UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

Case No.: 0:21-md-02994-RAR

In re:

MEDNAX SERVICES, INC.,
CUSTOMER DATA SECURITY BREACH LITIGATION
_____/

This Document Relates to All Actions

DEFENDANTS' MOTION TO EXCLUDE EXPERT TESTIMONY OF GARY OLSEN AND MARY FRANTZ AND MEMORANDUM OF LAW IN SUPPORT

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Pursuant to Federal Rule of Evidence 702 and Federal Rule of Civil Procedure 26, Defendants Mednax Inc., Mednax Services, Inc., Pediatrix Medical Group, and Pediatrix Medical Group of Kansas, P.C. (collectively, "Mednax") and American Anesthesiology, Inc. ("AA"), move to exclude the testimony and reports of Mary Frantz and Gary Olsen.

I. INTRODUCTION

As the Court is well aware, this case involves a phishing attack involving certain Microsoft Office 365 email accounts of Mednax and AA employees (the "Cyberattack"). Faced with the undeniable fact that the Cyberattack resulted from the actions of a former Mednax employee, as opposed to the exploitation of a security vulnerability, Plaintiffs attempt to rely on the report of Mary Frantz to argue that Mednax's cybersecurity was allegedly deficient. Frantz's report, however, is nothing more than an attempt to prejudice the jury by stringing together statements that are either unsupported or flatly contradicted by the evidence, improperly drawing negative inferences from evidence that doesn't exist, and is just Frantz's ipse dixit, instead of a reliable methodology.

Plaintiffs also try to use Frantz's report to overcome the fact that they have no evidence that the Cyberattack has caused them any legally cognizable damages by offering her opinion that [redacted] But the methodology that Frantz used cannot be replicated and is critically flawed because [redacted]

Plaintiffs' reliance on Frantz does not stop there. In addition to relying on Frantz to try to cobble together their affirmative case, Plaintiffs rely on Frantz to rebut all three of Defendants' experts. But Frantz, whose experience is concentrated in cybersecurity, is not qualified to rebut Brian Ellman, who provided opinions grounded in economics about [redacted]. And all three of Frantz's rebuttal reports exceed the scope of a permissible rebuttal report because they improperly try to bolster Plaintiffs' affirmative case.

Plaintiffs also enlist the assistance of another expert, Gary Olsen, to [redacted] But Olsen's report must also be excluded because he uses an unreliable methodology that is based on information that he has not verified and does not understand.

For these reasons, and those discussed below, the testimony and reports of Mary Frantz and Gary Olsen should be excluded in their entirety.

II. BACKGROUND

Plaintiffs have presented two experts: (1) Mary Frantz and (2) Gary Olsen.

Plaintiffs present Mary Frantz as an affirmative expert in three primary areas (collectively, her "Opinions"): (1) [redacted] ("Cybersecurity Opinion"); (2) [redacted] ("Investigation Opinion"); and (3) [redacted] ("DDW Opinion"). Frantz also authored reports responding to each of Defendants' three affirmative experts—Art Ehuan ("Ehuan Rebuttal");[1] Brian Ellman ("Ellman Rebuttal");[2] and Keith Wojcieszek ("Wojcieszek Rebuttal").[3]

Plaintiffs present Gary Olsen as an expert to provide a purported methodology for computing the putative classes' purported damages [redacted].[4]

III. LEGAL STANDARD

Federal Rule of Evidence 702 permits the admission of expert testimony only when it is based on "sufficient facts or data" and is "the product of reliable principles and methods" that have been "reliably applied . . . to the facts of the case." Fed. R. Evid. 702. In the Eleventh Circuit, this entails a "rigorous three-part inquiry" which requires courts to consider whether: (1) the expert is qualified to testify competently regarding the matters she intends to address; (2) the methodology by which the expert reaches her conclusions is sufficiently reliable; 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 in issue. *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004). These factors are referred to as the "qualification", "reliability", and

[1] Ex. 1 (Ehuan Rep.).
[2] Ex. 2 (Ellman Rep.).
[3] Ex. 3 (Wojcieszek Rep.).
[4] [redacted]. Ex. 4 (Olsen Dep.) at 56:17–57:16, 173:2–8.

"helpfulness" prongs, respectively. *Id.* Plaintiffs, as the proponents of the expert testimony, bear the burden of establishing these prongs by a preponderance of the evidence. *Id.*

Courts should exclude evidence where "its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Federal Rule of Civil Procedure 26(a)(2)(D)(ii) strictly confines the scope of a rebuttal report to "evidence [] intended ***solely to contradict or rebut evidence*** on the same subject matter identified by another party[.]" (emphasis added). The "opportunity to submit a rebuttal expert report is not license to expand [a party's] case-in-chief," *Gaddy v. Terex Corp*., 2017 WL 3276684, at *3 (N.D. Ga. Aug. 2, 2017), nor can it be used to fulfill a "dual purpose"—rebutting or contradicting an expert's opinions while also expounding on the plaintiff's case in chief. *Bell v. Progressive Select Ins. Co*., 2023 WL 5940306, at *2 (M.D. Fla. Sept. 13, 2023).

For the reasons set forth below, applying these standards, the opinions of Mary Frantz and Gary Olsen should be excluded in their entirety.

IV. ARGUMENT AND CITATIONS TO AUTHORITY

Mary Frantz's Opinions and Rebuttals must be excluded both under Federal Rules of Evidence 702 and 403. Her Rebuttals also must be excluded under Federal Rule of Civil Procedure 26. Likewise, Gary Olsen's report and testimony must be excluded under Federal Rules of Evidence 702 and 403.

