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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Edward M. Chen, Judge

CAT BROOKS and RASHEED	)	
SHABAZZ, individually and on	)	
behalf of all others similarly	)	
situated,	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	NO. C 21-01418 EMC
	)	
THOMSON REUTERS CORPORATION,	)	
	)	
Defendant.	)	
	)	

San Francisco, California
Thursday, April 20, 2023

TRANSCRIPT OF VIDEOCONFERENCE PROCEEDINGS

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United States District Court - Official Reporter

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Thursday - May 20, 2023

9:35 a.m.

P R O C E E D I N G S

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THE CLERK: The Court will now be hearing Brooks, et al. versus Thomson Reuters Corporation, case number 21-1418.

Counsel, please state your appearance for the record beginning with the Plaintiff.

MR. MURA: Good morning, Your Honor, Andre Mura for the Plaintiffs.

THE COURT: All right. Thank you, Mr. Mura.

MR. WALD: Good morning, Your Honor, Ezekiel Wald for the Plaintiffs.

THE COURT: All right. Good morning, Mr. Wald.

MS. JENSEN: Good morning, Your Honor, Hanne Jensen for the Plaintiffs.

THE COURT: Thank you, Ms. Jensen.

MS. PUTTIEVA: Good morning, Your Honor, Karina Puttieva for the Plaintiffs.

THE COURT: All right. Thank you, Ms. Puttieva.

MS. FAHRINGER: Good morning, Your Honor, Susan Fahringer, Perkins Coie, on behalf of Thomson Reuters.

With the Court's permission, I will be addressing the class certification motion with the exception of the issues relating to damages methodology and the Daubert motions relating to FSG, which will be handled by my colleague Tyler

1 Roberts.

2 **THE COURT:** All right. Thank you. Good morning,
3 Mr. Roberts.

4 **MR. ROBERTS:** Good morning, Your Honor.

5 **MS. MENALDO:** Good morning, Your Honor, Nicola Menaldo
6 also on behalf of Thomson Reuters. I will be handling any
7 issues relating to Thomson Reuters' motion to exclude the
8 testimony of Professor Turow and Plaintiff's motion to exclude
9 the testimony of Professor Bambauer and Dr. Kivetz.

10 **THE COURT:** All right. Thank you. So let's address
11 the class certification motion first. I, frankly, don't see a
12 standing -- a serious standing problem here.

13 I mean, the information, at least as alleged, that is I
14 gathered, as we have talked about before is extensive; and the
15 right to control information is something that's deeply rooted
16 historically in the right to privacy. There is a historic
17 common law analogue and concerning the California jurisprudence
18 on this in the *Hill NCAA* case talks about it and other cases
19 have talked about it and that applies whether or not -- and in
20 this case there's an allegation that this personal information
21 is commercialized and disseminated as a commercial product.

22 So it's not just gathered and put in a vault and stuck in
23 a basement somewhere. The whole purpose of this is to make
24 this available to subscribers.

25 So, I guess I will let Defendants respond if there's

1 something that I have missed; but, frankly, I don't see what
2 the standing issue is here.

3 **MS. FAHRINGER:** I'm so happy to respond. Thank you,
4 Your Honor, I would be delighted to.

5 **THE COURT:** Okay.

6 **MS. FAHRINGER:** So let me start by highlighting, by
7 noting something, that actually differentiates this case from
8 every case cited by the Plaintiffs for Article III standing.

9 The Plaintiffs here say that Thomson Reuters should have
10 asked them for consent before it collected any information
11 about them. That's -- that's the argument. That's the
12 concrete injury that they are relying on and that because it
13 didn't, Thomson Reuters caused them to lose control of that
14 information. That's the theory here.

15 So what we are talking about here is collecting
16 information about people. What we are not talking about is
17 collecting information from people.

18 For example, Thomson Reuters -- or rather, Plaintiffs
19 don't say that Thomson Reuters deceived them into giving it
20 information. It didn't place a tracking device or an app on
21 their devices to secretly gather information from them.

22 The Plaintiffs admit -- in fact, they emphasize -- that
23 there is no direct connection between the parties at all. And
24 by "direct connection," I don't just mean privity of contract.
25 I mean some sort of connection directly between the parties

1 beyond just having information about the person.

2 I'm talking about deception, secret spying, fraud, duress,
3 coercion, taking information from the Plaintiffs. And this
4 feature, the absence of any direct connection between the
5 parties, that distinguishes this case from every other case
6 cited by either party where Article III standing has been found
7 or where a UCL class or an unjust enrichment class has been
8 certified because in every one of those cases, there was a
9 direct connection between the parties.

10 Now, we are not saying that a direct connection is
11 necessary, but it is a common thread throughout every last one
12 of those cases.

13 So, without that, we are going to have to look even harder
14 to see whether the Plaintiffs suffered a concrete injury and to
15 see whether Thomson Reuters' conduct is unfair or unjust. And
16 there are two claims they have left.

17 And to do that, we are going to need to look at evidence
18 that's going to differ by class member; and that's going to
19 make it very hard to answer the central questions in this case
20 in one stroke for all or even most class members.

21 And by our reading, at least looking at all the cases
22 cited by either party, if the Court were to certify a UCL or an
23 unjust enrichment class or to, frankly, find Article III
24 standing based on this theory of injury, this privacy theory of
25 injury, it's going to be the first Court to do so.

1 **THE COURT:** Now let me ask you: You are suggesting
2 impliedly that aggregation of information if it doesn't come
3 directly from the subject is not -- does not state a privacy
4 claim.

5 **MS. FAHRINGER:** Not necessarily. That's the tricky
6 part.

7 **THE COURT:** Well, would you admit that aggregation
8 can?

9 **MS. FAHRINGER:** It depends.

10 **THE COURT:** On what?

11 **MS. FAHRINGER:** It depends. It depends on the classic
12 privacy considerations because privacy is an absolute. It's
13 going to depend. It's going to depend on --

14 **THE COURT:** All right. So something of this scale,
15 which is, at least as alleged -- you know, cradle to grave
16 sweeping. It's not one little piece of information like a
17 license plate entering a town or that kind of thing -- this, at
18 least as alleged, this is a great deal of aggregation.

19 And so if -- once you admit that aggregation without the
20 actual invasion -- going into someone's home or stealing their
21 bank accounts -- can constitute an invasion of privacy, which
22 is not a hard pill to swallow, why -- why isn't there enough
23 here?

24 **MS. FAHRINGER:** Yeah, let me address that. Number
25 one, we are past the allegations. We are well past the

1 allegations. What we are looking about now -- looking at now
2 is the actual information actually in this product that's
3 actually accessed by customers under various circumstances, and
4 that's most -- that's set forth in -- I think best in the
5 declaration of Kevin Appold where he talks about what's really
6 available and to whom and under what circumstances.

7 And the reason I keep saying it depends is because the
8 privacy interest that needs to be mapped to here is invasion of
9 privacy. And we agree.

10 And invasion of privacy typically requires some sort of
11 dissemination or disclosure; but either way, even as to
12 collection, it's going to depend on the information, the
13 sensitivity of the information, the volume of the information
14 and when we get to this stage for this motion, we look at the
15 individual Plaintiffs, the individual class members; and we
16 also for purposes of determining, you know, UCL and unjust
17 enrichment standing with respect to a privacy injury when we
18 later talk about predominance and common issues, this becomes a
19 really important point because without the common thread that
20 actually does tie every case together -- this common thread of
21 a direct connection -- it's just a lot harder to find actual
22 commonality, to find Article III concrete injury.

23 And let me walk through the cases that the Plaintiffs
24 cited in the Article III standing discussion because they
25 illustrate this point.

1 **THE COURT:** More than the cases, I'm actually
2 interested -- you are suggesting that well, maybe not so much
3 information is collected here. It's -- I don't know if you
4 would call it de minimus but not enough to breach the privacy
5 threshold.

6 **MS. FAHRINGER:** Yeah.

7 **THE COURT:** And so, I would like to hear the
8 counter-response before you go on from the Plaintiff.

9 What is it here -- what tells the Court that at this
10 juncture there's enough information to find that the
11 aggregation is egregious enough to constitute -- without the
12 actual invading and relationship and going into somebody's
13 house or going into their bank account, why the aggregation
14 aspect of this from third-party records, et cetera, et cetera
15 is enough?

16 **MR. MURA:** Yes, Your Honor. Well, we have put in
17 evidence showing that this is comprehensive cradle to graves
18 dossiers on Californians. It contained billions of data points
19 aggregated from public and non-public sources. We are talking
20 about social security numbers, criminal court records,
21 real-time booking information, utility and DMV records,
22 personal information about an individual's family and
23 associates.

24 Just the representative sample of the CLEAR report is 26
25 pages long with 40 categories of records. We also have in the

1 record the CLEAR reports of the named Plaintiffs.

2 So I think it's very -- it's very evident that this is a
3 comprehensive cradle to grave dossier that includes so much
4 information about individuals.

5 This Court addressed both California law and U.S. Supreme
6 Court law recognizing that compiling disparate pieces of
7 information into a single dossier, even if those individual
8 pieces of information are publicly available, constitutes a
9 significant invasion of privacy.

