

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-CV-23352-MGC

RAY MOHAMED, individually and on behalf of all
others similarly situated,

Plaintiff

vs.

AMERICAN MOTOR COMPANY, LLC,
a Florida limited liability company, d/b/a
“InstantCarOffer.com” and “ICO”; and
OFF LEASE ONLY, INC., a Florida Corporation,

Defendants.

**DEFENDANT OFF LEASE ONLY, INC.’S REPLY MEMORANDUM IN SUPPORT OF
ITS MOTION TO EXCLUDE PLAINTIFF’S EXPERT REPORT, SUPPLEMENTAL
REPORT AND THE TESTIMONY OF JEFFREY HANSEN**

Defendant, Off Lease Only, Inc. (“OLO”), by and through undersigned counsel and pursuant to Federal Rule of Evidence 702, hereby submits its reply memorandum in support of its Motion to Exclude Plaintiff’s Expert Report, Supplemental Report, and Testimony of Jeffrey Hansen. (D.E. 160), as follows:

Expert witnesses, with proper credentials, and a schooled analysis of an issue can be an asset in a case to assist the Court and the jury. However, when the expert is nothing more than a layman without the technical skill necessary or without having conducted a reasoned analysis, as in this case, any conclusions are not helpful, can be unduly prejudicial, and can mislead the jury.

In his Response, Plaintiff does not attempt to substantiate Hansen’s credentials or his methodology, but instead begins his Response with shrill, in lieu of substance, including baseless accusations of “systematic perjury” in an effort to discredit OLO to this Court. Plaintiff apparently imagines that this Court will be moved to deny the instant motion not based on the

merits, but based upon information not properly before the Court. Accusations that undersigned counsel or its client committed “systematic perjury,” a felony, as well as a fraud on the Court, is entirely improper and will be dealt with at the proper time and in a proper manner. In any event, Plaintiff’s accusations are irrelevant to the question of whether Plaintiff’s expert, Jeffrey Hansen, is qualified and has offered a reliable or otherwise permissible opinion under Rule 702 and *Daubert*.

When Plaintiff ultimately addresses the substantive issues at hand, his Response mischaracterizes OLO’s arguments, misstates the case law, and devolves into repeated and unprofessional personal attacks and other irrelevancies designed to distract attention away from the fatal flaws in Hansen’s opinions. Plaintiff chides OLO for not taking Plaintiff’s deposition, but OLO was under no obligation to do so. An expert’s report, standing alone, is required to sufficiently set forth the expert’s qualifications, methodology, and opinions. As explained below and more fully in OLO’s Motion, Hansen is unqualified to opine on the meaning of the term ATDS as defined within the “industry” or by the TCPA; (2) Hansen offers improper legal conclusions; (3) Hansen’s opinions are unreliable because he did not examine or test the actual systems and software on which he is rendering an opinion; and (4) Hansen’s calculations concerning the number of text messages sent are not a proper subject for expert testimony and are also unreliable.

A. HANSEN LACKS EXPERIENCE TO TESTIFY REGARDING THE MEANING OF ATDS IN THE ‘INDUSTRY’ OR AS DEFINED BY THE TCPA AND FCC.

Plaintiff misunderstands OLO’s argument regarding Hansen’s qualifications. OLO does not claim that Hansen lacks professional experience or academic experience *in general*, as Plaintiff suggests in his Response. Rather, Hansen premises his “opinions” that the technological platforms at issue constitute an ATDS, in part, on how the terms “ATDS” and

“predictive dialers” are (i) used in an unidentified “industry” and (ii) as those terms are defined by the FCC and in the TCPA. (*See, e.g.*, D.E. 160-1, Written Report, ¶¶16-20). Assuming that the unidentified “industry” referred to by Hansen is one that uses ATDS and predictive dialers as a daily part of its business, Hansen’s Resume does not reflect that he has ever been professionally employed by anyone in that “industry” which would enable him to competently testify based on his “professional experience” regarding the meaning of any terms used within that “industry.” Hansen’s Resume also fails to demonstrate any professional experience in an “industry” that would render him competent to testify to the meaning of the terms “ATDS” or “predictive dialer” as defined by the TCPA or the FCC. This is most-definitely not an attack on Hansen’s academic qualifications as Plaintiff vociferously claims. Plaintiff, therefore, fails to address OLO’s argument and thereby concedes the point. Further, Plaintiff’s Response offers nothing to show that Hansen is qualified, by professional experience or otherwise, to testify as to the meaning of any terms used in the so-called “industry” or to opine regarding the meaning of any terms as defined by the TCPA or the FCC.

