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

J.T. HAND, individually and on behalf
of all others similarly situated,

                Plaintiff,

vs.

BEACH ENTERTAINMENT KC, LLC
d/b/a SHARK BAR, et al.,

                Defendants.

Case No.:   4:18-cv-668-NKL

Hon. Nanette K. Laughrey

PLAINTIFF'S SUGGESTIONS IN OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE OPINION AND TESTIMONY OF PLAINTIFF'S PROFFERED EXERT DR. MICHAEL SHAMOS

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INTRODUCTION

Defendants Beach Entertainment KC, LLC d/b/a Shark Bar ("Shark Bar"), Entertainment Consulting International, LLC, and The Cordish Companies, Inc. (collectively, "Defendants") have moved to exclude the opinion and testimony of Plaintiff J.T. Hand's ("Plaintiff") expert Dr. Michael Shamos. In reality, Defendants' motion is largely a repackaging of the arguments advanced in their summary judgment brief, asserting their view of what the appropriate definition of an automatic telephone dialing system ("ATDS") is. Otherwise, Defendants' criticisms are limited to attacking Dr. Shamos for using the same terminology, the same methods, and the same evidence as their own expert. At the end of the day, Defendants' only quarrel with Dr. Shamos is that he describes differently from their expert how Defendants' texting platforms work. But while Defendants may be unhappy with Dr. Shamos's conclusions, Defendants' critiques are not valid reasons to exclude the totality of his opinions and testimony through a *Daubert* motion. *See CWC Commercial Warehousing, LLC v. Norcold, Inc.*, No. 6:15-CV-03312-MDH, 2016 WL 10644035, at *1 (W.D. Mo. Oct. 12, 2016) (Harpool, J.) ("While Defendant's arguments that [plaintiff's expert's] examination did not comply with the [] standard may be an appropriate issue for cross-examination, Defendant has not provided a sufficient basis for his exclusion at trial under *Daubert*. Rather, Defendant has merely provided numerous issues it believes renders [plaintiff's expert's] opinion inaccurate. The Court finds Defendant's arguments do not render [plaintiff's expert's] opinions inadmissible."). Defendants' Motion should be denied.

BACKGROUND

Dr. Shamos is a computer scientist currently teaching at Carnegie Mellon University with an extensive background in networking, wireless technology, and digital payment systems.

(Substitute Expert Report of Dr. Michael Shamos ("Shamos Rept.") ¶¶ 2–10, attached as Exhibit A to the Declaration of William C. Kenney, filed contemporaneously as Exhibit 1.)[1] Plaintiff retained Dr. Shamos in this matter to analyze and address the functionality of the two computer systems—TXT Live! and SendSmart—that Defendants used to send text messages to Plaintiff and the putative class. (*Id.* ¶¶ 12, 21–22, 31.) Dr. Shamos's technical explanations of the systems' functionality were the only opinions he was asked to provide. (*Id.* ¶ 22.)[2] In particular, he examined whether each system satisfied some or all of three technical criteria: (1) whether the system uses a random or sequential number generator to both "store" and "produce" telephone numbers and to dial such numbers (which he referred to as "Requirement 1"); (2) whether the system has the capacity—(A) to store telephone numbers to be called, or produce telephone numbers to be called using a random or sequential number generator; and (B) to dial such numbers ("Requirement 2"); and (3) whether the system has the ability to automatically dial telephone numbers without human intervention ("Requirement 3"). (*Id.* ¶¶ 12, 25–27; *see also* Exhibit C, Rebuttal Expert Report of Dr. Michael Shamos ("Shamos Reb. Rept.") §§ II.B, C.)

In order to determine whether the TXT Live! system met any of these technical criteria, Dr. Shamos analyzed the system's source code, including setting up a specialized virtual computing platform and installing a working clone of Defendants' TXT Live! platform, and creating a test "campaign" to demonstrate how the system selected who would be texted. (Shamos Rept. ¶¶ 32–72, 79–81.) Dr. Shamos also reviewed deposition testimony and related documentation regarding the system. (*Id.* ¶¶ 73–78.) Based on his review, Dr. Shamos rendered

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[1]   Unless otherwise specified, all referenced exhibits are attached to the Declaration of William C. Kenney.

