

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

**THE RODNEY A. HAMILTON LIVING  
TRUST AND JOHN BECK AMAZING  
PROFITS, LLC, INDIVIDUALLY AND ON  
BEHALF OF ALL OTHERS SIMILARLY  
SITUATED,**

**PLAINTIFFS,**

**V.**

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

**DEFENDANTS.**

**Civil Action No. 2:09-cv-00151-TJW-CE**

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

**OPPOSITION TO MOTION TO EXCLUDE MARONICK REPORT**

Comes now the Plaintiffs John Beck Amazing Profits, LLC and the Rodney Hamilton Trust <sup>1</sup> who oppose Defendants' motion to exclude the expert report of Dr. Thomas Maronick.

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<sup>1</sup> FPX, LLC has concurrently filed a nearly identical opposition in the discovery-consolidated related case, *FPX, LLC v. Google, Inc. et al.*, USDC EDTX Case No 2:09-cv-00142. Apart from the plaintiff name and the class identity, these oppositions are substantially identical.

## I. INTRODUCTION

Plaintiffs FPX, LLC, Rodney A. Hamilton Living Trust and John Beck Amazing Profits, LLC (“Plaintiffs”) brought these two cases in order to finally have a court rule on the legality of Defendants’ policies of making billions of dollars by selling other people’s registered trademarks to competitors and other parties who wish to take advantage of the goodwill associated with those marks. For the better part of five years, Google and the other defendants have, thanks to skillful lawyering, convinced courts that the legality of this practice is immune from legal scrutiny by arguing that “individual factual issues” preside over every single one of the thousands of registered trademarks sold by defendants as keywords. In essence, Google has managed to construct a world in which relief is available only to those companies with bottomless legal budgets, and small companies have no ability to police the use of their own marks.<sup>2</sup>

This case seeks to finally force Google to face judicial scrutiny, and does so by seeking only injunctive relief, permitting class members to demand that Google stop selling their registered trademarks to competitors. It does not seek damages.

Although class certification is proper under Rule 26(b)(3) even absent a survey, Plaintiffs have conducted a ‘proof of concept’ survey showing that (1) a significant number of consumers believe that ‘sponsored links’ are affiliated with the entered search term when that term is a mark; (2) this belief is consistent across marks and (3) the difficulty of conducting a confusion survey increases exponentially as the mark in question becomes less well known. Although Plaintiffs will conduct a more comprehensive survey at the liability phase,<sup>3</sup> the survey here shows consistent confusion across classes of marks.

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<sup>2</sup> E.g. American Airlines.

<sup>3</sup> Google’s expert, Dr. Itamar Simonson, outlined what he believed would be a ‘valid’ liability survey at deposition. Meyer Decl. Exh. A. Plaintiffs’ liability survey would closely conform to Defendants’ expert’s suggestions.

Plaintiffs' "proof of concept" surveys are potentially very damaging to defendants because they support the justification for class certification in this matter. Defendants apparently believe that at this stage of the proceeding they can convince the Court to ignore the proof of concept surveys altogether, thus enhancing their Opposition to class certification. Defendants apply Daubert factors to challenge the relevance of the proof of concept surveys. Not only do Defendants contend that Plaintiffs' survey expert, Dr. Maronick, tested the wrong issue, they assert that his survey apparently suffers from numerous methodological flaws. Defendants overstate and mischaracterize Dr. Maronick's survey and argue that Google's business model is entirely *beyond legal inquiry*. However, defendants ignore well-settled law that the imagined flaws in Dr. Maronick's report go to weight, rather than admissibility, particularly in the context of a Motion For Certification of the Class.

Plaintiffs address defendants' various challenges to Dr. Maronick's report below. But in brief, the alleged flaws described in the motion do not support exclusion for the following reasons:

- Particularly in a court hearing, methodological issues go to weight, not admissibility;
- The case law cited by Defendants actually supports admission here, as Dr. Maronick's survey addresses many of the flaws described in the cases cited by Defendants;
- Because Dr. Maronick filtered for knowledge, no further controls were needed;
- Because the screenshots matched what a normal viewer would see on a computer screen, normal market conditions were met; and
- The 'acquiescence bias' does not support exclusion of every single 'yes-or-no' survey ever conducted.

