EXPERT REPORT OF DR. ITAMAR SIMONSON

BACKGROUND AND QUALIFICATIONS

1. I am the Sebastian S. Kresge Professor of Marketing at the Graduate School of Business, Stanford University. A copy of my curriculum vitae, which includes a complete list of my publications, is attached as Exhibit A.

2. I hold a Ph.D. in Marketing from Duke University, Fuqua School of Business, a Master's degree in business administration (MBA) from the UCLA Graduate School of Management, and a Bachelor's degree from The Hebrew University with majors in Economics and Political Science.

3. My field of expertise is consumer behavior, marketing management, trademark infringement from the consumer's perspective, survey methods, and human judgment and decision making. Most of my research has focused on buyers' purchasing behavior, the effect of product characteristics (such as brand name, price, features), the competitive context, and marketing activities (such as promotions, advertising) on buying decisions, and trademark infringement from the customer's perspective.

4. I have received several awards, including (a) The award for the Best Article published in the *Journal of Consumer Research* (the major journal on consumer behavior) between 1987 and 1989; (b) The Ferber Award from the *Association for Consumer Research*, which is the largest association of consumer researchers in the world; (c) The 1997 O'Dell Award, given for the *Journal of Marketing Research* (the major journal on marketing research issues) article that has had the greatest impact on the marketing field in the previous five years; (d) The 2001 O'Dell award (and a finalist for the O'Dell Award in 1995, 2002, 2004, 2005, 2007, and 2008); (e) The award for the Best Article published in the *Journal of Public Policy & Marketing* (the major journal on public policy and legal aspects of marketing) between 1993 and 1995; (f) The 2007

Society for Consumer Psychology Distinguished Scientific Achievement Award; (g) The 2002 *American Marketing Association* award for the Best Article in the area of services marketing; and (h) I was a winner in a competition dealing with research on the effectiveness of direct marketing programs, which was organized by the *Direct Marketing Association* and the *Marketing Science Institute*. In addition to these awards, my research has been widely cited by other researchers in the marketing, consumer behavior, and other fields,[1] and my publication record has been ranked as one of the most prolific and influential.[2]

5. I have published three articles relating to trademark surveys and trademark infringement from the customer's perspective, including two in the *Trademark Reporter* and one in the *Journal of Public Policy & Marketing*. The two articles published in the *Trademark Reporter* were: The Effect of Survey Method on Likelihood of Confusion Estimates: Conceptual Analysis and Empirical Test,[3] and An Empirical Investigation of the Meaning and Measurement of Genericness.[4] The *Journal of Public Policy & Marketing* article, titled Trademark Infringement from the Buyer Perspective: Conceptual Analysis and Measurement Implications,[5] was selected (in 1997) as the Best Article published in that journal between 1993 and 1995.

6. At Stanford University I have taught MBA and executive courses on Marketing Management, covering such topics as buyer behavior, developing marketing strategies, building brand equity, advertising, sales promotions, and retailing. I also taught an MBA course on Marketing to Businesses and a course on High Technology

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[1] See, for example, Google Scholar (i.e., by entering my last name and first initial at http://scholar.google.com).

[2] See, for example, S. Seggie and D. Griffith (2009), "What does it take to get promoted in marketing academia? Understanding exceptional publication productivity in the leading marketing journals," Journal of Marketing, 73, 122-132.

[3] Itamar Simonson (1993), "The Effect of Survey Method on Likelihood of Confusion Estimates: Conceptual Analysis and Empirical Test," Trademark Reporter, 83 (3), 364-393.

[4] Itamar Simonson (1994), "An Empirical Investigation of the Meaning and Measurement of Genericness," Trademark Reporter, 84 (2), 199-223.

[5] Itamar Simonson (1994), "Trademark Infringement from the Buyer Perspective: Conceptual Analysis and Measurement Implications," Journal of Public Policy and Marketing, 13(2), 181-199.

Marketing. In addition to teaching MBA courses, I have guided and supervised numerous MBA student teams in their work on company and industry projects dealing with a variety of markets.

7. I have taught several doctoral courses. One doctoral course examines methods for conducting consumer research. It focuses on the various stages involved in a research project, including defining the problem to be investigated, selecting and developing the research approach, data collection and analysis, and deriving conclusions. A second doctoral course that I have taught deals with buyer behavior, covering such topics as buyer decision making processes, influences on purchase decisions, and persuasion. A third doctoral course that I have taught deals with buyer decision making. Prior to joining Stanford University, during the six years that I was on the faculty of the University of California at Berkeley, I taught an MBA Marketing Management course, a Ph.D. course on buyer behavior, and a Ph.D. course on buyer decision making. I also taught in various executive education programs, including a program for marketing managers in high technology companies.

8. After completing my MBA studies and before starting the Ph.D. program, I worked for five years in a marketing capacity in a subsidiary of Motorola Inc., serving in the last two years as the product marketing manager for two-way communications products. My work included (a) defining new products and designing marketing plans for new product introductions, (b) customer and competitor analysis, and (c) sales forecasting.

9. I have conducted, supervised, or evaluated well over 1,000 marketing research surveys, including many related to consumer behavior and information processing, trademark, branding, marketing strategies, and advertising-related issues. I serve on eight editorial boards, including leading journals such as the *Journal of Consumer Research, Journal of Marketing Research*, and the *Journal of Consumer Psychology*. I am also a frequent reviewer of articles submitted to journals in other

fields, such as psychology, decision making, and economics. I received (twice) the Outstanding Reviewer Award from the *Journal of Consumer Research.* As a reviewer, I am asked to evaluate the research of scholars wishing to publish their articles in leading scholarly journals. I have also worked as a consultant for companies and organizations on a variety of marketing and buyer behavior topics. And I have served as an expert in prior litigations involving various marketing and buyer behavior issues, trademark-related matters, false advertising, branding, and other areas. A list of cases in which I provided sworn testimony during the past four years is included in Exhibit B. I am being compensated at my standard rate of $650 an hour.

10. I was asked by counsel for Defendants (a) to evaluate, based on principles of consumer behavior and marketing, whether it is meaningful or possible to generalize across members of the proposed class (in the Rodney Hamilton Living Trust/ John Beck Amazing Profits and in the FPX matters) and sponsored links with respect to the alleged likelihood of confusion and the distinctiveness of their respective marks, and (b) to evaluate the surveys submitted by Dr. Maronick ("Maronick Surveys") on behalf of the Plaintiffs. Documents that I reviewed in connection with preparation of this report are listed in Exhibit C.

SUMMARY OF CONCLUSIONS

11. For obvious reasons that are grounded in basic principles of consumer behavior and marketing, the contention that the plaintiffs' allegations could possibly apply across all of the proposed class members and sponsored links is clearly wrong and not meaningful. Factors that lead to this conclusion include:

a. Keywords and trademarks vary greatly in terms of their distinctiveness, consumer recognition, type, legal status, and other characteristics that affect any conceivable likelihood of confusion.

b. Sponsored links vary greatly in terms of their content, heading, their context, and other characteristics that might affect any conceivable likelihood of confusion.

c. The degree of similarity or any perceived association between the search term and sponsored links vary greatly depending on the specific combination of keyword and particular sponsored links.

d. There are also great differences in terms of consumers' experience and familiarity with product categories, search engines, and sponsored links. Furthermore, consumers differ greatly in terms of their more general familiarity with common marketing practices, such as the marketing practice of targeting ads to consumers based on their revealed interests and preferences.

e. Relatedly, there are large differences in terms of consumers' familiarity with the specific trademarks or other keywords being used (and any entity/object behind it) as well as with the company/product/organization advertised or represented by the sponsored link.

f. There are large differences with respect to consumers' degree of care and level of involvement with respect to the goods or services offered by the company or good/service that is the subject of the search.

It is thus neither possible nor meaningful to make any generalizations about likelihood of

confusion across numerous different marks, sponsored links, and consumer "universes" without investigating each case separately.

12. The Maronick Surveys made no attempt to test for any commonality across the proposed class members and did not even try to test for the alleged likelihood of confusion pertaining to the trademarks of the class representatives. Accordingly, even if the surveys were properly conducted, they would not have provided pertinent information regarding the other members of the proposed class. Furthermore, the surveys violated virtually all of the basic principles and standards of likelihood of confusion surveys, making the "findings" meaningless and redundant. In particular:

a. The Maronick Surveys failed to follow any recognized methodology or even test for any relevant likelihood of confusion (or initial interest confusion);
b. The surveys relied on a series of slanted, leading questions that informed respondents what the "correct" answers were and merely asked for their approval;
c. The Maronick Surveys failed to include any controls;
d. The Maronick Surveys failed to ask the respondents to explain their answers;
e. The Maronick Surveys failed to approximate marketplace conditions or present the relevant stimuli to respondents as they are seen by consumers in reality;
f. The surveys' respondent universe failed to represent the relevant consumers' universes;
g. The results of the Maronick Surveys were not validated.
h. The surveys' methodology and Dr. Maronick's deposition testimony indicate a persistent lack of familiarity with the most basic principles of likelihood of confusion surveys (such as the meaning of a control, the importance of not revealing to respondents the "right, expected" answer, and the commonly used survey methods).

13. Each one of the flaws is sufficient to make the Maronick Survey unreliable. The combination of such fatal flaws indicates that the surveys provide no

pertinent information and are simply irrelevant.

INTRODUCTION

14. The "First Amended Class Action Complaint" (parag. 48 of the Rodney Hamilton Living Trust et al. Complaint; see also parag. 47 of the FPX, LLC Complaint) alleges that "... Defendants have intentionally developed a practice and policy that results in confusion as to whether the Sponsored Links are sponsored or affiliated with the Trademark Holders for the purpose of causing Internet Users to click-through the Sponsored Links to see if they are associated with the Trademark Holder for which they were searching ..." The Complaints also indicate that the allegations (parag. 2) apply to the entire proposed Class that includes "Any and all individuals and/or entities ... domiciled in the United States that own a mark that has been registered with the United States Patent and Trademark Office ('USPTO') and has been sold by defendant Google as a keyword and/or Adword during the period May 14, 2005 through the present."[6]

15. Thus, according to the Complaints, every time a consumer enters a trademark as a keyword and sees sponsored links, he or she is confused "as to whether the Sponsored Links are sponsored or affiliated with the Trademark Holders." In other words, regardless of which trademark is used as the keyword, which sponsored link is displayed, or who the consumer is, consumers are confused. As an aside, the Complaints appear to emphasize sponsored links of competitors of companies/brands used as keywords, yet the Maronick Surveys (discussed in detail below) did not even try to test such links.

