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

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| FPX, LLC d/b/a FIREPOND, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. GOOGLE, INC., YOUTUBE, LLC, AOL, LLC, TURNER BROADCASTING SYSTEM, INC., MYSPACE, INC. AND IAC/INTERACTIVECORP, Defendants. | § | Civil Action No. 2:09-cv-00142-TJW<br>CLASS ACTION COMPLAINT<br>JURY TRIAL REQUESTED |
| THE RODNEY A. HAMILTON LIVING TRUST and JOHN BECK AMAZING PROFITS, LLC, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, v. (1) GOOGLE INC.; AND (2) AOL LLC, Defendants. | § | Civil Action No. 2:09-cv-00151-TJW-CE<br>CLASS ACTION COMPLAINT<br>JURY TRIAL REQUESTED |

**DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO EXCLUDE THE EXPERT REPORT AND OPINION OF THOMAS J. MARONICK**

## MARONICK'S REPORT AND OPINIONS ARE UNRELIABLE

**Overview**. Plaintiffs had to establish that Maronick's report and opinions meet the "exacting standards" of Daubert (Weisgram v. Marley Co., 528 U.S. 440, 455 (2000)), but they failed to do so. Instead, they try to sweep under the rug their failure to provide a survey that demonstrates likelihood of confusion for any of Plaintiffs' trademarks.[1] Maronick's purported "proof of concept" survey (Opp. at 2, 3), whatever that means,[2] is no proof whatsoever at this class certification stage. Plaintiffs also ignore much of Defendants' arguments and evidence.[3] They even neglect to challenge Prof. Itamar Simonson's declaration, which debunks Maronick's report and surveys point by point. (See Simonson ¶¶54-84, attached to the Simonson Decl.).[4]

Exclusion at this stage of the proceedings is appropriate and fully supported by the record. The Court has an "obligation to consider the reliability of experts at the class certification stage," and need not wait before exercising its role as gate-keeper. Brooks v. Lincoln Nat'l Life Ins. Co., Cause No. 5:03-CV-256, 2008 WL 4355390, at *5 & n.2 (E.D. Tex. Feb. 12, 2008) (excluding expert) (Craven, M.J.).[5] Nor does Plaintiffs' argument that the flaws

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[1] Plaintiffs still have no explanation for the "highly unusual omission" that the Maronick Surveys in no way address the specific trademarks of any putative class representative. (Mot. at 4; Simonson ¶12).

[2] "Proof of concept" does not appear in Maronick's report, nor do Plaintiffs cite any evidence or authority about it.

[3] Maronick cannot survive a Daubert analysis, and nothing in the opposition saves the unreliable report and surveys from Daubert's command that it be excluded. Contrary to Plaintiffs' assertion, Defendants do not claim that Google "is immune from legal scrutiny" (Opp. at 2, 7, 14), and indeed the courts have passed on Plaintiffs' theory and found it wanting. (Opp. at 4). As pertinent here, two courts already have held that trademark infringement claims are unsuitable for class treatment. Vulcan Golf, LLC v. Google Inc., 254 F.R.D. 521, 535 (N.D. Ill. 2008); Chambers v. Time Warner, 66 U.S.P.Q.2d 1292, 1298-99 (S.D.N.Y. 2003). Numerous courts have rejected claims that use of trademarks as keywords to trigger sponsored links are likely to cause confusion. See, e.g., Tiffany (NJ) Inc. v. eBay Inc., 600 F.3d 93, 103 (2d Cir. 2010) (eBay's use of Tiffany's mark in sponsored links was lawful); Fair Isaac Corp. v. Experian Info. Sol. Inc., 2009 WL 4263699, at *1 (D. Minn. Nov. 25, 2009) (no "credible inference" that purchases of trademarks "as keyword search terms was likely to confuse consumers"). And two courts recently vindicated Google's policy on keywords. Rosetta Stone Ltd. v. Google Inc., --- F. Supp.2d ----, 2010 WL 3063152, at *6 (E.D. Va. Aug. 3, 2010) ("no reasonable trier of fact could find that Google's practice . . . creates a likelihood of confusion as to the source or origin of [the plaintiff's] products."); Jurin v. Google Inc., 2010 WL 3521955, at *3-4 (E.D. Cal. Sept. 8, 2010) (rejecting that Google users would be "'confused, mistaken, misled and/or deceived' that 'Sponsored Links' may be affiliated with or approved by Plaintiff.").

