IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

The Right Reverend Charles G. vonRosenberg, individually and in his capacity as the former Provisional Bishop of The Episcopal Church in South Carolina and The Right Reverend Gladstone B. Adams, III, individually and in his capacity as the Provisional Bishop of The Episcopal Church in South Carolina, Plaintiffs, The Episcopal Church, Plaintiff in Intervention vs. The Right Reverend Mark J. Lawrence, et al. Defendants.	**CIVIL ACTION NUMBER: 2:13-cv-00587-RMG** **DEFENDANTS' MEMORANDUM IN SUPPORT TO EXCLUDE TESTIMONY AND REPORTS OF MARK KEEGAN**

NOW COMES, Defendants, The Rt. Rev. Mark J. Lawrence, The Protestant Episcopal Church In The Diocese of South Carolina; and The Trustees of the Protestant Episcopal Church of South Carolina; Church of The Cross, Inc. and Church of the Cross Declaration of Trust, The Church of Our Saviour, of the Diocese of South Carolina, The Protestant Episcopal Church, of the Parish of Saint Philip, in Charleston South Carolina, The Protestant Episcopal Church, The Parish of Saint Michael in Charleston, in the State of South Carolina and St. Michael's Church Declaration of Trust, The Vestry and Church Wardens of the Episcopal Church of the Parish of St. Helena and the Parish Church of St. Helena Trust, Trinity Episcopal Church, Edisto Island, St.

David's Church, Vestry and Church Wardens of the Episcopal Church of the Parish of St. John's Charleston County, Vestry and Church Wardens of St. Jude's Church of Walterboro, The Vestries and Churchwardens of the Parish of St. Andrew, Old Saint Andrews Parish Church; Holy Trinity, Grahamville; St. Alban's Chapel, The Citadel; St. John's Episcopal, Charleston; St. Andrew's Mission; All Saints Protestant Episcopal Church, Inc.; St. Bartholomews Episcopal Church; The Church of the Holy Cross; The Vestry and Church Wardens of The Parish of St. Matthew Holy Apostles, Barnwell; St. James Anglican, Blackville; St. Barnabas, Dillon; Ascension, Hagood; St. Paul's Orangeburg; Historic Church of the Epiphany, St. Johns, Berkeley; Christ St. Paul's Episcopal Church; Church Of The Holy Comforter; St. Matthias Episcopal Church, Inc.; St. Matthews Church; Christ Episcopal Church, Mars Bluff Community, Florence County, South Carolina; Trinity Episcopal Church, Pinopolis; Church Of The Redeemer; Holy Trinity Episcopal Church; The Church Of The Good Shepherd, Charleston, SC; St. Paul's Episcopal Church of Bennettsville, Inc.; St. James' Church, James Island, S.C.; The Church of St. Luke and St. Paul, Radcliffeboro; The Church Of The Resurrection, Surfside; The Protestant Episcopal Church, Of The Parish Of St. Philip, In Charleston, In The State of South Carolina; The Vestry and Wardens Of St. Paul's Church, Summerville; St. Timothy's, Cane Bay; Trinity Church of Myrtle Beach; Vestry and Church-Wardens Of The Episcopal Church Of The Parish Of Christ Church; St. Luke's Church; Grace Parish, North Myrtle Beach; Christ the King, Waccamaw; The Vestry and Church Wardens Of The Episcopal Church Of The Parish Of Prince George Winyah; St. John's Episcopal Church of Florence, S.C.; Church of the Advent, Marion; St. Paul's Episcopal Church of Conway; The Well Ministries; Church of the Holy Cross, Sullivan's Island; and Berkeley County Strawberry Chapel, (collectively "The Defendants") by and through their undersigned attorneys, and pursuant to Federal Rules of Civil Procedure and Rules of Evidence move before this

Honorable Court for an order precluding the Plaintiffs from presenting opinion testimony from Plaintiffs' purported expert, Mr. Mark Keegan.

