

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

MALIBU MEDIA, LLC,)
)
 Plaintiff,)
 v.) Civil Action No.
) 0:14-cv-61957-JIC
 ROBERT DARE,)
)
 Defendant)
 _____)

DEFENDANT'S MOTION TO EXCLUDE EXPERT TESTIMONY
OF PATRICK PAIGE

COMES NOW Defendant, ROBERT DARE, by and through his undersigned counsel, and moves this Honorable Court for an Order prohibiting Plaintiff from calling Patrick Paige to testify.

I. Introduction

On March 17, 2015, the Court entered a Scheduling Order setting the deadline for the Plaintiff's Disclosure of Experts for September 18, 2015. (Doc. 25.)

On July 28, 2015, Plaintiff served its Report of Proposed Expert Patrick Paige (Doc. 1). Plaintiff and Paige failed to provide a report containing: a complete statement of all of Mr. Paige's opinions to be expressed and the basis and reasons therefore; and any exhibits used as a summary of or support for his opinions. Thus, the Plaintiff failed to comply with Rule 26(a)(2) and Rule 26(e) of the Federal Rules of Civil Procedure. Furthermore, Plaintiff

failed to demonstrate Paige's expertise in the area of software accuracy. Therefore, under Rule 37(c)(1) of the Federal Rules of Civil Procedure, the Defendant moves to exclude any and all opinion testimony of Plaintiff's proposed expert, Patrick Paige.

I. Legal Standard

A. Courts have a "gatekeeping" role when determining admissibility of expert testimony

The admission of expert testimony is governed by Federal Rule of Evidence 702, as explained and refined by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). Under this framework, district courts are charged with a gatekeeping function "to ensure that speculative, unreliable expert testimony does not reach the jury." *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1256 (11th Cir. 2002); *quoted by Latele Television, C.A. v. Telemundo Communications Group, LLC*, 113 U.S.P.Q.2d 1413 (S.D. Fla. 2014). This critical "gatekeeping" function determines the admissibility of expert testimony, whether scientific or technical. *U.S. v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (citations omitted). "This function 'inherently require[s] the trial court to conduct an exacting analysis' of the *foundations* of expert opinions to ensure they meet the standards for admissibility under Rule 702." *Id.* (citation omitted).

B. Expert reports must comply with Rule 26(a) and (e); non-disclosed information may not be admitted

In disclosing experts, parties must comply with Rule 26(a)(2) and (e), Federal Rules of Civil Procedure. Rule 26(a)(2)(B) outlines the requirements of the contents of an expert report, stating that, "[u]nless otherwise stipulated or ordered by the court," the report must be prepared and signed by the witness and contain the items enumerated in that subsection. "The report must contain a completed statement of all opinions the witness will express and the basis and reasons for them; the facts or data considered by the witness in forming them; any exhibits that will be used to summarize or support them." Fed. R. Civ. Proc. R. 26(a)(2)(B); *Reese v. Herbert*, 527 F.3d 1253, 1265 (11th Cir.2008) (finding that Rule 26(a)(2)(B) requires "a written report containing a complete statement of all opinions and the basis and reasons therefore").

"If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. Proc. R. 37(c)(1). *See also Warren v. Delvista Towers Condo. Ass'n, Inc.*, 13-23074-CIV, 2014 WL 3764126, at *1 (S.D. Fla. 2014) (citation omitted) ("A failure

to comply with the expert witness disclosure requirements may result in the striking of expert reports or the preclusion of expert testimony"). "Compliance with Rule 26's expert witness disclosure requirements is mandatory and self-executing." *Warren*, 2014 WL 3764126, at *1 (citing *Lohnes v. Level 3 Commc'ns, Inc.*, 272 F.3d 49, 51 (1st Cir. 2001)).

C. Additionally, experts must meet minimum standards

In the Eleventh Circuit, expert opinion evidence is admissible if: "(1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue." *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1338 (11th Cir. 2003) (citation omitted).

II. Analysis

A. Paige is not qualified to testify competently about the accuracy of IPP's software

Paige is not qualified to render an opinion about the accuracy of IPP's software allegedly used to track BitTorrent use because he lacks sufficient experience, education, or training. Only a

witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an expert opinion. Fed. R. Evid. 702.