16. To evaluate whether likelihood of confusion could conceivably be generalized across all of the proposed class members and their trademarks and for all sponsored links without investigating each case individually, it is necessary to examine

[6] The FPX Complaint, dated May 11, 2009, limits the class members to individuals and/or entities domiciled within the State of Texas.

the factors that are relied upon to determine the likelihood of confusion between any pair of marks. This assessment involves an analysis of the characteristics of the allegedly infringed marks, the allegedly infringing marks (or advertisements/sponsored links), and the consumers allegedly being confused. An examination of these factors, in turn, requires an understanding of the consumer behavior and psychological factors that influence likelihood of confusion.

17. From a consumer behavior perspective, the notion that there is commonality across all members of the proposed class with respect to the alleged infringement is akin to saying that likelihood of confusion does not depend on the characteristics of the specific marks, marketplace conditions, the sponsored links, the consumer, or any other factor. The question that naturally arises is, on what basis could one make such a sweeping allegation that ignores virtually all factors that have been shown to affect consumer confusion? To address this question, I will next discuss in more detail the factors that determine the likelihood of confusion between any two marks, the factors that affect inherent and acquired distinctiveness of marks, and what these factors mean with respect to the possibility of commonality across class members.

DETERMINANTS OF LIKELIHOOD OF CONFUSION AND THEIR IMPLICATIONS FOR COMMONALITY

18. The assessment of likelihood of confusion between two marks (or between a trademark and an advertisement/ sponsored link) involves the consideration of a certain set of factors. Specifically, factors that might affect the likelihood of confusion include:

a. Characteristics of the trademark used as the search term entered, its distinctiveness and consumer familiarity with the term, the manner in which it is used, and other characteristics of the search term (e.g., its legal status, such as whether it is registered by a particular company).

b. The particular ad or sponsored link, its content and presentation, the consumer's familiarity with the advertised product/service, the product category to which the advertised product/service belongs, and other characteristics of the sponsored link.

c. The degree of similarity between the search term and particular sponsored links.

d. The consumer's experience with search engines and familiarity with search results, including sponsored links. Also, consumers' more general familiarity with common marketing practices, such as the marketing practice of targeting ads to consumers based on their revealed interests and preferences (which might affect the consumers' understanding of sponsored links and others ads).

e. The consumer's familiarity with the trademark (i.e., the company or product name) or search term being entered (and any entity/object behind it) as well as with the company/product/organization promoted in the sponsored link; also the consumer's experience with the product/service category to which the searched term/trademark and sponsored link belong.

f. Consumers' degree of care and level of involvement with respect to the goods or services offered by the company that is the subject of the search.

I will next briefly explain each of these factors and its implications with respect to the issue of commonality.

19. First, the importance of the characteristics of the marks/links at issue is a key factor that makes it impossible to offer any generalizations or support any claims of commonality across all of the proposed class members and all sponsored links. In particular, the likelihood of confusion depends on the distinctiveness of each mark or term. Thus, trademarks differ greatly with respect to what is referred to as "inherent distinctiveness." For example, generic or descriptive names are less distinctive than arbitrary names (e.g., Sony). Relatedly, my understanding is that marks also have

different legal status; for example, particular marks may or may not be registered, and some marks are used by more than one company or organization.

20. Furthermore, when entering a keyword, it is often impossible to know what the consumer's state of mind or intention is. Also, different trademarks have little in common with respect to their degree of consumer recognition and the degree to which consumers associate the mark with a single source (i.e., its secondary meaning or "acquired distinctiveness"). Again, each mark must be evaluated individually. Just because one mark enjoys high recognition and inherent distinctiveness does not inform us about the recognition and distinctiveness of another mark. Therefore, it is not meaningful to suggest that all members of the proposed class enjoy the same level of either inherent or acquired distinctiveness.

21. Of course, the perceived similarity between two marks is another critical determinant of likelihood of confusion or any perceived business affiliation between two objects (or between a sponsored link and a search term). For example, it is reasonable to assume that consumers are more likely to perceive a business connection between the keyword "Southwest Airlines" and a sponsored link with the heading "Southwest Airlines Official Site" than between the same search term and a sponsored link with the heading "United Airlines." In general, the perceived similarity between two words, marks, or other objects is based on the number and perceptual significance of features that both objects share (i.e., have in common) relative to their unique features.[7] The degree to which common features increase perceived similarity and unique features diminish similarity depends on the uniqueness (or diagnosticity) of these features. Specifically, if two objects share a feature that is also shared with many other known objects/words that consumers encounter in everyday life, that feature has a much smaller effect on perceived similarity than if the two objects are the only ones possessing that feature.

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[7] See, e.g., "Features of Similarity," Amos Tversky (1977), *Psychological Review*, 84, 327-352.

22. Furthermore, the relation between apparent similarity and likelihood of confusion may often be difficult to predict, which is exactly why one needs to investigate each specific case individually to determine whether there is a likelihood of confusion in that case. For example, in research that I published in 1993,[8] I examined the likelihood of confusion between a "Rolex" watch and a "Ronex" watch. Both marks appear similar, yet the results using several survey methods revealed that there was no significant likelihood of confusion between them (even without accounting for "noise").

23. Thus, the great variability in terms of the perceived similarity and any perceived relationship between a search term and a sponsored link further indicates that the notion that the same confusion allegations apply across all keywords, proposed class members, and sponsored links simply makes no sense. It is also inconsistent with basic principles of perceived similarity and consumer confusion.

24. Moreover, sponsored links can be presented in many different ways, which might further influence how they are perceived. Thus, given the importance of similarity and the various factors that affect perceived similarity, it is simply impossible to establish any commonality with respect to the perceived similarity and likelihood of confusion across many, very different pairs of trademarks and sponsored links.

25. Consumers' prior experiences with Internet search engines influence any conceivable likelihood of confusion. Consistent with basic principles of consumer learning (discussed in most consumer behavior textbooks), consumers who have used Internet search engines such as Google previously (many of whom use it on a regular basis) can learn from their experiences. Suppose, for example, that a consumer who first used a search engine in 2000 was unsure at that time about the meaning of "sponsored links." Such a consumer has certainly had numerous opportunities to learn what such

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[8] Itamar Simonson (1993), "The Effect of Survey Method on Likelihood of Confusion Estimates: Conceptual Analysis and Empirical Test," Trademark Reporter, 83 (3), 364-393; see also Itamar Simonson (1994), "Trademark Infringement from the Buyer Perspective: Conceptual Analysis and Measurement Implications," Journal of Public Policy and Marketing, 13(2), 181-199.

links stand for. That is, that consumer must have quickly learned that these links usually represent an Internet version of advertisements, not fundamentally different from other ads that consumers encounter numerous times on a daily basis.

26. Learning what sponsored links stand for should be easy for consumers, because they are not different from many other familiar, everyday experiences. For example, when watching a TV show on network television, a consumer is highly unlikely to assume that, just because certain commercials are shown during the program, they have a business relationship with the TV show. Instead, consumers must have learned that the platform presenting the TV show (i.e., the network/station) offers commercial spots for interested advertisers.

27. In a similar fashion, a search engine such as Google has invested in the technology that allows it to display search results and thus provide a useful service to consumers. The results consist of both "organic listings" and "sponsored links/ads," with the search engine selling the right to display sponsored links to advertisers who wish to appeal to prospective buyers. Again, this is not different, for example, from advertising home improvement products during home improvement TV shows or cooking related products during cooking TV shows.

28. Furthermore, the likelihood of confusion depends on consumers' familiarity with common marketing practices more generally, on and off the Internet. Consider, for example, a consumer who buys a carton of Tropicana orange juice at a supermarket. Such a consumer may often receive at the check-out a coupon for Minute-Maid orange juice. That is, the fact that the consumer is identified as a purchaser of Tropicana triggers the printing of a coupon for a competing brand. Similarly, there are numerous other situations in which a consumer's interest in one brand causes a marketer or a sales person to offer another brand.

29. Such practices are also commonly used on the Internet. For example, a consumer searching for information on Amazon.com about a Sony camera may be

presented with a sponsored link for a Nikon camera. And a consumer who is looking for one movie on Netflix.com may be presented with other movies that belong to the same genre. Of course, the mere fact that other options are promoted on such sites does not mean and is highly unlikely to be interpreted as indicating that the item searched for and other items being presented on the web page have any business affiliation or connection; they merely appeal to consumers with similar interests or preferences. Based on such daily experiences with marketing methods and given consumers' ability to learn from experience, one would expect virtually all consumers to be well aware of such marketing practices as they are used on and off the Internet.

30. Most consumers nowadays regularly search for information on the Internet and use, among other things, search engines for that purpose. Of course, search engines (and information search on the Internet more generally) is often much easier to conduct than traditional information search, which often requires one to go to a store in order to find out which products it carries. For example, a consumer who is considering buying a suitcase and looking for a particular brand may decide to visit a department store that "carries all major luggage brands." The consumer travels to that store only to find out that the store does not have the specific brand s/he was looking for. Such common experiences often involve a significant waste of time and money. By contrast, while (similar to the brick-and-mortar world) consumers often cannot have full information about the precise products and services offered by each listing or each retailer/source, information search on the Internet is typically quick, easy, and comprehensive. A consumer can simply click on any listing or link to determine whether it has what the consumer is looking for. If it does not, the consumer clicks on the back button and gets back to the previous page. Accordingly, a consumer has no reason to debate much or waste cognitive effort trying to figure out whether a particular listing will have exactly what s/he is looking for -- a couple of mouse clicks will usually provide the needed information.

31. As I teach my MBA students, standard marketing tactics that identify and target consumers based on their revealed preferences is known as "behavioral targeting" – identifying consumers who belong to a certain segment (e.g., airline travelers) based on their interests and behavior (e.g., buying flight tickets or searching for information about flight tickets) and then targeting or directing related ads and offers to them. In addition, marketers often try to "customize" their offers based on the revealed preferences of consumers.[9] Academic research has also examined consumers' ability to understand marketers' persuasion tactics.[10]

32. Any likelihood of confusion is, of course, also related to the consumer's familiarity with the allegedly infringed mark and allegedly infringing mark/link/ad. Given that the familiarity with different marks varies across marks and across consumers, it is impossible to make any meaningful generalizations that could apply to different marks (or sponsored links) and consumers. In addition, the degree of care exercised by consumers varies greatly across categories. For example, when using a search engine with the intention of finding information about a new Dell computer a consumer is in a different state of mind than when looking for information about last night's episode of a TV program. This is yet another factor that makes keywords so different with respect to the likelihood of consumer confusion.

