UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BUC-EE'S, LTD.	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. 4:15-CV-03704**
	§	
SHEPHERD RETAIL, INC., BLANCO RESTAURANT, INC., LIVE OAK RETAIL, INC., HARLOW FOOD, INC., MARIAM, INC., S.W. RETAIL INC., FALFURRIAS HIGHWAY FOODS, INC., AND HIGHWAY 46 RETAIL, INC.	§ § § § § § §	**JURY TRIAL DEMANDED**

BUC-EE'S OPPOSED MOTION *IN LIMINE* TO EXCLUDE THE DEFENDANTS' SURVEY EVIDENCE OF DR. KIM ROBERTSON

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Plaintiff, Buc-ee's, Ltd. ("Buc-ee's"), moves, *in limine*, to exclude from trial any evidence relating to the likelihood of confusion survey of Kim Robertson ("Robertson") commissioned by defendants for purposes of this litigation.

I. SUMMARY OF THE ARGUMENT AND ISSUES TO BE RULED UPON

Defendants' expert, Kim Robertson, engaged in an alleged survey that is fatally defective because it was designed and conducted using a wholly improper universe. Robertson's survey universe was a general population universe that included all persons over age 18 holding a valid driver's license from North Texas, South/Central Texas, and East Texas. Robertson made no attempt to include the universe required by legally acceptable survey methodologies. He did not consider, screen for, or otherwise document whether survey participants were purchasers or potential purchasers of Choke Canyon products and services or otherwise likely to come into contact with the Choke Canyon logo. Robertson also limited his participants to three geographic areas that for the most part have no locations that offer products or services under the Choke Canyon logo and he failed to include geographic areas where several Choke Canyon stores are located. So even assuming Robertson asked the right questions in the right way in his survey, his survey has no value because he directed these questions to the wrong universe of respondents. Robertson's survey results are thus irrelevant, unreliable, and speculative and impermissibly skewed by his improper universe.

As a result, the survey does not withstand scrutiny under the *Daubert* standard for admission of expert testimony, and Robertson's survey and testimony should be excluded from being presented to the jury. Under *Daubert* and Federal Rule of Evidence 702, the Court must ensure that an expert's testimony "is not only relevant, but reliable" and that it is "more than a subjective belief or unsupported speculation." *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 589-90 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (extending

Daubert to expert testimony based on non-scientific knowledge). The survey and testimony of Robertson should also be excluded from the jury under Federal Rule of Evidence 403 because the prejudicial effect of this fundamentally flawed methodology far outweighs any potential probative value of Robertson's survey and testimony. *See* Fed. R. Evid. 403.

II. NATURE AND STAGE OF PROCEEDINGS

Through nearly three and a half decades of effort and expense, Buc-ee's has developed valuable intellectual property rights and tremendous customer goodwill related to its convenience store and gas station services, merchandise, and gasoline. Buc-ee's filed this action in response to Defendants' attempts to trade on those rights through use of logos that infringe and dilute the famous and distinctive Buc-ee's beaver logo trademarks. The parties are now approaching trial that is set to begin on August 21, 2017 and Defendants have offered the Robertson survey in an attempt to refute a likelihood of confusion between the parties' logos. But the Robertson survey is fundamentally flawed, irrelevant and prejudicial and should be excluded from the jury.

III. ROBERTSON'S SURVEY AND OPINIONS SHOULD BE EXCLUDED BECAUSE THE SURVEY'S IMPROPER UNIVERSE RENDERS THE RESULTS IRRELEVANT

Robertson's survey fails to meet *Daubert's* threshold requirement of "reliable" testimony and should not be presented to the jury. The district court's chief role when determining the admissibility of expert testimony under *Daubert* is that of a "gate-keeper." *Seatrax, Inc. v. Sonbeck Int'l, Inc.,* 200 F.3d 358, 371 (5th Cir. 2000). "The party seeking to have the district court admit expert testimony must demonstrate that the expert's findings and conclusions are based on the scientific method and are reliable." *City of Waco v. Kleinfelder Cent., Inc.*, No. 6:15-CV-310 RP, 2016 WL 5854290, at *9 (W.D. Tex. Oct. 6, 2016). "Where, as here, a trademark action contemplates a jury trial rather than a bench trial, the court should scrutinize

survey evidence with particular care." *THOIP v. Walt Disney Co.*, 690 F. Supp. 2d 218, 231 (S.D.N.Y 2010).

