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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 – PUBLIC VERSION

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR 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

In opposing class certification, Thomson Reuters (TR) never contests the classwide evidence that Californians are not afforded control over the personal information that CLEAR makes commercially available about them. Nor does TR contest that it uses uniform data collection, aggregation, and dissemination practices to profit off that personal information. All TR does is try to reframe Plaintiffs' theory of liability and misstate California's UCL and unjust enrichment causes of action as inherently unsuited to class treatment for any type of privacy claim. But Plaintiffs' claims and evidence are precisely the sort that fit the mold for class treatment under both the UCL and unjust enrichment theories.

TR's arguments do not counsel against class certification but instead preview its merits defense that CLEAR is a benign compendium of public information. *E.g.*, ECF No. 150-4 (Opp.) at 2. Discovery tells a different story. ECF No. 124-3 (Mot.) at 2-7. Indeed, just two weeks ago, a CLEAR product manager testified that, for at least a limited time, CLEAR had [redacted]—which includes potentially "[redacted]" and "[redacted]" information that [redacted]. Ex. 1 at 253:11-23; 254:22-255:19; 257:5-258:23; 261:20-269:6. TR's merits arguments—while meritless—are for another day.

ARGUMENT[1]

I. Plaintiffs have Article III standing.

TR argues (at 7-8) that Plaintiffs lack standing because they have failed to show (1) a concrete injury (2) traceable to TR's unlawful conduct. It is wrong on both counts.

First, courts in this district have repeatedly found that "collect[ing]" and "sell[ing]" individuals' "personal data to third parties" without consent causes Article III injury. *Cottle v. Plaid Inc.*, 536 F. Supp. 3d 461, 481 (N.D. Cal. 2021); *see, e.g.*, *In re Google Referrer Header Priv. Litig.*, 465 F. Supp. 3d 999, 1012 (N.D. Cal. 2020); *Heeger v. Facebook, Inc.*, 509 F. Supp. 3d 1182, 1192 (N.D. Cal. 2020). Indeed, binding circuit precedent compels that conclusion. In *In re Facebook, Inc. Internet Tracking Litigation*, the Ninth Circuit held that the plaintiffs suffered concrete privacy harms as a result of Facebook's "tracking and collection practices"—which allowed the company to create "a cradle-to-grave profile without users' consent" that deprived

[1] The amici either repeat TR's arguments, which fail for the same reasons, or improperly seek to raise classwide merits defenses such as preemption that TR does not. ECF No. 156 at 8-15; *California ex rel. Becerra v. United States Dep't of the Interior*, 381 F. Supp. 3d 1153, 1164 (N.D. Cal. 2019).

individuals of "a meaningful opportunity to control" their personal information. 956 F.3d 589, 598–99 (9th Cir. 2020). And the court held that the plaintiffs separately demonstrated an economic injury "sufficient to confer Article III standing" based on Facebook's "unjust enrichment"—namely, its nonconsensual sale of users' personal data for profit. *See id.* at 599–601.

Those are precisely the injuries here. TR collects Californians' data without their consent and offers it for sale through subscriptions to access searchable profiles on the CLEAR platform. And then it unjustly profits from the sale—again, without ever obtaining consent from the individuals whose data is sold. Yet TR doesn't even mention the Ninth Circuit's decision. Instead, it simply asserts (at 8) that Plaintiffs' privacy harms are not concrete because they do "not bear a 'close relationship' to harms 'traditionally recognized as providing a basis for a lawsuit.'" But *Facebook* concluded exactly the opposite: The "historically recognized right to privacy," the Ninth Circuit explained, "encompass[es] the individuals' control of information concerning his or her person." *Facebook*, 956 F.3d at 598–99 (quotations omitted); *see U.S. Dep't of Just. v. Reps. Comm. for Freedom of Press*, 489 U.S. 749, 763 (1989) ("both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person").[2]

TR's next argument—that Plaintiffs have not established Article III injury based on the company's failure to pay them for using and selling their data—is likewise foreclosed by *Facebook*. There, the Ninth Circuit rejected Facebook's similar argument "that unjust enrichment is not sufficient to confer standing, and that Plaintiffs must instead demonstrate that they either planned to sell their data, or that their data was made less valuable through Facebook's use." 956 F.3d at 599. That the plaintiffs' personal data "carr[ied] financial value" and "Facebook profited from this valuable data"—both of which are true here—was enough to entitle the plaintiffs to Facebook's "profits unjustly earned." *See id.* at 600–01; *cf. CTC Real Est. Servs. v. Lepe*, 140 Cal. App. 4th 856, 860 (2006) ("A person's identifying information is a valuable asset, the misuse of which can have serious consequences to that person.").

