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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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CHASOM BROWN, ET AL.	CASE NO. 20-cv-3664-YGR
Plaintiffs,	
v.	**ORDER GRANTING IN PART MOTION FOR CLASS CERTIFICATION; GRANTING IN PART *DAUBERT* MOTIONS; AND DENYING MOTION TO STRIKE GOOGLE'S NON-RETAINED EXPERTS**
GOOGLE, LLC,	
Defendant.	Re: Dkt. Nos. 609, 662, 663, 664, 703, 705

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United States District Court
Northern District of California

12   Plaintiffs Chasom Brown, William Byatt, Jeremy Davis, Christopher Castillo, and

13 Monique Trujillo bring this action against defendant Google, LLC, alleging seven counts based on

14 Google's alleged data collection practices: (1) violation of the Federal Wiretap Act, 18 U.S.C. §

15 2510, *et. seq.*, also known as the Electronic Communications Privacy Act ("ECPA"); (2) violation

16 of the California Invasion of Privacy Act ("CIPA"), Cal. Penal Code §§ 631 and 632; (3) violation

17 of the Comprehensive Computer Data Access and Fraud Act ("CDAFA"), Cal. Penal Code § 502

18 *et. seq.*; (4) invasion of privacy; (5) intrusion upon seclusion; (6) breach of contract; (7) violation

19 of California's Unfair Competition Law ("UCL").

20   Pending before the Court are plaintiffs' Motion for Class Certification, the parties'

21 corresponding *Daubert* motions, plaintiffs' Motion to Strike Google's Non-Retained Experts, and

22 several administrative motions to seal.[1] Having carefully considered the parties' briefing, the

23 admissible evidence, the record in this case, and upon further consideration after oral argument

24 which occurred on October 11, 2022, plaintiffs' motion for class certification is **GRANTED IN**

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26   [1] *See* Dkt. Nos. 609, 662, 663, 664, 703 and 705; *see also Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

27   As to the administrative motions to seal, these motions are **DENIED** to the extent the information is referenced and included in this Order. The specific motions will be addressed by

28 separate court order.

1   **PART**. Many of Google's arguments hinge on the general proposition that Google's customer base

2   is too big for class treatment. The notion that Google is too big to be held accountable does not

3   persuade. The Court finds certification for injunctive relief only appropriate. Moreover, the

4   *Daubert* motions are **GRANTED IN PART** and plaintiffs' Motion to Strike is **DENIED**.

5   **I.   BACKGROUND**

6   The Court incorporates the background provided in Judge Koh's 31-page order denying

7   Google's motion to dismiss. (Dkt. No. 363, at 1-8.) In sum, plaintiffs allege that Google

8   surreptitiously intercepts and collects users' data even while users are in a private browsing mode.

9   (Dkt. 395-2, Third Amended Complaint, ("TAC") at ¶ 1.) The at-issue data includes: (i) "[t]he

10 'GET request' sent from the user's computer to the website"; (ii) "[t]he IP address of the user's

11 connection to the internet"; (iii) "[i]nformation identifying the browser software that the user is

12 using, including any 'fingerprint' data"; (iv) "[a]ny 'user-ID' issued by the website to the user, if

13 available"; (v) "[g]eolocation of the user, if available"; and (vi) "[i]nformation contained in

14 'Google cookies,' which were saved by the user's web browser on the user's device at any time

15 prior." (TAC at ¶ 63(a)-(f).)

16 **II.   LEGAL STANDARDS**

17   ***A.   Daubert Motions***

18   Federal Rule of Evidence 702 permits opinion testimony by an expert as long as the

19 witness is qualified and based upon that qualification, the witness's opinion is relevant and

20 reliable. An expert witness may be qualified by "knowledge, skill, experience, training, or

21 education" as to the subject matter of the opinion. Fed. R. Evid. 702. The proponent of expert

22 testimony has the burden of proving admissibility in accordance with Rule 702. *Id.*, Advisory

23 Committee Notes (2000 amendments). At the class certification stage, "the relevant inquiry is a

24 tailored *Daubert* analysis which scrutinizes the reliability of the expert testimony in light of the

25 criteria for class certification and the current state of the evidence." *Rai v. Santa Clara Valley*

26 *Transportation Auth.*, 308 F.R.D. 245, 264 (N.D. Cal. 2015); *Grodzitsky v. Am. Honda Motor Co.,*

27 957 F.3d 979, 985–86 (9th Cir. 2020). For scientific opinions, they must be based on scientifically

28 valid principles. *Daubert*, 509 U.S. at 589. Experts assist the fact finder in their own evaluation of

United States District Court
Northern District of California

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1 the evidence by providing the fact finder with opinions based upon verifiable, scientific, or other

2 objective analysis. *Id.* at 589–90.

3   **B.   Class Certification**

4   A class action is "an exception to the usual rule that litigation is conducted by and on

5 behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013).

6 "Before certifying a class, the trial court must conduct a rigorous analysis to determine whether

7 the party seeking certification has met the prerequisites of Rule 23." *Mazza v. Am. Honda Motor*

8 *Co.*, 666 F.3d 581, 588 (9th Cir. 2012) (internal quotation marks omitted). The rigorous analysis

9 that a court must conduct requires "judging the persuasiveness of the evidence presented" for and

10 against certification and "resolv[ing] any factual disputes necessary to determine whether" the

11 requirements of Rule 23 have been satisfied. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982–

12 83 (9th Cir. 2011). A "district court must consider the merits if they overlap with the Rule 23(a)

13 requirements." *Id.* (citations omitted).

14   The party moving for certification first must show that the four requirements of Rule 23(a)

15 are met. Specifically, Rule 23(a) requires a showing that: (1) the class is so numerous that joinder

16 of all members is impracticable; (2) common questions of law or fact as to the class exist; (3) the

17 claims or defenses of the representative parties are typical of those of the class; and (4) the

18 representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P.

19 23(a). The moving party must then show that the class can be certified based on at least one of the

20 grounds in Rule 23(b). *See* Fed. R. Civ. P. 23(b). Relevant here, certification under Rule 23(b)(3)

21 is appropriate only if "the questions of law or fact common to class members predominate over

22 any questions affecting only individual members" and "a class action is superior to other available

23 methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Rule

24 23(b)(2) permits certification of a class when "the party opposing the class has acted or refused to

25 act on grounds that apply generally to the class, so that final injunctive relief or corresponding

26 declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

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United States District Court
Northern District of California

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III.   DISCUSSION

A.   *Daubert* Motions

The Court addresses the parties' various *Daubert* motions as they inform the Court's analysis of the plaintiffs' motion for class certification. Four such motions are pending: (1) Google's Motion to Exclude Opinions of Plaintiffs' Damages Expert Michael J. Lasinski (Dkt. No. 661-3); (2) Google's Motion to Exclude Opinions of Plaintiffs' Expert David Nelson (Dkt. No. 663); (3) Google's Motion to Exclude Opinions of Plaintiffs' Expert Bruce Schneier (Dkt. No. 661-4); and (4) Plaintiffs' Motion to Exclude Portions of Rebuttal Expert Report of Konstantinos Psounis (Dkt. No. 702-1). The Court addresses each motion in turn.

1.   *Daubert* as to Michael J. Lasinski

Google moves to exclude the testimony of plaintiffs' damages expert, Michael Lasinski, under Federal Rule of Evidence 702 and *Daubert*. (Dkt. No. 661-3.) Lasinski is a Senior Managing Director at Ankura Consulting Group ("Ankura") and head of the Intellectual Property Group. (Dkt. No. 608-9, Lasinski Report ¶ 2.) He has twenty-seven years of experience assisting clients in understanding and evaluating the financial aspects of intellectual property. (*Id.*) Lasinski received his Bachelor of Science degree in Electrical Engineering and a Master of Business Administration from the University of Michigan. (*Id.* ¶ 6.) As assigned, he assessed the feasibility of identifying and quantifying various measures of monetary relief tied to plaintiffs' claims, including unjust enrichment, actual damages (restitution), and statutory damages. (*Id.* ¶ 12.) To do so, he relied on his review of discovery produced by Google, deposition testimony, publicly available materials, deposition testimony of Google personnel, plaintiffs' experts' reports, as well as other materials listed in Appendix B of his report. (*Id.* ¶ 17.)

Lasinski offers an opinion on a methodology for determining three types of damages: (a) unjust enrichment, (b) restitution damages, and (c) statutory damages, and asserts eight opinions, summarized as follows: (1) discovery in this case can be used to quantify relief on a class-wide basis; (2) Google's ChromeGuard analysis provides a reliable basis for quantifying certain relief; (3) Google's internal analyses of the financial impact to Google because of third-party cookie blocking can be adjusted to reliably quantify Google's unjust enrichment; (4) calculation of unjust

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1   enrichment can be determined under a range of potential liability scenarios; (5) restitution

2   damages can be determined as a function of the payments necessary to incentivize an individual to

3   knowingly relinquish the choice to keep certain browsing private and allow a company to track all

4   online activity; (6) an appropriate damages rate can be applied in calculating statutory damages;

5   (7) these statutory rates can be readily updated to cover subsequent periods through the date of

6   trial; and (8) that his analyses can be readily used as common proof in part because they can be

7   adjusted to calculate and assess unjust enrichment, actual damages, and statutory damages for

8   different time periods. (*Id.* ¶ 1.)

9   The Court starts with a high-level summary of the disputed parts of Lasinski's models

10   before addressing the parties' arguments.

