UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

Case No.: 1:17-CV-00335

KAREN SAUNDERS,	)
	)
Plaintiff,	)
	)
v.	)
	)
DYCK O'NEAL, INC.,	)
	)
Defendant.	)

_____/

Defendant Dyck-O'Neal, Inc.'s
Motion to Strike and Exclude Report and Testimony of Randall A. Snyder

Introduction

Plaintiff offers Randall Snyder's "expert" declaration to argue Dyck-O'Neal (through VoApps, LLC) placed calls to her and putative class members' cellular telephone numbers and left prerecorded messages in violation of the Telephone Consumer Protection Act. Snyder's declaration must be stricken as:

- his opinions are not based on a reliable methodology;
- he fails to explain how the VoApps system functioned; and
- offers impermissible statements of law and draws legal conclusions, thereby invading the province of this Court.

Snyder's failure to visit VoApps's operations center to observe the way it connects to a voicemail platform or even inspect the VoApps patent, as well as his decision not to interview the inventor of VoApps compels this Court to join the growing list of federal judges that have stricken his declarations and/or refused to consider his opinions.

Statement of Facts

Dyck-O'Neal contracted with VoApps to deliver collection-related voice messages to voicemail service providers' platforms using VoApps's technology [1]To deliver these voice messages, VoApps uses Adaptive Signaling ("Adapti-Sig") technology to establish a direct connection between the VoApps Adapti-Sig media cluster and the target voicemail server provider's voicemail platform.[2]

Plaintiff's counsel retained Snyder to provide a Report regarding "whether the Defendant operated equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and/or from a list or database of numbers, and whether the Defendant operated equipment which has the capacity to dial telephone numbers without human intervention."[3] Plaintiff's counsel also asked Snyder to provide an opinion as to whether "'direct drop voicemail' messages initiated to cellular telephone numbers can be considered calls initiated to those subscribers using an artificial or prerecorded voice.'"[4]

Legal Standard

Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals*[5] control whether expert testimony is admissible in this action. 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:

[1] *See,* Deposition of Paul Gies ("Gies Dep."), ECF No. 36-4 at 8:4–8.

[2] *Ibid*. at 20:5–8 (Gies Dep.).

[3] *See* Dec. 22, 2017 Report of Randall A. Snyder ("Snyder Report"), ECF No. 36-2 at 25, ¶ 1-2 (filed under seal).

[4] *Ibid.* at 2 ¶ 2.

[5] *Id.*, 509 U.S. 579 (1993)

(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.[6]

Interpreting this rule, the Supreme Court in *Daubert* directed district courts to exercise a "gatekeeping" function under Rule 702 and evaluate the reliability and relevancy of an expert's proffered testimony prior to consideration of it.[7] "For expert testimony to be admissible, the court must find the expert to be: (1) qualified; (2) her testimony to be relevant; and (3) her testimony to be reliable."[8] The rules of evidence, particularly Rule 702, "assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." [9]The trial court's "gatekeeping" task with respect to expert testimony applies not just to scientific evidence, as was at issue in *Daubert*, but to all types of specialized knowledge presented through an expert witness.[10]

Argument

The Court should exclude Snyder's report and testimony from this case because: (A) his opinion is not based on a reliable methodology; (B) he fails to explain how the VoApps system could or did generate random telephone numbers to dial; (C) he offers impermissible statements of law and draws legal conclusions, thereby invading the province of this Court; and (D) offers

[6] Fed. R. Evid. 702(a)–(d).

[7] *Daubert*, 509 U.S. at 597.

[8] *United States v. LaVictor*, 848 F.3d 428, 441 (6th Cir. 2017), *cert. denied*, 137 S. Ct. 2231 (2017).

[9] *Daubert*, 509 U.S. at 597.

[10] *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 148–49 (1999).

testimony that is not helpful and risks unfair prejudice because it recycles information through an expert witness that is susceptible to the fact finder's perception and amounts to improper bolstering.

1. **Snyder's report should be excluded as it is not supported by a reliable methodology**.

To admit expert testimony, the trial court must assess whether the methodology underlying the proposed testimony is valid and properly applied to the facts at issue. [11]Non-scientific, experienced-based testimony is admissible only if it is "properly grounded, well-reasoned, and not speculative." [12]

Snyder's testimony and Report fail this standard in at least five ways. First, Snyder drew conclusions without seeing, testing, inspecting, or using the VoApps system at issue here. Second, Snyder speculates as to cellular providers' costing methods generally without offering any foundation for such opinion. Third, Snyder fails to explain how the VoApps system could or did generate random telephone numbers to dial. Fourth, Snyder's report and testimony substitute expert opinions for legal quotations and conclusions, thereby impermissibly invading the province of this Court. And fifth, Snyder's testimony recycles information that is not helpful to the factfinder, who may evaluate the facts just as well as Snyder, and amounts to improper bolstering.

