

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

<p>LVL XIII BRANDS, INC., <i>a New York corporation</i>,</p> <p><i>Plaintiff,</i></p> <p>— vs. —</p> <p>LOUIS VUITTON MALLETIER SA, <i>and</i> LOUIS VUITTON NORTH AMERICA INC.,</p> <p><i>Defendants.</i></p>	<p>DOCKET NO. 14-cv-04869 (PAE)</p>
<p>LOUIS VUITTON MALLETIER SA, <i>and</i> LOUIS VUITTON NORTH AMERICA INC.,</p> <p><i>Counterclaimants,</i></p> <p>— vs. —</p> <p>LVL XIII BRANDS, INC., <i>a New York corporation</i>,</p> <p><i>Counterclaim Defendant.</i></p>	

**LVL XIII BRANDS, INC.’S MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION TO EXCLUDE DEFENDANTS’ EXPERT DR. MICHAEL MAZIS’S
OPINIONS, TESTIMONY AND SURVEY**

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PRELIMINARY STATEMENT

Plaintiff LVL XIII Brands, Inc. (pronounced “Level 13,” hereinafter “LVL XIII”) submits this memorandum of law in support of its motion under Fed. R. Civ. P. 26 (a)(2)(B) and Fed. R. Evid. 403 and 702 to exclude the survey report of Michael Mazis, Ph.D. (“Mazis”) proffered by defendants/counterclaimants Louis Vuitton North America, Inc. and Louis Vuitton Malletier, S.A. (collectively, “Louis Vuitton”). As demonstrated below, the Mazis survey and accompanying report suffer from pervasive and fundamental technical and methodological errors. Mazis, for example, failed to survey the relevant universe of consumers, neglecting to make the most obvious inferences about the nature of the product and its placement in the footwear market. Mazis made virtually no effort to depict the trademark as it would be viewed by consumers in real life marketplace conditions. And Mazis conducted a survey meant to prove a lack of secondary meaning of a product **well over a year after that product had already been withdrawn from the market** because of conduct by the very party that waited until the end of the litigation to commission that survey.

There is much more, however. The extent of methodological sloppiness underlying the Mazis report is, presumably, the reason why Louis Vuitton improperly withheld from LVL XIII “the facts or data considered” by Mazis in forming his opinions despite the mandate of Fed. R. Civ. P. 26(a)(2)(B)(ii), as detailed below, and despite LVL XIII’s timely request that Louis Vuitton supplement its expert’s disclosures weeks earlier. On this basis alone, Mazis’s report should be excluded.

RELEVANT BACKGROUND

LVL XIII manufactures, markets and sells its own brand of luxury athletic footwear. (*See* Joint Stipulated Facts entered January 15, 2016 (Dkt. No. 102) (“JSF”) ¶ 3.) On March 6, 2013, LVL XIII filed an application with the U.S. Patent and Trademark Office (“PTO”), Serial No. 85868102, to register a trademark for a “rectangular metal plate across the front of the shoe toe

with the wording ‘LVL XIII’ engraved in the metal plate ...” (the “Mark”). (*Id.*, ¶ 12; Declaration of Joel G. MacMull sworn to February 11, 2016 (“MacMull Decl.”), Ex. 1.)

The Mark was published for opposition on August 7, 2013. (JSF ¶ 24.) No opposition was filed, and the PTO issued a Notice of Allowance on October 22, 2013. (*Id.*, ¶ 26.) LVL XIII filed a Statement of Use on April 7, 2014, claiming a first use of the Mark in commerce at least as early as August 1, 2013. (*Id.*, ¶ 38.) On July 15, 2014, the PTO issued a Notice of Acceptance of the Statement of Use for the Mark. (*Id.*, ¶ 42.) Significantly, at all relevant times, **all** LVL XIII sneakers utilized the rectangular metal toe plate, i.e., the Mark. (MacMull Decl., Ex. 2 (hereinafter “Brown Tr.”) at 65:11-22.)

LVL XIII had, by July 2013, invested approximately \$82,000 on marketing, advertising, promotion and sales. (*Id.* at 151:6-152:10.) No less significant, an intense viral social media campaign had succeeded in generating hundreds of thousands of user-generated posts referencing LVL XIII’s luxury sneakers by March 2014, and LVL XIII’s line of luxury sneakers had been the focus of numerous magazine, television and online media features and celebrity media placements. (MacMull Decl., Ex. 3 (hereinafter “Colman Tr.”) at 302:7-304:15; Dkt. No. 1 (hereinafter “Compl.”) ¶¶ 4, 23-27, 30-32.) By March of 2014, when Louis Vuitton introduced its On the Road Sneaker (“OTR Sneaker”), featuring a rectangular metal plate along the front of the toe in the U.S. (MacMull Decl., Ex. 4 (hereinafter “Battaglia Tr.” at 29:4-7), the Mark had already acquired distinctiveness or secondary meaning¹ in the market for luxury men’s sneakers being targeted by LVL XIII.

In the face of this, Mazis designed a survey to measure whether the Mark had acquired

¹ The terms “acquired distinctiveness” and “secondary meaning” are synonymous in trademark law. *Star Indus. v. Bacardi & Co.*, 412 F.3d 373, 385 (2d Cir. 2005). Accordingly, the terms are used interchangeably here. The premise of the Mazis report, of course, is that LVL XIII must prove that the Mark has achieved secondary meaning. In its summary judgment motion, however, LVL XIII demonstrates that because the Mark is inherently distinctive, it need not demonstrate secondary meaning at all. *See Two Pesos, Inc. v. Taco Cabana, Inc.* 505 U.S. 763, 769 (1992) (“The general rule regarding distinctiveness is clear: an identifying mark is distinctive and capable of being protected if it **either** (1) is inherently distinctive **or** (2) has acquired distinctiveness through second meaning”) (emphasis in original), *reh’g denied* 505 U.S. 1244 (1992)). LVL XIII does not by this motion or otherwise waive its argument that the Mark is inherently distinctive.

secondary meaning. Mazis, however, ignored the market for luxury sneakers—a distinct niche—and instead deemed the relevant market as the one for men’s footwear of **any kind** costing \$500 or more as of October 2015, qualifying as respondents for his Internet survey any male between 18 and 34 who had purchased such shoes in the previous 12 months or anticipated such a purchase in the next twelve months. (MacMull Decl., Ex. 5 (hereinafter “the Report”) ¶ 11.)

