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' REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO STRIKE AND EXCLUDE OR IN THE ALTERNATIVE LIMIT DEFENDANTS' EXPERTS' TESTIMONY AND REPORTS

Plaintiffs respectfully file this Reply to Defendants' Response to Plaintiffs' Motion to Strike and Exclude or in the Alternative Limit Defendants' Experts' Testimony and Reports [Doc. 267] ("Response"). In support thereof, Plaintiffs state the following:

I. ARGUMENT

Defendants' experts' opinions may be summarized as: "we did not look; therefore, we did not find." Defendants' experts' limited and meaningless investigations are not reliable nor are they helpful to the jury. Their conclusions are based on and comprised of speculative testimony that will confuse the jury and prejudice Plaintiffs. As such, their testimony and reports must be excluded at trial. Further, Mr. Ellman's testimony and report must be stricken from Defendants' Response to Plaintiffs' Motion for Class Certification [Doc. 267].

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

1. Ellman is not qualified.

In their Response, Defendants argue that Brian Ellman qualifies as an [redacted] expert because [redacted] In support of their first contention, Defendants point to Ellman's Deposition, wherein he states at some point in his past [redacted] [Doc. 267-5, 15:4–16:11]. These basic, entry level [redacted]. If that were the case, most college students would be considered expert [redacted]

Defendants' reliance on Ellman's career as [redacted] is also misplaced. In addition to his lack of supporting education, Ellman does not have any real-world experience as [redacted].

[Doc. 258-1, Appendix A, p. A-1-A-5]. Ellman's "experience" that Defendants rely on is comprised of [redacted]. *Id.* With the entirety of his [redacted]

2. Ellman impermissibly parrots the [redacted] finding.

Defendants further assert that Ellman has *not* rendered an opinion on [redacted] [Doc. 267, p. 5]. However, throughout their response to Plaintiffs' Motion for Class Certification, Defendants also hold [redacted] expert opinion. *See* [Doc. 250, pp. 8 (citing to [Doc. 250-21, (Ellman Report) pp. 4–5 ([redacted]) (emphasis added)])]. *See also id.* at pp. 9, 25 (asserting the same). Defendants' reliance on Ellman's report goes beyond the [redacted] *Id.* at pp. 8–9, 15. Although an expert may rely on the opinion of another expert, the expert may not simply repeat or adopt the findings of others without first investigating them. *Hendrix v. Evenflo Co., Inc.*, 255 F.R.D. 568, 607 (N.D. Fla. 2009). As Defendants have asserted, this is *not* Ellman's opinion and, as such, they may not rely on it as Ellman's opinion. [redacted] on pages 8–9 and 15 of their response to Plaintiffs' Motion for Class Certification must be stricken. [Doc. 250, pp. 8–9, 25].

3. Ellman cannot rely on [redacted] finding.

Even if Ellman merely relies on the [redacted] which he did not participate in and did not independently verify, such reliance is improper. Ellman cites to the deposition of [redacted] to along with his assertion that [redacted]. [Doc. 258-1, ¶ 10]. From [redacted] *Id.* at pp. 13–14. However, in coming to this conclusion, Ellman intentionally ignores significant portions of the Matthews' Deposition, wherein Mr. Matthews confirms that [redacted]. *Matthews Deposition*, pp. 112:6–113:15; 123:10–125:13;

128:21–130:7; 142:12–143:21; 190:9–25, attached as Exhibit 1. [redacted] *Id.* at pp. 37:20–39:10; 124:2–5, 129:22–130:1; 132:7–15, 188:22–189:2. Similarly, Ellman purposefully overlooks Matthews' testimony that [redacted]. For example, [redacted] However, a later review of the [redacted]. *Id.* at p. 114:12–116:1. Moreover, as Matthews testified, [redacted]. *Id.* at pp. 189:10–190:4. [redacted]. As such, the [redacted] does not *reliably* establish, as required under *Daubert* and Fed. R. Evid. 702, that [redacted]. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 584 (1993) (Expert testimony based on a technique is inadmissible unless the technique is generally accepted as reliable in the relevant community); Fed. R. Evid. 702 (requiring an expert's testimony to be based on sufficient facts or data).

