

# v. Dan's Fan City, Inc.

United States District Court for the Middle District of Florida, Tampa Division

May 25, 2021, Decided; May 25, 2021, Filed

Case No. 8:19-cv-1731-VMC-SPF

## Reporter

2021 U.S. Dist. LEXIS 98131 \*; 2021 WL 2103074

DELTA T, LLC d/b/a BIG ASS FAN COMPANY, Plaintiff,  
v. DAN'S FAN CITY, INC., and TROPOSAIR, LLC,  
Defendants.

**Prior History:** Delta T, LLC v. Dan's Fan City, Inc., 2021  
U.S. Dist. LEXIS 24422, 2021 WL 458022 (M.D. Fla., Feb.  
9, 2021)

**Counsel:** [\*1] For Delta T, LLC, doing business as, Big Ass  
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**Judges:** VIRGINIA M. HERNANDEZ COVINGTON,  
UNITED STATES DISTRICT JUDGE.

**Opinion by:** VIRGINIA M. HERNANDEZ COVINGTON

## Opinion

### ORDERDelta T, LLC

This matter is before the Court upon consideration of Plaintiff  
Delta T, LLC's Daubert Motion to Disqualify Defendants'  
Expert Dr. Rene Befurt (Doc. # 164), filed on April 13, 2021.  
Defendants Dan's Fan City, Inc., and TropoSAir, LLC,  
responded on April 27, 2021. (Doc. # 167). For the reasons  
set forth below, the Motion is granted in part and denied in  
part.

### I. Background

This is a patent case that arose out of Defendants' alleged

infringement of three of Delta T's patented designs of a  
modern residential ceiling fan. (Doc. # 65 at ¶¶ 8, 20). Delta T  
initiated this suit in the District of Maryland on December 14,  
2018. (Doc. # 1). Following transfer to this Court [\*2] on  
July 17, 2019, the case proceeded through discovery. (Doc. #  
30). The case is currently scheduled for trial during the June  
2021 trial term. (Doc. # 99 at 3).

At trial, Defendants intend to rely upon Dr. Rene Befurt's  
expert opinion and testimony. (Doc. # 179-4 at 2). Dr. Befurt  
has a master's degree in business administration and a Ph.D.  
in business administration with a focus on marketing. (Doc. #  
141-3 at ¶ 1). Dr. Befurt currently serves as the vice president  
of a "consulting firm [that] specializes in providing economic,  
financial, statistical, and strategy consulting to law firms,  
corporations, and government agencies." (Id.). Additionally,  
Dr. Befurt has experience in survey design. (Doc. # 164-1 at  
16:21-23, 19:9-11).

Defendants engaged Dr. Befurt in this case to render an expert  
opinion in rebuttal to that of Delta T's expert, Charles Mauro.  
(Doc. # 141-3 at ¶ 9). Mr. Mauro "design[ed] . . . online  
survey[s] for a sample of randomly chosen participants to  
evaluate whether, 'in the eye of an ordinary observer giving  
such attention as a purchaser usually gives,' the ceiling fan  
depicted in Delta T's patents and Defendants' Vogue ceiling  
fan 'are substantially the same.'" (Doc. [\*3] # 154 at 3  
(citations omitted)). Dr. Befurt was tasked with opining on  
Mr. Mauro's surveys, "including their conceptual background,  
details of the survey instruments and their administration, and  
ultimately the validity of the data, analyses, and survey  
results." (Doc. # 141-3 at ¶ 10). In his report, Dr. Befurt  
concludes that Mr. Mauro's surveys "suffer from significant,  
irreparable design flaws, ignore established survey practices  
and are prone to bias, and produce results that are unreliable."  
(Id. at ¶ 12).

In its Motion, Delta T seeks to exclude Dr. Befurt's expert  
opinion and testimony. (Doc. # 164). Defendants have  
responded (Doc. # 167), and the Motion is now ripe for  
review.

### II. Discussion

Federal Rule of Evidence 702, which governs the admission of expert testimony in federal courts, states:

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 [\*4] and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Civ. P. 702. In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), the Supreme Court held that federal district courts must ensure that any and all scientific testimony or evidence admitted is both relevant and reliable. Id. at 589-90. This analysis applies to non-scientific expert testimony as well. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147-49, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). District courts are tasked with this gatekeeping function so "that speculative, unreliable expert testimony does not reach the jury under the mantle of reliability that accompanies the appellation expert testimony." Rink v. Cheminova, Inc., 400 F.3d 1286, 1291 (11th Cir. 2005) (internal quotation marks and citation omitted).

