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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' REPLY IN SUPPORT OF
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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1 **I. INTRODUCTION**

2 In opposing Plaintiffs’ motion to exclude Defendant’s class certification rebuttal experts, Professors
 3 Jane Bambauer and Ran Kivetz, Thomson Reuters (TR) misses the forest and the trees. Ostensibly, TR’s
 4 experts serve a singular, limited purpose—to rebut Plaintiffs’ expert Professor Joseph Turow’s testimony
 5 about the classwide harm Plaintiffs suffered from TR’s unfair business practices. But designating an expert
 6 for purposes of “rebuttal” is no get out of jail free card: even a rebuttal expert must satisfy *Daubert* and the
 7 Federal Rules of Evidence. And here, as Plaintiffs demonstrated in their motion, neither Kivetz nor
 8 Bambauer do.

9 In response to Plaintiffs’ motion, TR offers little more than silence and misdirection. For example,
 10 TR never contests that Kivetz is unqualified to opine on privacy. Instead, TR argues that Kivetz is qualified
 11 to opine on the importance of individual consumer preferences. But TR then fails to respond to Plaintiffs’
 12 argument that Kivetz’s methodology does not fit the facts of this case, and it does not explain why Kivetz’s
 13 core conclusions are frequently predicated solely on TR’s employees’ opinions, or no evidence at all. That is
 14 not enough to carry TR’s burden of showing admissibility. Because Kivetz is unqualified to opine on privacy,
 15 Turow’s opinion is not premised on individual consumer preferences, and Kivetz’s conclusions are
 16 unsubstantiated, TR has not demonstrated that this proffered expert testimony should be admitted.

17 TR’s defense of Bambauer is similarly misguided. Instead of responding to Plaintiffs’ arguments that
 18 omitting California policy renders her opinion irrelevant and unreliable, TR argues only that Bambauer would
 19 not be able to opine on California’s privacy landscape without rendering an impermissible legal opinion. But
 20 at the same time that TR suggests Bambauer would not be permitted to opine on the foundational policies
 21 of *California* privacy law, it has her opine on the “tenets of U.S. privacy law.” ECF No. 150-4 at 6 n.23
 22 (emphasis added). And when discussing U.S. privacy law, Bambauer presents a good-for-litigation-only
 23 opinion that Turow’s understanding of a right of control is extreme—a view divorced from the history and
 24 context of privacy in California and, importantly for *Daubert* purposes, Bambauer’s own academic opinions.
 25 The history and context of privacy in California, not the U.S. more broadly, is what matters here. On that
 26 topic, Bambauer offers the Court nothing more than an unhelpful and unreliable opinion directly contrary
 27 to what she has routinely and consistently presented in her professional capacity outside this case.
 28

At bottom, TR's failure to adequately respond to Plaintiffs' motion shows that neither of its rebuttal experts offer admissible testimony to rebut Turow's report, and neither's testimony will assist the Court in its resolution of class certification.

II. ARGUMENT

A. The Court should exclude Kivetz's report because it is irrelevant and unsubstantiated.

In its defense of Kivetz, TR fails to respond to most of Plaintiffs' arguments and tries instead to shift focus onto Turow. But the subject of this motion is the admissibility of Kivetz's testimony, of which it is TR's burden to establish. Fed. R. Evid. 702, Advisory Committee Notes (2000 amendments). And here, TR makes no attempt to argue that Kivetz is qualified to opine on privacy harm. ECF No. 165 (Opp.) at 12. Moreover, TR fails to respond to the bulk of Plaintiffs' arguments, including that Kivetz's methodology does not fit the facts of this case, his review of Turow's sources was inadequate, he fails to support many of his opinions with any evidence, and he unquestioningly adopted TR's positions as his own opinion. Each of these is an independent reason to exclude Kivetz's testimony.

