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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' NOTICE OF MOTION AND
MOTION FOR LEAVE TO FILE FIRST
AMENDED CLASS ACTION COMPLAINT**

Date: January 19, 2023
Time: 1:30 p.m.
Place: Courtroom 5, 17th Floor
Judge: Hon. Edward M. Chen

NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on January 19, 2023 at 1:30 p.m., or as soon thereafter as the matter may be heard, via videoconference or in Courtroom 5 of the United States District Court, Northern District of California, San Francisco Division, located at 450 Golden Gate Avenue, San Francisco, California 94102, before the Honorable Edward M. Chen, Plaintiffs Cat Brooks and Rasheed Shabazz will, and hereby do, move this Court, pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure, for leave to file a First Amended Class Action Complaint, a copy of which is submitted with this motion.

The proposed First Amended Class Action Complaint updates Plaintiffs' UCL injunctive relief claim in line with the motion to certify a class, clarifies the proposed class definition, modifies certain factual allegations based on evidence produced by Defendant during discovery, and conforms Plaintiffs' class allegations to Rule 23 of the Federal Rules of Civil Procedure.

This motion is based on this Notice of Motion; the accompanying memorandum in support; the proposed First Amended Class Action Complaint, Ex. A; the Proposed Order, Ex. B; the Declaration of Andre M. Mura in Support of Plaintiffs' Motion for Leave to Amend, Ex. C; the complete files and records in this action; and on such other written and oral argument as may be presented to the Court.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Plaintiffs timely move for leave to amend their complaint. Plaintiffs originally filed the operative class complaint in state court, and now seek leave to amend for four reasons: (1) seeking class treatment for the UCL injunction claim, (2) updating the class definition, (3) revising select factual allegations to account for certain information learned in discovery, and (4) conforming class allegations to Rule 23 of the Federal Rules of Civil Procedure. Plaintiffs do not seek to add parties or claims.

II. BACKGROUND

Plaintiffs filed this action in state court on December 3, 2020, bringing four causes of action against Thomson Reuters: (1) common law right to publicity/misappropriation of likeness, (2) monetary relief under § 17200 of California's Unfair Competition Law, (3) unjust enrichment, and (4) public injunctive relief under § 17200 of California's Unfair Competition Law. ECF No. 1-1 at ¶¶81-118. Plaintiffs asserted their class allegations under California's procedural rules for class cases. *See id.* at ¶¶70-80. Thomson Reuters removed the case to this Court in February 2021, *see* ECF No. 1, and moved to dismiss the Complaint in its entirety. ECF No. 28. The Court dismissed Plaintiffs' common law privacy claims and request for monetary relief under the UCL,¹ but permitted Plaintiffs' standalone unjust enrichment and public injunctive relief claims to proceed. ECF No. 54.

Per the operative scheduling order in this case, Plaintiffs' deadline to file an amended complaint is November 9, 2022, the same date as their motion to certify the class. ECF No. 84 at 2. The close of fact discovery is set for June 14, 2023, more than seven months from now. *Id.* at 3. Before filing this motion, Plaintiffs sought Thomson Reuters' written consent to amend

¹ Because the dismissal order did not expressly state whether dismissal was with or without prejudice, Plaintiffs reallege the dismissed claims in their proposed amended complaint solely to preserve their right to any appeal. *See Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (en banc) ("For claims dismissed with prejudice and without leave to amend, we will not require that they be repled in a subsequent amended complaint to preserve them for appeal.").

1 their complaint pursuant to Rule 15(a)(2), which Thomson Reuters declined to provide. *See*
2 Mura Decl., Ex. C, at ¶3.

3 Plaintiffs seek to leave to amend to make four general changes that would bring their
4 pleading in line with their class certification motion. The first change would clarify that
5 Plaintiffs seek class treatment for their UCL injunction claim, and request representative public
6 injunctive relief in the alternative. The original claim, by contrast, stated only that Plaintiffs
7 were seeking a representative public injunction.

8 The second change would be to the class definition, which was written without the
9 benefit of discovery. As changed, the class definition would be co-extensive with, if not
10 narrower than, the previous definition. The original class definition states:

11 All persons residing in the state of California whose name, photographs, personal
12 identifying information, or other personal data is or was included in the CLEAR
13 database during the limitations period.

14 ECF No. 1-1 at 14 By contrast, the proposed amended class definition states:

15 All persons who, during the limitations period, both resided in the state of California
16 and whose personal information Thomson Reuters made available for sale through
CLEAR without their consent.

