Eric H. Gibbs (SBN 178658)
Andre M. Mura (SBN 298541)
Amy M. Zeman (SBN 273100)
Mark H. Troutman (*pro hac vice*)
Ezekiel S. Wald (SBN 341490)
Hanne Jensen (SBN 336045)
GIBBS LAW GROUP LLP
1111 Broadway, Suite 2100
Oakland, CA 94607
Telephone: (510) 350-9700
Facsimile: (510) 350-9701
ehg@classlawgroup.com
amm@classlawgroup.com
amz@classlawgroup.com
mht@classlawgroup.com
zsw@classlawgroup.com
hj@classlawgroup.com

Geoffrey A. Graber (SBN 211547)
Karina G. Puttieva (SBN 317702)
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave. NW, Fifth Floor
Washington, DC 20005
Telephone: (202) 408-4600
Facsimile: (202) 408-4699
ggraber@cohenmilstein.com
kputtieva@cohenmilstein.com

Attorneys for Plaintiffs and the Proposed Class

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SAN FRANCISCO DIVISION

CAT BROOKS and RASHEED SHABAZZ, individually and on behalf of all others similarly situated, Plaintiffs, v. THOMSON REUTERS CORPORATION, Defendant.	Case No. 3:21-cv-01418-EMC-KAW **[REDACTED – PUBLICLY FILED VERSION OF ECF NO. 167-3 PURSUANT TO COURT ORDER DATED MARCH 30, 2023 (ECF NO. 188)]** **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO EXCLUDE EXPERT TESTIMONY OF FINANCE SCHOLARS GROUP, INC. (TERRY LLOYD)** Date: April 20, 2023 Time: 1:30 p.m. Place: Courtroom 5, 17th Floor Judge: Hon. Edward M. Chen

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I. INTRODUCTION

Plaintiffs' expert Terry Lloyd, CPA, CFA, used generally accepted accounting principles to arrive at a workable methodology for calculating classwide disgorgement. Thomson Reuters (TR) nevertheless moves to exclude his opinions as irrelevant or unreliable. But there is nothing irrelevant about Lloyd's opinions. His considered views on the feasibility of calculating TR's unjust gains at Californians' expense, whether one agrees with his bottom-line or not, are logically connected to the issue at hand. What's more, his opinions are reliable: Lloyd followed established methods, approved by courts and blessed by the Restatement, in presenting his methodology.

That leaves TR to quibble over Lloyd's inputs and to preview its merits view that TR should have to disgorge less in net profits than Lloyd has estimated. TR ties itself in knots arguing that Lloyd should have calculated net profits a different way, even though TR's own expert admits that its preferred method is not feasible because TR doesn't have the data to support it. But these types of arguments have never disabled a trier of fact from awarding disgorgement classwide. Any uncertainty in calculating net profits does not mean a wrongdoer gets off scot-free.

The merits aside, even TR cannot bring itself to argue that estimating net profits for purposes of classwide disgorgement is an impossible task. At the class certification stage, Lloyd's work is both relevant and reliable, and is therefore admissible to demonstrate that disgorgement is capable of being measured classwide. TR's motion, therefore, should be denied.

II. BACKGROUND

In his expert report in support of class certification, Lloyd opines that there is a classwide methodology for calculating how much TR was unjustly enriched through its unfair use of Californians' information on the CLEAR platform. ECF No. 127-12 (Lloyd Rep.) at 1. Because at this stage Plaintiffs need only show that a damages calculation is possible in a manner consistent with Rule 23, Lloyd "evaluate[d] the feasibility of calculating the total net profits" that TR has obtained through its wrongful conduct, based on his extensive accounting background, accepted principles of his trade, publicly available information, and discovery materials produced thus far. *Id.* at 1-3.

