UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CHASOM BROWN, ET AL.

Plaintiffs,

v.

GOOGLE, LLC,

Defendant.

CASE NO. 20-cv-3664-YGR

ORDER GRANTING IN PART MOTION FOR CLASS CERTIFICATION; GRANTING IN PART *DAUBERT* MOTIONS; AND DENYING MOTION TO STRIKE GOOGLE'S NON-RETAINED EXPERTS

Re: Dkt. Nos. 609, 662, 663, 664, 703, 705

Plaintiffs Chasom Brown, William Byatt, Jeremy Davis, Christopher Castillo, and Monique Trujillo bring this action against defendant Google, LLC, alleging seven counts based on Google's alleged data collection practices: (1) violation of the Federal Wiretap Act, 18 U.S.C. § 2510, *et. seq.*, also known as the Electronic Communications Privacy Act ("ECPA"); (2) violation of the California Invasion of Privacy Act ("CIPA"), Cal. Penal Code §§ 631 and 632; (3) violation of the Comprehensive Computer Data Access and Fraud Act ("CDAFA"), Cal. Penal Code § 502 *et. seq.*; (4) invasion of privacy; (5) intrusion upon seclusion; (6) breach of contract; (7) violation of California's Unfair Competition Law ("UCL").

Pending before the Court are plaintiffs' Motion for Class Certification, the parties' corresponding *Daubert* motions, plaintiffs' Motion to Strike Google's Non-Retained Experts, and several administrative motions to seal.[1] Having carefully considered the parties' briefing, the admissible evidence, the record in this case, and upon further consideration after oral argument which occurred on October 11, 2022, plaintiffs' motion for class certification is **GRANTED IN**

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

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

PART. Many of Google's arguments hinge on the general proposition that Google's customer base is too big for class treatment. The notion that Google is too big to be held accountable does not persuade. The Court finds certification for injunctive relief only appropriate. Moreover, the *Daubert* motions are **GRANTED IN PART** and plaintiffs' Motion to Strike is **DENIED**.

I. BACKGROUND

The Court incorporates the background provided in Judge Koh's 31-page order denying Google's motion to dismiss. (Dkt. No. 363, at 1-8.) In sum, plaintiffs allege that Google surreptitiously intercepts and collects users' data even while users are in a private browsing mode. (Dkt. 395-2, Third Amended Complaint, ("TAC") at ¶ 1.) The at-issue data includes: (i) "[t]he 'GET request' sent from the user's computer to the website"; (ii) "[t]he IP address of the user's connection to the internet"; (iii) "[i]nformation identifying the browser software that the user is using, including any 'fingerprint' data"; (iv) "[a]ny 'user-ID' issued by the website to the user, if available"; (v) "[g]eolocation of the user, if available"; and (vi) "[i]nformation contained in 'Google cookies,' which were saved by the user's web browser on the user's device at any time prior." (TAC at ¶ 63(a)-(f).)

II. LEGAL STANDARDS

A. *Daubert* Motions

Federal Rule of Evidence 702 permits opinion testimony by an expert as long as the witness is qualified and based upon that qualification, the witness's opinion is relevant and reliable. An expert witness may be qualified by "knowledge, skill, experience, training, or education" as to the subject matter of the opinion. Fed. R. Evid. 702. The proponent of expert testimony has the burden of proving admissibility in accordance with Rule 702. *Id.*, Advisory Committee Notes (2000 amendments). At the class certification stage, "the relevant inquiry is a tailored *Daubert* analysis which scrutinizes the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence." *Rai v. Santa Clara Valley Transportation Auth.*, 308 F.R.D. 245, 264 (N.D. Cal. 2015); *Grodzitsky v. Am. Honda Motor Co.*, 957 F.3d 979, 985–86 (9th Cir. 2020). For scientific opinions, they must be based on scientifically valid principles. *Daubert*, 509 U.S. at 589. Experts assist the fact finder in their own evaluation of

the evidence by providing the fact finder with opinions based upon verifiable, scientific, or other objective analysis. *Id.* at 589–90.

B. Class Certification

A class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). "Before certifying a class, the trial court must conduct a rigorous analysis to determine whether the party seeking certification has met the prerequisites of Rule 23." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012) (internal quotation marks omitted). The rigorous analysis that a court must conduct requires "judging the persuasiveness of the evidence presented" for and against certification and "resolv[ing] any factual disputes necessary to determine whether" the requirements of Rule 23 have been satisfied. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982–83 (9th Cir. 2011). A "district court must consider the merits if they overlap with the Rule 23(a) requirements." *Id.* (citations omitted).

The party moving for certification first must show that the four requirements of Rule 23(a) are met. Specifically, Rule 23(a) requires a showing that: (1) the class is so numerous that joinder of all members is impracticable; (2) common questions of law or fact as to the class exist; (3) the claims or defenses of the representative parties are typical of those of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). The moving party must then show that the class can be certified based on at least one of the grounds in Rule 23(b). *See* Fed. R. Civ. P. 23(b). Relevant here, certification under Rule 23(b)(3) is appropriate only if "the questions of law or fact common to class members predominate over any questions affecting only individual members" and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Rule 23(b)(2) permits certification of a class when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

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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

enrichment can be determined under a range of potential liability scenarios; (5) restitution damages can be determined as a function of the payments necessary to incentivize an individual to knowingly relinquish the choice to keep certain browsing private and allow a company to track all online activity; (6) an appropriate damages rate can be applied in calculating statutory damages; (7) these statutory rates can be readily updated to cover subsequent periods through the date of trial; and (8) that his analyses can be readily used as common proof in part because they can be adjusted to calculate and assess unjust enrichment, actual damages, and statutory damages for different time periods. (*Id.* ¶ 1.)

The Court starts with a high-level summary of the disputed parts of Lasinski's models before addressing the parties' arguments.

a. Overview of the Methods

i. Unjust Enrichment Model

In opining on the methodology for determining classwide unjust enrichment damages, Lasinski looks to Google's internal analyses that describe the financial impact to Google of blocking third-party cookies by default in Chrome Incognito mode ("ChromeGuard"). (*Id.* ¶ 52.) He segments his analyses by product area (Display Ads, YouTube ads, and Search Ads), private browsing mode (incognito mode or other browsing modes), revenue source (personalization or conversion tracking), and the scope of conversion tracking (conversion tracking from traffic with third-party cookies or conversion tracking from all traffic). (*Id.* ¶ 60.) In doing so, he calculates unjust enrichment damages from Google's U.S. revenues from Display Ads, Search Ads, and YouTube Ads in three scenarios. (*Id.* ¶¶ 133-36.)

In Scenario One, Lasinski arrives at the unjust enrichment amount by calculating: (a) all of Google's U.S. Display Ads shown to users in private browsing mode, (b) U.S. search revenue attributable to conversion from all private browsing traffic, and (c) U.S. YouTube Ads revenue attributable to personalization from third-party cookies and conversion from all private browsing traffic. (*Id.* ¶¶ 133-35.) By using this approach, Lasinski calculates a damages amount of $3.87 billion. (*Id.* ¶ 136.)

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