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[2] *TransUnion v. Ramirez*, 141 S. Ct. 2190 (2021), does not change this analysis. "*TransUnion* involved a fundamentally different type of alleged injury than the one here"—"a claim akin to defamation, not invasion of privacy." *Mastel v. Miniclip SA*, 549 F. Supp. 3d 1129, 1138–39 (E.D. Cal. 2021). And *TransUnion* specifically noted that "disclosure of private information" and "intrusion upon seclusion" are "traditionally recognized" privacy injuries sufficient to support Article III standing. 141 S. Ct. at 2204; *see also Al-Ahmed v. Twitter, Inc.*, ---F. Supp. 3d---, 2023 WL 27356, at *6 (N.D. Cal. Jan. 3, 2023) (holding post-*Ramirez* that Twitter's unauthorized disclosure of both publicly available and private information caused concrete injury).

Second, Plaintiffs' injuries are traceable to TR's collection and sale of their information through CLEAR. The company's only traceability argument (at 8) is that Plaintiffs never had "control" over their personal information in the first place because it was already publicly available. That's wrong. Plaintiffs have shown that CLEAR provides an array of information about them and other Californians that is not publicly available or easily accessible, including live cell phone records, location data from billions of license plate detections, real-time booking information, motor vehicle service records, unclaimed assets, historical utility records, and more. Mot. at 3. More importantly, TR takes all of that information—some potentially public, some proprietary—and melds it together into something wholly new and uniquely harmful: A comprehensive, cradle-to-grave profile that exists nowhere else. *See, e.g.*, ECF No. 54 at 16; Mot. at 4-6; ECF No. 124-7 (Turow Rep.) at 10-11, 13; ECF No. 151-9 (CLEAR report for Cat Brooks, which includes her non-public social security number); ECF No. 151-10 (same for Rasheed Shabazz). The harms that Plaintiffs suffer as a result of TR's nonconsensual collection and sale of this information are therefore traceable to TR alone. *See Facebook*, 956 F.3d at 599–600.

In any event, the fact that a different data broker or other third party "*might* have caused [Plaintiffs'] personal information to be exposed does nothing to negate [their] standing to sue." *See Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 696 (7th Cir. 2015). "Merely identifying potential alternative causes does not defeat standing." *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 969 (7th Cir. 2016). TR's argument, in other words, "is less about standing and more about the merits of causation and damages." *In re Zappos.com, Inc.*, 888 F.3d 1020, 1029 (9th Cir. 2018). And "in determining whether plaintiffs have standing," courts "must assume that on the merits they would be successful in their claims." *Muir v. Navy Federal Credit Union*, 529 F.3d 1100, 1106 (D.C. Cir. 2008) (cleaned up); *see In re Facebook, Inc., Consumer Priv. User Profile Litig.*, 402 F. Supp. 3d 767, 788 (N.D. Cal. 2019).

II. Rule 23(a) is met.

A. Plaintiffs are adequate representatives with typical claims.

TR claims (at 9-10) Plaintiffs face "unique" defenses, making them inadequate to represent and atypical of the class. But the defenses are not only meritless but classwide, posing no obstacle to certification.

First, TR claims (at 9) that Plaintiffs have not "lost money or property" and therefore lack UCL standing. But as this and other courts have recognized, personal information *is* property—and having that "intellectual property" taken without compensation is economic injury. *Callahan v. PeopleConnect, Inc.*, 2021 WL 5050079, at *19 (N.D. Cal. Nov. 1, 2021); *see also Lepe*, 140 Cal. App. 4th at 860 ("A person's identifying information is a valuable asset."). More importantly, the theory of UCL standing is the same for all class members. So UCL standing isn't a typicality or adequacy problem; rather, it's a common question that *supports* certification. *See Elkies v. Johnson & Johnson Servs., Inc.*, 2018 WL 11223465, at *6 (C.D. Cal. Oct. 18, 2018).

*Second***,** TR argues (at 9-10) that Plaintiffs are public figures and thus face "unique First Amendment defenses unless the speech at issue is of purely private concern." But this Court has already concluded that TR's "private and unauthorized sale of Plaintiffs' personal information is 'an inherently private exchange between private parties,' not a matter of public concern." ECF No. 54 at 27 (quoting *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1124-25 (9th Cir. 2020). So it doesn't matter whether Plaintiffs are public or private figures. *See Beck v. Maximus, Inc.*, 457 F.3d 291, 300 (3d Cir. 2006) (meritless defense cannot defeat adequacy or typicality). Whatever interest the public might have in their or any other class member's personal information is immaterial because CLEAR is not part of the public discourse; it involves the private sale of Californians' information for TR's private financial gain. ECF No. 54 at 17 ("Thompson Reuters is not a journalist performing a 'public benefit' by making Plaintiffs' personal information available to the public. Rather, the company's dissemination of this information only benefits the private parties who purchase the CLEAR dossiers."); *see* ECF No. 124-10 at 15 (individuals cannot use CLEAR); Turow Rep. at 22 (journalists cannot use CLEAR).[3]