B. HANSEN’S OPINIONS ARE IMPERMISSIBLE LEGAL CONCLUSIONS.

Plaintiff attempts to circumvent the rule prohibiting an expert from offering a legal conclusion by focusing on Hansen’s apparently deliberate effort to circumvent Judge Cohn’s decision in *Strauss*, which entails insertion of the vague and ambiguous phrase “have the characteristics” of an ATDS, while ignoring the impermissible portion of Hansen’s opinion, which states “as defined by the TCPA” or as “clarified by the FCC Order.” Each of Hansen’s legal conclusions is set forth in full in OLO’s Motion and for the sake of brevity they not repeated here. However, for illustrative purposes, each of the legal conclusions tracks essentially the same language, as follows: “in my expert opinion, the below dialing systems that are discussed

in detail *have the characteristics of an ‘automated telephone dialing system’ (“ATDS”) as defined by the TCPA.*” (D.E. 160-1, Written Report, ¶ 21). It is *this* latter portion of Hansen’s opinion (underlined) that, when combined with the phrase “have the characteristics of an ATDS,” affirmatively and directly suggests that legal conclusion that the systems at issue meet the definition of an ATDS set forth in TCPA.

As explained in OLO’s Motion, the TCPA defines “automatic telephone dialing system” or “ATDS” as “equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” *See* 47 U.S.C. § 227(a)(1). If Hansen had the proper qualifications to render opinions, which he does not, it *might* have been appropriate for Hansen to opine that the system utilized by ICO had the “capacity to store or produce telephone numbers to be called using a random or sequential number generator.” However, in no event can Hansen venture the legal conclusion that the systems at issue have the characteristics of an ATDS as defined by the TCPA or the FCC Order – regardless of whether Hansen attempts to hedge that opinion with the phrase “characteristics of.”

C. HANSEN’S OPINIONS ARE NOT RELIABLE.

Plaintiff attempts to defend the reliability of Hansen’s opinion – specifically, his failure to test, review, inspect or even look at the actual platforms or systems he is offering an opinion on – by claiming that Hansen’s testimony is “non-scientific testimony” that “does not lend itself to analysis under the four factors mentioned in *Daubert*, as it is based upon the knowledge and experience of the [sic] Mr. Hansen . . . , rather than the methodology or theory.” (Resp., p. 8). Apparently, it is Plaintiff’s position that merely because Hansen allegedly has “experience” in an unidentified “industry” with ATDS systems in general – a fact OLO does *not* concede – he may render an opinion on the specific text messaging system at issue in this case despite never

personally inspecting or reviewing the systems at issue, or technical materials or deposition testimony explaining the system's configurations and capabilities. This argument fails for several reasons.

While Plaintiff may label Hansen's opinion as "non-scientific" expert testimony, Federal Rule of Evidence 702 and the factors outlined in *Daubert* still apply. While a trial judge may have more leeway in deciding whether non-scientific testimony is reliable, the Eleventh Circuit has specifically held that "[t]he same criteria that are used to assess the reliability of a scientific opinion may be used to evaluate the reliability of non-scientific, experience-based testimony. *United States v. Fraizer*, 387 F.3d 1244, 1261 (11th Cir. 2004) *Id.* at 1262 (citing *Kumho Tire*). Moreover, regardless of the specific factors considered in evaluating the reliability of the expert testimony, the "proposed testimony must be supported by appropriate validation – *i.e.*, 'good grounds,' based on what is known." *Id.* at 1261 (citing *Daubert*). If an expert witness is relying solely or primarily on experience, the Eleventh Circuit has instructed that then the witness must explain "how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." *"Id."*

In the instant case, Hansen is not testifying, based upon alleged experience, as to the characteristics of an ATDS *in general*. To the contrary, Hansen is opining based on his purported "experience" that the *specific Callfire, Twilio, and 3Seventy platforms or systems used by ICO* to send the text messages in question are each an ATDS without ever having personally inspected or tested those platforms or systems. Hansen does not explain (nor does Plaintiff's Response) how his alleged "industry" experience alone leads to the conclusion that each of the systems utilized by ICO is an ATDS, why his "industry" experience is a sufficient basis for that opinion, or how that "industry" experience is reliably applied to the facts of this case. Nowhere

in Hansen's Report or Supplemental Report does he state that he has any prior experience with either the Callfire, Twilio, and 3Seventy platforms or systems used by ICO. The simple fact is that his experience *alone* – regardless of whether that experience may qualify him to testify as an expert – is not enough to constitute “good grounds” on which to base his opinion that the systems at issue are an ATDS without having tested, inspected, or even seen those particular platforms or systems.