In Plaintiff's Expert Witness List (Doc. 62-1), Plaintiff indicates that it intends on calling Paige for the purpose of "opining about IPP International U.G.'s software." Then, in the accompanying expert report, the Declaration of Patrick Paige (Exhibit "1" hereto), Paige attempts to provide an opinion on the accuracy of IPP's software. (Decl. Paige, ¶ 37). However, in Paige's *Curriculum Vitae* (Exhibit "2") and Declaration, Plaintiff has not demonstrated Paige has any knowledge, skill, experience, training, or education that would qualify him as an expert about such topic. At most, Paige demonstrates that he has an introductory knowledge of computer forensics.

1. The courses taken and taught by Paige do not establish his expertise

Paige states that he has "taken over 400 hours of courses designed to teach people how to investigate computers." (Exh. 1 ¶ 8). He also states that he has taught over 375 hours of courses in computer forensics. (Exh. 1 ¶ 9). Then, in Paige's *curriculum vitae*, he provides generic titles of the classes he took and classes he taught. However, 400 hours of classes in some generically labeled classes and 375 hours of teaching some unspecified classes

is insufficient information to qualify Paige as an expert. Furthermore, the list of classes Paige took as stated in Paige's *curriculum vitae* is not exclusive to computer forensics training. 192 of said 400 hours, include classes that appear to provide no foundation for expertise in computer forensics training, including: Advanced Sex Crimes Investigations (Palm Beach Community College) 40HR; Organized Crimes Investigations (Palm Beach County Community College) 40HRS; Field Training Officer (Palm Beach County Community College) 40HRS; Advance Narcotics Identification (Palm Beach County Community College) 40HRS; and Dignitary Protection Operations (Tactical Response Training) 32 HRS. Paige goes on to state that he "instruct[s] students in other aspects of computer forensics like identifying and collecting computer evidence, how computers work, storage of electronic data and how files are deleted." However, the computer forensics courses taught by Paige, as included in his *curriculum vitae*, are all introductory courses, except for one computer forensics course that was at the basic/intermediate level. A basic, introductory level of knowledge does not qualify one as an expert.

2. Paige fails to identify what aspects of computer forensics he claims expertise

Paige offers himself as an expert in computer forensics, but does not explain what that means. The closest Paige gets to

identifying what computer forensics involves is listed in the topics of computer forensics he teaches, "identifying and collecting computer evidence, how computers work, storage of electronic data and how files are deleted." (Exh. 2 at 3.) If this list is what is involved with computer forensics, such "knowledge" does not demonstrate an expertise in the workings of BitTorrent software, or for that matter IPP's software. Such generic and overbroad descriptions do not provide us with enough information to establish Paige's expertise. "How computers work" is certainly not detailed enough to establish that Paige is an expert on any topic involving computers. Yet, this is exactly what Plaintiff would have us accept.

Paige states that he has been accepted as an expert witness in the field of computer forensics but does not provide sufficient foundation for us to determine that his knowledge in computer forensics can be parlayed into knowledge about the accuracy of IPP's software, nor that he is even adequately informed in the field of computer forensics. The closest Paige comes to demonstrating his level of knowledge in computer forensics software is found in his *curriculum vitae* where he states that he taught one class on how to **use** "forensic software EnCase®, FTK, and other various computer forensic examination software." However, being able to use software designed to run a forensic search of a computer is wholly

different from analyzing whether that software is accurate. As an example, knowledge of the inner workings of Microsoft Word is completely different from knowing how to type up a document on Microsoft Word. Computer forensics and ensuring software works accurately are not so intimately connected that an expert in one qualifies as an expert in the other, at least Paige's *curriculum vitae* and declaration do not demonstrate so, as they are completely lacking in details.

3. **Paige's list of experience is too general and generic to allow a proper analysis of his expertise**

In Paige's *curriculum vitae*, in a conclusory fashion, he states, "I have extensive knowledge of undercover online investigations including online enticement and Peer-to-Peer networks." However, Paige does not indicate in what capacity he played a role in these investigations. Paige does not provide detail explaining the type of experience he has, or how these investigations were conducted. For example, Paige states that he acted in a supervisory role in the Computer Crimes Unit. However, acting as a supervisor for other officers who are actually performing the work does not make one an expert in the work being performed - it only gives one experience as a supervisor.

Then, Paige attempts to define PCAPs and explain what "Wireshark" software does (Exh. 1 ¶ 30), but has not laid the

foundation to demonstrate his competency as an expert in PCAPs or Wireshark. Again, the generic and overbroad description of his knowledge of computer forensics does not provide the foundation necessary to determine that Paige is an expert about PCAPs or Wireshark software.