Here's a high-level summary of Lloyd's work. He started with the revenues TR attributed to CLEAR over the class period. *Id.* at 10. These figures, coming directly from TR, are a reliable representation of the total revenue TR derived from making *any* information available through CLEAR. *See id.* Lloyd's next step was to determine whether the data supported a method to estimate the share of total CLEAR revenue attributable specifically to the inclusion of *Californians'* data in CLEAR. *Id.* at 11-14. TR revealed, through discovery, that it had not done this work itself. *Id.* at 12. So Lloyd applied his experience and specialized knowledge to TR's discovery materials to make three intermediate inferences.

First, he demonstrated that discovery materials could be used to isolate how much of CLEAR's revenues could be tied to its inclusion of domestic information. *Id.* at 11-12.

Second, Lloyd showed how discovery and public data could be used to winnow domestic revenues down to those specifically attributable to CLEAR's inclusion of Californians' information. *Id.* at 12-13. Because TR does not itself attribute revenue to the availability of information from each state, Lloyd determined that proxies from public data could cover the shortcomings in TR's records.[1] *Id.* In selecting which proxies were reliable classwide, Lloyd again turned to the evidence. CLEAR customers overwhelmingly fall into two buckets: corporations and government entities. *See id.* at 12, 12 n.42. During the class period, there was a [redacted] between these two groups. *Id.* at 13, 13 n.47. Discovery showed that government customers use CLEAR primarily for law enforcement needs and economic activity. *See id.* at 7, 12-13. Economic activity was also the primary use for CLEAR's corporate subscribers. *See id.* Thus, Lloyd concluded that if [redacted] of CLEAR's customers were primarily engaged in economic activity, and [redacted] were engaged in a mix of economic and law enforcement activity, then California's relative shares of economic and law enforcement activity were reliable and reasonable proxies for the proportion of CLEAR's revenues attributable to California data. *See id.* And these two factors were also calculable classwide based on common evidence: California's share of GDP, and California's share of the national arrest rate. *See id.* Because corporate and law enforcement customers were [redacted], then, Lloyd determined that an average of these two data points offered a reasonable, reliable, and workable

[1] One option Lloyd considered was a straight proportion of California's population relative to the U.S. Lloyd Rep. at 12. While Lloyd concluded that this provided a workable method, it would almost certainly result in an underestimate because it assumes populations are static and that CLEAR customers were interested in all information equally when they decided to subscribe. *See id.* at 12-13. Of course, since individuals move, and because Lloyd's task was to model a classwide calculation of CLEAR's revenues attributable to Californians' data—a more accurate estimate would not focus merely on what data was available, but what data was actually of interest to CLEAR subscribers. *See id.*

apportionment of the domestic revenues attributable to CLEAR's inclusion of California data. *See id.*

Third, Lloyd determined that discovery materials could also reveal what portion of those revenues (from California data) could reasonably be tied to natural persons, rather than businesses. *See id.* at 13-14. And, as with each prior step, those materials showed that this calculation was also practicable classwide based on common evidence. *See id.*

Together, these three steps showed a straightforward, reliable method to estimate, on a classwide basis, the proportion of TR's overall CLEAR revenues that are attributable to its inclusion of Californians' information in CLEAR. *Id.* at 11-14.

Lloyd's final step, then, is to determine whether it is possible to deduct those costs that can be fairly and directly attributed to TR's wrongful conduct here, to arrive at net *profits*. *Id.* at 14-17. Reviewing publicly available financial data, commonly accepted principles of accounting, and the materials produced in discovery, Lloyd concluded that the only costs properly subject to deduction here are the transactional royalty fees paid to vendors for data made available through CLEAR. *See id.* at 2, 14-17. All other costs (*e.g.*, fixed costs and overhead) are not specifically attributable to Californians' information and therefore would have been incurred anyway, so deducting them would give TR a windfall by permitting it to keep portions of its net profits that are actually attributable to its unjust conduct. *Id.* at 15-16. And, Lloyd found, discovery provided all the data necessary to calculate a measure of those transactional royalty fees that could be applied classwide. *See id.*

Lloyd determined that the framework outlined above could be reasonably applied to each year of revenue data TR produced, and a simple sum of each year's final figure would provide the Court with a reliable methodology to estimate disgorgement, tied directly to Plaintiffs' theory of liability, and based entirely on common evidence. *Id.* at 18.

