

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

**ST. LUKE'S CATARACT AND LASER
INSTITUTE, P.A.,**

Plaintiff,

Case No. 8:06cv223

v

**JAMES C. SANDERSON,
JAMES C. SANDERSON M.D., LLC, and
MARK ERICKSON,**

Defendants.

**PLAINTIFF'S MOTION FOR ADMISSION OF EVIDENCE AND
MEMORANDUM OF LAW IN SUPPORT THEREOF**

Per this Court's order of April 26, 2006, Plaintiff St. Luke's Cataract and Laser Institute, P.A. ("St. Luke's"), hereby submits this motion and memorandum of law in support of admission of the print-outs of the LaserSpecialist.com Web site attached to St. Luke's Motion for Preliminary Injunction and supporting brief and declarations.

INTRODUCTION

One of the issues in this case is the Defendants' copying of the St. Luke's Web site that was formerly located at the Internet address <www.laserspecialist.com>. St. Luke's no longer has a copy of the Web site on its servers. Accordingly, in support of its Motion for Preliminary Injunction, St. Luke's printed out from the Internet Archive copies of pages of the Web site as they appeared at various times since 2000. (*See, e.g.*, Exhibits to and Decls. in support of St. Luke's Mot. for Prelim. Inj.)

Defendants, unable to deny such obvious infringement and misappropriation, attacked the authenticity of these documents during the parties' pre-trial conference. Ironically, Sanderson himself testified just days beforehand that he believed the Internet Archive print-outs to be accurate representations of the <laserspecialist.com> Web site. Indeed, the defendants have never suggested that the Internet Archive's records are inaccurate for the dates coded on the print-outs.

Given the history and methodology of the Internet Archive, along with the Defendants' own admissions that the relevant Web site print-outs appear accurate, the trustworthiness of these records cannot seriously be questioned and warrant admission pursuant to Fed. R. Evid. 901.

BACKGROUND

A. The Internet Archive and Its Storage Methodology

The admissibility of records stored by the Internet Archive was directly addressed by the District Court of the Northern District of Illinois in *Telewizja Polska USA, Inc. v. Echostar Satellite Corp.*, 2004 U.S. Dist. LEXIS 20845, at *16-*18 (Oct. 15, 2004) (attached hereto as Exhibit A). In *Telewizja*, the Plaintiff submitted a declaration from Molly Davis, the Internet Archives' administrative director at the time, to verify the authenticity of certain Web site copies retrieved from the Internet Archive. A copy of Ms. Davis' affidavit is attached as Exhibit B.¹

As Ms. Davis explains in her declaration, the Internet Archive is a Web site that provides access to a library of archived Internet sites in digital form. (Exh. B at ¶ 2.) Access is free to researchers, historians, scholars, and the general public, and the Internet Archive itself is

¹ St. Luke's is in the process of obtaining a certified copy for purposes of this motion

affiliated with and receives support from various institutions, including the National Science Foundation and the Library of Congress. (*Id.*)

The Wayback Machine is a service of the Internet Archive that makes it possible to surf more than 30 billion web pages stored in the Internet Archive's Web archive. (Exh. B at ¶ 3.) St. Luke's incorrectly understood at the time it filed its Motion for Preliminary Injunction that the Internet Archive archives entire Web *sites* at one time. Ms. Davis's declaration clarifies that what the Internet Archive actually does is save certain Web *pages*. Therefore, if the home page of a Web site is archived on a particular date, that does not mean that all of the sub-pages of the site are also archived on the same date. When an Internet user pulls up the home page of a Web site for a particular date using the Wayback Machine then clicks on a link on the home page to go to a sub-page of the site, the user is taken to the closest date for which the Wayback Machine has an archived version of the Web page (*Id.*) That date can be before or after the date on which the home page was saved. (*Id.*)

The Internet Archive receives its data from third parties who compile the Web site information using software programs known as crawlers that seek and automatically store copies of Web site files as they existed at that point in time. (Exh. B at ¶ 4.) The third parties then donate this data to the Internet Archive, which preserves and provides access to the data. (*Id.*)

