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 REPLY MEMORANDUM OF LAW IN FURTHER 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 reply memorandum in further support of its motion to strike the expert report and preclude the testimony of Lance James, a purported expert witness proffered by Defendants Congoo, LLC, doing business as Adiant and Adblade ("Congoo"), Ashraf Nashed and Rafael Cosentino (collectively, "Defendants").

PRELIMINARY STATEMENT

For purposes of this litigation, Defendants have retained "expert" witness Lance James ("James") to conduct an ***ex post facto*** evaluation of the truth of certain defamatory statements that Defendants made about their primary competitor, Broadspring. To this end, James has submitted a report (the "James Report"), which Broadspring moved to strike. In their opposition, Defendants urge that, despite its flaws, the James Report is admissible expert opinion. It is not.

The threshold requirement for the admissibility of expert testimony is relevance. By Defendants' admission, at no point did James actually evaluate the relevant source code (*i.e.,* code attributable to MindSet Interactive, Inc. ("MindSet")). Instead, James looked at 19 executable binaries (*i.e.,* collections of compiled code) selected essentially out of a hat from Reversinglabs.com, an anonymous internet repository. Without the necessary demonstration that the James Report is based on the actual source code of the actual software, it is simply not relevant.

Moreover, Defendants admit that James' report lacks any description or account of his methodological approach, relying instead on *ipse dixit* assertions about cyber security and his inadmissible opinions as to the state of mind of unknown programmers. Defendants further assert that James' methodology should speak for itself. It does not. It is perhaps not surprising

that James fails to provide an adequate methodological description given that his "analysis" appears to consist of—when not submitting inappropriate *ipse dixit*—regurgitating inadmissible hearsay in the form of cherry-picked statements from the web and certain favorable readouts from security programs. This attempt at an end-run around the Federal Rules of Evidence ("FRE") is far from a proper analysis.

ARGUMENT

I. James' Opinions are Irrelevant And Defendants Severely Misconstrue the Relevance Inquiry

The threshold requirement under Rule 702 is relevance. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993). Defendants argue that the relevance of expert testimony is determined by the following tautological test: "To the extent that expert testimony speaks to an essential element of the cause of action asserted, it is relevant." (Def. Mem. p. 3.) This entirely misses the point of the relevance inquiry prescribed by *Daubert*. As the Court stated, "An additional consideration under Rule 702—and another aspect of relevancy—is whether expert testimony proffered in the case is sufficiently ***tied to the facts*** of the case that it will aid the jury in resolving a factual dispute," and continuing in the same paragraph, "Rule 702's 'helpfulness' standard requires a valid ***scientific connection*** to the pertinent inquiry as a precondition to admissibility." *Daubert*, 509 U.S. at 591-92 (emphasis added). This standard is not toothless: Defendants must demonstrate that James' selection of binaries from a third-party internet repository does not disrupt the scientific fit of his evidence to his conclusion. *Id.*

James explains (rather tersely) that he identified the binaries "based on [his] look up of FavoriteMan and Netpals" (the two alleged pieces of spyware). (ECF No. 103-1, p. 4.) James

does not describe what his "look up" entailed, but it appears that he simply typed the words FavoriteMan and Netpals into ReversingLabs' search function and downloaded the results. This is why the remainder of his analysis focuses on software with titles such as "BomberMania," "Solitaire" and "SimAquarium"—the assumption is that these pieces of software have at some point and by persons unknown been bundled into software "suites" that allegedly contain FavoriteMan or Netpals components. (*See id.*, p. 8.) However, this assumption creates two very serious problems. First, ReversingLabs did not provide James with the original source code associated with FavoriteMan or NetPals. (ECF No. 103-2, p. 5.) Instead, what James acquired were compiled binaries that could be inauthentic, adulterated or incomplete versions of FavoriteMan or NetPals. (*Id.*, p. 4.) Second, the alleged FavoriteMan or NetPals software was not found in isolation, but instead was bundled with third-party software that could have been the source of any alleged "spyware." (*Id.*, p. 5.) There is no evidence that the "spyware" allegedly found in these other titles has anything to do with MindSet. Indeed, the "file hashes" James belatedly offers (ECF No. 128, p. 2) to support the alleged connection between MindSet software and the third-party binaries simply are not reliable indicators of authorship of components within a binary, and, in any event, can easily be corrupted, adulterated or faked. (ECF No. 103-2, p. 5.)

