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20 UNITED STATES DISTRICT COURT

21 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

22 STEVEN ROBERT PRESCOTT, individually
and on behalf of others similarly situated,

23 Plaintiff,

24 v.

25 RECKITT BENCKISER LLC,

26 Defendant.
27

Case No. 5:20-cv-02101-BLF
Assigned to: Hon. Beth L. Freeman
Magistrate Judge: Hon. Virginia K. DeMarchi

**JOINT STATUS REPORT RE
TECHNOLOGY ASSISTED REVIEW**

1 Defendant Reckitt Benckiser LLC (“RB”) and Plaintiff Steven Robert Prescott (“Plaintiff”)
2 (collectively, the “Parties”) jointly, by and through their respective undersigned counsel of record,
3 respectfully submit this status report regarding technology assisted review (“TAR”) pursuant to
4 the Court’s February 2, 2021, Status Report Order [Dkt. No. 77].

5 I. The feasibility of employing some form of technology assisted review to increase the
6 speed and efficiency of defendant’s document review and production.

7 RB’s Position: RB Is Agreeable to Using The TAR Tool “Active Learning”

8 Following the Court’s guidance at the February 2, 2021, discovery hearing, RB determined
9 that its counsel’s document review system, Relativity, has a tool called “Active Learning,” “a type
10 of TAR software that uses learning algorithms to prioritize documents for its attorneys to review
11 manually.” *Livingston v. City of Chicago*, 2020 WL 5253848, *2 (N.D. Ill. Sept. 3, 2020). With
12 Active Learning, “algorithms use data points collected through attorney review of documents in
13 order to reorganize the documents in the review queue in a more efficient order. With each coding
14 decision the attorneys make, the technology continues to learn and prioritize which documents
15 contain contextually similar content as documents which are coded as responsive.” *Id.* See also
16 Relativity 10.3 Active Learning at
17 https://help.relativity.com/10.3/Content/Relativity/Active_Learning/Active_Learning.htm (last
18 accessed Feb. 8, 2021). Eventually, “there comes a point when, based on the reviewers’ coding
19 decisions, the software establishes that the remaining documents in the queue are likely to be
20 nonresponsive.” *Livingston*, 2020 WL 5253848, *2. Active Learning has quality control
21 applications, such as elusion testing and family reconciliation, to ensure that an attorney reviews
22 an acceptable number of potentially responsive documents. *Id.*

23 Unlike other forms of TAR, Active Learning does not require a seed set because the model
24 is rebuilt every 20 minutes while the attorneys manually review the documents and code
25 responsiveness. See, e.g., *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125, 128 (S.D.N.Y. 2015) (“If
26 the TAR methodology uses “continuous active learning” (CAL) (as opposed to simple passive
27 learning (SPL) or simple active learning (SAL)), the contents of the seed set is much less
28 significant.”). RB could also use the results from the documents it has already reviewed, coded,

1 and produced from custodians Marine Grataloup and Heidi Fuentes – and for which Plaintiff has
2 already agreed it has no dispute regarding RB’s responsiveness review – to build a starting model.

3 For validation testing, RB would use Relativity’s elusion test. RB’s counsel is informed
4 that Relativity’s elusion test takes a sample size of the unreviewed documents deemed
5 nonresponsive. For the test, RB would review the unreviewed documents deemed nonresponsive
6 to see if any were responsive. RB’s counsel is informed that if 5% or less of the sample set was
7 eluded (*i.e.*, would have remained unreviewed if review stopped at that point), then the review is
8 deemed complete by the software. Any documents identified as responsive during the elusion test
9 would be produced.

10 On February 5, 2021, RB’s counsel advised Plaintiff’s counsel of the availability of Active
11 Learning, provided the website link for Relativity 10.3 Active Learning
12 (https://help.relativity.com/10.3/Content/Relativity/Active_Learning/Active_Learning.htm), and
13 informed Plaintiff’s counsel that RB agreed to employ Active Learning. As of the date of this
14 filing, Plaintiff has not agreed to the use of Active Learning. RB requests a further hearing to
15 discuss the use of Active Learning to increase the speed and efficiency of RB’s document review
16 and production.

