**UNITED STATES DISTRICT COURT FOR THE**
**NORTHERN DISTRICT OF CALIFORNIA**
**SAN FRANCISCO DIVISION**

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| CAT BROOKS and RASHEED SHABAZZ, individually and on behalf of all others similarly situated,<br><br>Plaintiffs,<br>v.<br><br>THOMSON REUTERS CORPORATION,<br><br>Defendant. | Case No. 3:21-cv-1418-EMC<br><br>**JOINT LETTER RE DISCOVERY DISPUTE (PLS' RFP NO. 36)**<br><br>Judge: Hon. Kandis A. Westmore |

The parties respectfully submit this joint letter brief addressing one discovery dispute in the above-referenced case. After meaningfully conferring by videoconference as set forth in ¶¶ 13-14 of your Standing Order and Section 9 of the Northern District of California's Guidelines for Professional Conduct, lead trial counsel for both parties have concluded no agreement can be reached on this issue.

Respectfully submitted,

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| */s/ Andre M. Mura*<br>Andre M. Mura | */s/ Susan D. Fahringer*<br>Susan D. Fahringer |

**A. Request for Production No. 36**

Plaintiffs' Request for Production 36 seeks "[a]ll information necessary (i.e., username, password, account registration key, etc.) for Plaintiffs to access and search CLEAR," the platform operated by Thomson Reuters ("Defendant" or "TR"). The parties escalated this dispute in June, and the case was referred to this Court for discovery purposes. *See* Dkt. 95, 96. Following the Court's direction, the parties continued to meet and confer. Dkt. 101. Following these discussions, and pursuant to the Court's order, the parties have agreed to the following parameters of Plaintiffs' access to CLEAR: the level of access (what content would be made available), the process Plaintiffs would use to access the platform, procedures for communication and troubleshooting, the purpose of Plaintiffs' use, a production plan for reports that Plaintiffs would generate through their use of the platform, confidentiality parameters, and the length of time for Plaintiffs' access. On the issue of the permissible use that Plaintiffs would designate for their use of the platform, Plaintiffs are submitting a proposed order, which Defendant will not oppose once the parties' dispute is resolved.

The parties, however, are unable to agree on four issues: (1) whether Plaintiffs must agree to terms of service governing access to CLEAR, (2) whether counsel for TR may review TR's automatically generated logs of Plaintiffs' use of CLEAR, (3) whether Plaintiffs' use of CLEAR must be screen recorded and whether certain of those recordings must be automatically produced, and (4) the number of transactions (searches + reports) that Plaintiffs may conduct through CLEAR.

**<u>Plaintiffs' Position:</u>**

**Terms of Service:** TR asked Plaintiffs to abide by CLEAR's customer terms of service, even though Plaintiffs' access is not as a customer, but pursuant to civil discovery. That request is unnecessary, problematic, and prejudicial. It is unnecessary because Plaintiffs have agreed to access CLEAR only for this case. The parties' agreement thus already protects against misuse of the product. The request is also problematic because the customer terms (among other things) require that information garnered from CLEAR be used "only one time," for "internal business purposes," and that Plaintiffs "assist" TR with any litigation related to access. Such terms make no sense here. Lastly, TR's proposal is prejudicial because the terms are numerous, subject to interpretation, and may be enforced by third parties. Even TR could not identify those terms that it or third parties might later seek to enforce—exposing Plaintiffs to unpredictable and disproportionate risk for no discernable purpose.

TR all but admits that imposing its customer terms makes little sense here. So it offered, "for the avoidance of doubt," not to enforce three specific terms, and it proposed that the terms generally would only apply "to the extent not superseded by this agreement or [court orders]." Plaintiffs agreed that TR's carve outs would not apply. But that does not go far enough. Terms like those mentioned above would still apply; they are neither specifically carved out nor "superseded" by the parties' agreement.

