NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PHARMACIA CORP., PHARMACIA AB, PHARMACIA ENTERPRISES S.A. and PHARMACIA & UPJOHN CO.,

Plaintiffs,

v.

ALCON LABORATORIES, INC.,

Defendant.

Civ. No. 01-1539 (WGB)

OPINION AND ORDER

APPEARANCES:

William W. Robertson, Esq.
Jeffrey A. Cohen, Esq.
Robertson, Freilich, Bruno & Cohen, LLC
One Riverfront Plaza, 4th Floor
Newark, New Jersey 07101

Bruce P. Keller, Esq.
Michael R. Potenza, Esq.
Debevoise & Plimpton
919 Third Avenue
New York, New York 10022

Attorneys for Defendant

Andrew T. Berry, Esq.
Sherilyn Pastor, Esq.
McCarter & English, LLP
Four Gateway Center
100 Mulberry Street
P.O. Box 652
Newark, New Jersey 07101

Edward E. Vassallo, Esq.
Timothy Kelley, Esq.
James Gibson, Esq.
Tila Duhaime, Esq.

Fitzpatrick, Cella, Harper & Scinto
30 Rockefeller Plaza
New York, New York 10112

Attorneys for Plaintiffs

BASSLER, DISTRICT JUDGE:

Defendant moves, *in limine*, to exclude certain expert testimony on the grounds that it is inadmissible under Fed. R. Evid. 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993). For the reasons set forth below, Alcon's motion is **granted**, in part, and **denied**, in part.

I. BACKGROUND

In March 2001, Pharmacia sued Alcon for trademark infringement and dilution under the Lanham Act, alleging that Alcon's Travatan mark infringes on its Xalatan mark. In April 2001, Pharmacia moved by order to show cause why a preliminary injunction enjoining Alcon from using the mark Travatan should not be granted.

In order to succeed on its motion for a preliminary injunction, one of the four factors Pharmacia must prove is a likelihood of success on the merits. S & R Corp. v. Jiffy Lube Intern., Inc., 968 F.2d 371 (3d Cir. 1992); Opticians Ass'n of America v. Independent Opticians of America, 920 F.2d 187, 191-92 (3d Cir. 1990).[1] To be successful on its trademark claim,

[1] The three other factors the Court must consider when ruling on a motion for preliminary injunctive relief are: (1) the extent to which the plaintiffs are being irreparably harmed by

Pharmacia must show that Alcon's use of the Travatan mark to identify its product is likely to create confusion concerning the origin of that product. 15 U.S.C. § 1114(1)(a); Accord Commerce Nat'l Ins. Svces., Inc. v. Commerce Ins. Agency, Inc., 214 F.3d 432, 437 (3d Cir. 2000).

To support its claim that Alcon's Travatan mark is likely to create confusion, Pharmacia relies on the testimony of several experts. Alcon now moves, *in limine*, to exclude portions of the opinions of some of those experts under FRE 702. Alcon argues that portions of their testimony are inadmissible because they are based on unreliable methodology and unqualified subjective beliefs.

II. DISCUSSION

Rule 702 of the Federal Rules of Evidence, which governs expert testimony, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed. R. Evid. 702

Under the Federal Rules of Evidence, the judge has a gatekeeping responsibility to "ensure that any and all scientific

---

the conduct complained of; (2) the extent to which the defendants will suffer irreparable harm if the preliminary injunction is issued; and (4) the public interest. S & R Corp., 968 F.2d at 374.

testimony or evidence admitted is not only relevant but reliable." Daubert, 509 U.S. at 589. The Court's role as gatekeeper is to determine the expert's qualifications, the reliability of the expert's opinions and the relevance of those opinions to the issues in the case. Id.

Initially, the Court notes that Alcon did not object to the qualifications of Pharmacia's witnesses.[2] Thus, the Court need not address the qualifications under FRE 702 of the experts whose testimony is challenged in this motion. For purposes of this motion, it is assumed that each proffered expert possesses the requisite qualifications to testify as an expert.

Alcon, however, objects to the substance of certain opinions. Even assuming these witnesses are qualified experts, Alcon asserts that portions of their opinions are not reliable and are, therefore, inadmissible. An expert's opinion is reliable if it is supported by "'good grounds,' based on what is known." Id. at 590. "[S]o long as the process or technique the expert used in formulating the opinion is reliable," the opinion is admissible. In Re Paoli Railroad Yard PCB Litigation, 35 F.3d 717, 742 (3d Cir. 1994) ("Paoli II"). In other words, an expert's opinion must be properly grounded before it can be admitted.

