

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

EOLAS TECHNOLOGIES
INCORPORATED,

PLAINTIFF,

v.

ADOBE SYSTEMS INC. et al.,

DEFENDANTS.

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Civil Action No. 6:09-CV-446-LED

JURY TRIAL DEMANDED

**DEFENDANTS' *DAUBERT* MOTION TO PRECLUDE
EXPERT TESTIMONY OF JONATHAN H. BARI**

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INTRODUCTION

Defendants Adobe Systems, Inc., Amazon.com, Inc., CDW, LLC, Citigroup, Inc., The Go Daddy Group, Inc., Google, Inc., J.C. Penney Corp., Inc., Staples, Inc., Yahoo!, Inc., and YouTube, LLC (collectively, “Defendants”) move the Court pursuant to Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993), to strike the Expert Report of Jonathan H. Bari (Ex. A,¹ “Bari Report”) submitted by Plaintiff Eolas Technologies, Inc., and to preclude the proffer of any opinion testimony from Mr. Bari and the Bari Consulting Group based thereon.

The Bari Report does not purport to offer any opinion concerning any issue relevant to this case. Instead, it provides summary assertions regarding the so-called “value proposition” provided by generalized, non-specific features like “Internet advertising sales.” The report relies entirely upon what it concedes are anecdotal citations concerning *non-accused* websites and third parties unmoored to any specific party, website, or feature at issue in this case. It does not disclose, let alone attempt to apply, any methodology to ostensibly relate those non-accused websites and parties to those that are actually at issue in this case and, more importantly, to the patents and facts in this case. Courts in this District as well as the Federal Circuit and Supreme Court have repeatedly held precisely such expert testimony unrelated to the patents and facts at issue in the case improper and must be excluded.

ARGUMENT

I. LEGAL STANDARD

It is well-established that expert testimony is admissible only 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

¹ Exhibits are to the Declaration of Aaron Y. Huang, filed concurrently herewith.

case.” Fed. R. Evid. 702; accord *Daubert*, 509 U.S.at 588; *Sundance, Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356, 1360 (Fed. Cir. 2009). The testimony must “assist the trier of fact to understand the evidence or to determine a fact in issue,” and that which does not relate to any issue in the case “is not relevant and, ergo, non-helpful.” *Daubert*, 509 U.S. at 591 (citation omitted).

The Federal Circuit has further clarified the requirements for expert testimony in patent cases. A “major determinant” of whether an expert should be excluded is “whether he has justified the application of a general theory to the facts of the case.” *Uniloc, USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1316 (Fed. Cir. 2011). “[A]ny evidence unrelated to the claimed invention does not support compensation for infringement but punishes beyond the reach of the statute,” so “[t]o be admissible, expert testimony opining on a reasonable royalty rate must ‘carefully tie proof of damages to the claimed invention’s footprint in the market place.’” *Id.* at 1316-17 (quoting *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869 (Fed. Cir. 2010) (rejecting opinion testimony reliant upon evidence “with no relationship to the claimed invention” and no “discernible link to the claimed technology”)); see also *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1331-37 (Fed. Cir. 2009).

As in the above-cited Federal Circuit cases, the Bari Report fails to meet the Rule 702 threshold requirement for admissibility because it is entirely reliant upon evidence like a survey that mixes and matches evidence from companies and websites that are completely unrelated to this case and fails to establish any relationship or link to the patents-in-suit.

II. MR. BARI'S TESTIMONY SHOULD BE EXCLUDED UNDER RULE 702 BECAUSE IT OFFERS ONLY ANECDOTAL CITES WITH NO RELATIONSHIP TO THE PATENTS-IN-SUIT OR PARTIES IN THE CASE.

A. Mr. Bari's Testimony Would Not Assist the Trier of Fact to Understand the Evidence or to Determine a Fact at Issue in This Case.

Mr. Bari does not purport to opine concerning any of the issues in the case or otherwise to assist the jury in understanding the evidence. He does not intend to testify, for example, about patent infringement or validity, or analyze how to determine the proper amount of damages to assess if infringement is proven. Instead, Mr. Bari simply offers his view of the "value proposition" generally provided to websites by the use of certain categories of features that he himself has constructed, such as "pan & zoom," "product videos," "auto-complete" (or "TypeAhead"), "Internet advertising sales," and combinations thereof. He does not purport to offer any opinions directed to any specific features implemented by any of the Defendants in this case.

