

EXHIBIT R

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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RALPH VARGAS and BLAND-RICKY)
ROBERTS,)
)
Plaintiffs,)
) No. 04CV 9772
vs.) (JCF)
)
)
PFIZER, INC.; PUBLICIS, INC.;)
FLUID MUSIC; EAST WEST)
COMMUNICATIONS, INC. and)
BRIAN TRANSEAU, p/k/a "BT",)

Defendants.

Deposition of
STEVEN W. SMITH, Ph.D.

Tuesday, August 15, 2006

CERTIFIED COPY

Reported by:

GEORGE SCHUMER, CSR

(01-384619)



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11:53:51 1 Defendant Exhibit 36?

11:53:58 2 A. Yes.

11:54:03 3 Q. After you prepared your fax, and sent it off
11:54:16 4 to Mr. Chin, what happened next?

11:54:19 5 A. Mr. Chin requested that I spend additional
11:54:30 6 time, and develop the full expert report.

11:54:34 7 Q. Did you agree to do so?

11:54:35 8 A. Yes.

11:54:36 9 Q. Did you have any restrictions on your time
11:54:40 10 that caused you concern, as to being able to do this?

11:54:44 11 A. I told Mr. Chin that my time was going to be
11:54:46 12 limited; that I could perhaps spend a few days on it.
11:54:49 13 I certainly couldn't spend a few weeks on it.

11:54:52 14 Q. You agree, don't you, that the overall methods
11:54:59 15 used by Boulanger are standard techniques in signal
11:55:03 16 analysis; is that right?

11:55:05 17 A. Yes.

11:55:06 18 Q. And you agree that the overall methods used by
11:55:10 19 Boulanger are appropriate for the analysis at hand in
11:55:15 20 this case?

11:55:15 21 A. Yes.

11:55:16 22 Q. What led you to believe, at the time of your
11:55:28 23 February 26 fax, that Aparthenonia -- at least in some
11:55:40 24 sections -- is a copy of Funky Drummer?

11:55:45 25 MR. CHIN: Objection.

12:11:09 1 but did any of the other material that you listed in
12:11:12 2 your expert report as having been reviewed -- did you
12:11:16 3 rely on any of it in forming the opinion given in your
12:11:21 4 expert report in this case?
12:11:22 5 A. No, I didn't.
12:11:23 6 Q. Did you use any tools in conducting your
12:11:35 7 analysis for your expert report?
12:11:36 8 A. I'm not sure I understand the definition of
12:11:40 9 "tools."
12:11:42 10 Q. Other than reading Dr. Boulanger's report, is
12:11:47 11 there anything else you made use of?
12:11:49 12 A. I digitally scanned in some of his data, and
12:11:55 13 used those electronic files for comparison.
12:12:01 14 Q. And "his" -- by "his," you mean Dr. Boulanger?
12:12:06 15 A. Yes.
12:12:07 16 Q. So you did not feed the audio files at issue
12:12:14 17 in this case into a computer; correct?
12:12:18 18 A. Correct.
12:12:19 19 Q. You didn't personally perform any of the
12:12:23 20 sonogram analysis of the files; correct?
12:12:26 21 A. Correct.
12:12:29 22 Q. And you didn't personally conduct any of the
12:12:33 23 Fast Fourier Transform analysis on the data in this
12:12:41 24 case; correct?
12:12:42 25 A. Correct.

12:12:44 1 Q. Your job was to look at Dr. Boulanger's
12:12:48 2 report, and make your conclusions from that; is that
12:12:50 3 correct?
12:12:50 4 A. Correct.
12:12:51 5 Q. So you were limited to the data that was
12:13:00 6 present in Dr. Boulanger's report?
12:13:02 7 A. Correct.
12:13:03 8 Q. Did you feel that that was enough data to
12:13:11 9 reach your conclusions?
12:13:12 10 A. Yes.
12:13:13 11 Q. At any point, did you think that it would have
12:13:26 12 been beneficial to have more data than was provided to
12:13:29 13 you in Dr. Boulanger's report?
12:13:32 14 A. I based my conclusions on whatever data was
12:13:40 15 available. If I had additional data, perhaps I could
12:13:45 16 reach additional conclusions, but the conclusions I
12:13:47 17 reached were completely justified by the data I had.
12:13:49 18 Q. Because you understood your job being to look
12:13:54 19 at the reporting data of Dr. Boulanger, and render an
12:13:59 20 opinion from that; right?
12:14:00 21 A. Yes.
12:14:00 22 Q. Mr. Chin never asked you to take audio files
12:14:04 23 and start from scratch with digitally analyzing them;
12:14:10 24 correct?
12:14:11 25 A. Correct.