[2]   *See also* Exhibit B, Plaintiff's June 14, 2019 Disclosure of Expert Witnesses ("Plaintiff's Expert Disc.") (identifying Dr. Shamos as a retained expert and providing a brief overview of the scope of his opinions and anticipated testimony).

an opinion on how TXT Live! stores and produces lists of numbers to be called and sends text messages to them, ultimately concluding that the system met the technical criteria he referred to as Requirements 1, 2, and 3. (*Id.* ¶¶ 97–100, 105.) With respect to SendSmart, the source code was unavailable, (*id.* ¶ 31), so Dr. Shamos performed an analysis of materials Defendants produced describing how the system worked, deposition testimony about its use, a declaration from SendSmart's CEO, and additional instructional materials, both written and in video walkthroughs, regarding the version of SendSmart in place at the time Shark Bar used it. (*Id.* ¶¶ 82–94.) Here again, Dr. Shamos rendered an opinion on how the SendSmart system stored and produced lists of numbers to be called and dialed those numbers, ultimately concluding that the system also met the technical criteria he referred to as Requirements 1, 2, and 3. (*Id.* ¶¶ 101–104, 106.)

ARGUMENT

Shark Bar's Motion to Exclude Dr. Shamos's opinion and testimony (the "Mot.") should be denied. "Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony" and "[t]he rule clearly is one of admissibility rather than exclusion." *Shuck v. CNH America, LLC*, 498 F.3d 868, 874 (8th Cir. 2007) (internal quotations and citations omitted). As such, "courts should resolve doubts regarding the usefulness of an expert's testimony in favor of admissibility." *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 758 (8th Cir. 2006); *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 596, 596 (1993) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."). The Court may admit testimony of a qualified expert witness if "(1) it is based on sufficient facts or data, (2) it is the product of reliable principles and methods, and (3) the expert has reliably applied the

principles and methods to the facts of the case." *Kuhn v. Wyeth, Inc.*, 686 F.3d 618, 625 (8th Cir. 2012) (citing Fed. R. Evid. 702). The testimony must also "help the trier of fact to understand the evidence or determine a fact in issue." Fed. R. Evid. 702. "The exclusion of an expert's opinion is proper only if it is so fundamentally unsupported that it can offer no assistance to the jury." *Wood v. Minn. Mining & Mfg. Co.*, 112 F.3d 306, 309 (8th Cir. 1997) (internal quotations and citation omitted). Dr. Shamos's technical analyses of Defendants' software easily meet these threshold requirements and are helpful in understanding how the two systems function.[3]

Ignoring that their own expert reviewed the same underlying facts and data, performed an identical analysis regarding the same technical criteria, and rendered a similar type of opinion, Defendants nonetheless contend that Dr. Shamos's report and testimony should be excluded. Defendants broadly offer three reasons why they believe Dr. Shamos fails to pass muster under *Daubert* and Rule 702. Each is without merit. First, Dr. Shamos made conclusions about the technical functions of the dialing software Shark Bar used, not the law. Second, Defendants' critiques of Dr. Shamos's assumptions, methodology, and conclusions may go the weight of his testimony, but do not preclude its admission. Finally, Dr. Shamos had sufficient data—the exact same data Defendants' expert relied on—to conclude how the SendSmart software worked.

I. Dr. Shamos Addresses How Defendants' Texting Software Functions, Not What the TCPA Proscribes.

Dr. Shamos was asked to analyze the functionality of the two software platforms that

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[3] While the standard for determining the admissibility of an expert report looks to whether the report would aid the ultimate trier of fact, Plaintiff has moved for partial summary judgment arguing that there is no disputed issue of material fact as to how Defendants' texting platforms operate. Nevertheless, although Plaintiff believes there is no ultimate factual dispute to be resolved with respect to the ATDS issue, in deciding whether to consider an expert report on summary judgment, the Court must determine whether the report would be admissible at trial. *See In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011) ("Because summary judgment ends litigation without a trial, the court must review the evidence in light of what would be admissible before either the court or jury.").

