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. BEACH ENTERTAINMENT KC, LLC d/b/a SHARK BAR, THE CORDISH COMPANIES, INC., ENTERTAINMENT CONSULTING INTERNATIONAL, LLC, Defendants.	Case No. 4:18-cv-668-NKL **REDACTED VERSION**

DEFENDANTS BEACH ENTERTAINMENT KC, LLC d/b/a SHARK BAR, THE CORDISH COMPANIES, INC., AND ENTERTAINMENT CONSULTING INTERNATIONAL, LLC'S SUGGESTIONS IN 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 suggestions in support of their motion to exclude the opinions and testimony of plaintiff J.T. Hand's ("Plaintiff") proffered expert Dr. Michael Shamos.

PRELIMINARY STATEMENT

Plaintiff asserts a claim under the Telephone Consumer Protection Act ("TCPA") arising out of his receipt of four text messages in response to his entry to win a happy hour at Shark Bar. Plaintiff alleges that Shark Bar sent him the text messages using an "automatic telephone dialing system" ("ATDS") without the legally required consent. The record establishes that the SendSmart and Txt Live platforms ("Platforms") that Shark Bar used to send the text messages do not constituted ATDSs, as that term is defined under the TCPA, because they lacked the capacity to "generate numbers randomly or sequentially" or dial numbers "automatically." Nevertheless, Plaintiff has proffered the opinion and testimony of Dr. Michael Shamos, who impermissibly and unreliably claims that the Platforms constitute ATDSs. The Court should exclude Dr. Shamos' opinions and testimony.

First, Dr. Shamos, an attorney, impermissibly offers legal opinions disguised as expert testimony concerning both (i) the definition of an ATDS under the TCPA, and (ii) whether the Platforms meet that definition. Testimony concerning legal interpretations or whether a law was violated is inadmissible. In any event, Dr. Shamos' legal opinions are *wrong*. His definition of an ATDS has been rejected by numerous courts—most notably, the D.C. Circuit in *ACA International v. Federal Communications Commission*, 885 F.3d 687, 698 (D.C. Cir. 2018).

Second, Dr. Shamos did not derive his opinions from any discernible methodology, much less a generally accepted one. Indeed, Dr. Shamos' opinions are inherently unreliable because they were formed exclusively for litigation.

Third, Dr. Shamos based his opinions regarding the SendSmart Platform on videos, deposition testimony, and irrelevant social media posts instead of a personal analysis of the software. Courts have repeatedly precluded experts from testifying about dialing systems that they did not personally inspect.

RELEVANT FACTS AND PROCEDURAL HISTORY

Background

Shark Bar is a bar located in the Kansas City Power & Light district in Kansas City, Missouri. (Decl. of Kyle Uhlig ("Uhlig Decl.") ¶ 1.) Shark Bar offers giveaways and happy hours to its customers who volunteer to participate. (*Id.* ¶ 4.) During the relevant period, there were several ways in which customers could enter to win a giveaway or happy hour, including by submitting their contact information (and birthdays) on paper cards, sign-in sheets, or Google or website forms. (*Id.* ¶ 6.)

During the class period, Shark Bar used SendSmart to send text messages to customers who submitted their contact information and consented to receive text messages about the contests they had entered. (*Id.* ¶ 11.) In or around March 2016, Shark Bar began to transition to Txt Live!. (*Id.*) Shark Bar employees used the Platforms to inform customers that they had won various contents. (*Id.*) Those messages frequently resulted in additional communications with customers for purposes of scheduling happy hours. (*Id.* ¶ 12.)