33. Finally, the type of search a consumer conducts will greatly determine the level of attention, if any, that the consumer would pay to sponsored links. For example, if the consumer has already decided where s/he wished to buy a particular brand (e.g., buy a Sony camcorder from Amazon.com), regardless of any sponsored links that may appear after the search term "Sony camcorder" is entered, the consumer is likely to

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[9] See, for example, Itamar Simonson (2005), "Determinants of Customers' Responses to Customized Offers: Conceptual Framework and Research Propositions," *Journal of Marketing*, 69 (January), 32-45.

[10] See, for example, M. Friestad and P. Wright (1995), "Consumers' Persuasion Knowledge: Lay People's and Researchers' Beliefs About Advertising," *Journal of Consumer Research*, 22 (June). Margaret Campbell and Amna Kirmani (2000), "Consumers' Use of Persuasion Knowledge ...", *Journal of Consumer Research*, 27 (June).

simply click on the Amazon listing. If, on the other hand, the consumer is willing to consider different retailers, then s/he may consider and pay attention to other listings/links.

34. In conclusion, for obvious reasons that are grounded in basic principles of consumer behavior and marketing, the contention that the plaintiffs' allegations could possibly apply across all of the proposed class members and sponsored links is clearly wrong and not meaningful. Factors that lead to this conclusion include:

a. Keywords and trademarks vary greatly in terms of their distinctiveness, recognition, legal status, type, and other characteristics that affect any conceivable likelihood of confusion.

b. Sponsored links vary greatly in terms of their content, heading, the entity they promote, their context, and other characteristics that affect any conceivable likelihood of confusion.

c. The degree of similarity or any perceived association between the search term and sponsored links vary greatly depending on the specific combination of keywords and particular sponsored links.

d. There are also great differences in terms of consumers' experience and familiarity with product categories, search engines, and sponsored links. Furthermore, consumers vary greatly in terms of their more general familiarity with common marketing practices, such as the marketing practice of targeting ads to consumers based on their revealed interests and preferences.

e. Relatedly, there are large differences in consumers' familiarity with the specific trademarks or other keywords being used (and any entity/object behind it) as well as with the company/product/organization advertised by the sponsored link.

f. There are large differences with respect to consumers' degree of care and level of involvement with respect to the goods or services offered by the company or good/service that is the subject of the search.

It is thus neither possible nor meaningful to make any generalizations about likelihood of confusion across numerous different marks, sponsored links, and consumer "universes" without investigating each case individually.

AN OVERVIEW OF SURVEY METHODS FOR ESTIMATING LIKELIHOOD OF CONFUSION

35. As indicated, it is neither possible nor meaningful to make any generalizations about likelihood of confusion across numerous different marks, sponsored links, and consumer "universes" without investigating each case separately. Indeed, precisely because such generalizations cannot be meaningful or informative, there is no survey that is capable of meaningfully testing the allegations at issue here. That is, there is no survey that could possibly allow us to reach any conclusions regarding likelihood of confusion that applies to all sponsored links and all trademark owners included in the proposed class. Putting commonality issues aside, after reviewing basic standards of likelihood of confusion surveys, I will evaluate the Maronick Surveys as if their purpose were potentially relevant. As indicated earlier, I have published two articles in which I contrast alternative survey methods used for estimating likelihood of confusion.[11] I have also evaluated and conducted many likelihood of confusion surveys.

36. The methodology of a consumer survey designed to estimate the likelihood of confusion between two marks (in a forward confusion case, the likelihood that the "junior," allegedly infringing, mark originates from or is affiliated in some manner with

[11] Itamar Simonson (1993), "The Effect of Survey Method on Likelihood of Confusion Estimates: Conceptual Analysis and Empirical Test," Trademark Reporter, 83 (3), 364-393; See also, Itamar Simonson (1994), "Trademark Infringement from the Buyer Perspective: Conceptual Analysis and Measurement Implications," Journal of Public Policy and Marketing, 13(2), 181-199.

the "senior mark") must follow certain standards and reflect marketplace conditions. These standards are not arbitrary; they have been developed by survey experts based on a great deal of experience and a careful examination of different methodological options. Furthermore, it is well accepted that the results of surveys are contingent on the methodology being employed; if the method is flawed on key survey dimensions, the survey results become unreliable and uninformative.

37. As shown below, the Maronick Surveys did not even attempt to test for commonality, and they suffered from major flaws on virtually every key dimension and completely failed to test for likelihood of confusion for any pair of a trademark used as a keyword and a sponsored link that might occur in the marketplace. Thus, as explained below, the Maronick Surveys merely prove the well-known fact that a flawed survey can produce almost any result by failing to include the relevant respondents, and by relying on a biased, leading methodology, misrepresentation of marketplace conditions, and inappropriate control.

38. As Professor McCarthy points out,[12] "The first step in designing a survey is to determine the 'universe' to be studied. The universe is that segment of the population whose perceptions and state of mind are relevant to the issues in the case. Selection of the proper universe is a crucial step, for even if the proper questions are asked in a proper manner, if the wrong persons are asked, the results are likely to be irrelevant."

39. The survey universe should not be either under-inclusive (i.e., exclude relevant segments of the customer population) or over-inclusive (i.e., include the opinions of irrelevant customer segments). Using an over-inclusive universe skews the results by introducing irrelevant data. For example, in a case where "Weight Watchers" sued for use of its mark on "Lean Cuisine" frozen diet entrees, the court found to be over-inclusive a survey of women between the ages of eighteen and fifty-five, who had purchased frozen food entrees in the past six months and who tried to lose weight through

[12] See, for example, 4 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition (September 2007) (McCarthy) at §32:159.

diet and/or exercise in the previous year. The court said that the universe should have been limited to women who had purchased a diet frozen entree.[13]

40. As I emphasized in the articles that I published, survey results are contingent on the method used, with different methods potentially producing drastically different results.[14] Consequently, as indicated, it is critical that the expert conducting the surveys select the method that fits the particular case at issue. Probably the first and most obvious criterion is that, although a survey usually cannot replicate the exact marketplace conditions, the survey should be conducted in a way that mirrors the essential characteristics of the marketplace as closely as possible. As Professor McCarthy points out, "the closer the survey methods mirror the situation in which the ordinary person would encounter the trademark, the greater the evidentiary weight of the survey results."[15] Indeed, courts have given little or no weight to (or excluded) likelihood of confusion surveys that failed to capture essential characteristics of the marketplace, such as surveys that show the marks at issue in a way that misrepresents reality.

41. Although there are different survey methods for assessing likelihood of confusion, the methods employed most often can be divided into two general categories. The first category includes methods in which respondents are shown just one of the marks and asked to identify the company that puts it out or is affiliated with it. As discussed in my articles, the most common method in this category is referred to as the *Eveready format*, named after a case in which the issue involved source confusion between Ever-Ready lamps and Eveready batteries.[16] McCarthy describes the sequence

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[13] Weight Watchers Int'l, Inc. v. Stouffer Corp., 744 F. Supp. 1259, 19 U.S.P.Q.2d 1321, 1331 (S.D.N.Y. 1990) ("[S]ome of the respondents may not have been in the market for diet food of any kind and the Survey universe therefore was too broad.").

[14] See, for example, "Trademark Infringement from the Buyer Perspective: Conceptual Analysis and Measurement Implications," Journal of Public Policy & Marketing, (Fall 1994, volume 13, 181-199).

[15] McCarthy at §32:163. See also THOIP v. The Walt Disney Co. et al., OPINION AND ORDER, (08 Civ. 6823; S.D. NY; Feb. 2010).

[16] Union Carbide Corp. v. Ever-Ready, Inc., 531 F.2d 366, 188 U.S.P.Q. 623 (7th Cir. 1976), cert. denied, 429 U.S. 830, 50 L. Ed. 2d 94, 97 S. Ct. 91, 191 U.S.P.Q. 416 (1976).

of questions with this method as follows: [17]

" 1. [Screening question to eliminate persons in the bulb or lamp industries.]

2. Who do you think puts out the lamp shown here? (A picture of defendant's EVER-READY lamp with its mark is shown).

3. What makes you think so?

4. Please name any other products put out by the same concern which puts out the lamp shown here."[18]

42. The second category of likelihood of confusion methodologies includes surveys in which respondents are shown both the junior and senior marks. One method, referred to by McCarthy as the "line-up survey,"[19] typically involves (a) showing respondents one mark, (b) asking "distracter questions," and (c) showing a line-up of products, including the allegedly infringing mark (in a forward confusion case). Respondents are then asked questions to assess the likelihood of confusion at issue. As indicated, such a method is appropriate *only* when consumers in the marketplace are often exposed to both marks at approximately the same time. Courts have harshly criticized and even excluded surveys where such a sequential presentation of the marks failed to approximate marketplace conditions. [20]

43. Another method, referred to as Squirt, involves a side-by-side presentation of both the junior and senior marks, followed by questions regarding a possible relationship between the two marks/products. This likelihood of confusion survey

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[17] McCarthy at §32:174.

[18] In many applications, the Eveready format also includes questions as to whether the company that puts out the presented mark has a business connection or affiliation with or received permission from another company.

[19] McCarthy at §32:177.

[20] See, for example, Simon Property Group L.P. v. MySimon, Inc., 104 F. Supp. 2d 1033; 2000, U.S. Dist. S.D. Indiana. Kargo Global, Inc. v. Advance Magazine Publishers, Inc., "Opinion & Order," 06 Civ. 550 (U.S. SDNY; Aug. 2007); THOIP v. The Walt Disney Co. et al., OPINION AND ORDER, (08 Civ. 6823; S.D. NY; Feb. 2010).

method is appropriate *only* if both marks are typically seen by consumers side-by-side (e.g., Heinz ketchup and Hunt's ketchup that are displayed side-by-side on most store shelves). However, a side-by-side presentation cannot be used and represents a potentially major flaw of the survey in cases where the two marks at issue are typically not seen in the marketplace side-by-side.

