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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CAT BROOKS and RASHEED
SHABAZZ, individually and on behalf of
all others similarly situated,

Plaintiffs,

v.

THOMSON REUTERS CORPORATION,

Defendant.

Case No. 3:21-cv-01418-EMC

**DEFENDANT THOMSON REUTERS'
OPPOSITION TO PLAINTIFFS'
MOTION FOR CLASS CERTIFICATION**

REDACTED - PUBLICLY FILED
VERSION OF DOC. 150-4
PURSUANT TO COURT ORDER,
DATED MARCH 21, 2023 (DOC. 178)

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

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. STATEMENT OF FACTS	2
A. The CLEAR Platform	2
B. Plaintiffs	3
C. CLEAR searches regarding Plaintiffs	4
D. CLEAR reports regarding Plaintiffs.....	5
E. Plaintiffs’ purported injury.....	6
III. ARGUMENT	7
A. Plaintiffs have not established they have Article III standing.....	7
B. Plaintiffs have not satisfied key requirements of Rule 23(a).	9
1. Plaintiffs are inadequate and atypical because they are subject to unique defenses.....	9
2. Plaintiffs’ purported “common” questions are neither central nor apt to generate common answers.	10
C. Plaintiffs have not satisfied any of the requirements of Rule 23(b).....	14
1. Plaintiffs have not shown a class should be certified under Rule 23(b)(3).	14
a. Plaintiffs have not proven that common issues predominate.	14
i) Plaintiffs have not proven that common issues predominate as to their unjust enrichment claim.	15
ii) Plaintiffs have not proven that common issues predominate as to their UCL claim.....	19
b. Class treatment is not superior to alternative methods of resolution.....	21
2. Plaintiffs have not shown that Rule 23(b)(2) certification of their UCL claim is appropriate.	23
IV. CONCLUSION.....	24

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Adobe Sys. Inc. v. Blue Source Grp., Inc.</i> , 125 F. Supp. 3d 945 (N.D. Cal. 2015)	11
<i>Archer v. Utd. Rentals, Inc.</i> , 195 Cal. App. 4th 807 (2011)	9
<i>Barbosa v. Cargill Meat Sols. Corp.</i> , 297 F.R.D. 431 (E.D. Cal. 2013)	21
<i>Buckeye Tree Lodge & Sequoia Vill. Inn, LLC v. Expedia, Inc.</i> , 2019 WL 1170489 (N.D. Cal. Mar. 13, 2019)	18, 19
<i>Bush v. Lucas</i> , 462 U.S. 367 (1983)	23
<i>Camacho v. Auto. Club of S. Cal.</i> , 142 Cal. App. 4th 1394 (2006)	19
<i>Carpenter v. U.S.</i> , 138 S. Ct. 2206 (2018)	15
<i>Coates v. Utd. Parcel Serv., Inc.</i> , 2019 WL 8884492 (C.D. Cal. July 2, 2019)	19
<i>Comcast Corp. v. Behrend</i> , 569 U.S. 27 (2013)	14, 17, 18, 19
<i>Corvello v. Wells Fargo N.A.</i> , 2016 WL 3995909 (N.D. Cal. Jan. 29, 2016)	14
<i>Diacakis v. Comcast Corp.</i> , 2013 WL 1878921 (N.D. Cal. May 3, 2013)	22
<i>Doe I v. Wal-Mart Stores, Inc.</i> , 572 F.3d 677 (9th Cir. 2009)	12
<i>Ehret v. Uber Techs.</i> , 68 F. Supp. 3d 1121 (N.D. Cal. 2014)	11
<i>Ellis v. Costco Wholesale Corp.</i> , 657 F.3d 970 (9th Cir. 2011)	9
<i>Erica P. John Fund, Inc. v. Halliburton Co.</i> , 563 U.S. 804 (2011)	15
<i>First Nationwide Sav. v. Perry</i> , 11 Cal. App. 4th 1657 (1992)	12, 16

TABLE OF AUTHORITIES

	Page(s)
1 <i>Florey Inst. of Neuroscience & Mental Health v. Kleiner Perkins Caufield &</i>	
2 <i>Byers</i> , 31 F. Supp. 3d 1034 (N.D. Cal. 2014)	11
3 <i>Foster v. Super. Ct.</i> ,	
4 107 Cal. App. 3d 218 (1980).....	17
5 <i>Frieman v. San Rafael Rock Quarry, Inc.</i> ,	
6 116 Cal. App. 4th 29 (2004)	18
7 <i>Goldstein v. ExxonMobil Corp.</i> ,	
8 2019 WL 2603967 (C.D. Cal. Apr. 1, 2019)	14
9 <i>Graham v. VCA Animal Hosps., Inc.</i> ,	
10 729 F. App'x 537 (9th Cir. 2018)	13
11 <i>Greenstein v. Noblr Reciprocal Exch.</i> ,	
12 585 F. Supp. 3d 1220 (N.D. Cal. 2022)	8
13 <i>Haney v. Aramark Unif. Servs., Inc.</i> ,	
14 121 Cal. App. 4th 623 (2004)	17
15 <i>Hanlon v. Chrysler Corp.</i> ,	
16 150 F.3d 1011 (9th Cir. 1998).....	22
17 <i>Hanon v. Dataproducts Corp.</i> ,	
18 976 F.2d 497 (9th Cir. 1992).....	9, 10
19 <i>Henry v. Assocs. Home Equity Servs., Inc.</i> ,	
20 272 B.R. 266 (C.D. Cal. 2002).....	21
21 <i>Herrera v. Svc. Emps. Int'l Union Loc. 87</i> ,	
22 2012 WL 13059697 (N.D. Cal. Apr. 10, 2012)	14
23 <i>Herskowitz v. Apple, Inc.</i> ,	
24 301 F.R.D. 460 (N.D. Cal. 2014).....	12, 13, 19
25 <i>Howard v. Crim. Info Servs., Inc.</i> ,	
26 654 F.3d 887 (9th Cir. 2011).....	22
27 <i>I.C. v. Zynga, Inc.</i> ,	
28 600 F. Supp. 3d 1034 (N.D. Cal. 2022)	8, 15
<i>In re Beer Distrib. Antitrust Litig.</i> ,	
188 F.R.D. 549 (N.D. Cal. 1998).....	10
<i>In re Yahoo! Inc. Customer Data Sec. Breach Litig.</i> ,	
2017 WL 3727318 (N.D. Cal. Aug. 30, 2017).....	20
<i>Janda v. T-Mobile USA, Inc.</i> ,	
378 F. App'x 705 (9th Cir. 2010)	12

TABLE OF AUTHORITIES

	Page(s)
1 <i>Jie v. Liang Tai Knitwear Co.</i> ,	
2 89 Cal. App. 4th 654 (2001)	17
3 <i>Kidd v. Thomson Reuters Corp.</i> ,	
4 299 F. Supp. 3d 400 (S.D.N.Y. 2017).....	2
5 <i>Kwikset Corp. v. Super. Ct.</i> ,	
6 51 Cal.4th 310 (2011)	9
7 <i>Leuthold v. Dest. Am., Inc.</i> ,	
8 224 F.R.D. 462 (N.D. Cal. 2004).....	21
9 <i>Lozano v. AT&T Wireless Servs., Inc.</i> ,	
10 504 F.3d 718 (9th Cir. 2007).....	12, 19, 20
11 <i>Mazza v. Am. Honda Motor Co.</i> ,	
12 666 F.3d 581 (9th Cir. 2012).....	11, 22
13 <i>Menagerie Prods. v. Citysearch</i> ,	
14 2009 WL 3770668 (C.D. Cal. Nov. 9, 2009).....	20
15 <i>N.Y. Times Co. v. Sullivan</i> ,	
16 376 U.S. 254 (1964)	10
17 <i>Nat. Res. Def. Council, Inc. v. Winter</i> ,	
18 508 F.3d 885 (9th Cir. 2007).....	24
19 <i>Nguyen v. Nissan N. Am.</i> ,	
20 932 F.3d 811 (9th Cir. 2019).....	18
21 <i>Nguyen v. Nissan N. Am., Inc.</i> ,	
22 487 F. Supp. 3d 845 (N.D. Cal. 2020)	7
23 <i>Norwest Mortg., Inc. v. Super. Ct.</i> ,	
24 72 Cal. App. 4th 214 (1999)	11
25 <i>Obsidian Fin. Grp., LLC v. Cox</i> ,	
26 740 F.3d 1284 (9th Cir. 2014).....	10
27 <i>Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC</i> ,	
28 31 F.4th 651 (9th Cir. 2022)	14
<i>Parsons v. Ryan</i> ,	
754 F.3d 657 (9th Cir. 2014).....	23
<i>Pro Water Sols., Inc. v. Angie's List, Inc.</i> ,	
2022 WL 9992458 (C.D. Cal. Oct. 17, 2022).....	19
<i>Rejoice! Coffee Co. v. Hartford Fin. Servs. Grp., Inc.</i> ,	
2021 WL 5879118 (N.D. Cal. Dec. 9, 2021)	11

