UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

GABYS BAGS, LLC,

Plaintiff, v. MERCARI, INC.,

Defendant.

Case No. 20-cv-00734-WHA (TSH)

DISCOVERY ORDER Re: Dkt. Nos. 237, 238, 239, 240, 241, 242, 244, 245

The parties have filed discovery letter briefs at ECF Nos. 237-42 & 244-45. This order resolves ECF Nos. 237-40 and 244-45 and requires further briefing for ECF Nos. 241-42. A. ECF No. 237

Mercari has named Kody Yates, Gaby Yates, Kole Yates, Kimberly Yates and Donald on each Yates CCD, 1

which were met solely with objections. ECF No. 237-2. Mercari now raises five arguments. First, it challenges the numerosity objection that is based on the case law concerning nominally separate parties. Second, Mercari raises an unclear argument concerning privileges. Third, Mercari challenges the Yates broad, burdensome, vague and ambiguous, and seek irrelevant information. Fourth, Mercari

challenges the Yates

1 When referring to one or some of the Yates CCDs, the Court uses their first names for the sake of clarity. No disrespect is intended. From her discovery responses, the Court gathers that Gaby

1. Nominally Separate Parties

aximum number of allowable 21X Capital Ltd. v. Werra, 2007 WL 2852367, *1 (N.D. Cal. Oct. 2, 2007) (citations

per side rule is often applied when parties to an action are nominally separate. Parties may be considered nominally separate when represented by a single attorney, when there is a unity of action,

or when there is a legal relationship between the parties Id. (citation omitted); see also Vinton v. Adam Aircraft Indus., Inc., 232 F.R.D. 650, 664 (D.Colo.

Here, the Plaintiff has taken the position that AAI and Defendant Adam are alter egos, and, in essence, should be treated as a single, unified entity. In such circumstances, the Court cannot say that the Magistrate Judge abused his discretion in limiting the Plaintiff to 25 interrogatories in total. Stiles v. Walmart, 2020 WL 264420, *4 (E.D. Cal. Jan. 17, 2020) Where separate parties are represented by the same counsel and are acting in unison, they may be treated as one party for purposes of the limit on interrogatories Freedom Foundation v. Sacks, 2020 WL 1914902, *3 (W.D. Wash. April 20, 2020) (interrogatories to be served upon each party, some courts have observed that multiple parties on Vinton v. Adam Aircraft Indus., Inc., for example, the court upheld the magistrat interrogatories when the plaintiff had taken the position that the corporate defendant and one of its .

inally separate parties. c In their jointly filed Answer to the Bags admit that to be true. ECF No. 163 ¶ 2. The significance of it were answered

by him and another 25 rogs on Kody would in practice force him to answer 50 rogs, contrary to the intent of Rule 33. Further, os, CC ¶ 3, which under the case law cited above also supports finding that they are nominally separate parties and limiting Mercari to 25 rogs as to both of those parties. Accordingly, the Court to all 25 of the rogs

2 However, the Court overrules the numerosity objection for the other Yates CCDs. In paragraph 56 of the Counterclaim and prayer for relief paragraph (e), Mercari sort of alleges that Donald, Kimberly, Gaby and Kole share alter ego liability, but the allegation is pretty threadbare. Paragraphs 14 and 38 suggest that although they were in league with Kody, they took actions themselves. As a matter of common sense, they are different people from Kody, so each of them may know different things. See 21X Capital Ltd., 2007 WL 2852367, at *1 (father and son not

There is no reason to apply the nominally separate parties rule to Donald, Kimberly, Gaby and Kole, and the Court declines to do so.

2. Privileges

ert any privilege and submit any waived. Fed. R. Civ. P. 33(b)(4). Further, each Rog requests different non-privileged factual

information, and because CCDs refuse to provide a log or even explain the basis for any privilege or work product claim, Mercari is entirely unable to review or challenge same. These objections should be overruled (ECF 201 at 26-28), or at least a log should be ordered as in ECF 144, which

2 In the event the Court applies the nominally separate parties rule, Mercari alternatively requests

leave to serve more than 25 rogs. Mercari has made this request for more than 25 rogs at least several times now, and the Court has rejected it on the ground that this case is not complicated enough to warrant more than 25 rogs. The Court has not changed its view.

