UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WEATHER UNDERGROUND, INC., a Michigan corporation,

Plaintiff,

v.

NAVIGATION CATAYLST SYSTEMS, INC., a Delaware corporation; BASIC FUSION, INC., a Delaware corporation; CONNEXUS CORP., a Delaware corporation; and FIRSTLOOK, INC., a Delaware corporation,

Defendants.
_____/

CASE NO. 09-10756

HON. MARIANNE O. BATTANI

ORDER GRANTING IN PART AND DENYING IN PART
PLAINTIFF'S MOTION FOR RECONSIDERATION

This matter is before the Court on Plaintiff Weather Underground's Motion for Reconsideration or in the Alternative, Clarification of Order Regarding Defendants' Motion to Strike Report of Christopher Schwerzler and Prohibit his Testimony on Same at Trial (Doc. No. 225). The Court has reviewed the relevant filings, and finds oral argument will not aid in the resolution of this dispute. See E. D. Mich. LR 7.1(h)(2). For the reasons that follow, Plaintiff's motion is **GRANTED in part and DENIED in part**.

I. PROCEDURAL BACKGROUND

In conjunction with dispositive motions filed by the parties, Defendants filed a motion to strike the report of Plaintiff's expert, Christopher Schwerzler. Defendants asked the Court to strike Schwerzler's opinions about trademarks, Defendant's intent, and related testimony. In their motion, Defendants argued that Schwerzler was unqualified as an

expert. In addition to the issue of Schwerzler's qualifications, Defendants advanced their request based on bias. Schwerzler is one of the original founders of Weather Underground. He has worked for Weather Underground since 1998. He is the Director, a member of the Board of Directors, and holds almost twenty percent of Plaintiff's outstanding shares. (D0c. No. 204, Exs. D, F, G). Consequently, Defendants characterized Schwerzler as a mere proxy for Plaintiff.

At the conclusion of oral argument on the motion, the Court issued its ruling granting the motion. In its reconsideration request, Plaintiff argues that the Court's ruling is ambiguous as to whether Schwerzler can testimony to those matters in his report that were unchallenged, and seeks clarification as to those areas in which Schwerzler can testify as a fact witness.

II. STANDARD OF REVIEW

Under the local rules, a motion for reconsideration must be filed within fourteen days of the entry of the order being challenged. E.D. Mich. L.R. 7.1(h)(1). Under the standards articulated in E.D. Mich. LR 7.1(h)(3), to obtain the requested relief, Plaintiff must demonstrate: (1) the Court and the parties have been misled by a palpable defect, and (2) the correction of that defect will result in a different disposition of the case. A "palpable defect" is an error which is obvious, clear, unmistakable, manifest or plain. Fleck v. Titan Tire Corp., 177 F. Supp.2d 605, 624 (E.D. Mich. 2001); Marketing Displays, Inc. v. Traffix Devices, Inc., 971 F. Supp. 262, 278 (E.D. Mich. 1997) (citation omitted).

III. ANALYSIS

In its role as gatekeeper, the trial court may examine the qualifications of an expert and the methodology employed by the expert. Under Federal Rule of Evidence 702,

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence. . .a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify . . . 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.

The Supreme Court has held that "Federal Rule of Evidence 702 imposes a special obligation upon a trial judge to 'ensure that any and all scientific testimony . . . is not only relevant, but reliable.'" Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999) (quoting Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993). The Court must not permit subjective belief and unsupported speculation to be admitted as expert testimony. Daubert, 509 U.S. at 590.

In reaching its decision granting Defendants' motion, the Court held that Christopher Schwerzler, Plaintiff's Chief Technology Officer, had "a bias that is beyond the subject, it is an interest in the outcome of the case, and because he has an interest in the outcome of this case," the Court would not allow him to testify as an expert. (Tr. at 69). The Court added that it would not bar his testimony as a fact witness. (Id.)