III. LEGAL STANDARD

Federal Rules of Evidence 702 and 703, as interpreted by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), permit expert opinion evidence so long as that expert is qualified, and based upon that qualification, the expert's opinion is relevant, reliable, and based on the types of facts or data reasonably relied upon in that field. "The expert may be qualified by 'knowledge, skill, experience, training, or education' as to the subject matter of the opinion." *Brown v. Google, LLC*, 2022 WL 17961497, at *1 (N.D.

Cal. Dec. 12, 2022) (quoting Fed. R. Evid. 702). The proponent of expert opinion evidence has the burden of proving admissibility. *Id.* At class certification, "the relevant inquiry is a tailored *Daubert* analysis which scrutinizes the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence." *Id.* (collecting cases); *see also Olean Wholesale Grocery Coop. v. Bumble Bee Foods LLC*, 31 F.4th 651, 665 (9th Cir. 2022) (en banc) (recognizing that at class certification, parties "may use any admissible evidence," including admissible expert opinions).

IV. ARGUMENT

Lloyd's report satisfies *Daubert*'s requirements at class certification because it rests on a reliable foundation and is relevant to the task at hand.[2] *See Brown*, 2022 WL 17961497, at *1. A plaintiff seeking certification under Rule 23(b)(3) need only show that its damages are "capable of measurement on a class-wide basis," and that its model for doing so "is consistent with its theory of liability in the case." *Id.* at *5 (citing *Comcast Corp v. Behrend*, 569 U.S. 27, 35 (2013)). Accordingly, at class certification, the *Daubert* inquiry is a limited one "tailored" to scrutinize the expert in light of the Rule 23 criteria and the current state of the evidence. *Id.* at *1 (citing *Grodzitsky v. Am. Honda Motor Co.*, 957 F.3d 979, 985-86 (9th Cir. 2020)). As explained in Plaintiffs' class certification briefing, Lloyd's report does just that. *See* ECF No. 130 at 20-21. Because Lloyd's report is "both relevant and reliable," the Court should deny TR's motion seeking to exclude his opinions. *Sloan v. Gen. Motors LLC*, 2020 WL 1955643, at *6 (N.D. Cal. Apr. 23, 2020) (Chen, J.) (quoting *United States v. Vallejo*, 237 F.3d 1008, 1019 (9th Cir. 2001)).

A. Lloyd's methodology for calculating disgorgement is reliable.

Daubert requires the district court to make a threshold finding of reliability to admit an expert's opinion. Expert evidence is reliable if it was "derived by the scientific method" and appropriately validated on "'good grounds,' based on what is known." *Daubert*, 509 U.S. at 590. The reliability inquiry leaves much discretion to the trial court, *see, e.g., Day v. GEICO Cas. Co.*, 2022 WL 16556802, at *2 (N.D. Cal. Oct. 31, 2022) (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147, 152 (1999)), but the Court's analysis must focus "solely on [the expert's] principles and methodology, not on the conclusions that they generate." *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1232 (9th Cir. 2017). Lloyd's report easily clears this bar,

[2] TR does not challenge Lloyd's qualifications.

because he employed standard accounting practices in making his calculations and adequately justified any assumptions he was required to make.

1. Lloyd measures TR's profits by applying widely accepted accounting principles to information TR itself produced.

TR objects to the way that Lloyd calculates disgorgement, but the alternatives it offers show that TR has no real issue with Lloyd's methodology; rather, TR simply would prefer to owe the class less money. According to TR, it is unreliable to proportionally allocate revenues to California and subtract incremental costs. ECF No. 157-2 (Mot.) at 10. So TR proposes two alternative measures to calculate gross profits and costs that it says *would* be proper and reliable. Lloyd, TR says, could have allocated all of CLEAR's revenues *and* expenses based on the proportion of Californians' information in CLEAR. *Id.* Or, it posits, he could have measured incremental revenue for each search, and subtracted the incremental costs per search. *Id.*

