United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re TWITTER, INC. SECURITIES LITIGATION

This Document Relates to:

ALL ACTIONS

Case No. 16-cv-05314-JST

ORDER GRANTING IN PART AND DENYING IN PART MOTIONS TO EXCLUDE EXPERT TESTIMONY

Re: ECF Nos. 424, 425, 427, 430, 432, 434-13, 435

Before the Court are Defendants' motions to exclude expert testimony of Jason Flemmons, ECF No. 432, Todd Henderson, ECF No. 430, and Jan Dawson, ECF No. 435, as well as Plaintiffs' motions to exclude expert testimony of John Coates, ECF No. 427, Michelle Madansky, ECF No. 434-13, Wayne Guay, ECF No. 425, and Martin Dirks, ECF No. 424. The Court will grant these motions in part and will deny them in part.

I. BACKGROUND

This is a securities class action against Twitter, Inc., a social media company, and two of its officers, Richard Costolo and Anthony Noto, for alleged violations of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934. Costolo was the Chief Executive Officer ("CEO") of Twitter until July 1, 2015. Noto was Twitter's Chief Financial Officer ("CFO") during all relevant times.

The gravamen of the operative complaint, ECF No. 81, is that Defendants made misleading statements that caused the price of Twitter stock to trade at artificially high prices during the Class Period, which ranges from February 6, 2015, to July 28, 2015. Plaintiffs allege that Defendants misled investors during the Class Period by making public statements that did not reflect the actual state of Twitter's user engagement, which is relevant to evaluating Twitter's potential user growth and financial performance. Plaintiffs contend that Defendants omitted

information from the challenged statements that would have provided investors with the necessary context to evaluate Twitter as an investment. This included information pertaining to Twitter's daily active users ("DAU") and the ratio of DAU to monthly active users ("MAU") ("DAU/MAU"), which are metrics that measure user engagement or frequency of use. Plaintiffs allege that persons who purchased Twitter stock during the Class Period suffered economic losses when the price of Twitter stock declined as a result of two sets of corrective disclosures that revealed the problems with user engagement, and potentially with user growth, that the challenged statements had concealed.

The parties filed the present motions to exclude expert testimony after the briefing on Defendants' motion for summary judgment, ECF No. 314-4, had been completed.

II. JURISDICTION

The Court has subject matter jurisdiction under 28 U.S.C. § 1331.

III. LEGAL STANDARD

Federal Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> > (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> > (b) the testimony is based on sufficient facts or data;
> > (c) the testimony is the product of reliable principles and methods; and
> > (d) the expert has reliably applied the principles and methods to the facts of the case.

Trial courts serve a "gatekeeping" role "to ensure the reliability and relevancy of expert testimony." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999). "*Kumho Tire* heavily emphasizes that judges are entitled to broad discretion when discharging their gatekeeping function." *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004) (citation omitted). Indeed, a "trial court not only has broad latitude in determining whether an expert's testimony is reliable, but also in deciding how to determine the testimony's reliability." *Id.* (citation omitted).

"Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline." *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1044 (9th Cir. 2014) (citation and internal quotation marks omitted).

Courts should screen "unreliable nonsense opinions, but not exclude opinions merely because they are impeachable." *Id.* "Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010). The proponent of the expert testimony has the burden of proving admissibility. *Lust By & Through Lust v. Merrell Dow Pharms., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996).

IV. DISCUSSION

A. Martin Dirks[1]

Plaintiffs move to exclude certain opinions in the initial and rebuttal reports of Martin Dirks, dated June 21, 2019, and August 7, 2019, respectively. ECF No. 424. Dirks is an adjunct professor of investment portfolio management at Golden Gate University who has more than thirty years of experience related to securities valuation and analysis. ECF No. 424-3 ¶¶ 3-9 (Dirks' report of June 21, 2019). Dirks was retained by Defendants to analyze how investors would have evaluated Twitter as a potential investment, and in particular, to determine whether Defendants' disclosure of DAU and DAU/MAU would have mattered to investors and why. *Id.* ¶¶ 3-9, 27.

Dirks concludes in his initial report that "DAU growth was not central to generating ad revenue or predictive of ad revenue growth," which, in his opinion, is what investors cared about when evaluating Twitter as an investment, and that the disclosure of DAU and DAU/MAU would not have "provide[d] anything incrementally new or different to the market that would have impacted" investors' assessment of Twitter. *Id.* ¶¶ 36-37. Dirks' opinions are based on his knowledge and experience, as well as his review of analyst reports and news articles. *Id.* ¶¶

[1] *See* ECF No. 424 (Plaintiffs' motion to exclude Dirks' expert testimony); ECF No. 442 (Defendants' opposition); ECF No. 458 (Plaintiffs' reply).

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In his rebuttal report, Dirks responds to the opinions of two of Plaintiffs' experts, Dr. Steven Feinstein and Dr. Sam Hui, with respect to the importance of DAU and DAU/MAU to investors' evaluation of Twitter. Dirks opines in his rebuttal report that Dr. Feinstein and Dr. Hui were incorrect to conclude that DAU and DAU/MAU are important to investors. ECF No. 424-4 ¶¶ 6-9 (Dirks' rebuttal report).

Plaintiffs argue that Dirks' opinions regarding what "reasonable investors" believed about Twitter and how the disclosure of DAU/MAU would have altered the "total mix of information" for investors during the relevant time period should be excluded on the grounds that: (1) the opinions are unreliable because Dirks failed to employ a reliable methodology when identifying publications and other materials that form the basis of the opinions at issue[2]; and (2) the opinions contain the legally specialized terms "reasonable investors" and "total mix of information," the use of which converts the opinions at issue into impermissible legal conclusions on an ultimate issue of law.

