UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

RAY MOHAMED, individually and on behalf of all others similarly situated, Plaintiff, v. OFF LEASE ONLY, INC., a Florida corporation, Defendant.	)	**Case No. 15−CV−23352−MCG**

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT OFF LEASE ONLY, INC.'S MOTION TO EXCLUDE PLAINTIFF'S EXPERT REPORT, SUPPLEMENTAL REPORT AND THE TESTIMONY OF JEFFREY HANSEN

Defendant, Off Lease Only, Inc. ("Defendant" or "Off Lease Only"), moves in boilerplate fashion to exclude Plaintiff's Expert Written Report, Plaintiff's Supplemental Report, and the testimony of Jeffery Hansen. Defendant's Motion is procedurally improper, legally frivolous, and factually unsupported and should be denied in its entirety. As explained below, after sitting on its rights and failing depose Mr. Hansen, Off Lease Only reflexively seeks to exclude his opinions and testimony in their entirety from this case based on a willful misreading of his Reports and its distorted view of the evidence they are based on.

INTRODUCTION

Since the inception of this case, Off Lease Only's strategy to avoid liability under the Telephone Consumer Protection Act ("TCPA") has been to disavow all knowledge of the allegedly illegal text message campaign. Because of its adherence to this blanket strategy of denial, Off Lease Only's discovery investigation consisted of a paltry fourteen (14) interrogatories to Plaintiff, fourteen (14) requests for production to Plaintiff, and a single

deposition.[1] Now that Off Lease Only is confronted with the results of the robust investigation Plaintiff undertook, which revealed that it has systematically perjured itself,[2] and it finds itself ill prepared to litigate as a result of its anemic discovery efforts to date, Off Lease Only panics and asks this Court to strike Plaintiff's expert from this case altogether. Notably, in its haste to file this Motion Off Lease Only failed to confer as mandated by Local Rule 7.1(a)(3). This omission is not harmless. For instance, Defendant alleges: "Hansen merely read 'publically available information,' which he does not specifically identify or include as an exhibit to his Written Report." [ECF No. 160, p. 11]. Had Defendant bothered to confer with Plaintiff about its concerns regarding the evidence Hansen relied on, the parties could have discussed the material Hansen's Report identifies[3] and eliminated or at least streamlined this issue. Similarly, Defendant's concern that certain of Hansen's statements are conclusory could potentially been resolved through agreement on mutually acceptable language. Defendant's disregard for procedure means this Court would be well within its rights to summarily deny this Motion. *See QBE Ins. Corp. v. Jorda Enterprises, Inc.*, No. 10-21107-CIV, 2012 WL 913248, at *2 (S.D. Fla. Mar. 16, 2012) (Denying motion to exclude expert testimony for failure to comply with Local Rule 7.1).

[1] Defendant conducted its deposition of Plaintiff on the final day of factual discovery, November 18, 2016.

[2] In apparent recognition that it has made material misrepresentations throughout this case, Defendant has now signaled its intent to produce supplemental document production, amended responses to certain interrogatories, and clarification of certain limited deposition testimony, and to petition this Court to reopen the pleadings so it can file an Amended Answer and Affirmative Defenses and to allow it to amend by interlineation its pending Motion for Summary Judgement and Statement of Material Facts. *See* Exhibit 1.

[3] Hansen's Expert Report, [ECF No. 160-1], identifies twenty-five (25) documents, including the publically available information Defendant alleges was not provided, which Hansen reviewed in formulating his opinion. These sources were served on Defendant on October 21, 2016. *See* Exhibit 2.

Next, Defendant's Motion is both legally and factually deficient. Off Lease Only argues that the "opinions and testimony of Hansen should be excluded, including the Written Report and the Supplemental Written Report, pursuant to Federal Rules of Evidence 702, because: (1) Mr. Hansen is not qualified to provide expert opinions on ATDS issues; (2) Mr. Hansen offers an improper legal conclusion in opining that each platform or system is and has been an ATDS within meaning of the TCPA; (3) even *if* Mr. Hansen was qualified and his opinion was a proper topic for expert testimony, Mr. Hansen's analysis, which does not include an actual examination or testing of the systems and software on which he is rendering an opinion, is unreliable; and (4) Mr. Hansen's calculations concerning the number of text messages sent are not a proper subject for expert testimony and are unreliable." [ECF No. 160 at 2].

