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18 **UNITED STATES DISTRICT COURT**
19 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
20 **SAN FRANCISCO DIVISION**

21 BUCKEYE TREE LODGE AND SEQUOIA
22 VILLAGE INN, LLC, ET AL.,

23 Plaintiffs,

24 v.

25 EXPEDIA, INC., HOTELS.COM, L.P.,
26 HOTELS.COM GP, LLC, ORBITZ, LLC,
27 VENERE NET S.R.L DBA VENERE NET, LLC,
28 and EXPEDIA AUSTRALIA INVESTMENTS
PTY LTD.,

Defendants.

Civil Case No.: 16-cv-04721-VC

**DEFENDANTS' NOTICE OF MOTION
AND CROSS-MOTION FOR SUMMARY
JUDGMENT AND OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT; MEMORANDUM IN
SUPPORT**

Date: April 23, 2020

Time: 10:00 a.m.

Courtroom: 4, 17th Floor

Judge: Hon. Vince Chhabria

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on April 23, 2020, at 10:00 a.m., at the United States District
3 Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco,
4 California 94102, before the Honorable Vince Chhabria, in Courtroom 4, 17th Floor, Defendants
5 Expedia, Inc., Hotels.com, L.P., Hotels.com GP, LLC, Orbitz, LLC, Venere Net S.r.l., and Expedia
6 Australia Investments Pty Ltd. will and hereby do move for summary judgment of Plaintiffs' claims.

7 This motion is based on this Notice of Cross-Motion, the supporting Memorandum and
8 Declarations, the pleadings and papers on file in this action, and any other matters, evidence, and
9 arguments that may be presented to the Court before or at the hearing on this Motion.

10
11 February 19, 2020

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12
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INTRODUCTION

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2 The four named Plaintiffs claim to represent hotels that “are not capable of being booked through
3 Expedia, but appear on Expedia’s websites.”¹ But now that it is time for them to make their case, they
4 offer no proof that there are hotels on Expedia’s sites that are incapable of being booked; that Expedia
5 has engineered a bait-and-switch plot to defraud hotels; or that Expedia deceived or misled any
6 consumer in any material way. Because Plaintiffs have no evidentiary support, their motion does more
7 to prove Expedia’s defenses than to support their own claims.

8 The first evidentiary gap is also the most conspicuous—no evidence establishes that all of the
9 four named Plaintiffs are or were members of the class they allegedly represent: (1) Expedia facilitated
10 a reservation at Prospect Historic Hotel in 2016, so notwithstanding a unique technical issue, it was
11 capable of being booked. (2) The Mansion on O Street sent availability data to global distribution
12 systems that in turn sent information to Expedia, and Expedia booked reservations at The Mansion. The
13 record contains contradictory evidence about when, if at all, The Mansion terminated its relationship
14 with each of these global distribution systems such that it would not have been bookable on Expedia’s
15 websites. (3) Expedia booked reservations at Shiloh Morning Inn, Shiloh appears to have maintained
16 relationships with third parties that sent availability data to Expedia, and no evidence shows that these
17 relationships ever ended, which means likewise that Plaintiffs have failed to establish Shiloh’s class
18 membership. (4) Although Buckeye Tree Lodge did appear on Expedia’s sites before Expedia could
19 make a booking, it was the result of a one-off inadvertent coding error that was quickly corrected, and
20 no evidence supports Plaintiffs’ conjecture that the error might somehow become un-fixed.

21 Plaintiffs’ failure to come forward with evidence of their own class membership is symptomatic
22 of a basic defect in their theory of class liability: No evidence shows that the class includes any hotels at
23 all. The handful of properties Plaintiffs mention in declarations replete with hearsay are either (1) not
24 actually on Expedia’s websites or (2) are capable of being booked. Furthermore, to the extent the Court
25

26 ¹ Well, not exactly. Their motion actually asserts that they represent a class of hotels that have “no
27 binding contractual affiliation” with Expedia. ECF 201-2 (“Mot.”) at 1. Plaintiffs’ motion ignores that
28 the Court denied their request to “to certify a class of hotels that have no direct contractual arrangement
with Expedia” and instead certified the narrower class stated in the text. ECF 164 at 4, 5.

1 determines that any named Plaintiff fits the class definition, no evidence shows the class is larger than
2 four or that the idiosyncratic issues that led any hotel to appear are widespread or unresolved.

3 The undisputed factual record debunks Plaintiffs' tired claims of a bait-and-switch scheme.
4 Expedia has no interest in marketing hotel rooms it cannot book. That would be bad business. Expedia
5 works to ensure that only hotels capable of being booked appear on its websites. For the same reason,
6 Expedia diligently works to ensure that it does not spend its money on Google ads for hotels it cannot
7 book. Finally, the phone numbers Plaintiffs complain of no longer appear on three of the four websites
8 at issue, and, as to the fourth, Expedia clearly identifies itself when a consumer calls the listed number.

9 But even if Plaintiffs had carried their burden to show that the class was not empty, their Lanham
10 Act claim would fail. Their case rests on the implicit but incorrect assumption that consumers arrive on
11 Expedia's websites like shoppers in a grocery store who decide to buy salt and vinegar potato chips
12 when the jalapeno chips they came for are sold out. In fact, consumers almost never come to Expedia's
13 sites with a specific hotel in mind, search for that hotel, and complete a reservation. They come to
14 Expedia's websites in the midst of a lengthy process that involves many other online resources, all
15 competing for their business, and they often leave without buying anything. They use Expedia's
16 websites to find inspiration for a vacation, to research hotel options, and to compare prices and hotel
17 amenities, and they commonly make a reservation on another website days or weeks later. Hotels listed
18 on Expedia actually benefit from that listing even if they are unavailable because Expedia is one of the
19 primary resources consumers use to find and learn about hotels. This "billboard effect" far outweighs
20 any of the negative effects that Plaintiffs hypothesize.

21 Plaintiffs thus cannot prove three essential elements of their claims under the Lanham Act: (1) no
22 evidence shows that any of the challenged statements were false or misleading; (2) Plaintiffs cannot
23 prove that a "substantial segment" of the relevant audience was misled; and (3) no evidence could prove
24 that any of the allegedly false or misleading statements were material to consumers' booking decisions.
25 *See Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1180 (9th Cir. 2003) (listing these elements).

26 The Court should therefore grant Expedia's cross-motion for summary judgment, and in no event
27 should the Court grant Plaintiffs' motion, even if Expedia's motion is denied.
28

BACKGROUND

I. Procedural History

Plaintiffs originally asserted five claims, *see generally* ECF 62, but now pursue only one claim under the Lanham Act, *see* ECF 164. The class Plaintiffs originally proposed would have swept in the vast majority of the more than 160,000 hotels on Expedia’s websites. *See* ECF 117-1. After that class was rejected almost two years ago, *see* ECF 118, Plaintiffs proposed a smaller class of hotels with “no direct contractual arrangements with Expedia.” ECF 164 at 4. The Court granted that motion in part, but “for an even narrower class than the one they proposed: hotels that do not have booking agreements with Expedia and are not capable of being booked through Expedia, but appear on Expedia’s websites.” *Id.* at 5. And although Plaintiffs originally sought a wide variety of relief, *see* ECF 62 at 20-23, only their claim for injunctive relief remains, *see* ECF 164 at 8-9.

Plaintiffs’ summary judgment motion identifies three supposed instances of false advertising. First, they allege that Expedia falsely states on its websites that class members’ hotels are “booked.” *See* Mot. at 6. Second, Plaintiffs allege that Expedia pays for false Google ads for class members’ hotels. *Id.* at 2-3. Third, Plaintiffs allege that Expedia lists false or misleading phone numbers on its websites. *Id.* at 2. The evidence supports none of these claims.

II. Undisputed Facts

A. The Named Plaintiffs Appeared on Expedia’s Sites as a Result of Their Own Actions or Inadvertent Technical Errors that Will Not Resurface.

Plaintiffs first challenge the messages Expedia displays next to hotels that have no availability on Expedia’s sites. *See* Mot. at 2. These messages are universal, apply to all hotels, and appear next to hotels that are *not* class members—hotels that are directly contracted or otherwise capable of being booked when the property has loaded inventory. *See* Goorbergh Decl. ¶¶ 8-11. Indeed, of the approximately 160,000 hotels that appear on Expedia, the vast majority are directly contracted. *Id.* ¶ 2.

