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

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Defendants Mednax Inc., Mednax Services, Inc., Pediatrix Medical Group, and Pediatrix Medical Group of Kansas, P.C. (collectively, "Mednax") and American Anesthesiology, Inc. ("AA" and together with Mednax, "Defendants"), respectfully submit this Response in Opposition to Plaintiffs' Motion to Strike and Exclude or in the Alternative Limit Defendants' Experts' Testimony and Reports ("Motion" or "Mot.") (ECF No. 258).

## I. INTRODUCTION

In their Motion to Strike and Exclude, Plaintiffs seek to preclude the reports and testimony of three of Defendants' experts: (1) Mr. Brian Ellman; (2) Mr. Keith Wojcieszek; and (3) Mr. Art Ehuan. None of Plaintiffs' arguments have merit. Plaintiffs misrepresent Defendants' experts' qualifications and mischaracterize their opinions in an effort to prevent the finder of fact from considering their reports and testimony because they do not fit Plaintiffs' contorted and unsupported narrative of this case. *See generally* Defs' Mots. for Summ. J. (ECF Nos. 254, 260). Because all three experts are qualified professionals, utilize reliable and helpful methodologies, and present appropriate and permissible opinions, their testimonies and reports are admissible. For reasons set forth below, none of Plaintiffs' concerns warrant exclusion of *any* of Defendants' experts, and, at best, are matters suited for cross-examination.

## II. BACKGROUND

***Brian Ellman*** is a Principal at Analysis Group, Inc., an economic, financial, and strategy consulting firm. Ex. 1 (Ellman Rep.) ¶ 1. Mr. Ellman has over 17 years of experience as an economic consultant and specializes in the application of microeconomics, statistics, and finance to complex commercial litigations. *Id.* ¶ 2. He has conducted economic and statistical analyses in a wide variety of industries and has authored articles on a number of topics, including the assessment of causation and harm in data breach litigation. *Id.* ¶¶ 2–3. Defendants retained Mr. Ellman to assess, [redacted] *Id.* ¶ 16. Mr. Ellman's report ultimately concludes that [redacted] *Id.* ¶ 65.

Plaintiffs seek to strike Mr. Ellman's testimony and report, arguing he is not qualified as an expert, his methodology is unreliable, and his opinions include impermissible legal conclusions. Mot. at 9–12. All of these arguments fail. First, Mr. Ellman is eminently qualified to offer his opinions on [redacted] given his many years of experience and training as a professional economist. Next, the data analysis Mr. Ellman incorporated into his analytical framework required the technical skill and specialized knowledge of an expert, far beyond the reaches of a layperson. Finally, Mr. Ellman's report presents no legal conclusions—and Plaintiffs do not point to even one—that would require its exclusion.

***Keith Wojcieszek*** is a Managing Director with Kroll, Inc., and the leader of its Cyber Threat Intelligence program. In that role, Mr. Wojcieszek manages cybercrime, data loss, threat intelligence, and incident response investigations. Ex. 2 (Wojcieszek Rep.) ¶ 6. He specializes in cyber threat intelligence, cybersecurity, incident response, and digital forensics, performs hundreds of investigations involving the deep and dark web annually, and has more than twenty years of experience beginning with his cybersecurity training by the United States Secret Service. *See* Ex. 3 (Wojcieszek Dep.) at 19:14–21, 80:4–13. To demonstrate that, among other things, [redacted], Mr. Wojcieszek conducted [redacted].

Plaintiffs seek to exclude Mr. Wojcieszek's report and testimony, arguing he is not qualified and that his methodology is neither peer reviewed nor generally accepted. Mot. at 13. Both of Plaintiffs' arguments as to Mr. Wojcieszek fail. First, Mr. Wojcieszek is unequivocally qualified to render his opinions in light of his extensive cyber threat intelligence and cybersecurity experience. Second, Mr. Wojcieszek properly relied on his training and experience [redacted]

***Art Ehuan*** is a cybersecurity expert retained by Defendants to assess [redacted] Ex. 4 (Ehuan Rep.) ¶ 5. Mr. Ehuan is the Vice President of Palo Alto Networks Unit 42, which provides cybersecurity and advisory services related to risk management and incident response for private organizations and

governments, and has approximately thirty years of experience in the cybersecurity industry. *Id.* ¶ 7. He regularly provides cybersecurity advisory services to corporations regarding cyber risk management and mitigation. *Id.* [redacted]

Plaintiffs seek to exclude Mr. Ehuan's analysis and testimony, arguing he merely parrots the opinions of others and fails to either use reliable methodology or reliably apply those methods. Mot. at 17. Both of Plaintiffs' arguments as to Mr. Ehuan fail. First, Mr. Ehuan properly utilizes support from a colleague in drafting his report. Second, Mr. Ehuan's methodology is reliable because he reviewed the necessary information to generate his report and applied that information to established frameworks for analysis.