TABLE OF AUTHORITIES

	Page(s)
1 <i>Rosenfeld v. U.S. Dep't of Just.</i> ,	
2 2012 WL 710186 (N.D. Cal. Mar. 5, 2012).....	13
3 <i>Smith v. Keurig Green Mtn., Inc.</i> ,	
4 2020 WL 5630051 (N.D. Cal. Sept. 21, 2020)	12
5 <i>Solis v. Am. Airlines Inc.</i> ,	
6 2022 WL 4359556 (C.D. Cal. Sept. 13, 2022).....	19
7 <i>Starkman v. Mann Theatres Corp.</i> ,	
8 227 Cal. App. 3d 1491 (1991).....	17
9 <i>Tarlesson v. Broadway Foreclosure Invs., LLC</i> ,	
10 184 Cal. App. 4th 931 (2010)	16
11 <i>Tomlinson v. County of Alameda</i> ,	
12 54 Cal.4th 281 (2012)	17
13 <i>TransUnion LLC v. Ramirez</i> ,	
14 141 S. Ct. 2190 (2021).....	7, 8
15 <i>U.S. Dep't of Just. v. Reps. Comm. for Freedom of Press</i> ,	
16 489 U.S. 749 (1989).....	22
17 <i>Wal-Mart Stores, Inc. v. Dukes</i> ,	
18 564 U.S. 338 (2011).....	7, 10, 24
19 <i>Williams v. Apple, Inc.</i> ,	
20 338 F.R.D. 629 (N.D. Cal. 2021).....	24
21 <i>Zinser v. Accufix Rsch. Inst., Inc.</i> ,	
22 253 F.3d 1180 (9th Cir. 2001).....	22
23 STATUTES	
24 Cal. Bus. & Prof. Code § 17200 <i>et seq.</i>	1, 9
25 Cal. Fam. Code § 3020.....	17
26 California Consumer Privacy Act, Cal. Civ. Code § 1798.100 <i>et seq.</i>	22
27 Drivers Privacy Protection Act, 18 U.S.C. § 2721 <i>et seq.</i>	22
28 Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 <i>et seq.</i>	22
OTHER AUTHORITIES	
Eduardo Medina, <i>Suspect in California Serial Killings is Charged with 4 More</i> ,	
N.Y. Times (Dec. 28, 2022).....	17

TABLE OF AUTHORITIES

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3 ed. 2022).....	9
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1 **I. INTRODUCTION**

2 CLEAR helps credentialed, authorized subscribers find relevant information about
3 people and businesses. CLEAR subscribers include school districts and universities, public
4 defenders and state attorneys general, departments of health and social services, ethics boards
5 and bar examiners, and banks and credit unions. CLEAR is designed to ensure that its
6 subscribers may access only information to which they are legally entitled and use it only for
7 legally permissible purposes. That information is lawfully obtained from public sources and
8 reputable third parties, and includes nothing that qualified subscribers could not get individually
9 on their own.

10 Plaintiffs believe that combining individually-lawful items of information reduces
11 people's "right to control" information about them without commensurate benefit. They seek to
12 represent a class of essentially every Californian about whom information has been "made
13 available" through CLEAR at any point in the last several years. Yet their claims,¹ which sound
14 in equity, require a careful balancing of the facts and circumstances surrounding the parties to
15 determine whether Thomson Reuters' ("TR") conduct was unjust or unfair. This will require
16 understanding, for each class member, what categories of information apply to them, whether
17 and how CLEAR was used as to them, how they benefited from CLEAR, and what other impact
18 (if any) CLEAR had on them. Every one of these considerations is fact- and information-
19 specific.

20 The case is not appropriate for class treatment. The central questions will not generate
21 common answers for all, or even most, putative class members, and are overwhelmed by
22 individualized issues. The named Plaintiffs were obviously chosen because of some of the
23 categories of information applicable to them, and although they still suffered no concrete injury,
24 they are inadequate and atypical. Certifying a class based on Plaintiffs' theory of injury, without
25 regard to the social benefits and policies served by CLEAR or how those affect individual class

26 _____
27 ¹ Unjust enrichment (seeking monetary relief and certification under Fed. R. Civ. P. 23(b)(3)),
28 and violation of Cal. Bus. & Prof. Code § 17200 *et seq.* ("UCL") (seeking injunctive relief and
certification under Rule 23(b)(3) or Rule 23(b)(2), or a public injunction).

members, would have far-reaching unintended consequences that would cause substantial harm to putative class members. And Plaintiffs have not met their burden to show that the sweeping injunction they seek is appropriate relief—or would be remotely beneficial—for the class as a whole. Plaintiffs’ Motion should be denied.

II. STATEMENT OF FACTS

A. The CLEAR Platform

CLEAR makes it easier for credentialed subscribers (also “customers”) to find relevant information about people and businesses. The information comes from public records, reputable third-party licensors, and the internet. The information will vary depending on the search terms used, the subject of the search (different types, content, and quantities of records are available for different people), customer type (not all information is available to all customers), source (e.g., different states make different records available²), purpose of the use (records are filtered based on the customer’s permissible purpose), and many other factors. CLEAR is designed with robust, layered protections to ensure that its customers may access only the information to which they are legally entitled, and TR proactively monitors for misuse and enforces these protections rigorously.³ Appold Decl. ¶¶ 11, 12; *id.*, Ex. B-1.

A complete list of all active CLEAR customers as of October 19, 2022, accompanies this brief. Appold Decl., Ex. B-2. Those customers include the offices of state and federal public defenders,⁴ city and county attorneys,⁵ attorneys general,⁶ legal services organizations,⁷ courts,⁸

² E.g., CLEAR might display records of arrests and convictions based on uniform offense codes published by the National Crime Information Center. Plaintiffs argue that this information might include “whether a person had an abortion” (Mot. at 3), but this is misleading; what CLEAR might display (to certain customers, under certain circumstances) is records of crimes, and in some states (*not* California), “illegal abortion” is among those crimes. Ex. B: Declaration of Kevin Appold (“Appold Decl.”) ¶ 6.

³ *See also Kidd v. Thomson Reuters Corp.*, 299 F. Supp. 3d 400, 407 (S.D.N.Y. 2017) (TR “takes affirmative steps—through both words and actions—at every stage of the customer acquisition, application, contracting, and support processes” to ensure appropriate use of CLEAR) *aff’d*, 925 F.3d 99 (2d Cir. 2019).

⁴ E.g., [REDACTED]

1 bar associations, bar examiners, ethics boards, boards of dental examiners, medical boards,
 2 departments of social services and child support services, state and county health departments,
 3 county coroners' offices, state senate security, state workers' compensation boards, public
 4 utilities districts, police departments, credit unions, banks, school districts, universities and
 5 graduate schools, and federal government agencies.⁹

6 These customers may use CLEAR only for legally permissible purposes, all of which
 7 serve compelling market or public welfare needs. *See* Ex. A: Declaration of Susan D. Fahringer
 8 ("Fahringer Decl."), Ex. A-1, at 17. CLEAR is used, for example, to detect, investigate, and
 9 combat fraud (e.g., identity theft and fraud in government benefits programs); to support
 10 regulatory compliance programs (e.g., anti-money laundering regulations);¹⁰ to combat drug and
 11 human trafficking;¹¹ to investigate and prevent crime (CLEAR was instrumental in preventing
 12 additional deaths in connection with a 2015 mass shooting in San Bernardino,¹² for example); to
 13 help public defenders defend the accused;¹³ and to locate recipients of government benefits so
 14 that they may receive any support to which they are entitled.¹⁴

15 **B. Plaintiffs**

16 Both Plaintiffs are self-described activists who have achieved notoriety in their
 17 communities and sought media attention on issues they care about. *See, e.g.*, Doc. 145, ¶¶ 3, 51;

19 ⁵ *E.g.*, [REDACTED]

20 [REDACTED].