Once this group was selected, its members were each shown two close-up images of LVL XIII sneakers (*id.*, ¶¶ 21, 22), and were then asked if they associated them with “one brand of shoes, with more than one brand of shoes, or don’t you know?” (Report, Ex. D. at “q4-q4”.) Depending on the specific sneaker participants were shown, and whether they indicated they had previously seen the sneaker before, no more than 4% of respondents could identify sneakers with either the original or modified metal toe plate with a single brand. (Report, ¶¶ 31-32.) Based on these results, Mazis concluded that “the LVL XIII brand was neither associated with the original toe plate tested in the first study nor with the new, modified toe plate tested in the second study” and “the toe plate, whether in its original form or in the new form, is not uniquely associated with any brand of men’s shoe.” (*Id.*, ¶¶ 46-47.)

ARGUMENT

I. LEGAL STANDARD

As numerous courts have held, a survey riddled with flaws “carries its own death warrant.” *A.J. Canfield Co. v. Vess Beverages, Inc.*, 612 F. Supp. 1081, 1092 (N.D. Ill., 1985), *aff’d* 796 F.2d 903 (7th Cir. 1986); *see also Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 296-97 (2d Cir. 1999). Under Fed. R. Evid. 702, opinion evidence is admissible only if it “both rests on a reliable foundation and is relevant to the task at hand.” *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 597 (1993). Rule 702 requires that an expert “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).² Survey evidence will be thus excluded when it is invalid or unreliable,” as this Court did in *THOIP v. Walt Disney Co.*, 690 F. Supp. 2d 218, 231, 235-41 (S.D.N.Y. 2010), excluding the plaintiff’s trademark survey because it was “not a reliable indicator of consumer confusion” because the methodology failed to use an adequate control and failed to replicate actual marketplace conditions. *See also, Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 563 (S.D.N.Y. 2007) (survey evidence may be excluded under Rule 403 but also under Rule 702 “where flaws are deemed to cumulatively undermine its relevance and reliability”).

“While errors in survey methodology usually go to weight of the evidence rather than its admissibility, a survey should be excluded under Fed. R. Evid. 702 when it is invalid or unreliable, and/or under Fed. R. Evid. 403 when it is likely to be insufficiently probative, unfairly prejudicial, misleading, confusing, or a waste of time.” *THOIP*, 690 F. Supp. 2d at 231. This is particularly true were, as here, “a trademark action contemplates a jury trial rather than a bench trial,” in which case “the court should scrutinize survey evidence with particular care.” *Id.*

II. DEFENDANTS CANNOT MEET THEIR BURDEN TO ESTABLISH A PROPER METHODOLOGICAL FOUNDATION FOR THEIR SURVEY

Defendants have the burden of establishing the admissibility of their survey evidence by a “preponderance of proof.” *THOIP*, 690 F. Supp. 2d at 229 (citations omitted). In particular, the proponent of a survey bears the burden of proving that a survey was conducted according to recognized standards, including the selection of a proper universe. *Malletier*, 525 F. Supp. 2d at 630, citing *Citizens Financial Group, Inc. v. Citizens Nat. Bank of Evans City*, 383 F.3d 110, 119 (3rd Cir. 2004), quoting J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 32:159 (4th ed. 2003) (“*McCarthy*”).

A. Defendants’ secondary meaning survey is inadmissible because it was not conducted according to accepted principles.

² “*Daubert’s* gatekeeping test applies both to “scientific” expert testimony and testimony based on “technical” and “other specialized knowledge.” *Kumho Tire*, 526 U.S. at 141 (citing Fed. R. Evid. 702).

Under *Daubert*, surveys may be considered only so long as they are conducted according to accepted principles. See *Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F. Supp. 2d 457, 458 (S.D.N.Y. 2007) (quoting *Campbell ex rel. Campbell v. Metropolitan Property and Cas. Ins. Co.*, 239 F.3d 179, 184-85 (2d Cir. 2001)). A survey design must conform to generally recognized statistical standards. *Malletier*, 525 F. Supp. 2d at 601, citing Manual For Complex Litigation, Fourth § 11:493 (Federal Judicial Center 2004) (“Manual”). Relevant factors include whether (i) the population or “universe” was properly defined; (ii) the sample chosen was representative of that population; (iii) the data gathered was accurately reported; and (iv) the data was analyzed in accordance with accepted statistical principles. *McCarthy* § 32:159, citing Manual § 21.493, at 102 (1995). Laying the foundation for such evidence ordinarily involves expert testimony. *Id.*

Louis Vuitton’s survey was not conducted according to accepted principles. As demonstrated below, it (i) is over-inclusive and thus based on an improper universe; (ii) did not present LVL XIII’s products as consumers would encounter them in real life settings; and (iii) failed to evaluate secondary meaning at anything approaching an appropriate point in time.

