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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CAT BROOKS and RASHEED SHABAZZ, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

THOMSON REUTERS CORPORATION,

Defendant.

Case No. Case No. 3:21-CV-01418-EMC

NON-PARTY FILE & SERVEXPRESS, LLC'S NOTICE OF MOTION AND MOTION FOR LIMITED INTERVENTION AND FOR PROTECTIVE ORDER; MEMORANDUM OF POINTS AND AUTHORITIES

Date: June 30, 2022
Time: 1:30 p.m.
Location: Courtroom 5, 17th Floor
Judge: Hon. Edward M. Chen

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on Thursday, June 30, 2022 at 1:30 p.m., or as soon thereafter as this mater may be heard before the Honorable Edward M. Chen in Courtroom 15 – 17th Floor of the above- captioned Court, located at 450 Golden Gate Avenue, San Francisco, California 94102, Non-Party File & ServeXpress, LLC will and hereby does move this Court for an Order prohibiting Defendant Thomson Reuters from producing the Service Agreement that exists between FSX and West Publishing Corporation ("West"), which governs FSX's provision of services to West with respect to material filed in the state courts of the State of Delaware.

This Motion is made pursuant to Federal Rule of Civil Procedure 26(c), as well as Section 9 of the Court's Stipulated Protective Order, filed in the above-captioned litigation on December 17, 2021 (Dkt. 70). This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the concurrently filed Declaration of Tamerlane Carter, any oral argument that may be heard, the complete files and record of this action, and such other and further matters as the Court may properly consider.

DATED: April 25, 2022

FOLEY & LARDNER LLP
Alan R. Ouellette

/s/ Alan R. Ouellette
Alan R. Ouellette
Attorneys for Non-Party
File & ServeXpress, LLC

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Non-Party File & ServeXpress, LLC ("FSX") files this motion for limited intervention and for protective order. FSX petitions this Court for an Order prohibiting Defendant Thomson Reuters from producing the Service Agreement that exists between FSX and West Publishing Corporation ("West"), which governs FSX's provision of services to West with respect to material filed in the state courts of the State of Delaware.[1] FSX petitions this Court for an order of protection pursuant to Federal Rule of Civil Procedure 26(c), as well as Section 9 of the Court's Stipulated Protective Order, filed in the above-captioned litigation on December 17, 2021 (Dkt. 70).

As a threshold matter, the Service Agreement is not relevant to the underlying litigation such that it is not discoverable pursuant to Rule 26. Even if the Service Agreement is relevant, it is highly confidential and contains FSX's proprietary information, including its service and pricing models. *See* Declaration of Tamerlane Carter ("Carter Decl."), at ¶ 9. Indeed, by its own terms it is to be maintained as confidential between the two parties to it—FSX and West.[2] *See Id.* at ¶ 11. Consequently, this court should prohibit its disclosure via a protective order as authorized by Rule 26(c).

II. Statement of Issues to be Decided

1. Whether the Services Agreement is irrelevant to the underlying litigation such that FSX is entitled to a protective order pursuant to Rule 26(c).

2. Whether the Services Agreement is confidential and proprietary such that FSX is entitled to a protective order pursuant to Rule 26(c).

III. Background

Plaintiffs Cat Brooks and Rasheed Shabazz filed suit against Defendant Thomson Reuters Corporation in California State Court on December 3, 2020, for purported violations of California state law. *See* Plaintiffs' Class Action Complaint, Dkt. 1-1. Thomson Reuters removed Plaintiffs' lawsuit to the Northern District of California. *See* Defendant Thomson Reuters Corporation's Notice of Filing of

[1] *See* Carter Decl., ¶ 6. Upon the Court's request, FSX will provide a copy of the Service Agreement for the Court's *in camera* review.

[2] West Publishing Corporation is a subsidiary of Defendant Thomson Reuters Corporation.

Removal and Removal to Federal Court, Dkt. 1. Plaintiffs purport to sue on behalf of nearly all of the citizens of the State of California. *See* Dkt 1-1 at ¶ 70.