10 So the arguments that Ms. Fahringer is making about how
11 this is not an invasion of privacy have already been rejected
12 by the Court at the motion to dismiss stage. The Court even
13 recognized that the mere fact that some of Plaintiffs' personal
14 information may come from publicly available sources doesn't
15 diminish the significant harm Plaintiffs suffer from the sale
16 of the compiled information.

17 That is a unique injury directly traceable to Thomson
18 Reuters' conduct. I didn't hear a single case that Thomson
19 Reuters cited in making these broad and sweeping statements
20 about Article III; but if the Court just looks at *In Re:*
21 *Facebook Internet Tracking Litigation* from the Ninth Circuit,
22 the Ninth Circuit held that Plaintiffs suffer two distinct
23 concrete injuries, both privacy based and economic, when a
24 Defendant unjustly enriches itself by collecting and selling
25 Plaintiffs' personal information without consent.

1 That decision entirely resolves the Article III standing
2 question here. There's no causation --

3 **THE COURT:** That case didn't involve just aggregation
4 of public available data, did it?

5 **MS. HAN:** I think it was a mix, Your Honor; but I
6 think if you look at the privacy cases that we have cited in
7 *Hill*, and the Court itself cited at the motion to dismiss
8 stage, there is a CLEAR significant invasion of privacy even
9 from collection of disparate pieces of information that are
10 publicly available and compiling it into a single dossier.

11 That's very different, and I don't believe Ms. Fahringer
12 is accurately describing the facts and what isn't CLEAR, but
13 that a merits dispute.

14 And then the question for the Court at the class
15 certification stage is whether there's a core merits question
16 that can be resolved class wide and there is. That question is
17 whether Thomson Reuters non-consensual collection and
18 dissemination of class members' personal information is unfair
19 and whether that conduct unjustly resulted in Thomson Reuters
20 retaining the benefit.

21 That is an entirely classwide inquiry relying exclusively
22 on facts on the class. It is based on Thomson Reuters business
23 model, which is uniform. It is collection, selling of personal
24 information without a data subject's consent is a uniform
25 practice throughout the class and it uniformly does not seek

1 any Californians' consent to do so.

2 **THE COURT:** All right. Let me -- let me put standing
3 aside for a moment and ask Ms. Fahringer this point: Your
4 argument that this is not enough; this is a unique situation;
5 no case has found the mere aggregation sufficient or if it
6 does, you know, it has got to be an extreme circumstance, why
7 isn't that a merits question that can be decided in one sweep
8 and it's common to everyone? I mean, it would be to your
9 advantage for your client to get a class certified and to get
10 an order from the Court or a judgment that says this ain't
11 enough --

12 **MS. FAHRINGER:** Here is why --

13 **THE COURT:** -- you lose?

14 **MS. FAHRINGER:** Yeah, here is why it's difficult --
15 first, I do want to address the framework issue because it
16 seems like it's not a big deal to lack a direct connection. I
17 want to deal with that -- and the reason it matters so much
18 here is because the privacy theory of injury isn't just any
19 theory. The theory of injury here is loss of control.

20 And the -- all the cases cited by Plaintiffs, a few of
21 them are loss of control cases. That particular theory, that
22 makes a lot of sense when you have got a direct connection,
23 when you took information from the Plaintiffs, as Facebook did
24 in the referrer header cases, in all of the cases. That theory
25 makes sense.

1 In fact, *In Re: Facebook*, the internet -- the referrer
2 header case, there is a trespass to chattels claim because of
3 that relationship.

4 If you have got a lost control theory here, which the
5 Plaintiffs do, then -- and what you are talking about is
6 information about people, what the Plaintiffs are saying is you
7 should have asked first but you can't even look up their name
8 or their address. That's by extension what they are saying in
9 a no direct relationship case. I mean, that makes sense where
10 you are taking information from someone, sure, you can ask them
11 for --

12 **THE COURT:** But you acknowledge that there are some --
13 there's some point for aggregation alone without taking
14 information under a direct relationship can constitute a
15 violation. And if the idea -- and it is obvious. If the
16 subject says, "Hey, that's okay with me," that's okay.

17 If they don't say, "Okay with me," that's the control.
18 It's not the control of every single piece of data. It is the
19 aggregation and then what happens in -- with it.

20 So go back to my question. Why if you win, you win on the
21 merits, why isn't this a classwide common question?

22 **MS. FAHRINGER:** Unfortunately, the claims we are left
23 with, it just begs the question -- the claims we are left with
24 are the Plaintiffs -- I don't understand why but these
25 Plaintiffs don't have an invasion of privacy claim. They have

1 a UCL claim, and they have an unjust enrichment claim. That's
2 what we have got in this case.

3 And the question that you just outlined, it begs the
4 question of whether the conduct is unfair under the UCL or
5 unjust.

6 **THE COURT:** Why isn't that -- why can't that be
7 resolved classwide? Your arguments are meritorious. This is
8 unprecedented. It's not like *Facebook*; taking information
9 without consent; using it, et cetera, et cetera. This is
10 garnering information. It is in the public. You may have to
11 pay for it but it is publicly available information. No
12 privacy invasion. It's not an unfair business practice,
13 whichever test you use under 17200. Why isn't that -- it's the
14 same conduct. It's the same practice.

15 **MS. FAHRINGER:** Because --

16 **THE COURT:** Why isn't that a classwide matter?

17 **MS. FAHRINGER:** Because you can't analyze it in a
18 vacuum without applying the tests you need to apply. And let's
19 start with unjust enrichment -- let's just leave UCL aside for
20 the moment -- unjust enrichment.

21 The Ninth Circuit in *Doe versus Wal-Mart* ruled that you
22 need a direct relationship. It can't be too attenuated to
23 support an unjust enrichment claim. So you need a relationship
24 which we do not have here, period.

25 Number two --

1 **THE COURT:** Okay. So if you are right, you win.
2 That's a classwide determination.

3 **MS. FAHRINGER:** Well, and so then the reason that you
4 can't stop at just -- you can't just look at the Thomson
5 Reuters' side of the equation. You have to look at both sides.
6 Why? And you can't look at the hypothetical Plaintiff. You
7 can't do an academic exercise. You need to look -- you must
8 look -- well, we must look at the circumstances as between the
9 parties.

10 And the information available on this platform differs for
11 everyone. The access differs for everyone. The amount that's
12 disclosed differs depending on circumstances.

13 **THE COURT:** All right. Well, let me ask you something
14 specific. Mr. Mura says there's evidence that social security
15 numbers and criminal records are part of the CLEAR report. Is
16 that true and is that true for everyone or only some people?

17 **MS. FAHRINGER:** Let's look at miss -- that -- okay.
18 That -- the answer is depends. It is true for some people and
19 the people who can see it are only the people -- are only law
20 enforcement, the people who already have access to the exact
21 same records.

22 Let's take a look at Ms. Brooks' report just as an
23 illustration. The version -- so the way this platform works,
24 it has -- it is a public records database essentially with a
25 lot of public records.

1 The Fahringer declaration Exhibit A9 is the version of
2 Ms. Brooks' report that is -- that was obtained by her
3 investigator before filing the suit to support the lawsuit.
4 That's Fahringer Exhibit A9.

5 In discovery Thomson Reuters produced the version --
6 Thomson Reuters produced sort of as a report everything that
7 could be available in CLEAR. And bear in mind that we are not
8 talking about -- let me back up a step. The Plaintiffs are not
9 talking about disclosure, and they are not talking about taking
10 information from people. They are just talking about
11 aggregating information.

12 So looking at even the omnibus Andre Mura declaration,
13 Exhibit 73 -- that's Ms. Brooks omnibus CLEAR profile -- what
14 we see there is most of the information is based on public
15 records. She admits she is a public figure, so there's a lot
16 of it. It -- in fact, the exhibit includes a whole lot of
17 pages but all but 15 of those pages are the results of an
18 internet search for the words "cat" and "brooks."

19 So there are articles about a horse named Rose Colored Cat
20 and an owner named Brooks. There -- that's what the bulk of
21 the report is about.

22 And then when you look at the actual report for this
23 actual human being, all of these reports are going to vary; and
24 they are going to vary -- you know, some people might have no
25 information in CLEAR or very little information in CLEAR, you

1 know, a deed. Other reports like Ms. Brooks' will be lengthy
2 for whatever reasons.

3 So, anyway, let me also point out that typically for
4 privacy injury, disclosure matters. And so what we do next is
5 we look at what was the disclosure here? Was there a search?
6 Was there even a search conducted for information related to
7 Ms. Brooks? And the answer is: Yep, there was, three in the
8 past six years.

9 Guess what? Three CLEAR customers searched for
10 information about her. Only three. One of them generated a
11 report, and she testified that she's not saying any of the
12 customers lacked the legal authority to review whatever
13 information they looked at.

14 And she also testified that nothing happened to her as a
15 result other than her belief that she lost control of her
16 information. Same is true for Mr. Shabazz.

17 But Ms. Brooks is a very extensive report and even then we
18 are talking about information that is largely public record.
19 And when you see information that is the sort of information
20 that the court has pointed out -- for example, booking
21 records -- bear in mind, that that's not disclosed to anyone.
22 The only people who have access to that information are people
23 who already have access to that information; namely, law
24 enforcement.

