

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Vizcarra v. Michaels Stores, Inc.

No. 23-cv-00468-NW (N.D. Cal. June 2, 2025) · No. 23-cv-00468-NW · Decided June 2, 2025

SUMMARY

The United States District Court for the Northern District of California denied without prejudice Michaels Stores, Inc.’s motions to exclude opinions by plaintiffs’ experts Bruce G. Silverman and Colin B. Weir. The court held that challenges to the experts’ qualifications, methodologies, and conjoint analysis primarily concerned the weight of their opinions rather than admissibility at the class-certification stage.

CASE DETAILS

COURT	United States District Court for the Northern District of California
WRITING FOR THE COURT	Noel Wise
JURISDICTION	United States District Court for the Northern District of California
DECIDED	June 2, 2025
DOCKET	23-cv-00468-NW
DISPOSITION	other
PROCEDURAL POSTURE	Plaintiffs moved for class certification and submitted two expert reports. Defendant moved under Daubert and Federal Rule of Evidence 702 to exclude portions of the experts' opinions. The district court denied both motions without prejudice.
STANDARD OF REVIEW	The court evaluated the challenged expert opinions for admissibility under Federal Rule of Evidence 702 and Daubert. At the class-certification stage, the court applied a tailored Daubert analysis focused on reliability in light of the class-certification criteria and the current evidentiary record.
PRECEDENTIAL VALUE	Unknown; district court order with no reported citation

TOPICS

- daubert standard
- expert testimony
- class actions
- evidence
- civil procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether portions of Silverman's opinions concerning consumer deception, the importance of Michaels' coupon discounts, and the effect of Michaels' advertising should be excluded under Rule 702 and Daubert.
2. Whether Silverman's opinions should be excluded as beyond his expertise, unsupported by reliable principles or methods, or improperly invading the province of the jury.
3. Whether portions of Weir's opinions relying on conjoint analysis should be excluded as novel, unreliable, or insufficiently attentive to relevant inputs and supply-side factors.
4. Whether, at the class-certification stage, the defendants' criticisms of the experts' methodologies went to admissibility or merely to the weight of the opinions.

HOLDINGS

1. When expert testimony is offered in support of class certification, the district court must evaluate its admissibility under Daubert through a tailored analysis that considers reliability in light of the class-certification criteria and the current record.
2. Silverman's opinions concerning whether Michaels' alleged discount practices would mislead reasonable consumers were not excludable merely because they addressed an ultimate issue; the opinions addressed consumer-related factual matters rather than legal conclusions.
3. At this stage, Silverman's opinions were not excludable based on challenges to the scope of his expertise, his reliance on hypothetical facts, his methodology, or the contention that the jury could analyze the facts without expert assistance.
4. The defendant's challenges to Weir's conjoint-analysis opinions did not warrant exclusion at this stage because the objections concerned the methodology, survey design, reliability, inputs, and conclusions, which went to the weight rather than the admissibility of the opinions.

KEY QUOTATIONS

“Expert testimony is admissible under Rule 702 if the court finds by a preponderance of the evidence that the expert is qualified and the testimony is both relevant and reliable.” (at 2)

“The judge is supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable.” (at 7)

“Each of Defendant’s objections to Weir’s opinions based on his conjoint analysis go to the weight to be given to Weir’s opinions, and not their admissibility.” (at 8)

FACTUAL BACKGROUND

Plaintiffs allege that Michaels' coupon-discount advertising misrepresented the regular and sale prices of its products and misled reasonable consumers. Silverman, an advertising and branding consultant, offered opinions

concerning how the advertising would affect consumers and whether the alleged discount practices would be misleading or important to reasonable consumers. Weir, an economics and statistics consultant, offered opinions concerning whether damages could be calculated on a class-wide basis, including through conjoint analysis.

PROCEDURAL HISTORY

Plaintiff Nea Vizcarra filed the action against Michaels Stores, Inc. on February 1, 2023. Plaintiffs later moved for class certification and submitted reports from Bruce G. Silverman and Colin B. Weir. Michaels filed separate motions to exclude portions of the experts' opinions; the court resolved the motions on the briefing without oral argument and denied them without prejudice, leaving open the possibility of renewed Daubert challenges if the class is certified or before trial.