While TR's alternative calculations would coincidentally preserve more of its profits, neither accurately measures unjust enrichment here, nor do they show any lack of reliability in Lloyd's methodology. Much the opposite. TR's first alternative shows that it agrees that gross profits can be measured here by allocating revenues to Californians' information in CLEAR—so long as it gets to deduct costs at the same proportion.[3] *See id.* And its next alternative shows that TR agrees with measuring costs incrementally—provided that TR's gross profit is considered incrementally as well. *Id.* TR's suggestion of using Lloyd's methods for measuring both profits and costs (just in a way that is more advantageous to its bottom line) reveals that its objection does not really target the reliability of Lloyd's methods. Instead, TR would prefer the best-for-business measures of revenues and costs. But the "best" measure of disgorgement is an ultimate merits question and is premature here. And more fundamentally, this shows that TR's challenge goes not to admissibility, but the weight it wants the Court to give Lloyd's work. *See Sloan*, 2020 WL 1955643, at *37 ("Where a party challenges the expert's assumptions or arguments, the challenges may go to impeachment, rather than admissibility."); *In re Lidoderm Antitrust Litig.*, 2017 WL 679367, at *12 (N.D. Cal. Feb. 21, 2017) (dispute about the appropriate inputs in an expert's model "does

[3] Of course, this method was not proposed or considered by TR's rebuttal damages expert, nor does TR explain why it should be entitled to deduct costs proportional to the amount of Californians information in CLEAR without any evidence that it incurs costs at a proportional rate.

not undermine the approach or the reliability of [the] model").

But it hardly matters that TR itself endorsed the composite elements of Lloyd's calculations—Lloyd's methodology is straightforward and reliable. First, Lloyd measured the relevant gross profit in a reliable way. Lloyd Rep. at 10 (relying on documents produced by TR in discovery). Reasoning that TR operates predominantly on a subscription model that gives customers access to the universe of information available in CLEAR, Lloyd concluded that gross profit attributable to Californians' information would require allocating that revenue based on its value to TR's customers. *Id.* at 7, 11-13. TR's narrow challenge here goes to *how* Lloyd performed that step. *See* Mot. at 3. But since TR does not keep this information itself, isolating the money it makes from Californians' information being offered through CLEAR requires a proportional approximation. Lloyd Rep. at 12-13. Courts have repeatedly held that defendants cannot, as TR attempts, suggest that the exclusive reliable method to quantify monetary relief is to look to data that those defendants do not keep. *Moore v. Ulta Salon, Cosms. & Fragrance, Inc.*, 311 F.R.D. 590, 621 (C.D. Cal. 2015) (collecting cases); *Grace v. Apple, Inc.*, 328 F.R.D. 320, 340 (N.D. Cal. 2018); *compare* Ex. 1[4] (Kidder Dep.) at 77:18-24 (testifying that "the only way I see" to "allocate . . . or understand what revenue was obtained by Thomson Reuters because of the [] data on Californians available in CLEAR" is "looking at search level data") *with* ECF No. 151-17 (Kidder Rep.) ¶¶ 113-14 ("Apportioning damages based on search results would not be possible."). Accordingly, Lloyd's allocated revenue is a reasonable estimation of the gross profits attributable to TR's wrongdoing. Nothing in TR's motion or Kidder rebuttal expert report suggests otherwise.

Lloyd likewise measured TR's relevant costs in a reliable way. TR does not dispute that "the delivery of digital content often incurs little, if any, *additional* cost to deliver it to the customer." Lloyd Rep. at 9 (emphasis added). Instead, TR deflects. To be "consistent," Kidder muses, Lloyd should have *also* allocated "all of CLEAR's expenses on the basis of the relative size of California."[5] Kidder Rep. ¶ 78. But many courts in and outside this district have rejected attempts, like Kidder's, to manufacture a rule that costs and

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[4] All references to exhibits refer to exhibits to the Mura Declaration unless otherwise noted.