A. Mary Frantz's Opinions Must Be Excluded.

Frantz's Opinions are inadmissible and must be excluded for numerous reasons. Frantz is offered by Plaintiffs, and describes herself, as a cybersecurity expert. Frantz's reports are focused on [redacted] These Opinions must be excluded for multiple reasons. First, they are unreliable and will not assist the trier of fact, because Frantz fails to articulate or employ a reliable methodology for any of her Opinions and because they are based upon an incomplete and erroneous understanding of the evidence. Second, Frantz's Opinions are unhelpful because they are entirely untethered from the claims or issues in this case. Frantz also strays into an area she is wholly unqualified to testify about—purporting to rebut economic analysis regarding the inability to prove causation on a class-wide basis. And finally, Frantz's rebuttal reports all exceed the permissible scope of an expert

rebuttal report and are nothing more than thinly veiled attempts to correct the myriad deficiencies of her affirmative report.

1. Mary Frantz's Opinions Must Be Excluded Because They Are Unreliable.

"The reliability inquiry requires the court to determine 'whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue.'" *Simmons v. Ford Motor Co.*, 2022 U.S. Dist. LEXIS 8817, at *7 (S.D. Fla. Jan. 17, 2022) (Ruiz, J.) (quoting *Frazier*, 387 F.3d at 1261–62). To make this determination, courts examine, among other factors "(1) whether the expert's theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community." *Id.* at *7–8. "[T]he same criteria which are used to assess the reliability of a scientific opinion may be used to evaluate the reliability of non-scientific, experience-based testimony." *Frazier*, 387 F.3d at 1261 (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (2004)). As set forth below, Frantz's Opinions are unreliable.

a. Frantz's Opinions are Unreliable Because She Repeatedly Fails to Support Her Statements with Evidence.

Expert testimony is inadmissible where it "lack[s] in any factual foundation, as required by [Rule 702]." *Cook*, 402 F.3d at 1111. [redacted] The foundation of the false understandings is the premise for everything else.

The issue here is not simply that Frantz failed to include record cites—though surely that was required; her statements are not supported by any evidence produced in discovery and must be excluded on that basis alone. For example, [redacted]

[5] *See, e.g.*, Ex. 5 (Frantz Rep.) ¶¶ 150, 162, 174, 177, 188, 195.
[6] Ex. 5 (Frantz Rep.) ¶ 30.
[7] Ex. 5 (Frantz Rep.) ¶ 174.

[redacted]

Frantz's failure to fully understand the factual record before rendering her opinions manifests itself in another way, as well. [redacted].[12] In other words, part of Frantz's "methodology" appears to be drawing adverse inferences when she does not see a document that supports a particular topic.[13] These inferences are unreliable because much of the evidence Frantz contends is lacking *actually is* in the record, and she simply failed to observe it or outright ignored it (see above). The best example of this is [redacted].[14] But Frantz wholly ignores the fact that such documentation would fall outside the scope of discovery

[8] *See* Ex. 6 (Ehuan Rebuttal Rep.) ¶ 17(b) ([redacted]).
[9] Ex. 5 (Frantz Rep.) Ex. B & ¶ 188.
[10] Ex. 7 (MEDNAX0002697).
[11] Ex. 5 (Frantz Rep.) ¶ 192; Ex. 8 (MEDNAX0129035).
[12] *See generally* Ex. 5 (Frantz Rep.) ([redacted]).
[13] Of course, while Frantz is not a legal expert, this is particularly problematic given Plaintiffs bear the burden of proof in this case.
[14] Ex. 5 (Frantz Rep.) ¶¶ 12, 84.

expressly negotiated between the parties, meaning that no conclusions can be drawn from a lack of documentation in the production set.[15] Indeed, Frantz's approach—drawing an adverse inference based on a lack of documentation falling outside of the scope of discovery negotiated by the parties themselves—flies in the face of binding Eleventh Circuit precedent, which cautions that—even when inferences are being drawn by a judge, not a proffered expert—"an adverse inference is drawn . . . only when the absence of . . . evidence is predicated on bad faith." *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997).

The pervasiveness of these deficiencies is grounds for striking all of Frantz's reports in their entirety. In the alternative, Mednax and AA request that the Court strike the uncited assertions in the following paragraphs of Frantz's affirmative report: 12 (the first of two Paragraph 12s in her report), 22, 25, 28, 30, 32-39, 41-43, 46, 49-50, 55, 64-65, 68, 70, 73-75, 80-81, 84-86, 89, 93-96, 98, 101, 105, 111, 114-19, 123-25, 127, 129-33, 135-36, 139-43, 145-51, 153, 156-58, 162-64, 166, 174-75, 177, 179-84, 186-90, 192, 195-99, 201-03, 238, 242, and 253-55. Mednax and AA further request that the Court strike the uncited assertions in the following paragraphs of the Ehuan Rebuttal: 5, 6, 8-14, 16, 19, 25-35, 37-40, 42, 51, 53, 64, 65, 69, 71-73, 76-77, 79-80, 83-84, 90, 92, 94, 98, 100, 105, 106, and 108-110; the uncited assertions in the following paragraphs of the Ellman Rebuttal: 3-4, 8-12, 14, 16-20, 22, 25-26; and the uncited assertions in the following paragraphs of the Wojcieszek Rebuttal: 4, 8-9, 14, 17, 18, 26 (the first of two Paragraph 26s in her report), 28, and 29.

b. Frantz Fails to Articulate or Employ a Coherent Methodology for Assessing Mednax's Cybersecurity.

Frantz's Cybersecurity Opinion is not grounded in a reliable methodology. To be admissible, an expert's conclusions must "employ[] a methodology" that can be evaluated "to determine whether it [is] reliable or even scientific in nature." *Mama Jo's, Inc. v. Sparta Ins. Co.*, 823 F. App'x 868, 877 (11th Cir. 2020). Here, Frantz purports to offer numerous opinions about Defendants' cybersecurity. She does not, however, identify the methodology that she employed to reach her conclusions. Instead, her "methodology" is best described as [redacted]

[15] The parties' negotiated scope of discovery included both a temporal limitation (June 1, 2019 to December 22, 2020, with the exception of one search string for which the Court expanded the date range) and a subject matter limitation (documents relevant to Office365 only). *See* ECF No. 166.