Defendants used to send the text messages at issue in this case. (Shamos Rept. ¶¶ 12, 21, 25–27; Plaintiff's Expert Disc.) Despite Defendants' protestations to the contrary, (*see generally* Mot. at 6–12), Dr. Shamos was not asked to give any legal opinions or to determine whether Defendants in fact violated the TCPA. Rather, he was provided certain technical criteria regarding telephone dialing systems and asked to determine whether Defendants' dialing platforms did or did not meet them. (Shamos Rept. ¶¶ 25–27.) He was not asked to provide any opinion beyond whether the platforms did or did not function according to these principles. Indeed, as is the subject of the parties' respective motions for summary judgment, which are being concurrently briefed, the Court will need to decide the legal significance of this functionality. Put simply, Dr. Shamos is offering an opinion only as to whether Defendants' texting platforms satisfy what he calls Requirements 1, 2, or 3. (Shamos Rept. ¶¶ 32–73, 82–94.)[4] He is *not* opining as to whether his Requirements 1, 2, or 3 adequately reflect the statutory definition of an ATDS or how an ATDS should be defined. That, of course, is a legal determination for this Court.

This is hardly remarkable, as experts in TCPA cases are regularly called upon to explain how particular dialing systems work. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009) (describing expert's conclusion, in part, that defendant's "telephone system 'stored telephone numbers to be called and subsequently dialed those numbers automatically and without human intervention'"); *Nicholson v. REI Energy, LLC*, 370 F. Supp. 3d 1199, 1202 (D. Or. 2019) (plaintiff's expert concluded that defendant's texting platform had "the capacity to dial telephone numbers from a stored list or database of numbers without human intervention"); *Mey*

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[4] To the extent that the Court finds Dr. Shamos's report to be inartfully worded in that it makes the statement that either system ▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮ (*see* Shamos Rept. ¶ 97), the Court can simply disregard or exclude the phrase ▮▮▮▮▮▮▮▮▮ in favor of "meets" rather than strike the entirety of his analysis. This will in no way affect his overall conclusions. (*See id.* ¶¶ 105, 106 (concluding that the systems ▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮).)

v. Venture Data, LLC, 245 F. Supp. 3d 771, 789 (N.D.W. Va. 2017) (expert report discussed how defendant's "dialing systems have the characteristics of an ATDS"); *Sherman v. Yahoo! Inc.*, 997 F. Supp. 2d 1129, 1136 (S.D. Cal. 2014) (denying summary judgment, based in part on expert's conclusion that "'equipment used by the [d]efendants 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'").[5] Dr. Shamos's report here is no different; like Defendants' expert report, it simply explains the functionality of the TXT Live! and SendSmart platforms. Indeed, for all of Defendants' handwringing that the technical requirements Dr. Shamos was asked to investigate overlap in part with the definition of an autodialer under 47 U.S.C. § 227(a)(1), (Mot. at 11–12), their own expert was asked to address identical technical requirements. (Exhibit D, Amended Expert Report of Dr. Michael Mitzenmacher ("Mitzenmacher Rept.") ¶ 8 ████████████████████████████████

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Dr. Shamos's technical analyses here are readily distinguishable from the legal opinions stricken in the cases that Defendants cite. For example, in *Legg v. Voice Media Group, Inc.*, the expert specifically sought to testify explicitly whether the defendant's dialing platform "me[t] the

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[5]   In fact, courts have allowed expert reports and opinions in TCPA cases that go well beyond just explaining how a particular dialing system works (as Dr. Shamos did here) and actually opine on whether a defendant has complied with the law. *See, e.g.*, *Bakov v. Consol. World Travel, Inc.*, No. 15 C 2980, 2019 WL 1294659, at *5–6 (N.D. Ill. Mar. 21, 2019) (rejecting *Daubert* challenge, allowing "TCPA compliance expert" to testify that defendant's system, among other things, "does not 'encroach upon' TCPA regulations and FCC concerns regarding prerecorded message[s]"); *Abante Rooter & Plumbing, Inc. v. Alarm.com Inc.*, No. 15-CV-06314-YGR, 2018 WL 3707283, at *8 (N.D. Cal. Aug. 3, 2018) (rejecting *Daubert* challenge of expert who opined that "[c]lass members received calls that were made using an ATDS").