[5] Kidder does not explain why costs should be so allocated when, as a factual matter, TR does not incur costs in that way, nor does he offer any evidence explaining why Lloyd's method is *unreliable*, as opposed to a different calculation than what he would choose for his client.

revenues must always walk in lockstep. *See Brown*, 2022 WL 17961497 at *6-7 (finding that where there was no proof of incremental costs to the defendant, an expert's unjust enrichment calculation need not account for them); *In re Actiq Sales & Mktg. Pracs. Litig.*, 2014 WL 3572932, at *8–9 (E.D. Pa. July 21, 2014) (declining invitation to exclude plaintiffs' expert for failure to deduct fixed costs, because "neither of these categories of costs directly varies with the number of units," and therefore those costs "would be borne in the actual world and in the but-for world").

That TR would calculate disgorgement differently does not make Lloyd's calculation unreliable. *See Wendell*, 858 F.3d at 1232 ("The court's task is to analyze not what the experts say, but what basis they have for saying it." (citing *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995) (*Daubert II*)) (cleaned up)). That TR prefers calculations that either dramatically overestimate its costs or underestimate its profits goes to the merits and is irrelevant to the admissibility of Lloyd's testimony, much less the Court's consideration of class certification. Lloyd's methodology is based on his 40-plus years' experience in accounting and business valuation and is consistent with the facts of this case. That is all that is required for his testimony to be admissible. *See, e.g.*, *JH Kelly, LLC v. AECOM Tech. Servs., Inc.*, 605 F. Supp. 3d 1295, 1305 (N.D. Cal. 2022) (admitting expert whose opinion was formed in part based on "his experience in accounting, auditing, and analyzing costs"); *see also, e.g.*, *Garcia v. Praxair, Inc.*, 2021 WL 38183, at *22 (E.D. Cal. Jan. 5, 2021) ("[T]he Court finds Mr. Lloyd has met the threshold requirements of reliability under *Daubert*," and to the extent defendant challenged his reliability, "their recourse is not the exclusion of the testimony, but rather to refute it on cross-examination").

2. The proxy figures and assumptions Lloyd used to devise a method of measuring disgorgement are reasonable.

TR next takes issue with the specific proxies Lloyd used to apportion CLEAR revenue to California—but the only things "plucked from thin air" are TR's arguments. Mot. at 1. Experts are permitted to make reasonable assumptions when estimating monetary relief—especially at class certification, and especially where estimations are necessary because of the defendant's failure to keep records. *See Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1183 (9th Cir. 2017), *rev'd and remanded on other grounds*, 139 S. Ct. 710 (2019) (holding all a plaintiff must show at class certification is that "the amount of damages could be approximated . . . even if that figure or the data supporting it . . . was uncertain"); *Moore*, 311 F.R.D. at 621. Indeed, "[d]amages calculations have long been understood to involve a degree of approximation; because of the economic complexities of the real world, it could not be otherwise." *Maldonado v. Apple, Inc.*, 2021 WL 1947512, at *22 (N.D. Cal. May 14, 2021). While an expert's model must be "tethered to theories of liability, fit the case, [and] have a reliable basis," it "inevitably will simplify the world," and is admissible so long as the "reasonable assumption[s]" on which the expert relies "can be cross-examined, rebutted, and argued over." *See id.* Just so here.

Lloyd's assumptions are both reasonable and adequately justified. *See id.* And TR's dispute here is narrow—its sole issue is Lloyd's averaging California's share of GDP (14.6%) with its share of national arrests (13.4%) to allocate 14 percent[6] of CLEAR's domestic revenue to California. *See* Mot. at 11. But the reason Lloyd chose these proxies makes good sense: about [redacted] of CLEAR's customers are corporate users, and [redacted] are government. *See* Lloyd Rep. at 13 n.47. Lloyd accounted for this makeup of CLEAR's customer base by choosing proxies that reflect California's outsize economic and criminal activity relative to its population share,[7] and then weighed them [redacted] to account for TR's actual customer composition. *See id.* at 12-13. Even if these proxies are not perfect,[8] they are at least reasonable, and anyway, "an expert's opinion 'is not per se unreliable" *even if* it "relies on some unverified or inaccurate information." *Grasshopper House, LLC v. Clean & Sober Media LLC*, 2019 WL 12074086, at *3 (C.D. Cal. July 1, 2019) (citations omitted).

