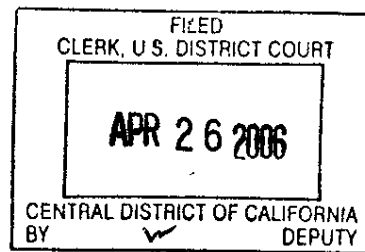
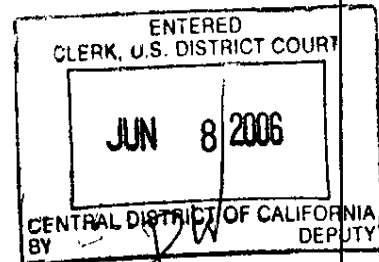


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SCANNED



UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

JOEL D. WALLACH, an individual,

Plaintiff, Counter-
 Claim Defendant,
 and Third Party
 Defendant,

v.

LONGEVITY NETWORK, LTD., a
 Nevada limited liability company

Defendant, Counter-
 Claim Plaintiff, and
 Third Party Plaintiff.

AND RELATED CROSS-ACTIONS

NO. CV 04-2404 SJO (RZx)

ORDER GRANTING PLAINTIFF, COUNTER-
 CLAIM DEFENDANT AND THIRD PARTY
 DEFENDANT'S MOTION TO EXCLUDE
 EXPERT TESTIMONY FROM LEONARD W.
 CLEMENTS AND DEFENDANT, COUNTER-
 CLAIM PLAINTIFF AND THIRD PARTY
 PLAINTIFF'S EXHIBITS 35-40, INCLUSIVE

THIS CONSTITUTES NOTICE OF ENTRY
 AS REQUIRED BY FRCP, RULE 77(d).

Plaintiff, Counter-Claim Defendant, and Third Party Defendant ("Defendant") seeks to preclude and prohibit any person, including any party, witness, or counsel from referencing, mentioning, discussing, or introducing: (a) testimony from Leonard W. Clements as an expert witness on the issues of consumer surveys, likelihood of confusion between trademarks, and damages recoverable for acts of trademark infringement; and (b) Defendant, Counter-Claim Plaintiff, and Third Party Plaintiff's ("Plaintiff's") Trademark Trial and Appeal Board ("TTAB") Exhibit Nos. 35-40, which include documents relating to an internet survey conducted by Mr. Clements.

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I. LEGAL STANDARD

Rule 702 of the Federal Rules of Evidence ("FRE") provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Thus, under Rule 702, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). In *Kumho Tire Co.*, the Supreme Court made clear that "this gatekeeping obligation applies. . .to all expert testimony." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). This is because "an expert is offered wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation [under the presumption that] the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Daubert*, 509 U.S. at 592.

In *Daubert*, the Supreme Court listed a number factors relevant to a determination of the reliability of expert evidence, including: whether the "theory or technique. . .can be (and has been) tested;" whether that theory or technique "has been subjected to peer review and publication;" whether there is a "known or potential rate of error" in the case of a particular technique; whether a particular technique involves "the existence and maintenance of standards controlling the technique's operation;" and whether the theory or technique is generally accepted within a "relevant scientific community." *Id.* at 592-94.

However, the Supreme Court has also recognized that "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert

1 testimony." *Kumho Tire Co.*, 526 U.S. at 152. Moreover, "[t]he trial court must have the same
2 kind of latitude in deciding how to test an expert's reliability, and to decide whether or when
3 special briefing or other proceedings are needed to investigate reliability, as it enjoys when it
4 decides whether that expert's relevant testimony is reliable." *Id.*

5 II. DISCUSSION

6 In this case, Defendant contends that Mr. Clements lacks the qualifications necessary to
7 testify as an expert on consumer surveys, likelihood of confusion between trademarks, and
8 damages recoverable for acts of trademark infringement. In addition, Defendant argues that
9 Exhibits 35-40 constitute documents relating to an internet consumer survey conducted by Mr.
10 Clements defectively in procedure, validation, and methodology.