The causes of action alleged in Plaintiffs' Class Action Complaint can be organized into three distinct categories: 1) violations of California's common law right to publicity/misappropriation of likeness, 2) violations of California's codified Unfair Competition Law, and 3) unjust enrichment. *See Id.* at ¶ 81, *et seq*. Upon motion from Thomson Reuters, this Court dismissed Plaintiffs' claims for violations of the right of publicity. *See* Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, Dkt. 54. Plaintiffs' claims for violations of California's Unfair Competition Law and for unjust enrichment remain. *Id*. In contrast to Plaintiffs' Complaint, which asserts violations of California law against California citizens, the Service Agreement at issue in this Motion speaks only to FSX's provision of services to West with respect to information and material which originates from filings made in three Delaware state courts. *See* Carter Decl., ¶ 6. The Service Agreement does not contemplate any access by FSX to any material from California. *See Id*. at ¶ 7.

Plaintiffs' Class Action Complaint does not allege that Thomson Reuters collected the information about which Plaintiffs complain from FSX. *See* Dkt. 1-1. Likewise, Plaintiffs' Class Action Complaint does not allege that any of the information whose dissemination they contest was collected from any of the courts of the State of Delaware. *Id*. Indeed, at the heart of Plaintiffs' Complaint is a concern about Thomson Reuters' *dissemination* of Plaintiffs' personal identifying information, rather than a complaint about how Thomson Reuters obtains it. *Id*.

IV. Argument

FSX moves to intervene in the instant litigation for the limited purpose of challenging the discoverability of the Service Agreement. A motion to intervene is the appropriate procedural vehicle for a non-party, like FSX, to object to Defendant Thomson Reuters' impending production of the Service Agreement, where FSX contends that such agreement is not relevant, not discoverable, and is entitled to be shielded from discovery. *See Beckman Industries, Inc. v. International Ins. Co*., 966 F.2d 470, 472 (9th Cir. 1992) ("Nevertheless, there is ample support for intervenor's argument that courts also recognize Rule 24(b) intervention as a proper method to modify a protective order."). *See also Center for Food Safety v. Sanderson Farms, Inc.,* Case No. 17-cv-03592-RS(SK), 2019 WL 8356293, *3 (N.D. Cal. Mar.

12, 2019) ("A third party may intervene to seek a protective order.").

The Service Agreement addressed in this Motion bears no rational relation to the case at bar. It was not entered into in California, it does not concern California citizens, and it does not control or inform the distribution of information from California courts. *See* Carter Decl., ¶ 7. Plaintiffs Cat Brooks and Rasheed Shabazz have neither pleaded nor shown Thomson Reuters obtained any of the personal identifying information about which they now complain as a consequence of the Service Agreement. *See* Dkt. 1-1. Consequently, the Service Agreement makes no fact of consequence in this litigation more or less probable. In other words, it is irrelevant. Fed. R. Evid. 401. While courts construe Federal Rule of Evidence 26 broadly, it is not boundless. Rule 26 sets limits on pretrial discovery to only that which is relevant to the underlying litigation. Fed. R. Civ. P. 26(b)(1). Moreover, Rule 26(c) authorizes the Court to issue a protective order to prevent Thomson Reuters' production of FSX's confidential and proprietary information contained in the Service Agreement.

A. FSX Should be permitted to intervene in this litigation for the limited purpose of preventing the production of the Service Agreement.

This Court recently opined that, "a third party is not without recourse in this case. It may move to intervene in this litigation to block the requested discovery, should it be so inclined." *See* Order re Parties' Joint Discovery Letter Brief of March 2, 2022, Dkt. 82 at p. 2. In support of the foregoing, the Court cited to *Chevron Mining Inc. v. Skanska USA Civ. W. Rocky Mountain Dist., Inc.*, No. 19-CV-04144-LB, 2019 WL 11556844, *1 (N.D. Cal. Sept. 13, 2019). *Chevron Mining*—as the Court's March 25, 2022 order acknowledges—illustrates that limited, permissive intervention by a non-party, for the purpose of seeking protection from the disclosure of confidential materials is appropriate. *See Id. See also Center for Food Safety,* 2019 WL 8356293 at *3 ("A third party may intervene to seek a protective order.").

Similarly, and pursuant to the same authority cited in *Chevron Mining,* FSX moves this Court for an order permitting it to intervene in this litigation for the limited purpose of requesting a protective order with respect to the Service Agreement addressed herein. The Service Agreement contains confidential and proprietary information that will cause a particularized harm to FSX and its business affiliates should the Service Agreement be produced. Therefore, FSX respectfully requests it be permitted to "move to intervene in this litigation to block the requested discovery." See Dkt. No. 82 at p. 2.