DISPOSITION

other

CASES CITED

- Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 591-92, 597 (1993)
- Hangarter v. Provident Life & Acc. Ins. Co., 373 F.3d 998, 1015-17 & n.14 (9th Cir. 2004)
- Elosu v. Middlefork Ranch Inc., 26 F.4th 1017, 1024 (9th Cir. 2022)
- Grodzitsky v. Am. Honda Motor Co., 957 F.3d 979, 984 (9th Cir. 2020)
- Wendell v. GlaxoSmithKline LLC, 858 F.3d 1227, 1232, 1237 (9th Cir. 2017)
- Cooper v. Brown, 510 F.3d 870, 942 (9th Cir. 2007)
- Primiano v. Cook, 598 F.3d 558, 565 (9th Cir. 2010)
- Stiner v. Brookdale Senior Living, Inc., 665 F. Supp. 3d 1150, 1168 (N.D. Cal. 2023)
- Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011)
- Elsayed Mukhtar v. California State Univ., Hayward, 299 F.3d 1053, 1066 (9th Cir. 2002)
- Estate of Barabin v. AstenJohnson, Inc., 740 F.3d 457 (9th Cir. 2014)
- United States v. Holguin, 51 F.4th 841, 854 (9th Cir. 2022)
- Children's Broad. Corp. v. Walt Disney Co., 357 F.3d 860, 865 (8th Cir. 2004)
- United States v. Kuiken, 198 F. App'x 643, 646 (9th Cir. 2006)
- Pyramid Techs., Inc. v. Hartford Cas. Ins. Co., 752 F.3d 807, 813 (9th Cir. 2014)
- Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc., 738 F.3d 960, 969 (9th Cir. 2013)
- Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc., 618 F.3d 1025, 1038 (9th Cir. 2010)
- Townsend v. Monster Beverage Corp., 303 F. Supp. 3d 1010, 1036 (C.D. Cal. 2018)

OPINION

1 2 3 4 UNITED STATES DISTRICT COURT 5 NORTHERN DISTRICT OF CALIFORNIA 6 7
NEA VIZCARRA, et al., Case No. 23-cv-00468-NW 8 Plaintiffs, ORDER DENYING
DEFENDANT’S 9 v. MOTIONS TO EXCLUDE CERTAIN OPINIONS 10 MICHAELS

STORES, INC., Re: ECF Nos. 98, 99 Defendant. 11 12 13 Plaintiff Nea Vizcarra, on behalf of herself and others similarly situated, (“Plaintiffs”) 14 initiated this action against Michaels Stores, Inc. (“Defendant”) on February 1, 2023 (“Compl.”), 15 ECF No. 1, and filed a motion for class certification on November 15, 2024.

ECF No. 83. 16 Plaintiffs filed two expert reports in support of their motion for class certification. ECF Nos. 83-4, 17 83-5. Defendant filed two Daubert motions to exclude certain opinions of Plaintiffs’ two experts: 18 Bruce G. Silverman, ECF No. 98 (“Silverman Daubert Mot.”), and Colin B. Weir, ECF No. 99 19 (“Weir Daubert Mot.”). Plaintiffs opposed the Daubert motions, and Defendant replied.

ECF 20 Nos. 108, 109, 113, 114. 21 Having considered parties’ briefing and the relevant legal authority, the Court finds this 22 matter suitable for resolution without oral argument, see Civil Local Rule 7-1(b), and VACATES 23 the hearing set for June 9, 2025.

The Court DENIES without prejudice both of Defendant’s 24 Daubert motions. 25 I. BACKGROUND 26 The Court previously summarized Plaintiffs’ allegations in its prior order denying in part 27 Defendant’s motion to dismiss. See ECF No. 56. Plaintiffs’ allegations remain largely unchanged 1 II. LEGAL STANDARD 2 Under Rule 702 of the Federal Rules of Evidence, a witness may offer expert testimony if 3 the following requirements are met: 4 (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to 5 determine a fact in issue; (b) the testimony is based on sufficient facts or data; 6 (c) the testimony is the product of reliable principles and methods; 7 and (d) the expert’s opinion reflects a reliable application of the principles 8 and methods to the facts of the case.

9 Expert testimony is admissible under Rule 702 if the court finds by a preponderance of the 10 evidence that the expert is qualified and the testimony is both relevant and reliable. See Daubert 11 v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993); Hangarter v. Provident Life & Acc. Ins. 12 Co., 373 F.3d 998, 1015 (9th Cir. 2004). Rule 702 “contemplates a broad conception of expert 13 qualifications.” Hangarter, 373 F.3d at 1015. “An expert’s specialized knowledge and 14 experience can serve as the requisite ‘facts or data’ on which they render an opinion.” Elosu v. 15 Middlefork Ranch Inc., 26 F.4th 1017, 1024 (9th Cir.

