

Susan D. Fahringer, Bar No. 21567
SFahringer@perkinscoie.com
Nicola C. Menaldo, *pro hac vice*
NMenaldo@perkinscoie.com
Erin K. Earl, *pro hac vice*
EEarl@perkinscoie.com
Anna M. Thompson, *pro hac vice*
AnnaThompson@perkinscoie.com
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Defendant
Thomson Reuters Corporation

Gabriella Gallego, Bar No. 324226
GGallego@perkinscoie.com
PERKINS COIE LLP
3150 Porter Drive
Palo Alto, CA 94304-1212
Telephone: 650.838.4300
Facsimile: 650.838.4350

Hayden M. Schottlaender, *pro hac vice*
HSchottlaender@perkinscoie.com
PERKINS COIE LLP
500 N. Akard Street, Suite 3300
Dallas, TX 75201-3347
Telephone: 214.965.7700
Facsimile: 214.965.7799

**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'
REPLY IN SUPPORT OF ITS MOTION
TO EXCLUDE TESTIMONY OF
JOSEPH TUROW**

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

1 **I. INTRODUCTION**

2 Plaintiffs characterize Professor Turow’s opinion differently depending on whether they
 3 are relying upon it or defending it. In defending it, Plaintiffs innocently claim that Prof. Turow
 4 merely “gives the Court historical context for important Californian policies that have been
 5 discussed by scholars at length, which is relevant to whether Californians share an interest in
 6 controlling information about them.” Doc. 166 (“Opp.”), at 3, 5. If, as Plaintiffs now claim, Prof.
 7 Turow’s opinions were limited to “historical context” for California policy around privacy, TR
 8 takes no issue with that offer of expert evidence. Offering historical context on the public policies
 9 underpinning California privacy laws is an appropriate subject of expert testimony and TR is
 10 confident that its own expert on that topic, Professor Jane Bambauer, far more credibly explains
 11 that no known theory of privacy has embraced the sort of ideological absolutism that Prof. Turow
 12 espouses in this case. *See* Doc. 151-1 (“Bambauer Rep.”), Part IV.

13 But Prof. Turow has gone further than that here. He has testified that “Thomson Reuters’
 14 operation of the CLEAR product affects privacy interests of Californians—the right to control
 15 personal information and to be let alone—in such a way that all Californians whose information is
 16 accessible through CLEAR are harmed.” Doc. 124-7 (“Turow Rep.”) at 5. And Plaintiffs rely on
 17 this testimony in support of their motion for class certification. *See, e.g.*, Doc. 124-3, at 13 (citing
 18 Turow for the proposition that the “named plaintiffs were injured in exactly the same way that all
 19 class members have been”). That opinion, which ascribes a uniform harm to tens of millions of
 20 putative class members, can be an appropriate subject of expert testimony only if it is supported
 21 by “objective, verifiable evidence,” and that testimony is based on “scientifically valid
 22 principles.” *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1317-18 (9th Cir. 1995).

23 Plaintiffs have not come close to making that showing in their opposition to TR’s motion.
 24 Prof. Turow’s opinion of uniform harm is based on Prof. Turow’s own say-so, is unsupported by
 25 the consumer preference surveys he himself cites, and to the extent that it is *not* based on the
 26 empirical evidence he cites, then it is inadmissible legal opinion. Plaintiffs’ retorts about Prof.
 27 Turow’s credentials and how *little* he relied on surveys do not fix these problems. Because Prof.
 28 Turow fails to apply scientific methodology in rendering his opinion, the issue goes to the

1 admissibility and not the weight of his testimony and the testimony should be excluded.

2 **II. REPLY**

3 Plaintiffs' opposition to TR's motion to exclude relies on obfuscation and misdirection at
 4 every turn. For example, TR does not "ignore the bulk of Turow's evidence" (Opp. at 2). To the
 5 contrary, TR dedicates nearly two full pages to examining that evidence and explaining how it
 6 bears no relation to Prof. Turow's ultimate conclusion that CLEAR has caused uniform harm to
 7 Californians. *See* Doc. 157-4 ("Mot.") at 5-7. And TR does not challenge whether Prof. Turow's
 8 surveys "support" his conclusions, as Plaintiffs contend. TR challenges whether those surveys are
 9 even relevant to his conclusion, as required to meet admissibility standards. *See* Mot. at 7
 10 (describing the "analytical gap between Prof. Turow's cited data and his opinion that all
 11 Californians suffer an identical privacy harm from CLEAR"); *Gen. Elec. Co. v. Joiner*, 522 U.S.
 12 136, 146 (1997). And Plaintiffs' contention that TR took the position in its opposition to class
 13 certification that Prof. Turow had *not* offered a legal conclusion (Opp. at 2) is similarly wrong.
 14 TR merely quoted Prof. Turow's who himself was, as any expert would, proclaiming that he was
 15 not offering a legal opinion.

