March 24, 2022

Via ECF
The Honorable Edward M. Chen,
U.S. District Court for the
Northern District of California,
San Francisco Courthouse, Courtroom 5
450 Golden Gate Avenue,
San Francisco, CA 94102

Re: Joint Letter Brief Regarding Defendants' Responses to Plaintiff's First Set of Requests for Production, *Brooks et al v. Thomson Reuters Corporation*, Case No. 3:21-cv-01418-EMC

Dear Judge Chen:

The parties respectfully submit this joint letter brief addressing one discovery dispute in the above-referenced case. After meaningfully conferring by phone and in writing, lead trial counsel for Plaintiffs has concluded no agreement can be reached on this issue.

Respectfully Submitted,

/s/ Andre M. Mura
Counsel for Plaintiffs

/s/ Susan D. Fahringer
Counsel for Defendant

Plaintiffs' Statement: Plaintiffs request that the Court compel Thomson Reuters to produce all of its data-licensing agreements for CLEAR.[1] These agreements enable Thomson Reuters to create its 360-degree view of Californians. For months, Thomson Reuters has refused to produce them. Only after Plaintiffs served their portion of this letter brief for the *second* time did Thomson Reuters agree to produce some of those agreements—but still, the company insists on carving out all those whose terms restrict disclosure. That's many, if not most, of the agreements: Thomson Reuters' model licensing agreement contains a confidentiality provision, and the company has confirmed that this provision is in many of its agreements. But the law does not allow parties to shield documents from discovery simply by inserting a confidentiality provision.

"[C]onfidentiality agreements alone do not shield information from discovery." *In Re: Vizio, Inc., Consumer Privacy Litig.*, No. 8:16-ML-02693, Dkt. 260 at 14 n.6 (C.D. Cal. Feb 5. 2018) (compelling disclosure of unredacted licensing agreements). "To conclude" otherwise "would clearly impede the truth-seeking function of discovery in federal litigation as all individuals and corporations could use confidentiality agreements to avoid discovery." *I.E.E. Int'l Elecs. & Eng'g, S.A. v. TK Holdings Inc.*, 2013 WL 12183637, at *1 (E.D. Mich. June 24, 2013) (cleaned up); *Chevron Mining Inc. v. Skanska USA Civ. W. Rocky Mountain Dist., Inc.*, 2019 WL 11556844, at *1 (N.D. Cal. Sept. 13, 2019); *see In re Application of O'keeffe*, 2016 WL 2771697, at *4 (D. Nev. Apr. 4, 2016). If any information actually warrants protection from public disclosure, the "protective order . . . will . . . protect [that] information." *Vizio*, Dkt. 260 at 14; *Seegert v. Rexall Sundown, Inc.*, 2019 WL 12044514, at *8 (S.D. Cal. Mar. 26, 2019).

Thomson Reuters asserts that it would be disproportionate to the needs of the case to produce all of its agreements, but it cannot substantiate this conclusory assertion. Its data-sharing agreements—unavailable from any other source—are critical sources of information about what data Thomson Reuters collects, shares, and sells, with whom, and under what terms—and thus they are highly relevant to the claims and defenses. Compl., Dkt. 1-1; Answer, Dkt. 60 ¶¶ 1-4. For example, Thomson Reuters has maintained that much of the information in CLEAR is public—these agreements will shed light on whether that's true. The omission of some—and potentially most—of the agreements would significantly impede Plaintiffs' ability to understand the data Thomson Reuters is using, where it comes from (and on what terms), and to assess the privacy impact of CLEAR on consumers. Indeed, Thomson Reuters itself all but concedes the agreements are relevant. And it has not identified any real burden that producing the agreements under a court order would impose. *Cf. Hinds v. FedEx Ground Package Sys., Inc.*, 2019 WL 11201544, at *2 (N.D. Cal. Mar. 8, 2019) (rejecting belated and unsubstantiated proportionality objections); *Francisco v. Emeritus Corp*., 2017 WL 11036693, at *6 (C.D. Cal. Sept. 5, 2017) (collecting cases rejecting requests to limit discovery based on the producing party's views of relevancy).

After refusing to comply with plaintiffs' request for months, Thomson Reuters has now proposed for the first time—weeks before the expert disclosure deadline—that it notify all its data partners and seek permission to produce the agreements. Of course, those partners might not agree or respond in a timely fashion (if at all). There is no legal support for allowing Thomson Reuters—or its partners—to control discovery. Nor is there any support for the contention that a party can manufacture a burden objection through self-imposed confidentiality restrictions—a burden which would nonetheless be resolved if the Court orders production. Nothing more is needed. This Court should reject the company's last-minute effort to further delay production.

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[1] *See* Pls.' RFP 9 ("All Agreements between You and any vendor, licensor, licensee, government agency, private entity, or third-party aggregator that may be a source of information available through CLEAR.").

Defendant's Statement: CLEAR is a research tool that allows Thomson Reuters customers—once they have been validated as a legitimate business entity with an appropriate use case, and have certified that they have a permissible and lawful purpose for every search they conduct—to search data that is provided by third-party licensors. This dispute centers on the license agreements between these third-party licensors and Thomson Reuters ("TR"). TR has agreed to produce the agreements, subject to a procedure that allows it to comply with the agreements' requirements. The parties' impasse regards *how* (not *whether*) the license agreements should be produced.

There are over 100 such agreements. As TR has (repeatedly) explained to Plaintiffs, the agreements' terms, including their confidentiality provisions, are far from uniform. Some of the agreements do not include any confidentiality restrictions. Those agreements will be produced, and TR anticipates doing so before month's end. But over 80 agreements include confidentiality restrictions, and those can vary. Some require advance notice before disclosure of their terms, so that the third-party licensor has the opportunity to object to production. Some (but not all) allow for production without notice following a court order. TR's template agreement confidentiality language is not widely used.

