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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CONCORD MUSIC GROUP, INC., ET AL.,

Plaintiffs,

v.

ANTHROPIC PBC,

Defendant.

Case No. 5:24-cv-03811-EKL-SVK

ANTHROPIC'S REPLY IN SUPPORT OF MOTION TO EXCLUDE EXPERT TESTIMONY AND OPINIONS OF BEN ZHAO

Hearing Date: October 21, 2026
Time: 10:00 AM
Judge: Hon. Eumi K. Lee

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INTRODUCTION

Publishers' opposition concedes that Dr. Ben Zhao intends to testify about Anthropic's intent, motive, and state of mind, and that he will speculate about the effectiveness of guardrails he did not evaluate. That is not expert testimony and warrants exclusion. Mot. 5-10.

Against that straightforward result, Publishers invent exceptions with no basis in the law that Zhao's testimony does not meet in any case. They primarily argue that experts can testify to state of mind if they have sufficient evidence of it. Opp. 3-5. But that Zhao seeks to "[redacted]" subjective motivations from "[redacted]" in the evidence ***is*** the problem. Ex. 4 at 433:7-16. "The jury is sufficiently capable of drawing its own inferences regarding intent, motive, or state of mind from the evidence, and permitting expert testimony on this subject would be merely substituting the expert's judgment for the jury's." *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 2018 WL 6511146, at *3 (N.D. Cal. Dec. 11, 2018). Publishers then claim that experts can testify to defendants' "knowledge" or "design choices." Opp. 3-5. Their quotations of Zhao's testimony show he will do nothing of the sort. As they admit, he plans to tell the jury "why" Anthropic and its employees made decisions. *Id*. at 5. These issues are clear on the face of his testimony, conceded by the opposition, and ripe for resolution before trial.

Publishers' defense of Zhao's opinions on Claude's guardrails reduces to misdirection, confirming that his testimony is "connected to existing data only by the *ipse dixit* of the expert." *General Elec. v. Joiner*, 522 U.S. 136, 146 (1997). Anthropic did not move on Zhao's opinions about "underlying technologies" or "LLMs generally," Opp. 8, but rather "the effectiveness of Anthropic's guardrails" specifically, Mot. 6-10. The analysis Zhao himself did touches only the former, and nothing in the opposition can close the "analytical gap between" his generic citations and Anthropic's actual technology. *Joiner*, 522 U.S. at 146. The Court should grant the motion.[1]

ARGUMENT

I. ZHAO'S INTENT, MOTIVE, AND STATE-OF-MIND OPINIONS SHOULD BE EXCLUDED

The parties agree on many of the limits on Zhao's testimony. Publishers concede that Zhao "generally cannot opine on [Anthropic's] subjective knowledge or intent," testify about

[1] Unless noted, "Ex." refers to exhibits to Dkt. 662, emphasis is added, and internal citations and quotations are omitted.

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"Anthropic's intent to induce infringement," or give an opinion on "whether Anthropic contemplated Claude's ability to infringe." Opp. 4-5. Nor can he "speculate about Anthropic's design intentions or knowledge" and offer "conjecture about Anthropic's state of mind." *Id.* at 4.

The rest of Publishers' brief confirms that Zhao intends to testify to these concededly impermissible subjects. According to Publishers, Zhao would like to tell the jury "that Anthropic deliberately designed Claude to have the functionality to provide lyrics to well-known songs and create new lyrics in response to user requests." Opp. 2. He will say that Anthropic "intend[ed] for Claude to be able to respond to song- or lyric-related requests." *Id.* He plans to assert that "Anthropic [redacted]." *Id.* at 3. And he will claim to know "***why*** Anthropic employees would have submitted" specific training prompts. *Id.* at 5 (emphasis Publishers'). His reports are filled with similar state-of-mind opinions. *See, e.g.*, Ex. 1 ¶82 (Anthropic "[redacted]" and "[redacted]"); Ex. 1 ¶113 (Anthropic "[redacted]"); Ex. 3 ¶102 ("[redacted]"). Such testimony about whether Anthropic's "processes were designed for a certain purpose or intent" is "impermissible," because "[t]he determination of motive, intent, and state of mind is for the jury alone." *In re Twitter, Inc. Sec. Litig.*, 2020 WL 9073168, at *3, 11 (N.D. Cal. Apr. 20, 2020).

