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

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Plaintiffs respectfully file this Response in Opposition to Defendants' Motion to Exclude Expert Testimony of Gary Olsen and Mary Frantz and Memorandum of Law in Support [Doc. 252] ("Motion to Exclude" or "Motion"). In support thereof, Plaintiffs state the following:

I. FACTUAL BACKGROUND

This case arises from a large and preventable data breach of Defendants' Microsoft Office 365-hosted business email accounts that occurred between June 17, 2020 and June 22, 2020, resulting in the access and exfiltration of Plaintiffs' and approximately 2.5 million other person's Personally Identifiable Information ("PII") and Protected Health Information ("PHI") (the "Data Breach" or "Breach"). Defendants unsuccessfully attempt to avoid liability by reiterating that this was a "phishing" attack and failing to adequately investigate the Data Breach, the information that was negligently stored on their network (including the Class Members PII/PHI), [redacted] and the damages resulting therefrom. In their attempt to further hide pertinent information from the Court, Defendants impermissibly seek to exclude Plaintiffs' expert witnesses Mary T. Frantz ("Frantz") and Gary Olsen ("Olsen"). Throughout their Motion to Exclude, Defendants intentionally misrepresent Plaintiffs' assertions, the facts at issue in this case, Frantz's and Olsen's opinions, and Frantz's and Olsen's ability to explain and give context to their methodologies and conclusions. As set out below, Defendants' Motion to Exclude must be denied.

II. LEGAL STANDARD

Courts presume that expert testimony is admissible. *Simmons v. Ford Motor Co.*, 576 F. Supp. 3d 1136, 1140 (S.D. Fla. 2021). "[I]t is not the role of the district court to make ultimate conclusions as to the persuasiveness of the proffered evidence." *Quiet Technology DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1341 (11th Cir. 2003). The exclusion of expert testimony is the exception, rather than the rule. *Moore v. Intuitive Surgical, Inc.*, 995 F.3d 839, 850 (11th Cir. 2021). Instead, courts will defer to rigorous cross examination of an expert over exclusion. *Simmons*, 576 F. Supp. 3d at 1140–41; *see Daubert v. Merrell Down Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993).

III. ARGUMENT

a. Frantz's testimony and reports are reliable, helpful, and within the parameters of a proper rebuttal.

Frantz's initial report ("initial report" or "report") consists of detailed and relevant failures and wrongful acts on behalf of Defendants that led to the unauthorized access and exfiltration of Plaintiffs' PII/PHI. Frantz employs reliable methodologies to come to these helpful conclusions.

Moreover, Frantz is qualified to render the rebuttal opinions as properly offered in her respective rebuttal reports ("rebuttal report").

1. Frantz's opinions are reliable.

As set out in her reports and deposition testimony, Frantz used sufficient facts and data and reliable methodologies to reach her expert conclusions regarding Mednax's negligence, inadequate cyber security, unreliable investigation into the Data Breach, and the availability of Plaintiffs' PII/PHI on the Dark Web as a result of the Data Breach.

i. Frantz's reports are based on sufficient facts and data in compliance with Fed. R. Evid. 702.

Without citing any supporting case law, statute, or rule, Defendants baselessly assert that Frantz's opinions must be excluded because a portion of her initial report does not include citations to the record. Fed. R. Evid. 702 merely requires that an expert's conclusions be based on "*sufficient* facts or data." (Emphasis added). In addition to the *numerous* record cites throughout Frantz's initial report and the long list of supporting documents and information that Frantz provides at the end of her report, Defendants were given the opportunity to depose Frantz on multiple occasions regarding the basis of her conclusions in her initial report and rebuttal reports. Defendants have not shown that Frantz was unable to answer these questions and provide sufficient facts and data in support of her conclusions. Defendants will also be given the same opportunity at trial. *See Simmons*, 576 F. Supp. 3d at 1140–41 (Expert testimony should not be excluded when questioning at trial would be sufficient.). Therefore, Defendants request to exclude portions of Frantz's initial report is unfounded.

