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.

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DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION AND MEMORANDUM FOR RECONSIDERATION OR, IN THE ALTERNATIVE, CLARIFICATION OF ORDER REGARDING DEFENDANTS' *DAUBERT* MOTION TO STRIKE REPORT OF CHRISTOPHER SCHWERZLER AND EXCLUDE HIS TESTIMONY AT TRIAL

OPPOSITION MEMORANDUM OF POINTS AND AUTHORITIES

No grounds for reconsideration or clarification exist here. Plaintiff The Weather Underground, Inc. ("Plaintiff") asserts that reconsideration or clarification is warranted because this Court's Order on the *Daubert* Motion to Strike Report of Christopher Schwerzler and Prohibit His Testimony on Same at Trial [Doc. #202] ("*Daubert* Motion") of defendants Connexus Corporation, Firstlook, Inc., and Navigation Catalyst Systems, Inc. ("Defendants") contains a "defect" in that it went beyond the relief requested by Defendants.

To the contrary, by its plain terms, the *Daubert* Motion sought to exclude Mr. Schwerzler's Report in its entirety, and all of Mr. Schwerzler's related expert testimony, and this Court granted the relief requested. No ambiguity exists in this Order. Mr. Schwerzler is precluded from testifying as an expert in this case. He is not precluded from testifying as a fact witness. Of course, Defendants do not concede that Mr. Schwerzler would have percipient knowledge of any facts relevant to any issue in dispute, but certainly this Court's *Daubert* ruling does not preclude such testimony if he has such knowledge. However, all of Mr. Schwerzler's Report, and all of his testimony regarding the subjects therein, plainly is barred by this Court's ruling.

Defendants respectfully request that this Court deny Plaintiff's Motion for Reconsideration in its entirety.

I. No Grounds for Reconsideration Exist.

Local Rule 7.1(h) provides that a motion for reconsideration shall be granted **only** if the movant can: (1) "demonstrate a palpable defect by which the court and the parties have been

misled," and (2) show that "correcting the defect will result in a different disposition of the case." E.D. Mich. LR 7.1(h)(3). Plaintiff argues that a "palpable defect" exists in that "the Court entered an order that appears to be beyond what was intended" because it precludes all of "Mr. Schwerzler's testimony as included in the report," and further, if that was this Court's intent, then this Court just got it wrong. (*See* Plaintiff's Motion and Memorandum for Reconsideration, or, in the Alternative, Clarification [Doc. #225] ("Mot."), pp. 2-3.)

This "defect" is completely pretextual – this Court granted precisely the relief requested and that this Court intended. Plaintiff points to no evidence of any error, and instead just essentially asks this Court instead to "split the baby" by accepting the vast majority of Mr. Schwerzler's expert testimony and omitting some of the most egregious of his biased opinions. This is not grounds for reconsideration. *See Rumburg v. McHugh*, Slip Copy, 2011 WL 4062382 at *4 (E.D.Mich. 2011) ("A motion for reconsideration should not be used to get a second bite at the apple, but should be used sparingly to correct actual defects in the court's opinion.") (citing *Maiberger v. City of Livonia*, 724 F.Supp.2d 759, 780 (E.D.Mich. 2010) ("It is an exception to the norm for the Court to grant a motion for reconsideration.... [A]bsent a significant error that changes the outcome of a ruling on a motion, the Court will not provide a party with an opportunity to relitigate issues already decided.")).

II. The Assumption Underlying Plaintiff's Motion for Reconsideration is Wrong; Defendants Objected to All of Mr. Schwerzler's Expert Testimony.

The crux of Plaintiff's Motion for Reconsideration – that there was some portion of Mr. Schwerzler's Report or certain areas of expert testimony that Defendants did not seek to exclude, or were "unchallenged" – is patently false. (*See, e.g.*, Mot. [Doc. #225], pp. iv, ¶ 8, 2-3; 7-8.)

