

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

THE WEATHER UNDERGROUND, INC.,
a Michigan corporation,

Plaintiff,

vs.

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

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.

Enrico Schaefer (P43506)
Brian A. Hall (P70865)
TRAVERSE LEGAL, PLC
810 Cottageview Drive, Unit G-20
Traverse City, MI 49686
231-932-0411
enrico.schaefer@traverselegal.com
brianhall@traverselegal.com
Lead Attorneys for Plaintiff

Anthony P. Patti (P43729)
HOOPER HATHAWAY, PC
126 South Main Street
Ann Arbor, MI 48104
734-662-4426
apatti@hooperhathaway.com
Attorneys for Plaintiff

William A. Delgado
WILLENKEN WILSON LOH & LIEB LLP
707 Wilshire Boulevard, Suite 3850
Los Angeles, CA 90017
(213) 955-9240
williamdelgado@willenken.com
Lead Counsel for Defendants

Nicholas J. Stasevich (P41896)
Benjamin K. Steffans (P69712)
BUTZEL LONG, P.C.
150 West Jefferson, Suite 100
Detroit, MI 48226
(313) 225-7000
stasevich@butzel.com
steffans@butzel.com
Local Counsel for Defendants

**DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF DAUBERT MOTION TO
EXCLUDE TESTIMONY BY CHRIS SCHWERZLER**

REPLY MEMORANDUM OF POINTS AND AUTHORITIES

I. INSISTING ON ADMISSIBLE EVIDENCE IS NOT A PROCEDURAL GAME.

Contrary to what Plaintiff may say, Defendants' insistence that Plaintiff support its Motion for Summary Judgment with admissible evidence is not a procedural game. It is actually a mandate required of Plaintiff by Rule 56 in the first instance (i.e., when Plaintiff files the Motion). Plaintiff's belated effort to authenticate Exhibit M runs afoul of Rule 56. Moreover, as Defendants pointed out originally, the Schwerzler Supplemental Report in Exhibit M is actually a draft version of that report. So, even now, Mr. Schwerzler is simply authenticating and relying on a *draft* of his supplemental report as opposed to the final version.

II. ARGUMENTS ABOUT SCHWERZLER'S PRIMARY ROLE ARE A RED HERRING.

Plaintiff seeks to avoid the exclusion of testimony by Mr. Schwerzler by arguing that his "primary role" was to extract information from a database. As a preliminary matter, that argument is a red herring. Defendants' motion seeks to exclude testimony as to his *faulty conclusions and improper opinions*, irrespective of what his primary, secondary, or tertiary "role" was.

Moreover, the argument is plainly untrue. Schwerzler's "primary" role was to write a PHP script that would support his preconceived notions of defendants as cybersquatters and then rely on the PHP script to reach improper, overreaching conclusions that lack foundation and are well beyond any experience or expertise he might ostensibly have. *See, e.g.*, Ex. C at p. 23 ("[Defendants] represent the worst intentional abusers of trademarks in modern history.").

III. PLAINTIFF DOES NOT EXPLAIN HOW SCHWERZLER'S TESTIMONY ABOUT HIS PHP SCRIPT WOULD BE HELPFUL TO A JURY.

As Defendants noted in their opening brief, Schwerzler did not analyze the registration method *actually* utilized by NCS. Instead, he created (and tweaked for purposes of this litigation) an alternate program to show a match between the NCS domain name portfolio and “highly trafficked websites.” And, in fact, Plaintiff fully admits that it intends to introduce testimony and argument that “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.” Opp. at p. 9.

But, as the Connexus Defendants noted earlier, that testimony is not helpful. This is not a products liability case where “feasibility of alternative design” is at issue. This is a case which focuses exclusively on whether the accused defendant had a “bad faith intent to profit.” That Schwerzler can perform trademark screening in a *different* way with *different* results says nothing about the intent behind the specific trademark screening performed by Defendants.

Indeed, Plaintiff’s argument is the quintessential argument that is “too great an analytical gap” which must be excluded. *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997). Essentially, Plaintiff is arguing that because Mr. Schwerzler’s trademark screening design has a certain efficacy with result to high-trafficked *domain names*, then that necessarily means that NCS’s trademark screening must have been intentionally designed to register (as opposed to avoid) *trademarks*. There is no logic in that argument. That would be akin to arguing: “Since Apple computers do not get as many viruses as Windows-based computers, Microsoft must intentionally have designed their computers to be susceptible to viruses.” Nonsense. The efficacy of a particular software design does not say anything about the *intent* behind a *different* software design. At best, it simply speaks to the efficacy of one design over the other.

IV. PLAINTIFF DOES NOT EVEN TRY TO SUPPORT SCHWERZLER'S BIASED OPINIONS.

As noted, above, Plaintiff attempts to avoid discussing Schwerzler's biased and improper conclusions by simply hoping that the Court will accept the "but-his-primary-role-was-just-to-extract-information" argument. Nevertheless, as Defendants noted earlier, Schwerzler is simply not qualified to offer all of the opinions he wants to offer. For example, Schwerzler offers multiple, grand opinions as to the Connexus Defendants' "intentions," which are based on nothing more than his own "beliefs." (*See, e.g.*, Ex. C, p. 22; Ex. E, pp. 160:15-161:10; *see also* Ex. C, p. 23 ("[Defendants] represent the worst intentional abusers of trademarks in modern history.")). He offers legal opinions, though, of course, he has no legal degree. (Ex. E, p. 7:20-21; 15:6-10; *see, e.g.*, Ex. C, p. 18.) He offers opinions regarding brand value, though he admits he does not have a marketing degree. (*See, e.g.*, Ex. C, p. 24; Ex. E, pp. 7:5-7; 162:19-163:8.).

