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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 JOHN McCURLEY, individually and on
12 behalf of all other similarly situated

13 Plaintiffs

14 v.

15 ROYAL SEAS CRUISES, INC.,

16 Defendant.
17
18

Case No.: 17-CV-986-RHS-AGS

**ORDER DENYING DEFENDANT'S
RENEWED MOTION TO CERTIFY
CLASS AND PROVISIONALLY
GRANTING DEFENDANT'S
MOTIONS TO EXCLUDE REPORTS
AND TESTIMONY**

[ECF Nos. 232, 233, 234, 241]

19 Pending before the Court are four motions filed by defendant Royal Seas Cruises,
20 Inc. ("Royal" or "Defendant"): Defendant's (1) Renewed Motion to Decertify Class (the
21 "Decertification Motion," ECF No. 241); (2) Second Renewed Motion to Exclude
22 Testimony and Reports of Wesley Weeks (the "Weeks Motion," ECF No. 232); (3)
23 Renewed Motion to Exclude Testimony and Reports of Nathan Bacon (the "Bacon
24 Motion," ECF No. 233); and (4) Second Renewed Motion to Exclude Testimony and
25 Reports of Christina Peters-Stasiewicz (the "Peters-Stasiewicz Motion," ECF No. 234). As
26 further described below, the Decertification Motion is denied, and each of the Weeks,
27 Bacon, and Peters-Stasiewicz Motions are provisionally granted.
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1 **I. BACKGROUND**

2 Each of the four pending motions are styled as “renewals” of previous motions filed
3 by Defendant. The relevant procedural history provides context for the pending motions.

4 **A. Past Motions To Certify, Decertify, And Exclude**

5 On July 30, 2018, Plaintiffs filed a Motion to Certify Class. ECF No. 49. Among the
6 materials that Plaintiffs filed in support of that motion were two reports by Wesley Weeks,
7 both dated July 29, 2018: a 161-page¹ initial report (the “Weeks Initial Report”) and a 59-
8 page supplemental report (the “Weeks Supplemental Report”). ECF Nos. 49-9, 49-10. Also
9 among those supporting materials was a 26-page report by Christina Peters-Stasiewicz
10 dated July 27, 2018 (the “Peters-Stasiewicz Initial Report”). ECF No. 49-8.

11 In addition to opposing the certification motion, Defendant moved to exclude under
12 Rule 702 the testimony and reports of Weeks, ECF No. 56, as well as the testimony and
13 report of Peters-Stasiewicz, ECF No. 57.

14 On January 14, 2019, Plaintiffs filed a 79-page report of Nathan Bacon dated January
15 6, 2019 (the “Bacon Report”), ECF No. 78.

16 On March 27, 2019, the Court granted in part and denied in part the motion for class
17 certification, certifying both a Class and a Subclass. ECF No. 87. The Court treated the
18 motions to exclude Weeks and Peters-Stasiewicz as evidentiary objections, and sustained
19 in part and overruled in part those objections. *Id.*

20 On March 4, 2020, Plaintiffs filed a Motion to Decertify Class in Part. ECF No. 132.
21 Due to a manageability problem with the originally certified Class, Plaintiffs sought in
22 effect to replace that Class with the originally certified Subclass. *Id.*

23 On March 17, 2020, Defendant filed a Motion to Decertify Class. ECF No. 143. In
24 connection with that motion, Defendant filed a 16-page supplemental report of Plaintiffs’
25

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27
28 ¹ The page-number counts for the respective reports, intended to aid in distinguishing
the reports, include exhibits.

1 expert Peters-Stasiewicz dated August 23, 2019 (the “Peters-Stasiewicz Supplemental
2 Report”). ECF No. 143-2.

3 On March 23, 2020, Defendant filed a motion to exclude the testimony and report
4 of Bacon. ECF No. 151.

5 On March 27, 2020, both Defendant and Plaintiffs moved for summary judgment.
6 ECF Nos. 159, 160. Defendant thereafter amended its motion for summary judgment. ECF
7 No. 165.