1. Kivetz is not qualified to opine on the relationship between consumer preferences and California privacy harms.

TR makes no attempt to argue Kivetz is qualified to opine on privacy, and he is not.¹ Opp. at 12; *see also* ECF No. 159-3 at 56:24-57:3 (Kivetz claiming he does not know what privacy means). Sweeping privacy-specific qualifications aside, TR counters that Kivetz *is* qualified to opine on the importance of individual consumer preferences. Opp. at 12. But TR fails to connect how Kivetz's experience measuring individual consumer attitudes about products that businesses market *to consumers* "provide[s] a foundation for [him] to answer a specific question" relevant to this case. *See Caldwell v. City of S.F.*, 2021 WL 1391464, at *3 (N.D. Cal. Apr. 13, 2021). TR does not market CLEAR to consumers, nor are consumers given a choice about how or whether to engage with the CLEAR product. Despite that it is TR's burden to establish Kivetz's qualifications to opine in this case, TR leaves the Court to guess how his expertise as a marketing professor would translate to anticipating consumer preferences about privacy, particularly when the product at issue is

¹ Nor does TR respond to Plaintiffs' point that Kivetz's prioritization of individuated subjective consumer preference is incongruous with Bambauer's metric, which does not prioritize subjective consumer preference in measuring privacy harm. ECF No. 158-3 (Mot.) at 5.

one with which they have never interacted.

TR fails to show how Kivetz’s unrelated experience qualifies him to testify as an expert in this case. Although experts need not be “hyperspecialized,” expertise in one area does not necessarily extend across an “expansive field.” *Maldonado v. Apple, Inc.*, 2021 WL 1947512, at *17 (N.D. Cal. 2021) (excluding chemical engineer from testifying in an electrical engineering case; collecting cases). TR offers Kivetz “to rebut the opinion of Prof. Turow,” specifically by testifying that establishing “common injury” requires some form of “empirical or scientific evidence.” Opp. at 2-3. But TR offers no evidence for its argument that privacy harms are routinely—if ever—measured by individual subjective preference. As a result, TR effectively concedes Kivetz is not qualified to discuss “the *type* of harm that Prof. Turow alleges to be at issue in this case”—interference with individuals’ right to control their information. *Id.* at 3 (emphasis in original).

That Kivetz was not excluded in other cases is beside the point. The cases Kivetz testified in previously were not cases involving privacy harm, and TR does not refute that Kivetz has never testified about how to measure privacy harm. *See* ECF No. 158-3 (Mot.) at 4-5. Plus, TR overstates the degree to which courts have relied on his testimony in prior cases. *See Red v. Kraft Foods*, 2011 WL 4599833, at *13 (C.D. Cal. Sept. 29, 2011) (finding Kivetz’s testimony about individuated consumer preferences “arguably, only marginally relevant,” because UCL plaintiffs are not required to “demonstrate individualized reliance”).² The relevance the *Red* court attached to Kivetz’s opinion had to do with his marketing background in relation to deceptive advertising predictions—not any qualification with measuring individual consumer preferences. *See id.* As this is not a marketing case, and Kivetz is not qualified to opine on privacy-related harms, his prior experience does not bolster the admissibility of his testimony in any way.

By conceding that Kivetz has no experience testifying about privacy harm—the subject of the opinion he was engaged to rebut—TR gives the Court a clear reason to exclude his testimony.

2. Kivetz’s methodology is not a ‘fit’ for this case.

Relatedly, TR does not explain how Kivetz’s consumer-preferences approach is a reasonable “fit” for the “facts in issue” in this case. *Rearden LLC v. Walt Disney Co.*, 2021 WL 6882227, at *5 (N.D. Cal. Jul.

² Moreover, the *Red* plaintiffs filed their motion to strike Kivetz’s testimony *after* the court considered class certification. *See Red v. Kraft Foods, Inc.*, 2012 WL 8019257, at *15 (C.D. Cal. Apr. 12, 2012) (tentative ruling denying the motion to strike as moot but noting Kivetz’s testimony “did not significantly affect the Court’s analysis), *adopted by* 2012 WL 8018618 (C.D. Cal. Apr. 26, 2012).

12, 2021). Neither TR nor Kivetz provides any authority showing that individuated, subjective consumer perceptions are the requisite—or even an appropriate—metric for assessing privacy harm here. Such a position would be a non-starter because both UCL tests are evaluated with an objective standard that would not depend on any individual’s subjective opinion. *See* ECF No. 124-3 at 25.

