IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

J.T. HAND, individually and on behalf of a class of all persons and entities similarly situated,	)	
Plaintiff,	)	
vs.	)	Case No. 4:18-cv-668-NKL
BEACH ENTERTAINMENT KC, LLC d/b/a SHARK BAR,	)	
THE CORDISH COMPANIES, INC.,	)	
ENTERTAINMENT CONSULTING INTERNATIONAL, LLC,	)	
Defendants.	)	

DEFENDANTS BEACH ENTERTAINMENT KC, LLC d/b/a SHARK BAR, THE CORDISH COMPANIES, INC., AND ENTERTAINMENT CONSULTING INTERNATIONAL, LLC'S REPLY SUGGESTIONS IN FURTHER SUPPORT OF THEIR MOTION TO EXCLUDE THE OPINION AND TESTIMONY OF PLAINTIFF'S PROFFERED EXPERT DR. MICHAEL SHAMOS

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Defendants Beach Entertainment KC, LLC d/b/a Shark Bar ("Shark Bar"), The Cordish Companies, Inc., and Entertainment Consulting International, LLC (collectively, "Defendants"), by and through their counsel, submit the following reply suggestions in further support of its motion to exclude the opinions and testimony of Plaintiff's proffered expert, Dr. Shamos.[1]

PRELIMINARY STATEMENT

The only opinion and testimony that Plaintiff has proffered Dr. Shamos to give in this case concern: (i) the meaning of certain terms Congress used to define an ATDS in the TCPA, and (ii) whether the Platforms Shark Bar used satisfy the statutory definition of an ATDS. However, it is the role of the Court—and the Court alone—to make those determinations as a matter of law. Expert testimony concerning the meaning of statutes and whether the law was violated is inadmissible and the Court should exclude the opinion and testimony proffered by Dr. Shamos.

In opposition ("Opposition" or "Opp."), Plaintiff argues that the Court should not exclude Dr. Shamos' testimony because Shark Bar can cross-examine him. This argument is meritless. Dr. Shamos' opinions are legally inadmissible because they violate the standards for expert testimony. No amount of cross-examination can change that, and Plaintiff's argument that Shark Bar's expert, Dr. Mitzenmacher, relied on similar evidence in rebuttal is irrelevant.

ARGUMENT

I. THE COURT SHOULD EXCLUDE DR. SHAMOS' LEGAL INTERPRETATION OF THE TCPA AND OPINIONS THAT THE PLATFORMS ARE AN ATDS

The law is well-settled that expert testimony concerning what the law means, and whether it was violated, is inadmissible. *Southern Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc.*, 320 F.3d 838, 842 (8th Cir. 2003); *In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d 1004, 1025-26 (E.D. Mo. 2009). There can be no serious dispute that Plaintiff has proffered Dr.

[1] Terms defined in the opening brief ("Opening Brief" or "Opening Br.") have the same meaning herein.

Shamos to offer inadmissible legal opinions concerning: (i) how the statutory definition of an ATDS should be interpreted—including the terms "produce," "sequential," and "random or sequential number generator," and (ii) whether the Platforms constitute an ATDS. Dr. Shamos' testimony on these issues must therefore be excluded.

Plaintiff attempts to distinguish the Eighth Circuit's decision in *Southern Pine* on the grounds that the proffered testimony there was excluded because the dispute involved an "interpretation of a policy provision in an insurance contract." (Opp. at 7, fn. 6.) Plaintiff is wrong. The court in *Southern Pine* held that the proffered expert testimony was inadmissible because it addressed whether a statutory violation had occurred: "[t]he evidence took the form, essentially, of a battle of experts opining as to whether Southern Pine had violated FAA regulations. As we have had occasion to remark before, however, expert testimony on legal matters is not admissible." 320 F.3d at 841. Likewise, Dr. Shamos' legal opinions here as to whether the Platforms constitute an ATDS are inadmissible and the Court should exclude them.