Paige has not sufficiently demonstrated expertise at determining the accuracy of software in order to be admitted as such an expert. Paige's experience in computer forensics does not provide him with the expertise to determine whether IPP's software is accurate. As such, Paige should be excluded as an expert witness.

B. Paige has provided no background proving the reliability of his methodology for testing the accuracy of IPP's software

"[U]nder the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is ... reliable." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993).

Faced with a proffer of expert scientific testimony under Rule 702, the trial judge, pursuant to Rule 104(a), must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue. Many considerations will bear on the inquiry, including whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate and the existence and maintenance of

standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community.

Id. at 580.

In his Declaration, Paige goes immediately into describing the method he employed to test the accuracy of IPP's software, "I tested Excipio GmbH's ("Excipio") infringement detection system... To test Excipio's infringement detection system, I downloaded four public domain movies from the national archive..." (Exh. 1 ¶¶ 25, 26). However, Paige fails to provide any background as to the reliability of his testing methods, as required in *Daubert*. We have been provided with no information as to whether Paige's method can be and has been tested, whether it has been subjected to peer review and publication, its known potential error rate, or whether it has attracted widespread acceptance within the relevant scientific community. We do not know whether Paige concocted this test specifically for this case. Without such facts, this court cannot make a preliminary assessment as to reliability of the methodology employed by Paige.

"That these requirements are embodied in Rule 702 is not surprising. Unlike an ordinary witness, see Rule 701, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Id.* at 592.

Paige admittedly did not use IPP's software himself but relied on IPP to confirm that it used its own software correctly and was able to pull Paige's movies with its software:

I then informed IPP of the movie names. Thereafter, IPP sent me screen captures of the movies I had seeded.

The screen captures sent by IPP had my codes on them; thus, I knew that Excipio's infringement detection system had caught the movies I had seeded.

Exh. 1 ¶¶ 33, 34. Paige is, therefore, attempting to offer an opinion of the accuracy of IPP's software without firsthand knowledge or observation of the software downloading the movies he allegedly seeded. Paige is relying on IPP's accuracy, not his own firsthand knowledge. Therefore, it is imperative that his methodology meets the reliability standard of *Daubert*. However, having provided us with no information as to the background of Paige's testing method, we cannot determine its reliability. As such, any testimony by Paige as to the accuracy of IPP's software should be excluded.

C. Paige cannot testify about Defendant's computers and hard drives

Rule 26(a)(2)(B) requires an expert witness to provide a "statement of all opinions the witness will express and the basis and reasons for them; the facts or data considered by the witness in forming them; any exhibits that will be used to summarize or

support them.” In Plaintiff’s expert witness list, Plaintiff states that it “intends on calling Mr. Paige for the purpose of... reviewing the Defendant’s computers and hard drives and opining about anything he may discover.” In the declaration of Patrick Paige, Paige does not provide any opinions regarding Defendant’s computers or hard drives. As Plaintiff failed to abide by the requirements of Rule 26, Paige may not testify as to Defendant’s computers or hard drives and should be excluded from such.

D. Paige’s opinions are not relevant to this case and are outweighed by the potential for unfair prejudice and misleading the jury

The court may exclude an expert whose testimony is not relevant. *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1294 (11th Cir. 2005) (citing *Daubert*, 509 U.S. at 589 (requiring expert testimony to be “relevant” to be admissible); *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1320 (11th Cir. 1999) (affirming exclusion of expert witness on relevance grounds)). Additionally, “the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403. Paige makes several statements based on his experience that lack an adequate foundation to connect Paige’s experience to the facts of this case. These statements are

therefore irrelevant to the case at hand, and their probative value is substantially outweighed by the danger of unfair prejudice and misleading the jury.

First, the following statement is irrelevant and would mislead the jury: "During my time in the Computer Crimes Unit, I can recall only one instance in all the times that we executed a search warrant and seized computers where we did not find the items listed in the search warrant at the dwelling identified in the search warrant" (Exh. 1 ¶ 16). To begin, this statement is irrelevant to the case at hand, which was not investigated by the Computer Crimes Unit and did not involve the high standard required to get a search warrant. Secondly, this statement would mislead the jury into believing that Paige's experience in the Computer Crimes Unit can be compared to Plaintiff's method of uncovering BitTorrent users downloading its films. We are provided with no information as to how "the offenders' IP addresses, as well as the dates and times of the illegal transmission were recorded" by the Computer Crimes Unit. Paige makes this conclusory statement without any background information as to how the investigation and recording was performed, so we do not know if the two events are even comparable. In fact, Paige does not even indicate that he was the one doing the investigating and recording. Therefore, it would be unduly

prejudicial to compare the results of the Computer Crimes Unit to Malibu Media's alleged investigation.

