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**UNITED STATES DISTRICT COURT
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

**DEFENDANT THOMSON REUTERS'
OPPOSITION TO PLAINTIFFS'
OMNIBUS MOTION TO EXCLUDE
DEFENDANT'S EXPERT OPINIONS
ON CLASS CERTIFICATION**

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

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INTRODUCTION

Plaintiffs cannot offer a single meritorious basis for excluding any part of the opinions of either Dr. Kivetz or Prof. Bambauer, Thomson Reuters’ (“TR’s”) rebuttal experts. Both are eminently qualified in their fields, use valid scientific methods, and offer opinions that soundly rebut Plaintiffs’ principal expert in support of class certification, Professor Joseph Turow.

Plaintiffs go to unusual lengths in asking the Court to exclude the opinions of Dr. Kivetz and Prof. Bambauer, including contradicting their own expert’s opinion by denying it is based on consumer perception and preference data, and criticizing Prof. Bambauer for not offering an inadmissible legal opinion. Plaintiffs even go so far as to invent strawman opinions that neither expert espoused.

Prof. Turow’s opinion is that TR’s CLEAR platform uniformly harms tens of millions of putative class members because it divests each of them of their “ethical and social” “right to control” their personal information. As explained in TR’s motion to exclude Prof. Turow’s testimony, his opinion is merely an unevidenced presentation of his personal opinion about CLEAR and its impact on nebulous and undefined “privacy rights.” Doc. 157-4. Where he purports to offer support for his opinion, it is in the form of flawed third-party surveys that either have no bearing on, or directly contradict, his conclusion. *Id.*

Plaintiffs now seek to exclude Dr. Kivetz’s opinion on the basis that this survey evidence—the very type of evidence upon which Prof. Turow himself relies—is not “accepted in the privacy field” as a means of assessing harm. Doc. 159 (“Mot.”) at 6. And, incredibly, they seek to exclude Prof. Bambauer’s opinion because she does not opine on California law. Mot. at 11. These are not bases to exclude expert testimony under *Daubert*.

Dr. Kivetz and Prof. Bambauer each explain, based on their individual expertise, experience, and analyses of relevant academic literature, the reasons why Prof. Turow’s opinion is unsubstantiated and unsupported, and instead reflects his personal and unscientific view. Dr. Kivetz opines that one cannot determine whether people are harmed in the way that Prof. Turow says they are without empirical evidence, such as reliable academic literature or consumer surveys. Dr. Kivetz then systematically dismantles the literature and third-party surveys upon

1 which Prof. Turow relies. In response, Plaintiffs do not contest that Dr. Kivetz is an expert in
 2 consumer surveys, consumer perception, or consumer behavior. They contend that he is not an
 3 expert in privacy, which he does not purport to be. They also argue that it is somehow *Dr.*
 4 *Kivetz's* responsibility to conduct a survey to support or rebut Turow's opinion. But the
 5 observation that Prof. Turow's opinion has no empirical basis does not somehow shift the burden
 6 to Dr. Kivetz to develop and execute a reliable survey that actually gauges whether consumers are
 7 uniformly impacted by CLEAR. That is Plaintiffs' burden.

8 Prof. Bambauer opines that Prof. Turow's personal opinions on privacy represent an
 9 absolutist, minority viewpoint that would directly and tangibly hurt class members, over class
 10 members' own objections, in the name of "privacy" for privacy's sake. Plaintiffs' sole critique of
 11 Prof. Bambauer—that she does not sufficiently opine on California law—is easily rejected; expert
 12 opinions about the law are inadmissible, and Prof. Turow himself denies that he is offering a legal
 13 opinion. Worse, Plaintiffs' criticism of Prof. Bambauer reveals problems with *their* theory of
 14 liability, not with TR's defense. Neither Prof. Turow nor Prof. Bambauer discuss CLEAR's
 15 intersection with California law because everybody—from the parties, to the experts, to the amici—
 16 recognizes that California *has* passed the country's most extensive consumer privacy laws, and
 17 TR's operation of CLEAR is not alleged to violate a single one of those laws. Plaintiffs here
 18 attempt to circumvent the California legislature, and they are upset that Prof. Bambauer has
 19 opined that those attempts would hurt—rather than help—the putative class.

20 Plaintiffs' Omnibus Motion should be denied.

21 SUMMARY OF EXPERT OPINIONS

22 **Prof. Turow:** Plaintiffs offer the opinion of Prof. Turow in support of their argument that
 23 CLEAR uniformly harms "all Californians" by depriving them of control over their personal
 24 information. Doc. 124-7, at 5. Prof. Turow testified that this harm is "ethical and social." Doc.
 25 157-10, at 174:18-175:2; 212:2-4. He bases this opinion on "consumer perceptions" of CLEAR.
 26 *Id.* at 119:3-10. TR provides a detailed summary of Prof. Turow's opinion and testimony in TR's
 27 motion to exclude that testimony. *See* Doc. 157-4.

28 **Dr. Kivetz:** TR offers Dr. Kivetz's opinion to rebut the opinion of Prof. Turow. Dr.