INTRODUCTION

In response to Defendants survey data showing the terms THE EPISCOPAL CHURCH and EPSICOPAL CHURCH are perceived to be generic terms rather than trademarks terms among individuals who are members of or attend religious services at Episcopal churches or other churches, Plaintiffs hired Mark Keegan as a purported consumer survey research expert. Mr. Keegan conducted a survey of 400 members of The Episcopal Church ("TEC") to show they view TEC as a religious organization and that "THE EPISCOPAL CHURCH" is perceived as a brand name for a religious organization. Pursuant to its gatekeeping responsibility as recently underscored by the Fourth Circuit, this Court should exclude Mr. Keegan's testimony for his lack of sufficient qualifications and lack of any data or reliable methodology.

STANDARD OF REVIEW UNDER RULE 104 AND 702.

Federal Rule of Evidence 702 permits an expert to testify where the expert's "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue," so long as the expert's opinion is "based on sufficient facts or data," "is the product of reliable principles and methods," and the expert "has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. In assessing the admissibility of expert testimony, a district court assumes a "gatekeeping role" under Federal Rule of Evidence 104 to ensure that the "testimony both rests on a reliable foundation and is relevant to the task at hand." Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 597 (1993).[1]

Daubert distinguished the scientific principles of validity and reliability; to be scientific, a

[1] Rule 104(a) states "[p]reliminary questions concerning the qualification of a person to be a witness … or the admissibility of evidence shall be determined by the court."

theory need not be established as true, it must simply be reliable as evidence, i.e. trustworthy. Id. While, this could be determined in a number of ways, a trial court's inquiry must remain flexible to account for the subject matter, looking for "scientific validity-- and thus the evidentiary relevance and reliability" focusing "solely on principles and methodology, not on the conclusions that they generate." Id. at 594-95. If the trial court determined that the testimony was reliable, it was then charged with the duty to determine if it would assist the trier of fact. That is, the testimony must be "helpful"; it must be relevant and fit the issues in dispute in the case.

The district court's inquiry is a "flexible one," whose focus "must be solely on principles and methodology, not on the conclusions that they generate." Id. at 594–95. Daubert 's design is to "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999). A district court may consider a wide variety of factors to evaluate the reliability of expert testimony, including "testing, peer review, error rates, and 'acceptability' in the relevant scientific community." Id. at 141, 119 S.Ct. 1167; In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod. Liab. Litig., 892 F.3d 624, 631 (4th Cir. 2018).

In Kumho, the Court found that Daubert's principles applied to all expert matters, holding that Rule 702 "establishes a standard of evidentiary reliability" and "requires a valid . . . connection to the pertinent inquiry." In any expert testimony, the trial judge must simply determine whether the testimony has "a reliable basis in the knowledge and experience of [the relevant] discipline." Id. at 152 (citations omitted). The question is only "whether [a] particular expert [has] sufficient, specialized knowledge to assist the jurors "in deciding the particular issues in the case." Id. at 156.

Therefore, the court must engage in a three part inquiry to determine the admissibility of

expert testimony under Fed.R.Evid. 702. Specifically, whether (1) [T]he expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. See Paoli R.R. Yard PCB Litig., 35 at 741 (3d Cir. 1994) (Courts must focus "on the trilogy of restrictions on expert testimony: qualification, reliability and fit.").

Although there is some overlap among the inquiries into an expert's qualifications, the reliability of his proffered opinion and the helpfulness of that opinion, these are distinct . Therefore, an expert's overwhelming qualifications are by no means a guarantor of reliability. By the same token, a reliable opinion expressed by a genuinely qualified expert may not help the jury if it does not pertain to a fact at issue in the case.