[redacted]

This does not constitute a reliable methodology that "properly can be applied to the facts in issue." *Frazier,* 387 F.3d at 1262; *see also Cook ex rel. Tessier v. Sheriff of Monroe Cty.*, 402 F.3d 1092, 1111–12 (11th Cir. 2005). [redacted] her analysis is not "capable of being tested or being subjected to peer review," nor is there any way to verify that her conclusions about the alleged significance of these events are "generally accepted in the scientific community." *Mama Jo's*, 823 F. App'x at 877.

Relatedly, as proof that Frantz's methodology is untestable and unreliable, she [redacted][18] This cannot satisfy Rule 702's reliability requirement. *See Leroux v. NCL (Bah.) Ltd.*, 2017 WL 2645755, at *8 (S.D. Fla. June 19, 2017) (excluding expert testimony based on alleged noncompliance with undefined "industry standard").

[16] Ex. 5 (Frantz Rep.) ¶¶ 50–122; 165–173.

[17] Curiously, much of the evidence that Frantz unilaterally deems "significant" does not even relate to [redacted]. *See* Ex. 6 (Ehuan Rebuttal Rep.) at ¶ 19(i).

[18] Ex. 5 (Frantz Rep.) ¶ 11 [redacted] To be clear, Frantz's vague reference to her [redacted] does not render her opinions reliable because she fails to explain *how* her training and experience supports her opinions. *See Pearson v. Deutsche Bank AG*, 2023 U.S. Dist. LEXIS 49779, at *22 (S.D. Fla. Mar. 23, 2023) (excluding expert's opinions to the extent they were based on his experience because he failed to explain "how his experience leads to the conclusion he reached, why that experience provides a sufficient basis for the opinion, and how that experience is reliably applied to the facts").

Frantz also fails to provide any analysis supporting her conclusion that [redacted] As Frantz explained in her Ehuan Rebuttal, Frantz [redacted].[20] Frantz cites nothing to suggest that her unduly restrictive reading of HIPAA is "generally accepted" among experts in the cybersecurity field.[21] She simply expects the Court to take her word for it. But the Eleventh Circuit has warned, "[t]he trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'" *Frazier*, 387 F.3d at 1261.

c. Frantz Fails to Articulate or Employ a Coherent Methodology for Assessing the Adequacy of Mednax's Investigation Into the Cyberattack.

Frantz's Investigation Opinion also fails because she fails to articulate a reliable methodology. Like her Cybersecurity Opinion, Frantz's Investigation Opinion amounts to nothing more than her unsupported belief that [redacted] Markedly absent is any citation, reference, or hinting at a "standard" that determines the sufficiency of a forensic investigation into a phishing event, or how her experience enables her to draw such a conclusion.[22]

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[19] Ex. 5 (Frantz Rep.) ¶ 187 (quoting AA_0001594).

[20] *See* Ex. 9 (Frantz Rebuttal Rep. to Ehuan) ¶ 3 [redacted]; Ex. 5 (Frantz Rep.) ¶ 256 [redacted]

[21] To the contrary, the evidence produced in discovery, [redacted], demonstrates that an entity does not violate HIPAA merely by falling victim to a phishing attack. *See* Ex. 10 (MEDNAX_0130102).

[22] For example, Frantz relies on just one external source—[redacted]

In short, Frantz again cherry picks certain "facts," editorializes them to fit her narrative, and asks the Court to take her word for the adequacy of the investigation.[23] Nothing about her "methodology" can be tested, replicated, or even understood by others and, therefore, is incurably unreliable.

d. Frantz's Dark Web Methodology is Unreliable.

Frantz's DDW Opinion—that [redacted]—should also be excluded because it is based on an unreliable methodology for three reasons:

First, [redacted] Accordingly, it is *impossible* to replicate her searches and test their validity. *See In re Zantac (Ranitidine) Prods. Liab. Litig.*, 644 F. Supp. 3d 1075, 1130–31 (S.D. Fla. 2022) ("[C]ourts across the country have excluded expert opinions based on scientific testing where the testing was inadequately documented to permit scrutiny and replication in the scientific community.") (collecting cases). This is a critical flaw because, despite opining that [redacted]

[redacted] Ex. 5 (Frantz Rep.) ¶ 129 & n.125. In stretching to find an external source to cite, she skips right over a directly on point, recognized standard—NIST Special Publication 800-86's "Guide to Integrating Forensic Techniques into Incident Response." The reason is clear—it does not support the conclusion she strives to reach. *See* Ex. 11 (Hale Rep.) ¶¶ 40–45 [redacted]

[23] As one example, Frantz claims that [redacted] Ex. 5 (Frantz Rep.) ¶ 133. This is a blatantly false statement. [redacted] *See* Ex. 11 (Hale Rep.) ¶ 28.

[24] Ex. 5 (Frantz Rep.), Ex. E at 4. To be clear, Frantz's report also suggests [redacted] This further undercuts the reliability of her methodology. *Id.* at 30.

[25] Ex. 12 (Frantz Dep.) at 266:14–20.

[26] Ex. 5 (Frantz Rep.) ¶ 207.

[redacted], coupled with Defendants' inability to replicate Frantz's searches, renders her conclusions hopelessly unreliable and requires their exclusion. *See Russ v. Berchtold Corp.*, 2013 WL 11317072, at *2 (S.D. Fla. Nov. 27, 2013) (excluding expert's opinions because they were not predicated on a "replicable" methodology).

Second, Frantz's methodology is flawed because she [redacted] By way of example, Frantz claims [redacted] but this misrepresents her actual findings. As demonstrated by the screenshot in Frantz's report, she simply found [redacted][31] She cannot reliably conclude from that

[27] Ex. 5 (Frantz Rep.), Ex. E at 24. Frantz suggested in her deposition that [redacted] Ex. 12 (Frantz Dep.) at 246:21–24. [redacted] *See generally* Ex. 5 (Frantz Rep.) Ex. E; Ex. 12 (Frantz Dep.) at 266:14–20 ([redacted]), 243:4–12 ([redacted]).

