

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION**

MAXELL, LTD.,

Plaintiff,

v.

APPLE INC.,

Defendant.

Case No. 5:19-cv-00036-RWS

JURY TRIAL DEMANDED

**MAXELL, LTD.'S SUR-REPLY IN OPPOSITION TO
APPLE INC.'S *DAUBERT* MOTION TO EXCLUDE THE OPINIONS AND
TESTIMONY OF PLAINTIFF'S SURVEY EXPERT DR. TÜLIN ERDEM**

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Apple insists that only one survey design is appropriate, no matter the purpose or what is being measured. Apple argues that **all** surveys must have a control test design, apparently even when it runs counter to what the survey seeks to test. Apple argues that **all** surveys must test absolute value or else be irrelevant to **any** possible issue. And Apple argues that the description of tested features must exactly track what is **accused**, and not necessarily what the patent claims. But there is not only one right way to survey. All the law requires is that the survey be reliable, pertinent to the inquiry, and compiled in accordance with accepted survey methods. Maxell has provided significant evidence and legal support showing Dr. Erdem's survey satisfies these requirements. Yet Apple all but ignores Maxell's positions, choosing instead to focus on the fact that the survey does not match Apple's survey design **preferences**. The "defects" Apple challenges are not defects at all. They are sensible and acceptable survey design choices Dr. Erdem made in order to measure the relative importance to consumers of patented features as compared to other features using well-established survey methodology principles. Apple's disagreements over its survey preferences are appropriately handled through cross-examination and Apple's motion should be denied.

I. ARGUMENT

A. Maxell Established that Apple's Preferred Control Test Design Was Not Appropriate For the Purposes of Dr. Erdem's Survey.

In its Reply, Apple continues to make the misleading assertion that Dr. Erdem did not control her survey. As Maxell has already explained, however, Dr. Erdem **did** include controls, just not the ones Apple wanted. Opp. (D.I. 399) at III(A)(2). For example, the survey included a nonexistent feature in order to identify and exclude respondents who were prone to providing feedback on features they were not familiar with. *Id.* at 7. The inclusion of this feature directly addresses Apple's stated concern that "there will always be some interviewees who are bored, hurried, or just plain contrary and whose responses must be filtered out." Reply at 1.

Focusing on the control group test design that is the Apple's obsession, Apple acknowledges Maxell's position that such design is not necessary for Dr. Erdem's survey. And yet Apple still argues that a control test design is always required. Apple continues to cite the same types of case law, treatises, and survey manual that Maxell already showed is irrelevant. Opp. at 7. Every single piece of support Apple cites relates to surveys that test causal propositions or likelihood of confusion. There is good reason that Apple has not cited any evidence standing for a universal control test design requirement—it does not exist. Indeed, if a control group were required for all surveys, then the survey manual repeatedly relied upon by Apple would not limit its discussion regarding control groups or questions to surveys “Designed to Test a Causal Proposition.” Mot. at Ex. D, p. 397. The issue here is not whether a control test design is ever required; of course it may be required in certain instances. The question here is whether it is required for Dr. Erdem's survey to be reliable and sound. As Maxell set forth in detail, it was not. Opp. at 5-7. Apple's cited law and “evidence” is inapposite.

Unable to find any law or evidence to support its universal control test design requirement, Apple argues that Maxell offers no plausible explanation for why measuring relative importance without a control test design is appropriate here.¹ But Maxell offered pages of explanation. Opp. at 5-7. Maxell explained that use of a control test design here was not only unnecessary, but not appropriate in view of what Dr. Erdem was testing. Opp. at 5-6. Dr. Erdem did not test a causal proposition. She wanted each respondent to evaluate the importance of the enhancement enabled by the Surveyed Asserted Patents. *Id.* To make such evaluation, the respondent had to compare the infringing feature directly to the next best alternative. *Id.* To have one group evaluate the

¹ Apple asserts the case Maxell cited, *Edmondson v. Caliente Resorts, LLC*, C.A. 8:15-cv-2672, 2017 WL 10591833 (M.D. Fla. Aug. 31, 2017), confirms a control group is necessary. The case explicitly acknowledges that “[c]ontrols are not necessary in surveys.” *Id.* at *11 (emphasis added). Apple argues the holding is undermined by the fact that case “actually used a control.” But as reiterated herein, so did Dr. Erdem, just not the control Apple prefers.

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