Rather than explaining how Kivetz’s methodology is relevant and reliable, TR instead argues (at 13-14) that *Turow* claims individual consumer preferences are relevant to evaluating privacy harm in this case. TR tries to set up (at 14-15) a double-bind: either Plaintiffs must accept the “relevancy” of individual consumer preference to this case or admit that Turow’s opinion lacks evidentiary support. Both of these points are overstated, but more to the point, they distract from the reality that TR did nothing to show that Kivetz’s methodology will assist the Court in resolving any question at class certification.

First, TR misreads Turow’s report and overstates his deposition testimony. *See* Opp. at 12-13; ECF No. 157-10 (Turow Dep.) at 119:3-10 (Turow clarifying that he opines on “[p]eople’s desire . . . to control their information”). Turow never says that individual subjective consumer preferences dictate whether harm has occurred, nor does he use survey evidence to support his analysis of privacy harm in his report. The fact that Turow affirmed what everyone already knows—he did cite to consumer surveys in a footnote in his report—does not transform his opinion into one that centers individual subjective consumer preferences. *See* Turow Dep. at 120:6-21 (Turow explaining that he “discuss[es] consumer perceptions of the right to control one’s information . . . at Footnote 6” and indirectly through ballot pamphlet materials, but nowhere else).

Second, TR fixates on Turow’s survey evidence to the exclusion of all other supporting authority. Opp. at 14-15. But the six surveys TR takes such great issue with are cabined to two footnotes supporting general statements that the American public believes that having control over their information is one aspect of their right to privacy. *See* ECF No. 124-7 (Turow Rep.) at 6 n.6, 7 n.9. Turow uses these consumer surveys only to show that the right to control one’s own information is commonly understood as a facet of individual privacy rights, speaking about general public opinion and common acceptance of the right to control. Mot. at 4-5, 6-7; Turow Rep. at 6. Zooming out from those two sentences in Turow’s report, the reader can readily see that Turow synthesizes the history of the right to control in American legal thought (at 6-7), its

sociological importance (at 8), and its relationship with California policy (at 8-9). Turow describes the nature and history of a right that is enshrined in California policy. Kivetz discusses none of this—indeed, the parties agree those topics are beyond Kivetz’s expertise. *Supra* Part II.A.1.

Finally, TR’s focus on Turow does nothing to affirmatively establish that Kivetz’s methodology is relevant and reliable. Although TR quibbles (at 2) that it is not Kivetz’s burden to offer a workable theory of harm, a rebuttal expert must pass muster under *Daubert* and Rule 702, just as any other expert would. *See, e.g., Maldonado*, 2021 WL 1947512, at *16-17 (excluding rebuttal expert opinion because “[h]e is not qualified under standard *Daubert* principles”). TR never explains how measuring individuated consumer preferences would assist the Court in its class certification inquiry when the UCL tests use objective measurements. Nor does TR respond to Plaintiffs’ point that Kivetz himself offers no evidence that consumer preferences would differ, despite claiming that is the only metric to reasonably evaluate whether privacy harm occurred. *See* Mot. at 7.

It is apparent that Kivetz does not merely intend, as TR suggests (at 7), to help the Court understand two footnotes in the background section of Turow’s report—though an outsized amount of space is dedicated to that purpose in both TR’s opposition and Kivetz’s report itself.³ Instead, Kivetz’s report offers the Court an alternative way to measure harm in this case. But Kivetz’s approach prioritizes the subjective responses of individual consumers as a measurement of harm, rather than an objective, rights-based approach that is responsive to Plaintiffs’ theory of harm. *See* Mot. at 6; ECF No. 151-14 (Kivetz Rep.) ¶¶ 49-55. TR asks (at 15) the Court to kick the question of “chosen methodology” down the road because it is “not the proper subject of a *Daubert* determination.” But this is wrong. Whether an expert’s methodology can help the Court to answer a relevant issue is precisely within *Daubert*’s purview. “The ‘fit’ question is one of relevance,” *Rearden*, 2021 WL 6882227, at *5, and “[r]elevancy depends on the particular law at issue.” *Messick v. Novartis Pharms. Corp.*, 747 F.3d 1193, 1197 (9th Cir. 2013). Kivetz’s chosen methodology—relying on individuated consumer opinions about CLEAR to determine whether a privacy harm has occurred—is not applicable to the Court’s objective inquiry under the UCL. *Cf. Red*, 2011 WL 4599833, at *13 (noting Kivetz’s