The reason James does not make his dubious chain of custody clear is that it so obviously calls into question the relevance of his analysis. The problem of "fit" is paramount here, as there is simply no way to be sure that James has analyzed the right software. (*Id.*, p. 4-5); *GE v. Joiner*, 522 U.S. 136, 144-46 (U.S. 1997) (toxic tort case rejecting, *inter alia*, expert submission of epidemiological study involving patients with exposure to a ***different carcinogen*** than the agent at issue). James' purported demonstration that some binaries he found in a bin on the

internet may produce potentially unwanted programs might be interesting, but it is not, under *Daubert*, relevant. *Amorgianos v. Amtrak*, 303 F.3d 256, 269 (2d Cir. 2002).

James also suggests that, in any event, it does not matter whether his analysis of the binaries accurately reflects MindSet's source code, since MindSet's servers were able to communicate with (some of) the binaries and consequently disseminate "spyware." (ECF No. 128, ¶ 5.) In support of this bold claim, James cites six pieces of inadmissible hearsay, none of which shows any communication or dissemination with or from MindSet, plus one almost indecipherable read-out from the execution of the SimAquarium binary. (ECF No. 103-1, Figures 41-47.) Assuming the read-out (*id.*, Figure 47) says what James claims—and it is not clear it does (ECF No. 103-2, pp 4-5)—James' argument simply begs the question, since he does not define, describe or even name the "spyware" he is referencing. (ECF No. 103-1, pp. 63-70.) Moreover, it appears that there is no way of knowing who compiled the SimAquarium binary or why, whether they borrowed some of MindSet's code for their own purposes, or whether the SimAquarium binary contains any MindSet software at all. (ECF No. 103-2, p. 5.) Nor does James describe where or how the SimAquarium binary accessed MindSet's servers. (ECF No. 128, ¶ 5.) We are asked, in essence, simply to take his word for it.

Further, Defendants' argument that fundamental lack of relevance ought to be interpreted as a question of "weight" rather than "admissibility" (Def. Mem., p. 5) is based on a misreading of the cases upon which they rely. The leading case Defendants cite for this proposition does not involve issues of relevance at all, but rather a carefully delineated expert opinion that the opponent complained would have been stronger with additional studies to support it. *Cedar Petrochems., Inc. v. Dongbu Hannong Chem. Co., Ltd.*, 769 F. Supp. 2d 269, 285 (S.D.N.Y.

2011) ("[T]he experts in this case have drawn limited conclusions based on existing test results and have also explained why additional investigation would likely prove fruitless.") When it comes to questions of ***scientific fit*** *vis-à-vis* the putative conclusions offered by an expert, courts treat the issue as a threshold question and strike testimony found to be irrelevant. *See, e.g.*, *Washburn v. Merck & Co.*, 213 F.3d 627, 627 (2d Cir. 2000); *see also GE v. Joiner*, 522 U.S. 136, 144-46 (1997).

In sum, James has not demonstrated that he analyzed software actually distributed by MindSet, nor has he been able to distinguish the effects of components allegedly attributable to MindSet from those of various other pieces of software bundled by unknown individuals at unknown times into the unauthenticated binaries he found on the internet. Consequently, his proposed testimony utterly fails the basic requirement of relevance and should be excluded. *Amorgianos*, 303 F.3d at 269.

II. James Does Not Sufficiently Explain His Methodology or Reasoning

Defendants claim that James does not need to explain or justify his methodological approach. (Def. Mem., p. 7.) This is, of course, incorrect. *Point Prods. A.G. v. Sony Music Entm't, Inc.*, 2004 U.S. Dist. LEXIS 2676, *24 (S.D.N.Y. Feb. 20, 2004) ("proposed testimony must be supported by appropriate validation") (quoting *Daubert*, 509 U.S. at 592); *see also Yang Feng Zhao v. City of New York*, 2008 U.S. Dist. LEXIS 67044 (S.D.N.Y. Aug. 18, 2008) ("The proponent of ... expert testimony bears the burden of establishing the admissibility of such testimony.") (quoting *Daubert*).