Finally, TR asserts (at 10) that Plaintiffs are atypical in that some "information" about them may be available "elsewhere." But the whole point of CLEAR, according to TR itself, is to make available a 360-degree profile of Californians that is unavailable elsewhere. *See* Mot. at 1, 2-7; Turow Rep. at 11; *see also* ECF No. 54 at 16 (reasoning that even if *all* information in CLEAR were publicly available, connecting and compiling that information constitutes "a significant invasion of privacy"). And, in any event, the company does not even attempt to argue that Plaintiffs are any different from the rest of the class in this regard, so any defense on this basis would be classwide anyway.

[3] TR's example of how CLEAR could theoretically advance the "public interest"—it mentions U.S. Representative George Santos, who reportedly lied about his biography—is ironic given that TR disclaims the veracity of any biographical information in CLEAR, including, presumably, that of Representative Santos. *See* Opp. at 10 n.26; Mot. at 9.

B. Commonality

Plaintiffs have identified, for each of their claims, central common questions whose resolution will drive the litigation. Mot. at 11-12. For example, TR never contests that its failure to obtain consent before making class members' information available through CLEAR applies equally to all class members. *See* Mot. at 10-12. Whether that failure, before selling access to Californians' information, violates California public policy, makes TR's retention of profits attributable to that practice "unjust," or on balance creates a more substantial harm to Californians than any countervailing benefits, are all central, common questions. *See id.* Accordingly, commonality is easily met here.

TR's contrary arguments miss the mark. It first contends (at 11) that the class is too broad because it includes people who were not injured in California, and consequently this action would impermissibly apply California law beyond its borders. Not so: "[T]he UCL reaches any unlawful business act or practice committed in California." *Sullivan v. Oracle Corp.*, 51 Cal.4th 1191, 1208 (2011). And here, each putative class member's claim is connected to California because the class is defined to include only those persons "who, during the limitations period, both resided in the state of California *and* whose information Thomson Reuters made available for sale through CLEAR without their consent." Mot. at 10 (emphasis added). That an absent class member may have moved to another state during the class period does not change the fact that they would be suing over harm that had occurred in California while they were a state resident. *See Sullivan*, 51 Cal.4th at 1207-09. Nor is TR's conjecture (at 11) that foreign law, rather than California law, might apply to such a class member's claims any basis to deny class certification of this proposed single-state class action. *Cf. In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 561 (9th Cir. 2019) (court adjudicating multistate class action not obligated to address undeveloped choice-of-law arguments). But even if the class definition were over-inclusive, that would be no reason to deny certification. At most, it would require "refining the class definition." *See Olean Wholesale Grocery Coop. v. Bumble Bee Foods, LLC*, 31 F.4th 651, 669 n.14 (9th Cir. 2022).[4]

Faring no better is TR's odd argument (at 14) that the unfair business practices here are "too vague to allow the Court even to assess whether any issue is common." Plaintiffs have thoroughly detailed, based

[4] TR's authorities, neither of which addressed class certification, both support the conclusion that the UCL may properly apply to the proposed class. *See* Opp. at 11 (citing *Adobe Sys. Inc. v. Blue Source Grp., Inc.*, 125 F. Supp. 3d 945, 972 (N.D. Cal. 2015), and *Ehret v. Uber Techs.*, 68 F. Supp. 3d 1121, 1130 (N.D. Cal. 2014)).

on the record, how TR collects, analyzes, and aggregates Californians' personal information and offers it for sale on CLEAR without consent or compensation. Mot. at 3-7; *see Newton v. Am. Debt Servs., Inc.*, 2015 WL 3614197, at *10 (N.D. Cal. June 9, 2015) (certification warranted under UCL when plaintiff describes a "series of practices amenable to some degree of precise definition"). Plaintiffs' showing here is critically different from that in *Herskowitz, v. Apple*, where there was "no evidence that Apple ha[d] a common, let alone uniform or 'blanket,' practice of denying refunds to customers." 301 F.R.D. 460, 476 (N.D. Cal. 2014).