---

[2] However, Alcon expressly reserved the right to object to the expert's qualifications at a later time.

In order to determine whether a given scientific methodology is reliable, the court may consider several factors, including: (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted. Daubert, 509 U.S. at 593-95.

The Supreme Court, however, made it clear that this list is non-exhaustive. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 142 (1999). For example, in addition to the factors listed above, the court may consider "(6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put." Paoli II, 35 F.3d at 742n.8, quoting, United States v. Downing, 753 F.2d 1224 (3d Cir.1985).

The Court has broad latitude in determining whether an expert's methodology is reliable. Kumho Tire, 526 U.S. at 142. It also enjoys broad latitude in deciding how to make that determination. Id. Thus, the Court may choose to consider any one or all of the factors listed in Daubert or Downing, or it may consider other factors, depending upon the particular circumstances of the particular case at issue. Kumho Tire, 526 U.S. at 150; Paoli II, 35 F.3d at 742.

Additionally, expert testimony does not have to concern scientific subjects to be admissible. The Rules merely require that an expert have special training that will assist the trier of fact. See FRE 702. Rule 702 requires that an expert witness have specialized knowledge, the basis of which "can be practical experience as well as academic training and credentials." Elcock v. Kmart Corp., 233 F.3d 734, 741 (3d Cir. 2000). The Third Circuit has liberally construed the specialized knowledge requirement to include one who has skills or knowledge greater than the average layman. Id.

Where an expert's testimony concerns non-scientific subjects, "it should be evaluated by reference to the 'knowledge and experience' of that particular field." American College of Trial Lawyers, Standards and Procedures for Determining the Admissibility of Expert Testimony After Daubert, 157 F.R.D. 571, 579 (1994). Thus, in order to be admissible, the opinions of each expert should be grounded in an accepted body of learning or experience in that expert's field.

Experience alone, or in conjunction with other knowledge, skill, training or education, may, in some circumstances, provide a sufficient basis for expert testimony. See Kumho Tire, 526 U.S. at 137; Oddi v. Ford Motor Co., 234 F.3d 135 (3d Cir. 2000). Indeed, "an expert might draw a conclusion from a set of observations based on extensive and specialized experience."

Kumho Tire, 526 U.S. at 155. However, the opinion must be more than mere speculation.

The experts' qualifications, conclusions and assurances of reliability are not enough under Daubert. The trial court's gatekeeping function requires more than simply "taking the expert's word for it." See Daubert, 43 F.3d at 1319. The purpose of the gatekeeper function "is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Kumho Tire, 526 U.S. at 152. If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.

If it is determined that the expert's opinion has a reliable basis in the knowledge and experience of his discipline, the expert is permitted wide latitude to offer opinions. Daubert, 509 U.S. at 592. According to the Supreme Court, "[t]he Rules grant this latitude to all experts, not just to 'scientific' ones." Kumho Tire, 526 U.S. at 148.

Finally, Daubert requires that the proffered expert's testimony "fit" under the facts of the case so that "it will aid

the jury in resolving a factual dispute." Daubert, 509 U.S. at 591, quoting, Downing, 753 F.2d at 1242. In other words, the expert's opinion must be relevant. Evidence is relevant if it is helpful to the trier of fact's understanding of the evidence or determination of a fact in issue. Daubert, 509 U.S. at 591. See also, FRE 702. There must be "a valid scientific connection to the pertinent inquiry as a precondition to admissibility." Daubert, 509 U.S. at 592.

Alcon argues that with the exception of consumer surveys, "lay or even expert opinion about the likelihood of confusion is inadmissible or entitled to little weight." See Alcon Reply Br., p.1 (citing, Kirkpatrick, Likelihood of Confusion in Trademark Law, § 1.8.c at 1-45). Neither Rule 702 nor the case law interpreting it expressly limit expert testimony in this manner. Conversely, the Court has been hard pressed to find a case in which a court has considered evidence of the type offered by Pharmacia. Nonetheless, the Court finds that the liberal thrust of Rule 702 does not preclude the admissibility of non-survey evidence. See In Re Unisys Savings Plan Liti., 1173 F.3d 145, 162 (3d Cir. 1999), citing, Daubert, 509 U.S. at 588; Waldorf v. Shuta, 142 F.3d 601, 625 (3d Cir. 1998); Downing, 752 F.2d at 1230.

