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UNITED STATES DISTRICT COURT
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

THOMSON REUTERS' OBJECTION TO NEW REPLY EVIDENCE

REDACTED - PUBLICLY FILED VERSION OF DOC. 174-2 PURSUANT TO COURT ORDER, DATED MARCH 28, 2023 (DOC. 185)

INTRODUCTION

Plaintiffs again play fast and loose with the facts to attempt to fearmonger their way into class certification. Plaintiffs' Complaint contained allegations about CLEAR containing abortion records. That was false.[1] Plaintiffs' motion for class certification contained allegations about CLEAR being sold to the Church of Scientology. That was false.[2] And now Plaintiffs' reply brief includes allegations about CLEAR having [redacted].[3] Again, that allegation is false. And, as new, irrelevant evidence introduced for the first time in a reply brief, the Court should strike it and refuse to rely on it.

TR objects to Plaintiffs' new argument and evidence about [redacted] under Local Rule 7-3(d)(1) because it is improper to introduce new argument and evidence on reply. TR further objects that [redacted] is irrelevant to Plaintiffs' case or to class certification and is substantially outweighed by a danger of unfair prejudice or confusing the issues. Neither the Amended Complaint nor Plaintiffs' motion for class certification contain a single reference to [redacted] or anything of the sort.[4] Alternatively, if the Court intends to credit Plaintiffs' new argument or evidence, then TR should be permitted an opportunity to respond. *Dutta v. State Farm Mut. Auto Ins. Co.*, 895 F.3d 1166, 1172 (9th Cir. 2018). TR would respond by showing that the witness Plaintiffs quote in connection with their purported "new evidence" stated that he had "no knowledge one way or the other" whether [redacted] was ever indexed in CLEAR. Doc. 169-4, 258:4-13. And, in fact, [redacted] was never made available to any CLEAR customers or integrated into the CLEAR product; it was merely a TR idea that was explored but never launched. Third Sealing Declaration of Kevin Appold ("Appold Decl."), Doc. 173-2, ¶ 2.

The Court should sustain TR's objection and strike lines 11-14 of page 1 of Plaintiffs' Reply In Support of Plaintiffs' Motion for Class Certification, Doc. 169-3, as well as the

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[1] *See* Doc. 150-4, 2 n.2.
[2] *Id.* at 3 n.9.
[3] Doc. 169-3, at 1.
[4] To the extent the allegation is relevant at all, the introduction of another variable data type to this case would only bolster TR's position: a class cannot be certified here because each putative class member had different types of data collected, in differing quantities, and that data was accessed in highly variable ways by a highly variable customer base.

accompanying evidence, Doc. 169-4, and otherwise decline to review or rely on Plaintiffs' newly-introduced evidence.

PLAINTIFFS' REPLY INTRODUCED NEW ARGUMENT AND NEW EVIDENCE

In reductively and inaccurately characterizing TR's arguments in opposition to class certification as an argument about CLEAR being "benign,"[5] Plaintiffs claim that discovery has told "a different story," because in their recent deposition of a TR engineer, that engineer testified "that, for at least a limited time, CLEAR had [redacted] –which includes potentially [redacted] and [redacted] information that cannot be accessed through normal internet channels." Doc. 169-3, at 1. They introduce transcript excerpts in purported support for that statement. *Id.*; *see also id.*, Ex. 1.

The phrase [redacted] does not appear once in either Plaintiffs' Complaint or their Amended Complaint. *See generally* Doc. 1-1; Doc. 145. It is not referenced in Plaintiffs' motion for class certification. *See generally* Doc. 124-03.

