

**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 OPPOSITION TO DEFENDANTS'
MOTION TO EXCLUDE THE EXPERT TESTIMONY OF MARTIN C. LAFFERTY**

Respectfully submitted,

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Plaintiff Broadspring, Inc. (“Broadspring”) respectfully submits this memorandum in opposition to the motion of Defendants Congoo, LLC, doing business as Adiant and Adblade (“Congoo”), Ashraf Nashed and Rafael Cosentino (collectively, “Defendants”), to exclude the testimony of Martin C. Lafferty (“Lafferty”), a software and computer technology expert who will, if necessary, rebut the proposed testimony of Defendants’ proffered expert, Lance James (“James”), the subject of Plaintiff’s *Daubert* motion. (ECF No. 102.)

PRELIMINARY STATEMENT

Defendants moved to exclude Lafferty’s testimony on three grounds: (1) his qualifications; (2) his purported “credibility” testimony; and (3) his expert report’s purported noncompliance with Rule 26. These arguments are meritless and Defendants’ motion should be denied.

First, Lafferty is eminently qualified to testify, and indeed, far more qualified than James. Lafferty was hand-selected by the FTC to help develop the March 2005 Report on Spyware—the *only* document that James cites as authoritative in his report. In other words, Lafferty quite literally helped “write the book” on spyware. Moreover, Lafferty has been intimately involved in software security issues for many years, with an emphasis on “malware” and “spyware.” Lafferty thus easily satisfies the standard for expert qualification.

Second, Lafferty does not propose to opine on James’ credibility as a witness, and his report does not offer any such opinions. Rather, as should be apparent from even a cursory review of the report, Lafferty will testify about the substance of James’ testimony—he will testify, in other words, that James’ conclusions are wrong. That is exactly what a rebuttal expert is supposed to do.

Finally, Defendants' technical objections under Rule 26 reek of gamesmanship. Although Lafferty's rebuttal report was served on November 18—a mere ten days after Defendants' belated disclosure that they intended to proffer a spyware expert—Defendants never so much as mentioned that they believed the report was deficient. If they had made any effort to meet and confer, Broadspring would have simply provided the missing signature page and confirmed for Defendants that Lafferty has not testified as an expert witness in litigation in the last four years.

ARGUMENT

I. Lafferty is Eminently Qualified to Testify

“[T]he Second Circuit has construed expert qualification requirements liberally. Indeed, liberality and flexibility in evaluating qualifications should be the rule ... the expert should not be required to satisfy an overly narrow test of his own qualifications.” *Canino v. HRP, Inc.*, 105 F. Supp. 2d 21, 27 (N.D.N.Y. 2002) (internal quotations omitted). “An expert need not be disqualified merely because he or she does not possess experience tailored to the precise product or process that is the subject matter of the dispute.” *Lion Oil Trading & Transp., Inc. v. Statoil Mktg. & Trading (US) Inc.*, 2011 U.S. Dist. LEXIS 24516, *4 (S.D.N.Y. Feb. 28, 2011) (quotation omitted).

Lafferty is well-qualified to rebut James' testimony. Lafferty is the CEO of the Distributed Computing Industry Association (“DCIA”), an organization focused on fostering technological and commercial advancement of cloud computing, peer-to-peer (P2P) software, and related technologies. (Declaration of Martin C. Lafferty, dated January 8, 2014 (“Lafferty Decl.”) ¶ 1.) DCIA Member companies include industry-leading software developers and

distributors, broadband network operators, content rights-holders, and service-and-support firms. (*Id.*)¹

Understanding “spyware” and “malware” is integral to the peer-to-peer software and cloud computing business, because these technologies face the greatest threat from “spyware” and “malware.” (Lafferty Decl. ¶ 2.) That concern has informed the DCIA’s working groups, voluntary codes of conduct, and ongoing evaluations and consultation throughout the ten years of its existence. (*Id.*) Lafferty’s work for the past decade has thus focused on issues regarding “spyware” and “malware,” and he has directly supervised efforts to find ways to eliminate and protect against such threats, for the benefit of DCIA’s Members. (*Id.* ¶ 3.) For example, security issues relating to “spyware” and “malware” are the topic of at least four DCIA public conferences per year. (*Id.* ¶ 4.)