Snyder did not see, test, inspect, or use the VoApps System at issue.

As relevant here, Snyder states in his Declaration:

> Based on my review of the relevant documents and facts described above, it is my opinion that the Defendant utilized equipment which has the capacity to store or produce telephone numbers to be

[11] *Daubert*, 509 U.S. at 592–93.

[12] Fed. R. Evid. 702 Advisory Committee Notes (2000 amends.).

> called, using a random or sequential number generator, or from a list or database of numbers, and to dial such numbers without human intervention. I base this opinion on my knowledge, education, experience, expertise, training and on the evidence I have reviewed.[13]

Snyder also states, "Based on my knowledge, education, expertise, training, the evidence I have reviewed and the facts described above, it is my opinion that VoApps, Inc.'s ('VoApps') 'DirectDrop Voicemail Service' messages initiated to cellular telephone numbers are calls made using an artificial or prerecorded voice made to phone numbers assigned to a cellular telephone service."[14]

Snyder reached these conclusions without seeing, testing, inspecting, or using the VoApps system at issue in this case.[15] Furthermore, Snyder has never seen VoApps's operations center, observed the manner in which it connects to a voicemail platform, inspected the VoApps patent, or interviewed David King.[16] That Snyder failed to engage in these rudimentary tasks before reaching his opinions is hardly surprising; in fact it is consistent his failures in other cases leading to following criticisms from federal judges:

- "Snyder's first opinion . . . is ***inadmissible for lack of sound methodology***," reasoning "***Snyder only reviewed testimony and documents, he never observed nor listened to the so-called prerecorded calls, nor otherwise experienced the VVT Software***."[17]

- "The Court further notes that ***Snyder never inspected the LiveVox system at issue in this case***. Courts have declined to allow expert testimony to create a disputed issue of material fact in TCPA cases where the expert in question has not

[13] *See* "Snyder Report", ECF No. 36-2 at 8, ¶ 12.

[14] *Ibid.* at 8, ¶ 13.

[15] *Ibid.* at 4–7, ¶¶ 8(a)–(tt) (describing sources of opinion).

[16] *Ibid. passim*.

[17] *Bakov v. Consol. World Travel, Inc.*, 2019 U.S. Dist. LEXIS 46510, *25–26 (N.D. Ill. Mar. 21, 2019) (emphasis added).

examined the dialing infrastructure at issue."[18]

- "Plaintiffs' expert ***Randall Snyder did not examine the machine, but only reviewed the capabilities literature provided by the manufacturer*** of the Ytel Dialer and information from witnesses who used the device."[19]

- Snyder's testimony was "not reliable and must be excluded," reasoning he present opinions "***without testing the viability*** of [his] hypotheses").[20]

- "***Snyder's testimony that VMG used an automatic telephone dialing system also lacks an adequate factual foundation. Snyder's opinion is based primarily upon his review of a client handbook*** produced by Phaz2, the vendor VMG relied upon to send its text messages. This client handbook purports to set forth instructions and descriptions relating to Phaz2's systems. VMG represents, however, and Legg does not dispute, that Snyder has not had the opportunity to inspect VMG's or Phaz2's equipment . . . ."[21]

Snyder's failure to investigate VoApps is heightened by the fact he has no apparent experience with other systems that deliver voicemails directly to a voicemail platform;[22] his generalized experience with other dialing systems does not qualify him to opine on VoApps's system. For the *same* reasons that multiple courts have stricken and/or criticized Snyder's reports and testimony under *Daubert's* reliability prong, this Court should strike Snyder declaration and report and exclude them in their entirety as neither are sufficiently reliable.

2. Snyder fails to explain how the VoApps System could or did generate random telephone numbers.

Snyder's declaration states: " . . . it is my opinion that Defendant utilized equipment

[18] *Marshall v. CBE Grp., Inc.*, 2018 U.S. Dist. LEXIS 55223, *19–21 (D. Nev. Mar. 30, 2018) (emphasis added).