Finally, TR suggests in passing (at 12) that because Plaintiffs' and the putative class's relationships with TR differ, including as to privity, an unjust enrichment claim would not yield common answers. But privity is not required. *See Hartford Cas. Ins. Co. v. J.R. Mktg., L.L.C.*, 61 Cal.4th 988, 998 (2015). And anyway, TR points to no evidence of differing relationships or circumstances, and the key evidence is otherwise: The putative class members uniformly did not consent to CLEAR, and many do not even know CLEAR exists. Mot. at 1, 21. More importantly, whether class members have a right to unjust enrichment even absent privity with CLEAR is a legal question that is resolvable classwide.

As the Ninth Circuit has made clear, "[e]ven a single common question of law or fact that resolves a central issue will be sufficient to satisfy this mandatory requirement for all class actions." *Castillo v. Bank of Am., NA*, 980 F.3d 723, 728 (9th Cir. 2020). Plaintiffs here have demonstrated that *all* key questions of law and fact are common. They have therefore satisfied Rule 23(a).[5]

III. Rule 23(b) is met.

A. Plaintiffs' UCL claim is ripe for certification under (b)(2).

TR opposes a (b)(2) class on the same grounds that it opposes a (b)(3) class. *See* Opp. at 23-24. But Rule 23(b)(2) requires a different analysis. "Unlike Rule 23(b)(3), a plaintiff does not need to show predominance of common issues or superiority of class adjudication to certify a Rule 23(b)(2) class. Rather, only a showing of cohesiveness of class claims is required." *In re Yahoo Mail Litig.*, 308 F.R.D. 577, 587 (N.D. Cal. 2015). That showing is easily met here because TR does not deny it acts uniformly towards the class.

[5] TR also argues (at 12-13) that Plaintiffs' UCL and unjust enrichment claims will require "individualized" analysis. But this argument is not about commonality at all; it's a predominance argument. And, as explained below, TR is simply wrong that predominance is not met here. The core questions for establishing TR's liability do not implicate individualized inquiries; rather, they turn entirely on common legal questions and classwide facts.

And contrary to TR's suggestion that their request is insufficiently developed, Plaintiffs have specifically described the business practices they seek to enjoin, which is all that is required at this stage. *See* Mot. at 3-5, 9, 17 (describing TR's uniform data-collection, aggregation, and analysis practices to offer Californians' personal information for sale, in a uniform way, through CLEAR, all without those Californians' consent); *B.K. ex rel. Tinsley v. Snyder*, 922 F.3d 957, 972 (9th Cir. 2019) ("[T]he 'general contours of an injunction' are enjoining [defendant] to abate the nine policies identified by the district court as amenable to class-wide litigation. That [is] enough."); *Parsons v. Ryan*, 754 F.3d 657, 674 (9th Cir. 2014) (similar).[6] Plaintiffs thus seek a single injunction relieving Californians from those generally applicable, centralized, and unfair practices.

TR nevertheless argues (at 24) that each class member may be impacted differently by CLEAR. But "Rule 23(b)(2) suits remain appropriate mechanisms for obtaining injunctive relief in cases where [such] a centralized policy is alleged to impact a large class of plaintiffs, even when the magnitude (and existence) of the impact may vary by class member." *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 503 (N.D. Cal. 2012). In any event, Plaintiffs' theory of the case does not turn on the specific data collected (or disclosed), the customer(s) who access it, or the purposes those customers profess in so doing. *See* Mot. at 22-28. All class members are harmed by TR's nonconsensual collection and sale of their personal information—and so all class members are entitled to an injunction enjoining TR's unfair practices.

B. Common questions predominate for both claims.

1. UCL

Plaintiffs challenge TR's uniform business practice of using Californians' information without their consent. That practice is common to all class members and violates class members' right to control whether and how TR uses their information in the same way. Ignoring this evidence, TR seeks to elevate differences in how *its customers* use information about Californians as the predominant merits issue. But "the UCL's focus is 'on the defendant's conduct, rather than the plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices.'" *Ehret*, 68 F. Supp. 3d at 1130–31 (quoting *In re Tobacco II Cases*, 46 Cal.4th 298, 312 (2009)). Predominance is therefore routinely found in cases

[6] The situation here is a far cry from that in *Williams v. Apple, Inc.*, 338 F.R.D. 629, 657-58 (N.D. Cal. 2021), where the plaintiffs waived a request for a (b)(2) class by failing to properly raise it in their motion and did not provide any meaningful analysis in reply.

involving "a uniform business practice," such as TR's decision to use Californians' personal information for profit without their consent. *See Newton*, 2015 WL 3614197, at *10–11 (quoting *Herskowitz*, 301 F.R.D. at 476 and citing *Lozano*, 504 F.3d at 737). So too here, the core merits question for Plaintiffs' UCL claim—whether TR's nonconsensual collection and dissemination of the class members' personal information is "unfair"—is an entirely classwide inquiry relying exclusively on facts common to the class.

a. Tethering Test. To start, nothing about applying the UCL's tethering test here implicates individualized questions. The test asks whether the alleged unfairness of the *defendant's* business practices is "tethered to some legislatively declared policy." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 166 (1999). And because the tethering test is an independent and separate basis for establishing TR's liability under the UCL's unfairness prong, it suffices to satisfy Rule 23(b)(3) here.[7] *See In re PFA Ins. Mktg. Litig.*, 2021 WL 5994908, at *17 (N.D. Cal. Nov. 3, 2021) ("[T]he predominance requirement could be satisfied with common evidence under either [UCL] test.").

