June 23, 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 Defendant's Responses to Plaintiffs' Second 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: Thomson Reuters should produce credentials that would permit Plaintiffs to access and search CLEAR.[1] CLEAR is an interactive platform that allows paying customers to view information about Californians through customizable reports, dashboards, and other tools. The user experience is an important aspect of a software product, *see Apple Computer, Inc. v. Microsoft Corp.*, 799 F. Supp. 1006, 1023 (N.D. Cal. 1992), and discovery to date shows that CLEAR's user interface is important to its customers and relevant to Plaintiffs' claims. TR, of course, has access to CLEAR, but Plaintiffs do not—despite offering to pay for it. This leaves the parties to dispute the operation of a platform that only one party can see. TR should not be permitted to so shroud the product that is the subject of this litigation.

TR raises three objections to producing the requested account information, but none has merit. First, TR objects that this request may provide Plaintiffs with access to private personal information of individuals other than the named plaintiffs. Plaintiffs agree that this information is private. That is the central point of this lawsuit—TR sells this private information to third parties. Regardless, TR cannot now claim that producing the same information in discovery, under the parties' joint protective order, Dkt. 70, violates Californians' privacy rights.

Second, Plaintiffs' request is not cumulative, despite what TR says. While TR has produced marketing images and certain documents showing—in part—how customers interact with CLEAR, those materials are not an adequate substitute for the information gained from experiencing how the product works from a customer's perspective. Nor have Plaintiffs been able to review unredacted CLEAR reports for individuals other than the named Plaintiffs, as TR has refused to produce them under the same privacy objection. And while Plaintiffs at one time retained pre-suit investigators who had temporary, and limited, access to CLEAR, those investigators are no longer involved in the case.

Third, TR objects that Plaintiffs asked for account access in the wrong way. But Plaintiffs have asked every which way. Plaintiffs requested the information available through CLEAR in both interrogatories and requests for production. After months of negotiation, TR took the position that, if Plaintiffs sought access, they must serve a request specifically seeking access credentials. Plaintiffs then did so, but TR continues to refuse to provide them, despite its obligation to produce "information that is stored in a medium from which it can be retrieved and examined," including "forms far different from fixed expressions on paper." Fed. R. Civ. Proc. 34 advisory committee notes to 2006 amendments. TR does not meaningfully dispute that the information sought by Plaintiffs' RFP 36 exists, and courts have ordered the production of account access credentials even if those credentials have not been reduced to paper. *See Chapman v. Hiland Operating, LLC*, 2014 WL 2434775, at *1–2 (D.N.D. May 29, 2014); *Tech. Sales Inc. v. Dresser, Inc.*, 2007 WL 9729125, at *3 (D.N.M. Sept. 13, 2007); *Get Seen Media Grp., LLC v. Tiller*, 2021 WL 5083741, at *3, 8 (C.D. Cal. June 23, 2021); *CSPC Dophen Corp. v. Zhixiang Hu*, 2018 WL 4191491, at *2 (E.D. Cal. June 26, 2018); *Garrison v. Ringgold*, 2020 WL 6537389, at *2 (S.D. Cal. Nov. 6, 2020). TR has provided no reason why it is unable to produce, from its electronic files, the information Plaintiffs seek.

Accordingly, Plaintiffs request that the Court order Thomson Reuters to produce, in response to Plaintiffs' RFP 36, information sufficient for Plaintiffs to access and search CLEAR.

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[1] Plaintiffs' RFP 36 seeks "[a]ll information necessary (i.e., username, password, account registration key, etc.) for Plaintiffs to access and search CLEAR."

Defendant's Statement: Plaintiffs ask, in a request for production, for "credentials that would permit Plaintiffs to access and search CLEAR," ostensibly to better understand the user interface of CLEAR and how CLEAR works. Plaintiffs admit that they *had* access to CLEAR, through their investigators, but they are dissatisfied with it in part because the access was "limited." Plaintiffs now seek the *unfettered* access that is implied by the allegations in the Complaint.

But the product described in the Complaint, with the unlimited access that Plaintiffs seek, exists only in Plaintiffs' imaginations. In reality, CLEAR is a platform that is specifically designed with multiple layers of privacy and data protection that work before, during, and after a subscriber's use of the platform to ensure that the subscriber may access only data to which it is otherwise legally entitled—as plaintiffs' own investigators apparently discovered, as multiple courts have held,[2] and as the more than 275,000 pages of documents that Thomson Reuters ("TR") produced and multiple depositions of TR personnel that have been taken in this case all consistently and plainly show. And these restrictions are necessary—and should not be stripped from the platform—not only because they are integral to the platform's operation, but also because unlimited access to the data available through CLEAR could run afoul both of privacy laws that regulate access, use, and disclosure of that data through CLEAR,[3] and the licenses granted to certain data.