2022). 16 “In evaluating challenged expert testimony in support of class certification, a district court 17 should evaluate admissibility under the standard set forth in Daubert.” Grodzitsky v. Am. Honda 18 Motor Co., 957 F.3d 979, 984 (9th Cir. 2020) (internal quotations and modifications omitted). 19 Under Daubert, expert testimony is admissible if it is both relevant and reliable.

Wendell v. 20 GlaxoSmithKline LLC, 858 F.3d 1227, 1232 (9th Cir. 2017). Expert testimony is relevant if it 21 “will assist the trier of fact to understand or determine a fact in issue.” Cooper v.

Brown, 510 F.3d 22 870, 942 (9th Cir. 2007) (citing Daubert, 509 U.S. at 591-92). “The evidence must logically 23 advance a material aspect of the party’s case.” Id. (citation omitted).

Expert testimony “is reliable 24 if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant 25 discipline.” Primiano v. Cook, 598 F.3d 558, 565 (9th Cir. 2010) (footnote omitted). 26 At class certification, “the relevant inquiry is a tailored Daubert analysis which scrutinizes 27 the reliability of the expert testimony in light of the criteria for class certification and the current 1 Reg’l Med.

Ctr., 909 F.3d 996, 1006 (9th Cir. 2018). “[E]ven if the evidence is admissible, the 2 district court must then evaluate its persuasiveness during the class certification analysis.” Stiner 3 v. Brookdale Senior Living, Inc., 665 F. Supp. 3d 1150, 1168 (N.D. Cal. 2023) (citing Ellis v. 4 Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011)). 5 III. DISCUSSION 6 Defendant concedes that Silverman and Weir are qualified to be experts, see Silverman 7 Daubert Mot. at 1 and Weir Daubert Mot. at 1, but filed two motions to exclude certain of their 8 opinions.

ECF Nos. 98, 99. The Court finds that at this point in the proceedings, Silverman’s and 9 Weir’s opinions should not be excluded. 10 A. Opinions of Expert Bruce G. Silverman 11 Silverman is the “owner and manager of Silverman Consulting LLC, an advertising and 12 branding firm,” and has spent of 50 years “working at the highest levels in the ‘real world’ of 13 marketing and advertising.” ECF No. 83-4, ¶ 14.

Silverman was asked to provide testimony 14 about: how advertisements that represent ongoing sales or that have “valid through” dates 15 influence consumer purchasing behavior; whether Michaels’ advertised coupon discounts would 16 be important to a reasonable consumer; and whether, assuming Plaintiffs’ allegations are true, a 17 significant portion of Defendant’s consumers would likely be misled by Defendant’s advertising 18 practice.

Id. ¶ 9. 19 Defendant asks the Court to exclude two sets of Silverman’s opinions: (1) opinions related 20 to whether certain discounts are misleading to reasonable consumers, Id. ¶¶ 39, 76, 77, 79 21 (“Misleading to Consumers Opinions”), and (2) opinions related to whether Defendant’s Coupon 22 Discount practice would be important to a reasonable consumer, Id. ¶¶ 40, 71 (“Michaels-Specific 23 Opinions”).

24 1. Misleading to Consumers Opinions 25 Defendant argues that Silverman’s Misleading to Consumers Opinions should be excluded 26 because they opine on ultimate issues of law. Specifically, Defendant asks for the following 27 opinions to be excluded: Discounts are true, it is probable that a significant portion of 1 Defendant’s general consuming public, acting reasonably in the circumstances, would likely be misled.

2 76. If, as Plaintiff alleges, at least a 20% Coupon Discount is always 3 available, these discounts are not time limited, and the Coupon Discounts are likely to mislead a reasonable consumer. 4 77.

To be sure, Plaintiff alleges that sometimes the Coupon Discount 5 is for a greater amount (e.g., 30% or 40%), and this full amount (e.g., the full 30%) is not always available.

But most of the discount (20%) 6 is always available, so this is similarly misleading in that the 20% component is not time limited. 7 79. If Plaintiff's allegations are true, that would mean that the sale 8 price is nothing more than the everyday regular price that most consumers (more than half) pay.

