

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
Atlanta Division

CHARLES SMITH,)	
)	
Plaintiff/Counterclaim-Defendant,)	
)	
v.)	Civil Action No.
)	1:06 CV 0526 (TCB)
WAL-MART STORES, INC.,)	
)	
Defendant/Counterclaim-Plaintiff.)	

**OPPOSITION TO WAL-MART’S MOTION
TO EXCLUDE ROSENBLATT TESTIMONY**

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Defendant/counterclaim-plaintiff Wal-Mart Stores has moved the Court to exclude the Affidavit and testimony of Alan Jay Rosenblatt, a rebuttal expert retained by plaintiff/counterclaim defendant Charles Smith, on the grounds that Rosenblatt is not an expert in the design or execution of surveys of commercial consumer products and hence his report must necessarily be irrelevant in this case. Wal-Mart also hypothesizes that Smith offers Rosenblatt's expert testimony in support of his "case-in-chief," and asks the Court to limit Rosenblatt's role to that of a rebuttal expert.

In fact, Rosenblatt is offered solely as a rebuttal expert, whose function in this case is **not** to testify as an expert on surveys (although Rosenblatt does have expertise in that area), but rather to question one of the fundamental underlying assumptions of Jacoby's study, an assumption that Jacoby made out of his admitted lack of expertise about how Internet users interact with web sites and how they search for content online. Accordingly, Wal-Mart's motion to exclude should be denied.

1. The Issues That Rosenblatt Was Retained to Address.

Smith retained the services of Alan Rosenblatt to address a fairly narrow question which, however, goes to the heart of Jacoby's point-of-sale confusion study, and which is a major basis for Smith's motion to exclude Jacoby's Report from consideration on the pending cross-motions for summary judgment, and for Smith's argument in support of summary judgment.

In his Memorandum Supporting the Motion to Exclude Report of Jacob Jacoby (“SmithDaubert”), Smith’s main argument against Jacoby’s point-of-sale study was that the process of shopping for T-shirts (or other items) online differs fundamentally from shopping in a physical store. In a store, the customer goes to the part of the store where the sort of merchandise is sold and looks through displayed items; once one identifies the universe of shoppers to be tested, any member of that universe is as likely as any other to reach the particular place where allegedly infringing or diluting merchandise is to be found.

In the online environment, however, particular items are reached by a process of search and deciding whether to scroll down or click past one web page to see material displayed on the next page. Internet users make choices, based on whether each page (or each part of a page) is of interest, in deciding whether to stay on a page, to look further on a page, or to click through to another page. Internet shoppers do not come to particular web sites randomly, and they do not progress through a given web site randomly; their progress rather is determined by their choices, which are not randomly distributed across the population. Because it is universally accepted (even Wal-Mart does not deny) that the relevant universe is the likely purchasers of the products of the junior user (in this case, Smith), the choice of the sample interviewed

must take account of the unique character of online shopping, **either** by limiting the universe to be sampled, or by ensuring that the sample selected includes only those who are likely to get to the point of viewing the shirts as a result of their choices. As Rosenblatt stated his affidavit, and reinforced during his deposition, the very process of finding Smith's web sites through the use of general search engines (such as Google or Yahoo!), and of navigating through Smith's web sites to eventually reach the pages where Smith's parody Tshirts could be viewed and purchased, would serve as a filter that would likely screen out those who were not interested in Smith's attacks on Wal-Mart. Thus, Rosenblatt argued, to the extent that Jacoby's selection of the persons to whom he posed his "likelihood of confusion" and "likelihood of dilution" questions failed to account for the presence of this filter, Jacoby questioned the wrong sample of his population.

During his deposition, Jacoby admitted that, despite the admitted breadth of his publications over the course of his lengthy career as an academic and as an expert-for-hire, he had never written any articles specifically devoted to Internet marketing, to Internet user experience, to Internet usability, to web site construction, or to the way users navigate web sites. Jacoby Deposition ("JacDep") 30-32. He said only that he had written articles on other topics that had "touched on and discussed the Internet and

selling on the Internet in general terms.” *Id.* 31. Later in his deposition, when pressed for any reasons he might have assumed that persons in the universe he had chosen for his “web site” study devoted to point-of-sale confusion – those who had bought Tshirts, mugs or bumper stickers with words or images printed on them, **and** who had shopped online for goods or services – would in the real world have reached the particular Tshirts that Jacoby decided to test, Jacoby repeatedly admitted that he did not know, *id.* 236, that he knew of no research about the topic, *id.*, and generally that “as to the behavior of the individuals when looking at the Internet, this is not something I studied. We established that earlier.” *Id.* 241-242.