16 Each of these sideshows highlights that Plaintiffs lack any compelling response to TR's
 17 challenge to Prof. Turow's report. Because Prof. Turow's testimony is based solely on his own
 18 say-so, untethered to the sources to which he cites, and purports to describe the law to the Court,
 19 it should be excluded.

20 **A. Prof. Turow's credentials do not empower him to skirt Daubert standards** 21 **with *ipse dixit* opinion.**

22 As explained in TR's motion to exclude, Prof. Turow himself conceded that his
 23 conclusion about uniform harm was the result of his "*sense*" that if Californians were told about
 24 CLEAR, "they would freak out." Doc. 157-10, at 152:20-153:4. In other words, Prof. Turow's
 25 conclusion is based on his own *ipse dixit* opinion, not any valid scientific methodology. Neither
 26 of Plaintiffs' two responses to this argument show otherwise. For example, Plaintiffs tout Prof.
 27 Turow's experience and qualifications and observe that TR has not challenged those
 28 qualifications. Rightly so. *Ipse dixit* opinion is properly excluded "[r]egardless of an expert's

1 credentials.” *Rodman v. Otsuka Am. Pharm., Inc.*, No. 20-16646, 2021 WL 5850914, at *1 (9th
 2 Cir. Dec. 9, 2021) (unpub.), *cert. denied*, 142 S. Ct. 2712 (2022). Prof. Turow’s qualifications are
 3 not at issue here. Next, Plaintiffs pluck a *different* opinion from Turow’s report—that “the right to
 4 control one’s information is a long-standing feature of . . . Californian [] privacy rights”—and
 5 claim that this *different* opinion is not *ipse dixit*. See Opp. at 2. And so? Prof. Turow’s opinion
 6 about uniform harm is. See Mot. at 4. And Prof. Turow’s opinion about uniform harm is nothing
 7 like the opinion about the “important and . . . historical roots” of privacy admitted in *Brown*. See
 8 Opp. at 3 (citing *Brown v. Google*, No. 20-CV-3664-YGR, 2022 WL 17961497, at *10 (N.D. Cal.
 9 Dec. 12, 2022)).¹ Nor would anyone fairly characterize it as a “general truth derived from
 10 specialized experience.” See *id.* (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148
 11 (1999)). In short, by mischaracterizing TR’s argument, Plaintiffs have ignored a core argument of
 12 TR’s Motion: that there is an analytical chasm between Prof. Turow’s opinion and the sources he
 13 relies upon.

14 **B. If Prof. Turow is relying on outside sources in forming his opinion, he fails to**
 15 **show how they relate to his opinion.**

16 If Prof. Turow’s opinion is anything other than his say-so, it must be based on the sources
 17 he cites to in his report, but none of those sources discuss uniformity of harm or evince any
 18 relation to Prof. Turow’s ultimate conclusion. A trial court properly excludes expert testimony
 19 where “there is simply too great an analytical gap between the data and the opinion proffered.”
 20 *Domingo ex rel. Domingo v. T.K.*, 289 F.3d 600, 606 (9th Cir. 2002) (citing *Joiner*, 522 U.S. at

22 ¹ Both parties have cited to *Brown*, and that case nicely captures why Prof. Turow’s opinion about
 23 harm here should be excluded. In *Brown*, that expert first offered testimony that was “general in
 24 nature” that provided “background and context information about what privacy is” on the
 25 internet. 2022 WL 17961497, at *10. The court rightly permitted that testimony, just as TR does
 26 not contest Prof. Turow’s opinion on those matters here. But *Brown* then turned to that expert’s
 27 subsequent opinions about consumer expectations and about Google’s particular disclosures at
 28 issue in that case. *Id.* at *10-11. *Those* opinions were excluded because the expert was attempting
 to impute his “relevant personal view” to affected consumers without establishing “that the
 methodology employed to arrive as such opinions [was] reliable.” *Id.* at *11. Prof. Turow’s
 opinions about universal privacy harms attributable to CLEAR fall within that latter bucket of
 properly excluded opinion.