1 Kivetz is a tenured, chaired, and full-time professor at Columbia University Business School,
 2 whose fields of expertise include “consumer psychology and behavior, survey methods ... human
 3 judgment, perception, and decision making,” and “survey design.” Doc. 151-14, at 4. Dr. Kivetz’s
 4 primary opinion is that Prof. Turow “fails to provide any empirical or scientific evidence of
 5 common injury allegedly suffered by the putative class members due to CLEAR, and Dr. Turow’s
 6 cited research and analyses do not substantiate his conclusions.” *Id.* at 11 (emphases omitted).¹

7 To form this opinion, Dr. Kivetz first analyzes Prof. Turow’s statements about the *type* of
 8 harm that Prof. Turow alleges to be at issue in this case: an “ethical and social” harm. *Id.* Dr.
 9 Kivetz observes that, by Prof. Turow’s own admission, this type of harm lacks any “physical
 10 injury, financial consequences, loss of property, or other quantification scheme.” *Id.* Dr. Kivetz
 11 therefore opines that, to identify and measure the abstract harm alleged by Prof. Turow, one
 12 would need to analyze: original survey data collected specifically for this litigation; or existing
 13 and relevant secondary data; or existing empirical academic literature regarding consumers’
 14 perceptions and preferences about privacy. *Id.* at Part D.1.

15 Second, Dr. Kivetz evaluates the academic literature and consumer surveys upon which
 16 Prof. Turow relies in forming his opinion. *Id.*, Parts D.2, D.3. Dr. Kivetz reviews problems with
 17 the questions asked by Prof. Turow’s cited surveys (for example that they deal with *marketer*
 18 access to personal information, which has little bearing on the type of privacy harm alleged here,
 19 since CLEAR specifically prohibits use for any marketing purpose) and explains that those survey
 20 results often directly support TR rather than Plaintiffs (for example, where a majority of surveyed
 21 participants disagreed that losing control over their personal information was a major concern).
 22 *Id.* These are issues well within Dr. Kivetz’s qualifications as an expert in consumer research,

23
 24 ¹ A prime example of Dr. Kivetz’s qualifications to rebut Prof. Turow is offered by Plaintiffs’
 25 own Motion. In the Motion’s footnote 6, Plaintiffs describe how Dr. Kivetz criticizes Prof. Turow
 26 for citing a survey claiming that “73% of households expressed major concern about privacy or
 27 security while using the internet.” Dr. Kivetz rebutted that citation by reviewing the very next
 28 page of that survey (in the same document cited by Prof. Turow), which reflected that only a
 “minority of participants perceived control over ‘personal data’ as important.” Doc. 151-14, at 43.
 Prof. Turow’s 73% survey statistic was “the sum of two distinct concerns,” one of which being
 “‘security risks,’ such as identity theft and credit card fraud,” the precise concerns that CLEAR is
 used by customers to combat. *Id.* at 42.

consumer psychology and behavior, and survey methodology.

Third, Dr. Kivetz identifies and analyzes multiple other sources of relevant evidence when assessing harm in this case that are inappropriately ignored by Prof. Turow. These include: (i) other empirical academic research and existing surveys that indicate a lack of commonality in consumers' perceptions and/or preferences about privacy; (ii) the named Plaintiffs' testimonies, which reveal differences in perceptions and preferences involving privacy and "harm"; and (iii) benefits related to CLEAR (including its use cases and safeguards) that can affect consumers' perceptions and preferences regarding the use of information in CLEAR. *Id.*, Part E. That empirical evidence, Dr. Kivetz concludes, is counter to Prof. Turow's speculation that putative class members "experience any common, classwide harm due to CLEAR." *Id.* at 82.

As should now be clear, Plaintiffs' Motion grossly mischaracterizes Dr. Kivetz's *actual* opinions in this case in several ways. Chiefly, Plaintiffs criticize Dr. Kivetz by suggesting that it is his opinion that the only way to measure privacy harms caused by CLEAR is through an original survey. But, as described above, that is neither his opinion's intent nor its conclusion. Dr. Kivetz focuses instead on the (lack of) empirical support that Prof. Turow offers for his *own* opinion about the commonality of harms generated by CLEAR. Plaintiffs repeat these disingenuous mischaracterizations of Dr. Kivetz's testimony throughout their Motion:

Plaintiffs' Characterization	Problems with Plaintiffs' Characterization	Quotes from Dr. Kivetz
"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." Mot. at 1. & Kivetz opines "that the privacy harms here can only	Dr. Kivetz's observation regarding the relevance of consumer perception and preference comes directly from Dr. Turow's own opinion and deposition testimony.	"Dr. Turow testified at his deposition that the underlying 'privacy rights' he opined on refer to 'ethical and social' rights, and that violation of such 'ethical and social' rights does not correspond to any physical injury, financial consequences, loss of property, or other quantification scheme. Dr. Turow's own deposition testimony and logic therefore indicate that any 'privacy