Publishers respond that Zhao has an evidentiary basis for these impermissible opinions, Opp. 3-5, but even if that were true, how he came to opinions on subjects reserved for the jury is irrelevant. Their distortion of *Medtronic* (at 4) illustrates the error. That decision permitted expert testimony on "underlying facts that may be probative of [the defendant's] state of mind or intent," but only after the parties ***agreed*** the expert could not give "any opinion on" the defendant's "subjective belief or intent." *Medtronic, Inc. v. Axonics Modulation Techs., Inc.*, 2024 WL 4406929, at *36 (C.D. Cal. Aug. 29, 2024). Zhao seeks to offer the latter. *E.g.*, Ex. 1 ¶10 ("[redacted]."); Mot. 5-6. *Pelican International, Inc. v. Hobie Cat Co.* (cited at 7) likewise excluded an expert's opinions "as to intent, motive, or state of mind"—"on issues related to willful infringement" no less—even when purportedly based on the record. 655 F. Supp. 3d 1002, 1029, 1030 (S.D. Cal. 2023). Publishers' characterization of *SA Music LLC v. Apple, Inc.* (at 6) is also wrong, with the

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sentence directly following their quote stating that the expert could not "opine about Apple's mental state," and the court excluding all state-of-mind testimony. 592 F. Supp. 3d 869, 903 (N.D. Cal. 2022).

Perhaps recognizing that Zhao's planned testimony impermissibly opines on state of mind, Publishers try to reinvent it as limited only to "knowledge," similar to what was allowed in *In re: Juul Labs, Inc. Marketing, Sales Practices & Products Liability Litigation* ("*Juul Labs*"), 2022 WL 1814440, at *14 (N.D. Cal. June 2, 2022). But that decision (again) recognized that speculation about "state of mind" and "intent" is not properly the subject of expert testimony and permitted opinions on only "the knowledge of various defendants" if there was "a basis in the record." *Id.* Even assuming that expertise would be necessary to read documents to determine what a defendant knew, however, Zhao went further: he opines, for example, that "[redacted]," Ex. 1 ¶86, and describes "[redacted]" *Id.*, ¶96. Publishers' recharacterization of Zhao's opinions as describing only "design decisions," *e.g.*, Opp. 5-6, suffers the same flaw—his reports and deposition, not attorney argument, define his testimony. And at every opportunity, he has confirmed it will reach Anthropic's motivations and intent. Mot. 5-6.

The scope of Zhao's testimony should be resolved now. Courts regularly exclude improper intent, motivation, and state-of-mind testimony on pretrial motions. *See, e.g.*, *Oracle*, 2018 WL 6511146 at *3; *SA Music LLC*, 592 F. Supp. 3d at 903. Here, there is no doubt that Zhao's testimony will cross the line—Publishers embrace the impermissible opinions, repeatedly quoting passages from Zhao's reports that describe Anthropic's intentions and beliefs. Publishers' cases, in contrast, largely turn on inapposite administrability concerns, like MDLs where courts were addressing the "most efficient path" in triaging numerous pre-trial motions. *In re Xyrem (Sodium Oxybate) Antitrust Litig.*, 2025 WL 860505, at *6 (N.D. Cal. Mar. 19, 2025); *Juul Labs*, 2022 WL 1814440, at *1 (challenges to over 20 experts and "many hundreds of pages of … arguments"). Here, administrability points only in the opposite direction: because so much of Zhao's testimony improperly reaches Anthropic's state of mind, sorting through objections in front of the jury will be burdensome and risk inadmissible testimony that cannot be unwound.

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II. ZHAO'S OPINIONS ON ANTHROPIC'S GUARDRAILS ARE UNRELIABLE AND BEAR NO CONNECTION TO ANY ANALYSIS HE ACTUALLY DID

Zhao says that his opinions on the effectiveness of Anthropic's guardrails rely on (1) testing related to four Works-in-Suit conducted before November 7, 2023 and "[redacted]" interactions with Claude thereafter; (2) Publishers' pre-suit investigation; (3) third-party research about LLMs more generally; and (4) the work of Shawn Shan, another of Publishers' experts. Mot. 8-10. Publishers do not even bother to defend the first of these bases, and now state that "Zhao's opinions do not rely on empirical testing." Opp. 1. That suffices to exclude, at a minimum, any testimony drawn from Zhao's personal interactions with Claude. As to the second, Publishers do not dispute that Zhao relied on pre-suit records to reach his guardrails-effectiveness opinions. Opp. 7-8. But Publishers told the Court that "pre-suit evidence was not being offered to test the effectiveness of the guardrails." 3/26/26 Hr'g Tr. 33:17-19. Based on that representation, Zhao's testimony relying on pre-suit evidence must be excluded. Holding Publishers to their promises has nothing to do with relitigating the underlying work product dispute; whether or not Publishers properly withheld these records in the first place, they agreed not to use them in precisely the way that Zhao does.