21 ⁶ *E.g.*, [REDACTED]

22 ⁷ *E.g.*, [REDACTED]

23 ⁸ [REDACTED]

24 ⁹ The subscribers do not include (and have never included) [REDACTED]
 notwithstanding Plaintiffs' unsupported statement to the contrary. *See* Mot. at 3; Appold Decl.
 25 ¶ 13, Ex. B-2.

26 ¹⁰ Appold Decl. ¶ 14.

27 ¹¹ *Id.*; Ex. D, Declaration of Derek Maltz ("Maltz Decl."), *passim*.

28 ¹² Ex. C, Declaration of Daani-Ruth Svonkin ("Svonkin Decl.") ¶¶ 5-8; *id.*, Ex. C-1.

¹³ Svonkin Decl. ¶ 14(e)

1 Fahringer Decl., Ex. A-2 at 109:3-110:20 (Brooks); *id.* Ex. A-3 at 214:1-217:18 (Shabazz). Ms.
 2 Brooks ran for Mayor of Oakland in 2018, has authored content about herself on multiple
 3 websites, has been publicly interviewed many times, and is an actress. Fahringer Decl., Ex. A-2
 4 at 105:15-106:13, 109:3-110:20 (mayoral run and website); 91:13-93:14 (information available
 5 online); 112:13-15 (actress); *id.*, Exs. A-4, A-5 (websites). She has a Wikipedia page, an IMDb
 6 page, and a public Twitter account with more than 10,000 followers. *Id.*, Exs. A-6 (Wikipedia),
 7 A-7 (IMDb), A-8 (press), A-2 at 98:5-101:5 (press and Wikipedia), 114:13-115:20 (Twitter).
 8 She considers herself a public figure. *Id.*, Ex. A-2 at 132:17 (“I’m a public figure”). Like Ms.
 9 Brooks, Mr. Shabazz has made a great deal of information about himself publicly available. He
 10 has been the subject of public news articles and has thousands of followers on his public Twitter
 11 account. *Id.*, Ex. A-3 at 263:5-263:13. He is a journalist as well as an activist (Doc. 145 ¶ 51)
 12 and uses public records requests for work and personal research. *Id.* at 104:4-104:15.

13 C. CLEAR searches regarding Plaintiffs

14 Exhibits B-4 (Brooks) and B-5 (Shabazz) to the Declaration of Kevin Appold identify
 15 every search that has been conducted since 2016 on the Plaintiffs’ current or former names or
 16 social security numbers, excluding attorney work product searches for this case. Other than
 17 searches by Plaintiffs’ own investigator,¹⁵ only three customers conducted searches that appear
 18 to regard Ms. Brooks.¹⁶ Of these, only [REDACTED] generated a report. One customer searched
 19 regarding Mr. Shabazz.¹⁷ Other searches were conducted on his former name by other
 20 customers [REDACTED] but those
 21 probably regarded a different person of the same name, illustrating the difficulty of identifying
 22 the information that Mr. Shabazz should “control.”

23
 24 ¹⁴ Svonkin Decl. ¶ 14(b).

25 ¹⁵ [REDACTED] See Fahringer Decl., Ex. A-2 at 213:4-214:16; Ex. A-3
 at 239:11-240:12.

26 ¹⁶ [REDACTED] (on July 7, 2021), [REDACTED] (on Nov. 21, 2017), and
 27 [REDACTED] (on Dec. 10, 2017). [REDACTED] search probably did not relate to
 Ms. Brooks; it was for a social security number that was not hers.

28 ¹⁷ [REDACTED] on August 2, 2016.

D. CLEAR reports regarding Plaintiffs

Plaintiffs’ investigator generated several reports regarding Plaintiffs,¹⁸ and, to respond to discovery in this case, TR created a report for each plaintiff that showed all information associated with them that is available through CLEAR.¹⁹ A report for Ms. Brooks that was generated by her investigator is 9 pages long. Fahringer Decl., Ex. A-9. The report that TR generated in response to discovery is 3,035 pages long, but all but 15 of those pages are the results of an internet search for the words “cat” and “brooks,” and most of those articles discuss cats, brooks, and other subjects entirely unrelated to Ms. Brooks.²⁰ *Id.* The remaining 15 pages contain largely public record information such as secretary of state records for business affiliations and property records. *Id.* The report generated by Plaintiffs’ investigator for Mr. Shabazz is 10 pages long. Fahringer Decl., Ex. A-10. The version TR generated is 366 pages long (Mura Decl., Ex. 74) but, as with Ms. Brooks, all but 16 of those pages are the results of an internet search for “Rasheed Shabazz” and include many articles that have nothing to do with him,²¹ and the remaining 16 pages contain information largely drawn from public records. *Id.* Plaintiffs’ investigator also generated five “Risk Inform” reports for the named Plaintiffs (no other customers generated Risk Inform reports for either plaintiff) and the differences between these reports illustrate how such reports can vary even for the same person.²²

¹⁸ Fahringer Decl., Exs. A-9, A-10, A-11, A-12.

¹⁹ Declaration of Andre M. Mura in Support of Plaintiffs’ Motion for Class Certification (“Mura Decl.”), Ex. 73, Dkt 128-01 (Brooks); *id.*, Ex. 74, Dkt. 129-01 (Shabazz).

²⁰ *See, e.g.*, Mura Decl., Ex. 73, Dkt. 128-01, at TR-BROOKS005236-37 (discussing a horse named Rose Colored Cat and an owner named Brooks).

²¹ *See, e.g., id.*, Ex. 74, Dkt. 129-01, at TR-BROOKS008397 (2011 article discussing the football player “Al-Rasheed Benton, Shabazz”).

²² For example, Plaintiffs’ investigator generated two “Risk Inform” reports for Plaintiff Brooks’ former name. Each resulted in a different “risk inform score.” *Compare* Fahringer Decl., Ex. A-11 *with id.*, Ex. A-12.

1 **E. Plaintiffs’ purported injury**

2 Ms. Brooks testified that she is unaware of anything bad happening to her due to
3 CLEAR. Fahringer Decl., Ex. A-2 at 274:7-274:10. She does not believe CLEAR caused her to
4 pay any money she otherwise would not have paid or to lose any property that she otherwise
5 would have had. *Id.* at 273:22-274:5. She does not know whether CLEAR reduced the value of
6 her personal information. *Id.* at 272:2-272:22. She does not know whether CLEAR will cause
7 her any harm in the future, or when that might occur. *Id.* at 275:7-276:4. She believes CLEAR
8 harms her privacy by taking away her “right to decide who sees [her] information.” *Id.* at 269:2-
9 13. This includes any information about her, even information she herself made public. *Id.* Mr.
10 Shabazz testified that he was unaware of the sole CLEAR search on his name until after he filed
11 the complaint. Fahringer Decl., Ex. A-3 at 286:14-287:12. The only harm from CLEAR he
12 could identify was “just this product being created and used to monetize [his] life or
13 representations of [him]” and that CLEAR “hurts [his] feelings.” *Id.* at 290:16-292:1.

14 According to Plaintiffs, CLEAR “deprive[s] [putative class members] of their right to
15 exercise control over the use of their personal information.” Mot. at 18. In support, they cite the
16 report of Professor Joseph Turow, but his opinions are not admissible evidence of cognizable or
17 concrete harm to anyone, including Plaintiffs.²³ By “right to control,” Turow means “the right to
18 decide whether a company should even have that information,” Fahringer Decl., Ex. A-13 at
19 196:1-3, which he describes as an “ethical and social right,” not a legal right. *Id.* at 174:18-
20 175:2. But the California Legislature has decided what types of information require consent and
21 under what circumstances, and TR honors that. Appold Decl. ¶ 10. Prof. Turow’s “right,” on the
22 other hand, is violated whenever a company “collects” *any* information about a person.
23 Fahringer Decl., Ex. A-13 at 198:1-198:7. In short, it is violated by the internet and every search
24

25 _____
26 ²³ As discussed in the rebuttal expert reports of Dr. Ran Kivetz and Professor Jane Bambauer,
27 the Turow report is unsupported by any empirical evidence and contradicted both by his own
28 research and the peer-reviewed studies of others. His theory of harm would “render the Google
search bar harmful” and contradict consumer expectations and basic tenets of U.S. privacy law.
Fahringer Decl., Ex. A-14 (Kivetz Report) Parts D, E; A-1 (Bambauer Report) at 10.

1 engine, and by every company that needs information about a person for any of the beneficial
2 purposes served by CLEAR.

