

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

The Right Reverend Charles G. vonRosenberg)
et al.,)
)
Plaintiffs,)
)
The Episcopal Church,)
)
Plaintiff-in-Intervention,)
)
v.)
)
The Right Reverend Mark J. Lawrence et al.,)
)
Defendants.)
_____)

No. 2:13-cv-00587-RMG

**OPPOSITION OF PLAINTIFFS AND PLAINTIFF-IN-INTERVENTION
TO DEFENDANTS’ MOTIONS TO EXCLUDE TESTIMONY AND REPORTS OF
MARK KEEGAN, ROBERT KLEIN, AND DR. WALTER EDGAR**

TABLE OF CONTENTS

| | Page |
|---|-------------|
| ARGUMENT | 1 |
| I. MARK KEEGAN SHOULD NOT BE EXCLUDED..... | 1 |
| A. Mr. Keegan’s Report..... | 1 |
| B. Defendants’ Criticisms of Mr. Keegan’s Report Have No Merit. | 1 |
| 1. Mr. Keegan is qualified..... | 1 |
| 2. Mr. Keegan surveyed the correct population..... | 4 |
| 3. It was appropriate for Mr. Keegan to collect data in 2018. | 7 |
| 4. Defendants’ other challenges to Mr. Keegan’s survey also fail. | 8 |
| II. ROBERT KLEIN SHOULD NOT BE EXCLUDED..... | 9 |
| A. Mr. Klein’s Report..... | 9 |
| B. Defendants’ Criticisms of Mr. Klein’s Report Have No Merit. | 10 |
| 1. The survey is not subject to exclusion for failing to simulate market conditions..... | 10 |
| 2. The survey used a proper control..... | 12 |
| 3. The survey did not use a leading question..... | 15 |
| 4. The confusion rates are not inflated..... | 18 |
| III. DR. WALTER EDGAR SHOULD NOT BE EXCLUDED. | 21 |
| A. Dr. Edgar’s Reports | 21 |
| B. Defendants’ Criticisms of Dr. Edgar’s Initial Report Have No Merit..... | 22 |
| C. Defendants’ Criticisms of Dr. Edgar’s Second Report Have No Merit..... | 25 |
| CONCLUSION..... | 30 |

Defendants seek to exclude reports from every expert that Plaintiffs (collectively, “TECSC”) and Plaintiff-in-Intervention The Episcopal Church (the “Church”) have tendered in this case. There is no legal basis for excluding any of these experts, however. TECSC and the Church therefore oppose Defendants’ motions to exclude Mark Keegan (Dkt. No. 597), Robert Klein (Dkt. No. 598), and Walter Edgar (Dkt. No. 585) for the reasons set forth below.

ARGUMENT

I. MARK KEEGAN SHOULD NOT BE EXCLUDED.

A. Mr. Keegan’s Report

Mark Keegan conducted a survey to determine whether THE EPISCOPAL CHURCH is perceived as the name of a “religious organization” or a “religion.” Dkt. No. 597-2. He did so because courts that have assessed whether the name of a religious organization was generic found such a name not generic if it was not the name of a religion. *See* Dkt. No. 586 at 8-9 (collecting authorities). One court even criticized a party for not offering “survey evidence” as to whether a church name “refer[red] to a religion or to a specific denomination.” *Gen. Conf. Corp. of Seventh-Day Adventists v. McGill*, 624 F. Supp. 2d 883, 894 (W.D. Tenn. 2008). In Mr. Keegan’s survey, 96% of respondents perceived THE EPISCOPAL CHURCH to be the name of a religious organization and only 4% perceived it to be the name of a religion, indicating that the mark is not generic. *See* Dkt. No. 597-2 at p. 17 of 19.

B. Defendants’ Criticisms of Mr. Keegan’s Report Have No Merit.

1. Mr. Keegan is qualified.

Defendants first claim (at 10) that Mr. Keegan is not qualified to conduct consumer surveys, even though they later complain (at 16) that he is a “professional expert witness.”

Under Fed. R. Evid. 702, an expert may be qualified based on “knowledge, skill, experience, training, or education.” In this Circuit, “a district court should be reluctant to

exclude a witness on the basis of qualifications.” *Nucor Corp. v. Bell*, 2008 U.S. Dist. LEXIS 86328, at *28 (D.S.C. Jan. 11, 2008) (citing *Thomas J. Kline, Inc. v. Lorillard, Inc.*, 878 F.2d 791, 799 (4th Cir. 1989)). *See also id.* (“This liberal approach to qualifications under Rule 702 reflects the common-sense notion that a jury can adequately determine how much weight to assign a witness’s testimony according to the quantity and quality of his or her education, knowledge, skill, experience, and training.”). If the proposed expert is reasonably well qualified, “criticisms of [the expert] go to the weight of [the] testimony and not its admissibility.” *Summers v. County of Charleston*, 2012 U.S. Dist. LEXIS 129212, at *7-8 (D.S.C. June 13, 2012) (Gergel, J.).

Mr. Keegan’s qualifications far exceed this relatively low bar. Defendants attempt to minimize Mr. Keegan’s credentials by providing an incomplete summary of his experience, including omitting any mention of his work conducting consumer surveys. *See* Dkt. No. 597-1 at 10. Mr. Keegan’s report explains that he is a principal at Keegan & Donato Consulting, which “designs and executes” consumer surveys and “conducts objective evaluation of existing survey research.” Dkt. No. 597-2 at pp. 3-4 of 19. He has “personally conducted hundreds of consumer surveys,” many of which have been admitted by state and federal courts, in arbitration, and by the Trademark Trial and Appeal Board. *Id.* at p. 4 of 19. He is also a member of the American Marketing Association (AMA), which is “the preeminent professional association for marketing practitioners and scholars,” and holds the designation of Professional Certified Marketer, which signifies “mastery of comprehensive and core marketing knowledge and principles.” *Id.* He has also taught CLE courses on survey research. *Id.* at pp. 4-5 of 19.

Further, Mr. Keegan’s CV—which Defendants did not provide the Court—includes additional details concerning his qualifications. It identifies over 25 years of experience in the

marketing field. Dkt. No. 595-93 at pp. 22-24 of 77. It also shows that, within the past four years, Mr. Keegan has given 19 depositions and testified at four federal court trials, all of which involved marketing and consumer research issues. *See* Dkt. No. 595-93 at pp. 26-27 of 77; Exh. 1 hereto at ¶ 5 (Keegan Declaration). In addition to surveys that have been made public, Mr. Keegan has also conducted over 40 consumer surveys for clients outside the context of litigation. *See id.* at ¶ 7. And although Rule 26(a)(2)(B)(v) requires the disclosure of expert testimony only from the past four years, Mr. Keegan has been involved in the design and execution of well over 100 consumer surveys for litigation that were completed more than four years ago. *See id.* at ¶ 6.

Mr. Keegan therefore has ample qualifications to conduct a consumer survey and testify about it. Instead of going through Mr. Keegan's experience and trying to explain why they believe his credentials are lacking, Defendants simply quote from *Warner Brothers Entertainment v. Global Asylum, Inc.*, 2013 WL 12114836 (C.D. Cal. Jan. 29, 2013). That was the only suit in Mr. Keegan's career in which an expert report he authored has ever been excluded. *See* Keegan Decl. at ¶ 10. But even that exclusion was not the result of a court reviewing all of Mr. Keegan's credentials and finding him unqualified. Instead, the court had not been given a full record of his credentials. Mr. Keegan's CV was not before the court and he was not even deposed. *See id.* As that court stated: "The only evidence that has been submitted to the Court regarding Keegan's expertise is a statement in his declaration attesting to his firm's experience in consumer survey research," which did "not suggest that he has any experience or training in crafting surveys of any kind." 2013 WL 12114836, at *6-7.