[4] Defendants also have submitted the Supplemental Declaration of Prof. Simonson.

[5] Plaintiffs rely on Gibbs v. Gibbs, 210 F.3d 491, 500 (5th Cir. 2000). (Opp. at 7). However, that decision predates Unger v. Amedisys Inc., 401 F.3d 316, 323 n.6 (5th Cir. 2005), the case relied upon by Judge Craven in Brooks.

in Maronick's surveys go to weight rather than admissibility defeat exclusion. (Opp. at 9). Numerous courts have rejected surveys suffering from "serious flaws," and Maronick's report and surveys are no exception. See, e.g., Scott Fetzer Co. v. House of Vacuums Inc., 381 F.3d 477, 488 (5th Cir. 2004) (survey inadmissible).[6]

**Plaintiffs Fail to Rebut Simonson's Testimony**. Simonson's critique of Maronick's report and surveys are wholly unrebutted by Plaintiffs. (See Simonson ¶¶54-84; Simonson Supp. Decl. ¶3). Simonson testified that it would be nonsensical to perform a series of surveys in support of Plaintiffs' theory, as Plaintiffs propose, because the results would be "so obvious":

> It just cannot be because it goes against the most basic principles of consumer judgment. It's as if you're suggesting there's always likelihood of confusion, any mark, any other mark, there is confusion. We know that not to be true, just cannot be true. Each case has its unique characteristics, and you have to investigate each case separately.

(Simonson Dep. at 31/5-14, attached to Mr. Meyer's Declaration; Simonson ¶¶11, 32, 34). The issue is whether the Maronick Surveys are reliable. Neither Simonson's report nor his testimony supports Plaintiffs. They have failed to introduce even a single valid trademark survey from which anyone could reasonably conclude that actionable confusion exists. (Simonson ¶12).

**Plaintiffs Fail to Employ any Recognized Methodology.** Plaintiffs do not contest that the Maronick Surveys failed to follow any recognized methodology. (Mot. at 12-14; Simonson ¶¶56-58). The surveys were designed to produce pre-determined results, and Maronick's "methodology" consisted of biased, leading statements that essentially asked respondents to

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See also Bell v. Ascendant Solutions, 422 F.3d 307, 314 n.13 (5th Cir. 2005) (finding it appropriate to consider "the reliability of expert testimony . . . at the class certification stage.").

[6] Citizens Fin. Group, Inc. v. Citizens Nat'l Bank, 383 F.3d 110 (3d Cir. 2004) (survey inadmissible because of flaws in structure); THOIP v. Walt Disney Co., 690 F. Supp. 2d 218, 240 (S.D.N.Y. 2010) (survey inadmissible because it failed to approximate marketplace conditions and did not have an effective control); Simon Prop. Group L.P. v. mySimon, Inc., 104 F. Supp. 2d 1033, 1052 (S.D. Ind. 2000) (the "court need not and should not respond reflexively to every criticism by saying it merely 'goes to the weight' of the survey rather than to its admissibility.").

confirm that they agreed. (Simonson ¶¶57-63).[7] Even the "Plaintiffs agree that the use of the word 'sponsored' . . . makes it more likely that respondents will believe the link is sponsored by the mark holder," but they blame this fatal defect on Google because Google chose the term "sponsored link." (Opp. at 13).[8] For good reason, courts require that such unreliable surveys be excluded.[9]