There is no basis for the Court to exclude Dr. Maronick's survey. The Court may give this report whatever weight it deems appropriate and should deny defendants' motion.

## **II. THE SURVEYS**

The Maronick<sup>4</sup> surveys address several key questions relating to the legality of Google's practices (which have never been addressed by American courts). Dr. Maronick conducted two separate surveys in order to address, at least in concept, whether or not the nature of Google's sponsored links was likely to cause confusion.<sup>5</sup> The surveys revealed that, generally speaking, respondents expected to be able to buy the searched-for goods or services through all sponsored links, and that this belief was consistent across marks.

### **Survey 1:**

Dr. Maronick's first survey asked respondents two categories of questions. First, he asked whether or not they believed 'sponsored links' were affiliated with the trademarked search term they entered, or whether they expected to be able to buy the trademark holder's goods or services through the sponsored link. Second, applying these questions, he used sample questions relating to a search for the "iPad," and asked whether or not they expected to be able to buy the iPad from certain sample sites. Respondents were filtered, and limited to those familiar with sponsored links who used trademarks as search terms. Separate cells were used for Google, Yahoo, and ask.com. Maronick Report at 7-8.

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<sup>4</sup> Dr. Maronick is a professor at Towson University who has conducted hundreds of surveys in his career. Google does not challenge his qualifications.

<sup>5</sup> The Maronick report is attached as exhibit B to the Butzer declaration in support of Defendants' Daubert motion.

A majority of respondents believed sponsored links were sponsored<sup>6</sup> by or affiliated with the trademark holder. A strong majority believed the links were related to the trademark holder. Equally important, a majority believed they definitely or probably could buy the mark holder's goods or services through the sponsored link.

The respondents were also asked about a hypothetical search for the 'iPad.' The results were striking. Approximately 80% of respondents believed, correctly, that they definitely or probably could buy an iPad from the Apple.com site.<sup>7</sup> Although this showed no confusion, because the belief was correct, the follow up question, i.e., whether they could buy the iPad at a generic electronics store with a sponsored link, still showed a positive response north of 50%. Maronick Report at 8-13.

### **Survey 2:**

The generic survey 1 was followed up with a more specific survey 2, which assessed initial interest confusion using screenshots of actual Google search pages (using two cells, one for Trek, one for Southwest). After filtering for people who would potentially be in the market for the products/services in questions and for knowledge, respondents were shown screenshots<sup>8</sup> of actual search results for Southwest and Trek,<sup>9</sup> and asked whether they believed the sponsored links were affiliated with the searched-for company, and whether they expected to be able to buy the searched-for products.

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<sup>6</sup> Plaintiffs did not choose the name "sponsored links" to describe the links. This name was chosen by Google as a description – as such, any confusion arising out of the use of the word "sponsored" is the fault of Defendants' business practices, not Plaintiffs' survey.

<sup>7</sup> On somewhat similar lines, even Defendants' counsel showed some actual confusion during the deposition of Dr. Maronick, when he asked Dr. Maronick, "and [Bergdorf Goodman] are competitors of Neiman Marcus as well; right?" Maronick Depo. at 92 and 196. Bergdorf Goodman is in fact affiliated and related to Neiman Marcus – it is a subsidiary.

<sup>8</sup> The screenshots showed all sponsored links and several organic links.

<sup>9</sup> Airlines and Bicycles, respectively. The search terms were simply "Southwest" and "Trek" to avoid companies that used "Airlines" or "Bicycles" as keywords.

First, the respondents were filtered. For Trek, the results were limited to individuals familiar with Trek who would consider buying Trek if they were in the market for a new bicycle. For Southwest, the sample was limited to individuals who used search engines to make airline reservations. Maronick Report at 14-15.

Both cells were shown screenshots<sup>10</sup> of actual Google search results for “Southwest” and “Trek.”<sup>11</sup> They were then asked about two of the sponsored links, BikeDirect.com and Smartfares.com/Southwest, which appeared on the searches. Ultimately, 60% of Southwest respondents and 73% of Trek respondents expected to be able to buy the relevant goods or services from Smartfares.com/Southwest or bikesdirect.com. Plaintiffs have independently determined that these beliefs are not, in fact, correct. Maronick Report at 15-18.