11   *a.*   *Overview of the Methods*

12   **i.**   **Unjust Enrichment Model**

13   In opining on the methodology for determining classwide unjust enrichment damages,

14   Lasinski looks to Google's internal analyses that describe the financial impact to Google of

15   blocking third-party cookies by default in Chrome Incognito mode ("ChromeGuard"). (*Id.* ¶ 52.)

16   He segments his analyses by product area (Display Ads, YouTube ads, and Search Ads), private

17   browsing mode (incognito mode or other browsing modes), revenue source (personalization or

18   conversion tracking), and the scope of conversion tracking (conversion tracking from traffic with

19   third-party cookies or conversion tracking from all traffic). (*Id.* ¶ 60.) In doing so, he calculates

20   unjust enrichment damages from Google's U.S. revenues from Display Ads, Search Ads, and

21   YouTube Ads in three scenarios. (*Id.* ¶¶ 133-36.)

22   In Scenario One, Lasinski arrives at the unjust enrichment amount by calculating: (a) all of

23   Google's U.S. Display Ads shown to users in private browsing mode, (b) U.S. search revenue

24   attributable to conversion from all private browsing traffic, and (c) U.S. YouTube Ads revenue

25   attributable to personalization from third-party cookies and conversion from all private browsing

26   traffic. (*Id.* ¶¶ 133-35.) By using this approach, Lasinski calculates a damages amount of $3.87

27   billion. (*Id.* ¶ 136.)

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United States District Court
Northern District of California

1   In Scenario Two, he arrives at the unjust enrichment amount by calculating Google's

2 Display, Search, and YouTube revenue that is attributable to personalization from third-party

3 cookies and conversion from all private browsing traffic. Here, he calculates a damages amount of

4 $3.61 billion. (*Id.* ¶¶ 133-36.)

5   In Scenario Three, he arrives at the unjust enrichment amount by calculating Google's

6 Display, Search, and YouTube that is attributable to personalization and conversion from third-

7 party cookies. With this model, he calculates a damages amount of $567.4 million. (*Id.*)

8   Lasinski explains that such segmentation is intended to assist the trier of fact in

9 determining Google's unjust enrichment under a range of liability scenarios. (*Id.* ¶ 133.)

10   **ii.   Restitution Model**

11   Next, Lasinski opines on a methodology for calculating classwide restitution damages.

12 Here, he uses the payment amount necessary to incentivize individuals to knowingly relinquish

13 their online privacy as a base rate. He then takes that rate and multiplies it by the number of

14 unique monthly private browsing instances ("UMPBI"). (*Id.* ¶ 184.)[2] In doing so, Lasinski

15 calculates a restitution damages amount of approximately $9.1 billion. (*Id.* at Fig. 72.)

16   In arriving at the base rate, Lasinski analyzed payments that Google made or considered

17 making to users for their data, users' willingness to pay to prevent data collection, and research

18 organizations' willingness to pay for data collection. (*Id.* ¶ 140.) Lasinski explains that the most

19 reliable input comes from Google itself. (*Id.* ¶ 165.) Since 2012, Google has used a market

20 research company called Ipsos to collect information on how users use the Internet. (*Id.* ¶ 143.)

21 Through Ipsos, Google conducts what are known as Screenwise Panel studies. (*Id.*) These studies

22 allow selected participants to get paid if they voluntarily link their devices and allow Google to

23 collect certain information about the users' online activities. (*Id.*) Some examples of the data

24 collected through the Screenwise Panel studies include: the content and advertising shown on

25 devices, interactions with that content and advertising, webpages, information you type into your

26 devices, cookies, and device information. (*Id.* ¶ 144, Fig. 57.)

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28   [2] "[A] single UMPBI represents one or more pageloads in Incognito mode or an Other
Private Browsing Mode on a single device during a one-month period." (Lasinski Report ¶ 139.)

1   As part of the Screenwise Panel, participants are paid a baseline minimum of $3 per month

2   per device. This base rate does not decrease based on one's browsing activity, but it can increase

3   based on other factors. (*Id.* ¶¶ 149-50.) To calculate damages, Lasinski uses this $3 rate that

4   Google pays survey participants as an input. (*Id.* ¶ 183.) He then multiplies that by the number of

5   UMPBI during the class period for both classes. (*Id.* ¶ 184.)

6   **iii.   Statutory Damages Model**

7   Third, in opining on a methodology for calculating statutory damages on a classwide basis,

8   Lasinski used data and internal documents produced by Google which quantified incognito traffic.

9   This quantified traffic was then used to calculate the four bases that Lasinski offers as common

10 proof of calculating statutory damages: (1) the total number of individual pageloads in the relevant

11 browsers; (2) the total UMPBI with one UMPBI referring to a specific browse that used a private

12 browsing mode at least once a month; (3) calculation of UMPBI based on the peak UMPBI for

13 one month; and (4) the total number of class members for each of the classes. (*Id.* ¶¶ 185-195.)

14 Lasinski opines that all four bases would allow the Court to calculate statutory damages and can

15 be used as common proof because they can be adjusted to account for different time periods and

16 subclasses. (*Id.* ¶ 198.)

17   **iv.   Damages Allocation Method**

18   Finally, Lasinski opines on two methods to allocate individual damages. The first method

19 includes taking the aggregate damages number and dividing it by the total number of UMPBI

20 during the class period. Awards would be distributed to class members based on the number of

21 UMPBI attributable to each class member.[3] The second method includes calculating individual

22 damages on a *per capita* basis based on the number of class members. (*Id.* ¶ 197.)

23   *b.   Overview of Parties' Contentions*

24   Google moves to exclude Lasinski's opinions and methodologies for computing damages

25 on the grounds that: (1) Lasinski fails to account for uninjured users who consented to the at-issue

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27   [3] Based on Lasinski's calculations, the Court calculates an average UMPBI of about .725
28 per class member. (*See id.* at Figs. 74 and 75.)

data collection; (2) his primary input for calculating class-wide restitution damages is speculative and unreliable; (3) his restitution opinions fail to account for variability in user benefit from personalization and valuation of privacy; (4) his failure to deduct costs from the unjust enrichment analysis is contrary to the law and has no basis in the facts; (5) all of his unjust enrichment scenarios are flawed and unreliable; (6) his proposed methods for apportioning damages ignore individual differences and are not efficient or feasible for distributing damages; and (7) his opinions on calculating statutory damages are unreliable.

Plaintiffs oppose arguing: (1) Lasinski's damages calculations are based on assumptions consistent with their theory of the case; (2) his actual damages calculations are based on the same key input Google used in the Screenwise Panel study; (3) Google documents and testimony confirm that incremental costs do not exist for private browsing traffic; (4) Lasinski's method for calculating statutory damages are sound and simply lead to penalties Google does not like; and (5) Lasinski is not required to adopt Google's preferred method of apportioning damages.

i.   **Assumption of Harm to Every Class Member**[4]

First, Google argues that all of Lasinski's opinions should be excluded because he fails to account for uninjured class members.

A plaintiff seeking certification under Rule 23(b)(3) must show that damages are capable of measurement on a class-wide basis, and such calculations "need not be exact." *Comcast*, 569 U.S. at 35. Under *Comcast*, a plaintiff must show that its proposed damages model is consistent with its theory of liability in the case. *Id.*

As an initial matter, Google's arguments "reflect[] a merits dispute about the scope of [its] liability, and is not appropriate for resolution at the class certification stage of this proceeding." *See Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 (9th Cir. 2016). Relatedly, Lasinski's methodology is consistent with plaintiffs' class definition and theory of liability. Google's disagreement with Lasinski's assumption is no reason to exclude his opinions. *Perez v.*

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[4] The Court notes that both parties used part of their *Daubert* briefing to argue the merits of their consent arguments. Counsel is aware of the legal standard under *Daubert* and should know that such argument is wholly inappropriate. The parties are warned that future conduct will result in the briefing being stricken and/or sanctions.

1   *Rash Curtis & Assocs.*, 2019 WL 1491694, at *3 (N.D. Cal. Apr. 4, 2019) ("any arguments that

2   [an expert] based his opinions on an improper assumption go to the weight, not the admissibility

3   of the testimony.")

4   Accordingly, the motion is **DENIED** on this ground.

5   **ii.**   **$3 Input for Calculating Restitution Damages**

6   Second, Google argues that Lasinski's restitution opinion should be excluded because the

7   $3 input that he uses is speculative and unreliable. Google does not persuade. The $3 rate is

8   derived from looking at what Google actually pays Screenwise participants for agreeing to allow

9   Google to collect their browsing data. In arriving at this number, Lasinski acknowledged that the

10 full scope of the data collected in the Screenwise studies differs in some respects from the at-issue

11 data and accounted for that in using the baseline of $3 rather than some higher amount that some

12 participants receive through the Screenwise program. (Lasinski Report ¶¶ 147-50.) Lasinski opines

13 that this rate is conservative because that is the rate willing people would accept to give up their

14 data and that unwilling users, hence users in private browsing mode, will likely require more

15 incentive to give up their data. (Dkt. No. 661-3, Lasinski Dep. 101:13-102:22.) The Court finds

16 such considerations and analysis logical and reliable. The question is one of weight, not

17 admissibility.