Under Rule 104(a) and 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 Pharm., Inc., 509 U.S. 579, 589 (1993). To be reliable, the proponent of the testimony must establish that (1) "the testimony is the product of reliable principles and methods," that (2) "the expert has reliably applied the principles and methods to the facts of the case," and (3) that the "testimony is based on sufficient facts or data." Fed.R.Evid. 702(b), (c), (d). "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid," Daubert, 509 U.S. at 592–93, 113 S.Ct. 2786, and whether the expert has "faithfully appl[ied] the methodology to facts." In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod. Liab. Litig., 174 F.Supp.3d 911, 920 (D.S.C. 2016), Aff'd 892 F.3d 624 (4th Cir 2018) (citing Roche v. Lincoln Prop. Co., 175 Fed.Appx. 597, 602 (4th Cir.2006). "The proponent of the

[expert] testimony must establish its admissibility by a preponderance of proof." Cooper v. Smith & Nephew, Inc., 259 F.3d 194, 199 (4th Cir.2001).

Factors to be considered include "whether a theory or technique ... can be (and has been) tested," "whether the theory or technique has been subjected to peer review and publication," the "known or potential rate of error," the "existence and maintenance of standards controlling the technique's operation," and whether the theory or technique has garnered "general acceptance." Id. These factors are neither definitive nor exhaustive, and "merely illustrate[ ] the types of factors that will bear on the inquiry." Id. Courts have also considered whether the "expert developed his opinions expressly for the purposes of testifying," or through "research they have conducted independent of the litigation". and whether experts have "failed to meaningfully account for ... literature at odds with their testimony." Id. (citing Wehling v. Sandoz Pharm. Corp., 162 F.3d 1158 (4th Cir.1998), Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1317 (9th Cir.1995) (on remand), McEwen v. Baltimore Washington Med. Ctr. Inc., 404 Fed.Appx. 789, 791–92 (4th Cir.2010).

Rule 702 also requires courts "to verify that expert testimony is 'based on sufficient facts or data . . . to determine if that data provides adequate support to mark the expert's testimony as reliable." E.E.O.C. v. Freeman, 778 F.3d 463, 472 (4th Cir. 2015) (quoting Fed.R.Evid. 702(b)). The court may exclude an opinion if "there is simply too great an analytical gap between the data and the opinion offered." Id.

OPINION AND TESTMONY OF MARK KEEGAN

TEC has proffered Mark Keegan as an expert in consumer survey research, to testify to Mr. Keegan's opinion that "relevant consumers perceive THE EPISCOPAL CHURCH to refer to a specific religious organization." (Exhibit A – Keegan Report, p. 1). As Keegan described it in

his report, he was retained by TEC to "determine whether THE EPISCOPAL CHURCH mark is understood by relevant consumers to refer to a religion, or conversely, to a specific religious organization." Id. . To that end, he "designed and executed a consumer study of 400 individuals who are likely consumers of the services provided by the parties in this matter—i.e., Episcopalians—to gauge their perceptions of the phrase THE EPISCOPAL CHURCH …to test for genericness with regard to the phrase THE EPISCOPAL CHURCH among these relevant consumers." Id .

Keegan's survey was purportedly designed to allow his selection of "relevant consumers" to decide whether various phrases referenced "a religion" or "a specific religious organization". (Exhibit A, p. 3). The survey screened putative participants so that only persons who self-identified as "Christian", and those who further self-identified as "Episcopalian" were allowed to participate.[2] Therefore, Keegan's survey established Episcopalians as the only alleged "relevant consumers" in the Teflon analysis. When asked why he limited the survey participants to only Episcopalians, Keegan stated

> I identified Episcopalians as a relevant universe because the term at issue is "The Episcopal Church", and I wanted people in the survey that - - where that term would have particular significance to them.

(Exhibit B, p. 70, lines 16-23)

A religion was defined as "the system of beliefs that a group follows", and the survey results equated a religion with a generic term. (Exhibit A, p. 3, 12). A specific religions organization, on the other hand, was equated to a brand name and defined as something

> that a person participates in and that is organized in a formal way. A religious organization can be a local, stand-alone organization, or a larger, regional, national, or international organization with local affiliates. Both are religious organizations because they are formally

[2] Ironically, Keegan's questions implied that Christianity (and other religions) was a "religious organization / institution". Exhibit A, p. 11.