Defendants also state that Frantz's opinions must be excluded because Frantz failed to consider twenty-one of Mednax's policies and procedures. However, contrary to Defendants' assertions, Frantz's initial report indicates that she *did* review these policies. [Doc. 252-5, pp. 112 (relying on Mednax's Responses and Objections to Plaintiffs First, Second, Third, and Forth Set of Requests for Production)]. Defendants further fail to show how these twenty-one policies contradict Frantz's testimony. [redacted] [Doc. 252-7]; *Frantz First Deposition*, pp. 158:19–159:25, attached as Exhibit 1. Rather than acting as a direct contradiction to Frantz's initial report, Defendants merely offer a different

interpretation of these policies, which is not sufficient to necessitate exclusion. *Moore*, 995 F.3d at 850. Mednax will have the opportunity to present its interpretations at trial.

ii. Frantz used and adequately explained her reliable methodology for [redacted]

Defendants argue that Frantz did not identify the methodology used to determine that [redacted]. Defendants argue that Frantz did not explain how she determined which events were "significant," what "industry standards" she used, and how these are relevant to the Data Breach. This argument misconstrues Frantz's reports and wholly ignores her deposition testimony, wherein Frantz sets out the documents and "industry standards" she relied on in drawing her conclusions. *See, e.g.*, [Doc. 252-5, ¶¶ 17-122 (discussing Mednax's significant cybersecurity events), ¶ 12(b) (discussing "industry standards" referenced in her initial report), ¶ 149 (industry standards), pp. 112–13 (industry standards)]. Frantz also uses her ***thirty years*** of professional work in the cyber security, information technology, and compliance industry to make these determinations. *Id.* at ¶ 2. Defendants were able to ask additional questions, *and did*, during Frantz's deposition, to which Frantz provided detailed and useful responses regarding the "significant" events and "industry standards" she references and their relation to the Data Breach. Ex. 1, pp. 120:20-123:12, 154:24-156:5, 163:15-164:15, 178:9-181:22 (discussing the "industry standards" set out in her initial report); *Frantz Second Deposition*, pp. 111:12-112:14, 128:8–24, 134:16-136-24, 138:23-140:8, attached as Exhibit 2 (discussing the "industry standards" referred to in her rebuttal reports). Frantz concludes that, [redacted] [Doc. 252-5, ¶ 12(a)-(k)]. [redacted] *See, e.g.*, *id.* at ¶ 12(a)-(k), ¶ 21–29; Ex. 2, pp. 130:16–23 [redacted]. Moreover, Defendants are free to ask additional questions regarding Frantz's methodology at trial. *See Simmons*, 576 F. Supp. 3d at 1140–41.

Defendants also improperly argue that Frantz's results are not subject to peer review. However, Frantz's report includes information on the documents and law reviewed, allowing another

cybersecurity expert to review those same documents and information to test her conclusion regarding Mednax's [redacted]. [Doc. 252-5, pp. 112–13]; *Quiet Tech. DC-8, Inc.*, 326 F.3d at 1341. *See also United States v. Majors*, 196 F.3d 1206, 1215 (11th Cir. 1999) (District courts "have substantial discretion in deciding how to test an expert's reliability . . . .").

iii. Frantz used and adequately explained her reliable methodology for [redacted].

Frantz's reports and deposition testimony provided sufficient reasoning and methodology to determine that the [redacted] was unreliable, incomplete, inadequate, insufficient, and conclusory. As indicated in her initial report, Frantz reviewed (and cites to) the transcript of [redacted] *See, e.g.*, *Matthews Deposition*, pp. 113:15; 123:10-125:13; 128:21-130:7; 132:7-15; 142:12-143:21; 188:22-189:2; 190:9-25, attached as Exhibit 3. During her depositions, Frantz testified that she relied on this information – [redacted] Ex. 1, pp. 117:10-23, 119:2-11, 331:10-13, 332:20-333:11 ([redacted]); Ex. 2, pp. 154:25-155:5, 157:10-14 (same). Finally, Frantz considered her own team's standard – from her ***thirty years*** of practice – and testified that her team of cyber security experts would not have [redacted]. Ex. 1, pp. 182:5–16.

iv. Frantz used reliable methodology in conducting [redacted].