## III. LEGAL STANDARD

When analyzing the admissibility of expert evidence, a district court has "broad discretion in determining whether to admit or exclude expert testimony." *Evans v. Mathis Funeral Home*, 996 F.2d 266, 268 (11th Cir. 1993). "The presumption is that expert testimony is admissible, so that once a proponent has made the requisite threshold showing, further disputes go to weight, not admissibility." *Simmons v. Ford Motor Co.*, 576 F. Supp. 3d 1136, 1140 (S.D. Fla. 2021). Thus, "the rejection of expert testimony is the exception rather than the rule." *Moore v. Intuitive Surgical, Inc.*, 995 F.3d 839, 850 (11th Cir. 2021).

## IV. ARGUMENT AND CITATIONS TO AUTHORITY

### A. The Opinions of Brian Ellman Should Not Be Stricken or Excluded.

#### 1. Mr. Ellman Is an Eminently Qualified Expert Whose Opinions [redacted] Will Assist the Trier-of-Fact.

Plaintiffs superficially critique Mr. Ellman as unqualified because [redacted] Mot. at 9. That is incorrect. As a threshold matter, Rule 702 plainly does not require that [redacted] to be qualified as an expert. Fed. R. Evid. 702 (a witness may be qualified as an expert by virtue of his "knowledge, skill, experience, training, or education"); *Southpoint Condo. Ass'n v. Lexington Ins. Co.*, 2020 U.S. Dist. LEXIS 115009, at *13 (S.D. Fla. June 30, 2020) (declining to exclude expert with "extensive background" in the relevant industry because "an individual may be qualified as an

expert based on one's knowledge, skill, experience, or training ***irrespective of one's academic degrees***.") (emphasis added). Moreover, Mr. Ellman [redacted]. Ex. 5 (Ellman Dep.) at 15:4–16:11. Mr. Ellman also has over twenty years of professional experience in [redacted] Ex. 1 (Ellman Rep.) ¶ 2. During this time, Mr. Ellman has [redacted] Ex. 5 (Ellman Dep.) at 29:15–32:7. This includes [redacted][1] *Id.* at 18:5–20:19; 32:8–34:18.

Plaintiffs try to undermine Mr. Ellman's extensive professional experience by claiming that his opinion [redacted] Mot. at 11. But Mr. Ellman's opinions are based on [redacted] Mr. Ellman's report, his CV, and his deposition testimony all demonstrate that he is eminently qualified to serve as an expert in this matter.

Plaintiffs also attempt to undermine [redacted] by arguing that he is nevertheless [redacted] Mot. at 2. But Mr. Ellman was [redacted]

[1] Plaintiffs critique Mr. Ellman on the basis that [redacted] Mot. at 9. Defendants would point the Court to [redacted] In contrast, Plaintiffs' damages expert, Gary Olsen, admitted that [redacted] Ex. 6 (Olsen Dep.) at 51:3–9. Plaintiffs cannot have it both ways.

[redacted][2] Ex. 1 (Ellman Rep.) ¶ 16. [redacted] *See* Ex. 5 (Ellman Dep.) at 68:6–11 [redacted] *Evanston Ins. Co. v. Xytex Tissue Servs., LLC*, 378 F. Supp. 3d 1267, 1281 (S.D. Ga. 2019) ("Authority does not require an expert to be qualified as to all issues that may arise in a particular case. Before his testimony may be admitted, the expert must be 'qualified to testify competently regarding the matters *he intends to address*.'" (quoting *City of Tuscaloosa v. Harcros Chems.*, 158 F.3d 548, 562 (11th Cir. 1998)); *see also infra* note 3.

Plaintiffs further argue that Mr. Ellman's opinion should be excluded because he [redacted] Mot. at 10. Again, Mr. Ellman rendered no such opinions. In his report, he discusses [redacted] Ex. 1 (Ellman Rep.) ¶¶ 10, 27. But it is not one of *his* opinions. And Mr. Ellman [redacted]

Finally, Plaintiffs' efforts to exclude Mr. Ellman on the grounds that he "intends to offer opinions [redacted] Mot. at 9, should be disregarded outright. As Mr. Ellman repeatedly testified during his deposition—and explicitly asserts in his report—he [redacted] Ex. 5 (Ellman Dep.) at 95:9–11; 104:10–16; 105:22–106:5; Ex. 1 (Ellman Rep.) ¶ 16. As Plaintiffs are well aware, Mr. Ellman is not Defendants' damages expert. That role is

[2] Plaintiffs' attempt to exclude Mr. Ellman on this basis is hypocritical, as their damages expert, Gary Olsen, [redacted] Ex. 6 (Olsen Dep.) at 40:1–15.

filled by Defendants' rebuttal expert, Dr. Jee-Yeon K. Lehmann, who Plaintiffs have not sought to exclude. Mr. Ellman's qualifications as a damages expert are simply not at issue in this case.

**2. Mr. Ellman's Opinions Provide a Reliable Synthesis of Voluminous Data that Assists the Trier of Fact.**

In arguing that Mr. Ellman's opinions should be excluded [redacted] Mot. at 11, Plaintiffs both ignore the detailed technical analyses set forth in the report and its appendices, and wholly mischaracterize Mr. Ellman's opinions. Without Mr. Ellman's expert work, [redacted]; thus, Mr. Ellman's report plainly will assist the factfinder.