44. Although it is probably obvious, a survey designed to estimate the likelihood of marketplace confusion between Mark A and Mark B (or between a mark and a sponsored link) should provide survey respondents information and context that approximate the information available to consumers in reality (or at least, the key elements of the information available to consumers in the marketplace). If, for example, respondents are shown only a fraction of the information available to the relevant consumers, the survey could not provide a reliable estimate of the likelihood of confusion between the marks at issue in reality.

45. A survey designed to estimate likelihood of confusion must include a (proper) "control."[21] A control is designed to estimate the degree of "noise" or "error" in the survey. Indeed, without a proper control, there is no benchmark for determining whether a likelihood of confusion estimate is significant or merely reflects guessing and the flaws of the survey methodology. To fulfill its function, a control must be as similar as possible to the "junior" (allegedly infringing) mark (in a forward confusion case), without infringing on the "senior" mark. For example, in a case involving *Simon Property Group and mySimon, Inc.*, the court determined that any likelihood of confusion survey with a control that does not include the "Simon" name component "amounts to little more than a meaningless word association or memory exercise."[22] Thus, to obtain an estimate of the net likelihood of confusion (after accounting for "noise"), the researcher subtracts the measured confusion level in the control from the measured

[21] See, for example, S. Diamond, Reference Guide on Survey Research, in Reference Manual on Scientific Evidence 221, 226 n.8 (Federal Judicial Center ed., 1994).

[22] Simon Property Group L.P. v. MySimon, Inc., 104 F. Supp. 2d 1033; 2000, U.S. Dist. S.D. Indiana.

confusion level in the "test" version (in which the allegedly infringing mark is presented).

46. As Professor McCarthy points out,[23] survey questions must not be slanted or leading, and it is improper to suggest a business relationship when the respondent might previously have had no thought on such a connection. For example, the question: "Do you think that there may or may not be a business connection between Beneficial Corp. and the Beneficial Finance System Companies?" was rejected as a leading question.[24]

47. As I teach my doctoral students in courses that deal with consumer research, when designing a survey, the researcher must avoid question order effects (i.e., the effect of answers to one question on answers to subsequent questions) and "demand effects." Demand effects[25] relate to the phenomenon whereby survey respondents use cues provided by the survey procedure and questions to figure out the purpose of the survey and the "correct" answers to the questions they are asked. The respondents then tend to provide (what they perceive as) the "correct" answers, to make sure that the results "come out right." Courts have also recognized the significance of demand effects, and such problems have contributed to the rejection of surveys.[26]

48. The results of surveys conducted in the context of litigation must be validated to try to confirm that those completing the survey questionnaires were the presumed respondents, that the interviews were indeed conducted, and that the respondents met the survey screening criteria. Increasingly, as is done in likelihood of confusion surveys that I conduct, the follow-up validation survey attempts to contact all of the respondents, with typical validation rates of between 70% and 80%.

49. Next, I will review the Maronick Surveys in light of the standard survey

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[23] See McCarthy at §32:172.

[24] Beneficial Corp. v. Beneficial Capital Corp., 529 F. Supp. 445, 213 U.S.P.Q. 1091 (S.D.N.Y. 1982).

[25] See, for example, "On the Social Psychology of the Psychological Experiment," M. Orne, American Psychologist, 17, 776-783.

[26] See, for example, Simon Property Group L.P. v. MySimon, Inc., 104 F. Supp. 2d 1033; 2000, U.S. Dist. S.D. Indiana.

principles reviewed above. As explained below, the Maronick Surveys violated virtually all of the above basic survey principles and completely failed to test for likelihood of confusion between the marks at issue (i.e., between the keywords and resulting sponsored links), which made the reported results uninformative and irrelevant.

AN EVALUATION OF THE MARONICK SURVEYS

50. The Maronick Surveys consisted of two sub-surveys,[27] which were similar in many but not all respects. Respondents in the first survey (Exhibit B to the Maronick Report) were members of the Zoomerang Internet panel. The survey consisted of a series of questions (pertaining to one of three search engines: Google, Ask.com, or Yahoo), and respondents were not shown any search results or any other stimuli. For example, Question 6 (in the Google version of the survey) was phrased as follows:

> "When you search using a specific company name or trademark, do you expect the Google.com sponsored links to be "sponsored" by that particular company or trademark holder?"

51. After answering the question as to whether sponsored links are "sponsored," respondents were also asked if the sponsored links were "related" to the searched company or trademark holder and to indicate the likelihood that they could buy the searched company's goods from the sponsored links. The survey then went on to ask about the maker of the "iPad" and, assuming "Apple.com" is a sponsored link from a search for "iPad," whether the respondents thought they would be able to buy the iPad from the Apple.com link and from two other (made-up) links. As described below, Dr. Maronick testified during his deposition that this "generic" test served as his "control" (though he also testified that his surveys had no controls).

52. Respondents in the second survey (Exhibit D to the Maronick Report) were

[27] The Maronick Report refers to three surveys, though the first two were different parts of the same survey (using the same respondents).

shown a small portion of a search results page (with four "organic" listings and three sponsored links) that pertained to the search term "southwest airlines." They were told to focus on the sponsored links and assess the likelihood that they would be able to buy a ticket for Southwest Airlines if they clicked on one of those links chosen by Dr. Maronick. Next, respondents were asked if the same sponsored link was "associated" with Southwest Airlines, "sponsored" by Southwest Airlines, and "affiliated" with Southwest Airlines.

53. Another version of the second survey focused on Trek bicycles instead of Southwest Airlines. This version of the survey included an additional question regarding the likelihood that the respondents would click on a particular sponsored link (BikesDirect.com) if they were interested in buying Trek bicycles. As already explained, putting aside the major flaws of the surveys, the fact that Dr. Maronick chose to test just a couple of trademarks (which were not the trademarks of the named class representatives) meant that he did not even attempt to test for commonality across the proposed class members. In other words, even if hypothetically the Maronick surveys were perfectly designed, they could not support the obviously flawed notion that the alleged likelihood of confusion between keywords and sponsored links does not depend on the characteristics of the keywords, the sponsored links, or any other factor.

54. As explained next, both surveys had much in common, including: (a) they did not follow any recognized methodology that could potentially produce a reliable estimate; (b) they relied on blatantly leading questions that virtually guaranteed that respondents would provide the answers that would "support" the surveys' sponsors (i.e., the plaintiffs); (c) they failed to approximate marketplace conditions (despite the fact that Dr. Maronick had already been criticized by a court for the same flaw); (d) they failed to include any control (despite the fact that Dr. Maronick had already been criticized by a court for the same flaw); (e) they failed to ask respondents to explain their answers; (f) they failed to include the relevant respondent universe; and (g) they failed to follow other

basic survey standards (e.g., the need to perform validation). Given these flaws, the Maronick Surveys were meaningless exercises with predictable and irrelevant results.

55. Although it is obvious (apparently also to Dr. Maronick; see, e.g., Maronick depo. at 193), it is important to note first that these surveys did not even attempt to test for commonality. Dr. Maronick initially (depo. at 191) suggested that his surveys tested for commonality "in the sense that I asked the same likelihood question in each of the different iterations of it ..." However, the fact that the same questions might have been asked in these surveys (actually, the questions were different in several cases) has nothing to do with the issue of commonality discussed above.

The Failure to Use Any Recognized Methodology

56. As explained above, there are specific survey methods that have been repeatedly used by experts (and accepted by courts) for estimating likelihood of confusion, with the choice of specific methodology determined largely by the pertinent conditions. In particular, as described earlier, probably the most commonly used survey method is known as the *Eveready* format.[28] However, Dr. Maronick did not use this standard methodology, perhaps because he is unfamiliar with it (Maronick Depo., p. 307).

57. As indicated, the Maronick Surveys did not follow the *Eveready* or any other survey format that I have ever encountered. In particular, as shown next, the "methodology" he invented consisted of a series of leading statements that essentially informed respondents what the "right" answers were and asked them to confirm that they agreed with what they were told.

[28] See, for example, McCarthy at §32:174; Itamar Simonson (1993), "The Effect of Survey Method on Likelihood of Confusion Estimates: Conceptual Analysis and Empirical Test," *Trademark Reporter*, 83 (3), 364-393; Itamar Simonson (1994), "Trademark Infringement from the Buyer Perspective: Conceptual Analysis and Measurement Implications," *Journal of Public Policy and Marketing*, 13(2), 181-199.

The Maronick Survey Relied on Biased, Leading Questions, Question Order Effects, and Demand Effects to Produce Predictable Results

58. The questions relied upon in the two Maronick surveys were stated in a slanted way that explicitly informed respondents what the expected, "right" answers were and asked them to either confirm that the (closed-ended, provided) statements were correct or assess the likelihood that they were correct. The first pertinent question in the first survey (in which respondents were not shown anything) was as follows:

Q. 8 When you search using a specific company name or trademark, do you expect the Google.com sponsored links to be "sponsored" by that particular company or trademark holder?

59. One does not need to be an expert on surveys or have any experience designing surveys to recognize that this question predetermined the "findings" (and due to "question order effects," also largely determined the results of the subsequent leading questions). Some of the obvious flaws of this question include:

a. As noted, the question simply states what the survey designers "expect" and merely asks respondents to confirm. Such wording suffers from strong "demand effects" whereby respondents know the "correct" answer and what they are supposed to say; prior research has shown that most respondents tend to follow the lead.

b. Furthermore, such a one-sided wording capitalizes on the "acquiescence bias,"[29] whereby (beyond demand effects) respondents are significantly more likely to agree with provided statements than to disagree with them.

c. The question ("...do you expect the Google.com sponsored links to be "sponsored" by that particular company or trademark holder?") includes the word "sponsored" twice (once without quotes and the second time in quotes). The question does not define the meaning of each "sponsored" as used in the

[29] See, for example, Jon A. Krosnick (1999), "Survey Research," *Annual Review of Psychology,*" 50:537-67.

question[30], so the question essentially asked respondents to confirm that sponsored links are "sponsored," which likely seemed to respondents as a tautology (as discussed further below, the Maronick Surveys did not allow respondents to explain their answers, so it is not possible to know how they interpreted the questions).