Defendants argue that Frantz's [redacted] although Frantz preserved and produced evidence of what she observed on the website. [Doc. 252-5, Exhibit E]. If Mednax's standards were applied, a cybersecurity expert would *never* be able to prove that someone's information is available on the dark web, as illegal marketplaces frequently come and go on the dark web. Even if Frantz was authorized to do business with these cybercriminals and purchase the illicit information, dark web transactions do not come with receipts that detail the vendor and source of the information. Yet, Frantz's reports offer a comprehensive review of how she conducted her search, what search term she used, what markets she searched, what PII/PHI she found in those markets, the price the PII/PHI was selling for, screenshots of the sites, and further explanation of the available PII/PHI.

Id. In her initial report, [redacted] *Id.* at Exhibit E, p. 5–6; *see also* Ex. 1, pp. 241:4-242:3. Moreover, Frantz's sworn testimony that [redacted] *Quiet Technology DC-8, Inc.*, 326 F.3d at 1341; *see* Ex. 1, pp. 230:12-231:7 ([redacted].).

Next, Defendants argue the Frantz made an error in searching for the Social Security numbers because [redacted] Defendants rely on Mednax's rebuttal expert, Jason Hale, who states that the [redacted]. However, Mr. Hale's rebuttal does not sufficiently call into question the reliability of Frantz's methodology. First, Frantz never testified that [redacted] Next, Frantz testified that the vendors on the [redacted]. Ex. 1, pp. 253:20-254:10. [redacted]. *Id.* at pp. 254:12-257:3.

Finally, Defendants assert that Frantz offers "no explanation" for how the Social Security numbers she found on the dark web came from Mednax. As established in her initial report, [redacted]" [Doc. 252-5, ¶ 208]. Frantz further explains that:

[redacted]

Id. at ¶ 209. In contrast to Defendants assertion that they did not have [redacted][1] [redacted]. Frantz has clearly established a reliable method for searching

[1] [redacted]. *Neilsen Deposition*, p. 48:15-19, attached as Exhibit 6. In contrast, Mednax has not produced any policies or procedures stating that it did *not* require or save Plaintiffs' Social Security numbers.

for the Plaintiffs' PII/PHI on the dark web. Such information must be heard and considered by the jury.

2. Frantz's opinions are helpful.

Defendants intentionally misrepresent Plaintiffs' allegations in their Motion to Exclude. In addition their negligence/failure to incur costs necessary to provide and implement adequate security measures, Plaintiffs' causes of action also rest on Defendants' (1) failure to take necessary precautions/comply with basic security protocols required to safeguard PHI/PII and prevent the Data Breach, (2) improperly handling of Plaintiffs' PHI/PII, (3) failure to provide Plaintiffs with proper notice, (3) failure to conduct a proper risk assessment, (4) failure to disclose to Plaintiffs that they did not have adequate security measures, and (5) failure to train their employees to identify email-borne threats and defend against them. [Doc. 115, ¶¶ 5, 356-57, 384, 421, 427]. Frantz's reports provide admissible and helpful expert opinions in support of these issues.

i. Frantz's cybersecurity opinion is helpful.

During her deposition, Frantz stated [redacted] Ex. 1, pp. 187:18–190:8; 194:16–199:19. [redacted]

[redacted]

[2] Defendants claim that Frantz cannot cite to a lack of evidence for events prior to the discovery window. However, given the reoccurring results of the [redacted] and Mednax's [redacted] Doc. 252-5, ¶¶ 62, 87–88, 99–100, 174–203].

[redacted]

Defendants claim that Frantz offers a hodge-podge of remediations. Yet, these necessary remediations show that [redacted] [Doc. 252-5, ¶¶ 12(a), 89, 94, 99, 179]. [redacted] Ex. 2, p. 128:8–9. Rather, each security measure is meant to work in combination with one another to prevent a Data Breach.

[redacted]

[redacted] *Id.* Frantz's opinion is relevant to the case, highly probative to Plaintiffs' causes of actions, helpful to the jury, and admissible.

ii. Frantz's opinions regarding Mednax's [redacted] are helpful.

Defendants improperly assert that Frantz's testimony is not helpful because "no link between [Defendants'] failure [redacted] and any harm to Plaintiffs."[3] [Doc. 252, p. 13]. First, an investigation into a data breach can be *critical* in determining what information was exposed in the data breach, whose information was exposed, and how that information was exposed. Here, [redacted]. [Doc. 252-5, ¶¶ 93, 96, 133-136, 139, 142-143, 195, 198-199]. [redacted] as they were not given sufficient and timely notification that their PII/PHI was exposed. Second, [redacted] [Doc. 252-5, ¶¶ 125, 154-155, 253]. As a result, [redacted].