The Court concludes that the opinions in question, which are relevant to the issue of materiality, are not subject to exclusion on the ground that they are unreliable. The reliability of opinions that are based on the expert's knowledge and experience, like the ones at issue here, "depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it." *Hangarter*, 373 F.3d at 1017-18; *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000) (holding that "in considering the admissibility of testimony based on some 'other specialized knowledge,' Rule 702 generally is construed liberally") (citation omitted). Here, Plaintiffs do not dispute that Dirks has decades of relevant experience in equities analysis, which includes experience in analyzing the investment value of technology companies such as Twitter. Further, Dirks' opinions are also based on his review of relevant analyst reports, disclosures, and

[2] Plaintiffs contend that Dirks intentionally excluded from his analysis reports that contained relevant information; for example, in compiling reports to establish the importance of DAU and DAU/MAU to investors, Dirks omitted reports that contained the term "user engagement" and other similar terms that Plaintiffs contend could be used in the marketplace in lieu of DAU and DAU/MAU.

financial publications. This is sufficient to conclude that the opinions at issue are reliable. *See Hangarter*, 373 F.3d at 1018. Dirks' purported failure to review certain relevant information goes to the weight of the opinions at issue and can be addressed during cross-examination.

The Court also rejects Plaintiffs' arguments that Dirks should not be allowed to use the terms "reasonable investor" and "total mix of information" because "[t]he issue of what 'reasonable investors' believed about Twitter and how its disclosure of the DAU/MAU ratio impacted the 'total mix of information' is an ultimate issue of law on which expert testimony is prohibited." ECF No. 424 at 7. The former prohibition on an expert opining as to an ultimate issue of law was abrogated nearly 50 years ago. Federal Rule of Evidence 704(a) states that "[a]n opinion is not objectionable just because it embraces an ultimate issue[,]" Fed. R. Evid. 704(a), and the Advisory Committee note to that rule provides that "the so-called 'ultimate issue' rule is specifically abolished by the instant rule[,]" Fed. R. Evid. 704 advisory committee's note.

It remains the case that an expert may not "improperly usurp the court's role by instructing the jury as to the applicable law." *Hangarter*, 373 F.3d at 1017. But where "the terms used by an expert witness do not have a specialized meaning in law and do not represent an attempt to instruct the jury on the law, or how to apply the law to the facts of the case, the testimony is not an impermissible legal conclusion." *United States v. Diaz*, 876 F.3d 1194, 1199 (9th Cir. 2017). In other words, "a witness may refer to the law in expressing an opinion without that reference rendering the testimony inadmissible. Indeed, a witness may properly be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms." *Hangarter*, 373 F.3d at 1017 (quoting *Specht v. Jensen*, 853 F.2d 805, 809 (10th Cir. 1988)) (internal quotation marks omitted).

Applying these rules here, the Court will not prohibit Dirks from using the terms "reasonable investor" or "total mix of information." The Court agrees with Defendants that these are "common, easily understandable terms" such that there is little risk of jury confusion if Dirks is allowed to use them. District courts have admitted expert testimony regarding the issue of materiality "on numerous occasions." *In re Metro. Sec. Litig.*, No. CV-04-25-FVS, 2010 WL 6783110, at *1 (E.D. Wash. Feb. 18, 2010); *see also Smilovits v. First Solar, Inc.*, No. CV12-

00555-PHX-DGC, 2019 WL 6875492, at *5-6, *2 (D. Ariz. Dec. 17, 2019) (denying motion to exclude expert testimony regarding materiality that included "whether and how the allegedly concealed information would have materially altered analysts' ability to assess [the Company's] stock value").

Plaintiffs next argue that Dirks' testimony that DAU and DAU/MAU were "not a focus of management's attention" should be excluded because it constitutes improper testimony on Defendants' state of mind. The Court agrees. Although Defendants contend that the testimony in question is permissible because it "concern[s], in part, how investors would have understood Twitter's public comments," ECF No. 442 at 9, the opinions in question contain no such qualification. The determination of motive, intent, and state of mind is for the jury alone. *See Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, No. 16-CV-01393-JST, 2018 WL 6511146, at *3 (N.D. Cal. Dec. 11, 2018) (excluding expert opinions about the motives and intent of the defendants on the grounds that they amount to nothing more than "the drawing of an inference from the facts of the case" and admitting them would impermissibly "substitut[e] the expert's judgment for the jury's"). Accordingly, the Court will exclude these opinions.

B. Jan Dawson[3]

Defendants move to exclude certain opinions in the Corrected Rebuttal Expert Report of Jan Dawson, dated August 14, 2019. ECF No. 435. Dawson was retained by Plaintiffs to evaluate and respond to the report of Defendants' expert, Martin Dirks, regarding how analysts and investors viewed Twitter's user growth metrics, user engagement metrics, and monetization metrics during the 2014-2015 timeframe. ECF No. 437-1 at 6 (Rebuttal Report).

Dawson has seventeen years of experience as an industry analyst. During that time, he has researched and published reports regarding technology companies, including Twitter. *Id.* at 7-8 & Ex. A. Dawson's analysis of companies involves researching and developing opinions regarding their current and future performance, as well as their competitive and other market dynamics. *Id.*

[3] *See* ECF No. 435 (Defendants' motion to exclude Dawson's expert testimony); ECF No. 447 (Plaintiffs' opposition); ECF No. 462 (Defendants' reply).

This requires the review of publicly available information about each company, including reviewing the reports of securities analysts. *Id.* at 11-12.

In his report, Dawson addresses and counters the opinions of Martin Dirks regarding the various factors that investors might have considered to be important to their evaluation of Twitter as an investment. Whereas Dirks concluded that investors would not have considered disclosures about DAU and DAU/MAU as important to their evaluation of Twitter, ECF No. 424-3 ¶ 32 (Dirks Report), Dawson concludes the opposite, namely that information about user growth and user engagement (which are measured by DAU and DAU/MAU, among other metrics) was material to investors' assessment of Twitter. ECF No. 437-1 at 48.

Defendants move to exclude certain of Dawson's opinions based on the following grounds.[4]

First, Defendants contend that Dawson's testimony about the importance of "user engagement" to investors should be excluded because it does not rebut Dirks' testimony, which was limited to the importance of DAU and DAU/MAU to investors. Defendants argue that Dawson's testimony about "user engagement" and whether investors cared about it is a new opinion because it goes beyond the scope of what would be required to rebut Dirks' opinion about the importance of DAU and DAU/MAU.

