IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Eolas Technologies Incorporated,	§	
	§	
Plaintiff,	§	**Civil Action No. 6:09-CV-00446-LED**
	§	
vs.	§	
	§	
Adobe Systems Inc., Amazon.com, Inc., Apple Inc., Argosy Publishing, Inc., Blockbuster Inc., CDW Corp., Citigroup Inc., eBay Inc., Frito-Lay, Inc., The Go Daddy Group, Inc., Google Inc., J.C. Penney Company, Inc., JPMorgan Chase & Co., New Frontier Media, Inc., Office Depot, Inc., Perot Systems Corp., Playboy Enterprises International, Inc., Rent-A-Center, Inc., Staples, Inc., Sun Microsystems Inc., Texas Instruments Inc., Yahoo! Inc., and YouTube, LLC	§	**JURY TRIAL**
	§	
Defendants.	§	

PLAINTIFF EOLAS' RESPONSE IN OPPOSITION TO DEFENDANTS' *DAUBERT* MOTION TO PRECLUDE EXPERT TESTIMONY OF JONATHAN H. BARI (DKT. NO. 906)

TABLE OF CONTENTS

I. INTRODUCTION 1

II. LEGAL STANDARDS 2

III. ARGUMENT 3

A. Mr. Bari's Testimony Is Relevant and Will Assist the Trier of Fact in Understanding the Evidence and Determining Facts in Issue. 3

B. Mr. Bari's Testimony Is Based on Sufficient and Reliable Facts and Data. 4

C. Mr. Bari's Testimony Is the Product of a Reliable Methodology 5

D. Mr. Bari Reliably Applies His Methodology to the Facts of the Case. 5

1. Mr. Bari's testimony does not offend *Uniloc*, *ResQNet,* and *Lucent* 6

2. Mr. Bari's testimony addresses issues that are relevant to the jury's evaluation of damages in this case 7

IV. CONCLUSION 8

TABLE OF AUTHORITIES

Page(s)

CASES

Bauman v. Centex Corp.,
611 F.2d 1115 (5th Cir. 1980) 3

Burbach Aquatics, Inc. v. City of Elgin,
No. 08 CV 4061, 2011 U.S. Dist. LEXIS 4573 (N.D. Ill. Jan. 18, 2011).....7

CDX Liquidating Trust v. Venrock Assocs.,
411 B.R. 571 (N.D. Ill. 2009) 7

Dartey v. Ford Motor Co.,
104 F. Supp. 2d 1017 (N.D. Ind. 2000) 7

Daubert v. Merrell Dow Pharms., Inc.,
509 U.S. 579 (1993)..... passim

Fractus, S.A. v. Samsung et al.,
No. 6:09-cv-203-LED-JDL (E.D. Tex. Apr. 29, 2011) 6

i4i Ltd. P'ship v. Microsoft Corp.,
598 F.3d 831 (Fed. Cir. 2010).....2, 6

Loeffel Steel Prods. v. Delta Brands,
372 F. Supp. 2d 1104 (N.D. Ill. 2005) 5

Micro Chem., Inc. v. Lextron, Inc.,
317 F.3d 1387 (Fed. Cir. 2003).....4

Perez v. City of Austin
No A-07-CA-044, 2008 U.S. Dist. LEXIS 36776 (W.D. Tex. May 5, 2008) 7

ResQNet.com, Inc. v. Lansa, Inc.,
594 F.3d 860, 869 (Fed. Cir. 2010).....6

Smith v. BMW N. Am., Inc.,
308 F.3d 913 (8th Cir. 2002) 7

Uniloc USA, Inc. v. Microsoft Corp.,
632 F.3d 1292, 1316 .....5, 6

United States v. 14.38 Acres of Land,
80 F.3d 1074 (5th Cir. 1996) 4

Westfield Ins. Co. v. J.C. Penney Corp.,
466 F. Supp. 2d 1086 (W.D. Wis. 2006) 7

OTHER AUTHORITIES

FED. R. EVID. 401 2

FED. R. EVID. 403 5

FED. R. EVID. 702 ..... passim

Wright & Gold, 29 FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6264 (1997) 3

I. INTRODUCTION

Defendants concede that the jury will ultimately be tasked with measuring the value of interactive content on their websites. Dkt. 903 at 8. To accomplish this task, the jury will need to understand in particular the role of interactive product images, interactive video, and search-suggest functionality in the e-commerce environment in which Defendants operate. There is no reason to believe, however, that the jury will have experience with the e-commerce industry, or will arrive with an understanding of the role and significance of interactive content in the e-commerce environment. Eolas plans to offer the expert testimony of Mr. Jonathan Bari to educate the jury on these background issues. In particular, Mr. Bari will educate the jury on the historical context of the e-commerce industry; on the rise in the use of interactive product images, interactive video, and search-suggest functionality in the e-commerce environment; on the role such interactive content plays in the industry today; and on background e-commerce marketing principles such as "conversion rate," "bounce rate," "stickiness," and "friction." Mr. Bari bases this educational testimony on his comprehensive review of respected industry sources viewed through the lens of his substantial experience in the e-commerce field. Ex. A at 1-73.