TR has proposed a process that will allow it to produce the agreements consistent with TR's obligations: TR will follow the contracts' requirements, producing those that can be produced without advance notice and consent, and advising Plaintiffs if TR encounters issues impeding production so that the parties can confer and escalate to this Court any disputes that remain.

TR's proposal is reasonable and appropriate. It will allow for production of many, perhaps the vast majority, of these agreements. It will allow the parties—and the Court—to focus on the subset of agreements (if any) as to which production is impeded, so that the Court can consider the unique features and terms of any particular disputed agreement. It will allow TR to comply with its contractual obligations. And it will not prejudice Plaintiffs, including because they already have ample documentation regarding the issues they identify as relevant (for example, model license agreements; a library of sample contract provisions; current and historic versions of the Supplier Additional Terms & Disclaimers, which detail contractual restrictions on data provided by specific licensors; a broad array of reports and source records showing the types and sources of information available through CLEAR; and CLEAR User Guides, Guidelines and many other documents discussing restrictions on the use of CLEAR).

Finally, this approach will not cause undue delay, because any urgency associated with this dispute is of Plaintiffs' own making. Discovery does not close until May 2023. Plaintiffs' motion for class certification is not due until October 2022. And although Plaintiffs allude to their experts' need for these agreements, Plaintiffs have known since December that TR objected to unqualified production of all license agreements, and the original expert disclosure deadline was March 1, yet the first TR heard of this need was on March 15, when TR saw this argument in Plaintiffs' insert to this letter brief. (On February 28, 2021, TR agreed to Plaintiffs' request for an extension of case deadlines, solely to account for Plaintiffs' lead counsel's jury service.) There are no agreed informal deadlines, either, and throughout this case, TR has been clear and transparent regarding what it expected to produce, the timing of that production, and the variables that could impact those timeframes (such as search terms and custodians).

Plaintiffs' position is neither reasonable nor supported by the cases they cite. None of those cases involves a party that agreed to produce documents subject only to taking steps to comply with its contractual obligations. In *Vizio*, a case regarding Vizio's alleged disclosure of consumer data to third parties, the discovery dispute centered on whether Vizio could redact its agreements with data licensees, to prevent discovery of the identities of those licensees. Vizio argued that redactions were proportional based on a previously unasserted argument about the "business burden[s]" associated with subjecting certain third parties to discovery. *Vizio* Order at 14. The Court held that relevance of the information outweighed this asserted burden. *Id.* But TR is not seeking to redact the identities of its data licensors, only to discharge its contractual obligations to them. And in *Seegert*, the procedure adopted was essentially what TR proposes here: the parties did not escalate any dispute until after the defendant was unsuccessful in securing consent to the disclosure of protected data, at which point the court examined the individual contracts, found that production was permitted under two particular contracts, and ordered production with respect to the remaining contracts only after giving the affected businesses "an opportunity to move for a protective order in this matter prior to production." *Seegert*, 2019 WL 12044514, at *8.

Accordingly, TR respectfully requests that the Court defer ruling on this dispute until the parties can identify which, if any, of the 80+ unique license agreements cannot be produced consistent with their terms and therefore remain in dispute. At that point, the Court can consider the remaining disputed agreement(s), if any, including the circumstances precluding disclosure and relevance of the agreements to plaintiffs' claims, and assess whether compelling production is appropriate, and under what conditions. In the alternative, if the Court orders the blanket disclosures of license agreements that Plaintiffs request, TR asks the Court to permit TR to provide advance notice to the third-party licensors to give them an opportunity to object, and also to specify in its order that if Plaintiffs or their representatives disclose license agreement information in violation of the parties' Protective Order, then Plaintiffs will face severe sanctions.

Plaintiffs' Reply: Thomson Reuters' ("TR") statement that this impasse regards only *how* the agreements are produced ignores that it refused to produce *any* agreements for months. Instead, after receiving an early draft letter brief, TR offered attorney-filtered exemplar agreements and summaries, representing that "many" agreements barred production. TR now says, for the first time, "many" do *not* bar production—yet it still has produced zero agreements and has not notified any of its partners that it is preparing to produce agreements in this litigation.

Its total failure to do so should not prejudice Plaintiffs' class certification expert's timely review of these materials. The agreements are vital sources of information about the licensing of data, and TR has not produced sufficient information to fill those gaps. The parties have been working through this dispute since January (well before the previous expert disclosure deadline); Plaintiffs identified RFP 9 as a priority in January and continued to discuss its importance thereafter. TR insisted this dispute was not ripe and asked to keep negotiating; and the parties agreed to a schedule change for other reasons. TR has collected the agreements and can produce them immediately—and certainly before the current May 2 class certification expert deadline.

TR's statement that it has until the close of fact discovery in 2023 to produce documents responsive to requests served in 2021 is unreasonable. *See Patagonia, Inc. v. Anheuser Busch, LLC*, 2020 WL 6260018, at *1 (C.D. Cal. Feb. 19, 2020). Besides, Plaintiffs took down a dispute in February over TR's production timing based on its promises that productions would be substantially completed by March 31, 2022 *and* that it would ramp up its production. It is troubling that TR has not abided by this schedule.

As we have explained, courts have consistently held that parties cannot use confidentiality agreements as roadblocks to discovery. And *Seegert* does not help TR—the court there concluded, contrary to TR's position, that third-party confidentiality agreements *do not* limit a party's discovery obligations. 2019 WL 12044514, at *7. The only difference in *Seegert* was that the parties jointly agreed to a protective order setting out a notification-and-objection procedure. *Id.* at *4. With no such agreement here, TR has no legal or procedural basis for its position.