"To determine whether an expert witness will assist the [trier of fact], the proper inquiry is whether a layman is competent to determine the particular issue for himself, or whether he cannot reasonably form his own conclusion on that issue without the assistance of the expert." *Medina v. 3C Constr. Corp.*, 2005 WL 5960937, at *2 (S.D. Fla. Sept. 26, 2005). "Expert testimony is properly excluded when it is not needed to clarify facts and issues of common understanding which jurors are able to comprehend for themselves." *Hibiscus Assocs. v. Bd. of Trs. of Policemen & Firemen Ret. Sys.*, 50 F.3d 908, 917 (11th Cir. 1995) (citations omitted). However, "[m]ost courts take a liberal approach to this standard, resolving doubts about whether the testimony is within the common understanding of the jury in favor of admissibility." *In re Seroquel Prods. Liab. Litig.*, 2009 WL 3806436, at *1 (M.D. Fla. July 20, 2009).

Plaintiffs' primarily critique Mr. Ellman's expert opinions on the grounds that [redacted] Mot. at 11. This argument is not only wrong, but devoid of any authority to support it. Mr. Ellman lays out the [redacted] *See* Ex. 1 (Ellman Rep.) ¶ 19, ¶ 21 & n.40–n.43, ¶ 23. Indeed, the data analysis that Plaintiffs characterize as [redacted].[3]

[3] Mr. Ellman's framework consists of three components: [redacted]

The issues described in Mr. Ellman's report plainly require the assistance of an expert. [redacted] Ex. 1 (Ellman Rep.) at C-2.

Recognizing the complexity of the technical knowledge necessary to [redacted][4] Ex. 1 (Ellman Rep.) at C-1–C-10. This task required expertise that a [redacted] simply lacks. Mr. Ellman's analysis is undoubtedly among the sorts of technical and specialized expertise that can assist the trier of fact—in this instance, the Court—on its consideration of class certification.

Plaintiffs make no attempt to explain how [redacted] and instead simply refer to [redacted] Mot. at 11. A review of the Ellman Report, however, demonstrates that Mr. Ellman applied his expert skills and specialized knowledge in a systematic manner that assists the trier of fact. Without Mr. Ellman's expertise, the Court would have [redacted] *See Herman v. Seaworld Parks & Entm't, Inc.*, 320 F.R.D. 271, 283 (M.D. Fla. 2017) (denying motion to exclude expert who was retained "to organize, combine, query, and analyze several different datasets of information about tens of thousands of putative class members contained within [the defendant's] business records" and "rendered opinions based on the combined data regarding the extent and method of individualized inquiry that may be required to identify class members and/or resolve [the defendant's] affirmative

[redacted] Regardless, the accessibility of a tool does not reflect expertise; it is how that tool is used and the judgment required to use it that reflects expertise. [redacted]

[4] Plaintiffs complain that Mr. Ellman's "contributions were non-technical and employed no methodology that can be tested." Mot. at 11. In fact, Mr. Ellman's methodology can be replicated and tested—as he outlines in Appendix C to his report. Ex. 1 (Ellman Rep.) at C-1–C-4.

defenses"). Mr. Ellman has provided valuable expert economic analyses and opinions, which will assist the Court in critical inquiries related to Rule 23 class certification.

In addition, Mr. Ellman's deposition testimony demonstrates that his methodology far exceeds what could be expected of any lay juror to independently comprehend. While expert testimony is not helpful if "a jury is capable of understanding and deciding without the expert's help," Plaintiffs cannot reasonably contend that [redacted] *Nat'l Union Fire Ins. Co. v. Tyco Integrated Sec., LLC*, 2015 U.S. Dist. LEXIS 193807, at *32 (S.D. Fla. July 2, 2015) (rejecting challenge that expert's testimony regarding concept of "due diligence" was unhelpful and could be understood without the expert's help as "not so simplistic and, undoubtedly, the jury benefits from the testimony of an expert"); *see also Better Holdco, Inc. v. Beeline Loans, Inc.*, 2023 U.S. Dist. LEXIS 55754, at *77 (S.D.N.Y. Mar. 30, 2023) (collecting cases and declining to preclude testimony from expert that was challenged as "overly rudimentary or crude" because it involved analysis using Microsoft Excel). Even the development of the factual examples in Mr. Ellman's report required [redacted] *See, e.g.*, Ex. 1 (Ellman Rep.) ¶ 29 [redacted]

At bottom, Mr. Ellman offers "expert testimony that synthesizes or summarizes data in a manner that streamlines the presentation of that data." *Ohio State Troopers Ass'n v. Point Blank Enters.*, 2020 U.S. Dist. LEXIS 58984, at *43 (S.D. Fla. Apr. 3, 2020). *Cf. Legg v. Voice Media Grp., Inc.*, 2014 U.S. Dist. LEXIS 61322, at *3–4 (S.D. Fla. May 2, 2014). It is plainly admissible. *Cf. id.* (excluding expert's testimony in part because it took no specialized knowledge to count number of class members on list produced in discovery).

**3. Mr. Ellman's Expert Opinions Do Not Constitute Legal Conclusions.**

Plaintiffs argue that Mr. Ellman's conclusion that "class certification is not appropriate[] usurp[s] the Court's role." Mot. at 12. This argument fails for several reasons.