A related point relates to Internet users’ behavior when using search engines. Jacoby testified at his deposition about his assumption that, if members of his universe reached the home page of CafePress.com – the only location where Smith’s parody shirts are sold – they could happen across Smith’s T-shirts after paging aimlessly through page after page of designs. In fact, Jacoby paged through CafePress pages during his deposition, without reaching any of Smith’s designs, but indicated his view that a consumer in the real world might eventually reach Smith’s T-shirts that way.¹

¹Of course, one who pages aimlessly through the CafePress web site would quickly learn that it is full of designs from individuals, not mass-market goods sold by Wal-Mart.

Rosenblatt's affidavit and deposition testimony explained that this is simply not the way Internet users would navigate the web site of CafePress.com, a company with which he is familiar and which he describes briefly in his affidavit. Instead, he noted, the CafePress web site is set up with its own search engine which users can and do use to find particular designs of interest. If, for example, a visitor to CafePress were to enter "WalMart" or "Wal-Mart" as a search term, he would see page after page of images that parody or comment upon Wal-Mart, occasionally favorably but for the most part quite unfavorably. (Exhibit Q, Part 1 submitted in support of Smith's Motion for Summary Judgment shows the results of a search of the CafePress web site using the search term "walmart.>"). Rosenblatt noted that anyone who conducted such a search of CafePress's designs would quickly learn that the designs available to be purchased from CafePress on Tshirts and other items were parodies and commentaries, and again this context would serve as a filter so that by the time a consumer reached one of Smith's designs (in the sample search in Exhibit Q Part 1, it is Smith's "Hillary" shirt on page 7 of 50), it is simply hard to believe that the consumer would not understand that he was looking at parodies and not at Wal-Mart's own wares.

In making these points, Rosenblatt did not purport to be an expert either on trademark law, on research concerning likelihood of confusion or of dilution, or on the

construction or execution of surveys of commercial consumer products (although as it happens he has some expertise on survey research, as discussed in the next section of this brief). Rather, Smith uses Rosenblatt's expertise on Internet user experience and navigation to support his *Daubert* argument that, in light of the clear precedent establishing both that the proper universe in a case such as this is the "likely purchasers of the junior user's product," and that in order to support a finding of point-of-sale confusion or dilution a survey must replicate or at least closely approximate the actual marketplace experience, the Jacoby study fails to satisfy legal requirements and hence should be excluded from evidence. In the alternative, Smith argues in his summary judgment motion that Jacoby's study falls so far short that, even if it is not excluded from evidence, it is so deficient that it should not be accorded sufficient probative value on the issues of confusion or dilution at point of sale to support summary judgment for Wal-Mart, or to defeat Smith's motion for summary judgment.

Rosenblatt's affidavit offers some opinions on various other topics, but Smith's *Daubert* motion and his motion for summary judgment rely on the foregoing points. In this regard, it is apparent that Wal-Mart's expression of concern that Smith may intend to offer Rosenblatt's testimony in support of his case-in-chief is baseless. The **only** purpose for Rosenblatt's evidence is to support the exclusion or discounting of

Jacoby's Report and testimony. If Wal-Mart were to withdraw Jacoby's affidavits from consideration on the cross-motions for summary judgment, and drop Jacoby from its witness list, Smith would have no need for Rosenblatt. Because Rosenblatt's testimony is purely rebuttal, Wal-Mart's motion to "limit" the use of that testimony to rebuttal should be denied as moot.²

2. Rosenblatt Has the Correct Expertise to Offer Opinions on These Issues.

Rosenblatt has the proper expertise to offer opinions about the way Internet users navigate web sites and use search engines. As shown both by his affidavit and the CV and publication list attached to that affidavit, and by his testimony when Wal-Mart took his deposition, Rosenblatt comes from a background in political science and research methodology, which he has taught for more than ten years at the university level. From that base, Rosenblatt developed an academic and practical career in Internet advocacy and Internet politics. In the course of his work as a consultant for the operators of advocacy web sites, Rosenblatt designs and analyses web sites regarding their ability

²Wal-Mart complains, at 17, 18, that it did not have an opportunity to find an expert in Internet user experience and navigation to respond to Rosenblatt. However, Rosenblatt's affidavit was signed and provided to Wal-Mart on December 12, 2006, nearly four months before the close of discovery. Indeed, Smith's questions to Jacoby at his deposition on November 20, 2006, clearly foreshadowed Rosenblatt's testimony. Wal-Mart had every opportunity to identify an expert witness on these issues. Its real problem is that its survey expert was ignorant about Internet navigation.

to attract visitors, engage their attention, and induce them to move through the various web pages on a web site toward the point at which they will take a desired action, such as joining or donating to the group, buying a class, sending a communication to a politician, or signing a petition. In order to accomplish these ends, Rosenblatt needs to understand and analyze the ways in which Internet viewers interact with existing sites, and the way in which they would likely interact with any revisions to the web sites that he may propose.

