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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 JOSHUA DENNIS

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

PUBLIC REDACTED VERSION

Anthropic moved to exclude Mr. Dennis's testimony as unreliable because he drew conclusions about third-party usage of Claude while conceding that he did not verify that the Claude records he was reviewing were third-party records. Publishers admit the key fact: Mr. Dennis did not verify that he was reviewing third-party records. Opp. 3. Mr. Dennis testified that "verification was not part of [his] assignment." Dkt. 735-2 at 243:12-17. That ends the analysis. Mr. Dennis's unreliable opinions should be struck.

Publishers try to backfill Mr. Dennis's opinions with a lawyer-written, lawyer-sworn declaration purporting to fill in what was missing from Mr. Dennis's analysis. Howell Decl. ¶7, Dkt. 738. But of course, an after-the-fact lawyer declaration cannot rescue an expert's deficient analysis. Publishers also claim that Anthropic "withheld" the information Mr. Dennis would have needed to conduct his analysis properly. Not so. Because Publishers shielded account information for the accounts they used, Anthropic does not know which prompts and outputs belonged to them. But more importantly for this motion, Publishers ***do know*** which records were generated by their agents, and they even admitted that one record they had initially represented to be a third-party record in fact was generated by another Publisher expert, Dr. Zhao. *See* Burrell Decl. ¶¶8-9 & Exhibit 6, Dkt. 670-1 & 670-7. In other words, it would have been possible for Mr. Dennis to verify that the records he characterized as third-party were not generated by Publishers based on information known to Publishers (and withheld from Anthropic) if he had bothered to ask. But Mr. Dennis did not even try. Dkt. 735-2 at 242:6-10 ("Q: Did you ask for a list of all email addresses belonging to [P]ublishers' [counsel]? A: No. I'm not sure what the purpose of that would be.").

In all events, even if Mr. Dennis had properly excluded Publisher-created records, his report does nothing more than present arbitrary percentages and charts of the type courts routinely exclude as misleading to a jury. None of the arguments in Publishers' opposition warrant allowing them.[1]

ARGUMENT

I. Mr. Dennis's Failed To Validate The Records He Relied Upon

Mr. Dennis drew conclusions about two sets of records based on the premise that real third-party users submitted the prompts that generated them. Burrell Decl. Ex. 2 (Dennis Report) at ¶¶7,

[1] 'Mot.' refers to Anthropic's motion (Dkt. 664); 'Opp.' refers to Publishers' opposition (Dkt. 738); emphasis is added; and internal citations, quotations, and objections are omitted throughout.

PUBLIC REDACTED VERSION

56, Dkt. 666-2. Publishers do not dispute that Mr. Dennis did nothing to confirm that the records were all generated by third parties. Because that failure infects all of Mr. Dennis's testimony, the Court should exclude it in full.

A. Mr. Dennis Failure's Is His Own (and Publishers') Fault, Not Anthropic's

Publishers' primary argument is that the deficiencies in Mr. Dennis's analysis are somehow Anthropic's fault. Publishers claim that Mr. Dennis could not identify records belonging to Publishers within the 5-million sample because Anthropic "generally redacted names and email addresses." Opp. 3. The "generally" in Publishers' claim is doing a lot of work. In actuality, in accordance with the Court's March 2025 order, Dkt. 318 at 4, Anthropic maintained the confidentiality of its users by masking names and email addresses, ***except when*** it knew that they were associated with Publishers—for example, email addresses ending in "oandzlaw.com." Anthropic repeatedly asked Publishers to provide information for other accounts associated with Publishers and their agents, and Publishers refused (on work product grounds). Mot. 3-4. Anthropic could not have provided the information that Publishers now claim it withheld from Mr. Dennis because ***Publishers*** refused to provide a complete set of names and email addresses to Anthropic.

