EXHIBIT Q

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

ARISTA RECORDS, INC., et al., Plaintiffs v. FLEA WORLD, INC., a Pennsylvania corporation, d/b/a Columbus Farmers Market, et al., Defendants	CIVIL ACTION Case No. 03cv2670 (JBS) **DOCUMENT FILED ELECTRONICALLY** **ORAL ARGUMENT REQUESTED** **RETURN DATE: NOVEMBER 18, 2005**

BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE TESTIMONY OF DR. STEPHEN M. NOWLIS

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Marketing Science, Marketing Letters, and the Annual Review of Psychology. Id. Dr. Nowlis has won two major awards in the fields of marketing and consumer behavior, including the 2001 William F. O'Dell Award (given annually to the article appearing in the Journal of Marketing Research that has made the most significant long-term contribution to the marketing discipline in the five year period of 1996-2001). Id. at 1; see also Nowlis Report at Ex. A (Dr. Nowlis' curriculum vitae).

II. DR. NOWLIS' METHODOLOGY

Dr. Nowlis' methodology was consistent with his usual practices, and is a common approach in Dr. Nowlis' field of expertise. See Nowlis Depo. 227:8-21 ("I relied on published peer reviewed academic research, plus my own experience, [and] my own observations. . . . That's something that's commonly done as an academic."). Dr. Nowlis was asked "to analyze how the sales of infringing recorded music (i.e., unauthorized duplications of copyrighted sound recordings) at flea markets generally, and at the Columbus Farmers Market specifically, may or may not increase the number and types of customers that are drawn to the flea market." Nowlis Report at 2.[4] To answer this question, Dr. Nowlis collected and

[4] Defendants' Motion completely ignores Dr. Nowlis' Supplemental Report, in which he was asked to "analyze how an increase in the draw to the outside area of the Columbus Flea Market may or may not lead to an increase in the traffic flow and sales in the indoor area of the Market." Supplemental Nowlis Report at 1.

reviewed the relevant scholarship and identified a "body of literature" that included dozens of "studies that have been done that have been published in peer reviewed academic journals." Nowlis Depo. 16:22-18:9, 228:8-22; Nowlis Report at 2. Dr. Nowlis synthesized this information with his own observations and own pre-existing research and published articles (see, e.g., Nowlis Report at 10 n. 25, 12 n.31). Id.

Armed with this foundation of scholarly knowledge, Dr. Nowlis then reviewed specific information about the Columbus Farmers Market, including the deposition testimony of Market employees, newspaper articles about the Market, the Market's television and print advertisements, the Market's Internet web site, and some of the infringing recorded music at issue in this case. He personally visited the Market on three separate days (a Thursday, a Saturday, and a Sunday), spending many hours there to observe its organization, structure, and operation, the variety of merchandise for sale by Market vendors, and the interactions between Market vendors and their customers. Id. at 2, Ex. B (listing materials Dr. Nowlis reviewed in preparing his Report); see also Nowlis Depo. 230:15-231:6.[5]

[5] Dr. Nowlis spent four to five hours at the Market on Thursday, May 5, 2005, and again on Sunday, May 8, 2005, walking through the entire Market (including the indoor buildings) twice on both days. Nowlis Depo. 80:9-81:15. Dr. Nowlis also spent "a few hours" at the Market on Saturday, May 7, 2005, when it was raining and there were fewer outdoor vendors present. Id. at 91:11-92:5.

Based upon his review of the relevant literature, his review of the record in this case, his own empirical observations of consumer behavior concerning the sale of infringing sound recordings at a flea market and his own preexisting knowledge of consumer behavior and marketing, Dr. Nowlis formed the conclusions reflected in his Report. Nowlis Report at 2; Nowlis Report at Ex. B.

III. DR. NOWLIS' CONCLUSIONS

Dr. Nowlis' Report combined his extensive research, his personal observations, and well-accepted and unassailable marketing principles into a series of sub-conclusions which inexorably led to his ultimate conclusion: that the presence of "infringing recorded music is a powerful means of increasing the draw of consumers to the Columbus Farmers Market." See Expert Report of Dr. Stephen M. Nowlis ("Nowlis Report") at 3. In building to this conclusion, Dr. Nowlis reached and relied upon four interim sub-conclusions, each independently supported by research, observation, and accepted marketing principles: (1) the presence of recorded music adds variety to the Market's available product mix; (2) infringing recorded music is particularly attractive product category for Market customers; (3) the availability of unique infringing compilations of recorded music at the Market gives the Market a unique benefit which customers cannot get from other outlets; and (4) the availability of infringing recorded music at below market

prices at the Market serves as a powerful incentive for consumers to shop there. Nowlis Report at 2-3.[6]

ARGUMENT

I. THE LEGAL STANDARD

Rule 702 of the Federal Rules of Evidence governs the admissibility of expert witness testimony:

> "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.