17 *See Proposed Amended Complaint, Ex. A at 15.* Both the original and proposed amended
18 definitions exclude “any officers and directors of Thomson Reuters; Class Counsel; and the
19 judicial officer(s) presiding over this action and the members of his/her immediate family and
20 judicial staff.” *See id.*; ECF No. 1-1 at 14. The amended definition simply reflects a more precise
21 understanding of how CLEAR operates and moves “during the limitations period” so that it
22 inarguably applies to both residency and whether information was made available for sale
23 through CLEAR. Although “[t]here is no rule that the definition of a certified class must exactly
24 match the definition contained in a complaint,” *Sandoval v. Cnty. of Sonoma*, 2015 WL 1926269,
25 at *2 (N.D. Cal. Apr. 27, 2015), it is at least prudent to update the class definition in the
26 operative pleading as the motion for class certification is filed, as that course avoids any
27 dispute over the court’s authority to consider a class beyond the definition provided in the
28 complaint. *See also Gold v. Lumber Liquidators Inc.*, 2017 WL 2688077, at *3 (N.D. Cal. June 22,

2017) (collecting cases).

The third change would be to make minor adjustments to Plaintiffs' factual allegations to account for select information learned through discovery, and the fourth change would be to update the pleading (originally filed in California state court) to reflect federal procedural standards.

Again, Plaintiffs do not seek to add new claims or join new parties.

III. ARGUMENT

Rule 15(a)(2) provides that leave to amend "shall be freely given when justice so requires." The rule "is designed 'to facilitate decision on the merits, rather than on the pleadings or technicalities.'" *Chudacoff v. Univ. Med. Ctr. of S. Nev.*, 649 F.3d 1143, 1152 (9th Cir. 2011) (citation omitted). Courts in this circuit therefore afford "extreme liberality" to plaintiffs seeking to amend their complaints. *Waldrip v. Hall*, 548 F.3d 729, 732 (9th Cir. 2008).

Leave to amend should only be denied only upon a showing of: (1) bad faith, (2) undue delay, (3) futility, or (4) undue prejudice to the opposing party. *Id.* Of these factors, often referred to as the *Foman* factors, "prejudice to the opposing party carries the greatest weight." *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 574 (9th Cir. 2020). "'Absent prejudice,' therefore, 'or a strong showing of any of the remaining *Foman* factors, there exists a *presumption* under Rule 15(a) in favor of granting leave to amend.'" *Crown Energy Servs., Inc. v. Zurich Am. Ins. Co.*, 2021 WL 2207348, at *2 (N.D. Cal. Jun. 1, 2021) (Chen, J.) (citation omitted, emphasis in original). The party opposing the motion bears the burden of showing prejudice. *Id.*

The Court should grant Plaintiffs leave to file the proposed amended complaint because the changes Plaintiffs seek to make are timely and proper. Fairly understood, the changes do not substantively alter the claims, parties, or scope of the class, and will not require any extension of the close of discovery or other deadlines. But even if Thomson Reuters could show that the amendments are in some sense substantive, there is no basis to deny these amendments, particularly as Thomson Reuters is not prejudiced by them, let alone substantially prejudiced. Because the *Foman* factors collectively weigh in Plaintiffs' favor, the Court should grant leave to amend.

1 **1. Amendment will not prejudice Thomson Reuters.**

2 As prejudice is the most important Rule 15(a) factor, *Brown*, 953 F.3d at 574, the Court’s
 3 inquiry may begin and end here because Thomson Reuters will not be prejudiced by
 4 permitting amendment. Prejudice to the nonmoving party must be “substantial” to justify
 5 denying leave to amend. *Chrimar Sys. Inc. v. Cisco Sys. Inc.*, 2016 WL 520948, at *3 (N.D. Cal.
 6 Feb. 10, 2016). Often, courts “evaluate prejudice in terms of whether relevant deadlines would
 7 have to be continued as a result of the new pleading” —a showing that cannot be made here,
 8 as seven months remain before the close of discovery. *Artemus v. Louie*, 2017 WL 747368, at *4
 9 (N.D. Cal. Feb. 27, 2017). And, as is the case here, courts fail to find prejudice to an opposing
 10 party when the moving party has made no prior attempt to amend because the opposing party
 11 has not been subject to repeated litigation costs involving amendment. *See, e.g., Crown Energy*
 12 *Servs.*, 2021 WL 2207348, at *3.