Under Rule 702, so long as the expert is qualified and his opinions are reliable and relevant, the testimony is admissible.

Daubert, 509 U.S. at 580. Although "[c]onsumer surveys, in which a representative sample of the consumers of a product are presented with the parties' products in a controlled setting, are the most direct method of showing the likelihood of confusion created by an infringing defendant," Charles Jacquin Et Cie, Inc. v. Destileria Serralles, Inc., 921 F.2d 467, 475-76 (3d Cir. 1990), they are not the only method for proving likelihood of confusion. Indeed, courts have considered the testimony of experts in the field of phonology and phonetics to prove similarity of names and likelihood of confusion. See, e.g., Pathfinder Comm. Corp. v. Midwest Comm. Co., 593 F. Supp. 281, 283-4 (N.D. Ind. 1984).

Finally, Alcon argues that these experts should not be permitted to opine on the ultimate legal issue in the case. However, the Third Circuit has concluded that likelihood of confusion is a question of fact. A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc., 166 F.3d 191 (3d Cir. 1999). Because the likelihood of confusion is in the "realm of everyone's common knowledge and experience," the fact finder is usually bestowed with deciding the issue. Kirkpatrick, Likelihood of Confusion in Trademark Law, § 1.8.c at 1-46. Therefore, expert opinions are admissible to assist the trier in determining the likelihood of confusion. Id.; FRE 702.

The Court will consider the testimony of each expert

separately to determine whether it is admissible.

A. Dr. Obstbaum

Alcon seeks to exclude the following portion of Dr. Obstbaum's testimony:

- "the TRAVATAN name is very similar to the XALATAN name."
- "there is a likelihood that medication substitution could occur, because of the substantial similarity" of the names.
- "a medication error by which a pregnant woman patient receives TRAVATAN rather than XALATAN can pose a health risk to that patient."

Alcon argues that this testimony is unreliable because it is not based on expert knowledge. Rather, it is the type of subjective belief and unsupported speculation that the Court, in its gatekeeper role, should exclude.

Dr. Obstbaum has been a practicing ophthalmologist for over twenty five years. Obstbaum Decl., ¶1. He is the Director of the Department of Ophthalmology at Lenox Hill Hospital in New York. Id. He is also a Professor of Clinical Ophthalmology at the Department of Ophthalmology at the Hew York University School of Medicine. Id. Additionally, Dr. Obstbaum serves on the Ophthalmology Advisory Board of Pharmacia. Id. Dr. Obstbaum is familiar with the topical products available for treating glaucoma and ocular hypertension. Id. at ¶ 2.

Whether Dr. Obstbaum's opinions are reliable depends upon

whether they are based in a valid scientific method or, alternatively, his experience and knowledge. Pharmacia argues that Dr. Obstbaum relied on his vast skill and experience as an ophthalmologist in formulating his opinions. It contends that Dr. Obstbaum considered the sound-alike qualities of the products' trademarks (particularly their suffixes), their non-name attributes (such as action, indication, means of application, profile of side effects and prescribed amounts) and their package inserts.

Dr. Obstbaum first opines that the Xalatan and Travatan names are similar. Admittedly, Dr. Obstbaum did not conduct any empirical studies or conduct any surveys. Obstbaum Tr., p. 59-60. Nor does he claim to have any specialized knowledge of phonology or phonetics.

Indeed, Dr. Obstbaum testified at his deposition that there is no other basis for his opinion that the names are similar other than his impression based on his review of the names. Obstbaum Tr., p. 61. That the opinion relies on his observations does not render the opinion inadmissible. As the Court said in Kumho Tire, "an expert might draw a conclusion from a set of observations based on extensive and specialized experience." 526 U.S. at 155. However, it is not clear how Dr. Obstbaum's specialized knowledge and experience in ophthalmology provide the bases for concluding that the names sound alike.

Although Dr. Obstbaum has specialized knowledge, that knowledge does not form the basis for this opinion. This is apparent from Dr. Obstbaum's deposition testimony, in which he admits that his conclusion is based solely on his subjective belief that the names simply sound the same. Obstbaum Deposition Tr., p. 61. The Court finds that because Dr. Obstbaum's opinion that the names are similar is not grounded in his specialized knowledge and experience or any other reliable methodology, it is not admissible as expert testimony.