25 So that's the -- that's what's going on. And the reason

1 that I keep hammering on -- you know, I -- I -- the reality is
2 these particular claims, you know, don't permit us to look at
3 this in a vacuum. They require us to look at this not in an
4 academic hypothetical sense but person-by-person.

5 **THE COURT:** All right. So let me ask Mr. Mura to
6 respond to two points. One is that the amount of information
7 is going to vary from person to person. Some may be more --
8 more intrusive than others, more -- you know, that the
9 information you gathered may be either more or less accessible
10 through other means -- readily through other means than for
11 some other than for others.

12 And two, doesn't it matter whether there was an actual
13 disclosure. If the class includes everyone who is in the
14 database but includes those where there has never been a search
15 request and the information has never been disseminated, aren't
16 they in a different position and wouldn't, for instance, the
17 balancing test for unfair practices under 17200, wouldn't that
18 vary depending on whether or not, for instance, there has been
19 a disclosure?

20 **MR. MURA:** Your Honor, let me take the first question,
21 the balancing test wouldn't -- wouldn't be any different
22 because the focus is on TR's conduct towards the class; and
23 that's sweeping in as much as data as it can from everyone and
24 without consent.

25 And if I can refer you -- some of this information is

1 under seal, so I'm a bit hamstrung in citing exactly all the
2 information. We detail it at pages 3 and 4 -- basically
3 pages 3 to 5 of our brief with record citations, but it is a
4 substantial amount of information that's collected from all
5 Californians. There are millions of searches happening.

6 So I don't agree with Ms. Fahringer that this is -- that
7 there's no harm here and that it differs based on each
8 Californian.

9 If you just look at the representative report, it's
10 representative because it includes the information that's
11 typically available in CLEAR reports. And Thomson Reuters buys
12 the information that populates those CLEAR reports pursuant to
13 subscriptions.

14 So it's not buying an individual's information. It is
15 buying wholesale records from the DMV, from utilities, from
16 different customers; and it's populating those reports. So
17 there's substantial information for all Californians; but,
18 again, if Thomson Reuters is going to make merits arguments
19 about the degree of harm, that's not a reason to deny class
20 certification because the focus here for the balancing test is
21 on Thomson Reuters' conduct; and that's its conduct of making
22 commercially available --

23 **THE COURT:** Well, but the balancing test has to take
24 into account how injurious, what the downside is; and you have
25 articulated at least a theory of privacy; but the argument is

1 in actuality if you look -- if one were to, you know, I don't
2 know, do a sampling of a hundred different reports, you may see
3 some are more intrusive and have more volume than others; and
4 that might inform -- you know, the ones that have the lightest
5 amount of information, the balance might not tip so heavily on
6 their side.

7 **MR. MURA:** Well, Thomson Reuters' defense to the
8 utility of their product, that society has benefited from
9 having everyone's information in CLEAR and that allowing
10 consent would allow individuals to then opt out. It would make
11 it more difficult for these customers to search. And so that
12 is a classwide defense of utility.

13 We also have the tethering test which doesn't require any
14 balancing whatsoever. And so under the tethering test, we
15 certainly would have class certification even despite all of
16 Ms. Fahringer's arguments because the question there is much
17 more straightforward.

18 And we also have a UCL injunction here, and it's seeking
19 to stop Thomson Reuters from making available this information
20 for sale.

21 **THE COURT:** Well, but you have to establish the
22 predicate violation. The injunction is just to remedy. So you
23 have got to either win on a balancing test, a tethering test,
24 an unlawful test, you know, whatever.

25 **MS. HAN:** That's right. The tethering test here is

1 straightforward. I mean, it looks to California statutes,
2 California regulations, which the Court already recognized at
3 the motion to dismiss stage. There are many ample examples of
4 the California legislature protecting Plaintiffs' personal
5 information from being disseminated online without consent.

6 And so the question is whether Thomson Reuters making
7 available this information is comparable to a violation of law,
8 and that is a straightforward question that doesn't require any
9 balancing.

10 Even on the balancing test, when you look at the harm, the
11 harm is classwide from not requesting consent before making
12 available so much information that's consistent with California
13 privacy cases.

14 And then the utility of the practice, if you just look at
15 Thomson Reuters' arguments about the utility of the challenged
16 conduct, which is Thomson Reuters' non-consensual collection
17 and sale of Californians' data, that doesn't turn on whether a
18 CLEAR customer's particular use of any particular Californian's
19 information is good or bad or what the information is.

20 I mean, the test asks about both the harm to the public
21 from the business practice, whether that's greater than the
22 utility of the practice. And this Court and many others have
23 found that when there is a uniform business practice, as there
24 is here, that that poses a question that can be resolved
25 classwide, that balancing test.

1 **THE COURT:** What -- when you say under the tethering
2 test of unfair, where you have a situation is not just taking
3 somebody's information out of their own hands but aggregating,
4 what is the -- what is your main tethered statute that you
5 assert?

6 **MR. MURA:** We have cited the California Constitution,
7 the CCPA, the -- I believe those are our main -- I disagree
8 with Ms. Fahringer to the extent she said there isn't an
9 invasion of privacy claim. We have tethered to California's
10 public policy which does protect against such invasions of
11 privacy.

12 **THE COURT:** But, for instance, the NCAA case -- I'm
13 familiar with that case since I litigated that case -- you
14 know, that was mandatory drug testing. That was extracting
15 urine from people and doing an analysis. That wasn't
16 aggregation of data.

17 What's a good -- is there -- have you cited, I don't
18 remember seeing it, a California constitutional case that
19 involves strictly aggregation of publicly available data?

20 **MR. MURA:** Well, I do think we cited the ballot
21 materials that were enacted as part of the California
22 Constitution. At least Professor Turow talks about this in his
23 report, and the animating force of those laws was to protect
24 the right to control and the right to be left alone. And both
25 of those are implicated here.

1 And we have also cited -- I mean, just if you look at
2 California policy involving the CCPA, there -- you know,
3 Californians are provided an opportunity to control their
4 information and decide whether it's made available.

5 I mean, Thomson Reuters by law is required to allow
6 certain opt out rights. We have a long discussion about
7 whether we think Thomson Reuters is complying with that law.

8 And so all of that is going to go to the merits. All of
9 that is going to be a decision that can be reached classwide
10 because Thomson Reuters' conduct in all of these respects is
11 uniform towards class.

12 **THE COURT:** So what about the dissemination, the
13 second half of the question, whether or not -- not everybody
14 has had their information disseminated and requested. Doesn't
15 that create differences?

16 **MR. MURA:** No, Your Honor, because the class includes
17 everyone for whom Thomson Reuters makes available the
18 information. And so everyone's information -- and we have
19 testimony from this from Mr. Fox -- but pretty much California
20 is well covered in CLEAR, so were the categories of information
21 that we have been discussing; and so and there are millions of
22 searches happening.

23 So I do agree that everyone's information is susceptible
24 to being made available, and there are searches being run all
25 the time.

1 And so for purposes of injunctive relief, it is entirely
2 inappropriate to enjoin Thomson Reuters from its uniform
3 practice of making available all of this information to its
4 customers.

5 **THE COURT:** Well, that raises a different question,
6 whether -- if there were an injunction in this case, whether it
7 would prohibit even the collection of information or just the
8 dissemination of information; but in terms of classwide damage
9 and the application of the balancing test, et cetera, et
10 cetera, if it's been -- if you are one of those persons in the
11 class who has had information collected, which seems to be a
12 lot of people, but only 10 percent have actually had their
13 information shared with anybody else -- it is still locked up
14 on the server -- are they not in a different position than
15 those who had information disseminated to others?

16 **MR. MURA:** Not in the sense of injury. If there's a
17 difference in terms of damages, that's not a reason to not
18 certify the class; and we think Ninth Circuit law is very CLEAR
19 on that. We don't think there's any real difference. We think
20 a pro rata distribution of Thomson Reuters --

21 **THE COURT:** I think the argument is -- before we get
22 to damages -- and, that is, there may not be a privacy
23 violation. If Thomson Reuters never sold this stuff, they just
24 collected it -- I don't know, for historical purposes or
25 whatever -- they never sold, never made it available, seems

1 like your case might be different.

2 **MR. MURA:** Well, but I think that is counter-factual,
3 Your Honor, because it is making available all of this
4 information.

5 **THE COURT:** No, no. But my point is: If that's the
6 only act they did, that might result in one -- one outcome.
7 What I'm suggesting is that if that makes a difference, then
8 doesn't it make a difference whether your information has been
9 disseminated or not? If it has not been disseminated, you
10 don't suffer the same harm as one where it has been given to
11 third parties. It's disclosure that's an important part of it.

12 **MR. MURA:** I think disclosure to the extent that it
13 matters for the degree of harm, but I don't think it matters in
14 terms of establishing a harm that's classwide because the
15 information is being made available for everyone.

16 So, yes, there might be additional harms that exist for
17 downstream harms; but the harm that we are focused on is the
18 lack of consents and everyone's information is being made
19 available.