In its Memorandum Supporting Its Motion to Exclude Rosenblatt Report and Testimony (“WM Rosenblatt Mem.”), Wal-Mart largely focuses on aspects of Rosenblatt’s affidavit (and his testimony when Wal-Mart took his deposition) other than those on which Smith’s summary judgment and *Daubert* motions relied. But Wal-Mart does argue that “Rosenblatt’s expert opinions are not grounded in any data whatsoever,” citing three Supreme Court cases, *id.* at 10, and objects to Rosenblatt’s invocation of industry standards and expectations for which, it argues, “Rosenblatt fails to cite a single source” and about which Rosenblatt supposedly “acknowledg[ed his] inability to find statistical research.” *Id.* at 11.

In fact, Rosenblatt’s testimony repeatedly described the data supporting his opinions. He testified that the behavioral phenomena that he described in his affidavit

and in his deposition testimony were based on data that he himself had developed and reviewed in the course of his work in the industry, and that other experts in his field had developed and described to him in personal conversations, in conference presentations, and in published research. As he stated, he was relying on the “behavioral . . . expectations of people who design web sites, do web site marketing, people who use web sites to encourage people to read the content and do things on it.” Rosenblatt Deposition (“RosenDep”) 81.

For example, he explained,

The grassroots advocacy software that we use in this business measures how many people view alerts, calls to actions, how many people click through and how many ultimately take action, so we have reams of data on this. [O]n a case-by-case study I have seen this pattern over and over and over again.

RosenDep 93.

And again, he testified,

Our technology allows us to send out a message, a mobilization message and track how many people open the message, how many people follow through and take the action requested, so playing with the wording and seeing which ones produce more responses is something that we do on a regular basis. Something that the other people in my industry do as well, and they write up their case studies and their analyses of those as well and present them at conferences, so I have the benefit of my personal experience and their personal experience and their case studies to draw upon.

Id. at 52.

Still further,

I rely on studies of behaviors and surveys that have been conducted in the field as part of my [] experience, but I also rely upon firsthand practical experience, where I've run campaigns and experimented with different things and see what works, what doesn't work.

Id. at 51.

Challenged by Wal-Mart's counsel to explain whether there was any empirical basis for his statements, Rosenblatt again explained that yes, the data on which he relied is

[e]mpirical in the sense that we have observed patterns in many contexts that a website like this presents. It presents a point of view, and people who don't care about that point of view more often than not will just simply leave the website. The research in this field says you got about four seconds to hook somebody before they decide to leave your website
. . . .

Id. at 64.

Wal-Mart's assertion that Rosenblatt could not "find statistical research supporting the 50 percent loss-per-click theory," WM Rosenblatt Mem. 11, takes his testimony out of context. Rosenblatt was stating that he could not find any **published** research, "but everybody I know in the business cites this as a reality" RosenDep 66. On other topics, Rosenblatt stated that there **is** published data. For example, in support

of his statement that the vast majority of Internet users find material online by conducting searches, Rosenblatt testified,

I've seen it in studies and articles about the Internet, and I've heard it from presentations from people who do search engine marketing repeatedly, for years.

Id. at 71.

Wal-Mart complains, however, that Rosenblatt did not test **Smith's** web site, but it is not at all clear that he would have been able to do so. Smith's Walocaust pages on CafePress were shut down as a result of Wal-Mart's original threat of litigation, and the sales data for T-shirts bearing the Wal-Qaeda designs that were filed along with Smith's motion for summary judgment, Smith Affidavit, Exhibit J, reveal that virtually all of Smith's sales were during the month immediately following the first media and blog attention to his new Wal-Qaeda parodies. By the time Wal-Mart had identified Jacoby as an expert witness and disclosed his expert report, and Smith secured Rosenblatt's services as an expert witness, Smith was no longer experiencing any sales, so it is doubtful that Rosenblatt **could** have effectively studied the real-world interactions between Internet users and Smith's web site.

And, in any event, an expert witness whose only function is to critique an opposing expert's study need not conduct his own surveys or tests. Undersigned

counsel have examined several other “critique” expert reports by Jacoby himself, which do not involve any independent surveys or testing. In presenting such reports, expert witnesses in trademark cases and otherwise typically rely on their experiences with data secured in other contexts, and that is what Rosenblatt has done here. For example, in *Hill’s Pet Nutrition v. Nutro Products*, 258 F. Supp.2d 1197 (D. Kan. 2003), the court rejected a survey offered by the plaintiff, based on a Jacoby critique, even though Jacoby only criticized the survey without performing his own survey.