60. It appears from his deposition testimony that Dr. Maronick recognized that this question had a "problem," but he could not find a way to solve that problem (depo. pp. 240-3):

"Q. The word sponsored in quotes, why did you put the words sponsored in quotes?

A. Because that was the - - I wanted to separate it from the fact that it's a sponsored link. We have--because of the Lanham Act concepts, criteria sponsored by associated, affiliated with, I wanted to somehow separate it. Sponsored by sponsored by. That's why I put the second sponsored in quotes.

...

Q. Do you think any consumers or users understood the word sponsor in quotation here as you've chosen it in question 6 to refer to the Lanham Act?

A. They certainly didn't refer it to the Lanham Act, but the concept from the Lanham Act, namely, that there's one of the dimensions of this affiliation or association is the word sponsored.

Q. When you asked this question you surely expected them to answer yes to that question; didn't you?

A. I didn't have an expectation. I wasn't surprised when they had, because of the fact that sponsored and sponsored are together.

Q. Yeah, isn't that the case, that you asked them, you expected a sponsored link to be sponsored. Wouldn't you be shocked if the answer were to be no?

[30] Before that question, respondents were asked "Are you familiar with Google.com sponsored links?"

A. I would have been surprised.

...

Q. Do you agree question 6 is leading?

A. No, I don't believe it is. There is a problem with the fact that the sponsored is there twice but, again, that's the nature of the fact that the term that is used is sponsored links and the Lanham Act component is sponsored links. It created a problem, but I don't know any other way to get around that."

Thus, Dr. Maronick was apparently aware that, due to the "problem" in his question, it would have been surprising if the results did not support the plaintiffs' position, but he simply could not find a better way to estimate likelihood of confusion.

61. The remaining questions suffered from similar problems, but with one additional problem. Specifically, the subsequent questions were asked immediately after the biased and leading Question 6, which created a further bias – *question order effect* – because respondents typically try to provide answers that are consistent and do not contradict earlier answers. That is, since respondents already agreed with the provided statement (in Question 6) that sponsored links were "sponsored" by the company or trademark, it would make little sense for them to disagree with the subsequent provided statements that the sponsored links were "related" (Question 7) and "affiliated" (Question 8) with the company/trademark.

62. It is also noteworthy that the first Maronick survey failed to explain the terms "related" and "affiliated" (as well as "sponsored" and the term used in the second survey – "associated"). For example, a company that sells computers can be said to be "related" to a manufacturer of computers – they are both part of the same general product category.

63. Question 9 asked respondents whether they thought that they could buy the searched for company if they were to click on sponsored links. Putting aside the other problems with that question, it appears that Dr. Maronick assumed that the mere fact that

consumers think that it is possible that a particular product might be sold through a particular retailer (the sponsored link) constitutes "initial interest confusion." As he testified (depo. p. 188):

"Q. What is initial interest confusion?

A. Where a consumer will have an expectation of being able to buy a product or service from a firm or has an interest or belief that there is an association, affiliation or sponsorship between the two marks.

And the confusion is when they get in there and they are not able to do that from the, in this case the sponsored link."

However, Dr. Maronick's contention that initial interest confusion refers to any situation in which consumers mistakenly believe that a retailer offers for sale a product that it does not is inconsistent with what happens routinely in reality. That is, consumers often think or conjecture (based, for example, on retailers' ads) that they could find particular products and brands in brick-and-mortar stores that actually do not offer them. The consumers may even travel to these stores based on such mistaken beliefs about the products and brands they sell, resulting in a waste of time and money. But such mistakes simply reflect the fact that consumers can rarely have perfect information about the product/brand assortments of retailers. Accordingly, Dr. Maronick's theory as to what constitutes initial interest confusion and the manner in which it is measured is inconsistent with basic principles of consumer behavior and marketing.

The Maronick Surveys Failed to Approximate Marketplace Conditions and Show Respondents Search Results Pages that Consumers Might See in Reality

64. As explained earlier, "the closer the survey methods mirror the situation in which the ordinary person would encounter the trademark, the greater the evidentiary weight of the survey results." It is noteworthy that Dr. Maronick was already criticized for his failure to approximate marketplace conditions in which his survey showed

respondents a web page that misrepresented what consumers see in reality.[31] As the Court stated:

> "Defendants submitted the rebuttal report and testimony of Dr. Itamar Simonson. Dr. Simonson noted problems with Dr. Maronick's survey, including that it failed to use a control, failed to instruct respondents not to guess, used improper and leading stimuli, and combined questions onto the same page. ... Furthermore, Dr. Simonson pointed out that Dr. Maronick's survey did not provide the respondents with a view of the full DMV.ORG webpage so that respondents could scroll down and see the disclaimer if they so desired. The Court agrees that the lack of a control, and the failure to present Defendants' webpage as an actual consumer would see it, including the disclaimer, are significant problems with Dr. Maronick's survey. The Court gives less weight to Dr. Maronick's survey as a result."

65. Surprisingly, in his present surveys, Dr. Maronick made the same mistakes, including not showing respondents the web page results that consumers would see in reality (and as discussed below, his surveys also lacked any control). Dr. Maronick initially testified that approximating marketplace conditions was important and that his survey complied with that rule; however, he later (p. 280) explained why his survey and the stimuli shown to respondents actually did not approximate marketplace conditions. That is, Dr. Maronick initially said (depo. p. 150) that "I think it's important to replicate the market as much as you can;" to support the claim that he complied with that principle, he further testified that approximated marketplace conditions "by the way the search results pages that I used, which were the actual ones that a consumer would have found in the different search situations we looked at."

66. However, an examination of the actual Maronick questionnaires (and stimuli) indicates that the presented search results were quite different from what consumers could have seen in reality, and respondents were not allowed to scroll or

[31] TrafficSchool.com, Inc. v. EDriver, Inc. 633 F. Supp. 2d 1063; 2008 U.S. Dist. LEXIS 78359.

review the entire page as consumers might normally be able to do. This obvious discrepancy was later explained by Dr. Maronick as follows (depo. p. 280): "My focus was not all the organic or natural links, but rather on the sponsored links, and those are clearly delineated on this page." But the question the survey should have tested was whether consumers are likely to exhibit any confusion in reality, not in an artificial study that "delineates" what Dr. Maronick was trying to prove.

67. Moreover, when respondents were asked the questions (e.g., Question 8 in the Southwest Airlines survey) on which Dr. Maronick relied for his conclusions, they could no longer see the search results page. That is, they could not see the "organic" listings or the sponsored links. For example, the first "organic" listing on the Southwest Airlines results page stated (under the heading "Southwest Airlines"): "Official Southwest Airlines website; the only place to find Southwest Airlines fares online." However, unlike reality, when the Maronick Survey respondents were asked whether they could purchased a Southwest Airlines ticket from the sponsored link singled out for them, they could not see this or any other "organic" listing and could not see any of the sponsored links. This rendered the Maronick Surveys a mere memory test, which had little to do with marketplace reality.[32]

The Failure to Include a Control

68. As indicated, a survey designed to estimate likelihood of confusion must include a (proper) "control."[33] A control is designed to estimate the degree of "noise" or "error" in the survey. Indeed, without a proper control, there is no benchmark for determining whether a likelihood of confusion estimate is significant or merely reflects guessing and the flaws of the survey methodology. As noted above, Dr. Maronick has

[32] The Maronick Surveys violated in other ways the principle that a likelihood of confusion survey (including the stimuli relied upon) should approximate marketplace conditions as closely as possible. For example, Dr. Maronick added the heading "[Question Title]" to the Trek results page, and he added a heading "Google Search Page – Southwest Airlines" to the Southwest Airlines results page.

[33] See, for example, S. Diamond, Reference Guide on Survey Research, in *Reference Manual on Scientific Evidence* 221, 226 n.8 (Federal Judicial Center ed., 1994).

been previously criticized for violating this basic principle of likelihood of confusion surveys.

69. Inexplicably, the present Maronick Surveys did not include any control. During his deposition, Dr. Maronick suggested that his surveys did include a control, but at the same time, he said that there was no control (depo. at 217-221):

"Q. Did you do a control in this case?

A. Yes. Actually, I think by using the generic tests where there was no explicit website we got a measure of the extent to which people would believe that there's an expectation being able to buy the product or service, independent of any particular product or service.

Q. With respect to the survey involving Southwest Airlines did you use a control?

A. No, I did not.

Q. With respect to the survey involving Trek did you use a control?

A. No, I did not.

Q. Now, with respect to the so-called hypothetical questions and/or survey involving iPAD did you use a control?

A. Well, the use of the Apple.com sponsored link served to a certain extent as a control because consumers know that the iPAD is made by Apple, so it served a function of a control."

...

Q. So it's your testimony that the questions and the results for the Yahoo, Google and Ask surveys operate as a control for the remaining portions of the survey?

A. That's correct."

Dr. Maronick conceded that he had no control in his "Southwest" and "Trek" surveys (at p. 217); he further testified (at p. 312) that, similar to a previous case (the TrafficSchool case cited earlier), he did not include a control in the current survey because he did not feel "it could capture the issue ..."

70. This testimony is not only incoherent and contradictory, it suggests that Dr. Maronick does not understand what a control is and the manner in which it is used. First, assuming that his testimony regarding his controls were correct, that is, that the Apple.com results and the Yahoo/Google/Ask results all served as some sort of controls, then his surveys should have led him to conclude that there was no confusion. Specifically, given that the confusion estimate in the control group is subtracted from the estimate in the "test" group (i.e., the version at issue), the net estimate in the present case was negative; that is, the "confusion" in the control group was greater than in the test group – for example, 47% + 36% = 83% for the Apple.com "control" [Maronick Report, p. 55] vs. 11% + 42% = 53% for the "test" question (i.e., the question regarding the likelihood of being able to buy the "searched for" goods from the sponsored links).

71. But these are meaningless calculations, because in reality, the Maronick Surveys included no controls whatsoever; in fact, it is simply incomprehensible on what basis Dr. Maronick might have thought that his "generic results" or results pertaining to other search engines served any control function. Again, it appears that Dr. Maronick is unfamiliar with the most basic and conventional survey principles and methodologies. At least he conceded the obvious fact that his Southwest Airlines test and Trek test (in the second survey) had no control. In fact, none of the surveys had any control.

