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

PLAINTIFFS' MOTION TO STRIKE AND EXCLUDE OR IN THE ALTERNATIVE LIMIT DEFENDANTS' EXPERTS' TESTIMONY AND REPORTS

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I. INTRODUCTION

The Court must exercise its gatekeeping powers by striking, excluding, or limiting testimony and reports from Defendants' experts who are unqualified, use improper methodology, and fail to offer helpful testimony. Defendants' proposed [redacted] expert – [redacted] – Brian Ellman ("Ellman"), and Defendants' [redacted] expert" Keith Wojcieszek ("Wojcieszek") have no relevant education or specialized training in cybersecurity, lack expertise in the area of cybersecurity, and resultingly use unreliable methodologies when formulating their opinions. Similarly, Defendant MedNax Services, Inc.'s ("MedNax")[1] [redacted] expert, Art Ehuan ("Ehuan"), impermissibly parrots the opinions of others working at his firm and fails to use reliable methodology. Plaintiffs respectfully request this Court exercise its gatekeeping responsibility by striking, excluding, or otherwise limiting the impermissible testimony and reports of Defendants' experts Ellman, Wojcieszek, and Ehuan.

II. FACTUAL BACKGROUND

This case arises from a major and preventable data breach. Mednax Services, Inc. is a physician-led healthcare organization. On May 6, 2020, North American Partners in Anesthesia ("NAPA") acquired American Anesthesiology ("AA"), a Mednax affiliate, from Mednax ("Mednax," "NAPA," and "AA" collectively, "Defendants"). As patients and parents of patients, Plaintiffs were required to provide Defendants with their Protected Health Information ("PHI") and Personally Identifiable Information ("PII") with the assurance that such information would be kept safe from unauthorized access. Defendants negligently breached their duties and betrayed patient trust by failing to properly safeguard and protect Plaintiffs' PII and PHI, thus enabling cybercriminals to access, acquire, appropriate, compromise, disclose, encumber, exfiltrate, release, steal, misuse, and/or view it. Plaintiffs, and approximately 2.5 million other similarly situated persons, had their unencrypted PII and PHI accessed by unauthorized cybercriminals between June 17, 2020, and June 22, 2020, through a successful phishing event in which cybercriminals infiltrated Defendants' inadequately protected Microsoft Office 365-hosted business email accounts where PII and PHI was being kept unprotected (the "Data Breach" or "Breach").

Defendants retained three experts in this case. As set out below, Ellman's testimony and report must be stricken from Defendants' Response to Plaintiffs' Motion for Class Certification [Doc. 250]. Ellman's, Wojcieszek's, and Ehuan's testimonies and reports must also be excluded from trial. Ellman

[1] Mr. Ehuan testified that he is not engaged by AA or testifying on behalf of AA. *Ehuan Deposition*, p. 34:9–13, attached as Exhibit 7.

and Wojcieszek are not qualified to render their opinions. Ehuan impermissibly parrots the opinions of others. Finally, Ellman's, Wojcieszek's, and Ehuan's opinions are unreliable and not helpful.

a. The Court must strike and exclude, or otherwise limit, Brian Ellman's testimony.

[redacted] As such, Ellman's testimony and report must be stricken from Defendants' Response to Plaintiffs' Motion for Class Certification [Doc. 250, pp. 8–9, 13, 19–20, 25] and excluded from trial.

The first glaring reason Ellman's testimony and report must be stricken and excluded stems from Ellman's professed lack of necessary education, training or work experience [redacted] In his report, Ellman claims to be an expert [redacted]. Yet, Ellman admits that he [redacted] training; and, until being employed by his current employer, [redacted]. Ex. 1, Appendix A, p. A-1. Ellman's time at [redacted] has not provided him sufficient experience to render him [redacted] as he lacks any real-world experience or peer-reviewed work. Ex. 1, Appendix A, p. A-1–A-6. Though he purports to render opinions [redacted], Ellman unequivocally admits he is **not** an expert in cybersecurity, data systems, forensic computing, hacking data systems, data security systems, medical identity fraud, the dark web, or HIPPA regulations. *Ellman's Deposition*, pp. 66–69, 75–76, attached as Exhibit 2.

Resultingly, Ellman does not employ reliable methodology to formulate his conclusions. [redacted] The only "technical" value Ellman added involved [redacted] Ex. 1, ¶¶ 46–62. Ellman's own report [redacted] and only regurgitates prior arguments made by Defendants. Ex. 2, pp. 115:15–116:21. Ellman fails to use any objective expertise

to draw many of his opinions and often states that his opinions are based on "logic," invading the province of the jury.

