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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SAN FRANCISCO DIVISION

CAT BROOKS and RASHEED SHABAZZ, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

THOMSON REUTERS CORPORATION,

Defendant.

Case No. 3:21-cv-01418-EMC-KAW

REDACTED VERSION - FILED PUBLICLY

PLAINTIFFS' NOTICE OF MOTION AND OMNIBUS MOTION TO EXCLUDE DEFENDANT'S EXPERT OPINIONS ON CLASS CERTIFICATION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: April 20, 2023
Time: 1:30 p.m.
Place: Courtroom 5, 17th Floor
Judge: Hon. Edward M. Chen

NOTICE OF MOTION

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on April 20, 2023 at 1:30 p.m., or as soon thereafter as the matter may be heard, via videoconference or in Courtroom 5 of the United States District Court, Northern District of California, San Francisco Division, located at 450 Golden Gate Avenue, San Francisco, California 94102, before the Honorable Edward M. Chen, Plaintiffs Cat Brooks and Rasheed Shabazz will, and hereby do, move this Court to exclude expert opinions pursuant to the Federal Rules of Evidence 702 and 703, and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and related cases.

Plaintiffs seek an order excluding two of Thomson Reuters' class certification rebuttal experts. In particular, Plaintiffs seek to exclude:

- Dr. Ran Kivetz's Rebuttal Expert Report; and
- Professor Jane Bambauer's Rebuttal Expert Report.

In the alternative, Plaintiffs seek an order striking the following portions of Dr. Kivetz and Professor Bambauer's rebuttal reports, each dated September 7, 2022:

- Dr. Ran Kivetz's Rebuttal Expert Report ¶¶ 23-27, 29, 31, and Parts D & E; and
- Professor Jane Bambauer's Rebuttal Expert Report at Part IV.

This motion is based upon this Notice of Motion, the attached Memorandum of Points and Authorities, the concurrently-filed declaration of Andre M. Mura ("Mura Declaration") and the exhibits to that declaration, the concurrently-filed Proposed Order, the pleadings and records on file in this action, and upon any additional evidence and argument that may be presented before or at the hearing of this motion.

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MEMORANDUM OF POINTS AND AUTHORITIES

ISSUE TO BE DECIDED

Whether the Court should exclude or limit the expert opinions of Thomson Reuters' (TR) class certification rebuttal experts Ran Kivetz and Jane Bambauer under Rules 702 and 703 of the Federal Rules of Evidence, and *Daubert*.

INTRODUCTION

Plaintiffs' expert Joseph Turow, a privacy scholar (among other areas), opines in his expert report in support of class certification that "Thomson Reuters' operation of the CLEAR product affects privacy interests of Californians—the right to control personal information and to be let alone—in such a way that all Californians whose information is accessible through CLEAR are harmed." ECF No. 124-7 at 8. Turow offered the Court an understanding of privacy grounded in California law, history, and policy. TR seeks to rebut Turow through the opinions of Ran Kivetz, a professor of marketing, and Jane Bambauer, a professor of law, but certain opinions of theirs are inadmissible.

Kivetz argues that the only way to think about California privacy law is to get inside every Californian's head and to evaluate their subjective perceptions and expectations under hyper-specific contextual circumstances. But Kivetz is not qualified to offer this opinion to the Court, and he readily admits it. He has no experience studying or teaching about privacy. He has never published on the topic of privacy, under California law or otherwise. He did not even bother to read the report of Bambauer—TR's other proposed privacy expert. But even if Kivetz were qualified to opine on privacy, he fails to reliably apply the very methodology he propounds, or even support his opinions with evidence. For these reasons, Kivetz should be excluded as a class certification expert. In the alternative, the Court should strike Parts D and E of his report, where he asserts that Turow's conclusions about privacy are wrong and that subjective consumer expectations are the *only* proper measure of privacy here.