Indeed, numerous courts have specifically excluded expert testimony virtually identical to that offered by Dr. Shamos concerning the statutory definition of an ATDS and whether technology qualifies as an ATDS. For example, in *Tomeo v. CitiGroup, Inc.*, No. 13 C 4046, 2018 WL 4627386, at *6 (N.D. Ill. Sept. 27, 2018) the court held that "[d]etermining whether a dialer is an ATDS under the TCPA's definition is a legal opinion." Similarly, in *Legg v. Voice Media Grp., Inc.*, No. 13-62044-CIV-COHN, 2014 WL 1767097, at *4 (S.D. Fla. May 2, 2014), the court held that "[b]ecause [an expert] may not offer a conclusion as to the legal definition of an automatic telephone dialing system or the legal implications of [defendant's] system in relation to that definition, the Court will exclude his proposed testimony that [the defendant] used an 'automatic telephone dialing system' within the meaning of the TCPA." *See also Strauss v. CBE Grp., Inc.*,

No. 15-62026-CIV, 2016 WL 2641965, at *2 (S.D. Fla. Mar. 23, 2016) (same); *Keyes v. Ocwen Loan Servicing, LLC*, 335 F. Supp. 3d 951, 959 (E.D. Mich. Aug. 16, 2018) (excluding testimony on the grounds that "[a]n expert makes a legal conclusion when he defines the governing legal standard or applies the standard to the facts of the case"). Dr. Shamos' proffered testimony should be excluded for the very same reasons.

Plaintiff tries to distinguish the extensive case law cited in Shark Bar's opening brief excluding expert opinion related to whether technology qualifies as an ATDS on the grounds that the experts in those cases "specifically sought to testify whether the defendant's dialing platform met the legal definition of an automatic telephone dialing system." (Opp. at 6-7.) But, as discussed below, that is exactly what Dr. Shamos does here. Moreover, courts not only exclude conclusions as to whether technology qualifies as an ATDS, but also exclude legal opinions from witnesses as to what an ATDS is under the TCPA. Plaintiff's attempt to distinguish that case law therefore fails.

Plaintiff's assertion that Dr. Shamos does not opine on whether the Platforms constitute an ATDS under the TCPA is false. Contrary to Plaintiff's contention, Dr. Shamos' legal opinions are not limited to quoting the TCPA "in a background paragraph in his report." (Opp. at 8.) Rather, Dr. Shamos' opinions that the Platforms constitute an ATDS are expressed clearly and unambiguously in the body of his Analysis and Conclusions. Dr. Shamos' Report argues that Defendants have misinterpreted the TCPA and defines what he considers the "conceivable interpretations" of an ATDS under the TCPA as "Requirement1," "Requirement2," and "Requirement3." (Shamos Rep. ¶¶ 23-27.) In the "Analysis" section of his Report, Dr. Shamos *expresses his legal opinion that the Platforms constitute an ATDS under each of those interpretations of the TCPA*: (i) "The TxtLive system *is an ATDS* under Requirement1" (Shamos

Rep. ¶ 97); (ii) "The Txt Live system *is an ATDS* under Requirement2" (¶ 99); (iii) "The Txt Live system *is an ATDS* under Requirement3" (¶ 100); (iv) "the SendSmart system *is an ATDS* under Requirement1" (¶ 101); (v) ""The SendSmart system *is an ATDS* under Requirement2" (¶ 103); and (vi) "The SendSmart system *is an ATDS* under Requirement3." (¶ 104) (emphasis added).

The "Conclusions" section of Dr. Shamos' Report contains just two paragraphs as follows: (i) "Txt Live satisfies Requirement 1, Requirement2, and Requirement3" (¶ 105); and (ii) "SendSmart satisfies Requirement1, Requirement2, and Requirement3." (¶ 106.) These paragraphs plainly state legal opinions as to whether the Platforms constitute an ATDS under the TCPA. Dr. Shamos renders no other conclusions in his Report.