The Bari Report describes his assignment as follows: "Specifically, Bari Consulting Group was tasked with providing an independent analysis in the Plaintiff's Expert Report on the qualitative and quantitative drivers that Eolas's Intellectual Property may provide from a macro perspective with regard to potentially increasing e-commerce sales and potentially decreasing e-commerce returns, for example." Ex. A at 3. With respect to each purported feature category, Mr. Bari then repeats essentially the same opinion: "there are various qualitative and quantitative benefits" derived from use of these features. *See, e.g., id.* at 11-14, 25, 32, 46, 57-58.

This over-generalized commentary has no bearing on the specific facts and damages issues pertaining to the asserted claims in this matter. The report does not explain, for example, how Mr. Bari's generalized theory concerning e-commerce relates to the patents-in-suit or the Defendants' accused websites. This is no surprise, given that neither Mr. Bari nor any other expert in this matter can or will opine that the patents-in-suit claim the only manner of

performing the “interactive” functions addressed by Mr. Bari: “1) product and service images - pan and zoom (sometimes referred to as interactive images), 2) product and service videos and 3) search suggest auto-complete (“Search Suggest”).” Ex. A at 3. Moreover, and as discussed further below, the report admits that Mr. Bari “did not analyze whether these companies cited have infringed on Eolas’s Intellectual Property,” including by selling or using any of the features addressed by Bari’s report. *See* Ex. A at 51, n.177. This testimony does not relate to any of the issues in this case, and is thus “non-helpful” and non-admissible. *Daubert*, 509 U.S. at 591.

B. Mr. Bari’s Testimony is Not Based on Sufficient Facts or Data.

Even setting aside his failure to relate his generalized opinion concerning e-commerce to any issue in the case, Mr. Bari’s testimony concerning e-commerce should also be excluded for the independent reason that it is not based on sufficient facts or data. In support of his opinion, Mr. Bari points to a selective smattering of evidence related to website retailers and companies that are not parties to this case. But he fails to offer any indicia of the reliability of such evidence that would in any way suggest that the sample cited is somehow representative of e-commerce retailers generally or, more importantly, Defendants’ websites.

Indeed, Mr. Bari concedes that the evidence he cites is only “anecdotal”:

Certain market research, case studies, companies and metrics which are cited in the Plaintiff’s Expert Report are used for *anecdotal purposes* in terms of general e-commerce matters and/or the use and quantifiable and/or qualifiable benefit(s) of specific technologies/functionalities including with interactive product images, product videos and search suggest auto-complete. ***Bari Consulting Group did not analyze whether these companies cited have infringed on Eolas’s Intellectual Property.***

Ex. A at 51, n.177 (emphasis added). Such anecdotal evidence is not a proper basis for expert testimony. *See U.S. Gypsum Co. v. LaFarge N. Am.*, 670 F. Supp. 2d 737, 745 (N.D. Ill. 2009) (granting motion to preclude expert testimony “essentially based on anecdotal data with little or no governing method of analysis”). Moreover, despite repeated assertions of “quantitative

benefits,” the report contains no information about how to evaluate the supposed “quantitative” benefits of Mr. Bari’s categories of features.

These alleged facts concerning the commercial activities of selected third parties unrelated to the patents in suit improperly risks confusing the jury and encouraging it to compute damages based on irrelevant and incomplete information. It should be excluded because its probative value is greatly outweighed by its prejudicial effect. *See* Fed. R. Evid. 703, 403.

C. Mr. Bari Fails to Proffer Any Principles or Methods to Support His Opinions.

Mr. Bari’s testimony should also be excluded because he fails to disclose any principles or methods that he relied upon in reaching his conclusions. Instead, Mr. Bari provides unsupported, vague conclusions about the “value propositions” of various website features, and the “qualitative and quantitative benefits” of such features, not tied to the Defendants or the patents in suit. The only support provided for these conclusions are summary assertions. For example, Mr. Bari simply asserts and provides no support for his opinions that the features provide “enhanced views,” reduces friction in e-commerce, boosts conversion rates or attains higher customer satisfaction rates. Such testimony unsupported by principles and methods should be excluded. *See Utah Med. Prods. v. Graphic Controls Corp.*, 350 F.3d 1376 (Fed. Cir. 2003).