Plaintiff submitted his contact information to Shark Bar, which Shark Bar recorded in its systems on or about November 2, 2013 and August 13, 2016. (Declaration of Whitney M. Smith ("Smith Decl.") Ex. D.) In response, Shark Bar employee Kyle Uhlig sent Plaintiff four text

messages. First, in March 2015 and February 2016, respectively, Mr. Uhlig sent Plaintiff a text message using SendSmart, offering him a promotional event for his birthday. (Uhlig Decl. ¶¶ 14; *id.* Ex. C.) Second, in September 2017, Mr. Uhlig sent Plaintiff a text message using TxtLive!, informing him that he had won a free party. (*Id.* ¶ 17; *id.* Ex. D.) Third, in December 2017, Mr. Uhlig sent Plaintiff a text message using TextLive!, inviting Plaintiff to a VIP party. (*Id.* ¶ 17; *id.* Ex. D.) To send each of these text messages, Mr. Uhlig had to manually log on to SendSmart or Txt Live!, manually type out the text message, and manually press send. (*Id.* ¶¶ 15, 18.) If Mr. Uhlig had skipped any of those steps, no text messages could have been sent. (*Id.*)

Plaintiff's ATDS Claim

Plaintiff alleges that "[b]etween April 25, 2014 [and] April 4, 2018," Defendants sent "unsolicited text messages to the cellular telephones of Plaintiff and the putative class members promoting specials and events at Shark Bar and encouraging Plaintiff and the putative class members to visit Shark Bar with their friends or associates." (Dkt. 56, Second Amended Complaint ¶¶ 15-16.) Plaintiff alleges that "the hardware and software used by Defendants and/or their agents had the capacity to generate and store random numbers, or store lists of telephone numbers, and to dial those numbers, *en masse*, in an automated fashion without human intervention," and that "Defendants' text messages are sent with equipment having the capacity to dial numbers without human intervention [and that] the equipment is unattended by human beings[.]" (*Id.* ¶¶ 49, 52.) Plaintiff asserts that Defendants violated Section 227(b)(1)(A)(iii) of the TCPA (*id.* ¶¶ 83-90), which prohibits making a non-emergency call, or a call without the prior express consent of the called party, to a cellular telephone number using an ATDS.

Plaintiff's Proffered Expert

On July 29 2019, Plaintiff served a Substitute Expert Report of Dr. Michael Shamos. (Smith Decl. Ex. A) ("Shamos Report"), which is nearly identical to the report that Dr. Shamos submitted in *Beal v. Outfield Brew House*, LLC, Case No. 2:18-cv-4028 (W.D. Mo). (Shamos Report ¶ 16).[1]

Section I of the Shamos Report states that Dr. Shamos has served on the faculty of Carnegie Mellon University since 1998, and that he is an attorney admitted to practice law in Pennsylvania and before the United States Patent and Trademark Office. (*Id.* ¶¶ 2, 5.) Dr. Shamos spent several years practicing law, including as (1) a solo practitioner (Smith Decl. Ex. C ("Shamos Tr.") at 20:23-21:4, 26:19-27:25); (2) General Counsel of Carnegie Group, Inc. (*id*. at 21:6-16); (3) an associate at Buchanan Ingersoll (*id*. at 24:23-25:13); (4) an associate and partner with The Webb Law Firm (*id*. at 28:16-23); and (5) Special Counsel at Reed Smith LLP (*id*. at 32:7-33:22).

Section II states that Dr. Shamos was engaged to opine on "whether the computer software utilized by Defendants in this case (i) has the present capacity to store or produce telephone numbers to be called using a random or sequential number generator, and (ii) automatically dial numbers from a list without human intervention." (Shamos Report ¶ 12.)

Section III identifies the purported "legal principles" on which Dr. Shamos' opinions are based, which he prepared based on [redacted] (Shamos Tr. at 146:16-147:3.)

