Oracle Corporation et al v. SAP AG et al
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United States District Court,
S.D. California.
TREKEIGHT, LLC, a California limited liability company, Plaintiff,
v.
SYMANTEC CORPORATION, a Delaware corporation, Defendant.
No. 04-CV-1479 H(BLM).

May 23, 2006.

Named Expert: Dr. Erik Laykia, Dr. Robert Trout
Frederic G. Ludwig, III, Procopio, Cory, Hargreaves and Savitch, San Diego, CA, for Plaintiff.

Katherine Wood, Michael P.A. Cohen, Heller Ehrman, Washington, DC, Chad R. Fuller, Heller Ehrman, San Diego, CA, for Defendant.

ORDER DENYING DEFENDANT'S MOTIONS IN LIMINE TO EXCLUDE THE PROPOSED EXPERT TESTIMONY OF ROBERT TROUT AND ERIC LAYKIN

MARILYN L. HUFF, District Judge.

***1** On April 11, 2006, Defendant Symantec Corporation filed motions in limine to exclude the proposed expert testimony of Dr. Robert Trout and Eric Laykin. (Doc. Nos. 122 & 120.) Plaintiff Trekeight, LLC filed oppositions to both motions April 24, 2006. (Doc. Nos. 138 & 139.) Defendant filed replies on May 1, 2006. (Doc. Nos. 143 & 144.) On May 22, 2006, the Court held a hearing on Defendant's motions. Frederick K. Taylor and Frederic G. Ludwig, III appeared for Plaintiff and Michael P.A. Cohen, Leonard Feldman, Chad R. Fuller, and Joyce Cartun appeared on behalf of Defendant. For the reasons stated below, the Court DENIES Defendant's motions.

Background

Plaintiff develops and sells computer software products, including SpywareNuker, an anti-spyware program. (Mot. to Exclude Test. of Trout, Fuller Decl. ("Fuller Decl. (Trout)"), Ex. A.) Plaintiff contends that the program protects computer users from adware and spyware programs that originate from the internet. (*Id.* at 1.) Plaintiff began selling SpywareNuker around December 2002. (*Id.*)

Defendant also makes computer security software that protect computers from a host of security risks, including spyware programs. (*Id.* at 2.) Trout claims that in September 2003, Defendant detected and classified Plaintiff's SpywareNuker program as spyware. (*Id.*) Trout asserts that this caused a series of problems for Plaintiff, most notably a decision by Google to remove SpywareNuker from its "AdWords" program that had been selling the SpywareNuker program until that point. (*Id.*)

Plaintiff then retained Trout to give his opinion on the amount of damages that Plaintiff suffered, assuming Defendant is found liable. (*Id.* at 1.) Trout conducted two analyses of Plaintiff's possible economic damages, a lost sales approach and a sales accrued approach. (*Id.* at 2.)

Plaintiff retained Laykin in order to examine Defendant's characterization of SpywareNuker as malware (injurious computer programs that include adware and spyware), and to serve as an **expert** on the **computer** security industry in general. (Mot. to **Exclude** Laykin Test., Fuller Decl. ("Fuller Decl. (Laykin)"), Ex. A at 2.) Laykin asserts that his tests revealed that three out of ten Symantec security programs classified SpywareNuker as adware. (*Id.* at 19.) Laykin's opinion is that this classification is incorrect as he contends that SpywareNuker is not malware. (*Id.* at 26-27.) Laykin claims that his conclusions are corroborated by several other anti-spyware vendors and independent reviews by industry analysts. (*Id.* at 25-27.) Defendant brought these motions to exclude the proposed expert testimony of Trout and Laykin.

Discussion

1. Legal Standard of *Daubert*

The Supreme Court in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125

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L.Ed.2d 469 (1993), held that district courts should serve as "gatekeepers" to ensure that "any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589;*see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (holding that the "gatekeeping" function of a district court to apply to all expert testimony, not just scientific testimony); *Mukhtar v. California State Univ.*, 299 F.3d 1053, 1063 (9th Cir.2002).