[19] *Abante Rooter & Plumbing, Inc. v. Alarm.com Inc.*, 2018 U.S. Dist. LEXIS 132078, *20–21 (N.D. Cali. Aug. 3, 2018) (emphasis added).

[20] *Dominguez v. Yahoo!, Inc.*, 2017 U.S. Dist. LEXIS 11346, *58 (E.D. Penn. Jan. 27, 2017) (emphasis added).

[21] *Legg v. Voice Media Group, Inc.*, 2014 U.S. Dist. LEXIS 61322, *12–18 (S.D. Fla. May 2, 2014 (citations omitted and emphasis added).

[22] *See,* Snyder Report, ECF No. 36-2 (*passim*).

which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, or from a list or database of numbers, and to dial such numbers without human intervention."[23] Yet, Snyder's report fails to describe how VoApps's system actually generated random numbers; instead it merely describes the ability of computer programs, in general, to generate numbers.[24]

Several courts across the country again criticized Snyder, this time for similar unsupported, bare bones "opinions."[25] The following excerpts from similar cases demonstrates various courts' condemnations of Snyder's opinions that were, like his "capacity" opinion in this case, devoid of analysis:

- "Snyder's report contains 'overbroad, generalized assertions,' about the ability of computer programs to generate random numbers generally. ***Absent from the report, though, is an explanation of how the CallShaper Predictive Dialer 'actually did' generate random telephone numbers to dial***. Because the report "does not shed light on the key factual question actually at issue in this case—whether the [CallShaper Predictive Dialer] functioned as an autodialer by randomly or sequentially generating telephone numbers, and dialing those numbers," the report does not create a genuine dispute of fact as to whether the equipment "had the capacity to function as an autodialer."[26]

- "Despite his conclusions, ***Snyder's declaration does not explain how the ININ system generates numbers***. [. . .] All telephone numbers called through the ININ system are inputted through a prearranged or preprogrammed list. In other words, the ININ system is not an ATDS merely because it reorganizes telephone numbers into a list with a different sequence. And Snyder's declaration does not otherwise establish that the ININ system has the capacity to randomly or sequentially generate telephone numbers to be called."[27]

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[23] *Ibid.* at 8, ¶ 12; *id.* at 8 ¶ 14; *id.* at 30 ¶ 79; *id.* at 32 ¶ 86; *id.* at 42 ¶ 116.

[24] *Ibid. passim*.

[25] The same argument applies equally to Snyder's claim that the VoApps system creates a "call" to a "number assigned to cellular service."

[26] *Richardson v. Verde Energy USA, Inc.*, 354 F. Supp. 3d 639, 650-651 (E.D. Penn. Dec. 14, 2018) (citation omitted and emphasis added).

[27] *Smith v. Navient Sols., LLC*, 2019 U.S. Dist. LEXIS 131231, *24–27 (W.D. Penn. Aug. 4, 2019) (emphasis added).

- "Mr. Snyder proposes to testify that the eRelevance system is an ATDS under the TCPA because it automatically sends text messages to stored numbers. But, as the Court has explained, ***that is not the proper standard; an ATDS must have the capacity to use randomly and sequentially generated phone numbers***."[28]

Snyder's failure to describe how the specific system used by VoApps's randomly generates numbers, renders his opinion meaningless as it is nothing more than an argument that since some telephone systems can generate numbers, VoApps system can necessarily generate numbers. The lack of any factual support for this opinion renders it inadmissible, and it must be stricken.

3. Snyder's opinion regarding cellular subscriber billing lacks foundation.

Paragraphs 87 through 95 of Snyder's report describe what is "what is common" for subscribers generally in terms of whether cellular subscribers pay for voicemail.[29] Yet Snyder offers no evidence supporting what he claims is "common" and what he wants the court to conclude: Plaintiff and the putative class members were charged for any calls here.[30] And Snyder does not explain his qualifications to offer such an opinion, whether by training, experience, education, or otherwise.[31] The absence of a reliable basis of support for Snyder's "observations" in paragraphs 87 through 95 of his report require the Court to exclude those paragraphs.[32]

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[28] *Smith v. Premier Dermatology*, 2019 U.S. Dist. LEXIS 152887, *20–21 (N.D. Ill. Sept. 9, 2019) (citation omitted and emphasis added).

[29] *See,* Snyder Report, ECF No. 36-2 *generally* at ¶¶ 32–35, ¶¶ 87–95.

[30] Indeed, Snyder's opinion mischaracterizes the § 227(b)(1)(A)(iii), which asks whether the defendant made a call to "any service for which the called party is ***charged for the call***." *See,* 47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added).