Here, two things are fundamentally different. First, a full statement of Mr. Keegan's credentials is before the Court, and it demonstrates that he easily satisfies Rule 702's expert-qualification requirement. Second, the *Warner Brothers* decision was almost six years ago.

Since then, Mr. Keegan has conducted over 70 consumer surveys for litigation and 20 consumer surveys outside of litigation; become a member of various professional societies in his field, including the International Trademark Association, the AMA, and the American Association for Public Opinion Research; and engaged in continuing professional education, working toward and earning certifications related to marketing and consumer survey research. *See* Keegan Decl. at ¶ 11. *Warner Brothers* is outdated.¹ The Court should find Mr. Keegan qualified.

2. Mr. Keegan surveyed the correct population.

Defendants claim (at 15) that Mr. Keegan should not have limited his survey to self-identified Episcopalians, because they contend “the proper universe is the potential customers of the Defendants.” Notably, this argument contradicts the work of Defendants’ own proffered expert (Hal Poret), who did not limit his survey to people likely to use *Defendants’* services. *See* Dkt. No. 586-1 at pp. 21-22 of 68. If this is a basis for excluding Mr. Keegan, then it first serves as an additional basis for excluding Mr. Poret.

As their sole support for this argument, Defendants cite *Leelanau Wine Cellars, Ltd. v. Black and Red, Inc.*, 452 F. Supp. 2d 772, 781-82 (W.D. Mich. 2006). But that case did *not* consider the relevant survey population for assessing genericness.

In a genericness survey, it would make no sense to survey the alleged infringer’s potential customers, since the infringer need not even be in the same field as the mark’s owner, and therefore what the infringer’s potential customers think about the mark is meaningless for assessing whether it is generic.² Instead, the relevant public for assessing genericness consists of

¹ *Flushing Bank v. Green Dot Corp.*, 138 F. Supp. 561 (S.D.N.Y. 2015), also provides no support for Defendants’ Motion. There, the court did not exclude Mr. Keegan on *Daubert* grounds, but instead simply did not agree with his opinions.

² For example, if McDonald’s restaurants brought an infringement action against a hardware store calling itself “McDonald’s Hardware,” and the hardware store claimed the

the users or likely users of the services offered by the owner of the mark. For example, in *Stocker v. General Conference Corp. of Seventh-Day Adventists*, 1996 TTAB LEXIS 41 (Feb. 15, 1996), the issue was whether SEVENTH-DAY ADVENTIST was generic. The Trademark Trial and Appeal Board found that the relevant public was “Christians and, more specifically, Adventist Christians,” because they were “most likely to avail themselves of respondents’ publications and services.” *Id.* at *32. The “respondent” was the trademark applicant, whose mark was allegedly generic. *See id.* at *1-6.³

Defendants also challenge (at 15) Mr. Keegan’s decision to survey only self-identified Episcopalians. This universe is correct for the following three reasons, all of which are reasonable and justify his methodology. First, Mr. Keegan believed that it “would be virtually impossible to survey whether someone is likely to use religious services offered by an organization of which they are not currently a member.” Exh. 1 at ¶ 12. Second, he concluded that trying to include potential Episcopalians would make no meaningful difference in the survey results, because “[g]iven the gravity of any person’s decision to begin worshipping in a particular denomination, it is unlikely that the potential worshippers in any denomination would be

McDonald’s mark was generic, it would be illogical to assess the genericness of the mark based on what customers or potential customers of the hardware store thought about the term. Rather, the appropriate population would be actual or potential customers of McDonald’s restaurants.

³ *See also, e.g., Magic Wand, Inc. v. RDB, Inc.*, 940 F.2d 638, 640 (Fed. Cir. 1991) (“By the words ‘relevant public’ for a product sold in the marketplace, the [Trademark] Clarification Act means the relevant public which does or may purchase *the goods or services* in the marketplace.”) (emphasis added); *Luxco, Inc. v. Consejo Regulador del Tequila, A.C.*, 2017 TTAB LEXIS 174, at *23-24 (Jan. 30, 2017) (genericness challenge to trademark application for TEQUILA covering “distilled spirits, namely, spirits distilled from the blue tequilana weber variety of agave plant”; relevant public was “the purchasing or consuming public for the identified products (*i.e.*, ‘spirits distilled from the blue tequilana weber variety of agave plant’)”); *Microsoft Corp. v. Lindows.com, Inc.*, 2002 U.S. Dist. LEXIS 24616, at *17, 26-27 (W.D. Wash. Mar. 15, 2002) (issue was whether “Windows” was generic; because “Microsoft Windows is designed to run only on Intel-compatible personal computers,” relevant public “consists of all owners and users of Intel-compatible personal computers”).

significant when compared to those who have over time made the decision to in fact worship with that denomination. This is far different from a situation involving consumer products, where there are likely to be a large group of potential users of the product.” *Id.* And third, as it turned out, trying to find potential Episcopalians would not have meaningfully impacted the outcome of the survey because the results were so one-sided, with 96% of respondents stating THE EPISCOPAL CHURCH identifies a religious organization and only 4% stating that it identifies a religion. *See id.* Mr. Keegan’s decision to limit his survey to only Episcopalians was, for these reasons, a reasonable one that provides no basis for excluding the survey.

Defendants go even further, however, and argue (at 16) that Mr. Keegan should have *excluded* Episcopalians. They make this claim even though Episcopalians are part of the “relevant public” because they are *actual* users of the Church’s services. *See Magic Wand*, 940 F.2d at 641. Even Defendants’ own proffered expert Mr. Poret agrees that Episcopalians are part of the relevant public, and himself included mostly Episcopalians in his survey pool. *See* Dkt. No. 586-2 at 138:16-18; Dkt No. 586-1 at p. 22 of 68. Notwithstanding this contradiction, Defendants make the wild argument that Episcopalians “are likely familiar with the ongoing litigation amongst the parties” and “may be aware of the purpose of the survey,” which “would automatically lead them to answer the survey questions in the manner which generated Keegan’s results.” There is no factual support for this speculation. Mr. Keegan’s survey was not limited to South Carolina residents, and there is no reason to think respondents knew about this suit or why they were being surveyed. Nor is there any reason why a respondent who knew any of this would have known which answer the Church preferred.

For all of these reasons, Mr. Keegan surveyed the correct group of people.

3. It was appropriate for Mr. Keegan to collect data in 2018.

Defendants argue (at 18) that Mr. Keegan’s survey is irrelevant because he collected his data “between August and September 2018.” This is supposedly a criticism because Defendants claim that “[t]o 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.”

As an initial matter, this is a strange argument for Defendants to make, since their own expert Mr. Poret collected data for his survey in April 2018, long after the PTO registered THE EPISCOPAL CHURCH. *See* Dkt. No. 581-1 at p. 27 of 68. If the Court credits Defendants’ argument, the result is that it first knocks out Mr. Poret’s report.

If the Court looks past this contradiction, Defendants’ argument is legally wrong in any event. To assess genericness, the inquiry is not whether the mark had secondary meaning at the time of registration. Instead, under 15 U.S.C. § 1064(3), a registered mark may be cancelled if it “*becomes* the generic name for the goods or services ... for which it is registered” (emphasis added). “Becomes” implies a present-day assessment, not a look-back to the time of registration. For example, in both *Glover v. Ampak, Inc.* 74 F.3d 57, 59-60 (4th Cir. 1996) and *Retail Services v. Freebies Publishing*, 364 F.3d 535, 545-46 (4th Cir. 2004), the Fourth Circuit assessed genericness by considering evidence contemporaneous with the time it issued its decision.⁴

Nor do Defendants provide any authority that supports their assertion. They cite (at 18) *Converse, Inc. v. International Trade Commission*, 2018 WL 6164571, at *7 (Fed. Cir. Oct. 30, 2018), which addressed whether a mark had acquired secondary meaning, not whether it had become generic. And *California Cooler, Inc. v. Loretto Winery, Ltd.*, 774 F.2d 1451 (9th Cir.