***2** The Court's analysis of the relevance and reliability of expert testimony is "vital to ensure accurate and unbiased decision-making by the trier of fact." *Mukhtar*, 299 F.3d at 1063. Vigorous cross-examination, presentation of contrary evidence, and instruction on the burden of proof remain the appropriate means of attacking dubious but admissible evidence. *Daubert*, 509 U.S. at 596. Under Ninth Circuit law, "[i]f two contradictory expert witnesses [can offer testimony that is reliable and helpful], both are admissible" and it is responsibility of the fact-finder, not the Court, to determine the credibility of the expert witnesses. *Dorn v. Burlington N. Santa Fe R.R. Co.*, 397 F.3d 1183 (9th Cir.2005) (internal citation omitted).

As to the first prong of *Daubert*, relevance means that the evidence will assist the trier of fact to understand or determine a fact in issue. *Daubert*, 509 U.S. at 591-92. "The gatekeeping inquiry must be 'tied to the facts' of a particular 'case.' " *Kumho*, 526 U.S. at 150 (quoting *Daubert*, 509 U.S. at 591)). "Encompassed in the determination of whether expert testimony is relevant is whether it is helpful to the jury, which is the 'central concern' of Rule 702." *Mukhtar*, 299 F.3d at 1063 n. 7 (citation omitted). Federal Rule of Evidence 702 states that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," an expert "may testify thereto," Fed.R.Evid. 702. Such testimony must be the product of: (1) sufficient facts or data, (2) reliable principles and methods, and (3) the reliable application of those principles and methods to the facts of the case. *Id.*

The proposed expert testimony must also satisfy the second prong of the *Daubert* test, reliability, before it can be admitted. "The trial court must [also] act as a 'gatekeeper' to exclude 'junk science' that does not meet Rule 702's reliability standards by making a preliminary determination that the expert's testimony is reliable." *Id.* at 1063. This inquiry is designed to ensure that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho*, 526 U.S. at 152.

Daubert provides the following non-exclusive list of factors to guide the assessment of the reliability of scientific expert evidence: (1) whether a scientific theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review or publication; (3) the known or potential rate of error and the existence and maintenance of standards controlling the technique's operation; and (4) whether the technique is generally accepted. *Daubert*, 509 U.S. at 593-94;*see also Kumho*, 526 U.S. at 151 ("[*Daubert*] made clear that its list of factors 11 was meant to be helpful, not definitive. Indeed, those factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged."). A trial court should consider the specific factors identified in *Daubert* when carrying out the reliability inquiry for all proffered expert testimony, not just that concerning scientific evidence. *Kumho*, 526 U.S. at 152. "A trial court not only has broad latitude in determining whether an expert's testimony is reliable, but also in deciding how to determine the testimony's reliability." *Mukhtar*, 299 F.3d at 1064 (citations omitted). "[F]ar from requiring trial judges to mechanically apply the *Daubert* factors ... judges are entitled to broad discretion when discharging their gatekeeping function." *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir.2000) (citing *Kumho*, 526 U.S. at 150-52).

***3** "It is the proponent of the expert who has the burden of proving admissibility." *Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 598 (9th Cir.1996). Admissibility of the expert's proposed testimony must be established by a preponderance of the evidence. *See Daubert*, 509 U.S. at 592 n. 10 (citing *Bourjaily v. United States*, 483 U.S. 171, 175-76, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987)). The party presenting the expert must demonstrate that the expert's findings are based on sound principles and that they are capable of independent validation. *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1316 (9th Cir.1995) (*"Daubert II"*).

