

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.: CV 20-09581-FLA (RAOx) Date: August 16, 2021
Title: Burhaan Saleh v. Nike, Inc., et al.

Present: The Honorable **ROZELLA A. OLIVER, U.S. MAGISTRATE JUDGE**

Donnamarie Luengo
Deputy Clerk

N/A
Court Reporter/Recorder

Attorneys Present for Plaintiff(s):

Attorneys Present for Defendant(s):

N/A

N/A

Proceedings: (In Chambers) **MINUTE ORDER RE: PLAINTIFF’S MOTION TO COMPEL DISCOVERY RESPONSES [62, 63, 64]**

Pending before the Court is Plaintiff Burhaan Saleh’s motion to compel production of Defendant FullStory’s (“Defendant”) source code. On July 23, 2021, the Court held an informal telephonic hearing following which the Court directed the parties to file letter briefs addressing this dispute. *See* Dkt. No. 62. Plaintiff submitted his brief (“Plaintiff’s Brief”) on July 30, 2021. Dkt. No. 63. Defendant submitted its brief (“Defendant’s Brief”) on August 6, 2021. Dkt. No. 64. For the following reasons, Plaintiff’s Motion is DENIED without prejudice.

Federal Rule of Civil Procedure 26(b)(1) provides that “parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”

The discovery request at issue, Plaintiff’s Request for Production (“RFP”) No. 15, seeks

All versions of the source code, including version numbers and deployment dates, for Session Replay as utilized on nike.com. This request includes any ‘front end’ code deployed on nike.com [i.e., such as JavaScript], and any ‘back end’ code residing on any server, and any other proprietary code necessary for end-to-end functionality of Session Replay.

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Defendant represents that its source code is “highly confidential and proprietary, and is the company’s most valuable asset.” Kuebrich Decl. in Support of Defendant’s Brief, Dkt. No. 64-4 at ¶ 4 at ¶ 2. Consequently, Plaintiff must establish that the source code is both relevant and necessary to his case. *See, e.g., In re Apple and AT & TM Antitrust Litigation*, 2010 WL 1240295, at *2 (N.D. Cal. Mar. 26, 2010).

The parties do not dispute that the source code is relevant to Plaintiff’s claims. *See* Plaintiff’s Brief at 2; Defendant’s Brief at 4. Defendant contends, however, that Plaintiff has failed to show that the code is necessary, or that his request is proportional to the needs of the case, since the information he seeks can be obtained through less burdensome means. Defendant’s Brief at 1, 2-4.

The burden of proportionality in discovery is not placed on the party seeking discovery, but “the parties and the court have the collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.” Rule 26, Advis. Comms. Notes for 2015 Amends. After reviewing the parties’ briefs and authorities cited therein, the Court agrees that RFP No. 15 is disproportionate and unduly burdensome at this stage of the proceedings.

First, Defendant represents that it would take approximately 120 hours to prepare the source code for production. Defendant’s Brief at 1; Kuebrich Decl. in Support of Defendant’s Brief, Dkt. No. 64-4 at ¶ 4 (stating “to disentangle [the requested version of the source code] would require bespoke novel software research development by expert engineering resources and would require approximately 120 hours or more of FullStory employee time.”).

Second, and more significant, Defendant contends that the risk of inadvertent disclosure far outweighs Plaintiff’s need for the source code. Defendant’s Brief at 2. As set forth above, Defendant represents that its source code is the company’s most valuable asset and that 95% of the source code consists of the “session replay functionality [that] is the primary feature of the service that FullStory provides to its clients.” *Id.* at 3. Furthermore, Defendant argues that what Plaintiff actually wants is to know how Defendant’s Session Replay software works and what data the software collected during the period in question, which is information that can be provided either through other documents or deposition testimony. *Id.*; Verdin Decl. in Support of Defendant’s Brief, Dkt. No. 64-3 at ¶ 5.

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Plaintiff seeks to downplay Defendant’s interest in not disclosing its source code, arguing that “[c]ourts routinely grant motions to compel disclosure of source code where, as here, it is relevant to the parties’ claims or defenses.” Plaintiff’s Brief at 1. The Court finds that Plaintiff’s authorities are readily distinguishable. For the most part, the decisions that Plaintiff relies upon are patent cases where the determination of infringement required an examination of the source code. The exception, *Burnett v. Ford Motor Co.*, 2015 WL 1527875 (S.D. W. Va. Apr. 3, 2015), while not a patent case, clearly required examination of the source code of software that was involved in the sudden unintended acceleration of cars, as shown by a government investigation into the same issue involving Toyota vehicles that “spent considerable time evaluating and analyzing the relevant . . . system’s source code.” *Id.* at *4.¹ There is no similar showing of necessity in the instant case.

Indeed, some courts have gone further than requiring a showing of necessity and held that “when source code is requested not only must it be relevant and necessary to the prosecution or defense of the case but when alternatives are available, a court will not be justified in ordering disclosure.” *Congoo, LLC v. Revcontent LLC*, 2017 WL 3584205, at *3 (D.N.J. Aug. 10, 2017) (citing cases); *see also Disney Enterprises, Inc. v. Hotfile Corp.*, 2011 WL 13100240, at *2 (S.D. Fla. Aug. 26, 2011) (denying plaintiffs’ request for code that “contains [defendant’s] entire business” where they had not shown that source code was necessary). Here, Plaintiff has not established why he cannot obtain the information he needs by alternative means. *See, e.g., Congoo*, 2017 WL 3584205, at *3 (finding plaintiff could gain adequate understanding of software functionality through witness testimony).

For the foregoing reasons, Plaintiff’s motion to compel Defendant’s response to RFP No. 15 is DENIED without prejudice.

IT IS SO ORDERED.

Initials of Preparer :
 dl

¹ Moreover, the source code at issue in *Burnett*, though assertedly a valuable trade secret, *Burnett*, 2015 WL 1527675, at *2, was not alleged to be Ford’s most valuable asset.