⁴ *See also, e.g., Express Homebuyers USA, LLC v. WBH Mktg.*, 323 F. Supp. 3d 784 (E.D. Va. 2018) (considering many types of evidence in assessing genericness, not limited to evidence from the time of registration over ten years earlier).

1985), too says nothing about whether genericness is assessed based on evidence existing the time of registration. Defendants also reference the McCarthy treatise, but the section they cite does not concern genericness. And even on the issue it addressed (secondary meaning), it counsels in favor of *admitting* expert testimony, stating: “The better view is to admit such [survey] evidence but give it weight appropriate to the extent that it sheds light on consumer perceptions in the past.” 2 McCarthy on Trademarks and Unfair Competition § 16.34 (2018).

4. Defendants’ other challenges to Mr. Keegan’s survey also fail.

Defendants make additional arguments concerning Mr. Keegan’s survey, all of which lack merit. First, they claim (at 9) his survey “did not measure” whether THE EPISCOPAL CHURCH was a “specific or particular religious organization.” In fact, this is exactly what the survey measured: whether respondents perceived THE EPISCOPAL CHURCH to be the name of a “religious organization” or a “religion.” As noted, this is the pertinent inquiry in this context. Defendants also claim Mr. Keegan did not know whether other churches were “Episcopal.” But there is no reason why Mr. Keegan—who is not being offered as an expert in religion—is responsible for understanding the beliefs or structure of other church groups. Defendants’ proffered expert Hal Poret similarly disclaimed any such knowledge. *See* Dkt. No. 586-2 at 10:23-11:3 (Mr. Poret is not an expert in religion or religious organizations).

Second, Defendants argue (at 15) that Mr. Keegan should not have used “religion” and “religious organization” as the two primary answer choices in his survey. But they ignore that this is the inquiry courts make when assessing whether the name of a religious organization is generic. *See* Dkt. No. 586 at 8-9. Defendants add, without any record citation, that Mr. Keegan was “very confused about the typical use of the term ‘religion’ in this context.” Exactly what Defendants are trying to argue here is unclear. But for present purposes, the relevant point is that Mr. Keegan defined “religion” in his survey (as “the system of beliefs that a group follows”), and

Defendants' Motion does not take issue with that definition. What Mr. Keegan knows or does not know about religions outside of the context of his survey is irrelevant.

Third, Defendants claim (at 16-17) that a "generic" term is entitled to protection only if it has "acquired a secondary meaning," and that Mr. Keegan's survey does not establish secondary meaning because he "made no attempt to tie the term THE EPISCOPAL CHURCH to any particular source identifier whatsoever." This is yet another one of Defendants' contradictions, since Mr. Poret too did not survey secondary meaning. Nonetheless, a survey need not be a secondary meaning survey to be probative on the issue of genericness. Mr. Keegan surveyed the precise issue before the Court: whether THE EPISCOPAL CHURCH identifies a religion or a religious organization. There is no reason why a survey on the issue before the Court is inadmissible simply because it did not also survey secondary meaning.⁵

For all of these reasons, the Court should deny Defendants' motion to exclude Mr. Keegan's testimony and report.

II. ROBERT KLEIN SHOULD NOT BE EXCLUDED.

A. Mr. Klein's Report

Robert Klein—who has almost five decades of experience conducting consumer surveys (Dkt. No. 598-2 at p. 2 of 17)—conducted "a market research survey ... to measure whether or not use of the terms 'Episcopal' and 'Diocese' in ['The Protestant Episcopal Church in the Diocese of South Carolina' and 'The Episcopal Diocese of South Carolina'] causes relevant

⁵ The Church does not need survey evidence on secondary meaning since it has ample other evidence on this subject, including (a) proof that THE EPISCOPAL CHURCH has obtained incontestable status with the PTO, which is conclusive evidence that the mark is non-descriptive or has acquired secondary meaning (*see* Dkt. No. 595-1 at p. 25-26 of 50), and (b) the massive record of media sources, listings, dictionaries, encyclopedias, internet references, and evidence from the Defendants themselves indicating that THE EPISCOPAL CHURCH has acquired secondary meaning because it is widely understood as referring only to the Plaintiff-in-Intervention (*see id.* at pp. 26, 40-47 of 50).

individuals who see these names to mistakenly believe that the church (or group of churches) is affiliated with The Episcopal Church.” Dkt. No. 598-2 at p. 3 of 17. His survey found that “relevant individuals who see churches affiliated with the Lawrence Diocese using names that include the terms ‘Episcopal’ and ‘Diocese’ will be confused and believe that churches with those names are affiliated with The Episcopal Church.” *Id.* at p. 17 of 17.⁶

B. Defendants’ Criticisms of Mr. Klein’s Report Have No Merit.

Defendants have offered no survey evidence concerning whether their uses of certain marks are likely to be confused with marks owned by The Episcopal Church or TECSC. In an attempt to overcome this deficiency, they seek to exclude Mr. Klein’s confusion survey, by claiming the survey is flawed. Not only are Defendants’ criticisms invalid, but their arguments would not justify exclusion of the survey even if they had merit.

1. The survey is not subject to exclusion for failing to simulate market conditions.

The survey was properly done. Defendants first argue (at 7-9) that Mr. Klein’s survey “failed to replicate market conditions because [he] failed to test the mark actually used by the Defendant Diocese,” which “uses the mark ‘Diocese of South Carolina’” and “seldom use[s]” “THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF SOUTH CAROLINA” or “THE EPISCOPAL DIOCESE OF SOUTH CAROLINA.”

The Lawrence Diocese provides no citation to the record in support of its claim that it “seldom use[s]” the marks Mr. Klein tested. The record shows that the claim is factually inaccurate. As the Church’s summary judgment brief explains, Defendant Lawrence refers to the diocese he leads by the names Mr. Klein surveyed; he claims to be the bishop of “The Protestant

⁶ Mr. Klein also submitted a rebuttal report critiquing Mr. Poret’s genericness survey (*see* Dkt. No. 586-11), which Defendants have not sought to exclude.

Episcopal Church in the Diocese of South Carolina”; the corporation the Lawrence Diocese claims to control is called “The Protestant Episcopal Church in the Diocese of South Carolina” and its banking documents still use that name; the Journal of the Lawrence Diocese’s 2017 convention (which is the latest Journal that is publicly available) refers to that diocese as “The Episcopal Diocese of South Carolina” over and over again; the parishes in the Lawrence Diocese file annual reports on the letterhead of “The Protestant Episcopal Church in the Diocese of South Carolina”; and the Lawrence Diocese continues to claim ownership of State trademark registrations for the names Mr. Klein surveyed. Dkt. No. 595-1 at pp. 18-19 of 50. Defendants’ unsupported claim that Mr. Klein’s survey should be excluded because the Lawrence Diocese “seldom use[s]” the names Mr. Klein surveyed is therefore wrong as a matter of fact.

Next, Defendants argue (at 8) that Mr. Klein surveyed the Lawrence Diocese’s names “in a complete vacuum and without context,” even though Defendants supposedly “advise current and potential parishioners of the ongoing dispute.” Defendants provide no factual support for this assertion either. As the Church’s summary judgment brief makes clear, the use of confusing names by both the Lawrence Diocese and its parishes and missions is ongoing. *See* Dkt. No. 595-1 at pp. 18-19 of 50; Dkt. Nos. 595-74 and 595-75.