13 Critically, Thomson Reuters faces no additional burden from the proposed amended
 14 complaint. Plaintiffs do not seek to join new parties, state new claims, or expand the class
 15 definition. The minor factual clarifications are few and will better inform the Court about
 16 CLEAR. Seeking class treatment of the UCL injunction claim, in addition to a representative
 17 public injunction in the alternative, in no way substantially prejudices Thomson Reuters: the
 18 legal and factual issues significantly overlap between a Rule 23(b)(2) class and representative
 19 public injunction, and the Rule 23(a) and 23(b)(3) analysis for Plaintiffs’ unjust enrichment
 20 claim remains the same irrespective of the proposed amendments. What’s more, the changes
 21 to the class definition merely reflect a better understanding of the case. And the fact that
 22 Plaintiffs intend to file an amended complaint along with their motion to certify the class has
 23 long been known to both parties —and is contemplated in the parties’ agreed-upon schedule,
 24 which sets the same deadline for both events. *See* ECF No. 84.

25 Because Thomson Reuters will not be substantially prejudiced by Plaintiffs’
 26 amendment, “the critical issue” weighs in favor of granting leave to amend. *See Staley v. Gilead*
 27 *Scis., Inc.*, 2021 WL 5906049, at *3 (N.D. Cal. Dec. 14, 2021) (Chen, J.). And, as explained below,
 28 there is no countervailing weight from the remaining *Foman* factors that could overcome the

1 “extreme liberality” courts afford amendment. *See Waldrip*, 548 F.3d at 732.

2 **2. Plaintiffs’ request for amendment is made in good faith.**

3 To find bad faith in a motion for leave to amend, “the adverse party must offer evidence
4 that shows ‘wrongful motive’ on the part of the moving party.” *Misle v. Schnitzer Steel Indus.,*
5 *Inc.*, 2017 WL 661366, at *3 (N.D. Cal. Feb. 17, 2017) (citation omitted). Courts have found bad
6 faith “where the amendment is introduced to cause a delay in proceedings or for some other
7 improper purpose,” such as to avoid an adverse summary judgment ruling and requiring
8 reopening discovery. *Artemus*, 2017 WL 747368, at *3. Thomson Reuters has no such evidence.
9 The amendment sought here is fairly “vanilla” – there is no impermissible motive for seeking
10 leave to amend here.

11 **3. Plaintiffs have not unduly delayed in seeking leave to amend.**

12 When considering whether delay is “undue,” courts typically look not just at the timing
13 of the motion but at whether there is some “dilatory motive” for delay. *In re Facebook Priv.*
14 *Litig.*, 2015 WL 632329, at *2 (N.D. Cal. Feb. 13, 2015). Because Plaintiffs developed the
15 proposed changes in the amended complaint in tandem with the motion to certify the class,
16 earlier amendment would not have been practical, particularly in light of significant discovery
17 received over last several months. Moreover, the parties clearly anticipated that Plaintiffs
18 would seek to revise their complaint at the time they filed the motion to certify class, and
19 routinely stipulated to that schedule. *See* ECF Nos. 58, 77, 83. Because the changes do not
20 substantially change Plaintiffs’ claims or the parties in this case, Thomson Reuters can show
21 no “dilatory motive” on Plaintiffs’ part for seeking a single amendment at a foreseeable
22 juncture, rather than filing inevitably successive requests for amendment each time new
23 information was learned. In any event, “undue delay by itself is not a reason to deny
24 amendment.” *Staley*, 2021 WL 5906049, at *3.

25 **4. Amendment is not futile.**

26 Proving futility is a “heavy burden” that requires the nonmoving party to establish that
27 “no set of facts can be proved under the amended complaint that would constitute a valid and
28 sufficient claim or defense.” *Microsoft Corp. v. Hon Hai Precision Indus. Co., Ltd.*, 2020 WL

836712, at *15, *14 (N.D. Cal. Feb. 20, 2020). Thomson Reuters cannot meet this burden, as evidenced by the Court's order allowing Plaintiffs' unjust enrichment and UCL injunctive relief claim to go forward. *See* ECF No. 54. But even if the Court had not already denied Thomson Reuters' motion to dismiss as to the remaining claims in the proposed amended complaint, granting leave would still be proper because courts typically avoid resolving claims on the merits under a futility analysis. *See Microsoft Corp.*, 2020 WL 836712, at *14. Plaintiffs replead the dismissed claims only to preserve their right to appeal, *see* Ex. A at 18 n. 19, 19 n. 20, and because Plaintiffs' unjust enrichment and UCL injunctive relief claims survived the motion to dismiss, amendment is not futile.

IV. CONCLUSION

Because Thomson Reuters will not be substantially prejudiced by the amendment and can show no other countervailing reason, Plaintiffs respectfully request that the Court grant their motion for leave to file their proposed First Amended Class Action Complaint.

Dated: November 9, 2022

Respectfully submitted,

By: /s/ Andre M. Mura

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