Bambauer, in turn, opines that Turow's view of privacy (as recognizing a right to control) is "extreme" and contrary to U.S. privacy law. This attack is unsurprising: Bambauer has built a career fighting against California's privacy scheme in favor of a tech-friendly

approach that reduces consumer control. But instead of coming out and saying so, Bambauer sidesteps the issue entirely—nowhere in her report does she address, or even mention, California law, much less her views about it. That omission is astounding in a case about the corporate violation of Californians' privacy rights where Plaintiffs assert only California state law claims, particularly from a law professor. While TR may prefer Bambauer's litigation-driven position, her professional position outside of this case tells a different story. In public statements, writings, and sworn congressional testimony, Bambauer repeatedly acknowledges that individuals' right to control their information is a focal point of California's privacy scheme—just as Turow defines it. Moreover, Bambauer admits that her own views of privacy are incompatible with California law and are not widely accepted: the model legislation she assisted drafting that would shift state privacy laws away from California privacy standards has not been adopted by any state. The Court should exclude Bambauer's good-for-litigation-only opinion that an individual's right to control their information is an "extreme" and unaccepted view because she fails to consider the controlling law in this case and omits her actually responsive professional opinion. In the alternative, the Court should strike her proposed framework for evaluating privacy harm because it ignores California law and is therefore unresponsive to the claims in this litigation.

In sum, because Kivetz and Bambauer do not offer the Court reliable, reasonable, qualified, or supported opinions to aid its resolution of the motion for class certification, their opinions should be excluded or limited at this stage.

LEGAL STANDARD

Federal Rules of Evidence 702 and 703, as interpreted by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), permit expert opinion evidence so long as that expert is qualified, and based upon that qualification, the expert's opinion is relevant, reliable, and based on the types of facts or data reasonably relied upon in that field. "The expert may be qualified by 'knowledge, skill, experience, training, or education' as to the subject matter of the opinion." *Brown v. Google, LLC*, No. 20-CV-3664-YGR, 2022 WL 17961497, at *1 (N.D. Cal. Dec. 12, 2022) (quoting Fed. R. Evid. 702). The proponent of expert opinion evidence has the burden

of proving admissibility. *Id.* At class certification, "the relevant inquiry is a tailored *Daubert* analysis which scrutinizes the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence." *Id.* (collecting cases); *see also Olean Wholesale Grocery Coop. v. Bumble Bee Foods LLC*, 31 F.4th 651, 665 (9th Cir. 2022) (recognizing that at class certification, parties "may use any admissible evidence," including admissible expert opinions).

ARGUMENT

I. Kivetz's opinions are not helpful to the Court's resolution of class certification.

Kivetz offers the Court four interrelated opinions. First, that the privacy harms here [redacted]. *See, e.g.*, ECF No. 151-14 ¶ 50. Second, that substantiating those privacy harms [redacted]. *See, e.g., id.* ¶ 52. Third, that [redacted] *See id.* ¶¶ 56-109. And fourth, [redacted]. *See id.* ¶¶ 110-118.

Each of these opinions is inadmissible, unreliable, and unhelpful to the Court. Kivetz is not qualified to opine on the contours of California's privacy rights or the harms caused by their violation. He is not qualified to synthesize and contextualize long-standing scholarly debates on privacy. And he did not do the work to offer such an opinion. He did not review, much less rely on, the proposed expert report of Professor Bambauer, or offer any other substantive support for his position on California privacy rights here. He offers his subjective opinion, buttressed solely by his credentials (which have nothing to do with privacy). And finally, Kivetz fails even to reasonably apply his own framework. For all of these reasons, the Court should exclude Kivetz from class certification, or in the alternative, strike Parts D and E of his report.