TR has no meaningful response to this. TR first argues (at 20-21) that whether California's public policy of protecting privacy is implicated will vary based on who its customers are, what information it makes available to them, and how and why the information was used. But that misunderstands Plaintiffs' theory of harm: *Every* class member was deprived of the right to control their information when TR made their information available for sale in CLEAR. As this Court recognized, California's public policy protecting the right to control one's own information is enshrined in numerous California constitutional and statutory provisions. *See* ECF No. 54 at 17-18. That policy either does or does not render TR's business model of offering Californians' data without consent "unfair." This significant aspect of the case, then, can and should be resolved in a single adjudication rather than on an individual basis.

TR also suggests (at 20-21) that California's public policy protecting privacy may be outweighed by CLEAR's utility or competing public policies. But there is no consideration of utility in the tethering test. *See In re Anthem, Inc. Data Breach Litig.*, 162 F. Supp. 3d 953, 990 (N.D. Cal. 2016). Even if the law were otherwise,

[7] Revisiting a debate circa 2006, TR suggests (at 19 n.37) the tethering test may not apply in consumer cases. *See Camacho v. Auto. Club of S. Cal.*, 142 Cal. App. 4th 1394, 1400-01 (2006). But the Ninth Circuit long ago rejected *Camacho*'s reasoning and recognized both the balancing and tethering tests apply to UCL unfairness claims. *See Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 736 (9th Cir. 2007); *see also MacDonald v. Ford Motor Co.*, 37 F. Supp. 3d 1087, 1098-99 (N.D. Cal. 2014).

TR does not explain why either CLEAR's purported utility or any competing public policy would create individualized issues. The question is not, as TR tries to make it seem (at 20), whether the disclosure of a *particular* piece of information violates California's public policy protecting privacy or not; it is whether the "challenged act"—TR's nonconsensual collection and sale of Californians' personal data—has a "close nexus" to the "legislative policy" protecting Californians' right to control their information. *See Hodsdon v. Mars, Inc.*, 891 F.3d 857, 866 (9th Cir. 2018). That question is a natural fit for classwide resolution.

b. Balancing Test. The same is true for the UCL's "balancing" test. The challenged practice is "uniform across the class," and nothing about TR's business operations "turn[s] on anything about any particular class member." Mot. at 2.

Evaluating whether TR's conduct is "unfair" under the UCL's balancing test—whether the utility of the challenged conduct outweighs the harm to the public—will thus require no individualized inquiries. Indeed, the balancing test explicitly requires that courts weigh the "harm to the public" against the challenged conduct's utility. *Backus v. Gen. Mills*, 122 F. Supp. 3d 909, 929 (N.D. Cal. 2015); *see also Tobacco II Cases*, 46 Cal.4th at 312 (UCL "protect[s] *the general public* against unscrupulous business practices" (emphasis added)). But even if the harm inquiry were framed as "harm to the *Plaintiffs*," as TR contends (at 13), it would still be a classwide inquiry in this case because all class members have suffered the very same harm as a result of TR's uniform practices: They have been deprived of the right to meaningfully control their personal information. *See* Mot. at 2-9; Turow Rep. at 16 ("Regardless of how expansive an individual's report may be, no Californian has control over the information in or use of dossiers about them. In these critical ways, all Californians face these same harms."). This is a specific, tangible harm caused by a "precisely defined" uniform practice towards Californians that is unfair. *See Grace v. Apple, Inc.*, 328 F.R.D. 320, 336-43 (N.D. Cal. 2018). Although TR speculates (at 13, 20) that the Court would have to consider some unspecified potential individualized harms that its customers' use of Californians' data may have caused, it doesn't identify any. *See Williams*, 338 F.R.D. at 648 (defendant cannot defeat predominance with "mere 'speculation and surmise'"). And even if it had, there is no gainsaying that the common questions Plaintiffs have identified are more apt to drive the resolution of the litigation and thus "must be given more weight in the predominance analysis." *Ruiz Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016).