One further aspect of the survey is worth noting. Although Google claims it is in its interest “not to confuse its users,” the search results showed that the sponsored link buyers were doing their level best to create confusion, and Google did not appear to care. Motion at 3. For example, a search for “Southwest,” beginning as early as March 2010 and as late as September 2010, revealed the sponsored link “smartfares.com/Southwest.” The very existence of this link gives lie to Google’s argument that “everyone knows you can only buy Southwest tickets from Southwest.com.” The sole reason for a site such as “smartfares.com/Southwest” can be to confuse consumers. And Google’s failure to remove this site for months after having been made specifically aware of it in the complaint and the Maronick report, shows that Google is at best manifestly indifferent to this fact.<sup>12</sup> As well, the above articulated fact pattern highlights the fact that there must

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<sup>10</sup> Taken from an average-sized window on a 20-inch monitor.

<sup>11</sup> “Airlines” and “Bicycles” were not included in the search to avoid false positives.

<sup>12</sup> At least until the class certification motion was filed. This link, the most egregious effort to create confusion mentioned in the motion, appeared in nearly every search for “Southwest” during the first three quarters of 2010. It had disappeared from “Southwest” searches by early October 2010. Meyer Decl. ¶ 4-5. This was also the case with sponsored links based on “Firepond.” The record suggests that Google, at least,

be some mechanism, other than several hundred thousand dollars worth of litigation, for companies smaller than Southwest or American Airlines to compel defendants to stop selling their marks. This mechanism is the sole reason this complaint is being brought.

### **III. NONE OF THE SURVEYS' IMAGINED METHODOLOGICAL FAULTS WOULD JUSTIFY EXCLUSION**

The real thrust of Defendants' motion, as admitted by Defendants' expert,<sup>13</sup> is that it is impossible to conduct a survey that assesses whether or not Defendants' practices are, in fact, illegal, and, *ipso facto*, Defendants' practices are immune from legal scrutiny. Not surprisingly, Defendants find considerable fault in what they contend is attempting the impossible. *See* Motion at 15. None of the alleged faults in the survey justify exclusion, so the motion should be denied.

As an initial matter, it is important to remember that the class certification motion will be tried by this Court, not by a jury. Courts have long recognized that the 'gatekeeper' role of the court is less significant in the context of a bench trial or hearing. *See, e.g., Gibbs v. Gibbs, 210 F.3d 491, 500 (5th Cir. 2000)* ("most of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury"); *U.S. v. Brown, 415 F.3d 1257, 1268 (11th Cir. 2005)* ("[The traditional barriers to opinion testimony] are even more relaxed in a bench trial situation, where the judge is serving as factfinder...There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself.");

Nevertheless, even if the gatekeeper doctrine applies here in full force, Plaintiffs respectfully submit that the testimony of Dr. Maronick will do much more, and certainly no less, than assist this Court in its understanding of the issue of consumer confusion, and its consistency across marks.

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makes efforts to insulate its business model from legal scrutiny by simply eliminating the small number of sponsored links under legal attack. A class action is the only route around this.

<sup>13</sup> Simonson Decl. [Docket no. 79-17] at 4 ¶ 8..

**A. Examination of Defendants' Case Law Shows that Dr. Maronick's Survey Is Admissible; Dr. Maronick's Survey Is Superior To Those Described in the Cases Cited by Defendants**

Defendants, in their motion, rely on a small handful of cases for the proposition that Plaintiffs' survey is inadmissible. An analysis of the facts and holdings of those cases should lead the Court to conclude that Dr. Maronick's survey was, in fact, valid, and to the extent there are any errors, they do not support exclusion of the survey.

For example, *Scott Fetzer Co. v. House of Vacuums Inc.*, 381 F.3d 477, 488 (5<sup>th</sup> Cir. 2004), the primary case relied upon by Defendants, supports the plaintiffs here, and provides a clear contrast with Dr. Maronick's survey. In *Scott Fetzer*, the plaintiff was a Kirby vacuum distributor, and the defendant was a vacuum repair shop that also sold new Kirby vacuums. The suit was over the use of the Kirby mark in the defendant's yellow pages advertisement.

