

Exhibit 2

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IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ORIGINAL

DON HENLEY and MICHAEL CAMPBELL,)
)
Plaintiffs,)

) No. SACV09-0481 JVS (RNBx)

-against-)

CHARLES S. DEVORE and JUSTIN HART,)
)
Defendants.)
-----)

1290 Avenue of the Americas
New York, New York
March 29, 2010
2:10 p.m.

DEPOSITION of HAL PORET, taken by
the Defendants, held at the aforementioned
time and place, before Sherri Flagg, a
Registered Professional Reporter,
Certified LiveNote Reporter, and Notary
Public.

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- H. PORET -

discuss with regard to Suzanne Shu's report or deposition?

A. Well, after I first saw it, we had a conversation on the phone where he asked me what my reaction to the things she said in her report were.

Q. What did you tell him?

A. That's -- I don't know how to answer that. I mean, there's a lot of things I told him. I could tell you and it would take a long, long time.

Q. Let's summarize it. I don't want it to take a long, long time but I do want you to give me the gist of what you told Mr. Whitney.

A. It's a bit hard to do as a narrative. There's a lot of topics and, I don't know, if you'd like me to go through her report, I could maybe do it that way. But I don't know how to --

Q. That sounds like a great idea. Let's grab her report and you can go through it and tell me what you told Mr. Whitney.

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- H. PORET -

A. Where should we start?

Q. Wherever you want to start.

A. Well, let's -- maybe it makes sense to start on page 4 where she starts "Bases of Opinions."

Q. Okay. What did you tell Mr. Whitney about this part of the report where she says "Bases of Opinions"?

A. I'm trying to get to where she first really starts trying to explain any criticisms.

(Examining document.)

And I think the only thing of substance on this first page is that I pointed out that she was incorrect at the bottom of page 4 that we didn't ask whether participants had seen the videos, because we had.

Q. Okay.

A. Then she does a -- she makes criticisms about the universe which have several features to them, one seeming to do with, you know, thinking people outside of California shouldn't have been included;

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- H. PORET -

one having to do with not having focused in on people who have a particular interest in the Senate election or, you know, an interest in DeVore; people who are campaign donors; things like that.

Q. Why is she wrong about that?

A. About the point of the specific interest in DeVore?

Q. No. Why is she wrong about her criticisms when it comes to not focusing on people inside California, not focusing on people who have particular interest in DeVore or the Senate campaign, you know, the other things that you just mentioned that she harped on in the report? Why is she wrong?

A. There's a lot of reasons. One obviously is that these were available over the Internet so they're available to be seen by people in any state and, in fact, in any country. So it's certainly not the case that anything could be limited to California when people could see these anywhere.

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- H. PORET -

You know, the second point conceptually is these were videos that weren't really specific to California even in their substance or topic of interest. I mean, one of the videos is largely an attack on Obama and other figures of national or international interest like Gore. And the other is an attack on Barbara Boxer and generally on taxation.

So generally, in terms of the substance, it's pretty obvious that these are political topics that are not targeted to California; they're of national, if not international, interest. I think the data is -- the data that I've been made aware of shows that these videos were watched around the world and they certainly would have been watched in a lot of states.

Q. What data were you made aware of in that regard?

A. Data from either Google or YouTube on hits that the survey had. And it was watched in many different countries around the world. I was made aware of data

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suggesting that I think the tax video was the number three rising news and politics video on YouTube. I think that video hit something like number ten in the world in popularity based on -- I forget what that was based on.

But the evidence was clearly that the videos were watched all over the place, and particularly I think the tax one was even described by Mr. DeVore as having gone viral; in other words, it proliferated wildly all over the place. So clearly no basis for limiting it to California.

The survey results also bore that out because people in the survey who had seen the video were mostly not from California. So I think that's clear, that there's no basis for limiting it to California.

In terms of limiting it to people who are Republicans or of a particular interest in DeVore of the California Senate race, I mean, again, the relevant universe are prospective watchers of a video like

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this. And videos that go viral are, by definition, not just targeted to or watched by some core niche like she's describing. They are widely watched, they're distributed, they're passed around by e-mail and anybody who is -- would watch a video like this is a prospective viewer.

