IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

THE WEATHER UNDERGROUND, INC.,
a Michigan corporation,

Plaintiff,

vs.

NAVIGATION CATALYST SYSTEMS, INC., a Delaware corporation; CONNEXUS CORP., a Delaware corporation; FIRSTLOOK, INC., a Delaware corporation; and EPIC MEDIA GROUP, INC., a Delaware corporation;

Defendants.

Case No. 2:09-CV-10756
Hon. Marianne O. Battani

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PLAINTIFF'S RESPONSE TO DEFENDANTS' *DAUBERT* MOTION TO STRIKE REPORT OF CHRISTOPHER SCHWERZLER AND PROHIBIT HIS TESTIMONY ON SAME AT TRIAL

NOW COMES Plaintiff, The Weather Underground, Inc. ("Plaintiff"), by and through its counsel, Traverse Legal, PLC, and responds to Defendants' *Daubert* Motion to Strike Report of Christopher Schwerzler and Prohibit His Testimony on Same at Trial as follows:

ARGUMENT

I. Schwerzler's Report is Authenticated.

Defendants request that the Court strike Exhibit M of Plaintiff's Motion for Partial Summary Judgment on its Anti-Cybersquatting Consumer Protection Act ("ACPA") claim. Defendants argue that, because the reports in Exhibit M are unsigned and unverified by sworn affidavit, they are inadmissible at trial and for purposes of the Motion for Summary Adjudication under Fed. R. Civ. P. § 56(c)(2) and Fed. R. Evid. § 602. Despite the fact that Defendants examined Mr. Schwerzler in detail at his deposition about his reports, Defendants continue to play procedural games and avoid the merits at all cost.

Regardless, Plaintiff is providing a sworn affidavit from Christopher Schwerzler authenticating the reports attached as Exhibit M to Plaintiff's Motion for Partial Summary Judgment, which affidavit is attached hereto as ***Exhibit A***. It is important to note that Chris Schwerzler's primary role in this case was to review and report on a terabyte drive comprised of Defendant's database containing, among other things: a list of defendant's domains, dates of registration, USPTO trademark database, USPTO database matching tool and other related software code. Mr. Schwerzler's primary role to report on what is, in fact, included in Defendant's production of the terabyte drive and use their

trademark matching tool to see how certain domains registered by Defendants match-up. The data (primarily lists of domains registered by Defendants) is either there or not. Verification could not be easier. Mr. Schwerzler's "Conclusions" listed on the last two pages of his report are not necessary to Plaintiff's Motion for Summary Judgment under the ACPA, although most of them remained unchallenged.

II. Chris Schwerzler's Report and Testimony Are Admissible Under Federal Rule of Evidence § 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

Defendants' argue Mr. Schwerzler is "the Plaintiff" because he is a Director, Board Member, Employee, and Shareholder of the Plaintiff, and therefore presumptively biased and unfit to be an expert witness in this case. Since Mr. Schwerzler is primarily reporting on what is contained in Defendants' databases, his status as an owner of Plaintiff Company is irrelevant. Defendants' case citations are distinguishable. *In re Commercial Money Center, Inc.*, 737 F. Supp. 2d 815 (N.D. Ohio 2010) involved a company owner who "had limited experience with loan servicing" and "no experience relevant to the technical areas involved in the case." *Id.* at 843. He was excluded for lack of foundation, and because his testimony would not be helpful to the jury. *Id.* Similarly, *In re Air Crash at Detroit Airport*, 737 F. Supp. 427 (E.D. MI 1989) had nothing to do with an owner testifying as an expert. The court precluded an expert's testimony because the evidence was "so lacking in probative force and reliability that no reasonable expert could base an opinion on the data." *Id.* at 430.

Here, Mr. Schwerzler's testimony is largely verifiable fact testimony about what is contained in Defendants' digital production, simple comparison queries against lists of

known third party web sites and related matters. To the extent Schwerzler offers opinions such as those ten paragraphs listed at the conclusion of his report, they are based on the data included in the database or in comparison to other publically available data; *i.e.* "That a large percentage of the current portfolio is a near miss of high-ranking Quantcast top million domains." With regard to his opinions, his status as an owner goes to credibility not admissibility.

Defendants further claim that Mr. Schwerzler is unqualified to render the opinions in his reports, although they do not challenge any of the specific information he was able to pull from Defendants' digital production.

Federal Rule of Evidence § 702 governing the admissibility of expert testimony provides as follows:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

Fed. R. Evid. § 702.

The Supreme Court enunciated guidelines in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) as a further guide for admission of expert testimony: (1) whether the theory or technique can be or has been tested; (2) whether it has been subjected to peer review and publication; (3) where there is a known or potential rate of error; (4) whether the theory or technique enjoys general acceptance in the relevant scientific community.