3. Frantz's rebuttal reports are proper and admissible.

i. Frantz's rebuttal of Keith Wojcieszek complies with Fed. R. Civ. P. 26.

A significant problems with Wojcieszek's report is that it is precariously balanced on his limited and [redacted]. In her rebuttal report, Frantz uses [redacted]. *See generally* [Doc. 252-14]; see *e.g.*, *id.* at ¶ 24 ("[redacted] ¶¶ 25-27 ([redacted]); pp. 12–20 (same); p. 18

[3] Although Defendants seem to challenge the helpfulness of Frantz's opinions regarding "Mednax's investigation" of the Data Breach, Defendants do not specifically indicate what portion of Frantz's reports and testimony they believe to improperly opine on this information. Plaintiffs respond to the best of their ability but given Defendants' failure to clarify the portions of Frantz's reports which they seek to exclude, Plaintiffs are hindered in providing a full response at this time.

(“ These details and explanations are offered to solely contradict Wojcieszek’s inadequate findings.

ii. Frantz is qualified to render her rebuttal report of Brian Ellman which complies with Fed. R. Civ. P. 26.

In her rebuttal of Mr. Ellman’s report, Frantz states [Doc. 252-15, ¶¶ 6, 8-9, 14-19, 22-24]. Frantz’s ultimate conclusion is that “.” *Id.* at ¶ 26.

Defendants argue that Frantz’s opinion regarding the significance of prior breaches is not proper rebuttal evidence because Ellman’s report does not suggest that one data breach caused any damage, nor does it offer an opinion on liability. [Doc. 252, p. 17]. However, in his report, . [Doc. 252-2, ¶¶ 19(c), 62]. This is not a situation where one breach cancels out the effects of another. Rather, prior breaches have little effect on the harms proximately caused by this Data Breach because new PHI is created with each doctor visit and, even with stagnate information, a renewed release of information still cause harm to the victims of a data breach as new cybercriminals gain access to, sell, and abuse the information. [Doc. 252-5, ¶¶ 3-4, 12].

Defendants assert that Frantz’s opinion regarding the standardization of the data exposed in this Data Breach has “absolutely nothing” to do with whether these harms were caused by the Data Breach. [Doc. 252, p. 17]. Yet, . *See, e.g.*, [Doc. 252-2, ¶¶ 34, 32, 35]. [Doc. 252-15, ¶ 26].

[redacted]. [Doc. 252-2, ¶ 27-28]. [redacted]. [Doc. 252-5, ¶¶ 14-15 ([redacted]); ¶¶ 16-19 ([redacted])].

Finally, [redacted]. [Doc. 252-2, ¶¶ 19(b)]. [redacted] [Doc. 252-15, ¶ 21-25]. The one year of free credit monitoring offered by Defendants – which was *significantly delayed* – is a small and ineffective drop in the lifelong struggle Plaintiffs and the Class Members will face due to the exposure of their PII/PHI.

Frantz's rebuttal opinions are – rightfully so – couched in terms of cybersecurity issues and cyber intelligence because, at the end of the day, this is a Data Breach which involves technical issues. These issues include Mednax's contribution to (causation) Plaintiffs' and the Class Members' PII/PHI being sold on the dark web (harm), something Ellman does not qualify to speak on (as further set out in Plaintiffs' Motion to Strike and Exclude [Doc. 258]). Frantz is more than qualified to render these opinions and does so in a manner that complies with Fed. R. Civ. P. 26.

iii. Frantz's rebuttal of Art Ehuan complies with Fed. R. Civ. P. 26.

Frantz's rebuttal report for Ehuan directly contradicts [redacted]. [Doc. 250-1, ¶¶ 16-17]. [redacted] *See, e.g.*, [Doc. 252-15, ¶ 31 ("[redacted]

[redacted].")].