A. Kivetz is not qualified to define privacy harms as requiring an analysis of consumer expectations.

For the first time in his career, Kivetz is attempting to opine on privacy. He purports to

offer the opinion that [redacted]. ECF No. 151-14 ¶¶ 49-50. This opinion is the linchpin of Kivetz's conclusion that assessing the class's privacy harms requires [redacted]. *Id.* ¶¶ 49-54. The centrality of [redacted] is foundational to the opinions that he offers the Court. *See id.* ¶ 23 (listing this opinion first in his summary of conclusions). But Kivetz admits that he is not qualified to opine on the proper contours of privacy harms, under California law or otherwise. *See* Ex. 1 at 56:24-61:16.[1] Kivetz cites nothing that even suggests his unfounded speculation on California privacy rights would be helpful to the Court in evaluating class certification. And to the extent that Kivetz could have done the work to support this opinion (for example, by relying on another expert who *was* so qualified)—he declined to do so. *See* ECF No. 151-14 at 135.

This is insufficient to pass muster under *Daubert*. An expert must opine within the bounds of their particular expertise. *Brown*, 2022 WL 17961497, at *11; *GPNE Corp. v. Apple, Inc.*, No. 12-CV-02885-LHK, 2014 WL 3870256, at *7 (N.D. Cal. Aug. 6, 2014). And "[i]n evaluating a proposed expert's qualifications, the court looks not at the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question." *Caldwell v. City of San Francisco*, No. 12-CV-01892-DMR, 2021 WL 1391464, at *3 (N.D. Cal. Apr. 13, 2021).

The answer here is no. Kivetz is not qualified to opine that the *only* privacy harm in this case [redacted]. *See* ECF No. 151-14 ¶¶ 23-27, 29, 45-46, 49-55; Parts D-E.[2] Indeed, he repeatedly disclaims understanding what

[1] All citations to exhibits refer to exhibits to the Mura Declaration unless otherwise noted.

[2] *See* ECF No. 151-14 ¶¶ 49, 51-55 (opining that the only way to measure harm here is through empirical review of subjective consumer expectations), ¶ 50 (claiming that any privacy harm here must exist in consumers' minds), ¶¶45-46, 56-109 (purporting to weigh in on the scholarly debate on the contours of privacy rights and disagreeing with Turow's synthesis

"privacy" means and refused to offer his own definition of the term. Ex. 1 at 56:24-57:3. He has never taught a course on the subject. *Id.*; *see* ECF No. 151-14 ¶¶ 7-8. Nor has he ever published a paper addressing privacy rights, under California law or otherwise. Ex. 1 at 60:12-61:16. He does not claim a discussion of privacy as part of his mandate in this case or mention privacy as one of his topics of study or expertise. ECF No. 151-14 ¶¶ 1, 5-8. He did not rely on—or even review—Bambauer's report on the topic.[3] *See* ECF No. 151-14 at 135 (listing "Expert Reports" made available to Kivetz in preparing his report, which does not include Bambauer's Rebuttal Expert Report). And in her own report, Bambauer does not advance Kivetz's "[redacted]" theory, nor does she ever state that consumer expectations control whether a privacy injury occurs. In short, Kivetz simply offers no "scientific, technical, or other specialized knowledge" whatsoever that might assist the Court in understanding the nature of privacy rights—let alone support his conclusion that Professor Turow's discussion of privacy harms is somehow invalid. *See id.* ¶¶ 110-118; Fed. R. Evid. 702(a). His opinions do not "rest[] on a reliable foundation and [are not] relevant to the task at hand." *In re Google Play Store Antitrust Litig.*, No. 21-MD-02981-JD, 2022 WL 17252587, at *3 (N.D. Cal. Nov. 28, 2022).

For these reasons, Kivetz cannot help the Court answer the "specific question[s]" posed by Rule 23 in this privacy case, and the Court should exclude Kivetz, or in the alternative, strike Parts D and E of Kivetz's report that purport to opine on the nature and scope of privacy rights for purposes of class certification. *Caldwell*, 2021 WL 1391464, at *3; *Brown*, 2022 WL 17961497,

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thereof), Part D (same), Part E (speculating that class members are not injured from TR's violation of their right to control their information, and may even like CLEAR), ¶¶23-27 (summarizing these same opinions).