(including confidentiality), work product or privilege. As explained in the objections and during the numerosity objections. However, out of an abundance of caution to avoid any possible waiver argument, CCD made, empted to explain the basis for the privilege objections

and indicated that CCD is not currently withholding discovery in response to these Rogs that would need to be logged per the case law in DE 194, p. 4-5. This is the same issue Mercari has been vexat

The Court has skimmed the 125 rog responses at issue and believes the issue relates to how the Yates CCDs responded to each rog. Each response begins by asserting the numerosity objection. Then the answer states that the responding party should not have to respond further.

and the next paragraph is a list of objections. Mercari is right that any objections that were not stated are waived, see Fed. R. Civ. Proc. 33(b)(4), but there is no indication that the Yates CCDs failed to state any applicable objections, and in their section of the letter brief, they say they did make them.

As for work product or privilege, the Court has explained that certain types of communications with counsel do not have to be logged. ECF No. 194 at 4-5. Mercari has never cited any case law contra withholding any discovery in response to these rogs that would need to be logged. In any event, since the Yates CCDs never got past stating their numerosity objection, the Court does not see a ripe issue with respect to privileges.

3. Relevance, Overbreadth, Burden, Vagueness, Ambiguity (and ECF No. 239) The parties do not say much in this letter brief about the substantive objections to these rogs. Instead, Mercari addresses relevance and other objections in ECF No. 239.

The Court is persuaded that these objections are mostly boilerplate and do not have substance to them. It is generally easy to tell what these rogs are asking for. Given the lesser role that Donald, Kimberly, Gaby and Kole seem to play in the case, it seems unlikely that providing

responsive information could be burdensome. And for the most part, the Court can connect the

There are a few exceptions. Rog 19 (communications with experts) at least superficially looks improper, and Mercari has not briefed the privilege issues associated with discovery regarding a consulting expert or issues under Rule 26(b)(4) with respect to discovery about a potential trial expert. The Court will not grant a motion to compel on rog 19 without some briefing on those issues.

Rogs 10 and 12- s written these requests are

overbroad and seek invasive personal information about the Yates family. Because Kody is the between him and his family members, no matter how irrelevant to this case. If anyone else in the

se rogs ask financial dealings with him or her as well. These rogs seek broad information about family

financial arrangements, and they are not limited in any way to what is relevant to this lawsuit. They are incredibly invasive of family privacy. It is normal for family members to claim each other on tax returns at times and to have financial dealings with each other, and that is not suggestive of an alter ego relationship it just means they are family. In ECF No. 239, Mercari between at 4 (emphasis added) allegation, threadbare as it is, is that Donald, Kimberly, Gaby and Kole are alter egos , not with each other or with Kody. Accordingly, to cure the overbreadth, privacy and relevance problems, for rogs 10 and 12- 17, the Court strikes the

Finally, rog 6 asks to identify all written or oral contracts, agreements, understandings, and/or terms between you and/or any Counterclaim-Defendants, and Mercari. The Court understands that to mean: Identify all written or oral contracts, agreements, understandings, and/or terms between you and/or any Counterclaim-Defendants, on the one hand, and Mercari, on the other. So construed, the rog is relevant and proportional. Since the Yates CCDs are family,

and Mercari alleges in paragraphs 3 and 4 of its Counterclaim that they all live together, they probably have all sorts of agreements between each other, such as who will mow the lawn or take out the recycling, and those are not relevant to this lawsuit.

Accordingly, the Court orders Donald, Kimberly, Gaby and Kole to answer rogs 1-18 and 20-25 within 10 days. Rogs 6, 10 and 12-17 are narrowed as explained above.

4. Confidentiality Mercari is wrong that the Yates CCDs have waived their confidentiality objection. However, the objection has no merit because there is a protective order in this case.

5.

Local Rule 7. B. ECF No. 238

In ECF No. 238, Mercari moves to compel on its 42 RFPs to the Yates CCDs and on 19

1. Number of RFPs

the discovery limit in the FRCP including a limit of 60 document requests per side, including those to non- magistrate judge. The parties now have two discovery disputes concerning the number of RFPs.

First, Mercari argues that because its amended counterclaims at ECF Nos. 138 and 153 added five new counterclaimants (the Yates CCDs), it is appropriate to increase the per-side RFP limit to include the 42 RFPs it served on each of the Yates CCDs. The Yates CCDs do not say anything substantive in response. Accordingly, the Court increases the per-side number of RFPs from 60 to 102.

limit of 60 because some of them had subparts. Under the Federal Rules of Civil Procedure, the See Fed. R. Civ. Proc. 33(a)(1). have discretion under Rule 26 to fashion RFP limitations that

specifically restrict subparts. However, Judge Alsup did not do that in ECF No. 112.

within the new per-side numerical limit of 102.