[28] Ex. 11 (Hale Rep.) ¶ 64.

[29] Ex. 11 (Hale Rep.) ¶ 64.

[30] In fact, Frantz acknowledges that [redacted] Ex. 12 (Frantz Dep.) at 254:4–10.

[31] Ex. 11 (Hale Rep.) ¶¶ 65–68.

evidence that [redacted] and her DDW opinions must be excluded.[32]

Third, Frantz claims that, because [redacted].[33] But Frantz offers no explanation for how that could be the case when, as noted in Mednax's Motion for Summary Judgment, Defendants never had these Plaintiffs' Social Security numbers to start with. Frantz also offers no method of testing or confirming this hypothesis. Indeed, [redacted][34]

* * *

In sum, instead of applying a generally accepted methodology, Frantz takes a kitchen-sink approach. Though her report is voluminous, it consists of little more than a series of uncorroborated statements, unsupported conclusions, and adverse inferences supported only by her *ipse dixit*. For these reasons, her opinions violate Rule 702's reliability requirement and must be excluded.

2. Frantz's Opinions Are Unhelpful Because They Would Not Assist a Trier of Fact.

The helpfulness inquiry is, at its base, a question of relevance. *See Nat'l Union Fire Ins. Co. v. Tyco Integrated Sec., LLC*, 2015 U.S. Dist. LEXIS 193807, at *31 (S.D. Fla. July 2, 2015) (citing *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1347 (11th Cir. 2003)). To be helpful, there must be a nexus between the offered opinion and the facts of the case. *Simmons*, 576 F. Supp. 3d at 1142 (Ruiz, J.). Put another way, helpful expert testimony "logically advances a material aspect of the proposing party's case" and "fits" the disputed facts. *McDowell v. Brown*, 392 F.3d 1283, 1298–99 (11th Cir. 2004) (citations omitted). Expert testimony does not satisfy the helpfulness prong, and must be excluded, when there is "too great an analytical gap"

[32] Ex. 5 (Frantz Rep.) ¶ 207. The issues identified with respect to A.H. are only one example. These flaws exist with respect to all of Frantz's searches.
[33] Ex. 5 (Frantz Rep.) Ex. E at 33.
[34] Ex. 5 (Frantz Rep.) Ex. E at 13; *see also* Ex. 11 (Hale Rep.) ¶ 81 [redacted] (citing Ex. 5 (Frantz Rep.) fig. 9).

between the facts and the proffered opinion. *In re Abilify (Aripiprazole) Prods. Liab. Litig.*, 299 F. Supp. 3d 1291, 1305 (N.D. Fla. 2018) (citation omitted). Additionally, expert testimony that is "'imprecise and unspecific,' or whose factual basis is not adequately explained," should be excluded. *Simmons*, 576 F. Supp. 3d at 1142 (Ruiz, J.) (quoting *Cook*, 402 F.3d at 1111); *see Frazier*, 387 F.3d at 1266. As discussed below, each of Frantz's Opinions must be excluded as unhelpful.

a. Frantz's Cybersecurity Opinion is Unhelpful.

Plaintiffs allege in the operative Complaint that the Cyberattack was caused by Mednax's "failure to incur the costs necessary to implement adequate reasonable cyber security procedures and protocols necessary to protect Plaintiffs' and Class Members' PHI and PII," and that the "disclosure of the PHI and PII at issue was a result of [Defendants'] inadequate safety and security protocols governing PHI and PII."[35] This is their theory of breach and causation. Thus, to be helpful to the trier of fact, Frantz's opinions must bear on those issues. They do not.

[redacted] A phishing attack is, by design, caused by human error, not the exploitation of a cybersecurity deficiency.[36] [redacted]

[35] ECF No. 115 ¶¶ 380, 390.

[36] *See* Ex. 3 (Wojcieszek Rep.) ¶ 34 [redacted].

[37] Ex. 6 (Ehuan Rebuttal Rep.) ¶ 16(b) [redacted] and ¶ 19(i) [redacted].

[redacted] This is unhelpful, improper, unduly prejudicial, and must be excluded. *Frazier*, 387 F.3d at 1263 (Because "expert testimony may be assigned talismanic significance in the eyes of lay jurors, . . . district courts must take care to weigh the value of such evidence against its potential to mislead or confuse."); *Thomas v. Evenflo Co.*, 205 F. App'x 768, 773 (11th Cir. 2006) (affirming dismissal of expert opinions because the opinions "offer no assistance to a trier of fact" and "would mislead the jury and unfairly prejudice the [defendants]").

Frantz's other cybersecurity opinions are similarly untethered to Plaintiffs' claims in this litigation. [redacted][39] [redacted][40] [redacted][41]

b. Frantz's Investigation Opinions Are Unhelpful.

Frantz's opinions about the sufficiency of Mednax's investigation are unhelpful and must be excluded. There is no link between failure to conduct a reasonable investigation and any harm to Plaintiffs. By definition, the investigation took place after the phishing attack had already occurred. Moreover, Plaintiffs have built their case on the results of Defendants' investigation—using those results to identify the members of the putative class and to calculate damages (based

[38] Ex. 6 (Ehuan Rebuttal Rep.) ¶ 16(b).
[39] *See, e.g.*, Ex. 5 (Frantz Rep.) ¶ 75.
[40] Ex. 5 (Frantz Rep.) ¶ 12(c).
[41] Ex. 13 (Frantz Dep.) at 156:23–157:18.

on data elements identified in the investigation). Frantz's detour into Mednax's investigation is just a sideshow that has nothing to do with any of Plaintiffs' claims and is entirely unhelpful to the finder of fact.