> organized entities that practice and/or teach the doctrine of a religion.

(Exhibit A, p. 14). By way of example, the Keegan survey instructed participants that "Judaism is the ***religion*** of the Jewish people" while "Temple Emanu-El of New York is a ***religious organization***". (Exhibit A, p. 13 (emphasis in original)). Survey participants were then screened to ensure they understood these instructions. (Exhibit A, p. 12-13).

After the participants were screened to ensure that they were Episcopalian, and then being instructed on the difference between a religion and a religious organization, the participants were asked the pertinent questions. As described in Keegan's report, the participants were presented, one at a time in random order, with five terms describing religions and religious organizations and were asked to indicate whether they believe each term to be a religion or a religious organization:

> Please read the name listed below and indicate whether you understand the name to be a ***religion***, that is, a system of religious beliefs and practices; or a ***religious organization***, that is, a religious group that practices and/or teaches the doctrine of a religion.
>
> If you don't have an opinion or don't know, please feel free to select that answer.
>
> **SOUTHERN BAPTIST CONVENTION** [or]
> **ISLAM** [or]
> **THE EPISCOPAL CHURCH** [or]
> **UNITED CHURCH OF CHRIST** [or]
> **HINDUISM**
>
> □□Religious organization
> □□Religion
> □□Don't know

The results were predictable: Of the four hundred Episcopalians that Keegan chose to include as survey participants, three hundred eighty-four of them indicated that THE EPISCOPAL

CHURCH was a religions organization, sixteen indicated that it was a religion, and none indicated that they had no opinion. (Exhibit A, pp.14-15, 64).

In his deposition, Keegan admitted that his survey did not ask, and therefore did not measure, whether the participants believed the term THE EPISCOPAL CHURCH referred to any specific or particular religious organization. (Exhibit B, p. 73, line 16-p.75, line 9; p. 75, line 24-p.76, line 8). Keegan was able to define the term "secondary meaning" as a consumer's perception of a mark and how that mark has gained potentially particular significance to the consumer in terms of its ability to identify a source. (Exhibit B., p. 48, line 22-p. 49, line 2). However, the survey made no attempt to determine if any consumer, even amongst only self-identified Episcopalians, associated the term The Episcopal Church with any particular source.

Keegan further admitted that "there are quite a few" entities not involved in this case that use the phrase "Episcopal Church" in their names. (Exhibit B., p. 76, lines 9-23). When asked about a significant number of such religious organizations, Keegan professed to having no knowledge of any of them. (Exhibit B., p. 77, line 17-p. 82, line 7).

Remarkably, during this portion of his testimony, the following colloquy established that Keegan had no basic knowledge of what it meant to be *an* episcopal church, as opposed to *The* Episcopal Church.

> Q. As you sit here today, do you have an understanding whether the Charismatic Episcopal Church is an Episcopal church?
>
> A. I don't know.
>
> Q. As you sit here today, do you have an understanding whether the Christian Methodist Episcopal Church is an Episcopal church?
>
> A. Honestly, I don't even understand the question.
>
> Q. What don't you understand about the question?

> A. How we're using the term Episcopal. Do you mean the plaintiff? Do you mean a church that practices the -- some understood beliefs of the Episcopal religion? Do you mean Episcopal with a little E? So I don't know.
>
> Q. Well, what do you understand to be practicing the Episcopal religion or some version of the Episcopal religion that you just referred to?
>
> [Objection by Mr. Chud]
>
> A. I don't understand. That's why I made the -- that's why I answered the question as I did. Q. So you don't understand what it means to be practicing in an Episcopal religion; is that correct?
>
> A. I don't understand your question.

(Exhibit B., p. 80, line 1-p.81, line 5).