[3] That Kivetz would blind himself to Bambauer's report and scholarship is not surprising; his consumer-expectation framework directly contradicts her view that consumers can't be trusted to make decisions about privacy. When she testified before the Senate Judiciary Committee, Bambauer explained that consent should not be the standard because consumers are often "overprotect[ed]" when they "distrust" data use practices that are—in Bambauer's view—good for them. *See GDPR & CCPA: Opt-ins, Consumer Control, and the Impact on Competition and Innovation: Hearing Before the Sen. Comm. On the Judiciary*, 116th Cong. (Mar. 12, 2019) at 2:18:18-19:07, available at https://www.judiciary.senate.gov/meetings/gdpr-and-ccpa-opt-ins-consumer-control-and-the-impact-on-competition-and-innovation.

at *11.

B. Kivetz proposes a methodology incompatible with this case, then fails to reliably apply it.

Even if Kivetz were qualified to opine on privacy issues—which he is not—his opinions should still be excluded or limited because he neither proposes a compatible methodology for evaluating privacy harms nor adheres to the standards he himself promotes. It is not enough for an expert witness to be qualified to opine on an issue—they must propose a *reliable* methodology, reliably *apply* that methodology in their report, and tailor their analysis to the facts at issue in the case. Fed. R. Evid. 702(d); *Brown*, 2022 WL 17961497, at *11. Kivetz fails on all counts.

Kivetz fails to propose a reliable and compatible methodology for measuring privacy harm in this case. He claims that the only way to establish and measure privacy harm (which he mischaracterizes as a [redacted] only) necessitates [redacted]. *See* ECF No. 151-14 ¶¶ 49-55. But Kivetz has done no work to show that [redacted] *See id.* ¶¶ 5-9, 23-27, 29, 46, 49-55, Ex. B (listing cases in which Kivetz has previously offered expert opinions). Nor does Kivetz ever explain why [redacted] or know it exists. *See* ECF No. 151-14 ¶ 21. Kivetz's approach, then, is a non-sequitur. Plaintiffs' theory of the case is that the class is universally harmed by their lack of control over the information TR collects about them and commercially exploits through CLEAR. Asking how an individual class member might choose to assert their control if they did have that knowledge, as well as the option to exercise their control, is wholly unresponsive to the harm alleged and the realities of this case. *See Red v. Kraft Foods, Inc.*, No. CV 10–1028–GW(AGRx), 2011 WL 4599833, at *12-13 (C.D. Cal. Sept. 29, 2011) (finding Kivetz's individuated consumer expectation theory did not defeat class certification).

Even supposing that Kivetz's proposed framework of evaluating consumer expectations

fit the facts of this case, Kivetz fails to meet his own standards. In Part E of his report, Kivetz argues that consumers will appreciate CLEAR, but fails to offer any evidence of consumer expectations, much less any of the survey evidence that he claims is obligatory to determine what consumers feel. Instead, he supplies only two sources that are even arguably responsive, neither of which measure consumer expectations regarding privacy or mention any product at all. *See* ECF No. 151-14 ¶¶ 126 n.264, 155 n.334; Ex. 2 (first source); Ex. 3 (second source). The first article is an "interdisciplinary review" of privacy-related research, not a consumer survey or measurement of consumer expectations around privacy. *See* Ex. 2. The second summarizes consumer perceptions about digital marketing and targeted advertising—a type of digital commerce that Kivetz himself considers wholly dissimilar to CLEAR. *See* Ex. 3; ECF No. 151-14 ¶¶ 72, 81, 128.[4] So while Kivetz is wrong that the Court need consider how individuals might exercise their right to control, he also fails to reliably apply the methodology he demands the Court use. That failure also renders his conclusions unreliable and unhelpful here. Fed. R. Evid. 702(c), (d); *Brown*, 2022 WL 17961497, at *11.