Even putting aside the lack of factual support for Defendants’ claim, they are wrong legally as well. In the cases Defendants cite, surveys were excluded for not simulating market conditions because the experts had *changed* the marks when conducting their surveys.⁷ Here,

⁷ *See, e.g., Valador, Inc. v. HTC Corp.*, 242 F. Supp. 3d 448, 462-63 (E.D. Va. 2017) (proposed expert had “deliberately altered defendants’ mark to make it appear more similar to plaintiff’s before asking questions about the marks’ likelihood of confusion,” including by omitting “styling, words, symbols or images that typically accompany [the mark] as [the parties] use that term in the marketplace”); *Water Pik, Inc. v. Med-Sys., Inc.*, 726 F.3d 1136, 1145-46 (10th Cir. 2013) (marks were shown “in a format that did not accurately reproduce the manner in which consumers ordinarily view them,” including because “[t]he SinuCleanse mark was

Defendants do not claim that Mr. Klein altered the marks when conducting his survey. Nor do Defendants articulate how they believe Mr. Klein should have conducted his survey to properly simulate market conditions. Unlike a commercial product for which confusion in the “real world” can be tested in various ways, it would be completely infeasible to conduct a consumer survey in a church building or other setting that might satisfy Defendants’ concerns.

Defendants’ argument is no basis for exclusion in any event. Even if the Court credited Defendants’ criticism, complaints about whether a survey adequately replicated market conditions bear upon the weight to be given the survey, not its admissibility.⁸

2. The survey used a proper control.

The survey was properly done. Next, Defendants claim (at 9-10) that Mr. Klein’s survey did not use a proper control. The control term that Mr. Klein’s survey used was “The Protestant

typewritten without italics” even though “[e]very photograph of a Med-Systems package conspicuously features the stylized term ‘Sinu*Cleanse*,’ with the first component printed in plain type and the second component italicized”; this had the effect of “exaggerat[ing] the similarities between the two marks, likely increasing the confusion of the respondents”).

⁸ See, e.g., *Zetor N. Am., Inc. v. Rozeboom*, 2018 U.S. Dist. LEXIS 137042, at *55-62 (W.D. Ark. Aug. 14, 2018) (survey admitted notwithstanding Mr. Poret’s critique that it did not “realistically simulate market conditions”; “Rather than exclude the survey, the Court will permit its introduction and afford ... Defendants ... an opportunity to attack the weight of the evidence presented in the survey and attempt to convince the jury that its value is negligible”); *Alzheimer’s Disease & Related Disorders Ass’n v. Alzheimer’s Found. of Am., Inc.*, 307 F. Supp. 3d 260, 278, 280 (S.D.N.Y. 2018) (survey criticized “for failing to replicate market conditions”; court had “denied ... *Daubert* motion,” but found that the evidence “militates against placing much weight on the study evidence”); *Marketquest Grp., Inc. v. BIC Corp.*, 2018 U.S. Dist. LEXIS 62360, at *16-18 (S.D. Cal. Apr. 12, 2018) (admitting survey over objection that it “did not adequately replicate the way customers encounter and perceive either party’s marks in the actual marketplace”; “The appropriate approach is to view such evidence with an understanding of the difficulty of developing and implementing a survey and to use any technical defects only to lessen evidentiary weight, not to reject the results out-of-hand”); *Moroccanoil, Inc. v. Zotos Int’l, Inc.*, 230 F. Supp. 3d 1161, 1175 (C.D. Cal. 2017) (resolving challenge to survey for failing to simulate market conditions by stating: “[T]he Court gives the survey less weight. The survey is still some evidence of actual confusion.”); *Koninkijke Philips Elecs. N.V. v. Hunt Control Sys.*, 2016 U.S. Dist. LEXIS 84299, at *20-21 (D.N.J. June 29, 2016) (“No survey is perfect, and to the extent that this survey does not perfectly replicate market conditions, the Court may give it less evidentiary weight at trial.”).

Church in the District of South Carolina,” which his report explains he selected because it would “isolate the influence of the alleged infringing aspect of the names (i.e., the terms ‘Episcopal’ and ‘Diocese’) on the likelihood of confusion.” Dkt. No. 598-2 at pp. 7-8 of 17. Mr. Klein subtracted the confusion rates for his control term from the raw confusion numbers in his survey to determine the “net confusion” rates stated in his conclusion. *Id.* at pp. 8, 17 of 17.

As an initial matter, Defendants do not cite any authority that can be used to critique the control that Mr. Klein selected. Their authorities emphasize the need for a survey to include a control group (which Mr. Klein’s survey had), but say nothing that would render Mr. Klein’s survey subject to exclusion for using the wrong control. In fact, those authorities counsel in favor of finding that Mr. Klein’s control was perfectly appropriate.

For example, in *Valador, Inc. v. HTC Corp.*, 242 F. Supp. 3d 448 (E.D. Va. 2017), the court said that surveys should test control terms because controls “account for potential error, false positives, or background noise” in the survey. *Id.* at 464. The surveyor in that case “appear[ed] to rely solely on the raw confusion rate ... without having used a control of any kind.” *See id.* Here, however, Mr. Klein’s survey used a control term.

Defendants also cite *Water Pik, Inc. v. Med-Sys., Inc.*, 726 F.3d 1136 (10th Cir. 2013), where the court explained the need to test “a control mark that shares as many characteristics with the contested mark as possible, ‘with the key exception of the characteristic whose influence is being assessed,’” and then “discounting for confusion arising from the control” in order to measure “net confusion, or ‘the difference between the raw confusion percent and the control confusion percent.’” *Id.* at 1148-49. This is exactly what Mr. Klein did. He created a control term that shares some characteristics with the terms that were the focus of his survey, but changed the terms “whose influence [were] being assessed” (those terms being “Episcopal” and

“Diocese”). He then calculated “net confusion” by subtracting the confusion rate for the control term from the confusion rate for the marks at issue. Mr. Klein’s survey thus did what the court in *Water Pik* said he should have done.

Defendants’ only other authority on this issue is the McCarthy treatise, which too supports the type of control that Mr. Klein used. It states that a survey “should have a ‘control,’” and have “at least two groups of respondents: one group (the ‘test cell’) is shown the allegedly infringing mark; the second group (the ‘control cell’) is shown a mark similar in appearance to the test cell, except for the designation whose influence is being tested,” with “net confusion” being “the difference between the raw confusion percent and the control confusion percent.” 6 McCarthy on Trademarks and Unfair Competition § 32:187 (2018). Mr. Klein’s survey did *all* of these things. McCarthy then cites another source as setting forth the standard for control terms: “The general principle for choosing an appropriate control is easily stated: It should share as many characteristics with the experimental stimulus as possible, with the key exception of the characteristics whose influence is being assessed.” *Id.* Mr. Klein’s control term satisfies this standard, since the control term he used—“The Protestant Church in the District of South Carolina”—is similar to the marks that were the focus of his survey, while omitting the terms “Episcopal” and “Diocese,” which Mr. Klein viewed as the “alleged infringing aspect of the names.” Dkt. No. 598-2 at pp. 7-8 of 17.

Even though Defendants cite no legal authority that would require the exclusion of Mr. Klein’s survey, they claim that his control term needed to use the word “episcopal.” But “episcopal” was a term Mr. Klein identified as being a potential source of confusion, which would have made it inappropriate to use that word in his control. *See Water Pik*, 726 F.3d at 1148-49 (control should omit “the characteristic whose influence is being assessed”).

Defendants’ argument is no basis for exclusion in any event. McCarthy also counsels in favor of admitting Mr. Klein’s survey for another reason: It states that challenges to the control term “do[] not necessarily mean that the survey should be excluded from evidence, rather than just given less weight.” 6 McCarthy on Trademarks and Unfair Competition § 32:187. This is consistent with substantial case law. *See, e.g., Gucci Am., Inc. v. Guess?, Inc.*, 831 F. Supp. 2d 723, 740 (S.D.N.Y. 2011) (“while the fact that a survey used a control that could have been ‘stronger’ or ‘better’ may mean it is entitled to less weight, it does not mean that the survey does not provide relevant information”).⁹ As a result, even if the Court agrees with Defendants’ criticisms of Mr. Klein’s control term, that still would not warrant exclusion of his survey.