17 Plaintiff’s Position:

18 RB buries a stunning revelation: Plaintiff’s compromise search terms only yield
19 approximately 24,000 documents. Only at 7:59 pm Eastern Time on February 9 (the day of this
20 filing) did RB disclose that Plaintiff’s compromise search terms yield so few documents. By
21 picking custodians who had significant duties at RB-owned companies other than Woolite¹, RB
22 misled Plaintiff – and the Court – into believing Plaintiff’s search terms yield far more than 24,000
23 documents for the 16 unsearched custodians.

24 At the February 2, 2021 hearing, defense counsel told the Court that the volume of
25

26 ¹ Below, RB writes that they processed the documents of three custodians – Duncan Watson,
27 Daniel Redmon, and Quyen Slotznick – for their “early case assessment.” And, Plaintiff requested
28 that RB begin its document production with Duncan Watson. Curiously, RB instead chose to
begin its document production with two custodians -- Marine Grataloup and Heidi Fuentes -- that
were neither part of RB’s early assessment nor specifically mentioned by Plaintiff.

1 documents from the 18 custodians will be “at least a few hundred gigs,” leading the Court to
2 believe that RB would search 100s of gigabytes of documents. *See* February 2, 2021 Hearing
3 Transcript, at 3:18-19; 8:15. It turns out that RB was misleadingly referring to the total data it was
4 processing, not the post-search term document volume. Furthermore, the cherry-picked numbers
5 provided by RB led Plaintiff’s counsel to estimate that that there would be 91,000 documents
6 across the remaining 16 custodians, more than three times the number now provided by RB. *See*
7 February 2, 2021 Hearing Transcript, at 8:16 – 9:1.

8 Given that Plaintiff’s modified search terms are hyper-targeted to produce to yield only
9 24,000 documents across 16 custodians, there is no legitimate reason for RB to use TAR. This is
10 not a burdensome search. If anything, Plaintiff’s search terms are likely too narrow, and Plaintiff
11 reserves the right to request supplemental search terms.

12 Astoundingly, after misleading Plaintiff’s counsel and the Court regarding the volume of
13 Plaintiff’s proposed modified search terms, RB seeks to utilize a one-sided and opaque TAR
14 process. On February 4, 2021, Plaintiff’s counsel asked for a meet-and-confer telephone call
15 regarding the use of Technology Assisted Review (“TAR”). *RB refused to meet-and-confer*. Then,
16 on February 5, 2021, Plaintiff e-mailed RB seeking transparency by asking specific questions
17 about the RB’s proposed “TAR” process. *RB never answered Plaintiff’s questions*. This is yet
18 another step in RB’s months long campaign of delay and obfuscation regarding RB’s ESI that has
19 forced Plaintiff to file two prior joint letter briefs.

20 RB’s ESI delays are inhibiting this litigation’s progress. Six months into discovery, RB has
21 produced less than 1,500 documents. Despite RB characterizing its production as rolling, it has
22 been four weeks since RB has produced any documents. And, because RB has yet to produce a
23 single document for 16 of its 18 custodians, Plaintiff is unable to take Rule 30(b)(1) depositions.

24 While Technology Assisted Review can be a very valuable tool in some circumstances,
25 TAR is not a good fit for this litigation.

26 *First*, RB wants to use Technology Assisted Review without providing transparency.
27 Technology Assisted Review is not appropriate when the producing party fails to be transparent.
28 *Progressive Cas. Ins. Co. v. Delaney*, 2014 WL 3563467, at *11 (D. Nev. July 18, 2014). “The

1 cases which have approved technology assisted review of ESI have required an unprecedented
2 degree of transparency and cooperation among counsel in the review and production of ESI
3 responsive to discovery requests.” *Id.* at 10.