Off Lease Only's arguments, however, run contrary to the standards for admissibility of expert testimony governed by Federal Rule of Evidence 702, as well as *Daubert*[4] and its progeny. Instead of offering substantive and targeted rationale for the relief it requests, Off Lease Only, in boilerplate fashion, simply parrots the same old arguments: that Plaintiff's expert does not have the education to offer expert testimony, that he is offering legal conclusions, and that his methods are unorthodox, etc. Defendant even attempts to squabble over the word, "industry," as if trade usage of the term ATDS changes the defining parameters under the TCPA. *See* [ECF No. 160, p. 5]. Simply put, there is no basis to exclude or limit Mr. Hansen's testimony.

The truth is that Mr. Hansen has served as an expert or consultant in more than 150 TCPA class action lawsuits, and as an expert or consultant in numerous other civil cases. [ECF No. 160-1¶ 4]. Additionally, he also served as an expert witness and consultant to numerous law firms for computer forensics analysis. *Id.* at ¶ 5. Finally, not only did Off Lease Only fail to

[4] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

depose Mr. Hansen, but it also failed to retain its own expert to evaluate and attempt to contradict his testimony. Now, faced with the high probative value of Mr. Hansen's opinion, Off Lease Only attempts to exclude Hansen's valid and helpful opinion.

FEDERAL RULE OF EVIDENCE 702 AND THE DAUBERT STANDARD

The admissibility of expert testimony is governed by Federal Rule of Evidence 702 and *Daubert* and its progeny. Rule 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) The testimony is based on sufficient facts or data
> (c) The testimony is the product of reliable principles and methods; and
> (d) The expert has reliably applied the principles and methods to the facts of the case.

Fed.R.Evid. 702.

In *Daubert*, the Supreme Court emphasized that Rule 702 assigns the trial court a gatekeeping role to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589 & 597, 113 S. Ct. 2786. *See generally Elsayed Mukhtar v. Cal State Univ., Hayward*, 299 F.3d 1053, 1063-64 (9th Cir. 2002) (Daubert's policy goal was to guard against "junk science"). Critically however, when the methodology is sound, and the evidence relied upon sufficiently related to the case at hand, disputes about the degree of relevance or accuracy (above this minimum threshold) may go to the testimony's weight, but not its admissibility. *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 852 (Fed. Cir. 2010), aff'd, 564 U.S. 91 (2011) (citations omitted).

In light of *Daubert's* "gatekeeping requirement," the Eleventh Circuit requires district courts to engage in a "rigorous three-part inquiry" for assessing the admissibility of expert testimony under Rule 702:

> Trial courts must consider whether: "(1) [T]he expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue."

United States v. Frazier, 387 F.3d 1244, 1260 (11th Cir.2004) (quoting *City of Tuscaloosa v. Harcros Chems., Inc*., 158 F.3d 548, 562 (11th Cir.1999)). These requirements are known as the "qualifications," "reliability," and "helpfulness" prongs. *Seamon v. Remington Arms Co., LLC*, 51 F. Supp. 3d 1198, 1202 (M.D. Ala. 2014). The law is clear: "[o]nly if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded." *Children's Broad. Corp. v. Walt Disney Co.*, 357 F.3d 860, 865 (8th Cir. 2004) (citations omitted).

ARGUMENT

Mr. Hansen's expert testimony easily meets the requirements under *Daubert*: he is qualified, reliable, and helpful to a jury.

