

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

FPX, LLC d/b/a FIREPOND,

Individually and on Behalf of All Others
Similarly Situated,

Plaintiff,

v.

GOOGLE, INC., YOUTUBE, LLC, AOL,
LLC, TURNER BROADCASTING
SYSTEM, INC., MYSPACE, INC. AND
IAC/INTERACTIVECORP,

Defendants.

§
§
§ Civil Action No. 2:09-cv-00142-TJW
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§ CLASS ACTION COMPLAINT
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§

§
§ JURY TRIAL REQUESTED
§
§

THE RODNEY A. HAMILTON LIVING
TRUST and JOHN BECK AMAZING
PROFITS, LLC, Individually and on Behalf
of All Others Similarly Situated,

Plaintiffs,

v.

(1) GOOGLE INC.; AND
(2) AOL LLC,

Defendants.

§
§
§ Civil Action No. 2:09-cv-00151-TJW-CE
§
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§
§ CLASS ACTION COMPLAINT
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§ JURY TRIAL REQUESTED
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DECLARATION OF SHANNON ZMUD TEICHER

A. My name is Shannon Zmud Teicher, I am over the age of 21, of sound mind, have never been convicted of a felony, am competent to make this Declaration, and every statement herein is within my personal knowledge and is true and correct.

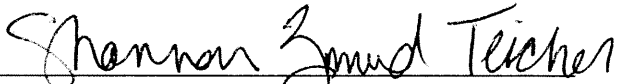
B. I am an attorney of record for Defendants. In that capacity, I have gained personal knowledge of the facts contained herein, each of which is true and correct.

C. Attached to this declaration is the following:

1. Exhibit 1 is a true and correct copy of excerpts of the June 22, 2010 deposition of Thomas J. Maronick, DBA, JD.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18th day of October, 2010.


Shannon Zmud Teicher

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

FPX, LLC d/b/a FIREPOND, Civil Action No.
2:09-cv-00142-TJW-CE

Individually and/or on
Behalf of All Others
Similarly Situated,
Plaintiff,

**Certified
Transcript**

vs.

GOOGLE, INC., YOUTUBE,
LLC, AOL, LLC, TURNER
BROADCASTING SYSTEM, INC.,
MYSFACE, INC. AND
IAC/INTERACTIVECORP,
Defendants.

REVISED

THE RODNEY A. HAMILTON
LIVING TRUST and JOHN BECK
AMAZING PROFITS, LLC, Civil Action No.
Individually and on Behalf of All Others Similarly
Situatd, 2:09-cv-00151-TJW-CE
Plaintiffs,

vs.

(1) GOOGLE INC.; AND
(2) AOL LLC,
Defendants

EXHIBIT
1

VIDEOTAPED DEPOSITION OF
THOMAS J. MARONICK, DBA, JD
WASHINGTON, D.C.
June 22, 2010

The videotaped deposition of THOMAS J. MARONICK,
DBA, JD was convened on Wednesday, June 22,
2010, commencing at 9:18 a.m., at the offices of

1 Katten Muchin Rosenman LLP, 2900 K Street, NW,
2 North Tower, Suite 200, Washington, DC 20007,
3 before Paula G. Satkin, Registered Professional
4 Reporter and Notary Public.
5 Job No. 266375

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ON BEHALF OF THE PLAINTIFFS:

MARC A. FENSTER, ATTORNEY AT LAW

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12424 Wilshire Boulevard, 12th Floor

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310.979.8278

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(PRESENT VIA TELEPHONE)

ON BEHALF OF THE DEFENDANTS:

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CARL C. BUTZER, ATTORNEY AT LAW

JACKSON WALKER LLP

901 Main Street, Suite 6000

Dallas, Texas 75202

214.953.6051

ALSO PRESENT:

MIA MARBURY, VIDEOGRAPHER

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1 P R O C E E D I N G S

2

3 THE VIDEOGRAPHER: Good morning.

4 My name is Mia Marbury of Veritext. The date
5 today is June 22nd, 2010. The time on the video
6 screen is 9:18:05.

7 This deposition is being held in
8 the office of Katten Muchin Rosenman LLP,
9 located at 2900 K Street, Northwest, North
10 Tower, Washington, D.C. 20007.