To avoid these issues, Plaintiffs propose that the terms would only apply "to the extent not inconsistent with this agreement, the Protective Order (or any other court order), or the purpose of Plaintiffs' use of CLEAR for civil discovery in this case." Plaintiffs (but not TR) also propose that if any disputes arise as to applicability, the parties confer promptly and present disputes to the Court. Plaintiffs' proposal, then, protects both parties, recognizes the purpose of Plaintiffs' access to CLEAR, and allows the parties to address concrete disputes—a far more considered course than TR's approach: asking the Court for a blanket determination at the outset on an issue even the parties cannot figure out.

**Usage Logs and Screen Recording:** Plaintiffs propose preserving the reports showing details of their use of CLEAR, including the text entered into the platform for every search ("usage logs"). If a legitimate need for access to Plaintiffs' searches arises, counsel may petition the Court for access. Plaintiffs' proposal balances protecting their attorney work product while preserving information *if* TR can demonstrate a legitimate need. The Court could then apply the "fact-specific" work-product doctrine to a ripe dispute over specific logs instead of ruling now that all logs should be automatically produced. *See Kava Holdings, LLC v. Rubin*, 2016 WL 6652706, at *1 (C.D. Cal. Nov. 10, 2016). In contrast, TR seeks a sweeping ruling granting automatic access to all usage logs without a showing of particularized need—and *also* an order that Plaintiffs must screen record their usage and automatically produce certain recordings. Plaintiffs dispute that screen recording is appropriate here, but if the Court disagrees, Plaintiffs ask the Court to adopt the same essential procedure as for usage logs: create and preserve recordings in case a legitimate and particularized need arises without automatic production.

TR's highly intrusive proposal would unnecessarily infringe on Plaintiffs' protected attorney work product. *See Ramos v. Carter Exp. Inc.*, 292 F.R.D. 406, 409 (S.D. Tex. 2013) (collecting cases). Plaintiffs seek access to CLEAR to evaluate both how CLEAR functions and what information about putative class members is available. Thus, Plaintiffs' use of CLEAR is more similar to a hybrid product test and informational investigation than a purely factual search for ESI. When a list of search terms "goes to the underlying facts of what documents are responsive to Defendants' document request, rather than the thought process of Plaintiffs' counsel," courts have ordered disclosure. *See FormFactor, Inc. v. Micro-Probe, Inc.*, 2012 WL 1575093, at *7 n.4 (N.D. Cal. May 3, 2012). But courts protect attorneys' broader attempts to understand a product and "habitually refuse to allow the presence of an opposing party" when ordering "production of materials for non-destructive testing"—like what Plaintiffs propose here.[1] *Ramos*, 292 F.R.D. at 409. Moreover, like other cases where courts refuse to grant opposing parties a birds-eye view into product inspections, TR will not be prejudiced without automatic and unfettered review of Plaintiffs' access. *See Cottrell v. Dewalt Indus. Tool Co.*, 2009 WL 5213876, at *2 (N.D. Ill. Dec. 29, 2009). Because any use of CLEAR that Plaintiffs provide to testifying experts is *already* subject to discovery, TR's proposal is of limited additional legitimate value to the company, but would prejudice Plaintiffs by exposing protected work product. *See id.* TR "would not otherwise be entitled to the privileged information developed by a nontestifying expert," *see id.*, much less the "decision[s] of what to test and how" made by counsel, both of which are protected from discovery. *See Shoemaker v. Gen. Motors Corp.*, 154 F.R.D. 235, 236 (W.D. Mo. 1994).

TR's proposal cannot be justified by the *internal* use of screen recordings by Plaintiffs' counsel. Work product is "intensely practical" and "recognizes that attorneys must often rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial." *Lewis v. Wells Fargo & Co.*, 266 F.R.D. 433, 439–40 (N.D. Cal. 2010) (internal quotation omitted). Sharing screen recordings between counsel and investigators for litigation purposes does not bear on whether Plaintiffs should be required to record themselves, much less support *producing* those recordings to TR. Nor does Plaintiffs' voluntary production of screen recordings from pre-suit investigators waive work-product protections for subsequent work of counsel or experts. TR's proposal is akin to seeking access to Plaintiffs' Westlaw case research (or logs that TR's systems retain during that research). Such access would turn attorney work product on its head. *See, e.g.*, *United States v. Segal*, 2004 WL 830428, at *8 (N.D. Ill. Apr. 16, 2004) (protecting search terms entered into LexisNexis as work-product).