**Plaintiffs Fail to Target the Relevant Consumer Universes.** The Maronick Surveys failed to target the relevant consumer universes of those who are "potential purchasers of the goods and services at issue." (Simonson ¶74); Fetzer, 381 F.3d at 487-88. Plaintiffs are simply silent as to the defects of Survey 1, which failed to ask respondents whether they were likely to purchase any goods or services – much less the tested product. (Simonson ¶76; Mar. Dep., Ex. 2, 65-66). In Survey 2, the SWA survey failed to ask respondents if they expected to purchase an online flight reservation within a specified period. (Mar. Dep., 131-32, 272; Simonson ¶76). Similarly, in Survey 2, even Maronick admits he did not qualify the Trek survey participants as prospective purchasers. (Mar. Dep., 292, Ex. 2, p. 80). Plaintiffs' weak attempt to distinguish Fetzer's application to Survey 2 is without merit.[10] Likewise, Plaintiffs' argument that universe

[7] Plaintiffs incorrectly assert, without any evidentiary support, that Google eliminated the sponsored links of which Plaintiffs complain, such as "smartfares.com/Southwest." The Opposition mistakenly claims that Maronick used and surveyed the keyword "Southwest." (Opp. at 6-7 nn.12-13). Maronick testified he used the keyword "Southwest Airlines." (Mar. Dep., Ex. 2, p. 65). Perhaps this explains Plaintiffs' difficulty in finding the link when Mr. Meyer searched for something different ("Southwest") than Maronick searched ("Southwest Airlines"). In any event, Plaintiffs' error here and their concession that reliance on the keyword "Southwest Airlines" would create "false positives" (Opp. at 6 n.11), is an admission that the SWA survey by Maronick is so flawed it should be excluded.

[8] Plaintiffs also attempt to deflect the serious consequences of some of Maronick's admissions by asserting that Neiman Marcus and Bloomingdales are related. (Opp. at 5). Regardless, Maronick testified that consumers clearly would not be confused by sponsored links that include the names of competitors. (Mot. at 5; Mar. Dep., 92-93) ("[C]an I buy Dunkin' Donuts at McDonald's or Krispy Kreme donuts. Clearly not.").

[9] See Wells Fargo & Co. v. WhenU.com, Inc., 293 F.Supp.2d 734, 753 (E.D. Mich. 2003) (survey deemed unreliable because expert used leading questions that may have skewed the survey results); Vail Assoc., Inc. v. Vend-Tel-Co., Ltd., 516 F.3d 853, 864 n.8 (10th Cir. 2008) (exclusion due to, among other things, question bias and participant bias).

[10] Plaintiffs simply claim that (1) the Fetzer survey's end results showed no confusion – which does not even address the universe selection (Opp. at 8), (2) vacuums are supposedly more durable than bicycles and airline tickets – without any support or explanation (Opp. at 9), and (3) the leading qualifier "in any way" (fatal to the Fetzer survey)

deficiencies should go to weight instead of admissibility does not apply.[11] Maronick's failure to target the proper universe of consumers requires that his surveys be excluded.[12]

**The Maronick Surveys Failed to Use any Controls.** Maronick immediately conceded that Survey 2 used no control (Mar. Dep., 216-17), and he ultimately admitted that Survey 1 also lacked one. (Mar. Dep., 311-12). The failure to use any controls alone requires exclusion.[13]

Confusing the concepts of universes and controls, Plaintiffs claim no controls were needed because the Maronick Surveys "filtered for knowledge." (Opp. at 3, 11-12). As explained by Simonson, the issue of control is separate and unrelated to universe. (Simonson Supp. Decl. ¶¶3-6). Even if we accept the "filtering" assertion, it does not excuse or substitute for the lack of controls. (Id.). Likewise, Plaintiffs' reliance on Kinetic Concepts, in support of their claim that "screening for familiarity" should be treated as a control, is misplaced. (Opp. at 11). Kinetic Concepts merely found that control questions may be used as an alternative to a separate control group, citing to Shari Diamond.[14] Kinetic Concepts, 2006 WL 6505346, at *4 n.41. But Diamond supports exclusion here, because all respondents must be asked control questions unrelated to the product or service at issue. Diamond at 260. There is no evidence that

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is somehow materially different than Maronick's qualifier "in some way" – again without any support or explanation (Opp. at 9). Even accepting such distinctions, they would not have changed the result in Fetzer because, as here, the survey universe was "suspiciously underinclusive" and said nothing about the relevant class of potential consumers. Fetzer, 381 F.3d at 488.