11 The caption of this case is FPX
12 LLC doing business as Firepond, Individually and
13 on Behalf of All the Others Similarly Situated
14 versus Google, Incorporated, YouTube, LLC, AOL,
15 LLC, Turner Broadcasting System, Incorporated,
16 MySpace, Incorporated and IAC,
17 IAC/Interactivecorp, Civil Action Number
18 209-cv-00142-TJW-CE.

19 Also taken in the matter of the
20 Rodney A. Hamilton Living Trust and John Beck
21 Amazing Profits LLC, Individually and on Behalf
22 of All Others Similarly Situated versus Google
23 and AOL, LLC, In the United States District
24 Court for the Eastern District of Texas,
25 Marshall Division. The name of the witness is

1 Thomas J. Maronick.

2 At this time will the attorneys
3 please identify themselves and the parties they
4 represent, after which our court reporter, Paula
5 Satkin of Veritext, will swear in the witness
6 and we can proceed.

7 MR. FENSTER: Marc Fenster with
8 Russ August & Kabat on behalf of the Plaintiffs.

9 MR. MORAN: David Moran of Jackson
10 Walker on behalf of the Defendants, along with
11 Carl Butzer, my partner, also representing the
12 Defendants.

13 MR. FENSTER: And David Pridham
14 may be joining telephonically, although he's not
15 currently on the line.

16 Whereupon--

17

18 THOMAS JOSEPH MARONICK
19 a witness, called for examination, having been
20 first duly sworn, was examined and testified as
21 follows:

22

23 EXAMINATION BY COUNSEL FOR DEFENDANTS

24

25 BY MR. MORAN:

1 Q. Tell us your name, sir?

2 A. Thomas Joseph Maronick, that's
3 M-A-R-O-N-I-C-K.

4 Q. And where did do you live Mr.
5 Maronick?

6 A. 5911 Charlesmead Road, Baltimore,
7 Maryland.

8 Q. How long have you lived there?

9 A. 25 years.

10 Q. Are you married?

11 A. Yes.

12 Q. Do you have any children?

13 A. Yes, I have two. A 33 year old
14 son and a 30 year old son.

15 Q. Is your wife employed outside the
16 home?

17 A. No, she is not.

18 Q. You understand you're under oath?

19 A. Yes.

20 Q. And you've been retained in this
21 case by the Plaintiffs as a testifying expert;
22 is that correct?

23 A. That's correct.

24 Q. Could you briefly tell us what
25 your expertise is with respect to this case?

1 whether or not you would have expected the
2 survey respondents to believe that that
3 Southwest official site was related to Southwest
4 Airlines?

5 MR. FENSTER: Object to form.

6 THE WITNESS: Yes.

7 BY MR. MORAN:

8 Q. Would you have expected the survey
9 respondents to say that that sponsored link was
10 affiliated with Southwest Airlines?

11 A. As I think about it, yes, I would
12 expect that they would have.

13 Q. And would you also have expected
14 survey respondents to say that that sponsored
15 link, Southwest official site, would also be
16 associated with Southwest Airlines?

17 A. Yes.

18 MR. FENSTER: Same objections.

19 BY MR. MORAN:

20 Q. And would you also expect the
21 survey respondents to have said that they
22 believe you could purchase goods or services
23 from Southwest Airlines from that Southwest
24 official site sponsored link?

25 A. I would expect that they would

1 think that, yes.

2 Q. And, as you just testified, users
3 who did that click through -- would, in fact, be
4 able to purchase those tickets; true?

5 A. I presume they would. I don't
6 know they would, but I presume they would, yes.

7 Q. Assuming they could, in fact,
8 purchase tickets on that official Southwest
9 site, would you agree that under those
10 circumstances there would be no initial interest
11 confusion with respect to those respondents?