3. The survey did not use a leading question.

The survey was properly done. Defendants next claim (at 11-12) that Mr. Klein’s survey wrongly used a leading question, which is not true. That question was: “Do you or do you not believe that this group of churches is affiliated with a national or international organization?” Respondents who said “yes” to the first question were asked: “What is the name of the

⁹ *See also, e.g., Zetor*, 2018 U.S. Dist. LEXIS 137042, at *54-61 (Mr. Poret criticized surveyor’s failure to “utilize a proper control group”; court found that his arguments were “potentially good subject matter for debate,” but admitted the survey and allowed the Defendant “an opportunity to attack the weight of the evidence presented in the survey”); *Newborn Bros. v. Albion Eng’g Co.*, 2016 U.S. Dist. LEXIS 181610, at *5 (D.N.J. Dec. 20, 2016) (challenge that “surveys lacked control groups and control questions”; held that these arguments “go to the weight of the evidence rather than its admissibility”); *Retractable Techs., Inc. v. Becton*, 2013 U.S. Dist. LEXIS 26996, at *11 (E.D. Tex. Feb. 27, 2013) (critique that survey “failed to use an experimental control group”; held that this “criticism of the brochure survey’s controls does not warrant excluding the survey, and ... instead goes to the weight of the evidence”); *CNG Fin. Corp. v. Google, Inc.*, 2007 U.S. Dist. LEXIS 96152, at *6 (S.D. Ohio Aug. 24, 2007) (“Assuming [surveyor] did not use a proper control this does not warrant excluding the survey and his report from evidence pursuant to Rule 702. Google’s objections regarding the selected control ... go to the weight to be afforded the survey.”); *On Site Energy Co. v. MTU Onsite Energy Corp.*, 2012 U.S. Dist. LEXIS 100690, at *8 (E.D.N.Y. July 19, 2012) (“[T]he Court cannot say that [the surveyor’s] choice of control renders his survey unreliable as a matter of law. [Defendant] may address the control’s efficacy on cross-examination.”).

organization with which you believe this group of churches is affiliated?” Dkt. No. 598-2 at p. 10 of 17. Defendants’ summary of Mr. Klein’s survey ignores this second question.

Defendants argue that the first question was “improperly suggestive.” But the survey did not suggest any affiliation with The Episcopal Church. If the question had asked: “Do you or do you not believe that this group of churches is affiliated with The Episcopal Church?,” that *would* have made such a connection. Mr. Klein’s survey question did not do so. Further, after the initial question that did *not* mention the Church, the survey asked an *open-ended* follow-up question that permitted respondents who said “yes” to the first question to identify whatever organization he or she thought was affiliated with the terms at issue. The survey did not suggest that respondents should identify The Episcopal Church in their narrative response to the second question.

Defendants cite no authority in which a court considered, let alone criticized or excluded, survey questions like these. For example, in *Valador*, the survey—which was done by someone who had never before done a survey for trademark litigation (242 F. Supp. 3d at 458 n.11)—asked: “‘How likely do you think it is that there will be confusion between’ the two products, the two product names, and the two ‘VIVE’ names [the mark at issue there] ‘if they are used by different companies selling similar products.’” It also asked: “Do you think these two ways of showing the VIVE name look like they’re coming from the same company, or do they look [like] they come from two different companies.” *Id.* at 465-66. The court found that those questions “imply that there is confusion,” which is improper. *Id.* at 466. By contrast, Mr. Klein’s questions did not suggest that confusion existed. The inappropriate survey questions in *Valador* say nothing about Mr. Klein’s survey.

Defendants also cite *Scott Fetzer Co. v. House of Vacuums, Inc.*, 381 F.3d 477 (5th Cir. 2004), where the survey showed respondents an advertisement in the yellow pages and then asked: “Looking at this ad, would you say this company is in any way affiliated with, connected with, sponsored by, associated with or authorized by the Kirby Company?” *Id.* at 487. The court found this question improper because “[t]he use of the phrase ‘in any way’ prodded survey participants to search for any connection, no matter how attenuated, between the two companies. Second, the survey question suggested a connection between House of Vacuums and Kirby instead of permitting participants to make their own associations.” *Id.* at 488. By contrast, Mr. Klein’s survey did not ask respondents whether the terms at issue were “affiliated with, connected with, sponsored by, associated with or authorized by” The Episcopal Church. He used the general phrase “national or international organization,” and only if a person responded affirmatively did he then follow up with an open-ended, non-leading question asking respondents to identify that organization. Defendants thus provide no authority in which a court criticized survey questions like those Mr. Klein used in his survey.¹⁰

It is also clear from the responses to Mr. Klein’s survey that Defendants’ criticism has no merit. Defendants assert that Mr. Klein’s first question told respondents that the marks were affiliated with a national or international organization and somehow implied that the affiliation

¹⁰ The same is true for the other cases Defendants cite on this issue. In *Simon Property Group L.P. v. mySimon, Inc.*, 104 F. Supp. 3d 1033 (S.D. Ind. 2000), the respondents were shown a card with one party’s web page and asked what services may be offered on the web site, and then shown a card with the other party’s web page and asked the same question. *See id.* at 1041. Then respondents were asked: “Do you believe that the two web pages just shown to you are put out by (a) Two unrelated sources, companies, or organizations; (b) The same source, company, or organization; (c) Related but different sources, companies, or organizations; or (d) Don't know?” *Id.* at 1041. The court found that this survey “is designed to create ‘demand effects’ that will appear to exaggerate unfairly any possible confusion about affiliation between” the parties. *Id.* Mr. Klein’s survey format was not in any way analogous to that one, and suffers from none of the demand effects that court criticized.

was with The Episcopal Church. But, although Mr. Klein’s survey found significant confusion, an appreciable percentage of respondents answered “no” to the first question, or answered the second question by stating that the affiliation was with a group *other than* The Episcopal Church. See Dkt. No. 598-2 at pp. 13-16 of 17. Respondents’ abilities to parse the questions this way shows that the questions were not improperly suggestive.¹¹

Defendants’ argument is no basis for exclusion in any event. The Court should also reject Defendants’ argument because challenges to survey questions for being leading generally go to the weight to be afforded the survey, not its admissibility. See, e.g., *United States v. H&R Block, Inc.*, 831 F. Supp. 2d 27, 35 (D.D.C. 2011) (“[T]he survey question cannot be considered to be as ‘leading’ as the questions identified as problematic in the plaintiff’s cited authority. Accordingly, this critique goes to the weight of the evidence and not to admissibility.”).¹²

4. The confusion rates are not inflated.

The survey was properly done. Defendants briefly complain (at 12-13) about Mr. Klein’s coding of the responses to his second question. That question was: “What is the name of the organization with which you believe this group of churches is affiliated?” Because this was an open-ended question, the responses had to be interpreted and “coded” to determine which

¹¹ Defendants claim a better question would have been to ask if the marks “were affiliated with *any other organization*.” They did not conduct their own confusion survey, however, and therefore have no way of knowing whether this would have been a better question or not.

¹² See also, e.g., *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1143 (9th Cir. 1997) (objection that a “survey ... asked leading questions – go[es] only to the weight, and not the admissibility, of the survey”); *Fortune Dynamic, Inc. v. Victoria’s Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1037-38 (9th Cir. 2010) (admitting survey with “highly suggestive” questions); *Estes Park Taffy Co., LLC v. Original Taffy Shop, Inc.*, 2017 U.S. Dist. LEXIS 88113, at *11 (D. Colo. June 8, 2017) (refusal to exclude survey for “the use of leading questions”); *Black & Decker Corp. v. Positec USA Inc.*, 2015 U.S. Dist. LEXIS 127193, at *66-68 (N.D. Ill. Sept. 22, 2015) (criticisms of survey questions as leading “go to the weight but not the admissibility of the surveys”); *Bach v. Forever Living Prods. U.S., Inc.*, 473 F. Supp. 2d 1110, 1115-16 (W.D. Wash. 2007) (challenge to survey for “employ[ing] leading questions” “go[es] to the weight that should be afforded [the] survey, not to its admissibility”).

responses indicated that the respondents believed the affiliation was with The Episcopal Church. See Dkt. No. 598-2 at p. 12 of 17.