Plaintiffs have identified no systematic errors—let alone intentional processes—that cause hotels that cannot be booked to appear on Expedia’s websites. The reason is simple: there are none. Expedia has no incentive to draw attention to hotels that cannot be booked through its websites. Stevenson Decl. ¶ 5; Grender-Jones Decl. ¶ 7; Crawford Decl. ¶ 4.

1 The four properties that lend their names to this lawsuit are therefore not representatives of
 2 victimized hotel owners; they are idiosyncrasies that found their way onto Expedia’s websites as a result
 3 of their own actions, relationships with various third parties, or inadvertent technical errors that occurred
 4 in unique circumstances. The record does not establish any likelihood of these errors resurfacing.

5 **1. The Mansion on O Street**

6 The Mansion appeared on Expedia because it worked with a channel manager² and global
 7 distribution systems³ (“GDSs”) that sent information to online travel agencies like Expedia. Jolin Decl.
 8 ¶¶ 26-27, Exs. F & G. If someone searched for The Mansion on Expedia, Expedia’s system would
 9 query the GDSs to determine whether The Mansion had rooms. *Id.* ¶¶ 12, 26-28. The Mansion was thus
 10 capable of being booked and was booked—and so is not a class member. *Id.* ¶ 27.

11 The Mansion claims to have terminated its relationship with its channel manager, but the record
 12 does not clearly show that the relationship between The Mansion and each of the GDSs was terminated
 13 such that it would not have been bookable on Expedia’s websites. *See* Oatis Decl. Ex. C. What is clear
 14 is that Expedia did not receive notification of the termination from two intermediary GDSs. Jolin Decl.
 15 ¶ 28. Expedia therefore continued to query the GDSs for information about The Mansion, only to
 16 receive reports that no rooms were available. *Id.* As soon as Expedia learned of the issue, it deactivated
 17 The Mansion and any other hotel that might have experienced a similar issue. Expedia marked as
 18 “inactive” any hotels that were both (a) formerly bookable through a global distribution system and (b)
 19 not bookable through any other provider. ECF 103-28 ¶¶ 2-5. Inactive hotels cannot appear on
 20 Expedia’s websites unless they revive their relationship with Expedia or a third party. Jolin Decl. ¶¶ 10,
 21 28-29. Expedia also stopped working with GDSs as a supply source for lodging properties altogether in
 22 2019. *Id.* ¶ 13. There can be no hotels similar to The Mansion because Expedia does not source hotels
 23 from a GDS. As a result, no evidence suggests that this error could occur again.

24
 25 _____
 26 ² Hotels use channel manager software to connect their internal reservation systems to the many third
 parties who sell rooms. *See* ECF 199-8 at 23; ECF 117-1 ¶ 4.

27 ³ Hotels use third-party electronic reservation networks known as “global distribution systems” to
 28 widely disseminate information to the online platforms where consumers search for and reserve rooms.
 ECF 117-1 ¶¶ 3, 5.

1 **2. Prospect Historic Hotel**

2 Prospect Historic Hotel first appeared on Expedia in 2016 because of its apparent relationship
3 with a destination management company.⁴ Puig Sainz Decl. ¶¶ 8-9. The destination management
4 company appears to have contracted in turn with a bed bank⁵ to distribute information about Prospect’s
5 rate and rooms. *Id.* The bed bank then contracted with Expedia and passed on Prospect’s data. *Id.* ¶ 9.
6 Expedia in fact facilitated one reservation at Prospect in 2016. ECF 145-1 ¶ 4. It was thus bookable and
7 not a class member.

8 Later, however, when Expedia attempted to complete bookings at Prospect, customers would
9 often receive an error message that resulted in a failed reservation attempt—apparently because of a
10 latency issue on the part of the bed bank. Puig Sainz Decl. ¶ 9. As a result of the high error rates,
11 Expedia discussed the issue with the bed bank and agreed that Expedia would stop offering availability
12 information until the technical issue was corrected. *Id.* ¶ 10. Expedia later completely shut off the
13 connection between the bed bank and Expedia for all properties potentially subject to the bed bank’s
14 latency issue. *Id.* ¶ 12. No evidence suggests any possibility that this problem will occur in the future,
15 and Expedia conducted an investigation that confirmed Prospect was the only U.S. property that
16 appeared on Expedia as unavailable as a result of this issue. *Id.* ¶ 13.

17 In addition to correcting the technical issue that caused unsuccessful bookings for Prospect,
18 Expedia maintains four proactive controls that work to prevent hotels from appearing as a result of
19 inaccurate or outdated information from bed banks. First, before Expedia partners with a bed bank, it
20 instructs its representatives to discuss the process for the bed bank to notify Expedia when a hotel ceases
21 its affiliation with the bed bank. Puig Sainz Decl. ¶ 5. Second, Expedia’s contracts with bed banks
22 require the bed banks to provide accurate information for all unbooked rooms. For example, Expedia’s
23 contract with HotelBeds (the entity that provided Expedia with rate and availability information for
24 Prospect) requires it to provide Expedia with “all active and valid inventory available and to operate in
25

26 ⁴ Destination management companies market properties to travel agents for events and tours. ECF 145-
27 13 ¶ 8.

28 ⁵ “Bed banks” contract with hotels to hold large numbers of rooms in reserve for resale. Puig Sainz
Decl. ¶ 2.

1 real time confirmation.” *Id.* ¶ 4, Ex. A. Third, Expedia requests that bed banks remove properties that
 2 terminate their affiliation with the bed bank from the feed they pass to Expedia. *Id.* ¶¶ 4-6, Exs. D & E.
 3 And fourth, Expedia uses technology that prevents hotels from appearing in search results when a bed
 4 bank removes the property from the same inventory feed. *Id.* ¶ 6.

5 **3. Shiloh Morning Inn**

6 Shiloh Morning Inn also appeared as a bookable property on Expedia’s websites and Expedia
 7 booked reservations at Shiloh. ECF 145-1 ¶¶ 2-3, Ex. A (ECF 145-2). It is clear that Shiloh contracted
 8 with some third parties, including BedandBreakfast.com and channel managers, but its owner could not
 9 explain what third-party relationships it had or when those relationships ended, if ever. *See* ECF 145-4
 10 at 106:13-16. In any event, no evidence shows that Shiloh could appear on Expedia’s websites again
 11 without its agreement, so no evidence shows that it was or is in the class.⁶

12 **4. Buckeye Tree Lodge**

13 Buckeye Tree Lodge, a property formerly owned by Plaintiff Buckeye LLC, appeared on
 14 Expedia as a result of a coding error that was corrected more than three years ago. Buckeye’s previous
 15 owner, Dennis Villavicencio, communicated with Expedia about joining in early 2015. Jolin Decl. ¶ 17,
 16 Ex. C. Although Mr. Villavicencio ultimately decided not to partner with Expedia, Buckeye was
 17 inadvertently marked as bookable before negotiations were complete, and this error caused Buckeye to
 18 appear in response to certain searches. *See id.* ¶ 19, Ex. D. Expedia took immediate steps to correct the
 19 coding error—for Buckeye, any similarly impacted hotels, and any future hotels—when it learned of this
 20 issue in August 2016. *See* ECF 145 at 5.

21
 22 ⁶ Despite the lack of evidence about what caused Shiloh to appear on Expedia’s sites, and even though
 23 there is no evidence that any hotels appeared on Expedia’s sites as a result of a connection with
 24 BedandBreakfast.com, Expedia has ensured that hotels with relationships to BedandBreakfast.com do
 25 not appear on its sites unless they can be booked. Expedia has partnered with BedandBreakfast.com
 26 since 2005. Hutchings Decl. ¶ 2. In the summer of 2018, Expedia migrated properties from the
 27 BedandBreakfast.com platform to the Expedia platform. *Id.* ¶ 3. For those properties that contracted
 28 directly with BedandBreakfast.com, Expedia sought to re-contract them directly. *Id.* ¶¶ 3-7. Some
 properties decided not to re-contract directly with Expedia. To ensure that those hotels were removed
 from the websites, Expedia first identified and deactivated hotels that had declined the migration, and
 second, it turned off BedandBreakfast.com as a provider so that no hotels can appear as a result of that
 connection. *Id.* ¶ 8. There is thus no evidence to suggest that any errors will occur in the future.