ARGUMENT

I. Keegan is not qualified to testify.

As stated above, TEC bears the burden of establishing the expertise of a witness that it proposes to produce under Rule 702. Keegan's qualifications and experience are included in Exhibit A as the "About Keegan & Donato Consulting, LLC", exhibit thereto, and his deposition testimony is consistent with that document. Educationally, Keegan has a Bachelor of Arts in History, a Juris Doctorate, and some postgraduate MBA course work. He began working for Keegan & Company, LLC in 2001, and his experience is generally described as "[l]itigation consulting and testifying expert for corporate clients across a broad range of industries for cases in state and federal courts and before administrative agencies" and "Develop case strategy and expert testimony in the areas of economic analysis, marketing, consumer behavior, intellectual property, and other business-related fields for complex civil litigation."

Keegan has been offered to present testimony within the realm of Rule 702 in that he intends to present the result of his survey of Episcopalians as to the term The Episcopal Church,

and has opined that "relevant consumers perceive THE EPISCOPAL CHURCH to refer to a specific religious organization". However, at no point has TEC or Keegan established though documentation or testimony that he has the requisite "knowledge, skill, experience, training, or education" to present this "scientific, technical, or other specialized knowledge" Fed. R. Evid. 702.

In fact, the Central District of California has specifically held that another of Keegan's survey reports and testimony was inadmissible under Rule 702 due to his lack of qualifications. In Warner Bros. Entm't v. Glob. Asylum, Inc., Case No. CV129547PSGCWX, 2013 WL 12114836, at *7 (C.D. Cal. Jan. 29, 2013), *aff'd sub nom*. 544 F. App'x 683 (9th Cir. 2013), the court went so far as to state

> The education and experience outlined in Keegan's biography is insufficient to establish that he is an expert in the field of consumer surveys. The biography provides no indication that he has any special training or experience in crafting or analyzing consumer perception surveys; in fact, the biography does not suggest that he has any experience or training in crafting surveys of any kind.

Likewise, in Flushing Bank v. Green Dot Corp., 138 F. Supp. 3d 561 (S.D.N.Y. 2015), the Southern District of New York found Keegan's opinions wholly unreliable in the context of a summary bench trial. The Flushing court's opinion goes so far as to state

> The Court does not find that Keegan's background in surveys is sufficiently deep or tested to provide a reliable basis for his criticisms. The Court is troubled by what appears to be a large amount of "cutting and pasting" between a prior report and this report, potentially reflecting off-the-shelf criticism.

Id., 138 F. Supp 3d at 580, n.16

TEC bears the burden of establishing, by a preponderance of the evidence, that Keegan is qualified to give opinion testimony under Rule 702, Daubert, and Kumho Tire. To date, insufficient evidence has been offered to establish that expertise in the area of consumer surveys,

religious institutions, or any other aspect of trademark law that would assist the trier of fact in this matter. At best, Keegan purports to have work experience in "consumer research", which does not explicitly include expertise in consumer survey or trademark affiliation. (Exhibit B. p. 37:10-38:16). Moreover, there is no evidence he has undertaken any additional training, education, etc. following the exclusion of his testimony in the Flushing and Warner Bros. cases cited above. Accordingly, TEC has failed to meet its burden, and Keegan's opinion testimony is inadmissible in this case.

II. Keenan's survey is so flawed that it fails to meet the standard for admissibility.

Keenan's report and testimony indicate that he attempted performed a "Teflon survey" to determine consumer recognition of the term THE EPISCOPAL CHURCH. Teflon surveys are the "most widely used" to "resolve a genericness challenge." J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 12:16 (4th ed. updated June 2014). The survey asks consumers to categorize different words as either brand names or common names. This is done by first establishing whether the respondent grasps the distinction between common names (airline or automobile) and brand names (American Airlines or Chevrolet), and then asks the respondent to categorize a number of terms as common or brand. See, e.g., E.T. Browne Drug Co. v. Cococare Prods., Inc., 538 F.3d 185, 195 (3d Cir.2008). This is then used to prove that "the primary significance of the term in the minds of the consuming public is not the product but the producer." Kellogg Co. v. Nat'l Biscuit Co., 305 U.S. 111, 118 (1938).