This argument is not persuasive. A rebuttal report may "contradict or rebut evidence on the same subject matter identified by another party." *See* Fed. R. Civ. P. 26(a)(2)(D)(ii). Here, Dawson's report does exactly that. The subject matter of both the Dirks report and the Dawson rebuttal report is the extent to which, if any, investors would have considered information about metrics pertaining to user engagement to be important to their evaluation of Twitter as a potential investment. Although Dirks limited his analysis to the importance of disclosures regarding DAU and DAU/MAU, Dawson's analysis of the importance of "user engagement," which is a broader concept that encompasses DAU and DAU/MAU, does not take his opinions outside of the scope

[4] Although Defendants describe the opinions at issue as falling within three distinct categories, the categories overlap and therefore are unhelpful in analyzing the admissibility of the opinions at issue.

of permissible rebuttal testimony, because Dawson's view is that the importance of "user engagement" to investors was relevant to the question of whether investors cared about disclosures of DAU and DAU/MAU more specifically. In other words, to respond to Dirks' opinions about the importance of DAU and DAU/MAU to investors, Dawson had to address the importance to investors of the broader concept of "user engagement."

Defendants next argue that Dawson's opinions about what investors and analysts "understood" regarding Twitter's user engagement and growth metrics, and any relationships between such metrics, are unreliable because (1) Dawson's review of and quotations from analyst reports were not based on a reliable methodology; (2) Dawson does not define certain terms, such as "user engagement"; (3) Dawson does not have any experience or training in statistics or in making investment decisions or investment recommendations; and (4) Dawson has not talked to anyone at Twitter.

The Court concludes that the opinions in question are not subject to exclusion on the basis that they are unreliable. The reliability of Dawson's testimony "depends heavily on the knowledge and experience of [Dawson], rather than the methodology or theory behind it." *Hangarter*, 373 F.3d at 1017-18; *Hankey*, 203 F.3d at 1168 (holding that "in considering the admissibility of testimony based on some 'other specialized knowledge,' Rule 702 generally is construed liberally"). Dawson's opinions about the perceptions in the marketplace regarding Twitter's metrics, and any relationships between such metrics, have sufficient foundation because they are based on Dawson's seventeen years of experience as an industry analyst, which includes research and analysis as to the investment value of technology companies and Twitter specifically, as well as his review of relevant analyst reports, public filings and disclosures, and financial publications, all of which are cited in detail in his report. This is sufficient to conclude that the opinions in question are reliable under Rule 702. *See Hangarter*, 373 F.3d at 1018.

Dawson's opinions also are not subject to exclusion on the ground that he failed to define terms such as "user engagement" in his report. Dawson's use of the terms in question is based on his experience and his review of the materials cited in his report. Defendants can explore any purported misuse of these terms during cross-examination.

Defendants next argue that Dawson improperly opines that certain relationships *actually exist* between various metrics, and argue that such opinions must be excluded because they are unsupported by sufficient facts and data and because Dawson did not perform any quantitative analysis. The Court concludes that, contrary to Defendants' assertions, Dawson's opinions are not about the existence of *actual* relationships between the metrics in question; instead, Dawson opines as to a *perception* or *understanding* in the marketplace that any such relationships exist or could exist. *See, e.g.*, 437-1 at 29-34. The opinions in question, when properly construed, have sufficient foundation based on Dawson's knowledge and experience and review of SEC filings, analyst reports, and the financial media, as discussed above. Defendants may challenge the bases for the opinions in question through cross-examination.

Finally, Defendants argue that Dawson's prior work contradicts his opinions regarding user engagement and revenue growth in this case. This is not a ground for exclusion, however. The alleged inconsistencies can be addressed through cross-examination. *See City of Pomona*, 750 F.3d at 1044 (holding that trial courts should screen "unreliable nonsense opinions, but not exclude opinions merely because they are impeachable").

C. Todd Henderson[5]

Defendants move to exclude the report and testimony of Todd Henderson. ECF No. 430. Henderson, a law professor at the University of Chicago, was retained by Plaintiffs to examine the stock trades of Richard Costolo and Anthony Noto and other Twitter executives immediately prior to and during the Class Period to determine whether any such trading activity is "consistent with a lack of scienter." ECF No. 430-2 at 5-6 (Henderson Report).

Henderson's primary conclusion is that the trading behavior just described is "suspicious," "extraordinary," and "unprecedented." *Id.* at 6. Henderson offers several theories to explain the trading behavior of Noto, Costolo, and other Twitter executives, including that such trading behavior was motivated by an intent to avoid scrutiny from regulators, *id.* at 41, and a desire to

[5] *See* ECF No. 430 (Defendants' motion to exclude Henderson's expert testimony); ECF No. 446 (Plaintiffs' opposition); ECF No. 463 (Defendants' reply).

establish a litigation defense to a potential lawsuit, *id.* at 32, 38, 41. In addition to and separately from these opinions that specifically analyze the trading behavior of Costolo, Noto, and other Twitter executives, Henderson's report also discusses, in general terms, executive compensation, Rule 10b5-1 trading plans (including Henderson's "seven hallmarks" of proper Rule 10b5-1 usage), as well as trading behavior that is consistent with the misuse of Rule 10b5-1 plans or with informed trading. *Id.* at 11-26.

The Court will grant Defendants' motion because Henderson's testimony that Twitter executives' trading activity is consistent with scienter constitutes an impermissible opinion regarding Defendants' state of mind and usurps the role of the jury. Henderson's testimony regarding the possible reasons why Twitter executives did or did not sell Twitter stock, and his testimony regarding whether any such trading activity is consistent with scienter, is impermissible testimony as to intent, motive, and state of mind. *See Siring v. Oregon State Bd. of Higher Educ. ex rel. E. Oregon Univ.*, 927 F. Supp. 2d 1069, 1077 (D. Or. 2013) ("Courts routinely exclude as impermissible expert testimony as to intent, motive, or state of mind.") (collecting cases); *Oracle*, 2018 WL 6511146 at *3 (excluding expert opinions about the motives and intent of the defendants on the grounds that they amount to nothing more than "the drawing of an inference from the facts of the case" and admitting them would impermissibly "substitut[e] the expert's judgment for the jury's").