Ellman's entire report and testimony is premised on the notion that [redacted].[1] Ellman's reliance on Matthews' Deposition and the limited [redacted] *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1292 n.7 (11th Cir. 2005) ("In evaluating the reliability of an expert's method, however, a district court may property consider whether the expert's methodology has been contrived to reach a particular result."); *In re Rezulin Products Liability Litigation*, 309 F. Supp. 2d 531, 563 (S.D.N.Y. 2004) (Courts will exclude an expert from testifying when he ignores available information that is vital to his opinion); *see also La Gorce Palace Condominium Ass'c, Inc. v. Blackboard Specialty Ins. Co.*, 117 F. Supp. 3d 1300, 1306 (S.D. Fl. 2022) (Under Fed. R. Evid. 703, an expert may not reasonably rely on the testimony of another if that testimony is not reasonably reliable). In addition, Defendants' assertions and citations [redacted]) on pages 8–9 and 15 of their response to Plaintiffs' Motion for Class Certification must be stricken. [Doc. 250, pp. 8–9, 25].

[1] The term "Data Breach" refers to the same Data Breach as set out in Plaintiffs' Second Amended Consolidated Complaint. [Doc. 115].

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

1. Wojcieszek's [redacted] was not reliable.

Wojcieszek has not shown any evidence that either he or his team [redacted]. Just because a methodology is *capable* of being replicated, does not mean it is reliable. *Quiet Tech. DC-8, Inc. v. Herel-Dubois UK Ltd.*, 326 F.3d 1333, 1340 (11th Cir. 2003) (citing to additional factors necessary in considering a method's reliability).[2] Even if that were the case, it would not apply here because Defendants have failed to produce any evidence of, and Wojcieszek states that he cannot recall, [redacted].

In his report, Wojcieszek states that [redacted]." [Doc. 258-3, ¶ 18]. Wojcieszek still has not provided [redacted]. [Doc. 258-4, p. 80:1–19].[3] Defendants claim [redacted] [Doc. 267, p. 13]. In his [redacted]. [Doc. 258-3, Appendix B]. However, neither Wojcieszek nor Defendants have produced the results of those [redacted] in accordance with Fed. R. Civ. P. 26(a)(2)(B) and Plaintiffs' Request for Production No. 50 (attached hereto as Exhibit 2). Wojcieszek will also not be able to provide this information at trial to show to the jury and the Court this his methods were reliable. *La Gorce Palace Condominium Ass'c., Inc.*, 586 F. Supp. 3d at 1312 (citing *GPNE Corp. v. Apple, Inc.*, No. 12-cv-02885-LHK, 2014 WL 1494247, at *4 (N.D. Cal. Apr. 16, 2014) ("[T]he Court must be able to see the mechanisms in order to determine if they are reliable and helpful." (alteration added; quotation marks and citation omitted)); *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 761 (7th Cir. 2010)

[2] Unlike in the case to which Defendants cite, *Gibbs Patrick Farms, Inc. v. Syngenta Seeds, Inc.*, No. 7:06-cv-48 (HL) (M.D. Ga. Mar. 26 (2008), Defendants' expert in this case did not produce a "written protocol that allowed other[s] [sic] to repeat his experiment." 2008 WL 82252, at *19.

[3] It will be impossible for Wojcieszek to [redacted].

("Rule 702 does require, however, that the expert explain the 'methodologies and principles' that support his opinion[.]"))

Moreover, in contrast to the [redacted], the information that Wojcieszek disclosed indicates that he relied heavily [redacted]. [Doc. 258-3, Appendix D (relying [redacted])]. [redacted]" *Mary T. Frantz Wojcieszek Rebuttal Report*, ¶ 4, attached as Exhibit 3. [redacted] *Id.* at ¶ 14. Wojcieszek's report fails to produce [redacted]