It is therefore the very "operation of the platform" that plaintiffs seek to *bypass* when they ask for uniquely unfettered access to CLEAR. Plaintiffs already have mountains of information about the operation and user interface of CLEAR: TR has produced reams of documents and videos about every aspect of CLEAR's operation and user interface, which Plaintiffs' own investigators have apparently verified through their own use of the platform (which they apparently videoed[4]). Plaintiffs have not explained what additional information about the CLEAR "user experience" they need to pursue their claims, why they need *unredacted* CLEAR reports on other putative class members to understand the user interface, or why their investigators' prior access to CLEAR is insufficient. Had Plaintiffs truly sought *more* information about CLEAR's user interface, they should have asked for it in discovery, yet not one of their 19 interrogatories and 48 RFPs even mentions the term.

This is no surprise, because the way CLEAR actually works does not serve Plaintiffs' narrative. They would prefer to ignore the true operation of CLEAR so that they can "access" and "search" the data it contains without restriction, to mine it for a parade of horribles and continue to falsely portray the product as a motherload of data, offered for sale to anyone who will pay. Plaintiffs' request is not unlike stripping a product of its safety features so they can decry that product as inherently dangerous.

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[2] *Kidd v. Thomson Reuters Corp.*, 925 F. 3d 99, 108 (2d Cir. 2019) (recognizing CLEAR's "numerous … controls" intended to prevent "misuse of the [] platform"); *Kidd v. Thomson Reuters Corp.*, 299 F. Supp. 3d 400, 407 (S.D.N.Y. 2017) (describing the "affirmative steps–through both words and actions–at every stage," to prevent subscribers from "abusing the platform," including customer vetting, certifications, and agreements).

[3] *E.g.*, the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 et seq., the Driver's Privacy Protection Act, 18 U.S.C. § 2721 et seq., and state voter-identification laws.

[4] Plaintiffs recently produced an expert report referring to a "[v]ideo of [a] sample CLEAR search" taken by "Quest Research & Investigations." Plaintiffs have not produced the video to TR.

Plaintiffs' stated justification for their request—that they need such access to learn about CLEAR's "user experience"—is pretextual. Plaintiffs' request for CLEAR credentials originally arose during meet and confer efforts about their request for "information in or accessible through CLEAR as it relates to putative class members."[5] Only after TR expressed concern about giving Plaintiffs unfettered access to personal data and objected that it had already produced voluminous sample reports, redacted-PII reports, and Plaintiffs' own unredacted reports, all of which should fully address any legitimate need to understand what data are available through CLEAR, that Plaintiffs invented the need for special credentials to further evaluate the CLEAR "user experience." Finally, Plaintiffs argue that it is *TR* that insisted they seek credentials in an RFP, but that is not so. Plaintiffs asked for special credentials informally; counsel for TR responded by reminding Plaintiffs that their investigators appeared to have had access to CLEAR (because it was they who conducted the searches that formed the basis for the Complaint), then invited Plaintiffs to make their request formally so that TR could consider it and respond appropriately.

All of these reasons explain why there *is* no document responsive to the RFP at issue here—an existing document that would give Plaintiffs unfettered access to CLEAR. TR is not required to create access credentials in response to a document request, *Van v. Wal-Mart Stores, Inc.*, No. C08-5296 PSG, 2011 WL 62499, at *1 (N.D. Cal. Jan. 7, 2011) ("A party responding to a Rule 34 document request cannot be compelled to prepare or create new documents."), and even the authority Plaintiffs cite supports TR's position, not theirs. TR has fully responded to RFP 36, and respectfully requests that the Court deny the relief Plaintiffs seek.

Plaintiffs' Reply: For all its talk of the dangers of unfettered access, the reality is TR refuses to provide Plaintiffs *any* access to CLEAR. TR claims that Plaintiffs, if allowed to view CLEAR content, will paint an inaccurate picture of the platform. But if TR disagrees with how Plaintiffs portray CLEAR, it may contradict that portrayal—it may not deny Plaintiffs access to relevant evidence. In fact, TR does not cite a single case that challenged the legality of a product, in which the defendant was permitted to deny the plaintiff access to that product.

TR baldly asserts "unlimited access" to CLEAR would somehow violate privacy laws, but it does not even attempt to explain how allowing access in a civil proceeding to litigants bound by a protective order would do so. *See, e.g.*, *RQ Const., Inc. v. Ecolite Concrete U.S.A.*, 2010 WL 3069198, at *2 (S.D. Cal. Aug. 4, 2010) (citing 15 USC § 6802(e)(8)); 18 U.S.C. § 2721(b)(4). In any event, Plaintiffs do not seek unfettered access to all of TR's data; they seek access on par with TR's customers (which include law firms), who obtain unredacted information.

Nor is this request pretextual or cumulative. A thorough understanding of CLEAR (and the user experience) is relevant to Plaintiffs' Unfair Competition Law claim. Handpicked, redacted reports, screenshots, and technical specifications that TR chooses to disclose are not an adequate substitute, nor are videos or product demos. *See Broker Genius, Inc. v. Zalta*, 280 F. Supp. 3d 495, 518-20 (S.D.N.Y. 2017). To date, TR has categorically refused to produce unredacted CLEAR content of putative class members, so none of this discovery would be unreasonably cumulative.

Finally, TR suggests that a document request is not the right way to request access. This is form over substance: Plaintiffs have made this request through every possible avenue, and still TR has refused. Ultimately, the parties should not be left to dispute a platform that only one side can access.

[5] Quoting Plaintiff's letter to TR dated Feb. 18, 2022.