The Internet Archive assigns a Uniform Resource Locator (e.g., Web site address) on its site to the archived files in the format <http://web.archive.org/web.[Year in yyyy][Month in mm][Day in dd][Time code in hh:mm:ss]/[Archived URL]>. (Exh. B at ¶ 5.) Thus, the Internet Archive URL <http://web.archive.org/web/19970126045828/http://www.archive.org/> would be the URL for the record of the Internet Archive home page HTML file (http://www.archive.org/)

archived on January 26, 1997 at 4:58 a.m. and 28 seconds (1997/01/26 at 04:58:28). (*Id.*) Typically, a printout from a Web browser will show the URL in the footer. (*Id.*)

To illustrate the foregoing, assume an Internet user is interested in viewing archived copies of the home page of the LaserSpecialist.com Web site. The user would go to the Internet Archive Web site, located at <www.archive.org>. At the top of the Internet Archive site is a box that says “Wayback Machine” and includes an address box where a user can enter the URL of the home page of the LaserSpecialist.com site, or “www.laserspecialist.com.” (*See* Exh. C hereto.) Entering this address in the Wayback Machine address box takes the user to a page of the Internet Archive site that lists all of the dates for which the Internet Archive has archived copies of that Web page. (*See* Exh. D hereto) When the user clicks on a date, such as September 25, 2002, the user is presented with an archived copy of the LaserSpecialist.com home page as it appeared on that date. (*See* Exh. E hereto.)²

As can be seen in Exhibit E hereto, the LaserSpecialist.com home page had many buttons down the left-hand side of the site that, if clicked, would take Internet users to different pages within the Web site or to linked Web sites. One of the buttons is named “Meet the Doctor,” and, when the site was live, would take an Internet user to a separate page of the Web site with information about Dr. Sanderson. Clicking on this link on the Wayback Machine pulls up the Web content that is attached as Exhibit F. The Internet Archive URL for this archived page is <http://web.archive.org/web/20020204085631/laserspecialist.com/jcs.htm>, indicating that this page was archived on February 4, 2002. Thus, although the Internet Archive does not have a

² The archived versions of the LaserSpecialist.com site are not perfectly archived in that some of the graphics do not resolve, but the archived versions are sufficient to show the essential content and layout of the Web pages on various dates in time.

copy of the "Meet the Doctor" page as it existed on September 25, 2002, it does have a copy of that page as it existed on February 4, 2002.

B. The Internet Archive Pages Submitted with St. Luke's Motion for Preliminary Injunction

In support of its Motion for Preliminary Injunction and Expedited Discovery, St. Luke's submitted print-outs from the Wayback Machine of the <laserspecialist.com> Web site. (See, e.g., Exh. A to the Prelim Inj. Mot.; Exh. A to the Decl. of Benjamin C. Fertic in Support of Plaintiff's Mot. for Prelim. Inj.; Exhs. B & H to the Decl. of J. Bradley Houser in Support of Plaintiff's Mot. for Prelim Inj.) St. Luke's introduced these Web pages to give the court a depiction of what the site looked like during certain time periods and to show how the site changed after Sanderson left St. Luke's employ.

At the time St. Luke's submitted its Motion, St. Luke's and its witnesses understood that the Wayback Machine saved all of the pages of a Web site on a particular date. As set forth above, that understanding was incorrect.³ However, the content of each of the pages of the site that are attached to St. Luke's motion and supporting declarations are accurate copies of the Web site pages as they appeared on the dates that are included as a part of the Internet Archive URL for the page. In support of the same, Sanderson testified in his deposition on April 20, 2006 when presented with pages from the <laserspecialist.com> site obtained from the Wayback Machine that the information on the archived web pages appeared correct. (April 20, 2006 Deposition of John Sanderson 52:20 – 53:15, 54:1-7.) Erickson also gave no indication that he

³ St. Luke's will submit new amended declarations to accurately reflect the new information it has learned about how the Internet Archive works.

believed the representations of the Web pages stored on the Wayback Machine were inaccurate or incorrect in any way. (April 19, 2006 Deposition of Mark Erickson 75:9 – 76:23).