A. SCHWERZLER IS A QUALIFIED EXPERT

The proponent of the testimony is obliged to demonstrate the facets of the witness' background that makes his knowledge "specialized," that is, beyond the scope of the ordinary juror. *Zuzula v. ABB Power T & D Co., Inc.*, 267 F. Supp. 2d 703, 713 (E.D. Mich. 2003) (citing *De Jager Const., Inc. v. Schleininger,* 938 F.Supp. 446, 449 (W.D.Mich.1996)). The qualifications must be relevant to the opinion sought. The seminal explanation of this principle comes from *Berry v. City of Detroit:*

> [I]f one wanted to explain to a jury how a bumblebee is able to fly, an aeronautical engineer might be a helpful witness. Since flight principles have some universality, the expert could apply general principles to the case of the bumblebee ... even if he had never seen a bumblebee.... On the other hand, if one wanted to prove that bumblebees always take off into the wind, a beekeeper with no scientific training at all might be an acceptable witness *if* a proper foundation were laid for his conclusions.

25 F.3d 1342, 1349–50 (6th Cir. 1994).

Whether or not an expert has a degree is not dispositive in determining his qualifications "because the expert's education must be relevant to the opinion, and qualification may be based on knowledge, skill, experience or training as well." *Zuzula* at 713 (citing Fed. R. Evid. § 702). The Sixth Circuit has held that "Rule 702 should be broadly interpreted on the basis of whether the use of expert testimony will assist the trier of fact." *Morales v. American Honda Motor Co.,* 151 F.3d 500, 517 (6th Cir. 1998) (quoting *Davis v. Combustion Engine, Inc.,* 742 F.2d 916, 919 (6th Cir.1984)). "The court's investigation of qualifications should not be onerous or inordinately exacting, but rather must look to underlying competence, not labels." *Zuzula*, 267 F. Supp. 2d at 713 (E.D. Mich. 2003) (citing *Mannino v. Int'l Mfg. Co.,* 650 F.2d 846, 850 (6th Cir.1981)).

Further, "[T]he expert need not have complete knowledge about the field in question, and need not be certain. He need only be able to aid the jury in resolving a relevant issue." *Id.* As indicated in Mr. Schwerzler's affidavit, Mr. Schwerzler's testimony is crucial in informing the jury about the information provided by Defendants in discovery, which is not in a format that is decipherable by a jury.

In arguing that Mr. Schwerzler is unqualified, Defendants decline to properly recognize the limited field of inquiry. Defendants also ignore that Mr. Schwerzler's degree in Computer Science, his experience in computer science while working for Plaintiff, his ability to write queries to pull and compare data, and his demonstrated skill in analyzing computer code qualify him as an expert in this case. Defendants rely on *Communities for Equity v. Michigan High School, Athletic Assoc.*, 2007 WL 5830967 at * 4 (W.D. Mich. 2007) to argue that Mr. Schwerzler is not qualified; however, in that case, of the two out of four proposed experts the Court declined to qualify as experts on Title IX gender inequity issues, one was a high school volleyball coach and another an individual who was "instrumental" in convincing the Minnesota High School League to sanction a girls ice hockey tournament. The Court noted in each instance that in addition to the fact neither had ever testified as an expert in the issue of gender equity and sports, neither reviewed any documents related to the case. *Id.* Schwerzler's qualifications in this case are derived from his education in computer science, his work experience and particular knowledge of working with software code and pulling information from databases using simple queries. These characteristics assure that Mr. Schwerzler's knowledge meets the standard to qualify as an expert in this case, which

is knowledge beyond the scope of an ordinary juror in explaining computer code that screens potentially trademarked domain names.

B. SCHWERZLER'S METHODOLGY IS SIMPLE AND RELIABLE

The task for the district court in deciding whether an expert's opinion is reliable is not to determine whether it is correct, but rather to determine whether it rests upon a reliable foundation, as opposed to unsupported speculation. *See* Fed. R. Evid. § 702. Although the opinions of a proffered expert may be "shaky," if the opinions are based upon facts in the record, and are not "assumptions" or "guesses," challenges merely go to the accuracy of the conclusions, not to the reliability of the testimony. *See Jahn v. Equine Services*, 233 F.3d 382, 390-93 (6th Cir. 2000); *see also McLean v. 988011 Ontario, Ltd.,* 224 F.3d 797, 801 (6th Cir. 2000) ("An expert's opinion, where based on assumed facts, must find some support for those assumptions in the record. However, mere 'weaknesses in the factual basis of an expert witness' opinion ... bear on the weight of the evidence rather than on its admissibility.'") (quoting *United States v. L.E. Cooke Co.,* 991 F.2d 336, 342 (6th Cir.1993)) ("Where an expert's testimony amounts to 'mere guess or speculation,' the court should exclude his testimony, but where the opinion has a reasonable factual basis, it should not be excluded. Rather, it is up to opposing counsel to inquire into the expert's factual basis."); *see e.g. In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 529-30 (6th Cir. 2008). Interestingly, Defendant's take no issue with the accuracy of Mr. Schwerzler's conclusions, i.e. list of domains registered by Defendants pulled from their database, comparisons of Defendants domains to Defendants' purchased list of registered trademarks, comparisons of

Defendants' domains to Defendants' public list of well known web sites with substantial traffic, etc. You would think that Defendants would be able to point to a single instance where Mr. Schwerzler's data output was incorrect given their argument that he is unqualified.