Plaintiff's contention that Dr. Shamos does not interpret the TCPA's terms is also demonstrably false. (Opp. at 9.) For example, in order to conclude that the Platforms "produced" telephone numbers, Dr. Shamos had to interpret that term as it is used in the TCPA. Dr. Shamos acknowledged that the term "produce" could be interpreted to require the creation of new phone numbers, but there is no dispute the Platforms did not do so. (Shamos Tr. at 115:1-18.) Dr. Shamos, therefore, chose instead to interpret the term to include the mere retrieval of numbers from a curated list, and concluded that the Platforms have that ability. (*Id*.) Thus, Dr. Shamos selected among competing interpretations of the TCPA's terms, and chose the broadest possible definition, which is contrary to the D.C. Circuit's ruling in *ACA Int'l v. Federal Communications Commission*, 885 F.3d 687, 698 (D.C. Cir. 2018). This plainly constitutes statutory interpretation and legal opinion. And even if such interpretation were permitted – which it is not – the Court should still exclude Dr. Shamos' opinions as to these matters because he offers a definition that includes smartphones – a result the D.C. Circuit rejected.[2] (Opening Br. 9-10.)

[2] Plaintiff's effort to distance himself from Dr. Shamos' testimony on this point fails, given that Dr. Shamos testified that an iPhone could satisfy his Requirement 1 with respect to text messages – the form of

Dr. Shamos also applied no technical knowledge or experience to his statutory interpretation. Indeed, while Plaintiff contends that Dr. Shamos' "methodology is reliable," Plaintiff does not even try to identify what that methodology allegedly is, or identify any technical expertise Dr. Shamos arguably relied upon in choosing among competing interpretations of the TCPA. (Opp. at 11.) For example, Dr. Shamos explained at his deposition that he applied the meaning of "produce" as it is used in litigation discovery. (Shamos Tr. at 115:1-18.) He drew upon his experience as a lawyer to interpret the TCPA, and not on any technical knowledge or expertise. Plaintiff also concedes that certain terms Dr. Shamos interpreted do not have a "specialized meaning in the computer context," and that Dr. Shamos therefore interpreted them in accordance with what he considers "common parlance." (Opp. at 10, n. 8.)[3] Because Dr. Shamos admittedly did not apply any technical knowledge or expertise to interpreting the TCPA, there is no need for any "expert" testimony on these issues at all. The Court is responsible for, and fully capable of, interpreting the TCPA on its own. Regardless of how Dr. Shamos went about choosing among competing interpretations of the TCPA's language, his opinions regarding such matters clearly encroach upon the Court's exclusive role. Dr. Shamos' opinions regarding what Congress might have intended the terms "produce," "sequential," or "random or sequential number generator" to mean are inadmissible.

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communication relevant here. (Shamos Tr. 119:3-18.) Under Dr. Shamos' Requirement 1, technology qualifies as an ATDS if it can merely retrieve numbers from a stored list and dial them. (Shamos Tr. 74:2-18; Shamos Rep. ¶ 84.) Group text messaging to multiple stored contacts at once using a smart phone would plainly satisfy that criteria.

[3] As stated in Shark Bar's opening brief, Dr. Shamos' opinions on how the TCPA should be interpreted and what kinds of technology qualifies as an ATDS is inherently unreliable because he formed them exclusively in connection with this case. (Opening Br. 14.) Plaintiff counters that Rule 702 requires "an expert to reliably apply the principles of methods to the facts of the case." Plaintiff ignores, however, that the "principles and methods" applied should be developed "in the lab or the field, not the courtroom or the lawyer's office." *Nelson v. American Home Prods. Corp.*, 92 F. Supp. 2d 954, 968 (W.D. Mo. 2000).