3. Mary Frantz is Not Qualified to Rebut Brian Ellman.

[redacted] Most of her opinions relate to areas Defendants are not contesting her qualification as an expert: cybersecurity, forensic investigation, and the DDW (though her opinions do have incurable reliability and helpfulness problems). But "expertise in one field does not qualify a witness to testify about others." *Banuchi v. City of Homestead*, 606 F. Supp. 3d 1262, 1273 (S.D. Fla. 2022). Where, as here, an expert proffers testimony on a subject area she has no experience in, courts can and do regularly exclude such testimony. *See, e.g., id.* ("If Defendants wanted to obtain expert opinions from a DNA expert, then they could have retained one. They did not, opting instead to try to broaden Dr. Hough's credentials to include DNA. But the mere fact that Dr. Hough has previously been qualified as an expert on police procedures in certain settings does not automatically confer upon him the qualifications to offer opinions about anything and everything that police officers, investigators and forensic technicians do when investigating criminal activity."); *Webb v. Carnival Corp*., 321 F.R.D. 420, 428–29 (S.D. Fla. 2017) (excluding expert who attempted to opine on toxicology based on only a law enforcement background because he was not qualified to opine on a level of intoxication); *Lopez v. Allstate Fire & Cas. Ins. Co*., 2015 WL 5584898, at *54 (S.D. Fla. Sept. 23, 2015) (excluding expert because his "particular expertise—in insurance law—does not match the type of expertise needed to render an expert opinion on the internal standard for handling an insurance claim").

Frantz goes outside her lane when she attempts to rebut Brian Ellman, an economist. [redacted]

[42] Ex. 13 (Frantz Dep.) at 28:19.

[redacted][43] His opinion is, at its core, an economics analysis.[44]

Nothing in Frantz's resume suggests she is qualified to rebut Ellman's report. [redacted].[45] It goes without saying that if Frantz is not an economics expert, she is not qualified to rebut an expert opinion, applying economics principles and analysis, regarding [redacted]. Therefore, the Ellman Rebuttal must be excluded.

4. Frantz's Rebuttal Opinions Violate Rule 26 and Must Be Excluded.

In addition to the reliability and helpfulness issues discussed above, each of Frantz's three rebuttal reports run afoul of Rule 26 and must be excluded on this independent basis. None of Frantz's three rebuttal reports is limited to a rebuttal opinion. Rather, they all attempt to bolster Frantz's affirmative report or offer "evidence" that is intended to bolster Plaintiffs' case-in-chief. Frantz was required to include *all* of her relevant opinions in her affirmative report—not hold back information or support and wait and see what Defendants' experts said first.

a. Rebuttal of Keith Wojcieszek.

Through affirmative expert reports, both Plaintiffs and Defendants proffered experts who opined on the DDW. Plaintiffs utilized Frantz and Defendants engaged Wojcieszek to assess the presence of Plaintiffs' information on both open-source websites and the DDW. Wojcieszek reached three conclusions:

(1) [redacted]

(2) [redacted]

[43] Ex. 2 (Ellman Rep.) ¶¶ 19, 20.
[44] Ex. 2 (Ellman Rep.) ¶¶ 23–24, 33, 64.
[45] Ex. 13 (Frantz Dep.) at 23:14–21, 25:10–12.

(3) [redacted].[46] [redacted].[47] With her Wojcieszek Rebuttal, Frantz tries to *cure* those deficiencies and *bolster* her own report by [redacted].[48] This is nothing more than a transparent attempt to effectively *revise* her original report. Wojcieszek's report was submitted at the same time as Frantz's initial report and therefore does not include an attack on Frantz's methodology. Thus, a description of [redacted] in no way, shape, or form rebuts Wojcieszek's report. [redacted] is a clear effort by Plaintiffs to prove an element of their case-in-chief—damages proximately caused by the Cyberattack. But this is impermissible. *See Bell v. Progressive Select Ins. Co.*, 2023 WL 5940306, at *2 (rejecting rebuttal report because it had a "dual purpose" of supporting Bell's case and chief and was "not being offered solely to contradict or rebut" (internal quotations omitted)); *Gaddy v. Terex Corp*., 2017 WL 3276684, at *4 (N.D. Ga. Aug. 2, 2017) ("The Court finds these revised alternative designs are a transparent attempt by Mr. Morrill to revise or supplement his original, allegedly deficient, alternative designs. This is not a proper rebuttal opinion.").

In short, because Frantz's rebuttal of Wojcieszek is nothing more than her attempt to fix problems in her initial report, it is an improper rebuttal and must be excluded.

b. Rebuttal to Brian Ellman.

Mednax's causation expert, Brian Ellman, demonstrated that, based on his experience as an economist, [redacted].

[46] Ex. 3 (Wojcieszek Rep.) ¶¶ 28, 33, 38.
[47] *E.g.*, Ex. 12 (Frantz Dep.) at 237:6–242:3.
[48] *See, e.g.*, Ex. 14 (Frantz Rebuttal Rep. to Wojcieszek) at 2, 11–20. Frantz has repeatedly testified that [redacted] E.g., Ex. 12 (Frantz Dep.) at 266:21–267:9. Accordingly, it was not even as if she was describing a *new* search done to rebut Wojcieszek's conclusions.

The bulk of Frantz's "rebuttal" report bears no relationship to Ellman's opinions. The "conclusion" of her rebuttal report is that [redacted][49] This is a complete mismatch. [redacted]. If anything, Frantz is addressing [redacted], which is an entirely different element of Plaintiffs' claims, and one on which Ellman expressly did not offer an opinion.