Accordingly, the Court will exclude any testimony by Henderson about why Twitter executives, including Costolo and Noto, did or did not sell stock before or during the Class Period, and about whether any trading activity *in this case* is consistent or inconsistent with scienter.[6] *See Oracle*, 2018 WL 6511146 at *3 (excluding expert opinions about "why any person *in this case* took or did not take a particular action or made or did not make a particular decision" because such opinions are impermissible opinions about intent, motive, or state of mind) (emphasis in

[6] This excluded testimony includes Henderson's comparison of the trading activity *in this case* with trading activity discussed in articles and other materials cited in Henderson's report, or with prior trading activity by Twitter executives.

original). Because the Court grants the motion on this ground, it need not address Defendants' other arguments.

In their opposition, Plaintiffs point to portions of Henderson's report that discuss executive compensation, Rule 10b5-1 trading plans, and Henderson's "seven hallmarks" of proper Rule 10b5-1 usage in general terms and without addressing or analyzing the trading activity of Twitter executives. Plaintiffs contend that this testimony should be admitted because it "will assist the jury in understanding the concepts behind Rule 10b5-1 plans; how those plans can be misused; the timing of trades relative to corrective disclosures; and trading behaviors that Henderson's and others' research indicate might signal misuse or informed trading." *See* ECF No. 446 at 12-13.

The Court concludes that, to the extent that any party introduces evidence regarding the trading behavior of Twitter executives as to Twitter stock, the jury would benefit from expert testimony on executive compensation, Rule 10b5-1 plans, and trading behavior that may be indicative of informed trading. Accordingly, the Court will permit Henderson to testify regarding these topics, albeit without any discussion of any trading activity *in this case*, because the record shows that Henderson has sufficient knowledge and experience to do so in a reliable manner as required by Rule 702.[7] Henderson has more than twenty years of experience in the areas of securities regulation, corporate governance, and executive compensation. Further, Henderson has been a law professor at the University of Chicago since 2004, where he has taught courses on securities regulation and executive compensation, and has conducted research and published articles relating to Rule 10b5-1 plans. ECF No. 430-2 at 5-6 & Ex. 1. Defendants may explore any weaknesses in Henderson's opinions regarding executive compensation, Rule 10b5-1 plans, and informed trading through cross-examination.

D. Wayne Guay[8]

Plaintiffs move to exclude certain opinions of Wayne Guay. ECF No. 425. Guay, a

[7] Other courts have allowed Henderson to testify regarding these topics on the ground that he has sufficient knowledge and experience to offer that testimony. *See, e.g.*, *Smilovits*, 2019 WL 7282026 at *3-5; *In re Novatel Wireless Sec. Litig.*, No. 08CV1689 AJB RBB, 2012 WL 5463214, at *4 (S.D. Cal. Nov. 8, 2012).

[8] *See* ECF No. 425 (Plaintiffs' motion to exclude Guay's expert testimony); ECF No. 444

professor of accounting at the Wharton School of Business at the University of Pennsylvania[9], was retained by Defendants to respond to Todd Henderson's testimony that the trading behavior of Costolo and Noto is "suspicious," "extraordinary," and "unprecedented," and to evaluate whether the trading behavior of Twitter executives, including Costolo and Nolo, is inconsistent with an intent to deceive investors or improperly profit from material non-public information. ECF No. 425-3 ¶ 6 (Guay Report of August 7, 2019).

Guay concludes that the trading behavior of Twitter executives before and during the Class Period is "consistent with and reflective of economically rational trading behaviors of executives of newly-public companies based on diversification, liquidity, and signaling reasons and cannot be used to support an allegation of an intent to defraud." *Id.* ¶ 8.

Plaintiffs move to exclude the following opinions by Guay, which relate to the trading behavior of Costolo, Noto, and other Twitter executives with respect to Twitter stock: (1) Guay's testimony regarding Costolo and Noto's purportedly "economically rational" reasons for their trading behavior and his conclusion that this "economically rational" conduct cannot be used to support an allegation of an intent to defraud; (2) Guay's testimony that Costolo and Noto's trading behavior was inconsistent with Plaintiffs' allegations that they used material, non-public information to their benefit, and that Costolo and Noto received no financial profit from the alleged fraud in this case; and (3) Guay's testimony regarding the purported motives for and "reasonableness" of the trading behavior of Costolo, Noto, and other Twitter executives.

The grounds for excluding these opinions are that they: (1) constitute impermissible state-of-mind opinions; (2) impermissibly usurp the jury's role as fact-finder; (3) instruct the jury on the applicable law; and (4) are unreliable.

Defendants argue that the purpose of the opinions at issue is to rebut the opinions of Henderson with respect to the trading behavior of Costolo, Noto, and other Twitter executives.

(Defendants' opposition); ECF No. 459 (Plaintiffs' reply).

[9] Guay has been a professor of accounting at the Wharton School of Business at the University of Pennsylvania since 1997, where he has taught doctoral-level classes and courses on executive compensation, executive stock trading, and corporate governance. ECF No. 425-3 ¶¶ 1-2.

The Court concludes that Guay's opinions regarding possible motivations for the trading behavior of Costolo, Noto, and other Twitter executives, and regarding whether any such behavior is consistent with scienter, are subject to exclusion for the same reasons the Court excluded Henderson's opinions on the same topics. This testimony is impermissible because it speculates about Defendants' state of mind and motivations for trading or not trading Twitter stock, and because it usurps the role of the jury. *See Oracle*, 2018 WL 6511146 at *3 (excluding expert opinions about the motives and intent of the defendants on the grounds that they amount to nothing more than "the drawing of an inference from the facts of the case" and admitting them would impermissibly "substitut[e] the expert's judgment for the jury's").

Guay may respond to any testimony by Henderson that the Court has not excluded, so long as his responsive testimony was adequately disclosed in his report.