The Reliance on Closed-Ended Questions and the Failure to Ask Respondents to Explain Their Answers

72. As indicated, Dr. Maronick relied exclusively on closed-ended questions whereby respondents were given the "correct" answers (phrased in a one-sided way, which in all cases corresponded to the plaintiffs' position in the current litigation). It should be noted that virtually all likelihood of confusion surveys include open-ended questions that ask respondents to provide their own answers and explain their answers. As Professor McCarthy points out (in reference to different likelihood of confusion

survey formats):[34]

> "Both questions should be followed up by the important question: 'What makes you say that?' Often, an examination of the respondents' verbatim responses to the 'why' question are the most illuminating and probative part of the survey, for they provide a window into consumer thought processes in a way that mere statistical data cannot."

73. The principle that the survey should include open-ended questions notwithstanding, Dr. Maronick apparently believes that they are not necessary and are needed only in advertising studies (depo. at 248-9):

"Because it didn't seem that there was a need to. I wasn't asking -- typically open-ended questions are advertising studies where you're trying to find out what consumers are taking from an ad in terms of what does the ad say or suggest, what is said or suggested by the ad. Here I'm trying to get at much more specific issues, namely, the extent to which they see a relationship, specifically these three components of a relationship." Again, regardless of whether the specific aspects of confusion the surveys were presumably designed to test, similar to standard likelihood of confusion surveys, the Maronick respondents should have been asked to explain their answers.

The Maronick Surveys Failed to Include the Relevant Consumer Universe

74. As indicated earlier, the relevant consumers (and survey respondents) are potential purchasers of the goods and services at issue. Accordingly, likelihood of confusion survey participants are screened based on their expectation that they would purchase the product at issue within a specific time period. For example, a survey involving a bicycle brand includes only those respondents indicating that they expect (or plan to) purchase bicycles within a period such as a year.

75. Putting aside that the plaintiffs' allegations pertain to all trademarks that

[34] McCarthy at §32:175.

might be used as keywords (i.e., to examine the proposed class' allegations, the respondent universe should represent all product/service categories), the Maronick Surveys' universes failed to represent the relevant consumers even for the couple of products that it was presumably designed to test. Consider, for example, the manner in which the Maronick second survey qualified respondents to participate in the survey concerning Trek bicycles (comparable problems apply to the "Southwest Airlines" and "iPad" universes). Respondents were asked if they owned a bicycle (those who said "no" were excluded), asked to confirm that they had heard of Trek bicycles, and were then asked: "Would you consider buying a Trek bicycle if you were in the market for a new bicycle?" These screening questions reflect a misunderstanding of the relevant survey universe. What counts in the definition of the relevant likelihood of confusion survey universe is that respondents expect to buy the product within a certain period such as a year (regardless of the particular brand, because consumers often do not know in advance which brand/s they would consider).

76. The same flaws applied to the other keyword tested in the Maronick Survey – "Southwest Airlines." Similar to the Trek Survey, the Southwest Survey completely failed to ask respondents if they expected to make an online flight reservation within a specified period (e.g., six months) and intended to use a search engine for that purpose. Thus, we have no basis for establishing that any of the survey respondents were prospective purchasers of Southwest Airlines services and would use a search engine for that purpose. Finally, the first ("generic") survey, which presumably tested for confusion concerning the Apple iPad, did not even bother to ask respondents if they had any intention to buy or would consider buying an iPad (or another tablet computer).

77. Thus, in addition to limiting the survey to just a couple of trademarks (and not testing all the other proposed class members, including the named plaintiffs) the Maronick Surveys never asked respondents if they expected to purchase the products/services in question. Accordingly, in addition to the many other fatal flaws, the

Maronick Surveys failed to represent the relevant consumers' universes.

Other Survey Flaws

78. Considering the many major flaws of the Maronick Surveys, there is no need to elaborate on other flaws and deviations from standard practice. For example, as indicated, the results of surveys conducted in the context of validation must be validated (by an independent research firm). However, the Maronick Surveys results were not validated.

The Maronick Survey Results

79. As is obvious from the above discussion of the many fatal flaws of the Maronick surveys, the results were meaningless and provided no relevant information. However, it is worth noting that these results also make no sense. For example, Questions 10 in the second Maronick Survey (the Trek bicycle version; Maronick Report, p. 70) called the respondents' attention to the sponsored link with the heading "Bikes Up to 60% Off List." Then, Question 11 asked respondents about the likelihood they would click on that sponsored link if they were interested in buying a Trek bicycle. According to the survey results (Maronick Report, p. 81), 74% of the respondents would "definitely" or "probably" click on that link.

80. In reality, I believe that the actual click rate on such sponsored links is 1-2%. In other words, the results of the Maronick Surveys overestimated the click rate by a factor of about fifty. Of course, the nonsensical survey results are not surprising if we consider all the biases and flaws discussed above; yet it appears that Dr. Maronick attempts to reach rather strong conclusions based on his surveys.

81. There is another noteworthy implication of the Maronick Surveys' results. The surveys suggest that consumers regularly click on sponsored links. Furthermore, Dr. Maronick emphasizes that sponsored links may or may not actually sell the products put

out by the companies that are the subject of the search. Accordingly, one does not need to be a consumer psychologist to realize that consumers must have learned many years ago that sponsored links are, in many cases, simply ads for products and services that the search engine user might be interested in.

82. Moreover, search engine users must have learned many years ago that the companies and retailers placing the sponsored ads/links may or may not carry the specific product or service that was entered as the search term. But if one were to take the Maronick results seriously, we would have to conclude that consumers keep making the same mistake and exhibiting the same confusion every day. Evidently, Dr. Maronick failed to realize that, in addition to violating the most basic survey principles, the results make no sense and have no face validity. That is, the Maronick Report concludes that, no matter which search term is used or which sponsored link is displayed, the consumer in 2010 and before has continued to be confused time and time again.

The Maronick Surveys: Conclusion

83. The Maronick Surveys made no attempt to test for commonality and violated virtually all of the basic principles and standards of likelihood of confusion surveys, making the "findings" meaningless and redundant. In particular:

a. The Maronick Surveys failed to follow any recognized methodology or even test for any relevant likelihood of confusion (or initial interest confusion);
b. The surveys relied on a series of slanted, leading questions that informed respondents what the "correct" answers were and merely asked for their approval;
c. The Maronick Surveys failed to include any controls;
d. The Maronick Surveys failed to ask the respondents to explain their answers;
e. The Maronick Surveys failed to approximate marketplace conditions or present the relevant stimuli to respondents as they are seen by consumers in reality;

f. The surveys' respondent universe failed to represent the relevant consumer universes;

g. The results of the Maronick Surveys were not validated.

h. The surveys' methodology and Dr. Maronick's deposition testimony indicate a persistent lack of familiarity with the most basic principles of likelihood of confusion surveys (such as the meaning of a control, the importance of not giving respondents the "right answer" and asking for their approval, and the commonly used survey methods).

84. Each one of the flaws is sufficient to make the Maronick Surveys unreliable. The combination of such fatal flaws indicates that the surveys provide no pertinent information and are simply irrelevant.

Date: 07/7/2010

I. Simonson

Itamar Simonson, Ph.D.

Exhibit A

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- Best Article in the *Journal of Public Policy & Marketing* during the period 1993-1995.
- The 2007 Society for Consumer Psychology Distinguished Scientific Achievement Award.
- The 2002 American Marketing Association Award for the Best Article in the area of Services Marketing.
- The Association for Consumer Research 1990 "Ferber Award."
- Runner-up/Finalist for the O'Dell Award: 1995; 2002; 2004; 2005; 2007; 2008.
- Finalist for the 2003 Paul Green Award (for the *Journal of Marketing Research* article with the greatest potential to contribute to the practice of marketing research).
- Runner-up for the 2005 *Journal of Consumer Research* Best Article Award.
- Winner in the Marketing Science Institute and Direct Marketing Association competition on "Understanding and Measuring the Effect of Direct Marketing."
- Runner-up for the 1993 *California Management Review* Best Article Award.
- National Science Foundation Grant (for 1996-8).
- Outstanding Reviewer Award, *Journal of Consumer Research*, 2005.
- Honorable Mention for the Sloan Executive Program Teaching Award (Fall 1995).
- Five years in the Berkeley School of Business "6-Point Club" (instructors with teaching ratings of 6 or more on a 7-point scale).

TEACHING EXPERIENCE

Stanford University:

Marketing Management (for MBAs and the Sloan Executive Program)
Marketing & Competition (for MBAs)
Marketing to Businesses (for MBAs)
Technology Marketing (for MBAs)
Research Methods for Studying Buyer Behavior (a Ph.D. Course)
Decision Making (a Ph.D. Course)
Buyer Behavior (a Ph.D. course)

University Of California, Berkeley:

Marketing Management (for MBAs - day and evening programs)
Consumer Behavior and Decision Making (a Ph.D. Course)
Various Marketing Executive Education Programs.

BUSINESS EXPERIENCE

October 1978-August 1983 Motorola, Inc.
Worked in an international subsidiary; responsibilities included marketing research and customer analysis, definition of new products, pricing, analysis of sales force performance, competitive intelligence, and forecasting. Conducted studies of markets for various communications products. Last two years served as Product Marketing Manager for communications products.

Consulting:

Consulted for clients from the communications, services, and manufacturing sectors. Expert witness assignments in the areas of trademark infringement, deceptive advertising, market surveys, buyer behavior, marketing management, brand equity, retailing and distribution, and other aspects of marketing.

PUBLICATIONS

Stephen Nowlis, Ravi Dhar, and Itamar Simonson, "The Effect of Decision Order on Purchase Quantity Decisions," forthcoming, *Journal of Marketing Research.*

Chezy Ofir, Itamar Simonson, and Song-Oh Yoon (2009), "The Robustness of the Effects of Consumers' Participation in Market Research: The Case of Service Quality Evaluations," *Journal of Marketing*, 73 (November), 105-14.

Aimee Drolet, Mary Frances Luce, and Itamar Simonson (2009), "When Does Choice Reveal Preference? Moderators of Heuristic vs. Goal Based Choice," *Journal of Consumer Research*, 36 (1).

Itamar Simonson (2008), "Regarding Inherent Preferences," *Journal of Consumer Psychology*, 18, 191-196.

Itamar Simonson (2008), "Will I Like a 'Medium' Pillow? Another Look at Constructed and Inherent Preferences," *Journal of Consumer Psychology*, 18, 155-169.