In the Eleventh Circuit, trial courts must engage in a "rigorous three-part inquiry" in determining the admissibility of expert testimony. Hendrix v. Evenflo Co., 609 F.3d 1183, 1194 (11th Cir. 2010). Specifically, courts must assess whether:

(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 [\*5] in issue.

Id. (citation omitted). "The party offering the expert has the burden of satisfying each of these three elements by a preponderance of the evidence." Adams v. Magical Cruise Co., No. 6:15-cv-282-RBD-TBS, 2016 U.S. Dist. LEXIS 196855, 2016 WL 11577631, at \*2 (M.D. Fla. Oct. 21, 2016) (citing Rink, 400 F.3d at 1292). The Court will address each aspect of the three-part inquiry below.

#### A. Dr. Befurt's Qualifications

First, the Court must assess whether Dr. Befurt is qualified to testify about the matters he intends to address. City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 563 (11th Cir. 1998). An expert may be qualified "by knowledge, skill, experience, training, or education." Fed. R. Civ. Evid. 702. "Determining whether a witness is qualified to testify as an expert 'requires the trial court to examine the credentials of the proposed expert in light of the subject matter of the proposed testimony.'" Clena Invs., Inc. v. XL Specialty Ins. Co., 280 F.R.D. 653, 661 (S.D. Fla. 2012) (quoting Jack v. Glaxo Wellcome Inc., 239 F. Supp. 2d 1308, 1314 (N.D. Ga. 2002)). "This inquiry is not stringent, and so long as the expert is minimally qualified, objections to the level of the expert's expertise go to credibility and weight, not admissibility." Id. (citations omitted).

Here, Delta T does not dispute Dr. Befurt's qualifications regarding his survey design expertise. (Doc. # 164 at 3 ("Delta T is not challenging Dr. Befurt's qualifications as a survey designed as a *general matter*[.]").) However, Delta T does challenge Dr. Befurt's qualifications to render an opinion on the [\*6] particular type of survey in this case, which they dub the "eye of an ordinary observer test" survey. (Id.). Specifically, Delta T argues that Dr. Befurt is unqualified because he "has never testified as to design patent infringement," "has not formally studied industrial design," "has . . . never lectured on this subject," "has no practical working knowledge of the technology [(ceiling fans)] in question," "has never designed a survey or done an expert report in a design patent case," "has at best a very cursory understanding of design patent law," "has not even read the key case on design infringement setting out the [ordinary observer test]," his "work experience . . . does not qualify him to testify with respect to design patent infringement," "he did no survey work of his own in this case," and he "readily acknowledges no ordinary observer expertise." (Doc. # 164 at 3-7 (emphases omitted)). Defendants respond that "Dr. Befurt is amply qualified to testify as an expert in the formulation and administration of consumer surveys, including consumer surveys used in assessing intellectual property rights." (Doc. # 167 at 5).

The Court agrees with Defendants that Dr. Befurt need not be [\*7] an expert on patent law, the ordinary observer test, patent-specific surveys, or ceiling fans, to render an opinion on the adequacy of Mr. Mauro's survey design. See Bluetooth SIG, Inc. v. FCA US LLC, 468 F. Supp. 3d 1342, 1348-49 (W.D. Wash. 2020) (finding an expert qualified to testify "in the area of trademark litigation surveys" despite not being an expert in that field because he was a survey research professional, had a certificate in marketing analytics, and took graduate-level courses in survey research methods).

Dr. Befurt has extensive expertise in consumer research marketing, including by consulting "on the positioning of brands and product lines based on consumers' perceptions of prototypical[ity], object comparisons, and similarity judgments." (Doc. # 141-3 at ¶¶ 1-3). Dr. Befurt has "supervised and consulted on a number of projects[,] . . . including choice-based conjoint, market forecasting, and product positioning projects for Audi Germany, Daimler-Chrysler Germany, Swiss Postal Service, and Buehlergroup Switzerland." (*Id.* at ¶ 2). Dr. Befurt has taken a number of graduate-level courses on the topic of survey design methodologies and statistical analysis. (Doc. # 164-1 at 16:11-17:23 ("These are the classic courses that someone interested in market [\*8] research takes. They're typically called introduction to survey design and then the main classes on survey design and market research, market research methods, statistical testing.")). Dr. Befurt has himself designed a number of surveys. (*Id.* at 25:8-11). And, Dr. Befurt has published multiple articles on the topics of survey design methodology and product similarity. (*Id.* at 19:9-22:21; Doc. # 141-3 at 47-48).