18   Accordingly, the motion is **DENIED** on this ground.

19   **iii.**   **Variability in User Benefit and Valuation of Privacy**

20   Third, Google avers that Lasinski's restitution opinions should be excluded as unreliable

21 because he ignores: (i) the strong evidence of variability in the benefits that users may have

22 received from ad personalization and (ii) the value users place on their private browsing data and

23 their privacy. In response, plaintiffs argue that under their theory of restitution such subjective

24 valuations are not necessary.

25   Where there is "enrichment from the receipt of nonreturnable benefits," restitution can be

26 measured by either: (a) the value of benefit to the defendant; (b) the cost to plaintiff of conferring

27 such benefit; (c) the market value of the benefit; or (d) the price the defendant has expressed a

28 willingness to pay, if the defendant's asset may be treated valid on the question of price.

1   Restatement (Third) of Restitution and Unjust Enrichment § 49.

2   The Court finds that under any of these formulations, this is precisely what Lasinski's

3   method measures. He measures the value that Google actually pays to users who voluntarily give

4   up their right to privately browse the Internet. Lasinski's method does not turn on the subjective

5   feelings and beliefs of class members. Rather, he employs an objective standard focused on paying

6   users to relinquish their right to browse privately.

7   Indeed, Google employs a similarly objective standard in compensating Screenwise

8   participants. The amount Google pays participants does not fluctuate depending on the

9   participants' subjective beliefs. Rather, Google sets a base rate and then compensates based on

10 objective measures such as how many devices are registered and what kinds of devices are used.

11 These same objective criteria that Google employs in its Screenwise panel study is what Lasinski

12 uses as a base for his calculation of restitution damages. Therefore, Google's disagreement with

13 the restitution method applied and the outcome of that method does not make Lasinski's method

14 unreliable. Google's concerns go to weight, not admissibility.

15   Accordingly, the motion on this ground is **DENIED**.

16   **iv.**   **Unjust Enrichment Model and Costs**

17   Fourth, Google seeks to exclude Lasinski's unjust enrichment model on the grounds that it

18 looks at Google's revenue and does not take into account Google's costs. Plaintiffs argue that

19 Lasinski did not deduct costs from his calculation because there are no incremental costs to

20 Google.

21   "Disgorgement is a remedy in which a court orders a wrongdoer to turn over all profits

22 obtained by violating the law." *Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1195 (9th

23 Cir. 2016). A party that is wronged and seeks unjust enrichment "may present evidence of the total

24 or gross amount of the benefit, or a reasonable approximation thereof, and then [the defendant]

25 may present evidence of costs, expenses, and other deductions to show the accrual or net benefit

26 the defendant received." *Meister v. Mensinger*, 230 Cal. App. 4th 381, 399 (2014). Importantly,

27 "the residual risks of uncertainty in calculating net profit is assigned to the wrongdoer." *Id.*

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1   In proffering his unjust enrichment model, Lasinski did not account for costs in calculating

2   Google's profits. He testified that he did not include costs because there was no proof of

3   incremental costs to Google included in the record. Lasinski relied on plaintiffs' other expert,

4   Hochman, who explained to Lasinski that there are no costs to Google for maintaining the

5   advertising infrastructure that Google has already built. (Lasinski Dep. 165:20-166:8.) Hochman

6   also explained to Lasinski that many of the costs associated with the at-issue data collection is

7   passed down to users by way of Google's tracking beacons. (*Id.* at 163:15-23.) In response,

8   Google argues that Strombom's Report identifies many components of Google's costs including

9   those associated with generating the at-issue data.

10   Google misstates the evidence. Strombom testified during his deposition that Google does

11   not account for costs associated with private data, and that he had no evidence of actual costs

12   saved because of Google launching ChromeGuard. (Dkt. No. 698-8, Strombom Dep. 93:1-13,

13   111:21-119:10, 119:11-17.) Google's 30(b)(6) witness, Sonal Singhal, did not contradict him. Ms.

14   Singhal was designated to talk about an Ads Impact document that looked at the impact of

15   ChromeGuard on Google's finances. She testified that, while questions about costs are outside of

16   her expertise, she "[didn't] think that there is any cost that would vary." (Dkt. No. 698-7, Singhal

17   Dep. 23:25-24:9.) Plaintiffs may rely on those admissions.

18   Thus, the only evidence of any potential costs is in the form of a declaration by George

19   Levitte, a Google employee, who testifies generally about form-sharing agreements with

20   publishers. (Dkt. No. 659-8, Levitt Decl., ¶¶ 11-13.)[5] Levitte explains that there are costs

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22   [5] Pending before the Court is plaintiffs' Motion to Strike Google's Non-Retained Expert Declarations for Glenn Berntson, Steve Ganem, George Levitte, and Jonathan McPhie. (Dkt. No.

23   704-2.) Having considered the parties' briefing, and the record in this case, the Court **DENIES** the motion because plaintiffs have not shown harm. Plaintiffs admit that Google disclosed three of the four witnesses (Ganem, Levitte, and Bernston) in its initial disclosures before the close of

24   discovery, and plaintiffs were able to depose these witnesses. While Google did not disclose McPhie in its amended disclosures, Google explains that it did disclose Gregory Fair, who was

25   McPhie's former supervisor. Fair has since left the company and Google substituted McPhie as a declarant in lieu of Fair. (Dkt. No. 746-3, Opposition to Motion to Strike, at 5.) McPhie's

26   declaration covers the topics Google disclosed for Fair in its amended disclosures. (*See* Dkt. No. 705-6.) Accordingly, the Court finds that any harm to plaintiffs is minimal, and the motion is

27   **DENIED** on that ground. However, the Court will allow plaintiffs to depose the witnesses on the topics contained in their declarations to the extent relevant. The parties shall meet and confer

28   regarding a schedule for depositions. A joint proposed schedule shall be filed within seven (7)

1   associated with Google generating revenue but that the profits (which would reflect costs) cannot

2   be calculated for "individuals who browsed while in Incognito mode, or those individuals who use

3   any other browser's private browsing mode." (*Id.* ¶ 20.) While possible, this conflicting evidence

4   reflects on the weight of the testimony, not admissibility.

5   Accordingly, the motion is **DENIED** on this ground.

6   **v.**   **Method for Apportionment**

7   Next, Google's attempt to exclude Lasinski's method for apportioning the aggregate

8   damages does not persuade. With respect to Lasinski's method of apportionment, Google does not

9   have standing to complain. The Ninth Circuit counsels that when "the only question is how to

10   distribute the damages, the interests affected are not the defendant's but rather those of the silent

11   class members." *Six (6) Mexican Workers v. Az. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir.

12   1990); *see also Story Parchment Co. v. Paterson Parchment* Paper Co., 282 U.S. 555, 563 (1931)

13   ("[w]here the tort itself is of such a nature as to preclude the ascertainment of the amount of

14   damages with certainty, it would be a perversion of fundamental principles of justice to deny all

15   relief to the injured person, and thereby relieve the wrongdoer from making any amend for his

16   acts.") Further, the argument is premature.

17   Accordingly, the motion is **DENIED** on this ground.

18   **vi.**   **Statutory damages**

19   Lastly, Google moves to exclude Lasinski's methods for calculating statutory damages on

20   the basis that the proposed methods fail: (1) to account for instances where Google would not have

21   received the at-issue data—like when a user starts a private browsing session but closes it before

22   navigating to a third party website; (2) to provide a way to calculate statutory claims for the

23   California CIPA class; and (3) to opine on a method for apportioning statutory damages.

24   Google does not persuade. As to the first argument, Google offers only a hypothetical

25   situation with no proof or data to support the idea that Lasinski should have accounted for

26   instances where Google did not receive data. That Google can think of different ways in which

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28   days from the date of this order.

United States District Court
Northern District of California

1   Lasinski ought to have created his model does not make it unreliable and is thus no reason to

2   exclude. Google's second argument is merely a rehash of its arguments about Lasinski's

3   apportionment method. As previously explained, Google does not have standing to raise such

4   arguments. Moreover, none of Google's concerns about apportionment render Lasinski's methods

5   and opinions unreliable. As to the third argument regarding the California CIPA class, Lasinski

6   explained both in his report, and during the hearing, that his model could be adapted to account for

7   just California residents by extrapolating the percentage of California users based on publicly

8   available information from the general United States population. (Lasinski Report ¶ 197; *see also*

9   Dkt. No. 775, Hearing Transcript, at 36:24-39:9.) Plaintiffs also explained that this information

10   can also be collected by using Geolocation data and users' IP addresses. (Hearing Transcript, at

11   36:24-39:9.) The Court finds the proffered explanations reasonable.

12   Thus, the Court finds the proffered statutory damages method reliable for calculating

13   statutory damages. Accordingly, the motion is **DENIED** on this ground.

14   **2.   *Daubert as to David Nelson***

15   Google moves to exclude plaintiffs' expert, David Nelson, report under *Daubert* and Rule

16   702. (Dkt. No. 663). Nelson is the co-founder of Full Nelson Investigations, LLC ("FNI") and a

17   former agent for the Federal Bureau of Investigation ("FBI"). (Dkt. No. 608-8, Nelson Report ¶¶

18   3-4.) Prior to co-founding FNI, Nelson spent twenty-four years as an FBI agent. (*Id.* ¶ 4.)

19   Approximately eighteen of those years were devoted to investigating and instructing cyber crime

20   matters as a Cyber Special Agent. (*Id.* ¶¶ 5-6.) His investigations in the cyber division of the FBI

21   included obtaining and enforcing administrative subpoenas, grand jury subpoenas, court orders,

22   and search warrants to obtain additional information to investigate criminal conduct. (*Id.* ¶ 23.)

