for partial summary judgment. I have personal knowledge of the following facts and, if  
4 called upon as a witness, could and would competently testify about the matters stated  
5 herein.

6 2. I have personally designed, supervised and implemented nearly 300  
7 consumer surveys concerning consumer perception, opinion and behavior. Over 150 of  
8 these surveys have concerned consumer perception relevant to the types of issues  
9 regulated by the Lanham Act. I have also testified as an expert witness regarding the  
10 results of these surveys on numerous occasions. My surveys and expert testimony have  
11 always been found admissible in court.

12 3. The survey I designed for this case was based on the *Eveready* survey  
13 format, which, in my experience, is one of the most common and highly regarded survey  
14 techniques for testing likelihood of confusion. The *Eveready* format involves exposing  
15 respondents to the allegedly infringing material and asking questions to see whether the  
16 respondent identifies or references the plaintiff in connection with the material. The key  
17 feature of the *Eveready* format is that the plaintiff's name is never mentioned to survey  
18 respondents; respondents must think of the plaintiff of their own. Accordingly,  
19 respondents can only indicate confusion if they think of the plaintiff on their own when  
20 viewing the allegedly infringing material. When applied to a false endorsement claim,  
21 an *Eveready* survey asks a series of open-ended questions designed to determine whether  
22 respondents believe the defendant's material (in this case, Defendants' Hope and Tax  
23 Videos) was approved by or affiliated with the plaintiff. The *Eveready* approach  
24 commonly asks open-ended questions, followed by probes and/or closed-ended questions  
25 to clarify or further understand respondents' perceptions.

26 4. My survey in this case followed this *Eveready* format. It consisted of three  
27 parts: screening questions, open-ended questions and a closed-ended question. As I  
28 explained in my previous declaration in support of Plaintiffs' motion, the screening

1 questions were designed to identify prospective viewers of the Defendants' videos who  
2 have an understanding that Don Henley is the artist whose music is used in the videos.  
3 This was necessary because surveying individuals who do not understand the music to be  
4 Henley's would not reveal whether or not the videos are confusing or misleading. I  
5 included an analysis of the responses to the open-ended and closed-ended questions in  
6 my previous declaration, and a more detailed analysis is set forth in my expert report  
7 attached as Exhibit 1 to my previous declaration.

8 5. I have reviewed the portion of Defendants' Memorandum in Opposition to  
9 Plaintiffs' Motion for Partial Summary Judgment ("Def. Op.") discussing my survey and  
10 report, as well as the Declaration of Suzanne B. Shu ("Shu Decl."). I believe the analysis  
11 of the survey results included in those papers is inaccurate and misleading.

12 6. Defendants claim that "3% of the respondents said that they believed Henley  
13 endorsed or approved Defendants' videos." (Def. Op. at 21; Shu Decl. ¶ 6.) This figure  
14 is incorrect. It is unclear how Defendants determined that "3% of the respondents said  
15 that they believed Henley endorsed or approved Defendants' videos," but it could not  
16 have been based on the results of my survey, which does not support such a figure. The  
17 correct figure based on the survey data is 23%.

18 7. The portions of testimony quoted in Defendants' opposition brief (and Shu's  
19 declaration) regarding 3% being a "low response rate" were not in reference to the  
20 number of respondents who named Don Henley as a person who endorsed or approved  
21 Defendants' videos. (In addition, certain statements falsely attributed to me were  
22 actually statements made by Defendants' counsel at my deposition.) Rather, the quoted  
23 testimony references the 3% of respondents who identified *Barack Obama* as a person  
24 who endorsed or approved the Hope video. I cited this 3% figure to gauge the level of  
25 "noise" in the survey, which, as I stated in my report, is the tendency of the survey to  
26 cause respondents to name Henley for reasons other than a genuine belief that he  
27 endorsed the videos or authorized the use of his music in the videos. When compared to  
28 the 23% of respondents who named Henley in response to open-ended questions (not

1 3%, as Defendants falsely state), the 3% of respondents who named Obama represents a  
2 small percentage, and thus I was able properly to conclude that the level of survey noise  
3 was minimal.