Defendants argued, and this Court agreed, that all of Mr. Schwerzler's Report and expert testimony should be excluded. (*See Daubert* Mot. [Doc. #202], *generally*; Order [Doc. #222], p. 1; Declaration of William A. Delgado ("Delgado Decl."), Exhibit A (hearing transcript) [Doc. #224] p. 68:25-69:7.)

Further, that Defendants acknowledged that certain tasks undertaken by Mr. Schwerzler – namely extracting files from a database and running queries on them – were not necessarily beyond his limited area of expertise, does not mean that Defendants did not object to testimony on such subjects. To the contrary, Defendants objected to such testimony because all of Mr. Schwerzler's opinions are tainted by his bias, and thus are unreliable. *See In re Commercial Money Center, Inc.*, 737 F. Supp. 2d 840, 844 (N.D. Ohio 2010) (noting "[the expert] may be qualified by general experience to opine as to some limited issues set forth in his expert report," but excluding proffered expert report and holding "[the proffered expert] is not qualified to serve as an expert witness in these proceedings" where, *inter alia*, the proffered expert's "status as an owner and high-level officer of a party to this case . . . render[ed] [the proffered expert] partisan and far too biased to provide a reliable expert opinion in this matter."). Additionally, Defendants argued that such testimony should not be permitted because Mr. Schwerzler did not maintain records of the queries he ran, his queries were otherwise incomplete, and thus his methodology was so flawed that the opinions should not be accepted by this Court and could not be helpful to a jury. (*Daubert* Mot. [Doc. #202], pp. 10-12, 15-20.)

In sum, Plaintiff's argument that this Court's Order somehow went beyond what was requested by Defendants, or is in need of clarification as to which expert opinions are permitted, fails. Defendants argued that all of Mr. Schwerzler's Report and expert testimony should be

excluded based upon, *inter alia*, his extreme bias, and this Court agreed. (*See* Delgado Decl., Exhibit A [Doc. #224], p. 69:6-7) ("because he has an interest in the outcome of this case the Court is not going to allow him to testify as an expert").

III. Deleting the More Egregious Examples of Mr. Schwerzler's Bias from his Report Does Not Change the Fact of His Bias.

Based upon the faulty presumption that Defendants did not challenge all of Mr. Schwerzler's Report, Plaintiff purports to identify the portions of the Report that are Mr. Schwerzler's "opinions," which it has highlighted in yellow and claims that the remaining portions were not challenged by Defendants and thus should be permitted. (*See* Mot. [Doc. #225], p. iv-v, ¶ 10; p. 7.) As noted above, this is a blatant misrepresentation to this Court. Defendants unequivocally challenged the entire Report, not simply the portions highlighted by Plaintiff, which represent only some of the more inflammatory of Mr. Schwerzler's "opinions."

Furthermore, what Plaintiff essentially proposes is that, instead of precluding all Mr. Schwerzler's expert opinions because of his bias, this Court permit Plaintiff to delete the most obvious statements revealing Mr. Schwerzler's bias from his Report, and otherwise allow him to testify on the remaining parts of the Report. This purported solution does not do anything to address Mr. Schwerzler's bias – it would only render it more insidious.

What's more, the remaining portions of the Report all constitute expert testimony and opinion, including opinions on ultimate issues in this action, and are clearly infected by bias. By way of just a few examples, Plaintiff includes opinions: (1) as to how Defendants' software supposedly is "flawed" and "fails" (*see, e.g.,* Ex. B [Doc. #226], p. 6); (2) as to what domains

"represent additional violations of the Weather Underground's marks by the defendants" (*id.*, p. 9); (3) that it would be "easy" to create more effective software (*id*., p. 19, ¶ 9); and (4) that the effectiveness of Defendants' software is "questionable, likely by design" (*id*., p. 18, ¶ 9). In other words, aside from wholly undermining Plaintiff's representation to this Court that it is not seeking to introduce any testimony from Mr. Schwerzler regarding Defendants' "intent," even a cursory glance reveals that the Report is replete with opinions that are susceptible to, and in fact are, infected by bias. (*See* Mot. [Doc. #225], p. 6.) Plaintiff's proposed redacted Report thus should be rejected.