23   Nelson's investigations also included extensive interactions with Google where IP addresses or

24   other information would be provided to Google to obtain information from Google. (*Id.*)

25   Nelson offers one main opinion: that Professor Zervas' opinions regarding the

26   functionality of private browsing are incomplete and misleading because he failed to address how

27   Google saves, collects, and routinely produces private browsing data tied to IP addresses that can

28   be linked to specific individuals and devices. (*Id.* ¶ 2.)

1   Google moves to exclude Nelson's opinion on the basis that Nelson's opinion is: (1) based

2   on statements from three unidentified individuals that Nelson allegedly interviewed but about

3   whom he refused to provide any information due to ongoing confidentiality obligations to the FBI,

4   and (2) admitted speculation about the meaning of an empty field in certain spreadsheets Google

5   provided to the FBI.

6   In response, plaintiffs argue that: (1) Nelson's opinion is reliable given his experience as a

7   FBI agent; and (2) Nelson provided sufficient details about the three individuals he bases his

8   opinion on. The Court addresses each argument in turn.

9   Here, Nelson opines that Google routinely collects, saves, and produces private browsing

10   data to third parties, including the FBI, that can be linked to specific individuals and devices.

11   When asked about the basis of this opinion, Nelson testified that his opinion that the information

12   the FBI received in response to requests is private browsing information is based on his interview

13   of three suspects and subjects who told him, during interviews, that they "were surprised that he

14   had the information [] because they were using private browsing mode whe[n] they conducted

15   those activities." (Dkt. No. 663-2, Nelson Dep. 53:4-25.) He also testified that the only other

16   source for his opinion was his recollection of receiving spreadsheets from Google when he was an

17   FBI agent and seeing that certain entries under the "Google user account" column were left blank.

18   (*Id.,* 54:1-20.) Nelson did not review any documents produced by Google in discovery, nor does

19   he have an opinion on the content or meaning of any documents that Google has produced. (*Id.,*

20   38:14-39:2.)

21   Here, the Court finds that Nelson's opinion that the information Google produced was

22   from private browsing sessions is not sufficiently reliable. First, Nelson testified that he did not

23   verify the witnesses' statement at the time to determine whether they were in fact identified using

24   information obtain from private browsing sessions. Rather, Nelson merely accepted their words as

25   true. However, it is possible that the suspects, who were being interviewed and interrogated for

26   crimes, had an incentive to say that they were in private browsing mode as a way to not have

27   whatever evidence that was had against them. Without knowing more about the witnesses and

28   their specific circumstances, the Court finds Nelson's reliance on such information unreliable.

14

1   Similarly, Nelson's testimony that he was not for certain why Google's spreadsheets had

2   an empty space also renders his opinion unreliable. During his deposition Nelson testified that the

3   empty column on the spreadsheet could mean various things and does not necessarily mean that

4   the blank space means the user was in private browsing mode. (Nelson Dep. 54:14-58:5.)

5   Based on the foregoing, the Court finds Nelson's opinion to be unreliable. Accordingly,

6   the motion is **GRANTED** on this ground.

7   **3.   *Daubert* as to Bruce Schneier**

8   Next, Google seeks to exclude the entirety of plaintiffs' expert, Bruce Schneier, reports

9   (both opening and rebuttal) under *Daubert* and Rule 702. (Dkt. No. 661-4). Schneier is an

10   international security technologist. (Dkt. No. 608-7, Schneier Report ¶ 7.) Schneier received his

11   master's degree in computer science from American University in 1986, a bachelor's degree in

12   physics from the University of Rochester in 1984, and an honorary Ph.D. in Computer Science

13   from the University of Westminster in 2011. (*Id.* ¶ 6.)

14   Schneier currently serves as the Chief of Security Architecture at Inrupt, Inc. (*Id.*) He also

15   serves as an Adjunct Lecturer and fellow at the Harvard Kennedy School where he teaches

16   cybersecurity policy. (*Id.* ¶ 8.) Schneier has authored approximately twelve books on the topics of

17   cryptography, computer security, general security technology, trust, surveillance, and privacy. (*Id.*

18   ¶ 10.) He has also authored or coauthored over 100 academic publications on many of these same

19   subjects. (*Id.* ¶ 12.)

20   Schneier filed two expert reports in this case: (1) an opening report from April 15, 2022

21   (Dkt. No. 608-7, "Schneier Opening Report") and (2) a rebuttal report from June 7, 2022 (Dkt.

22   No. 608-6, "Schneier Rebuttal Report"). Schneier offers a total of twenty opinions, fourteen in the

23   opening report and six in his rebuttal report. The parties separate Schneier's opinions into four

24   separate categories: (a) data and privacy topics (opinions 1-6); (b) Google specific topics (opinions

25   7-10); (c) private browsing and incognito topics (opinions 11-14); and (d) rebuttal opinions

26   concerning the expert report of Professor Zervas. Google argues that these opinions should be

27   excluded for five different sets of reasons. The Court addresses each category below.

28   ///

a.   *Data and Privacy Topics*

First, Google seeks to exclude Schneier's data and privacy opinion, not because of a lack of qualifications, but on the basis that those opinions do not "fit" the allegations in the case and fail to speak clearly and directly to a disputed issue in the case. Specifically, Google argues that Schneier's opinions on broad privacy topics such as "major data leaks" and other topics that are not directly at issue in this case.

Plaintiffs counter that Schneier's data and privacy opinions provide relevant context for other opinions and are thereby generalized opinions admissible under Rule 702. The Court agrees.

Rule 702 permits generalized testimony without application to the underlying facts of the case. The Committee Notes of Rule 702 (2000) explains:

> It might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or blood clotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles. For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony "fit" the facts of the case.

To past the *Daubert* test, the expert's testimony must be "relevant to the task at hand" and must "logically advance[] a material aspect of the proposing party's case." *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1321 n.17 (9th Cir. 1995).

Here, Schneier offers the following six main opinions under the data and privacy category: (1) "privacy, including freedom from unwanted surveillance, is important and has historical roots in political liberty, commercial fairness, and economic competition"; (2) the rise of the Internet has created greater threats to online privacy; (3) "such privacy concerns are justified by the volume and scope of data generated, collected, and used when people access the Internet"; (4) personal data and peoples' browsing activities are highly valuable to commercial actors and users; (5) "effective protection of privacy requires disclosures and controls" in terms of how data is used,

1   what is collected, and how long such information is retained; and (6) "expectations about sharing

2   information are easily manipulated by commercial actors with an economic interesting in

3   fabricating the appearance of consent." (Schneier Opening Report ¶ 1.A.-1.F.)

4   The Court finds that such opinions, while largely general in nature, fit the allegations and

5   issues of this case. These opinions provide background and context information about what

6   privacy is, the importance of privacy, the different types of data, pervasive data collection and

7   tracking of users as a function of the Internet, and the impact and negative consequences of the

8   misuse of one's data. Schneier explains that such opinions are a "general overview of data privacy

9   in the context of internet usage" that "provide context for how a reasonable user would have

10   reasonably expected privacy over their browsing information, and to understand the considerations

11   relating to why Google's collection of use and use of private browsing information data is highly

12   offensive." (*Id.* ¶ 23.) Such background information is permitted under Rule 702 and *Daubert*.

13   Accordingly, the *Daubert* motion is **DENIED** on these grounds.[6]

14   b.   *Consumer Expectation Opinions*

15   Second, Google seeks to exclude Schneier's consumer expectation opinions (mostly in

16   opening opinions 10-13 and rebuttal opinions 3 and 5) on the basis that Schneier is not qualified to

17   opine on consumer expectations and his methods for doing so are not reliable.

18   Schneier offers several opinions about the purported expectations and understandings of

19   "reasonable users." (*See* Schneier Opening Report ¶¶ 261, 283, 285, 286, 296, 297, 298, 300, 301,

20   302, 306, 307, 356; Schneier Rebuttal Report ¶¶ 1.C, 1.F, 63, 64, 70, 75, 79, 101, and 102.)[7]

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24   [6] Google also seeks to exclude these opinions and others under Rule 403 on the grounds
     that they are highly prejudicial. (Schneier Daubert at 16-18.) The motion to exclude on these
25   grounds strains credulity and is **DENIED**. Any trial in this action will have time limitations. Google
     can review the 403 objections during trial if appropriate.

26
           [7] Google also argues that Schneier's following opinions should also be excluded for the
27   same reasons. (*See* Schneier Opening Report ¶¶ 2, 63, 77, 78, 246, 248, 316, and 317.) As to these
     opinions, the motion is **DENIED**. The Court finds Schneier has the necessary background and
28   experience to render these specific opinions.

1   These opinions, which rely on Schneier's interpretation of certain Google documents and a

2 purported "industry standard," fall outside the scope of Schneier's expertise and are not reliable.[8]

3 While experts are allowed to opine as to a reasonable consumer's expectation, such opinion must

4 be rooted in the expert's relevant expertise. *Chamberlan v. Ford Motor Co*, 369 F. Supp. 2d 1138,

5 1145 n.3 (N.D. Cal. 2005). While Schneier is a security technologist, and can opine generally

6 about relevant privacy issues, he does not have specialized expertise in opining about the

7 purported understandings and expectations of consumers specifically. Nor can he merely impute

8 his own opinions to those of a reasonable consumer.