1 When Expedia corrected the coding error, it ensured that a hotel in negotiations cannot appear on
 2 Expedia until its agreement is finalized. Jolin Decl. ¶ 24. Negotiating properties are not set to
 3 “bookable” until they execute a partner agreement. *See id.* ¶¶ 8, 10, 24. Expedia also trains its market
 4 managers to mark hotels that do not sign a partner agreement as “unsuccessful” or “lost property.” *Id.*
 5 ¶ 11. This designation automatically prompts Expedia’s Lodging Data Management team to mark the
 6 property as “inactive,” a further protection. *Id.* Plaintiffs cite no evidence that a hotel has appeared on
 7 Expedia’s sites as a result of this error since it was corrected or that the error is likely to recur. It is not.

8 **5. Other Properties**

9 Plaintiffs claim to have identified *only 25 other hotels* out of the approximately 160,000
 10 properties listed on Expedia’s websites that supposedly fit the class definition. *See* ECF 202-20, 202-21,
 11 202-22. That is quite a shocking admission to make after so much discovery, so much litigation, so
 12 much time, and such great costs.⁷ But even those hotels are not members of the class. They either do
 13 not appear on Expedia’s websites or are actually capable of being booked on the websites (including
 14 through direct contracts with Expedia). *See* Graham Decl. ¶¶ 7-31. Almost 90% of the properties
 15 Plaintiffs identified are indeed bookable.⁸

16 In sum, no evidence shows that any hotels are members of the class the Court defined or that any
 17 errors that caused the named Plaintiffs to appear on Expedia’s sites will resurface. It is clear that if a
 18 problem did arise, Expedia has no interest in displaying unbookable hotels and ensures that would-be
 19 class member hotels do not appear on its websites.

20 **B. Expedia Prevents Google from Disseminating the Challenged Ads.**

21 Plaintiffs next argue that Expedia’s Google ads are false or misleading because they direct
 22 consumers toward Expedia’s websites for class member hotels even though Expedia cannot complete a
 23

24 ⁷ Then again, it matches other evidence in the record. Out of the approximately 160,000 U.S. hotels on
 25 Expedia, Goorbergh Decl. ¶ 2, there are only approximately 400 (0.25%) for which Expedia receives
 26 inventory information only through a bed bank, Puig Sainz Decl. ¶ 3, which is, as far as Expedia can
 27 determine, the only category of hotels raised by Plaintiffs that could theoretically include class members.
 No evidence shows that any of these properties actually are class members.

28 ⁸ Expedia has also proven that Plaintiffs’ list is unreliable before, and Plaintiffs have taken no efforts to
 provide additional or different evidence to the Court. *See* ECF 145-16.

1 reservation. *See* Mot. at 2-3.

2 Expedia ads do not appear in Google search results as Plaintiffs allege. Expedia purchases
 3 Google ads in two ways. First, Expedia uses Google’s automated Dynamic Search Ads program.
 4 Taylor Decl. ¶ 2; Grender-Jones Decl. ¶ 2. That program indexes Expedia’s websites and creates ads for
 5 hotels if it finds that Expedia offers reservations for the searched hotel. Taylor Decl. ¶ 3; Grender-Jones
 6 Decl. ¶ 3. After an automated bidding process, Expedia ads appear with Google search results. *Id.*
 7 Because class member hotels do not appear on Expedia’s websites, the automated Google process will
 8 not serve advertisements for a class-member hotel that is not capable of being booked on Expedia’s
 9 sites.⁹ Taylor Decl. ¶¶ 6-7; Grender-Jones Decl. ¶ 4. Three of the four Expedia sites at issue here
 10 (Expedia.com, Travelocity.com, and Orbitz.com) have gone further and block advertisements from
 11 appearing within search results created via Google’s automated Dynamic Search Ads program [REDACTED]
 12 [REDACTED] Taylor Decl. ¶ 7.

13 Second, Expedia uses Google’s exact match keywords bidding program. Taylor Decl. ¶ 2;
 14 Grender-Jones Decl. ¶ 2. Expedia provides Google with specific key words on which it would like to
 15 bid. Again, Expedia works to exclude properties that it ceases to work with or that are set to “inactive”
 16 status from the exact match keywords program. Taylor Decl. ¶¶ 7-8; Grender-Jones Decl. ¶ 6.

17 **C. Phone Numbers on Expedia Did Not and Do No Mislead Anyone.**

18 Plaintiffs also challenge previous versions of Expedia’s websites that showed Expedia phone
 19 numbers next to hotel listings.¹⁰ *See* Mot. at 2, 6. But as Plaintiffs acknowledge, Expedia’s operators
 20 said who was actually on the phone. *See id.* at 2.

21 Expedia no longer displays phone numbers as Plaintiffs allege. As part of a broader revamp of
 22 its websites in 2019, Expedia removed all phone numbers that previously appeared next to hotel listings
 23 on search results pages on Expedia.com, Travelocity.com, and Orbitz.com. On infosite pages on these
 24

25 _____
 26 ⁹ For this reason, it is no surprise that the hotel Plaintiffs’ survey experts used in their Google ads
 27 surveys, the Vendange Carmel Inn & Suites, *can* be booked on Expedia’s sites. *See* Dennis Rep. Att. D
 28 at 47, ECF 199-4; ECF 199-5 at 5; Wood Rep. Ex. A at 8, ECF 93-6.

¹⁰ Plaintiffs also claim that consumers who call Expedia are “pressured to book other hotels,” *see* Mot. at
 6, but they cite no evidence to support that assertion.

1 sites, one phone number is located next to the text: “Book online or call.” Crawford Decl. ¶ 10. Each
2 website uses one phone number for all hotels on the website (although the number is different on the
3 desktop site versus mobile site and different for hotel searches versus package searches). *Id.* When a
4 customer calls the phone number, a recorded message immediately identifies the website by saying “Hi,
5 welcome to Expedia.com,” “Thank you for calling Orbitz,” or “Thanks for calling Travelocity.” *Id.*

6 Hotels.com similarly changed the way it displays phone numbers as part of a 2019 website
7 redesign. Hotels.com uses only one phone number for all hotels in the search results page and one
8 phone number for all hotel infosite pages (with different numbers for desktop versus mobile sites and for
9 hotel searches versus package searches). Callers hear a recorded message that clearly identifies the line
10 as a Hotels.com number. Stevenson Decl. ¶ 9.

11 **D. Plaintiffs’ Bait-and-Switch Theory Is Fiction.**

12 As explained above, Plaintiffs have no evidence that they represent any class members. But
13 even if they could find a class to represent, the undisputed facts disprove their allegations of a bait-and-
14 switch scheme. Plaintiffs have litigated this case and now seek summary judgment on the premise that
15 this is a traditional case about false advertising and labeling. Their abstract theory is that consumers
16 searching for a room at a specific class member hotel for particular dates were misled by Expedia to
17 believe the hotel was unavailable for those dates, and immediately booked a different hotel available on
18 Expedia. Mot. at 3. The undisputed reality is far more complicated.

19 The online travel marketplace is highly competitive and varied, and a consumer’s path to a hotel
20 booking is not a simple process. *See* ECF 199-8. Online search resources have proliferated. *Id.* at 4.
21 Hotels offer rooms on their own websites and promote a variety of brands and loyalty programs. *See id.*
22 at 3, 25-29. Online travel agents such as Expedia.com and Hotels.com allow consumers to search for,
23 browse, and compare many hotels in addition to completing an actual booking. *See, e.g., id.* at 6-7.
24 Aggregators like Kayak collect information from many travel sites and often focus on price-comparison
25 shoppers. *See id.* at 5-6. Social media sites like TripAdvisor and Yelp offer reviews. *See id.* at 6.
26 Search engines like Google, in addition to displaying URLs, pictures, and maps in response to searches,
27 offer their own booking tools. *See id.* at 4-5. These resources are also interconnected. For example, in
28 response to a search for hotels, Google might offer links to multiple direct hotel websites, online travel

1 agents, and its own booking tools. *See id.* at 4-5.

2 Consumers typically consult many online resources during a search for a single hotel stay.
3 According to Google, travelers generally follow a five-stage process and visit 22 travel-related sites over
4 more than nine days on average. ECF199-8 at 7-8. Research by TripAdvisor shows that searches last
5 longer (typically more than four weeks) and begin with generic search terms before narrowing to a
6 middle phase that involves online travel agents and hotel-specific websites. *Id.* at 8. According to pre-
7 litigation research sponsored by Expedia, consumers spend up to 45 days and make up to 140 visits to
8 travel sites before making a particular hotel reservation. ECF 102-27 at 11-17.