In my opinion, a reasonable 9 consumer would therefore be deceived and misled by Defendant's advertisements, since the item's true regular, former, and usual price 10 is no better than the "sale" price. Consumers would not be getting the deal they believed they were getting by taking advantage of 11 Defendants limited-time offer. Rather, they were paying the full, regular price.

12 13 Silverman Daubert Mot. at 7-8. 14 "An opinion is not objectionable just because it embraces an ultimate issue." Fed. R. Evid. 15 704; see also *Elsayed Mukhtar v. California State Univ., Hayward*, 299 F.3d 1053, 1066 (9th Cir. 16 2002), overruled on other grounds by *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457 (9th 17 Cir. 2014). "[E]xpert witnesses may give an opinion that 'embraces an ultimate issue to be 18 decided by the trier of fact,' but 'cannot give an opinion as to her legal conclusion, i.e., an opinion 19 on an ultimate issue of law.'" In re Northrop Grumman ERISA Litig., 2017 WL 11685251, at *3 20 (C.D.

Cal. Mar. 3, 2017) (citing *Hangarter*, 373 F.3d at 1016) (emphasis in original). Silverman 21 does not opine on any legal issues, so there is no reason to exclude his proffered testimony on 22 those grounds. 23 The Court denies without prejudice Defendant's motion to exclude Silverman's 24 Misleading to Consumers Opinions. 25 2. Michaels-Specific Opinions 26 Defendant argues that Silverman's Michaels-Specific Opinions should be excluded 27 because they (1) exceed the scope of Silverman's expertise, (2) are not the product of any reliable 1 opinions to be excluded: 2 40.

In particular, in my opinion, a reasonable consumer would understand that the Coupon Discount promotional messaging 3 described and shown in the Fourth Amended Complaint would convey that Defendant's Products (the "Products") usually retail for 4 the "regular" list prices featured on Defendant's website and in stores (the "Regular Prices"), and that those are the prices that consumers 5 would have had to pay to buy Defendant's Products before the advertised sale began (and after it ends).

Further, reasonable 6 consumers would understand Defendant's promotional messaging to mean that they could receive a discount off of those regular and 7 former prices (the prices that a majority of consumers pay), and therefore pay prices lower than the Regular Prices (the "Sale Prices") 8 by purchasing during the limited time that the sale was ongoing (the "Promotional Period").

In other words, reasonable consumers would believe, based on Defendant's advertisements, that they are getting a real discount when (assuming the allegations are true) they are not. That is why Defendant's Coupon Discount claims would be important to a reasonable consumer in deciding whether to purchase one or more of Michaels products. Instead of a product being one she or he could live without, it becomes perfectly okay to buy because they are getting it at what they believe to be a substantial discount (at least 20%).

In other words, the deal a reasonable consumer thinks they are getting is more than just an item for a listed price – it is an item for a supposedly discounted price that is substantially less than the regular price. Consumers reasonably expect to get an item worth the regular price, but for less. And this supposed discount is an important and attractive part of the deal.

That is also why the ads (on search engines as well as on Defendant's webpage) at issue in this matter would, in my opinion, be quite effective. Silverman Daubert Mot. at 8. Scope 19 Defendant argues that the Court should exclude Silverman's opinions because they exceed his expertise.

The Court disagrees. Defendant specifically challenges whether Silverman's advertising experience provides a sufficient foundation to offer specific opinions about Michaels, Michaels' customers, or the coupon discount at issue in the case, without having conducted consumer surveys. Id. at 11.

As an expert, Silverman is allowed to make certain factual assumptions within his opinions. See Fed. R. Evid. 702, advisory committee notes to 2000 amendments ("The language 'facts or data' is broad enough to allow an expert to rely on hypothetical facts that are supported by the evidence."). Silverman's opinions are sufficiently based in his experience in the advertising industry, and he is permitted to rely on hypotheticals supported by evidence.

United States v. Holguin, 51 F.4th 841, 854 (9th Cir. 2022). 2 b. Reliable Principles and Methods 3 Defendant argues that Silverman has "not employed any reliable methodology for reaching 4 those opinions, instead rel[y]ing on non-empirical assumptions." Silverman Daubert Mot. at 13. 5 This argument from Defendant goes to the weight, not the admissibility, of Silverman's opinions.