12:15:51 1 Q. And your conclusion as to your second opinion,
12:16:20 2 that it is likely that Aparthenonia and Funky Drummer
12:16:23 3 are copies -- I would like to ask you a question about
12:16:26 4 that opinion; okay?

12:16:28 5 MR. CHIN: Objection.
12:16:28 6 You can answer.

12:16:29 7 THE WITNESS: Yes.

12:16:30 8 MR. OLSON: Q. That is based on similarities
12:16:35 9 that you perceived in the data presented in
12:16:42 10 Dr. Boulanger's report; correct?

12:16:43 11 MR. CHIN: Objection.
12:16:43 12 You can answer.

12:16:44 13 THE WITNESS: I think it is more than
12:16:46 14 similarities I perceived. I think I developed
12:16:49 15 objective evidence that they were.

12:16:54 16 MR. OLSON: Q. Your opinion, then, is based
12:16:56 17 on what you have just referred to as "objective
12:17:00 18 evidence of similarity between Aparthenonia and Funky
12:17:05 19 Drummer"; is that correct?

12:17:06 20 MR. CHIN: Objection.
12:17:07 21 THE WITNESS: Yes.

12:17:07 22 MR. OLSON: Q. Anything else that forms the
12:17:12 23 basis of that second opinion?

12:17:13 24 A. No.

12:17:17 25 Q. You agree, don't you, that frequency spectra

12:17:33 1 are a much more sensitive measure of the similarity of
12:17:36 2 audio wave forms than hearing; correct?

12:17:39 3 A. Yes, I would agree with that.

12:17:45 4 Q. And you also agree that comparing the
12:17:53 5 frequency spectra of Aparthenonia and Funky Drummer is
12:17:57 6 an appropriate and powerful method of resolving if
12:18:00 7 Aparthenonia is a digitally edited and/or manipulated
12:18:06 8 copy of Funky Drummer; correct?

12:18:08 9 A. Correct.

12:18:08 10 Q. So you don't have an issue with the tools
12:18:11 11 Dr. Boulanger chose to analyze the audio files;
12:18:15 12 correct?

12:18:15 13 A. Correct.

12:18:16 14 Q. You think the methodology is okay; correct?

12:18:18 15 A. The methodology, as far as preparation of the
12:18:22 16 raw data, I have no objection to.

12:18:26 17 Q. But it is the conclusions based on that data
12:18:33 18 that you think are incorrect?

12:18:35 19 A. That's correct.

12:18:36 20 Q. Do you know the name of the -- I know it is
12:18:47 21 referred to in Dr. Boulanger's report and your report
12:18:51 22 as "Funky Drummer," but do you know the name of the
12:18:54 23 plaintiffs' drum track that's at issue in this suit?

12:18:57 24 A. Yes.

12:18:58 25 Q. What is it?

16:09:03 1 Q. Now what I have put in the fourth copy line,
16:09:08 2 the little a, b, c, d with the bars over them: Would
16:09:15 3 those be what you were referring to as direct copies
16:09:17 4 of the A, B, C and D from the original?

16:09:20 5 A. Yes.

16:09:20 6 Q. But are different from a, b, c and d, from
16:09:27 7 what we said was the first copy; right?

16:09:30 8 A. Yes, in the first copy those are exact, which
16:09:33 9 are indistinguishable from A, B, C and D.

16:09:36 10 Q. So in the fourth copy you can distinguish "a"
16:09:39 11 a little bit, because there is a little amount of
16:09:43 12 noise; correct?

16:09:44 13 A. Correct.

16:09:45 14 Q. Now I want you to assume that the Funky
16:09:56 15 Drummer pattern was made from taking the 2.3-second
16:09:59 16 loop that Dr. Boulanger analyzes, and repeating that;
16:10:03 17 okay?