legal definition of an [ATDS]." No. 13-62044-CIV-COHN, 2014 WL 1767097, at *4 (S.D. Fla. May 2, 2014); *see also Strauss v. CBE Grp., Inc.*, No. 15-62026-CIV, 2016 WL 2641965, at *2 (S.D. Fla. Mar. 23, 2016) (rejecting conclusion "as to the legal definition of an ATDS, or the legal implications of using a predictive dialer"); *Tomeo v. CitiGroup, Inc.*, No. 13 C 4046, 2018 WL 4627386, at *6 (N.D. Ill. Sept. 27, 2018) (same outcome regarding same expert as in *Strauss*); *Keyes v. Ocwen Loan Servicing, LLC*, 335 F. Supp. 3d 951, 959 (E.D. Mich. 2018) (excluding report proffered by same expert as in *Tomeo* and *Keyes* in part because expert sought to "define[] the governing legal standard" of what an ATDS is under the TCPA). Again, Dr. Shamos is offering an opinion only as to whether Defendants' texting platforms satisfy certain criteria, *not* whether those criteria meet the statutory definition of an ATDS.[6]

Defendants also point to two cases in which courts excluded testimony from Dr. Shamos for purportedly offering legal conclusions. (Mot. at 8–9.) But the fact that his testimony was excluded in two cases (out of over 260 in which he has served as an expert (Shamos Rept., Appx. A, "Expert Witness")) has no bearing on the admissibility of his report and testimony in this matter. In any event, those cases are readily distinguishable. Unlike the report here, which takes no position as to what the correct interpretation of an ATDS under the TCPA is, in *FedEx Ground Package System, Inc. v. Applications International Corp.*, a copyright infringement and misappropriation of trade secrets case, Dr. Shamos opined about what was "required under the

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[6]   *Southern Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc.*, 320 F.3d 838, 841 (8th Cir. 2003), cited by Defendants at 7, stands for the unremarkable proposition that an expert cannot testify as to "whether federal law was contravened." That case addressed the interpretation of a policy provision in an insurance contract, a question of law. *Id.* Thus, legal conclusions as to whether or not the policy provision applied were appropriately excluded. *Id.*; *see Fleishour v. Stewart Title Guar. Co.*, No. 4:08CV01958 ERW, 2010 WL 1006230, at *1 (E.D. Mo. Mar. 16, 2010); *see also In re Air Crash at Lexington, Kentucky, Aug. 27, 2006*, No. CIV.A. 506CV316-KSF, 2008 WL 2954973, at *7 (E.D. Ky. July 30, 2008) (distinguishing *Southern Pine*, noting that the case "that the case was not about industry standards or practice, but about meeting the requirements for an exclusion under the language of an insurance policy.").

law." 695 F. Supp. 2d 216, 222 (W.D. Pa. 2010). Furthermore, in that case, Dr. Shamos did not do a source code review or compare the screenshots of the software that was alleged to have been misappropriated. *Id*. at 224. Not so here, where Dr. Shamos went through an exhaustive, step-by-step analysis of Defendants' texting platforms, complete with excerpts of and citations to the actual source code, numerous screenshots, and references to a multitude of other materials describing the systems' functionalities. (*See* Shamos Rept. ¶¶ 31–94.) And in *Ameranth, Inc. v. Menusoft Systems Corp*., another infringement case, the court allowed Dr. Shamos to give background on certain legal principles, such as generally explaining "indirect infringement," but did not allow him to testify in detail about such matters. No. 2:07-CV-271-TJW-CE, 2010 WL 11530915, at *1 (E.D. Tex. Sept. 1, 2010). Here, Dr. Shamos is not opining about the TCPA, or what the legal definition of an ATDS is or ought to be pursuant to it.

To support their argument, Defendants attempts to spin the fact that Dr. Shamos quotes the TCPA in a background paragraph in his report as evidence that he is offering legal conclusions regarding the TCPA's interpretation. (Mot. at 8.) This does not warrant exclusion. *See Sterk v. Path, Inc*., 46 F. Supp. 3d 813, 817 (N.D. Ill. 2014) (rejecting defendant's contention that plaintiff's expert "offer[ed] his opinion as to what he believes the TCPA prohibits, how FCC rulings should be interpreted, and whether certain legal standards have been met in this case," and finding the expert "merely discusse[d] the law and facts to give a background and overview for his report"). This is precisely what Defendants' expert included, as well, incorporating 47 U.S.C. § 227(b)(1)(A)(iii)'s ATDS definition (*see* Mitzenmacher Rept. ¶¶ 7–8), and discussing that he reviewed numerous district and appellate court opinions interpreting the autodialer provision—which he testified ██████████████████████████████████████

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Dr. Michael Mitzenmacher ("Mitzenmacher Dep."), 56:24–57:21).

