

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION  
NO. 5:07-cv-00347-D

LULU ENTERPRISES, INC.,

Plaintiff,

vs.

HULU, LLC, *et al.*,

Defendants.

**DEFENDANT HULU, LLC'S  
RESPONSE IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR LEAVE  
TO FILE DECLARATION OF  
KENT VAN LIERE**

Defendant, Hulu, LLC ("Hulu"), respectfully submits this Response in opposition to Plaintiff's Motion for Leave to File Declaration of Kent Van Liere, which includes a purported consumer confusion focus group study commissioned by Plaintiff:

1. Plaintiff produced the Declaration of Kent Van Liere ("Declaration") and the accompanying purported consumer confusion focus group study, at 5:46 p.m. on October 12, 2007, after the close of expedited discovery and briefing in this matter.
2. Hulu incorporates by reference its Memorandum of Law in Opposition to Plaintiff's Motion for Leave to File Declaration of Hal L. Poret and In Support of Hulu's Motion in Limine to Exclude Plaintiff's Survey and Focus Group Declarations and Reports [docket 108] [hereinafter "Hulu's Memorandum of Law"].
3. For the same reasons set forth in Hulu's Memorandum of Law, the Court should exclude and refuse to consider the Declaration.
4. The untimely production of Plaintiff's purported expert evidence is contrary to the Court's September 14 scheduling order, Fed. R. Civ. P. 6(d), and Local Civil Rule 7.1, EDNC.

5. Hulu will be unfairly prejudiced by Plaintiff's untimely production if Plaintiff is allowed to submit this evidence for the Court's consideration.

6. Delaying the preliminary injunction hearing, however, would only further serve to postpone Hulu's roll-out, again allowing Plaintiff to benefit from its own failure to timely present its evidence.

7. The appropriate remedy for Plaintiff's failure to timely produce its purported expert evidence is to exclude the use of such evidence at the hearing on Plaintiff's motion for preliminary injunction.

WHEREFORE, for the reasons set forth above, as well as discussed in detail in Hulu's Memorandum of Law in Opposition to Plaintiff's Motion for Leave to File Declaration of Hal L. Poret and In Support of Hulu's Motion in Limine to Exclude Plaintiff's Survey and Focus Group Declarations and Reports, Plaintiff should not be given leave to file and rely upon the Declaration of Kent Van Liere, or any other survey evidence or focus group report, in support of its Motion for Preliminary Injunction.

Respectfully submitted, this the 15th day of October, 2007.

/s/ Hayden J. Silver, III

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*Attorneys for Defendant Hulu, LLC*

**CERTIFICATE OF SERVICE**

This is to certify that on this date the foregoing was electronically filed with the Clerk of the Court using the CM/ECF System which will send notice to the following CM/ECF participants:

Leslie C. O'Toole  
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This the 15th day of October, 2007.

/s/ Hayden J. Silver, III  
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