Lastly, Ellman oversteps his role as an expert to provide an unsolicited and unfounded legal opinion [redacted], usurping the role of this Court. [redacted] is a legal opinion that is outside of Ellman's purview. *Plott v. NCL Am., LLC*, 786 F. App'x 199, 203–04 (11th Cir. 2019).

b. The Court must exclude, or otherwise limit, Keith Wojcieszek's testimony.

Defendants retained [redacted] Keith Wojcieszek to [redacted] *Wojcieszek's Report*, ¶ 3, attached as Exhibit 3. [redacted] While Wojcieszek may have provided personal physical protection while serving in the U.S. Secret Service, that experience does not translate to this case. Wojcieszek has no relevant training or education; lacks expertise and experience regarding [redacted] and offers no expert opinions in this case, only a recitation of speculative testimony.

Given his lack of qualifications, Wojcieszek's methodology is also flawed. [redacted]. *Wojcieszek's Deposition*, pp. 69:22-70:14, attached as Exhibit 4. [redacted] *Id.* at pp. 108:7-109:8, 128:9-17. [redacted] *Id.* at p. 161:10–14. [redacted] *id.* at p. 187:11–12, [redacted] *Frantz's Report*, ¶¶ 204–37, attached as Exhibit 5.

c. The Court must exclude, or otherwise limit, Art Ehuan's testimony.

Defendant Mednax retained Art Ehuan to act as [redacted]"" *Ehuan's Report*, ¶ 5, attached as Exhibit 6. Ehuan was also asked to [redacted]" *Ehuan's Rebuttal Report*, pp. 1–2, attached as Exhibit 8.

However, Defendant's proposed expert offers a very limited amount of his own testimony. [redacted] *Ehuan's Deposition*, pp. 155:12–16; 156:23–157:1; 163:11–164:5, attached as Exhibit 7. Ehuan failed to review the same facts and evidence that the primary author of his report did, and he is not sufficiently familiar with [redacted] used to draw these conclusions. *Id.* at pp. 134:8–135:1, 162:13–24.

Moreover, Ehuan failed to use reliable methods or reliably apply those methods in coming to the conclusions he purports to offer in both his report and his rebuttal. Ehuan violated his own methods and standard of practice and failed to conduct a meaningful investigation into [redacted]. [redacted]. at p. 84:8–10. Similarly, Ehuan failed to establish the reliability and accuracy of the "formula" used to draw the conclusions outlined in his report. Ex. 7, pp. 155:12–16; 156:23–157:1; 163:11–164:5. Rather, he blindly parrots the opinions of Mednax and his co-worker, failing to verify the accuracy of these opinions before releasing them as this own.

III. LEGAL STANDARD

Federal Rule of Evidence 702 states:

> 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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. The rule requires district courts to act as a "gatekeeper" to ensure "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *In re Denture Cream Prods. Liab. Litig.*, 795 F. Supp. 2d 1345, 1349 (S.D. Fla. 2011) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993)).

The Eleventh Circuit has identified "three requirements that an expert must meet before his opinions may be admitted." *Hughes v. Kia Motors Corp.*, 766 F.3d 1317, 1329 (11th Cir. 2014). "First,

the expert must be qualified on the matter about which he intends to testify." *Id.* (citing *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998)). "Second, he must employ reliable methodology." *Id.* "Third, the expert's testimony must be able to assist the trier of fact through the application of expertise to understand the evidence or fact in issue." *Id.* The Eleventh Circuit refers to these requirements as the "qualifications," "reliability," and "helpfulness" prongs, respectively. *Quiet Tech. DC–8, Inc. v. Herel-Dubois UK Ltd.*, 326 F.3d 1333, 1340 (11th Cir. 2003). The party offering the expert bears the burden of establishing these three prongs. *Umana-Fowler v. NCL (Bahamas) Ltd.*, 49 F. Supp. 3d 1120, 1122 (S.D. Fla. 2014) (citing *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004)).