That leaves only generic third-party research and Shan's analysis. Neither renders Zhao's opinions reliable. To start, third-party research about non-Anthropic LLM guardrails generally does not support Zhao's opinions about Claude specifically. To obscure that lack of fit, Publishers largely defend opinions that Anthropic has not challenged, insisting that Zhao permissibly opines about "underlying [guardrails] technologies, architectural limitations, [and] methods to bypass them." Opp. 7. But Anthropic does not seek to exclude opinions about generic technology or literature—only Zhao's conclusions about Anthropic's guardrails' effectiveness. On the latter, neither Publishers nor Zhao can explain how studies that concededly discuss only "LLMs generally" and are "not specific to song lyrics" could support conclusions about the effectiveness of Anthropic's specific guardrails at issue here. Opp. 8. At best, Publishers offer that the studies are "relevant" to Zhao's "general[]" conclusions about guardrails technology. *Id.* But they cite nothing from Zhao that bridges the "analytical gap" between that literature and Claude's specific and documented approach to lyrics. *Joiner*, 522 U.S. at 146. Where the conclusion is "connected to [the evidence]

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only by the *ipse dixit* of the expert," exclusion follows. *Id.*

Without testing, a pre-suit investigation, or literature to support his opinions on Anthropic's guardrails, Zhao is reduced to parroting Shan's work. Zhao testified, for example, that he exclusively "[redacted]" for details about Claude's guardrail source code, Ex. 4 at 126:4-127:4, and more recent testing of those guardrails, Ex. 4 at 141:5-7. Zhao also expressly based his guardrails-effectiveness rebuttal to Anthropic's expert, Dr. Jeffrey Bilmes, on "[redacted]" Ex. 2 ¶124. Zhao's deposition is full of such admissions, with more than a dozen instances of Zhao disclaiming any knowledge of the specifics of Anthropic's systems because he relied on Shan's analysis. *See, e.g.*, Ex. 4 at 125:22-126:16. Whatever the scope or robustness of Shan's own opinions, expert testimony is unreliable when based "largely, if not entirely, on the observations of another expert." *Scientific Apps. & Rsch. Assocs. (SARA), Inc. v. Zipline Int'l, Inc.*, 2025 WL 4108875, at *5-6 (N.D. Cal. Apr. 11, 2025). Here, Zhao failed to give the kind of "independent analysis" or explanation for "why he agrees with" Shan that could obviate that defect. *Id.* Publishers respond with one paragraph from Zhao's rebuttal and another from his reply, which they claim demonstrate that Zhao "incorporates" rather than parrots Shan. Opp. 9. But those paragraphs offer zero explanation of ***why*** Zhao agrees with Shan. Ex. 2 ¶124; Ex. 3 ¶115. Incorporating an opinion without adding anything new ***is*** parroting.

Finally, Publishers' refrain that any concerns about Zhao's guardrails testimony go only to weight relies exclusively on cases predating the 2023 amendment to Rule 702 and *Engilis v. Monsanto Co.*, 151 F.4th 1040 (9th Cir. 2025). As those authorities explain, courts now cannot treat sufficiency as only a question of "weight," and must first "find[] it more likely than not that an expert has a sufficient basis to support an opinion." *Engilis*, 151 F.4th at 1049. Here, however, the only material that could even conceivably support Zhao's specific opinions about Anthropic's guardrails is the regurgitated work of another expert.

CONCLUSION

The Court should preclude Zhao from offering any testimony concerning (1) Anthropic's or its employees' intent, motives, or state of mind; and (2) the effectiveness of Anthropic's guardrails, including those paragraphs identified at Mot. 6, 10.

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Date: August 18, 2026

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I hereby certify that on August 18, 2026, I did cause this motion to be served on the following listed below and in the manner so indicated.

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