[31] *See,* Snyder Report, ECF No. 36-2, generally.

[32] *See, Daubert*, 509 U.S. at 592–93 (stating to admit expert testimony, the trial court must assess whether the methodology underlying the proposed testimony is valid and properly applied to the facts at issue).

Snyder states, "It is very ***common*** in today's cellular market for subscribers to obtain cellular features and services that are bundled for 'no charge' into a variety of single-price rate plans."[33] Snyder also describes what he believes is "typical" with unlimited telephone call traffic. For instance, he claims, "***The carriers typically*** raise the price of these bundled plans and/or offer alternative plans to account for the loss in revenue[34]… inform the market that voicemail service is included in a bundled rate plan for 'no charge,'"[35] [and] "***offer*** their subscribers several tiers of voicemail service."[36] So, according to Snyder, "***it is very possible*** that subscribers may be forced to upgrade and pay for a higher capacity voicemail box."[37] Yet, he does not state that the "carrier" at issue here charged Plaintiff or any putative class members for the alleged calls. At best, he claims it is "very possible."

Even if the aforementioned statements were more than random musings, Snyder lacks the education, training, or experience to opine on the factors that impinge on carriers when setting prices—and, indeed, influenced the amount Plaintiff and the putative class members ***actually were charged***.[38] Nor does Snyder claim to have reviewed any economic or costing data of the cellular carriers at issue or cite any other basis for his opinions in paragraphs 87 through 95.

Snyder's opinion is precisely to the sort of speculation courts are required to exclude when exercising their proper gatekeeping function.[39]Paragraphs 87 through 95 should therefore

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[33] *See* Snyder Report, ECF No. 36-2 at 33, ¶ 88 (emphasis added).

[34] *Ibid.* at 34, ¶ 92;

[35] *Ibid.* at 34, ¶ 93

[36] *Ibid.* at 34, ¶ 94

[37] *Ibid.* at 35, ¶ 95

[38] *Ibid.*, generally.

[39] *See, Daubert*, 509 U.S. at 599 (" . . . the word 'knowledge' 'connotes more than subjective belief or unsupported speculation.'"); *see also Dixon ex rel. Dixon v. Cook Cty.*, No. 09 C 6976, 2012 U.S. Dist. LEXIS 136644, 2012 WL

be excluded.

4. Snyder's statements of law and legal conclusions invade the province of the Court and must be excluded.

It is Black-letter law that "expert testimony that expresses a legal conclusion" must be excluded.[40] In *Torres v. County of Oakland*, the Sixth Circuit Court succinctly outlined the reason such testimony is inadmissible, stating:

> The problem with testimony containing a legal conclusion is in conveying the witness' unexpressed, and perhaps erroneous, legal standards to the jury. This "invade[s] the province of the court to determine the applicable law and to instruct the jury as to that law."[41]

The Court explained that the "best resolution" for this type of problem is "to determine whether the terms used by the witness have a separate, distinct and specialized meaning in the law different from that present in the vernacular," and if they do, "exclusion is appropriate."[42]

Here, Snyder's report is peppered with legal conclusions.[43] In fact, Snyder dedicates entire sections of his report to legal citations[44] and includes the following legal conclusions:

- "Text messages have been deemed to be calls that can be automatically sent *en masse* via an automatic telephone dialing system."[45]
- "It is my understanding that automated text messages are considered calls to cellular telephone numbers within the TCPA, associated FCC regulations and

4464460, at *3 (N.D. Ill. Sept. 25, 2012) (finding that an expert who "merely state[s] a fact and then provide[s] a conclusion, without providing any analysis as to how [they] reached such a conclusion" fails to satisfy Rule 702 and the *Daubert* standard); *see also Lang v. Kohl's Food Stores*, 217 F.3d 919, 924 (7th Cir. 2004) ("[E]xperts' work is admissible only to the extent it is reasoned, uses methods of the discipline and is founded on data . . . [t]alking off the cuff—deploying neither data nor analysis—is not an acceptable methodology.").

[40] *Berry v. City of Detroit*, 25 F.3d 1342, 1354 (6th Cir. 1994) (internal quotation marks omitted).

[41] *Id.*, 758 F.2d 147 (6th Cir. 1985).

[42] *Id.*

[43] *See,* Snyder Report, ECF No. 36-2 at 7–9, ¶¶ 9–16.