Teflon surveys are generally considered to be reliable and are widely accepted in trademark litigation to resolve genericness challenges by assisting the trier of fact on issues of secondary meaning and likelihood of consumer confusion. Innovation Ventures, LLC v. NVE, Inc., 90 F. Supp. 3d 703, 720–21 (E.D. Mich. 2015); see also Herman Miller, Inc. v. Palazzetti Imports &

Exports, Inc., 270 F.3d 298, 298, 312 (6th Cir.2001) ("'Because the determination of whether a mark has acquired secondary meaning is primarily an empirical inquiry, survey evidence is the most direct and persuasive evidence.' "); Sugar Busters LLC v. Brennan, 177 F.3d 258, 269 (5th Cir.1999); Schering Corp. v. Pfizer Inc., 189 F.3d 218, 225 (2d Cir.1999) ("Surveys are ... routinely admitted in trademark ... cases to show actual confusion, genericness of a name or secondary meaning, all of which depend on establishing that certain associations have been drawn in the public mind.").

Like other aspects of expert testimony, the proponent of the survey bears the burden of establishing its admissibility." Keith v. Volpe, 858 F.2d 467, 480 (9th Cir.1988). "[O]nce a survey has passed the threshold criteria of having a proper foundation, being relevant, and having been conducted according to accepted principles" it may be admitted, largely leaving any follow-on technical critiques are for the trier of fact to weigh when assessing the persuasive value of the expert's testimony. 6 McCarthy on Trademarks and Unfair Competition § 32:170 (4th ed.) ("McCarthy") (emphasis added). As the Fourth Circuit has observed, however, "there will be occasions when the proffered survey is so flawed as to be completely unhelpful to the trier of fact and therefore inadmissible, such situations will be rare." PBM Prods., LLC v. Mead Johnson & Co., 639 F.3d 111, 123 (4th Cir. 2011) (quoting AHP Subsidiary Holding Co. v. Stuart Hale Co., 1 F.3d 611, 618 (7th Cir. 1993)).

Thus, an expert's survey and conclusions may be excluded under Rule 702 if the survey "was fundamentally flawed" and suffers from "fatal flaws," as opposed to "mere technical flaws." Valador, Inc. v. HTC Corp., 242 F. Supp. 3d 448, 456–57 (E.D. Va.), aff'd, 707 F. App'x 138 (4th Cir. 2017) (citing Citizens Fin. Grp., Inc. v. Citizens Nat'l Bank of Evans City, 383 F.3d 110, 121 (3d Cir. 2004) (holding that the district court properly excluded a likelihood of confusion survey

that (1) used vague and imprecise language and (2) surveyed consumers outside of the relevant customer base). Surveys may also require exclusion under Rule 403 if the probative value of the survey is outweighed by the prejudice, waste of time, and confusion it will cause at trial. Id. (citations omitted) "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." Daubert, 509 U.S. at 595

A consumer survey is properly excluded from a trademark case if the witness does not qualify as an expert, or if the survey was not "conducted according to accepted principles" and in "a statistically correct manner." Leelanau Wine Cellars, Ltd. v. Black & Red, Inc., 452 F. Supp. 2d 772, 777–79 (W.D. Mich. 2006), aff'd, 502 F.3d 504 (6th Cir. 2007) (citing M2 Software, Inc. v. Madacy Entm't, 421 F.3d 1073, 1087 (9th Cir. 2005) (upholding exclusion of proffered likelihood of confusion survey).

Courts have typically required a survey to satisfy the following foundational requirements to be admissible under Rule702:

> (1) the "universe" was properly defined,
> (2) a representative sample of that universe was selected,
> (3) the questions to be asked of interviewees were framed in a clear, precise and non-leading manner,
> (4) sound interview procedures were followed by competent interviewers who had no knowledge of the litigation or the purpose for which the survey was conducted,
> (5) the data gathered was accurately reported,
> (6) the data was analyzed in accordance with accepted statistical principles, and
> (7) objectivity of the process was assured.