Song-Oh Yoon and Itamar Simonson (2008), "The Context of Construction As a Determinant of the Strength and Stability of Consumer Preferences," *Journal of Consumer Research*, 35, September, 324-336.

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Jonah Berger, Michaela Draganska, and Itamar Simonson (2007), "The Influence of Product Variety on Brand Perceptions, Choice, and Experience," *Marketing Science*, 26, July-August, 460-72.

Ray Fisman, Sheena Iyengar, Emir Kamenica, and Itamar Simonson (2007), "Racial Preferences in Dating," *Review of Economic Studies*, 75, 1, 117-132.

PUBLICATIONS (continued)

Nathan Novemsky, Ravi Dhar, Norbert Schwarz, and Itamar Simonson (2007), "Preference Fluency in Choice," *Journal of Marketing Research*, XLIV, 347-356.

Chezy Ofir and Itamar Simonson (2007), "The Effect of Stating Expectations on Customer Satisfaction and Shopping Experience," *Journal of Marketing Research*, February, 164-174.

Raymond Fisman, Sheena Iyengar, Emir Kamenica, and Itamar Simonson (2006), "Gender Differences in Mate Selection: Evidence from a Speed Dating Experiment," *Quarterly Journal of Economics*, 121 (2), 673-697.

Itamar Simonson (2005), "Determinants of Customers' Responses to Customized Offers: Conceptual Framework and Research Propositions," *Journal of Marketing*, 69 (January), 32-45.

Itamar Simonson (2005), "In Defense of Consciousness: The Role of Conscious and Unconscious Inputs in Consumer Choice," *Journal of Consumer Psychology*,15(3), 211-217.

Donnel Briley, Michael Morris, and Itamar Simonson (2005), "Cultural Chameleons: Biculturals, Conformity Motives, and Decision Making," *Journal of Consumer Psychology*, 15 (4), 351-362.

Uptal Dholakia and Itamar Simonson (2005), "The Effect of Explicit Reference Points on Consumer Choice and Online Bidding Behavior," *Marketing Science*, 24, 206-17.

Itamar Simonson, Thomas Kramer, and Maia Young (2004), "Effect Propensity," *Organizational Behavior and Human Decision Processes*, 95 (November), 156-74.

Itamar Simonson and Aimee Drolet (2004), "Anchoring Effects on Consumers' Willingness-to-Pay and Willingness-to-Accept," *Journal of Consumer Research*, 31 (December), 681-90.

Ran Kivetz and Itamar Simonson (2003) "The Idiosyncratic Fit Heuristic: The Role of Effort Advantage in Consumer Response to Loyalty Programs," *Journal of Marketing Research*, 40 (November), 454-67.

Ravi Dhar and Itamar Simonson (2003), "The Effect of Forced Choice on Choice," *Journal of Marketing Research*, 40 (May), 146-60.

Dan Ariely and Itamar Simonson (2003), "Buying, Bidding, Playing, or Competing? Value Assessment and Decision Dynamics in Online Auctions," *Journal of Consumer Psychology*, 13(1&2), 113–123.

Ran Kivetz and Itamar Simonson (2002), "Self Control for the Righteous: Toward a Theory of Luxury Pre-Commitment," *Journal of Consumer Research*, 29 (September), 199-217.

Ran Kivetz and Itamar Simonson (2002), "Earning the Right to Indulge: Effort as a Determinant of Customer Preferences Toward Frequency Program Rewards," *Journal of Marketing Research*, 39 (May), 155-70.

PUBLICATIONS (continued)

Chezy Ofir and Itamar Simonson (2001), "In Search of Negative Customer Feedback: The Effect of Expecting to Evaluate on Satisfaction Evaluations," *Journal of Marketing Research*, 38 (May), 170-82.

Itamar Simonson, Ziv Carmon, Ravi Dhar, Aimee Drolet, and Stephen Nowlis (2001), "Consumer Research: In Search of Identity," *Annual Review of Psychology*, 52, 249-275.

Donnel Briley, Michael Morris, and Itamar Simonson (2000), "Reasons as Carriers of Culture: Dynamic Vs. Dispositional Models of Cultural Influence on Decision Making," *Journal of Consumer Research*, 27 (September), 157-178.

Aimee Drolet, Itamar Simonson, and Amos Tversky (2000), "Indifference Curves that Travel with the Choice Set," *Marketing Letters*, 11(3), 199-209.

Stephen Nowlis and Itamar Simonson (2000), "Sales promotions and the Choice Context as Competing Influences on Consumer Decision Making," *Journal of Consumer Psychology*, 9(1), 1-17.

Ran Kivetz and Itamar Simonson (2000), "The Effect of Incomplete Information on Consumer Choice," *Journal of Marketing Research*, 37(4), 427-48.

Itamar Simonson and Stephen Nowlis (2000), "The Effect of Explaining and Need for Uniqueness on Consumer Decision Making: Unconventional Consumer Choices Based on Reasons," *Journal of Consumer Research*, 27 (June), 49-68.

Itamar Simonson (1999), "The Effect of Product Assortment on Consumer Preferences," *Journal of Retailing*, 75(3), 347-70.

Ravi Dhar and Itamar Simonson (1999), "Making Complementary Choices in Consumption Episodes: Highlighting Versus Balancing" *Journal of Marketing Research*, 36 (February), 29-44.

Houghton, David, ..., and Itamar Simonson (1999), "Correction Processes in Consumer Choice," *Marketing Letters*, 10(2),107-112.

Ziv Carmon and Itamar Simonson (1998), "Price-Quality Tradeoffs in Choice Versus Matching: New Insights into the Prominence Effect," *Journal of Consumer Psychology*, 7(4), 323-343.

Stephen Nowlis and Itamar Simonson (1997), "Attribute–Task Compatibility as a Determinant of Consumer Preference Reversals," *Journal of Marketing Research*, 34 (May), 205-218.

Joel Huber, ..., and Itamar Simonson (1997), "Thinking About Values in Prospect and Retrospect: Maximizing Experienced Utility," *Marketing Letters*, 7, 324-334.

Stephen Nowlis and Itamar Simonson (1996), "The Impact of New Product Features on Brand Choice," *Journal of Marketing Research*, 33 (February), 36-46.

PUBLICATIONS (continued)

Itamar Simonson (1994), "Trademark Infringement from the Buyer Perspective: Conceptual Analysis and Measurement Implications," *Journal of Public Policy and Marketing*, 13(2), 181-199.

Itamar Simonson (1994), "An Empirical Investigation of the Meaning and Measurement of Genericness," *Trademark Reporter*, 84 (2), 199-223.

Itamar Simonson, Ziv Carmon, and Suzanne O'Curry (1994), "Experimental Evidence on the Negative Effect of Product Features and Sales Promotions on Brand Choice," *Marketing Science*, 13 (1), 23-40.

Itamar Simonson (1993), "Get Closer to Your Customers by Understanding How They Make Choices," *California Management Review*, 35 (4), 68-84.

Itamar Simonson (1993), "The Effect of Survey Method on Likelihood of Confusion Estimates: Conceptual Analysis and Empirical Test," *Trademark Reporter*, 83 (3), 364-393.

Itamar Simonson, Stephen Nowlis, and Katherine Lemon (1993), "The Effect of Local Consideration Sets on Global Choice Between Lower Price and Higher Quality," *Marketing Science*, 12 (4), 357-377.

Itamar Simonson, Stephen Nowlis, and Yael Simonson (1993), "The Effect of Irrelevant Preference Arguments on Consumer Choice," Journal of Consumer Psychology, 2 (3), 287-306.

Eldar Shafir, Itamar Simonson, and Amos Tversky (1993), "Reasons-Based Choice," *Cognition*, 49, 11-36.

Amos Tversky and Itamar Simonson (1993), "Context-Dependent Preferences," *Management Science*, 39 (10), 1179-1189.

Itamar Simonson (1992), "Influences of Anticipating Regret and Responsibility on Purchase Decisions," *Journal of Consumer Research*, 19 (June), 105-118.

Itamar Simonson and Peter Nye (1992), "The Effect of Accountability on Susceptibility to Decision Errors", *Organizational Behavior and Human Decision Processes*, 51 (3), 416-446.

Itamar Simonson and Barry Staw (1992), "De-Escalation Strategies: A Comparison of Techniques for Reducing Commitment to Losing Courses of Action," *Journal of Applied Psychology*, 77 (4), 419-426.

Itamar Simonson and Amos Tversky (1992), "Choice in Context: Tradeoff Contrast and Extremeness Aversion," *Journal of Marketing Research*, 29 (August), 281-295.

Itamar Simonson and Russell S. Winer (1992), "The Influence of Purchase Quantity and Display Format on Consumer Preference for Variety", *Journal of Consumer Research*, 19 (June), 133-138.

PUBLICATIONS (continued)

Ravi Dhar and Itamar Simonson (1992), "The Effect of the Focus of Comparison on Consumer Preferences," *Journal of Marketing Research*, 29 (November), 430-440.

William T. Ross and Itamar Simonson (1991), "Evaluations of Pairs of Experiences: A Preference for Happy Endings," *Journal of Behavioral Decision Making*, 4(4), 273-282.

Itamar Simonson (1991), "The Effect of Buying Decisions on Consumers' Assessments of Their Tastes", *Marketing Letters*, 2, 1, 5-14.

Itamar Simonson (1990), "The Effect of Purchase Quantity and Timing on Variety Seeking Behavior," *Journal of Marketing Research*, 27 (May), 150-162.

Itamar Simonson (1989), "Choice Based on Reasons: The Case of Attraction and Compromise Effects," *Journal of Consumer Research*, 16 (September), 158-174.

Itamar Simonson, Joel Huber, and John Payne (1988), "The Relationship Between Prior Brand Knowledge and Information Acquisition Order", *Journal of Consumer Research*, (March), 14,4, 566-78.

ARTICLES UNDER REVIEW

Leilei Gao and Itamar Simonson, "Buying First and Choosing First: The Impact of Decision-Making Order on Consumer Choice"

Michal Maimaran and Itamar Simonson, "Multiple Routes to Self Versus Other-Expression in Consumer Choice."

Thomas Kramer, Michal Maimaran, and Itamar Simonson, "The Asymmetric Impact of Option Type in Choice Defense and Criticism."

Aner Sela and Itamar Simonson, "Perceptions of Value: The Effect of Context, Mindset, and Deliberation."