In assessing the validity of a survey, the Fifth Circuit first looks at "the manner of conducting the survey, ***including especially the adequacy of the universe***." *Scott Fetzer Co. v. House of Vacuums Inc.*, 381 F.3d 477, 487 (5th Cir. 2004) (emphasis added). When conducting a consumer survey, one of the most critical considerations in achieving an accurate and meaningful result is to pick the proper "population" or "universe" of consumers to question. (Ex. 1, Federal Judicial Center, *Reference Manual on Scientific Evidence* 377 (3rd ed. 2011)) ("The definition of the relevant population is crucial because there may be systematic differences in the responses of members of the population and non-members."). "Selection of the proper universe is a crucial step, for even if the proper questions are asked in a proper manner, if the wrong persons are asked, the results are likely to be irrelevant." (Ex. 2, 6 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* (hereinafter "*McCarthy*") § 32:159 (4th Ed. Updated 2017)).

In a likelihood of confusion survey, "[t]he appropriate universe should include ***a fair sampling of those purchasers most likely to partake of the alleged infringer's goods or services***." *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 264 (5th Cir. 1980) (emphasis added); *Scott Fetzer*, 381 F.3d at 487–88. Surveys that do not address the relevant universe are unreliable, inadmissible, and confusing. *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 264 (5th Cir. 1980)*; see Joules Ltd. v. Macy's Merch. Grp. Inc.*, No. 15-CV-3645 KMW, 2016 WL 4094913, at *10 (S.D.N.Y. Aug. 2, 2016) (giving little weight to a survey that "failed to limit its universe of respondents"); *Jordache Enterprises, Inc. v. Levi Strauss & Co.*, 841 F.Supp. 506, 518–519 (S.D.N.Y.1993) (survey that "interviewed participants who had purchased or worn jeans within the past six months" but "did not inquire as to whether those participants intended to

purchase jeans in the future ... does not necessarily include potential purchasers of jeans" and "does not constitute acceptable evidence of actual confusion"); Ex. 2, *McCarthy* § 32:159 ("A survey of the wrong 'universe' will be of little probative value in litigation."). This is because surveys that use an improper universe skew the results by introducing irrelevant data. *Big Dog Motorcycles, L.L.C. v. Big Dog Holdings, Inc.*, 402 F. Supp. 2d 1312, 1334 (D. Kan. 2005).

Here, Robertson's survey is defective and the results are skewed because Robertson surveyed the general population of limited geographic areas with no regard as to whether any of the people surveyed are actually from the relevant population. As a result, Robertson's opinions relating to his likelihood of confusion survey do not pass muster under *Daubert* and should be excluded from the jury. *Id.* (finding survey results not relevant and of no probative value where the survey universe was not limited to buyers of junior user's goods).

a. The Relevant Universe Is People Likely To Be Customers Of Choke Canyon

The authorities are unanimous regarding who is in the relevant universe for likelihood of confusion in a forward confusion case.[1] According to the Fifth Circuit, the relevant population for a likelihood of confusion survey in this dispute is prospective and past purchasers of Choke Canyon's goods and services. *See Scott Fetzer*, 381 F.3d at 487–88 ("the appropriate universe should include a fair sampling of those purchasers most likely to partake of the alleged infringer's goods or services"). The Federal Judicial Center also confirms the proper universe consists of "all prospective and past purchasers of the defendant's goods or services." (Ex. 1, Federal Judicial Center, *Reference Manual on Scientific Evidence* 376 (3rd ed. 2011)). Significantly, the sources Robertson cited in his report as authoritative, dictate that the proper universe to survey be comprised of potential purchasers of the junior user's (Choke Canyon's)

[1] Forward confusion occurs when customers mistakenly think the junior user's (Choke Canyon's) goods or services are from the same source as or are connected with the senior user's (Buc-ee's) goods or services.

goods or services. (Ex. 3, Jacob Jacoby, *Trademark Surveys, Volume I, Designing, Implementing, and Evaluating Surveys*, § 5.45, at 284-287, American Bar Association (2013)) ("define the survey universe for assessing forward confusion as consisting of (1) potential purchasers of the junior user's products or services (2) who have indicated a willingness or likelihood of purchasing the product(s) or service(s) at issue."); (Ex. 4, Jerre B. Swann, *Likelihood of Confusion Studies and the Straitened Scope of Squirt*, 98 Trademark Rep. 739, 747-48, n. 46 (2008)) ("where the junior user's operations are geographically confined, the study should be confined to the area where there are respondents with the opportunity to come in contact with the junior mark").