At bottom, Lloyd's assumptions—and the data he relied on to make them—should not bar his admission, because TR's objections to inputs are premature. The appropriate time to challenge the data an expert used in his model, as well as the assumptions he made, is on cross-examination. *See Sloan*, 2020 WL

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[6] Lloyd turned out to be [redacted]. TR subsequently produced information showing that, across all CLEAR searches run since 2015 with a "state" search field, [redacted] percent were for California. *See* Ex. 2 at 4-5 (percent calculated by summing "Total CLEAR with State=CA" column, then dividing by sum of "Total CLEAR with State=*" column).

[7] While California's share of GDP and its share of national arrests exceed its population proportion, all three numbers are in close proximity: California's population proportion is approximately 11.8%, its share of GDP is roughly 14.6%, and its share of the national arrest rate is approximately 13.4%. *See* Lloyd Rep. at 12-13.

[8] To the extent that TR believes Lloyd should have used a weighted average, that argument is premature at this stage and doesn't mean that his methodology (using arrest rates and GDP) is unreliable. Other inputs may be used, like a weighted average, and the methodology would still be sound.

1955643 at *6, *37 ("The fact that an expert's testimony contains some vulnerable assumptions does not make the testimony irrelevant or inadmissible," and "challenges [to] the expert's assumptions or arguments . . . go to impeachment, rather than admissibility"). Accordingly, "district courts within and outside this district have often" agreed that "experts' decisions about what data to use in their analysis" are better tested on cross-examination than excluded by *Daubert*. *Hamm v. Mercedes-Benz USA, LLC*, 2021 WL 1238304, at *14 (N.D. Cal. Apr. 2, 2021) (collecting cases); *see also Brown*, 2022 WL 17961497, at *7 ("conflicting evidence" between experts "reflects on the weight of the testimony, not admissibility").

Nothing about the methodology, principles, or proxies Lloyd used in approximating TR's disgorgement is unreliable. And TR's quibbles with specific inputs, to the extent they remain after the parties submit merits expert reports, are fodder for cross-examination, not a basis for exclusion.

B. Lloyd's report is relevant because it approximates the amount TR was unjustly enriched through its unfair use of Californians' data.

The remaining threshold to admission is relevance, which requires that expert testimony "assist the trier of fact to understand or determine a fact in issue." *Sloan*, 2020 WL 1955643, at *6 (citations omitted). "The relevancy bar is low," satisfied if the expert's underlying knowledge "has a valid connection" to the Court's inquiry. *Messick v. Novartis Pharms. Corp.*, 747 F.3d 1193, 1196-97 (9th Cir. 2014) (citing *Daubert II*, 43 F.3d at 1315). Because Lloyd offers a methodology showing that TR's ill-gotten gains are calculable on a classwide basis in a manner consistent with Plaintiffs' theory of liability, his report is squarely relevant to the Court's class certification analysis.

1. Lloyd's methodology calculates TR's disgorgeable profits consistent with California's law of unjust enrichment, and is therefore helpful to the Court.

In his report, Lloyd determined how to calculate the profits TR obtained from its unfair use of Californians' data in CLEAR, based on the evidence currently available. *See* Lloyd Rep. at 3. That is directly relevant to the Court's determination of disgorgement under California law. *Am. Master Lease LLC v. Idanta Partners, Ltd.*, 225 Cal. App. 4th 1451, 1487 (2014) (Disgorgement is "the net profit attributable to the underlying wrong.") (citing Restatement (3d) of Restitution and Unjust Enrichment § 51(4) (2011)); *see also Cnty. of San Bernardino v. Walsh*, 158 Cal. App. 4th 533, 542 (2007) (noting the "emphasis" of disgorgement "is on the wrongdoer's enrichment, not the victim's loss").