E. Jason Flemmons[10]

Defendants move to exclude the report and testimony of Jason Flemmons. ECF No. 432. Flemmons is an accountant with experience in forensic accounting, fraud examinations, auditing, and financial forensics; Flemmons worked at the SEC for twelve years, including as the Deputy Chief Accountant for the SEC's Division of Enforcement. ECF No. 432-2 ¶¶ 5-9 (Flemmons' report of June 21, 2019). Flemmons was retained by Plaintiffs to opine on whether the SEC's disclosure rules require companies to disclose "key metrics" in SEC filings; whether DAU was a "key metric" from late 2014 to mid-2015 according to SEC disclosure rules; and whether Twitter's response to the SEC's letter regarding Twitter's disclosure of alternative user engagement metrics was misleading. *Id.* ¶ 4.

Flemmons concludes that (1) Item 303 of Regulation S-K requires companies to disclose "key metrics" in their SEC filings; (2) DAU was a key metric of Twitter at the end of 2014 and throughout the first half of 2015; and (3) Twitter's May 11, 2015, response to the SEC's April 13, 2015, comment letter regarding Twitter's disclosure of alternative user engagement metrics was

[10] *See* ECF No. 432 (Defendants' motion to exclude Flemmons' expert testimony); ECF No. 448 (Plaintiffs' opposition); ECF No. 451 (Defendants' reply).

misleading. *Id.* at 7. Flemmons' report also contains a brief discussion of the SEC's customs and practices relating to Regulation S-K disclosures. *Id.* at 14-18.

Defendants move to exclude each of the opinions just described on the grounds that (1) Flemmons is not a lawyer and is therefore unqualified to opine on Twitter's legal obligations under Regulation S-K; (2) Flemmons has no education or training regarding disclosure requirements for non-financial metrics, such as DAU and DAU/MAU, and therefore, his opinions on this topic are unreliable; (3) his opinions are irrelevant because this case is not about whether Defendants violated SEC disclosure requirements under Item 303 of Regulation S-K; and (4) his opinions impermissibly usurp the role of the court by instructing the jury on the applicable law or usurp the role of the jury by telling the jury what conclusion to reach.

Plaintiffs argue that the opinions in question are relevant because they are necessary to counter Defendants' argument at summary judgment that the SEC's decision not to prosecute Twitter based on its failure to disclose DAU in its Regulation S-K disclosures undermines a finding of scienter. ECF No. 448 at 7. Plaintiffs also contend that Flemmons has sufficient knowledge and experience to render the opinions at issue, because at the SEC he worked on various matters related to disclosures under Item 103 of Regulation S-K in the context of non-financial metrics. *Id.* at 9-10.

The Court will exclude Flemmons' testimony regarding SEC customs and practices on relevance grounds, because the Court will exclude at trial the argument and any supporting evidence to which Flemmons is responding, i.e., that Defendants' "open and frank discussion" with the SEC and the SEC's decision not to prosecute Defendants in connection with Twitter's Regulation S-K disclosures show that Defendants did not act with scienter. ECF 314-4 at 28.

The cases the Court has located are not conclusive as to the relevance of evidence relating to the existence of an SEC investigation, or lack thereof, in the context of a claim for violations of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. Certainly, such evidence by itself proves nothing. "[S]everal district courts have found [that] the existence of an investigation, standing alone, [is] insufficient to support scienter." *Zamir v. Bridgepoint Educ., Inc.*, No. 15-CV-408 JLS (DHB), 2018 WL 1258108, at *17 (S.D. Cal. Mar. 12, 2018) (collecting cases). Some of

these courts have qualified their conclusions on this issue with phrases such as "standing alone" or "mere existence," suggesting that evidence regarding a government investigation or prosecution could become relevant to the scienter element in a § 10(b) action if combined with other evidence. *See, e.g., id.* (holding that "the existence of an SEC investigation, standing alone, does not support Plaintiffs' scienter argument"); *City of Austin Police Ret. Sys. v. ITT Educ. Serv., Inc.*, 388 F. Supp. 2d 932, 942 (S.D. Ind. 2005) ("[T]he mere existence of [an] investigation cannot support any inferences of wrongdoing or fraudulent scienter on the part of [a] company or its senior management."). The Court believes, however, that any such unqualified suggestion is misplaced and that evidence relating to an SEC investigation, or lack thereof, simply should not be admitted where, as here, the danger of jury confusion or wasting time substantially outweighs the relevance of such evidence, which would be, at best, marginal.

In the criminal sphere, evidence of a lack of prosecution or dismissal is often excluded because it "ordinarily does not prove innocence[,]" as "cases are dismissed for a variety of reasons, many of which are unrelated to culpability." *United States v. Marrero-Ortiz*, 160 F.3d 768, 775 (1st Cir. 1998); *see also Berman v. Sink*, No. 1:13-CV-00597-SAB, 2016 WL 8730672, at *2 (E.D. Cal. May 27, 2016) ("There are a variety of reasons for a prosecutor's determination not to file criminal charges in a particular case that are unrelated to whether probable cause exists to arrest a suspect."). As with any prosecutorial decision, "[t]he decision not to prosecute is highly discretionary and demonstrates nothing more than the opinion of the prosecutor." *J.W. v. City of Oxnard*, No. CV 07-06191 CAS (SHX), 2008 WL 4810298, at *22 (C.D. Cal. Oct. 27, 2008). Even "the fact of acquittal in a prior court proceeding involving similar subject matter is usually not admitted into evidence . . . because such acquittals are not generally probative of the defendant's innocence in the case at trial and the information has a tendency to confuse the jury rather than assist it." *United States v. Bisanti*, 414 F.3d 168, 172-73 (1st Cir. 2005).