A person may qualify as an expert based on his or her "knowledge, skill, experience, training, or education." *Furmanite Am., Inc. v. T.D. Williamson, Inc.*, 506 F. Supp. 2d 1126, 1129 (M.D. Fla. 2007) (citing Fed. R. Evid. 702). In determining whether a witness is qualified, the courts must "examine the credentials of the proposed expert in light of the subject matter of the proposed testimony." *Clena Investments, Inc. v. XL Specialty Ins. Co.*, 280 F.R.D. 653, 661 (S.D. Fla. 2012) (quoting *Jack v. Glaxo Wellcome, Inc.*, 239 F. Supp. 2d 1308, 1314–16 (N.D. Ga. 2002)). In other words, it is the district court's duty to determine whether an expert is qualified to testify **competently** regarding the matters he intends to address. *City of Tuscaloosa,* 158 F.3d at 562.

Under Rule 702 and *Daubert*, courts may only admit expert testimony if the expert's methodology is sufficiently reliable. *Daubert*, 509 U.S. at 589. In ascertaining such reliability, courts may consider whether (1) the expert's methodology can be tested; (2) the expert's scientific technique has been subjected to peer review and publication; (3) the method has a known rate of error; and (4) the technique is generally accepted by the scientific community. *Quiet Tech. DC–8, Inc*, 326 F.3d at 1340. This list, however, is not exhaustive. *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1292 (11th Cir. 2005). Courts may also consider other factors, such as, whether the expert's methodology has been contrived to reach a particular result. *Id.*

As the gatekeeper, the judge is charged with conducting a preliminary assessment of all reasoning and methodology underlying an expert's testimony and ensuring that it is scientifically valid and can properly be applied to the facts at issue. *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1335 (11th Cir. 2010). While this gatekeeping role requires courts to focus on principles and methodologies rather than the conclusions they generate, conclusions and methodology are not entirely distinct from one another. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141–42 (1997). As the U.S. Supreme Court explained:

> Trained experts commonly extrapolate from existing data. But 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 [ ]offered.

Id. at 146 "Courts are cautioned not to admit speculation, conjecture, or inference and a court properly excludes expert opinion when a 'leap from data to opinion [is] too great.'" *Umana-Fowler*, 49 F. Supp. 3d at 1122 (quoting *Hughes v. Kia Motors Corp.*, 766 F.3d 1317, 1331 (11th Cir. 2014)) (addition in original). A key determination in whether an expert's opinion is reliable or merely an *ipse dixit* is **whether the expert's theory is capable of being tested.** *In re Zantac (Ranitidine) Produces Liab. Litig.*, 644 F. Supp. 3d 1075, at 1234–35 (S.D. Fla. 2022).

Finally, expert testimony must be helpful to be admissible. Expert testimony is helpful to the trier of fact only "if it concerns matters that are beyond the understanding of the average lay person." *Frazier*, 387 F.3d at 1262. An expert opinion that may confuse the trier of fact is not helpful. *Id.* at 1258. "Because of the powerful and potentially misleading effect of expert evidence," courts must take care not to allow misleading and prejudicial opinions to influence the finder of fact. *Id.* at 1263.

IV. SUMMARY OF OPINIONS

a. Brian Ellman's Opinions

[redacted]

[redacted]

b. **Keith Wojcieszek's Opinions**

[redacted]

[redacted]

c. **Art Ehuan's Opinions**

[redacted]

[redacted]

V. ARGUMENT

a. Brian Ellman's Testimony and Report Must be Stricken and Excluded.

"When an expert's report or testimony is critical to class certification, . . . a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion." *Sher v. Raytheon Co.*, 419 F. App'x 887, 890 (11th Cir. 2011). This may require the court to perform a full *Daubert* analysis before certifying the class. *Id.* "The [district] court must also resolve any challenge to the reliability of information provided by an expert if that information is relevant to establishing any of the Rule 23 requirements for class certification." *Id.*

Brian Ellman's testimony and report must be stricken before any Rule 23 Class Certification ruling, and excluded from trial, because: (1) Ellman is not qualified and his opinions are not helpful; (2) Ellman does not use a reliable methodology; and (3) Ellman offers impermissible legal conclusions.

1. Ellman is Not Qualified on the Matter About Which He Intends to Testify, and, Thus, His Opinions Are Not Helpful to the Jury or the Court.

Ellman intends to offer opinions about [redacted] Ellman admits point blank he knows nothing about these subjects. Ex. 2, pp. 66–69, 75–76. As such, he is unqualified to render a helpful and reliable opinion on [redacted].

