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

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

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

Attorneys for Defendant
Thomson Reuters Corporation

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' MOTION TO EXCLUDE TESTIMONY OF JOSEPH TUROW

Date: April 20, 2023
Time: 9:00 a.m.
Place: Courtroom 5, 17th Floor
Judge: Hon. Edward M. Chen

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 20, 2023 at 9:00 a.m., or as soon thereafter as this Motion may be heard in this Court, Defendant Thomson Reuters Corporation ("TR"), by and through its counsel of record, will and hereby does move the Court for an order excluding the testimony of Joseph Turow, including the report filed as Doc. 124-07. This Motion is based on this Notice, the following Memorandum of Points and Authorities, the pleadings and papers on file in this action, any arguments and evidence to be presented at hearing, and any other matters that may properly come before the Court.

TABLE OF CONTENTS

Page

I. STATEMENT OF ISSUE 1

II. INTRODUCTION 1

III. PROF. TUROW'S OPINION & TESTIMONY 1

IV. LEGAL STANDARD 3

V. ARGUMENT 4

A. Prof. Turow's opinion that all Californians have suffered uniform harm to their ethical and social rights is nothing more than *ipse dixit* philosophizing. 4

B. If Prof. Turow is being offered as an expert in consumer preferences, he fails to articulate how consumer preference affects his opinion, nor how the consumer surveys he cites are reliable or supportive of his conclusion. 5

C. If Prof. Turow is instead offering a conclusion about whether consumers' legal rights have been violated, such opinion ought to be excluded as a legal conclusion. 7

VI. CONCLUSION 8

TABLE OF AUTHORITIES

Page(s)

CASES

Andrews v. County of Orange,
2021 WL 6496831 (C.D. Cal. July 27, 2021) 7

Brown v. Google, LLC,
2022 WL 17961497 (N.D. Cal. Dec. 12, 2022) 4

Cahen v. Toyota Motor Corp.,
147 F. Supp. 3d 955 (N.D. Cal 2015) 8

Claar v. Burlington N. R.R. Co.,
29 F.3d 499 (9th Cir. 1994) 4

Daubert v. Merrell Dow Pharms., Inc.,
43 F.3d 1311 (9th Cir. 1995) 1, 4

Domingo ex rel. Domingo v. T.K.,
289 F.3d 600 (9th Cir. 2002) 1, 4, 5

Ellis v. Costco Wholesale Corp.,
657 F.3d 970 (9th Cir. 2011) 3

F.T.C. v. Com. Planet, Inc.,
642 F. App'x 680 (9th Cir. 2016) 5

Godinez v. Huerta,
2018 WL 2018048 (S.D. Cal. May 1, 2018) 7

Gong v. Jones,
2008 WL 4183937 (N.D. Cal. Sept. 9, 2008) 7

In re iPhone Application Litig.,
2011 WL 4403963, at *5 (N.D. Cal. Sept. 20, 2011)), *aff'd*, 717 F. App'x 720
(9th Cir. 2017) 8

Lust ex rel. Lust v. Merrell Dow Pharms., Inc.,
89 F.3d 594 (9th Cir. 1996) 3

TransUnion LLC v. Ramirez,
141 S. Ct. 2190 (2021) 8

United States v. Tamman,
782 F.3d 543 (9th Cir. 2015) 7

OTHER AUTHORITIES

Federal Rule of Evidence 702 ..... 1, 3

I. STATEMENT OF ISSUE

Whether the testimony and report of Joseph Turow should be excluded under Federal Rule of Evidence 702.

II. INTRODUCTION

Professor Turow's opinion[1] that CLEAR generates an abstract privacy harm should be excluded because it is based on nothing more than his personal belief (or, in his words, his "sense"). His report is not supported by any objective or verifiable evidence or methodology. Where "[p]ersonal opinion, not science, is testifying . . . [that] testimony is inadmissible as a matter of law under Rule 702." *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) (cleaned up).

To the extent Prof. Turow attempts to support his editorial scholarship by reference to "consumer perceptions," he has never articulated how those perceptions affect his opinion at all (i.e., whether a consumer's own preferences with respect to privacy tradeoffs affect the uniformity of his perceived "harm"). But, even if that explanation comes in response to this Motion, it would not matter. Each of the surveys that Prof. Turow cites in his report is either irrelevant to this case, or directly supports TR's position that there is a significant lack of commonality among putative class members regarding their preferences for CLEAR and its many socially-beneficial uses. As a result, Prof. Turow cannot "set forth the steps used to reach the conclusion that the research is applicable" and his report ought to be excluded. *Domingo ex rel. Domingo v. T.K.*, 289 F.3d 600, 606 (9th Cir. 2002).