FRE 702 "requires that the trial court make a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that

reasoning or methodology properly can be applied to the facts in issue." *Montefiore Med. Ctr. v. Am. Prot. Ins. Co.*, 2003 U.S. Dist. LEXIS 7986, *3-4 (S.D.N.Y. May 14, 2003) (quoting *Daubert*, 509 U.S. at 592-93). It is axiomatic that in order for a court to make the determination about the reliability of an expert's claim, the court must be given sufficient information to make that assessment. *Daubert*, 509 U.S. at 595. When faced with inadequate methodological explanations, courts routinely exclude expert testimony. *See, e.g., Fate v. Vill. of Spring Valley*, 2013 U.S. Dist. LEXIS 83425, *12 (S.D.N.Y. Jun. 13, 2013) (excluding expert testimony where there was "no 'method' whose 'reliability' [could] be tested"); s*ee also Giladi v. Strauch*, 2007 U.S. Dist. LEXIS 8666 (S.D.N.Y. Feb. 6, 2007) (same); *Stone v. 866 3rd Next Generation Hotel, LLC*, 2002 U.S. Dist. LEXIS 9215, *13 (S.D.N.Y. May 22, 2002) (same).

In response to Broadspring's objection that James offers essentially no methodology other than a cryptic list of "software analysis" tools, Defendants blithely urge that James' opinions are based on his "experiential knowledge in the field of cyber intelligence." (Def. Mem., p. 8.) However, the mere fact of such experience is insufficient to support the admission of an expert opinion. *Faryniarz v. Nike, Inc.*, 2002 U.S. Dist. LEXIS 15825, *10 (S.D.N.Y. Aug. 23, 2002) ("While [the proponent] correctly argues that an expert may rely on his experience as the basis for his opinion, that expert must explain how that experience leads to his proffered conclusion and why it provides a sufficient basis for it.").

Particularly troubling are James' *ipse dixit* conclusions regarding "system32 directories" and "Browser Helper Objects," in support of which James offers no study, authority, analysis or, for that matter, relevant professional experience. (ECF No. 103-1, pp. 13, 18.) "Nothing in either *Daubert* or the FRE requires a district court to admit opinion evidence which is connected

to existing data only by the *ipse dixit* of the expert." *Nimely v. City of N.Y*, 414 F.3d 381, 396 (2d Cir. 2005).[1]

Finally, Defendants again urge that the flaws in the James Report should be treated as factors going to the "weight, not the admissibility" of the proposed testimony; this time urging that flaws with respect to reliability are no bar to admission of evidence. (Def. Mem., p. 8.) However, their leading case, *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038 (2d Cir. 1995), was carefully circumscribed by the Second Circuit in 2005 when that court admonished the appellant not to "over-read[]" the relevant pasage in *McCullock*. *Ruggiero v. Warner-Lambert Co.*, 424 F.3d 249, 254 (2d Cir. 2005). The court explained that the *McCullock* decision was "merely signaling that any remaining objection as to the expert's" methodology should not be dealt with by the appeals court (which was reviewing solely for abuse of discretion). *Id.* Indeed, it is black letter law that "when an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony." *Amorgianos*, 303 F.3d at 266.

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[1] Defendants' authorities here are inapposite. In *Bd. of Trs. of the Aftra Ret. Fund v. JPMorgan Chase Bank, N.A.*, the expert's report was based on an "extensive credit analysis" and employed a methodology that was unchallenged by plaintiffs. 2011 U.S. Dist. LEXIS 144382, *45 (S.D.N.Y. Dec. 14, 2011). And in *Giladi v. Strauch*, a medical malpractice case, the Court based its decision on the existence of ***precisely what is missing in the James Report***, to wit:

> Dr. Grad specifically explained, inter alia, that in his opinion there were no deviations from ***accepted medical practice*** in the care of plaintiff [which finding] was based upon his ***review of the medical records*** ... . Dr. Grad's report includes the underlying conclusions on which his opinions are based, and sets forth a ***complete statement of the bases and reasons for his opinions***.