Leelanau Wine Cellars, 452 F. Supp. At 778 (counting cases).

Keegan's survey was fundamentally flawed for a number of reasons. First, the very notion that the only two choices provided to the participants to classify the subject terms was either "religion" or "religious organization" would have led nearly any participant to the answer that Keegan sought. In fact, Keegan himself seemed very confused about the typical use of the term "religion" in this context. Christianity is a religion, of which there are a number of denominations such as Catholicism, Protestantism, and Anglicanism. Within those denominations there are any number of entities and associations that could fall within the definition of "religious organization", but the only correct answer as to what religion those organizations followed would be that they are all Christians. This flaw was compounded by the fact that all the participants in the survey were persons who self-identified as Episcopalian. Given that sample, *any* phrase that included the word Church would have likely generated similar results.

Keegan's choice to limit the survey universe to self-identified Episcopalians was also a fundamental flaw. Courts have held that the selection of the proper universe as one of the most important factors in assessing the validity of a survey as well as the weight that it should receive. See Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252, 264 (5th Cir.1980) (stating that "one of the most important factors in assessing the validity of an opinion poll is the adequacy of the 'survey universe,' that is the persons interviewed must adequately represent the opinions which are relevant to the litigation"); Wells Fargo & Co. v. WhenU.com, Inc., 293 F.Supp.2d 734, 767 (E.D.Mich.2003) ("Selection of a proper universe is so critical that 'even if the proper questions are asked, the results are likely to be irrelevant.").

In a trademark infringement case where the plaintiff alleges that the defendant's mark causes consumers of the defendant's products to mistakenly believe that the defendant's products are connected with the plaintiff, the proper universe is the potential customers of the Defendants.

Leelanau Wine Cellars, Ltd. v. Black & Red, Inc., 452 F. Supp. 2d 772, 781–82 (W.D. Mich. 2006), aff'd, 502 F.3d 504 (6th Cir. 2007). Admittedly, perhaps *some* self-identified Episcopalians are potential parishioners of the Defendants, but they are in fact customers of the Plaintiff. The broader sphere of potential customers of the Defendants would include many persons beyond that sphere. Moreover, limiting the sample to self-identified Episcopalians undermines all confidence in the results, as those persons are likely familiar with the ongoing litigation amongst the parties, and therefore may be aware of the purpose of the survey. Their likely familiarity with the phrase THE EPISCOPAL CHURCH, regardless of what they believe it to mean, would automatically lead them to answer the survey questions in the manner which generated Keegan's results.

All of these facts, read in the light that the survey was generated by a professional expert witness for litigation purposes only, should prevent the Court from having any confidence in the survey results. The survey simply does not meet the foundational requirements that federal courts require, and therefore the survey and any opinions taken from it must be excluded under Rule 702.

III. Keegan's survey is not helpful to the trier of fact because it produced no evidence of consumer connection to a particular entity

As Keegan described it, his survey was designed "to test for genericness with regard to the phrase THE EPISCOPAL CHURCH among these relevant consumers." A term is deemed generic if it "refers to the genus of which the particular product is a species." Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 194, (1985)). See also Heirs of Estate of Jenkins v. Paramount Pictures Corp., 90 F.Supp.2d 706 (E.D.Va.2000) (aff'd sub nom Evans v. Paramount Pictures Corp., 7 F. App'x 270, 271–72 (4th Cir. 2001)). Put another way, a mark is generic if it is the name of a subcategory of which the associated product is a member. Jenkins, 90 F.Supp.2d at 711.