Plaintiffs' Characterization	Problems with Plaintiffs' Characterization	Quotes from Dr. Kivetz
be defined and measured based on subjective consumer expectations." Mot. at 3.		harms' allegedly caused by CLEAR must exist in consumers' minds and accordingly be measured according to consumers' perceptions and preferences." Doc. 151-14, at 11-12 (footnotes omitted). "Because the 'privacy harms' allegedly inflicted by CLEAR (and conceptualized by Dr. Turow as ethical and social harms) are not objectively quantified with respect to Dr. Turow's opinions in this litigation, and given that he does not purport to offer any legal opinion (including with respect to these harms), such 'harms,' to the extent that they exist, must therefore (by Dr. Turow's own logic) exist in the minds of <i>consumers</i> and must accordingly be defined and measured based on <i>consumers' (subjective) perceptions and preferences</i>. Indeed, as Dr. Turow testified, his opinion in this case does purport to 'reflect consumer perceptions,' specifically on the topic of 'the right to control one's information.'" Doc. 151-14, at 23 (footnotes omitted).
Kivetz opines "that substantiating those privacy harms require a specific methodological practice-original survey research." Mot. at 3.	Dr. Kivetz opines that Prof. Turow must have an empirical basis for his opinion about a universal privacy harm. Such empirical evidence could consist of original survey data, existing and relevant secondary data,	"...the question of whether the putative class members in this litigation have suffered common (or even individualized) harm attributable to CLEAR depends crucially on investigating how class

Plaintiffs' Characterization	Problems with Plaintiffs' Characterization	Quotes from Dr. Kivetz
	or existing and empirical academic literature.	members would perceive or respond to the CLEAR product and/or Thomson Reuters's operation thereof. Such consumer perceptions and preferences cannot be investigated, ascertained, or substantiated on the basis of: (i) legal opinions; (ii) personal opinions or ideologies, even those held by an expert; or (iii) research or analyses that do not evaluate consumers' perception and preferences in the relevant context of the product or service at issue. [] Thus, it was necessary for Dr. Turow to provide a scientific, empirical basis for his claim that the putative class members suffered common harm due to CLEAR's alleged violation of consumers' privacy. Such substantiation could consist of (original) survey data collected specifically for the current litigation, analysis of (existing) relevant secondary data, or a careful application to the particulars of CLEAR of existing (empirical) academic literature on consumers' perceptions and preferences about privacy." Doc. 151-14, at 23-24 (footnotes omitted).
Kivetz opines "that Professor Turow is wrong that the right to control is an aspect of Californians' privacy rights, and that the only potential injury here is a psychic	Dr. Kivetz opines that Prof. Turow's academic or legal conclusion about a violated "right" is distinct from how consumers value their privacy, and from whether	"Crucially, how privacy is defined by scholars in the abstract (e.g., in law, history, political philosophy/economy, or academia in general) is distinct from—and <i>irrelevant</i>

Plaintiffs' Characterization	Problems with Plaintiffs' Characterization	Quotes from Dr. Kivetz
injury.” Mot. at 3.	consumers themselves would perceive a loss of “control” to be harmful in the context of CLEAR.	to—how consumers understand, perceive, or value their privacy, particularly when considering the use of their information in connection with a specific product such as CLEAR. These theoretical definitions of privacy do not address whether and to what extent Californians are harmed. Answering that question requires asking whether consumers—when made aware that information about them was collected or disseminated through CLEAR—would, inter alia: be concerned about not being able to control their information on CLEAR; be disappointed or dissatisfied with Thomson Reuters’s operation of CLEAR; feel “blindsided” or surprised; feel “betrayed” by Thomson Reuters; expect compensation from a product like CLEAR; not have consented to having their information be collected or disseminated through the CLEAR platform; believe that the harms from CLEAR outweigh any benefits; or express any other relevant perception or preference regarding Thomson Reuters and/or CLEAR. The Turow Report does not ask, let alone answer, any of these questions.” Doc, 151-14, at 32.
Kivetz opines “that there is no classwide harm based on	Dr. Kivetz says no such thing. Dr. Kivetz opines that Prof.	“...an (empirical) evaluation of consumers’ perceptions

Plaintiffs' Characterization	Problems with Plaintiffs' Characterization	Quotes from Dr. Kivetz
California's right to control one's information and right to be let alone." Mot. at 3.	Turow needs to support his own opinion with empirical evidence, and the empirical evidence upon which Prof. Turow attempts to rely at present does not support Prof. Turow's opinion.	and values is necessary in order to evaluate the existence and magnitude of harm." Doc. 151-14, at 35.
"Kivetz argues that consumers will appreciate CLEAR" Mot. at 7.	Dr. Kivetz opines that Prof. Turow does not address how CLEAR's social benefits could impact consumer perception of harm.	"Instead of presenting consumers with information on the potential harm and potential benefits that could arise from CLEAR (or a CLEAR-like product), the Turow Report discounted the possibility of benefits altogether, asserting that all putative class members must have been harmed due to having their right to control "personal information" allegedly violated. Such an assumption is completely unsubstantiated. In fact, the results of the 2019 Pew Survey suggest that many members of the putative class would disagree with Dr. Turow's assessment of harm outweighing any benefits ... if they were presented a full picture of CLEAR." Doc. 151-14, at 63.
Kivetz concludes "that class members would like CLEAR if only they knew more about it." Mot. at 7.	Dr. Kivetz opines that Prof. Turow lacks empirical support for his claims about universal consumer disapproval of CLEAR.	"Not only does the Turow Report ignore the possibility that some putative class members are likely to believe that they benefited from (or could benefit from), rather than were harmed by, CLEAR, but Dr. Turow also assumes that all class members would be "blindsided by the unknown