2007 U.S. Dist. LEXIS 8666, *25-26 (S.D.N.Y. Feb. 6, 2007) (emphasis added). The James Report offers nothing that compares to that standard of completeness, sourcing, expertise and reference to outside authority and data.

III. James' Cherry-Picked Submissions of Hearsay are Improper and Inadmissible

It is settled law 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). The James Report does just that, repeating statement after statement found on the internet, including, but not limited to: a http://virustotal.com search, an "Intrusion Detection Systems Analysis," a http://doc.emergingthreats.net search, Google searches for "ATPartners.dll" and "F1organizer.com," a McAfee report (which he does not reproduce in its entirety), an F-secure blog entry, an Alexa.com entry, and an "Industry Standard Threat Intelligence" feed, among others. (ECF No. 103-1, pp. 1, 5, 17, 18, 20, 26-28, 38, 39.) Typically, James reproduces or summarizes the hearsay statements without comment. (*Id.*, p. 39.) Particularly lacking is any expert assessment of the validity or likely validity of the hearsay content or what, if valid, such content means. This is absolutely fatal to James' analysis. "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.*

Further, James' choices as to the hearsay he selects to reproduce are ***egregiously cherry-picked***. He does not, for example, reproduce a simple Google search of the terms "NetPals" and, separately, "FavoriteMan," the leading results of which identify the software as "adware." (ECF

No. 103-2, pp. 17, 19.) He does not reproduce the Symantec analysis, which also labels the software as "adware." (*Id.*, p. 26.) He does not reproduce the Emisoft report, which labels NetPals as "low risk." (*Id.*, p. 6.) And, perhaps most disturbingly, he does not reproduce the entirety of the McAfee report, which states univocally that "[NetPals] is not a virus or a Trojan. It is detected as a 'potentially unwanted program' (PUP) ... . PUPs are often made by a legitimate corporate entity for some beneficial purpose ... ." (*Id.*, p. 7.) James' decision-making in this regard undermines the very core of his apparent "methodology." *Fate*, 2013 U.S. Dist. LEXIS 83425 at *11.

Defendants' argument that the hearsay evidence is "directly relevant to whether MindSet was a 'notorious spyware company'" is unavailing. (Def. Mem., p. 9.) Broadspring's claim is that Defendants defamed Broadspring by falsely stating that Broadspring distributed spyware, often by publishing bogus posts to the internet. The fact that Defendants often—but not always—added the "notorious" is irrelevant and should not be used as an excuse for Defendants' expert to inappropriately act as a conduit for hearsay found on the internet, which, as noted (ECF No. 103, p. 6), may well have been planted by Defendants.

Likewise, Defendants' claim that the hearsay regurgitated by James falls under an exception to the hearsay rules is ill-founded. (Def. Mem., p. 10). The sole case Defendants cite, *Fournier v. McCann Erickson*, 242 F. Supp. 2d 318 (S.D.N.Y. 2003), involves a chart found on the internet summarizing various pieces of uncontroversial and otherwise publicly available information (magazine circulation numbers), which description went undisputed by the opposing party. *Id.* at 338.

IV. James' Opinions About Unknown Programmers' States of Mind Are Inadmissible

The sole authority on which Defendants rely for their contention that an expert may opine as to the "design" of a software program without thereby impermissibly opining as to the state of mind of the programmers is wholly irrelevant. (Def. Mem., p. 12) (citing *Arista Records LLC v. Lime Group LLC*, 784 F. Supp. 2d 398, 414 (S.D.N.Y. 2011). In *Arista Records*, the expert submitted a description of the basic functionality of LimeWire (the infamous pirating platform), stating rather obviously that it was designed to download music files. The James Report goes much further, describing the *mens rea* of MindSet's programmers as being, for example, "surreptitious" and "inconsiderate." (ECF No. 103-1, p. 22-23.) An expert is simply not allowed to do this. *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 547 (S.D.N.Y. 2004).

CONCLUSION

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

Dated: New York, New York
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