Similarly, Defendants make much of Dr. Shamos's use of the word "parse" at his deposition when Defendants' counsel asked how he came to his understanding of what the first technical criterion in his report—Requirement 1—meant regarding the phrase to "store or produce." (*See* Mot. at 4, 8.) Dr. Shamos's interpretation of these words was not, nor was it meant to be, a legal interpretation of the phrase's meaning. Instead, Dr. Shamos's "parse" was based on his technical knowledge of how storage in computers works and which he sets out in his report. This led him to conclude that it is illogical in a technical sense for a telephone number to be stored using a random number generator, but logical for a telephone number to be produced using a random number generator. (Shamos Rept. ¶ 25; Exhibit F, Excerpts from the Deposition of Dr. Michael Shamos ("Shamos Dep."), 70:21–71:1.)[7] And Dr. Shamos further admits that there may be different formulations of the terms' meanings, which are accounted for in other technical analyses—Requirements 2 and 3—in his report. (Shamos Rept. ¶¶ 26–27; Shamos Dep. 71:13–19.) Here again, Dr. Shamos is not opining as to which—if any—of these technical requirements satisfies the statutory definition of an ATDS, he is just concluding that Defendants' systems meet the technical criteria outlined in Requirements 1, 2 and 3.

For the same reasons, Defendants' criticism of Dr. Shamos's purported interpretation of the TCPA to include smartphones (Mot. at 4–5, 9–10), misses the mark; Dr. Shamos does not opine on how the TCPA should be interpreted, nor does he conclude that every smartphone is an ATDS. In fact, Dr. Shamos's report doesn't mention smartphones at all. (*See generally* Shamos Rept.) Instead, Defendants cherry-pick responses to questions their counsel asked at Dr.

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[7]   Notably, as explained in Section II, *infra*, Dr. Mitzenmacher's report is centered around his own interpretation of the same words. (*See, e.g.*, Mitzenmacher Rept. § 2).

Shamos's deposition, (Mot. at 5), ignoring that Dr. Shamos often pushed back or disagreed with Defendants' counsel. (*See* Shamos Dep. at 116:7–118:2 (disagreeing that ████████████ ███████████); 75:19–76:3 (responding that ████████████████████████████).) And it is beyond dispute that an out-of-the-box iPhone cannot function as SendSmart and TXT Live! did—replete with ██████████████████████████████████

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████████ (*See id*. 168:13–170:5; Shamos Rept. ¶¶ 55–57, 68–69, 75–77.) Much as Defendants try to repeat these arguments here, they belong in the parties' motions for summary judgment.

Because Dr. Shamos makes no legal conclusions about what the law should be or Defendants' liability under it, Defendants' bid to exclude Dr. Shamos's report and testimony on these grounds should be denied.

II. Defendants' Arguments About Dr. Shamos's Assumptions and Applications of His Do Not Warrant Exclusion.

Defendants next argue that Dr. Shamos "did not apply any reliable methodology or utilize any relevant expertise" in his use of the words "produce," "sequential" and "random or sequential number generator." (Mot. at 13–14.) The thrust of this argument, however, is simply that Defendants disagree with how Dr. Shamos used these particular words. (Mot. at 8, 13–14.) Yet Defendants' own expert uses these same terms throughout his report.[8] (*See*, *e.g.*,

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[8]   Defendants criticize Dr. Shamos for relying on how these terms are used in "common parlance," ignoring that Defendants' own expert testified that none of these terms ████████████ ██ and that Dr. Mitzenmacher defined these same terms based on their ████████████████████████ (Mitzenmacher Dep. 45:10–55:24; *see also* Shamos Reb. Rept. § C.1–4 (addressing bases for defining "sequential," "produce," "random number generation," and "store").)

Mitzenmacher Rept. ¶¶ 8, 15, 62, 67.) While Dr. Shamos may use these words differently than Defendants' expert, (*see id*. ¶¶ 62), Defendants never actually argue that Dr. Shamos's review of the systems' underlying functionality—i.e. the application of his expertise as a computer scientist to analyzing the systems' capabilities—is flawed, such that the TXT Live! code does not work as Dr. Shamos explains it or that the campaigns are not sent as discussed;[9] instead, Defendants complain about how Dr. Shamos describes those functionalities.