Plaintiffs' proposal accommodates any legitimate concern TR can raise. Plaintiffs will produce any CLEAR reports they generate, so TR will know what information is retrieved and can cross examine experts who rely on them. If Plaintiffs introduce descriptions of CLEAR, TR's unparalleled knowledge of, and full visibility into, CLEAR's workings are more than sufficient to respond. Plaintiffs' proposal avoids blanket exposure of their attorneys' mental impressions—in real time and without Court oversight—while preserving a way for TR to seek disclosure in the context of a concrete future dispute.

**Search Limitations:** Lastly, TR has agreed to three weeks of access but proposes a highly restrictive limitation on Plaintiffs' use of CLEAR: a 50-transaction cap, *i.e.*, Plaintiffs may press enter only 50 times before their access terminates. If that limitation is imposed, Plaintiffs' access would be

[1] In a patent case, a court permitted screen recording an expert's product test because the way that users interacted with the device was factually at issue, but Plaintiff's counsel's use was not recorded. *See Elan Elecs. Corp. v. Apple, Inc.*, 2011 WL 2293224, at *2-3 (N.D. Cal. Jun. 8, 2011).

pointless and could end in mere days. Even TR's trial periods are far more generous. By comparison, Plaintiffs propose a 500-transaction limit, consistent with CLEAR trial plans described in discovery.

Unlike TR's, Plaintiffs' proposal reasonably limits their access. Plaintiffs have already agreed to only three weeks of use, despite evidence that CLEAR customers receive far longer trial periods of 48 days, 60 days, and even six months.[2] Consistent with other trial plans described in discovery, Plaintiffs initially requested unlimited searches during the access period—but later proposed a 500-transaction limit trial, provided that Plaintiffs may petition the Court if that proved too restrictive. And evidence shows that Plaintiffs' proposed 500-transaction limit is consistent with or lower than limits TR has imposed on other customer trials (including a 500 limit batch trial, a 600+ limit transaction trial, a 1,500 transaction trial, and some entirely uncapped trials).[3]

Severely limiting Plaintiffs' use is unnecessary and prejudicial. TR has raised just three concerns behind its limitation—privacy, prior access, and cost—but none persuade. The parties have accounted for privacy concerns by agreeing that Plaintiffs' access will be confidential (or AEO) under the parties' protective order. *See* Dkt. 82 at 2. And, as discussed, Plaintiffs' limited pre-suit investigatory searches in no way justify arbitrarily and severely restricting Plaintiffs' access in discovery. Finally, TR cannot support this limitation based on cost. Plaintiffs' proposed access falls well within the normal limits TR sometimes places on customer trials. Any costs incurred are therefore within the ordinary range for CLEAR trials and are proportional to the needs of this case. Regardless, Plaintiffs offered to pay for their access to offset such costs, an offer TR did not accept. *See* Dkt. 95 at 2. In the end, TR's 50-limit proposal is a backhanded way of rendering Plaintiffs' access meaningless. The Court should allow, at the start, at least 500 transactions during the parties' agreed-upon three-week period.[4]

**Defendant's Position:**

CLEAR is a platform, not unlike Google Search, that makes it easier to find relevant information about businesses and people. When Plaintiffs first escalated this dispute, they said they needed access to understand CLEAR's "user interface." Dkt. #95 at 2. They did not reveal that their own experts had used CLEAR for over a year or explain why they needed more access than that. Plaintiffs also argued that granting them access was only fair because counsel for TR had such access, but TR's counsel has never had direct access to CLEAR. TR has nonetheless agreed to create Credentials for Plaintiffs to access CLEAR (1) on the same terms that bind every other user of CLEAR (except to the extent inconsistent with the Protective Order, another order of this Court, or the parties' agreement), provided that (2) Plaintiffs preserve evidence of their use (through screen recording) and produce that if it is relevant to their Court submissions, and (3) Plaintiffs limit their use to fifty transactions. Plaintiffs refused, and further insisted that (4) TR may not provide its own business logs of Plaintiffs' use of CLEAR to TR's own counsel. Each of these issues is discussed below.

