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,	**Civil Action No. 2:09-cv-00151-TJW-CE**
PLAINTIFFS,	**CLASS ACTION COMPLAINT**
V.	**JURY TRIAL DEMANDED**
(1) GOOGLE, INC.; AND (2) AOL, LLC	
DEFENDANTS.	

SURREPLY IN OPPOSITION TO MOTION TO EXCLUDE MARONICK REPORT

This case seeks to finally force Defendants to face judicial scrutiny of their business processes, and does so by seeking only injunctive relief, permitting class members to demand that Google stop selling their registered trademarks to competitors.

Defendants' reply in support of their motion to exclude the report of Dr. Thomas Maronick does little more than reiterate the points made in their original motion. Defendants' refusal to conduct their own survey undermines any of the purported methodological flaws in the survey conducted by Dr. Maronick.[1] Furthermore, as discussed in detail in the opposition and summarized below, none of the purported flaws in Dr. Maronick's surveys support exclusion.

The reply is but one more attempt by Google to avoid legal scrutiny of its business models.

[1] Plaintiff did not object to Dr. Simonson's declaration because there was no evidence to object to.

I. THE POINTS REITERATED BY DEFENDANTS IN REPLY HAVE ALREADY BEEN REBUTTED

Although the various points raised by the reply are merely re-statements of points made in the motion itself, a few bear addressing here. In short, the points raised by Defendants in their motion were successfully rebutted in the opposition, and no new facts or authority were raised in reply.

The relevant universe was surveyed – As stated in the opposition, *Scott Fetzer Co. v. House of Vacuums Inc.,* 381 F.3d 477, 488 (5th Cir. 2004)[2] does not support exclusion of the Maronick report. Any errors in the universe of respondents here pale in comparison to those in *Fetzer,* when they were composed solely of the plaintiff's own customers. Here, the survey universe contained only individuals who were familiar with the relevant providers and used the relevant products or services. In contrast, as discussed in the opposition, the universe of respondents (which, even in *Fetzer*, does not appear to have been the fatal flaw in the survey) was biased. The universe was therefore appropriate.

Maronick's surveys were sufficiently controlled – Defendants fail to rebut Plaintiff's reliance on *Kinetic Concepts, Inc. v. BlueSky Med. Corp*., 2006 U.S. Dist. LEXIS 60187 (W.D.Tex August 11, 2006). As stated in that case, and unrebutted (Defendants imply, but do not state outright, that they believe *Kinetic Concepts* was wrongly decided), by filtering for familiarity and use of the product and services at issue, the surveys here were sufficiently controlled.

The survey replicated market conditions - Defendants, in their reply, repeat the same argument that a display that replicates what actually appears on a normal-sized monitor does not replicate market conditions. This argument has no substance, and Defendants cite no new law in support of this argument. Because most consumers see

[2] The only case cited on this point in the reply.

what is "above the fold" when they run a search, that screen constitutes a normal market condition.[3]

None of the other points raised in reply, such as Dr. Simonson's assertion that doing a comprehensive survey would be "so obvious" require separate briefing at the surreply stage.

II. DEFENDANTS' REFUSAL TO CONDUCT THEIR OWN SURVEY UNDERMINES THEIR MOTION TO EXCLUDE DR. MARONICK

Defendants have spent over $100,000 to use Dr. Simonson in this case and the *Vulcan Golf* case. All of that money has gone only to attacking surveys conducted by plaintiffs. Had Defendants expended some of that money on building a survey rather than attacking them, then they would have either seen the error of their ways (and stopped selling trademarks), or they would have a competing survey. Their failure to do so speaks volumes, and their comment that the result would be "so obvious" does not excuse this failure.

Google's legal strategy for the last half-decade has been one of obfuscation, an active effort to avoid true legal scrutiny of their business model. Through very aggressive legal tactics, plus the fact that for most plaintiffs, litigation is just not worth the trouble, Google has avoided a meaningful court or jury ruling on the legality of its actions. In this context, Dr. Maronick's survey is the best effort to briefly analyze whether consumers are confused by sponsored links. Its methodology is sound, and its results are striking.

In short, Dr. Maronick's surveys here are more than sufficiently reliable to satisfy the *Daubert* standard. Defendants' motion should be denied.

Dated: November 4, 2010 Respectfully submitted,

[3] This point goes back to defendants' failure to conduct their own survey, which would likely have shown that consumers pay quite a bit more attention to the 'above-the-fold' results from a search than the items at the bottom.

By: /s/ Nathan D. Meyer
Marc A. Fenster, CA SB # 181067
E-mail: mfenster@raklaw.com
Nathan Meyer, CA SB # 239850
Email: nmeyer@raklaw.com
RUSS, AUGUST & KABAT
12424 Wilshire Boulevard 12th Floor
Los Angeles, California 90025
Telephone: 310/826-7474
Facsimile: 310/826-6991

Scott M. Kline, TX SB # 11573100
Email: scott.kline@snrdenton.com
SNR Denton US LLP
2000 McKinney Avenue, Suite 1900
Dallas, TX 75201-1858
Direct 214/259 0970
Telephone: 214/906 5149
Facsimile: 214/259 0910

David M. Pridham, RI Bar No. 6625
E-mail: david@pridhamiplaw.com
LAW OFFICE OF DAVID PRIDHAM
25 Linden Road
Barrington, Rhode Island 02806
Telephone: 401/633-7247
Facsimile: 401/633-7247

Andrew W. Spangler, TX SB # 24041960
E-mail: spangler@spanglerlawpc.com
SPANGLER LAW P.C.
208 N. Green Street, Suite 300
Longview, Texas 75601
Telephone: 903/753-9300
Facsimile: 903/553-0403

Attorneys for Plaintiffs
John Beck Amazing Profits, LLC and The
Rodney Hamilton Trust, LLC

CERTIFICATE OF SERVICE

I hereby certify that the counsel of record who are deemed to have consented to electronic service are being served on November 4, 2010 with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3). Any other counsel of record will be served by electronic mail, facsimile transmission and/or first class mail on this same date.

Dated: November 4, 2010

/s/ *Nathan D. Meyer*
Nathan D. Meyer