Personalized User Model LLP v. Google Inc. Doc. 579

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PERSONALIZED USER MODEL, L.L.P.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
GOOGLE, INC.,	)	
	)	
Defendant.	)	
	)	C.A. No. 09-525 (LPS)
GOOGLE, INC.,	)	
	)	
Counterclaimant,	)	
	)	
v.	)	
	)	
PERSONALIZED USER MODEL, L.L.P. and YOCHAI KONIG,	)	
	)	
Counterclaim-Defendants.	)	

PUM'S RESPONSE TO GOOGLE'S *DAUBERT* MOTION TO EXCLUDE CERTAIN OPINIONS OF DR. MICHAEL PAZZANI

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February 10, 2014

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SUMMARY OF ARGUMENT

Google's *Daubert* Motion to Exclude Certain Opinions of Dr. Michael Pazzani (D.I. 552) should be denied. None of Google's arguments are accurate or valid reasons to exclude Dr. Pazzani's opinions comparing and contrasting the *technology* Dr. Konig worked on at SRI, the *technologies* SRI was developing during the time of Dr. Konig's employment, and the *technology* underlying the patents-at-issue in this case.

First, Google argues Dr. Pazzani offers legal opinions. Not so. Dr. Pazzani does not explain or even make reference to the applicability of California Labor Code § 2870. Instead, Dr. Pazzani makes technical comparisons between the technology he understands Dr. Konig worked on while at SRI, the technologies SRI was developing at that time, and the patented technologies. Dr. Pazzani bases that opinion on his thirty years of experience studying, teaching, and practicing computer science, including machine learning, and his study of the technologies at issue here. Thus, Dr. Pazzani provides a technical, not legal, opinion.

Second, Google incorrectly asserts that Dr. Pazzani's opinions as to Dr. Konig's research at SRI are without factual basis. But there has never been a dispute that Dr. Konig's work at SRI concerned speech recognition and speaker verification. Dr. Pazzani's opinion is that, based on his expertise, speech recognition and speaker verification technology are significantly different from, and could not result in, the Internet personalization technology described in patents-at-issue. That testimony will be helpful to the jury in sorting through the issues relating to Google's breach of contract claim in this case.

Finally, Google's assertion that Dr. Pazzani did not consider all of the evidence Google believes to be relevant, or made incorrect assumptions, is a matter for cross-examination, not exclusion.

ARGUMENT

Rejection of expert testimony is the exception rather than the rule. *See Pineda v. Ford Motor Co.*, 520 F.3d 237, 243 (3d Cir. 2008) ("The Rules of Evidence embody a strong preference for admitting any evidence that may assist the trier of fact."). Federal Rule of Evidence 702, which governs the admissibility of expert testimony, is a rule of flexibility that "has a liberal policy of admissibility." *Id.* This is because "[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 v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993). "Where there is a logical basis for an expert's opinion testimony, the credibility and weight of that testimony is to be determined by the jury, not the trial judge." *Breidor v. Sears, Roebuck and Co.*, 722 F.2d 1134, 1138 (3d Cir. 1983).

"An expert's testimony is admissible so long as the process or technique the expert used in formulating the opinion is reliable." *Pineda*, 520 F.3d at 244. A party does not have to prove that its expert's proposed opinion is correct. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 742 (3d Cir. 1994) ("The evidentiary requirement of reliability is lower than the merits standard of correctness."); *see also In re TMI Litig.*, 193 F.3d 613, 665 (3d Cir. 1999) ("[T]he standard for determining reliability is not that high.").

I. DR. PAZZANI DOES NOT OFFER LEGAL OPINIONS.

Contrary to Google's argument, Dr. Pazzani does not offer legal opinions. Courts in the Third Circuit define a legal opinion as: explaining the law for the jury or how it should apply, *see FedEx Ground Package Sys., Inc. v. Applications Int'l*, 695 F. Supp. 2d 216, 221-222 (W.D. Pa. 2010); stating what is required under the law, *id.*; or opining whether a law has been violated, *Schieber v. City of Philadelphia*, No. 98-cv-5647, 2000 WL 1843246, at *8 (E.D. Pa. Dec. 13,

2000). Dr. Pazzani does not provide such legal opinions, but instead offers technical opinions based on his review of the technologies at issue in this case.