Not only does the weight of authorities confirm the proper universe, Robertson agreed during his deposition that the proper universe in this case is people that are likely to come into contact with Choke Canyon's logo:

> Q: But the relevant universe is supposed to be people that are likely to come into contact with the defendants' mark?
> A: Yes.
>
> * * *
>
> Q: And you agree that for a likelihood of confusion survey, the proper universe is people who are likely to come into contact with the junior user's mark?
> A: Yes.

(Ex. 5, Robertson Dep. 130:20-23 and 138:12-16, Dec. 16, 2016).

Further, Choke Canyon's other expert, Jacob Jacoby, confirms the proper universe is potential or perspective purchasers of Choke Canyon's goods or services:

> Q: For a likelihood of confusion study, you would agree that the proper universe of survey respondents are people that are likely to come in contact with the defendants or the accused infringer's mark, correct?
> A: If it is a forward confusion study, you are supposed to be testing potential or perspective purchasers of the defendant's goods or services. If it is a reverse confusion, you do the opposite.

(Ex. 6, Jacoby Dep. 25:13-23, January 5, 2017).

The relevant universe here of past or prospective customers of Choke Canyon includes people who had or were likely to drive through or around San Antonio, Atascosa, or Whitsett, and had or were likely to visit a BBQ restaurant or convenience store with a gas station. Despite the controlling case law, the Federal Judicial Center, the treatises cited by Robertson, Robertson's own testimony, and Choke Canyon's other expert confirming that the relevant universe is past or prospective customers of Choke Canyon, Robertson failed to survey that universe: Robertson improperly surveyed the general population of limited geographic areas.

b. Robertson's Survey Universe Is Improper and Unreliable

Robertson surveyed an incorrect universe. He did not screen for or even consider whether the survey participants had or were likely to come into contact with Defendant's Choke Canyon logo. At bottom, Robertson failed to follow the most critical and necessary step of survey design. McCarthy § 32:159 ("The first step in designing a survey is to determine the 'universe' to be studied.").

In particular, Robertson's Report identifies the "Relevant Universe to be Sampled" as:

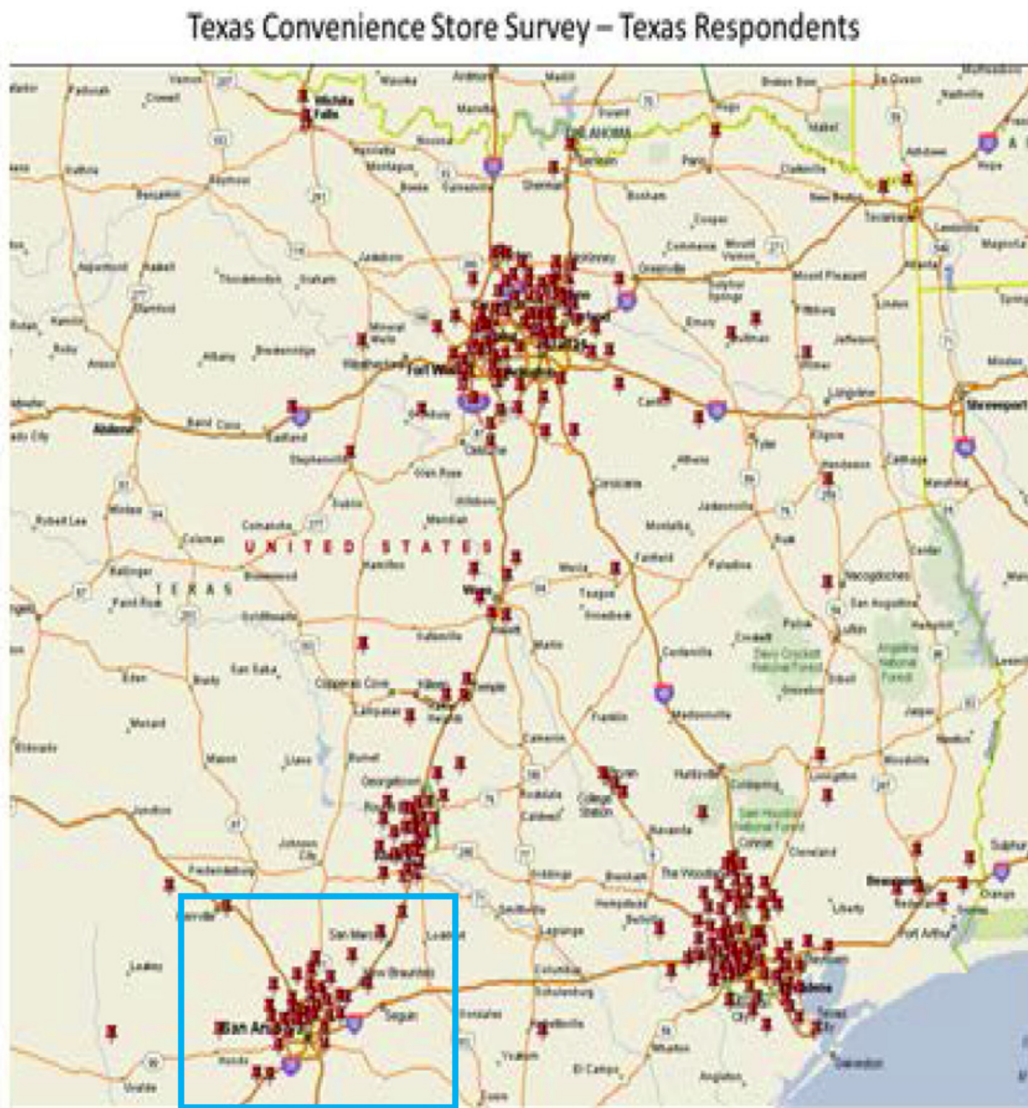
> 7. The relevant consuming public for the survey was identified as persons residing in three general areas of Texas: **North Texas** (includes Ft. Worth, Dallas, Abilene, Wichita Falls and Longview), **South/Central Texas** (includes Waco, Temple, Austin and San Antonio) and **East Texas** (includes Houston, Galveston, Beaumont and Port Arthur) who had a current driver's license and who were over the age of 18. ***This area covers more than 80% of the population of Texas and covers the vast majority of drivers in Texas*** who could reasonably be expected to use the services of the sort offered by the parties in this litigation.