The plaintiff conducted a survey of plaintiff's customers that showed the advertisement to participants, asked questions regarding (1) affiliation/sponsorship/connection and (2) whether participant thought one could buy a Kirby vacuum from the defendant. In these ways, the *Fetzer* survey was similar to the survey here, and indeed any Lanham Act survey. The similarities end there. The differences between the *Fetzer* survey and Dr. Maronick's survey ultimately proved fatal to the *Fetzer* survey.

First, and most importantly, *Fetzer's* survey indicated no confusion. Nearly all respondents expected to be able to buy Kirby vacuums from defendant. In that case, the belief was correct, and thus the question did not speak to confusion. *Id.* at 487 n. 2. Here, in contrast, respondents have reviewed numerous sponsored links either containing or linked from the mark in question. The respondents have the same belief, but in this case, it is false. As such, it speaks to considerable confusion.



Second, the Fetzer survey universe was deliberately constructed to be both under and over inclusive. It was limited to plaintiff's customers, who were familiar with plaintiff's marketing techniques. Due to the durable nature and vacuums (versus airline tickets or bicycles), this under inclusiveness was particularly problematic as, it systematically excluded anyone potentially in the market for new vacuums. Here, in contrast, the survey universe is drawn from an objective internet survey, and filtered for familiarity with the marks in question and potential involvement with the relevant market. Any imagined flaws in the survey universe here, particularly in light of the repeat customer nature of airline tickets, are far more benign than those in the *Fetzer* case.

Finally (although the language of *Fetzer* suggests this was not the key factor), the questions in the Fetzer survey were extremely leading. Instead of traditional, unmodified questions regarding "sponsorship," the *Fetzer* survey added the "in any way" qualifier that thus considerably broadened the scope of a permissible 'yes' answer, thus rendering the survey quite leading. In contrast, the "in some way" qualifier in Dr. Maronick's survey does not broaden the question in the same way. This issue does not appear in any of Maronick's surveys.

Simply put, any flaws in Dr. Maronick's surveys, even as imagined by Defendants, pale in comparison to those in *Fetzer*; as such, the more general rule stated in *Fetzer* applies, namely that "Usually, methodological flaws in a survey bear on the weight the survey should receive, not the survey's admissibility." *Id.* at 488.

Indeed, the Western District of Texas overruled a Daubert motion that closely paralleled the one here in *Kinetic Concepts, Inc. v. BlueSky Med. Corp.*, 2006 U.S. Dist. LEXIS 60187 (W.D.Tex August 11, 2006). In that case, a false advertising survey was attacked for (1) alleged ambiguity in the questions; (2) failure to use a control group; and (3) the universe of respondents. The court rejected all of these objections, noting that methodological errors go generally to weight. Because, broadly speaking, Dr.

Maronick's surveys are far closer to the one in *Kinetic Concepts* than *Fetzer*, the motion to exclude should be denied.

**B. By Showing Screenshots that Reflect Those Actually Seen by Consumers, Dr. Maronick's Survey Adequately Represented Market Conditions**

Defendants also argue that by showing respondents a screenshot of a single search result that contained all of the information likely to appear on a medium-sized browser window, the Maronick survey failed to adequately represent market conditions. This argument is not well taken.

However, a screenshot that reflects exactly what a consumer would see more than adequately reflects market conditions. Defendants' case law does not suggest otherwise. For example, in *Simon Prop. Group L.P. v. mySimon, Inc.*, 104 F. Supp. 2d 1033, 1041 (S.D.Ind. 2000) conducted a survey at a mall, showing two physical cards with photographs away from a computer of a website, in sequence, to potential consumers. The court, although it struck the survey, appeared to have no problem with the cards themselves, which departed from market reality far more than Dr. Maronick's screenshots. Indeed, one of the criticisms of the survey in *Simon* is that the sequence of sites shown did not reflect the real-world results of search engine searches. *Id.* at 1044. Here, in contrast, the screenshots were real search engine searches, and reflected exactly what a viewer would see in a medium-sized browser window after typing in the search term.

Because the screenshots in fact replicate exactly what a consumer would see if searching for Southwest or Trek through Google, they more than adequately replicate market conditions.