Defendants make a broad challenge to Mr. Klein's coding without explaining which particular responses they claim were not coded properly. Their argument seeks to impose too high a standard for the interpretation and coding of open-ended survey responses. When a survey permits respondents to give open-ended answers, the words they use in their responses must be interpreted and organized (or "coded"). This process requires the exercise of judgment, since different people use different words to express themselves. For example, in *Gucci America, Inc. v. Guess?, Inc.*, 831 F. Supp. 2d 723 (S.D.N.Y. 2011), Guess claimed an expert had miscoded open-ended survey responses. See *id.* at 741. The court stated that "expecting survey respondents to be able to parse their thought processes with such a high degree of specificity in response to an open-ended 'why-do-you-say-that' question is unrealistic." *Id.* It admitted the survey notwithstanding the criticisms of how the responses were coded, noting that Guess was "free to make any and all reasonable arguments as to the weight [the court] should accord it." This same understanding should be applied when evaluating Mr. Klein's coding of the open-ended responses to his survey in this case.¹³

¹³ The cases Defendants cite are not to the contrary. In *THOIP v. Walt Disney Co.*, 788 F. Supp. 2d 168 (S.D.N.Y. 2011), some of the miscoding caused the results to sweep in confusion that was extraneous to the case, such as confusing the shirt at issue with a movie that had nothing to do with the case and was therefore "irrelevant confusion [that] should not have been counted," and confusion based on characteristics other than those being surveyed, such as the shirts being "targeted to the same age group" or both using "bright colors," which were "not based on the purportedly protectable elements of [the] mark." *Id.* at 183. None of that is present here. In *Board of Regents v. KST Elec., Ltd.*, 550 F. Supp. 2d 657 (W.D. Tex. 2008), the court refused to grant summary judgment to the party that had retained Mr. Klein, but did not *exclude* Mr. Klein's survey. It criticized Mr. Klein for coding decisions that have nothing to do with his work here, including failing to code "Texas football" and "the Texas longhorns" as responses indicating the University of Texas and identifying errors in his coding (which he has not done here).

When considering Defendants' challenge to Mr. Klein's coding, the Court should be aware of the extreme position Defendants and their expert (Mr. Poret) are taking on this issue. According to Mr. Poret's report critiquing Mr. Klein's survey, there is *no* answer a respondent could have given to Mr. Klein's second question that would have shown that the person believed the marks he surveyed indicated an affiliation with The Episcopal Church. Even if a person responded that the surveyed terms indicated an affiliation with "The Protestant Episcopal Church in the United States of America" or "The Episcopal Church," Mr. Poret *still* contends that such responses do not mean the person was stating that the marks indicated an affiliation with Plaintiff-in-Intervention The Episcopal Church. Dkt. No. 598-3 at pp. 16-18 of 28. This is a totally unreasonable position, which highlights that Defendants are merely trying to exclude Mr. Klein at all costs (because they have no confusion survey of their own), rather than attempting to raise legitimate grounds for excluding his survey.

Finally, even if the Court puts aside the extreme nature of Defendants' challenge, there was nothing unreasonable about Mr. Klein's coding decisions. He concluded that respondents who said the terms at issue referred to an "Episcopal" organization, "Episcopal Church," or "The Episcopalian Church," or many other variants thereof, were referring to The Episcopal Church in their responses. None of these responses included any modifier (such as "Methodist" or "Reformed") that would have indicated that the individual did *not* intend his or her response to be a reference to The Episcopal Church. Mr. Klein therefore used his professional judgment to code these responses as references to The Episcopal Church, since they included the term "Episcopal" and there was no reason to believe they related to any group that was not affiliated with the Church. Defendants are free to dispute this or cross-examine Mr. Klein, but that is no basis for excluding his survey.

Defendants’ argument is no basis for exclusion in any event. As with all of Defendants’ other arguments concerning Mr. Klein’s survey, even if the Court finds merit in Defendants’ challenge to Mr. Klein’s coding decisions, that argument affects only the weight to be given to the survey, not its admissibility.¹⁴

For all of these reasons, the Court should not exclude Mr. Klein’s expert report.

III. DR. WALTER EDGAR SHOULD NOT BE EXCLUDED.

A. Dr. Edgar’s Reports

Defendants acknowledge that “Dr. Edgar is a respected South Carolina historian and professor.” Dkt. No. 585-1 at p. 4. He prepared two expert reports. In the first, he considered “whether the common usage of the terms ‘Episcopal,’ ‘Protestant Episcopal,’ and ‘Diocese,’ particularly in South Carolina, has historically been made in reference to churches affiliated with The Episcopal Church.” Dkt. No. 585-3. His work consisted of doing exactly what an historian would do to answer this question: He identified the appropriate universe of relevant source materials, and located and analyzed those materials, including city directories and telephone directories dating back a hundred years, encyclopedias, many historical texts, and historical magazines and newspapers. *See id.* His conclusion was that virtually all such references were to the Church itself. *See id.*

Dr. Edgar’s second report sought “to determine how the name ‘The Episcopal Church’ is used by the public, and which organization or organizations use that name.” Dkt. No. 585-4. He conducted an internet search for the terms “The Episcopal Church.” *Id.* In order to be thorough,

¹⁴ *See, e.g., E&J Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1292-93 (9th Cir. 1992) (challenge made “that the interviewees’ responses were coded improperly”; held that “any technical unreliability goes to weight, not admissibility”); *Dyson*, 951 F. Supp. 2d at 1022 (“the problems identified [including with “the coding”] more appropriately go to the weight of the survey than to its admissibility”); *Gucci Am.*, 831 F. Supp. 2d at 741.

he did this search using both Google and Yahoo, and, to eliminate any potential bias due to his location in South Carolina, asked his son-in-law in Massachusetts to run the same searches, the results of which Dr. Edgar reviewed. *See id.* He concluded that all uses of “The Episcopal Church” were references to the Church itself or entities affiliated with the Church. *Id.*

Because Dr. Edgar submitted two reports, we analyze Defendants’ arguments with respect to each one separately.¹⁵

B. Defendants’ Criticisms of Dr. Edgar’s Initial Report Have No Merit.

Dr. Edgar’s first report is an historical analysis of a particular question: How have the terms “Episcopal,” “Protestant Episcopal,” and “Diocese” been used in the past, especially in South Carolina? Courts admit expert testimony concerning this kind of historical question, because expertise is required to determine which materials to search, locate the materials, and analyze and explain the materials once they have been located.¹⁶ Defendants try to belittle this

¹⁵ Defendants argue (at 5, 11) that Dr. Edgar is biased because he is an Episcopalian and therefore they “express concern[ing] over the reliability of Dr. Edgar’s opinions.” They do not, however, claim that he should be excluded for this reason. This argument is a topic for cross-examination, not grounds for exclusion. *See, e.g., Gore v. Air & Liquid Sys. Corp.*, 2018 U.S. Dist. LEXIS 161711, at *47 (E.D.N.C. Sept. 21, 2018) (“any bias [expert] may have can be explored on cross-examination”).