So you would be excluding probably most of the relevant universe by limiting it to who I think she would consider core Republicans or people with a particular interest in DeVore. You know, a video does not get to number ten in the world or the number three rising video on YouTube by being watched by this little core niche of people who have an interest in the California Senate race.

She also makes a criticism about that this should have been targeted specifically to people who say they watch videos on YouTube or Hipcast where the videos are known to have been posted.

And I think that that is incorrect for several reasons, one of which

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2 is the fact that the analysis in this case
3 is obviously not just about what has
4 happened already but about what is going to
5 happen in the future.

6 Q. Why is that the analysis in this
7 case?

8 A. Because the Plaintiff is asking
9 the Court for an injunction to stop
10 Mr. DeVore from using videos like this or
11 posting these videos again, and Mr. DeVore
12 clearly is interested in posting these
13 videos again and has expressed every
14 intention to do that, if not post more of
15 them.

16 So this case is -- certainly one
17 aspect of this case is about does
18 Mr. DeVore have the right to continue to do
19 this. And if he wins this case, he's going
20 to -- he has the ability to go post these
21 videos and the assumption has to be that he
22 will do that.

23 So a major part of the analysis
24 here, as it is in most Lanham Act cases, is
25 likelihood of future confusion. So we are

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trying to determine should Mr. DeVore be enjoined from doing this because if he does it, he will create more confusion and false association.

And that is one of the pieces of this analysis that Ms. Shu seems to be very unaware of in saying you just need to measure something that went on in the past. And that is very contrary to the general approach to a Lanham Act analysis. I'm not saying the past is irrelevant, it is relevant. But certainly a primary focus of a Lanham Act analysis and a Lanham Act survey is: Is there going to be future confusion or mistake?

And that is the reason that the universe is typically accepted to be prospective purchasers, not just past purchasers and users. And that is why the focus is largely on is confusion going to occur, and that's a lot of what you're simulating.

So one reason that she is wrong that you should limit a survey like this to

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YouTube users, for example, is that we have no idea where Mr. DeVore is going to post these if he is allowed to continue to do this, if he wins this case and this is found to be noninfringing. He can post them wherever he wants.

To focus just on people who watch YouTube is ignoring the whole future analysis and excluding anybody who might see it in some other way that he's going to do it.

Q. Okay.

A. The second point is that even if you did want to look back on the past, one clearly does not have to be what you would call an active YouTube user or fan to come across a video like this. And that is contrary to the whole nature of videos like this, videos that go viral which get spread by word of mouth and buzz and people, e-mail links around and people can read about them on news sites and a variety of places.

So even looking just on the past,

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to try to say you can only be in the study if you actively watch YouTube is going to exclude many potential viewers of the video who just are people who, you know, watch videos occasionally, whether it's on YouTube or not. But if somebody sent them a link with a YouTube link to this video, they would watch it. So it's -- you know, it's wrong for that reason as well.

Q. Okay. In addition to her criticisms of your survey for not I guess honing in on the right people, do you remember anything else she criticized you about that you discussed with Mr. Whitney?

A. Yes. Let me just continue going through this.

(Examining document.)

And I do want to say that, you know, what I've said so far is not necessarily a comprehensive account of all my responses to this universe question, but I've certainly hit some of the key ones.

My -- yeah, well, in paragraph 10 she gets to another criticism which is she

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- H. PORET -

is critical of the Cell 3 in which respondents saw both videos and she says that that was inappropriate.

Q. Why is she wrong?

A. Again, for several reasons, the first one being the same as we just discussed for the universe which is that she is entirely ignoring one of the main parts of the analysis here which is should Mr. DeVore be allowed to continue this conduct or should he be enjoined.

And I think if he is allowed to continue posting videos like this, he's given every indication that he will make both of these videos available together at the same time, if not along with others. His own website, he posts many videos at the same time. He certainly went all out in an attempt to get these videos up wherever he could. He's already encouraged other people to try to make other Henley videos, and he's already mentioned that he's interested in making more Henley videos.

