UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BROADSPRING, INC., Plaintiff, v. CONGOO, LLC, doing business as ADIANT and ADBLADE, ASHRAF NASHED, RAFAEL COSENTINO and DOES 1-10, Defendants.	13 Civ. 1866 (JMF)

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO STRIKE THE EXPERT REPORT AND PRECLUDE THE TESTIMONY OF LANCE JAMES

Respectfully submitted,

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Plaintiff Broadspring, Inc. ("Broadspring") respectfully submits this memorandum in support of its motion to strike the expert report and preclude the testimony of Lance James, an expert witness proffered by Defendants Congoo, LLC, doing business as Adiant and Adblade ("Congoo"), Ashraf Nashed and Rafael Cosentino (collectively, "Defendants").

PRELIMINARY STATEMENT

This case is about a campaign of false statements that Defendants made about Broadspring, their primary competitor. One of the categories of false statements at issue involves Defendants' claims that Broadspring distributed in the past, and continues to distribute today, spyware. Although Defendants had no factual basis for these statements at the time they started disseminating them, they have retained an expert witness to create a post-hoc justification. Defendants proffer Mr. Lance James, who holds the title of "Chief Scientist" at a company called Vigilant, Inc. A copy of Mr. James' report, dated November 8, 2013, is annexed hereto as Exhibit 1. For completeness, a copy of the rebuttal report of Broadspring's expert, Marty Lafferty, is annexed as Exhibit 2.[1] According to James' report, he was retained by Defendants' counsel "to (i) determine whether an entity known as MindSet Interactive, Inc., distributed spyware and adware during the period 2003-2005, including software titled "FavoriteMan" and "Netpals" and (ii) review the threat intelligence research associated with Mindset and the specified software." (Ex. 1, p. 1.)

James' report and proposed "expert" testimony exemplify almost everything that an expert is not permitted to do. As a threshold matter, James' software analysis is not based on the actual source code for FavoriteMan or Netpals, but rather binaries that James downloaded from a third-party web site, Reversinglabs.com. These unauthenticated binaries lack any assurance that

[1] The Lafferty Report is the subject of a *Daubert* motion by Defendants filed today.

they are true and accurate copies of the original source code. Moreover, the bulk of James' report is nothing but a conduit for hearsay, rotely repeating the results of internet searches he conducted, statements James found on various web sites, and alarmist warnings by third-party software vendors whose business depends on convincing consumers that they should purchase their "anti-spyware" products. And when James is not regurgitating hearsay he found on the internet, he offers mainly *ipse dixit*, improper factual narrative, and inadmissible opinions about the state of mind of the unknown programmers responsible for the unauthenticated "FavoriteMan" and "Netpals" binaries that James found on the web and analyzed. His report is utterly devoid of any of information that the Court would need to evaluate James' methodology. In sum, the rambling and ungrammatical 43-page report is so fundamentally flawed that attempting to parse it line-by-line would be pointless. Instead, James' report should simply be stricken in its entirety, and he should not be permitted to testify.

ARGUMENT

It is well-established that the Court acts as a gatekeeper, ensuring that the jury is not exposed to unreliable expert testimony. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589-92 (1993). This gatekeeping function applies to all forms of expert testimony. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147-53 (1999). The requirements of *Daubert* have been codified in Rule 702, which provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and

> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed R. Evid. 702. "[T]he proponent of expert testimony has the burden of establishing by a preponderance of the evidence that the admissibility requirements of Rule 702 are satisfied." *U.S. v. Williams*, 506 F.3d 151, 160 (2d Cir. 2007). As explained below, James' proposed testimony is inadmissible for a whole host of reasons.

I. James' Opinions Are Irrelevant Because He Analyzed Unauthenticated Binaries

James begins his report by stating that he "acquired 56 binaries from the company 'ReversingLabs' based on my look up of FavoriteMan and Netpals," and then identified nineteen of the "binaries that were considered executable." (Ex. 1, p.4.) In other words, James concedes that he is not analyzing the original source code, but rather after-the-fact binaries that he acquired from ReversingLabs.com.[2] According to its web site, ReversingLabs, founded in 2009, is in the business of selling "threat detection and analysis solutions that address new generations of malicious software" and boasts that its "products are the fastest, most scalable and most comprehensive tools for cyber threat detection and analysis." (http://www.reversinglabs.com/about.html; last visited Dec. 18, 2013.) While James describes ReversingLabs as having a "repository containing over 1 billion Malware, Spyware and other surreptitiously behaving programs" (Ex. 1, p. 4), neither James nor ReversingLabs purports to have any knowledge about how any of the nineteen binaries got into the repository, including such basic information as who deposited them or whether they accurately

[2] *See Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 448 n.8 (2007) (explaining that "Software in the form in which it is written and understood by humans is called 'source code,'" which is then "converted (or 'compiled') into its machine-usable version, a sequence of binary number instructions'") (quoting Brief for U.S. as Amicus Curiae 4).

reflect the original source code for any of the one billion programs, including FavoriteMan or Netpals. Indeed, given that the repository purportedly contains over one billion programs, it is, at best, totally implausible that anyone is taking the time to verify their authenticity.