The Court will similarly rely on facts and arguments common to all class members when considering the utility of the challenged practice to Californians. The law is clear that, when evaluating "utility" under the UCL's balancing test, the focus is on "the challenged business practice" as a whole. *Herskowitz*, 301 F.R.D. at 476. TR asserts (at 19) that "the utility of CLEAR will vary among class members and their circumstances," but again it identifies no reason—aside from speculation—why that's the case. Nor could it. The utility of the challenged conduct—TR's nonconsensual collection and sale of Californians' data—does not turn on whether a CLEAR customer's particular use of any particular Californians' information is "good" or "bad." Rather, the test asks whether "the harm to the public from the business practice is greater than the utility *of the practice*." *Backus*, 122 F. Supp. 3d at 929 (emphasis added). For these reasons, as we have previously explained, this Court and others have repeatedly held that, in cases involving uniform business practices, the question "whether harms outweigh utilities" under the UCL is a "question[] capable of classwide resolution." *Ellsworth v. U.S. Bank, N.A.*, 2014 WL 2734953, at *28 (N.D. Cal. June 13, 2014); *see also Longest v. Green Tree Servicing LLC*, 308 F.R.D. 310, 331 (C.D. Cal. 2015); *Newton*, 2015 WL 3614197, at *10.

The utility of the challenged practice under the UCL balancing test will necessarily be measured classwide. TR wouldn't have it any other way. Its main defense—that CLEAR benefits society because it makes available all Californians' information—is itself classwide. [redacted]. *See* ECF No. 151-14 ¶ 14 (Kivetz arguing CLEAR benefits "[redacted]"); *id.* ¶ 136 (describing CLEAR's benefits as [redacted]."); *id.* ¶ 143 ("[redacted]"); ECF No. 151-1 at 23 (Bambauer claiming "[redacted]") (emphasis added); *id.* ("[redacted]"); ECF No. 153-2 ¶ 15 (Svonkin claiming personal benefits from "[redacted]").[8] Because this core

[8] Even TR's attempts to show benefits specific to individual class members turn out to be generalized. For example, Bambauer suggests "[redacted]" based on [redacted] due to [redacted]. ECF No. 151-1 at 28. But apart from being an entirely speculative conclusion—grounded in nothing more

question—balancing the harm from depriving Californians of their right to control information against the utility to society from a platform that does not require consent—is "apt to drive the resolution of the litigation," it carries great "weight" in the predominance analysis. *Ruiz Torres*, 835 F.3d at 1134.

For these reasons, class adjudication of the UCL's balancing test is appropriate because common questions predominate and "the Court may make one uniform determination of whether the utility of the conduct outweighed the harm to class members." *See Newton*, 2015 WL 3614197, at *10.

2. Unjust Enrichment.

TR's predominance arguments about unjust enrichment fail for similar reasons. TR focuses on how its customers use CLEAR to obscure that TR's conduct towards the class generates entirely common questions that will drive the resolution of this case. But the actions of TR's *customers* have no bearing on Plaintiffs' unjust enrichment claim—"[t]he emphasis is on the wrongdoer's enrichment." *See Am. Master Lease LLC v. Idanta Partners, Ltd.*, 225 Cal. App. 4th 1451, 1482 (2014). At the merits stage, the Court will need to decide whether letting TR keep [redacted] of dollars in profits from selling information it did not have Californians' consent to collect and use would be "just." Downstream uses by TR's customers are irrelevant to the unjustness inquiry because the Court will evaluate unjustness "as between the two"—TR and the class members—as TR itself admits. *See Ghirardo v. Antonioli*, 14 Cal.4th 39, 51 (1996); Opp. at 19. TR's conduct towards the class—sweeping in as much data as it can, from everyone and without consent, to make commercially available to its paying customers through CLEAR—does not vary from class member to class member, even if some class members' have different information in CLEAR or that information is available elsewhere. Whether class members' information is otherwise publicly available through the third-party data brokers TR uses neither obviates the harm from compiling information into dossiers nor creates individualized questions. *See* ECF No. 54 at 16.

TR is also wrong that unjust enrichment claims "are not amenable to class treatment." Opp. at 12. Indeed, the very treatise it cites for this proposition explains that "[c]ertification of an unjust enrichment class may be proper if it is clear that the defendant had uniform interactions or transactions with all members

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than Bambauer's personal belief that all individuals will be better served with more information sharing, more access, and less privacy—this would not even be an individualized benefit. The theoretical boon that any class member may experience from having more information (whose veracity TR declines to guarantee) available to be searched in CLEAR is one all class members would share.

of the putative class so that it is reasonable to conclude that no significant equitable differences exist in the status of class members." 1 McLaughlin on Class Actions § 5.60; *see also, e.g.*, *Smith v. Keurig Green Mountain, Inc.*, 2020 WL 5630051, at *5 (N.D. Cal. Sept. 21, 2020) (noting certification of unjust enrichment class is appropriate when, as here, a claim "raises the same legal issues as to all class members."). Courts are particularly willing to certify unjust enrichment classes where the defendant's conduct is identical toward all class members, such as through a material omission or standardized business practice. *See Beck-Ellman v. Kaz USA, Inc.*, 283 F.R.D. 558, 568-69 (S.D. Cal. 2012); *Ellsworth*, 2014 WL 2734953, at *27-28. Because even TR recognizes (as it must) that its conduct toward the class is uniform, common questions predominate for Plaintiffs' unjust enrichment claim.