Lloyd's model calculates "the net profits (the unjust enrichment) that Thomson Reuters earned from the class members' personal data," which is inescapably relevant to the Court's evaluation of Plaintiffs' unjust enrichment claim. *See* Lloyd Rep. at 3. To the extent TR faults Lloyd for failing to differentiate between the purportedly "just" and "unjust" revenue-generating aspects of CLEAR (Mot. at 1, 8-9), even its own expert concedes that the platform's differentiating "features" are worthless without the underlying data. *See* Ex. 1 at 37:3-21; 42:16-17; 43:5-8. Of course, liability and the amount of disgorgement are merits questions not yet ripe for decision. But because TR cannot credibly challenge Lloyd's methodology, as explained above, it attempts to distract by again taking aim at Lloyd's inputs and assumptions. *See* Mot. at 6-8 (in challenging relevance, TR primarily takes issue with various costs Lloyd purportedly failed to deduct). These attacks are unavailing, as they go solely to the weight of his report. *See Sloan*, 2020 WL 1955643, at *37.

Similarly, TR's averment that Lloyd calculated something other than "net profit" relies on a generic definition from Black's Law Dictionary that does not account for the more nuanced guidance from the Restatement. *See* Mot. at 6; Restatement (3d) of Restitution and Unjust Enrichment § 51. TR does not challenge the relevancy of the Restatement's guidance, which Lloyd incorporates into his report. *See* Lloyd Rep. at 3 n.4, 7-8. In any event, such a challenge would be unavailing. California courts afford "great consideration" to the Restatement (Third) of Restitution and Unjust Enrichment "as an argumentative authority" and routinely "apply principles" from it to "reach the fair and equitable result." *City of Oakland v. Oakland Raiders*, 83 Cal. App. 5th 458, 479 (2022) (collecting cases) (internal quotations and citations omitted). Even assuming the Court ultimately considers these authorities conflicting, that question is for the merits and does not affect the relevancy of Lloyd's calculations.

Because Lloyd's report will help the Court understand or determine facts in issue with respect to Plaintiffs' claim for unjust enrichment, it is relevant to the task at hand. *See Sloan*, 2020 WL 1955643, at *6; *Grace*, 328 F.R.D. at 340 (the "bottom line" for admission of an expert at class certification is whether the expert's model is "tied" to plaintiffs' theory of liability (citing *In re Lenovo Adware Litig.*, 2016 WL 6277245, at *21 (N.D. Cal. Oct. 27, 2016))). If, after the parties submit merits expert reports, TR still takes issue with Lloyd's assumptions or inputs, it may challenge them at a class trial. The answer to these objections is not exclusion on relevance grounds.

2. If TR seeks additional deductions, it bears the burden to provide that evidence.

The thrust of TR's relevancy argument (that Lloyd should have deducted additional costs) is particularly weak considering that perfecting cost deductions was never Lloyd's responsibility to begin with. While the party seeking disgorgement has "the burden of producing evidence permitting at least a reasonable approximation of the amount of the wrongful gain," as Lloyd has done, "the residual risks of uncertainty in calculating net profit is assigned to the wrongdoer." *Ctr. for Healthcare Educ. & Rsch., Inc. v. Int'l Cong. for Joint Reconstruction, Inc.*, 57 Cal. App. 5th 1108, 1127 (2020) (quoting *Uzyel v. Kadisha*, 188 Cal. App. 4th 886, 894 (2010)).