A. MR. HANSEN HAS EXTENSIVE EXPERIENCE REGARDING AUTOMATIC TELEPHONE DIALING SYSTEMS.

Mr. Hansen is the principal of Hansen Legal Technologies, Inc., a firm in the business of handling Information Technology, including investigations and analysis of electronic data. [ECF No. 160-1, at ¶ 4]. He has set up and maintained automated telephone equipment from dialers operating with just three telephone lines to outbound call centers, run from three locations, capable of generating over one (1) million calls per hour. *Id.* at ¶ 8. He has assembled, configured, maintained, operated automated telephone equipment and interfaced this equipment with telephone service providers. *Id.* at 7. Additionally, Hansen has served as an expert or consultant in more than 150 TCPA cases. *Id.* at 4. Indeed, this Court has accepted his testimony on this very issue, striking only four paragraphs from his report which it found stated

impermissible legal conclusions. *Strauss v. CBE Grp., Inc*, No. 15-62026-CIV, 2016 WL 2641965, at *2 (S.D. Fla. Mar. 23, 2016) ("The Court . . . will not exclude Hansen's testimony regarding the equipment that he believes CBE used to dial Plaintiff's cell phone or the capacity of that equipment.").

Despite his abundant amount of experience, Off Lease Only argues that because Mr. Hansen does not boast of having his walls papered with graduate degrees and has not authored scholarly articles, he "does not demonstrate any *professional* experience to competently testify as to the meaning of an ATDS." [ECF No. 160 at 5] (emphasis added). However, academic experience is not required to be an expert in a field, as one may qualify as an expert by virtue of practical experience or other training. *Hunt v. 21st Mortg. Corp*., 2014 U.S. Dist. LEXIS 57804, *7 (N.D. Ala. Apr. 25, 2014) ("The 'specialized knowledge' required by the Rule need not take the form of any traditionally learned scientific discourse. As numerous courts, along with the text of the rule itself, recognize, expert opinion based on practical experience is equally admissible as that based on academic science"); *In re Trasylol Prod. Liab. Litig.*, No. 08-MD-01928, 2011 WL 7109295, at *3 (S.D. Fla. Feb. 4, 2011) ("An expert opinion need not have as its sole basis professional studies; opinion based in part on professional experience may also be reliable.") (citing *Hendrix v. Evenflo Co., Inc*., 609 F.3d 1183,1196–97 (11th Cir. 2010)); *Abramson v. Walt Disney World Co*., 370 F. Supp. 2d 1221, 1223 (M.D. Fla. 2005). As one court recently observed when faced with similar allegations regarding Hansen's qualifications, this particular attack is "gratuitously derogatory; geniuses of all kinds have boasted no college degree." *See* Exhibit 3 - *Order* from *Sherman v. Yahoo* at p. 10, n. 14.

The trial court should "examine the credentials of the proposed expert in light of the subject matter of the proposed testimony" in determining the qualification of an expert witness.

Fisher v. Carnival Corp., No. 11-22316-CIV, 2013 WL 2157164, at *3 (S.D. Fla. May 17, 2013)(holding the type of experience of the expert does not even need to precisely match the matter at hand) This inquiry is not a stringent one, and it is sufficient that the expert be *minimally qualified*. *Id.* Notably, "objections to the level of the expert's expertise [only go] to credibility and weight, not admissibility." *Id.*; *see also Valdes v. Miami-Dade Cty.*, No. 12-22426-CIV, 2015 WL 6829055, at *2 (S.D. Fla. Nov. 6, 2015) ("This Court has stated that 'alleged flaws in [an expert]'s analysis go to the accuracy of his conclusions, and less to the general scientific validity of his methods. That is what cross-examination will highlight at trial, but not enough to exclude the expert's analysis altogether.'" (quoting *Catalina Rental Apartments, Inc. v. Pac. Ins. Co.*, No. 06-20532 CIV, 2007 WL 1970808, at *5 (S.D. Fla. July 3, 2007))).

As indicated in Mr. Hansen's report, he has consulted or offered expert testimony in at least one hundred fifty (150) TCPA cases, and has set up and maintained all aspects of predictive dialers and autodialers. [ECF No. 160-1 at ¶ ¶ 8-9]. Additionally, Mr. Hansen has many software development and system engineering certifications such as MCP 4.0, A+, Network +, MCP 2000, MCSA, MCSE, and Linux+, i-Net+, and Security+. *Id*. at ¶ 10.