16:10:03 18 A. It is my understanding you are saying it is a
16:10:07 19 digital exact copy?

16:10:10 20 Q. Yes, thank you.

16:10:13 21 Let me restate it. I would like you to assume
16:10:16 22 that Funky Drummer was made by taking the 2.3-second
16:10:21 23 loop that Dr. Boulanger analyzed, digitally copying
16:10:25 24 and repeating that loop; okay?

16:10:27 25 A. Yes.

16:10:32 1 Q. So in the example that I just described, for
16:10:44 2 each new beginning of the loop, the first drum strike
16:10:48 3 would be an exact copy of the beginning of the
16:10:50 4 previous loop; correct?
16:10:51 5 A. Yes.
16:10:52 6 Q. Now if Aparthenonia was created from Funky
16:11:04 7 Drummer, as I have just asked you to assume it exists,
16:11:10 8 you would expect to find direct copies in Aparthenonia
16:11:13 9 from Funky Drummer; correct?
16:11:15 10 MR. CHIN: Objection.
16:11:17 11 THE WITNESS: Correct.
16:11:17 12 MR. OLSON: Q. In your report, you don't
16:11:23 13 point to any direct copies from Funky Drummer in
16:11:26 14 Aparthenonia; correct?
16:11:28 15 A. In my report I stated that I did not believe
16:11:33 16 that there could be direct copies that exist. I
16:11:39 17 didn't specifically look for direct copies, because I
16:11:41 18 was under the assumption, very different than what we
16:11:44 19 are now, about the nature of Funky Drummer being an
16:11:46 20 exact copy between the various bars.
16:11:49 21 Q. What was your assumption about Funky Drummer
16:11:51 22 that you made, when you were performing your analysis?
16:11:56 23 A. My assumption is that the 26 or 27 bars of
16:12:00 24 Funky Drummer are associated copies, meaning that they
16:12:02 25 were not exact duplicates of each other; that they

16:12:06 1 were made by a drummer playing the bar over and over.

16:12:11 2 Q. Even if the drummer played the bar over and
16:12:22 3 over physically, there's a possibility that you would
16:12:25 4 find a direct copy between Funky Drummer and
16:12:27 5 Aparthenonia, if Aparthenonia is a copy; right?

16:12:31 6 MR. CHIN: Objection.

16:12:33 7 THE WITNESS: It is just on random chance, 1
16:12:37 8 in 26.

16:12:38 9 MR. OLSON: Q. Did you look for any such
16:12:40 10 direct copy?

16:12:41 11 A. I didn't have any way of distinguishing what
16:12:46 12 was a direct copy, versus an associated copy. What I
16:12:50 13 was able to do was just make a comparison of how
16:12:53 14 similar they were.

16:12:55 15 Q. Is there anything you could do to determine
16:13:08 16 whether there's a direct copy from Funky Drummer in
16:13:12 17 Aparthenonia?

16:13:13 18 A. I don't believe there is, based on the data
16:13:18 19 directly, and Dr. Boulanger's report. Certainly if
16:13:24 20 you were looking at all 26 bars, there would be the
16:13:26 21 possibility of examining that data for it.

16:13:28 22 Q. Now I want you to assume something different.
16:13:31 23 I want you to go back to the assumption you had when
16:13:34 24 you did your analysis, which is that Funky Drummer was
16:13:36 25 created all by live drumming; okay?

CERTIFICATE OF REPORTER

I, George Schumer, a Certified Shorthand Reporter, hereby certify that the witness in the forgoing matter was by me duly sworn to tell the truth, the whole truth and nothing but the truth in the within-entitled cause;

That said proceeding was taken down in shorthand by me, a disinterested person, at the time and place therein stated, and that the testimony of the said witness was thereafter reduced to typewriting, by computer, under my direction and supervision;

That before completion of the deposition, review of the transcript was ___ was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed are appended hereto.

I further certify that I am not of counsel or attorney for either or any of the parties to the said deposition, nor in any way vested in the outcome of this cause, and that I am not related to any of the parties thereto.

DATED: August 22, 2006



George Schumer, CSR 3326