In Section IV, Dr. Shamos describes how the Platforms operate. He does not dispute that, contrary to Plaintiff's allegations, significant human intervention was required for Shark Bar

[1] Plaintiff initially served an Expert Report of Dr. Michael Shamos on June 14, 2019. (Shamos Report ¶ 1.) Plaintiff later served a substitute report to incorporate material from non-party IT Nachos' subsequent document production. (*Id.*)

employees to send text messages. In particular, Dr. Shamos admits that [redacted] (*id.* at 88:10-89:1, 126:13-17); [redacted] (*id.* at 78:12-79:1, 89:8-10, 126:18-25); [redacted]s (*id.* at 89:14-22, 127:6-9); [redacted] (*id.* at 79:2-24, 89:23-90:9, 127:10-15); [redacted] (*id.* at 92:4-20, 82:9-83:13, 83:14-21, 128:6-129:9); [redacted] (*id.* at 83:22-84:7, 94:20-23, 129:17-130:11); [redacted] (*id.* at 84:7-85:3); [redacted] (*id.* at 85:4-86:12, 98:19-22). Dr. Shamos concedes that [redacted] (*Id.* at 120:18-122:14.)

In Sections V (titled "Analysis") and VI (titled "Conclusions"), Dr. Shamos opines that the Platforms qualify as ATDSs, as he interprets the TCPA. (Shamos Report at 42-44) Dr. Shamos admits that [redacted] (Shamos Tr. at 71:21-72:15, 74:24-76:3, 119:3-18, 116:15-122: 14.)

On August 23, 2019, Plaintiff served a Rebuttal Expert Report of Dr. Michael Shamos ("Shamos Rebuttal") in response to the Amended Expert Report of Dr. Michael Mitzenmacher, served by Defendants on August 12, 2019. (Smith Decl. Ex. B.) In the Shamos Rebuttal, Dr. Shamos states that [redacted] (Shamos Rebuttal ¶ 8.) Nevertheless, Dr. Shamos maintains that the Platforms meet his definition of an ATDS under the TCPA.

ARGUMENT

Dr. Shamos' opinion and testimony are inadmissible because he: (1) offers legal opinions concerning the interpretation of the TCPA and whether Defendants violated the TCPA; (2) does not rely on any reliable methodology in forming those opinions; and (3) offers testimony that lacks foundation.

A qualified expert is permitted "to 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. The proponent of the testimony, here Plaintiff, bears the burden to establish, by a preponderance of the evidence, that the testimony is admissible. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 n.10, 113 S. Ct. 2786, 2796 n.10 (1993); *see also Polski v. Quigley Corp.*, 538 F.3d 836, 841 (8th Cir. 2008). Furthermore, the court "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589. Dr. Shamos' purported expert opinion does not meet this standard.

I. DR. SHAMOS' LEGAL OPINIONS ARE INADMISSIBLE

A. Dr. Shamos Impermissibly Interprets the Meaning of an ATDS Under the TCPA and Opines on Whether the Platforms Meet that Definition

Dr. Shamos' report and testimony are inadmissible because they offer legal opinions as to the definition of an ATDS under the TCPA and whether the Platforms meet that definition. Expert testimony purporting to interpret the law "is neither helpful nor proper," and is therefore inadmissible. *In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d 1004, 1021 (E.D. Mo. 2009). "The only legal expert in a federal courtroom is the judge." *United States v. Lupton*, 620 F.3d 790,

800 (7th Cir. 2010). Thus, "the meaning of statutes, regulations, and contract terms is a subject for the court, not for testimonial experts." *Id.* at 799-800; *see also Southern Pine Helicopters, Inc. v. Phoenix Aviation Mgrs., Inc.*, 320 F.3d 838, 841 (8th Cir. 2003); *Lipp v. Ginger C, L.L.C.*, No. 2:15-CV-04257-NKL, 2017 WL 277613, at *6 (W.D. Mo. Jan. 19, 2017).

Relatedly, an expert may not opine on whether a party violated the law. *See Southern Pine Helicopters*, 320 F.3d at 841; *Cowden v. BNSF Ry. Co.*, No. 4:08CV01534 ERW, 2013 WL 5442926, at *7 (E.D. Mo. Sept. 30, 2013). Rather, "legal compliance and liability determinations are the province of the jury." *Cattanach v. Burlington N. Santa Fe, LLC*, No. CIV. 13-1664 JRT/JSM, 2015 WL 5521751, at *9 (D. Minn. Sept. 18, 2015).