Lafferty’s work also focuses on finding solutions to security-related issues such as the unwitting disclosure of personal or sensitive data as a result of file-sharing software that lacks features designed to protect users from such harms. (*Id.* ¶ 5.) Such software is a form of “malware” and such deceptive file-sharing applications would be “spyware” under the definition of the term. (*Id.*)

Contrary to Defendants’ unsupported assertion that Lafferty “has no background whatsoever in malware analysis, in software analysis, or in software development” (Def. Mem. at 7), his work for the DCIA has included extended engagements in which he served as the principal interface between DCIA Member companies and the FTC and other federal regulatory

¹ Defendants unfairly malign Lafferty’s background as one “in marketing and running advertising companies.” (Def. Mem. at 7.) In reality, Lafferty has been a senior executive in management roles involving high technology companies for almost three decades. These roles include the supervision of software analysis and development, particularly with respect to adware and spyware. (Lafferty Decl. ¶ 6.)

agencies on malware and spyware analysis issues, and the development of assurances that no malware was present, or in making changes in the software to achieve this end. (Lafferty Decl. ¶ 7.)

Indeed, due to his extensive expertise in this area, Lafferty was selected by the FTC to serve as one of 35 experts at the seminal multi-day summit (from which Lance James was notably absent) that developed the accepted definitions of “spyware” and “adware.” (*Id.* ¶ 8.) Seemingly oblivious to the fact that their own purported expert cites and relies on these very same definitions in his report (Greenberger Decl. Ex. 1, p.2 & n.1), Defendants denigrate Lafferty’s participation in this summit as an “appearance—10 years ago—as a panelist.” (Def. Mem. at 5). But Lafferty contributed substantially to the multi-day workshop and follow-up written work that culminated in the FTC’s definitions, which are now the industry standard. (Lafferty Decl. ¶¶ 8-9.)

Further, to the extent Defendants seem to argue that they disagree with Lafferty’s conclusions (*see, e.g.*, Def. Mem. at 9 (asserting that Lafferty’s statements are “nonsensical” and “ludicrous” while citing absolutely no authority)), that is no basis upon which to exclude his testimony. Proponents of expert testimony “do not have to demonstrate ... by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that [the experts’] opinions are reliable.” *Hollman v. Taser Int’l, Inc.*, 928 F. Supp. 2d 657, 671 (E.D.N.Y. 2013).

II. Lafferty’s Testimony Has Nothing to Do With James’ Credibility

Defendants’ assertion that Lafferty intends to proffer impermissible “credibility” testimony (Def. Mem. at 10-11) is nonsense. Lafferty does not propose to testify about James’ credibility as a witness. He has no intention of offering any testimony about James’ honesty,

biases, mental competence or any other factor that might bear on his credibility. Rather, Lafferty will address the *substance* of James' testimony, if the Court permits James to testify (*but see* Plaintiff's *Daubert* motion, ECF No. 102), by rebutting his analysis and conclusions. That is the whole point of a rebuttal expert.

Rule 26(a)(2)(D)(ii) expressly authorizes rebuttal expert testimony that is "intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C)." "Rebuttal evidence is properly admissible when it will explain, repel, counteract or disprove the evidence of the adverse party." *S.W. v. City of N.Y.*, 2011 U.S. Dist. LEXIS 80833, *10 (E.D.N.Y. Jul. 25, 2011) (quotation omitted). Thus, a rebuttal expert can be called to "critique the methodology" of an opposing expert, and his testimony may consist of a "lengthy discussion of the flaws" in the opposing expert's methods. *Faryniarz v. Nike, Inc.*, 2002 U.S. Dist. LEXIS 15825, *7 (S.D.N.Y. Aug. 23, 2002). Lafferty's proposed testimony is well within the bounds of proper rebuttal expert testimony.