Defendants object to Mr. Bari's testimony principally on the ground that he does not offer an opinion going to an ultimate issue such as infringement, validity, or specific quantum of damages. Dkt. 906 at 1. The law holds, however, that an expert need not offer an opinion going to an ultimate issue in order for his testimony to be relevant and admissible. Mr. Bari's testimony is obviously relevant to the issues in this case; it will undoubtedly assist the jury in understanding the damages evidence submitted by both parties; and it is based on comprehensive research informed by Mr. Bari's substantial experience in the e-commerce industry. Mr. Bari's testimony is thus admissible under Rule 702, and Defendants' motion to preclude it should be denied.

II. LEGAL STANDARDS

Where "scientific, technical, or otherwise specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," an expert witness may testify "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. The fundamental requirement that expert testimony "assist the trier of fact" goes "primarily to relevance." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993). "Relevant evidence" is defined in turn "as that which has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Id.* at 587 (quoting FED. R. EVID. 401). This "basic standard of relevance thus is a liberal one." *Id.* And when an expert's "methodology is sound, and the evidence relied upon sufficiently related to the case at hand, disputes about the degree of relevance or accuracy (above this minimum threshold) may go to the testimony's weight, but not its admissibility." *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 852 (Fed. Cir. 2010).

Significantly, Rule 702 contemplates that "it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on … how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case." FED. R. EVID. 702, 2000 advisory committee note. In short, nothing in Rule 702 alters "the venerable practice of using expert testimony to educate the factfinder on general principles." *Id.*

III. ARGUMENT

A. Mr. Bari's Testimony Is Relevant and Will Assist the Trier of Fact in Understanding the Evidence and Determining Facts in Issue.

Defendants assert that Mr. Bari's "testimony does not relate to any of the issues in this case, and is thus 'non-helpful' and non-admissible." Dkt. 906 at 4. Defendants are wrong. Indeed, they concede that the jury will ultimately be tasked with measuring "the value of interactive content on [their] websites." Dkt. 903 at 8. And there is no dispute that this interactive content includes in particular interactive product images, interactive video, and search-suggest functionality—every Defendant is accused of infringement based on the provision of at least one of these specific forms of interactive online content and functionality. Mr. Bari's testimony is directly relevant to these issues; it focuses in particular on the role played by interactive product images, interactive video, and search-suggest functionality in the e-commerce environment in which Defendants operate. And Mr. Bari will further educate the jury on the historical context of the e-commerce industry; on the rise in the use of interactive product images, interactive video, and search-suggest functionality in the e-commerce environment; on the role such interactive content plays in the industry today; and on background e-commerce marketing principles such as "conversion rate," "bounce rate," "stickiness," and "friction." Ex. A at 1-73. All of these issues are directly relevant to the facts of this case, and will assist the jury in understanding and evaluating the damages evidence submitted by both parties.

The Fifth Circuit recognizes that experts are needed where the testimony concerns complex matters that challenge the comprehension of lay people. *See Bauman v. Centex Corp.*, 611 F.2d 1115, 1121 (5th Cir. 1980); *see also* Wright & Gold, 29 FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6264 (1997). The specialized and technical nature of internet marketing and the e-commerce industry warrant guidance by an expert here. There is no reason

to believe that the jury will arrive with an understanding of background e-commerce marketing principles, or of the role and significance of interactive content in the e-commerce environment. Mr. Bari's testimony will educate the jury on these technical issues. Ex. A, at 1-73. It is thus relevant, and "will assist the trier of fact to understand the evidence." FED. R. EVID. 702.