A. Dr. Pazzani's Opinions Are Technical And Do Not Turn On California Law.

Although Google complains that Dr. Pazzani's report references California Labor Code § 2870, Google cannot and does not point to any opinion in Dr. Pazzani's report stating how or if California Labor Code § 2870 applies. Dr. Pazzani does not explain, interpret, or apply that statute and therefore could not usurp this Court's role in explaining it. This is not a case where a significant portion of Dr. Pazzani's report references and applies case law and statutes. S*ee, e.g.*, *FedEx Ground Package Sys., Inc.*, 695 F. Supp. 2d at 221-222 (court found expert usurped its role by opining on improper legal conclusions when expert repeatedly opined on what was required under law).

Rather than opine on law, Dr. Pazzani opines on technology. He compares and contrasts the technologies on which Dr. Konig worked while employed by SRI, other technologies being developed by SRI during Dr. Konig's time of employment, and the technologies that underlie the patents-at-issue in this case. Despite moving to exclude Dr. Pazzani's testimony, Google does not claim these complex technologies will be "easily understandable without the need for expert explanatory testimony." *Centricut, LLC v. Esab Group, Inc.*, 390 F.3d 1361, 1369 (Fed. Cir. 2004) ("[I]n this case the technology involved was complex."); *see also Whelan Assocs. Inc. v. Jaslow Dental Labs., Inc.*, 797 F.2d 1222, 1232–33 (3d Cir. 1986) ("[E]xpert testimony is essential to even the most fundamental understanding of" computer programs at issue in infringement case.).

Dr. Pazzani's opinions exist independent of whatever the legal standard may be. Rather than base his opinions on an interpretation of the California statute, Dr. Pazzani bases his

opinions on his experience, technical expertise, and review of these complex technologies. Pazzani Report ¶¶ 573-79. Whether research in speech recognition and speaker verification technology could give rise to, lead to, or otherwise result in Internet search personalization technology covered by the asserted patents is a technical issue; as is whether the other technologies that SRI actively developed during the time of Dr. Konig's employment are related to Internet search personalization technology. For these purely technical matters, Dr. Pazzani's opinions will assist the jury which would otherwise have no meaningful way to compare the complex technologies at issue.

B. Dr. Pazzani Is Entitled To "Embrace An Ultimate Issue."

At most, Dr. Pazzani's determinations could be characterized as embracing ultimate issues. But Federal Rule of Evidence 704 allows Dr. Pazzani to do so. *See* Fed. R. Evid. 704 ("[A]n opinion is not objectionable just because it embraces an ultimate issue."); *see also Berckeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195, 217-18 n.23 (3d Cir. 2006) (citation and quotations omitted) (discussing advisory note to Rule 704); *Snellman v. Ricoh Co.*, 862 F.2d 283, 287 (Fed. Cir. 1988) ("[E]xpert testimony is admissible . . . to give an opinion on the ultimate question of infringement").

Other courts in the Third Circuit have also allowed experts to testify as to "ultimate issues" so long as they do not cross the line to opine whether a legal test has been satisfied. *See, e.g., ID v. Cumberland Valley School District*, No. 1:03-cv-1874, 2005 WL 6782653, at *4-5 (M.D. Pa. Oct. 5, 2005) (allowing expert to opine what steps a school district should have taken in providing child with free and appropriate public education and that services offered to student were not appropriate, but *not* allowing expert to opine whether school district violated law by not providing free and appropriate public education); *Schieber*, 2000 WL 1843246, at *8 (allowing expert to opine that police officers were not adequately trained to enter homes in exigent

circumstances, that City's approach was inferior to other cities, and that department promoted systemic practices of downgrading rapes, which had an effect on police responding to rescue calls, but *not* allowing expert to take final step to testify that police officers' actions were constitutional violations).

More recently, in *Microsoft Corp. v. Motorola*, No. C10–1823JLR, 2013 WL 4008822, at *19 (W.D. Wash. Aug. 5, 2013), the district court allowed an expert witness to testify "as to the ultimate issue—breach of the good faith obligation," because it was a "complicated case" and the expert's "opinion, which pieces together the evidence heard by the jury into an opinion on the issue of good faith" would "assist the trier of fact in reaching its own decision on the issue of good faith." *Id.* The district court did *not* allow the expert to opine, however, that by not breaching that obligation Motorola had met its statutory obligations because doing so "goes too far in that it intertwines a legal conclusion" with the expert opinion on good faith. *Id*. at *20.

