

IN THE 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,**

Civil Action No. 2:09-cv-00142

Plaintiff,

v.

(1) GOOGLE, INC.;
(2) YOUTUBE, LLC;
(3) AOL, LLC;
**(4) TURNER BROADCASTING
SYSTEM, INC.;**
(5) MYSPACE, INC., and
(6) IAC/INTERACTIVECORP

Defendants.

OPPOSITION TO MOTION TO STRIKE

Plaintiff FPX, LLC hereby opposes Defendants' motion to strike portions of the declaration of Marc A. Fenster.

The exhibits and statements referenced in Defendants' one-page motion to strike are properly admitted, and the motion should be denied.

Paragraph No. 2

The documents attached to Mr. Fenster's declaration do in fact reflect Google's trademark policy. Google has further authenticated this policy with its own declarations in connection with its opposition to class certification. See Declaration of Kerry Barker, generally. Because the exhibits and statements in Mr. Fenster's declaration are consistent with those in Google's own declaration, Paragraph No. 2 should be admitted.

Paragraphs Nos. 5-6 and Exhs. C and D

Mr. Fenster's declaration regarding keyword searches are likewise admissible and not subject to a motion to strike. Because the fact of the search is apparent from the screenshots attached to Mr. Fenster's declaration, the statements of sufficient indicia of reliability to be admissible non-hearsay. Likewise, the allegations regarding inability to buy good through the websites appearing as sponsored links are not vague – they are simple, verifiable empirical statements.¹ If Google thought those statements were in any way false, they could easily rebut them.

CONCLUSION

For the reasons stated above, the motion to strike should be denied.
Dated: November 5, 2010

Respectfully submitted,

By: /s/ Nathan D. Meyer

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¹ That said, to avoid even the appearance of an evidentiary issue, attached as Exhibit A is the declaration of Nathan D. Meyer, who actually performed the searches at issue.

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CERTIFICATE OF SERVICE

I hereby certify that the counsel of record who are deemed to have consented to electronic service are being served on November 5, 2010 with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3). Any other counsel of record will be served by electronic mail, facsimile transmission and/or first class mail on this same date.

Dated: November 5, 2010

/s/ Nathan D. Meyer
Nathan D. Meyer