9   Further, plaintiffs have not established that the methodology employed to arrive at such

10 opinions are reliable. When asked about the methodology for arriving at his opinions on what

11 reasonable users would think of Google's disclosures, Schneier testified that he is "not a random

12 person coming in off the street and reading a screen and telling you what I think. I mean, I write

13 books on this stuff. This is what I do. Security and privacy experts have [] standards of what

14 disclosure looks like, and we know when it's met and when it's not met." (Dkt. No. 664-2,

15 Schneier Dep. 84:17-23.) When questioned about the industry standard, Schneier testified that the

16 standard is not really an objective one but is instead one that is based on his personal opinion. (*See

17 id.,* 146:21-147:22.) Schneier also acknowledged that he had not "queried any privacy and security

18 expert" relating to whether Google's disclosures were adequate. (*Id.*, 147:1-11.) Nor has he

19 conducted any consumer surveys regarding these issues. (*Id.*, 20:20-22.).

20

21
_____

22   [8] Google's argument that Schneier's opinions are also unreliable because he failed to
conduct any consumer surveys does not persuade. An expert who offers testimony on the question
on what a reasonable consumer is likely to do and/or think is not required to conduct a consumer
23 survey if his or her testimony is otherwise reliable. *See Bailey v. Rite Aid Corp.*, 338 F.R.D. 390,
401 (N.D. Cal. 2021); *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1115 (N.D. Cal.
24 2018) (holding that an expert need not conduct a consumer survey to reliably opine on likelihood
of deception and materiality); *see also Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th
25 663, 681-82, 38 Cal.Rptr.3d 36 (2006) (noting that California courts have "reject[ed] [the] view
that a plaintiff must produce a consumer survey or similar extrinsic evidence to prevail on a claim
26 that the public is likely to be misled by a representation" under the FAL, CLRA, or UCL) (citation
and internal quotation marks omitted). Thus, Schneier's failure to conduct a survey is not
27 necessarily dispositive. However, a survey might have helped in this case given his lack of
relevant expertise on the specific opinions at issue.
28

1   In essence, Schneier's opinions are based on nothing more than his personal interpretation

2   of the at-issue disclosures and Google documents and the idea that such interpretations are

3   reasonable. While Schneier may have a relevant *personal* view, plaintiffs fail to explain why

4   Schneier's interpretation of Google's policies and documents qualify him to opine on how a

5   *reasonable consumer* would understand them, or what expectations they would derive from them.

6   Accordingly, Google's motion to exclude the consumer expectations opinions found at the

7   following paragraphs is **GRANTED**: Schneier Opening Report ¶¶ 261, 283, 285, 286, 296, 297,

8   298, 300, 301, 302, 306, 307, 356; Schneier Rebuttal Report ¶¶ 1.C, 1.F, 63, 64, 70, 75, 79, 101,

9   and 102.[9]

10   *c.   Opinions Based on Summarization of Google Documents*

11   Third, Google moves to excludes Schneier's opinions seven through fourteen of his

12   opening report on the basis that such opinions are "biased summaries of Google documents

13   testimony, and disclosures that merely regurgitate attorney argument." In opposition, plaintiffs

14   argue that exclusion is not warranted because such opinions do more than just summarize

15   Google's documents and are necessary to lay a foundation for Schneier's other opinions.

16   The Court agrees with plaintiffs. The Court finds that Schneier does more than summarize

17   Google's documents, testimonies, and disclosures. While some of the opinions reference such

18   documents, the opinions analyze them by synthesizing information from a variety of different

19   sources, including both Google's internal documents and public documents. (*See* Schneier Report

20   ¶¶ 179-84.) The opinions also provide Schneier's interpretation and meaning of certain trends seen

21   within Google and the risks associated with such trends. (*Id.* ¶¶ 202-30.) Further, Schneier

22   employs a readability tool in paragraphs 231 to 242 and opines on the accessibility and readability

23

24   [9] Plaintiffs' reliance on *Berman v. Freedom Financial Network, LLC* 400 F.Supp.3d 964,
972 (N.D. Cal. 2019) does not persuade. In *Berman*, the Court found that the proffered expert was
25   qualified to offer opinions on the issue of whether the design of a website would be likely to
mislead or confuse a typical user. *Id.* The Court found the expert's training and work as a web
26   development practitioner and Chief Technology Officer of a web development and consultancy
firm sufficient because "his daily work include[d] the design of websites that solicit a user's
27   consent to receive marketing communications." *Id*. He was not imputing his view but explaining
why the design would mislead and should be designed differently. Plaintiffs have not established
28   that Schneier's experience is like the expert's experience in *Berman*. Thus, plaintiffs fail to
persuade.

United States District Court
Northern District of California

of Google's polices. These are just some of the many ways in which Schneier does more than summarize facts and "regurgitate" legal arguments.

Thus, Google's motion on this ground is **DENIED**.

d.   Opinions about Hypothetical Risks

Fourth, Google seeks to exclude Schneier's opinions about hypothetical risks on the grounds that such opinions are irrelevant to the issues in this case. (*See* Schneier Report ¶¶ 29, 34, 36, 37, 39, 41, 49, 71, 73, 100, 102, 114, 119, 127, 288, 292, 293.) Plaintiffs oppose, contending that such opinions about the potential risks of data retention are relevant to the offensive of Google's conduct.

Again, the challenge is not one of expertise or methodology. Whether plaintiffs' data can be linked to other data such that plaintiffs' identity can be revealed is relevant to the issues in this case. At this juncture, it appears such information is at least relevant to the analysis of plaintiffs' intrusion upon seclusion and invasion of privacy claims, both which turns on the offensiveness of Google's conduct. Google's argument does not change the Court's *Daubert* analysis. The Court will not engage in a merits analysis or fact-finding at this stage.

Accordingly, Google's motion on this ground is **DENIED**.

e.   Google's Intent, Services, or Receipt of Data

Fifth, Google argues that Schneier's opinions based on what Google calls "Google's intent, services, or receipt of data" should be excluded because he does not have the requisite knowledge or expertise to opine on such subjects.

In general, an expert may only testify as to "scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence or determine a fact in issue" and may not testify as to legal conclusions. *U.S. v. Tamman*, 782 F.3d 543, 552 (9th Cir. 2015).

The Court has considered the parties' arguments and agrees that some of Schneier's opinions impermissibly opine on Google's intent or state of mind. For example, he opines that "Incognito mode's simple, bold, and friendly 'Spy Guy' may communicate Google's 'intent' to lead users to believe that Incognito will provide them with virtual cover of darkness." (Schneier Report ¶ 302.) Similarly, Schneier opines that "Google counts on most people to access the

1   Internet using Google's Chrome browser, check their messages in Gmail, use Google search,

2   watch videos on YouTube, or obtain directions from Google Maps, without thinking about how

3   much personal information they're revealing to Google when they search for information,

4   communicate with others, entertain themselves, and get themselves from here to there." (*Id.* ¶ 57.)

5   Schneier also impermissibly opines that "Google is motivated to ensure that any privacy controls

6   are difficult to understand." (*Id.* ¶ 255.)

7   However, with respect to the other opinions, Google does not persuade. Schneier's has

8   offered opinions about Google's services and receipt of data based on conclusions that he drew

9   after reviewing the discovery and Google's documents in this case. He cites to such documents in

10   his report. Further, given his computer scientist background, the Court finds that he has the

11   necessary skill and expertise to provide general opinions about Google's services so long as those

12   opinions are tied to documents and/or discovery relevant to this case.

13   Accordingly, the Court **GRANTS IN PART AND DENIES IN PART** the motion to exclude. The

14   motion is granted with respect to the opinions in paragraphs 57, 255, and 302 of the Opening

15   Report and denied as to the remaining opinions.

16   **4.**   ***Daubert* as to Konstantinos Psounis**

17   Plaintiffs move to exclude six opinions by Google's computer scientist expert,

18   Konstantinos Psounis, under *Daubert* and Rule 702. (Dkt. No. 702-1.) Psounis is a Professor and

19   Associate Chair of the Electrical and Computer Engineering and Professor of Computer Science at

20   the University of Southern California ("USC"). (Dkt. No. 659-10, Psounis Report ¶ 16.) He joined

21   USC's faculty in 2003 after completing his Ph.D. at Sanford University as a Stanford Graduate

22   Fellow. (*Id.*)

23   Throughout his career, Psounis has analyzed, designed, and developed efficient, privacy-

24   preserving networked distributed systems, for the Internet and the world wide web, content

25   delivery networks, data centers and cloud computing, and wireless mobile networking systems.

26   (*Id.* ¶ 19.) He has also published more than 100 technical papers in these fields. (*Id.* ¶ 18.) Psounis

27   also has practical experience with networked distributed systems designed and developed to

28   operate in the World Wide Web deployed over the Internet. (*Id.* ¶ 22.) For instance, he has

21

1   designed and developed systems to accelerate the delivery of content over the Internet. (*Id.*)

2   Psounis offers a total of thirteen opinions to rebut plaintiffs' expert, Johnathan Hochman.

3   Of the thirteen opinions, plaintiffs seek to exclude six: (1) Hochman' opinion that users can

4   readily be identified from the data at issue is incorrect (first opinion); (2) Hochman's opinions on

5   private browsing profiles, server-side processes, and data joinability are inaccurate (third opinion);

6   (3) Hochman's proposal to identify Class I (Chrome Class) is unreasonable and unreliable

7   (seventh opinion); (4) Hochman's opinion that the "maybe_chrome_incognito" bit reliably detects

8   incognito traffic is incorrect (eighth opinion); (5) Hochman's proposal to identify Class 2 is

9   unreasonable and unreliable (ninth opinion) and (6) Hochman's proposed methods for identifying

10   class members do not and cannot account for shared devices or accounts (tenth opinion). (Psounis

11   Report § 1.) Plaintiffs seeks to exclude these opinions on the grounds that: (1) Psounis did not

12   employ any methodology to evaluate the data that he opines about and (2) Google's lawyers

13   performed his (limited) analyses. Neither argument persuades.