Ultimately, Kivetz fails to connect his proposed metric to the facts of this case. It is nonsensical to isolate the privacy harms here to consumers' [redacted] when Californians do not even know of the alleged unlawful practice and are given no choice in the matter. But even assuming consumer expectations were relevant to the Court's class certification inquiry, Kivetz's report would still be unhelpful because his conclusion that class members would like CLEAR if only they knew more about it is not grounded in any evidence of consumer expectations. *See infra*, Section I.C; *see Farar v. Bayer AG*, No. 14-cv-04601-WHO, 2017 WL 5952876, at *12 (N.D. Cal. Nov. 15, 2017) (granting class certification and finding that Kivetz's consumer expectation survey was "inconclusive" as to elements of the predominance inquiry). Because Kivetz fails to propose *or* apply a reliable methodology for measuring privacy harm, the Court should exclude his report.

[4] Worse, Kivetz glosses over the paper's conclusion that the majority of consumers view companies assembling data about them as "intrusive," prompting the authors to recommend that businesses "give[] data ownership and control to consumers." Ex. 3 at 10.

C. Kivetz offers unsupported speculation and repeats, without independently confirming, the statements of Thomson Reuters as fact.

The third reason that the Court should exclude or limit Kivetz's opinions is his manifest failure to support his conclusions. "'[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert,' and 'a trial court may exclude evidence when it finds that there is simply too great an analytical gap between the data and the opinion proffered.'" *Zetz v. Boston Sci. Corp.*, ---F. Supp. 3d---, 2022 WL 17418450, at *3 (E.D. Cal. Dec. 5, 2022) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). An expert may not create admissible evidence simply by placing their credentials behind the statements of a party, and "parroting" those statements as their own. *Spintouch, Inc. v. Outform, Inc.*, No. 21-00840-DOC, 2022 WL 17363902, at *5 (C.D. Cal. Sept. 28, 2022). Rather, expert opinions must be supported by actual "facts and data," and may not "include unsubstantiated speculation and subjective beliefs." Fed. R. Evid. 702(b); *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007); *Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017, 1025 (9th Cir. 2022). "Without more than credentials and a subjective opinion, an expert's opinion that 'it is so' is not admissible." *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 424 (5th Cir. 1987).

Kivetz's opinions are wholly unsubstantiated. Kivetz tells the Court—repeatedly—that [redacted], with the implication that these differences will somehow impact whether common questions of law or fact predominate in Plaintiffs' UCL claim. *See* ECF No. 151-14 ¶¶ 31, 82, 121, 136, 138, 142-144, 153-155, 162; *see also* ECF No. 150-4 at 20. Apart from Kivetz's failure to apply his own methodological framework for measuring consumer expectations of CLEAR, Kivetz offers no evidence *whatsoever* to support any of these assertions. Kivetz argues, for example, that because there are many data aggregators in the marketplace, [redacted], ECF No. 151-14 ¶ 162, or that because government customers may use CLEAR [redacted]. *Id.* ¶¶ 142-143. But Kivetz cites to no evidence of consumers' awareness of data aggregators (much

less their opinion about data aggregation as a practice). Nor does he offer any evidentiary support for his belief that class members would accept violations of their privacy because CLEAR is somehow so beneficial to them or society. Kivetz even goes so far as to speculate that "[redacted]." *Id.* ¶ 153. Again, he provides no support for this claim. Kivetz cannot transform these statements into expert opinions based solely on his credentials and his personal belief.[5] *See Viterbo*, 826 F.2d at 424; *Cooper*, 510 F.3d at 942; *Zetz*, 2022 WL 17418450, at *3. Without evidence, these opinions amount to little more than unsubstantiated musings, and the Court should exclude them. *See* ECF No. 150-4 at 6 n.23; *see also Viterbo*, 826 F.2d at 424.