(Ex 7, Robertson Rep. at p 5-6) (emphasis added). But this universe assumes, without any basis to do so, that virtually every person with a driver's license in three limited areas in Texas not only owns and/or uses an automobile, but that they do so in the limited geographic area where the Choke Canyon logo is used, regardless of how far away that person lives, works, and so on.

In reality, Defendants' Choke Canyon logo is used in connection with ten locations near or south of San Antonio—only some of which fall within a very small corner of one of Robertson's three general areas used for the universe (the South/Central Texas region). (Ex. 5, Robertson Dep. 135:2-8; Ex. 7, Robertson Rep. at p. 5-6).

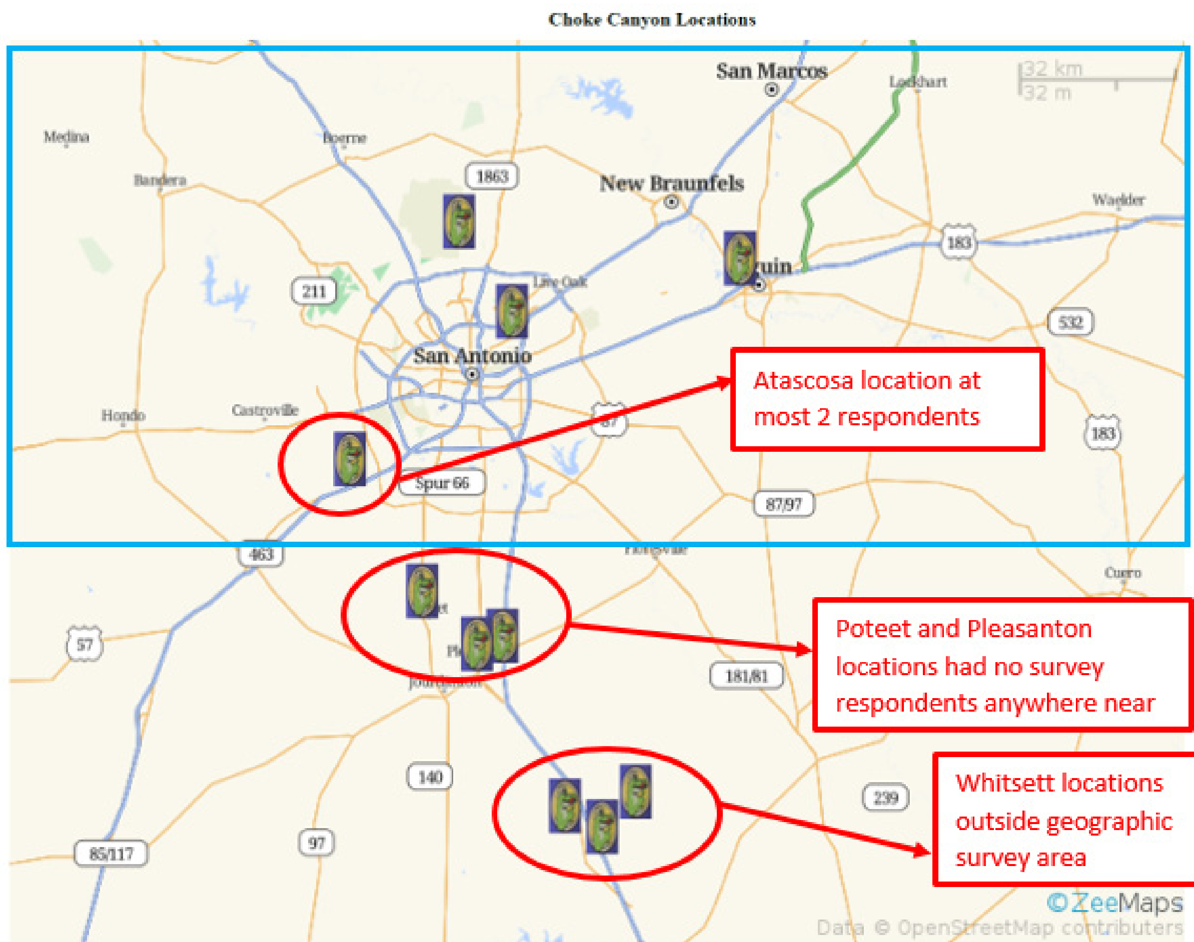
The majority of people Robertson surveyed are nowhere near the Defendants' locations. Below is the map of respondents' locations from Robertson's report. (Ex. 7, Robertson Rep. at Appendix C). The area in the blue rectangle is the only area where some of the defendants' locations using the Choke Canyon logo are located.

Texas Convenience Store Survey – Texas Respondents



The map immediately below shows the locations where the Defendants use the Choke Canyon logo. The blue rectangle in the map below coincides with the blue rectangle in the map above to further illustrate that the majority of Robertson's survey respondents were from the wrong universe.

Choke Canyon Locations



As shown above, six of the Defendants' ten locations were excluded from the pool of potential respondents to the survey. First, the location of Choke Canyon's second largest travel center, one of its convenience stores and gas stations, and one of its stand-alone BBQ restaurants in Whitsett where the Choke Canyon logo is used was completely excluded from the geographical areas surveyed. Second, Robertson's map of respondents confirms that no respondents reside anywhere near the Poteet and Pleasanton locations. Finally, in the location of