3 Prof. Turow believes TR causes this harm whenever it “collects its own information,”
4 even if it does nothing more, even as to publicly available information, and regardless of
5 whether anyone sees the information. *Id.* at 166:13-168:11. He has no opinion on how to
6 measure (or even discern) any incremental harm to Plaintiffs’ “loss of control” that was caused
7 by TR. *Id.* at 128:1-13. According to him, “millions of companies” other than TR “interfere”
8 with this “right” “every minute.” *Id.* at 65:12-66:16. He believes *when* a person loses that
9 control might vary depending on the person. *Id.* at 79:2-79:4. According to his research, many
10 Americans feel that they have already lost the ability to control their information. *Id.* at 70:18-
11 71:5; 77:4-77:15. And under his personal opinion, they have.

12 Prof. Turow does not opine that CLEAR caused economic harm or loss of property. *Id.*
13 at 184:8-185:22. He “has no idea” how many Californians would not object to “their
14 information” being made available through CLEAR. *Id.* at 191:19-22. He does not take into
15 account any of the benefits of CLEAR and offers no opinion on balancing the harm and utility
16 of TR’s conduct. *Id.* at 112:5-112:21.

17 **III. ARGUMENT**

18 This Court must conduct a “rigorous analysis” to determine whether a party seeking
19 certification has “affirmatively demonstrate[d] compliance with Rule 23.” *Wal-Mart Stores, Inc.*
20 *v. Dukes*, 564 U.S. 338, 350-51 (2011) (cleaned up). When a plaintiff fails to carry this burden,
21 class certification must be denied. *Nguyen v. Nissan N. Am., Inc.*, 487 F. Supp. 3d 845, 860
22 (N.D. Cal. 2020).

23 **A. Plaintiffs have not established they have Article III standing.**

24 For each claim and each form of relief they seek, Plaintiffs must prove that they,
25 personally, suffered injury in fact that is concrete, particularized, traceable to the conduct that
26 forms the basis for their claims, and redressable. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190,
27 2203 (2021). Plaintiffs have not satisfied these requirements.

1 **First**, Plaintiffs’ “right to control” theory of injury is not concrete because it does not
 2 bear a “close relationship” to harms “traditionally recognized as providing a basis for a
 3 lawsuit.” *Id.* According to Plaintiffs and their expert, this “right” extends to the collection of any
 4 information about them, even if it is publicly available and never disclosed to a third party. *See*
 5 *supra* Part II.D. Plaintiffs could not identify anything that happened to them as a result of TR’s
 6 alleged violation of this “right.” *Id.* Their alleged “injury” therefore does not bear a close
 7 relationship to any traditionally recognized privacy harm. *See, e.g., TransUnion*, 141 S. Ct. at
 8 2209 (“the mere existence of inaccurate information in database is insufficient to confer Article
 9 III standing”) (citation omitted); *I.C. v. Zynga, Inc.*, 600 F. Supp. 3d 1034, 1049-50 (N.D. Cal.
 10 2022) (exposure of usernames, email addresses and phone numbers not sufficiently related to
 11 traditional privacy torts).

12 Plaintiffs also alleged that they were injured because TR did not pay them. *See* Doc. 145
 13 ¶¶ 100, 101; Mot. at 1. But failure to pay cannot be a concrete injury unless Plaintiffs establish
 14 that they were entitled to payment in the first place. Here, Plaintiffs do not contend that their
 15 entitlement is based on contract or quasi-contract.²⁴ Instead, they argue that they are entitled to
 16 payment because TR reduced their “right to exercise control” over information about them.
 17 Mot. at 2. Plaintiffs’ “failure to pay” theory is therefore based entirely on their “lost control”
 18 theory of harm, and it fails for the same reasons.

19 **Second**, Plaintiffs’ purported injury is not traceable to TR’s conduct, because they have
 20 not established that they had control of “their” information in the first place or that any loss of
 21 control was due to TR’s actions rather than the actions of others (including themselves). *See*
 22 *supra* Part II.D; *Greenstein v. Noblr Reciprocal Exch.*, 585 F. Supp. 3d 1220, 1231 (N.D. Cal.
 23 2022) (no traceability for future harm from data breach because “[i]nformation is widely
 24 available on the internet”).

25
 26
 27
 28 ²⁴Indeed, Plaintiffs concede that TR obtains the information at issue *not* from them, but from
 third parties. Doc. 145 ¶ 16.

1 **B. Plaintiffs have not satisfied key requirements of Rule 23(a).**

2 Plaintiffs have not shown that they are adequate or typical of class members as required
3 by Rule 23(a)(3) and (4), or that a question that will drive the resolution of their claims will
4 generate common answers for all class members as required by Rule 23(a)(2). Each of these
5 failures independently precludes certification.

6 1. Plaintiffs are inadequate and atypical because they are subject to unique
7 defenses.

8 To certify a class, Plaintiffs must establish that their “claims or defenses ... are typical
9 of the claims or defenses or the class” and that they “will fairly and adequately protect the
10 interests of the class.” Fed. R. Civ. P. 23(a)(3)-(4). These requirements often overlap, and courts
11 frequently analyze them together. *See, e.g.,* 1 Herbert B. Newbert et al., *Newberg and*
12 *Rubenstein on Class Actions* § 3:32 (6th ed. 2022). A key consideration in assessing whether the
13 class representatives meet these criteria is whether they are subject to unique defenses that could
14 distract from issues common to the class. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508-09
15 (9th Cir. 1992).

16 Here, both Plaintiffs are subject to such unique defenses. **First**, they seek to represent a
17 class of people who “lost money or property” as the result of TR’s conduct. Doc. 145 ¶ 100. But
18 if any class members lost money or property as the result of TR’s conduct, it was not Plaintiffs.
19 The harm Plaintiffs contend they suffered cannot even support Article III standing, much less
20 constitute lost money or property under the UCL.²⁵

21 **Second**, both Plaintiffs are public figures, or at least limited public figures, *see supra*
22 Part II.B, but most other class members “will not be famous or notorious people who ‘create a
23

24 ²⁵ *See supra* Parts III.A, II.D; *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979, 986 (9th Cir.
25 2011) (Article III standing); Cal. Bus. & Prof. Code § 17204; *Kwikset Corp. v. Super. Ct.*, 51
26 Cal.4th 310, 322 (2011) (lost money or property required for UCL statutory standing); *Archer v.*
27 *Utd. Rentals, Inc.*, 195 Cal. App. 4th 807, 816 (2011) (“Plaintiffs essentially claim the unfair
28 business practice is the unlawful collection and recordation of their personal identification
information [and] ... invasion of their right of privacy, ... [y]et Plaintiffs have failed to
demonstrate how such privacy violation translates into a loss of money or property[, which] is
fatal to Plaintiffs’ UCL class claim....”), *as modified on denial of reh’g* (June 13, 2011).

legitimate and widespread attention to their activities’ because they are in the public eye.” Doc. 53 at 28. Plaintiffs’ public figure status subjects them to unique First Amendment defenses unless the speech at issue is of purely private concern. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280-81 (1964) (actual malice required to regulate speech about public figures). Many uses of CLEAR fall squarely within the realm of public concern, including solving crimes, preventing fraud, ensuring public health benefits are distributed to people who are entitled to them, and many others.²⁶ *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1292 (9th Cir. 2014) (allegations regarding whether someone had been involved in a crime and consumer complaints about non-criminal conduct are matters of public concern, which gave the relevant speech heightened First Amendment protections).

Third, Plaintiffs’ notoriety gives rise to other defenses that will not be typical of the rest of the class, for example, that the availability of information about them elsewhere (and through their own actions) makes collecting information about them (or making it available to authorized customers for permissible purposes) neither “unfair” nor “unjust.” *See supra* Part II.B, *see also infra* Part III.C.1.a.i.

Plaintiffs’ failure to establish they are typical and adequate class representatives, on its own, precludes class certification here. *Hanon*, 976 F.2d at 509 (denying class certification due to the absence of typicality); *In re Beer Distrib. Antitrust Litig.*, 188 F.R.D. 549, 554 (N.D. Cal. 1998) (same, due to the absence of adequacy).

2. Plaintiffs’ purported “common” questions are neither central nor apt to generate common answers.

“What matters to class certification ... is not the raising of common ‘questions’—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation.” *Dukes*, 564 U.S. at 350. Because “any competently crafted

²⁶ If there were a California version of George Santos, for example, CLEAR and products like it would be important tools in investigating his statements. *See N.Y. Rep.-elect George Santos is being investigated for lying about his past*, NPR (Dec. 29, 2022), <https://www.npr.org/2022/12/29/1145950468/n-y-rep-elect-george-santos-is-being-investigated-for-lying-about-his-past>.