B. Mr. Bari's Testimony Is Based on Sufficient and Reliable Facts and Data.

As in *Micro Chemical*, Defendants "confuse the requirement for sufficient facts and data with the necessity for a reliable foundation in principles and method, and end up complaining that [Mr. Bari's] testimony [is] not based on 'reliable facts.'" *Micro Chem., Inc. v. Lextron, Inc*., 317 F.3d 1387, 1392 (Fed. Cir. 2003). Contrary to Defendants' apparent assumption, questions relating to the bases and sources of an expert's opinion affect only the weight to be assigned that opinion rather than its admissibility. *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1077 (5th Cir. 1996). In any event, Mr. Bari's opinions are based on sufficient and reliable facts and data. In conducting his analysis, Mr. Bari reviewed far more than a "selective smattering" of evidence, as reflected by his source citations. He extensively evaluated market research, case studies, company profiles, industry metrics, and more.[1] Ex. A at 4, 7-8. And contrary to Defendants' assertion that Mr. Bari fails to offer "indicia of reliability" for his evidence, he relies—as he explains—on trade publications in the relevant industry, reputable news outlets, market research, and his personal experience in the industry. These are just the types of sources routinely utilized by experts that pass *Daubert* muster. Furthermore, Defendants do not

[1] Defendants also criticize Mr. Bari's use of certain "anecdotal evidence." Dkt. 906 at 4. As Defendants note, Mr. Bari has used "[c]ertain market research, case studies, companies and metrics … for anecdotal purposes." Ex. A at 51 n.177. Mr. Bari's disclosure clearly reflects that he has utilized certain case studies to illustrate the role and significance of the functionalities enabled by embedded interactive content to web retailers. But Defendants misconstrue Mr. Bari's disclosure. These "anecdotal" case studies simply provide background information relevant to understanding the general e-commerce principles at issue.

specifically challenge any of Mr. Bari's underlying sources or evidence as unreliable.[2]

C. Mr. Bari's Testimony Is the Product of a Reliable Methodology.

As noted, Mr. Bari has reviewed and analyzed numerous industry reports, the business profiles of the leading web-based companies and internet retailers, government reports, articles from well-respected news sources, and industry analyst services. Ex. A at 9-10. He then analyzed and evaluated this substantial literature in light of his own extensive experience in the e-commerce industry. *Id.* at 9. This methodology—"employing experience to analyze data assembled by others"—is "neither illicit nor unusual." *Loeffel Steel Prods. v. Delta Brands*, 372 F. Supp. 2d 1104, 1119 (N.D. Ill. 2005); FED. R. EVID. 702, 2000 advisory committee note.

D. Mr. Bari Reliably Applies His Methodology to the Facts of the Case.

Defendants point out that a "major determinant of whether an expert should be excluded under *Daubert* is whether he has justified the application of a general theory to the facts of the case." Dkt. 906 at 1; *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1316 (Fed. Cir. 2011). Defendants argue that Mr. Bari's testimony fails to meet this requirement, Dkt. 906 at 5-7, but Defendants are again wrong. Mr. Bari clearly applies his analysis of e-commerce marketing to the facts of this case: his testimony addresses the development of the market demand for interactive images, interactive videos, and search suggest, *see* Ex. A at 17; the growth of the internet retail market in which the majority of Defendants compete, *see id.* at 18-19; the importance of interactive images, interactive video, and search suggest to success in internet

[2] Defendants also throw in a Rule 403 objection. For the reasons discussed in sections III.A and III.D.3, evidence relating to the role played by interactive images, interactive video, and search-suggest functionality in online retail marketing is both highly relevant to this case and tied to the patents-in-suit. To the extent that Defendants believe that the general principles discussed by Mr. Bari apply to their particular products in a particular way, they are free to explore those issues on cross-examination, or to present their particular story through their own witnesses.

retail market, *see id*. at 24-31; and the underlying reasons for consumer demand for those interactive features, *see id*. at 46-50.

1. Mr. Bari's testimony does not offend *Uniloc*, *ResQNet*, and *Lucent*.

Defendants rely on isolated snippets from *Uniloc*, *ResQNet*, and *Lucent* to suggest that Mr. Bari *must* evaluate the specific claims at issue, and that he *cannot* provide any testimony touching on non-accused products. Dkt. 906 at 3, 6-7. Those cases, however, do not support Defendants' position. To the contrary, they endorse expert testimony of comparable licenses to non-accused products as a potentially reliable means of ascertaining a reasonable royalty. *See Uniloc*, 632 F.3d at 1317-18 ("looking at royalties paid … in comparable licenses … remain[s] valid").[3] Here, Mr. Bari's testimony relates to the internet retail market's use of the *same* functionalities that Defendants utilize—interactive images, interactive video, and search suggest. There should be no doubt, therefore, that Mr. Bari's testimony is sufficiently tied to the facts of this case. *See id.* Defendants' reliance on isolated snippets from *Uniloc*, *ResQNet*, and *Lucent* is further misplaced because those cases specifically address expert testimony opining on a reasonable royalty rate. *See Uniloc*, 632 F.3d at 1317. Here, Mr. Bari's testimony does not advance a reasonable royalty rate formulation—it simply educates the jury on the role and significance of interactive images, interactive videos, and search-suggest features in the online retail market. Thus, the concerns for precision in an expert's reasonable-royalty formulation are not relevant here.[4] *See ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869 (Fed. Cir. 2010).