The report attached as Exhibit B should be rejected for the additional reason that it is submitted for the first time with Plaintiff's Motion for Reconsideration. (*See* Ex. B [Doc #226].) By way of explanation, bizarrely, Plaintiff states that, in connection with Plaintiff's Summary Judgment Motion, "Defendant only provided an unsigned draft version of the Report." (Mot. [Doc. #225], p. iv, fn 1.) To the contrary, Plaintiff "only provided an unsigned draft version of the Report" with its Summary Judgment Motion – Defendants merely copied it and put page numbers on and submitted it with their Opposition for this Court's ease of reference as the version Plaintiff submitted was unpaginated. (*See* Mot. for Summary Judgment [Doc. #189], Ex. M.) In any event, Plaintiff certainly should not be permitted to submit a new expert report with its Motion for Reconsideration.

IV. The Testimony that Plaintiff Describes as "Lay Witness" or "Lay Opinion" Testimony to Be Provided by Mr. Schwerzler Is Expert Testimony.

Plaintiff is correct that this Court did agree that its ruling would not bar Mr. Schwerzler from testifying as a fact witness. It is hard to imagine what relevant lay testimony could be elicited from Mr. Schwerzler given the issues to be tried (*see* Federal Rule of Evidence 602), but no plainly no *per se* bar exists based on this Court's *Daubert* ruling.

However, Plaintiff is wrong that it is "unclear" under the Federal Rules of Evidence what portions of Mr. Schwerzler's testimony identified to date would "be considered 'fact' or 'opinion'" – all of the subjects of testimony identified by Plaintiff and/or in the Report constitute expert testimony. (*See* Mot. [Doc. #225], p. 2.) Plaintiff identifies two subjects upon which it claims Mr. Schwerzler should be permitted to testify, despite this Court's ruling: (1) the results of Mr. Schwerzler's queries run on Defendant's terabyte drive (*id*., pp. 2, 8-9); and (2) the results of tests run by Mr. Schwerzler using the PHP script he developed for this litigation (*id.*, pp. 6-7). Both of these categories include only testimony regarding acts undertaken for the purpose of this litigation set forth in his "expert" report– not any "facts" that Mr. Schwerzler somehow might testify to as a percipient witness here.

Indeed, while Plaintiff suggests throughout the Motion for Reconsideration that Mr. Schwerzler simply would be summarizing some indisputable "facts" about what is on the terabyte drive, that is a gross mischaracterization of the testimony offered. As detailed in Defendants' *Daubert* motion, Schwerzler's testimony regarding the terabyte drive is based on "queries" that he ran in connection with this litigation, and testimony regarding those queries and results should not be permitted because the methodology he employed in running such queries

was deeply flawed and unreliable, and, of course, as explained in detail above, is tainted by his bias. (*See Daubert* Mot. [Doc. #202], pp. 11-12.) In other words, the testimony offered is expert testimony, not lay witness testimony, and it is inadmissible under *Daubert*.

An argument strikingly similar to Plaintiff's was made and rejected in *United States v. Ganier*, 486 F.3d 920 (6th Cir. 2006) ("*Ganier*"). *Id.* at 925. There, the government had one of its agents, a forensic computer specialist, use forensic software to determine what searches had been run on several computers, and sought to introduce the testimony as lay witness testimony. *Ibid.* The government argued the proposed testimony was "not based on any scientific, technical or other specialized knowledge," but was "simply lay testimony" available by running "software, obtaining results, and reciting them." *Ibid*. The court disagreed, explaining that "programs such as Microsoft Word and Outlook may be as commonly used as home medical thermometers, but the forensic tests [the agent] ran are more akin to specialized medical tests run by physicians." *Id*. at 926. Here, Mr. Schwerzler's proposed testimony is even more clearly expert testimony than that identified in *Ganier* in that the software analyzed by Mr. Schwerzler is not Microsoft Word or Outlook or some other commercially available software but, rather, highly sophisticated software that is not available to the public, upon which Mr. Schwerzler attempted to run specialized tests. This is quintessential expert testimony, and Plaintiff's attempt to characterize it otherwise should be rejected, as in *Ganier*.