Similarly, here, the fact that the SEC chose not to prosecute Twitter or its executives in connection with Twitter's Regulation S-K disclosures does not prove the absence of scienter. *See In re UTStarcom, Inc. Sec. Litig.*, 617 F. Supp. 2d. 964, 975 n.15 (N.D. Cal. 2009) (concluding that the "SEC's discretionary determination" not to prosecute the defendants "is not determinative

of whether Defendants, in fact, committed securities fraud"); *see also* 15 U.S.C. § 78z (providing that action or inaction by the SEC shall not be "deemed a finding by such authority that [a] statement or report is true and accurate on its face or that it is not false or misleading"). Further, the relevance of evidence regarding action or inaction by the SEC in connection with Regulation S-K disclosures would be, at best, minimal in the context of a claim under § 10(b) and Rule 10b-5, because the standards for Regulation S-K disclosures differ from the standards for disclosures under § 10(b). *See In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1055-56 (9th Cir. 2014). Accordingly, the Court finds that the relevance of evidence or argument relating to the SEC's actions or inaction with respect to Defendants is substantially outweighed by the danger that it will confuse the jury or unduly consume their time, and the Court will exclude it, and Flemmons' testimony in response to it, on that basis. *See* Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . confusing the issues [or] . . . wasting time[.]").

The Court also concludes that Flemmons may not testify at trial about whether any SEC rule or regulation requires the disclosure of any metric at issue in this case,[11] in SEC filings or otherwise. Any such testimony would amount to an impermissible legal conclusion. Flemmons also may not testify that Twitter's response to the SEC's comment letter regarding Twitter's disclosure of user engagement metrics was "misleading." That testimony would usurp the role of the jury as fact-finder.

The Court further concludes that Flemmons' testimony that DAU was a "key metric" of Twitter is subject to exclusion, because this testimony improperly usurps the role of the jury as the finder of fact. *See Oracle*, 2018 WL 6511146 at *7 ("An expert witness may not usurp the jury's role in making fact determinations."). Indeed, this testimony is based on Flemmons' review of internal Twitter documents and deposition testimony; Plaintiffs have not shown that Flemmons has any specialized knowledge or expertise that would permit him to draw conclusions from these

[11] The metrics at issue in this case include "key metrics," because, as Plaintiffs admit, Twitter has used that phrase to refer to its metrics in SEC filings. *See* ECF No. 448 at 12.

documents that a jury could not. *See id.* ("[A]n expert witness is not permitted simply to review deposition testimony and other evidence and then proffer an opinion about what actually happened in the case at hand") (citation and internal quotation marks omitted).

F. John Coates[12]

Plaintiffs move to exclude certain testimony by John Coates. ECF No. 427. Coates submitted an expert report on June 21, 2019, ECF No. 427-3, and a rebuttal report on August 7, 2019, ECF 472-4. Coates is a professor at Harvard Law School who teaches courses on corporations and securities laws and regulations, and has decades of experience advising corporations and regulatory agencies, including the SEC, on issues relating to federal and state securities disclosure obligations. ECF No. 427-3 ¶¶ 2-7. Coates was retained by Defendants to assess whether the process by which Twitter decided what metrics to disclose was generally consistent with customs and practices among large public companies. *Id.* ¶ 12. Coates also was retained to respond to the opinions of Jason Flemmons. ECF No. 472-4 ¶ 1.

Coates concludes in his report of June 21, 2019, that (1) "Twitter's process for defining metrics and for deciding which metrics to disclose in regulatory filings and during earnings calls was . . . designed to ensure Twitter's disclosed metrics were accurate, informative, and reflected and were aligned with Twitter's business strategy"; and (2) "Twitter's process for defining metrics and for deciding which metrics to disclose was consistent with general customs and sound business practices followed by large public companies." ECF No. 472-4 ¶¶ 15, 16.

Coates concludes in his rebuttal report of August 7, 2019, that (1) Flemmons' conclusion that SEC rules require that companies unconditionally disclose "key metrics" is fundamentally flawed and ambiguous; (2) contrary to Flemmons' opinion that DAU was a "key metric," Twitter's management did not consider DAU or DAU/MAU to be metrics appropriate for public disclosure; and (3) Flemmons' opinion that Twitter's May 11, 2015, response to the SEC's April

[12] *See* ECF No. 427 (Plaintiffs' motion to exclude Coates' expert testimony); ECF No. 450 (Defendants' opposition); ECF No. 457 (Plaintiffs' reply).

13, 2015, comment letter was misleading is based on the flawed assumption that user engagement metrics and ad engagement metrics are mutually exclusive. *Id.* ¶¶ 4-7.

First, Plaintiffs move to exclude Coates' testimony that Twitter's process for preparing public disclosures was designed to ensure Twitter's disclosed metrics were accurate and aligned with Twitter's business strategy and was consistent with general customs and practices followed by large public companies. Plaintiffs argue that this testimony should be excluded because it is irrelevant, as the adequacy of Twitter's disclosure processes is not at issue in this action. Plaintiffs also argue that this testimony amounts to impermissible testimony on Defendants' state of mind. Finally, Plaintiffs contend that this testimony is unreliable because Coates does not identify an industry standard for preparing public disclosures and because Coates did not exclude companies that have committed securities fraud from the set of large public companies against which he compared Twitter's public-disclosure process.

Defendants argue that this testimony is relevant to the question of whether Defendants acted with scienter and that it will help the jury understand whether Twitter's failure to disclose DAU/MAU was an extreme departure from the standards of ordinary care relative to the customs and practices of large public companies. ECF No. 450 at 9-10. Defendants contend that, while Coates is not opining on an "industry standard," he is opining on the customs and practices of large public companies for complying with SEC disclosure requirements. Further, Defendants note that, while Coates did not exclude companies that had committed security fraud from the set of large public companies he used for comparison, the general customs and practices that he observed are nevertheless probative as to the issue of scienter, because such customs and practices are intended to generate compliant disclosures. *Id.* at 17.