D. Mr. Bari Does Not Apply Principles and Methods Reliably to the Facts of This Case.

Mr. Bari’s testimony should also be excluded because, even to the extent it purports to apply an (unexpressed) principle or method, it does not reliably apply that principle or method to the facts of this case. Indeed, as noted above, Mr. Bari does not address the facts of this case at all. The report is instead filled with irrelevant information about third parties and various e-

commerce activities, articles, and promotional information, unrelated to the patents-in-suit or any of the Defendants.

As noted above, the statements in Mr. Bari's report are not only unrelated to the Defendants, they also are not tied to the patents-in-suit. To cite only a few examples, Mr. Bari seeks to testify that:

- Sales of the Top 500 retailers grew 18% in 2009
- Design Within Reach increased online sales by 45%
- B's Purses' online sales jumped by "more than 10x"
- Beale's Department stores attained a 20% increase in conversions
- L.L. Bean's web sales grew by more than 29% in 2010
- Treadmill Doctor improved its conversion rate by 10%
- Golfsmith recently measured a 64% lift in sales.

Mr. Bari makes no attempt to specifically apply his generic "industry" opinions purportedly gleaned from this evidence to the business realities of any of the Defendants in the case. Indeed, the Bari Report, prepared for this litigation, explicitly states on its first page that it is *not* tied to the specific claims of the patents:

For the record, Bari Consulting Group was not tasked with reviewing how Eolas's Intellectual Property is allegedly used and/or infringed by each of the individual or collective Defendants in this matter. As such, Bari Consulting Group concentrated its analysis from a macro perspective and did not develop any patent claims' chart analyses, for example.

Ex. A at 3.

The only thing some Defendants have in common is that they earn revenue through websites. But each individual Defendant has a different on-line presence. For example, Adobe sells software products through its website Adobe.com; as there is no physical product, there is no need for "visualization" for software products that would require "interactive" images.

Likewise, Go-Daddy offers website hosting services; CDW sells multi-brand technology solutions; and Staples sells office supplies. Mr. Bari's opinions simply cannot be applied to these very different defendants on a "mix and match" basis, and certainly cannot be done so absent any explanation or specific application of the facts for each individual defendant.

Mr. Bari's report also relies upon a purported "survey" of e-commerce and Internet retailing that does not attempt to tie his resulting opinions to the patents' claims. As Magistrate Judge Love recently affirmed in the *Fractus* case, such a survey that does not limit itself to the claimed invention is not admissible and may not be the basis for expert testimony under Rule 702. *Fractus, S.A. v. Samsung et al.*, Civil No. 6:09-cv-203-LED-JDL, at 2-3 (E.D. Tex. April 29, 2011) (attached as Ex. B) ("Survey evidence purportedly demonstrating the value of internal antennas not tied directly to Plaintiff's technology confuses the issues and must be excluded.").

Mr. Bari's indiscriminate reliance on purported evidence about companies that are not parties to this lawsuit, who sell products unrelated to those sold by many of the defendants herein, and that is unrelated to the patents-in-suit, plainly contradicts the governing Federal Circuit case-law requiring specificity in damages evidence. *See, e.g., Uniloc, ResQNet, Lucent*. Those cases confirm that evidence and opinions not relating to the patents-in-suit are inadmissible. To the contrary, Mr. Bari admits in his report that he has no idea whether these non-party websites infringe the asserted patents. Like the expert testimony the Federal Circuit rejected in *Uniloc* and *ResQNet.com*, Mr. Bari's opinions are completely unhinged from the market footprint of the claimed invention. Absent proof that these non-parties are using the asserted patents, Mr. Bari's opinions have no relevance to the amount of damages to be assessed for alleged infringement of these patents, and should be excluded.

III. CONCLUSION

For the foregoing reasons, Mr. Bari's testimony fails to satisfy the requirements of Rule 702 and should be excluded by the Court.

Dated: August 19, 2011

Respectfully submitted,

/s/ Edward R. Reines

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CERTIFICATE OF CONFERENCE

I certify that David J. Healey attempted to contact counsel for Eolas between 7:00 and 8:00 p.m. CT on August 19, 2011 by email and telephone calls to the offices of Josh Budwin and John Campbell, as well as to the mobile phone of Josh Budwin. Based on prior discussions and scheduling and other case matters, Defendants understand this motion to be opposed. Defendants remain willing to meet and confer on any issue raised in this motion once the Plaintiffs have had the chance to study the motion and supporting exhibits in detail.

/s/ Aaron Y. Huang

Aaron Y. Huang

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on this 19th day of August 2011. All other counsel of record will be served via facsimile or first class mail.

/s/ Danielle Delorio

Danielle Delorio