IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ENERGY INTELLIGENCE GROUP, INC. and ENERGY INTELLIGENCE GROUP (UK) LIMITED,

Plaintiffs,

vs.

Case No. 16-1015-EFM-GLR

CHS McPHERSON REFINERY, INC. (F/K/A A NATIONAL COOPERATIVE REFINERY ASSOCIATION),

Defendant.

MEMORANDUM AND ORDER

Plaintiffs Energy Intelligence Group, Inc., and Energy Intelligence Group (UK) Limited (collectively "EIG") have sued CHS McPherson Refinery, Inc. ("the Refinery") for copyright infringement. There are four motions pending before the Court. The Refinery has moved for partial summary judgment (Doc. 52) seeking to limit EIG's claims based on the three-year statute of limitations and seeking to limit EIG's request for statutory damages. In response to this motion, EIG has filed a cross-motion for summary judgment (Doc. 67) regarding EIG's statutory damages request. In addition, EIG has moved for partial summary judgment (Doc. 100) seeking to dismiss the Refinery's affirmative defenses and has filed a Motion Challenging the Admissibility of Expert Report and Testimony of William Rosenblatt (Doc. 86). For the reasons stated below, the Court denies the Refinery's motion for partial summary judgment, grants EIG's cross motion for summary judgment, grants in part and denies in part EIG's motion for partial summary judgment, and grants EIG's motion to exclude the expert testimony and report of Rosenblatt.

I. Factual and Procedural Background

A. EIG's Publications and Copyright Registrations

EIG sells subscriptions to many publications, two of which include *Oil Daily* and *Petroleum Intelligence Weekly*. EIG sells at least three types of subscriptions to its publications: (1) a single subscription; (2) multiple subscriptions; and (3) a Global Enterprise License, which includes up to 15 publications and six databases. In addition to its subscriptions, EIG allows readers to access individual articles or issues on a pay-per-view basis.

Within EIG, account managers are required to make periodic calls on their assigned accounts to, among other things, look for opportunities to increase the number of subscriptions an individual or company might hold. Account managers are assigned to both large and small accounts. One of EIG's account managers who specializes in small accounts is Derrick Dent. Dent managed the Refinery's account with EIG beginning in 2009.

Since 2006, Deborah Brown—an account services manager at EIG—has filed EIG's copyright applications with the U.S. Copyright Office. During that time, EIG registered *Oil Daily* using Form G/DN. From 2006 to 2008, Brown checked the "Compilation" box in the "Author's Contribution" section of Form G/DN, as well as the "text" and "editing" boxes in the group applications. In 2008, she stopped checking the "Compilation" box but continued checking the "text" and "editing" boxes. From 2004 to 2016, EIG registered *Petroleum Intelligence Weekly* as a collective work using Form SE/Group.

B. EIG's Copyright Enforcement

EIG began enforcing its copyrights and pursuing potential copyright infringement litigation around 2005. At that time, EIG's president, Tom Wallin, proposed copyright enforcement as a potential revenue stream, comprised of both legal settlement and improved subscription revenues due to better compliance by subscribers. In 2007, EIG ramped up its copyright enforcement tactics by issuing copyright notices on its publications, implementing new procedures for monitoring and enforcing its copyrights, and running "password abuse" reports designed to "pick out users with the most suspicious behavior." When EIG uncovered information indicating infringement by its large clients, EIG believed that it should pursue remedies for that infringement, including litigation. This aggressive approach was supported by EIG's board of directors and ownership.

In 2010, EIG hired John Hitchcock as managing director. On February 23, 2010, he emailed his team a memorandum "which represented[ed] a ratcheting-up of [EIG's] efforts to thwart copyright abuse." In the memorandum, EIG rolled out its bonus plan, calling upon the "sales force and customer service representatives to act as another line of defense in identifying incidents of unauthorized use among [its] customers." The plan required all documented information of suspicious activity or direct evidence of unauthorized usage to be reported immediately to Hitchcock. Under these policies, if management determines that there are ambiguous circumstances as to whether unauthorized copying occurred, the account representative is instructed to contact the customer and ask them to confirm the scope of their usage of EIG's publications.