The Court concludes that Coates' testimony regarding customs and practices among large public companies with respect to the preparation of public disclosures is relevant to the question of whether Defendants acted with scienter, because it bears on the question of whether Defendants' disclosures were an extreme departure from the standards of ordinary care with respect to public disclosures. *See Provenz v. Miller*, 102 F.3d 1478, 1491 (9th Cir. 1996) (providing that scienter is "a mental state" that covers intent to deceive, manipulate, or defraud, as well as deliberate

recklessness, and that deliberate recklessness is "an extreme departure from the standards of ordinary care . . . which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it") (citation and internal quotation marks omitted); *see also S.E.C. v. Daifotis*, No. C 11-00137 WHA, 2012 WL 2051193, at *3 (N.D. Cal. June 7, 2012) (holding that expert testimony "regarding the industry practice . . . for a mutual funds' communications with the public, the process by which communications with the public are created, reviewed, and approved, is the proper subject of expert testimony and may be helpful to the jury in understanding the technical regulatory process and industry practice. This testimony is relevant to assisting the jury in its determination of whether defendant, who is alleged to have made various misstatements and misleading omissions, did so with the requisite scienter"). Accordingly, Coates' opinions on this topic are not subject to exclusion on the basis that they are irrelevant.

Nor are Coates' opinions on this topic subject to exclusion on the basis that they are unreliable. Coates' testimony is based on his knowledge and decades of experience advising corporations and regulatory agencies, including the SEC, on issues relating to federal and state securities disclosure obligations. ECF No. 427-3 ¶¶ 2-7. This knowledge and experience, which Plaintiffs do not dispute, is sufficient to conclude that the opinions in question are reliable.

That said, Coates may not testify before the jury about whether he believes that Twitter's processes for preparing public disclosures are consistent or inconsistent with the customs and practices among large public companies. That factual determination is reserved for the jury. *See Oracle*, 2018 WL 6511146 at *7 ("An expert witness may not usurp the jury's role in making fact determinations."); *Daifotis*, 2012 WL 2051193 at *4 (excluding expert testimony evaluating how the defendant's "process for communications with the public measured up against industry standards" on the ground that "[t]hese are factual issues for the jury to consider after hearing the evidence at trial").

The Court further concludes that Coates' testimony with respect to whether Twitter's public-disclosure processes were designed for a certain purpose or intent, or whether they were consistent with Twitter's business strategies, is subject to exclusion on the ground that it amounts

to impermissible testimony regarding Defendants' motives or intent. *See Oracle*, 2018 WL 6511146 at *3 (excluding expert opinions about the motives and intent of the defendants on the grounds that they amount to nothing more than "the drawing of an inference from the facts of the case" and admitting them would impermissibly "substitut[e] the expert's judgment for the jury's").

Second, Plaintiffs move to exclude Coates' opinion that a proper cleaning and retrieval process was not consistently in place at Twitter for all metrics, such as DAU. Plaintiffs argue that this opinion, which is stated in Coates initial report, should be excluded because it usurps the role of the jury by reaching a conclusion on a disputed issue of fact. Plaintiffs also argue that Coates lacks the qualifications to render this opinion, because Coates admitted during his deposition that he is not familiar with data cleaning and retrieval procedures, either at Twitter or at any other company. ECF No. 457 at 11.

Defendants argue that this testimony is not impermissible because it is merely probative of scienter and does not tell the jury whether or not Defendants acted with scienter. ECF No. 450 at 11. Defendants further contend that this testimony amounts to Coates' own understanding of Twitter's cleaning and retrieval processes, and the question of whether Coates has sufficient experience to render this opinion is a matter for cross-examination. *Id.* at 17-18.

The Court concludes that the testimony at issue is subject to exclusion both because the determination of whether a certain cleaning or retrieval process was in place for Twitter's metrics is reserved exclusively for the jury, *Oracle*, 2018 WL 6511146 at *7 ("An expert witness may not usurp the jury's role in making fact determinations."), and because Coates lacks sufficient knowledge or experience to render an opinion on this subject.

Third, Plaintiffs move to exclude Coates' opinion that the lack of a reply from the SEC to a company's response letter is customarily interpreted by companies and their counsel as indicating that the SEC finds the company's response acceptable. Plaintiffs argue that this testimony is contrary to law[13] and constitutes improper testimony about state of mind. Defendants respond that

[13] Plaintiffs cite to 15 U.S.C. §78z, which provides, in relevant part, that action or inaction by the SEC shall not be "deemed a finding by such authority that [a] statement or report is true and accurate on its face or that it is not false or misleading[.]"

this opinion is admissible because it is necessary to rebut Flemmons' opinion that Twitter's May 11, 2015, response letter to the SEC was misleading, and because it does not amount to improper state-of-mind testimony. ECF No. 450 at 19. Because the Court has excluded the testimony that this opinion was intended to rebut, namely Flemmons' opinion that Twitter's response letter to the SEC was misleading, this opinion of Coates is no longer relevant and must also be excluded.[14]

Finally, Plaintiffs move to exclude Coates' testimony that Twitter's management did not consider DAU or DAU/MAU to be metrics appropriate for public disclosure at the end of 2014 through the end of the Class Period. Plaintiffs contend that this opinion, which is stated in Coates' rebuttal report only, constitutes improper testimony as to Defendants' state of mind. Defendants contend that this opinion is admissible because it rebuts Flemmons' opinion that DAU was a key metric in late 2014 and during the Class Period.

The Court concludes that the testimony in question is subject to exclusion, because it constitutes improper testimony as to Defendants' state of mind and infringes on the jury's role as fact-finder. Further, the testimony is no longer relevant because the Court has excluded the testimony by Flemmons that it was intended to rebut.

G. Michelle Madansky[15]

Defendants move to exclude certain testimony by Michelle Madansky. ECF No. 434-13. Madansky submitted a report on June 21, 2019, ECF No. 434-4, and a rebuttal report on August 7, 2019, ECF No. 434-6. Madansky is an independent market and media research consultant who has at least twelve years of experience working on various aspects of advertisement campaigns of digital publishers and social media platforms, including Twitter. ECF No. 434-4 ¶¶ 1-6. Madansky has a Ph.D. in marketing and statistics from the University of Chicago Booth School of Business. *Id.* ¶ 1.

Madansky was retained by Defendants, in relevant part, to analyze the "metrics that digital

[14] Coates may respond to any opinion by Flemmons that the Court has not excluded to the extent that Coates disclosed that response in his reports.

