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

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

Plaintiffs,

v.

THOMSON REUTERS CORPORATION,

Defendant.

Case No. 3:21-cv-01418-EMC-KAW

**PLAINTIFFS' ADMINISTRATIVE MOTION
FOR LEAVE TO RESPOND TO OBJECTION
(ECF NO. 174-2)**

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Pursuant to Civil L.R. 7-3(d) and 7-11, Plaintiffs seek court approval to file a response to Thomson Reuters' (TR) Objection to Reply Evidence, ECF No. 174-2. TR's objection is improper under Civil L.R. 7-3(d)(1), which prohibits an objection to reply evidence from "includ[ing] further argument on the motion." In addition, TR's objection is meritless. Plaintiffs seek leave to file the following response:

TR styles its submission as an "objection" to a single sentence in Plaintiffs' reply which merely brought to the Court's attention recent deposition testimony of its employee, but in reality it has "effectively used [that] evidentiary objection as an unauthorized sur-reply." *Yung Kim v. Volkswagen Grp. of Am., Inc.*, 2013 WL 1283399, at *4 (N.D. Cal. Mar. 26, 2013). TR's sur-reply includes pages of additional argument untethered to the evidence to which it objects; indeed, it addresses evidence that was presented only in Plaintiffs' motion for class certification, not their reply, and it addresses whether Rule 23 is met. *See, e.g.*, ECF No. 174-2 at 1:2-5 (arguing about disputed evidence never mentioned in Plaintiffs' reply), 1:26-28 (arguing predominance), 2:4-6 (arguing about Plaintiffs' characterization of CLEAR), 2:19-23 (arguing about the analysis required under the UCL balancing test), 3:25-28 (arguing about Plaintiffs' motivations for including evidence in their reply), 4:4-10 (quoting other portions of Plaintiffs' exhibit—all of which were provided to the Court—to argue TR's preferred interpretation of the testimony), 4:10-14 (relying on a newly-submitted employee declaration to argue TR's preferred interpretation of the testimony objected to here). TR's improper additional argument violates the plain language of Local Rule 7-3(d) and thus the Court should overrule its objection. *See Yung Kim*, 2013 WL 1283399, at *4 (overruling objection for improper sur-reply argument); *Armstrong v. Brown*, 2012 WL 1225911, at *1 n.1 (N.D. Cal. Apr. 11, 2012) (striking objection for same reason); *Umeda v. Tesla Inc.*, 2020 WL 5653496, at *4 (N.D. Cal. Sept. 23, 2020) (disregarding new argument in objection and permitting supplemental evidence that "provides facts in response to arguments set forth in [the] opposition"), *aff'd*, 2022 WL 18980 (9th Cir. Jan. 3, 2022).

The thrust of TR's challenge to Plaintiffs' submission is that Plaintiffs' statement based on that testimony is "false." ECF No. 174-2 at 1:5-6, 1:16-21, 4:4-14; ECF No. 173-2 ¶ 2 (additionally incorporating argument from TR's newly submitted employee declaration in support of sealing portions of Plaintiffs' reply). But Plaintiffs' statement simply and accurately repeated the testimony of TR's employee—and the evidence Plaintiffs submitted speaks for itself. ECF No. 169-4; ECF No. 124-11 at 629; ECF No. 124-14. TR may believe that its employee incorrectly testified, but even if he did, that is not a basis to find that this testimony

1 is inadmissible nor to find that it was improperly submitted here. *Damiani v. Detective Duffy*, 2017 WL 635644,
 2 at *4 (D. Del. Feb. 16, 2017) (“[I]f a party disagrees with deposition testimony given by witnesses, he is free
 3 to challenge that testimony through his own factual assertions, impeach it through other evidence, and cross-
 4 examine the witnesses vigorously at trial.”) (internal alteration and citation omitted).