***First***, Mr. Ellman does not opine that "class certification is not appropriate." *Id.* He does not discuss Rule 23 in his report, opine on Plaintiffs' ability to meet the requirements of that rule,

or offer any opinions on whether the Cyberattack caused any of the Plaintiffs' alleged harms. [redacted] Ex. 5 (Ellman Dep.) at 92:16–19. Rather, Mr. Ellman opines that, [redacted] Ex. 1 (Ellman Rep.) ¶¶ 19–20. "Because [Mr. Ellman] has not gone so far as providing a legal conclusion akin to whether individual issues predominate such that class certification should be denied," his opinion does not "usurp this Court's role." *See Ohio State Troopers Ass'n*, 2020 U.S. Dist. LEXIS 58984, at *47 (declining to exclude expert who opined on whether injury and damages could be assessed on a class-wide basis); *see also Herman*, 320 F.R.D. at 283 (declining to exclude expert who "opine[d] on potential factual differences between the claims of the members of the putative class and the methodology by which such factual differences can or cannot be identified on a class-wide basis" but who did "not opine on whether individualized differences predominate such that class certification should be denied").

***Second***, nothing in Rule 704 precludes the introduction of expert testimony that may assist the Court in determining whether class certification is appropriate or whether the factors of Rule 23 are met. On the contrary, courts routinely rely upon expert testimony in making their Rule 23 determinations. *See, e.g.*, *Simmons*, 576 F. Supp. 3d at 1144 (declining to exclude expert opinions that would "warrant[] consideration at the class certification stage"); *Reyes v. BCA Fin. Servs.*, 2018 U.S. Dist. LEXIS 106449, at *36–37 (S.D. Fla. June 26, 2018) (declining to strike expert testimony and "consider[ing] it when deciding the administrative-feasibility question" of class certification); *S. Indep. Bank v. Fred's, Inc.*, 2019 U.S. Dist. LEXIS 40036, at *53 (M.D. Ala. Mar. 13, 2019) (declining to exclude and instead explicitly relying on expert opinion in determination that predominance requirement was not met); *In re Fla. Cement & Concrete Antitrust Litig.*, 278 F.R.D. 674, 681 (S.D. Fla. 2012) (relying on expert testimony in determining that "typicality" requirement of Rule 23 was not met); *Midwestern Mach. v. Nw. Airlines*, 211 F.R.D. 562, 568 (D. Minn. 2001) (admitting expert testimony that "superiority" element of Rule 23 is lacking because "the volume and complexity of the evidence will defeat manageability and will create a strong likelihood of confusing the jury"), *aff'd*, 392 F.3d 265 (8th Cir. 2004). Here, Mr. Ellman's expert testimony will assist the Court in assessing the propriety of class certification, including helping

with key questions of ascertainability, manageability, commonality, adequacy, typicality, and predominance—as contemplated under Rule 704.

***Third***, Plaintiffs offer no authority to suggest such testimony is not admissible under Rule 704. In fact, none of the cases Plaintiffs cite for the proposition that Mr. Ellman's opinion is a legal conclusion even relates to class certification or class actions. All but one of Plaintiffs' cited cases involve expert testimony in individual slip-and-fall cases.[5] The other case Plaintiffs cite involves a criminal banking and securities fraud matter.[6]

Plaintiffs' motion to strike or exclude Mr. Ellman's testimony should be denied.

**B. The Opinions of Keith Wojcieszek Should Not Be Stricken or Excluded.**

Plaintiffs take issue with two aspects of Mr. Wojcieszek's analysis. First, Plaintiffs say Mr. Wojcieszek is not qualified to render his opinions. Mot. at 12–13. Second, Plaintiffs misleadingly contend that Mr. Wojcieszek uses a contrived methodology to opine that [redacted] *Id.* at 13–17. Both arguments fail.

**1. Mr. Wojcieszek Is Qualified to Opine Regarding [redacted].**

Plaintiffs acknowledge that Mr. Wojcieszek spent more than a decade as a Secret Service agent, but they attempt to diminish that lengthy term of service by arguing that [redacted] and is not qualified to render an opinion about [redacted] Mot. at 12–13. Similarly, although Plaintiffs admit that Mr. Wojcieszek leads Kroll's Cyber Threat Intelligence program, *see id.* at 13 (referencing his "time at Kroll, Inc."), Plaintiffs argue he is unqualified because he "has never been published or cited in any peer-reviewed article on sophisticated phishing attacks." *Id.* Neither argument bears any weight.[7]

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[5] *See Plott v. NCL Am., LLC*, 786 F. App'x 199, 204 (11th Cir. 2019); *Chappell v. Carnival Corp.*, 2023 U.S. Dist. LEXIS 55455, at *2 (S.D. Fla. Mar. 30, 2023); *Leroux v. NCL (Bah.) Ltd.*, 2017 U.S. Dist. LEXIS 94156, at *23 (S.D. Fla. June 19, 2017).

[6] *See United States v. Masferrer*, 367 F. Supp. 2d 1365, 1376 (S.D. Fla. 2005) (criminal banking and securities fraud matter excluding expert for proposed testimony that "merely tell[s] the jury the result it should reach").