8 On March 30, 2020, Defendant filed a motion to exclude the testimony and both
9 reports of Peters-Stasiewicz, as well as the testimony and both reports of Weeks. ECF Nos.
10 163, 164.

11 On August 10, 2020, the Court granted Plaintiffs’ motion to decertify in part,
12 narrowing the scope of the Class to what had previously been the certified Subclass. ECF
13 No. 191. The Court denied Defendant’s motion to decertify that newly narrowed Class.
14 ECF No. 191. The Court explained:

15 Defendant argues—for a variety of reasons already addressed in the
16 Court’s initial Order granting class certification—that the subclass
17 should also be decertified. (ECF No. 143.)

18 A district court has broad discretion to revisit class certification
19 throughout the legal proceedings before the court. *Armstrong v. Davis*,
20 275 F.3d 849, 872 n. 28 (9th Cir. 2001) (abrogated on other grounds by
21 *Johnson v. Calif.*, 543 U.S. 499 (2005)). For instance, a court may alter
22 or amend an order granting class certification before final judgment.
23 Fed. R. Civ. P. 23(c)(1)(C). A district court may also decertify a class
24 at any time. *Rodriguez v. West Publishing Co.*, 563 F.3d 948, 966 (9th
25 Cir. 2009) (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160
26 (1982)).

27 That said, a Motion for Reconsideration merely rehashing arguments
28 already considered and rejected by the Court is a waste of judicial
resources. That largely appears to be what Defendant is doing in its
instant Motion to Decertify. Notably, the only new evidence presented
by Defendant in the Motion for Reconsideration are the declarations

1 already rejected by the Court in its Order granting sanctions against the
2 Defendant. (See ECF No. 190.)

3 As the Court pointed out in its original order, merits arguments are
4 largely inappropriate at the class certification stage. As the parties have
5 filed motions for summary judgment currently pending before the
6 Court, the Court assumes it will address many of these merits
7 arguments when it reaches those motions. Whether Prospects DM made
8 telephone calls with an automatic telephone dialing system or whether
9 there was blanket consent for the calls are issues capable of class
10 resolution. Therefore, for the reasons previously stated by the Court in
11 its Order Certifying the Class in part (ECF No. 87), Defendant's Motion
12 to Decertify (ECF No. 143) is DENIED.

13 ECF No. 191 at 2-3.

14 On January 29, 2021, the Court denied Plaintiffs' motion for summary judgment,
15 and granted Defendant's motion for summary judgment. ECF No. 208. The Court denied
16 as moot Defendant's motions to exclude as to Weeks, Bacon, and Peters-Stasiewicz. *Id.* at
17 14.

18 On April 5, 2022, the U.S. Court of Appeals reversed in part the grant of summary
19 judgment to Defendant. ECF No. 228.

20 **B. Pending Motions To Decertify And Exclude**

21 On May 27, 2022, Defendant filed its motions to exclude – that is, the pending
22 (second renewed) Weeks Motion, (renewed) Bacon Motion, and (second renewed) Peters-
23 Stasiewicz Motion. ECF Nos. 232, 233, 234. These motions have been fully briefed. ECF
24 No. 238 (Plaintiffs' Opposition to the Bacon Motion); ECF No. 239 (Plaintiffs' Opposition
25 to the Peters-Stasiewicz Motion); ECF No. 240 (Plaintiffs' Opposition to the Weeks
26 Motion); ECF No. 242 (Defendant's Reply as to the Weeks Motion); ECF No. 243
27 (Defendant's Reply as to the Peters-Stasiewicz Motion); ECF No. 244 (Defendant's Reply
28 as to the Bacon Motion).