6 Hangarter, 373 F.3d at 1017 n.14 (quoting Children's Broad. Corp. v. Walt Disney Co., 357 F.3d 7 860, 865 (8th Cir. 2004)) ("[T]he factual basis of an expert opinion goes to the credibility of the 8 testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for 9 the opinion in cross-examination."); Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc., 738 F.3d 10 960, 969 (9th Cir.

2013) (trial court is "supposed to screen the jury from unreliable nonsense 11 opinions, but not exclude opinions merely because they are impeachable"); Wendell v. 12 GlaxoSmithKline LLC, 858 F.3d 1227, 1237 (9th Cir. 2017) ("Where, as here, the experts' 13 opinions are not the 'junk

science’ Rule 702 was meant to exclude, the interests of justice favor leaving difficult issues in the hands of the jury and relying on the safeguards of the adversary system—vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof—to attack[] shaky but admissible evidence.”) (internal citations and quotations omitted).

The Court is persuaded that Silverman’s opinions are adequately based upon his extensive personal knowledge and experience. c. Province of the Jury Defendant argues that the facts Silverman relies upon could be just as effectively analyzed by a jury. Silverman Daubert Mot. at 11.

However, “[e]xpert testimony is properly admissible when it serves to assist the trier of fact in understanding the evidence or determine a fact in issue.” United States v. Kuiken, 198 F. App’x 643, 646 (9th Cir. 2006); Daubert, 509 U.S. 24 at 597; Pyramid Techs., Inc. v. Hartford Cas. Ins. Co., 752 F.3d 807, 813 (9th Cir. 2014) (“The judge is supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable.” (quotations omitted) (citing Alaska Rent-A-Car, 738 F.3d 27 at 969).

Defendant has not shown how Silverman’s opinions will invade the province of the jury. trial, the parties revive these or other Daubert issues, the Court will consider the merits of those 2 motions at that time. 3 The Court DENIES without prejudice Defendant’s motion to exclude certain opinions of 4 Silverman. 5 B. Opinions of Expert Colin B. Weir 6 Weir is the “President at Economics and Technology, Inc,” a “research and consulting firm 7 specializing in economics, statistics, regulation and public policy.” ECF No. 83-5 at 2.

Weir was 8 asked to “ascertain whether it would be possible to calculate damages arising from Plaintiffs’ 9 theories of liability on a class-wide basis using common evidence, and if so, to provide a 10 framework for the calculation of damages suffered by the proposed class of consumers as a result 11 of the Deceptive Coupon Discounts.” Id. ¶ 7.

In his report, Weir opines that it is possible to 12 determine class-wide damages using three damages theories, one of which is a conjoint analysis. 13 Id. ¶ 10. Weir “propose[s] to calculate Price Premium Damages using conjoint analysis (wherein 14 consumers would receive the difference in value between what they paid and the value of what 15 they received that is solely attributable to Defendant’s challenged conduct).” Id. ¶ 12.

16 Defendant asks the Court to exclude Weir’s opinions that rely upon his conjoint 17 methodology on the grounds that they (1) are novel and unreliable, (2) ignore critical inputs, and 18 (3) fail to properly account for supply-side factors. Defendant seeks to exclude all of Weir’s 19 conjoint opinions. Weir Daubert Mot. at 3. 20 The Court concludes that Defendant has not shown that Weir’s opinions are subject to 21 exclusion at this stage of the litigation.

Each of Defendant's objections to Weir's opinions based on his conjoint analysis go to the weight to be given to Weir's opinions, and not their admissibility. See *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1038 (9th Cir. 2010) (holding that criticisms as to "issues of methodology, survey design, reliability,... [and] critique of conclusions" "go to the weight of the survey rather than its admissibility") (citation and internal quotation marks omitted); see also *Townsend v. Monster Beverage Corp.*, 303 F. Supp. 3d 1010, 1036 (C.D.

Cal. 2018) (holding that criticisms based on] questions, go to the weight, not the admissibility, of the expert's survey). Again, if the class is certified, and if, prior to trial, the parties revive these or other Daubert issues, the Court will consider the merits of those motions at that time. Accordingly, the Court DENIES without prejudice Defendant's motion to exclude certain opinions of Weir.

6 || IV. CONCLUSION 7 The Court DENIES without prejudice Defendant's motions to exclude certain opinions of 8 Silverman and Weir, ECF Nos. 98, 99. 9 IT IS SO ORDERED. 10 || Dated: June 2, 2025 L hid Noël Wise 12 United States District Judge 15 16 Z 18 19 20 21 22 23 24 25 26 27 28