Furthermore, since St. Luke's filed its Motion for Preliminary Injunction, Sanderson has produced a CD containing images of the <laserspecialist.com> website as it existed at various points in time. Specifically, attached as Exhibit G, are printouts from the CD produced by Sanderson. These printouts contain an electronic date on the CD of August 24, 2005 and accordingly represent a portion of the <laserspecialist.com> website as it existed on that date. Attached as Exhibit H to this Motion are pages from the <laserspecialist.com> website St. Luke's obtained from the Wayback Machine and filed in support of its Motion for Preliminary Injunction. (See Exhibit G to the Decl. of J. Bradley Houser in Support of Plaintiff's Mot for Prelim. Inj). The Wayback Machine printouts in Exhibit H are dated July 4, 2004 and July 3, 2004 and represent the same pages of the <laserspecialist.com> website shown in Exhibit G.

Although Exhibit G shows these pages as of August 25, 2004 and Exhibit H are the same pages as of July 3rd and 4th of 2004, all the pages are identical. The fact that the Wayback Machine pages are identical to pages produced by Sanderson further supports the accuracy, authenticity and reliability of the Wayback Machine evidence. Sanderson cannot reasonably maintain that the Wayback Machine printouts are not an accurate and fair representation of the <laserspecialist.com> website when the printouts are identical to the website images he has produced.

ARGUMENT AND CITATION OF LEGAL AUTHORITY

Rule 901 of the Federal Rules of Evidence states that "authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that

the matter in question is what its proponent claims.” A prima facie showing thus only requires that the “the court admit evidence if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification.” *United States v Tank*, 200 F.3d 627, 630 (N.D. Ca. 2000). Whether evidence is completely accurate goes toward the weight of the evidence and not its admissibility. *See id.*

The authenticity of Web pages stored by Internet Archive was directly at issue in *Telewizja*. *See Telewizja*, 2004 U.S. Dist. LEXIS 20845, at *16-*18 (Oct. 15, 2004). After reviewing Ms. Davis’ declaration and the other evidence of record, the district court in *Telewizja* admitted into evidence an exhibit of a Web site obtained from the Internet Archive. As is the case here, the party opposing the admission of the exhibit in *Telewizja* presented no evidence that the Internet Archive was unreliable or biased, nor did the party deny that the proffered exhibit represented the contents of the Web site on the dates in question. *Telewizja Polska USA, Inc. v. EchoStar Satellite Corp.*, 2004 U.S. Dist. LEXIS 20845, at *18. There was simply no evidence challenging the veracity of the exhibit, and therefore no reason to doubt its authenticity. *See id.*

Given the explanation provided by Ms. Davis, there is no reason to believe in this case that the <laserspecialist.com> print-outs are not representations of the relevant pages of that Site as they appeared on the dates indicated in the Internet Archive URLs that are printed out as part of the Exhibits. There is nothing in the way the Internet Archive collects and stores Web site files that would indicate that the information provided by the Wayback Machine is not genuine or trustworthy, nor have Defendants submitted any evidence as such. Defendants, instead, have confirmed the veracity of the documents through deposition testimony. Whether the print-outs all had the same date coding has nothing to do with the reason St. Luke’s proffered such evidence,

namely, to demonstrate Defendants' undeniable use and copying of St. Luke's copyrighted works since 2003.

CONCLUSION

For these reasons, St. Luke's proffered Web site print outs from the Internet Archive should be allowed into evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st of May, 2006 I electronically filed the foregoing **MOTION FOR ADMISSION OF EVIDENCE AND MEMORANDUM OF LAW IN SUPPORT THEREOF** with the Clerk of the Court by using the CM/ECF system. I further certify that a copy of the foregoing was furnished by electronic filing through the CM/ECF system to H. William Larson, Esq. and Ruth E. Freeburg, Esq., Larson & Larson, P.A., 11199 69th Street North, Largo, Florida 33773:

/s/ Mark D. Kiser .

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