On June 16, 2022, Defendant filed its (renewed) Decertification Motion. ECF No.
241. The Motion has been fully briefed. ECF Nos. 248 (Plaintiffs' Opposition), 252

1 (Defendant’s Reply). Ancillary to the Motion, the Parties have filed various evidentiary
2 objections, responses, and a reply. ECF Nos. 249, 253, 254, 256, 257.

3 **C. Motion Cutoff**

4 The motion filing cutoff in this case was March 17, 2020. ECF No. 113 (Scheduling
5 Order dated Oct. 10, 2019). Upon joint motion of the parties, this cutoff was extended by
6 the Court by a matter of days or weeks for certain specified motions. ECF No. 140 (Order
7 dated Mar. 13, 2020); ECF No. 147 (Order dated Mar. 18, 2020). Relevant to the pending
8 motions, the Court extended the time for Defendant to move to strike as to Weeks, Peters-
9 Stasiewicz, and Bacon to March 31, 2020. ECF No. 147.

10 Defendant’s initial Motion to Decertify was timely filed on March 17, 2020, the
11 cutoff date. ECF No. 143. As set forth above, this motion was denied. ECF No. 191.

12 Defendant’s motions to exclude as to Weeks, Peters-Stasiewicz, and Bacon were
13 timely filed on or before the extended filing cutoff. As set forth above, these motions were
14 denied as moot when the Court granted summary judgment to Defendant, ECF No. 208,
15 although the Court had previously ruled on the merits for motions to exclude as to the two
16 Weeks reports and the first Peters-Stasiewicz report. ECF No. 87.

17 **II. ANALYSIS**

18 **A. Timeliness**

19 Plaintiffs argue that each of the four pending motions is untimely, and filed without
20 leave of Court over two years beyond the relevant scheduling order’s motion cutoff date of
21 March 17, 2020. *See* ECF No. 113 (Scheduling Order dated Oct. 10, 2019).

22 Rule 16(b) provides that a scheduling order “may be modified only for good cause
23 and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4). “Rule 16(b)’s ‘good cause’
24 standard primarily considers the diligence of the party seeking the amendment. The district
25 court may modify the pretrial schedule ‘if it cannot reasonably be met despite the diligence
26 of the party seeking the extension.’” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604,
27 609 (9th Cir. 1992) (quoting Fed. R. Civ. P. 16 advisory committee’s notes (1983
28 amendment)); *accord Noyes v. Kelly Servs.*, 488 F.3d 1163, 1174 n.6 (9th Cir. 2007).

1 Where there has been no request to modify a scheduling order, a district court may deny
2 late-filed motions solely on the ground that they are filed past the cutoff date. *Johnson*, 975
3 F.2d at 610 n.7.

4 Here, Defendant filed its Decertification Motion—in effect, a motion for
5 reconsideration—approximately 27 months after the initial motion cutoff. Defendant did
6 not seek leave to file this motion, and has not asked for an extension of the motion cutoff
7 or attempted to make a showing of good cause. Indeed, although Plaintiffs’ opposition brief
8 argues that the Decertification Motion violates the motion cutoff date, ECF No. 248 at 1,
9 Defendant’s reply simply ignores the argument and makes no mention whatsoever of the
10 motion cutoff.

11 The fact that the pending Decertification Motion is seeking reconsideration of a
12 motion that was timely filed, and that was denied by the Court, does not change the analysis
13 of timeliness. Defendant does not claim to be presenting newly discovered evidence or
14 intervening Supreme Court or Ninth Circuit precedent. Nor did the fact of an appeal to the
15 Ninth Circuit of the Court’s Order granting summary judgment to Defendants somehow
16 revive or reset the long-since-expired motion cutoff.

17 Defendant has not undertaken to show good cause for renewing a motion, over two
18 years after the motion filing cutoff, that had previously been denied. The Court declines to
19 exercise its discretion to consider the Decertification Motion. Accordingly, the
20 Decertification Motion is DENIED. The Parties’ objections filed in connection with the
21 Decertification Motion, ECF Nos. 249, 253, 254, 256, 257, are OVERRULED as moot.