3. Calculating unjust enrichment classwide.

Consistent with *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), Plaintiffs have proposed a reasonable method of calculating the amount of unjust enrichment stemming from TR's unjust actions vis-a-vis the class. ECF No. 127-12 (Lloyd Rep.); *see generally* ECF No. 167-3. TR acquires the information it uses in CLEAR in bulk, accumulating individuals' information not person-by-person but through access to troves of records. *See* Mot. at 4-5. Its customers pay for access to that information—some of which is Californians'—largely through subscription plans, not by paying to search for a specific person. Lloyd Rep. at 9. Plaintiffs' methodology, then, accounts for these business realities along with the legal theories actually at issue in this case. *See* Mot. at 20; Lloyd Rep. at 7-10. Plaintiffs' model begins with TR's direct revenues from CLEAR (derived largely from those customer subscriptions). Lloyd Rep. at 10. Next, because TR has not attributed how much of its revenues are derived from customers seeking to access Californians' information, the model incorporates a step to allocate an appropriate share of TR's overall CLEAR revenues to its use of Californians' information without consent. *Id.* at 11-14. Finally, Plaintiffs' method offers a step to deduct the costs that are properly attributable to TR's challenged conduct. *Id.* at 14-17. That classwide model is reasonable, reliable, and tied directly to Plaintiffs' theory of liability. *See* ECF No. 167-3. *Comcast* requires nothing more. *See Grace*, 328 F.R.D. at 340.

TR sees *Comcast* problems where none exist. It argues (at 18), first, that Plaintiffs' method fails to properly measure "net profits" derived from the use of Californians' personal information. But that is exactly what Plaintiffs' model does: It shows, based entirely on reliable common evidence, how to calculate the amount of TR's profits attributable to its commercial use of Californians' information in CLEAR. Lloyd Rep. at 2-3, 7-10, 16-17 (including, in Plaintiffs' methodology, a step to deduct costs and explaining why removing only incremental costs measures the amount of TR's "net profits" here); *United States v. Abouammo*, 2022 WL 17734424, at *2 (N.D. Cal. Dec. 16, 2022) (common law unjust enrichment permits recovery based on a measurement of the defendant's wrongful gain). TR may disagree with the amount of disgorgement this model calculates, but that is a merits dispute, not a *Comcast* problem. *Lytle v. Nutramax Labs., Inc.*, 2022 WL 1600047, at *18 n.21 (C.D. Cal. May 6, 2022) (*Comcast* does not require plaintiff to run damages model—just present a likely method for measuring classwide relief).

Next, TR faults (at 18) Plaintiffs' model because, in its view, it fails to deduct for the "just" aspects of CLEAR—the benefits its customers derive, and the incidental benefits class members purportedly enjoy from living in a world in which CLEAR is available. Plaintiffs' theory, however, is that TR was unjustly enriched by selling access to Californians' information without consent; that CLEAR customers may use this unjustly obtained information for (supposedly) "just" reasons does not make *TR's* collection and sale of the class members' data "just." Mot. at 20; ECF No. 167-3 at 10. As for incidental benefits that Californians may receive in exchange for TR violating their privacy, California law does not require that a disgorgement calculation account for such downstream (and here, illusory) benefits. *See In re Lenovo Adware Litig.*, 2016 WL 6277245, at *21 (N.D. Cal. Oct. 27, 2016). Even so, TR's disputes about the failure to account for certain benefits can be resolved on an entirely classwide basis; they again go to the merits, not *Comcast*.