Plaintiff argues that Hansen's testimony is based on sufficient facts because he reviewed various documents, identified in paragraph 13 of his Report, including “American Motor Company's responses to Plaintiff's discovery requests, Callfire and Twilio's responses to Plaintiff's Subpoenas, and instructional materials describing the services which the discovery responses and subpoenas indicated that Rowe actually used to send the text messages at issue.” (Resp., p. 9). However, as explained in OLO's Motion, there is nothing in any of these documents to show the technical capabilities of the particular systems at issue. Notably absent from the documents identified by Hansen is any deposition testimony from representatives of Callfire, Twilio, or 3Seventy explaining their respective systems, or any technical information or source code describing the exact configuration and capabilities of each system.

Lastly, Plaintiff cites to three cases in which he claims the courts have allowed other TCPA experts to opine that a system is an ATDS without having conducted a physical inspection of the actual system or a review of its source code. None of the cases cited by Plaintiff support this proposition and, in most respects, have been misunderstood by Plaintiff. First, Plaintiff contends that in *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009), the appellate court “accepted expert testimony from the plaintiff's technology expert, Randall Synder, *without any indication* that Mr. Synder personally inspected the text messaging system

at issue.” (Resp., p. 9). However, in addition to the fact that expert’s opinion was provided in a declaration in opposition to the defendant’s motion for summary judgment – and was not subject to a rigorous analysis as part of a *Daubert* motion to exclude – the appellate court’s opinion is *silent* on whether the plaintiff’s expert conducted a personal inspection. Nowhere in the Ninth Circuit’s opinion does the court hold that personal inspection is not required under *Daubert*.

In *Sherman v. Yahoo!, Inc.*, 997 F. Supp.2d 1129, 1136 (S.D. Cal. 2014), Plaintiff maintains that the court accepted the testimony of plaintiff’s expert who had allegedly not personally inspected the text messaging equipment at issue. However, as in *Satterfield*, the expert’s testimony was presented in a declaration in opposition to the defendant’s motion for summary judgment and was not specifically considered by the trial court under a *Daubert* analysis. More significantly, as Plaintiff concedes, the *Sherman* plaintiff *did* review “background information and Yahoo! Technology,” which included a review of the deposition of Yahoo!’s engineer, in which she explained how Yahoo!’s text messaging system worked and its capabilities. *See id.* at 1135-36. A true and correct copy of the declaration submitted by plaintiff in *Sherman*, in which he outlines the testimony of Yahoo!’s chief engineer and explains that his opinion is based on that testimony and the expert’s “own detailed analysis of the design of the Yahoo! Messenger application program” is attached hereto as Exhibit “A.” While it appears that the expert did not conduct a physical inspection of the system, his opinion was nonetheless based on significantly more technical facts about the particular Yahoo! system at issue, *i.e.*, “good grounds,” than Hansen’s opinion in our case.¹ In any case, *Sherman*, like *Satterfield*, does not specifically hold that a personal inspection of the system at issue is not required.

¹ Plaintiff’s attempt to distinguish the Southern District of Florida’s decision in *Strauss v. CBE Group, Inc.*, No. 15-62026, 2016 WL 2641965 (S.D. Fla. Mar. 23, 2016), fails for a similar reason. As Plaintiff admits in his Response, the expert in *Strauss* reviewed the defendant’s patent application for the technology at issue, as well as deposition testimony of the defendant. *See id.* at *3.

Finally, the case of *Hunt v. 21st Mortgage Corporation*, No. 2:12-cv-02697, 2014 U.S. Dist. LEXIS 57804 (N.D. Ala. April 25, 2014), *actually supports exclusion of Hansen's opinion as unreliable*. In that case, the plaintiff's expert sought to examine the defendant's telephone system, but could not do so because the defendant had dismantled the system and replaced it with a new one. *Id.* at *4-5. The district court wrote that “[i]deally [plaintiff's expert] would have examined the actual system in live action,” but because it had been dismantled, the court “hoped” that defendant could “dig[] out from the garbage its old system and mak[e] its best effort to recreate its old calling method for plaintiff and his expert's examination.” *Id.* While the court considered the defendant's “best efforts” to make the old system available for inspection severely lacking, the expert was able to observe the old equipment, a “demonstration” in which the defendant “pantomimed” dialing numbers on the old system, and a small group of veteran employees using the new system. *Id.* at *5. The court concluded that the expert's opinion met the Rule 702 standard for reliability because “[h]is testimony is ‘based on sufficient facts or data’ . . . *because he went to the 21st Mortgage facility and observed first-hand everything that 21st Mortgage allowed him access to*, including, as relevant to the two general conclusions he plans to testify to, the server previously used by 21st Mortgage and the call-making simulation.” *Id.* at *13-14. Thus, far from excusing Hansen's failure to test or inspect the actual systems on which he renders his opinion, this decision actually provides that such an inspection is absolutely necessary to render the opinion reliable.