1. Mazis’s survey utilizes a fatally over-inclusive universe.

Selection of the proper universe for a survey 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.” *McCarthy* § 32:159. “A flawed universe minimizes the probative value of a survey and may lead to skewed results.” *Malletier*, 525 F. Supp. 2d at 630 (internal quotations and citations omitted.) And indeed, this Court has previously excluded or discounted consumer surveys in cases where a survey expert has failed to adequately define or screen for the relevant consumers. For example, in *MasterCard Int’l, Inc. v. First Nat’l Bank of Omaha, Inc.*, No. 02 Civ. 3691 (DLC), 2004 U.S. Dist. LEXIS 2485, at *31 (S.D.N.Y. Feb. 23, 2004), the Court excluded survey evidence in a jury trial because of the small sample size and the absence of real world market conditions, stating, “the potential for the Survey’s results to prejudice unfairly, to

confuse, and to mislead the jury substantially outweighs any limited relevance.” *See also, Jordache Enters. v. Levi Strauss & Co.*, 841 F. Supp. 506, 518 (S.D.N.Y. 1994) (excluded survey’s universe was defective); *Leelanau Wine Cellars, Ltd.*, 452 F. Supp. 2d., 781-82 (overinclusive universe where expert failed to screen participants to ensure they were potential customers); *Big Dog Motorcycles, L.L.C. v. Big Dog Holdings, Inc.*, 402 F. Supp. 2d 1312, 1334 (D. Kan. 2005) (survey results had essentially no probative value where expert did not attempt to limit survey universe to potential purchasers).

Mazis, of course, acknowledged in his deposition that “it matter[s] which consumers [form] the universe of the study.” (MacMull Decl., Ex. 6 (hereinafter “Mazis Tr.”) at 11:5-7.) But in designing a survey in which the only document Mazis initially acknowledged he reviewed in preparing his survey (Report, Ex. C), i.e., the Complaint, containing numerous direct and indirect textual and photographic references to the popularity of LVL XIII’s footwear products among young African American males and the relevance of that market to the product, Mazis ignored this demographic completely.³ Mazis, a Professor Emeritus of Marketing (Mazis Tr. at 6:16-18), has a Ph.D. in the areas of marketing and social psychology. (Report, Ex. A.) Yet, the survey he formulated for Louis Vuitton relies on a universe that is irrelevant and biased, as indicated by the following key omissions:

- A failure to account, in selecting his universe, for the fact that young African American males comprise a significant component subset of LVL XIII’s known consumer base and to account for this demographic among sampled respondents. (*Compare* Mazis Tr. at 18:2-19:25; 30:23-32:22 *with* Compl. *generally and* Colman Tr. 114:22-115:2);
- A failure to distinguish between respondents who purchased or expected to purchase **dress shoes** costing \$500 dollars or more from those who purchased or expected to purchase **sneakers**—the subject of LVL XIII’s Complaint—a unique niche product, costing the same amount. (*Compare* Compl., ¶¶ 3, 38, 42-

³ *See, e.g.*, Compl., ¶4 (identifying young male celebrities of color), ¶25 (same), ¶27 (same), ¶29 (same), ¶32 (same), ¶34 (the “GOTTA GET ME A PAIR OF LVL XIII” post contains seven photographs of an African American male model juxtaposed with several references to LVL XIII and the Mark, *available at* <http://loveismyrealname.blogspot.com/2014/03/gotta-get-me-pair-of-lvl-xiii.html> (last visited February 16, 2016), and ¶35 (noting LVL XIII’s African American founder and principal, Antonio Brown, interview in *Ebony* magazine).

43 *with* Mazis Tr. at 20:1-23:13; 26:22-28:3 *and* MacMull Decl., Exs. 7 and 8; and

- A failure to even consider whether respondents were located in or otherwise had even visited the metropolitan markets in which LVL XIII had previously offered its footwear, including the following U.S. cities: Houston, Atlanta, Los Angeles, Chicago, Miami and Washington D.C. (*Compare* Mazis Tr. at 28:21-30:15 *with* MacMull Decl., Ex. 9 *and* Brown Tr. at 312:5-313:4.)

These are not mere quibbles, given the glaring obviousness of what Mazis ignored in designing his survey; his attempt to explain these omissions were not credible. (Mazis Tr. at 18:2-19:25; 30:23-32:22.) Mazis went so far into advocacy as to say that “nothing in th[e] complaint ... indicated to [him] that the target market should somehow be restricted to African Americans.” (*Id.* at 19:9-12.) But Mazis is too experienced not to know the difference between “restricting” his study to one racial group and making sure it was at least **represented** in the universe surveyed concerning secondary meaning in the market relevant to the Mark.⁴

2. Mazis’s survey universe was overly broad because it included consumers of all high-end shoes instead of luxury sneakers, the product at issue in this case.

Rather than trying to identify relevant consumers for his survey, Mazis’s screening questions ensured an overly inclusive universe, relying on numerous consumers that would not have been exposed to, let alone have any interest in, LVL XIII’s products. Besides the racial-composition issue already addressed, there was at least one other seriously fatal aspect of over-inclusion in Mazis’s screening. Mazis screened potential survey participants based merely on the following bare-bones substantive criteria: men between 18-34 years of age who purchased, or in the next twelve months expected to purchase, men’s shoes costing \$500 or more. (Report, ¶¶ 1, 8.) Mazis made no attempt to demonstrate any connection a person so described and the much rarer breed—as Mazis acknowledged—of person who would be in the market for the sort of

⁴ Mazis’s oversights did not end there. He testified that he was unaware of LVL XIII’s reverse confusion claim in this case (Mazis Tr. at 41:6-9) despite having reviewed the Complaint, as he acknowledged both in his Report and during his deposition. The Complaint, however, makes no less than four separate references to LVL XIII’s reverse confusion claim. (*Compare* Report, Ex. C. *with* Compl. ¶¶ 11, 53, 61 and 65.) Mazis, therefore, either prepared his Report without paying all that much attention to the underlying pleadings in the case, or gave the Court further reason to question his credibility.

luxury athletic footwear, i.e., sneakers at that price. The latter, however, is the **only** product, or category of product, at issue in this case.⁵ (*Compare* generally, Compl. with Report, ¶¶ 16-27.) While Mazis testified that he understood sneakers to be distinguishable from shoes generally (Mazis Tr. at 20:1-6), his study failed to account for these differences at all because, notwithstanding this case’s exclusive focus on sneakers, Mazis nevertheless believed sneakers are “just too narrow a definition of a target market.” (*Id.* at 20:7-23:13.)