Plaintiff's cases are inapposite. They do not even address objections to expert testimony on the grounds that it constituted inadmissible legal opinions. (Opp. at 5-6.) Nor were any of the cases decided by courts in this Circuit, where binding Eighth Circuit law prohibits expert testimony on issues of legal compliance. *Southern Pine*, 320 F.3d at 841. Furthermore, in the cases Plaintiff cites, there were material factual disputes as to the functionality of the telephone equipment, and expert testimony was offered to explain the technologies' capabilities. Here, on the other hand, there is no material dispute as to the critical features of how the Platforms function. Dr. Shamos agreed that Shark Bar employees had to perform at least eight manual steps in order to send text messages from the Platforms. (Opening Br. 5.) Dr. Shamos offers his opinion on the hotly disputed issue as to whether the Platforms satisfy the TCPA's definition of an ATDS. Courts have repeatedly held that expert testimony on that issue is strictly prohibited.

Plaintiff places great weight in his argument that Dr. Shamos' testimony should be admitted because Shark Bar has offered an expert, Dr. Mitzenmacher, to rebut Dr. Shamos' opinions. Plaintiff, however, cites no authority holding that inadmissible legal opinions can become admissible simply because an opposing party offered rebuttal opinions in an expert report. And, of course, no such authority exists. Rather, in *Southern Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc.*, 320 F. 3d 838 (8th Cir. 2003), the Eighth Circuit expressly held that "a battle of the experts opining as to whether [the plaintiff] had violated FAA regulations … was simply inadmissible." *Id*. at 841

Plaintiff has not moved to exclude Dr. Mitzenmacher's testimony. The admissibility of his testimony is therefore not an issue before the Court. Plaintiff's arguments concerning Dr. Mitzenmacher's proffered testimony are entirely irrelevant to this motion. Moreover, it is no surprise that Shark Bar's expert addressed the same subject matter as Dr. Shamos. That is exactly

what rebuttal testimony should do. Fed. R. Civ. P. 26(a)(2)(D)(ii) (rebuttal testimony is used "to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C)").

II. DR. SHAMOS' ANALYSIS OF THE SENDSMART PLATFORM RESTS UPON INSUFFICIENT DATA

Plaintiff disingenuously asserts that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility." (Opp. at 13.) Plaintiff is wrong. Rule 702 of the Federal Rules plainly provides that expert testimony must be "based on sufficient facts or data." Fed. R. Civ. P. 702(b). In its role as gatekeeper, the Court "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert v. Merrell Dow Parms., Inc.*, 509 U.S. 579, 589 (1993). Indeed, the Eighth Circuit case that Plaintiff cites to support his broad, and incorrect, assertion recognizes that expert testimony must be excluded where it is "so fundamentally unsupported that it can offer no assistance to the jury."[4] *Children's Broadcasting Corp. v. Walt Disney Co.*, 357 F.3d 860, 865 (8th Cir. 2004).

For this reason, courts have consistently excluded expert testimony concerning telephone technology where, as here, the expert did not personally analyze or test the platform. *Keyes*, 335 F. Supp. 3d at 958; *Legg*, 2014 WL 1767097, at *5; *Mohamed v. Am. Motor Co., LLC*, No. 15-23352-CIV, 2017 WL 4310757, at *4 (S.D. Fla. Sept. 28, 2017); *Dominguez v. Yahoo!, Inc.*, No. CV 13-1887, 2017 WL 390267, at *19–20 (E.D. Pa. Jan. 27, 2017), *aff'd sub nom. Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018). Plaintiff simply ignores these cases, which Shark Bar cited in its Opening Brief. (Opening Br. 14-15.)

[4] Plaintiff's attempt to rely upon this Court's conclusion in *CWC Commercial Warehousing, LLC v. Norcold, Inc.*, No. 6:15-CV-03312-MDH, 2016 WL 10644035 (W.D. Oct. 12, 2006) also fails because in that case, the parties disagreed as to whether proffered experts complied with industry standards in rendering their opinions. Here, it is undisputed that Dr. Shamos offered his opinions concerning the SendSmart system without analyzing the platform.