Ellman does not possess a sufficient education or background in [redacted] Ellman does not have a degree [redacted]. Ex. 1, Appendix A, p. A-1. From his business education, like many students completing their general education requirements, [redacted] as an undergraduate and M.B.A. student. Ex. 2, 10:19–11:5. He never obtained any formal or informal mastery [redacted] Ex. 1, Appendix A, p. A-1. At Ellman's current job, he claims to have gained experience [redacted] However, his consulting work lacks any actual real-world experience or education and, rather, is centered around testifying as a paid expert in cases. *Id.* Ellman's work has never been published in any peer-reviewed economic publications. *Id.* at pp. A-1–A-6.

Similarly, Ellman is not qualified to render an opinion on [redacted][2] [redacted] Ex. 1, ¶¶ 19, 25–26, 36. Ellman admitted he had no expertise [redacted] Ex. 2, p. 68:6–18. Ellman also admits that he is not an expert in [redacted] ex. 2, p. 76:16–21, and he is not qualified as an expert in cybersecurity, the hacking of data systems, HIPAA regulations, the functionality of the dark web, or identity theft, *id.* at pp.66–69, 75–76. As such, his opinions fail to go beyond mere speculation.

As a result, Ellman's conclusions [redacted], and Defendants' reliance on these opinions in their Response to Plaintiffs' Motion for Class Certification [Doc. 250, pp. 8–9, 13, 19–20, 25], must be stricken. When asked about the "expertise, training, or education" that provided the "foundational support" for this opinion, he simply answered, vaguely, [redacted]." Ex. 2, p. 108:5–13. His report further states, [redacted]" Ex. 1, ¶ 30. When asked what training, expertise, and experience provides the basis for that opinion, he responded, "[redacted] Ex. 2, 113:8–21 (emphasis added).

Ellman's report is comprised entirely of these [redacted] conclusions because Ellman is not qualified to offer any sort of scientific, technical, or other specialized knowledge to render an opinion beyond that of a layperson. Ellman's own testimony has made it clear that he does not possess adequate knowledge or qualifications to render an opinion [redacted] Rather,

[2] Throughout their response to Plaintiffs' Motion for Class Certification, Defendants cite to and hold out as an expert opinion, Ellman's conclusion that [redacted] *See* [Doc. 250, pp. 8–9, 25]. Ellman is not qualified to render an opinion on [redacted] Rather, Ellman's testimony impermissibly parrots Defendants' opinions, *La Gorce Palace Condominium Ass'c, Inc. v. Blackboard Specialty Ins. Co.*, 117 F. Supp. 3d 1300, 1306 (S.D. Fl. 2022), and is not helpful to the jury, *Frazier*, 387 F.3d at 1262.

from his own words, [redacted] – *i.e.,* a personal non-scientific opinion that would fail to aid the jury or this Court in any way in their fact-finding duties. *Frazier*, 387 F.3d at 1262.

2. Ellman Uses Unreliable Methodology and Renders an Unhelpful Report.

Ellman's "methodology" is comprised of [redacted] that lead him to *ipsi dixit* conclusions. In order to draw his opinion [redacted] Ex. 1, Appendix C, ¶ 7. They then used those same entry level [redacted] The proper characterization of this work product is [redacted], both of which can be accomplished by any lay witness with an understanding of Excel.

Once the PII and PHI was in a single spreadsheet, Ellman and his team [redacted] Ex. 1, Appendix C, ¶ 7. [redacted]. *Id.* at ¶ 16, Appendix C, ¶ 7. Ellman does not offer any insight or use of critical database management skills, data interpretation, or independent analysis beyond [redacted] As stated above, Ellman does not possess sufficient scientific, technical, or specialized knowledge or render these opinions without a further analytical process. His contributions were non-technical and employed no methodology that can be tested. Any effort by Ellman to elaborate on [redacted] is speculation and at best a lay person's guess. Ellman's testimony and report cannot be permitted at trial, and Defendants' reliance on such in their Response to Motion for Class Certification, [Doc. 250, pp. 8–9, 13, 19–20, 25], must be stricken.

