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,

Defendants.

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

JOINT LETTER RE DISCOVERY DISPUTE (Supplementation)

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.

Dated: May 19, 2023

Respectfully submitted,

By: /s/ Geoffrey Graber
Geoffrey Graber

/s/ Andre Mura
Andre Mura
Counsel for Plaintiffs

/s/ Susan D. Fahringer
Counsel for Thomson Reuters Corp.

A. Discovery Dispute Factual Background

Plaintiffs served discovery requests in 2021 and 2022 that they instructed were "continuing in nature." Thomson Reuters ("TR") objected to that instruction, and stated that it would "limit its collection, review, and production of Documents…to the period from January 1, 2015 to December 1, 2021." TR then produced documents from 2015 through 2021 or 2022. In March 2023, Plaintiffs served a Notice of a Rule 30(b)(6) Deposition on topics covering (among other things) CLEAR content sets, licensors and customers, business practices, policies, and financial information for 2015 through the present. A dispute arose regarding the scope of Thomson Reuters' obligation to supplement with respect to a number of its earlier discovery responses and document productions related to those topics. Plaintiffs' last compromise position asked TR to "supplement" its responses to eight RFPs and one interrogatory, and to "update" the information originally produced in ten specific documents. Thomson Reuters thereafter agreed to create updated versions of two documents and to provide a supplemental answer to the interrogatory. As to the remaining eight RFPs and eight documents, TR asked Plaintiffs to narrow those requests and explain why they believed a more recent document review and production was necessary to pursue their claims. Plaintiffs disagree that further narrowing is necessary or appropriate. They also disagree with TR that they should have to serve new requests seeking this information but did so on April 29, 2023. Thomson Reuters' deadline to respond and object to those requests is May 30, 2023.

B. Plaintiffs' Position

TR collects and sells a vast array of personal information about virtually all Californians without their consent through a subscription-based platform called CLEAR. Plaintiffs allege this is an unfair business practice, and they seek injunctive relief and disgorgement of profits TR unjustly retains at Californians' expense. In discovery, Plaintiffs have sought information on how CLEAR works, what data is in CLEAR, CLEAR-related policies, practices, and financial information, inquiries into and complaints about CLEAR misuse or inaccuracies, and requests to delete, correct, or opt personal information out of CLEAR. TR has largely produced information up to 2021, along with some limited documents created in 2022 and 2023.

Plaintiffs asked TR to supplement their productions in certain narrow and specific respects with information thereafter acquired.[1] Because Plaintiffs seek disgorgement of TR's profits, they asked for up-to-date financial information. And because they seek to (i) prove that TR has engaged in an unfair business practice, and (ii) enjoin the practice as it currently exits, they asked for up-to-date information in targeted areas, such as whether CLEAR

[1] RFP Set 1, Nos. 7 (financial statements), 17 and 18 (class member communications about opting out and deleting/correcting their data), 24 (Californians' complaints); RFP Set 4, Nos. 4, 5, and 6 (complaints to TR's privacy office); RFP Set 5, No. 23 (allegations of misuse); and updated information produced in TR-BROOKS047405 (customers and revenues by segment), TR-BROOKS061094 (revenue by customer), TR-BROOKS052564 (customers by region/state), TR-BROOKS129381 (transactional royalty rate), TR-BROOKS035636–'39381 (content licensing contracts), TR-BROOKS129870 (S2S Content Guide), TR-BROOKS001363-'1482 (user guides), TR-BROOKS000959-'994 (capabilities statements).

practices and data has materially changed, what CLEAR costs and revenues look like today, and current information relating to Californians' experience with CLEAR. TR agreed to provide two financial documents and a customer list. But TR otherwise refuses to supplement, even as it has repeatedly told Plaintiffs that it has not done any work to ascertain whether new, material information exists.