Dr. Obstbaum's opinion concerning the likelihood of substitution of the medications is a bit more complicated. Here, Dr. Obstbaum's particular knowledge of the products' non-name attributes provides part of the basis for his opinion. An ophthalmologist may very well be qualified to discuss similarities in the medical characteristics of ophthalmic medications. However, it is unclear how even an experienced ophthalmologist could conclude that these similarities, in conjunction with alleged similarity of their names, is likely to lead to substitution.

Dr. Obstbaum does not discuss any experiences where medications were substituted as a result of name similarity and/or similarity of non-name attributes. In fact, he does not recall ever having experienced medication being substituted with another medication. Obstbaum Tr., p. 73. How, then, can Dr.

Obstbaum purport to rely on his experience as an ophthalmologist to reach this conclusion?

The Court cannot admit Dr. Obstbaum's opinion without evidence of a reliable basis. Dr. Obstbaum's knowledge and experience do not create the basis for his conclusion that a substitution is likely to occur. Thus, it is not admissible as expert testimony.

The admissibility of Dr. Obstbaum's opinion that an error in medications can pose a health risk also depends upon whether it is based in his experience and knowledge. If it is based solely on his reading of the package insert, then he is not qualified to testify about it. See In re TMI Litig., 193 F.3d 613, 680 (3d Cir. 1999) (expert whose only knowledge of health effects was literature reviewed for litigation unqualified).

Here, Dr. Obstbaum testified that he had "no idea" about the actual nature of the risk to pregnant women. Obstbaum Tr. 149-50. He did not do any research and had no experience using or prescribing the drug. Rather, his opinion was based solely on the warning language "in the [TRAVATAN] package insert." Id. at 150. Additionally, Dr. Obstbaum admitted that if he were to learn that Travatan did not pose a greater risk to pregnant women than Xalatan, then his opinion as to whether an error would pose a health risk would change. Obstbaum Tr., p. 152-3.

Dr. Obstbaum's opinion is clearly not based on his knowledge

because he has no knowledge of the health risk to pregnant women of taking either Xalatan or Travatan. Nor is his opinion based on his experience or any purported reliable methodology. Dr. Obstbaum's qualifications, conclusions and assurances of reliability are not enough to conclude that his opinion on this matter is reliable. This opinion is, therefore, inadmissible as expert testimony.

B. Mr. DiDomizio

Next, Alcon seeks to exclude Mr. DiDomizio's testimony that:

- "The name TRAVATAN is similar to XALATAN."
- "This similarity...leads me to conclude that medication errors between the two products are likely to occur."
- There is no reasonable basis to assume that [Alcon's] decision to use ATAN was accidental or coincidental."

Alcon submits that the testimony regarding the similarity of the names and likelihood of confusion is not based on expert knowledge, but rather subjective belief and unsupported speculation. Additionally, Alcon argues that the testimony regarding Alcon's decision to use ATAN is similarly unreliable and factually baseless.

Mr. DiDomizio is the President of Gemini Trademark Services, a trademark consulting service for the pharmaceutical industry. DiDomizio Decl., ¶ 2. Prior to that, he was Chairman of the Trademark Committee at Merck & Co., where he guided the

development of brand names for many of Marck's products. Id. at ¶ 4. He currently serves on the Board of trustees of ISMP and the Board of Directors for Med-ERRS, providing services to identify potential flaws in trademarks and packaging that could result in errors between medications. Id. at ¶ 8. Additionally, Mr. DiDomizio has published a number of articles and made numerous presentations concerning the role of pharmaceutical trademarks in medication errors. Id. at ¶ 7.

Mr. DiDomizio did not conduct any tests or research to substantiate his opinion. Rather, his conclusions were based on his observations of the phonetic and visual qualities of the marks and the non-name attributes and package inserts of the products. This is the same method Mr. DiDomizio employs when he is hired and paid by pharmaceutical companies to determine a trademark's potential for confusion and to assist them in selecting non-infringing trademarks. Accordingly, Pharmacia contends that Mr. DiDomizio's methodology is "generally accepted in the proper scientific community." See Pharmacia Brief in Opp., p. 8. Additionally, Alcon argues that Mr. DiDomizio's extensive experience, training and background in the development, selection and evaluation of trademarks in the prescription pharmaceutical field render his testimony reliable.