³ And if this were Kivetz’s sole purpose, as Plaintiffs explain in their Motion, Kivetz does a lackluster job. *See* Mot. at 7 (pointing out that Kivetz fails to offer any *evidence* about consumer preferences regarding CLEAR or even preferences about privacy generally); *id.* at 10 (showing that Kivetz’s review of Turow’s surveys was inadequate).

individuated analysis of consumer harm was not relevant where plaintiffs need not show individual reliance). Because his methodology does not “fit” this case, Kivetz does not pass muster under *Daubert* and, moreover, fails to offer the Court any insight about Turow’s report.

3. Kivetz unquestioningly assumes TR’s positions and fails to substantiate his opinions.

TR gives no response whatsoever to Plaintiffs’ critique that Kivetz parrots the views of TR’s employee Kevin Appold without critical engagement. *See* Mot. at 9-10. But Appold’s view does not transform into consumers’ actual beliefs about CLEAR just because Kivetz is willing to swallow it hook, line, and sinker. *See Stephens v. Union Pac. R.R. Co.*, 935 F.3d 852, 857 (9th Cir. 2019); *Caldwell*, 2021 WL 1391464, at *5 (“[C]ourts have rejected attempts to use experts as mere ‘conduits’ for otherwise inadmissible evidence.” (citation omitted)). But even without that problem, Kivetz’s failure to substantiate his opinions runs through the main conclusions of his report. Although TR blusters (at 12 n.4) about the sheer number of sources Kivetz cites, it has no response to Plaintiffs’ argument that Kivetz’s core conclusions are unsupported. *See* Mot. at 8-9. Kivetz must be able to support his opinions with something other than his view that “it is so.” *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 424 (5th Cir. 1987). Either of these arguments—to which TR has *no* adequate response—is an independent reason to exclude or limit Kivetz’s testimony.

As shown in its opposition to class certification, TR does not only use Kivetz to rebut Turow’s survey evidence. Instead, it attempts to use Kivetz’s unsubstantiated opinions to argue that harms among the class are not common or that, if they are, individual considerations will predominate. *See* ECF No. 150-4 at 20. But (1) this topic is beyond the scope of Kivetz’s expertise, (2) his methodology is a poor fit for the issues in this case, and (3) his unsubstantiated conclusions are simply too speculative to be properly admissible. The Court should exclude his report from consideration at class certification.

B. The Court should exclude Bambauer’s report because her choice to omit California law renders it unreliable and irrelevant to the issues in this case.

TR gives no response at all to Plaintiffs’ argument that Bambauer’s decision to omit her opinions on California law makes her testimony unreliable. *See* Mot. at 11. Rather than confronting Plaintiffs’ argument that this shows a lack of candor to the Court, TR misdirects, asserting that Bambauer could not discuss

California law in her report because doing so would require her to offer an impermissible legal conclusion. Opp. at 17. But TR cannot have it both ways. Bambauer’s expertise is privacy law, her qualifications are as a professor of privacy law, and her report offers her opinions about U.S. privacy law. No pearl-clutching about offering a legal conclusion prevented TR from offering her opinions on *her* preferred framework for evaluating privacy harm. But at both class certification and on the merits, the Court will look to *California* law and policy, not Bambauer’s personal opinions or an abstracted discussion of general principles. Her opinion is therefore not only unreliable, but irrelevant to the questions the Court will have to resolve.