The second category of testimony identified by Plaintiff – the results of tests run by Mr. Schwerzler using the PHP script he developed for this litigation – likewise plainly is expert opinion testimony. As this Court noted at the hearing on Defendant's *Daubert* Motion, "this other development that he had, that he made this other program, would be an area of expertise

because it didn't exist at the time that this went on, so therefore he could not be a fact witness as to the facts in the underlying case." (Delgado Decl., Ex. A [Doc. #224], p. 69:10-13.) In other words, this software was developed specifically for this litigation in preparation for testimony as an expert, not as part of the facts that gave rise to this litigation. Thus Mr. Schwerzler's testimony could only be that of an expert witness.

Plaintiff also argues that if the foregoing is not admissible as fact testimony, it should be admitted under Federal Rule of Evidence 701 as "lay opinion" testimony. (*See* Mot. [Doc. #225], pp. v, 2.) Under Rule 701, a witness who is not an expert may testify as to opinions only that are "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. Plaintiff cannot argue in one breath that Mr. Schwerzler's specialized knowledge is necessary to aid the jury, and then in the next breath argue that he should be permitted to opine as a lay witness under FRE 701, which requires that testimony *not* be based on specialized knowledge. In fact, subsection (c) of FRE 701 was added in an attempt to address just this situation – to reduce "the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." *See JGR, Inc. v. Thomasville Furniture Indus., Inc.*, 370 F.3d 519, 525 (6th Cir. 2004) (quoting Fed.R.Evid. 701, Advisory Committee Notes for 2000 Amendments). Accordingly, Mr. Schwerzler's expert testimony should not be accepted under the cloak "lay opinion" testimony.

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V. This Court Correctly Ruled that Mr. Schwerzler's Bias Renders His Expert Testimony Unreliable.

Plaintiff also asks this Court to reconsider its ruling that Mr. Schwerzler is not permitted to testify as an expert in this case because his bias is too extreme – but Plaintiff identifies no "mistake" or other basis for reconsideration, other than suggesting that the Court just got it wrong. In support of this argument, Plaintiff argues that there is no "per se rule" disqualifying party experts. (Mot. [Doc. #225], p. 4.) But, Defendants never argued any such rule existed, and this Court did not base its Order on any such rule, and thus *Conde v. Velsicol Chem. Corp.*, 804 F. Supp. 972 (S.D. Ohio 1992), cited by Plaintiff for this proposition, is inapposite.[1] Rather, Defendants argued, and this Court agreed, that where bias is as extreme as here, expert testimony properly is precluded. (*See Daubert* Mot. [Doc. #202], pp. 7-10; Order [Doc. #222], p. 1; Delgado Decl., Ex. A [Doc. #224], pp. 65:15-16; 68:25-69:7.)

Furthermore, this Court ruled correctly. For the reasons set forth in full in Defendants' *Daubert* Motion, Mr. Schwerzler's role as an Officer, Director, salaried employee, and major shareholder of Plaintiff render his bias so "extreme" that his expert testimony must be excluded. *See In re Commercial Money Center*, 737 F. Supp. 2d at 844 (where *Daubert* motion was filed

[1] Nor are the other two cases cited by Plaintiff any more helpful. In *Gravely v. Providence Partnership*, 549 F.2d 958 (4th Cir. 1977), no issue of bias was raised, nor was any *Daubert* challenge made; rather, the plaintiff challenged on relevancy grounds, the testimony of the manufacturer of a stairway, where the plaintiff had sued the architect – there is no indication that the manufacturer and the architect were affiliated. Likewise, in *Glosband v. Watts Detective Agency*, 21 B.R. 963 (D.C. Mass. 1981), no issue of bias was raised, no *Daubert* challenge was made; rather, the plaintiff argued that the owner of a bankrupt company lacked foundation to testify as to its value, and the Court noted that federal courts have admitted the opinion testimony of a landowner on the valuation of his land under FREs 701 or 702 as an owner of land is presumed to have special knowledge of its value – plainly that is not the case here.

on the grounds that the proffered expert's "status as an owner and high-level officer of a party to this case . . . render[ed] [the proffered expert] partisan and far too biased to provide a reliable expert opinion in this matter," the District Court agreed, noting, "[f]inally, and most troubling, [the proffered expert] is a mere proxy for a party in this case, and his extreme partisanship renders any testimony that he could provide unhelpful. . . . Because [*inter alia*] of his partisan status, . . . [the proffered expert] is not qualified to serve as an expert witness in these proceedings."). No reason exists to reconsider that ruling.