2. Analysis

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A. Trout's Proposed Testimony Regarding the Lost Sales Approach to Calculating Lost Profit

Defendant argues that Trout's proposed testimony regarding the lost sales approach to calculating the lost profits allegedly suffered by Plaintiff is inadmissible under Federal Rule of Evidence 702 and *Daubert.* According to Trout, in September 2003, Defendant began making claims that Plaintiff's SpywareNuker program was actually a spyware program that could infect and disrupt a user's computer. (Fuller Decl. (Trout), Ex. A at 2.) Trout claims this had a negative impact on Plaintiff's business, specifically causing Google to cancel the memberships of distributors that sold SpywareNuker on Google's "AdWords" program. (*Id.*)

Trout acknowledges that his calculations are predicated on Defendant being held liable for damages. (*Id.*) For the lost sales approach, Trout focuses his analysis on the moment when Google eliminated distribution of Plaintiff's product. (*Id.*) Plaintiff claims Google's decision was a byproduct of Symantec's decision to catagorize SpywareNuker as harmful spyware. (*Id.*) Trout uses a time series statistical program called multiple regression to determine the effect of the "Google event" on SpywareNuker sales. (*Id.* at 2-3.) Trout's methodology then compares the forecasted net sales of SpywareNuker if the advertisements had not been dropped by Google to the actual net sales of the product after the Google event. (*Id.* at 3.) Trout predicts the lost sales by measuring the difference between the forecasted sales and the actual sales. (*Id.*)

Lost profits are then calculated by subtracting the direct costs of producing the lost sales from the estimated lost revenues. (*Id.*) Trout measures lost revenues beginning in July 2004 through November 2005. (*Id.*) Trout estimates that Plaintiff lost a total of $6,215,317 in revenues during this 17-month period. (*Id.*) Trout assumes a cost margin of 31%, which he asserts is based on Plaintiff's review of marginal expenses during the preceding months. (*Id.* at 3 n. 3.) Subtracting this assumed cost margin from the expected lost revenues, Trout arrives at a final lost profits calculation of $4,791,797. (*Id.* at 3.)

Trout's lost profit testimony is sufficiently relevant and reliable for the Court to potentially admit it under the *Daubert* standard, subject to proof at trial. First, Trout's analysis of the possible economic damages suffered by Plaintiff is relevant to the case. His analysis focuses on the facts at issue between the two parties, and suggests a determination of potential damages should the trier of fact determine that Defendant is liable for damage caused to Plaintiff. Accordingly, the Court concludes that Trout's proposed testimony is relevant under the *Daubert* standard. 509 U.S. at 591-92.

***4** Second, Trout's lost profit analysis is sufficiently reliable to permit admission into evidence, subject to an adequate foundation at trial. As described above, Trout applied basic mathematical principles to his lost sales estimate. *See Humetrix. Inc. v. Gemplus S.C.A.*, 268 F.3d 910, 919-20 (9th Cir.2001) (recognizing that lost profit calculations are necessarily estimates). The essence of his lost sales approach is to determine the difference between Plaintiff's forecasted earnings had Google not withdrawn advertisements for SpywareNuker from its "AdWords" program and what Plaintiff actually earned after the Google event. The assumptions Trout made to reach his conclusions regarding Defendant's liability in causing injury to Plaintiff are among the necessary elements of the underlying causes of action that Plaintiff will have to prove independent of Trout's testimony. *See Obrey v. Johnson*, 400 F.3d 691, 695 (9th Cir.2005) (noting that expert evidence does not need to establish any element of a claim or defense in order to be admissible under the *Daubert* standard). Furthermore, to the extent that Trout's analysis is incomplete in that it fails to consider other possible market factors that could have negatively impacted Plaintiff's sales, such possible shortcomings typically go to the weight of the evidence rather than to its admissibility. *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 235 F.3d 1184, 1192 (9th Cir.2000) (stating that weighing the credibility of competing experts is province of the jury, not the court).

Finally, the Court notes that Defendant's expert, Robert N. Yerman, produced a report that contradicts Trout's assessment. (Fuller Decl. (Trout), Ex. F ("Yerman Report").) Yerman's report highlights several alternative market factors to the Google event that could have played a role in Plaintiff's loss of sales on its SpywareNuker program. (*Id.*) The exposure of any possible shortcoming of Trout's methodology or theory is appropriate for refutation by Defendant through its own witnesses or on cross-examination. *See, e.g., Daubert*, 509 U.S. at 596. Therefore, the Court con-

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cludes that Trout's lost sales approach to calculating possible damages suffered by Plaintiff is potentially admissible, subject to adequate proof at trial.