12 A. Yes.

13 (Maronick Exhibit Number 15 was
14 marked for identification.)

15 BY MR. MORAN:

16 Q. Professor Maronick, I've handed
17 you Exhibit 15. Have you had a chance to look
18 at that exhibit?

19 A. Yes.

20 Q. What is it?

21 A. Again, this is a Google search for
22 Neiman Marcus.

23 Q. And that was sent to you by
24 Mr. Meyer?

25 A. I believe so, yes.

1 the consumers when they see a sponsored link
2 that doesn't have the brand name of a competitor
3 in it whether -- the two things I wanted to find
4 out about is, number one is whether if at all
5 they are likely to purchase -- be able to buy
6 that searched for company's products from the
7 sponsored link and, secondly, whether they saw
8 there was any affiliation association.

9 Q. How were you able to determine
10 whether or not a sponsored link was a competitor
11 of the -- either the company or the mark that
12 was searched for?

13 A. Well, it was really a question of
14 could you buy the searched for company's
15 products on that -- from that sponsored link.
16 Go back to the question of Southwest Airlines.
17 Southwest Airlines doesn't sell tickets on -- on
18 the sponsored links then -- and there is an
19 expectation that they could, then you would
20 have -- or that they can buy it or that there's
21 an association, affiliation, relationship
22 between them then you're now at a situation of
23 dealing with initial interest confusion. So we
24 wanted to get ones where they could possibly
25 consider going to that sponsored link.

1 Q. So did you go to the various
2 sponsored links and then click through that
3 sponsored link and ascertain or determined
4 whether or not they could purchase tickets or
5 not purchase tickets on Southwest Airlines? Is
6 that how you chose the sponsored links?

7 MR. FENSTER: Excuse me. Object
8 to form.

9 THE WITNESS: That's how Southwest
10 Airlines was selected, because it was my
11 understanding and confirmed by Mr. Meyer that
12 you can't buy Southwest Airlines tickets on
13 anything other than Southwest Airlines.

14 And the second one that was
15 suggested either by Mr. Meyer or me was the Trek
16 website and looking at the Trek website I didn't
17 see evidence that they sold -- at the sponsored
18 link I didn't see where they sold or any
19 evidence that they sold Trek bicycles.

20 BY MR. MORAN:

21 Q. As a result of that investigation,
22 that determination by you, you decided in this
23 case to survey as to that particular sponsored
24 link?

25 A. That seemed to be an appropriate

1 one to address the issue I was asked to address.

2 Q. And that's what you did in this
3 case?

4 A. Yes.

5 Q. And the way you were able to
6 ascertain or determine whether or not a
7 particular sponsored link did or did not sell
8 the goods or services for that mark that you
9 were searching was actually to click through to
10 the website of that particular sponsored link;
11 true?

12 A. That's correct, yes.

13 Q. And then after you clicked through
14 you made -- from your review of that website you
15 were able to determine, at least in your
16 judgment or Mr. Meyer's judgment, whether or not
17 they sold either Southwest Airlines tickets or
18 they sold Trek bikes?

19 MR. FENSTER: Object to form.

20 THE WITNESS: It did not appear in
21 either case that they did sell -- in the case of
22 Southwest Airlines that you could get Southwest
23 Airlines from that website and in the case of
24 Trek bicycle they had -- from the sponsored link
25 I didn't see any evidence that I would have been

1 And, secondly, it was high across
2 the three hypothetical sponsored links for an
3 iPad.

4 And then it was consistently high
5 across the two actual links.

6 Q. Do your results suggest that all
7 sponsored links, regardless of the search name
8 or the sponsored links, cause initial interest
9 confusion?

10 MR. FENSTER: Object to form.

11 THE WITNESS: No.

12 BY MR. MORAN:

13 Q. How do we determine which
14 sponsored links cause initial interest confusion
15 and those that don't?

16 A. Well, the -- those sponsored links
17 where the consumer can't buy the product or
18 service of the searched for -- the searched for
19 product or service would be the ones where there
20 would be initial interest confusion.

