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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

**PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION TO EXCLUDE
EXPERT TESTIMONY OF JOSEPH TUROW**

Date: April 20, 2023

Time: 1:30 p.m.

Place: Courtroom 5, 17th Floor

Judge: Hon. Edward M. Chen

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I. INTRODUCTION

Plaintiffs’ expert Professor Joseph Turow opines in his expert report that “CLEAR deprives all Californians of the right to control their personal data, an economically valuable commodity and a well-defined feature of individual privacy.” ECF No. 124-7 at 17 (Turow Rep.). Although each person may have different amounts or types of information in their CLEAR report, Turow notes that “every Californian whose information is accessible through CLEAR has suffered the same fundamental privacy harm of a lack of control . . . [and] no Californian has control over the information in or use of dossiers about them.” *Id.* at 13. Turow’s conclusion supports Plaintiffs’ argument that TR harms all class members in the same way: by depriving them of their right to control who has access to their information. Because the harm to consumers that Turow identifies is common to the class, Turow’s opinion is relevant to the Court’s class certification analysis.

TR asks the Court to exclude Turow’s testimony entirely. But TR does not challenge Turow’s qualifications or experience, nor does it argue that Turow’s methodology and techniques are irregular for his field. TR does not claim that Turow’s opinions are irrelevant to resolving class certification, or even to the merits of this litigation. Instead, TR challenges Turow because it does not like his conclusion that violating Californians’ right to control the use of their personal information can be considered a “harm.” Its objection to Turow’s testimony has nothing to do with the gatekeeping function of *Daubert*. Because TR disagrees with the substance of Turow’s opinions, rather than the reliability of his testimony or his qualifications to opine on the matters in this case, its challenge goes not to admissibility but to weight. The Court should therefore deny the motion.

II. 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*, 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.* at *1 (collecting cases); *see also Olean Wholesale Grocery Coop. v. Bumble Bee Foods LLC*, 31 F.4th 651, 665 (9th Cir. 2022) (en banc) (recognizing that at class certification, parties “may use any admissible evidence,” including admissible expert opinions).

III. ARGUMENT

Because Turow offers reliable, relevant opinions that he arrived at in conformity with accepted practices in his field of expertise, the Court should deny TR’s motion to exclude his report. Each of TR’s arguments—that Turow’s opinions are mere *ipse dixit*, that his conclusions are unsupported, and that he offers impermissible legal opinions—fails to withstand even moderate scrutiny. First, TR ignores the bulk of Turow’s evidence—including seminal texts by privacy scholars, empirical consumer surveys, and California legislative history, among others—and argues his opinion is mere *ipse dixit*. Second, TR challenges whether Turow’s survey evidence supports his conclusions. Finally, TR recasts Turow’s analysis as offering a legal conclusion—despite arguing the exact opposite in its opposition to Plaintiffs’ motion for class certification.

None of these arguments are reasons to exclude Turow’s opinions. At best, they go to the weight the Court should give Turow’s testimony, not whether his opinions are admissible. But TR’s motion also routinely jumps ahead to the merits of the case, asking the Court to resolve questions that are premature at this juncture. As explained more fully below, the Court should deny TR’s motion.

A. Turow grounds his opinion in his professional experience and expressly relies on relevant, reliable material.

TR does not challenge Turow’s experience or qualifications as a privacy and marketing scholar. It would be difficult to do so. Turow is a tenured professor at the University of Pennsylvania who has researched, written about, and taught courses on privacy and digital audience targeting for decades. *See* Turow Rep. at 2-3. Instead, TR suggests that Turow’s explanation that the right to control one’s information is a long-standing feature of American—and, particularly, Californian—privacy rights is “*ipse dixit*.” ECF No. 157-4 (Mot.) at 4. But Turow shows his work. When rendering his opinion about how CLEAR harms Californians by impinging on their right to control their information, Turow cites to seminal interdisciplinary

1 privacy texts, contemporary surveys about perceptions of privacy, and California legislative history. *See* Turow
 2 Rep. at 6-9, 17-19. Turow’s report gives the Court historical context for important Californian policies that
 3 have been discussed by scholars at length, which is relevant to whether Californians share an interest in
 4 controlling information about them.