2. Wojcieszek's [redacted] is not helpful to the jury.

"[W]here an expert opinion has a tendency to confuse the trier of fact, it may not satisfy the helpfulness prong." *J.G. v. Carnival Corp.*, No. 12–21089–CIV, 2013 WL 752697, at *4 (S.D. Fla. Feb. 27, 2013) (citing *Frazier*, 387 F. 3d at 1263). Moreover, to assist the trier of fact, "'[e]xpert testimony must be relevant to the task at hand, . . . *i.e.*, that it logically advances a material aspect of the case.'" *Coral Way, L.L.C. v. Jones*, No. 05-21934-CIV, 2006 WL 5249734, at *2 (S.D. Fla. Oct. 17, 2006) (quoting *McDowell v. Brown*, 392 F.3d 1283, 1299 (11th Cir. 2004)). The question for the jury is simple: [redacted]

Wojcieszek's limited, cursory review [redacted] will not aid the jury in making this decision. That Wojcieszek's team [redacted]

[4] *Take Rapid, Information Actions to Mitigate Risk Everywhere*, Flashpoint https://flashpoint.io/#:~:text=Our%20targeted%2C%20automated%20collection%20systems,the%20deep%20and%20dark%20web. (last accessed on Dec. 19, 2023).

[5] "Open Source Intelligence (OSINT) is the collection, analysis, and dissemination of information that is publicly and legally accessible. Gill, Ritu, *What is Open-Source Intelligence?* (Feb. 23, 2023) https://www.sans.org/blog/what-is-open-source-intelligence/.

[redacted] Fed. R. Evid. 702 (requiring an expert review sufficient facts and data to render his or her opinion). Wojcieszek's inadequate methodology is exacerbated by [redacted] [Doc. 258-5, ¶¶ 27, 29]. Testimony that one could not find a needle in a haystack does not mean that there are needles in the haystack; this is especially true when others have found needles in those same haystacks. Wojcieszek's opinion is not an "expert conclusion" but rather a recitation of a partial, sorely underdeveloped, and unreliable investigation.

In addition to its inadmissibility under Fed. R. Evid. 702, Wojcieszek's [redacted] must be excluded under Fed. R. Evid. 403 because the meager probative value it may offer is *significantly* outweighed by the confusion to the jury and prejudice to the Plaintiffs that it would surely cause. "Because of the powerful and potentially misleading effect of expert evidence, *see Daubert*, 509 U.S. at 595, 113 S.Ct. at 2798, sometimes expert opinions that otherwise meet the admissibility requirements may still be excluded by applying Rule 403." *U.S. v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004). Under Fed. R. Evid. 403, evidence must be excluded at trial if the probative value of that evidence is substantially outweighed by its potential to confuse or mislead the jury, or if the testimony is cumulative. *Id.* Indeed, testimony which is speculative and "potentially confusing testimony is at odds with the purpose of expert testimony as envisioned in Fed. R. Evid. 702" and must be excluded at trial. *Hull v. Merck & Co., Inc.*, 758 F.2d 1474, 1477 (11th Cir. 1985). Courts are called to exercise more control in their gatekeeper role excluding experts under Fed. R. Evid. 403 than other lay witnesses as "expert testimony may be assigned talismanic significance in the eyes of lay jurors." *Frazier*, 387 F.3d at 1263. As laid out above, Wojcieszek has not shown that [redacted]

3. Wojcieszek's speculative testimony [redacted]

Wojcieszek's conclusion [redacted] Wojcieszek and Defendants want to ignore (and hope to avoid the fact) that [redacted] Ex. 3, ¶ 6 ([redacted]

[redacted]), ¶ 14 [redacted]), ¶¶ 15–23. Even if [redacted]. Wojcieszek does not offer any education, training, skills, or other special talents that allow him to [redacted]. Wojcieszek's opinion is mere speculation, which is ultimately not helpful and would be confusing to the jury. *J.G. v. Carnival Corp.*, 2013 WL 752697, at *4 (citing *Frazier*, 387 F. 3d at 1263).