the Atascosa travel center—the largest of the Choke Canyon travel centers with the most prominent usage of the Choke Canyon logo—at most, there were 2 respondents who could have been potential purchasers of Choke Canyon's goods or services. As a result, the majority of participants reside hundreds of miles away from the nearest location using the Choke Canyon logo and are unlikely to come in contact with the Choke Canyon logo. (Ex. 7, Robertson Rep. at App. C). Therefore, Robertson's admitted scope covering a vast majority of drivers in Texas is grossly improper, and his survey should not be presented to the jury. *Trouble v. The Wet Seal, Inc.*, 179 F.Supp.2d 291, 307 (S.D.N.Y. 2001) (survey not conducted in close proximity to the junior user's stores resulting in a flawed and inadmissible survey).

There is simply no way to determine which if any respondents are from the proper universe. This is because Robertson failed to include any filter questions to ensure the universe of respondents were likely to come into contact with defendant's mark:

> Q: So where is your filter question for the universe of respondents to make sure they are people that would likely to come into contact with the defendant's marks?
> A: I don't have any except for the general geographic areas and the age groupings and the quotas.

(Ex. 5, Robertson Dep. 130:24-131:6). Thus, Robertson also failed to limit the universe to those who, even assuming they drive an automobile in the correct area of Texas, used highway convenience stores, ate at barbeque restaurants, or were likely to do so. Indeed, Robertson even acknowledged he did not know whether participants had ever previously come into contact with Defendants' marks, and had no idea whether participants would be likely consumers at Choke Canyon in the future.

> Q: So you don't know that the people who were surveyed in North Texas had ever previously come in contact with the defendants' marks?
> A: That's correct.