Second, Kivetz parrots TR's talking points without critical engagement. Kivetz tells the Court a number of "facts" about CLEAR and how consumers may view CLEAR—but bases his information solely on statements by TR (either given directly to him in an interview, or from TR's materials in discovery). Kivetz may not transform the statements of TR into admissible expert evidence merely by assuming their correctness. *See Stephens v. Union Pac. R.R. Co.*, 935 F.3d 852, 857-58 (9th Cir. 2019); *Caldwell*, 2021 WL 1391464, at *5. But that is exactly what Kivetz has attempted here. He simply interviewed Kevin Appold, the Vice President of Investigations and Public Records at Thomson Reuters, and then repeated the information he learned as his own expert opinion. *See, e.g.*, ECF No. 151-14 ¶ 15 (disclosing the Appold interview*); id.* ¶¶ 20 n.15, 21 n.16, 83 n.161, 152, 155 n.335 (citing the Appold interview as fact). "Where an expert merely offers his client's opinion as his own, that opinion may be excluded." *Ask Chemicals, LP v. Computer Packages, Inc.*, 593 Fed.Appx. 506, 510 (6th Cir. 2014) (unpublished) (citing cases);

[5] Kivetz premises some of the value of his credentials on his extensive experience as an expert witness testifying on behalf of corporate defendants. *See* ECF No. 151-14 ¶¶ 12-13, Ex. B (listing cases in which Kivetz testified over the preceding four years—most (if not all) in support of a corporate defendant). But while a lucrative practice (generating [redacted] of dollars a year), that experience is equally insufficient to transform rampant speculation into admissible evidence. Ex. 1 at 26:4-28:5; 40:5-23; 41:16-25.

see Caldwell, 2021 WL 1391464, at *5; Fed. R. Evid. 703.

Third, Kivetz's review of Turow's work and sources is inadequate, generating misleading and unhelpful conclusions. Kivetz makes much about the importance of assessing how questions are posed to survey respondents to avoid inaccurate results. *See* ECF No. 151-14 ¶ 93 n.181. But Kivetz did not apply this same level of care to meaningfully engage with, understand, or rebut Turow's sources.[6] Instead, Kivetz casts around for reasons that would support his desired conclusions. *See* ECF No. 151-14 ¶¶ 76-77 (opining that Turow's sources directly contradict his report based on Kivetz's misunderstanding of the source).

Instead of actually engaging with Turow's evidence, Kivetz relies on internally inconsistent and facially results-oriented suppositions. Kivetz criticized the ValuePenguin survey by [redacted] — without any evidence that they were. *Id.* ¶¶ 80-81. When confronted with evidence from the Pew Research Center that consumers overwhelmingly desire control over their information, Kivetz attacks straightforward questions such as [redacted] without offering any specific suggestions of how the question could be improved, much less providing any survey evidence that would be preferable. *Id.* ¶¶ 91-92. These speculative assertions reveal Kivetz's analysis for what it is—a half-hearted attempt to create problems with evidence where there are none. *See,*

[6] For example, Turow relied on a 2019 National Telecommunications and Information Administration (NTIA) survey, titled "Nearly Three-Fourths of Online Households Continue to Have Digital Privacy and Security Concerns." *See* ECF No. 124-7 at 6 n.6. Kivetz criticized Turow for relying on a chart in the survey showing that 73% of households expressed major concern about privacy or security while using the internet, arguing that because [redacted]." ECF No. 151-14 ¶¶ 74-75. Likewise, in his deposition, Kivetz insisted that "there was a follow-up question," that when he reviewed Turow's Report he found it to be "inaccurate" compared to what the survey "actually does show," and that he had "had the NTIA survey article in front of [him]" and "knew everything that [he] could know about it." Ex. 1 at 191:13, 194:1-10. But none of this was true. NTIA makes its survey questions publicly available on its website. *See* NTIA, "November 2019 CPS Computer and Internet Use Supplement," available at https://www.ntia.gov/files/ntia/blogimages/november_2019_cps_supplement_-_final.pdf.

e.g., *Morin v. McCulloch Corp.*, No. CV-01-6431-SVW, 2002 WL 34357202, at *2 (C.D. Cal. July 3, 2002) (explaining that to be reliable, litigation consultants must perform their work with the same care they otherwise would).