On the flip side, ***Publishers*** obviously know what prompts they and their agents submitted. But Mr. Dennis repeatedly testified that he did ***nothing*** to determine that the records he reviewed were from real third-party users. Opp. 2-3. He relied solely on the say-so from Publishers' counsel because validating that assumption was "outside the scope of [his] assignment." Dkt. 735-2 at 243:12-17. Mr. Dennis's decision to "blindly accept data" from counsel "without assessing its reliability" warrants exclusion under *Daubert*. *In re Baby Food Prods. Liab. Litig.*, 2026 WL 559857, at *13 (N.D. Cal. Feb. 27, 2026). This would be true in any case, but is especially true where Publishers have conceded (after Anthropic raised questions) that one of the records Publishers previously characterized as third-party actually came from Publishers' technical expert; Publishers then went as far as to ask ***Anthropic*** to bring additional errors to their attention. Dkt. 670-1 & 670-7. But Anthropic does not have the information Publishers have shielded as work product.

Indeed, Publishers' ***counsel*** has now submitted a declaration that includes his own analysis of email address metadata. Dkt. 738-1 at ¶7. But a party cannot cure a *Daubert* problem with an

PUBLIC REDACTED VERSION

after-the-fact disclosure. *See Luke v. Family Care & Urgent Med. Clinics*, 323 F. App'x 496, 500 (9th Cir. 2009) (party cannot use "untimely declarations" to "fix the weakness" in expert testimony identified by the opposing party). In any case, counsel's declaration does nothing to close the gap in the analysis—it does not disclose which records belong to Publishers—nor does it cure Mr. Dennis's failure to verify the records were third-party. Publishers' suggestion that this failure can be excused because Anthropic's expert Dr. Bray used email metadata to identify Publishers' records appears to be willfully misleading. Opp. 4. Dr. Bray explained that ***at least*** [redacted] he reviewed "belong to Publishers' known investigator" but, due to Publisher's refusal to disclose all account information, "it is possible that even more of these prompts were generated by Publishers or their agents." Howell Decl., Ex. A (Bray Report) ¶120, Dkt. 656-2.

B. Anthropic's *Daubert* Motion Is Independent of the Parties' Discovery Dispute

Contrary to Publisher's suggestion, Anthropic's motion is independent of the parties' discovery dispute related to Publishers' account information. *See* Mot. 8 n.4; Dkt. 719 at 3. The parties agreed that Anthropic's existing motion to compel was mooted by Publishers' dismissal of the secondary liability claims and that the question of the consequences of Publishers' work product assertions was reserved for another day. Dkt. 722. As relevant here, nothing prevented Mr. Dennis from verifying, with information from Publishers, whether the records he received contained Publishers' prompts. And to the extent Publishers now argue that Mr. Dennis could not have validated those records without Publishers waiving work product, that is a consequence of Publishers' own decisions to: (1) conduct a pre-suit investigation using their own employees, outside counsel, and agents; (2) selectively rely on the results of that investigation; and (3) selectively assert work product protection over the remainder, including by shielding identities and account information. Publishers cannot have it both ways. They can withhold these records as work product and offer no opinion on third-party usage. Or they can offer an opinion on third-party usage that verifies which records come from third parties. But they cannot do what they have done here, which is relying on Mr. Dennis's unverified opinions about how supposed third parties used Claude.

PUBLIC REDACTED VERSION

II. Mr. Dennis's Arbitrary Figures And Graphs Will Mislead The Jury

Separately, Publishers want Mr. Dennis to opine to the jury that, in [redacted], Claude output lyrics without triggering guardrails, and that guardrails were therefore activated [redacted] observed. Dkt. 666-2 at ¶¶142, 147. But [redacted]? Mr. Dennis cannot say. *Id.* ¶¶60, 77-78; Burrell Decl. Ex. 4 (Dennis Dep.) at 72:24-73:2; 84:3-17, Dkt. 666-4. All he knows is that he was given a set of 851 records by counsel; he had no idea what criteria were used to select those records. Mot. 4. The 851 number—the denominator in Mr. Dennis's percentage—is entirely arbitrary, rendering the percentage meaningless. Publishers want Mr. Dennis to deliver this and other similar information to the jury with the imprimatur of scientific expertise, complete with tables and graphs and percentages. *See* Dkt. 666-2 at ¶¶15-16, 76-209, 217-221; Dkt. 666-3 (Dennis Reply) at ¶¶13-14, 52-141, 149-208, 232-250. From these figures, Mr. Dennis opines—and Publishers will ask the jury to conclude—that Claude users ***frequently*** requested song lyrics, *see, e.g.*, Dkt. 666-2 at ¶84, and that Anthropic's guardrails [redacted] *id.* ¶144. Presenting meaningless percentages as science creates "special dangers" of juror confusion and warrants exclusion. *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1321 n.17 (9th Cir. 1995).