20 So I do think on this record and the -- the evidence that
21 we have put forward, there is uniformity across the class in
22 terms of -- in terms of that consideration.

23 **THE COURT:** Do we have any idea what percentage of
24 those -- of the names in CLEAR have been subject to requests
25 and dissemination? Is it most of them? Some of them? Do we

1 have any idea?

2 **MS. FAHRINGER:** Your Honor, that --

3 **THE COURT:** I'm --

4 **MS. FAHRINGER:** Oh, I'm sorry.

5 **THE COURT:** Do you know, Mr. Mura?

6 **MR. MURA:** I don't know off the top of my head,
7 Your Honor.

8 **THE COURT:** All right. You were going to say
9 something, Ms. Fahringer.

10 **MS. FAHRINGER:** Yes, I was. I was going to say: How
11 do we answer that question? Because we are not talking about
12 taking information from people. We are talking about
13 information about people, street address, that sort of thing.
14 So --

15 **THE COURT:** No, no.

16 **MS. FAHRINGER:** -- I don't know the answer.

17 **THE COURT:** Yeah. My question was simpler. How many
18 searches -- of the people in the database, what percentage of
19 them have had -- like the named Plaintiff here -- somebody
20 request, make a search? Is it most or all?

21 **MS. FAHRINGER:** Good question. I think all we have
22 got right now is the fact that over six years this public
23 figure, who is Ms. Brooks who ran for mayor of Oakland, over
24 six years there were only three searches for her.

25 **THE COURT:** You would -- your client would know how

1 many searches. People pay for these searches, right? They
2 would know how many.

3 **MS. FAHRINGER:** Yeah, there are a lot -- I'm sorry. I
4 don't mean to be difficult, but we have to frame the question
5 in a way that it's answerable.

6 And so how many queries are made per day? A whole lot.
7 How many are made for California residents? Can't tell. You
8 know I think "a lot" is the only answer I can give.

9 But if I may, may I just show some illustrations of why
10 this is an important question and why it's a difficult
11 question, and also I want to speak to the tethering test
12 because that -- I think captures some of the issues we are
13 talking about.

14 **THE COURT:** Okay.

15 **MS. FAHRINGER:** Let me give specific examples of
16 people in CLEAR, just a couple of them. Let's take -- so let's
17 start with the balancing test. We balance the harm against the
18 utility of CLEAR. It's not correct to say we are only talking
19 about social utility. We are talking about utility to people
20 because this product is used for -- to prevent identity theft.
21 It's used for all sorts of very, very socially beneficial
22 reasons for particular class members. Preventing fraud,
23 identity theft, solving crime, making sure that government
24 benefits get to the right address, things like that. That's
25 how courts and public defenders and others actually use this

1 product.

2 So let's just take a few examples. Say we have got a
3 victim of identity theft with very scant information in the
4 database -- footnote, it is not actually a database but
5 whatever -- a very scant information through the platform.

6 The only time the platform is used as to that person is to
7 prevent somebody who stole their identity from opening an
8 account at a bank. That's the only time this platform is used
9 as to them. Is that unfair?

10 **THE COURT:** And who is the user in that circumstance?

11 **MS. FAHRINGER:** The only customers who can use this
12 product are companies and government entities, government
13 agencies. No individuals can use this product. Just official
14 customers.

15 And you can see that because we gave the Court a list of
16 all -- all current customers of CLEAR. They are public
17 defenders. They are courts. They are banks, law enforcement,
18 anyone who needs to try to find a correct address for someone,
19 you know, government agencies, health and social services,
20 child protective services. That's the customer base. The
21 customer base is --

22 **THE COURT:** So, I'm just trying to understand. I
23 should ask a more specific question. You have a case of credit
24 card fraud. You say the benefits of making sure no further
25 fraud -- is it the bank then that engages the services of

1 Reuters? Who queries?

2 **MS. FAHRINGER:** It would be the bank. It would be the
3 person who is checking -- the person who is approving a loan.
4 The account would be held by the entity; that is the bank. And
5 that person could go do the research on their own, but it's
6 faster and the loan gets approved faster if they have got a
7 product that allows them to say this person in front of me is
8 actually who they say they are. That is actually how this
9 product is used.

10 **THE COURT:** Do you know if it is common then for the
11 bank to get consent from the proposed lender and say, "Well we
12 are going to do" -- because usually you have to tell them it's
13 okay to run a --

14 **MS. FAHRINGER:** Yeah, typically, I would imagine. I
15 mean, that's what I do when the bank -- you have to sign all
16 sorts of forms that say, "Yeah, you can look me up." I mean, I
17 want you to look me up. You know, I don't -- bear in mind, the
18 fraudster would have given their consent.

19 Let me take a real life example. San Bernardino shooter.
20 This is in actual use of this platform. You know, this was
21 long ago at least for some people, not for me. I remember it
22 vividly. But there was a San Bernardino shooter and this
23 Sporten (phonetic) declaration explains that she was in law
24 enforcement at the time and other sources had given an address
25 for the guy who was suspected -- who was associated with the

1 event, the San Bernardino shooting. The only platform that got
2 them the right address was CLEAR and then because of that,
3 police cars rushed to the address and they were able to
4 actually stop the vehicle with the guy in it on the way to kill
5 more people. That's how this platform is actually used.

6 And no, they are not going to go ask for his permission
7 before they do that. And is that unfair under the UCL? Does
8 it violate his privacy? Does it violate the tethering test?
9 No.

10 And that's why you can't look at this in the abstract.
11 You have to look at it in specific examples especially when the
12 core -- the core feature of this case is privacy, which is
13 classically context dependent and classically accommodates
14 other social policies and depends on the setting and
15 typically -- and typically requires one of two things, neither
16 of which is the contention here -- one thing it requires -- and
17 I will emphasize every single UCL case we are talking about,
18 every single unjust enrichment case requires taking from
19 because asking for consent does not make sense if you don't
20 have that construct because ask first doesn't make -- because a
21 loss of control theory doesn't make sense if you don't have
22 that construct, number one.

23 Number two, the Court is one hundred percent right that
24 dissemination matters. And beyond that, it's not just
25 dissemination. It's what is the information? Who was it

1 disclosed to? Under what circumstances? Those are the classic
2 privacy considerations that --

3 **THE COURT:** I guess I go back to the same question,
4 what you have just argued is the utility of this, whether it is
5 by banks, whether it is by law enforcement in an urgent
6 situation; and that informs the calculus under the unfair test,
7 but that -- why isn't that an issue that is decided with one
8 stroke?

9 Either -- either there is a lot of utility -- because I
10 don't think anybody is arguing well, we are going to judge each
11 one -- whether the shooter in San Bernardino rights were
12 violated as opposed to the person who is applying for a loan.

13 **MS. FAHRINGER:** Yeah.

14 **THE COURT:** It is a -- so, you know, all the arguments
15 on the merits and then the counter-arguments, which I'm sure
16 Mr. Mura has -- he has already made -- those all seem to me
17 classwide arguments. You either win or lose.

18 **MS. FAHRINGER:** Yeah, because you can't -- this claim,
19 UCL does not let you look at this in the abstract. We have to
20 look at the person. We have to look at the Plaintiff.

21 **THE COURT:** Right. Not in the abstract. You can look
22 at examples. I mean, you can look at -- when you assess
23 utility, I would imagine your trial, your side of the brief,
24 will give all these examples of why there is utility generally
25 to this product and why you can't stifle this product because

1 there's going to be true societal costs. And Mr. Mura may come
2 up with other examples of why no, there are huge costs to this
3 thing that's not worth the benefits, et cetera; but these are
4 all -- it is not in a vacuum but it is in the aggregate.

5 **MS. FAHRINGER:** Uh-huh, yeah, a couple things. One
6 is -- and I will just reiterate that what we have got is the
7 damages claim is just for unjust enrichment the disgorgement
8 theory is just that one claim. The UCL is just for injunctive
9 relief. That's where we are today. That's after the motion to
10 dismiss. We've just got unjust enrichment for disgorgement,
11 just that. And the Ninth Circuit says under *Doe v. Wal-Mart* no
12 dice, you can't do that.

13 And I would be happy to go into great detail about why
14 class certification is inappropriate about -- you know, with
15 respect to the unjust enrichment class.

16 The Court asked about UCL claim injunctive relief, that's
17 what we are left with, 23(b)(2) certification. And I just -- I
18 don't think that we are in a situation where we have got enough
19 clarity about the injunction. The injunction is going to need
20 to be tethered to the violation of the UCL. It's going to need
21 to be narrowly -- we are going to have an injunction that --
22 that maps to the UCL and that maps to the class.

23 And it's -- there's just so much variation in the class.
24 I'm going to give you another example. I hope I'm not too
25 tiring with these examples, but let me give you one more, which

1 is we have got, say -- just for the sake of argument, let's
2 just assume Florida's Unfair Competition law is different for
3 conflict of laws purposes.

4 You have got a Florida resident. They grow up in Florida.
5 They live in California for a year during class period. The
6 information in CLEAR has to do with their Florida residency.
7 They move back to Florida and that's where we are. They are in
8 the class.