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

To be admissible under Fed. R. Evid. 702, an expert's testimony and report must be "based on sufficient facts or data." Fed. R. Civ. P. 702(b). Testimony that is not supported by sufficient facts or data is neither reliable nor helpful and must be excluded at trial. *See Frazier*, 387 F.3d at 1259–62. Here, Ehuan did not consider sufficient evidence to come to or support his conclusion that [redacted] rendering his conclusion inadmissible.[6]

The key deficiency with Ehuan's conclusion is that he opines [redacted]. Ehuan makes, and Defendants impermissibly rely upon, baseless claims that [redacted]. However, merely creating written policies does not automatically bring a company into compliance with the law. Courts have found that actual implementation of a policy, not just its existence, is crucial. *See, e.g.*, *Montelongo v.*

[6] As a last resort, Defendants argue that Plaintiffs' objections go to the weight of Ehuan's testimony, rather than the admissibility. Even under the improper standard set out by Defendants, Ehuan's testimony and report must be excluded at trial under Fed. R. Evid. 403. In this case, Ehuan's testimony – [redacted] – provides only limited probative value to Defendants. Such testimony is cumulative of the testimony that will be provided by [redacted] will certainly enter at trial. Fed. R. Evid. 403 (excluding cumulative evidence with little probative value). Ehuan's purported testimony that [redacted] As indicated throughout this section, Ehuan did not review sufficient facts and evidence to [redacted]. Rather, his testimony is mere speculation. *Hull*, 758 F.2d at 1477.

RadioShack, No. 09-01235 MMM, 2009 WL 10672160, at *5 (C.D. Cal., Apr. 6, 2009) (It is possible that a company's actual practices are inconsistent with its written policies; therefore, a company's policy alone will not make it immune from suit.); *Cox Retirement Properties, Inc. v. Johnson*, 323 F. App'x 668, 672 (10th Cir. 2009) ("Simply maintaining documents in a file, however, without also implementing the policies contained therein and regulating staff actions to assure compliance does not satisfy the regulation.").

In their Response, Defendants senselessly argue that [redacted]. However, his deposition is littered with examples wherein Ehuan assumes *but does not know* [redacted] [Doc. 267-7, 56:13–18]. [redacted], [Doc. 158-1, ¶ 38], [redacted], [Doc. 267-7, p. 77:6–20]. [redacted], [Doc. 158-1, ¶ 49]; [redacted], [Doc. 267-7, p. 211:7–212:8, 241:15–24]. [redacted]. *See, e.g.*, Ex. 1, pp. 114:12–116:1. [redacted] [Doc. 158-1, ¶ 21]. [redacted]. [Doc. 267-7, pp. 193:20–194:6].

Equally as concerning is Ehuan's statement that [redacted] [Doc. 267-7, pp. 168:23–169:7]. [redacted]. *Id.* at 169:25–170:18. [redacted]

[redacted]. *Id.* at pp. 170:21–171:16. [redacted] [Doc. 258-1, ¶ 12], [redacted], [Doc. 267-7, pp. 169:25–170:18]. [redacted]. *See La Gorce Condominium Ass'c, Inc.*, 586 F. Supp. 3d at 1311 ("Unreliable inputs yield unreliable outputs."); *SLSJ, LLC v. Kleban*, 277 F. Supp. 3d 258, 281 n.21 (D. Conn. 2017) ("[N]o matter how sophisticated and capable an information processor is, the quality of that information it generates cannot be superior to the quality of the information it received." (alteration added; quotation marks omitted)).

Ehuan intentionally failed to consider this readily available information prior to rendering his overly [redacted]. *Rink*, 400 F.3d at 1292; *In re Rezulin Products Liability Litigation*, 309 F. Supp. 2d at 563. The information he considered is not sufficient to render an opinion on [redacted] Contrary to the cases relied on by Defendants, [redacted]. *Morton v. Gov't Employee's Ins. Co.*, No. _, 2019 WL 4739418, at *4 (S.D. Fla. Aug. 2, 2019) ("'[R]elevant testimony from a qualified expert is admissible only if the expert knows of facts which enable him to express a reasonably accurate conclusion as opposed to conjecture or speculation.'") (quoting *Jones v. Otis Elevator Co.*, 861 F.2d 655, 662 (11th Cir. 1988)).

II. CONCLUSION

Defendants' proposed experts Ellman and Wojcieszek are not qualified to render their opinions. Further, Ellman, Wojcieszek, and Ehuan offer no testimony that 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 from trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 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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