

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	§	Civil Action No. 2:09-cv-00151-TJW-CE
of All Others Similarly Situated,	§	
	§	
Plaintiffs,	§	CLASS ACTION COMPLAINT
	§	
v.	§	
	§	
(1) GOOGLE INC.; AND	§	JURY TRIAL REQUESTED
(2) AOL LLC,	§	
	§	
Defendants.	§	

DEFENDANTS’ MOTION TO STRIKE

Defendants Google Inc. (“Google”), and AOL Inc. (the “Defendants”) respectfully submit this Motion to Strike evidence submitted by Plaintiffs in support of their Opposed Motion for Class Certification.

I. SUMMARY OF RELIEF REQUESTED

On September 17, 2010, Plaintiffs filed their Opposed Motion for Class Certification. In support of the motion, Plaintiffs submitted the Declaration of Marc A. Fenster (the “Fenster Declaration”). Defendants object to, and move this Court to strike, paragraphs 2, 5 and 6 of the Fenster Declaration, and the exhibits relating thereto.

II. ARGUMENT AND AUTHORITIES

A. THE FENSTER DECLARATION-PARAGRAPH NO. 2.

Paragraph No. 2 of the Fenster Declaration incorporates “Google documents, bearing bates numbers GOOG000000799-812, GOOG000000824-831, GOOG000003125-3129 and GOOG000016393-16396,” copies of which are attached to the Declaration as Exhibit A. Mr.

Fenster's unsupported assertion that the documents in Exhibit A "reflect Google's trademark policy" is impermissibly vague, conclusory, and speculative. Burger King Corp. v. Lumbermens Mut. Cas. Co., 410 F. Supp.2d 1249, 1255 (S.D. Fla. 2005) ("An affidavit has no probative value and must be stricken when it contains conclusions rather than statements of fact, or when it is not based on personal knowledge."). Specifically, Mr. Fenster fails to explain the scope or application of the "trademark policy" he claims is reflected in Exhibit A. As a result, Paragraph No. 2 appears to contain nothing more than Mr. Fenster's own conclusory speculation that the documents attached as Exhibit A "reflect Google's trademark policy."¹ See Id.; Fed. R. Evid. 602. Accordingly, Defendants ask the Court to strike Paragraph No. 2 and Exhibit A of the Fenster Declaration as vague, conclusory, and speculative.

B. THE FENSTER DECLARATION-PARAGRAPH NOS. 5 & 6.

In Paragraph Nos. 5 and 6, Mr. Fenster alleges that "[o]n September 14, 2010, those working under my direct supervision caused" the terms "Southwest Airlines" and "Trek" to be entered into Google's internet search engine. (Fenster Declaration, ¶¶ 5-6; Exs. D, E.). Paragraph Nos. 5 and 6 and Exhibits D and E constitute inadmissible hearsay, as there is no indication that Mr. Fenster perceived the internet search process reflected therein, and must rely on the out-of-court statements of those who actually performed the internet searches to describe the process and results. See Fed. R. Evid. 810(c). Furthermore, Mr. Fenster's statements that the persons performing the searches "could not buy" certain products are too vague, ambiguous, speculative, and conclusory to merit consideration as evidence. Burger King, 410 F. Supp.2d at 1255. Consequently, Defendants object to and ask the Court to strike Paragraph Nos. 5 and 6

¹ Also, as evidenced by the Declaration of Kerry Barker, filed in response to the Opposed Motion for Class Certification, Mr. Fenster has incorrectly characterized the documents attached to his declaration as Exhibit A.

and Exhibits C and D of the Fenster Declaration because they constitute inadmissible hearsay and are vague, ambiguous, speculative, and conclusory.

III. PRAYER

Defendants respectfully request that their Motion to Strike be granted, and for such further relief to which they are entitled.

Respectfully submitted,

/s/ Charles L. Babcock

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF CONFERENCE

I hereby certify that counsel for Defendants have conferred with counsel for Plaintiffs on October 18, 2010, regarding the merits of the foregoing Motion and state that counsel for Plaintiffs oppose the relief requested in the Motion. It is therefore presented to the Court for determination.

Certified this 18th day of October, 2010.

/s/ Charles L. Babcock

Charles L. Babcock

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2010, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Eastern District of Texas, using the electronic case files system of the court. The electronic case files system sent a “Notice of Electronic Filing” to individuals who have consented in writing to accept this Notice as service of this document by electronic means. All other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by first class mail today, October 18, 2010.

/s/ Charles L. Babcock

Charles L. Babcock