TR's refusal to supplement should be rejected. TR must supplement its discovery responses when it "learns that in some material respect [its prior discovery] response[s are] incomplete or incorrect." Fed. R. Civ. P. 26(e)(1). This duty extends to "information thereafter acquired[.]" Fed. R. Civ. P. 26 Advisory Comm. Notes, 2006 Amendments; *Switch Commc'ns Grp. v. Ballard*, 2012 WL 2342929, at *6 (D. Nev. June 19, 2012) (duty to supplement includes documents created after the party's initial response). And that duty is triggered if this additional information could substantially affect or alter Plaintiffs' discovery plan or trial preparation. *L.A. Terminals, Inc. v. United Nat'l Ins. Co.*, 340 F.R.D. 390, 396 (C.D. Cal. 2022). Here, the additional information Plaintiffs seek could substantially impact their plan for a 30(b)(6) deposition and trial, and the Court should order TR to supplement. Plaintiffs' request for supplementation is narrow and specific—eight RFPs (seeking updates to the types of documents TR *already* produced in response) and eight specific documents with out-of-date information. TR's refusal leaves Plaintiffs without updates to undisputedly relevant information, including user and content guides, capabilities statements, data licensing agreements, Californians' complaints and other communications about CLEAR, and certain data about CLEAR's revenues and costs.

None of TR's arguments for why it shouldn't be required to supplement its production persuade. TR has said it doesn't have knowledge that additional material information exists. Putting aside that TR also said it never looked, the reality is TR or its employees have acknowledged that newer business records exist, both through deposition testimony that its existing documents are out of date, and by agreeing to produce some—but not all—of the updated financial information Plaintiffs seek. Regardless, the standard is also whether TR reasonably *should* know, and the information Plaintiffs seek here is the type of information that is regularly updated, such as user and content guides, policies, financial information, and consumer complaints. *Reinsdorf v. Skechers U.S.A., Inc.*, 2013 WL 12116416, at *8 (C.D. Cal. Sept. 9, 2013) ("a party which . . . at a later time creates another responsive document which the party then knows, or reasonably should know, is materially within the scope of the earlier request most certainly 'learns' of the existence of the document . . . . To argue otherwise would effectively defeat the long-standing salutary purpose of Rule 26(e).")

TR may also argue that it objected to the time period in its general objections to instructions, and thus cannot be made to supplement its production. But TR's generalized, boilerplate objection is legally inadequate to limit its discovery obligations, *Welle v. Provident Life & Accident Ins. Co.*, 2013 WL 6020763, at *2 (N.D. Cal. July 31, 2013) (Westmore, J.); *E.E.O.C. v. Safeway Store, Inc.*, 2002 WL 31947153, at *2 (N.D. Cal. Sept. 16, 2002) (Chen, J.), much less obviate its duty to supplement, *Reinsdorf*, 2013 WL 12116416, at *7-11. Nor does it matter whether Plaintiffs *previously* sought supplementation or challenged TR's baseless objection. *Id*. Unlike the cases TR relies on, such as *In re Google RTB Consumer Priv. Litig.*, 2023 WL 3046793, at *1 (N.D. Cal. Apr. 21, 2023), Plaintiffs are not asking TR to re-run search terms for wholesale custodial productions. Far from seeking to impose a never-ending discovery obligation, Plaintiffs' supplementation requests are narrow and specific—even identifying documents by Bates. Another critical difference with TR's cases: discovery is still ongoing here. *See Dong Ah Tire & Rubber Co. v. Glasforms, Inc.*, 2008 WL 4786671, at *1 (N.D. Cal. Oct. 29, 2008). In fact, Plaintiffs served new, nearly identical discovery requests, in an abundance of caution and at TR's suggestion, though they shouldn't have to when TR has a duty to supplement.

TR has not raised, much less substantiated, a burden objection. It has not argued or explained why an update of new information in these discrete areas is not proportional to the needs of the case. And its position has never come to grips with the fact that the proposed class period runs through the present, and the complaint alleges TR's conduct is ongoing—all of which renders TR's current practices indisputably relevant. *See Allen v. Similasan Corp.*, 2014 WL 1672594, at *2 (S.D. Cal. Apr. 28, 2014).

