

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
PALM BEACH DIVISION

CASE NO.: 09:17-CIV-80499

COMPULIFE SOFTWARE, INC.,

Plaintiff,

vs.

ONE RESOURCE GROUP CORPORATION,
AMERICAN WEB DESIGNERS, LTD., et al.,

Defendants.

**DEFENDANT AMERICAN WEB DESIGNERS, LTD.’S MOTION TO STRIKE
NANCY MIRACLE’S EXPERT REPORT AND TESTIMONY**

Defendant, American Web Designers, LTD. (“AWD”), by and through its undersigned counsel, moves this Court to strike Nancy Miracle’s Expert Report¹ (“Report”), a copy of which is attached hereto as Exhibit “A,” as well as her testimony.

INTRODUCTION

Ms. Miracle’s Report is both unreliable and not relevant because she relied solely on the information provided to her by Plaintiff, Compulife Software, Inc. (“Compulife”) and failed to do any independent investigation of Compulife’s claims. As such, Ms. Miracle’s report is nothing more than a mere regurgitation of the principal of Compulife, Robery Barney’s deposition testimony, a copy of which is attached hereto as Exhibit “B.”

RELEVANT FACTS

Compulife produces computer software that provides insurance quoting systems to insurance

¹ Compulife originally designated the Report as highly confidential but has subsequently removed the designation.

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agents. (Exh. "B," pp. 10:1-10:3). Compulife claims to provides a database culled from information provided by various insurance companies to generate the quotes that appear in the life insurance quote engines in the software or online. (Exh. "B," pp. 46:4-47:10). Compulife also maintains its own website at www.term4sale.com that includes a life insurance quote engine that is available to the public at no cost and, prior to September 5, 2016, no licensing agreement. (Exh. "B," pp. 55:10-56:6; 150:7-150:22).

On April 8, 2015, Compulife discovered what it believed to be its life insurance quote engine on www.NAAIP.org insurance agent websites. As a direct result, Plaintiff registered four (4) copyrights, two (2) for HTML source code and main source codes created in 2001 and two (2) for HTML source code and main source codes created in 2010. (Exh. "B," pp. 44:11-45:24). In May of 2016, Compulife instituted suit against David Rutstein and Binyomin Rutstein for copyright infringement and trade secret misappropriation. In connection with that case, Nancy Miracle prepared the Report which was completed on or about December 1, 2016. Compulife is relying on the Report in the present case as well.

Based upon the Report, Ms. Miracle only reviewed the HTML source code or partial source code of only a handful of the "thousands" of NAAIP.org user websites. Of those reviewed, Ms. Miracle only compared the source code from <http://naaip.org/tmatteson77> ("Matteson source code") with Compulife's 2010 HTML source code in the Report. A true and correct copy of Compulife's 2010 HTML source code is attached hereto as Exhibit "C" and the Matteson source code is attached hereto as Exhibit "D." In reviewing the Matteson source code, Ms. Miracle highlights in the Report four (4) similarities with Compulife's 2010 HTML source code as follows:

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- the use of SortOverride1:Value “A”
- coding of states by numbers
- the values used for “HealthClass”
- the values used for “NewCategory”

(Miracle Report, pp. 15-16).

These four (4) allegedly protected elements only all appear in the Matteson source code. The SortOverride1:Value “A” that appears in Compulife’s 2010 HTML source code does not appear in the www.naaip.org/aariseitz source code, a copy of which is attached hereto as Exhibit “E.” The assigning of number values to states only appears in the Matteson source code and none of the other source codes reviewed by Ms. Miracle. True and correct copies of the other source codes reviewed are attached hereto as Composite Exhibit “F.” The values assigned to the Health Class in Compulife’s 2010 HTML source code also only appear in the Matteson source code. Finally, Ms. Miracle states in the Report that five (5) values for NewCategory in the Compulife’s HTML 2010 source code that “uniquely identify the types of insurance quote requested.” (Miracle Report p. 16). However, upon reviewing the Compulife’s 2010 HTML source code, the values Ms. Miracle states do not coincide with the values assigned therein.

Ms. Miracle also states in the Report that she is “unaware of any argument that the Compulife copyrights are invalid or that these elements are unworthy of copyright protection.” *Id.* At the trial in the case of *Compulife Software, Inc. v. Binyomin Rutstein, et. al*; In the United States District Court of the Southern District of Florida; Case No.: 16-80808, Ms. Miracle further testified that all legal information in the Report was supplanted by Compulife’s counsel to Ms. Miracle and that she

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completed no independent verification of the legal principles. A true and correct copy of that portion of testimony is attached hereto as Exhibit "G." (pp. 81:12-24; 82:7-15).

Finally, all of Ms. Miracle's statements in the Report concerning the whether Compulife's data compilations are trade secrets that were protected, not regularly known and of economic value are based solely on the deposition testimony of Plaintiff's principal, Robert Barney. (Miracle Report p. 13-15). Again, Ms. Miracle did no independent verification of Mr. Barney's claims to determine whether in fact the data compilations were entitled to trade secret protection. Ms. Miracle also failed to describe with any specificity the alleged trade secrets in the Report to be identified.

MEMORANDUM OF LAW

Rule 702 of the Federal Rules of Evidence sets forth when an expert is qualified to testify based upon the following:

- (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.