Mr. Hansen offered expert testimony in a published opinion regarding the capacities of autodialers in general. *See Gaines v. Law Office of Patenaude & Felix, A.P.*C., 2014 U.S. Dist. LEXIS 110162, *6 (S.D. Cal. June 12, 2014) ("Plaintiff's expert [Jeffrey A. Hansen] states that almost all autodialer or predictive dialers have the ability to store the numbers called and can generate reports of such numbers.") Clearly, Mr. Hansen certainly has sufficient knowledge and practical experience in the relevant field to offer the expert opinion that Defendant used a group of SMS Blasting systems (Callfire, Twilio, and 3Seventy) capable of broadcasting SMS

messages to multiple recipients either to a list of numbers generated either sequentially or randomly. [ECF No. 160-1 at ¶28].

B. THE METHODOLOGY EMPLOYED BY MR. HANSEN IS RELIABLE, SOUND, AND EMPLOYED BY OTHER EXPERTS IN THE FIELD.

The expert testimony offered by Mr. Hansen in this case does not lend itself to analysis under the four factors mentioned in Daubert, as it is based upon the knowledge and experience of the Mr. Hansen (*supra* Section II.A), rather than the methodology or theory behind Mr. Hansen's opinions regarding the capacity of the equipment used to send the text messages at issue. "The Daubert factors (peer review, publication, potential error rate, etc.) simply are not applicable to this kind of testimony, whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it." *United States v. Hankey*, 203 F.3d 1160, 1169 (9th Cir. Cal. 2000) (citing *Kumho Tire*, 119 S. Ct. at 1175 ("Engineering testimony rests upon scientific foundations, the reliability of which will be at issue in some cases . . . . In other cases, the relevant reliability concerns may focus upon personal knowledge or experience.") (internal citations omitted).

When evaluating non-scientific expert testimony, the trial court may consider one or more of the *Daubert* factors, but "the test of reliability is 'flexible,' and *Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case." *Kumho Tire Co.*, 526 U.S. at 141. The district court has broad discretion in determining whether *Daubert's* scientific factors are reasonable measures of reliability in a particular case and "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Id.* at 141, 152, 153. The admissibility standard for expert testimony is a "liberal one," and a "review of the case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule." *Frazier*, 387 F.3d at 1259 (citations omitted).

Mr. Hansen's expert testimony here should be reviewed through the lens of "knowledge and experience" rather than "methodology or theory." Consistent with the foregoing, Mr. Hansen explains in his uncontested report how his extensive experience allows him to arrive at the opinion that the "SMS messaging systems have the capacity to store numbers in a list, generate numbers while simultaneously calling them, all without human intervention." [ECF No. 160-1, at ¶40].

Next, Mr. Hansen's testimony is based on sufficient facts or data because he reviewed twenty-five (25) documents 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. [ECF No. 160-1 at ¶ 13].

Regardless, Defendant argues that Mr. Hansen's opinion concerning the nature of the platforms and systems utilized by Defendant to send the text messages is unreliable because Hansen did not test, review, inspect, or even look at the actual platforms or systems before rendering his opinion. [ECF No. 160 at 9]. However, other TCPA experts have employed the same (or similar) methodology as Mr. Hansen, and have not needed to conduct a physical inspection of the system or review its source code in order to give expert opinion that the system has the characteristic of an ATDS.

i. *Satterfield v. Simon & Schuster, Inc*., 569 F.3d 946 (9th Cir. 2009).

In *Satterfield*, the Ninth Circuit Court of Appeals accepted expert testimony from the plaintiff's technology expert, Randall Snyder, without any indication that Mr. Snyder had personally inspected the text messaging system at issue in that case or its source code, and based

on a limited record found a material dispute as to whether the text messaging system was an ATDS.

ii. *Sherman v. Yahoo! Inc*., 997 F. Supp. 2d 1129 (S.D. Cal. 2014).