In *Southern Pine Helicopters*, for example, the parties disputed whether an insurance claim was covered by a policy that excluded damage to aircraft "operated in violation of any [FAA] regulation." 320 F.3d 838 at 841. The court rejected purported expert testimony concerning whether the plaintiff had violated FAA regulations because "expert testimony on legal matters," including "whether federal law was contravened," is "simply inadmissible." *Id.*

For the same reason, district courts consistently exclude expert testimony concerning whether technology constitutes an ATDS under the TCPA. *See, e.g.*, *Legg v. Voice Media Grp., Inc.*, No. 13-62044-CIV-COHN, 2014 WL 1767097, at *4 (S.D. Fla. May 2, 2014); *Strauss v. CBE Grp., Inc.*, No. 15-62026-CIV, 2016 WL 2641965, at *2 (S.D. Fla. Mar. 23, 2016); *Keyes v. Ocwen Loan Servicing, LLC*, 335 F. Supp. 3d 951, 959 (E.D. Mich. 2018); *Tomeo v. CitiGroup, Inc.*, No. 13 C 4046, 2018 WL 4627386, at *6 (N.D. Ill. Sept. 27, 2018). The *Legg* court explained that "[b]ecause [the expert] may not offer a conclusion as to the legal definition of an [ATDS], or the legal implications of [the defendant's] systems in relation to that definition, the Court will exclude

his proposed testimony that [the defendant] used an [ATDS] within the meaning of the TCPA." 2014 WL 1767097, at *4.

Here, Dr. Shamos quotes the TCPA's definition of an ATDS, and explains what he and Plaintiff's counsel considers to be "conceivable interpretations" of the TCPA. (Shamos Report ¶¶ 25, 26.) Dr. Shamos testified that [redacted] (Shamos Tr. at 70:2-20.) Dr. Shamos also interprets specific terms used in the TCPA, including the terms "produce," "sequential" and "random or sequential number generator." (Shamos Rebuttal ¶¶ 15-31.) Expert opinions as to how a statute should be parsed and interpreted, however, are strictly prohibited. It is the Court's role to interpret the TCPA—not the role of a purported expert witness.

Dr. Shamos also impermissibly offers opinions as to whether the Platforms constitute ATDSs. (Shamos Report ¶¶ 97-106.) Indeed, Dr. Shamos states that the only issues on which he was asked to opine are whether the Platforms "(i) ha[ve] the present capacity to store or produce telephone numbers to be called using a random or sequential number generator, and (ii) automatically dial numbers from a list without human intervention." (Shamos Report ¶ 12.) These descriptions match the TCPA's statutory definition of an ATDS. Applying his extremely broad definition of an ATDS under the TCPA, Dr. Shamos concludes that the Platforms satisfy that definition. (*Id.* ¶¶ 97, 99, 100, 101, 103, 104). These are plainly inadmissible legal conclusions.

Notably, other courts have excluded Dr. Shamos' testimony where, as here, he attempted to offer inadmissible legal conclusions. *See, e.g., FedEx Ground Package Sys. v. Appls. Int'l Corp.*, 695 F. Supp. 2d 216 (W.D. Pa. 2010); *Ameranth, Inc. v. Menusoft Sys. Corp.*, No. 2:07-CV-271-TJW-CE, 2010 WL 11530915, at *1 (E.D. Tex. Sept. 1, 2010). In *FedEx Ground Package Systems*, for example, the court excluded Dr. Shamos' testimony on whether the plaintiff

infringed the defendant's copyrights because his report did "nothing more than recite general legal principles and apply them to [the defendant's] version of the facts in the case." 695 F. Supp. 2d at 223. The Court held that such testimony constituted "improper legal conclusions" that "would usurp the District Court's pivotal role in explaining the law to the jury." *Id.* at 221, 223. The same result should apply here.

B. Dr. Shamos' Opinions Are Contrary to the Law

Leaving aside the fact that an expert may not offer a legal opinion, the legal conclusion that Dr. Shamos offers is *wrong*. Indeed, Dr. Shamos' definition of an ATDS was explicitly rejected by the D.C. Circuit in *ACA International v. Federal Communications Commission*, 885 F.3d 687, 698 (D.C. Cir. 2018).