"[R]ejection of expert testimony is the exception rather than the rule." Fed. R. Evid. 702, Adv. Comm. Notes to 2000 Amendments. "[V]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking" such

[6] In Dr. Nowlis' Supplemental Report, he also concluded that "customers at the Columbus Farmers Market who were drawn to outside vendors, such as those selling infringing recorded music, would also be attracted to shopping in the indoor portion of the Market," and that "[t]his would benefit the owners of the indoor portion of the Market, due to increased customer foot traffic, sales, and vendor interest in obtaining indoor store space." Supplemental Nowlis Report at 4. Defendants' Motion does not address the Supplemental Nowlis Report.

testimony. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 596 (1993); see also U.S. v. Mitchell, 365 F.3d 215, 244-45 (3d Cir. 2004) ("Rule 702 and Daubert put their faith in an adversary system designed to expose flawed expertise"); Stecyk v. United States, 295 F.3d 408, 414 (3d Cir. 2002) (Rules of Evidence 703 and 705 place "the burden of exploring the facts and assumptions underlying the testimony of an expert witness on opposing counsel during cross-examination").

II. DR. NOWLIS' METHODOLOGY IS SOUND

Defendants' argument that Dr. Nowlis "performed no independent research in support report of *any* conclusion found in his report" (Motion at 8) rests on several interrelated grounds, most of which are factually incorrect, and all of which are legally irrelevant.

Defendants' repeated claim that Dr. Nowlis did not do any research (see Motion at 8, 11, 13) is just wrong. Defendants ignore that the Nowlis Report contains multiple references to Dr. Nowlis' ***own*** peer-reviewed academic writings. See, e.g., Nowlis Report at 10 n. 25 ("My own independent research examines factors that influence the degree to which consumers prefer features which are either unique or common to products, and I find that unique features are particularly important when consumers are choosing which type of product to

buy"); 12 n.31 ("My own independent research has found that lower prices serve as a powerful incentive for buyers to purchase products").

Dr. Nowlis also testified that, in his field, research involves "looking at other academic papers that have been published on that topic." Nowlis Depo. 33:13-23. Here, Dr. Nowlis' research included "reviewing the literature, looking at studies that have been done that have been published in peer reviewed academic journals, synthesizing that information, [and] using that to form conclusions..." Nowlis Depo. 16:14-17:4. Indeed, the Nowlis Report includes ***over fifty citations*** to other relevant academic articles, deposition testimony from Market employees, and published reports about the problem of counterfeit goods at the Market. See Nowlis Report at 20-21. Dr. Nowlis also considered other sources such as the infringing merchandise at issue in this case, the Market's Internet web site and message board postings from its customers, the Market's television and print advertising, as well as Dr. Nowlis' own first-hand observations of the Market from his three separate visits. Id. at 4, 8-9.

Defendants next argue that Dr. Nowlis' methodology "falls short of the standards for a reliable expert report" because they claim it consisted of simply "cobbling together articles from his collection" (Motion at 8-9). This, too, is false. Dr. Nowlis reviewed the relevant scholarship ***as a whole*** to identify the particular "body of literature" that in his view applied here, including dozens of studies that

have been published in peer reviewed academic journals. Nowlis Depo. 16:22-18:9, 228:8-22.[7] Reliance upon such existing, peer-reviewed studies and papers is a generally accepted methodology, which Courts have credited in a variety of contexts. See e.g., Eclipse Electronics v. Chubb Corp., 176 F. Supp. 2d 406, 412 (E.D. Pa. 2001) (an expert "may rely on the research, studies, and expertise of others, so long as they are of the sort of information regularly relied on by experts in the field"); Voilas v. General Motors Corp., 73 F. Supp. 2d 452, 461 (D.N.J. 1999) (testimony of expert economist admissible even though expert did not employ "any particular methodology but simply [engaged in] a straightforward review of the corporation's data"); see also Kannankeril v. Terminix Int'l, 128 F.3d 802, 807 (3d Cir. 1997) (in the context of medical testimony, "it is perfectly acceptable, in arriving at a diagnosis, for a physician to rely on examinations and tests performed by other medical practitioners[ ]" and the fact that the physician did not himself perform a physical examination does not necessarily diminish his opinion); Nanda v. Ford Motor Co., 509 F.2d 213, 221 (7th Cir. 1975) ("Facts or