2. Privileges This issue is the same as with ECF No. 237, and the Court again thinks the dispute is not ripe.

3. Relevance, Overbreadth, Burden, Vagueness, Ambiguity (and ECF No. 239) As with ECF No. 237, Mercari puts all of its explanations about relevance and proportionality in a separate letter brief, ECF No. 239. Because Mercari is moving on so many RFPs, the Court will not discuss its reasons for ruling on each RFP. Instead the Court rules as follows: The Yates CCDs must produce responsive, non-privileged documents for RFPs 1-5, 7-8, 10-13, 16, 20, 28-34, 36-42; RFP 9 limited to agreements between you and/or any CCD on the one hand, and Mercari on the other; RFPs 14-15, 17- and RFPs 22-

produce responsive, non-privileged documents for RFPs 42- Bags must produce these documents within 14 days.

4. Confidentiality s order is the same on this issue as in ECF No. 237. 5.

Local Rule 7. C. ECF No. 240

This joint discovery letter brief is about dozens of requests fo relevance arguments are again set forth in ECF No. 239. Neither side has displayed

good judgment in bringing these RFA disputes to the Court. It to ask the of service that were in effect on January 26, 2017 (RFA 1) or May 8, 2019 (RFA 3). For a lot of

answer, and i that it seems the CCDs should know about, could figure out, and likely haven

might have to qualify their answers in certain ways, but that does not justify their refusal to answer. Because there are so many RFAs at issue, the Court will not explain its reasoning for each one.

Rather, this paragraph provides th the Court states its conclusions.

With respect to the RFAs to the Yates CCDs, for RFAs 3-4 and 10-14, the Yates CCDs say they have made a reasonable to think that is implausible. That is also true for RFA 1 as to Kody, Kimberly and Kole; RFAs 2, 15-18 and 30 for Kimberly and Kole. For RFA 1, Donald and Zhong deny, and there is no proof they are enials of RFAs 2 and 15-18.

For RFA 5, the Yates CCDs might need to qualify their answer in terms of their ability to identify any specific version of the terms of service, but the thrust of the RFA is about the ability to seek the advice of counsel, which they can answer. For RFA 33, the RFA is clear, the objections have no merit, and Kody and Zhong have to answer, qualifying it if necessary. RFAs

and the Yates CCDs must know the answer. They must answer, qualifying their answer as necessary. The same is true for RFAs 44-46 and 49 for Kimberly, Donald, Kole and Zhong. (Mercari does not move as to Kody.)

With respect to the RFAs to , RFAs 79-98 are not a model of clarity, but they are answerable, probably with some qualifications built in, and the objections have no merit. RFAs 119-38 and 159-68 are straightforward and seek relevant information. They are not hard to answer, and all of the objections lack merit.

Accordingly, the Court orders Kody and Zhong to answer RFA 33; all of the Yates CCDs to answer RFAs 5, 40, 41; Kimberly, Donald, Kole and Zhong to answer RFAs 44-46 and 49; and -98, 119-38 and 159-68. These responses are due in 10 days.

D. ECF No. 241

what should have been a joint discovery letter brief by March 11, 2021. E. ECF No. 242

letter brief by March 11, 2021.

F. ECF Nos. 244 and 245

In these joint discovery letter briefs documents responsive to (Both letter briefs are about all 40 RFPs.) Between them, the two letter briefs do not contain even one sentence explaining how the requested discovery is relevant and proportional to the needs of the case. As discussed above, Mercari presented its relevance arguments in combined fashion in ECF No. 239, which it then

No. 239 does not contain any arguments about relevanc

objections are boilerplate. In neither let has satisfied proportional to the needs of the case.

As a reminder, the moving party on a motion to compel should explain why the discovery it is seeking is relevant and proportional to the needs of the case. There are two basic reasons for this. First, you should not expect the Court to figure out on its own why your motion should be granted.

guess what that is and whether that request is appropriate without some help from the moving party. Second, and more importantly, there is a due process function. Once the moving party sets out its relevance and proportionality arguments, the opposing party has an opportunity to respond,

and then the Court can rule having seen the arguments from both sides. Without any briefing from the moving party on why the requested discovery is relevant and proportional, there is nothing for the nonmoving party to respond to, and the Court does not have any arguments to evaluate. This leaves the Court in the untenable position of having to imagine what the arguments for and against the requested discovery might be. However, the Court is supposed to be neutral and rule on arguments presented, not compel is therefore denied.

IT IS SO ORDERED.

Dated: March 8, 2021

THOMAS S. HIXSON United States Magistrate Judge