[5] Plaintiffs cannot claim that they have introduced this new evidence "to rebut arguments raised in the opposition brief." *See Applied Materials, Inc. v. Demaray LLC*, No. 5:20-cv-05676-EJD, 2020 WL 8515132, *2 ((N.D. Cal. Dec. 16, 2020). What Plaintiffs term TR's "benign" CLEAR argument is instead TR's argument that determining the "unjustness" or "unfairness" of TR's operation of CLEAR will depend on individualized determinations, because Plaintiffs' two remaining claims necessitate equitably evaluating CLEAR's benefits for each class member against the harms that any class member experienced. *See generally* Doc. 150-4, at Part III.C.1.a. Plaintiffs recognized this requisite balancing of benefits and harms even in the *introduction* to their motion for class certification. *See* Doc. 124-03, at 1-2 (arguing that Plaintiffs should prevail in UCL analysis because the "harms [] far outweigh any benefit"). TR never discusses [redacted] in its opposition because [redacted] was never offered through CLEAR and has never been mentioned in any pleading to date. Nor can Plaintiffs claim that the concept of [redacted] is new to them and that they could not have discovered the issue sooner. Documents related to TR's consideration of [redacted] functionality (including those that were presented to Mr. Gerhard at his deposition) were produced to them *at least* as far back as May 2022. Declaration of Hayden M. Schottlaender, ¶ 2. And Plaintiffs themselves delayed in deposing Mr. Gerhard. They stated their intent to depose Mr. Gerhard as far back as June 2022, and then unilaterally withdrew from an agreed deposition date in October 2022. *Id.* ¶ 3.

THOMSON REUTERS' OBJECTIONS

TR objects to Plaintiffs' introduction of Doc. 169-4 and to their reply brief's new references to and arguments about [redacted] under Local Rule 7-3(d)(1). Where a reply brief "presents new information, it is improper." *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1273 n.3 (9th Cir. 1993); *see also Lam Research Corp. v. Schunk Semiconductor*, No. C-03-1335-EMC, 2014 WL 1995799, at *2 (N.D. Cal. May 15, 2014) (Chen, J.) ("new evidence cannot be attached to a reply") (citing *Tovar*, 3 F.3d at 1273 n.3). Because anything regarding [redacted] is new information and new evidence, its introduction on reply is improper and should be stricken.

TR also objects that the new evidence regarding [redacted] is irrelevant. At class certification, plaintiffs must rely on "admissible evidence" that "must meet all the usual requirements of admissibility [including] Rules 401, 403, and 702 of the Federal Rules of Evidence." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 665 (9th Cir. 2022) (citing *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 454-55 (2016)). Evidence is relevant under Federal Rule of Evidence 401 only if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. More, even relevant evidence ought to be excluded where "its probative value is substantially outweighed by a danger of…unfair prejudice [or] confusing the issues." Fed. R. Evid. 403.

[redacted] has no connection to this litigation. To TR's knowledge, Plaintiffs' reply brief is the first time they have ever mentioned the topic in any filing. Plaintiffs do not mention what types of [redacted] may be at issue, what [redacted] even is, why TR explored using it, the types of persons or entities for whom TR might possess such data, to whom that information might be offered, whether that offering was during the period of time covered by this lawsuit, or any other information that might connect their incendiary allegation to this litigation. Instead, Plaintiffs merely lob the allegation in the hopes of eliciting a "decision on an improper basis, commonly…an emotional one." *U.S. v. Ellis*, 147 F.3d 1131, 1135 (9th Cir. 1998) (quoting 2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, § 403.04[1][b] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed.1997)). The Court should reject that attempt.

Finally, "the practice rules recognize the potential inequities that might flow from the injection of new matter at the last round of briefing." *Dutat*, 895 F. 3d at 1171-72. As a result, if the new evidence and argument is not stricken from consideration, TR should be permitted leave to file a sur-reply. *Id.* If granted that leave, TR would show the witness that Plaintiffs cite for this point testified that he did not know whether Thomson Reuters ever acquired or made available to customers [redacted]. *See, e.g.*, Doc. 169-4, 258:4-13. Rather, his testimony reveals that CLEAR does not include [redacted] currently, Doc 169-4, 268:17-23; that several years ago he was asked to work on a "development environment" to *test* integrating certain data into CLEAR, *id.* at 262:5-263:8; and he had "no knowledge" whether [redacted] was ever made available to customers at some prior point in time, *id.* at 258:1-13. Indeed, the TR Vice President responsible for the integration and ongoing design of CLEAR since 2008 avers that CLEAR has never made [redacted] available to customers. Appold Decl., ¶ 2. That functionality was briefly explored by the company, internally, as a potential product feature, but was never launched or actually integrated into the CLEAR product available to customers. *Id*

Dated: March 16, 2023

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