4. Mary T. Frantz's opinions regarding NAPA are relevant.

On May 6, 2020, North American Partners in Anesthesia ("NAPA") acquired Defendant American Anesthesiology ("AA"), an affiliate of Defendant Mednax. In June 2019, [redacted] [Doc. 250-5, ¶ 89 (citing AA_0002214, attached as Exhibit 8)]. Frantz's discussions of NAPA in her reports relate to AA's inadequate cyber security system, given NAPA's failure to remediate known vulnerabilities in AA's system. *Id.* Frantz's opinions regarding NAPA are intended to opine on AA's inadequate cyber security (given that it is now AA's parent company), AA's decision to continue to work with Mednax after the acquisition, and AA's failed response after notice of the Data Breach. *See, e.g.*, [Doc. 252-5, ¶¶ 21–27, 39–41, 183, 189]. As such, Frantz's testimony regarding NAPA is relevant in that it speaks to AA's knowledge, vulnerabilities, and liability for the Data Breach.

b. Gary Olsen's testimony and report are reliable.

Plaintiffs' expert Gary Olsen is undeniably qualified (which Defendants do not dispute), he reliably applies accepted accounting and valuation principles and methods to determine components of the [redacted], and his testimony will help the factfinder identify the [redacted] by the Class and determine those on a class wide basis. Defendants' challenges to Olsen's testimony all rest on a misinterpretation of his opinion and the law or go to the weight and credibility of his opinion rather than its admissibility.

In addition, much of the criticism goes to the weight of Olsen's opinions to the ultimate fact finder, not the admissibility of those opinions, such as critiques of research and data Olsen used to illustrate the available damages methodologies and the denunciation of Olsen's extensive and relevant experience. Such criticism is further inconsequential because Olsen's sources are reputable and readily relied upon by economic damages experts.

Under the widely accepted economic principles of the "market approach," Olsen demonstrates the value of such data by how much such information could be sold for in the relevant marketplace: the dark web. [redacted] *Lehmann Deposition*, p. 89:5–

14, attached as Exhibit 4. Essentially Defendants' arguments turn on the self-serving premise that access to Plaintiffs' and class members' PII cannot, or should not, be valued. At various points, Defendants question Olsen's calculations or the data underlying them, but at no point do they proffer an alternative damages calculation or provide alternative underlying data. Nor do Defendants address the fact that the same methodology proffered by Olsen was accepted over the defendant's objections in another data breach case. *See Adkins v. Facebook, Inc.*, 424 F. Supp. 3d 686, 694 (N.D. Cal. 2019) ("CPA Ratner attempted to show, through economic models, that access to personal information in-and-of-itself has market value, and that the hackers taking the personal information freely from Facebook is a value lost to the class members. He also showed that companies are willing to pay money (such as through targeted advertising) for access to someone's personal information. In addition, he pointed out that Facebook's role in the data breach deprived plaintiff and the class members from being able to control access to their personal information and monetize it if they so choose. This calculation is admissible.")

As discussed more fully herein, there is no basis for excluding any of the opinions offered by Olsen in support of Plaintiffs' Motion for Class Certification.

1. Olsen is undeniably qualified to render [redacted] opinions in this matter.

Defendants do not challenge Olsen's qualification to offer his [redacted] opinion nor could they. Olsen is a certified public accountant with decades of experience in business and property valuation, making him well qualified to provide opinions about the market value of the class members' PII, and he has considerable experience in modeling of damages in data privacy matters. *See* [Doc. 252-16, ¶¶ 24–26]. Particularly relevant to his opinions rendered in this matter, Olsen has a specialty designation "Accredited in Business Valuation" from the American Institute of Certified Public Accountants," and he is a Certified Patent Valuation Analyst. *Id.* He has 20 years of experience consulting and providing expert testimony in litigation matters concerning damages, intellectual property, lost profits, and valuation. *Id.* His background and experience readily meet the requirement of sufficient specialized knowledge to assist the trier of fact in deciding the particular issues in this case. *Quiet Tech. DC–8, Inc.,* 326 F.3d at 1342 ("Under Rule 702, a witness may be qualified as an expert by virtue of his or her knowledge, skill, experience, training, or education.").