9 Clickstream data shows that consumers' movements from search to booking vary significantly.
10 Some travelers do all of their research and booking on the hotel site itself, *see* ECF199-8 at 9, but most
11 move from one site to another and back again—for example from an online travel agency to an
12 aggregator, then back to the online travel agency, then finally to the hotel site. *Id.* According to data
13 collected from a random sample of 50,000 consumers, people who eventually book on an online travel
14 agent's site have also visited direct hotel sites more than three times, completed more than four web
15 searches, visited TripAdvisor more than twice, and visited an aggregator more than twice before making
16 a booking. *Id.* at 11. These figures are similar for those who book directly on the hotel site. *See id.*
17 Even after a booking is complete, cancellations approach 40 percent. *See id.* at 12. Most of those who
18 rebook after a cancellation visit both an online travel agent and a direct hotel site, which suggests that
19 they were undecided or are hunting for a better deal. *See id.* at 12-13.

20 Travelers visit online travel agents like Expedia throughout their searches, but these sites are
21 most heavily consulted in the middle stages and focus on research and comparisons. *See* ECF102-27 at
22 12-13, 15-16. Notably, fewer than 2% of visitors who clicked on a hotel search result for a specific
23 property on Expedia did so after searching for a specific hotel. ECF199-8 at 13-14. Even the tiny
24 fraction of consumers who search for a specific hotel appear mostly undecided. Almost half of these
25 consumers search for *another* hotel by name, and the vast majority view multiple hotels. *See id.* at 14-
26 16. In order for Plaintiffs' theory of liability to bear out, a consumer must have gone to Expedia
27 knowing about and wanting to stay at a specific hotel on particular dates, looked for that hotel on
28 Expedia for those dates, saw unavailability messaging, believed that the messaging meant the hotel was

1 completely sold out, did not consult and used no other resources to check availability for that chosen
 2 hotel, booked another hotel offered by Expedia for the desired dates, and did not cancel that reservation
 3 later after obtaining additional information. *Id.* at 2. That scenario is exceedingly rare. *Id.*

4 Because websites like Expedia feature prominently in the research phase of a typical consumer's
 5 search, hotels actually see a boost in business merely by appearing on an online travel agent's website.
 6 *See* ECF199-8 at 21-22. About 10% of the people who ultimately book on a hotel's direct website
 7 discovered the hotel only by conducting research on an online travel agent. *Id.* at 22. This is known as
 8 the "billboard effect" and has been shown to lead to a 7.5% to 26% increase in additional reservations.
 9 *Id.* at 21. In effect, hotels use online travel agents as marketing tools. *Id.* at 30.

10 Hotels, like consumers, use many tools to manage their bookings. For example, because
 11 different customers find and purchase accommodations differently, hotels may use a channel manager to
 12 offer different rates to different parties. *See id.* at 23. Hotels can also maximize revenues by changing
 13 the number of rooms they offer to online travel agents. When demand is high, for example, a hotel
 14 might withhold rooms from Expedia to save on commissions. *See id.* at 25.

15 With this context in mind, it is clear why the "advertisements" here would make for an utterly
 16 ineffective "scheme." For example, because unavailable hotels do not appear at the top of the list of
 17 search results in response to the most common searches, consumers are unlikely to see unavailability
 18 messaging, and they will see any unavailability messaging only after scrolling past alternatives. *Id.* at
 19 17. Only the tiny fraction of consumers who come to Expedia's sites with a specific hotel in mind and
 20 search for that hotel by name will see an unavailability message at the top of the search results next to
 21 the searched-for hotel (if that hotel has no availability on Expedia); and as described above, many of
 22 these people also appear undecided.¹¹ Nothing prevents consumers who see an unavailability message
 23 from checking one of the many other websites they visited—or the hotel's own website—for an
 24 available room. Nor does Expedia buy Google ads for would-be class member hotels. As explained

25 _____
 26 ¹¹ From the Expedia.com homepage, only █████ of visits involve a hotel name search for a specific
 27 property. Crawford Decl. ¶ 3. For Orbitz.com and Travelocity.com, the percentages are █████ and █████
 28 █████, respectively. *Id.* For Hotels.com, the percentage is █████. Stevenson Decl. ¶ 4. These figures
 include visits where consumers made multiple hotel name searches for specific hotels. Crawford Decl. ¶
 3, Stevenson Decl. ¶4.

1 above, the ads it does buy are either (1) generated with an automated process that creates ads only for
 2 hotels that appear in Expedia search results or (2) specific to properties that Expedia can book. Expedia
 3 also makes clear to people who call that they are not speaking directly with a hotel.

4 LEGAL STANDARDS

5 “The court shall grant summary judgment if the movant shows that there is no genuine dispute as
 6 to any material fact” and “the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).
 7 “Only disputes over facts that might affect the outcome of the suit under the governing law will properly
 8 preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

9 The party moving for summary judgment bears the initial burden of explaining the basis for its
 10 motion and identifying those portions of the record that demonstrate the absence of a genuine issue of
 11 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party would bear the
 12 burden of proof at trial, as Plaintiffs do here, “it must demonstrate that no reasonable trier of fact could
 13 find other than for the moving party.” *Apple Inc. v. Amazon.com Inc.*, 915 F. Supp. 2d 1084, 1086 (N.D.
 14 Cal. 2013). But if the moving party does not bear the burden of proof at trial, as is true of Expedia, then
 15 it may carry its initial burden by pointing out that no evidence supports the other party’s claims. *Id.* The
 16 non-moving party then bears the burden to identify a disputed material fact, citing *specific evidence in*
 17 *the record*. See *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 248.

18 These same rules govern simultaneous cross-motions for summary judgment. See *Fair Hous.*
 19 *Council of Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132, 1135-37 (9th Cir. 2001). The filing of
 20 cross-motions does not establish an absence of disputed facts. *Id.* at 1136. Each motion must “be
 21 evaluated in accordance with the claim or defense which is the subject of the motion and in accordance
 22 with the burden of proof allocated to each party.” *Regents of Univ. of Cal. v. Micro Therapeutics, Inc.*,
 23 507 F. Supp. 2d 1074, 1078 (N.D. Cal. 2007).¹²

24
 25 ¹² Nor does Rule 56 make exceptions for bench trials. Recognizing the weakness of their record,
 26 Plaintiffs suggest the opposite. See Mot. at 4-5, 11. But in a decision Plaintiffs cite, the Ninth Circuit
 27 emphasized that summary judgment is improper “unless it is clear that more complete factual
 28 development could not possibly alter the outcome and that the credibility of the witnesses’ statements or
 testimony is not at issue.” *TransWorld Airlines, Inc. v. Am. Coupon Exch., Inc.*, 913 F.2d 676, 684-85
 (9th Cir. 1990).

ARGUMENT

The undisputed facts summarized above demonstrate Plaintiffs lack standing to pursue an injunction, cannot prove that Expedia violated the Lanham Act, and are not entitled to an injunction.

I. Plaintiffs Cannot Establish a Live Dispute Between Expedia and the Class.

Although a defendant cannot rob a court of jurisdiction by “picking off” plaintiffs, *see, e.g., Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1143 (9th Cir. 2016), class plaintiffs must still establish the court’s jurisdiction, *see, e.g., Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999). At least one identifiable member of the class must have standing to sue. *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc). If not, there is no “Article III controversy” between the defendant and the class. *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1090 (9th Cir. 2011). Because standing is a jurisdictional requirement, it “may be raised at any time during the proceedings,” including at summary judgment. *See Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013) (vacating order resolving cross-motions for summary judgment due to lack of standing).

A plaintiff class must meet three requirements to have standing to pursue a claim for prospective injunctive relief. First, at least one class member must have suffered or be threatened with a “concrete and particularized’ legal harm.” *Bates*, 511 F.3d at 985 (citation omitted). Second, there must be “a sufficient likelihood that [this person] will again be wronged in a similar way.” *Id.* (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)). “[P]ast wrongs” do not alone suffice to show this “sufficient likelihood.” *Id.* (citation omitted). The Supreme Court has “repeatedly reiterated that ‘threatened injury must be *certainly impending* to constitute injury in fact,’ and that ‘[a]llegations of *possible* future injury’ are not sufficient.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013) (citations omitted). And third, “the claimed threat of injury must be likely to be redressed by the prospective injunctive relief.” *Bates*, 511 F.3d at 985.