14   As an initial matter, the Court notes that plaintiffs primarily object because Psounis did not

15   conduct a competing analysis of the data sets Hochman analyzed. The Court disagrees. Plaintiffs

16   do not point to any binding authority, nor is the Court aware of any, that mandates such testing

17   requirement to meet *Daubert's* test. *See Linares v. Crown Equip. Corp.*, 2017 WL 10403454, at

18   *12 (C.D. Cal. Sept. 13, 2017) ("While one of the Daubert factors suggests that the reliability of

19   expert testimony can be judged by whether the expert's technique or theory can be and has been

20   empirically tested, such testing is not required."); *Wyman v. Sunbeams Prods. Inc.*, 2021 WL

21   1531000, *3 (N.D. Cal. Apr. 19, 2021). Indeed, plaintiffs concede in their reply brief that "failing

22   to conduct a study is not always an automatic ticket to exclusion." (Psounis *Daubert* at 5:25-26.)

23   Next, the Court finds that Psounis opinions are based on reliable principles of information

24   theory and networked distribution systems and relevant documentation. In arriving at the

25   challenged opinions, Psounis reviewed the Hochman Report and the corresponding exhibits,

26   appendices, and sources on which he relied, Google documents and discovery responses produced

27   in this case, including Google's logging polices and infrastructure, issues surrounding

28   fingerprinting and IP addresses, publicly available sources, and existing technical and academic

1   research. (Psounis Report ¶ 33.) For example, Psounis' first opinion, which rebuts Hochman's, is

2   based on Psounis' experience researching browser communications, review of documents upon

3   which Hochman relied, and review of relevant testimony and documents in this case. (*Id.* ¶¶ 37,

4   58.) Psounis also reviewed and analyzed Google's policies regarding technical barriers and polices

5   meant to prevent identification of private browser users. (*Id.* ¶¶ 65-68.)

6   With respect to opinion three, Psounis not only relied on his experience in the industry and

7   relevant documents, but he also analyzed certain data produced under the Special Master process

8   and to which Hochman cites in his report. (*Id.* ¶¶ 79-83.) Psounis uses this data, plus his industry

9   knowledge, to arrive at his opinion.

10   Similarly, Psounis' opinions seven through ten are based not only on Psounis' industry

11   experience but also on additional principles such as the characteristics of IP addresses and

12   networked distributed systems. Psounis then reaches the conclusion that one's IP addresses and

13   User Agent cannot reliably identify devices or class members. Psounis also relies on studies and

14   research that show that people share devices and accounts to support his conclusions that

15   Hochman's proposed methods of identifying class members are unreasonable and unreliable. (*Id.*

16   ¶¶ 162-169.) The Court finds that Psounis relied on a sound methodology to support his opinions.

17   That Google's lawyers assisted Psounis in gathering the data and running the testing that

18   Psounis conducted in this case does not change the result. Plaintiffs have not pointed to any error

19   or discrepancies in the testing that is attributed to such assistance. Nor do plaintiffs argue as much.

20   If anything, the fact that Google's lawyers were involved in the process goes to the weight of the

21   opinions not the admissibility.

22   Accordingly, the motion on this ground is **DENIED**.

23   **IV.   CLASS CERTIFICATION**

24   Plaintiffs move for certification of a proposed nationwide class under Rules 23(b)(2) and

25   23(b)(3) based on the following Counts: (I) violation of the Federal Wiretap Act, 18 U.S.C. §

26   2510, *et. seq.*; (II) violation of CIPA; (III) violation of CDAFA.; (IV) invasion of privacy; (V)

27   intrusion upon seclusion; (VI) breach of contract; (VII) violation of California's UCL. Plaintiffs'

28   theory of the case is that Google collects users' private browsing data after promising not to do so.

In their class certification motion, plaintiffs seek to certify the following proposed classes

under Rules 23(b)(2) and 23 (b)(3):

> Class 1 – All Chrome browser users with a Google account who accessed a non- Google website containing Google tracking or advertising code using such browser and who were (a) in "Incognito mode" on that browser and (b) were not logged into their Google account on that browser, but whose communications, including identifying information and online browsing history, Google nevertheless intercepted, received, or collected from June 1, 2016 through the present.

> Class 2 – All Safari, Edge, and Internet Explorer users with a Google account who accessed a non-Google website containing Google tracking or advertising code using such browser and who were (a) in a "private browsing mode" on that browser and (b) were not logged into their Google account on that browser, but whose communications, including identifying information and online browsing history, Google nevertheless intercepted, received, or collected from June 1, 2016 through the present.

Docket No. 608-3 at 1. Plaintiffs seek to certify nationwide classes for Counts I, III, IV, V, VI, and

VII of their complaint and California-resident only classes for Count II. (*See* generally TAC.)[10]

A.   Rule 23(a)

1.   Numerosity

The requirement of numerosity is that the class be so numerous that joinder of all members

individually would be impracticable. Fed. R. Civ. P. 23(a)(1). "Although there is no exact

number, some courts have held that numerosity may be presumed when the class comprises forty

or more members." *See Krzesniak v. Cendant Corp.*, No. 05–05156, 2007 WL 1795703, at *7

(N.D. Cal. June 20, 2007).

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[10] Excluded from the classes are: (1) the Court (including any Judge or Magistrate presiding over this action and any members of their families); (2) Defendant, its subsidiaries, parents, predecessors, successors and assigns, including any entity in which any of them have a controlling interest and its officers, directors, employees, affiliates, legal representatives; (3) persons who properly execute and file a timely request for exclusion from the Class; (4) persons whose claims in this matter have been finally adjudicated on the merits or otherwise released; (5) Plaintiffs' counsel, Class counsel and Defendant's counsel; and (6) the legal representatives, successors, and assigns of any such excluded persons. (*Id.* at 55-56.)

1   Plaintiffs contend that this requirement is met because there are tens of millions of class

2   members. (*See* Lasinski Report ¶¶ 194-95.) Google does not dispute this estimate. Accordingly,

3   the Court concludes that plaintiffs have satisfied the numerosity requirement.

4   **2.   Commonality**

5   Commonality requires "questions of law or fact common to the class." Fed. R. Civ. P.

6   23(a)(2). To satisfy this requirement, the common question must be of "such nature that it is

7   capable of class-wide resolution—which means that the determination of its truth or falsity will

8   resolve an issue that is central to the validity of each of the claims in one stroke." *Wal-Mart*

9   *Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011) "[F]or

10   purposes of Rule 23(a)(2)[,] even a single common question will do." *Id.* at 359 (internal

11   quotations and brackets omitted). The requirements of Rule 23(a)(2) have "been construed

12   permissively," and '[a]ll questions of fact and law need not be common to satisfy the rule." *Ellis*,

13   657 F.3d at 981 (quoting *Wal-Mart Stores, Inc.*, 564 U.S. at 350). A district court must analyze the

14   persuasiveness of the evidence submitted to establish the commonality requirement and may not

15   simply conclude that the commonality requirement is met on the basis that the plaintiff's evidence

16   in support of that requirement is admissible. *See Grodzitsky,* 957 F.3d at 986 (holding that "[a]

17   district court errs when it 'limit[s] its analysis of whether there was commonality to a

18   determination of whether Plaintiffs' evidence on that point was admissible" and that a "district

19   court must engage in a 'rigorous analysis' of commonality, rather than 'merely conclud[ing] that,

20   because . . . evidence was admissible, a finding of commonality was appropriate' ") (quoting *Ellis*,

21   657 F.3d at 984).

22   Here, plaintiffs argue that common issues include whether: (1) Google promised not to

23   collect private browsing information; (2) Google collected, stored, and used private browsing

24   information; (3) Google's conduct was highly offensive to a reasonable person; and (4) Google

25   uniformly attempted to and actually intercepted private browsing communications between class

26   members and non-Google websites. Plaintiffs submit that Google's standardized contracts and

27   actions constitute common evidence capable of answering the common questions above. Google

28   does not dispute that the commonality requirement is met.

25

United States District Court
Northern District of California

1   The Court agrees and finds that, at least for commonality purposes, Google's form contract

2 is proof that could resolve the question of whether Google promised not to collect users' private

3 browsing data. Having found at least one common question among the class members' claims, the

4 Court need not consider, for commonality purposes, the other questions. *Wal-Mart Stores,* 564

5 U.S. at 359 ("[F]or purposes of Rule 23(a)(2)[,] even a single common question will do.") Thus,

6 the commonality requirement is satisfied.

3.   Typicality

7   "The purpose of the typicality requirement is to assure that the interest of the named

8 representative aligns with the interests of the class." *Wolin v. Jaguar Land Rover N. Am., LLC*,

9 617 F.3d 1168, 1175 (9th Cir. 2010). "The typicality requirement looks to whether the claims of

10 the class representatives [are] typical of those of the class, and [is] satisfied when each class

11 member's claim arises from the same course of events, and each class member makes similar legal

12 arguments to prove the defendant's liability." *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir.