1 class complaint literally raises common questions,” Plaintiffs must prove that there are common
 2 questions whose “truth or falsity will resolve an issue that is central to validity of each one of
 3 the claims in one stroke.” *Id.* at 349-50 (cleaned up).

4 Plaintiffs have not satisfied this requirement. **First**, the breadth of the proposed class
 5 precludes common answers to central questions. The proposed class would include people who
 6 were not California residents when TR committed its allegedly wrongful conduct as to them.²⁷
 7 But California law “does not apply where a plaintiff who is not a resident of California brings a
 8 cause of action based on conduct which occurred outside of California.”²⁸ *Adobe Sys. Inc. v.*
 9 *Blue Source Grp., Inc.*, 125 F. Supp. 3d 945, 972 (N.D. Cal. 2015); *see also Ehret v. Uber*
 10 *Techs.*, 68 F. Supp. 3d 1121, 1130 (N.D. Cal. 2014) (“Simply put, ‘the UCL does not apply to
 11 actions occurring outside of California that injure non-residents.’” (citation omitted)). So, as to
 12 those class members, the answer whether TR violated the UCL or was unjustly enriched would
 13 be “no.” Because the proposed class is so broad, none of the questions that are central to
 14 Plaintiffs’ claims will generate common answers for each class member.

15 **Second**, even for those class members whose claims would survive application of the
 16 extraterritoriality doctrine, the issues that Plaintiffs identify as common (*see* Mot. at 11-12;
 17 Doc. 145 ¶ 77) will not generate common answers. To establish unjust enrichment, Plaintiffs
 18 must show that TR received and unjustly retained a benefit at Plaintiffs’ expense under
 19 circumstances, such as “fraud, coercion or duress,” that make it inequitable for it to retain the
 20 benefit without paying for its value. *See Rejoice! Coffee Co. v. Hartford Fin. Servs. Grp., Inc.*,

21 ²⁷ *See, e.g.*, Doc. 91 (1,630 individuals moved from Delaware to California in 2019 alone).

22 ²⁸ The only circumstance in which a nonresident *might* bring a claim based on California law is
 23 when the defendant’s allegedly wrongful conduct occurred within California. *See Norwest*
 24 *Mortg., Inc. v. Super. Ct.*, 72 Cal. App. 4th 214, 224-25 & n.13 (1999). But Plaintiffs
 25 acknowledge that TR is a Canadian corporation headquartered in Canada, (Dkt. 145 ¶ 8) so its
 26 conduct will not have occurred in California. Further, even if TR had collected or “sold”
 27 information from California, the presence of nonresident class members would raise serious
 28 choice-of-law problems. *See Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 591-94 (9th Cir.
 2012) (vacating class certification because the unjust enrichment and consumer protection laws
 of non-resident class members’ home states applied rather than California law), *overruled, in*
part, on other grounds by Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31
 F.4th 651 (9th Cir. 2022).

2021 WL 5879118, at *11 (N.D. Cal. Dec. 9, 2021). This analysis requires careful consideration of the equities at work based on a close examination of the facts. *Florey Inst. of Neuroscience & Mental Health v. Kleiner Perkins Caufield & Byers*, 31 F. Supp. 3d 1034, 1049-50 (N.D. Cal. 2014) (recovery for unjust enrichment is not governed by broad maxims, but a fact-specific balancing of equities). Benefit alone is not enough: to determine whether it would be unjust for the defendant to retain any benefit, a court must understand the circumstances *as between the parties*. See *First Nationwide Sav. v. Perry*, 11 Cal. App. 4th 1657, 1663 (1992) (“The fact that one person benefits another is not, by itself, sufficient to require restitution. The person receiving the benefit is required to make restitution only if the circumstances are such that, *as between the two individuals*, it is unjust for the person to retain it.”) (emphasis added); *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 685 (9th Cir. 2009) (in case where employees of third party suppliers claimed that the defendant was unjustly enriched by their cheap labor, the circumstances between the parties, i.e., “[t]he lack of any prior relationship” between the plaintiffs and the defendant, “preclude[d] the application of an unjust enrichment theory”). For these reasons, “[t]he majority view is that unjust enrichment claims usually are not amenable to class treatment because the claim requires evaluation of the individual circumstances of each claimant to determine whether a benefit was conferred on defendant and whether the circumstances surrounding each transaction would make it inequitable for the Defendant to fail to return the benefit to each claimant.” 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 5:60 (19th ed. 2022).²⁹

UCL “unfairness” requires a similarly individualized analysis. *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 736 (9th Cir. 2007) (“[E]vidence about individual knowledge and expectations may help the court determine the extent of the harm for the purposes of the UCL’s balancing test.”); *Herskowitz v. Apple, Inc.*, 301 F.R.D. 460, 477 (N.D. Cal. 2014) (denying

²⁹ Plaintiffs cite only one California case for the proposition that “[c]lass treatment of unjust enrichment claims is appropriate[.]” Mot. at 19 (citing *Smith v. Keurig Green Mtn., Inc.*, 2020 WL 5630051, at *5 (N.D. Cal. Sept. 21, 2020)). But unlike the instant case, *Smith* dealt with a direct, quasi-contractual relationship between a business and consumers, which was

certification of UCL class because assessing both utility and harm under UCL balancing test would “likely require individualized inquiries”). Plaintiffs try to avoid this requirement by asking the Court to consider some generalized “harm to the public,” Mot. at 12, but the Ninth Circuit has made clear that the relevant consideration for a UCL claim is harm to the *Plaintiffs*. *Janda v. T-Mobile USA, Inc.*, 378 F. App’x 705, 708 (9th Cir. 2010) (“Under the balancing test, Plaintiffs have not plausibly alleged a harm *to them* because they have not shown an actionable misrepresentation by T-Mobile.” (emphasis added) (citing *Samura v. Kaiser Found. Health Plan, Inc.*, 17 Cal. App. 4th 1284, 1299 n.6 (1993) (observing that the “unfairness” prong of the UCL “does not give courts a general license to review the fairness of contracts”))); *see also* *Graham v. VCA Animal Hosps., Inc.*, 729 F. App’x 537, 540 (9th Cir. 2018) (citation omitted) (relevant consideration is “harm to the alleged victim”).

Whether TR’s conduct was “unjust” or “unfair” as to any class member requires careful consideration of, among other things, the category and content of the information at issue, whether it was returned in response to a search query, whether the query regarded the class member or someone else, what customer conducted the search, for what purpose, what happened as a result (including the benefits and harms, if any), and many other factors.³⁰ These questions will not generate common answers for all, or even most, class members.³¹ This need for individualized analysis negates every one of Plaintiffs’ “common” questions.

straightforward and the same for all class members. Even then, the Court expressly recognized that its certification of an unjust enrichment claim was exceptional. *Id.*

³⁰ Courts often balance privacy harms against the social utility of disclosing information, and examine fact-intensive circumstances to reach a just result. For example, in considering disclosure of information in response to a FOIA request, courts consider the categories of information at issue; the age and volume of the records being disclosed; the “public figure” statute of the individual; the potential stigma resulting from the disclosure; and the public’s interest in the disclosure. *See, e.g., Rosenfeld v. U.S. Dep’t of Just.*, 2012 WL 710186, at *5 (N.D. Cal. Mar. 5, 2012) (Chen, J.).

³¹ Even Ms. Brooks believes that each class member’s “injury” is individualized, “given the fact that what’s in there changes, and who may want to access it, for whatever purposes at any time, [which] could shift between tomorrow and next month or next year.” Fahringer Decl., Ex. A-2 at 275:7-276:4.

Even more fundamentally, the business practice on which Plaintiffs base their UCL claim (“offering Californians’ personal information for sale without their consent,” Mot. at 2) is too vague to allow the Court even to assess whether any issue is common. To establish unfair conduct, Plaintiffs must begin by identifying, with some particularity, the business practice at issue and the proof that will resolve some central issue. *See Herskowitz*, 301 F.R.D. at 476 (denying class certification where Plaintiffs identified no “business practice [] amenable to some degree of precise definition.”); *Corvello v. Wells Fargo N.A.*, 2016 WL 3995909, at *6 (N.D. Cal. Jan. 29, 2016) (commonality analysis fails where “Plaintiffs...have posed the question at an exceedingly high level of generality”), *supplemented*, 2016 WL 4059181 (N.D. Cal. Apr. 18, 2016). The overly general business practice on which Plaintiffs base their claims therefore precludes finding any common issue and is fatal to Plaintiffs’ motion to certify a UCL class.