A claim is also moot when “events make it ‘absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.’” *Akina v. Hawaii*, 835 F.3d 1003, 1010 (9th Cir. 2016) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2000)). For example, in *Mutual Pharmaceutical Co. v. Ivax Pharmaceuticals, Inc.*, the court declined in part to award a preliminary injunction because “[t]he substance of [the] false advertising claim” had been

1 “rendered moot by the defendants’ subsequent act of removing the offending material from their web
2 sites.” 459 F. Supp. 2d 925, 944 (C.D. Cal. 2006); *see also WeWork Cos. v. WePlus (Shanghai) Tech.*
3 *Co.*, 2020 WL 83845, at *3-5 (N.D. Cal. Jan. 7, 2020) (dismissing trademark claim because the
4 defendant’s voluntary actions had mooted the dispute).

5 Here, the named Plaintiffs have failed to identify any class member with a live claim for
6 injunctive relief, even among their own ranks. *See supra* Background II.A. Buckeye LLC does not
7 even own Buckeye Tree Lodge, and thus lacks standing independently of the fact that the error that
8 caused it to appear on Expedia’s sites has long been resolved. *See* ECF 145 at 23. Nor would the
9 injunctive relief Plaintiffs seek even redress their claims for any of the three practices they challenge.
10 Expedia has resolved any errors that could theoretically cause class member hotels to appear on its
11 websites and has proactive measures in place to prevent future errors, including for those properties
12 Plaintiffs identify. *See supra* Background II.A, Graham Decl. ¶¶ 3-27. Expedia does not purchase
13 Google ads for class member hotels that are unbookable. *See supra* Background II.B. The challenged
14 phone numbers do not appear on three of the challenged websites, and Expedia informs all callers that
15 they have called Expedia. *See supra* Background II.C. These undisputed facts show that no future harm
16 is “certainly impending,” if possible at all.¹³ *Clapper*, 568 U.S. at 409 (emphasis omitted) (quoting
17 *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). An injunction would not redress any harm or resolve
18 any live dispute. For all these reasons, Plaintiffs lack standing and cannot pursue their claim as a matter
19 of law.¹⁴

20
21 ¹³ Plaintiffs’ citations do not show otherwise. *See* Mot. at 12. In most of the cited cases, the defendants
22 did not even appear and thus could not have shown that the alleged wrongdoing had ceased. *See*
23 *Chanel, Inc. v. Puka Creations, LLC*, 2015 WL 3649016, at *5 (C.D. Cal. June 11, 2015); *Otter Prods.,*
24 *LLC v. Berrios*, 2013 WL 5575070, at *12 (C.D. Cal. Oct. 10, 2013); *Wecosign, Inc. v. IFG Holdings,*
25 *Inc.*, 845 F. Supp. 2d 1072, 1076 (C.D. Cal. 2012); *see also Yash Raj Films (USA), Inc. v. Sidhu*, 2010
26 WL 1032792, at *7 (E.D. Cal. Mar. 19, 2010) (mentioning the standard for mootness in passing without
27 analysis). In the others, the plaintiffs had actually established that they stood to lose business or that the
28 challenged practice was ongoing. *See, e.g., Stuhlberg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d
832, 841 (9th Cir. 2001).

¹⁴ In the alternative, the Court should decertify the class because it does not satisfy the numerosity,
typicality, and adequacy requirements of Rule 23(a) and because Expedia has not acted or refused to act
on grounds that apply generally to the class, as required by Rule 23(b)(2); *see also* Rule 23(c)(1)(C)
 (“An order that grants or denies class certification may be altered or amended before final judgment.”);

1 **II. Defendants, Not Plaintiffs, Are Entitled to Summary Judgment.**

2 Even if Plaintiffs could prove the class has standing to pursue injunctive relief, Defendants
3 would nonetheless be entitled to summary judgment. Plaintiffs have not cited evidence that could
4 establish a claim for false advertising under the Lanham Act. To prevail, they must prove, among other
5 elements, that (1) Defendants made a false statement of fact in a commercial advertisement about their
6 own or another's product; (2) the statement actually deceived or has the tendency to deceive a
7 substantial segment of its audience; and (3) the deception is material in that it is likely to influence the
8 purchasing decision.¹⁵ See *Rice*, 330 F.3d at 1180; ECF 164 at 5. Plaintiffs cannot establish these
9 required elements.

10 **A. Expedia's Statements Were Neither False Nor Misleading.**

11 A statement is "false" under the terms of the Lanham Act if it was literally false or if it was true
12 but likely to mislead. *Zeltiq Aesthetics, Inc. v. BTL Indus., Inc.*, 32 F. Supp. 3d 1088, 1100 (N.D. Cal.
13 2014). None of the challenged statements here were false or misleading.

14 **1. The Statements Were Not Literally False.**

15 A statement is literally false if it is either false on its face or false by necessary implication.
16 *Kwan Software Eng'g, Inc. v. Foray Techs., LLC*, 2014 WL 572290, at *5 (N.D. Cal. Feb. 11, 2014).
17 "The standard for proving literal falsity is rigorous." *Id.* "To be 'literally false,' the statement must be
18 unambiguously false." *Id.* (citations omitted). The court evaluates the supposedly false statements "in
19 their full context." *Id.* The same standards apply to claims of falsehood by necessary implication—the
20 implication must truly be "necessary." See, e.g., *Pamlab, LLC v. Macoven Pharm., LLC.*, 881 F. Supp.
21 2d 470, 476 (S.D.N.Y. 2012) ("[A]n advertisement is literally false by necessary implication, when,
22 considering the advertisement in its full context, the relevant audience would recognize the false implied
23 claim as easily as if it had been stated explicitly.").

24
25 _____
26 *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009) ("A district court may decertify a
class at any time.").

27 ¹⁵ Defendants do not dispute that the alleged advertisements entered interstate commerce. Nor do
28 Defendants move for summary judgment on the basis of Plaintiffs' failure to prove injury. See
Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1145-46 (9th Cir. 1997).

1 Plaintiffs make no attempt to prove that the phone numbers or Google ads are “literally false.”
 2 Nor can they. As discussed above, there is no evidence that any class member hotels are appearing in
 3 Google ads or that any consumers are being misled by the remaining phone numbers. The unavailability
 4 messaging is also true because no rooms are available on Expedia’s sites. Many of the disputed
 5 messages even refer to the Expedia site by name. *See, e.g.*, ECF 202-23 at 5 (“Your dates are popular!
 6 Rooms are unavailable for your trip dates on [website]. Try new dates to check availability.” “This
 7 property has no availability for your travel dates on [website].”); ECF 202-24 at 5 (“[Hotel name] has no
 8 availability for your travel dates on Hotels.com.”).

9 Another California court considered a similar situation and reached the same conclusion. In
 10 *Stiles v. Wal-Mart Stores, Inc.*, Wal-Mart had terminated its supplier relationship with the plaintiff, but it
 11 still displayed the plaintiff’s razors—marked “out of stock”—next to competitors’ razors on
 12 walmart.com. 2015 WL 5173060, at *3-4 (E.D. Cal. Sept. 2, 2015), *report and recommendation*
 13 *adopted*, 2016 WL 696602 (E.D. Cal. Feb. 22, 2016). The court held that “out of stock” described the
 14 situation truthfully and dismissed the claim.¹⁶ *Id.*

15 Plaintiffs cannot establish that Expedia’s statements are literally false by making arguments
 16 about “innuendo, indirect intimations, and ambiguous suggestions.”¹⁷ Mot. at 6 (quoting *William H.*
 17 *Morris Co. v. Grp. W, Inc.*, 66 F.3d 255, 257-58 (9th Cir. 1995) (per curiam)). Ambiguities preclude a
 18 finding of literal falsehood. *See, e.g., Zeltiq*, 32 F. Supp. 3d at 1100; *Kwan*, 2014 WL 572290 at *5. In
 19 *Zeltiq*, for example, the defendant had received FDA approval for a device that relieved pain and
 20 reduced spasms by heating a consumer’s muscles, but its advertisements suggested that the device could
 21 also reduce fat. 32 F. Supp. 3d at 1101. The plaintiffs argued that this claim necessarily implied that the
 22 device was also FDA approved to reduce fat. *See id.* The court disagreed and held the claim of FDA
 23

24 _____
 25 ¹⁶ The court also dismissed the plaintiff’s claim that the statement was true but misleading. *See id.*
 Plaintiffs’ analogous claim here is discussed separately below. *See infra* Argument II.A.2.