Between 2003 and 2015, the Federal Communications Commission ("FCC") issued several declaratory rulings seeking to clarify the definition of an ATDS. In 2003, the FCC ruled that "predictive dialers" qualify as ATDSs because they have "the capacity to dial numbers without human intervention." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14091-92 ¶ 132-33 (2003). Subsequent FCC orders also focused on the absence of human intervention as the defining characteristic of an autodialer. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559, 566 ¶¶ 12-13 (2008); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 15391, 15392 ¶ 2 n.5 (2012).

In 2015, the FCC was asked to clarify which devices qualify as an ATDS. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 7974 ¶ 16 (2015). The FCC declined to define a device's "capacity" in a manner confined to its "present capacity," and instead, construed it to encompass "potential functionalities" with

modifications. *Id.* The FCC also reiterated that the "basic function[ ]" of an autodialer is to "dial numbers without human intervention." *Id*. at 7975 ¶ 17.

Last year, in *ACA*, the D.C. Circuit vacated the FCC's interpretation of an ATDS, and remanded that issue for consideration consistent with its ruling. 885 F.3d at 703. The court concluded that the FCC's interpretation of an equipment's "capacity" was overbroad because it would "hav[e] the apparent effect of embracing any and all smartphones," which would violate the Administrative Procedures Act. *Id*. at 695-703. As the court explained, "[t]he TCPA cannot reasonably be read to render every smartphone an ATDS subject to the Act's restrictions, such that every smartphone user violates federal law whenever she makes a call or sends a text message without advanced consent." *Id*. at 697. The court also held that the FCC's conclusions regarding whether an ATDS must generate random or sequential numbers, rather than dial from a stored list of numbers, was not based on reasoned decision-making and set aside those orders. *Id*. The FCC has not issued an order on remand.

Since *ACA*, courts have debated whether technology must be able to generate numbers to qualify as an ATDS, or whether it is enough to automatically dial numbers from a pre-existing stored list. The weight of authority holds that technology must be able to *create* numbers, not merely dial them. *See, e.g.*, *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018); *Thompson-Harbach v. USAA Fed. Sav. Bank*, 359 F. Supp. 3d 606, 626-27 (N.D. Iowa 2019); *Gadelhak v. AT&T Servs., Inc*., No. 17-CV-01559, 2019 WL 1429346, at *6 (N.D. Ill. Mar. 29, 2019)); *Roark v. Credit One Bank, N.A.*, No. CV 16-173, 2018 WL 5921652, at *3 (D. Minn. Nov. 13, 2018); *Keyes v. Ocwen Loan Servicing, LLC*, 335 F. Supp. 3d 951, 962-63 (E.D. Mich. 2018); *Fleming v. Associated Credit Servs., Inc*., 342 F. Supp. 3d 563, 576 (D.N.J. 2018); *Johnson v. Yahoo!, Inc*., 346 F. Supp. 3d 1159, 1162 (N.D. Ill. 2018).