1. Omitting California specific law and policy renders Bambauer’s report unreliable.

After admitting that Bambauer does not opine on California-specific privacy law and policy, TR claims (at 17) there is “no reason” for her to do so because experts “do not opine on the law.” Of course, courts have long held that experts may testify about issues that involve law without offering an impermissible legal conclusion. *Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998 (9th Cir. 2004) (differentiating proper opinions that rely upon an understanding of specific law from improper opinions that offer an ultimate legal conclusion). And Bambauer’s report in fact does nothing but opine on privacy law and policy.

TR cannot wriggle away from the fact that Bambauer has relevant, well-documented, professional opinions about California privacy policy that she chose not to disclose to the Court. *See* Mot. at 12-14. This is especially pertinent because Bambauer attempts to cast Turow as an extremist when her understanding of California law largely aligns with the opinion Turow gave in his report. The Ninth Circuit has noted that “reliability becomes more, not less, important” when considering “‘experience-based’ expert opinion[s]” because the normal reliability measurements—peer review, routine testing, etc.—may not be present as they would in a science-based expert opinion case. *United States v. Valencia-Lopez*, 971 F.3d 891, 898 (9th Cir. 2020). Even though Bambauer’s “qualifications and experience are relevant” to the matter at hand, those alone “cannot establish the reliability and thus admissibility” of her testimony. *Id.* at 900. By omitting relevant—*central*—opinions that she has expressed in her professional capacity about the way that California values individuals’ right to control their information, Bambauer offers the Court fatally incomplete and unreliable testimony. In any other context, Bambauer would have—and, indeed, has—included California-specific opinions when discussing privacy law and policy. Mot. at 14; *see also, e.g.*, ECF Nos. 159-7, 159-8. This reason

1 alone is sufficient to exclude her testimony from this case, and TR does not respond to it whatsoever.

2 **2. Because Bambauer's report lacks California specific analysis, her opinions are**
3 **irrelevant and fail to engage with Turow.**

4 Bambauer's testimony is separately excludable because her framework is irrelevant to the Court's
5 determination both of class certification and the merits. Plaintiffs' theory of harm for their UCL claim (under
6 either the balancing or tethering test) will require the Court to consider TR's conduct in light of California
7 constitutional or statutory laws and violations of the right to control, as this Court recognized. *See* ECF No.
8 54 at 17-18. And TR offers Bambauer to rebut Turow's opinion that class members have suffered a privacy
9 harm. Opp. at 9-10. But because Bambauer's opinions do not consider California law and policy, her
10 framework is both unresponsive to Turow's opinions and, ultimately, unhelpful to the Court's resolution of
11 relevant questions in this case.

12 TR's argument (at 17-18) that Bambauer need not opine on California law because Plaintiffs do not
13 raise specific California statutory violations fails to persuade. First and foremost, the UCL *is* a California
14 statute that Plaintiffs allege TR violated. But more directly, it is obvious that Plaintiffs' UCL claim will require
15 in-depth engagement with California law and policy. Turow recognizes that California has a comparatively
16 strong privacy scheme that emphasizes individuals' control over their information because he engaged with
17 the *relevant* policies that Bambauer would rather the Court ignore. But Bambauer's own view of privacy is not
18 the metric by which Turow should be measured. Even assuming that her views were widely accepted, which
19 by her own admission they are not, they are at odds with the relevant policies the Court will consider in this
20 case: California's. *See* ECF No. 159-6 at 70:9-11 (Bambauer admitting the framework in her report is not
21 widely used), 93:23-24 (admitting no state has adopted ULC model privacy law she worked on), 72:20-73:3
22 (admitting California privacy is "more restrictive than most other jurisdictions"). In sum, Bambauer utterly
23 fails to engage with Turow on any relevant question—indeed, had she done so, she would have had to
24 acknowledge her many statements and writings on California policy that are consistent with Turow's and
25 unfavorable to TR. The Court should therefore exclude her testimony or, at minimum, strike Part VI of her
26 report.

III. CONCLUSION

For these additional reasons, the Court should exclude Ran Kivetz’s and Jane Bambauer’s opinions or, in the alternative, strike Parts D and E of Kivetz’s report and Part IV of Bambauer’s report for failing to meet the admissibility requirements of expert evidence under Rules 702 and 703.

DATED: March 20, 2023

Respectfully submitted,

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