¹⁶ *E.g., Hunter v. Underwood*, 471 U.S. 222, 228-29 (1985) (“Although understandably no ‘eyewitnesses’ to the 1901 proceedings testified, testimony and opinions of historians were offered and received without objection.”); *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 135-36 (2d Cir. 2013) (“synthesiz[ing] dense or voluminous historical texts” and offering “context that illuminates or places in perspective past events” are proper uses of historical expertise); *Burton v. Am. Cyanamid*, 2018 U.S. Dist. LEXIS 139727, at *18 (E.D. Wisc. Aug. 16, 2018) (“Even when the words on the face of an historical document are comprehensible to the lay juror, a trained historian can contribute tremendously to the accuracy and completeness of the juror’s understanding by situating the document in its historical context—a context with social, economic, technological, linguistic, and medical dimensions, to name but a few.”); *Cyprus Amax Minerals Co. v. TCI Pac. Communs., Inc.*, 2014 U.S. Dist. LEXIS 21829, at *10-12 (N.D. Okla. Feb. 21, 2014) (admitting expert testimony of historian who “identified each of the historical archives and databases that she examined in an attempt to locate relevant documents” and gave “opinions [that] are simply intended to show what factual findings the historical record tends to support”; “her opinion is properly viewed as a recitation or summary of the historical documents

expertise by arguing that “Dr. Edgar may know his way around a research library better than most,” but “the work he has performed is not unique or specialized.” Dkt. 585-1 at p. 8. But Defendants do not support this rhetoric with a single decision in which a court barred an historian from giving expert testimony about his or her review and analysis of historical materials that were relevant to a suit. As noted, the law is to the contrary.¹⁷

With respect to Dr. Edgar’s first report, Defendants’ primary criticism is that he did not employ “specialized knowledge” because his opinions “were based on a review of publically accessible records postdating 1900 that were ‘for everyday people,’ as opposed to being tailored for academics.” Dkt. No. 585-1 at 7. This claim is factually inaccurate, since, in addition to reviewing historical directories, encyclopedias, magazines, and newspapers, Dr. Edgar also analyzed *twenty* history texts. Moreover, legally, Defendants do not cite any case stating that it is improper for an historian to opine on an historical factual matter by identifying the relevant historical materials, locating and analyzing those materials, and opining on the meaning of those

she found”); *Walden v. City of Chicago*, 755 F. Supp. 2d 942, 951 (N.D. Ill. 2010) (historian’s expertise includes “knowing where to search for sources, formulating searches based on an understanding of the history of the period in question, and evaluating the reliability of the sources”); *Saginaw Chippewa Indian Tribe v. Granholm*, 690 F. Supp. 2d 622, 635-36 (E.D. Mich. 2010) (admitting expert testimony of historian concerning “the historical interpretation of ... 1855 and 1864 treaties”); *United States v. Newmont USA Ltd.*, 2007 U.S. Dist. LEXIS 96264 (E.D. Wash. Nov. 16, 2007) (admitting expert historian); *Waterhouse v. R.J. Reynolds*, 368 F. Supp. 2d 432, 436-37 (D. Md. 2005) (considering expert testimony that provided “extensive historical evidence” concerning “public knowledge about the effects of tobacco use,” including newspapers, magazines, and books); *United States v. Lileikis*, 929 F. Supp. 31 (D. Mass. 1996) (allowing expert historian in denaturalization action against war criminal).

¹⁷ Instead, Defendants cite (at 7) to *Kennedy v. Joy Technologies*, 269 F. App’x 302, 312 (4th Cir. 2008). There, the court did not consider whether to admit the testimony of an historian. It was a personal injury suit in which a proposed “causation expert” was “asked to review the available documents and other materials and to determine, if possible, the cause of the accident.” *Id.* at 303-04, 312. That is not factually analogous. Dr. Edgar identified the universe of relevant historical materials (which were not otherwise in the record), located and analyzed them, and drew his conclusions about them. That is the basic process that all historians follow to do their work.

materials, where the materials include some that “everyday people” could understand. There is no requirement that the historian review materials “tailored for academics” for his or her opinions to be admissible.

Defendants also claim (at 9) that Dr. Edgar merely made “personal impressions” of the materials he reviewed. But identifying, locating, analyzing, and explaining historical materials is what historians do. The authority cited above shows that courts routinely admit expert testimony from historians who do what Dr. Edgar did, and Defendants cite nothing to the contrary.¹⁸

Finally, Defendants criticize Dr. Edgar (at 11-12) for concluding that references he saw where a modifier was used along with the term “Episcopal” (such as “African Methodist Episcopal Church” or “Reformed Episcopal Church”) were not references to The Episcopal Church. Dkt. No. 585-3 at p. 2 of 13 ¶ 4. Dr. Edgar’s report states that “[n]one of the references that I saw in my literature review to an ‘Episcopal’ church entity (without some other qualifier) was a reference to a group affiliated with any denomination other than The Episcopal Church.” If Defendants want to cross-examine him on the basis for this conclusion—which they do not actually dispute on the merits—they are free to do so. But the mere fact that Dr. Edgar distinguishes between references to The Episcopal Church and references to groups that seek to

¹⁸ Defendants cite *Free v. Bondo-Mar-Hyde Corp.*, 25 F. App’x 170 (4th Cir. 2002), where the court barred a proposed metallurgist from giving expert testimony as to why a can exploded because he “lack[ed] knowledge” concerning pertinent facts such as “the aerosol can manufacturing process, the process of filling aerosol cans, the testing performed on cans during the manufacturing process prior to their distribution, the pressurization of the can, or the normal pressure expected of this type of can.” *Id.* at 172. That says nothing about whether to admit an expert historian’s testimony concerning his review of historical materials, especially when there is no dispute the expert has knowledge concerning the subject matter of his review. Defendants also cite *Oglesby v. GMC*, 190 F.3d 244 (4th Cir. 1999), which affirmed the exclusion of testimony that was “mere speculation.” *Id.* at 248. Defendants do not contend that Dr. Edgar speculated in reaching his conclusions. In fact, they do not even dispute the accuracy of his review of the materials cited in his report, all of which have been provided to the Defendants.

connote that they are *not* affiliated with The Episcopal Church by using a modifier in their names is no basis for excluding his opinions.

Defendants' arguments therefore boil down to nothing more than a claim that historians may not give expert testimony because all they do is identify, locate, review, and explain historical materials. That simply is not the law.

C. Defendants' Criticisms of Dr. Edgar's Second Report Have No Merit.

Dr. Edgar's second report is based on his analysis of internet search results for the terms "The Episcopal Church." His work involved not only doing the searches (and directing someone else to search), but also analyzing the results to see whether references to "The Episcopal Church" in the search results were references to the Plaintiff-in-Intervention (or its dioceses and parishes) or to unrelated groups. He found that every such reference in the hundreds of results he reviewed was a reference to the Plaintiff-in-Intervention or one of its affiliates. Defendants have not challenged the accuracy of Dr. Edgar's analysis of the search results, and in fact do not even dispute that Plaintiff-in-Intervention is the *only* entity that calls itself "The Episcopal Church." See Dkt. No. 586 at p. 29 of 31 n.21.