VI. Plaintiff's Threat Regarding the Presentation of Evidence Taking "Months" Is Empty.

Plaintiff argues that certain digital evidence on the terabyte drive that must be presented at trial, and there is "no way for the jury to see the evidence in the terabyte drive without an expert such as Mr. Schwezler." (Mot. [Doc. #225], pp. 1, 8.) First, to the extent Plaintiff is suggesting Mr. Schwerzler plans to summarize what is in the database, such testimony would be hearsay evidence under Federal Rule of Evidence 802, and would violate Federal Rule of Evidence 1002 (the "best evidence rule"). *See* Fed. R. Evid. 801, 802, 1002. Second, Plaintiff admits that such evidence can be presented through Defendant's programmers (*i.e.*, true fact witnesses). (Mot. [Doc. #225], 8-9.) Plaintiff is correct: the Federal Rules of Evidence require that it present evidence through the appropriate fact witnesses, even if Plaintiff considers that less expedient. Plaintiff asserts that it will take "months" to put its evidence on this way. (*Id.*, p. 9.) Defendants believe this to be a gross exaggeration designed to "scare" this Court into reconsidering its ruling, but in any event, as a practical matter, undoubtedly the parties will stipulate to certain undisputed facts as to information in the database – what Defendants are

unwilling to do is permit Mr. Schwerzler to offer an incomplete picture of the database, given his lack of personal knowledge, and where his Report reveals that in his analysis of the database, he missed large portions of Defendants' registration procedure.

In sum, Plaintiff's threats as to the presentation of certain evidence being impossible or overly time-consuming without Mr. Schwerzler's testimony are unfounded.

VII. Plaintiff's Misrepresentations Regarding the Meet and Confer Process.

Plaintiff's Motion contains misrepresentations to this Court regarding the meet and confer process for Defendants' *Daubert* Motion, and for this Motion for Reconsideration.

Plaintiff falsely asserts that "no meet and confer occurred prior to Defendants' *Daubert* Motion." (Mot. [Doc. #225], p. 6.) In reality, on August 10, 2011, Defendants' counsel wrote to Plaintiff's counsel in an effort to meet and confer, but Plaintiff's counsel never responded (Mr. Schaefer has since said that he was on vacation, but no excuse has been provided as to why his partner, Mr. Hall, who was copied on the correspondence, did not respond). (Delgado Decl., ¶ 3.)

Plaintiff also asserts that in the meet and confer process regarding the present Motion for Reconsideration, Defendants' counsel "indicated that he was open to the proposition that Mr. Schwerzler could run scripts on the terabyte drive and indicate what is contained therein but has not stipulated to the same." (Mot. [Doc. #225], p. vi-vii, ¶ 14.) This is not true – counsel for Defendants certainly did not "indicate" that he would allow such acts, after the close of discovery, including expert discovery, and after this Court had already ruled that Mr. Schwerzler's expert testimony is excluded. (Delgado Decl., ¶ 4.) To the contrary, as Plaintiff

admits in the sentence following that one: "Counsel further indicated that he would be arguing enforcement of the Court's September 21, 2011 Order to broadly preclude the testimony of Chris Schwerzler about the subject terabyte drive and its contents." (Mot. [Doc. #225], p. vi-vii, ¶ 14; Delgado Decl., ¶ 5.)

VII. CONCLUSION

For all of the foregoing reasons, Plaintiff's Motion for Reconsideration should be denied in its entirety.

RESPECTFULLY SUBMITTED this 25th day of October, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 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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