9 So would an injunction that says you can't collect
10 information about that person, you can't make it available for
11 sale, how does that work? Does that mean that you can't --
12 that Florida -- who wants that person, their resident, to be
13 able to get government benefits, to be able to be investigated
14 for crime, to be -- Florida wants that for its residents. So
15 how is it going to work?

16 Is Thomson Reuters going to have -- because they were in
17 the class and they -- their information was made available in
18 CLEAR during the class period, does Thomson Reuters -- for the
19 injunction does Thompson Reuters now need to go ask them for
20 their consent before anyone can search for their information
21 now?

22 The hypotheticals are endless, and that's -- that's why we
23 have to get rigorous, rigorous about the analysis under the UCL
24 and the balancing test and the tethering test in order to
25 undertake the analysis that we are required to do.

1 And I'm going to -- as I mentioned the tethering test, I
2 have just got to emphasize that the right to privacy and the
3 statutes that Mr. Mura described -- and I will just go over the
4 CCPA as one example. Guess what? That statute has to do with
5 taking information from people not about people. That's the
6 nature of the CCPA.

7 There's no private right of action. But that's what's
8 going on with the CCP and the California Constitutional Right
9 for Privacy, the classic intrusion upon seclusion, privacy
10 invasion, all of those, they are triggered when we have either
11 got something like "you took it from me. You shouldn't have
12 done that. You intruded on my privacy" or "you disclosed it.
13 You told somebody about it. You forced me to take a urine
14 test. That's wrong. You can't do that to me. That invades my
15 privacy."

16 We are one hundred percent behind that, but to say that
17 you can't even collect information about people, connect that
18 information, relate it to each other, this is one -- this is an
19 activity I do every day. Everyone does this every day.

20 **THE COURT:** But you have admitted there may be some
21 limit to that?

22 **MS. FAHRINGER:** Well --

23 **THE COURT:** Not the mere act of collecting
24 information, putting two and two; but putting 1,000 plus 1,000
25 together may be a little different than adding 1 and 1.

1 **MS. FAHRINGER:** Well, no court has said that yet, not
2 in the context -- we just haven't -- we don't have it in *In Re:*
3 *Facebook* tracking. This would be the first Court to say that
4 absent disclosure, absent taking from that direct relationship,
5 be kind of thing, absent that, this looks like a privacy
6 invasion. That's really -- that would be anomalous, and I
7 think Transunion would have been a different case if that was,
8 in fact, a privacy right.

9 **THE COURT:** All right. But again, that's a
10 categorical argument. You are making a categorical argument
11 that there is no precedent for gathering information without
12 taking information and having it actionable under California
13 law, which you might win, you might lose. But it seems to
14 me --

15 **MS. FAHRINGER:** Yeah.

16 **THE COURT:** -- it's not individually fact dependent.
17 It's --

18 **MS. FAHRINGER:** It is. I'm sorry. I didn't mean to
19 interrupt. Did I?

20 **THE COURT:** Well, I don't see why it is because if
21 your rule of law is correct, then why does it matter whether --
22 you know, what particular piece of information because none of
23 it was taken from. That's your key. That's your --

24 **MS. FAHRINGER:** Oh, I see. So you are -- so the
25 thought is that well, if we can say this isn't a violation, as

1 long as you are not taking from, as long as you are not
2 disclosing -- I mean, I think I'm not understanding your
3 question, Your Honor.

4 **THE COURT:** Well, that's what you have been arguing.

5 **MS. FAHRINGER:** No, no.

6 **THE COURT:** If you don't take from, there's no
7 violation of California law.

8 **MS. FAHRINGER:** This is where we are not connecting.
9 I'm not saying that it's necessary to have that -- to have that
10 connection, and I'm not saying it is necessary to have
11 disclosure.

12 What I am saying is that it is the collection -- the
13 to/from relationship -- happens to be the common thread between
14 all the Article III standing cases and all the certification of
15 UCL classes and all the certification of unjust enrichment
16 classes. All of them require that.

17 I'm not saying you need it necessarily. I'm saying that
18 if you don't have it, you are going to have to look more
19 deeply. And what you are going to look at is going to vary.
20 It is going to vary by class member and even for the same class
21 member, over time, depending on what customer searched,
22 depending on whether that search, it's going to -- for each of
23 those situations, you are going to have to look more deeply.

24 And that's why what we are left with is no common issues,
25 not with this set of claims, not with this theory of injury.

1 No common issues, no predominance, not a -- not a situation
2 that lends --

3 **THE COURT:** Well, the variances -- tell me -- just
4 articulate so I understand --

5 **MS. FAHRINGER:** Yeah.

6 **THE COURT:** -- absent the taking from, what are the
7 factors that would inform whether or not a cause of action lies
8 under the various privacy and business practice laws?

9 **MS. FAHRINGER:** Sure. So for -- I will focus -- let
10 me focus first on unjust enrichment because we are going to
11 deal with unjust enrichment with respect to the disgorgement
12 theory.

13 So we start with the elements of the claims. Again, I
14 will emphasize the *Doe versus Wal-Mart* case, which is kind of
15 very, very similar to this one. It's -- and the Ninth Circuit
16 ruled there that there's no unjust enrichment where the
17 relationship is too attenuated between the parties.

18 **THE COURT:** Right. And that's a classwide --

19 **MS. FAHRINGER:** Yeah.

20 **THE COURT:** Yeah.

21 **MS. FAHRINGER:** Here is what you need to look at: So,
22 it's not enough to show that Thomson Reuters received a
23 benefit. It has to have done so under circumstances as between
24 the parties such as fraud, coercion or duress but make it
25 inequitable; to obtain the benefit without paying for it.

1 That's the test. That's the famous test.

2 The Court -- the Rejoice! Coffee Company restates that
3 test. So the circumstances between the parties, whether they
4 are similar to fraud, coercion or duress will drive the
5 resolution of the claim. That's *Florey Institute of*
6 *Neuroscience*, we cited it in our brief. Common thread, of
7 course, is the direct connection. That's the *Doe* case.

8 Where there isn't a direction connection, we need to look
9 even more closely at the circumstances between the parties, not
10 ignore the requirement entirely.

11 And every one of the -- there are very, very few class
12 certifications of unjust enrichment classes, and they are
13 typically like deceptive advertising, you know, sort of
14 ancillary claims towards deceptive fraud case, a deceptive
15 advertising case.

16 So on top of that, an unjust enrichment claim can't
17 frustrate a public policy. That's an additional layer on top
18 of the standard elements. That's the *First National Savings*
19 *Bank* case, the *Tarlison* case.

20 And so this is a classic example of a claim that isn't
21 suited to class treatment because those need to be looked at as
22 between the parties. And case after case after case says that.
23 And that --

24 **THE COURT:** Why -- that's where I question you because
25 many of your arguments are "here is an example of why it is so

1 important. It is valuable for law enforcement. It is valuable
2 for bank fraud. It is valuable for this situation."

3 Why shouldn't -- why can't that be looked at in the
4 aggregate? That is, this practice of, you know, collecting
5 information, is it sufficiently -- is this an unjust use?

6 And you would argue that absolutely not because look at,
7 we have saved lives, we have saved people, we have facilitated
8 loans, we have done all this. Why can't that be decided in the
9 aggregate as a class? That's why I'm --

10 **MS. FAHRINGER:** Because it won't drive the full
11 resolution of the claims because it is only decided if it is
12 answered in one direction because if that's not enough, then
13 you still might have no unjust enrichment because of the
14 circumstances between the parties, the San Bernardino shooter,
15 things like that.

16 And so it's like that is -- there's no doubt that it
17 matters; that there are great, great social utility benefits to
18 this product. We are not saying ignore them. We are saying
19 they are part of the equation, and they are part of the steps
20 that need to be taken; and there are a lot of them in order to
21 resolve the claim in either direction.

22 That's -- that's the problem that we are faced with. So
23 circumstances do differ based on things like, for a particular
24 person, what information isn't CLEAR? Is it the -- and let me
25 just emphasize that the Plaintiffs kind of seem to know this

1 when they drafted the complaint and the first amended complaint
2 and their -- and their motion, for that matter, because all of
3 those were chock-full of specific illustrations of specific
4 information that might be available in CLEAR as to any
5 particular class member, that might be disclosed, that might be
6 shared, not necessarily -- wouldn't necessarily be shared. It
7 depends.

8 And so the question -- I mean, I'm struggling too candidly
9 because there are -- it's so seductive. It's so -- especially
10 for these incredibly important issues, it's so alluring to want
11 to resolve them in an abstract way, in sort of a hypothetical
12 way that is not driven by real people, real class members who
13 are going to be directly impacted by whatever decision the
14 Court makes. That's -- these two claims don't let us do that.

15 **THE COURT:** All right. Let me hear from, Mr. Mura,
16 your response to several things. One is the depth of the
17 information, how much uniformity is there that you can
18 demonstrate in terms of the depth of information and the
19 breadth of information that is collected because Mr. Fahringer
20 is suggesting "Well, for some people we might get this, we
21 might not get that;" and there's so much variation that there's
22 not enough here to a substantial invasion privacy.