5 TR also argues (at 2 n.5) that it was procedurally improper to cite recent testimony in reply because
 6 Plaintiffs could have cited other documents that TR had produced to make a similar point in their motion.
 7 But there is no procedural impropriety here. First, while TR claims through a declaration of counsel that this
 8 evidence existed before (at 2 n.5), that is not accurate. The actual evidence Plaintiffs submitted—as TR readily
 9 admits—came from a deposition conducted approximately two weeks before Plaintiffs filed their reply brief.
 10 ECF No. 174-3 ¶ 3. But more importantly, when TR raises arguments in opposition, Plaintiffs are entitled
 11 to reply. *See Edgen Murray Corp. v. Vortex Marine Constr., Inc.*, 2018 WL 4203801, at *3 n.1. Here, Plaintiffs
 12 argued in their motion that CLEAR is continuously looking to expand its data coverage to sweep as broadly
 13 as possible. *See* ECF No. 124-3 at 3-4. TR responded that CLEAR content “comes from public records,
 14 reputable third-party licensors, and the internet” and “includes nothing that qualified subscribers could not
 15 get individually on their own.” ECF No. 150-4 at 1-2. Plaintiffs then cited recent deposition testimony in
 16 reply to rebut TR’s suggestion that the company’s focus has only been public data. Accordingly, there was
 17 nothing procedurally improper about the sequence in which Plaintiffs presented this deposition testimony,
 18 which was obtained just before Plaintiffs’ reply, and “was filed to respond to [Defendant’s] opposition and
 19 [wa]s consistent with . . . arguments presented in the original motion.” *Edgen*, 2018 WL 4203801, at *3 n.1
 20 (overruling objection).

21 Next, TR argues that this evidence is irrelevant to this litigation. ECF No. 174-2 at 3 (citing Fed. R.
 22 Evid. 401). But TR itself argues—repeatedly—that the Court will need to consider, at the merits stage, the
 23 types of information that CLEAR makes available for its customers. ECF No. 150-4 at 1, 2, 13, 15, 17, 20.
 24 And, as Plaintiffs have explained, TR’s practice of continually seeking out evermore information from all
 25 corners of individuals’ lives, with decisions on what data to add to CLEAR rising and falling on TR’s business
 26 prerogative, is relevant to the harms CLEAR causes Californians and informs the scope of injunctive relief.
 27 *See, e.g.*, ECF No. 124-3 at 3-4; *see also Sali v. Corona Reg’l Med. Ctr.*, 909 F.3d 996, 1006 (9th Cir. 2018) (“Instead,
 28 an inquiry into the evidence’s ultimate admissibility should go to the weight that evidence is given at the class

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certification stage.”). So TR’s gesturing towards Fed. R. Evid. 403 also misses the mark—this evidence goes directly to issues at the heart of this case—TR’s ability to sweep up any and all data about Californians for its own commercial benefit, without those Californians’ knowledge or consent—and the scope of injunctive relief. *See* ECF No. 174-2 at 3 (citing Fed. R. Evid. 403).

All that said, TR’s arguments regarding the types of data available through CLEAR are premature and go to the merits, not class certification; indeed, that was the very point Plaintiffs made in their reply brief when citing this deposition testimony. *See* ECF No. 169-3 at 1. Evidence tending to show the particular contours of injunctive relief is best determined at the merits stage. *See Sali*, 909 F.3d at 1006. Because admissibility is properly determined at the merits, the Court may rule on class certification here without reaching TR’s premature arguments, and overrule its objection on those grounds as well. *See Powertech Tech. Inc. v. Tessera, Inc.*, 2013 WL 1164966, at *2 (N.D. Cal. Mar. 20, 2013) (overruling objection “[b]ecause the Court reaches the same result notwithstanding the reply evidence”).

Finally, TR cursorily claims prejudice if it is not afforded a sur-reply to substantively respond to its employee’s statements. ECF No. 174-2 at 4. But TR will have ample opportunity to address this evidence—and any other merits issues—at the merits stage. Even setting that aside, this request strains credulity—TR *already* directly and substantively responded to this deposition testimony with a declaration from TR’s employee Kevin Appold that it attached to a sealing motion, even before filing its objection here. ECF No. 173-2 ¶ 2. TR cannot claim prejudice from the lack of an opportunity to respond when it has already afforded itself that opportunity without leave of Court.

For these reasons, Plaintiffs respectfully submit that the Court should overrule TR’s objection to reply evidence.

DATED: March 24, 2023

Respectfully submitted,

/s/ Andre M. Mura

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