22 Defendant’s renewed motions to exclude are differently situated. Because these
23 motions were filed after the Orders disposing of class certification, class decertification,
24 and summary judgment motions, the Court construes these motions as being directed
25 toward exclusion of reports and testimony at trial. In ruling on the summary judgment
26 motions, the Court previously declined to address the merits of Defendant’s timely-filed
27 motions to exclude, instead denying those motions as moot. The Court will treat the
28 pending motions to exclude as timely.

1 **B. Motions To Exclude**

2 Defendant’s motions to exclude are based on Fed. R. Evid. 702. Under Rule 702,
3 “[a] witness who is qualified as an expert by knowledge, skill, experience, training, or
4 education may testify in the form of an opinion or otherwise . . .” Fed. R. Evid. 702. The
5 Rule imposes four constraints. First, “the expert’s scientific, technical, or other specialized
6 knowledge” must “help the trier of fact to understand the evidence or to determine a fact
7 in issue.” *Id.* Second and third, the testimony must be “based on sufficient facts or data”
8 and be “the product of reliable principles and methods.” *Id.* Fourth, the expert must have
9 “reliably applied the principles and methods to the facts of the case.” *Id.*

10 These requirements “assign to the trial judge the task of ensuring that an expert’s
11 testimony both rests on a reliable foundation, and is relevant to the task at hand.” *Daubert*
12 *v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). “[R]elevance means that the
13 evidence will assist the trier of fact to understand or determine a fact in issue.” *Cooper v.*
14 *Brown*, 510 F.3d 870, 942 (9th Cir. 2007); *see also Primiano v. Cook*, 598 F.3d 558, 564
15 (9th Cir. 2010) (“The requirement that the opinion testimony assist the trier of fact goes
16 primarily to relevance.”) (internal quotation marks omitted). “[A] district court’s inquiry
17 into admissibility is a flexible one.” *City of Pomona v. SQMN. Am. Corp.*, 750 F.3d 1036,
18 1043 (9th Cir. 2014) (citing *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d
19 960, 969 (9th Cir. 2013)). “[E]xpert testimony is liberally admitted[.]” *Daubert*, 509 U.S.
20 at 588 (noting that Rule 702 is part of the “liberal thrust of the Federal Rules and their
21 general approach of relaxing the traditional barriers to opinion testimony”).

22 In addressing Defendant’s motions, a threshold question for the Court—necessary
23 to determining relevance and reliability—is precisely what opinions each of the experts
24 actually intends to offer at trial. The disclosure and discovery regime provided in Rule 26
25 is designed to answer this question far in advance of trial. Here, the expert opinions at issue
26 are memorialized in reports that were filed in connection with class certification or
27 summary judgment briefing, and that necessarily preceded the Court’s rulings on those
28 motions. Much of the Parties’ current briefing on these issues recycles their briefing from

1 years ago and is not tailored to the impending trial. This is understandable, but it poses
2 difficulties for the Court in ascertaining what is being proposed for use at trial.

3 For example, each of Defendant’s three pending motions to exclude is directed to
4 the “testimony and report[s]” of Weeks, Bacon, and Peters-Stasiewicz. ECF Nos. 232, 233,
5 234. Although the parties do not address this point in their briefing, the *reports* of these
6 witnesses, if offered for the truth of the reports, are hearsay and presumptively inadmissible
7 at trial. Fed. R. Evid. 802. The Court therefore GRANTS the motions to exclude the reports
8 of the three experts.