Notably, Olsen has been found qualified and permitted to offer expert opinion testimony on damages in multiple cases, and no court has ever excluded his testimony. *See, e.g.*, *Olsen Deposition*, p. 179:4–180:14, attached as Exhibit 5; *United States v. Talmage*, No. 1:16-CV-00019-DN, 2019 WL 1787493, at *2 (D. Utah Apr. 24, 2019) (denying motion to exclude); *AngioScore, Inc. v. TriReme Med.,*

Inc., 87 F. Supp. 3d 986, 1017 (N.D. Cal. 2015) (denying motion to exclude); *AngioScore, Inc. v. TriReme Med., Inc.*, No. 12-CV-03393-YGR, 2015 WL 5258786, at *7 (N.D. Cal. Sept. 8, 2015) (same). This Court should reach the same conclusion.

2. Olsen's opinions and methodologies are based on reliable principles and methods.

"The reliability analysis is guided by several factors: (1) whether the scientific technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review or publication; (3) whether the technique has a known or knowable rate of error; and (4) whether the technique is generally accepted in the relevant community." *Navelski v. Int'l Paper Co.*, 244 F. Supp. 3d 1275, 1286 (2017) (citing *Daubert*, 509 U.S. at 593–94). The reliability requirement is met when the expert's opinion is "based on scientifically valid principles, reasoning, and methodology that are properly applied to the facts at issue." *Id.*

For this matter, Olsen was asked to determine whether a common methodology exists to [redacted] [Doc. 252-16, ¶ 28].

i. Olsen properly calculated Class Members' [redacted]

The premise for Olsen's [redacted] [Doc. 252-16, ¶ 68]. The act of accessing that information has a value that can be quantified by using the commonly accepted market approach to valuation which measures what similarly situated third parties pay to access comparable information. The market approach uses "a market transaction as a benchmark for value of the underlying asset." Ex. 5, p. 68:20–22. [redacted] [Doc. 252-16, ¶ 70].

In discovery, [redacted] *Id.* at ¶ 44. [redacted]. *Id.* at ¶ 44 (Table 9). Because there are various combinations of data points that can be sold together, Olsen classified various

categories of PII and PHI, [redacted] [Doc. 252-16, ¶¶ 60–67, 70 (Table 11)]. [redacted]. *Id.* at ¶¶ 8, 11, 13 [redacted], Olsen uses the dark web values as the best available data to perform a market value analysis. *See* Ex. 5, pp. 73:9–13, 79:19–82:22. [redacted] the dark web operates as a marketplace, where there are willing buyers and sellers of information. *See* Ex. 4, p. 94:3–9 (acknowledging that in a dark web transaction, there would need to be a willing buyer and willing seller).

The market approach Olsen utilized is similar to that used to calculate damages for the unauthorized use of a nonpracticing patent owner's patented technology: a "reasonable royalty" is utilized, based on comparable royalty rates, to assess reasonable royalty damages. [Doc. 252-16, ¶ 69]; *See also StoneEagle Servs., Inc. v. Pay-Plus Sols., Inc.*, No. 8:13-CV-2240-T-33MAP, 2015 WL 3824170, at *9–10 (M.D. Fla. June 19, 2015) (finding that the market approach is an accepted methodology for determining a reasonable royalty). As Olsen further explained in his deposition, Plaintiffs and class members function as nonpracticing patent owners with respect to their PII and PHI: they have property; that property was accessed or used without their consent; they do not have lost profits (because they were not in the business of selling that property); and so, a reasonable royalty based on the market value of accessing or using that property (i.e., a hypothetical transaction) is an appropriate measure of harm. *See* Ex. 5, pp. 82:22–86:16 ("But the fact is that their information was taken and was used and they should be compensated.").

This theory is premised on the well-established principle that individuals have protected property interests in their PII. *See, e.g., In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*, 440 F. Supp. 3d 447, 460-61 (D. Md. 2020) (collecting and citing cases establishing the "growing trend across courts that have considered this issue" to conclude individuals have property interest in their PII); *Hameed-Bolden v. Forever 21 Retail, Inc.*, 2018 WL 6802818, at *5 (C.D. Cal. Oct. 1, 2018) (recognizing that loss of value of personal information may represent a form of property damages, not merely economic losses); *Claridge v. RockYou, Inc.*, 785 F. Supp. 2d 855, 865 (N.D. Cal. 2011) (concluding

plaintiffs had property right in their PII); *Caudle v. Towers, Perrin, Forster & Crosby, Inc.*, 580 F. Supp. 2d 273, 282 (S.D.N.Y. 2008) ("It is sufficient to conclude that the plaintiff has a protectable property interest in his personal data conveyed under an express or implied pledge of confidentiality."); *Blaustein v. Burton*, 9 Cal. App. 3d 161, 177 (Cal. Ct. App. 1970) (personal data encompasses "the legal right to exclude others," which is "[a]n essential element of individual property.

ii. In selecting comparables for his "market approach" methodology, Olsen used reliable sources and data.