Plaintiffs' Characterization	Problems with Plaintiffs' Characterization	Quotes from Dr. Kivetz
		and unwanted collection and use of information about themselves” and would, as he testified, “freak out” upon learning about CLEAR. Such an unsubstantiated assertion is at odds with both the evidence reviewed previously and with many consumers’ likely expectations about the use of their information in the current digital marketplace and era of “Big Data.” Doc. 151-14, at 95-96 (evidentiary support omitted).

Prof. Bambauer: TR also offers Prof. Bambauer’s opinion to rebut that of Prof. Turow. Prof. Bambauer’s fields of expertise include privacy policy, data technologies, and “consumer preferences and attitudes related to the collection, disclosure, or repurposing of personal data.” Doc. 151-2, at 4. Prof. Bambauer directly rebuts Prof. Turow’s claim that “any unconsented collection, disclosure, or use of personal data constitutes a privacy harm.” *Id.* at 6. She explains that Prof. Turow’s perception of CLEAR and personal opinions about privacy harms are absolutist and inconsistent with the ideological tenets behind every privacy law that has been enacted. *Id.* at 8. Indeed, Prof. Turow’s opinion is “out of sync with generally-accepted theoretical, academic, and historical frameworks for understanding privacy violations and harms because the report admits of no exceptions to his claim that privacy requires data subject control.” *Id.* Prof. Bambauer discusses the views of the very privacy scholars that Prof. Turow cites in his report, and explains that each recognizes that complete information control “is not always in the best interest of society or of the data subjects themselves, and privacy does not and should not require consent in every single conceivable case.” *Id.* at 9. Prof. Bambauer offers her opinion that any evaluation of privacy harm “must take into account differing levels of sensitivity and preferences (as well as differences in the impact of potential benefits).” *Id.* at 13. And, Prof. Bambauer explains, these harms will necessarily vary by person, as she supports with evidence

1 about the various privacy tradeoffs that consumers make every day for themselves or for broader
2 social benefits. *Id.* at 13-14.

3 Prof. Bambauer also analyzes CLEAR and TR's practices with respect to CLEAR in great
4 detail. She analyzes each of the finite number of uses for which CLEAR customers are permitted
5 to use CLEAR, and explains how each either directly benefits the data subject or serves a
6 compelling market or public welfare need. *Id.*, Part V. As two of many examples, Prof. Bambauer
7 opines that, contrary to Prof. Turow's concept of universal harm from CLEAR, when agencies
8 use CLEAR to locate individuals to provide them with requested social services, or to return them
9 to their family members, CLEAR benefits those individuals much more than it harms them. *Id.* at
10 17-18. And, with respect to TR's practices, Prof. Bambauer offers her opinion (based on
11 substantial evidence) that CLEAR has adequate systems for safeguarding data and limiting access
12 to only authorized use cases, directly rebutting Prof. Turow's unevidenced assertions to the
13 contrary. Doc. 151-2, Part VI.

14 As with Dr. Kivetz, Plaintiffs also misconstrue Prof. Bambauer's *actual* opinion. For
15 example, they suggest Prof. Bambauer has hidden the ball by failing to acknowledge that
16 California laws "vest individuals with a right to control their information." Mot. at 13. But,
17 putting aside the inappropriateness of expert testimony about California law, Prof. Bambauer's
18 report makes clear that "consent and data subject control have a major influence over whether
19 privacy has been respected." Doc. 151-2, at 6. Her challenge to Prof. Turow is that "avoiding
20 privacy harms has never required absolute control to be vested in the data subject" and "scholars
21 and lawmakers have understood that the broader social contract requires individuals' interest in
22 controlling information about them to be balanced against, and sometimes overcome by, other
23 interests and needs." *Id.*

24 Plaintiffs also suggest that Prof. Bambauer "offers the Court her preferred alternative to
25 California law—a tripartite, context-based framework for assessing privacy harms that she later
26 admits is not used by other privacy scholars." Mot. at 11. In reality, Prof. Bambauer offers that
27 "tripartite, context-based framework" not as an "alternative to California law" but as a way of
28 understanding that Prof. Turow is wrong that privacy law, privacy policy, or privacy scholars