In other words, it was too expensive, for Mazis to survey actual prospective members of the relevant market. This, however, is a fundamental survey design error as a matter of law. *See*, e.g., *Safeway Stores, Inc. v. Safeway Ins. Co.*, 657 F. Supp. 1307, 1317-18 (M.D. La. 1985) (just because the survey participants had drivers licenses did not mean they made purchasing decisions about car insurance), *aff’d*, 791 F.2d 929 (5th Cir. 1986). The over-inclusive universe generated by Mazis’s failure to account for an appropriate respondent pool ensured the lack of secondary meaning results he was hired to generate.⁶

B. Mazis’s survey failed to accurately poll the over-inclusive sample.

1. The survey’s visual stimuli and method of display failed to simulate real world conditions.

A survey’s failure to “approximate the manner in which consumers encountered the parties’ products” in the real world is grounds for exclusion. *THOIP*, 690 F. Supp. 2d at 235-41; *see also Am. Footwear Corp. v. General Footwear Co. Ltd.*, 609 F.2d 655, 660 n.4 (2d Cir. 1979). Consequently, a survey “that uses a stimulus that makes no attempt to replicate how the

⁵ *See, e.g.*, Louis Vuitton’s pre-motion correspondence to the Court dated November 24, 2015 (“To prevail on its claims under 15. U.S.C. § 1125(a), LVL XIII must prove that: (1) its Toe Plate Design is entitled to protection; and (2) **the toe plate on Louis Vuitton’s On The Road (“OTR”) Sneaker is likely to cause confusion as to source.**”) (Dkt. No. 95; emphasis added).

⁶ While over-inclusive, Mazis’s study was also fatally under-inclusive in other respects. Although no single factor is dispositive in assessing the presence of secondary meaning, where an ordinary buyer associates the mark with a single source, though that source may be anonymous, this constitutes secondary meaning. *See, Erchonia Corp. v. Bissoon*, 410 Fed. Appx. 416, 418 (2d Cir. 2011), citing *Centaur Communs., Ltd. v. A/S/M Communs., Inc.*, 830 F.2d 1217, 1221 (2d Cir. 1987). Mazis’s study eliminated this possibility, doing nothing to assess whether respondents’ responses of “I don’t know” nevertheless allow for some source association with the Mark. (Report, ¶¶ 31-42.) Despite this obvious “gap” in his analysis, Mazis concludes that any failure to name LVL XIII when presented with the Mark constitutes a lack of secondary meaning. (*Id.*, at ¶¶ 46-47.)

marks are viewed by consumers in real life may be excluded on that ground alone.” *Malletier*, 525 F. Supp. 2d at 591. An improperly conducted survey, with slanted questions or other serious methodological defects may be excludable as “irrelevant” of the true state of mind of potential purchasers. *See, e.g., Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 297 (2d Cir. 1999); *Toys “R” Us, Inc. v. Canarsie Kiddie Shop, Inc.*, 559 F. Supp. 1189, 1205 (E.D.N.Y. 1983).

As the proponent of the survey, Louis Vuitton bears the burden of demonstrating that Mazis’s survey results are truly “representative” of the relevant consumer population in the real world. *See THOIP*, 690 F. Supp. 2d at 229. Neither Mazis nor Louis Vuitton have demonstrated that the circumstances tested by Mazis, in which respondents were “shown a front and side image of a LVL XIII black men’s shoe” is representative or typical of how LVL XIII’s consumers view or otherwise go about purchasing LVL XIII’s luxury athletic footwear. (Report, ¶ 21.)⁷

2. Mazis’s survey failed to separate the protectable trademark element from clearly non-protectable elements.

While there are several fatal methodological flaws with Mazis’s survey, perhaps none are more compelling than his failure to separate the protectable mark, i.e., the metal toe plate, from the clearly non-protectable functional elements of the footwear, namely, their zippers. As the

⁷ Here LVL XIII is at a distinct disadvantage – one Louis Vuitton has designed, and from which it should not be permitted to benefit – for plaintiff simply has been refused meaningful detail concerning what Mazis did or how he did it. Despite repeated requests to defendants to supplement their expert’s disclosure concerning his survey, beginning during his deposition on the afternoon of November 23, 2015, Louis Vuitton has refused to furnish LVL XIII with any documents or information regarding (i) the origin of the images shown to respondents during Mazis’s survey; (ii) the size, orientation and resolution of the images respondents were shown; (iii) whether, and to what extent, the images appearing in his Report were displayed on backgrounds, if any; and (iv) whether there was any text accompanying the images when they were displayed to respondents. (*See generally*, Report; MacMull Decl., Exs. 11 and 12.)

Such technical details concerning the conduct and presentation of a survey are entirely appropriate subjects for consideration in connection with a survey’s admissibility. *See, e.g., Malletier*, 525 F. Supp. 2d at 591-592. Yet Louis Vuitton has refused to even produce screen shots of Mazis’s online survey, let alone the software program he used or the data he generated in its native format demonstrating precisely how the online survey appeared to respondents during the testing process. (*See generally*, Report; MacMull Decl., Exs. 11 and 12.) Considering both the number of instances in which Mazis has previously served as an expert witness in just the last four years alone, coupled with the fact that he **previously produced screen shots in the course of his engagement** in the matter styled as *Lutron Electronics Co., Inc. v. Creston Electronics, Inc. et al.*, Civ. No. 09-cv-707, U.S. District Court, District of Utah, Central Division, makes Louis Vuitton’s failure here all the more inexcusable and should by itself justify exclusion. (MacMull Decl., Ex. 10, ¶ 19 and Exs. C and D.)