Wal-Mart also faults Rosenblatt for acknowledging that the typical patterns reported in the literature are not invariably correct, and that there is some variation in individual cases. WM Rosenblatt Mem. at 11-13. But again Wal-Mart ignores Rosenblatt’s testimony that although here is some variation in the patterns that he described, “I’ve looked at hundreds of cases, and the variation is minimal.” RosenDep 94. Indeed, Rosenblatt explained, visitors to Smith’s web sites were even less likely to remain and click through to additional pages because in many of the cases that Rosenblatt studies, the audience are members who have already chosen to be engaged with the web site, while Smith’s web site “would be on the other end of the spectrum, a much looser relationship. We would not expect it to be more. We might even expect the drop-off to be greater.” *Id.*

Finally, Wal-Mart faults Rosenblatt for having failed to consider the possibility that Smith might later sell his parody Tshirts only through his current web site and through CafePress.com : “Rosenblatt never considered the possibility of future sales from venues other than the Internet or even from other websites.” WM Rosenblatt Mem. at 11. But this case is about what Smith has done, not what Wal-Mart might prefer to imagine about future activities that might be more easily litigated. Even Jacoby, in conducting his point-of-sale confusion study, recognized that the **only** relevant method of sales was over the Internet, and did not test whether there would be a likelihood of confusion from sales by any other method.

The *Safeway* factors for likelihood of confusion and the tests for likelihood of dilution consider the parties’ actual advertising and their actual retail outlets, not what they might do sometime in the future even though such changes are not foreshadowed by anything in the record. There is no evidence whatsoever that Smith, having used the same methods for his sales since he started in July 2005, is likely to change his approach, and just as a markholder can defer suit until an infringer’s expansion brings the two parties into conflict, so will Wal-Mart be able to sue anew in the event that Smith, contrary to everything that he has done in this case and said he would so, suddenly opens a chain of Walocaust and Wal-Qaeda Tshirt stores.

3. Contrary to Wal-Mart's Arguments, Rosenblatt Has Survey Expertise.

Although Smith retained Rosenblatt as an expert witness based on his expertise in Internet navigation, Rosenblatt's affidavit barely mentions in passing his knowledge about survey methodology, RosenAff at 3, and Smith's *Daubert* motion did not rely on Rosenblatt's survey expertise at all, Wal-Mart challenged Rosenblatt at his deposition to explain his knowledge and expertise about survey methods. Its brief now complains that Rosenblatt is ignorant about survey methods. Because Wal-Mart has decided to brief the issue, we end this memorandum by setting forth Rosenblatt's testimony about his survey expertise.

Rosenblatt testified that he has had extensive experience both teaching survey methodology and working with surveys. RosenDep 23, 24. In 2006, he chaired a panel about online survey methodology, *id.* 18-19, and in response to other questions he described at some length some articles he had written about methodology for online surveys. *Id.* 46-47. 49-50. Rosenblatt also testified that he has designed and conducted surveys, *id.* 33-35, and that he frequently "consumes surveys," in the sense that he reviews surveys conducted by others and has to assess the quality of the research. *Id.* at 44.

In light of this testimony, Wal-Mart carefully limits its complaints about

Rosenblatt's lack of survey expertise to saying that he has no expertise in "commercial consumer-survey methodology." WM Rosenblatt Mem. at 3, 5, 6. Rosenblatt testified that only one of the surveys he designed or conducted (since his graduate work fifteen years ago) involved a consumer product, RosenDep 36-37, but he also testified that there is little difference between surveys about commercial consumer products and other kinds of social science surveys, *id.* at 25, 27 ("just like there is no unique political survey methodology, there is survey methodology, and it is applied to different disciplines. . . . The narrowness of your question doesn't make sense"). Indeed, the Federal Judicial Center's *Reference Guide on Survey Research*, which Jacoby accepted as authoritative both in his report and in his deposition testimony, is not specifically devoted to "consumer surveys," but sets forth general considerations for assessing the validity and reliability of surveys generally.

Thus, although Smith did not present Rosenblatt as an expert witness specifically because of his experience in the area of critiquing surveys, Rosenblatt's expertise **does** extend to that subject, and is yet another reason why Wal-Mart's attempt to bar consideration of his testimony should be denied.

CONCLUSION

Wal-Mart's motion to exclude from evidence Rosenblatt's report and testimony

should be denied, and its motion to limit his testimony to bar its use in support of Smith's case-in-chief should be denied as moot.

Respectfully submitted,

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