[3] *See also i4i*, 598 F.3d at 856 (affirming a *Daubert* ruling that allowed a damages expert to rely on a non-accused, third-party product as his benchmark for calculating a licensing fee).

[4] The experts excluded in *Fractus, S.A. v. Samsung et al.*, No. 6:09-cv-203-LED-JDL (E.D. Tex. Apr. 29, 2011), cited by Defendants, Dkt. 906 at 7, also appear to have been testifying as to a reasonable royalty rate.

2. Mr. Bari's testimony addresses issues that are relevant to the jury's evaluation of damages in this case.

The admissibility of Mr. Bari's testimony educating the jury on the role and significance of interactive images, interactive videos, and search suggest is expressly contemplated by the advisory committee notes to Rule 702:

> it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of … how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles.

FED. R. EVID. 702, 2000 advisory committee note. Accordingly, an expert's testimony "need not relate directly to the ultimate issue in a particular case." *Perez v. City of Austin*, No A-07-CA-044, 2008 U.S. Dist. LEXIS 36776, at *12 (W.D. Tex. May 5, 2008).[5] In line with these authorities, Mr. Bari does not testify as to a specific quantum of damages—Eolas' expert Mr. Roy Weinstein does that. But Mr. Bari does educate the jury on background interactive-content and e-commerce principles that will assist the jury in evaluating the damages evidence submitted by both parties. In particular, Mr. Bari will educate the jury on the historical context of the e-commerce industry; on the rise in the use of interactive product images, interactive video, and

[5] *See also Smith v. BMW N. Am., Inc.*, 308 F.3d 913, 919 (8th Cir. 2002) ("An expert's testimony need not relate directly to the ultimate issue that is to be resolved by the trier of fact, it only need be relevant to evaluating a factual matter."); *Burbach Aquatics, Inc. v. City of Elgin*, No. 08 CV 4061, 2011 U.S. Dist. LEXIS 4573, at *14 (N.D. Ill. Jan. 18, 2011) ("expert testimony need not concern the (or an) ultimate issue in the case in order to be reliable"); *CDX Liquidating Trust v. Venrock Assocs.*, 411 B.R. 571, 584 (N.D. Ill. 2009) (expert testimony "need not embrace the ultimate issue; rather, it need only be relevant to evaluating a factual matter"); *Westfield Ins. Co. v. J.C. Penney Corp.*, 466 F. Supp. 2d 1086, 1093 (W.D. Wis. 2006) (an expert "need not have an opinion on the ultimate question to be resolved by the trier of fact in order to satisfy the relevance requirement"); *Dartey v. Ford Motor Co.*, 104 F. Supp. 2d 1017, 1025 (N.D. Ind. 2000) ("To be relevant under Rule 702, the proffered testimony must only assist the jury in determining any fact in issue in a case. Relevant testimony is not excluded simply because the testimony does not relate to the ultimate issue in the case.").

search-suggest functionality in the e-commerce environment; on the role such interactive content plays in the industry today; and on background e-commerce marketing principles such as "conversion rate," "bounce rate," "stickiness," and "friction." Ex. A at 1-73. Defendants are plainly wrong to assert that this testimony does not "concern [] any of the issues in the case." Dkt. 906 at 3.[6] Mr. Bari's testimony is relevant, and it is reliably applied to the interactive-content features and the e-commerce context of this case.

IV. CONCLUSION

For the reasons discussed above, Eolas respectfully asks that the Court deny Defendants' *Daubert* Motion to Preclude the Expert Testimony of Jonathan H. Bari, Dkt. 906, in its entirety.

[6] Defendants also fail to acknowledge that Mr. Bari specifically addresses some Defendants' success in the internet retail market as driven by their use of infringing functionalities. *See* Ex. A at 34 (Amazon's use of video); 47-50 (Google's use of search suggest). It should also be noted that Eolas' and Mr. Bari's reliance on market-wide data regarding the significance of the infringing features is in part necessitated by Defendants' failure to produce adequate A/B testing results, a method of marketing testing frequently used in the internet retail context to determine the most effective way to impulse customers into making a purchase.

Dated: October 5, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been served on all counsel of record via e-mail and the Court's ECF system on October 5, 2011.

/s/ Josh Budwin
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