1 would require individuals to command absolute control over their personal information. *See* Doc.
 2 151-2, at 10-11. And, as for Plaintiffs’ suggestion that Prof. Bambauer is a fringe academic, she
 3 explained that her tripartite framework is “my way of helping to organize concepts that aren’t
 4 always given precise terminology.” Doc. 159-6, at 70:12-20. That is precisely the role an expert
 5 witness plays. *Stencel v. Fairchild Corp.*, 174 F. Supp. 2d 1080, 1086 (C.D. Cal. 2001) (“An
 6 expert witness...helps the trier of fact understand...specialized topics.”).²

7 ARGUMENT

8 **I. Dr. Kivetz is a qualified expert on consumer preference and opinion, which** 9 **Plaintiffs’ own expert argues is relevant to assessing the existence and commonality** 10 **of privacy “harm” in this case.**

11 Plaintiffs claim that Dr. Kivetz is not helpful to the Court because privacy harms cannot
 12 be measured by consumer expectations, but Prof. Turow himself rejected such an argument when
 13 he stated his own opinion is based on consumer opinion and perception. Dr. Kivetz agrees that
 14 Prof. Turow’s opinions about a universal “ethical and social” harm are, and must be, based on
 15 consumer opinion and perception, since they are not otherwise measurable (and Prof. Turow does
 16 not purport to measure them through any other means).

17 **A. Plaintiffs do not dispute that Dr. Kivetz is a qualified expert on consumer** 18 **perception and preference.**

19 Dr. Kivetz is one of the world’s foremost experts on consumer psychology and behavior.
 20 Doc. 151-14, at 4. He teaches numerous graduate and doctoral courses at Columbia University
 21 regarding human judgment and decision-making, as well as consumer behavior and perception,
 22 including courses on high-technology and digital marketing. He has conducted, supervised, and
 23 evaluated over 1,000 consumer surveys. *Id.* at 6. Dr. Kivetz draws on that substantial experience
 24 to provide an opinion in this case about the consumer surveys cited by Prof. Turow. *Id.*, Part D.3.
 25 And Dr. Kivetz collects, reviews, and offers his opinion to the court about academic literature
 26 regarding consumer privacy concerns and the numerous variables that impact consumer

27 ² It is likewise disingenuous for Plaintiffs to say that Prof. Bambauer “admits that her work on
 28 privacy is itself not widely accepted.” Mot. at 13. Plaintiffs’ citations for that “admission” say
 nothing of the sort. It is Plaintiffs’ own expert that holds views “out of sync with generally-
 accepted theoretical, academic, and historical frameworks,” as described above. Doc. 151-2, at 8.

1 preferences with respect to privacy. *Id.*, Part E.1. His analysis in this case is expressly based on
 2 “existing scientific research and treatises regarding survey design, consumer behavior, and
 3 decision making.” *Id.* at 8.

4 Plaintiffs’ attacks on Dr. Kivetz’s qualifications all lack merit. Plaintiffs argue that Dr.
 5 Kivetz is unqualified to opine on “California[] privacy rights or the harms caused by their
 6 violation.” Mot. at 3. But Dr. Kivetz opines in this case on consumer preferences and consumer
 7 opinion, not California privacy rights (which would be an inappropriate subject for expert
 8 testimony).

9 Plaintiffs also complain that Dr. Kivetz relies on “personal belief.” Mot. at 9. They have
 10 that backwards. It is Prof. Turow that relies primarily on *ipse dixit* for his opinion on the
 11 uniformity of a supposed harm in this case.³ To the extent Prof. Turow relies on any empirical or
 12 academic evidence, Dr. Kivetz directly rebuts that evidence and explains why it does not support
 13 (and in many cases directly refutes) Prof. Turow’s opinion. Doc. 151-14, at Parts D.3, D.4. Dr.
 14 Kivetz’s analysis of each survey cited by Prof. Turow is summarized in TR’s Motion to Exclude
 15 Prof. Turow’s Testimony, Doc. 157-4, at Part V.B.⁴

16 Finally, Plaintiffs complain that Dr. Kivetz fails to “offer[] any specific suggestions of
 17 how the questions [in the surveys cited by Prof. Turow] could be improved.” Mot. at 10. But
 18 designing and executing a reliable survey to establish commonality is Plaintiffs’ burden, not Dr.
 19 Kivetz’s. *See Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F. 4th 651, 665
 20 (9th Cir. 2022) (“plaintiffs must prove the facts necessary to carry the burden of establishing that
 21 the prerequisites of Rule 23 are satisfied” and, to do so, “frequently offer expert evidence,
 22 including statistical evidence or class-wide averages”).

23 _____
 24 ³ As explained in TR’s motion to exclude Prof. Turow’s testimony, Doc. 157-4, Turow formed
 25 his opinions based on his own “sense . . . that if you told people what – what is in my report, they
 26 would freak out.” Doc. 157-10 at 152:20-153:4. That “sense” was derived from “read[ing]
 material that was provided to [him] about CLEAR including promotional materials by CLEAR . .
 . [and] “depositions that described some of CLEAR’s activities.” *Id.* at 27:8-14.