B. The Service Agreement is irrelevant and outside the scope of discovery.

The at-issue Service Agreement is not relevant to Plaintiffs' Complaint, which alleges only violations of California law purportedly perpetrated against California residents. FSX's provision of materials from Delaware state courts to an affiliate of Defendant Thomson Reuters will make no fact of consequence in the instant litigation more or less probable. Fed. R. Evid. 401. Federal Rule of Civil Procedure 26(b)(1) provides that only relevant information is discoverable. Where material requested in discovery is determined to be irrelevant, it "fall[s] outside the scope of discovery articulated in Federal Rule of Civil Procedure 26(b)(1)." *Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 438–39 (9th Cir. 1992).

Nugget Hydroelectric is instructive. There, Plaintiff Nugget requested all documents from Defendant Pacific "concerning every aspect of PG&E's relationships with private power suppliers," despite the fact that the allegations Nugget sought to prove with the requested material related only to a much narrower subset of projects than that which was contemplated by the discovery request. *Id*. at 438. The District Court held, and the Ninth Circuit affirmed, that most of the documents that Nugget requested fell outside the scope of discovery as articulated in Rule 26(b)(1). *Id*. Production of the Service Agreement here would be analogous to the production of materials sought in *Nugget Hydroelectric*. There, Nugget sought all information related to Pacific's relationship with all of its private power suppliers, even though the allegations it sought to prove up with the requested material related to only a few specified projects. *Id*. In essence, the needs of the case did not justify the breadth of the requested document production.

Here, the needs of Plaintiffs' case, wherein the only allegations made relate to violations of California law against California citizens, do not implicate, much less justify the production of, the Service Agreement, which does not relate to California at all. *See* Carter Decl., ¶ 7. Consequently, the Service Agreement "fall[s] outside the scope of discovery articulated in Federal Rule of Civil Procedure 26(b)(1)." *Nugget Hydroelectric, L.P.*, 981 F.2d at 438.

C. The court should enter a protective order under Rule 26(c) to forbid disclosure of the Service Agreement.

Rule 26(c) provides that a court may issue a protective order—on a showing of good cause—to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed.

R. Civ. P. 26(c)(1). To demonstrate good cause, a party must show "(1) that the documents in question truly are confidential and (2) that disclosure of the documents would cause a 'clearly defined and very serious injury.'" *Welsh v. City & Cnty. of San Francisco*, 887 F. Supp. 1293, 1297 (N.D. Cal. 1995) (*quoting Traveler's Ins. Co. v. Allied–Signal Inc. Master Pension Trust*, 145 F.R.D. 17, 18 (D. Conn. 1992)).

Rule 26(c) vests the Court with broad discretion to balance privacy concerns and the interests of full disclosure via pretrial discovery through the use of protective orders. Because "the fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively public[,] Rule 26(c) authorizes a district court to override this presumption where 'good cause' is shown." *San Jose Mercury News, Inc. v. U.S. Dist. Court—N. Dist. (San Jose)*, 187 F.3d 1096, 1103 (9th Cir. 1999). Further, "it is clear from experience that pretrial discovery … has significant potential for abuse." *Seattle Times Co. v. Rinehart*, 467 U.S. 20, 34 (1984). "This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants *and third parties*." *Id*. at 34-35 (emphasis added). The trial court is in the best position to weigh fairly the competing needs and interests of the parties affected by discovery. *Id*. at 36. Rule 26(c) grants courts great latitude to enter protective orders that appropriately balance the right to information through tools of discovery, and the prohibition of access to confidential information that is outside the scope of litigation. *See Id.* Courts are empowered to tailor the protective order to the needs of the case, up to and including forbidding the disclosure of the requested material. Fed. R. Civ. P. 26(c)(1)(A).

Here, the Service Agreement should be completely protected from disclosure—rather than simply marked as "CONFIDENTIAL," or even "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY"—because the confidential and proprietary information contained within the Service Agreement pertains to non-parties to the instant litigation. Further, the Service Agreement does not involve any of the parties to this litigation, and involves an additional non-party entity by its terms: the State of Delaware. Neither FSX nor West nor the State of Delaware are parties in this matter, and their conduct has not been implicated by Plaintiffs' Class Action Complaint. The relationship between West and FSX, as outlined in the Service Agreement, is tangential at best to the instant litigation, such that those non-party-entities' privacy rights in preserving the confidentiality of the contract that governs the relationship between them should be

maintained. *See Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (acknowledging the public's lesser need for access to court records that are only tangentially related to the underlying cause of action).