Next, the following statement is irrelevant and would mislead the jury: "In these cases, the subscribers were not notified by the ISPs that their identity was being subpoenaed because they could have deleted the images and destroyed the data." (Exh. 1 ¶ 17). To begin, this statement is not relevant to the case at hand which was not investigated by the Computer Crimes Unit and does not involve child pornography. Furthermore, such a statement would be unfairly prejudicial to Defendant and would mislead the jury because it implies that by providing Defendant with notice, that he deleted evidence on his computer. However, such speculation is baseless. Plaintiff has no evidence to indicate that Defendant deleted any information from his computer. Therefore, such baseless allegations would be unfairly prejudicial and have no probative value.

Thirdly, the following statement is irrelevant to the case at hand and would be unfairly prejudicial to Defendant and mislead the jury: "During my time in the Computer Crimes Unit, I can recall only one instance in all the times that we executed a search warrant and seized computers where we did not find the items listed in the search warrant at the dwelling identified in the search warrant" (Exh. 1 ¶ 20). To begin, an investigation by the Computer Crimes

Unit is not comparable to the investigation performed by Malibu Media and would provide no possible relevance to the case at hand. Furthermore, the search performed by Malibu Media did not involve the rigors required to acquire a search warrant. Therefore, such a statement as to the accuracy of a search warrant is irrelevant to this case. Next, this statement would be unfairly prejudicial to Defendant and mislead the jury, because the jury would believe that the alleged investigation conducted by Malibu Media met with the rigors of law enforcement investigations, and that the alleged investigation conducted by Malibu Media is conclusive proof that Defendant downloaded Malibu Media's films.

Fourthly, the following statement lacks foundation, is irrelevant, and would mislead the jury: "[A] child pornographer has a greater incentive to hack someone's Wi-Fi connection than a BitTorrent user because transmission of child pornography is a very serious crime with heavy criminal penalties" (Exh. 1 ¶ 20). Paige provides no foundation to make such a statement about BitTorrent users, because he provides no background information to qualify him as a BitTorrent user expert. At most, Paige has demonstrated that he has taken a few classes in computer forensics and taught a few introductory computer forensics classes. However, having an introductory knowledge of computer forensics does not qualify him as an expert in BitTorrent use by non-child

pornographers. Next, this statement is irrelevant to the case at hand, which does not involve child pornography.¹ Finally, this statement would be unfairly prejudicial to Defendant because it would lead the jury to believe that no third party would have hacked Defendant's Wi-Fi to download Malibu Media's films because downloading Malibu Media's films would not involve a "serious" crime like downloading child pornography would.

As each of these statements is either irrelevant to the case at hand, lacks foundation, or would be unfairly prejudicial or mislead the jury, this Court should exclude such statements.

III. Conclusion

As Plaintiff failed to provide a reliable expert and a complete report including exhibits used, facts upon which each opinion is based, and a list of expert's publications, Mr. Paige should be excluded from acting as an Expert Witness.

WHEREFORE, Defendant, ROBERT DARE, pleads that this Honorable Court GRANT Defendant's Motion to Exclude Expert Testimony of Patrick Paige.

¹ Plaintiff declined to provide the ages of each of its performers in its pornographic films. Therefore, Defendant is only making an assumption that all performers were over the age of 18.

RULE 7.1(a) (3) CERTIFICATE OF GOOD-FAITH CONFERENCE

I, the undersigned attorney, hereby certify that, pursuant to Local Rule 7.1(a) (3) I conferred with counsel for Plaintiff via email in a good faith effort to resolve the issues raised in the motion and was been unable to do so.

Attorney for Defendant:

/s/ Cynthia Conlin
CYNTHIA CONLIN, ESQ.
Florida Bar No. 47012

CERTIFICATE OF SERVICE

I hereby certify that on **October 21, 2015**, I filed electronically the foregoing with the Clerk of the Court via CM/ECF system, which will notify electronically all parties.

Attorney for Defendant:

Cynthia Conlin, P.A.
1643 Hillcrest Street
Orlando, Florida 32803-4809
Tel. 405-965-5519/Fax 405-545-4395
www.conlinpa.com

/s/ Cynthia Conlin, Esq.
[X] CYNTHIA CONLIN, ESQ.
Florida Bar No. 47012
Cynthia@cynthiaconlin.com
Secondary Email for Service:
Jeff@cynthiaconlin.com