11 Plaintiff claims that Mr. Clements is qualified as a multi-level marketing (MLM) distribution
12 expert in that he has "extensive" personal experience as an independent distributor, and has
13 testified in other cases, published on the subject of the MLM industry, and trained others as
14 independent distributors. In addition, Plaintiff argues that Mr. Clements's testimony as to
15 likelihood of confusion is admissible in that it is not directed to the ultimate legal issue of
16 "likelihood of confusion," but rather as to facts demonstrating "actual" confusion. Plaintiff further
17 states that Mr. Clements is qualified to testify as to the alleged harm suffered by Plaintiff. Finally,
18 Plaintiff contends that Mr. Clements's survey was useful and reliable even in the face of certain
19 admitted flaws.

20 During the proceedings before the TTAB, the Board recognized that Mr. Clements lacked
21 academic and professional experience in developing and conducting computer surveys in
22 likelihood of confusion cases. (TTAB Decision 21.) The Board thus held that the survey offered
23 little, if any, support to Plaintiff and afforded the survey little weight in rendering its decision. (*Id.*
24 at 24.)

25 The TTAB was correct in its assessment of Mr. Clements.¹ While Plaintiff focuses the first
26 portion of its argument on Mr. Clements's expertise in the multi-level market industry, Defendant

27
28 ¹This Court adopts all of the findings of the TTAB pertaining to Mr. Clements, his testimony,
and the survey that Mr. Clements conducted.

1 has not challenged this portion of Mr. Clements's potential testimony. Similarly, Mr. Clements's
2 potential testimony as to his perceptions of fact tending to show "actual" confusion are not at
3 issue. Rather, the challenges raised by Defendant are to Mr. Clements's testimony as to
4 consumer surveys, likelihood of confusion between trademarks, and damages recoverable for
5 acts of trademark infringement.

6 Mr. Clements is not qualified to testify as an expert regarding "likelihood of confusion." Mr.
7 Clements's experience as a MLM distributor is wholly distinct from the subject of trademarks and
8 trademark infringement. Given his lack of experience in the relevant field, Mr. Clements's
9 testimony as to "likelihood of confusion" cannot be considered reliable as required by FRE 702,
10 *Daubert*, and *Kumho Tire Co.* Similarly, Mr. Clements's lack of experience in the trademark
11 infringement field makes him an inappropriate witness to testify as an expert in opinion format to
12 the damages suffered by Plaintiff. Mr. Clements may testify, however, to facts that tend to show
13 damages.

14 Finally, Mr. Clements's survey and testimony regarding his survey, including the exhibits
15 to which Defendant objects, are all inadmissible. Here, Mr. Clements attempted to research
16 confusion in the MLM field resulting from the American Longevity-Longevity Networks trademarks
17 by posting an internet poll on his website. This poll asked users to choose which company,
18 between a choice of five answers, was founded by "Doc Wallach." However, Mr. Clements
19 himself testified to the fact that he lacked any training or background in developing consumer
20 surveys in likelihood of confusion cases. (Clements Dep. 135.) Based on this alone, the Court
21 would have to ignore its gatekeeping function before it could allow the admission of such evidence
22 at trial. However, Mr. Clements also failed to screen the participants in the survey in any manner,
23 told the participants to "guess" if they did not know the answer, and based the relevance of the
24 entire survey on the aforementioned vague inquiry, further clarifying that the survey evidence, in
25 its totality, is unreliable and accordingly inadmissible.

26 III. CONCLUSION

27 For the foregoing reasons, Defendant Wallach's Motion is GRANTED. As recognized by
28 Defendant, Mr. Clements may testify to his own perceptions. In addition, Mr. Clements may testify

1 as an expert regarding the MLM industry. Mr. Clements may not testify, however, to his consumer
2 survey, or to any opinions he may have formed regarding trademark confusion and/or damages.

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4 IT IS SO ORDERED.

5 Dated this 26 day of April, 2006.

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S. JAMES OTERO
UNITED STATES DISTRICT JUDGE