27 ⁴ Dr. Kivetz’s report cites to over 200 independent sources, including 61 case material documents
 28 (i.e., pleadings, discovery responses, deposition transcripts, and produced documents); 59 third-
 party sources (i.e., peer-reviewed academic articles, textbooks, industry reports, etc.); and 104
 examples of CLEAR use cases (as summarized in Ex. D to his report).

B. Consumer perception and preference are directly relevant to Prof. Turow's opinion.

Plaintiffs' chief complaint with Dr. Kivetz is that he is not a privacy expert, but a consumer perception and preferences expert, a field of study which they contend is irrelevant and "wholly unresponsive to the harm alleged and the realities of the case." Mot. at 6. But consumer perception and preference is—purportedly—the very evidence upon which Prof. Turow relies for his own opinion of consumer harm. *See* Doc. 157-10, 118:19-121:14. Consumer perceptions and preferences are therefore directly relevant to whether Prof. Turow can establish a scientifically sound basis for his opinion of universal consumer harm.

Prof. Turow testified at deposition that his opinion was based on consumer perceptions:

Q. All right. Are you rendering an opinion in this case as to the views of anyone other than scholars?

A. Yes.

Q. Who?

A. The public.

Q. Ah, okay. Are you offering opinion in this case regarding consumer perceptions?

A. Yes. [objection lodged] People's desire not to be -- the desire to have their -- to control their information, yes.

Q. And that's as reflected in the empirical survey that we've discussed previously that's Exhibit 2?

A. Plus other work that I've done and others have done.

Q. So is your opinion in this case purporting to reflect consumer perceptions[...?...]

A. Yes.

Q. Okay. So the answer is yes?

A. Yes.

Q. All right. And on what topics?

A. On the right to control one's information.

Q. Where does your report discuss consumer perceptions of the right to control one's information?

A. I discuss the -- tell you in just a second. Look at Page 6 and look at Footnote 6 and you'll see that.

Q. I see. Terrific. So at Footnote 6 and the materials cited in Footnote 6, this is where you -- this is one place your report addresses consumer perceptions?

A. Yes.

Q. What -- is there any other place in your report where you address consumer perceptions?

A. (Reviewing document.) I think that is the dominant one. The -- the pamphlet that I cite when the discussions were taking place around the California amendment to the Constitution one could argue are enactments of -- of some consumer's interests, but the -- but that footnote and the various studies I cite are -- are the clear statement of my sense of that, yes.

Q. I want to make sure we captured your testimony clearly. Did you testify that the

1 footnote and the various studies you cite are a clear statement of your sense of
2 consumer perceptions?

3 A. Yeah, not my sense, but a clear statement of consumer sentiments regarding the
4 desire to control their information.

5 Doc. 157-10, 118:19-121:14. Prof. Turow's report was similarly explicit that his opinion was
6 based on consumer perceptions. His report states: "The long history of protecting privacy through
7 the right to control one's information is reflected in the view of privacy enunciated by Americans
8 today." Doc. 124-7, at 6. He then cites to the 2015 Pew Research survey and the NTIA survey.
9 Dr. Kivetz analyzes both in great detail. *See* Doc. 151-14, at D.3.5 (entitled "The results from the
10 2015 Pew Research Center Survey Contradict Dr. Turow's Assumption 1 and Fail to Support
11 Assumption 2"); *id.* at Part D.3.2 (explaining that the survey results reflect that "only a *minority*
12 of participants perceived control over 'personal data' as important") (emphasis in original)); *see*
13 *also* Doc. 157-04, Part V.B (summarizing Dr. Kivetz's conclusions about these surveys).

14 Prof. Turow attempts to rely on consumer perception and opinion, ostensibly, because
15 Plaintiffs themselves recognize that an "expert" cannot simply flash their credentials and
16 recognize a legally cognizable privacy "harm" for tens of millions of putative class members.
17 *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2209 (2021) ("the 'retention of information
18 lawfully obtained, without further disclosure, traditionally has not provided the basis for a lawsuit
19 in American courts,' meaning that the mere existence of inaccurate information in a database is
20 insufficient to confer Article III standing.") (quoting *Braitberg v. Charter Comm's, Inc.*, 836 F.
21 3d 925, 930 (8th Cir. 2016)). In Plaintiffs' own words: an expert cannot "create admissible
22 evidence simply by placing their credentials behind the statements of a party, and 'parroting'
23 those statements as their own." Mot. at 8 (citation omitted). Instead, that expert must support their
24 opinion with "actual facts and data." *Id.* (cleaned up).

25 But if Plaintiffs now claim Prof. Turow did *not* support his opinion with facts and data as
26 a means to exclude Dr. Kivetz's testimony,⁵ it is *Prof. Turow's* report, not Dr. Kivetz's, that
27 ought to be excluded. After all, if Prof. Turow merely offers an opinion about privacy law, then
28 his opinion should be excluded as a legal conclusion. Doc. 157-4, Part V.C. If he is merely

⁵ *See* Mot. at 6 (arguing that consumer preference is "wholly unresponsive to the harm alleged").