Olsen's opinion is reliable because it is based on the straightforward application of property valuation principles to the facts of this case—an area in which Olsen is qualified to offer expert opinion testimony. Although Defendants challenges the reliability of Olsen's market value opinion on several fronts, each argument fails. Defendants' contention that Olsen's calculations of market value are unreliable because [redacted] is a meaningless criticism. [redacted] . Ex. 5, pp. 69:8–18; 191:14–24. None of Defendants' experts even attempted to replicate Olsen's work (and thus did not show it could not be replicated), nor did they provide any independent analysis of potentially comparable transactions or any other information about the market value of accessing the class members' PII.

As explained in his deposition, [redacted] Ex. 5, p. 73:9–13. Notably, neither Lehmann nor any of Defendants' experts identified any other transactions or data that they contend Olsen should have considered or relied upon, and none are available. Such a reasonable approximation based on the best available data is widely accepted as a reliable valuation, and challenges to reliance on the best available data go to the weight and credibility of opinion testimony rather than its admissibility. See, *Simmons*, 576 F. Supp. 3d at 1145 (noting that differences in source selection and even mistakes "clearly go to the weight the factfinder may ultimately choose to afford [the expert's] opinions as opposed to their admissibility).

Olsen's reliance on the best available data to render an opinion concerning the market value of class members' PII/PHI is decidedly appropriate. *See, e.g.*, *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1188 (9th Cir. 2002) (affirming admission of expert testimony based on "best available data"); *In re Hernandez*, 493 B.R. 46, 50 (Bankr. N.D. Ill. 2013) ("Opinions have consistently held that valuation of assets is 'not an exact science.'"); *Cook Inc. v. Endologix, Inc.*, No. 1:09-CV-01248-TWP, 2012 WL 3948614, at *5 (S.D. Ind. Sept. 10, 2012) (finding "calculation of market share is based on reliable data

and methods" where opposing party did not "provide any alternative data that would have been more reliable upon which [expert] could have relied" or "suggest how the data for the missing year or quarters could otherwise have been calculated"); *Ponca Tribe of Indians of Oklahoma v. Cont'l Carbon Co.*, No. CIV-05-445-C, 2008 WL 7211698, at *4 (W.D. Okla. Dec. 3, 2008) (holding regression analysis was admissible and questions about amount of and particular data used could be explored in cross-examination); *Taian Ziyang Food Co. v. United States*, 35 C.I.T. 863, 870 (2011) (in determining valuation of factors of production, question is whether Commerce Department has used "best available data" and calculated "as accurately as possible"). Notably, Defendants have not provided any data or analysis showing different market values of the PII that would diminish or call into question the validity of the values used by Olsen.

Defendants further claim Olsen's [redacted] is unreliable because his [redacted] Here, too, Defendants are wrong. To start, none of Defendants' experts offer any alternative to even suggest that Olsen's values are incorrect. Moreover, Defendants provide no support that comparable transactions must be identical to the target transaction for the market valuation to be reliable. Indeed, the comparisons utilized by Olsen are adequate for valuation purposes, which is "not an exact science" but is nevertheless routinely used in court to prove the value of property or assets. *In re Hernandez*, 493 B.R. at 50. If Defendants wants to challenge the appropriateness of the comparison points Olsen used, they can do so through cross-examination at trial—but this is not a reason to exclude Olsen's report or testimony. *StoneEagle Servs*, 2015 WL 3824170, at *5–6; *Cook*, 2012 WL 3948614, at *5.