[44] *Ibid.* at 13–16, ¶¶ 16–35 (section entitled "The TCPA and Automatic Telephone Dialing Systems"); 17, ¶ 38.

[45] *Ibid.* at 28–29, ¶ 69.

under *Satterfield*."[46]

- Snyder's description of his understanding of the FCC's authority to "issue regulations implementing the TCPA's requirements" and the FCC's application of "the concept of calls initiated using an artificial or prerecorded voice and from an ATDS to paging service, cellular telephone service, specialized mobile radio service, or common carrier service, or any service for which the called party is charged for the call."[47]

- "I place 'no charge' in quotes, so as not to confuse the concept with what I understand the FCC to have defined 'charged for the call.'"[48]

- Describing the FCC's "mandated" implementation of number portability .[49]

Mindful of their role as gatekeepers of the evidence federal judge after federal judge has refused to permit Snyder to usurp the court's authority ruling "to the extent that Snyder's opinions [] draw legal conclusions, they are disregarded,"[50] "excluding Snyder testimony that impermissibly stat[es] a legal conclusion, and…lack[s] an adequate foundation,"[51] and that "Snyder's opinions . . . draw legal conclusions [and will be] disregarded."[52]

Snyder's report and testimony impermissibly offer statements of law and draw legal conclusions; well-established precedent requires their exclusion.[53]

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[46] *Ibid.* at 32, ¶ 87.

[47] *Ibid.* at 33, ¶ 90 n.33.

[48] *Ibid.* at 35, ¶ 97.

[49] *Ibid.* at 36–37, ¶ 99.

[50] *See, e.g.*, *Ramos v. Hopele of Fort Lauderdale, LLC*, 334 F. Supp. 3d 1262, 1272 n.5 (S.D. Fla. Aug. 16, 2018).

[51] *See, Legg v. Voice Media Group, Inc.*, 2014 U.S. Dist. LEXIS 61322, *12 (S.D. Fla. May 2, 2014).

[52] *See, Johnson v. Yahoo!, Inc.*, 2014 U.S. Dist. LEXIS 171325, *12–13 (N.D. Ill. Dec. 11, 2014).

[53] *See, Berry*, 25 F.3d at 1354.

5. Snyder offers testimony that is not helpful as it is designed to inject his own personal experiences and beliefs into the case.

Dyck-O'Neal moves to exclude portions of Snyder's report and testimony that recycle information the factfinder may evaluate without an expert's assistance.[54] Snyder offers numerous opinions that do not assist the factfinder in understanding evidence through the application of technical expertise. For instance, Snyder opines that the definition of a "call" in *Satterfield* is consistent with his "view of what a 'call' is, both in [his] professional life and ***personal experience***."[55] Snyder is no more qualified to opine about the definition of a call based on his "personal experience" than is the factfinder in this case. Snyder's practice of defining "call"—which he is no better suited to do than a lay juror—by anchoring the definition to his own legal conclusion or "personal experience," mandates exclusion of this testimony its entirety.[56]

Snyder's declaration is littered with improper observations within the kin of a lay juror. A non-exhaustive sample of these types of inadmissible "personal experience" observations in are the following:

- "Voicemail is a well-known and commonly-used telecommunications feature that is offered to subscribers of cellular carrier networks. [. . .] Voicemail has been a telecommunications carrier feature offered to subscribers for nearly 40 years."[57]

- "When cellular subscribers receive a text message on the mobile phone, the phone provides an audible alert, visual alert or both. Similarly, when cellular subscribers receive a voicemail message on the mobile phone, the phone also provides an audible alert, visual alert, or both."[58]

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[54] *See, e.g.*, *United States v. Freeman*, 730 F.3d 590, 597 (6th Cir. 2013); *see also United States v. Kilpatrick*, 798 F.3d 365, 380 (6th Cir. 2015).

[55] *See* Snyder Report, ECF No. 36-2 at ¶ 8, ¶ 11 (emphasis added).