Ultimately, because Dr. Shamos's "methodology is reliable and can be reasonably applied to the facts of the case[,]" his testimony should be admitted. *See Eckelkamp v. Beste*, 315 F.3d 863, 868 (8th Cir. 2002). Defendants' "mere disagreement with the assumptions and methodology used does not warrant exclusion of [Dr. Shamos's] expert testimony." *Synergetics, Inc. v. Hurst*, 477 F.3d 949, 956 (8th Cir. 2007). Instead, if Defendants think "other assumptions and methods were more appropriate, [they have] the opportunity to make this apparent 'through cross-examination and by presenting [their] own expert witness.'" *David E. Watson, P.C. v. United States*, 668 F.3d 1008, 1015 (8th Cir. 2012) (citing *Synergetics*, 477 F.3d at 956). And indeed, Defendants had exactly that opportunity in their motion for summary judgment. Similarly, that the parties' experts differently described the software (again, while seemingly agreeing on how its campaigns are actually sent) does not warrant exclusion. *See Kuhn*, 686 F.3d at 625, 633 (discussing that "[p]roponents of expert testimony need not demonstrate that the assessments of their experts are correct" and that "it is not the province of the court to choose between the competing theories when both are supported by reliable scientific evidence"). Defendants' list of reasons as to why it thinks Dr. Shamos's opinion is inaccurate does not

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9   *See* Shamos Reb. Rept. ¶¶ 8, 37 (reiterating that the experts agree regarding how the TXT Live! and SendSmart systems actually operate).

warrant his exclusion. *See CWC Commercial*, 2016 WL 10644035, at *1.

Defendants make the related argument that Dr. Shamos's testimony is somehow inherently unreliable because this is his first time analyzing a texting platform. (Mot. at 14.) But Dr. Shamos has an exhaustive background in computer science, and competently performed an extensive code review of TXT Live! and system analysis SendSmart. And in any event, there is—unsurprisingly—no default rule excluding experts because they are applying their expertise to a particular application for the first time. *See Curbow v. Nylon Net Co.*, No. 07-3106-CV-S-JCE, 2008 WL 4186919, at *3 (W.D. Mo. Sept. 5, 2008) ("[T]hough defendant complains that [plaintiff's expert] has never worked on a case involving sports-related equipment and has never designed warnings for sports equipment, the Court believes that based on his education, training, and knowledge as a Mechanical Engineer and Professional Engineer, he is qualified to testify as an expert in this case."). Indeed, such a rule would also bar Defendants' expert, who himself has

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████████████████████████ (Mitzenmacher Dep. 13:1–7, 19:6–9, 20:4–13, 23:2–10, 24:1–5, 58:15–59:7.) Defendants also argue that Dr. Shamos should be excluded because he didn't preform his opinion on how Defendants' dialing software worked before this case. (Mot. at 14.) This is not problematic; in fact, it's a requirement under Rule 702. *See* Fed. R. Evid. 702(d) (requiring an expert to "reliably appl[y] the principles and methods *to the facts of the case*") (emphasis added).

Defendants' attacks on Dr. Shamos's methodology do not warrant exclusion.

III. Dr. Shamos Had Sufficient Facts and Data on Which to Base His Conclusions Regarding the SendSmart Dialing Platform.

Finally, Defendants take the position that because the company that designed the

SendSmart platform lost the code it used to send ███████████ texts to Plaintiff and the putative SendSmart Class, Dr. Shamos is incapable of rendering any opinion whatsoever on how the software functions. But Defendants' bid to ignore the myriad contemporaneous sources of information regarding the code and SendSmart's capabilities—exactly the same information that Defendants' expert relied on—is unconvincing. Dr. Shamos had sufficient facts and data on which to assess SendSmart's functionality.

As an initial matter, the Eighth Circuit has recognized that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination." *Children's Broad Corp. v. Walt Disney Co.*, 357 F.3d 860, 865 (8th Cir. 2004); *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 929–30 (8th Cir. 2001) (same); *see also Martin v. F.E. Moran, Inc.*, No. 13 C 03526, 2017 WL 1105388, at *6 (N.D. Ill. Mar. 24, 2017) ("[T]here is no need to evaluate an expert's underlying data or factual assumptions so long as there is a basis in the record supporting the [expert's] factual assumption[s].") (internal quotations and citation omitted); *see Kuhn*, 686 F.3d at 625 ("Proposed testimony must be supported by appropriate validation— *i.e.,* 'good grounds,' based on what is known.") (citing *Daubert*, 509 U.S. at 590). Indeed, it is only "[w]hen the analytical gap between the data and proffered opinion is too great[] [that] the opinion must be excluded." *Marmo*, 457 F.3d at 758. There is no such analytical gap here, and Dr. Shamos's opinion and testimony are appropriately admitted.