Even courts that do not explicitly require technology to "create" numbers, however, hold that equipment does not constitute an ATDS where, as here, it requires significant human intervention to dial or text a phone number. *See, e.g.*, *Duran v. La Boom Disco, Inc.*, 369 F. Supp. 3d 476, 490 (E.D.N.Y. 2019) (no ATDS because "a human agent must determine [the time to send the message], the content of the messages, and upload the numbers to be texted into the system"); *Franklin v. Upland Software, Inc.*, No. 1-18-CV-00236-LY, 2019 WL 433650, at*2-3 (W.D. Tex. Feb. 1, 2019) (no ATDS because platform "require[d] significant human intervention" by requiring the customer to: (i) "log onto [the] platform and set up a mobile messaging campaign from a list of individuals who ha[d] opted [in]," (ii) "set[] up the lists," (iii) "draft the content of the text message," and (iv) "select the date and time the text message [was] to be sent," and (v) "schedule the text to be sent"); *Herrick v. GoDaddy.com LLC*, 312 F. Supp. 3d 792, 803 (D. Ariz. 2018) (no ATDS where a user had to "log into the system, create a message, schedule a time to send it"); *Hatuey v. IC System, Inc.*, No. 1:16-cv-12542-DPW, 2018 WL 5982020, at *7 (D. Mass. Nov. 14, 2018) (no ATDS where human "must manually click a button to place a call"); *Maddox v. CBE Grp., Inc.*, No. 1:17-cv-1909-SCJ, 2018 WL 2327037, at *4-5 (N.D. Ga. May 22, 2018) (same *Marshall v. CBE Grp., Inc.*, No. 2:16-cv-02406-GMN-NJK, 2018 WL 1567852, at *6-7 (D. Nev. Mar. 30, 2018) (same); *Gary v. TrueBlue, Inc.*, No. 17-cv-10544, 2018 WL 3647046, at *7-8 (E.D. Mich. Aug. 1, 2018) (no ATDS because employees had to "craft an outgoing text message, and then click certain keys to send a message," explaining that "[t]his level of human judgment and intervention precludes a system from falling under the definition of ATDS"); *Ung v. Universal Acceptance Corp.*, 249 F. Supp. 3d 985, 989-91 (D. Minn. 2017) (no ATDS because equipment required human intervention to dial numbers from a stored list); *Ramos v. Hopele of Fort Lauderdale, LLC*, 334 F. Supp. 3d 1262, 1268, 1274 (S.D. Fla. 2018) (no ATDS because

equipment required an individual to, among other things, sign into the system, upload numbers, write the message, program the date and time of delivery, and hit send).

According to Dr. Shamos, [redacted] (Shamos Tr. at 74:2-18; 115:1-9.) Dr. Shamos claims that [redacted] (Shamos Rebuttal ¶¶ 9, 10.) No court has ever adopted this interpretation.[2] Indeed, the foregoing case law explicitly considers the pre-dialing steps of human intervention in determining whether equipment constituents an ATDS. *See supra*, at pp. 10-11.

Moreover, Dr. Shamos' interpretation of the TCPA is inconsistent with *ACA* because it defines an ATDS to include smart phones, a result the D.C. Circuit described as "untenable." 885 F.3d at 698. Indeed, Dr. Shamos [redacted] (Shamos Tr. at 115:19-119:18.) Dr. Shamos likewise testified that [redacted] (*Id*. at 74:24-76:21; *see also* Shamos Rebuttal ¶ 32.) Finally, Dr. Shamos testified that [redacted] (*Id*. at 120:18-122:14.)

Dr. Shamos' interpretation of an ATDS suffers from the same fatal flaw as the FCC interpretation that the D.C. Circuit invalidated in *ACA*. 885 F.3d at 698. His proffered testimony is therefore unreliable and of no value to the factfinder.

[2] Plaintiff attempts to rely on *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1048 (9th Cir. 2018) to claim that the Platforms qualify as ATDSs. (*See* Shamos Report p. 46.) Even *Marks*, however, did not interpret the definition of an ATDS as broadly as Dr. Shamos does because the text platform in that case utilized a greater level of automation than the Platforms here, which require significant human intervention.

II. DR. SHAMOS DOES NOT APPLY ANY RELIABLE METHODOLOGY

The Court should exclude Dr. Shamos' opinions on the independent ground that he did not apply any reliable methodology or utilize any relevant expertise to conclude that the Platforms are ATDSs.

A proffered expert "must explain how he arrived at his conclusions." *CitiMortgage, Inc. v. Just Mortg., Inc.*, No. 4:09 CV 1909 DDN, 2012 WL 1060122, at *2 (E.D. Mo. Mar. 29, 2012) (*citing* Fed. R. Evid. 702 advisory committee's note). When presented with a proffer of expert testimony, "the trial court must make a 'preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.'" *Polski*, 538 F.3d at 838. Furthermore, "if the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached . . . and how that experience is reliably applied to the facts." *Morris v. Hockemeier*, No. 05-0362-CVW-FJG, 2007 WL 1073875, at *4 (W.D. Mo. Apr. 4, 2007). Courts exclude expert testimony where the expert has failed to apply any discernible methodology. *Id*.