[56] *See* discussion, *supra.*

[57] *See* Snyder Report, ECF No. 36-2 at ¶ 18, ¶ 42

[58] *See, e.g.*, *Ibid.* at 17, ¶ 36

- "When cellular subscribers receive a text message on the mobile phone, the phone provides an audible alert, visual alert or both. Similarly, when cellular subscribers receive a voicemail message on the mobile phone, the phone also provides an audible alert, visual alert, or both."[59]

- "The intent of a calling party is generally not to leave a prerecorded message for the cellular subscriber; rather, the calling party is typically attempting to have a real-time voice communication with the cellular subscriber when it places a call. Voicemail is used as an alternative means to communicate with the cellular subscriber when a real-time voice call is not possible."[60]

- "The voicemail box itself is not a physical construct . . . Most subscribers require only one voicemail box; however, the more modern systems enable subscribers to obtain and use more than one for various reasons."[61]

- "Voicemail is used in conjunction with another commonly used feature, 'call forwarding . . . .' If a cellular subscriber configures the call forwarding feature to forward incoming calls to an optional 'forward to' telephone number, the call will be redirected and completed to that number ."[62]

- "The voicemail box itself is not a physical construct . . . Most subscribers require only one voicemail box; however, the more modern systems enable subscribers to obtain and use more than one for various reasons."[63]

- "Voicemail is used in conjunction with another commonly used feature, 'call forwarding . . . . If a cellular subscriber configures the call forwarding feature to forward incoming calls to an optional 'forward to' telephone number, the call will be redirected and completed to that number . . . ."[64]

These are by no means the only examples and here again, Snyder has come under frequent criticism from various Courts for simply regurgitating facts requiring no technical expertise. In addressing a nearly identical issue in *Legg*, the court held: "Snyder's opinion

[59] *Ibid.* at 17, ¶ 38

[60] *Ibid.* at 18, ¶ 40.

[61] *Ibid.*

[62] *Ibid.* at 18, ¶ 41.

[63] *Ibid.*

[64] *Ibid.* at 18, ¶ 42.

therefore offers no more than what Legg's attorneys could argue to the jury, and ***does not assist the factfinder in understanding the evidence through the application of technical expertise***."[65] Indeed, the *Legg* court explained that "Snyder's proposed expert opinion raise[d] a "real danger that the jury may accord undue weight to expert evidence that attempts to validate [a party's] testimony."[66]

The same danger the Court recognized in *Legg* exists here because Snyder's opinion improperly bolsters Plaintiff's alleged claims. For example, Snyder's opinion states, "Unbeknownst to cellular subscribers, their voicemail boxes . . . can fill up with prerecorded voice messages from robo-calls"[67] which "results in cellular subscribers losing control of their voicemail and being forced to listen to unwanted and unsolicited prerecorded voice messages while attempting to listen to personal and meaningful voice messages"[68] making "it is very possible that subscribers may be forced to upgrade and pay for a higher capacity voicemail box.[69] Yet Snyder does not state that Plaintiff actually experienced any of these issues—nor should he. These and similar statements must therefore be excluded.[70]

Conclusion

Snyder has never seen, tested, or used VoApps's system and he has no insight into the manner in which VoApps connected to the voicemail platform in spite of the fact all of this

[65] *Id.*, 2014 U.S. Dist. LEXIS 61322, *12–18 (emphasis added).

[66] *Id.* at *18 (citing *United States v. Pavlenko*, 845 F. Supp. 2d 1321, 1327–28 (S.D. Fla. 2012)).

[67] *See* Snyder Report, ECF No. 36-2 at ¶ 35, ¶ 95.

[68] *Ibid.* at 25, ¶ 58.

[69] *Ibid.* at 35, ¶ 95.

[70] *See, Legg*, 2014 U.S. Dist. LEXIS 61322, *18 (agreeing with the defendant's argument that Snyder's testimony was "an impermissible use of an expert to bolster [the plaintiff's] credibility").

information was readily available to him. Court after court has admonished Snyder for what is, in essence, the same type of pointless conjecture, pontification and poetic waxing on issues ranging from cellular providers' costing methods to a phone system's ability to generate random telephone numbers to dial, as well as his frequent habit of offering statements of law and legal conclusions. This Court, like numerous court before it must conclude Snyder declaration fails to satisfy the *Daubert* standard, improperly offer statements of law and legal conclusions, and improperly recycles information that is not helpful to the factfinder in an attempt to bolster Plaintiff's position in the case.

Accordingly, Dyck-O'Neal respectfully requests that the Court exclude Randall A. Snyder's testimony and report under Federal Rule of Evidence 702.

Respectfully submitted this 22nd day of November, 2019.

CERTIFICATION OF GOOD FAITH

The undersigned certifies he has in good faith conferred with Plaintiff's counsel in an effort to resolve this matter without court action, but has been unable to reach an agreement.

Respectfully submitted by:

/s/ Dale T. Golden
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 22, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF. I also certify that the foregoing document is

being served this day on all counsel either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Dale T. Golden
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