Dr. Shamos reviewed multiple sources to come to his conclusions regarding the SendSmart system's functionality: testimony provided by the system's designer that set out the functionality of the system at the time it was used by Defendants, deposition testimony regarding the system's use by bar employees that used it daily, instructional materials on the system that

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Defendants produced from their own records, and a demonstration video of the platform as it existed in 2014, around the time that Defendants began using it to send text messages. (*See* Shamos Rept. ¶¶ 31, 82–94, Appx. B.) Courts have found this type of documentary evidence—or less—regarding a texting system to be a sufficient basis for an expert to opine on its functionality. *See Hunt v. 21st Mortg. Corp.*, No. 2:12-CV-2697-WMA, 2014 WL 1664288, at *2 (N.D. Ala. Apr. 25, 2014) (allowing opinion when expert reviewed "[a] small, unused office where defendant's old equipment was stacked, offline and in fact not even plugged in[; a] 'demonstration' in which defendant's 'litigation coordinator' held up a numeric keypad and pantomimed dialing numbers on it[; and a] small group of veteran debt collection employees at work using the new system"); *Mey v. Venture Data, LLC*, No. 5:14-CV-123, 2017 WL 10398569, at *4 (N.D.W. Va. June 6, 2017) (allowing expert opinion without physical inspection of device, citing in part his review of "voluminous documentary evidence" and contact with "an engineer of one of the dialing systems"); *Strauss*, 2016 WL 2641965, at *3 (allowing expert opinion without physical inspection of device based in part on review of dialer's manual in other cases, a deposition transcript, and notes associated with plaintiff's account).

As these cases and others make clear, and despite Defendants' allusion to the contrary, there is no hard-and-fast rule that a plaintiff's expert must physically examine the dialing hardware or software in order to form an opinion on it. *See*, *e.g.*, *Abante*, 2018 WL 3707283, at *9 ("[T]he fact that [plaintiff's expert] did not physically inspect the . . . [d]ialer does not preclude [the expert's] testimony about its nature."); *Mey*, 2017 WL 10398569, at *4 (rejecting motion to exclude on the basis that expert in TCPA case didn't perform a physical inspection of the dialer); *Strauss*, 2016 WL 2641965, at *3 (same). This is particularly true here, where the SendSmart system was no longer in use at Shark Bar and unavailable for the parties to review

after the original source code was lost, situations that were entirely beyond Plaintiff's control. (Shamos Rept. ¶ 31); *see Hunt*, 2014 WL 1664288, at *2 (declining to exclude expert for failing to examine defendant's dialing equipment, noting "[i]deally, [plaintiff's expert] would have examined the actual system in live action, but defendant had dismantled the entire system and replaced it with a new one directly after being sued"). Here again, Defendants' complaints do not translate into a meritorious *Daubert* motion.

Lastly, Defendants cannot seriously suggest that the facts and data underlying Dr. Shamos's SendSmart opinions are insufficient without critically undermining their own expert's conclusions regarding the system which are based on precisely the same underlying data. Dr. Mitzenmacher acknowledged that ██████████████████████████████████

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(Mitzenmacher Rept. ¶ 25.) Dr. Mitzenmacher further notes that he ████████████████████ ██████████ to conclude that ██ ████████ (*id*. ¶ 129), and purports to describe SendSmart based on ████████████████ ████████████████████████████████ (*id*. ¶ 17). (*See also id*. ¶ 21 (concluding that ████████ ██ ████████████████████████████████████).) Both experts had sufficient facts and data to analyze the SendSmart system; competing questions about how that underlying information affected their respective conclusions does not mean their testimony is inadmissible.

CONCLUSION

For the forgoing reasons, Defendants' Motion to Exclude should be denied in its entirety.

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Date: November 8, 2019   Respectfully submitted,

                                          /s/ Bill Kenney
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CERTIFICATE OF SERVICE

I hereby certify that, on November 8, 2019, the foregoing document was electronically filed with the Court's Electronic Filing System and will be served electronically on all registered attorneys of record.

                                          /s/ Bill Kenney
                                         William C. Kenney