3. Ellman's Testimony and Report Includes Impermissible Legal Conclusions.

Generally, "expert testimony will not assist the trier of fact and will be excluded if it 'offers nothing more than what lawyers for the parties can argue in closing arguments.'" *Leroux v. NCL (Bah.) Ltd.*, No. 15-23095-CIV-WILLIAMS/SIMONTON, 2017 WL 2645755, at *9 (S.D. Fla. June 19, 2017) (citing *Frazier*, 387 F.3d at 1262–63). "An expert witness may testify as to his opinion on an ultimate issue of fact, but he 'may **not** testify as to his opinion regarding ultimate legal conclusions.'" *Id.* (quoting *United States v. Delatorre*, 308 F. App'x 380, 383 (11th Cir. 2009)) (emphasis added); *Plott*, 786 F. App'x at 203–04. Furthermore, "merely telling the jury what result to reach is unhelpful and inappropriate." *Leroux*, 2017 WL 2645755, at *9.

Ellman's opinions, [redacted], usurp this Court's role in making legal determinations. Ex. 1, p. 13 (Section IV). In this case, it is the duty of the Court to determine [redacted] Ellman's opinion robs the Court of its duty to make such determination and provides an impermissible legal conclusion on how the Court should rule. *Chappell v. Carnival Corp.*, No. 21-cv-23787-SMITH/DAMIAN, 2023 WL 2714025, at *6 (Mar. 30, 2023) (finding that expert's testimony regarding ultimate causation of plaintiff's injuries was an impermissible legal conclusion that invades the province of the jury and was not helpful). *See U.S. v. Masferrer*, 367 F. Supp. 2d 1365, 1376 (S.D. Fla. 2005) (excluding expert testimony that "will not assist the trier of fact, but merely tell the jury the result it should reach"). By rendering such an opinion, he oversteps the role of expert and supplants himself into a role exclusively reserved for the Court.

b. Keith Wojcieszek's Testimony and Report Must be Excluded.

Keith Wojcieszek's testimony and report must be excluded because: (1) Wojcieszek is not qualified; and (2) Wojcieszek does not use reliable methodology.

1. Wojcieszek is Not Qualified on the Matter About Which He Intends to Testify.

The Committee Notes to the 2000 Rule 702 Amendments expressly state that,

> 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. The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'

Fed. R. Evid. 702 Advisory Committee's Note (2000 Amends.). "Merely demonstrating that an expert has experience . . . does not automatically render every opinion and statement by that expert reliable." *Hendrix ex rel. G.P. v. Evenflo Co.*, 609 F.3d 1183, 1201 (11th Cir. 2010).

This Court must exclude Wojcieszek's opinion because he is not an expert on the matter in which he intends to offer expert opinions. Wojcieszek's entire report is premised on his former employment as a Secret Service agent. Ex. 3, ¶ 7. However, from 2002 to 2010 and from 2012 to 2015, which spans a majority of Wojcieszek career with the Secret Service, Wojcieszek worked *exclusively* on physical security. *Id.*, at Appendix A; Ex. 4, p. 25:2–16; 30:14–23; 31:12–25. From 2010 to 2012, Wojcieszek spent a limited amount of time with the Secret Service's Cyber Intelligence Division. *Id.* at pp. 31:18–32:6. As part of his assignment, he used false online identities and went physically undercover in Eastern Europe to lure individuals and cybercriminals who had committed credit card fraud. *Id.* at pp. 25:23-26:7. However, Wojcieszek admitted that he was not responsible for any

cybercriminal investigations during this time. Ex. 4., pp. 30:24–31:3. Moreover, Wojcieszek never worked on [redacted] his tenure with the Secret Service's Cyber Intelligence Division. The data involved and methods used by the attackers in this case bear no resemblance to Wojcieszek's job responsibilities as a Secret Service agent.

Wojcieszek's time at Kroll, Inc. similarly is devoid of meaningful experience with PHI, [redacted]. Wojcieszek has never been published or cited in any peer-reviewed article on sophisticated phishing attacks. Ex. 3, Appendix A; Ex. 4, p. 52:18–20. 25 out of the 28 articles listed on his CV are blog posts from his employer's website. Ex. 3, Appendix A; Ex. 4, pp. 52:11–53:11. None of his published material specifically address PHI. Ex. 3, Appendix A; Ex. 4, pp. 55:12–24. [redacted] *Id.* at p. 186:21–24. [redacted] Ex. 5, ¶ 6. Wojcieszek does not have the "experience, training, or education" to consider and appreciate his own clients' position: [redacted]. *Id.*

Wojcieszek fails to show that his experience as a Secret Service Agent, focusing on physical security and credit card fraud investigations, and his time at Kroll, Inc. qualifies him to opine on [redacted].