5 This type of analysis falls neatly within the scope of helpful and reliable expert testimony. Courts
 6 accept expert opinions that provide “background and context information about what privacy is.” *Brown*,
 7 2022 WL 17961497, at *10 (denying *Daubert* challenge to a privacy expert); *see also Kumho Tire Co., Ltd. v.*
 8 *Carmichael*, 526 U.S. 137, 148 (1999) (“Experts of all kinds tie observations to conclusions through the use of
 9 what Judge Learned Hand called ‘general truths derived from . . . specialized experience.’” (citation omitted)).
 10 TR makes no specific objection to Turow’s methodology, nor does it explain why Turow’s carefully reasoned
 11 and well-sourced opinions fall below professional muster. If TR wants to counter Turow’s conclusions about
 12 what types of conduct California intended to protect its citizens against, that challenges the weight the Court
 13 should give his testimony and is not the proper subject of a *Daubert* challenge.

14 **B. Turow is not offering a legal opinion on individual consumer preferences.**

15 TR next challenges Turow for failing to explain “how consumer preference affects his legal opinion
 16 at all.” Mot. at 10. But, as explained more fully below, Turow does not offer a legal opinion, *see infra* III.C,
 17 nor does he ever suggest that privacy harms must be measured by individual consumers’ perceptions. Turow
 18 does not share TR’s misguided theory of this case that consumer harm can or should be measured by
 19 considering every individual class member’s “psychic injury,” thus necessitating some kind of CLEAR-
 20 specific consumer survey. *Compare* ECF No. 151-14 at ¶¶ 49-51 (Defendant’s expert Ran Kivetz conjecturing
 21 that harms must “exist in the minds of *consumers* and must accordingly be defined and measured based on
 22 *consumers’ (subjective) perceptions and preferences*” (emphasis in original)), *with* Turow Rep. at 14-16 (Turow
 23 explaining that TR harms consumers by aggregating their information without their consent or, often, even
 24 knowledge that it is happening). As TR notes in its own motion, when asked about whether “every
 25 Californian would object to their information being in CLEAR,” Turow responded that that is not what he
 26 was asked to opine about, is not what he has written about, and would not affect his conclusion. *See* Ex. 1 to
 27 Mura Decl. (Turow Dep.) at 151:13-152:6.

1 Instead, Turow offers opinion on public policy and the history of societal recognition of privacy
 2 rights. Turow highlights how California legislators recognized that “the ability to control circulation of
 3 personal information” is “[f]undamental to our privacy” and “essential to social relationships and personal
 4 freedom,” and expressed their intent to prevent “business interests from collecting and stockpiling
 5 unnecessary information about us.” Turow Rep. at 8, 15. Turow connects that legislative history to modern
 6 privacy scholars’ views, showing increasing concern about the specific threats posed by the aggregation of
 7 personal information without individuals’ consent. *Id.* at 18. Then, Turow applies his historical background
 8 and brings in a variety of scholars’ views to analyze the CLEAR product and TR’s business practices with
 9 respect to Californians. *Id.* at 18-20.

10 TR ignores that Turow’s opinions connect CLEAR with specific historical background and
 11 interdisciplinary policy discussions. Rather than engaging with the substance of Turow’s evidence, TR
 12 recycles the opinions of its expert, Ran Kivetz,¹ and focuses on six consumer surveys Turow cites in his
 13 report to claim there is an “analytical chasm” between Turow’s evidence and his opinions. *See* Mot. at 5-7.
 14 But Turow does not rely on these surveys for any of his conclusions about CLEAR. The surveys to which
 15 TR objects are cited as background material in just two footnotes of Turow’s report, as support for general
 16 propositions that the right to control information is widely understood as a privacy right.² *See* Turow Rep. at
 17 6 n.6 (citing the 2015 Pew Center survey, Turow 2015 working paper, and National Telecommunications
 18 and Information Administration survey); *id.* at 7 n.9 (citing the ValuePenguin survey, 2019 Pew Center survey,
 19 and the boyd study). If TR finds it worthwhile to question whether the results of the NTIA’s internet use
 20 survey support the sentence, “The majority of Americans believe that privacy and confidentiality are very
 21 important aspects of their lives,” that argument is properly made through cross-examination. *Id.* at 6; *see Utne*
 22 *v. Home Depot U.S.A., Inc.*, 2022 WL 16857061, at *3 (N.D. Cal. Nov. 10, 2022) (“Courts may not exclude