In *Sherman*, the court denied motion for summary judgment where the plaintiff's technology expert had not personally inspected the text messaging equipment used, but rather relied upon "a review of background information and Yahoo!'s technology" to "conclude[] that the 'equipment used by the Defendants has the capacity to store or produce cellular telephone numbers to be called, using a random or sequential number generator, or from a list of telephone numbers,' and that the equipment 'has the capacity to dial cellular telephone numbers without human intervention.'" As was the case for the plaintiff's expert in *Sherman*, Mr. Hansen is not required to personally inspect the text messaging system or review its source code in order to give an expert opinion about its capacities, after having reviewed the transcript of the deposition of Defendant's representative pursuant to Fed. R. Civ. P. 30(b)(6).

iii. *Hunt v. 21st Mortgage Corporation*, No. 2: 12-CV-2697-WMA (N.D. Ala. Apr. 25, 2014).

In *Hunt*, the plaintiff's TCPA expert's testimony satisfied the requirements of *Daubert* regarding the use of an ATDS by the defendant. Specifically, the court found that Hunt's expert, Robert Biggerstaff, had "specialized knowledge [that] will help the trier of fact," Rule 702(a), because, as a former IT professional who spent years consulting companies on setting up network systems, including phone dialing systems, he has a much better sense of what a "normal" network and telephone system setup looks like than a layperson would. As with the expert in *Hunt*, Mr. Hansen's testimony satisfied the requirements of Fed. R. Evid. 702. Mr. Hansen has considerable specialized knowledge and experience using and even building

automated dialers, including dialers that are capable of sending SMS text messages, which knowledge will help the jury here.

Finally, this Court accepted the expert opinion of Mr. Hansen in the absence of a direct inspection of the dialing system in the past. *Strauss v. CBE Grp., Inc*., No. 15-62026-CIV, 2016 WL 2641965, at *3 (S.D. Fla. Mar. 23, 2016) ("Although Hansen did not visually inspect the equipment in preparing the Report, he reviewed, among other things, CBE's patent application for the MCA, Plaintiff's account notes, and Johnson's deposition transcript. In light of Hansen's familiarity with CBE's dialing systems and review of evidence particular to this case, the Court finds sufficiently reliable Hansen's expert opinion on the technologies CBE used to place the calls at issue."). Accordingly, a visual inspection of Callfire, Twilio, and 3Seventy's systems is not necessary. Moreover, such an inspection would be incredibly burdensome and virtually impossible since it involves third parties' equipment; third parties are naturally inclined to deny access to their systems given their non-involvement and unfamiliarity with the pending action.

C. MR. HANSEN DOES NOT STATE IMPERMISSIBLE LEGAL CONCLUSIONS

Plaintiff and Defendant agree that a witness "may not testify to the legal implications of conduct." *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990). However, at no point in Mr. Hansen's original report or supplemental report does he conclude that Defendant's telephone system is an ATDS, nor do the selectively edited quotations that Defendant has pulled from his report conclude that the equipment is an ATDS. The full quotations that Defendant identifies as impermissible legal conclusions are:

- "The fact that the dialers places (sic) calls to numbers stored by the dialing systems and dial phone numbers indicates that the dialers have the characteristics of an ATDS, as it relates to predictive dialers, as clarified by the FCC 2003 Order." (quotation omitted) [ECF No. 161-1, ¶19];

- "Based upon the documents and evidence I have reviewed, the calls that American Motor Company made to Plaintiff were made using dialers capable of broadcasting SMS messages to multiple recipients. As explained further below, in my expert opinion, the below dialing systems that are discussed in detail have the characteristics of an 'automatic telephone dialing system' ('ATDS') as defined by the TCPA." *Id.* at ¶21;

- "Thus, in my expert opinion, the dialing systems (as outlined above) have the characteristics of an ATDS as contemplated by the TCPA and clarified by the FCC, because this system has the capacity to store numbers in a list and dial them without human intervention and also has the capacity to dial numbers generated for inclusion in any marketing list." *Id.* at ¶29; and,