1 relying on his qualifications as a privacy scholar to provide an *ipse dixit* opinion on CLEAR’s
2 privacy harms, then his opinion is precisely what *Daubert* is intended to exclude. *Id.*, Part V.A.

3 More, if Plaintiffs are now contradicting their own expert and claiming that consumer
4 preference is irrelevant, then they are merely disagreeing with Dr. Kivetz’s substantive opinion
5 about the methodological support necessary to support Prof. Turow’s arguments about harm.⁶
6 And disagreeing with the substance or chosen methodology of a report is not the proper subject of
7 a *Daubert* determination. *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1231 (9th Cir. 1998)
8 (arguments about faults in an expert’s “use of a particular methodology...go to the weight, not the
9 admissibility, of his testimony.”) (cleaned up).

10 C. Plaintiffs’ authority supports admitting Dr. Kivetz’s opinion.

11 None of the cases Plaintiffs cite support excluding Dr. Kivetz’s opinion. For example,
12 Plaintiffs cite *Red v. Kraft Foods, Inc.*, No. CV 10-1028-GW(AGRx), 2011 WL 4599833 (C.D.
13 Cal. Sept. 29, 2011) as authority for “finding Kivetz’s individuated consumer expectation theory

14 ⁶ Part of Dr. Kivetz’s substantive testimony is about *why* consumer perceptions and preferences
15 are relevant to assessing whether putative class members suffer a privacy harm from CLEAR.
16 Doc. 151-14, at Part D.1. Dr. Kivetz directly quotes from relevant literature on this point—
17 literature that characterizes Prof. Turow’s opinions as “emotionally charged” and calls for
empirical research to move beyond those opinions:

18 A large body of normative studies of privacy has accumulated. Many of these
19 offerings are politically engaging or emotionally charged with strong beliefs about
20 the ethics and norms that underlie democratic societies. [...] **[R]igorous
empirically descriptive studies that either trace processes with, or test implied
assertions from, these value-laden arguments could add great value.**

21 ...
22 [T]o the extent that the normative conclusions are viewed as enlightening and
23 motivating events for empirical studies that trace processes associated with the
24 implementation of these normative conclusions or that test the impact on different
25 outcomes, their value rises enormously. **For example, an emotionally charged
assertion such as “there is war on privacy” (e.g., Sobel 1976) or “the system is
broken” (Turow 2003), or a lengthy normative debate regarding whether
privacy should be viewed as a right or as a commodity will yield little additional
insight.** The normative debates themselves are unlikely to inform us further in terms
26 of privacy protection, **but an examination of the positivist nomological models
that link the normative conclusions to different outcomes, or the processes
through which that linkage occurs, could prove quite instructive.**

28 *Id.* at 82 (quoting Smith, H. Jeff, Tamara Dinev, and Heng Xu (2011), “Information Privacy
Research: An Interdisciplinary Review,” *MIS Quarterly*, 35(4), 989 – 1015)) (emphases added).

1 did not defeat class certification.” Mot. at 6. That is incorrect. *Red* was an order *denying* class
 2 certification and expressly relying on Dr. Kivetz’s opinion to do so. *Red*, 2011 WL 4599833, *12-
 3 13. Specifically, *Red* involved a UCL allegation that the labeling of certain Kraft food products
 4 was deceptive regarding their healthfulness. *Id.* at *2. Dr. Kivetz opined that “Kraft’s alleged
 5 deception cannot be generalized across the proposed class.” *Id.* *12. The court found that the
 6 “Kivetz Declaration casts further doubt on Plaintiffs’ ability to prove their claims by common
 7 evidence insofar as he testifies ... [that] there is no scientific evidence to support the
 8 generalization of the alleged deception to the entire proposed class; and [] the Plaintiffs’
 9 testimonies do not support generalizing the alleged deception across the proposed Class
 10 members.” *Id.* at *13 (typographical error corrected). That court concluded: “Because there are
 11 significant questions as to the over-breadth of the proposed class, whether it is ascertainable,
 12 whether common issue of fact predominate, whether Plaintiffs are typical of the purported class,
 13 and whether California law applies to the claims of nonresidents, the Court would deny without
 14 prejudice Plaintiffs’ motion for class certification.” *Id.* at *16.

15 Plaintiffs also cite *Farar v. Bayer AG*, No. 14-cv-04601-WHO, 2017 WL 5952876, at *12
 16 (N.D. Cal. Nov. 15, 2017). There, the Court found Dr. Kivetz’s survey (testing the effect of
 17 certain challenged packaging claims on consumers’ purchase likelihood for the disputed vitamin
 18 products) to be inconclusive on the issue of materiality in light of the weight of other evidence.
 19 *Id.* Dr. Kivetz’s opinion was *not* excluded or criticized in that case.