Critically, at least one court has admitted expert testimony in a data breach case employing the *same* method as Olsen did here. *See Adkins*, 424 F. Supp. 3d at 694. Olsen's opinion is relevant and reliable, and the Court should reject Defendants' contentions otherwise.

iii. Olsen's methodology for [redacted]

To address the future risk of identity theft faced by Plaintiffs and Class Members because of the Data Breach, Plaintiffs seek a remedy of the monetary value of identity theft protection over a period of time to be determined by the jury, to restore Plaintiffs to the position they would have been in if Defendants had adequately protected class members' PII and PHI. [Doc. 252-16, ¶ 82]. Plaintiffs do not seek to directly provide an identity theft protection product to the Class; rather, the Class is

entitled to the value of the identity theft protection as compensation for offsetting the risks they now face. Ex. 5, p. 159:23–24.

[redacted]. Olsen is not being offered as an identity theft expert to opine as to the length of time the increased risk will burden Plaintiffs and class members. Rather, Olsen's methodology and range of calculations will be presented to assist the jury in determining the value of the remedy necessary to compensate [redacted] In arguing that Olsen's reliance on his experience in data breach cases and his work with [redacted] Defendants incorrectly argue that Olsen's opinions are "premised on numerous unsupported and speculative assumptions." This argument misconstrues Olsen's report and the remedy advocated by Plaintiffs. Olsen does not purport to determine whether any particular remedy for the Class is appropriate; rather, he only calculates what the value of that remedy would be if awarded. [Doc. 252-16, ¶ 83]. That is an entirely proper use of expert testimony, especially in the context of calculations. *RG Steel Sparrows*, 609 F. App'x at 739; *see also Barris v. Bob's Drag Chutes & Safety Equip., Inc.*, 685 F.2d 94, 101 n.10 (3d Cir. 1982) ("Under Rule 703, an expert's testimony may be formulated by the use of the facts, data and conclusions of other experts."); *Asad v. Cont'l Airlines, Inc.*, 314 F. Supp. 2d 726, 740 (N.D. Ohio 2004) (finding one expert "properly relied on [another] expert['s] opinion in expressing his own opinion on causation").

iv. Olsen's calculations of statutory damages will assist the trier of fact.

Defendants are incorrect in their proclamation that an expert cannot be proffered for purposes of calculating statutory damages. Because a damages expert's opinions are based upon mathematical calculations is not dispositive of the question whether that expert will assist the trier of fact. *See City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 566 (11th Cir. 1998) (finding an expert's compilation of data and testimony concerning damages admissible even though they were "the products of simple arithmetic and algebra . . . ."); *Apple Inc. v. Corellium, LLC*, No. 19-81160-CV, 2020 WL 8836065, at *4 (S.D. Fla. July 29, 2020), *report and recommendation adopted in part*, No. 19-81160-CIV, 2021 WL 930292 (S.D. Fla. Mar. 11, 2021) (allowing expert to testify as to his statutory damages calculations).

IV. CONCLUSION

Plaintiffs' experts' testimony and reports are admissible under Fed. R. Evid. 702, Fed. R. Evid. 403, and *Daubert*. Defendants improperly use their Motion to Exclude as a means to prevent the Court and jury from learning pertinent evidence regarding Defendants' failures to maintain adequate security

measure as required by law. At best, the issues raised by Defendants are nothing more than potential questions about the weight and credibility to be afforded by the trier of fact; they are not a basis to exclude the testimony of Frantz or Olsen under *Daubert* and Rule 702. Defendants will have the opportunity to cross-examine both experts at trial and argue to the trier of fact that their opinions should not be given credence. For the reasons stated above, and the entire record in the litigation, Plaintiffs respectfully request that the Court deny Defendants' Motion to Exclude in its entirety.

Respectfully submitted,

/s/ William B. Federman

William B. Federman (admitted *pro hac vice*)
FEDERMAN & SHERWOOD
10205 N. Pennsylvania Ave.
Oklahoma City, Oklahoma 73120
Telephone: (405) 235-1560
Facsimile: (405) 239-2112
Email: wbf@federmanlaw.com

Maureen M. Brady (admitted *pro hac vice*)
MCSHANE & BRADY, LLC
1656 Washington Street, Suite 120
Kansas City, MO 64108
Telephone: (816) 888-8010
Facsimile: (816) 332-6295
E-mail: mbrady@mcshanebradylaw.com l

Co-Lead Counsel for Plaintiffs and the Proposed Classes

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 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
William B. Federman