26 ¹⁷ Nor should the Court credit Plaintiffs’ citation of *Rolex Watch U.S.A., Inc. v. Agarwal*, 2012 WL
 27 12886444 (C.D. Cal. Dec. 17, 2012). *See* Mot. at 6. In that case the court was considering only whether
 28 a claim of trademark infringement sounded in fraud for purposes of Rule 9(b). *See* 2012 WL 12886444
 at *3.

1 approval was literally true.¹⁸ *Id.*

2 In a tacit admission of the weakness of their claim, Plaintiffs advance a different theory about
 3 why the unavailability messages are false. They argue that the messages “falsely suggest[] that Expedia
 4 has a right to market rooms” at class member hotels. Mot. at 6. But by claiming that the messaging
 5 only “suggests” a conclusion, they concede that it is not literally false. *See Kwan*, 2014 WL 572290 at
 6 *5 (“To be ‘literally false’ the statement must be unambiguously false.”) (citations omitted). Nor does
 7 the Lanham Act require Expedia to spell out its business relationships. *See, e.g., Zeltiq*, 32 F. Supp. 3d
 8 at 1101 (rejecting argument that the Lanham Act required the defendants to affirmatively disabuse
 9 consumers of any incorrect understanding). And in any event, as discussed below, Expedia’s business
 10 relationships and marketing rights are not material to a consumers’ decision. *See infra* Argument II.A.2.

11 **2. The Statements Were Not Misleading.**

12 If a statement is not literally false, but is alleged to be “misleading in context,” the plaintiff must
 13 prove “that the advertising actually conveyed the implied message.” *Morris*, 66 F.3d at 258. It is not
 14 enough if a statement is merely “susceptible to misunderstanding”; such a standard “would make
 15 consumers as a whole worse off by suppressing truthful statements.” *Mead Johnson & Co. v. Abbott*
 16 *Labs.*, 201 F.3d 883, 886 (7th Cir. 2000). A plaintiff thus cannot prevail with anecdotes about a few
 17 people who claim to have been misled. *See Morris*, 66 F.3d at 258.

18 Here, Plaintiffs first cite vague secondhand accounts about how a few unnamed consumers were
 19 misled. *See* Mot. at 3 (citing French Decl. Exs. 5 & 15, deposition testimony about what unknown
 20 people said were their reasons for not booking travel); *id.* at 3 (citing French Decl. Exs. 20-21,
 21 declarations summarizing paralegals’ phone calls with hotel managers and repeating hearsay accounts
 22 about affiliations with Expedia and availability).¹⁹ Such inadmissible hearsay cannot support summary
 23

24 ¹⁸ The *Zeltiq* court also declined to grant an injunction based on the claim the statement was true but
 25 misleading. *See id.* at 1101, 1105. The analogous claim here is discussed below. *See infra* Argument
 II.A.2.

26 ¹⁹ Plaintiffs neglect to mention that at least two named Plaintiffs testified that consumers saw the
 27 unavailability messages on the websites and then made direct bookings with the hotels: “We have had
 28 several guests this week who looked us up on the OTAs and called us (they are the smart ones) to see if
 we did or did not have availability which we did! And they booked direct.” Oatis Decl. Ex. A,

1 judgment. *See, e.g., Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002); *Burch v. Regents*
 2 *of Univ. of Cal.*, 433 F. Supp. 2d 1110, 1121 (E.D. Cal. 2006). But even if these statements were
 3 admissible, they would not establish a Lanham Act violation. *See, e.g., Morris*, 66 F.3d at 258 (holding
 4 that the testimony of a few consumers and claims about “several” others were not enough to show that
 5 the challenged statements were misleading).

6 The only other evidence Plaintiffs offer is a collection of irrelevant and misleading consumer
 7 surveys. The surveys do not address the phone numbers at all, and they cannot prove that the Google
 8 ads altered any consumers’ purchasing decisions—as they asked only whether participants “would click
 9 on the [ads] to *check availability* at [the] hotel,” not to book at them. ECF 199-4 at 53 (emphasis
 10 added); *see also* ECF 199 at 7-8. Moreover, the survey questions about Google ads lacked any controls,
 11 so they cannot separate the effects of the challenged advertising from background noise. *See* ECF 199 at
 12 14-15.

13 This leaves the unavailability messages. Plaintiffs rely first on a set of surveys conducted by
 14 Leonard Wood. *See* Mot. at 8-9. That reliance is misplaced. The Court has recognized that Mr.
 15 Wood’s surveys suffer from “some real problems,” ECF 123 at 4:13-15, and Plaintiffs abandoned Mr.
 16 Wood’s report completely in their renewed motion for class certification, only to later commission more
 17 surveys by a new expert, *see* ECF 126-1; ECF 199-4. Their decision to abandon Mr. Wood’s surveys
 18 was justified: he asked no questions about two of the Expedia websites at issue (Travelocity.com and
 19 Orbitz.com), and the questions he did ask were, as he explicitly acknowledged in deposition, not even
 20 designed to test whether messages on Expedia’s websites were misleading. *See* ECF 199-2 at 251:24-
 21 252:22. And because he used no controls, Mr. Wood’s surveys cannot prove cause and effect. *See* ECF
 22 103-2 ¶¶ 18-2.²⁰

23
 24 Wickman Dep. 179:6-180:9; *see also* Oatis Decl. Ex. B, Villavicencio Dep. at 173:22-174:1 (similarly
 25 describing a customer who booked directly at Buckeye after purportedly seeing it listed as unavailable
 26 on Hotels.com). This testimony reflects the complexities of the online travel environment that defeat
 27 Plaintiffs’ simplistic story of false advertising and also evidences the “billboard effect,” described *supra*
 28 at 5.

²⁰ Many of the defects in Mr. Wood’s surveys were repeated in a second set of surveys conducted by Dr.
 J. Michael Dennis. Expedia addressed these problems in its motion to exclude Dr. Dennis’s surveys

1 The replacement surveys conducted by Dr. J. Michael Dennis are no more capable of proving
 2 Plaintiffs' case, as discussed in Expedia's motion to exclude his opinions. *See* ECF 199. First, the
 3 surveys are irrelevant. Like Mr. Wood, Dr. Dennis performed no tests for Travelocity and Orbitz. Nor
 4 did Dr. Dennis test the relevant question: whether consumers understood the unavailability messages to
 5 mean (1) that a hotel was sold out everywhere or (2) that Expedia's website had no rooms. Instead he
 6 tested respondents' understanding of the business relationships between Expedia's websites and the
 7 hotels. *See* ECF 199 at 6-7. Second, Dr. Dennis did not use reliable science to form his opinions:

- 8 • His surveys did not approximate the environment in which consumers would have encountered
 9 the disputed messages in the real world. For example, he asked respondents to suppose that they
 10 had searched by region and date, but then he put the "unavailable" hotel at the top of the search
 11 results, which is not how Expedia's sites behave. He also used static, cropped, and altered
 12 screenshots of Expedia's websites that often divorced the key language from even the minimal
 13 context he provided elsewhere. *See id.* at 9-12.
- 14 • He used closed-end, leading, confusing questions to nudge survey participants toward the
 15 answers most favorable to Plaintiffs' case. *See id.* at 12-13. For example, he gave participants
 16 what amounted to a false choice between (1) a simple answer Plaintiffs would prefer ("There are
 17

18 under Rule 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). *See* ECF 199. The
 19 Court should exclude Mr. Wood's surveys for the same reasons. *See* ECF 102-25 at 14-15, 19-21.