- "The FCC's order and rulings provide me with the information that assists me in forming an opinion about whether American Motor Company's SMS messaging systems have the characteristics of an ATDS. Based on those orders and rulings, based upon my review of the documents and evidence provided in this case, based on my knowledge of computer storage and computer processing, and based on my knowledge of autodialers and predictive dialers, it is also my expert opinion that the SMS messages sent to Plaintiff and the Putative Class using the dialer described in detail above were made using SMS Blasting systems, capable of broadcasting SMS messages to multiple recipients either from a list of numbers or numbers generated with a random or sequential number generator which has the characteristics of an automatic telephone dialing system as defined by the TCPA and FCC." *Id.* at ¶37.

Defendant either misreads or misunderstands these quotations, because these findings do not reflect legal conclusions, but merely state Mr. Hansen's opinion that the systems that he analyzed have certain defining **characteristics** which the FCC and the TCPA identify as relevant. In each and every statement, Mr. Hansen appropriately limited his opinion to whether Callfire, Twilio, and 3Seventy *have the characteristics* indicative of an ATDS and specifically identified the characteristic at issue.[5] Defendant also misapplied the holding of *Strauss v. CBE Group, Inc*., No. 15-cv-62026, 2016 WL 2641965, at *2 (S.D. Fla. Mar. 22, 2016), where the court stated that an expert may not offer an opinion that a telephone dialing system *is* an ATDS. *See* [ECF 160 at

[5] E.g., in ¶19 Hansen identifies that the equipment store numbers and dials them, in ¶21 Hansen identifies that the equipment broadcasts SMS messages to multiple recipients, in ¶29 Hansen identifies that the equipment store numbers and dials them without human intervention, and in ¶37 Hansen identifies that the equipment is capable of dialing from a list or numbers generated randomly or sequentially.

7]. Mr. Hansen's report does not state that the systems used by Defendant *are* ATDS; rather, Mr. Hansen identifies functions of the systems at issue from either their use or technical documentation, and then identifies these functions as the characteristic of an ATDS under the relevant legal authority. This does not invade the province of the jury because they are still free to decide whether the equipment at issue does in fact have the characteristics Mr. Hansen refers to, and then to decide whether all of these characteristics taken as a whole make the equipment an ATDS within the scope of the TCPA.

Mr. Hansen's testimony does not attempt to define legal parameters or explicate the standards set forth in the TCPA and the FCC's associated Orders. The mere fact that Mr. Hansen's report embraces ultimate issues of fact, specifically whether the various equipment employed by Defendant the characteristics of an ATDS, does not make them inadmissible. *See* FRE 704 ("An opinion is not objectionable just because it embraces an ultimate issue"); *Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cty., Fla.*, 402 F.3d 1092, 1112 (11th Cir. 2005) ("testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."). Consequently, Mr. Hansen's testimony is permissible factual analysis. Finally, Defendants are free to challenge Mr. Hansen's factual assertions through the traditional techniques of "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" *Daubert*, 509 U.S. at 596. Striking Hansen's testimony in its entirety on the basis of the four statements Defendant identifies is unnecessary and unsupported by the law.

D. THE TESTIMONY OF MR. HANSEN IS RELEVANT AND WOULD BE HELPFUL TO A JURY.

Mr. Hansen's years of practical, hands-on experience is, in large part, why his testimony would be helpful to a jury. Having taught over 1000 people the skills of his trade (ECF No. 160-

1, ¶ 10), Mr. Hansen has demonstrated ability to convey complex information in a useful and understandable way, unlike others who might simply bombard jurors with mind numbing technical jargon. When an ultimate factual issue is one on which expert testimony would be helpful to the jury, an expert opinion may nonetheless be excludable if it does not convey information which is in a form useful to the jury. *Specht v. Jensen*, 853 F.2d 805, 814 (10th Cir. 1988) (dissenting opinion) (finding when an average person does not possess the knowledge and training to understand a determined fact, the opinion of an expert is helpful to the trier of fact). However, when most people (applying an "average person standard") do not possess the knowledge and training to understand a determined fact, the opinion of an expert is helpful to the trier of fact. *See QBE Ins. Corp. v. Jorda Enterprises, Inc.*, No. 10-21107-CIV, 2012 WL 913248, at *4 (S.D. Fla. Mar. 16, 2012) (determining that the expert testimony about the installation of an air conditioning system was helpful to the trier of fact, also because the defendant failed to explain why such testimony would not be helpful).