Finally, to the extent that Prof. Turow opines on CLEAR's encroachment on any legal privacy right, that opinion should be excluded as legal opinion beyond the scope of expert testimony.

III. PROF. TUROW'S OPINION & TESTIMONY

Prof. Turow offers the opinion that "Thomson Reuters' operation of the CLEAR product affects privacy interests of Californians–the right to control personal information and to be let

[1] Report of Prof. Turow, Doc. 124-07 ("Turow Rep.").

alone–in such a way that all Californians whose information is accessible through CLEAR are harmed." Turow Rep. at 5. He claims that those rights are violated "at the point at which Thomson Reuters aggregates or collects . . . people's data," Declaration of Hayden Schottlaender, Ex. 4, Deposition of Joseph Turow ("Turow Dep."), at 167:19-168:4, and "regardless of who sees that information." *Id.* at 327:1-6. He has no opinion about whether those harms may differ among Californians. *Id.* at 188:5-12.

By "right to control," Prof. Turow means "the right to decide whether a company should even have [certain] information." *Id.* at 196:1-3. Prof. Turow concedes that "many Americans … have already . . . lost the ability to control their information." *Id.* at 70:22-71:5. Notwithstanding, Prof. Turow claims that the right involves "ensuring individuals are not blindsided by the unknown and unwanted collection and use of information about themselves." Turow Rep. at 15. Prof. Turow opines that TR violates that right because "the general public does not know about CLEAR." *Id.* at 15-16. And he bases that conclusion solely on: (1) the fact that he was "personally . . . unaware of CLEAR;" and (2) a deposition of a TR employee, where that employee "came close" to saying that "he doesn't know that any marketing materials are . . . presented to the public about . . . Thomson Reuters." Turow Dep. at 334:8-335:8.

Prof. Turow describes the right "to be let alone" as "a corollary of the right to control one's information. So they come together." *Id.* at 99:15-17. He also defines it as "the right to not be worried that companies could use data to create trouble for that person or to create discriminatory activities for that person." *Id.* at 212:5-12. He believes that that right extends to a "right not to be chosen by particular agencies for investigation because of certain information that got out that might not even be accurate and that CLEAR makes no pretension to accuracy." *Id.* at 212:22-213:10. But, when asked whether he was suggesting that criminals have a right to not be investigated, Prof. Turow reversed course and explained that the right to be let alone applies "within a marketing context." *Id.* at 215:2-6, 215:16-19. Prof. Turow concedes that CLEAR "cannot be used for" marketing or advertising, *id.* at 295:10-13, and CLEAR is in fact not used for marketing purposes. Doc. 152, ¶ 11.

Prof. Turow describes both the right to "control" and the right to "be let alone" as "ethical and social" rights. Turow Dep., at 174:18-175:2; 212:2-4. And he states that he is "offering opinion in this case regarding consumer perceptions." *Id.* at 119:3-10. But Prof. Turow did not conduct any survey in connection with this case because "it is so clear what CLEAR is doing that the harm of – the privacy harms that it is creating among Californians is – is not at issue here in my mind." *Id.* at 72:4-19. Instead, he relied on a handful of pre-existing surveys having nothing to do with CLEAR or any platform even similar to CLEAR. *Id.* at 71:8-16; *see also infra*, Part IV.B.

Because Prof. Turow conducted no surveys, he has "no idea" whether there might be any Californians who would *not* object to their information being in CLEAR. *Id.* at 153:5-8. Instead, Turow formed his opinions based on his own "sense . . . that if you told people what – what is in my report, they would freak out." *Id.* at 152:20-153:4. That "sense" was derived from "read[ing] material that was provided to [him] about CLEAR including promotional materials by CLEAR . . . [and] "depositions that described some of CLEAR's activities." *Id.* at 27:8-14.

IV. LEGAL STANDARD

"It is the proponent of the expert who has the burden of proving admissibility." *Lust ex rel. Lust v. Merrell Dow Pharms., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996). Expert testimony should only be admitted if "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. In evaluating a motion to strike expert testimony offered to support a motion for class certification, "the trial court must act as a 'gatekeeper' to exclude junk science that does not meet Federal Rule of Evidence 702's reliability standards by making a preliminary determination that the expert's testimony is reliable." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011) (citation omitted). "Thus, an expert's inference or assertion must be derived by the scientific method to be admissible." *Id.* (cleaned up).