23 ¹ As explained in Plaintiffs’ Omnibus Motion to Exclude Defendant’s Expert Opinions on Class
 24 Certification, Kivetz’s criticisms of Turow’s sources leave much to be desired. ECF No. 158-3 at 10-11,
 25 n.6.

26 ² Specifically, the sentences Turow offers the surveys to support are: “The long history of protecting
 27 privacy through the right to control one’s information is reflected in the view of privacy enunciated by
 28 Americans today” (Turow Rep. at 6, citing Turow’s 2015 working paper, and the NTIA survey), and “[The
 right to control access to one’s information] remains ‘[p]erhaps the most commonly accepted definition of
 information privacy’” (*id.* at 7, citing ValuePenguin, 2019 Pew Survey, and the boyd study).

testimony simply because it is impeachable.” (citing *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969-70 (9th Cir. 2013))).

C. Turow never offers an impermissible legal opinion on any issue.

Lastly, TR argues that Turow’s opinions should be excluded as an impermissible legal opinion. Mot. at 8. But TR itself argues that Turow does not offer a legal opinion. In its opposition to Plaintiffs’ motion for class certification, TR notes that Turow characterizes the right to control one’s information “as an ‘ethical and social right,’ not a legal right.” ECF No. 150-4 at 6. At no time does Turow give an opinion on an ultimate issue of law. Indeed, as TR admits, he “offers no opinion on balancing the harm and utility of TR’s conduct.” *Id.* at 7.

Although TR was adamant in its opposition to class certification that Turow’s opinions do not give any legal opinion, it now argues the opposite in its motion to exclude Turow’s testimony. Mot. at 7-8. TR was correct the first time. In *Brown*, for example, the court, at the class certification stage, admitted an expert to testify about the historical and policy background of data privacy, recognizing that such background would be helpful. *See* 2022 WL 17961497, at *10. Here too, Turow’s discussion of social norms and the historical development of privacy in California are beyond common knowledge and thus helpful at this stage. And the fact remains that nowhere does Turow assert that TR has violated any law—unlike TR’s own privacy expert, Jane Bambauer, who opines that CLEAR’s benefits to society outweigh its harms to individuals. *See Torliatt v. Ocwen Loan Servicing, LLC*, 570 F. Supp. 3d 781, 791 (N.D. Cal. 2021) (distinguishing between expert testimony that might “support a finding that the defendants violated the law,” and testimony “that they in fact did so”); *see, e.g.*, ECF No. 151-1 at 23 (“The effects on individual data subjects will be mixed . . . [b]ut . . . there will be more ‘winners’ than ‘losers,’ and society will be well-served.”); *see also id.* at 10-11 (Bambauer asserting that privacy harms must be weighed against the practice’s utility). TR’s about-face is nothing more than a half-hearted attempt to keep testimony it does not like out of this case—but that is not a reason to exclude Turow’s report. In sum, TR has failed to give any reason under *Daubert* or Rule 702 why Turow’s testimony is inadmissible.

IV. CONCLUSION

Turow is qualified to opine on the types of harm that consumers face from data aggregation platforms

1 like CLEAR and offers relevant and reliable testimony about those harms in his report. The Court should
2 therefore deny TR's motion to exclude his testimony.

3
4 DATED: March 6, 2023

Respectfully submitted,

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