13 2010) (citation omitted). Typicality refers to the nature of the claim or defense of the class

14 representative, and not to the specific facts from which it arose or the relief sought." *Hanon v.

15 Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (internal citation and quotation marks

16 omitted). The requirement is "permissive," and the representative's claims need only be

17 "reasonably co-extensive with those of absent class members." *Rodriguez v. Hayes*, 591 F.3d

18 1105, 1124 (9th Cir. 2010) (quoting *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1020 (9th Cir.

19 1998)).

20   Plaintiffs argue that this requirement is satisfied because:

21 > [E]ach named Plaintiff browsed in Chrome Incognito (Class 1) and
one, Ms. Trujillo, also used a non-Chrome private browsing mode
(Class 2). For both classes, the "injuries arise from a common
wrong" based on Google's broken promises and systematic
collection.

22 Docket No. 608-3 at 5 (referencing plaintiffs' declarations and citing Hochman Report § VIII.A

23 (detailing Google's practices)). Google does not dispute that this requirement is met. Accordingly,

24 the Court finds that plaintiffs have pointed to sufficient evidence to show that named plaintiffs'

1   claims and defenses are typical of the classes. Thus, the typicality requirement is satisfied.

2   **4.   Adequacy**

3   The requirement of adequate representation requires a showing that the representative

4   parties "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4).

5   This requires inquiry into whether the plaintiff and its counsel have any conflicts of interest with

6   other class members, and whether the plaintiff and its counsel will prosecute the action vigorously

7   on behalf of the class. *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). Google does not

8   dispute that counsel and plaintiffs adequately represent the class.

9   With respect to plaintiffs, the Court finds that they have already expended a substantial

10   amount of time litigating this case, including by responding to discovery, sitting for depositions,

11   and allowing for Google to pull information from their accounts. (*See e.g.,* Dkt. No. 609-3. at

12   ¶ 13.) As to counsel, the Court finds that counsel has extensive experience litigating privacy class

13   actions and that given Counsel's experience, proposed class counsel can adequately represent the

14   proposed class. Accordingly, the Court finds that the adequacy requirement is met with respect to

15   counsel and named plaintiffs.

16   In sum, the Court finds that plaintiffs have satisfied all the requirements of Rule 23(a).

17   **B.   Rule 23(b)(3)**

18   Having found that plaintiffs satisfy Rule 23(a), and consistent with plaintiffs' order of

19   briefing, the Court starts with its analysis under Rule 23(b)(3) first, namely predominance of the

20   elements and damages.

21   **1.   Predominance of Evidence re Liability Inquiry**

22   Rule 23(b)(3) requires the Court to determine whether "questions of law or fact common to

23   class members predominate over any questions affecting only individual members." Fed. R. Civ.

24   P. 23(b)(3). "An individual question is one where 'members of a proposed class will need to

25   present evidence that varies from member to member,' while a common question is one where 'the

26   same evidence will suffice for each member to make a prima facie showing [or] the issue is

27   susceptible to generalized, class-wide proof.'" *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442,

28   453, 136 S. Ct. 1036, 194 L. Ed. 2d 124 (2016) (citation omitted). The "predominance inquiry

1   asks whether the common, aggregation-enabling, issues in the case are more prevalent or

2   important than the non-common, aggregation-defeating, individual issues." *Id.* (quoting 2 W.

3   Rubenstein, 2 Newberg on Class Actions § 4:49 (5th ed.)). "When 'one or more of the central

4   issues in the action are common to the class and can be said to predominate, the action may be

5   considered proper under Rule 23(b)(3) even though other important matters will have to be tried

6   separately, such as damages or some affirmative defenses peculiar to some individual class

7   members.'" *Id.* (quoting 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §

8   1778 (3d ed.)). "Considering whether 'questions of law or fact common to class members

9   predominate' begins, of course, with the elements of the underlying cause of action." *Erica P.*

10   *John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804 (2011) (citation omitted).

11   Here, plaintiffs argue that the predominance requirement is satisfied with respect to all

12   seven counts. Unsurprisingly, Google disagrees. The Court begins with the parties' primary

13   dispute over implied consent.

14   a.   *Implied Consent*

15   With respect to all seven of plaintiffs' claims, Google argues that the affirmative defense

16   of implied consent raises individualized issues that defeat predominance.

17   Defenses that must be litigated on an individual basis can defeat class certification. *True*

18   *Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 931 (9th Cir. 2018). However, courts

19   may certify a Rule 23(b)(3) class "even though [ ] important matters will have to be tried

20   separately, such as some affirmative defenses peculiar to some individual class members." *Id.*

21   (original alterations omitted) (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453

22   (2016)).

23   The Ninth Circuit's decision in *True Health* is instructive. In *True Health*, the Ninth

24   Circuit affirmed in part, reversed in part, and remanded a district court's denial of class

25   certification. *True Health Chiropractic, Inc.,* 896 F.3d at 931. In that case, the plaintiff moved to

26   certify a class of all persons who received faxes from the defendant where the faxes failed to

27   inform the recipient that they could opt out of future faxes. *Id.* at 928. In opposing class

28   certification, the defendant argued that the consent defense available against class members could

United States District Court
Northern District of California

1   not be resolved without individualized inquires. *Id.* The Ninth Circuit held that consent is an

2   affirmative defense on which the defendant bears the burden of proof. *Id.* That said, the plaintiff

3   nonetheless maintains the burden of predominance. *Id.* Thus, in assessing this issue, the Ninth

4   Circuit started by "analyzing the consent defenses [defendant] has actually advanced and for

5   which it has presented evidence." *Id.*[11]

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8   [11] In *True Health*, the defendant produced evidence with respect to individual class

9   members, namely three exhibits listing putative class members that eventually provided the bases
     for subclasses. *Id.* at 927. Exhibit A listed all putative class members that provided their fax

10   numbers when registering a product purchased from a business unit of the defendant or entered
     into a software-licensing agreement. *Id.* Exhibit B listed class members that checked a box during

11   their software registration that indicated their express permission to be sent faxes, completed a
     written consent form where they provided express permission, and/or confirmed via phone that

12   they would like to continue to receive faxes. *Id.* Exhibit C listed class members that gave consent
     in individual oral or email communications with sales representatives. *Id.*

13

14   The Ninth Circuit reversed with respect to the class members listed in Exhibit A. The
     Ninth Circuit found that this group may have given consent by providing their fax numbers when

15   registering a product or when entering into a software-licensing agreement. *Id.* The Ninth Circuit
     held that "consent, or lack thereof, is ascertainable by simply examining the product registrations

16   and the [software-licensing agreements]." *Id.* at 932-33. The Ninth Circuit remanded with respect
     to the class members list in Exhibit B, explaining that the record was somewhat unclear as to that

17   group. *Id.*

18   With respect to the class members in Exhibit C, those that arguably gave consent in

19   individual communications with sales representatives, the Ninth Circuit affirmed the district
     court's denial of class certification. *Id.* There, the defendant argued that "because of . . . long-

20   standing and well-developed relationships . . . sales representatives would learn and know that a
     particular customer exclusively preferred to receive faxes[.]" *Id.* In support of this position,

21   defendant submitted a declaration from one of its sales representatives who testified that many
     customers specifically asked him to send them faxes. *Id.* In affirming the denial of plaintiff's class

22   certification motion, the Ninth Circuit held:

23

24   [Defendant] provided evidence in the district court that its consent defenses to
          these claims would be based on individual communications and personal

25   relationships between [Defendant's] representatives and their customers. The
          variation in such communications and relationships, as evidenced by the

26   declaration [of a sales representative] and deposition testimony of [a separate
          sales representative], is enough to support denial of class certification

27   under Rule 23(b)(3) for the putative class members listed in Exhibit C.

28   *Id.* at 932.

1   *True Health* instructs that a defendant must present non-speculative evidence that an

2   affirmative defense would require individualized inquiries to defeat the predominance

3   inquiry. *Id.* at 932 (quoting *Bridging Communities Inc. v. Top Flite Fin. Inc.*, 843 F.3d 1119, 1125

4   (6th Cir. 2016)); *cf. Gene And Gene, LLC v. Biopay, LLC*, 541 F.3d 318, 327 (5th Cir. 2008)

5   ("predominance of individual issues necessary to decide an affirmative defense may preclude class

6   certification."); *True Health Chiropractic, Inc.,* 896 F.3d at 931 ("Since [defendant] bears the

7   burden, we assess predominance by analyzing the consent defenses [defendant] has actually

8   advanced and for which it has presented evidence.") Thus, the Court analyzes Google's proffered

9   evidence in light of its burden to show consumers consented to, or had adequate notice of, the data

10   collected, stored, and disclosed.

11   First, Google points both to its and plaintiffs' experts' surveys detailing how class

12   members had divergent knowledge and expectations regarding their privacy in private browsing

13   mode. Google also relies on several statistics included in its consumer expectations expert's, On

14   Amir, report. For instance, Google points to Amir's findings that after being shown just the

15   incognito screen, 44% of chrome users answered that they expect companies like Google

16   "probably do or do" receive IP addresses, URLs of sites visited, and cookies versus the 35% of

17   participants that expect that such companies "probably do not or do not" receive such information.

18   (Dkt. 659-9, Amir Report ¶ 56 & Tables 2 & 3 (summarizing similar results for other browsers).)