**Application of CLEAR's Standard Terms of Use**. Content available through CLEAR is licensed from third parties pursuant to agreements that impose strict requirements on both TR and CLEAR users. Those are incorporated in the TR Supplier Terms (https://www.thomsonreuters.com/content/dam/ewp-m/ documents/legal/en/ pdf/other/clear-additional-terms-6-30-2020.pdf), which, like TR's General Terms (http://tr.com/TermsandConditions) (collectively, "Terms"), must be agreed to by every CLEAR user. The Terms help prevent abuse of the

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[2] *See* TR-BROOKS118074-TR-BROOKS118075, TR-BROOKS053798, TR-BROOKS313157-TR-BROOKS313165.

[3] *See* TR-BROOKS229698-TR-BROOKS229706, TR-BROOKS118074-TR-BROOKS118075, TR-BROOKS150920-TR-BROOKS150930, TR-BROOKS152148-TR-BROOKS152149, TR-BROOKS039422-TR-BROOKS039425.

[4] That TR is willing to agree that its counsel would also receive highly circumscribed access to CLEAR does not make its proposal evenhanded. The parties' needs are asymmetric and not co-extensive.

platform (e.g., by prohibiting mining or automatically downloading data from CLEAR; prohibiting use of the data for solicitations or marketing; and requiring users to abide by their designated permissible use). TR would agree, and the Court should Order, that the Terms apply to Plaintiffs' use unless superseded by the parties' agreement or any order entered in this case. Plaintiffs insist on a sweeping, subjective, exception-swallowing rule that would only generate disputes: that whenever the Terms are "inconsistent with use of CLEAR for civil discovery in this case," they will not apply. The Court should reject this proposal. *First*, TR *cannot* agree to waive the Supplier Terms, which are imposed by third-party licensors and help prevent abuse of the platform. *Second*, Plaintiffs' carveout would vitiate the risk-shifting provisions in the Terms that deal with potential third-party claims (such as those by licensors or individuals), and shift liability *to TR* for Plaintiffs' *own* use of CLEAR. *See* General Terms § 9(d). This would impose an extraordinary and unfair risk on TR, not unlike ordering a person to allow a stranger to drive their car without requiring the stranger to cover the cost of an accident they have while driving. *Third*, Plaintiffs' carveout could vitiate other important guardrails in the Terms, such as the prohibitions on sharing passwords or reverse engineering CLEAR. *Cf. id.* § 1(c), (d), (h).

**Evidence Preservation and Production via Screen Recording**. As in Google Search, when CLEAR users input search queries to access content through CLEAR, search results display on screen. Users can click on those results and take additional steps to create custom reports for download. Crucially, *CLEAR users actively shape search results and reports as they use CLEAR*, and the steps they take to do so are essential to understanding those results. Not all of these steps are automatically logged or readily apparent from any final report, and the data searchable through CLEAR is constantly changing. So the only (and best, and least burdensome) way to understand the basis and reliability of a report is to watch a recording of its creation—the very type of recording that Plaintiffs' own investigators made when they used CLEAR. *Unless Plaintiffs preserve and produce that evidence, it will be forever lost*, and TR will be hamstrung and denied crucial information that it needs for its own defense. Further, Plaintiffs have said that they intend to use the Credentials to give their testifying experts material to consider for their opinions. TR is entitled to obtain such material under Fed. R. Civ. P. 26(a)(4)(C). It is for precisely this reason that the only other decision in this jurisdiction to have reviewed a similar issue ordered a screen recording. *Elan Microelectronics Corp. v. Apple, Inc.*, 2011 WL 2293224, at *3 (N.D. Cal. June 8, 2011) ("a recorded inspection [] will allow both parties—to say nothing of the presiding judge and the jury—to understand exactly the facts and information considered by that expert in forming his opinion about the data revealed by the tool."). Plaintiffs have not identified other ways in which they will use evidence from their use of the Credentials (and they may not know, hence this fishing expedition), but to interpret that evidence and gauge its reliability, TR (and the Court) will almost certainly need to understand the steps Plaintiffs took to create it. Screen recordings are essential to that effort. Plaintiffs argue that their conduct is protected by the work product doctrine, but the method that Plaintiffs used to generate their evidence is not protected work product. See *Davidson v. Apple, Inc.*, 2017 WL 11573594, at *2-3 (N.D. Cal. Dec. 14, 2017) (rejecting work-product objection to revealing testing methodology where objecting party could not specifically detail how "the tests would tip off plaintiffs to some area of inquiry they would not have thought of otherwise"). This Court should therefore order Plaintiffs to preserve evidence of the role they play in shaping the evidence they will use in this case by screen recording their access to CLEAR, and require Plaintiffs to produce the recordings that are associated with any material that Plaintiffs file or otherwise submit, or that is considered by a testifying expert witness in forming his or her opinion.