Defendant argues that Hansen's opinion has no value to a jury because it is based, in part, on publicly available information. This argument fails for a number of reasons. First, Mr. Hansen, with twenty-seven (27) years of practice in the field, is naturally able to glean far more information from descriptive material even if it is drafted for the public and not specifically for experts. Mr. Hansen's conclusions are based upon a specialized knowledge of automatic dialing systems not generally known to the average layperson. Furthermore, the materials Hansen relies on are not promotional materials, but are intended to teach people how to use the systems used to send the text messages at issue. *See* [ECF No. 161-1, at ¶¶24-26] (Citing *Exhibit W - Creating an SMS Campaign Walkthrough [HD, 720p] at 00:40-00:53*; *Exhibit U - Add Contacts - CallFire Solutions; Exhibit V - Compose TextCallFire Solutions; Exhibit X - Finalize Settings - CallFire*

Solutions; Exhibit Y - Get Started with Twilio SMS Sending SMS Messages Screencast [HD, 720p]; Exhibit Z – Simple SMS with Twilio [HD, 720p]; *Exhibit S - 3seventy SMS Platform for Texting; Exhibit T - 370 Web APD*).[6]

Moreover, as in *Jorda*, Defendant did not explain *why* Hansen's opinion would not be helpful to the trier of facts. Defendant has not pointed to any fault in the substance of the documents Hansen reviewed, but disparages them only because of their provenance. To be clear Defendant cannot fault any specifics about the content of the materials reviewed. These are highly relevant descriptions of how to use the technology that was actually used to send the text messages at issue. Defendant attempts to sidestep this issue by claiming that "noting in any of these materials currently found on the companies' various websites – or in Hansen's Written Report – demonstrates that the systems described in those materials are the same systems ICO acutally utilized to send the specific text messages to Plaintiff or to send text messages to the putative class members." However, Defendant willfully overlooks the fact that Plaintiff subpoenaed Callfire and Twilio to establish the exact products used. *See* Exhibit 4, Twilio Subpoena Response at Supplemental Response to Request 2 ("a review of Mr. Rowe's account indicates he signed up to use Twilio's Programmable SMS and Twilio's Programmable Voice products."); Exhibit 5, Callfire Subpoena Response at p. 9 ("AMC is a CallFire Terms of Service customer.")[7]

[6] Puzzlingly, Defendant states that Hansen did not identify or include the information he relied on to ascertain the capabilities of Twilio, Callfire and 3Seventy. [ECF No. 160, p. 11]. This is not true. Hansen provided each of the twenty-five exhibits he relied on, specifically cited to each, and these exhibits were served on Defendant.

[7] Although Plaintiff issued a subpoena to 3Seventy, it did not respond and Plaintiff was unable to obtain the information sought from this company in the time allotted. However, a review of 3Seventy's website reveals that it offers only one service and its pricing varies only based on the number of text messages sent, the number of "key words" available, and the phone number used to send the messages (short code versus a traditional phone number).

Finally, Mr. Hansen's testimony regarding the ability of the SMS platforms used to automatically send text messages stored in the system is absolutely relevant as the potential capacity of the equipment is the determinative factor as to whether a system is an ATDS. *Keim v. ADF Midatlantic, LLC*, No. 12-80577-CIV, 2015 WL 11713593, at *3 (S.D. Fla. Nov. 10, 2015) ("[E]quipment that has the capacity to store or dial random or sequential numbers falls within the TCPA's scope even if that capacity is not used and instead the telemarketer programs the equipment with a set list of numbers to be dialed.") CallFire, Twilio and 3Seventy's description of their own products capacity is undeniably relevant regardless of how the texts at issue were actually sent. Thus, Mr. Hansen's testimony based on what the three providers say their platforms can do is both relevant and helpful to a jury.