To the extent TR argues that it has not created updated "documents" out of the information Plaintiffs seek, that makes no difference. TR must 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 Comm. Notes, 2006 amendments. TR cannot reasonably dispute that the additional information Plaintiffs seek to have supplemented—business and financial information that TR acknowledges it tracks—resides in its electronic files. That is enough. *See, e.g., Frasier Healthcare Consulting, Inc. v. Grant Mem'l Hosp. Reg'l Healthcare Ctr.*, 2014 WL 12701042, at *4 (N.D.W. Va. Jan. 9, 2014); *Lee Valley Tools, Ltd. v. Indus. Blade Co.*, 288 F.R.D. 254, 260 (W.D.N.Y. 2013).

Finally, TR is wrong that it has no obligation to produce information created after it served its discovery responses. *See L. Tarango Trucking v. Cnty. of Contra Costa*, 202 F.R.D. 614, 618, 623 (N.D. Cal. 2001). Again, Plaintiffs here do not seek unending custodial searches and boundless productions after close of discovery, but a targeted supplementation of material information while discovery remains open. Thus, Plaintiffs respectfully ask that the Court compel TR to produce updated information as requested in footnote 1.

C. TR's Position

Plaintiffs ask the Court to order TR to provide "updated" document productions for 8 RFPs and to "update the information" set forth in 8 previously-produced documents. There is no basis to believe that any of TR's responses to the RFPs are materially incomplete or incorrect, yet Plaintiffs characterize their request as one for "supplementation" under Rule 26(e)(1). But the duty to supplement does not require a party to shoulder the burden of ongoing document collections, reviews, and productions without a showing that its responses were materially incomplete or incorrect. Fed. R. Civ. P. 26(e)(1) (duty to supplement arises when a party "learns that in some material respect the disclosure or response is incomplete or incorrect."). "The fact that responsive documents similar to those previously produced by a custodian have continued to accumulate in that custodian's files during the course of litigation does not automatically render the prior production materially incomplete or incorrect." *In re Google RTB*, 2023 WL 3046793, at *2 (N.D. Cal. Apr. 21, 2023). And the duty to supplement responses to RFPs does not require a party to update the information reflected in previously produced documents.

To respond to Plaintiffs' 79 RFPs, TR collected more than 3.3 million documents and produced over 430,000 pages. TR's objections to the RFPs made clear that its collection, review, and production would apply through December 2021 and into 2022, well after the December 2020 commencement of this litigation. Plaintiffs did not challenge that limitation. Plaintiffs have not explained—nor can they—why they believe more current information is necessary for either their claims or their 30(b)(6) deposition; they offer only hand waving statements that the documents are "relevant."

If Plaintiffs seek new information, they should propound new discovery requests, which they have done. But the duty to supplement does not require a party to re-initiate the discovery process where its prior productions were neither "incomplete" nor "incorrect." Plaintiffs' demand for new discovery under the guise of "supplementation" should be rejected.

I. The duty to supplement does not require TR to continuously collect, review, and produce documents.

"[N]othing in [Rule 26(e)(1)] imposes a never ending obligation to produce documents continuously as they are created[.]" *Dong Ah Tire & Rubber Co. v. Glasforms, Inc.*, 2008 WL 4786671, at *2 (N.D. Cal. Oct. 29, 2008); *see also CornerStone Staffing Sols., Inc. v. James*, 2015 WL 13037132, at *2 (N.D. Cal. Jun. 24, 2015) (same). Indeed, "to conclude otherwise would be to invite rolling discovery in a way that would unfairly burden Defendant and indefinitely postpone trial." *Our Children's Earth v. Leland Stanford Jr. Univ.*, 2015 WL 12964638 (N.D. Cal. Oct. 29, 2015). (cleaned up). Yet this is precisely what Plaintiffs would have the Court require here. What Plaintiffs characterize as a request for "supplementation" is effectively a request that TR take all the steps necessary to diligently investigate and respond to document requests that it fully responded to months ago, without any basis beyond the mere passage of time, which is insufficient to render TR's prior responses and productions materially incomplete or incorrect. *In re Google RTB*, 2023 WL 3046793, at *2 ("likely relevance and the passage of time" insufficient to trigger duty to supplement). Indeed, Plaintiffs limited their own document productions to up to January 2022 and have neither supplemented that production nor produced any later documents.