**C. Because the Maronick Survey Filtered Respondents For Involvement  
In the Relevant Market, No Additional Control Was Required**

On the control issue, which was emphasized heavily by Defendants here, the *Kinetic Concepts* court noted that because the survey assessed respondents' familiarity with the products at issue before asking them any substantive questions, the survey was sufficiently controlled. Thus, the survey here is admissible due to its filters, and the control argument raised by Defendants in this case is not well taken.<sup>14</sup> As noted in *Kinetic Concepts*, screening for familiarity with the relevant universe of information may constitute a sufficient control. *Kinetic Concepts, supra*, 2006 U.S. Dist. LEXIS 60187 at \*20. See also *See Ironclad, L.P. v. Poly-America, Inc.*, 2000 U.S. Dist. LEXIS 10728, 2000 WL 1400762 at \*7 (N.D. Tex. Jul. 28, 2000) (stating ". . . the Court need not exclude the survey due to the lack of control, as generally, technical deficiencies affect the weight rather than the admissibility"); *Jellibears, Inc. v. Skating Clubs of Ga., Inc.*, 716 F.2d 833, 846 n.24 (11th Cir. 1983) (technical deficiencies of survey go to weight rather than to admissibility).

The other cases cited by Defendants addressing the other imagined flaws in Maronick's survey applied this general rule. For example, in *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 264 (5<sup>th</sup> Cir .1980),<sup>15</sup> despite errors in the universe of respondents, the court only "discounted" the results.<sup>16</sup> In any event, since the various

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<sup>14</sup> The confusion is not negative 30% as alleged at Motion at 10. The difference between the correct answer on the Apple official site, and the incorrect answer on the generic electronics store is *positive* 30%. 83% of respondents were *not* confused about the Apple site, but 53% *were* confused about the generic store.

<sup>15</sup> Also, most of the survey respondents had never been exposed to the defendant's mark (Domino's Pizza).

<sup>16</sup> As discussed below and as will be discussed in the reply in support of class certification, the results should not be discounted, as the universe was proper. For example, limiting the "Trek" survey to bicycle owners generally would have no meaningful effect on the universe – it is difficult to imagine someone who did not already own a bicycle of some sort being in the market for a Trek bicycle. Likewise, *contra Fetzer*, it is difficult to imagine large numbers of persons in the market who do not own a

surveys were limited to individuals that would logically be in the market for the relevant products or services, any universe errors are minor at worst, and do not support exclusion.

*THOIP v. Disney*, 690 F.Supp.2d 218 (S.D.N.Y. 2010), also cited by Defendants, involved comparisons of two surveys. Had Defendants (who have orders of magnitude more resources than Plaintiffs) chosen to conduct a survey to rebut Dr. Maronick's, perhaps *THOIP* would be useful to the court in comparing them. Second, the primary objection to the *THOIP* survey, that it did not replicate market conditions, is inapplicable here, as the consumers were shown a full screenshot (based on a medium-sized monitor) of search results,<sup>17</sup> just as consumers would have seen had they typed the words in themselves. *American Footwear Corp. v. General Footwear Co.*, 609 F.2d 655 (2d. Cir. 1979) had similar marketplace replication issues, that again were not implicated by the screenshots of actual search results.

**D. The “Acquiescence Bias” Does Not Support Exclusion of the Survey<sup>18</sup>**

Finally, Defendants argue that the ‘acquiescence bias’ mandates striking the report. The acquiescence bias is essentially the theory that any ‘yes or no’ question, even if not leading in a traditional sense, is leading because respondents are inclined to answer ‘yes’ generally. Other than Dr. Simonson's declaration, Defendants cite no law suggesting the acquiescence bias even affects the weight given to a survey, let alone its admissibility.

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vacuum of some sort being in the market for a Kirby vacuum. The problem in *Fetzer* was more the use of Plaintiff's distribution list than limiting the universe to vacuum owners generally.

<sup>17</sup> The shots were not truly “partial” as alleged by Defendants. The screenshots constituted the entirety of the ‘above the fold’ display. They would only be partial compared to a very large computer monitor.

<sup>18</sup> Likewise, Defendants cite no law suggesting closed ended questions made a survey inadmissible. Motion at 13-14.