[11] Plaintiffs erroneously compare their surveys to the underinclusive universe survey spared in Kinetic Concepts, Inc. v. Blue Sky Med. Corp., 2006 WL 6505346, at *4 (W.D. Tex. 2006). However, Kinetic Concepts involved a universe of physicians and nurses which, despite not being the direct purchasers of the product at issue, at least influenced the purchasing decisions of their administrators. Id. Plaintiffs offer no evidence, much less argument, as to how this could possibly apply here.

[12] Fetzer, 381 F.3d at 487; Am. Footwear Corp. v. General Footwear Co., 609 F.2d 655, 661 n.4 (2d Cir. 1979) (rejecting survey in which participants did not have a present purchasing interest).

[13] THOIP, 690 F. Supp. 2d at 240 (excluding report); Wells Fargo & Co., 293 F. Supp.2d at 768-69.

[14] Shari Seidman Diamond, "Reference Guide on Survey Research," in Fed. Jud. Ctr., Reference Manual On Scientific Evidence, 256-60 (2d ed. 2000). Maronick recognizes Diamond as "authoritative." (Mar. Dep., 12-15).

such "control questions" were asked here.[15] Plaintiffs' alternative claim, that a lack of control should merely go to weight rather than admissibility, is also misplaced. (Opp. at 11). Absent proper control, there is no benchmark for determining whether a likelihood of confusion estimate is significant – rendering survey results meaningless. Diamond at 260; Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252, 263-64 (5th Cir. 1980) (survey that lacked control did not "present any meaningful evidence of likelihood of confusion."); (Simonson Supp. Decl. ¶¶4-6).

**The Maronick Surveys Failed to Replicate Marketplace Conditions.**[16] Plaintiffs do not respond to Defendants' critique of Survey 1; nor do they address Defendants' argument that Survey 2 was nothing more than a memory test. As to Survey 2, Plaintiffs offer only that the Simon decision is distinguishable because that court had no problem with the survey's use of physical cards of the homepages of the sites at issue. (Opp. at 10).[17] But the fatal deficiency of the survey in Simon was that respondents were not shown a complete search results page – which is precisely what Plaintiffs did here with their "above the fold display" screenshot "(based on a medium-sized monitor)." (Opp. at 12 n.17). This critical alteration turned the survey into "nothing more than a meaningless memory game . . . that bears no relationship to the marketplace." Simon Prop. Group, 104 F. Supp. 2d at 1043. Similarly, the Maronick Surveys should be excluded. Id. at 1043-44.[18]

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[15] Plaintiffs' arguments, without any evidence, that Survey 1 showed positive confusion are unintelligible. (Opp. at 11 n.14). As testified by Simonson, at ¶32, and supported by THOIP, 690 F. Supp.2d at 240, Maronick's results reflect a net confusion of negative 30%.

[16] Survey 1 only discussed admittedly fictional links and Survey 2 only showed respondents a partial search results page during one of several questions. (Mar. Dep. at 152, 257-58, 277-79). Citing no evidence, Plaintiffs merely contend that information on screenshots in Survey 2 were what was likely to appear on a "medium-sized browser window." (Opp. at 10).

[17] This point is irrelevant because Maronick did not use physical cards, but rather a static, partial search results page. (Mar. Dep. Ex. 2, pp. 65, 70).

[18] See also Kargo Global, Inc. v. Advance Magazine Pub., Inc., No. 06 Civ. 550, 2007 WL 2258688, at *10 (S.D.N.Y. Aug. 6, 2007); Wells Fargo & Co., 293 F. Supp.2d at 765.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on October 25, 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 25, 2010.

/s/ Charles L. Babcock
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