When it comes to the "substance" of Frantz's Ellman Rebuttal, it cannot be said to "solely" contradict Ellman, either. Instead, she offers a series of disorganized statements that are generally meant to take shots at Defendants, entirely untethered from (or blatantly misconstruing) Ellman's report. For example:

- [redacted][50] But negligence requires damages *proximately caused by* a breach of a duty. *In re Mednax Servs., Inc., Customer Data Sec. Breach Litig.*, 603 F. Supp. 3d 1183, 1222 (S.D. Fla. 2022). [redacted]. Frantz's opinion does not actually rebut anything Ellman says—it simply offers an inappropriate, unsubstantiated, and inaccurate legal opinion by concluding that [redacted].
- [redacted][51] But these alleged "facts" have absolutely nothing to do with Ellman's opinions about causation. Frantz attempts to sow confusion

[49] Ex. 15 (Frantz Rebuttal Rep. to Ellman) ¶ 26.
[50] Ex. 15 (Frantz Rebuttal Rep. to Ellman) ¶ 4; *see also id.* ¶ 8 (claiming that Ellman [redacted]).
[51] Ex. 15 (Frantz Rebuttal Rep. to Ellman) ¶¶ 13–20.

by [redacted]. But Frantz's opinions about [redacted] are totally irrelevant to Ellman's causation opinions.

- [redacted].[52] These statements bear absolutely no relationship to Ellman's report, as Ellman offered no opinion about [redacted], and therefore are not properly part of a rebuttal report. *See Gaddy*, 2017 WL 3276684, at *3 (a rebuttal must relate to the "same subject matter" and is not the appropriate mechanism to present new arguments); *In re Trasylol Prods. Liab. Litig.*, 2010 WL 4065436, at *2 (S.D. Fla. Aug. 6, 2010) ("Rebuttal testimony is permitted only when it directly addresses an assertion raised by an opponent's experts.") (citing *Bennedict v. United States*, 822 F.2d 1426, 1430 (6th Cir. 1987)).

c. Rebuttal to Art Ehuan.

Frantz's rebuttal to Mednax's cybersecurity expert, Art Ehuan, is, much like her rebuttal to Keith Wojcieszek, a blatant attempt to bolster her original report. Pages 7 through 31 of her Ehuan Rebuttal do nothing more than [redacted]. Accordingly, this is not "intended ***solely*** to contradict" Ehuan's report. Fed. R. Civ. P. 26(a)(2)(D)(ii) (emphasis added). [redacted] does not give Frantz license to take a second bite at the apple by attempting to bolster a point on which Plaintiffs bear the burden of proving. Accordingly, like her rebuttals to Wojcieszek and Ellman, Frantz's rebuttal to Ehuan must be excluded.

5. Frantz's Opinions Regarding NAPA Should Be Excluded.

NAPA Management Services Corporation ("NAPA") is not a defendant in this action and Plaintiffs assert no claims against it.[53] Plaintiffs nevertheless offer Frantz to provide opinions

[52] Ex. 15 (Frantz Rebuttal Rep. to Ellman) ¶¶ 21–25.
[53] ECF No. 115 at 2 (defining "Defendants" as "Mednax, Pediatrix, and American Anesthesiology").

specific to NAPA's conduct. [redacted][54]

It is well-settled that "[e]xpert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993) (internal quotation marks omitted). So, expert opinions and testimony about a non-party, is not relevant, helpful, or admissible. *See, e.g.*, *Golden Unicorn Enters., Inc. v. Audible, Inc.*, --- F. Supp. 3d ----, 2023 WL 4561718, at *7 (S.D.N.Y. July 17, 2023); *Optimum Techs., Inc. v. Henkel Consumer Adhesives, Inc.*, 2006 WL 1663357, at *4–5 (N.D. Ga. June 14, 2006), *aff'd*, 496 F.3d 1231 (11th Cir. 2007). Frantz's opinions regarding NAPA, a non-party to the litigation, should be excluded.

B. The Expert Opinions of Gary Olsen Must be Excluded.

Plaintiffs' damages expert, Gary Olsen, authored a report that purports to quantify, for all of the members of the putative class, two categories of damages. [redacted][59]

Olsen's expert opinions must be excluded for three reasons. First, his [redacted] and related opinions fail all three aspects of the *Daubert* test. Second, his proposed method for

[54] Ex. 5 (Frantz Rep.) ¶ 11(h)–(i).
[55] Ex. 16 (Olsen Rep.) ¶ 7.
[56] Ex. 16 (Olsen Rep.) ¶ 68–69.
[57] Ex. 16 (Olsen Rep.) ¶ 77.
[58] Ex. 16 (Olsen Rep.) ¶¶ 80, 83.
[59] Ex. 16 (Olsen Rep.) ¶¶ 87–90.

calculating damages for [redacted] opinions is unreliable and unhelpful. Finally, his [redacted] is nothing more than multiplication that does not involve any expert analysis.

1. Olsen's [redacted] Fail All Three Requirements for the Admissibility of Expert Testimony.

a. Olsen Uses an Unreliable Methodology to Calculate the Putative Classes' Alleged Damages.

Olsen's [redacted] and corresponding opinions are inadmissible. [redacted][60] [redacted][61]

But, as discussed below, the methodology Olsen used for his [redacted] is hopelessly flawed for four reasons. First, it stumbles out of the gate by relying on data that was selected haphazardly, without any of the hallmarks of reliability. Second, Olsen relies on sources that he has not verified and that he does not understand. Third, Olsen relies on [redacted], which runs headlong into his assumption that [redacted][62] Fourth, Olsen improperly groups dissimilar types of PHI and PII together, vastly oversimplifying his analysis and rendering it hopelessly unreliable.

i. Olsen Does Not Utilize a Reliable Methodology in Selecting the Data Used in His Analysis.

The unreliability of Olsen's [redacted] analysis and related opinions starts from the very first step in his work—the selection of his source materials. [redacted]

[60] Ex. 16 (Olsen Rep.) ¶ 7.
[61] Ex. 16 (Olsen Rep.) ¶¶ 7, 68.
[62] Ex. 16 (Olsen Rep.) ¶ 68.
[63] Ex. 4 (Olsen Dep.) at 69:3–6; 72:21–24.