4 8. Defendants also include a chart in their brief that purports to list the answers  
5 to question 7b in the survey, which is just one of nine open-ended questions in the  
6 survey. Looking at respondents' answers to question 7b alone, Defendants claim that 20  
7 respondents whom I included as part of the 55 respondents who were confused as to  
8 Henley's association with Defendants' videos were improperly counted. This analysis is  
9 simply wrong. It is inappropriate to focus on only a single answer and to ignore the other  
10 answers where respondents expressed relevant opinions.

11 9. By isolating the responses to a single question – and then claiming that the  
12 answer to that one question does not support my conclusion because the respondent did  
13 not name Henley – Defendants ignore the fact that all of these respondents identified  
14 Henley in a *different* answer. For example, Defendants argue that respondent 265 in  
15 Defendants' chart (which was actually respondent number 1342 in the survey) should not  
16 have been considered as mistakenly believing that Henley gave permission or  
17 authorization for the use of his music in Defendants' videos based on the respondent's  
18 answer to Question 7b. (Defs. Op. at 22-23.) Defendants, however, ignore this  
19 respondent's answer to a prior question stating his belief that permission or authorization  
20 was given for the music in the Hope Video "because he [DeVore] used the song Boys of  
21 Summer by Don Henley in this video." Defendants omitted these explicit references to  
22 Henley from their chart.

23 10. Similarly, respondent 162 in Defendants' chart (respondent number 885 in  
24 the survey) stated that she believed permission or authorization was given for All She  
25 Wants to Do is Dance (which she identified as a Henley song) because "it was for his  
26 original song that they changed the lyrics ... they are using the song, just a different mix  
27 and words." When asked who provided permission or authorization to use Henley's  
28 song, the respondent answered, "him." Defendants include only the response "him" in

1 their chart and conclude that this respondent did not identify Henley. But this is because  
2 Defendants deleted the portion of her response where she expressly named “don henleyt  
3 [sic]” and the portion of her response where she explained that it was *his* original song  
4 used in the video.

5 11. Even in the example specifically called out by Defendants in their brief,  
6 respondent 97 in Defendants’ chart (number 418 in the survey) stated in response to  
7 open-ended questioning that permission or authorization was obtained by DeVore for  
8 “the copyrighted music” from “the person who owns the song.” When later asked to  
9 identify the artist whose song was used, the respondent stated, “don henly [sic].”


10 12. To further demonstrate the misleading nature of Defendants’ critique, I  
11 attached as Exhibit 1 a chart that shows *all* of the relevant responses from the 26  
12 respondents (23% of the total) who evidenced confusion in response to open-ended  
13 questions. Because Defendants’ critique in their brief is focused on the open-ended  
14 questions, the chart does not include the additional 29 respondents (25% of the total)  
15 whose response to the closed-ended question in the survey indicated confusion.

16 13. In my professional opinion in designing and analyzing hundreds of surveys  
17 on consumer perception and opinion, each of the respondents listed in the chart  
18 evidenced actual confusion that Henley endorsed the Defendants video(s) or authorized  
19 the use of his music in the video(s).

20 14. In paragraph 14 of Shu’s declaration, she states that she believes my survey  
21 “suffered from methodological errors that tainted the data [I] received.” I addressed  
22 these supposed criticisms at my deposition, and demonstrated why they are unfounded. I  
23 therefore incorporate that portion of my deposition testimony, attached hereto as Exhibit  
24 2, into this declaration.

1 I declare under penalty of perjury under the laws of the United States of America  
2 that the foregoing is true and correct.

3 Executed on this 17<sup>th</sup> day of May, 2010.

4  
5   
6 \_\_\_\_\_

7 Hal Poret  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28