[15] *See* ECF No. 434-13 (Plaintiffs' motion to exclude Madansky's expert testimony); ECF No. 441 (Defendants' opposition); ECF No. 460 (Plaintiffs' reply).

publishers disclose to advertisers to market their platforms," and to "analyze and explain Twitter's advertising platform during the Class Period, how it was evolving, how it was perceived by advertisers and what factors and metrics were critical to Twitter's success as an advertising revenue generating business." *Id.* ¶ 11. Madansky was also retained by Defendants to respond to the opinions of Dr. Sam Hui, one of the experts retained by Plaintiffs, about the importance of DAU/MAU. ECF No. 434-6 ¶ 2 (Madansky rebuttal report).

Madansky concludes in her initial report that metrics such as DAU and DAU/MAU were not "meaningful" to digital advertisers' decisions to purchase or renew advertisements, and that Twitter's success in revenue was dependent upon its monthly reach, the number of ad engagements, and cost per ad engagements on its platform, as well as several qualitative and quantitative factors that do not include DAU or DAU/MAU. ECF No. 434-4 ¶ 12.

Madansky concludes in her rebuttal report that Dr. Hui was incorrect in concluding that DAU/MAU was the best measure of user engagement at Twitter, and in concluding that DAU/MAU drove Twitter's revenue. ECF No. 434-6 ¶ 4.

Plaintiffs move to exclude the following opinions by Madansky: (1) that DAU and DAU/MAU were not meaningful metrics to advertisers; (2) that Twitter could increase its ad load without negatively affecting campaign performance; (3) that Twitter repeatedly acknowledged the challenges with measuring engagement and that there was robust internal debate at Twitter regarding key metrics; and (4) that DAU and DAU/MAU were not relevant to Twitter's generation of revenue.

Plaintiffs argue that these opinions should be excluded on the grounds that (1) they are irrelevant, because this case is not about what information would be meaningful to advertisers; and (2) they are unreliable, because they are not the product of any reliable principles or methodology, they ignore relevant facts, and are not based on sufficient knowledge or experience.

Given the forgiving threshold for relevance with respect to expert testimony, *see Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1196-97 (9th Cir. 2014), the Court will not exclude Madansky's opinion as irrelevant. As Defendants point out, ECF No. 441 at 5-7, and Plaintiffs do not dispute, Twitter investors cared about Twitter's ability to generate revenue, and 90% of its

revenue came from advertising. Thus, that Madansky focuses on what user metric information was important to advertisers rather than investors is not disqualifying.

The Court further concludes that Madansky's testimony that DAU and DAU/MAU were not meaningful metrics to advertisers is not subject to exclusion on the basis that it is unreliable. Plaintiffs contend that this opinion is unreliable because Madansky did not account for variation among advertisers as to what metrics each advertiser would consider meaningful and because Madansky did not ascertain whether Twitter's advertisers ever sought information about DAU/MAU. ECF No. 434-13 at 12-13. Madansky's more than twelve years of experience in the marketing and advertising industry, during which she has worked on various aspects of the advertisement campaigns of Twitter and other social media companies and digital publishers, are a sufficient basis to find these opinions reliable. *See Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1043 (9th Cir. 2010) (holding that expert testimony on industry norms was reliable based on the expert's "forty years of experience in the marketing and advertising industry" and "familiar[ity]" with industry practices). Plaintiffs may explore any purported weaknesses in her testimony during cross-examination.

Likewise, the Court concludes that Madansky's rebuttal testimony that DAU and DAU/MAU were not relevant to Twitter's generation of revenue is not subject to exclusion on the ground that it is unreliable. This opinion is predicated on the testimony analyzed above, which provides that DAU/MAU was not meaningful to advertisers, *see* ECF No. 434-6 ¶¶ 32-38, and it is also based on Madansky's knowledge and experience in helping companies like Twitter sell their platform and audiences to the advertising community, ECF No. 434-4 ¶ 4. This constitutes a sufficient foundation under Rule 702 for Madansky to render the testimony in question. If Madansky failed to consider certain facts in reaching her opinions, Plaintiffs may address those during cross-examination. *See Primiano*, 598 F.3d at 564 ("Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion.").

The Court also overrules Plaintiffs' objection that Madansky's opinion that Twitter could increase its ad load without negatively affecting campaign performance is unreliable. ECF No.

434-4 ¶ 33. Plaintiffs argue that Madansky failed to explain her methodology or show that she has specialized knowledge for rendering it. ECF No. 460 at 8-11. But Defendants have shown a sufficient foundation for the testimony in question. Madansky's report states that she arrived at the conclusion that Twitter could increase its ad load without negatively affecting its campaign performance by comparing it to the ad load of Facebook, "Twitter's main competitor for advertisement purposes." *See* ECF No. 434-4 ¶¶ 29-33. Further, as discussed above, Madansky has more than twelve years of specialized and relevant experience, which includes working as an advertising consultant to social media companies, including Twitter. This foundation is sufficient under Rule 702 to conclude that the opinion in question is reliable. And again, Plaintiffs may explore any purported weaknesses in the testimony during cross-examination.

As to Madansky's rebuttal testimony that Twitter "repeatedly acknowledged" the challenges with measuring user engagement, ECF No. 434-6 ¶ 12, and that there was a "robust internal debate" at Twitter regarding key metrics, *id.* ¶¶ 22, 24, the Court concludes that it is subject to exclusion because it usurps the role of the jury. This testimony, which is based on Madansky's interpretation of certain documents, is not expert opinion based on the application of specialized expertise to the facts of the case; instead, as Plaintiffs point out, this testimony amounts to the making of factual determinations, which is the exclusive province of the jury. *See Oracle*, 2018 WL 6511146 at *7 ("[A]n expert witness is not permitted simply to review deposition testimony and other evidence and then proffer an opinion about what actually happened in the case at hand") (citation and internal quotation marks omitted).

V. CONCLUSION

For the foregoing reasons, the Court grants in part and denies in the part the parties' motions to exclude certain expert testimony.

IT IS SO ORDERED.

Dated: April 20, 2020

JON S. TIGAR
United States District Judge