The Court finds that Mr. DiDomizio's opinion is reliable. It is based on extensive experience in the trademark industry and

years of research concerning the role of trademarks in errors between medications. Mr. DiDomizio exhibits more than the average lay person's understanding of what causes errors between medications. His conclusions are not simply based on subjective beliefs. They are drawn from a set of observations based on years of extensive and specialized experience. Additionally, Mr. DiDomizio's findings are regularly relied upon by the world's leading pharmaceutical companies in determining a trademark's potential for confusion.

Alcon analogizes Mr. DiDomizio to the tire expert, whose testimony was excluded in Kumho Tire. There, the Supreme Court held that the district court did not abuse its discretion in finding the tire expert's methodology unreliable because it failed to satisfy any of the Daubert factors or any other criteria for reliability. Kumho Tire, 526 U.S. at 158. Mr. DiDomizio is not Pharmacia's "tire expert" because, unlike the tire expert in Kumho Tire, the method used here has been relied on by several major companies in the industry. Thus, his testimony in this regard is reliable.

Mr. DiDomizio's testimony that there is no reasonable basis to assume that Alcon's decision to use ATAN was accidental or coincidental is another matter.[3] The record does not disclose

[3] This testimony speaks to the issue of Alcon's alleged bad faith in selecting the Travatan mark.

any special skill or knowledge by Mr. DiDomizio that would give him insight into how Alcon arrived at its decision to use ATAN. Mr. DiDomizio relies on his experience that a "second comer" to the market will generally take steps to select a trademark that is distinctly different from those in its category. DiDomizio Suppl. Decl., ¶ 6.

However, "nothing 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. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." General Elec. Co. v. Joiner, 118 S.Ct. 512, 519 (1997). The analytical gap in Mr. DiDomizio's testimony is simply too wide to establish that Alcon's use of ATAN was not accidental or coincidental.

Mr. DiDomizio did not rely on any scientific methodology, specialized knowledge or experience to reach this conclusion. It is based on little, if anything, beyond his own intuition. Therefore, it is inadmissible as expert testimony.

C. Dr. Eisenberg

Next, Alcon objects to Dr. Eisenberg's opinions that

- "it is not unreasonable to anticipate a confusion between XALATAN and TRAVATAN."
- the FDA's approval of the TRAVATAN mark was based on

"reasoning" that "no longer holds."[4]

Again, Alcon submits that the testimony is unreliable, subjective and speculative.

Dr. Eisenberg is an ophthalmologist specializing in the treatment of glaucoma. Eisenberg Decl., ¶ 1. In connection with his position as Statistical Consultant for Ophthalmic Surgery and Lasers, he regularly reviews manuscripts for the purpose of evaluating and commenting upon the statistical analyses contained therein. Id. at ¶ 2. He also does private statistical consulting for researchers and companies and the area of ophthalmic medications. Id.

Dr. Eisenberg opines that Travatan, being available in only one concentration will, like Xalatan, be written almost exclusively by name only. Alcon does not dispute this portion of his testimony. Dr. Eisenberg referred to experiences he had where drugs he had written by name only were confused by the pharmacists when filling the prescriptions. Based on his past experience, Dr. Eisenberg concludes that since both Xalatan and Travatan will be written almost exclusively by name only, it is not unreasonable to anticipate confusion between them.

---

[4] This refers to an FDA report prepared when Alcon was considering launching with two concentrations – .0015% and .004% travoprost solution. The report noted that the Xalatan and Travatan names were similar but that the differing concentrations of Travatan "would likely serve to distinguish prescriptions for" Xalatan and Travatan. Alcon then went on to market only one concentration. See Eisenberg Decl., ¶ 5.

Dr. Eisenberg's opinion is interesting because he does not go so far as to opine that confusion is likely. He merely concludes that to anticipate confusion would not be unreasonable. Absolute certainty of a result is not required for admissibility. However, the degree of certainty expressed by an expert will, of course, be considered in determining a question of fact. See Paoli II, 35 F.3d at 751.

The fact that drug names written alone have in his experience as an ophthalmologist been a source of confusion provides a reliable basis for this conclusion. That drug names written alone are sometimes confused by pharmacists is not within the realm of everyone's common knowledge and experience. Thus, Dr. Eisenberg has "sufficient specialized knowledge to assist the [fact finder] 'in deciding the particular issues of the case.'" See Kumho Tire, 526 U.S. at 156, citing, McLaughlin, Weinstein's Federal Evidence, ¶ 702.05[1], p.702-33 (2d ed. 1998). This portion of Dr. Eisenberg's testimony is, therefore, admissible for whatever value it may have.