C. Plaintiffs have not satisfied any of the requirements of Rule 23(b).

Even if Plaintiffs had satisfied every requirement of Rule 23(a), they also must “satisfy through evidentiary proof at least one of the provisions of Rule 23(b).” *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). Plaintiffs seek certification under Rules 23(b)(3) and 23(b)(2) but have failed to show that certification is proper under either one.

1. Plaintiffs have not shown a class should be certified under Rule 23(b)(3).

Rule 23(b)(3) is an “adventuresome innovation,” “designed for situations in which class-action treatment is not as clearly called for.” *Id.* at 34 (cleaned up). Plaintiffs have failed to establish predominance and superiority as required by Rule 23(b)(3).

a. *Plaintiffs have not proven that common issues predominate.*

The predominance inquiry is “far more demanding” than the commonality inquiry, and “asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.” *Olean Wholesale Grocery*, 31 F.4th at 664 (citation omitted). A court “does not have th[e] luxury in performing the rigorous analysis required under Rule 23” to review predominance at a “high level of

generality.” *Goldstein v. ExxonMobil Corp.*, 2019 WL 2603967, at *3 (C.D. Cal. Apr. 1, 2019) (citing *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011)); *see also* *Herrera v. Svc. Emps. Int’l Union Loc. 87*, 2012 WL 13059697, at *6-7 (N.D. Cal. Apr. 10, 2012) (rejecting “seductively simple” class certification argument because “[c]lass certification does not proceed at such a high level of generality”).

- i) Plaintiffs have not proven that common issues predominate as to their unjust enrichment claim.

The Court’s consideration of predominance “begins [] with the elements of the underlying cause of action.” *Erica P. John Fund, Inc.*, 563 U.S. at 809. Unjust enrichment claims require careful analysis of the facts and circumstances between the parties to assess the equities at work, and therefore are not amenable to class treatment. *See supra* Part II.B.3. Here, the facts and circumstances that will drive the determination whether TR was unjustly enriched will vary for every class member. For example, Plaintiffs base their claim on their belief that TR caused class members to lose “control” of “their information.” But to determine whether this is true for any class member requires understanding the facts and circumstances of that class member. This begins with understanding what “their” information means. This is important, because information often regards more than one person, and not all information about a person implicates privacy concerns, at all or at the same level.³² *See, e.g., Carpenter v. U.S.*, 138 S. Ct. 2206, 2218 (2018) (evaluating privacy implications of data disclosures based on the type of data being disclosed). Plaintiffs try to sidestep this difficulty by defining the term circularly, with possessives that assume ownership (“all persons ... whose information ...,” Mot. at 10). But the Court, and TR, cannot determine whether TR caused any class member to “lose control” of “their information” without knowing what that information is. The answer requires

³² Even Plaintiffs themselves disagree as to the information they consider problematic. *Compare* Fahringer Decl. Ex. A-2 (Brooks Tr. 70:2-18) (Brooks believes “all” information about her is personal information, except for her name)), *with id.* Ex. A-3 (Shabazz Tr. 127:2-128:8) (information such as one’s race and gender might constitute personal information for some people, but not others). And their expert believes that “all” information about a person qualifies, even if it is public. *Id.*, Ex. A-13, at 148:2-15.

individualized analysis. *I.C.*, 600 F. Supp. 3d at 1054 (injury depends on “specific information” at issue, existence of market for that information, and plaintiff intent and ability to participate in that market). The Court cannot conduct the rigorous analysis necessary to determine whether Rule 23 is satisfied based on Plaintiffs’ hand-waving, circular definition of the information on which their claims rest. In addition, even if the information were identified, determining whether any class member lost control of it due to TR’s conduct would require further individualized analysis, including whether and when the class member had control of the information and whether any “loss” of control was due to TR’s actions or the actions of others.³³ *See supra* Part II.D. The answers to these questions are critical to resolving any class member’s unjust enrichment claim, and they will differ for each class member.

Another key driver of the unjust enrichment analysis is whether sustaining an unjust enrichment claim would frustrate a public policy. *See First Nationwide Sav.* 11 Cal. App. 4th at 1663 (“Determining whether it is unjust for a person to retain a benefit may involve policy considerations. ... The desirability of allowing a party to retain the benefit of his or her bargain may preclude the injured party from receiving restitution.”); *Tarlesson v. Broadway Foreclosure Invs., LLC*, 184 Cal. App. 4th 931, 938 (2010) (application of unjust enrichment can “involve[] no violation or frustration of law or opposition to public policy, either directly or indirectly” (quotation omitted)). The table below identifies some of the ways in which CLEAR has been used and some important public policies served by each use:

Use	Public Policy Served
To find missing children and reunite them with their parents. <i>See Svonkin Decl. ¶ 14(a); id.</i> , Ex. C-2.	Cal. Fam. Code § 3020 (recognizing California public policy “that children have the right to be safe” and that children have continuing contacts with parents).
To facilitate the provision of pensions to retirees. <i>Svonkin Decl. ¶ 14(a).</i>	<i>Starkman v. Mann Theatres Corp.</i> , 227 Cal. App. 3d 1491, 1499-1500 (1991) (“Encouraging and enabling citizens to enjoy life and the benefits of our society as they reach an elderly age is a favored public policy.”).

³³According to counsel for Plaintiffs, even the “manner of collecting” information will affect the analysis, because it is “relevant to understanding the nature at which the information might impact the interests of Californians.” *Fahringer Decl.*, Ex. A-15.

Use	Public Policy Served
To combat government benefits fraud. <i>See</i> Svonkin Decl. ¶ 14(h); <i>id.</i> , Ex. C-3.	<i>Haney v. Aramark Unif. Servs., Inc.</i> , 121 Cal. App. 4th 623, 629 (2004) (“[T]he public policy of discouraging fraud constitutes a fundamental public policy of California....”).
To identify owners of properties in need of environmental cleanup. Svonkin Decl. ¶ 14(b).	<i>Tomlinson v. County of Alameda</i> , 54 Cal.4th 281, 285 (2012) (noting “California’s strong public policy of protecting the environment.”).
To investigate crimes. <i>See</i> Svonkin Decl., ¶ 9-10; Maltz Decl., <i>passim</i> .	“[A] law represents a fundamental public policy when the conduct it proscribes is punishable as a crime.” <i>Jie v. Liang Tai Knitwear Co.</i> , 89 Cal. App. 4th 654, 688 n. 6 (2001).
To defend the criminally accused, or exonerate the wrongfully convicted. Svonkin Decl. ¶ 14(d).	“Criminal discovery is based on the fundamental proposition that (an accused) is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information...[T]he state has no interest in denying the accused access to all evidence that can throw light on the issues in the case” <i>Foster v. Super. Ct.</i> , 107 Cal. App. 3d 218, 227 (1980) (cleaned up).

Determining whether any class member’s unjust enrichment claim would frustrate these policies, or others, will require understanding, as to each class member and “their” information, what customer accessed the information (if any), for what purpose, and whether a public policy is served by that use, among other things. For example, law enforcement searching CLEAR for information about accused Stockton, California, serial killer (and putative class member) Wesley Brownlee³⁴ would implicate different policies than a search by a class action administrator to send settlement notice to the right address.³⁵ The analysis is necessarily individualized because each use of CLEAR may implicate different California public policies depending on a variety of factors, including the customer and purpose of the use.

Further, individual issues predominate with respect to the monetary relief Plaintiffs seek. To certify a class under Rule 23(b)(3), Plaintiffs must prove that “damages are capable of

³⁴ Eduardo Medina, *Suspect in California Serial Killings is Charged with 4 More*, N.Y. Times (Dec. 28, 2022), <https://www.nytimes.com/2022/12/28/us/stockton-serial-killer-murder-charges.html>.

³⁵ Appold Decl., Ex. B-5, at TR-BROOKS425994.

1 measurement on a classwide basis.” *Behrend*, 569 U.S. at 34. This is true even when the
 2 monetary relief is disgorgement. *Buckeye Tree Lodge & Sequoia Vill. Inn, LLC v. Expedia, Inc.*,
 3 2019 WL 1170489, at *5 (N.D. Cal. Mar. 13, 2019) (denying 23(b)(3) class certification
 4 because Plaintiffs’ nonrestitutionary disgorgement model was not sufficiently related to theory
 5 of liability). Courts must conduct a “rigorous analysis” to ensure that the proposed damage
 6 methodology identifies the amount that is “the result of the wrong” and “measure[s] only those
 7 damages attributable to that theory.” *Behrend*, 569 U.S. at 35-37 (cleaned up).