[7] As with Mr. Ellman, Plaintiffs' baseless contention regarding a dearth of publications by Mr. Wojcieszek is directly contradicted by the evidence. Mr. Wojcieszek has published extensively

In the Eleventh Circuit, the Federal Rules do not define experts "in a narrow sense." *United States v. Augustin*, 661 F.3d 1105, 1125 (11th Cir. 2011). Thus, "[t]he expert need not have experience precisely mirroring the case at bar in order to be qualified." *Griffin v. Coffee Cnty.*, 623 F. Supp. 3d 1365, 1372 (S.D. Ga. 2022); *see also Furmanite Am., Inc. v. T.D. Williamson, Inc.*, 506 F. Supp. 2d 1126, 1129 (M.D. Fla. 2007) ("An expert is not necessarily unqualified simply because her experience does not precisely match the matter at hand."); *Maiz v. Virani*, 253 F.3d 641, 665 (11th Cir. 2001) (expert was qualified despite not having real estate development experience). Indeed, in *Hendrix ex rel. G.P. v. Evenflo Co.*, 609 F.3d 1183 (11th Cir. 2010)—the sole authority cited by Plaintiffs to support their contention that Mr. Wojcieszek is not qualified—the Eleventh Circuit made clear that to be sufficiently qualified, the expert need only explain "how [his] 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." *Id.* at 1201. In other words, the rule merely requires that the court not "tak[e] the expert's word for it." *Id.*

Here, the Court need not take Mr. Wojcieszek's word for it. Mr. Wojcieszek testified at length regarding [redacted] *See* Ex. 3 (Wojcieszek Dep.) at 133:20–134:10 [redacted] *id.* at 134:11–135:6 ([redacted]); *id.* at 84:12–23 ([redacted]

regarding various cybersecurity threats, and he testified during his deposition that he recently published an article related to sophisticated phishing attacks. *See* Ex. 2 (Wojcieszek Rep.) at App'x A (Wojcieszek et al., "Threat Actors Use Google Ads to Deploy VIDAR Stealer," Dec.13, 2022); Ex. 3 (Wojcieszek Dep.) at 202:15–203:5. To the extent that Plaintiffs attempt to disregard Mr. Wojcieszek's numerous publications because they were not "peer-reviewed," Mot. at 13, peer review is not a requirement for admissibility of expert testimony which, like Mr. Wojcieszek's, is based on the expert's personal knowledge or experience. *See Am. Gen. Life Ins. Co. v. Schoenthal Family, LLC*, 555 F.3d 1331, 1338 (11th Cir. 2009) ("Standards of scientific reliability, such as testability and peer review, do not apply to all forms of expert testimony," and court has discretion to deem expert testimony reliable based upon personal knowledge or experience); *see also Scott v. Paychex Ins. Agency, Inc.*, 2023 U.S. Dist. LEXIS 143565, at *6–7 (S.D. Fla. Aug. 16, 2023) (citation omitted).

[redacted]); *id.* at 190:17–191:22 ([redacted]); *id.* at 201:4–12 ([redacted]). Because Mr. Wojcieszek explained how his extensive experience applied to the facts at hand and how that experience led him to a conclusion [redacted], the Court need not invoke its limited gatekeeping role. Mr. Wojcieszek is qualified to render his expert opinion.

**2. Mr. Wojcieszek's Methodology Is Reliable.**

**i. Mr. Wojcieszek Relies on a Verifiable Method for Assessing [redacted]**

Plaintiffs also take issue with Mr. Wojcieszek's methodology, arguing he [redacted] Mot. at 14. Plaintiffs likewise urge that Mr. Wojcieszek [redacted] *Id.* at 15. These arguments fail on numerous fronts.

***First***, Plaintiffs distort Mr. Wojcieszek's opinion regarding [redacted] Mr. Wojcieszek opined that [redacted] Ex. 2 (Wojcieszek Rep.) ¶ 19 (emphasis added); *see also id.* ¶ 20 [redacted] (emphasis added). Contrary to Plaintiffs' argument, Mr. Wojcieszek did not represent that [redacted] rather, his methodology involved utilizing his experience and training [redacted][8]

[8] Indeed, Plaintiffs acknowledge later in their brief that [redacted]

*See* Ex. 3 (Wojcieszek Dep.) at 82:19–85:6 [redacted] *See, e.g.*, Ex. 2 (Wojcieszek Rep.) at 19; *see also* Ex. 3 (Wojcieszek Dep.) at 93:3–8 ([redacted]); *id.* at 110:16–111:2 ([redacted]); *id.* at 116:24–117:23 ([redacted]).

***Second***, and relatedly, Plaintiffs' take issue with Mr. Wojcieszek's [redacted] Mot. at 15. But Mr. Wojcieszek disclosed in his report that he [redacted] Ex. 2 (Wojcieszek Rep.) ¶ 18. Where, as here, a methodology is capable of being replicated, it is sufficiently reliable. *See, e.g.*, *Gibbs Patrick Farms, Inc. v. Syngenta Seeds, Inc.*, 2008 U.S. Dist. LEXIS 23923, at *59 (M.D. Ga. Mar. 26, 2008) (finding expert testimony sufficiently reliable where "other labs [could] repeat his experiment"); *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, 2021 U.S. Dist. LEXIS 249747, at *56 n.17 (N.D. Fla. Sept. 2, 2021) (disregarding the fact that the expert "could not personally replicate [her findings] during her deposition" because her conclusion was accompanied by "a reasoned explanation that would enable the Court, a jury, or an opposing party to meaningfully evaluate the process by which it was reached").[9]

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[redacted] Mot. at 16. Plaintiffs' suggestion to the contrary is a disingenuous attempt to exclude Wojcieszek's opinions simply because they are damaging to Plaintiffs' case.