2. Wojcieszek's Uses Unreliable Principles and Methods.

Wojcieszek's report employs an uncertain methodology that cannot be tested or reproduced. His methodology, which he does not make available for cross-examination, has been neither peer reviewed nor generally accepted. As such, this Court must exclude Wojcieszek's testimony based on its unreliable methods and principles.

i. Wojcieszek's method was contrived to reach [redacted]

An expert may not render speculative testimony that the absence of evidence is evidence of absence. In *U.S. v. Frazier*, the Eleventh Circuit affirmed a district court's decision to exclude an expert's opinion on the grounds that the expert "had not provided any specific basis—quantitative, empirical or otherwise—for his opinion." *Frazier,* 387 F. 3d at 1255. There, the government

prosecuted a defendant for the abduction and rape of a young woman. *Id.* at p. 1250. The defendant sought to introduce expert forensic opinion from a former police officer who had worked on "thousands of cases, including between 150 and 250 sexual assault cases," and had additionally worked for thirteen years in the medical examiner's office. *Id.* at p. 1252. The forensic consultant opined that, "no forensic evidence [existed] to substantiate the claim of rape." *Id.*

> In explaining its decision to exclude the forensic consultant's opinion, the district court said,
>
> I do have a problem with [the expert] saying that that's what's [commonly] found, and if it's not there, I don't believe there was a rape . . . when you start trying to prove that there is no case because they didn't find [evidence], you have got to have something more than just [the expert's] opinion. You need something showing some study.

Id. at p. 1255. The Eleventh Circuit added that the forensic consultant "offered precious little in the way of a reliable foundation for his opinion" and affirmed the district court's decision to exclude his opinion, finding an "absence of a sufficiently verifiable, quantitative basis" for it. *Id.* at p. 1265.

Here, just like the forensic consultant expert in *Frazier*, Wojcieszek seeks to offer an opinion that [redacted] Such logic is devoid of any verifiable methodology.

Wojcieszek did not review, and his report purposefully excludes, [redacted]. Ex. 4, p. 161:10–17. Plaintiffs' own expert reviewed this information, and subsequently found [redacted]. Ex. 5, ¶ 27. In fact, Plaintiffs' expert found [redacted] *Id.* at ¶ 29.

Wojcieszek admitted that [redacted] Ex. 3, ¶ 23. Yet, Wojcieszek inadequately concludes, [redacted] *Id.* at ¶ 32. [redacted]. Ex. 4, pp. 69:22–70:14. [redacted]. *Id.* [redacted]. *Id.* at pp. 108:14–109:8. [redacted] *Id.* at p. 128:9–17.

Resultingly, Wojcieszek's report did not expose [redacted] *Id.* at p. 80:1–19. Instead, like the forensic consultant in *Frazier* who appealed to his experience without any quantifiable or verifiable method that could be cross-examined, Wojcieszek nebulously appealed to [redacted] *Id.* [redacted] *Id.* at pp. 65:16–66:3. When asked why he did not reveal documentation showing [redacted] *Id.* at pp. 69:22–70:14, 101:13–104:8. Given Wojcieszek's lack of knowledge on how his team conducted their search, his "method" for rendering this conclusion is not capable of being tested or replicated. *In re Zantac (Ranitidine) Produces Liab. Litig.*, 644 F. Supp. 3d at 1234–35.

Wojcieszek's limited investigation is exacerbated by his lack of knowledge regarding [redacted]

[redacted]

Id. at pp. 92–94.

[redacted]. Ex. 3, ¶¶ 32–33; Ex. 4, pp. 135:7–136:13, 138:2–13. To arrive at this unsubstantial opinion, Wojcieszek's team, not Wojcieszek, [redacted]. Ex. 3, Appendix D. Not only did his team not validate [redacted], clearly creating an unreliable set of data points and facts. Ex. 4, pp. 135:7–136:13, 138:2–13. Further, and what is perhaps most telling about the deficiencies in his work, is that Wojcieszek's opinion/finding was [redacted]. Ex. 4, pp. 197:6-199:7. This is not an "expert conclusion" but rather a recitation of a partial, and sorely underdeveloped, investigation.