To interpret the duty to supplement to extend to circumstances such as these, simply to obtain "newer" documents that might be relevant to the claims (but are not necessary to materially correct or complete a prior response), would arm parties like Plaintiffs with the ultimate "make work" weapon, and would burden the opponent with the obligation to repeatedly investigate, collect, review, and produce information and documents as they are created. But the duty to supplement does not require that TR engage in this process every time Plaintiffs suppose that an "update" might exist to previously-produced documents.

The only authorities Plaintiffs identified to TR to support their position are inapposite and were expressly distinguished in *In re Google RTB*. In *Reinsdorf v. Skechers*, the defendant's prior discovery responses indicated that no recall notices existed. When recall notices were later issued, those responses became incomplete. It is this "change in circumstances" that gave rise to a duty to supplement. 2013 WL 12116416, at *11 (C.D. Cal. Sept. 9, 2013). There is no similar change in circumstances here. *Switch Comms. v. Ballard* is distinguishable on similar grounds. 2012 WL 2342929 (D. Nev. June 19, 2012); *see also In re Google RTB*, 2023 WL 3046793, at *2 (newly created documents in Switch required to be produced only "'to the extent they materially affect the completeness or correctness of the previous responses,'"). Plaintiffs have not satisfied their burden to show that TR has learned that its prior productions in response to the 8 RFPs are materially incomplete or incorrect, and Plaintiffs have never explained to TR why they believe that to be the case. The duty to supplement does not require any further response or production by TR.

II. The duty to supplement does not require a party to "update" information in previously-produced documents.

Plaintiffs also ask the Court to interpret the duty to supplement to require TR to "update" the contents of 8 previously-produced documents. But the duty to supplement does not extend to requiring a party to generate new documents and information in response to a previously-issued document request. Indeed, Rule 34 does not require the creation of new documents in the first place. *Van v. Wal-Mart Stores*, 2011 WL 62499, at *1 n.1. The documents themselves demonstrate the overreach and unreasonableness of Plaintiffs' position. One of the documents Plaintiffs ask TR to "update" is TR-BROOKS129381. That document is not a standard business form; it is an excel spreadsheet that TR believes an employee created in 2012, apparently to answer one or more questions someone had about CLEAR at the time. Exactly how and why that eleven-year-old document was created, whether it was correct at the time, what it truly represents, what caveats and conditions may have been associated with it, all are unknown. To "update" the information in the document would require answering all of these questions. And because there is no reason to believe that any new version of this bespoke document exists, this exercise would likely require the creation of new documents. TR-BROOKS047405 appears to be an ad hoc report created in 2018 about multiple TR products that only happens to include CLEAR. It includes unknown financial metrics about tens of thousands of TR customers and was attached to an email thread to a marketing employee that suggested that the spreadsheet resulted from a prior unknown "adjustment," and was incomplete. TR-BROOKS061094 is another ad hoc report created in 2017 in response to an unknown request for information involving that same marketing employee. Again, that spreadsheet contains tens of thousands of rows of unknown financial data associated with presumable CLEAR customers and users. And TR-BROOKS052564 is a bespoke spreadsheet from 2015, found in that same marketing employee's files, containing tens of thousands of rows of metrics about what appear to be CLEAR customers and various CLEAR subscription plans.

Plaintiffs' request for an "update" of the information found in the eight documents is in fact a question about the contents of the documents and should be posed via interrogatory or deposition; a document "supplement" requires no such information.[2] To adopt Plaintiffs' approach would enable potentially abusive, unending investigation demands without protections and guardrails such as the ability to object and to limit the number of interrogatories. The Court should decline to adopt such an approach here and deny Plaintiffs' requests for "update[d] information."

[2] 8B Fed. Prac. & Proc. Civ. § 2163 (3d ed.) ("When information is sought from a party," the appropriate mechanisms are a deposition or an interrogatory).

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 Mura
Andre Mura