

**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

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 9 believe, based on Defendant's advertisements, that they are getting a real discount when (assuming the allegations are true) they are not. 10 71. That is why Defendant's Coupon Discount claims would be 11 important to a reasonable consumer in deciding whether to purchase one or more of Michaels products. Instead of a product being one she 12 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 13 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 14 for a supposedly discounted price that is substantially less than the regular price. Consumers reasonably expect to get an item worth the 15 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 16 engines as well as on Defendant's webpage) at issue in this matter would, in my opinion, be quite effective. 17 Silverman Daubert Mot. at 8. 18 a. Scope 19 Defendant argues that the Court should exclude Silverman's opinions because they exceed 20 his expertise.

The Court disagrees. Defendant specifically challenges whether Silverman's 21 advertising experience provides a sufficient foundation to offer specific opinions about Michaels, 22 Michaels' customers, or the coupon discount at issue in the case, without having conducted 23 consumer surveys. Id. at 11.

As an expert, Silverman is allowed to make certain factual 24 assumptions within his opinions. See Fed. R. Evid. 702, advisory committee notes to 2000 25 amendments ("The language 'facts or data' is broad enough to allow an expert to rely on 26 hypothetical facts that are supported by the evidence."). Silverman's opinions are sufficiently 27 based in his experience in the advertising industry, and he is permitted to rely on hypotheticals 1 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 14 leaving difficult issues in the hands of the jury and relying on the safeguards of the adversary 15 system—vigorous cross-examination, presentation of contrary evidence, and careful instruction on 16 the burden of proof—to attack[] shaky but admissible evidence.”) (internal citations and 17 quotations omitted).

The Court is persuaded that Silverman’s opinions are adequately based upon 18 his extensive personal knowledge and experience. 19 c. Province of the Jury 20 Defendant argues that the facts Silverman relies upon could be just as effectively analyzed 21 by a jury. Silverman Daubert Mot. at 11.

However, “[e]xpert testimony is properly admissible 22 when it serves to assist the trier of fact in understanding the evidence or determine a fact in issue.” 23 *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 25 judge is supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions 26 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. 1 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 22 on his conjoint analysis go to the weight to be given to Weir's opinions, and not their 23 admissibility. See *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d 24 1025, 1038 (9th Cir. 2010) (holding that criticisms as to "issues of methodology, survey design, 25 reliability,... [and] critique of conclusions" "go to the weight of the survey rather than its 26 admissibility") (citation and internal quotation marks omitted); see also *Townsend v. Monster 27 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 2 certified, and if, prior to trial, the parties revive these or other Daubert issues, the Court will 3 consider the merits of those motions at that time. 4 Accordingly, the Court DENIES without prejudice Defendant's motion to exclude certain 5 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