The cases Plaintiff cites allowing testimony from experts in TCPA cases are easily distinguishable. (Opp. at 14.) In *Mey v. Venture Data, LLC*, No. 5:14-CV-123, 2017 WL 10398569, at *4 (N.D.W.Va. June 6, 2017), for example, the court allowed testimony from an expert primarily because, among other things, the expert "had prior experience with each dialer" he was proffered to testify about. Dr. Shamos has no experience at all with SendSmart. Unlike Shamos, the expert in *Strauss*, reviewed the patent application for the technology at issue. 2016 WL 2641965, at *3. Indeed, in *Keyes*, where the court excluded testimony from an expert that did not inspect the platform at issue, the court distinguished *Strauss* on that very basis: "No evidence in the record indicates that [the expert] has tested or inspected the Aspect System which [the defendant] called [the plaintiff] from, or that [the expert] has reviewed any patents which detailed the specifications for how [the defendant] used the Aspect System to make calls." 335 F. Supp. 3d at 958. Here too, Dr. Shamos has neither tested the SendSmart platform, nor has he reviewed any patents detailing the specification of the technology.[5]

The court's decision in *Hunt v. 21st Morg. Corp.*, No. 2:12–CV–2697–WMA, 2014 WL 1664288, at *5 (N.D. Ala. April 25, 2015), is particularly off-base. The expert in *Hunt* was not proffered to testify as to the capabilities of calling technology. Rather, he was offered to testify that (i) defendant's employees lacked the skill to efficiently dial numbers manually, and (ii) manual dialing techniques would have been inconsistent with the advanced technology the defendant used at its facilities. *Id*. at *4. The court expressly stated that the unique circumstances of that case warranted admitting the expert's testimony. Further, the court admitted the testimony because it could find no other decisions where an expert was offered for similar purposes: "[T]he first

[5] Any effort to excuse these failings by Dr. Shamos on the ground that Shark Bar's expert lacked access to this material as well are irrelevant for the reasons set forth above, *supra*, pp. 7.

proposed expert on a subject should be granted more leeway than an expert on the same subject twenty cases down the road." *Id*. at *5. This is not the case here.

Plaintiff's assertion that there is no "analytical gap" in Dr. Shamos' testimony is also meritless. In particular, Plaintiff failed to address the "analytical gaps" in Dr. Shamos' opinion that Shark Bar identified in its Opening Brief. First, Dr. Shamos admitted at his deposition that he could not assess whether technology satisfied certain criteria of an ATDS without seeing the technology's "internal workings," or knowing what its "internal organization is." (Shamos Tr. at 119:3-120:17.) Dr. Shamos had no access to the "internal workings" or "internal organization" of the SendSmart platform. He nonetheless opined on whether it met that exact same criteria. Dr. Shamos also concluded that "SendSmart uses Artificial Intelligence to send millions of text messages completely autonomously." (Shamos Rep. ¶ 96.) Lacking access to the SendSmart Platform, Dr. Shamos based his opinion entirely on a *January 2019* LinkedIn post by SendSmart's CEO, Mr. Yasnoff. Dr. Shamos later conceded that Mr. Yasnoff's post did not appear to have any relation to the 2015 Platform Shark Bar used. (Shamos Tr. at 133:23-134:24.) Plainly, if Dr. Shamos had inspected and used the SendSmart technology he would not have rendered such a baseless conclusion in his Report. The documents and information upon which Dr. Shamos relied to form his proffered testimony relating to the SendSmart platform Shark Bar used in 2015 is grossly inadequate to support his opinions. Dr. Shamos' testimony and opinions regarding the SendSmart platform should accordingly be excluded in their entirety.

CONCLUSION

Shark Bar respectfully requests that the Court grant its motion to exclude the opinions and testimony of Plaintiff's proffered expert, Dr. Shamos, and grant any other relief the Court deems just and proper.

Dated: November 22, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on this 22nd day of November, 2019, a true and correct copy of the above and foregoing document was filed with the Court's CM-ECF system which will provide notice to all counsel of record.

/s/ Jacqueline M. Sexton
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