9 The Court considers the *testimony* of the three witnesses below.

10 **i. Weeks**

11 At the class certification stage, the Court addressed Defendant’s motion to exclude
12 as to the two Weeks Reports. ECF No. 87 at 14-19 (Order dated Mar. 27, 2019). In those
13 reports, “Weeks was asked to analyze whether (1) the websites used by third parties Royal
14 has identified as generating leads could ‘attract the number of visitors stated by’ Royal and
15 (2) whether the personal information identified in the database records could be generated
16 from the third-party websites.” *Id.* at 14-15. The Court summarized:

17 Royal contends that (1) Weeks is not qualified to offer expert
18 testimony, (2) Weeks’s opinions are irrelevant, and (3) Weeks’s
19 methods are unreliable. (ECF No. 56-1.) The Court overrules Royal’s
20 relevance objection. The Court sustains Royal’s particular objections
21 on qualifications and methodology, yet finds that the objections are
22 largely immaterial. Weeks has relevant knowledge for website traffic
23 analysis which could be used to test Plaintiffs’ assertions about Royal’s
24 lead generation program, but the data from servers of the websites that
25 purportedly generated leads was not available at the time of his reports.

26 *Id.* at 15. The Court noted that Plaintiffs had outstanding subpoenas to Google and Amazon,
27 which were intended to obtain web traffic data to support a set of conclusions by Weeks.

28 *Id.* at 18. In the absence of such data, the Court “sustain[ed] Royal’s objections to Weeks’
website traffic conversion-based opinions.” *Id.* at 19.

1 From the briefing on the pending Weeks Motion, it appears that the sought-after web
2 traffic data was not produced. Plaintiffs explain that “neither side obtained the web traffic
3 data,” and that “Plaintiffs attempted to obtain the necessary underlying web traffic from
4 Amazon and Google of the web traffic analytics, but hit a dead end when both companies
5 advised Class Counsel that they were not able to locate any responsive documents or data.”
6 ECF No. 240 at 5. Plaintiffs therefore concede that it is “effectively correct” that Weeks’
7 expert testimony, offered without the web traffic data, would be incomplete. *Id.* Plaintiffs
8 argue, however, that as currently proposed, Weeks “effectively acts as a rebuttal expert,”
9 whose testimony “is only necessary to the extent Defendant produces previously
10 undisclosed web traffic information at the time of trial.” *Id.* Defendant argues that Weeks
11 is not a proper rebuttal expert because Defendant has not noticed any experts to testify at
12 trial. ECF No. 242 at 6. Naturally, absent an order of this Court, neither party is entitled to
13 offer at trial previously undisclosed evidence or unnoticed expert testimony. It therefore
14 does not appear that, as currently framed by Plaintiffs, Weeks has relevant testimony to
15 offer at trial.

16 On the basis of relevance, the Court provisionally GRANTS the Weeks Motion and
17 excludes any testimony to be offered by Weeks at trial. Plaintiffs must seek and obtain
18 leave of Court before presenting such testimony. Such a request must: (1) be tailored to the
19 testimony that Plaintiffs actually seek to present, (2) establish admissibility under Fed. R.
20 Evid. 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and (3) identify
21 how the testimony is consistent with the disclosure requirements of Fed. R. Civ. P. 26. In
22 briefing the issue, the Parties may not incorporate by reference or cut and paste from prior
23 briefing.

24 **ii. *Peters-Stasiewicz***

25 At the class certification stage, the Court also addressed Defendant’s motion to
26 exclude as to the Peters-Stasiewicz Initial Report. ECF No. 87 at 19-22 (Order dated Mar.
27 27, 2019). In that report, Peters-Stasiewicz “was asked to [1] identify a process for
28 determining which of the telephone numbers in Royal’s data were wireless numbers at the

1 time of the call, ... and [2] describe[] a means for identification of class members.” *Id.* at
2 19. Defendant did not object to the qualifications of Peters-Stasiewicz, which the Court
3 found to be sufficient. *Id.* at 19-20. Defendant did object that Peters-Stasiewicz’s testimony
4 was not based on sufficient data, and that her methodology was flawed; the Court overruled
5 both objections for purposes of the class certification motion. *Id.* at 20.