Publishers' counsel assert—without support—that these were "the relevant subset[s] of records" available to Mr. Dennis for his analysis of Claude use by actual third parties. Opp. 8. But Publishers' counsel never explained—and Mr. Dennis does not know—how they determined that the records they hand-picked for Mr. Dennis, and only those records, were the records "relevant" to his analysis. It was not Anthropic's burden to identify other records that Mr. Dennis should have considered; it was Publishers' burden to establish that Mr. Dennis reliably analyzed relevant (rather than arbitrary) data. *Engilis v. Monsanto Co.*, 151 F.4th 1040, 1048 (9th Cir. 2025).[2] Publishers also suggest this use of arbitrary samples to draw unsupported conclusions is business as usual for scientific experts. Opp. 6-7. Not so. Courts have excluded expert's percentages and other figures based on less serious defects to guard against juror confusion. In *Fahmy v. Jay Z*, the court excluded an expert's superficially precise percentages based on "a substantial risk that the jury will attach

[2] Contrary to Publishers' suggestion, Opp. 8, Dr. Bray did not confirm that Mr. Dennis analyzed all relevant records. Howell Decl. Ex. 3 (Bray Dep.) at 99:18-100:16, Dkt. 735-4.

PUBLIC REDACTED VERSION

undue weight to the numbers provided." 2015 WL 5680299, at *5 (C.D. Cal. Sept. 24, 2015). And in *In re Baby Food*, the court excluded an expert's "figures" and "estimate[s]" where their reliance on flawed assumptions risked misleading the jury. 2026 WL 559857, at *13. Mr. Dennis's use of an arbitrary denominator renders his percentages meaningless. The Court should exclude them because they can serve no purpose except to mislead the jury.

Finally, Publishers' offer to limit the scope of Mr. Dennis's opinions does not reduce the risk of jury confusion. A party cannot put an expert on the stand to offer misleading testimony to a jury by agreeing that they will admit that they had no valid basis for the testimony to begin with. That is precisely what courts routinely exclude at *Daubert*. *See, e.g.*, *Fahmy*, 2015 WL 5680299, at *5. Nor can Mr. Dennis's opinions be cabined as Publishers suggest. Mr. Dennis offers sweeping conclusions about Anthropic's guardrails, which he calls "[redacted]," based on his review of the records hand-picked by counsel. Opp. 8-9; Dkt. 666-2 at ¶ 144. And Publishers' insistence that "every lyric-related Claude output Dennis analyzed necessarily reflects an output Anthropic's then-existing guardrails did not block," Opp. 8, reveals that their goal is to use Mr. Dennis to guide the jury to unsupported conclusions about guardrail efficacy based on these statistics. Mr. Dennis cannot blunt the damage from his misleading figures by acknowledging that the records are not representative samples of the record universe. *Id.* at 9. In fact, he only admitted the Sample Song Records were not representative after sustained cross-examination at his deposition. *See* Dkt. 666-4 at 78:21-80:18. Publishers argue that Mr. Dennis should at least be able to present the jury with his "raw counts." Opp. 9-10. But because Mr. Dennis offers no meaningful context for these numbers, the risk that the jury will attach undue weight to them warrants exclusions. *Id.*

III. Any Opinions Relying On Mr. Dennis Should Be Excluded

Publishers do not deny that their experts Dr. Shan, Dr. Zhao, and Dr. Smith relied on Mr. Dennis's flawed conclusions. Opp. 10. Anthropic's request to exclude "any opinions of [those] experts that rely" on Mr. Dennis's opinions should thus be granted as well. *See* Mot. 1.

CONCLUSION

For the foregoing reasons, the Court should exclude the testimony of Mr. Dennis in full, along with the specific opinions of other Publisher experts that rely on it.

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Date: August 18, 2026

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

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