B. Trout's Proposed Testimony Regarding the Accrued Sales Approach to Calculating Lost Profit

Defendant contends that Trout's second approach to calculating lost profit damages, an accrued sales approach, is also inadmissible. Trout presented his second damages analysis as an addendum to his earlier findings.[FN1] (Fuller Decl. (Trout), Ex. B.) In his accrued sales analysis, Trout seeks to measure the amount of sales accrued by Defendant that would have been recorded by Plaintiff but for Defendant's alleged harmful actions. (*Id.* at 2.) First, Trout calculates Defendant's revenue from all its products that include an anti-spyware component to be $3.25 billion. (*Id.*, Ex. 5.) Trout's analysis then seeks to determine what percentage of this overall business would have been filtered down to the stand-alone anti-spyware market occupied by Plaintiff's SpywareNuker. (*Id.* at 2.) This is necessary because many of Defendant's anti-spyware programs are included as one of many programs bundled together in a single product, whereas Plaintiff's SpywareNuker is a stand-alone anti-spyware program. (*Id.*) Trout admits that it is not possible to determine conclusively what percentage of customers purchase Defendant's bundled products specifically for the anti-spyware component. (*Id.*) Therefore, Trout assumes a "rough estimate" of the importance consumers place on different features of the bundled products in order to allow comparison of these bundled products to products like Plaintiff's SpywareNuker in the stand-alone anti-spyware market. (*Id.*) Trout suggests that anti-spyware products account for two percent of Defendant's revenues based on the fact that anti-spyware products account for two percent of all secured content management products across the industry. (*Id.* at 2-3.) Therefore, Trout assumes that two percent of Defendant's $3.25 billion revenues would have filtered down to the anti-spyware market. (*Id.* at 3.)

> FN1. Defendant argues that, among other reasons, Trout's accrued sales approach is inadmissible 28 because Plaintiff did not submit it in a timely fashion. The Court, in its discretion, declines to find Trout's proposed testimony regarding the accrued sales analysis inadmissible on these grounds.

***5** Based on an independent study of the anti-spyware market, Trout concludes that Plaintiff's SpywareNuker controlled five to nine percent of total market for unbundled anti-spyware products. (*Id.*) Thus, Trout estimates that Plaintiff would have suffered $3.64 million in lost revenue if Defendant is found liable for damages. (*Id.*) When adjusted to account for an estimated cost margin of 31%, Trout concludes that Plaintiff would have suffered net damages in the amount of $2.51 million. (*Id.*)

Trout's proposed testimony regarding the accrued sales approach to calculating Plaintiff's possible economic damages is potentially admissible under the *Daubert* standard, subject to adequate proof at trial. First, like his lost profits approach, Trout's accrued sales analysis is relevant in that it may assist the trier of fact in determining appropriate damages, assuming damages are found. *See* *Daubert*, 509 U.S. at 591-92.

Second, the proposed testimony satisfies the second prong of the *Daubert* analysis because it is sufficiently reliable to be admitted, subject to proper proof of relevance and admissibility at trial. Defendant asserts that Trout's analysis contains several flaws, errors, and unfounded assumptions. However, such possible failings are not sufficient grounds to conclude that his proposed testimony is inadmissible. As the Supreme Court stated in *Daubert*, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 596;*see also* *Humetrix*, 268 F.3d at 919 (noting that an opposing party's proper challenge to the accuracy of an expert's testimony is "not exclusion of the testimony, but, rather, refutation of it by cross-examination and by the testimony of its own expert witnesses.").

Accordingly, the Court concludes that Trout's proposed testimony regarding his accrued sales approach to Plaintiff's possible economic damages is potentially admissible under the *Daubert* standard, subject to a proper showing of proof at trial. Therefore, the Court DENIES Defendant's motion in limine to exclude Trout's proposed testimony.