> Q: And you have no idea whether [people who were surveyed in North Texas] are likely in the future to have come into contact with Defendants' marks?
> A: That's correct.
> Q: Does the same go for the respondents from the East Texas area, that you don't know if they had ever previously come in contact with the defendants' marks?
> A: That's true.
> Q: And you don't know if in the future [the respondents from East Texas] were likely to come into contact with the defendant's mark?
> A: Correct.

(Ex. 5, Robertson Dep. 131:16-132:8).

Of the 450 responses to his survey, Robertson was able to identify ***just one respondent*** that had come into contact with the Choke Canyon logo. (Ex. 5, Robertson Dep. 136:20-137:25). And Robertson's survey failed to ask sufficient questions to determine whether the opinions of any of the other respondents are relevant to the likelihood of confusion analysis.

> Q: And you don't know whether any of the other respondents were likely to come into contact with the Choke Canyon logo in the future, were you?
> A: Except that they were 18-year-old-plus drivers in Texas.
> Q: But you don't know whether any of those respondents were likely to come into contact with the Choke Canyon log in the future, were you?
> A: Not specifically, no.

(Ex. 5, Robertson Dep. 137:17-25).

As a result of Robertson's improper universe, the responses of the overwhelming majority of participants are irrelevant to the likelihood of confusion analysis and skew the survey results. *See Big Dog Motorcycles,* 402 F.Supp.2d at 1334 (survey had no probative value and was excluded because did not limit survey universe to buyers who would be likely purchase the products at issue). The Court should therefore exclude Robertson's survey and related testimony from the jury.

IV. ROBERTSON'S SURVEY AND TESTIMONY SHOULD BE EXLCUDED UNDER RULE 403

Because the flaws in Robertson's survey render the survey irrelevant to any issue in the case, the Court should also exclude the survey from the jury under Rule 403. Where the flaws in a survey are sufficiently serious, a court may find that the probative value of the survey is substantially outweighed by the prejudice, waste of time, and confusion it will cause at trial. Fed. R. Evid. 403; *Trouble*, 179 F.Supp.2d at 307 ("A survey, however, must be excluded under Federal Rule of Evidence 403 where it is so flawed in methodology that its probative value is substantially outweighed by its prejudicial effect.").

The defect in the Robertson's survey universe is substantial enough to warrant exclusion under Rule 403 because the survey has little, if any relevance. *McCarthy*, § 32:159 ("even if the proper questions are asked in a proper manner, if the wrong persons are asked, the results are likely to be irrelevant"); *Starter Corp. v. Converse Inc.*, 170 F.3d 286, 289, 297 (2d Cir. 1999) (affirming exclusion in a jury case of consumer survey that was irrelevant because "any probative value of the survey was outweighed by its potential to confuse the issues in the case").

Because this is a jury trial, the Rule 403 analysis takes on a heightened importance. The concern about preventing jurors from being misled is particularly significant with regard to expert evidence such as the survey and expected testimony—which jurors are more likely to give great weight to because they come from persons labeled as "experts." *Daubert*, 509 U.S. at 595 ("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."). In order to prevent unfair prejudice to plaintiff, and to prevent the jury from being

misled, the survey should be excluded under Rule 403. *Trouble*, 179 F.Supp.2d at 308 (excluding survey in jury case under Rule 403).

V. CONCLUSION

Robertson's failure to properly define a survey universe makes any reliance on his survey unreasonable. *See Scott Fetzer*, 381 F.3d at 488 ("serious flaws in a survey will make any reliance on that survey unreasonable"). Consequently, Robertson's survey and corresponding opinion cannot withstand scrutiny under *Daubert* and are substantially more prejudicial than probative under Rule 403 and must be excluded from the jury.

Dated: June 23, 2017

By /s/ Janice V. Mitrius

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CERTIFICATE OF CONFERENCE

Plaintiff's attorney, Janice Mitrius, communicated with Charles W. Hanor, counsel for Defendants, about the request to exclude Dr. Robertson's survey and opinions, but Defendants have indicated they oppose the motion.

Dated: June 23, 2017

By: /s/ Janice V. Mitrius
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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2017, a true and correct copy of BUC-EE'S, LTD.'S OPPOSED MOTION *IN LIMINE* TO EXCLUDE THE DEFENDANTS' SURVEY EVIDENCE OF DR. KIM ROBERTSON will be served upon counsel of record via electronic mail through the United States District Court's CM/ECF system.

/s/ Janice V. Mitrius
FOR BUC-EE'S, LTD.