Plaintiff attempts to bolster Hansen's use of “publically available” materials from Callfire's, Twilio's, and 3Seventy's websites as a basis to conclude the platforms or systems used were an ATDS by claiming that the materials are “helpful” and “not promotional materials, but are intended to teach people how to use the systems used to send the text messages at issue.”

(Resp., p. 14). Plaintiff ignores the case of *Legg v. Voice Media Group, Inc.*, 2014 WL 1767097, at *5, previously discussed in detail in OLO's Motion, in which the plaintiff did not inspect the equipment at issue, but instead, relied upon a client handbook containing, among other things, instructions on how to use the system in question – virtually the exact same argument Plaintiff makes in his Response. In *Legg*, this District concluded that the handbook, standing alone, was an insufficient factual foundation upon which to opine as to the system's capabilities. *See id.* This Court should reach the same conclusion regarding the website instructional materials.

D. HANSEN'S CALCULATIONS REGARDING THE NUMBER OF TEXT MESSAGES SENT NOT THE PROPER SUBJECT OF EXPERT TESTIMONY AND ARE UNRELIABLE.

Plaintiff does not dispute that Hansen's opinion regarding the number of text messages sent is anything more than a simple mathematical computation, which does not require expert skill. Instead, Plaintiff argues that there is "currently a *split* among circuit courts as to whether *Daubert* must be applied to its full extent in every putative class action" and "many courts agree that a less stringent standard should be applied for class certification purposes," citing to two district court orders from Pennsylvania (Resp., p. 17) (emphasis added). This argument is flatly contradicted by authority cited in Plaintiff's own Response. As stated in "Expert Evidence at Class Certification and the Role of *Daubert*," cited by Plaintiff in footnote 8 of his Response, "the **majority of circuit courts** that have addressed the issue have recognized that a **full Daubert analysis**, at least with respect to the expert witnesses who are critical to the certification question, is appropriate." A true and correct copy is attached hereto as Exhibit "B." As such, Hansen's purported "conclusions" regarding the number of text messages sent is not the proper subject of expert testimony, is not reliable,² and should be excluded.

² As discussed in OLO's Motion, Hansen has not independently verified the veracity of the information compiled on the Excel spreadsheet or even what the various entries mean.

E. OLO'S FAILURE TO CONFER DOES NOT MANDATE DENIAL.

Plaintiff is correct that undersigned counsel did not confer with Plaintiff's counsel prior to filing the Motion as required under Local Rule 7.1(a)(3). Plaintiff does not claim that this one inadvertent instance presents a pattern. And, while failure to comply with the requirements of the Rule "*may* be cause for the Court to grant or deny the motion" Plaintiff over-plays his hand when suggesting that solely on this basis, the Court should summarily deny the Motion thus leaving the Court's *Daubert* gate-keeping function for trial. In any event, Plaintiff is hard-pressed to articulate any real prejudice suffered here.³ *See Contreras v. Aventura Limousine & Transp. Service, Inc.*, No. 12-22425, 2014 WL 11880994, at *1, n.1 (S.D. Fla. July 28, 2014) (granting *Daubert* motion despite the failure to confer as required by Local Rule 7.1(a)(3) where the court "finds no prejudice meriting any relief").

At best, Plaintiff claims that OLO's arguments regarding the "publically available information" Hansen relies upon in rendering his opinion could have been "streamlined." But, OLO's argument is not that it is unaware of the materials; rather, the problem is that the website materials are an insufficient foundation for Hansen's opinion – an issue that cannot be "streamlined" as Plaintiff suggests. Plaintiff also contends that OLO's argument concerning the legal conclusions offered by Hansen "could potentially been resolved through agreement on mutually acceptable language." (Resp., p. 2). It is unclear how Hansen would agree to change his opinions.. Notably, Plaintiff does not claim the parties could confer and resolve Hansen's lack of foundation for an opinion on the platforms and systems utilized by ICO without ever having tested, inspected, or even seen those particular platforms or systems.

³ Plaintiff cites to *QBE Insurance Corp. v. Jorda Enterprises, Inc.*, 10-21107, 2012 WL 913248 (S.D. Fla. Mar. 16, 2012). However, while the motion to exclude in *Jorda* included *Daubert* issues, the court expressly stated that the movant's "primary argument is that the written summary provided the previous July was inadequate and that [the expert], in her deposition, added new opinions" -- issues that could be resolved by a pre-filing conference. *See id.* at *1

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on February 2, 2017, we electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will serve a copy of the document on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: /s/ Franklin Zemel
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SERVICE LIST

***Mohamed v. American Motor Company, et al.,*
United States District Court for the Southern District of Florida
Case No. 15-cv-23352-MGC**

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