There is **nothing** in Plaintiff's opposition which even attempts to argue that Schwerzler is qualified to opine on anything other than his ability to extract files from a database or run a query on those files. Furthermore, Plaintiff's attempt to explain away Schwerzler's obvious bias is ineffectual since its attempt to "distinguish" *In re Commercial Money Center* simply consists of ignoring that part of the Court's opinion which reads that the proposed expert was "merely a proxy for a party in this case and his extreme partisanship renders any testimony that he could provide unhelpful." *In re Commercial Money Center*, 737 F. Supp. 2d 815, 844 (N.D. Ohio 2010). Plaintiff's effort to distinguish *In re Air Crash at Detroit Airport* suffers from a similar defect because Plaintiff is simply ignoring the very next line **after** the line it cites in its Opposition which reads "where an expert becomes an advocate for a cause, he therefore departs

from the ranks of an objective expert witness, and any resulting testimony would be unfairly prejudicial and misleading.” See *In re Air Crash at Detroit Airport*, 737 F. Supp. 427, 430 (E.D. Mich.1989) *aff’d without opinion*, 917 F.2d 24 (6th Cir.1990) (citations omitted). The same is absolutely true here: Schwerzler is simply a mouth-piece for Plaintiff who is, undoubtedly, an advocate, not an objective third-party witness. Permitting him to testify would not be helpful and would, instead, be unfairly prejudicial and misleading.

V. SCHWERZLER IS OBLIGATED TO PRODUCE DOCUMENTS HE RELIED UPON.

Plaintiff takes umbrage at the idea that Schwerzler should have retained and produced the documents upon which he relied in forming his opinions by referring to the retention of such information as maintaining a “junk folder.” Opp. at p. 8. Putting aside the obvious irony in that statement (i.e., that, in forming his opinion, Schwerzler was relying on “junk”), the law is clear that experts have to produce the documents on which they rely so that their ultimate opinions can be tested against the source of their opinions. *In re Commercial Money Center, Inc.*, 737 F. Supp. 2d at 843-844. Here, Schwerzler’s failure to retain documents he relied upon and inability to recall them at deposition deprives Defendants of that opportunity.

VI. SCHWERZLER’S DECLARATION BELIES PLAINTIFF’S POSITION.

One would have thought that, having seen Defendants’ arguments in support of exclusion, any declaration by Schwerzler would have avoided language that fed into those arguments. One would have thought wrong. In his Affidavit, Schwerzler: (i) makes assumptions without any foundation (e.g., he testifies in Paragraph 2 that plentyoffish.com and ultimate-guitar.com are “well known web site domains”), (ii) mischaracterizes the sequence of document production in a biased way as “Defendants’ repeated failures to provide discovery” in paragraph

5, (iii) once again relied only on a *portion* of the code to assume the date when the blacklist was implemented in paragraph 13, and (iv) assumes that “high traffic domain names” necessarily consist of a trademark in paragraph 15 without establishing any foundation for that fact.

Together with his expert report, the Affidavit underscores the need for exclusion.

VII. CONCLUSION

Perhaps it would be one thing if Mr. Schwerzler had been retained to simply discuss how he extracted information from a database. But, given the **multiple** bases for exclusion and the “expert” opinions he plans to share with the jury which go far beyond any expertise he has, relate to irrelevant alternative designs, and, ultimately, are so soaking wet with bias that they are unhelpful to the jury, this is an easy call. For all the reasons set forth by Defendants, Schwerzler’s testimony should be excluded. *In re Commercial Money Center*, 737 F. Supp. 2d 815, 844 (ruling that “[expert] may be qualified by general experience to opine as to some limited issues set forth in his expert report” but ultimately excluding the testimony as unhelpful to the jury because “[expert’s] report is riddled with vague and unsupported statements, many of which are outside the area of proper expert testimony, and many of which are blatantly improper legal conclusions. [Expert] shows no hesitation in opining as to the Sureties’ alleged fraudulent intent, or in determining the Sureties’ violation of law based upon a single reading of a statute.”).

RESPECTFULLY SUBMITTED this 2nd day of September, 2011.

/s/William A. Delgado

William A. Delgado
WILLENKEN WILSON LOH & LIEB LLP
707 Wilshire Boulevard, Suite 3850
Los Angeles, CA 90017
(213) 955-9240
williamdelgado@willenken.com
Lead Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2011, I electronically filed the foregoing paper with the Court using the ECF system which will send notification of such filing to the following:

Enrico Schaefer (P43506)
Brian A. Hall (P70865)
TRAVERSE LEGAL, PLC
810 Cottageview Drive, Unit G-20
Traverse City, MI 49686
231-932-0411
enrico.schaefer@traverselegal.com
brianhall@traverselegal.com
Lead Attorneys for Plaintiff

Nicholas J. Stasevich (P41896)
Benjamin K. Steffans (P69712)
BUTZEL LONG, P.C.
150 West Jefferson, Suite 100
Detroit, MI 48226
(313) 225-7000
stasevich@butzel.com
steffans@butzel.com
Local Counsel for Defendants

Anthony P. Patti (P43729)
HOOPER HATHAWAY, PC
126 South Main Street
Ann Arbor, MI 48104
734-662-4426
apatti@hooperhathaway.com
Attorneys for Plaintiff

William A. Delgado
WILLENKEN WILSON LOH & LIEB LLP
707 Wilshire Boulevard, Suite 3850
Los Angeles, CA 90017
(213) 955-9240
williamdelgado@willenken.com
Lead Counsel for Defendants

/s/William A. Delgado

William A. Delgado
WILLENKEN WILSON LOH & LIEB LLP
707 Wilshire Boulevard, Suite 3850
Los Angeles, CA 90017
(213) 955-9240
williamdelgado@willenken.com
Lead Counsel for Defendants