[redacted].[65]

Gathering data for an expert analysis in this way is not reliable and does not pass muster under Rule 702. [redacted][66] Experts who depend on their own judgment when compiling data must describe the steps they took to gather and consider the data used to form their opinions. *In re Zantac (Ranitidine) Prods. Liab. Litig.*, 644 F. Supp. 3d 1075, 1168–69 (S.D. Fla. 2022) (explaining that experts who, rather than describing how they gathered and assessed their reliance materials, only asserted that they "applied their 'careful judgment' and gave 'scientifically grounded reasons' in assigning weight to each study" they used prevented court from fulfilling its role as a gatekeeper of expert evidence). Olsen, however, does not [redacted].[67] He just aggregates unreliable sources, *see* Section IV.B.1.a.iv, *infra*, and uses his self-selected universe of data to develop [redacted].

By not using a reliable method to select the data for his analysis, Olsen is left with [redacted][68] [redacted].[69] "[A]n expert cannot merely aggregate various categories of otherwise unreliable evidence to form a reliable theory." *In re Abilify (Aripiprazole) Prods. Liab. Litig.*, 299 F. Supp. 3d 1291, 1311 (N.D. Fla. 2018). Because that is all Olsen has done, his methodology is faulty and unreliable and his analysis and opinions should be excluded.

[64] Ex. 4 (Olsen Dep.) at 69:9–71:11.
[65] Ex. 4 (Olsen Dep.) at 135:23–136:6.
[66] Ex. 17 (Lehmann Rep.) ¶ 68.
[67] Ex. 17 (Lehmann Rep.) ¶ 68.
[68] Ex. 17 (Lehmann Rep.) ¶ 68.
[69] Ex. 4 (Olsen Dep.) at 108:19–109:11.

ii. Olsen Does Not Independently Verify the Reliability of His Sources and Uses Information He Does Not Understand.

Olsen's methodology is also unreliable because he relies on information he admittedly does not understand. An expert cannot reliably form an opinion if he or she does not even understand the underlying data. *See Chemipal Ltd. v. Slim-Fast Nutritional Foods Int'l, Inc.*, 350 F. Supp. 2d 582, 592 (D. Del. 2004) (excluding expert in part because he did "not understand the methodology used" in "untested, and unverified marketing projections" that formed "the foundation of a damages calculation").

Olsen candidly admits [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted].[71]

Due to his lack of understanding of the data, Olsen's methodology for determining [redacted] is unreliable.

[70] Olsen defines [redacted] Ex. 16 (Olsen Rep.) ¶ 60.

[71] Ex. 4 (Olsen Dep.) at 112:17–113:5; Ex. 18 (scheds. 1–16 to Olsen Rep.) at sched. 10, rows 12–13.

iii. Olsen's Use of [redacted] Makes His Analysis and Opinions Unreliable.

Olsen's reliance on [redacted] also poses an insurmountable hurdle to the admissibility of his opinions. [redacted].[74]

iv. Olsen Improperly Groups [redacted] into Broad Categories to Develop Unreliable Opinions.

The last aspect of Olsen's unreliability relates to his attempt to group disparate types of PII and PHI together to support his assumed and untested hypothesis that [redacted]

[72] Ex. 4 (Olsen Dep.) at 68:19–22 (emphasis added).
[73] Ex. 4 (Olsen Dep.) at 72:21–24.
[74] *See, e.g.*, Ex. 4 (Olsen Dep.) at 72:21–24, 104:18–105:9 ([redacted]); Ex. 17 (Lehmann Rep.) ¶ 56 [redacted]
[75] Ex. 16 (Olsen Rep.) ¶¶ 44–45, tbls. 9, 10; Ex. 17 (Lehmann Rep.) ¶ 64.
[76] Ex. 17 (Lehmann Rep.) ¶ 64.
[77] Ex. 18 (scheds. 1–16 to Olsen Rep.) at scheds. 9–16.

[redacted]

Olsen's groupings and categorizations are unreliable because they mask important differences between [redacted] and the PII and PHI allegedly impacted in the Cyberattack. [redacted] skews his calculations and causes them to be unreliable and inadmissible. *See City of Tuscaloosa v. Harcros Chem., Inc.*, 158 F.3d 548, 566–67 (11th Cir. 1999) (holding that including data beyond the transactions at issue skews the results and calculations based on such are properly excluded); *Williams v. Tristar Prods., Inc.*, 418 F. Supp. 3d 1212, 1225 (M.D. Ga. 2019) (excluding statistical analysis that included data related to incidents having different characteristics from the product at issue in the litigation).

A review of certain of Olsen's categories readily demonstrates his unreliable analysis:

- [redacted] Beyond not accounting for the differences between the impacted PII and PHI and [redacted], Olsen's analysis gives too much weight to certain types of information. [redacted].[82] Olsen's analysis is thus unreliable.[83]

[78] Ex. 16 (Olsen Rep.) at tbl. 11.
[79] Ex. 17 (Lehmann Rep.) ¶ 66.
[80] Ex. 16 (Olsen Rep.) ¶ 60.
[81] Ex. 17 (Lehmann Rep.) ¶ 89 (citing Olsen Rep. sched. 9, rows 49–50, 54–57, 61–65, 67–70).
[82] Ex. 17 (Lehmann Rep.) ¶ 90.
[83] Ex. 17 (Lehmann Rep.) ¶ 91, fig. 11.

[redacted]

[84] Ex. 17 (Lehmann Rep.) (citing Olsen Rep. scheds. 17–18).
[85] Ex. 4 (Olsen Dep.) at 143:14–19.
[86] Ex. 17 (Lehmann Rep.) ¶ 79.
[87] Ex. 17 (Lehmann Rep.) ¶ 77.
[88] Ex. 17 (Lehmann Rep.) ¶ 86.
[89] Ex. 17 (Lehmann Rep.) ¶ 83–85, fig. 8.
[90] Ex. 17 (Lehmann Rep.) ¶ 93 (citing Olsen Report, scheds. 8, 17–18).
[91] Ex. 17 (Lehmann Rep.) ¶ 94.
[92] Ex. 17 (Lehmann Rep.) ¶ 94.

[redacted] are not comparable to the insurance-related PII and PHI impacted in the Cyberattack.