E. Mr. Hansen's Calculations Regarding the Number of Text Messages Sent For Class Certification Purposes Is Permissible.

Experts' opinions are normally accepted and considered helpful to explain statistics and other sort of data compilations. *See, e.g., Manno v. Healthcare Revenue Recovery Grp., LLC*, 289 F.R.D. 674, 684 No. 3 (S.D. Fla. 2013); *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 984 F. Supp. 2d 1021, 1041 (C.D. Cal. 2013); *E.E.O.C. v. Morgan Stanley & Co.*, 324 F. Supp. 2d 451, 467 (S.D.N.Y. 2004). In TCPA cases, experts' reports are commonly used to determine and/or describe the number of calls, text messages, or faxes. *See, e.g., Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1249 No. 3 (11th Cir. 2015); *Ranwick v. Texas Gila, LLC*, 37 F. Supp. 3d 1053, 1056 (D. Minn. 2014). And usually, these reports are used for class certification purposes. *See Imhoff Inv., L.L.C. v. Alfoccino, Inc.*, 792 F.3d 627, 631 (6th Cir. 2015).

See http://www.3seventy.com/pricing/ (last accessed January 21, 2017).

There is currently a split among the circuit courts as to whether *Daubert* must be applied to its full extent in every putative class action, and the Eleventh Circuit has not taken solid position on the issue.[8] However, many courts agree that a less stringent standard should be applied for class certification purposes. *See, e.g.*, *Hayden v. Freightcar Am., Inc.*, No. CIV.A. 3:2007-201, 2008 WL 375762, at *2 (W.D. Pa. Jan. 11, 2008) ("evidence submitted for use in a determination of the issue of class certification need not be admissible at trial"); *Vinson v. Seven Seventeen HB Philadelphia Corp.*, No. CIV.A 00-6334, 2001 WL 1774073, at *20 (E.D. Pa. Oct. 31, 2001) ("[O]n a motion for class certification, the evidentiary rules are not strictly applied and courts will consider evidence that may not be admissible at trial.").

Here, Plaintiff submitted Mr. Hansen's analysis to help, inter alia, to identify the size and ascertainability of the putative class. [ECF No. 160-1 at ¶¶ 41-51]; [ECF No. 160-2 at ¶¶ 14-20] Mr. Hansen's Reports, in these respects, are only for class certification purposes. The actual records of transmission of the text messages would be introduced at trial as business records through Thomas K. Rowe,[9] who was the records custodian. Therefore, in consideration of the helpfulness of Mr. Hansen's opinion and the less stringent *Daubert* standard that is applied for class certification purposes, Mr. Hansen's calculations regarding the number of the text messages sent, and his proposals for identifying class members based on the their telephone numbers should not be excluded.

[8] *See* M. Joseph Winebrenner, Expert Evidence at Class Certification and the Role of *Daubert*, ABA (July 16, 2015), http://apps.americanbar.org/litigation/committees/masstorts/articles/summer2015-0715-expert-evidence-class-certification-stage-role-daubert.html.

[9] Mr. Rowe is the co-owner of American Motor Company. Both Thomas K. Rowe and American Motor Company, LLC were dismissed as parties to this action. [ECF No. 153].

CONCLUSION

WHEREFORE Plaintiff respectfully requests that this Court deny Defendant's Motion to Exclude Plaintiff's Expert Report, Supplemental Report, and the Testimony of Jeffrey Hansen in its entirety.

Dated: January 23, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 23, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this date in some other authorized manner for those counsel or parties, if any, who are not authorized to receive electronically Notices of Electronic Filing.

By: /s/ *Scott D. Owens*
Scott D. Owens, Esq.