23 **MR. MURA:** Yes, Your Honor, that's entirely wrong
24 because the way in which Thomson Reuters' business model works
25 is that it collects as much information from as many people as

1 possible from as many sources and makes them available to its
2 many paying customers.

3 And if you just look again, I pointed to a representative
4 sample of CLEAR report. There is no dispute that that's a
5 representative sample. It's 26 pages long. It has forty
6 category of records. You are going to find those records for
7 Californians because of the way in which Thomson Reuters goes
8 out and buys information that it makes available through CLEAR.

9 It's through subscription based plans. It buys the
10 information from a variety of sources. So many of those
11 sources are listed there.

12 Ms. Fahringer was very selective in her description of the
13 use of the CLEAR and its customers, but they are much broader
14 than the examples that she is cherry-picking; and all of that
15 information is available for Californians.

16 And so if you -- and we also did talk about the amount of
17 searches. I think that's on page 4 and 5 of our brief,
18 Your Honor. We talked about how customers may search for
19 single individuals. They may also run batch searches, which
20 are very large searches of individuals at once. And we talk
21 about the substantial -- about the search following there
22 through CLEAR. And we give 2020 as an example.

23 And so that's Exhibits 30 and Exhibit 26 and Exhibit 29,
24 which all discuss the high-level of searches that are being
25 done every single day.

1 And so there isn't any real difference in terms of the
2 making available of Californians' information here. And I
3 totally disagree with Ms. Fahringer that there isn't a direct
4 connection here. Plaintiffs' information is the product, and
5 the misappropriation of that information is a common injury.

6 Thomson Reuters simply doesn't ask for consent. If it
7 thinks CLEAR is so beneficial, it would ask for consent but it
8 doesn't ask for consent. Ultimately, that's a merits question.

9 I mean, this uniform practice is going to be an issue
10 that's going to be decided classwide. And all of the defenses
11 that Ms. Fahringer is talking about are due to unjust
12 enrichment or the UCL. For example, she talked about how an
13 unjust enrichment claim can frustrate a public policy. I mean,
14 that's a classwide defense. If Ms. Fahringer wants to make
15 that argument, she can make it.

16 **THE COURT:** All right. What about -- I understand
17 that point. What about -- there may be situations if you look
18 at it individually, the unjust enrichment or unfair practice
19 may -- that calculus may run in a different direction. The
20 example is the San Bernardino shooter. Would he have a claim
21 because they ran the search to find out his true address?

22 **MR. MURA:** Well, even that, Your Honor, I mean, the
23 argument that Ms. Fahringer is making is that society is better
24 off when CLEAR has everyone's information in it because we are
25 taking about the --

1 **THE COURT:** Well, no, she's --

2 **MR. MURA:** -- harm to the general public.

3 **THE COURT:** She is --

4 **MR. MURA:** What is the harm to the general public?

5 **THE COURT:** Hold on.

6 **MR. MURA:** Sorry, Your Honor.

7 **THE COURT:** You are making two arguments. One is the
8 categorical one, which I agree with you is -- can be decided
9 categorically. She is also saying even if she loses that
10 argument and you win, there are still individual instances
11 where there is no unjust enrichment like the San Bernardino
12 shooting. Even if they don't -- they can't justify all of
13 their practices because of the San Bernardino situation and the
14 fraud situation. And there's no good excuse because, like
15 banks can get consent. There's no reason why you can't get
16 consent absent exigent circumstances.

17 Let's say she loses that, her client still has an argument
18 that there are still individual circumstances where if you are
19 looking at unjust enrichment, there's a good argument that
20 there is no unjust enrichment because we are an exigent
21 circumstance where you can't get consent and the utility is
22 tremendous, et cetera, et cetera.

23 So if you admit that there may be some situations, does
24 that defeat class certification?

25 **MR. MURA:** I don't think I'm admitting that there are

1 those situations, Your Honor. I think the question is you are
2 balancing the harm to the public versus the utility of that
3 practice.

4 If Thomson Reuters wants to come forward with individual
5 examples of where society was benefited or an individual was
6 benefited, then that would be balanced against the harm to the
7 public. I still don't think the question is whether Thomson
8 Reuters non-consensual collection and sale of that data
9 outweighs the utility of that practice. It's that practice
10 that must be balanced against the harm.

11 Thomson Reuters really wants to focus on "Well, yes, we
12 took your information, we collected it, we aggregated it, we
13 sold it, we didn't get your consent; but we should be excused
14 from that privacy violation because at the end a customer used
15 it for good.

16 And that's not how California privacy law or any privacy
17 law is understood. I mean, privacy law recognizes the failure
18 to obtain consent as an independent harm even if there aren't
19 consequences later on downstream.

20 So I don't think that's even a defense either under the
21 UCL test or under unjust enrichment; but if Ms. Fahringer wants
22 to come up with examples such as that, it's going to have to be
23 balanced against the general practice of Thomson Reuters
24 collecting and aggregating and selling information without
25 consent, and that's going to be something that can be decided

1 classwide.

2 **THE COURT:** So you are saying that those examples,
3 however many San Bernardino type examples she comes up with,
4 that just gets thrown into the aggregate calculus. There's no
5 carve-out.

6 **MR. MURA:** Yes. And when they talk about those
7 examples, they talk about those as indirect benefits to
8 society. They talk about those benefits as indirect benefits
9 to society; that society is safer because if you allow people
10 to -- as Ms. Fahringer said earlier, if you allow people to
11 agree to have a consent model, then CLEAR isn't going to work.
12 It's not going to to allow the investigation of everyone at a
13 moment's notice.

14 And so that's their -- their argument for why this is
15 beneficial to society, societal wide. And that's an argument
16 that should be made classwide.

17 (Pause in proceedings.)

18 **THE COURT:** How about the example about the Florida
19 resident who lives into California for six months, gets into
20 the CLEAR database and then moves back to Florida and Florida
21 wants to use it. Why should that -- somebody like that, a
22 transient person, be included in the class at least as you have
23 defined it?

24 **MR. MURA:** Well, the way we have defined the class is
25 to focus on California. I mean, the UCL reaches any unlawful

1 business practice committed in California. We have defined the
2 class to be limited to individuals who both resided in the
3 State of California and whose information Thomson Reuters made
4 available for sale through CLEAR.

5 So there's always a connection under our class definition
6 to California. And I think an injunction that stops Thomson
7 Reuters from collecting information from Californians without
8 consent, I think that would perfectly cover California. It is
9 consistent with the reach of the UCL. There is no permissible
10 extraterritorial there.

11 I mean, we have endeavored to draft our class definition
12 to be closely tied and to provide the nexus required to
13 California.

14 **THE COURT:** So, you are saying that there's not an
15 extra territorial application because the injunction, if there
16 were an injunction, would run to Reuters based in California or
17 what?

18 **MR. MURA:** It would run to Reuters with respect to
19 their practices in California. I mean --

20 **THE COURT:** Well, how do you define that? So somebody
21 who lived in California for a year and then they are back in
22 Florida and the Florida authorities want to get access to
23 CLEAR, would this -- would any injunction apply?

24 **MR. MURA:** Well, the injunction would apply to Thomson
25 Reuters not providing Californians' information. Thomson

1 Reuters has a significant amount of information, as you can
2 imagine, about every single individual. So if someone is no
3 longer a Californian then and they are in Florida, then the
4 injunction might not lie against them. If the injunction
5 involves the leading data relating to Californians, that might
6 be different; but the injunction here, as the Court recognized
7 at the motion to dismiss stage, would be enjoining Thomson
8 Reuters from making Californians personal information available
9 for sale on the CLEAR platform without their consent.

10 I mean, that is an indivisible remedy that would provide
11 relief to each member of the class. So if someone is no longer
12 a Californian and a Floridian, maybe that's different. We are
13 talking about Californians' personal information for sale on
14 the CLEAR platform.

15 **THE COURT:** Well, when you say maybe that's different,
16 the definition of class has to be precise. You can't say maybe
17 that's different. Right now your proposed definition is anyone
18 during the limitations period who resided in California and
19 whose information was made available. So somebody who resided
20 here for a short period of time and no longer here would be
21 included.

22 **MR. MURA:** Well, they would be included and they might
23 be entitled to the injunctive relief of having the information
24 that related to them deleted if it hasn't been deleted; but the
25 injunction would lie to protect people who are residents of

1 California when their information was taken from them through
2 CLEAR.

3 Again, I mean, if there needs to be a narrowing of the
4 class so that it's even more tightly tied to the fact that
5 Californians have to be presently in California or residents in
6 California, I think that can be easily accomplished.

7 I mean, the argument that Ms. Fahringer is making is not a
8 reason to deny class certification. The Ninth Circuit is very
9 CLEAR in *Olean* that any overbreadth in the class definition is
10 not a basis to deny class certification. It is simply a reason
11 to more narrowly define the class.

12 If the Court has any concerns -- I mean, I don't think
13 there is any concern here in the way in which the class
14 definition is worded. We would certainly be open to providing
15 an alternate definition if the Court has any concerns.

16 **THE COURT:** All right. Let me go back to,
17 Ms. Fahringer -- I know we are skipping around -- but
18 Rule 23(a) looks at commonality. And as you know, that's a
19 fairly low threshold. Maybe a little higher when you get to
20 predominance and maybe that's where your argument really lies.