For these reasons, the Court should exclude Kivetz's opinions or, at minimum, strike Parts D and E of Kivetz's Report.

II. Bambauer's report is unreliable and unhelpful to the Court because Bambauer has publicly stated that her views on privacy are contrary to California law.

To counter Turow, TR also hired Bambauer, an academic who has made a career of criticizing California's strong consent and control model of privacy. But here, Bambauer does not actually discuss California privacy law or her opinions about it. Instead, she attempts to position Turow as an outlier in his view of how California treats privacy. ECF No. 151-1 at 6. She claims that Turow "[redacted]," and that his position is "[redacted]" and "[redacted]." ECF No. 151-1 at 6. Bambauer then offers the Court her preferred alternative to California law—a tripartite, context-based framework for assessing privacy harms that she later admits is not used by other privacy scholars. *See id.* at 6-16; Ex. 4 at 70:9-11. Bambauer's litigation opinions conceal that she has, for years, spoken professionally and publicly about her disapproval of California's particularly strong privacy scheme. She has done so under oath before Congress, and on a legal commentary podcast the very same month she submitted her report in this case. In fact, these public statements show she *agrees* with Turow that California law vests in its citizens a property-style right to control how their information is used and by whom. Those opinions are mysteriously absent from her report. Bambauer's failure to consider the only controlling law in this case makes her opinions on class certification unreliable and unhelpful. But just as importantly, Bambauer's choice to omit her California-specific opinions shows a lack of candor toward the Court that renders her opinions inadmissible.

By failing to even reference California law, much less engage directly with Turow's analysis about Californians' privacy rights, Bambauer is not "being as careful as [she] would be in [her] regular professional work outside [her] paid litigation consulting." *Morin*, 2002 WL

34357202, at *2 (cleaned up). *Daubert* requires the trial court to assure itself that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* (cleaned up). Thus, an expert who "made [no] effort" to consider obvious contrary evidence, follow standard procedures in their field, or look to clear alternatives of which they are aware fails to pass *Daubert*'s gates. *Claar v. Burlington N. R. Co.*, 29 F.3d 499, 502-03 (9th Cir. 1994); *Nelson v. Matrixx Initiatives*, No. 09-02904-WHA, 2012 WL 3627399, at *8-10 (N.D. Cal. Aug. 21, 2012), *aff'd*, 592 F. App'x 591 (9th Cir. 2015); Fed. R. Evid. 702 advisory committee notes to 2000 amendments. By ignoring California law, despite the fact that this is a case about California privacy rights, Bambauer cannot satisfy this requirement or assist the Court in its determination of class certification.

Bambauer offers no excuse for her failure to consider California law here. As a privacy law scholar, Bambauer has spoken at length about how California law treats privacy—and her disapproval of California's approach. When she testified before the full Senate Judiciary Committee in 2019, Bambauer described California privacy law as "creat[ing] a property right" where "the idea is that as a consumer, it's your data and you're the ultimate authority about its best uses."[7] This testimony is consistent with remarks she made as a panelist on a Federalist Society podcast in 2018, in which Bambauer described California's privacy scheme as a "strong consent model" that "says consumers have kind of overwhelming interest in understanding how their data is collected and used, and should be given not only clear notice, very effective notice . . . and then an opportunity to reject the terms and yet still use the service."[8] In comments to Law360 about her work as a reporter for the Uniform Law Commission's model Uniform

[7] *See, e.g.*, GDPR & CCPA: Opt-ins, Consumer Control, and the Impact on Competition and Innovation: Hearing Before the Sen. Comm. On the Judiciary, 116th Cong. (Mar. 12, 2019) at 2:17:17-32, available at https://www.judiciary.senate.gov/meetings/gdpr-and-ccpa-opt-ins-consumer-control-and-the-impact-on-competition-and-innovation; Ex. 4 at 122:3-7, 132:9-136:1 (authenticating).

