

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 01-M-1172

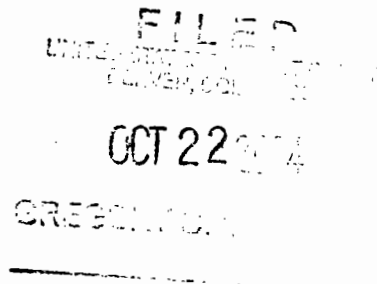
VAIL RESORTS, INC.,
VAIL ASSOCIATES, INC., and
VAIL TRADEMARK, INC.,

Plaintiff,

v.

VEND-TEL-CO, LTD. and
ERIC A. HANSON,

Defendants.



ORDER ON PLAINTIFFS' PROFFER OF SAMPLING DATA
AND OPINION TESTIMONY

In this trademark infringement and false designation of origin case, the plaintiffs' primary contention is that the defendant's use of 1-800-SKI-VAIL to identify "[m]arketing services related to the ski industry, namely providing an automated phone switching system to offer services available in or near Vail, Colorado, and nearby resort locations," presents a likelihood of confusion regarding the source of such services and falsely identifies the defendant with such services. The plaintiffs have a trademark registration for the word VAIL for its skiing facilities and related recreational services at the Vail, Colorado, resort.

As some proof of actual confusion generated by the defendant's use of the words SKI VAIL in the toll free telephone number, the plaintiffs propose to use a trademark study, final report and analysis prepared by Nolan Rosall of RRC Associates.

Mr. Rosall designed and supervised a survey of skiers and snowboarders at four ski resorts owned and operated by Vail Resorts, Inc., being Vail Mountain, Beaver Creek, Breckenridge and Keystone ski areas, all of which are within the same geographical vicinity in Colorado.

The defendants challenge the relevance and reliability of the survey results and the conclusions reached by Mr. Rosall from the statistical analysis of the responses to a questionnaire as recorded by interviewers who conducted supposedly random sampling interviews at these locations from December 29, 2001, to January 10, 2002, between the hours of 10 a.m. and 3 p.m.

To consider the defendants' objections and to determine the admissibility of the collected and analyzed data together with the proposed opinion testimony of Mr. Rosall, an evidentiary hearing was held on October 20, 2004. Based on the evidence received at that hearing, the court finds and concludes that the methodological flaws in the survey make the results inadmissible at trial.

The initial flaw in the Rosall study is the definition of the "Target Population," defined as customers at the four Colorado ski resorts – Vail Mountain, Beaver Creek, Breckenridge and Keystone. These are all owned by the plaintiffs. There is an obvious selection bias in this definition because it includes only those who have already become users of these facilities. The plaintiffs' position is that Vail signage is only present at the Vail Mountain area and that the other areas are marketed with independent identification. The necessary assumption would be that a skier or snowboarder interviewed at one of the other three ski areas has no knowledge of the common ownership. The study made no effort to test that assumption or control for the variable

of such knowledge. Excluded from the Target Population are the skiers and snowboarders throughout the United States who may have an interest in arranging a ski vacation in Colorado's mountains and may call the defendants' toll free number for information and making arrangements. The exclusion of those potential users of the defendants' services creates a selection bias. The Target Population is not representative of the relevant market.

The interviews were conducted by twelve to sixteen persons provided by Vail Resorts as persons experienced in conducting surveys on a random selection basis for other research conducted for Vail Resorts. Their supervisors were persons with the same type of experience. Although Mr. Rosall conducted a training session on December 28 between 10 a.m. and 12 noon, giving instructions to these interviewers and informing them that the assignment was independent of any relationship to Vail Resorts and within the responsibility of RRC Associates, Inc., who paid for their services, it is contrary to good survey practices for the interviewers to have not only knowledge of but prior experience with a party interested in the outcome. The instructions were given at the Vail resort. The interviewers would be less than human if they did not have some sense of loyalty to Vail Resorts.

Mr. Rosall reported that he instructed the interviewers to use random selection to contact people at chair lifts and restaurants to request interviews. There was no specific direction as to the randomization techniques or whether the practices followed were uniform. The recorded results show that interviews were conducted at other locations as well, but there is no recorded information as to how individual interviewers made their selections and what other locations were used. There is no information as

to whether the interviewers conducted the interviews in a manner where the respondent was separated from others and whether other persons participated in suggesting the responses. There was no recording of the number of rejections, that is persons who refused to respond to the interviewers questions.

The questionnaire contained three preliminary questions, the first being whether the person contacted or any member of his or her immediate family was an employee of the ski industry. A "yes" answer disqualified that person. There followed two other questions, the first of which being "have you made or are you planning to make a purchase of goods or services while in the area this trip or on a future trip," and "have you ever made a reservation for hotel or other lodging accommodations or restaurant reservations over the phone?" A "no" answer to those questions also caused termination of the interview.