6 The pending Peters-Stasiewicz Motion is directed instead to the opinions in the
7 Peters-Stasiewicz Supplemental Report. Specifically, Defendant moves to exclude her
8 “opinions purporting to associate calls in the consent and call log records produced by
9 Prospects DM, Inc. ... to the websites through which the Named Plaintiffs consented to
10 marketing calls.” ECF No. 234 at 1.

11 It is difficult for the Court to determine from the briefing precisely what testimony
12 Plaintiffs will seek to offer at trial. Since the Peters-Stasiewicz Supplemental Report was
13 signed on August 23, 2019, the ground has shifted—namely, upon Plaintiffs’ own motion,
14 granted on August 10, 2020, the Court narrowed the scope of the class. ECF No. 191. In
15 opposing the pending Peters-Stasiewicz Motion, Plaintiffs reuse earlier briefing that refers
16 to that narrowing of the class as something expected to happen in the future:

17 Because of the pending decertification of the Class, the only relevance
18 of the Outbound Call Records database at this point is that it can be
19 used to determine the number of calls placed by Prospects DM to
20 Transfer Subclass members who are specifically identified by
referencing those individuals identified in the Transfer List.

21 ECF No. 239 at 4. Later in their briefing, Plaintiffs summarize their position as follows:

22 At this point, besides confirming that the Subclass’s contact
23 information was addressed properly per her methodologies, the only
24 outstanding testimony for Ms. Peters-Stasiewicz is to confirm the
25 number of calls specifically placed to Transfer Subclass members by
26 cross-referencing their information in the Transfer List with the
Outbound Call Records and counting up the number of calls.

27 *Id.* at 6. Plaintiffs then add that “this is a post-trial damages issues [sic],” and that
28 “[c]urrently, Ms. Peters-Stasiewicz report [sic] only includes an analysis of the expected

1 total number of calls for the Class as a whole, which is irrelevant given the pending
2 decertification of the class.” *Id.*² The Court is at a loss to determine what opinion testimony
3 of Peters-Stasiewicz, if any, Plaintiffs view as relevant and intend to present at trial.

4 On the basis of relevance, the Court provisionally GRANTS the Peters-Stasiewicz
5 Motion and excludes any testimony to be offered by Peters-Stasiewicz at trial. Plaintiffs
6 must seek and obtain leave of Court before presenting such testimony. Such a request must:
7 (1) be tailored to the testimony that Plaintiffs actually seek to present, (2) establish
8 admissibility under Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S.
9 579 (1993), and (3) identify how the testimony is consistent with the disclosure
10 requirements of Fed. R. Civ. P. 26. In briefing the issue, the Parties may not incorporate
11 by reference or cut and paste from prior briefing.

12 **iii. Bacon**

13 Defendant seeks to preclude Nathan Bacon from offering an opinion consistent with
14 the January 6, 2019 Bacon Report. That report, ECF No. 78, was drafted and submitted in
15 response to the Declaration of Kevin Brody, ECF No. 58-7, which Defendant filed with its
16 opposition to Plaintiff’s class certification motion. ECF No. 58. The Brody Declaration, in
17 turn, was a response to the two Weeks Reports filed by Plaintiffs in their class certification
18 motion.

19 The Bacon Report recites that Bacon “was asked by Plaintiffs to opine on the
20 veracity of Mr. Brody’s testimony relating to his presentation of Plaintiff McCurley’s
21 ‘consent’ data.” ECF No. 78 at ¶ 12. Bacon explains:

22 Mr. Brody states in his Declaration that he works with a large network
23 of publishers which control the website www.diabeteshealth.info. See
24 Brody Decl. ¶¶ 8-11. Mr. Brody states that when a consumer accesses
25 the website domain www.diabeteshealth.info, the person is met with a
26 form which needs to be completed in order for the individual to receive
telephone calls to learn about the products or services being offered. He

27 ² Plaintiffs used identical language in their opposition brief filed on April 27, 2020.
28 ECF No. 177 at 4, 6.