Under this test, Dr. Pazzani offers admissible opinions that (1) speech recognition or speaker verification research could not result in the patented Internet search personalization technology and that (2) SRI's research during that time did not relate to the patented technology. These opinions are directed to the complex technology and not Section 2870 and thus are admissible. PUM agrees that Dr. Pazzani cannot testify that the respective provisions of California Labor Code § 2870 do not apply. That would "go too far." Instead, having heard Dr. Pazzani's testimony, it will be for the jury to decide whether those provisions are met consistent with whatever instruction the jury receives from the Court.

C. "Resulted From" And "Related To" Are Not Terms Of Art.

Dr. Pazzani's use of the same terms ("resulted from" and "related to") found in the California statute, also does not render his opinions inadmissible. The Third Circuit has made clear that an expert can testify as to the ultimate issue even when doing so includes the use of

terminology that tracks the language found in the law. For example, in *Marcavage v. Bd. of Trs. of Temple Univ. of Commonwealth Sys. of Higher Educ.*, the Third Circuit held that a district court properly admitted a psychologist's expert opinion that a university official acted "reasonably"—one of the ultimate issues at trial—because the expert had vast experience in the subject matter and the opinion would assist the trier of fact. 232 F. App'x 79, 85 (3d Cir. 2007). This disputed opinion was admissible to assist the jury in deciding the reasonableness of the university official's actions, including, specifically, whether the official's conduct was grossly negligent or willful. *Id.*; *see also Motorola*, 2013 WL 4008822, at *19 (allowing testimony as to whether party acted in "good faith"); *Lapsley v. Xtek, Inc.*, 689 F.3d 802, 816 (7th Cir. 2012) (upholding admission of expert opinion about "reasonable care in design," which included an element of foreseeability under Indiana law); *United States v. McIver*, 470 F.3d 550, 562 (4th Cir. 2006) (upholding admission of expert medical testimony that particular doctor's conduct was "illegitimate," "inappropriate," and "way outside the course of legitimate medical treatment" because those words fell into "limited vernacular that is available" to express medical malpractice); *United States v. Jefferson*, 623 F. Supp. 2d 683, 687-688 (E.D. Va. 2009) (allowing expert opinion that used words that tracked language in applicable bribery statue, like "routinely performed," "decision," "official act," and "settled practice," because they are words within limited vernacular available to express issues in case).

Although the terms "resulting from" and "related to" are used in the statute, they are not terms of art. *See Kapche v. Holder*, 677 F.3d 454, 464 (D.C. Cir. 2012) (finding expert testimony did not constitute impermissible legal conclusion because expert "did not use terms that have a separate, distinct and specialized meaning in the law different from that present in the vernacular"); BLACK'S LAW DICTIONARY 1511 (8th ed. 2004) (defining "term of art" as "a word

or phrase having a specific, precise meaning in a given specialty, apart from its general meaning in ordinary contexts").[1] Those terms are readily understood by the jury and properly used by Dr. Pazzani to express comparisons and relationships between the different technologies. Indeed, "related to" and "resulting from" are terms within the "limited vernacular" available to compare the technologies. *See Lapsley*, 689 F.3d at 816; *McIver*, 470 F.3d at 562; *Jefferson*, 623 F. Supp. 2d at 687-688. At most, Dr. Pazzani "simply [gives] his opinion as to facts that, if found, would [not] support a conclusion that the legal standard at issue was satisfied." *Kapche*, 677 F.3d at 464.

Google argues the term "related to" is subject to particular interpretations set forth in California case law. Opening Br. (D.I. 553) at 7. Google does not assert, however, that Dr. Pazzani's testimony is inconsistent with those interpretations. Nor does Google offer any "particular interpretation" of that term other than asserting that it is interpreted "broadly." Contrary to Google's assertions, Dr. Pazzani is not seeking to testify about "interpretive principles," but rather opines—using commonly understood terms—about the relationships between certain technologies. To the extent Google believes Dr. Pazzani's opinions are inconsistent with California law, however, that is a matter for cross-examination, not exclusion.

D. Dr. Pazzani Does Not Conflate The Terms "Resulting From" And "Related To."

Google also incorrectly argues that Dr. Pazzani conflates the "resulting from" and "relating to" language in the California statute. *See* D.I. 553 at 7, 10-12. To the contrary,

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[1] *See also Applera Corp.-Applied Biosys. Grp. v. Illumina, Inc.*, Civ. A. No. 07-2845, 2008 WL 170597, at *4 (N.D. Cal. Jan. 17, 2008) (noting jury could find invention did not related to employer's business); *Enreach Tech. Inc. v. Embedded Internet Solutions, Inc.*, 403 F. Supp. 2d 968, 975 (N.D. Cal. 2005) (finding "material fact dispute" whether invention falls within § 2870).