V. ARGUMENT

Prof. Turow's opinion should be excluded as personal opinion unsupported by verifiable evidence or any science whatsoever. His attempts to connect that personal opinion to consumer perception are equally unexplained and unavailing. Consumer preference does not impact his opinion about uniform privacy harms whatsoever and does not even support that opinion. Finally, to the extent Prof. Turow's opinion touches on any *legal* privacy right, it should be excluded as legal opinion beyond the permissible scope of expert testimony.

A. Prof. Turow's opinion that all Californians have suffered uniform harm to their ethical and social rights is nothing more than *ipse dixit* philosophizing.

As described above, Prof. Turow opines that everyone has "ethical and social rights" to control their information and to be let alone. And he "conclude[s], based on a review and understanding of privacy scholarship, and . . . case materials, that Thomson Reuters' operation of CLEAR interferes" with those rights. Turow Rep. at 5. But Prof. Turow lacks "objective, verifiable evidence that [his] testimony is based on 'scientifically valid principles.'" *Daubert*, 43 F.3d at 1317-18. Instead, he relied only on his "*sense* . . . that if you told people" about the platform, "they would freak out[.]" Turow Dep. at 152:20-153:4. But an expert cannot "merely impute his own opinions to those of a reasonable consumer." *Brown v. Google, LLC*, 2022 WL 17961497, at *11 (N.D. Cal. Dec. 12, 2022) (excluding consumer expectation opinion where expert opinions were "based on nothing more than his personal interpretation . . . and the idea that such interpretations are reasonable."). "Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Domingo*, 289 F.3d at 607 (citation omitted). Thus, because Prof. Turow's sole opinion in this case espouses nothing more than "subjective beliefs or unsupported speculation," it is properly excluded under *Daubert*. *Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 502 (9th Cir. 1994).

B. If Prof. Turow is being offered as an expert in consumer preferences, he fails to articulate how consumer preference affects his opinion, nor how the consumer surveys he cites are reliable or supportive of his conclusion.

Despite claiming that he is "offering opinion in this case regarding consumer perceptions," (Turow Dep. at 119:3-10), Prof. Turow never explains how consumer preference affects his legal opinion at all. To the contrary, he suggests that whether Californians "would object to their information being in CLEAR" is not a point that would "affect [his] conclusion." *Id.* at 151:9-152:6.

But even if consumer preferences were somehow relevant to his opinion, Prof. Turow's testimony should still be excluded. First, he conducted no survey of consumer preferences relating to CLEAR. *Supra*, Part II. Second, to the extent Prof. Turow relies on extrinsic evidence to support his "sense" of consumer preferences, that extrinsic evidence is unreliable and fails to support his own conclusion. If an expert relies on surveys conducted by others, the expert must "demonstrate that the survey was conducted according to accepted principles." *F.T.C. v. Com. Planet, Inc.*, 642 F. App'x 680, 682 (9th Cir. 2016) (cleaned up). And "while studies involving similar but not identical situations may be helpful, an expert must set forth the steps used to reach the conclusion that the research is applicable." *Domingo*, 289 F.3d at 606. A trial court properly excludes expert testimony where "there is simply too great an analytical gap between the data and the opinion proffered." *Id.* (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

Here, there is an analytical chasm between Prof. Turow's cited evidence and his opinion regarding CLEAR. Prof. Turow's evidence was expressly identified, collected, and analyzed in significant detail in the Report of Dr. Ran Kivetz, Doc. 151-14, at 38 ("Kivetz Rep.") (offering a table and summary of Dr. Kivetz's survey evidence).

The problems Dr. Kivetz identifies with the surveys relied upon by Prof. Turow include:

- Prof. Turow's 2015 working paper conducted a survey regarding what Americans believe that *marketers* should be able to learn about them online. *Id.* at Part D.3.1. Again, Prof. Turow is well aware that CLEAR is not used for marketing or by marketers. Turow Dep. at 295:10-13.

- The statistic that Prof. Turow pulls from the National Telecommunications and Information Administration survey actually relates to consumer concerns with online security risks, such as identity theft and credit card fraud. Those have nothing to do with CLEAR (except to the extent CLEAR helps *combat* identity theft and fraud). Other components of the survey actually contradict Prof. Turow's opinion, as 77% of participants disagreed that losing control of their personal data was a major concern to them. Kivetz Rep., Part D.3.2.

- The ValuePenguin survey is wholly unreliable because it lacks any information about the survey questions, and the survey results are so vague that they could be interpreted in a multitude of ways, depending on what is meant by "companies," "use," "private information," "selling," and "personal information." More, the actual statistics offered by the ValuePenguin survey contradict Prof. Turow's opinion; they show that a *minority* of consumers are concerned with controlling information about them. *Id.* at Part D.3.3.