1 goes on to state that with respect to the phone number for Plaintiff John
2 McCurley, web server records show that Mr. McCurley's phone
3 number was voluntarily provided by a consumer through the
4 www.diabeteshealth.info web portal on April 30, 2017. He attaches
5 what he refers to as a "true and correct copy" of the records pulled from
6 Landfall Data's web server as Exhibit B.

7 *Id.* at ¶ 13. Bacon's conclusion, based on his analysis of source code, is that "there was no
8 way for the data that is presented by Mr. Brody in Exhibit B to have been submitted through
9 the www.diabeteshealth.info web portal." *Id.* at ¶ 39.

10 Bacon's expert opinion is thus intended as a rebuttal of the expert opinion of Brody,
11 with respect to the data that had been attached as Exhibit B to Brody's declaration. In short,
12 it is a rebuttal opinion. But Defendant is not offering the expert testimony of Kevin Brody,
13 or any other expert testimony. ECF No. 242 at 6 ("Royal has not offered any expert
14 witnesses for trial.").

15 In their briefing, Plaintiffs state in general terms that "[t]he jury should be permitted
16 to hear Bacon's expert testimony regarding the inability of www.diabeteshealth.info to
17 generate the alleged prior express consent data." ECF No. 238 at 13. It may be that
18 Defendant does indeed offer the same "alleged prior express consent data" that is the
19 subject of the Bacon Report, and that Bacon's testimony is appropriate rebuttal even
20 without the expert testimony of Kevin Brody. The Court cannot make that determination
21 at this time.

22 On the basis of relevance, the Court provisionally GRANTS the Bacon Motion and
23 excludes any testimony to be offered by Bacon at trial. Plaintiffs must seek and obtain leave
24 of Court before presenting such testimony. Such a request must: (1) be tailored to the
25 testimony that Plaintiffs actually seek to present, (2) establish admissibility under Fed. R.
26 Evid. 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and (3) identify
27 how the testimony is consistent with the disclosure requirements of Fed. R. Civ. P. 26. In
28 briefing the issue, the Parties may not incorporate by reference or cut and paste from prior
briefing.

1 **III. CONCLUSION**

2 For the reasons stated above:

3 1. Defendant’s Renewed Motion to Decertify Class (ECF No. 241) is DENIED.

4 2. The Parties’ objections filed in connection with the above-mentioned motion,
5 ECF Nos. 249, 253, 254, 256, 257, are OVERRULED as moot.

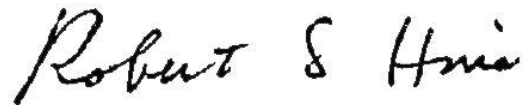
6 3. Defendant’s Second Renewed Motion to Exclude Testimony and Reports of
7 Wesley Weeks (ECF No. 232) is GRANTED as to the witness’s reports on the grounds of
8 hearsay; and is provisionally GRANTED as to the witness’s testimony on grounds of
9 relevance, without prejudice to Plaintiff seeking leave to present such testimony as further
10 described above.

11 4. Defendant’s Second Renewed Motion to Exclude Testimony and Reports of
12 Christina Peters-Stasiewicz (ECF No. 233) is GRANTED as to the witness’s reports on the
13 grounds of hearsay; and is provisionally GRANTED as to the witness’s testimony on
14 grounds of relevance, without prejudice to Plaintiff seeking leave to present such testimony
15 as further described above.

16 5. Defendant’s Renewed Motion to Exclude Testimony and Reports of Nathan
17 Bacon (ECF No. 234) is GRANTED as to the witness’s report on the grounds of hearsay;
18 and is provisionally GRANTED as to the witness’s testimony on grounds of relevance,
19 without prejudice to Plaintiff seeking leave to present such testimony as further described
20 above

21 **IT IS SO ORDERED.**

22 Dated: September 30, 2022



23 Hon. Robert S. Huie
24 United States District Judge