If an EIG salesperson reports suspicious behavior to management and EIG initiates a lawsuit based on such reporting, then EIG pays that salesperson $5,000. If the lawsuit leads to a settlement or court-ordered award, EIG then pays the salesperson an additional $5,000. Since

2005, EIG has vigilantly protected its copyrights and aggressively enforced them after discovering overt evidence of infringement.

C. The Refinery's Subscription to *Oil Daily* and *Petroleum Intelligence Weekly*

The Refinery purchased a subscription to *Oil Daily* beginning in 1992 and renewed it annually until it allowed the subscription to expire on or around May 15, 2015. The Refinery received *Oil Daily* by print delivery until 1999 when it elected to receive it electronically. EIG directed its subscription renewals to Galen Menard, who was the Refinery's Vice-President of Supply & Trading. Refinery employee LeAnn Flickinger, who was Menard's assistant, received the publication through an email sent by EIG with the publication attached. Flickinger forwarded the email with the attached publication to Menard and other Refinery employees daily.

The Refinery first subscribed to *Petroleum Intelligence Weekly* in 1982 and renewed it annually until it allowed the subscription to expire on or around June 13, 2016. The Refinery received the publication by print delivery until approximately 2002 when EIG moved from print delivery to electronic delivery. From 2005 to 2011, EIG directed its renewal subscriptions to Refinery employee Kathy Swanson. Swanson served as an assistant to James Loving, who was the Refinery's president. Swanson downloaded issues of *Petroleum Intelligence Weekly* and distributed it to multiple Refinery employees including Loving. When Swanson retired in June 2012, her responsibilities regarding the publication were assumed by Deborah Ratzloff.

Both *Oil Daily* and *Petroleum Intelligence Weekly* contained copyright notices and warnings. In addition, EIG included a copyright notice and warning on the weekly emails it sent notifying the Refinery that a new issue was available.

D. Communications between the Refinery and EIG

On September 25, 2007, Menard sent an email to Loving, which stated:

> The Oil Daily is produced by the same company as Energy [sic] Intelligence Weekly. Please note the copyright pronouncement below for the Energy Intelligence Group.
>
> We will need to discontinue the e-mailing of the Oil Daily until a decision is made as to our subscription and the cost of retaining service to the list that currently receives the publication.

Five months later, on February 26, 2008, Flickinger emailed 11 Refinery employees, including Menard and Loving, stating: "I will no longer be forwarding the Energy Oil Daily report out every morning due to Energy Oil Daily's copyright policy." That same day, in response to an inquiry from a Refinery employee about *Oil Daily*'s ongoing availability, Menard told the employee that he was going to attempt to negotiate with EIG regarding a group discount and that he would make sure copies were available until the situation was resolved.

The following day, on February 27, Menard emailed EIG Customer Service indicating that he would like to discuss the costs associated with adding up to 10 users within the Refinery for *Oil Daily*. EIG responded with a pricing schedule that indicated that five users would cost $7,863.00 annually and that 10 users would cost $14,708 annually. Menard then notified the Refinery employees of the quoted prices and stated that he was reluctant to increase the Refinery's subscription because the prices were "highway robbery." Menard further stated that he would continue to negotiate with EIG for better rates but that EIG did not seem interested in lowering its prices.

Menard followed up with EIG on April 2, and again on April 3, requesting pricing for two or three additional users. On April 17, the Refinery received a renewal notice from EIG for its subscription to *Oil Daily*. The Refinery renewed that subscription on May 12.

Almost four years later, on the morning of March 27, 2012, Flickinger forwarded *Oil Daily* to Menard and three other Refinery employees. Later that day, she spoke with EIG account

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