Moreover, producing the Service Agreement pursuant to the Stipulated Confidentiality Order, even with the most restrictive confidentiality label affixed, will not necessarily prevent the use of the Service Agreement in subsequent public filings. *Id*. at 1183 ("Thus, the [non-party] should have been on notice that confidential categorization of discovery documents under the protective order was not a guarantee of confidentiality, especially in the event of a court filing."). Additionally, even materials marked "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY," can still be disclosed to a party's outside counsel, in-house counsel, experts, the court and its personnel, court reporters and their staff, jury consultants, and/or mock jurors. See Dkt. 70 at Section 7.3. In light of the risk that the Service Agreement could be disclosed in one or more of the foregoing ways, the only way to safeguard the Service Agreement from disclosure is to prohibit its production in this litigation, particularly given that it is irrelevant to any issue in dispute.

1. Good cause exists to prohibit the production of the Service Agreement because its disclosure will cause particularized harm to FSX.

FSX will suffer particularized harm if Thomson Reuters is permitted or required to produce the Service Agreement because it is confidential and proprietary. *See Todd v. Tempur-Sealy Int'l, Inc.*, Case No. 13-cv-04984-JST (MEJ), 2015 WL 1006534, *3 (N.D. Cal. Mar. 6, 2015) ("[T]he Court finds that Defendant has shown a particularized harm that can result from disclosure of the challenged materials to the public—namely, that competitors would be able to see Defendant's strengths and weaknesses, and use its business strategies to their own benefit or to Defendant's detriment."). *See also Muench Photography, Inc. v. Pearson Educ., Inc*., Case No. 12-cv-01927-WHO, 2013 WL 4475900, *4 (N.D. Cal. Aug. 15, 2013) (finding particularized harm where the disclosure of the material sought to be protected could enable the movant's competitors to "use its business strategies to their own benefit.").

The Service Agreement contains detailed information about a non-party's (FSX) provision of services to a second non-party (West), including the sources of the material from a third non-party (the State of Delaware) FSX provides to West, the terms of FSX's provision of services, the frequency with which FSX provides said materials, and the costs associated with FSX's provision of services. *See* Carter

Decl., ¶ 9. Each of these particulars, as well as the manner in which FSX combines them to provide the services it provides attendant to the Service Agreement, is confidential and proprietary to FSX. *AIS GmbH Aachen Innovative Sols. v. Thoratec LLC*, Case No. 16-mc-80094-EJD (SVK), 2021 WL 292173, *3 (N.D. Cal. Jan. 28, 2021) (determining that the public disclosure of the numerous confidential features of a medical device would result in particularized harm). *See also* Carter Decl., ¶¶ 8-10.

Moreover, the Service Agreement has not been publicly disclosed. *See Id*. at ¶ 11. This fact weighs in favor of finding that particularized harm would result from its disclosure. *Richard v. City and Cnty. of San Francisco*, Case No. 20-cv-04276-JSC, 2021 WL 5298829, *1 (N.D. Cal. Nov. 15, 2021). Consequently, Thomson Reuters' disclosure of the Service Agreement would result in particularized harm to FSX, such that good cause exists to prohibit such a disclosure by the entry of a protective order.

2. A balance of relevant public and private interests militates against disclosure of the Service Agreement.

Once the Court determines that a particularized harm will result from disclosure of confidential information to the public, the court must then balance the public and private interests in order to determine whether a protective order is necessary. *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002). The Ninth Circuit has endorsed the consideration of the following factors when balancing the public and private interests related to disclosure, including whether disclosure will violate privacy interests, the purpose for which the information is being sought, whether disclosure will cause a party embarrassment, whether the information sought is important to public health and safety, whether the sharing of information among litigants will promote fairness and efficiency, the public or private status of the entity benefiting from the order, and whether the case involves issues important to the public. *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 424 (9th Cir. 2011) (citing to *Glenmede Trust Co. v. Thompson* and stating, "We have directed courts doing this balancing to consider the factors identified by the Third Circuit in *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995).").