Dr. Pazzani makes separate opinions in his conclusion about whether the patented technology resulted from Dr. Konig's work at SRI or related to SRI existing or anticipated business. Pazzani Report ¶ 586 ("the inventions in the patents-in-suit did not result from Dr. Konig's work at SRI nor were they related to any other work SRI was doing or then contemplated."). To the extent Google still perceives error in such semantics, however, Google will have the opportunity to cross-examine Dr. Pazzani on whether there can be a "resulting from" relationship between unrelated technologies and can present any purported flaws at trial for the jury to weigh.

II. DR. KONIG'S WORK AT SRI IS NOT IN DISPUTE AND IS BASED IN EVIDENCE REVIEWED BY DR. PAZZANI.

Google argues that Dr. Pazzani's testimony should be excluded because he made supposedly unsupported assumptions that Dr. Konig worked on speech recognition and speaker verification research at SRI and used common machine learning tools. D.I. 553 at 8. The Third Circuit has instructed that a district court should exclude evidence only if the flaws are significant enough that the expert lacks "good grounds" for his conclusion. *In re TMI Litigation*, 193 F.3d at 677; *Main Street Mortgage, Inc. v. Main Street Bancorp., Inc.*, 158 F. Supp. 2d 510, 513-14 (E.D. Pa. 2001). To determine whether "good grounds" are present, courts examine the expert's conclusions to see "whether they could reliably flow from the facts known to the expert and methodology used." *Heller v. Shaw Indus.*, Inc., 167 F.3d 146, 153 (3d Cir. 1999). Applying that test here, there is no basis to exclude Dr. Pazzani's testimony.

First, Google has never disputed the fact that Dr. Konig's work at SRI involved speech recognition and speaker verification. That fact makes Google's challenge of Dr. Pazzani's "understanding" curious at best.

Second, contrary to Google's assertion, Dr. Pazzani had a sufficient basis in facts and evidence for his understanding that Dr. Konig worked on speech recognition and speaker

verification. In particular, as Dr. Pazzani indicates in his report, he spoke with Dr. Konig. He also reviewed publications relating to Dr. Konig's speech recognition research, Dr. Konig's SRI files including, Dr. Konig's email, and reviewed the deposition transcripts of SRI corporate designees and employees, including, the deposition transcripts of Raymond Perrault, Kemal Sonmez, Douglas Bercow, Horacio Franco, and Andreas Stolcke. *See* Pazzani Report, Ex. B (attached hereto as Ex. 1). Moreover, the testimony Dr. Konig provides at trial will support Dr. Pazzani's understanding.

Dr. Pazzani's testimony is consistent with "a long tradition" in American courts permit[ting] an expert to testify in the form of a "hypothetical question," where the expert assumes the truth of factual predicates and then offers testimony based on those assumptions. *Williams v. Illinois*, 132 S.Ct. 2221, 2234 (2012). "Modern rules of evidence continue to permit experts to express opinions based on facts about which they lack personal knowledge," allowing an expert to "base an opinion on facts that are 'made known to the expert at or before the hearing.'" *Id*.

But in any event, challenges to Dr. Pazzani's understanding of what Dr. Konig worked on at SRI have no effect on Dr. Pazzani's opinion that speech recognition and speaker verification research did not result in the patented technologies in this case. *See* Pazzani Report ¶ 580 ("Personalized user search is no more related to speech recognition and speaker verification than are medical diagnosis or computational science that may use machine learning techniques.").

Google's argument ignores that "the full burden of exploration of the facts and assumptions underlying the testimony of an expert witness [is] squarely on the shoulders of opposing counsel's cross-examination." *Symbol Tech., Inc. v. Opticon, Inc.*, 935 F.2d 1569, 1575 (Fed. Cir. 1991) (quoting *Smith v. Ford Motor Co.*, 626 F.2d 784, 793 (10th Cir. 1980)). If

Google wants to challenge the "facts and assumptions underlying" Dr. Pazzani's testimony, notwithstanding the fact that Google itself does not dispute those assumptions, the Third Circuit has made clear that "[a] party confronted with an adverse expert witness who has sufficient, though perhaps not overwhelming, facts and assumptions as the basis for his opinion can highlight those weaknesses through effective cross-examination." *Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 414 (3d Cir. 2002).