Dr. Eisenberg's opinion that the FDA's approval of the TRAVATAN mark was based on "reasoning" that "no longer holds" is not based in his area of knowledge and experience. Dr. Eisenberg has not alleged any experience in the area of FDA approval. Thus, he is not qualified to opine on whether the reasoning for that approval is still relevant. Additionally, Dr. Eisenberg is

not employed by the FDA. Because admittedly, he has no knowledge of the FDA's reasons for approving Travatan, there is no reliable basis for his opinion and it is, therefore, inadmissible.

D. The Lambert Statistical Model

Dr. Lambert is a researcher with considerable experience in identifying look-alike and sound-alike drug names and assessing their probability of confusion. Lambert Decl., ¶ 1. Dr. Lambert, through the use of a statistical model, analyzed the Xalatan and Travatan names. Based on his analyses employing mathematical modeling designed to predict name confusion, Dr. Lambert concluded that the similarities between Xalatan and Travatan are substantial and, therefore, likely to cause confusion. Lambert Decl., ¶ 7.

Alcon objects to the use of the Lambert statistical model on the ground that it is unreliable, arguing that the methods applied by Mr. Lambert have poor positive predictive value and high error rates. Additionally, Alcon claims that the model's inherent limitations, as acknowledged by Dr. Lambert, render it unreliable. Therefore, Mr. Lambert's opinion should be excluded.

The first Daubert factor is whether the scientific technique can be tested. Daubert, 509 U.S. at 593. Dr. Lambert's model appears to use objective measures to determine the similarity of the names. He employs a Trigram-2b model or a Bigram 1b1a model to compute the numerical measures of similarity in spelling and

pronunciation. He then uses a Dice coefficient, which is a mathematical equation, to compute a similarity score. Therefore, other name pairs can be tested for similarity by simply inputting the appropriate data into the equation.

Whether a technique has been subjected to peer review and publication is another relevant consideration in assessing its scientific validity. Daubert, 509 U.S. at 594. "The peer review and publication process increase the likelihood that flaws in methodology will be detected." Giannelli & Imwinkelried, Scientific Evidence, Lexis Law Publishing, Vol. 1, § 1-7(B) (1999). Here, Dr. Lambert's model has been subject to peer review and publication.

A technique's "known or potential rate of error" is also an indicator of evidential reliability. Daubert, 509 U.S. at 594. Alcon complains that Dr. Lambert's model lacks predictive ability because it has an error rate of 99.96%. To arrive at this number, Alcon cites the fact that only 1127 name pairs have been reported as confusing compared with the 2,350,000 name pairs whose similarity scores were equal or greater than Xalatan/Travatan.

However, Alcon provides no basis for its method of calculating error rates. First, Alcon appears to be comparing what is alleged to be similar with what was reported as confusing. That something is similar does not necessarily mean

that it will be confused. Additionally, the Court notes that what is reported as confusing does not necessarily equate with what is actually confusing. Therefore, the error rate of 99.96% is inapplicable.

Alcon also points to the model's limitations to prove its unreliability. As Mr. Lambert readily admits, this model has some practical limitations. Lambert Tr., p. 226-27. According to Mr. Lambert, the statistical regression measures are a starting point; in order to determine whether the name is likely to cause confusion, one must consider these measures in conjunction with other marketplace factors.

Alcon argues that it is the Court's, not an expert's, duty to examine such marketplace factors[5] and draw a conclusion as to the likelihood of confusion. However, that the Court will ultimately make a finding of fact on the likelihood of confusion does not preclude consideration of an expert's opinion. Under FRE 702, the question is whether the opinion will assist the Court in reaching its decision. The Court finds that it will.

Moreover, a given scientific methodology does not have to be

---

[5] The factors Alcon refers to were set forth by the Third Circuit in A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc., 237 F.3d 198 (3d Cir. 2000). They are: (1) strength of plaintiff's mark; (2) similarity between the marks; (3) similarity of the products and the degree to which they directly compete with each other; (4) marketing or advertising channels used; (5) sophistication of consumers; (6) defendant's intent in selecting the mark; and (7) incidents of actual confusion. Id. at 211.

perfect or yield accurate results one hundred percent of the time. Paoli, 35 F.3d 717, 744 (finding that flaws in an expert's methodology do not necessarily render it unreliable). It is the methodology and not the conclusions that the court must focus on. Id. A judge can think an opinion incorrect, yet still find that the expert has good grounds for it. Id.