20 Plaintiffs' attempts to rehabilitate Mr. Wood's opinions only highlight his errors. They first claim
 21 Expedia's consumer survey expert, Dr. Jerry Wind, admitted Mr. Wood's surveys actually did include
 22 controls. *See* Mot. at 8. Not so—Dr. Wind testified unambiguously in his deposition, as he wrote in his
 23 report, that Mr. Wood's surveys were fatally flawed because they lacked controls. *See, e.g.*, ECF 202-
 24 27 at 44:10-45:1; ECF 103-2 ¶¶ 18-21. Plaintiffs also misleadingly suggest that Dr. Wind testified Mr.
 25 Wood's small sample size was common. *See id.* Dr. Wind said the opposite—that Mr. Wood's sample
 26 was "relatively small" and that "in today's environment . . . you typically have larger panels." ECF 202-
 27 27 at 72:13-17. Plaintiffs next argue that there were no "computer-generated answers" in Mr. Wood's
 28 surveys. *See* Mot. at 8. His surveys would remain incapable of supporting Plaintiffs' case whether
 completed by a computer or a person. Plaintiffs conclude their defense of Mr. Wood's surveys by
 suggesting Expedia's management and economics expert, Dr. Lorin Hitt, agreed the unavailability
 messages were inaccurate or caused confusion. *See id.* Again, this claim is incorrect. Dr. Hitt testified
 that confusion was an "empirical question" that could be answered only with appropriate controls and a
 realistic survey environment, which Mr. Wood's surveys lack. *See* ECF 202-28 at 63:13-64:1, 265:5-
 266:7.

1 no rooms available because the hotel does not have availability.”) and (2) a complicated and
 2 unlikely answer Plaintiffs would disfavor (“There are no rooms available at the travel website
 3 because the travel website does not have a business relationship with the hotel.”). *See id.* at 13.

- 4 • He restricted his sample to people who made a purchase rather than consumers who simply used
 5 Expedia’s websites, which skewed the sample in Plaintiffs’ favor. *See id.*

6 Plaintiffs’ primary defense of Dr. Dennis’s surveys is to argue that Expedia should have
 7 conducted its own surveys.²¹ *See Mot.* at 9. That is not Expedia’s case to prove, so Plaintiffs cannot
 8 prevail at summary judgment. *See, e.g., Kwan*, 2014 WL 572290 at *5, 14 (granting summary judgment
 9 on false advertising claims because plaintiffs’ survey was not relevant and reliable); *Apple*, 915 F. Supp.
 10 2d at 1090-91 (granting summary judgment on false advertising claim where defendant “point[ed] out to
 11 the court that there is an absence of evidence” supporting plaintiff’s claim of deception); *Am.*
 12 *Infrastructure v. Zachary Constr. Corp.*, 2010 WL 5464765, at *14-15 (E.D. Pa. Dec. 28, 2010)
 13 (granting summary judgment on Lanham Act claim even though the plaintiff had “point[ed] out that
 14 Defendants did not conduct surveys,” as “it is [the plaintiff’s] burden to set forth sufficient evidence”).

15 Plaintiffs’ remaining arguments do not remedy these failures. They first suggest that “last room
 16 available” clauses in Expedia’s contracts support their claim that consumers were misled by the
 17 unavailability messages. *See Mot.* at 7. But they cite no evidence that any consumers are even aware of
 18 these clauses. Nor are contracting hotels members of the class. Next they argue courts have “regularly”
 19 held it is “injurious” to claim a rival is “out of business or out of goods.” *Mot.* at 7-8. The decisions
 20 they cite do not support that claim. *See Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 865 (9th
 21 Cir. 2017) (upholding an injunction in a copyright case based on a declaration stating that the infringing
 22 conduct had undermined licensing negotiations and reduced goodwill); *AMC Tech., LLC v. Cisco Sys.,*
 23 *Inc.*, 2012 WL 174949, at *8 (N.D. Cal. Jan. 20, 2012) (holding that wrongly blaming software failures
 24 on a competitor would support a claim of commercial disparagement under California law).

25 For all these reasons, Plaintiffs have not established that any of the three types of challenged
 26

27 ²¹ Plaintiffs also append a citation to several pages from Dr. Wind’s deposition and claim that they
 28 contain “examples of Dr. Wind’s failure to account for discrepancies in his opinions.” *See Mot.* at 9
 But no discrepancies are apparent in the cited passages. *See ECF No.* 201-32.

1 statements are false under the Lanham Act.

2 **B. Only a Small Fraction of Consumers Could Have Been Misled as Plaintiffs Suggest.**

3 A plaintiff advancing a claim under the Lanham Act must also show that the allegedly false
4 statements actually deceived or tended to deceive a “significant portion,” *Morris*, 66 F.3d at 258, or
5 “substantial segment” of their audience, *Rice*, 330 F.3d at 1180 (quoting *Cook, Perkiss & Liehe, Inc. v.*
6 *N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 244 (9th Cir. 1990) (per curiam)).

7 Plaintiffs point to no evidence that *any* portion of consumers saw or was influenced by the
8 challenged phone numbers. As for the Google ads, only the surveys purport to show how many
9 consumers were misled. But those surveys (in addition to other defects) include no controls, so they
10 cannot show that the ads caused consumers to believe or do anything. *See supra* Argument II.A.2.

11 The same is true of the unavailability messages. It is undisputed that consumers commonly visit
12 Expedia’s websites during the early part of their search when researching and considering options. *See,*
13 *e.g.*, ECF102-27 at 12-13, 15-16; ECF199-8 at 11-13. More than 98.5% of visitors who view a specific
14 hotel on Expedia’s sites have not searched specifically for that property, and the few who search for a
15 specific hotel also search for *other* hotels by name. ECF199-8 at 13-16. Only about 0.01% visit an
16 online travel agent with a specific hotel in mind and then book that hotel on the site. *Id.* at 22. Even
17 these users, faced with unavailability messaging, are unlikely to believe no rooms are available, as it is
18 undisputed consumers consult many online resources. *Id.* at 3-6, 11-13; ECF102-27 at 11-17.

19 Plaintiffs theorize, however, in contradiction of these undisputed facts, that people who already
20 knew where they wanted to stay looked for availability for that hotel on Expedia for specific dates, saw
21 unavailability messaging on Expedia, believed that the messaging meant the hotel was completely sold
22 out, did not consult and were not exposed to any other resources to check availability for that chosen
23 hotel, booked another hotel offered by Expedia for the desired dates, and did not cancel that reservation
24 later after obtaining more information. Only a vanishingly small percentage of people *might* fit that fact
25 pattern. *See* ECF199-8 at 2. Plaintiffs therefore have not established—and cannot establish—that the
26 unavailability messaging, when shown for a hotel that cannot be booked on Expedia, will mislead a
27 “significant” or “substantial” portion of consumers. *See, e.g., Morris*, 66 F.3d at 258 (stating that 3%,
28 7.5%, and 10% were not a “significant portion”).

1 **C. The Statements Are Not Material to a Consumer’s Booking Decision.**

2 To prevail in a claim under the Lanham Act, a plaintiff must also prove that the alleged
3 deception was “material, in that it is likely to influence the purchasing decision.” *Rice*, 330 F.3d at 1180
4 (quoting *Cook*, 911 F.2d at 244).

5 Plaintiffs present no evidence that the phone numbers were material to any consumer’s
6 purchasing decision. Undisputed facts also show that the unavailability statements and Google ads are
7 unlikely to have influenced a consumer’s purchasing decisions. Consumers consult many online
8 resources for many days or weeks and consider many factors in a complex and competitive environment.
9 *See, e.g.*, ECF199-8 at 7-13; ECF102-27 at 11-13. Consumers also see Google’s own booking tools and
10 links to a hotel’s own website in search results. ECF199-8 at 4-5.

11 Plaintiffs’ surveys do not even attempt to show materiality.²² Mr. Wood’s surveys fall short
12 because they showed only whether consumers “would look at other hotels” when they saw the
13 unavailability messages, not “book at another hotel,” *see* ECF 199-2 at 88:5-16, and because they do
14 not use controls, *see* ECF 103-2 ¶¶ 18-21. Dr. Dennis’s surveys cannot prove materiality because, like
15 Mr. Wood, he asked only whether consumers were likely to *look* at another hotel, not *book* another
16 hotel, as he acknowledged in deposition. *See* ECF 199 at 7; Dennis Dep. (ECF 197-2) at 169:17-25 (“Q.
17 . . . You were just asking, for purposes of what you call materiality, if respondents would look at the
18 alternative hotels; correct? A. That’s right. I talk about the looking that’s right. Q. And you never asked
19 any questions that went to whether or not they would book an alternative hotel, did you? A. No, this is
20 my survey right here.”). That conclusion adds nothing—consumers commonly look at many hotels.
21 ECF199-8 at 14-15.