- The boyd and Marwick paper is a result of 58 interviews with teenagers, focusing on social media privacy. That paper opines: "Privacy is a fraught concept, with no clear agreed-upon definition . . . . How people conceptualize privacy and locate it in their life varies wildly, highlighting that a universal notion of privacy remains enigmatic." boyd, danah and Alice Marwick (2011), "Social Privacy in Networked Publics: Teens' Attitudes, Practices, and Strategies," A Decade in Internet Time: Symposium on the Dynamics of the Internet and Society, at 2-3. That paper supports TR's position that "Privacy must be contextualized" because it "varies by individual, by community, by situation, by role, and by interaction. In other words, privacy–and the norms surrounding privacy–cannot be divorced from context." *Id.* at 12; *see* Kivetz Rep., at Part D.3.4.

- The 2015 Pew Research Center survey asked vague and broad closed-ended questions that could encompass "potentially infinite circumstances [that] likely yielded idiosyncratic and varied interpretations across participants[.]" Kivetz Rep., ¶ 92. The irrelevance of the responses to the instant case is demonstrated by focus group responses

relating to that survey, in which participants clarified that they had in mind "[e]xpansive government data collection efforts" and "hackers" when discussing privacy concepts. *Id.* at Part D.3.5.

- The 2019 Pew Research Center survey reflected that respondents had wildly differing definitions of privacy, with only 26% of participants mentioning "control over information" as being a component of privacy. In fact, an even higher percentage of that survey's respondents had *no* answer for what "digital privacy" meant to them. And, again, the results suggested that respondents would support CLEAR's existence, insofar as a majority of respondents to that survey indicated that they would be very or somewhat comfortable with their data being used to "help improve [companies'] fraud prevention systems." And the same survey reflected that more respondents found it "acceptable" than "not acceptable" for the government to collect data about "all Americans to assess potential terrorist threats," and for DNA testing companies to "shar[e] customers' genetic data with law enforcement to help solve crimes." These results support TR; respondents' "openness to consider situations in which community or societal benefits can outweigh the alleged harm of sharing personal data indicates that it is *not* appropriate to assume classwide harm in the case of CLEAR . . . ." *Id.* at Part D.3.6.

Because of the analytical gap between Prof. Turow's cited evidence and his opinion that all Californians suffer an identical privacy harm from CLEAR, the Court should exclude his report.

C. If Prof. Turow is instead offering a conclusion about whether consumers' legal rights have been violated, such opinion ought to be excluded as a legal conclusion.

"[A]n expert cannot testify to a matter of law amounting to a legal conclusion." *United States v. Tamman*, 782 F.3d 543, 552-53 (9th Cir. 2015) (citations omitted). Testimony about whether a right has been violated is necessarily a legal opinion subject to exclusion. *Gong v. Jones*, 2008 WL 4183937, at *4 (N.D. Cal. Sept. 9, 2008) (excluding testimony regarding "whether any particular conduct violated any particular law or right") (citation omitted); *Godinez*

v. Huerta, 2018 WL 2018048, at *5 (S.D. Cal. May 1, 2018) (excluding opinion regarding whether defendant "violated [a] clearly established legal right"); *Andrews v. County of Orange*, 2021 WL 6496831, at *1 (C.D. Cal. July 27, 2021) ("Whether or not [defendants] violated [plaintiff's] legal rights is an ultimate issue of law that is not appropriate subject for expert testimony."). As such, his testimony that CLEAR violates established privacy rights ought to be excluded as legal opinion.

Even if Prof. Turow were entitled to render a legal opinion, his opinion would be inadmissible because the Supreme Court has already rejected it. In *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), the Supreme Court held that, "the retention of information lawfully obtained, without further disclosure" did not give rise to concrete harm necessary to confer Article III standing. *Id.* at 2209 (cleaned up); *see also Cahen v. Toyota Motor Corp.*, 147 F. Supp. 3d 955, 971 (N.D. Cal 2015) ("alleged collection and tracking of … personal information" held insufficient to show harm or injury for Article III standing (citing *In re iPhone Application Litig.*, 2011 WL 4403963, at *5 (N.D. Cal. Sept. 20, 2011)), *aff'd*, 717 F. App'x 720 (9th Cir. 2017). Dr. Turow's opinion regarding the purported harm that Plaintiffs and putative class members suffered is therefore inadmissible.

VI. Conclusion

For the foregoing reasons, the Court should strike the report of Prof. Turow.

Dated: April 11, 2023

PERKINS COIE LLP

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

Attorneys for Defendant Thomson Reuters Corporation