19   Amir's report also indicates that participants, when shown the documents plaintiffs claim

20   comprise their contract (the Incognito Screen, the Privacy Policy, and the Chrome Privacy Notice),

21   63% of respondents expect Google receives their IP addresses in Incognito mode, while 55%

22   expect that Google receives the URLs of sites visited and cookies. (*Id.* ¶¶ 69, 73 & Tables 5 & 6.)

23   Google also points to plaintiffs' rebuttal consumer expectations expert, Mark Keegan, who

24   showed that class members knowledge of the alleged conduct varies. Keegan's report shows that

25   respondents, after only being shown the splash screens, 20.2% indicated a belief that they had not

26   given consent to Google to collect and save their Internet browsing activity when they browser the

27   Internet in private browsing mode. (Dkt. No. 608-10, Report of Keegan ¶ 187.) Further, roughly

28   half of respondents who were asked whether they agreed that Google "collects and saves" "URL

1   information," "IP address," "browsing activity," and "cookies" in private browsing mode

2   confirmed that they did agree, which represents more than three times the number of respondents

3   who disagreed. (*Id.* at Ex. 72.)

4   Second, Google identifies several media and academic reports that publicly disclosed the

5   alleged conduct and the fact that 40% of named plaintiffs were aware of media and academic

6   reports discussing the privacy limitations of private browsing mode. (Dkt. No. 659-3, Opposition

7   to Class Certification Motion "Class Cert. Opp." at 5-6.)

8   Third, Google submits a declaration by Jonathan McPhie, a Group Product Manager for

9   Google's Privacy and Data Protection Office, that describes a developer tool that users can use to

10   see, in real time, what data is being collected when users are browsing in private mode. (Dkt. No.

11   659-6, Declaration of Jonathan McPhie "McPhie declaration" ¶ 99.) At least one plaintiff, Byatt,

12   testified that he is aware of this developer tool and that the tool shows a lot of information. (Dkt.

13   666-2, Ex. 25, 47:17-49:12.) However, plaintiff does not recall ever using the tool in private

14   browsing mode. (*Id.*)

15   Lastly, Google submitted the McPhie declaration which discusses various other ways

16   users' knowledge of the alleged conduct could vary. McPhie explains that the Incognito Screen

17   included a "Learn More" hyperlink that took users to different pages throughout the class period.

18   (McPhie declaration ¶ 73.) The "Learn More" hyperlink has been clicked more than 14 million

19   times between August 1, 2016, and January 1, 2022. (*Id.*) For half the class period, the button

20   linked to the "How private browsing works in Chrome" page in the Google Help Center

21   explaining that "Incognito mode stops Chrome from saving your browsing history to your local

22   history," but "[y]our activity . . . might still be visible to," among others: "websites you visit,

23   including the ads and resources used on those sites"; "Search engines" and "web-service[s]." (*Id.*

24   ¶¶ 59, 73.) This page was visited about 30 million times between its launch in July 2017 and

25   January 2022. (*Id.* ¶ 59 & Ex. 17.)

26   Plaintiffs proffer three reasons why predominance is not defeated: (1) Google waived any

27   implied consent defense in its form contract throughout the class period; (2) Google's internal

28   documents from Google employees recognize that Google collects private browsing data without

United States District Court
Northern District of California

31

1 consent; and (3) none of the news articles identified by Google discloses the collection at issue

2 here.

3   The Court finds that the inquiry into implied consent that Google advances, and which it

4 also presents evidence, creates individualized issues that defeat predominance. Here, as in *Truth*

5 *Health*, Google provides evidence that its consent defense would be based on individual, and

6 subjective, interactions of what certain class members knew, read, saw, or encountered.[12]

7 Evidence shows variation between what users knew or did not know.

8   A factfinder, in determining whether class members impliedly consented to the alleged

9 conduct would have to determine the sources of information to which each class member was

10 exposed. Given the plaintiffs' strategy, this would require individualized assessment into class

11 members' experience. Thus, the Court finds that if the class was certified, the jury would be tasked

12 with filtering out what members consented to the alleged conduct, and how. Identifying what

13 members impliedly consented to the alleged conduct, and what members did not, would

14 undoubtedly drive the litigation. That is because consent is a defense to all of plaintiffs' claims.

15 (Dkt. No. 113, at 14.) Unsurprisingly, consent remains the central disputed issue in this case.

16 Indeed, both sides have heavily litigated this issue at every stage of this litigation. The Court

17 expects that the parties will also litigate the issue at trial. Accordingly, for the reasons set forth

18 above, the Court finds that individual issues of implied consent are likely to predominate over any

19 common issues. Accordingly, the Court **DENIES** plaintiffs' motion to certify a damages class under

20 Rule 23(b)(3).

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24   [12] However, the nature of the evidence in *True Health* slightly differs from the evidence in this case. In *True Heath*, the defendant pointed to actual evidence with respect to specific class

25 members in the subclass that arguably "gave consent in individual 'oral or email' communications with [defendant's sales representatives.]" *True Health Chiropractic, Inc.*, 896 F.3d at 927. Here,

26 with the exception of the developer tool data, Google's data is not connected to any particular class member, but general data that shows that class members have differing experiences and

27 knowledge of the alleged conduct. Nonetheless, Google's evidence, like the evidence in *True Health*, establishes that individual and subjective interactions require individualized inquiries into

28 the consent defense.

1

C.   Rule 23(b)(2)

2   Plaintiffs also seek certification under Rule 23(b)(2). Rule 23(b)(2) permits certification of

3   a class when "the party opposing the class has acted or refused to act on grounds that apply

4   generally to the class, so that final injunctive relief or corresponding declaratory relief is

5   appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "Class certification under

6   Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive."

7   *Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1195 (9th Cir.), *opinion amended on denial of*

8   *reh'g*, 273 F.3d 1266 (9th Cir. 2001).

9   To obtain certification under Rule 23(b)(2), plaintiffs must "describe[] the general contours

10 of an injunction that would provide relief to the whole class, that is more specific than a bare

11 injunction to follow the law, and that can be given greater substance and specificity at an

12 appropriate stage in the litigation through fact-finding, negotiations, and expert testimony." B.K.

13 *by next friend Tinsley v. Snyder*, 922 F.3d 957, 972 (9th Cir. 2019) (quoting *Parsons v. Ryan*, 754

14 F.3d 657, 689 n.35 (9th Cir. 2014))

15   Google argues that plaintiffs cannot obtain certification under Rule 23(b)(2) because

16 plaintiffs are precluded from seeking Rule 23(b)(2) certification because they also seek monetary

17 relief, and such relief is not "incidental." Here, plaintiffs are not precluded from seeking

18 certification of a Rule 23(b)(2) class for injunctive relief merely because they also seek

19 certification of a Rule 23(b)(3) class. Indeed, "Ninth Circuit precedent indicates that the court can

20 separately certify an injunctive relief class and if appropriate, also certify a Rule 23(b)(3) damages

21 class." *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 573 (C.D. Cal. 2014) (rejecting the argument

22 that "the court can certify a Rule 23(b)(2) class only if the monetary relief sought is purely

23 incidental to the injunctive relief").

24   Moreover, plaintiffs describe the "general contours" of the injunction they seek. Injunctive

25 relief would (1) preclude Google from collecting further private browsing information; (2) require

26 Google to delete the private browsing information that it previously collected and is currently

27 storing; (3) require Google to remove any services that were developed or improved with the

28 private browsing information; and (4) appointment of an independent third-party to verify that the

United States District Court
Northern District of California

33

1   injunctive relief has been implemented. These would be important changes to reflect transparency

2   in the system.

3   Plaintiffs' description sufficiently identifies the specific course of conduct that plaintiffs

4   seek to enjoin, and it establishes that this course of conduct applies to the entire proposed class.

5   *See Broomfield v. Craft Brew All., Inc.,* No. 17-CV-01027-BLF, 2018 WL 4952519, at *8 (N.D.

6   Cal. Sept. 25, 2018) (certifying Rule 23(b)(2) class where the injunctive relief sought was to

7   enjoin defendant's "uniform policy and practice of misrepresenting on its packaging the brewing

8   location of the Kona Beers").

9   Accordingly, the Court concludes that plaintiffs have met their burden under 23(b)(2).

10 Having previously found that plaintiffs meet all the requirements under Rule 23(a), the Court

11 **GRANTS** plaintiffs' motion to certify a class under Rule 23(b)(2).

12 **V.   CONCLUSION**

13 For the foregoing reasons, the Court hereby **GRANTS IN PART** plaintiffs' motion for class

14 certification and certifies an injunctive class under Rule 23(b)(2). Plaintiffs' Motion to Strike

15 Google's Non-Retained Experts is **DENIED**, but the Court will allow plaintiffs to depose the

16 witnesses based on the topics covered in their declarations. The parties shall file a joint proposed

17 schedule for completing these depositions within seven (7) days from the date of this Order. The

18 parties' pending motions to seal will be addressed by separate court order.

19 The Court sets a case management conference for **JANUARY 30, 2023, AT 2:00 P.M**. Parties

20 shall meet and confer on a schedule for the balance of the action and file a statement with respect

21 to scheduling no later than **JANUARY 23, 2023**. If sufficient, the Court will issue a scheduling

22 order without a conference unless requested.

23 This Order terminates Docket Numbers 609, 662, 663, 664, 703, 705.

24 **IT IS SO ORDERED.**

25 Dated: December 12, 2022

26 _____
    YVONNE GONZALEZ ROGERS
    UNITED STATES DISTRICT COURT JUDGE

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United States District Court
Northern District of California