22 The surveys also ignore the market realities described above. If a consumer clicked on one of
23 the challenged Google ads or saw an unavailability message, nothing would prevent the consumer from
24 consulting one of the many other available resources to check whether a room was available. *See Caltex*
25 *Plastics, Inc. v. Elkay Plastics Co.*, 2015 WL 13283255, at *7 (C.D. Cal. Feb. 4, 2015), *aff’d*, 671 F.

26 _____
27 ²² Plaintiffs do not even cite these surveys in their motion. Instead they cite the report of an expert they
28 engaged to offer opinions about their now-defunct disgorgement claims. *See* Mot. at 10 (citing French
Decl. Ex. 29 (Nelson Rep.) ¶¶ 26, 31, 32).

1 App'x 538 (9th Cir. 2016) (rejecting a false advertising claim because consumers could check other
2 sources to confirm the product was “qualified” as represented, among other reasons).

3 In apparent recognition of these evidentiary gaps, Plaintiffs advance the alternative theory that
4 Expedia “falsely suggests that [it] has a right to market rooms for the unaffiliated hotels, when Expedia
5 has no such right.” Mot. at 6. Statements about Expedia’s “rights” are not material because a
6 consumer’s misunderstanding of those rights is not “likely to influence the purchasing decision.” *Rice*,
7 330 F.3d at 1180 (quoting *Cook*, 911 F.2d at 244). A consumer who believes incorrectly that Expedia
8 *can* facilitate a booking at a class-member hotel is not more likely to book a *different* hotel on Expedia’s
9 websites as a result of that mistaken belief. Nor is it logical to conclude that just because a consumer
10 believes Expedia *can* complete a reservation that he or she will interpret “sold-out” to mean that *all* of
11 the hotels’ rooms are sold out *everywhere*.

12 In reality, Plaintiffs’ alternative theory is a request for free advertising. Plaintiffs ask Expedia to
13 inform consumers it is “not permitted to book rooms at [a] hotel and [has] no information regarding
14 availability.” See ECF 199-4 ¶ 22; see also Dennis Dep. (ECF 197-2) at 179:5-6 (“[T]his is my
15 understanding of what the plaintiffs’ belief should have been on the website.”). That is, they contend
16 that Expedia should list hotels on its websites despite knowing it cannot facilitate reservations—and then
17 send interested consumers on their way to another website, presumably to the Plaintiffs’ own websites.
18 Nothing in the Lanham Act supports this contention.

19 **D. The Court Should Deny Plaintiffs’ Motion No Matter How It Resolves Expedia’s**
20 **Motion.**

21 Because Plaintiffs lack evidence to support these three essential elements of their claim, the
22 Court should grant Expedia’s motion for summary judgment. If it does not, however, the Court should
23 deny Plaintiffs’ motion. The evidence above shows at minimum that material facts necessary to support
24 Plaintiffs’ motion are disputed, including, for example, how the context and market environment
25 affected consumers’ decisions, whether consumers were actually misled, how many consumers were
26 misled, and the effect of the market environment on the materiality of the allegedly false statements.
27 See, e.g., *Caltex Plastics*, 2015 WL 13283255 at *7 (considering consumers’ knowledge and ability to
28 test the allegedly false claims); *Kwan*, 2014 WL 572290 at *5 (stating that falsity is a factual question).

1 In addition, if Expedia is not granted summary judgment, and if Plaintiffs' consumer surveys are not
2 excluded, those surveys must be tested at trial. *See, e.g., In re: Autozone, Inc.*, 2016 WL 4208200, at
3 *16 (N.D. Cal. Aug. 10, 2016), *aff'd*, 789 F. App'x 9 (9th Cir. 2019).

4 **III. Plaintiffs Are Not Entitled to a Permanent Injunction.**

5 Even if an identifiable member of the class had standing, and even if Plaintiffs could prove the
6 elements of a Lanham Act claim, they would still need to show that they are entitled to a permanent
7 injunction. *See Westinghouse Elec. Corp. v. Gen. Circuit Breaker & Elec. Supply Inc.*, 106 F.3d 894,
8 903 (9th Cir. 1997). An injunction can be entered only if the plaintiff proves (1) an irreparable injury,
9 (2) the inadequacy of legal remedies, (3) a balance of the hardships in the plaintiff's favor, and (4) no
10 disservice to the public interest. *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

11 Contrary to Plaintiffs' argument, *see* Mot. at 12-13, they are entitled to no presumption of
12 irreparable harm or that legal remedies are inadequate, *see Herb Reed Enters., LLC v. Fla. Entm't*
13 *Mgmt., Inc.*, 736 F.3d 1239, 1250-51 (9th Cir. 2013). Plaintiffs can obtain an injunction only with
14 *evidence* of irreparable harm and of the inadequacy of legal remedies. *See id.* Empty assertions of
15 damaged reputations or lost business do not suffice. *See, e.g., Equinox Hotel Mgmt., Inc. v. Equinox*
16 *Holdings, Inc.*, 2018 WL 659105, at *10 (N.D. Cal. Feb. 1, 2018). Plaintiffs cannot make that showing
17 with respect to any of the three practices they challenge.

18 First, Plaintiffs have not proven that they suffered an irreparable injury. Appearing on Expedia's
19 sites *benefits* hotels through the billboard effect even if they are not bookable on Expedia. ECF199-8 at
20 21-22. Nor have Plaintiffs cited evidence showing that any class member hotel appears on Expedia's
21 sites or suffered any reputational harms, and, aside from vague and inadmissible hearsay accounts,
22 Plaintiffs cite no evidence that any consumer stayed in a different hotel as a result of the unavailability
23 messaging. *See supra* Argument II.A.2. Expedia's controls prevent, identify, and correct any future
24 errors, and Plaintiffs have not identified any shortfalls in those controls. An injunction would thus be
25 unjust. *See Westinghouse*, 106 F.3d at 903 (affirming the denial of an injunction because, among other
26 reasons, the defendants had infringed innocently, had ceased the challenged conduct, and were not likely
27 to cause any future harm).

28 For similar reasons, Plaintiffs have not shown that legal remedies are inadequate. Rather than

1 presenting evidence, Plaintiffs offer empty platitudes and reiterate their claims of deception. *See* Mot.
2 12-13. They cannot obtain an injunction on that basis. *See Herb Reed*, 736 F.3d at 1250.

3 A permanent injunction would also weigh unfairly on Expedia and would disserve the public
4 interest. Injunctions must remedy only proven and specific harms. *Stormans, Inc. v. Selecky*, 586 F.3d
5 1109, 1140 (9th Cir. 2009). Overbroad injunctions harm the public interest by hindering the “informed
6 and reliable decisionmaking’ that honest advertising can provide.” *U-Haul Int’l, Inc. v. Jartran, Inc.*,
7 793 F.2d 1034, 1042-43 (9th Cir. 1986) (citation omitted). An injunction requiring specific messaging
8 would reach all 160,000 U.S. properties despite the narrowed class definition and the absence of
9 evidence that unbookable properties even appear on the websites. Plaintiffs’ request is indeed an unfair
10 bid for free advertising. *See supra* at 23. In sum, they are improperly asking the Court to “permanently
11 and unnecessarily burden access to [Expedia’s] First Amendment-protected content,” to make Expedia’s
12 sites less “welcoming to visitors,” and to make it “more difficult for consumers to find [Expedia’s]
13 protected content.” *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 830 (9th Cir. 2011).

14 Second, for similar reasons, no injunction related to the Google ads is equitable. Hotels that do
15 not appear on Expedia’s websites will not appear in Google ads, and Plaintiffs offer no evidence that
16 they suffered irreparable harms as a result of any Google ads. Nor is Google present to defend its own
17 interests, and Expedia cannot change Google’s processes. *See, e.g., GSI Tech., Inc. v. United Memories,*
18 *Inc.*, 2013 WL 12172990, at *11 (N.D. Cal. Aug. 21, 2013) (declining to award an injunction in light of
19 potential harms to “the interests of the public or uninvolved third parties”).

20 Third, Plaintiffs offer no evidence to support a request for an injunction related to the challenged
21 phone numbers. These numbers do not appear on three of the four websites, and it is undisputed that
22 Expedia informs callers that they are not speaking to a specific hotel.

23 CONCLUSION

24 For all these reasons, Defendants’ Cross-Motion for Summary Judgment should be granted and
25 Plaintiffs’ motion should be denied. In the alternative, if the Court does not grant Defendants’ motion,
26 unresolved disputes of material fact would require that Plaintiffs’ motion also be denied.

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