In short, James simply has no idea whether he is even analyzing software that Mindset distributed, and his proposed testimony thus flunks the basic requirement of relevance because there is absolutely no "chain of custody." *See Amorgianos v. Amtrak*, 303 F.3d 256, 265 (2d Cir. 2002) (In addition to Rule 702 analysis, "the trial court should look to the standards of Rule 401 in analyzing whether proffered expert testimony is relevant").[3]

II. James' Opinions Are Unreliable

The "Software Analysis" section of James' report (Part I) begins by claiming that James used the following methodologies: Static Analysis; Dynamic Analysis; Behavioral Analysis; Registry Analysis; File Analysis; and Memory Analysis. (Ex. 1, p. 3.) Yet James never explains what any of these methods are, much less why they satisfy Rule 702. Indeed, his report is barren of any of the information one would expect to find in an expert's report. James cites to no published studies, analyses, treatises or textbooks. He offers no information about "whether [his] theory or technique had been and could be tested, whether it had been subjected to peer review, what its error rate was, and whether scientific standards existed to govern the theory or technique's application or operation." *Nimely v. City of N.Y*, 414 F.3d 381, 396 (2d Cir. 2005) (citing *Daubert*, 509 U.S. at 593-94). And, many of the opinions are pure *ipse dixit*, such as James' assertion that the "only files that should be stored in the [system32] directory are system files that are installed onto the operating

[3] Alternatively, James' proposed testimony is inadmissible because it is not "based upon sufficient facts or data." Fed. R. Evid. 702(b). The unauthenticated binaries plainly are not sufficient data on which to base expert testimony.

system by default, and there is no legitimate reason that software games or ad-based software should ever add files to this folder." (Ex. 1, p. 13.) His discussion of "Browser Helper Objects" (*id*., p. 18) is also devoid of explanation. "These deficiencies undermine both the case for [James'] qualifications and the case for reliability; simply put, there is no 'method' whose 'reliability' can be tested." *Fate v. Vill. of Spring Valley*, 2013 U.S. Dist. LEXIS 83425, *12 (S.D.N.Y. Jun. 13, 2013).

What is more, James' report misleadingly muddles spyware and adware in reaching his unreliable conclusions. Indeed, James admits that he was hired to determine whether Mindset "distributed adware and spyware," as if these terms were interchangeable. (Ex. 1, p. 1.) Yet the FTC's March 2005 Staff Report—the sole source James cites in his report—explains that "the term 'spyware' should be limited to software that causes some harm to consumers," and that adware does not fall within this definition of "spyware." (Ex. 3 hereto, pp. 3-4.) Tellingly, many of the "anti-spyware" sources James used to "test" the unauthenticated binaries conclude that they are adware, not spyware. (*See* Ex. 1, p. 17).

III. James' Opinions Improperly Attempt to Circumvent the Hearsay Rules

Even more troubling than James' reliance on the unauthenticated "binaries" found on reversinglabs.com, the vast majority of James' report is dedicated to aggregating inadmissible hearsay. It is settled law, however, that "a party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony." *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 136 (2d Cir. 2013) (quotation omitted). "Although an expert may rely upon inadmissible hearsay, the expert 'must form his own opinions by applying his extensive experience and a reliable methodology to the inadmissible materials.'" *Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 438 (E.D.N.Y. 2013) (quoting *U.S. v. Mejia*,

545 F. 3d 179, 197 (2d Cir. 2008)). "Otherwise, the expert is simply repeating hearsay evidence without applying any expertise whatsoever, a practice that allows the [party] to circumvent the rules prohibiting hearsay." *Id.*

Again and again, James merely repeats hearsay he found on the internet. Most obviously, virtually the entire "Threat Intelligence Research" section of James' report consists of a recitation of whatever happened to appear on James' computer screen when he typed in various terms on third-party web sites. Likewise, the "Software Analysis" section is also littered with hearsay, such as McAfee Security "warnings" and Google search results.

Indeed, James' extensive reliance on internet hearsay is particularly troubling given the nature of the allegations in this case. This case is about a company that has made a business out of posting false information to the internet using fake identities. The facts of this case vividly illustrate the profound unreliability of the hearsay James proposes to expose to the jury under the guise of expert testimony. This Court should not permit that to happen; James should be barred from acting as a conduit for inadmissible hearsay.

IV. James Offers Inadmissible Opinions About Programmers' States of Mind

The introduction section of James' report acknowledges that his analysis of the nineteen executable binaries he stumbled upon by searching reversinglabs.com "will explain … the intent when executed on a user's computer." (Ex. 1, p. 2.) The remainder of his report makes good on this threat, repeatedly opining on the motives, intentions and state of mind of whomever wrote the source code that was converted into the binaries that James found on ReversingLabs.com. But expert testimony about someone's state of mind is never admissible under Rule 702. *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 547 (S.D.N.Y. 2004) ("Inferences about the intent or motive of

parties or others lie outside the bounds of expert testimony."); *Highland Capital Mgmt., L.P. v. Schneider*, 551 F. Supp. 2d 173, 183 (S.D.N.Y. 2008) (an expert's "belief about a party's state of mind is an improper subject for expert testimony and cannot be saved by couching his opinion as 'industry custom and practice.'"). James should therefore be precluded from offering any such testimony.

V. James' "Relationship Map" Opinions Are Inadmissible

Finally, James' opinions about the purported relationships between Broadspring, Mindset, Addictive Technologies and Vista Interactive (Ex. 1, pp. 29-40) are grossly improper. Aside from the fact that (once again) James merely aggregates hearsay he found on the internet, the question whether there is a relationship between any of these entities is not the proper subject of expert testimony. Rather, this is fact testimony, and must be presented by competent fact witnesses and admissible evidence. *See In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d at 551 ("Dr. Gale's 'history of Rezulin' is merely a narrative of the case which a juror is equally capable of constructing.") (quotation omitted); *Highland Capital Mgmt., L.P. v. Schneider*, 379 F. Supp. 2d 461, 468-69 (S.D.N.Y. 2005) (section of report that "marshals Highland's evidence concerning the alleged dealings between Highland and the Schneiders" was inadmissible because "an expert cannot be presented to the jury solely for the purpose of constructing a factual narrative based upon record evidence"), *vacated in part on other grounds*, 485 F.3d 690 (2d Cir. 2007).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should strike the expert report and preclude the testimony of Lance James.

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