Overall, Wojcieszek cannot show that [redacted]. Rather, his methods are more akin to "methodology [that] has been contrived to reach a particular result." *Rink*, 400 F.3d at 1292.

ii. Wojcieszek offers only speculative testimony [redacted]

Wojcieszek speculates [redacted] Ex. 3, at ¶ 37–42. [redacted] Ex. 4, pp. 200–01. Yet, Wojcieszek did not rely on any documents, treatises, textbooks, or the [redacted] *Id.* at p. 161:10–14; 201:1–18. Rather, he relies exclusively on his "training and experience" to speculate as to [redacted]. *Id.* at

p. 201:1–18. [redacted]. [redacted]" ex. 3, ¶ 41, [redacted]. Sjouwerman, Stu, *Children's Full Personal Data and SSNs Are Being Sold on the Dark Web*, KnowBe4 (Dec. 21, 2022) https://blog.knowbe4.com/childrens-full-personal-data-and-ssns-are-being-sold-on-the-dark-web. [redacted]. Ex. 5, ¶ 6. Contradicting his own opinion, Wojcieszek ultimately admitted that [redacted] Ex. 4, pp. 184:10–185:3. In this case, Wojcieszek's report merely speculates that [redacted]

c. Art Ehuan's Testimony and Reports Must be Excluded.

Art Ehuan's testimony, including his expert report and rebuttal report, must be excluded because: (1) Ehuan is parroting the opinions of others; and (2) Ehuan failed to use reliable methodology or reliably apply those methods.

1. Ehuan is Acting as a Mouthpiece for Others.

Rule 703 requires that expert testimony be based on firsthand observation of witnesses, on facts or data presented at the trial, or on facts and data presented before the trial. *La Gorce Palace Condominium Ass'c, Inc. v. Blackboard Specialty Ins. Co.*, 117 F. Supp. 3d 1300, 1306 (S.D. Fl. 2022). Under this rule, an expert may not rely on the testimony of another expert if that testimony is not reasonably reliable. *Id.*; Fed. R. Evid. 703. Even so, an expert may not "under the guise of giving expert testimony . . . [,] become the mouthpiece of the witnesses on whose statements or opinions the expert purports to base his opinion." *La Gorce Palace Condominium Ass'c, Inc.*, 117 F. Supp. 3d at 1306 (quoting *Factory Mut. Ins. Co. v. Alon USA L.P.*, 705 F.3d 518, 524 (5th Cir. 2013)). An expert, rendering an opinion or adopting an opinion, for which he has no understanding of the underlying facts or methodology used, raises the same concerns as hearsay in that the proffered testimony denies the opponent his or her right to cross examine the witness. *La Gorce Palace Condominium Ass'c, Inc.*, 117 F. Supp. 3d at 1306.

In order to rely on and adopt the findings of another expert, such that the testimony is admissible, (1) the relied upon testimony must be either admissible at trial, in its own right, or reasonably relied on by experts in that field, and (2) the expert must adequately assess the validity and

underlying information of the opinions relied upon such that the expert may be cross examined it. *Id.* At the end of the day, the expert witness must be giving his *own* opinion, not parrotting the opinion of others. *Schoen*, 638 F. Supp. 3d at 1335 (citing *PODS Enterprises, Inc. v. U-Haul Int'l, Inc.*, No. 812CV01479T27MAP, 2014 WL 12628662, at *2 (M.D. Fla. July 2, 2014)). It is the courts' duty to ensure that an expert witness is sufficiently familiar with the reasoning and methodology of the adopted opinion in order to be allowed to present such opinions to a jury. *La Gorce Palace Condominium Ass'c, Inc.*, 117 F. Supp. 3d at 1306.

Here, Ehuan merely parrots the opinion of his co-worker, [redacted] fact, Ehuan holds his reports out to be "[redacted] opinion." *Id.* at p. 225:15.

In reviewing documents pertinent to his testimony, Ehuan admits that he "just briefly glanced" or "probably didn't see" all of the documents. *Id.* at p. 134:8–135:1 ([redacted]; p. 193:6–17 ([redacted]); p. 142:9–23 ([redacted]); p. 160:21–161:3 ([redacted]); p. 152:23–153:3 ([redacted]); p. 91:7–25 ([redacted]); p. 240:4-15 ([redacted]); p. 192:9–12 ([redacted]).

It's clear that Ehuan is neither rendering his own opinions, nor is he sufficiently familiar with the evidence and facts at issue in this case. Rather, Ehuan is merely acting as a mouthpiece and parroting the testimony and opinions of his coworker, who actually reviewed and drafted the report. Allowing Ehuan's testimony to be admitted at trial would substantially prejudice Plaintiffs by robbing them of their right to meaningfully cross examine him on "his" opinions.