* * *

Olsen's analysis and [redacted] are riddled with errors. His analysis is incurably flawed in that he does not test his hypothesis. He just improperly assumes the putative class can be compensated for its alleged injury. Olsen thereafter undertakes what can at best be described as a shaky analysis to back into his conclusion. Viewed by themselves and cumulatively, the errors in Olsen's work causes his analysis and [redacted] opinions to be unreliable and inadmissible.

b. Olsen's [redacted] Opinions and Analysis Do Not Fit the Case.

Even if Olsen employed a reliable methodology to render his [redacted] opinions, his analysis would still be inadmissible because it does not "fit" the facts of this case. Olsen's [redacted], more specifically, does not measure Plaintiffs or the putative classes' losses.

Olsen's [redacted] opinions are predicated on the unsupported and incorrect assumption that [redacted], his analysis and opinions on the topic are unhelpful and irrelevant.

2. Olsen's Opinions on [redacted] are Unreliable.

[redacted]

Experts relying on their experience must apply a methodology that has the analytical rigor used by others in their field. *See, e.g.*, *Frazier*, 387 F.3d at 1261 ("[I]f the witness is relying solely or primarily on experience, then the witness must explain *how* that experience leads to the

[93] Ex. 17 (Lehmann Rep.) ¶ 52.
[94] Ex. 17 (Lehmann Rep.) ¶¶ 54–55.
[95] Ex. 17 (Lehmann Rep.) ¶ 58.

conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.") (quoting Fed. R. Evid. 702, advisory committee note to 2000 amendments; *King v. Cessna Aircraft Co.*, 2010 WL 1980861, at *4 (S.D. Fla. May 18, 2010) ("We thus know from *Frazier* that to allow an expert to give a subjective opinion merely because he is an expert and experienced in the field would eliminate the requirement of reliability.").

[redacted] That is not sufficient to move [redacted] from being entirely speculative to being based on a reliable methodology.

Similar shortcomings plague Olsen's selection of [redacted] Incorporating the conclusions of others without engaging in any independent thought or verification, as it appears Olsen did, does not produce opinions that have

[96] Ex. 4 (Olsen Dep.) at 161:2–15.
[97] Ex. 4 (Olsen Dep.) at 161:2–15.
[98] Ex. 4 (Olsen Dep.) at 161:16–21.
[99] Ex. 16 (Olsen Rep.) ¶ 80 n.47; Ex. 4 (Olsen Dep.) at 162:7–11; Ex. 19 Lillian Ablon, Data Thieves: The Motivation of Cyber Threat Actors and Their Use and Monetization of Stolen Data, Testimony Before the U.S. House of Reps., Mar. 15, 2018, at 1 n.1.

adequate indicia of reliability to be admissible as expert testimony. Olsen's calculations regarding [redacted] should be excluded against this backdrop.

Moreover, Olsen's opinions on [redacted] are wholly unreliable and unhelpful. Olsen agrees that [redacted][100] [redacted].[101]

Olsen is wrong. Alternative causes for the injuries must at least be considered by experts. *MidAmerica C2L Inc. v. Siemens Energy Inc.*, 2023 WL 2733512, at *9 (11th Cir. Mar. 31, 2023) ("Our caselaw makes clear that, in order for a methodology to be reliable, the expert must be able to adequately explain how the data he relied on led him to his conclusions. In a case such as this one—where the expert notes that many factors could have contributed to the defect at issue—this means the expert must be able to explain his consideration of the other alternative causes."); *Worley v. Carnival Corp.*, 2023 WL 3028038, at *1 (S.D. Fla. Apr. 20, 2023) (holding that expert's opinion on causation was not reliable because there was "no evidence that [the expert] even *considered* any alternative causes for Plaintiff's claimed injuries"). [redacted].[102] [redacted].[103] Thus, Olsen's [redacted] opinions, as well as

[100] Ex. 4 (Olsen Dep.) at 47:21–48:4.
[101] Ex. 4 (Olsen Dep.) at 154:9–16.
[102] Ex. 20 (Cohen Dep.) at 149:23–154:7; Ex. 21 (Lee Dep.) at 232:5–234:1, 264:19–266:18; Ex. 22 (Lee Dep. Ex. 3); Ex. 23 (Lee Depo. Ex. 5); Ex. 24 (Nielsen Dep.) at 100:1–105:22; Ex. 25 (Nielsen Dep. Ex. 5); Ex. 26 (Rumley Dep. Ex. 8).
[103] Ex. 4 (Olsen Dep.) at 178:3–10.

any other opinions he could possibly develop on that topic, are unreliable, irrelevant, and unhelpful.

3. Olsen's Simple Calculation on [redacted] Does Not Involve Any Expert Analysis.

[redacted][104] To calculate [redacted] Olsen simply [redacted].[105] This type of "simple arithmetic" consisting of basic "multiplication . . . is not beyond the understanding of the average lay person and is therefore not admissible expert testimony." *Bowe v. Pub. Storage*, 2015 WL 11233065, at *4 (S.D. Fla. May 7, 2015). Olsen's "opinion" on [redacted], which is nothing more than simple multiplication, should be excluded.

V. CONCLUSION

For the reasons set forth above, the reports and testimony of Mary Frantz and Gary Olsen must be excluded.

Dated: November 29, 2023

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[104] Ex. 16 (Olsen Rep.) ¶ 22.
[105] *See* Ex. 16 (Olsen Rep.) at 9, tbl. 8.

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LOCAL RULE 7.1(a)(3) CERTIFICATION

Pursuant to Local Rule 7.1(a)(3), I verify that counsel for Defendants conferred via telephone with counsel for Plaintiffs on November 17, 2023 regarding the relief requested in this motion. Plaintiffs oppose the relief requested.

/s/ Kristine McAlister Brown
Kristine McAlister Brown

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2023, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notice of electronic filing to all counsel of record.

/s/ Kristine McAlister Brown
Kristine McAlister Brown