Report acknowledges, “each respondent was shown a front and side image of a LVL XIII’s black men’s shoe.” (Report, ¶¶ 21-22.) The test images respondents were shown and which are referenced in the Report are reproduced below in Figures 1 and 2. As is immediately obvious, there is a striking difference between the two Figures, and it has nothing to do with toe plates and everything to do with something far more mundane: Zippers.



Figure 1



Figure 2

“Functionality” in trademark parlance is determined by a feature’s usefulness. *See* Restatement Third, Unfair Competition § 17.

The requirement of nonfunctionality in trademark and trade dress law is concerned with whether the particular shape or feature claimed to be a trademark or trade dress contributes to a utilitarian purpose. It if makes the product more useful for its purpose or contributes to economy of manufacture or use, then the feature is “functional” and is not capable of trademark protection.

Zippers are functional, incapable of trademark protection. *See, e.g., Indonesian Imports, Inc. v. Old Navy, Inc.*, No. 98 Civ. 2401 (FMS), 1999 U.S. Dist. LEXIS 3975, at *18 (N.D. Cal. Mar. 29, 1999) (zippers are “basic handbag features” and functional); *Henri Bendel Inc. v. Sears, Roebuck & Co.*, 25 F. Supp. 2d 198, 202 (S.D.N.Y. 1998) (vertically-striped, plastic coated fabric and gold zipper pulls on cosmetics bags are functional). LVL XIII, of course, has not sought protection, nor is it alleging infringement regarding the design of its entire sneaker—indeed, this is but one more reason why its Mark is more appropriately characterized as a “trademark” as opposed to “trade dress”⁸—but instead, seeks protection merely with regard to the discrete metal toe plate appearing on the front of its men’s athletic footwear. (MacMull Decl., Ex. 1.) The only reason there are zippers on some LVL XIII sneakers (some more visible, some less) is so the wearer can get his foot into them and then zip up the high tops. But it can hardly be doubted that the appearance of zippers in the two Figures shown to respondents in Mazis’s study affected the responses of participants. When participants were asked why they identified a particular brand of shoes bearing LVL XIII’s metal toe plate, several respondents pointed to the presence of zippers. (*See* MacMull Decl. Exs. 11 and 12⁹.)

This is no mere distraction but a serious methodological flaw. Thus in *Thomas & Betts Corp. v. Panduit Corp.*, 65 F.3d 654 (7th Cir. 1995), the Seventh Circuit held that a survey “which asks consumers to identify the source of a product based on its overall configuration when most of the product’s configuration is functional is **worthless** in determining whether a particular product feature has acquired secondary meaning.” *Id.* at 663 (citation omitted; emphasis added.) Similarly, in *The Straumann Company v. Lifecore Biomedical Inc.*, 278 F.

⁸ *See supra*, n. 1.

⁹ Zipper-related responses within MacMull Decl., Ex. 12 are contained in the following cells: Row 54, Column “MY”; Row 66, Column “CO”; Row 114, Column “MY” Row 168, Column “LW”; Row 176, Column “CA”; Row 219, Column “KU”; Row 237, Column “CA”; Row 314, Column “CA”, Row 409, Column “KU”; Row 423, Column “LI”; Row 465, Column “LW”; Row 482, Column “CA”; Row 543, Column “CA”; and Row 555, Column “KU”.

Supp. 2d 130 (D. Mass. 2003), a secondary meaning survey that fails to filter out functional features was ruled invalid for secondary meaning purposes. *A fortiori*, the failure to filter out functional features or attributes is especially inappropriate in assessing the presence of secondary meaning. *See id.* at 137-138.

Here, too, Mazis's failure to separate non-protectable from protectable elements of LVL XIII's footwear is fatal because respondents' responses were distracted by immaterial, non-protectable elements of LVL XIII's sneakers. (MacMull Decl., Ex. 12.) Even relevant evidence will be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *See Fed. R. Evid.* 403; *see also Isaac v. City of New York*, 271 Fed. Appx. 60, 64 (2d Cir. 2008). Because Mazis's survey fails to distinguish between consumer recognition of functional elements present within LVL XIII's sneakers versus solely the Mark itself, his Report therefore (i) does not tend to make the existence of any fact that is of consequence to the determination of this action more or less probable than it would be without the evidence; and (ii) poses a significant danger of confusing or misleading the jury and prejudicing LVL XIII in the process. Thus, testimony, argument and any evidence concerning Mazis's survey should be excluded in its entirety.

3. Mazis's survey measured recognition at the wrong point in time.

The appropriate date for assessing distinctiveness is "the time when [the defendant] entered the market." *Nora Beverages v. Perrier Group of Am.*, 269 F.3d 114, 120 n.3 (2d Cir. 2001); *see also Saratoga Vichy Spring Co. v. Lehman*, 625 F.2d 1037, 1043 (2d Cir. 1980); *PlaSmart, Inc. v. Wincell Int'l, Inc.*, 442 F. Supp. 2d 53, 60 (S.D.N.Y. 2006) (to succeed on an infringement claim, plaintiff must show that the mark had acquired secondary meaning before its competitor commenced use of the mark). To the extent LVL XIII bears the burden of showing

the Mark acquired secondary meaning by March 4, 2014¹⁰ — the date Louis Vuitton began marketing, promoting and selling its infringing footwear in the U.S. (Battaglia Tr. at 29:4-19; 53:12-14) — Mazis’s efforts to “disprove” that it had secondary meaning more than eighteen months later—more than a year after the product was withdrawn from the market precisely because of Louis Vuitton’s infringement—is entirely uninformative, to say the least. (Report, ¶ 12 (confirming data was collected from October 12 through October 28, 2015).)