1. CONNEXUS SOFTWARE

Defendants argue that Schwerzler's methodology is unreliable because he did not make record of every single search, every table viewed, or every query made during his research, but Defendants do not tell why such an over-share of all simple queries, the dead ends and irrelevant search results is necessary to determine Schwerzler's basic methodology. The expert conducts research and refines his analysis and conclusions from the relevant results. Defendants are basically demanding that Plaintiff's expert keep a junk folder of every piece of information he comes across during his research, which is obviously unrealistic and of little help in assisting the Court in determining whether Defendants committed the alleged infringements. Defendants do not argue that Mr. Schwerzler did not keep enough notes; Defendants argue that he did not keep a note of every single piece of information during his research. This does nothing to establish a lack of reliability in his methods. More importantly, Defendants have full access to their own data, the very data used by Mr. Schwerzler. If they believe Mr. Schwerzler has incorrectly reported data, showing that could not be much more straightforward. The proof in this case is truly in the pudding. It is most certainly verifiable.

Defendants argue that Schwerzler admitted conspicuous oversights in his methodology. This is a perversion of Schwerzler's statements. He admitted to not including the "blacklist," but did not ever admit that this was a conspicuous oversight. Mr. Schwerzler analyzed the only database provided by Defendants in this case, which includes the domains they in fact registered. If Defendants wish to talk about domains they never registered or considered or were excluded by the blacklist, they are free to offer into evidence the jury a list of domains they never considered for registration because of the supposed blacklist.

Further, although he missed a single path in the code in his first draft because of Defendants' discovery delays, Schwerzler corrected this after having more time to review the terabyte drive produced only after his initial report was submitted. The timely supplement identified in discovery is no basis to preclude testimony or strike reports.

Defendants' argument that Schwerzler failed to demonstrate Defendants' intention to register trademarked domains is equally unpersuasive. Schwerzler did set out to test the supposed trademark vetting software used by Defendants. Schwerzler's own trademark testing tool demonstrates the ability to, with relative ease, effectively screen trademarked names and famous brands if Defendants had actually wanted to succeed in that endeavor. Simply criticizing Schwerzler's conclusions are no basis to preclude him from testifying given that Schwerzler utilized facts provided in discovery and a simple methodology to demonstrate his opinions and conclusions.

2. CREATING PHP SCRIPT

Schwerzler has a degree in computer science and relevant practical experience in creating software code, including in his current employment testifying he had "created many PHP scripts." *Daubert* Motion for Defendant, Ex. E at pp. 11, 29. Defendants attempt to delegitimize Schwerzler's skill and experience in creating PHP script because he had heretofore never created one for trademark matching. These scripts don't care what data is being analyzed, trademark data or otherwise. The fact that trademark registration data is being analyzed is irrelevant. Schwerzler's expertise is demonstrated by the fact he created many PHP scripts that matched code on subjects and data other than trademarks, which is beyond an ordinary juror's understanding of source code function and application and is essential to a juror's understanding of why Defendants could have easily produced their own effective version of screening software if they had wanted to take that route. Ironically, Defendants business supposedly is to exclude trademarks from their domain registrations. Mr. Schwerzler, who they say is unqualified, was able to write a trademark matching system which performs much better than their own. What does that say about how hard Defendants tried to exclude trademarks?

III. THE DAUBERT FACTORS FAVOR ADMISSION OF SCHWERZLER'S REPORTS AND TESTIMONY

Rejection of expert testimony is the exception rather than the rule, and generally, testimony will be admissible even if based on allegedly erroneous facts when there is some support for those facts in the record. *In re Scrap Metal Antitrust Litigation,* 527

F.3d at 517. Nothing in the text of Rule 702 establishes "general acceptance" as an absolute prerequisite to admissibility; a rigid "general acceptance" requirement would be at odds with the "liberal thrust" of the Federal Rules and their "general approach of relaxing the traditional barriers to 'opinion' testimony." *Daubert,* 509 U.S. at 588. If the opinions are based upon facts in the record, and are not "assumptions" or "guesses," challenges from opposing party merely go to the accuracy of the conclusions, not to the reliability of the testimony. *Jahn,* 233 F.3d at 390-93. The Sixth Circuit has also allowed experts to testify under circumstances where the expert created his research and report specifically for the litigation. *See Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 791 (6th Cir. 2002) (where court allowed expert's testimony despite the fact that expert created his methodology specifically for the case at hand.) Further, "[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." *Id.* at 794.