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So I would think you would have to expect that if he is allowed to do this, that these videos will go up together, they'll be available together probably in multiple places. So probably the most likely scenario is that the two videos will be available to be watched together. So that's the first level of response.

Q. If part of what you were trying to do is figure out the possibility of future confusion, assuming Mr. DeVore is able to put these videos up again, why would you not show the video where there was a disclaimer at the beginning?

A. Well, partly because these were the two videos that I was asked to survey. But I think --

Q. Why weren't you asked to survey the other one?

A. Well, I'm assuming that Mr. DeVore's intent obviously was to do these -- make these videos and present them in the form he originally created them in. He only created this other one in response

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to being sued, so I think it seems pretty likely that if he is allowed to continue on with his intent to make and post videos like this, that he's going to post ones that are just a music video and do not have these disclaimers on them.

Q. Okay. So that's the logic that went into not showing the one with the disclaimer in your survey?

A. That's my assumption, you know, for why it makes sense to test.

Q. But you were actually told to test the ones without the disclaimer, right? That wasn't a decision you made; you were instructed to do the survey with regard to the two videos without the disclaimer, right?

A. I was asked to test those, yeah. I would say that was the scope of the assignment.

Q. Okay. All right. You were telling me all the reasons why Ms. Shu was wrong to say that you erred in showing both videos at the same time. Have we completed

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all that or are there additional reasons why she's wrong?

A. No, there's additional reasons.

Q. What are they?

A. That even to the extent that you were looking back at the past, it's my understanding that these videos, first of all, were available at the same time, that they overlapped at least a little bit from the final stage of when "The Hope" video was up at least on Hipcast or on Mr. DeVore's own website and when the tax video went up. So it certainly was possible that both of these videos were available at the same time.

But I think even more importantly, from a survey perspective, these videos were both available in very close proximity. Even if people would have seen them a week apart or a couple of days apart, they still were seeing them in close proximity. And it is very common for surveys to simulate sequential exposures to things which in the survey occur only a

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minute or a couple of minutes apart but in real life occur a little bit further apart.

For example, a very common form of likelihood of confusion survey shows a sequence of products or marks where people are asked: "Do you think any of these are from the same source or related to each other?" And it's simulating in the real world somebody coming into contact with one brand and then subsequently coming into contact with the Defendant's mark. And all the time surveys are done where what your simulating is sequential exposure to things that in the real world would happen more than a couple of days or a week apart.

So even if it is the case that people in the real world would have seen the videos a week apart or a couple of days apart, the fact that they're seeing them closer together than that in the survey does not undermine the survey. You're still simulating a very valid, real-world phenomenon, which is that people could have seen these two in reasonably close

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proximity.

And when she makes the point that people in the survey who saw two videos would be more likely to notice that Don Henley music was in both of them and to think that that was significant, that is a reflection of a real-world condition, that people in the real world who see more than one video that has Don Henley music are going to be likely to notice that if even they're seeing them a couple of days apart or a week apart instead of a minute apart.

So it's not a flaw in the survey; it's simulating a real-world phenomenon.

Q. On her paragraph 11 she seemed to criticize your survey for not including appropriate mechanisms to control for guessing the purpose of the survey or the identity of the survey sponsor. Do you agree with that?

A. No.

Q. Why is she wrong about that?

A. Well, for a number of reasons. First of all, this survey that I did is a

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variation of a very well accepted type of survey format which is called an Eveready survey. It's the most common or accepted or if not -- or one of the two most common, well-accepted surveys. And in that survey you expose respondents to only the Defendant's conduct, not to other random instances of conduct.

So what she is suggesting is -- contradicts what I consider, you know, basically a 30- to 40-year track record of what you do in this type of survey.

As a matter of substance, I think she's wrong because I mean, first of all, she's saying -- suggesting that people might figure that DeVore is the sponsor of the survey. And I don't see in any way how somebody thinking that DeVore is the sponsor of the survey or realizing that this is relevant to DeVore could bias them toward naming Henley in any way. It's an illogical criticism.