III. GOOGLE'S REMAINING ISSUES ARE A BASIS, AT BEST, FOR CROSS-EXAMINATION, NOT EXCLUSION.

Google also argues that Dr. Pazzani failed to consider certain evidence that Google considers to be relevant. D.I. 553 at 8-10, 12-14. But under *Daubert*, 509 U.S. at 596, determinations regarding the weight to be afforded an expert's conclusions, and the sufficiency of the evidence relied upon by the proffered expert, are within the sole province of the jury. *See Breidor v. Sears, Roebuck & Co.*, 722 F.2d 1134, 1138–39 (3d Cir. 1983) ("Where there is a logical basis for an expert's opinion testimony, the credibility and weight of that testimony is to be determined by the jury, not the trial judge."). What Dr. Pazzani did and did not rely on in making his determinations goes to the weight that the jury should afford his testimony. *See Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 414 (3d Cir. 2002) ("Rule 705, together with Rule 703, places the burden of exploring the facts and assumptions underlying the testimony of an expert witness on opposing counsel during cross-examination."). Google's remaining contentions can be raised on cross-examination, and, to the extent Dr. Pazzani did not consider certain evidence, that evidence can also be presented at trial.

For example, Google asserts that Dr. Pazzani did not consider or discuss "Bayesian statistics" and "Markov models" allegedly appearing in the Asserted Patents; certain power points purportedly showing the patented inventions did result from Dr. Konig's speech research

at SRI;[2] SRI's purported activities in the field of internet search; and the deposition of Doug Bercow. *See* D.I. 553 at 405, 8-9. Google also argues Dr. Pazzani uses the wrong date when Dr. Konig's work ended.[3] *See id.* at 13-14. These purported omissions, however, do not change that fact that Dr. Pazzani had reliable bases and reasons to make his determination. PUM need not demonstrate by a preponderance of the evidence that Dr. Pazzani's opinions are *correct*, but only that they are *reliable*. *In re Paoli R.R. Yard PCB Litig.* 35 F.3d 717, 744 (3d Cir. 1994). Google can raise allegedly non-considered evidence that Google maintains weakens Dr. Pazzani's opinion on cross-examination. *Daubert*, 509 U.S at 596.

Other courts in this Circuit have held that whether an expert failed to consider additional or contradictory evidence is a basis for cross examination, not exclusion. For example, in *Carnegie Mellon University v. Marvell Technology Group, Ltd.*, No. 09-cv-290, 2012 WL 5409793, at *2 (W.D. Pa. Nov. 6, 2012), plaintiff argued that defendant's expert did not consider alternatives with supporting evidence and that the court found both parties "pointed to evidence that contradicts or supports [the expert's] opinions." The court there, however, determined that such disputes regarding the "weaknesses in the testimony . . . are properly resolved at the trial itself on the basis of evidence and cross-examination." *Id.* (citations omitted) (citing *Daubert*). The court, then, did not preclude the expert's testimony, despite perceived weaknesses in her opinion. *Id.*

Google points to *Dwyer ex rel. Dwyer v. Sec. of Health and Human Serv's*, No. 03-cv-1212, 2010 WL 892250, at *148 (Fed. Cl. 2010), for the proposition that Dr. Pazzani's opinion is

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[2] Contrary to Google's argument, Dr. Pazzani did address an "early UTOPY white paper" in paragraph 580 of his report.

[3] Notably, Google fails to explain how Dr. Pazzani's inadvertent reference to a December, 1999 versus August 1999 date affects the reliability of Dr. Pazzani's opinions in any way.

unreliable because he did not consider "contrary *data*." In *Dwyer*, however, the court not only found a pattern of ignoring "prominent data," but also found that the expert "misstate[d] the findings of others, ma[de] sweeping statements without support, and cite[d] papers that do not provide the support asserted." *Id.* Here, there are no such allegations to render unreliable the entirety of Dr. Pazzani's opinion on how Dr. Konig's work at SRI related to or resulted from the patents at issue. Nor does Google point to contrary *data* to support the opposite conclusion that Dr. Konig's work at SRI did relate to or result in the patented technology. Accordingly, if Google believes Dr. Pazzani's opinions are made in error, then Google has the opportunity to scrutinize Dr. Pazzani's testimony at trial.

CONCLUSION

For the foregoing reasons, the Court should deny Google's Daubert Motion to Exclude Certain Opinions of Dr. Pazzani.

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February 10, 2014

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2014, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF which will send electronic notification of such filing to all registered participants.

Additionally, I hereby certify that true and correct copies of the foregoing were caused to be served on February 10, 2014, upon the following individuals in the manner indicated:

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