20 Indeed, Dr. Kivetz’s opinions, testimony, or surveys have never been excluded or
 21 criticized by a court. *See, e.g., Dyson, Inc. v. Bissell Homecare, Inc.*, 951 F. Supp. 2d 1009, 1016-
 22 22 (N.D. Ill. 2013) (denying motion to exclude expert report of Dr. Kivetz); *People v. Kohl’s*
 23 *Dep’t Stores, Inc.*, Nos. BC643037, BC643040, 2021 WL 3507072 (Cal. Super. Ct. July 13,
 24 2021) (rejecting California’s expert who “simply opined based on decades of scientific research”
 25 and praising the “highly competent and entirely credible” Dr. Kivetz for his explanation of why
 26 California’s expert offered no reliable empirical evidence for his conclusions).

27 Dr. Kivetz’s opinion is admissible because his specialized knowledge of consumer
 28 perceptions and preferences will help the Court evaluate Prof. Turow’s testimony.

1 **II. Professor Bambauer’s opinion should not be excluded for failing to offer**
 2 **inadmissible and irrelevant legal conclusions.**

3 Plaintiffs devote four pages to arguing that Prof. Bambauer’s testimony is inadmissible
 4 because she “fail[s] to even reference California law,” “simply ignore[s] California law in her
 5 opinion,” and “does not focus on - or even reference - California privacy law.” Mot. at 11-14.
 6 Those arguments fail for at least two reasons.

7 **First**, it is axiomatic that experts do not opine on the law. That is the court’s role. *See*,
 8 *e.g.*, *United States v. Tamman*, 782 F.3d 543, 552-53 (9th Cir. 2015) (“[A]n expert cannot testify
 9 to a matter of law amounting to a legal conclusion.”); *Traumann v. Southland Corp.*, 858 F. Supp.
 10 979, 985 (N.D. Cal. 1994) (“Mr. Murphy’s opinions regarding California franchise laws and their
 11 application to this case are not a proper subject for expert testimony because they do not help
 12 determine the facts in issue. Expert testimony must embrace factual issues and may not include
 13 legal opinions or conclusions.”) (citations omitted). That Plaintiffs believe that experts ought to
 14 opine on the law is evident from Prof. Turow’s own report, and is an independent reason his own
 15 opinion ought to be excluded. *See* Doc. 157-4, at 12-13; *see also* *Nationwide Transport Finance*
 16 *v. Cass Info. Sys’s, Inc.*, 523 F. 3d 1051, 1059 (9th Cir. 2008) (an opinion about whether certain
 17 conduct violates existing law is inadmissible either because it is opinion on a legal conclusion or
 18 because it is lay opinion not “helpful to a clear understanding of the testimony or a fact in issue.”)
 19 (cleaned up).

20 **Second**, Plaintiffs’ argument is *substantively* wrong. There is no reason for Prof.
 21 Bambauer to offer an opinion on CLEAR with respect to California privacy laws, because it
 22 appears undisputed that TR is in compliance with them. As described in detail by the *Amici*
 23 *Curiae* Brief In Support of Defendant, the California Legislature is a vanguard in consumer
 24 privacy, having passed numerous laws protecting Californians’ privacy rights. Doc. 156. CLEAR
 25 comports with these. *Id.* Plaintiffs do not allege that TR violated any California privacy statute or
 26 law and Plaintiffs do not bring claims under California’s constitution or any other California
 27 privacy law. *See generally* Doc. 145. Instead, Plaintiffs allege that TR’s provision of CLEAR is
 28 unfair and unjust because it collects and makes available to third parties data about Californians

1 without consent—something that existing California laws do not prohibit. Doc. 150-4, at 22-23;
 2 Doc. 156. And neither Plaintiffs nor Prof. Turow has identified a *single provision* of any
 3 California privacy law that TR violates through its operation of CLEAR. In other words, because
 4 Plaintiffs’ “absolutist approach to privacy” has been “rejected” by “every modern data privacy
 5 statute,” there is no substantive reason that Prof. Bambauer would need to discuss existing
 6 California law. Doc. 151-2, at 8.⁷

7 CONCLUSION

8 For the foregoing reasons, Plaintiffs’ Motion should be denied.

9
 10
 11 Dated: March 6, 2023

PERKINS COIE LLP

12
 13 By: /s/ Hayden M. Schottlaender

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Admitted *pro hac vice*

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 16 Attorneys for Defendant Thomson Reuters
 Corporation

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 23 ⁷ Plaintiffs’ repeated references to Prof. Bambauer’s Congressional testimony about the
 24 California Consumer Privacy Act are unavailing. Mot. at 12. Prof. Bambauer’s testimony there
 25 was entirely consistent with her opinions offered in this case. *See* Jane Bambauer, The Perils of
 Privacy as Property, Testimony before the Senate Judiciary Committee, 116th Cong. (Mar. 12,
 26 2019), at 5-6 available at
<https://www.judiciary.senate.gov/imo/media/doc/Bambauer%20Testimony.pdf> (“on balance,
 27 consumers are not greatly interested in managing the particulars of their personal data...An
 optimal privacy law will protect consumers from data-related harm while also protecting them
 28 from the less obvious costs of data siloing and underutilization...without unduly focusing on
 consumer control.”).