4 RB has refused to answer the following questions about RB’s use of Active Learning:

- 5 • Will RB apply search terms to its 18 custodians’ documents before reviewing them
6 with Active Learning? If so, which search terms will RB use?
- 7 • Will RB review documents by custodian or across custodians?
- 8 • Will RB provide a weekly update regarding the pace of its document review and
9 the responsiveness rate?
- 10 • If RB stops its document review based on Active Learning, will RB agree to use
11 the Elusion technology to share the next 1,000 documents that would have been
12 reviewed with the Plaintiff?

13 *Second*, to the extent that RB intends to apply search terms to cull its ESI before using
14 TAR, the Technology Assisted Review will be rendered ineffective. When a party is using search
15 terms to cull ESI before applying TAR, the party is “dumbing-down the predictive coding
16 intelligence, and, thereby, driving down its value.” *See* Speros, J. William, Predictive Coding’s
17 Erroneous Zones Are Emerging Junk Science, e-discoveryteam.com blog (Apr. 28, 2013); *see also*
18 *FCA US LLC v. Cummins, Inc.*, No. 16-12883, 2017 WL 2806896, at *1 (E.D. Mich. Mar. 28,
19 2017) (“applying TAR to the universe of electronic material before any keyword search reduces
20 the universe of electronic material is the preferred method.”)

21 *Third*, as discussed above, with only 24,000 documents to review, RB has failed to show
22 that Plaintiff’s proposed modified search terms are so burdensome that TAR is needed. RB has not
23 cited a single case where TAR was applied to fewer than 100,000 documents.

24 **Given that TAR is inappropriate for the specific needs of this litigation, Plaintiff**
25 **respectfully asks the Court order RB to review the documents that hit on Plaintiff’s**
26 **proposed modified search terms (from the parties’ January 22 joint letter brief) for the 18**
27 **agreed-upon custodians, and to produce the responsive documents.**

28

1 II. The estimated volume of documents to be reviewed if the parties make the agreed-upon
2 modifications to the ESI search strings, limit the review time period for each custodian based on
3 the start date for the custodian's relevant role, and continue to apply the other procedures (e.g.,
4 email-threading, de-duplication) already being utilized.

5 RB's counsel's vendor estimates the volume of documents to be reviewed after applying
6 the agreed-upon modifications to ESI search strings, time period based on start date for the
7 custodian's relevant role, and de-duplication is approximately 24,000 documents. RB's counsel is
8 informed that e-mail threading is not applied during the early case assessment stage of data
9 processing, but can be applied at the review stage later.

10 RB expects the estimated number of documents will slightly increase. To obtain the above
11 estimate, the vendor has processed over 800 gigabytes of data. The data for custodians Duncan
12 Watson, Daniel Redmon, and Quyen Slotznick was processed for early case assessment, and
13 documents with extracted text were searched. Documents without associated extracted text will
14 still need to be converted to a tiff image so that an optical character recognition ("OCR") process
15 can be applied. Given the volume of data and time constraints, the OCR and search string
16 application process for the documents for these three custodians was not yet complete at the time
17 of filing this status report. Due to similar time constraints, the data for custodian Joan Badrenas
18 has not been processed yet. As noted above, RB requests a further hearing to address these issues
19 and, if helpful to the Court, RB will have more detailed information available on a custodian-by-
20 custodian basis.

21 Dated: February 9, 2021

22 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

23 By

/s/ Juthamas J. Suwatanapongched

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Dated: February 9, 2021

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ATTESTATION

Pursuant to Local Rule 5-1(i)(3), the undersigned filer hereby attests that all signatories listed above, and on whose behalf this filing is submitted, concur in the filing’s content and have authorized the filing.

Dated: February 9, 2021

/s/ Juthamas J. Suwatanapongched

JUTHAMAS J. SUWATANAPONGCHED