A mark that is generic, and therefore merely descriptive, can only gain trademark

protection if it has "acquired a secondary meaning, that is, if in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself." Sara Lee Corp. v. Kayser-Roth Corp., 81 F.3d 455, 464 (4th Cir.1996) (internal quotation marks omitted). The Fourth Circuit uses seven factors to analyze a claim that a generic term has acquired secondary meaning: (1) advertising expenditures; (2) consumer studies linking the mark to the source; (3) sales success; (4) unsolicited media coverage of the work; (5) attempts to plagiarize the mark; (6) the length and exclusivity of the mark's use; and (7) evidence of actual confusion. Evans, 7 F. App'x 270, 271–72 (4th Cir. 2001) (citing Perini Corp. v. Perini Constr., Inc., 915 F.2d 121, 125 (4th Cir.1990); Lone Star Steakhouse & Saloon v. Alpha of Va., 43 F.3d 922, 936 n. 16 (4th Cir.1995)).

The record is replete with evidence, and the court could likely take notice, that the words episcopal and church, along with the term "episcopal church" are used by many entities worldwide both in recognition of their polity and as their proper names. TEC's claim to be *THE* episcopal church, and thereby claiming the mark at issue, is simply a demonstrable use of an entity's attempt to claim a secondary attachment to an undeniably generic term. Keegan's report even admits that his survey was designed to combat the Defendants' claim of genericness. However, even if it that survey had any established validity, the survey is not relevant because it made no attempt to tie the term THE EPISCOPAL CHURCH to any particular source identifier whatsoever. In fact, the Keegan survey failed to address any of the factors that the Fourth Circuit recognizes to evaluate the plaintiffs' claims. Accordingly, the survey and any opinions derived from it fail to make a material fact more or less probable, are therefore not relevant, and would be of no assistance to the trier of fact.

Keegan's survey also fails to meet basic standards of relevancy because the survey only collected data between August and September 2018. To prevail on a claim of infringement, secondary meaning must have been acquired by the date of first infringing use. To the extent an alleged infringer challenges the present validity of the asserted trademark registration based on a claim of genericness, validity depends on whether the mark had acquired secondary meaning as of the date of registration. Converse, Inc. v. Int'l Trade Comm'n Skechers U.S.A., Inc., No. 2016-2497, 2018 WL 6164571, at *7 (Fed. Cir. Oct. 30, 2018); California Cooler, Inc. v. Loretto Winery, Ltd., 774 F.2d 1451, 1454 (9th Cir. 1985). In contrast, Teflon surveys analyze the mindset of the consumer at the time they take the survey. See, e.g., Intel Corp. v. Adv. Micro Devices, Inc., 756 F. Supp. 1292, 1297 (N.D. Cal. 1991) (holding that the Teflon Survey was properly conducted as it showed that 72% of the public regard at that point in time found that the phrase was generic). Thus, the survey could only be admissible "to the extent that it sheds light on consumer perceptions in the past." 2 McCarthy, supra, § 16:34. "The relevant consumer population for assessing consumer attitudes at a point in the past is a group of consumers at that point in the past" and "[a] contemporaneous survey commissioned for litigation obviously cannot access such a pool of respondents." Id. A survey which captures consumers' minds at any other point in time has little relevance with respect to the issue of secondary meaning. Convers, 2018 WL 6164571, at *8–9; Commerce Nat'l. Ins. Servs., Inc. v. Commerce Ins. Agency, Inc., 214 F.3d 432, 440 (3d Cir. 2000) (recency of survey contributed to its being "wholly irrelevant to whether CBI established secondary meaning in the 'Commerce' mark as of 1983").

CONCLUSION

Keegan's survey was designed to measure genericness of the mark THE EPISCOPAL CHURCH in 2018. That is simply not relevant to the question of whether that mark was generic

or descriptive when registered, or whether the mark had attained secondary meaning when registered. Therefore, the Keegan survey, and any opinion derived from it not relevant to prove or disprove any material fact at issue in this case. Therefore, the survey and Keegan's opinions would not be helpful to the trier of fact and must be excluded under Rule 702 and Daubert.

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