[9] Plaintiffs note that Mr. Wojcieszek [redacted], but do not actually argue that his opinions should be excluded on this basis. *See* Mot. at 16. Any such argument would fail, as "[a]n expert witness is permitted to use assistants in formulating his or her expert opinion." *Hi-Tech Pharms., Inc. v. Dynamic Sports Nutrition, LLC*, 2021 WL 2185699, at *7 (N.D. Ga. May 28, 2021).

**ii. Mr. Wojcieszek's Method for Determining [redacted] Is Reliable.**

Mr. Wojcieszek also properly connected specific and relevant experience to his opinion regarding [redacted]. Plaintiffs attempt to exclude his opinion regarding [redacted], misconstruing his testimony to argue that Mr. Wojcieszek [redacted] Mot. at 17. But Plaintiffs overlook Mr. Wojcieszek's extensive deposition testimony, in which he explains how he arrived at the conclusion that [redacted] For instance, Mr. Wojcieszek testifies that based on his experience, [redacted] Ex. 3 (Wojcieszek Dep.) at 175:14–21; *see also id.* at 187:21–188:12 ([redacted]); *id.* at 199:9–200:20 ([redacted]). The data Mr. Wojcieszek reviewed, which included [redacted]. *Id.* at 175:22–176:11 ([redacted]).

Plaintiffs insinuate that Mr. Wojcieszek's many years of training and experience are not a sufficient basis to support his opinion regarding [redacted]. *See* Mot. at 16 ("Wojcieszek did not rely on any documents, treatises, textbooks, or the forensic report. . . . Rather, he relies exclusively on his 'training and experience' to speculate as to [redacted]). This is nothing more than a rehashing of Plaintiffs' failed contention that Mr. Wojcieszek is not qualified.[10] Experience alone can be a sufficient basis for an expert's

[10] Plaintiffs attempt to shoehorn their argument regarding Mr. Wojcieszek's qualifications into an attack on his methodology, calling his testimony [redacted] But Plaintiffs' chief complaint is that Mr. Wojcieszek [redacted] *See* Mot. at 17. Any argument as to [redacted] goes to the probative value of Mr. Wojcieszek's testimony, ***not*** his admissibility as an expert. *See Quiet Tech.,* 326 F.3d at 1341 (11th Cir. 2003) ("[I]t is not the role of the district court to make ultimate conclusions as to the persuasiveness of the proffered evidence.") (internal quotation marks and

qualification. *See United States v. Brown*, 415 F.3d 1257, 1262 (11th Cir. 2005) (affirming district court's conclusion that an expert's testimony was reliable when it was based primarily on the expert's thirty years of experience and general knowledge in the field); *Banta Props., Inc. v. Arch Specialty Ins. Co.*, 2011 WL 7139154, at *2 (S.D. Fla. Dec. 23, 2011) (noting that the "qualification standard for expert testimony is 'not stringent'" and finding an expert qualified based on his "background and length of experience"); *Southpoint Condo. Ass'n*, 2020 U.S. Dist. LEXIS 115009, at *13. And as set forth above, Mr. Wojcieszek has extensive experience [redacted].

Defendants should be permitted to offer Mr. Wojcieszek's report and testimony in this matter.

**C. The Opinions of Art Ehuan Should Not Be Stricken or Excluded.**

Plaintiffs attack Mr. Ehuan's expert opinion as to Mednax's cybersecurity because he was assisted by a colleague in drafting his report and because his methodology is purportedly unreliable. In particular, Plaintiffs seek to exclude Mr. Ehuan's opinion based upon his [redacted] But Plaintiffs' unsupported arguments bear no weight. Instead, Mr. Ehuan's opinion properly focuses on specific facts in the record that he analyzed based on his relevant experience.

**1. Mr. Ehuan's expert opinion properly incorporates support from colleagues.**

Plaintiffs take issue with Mr. Ehuan's collaboration with a colleague in preparing his reports, arguing that Mr. Ehuan was relying on and adopting the findings of another expert without adequately assessing the validity of the underlying facts and evidence. Mot. at 18. This argument fails. Courts routinely admit the testimony of experts who, like Mr. Ehuan, draw on assistance from colleagues in forming their opinions and generating a report. *See In re Massa Falida Do Banco Cruzeiro Do Sul S.A.*, 2020 Bankr. LEXIS 1253, at *7–8 (Bankr. S.D. Fla. May 12, 2020) (admitting expert who supervised and reviewed the work of others, conducted his own limited analysis, and helped review and prepare his report, noting that "[a]n expert witness can rely on

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citations omitted). Because Mr. Wojcieszek explains in detail [redacted] his testimony is sufficiently precise and specific to be admissible.

assistants to formulate an expert opinion"); *Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 612 (7th Cir. 2002) ("An expert witness is permitted to use assistants in formulating his expert opinion."); *In re Syngenta AG MIR 162 Corn Litig.*, 2016 WL 4593477, at *2 (D. Kan. Sept. 2, 2016) ("[I]n the Court's experience, it is common practice for an expert to have employees or associates assist with studies or analysis or the drafting of a report, and such practice is clearly appropriate as long as the expert who signs the report takes all of the opinions as his own and can testify about them.").