Given *Daubert's* lenient standard, and noting Delta T's lack of objection to Dr. Befurt's qualifications as to survey design methodologies generally, the Court finds that Dr. Befurt's experience in consumer marketing research and survey design methodologies makes him "minimally qualified" to testify about the methodologies Mr. Mauro employed in creating and administering his three surveys. *See Edmondson v. Caliente Resorts, LLC*, No. 8:15-cv-2672-SDM-TBM, 2017 U.S. Dist. LEXIS 220882, 2017 WL 10591833, at \*10 (M.D. Fla. Aug. 31, 2017) (deeming a marketing research and survey evidence expert minimally qualified under *Daubert* despite his lack of focus in the particular area of law at issue in the case).

### **B. Reliability of Dr. Befurt's Methodology**

Next, the Court must determine whether Dr. Befurt's methodology is reliable. *City of Tuscaloosa*, 158 F.3d at 562. "Exactly how reliability is evaluated may vary from case to case, but what remains constant is the [\*9] requirement that the trial judge evaluate the reliability of the testimony before allowing its admission at trial." *United States v. Frazier*, 387 F.3d 1244, 1262 (11th Cir. 2004) (emphasis omitted). There are four recognized, yet non-exhaustive factors a district court may consider in evaluating reliability:

- (1) whether the expert's methodology has been tested or is capable of being tested;
- (2) whether the technique has been subjected to peer review and publication;
- (3) the known and potential error rate of the methodology; and
- (4) whether the technique has been generally accepted in

the proper scientific community.

*Seamon v. Remington Arms Co.*, 813 F.3d 983, 988 (11th Cir. 2016) (internal quotation marks and citation omitted). A district court may take other relevant factors into consideration as well. *Id.* "Although an opinion from a nonscientific expert should receive the same level of scrutiny as an opinion from an expert who is a scientist, some types of expert testimony will not naturally rely on anything akin to the scientific method, and thus should be evaluated by other principles pertinent to the particular area of expertise." *Washington v. City of Waldo*, No. 1:15-CV-73-MW-GRJ, 2016 U.S. Dist. LEXIS 91790, 2016 WL 3545909, at \*3 (N.D. Fla. Mar. 1, 2016) (citation omitted).

Delta T argues that Dr. Befurt's opinion is unreliable because it merely "parrot[s]" what he was told by counsel as to the critical issue on which he challenge[s] [\*10] Mr. Mauro's surveys — whether pertinent prior art was disregarded." (Doc. # 164 at 9). Defendants respond that they do not seek to introduce Dr. Befurt's testimony for this purpose. (Doc. # 167 at 9 ("Dr. Befurt was not proffered, and will not be proffered, as an expert in regard to the prior art in this case.")). Rather, Dr. Befurt "will testify . . . to the importance of the choice of stimuli, in this case prior art references, in consumer surveys such as those conducted by Mr. Mauro and will testify that 'similarity comparisons such as [Mr. Mauro's] Paired Rating Scale Task are highly sensitive to the stimuli presented to survey respondents.'" (*Id.* (citation omitted)).

The Court finds that Dr. Befurt's methodology is sufficiently reliable with regard to these topics. In opining on the purported design flaws in Mr. Mauro's surveys, Dr. Befurt relied on his experience and expertise, Mr. Mauro's survey reports, and academic literature on the topic of survey designs, including on survey designs in the intellectual property sphere. (Doc. # 141-3 at 53; Doc. # 164-1 at 25:8-11, 86:1-6, 94:3-8). Delta T does not appear to attack the reliability of the literature or sources upon which Dr. [\*11] Befurt relied. (Doc. # 164). This is sufficient for *Daubert* purposes. *See Arevalo v. Coloplast Corp.*, No. 3:19-cv-3577-TKW-MJF, 2020 U.S. Dist. LEXIS 124417, 2020 WL 3958505, at \*6 (N.D. Fla. July 7, 2020) ("Along with his experience . . . and his review of internal documents, Dr. Garely relied on numerous published medical articles to form his device design opinion. Defendant did not criticize the reliability of the cited articles. The Court finds the scope of internal documents relied on by Dr. Garely did not render his methodology unreliable. Accordingly, the Court finds that his device design opinion is sufficient reliable.").

However, to the extent Dr. Befurt seeks to testify that Mr. Mauro's surveys are faulty because of the specific prior art