**Access to TR records**. TR logs some information about CLEAR searches in the ordinary course. Logs of Plaintiffs' use would be directly relevant and important to understanding the search results and to ensuring compliance with the parties' agreement on access to CLEAR. TR would readily agree that the logs must be produced to Plaintiffs. Astonishingly, Plaintiffs insist that *TR's own counsel* may not view TR's business records, arguing that TR's own logs constitute *Plaintiffs'* attorney work product. This is flatly wrong on the law. *First*, the logs are not work product because they do not reflect Plaintiffs' "mental impressions, conclusions, opinions, or legal theories of a party's attorney . . . concerning the litigation," F.R.C.P. 26(b)(3)(B), and protection would not advance the purpose of the doctrine, which is to prevent the "exploitation of a party's efforts in preparing for litigation." *Admiral Ins. Co. v. U.S. Dist. Ct. for Dist. of Ariz.*, 881 F.2d 1486, 1494 (9th Cir. 1989). *Second*, any work product protection is necessarily waived because the logs are, by definition, already in the hands of TR. *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (Chen, J.) ("[W]ork-product privilege may be waived by disclosure to third parties which results in disclosure to an adversary party."); *see also Cal. Sportfishing Protection Alliance v. Chico Scrap Metal, Inc.*, 299 F.R.D. 638, 645 (E.D. Cal. 2014). *Third*, work product protection is qualified, and overcome on a showing of substantial need where the substantial equivalent cannot be obtained by other means without undue hardship, as is the case here. FRCP 26(b)(3)(A)(ii). The Court should decline Plaintiffs' request that it bar TR's own counsel from reviewing TR's own business record logs of Plaintiffs' use of CLEAR.

**Number of Transactions**. To understand CLEAR's user interface (Plaintiffs' ostensible purpose for accessing CLEAR), Plaintiffs at most need to search for and generate reports on a dozen people. TR proposed a limit of far more than that—50 transactions (searches + reports)—but Plaintiffs refused. Instead, Plaintiffs ask for 500, without any explanation why they need *hundreds* of searches and reports. Plaintiffs have not articulated any reason why they should be allowed "to rummage unnecessarily and unchecked through the private [information]" of 500 people who are not parties to this lawsuit. *Del Campo v. Am. Corrective Counseling Servs., Inc.*, No. C 01-21151 JW (PVT), 2008 WL 3978079, at *1 (N.D. Cal. Aug. 26, 2008). And there is a meaningful burden associated with even one search in CLEAR: for every search Plaintiffs offer into evidence or their experts consider, TR must investigate its context and whether it supports the conclusion Plaintiffs draw from it. For example, if Plaintiffs were to contend that a fact in a CLEAR report is false, is not otherwise publicly available, or was subjectively easy or difficult to find, TR would have to investigate many internal and third-party sources to respond. This would take extraordinary time and effort. Imposing a reasonable limit on the number of searches that may be conducted would help mitigate both privacy and burden concerns and take into consideration the privacy of third parties. Accordingly, the Court should adopt TR's proposal and permit Plaintiffs a total of 50 transactions in CLEAR.

**ATTESTATION**

Pursuant to Civil Local Rule 5-1(i)(3), I attest that concurrence in the filing of this document has been obtained from the other signatory.

/s/ *Andre M. Mura*