2. Ehuan Failed to Use Reliable Methods and Reliably Apply Those Methods.

Failure to show the reliability of each step an expert takes in making his conclusion will result in a fatal defect under *Daubert*. *McClain v. Metabolife Intern., Inc.*, 401 F.3d 1233, 1245 (11th Cir. 2005). "The *Daubert* 'requirement that the expert testify to scientific knowledge–conclusions supported by good grounds for each step in the analysis–means that *any* step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible.'" *Id.* (quoting *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2002)). In this case, Ehuan failed to comply with his own standards of proper methodology, did not reliably apply [redacted], and conducted his research in such a manner as to generate a specific, Defendant-favorable, opinion.

i. Ehuan failed to comply with his own standards of methodology.

An expert's testimony is rendered unreliable when that expert violates his own standard of proper methodology. *In re Rezulin Products Liability Litigation*, 309 F. Supp. 2d 531, 563 (S.D.N.Y. 2004) (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999)). [redacted]. Ex. 7, p. 154:7–155:1. [redacted] *Id.* at p. 142:25–143:7. As Ehuan explained in his deposition, [redacted] *Id.* at p. 142:18–21. [redacted]. *Id.* at pp. 160:21–161:3; 192:5–8. [redacted] *Id.* at p. 86:6–11. Rather, in coming to his conclusions [redacted].

ii. Ehuan unreliably applied the [redacted].

In coming to his conclusions, Ehuan used an [redacted]. *Id.* at p. 155:2–6. Ehuan had no hand in drafting or developing the framework. *Id.* at p. 155:7–13. In fact, Ehuan could not say with any certainty how or what portions of the framework were used. *Id.* at p. 155:15–24. Ehuan did not take part in inputting information into the framework. *Id.* at p. 163:16–164:9. To date, Ehuan has failed to make this framework available to Plaintiffs for inspection. Both Plaintiffs and the Court are kept in the dark on Ehuan's elusive framework. The jury will fair no better since the framework will not be in evidence nor presented at trial.

Moreover, Ehuan cannot make any statements or assurances that this framework adequately considered sufficient information to determine [redacted], in violation of Ehuan's own standards. The framework did not review [redacted] – [redacted] – [redacted] *Id.* at p. 92:13–93:3. [redacted]. *Id.* at p. 170:11–18. Rather, Ehuan and the [redacted] merely considered whether [redacted] *Id.* at p. 170:5–10. The framework that Ehuan used to form his opinions likewise did not consider [redacted]. *Id.* at p. 158:6–10. As such, Ehuan cannot establish a reliable application of this framework.

iii. Ehuan's methodology was contrived to reach a particular result.

Experts may not pick and choose from readily available, vital evidence and intentionally ignore contradictory information in order to reach a specific conclusion. *Rink*, 400 F.3d at 1292; *In re Rezulin Products Liability Litigation*, 309 F. Supp. 2d at 563. Here, Ehuan intentionally ignored or failed to conduct an adequate inquiry into relevant and readily available evidence regarding [redacted] Ex. 7, p. 143:8–13; *see, e.g.*, p. 143:14–25 ([redacted]); p. 92:9–12 ([redacted]); p. 211:7–212:8, 241:15–24 ([redacted]); p. 193:20–194:6 ([redacted]. Ehuan cannot claim to have used reliable methods in rendering his report and rebuttal when those methods were intentionally curate to obtain Mednax's desired result.

VI. CONCLUSION

Defendants' proposed experts Ellman and Wojcieszek are not qualified to render their opinions. Further, Ellman, Wojcieszek, and Ehuan offer no testimony which is reliable or helpful to the fact finders. If permitted in court, such testimony would prejudice the Plaintiffs and the Class and confuse the jury. For the above reasons, Plaintiffs ask this Court to exercise its important gatekeeping function and strike Ellman's testimony from Defendants' Response to Plaintiffs' Motion for Class Certification [Doc. 250], and exclude or otherwise limit Ellman's, Wojcieszek's, and Ehuan's impermissible testimony and reports.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I hereby certify that on November 17, 2023, counsel for the movant has conferred with all parties and non-parties who may be affected by the relief sought in the underlying Motion in a good faith effort to resolve the issues raised in the motion and have been unable to do so.

/s/ William B. Federman
William B. Federman

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 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/ William B. Federman
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