included in the surveys or because they did not include certain prior art, Defendants have offered no reliable basis for such testimony. Dr. Befurt concedes that he himself conducted no research on the prior art in this case and has no specific background in determining what constitutes prior art. (Doc. # 164-1 at 13:8-24, 30:6-19, 36:25-38:20). Indeed, Dr. Befurt did not reach his own independent conclusions as to what prior art should have been used in Mr. Mauro's surveys. (*Id.*). Rather, Defendants' counsel merely told him that relevant prior art was excluded. (*Id.* [\*12] at 43:23-44:15, 49:11-15, 52:7-13 ("Q. How did you determine whether or not Mr. Mauro looked at a complete set of prior art or not? A. I didn't determine it myself. As I mentioned in a later paragraph — and I can find it — I inquired with counsel. . . . They told me that he used prior art as a consideration in his report and that there is more prior art out there.")); (Doc. # 141-3 at ¶ 19 ("I understand from inquiries with counsel for Dan's Fan City that Mr. Mauro does not use the correct prior art in his . . . [s]urveys — that is, he presents a reduced set of prior art examples and leaves out crucial prior art designs from his Paired Rating Scale Task." (emphasis added))). Dr. Befurt may not simply repeat counsel's opinion or analysis as to what prior art is relevant. See *Morales v. Kraft Foods Grp., Inc.*, No. LA CV-14-04387 JAK (PJWx), 2017 U.S. Dist. LEXIS 97433, 2017 WL 2598556, at \*10 (C.D. Cal. June 9, 2017) ("An expert may not present testimony that merely 'parrots' the opinions of others, without providing an independent evaluation of the evidence.").

Therefore, Dr. Befurt may not testify, as he concludes in his expert report, that Mr. Mauro's "surveys do not use the correct prior art — that is, he presents a reduced set of prior art examples and leaves out crucial prior art designs[.]" (Doc. # 141-3 at ¶ 12). Neither [\*13] may he testify that Mr. Mauro's surveys are flawed because they specifically fail to include prior art of the "Taiwanese Patent 352,920 and Chinese Patent 3,379,773." (*Id.* at ¶ 19).

Accordingly, the Motion is granted to the extent it seeks to exclude Dr. Befurt's expert opinion and testimony that relevant prior art was left out of Mr. Mauro's surveys. See *Rodgers v. Beechcraft Corp.*, No. 15-CV-129-CVE-PJC, 2016 U.S. Dist. LEXIS 183585, 2016 WL 7888002, at \*8 (N.D. Okla. Oct. 27, 2016) ("Haider did no testing[.] . . . Instead, Haider largely adopted as his own a list of opinions provided by counsel and other experts. This is not proper."). However, Dr. Befurt's opinion about the importance of choice stimuli, order effects, target populations, control groups, randomization, pretests, and other considerations that generally go into survey design — including with regard to Mr. Mauro's surveys — is sufficiently reliable. (Doc. # 141-3 at ¶ 12).

### C. Assistance to the Trier of Fact

Finally, Dr. Befurt's testimony must assist the trier of fact. Fed. R. Evid. 702(a). "By this requirement, expert testimony is admissible if it concerns matters that are beyond the understanding of the average [layperson]." *Frazier*, 387 F.3d at 1262. "[T]he court must 'ensure that the proposed expert testimony is relevant to the task at hand, . . . i.e., that it logically advances a material [\*14] aspect of the proposing party's case.'" *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1312 (11th Cir. 1999) (citation omitted). "Proffered expert testimony generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments." *Frazier*, 387 F.3d at 1262-63.

Because the Court has already excluded Dr. Befurt's testimony to the extent he seeks to opine that Mr. Mauro's survey omitted pertinent prior art, it considers only Dr. Befurt's remaining testimony. Delta T does not appear to argue that any of Dr. Befurt's other testimony would be unhelpful. (Doc. # 164 at 14-15). And, the Court finds that an expert's opinion of the methodologies Mr. Mauro utilized in creating his novel survey would assist the jury. See *In re Trasylol Prods. Liab. Litig.*, No. 08-MD-01928, 2010 U.S. Dist. LEXIS 142228, 2010 WL 1489793, at \*7 (S.D. Fla. Feb. 24, 2010) ("Further, the opinion is not so fundamentally unsupported that it can offer no assistance to the jury."). Therefore, the Motion is denied to the extent it seeks to exclude the remainder of Dr. Befurt's opinion.

Accordingly, it is now

### ORDERED, ADJUDGED, and DECREED:

(1) Plaintiff Delta T, LLC's *Daubert* Motion to Disqualify Defendant's Expert Dr. Rene Befurt (Doc. # 164) is **GRANTED** in part and **DENIED** in part.

(2) Dr. Befurt's expert opinion and testimony are excluded to the extent he opines that Mr. Mauro's surveys [\*15] are faulty because of the specific prior art included in the surveys or because they did not include specific prior art. However, Dr. Befurt may testify as to survey design methodologies generally, as well as the other purported design flaws in Mr. Mauro's surveys.

**DONE** and **ORDERED** in Chambers in Tampa, Florida, this 25<sup>th</sup> day of May, 2021.

/s/ Virginia M. Hernandez Covington

VIRGINIA M. HERNANDEZ COVINGTON

UNITED STATES DISTRICT JUDGE

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