8 Here, Plaintiffs’ theory of liability is that TR’s “collection” of information about class
 9 members is unjust, and they seek disgorgement of “the company’s net profits from CLEAR that
 10 are attributable to the use of the class members’ personal data.” Mot., at 20. But the
 11 methodology proposed by Plaintiffs’ expert witness does not correspond to that theory for at
 12 least two reasons. **First**, their expert offers no methodology to distinguish between just and
 13 unjust aspects of CLEAR, even though Plaintiffs’ theory of liability would entitle them only to
 14 disgorgement of “unjust” profits. *Id.* Fahringer Decl., Ex. A-16 at 101:8-15 (methodology did
 15 not account “for just portions of CLEAR or unjust portions of CLEAR.”); *see also id.*, Ex. A-
 16 17, at 19. **Second**, the methodology offered by Plaintiffs’ expert does not measure “net profits,”
 17 Mot. at 20 (emphasis added), but rather only “gross profits,” so it does not even correspond to
 18 the amount plaintiffs claim to seek in disgorgement. Fahringer Decl., Ex. A-17, Part 6.3.1.

19 Another flaw in Plaintiffs’ damages methodology is that it does not account for the need
 20 to allocate monetary relief among class members.³⁶ While “uncertainty regarding class
 21 members’ damages does not prevent certification of a class,” Plaintiffs still must propose “a
 22 valid method...for calculating those damages.” *Nguyen v. Nissan N. Am.*, 932 F.3d 811, 817
 23 (9th Cir. 2019) (quotation omitted). This is required for disgorgement of profits as well as

24 ³⁶ Plaintiffs do not even state outright that they believe profits should be allocated equally
 25 among class members. But equal allocation would treat all class members the same, regardless
 26 of all other circumstances between the parties that affect the unjust enrichment analysis as to
 27 each class member. *See supra* Part III.C.1.a.i. This is precisely why “when the members of a
 28 proposed class have no individual monetary loss that may be redressed by disgorgement, that
 factor may weigh *against* class treatment.” *Frieman v. San Rafael Rock Quarry, Inc.*, 116 Cal.
 App. 4th 29, 36 (2004) (emphasis added).

1 damages. *Buckeye Tree Lodge*, 2019 WL 1170489, at *5 (“In seeking disgorgement of
 2 Expedia’s profits, the Plaintiffs failed to proffer a model or a legitimate theory for how those
 3 damages would be estimated, let alone disseminated among class members.”). And a method for
 4 fair allocation is critical here, because if any “use” of CLEAR is “unjust,” it will require
 5 individualized analysis to find it. *See supra* Part III.C.1.a.i. Without a viable methodology, this
 6 determination will “devolve into an endless series of mini-trials.” *Solis v. Am. Airlines Inc.*,
 7 2022 WL 4359556, at *6 (C.D. Cal. Sept. 13, 2022) (quotation omitted).

8 Because Plaintiffs’ methodology does not correspond to their theory of liability, and
 9 because it does not offer any way to allocate any disgorged amount fairly among class
 10 members, individual damage calculations will inevitably overwhelm questions common to the
 11 class.” *Behrend*, 569 U.S. at 34. This precludes certification of Plaintiffs’ UCL class. *Id.*; *see*
 12 *also Coates v. Utd. Parcel Serv., Inc.*, 2019 WL 8884492, at *7 (C.D. Cal. July 2, 2019).

13
 14 ii) Plaintiffs have not proven that common issues predominate as to
 their UCL claim.

15 The central issue to resolve Plaintiffs’ UCL claim—whether TR’s conduct was “unfair”
 16 under the balancing test or the tethering test³⁷—is necessarily individualized. *Lozano*, 504 F.3d
 17 at 736 (“[E]vidence about individual knowledge and expectations may help the court determine
 18 the extent of the harm for the purposes of the UCL’s balancing test.”); *Herskowitz*, 301 F.R.D.
 19 at 477 (“weighing utility, the utility of Apple’s business practice, uniform or not, will again
 20 likely require individualized inquiries”). Under the balancing test, the utility of CLEAR will
 21 vary among class members and their circumstances (and even among transactions for the same
 22 class member), depending on many factors.³⁸ Determining whether any class member was

23
 24 ³⁷ The tethering test was developed for cases alleging anti-competitive conduct, where “the
 25 universe of laws and/or regulations that bear on unfair practices is [not] so varied that it is not
 26 possible to achieve consensus which of these laws and regulations might apply to define an
 27 unfair practice,” and should not apply to consumer cases. *Camacho v. Auto. Club of S. Cal.*, 142
 Cal. App. 4th 1394, 1403 (2006). This Court declined to apply the FTC test for the same reason.
 Doc. 54, at 13 n.5.

28 ³⁸ Utility might be greater, for example, where CLEAR is the only resource capable of locating
 an active shooter, as was the case in connection with the 2015 shooting in San Bernardino,

1 harmed due to CLEAR will require a similarly individualized analysis. *See supra* Parts II.D,
 2 III.B.2; *see also Pro Water Sols., Inc. v. Angie’s List, Inc.*, 2022 WL 9992458, at *10 (C.D. Cal.
 3 Oct. 17, 2022) (where the “unfairness analysis includes considering the impact on [the] alleged
 4 victim,” “[t]hese further variations make the central ‘unfairness’ question even less likely to
 5 generate common answers.” (internal quotations and citation omitted)); *Menagerie Prods. v.*
 6 *Citysearch*, 2009 WL 3770668, at *14 (C.D. Cal. Nov. 9, 2009) (denying certification of UCL
 7 unfairness claim because even if “a defendant engaged in a single course of wrongful conduct
 8 ... a plaintiff’s individual expectations about the business practice are relevant to determining
 9 the extent of its harm”).

10 The result would be the same under the tethering test, which requires that the alleged
 11 unfair conduct be “tethered to some legislatively declared policy.” *Lozano*, 504 F.3d at 736
 12 (quoting *Cel-Tech Commc’ns, Inc. v. L.A. Cell. Tel. Co.*, 20 Cal. 4th 163, 186 (1999)). **First**,
 13 because the tethering test requires weighing the tethered policy against the utility of the
 14 challenged conduct, the same individualized issues that arise under the balancing test will
 15 predominate. *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 2017 WL 3727318, at *24
 16 (N.D. Cal. Aug. 30, 2017) (reviewing “whether Defendants’ alleged ‘public policy violation is
 17 outweighed by the utility of their conduct’” and still describing that as the “balancing test”
 18 (citation omitted)). **Second**, Plaintiffs argue that their claim is tethered to the public policy of
 19 protecting consumers’ privacy, but whether that policy is implicated as to any class member
 20 will depend on the information at issue, whether it was disclosed, to what customer, for what
 21 purpose, and many other circumstances that will vary among class members. *Supra* Part
 22 III.C.1.a.i; *see also* Fahringer Decl., Ex. A-14, at 80-81 (individualized factors affecting
 23 consumer privacy concerns include “individual-level personality, demographic, and cultural
 24 differences to the level of trust a person might have toward a focal entity”); Fahringer Decl., Ex.
 25 A-1, at 12 (“concerns about privacy are adjusted up or down depending on a large range of
 26 factors specific to each individual and each data practice.”). **Third**, different customer uses will

27 California (*see* Svonkin Decl.), or when it is used to find the stash house of a Fentanyl
 28 distributor (*see* Maltz Decl.).

1 implicate *other* policy “tethers” that would *justify* CLEAR based on competing California
 2 public policies. *Supra*, Part III.C.1.a.i.

3
 4 *b. Class treatment is not superior to alternative methods of resolution.*

5 Plaintiffs must also show that “a class action is superior to other available methods for
 6 fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). The factors
 7 pertinent to this analysis are “(A) the class members’ interests in individually controlling the
 8 prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning
 9 the controversy already begun by or against class members; (C) the desirability or undesirability
 10 of concentrating the litigation of the claims in the particular forum; and (D) the likely
 11 difficulties in managing a class action.” *Id.* These factors weigh against certification here.