It is the responsibility of this Court to determine whether in fact the testimony proffered by an expert is reliable or should otherwise be excluded. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In making that determination, this Court must consider the following three factors: (1) whether the expert is qualified to testify competently concerning the subject matter; (2) whether the expert's methodology is sufficiently reliable and (3) whether the testimony will assist the trier

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of fact to understand the evidence through the application of the expert's testimony. *Feliciano v. City of Miami Beach*, 844 F.Supp.2d 1258, 1261-1262 (S.D. Fla. 2012); (*Quiet Technology Dc-8 v. Hurel-Dubois Uk Ltd.*, 326 F.3d 1333, 1340 (11th Cir. 2003) (citations omitted)). These factors do not only apply to scientific testimony, but to all expert testimony, as in this case. *Allapattah Services, Inc. v. Exxon Corp.*, 61 F.Supp.2d 1335, 1338 (S.D. Fla. 1999) (citing *Kumho Tire v Carmichael*, 526 U.S. 137 (1999)). Thus, this Court is required "to exercise a special 'gate-keeping' function to ensure that an opinion offered by an expert is reliable." *Id.* at 1339 (citation omitted).

Reliability depends on the reasonableness of the expert's approach and method of analyzing data to draw a conclusion regarding the particular matter. *Id.* An expert's claim of accuracy is insufficient; "[n]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Id.* at 1340 (citing *Kumho Tire v Carmichael*, 526 U.S. 137 (1999)).

In this case, Ms. Miracle's approach in analyzing data concerning the issue of copyright infringement by NAAIP.org users was not reliable or reasonable. Ms. Miracle admittedly only reviewed a handful of NAAIP.org user websites as provided to her by Compulife in reaching her conclusion that all NAAIP users had infringed on Compulife's alleged copyright. (Miracle Report, p. 17). This conclusion was not reliable and not reasonable given that only one of the websites reviewed by Ms. Miracle actually contained the alleged copyright elements. Further, by failing to include the analysis of the other reviewed websites, Ms. Miracle is misleading the reader of the Report with her conclusions.

Additionally, Ms. Miracle claims that Compulife's copyright claim is valid because she

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“knows of nothing to the contrary.” (Miracle Report, p. 16). However, Compulife, having registered its copyright over five (5) years after the HTML source code was created, lacks the presumption of validity afforded by 17 U.S.C. §401(c). *See also Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1233 (11th Cir. 2010); *Habersham Plantation Corp. v. Art & Frame Direct, Inc.*, No. 10-61532, *6 (S.D. Fla. 2011) (“If the registration is made more than five years after first publication, then there is no presumption of validity”). Therefore, Ms. Miracle was required to make an independent determination as to whether Compulife’s HTML source code was entitled to copyright protection before determining it was infringed rather than rely on her claim that she was unaware of any claim that the copyrights were invalid. Again, Ms. Miracle relied on the information provided by Compulife only and clearly performed no independent investigation of her own based on her experience. This, alone, violates the expectations of Rule 702 of the Federal Rules of Civil Procedure.

Ms. Miracle’s approach in analyzing data concerning the issue of trade secret misappropriation by NAAIP.org users was also not reliable or reasonable and demonstrates that she is not competent to testify as to whether Compulife’s database compilation in fact a trade secret. All of Ms. Miracle’s statements in her report concerning whether Compulife’s compilations were protected, not regularly known and of economic value where based on the deposition testimony of Compulife’s principal, Robert Barney. (Miracle Report p. 13-15). “An expert who simply regurgitates what a party has told him provides no assistance to the trier of fact through the application of specialized knowledge.” *Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 424-25 (S.D.N.Y. 2009). Ms. Miracle performed no independent verification of Mr. Barney’s

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claims to determine whether in fact the compilations were entitled to trade secret protection. As a result, Ms. Miracle's testimony offers nothing more than what Mr. Barney, himself, can testify at trial. The addition of Ms. Miracle's testimony would only confuse the trier of fact to believe that Ms. Miracle has some expertise which will validate Mr. Barney's testimony which in fact is not the case.

In addition, Ms. Miracle fails to address the undisputable fact that the premiums, products and insurance company names allegedly contained in Compulife's database are ultimately disclosed to the end user through Compulife's own life insurance quote engine at www.term4sale.com. Prior to September 5, 2016, there was nothing on term4sale.com that restricted the use of that information. Ms. Miracle does not discuss term4sale.com or the information presented thereon in any part of the Report. As a result, her analysis is incomplete and her testimony would therefore be misleading.

CONCLUSION

Based on the foregoing, Ms. Miracle did not properly review, investigate and prepare the Report and as such, it must be stricken. In addition, as Ms. Miracle made no independent investigation as to the insurance premium quoting industry or as to the other NAAIP.org user websites, her knowledge and analysis of the material is incomplete and she is not qualified to testify as an expert. As such, Ms. Miracle should be stricken as an expert on behalf of Compulife.

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CERTIFICATE OF SERVICE

HEREBY CERTIFY that on the 16th day of January, 2018, I served the foregoing document via electronic mail on Joel B. Rothman, Esq., Schneider Rothman, 4651 North Federal Highway, Boca Raton, Florida 33431, joel.rothman@sriplaw.com and Matthew S. Nelles, Esq., Berger Singerman, 350 East Las Olas Boulevard, Suite 1000, Fort Lauderdale, FL 33301, mnelles@bergersingerman.com.

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