Instead, Defendants claim that analyzing the results of internet searches is not a proper subject of expert opinion. But on this issue as well, they provide no authority for their assertion. To assess whether a mark is generic, courts *do* admit expert testimony that is based on the expert's analysis of web pages, to explain how the mark is used. For example, in *Globalaw Ltd. v. Carmon & Carmon Law Office*, 452 F. Supp. 2d 1, 32 (D.D.C. 2006), the court relied upon the results of an expert's "search of the Internet through the 'Google' search engine" to determine whether "Globalaw" was generic. Likewise, in *National Envelope Corp. v. American Pad & Paper Co.*, 2009 U.S. Dist. LEXIS 121308, at *12-17 (S.D.N.Y. Dec. 30, 2009), the court relied upon an expert's internet searches to determine whether "peel and seal" was generic, because the

report represented “a simple, straightforward method of searching the Internet and databases to determine third-party use.” In *Hershey Co. v. Promotion in Motion, Inc.*, 2010 U.S. Dist. LEXIS 152868, *10 (D.N.J. Oct. 4, 2010), the court admitted an expert who “conducted a study based on searches of internet news databases ... allegedly showing the genericness of ‘kisses.’” And in *Van Well Nursery, Inc. v. Mony Life Insurance Co.*, 421 F. Supp. 2d 1321, 1330 (E.D. Wash. 2006), the court relied on the declaration of an expert who conducted “internet searches” to assess whether the names of tree varieties were generic. Thus, Defendants are wrong when they claim Dr. Edgar’s second report should be excluded because experts cannot report on the results of internet searches.¹⁹

Permitting an expert historian—who is familiar with the terms in question and how they have been used historically—to review internet materials and report on what they say is the most appropriate way to present this kind of evidence. The three alternatives to admitting expert testimony by Dr. Edgar on this subject are all inferior. One option would be to put all of the individual web pages before the fact finder without a witness. This would be highly inefficient and also unhelpful, because no one would be able to interpret and explain the references to “The Episcopal Church” on hundreds of web pages, as Dr. Edgar has done. Second, counsel could conduct the web searches and testify about what they found. This is the approach Defendants’ counsel have taken. *See* Dkt. No. 607 at ¶ 3; Dkt. No. 601 at ¶¶ 5-8. But this unnecessarily turns

¹⁹ The four cases discussed above, *Globalaw, National Envelope Corp., Hershey*, and *Van Well Nursery*, stand for this proposition. Courts in still other cases have also recognized that internet search results are relevant to assessing genericness. *See, e.g., Cheval Int’l v. Smartpak Equine, LLC*, 2016 U.S. Dist. LEXIS 33023, at *16 (D.S.D. Mar. 15, 2016); *Pond Guy, Inc. v. Aquascape Designs, Inc.*, 2014 U.S. Dist. LEXIS 85504, at *12 (E.D. Mich. June 24, 2014); *L&L Franchise, Inc. v. Tsai*, 2008 U.S. Dist. LEXIS 126311, at *10-11 (S.D. Cal. Mar. 7, 2008); *Sports Imaging Photo. of Utah, Inc. v. Utah Sch. & Sports Imaging*, 2007 U.S. Dist. LEXIS 88589, at *5 (D. Utah Nov. 1, 2007); *Johnny’s Fine Foods, Inc. v. Johnny’s Inc.*, 286 F. Supp. 2d 876, 890 (M.D. Tenn. 2003).

counsel into a witness, which is not optimal, especially since counsel would not be neutral witnesses. The third option would be for Dr. Edgar to provide fact-witness testimony about what the search results showed, either as a pure fact witness or a summary witness under Fed. R. Evid. 1006. That option is plausible, but still not a perfect fit since the search results require interpretation by someone with the kind of expertise concerning the Church and its affiliated entities that Dr. Edgar possesses.

The bottom line is that whether Dr. Edgar is designated as an expert witness to explain how “The Episcopal Church” is used on the internet, or as a fact witness to say that a search was done and explain the search results, Dr. Edgar should be permitted to testify concerning the subject of his second report.

Defendants’ arguments to the contrary provide no basis for excluding testimony concerning Dr. Edgar’s searches. They claim (at 13) that Google results are unreliable because such results depend upon the location of the person doing the search, the person’s search history, and the search settings. But courts admit Google search results to assess genericness (*see, e.g., Globalaw*, 452 F. Supp. 2d at 32), and Defendants cite no authority to the contrary. Moreover, Dr. Edgar undertook various measures to ensure the reliability of his search results, including searching both Google *and* Yahoo, eliminating any geographic bias by enlisting his son-in-law to conduct the same search from a different location, and looking at 20 pages of search results (amounting to over 200 citations) for each search engine to ensure that his search was complete. *See* Dkt. No. 585-4 at p. 2 of 137. Defendants’ general critique of Google searches ignores all of these quality-control measures. Finally, Defendants provide no legal support for why their nitpicking at the search engine Dr. Edgar used means his results should be excluded rather than probed on cross-examination.

The fallacy of Defendants' complaint about Dr. Edgar's Google searches is also exposed by the fact that they *do not dispute* that "The Episcopal Church" is used only in reference to the Plaintiff-in-Intervention or its affiliates.²⁰ Their Motion provides *no* examples from web pages they claim Dr. Edgar missed. Defendants' argument is therefore hollow, since there is no search engine he could have used from any location, with any settings, that would have yielded evidence of any other organization calling itself "The Episcopal Church." Their gripes about his methodology are thus meaningless.

Defendants also claim (at 8-9) that because Dr. Edgar's son-in-law did a parallel search, that shows Dr. Edgar's search did not require expertise. This is a misleading argument. Obviously, almost anyone can do an internet search. But that is not where the expertise comes in. Once the search is completed, it takes specialized knowledge concerning the Church to be able to review hundreds of search results and assess whether references to "The Episcopal Church" therein are references to the Plaintiff-in-Intervention (or one of the Church's affiliated entities) or entities that are unrelated to the Church. Because this type of analysis is not within the cognizance of people who lack this specialized knowledge, Dr. Edgar should be admitted as an expert to give his opinions on this subject, to help the trier of fact understand the search results. *See United States v. Johnson*, 617 F.3d 286, 294 (4th Cir. 2010) ("Experts must have specialized knowledge that will *assist the trier of fact*."). (emphasis added); *AVX Corp. v. United States*, 518 Fed. App'x 130, 134 (4th Cir. 2013) ("Certainly, an expert must have specialized knowledge to assist [a trier of fact] in deciding particular issues in the case,' but this Court has

²⁰ The Lawrence Diocese acknowledged this at its deposition. *See* Dkt. No. 595-70 at 91:17-21 ("Q. Are you aware of any religious organization in the United States, other than the Plaintiff-in-Intervention in this case, that holds itself out as being called 'The Episcopal Church'? A. Personally, no.").

taken care not to ‘read[] this requirement ... too narrowly.’”) (quoting *Belk, Inc. v. Meyer Corp.*, 679 F.3d 146, 162 (4th Cir. 2012)).²¹

Relatedly, Defendants claim (at 14) it is an “inherent weakness” in Dr. Edgar’s work that a parallel search was done from a different location. But just the opposite is true: Asking someone else to run a web search from a different location (as a research assistant might do), and then reviewing the results himself, shows that Dr. Edgar was being thorough in trying to cure any geographic bias in the search he undertook from South Carolina. *See* Dkt. No. 585-4 at p. 2 of 137. Defendants cannot seriously complain about this diligence, since it is they who claim internet search results are skewed by the searcher’s location. *See* Dkt. No. 585-1 at 13.

Defendants also assert (at 13) that the terms Dr. Edgar searched “are of little worth as they are narrowly defined and appeared intended to only return results with the name of the Plaintiff-in-Intervention.” To the contrary, Dr. Edgar used exactly the right search terms. His goal was “to determine how the name ‘The Episcopal Church’ is used by the public, and which organization or organizations use that name.” Given this, the words “The Episcopal Church” were the *only* appropriate search terms. Defendants’ claim that this search somehow biased the results in favor of “only return[ing] results with the name of the Plaintiff-in-Intervention” *proves the Church’s point* on the issue of genericness. If a search for “The Episcopal Church” yields only results that identify the Plaintiff-in-Intervention, then that is compelling evidence that those words refer to a single source, and are therefore not generic.

²¹ Defendants cite *Certain Underwriters at Lloyd’s v. Sinkovich*, 232 F.3d at 200 (4th Cir. 2000), for the proposition that an expert must have knowledge, skill, or education that jurors do not possess. As explained above, a person who does not have knowledge, experience, or education concerning the Church would not be able to review hundreds of web pages and reliably assess whether or not those pages refer to the Church and its affiliated entities.

CONCLUSION

The Court should deny Defendants' motions to exclude Mark Keegan (Dkt. No. 597), Robert Klein (Dkt. No. 598), and Dr. Walter Edgar (Dkt. No. 585).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served upon all counsel of record via the Court's ECF system on January 11, 2019.

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