I mean, you can't explain away people having said I think Henley endorsed

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this by saying people realized DeVore was the sponsor. That makes no sense. So it's not -- it's not a criticism of a survey, it's just -- I don't know what to call it.

Q. Okay. On No. 12 she says that your survey suffers from a series of poorly structured questions that are likely to lead respondents into specific responses due to demand affects. Would you agree with that?

A. No.

Q. Why not?

A. Again, these questions tracked very standard questions that have been asked probably thousands of times in this survey format and have been repeatedly endorsed as appropriate questions by courts, commentators, other experts on this topic.

Substantively, none of these questions she's talking about mention the music or hint at the music in any way at all. So there's nothing about these questions that would lead somebody to

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mention Henley or the music. They would have to completely think of that on their own.

And finally I would just go back to what we talked about before, that the survey measured the extent to which there were demand effects because we saw the extent to which it -- you know, what she's saying here is these would lead people to give specific responses due to demand effects.

Well, we saw that, the tendency to give specific responses due to demand affects is in the 1 to 3 percent range. So this is just a theoretical criticism. It's invalid once you look at the data and see what actually happened.

You know, at the end of this paragraph 12, she also says: "Survey respondents may attempt to list all possible aspects of the video that could require approval rather than only those that they actually believed were approved." And she goes on a lot about this in her

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deposition about how people were supposedly led to try to name everything they could think of to try to please the interviewer.

And, again, this is an academic criticism that anybody who bothered to actually look at the results would see as false because, first of all, of these 26 people that mention Henley, as I mentioned before, 24 of them mentioned it the very first comment that they made.

So it clearly was not the case that people were just trying to list whatever they could think of and eventually came up with the music. That's just flatly not true.

Secondly, of the 572 people in the survey, there were only 32 people who even gave a second response when asked what aspect of the video were approved, which is about 5 percent. So only 5 percent of people in the whole survey even gave a second answer and 1 percent gave a third answer and less than 1 percent gave anything more than that.

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So it's just crystal clear in the data that people were not listing everything they could think of and not trying to please the interviewer by coming up with lots of factors, not to mention that there is no interviewer. But, you know, it's very easy to just take general principles and make a random criticism out of it, but if you actually look at the data, it's clear that none of that is valid as applied to this survey.

Q. We talked quite a bit about demand effects. Let me skip down to something that you haven't covered if there is, in fact, something like that.

A. The only other thing I would respond about demand effects as well, not so much based on this, but in her deposition she talked at length about this desire to please the interviewer or the sponsor of the survey. And while I agree with her that this is an issue to be considered and that there is quite a body of research on this in general, she is

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taking a very academic view of this which, you know, is severely overblown in this context.

Somebody who does research in the setting of a university, I can understand why they would view things that way. They're largely doing surveys where undergrads are filling out surveys that are commissioned by grad students and professors. And in the context of an undergrad who's doing research that's obviously University-sponsored and is maybe being interviewed by a grad student or a professor and either way they know that's who is getting this, certainly she is operating in a world where those effects are at their maximum.

An undergrad's desire to look smarter, come up with good answers to please the sponsor of University-sponsored research is quite strong.

It's not nearly as strong in commercial market research. You know, the survey respondent's desire to please an

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interviewer who stops them in a mall or the sponsor of some commercial research is not the same. It's not to say it doesn't exist at all, but it's not nearly the same.

And taking a step to the Internet survey where there's no interviewer at all and people who do Internet surveys are a part of Internet panels who fairly regularly get invited to do surveys, if anything, the battle that that industry fights is getting people to pay enough attention to surveys and give sufficient answers.

So her criticisms, as applied to a commercial Internet study, are severely overblown. People who are taking these surveys because they're part of an Internet panel and got invited are not sitting there racking their brains trying to come up with great answers to give the interviewer like an undergraduate might be if they are doing some University-sponsored survey.