1 146).

2 “But Turow shows his work,” Plaintiffs respond. Opp. at 2. They are wrong. Prof. Turow
3 shows *other academics’* work, and then he expresses his subjective and personal opinions about
4 CLEAR, but he does not do *his* work in explaining his “steps used to reach the conclusion that the
5 research is applicable.” *Domingo*, 289 F.3d at 606. A “mere recitation of [academic] text in
6 evidence does not assist the court in understanding the evidence because reading, as much as
7 hearing, ‘is within the ability and experience of the trier of fact.’” *Perry v. Schwarzenegger*, 704
8 F. Supp. 2d 921, 947 (N.D. Cal. 2010) (quoting *Beech Aircraft Corp. v. United States*, 51 F.3d
9 834, 842 (9th Cir. 1995)) (giving “no weight” to expert’s expressed opinion that was not
10 sufficiently connected to that expert’s cited data and literature), *aff’d sub nom. Perry v. Brown*,
11 671 F.3d 1052 (9th Cir. 2012).

12 More specifically, Prof. Turow cites only two types of materials to support his personal
13 opinions about CLEAR:²

14 Consumer Surveys: First, he cites consumer surveys. Turow Rep., 6 n.6; *see also* Doc.
15 157-10, at 119:3-5 (“Q. [] Are you offering opinion in this case regarding consumer perceptions?
16 A. Yes.”). Plaintiffs now claim “Turow does not rely on these surveys for any of his conclusions
17 about CLEAR.” Doc. 166, at 4. That directly contradicts a sentence on the preceding page of
18 Plaintiffs’ opposition brief. *See* Doc. 166, at 2-3 (“When rendering his opinion about how
19 CLEAR harms Californians ... Turow cites to ... contemporary surveys about perceptions of
20 privacy”). But no matter. If Plaintiffs want to eliminate one of only two existing bases for
21 Prof. Turow’s opinion, that is their prerogative. Those surveys support TR in any event. *See* Mot.,
22 Part V.B.

23 Existing Academic Literature: The only other possible “scientific” basis for Prof. Turow’s
24 opinion about CLEAR is existing “seminal interdisciplinary privacy texts,” i.e. academic
25 literature. Doc. 166, at 2.³ And, again, TR *agrees* that existing academic literature could form the

26 ² While Plaintiffs also mention Prof. Turow’s discussion of “California legislative history,” (Opp.
27 at 3) that discussion is entirely unrelated to CLEAR. *See* Turow Rep., at 8. Again, TR does not
28 take issue with Prof. Turow providing “historical context” on California privacy laws; TR moves
to exclude Prof. Turow’s testimony about a uniform harm in this case. *Supra*, Part II.A.

³ Perhaps to suggest that Prof. Turow bases his opinion on more than just a smattering of

1 scientific basis for an expert opinion in this case. *See* Doc. 165, at 3 (“Dr. Kivetz [] opines that, to
 2 identify and measure the abstract harm alleged by Prof. Turow, one would need to analyze:
 3 original survey data collected specifically for this litigation; or existing and relevant secondary
 4 data; *or existing empirical academic literature regarding consumers’ perceptions and*
 5 *preferences about privacy.*”) (emphasis added). The problem is that Prof. Turow has cited some
 6 academic literature but failed to close the “analytical gap” between that literature and his
 7 expressed opinion of universal harm. Indeed, of the twenty academic sources that Prof. Turow
 8 relies on for alleged support for his personal opinion, not a single one offers any empirical
 9 evidence for his claims about consumer perceptions regarding privacy. Doc. 151-14 (“Kivetz
 10 Rep.”), ¶ 59.