Finally, TR criticizes Plaintiffs for not proposing an apportionment plan, even as it admits (at 18) that one is not required at the class certification stage. Plaintiffs agree that an apportionment plan is not required now, but they disagree with TR's suggestion that any apportionment of TR's ill-gotten gains would require minitrials over the types and amounts of individual information searched. To the contrary, an equal allocation of disgorgement among the class, courts agree, would be appropriate in these circumstances. *See, e.g.*, *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2013 WL 12333442, at *45 (N.D. Cal. Jan. 8, 2013) (approving pro rata distribution of disgorgement settlement class based on claims that focused "solely on the alleged behavior of the Settling Defendants and the benefits that they reaped from that behavior"); *United States v. Real Property Located at 13328 and 13324 State Hwy. 75 N.*, 89 F.3d 551, 553-54 (9th Cir. 1996) (approving pro rata allocation of disgorgement settlement to victims of fraudulent investment scheme). After all, Plaintiffs' claims in no way turn on the amount or type of information available regarding any one class member, who accessed that information for what purpose, or any downstream consequential harms those individual Californians suffered as a result. Mot. at 20-21. So none of those factors could influence the method of apportioning disgorgement here; nor could such considerations here defeat predominance. *Pulaski & Middleman LLC v. Google, Inc.*, 802 F.3d 979, 987 (9th Cir. 2015) ("differences in damage calculations [across individual class members] is not sufficient to defeat class certification").[9]

C. A class trial is superior to litigation alternatives and would be manageable.

TR's primary superiority argument is that legislative action is better than a class action. Opp. at 22-23. But a "superiority analysis focuses on the relative advantages of a class action suit over whatever other forms of *litigation* might be realistically available to plaintiffs." *Richie v. Blue Shield of Cal.*, 2014 WL 6982943, at *22 (N.D. Cal. Dec. 9, 2014) (emphasis added). Because Rule 23 "sets the requirements [courts] are bound to enforce," and a comparison of class actions with legislation is not one of them, the mere possibility of future legislative action cannot defeat superiority.[10] *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1128 (9th Cir. 2017) (quoting *Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997)). *Diacakis v. Comcast Corp.*, 2013 WL 1878921 (N.D. Cal. May 3, 2013), is not to the contrary. The superiority analysis there considered regulatory proceedings before administrative agencies specifically empowered to adjudicate the practices at the crux of that litigation—that is, another form of adjudication, not legislation. *Id.* at *9. In short, TR's preference that Californians *only* vindicate their privacy rights through legislative action is not a reason to find that class adjudication of Californians' existing legal rights is not superior to individual adjudication of those rights.

TR presses other scattershot arguments about superiority, but none persuade. TR claims (at 21), for example, that a class action is not warranted because certain class members might actually like CLEAR. But "district courts in the Ninth Circuit routinely refuse to deny class certification where some—even most—of the putative class members oppose" the litigation itself. *James v. Uber Techs.*, 338 F.R.D. 123, 133 (N.D. Cal.

[9] TR's reliance (at 18) on inapposite false advertising cases does nothing to challenge the appropriateness of a pro-rata distribution in this very different case. *See Buckeye Tree Lodge and Sequoia Village Inn, LLC v. Expedia, Inc.*, 2019 WL 1170489, at *5 (N.D. Cal. Mar. 13, 2019) (because consumer perceptions of false "sold out" notices were material to false advertising claim, they had to be accounted for in damages model).

[10] Besides, the California Legislature has *already* acted to proscribe unfair business practices. While TR might prefer a more targeted law, "[t]he unfair competition law is less specific, [precisely] because the Legislature cannot anticipate all possible forms in which unfairness might occur." *Cel-Tech*, 20 Cal.4th at 183.

2021) (collecting cases). Class certification here remains appropriate, then, even if some subset of putative class members would prefer that TR's unfair business practice persist. *Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776, 781 (9th Cir. 1986). And while TR claims (at 22 n.40) the absence of follow-on litigation shows a class action is not a superior means of adjudication, the takeaway should be the opposite. *See Moore v. Ulta Salon, Cosms. & Fragrance, Inc.*, 311 F.R.D. 590, 625 (C.D. Cal. 2015). Plus, the relatively small amount of individual monetary recovery as compared to the costs and difficulty of pursuing this legally and technologically complicated public-interest case on an individual basis weighs strongly in favor of class treatment. *O'Donovan v. CashCall, Inc.*, 278 F.R.D. 479, 504 (N.D. Cal. 2011).

Lastly, TR says (at 21) it is not desirable to concentrate this litigation—raising purely California law claims on behalf of Californians injured by TR's practices—in California. What other forum could possibly be more appropriate? TR doesn't say. And contrary to TR's assertions, the fact that a small number of Californians might have moved to another state during the class period does not make these class proceedings unmanageable in any way. In all, Rule 23(b)'s superiority and manageability requirements are met here.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court certify a hybrid (b)(2) and (b)(3) class or, in the alternative, certify both claims for class treatment pursuant to Rule 23(b)(3), appoint Plaintiffs Cat Brooks and Rasheed Shabazz as class representatives, and appoint Gibbs Law Group and Cohen Milstein Sellers & Toll as class counsel.

DATED: March 9, 2023

Respectfully submitted,

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