Indeed, California unambiguously tasks *the defendant* with producing evidence of additional costs to be deducted from a net profit calculation. *See Meister v. Mensinger*, 230 Cal. App. 4th 381, 399 (2014); *Am. Master Lease*, 225 Cal. App. 4th at 1487-88 (it is up to defendant "to introduce evidence tending to show that the true extent of unjust enrichment is something less" that what plaintiff offers); Restatement (3d) of Restitution and Unjust Enrichment § 51(5)(d) ("[r]esidual risk of uncertainty in calculating net profit is assigned to the defendant"); *see also Brown*, 2022 WL 17961497 at *6; *Aoki v. Gilbert*, 2020 WL 6741693, at *32 (E.D. Cal. Nov. 17, 2020) (same). Allocating the risk of missing particular costs to the wrongdoer aligns with the purpose of disgorgement generally. *See, e.g.*, *Am. Master Lease*, 225 Cal. App. 4th at 1482-83, 1486 (emphases added) (to "compel a defendant to surrender *all* money obtained through an unfair business practice," and to "eliminate *the possibility of profit* from conscious wrongdoing").

Not only are cost deductions decidedly not Plaintiffs' burden, they too are input issues that go to weight rather than admissibility. So TR's refrain that Lloyd should be excluded for failing to deduct *enough* costs from his calculations should again be ignored. *See* Mot. at 6-9. In reality, Lloyd *did* deduct the marginal costs he identified as being attributable to TR's wrongful use of Californians' data, *see* Lloyd Rep. at 14-17, and his model can accommodate more deductions if needed. *See Grace*, 328 F.R.D. at 342 (admitting plaintiffs' expert even when assuming their model overlooked important inputs because defendant nowhere "suggests that [the] model is incapable of doing so"); *Culley v. Lincare Inc.*, 2016 WL 4208567, at *2 (E.D. Cal. Aug. 10, 2016) (admitting expert where "other variables could be substituted or added into [the] models," because "the actual calculation of damages is not useful in evaluating whether class certification requirements have been met"). Should TR come forward with evidence of more deductible costs, it is free to do so, but the Court should not exclude Lloyd for TR's abdication.

Lloyd's report is relevant because it will help the Court determine that Plaintiffs' unjust enrichment claim is certifiable, by showing that disgorgement can be calculated on a classwide basis in a manner consistent with plaintiffs' theory of liability. TR's attacks are transparent and unavailing. In its attempts to exclude Lloyd, TR divorces "net profit" from the policy undergirding disgorgement, in hopes of reducing its liability. This is a merits issue, not ripe for discussion at class certification. But even if TR were correct that the inputs Lloyd used, or the assumptions he made were somehow deficient, the Court should not exclude Lloyd on this ground; instead, to the extent TR's objections remain after the parties submit merits expert reports, TR may raise those objections on cross-examination.

V. CONCLUSION

Terry Lloyd is a well-qualified expert who produced a reliable report that is directly relevant to the issue of whether and how disgorgement may be measured classwide. All of TR's arguments to exclude his testimony and report are either incorrect, or irrelevant previews of its contentions on the merits. If, after the parties submit merits expert reports, TR still takes issue with Lloyd's final calculations, it may raise them on cross-examination. But these are not reasons for exclusion, especially at class certification. Accordingly, TR's request to exclude certain opinions of Lloyd's should be denied.

DATED: March 6, 2023

Respectfully submitted,

/s/ Andre M. Mura
Andre M. Mura

Eric H. Gibbs (SBN 178658)
Andre M. Mura (SBN 298541)
Amy M. Zeman (SBN 273100)
Mark H. Troutman (*pro hac vice*)
Ezekiel S. Wald (SBN 341490)
Hanne Jensen (SBN 336045)
GIBBS LAW GROUP LLP
1111 Broadway, Suite 2100
Oakland, California 94607
Telephone: (510) 350-9700
Facsimile: (510) 350-9701
ehg@classlawgroup.com

amm@classlawgroup.com
amz@classlawgroup.com
mht@classlawgroup.com
zsw@classlawgroup.com
hj@classlawgroup.com

Geoffrey A. Graber (SBN 211547)
Karina G. Puttieva (SBN 317702)
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave. NW, Fifth Floor
Washington, DC 20005
Telephone: (202) 408-4600
Facsimile: (202) 408-4699
ggraber@cohenmilstein.com
kputtieva@cohenmilstein.com

Attorneys for Plaintiffs and the Proposed Class