Dr. Shamos does not explain the methodology he used to define the TCPA's terms. [redacted] (Shamos Tr. at 115:1-18.) [redacted] (Shamos Rebuttal ¶22.) [redacted] (Shamos Tr. 115:1-9.) At most, therefore, Dr. Shamos conducted a legal analysis based on his experience as a practicing attorney.

Dr. Shamos likewise defined [redacted] (*id*. at 105:5-21), [redacted] (*id*. at 142:14-24; *see also* Shamos Rebuttal ¶¶ 26-28).

Dr. Shamos' opinions are also inherently unreliable because they were formed entirely for litigation. *Wagner v. Hesston Corp.*, 450 F.3d 756, 759 (8th Cir. 2006); *Nelson v. American Home Prods. Corp.*, 92 F. Supp. 2d 954, 968 (W.D. Mo. 2000). "[A] scientific expert's normal workplace is the lab or the field, not the courtroom or the lawyer's office." *Nelson*, 92 F. Supp. 2d at 968. Dr. Shamos has never written any articles concerning dialing or texting platforms (Shamos Tr. at 43:13-21), nor has he taught any TCPA content in any of his courses (*id*. at 43:25-44:17). [redacted] (*id*. at 48:25-49:5); [redacted] (*id*. at 49:9-15); [redacted] (*id*. at 50:4-6). Dr. Shamos developed opinions on these matters solely for litigation purposes. (*Id.* at 48:16-50:6.) His opinions are therefore unreliable and should be excluded.

III. DR. SHAMOS' TESTIMONY LACKS FOUNDATION

The Court should exclude Dr. Shamos' opinion and testimony concerning the SendSmart Platform on the independent ground that they lack foundation because they are based solely on videos, testimony, and irrelevant LinkedIn posts rather than a personal analysis of the technology.

Under Rule 702, expert testimony is admissible only if it "is based on sufficient facts or data." Thus, courts have consistently excluded expert testimony concerning texting platforms where the expert did not personally analyze or test the platform. *See, e.g.*, *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). In *Keyes*, for example, the court excluded testimony concerning whether a telephone system constituted an ATDS because the expert never tested or inspected the system, but instead formed his opinions based on documents and manuals regarding the platform. *Id*. at 958.

Likewise, Dr. Shamos never [redacted] (Shamos Tr. at 77:1-78:2, 123:17-20, 132:1-7.) Instead, Dr. Shamos formed his opinions of SendSmart [redacted] (Shamos Report ¶ 84) [redacted] (Shamos Tr. at 123:21-124:6). [redacted] (*Id*. at 124:7-21.) When Dr. Shamos encountered inconsistencies in the evidence, he resorted to making assumptions. (Shamos Report ¶ 94.) Dr. Shamos also testified that [redacted] (Shamos Tr. at 119:3-120:17.) He had no access to the "internal workings" of the SendSmart platform. Dr. Shamos purports to rely on a January 2019 LinkedIn post by Mr. Yasnoff to conclude that "SendSmart uses Artificial Intelligence to send millions of text messages completely autonomously." (Shamos Report ¶ 96.) Dr. Shamos admitted, however, [redacted] (Shamos Tr. at 133:23-134:24.)

Dr. Shamos' testimony and opinions regarding the SendSmart Platform should be excluded in their entirety because they lack foundation.

Defendants respectfully request that the Court grant their motion to exclude the opinions and testimony of Plaintiff's proffered expert, Dr. Michael Shamos, and grant any other relief the Court deems just and proper.

Dated: October 25, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on this 25th day of October, 2019, the foregoing was filed electronically with the Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

/s/ Jacqueline M. Sexton
Jacqueline M. Sexton