Itamar Simonson and Aner Sela, "Seeking Patterns in Heritable Effects on Choice and Judgment: Are People Born to Live on the Edge or in the Mainstream?"

C. Ofir, I. Simonson, O. Grossman, A. Hasdia, and M. Rachamim, "The Impact of Ethnic Minority Solidarity on Service Evaluations."

Doctoral Dissertations Chaired:

Ravi Dhar (Chaired Professor, Yale U.)
Aimee Drolet (Chaired Professor, UCLA)
Stephen Nowlis (Chaired Professor, Washington U., St. Louis)
Ziv Carmon (Professor, INSEAD)
Ran Kivetz (Chaired Professor, Columbia U.)
Donnel Briley (Professor, U.O. Sydney)
Thomas Kramer (Tenured Associate Professor, Baruch College)
Wendy Liu (Assistant Professor, UCLA)
Sanjay Sood (Tenured Associate Professor, UCLA)
Song-Oh Yoon (Assistant Professor, Korea U.)
Michal Maimaran (Visiting Assistant Professor, Kellogg School).
Leilei Gao (Assistant Professor, Chinese University, Hong Kong).
Aner Sela (Assistant Professor, U. O. Florida)
(disser. co-chair of) Jonah Berger (Assistant Professor, Wharton School, U.O. Penn.)

EDITORIAL ACTIVITIES

Editorial Boards: *Journal of Consumer Research, Journal of Marketing Research, Journal of Consumer Psychology, Journal of Marketing, Journal of Behavioral Decision Making, International Journal of Research in Marketing, Review of Marketing Research, Marketing Letters, Review of Marketing Research.*

Reviewer for *Marketing Science, Journal of Economic Behavior and Organization, Science, Management Science, Journal of Retailing and Consumer Services, Journal of Marketing, Journal of Retailing, Organizational Behavior and Human Decision Processes, Journal of Experimental Psychology, Psychological Review, Psychological Bulletin, Journal of Personality and Social Psychology, Psychological Science, California Management Review, Journal of Economic Psychology, European Journal of Social Psychology, Journal of Judgment and Decision Making, Medical Decision Making,* and National Science Foundation.

PROFESSIONAL AFFILIATIONS

Association for Consumer Research
Judgment and Decision Making Society
American Psychological Society

PERSONAL DATA

Birth Date: December 25, 1951
Marital Status: Married, 2 children

EXHIBIT B

Cases in which Dr. Itamar Simonson Testified as an Expert at Trial (including written expert reports submitted to the court) or by Deposition in the Past Four Years

1. Starbucks Corp. v. Sambuck's Coffeehouse (District of Oregon; 02CV06541) (trial)
2. Nissan Motors v. VW and Audi of America (Eastern District of Michigan; 05CV71126) (deposition)
3. Met-Rx Substrate Technology v. Champion Nutrition (Northern District of California; 04CV04180) (settled before deposition)
4. Ann Castello et al. v. Allianz Life Insurance Company of North America and LifeUSA Insurance Co. (State of Minnesota, Country of Hennepin; MC 03-20405) (settled before trial)
5. Tamares Las Vegas Properties v. The El-Ad Group (Dist. Court, Clark County, Nevada; case # A546046) (trial)
6. Classic Foods v. Kettle Foods (Central District of California; 04CV00725) (trial)
7. Allergan Inc. v. Klein-Becker (Southern District of Florida; 05CV81155) (settled before or after deposition)
8. Enterprise Rent-A-Car v. U-Haul International (District of Missouri; 03CV1480) (deposition)
9. Nautilus v. ICON Health & Fitness, Inc. (Western District of Washington; 04CV5426) (deposition)
10. Newport Pacific v. Moe's Southwestern Grill (District of Oregon; 05CV995) (deposition)
11. American Blinds & Wallpaper factory v. Google Inc. (Northern Dist. Calif., C 03-5340) (deposition)
12. Kargo Global, Inc. v. Advance Magazine Publishers, Inc. (SDNY; 06 CV 0550) (deposition)
13. CNG Financial Corp. v. Google, Inc. (Southern Dist. of Ohio, Western Div., 1:06 CV 040) (deposition)
14. Louis Vuitton Malletier v. Dooney & Bourke (SDNY; 04 CV 2990) (deposition)
15. The Sugar Association v. McNeil Nutritionals (Central Dist. of Calif., West. Div., CV 04-10077 DSF) (deposition)
16. Dyson, Inc. v. Maytag Corp. (District of Delaware; 05-434-GMS) (deposition)

17. MD Beauty, Inc. and Bare Escentuals, Inc. v. Dennis Gross and M/D Skin Care, LLC (SDNY, 03 CV 3089 (RLC)) (deposition)

18. Environmental World Watch, Inc. v. Procter & Gamble Distributing Co. et al. (also referred to as, State of California v. Frito Lay et al.) (Superior Court of the State of California for the County of Los Angeles; Case No.: 337618) (deposition)

19. Kosmedix Inc. v. Allergan inc. et al. (Dist. Colorado, 06-CV-00938-LTB-MJW) (depositon)

20. Trafficschool.com v. EDRIVER, Inc. (USDC, Cen. Dist. Ca., CV 06-7561 PA (CWx) (deposition)

21. Hewlett Packard Inkjet Printer Litigation (Northern Dist. Calif., C05-3580 JF) (deposition)

22. Johnson & Johnson (previously Pfizer Inc.) v. Actavis, Inc. (S.D.N.Y. 06CV 8209) (deposition)

23. Champagne Louis Roederer v. J. Garcia Carrion, S.A. and CIV USA (US Dist. of Minnesota; 06-CV-213 JNE/SRN) (trial)

24. Johnson & Johnson v. The American Red Cross et al. (S.D.N.Y. 07 CV 7061) (deposition)

25. American Eagle Outfitters v. Lyle & Scott (Western Dist. of Penn., 2:06-cv-00607-FAC) (deposition)

26. American Airlines, Inc. v. Google Inc. (No. Dist. Texas; 4:07-CV-487-A) (deposition)

27. Emerging Vision, Inc. v. For Eyes Optical (S.D.N.Y; 06 CV 5823) (deposition)

28. Sobel et al. v. The Hertz Corp. (USDC of Nevada; 3:06-CV-00545-LRH) (deposition)

29. Mary Kay, Inc. v. Amy Weber et al. (US Dist. Court, Northern Dist. of Texas, Dallas Div.; 3-08-CV-776-G) (deposition)

30. Cricket Communications, Inc. v. Hipcricket, Inc. (USDC, West. Dist. of Washington; 2008-CV-00908 MOP) (deposition)

31. National Envelope Corp. v. American Pad & Paper (S.D.N.Y; 1:06-CV-12988-CSH) (deposition)

32. Hardy Life LLC v. Nervous Tattoo, Inc. et al. (USDC, Cent. Dist. of CA; CV08-03524-PA).

33. High Voltage Beverages v. The Coca-Cola Company (West. Dist. of NC; 3:08-CV-367) (deposition)

34. Robert Goldman and CELS Enterprises, Inc. v. L.C. Licensing and Liz Claiborne, Inc. (Cent. Dist. of CA, West. Div., CV-7-07619 DSF) (deposition).

35. JIPC Management v. Incredible Pizza Co. et al. (Cent. Dist. of CA, West. Div., CV08-04310 MMM) (deposition)

36. i4i Limited Partnership v. Microsoft Corp. (East. Dist. of Texas, Tyler Div., 6-07CV-113 LED) (trial)

37. Individual Network LLC v. Apple, Inc. (East. Dist. of Texas, Marshall Div., 2:07CV 158)

38. Weir Slurry Group, Inc. v. Atlas Equipment Company (West. Dist. of Washington, 2:07-cv-01358) (deposition)

39. WMH Tool Group, Inc. v, Woodstock International, Inc. and Grizzly Industrial, Inc. (North. Dist. of ILL, 07-cv-3885) (deposition)

40. Wisconsin Alumni Research Foundation v. Intel Corp. (West. Dist. of Wiscon.; 08-c-78-C) (deposition)

41. Hansen Beverage Company v. CytoSport, Inc. (Cent. Dist. of CA.; CV-09-0031 VBF) (deposition)

42. THOIP v. The Walt Disney Company et al. (S.D.N.Y., 08 Civ. 6823 (SAS) (deposition)

43. Credit One Corp. v. Credit One Financial, Inc. (Cent. Dist. of CA, CV 09-2985 ODW)

44. In the Matter of the Motor Fuel Temperature Litigation (Dist. of Kansas; 07-MD-1840-KHV) (deposition)

45. The Hershey Company v. Promotion in Motion (Dist. of NJ; 07-CV-1601) (deposition)

46. Hansen Beverage Company v. Vital Pharmaceutical (South. Dist. of CA; 08CV-1545 IEG) (deposition)

47. Whirlpool Corp. Front-Loading Washer Products Liability Litigation (North. Dist. Ohio; 1:08-wp-65000; MDL 2001) (Deposition).

48. Arbitration between Bank of America Corp. (and FIA Card Services) and L.L. Bean (arbitration).

49. People's United Bank v. PeoplesBank (US Dist. of CT; 08-cv-01858).

50. Scott's of Keene, Inc. v. Piaggio USA, Inc. (Dist. off New Hampshire, 1:09-CV-122) (deposition).

51. Veronica Gutierrez et al. v. Wells Fargo Bank (N. Dist. of CA; c 07-05923 WHA) (trial).

52. Sharp Corp. v. Dell, Inc. (Dist. of NJ; 08-CV-05088) (deposition).

53. Quia Corp. v. Mattel, Inc. (North. Dist. of CA, San Jose; C 10-1902 JF).

EXHIBIT C

DOCUMENTS REVIEWED BY DR. SIMONSON

1. Vulcan Golf v. Google, Inc., 254 F.R.D. 521.
2. Class Action Complaint (FPX).
3. Google's Answer and Aff. Def. (FPX).
4. First Amended Class Action Complaint (Beck).
5. Google's Ans., Aff. Def., and Counterclaims (Beck).
6. Agreed Protective Order (FPX & Beck).
7. Vulcan Golf v. Google – Amended Declaration of Professor Itamar Simonson.
8. Electronic deposition transcript of T. J. Maronick.
9. Deposition Transcript and video of T. J. Maronick.
10. Exhibits to deposition of T. J. Maronick.