21 But it seems to me that there is an argument that when
22 somebody is challenging a practice, even though that practice
23 may have varying results and may be justifiable in some ways
24 but not others, you know, that doesn't preclude class
25 certification.

1 So, for instance, if you challenge a height requirement
2 for joining the fire department, as they used to have, which
3 excluded people of my ancestry disproportionately and people of
4 your gender disproportionately. Just because a lot of people
5 got through -- they were 5'9 or 5'10 -- doesn't mean that
6 there's not a class action. Just because some people, you
7 know, weren't affected the same way doesn't preclude the larger
8 question of whether this practice -- you are challenging a
9 practice. Is it a fair practice? Just because there's
10 exceptions doesn't mean that you can't look at it.

11 It may be the exceptions prove that there is no disparate
12 impact; therefore, it's not a big deal. Or this is really a
13 good idea; it has got a lot of utility to it, et cetera.

14 When you are challenging a practice, a -- a uniform
15 practice -- I mean, what the practice is, at least as alleged,
16 is uniform. The results may be different because sometimes you
17 don't get certain amount of -- you know, there is different
18 depths of information. If you query the same sources and you
19 aggregate them and the goal is to come up with as much detail
20 as you can, if the challenge is the practice, I fail to see why
21 there aren't common questions sufficient for class
22 certification purpose.

23 **MS. FAHRINGER:** Yeah, couple things. For the Court's
24 rigorous analysis because this has become such a unique case
25 with these two -- frankly, I mean, they are quite equitable,

1 quite context dependent claims; unjust enrichment and unfair
2 competition. We are going to have to analyze this rigorously
3 claim-by-claim relief-by-relief to see whether there's
4 commonality.

5 So I think that the Court was -- was raising this issue
6 primarily with respect to injunctive relief or that's my guess.
7 And I think where we are right now is that as presented, we
8 have got an injunction that is way too sweeping and too vague
9 and a class that is way too gigantic.

10 And I'm just going to emphasize that by saying I think the
11 first sentence of *Wal-Mart v. Dukes* said that it was addressing
12 one of the largest classes ever, something like that; and that
13 was 1.5 people. In this case for injunctive relief we are
14 talking about tension upon tens of millions of people who
15 aren't -- many of whom aren't even California residents
16 anymore.

17 So we are talking about an injunction that is highly
18 abstract, and we are talking about injunction under the UCL,
19 which requires lost money or property among other things to
20 show entitlement to relief, not the impact of relief.

21 So that's a strange beast. That is a very strange beast.
22 And what you have got is like how is that -- and this is why we
23 keep going back to these specific examples because UCL requires
24 balancing harm to the class member. Harm to the public is
25 wrong. That is not the test. It's to the class member. Maybe

1 the class member benefits from social utility as well.

2 But it's to the class member. That's the test against the
3 utility of the conduct across everything, socially to the class
4 member, et cetera. Tethering test, classically tethered to one
5 of the most context dependent policies there is, which is
6 privacy.

7 **THE COURT:** Let me ask you: You say the UCL requires
8 a balancing of harm on an individual basis.

9 **MS. FAHRINGER:** Yeah.

10 **THE COURT:** That almost defies any kind of classwide
11 relief in just about anything, whether it's a labeling -- false
12 labeling of cereal, which we see a lot of those cases; whether
13 it's a -- bank charges, you know, unlawful charge.

14 There's going to be situations where somebody said: "Oh,
15 yeah, I did read that disclosure even though it was in .2 font,
16 I read it."

17 That doesn't defeat or I don't care if it is truly not
18 made of vanilla extract. That has never in my experience said:
19 Oh, well, we have every individual -- we cannot have class
20 relief.

21 **MS. FAHRINGER:** Right. That's true. I agree. When
22 you have got that direct connection case, you have that
23 relationship case, things get a whole lot easier. That's
24 why -- that's the thing is what the Plaintiffs have done here
25 is they have taken the tethers off. Typically you have a

1 direct relationship. The Defendant lied or they deceived or
2 they have got -- I mean, every single UCL --

3 **THE COURT:** That seems to go to the merits. Whether
4 there is this direct connection or not, may go to the merits;
5 that is, maybe you can't have a cause of action for mere
6 aggregation without taking data.

7 Maybe all these cases like *NCAA*, you know, and all those
8 cases and Article 1, Section 1 of the California Constitution
9 don't apply to this aggregation; but I mean, that's -- I don't
10 understand why the mode of analysis changes. It may be that in
11 the aggregate you have a different outcome; but I don't know
12 why the mode of analysis said suddenly you have got to go to
13 individualized if you don't have the tether, if you don't have
14 the direct connection. I'm not sure. This seems to me a
15 non-sequitur.

16 **MS. FAHRINGER:** And the reason it isn't is because it
17 is not a merits question since Wal-Mart. It's -- what we have
18 got to do is look at what the evidence is going to need to be
19 in order to have a conversation, in order to make a decision
20 about resolving that UCL claim. What's the evidence going to
21 be? Does it differ? And is the answer going to be different
22 depending on who the class member is?

23 That's what we are looking at. Is it a central question
24 or not. And what we have got here is the -- is we are
25 taking -- we can't decide whether it is unfair under the UCL,

1 without looking a little more deeply, at stuff that's going to
2 have to vary by class member.

3 Sure. Some of it is going to be the same. This goes back
4 to the point of, yeah, for one answer maybe it can be resolved
5 classwide. If the answer is sorry, Mr. Mura, sorry, Plaintiffs
6 there's no UC -- there's no unjust -- under no circumstances
7 are you going to be able to have a UCL claim because there's
8 just -- we need a direct connection, fine. But if the answer
9 is the other way and it says, "Thomson Reuters, you know, there
10 could be some circumstances, direct connection isn't required,"
11 then we are going to have to ask so many questions in order to
12 figure out whether there is a claim for unjust enrichment. And
13 that's why --

14 **THE COURT:** Well, there may be questions but there may
15 be many questions in the aggregate. And you have got to --

16 **MS. FAHRINGER:** Well, but --

17 **THE COURT:** The Plaintiff has to show an awfully high
18 level of aggregation, for instance, not just asking for
19 somebody's telephone number or showing a Mapquest view of their
20 house or something; but at some point that threshold may be
21 past; but, again, it's not CLEAR to me why that is not an
22 aggregated answer.

23 **MS. FAHRINGER:** And I think the answer is just that
24 this is -- you know, this is a situation where it actually --
25 if one of the class members were before the Court, just one of

1 them, saying to the Court this is an unfair practice, you would
2 look at the sort of things that the Plaintiffs alleged in their
3 first complaint and the second complaint and in the motion; you
4 would look at the facts; you would look at what was the
5 information available in CLEAR; what was the practice; was the
6 information disclosed, all of those things. And those
7 questions are going to be based on different evidence.

8 Sure, absolutely some of the information -- some of the
9 evidence is going to be the same, but some of the important
10 evidence is going to be different; and that's why we have a
11 problem with this.

12 For injunctive relief we have got the most vague
13 injunction. It's not narrowly tailored. We can't tell whether
14 it's going to be appropriate for this class as a whole. For
15 this try the Plaintiffs have not gotten where they need to go
16 to show that these tens upon tens of millions of people -- some
17 of whom are not even in California, some of whose information
18 about them didn't even come from California. Thomson Reuters
19 is not a California company -- that they are entitled to UCL
20 relief?

21 That's just not -- we just aren't there. We just don't
22 have a -- we don't have a rigorously thought out scenario where
23 the Court is in a position to say that's okay. Not at this
24 point.

25 **THE COURT:** All right. Let me -- time is running out

1 here. I want to give you a chance to -- if you want to add
2 something to your papers with respect to the Daubert motions, I
3 think they are pretty comprehensive; but I will allow each side
4 to take your pick and highlight something.

5 First, with respect to Reuters' motions as to the
6 Plaintiffs' experts I will give you three minutes to discuss
7 that one. Tell me which one you would like to talk about.

8 **MS. FAHRINGER:** I think Mr. Roberts should have the
9 opportunity to speak, Your Honor.

10 **THE COURT:** Good, okay.

11 **MR. ROBERTS:** Good morning, Your Honor. Let me
12 address the Daubert motion related to Dr. Lloyd, the damages
13 expert.

14 **THE COURT:** Okay.

15 **MR. ROBERTS:** The most serious issue with Dr. Lloyd's
16 opinion is that it's totally inconsistent with California law.

17 The proper measure of disgorgement in California is the
18 net profit attributable to the alleged wrong. Dr. Lloyd admits
19 that he didn't even attempt to calculate that. He calculated
20 gross profit instead of net profit, and he didn't even attempt
21 to isolate only the profit attributable to the alleged wrong
22 because Plaintiffs didn't ask him to do so. And because he
23 conducted the entirely incorrect inquiry, his testimony is
24 irrelevant and inadmissible.

25 **THE COURT:** When you say "the attribution" -- I

1 understand the gross profit because I guess he looked at sort
2 of what we might call incremental marginal expenses and no
3 attempt to allocate fixed expenses; correct?

4 **MR. ROBERTS:** Correct.