12 Class members’ interests in individually controlling the litigation (Rule 23(b)(3)(A)) and
 13 the likely difficulties of managing a class action (Rule 23(b)(3)(D)) weigh against certification
 14 because CLEAR may affect each class member very differently, generating “discord in the
 15 potential class” in such a way “that managing the class could be an unwieldy process.”³⁹
 16 *Leuthold v. Dest. Am., Inc.*, 224 F.R.D. 462, 470 (N.D. Cal. 2004); *see, e.g., supra* Part II.A
 17 (discussing benefits of CLEAR); Svonkin Decl. ¶ 14 (describing CLEAR uses); *id.* ¶ (“As a
 18 California resident ... I would be harmed if the platform was limited with respect to the data it
 19 contains or the individuals capable of being searched”); Maltz Decl. ¶ 5 (“if law enforcement
 20 did not have access to CLEAR ... many more children and Americans could die from drug
 21 overdoses.”). The desirability of concentrating litigation in this forum (Rule 23(b)(3)(C)) also
 22 weighs against certification because the overbroad class definition raises complex
 23 extraterritoriality and choice of law issues that could make a different forum superior for some
 24

25 ³⁹ Myriad other issues unique to each class member would add to the difficulty of class
 26 management, including the absence of any methodology to allocate monetary relief among class
 27 members. *Supra* Part III.C.1.a.i; *Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1192 (9th
 28 Cir.) (“If each class member has to litigate numerous and substantial separate issues to establish
 his or her right to recover individually, a class action is not ‘superior.’”), *opinion amended on
 denial of reh’g*, 273 F.3d 1266 (9th Cir. 2001).

1 class members. *See supra* Part III.B.2. Finally, no other litigation is pending (Rule 23(b)(3)(B)),
 2 so the second factor is neutral. *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 444 (E.D.
 3 Cal. 2013).⁴⁰

4 Underscoring all of this is the fact that the superiority analysis “requires determination
 5 of whether the objectives of the particular class action procedure will be achieved in the
 6 particular case,” which “necessarily involves a comparative evaluation of alternative
 7 mechanisms of dispute resolution.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir.
 8 1998) (citation omitted), *overruled on other grounds by Dukes*, 564 U.S. at 338. Here, the
 9 superior method of resolving the policy questions posed by this case is through the legislative
 10 process, not Rule 23 certification. *See Diacakis v. Comcast Corp.*, 2013 WL 1878921, at *9
 11 (N.D. Cal. May 3, 2013) (no superiority where plaintiff did not address whether regulatory
 12 action offered a superior method of resolution); *see also Mazza*, 666 F.3d at 592 (“Getting the
 13 optimal balance between protecting consumers and attracting foreign businesses, with resulting
 14 increase in commerce and jobs, is not so much a policy decision committed to our federal
 15 appellate court, or to particular district courts within our circuit, as it is a decision properly to be
 16 made by the legislatures and courts of each state.”).

17 Congress, the California legislature, and federal and state regulators continually balance
 18 the benefits and harms associated with treatment of information about people by regulating the
 19 collection, storage, and disclosure of that information, both in the business-to-business context
 20 (as here) and in the business-to-consumer context. *See, e.g., U.S. Dep’t of Just. v. Reps. Comm.*
 21 *for Freedom of Press*, 489 U.S. 749, 764-65 (1989) (recognizing a “web of federal statutory and
 22 regulatory provisions that limits the disclosure of rap-sheet information” depending on users
 23 and use cases); California Consumer Privacy Act (“CCPA”), Cal. Civ. Code § 1798.100 *et*

24
 25 ⁴⁰ While *Zinser* discusses Rule 23(b)(3)(B) analysis where other lawsuits *are* pending, it offers
 26 no guidance regarding an absence of such litigation. *Zinser*, 253 F.3d at 1191. If anything, the
 27 paucity of similar litigation here “evidence that [class] members do not wish to pursue any of
 28 the claims asserted here,” as further support for the first of the superiority factors. *Henry v.*
Assocs. Home Equity Servs., Inc., 272 B.R. 266, 279-80 (C.D. Cal. 2002), *aff’d*, 69 F. App’x
 394 (9th Cir. 2003).

1 *seq.*⁴¹ Plaintiffs in this case base their claims on an “ethical and social” “right” that would
 2 prevent any company from collecting any information about people, from any source, for any
 3 purpose, without their consent. But that “right” must be “be reconciled with, and sometimes
 4 superseded by, other needs of society[, including] physical and financial security, the right of a
 5 free press, and compliance with a wide range of legal and ethical duties.” Fahringer Decl., Ex.
 6 A-1, at 8; *supra*, Part III.C.1.a.i (table describing a handful of social needs satisfied by
 7 CLEAR); Svonkin Decl. ¶ 14 (describing same).

8 As Plaintiffs’ own expert testified, “millions of companies” other than TR “interfere”
 9 with this “right” “every minute.” Fahringer Decl., Ex. A-13 at 65:12-66:16. And Plaintiffs’
 10 proposed class definition, which could encompass every person who has lived in California in
 11 the last several years, as well as their request for public injunctive relief (Doc. 145 ¶ 103),
 12 emphasize that Plaintiffs are asking the Court to make policy decisions that are best made by the
 13 legislature, which “is in a far better position than a court to evaluate” the competing interests of
 14 the public in this space. *Bush v. Lucas*, 462 U.S. 367, 389 (1983).

15 2. Plaintiffs have not shown that Rule 23(b)(2) certification of their UCL
 16 claim is appropriate.

17 Before a Rule 23(b)(2) class can be certified, a plaintiff must “describe[] the general contours of
 18 an injunction that would provide relief to the whole class,” *Parsons v. Ryan*, 754 F.3d 657, 689
 19 n.35 (9th Cir. 2014), to establish that “injunctive relief ... is appropriate respecting the class as a
 20 whole,” Fed. R. Civ. P. 23(b)(2). Plaintiffs have not done so here.

21 Plaintiffs seek certification of their UCL claim under Rule 23(b)(2) and an injunction
 22 requiring TR to seek every class member’s consent before “collecting” any information about
 23 them. Mot. at 15. This vague injunction would not distinguish among class members who have

24 _____
 25 ⁴¹ Federal laws and regulations such as the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.*
 26 (“GLBA”), and the Drivers Privacy Protection Act, 18 U.S.C. § 2721 *et seq.* (“DPPA”), also
 27 regulate personal information, and the Ninth Circuit has reviewed and rejected claims under
 28 those very privacy laws based on the same sort of “information collection” theories urged by
 Plaintiffs here. *See, e.g., Howard v. Crim. Info Servs., Inc.*, 654 F.3d 887, 891 (9th Cir. 2011)
 (“[S]tockpiling information for a permitted use does not constitute a violation under the
 DPPA”).

1 no claim for relief, class members as to whom TR’s conduct is fair, and class members who
2 would be outright harmed by such an injunction. *See supra* Part III.C.1.a.ii (discussing
3 variations among class members that will affect the UCL analysis); *Dukes*, 564 U.S. at 365
4 (class could not be certified when “about half the members ... ha[d] no claim for injunctive or
5 declaratory relief at all”). Since the Court must determine for each individual class member
6 whether TR’s conduct is unfair (Part III.B.2), unfairness determinations, and appropriately
7 tailored injunctions, will vary by class member. *See Nat. Res. Def. Council, Inc. v. Winter*, 508
8 F.3d 885, 886 (9th Cir. 2007) (“Injunctive relief must be tailored to remedy the specific harm
9 alleged, and an overbroad ... injunction is an abuse of discretion.”), *rev’d on other grounds* 555
10 U.S. 7 (2008). Plaintiffs therefore cannot show that “final injunctive relief ... is appropriate
11 respecting the class as a whole,” and their motion for certification under Rule 23(b)(2) should
12 be denied. *See Williams v. Apple, Inc.*, 338 F.R.D. 629, 657 (N.D. Cal. 2021) (denying motion
13 to certify 23(b)(2) class based on “Plaintiffs’ failure to meaningfully analyze the injunctive class
14 in their motion for class certification” and providing only a “vague[] descri[ption] [of] the
15 proposed injunctive relief”).

16 **IV. CONCLUSION**

17 Plaintiffs ask the Court to position this case for a ruling that would bind tens of millions
18 of former, current, and future Californians by considering in isolation the abstract harm that
19 Plaintiffs believe is caused by CLEAR, without regard to all of the benefits and policies it
20 serves. But Plaintiffs’ claims require the Court to take a more holistic view, and to carefully
21 weigh the equities and the facts and circumstances between the parties. Those equities, facts,
22 and circumstances differ among class members in important ways and preclude certification
23 here. Plaintiffs’ Motion should be denied.

1 Dated: January 26, 2023

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