A. Expert Testimony

In its request for reconsideration, Plaintiff asks the Court to reconsider its ruling to the extent it held that Schwerzler was disqualified from offering any information contained in his report. The report includes an objective analysis of the primary piece of evidence

in this case, the terabyte drive provided by Defendants. Because his report is "testable and verifiable," Plaintiff concludes that the issue of bias is irrelevant. (Doc. No. 225 at 5). Therefore, Plaintiff posits that only the subjective portions of Schwerzler's report should be stricken and the remaining matters, which Defendant did not specifically challenge, should be allowed into evidence.

Contrary to Plaintiff's position, the Court finds that the entire report must be excluded based on the extreme bias of Schwerzler. This determination falls within the sound discretion of the trial court, Finch v. Monumental Life Insurance Co., 820 F.2d 1426, 1432 (6th Cir. 1987); United States v. Green, 548 F.2d 1261, 1268 (6th Cir. 1977), and here, the Court declines to alter its decision. Plaintiff's expert not only became an advocate for the case, he always was an advocate for this litigation. Viterbo v. Dow Chemical Co., 646 F. Supp. 1420, 1425–26 (E.D. Tex. 1986) (citing Johnston v. United States, 597 F. Supp. 374 (D. Kan. 1984)). Thus, he has departed "from the ranks of an objective expert witness, and any resulting testimony would be unfairly prejudicial and misleading." Id. Accord 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) (holding that the president of a national "right to life" organization could not provide expert testimony as to when a fetus becomes viable because the witness could not be considered objective). Here, as in the decisions in the cases cited above, the experts had preconceived notions before the litigation commenced. Schwerzler certainly had a preconceived notion as to Defendants' motive and business practices before Plaintiff ever filed this case. His bias renders his opinions wholly unreliable and warrants their exclusion.

The Court is cognizant that typically cross-examination sufficiently protects against witness bias. In this case, however, Schwerzler simply is too "partisan and far too biased to provide a reliable expert opinion." In re Commercial Money Center, Inc., 737 F. Supp. 2d 840, 844 (N. D. Ohio 2010).

B. Clarification

Even as it precluded his expert testimony, the Court concluded that Schwerzler could testify as a fact witness. Plaintiff asks the Court to clarify this ruling, and the Court agrees that clarification is needed.

The Court finds that Schwerzler can testify as to facts known to him, but may not offer any opinion testimony. Specifically, he may testify as to the contents of the terabyte drive produced by Defendants during discovery, including data, queries, and stored procedures. Because Schwerzler must stick to the facts, Defendants' assertion that his testimony violates the distinction between "lay" opinion testimony, governed by Rule 701, and "expert" testimony, governed by Rule 702, lacks merit. The Court's ruling does not allow for evasion--Schwerzler cannot couch his opinions in "lay witness clothing." 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)).

In sum, Schwerzler may not testify as to his own trademark matching script and its output as compared to Defendant's tool or as to the script he prepared to test the domain portfolio against a database of known third party domain names, which he created for litigation. His script, which was designed and conducted during the course of litigation, was intended to support his opinion. Compare Daubert v. Merrell Dow Pharmaceuticals,

Inc., 43 F.3d 1311, 1317 (9th Cir. 1995) (independent, pre-litigation research "provides important, objective proof that the research comports with the dictates of good science" and is less likely "to have been biased by the promise of remuneration"). Consequently, his testimony may include his review of data from that contained in the terabyte drive, and his organization of the information into a timeline. In addition, he may use the "**Algo**" tool provided by Defendants to show software matches. He may not voice any opinions, however, on the meaning of the output.

IV. CONCLUSION

For the reasons stated above, the motion is **GRANTED in part and DENIED in part.**

IT IS SO ORDERED.

s/Marianne O. Battani
MARIANNE O. BATTANI
UNITED STATES DISTRICT JUDGE

Date: December 16, 2011

CERTIFICATE OF SERVICE

Copies of this Order were mailed and/or electronically filed to counsel of record on this date.

s/Bernadette M. Thebolt
Case Manager