III. Defendants' Rule 26 Arguments Are Meritless

To place Defendants' Rule 26 arguments in context, discovery in this action went badly off track due to Defendants' gross failure to complete their document production until well into October. As a consequence of their misconduct, the parties were forced to compress all party depositions and expert discovery into a very brief window. Broadspring consistently informed Defendants from early on that it intended to proffer a damages expert, but could not do so without the benefit of Congo's 30(b)(6) testimony regarding any "element of cost or deduction" it intended to claim under the Lanham Act. *See* 15 U.S.C. § 1117(a). In response, Defendants took the knee-jerk the position that they would not provide any expert disclosures of their own until Broadspring served its damages expert's report.

Broadspring took Congoo's 30(b)(6) testimony on October 30, and then Dr. Russell Mangum prepared his damages expert report of November 8, which was served that day. (Parenthetically, no motion to preclude has been made as to Dr. Mangum's report.) Also on that day, Congoo served its spyware "expert" report by James. It is obvious from that report that it was prepared at least a month prior (*see, e.g.*, Greenberger Decl. Ex. 1, pp. 10, 17, 19), and unlike Broadspring's report, there was no reason it could not have been served earlier. As a result of Defendants' sandbagging, Broadspring was forced to, and did, scramble to prepare a rebuttal report by the November 18 discovery cut off. The signature page to the rebuttal report, however, was inadvertently omitted. After receiving the report, Defendants said nothing to indicate they thought it was deficient or missing any information. Instead, they waited a month and then filed this motion seeking preclusion.

"The remedy of preclusion is not to be employed as a 'paper tiger' with parties capitalizing on technical mistakes in discovery, but rather should be employed sparingly when the circumstances demand such a drastic measure." *Croom v. W. Conn. State Univ.*, 218 F.R.D. 15, 17-18 (D. Conn. 2002) (denying motion to preclude based on incomplete expert report); *see also, e.g., Hinton v. Patnaude*, 162 F.R.D. 435, 440 (N.D.N.Y 1995) (accepting expert reports where Rule 26 violation was "harmless."). Here, the omission of Lafferty's signature was both inadvertent and harmless. In any event, that "defect" has been cured by the signed version of the report, a copy of which is annexed to Lafferty's Declaration as Exhibit 1.

As for Defendants' complaint that the report does not list Lafferty's testimony during the past four years (Def. Mem. at 10-11), there is no such testimony to list (*see* Lafferty Dec. ¶ 10). Thus, the report is accurate and complies with Rule 26. In this regard, Defendants also assert that since Lafferty has not testified as a spyware expert in another case in the last four years he

“should be precluded from doing so in this case.” (Def. Mem. at 12.) Aside from the fact that this argument makes no sense since such a rule would limit the universe of experts to those who have already testified as experts, the fact that Lafferty has not made a career out of being a “hired gun” is not grounds to exclude his testimony. “Although the converse may be true, *i.e.*, that a court may be persuaded by another court’s determination of an expert’s qualification to testify, there is no such barrier preventing one without prior expert witness experience from testifying as an expert. Such a rule would be counter-productive and would prevent many highly-qualified individuals from offering their opinions in our courts. Rather, the court [should] consider[] the potential expert’s knowledge, skill, experience, training, or education, *see* Federal Rule of Evidence 702” *Great N. Ins. Co. v. Power Cooling, Inc.*, 2007 U.S. Dist. LEXIS 95912, *40-41 (E.D.N.Y. Dec. 18, 2007) (citing *Tiffany (NJ) Inc. v. eBAY, Inc.*, No. 04 Civ. 4607, 2007 U.S. Dist. LEXIS 85367, 2007 WL 4104089, at *2 (S.D.N.Y. Nov. 9, 2007)).²

Finally, although Defendants do not dispute that they have had complete and unfettered access to a comprehensive list of Lafferty’s publications, they complain that they had to click on a link on the DCIA website to access that list. (Def. Mem. at 11.) Needless to say, this is an utterly trivial gripe. In any event, Lafferty attaches a printout of that page to his declaration at Exhibit 2.

² Interestingly, while Defendants’ expert, James, has previously offered various expert testimony in litigation, he does not appear to have ever testified as an expert on spyware.

CONCLUSION

For the foregoing reasons, it is respectfully requested that Defendants' motion be denied in its entirety.

Dated: New York, New York
January 8, 2014

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