[8] Ex. 5 (transcript of The Federalist Society's Practice Group Podcast, *The Right to Be Forgotten*, The Federalist Society (Oct. 5, 2018 12:30p.m. EDT), available at https://fedsoc.org/events/the-right-to-be-forgotten); Ex. 4 at 138:2-140:2 (authenticating).

Data Privacy and Protection Act, Bambauer remarked that she was "glad" the Commission didn't adopt a similar privacy standard to California's and, if it had wanted to do so, she "probably[] would not have been the right reporter" for the project.[9] Instead, Bambauer wanted to move away from a "property approach" that "vest[s] control in the data subject."[10]

None of Bambauer's views on California privacy law are included in her report, despite the obvious centrality of California law in this case and in her own academic writings about U.S. privacy law. Bambauer's decision to simply ignore California law in her opinion renders her report deeply unreliable and unhelpful to the Court. For example, TR uses Bambauer to support its argument that Turow's views "contradict . . . basic tenets of U.S. privacy law." *See* ECF No. 150-4 at 6 n.23. But as a preliminary matter, Bambauer does not offer a view of the "basic tenets of U.S. privacy law"—the framework she offers in her report is not widely used by privacy scholars, and she admits that her work on privacy is itself not widely accepted. *See* Ex. 4 at 70:9-11 (tripartite framework not widely used), 93:23-24 (admitting no state has adopted ULC model law she worked on). Next, Bambauer readily admits that *California* law—the law at issue in this case—offers stronger protections for its citizens than other states, including the model she herself advances. *See id.* at 72:20-73:3 (agreeing that California privacy law, when taken as a whole, is "more restrictive than most other jurisdictions").

In fact, Bambauer's public statements and congressional testimony make clear that she agrees that, whatever theoretical privacy framework she may advocate for, California law vests individuals with a right to control their information—an opinion that is inexplicably absent from her report. As a result, Bambauer fails to engage with the predicate harm in this case at all, electing instead to focus on the potential benefits that CLEAR may provide to users. But without engaging with the underlying violation of Californians' privacy rights, Bambauer

[9] Ex. 6 (transcript of The Information Management 260 Podcast, *Episode 30: Discussing Privacy Regulation with the Uniform Law Commission*, Law360 (Sept. 7, 2022), available at https://www.archive360.com/podcast/discussing-privacy-regulation-with-the-uniform-law-commission); Ex. 4 at 120:18-121:25 (authenticating).

[10] Ex. 6.

overlooks the questions that are core to the resolution of Plaintiffs' class certification motion, skipping ahead to the balancing test itself, which is a merits inquiry. *Compare* ECF No. 124-7 at 13 (reasoning that because "no Californian has control over the information in or use of dossiers about them . . . all Californians face these same harms") *with* ECF No. 151-1 at 33 ("[redacted]").

Because Bambauer's report does not focus on—or even reference—California privacy law, it lacks relevance to this litigation. Moreover, Bambauer's choice to omit her professional opinions about California law and the rights that Californians enjoy as a result renders her report unreliable—in any other context about privacy law and data sharing, she both would and has included California-specific opinions, yet here they are conspicuously absent. Critically, Bambauer's opinions about privacy law generally are nonresponsive to the specific points Turow makes in his report about California law and are unhelpful to the legal questions the Court must resolve at class certification. For these reasons, the Court should exclude her opinions. In the alternative, the Court should strike Part IV of her report, outlining her definition of privacy harm that is not recognized by privacy scholars and ignores California law, because it is unreliable, unhelpful, and irrelevant to this litigation.

CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court exclude Ran Kivetz's and Jane Bambauer's opinions or, in the alternative, strike Parts D and E of Kivetz's Report and Part IV of Bambauer's Report for failing to meet the admissibility requirements of expert evidence under Rules 702 and 703.

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Respectfully submitted,

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