Where a secondary meaning survey “does not even purport to reproduce the market conditions years before when [the defendant] entered the market . . . the survey is fatally defective as a meaningful indication of secondary meaning for the relevant time period.” *Calvin Klein Co. v. Farah Mfg. Co., Inc.*, No. 85 Civ. 2989 (CBM), 1985 U.S. Dist. LEXIS 13475, at *24 (S.D.N.Y. Nov. 26, 1985) (rejecting secondary meaning survey where the survey was completed seven years after the period relevant for secondary meaning); *Zippo Mfg. Co. v. Rogers Imports, Inc.*, 216 F. Supp. 670, 689 (S.D.N.Y. 1963) (survey conducted in 1960 not probative of secondary meaning in 1957, the year the parties first began to compete). Indeed, while *Calvin Klein* and *Zippo* may represent the outer limits of when secondary meaning surveys may be said to be probative, more recent decisions find fatal fault with far shorter time periods. *See, e.g., Cross Commerce Media, Inc. v. Collective, Inc.*, No. 13 Civ. 2754 (KBF), 2014 U.S. Dist. LEXIS 117244, at *25 (S.D.N.Y. Aug. 21, 2014) (responses in 2013 are not indicative of perceptions in 2011); *Schwan’s IP, LLC v. Kraft Pizza Co.*, 379 F. Supp. 2d 1016, 1024 (D. Minn. 2005) (finding that a secondary meaning survey “conducted **months** after [the defendant’s] product had already entered the market . . . [was] irrelevant for the establishment of secondary meaning”) (emphasis added).

Certainly, where a trademark (or trade dress) had been in use for a long and exclusive period of time, it is reasonable to assume that a delay in conducting a survey until shortly after

¹⁰ *See n.1 supra*, regarding the existence of inherent distinctiveness in the Mark.

the infringement occurred is not prejudicial. *See, e.g., STX, Inc. v. Trik Stik, Inc.*, 708 F. Supp. 1551, 1559 (N.D. Cal., 1988). This is not such a case, however. Here, Louis Vuitton waited until virtually the last minute to conduct its survey, more than fourteen months after it first learned of LVL XIII's allegations.¹¹ (Dkt. Nos. 4 and 6 (affidavits of service); Mazis Tr. at 33:8-12 (acknowledging he became "involved" as an expert for Louis Vuitton in February 2015.) At the time LVL XIII discovered Louis Vuitton's infringement, plaintiff's products had been available in the market for only a short time, but after it had expended the bulk of its 2013 advertising and marketing budget by July of that year. (Brown Tr. at 148:12-149:6; 151:6-152:5-10.)

Louis Vuitton's effort to "turn back the clock" and equate survey responses obtained in the fall of 2015 with market conditions in the spring of 2014 is particularly ironic here considering that LVL XIII was forced to suspend its sales from May 2014 through December 2014, when retailers, having experienced "reverse confusion"¹² by virtue of Louis Vuitton's infringement, were no longer interested in carrying LVL XIII's footwear. (Brown Tr. at 408:13-409:9; 438:15-448:10; 451:7-452:24.) If equitable estoppel applied to surveys, it would govern here.

Because Louis Vuitton's survey was conducted more than eighteen months after it first began selling and promoting its infringing OTR Sneaker, its expert's survey has no probative value to show the level of recognition surrounding LVL XIII's Mark in March 2014 when Louis

¹¹ In fact, LVL XIII served Louis Vuitton with a courtesy copy of its Complaint on June 30, 2014 which it acknowledged receipt of the same day. (MacMull Decl., Ex. 13.)

¹² In explaining the concept of reverse confusion, this Court recently wrote:

Under the Lanham Act, confusion is ordinarily the misimpression that the senior user is the source of the junior user's goods; reverse confusion is the misimpression that the junior user is the source of the senior user's goods. The Lanham Act protects against reverse confusion in order to prevent a situation in which consumers initially aware of [the junior user's goods] may believe that [the senior user's] mark they later encounter originates with [the junior user]. These consumers may consider [the senior user] an unauthorized infringer, and [the junior user's] use of the mark may in that way injure [the senior user's] reputation and impair its good will. Reverse confusion has been thought to injure the reputation of the prior user of the mark by causing potential customers to consider it a trademark infringer.

Flushing Bank v. Green Dot Corp., No. 13 Civ. 9120 (KBF), 2015 U.S. Dist. LEXIS 135368, at *47-48 (S.D.N.Y. Oct. 5, 2015)(citations and internal quotations omitted).

Vuitton first began selling and promoting its infringing OTR Sneaker. (*Compare* Report, ¶ 11 with Battaglia Tr. at 29:4-7; 53:12-14.)

4. Mazis’s abbreviated and result-oriented methods render his survey unreliable and invalid.

Mazis’s failure to identify a proper universe of relevant consumers or to approximate real world conditions were not his only mistakes. The cumulative effect of numerous other errors render his survey and opinions wholly unreliable. One such error was Mazis’s use of an Internet survey panel here. Internet survey methodology is riddled with validity and reliability issues because the researcher is unable to know who is actually sitting behind the computer answering the questions and whether the person is being truthful.¹³

Indeed, Mazis acknowledged the absence of verification methods during his deposition. (Mazis Tr. at 16:5-17.) This problem is aggravated by the fact that survey participants accumulate points from the online panel based on the amount of surveys they participate in. (*Id.* at 13:22-14:10.) As a result, “professional Internet survey takers” have learned how to game the system in order accumulate points and substantial methodological safeguards are necessary to address this.¹⁴ Mazis did not identify any safeguards he implemented to address this issue and confirmed that a mere completion of his questionnaire, regardless of the quality of responses, earned points for participants.¹⁵ (*Id.* at 26:10-21.)