"Issues concerning the scope of protective orders for confidential information entails a balancing test of the conflicting interests between the protection of Rule 26(c) and the broad mandate of the admissibility of information in discovery conferred by Rule 26(b)(1)." *Phoenix Sols. Inc. v. Wells Fargo*

Bank, N.A., 254 F.R.D. 568, 579 (N.D. Cal. 2008). When the harm caused by disclosing confidential information outweighs the burden to litigants for being deprived of such information, a protective order is necessary. *See Id*.

Neither Plaintiffs, nor the public, have a reasonable need for the information contained within the Service Agreement. Conversely, FSX's interests will be significantly harmed should the confidential contents of the Service Agreement become public. First, the Service Agreement itself dictates that its contents are to remain confidential between the parties thereto. *See* Carter Decl.. ¶ 11. Second, and relatedly, the Service Agreement contains confidential and proprietary information related to the scope of FSX's provision of services, the pricing model that it employs, and the other entities with whom it is affiliated to provide the services it offers. *See Id*. at ¶¶ 8-9.

An application of a majority of the relevant factors weighs in favor of prohibiting disclosure in this case. First, disclosure of the Service Agreement will violate the privacy interests of the signatories thereto because the Service Agreement itself contains a confidentiality provision that prohibits the public disclosure of its terms. Moreover, where disclosure would reveal trade secrets, this factor weighs in favor of maintaining the Service Agreement as confidential. *Doe v. Uber Tech. Inc*., Case No. 19-cv-03310-JSC, 2022 WL 834316, *3 (N.D. Cal. Mar. 21, 2022)

Second, the purpose for which the Service Agreement has been requested is unclear. As provided herein, the Service Agreement is not relevant to this litigation because it has no connection to the State of California or the allegations of violations of California state law alleged in Plaintiffs' Complaint. *See supra* Section III.b.

Third, disclosure of the Service Agreement is likely to cause FSX embarrassment because of the nature of the allegations contained in Plaintiffs' Complaint. Plaintiffs' Complaint contains serious allegations of privacy violations. But Plaintiffs' Complaint is silent as to whether any of these violations are related at all to any material that was provided to West by way of the Service Agreement. Further, even absent a showing of embarrassment per se, the harm that FSX has demonstrated herein weighs in favor of protecting the Service Agreement under this factor. Doe, 2022 WL 834316 at *3 ("Third, while Uber does not contend that revealing this information would cause it embarrassment, it has demonstrated the potential for harm to its commercial interests if this information were revealed.").

Fourth, the information sought—the Service Agreement—is not related to public health and safety. Two private non-party entities entered into the Service Agreement over seven years ago related to information obtained, or obtainable, from a court system that the instant lawsuit does not implicate. *See* Carter Decl., ¶¶ 5-7.

Finally, FSX is a private entity, which does not weigh in favor of disclosure. *Id*. at *3 ("Fourth, Uber—the party benefitting from the order of confidentiality—is not a public entity or official, and thus this factor is neutral.").

FSX has demonstrated herein that the harm that will result from Thomson Reuters' production of the Service Agreement outweighs any burden on the parties to the instant litigation of being deprived of access to the Service Agreement. *Phoenix Sols. Inc.,* 254 F.R.D. at 579 (N.D. Cal. 2008). Consequently, a protective order, preventing the disclosure of the Service Agreement, is necessary.

V. Conclusion and Request for Relief

For the reasons set forth herein, Non-party FSX respectfully requests this Court grant its motion to intervene in the case at bar for the limited purpose of the entry of an appropriate order that prohibits the production of the Service Agreement in the instant litigation.

DATED: April 25, 2022

FOLEY & LARDNER LLP
Alan R. Ouellette

/s/ Alan R. Ouellette
Alan R. Ouellette
Attorneys for Non-Party
File & ServeXpress, LLC

CERTIFICATE OF CONFERENCE

I hereby certify that counsel for FSX conferred with counsel for Defendant Thomson Reuters on Thursday, April 21, 2022, about the relief requested in this motion. Counsel for FSX also conferred with counsel for Plaintiffs Cat Brooks and Rasheed Shabazz on Saturday, April 23, 2022. Counsel for Thomson Reuters and Plaintiffs stated their clients' opposition to the relief requested in this motion.

/s/ Alan R. Ouellette
Alan R. Ouellette

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served on all parties of record via ECF on April 25, 2022.

/s/ Alan R. Ouellette
Alan R. Ouellette