21 Q. All right, sir.

22 A. And also where they see that there
23 is an association, affiliation, relationship
24 between the sponsored link and the searched for
25 link, when it isn't there.

1 Q. Okay. And how can we go about
2 identifying all of those sponsored links that in
3 your view are initially interest confusing and
4 those for which no consumer would be confused?

5 MR. FENSTER: Object to form.

6 THE WITNESS: I really haven't
7 thought about how to go about it. That seems to
8 me that's Google's task, I mean, to identify
9 that or figure out how to do that. I really
10 didn't look at that, wasn't asked to consider
11 that.

12 BY MR. MORAN:

13 Q. Okay. So you haven't been asked
14 to undertake how to answer that question of
15 identifying those sponsored links that may cause
16 initial interest confusion from those that cause
17 no confusion; true?

18 A. That's correct, I have not.

19 Q. And so your report says nothing
20 about the answer to that question; true?

21 A. About how to go about identifying
22 them?

23 Q. Right.

24 A. No, it does not.

25 Q. And, in fact, you have not gone

1 about to identify those sponsored links that
2 might be initially interest confusing from those
3 that are not confusing; have you?

4 A. No, we have not.

5 Q. We know from this morning's
6 questions and your answers that, for example,
7 the Neiman Marcus search results page; do you
8 recall that?

9 A. Yes.

10 Q. That two of the sponsored links
11 that were displayed in response to that search,
12 the one was by Bloomingdales, a competitor;
13 correct?

14 A. Yes.

15 Q. And it indicated in the sponsored
16 link that it was Bloomingdales; right?

17 A. Yes.

18 Q. And it was your view that that
19 sponsored link was not susceptible to initial
20 interest confusion; true?

21 The very first sponsored link that
22 came up on the right-hand side of the Neiman
23 Marcus search was for Bloomingdales; correct?

24 A. I believe so, yes.

25 Q. It indicated that in some portion

1 A. I believe it is. Again, the focus
2 here was on if they are searching for Southwest
3 Airlines. There's really no reason why they
4 would need to scroll down, because the official
5 website is there to book flights, airline
6 tickets and whatever, plus they have a Southwest
7 Airlines sponsored link. So could they have
8 scrolled down? Yes.

9 My focus was on not all the
10 organic or natural links, but rather on the
11 sponsored links, and those are clearly
12 delineated on that page.

13 Q. Of the three sponsored links that
14 are shown on page 65, why did you choose the one
15 that says smartfares.com/southwest, as opposed
16 to the other two sponsored links, the one that's
17 the Southwest official site or the Southwestern
18 Airline, the one above it?

19 A. Again, the official one has the
20 brand name in it and I wanted the one that
21 didn't. And then the question of the two, it
22 just seemed like that one was as easy to use as
23 not. Again, the questions have -- they see them
24 in front of them, so it really didn't matter to
25 me which one I used, and

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ACKNOWLEDGMENT OF DEPONENT

I do hereby acknowledge that I have read and examined the foregoing of the transcript of my deposition and that:

(Check appropriate box):

() the same is a true, correct and complete transcription of the answers given by me to the questions therein recorded.

() except for the changes noted in the attached errata sheet, the same is a true, correct and complete transcription of the answers given by me to the questions therein recorded.

DATE

SIGNATURE

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CERTIFICATE OF NOTARY PUBLIC

I, Paula G. Satkin, the officer before whom the foregoing proceedings were taken, do hereby certify that the witness whose testimony appears in the foregoing proceeding was duly sworn by me; that the testimony of said witness was taken by me in stenotype and thereafter reduced to typewriting under my direction; that said proceedings is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

My commission expires October 31, 2010.

Paula G. Satkin

PAULA G. SATKIN

Notary Public in and for the
District of Columbia