¹³ See Benjamin Sackmary, *Internet Survey Research: Practices, Problems and Prospects*, Buffalo State College, Buffalo (undated), at 4-6, available at <http://faculty.buffalostate.edu/sackmabd/sackmary/Ama98.pdf> (last visited February 16, 2016)(outlining various problems associated with Internet survey research, including sample bias (“samples obtained do not represent a cross-section of the population of users of the Internet”), selection bias (Internet survey respondents are “self-selected” such that their bias “is intensified by the fact that they may be repeat responders,” data quality (“there is no method to determine the accuracy of the responses to the survey” and while “this is a common survey problem but some sectors of Internet ‘culture’ tend to support misrepresentation and the problem may prove to be substantial”).

¹⁴ See n.19, *supra*.

¹⁵ The suspect quality of certain responses obtained by Mazis cannot be disputed. In response to the question: what is it about the appearance of these shoes that makes you associate it with [a particular brand?], one respondent wrote: “because is kinda gay.” (MacMull Decl., Ex. 12, Row 473, Column “LW” (error in original.) In a follow-up to a similar question, another respondent wrote: “good fuck this missing things.” (*Id.*, Row 252, Column “CO” (error in original.) Other responses were equally unhelpful or incomprehensible, evidently designed to populate a response cell and simply move on to the next question so that the respondent could collect their points. (*Id.*, Row 166, Column “CA” (“asdasdasdasd”); Row 166, Column “CO”(“ dasdasda”), Row 236, Column “AN” (“ssadasd”).

Likewise, respondents' "device settings" remain a complete mystery. The type of Internet browsers respondents' used, their browser settings, as well as the size of the screens of the devices respondents used to participate in the survey are all entirely unknown, and Mazis's concession that these were relevant "considerations" in assessing his results did cure them. (Mazis Tr. at 48:9-49:20.) The cumulative effect of Mazis's numerous methodological errors render his survey and resulting opinions unreliable and invalid. His survey and the opinion based on it should be excluded under Fed. R. Evid. 401, 403, and 702.

III. MAZIS'S REPORT SHOULD BE EXCLUDED BECAUSE DEFENDANTS FAILED TO COMPLY WITH FED. R. CIV. P. 26.

Louis Vuitton's expert report should also be excluded because it defendants, in effort to camouflage the methodological mishmash on which it is based, made a mockery of Fed. R. Civ. P. 26(a)(2)(B), which mandates the disclosure of the evidentiary basis and data underlying expert opinions. Defendants did this in full view, on the record, and repeatedly, as if the prestige of their "House" and the respect due their expert exempted them from compliance with the Rules.

This Rule, among other things, requires expert reports to contain "a complete statement of all opinions the witness will express and the basis and reasons for them," and "the facts or data considered by the witness in forming them." *See Republic of Ecuador v. Hincbee*, 741 F.3d 1185, 1195 (11th Cir. 2013) ("the term 'facts or data' should 'be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients.'") Rule 37(c)(1) permits a court to preclude expert testimony and information included in an expert report if the party presenting it has "fail[ed] to provide information or identify a witness as required by Rule 26(a) . . . unless [such] failure was substantially justified or is harmless." Louis Vuitton's open refusal to comply with its obligations under Rule 26, detailed below, was neither justified nor harmless.

First, it readily became clear that the Report served by defendants on November 5, 2015 did not contain all the facts or data Mazis considered in preparing it. (*Compare* Report, Ex. C

with MacMull Decl., Ex. 11.) Nor did it list all the documents Mazis reviewed. (*Id.*; Mazis Tr. at 9:6-10:8.) Once confronted, Mazis acknowledged these deficiencies, testifying as follows:

Q. Is it correct that [the Complaint] is what you referred to in Exhibit C [of your report]?

A. Yes.

Q. So, is it the fact that you relied on no other materials or information whatsoever in formulating the expert report other than the study that you prepared? ...

A. Well, I probably should have put on here, there is an answer and a cross complaint, so there is another—there was [a] subsequent document. I just forgot to include that. I did look at that. In terms of information, I did—I was on the internet a number of times and looked at the LVL XIII website. And although I didn't read the Antonio Brown deposition, I talked to counsel about the deposition. So that was some additional information that I considered.

(Mazis Tr. 9:3-10:5) Moreover, after Mazis testified, as set out above, that he did **not** read Mr. Brown's deposition testimony, moments later he slipped up, saying "I got that from Antonio Brown's deposition" (*Id.*, 17:24-25) and, shortly thereafter, "certainly Antonio Brown did not in his deposition restrict the target population in any way to African Americans" (*Id.*, 19:21-24).

Either way, Mazis's failure to disclose his review of the Brown transcript before his deposition deprived LVL XIII of the opportunity to prepare fully his Mazis's deposition – exactly what the Rules are meant to address. See, *Ferriso v. Conway Organization*, No. 93 Civ. 7962, 1995 U.S. Dist. LEXIS 14328, at *6 (S.D.N.Y. Oct. 3, 1995) (significant weight is due to "the formal requirements of Rule 26" written expert reports considering that under Rule 26(b)(4)(A) expert depositions occur "only **after** the report is provided"). Mazis's evasive responses only made things worse; full and truthful disclosure came only when it was useless.¹⁶

Louis Vuitton's expert non-disclosures were not confined to documents prepared or produced in this case. Louis Vuitton also refused to provide LVL XIII with **any of the collected data** on which Mazis's Report was based at the time it was produced. Moreover, Louis Vuitton **continued** to withhold it even after Mazis testified that the raw data was available and after LVL

¹⁶ Mazis fully recanted his false testimony in his December 8, 2015 supplemental disclosures, acknowledging that he did in fact review Mr. Brown's deposition transcript and the related exhibits. (MacMull Decl., Ex. 11.)