Mr. Ehuan's expert analysis fits this mold. Indeed, Mr. Ehuan repeatedly testified at his deposition that he engaged in "a back and forth with [his colleague]" to prepare his reports. *See* Ex. 7 (Ehuan Dep.) at 36:20–37:3. Moreover, Mr. Ehuan reviewed both reports "extensively" before he signed them, made edits to them, and testified unequivocally that all opinions contained in both reports are his own. *Id.* at 285:13–21. The fact that Mr. Ehuan was thoroughly involved in the creation of his report is further made evident by the fact that he personally spent "more than a hundred" hours on this engagement. *Id.* at 10:24–11:3.

Plaintiffs attempt to minimize this significant involvement, arguing that Mr. Ehuan simply "parrot[ed] the opinion of others." Mot. at 18 (citing *Schoen v. State Farm Fire & Cas. Co.*, 638 F. Supp. 3d 1323, 1335 (S.D. Ala. 2022)). But the authority that Plaintiffs rely on does not support excluding Mr. Ehuan's reports and testimony. In *Schoen*, a damages expert testified regarding an estimate for repair costs that was entirely prepared by someone else and sent to the expert, who merely forwarded it to counsel without examining the property that was the subject of the estimate himself or making any changes to the estimate.[11] *Schoen* does not involve an expert's collaboration with a colleague. Plaintiffs also misleadingly argue that Mr. Ehuan cannot render an opinion "for which he has no understanding of the underlying facts or methodology used." Mot. at 17 (citing *La Gorce Palace Condominiums Ass'n, Inc. v. Blackboard Specialty Ins. Co.*, 586 F. Supp. 3d 1300, 1306 (S.D. Fla. 2022)). But that is plainly not the case here. Mr. Ehuan testified at length about the underlying facts in this litigation, and personally reviewed "a lot of documents" and read numerous deposition transcripts to develop his command of the facts. Ex. 7 (Ehuan Dep.) at 191:5–

[11] *Schoen* cites to *PODS Enterprises, Inc. v. U-Haul International, Inc.*, 2014 WL 12628662, at *2 (M.D. Fla. July 2, 2014), but *PODS* is likewise unhelpful to Plaintiffs. There, the court excluded an expert's testimony where the expert merely repeated another expert's findings and opinions and suggested they "corroborated" his own opinion.

192:4; *see also id*. at 185:16–24 (testifying that he reviewed nearly a dozen depositions). This is a far cry from the facts of *La Gorce Palace*. There, the defendant's expert admitted that he did not play any role in the revision of his report, nor did he even know who had revised it. Even under those extreme facts, the expert was permitted to testify as to the "bulk" of the report that was "substantially his own work." *La Gorce Palace*, 586 F. Supp. 3d at 1307. It was only the portion of the report for which the expert admitted to having done "no work whatsoever" and which was prepared after his departure from his employer that was excluded. *La Gorce Palace* stands in stark contrast to Mr. Ehuan's "[e]xtensive[]" involvement in the preparation of his reports, which involved more than one hundred hours of his own time, and where he confirmed under oath that all of the opinions in those reports were his own. Ex. 7 (Ehuan Dep.) at 285:13–286:13.

**2. Mr. Ehuan's Methodology Is Reliable.**

Separately, Plaintiffs challenge Mr. Ehuan's methodology in reaching his opinions, arguing he failed to comply with his own standards of methodology, unreliably applied his firm's purportedly "elusive" framework for evaluation, and engaged in a contrived review of documents designed to reach a particular result. As set forth below, each contention is meritless.

***First***, Mr. Ehuan properly relied upon [redacted] *See* Mot. at 19. [redacted] Ex. 7 (Ehuan Dep.) at 28:20–29:4. Moreover, [redacted] *See id.* at 61:12–22. In the Eleventh Circuit, an expert's testimony is sufficiently reliable where he has the necessary information to render his opinion. *See Maiz*, 253 F.3d at 666 (rejecting the movant's "complaints about [the expert's] supposed lack of familiarity with the Plaintiffs" because the expert "specifically opined that most economists would not . . . have interviewed individual Plaintiffs" as part of their evaluation); *see also In re Massa*, 2020 Bankr. LEXIS 1253, at *16 (overruling objection to expert

testimony based on failure to review underlying working papers where the expert "testified that he had the necessary information to render his opinions without access to certain information"); *Guzman v. Holiday CVS, LLC*, 2022 U.S. Dist. LEXIS 189321, at *8 (S.D. Fla. Oct. 17, 2022) (admitting testimony where an expert explained during her deposition why she could render her opinion without knowing facts from the time period immediately before a fall); *Housley & Transp. Ins. Co. v. Liftone, LLC*, 2021 U.S. Dist. LEXIS 175444, at *18 (N.D. Ala. Sept. 15, 2021) (expert's testimony was reliable despite "not know[ing] specific factual details" because "absolute certainty is not required" and an expert must merely "know[] of facts which enable him to express a reasonably accurate conclusion as opposed to conjecture or speculation") (citations omitted). Mr. Ehuan plainly did.