Defendants' real objection here is that the Maronick survey referred to defendants' sponsored links as "sponsored links." They describe the question "do you expect the sponsored links to be 'sponsored' by that particular company . . ." as 'glaringly biased' because of the use of the word "sponsored" twice. Plaintiffs agree that the use of the word "sponsored" to describe the link makes it more likely that respondents will believe the link is sponsored by the mark holder. However, the word "sponsored link," was not a choice of plaintiff, but is the name used by Google. Thus, to the extent the use of the word "sponsored" makes the questions "glaringly biased," it is only because the links themselves are glaringly confusing. To the extent there is a problem, it is a problem inherent in Google's business practices, and one that supports class certification. As such, the use of the word "sponsored" to describe sponsored links does not support exclusion of the Maronick report.

**IV. THE FACT THAT DR. MARONICK'S SURVEY DOES NOT CONFORM WITH *DEFENDANTS'* THEORY OF THE CASE DOES NOT MAKE IT IRRELEVANT UNDER *DAUBERT* – DR. MARONICK'S OPINION WILL AID THE COURT IN DETERMINING WHETHER DEFENDANTS' ADWORDS PROGRAMS CAUSE CONFUSION ACROSS MARKS**

Defendants' primary non-technical argument is that Dr. Maronick's opinion is not relevant. Examining relevance in the context of the admission of expert testimony includes analyzing whether the testimony "fits" the facts of the case and whether the testimony addresses a subject matter on which the factfinder can be assisted by an expert. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993). In *Daubert*, the Supreme Court notes that relevant evidence is defined elsewhere in the Federal Rules of Evidence as "that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 509 U.S. at 587 (quoting Fed. R. Evid. 402). The Court goes on to provide that "[t]he Rules' basic standard of relevance thus is a liberal one." *Id.*

Defendants assert that Dr. Maronick's conclusions “do not speak to whether classes . . . should be certified.” Motion to Exclude at 15. But this statement is based on the Defendants’ fundamentally flawed belief that a valid survey is impossible, and thus their business practices are beyond legal scrutiny. As Defendants state in their own motion, the idea whether or not Defendants’ practices are legal is a single question is “clearly erroneous.” Motion at 15. In short, Defendants essential allege that because, as a matter of law, Google’s business model is not subject to legal scrutiny, the Maronick survey is irrelevant. This circular reasoning must be rejected.

Defendants’ narrow definition of what is and is not relevant confusion fails to deal with the fact that if their tautological arguments are correct, then Defendants are beyond legal scrutiny. Indeed, Defendants seem to take pleasure in this, underlining the conclusion that mark-by-mark surveys become exponentially more difficult as the brand in question becomes less well known. But this argument in truth supports Plaintiffs’ case. It shows that absent class certification, for most plaintiffs, preventing Google from trading on their name and causing confusion would be essentially impossible.

In any event, the consistency shown by Dr. Maronick’s survey shows consistency across marks, and therefore is relevant to the Court’s fact-finding role at the class certification stage.

Google's dispute with Dr. Maronick's factual bases for his opinion, if to be credited by this Court at all, goes only to the evidentiary weight afforded his opinion, not its admissibility. *See, e.g., Daubert, 509 U.S. at 595-96* (gatekeeper analysis should focus on "principles and methodology, not on the conclusions they generate"); *AHP Subsidiary Holding Co. v. Stuart Hale Co., 1 F.3d 611, 618 (7th Cir. 1993)* (“[w]hile there will be occasions when the proffered survey is so flawed as to be completely unhelpful to the trier of fact and therefore inadmissible, *such situations will be rare*”). A court's gatekeeper role under the federal rules is not meant to replace the adversary system. Indeed, given the liberal thrust of the federal rules, especially in the context of a bench

trial, Google's objections to Dr. Maronick's testimony are more suitable for demonstration during its cross-examination of Dr. Maronick and through presentation of its own contrary evidence – although Google chose not to conduct a rebuttal survey here. Simply because Google disagrees with Plaintiff's determination of the facts pertinent to the determination of class certification in the context of this case does not render the opinion of Plaintiff's expert irrelevant or unhelpful to this Court in its role as fact finder.

## V. CONCLUSION

For the reasons stated above, the Court should deny Defendants' motion to exclude Dr. Maronick's report.

Dated: October 14, 2010

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the counsel of record who are deemed to have consented to electronic service are being served on October 14, 2010 with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3). Any other counsel of record will be served by electronic mail, facsimile transmission and/or first class mail on this same date.

Dated: October 14, 2010

/s/ Nathan D. Meyer  
Nathan D. Meyer