XIII's requested, on the record, that it and all other materials Mazis relied on in producing his report and survey, be produced forthwith, as should have been done in the first instance. (Mazis Tr. at 28:21-30:15.) Even after LVL XIII wrote to Louis Vuitton immediately after Mazis's November 23, 2015 deposition ended, reiterating its request for the immediate supplementation of "Exhibit C" to his Report pursuant to Rule 26(e), (MacMull Decl., Ex. 14), Louis Vuitton responded by simply denying any deficiency with its expert's report—after transcribed testimony explicitly establishing exactly what that deficiency was—and cynically requesting LVL XIII to articulate "what you would like us to produce." (*Id.*)

The parties continued to correspond via email well into the evening of November 23rd, with Louis Vuitton continuing to deny any deficiencies with its Report in response to LVL XIII's demand for supplementation. (*Id.*) The next day, November 24th, LVL XIII wrote to Louis Vuitton again noting that, unlike discovery under Rules 33 and 34, expert disclosures do not require a written request or demand. (*Id.*) See *Hinton v. Outboard Marine Corp.*, 828 F. Supp. 2d 366, 370 (D. Me. 2011); *St. Paul Fire & Marine Ins. Co. v. Heath Fielding Ins. Broking*, No. 91 Civ. 0748 (MJL), 1995 U.S. Dist. LEXIS 19847, at *40 (S.D.N.Y. Dec. 30, 1995).

Louis Vuitton did not respond. Instead, Louis Vuitton chose to remain completely silent in the face of LVL XIII's November 24th email for a full **two weeks, including through the date the parties met in-person with the Court** on December 1st when, on December 8th at 6:18 p.m. (EST), and out of the blue, Louis Vuitton served its supplemental disclosures. (MacMull Decl., Ex. 11.) This "supplemental" production contained five previously undisclosed references to "materials considered" by Mazis in contemplation of his Report. (*Id.*) It also contained two native MS Excel spreadsheets purportedly containing the collected data from the survey sampling company, Survey Sampling International ("SSI") used by Mazis. (Report, ¶ 10; MacMull Decl., Ex. 11.)

Justifiably insistent on making a record of Louis Vuitton's undue delay in producing, far

out of time and well after expert discovery was over, a woefully incomplete¹⁷ supplementation of its “facts or data” obligations under Rule 26(a)(2)(B), LVL XIII wrote to Louis Vuitton on December 9th setting forth its objections. (MacMull Decl., Ex. 15.) LVL XIII noted that by virtue of Louis Vuitton’s two weeks of silence it had “put plaintiff in the position of having to approach the Court for permission to reopen expert discovery in order to make any use of [its] belated supplementation, [which Louis Vuitton is] well aware ... is not going to happen.” (*Id.*)

Louis Vuitton saw no urgency in responding to LVL XIII’s short December 9th letter, taking a full week to compose and deliver its *ex post facto* rationalization for why it was “justified” in taking as much time as it did in supplementing its expert’s Report. (MacMull Decl., Ex. 16.) Louis Vuitton made no attempt to explain either why Mazis’s initial Report omitted so many substantial and obvious disclosures or why Louis Vuitton remained silent from November 23 until December 8, including the period of the in-person conference on December 1, 2015, thus delaying the issue of reopening expert discovery until it was obviously too late.

At bottom, Louis Vuitton’s failure to initially disclose or timely supplement the “facts or data” on which Mazis relied is, by itself, reason enough to exclude his expert report and testimony. *See Smolowitz v. Sherwin-Williams Co.*, 2008 U.S. Dist. LEXIS 91019, at *9 (E.D.N.Y. Nov. 10, 2008) (“A party that fails to satisfy the Rule 26 disclosure requirements without justification is precluded from offering expert witnesses at trial,” citing Fed. R. Civ. 37(c)(1) and *Design Strategies, Inc. v. Davis*, 367 F.Supp.2d 630, 634 (S.D.N.Y. 2005) for the proposition that Rule 37(c)(1)’s preclusionary sanction is automatic absent either substantial justification or harmlessness). *Accord, Jinghong Song v. Yao Brothers Group LP*, No. 10 Civ. 4157, 2012 U.S. Dist. LEXIS 62235, at *4 (S.D.N.Y. May 2, 2012) (rejecting expert report that

¹⁷ While just one of these belatedly produced Excel spreadsheets contemplates nearly 25,000 cells of data (MacMull Decl., Ex.12), neither of the two files contains, for example, information identifying the geographic location of participants at the time they took the survey and which Mazis testified was “available.” (*Compare id. with Mazis Tr.* at 28:21-29:17.)

failed to “adequately identify the ‘facts or data’ considered by the witness in forming his opinions”); *Loyd v. United States*, No. 08 Civ. 9016, 2011 U.S. Dist. LEXIS 36237, at *7 n.4 (S.D.N.Y. March 31, 2011) (precluding expert witness where written report failed to provide the basis and data considered the expert in forming his opinion).

Because Louis Vuitton has not justified its expert’s material failure to comply with the requirements of Rule 26(a)(2) or a “substantial” basis for not disclosing or timely supplementing pursuant to Rule 26(e), nor can it fairly be said that these oversights are “harmless,” Louis Vuitton’s failure to comply with Rule 26 provides an additional basis to exclude the Mazis Report and his testimony.

CONCLUSION

For all the foregoing reasons, as well as those set forth in the accompanying declaration and exhibits submitted herewith, this Court should grant the motion of LVL XIII Brands, Inc. to exclude from evidence the opinions, testimony and survey of Michael Mazis, Ph.D.



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