The interviewers were required to classify the respondents into three categories. The first was that of a local resident, defined as a full time or seasonal resident "of the area." The second was that of a day visitor to the resort meaning persons not staying overnight "in the area," and the third was an overnight visitor, staying overnight "in the area" with a permanent address outside the area. There is no definition of the meaning of "the area" and the inclusion of local residents and day visitors permits the influence of the local bias of prior knowledge of Vail Resorts. Of the 512 respondents, 7% were deemed local residents and 15% day visitors. As would be expected, a strong majority of the local residents and a majority of day visitors responded that the word "VAIL" signified an affiliation with a particular company, specifically Vail Resorts or Vail Associates.

The form of the questionnaire required the interviewer to record responses in categories. Question 9 reads as follows:

When you first saw or heard about "1-800-SKI VAIL," what company or entity did you believe owned or operated the phone number/service?

- Vend-Tel-Co
- Vail Resorts Inc. or Vail Associates
- Operator of Vail Mountain
- An independent company not affiliated with any of the above
- Vail

(IF ANSWERED "Vail") – Could you explain what you mean by "Vail?"

- Vail Resorts/Vail Associates
- Operator of Vail Mountain
- Town of Vail
- Other: _____

Question 13 asked of respondents who said that they had called 1-800-SKI VAIL reads as follows:

Did you believe this number was operated by Vail Mountain or someone affiliated with the operator of Vail Mountain?

- Yes, the operator of Vail Mountain
- Yes, a company affiliated with the operator of Vail Mountain
- No, some other independent company
- Uncertain

For those responding that they had not seen or heard of 1-800-SKI VAIL, question 14 was asked and the responses were placed in the categories indicated:

What company do you believe owns or operates this service? 1-800-SKI VAIL

- Vend-Tel-Co
- Vail Resorts Inc. or Vail Associates
- Operator of Vail Mountain
- An independent company not affiliated with any of the above
- Vail

(IF ANSWERED "VAIL") – Could you explain what you mean by "Vail?"

- Vail Resorts/Vail Associates
- Operator of Vail Mountain
- Town of Vail
- Other: _____

(ALL RESPONSES TO q.14) What makes you say that? _____

Mr. Rosall testified that the interviewers were instructed not to show the form to the respondents and to read only the questions and not the answers. He testified that they had the discretion to suggest the names that were on the form. The defendants' expert witness critiquing this methodology inferred from the response data that the answers were also read. The court can make no finding as to how the interviews were actually conducted based on the limited record presented. Because the interviewers were required to categorize these responses, there is certainly no way to measure how much suggestion was given to the respondents. The data show that 47% of the responses identified Vail Resorts, Inc/Vail Mountain as the owner or operator of the phone service, 38% said Vail and 11% said the operator of Vail Mountain with only 4% thinking it was an independent company and 1% thinking Vend-Tel-Co owned or operated the service. These are the most significant findings in the survey report and they are clearly untrustworthy. Proper methodology would have required that this question be open-ended with the responses recorded exactly as they were given by the person interviewed.

The interviewers should have been able to report "I don't know" responses and to indicate the degree of certainty of the responses when there was a source identification, such as "thinks," "not sure," etc.

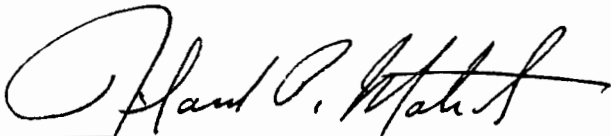
Regardless of whether the interviewers were suggesting the categories of response, they were required to interpret them by placing them into the prescribed names and that interpretation was made by persons who may have been influenced by a bias favoring Vail Resorts or Vail Associates. As the interview progressed, assuming the answers were not disclosed to the respondent, the order of the questions becomes suggestive that the interviewer is seeking to link the telephone number with the Vail entities and there is nothing in the record to preclude the possibility that some of the responses were changed during the course of the interview as the respondents heard the succeeding questions.

Because of these flaws in methodology, the data collected are not reliable and may not be used as a basis for drawing conclusions about confusion or the likelihood of confusion in the relevant market of potential purchasers of the type of services offered by the plaintiffs. Accordingly, it is

ORDERED that the evidence is not admissible.

DATED: October 22nd, 2004

BY THE COURT:


Richard P. Matsch, Senior District Judge

Case Number: 01-M-1172

I certify that I mailed a copy of the attached Order entered by Judge Richard P. Matsch on October 22, 2004, to the following:

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Dated: October 22 2004

GREGORY C. LANGHAM, CLERK

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Deputy Clerk