Moreover, any challenge by Plaintiffs as to Mr. Ehuan's decision [redacted] does not impact his admissibility as an expert—it merely goes to the weight afforded to his opinion. *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1345 (11th Cir. 2003) (purported failure to consider "all available . . . parameters in [the expert's] model" affected only the analysis's "probativeness, not its admissibility") (citation omitted); *Jones v. Otis Elevator Co.*, 861 F.2d 655, 663 (11th Cir. 1988) (same); *see also Guzman*, 2022 U.S. Dist. LEXIS 189321, at *8 ("[F]ailure to consider material facts goes to the weight, not admissibility of [the expert's] testimony.").

***Second***, Mr. Ehuan adequately described and appropriately used [redacted] Ex. 4 (Ehuan Rep.) ¶ 12. [redacted] *Id.* ¶ 63; *see also* Ex. 7 (Ehuan Dep.) at 90:2–18 ([redacted]). This is all that is required to establish a reliable

methodology. *See United States v. Azmat*, 805 F.3d 1018, 1042 (11th Cir. 2015) (finding that an opinion grounded in professional literature and preexisting standards can form the basis of an expert's opinion where the opinion was rationally drawn from an accepted text); *Adams v. Lab. Corp. of Am.*, 760 F.3d 1322, 1329 (11th Cir. 2014) (concluding an expert's methodology was sufficiently reliable where she used a "well-established classification system" because an expert methodology can be "based on generally accepted diagnostic principles" (quoting *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 246–47 (5th Cir. 2002)). Plaintiffs' argument that they were "kept in the dark" on the framework that Mr. Ehuan used is meritless.[12] Mot. at 19. Plaintiffs need look no further than Mr. Ehuan's report to understand the framework that he used. But to the extent Plaintiffs believed they needed additional information,[13] they were free to subpoena Palo Alto to gather it. That they chose not to do so is not grounds to exclude Mr. Ehuan.[14]

***Third***, Plaintiffs seek to exclude Mr. Ehuan's testimony based on his purported decision to "pick and choose from readily available, vital evidence and intentionally ignore contradictory information in order to reach a specific conclusion." Mot. at 20. But again, Plaintiffs ignore the record. They cannot identify a single document that Mr. Ehuan purportedly ignored. Instead, they

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[12] Plaintiffs do not cite any authority to support their baseless claim that an [redacted] Mot. at 19. There is no such requirement under the Federal Rules of Evidence. Indeed, experts may rely on third-party sources, and even "inadmissible hearsay evidence in forming their opinions if the evidence is reasonably relied upon by professionals in the same field." *City of S. Miami v. DeSantis*, 2020 WL 7074644, at *15 (S.D. Fla. Dec. 3, 2020).

[13] Further, Plaintiffs suggest that Mr. Ehuan [redacted] Mot. at 4. This position is belied by the facts. [redacted] Ex. 7 (Ehuan Dep.) at 166:21–167:3. Mr. Ehuan conducted—in painstaking detail—[redacted] *See id.* at 97:5–16 ([redacted]

[14] Plaintiffs also argue that Mr. Ehuan [redacted] Again, this argument falls flat—Mr. Ehuan testified [redacted] *See* Ex. 7 (Ehuan Dep.) at 168:23–169:24; *see also Guzman*, 2022 U.S. Dist. LEXIS 189321, at *8 (testimony sufficiently reliable where expert testified as to why she could render her opinions without certain facts); *Housley*, 2021 U.S. Dist. LEXIS 175444, at *18.

identify various statements from Mr. Ehuan's deposition, but the testimony Plaintiffs highlight disproves their point. It does not show that Mr. Ehuan intentionally *ignored* evidence contrary to his opinion; rather, Mr. Ehuan either testified that he *did* review the evidence identified by Plaintiffs, *see* Ex. 7 (Ehuan Dep.) at 193:17–194:6 ([redacted]), or he *did not need* certain information [redacted]. *See id.* at 143:14–22 ([redacted]); *id.* at 81:6–22 ([redacted]); *id.* at 211:20–212:1 ([redacted]); *id.* at 222:7–11 ([redacted]). In any event, this is nothing more than a challenge to Mr. Ehuan's "application of [his] methodology,' which is "best resolved through cross-examination and the adversarial process," not through a *Daubert* challenge. *Coshap, LLC v. Ark Corp. Member Ltd.*, 2017 WL 9287017, at *3 (N.D. Ga. Dec. 12, 2017); *see also Quiet Tech.*, 326 F.3d at 1345.

Mr. Ehuan's reports and testimony should not be excluded.

## V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' Motion to Strike and Exclude or In the Alternative Limit Defendants' Expert Testimony and Reports.

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 14, 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/ Gavin Reinke*
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