Defendants' purported application of the Daubert factors is rigid and inaccurate. A true application of the factors favor the admission of Schwerzler's report and testimony:

A. (1) "whether the theory or technique can be or has been tested"

Schwerzler's testing of the Connexus software can be replicated by any software coder capable of writing straight forward scripts. He is pulling data and identifying software code within Defendants' system so the jury can see what is there. If Defendants want to argue that the data does not exist, or is inaccurate, they are free to

do so. Mr. Schwerzler has identified each issue he looked at and set forth every piece of code relevant to the issues he reviewed and identified where it is found within the produced code, along with his analysis of that specific code and his conclusions related thereto. Examples of such methodology run throughout his report; in fact, his report sets forth the code he is reviewing. Only the aspects that form a basis for his opinions and conclusion need to be tested, not every uneventful search and query. Further, the fact that no one has tested Schwerzler's PHP script or its ability to screen for trademarks has no legal significance because the script and its capabilities are still free to be tested by Defendants' experts and they do not claim otherwise. *See Daubert,* 509 U.S. at 593 ("*can be* OR has been tested").

B. (2) "whether it has been subjected to peer review and publication"

Schwerzler's methodology has not been subject to peer review or publication and is very narrow in scope; however this does not discredit his work because "publication does not necessarily correlate with reliability, and, in some instances, well-grounded but innovative theories will not have been published." *Daubert,* 509 U.S. at 593. What is being done here in many instances is simple, but important since the jury has no way to pull or see data contained within Defendants' production.

C. (3) "whether there is a known or potential rate of error"

There can be no error rate in much of what Mr. Schwerzler is doing, which in many instances reports only on what is contained in Defendants' production by way of software code and databases. Much like an expert who might report on what text

appears in a digital book jurors can't read, Mr. Schwerzler reports on whether the code or data is there or not. With regard to certain conclusions - such as Defendants' are trying very hard to exclude trademarks – Defendants exaggerate the potential for errors committed in the research. Schwerzler's inference that the most popular domain names will be trademarked is reasonable and logical, although not critical to his opinions. This can easily be determined by referring the trademark database that will be part of the evidence in this case. The court can further take judicial notice of marks that are contained in the trademark database.

D. (4) "whether the theory or technique enjoys general acceptance in the relevant scientific community"

Defendants overemphasize the need for general acceptance in the community, especially in the case here where Schwerzler has simply reported on what is contained in Defendants' production in terms of lines of code and data, as well as explained search code. A rigid "general acceptance" requirement would be at odds with the "liberal thrust" of the Federal Rules of Evidence and their "general approach of relaxing the traditional barriers to 'opinion' testimony." *Daubert*, 509 U.S. at 588. Again, Defendants fail to identify a single error made by Mr. Schwerzler in his reports. They fail to identify a single domain identified by Schwerzler that does not belong to Defendants or a single domain name which does not match a registered trademark.

Finally, Defendants' suggestion that somehow Plaintiff failed to comply with the rules by preparing a "draft report" is incorrect, given their delays and discovery order violations in the case. In fact, Defendants failed to turn over the primary piece of

evidence in this case until the Depositions of Donnie Misino, when the terabyte drive was inexplicably tendered over two months after the Magistrate order required and two weeks after Mr. Schwerzler turned in his expert report. (See ***Exhibit B***; 30(b)(6) Deposition of Donnie Misino; pp. 13-15, 131-133.) The fact that Plaintiff worked with Defendants in order to complete discovery without further court involvement only to now have Defendants come back and complain at delays caused exclusively by their own failures is troubling indeed. Defendants did not object at the time to the supplemental report and subsequent depositions, given their own discovery delays. They can not do so now.

CONCLUSION

Mr. Schwerzler's expert opinions found on the last two pages of his report are not necessary to find in favor of Plaintiff on its Motion for Partial Summary Judgment on its ACPA Claims. Plaintiff has not relied on those opinions in bringing its Summary Judgment motion. A *Daubert* hearing can be held prior to his trial testimony with regard to specific objections to listed opinions.

To the extent Mr. Schwerzler pulled or compared data from Defendants' terabyte drive production, the testimony is factual, not opinion. In fact, such data and comparison remain unchallenged by Defendants in this Motion.

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Respectfully submitted this 30th day of August, 2011.

/s/Enrico Schaefer
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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of August, 2011, I electronically filed the foregoing paper with the Court using the ECF system which will send notification of such filing to the following:

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