She -- I was just going to move on in order, but if you want to ask

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2 questions.

3 Q. Go ahead, what was the next
4 criticism you were going to address?

5 A. Well, she says in paragraph 14
6 that the questions don't make a distinction
7 between endorsement of the message and
8 approval of the musical content. And my
9 only response to that is that I'm aware of
10 that but it doesn't matter if somebody
11 thinks Don Henley endorsed some message or
12 if they associate Henley with DeVore in the
13 video because his music was used in it.
14 Either way it qualifies as having misled
15 the consumer as to an association between
16 Henley and DeVore. So I don't think that
17 distinction needs to be made.

18 Q. Okay.

19 A. In No. 15 she is criticizing the
20 use of the base of 114 respondents to do
21 the analysis, but in her deposition she
22 admitted that that is not really a
23 criticism. So I don't think I need to
24 really respond to that.

25 I mean, I think we've already

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talked about why I based it on the 114.
And she acknowledged in her deposition that
that is a fair thing to do once you're
focusing on what the point of the survey
is.

I think we've covered -- I'm
trying to think what we haven't covered.

Q. Any criticisms she leveled in her
deposition that maybe we didn't talk about
in going through the report that you can
remember?

A. Well, she -- I know in her
deposition that she touched more on the
topic of there should have been a control
group to measure noise.

Q. Right. Why didn't you use a
control group to measure noise?

A. Because frankly I thought that
the alternative hypothesis that would be
ruled out with a control group was pretty
absurd. She mentions this.

In other words, you have the 23
percent of people who mentioned Henley and
the music. And the alternative theory

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C E R T I F I C A T I O N

I, Sherri Flagg, a Registered Professional Reporter, Certified LiveNote Reporter, and a Notary Public, do hereby certify that the foregoing witness, HAL PORET, was duly sworn on the date indicated and that the foregoing is a true and accurate transcription of my stenographic notes.

I further certify that I am not employed by nor related to any party to this action.



Sherri Flagg, RPR

ERRATA SHEET

Henley v. DeVore, Case No. SACV 09-0481 JVS (RNBx)

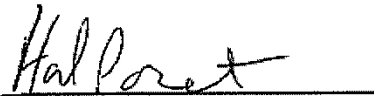
Changes to Deposition Transcript of Hal Poret
Taken on March 29, 2010

Page	Line	Correction From	Correction To	Reason
8	24	be a prospective viewer of the study, you	be a prospective viewer of the video, you	To clarify the record
24	11-14	question for have you watched a video on the Internet containing any of this content, and then there was also a question in the next 12 months are you likely to.	question for "have you watched a video on the Internet containing any of this content," and then there was also a question "in the next 12 months are you likely to."	To clarify the record
26	15	to how likely they would [verbatim] in real	to how likely they would be in real	Transcription error
31	13	it depends what the failure and	it depends what the failures of	Transcription error
64	25	and the percentage for these other	and the percentage for these other individuals	Transcription error
77	13	it has a high likelihood of confusing	it has a high likelihood of confusion	Transcription error
129	6	that is listed as a piece of paper so...	that is listed on a piece of paper so...	Transcription error
131	8	and seems to be no experience either in	and seems to have no experience either in	Transcription error

Page	Line	Correction From	Correction To	Reason
134	4-5	disallow your testimony because of a doubt bear (ph) challenge?	disallow your testimony because of a Daubert challenge?	Understood the question to be in the corrected form
141	18	I spoke to Jacquelyn Charlesworth	I spoke to Jacqueline Charlesworth	Spelling error
150	23	YouTube on hits that the survey had.	YouTube on hits that the video had.	To clarify the record
161	13	the time surveys are done where what your	the time surveys are done where what you're	Spelling error

I, HAL PORET, do hereby declare under penalty of perjury that I have read the transcript of my deposition taken on March 29, 2010; that I have certain corrections thereto as noted above; and that my testimony as contained in such transcript, as so corrected, is true and correct.

Executed this 5th day of April, 2010, at New York, NY.



Hal Poret