5 **THE COURT:** But the allocation point is with respect
6 to the revenues attributable to the challenged practice and
7 others or what's the allocation?

8 **MR. ROBERTS:** Well, so what the law is is they are
9 entitled to only the profit that's attributable to their
10 information being in CLEAR, but there is a bunch of other
11 features of CLEAR that they don't challenge that contributed to
12 the profit.

13 That's the organization of the data, the user interface,
14 the fact that the data is searchable, Thomson Reuters' brand
15 recognition. And he made no attempt to account for those
16 aspects of the product.

17 Now, I will direct you to the *Oracle* and *Google* case we
18 cited and the *MGM* case. So there courts rejected the exact
19 arguments Plaintiffs made here.

20 In the *Oracle* case Oracle alleged that Google copied some
21 of their code and incorporated it into the Android code and
22 that without the Oracle code, you couldn't have had Android.
23 They said so we get all the profit. And Judge Alsup said, "No,
24 that's not the law. You have to allocate the portion that's
25 attributable to your code and the portion that's attributable

1 to Google's code." And he excluded their expert's opinion that
2 was going to say that a hundred percent was attributable to the
3 Oracle code because he made no effort to attempt to isolate
4 that.

5 And the *MGM* case was similar -- that's in the copyright
6 context. We cited that because that's kind of the seminal case
7 in this area -- similar case there. MGM copied a play and made
8 a movie out of it and didn't pay the playwright, and the
9 playwright said, "Hey, well, without my story, you couldn't
10 have had a movie so we get a hundred percent of the profits."

11 **THE COURT:** I understand those cases. You see that in
12 copyright. You see that in patent infringements. There are
13 many components to a phone, Android, et cetera.

14 But here, this is -- my understanding is that he took the
15 revenue from CLEAR itself. I mean, it is -- whether maybe
16 CLEAR was enhanced because given who stood behind it, Reuters,
17 et cetera, et cetera; but it is the product itself. It is not
18 a component of a product.

19 So why does there need to be an allocation or at least why
20 can't he argue that there shouldn't be an allocation -- and you
21 can argue to the contrary -- but at least to survive Daubert?

22 **MR. ROBERTS:** Well, on that point he admits he didn't
23 even look into it. So he didn't argue there shouldn't be an
24 allocation, and he didn't make a conclusion about this.

25 He testified in his deposition that he wasn't asked to

1 look into this. And so the second point is not an option
2 because it didn't happen; but on the first point, what those
3 cases stand for is -- you have to look at whether the
4 Defendants' allegedly wrongful conduct generated the profit and
5 what portions were generated from other features of the
6 product.

7 So take the movie example where the play is copied, they
8 said, "Well, without the story, you wouldn't have had a movie
9 so we get it all." That's what they are saying here. They are
10 saying without the information, you wouldn't have had a product
11 so we get it all. And that's not how it works.

12 In all of those cases they say, "Well, let's think about
13 why people wanted to use CLEAR and why they paid for it." A
14 big piece of that is the user interface. A big piece of that
15 is the organization of the data.

16 If Thomson Reuters just took these public records that are
17 already available elsewhere and just put them on a website --
18 there's no search bar; there's no organization; there's no user
19 interface -- people wouldn't use it.

20 It's the same reason that people refer Westlaw versus
21 LexisNexis or just going on PACER. The features other than the
22 information are what drive most of the profit, and he didn't
23 even attempt to account for that.

24 So we agree that if he offers an opinion, we can offer
25 another opinion and then argue about it; but he didn't even

1 meet his burden of offering an opinion on that. And so because
2 he didn't comply with California law, his testimony is
3 inadmissible.

4 **THE COURT:** All right. Let me get a quick response.

5 **MR. WALD:** Thank you, Your Honor. I think Your Honor
6 asked a question that is key to this question of accounting for
7 the platform and the features. And that is: Isn't the data
8 here the product? Isn't all of the revenue that Plaintiffs are
9 starting with the revenue specifically from CLEAR?

10 And answer to that is yes. Based on Thomson Reuters'
11 business records, the revenues here are attributable to the
12 data. None of those revenues would have been received if there
13 wasn't data to search.

14 **THE COURT:** What about the idea that that value,
15 though, was enhanced through some application of IP, the
16 organization, the presentation? I mean, if you just collected
17 the data, it wouldn't have been worth much but it was through
18 their know-how that enhanced the data beyond the value of
19 the -- the raw value -- the value of raw data?

20 **MR. WALD:** Well, Your Honor, we think the restatement
21 here is CLEAR; that the question of attribution is not a
22 question of sole causation.

23 The restatement says in the attribution inquiry you are
24 looking for profits that are attributable to the wrongful
25 conduct. And here, the wrongful conduct is collecting and

1 making available Californians' information without consent.

2 And none of the profits that Mr. Roberts describes would have
3 been realized absent that conduct.

4 Therefore, all of those profits are properly attributable
5 under the CLEAR and specific guidance of the restatement
6 looking specifically at section 51 comments F and E and cases
7 applying the restatement. It's CLEAR that California law does
8 not require this -- this sole causation question that they are
9 importing to this inquiry.

10 So, here all of the profits -- all of the profits from
11 CLEAR that Mr. Lloyd evaluated and considered -- and I think it
12 is a mischaracterization to say that he did not look at
13 evidence of these other features. He concluded that all of the
14 revenues here are attributable to Thomson Reuters' unjust
15 conduct of making available data.

16 Now, there might be enhancements that come down the line
17 but that's not the question that the restatement asks in
18 determining which revenues are properly attributable to the
19 wrongful conduct; and it's not a Daubert challenge to say,
20 "Well, in our opinion we would have considered some of these
21 additional factors."

22 So, Your Honor, I think that's what we would say with
23 respect to the platform's features. And if I can just touch
24 for a moment on the net versus gross issue, I think this is
25 similar, Your Honor.

1 Lloyd did calculate net profits according to the guidance
2 in the restatement. What the restatement says is under a
3 disgorgement analysis you disgorge money gained because of the
4 wrongdoing -- that's the point that we were just discussing --
5 and you deduct the marginal costs that were specifically
6 incurred because of those ill gotten gains in order to produce
7 those ill gotten gains but you do not deduct costs that would
8 have been incurred anyway.

9 **THE COURT:** All right. I get it. So let me move on.
10 I'm going to give now the Plaintiffs a chance to choose which
11 of your challenges you want to talk about, which one.

12 **MS. JENSEN:** Thank you, Your Honor. We will address
13 Professor Bambauer's opinion. Plaintiffs seek to exclude
14 Professor Bambauer because she essentially opines that
15 Professor Turow's view is extreme just for testifying that
16 California recognizes a strong right to control.

17 But Professor Bambauer shouldn't be permitted to offer a
18 made-for-litigation opinion that contradicts everything that
19 she has said elsewhere.

20 She repeatedly has stated that California privacy policy
21 essentially vests individuals with a property right and views
22 them as the ultimate authority on the use of their information,
23 but those opinions are completely absent from her report.

24 Even when experts make a mistake and do not consider
25 material contradictory information, courts have found that as a

1 reason to exclude the testimony. Her report is ultimately
2 unreliable and irrelevant to the issues in this case, which are
3 governed by California law, when she doesn't talk about
4 California policy whatsoever.

5 **THE COURT:** All right. Response.

6 **MS. MENALDO:** Your Honor, Professor Bambauer's opinion
7 doesn't relate to what California law says or doesn't say about
8 whether privacy is a property right.

9 First of all, that wasn't the subject of Professor Turow's
10 report. And second of all, Professor Bambauer's report
11 essentially lays out in detail what the academic literature
12 says about what privacy is, and she shows that Professor
13 Turow's view -- his espoused view that privacy is absolutest,
14 that you cannot consider any other factors, simply goes against
15 weight of all of the authority under, you know, academic
16 literature around privacy.

17 This question about what Professor Bambauer's views are as
18 to California law are just inapposite to the conversation. And
19 Plaintiffs want to sort of paint Professor Bambauer as hiding
20 her views when there's nothing that could be more wrong.

21 The fact that she has been asked to testify before
22 Congress to weigh in on what model legislation about privacy
23 should look like is evidence that she -- she is well regarded
24 in her field and more than qualified to offer the opinion that
25 she did, which is that Professor Turow's opinion is not in line

1 or in step with what privacy literature says, either now or
2 previously, about how -- what factors to consider.

3 So Plaintiffs' arguments simply don't line up with the
4 Daubert requirements, and they don't actually speak to the
5 content of her report.

6 **THE COURT:** All right. Thank you. That's helpful. I
7 will take the matter under submission. If for some reason I
8 feel that we need supplemental papers or further thoughts, I
9 will order that; but at this point I have got plenty here and I
10 will take the matter under submission. So thank you.

11 **MR. MURA:** Thank you, Your Honor.

12 **MS. FAHRINGER:** Thank you, Your Honor.

13 **MR. ROBERTS:** Thank you.

14 **THE CLERK:** This calendar is concluded.

15 (Proceedings adjourned at 11:00 a.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Friday, May 5, 2023



Marla F. Knox, CSR No. 14421, RPR, CRR, RMR
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