[7] In re TMI Litig., 193 F.3d 613, 673 (3d Cir. 1999), is not to the contrary. In TMI, the Court excluded portions of expert testimony regarding radiation levels in the wake of the Three Mile Island disaster that consisted of "purely anecdotal" accounts of the expert's telephone conversations with an unidentified man who claimed he had made certain unconfirmed radiation readings. Id. Here, Dr. Nowlis specifically testified at his deposition that his Reports were "not anecdotal by any means," because they "relied on a scientific method to gather information and to use it to come up with a conclusion, and this type of way of doing this is well-accepted in the academic community." Nowlis Depo. 17:13-18:12.

data found in the literature of the profession, even though not themselves admissible in evidence, properly form a part of the basis for an expert's opinion"); Fed. R. Evid. 703 (expert may rely upon information supplied to the expert at or prior to trial, whether or not that information is itself admissible as evidence).[8]

In essence, Defendants critique Dr. Nowlis for relying on academic literature rather than doing his own "survey" of Columbus Farmers Market customers. As

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[8] The cases cited by the Defendants are not to the contrary. In Total Containment, Inc. v. Dayco Products, Inc., 2001 WL 1167506 (E.D. Pa. Sept. 6, 2001), the Court excluded a proffered damages expert that had ignored critical facts and had relied on improper sources that the expert admitted were "not a professionally accepted means of determining a company's sales." Id. at *5. In JMJ Enterprises, Inc. v. VIA Veneto Italian Ice, Inc., 1998 U.S. Dist. LEXIS 5098, at *18-19 (E.D. Pa. Apr. 15, 1998), the Court excluded a proffered damages expert who had violated a professional guideline regarding his assumptions and had relied upon the plaintiff's tax returns without independent verification despite the fact that plaintiff had admitted that not all sales were properly recorded. In Callaway Golf Co. v. Dunlop Slazenger Group Americas, Inc., 2004 WL 1534786 (D. Del. May 21, 2004), the Court excluded testimony of an individual who intended to opine that the opposing party had been unjustly enriched in the amount of $74 million, yet who admitted that he was "not a forensic economic expert," was not providing a "formal valuation opinion," had "no intent to offer any calculations," but rather wanted to add a "real world" perspective to the damages analysis, and who the Court found did not employ "any methodology, analysis, or factual support." In Holden Metal & Aluminum Works v. Wismarq Corp., 2003 WL 1797844, *3 (N.D. Ill. April 3, 2003), the Court excluded the testimony of a proffered expert who failed to "employ ***any*** identifiable methodology" (emphasis added), and who failed to "sufficiently take into account existing data and research." Finally, in LinkCo, Inc. v. Fujitsu Ltd., 2002 WL 1585551, *4 (S.D.N.Y. July 16, 2002), the proposed expert on licensing issues "did not employ actual licensing agreements for comparison, articles, studies or anecdotal evidence to support or explain his conclusions," but rather, simply purported to rely upon his conclusory aversion "that his experience led to his opinion."

an initial matter, whether or not an allegedly "better" or "more reliable" method of testing the expert's hypothesis exists is irrelevant. See Paoli, 35 F.3d at 744; Kannankeril, 128 F.3d at 806 ("Daubert does not set up a test of which opinion has the best foundation, but rather whether any particular opinion is based on valid reasoning and reliable methodology"); Eclipse Electronics, 176 F. Supp. 2d at 412 ("While [the expert's] opinion might be more valuable had he conducted more tests . . . and provided 'icing on the cake,' the test for admitting his expert testimony is not a question of whether his methods were perfect or whether a possibility exists that the 'expert might have done a better job.'").[9] Here, an accurate survey of the relevant population would have been impossible to conduct, considering (among other factors) consumer reluctance to admit to an intention to

[9] The fact that Dr. Nowlis did not conduct a survey of Columbus Farmers Market customers or otherwise attempt to quantify the draw is also irrelevant to the claims at issue in this case. No quantification of the amount of the draw is required. See Sinnott, 300 F. Supp. 2d at 1003 n. 9 ("it is not necessary for the expert to quantify the draw; his characterization of the draw as "substantial" is sufficient to make his opinion relevant"); PolyGram International Publishing, Inc. v. Nevada/TIG, Inc., 855 F. Supp. 1314, 1333 (D. Mass. 1994) ("[T]he amount of a benefit to a defendant is a factor for the court to consider when calculating an amount for statutory damages. . . . [F]ull assessment of the amount of benefit is not required to determine liability"). Even if it were not, the Motion never explains how such quantification would have even been possible – the Market does not keep track of customer attendance or vendor sales figures, and an accurate and admissible "survey" of Market customers may not have been possible because customers would be reluctant to disclose an intention to purchase illegal merchandise and because Defendants contend that the relevant conditions at the Market have substantially changed (i.e., infringing recorded music has been virtually eliminated from the premises).