Here, Dr. Lambert's statistical model provides a method to objectively measure the similarity of the names. The methodology employed satisfies many of the criteria under Daubert. Therefore, the Court finds that Mr. Lambert's statistical model and supporting testimony are admissible.

E. The McCullough Survey

Mr. McCullough is the owner and President of Monroe Mendelsohn Research, a marketing and opinion research firm in New York that conducts research relating to trademark infringement and dilution issues for litigation. McCullough Decl., ¶ 1. Mr. McCullough designed a survey questionnaire to test whether Xalatan was diluted by use of the mark Travatan (the "McCullough Survey"). Id. at ¶ 3.

The McCullough Survey was conducted by interviewing 311 ophthalmologists that prescribed medication for patients suffering from glaucoma or ocular hypertension. See McCullough Research Report, p. 4. The sample was selected from the American Medical Association database, based on their proximity to a local

interviewing service throughout twenty-five cities in four different regions of the country. Id. The physicians were contacted by phone and those who agreed to participate were compensated $100-150 for their time. Id. at p.5.

The interviews were conducted in the physicians' offices by trained interviewers who did not know the purpose of the survey or the sponsor of the research project. Id. The interview began with the ophthalmologist being shown either a package of Travatan or Lumigan. Id. After giving the ophthalmologist an opportunity to inspect the package, he or she was asked whether any other products came to mind and why. Id. The interviewer was directed to probe the respondent for reasons until the respondent said there were no more. Id.

The survey found that Xalatan was brought to mind by 89% of those who were shown Travatan and 78% of those who were shown Lumigan. Id. at p. 6. Out of the 89% who associated Xalatan with Travatan, 18% did so because of the similarity of their names. Id. Out of the 78% who associated Xalatan with Lumigan, 4% did so because of the similarity of their names. Id. Based on the foregoing, Mr. McCullough concluded that the level of dilution due to the similarity of the Xalatan and Travatan names was 15%. Id.

Alcon argues that the McCullough survey fails to meet well-established standards meant to assure its reliability, thereby

warranting its exclusion. Alcon relies mainly on Universal City Studios Inc. v. Nintendo Co., 746 F.2d 112, 118 (2d Cir. 1984) in support of its argument. There, the survey was excluded because of an unfair survey question, its use of an "improper universe", and its use of a leading question which "suggested its own answer". The court found the survey to be "so badly flawed" that it could not be used. Alcon makes many of these same arguments about the McCullough survey. A closer examination of Universal City Studios reveals several incongruities with the case at hand.

Alcon first argues that the survey should be excluded because of its "fundamental failure to avoid the bias created by the lack of double-blinding." (Def. Mem. at 18-19). Here, Alcon points to the fact that two respondents explicitly referred to a lawsuit during their interview, purportedly resulting in at least two of the interviewers being made aware of the litigation. Alcon's argument focuses mostly on one Los Angeles interviewer, Susan Boyd, who received responses that were helpful to Pharmacia fifty percent of the time, accounting for twenty-five percent of all responses indicating dilution.

Alcon argues that these facts coupled with the facts that: (1) she conducted most of the interviews in that office; (2) she was unsupervised during the interview process; (3) on one occasion she completed five interviews within two and a half

hours; (4) the responses she elicited were highly specific, consistent and contained nearly identical wording[6]; indicate that the answers she recorded were prompted, if not entirely fabricated, by Ms. Boyd.

Contrary to Alcon's complaints, Pharmacia asserts that the survey was indeed conducted in a double-blind fashion. That is because neither the interviewer nor the respondent knew for whom the survey was conducted or for what purpose. Additionally, they were not given information that would alert them to the anticipated or preferred pattern of response. That two respondents made reference to a lawsuit, Pharmacia insists, does not undercut these facts.

Double-blinding ensures the anonymity of the sponsor of the survey, thereby preventing bias. See Castrol, Inc. v. Pennzoil Quaker State Co., 2000 WL 1556019, *11 (D.N.J. 2000). The Court agrees with Pharmacia that just because two respondents mentioned a lawsuit does not render the survey unreliable. Even if their comments were more than mere conjecture, there is no evidence that they knew who sponsored the survey or what answers were expected.