11 Worse, some of those academic sources directly contradict Prof. Turow’s personal
 12 opinion. For example, in support for his claim that “informational privacy has centered around the
 13 concept of control of one’s information,” Prof. Turow cites Moreham, Nicole (2005), “Privacy in
 14 the Common Law: A Doctrinal and Theoretical Analysis,” *Law Quarterly Review*, 121, 628-656.
 15 As TR’s rebuttal expert, Dr. Ran Kivetz, identifies, that academic text actually suggests that there
 16 are *not* universal privacy harms:

17 This broad, subjective approach is necessary because what is private to one person
 18 is not necessarily private to another: Y, the impecunious academic, might regard
 19 her annual income as an intensely private matter while X, the braying City banker,
 20 will boast about this to anyone who will listen. Conversely, X might regard the
 21 intimate details of his medical misadventures as intensely private while Y will
 22 recount hers enthusiastically to the barest acquaintances. **A comprehensive
 definition of privacy must therefore recognize that different people have
 different reactions to different types of disclosure [...].**

22 *Id.* (emphasis added). Dr. Kivetz evaluates these academic texts, and the complete disconnect
 23 between them and Prof. Turow’s opinion about CLEAR, in great detail. Kivetz Rep., Part D.2.
 24 Prof. Bambauer similarly explains that the academics that Prof. Turow cites would not support
 25 _____
 26 inapposite academic texts, Plaintiffs repeatedly exclaim that Prof. Turow’s “qualifications or
 27 experience” (Doc. 166, at 1) or “historical background,” (*id.*, at 4) lend support. That is the very
 28 definition of *ipse dixit* reliance. *United States v. Cerna*, No. CR 08-0730 WHA, 2010 WL
 11627594, at *6 (N.D. Cal. Dec. 17, 2010) (“The government seeks to satisfy its reliability
 burden with a chant of ‘training and experience.’ This it cannot do.”).

1 Prof. Turow’s opinions about privacy harms in this case. *See* Bambauer Rep., at 9 (discussing
 2 Prof. Turow’s flawed reliance on Alan Westin, for example). These are not challenges that go to
 3 weight. Opp., at 3. Instead, they show a complete disconnect between Prof. Turow’s expressed
 4 opinions and the “objective” evidence upon which he purports to reply. Where no line can be
 5 drawn between Prof. Turow’s opinion and his proffered evidence, that opinion is properly
 6 excluded. *Domingo*, 289 F.3d at 606.

7 **C. Prof. Turow’s opinion is a legal conclusion.**

8 Prof. Turow’s testimony that CLEAR violates established privacy rights should be
 9 excluded as legal opinion. Turow Rep., at 5 (“Thomson Reuters’ operation of CLEAR interferes
 10 with Californians’ right of control and to be let alone, causing them privacy and economic
 11 harm.”); *id.* at 13 (explaining how CLEAR generates a “violation of their right to be let alone”).
 12 Whether a legal right exists, and whether it has been violated, are squarely for the court, not Prof.
 13 Turow, to decide. *See United States v. E. Mun. Water Dist.*, No. CV 04-8182 CBM(RNBx), 2008
 14 WL 4755425, at *2 (C.D. Cal. April 8, 2008) (excluding expert testimony “describ[ing]
 15 California’s law of appropriative rights and discuss[ing] whether Plaintiffs have a legal right to
 16 appropriate” a water source); *Orgain, Inc. v. N. Innova. Holding Corp.*, No. 8:18-CV-01253-
 17 JLS(ADS), 2022 WL 2189648, at *4 (C.D. Cal. Jan. 28, 2022) (excluding expert testimony on
 18 certain trade dress rights held by plaintiff).

19 Plaintiffs respond that Prof. Turow simply offered a “discussion of social norms and the
 20 historical development of privacy” (Opp. at 5). But, as quoted above, Prof. Turow’s report itself
 21 tells a different story and his opinion is not so limited to the contextual, historical background that
 22 Plaintiffs now claim. Plaintiffs also claim that TR has in some way flip-flopped on this issue of
 23 whether Prof. Turow has offered a legal opinion. *See* Opp., at 5. But their quote from TR’s
 24 opposition to class certification was a direct quote from Prof. Turow, not TR. *Id.* That Prof.
 25 Turow disclaimed having provided a legal opinion does not make it so.

26 Because Prof. Turow does not, in fact “show[] his work,” in explaining how objective
 27 scientific evidence supports his sweeping personal opinion about CLEAR, the Court should strike
 28 his report.

1
2 Dated: March 20, 2023

PERKINS COIE LLP

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4 By: /s/ Hayden M. Schottlaender
Hayden M. Schottlaender
5 HSchottlaender@perkinscoie.com

6 Attorneys for Defendant
7 Thomson Reuters Corporation
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