C. Laykin's Proposed Testimony

Defendant argues that Laykin's proposed testimony is

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inadmissible for a variety of reasons.[FN2] Laykin proposes to testify about studies he performed on SpywareNuker utilizing various Symantec security products. (Fuller Decl. (Laykin), Ex. A at 17.) Laykin also proposes to testify regarding Symantec's classification of SpywareNuker as adware. (*Id.* at 21.) Furthermore, Laykin describes and comments on the process employed by Symantec in evaluating and classifying Plaintiff's SpywareNuker product. (*Id.*) Laykin also offers his opinion on more general aspects of the computer security industry, including descriptions of industry standards and how other anti-spyware vendors have classified SpywareNuker. (*Id.* at 20-25.)

> FN2. Among other reasons, Defendant argues that Laykin's proposed testimony is inadmissible 28 because his rebuttal report was submitted late. The Court, in its discretion, declines to find Laykin's proposed testimony inadmissible on these grounds.

***6** Laykin's proposed testimony is sufficiently relevant and reliable for the Court to potentially admit it under *Daubert*, subject to proof at trial. First, Laykin's proposed testimony regarding his testing of SpywareNuker is potentially relevant to the facts of this dispute. *See* *Daubert*, 509 U.S. at 591-92. He proposes to testify to a variety of general and specific aspects of this case, including testing he performed on SpywareNuker with Defendant's security software. (Fuller Decl. (Laykin), Ex. A at 17.) Defendant contends that such testimony is inadmissible because Laykin only tested later versions of the SpywareNuker program and not the original 2003 file that allegedly led to Symantec's classification of SpywareNuker as adware. Even if true, Laykin's testing of other versions of the same SpywareNuker program is potentially relevant to understanding the operations and functions of the program in general. Therefore, having reviewed the relevant submissions by the parties, the Court concludes that Laykin's proposed testimony is potentially relevant to the trier of fact, subject to adequate proof at trial.

Second, Laykin's proposed testimony satisfies the second prong, reliability, of the *Daubert* analysis because it is adequately reliable to be admitted, subject to proper proof of relevance and admissibility at trial. Defendant asserts that Laykin's testimony is flawed in that his testing of the SpywareNuker programs was not exhaustive and that he "cherry-picked" only the information that supported his conclusions in formulating his proposed testimony. Like the possible flaws in Trout's analysis cited by Defendant, such possible shortcomings in Laykin's evaluation are not sufficient grounds to exclude his testimony. Rather, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596;*see also* *Humetrix*, 268 F.3d at 919 (noting that an opposing party's proper challenge to the accuracy of an expert's testimony is "not exclusion of the testimony, but, rather, refutation of it by cross-examination and by the testimony of its own expert witnesses."). Therefore, such challenges to Laykin's testimony are more appropriate for trial when the context of the evidence will be available. Furthermore, to the extent that Laykin offers expert testimony on areas beyond his expertise as a computer forensics expert, Defendant may renew its objections on these grounds at trial.

Finally, the Magistrate Judge's October 2005 order regarding a recommendation to the District Court of a possible adverse evidentiary inference to be made against Plaintiff does not impact Laykin's ability to offer expert testimony that otherwise meets the criteria set forth by *Daubert* and Federal Rule of Evidence 702. It is within the province of district courts to determine what jury instructions to give at trial. *See* *Monroe v. City of Phoenix*, 248 F.3d 851, 857 (9th Cir.2001): *see also* *United States v. Southwell*, 432 F.3d 1050, 1052 (9th Cir.2005) (holding that the "necessity, extent, and character" of jury instructions are matters within the sound discretion of the trial court). The parties will have an opportunity at the appropriate time to submit proposed jury instructions for the Court's consideration. The Court will also carefully consider the recommendation of the Magistrate Judge, but will make its own determination concerning jury instructions. Absent a violation of a court order, the Court may not necessarily give a jury instruction regarding the non-retention of certain evidence, but defers that determination to trial.

***7** Accordingly, the Court concludes that Laykin's proposed testimony meets the standards established by *Daubert* for expert witnesses, subject to a proper showing of proof at trial. Therefore, the Court DENIES Defendant's motion in limine to exclude his

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testimony.

Conclusion

For the reasons stated above, the Court **DENIES** Defendant's motions in limine to exclude the proposed testimony of Dr. Robert Trout and Eric Laykin, expert witnesses for Plaintiff.

IT IS SO ORDERED.

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