Furthermore, the circumstances under which Ms. Boyd's responses emerged do not indicate that she knew or learned about

---

[6] Alcon points out that there were a total of 10 survey responses of this nature nationwide and that Ms. Boyd recorded 7 of those 10.

the survey's sponsor or what answers were expected. Nonetheless, any suspicions raised by one surveyor's methodology does not render the entire survey unreliable. Whether Ms. Boyd "cheated" is a matter that should be accorded to the weight, not the admissibility, of the survey. (See discussion below.)

Next, Alcon argues that the survey contained a leading question that affected the validity of the results. Specifically, it complains that the use of the word "product" somehow led the respondent to provide answers based on the product functions rather than its name. Assuming arguendo that Alcon is correct in its assumption that respondents would focus on the nature of the product rather than the name of the product, this does not render the study unreliable.

The Court agrees with Alcon that the wording of a question can be leading. The credibility of a survey may be called into question "if it relies on leading questions which are inherently suggestive." Johnson & Johnson-Merck Consumer Pharmaceuticals Co. v. Rhone-Poulenc Rorer Pharmaceuticals, Inc., 19 F.3d 125, 134 (3d Cir.1994)(citations omitted). However, that a survey contains leading questions does not necessarily make the survey inadmissible. See Id. at 135 (crediting non-leading survey questions).

Here, there is no doubt that the use of the word "products" narrowed the range of responses to those that fall under the

category of products, goods or commodities. However, it is unlikely, as Alcon suggests, that the use of the word "products" somehow suggested that respondents focus only on medications or, more specifically, medications that, like Travatan, treat glaucoma and ocular hypertension. Therefore, the question did not indicate to respondents what answers were expected.

Additionally, the Court notes that the question is similar in nature to that used in other trademark cases. For example, the survey admitted and relied on by the Court in Westchester Media Co L.P. v. PRL USA Holdings, Inc., 103 F. Supp. 2d 935, 965-66 (S.D. Tex. 1999), aff'd on relevant grounds, 214 F.3d 658 (5th Cir. 2000), contained the nearly identical survey question. Therefore, the use of the word product in the survey questions does not render the survey unreliable.

Additionally, Alcon argues that the survey failed to test the relevant universe. They contend that the sample surveyed was underinclusive in that only ophthalmologists were interviewed; and not optometrists.

A survey may be discounted when the sample of respondents is not "clearly representative of the universe it was intended to reflect." Harolds Stores, Inc. v. Dillard Dept. Stores, Inc., 82 F.3d 1533, 1544 (10th Cir. 1996), quoting, Bank of Utah v. Commercial Sec. Bank, 369 F.2d 19, 27 (10th Cir. 1966). However, this is not a situation where the sample is not representative of

the universe it was intended to reflect.

According to Pharmacia, the vast majority of prescriptions for Xalatan are written by ophthalmologists. Therefore, the universe of ophthalmologists who prescribe Xalatan to their patients represent opinions which are relevant to the litigation. Their opinions are probative on the issue of whether Xalatan and Travatan may be confused. See Harolds Stores, 82 F.3d at 1546 (survey concerning purchasing patterns of store's consumers tested appropriate universe where sample was comprised only of college-age women, since college-age women comprised the store's core customer base). Therefore, Defendant's contention that the survey was underinclusive does not warrant its exclusion.

Finally, it is well settled that imperfections in survey evidence go to its weight rather than its admissibility. See McGraw-Edison Co. v. Walt Disney Prods., 787 F.2d 1163, 1172-73 (7th Cir. 1986)(method of testing and manner of presentation went to weight not admissibility); Mobil Oil Corp. v. Pegasus Petroleum Corp., 818 F.2d 254, 259 (2d Cir. 1987)(statistical imperfections go to weight rather than admissibility); United States v. 88 Cases, More or Less, Containing Bireley's Orange Beverage, 187 F.2d 967, 974 (3d. Cir 1951)(technical adequacy of surveys is matter of weight, not admissibility). Courts have the discretion to evaluate and assign weight to survey evidence as it deems appropriate. Johnson & Johnson-Merck, 19 F.3d at 134. For

these reasons, the survey is admissible.

III. CONCLUSION

Alcon's motion to preclude certain expert opinions is granted, in part, and denied, in part. Dr. Obstbaum, Mr. DiDomizio and Dr. Eisenberg are precluded from giving testimony on all opinions that the Court has ruled inadmissible. In all other respects, Alcon's motion is denied.

SO ORDERED.

William G. Bassler, U.S.D.J.

DATED: November 28, 2001