

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RE3W, INC., et al.,

Plaintiffs and Appellants,

v.

THE FIRST AMERICAN
CORPORATION, et al.,

Defendants,

COSTAR GROUP, INC.,

Objector and Respondent.

G045681

(Super. Ct. No. 30-2009-00126333)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Kim Garlin
Dunning, Judge. Affirmed.

Eagan Avenatti, Michael J. Avenatti and Alexander L. Conti for Plaintiffs
and Appellants.

Munger, Tolles & Olson, Katherine K. Huang and Claire Yan for Objector and Respondent.

* * *

Plaintiffs RE3W, Inc., and RE3W Worldwide Limited, Inc., appeal from an order imposing discovery sanctions against them. The court found no substantial justification for their motion to compel production of financial data and customer information from a nonparty competitor, respondent CoStar Group, Inc. (CoStar). We see no abuse of discretion, and affirm.

FACTS

Plaintiffs sued two joint venturers for “unilaterally abscond[ing] with the fruits of the venture for themselves.” Plaintiffs alleged the joint venture “was commenced years ago to finalize the development of, and to market the technology behind, RE3W’s commercial real estate application.” The “RE3W Application” allowed users to search satellite images of properties, determine parcel numbers and owner contact information, and store relevant documents electronically. Plaintiffs claimed their application reduced “commercial real estate transaction times . . . from months to days.”

Plaintiffs served a deposition subpoena for the production of business records on CoStar, whose products competed with the RE3W Application. The subpoena attached 17 document requests. A discovery referee quashed four of them.

The remaining 13 requests boiled down to three basic groups. In Group No. 1, plaintiffs asked for all CoStar documents regarding revenue and profit information for its online commercial real estate applications (request Nos. 1-8). In Group No. 2, plaintiffs asked for all CoStar documents regarding the total number of subscribers for its applications (request Nos. 9-11). In Group No. 3, plaintiffs asked for all CoStar

documents regarding plaintiffs or the RE3W Application in the last 10 years (request Nos. 16-17).¹

¹ Here are the relevant requests. “**REQUEST NO. 1:** [¶] DOCUMENTS sufficient to show YOUR annual profits from 2004 through the present for the commercial real estate application CoStar Property Professional, described at <http://www.costar.com/products/>. [¶] **REQUEST NO. 2:** [¶] DOCUMENTS sufficient to show YOUR annual revenues from 2004 through the present for CoStar Property Professional, described at <http://www.costar.com/products/>, and/or any of its predecessor applications/versions. [¶] **REQUEST NO. 3:** [¶] DOCUMENTS sufficient to show YOUR annual profits from 2004 through the present for CoStar COMPS Professional, described at <http://www.costar.com/products/>, and/or any of its predecessor applications/versions. [¶] **REQUEST NO. 4:** [¶] DOCUMENTS sufficient to show YOUR annual revenues from 2004 through the present for CoStar COMPS Professional, described at <http://www.costar.com/products/>, and/or any of its predecessor applications/versions. [¶] **REQUEST NO. 5:** [¶] DOCUMENTS sufficient to show YOUR annual profits from 2004 through the present for CoStar Tenant, described at <http://www.costar.com/products/>, and/or any of its predecessor applications/versions. [¶] **REQUEST NO. 6:** [¶] DOCUMENTS sufficient to show YOUR annual revenues from 2004 through the present for CoStar Tenant, described at <http://www.costar.com/products/>, and/or any of its predecessor applications/versions. [¶] **REQUEST NO. 7:** [¶] DOCUMENTS sufficient to show YOUR annual profits from 2004 through the present for CoStar Listings Express, and/or any of its predecessor applications/versions. [¶] **REQUEST NO. 8:** [¶] DOCUMENTS sufficient to show YOUR annual revenues from 2004 through the present for CoStar Listings Express, described at <http://www.costar.com/products/>, and/or any of its predecessor applications/versions. [¶] **REQUEST NO. 9:** [¶] DOCUMENTS sufficient to show the number of subscribers from 2004 through the present for CoStar COMPS Professional, described at <http://www.costar.com/products/>, and/or any of its predecessor applications/versions. [¶] **REQUEST NO. 10:** [¶] DOCUMENTS sufficient to show the number of subscribers from 2004 through the present for CoStar Listings Express, described at <http://www.costar.com/products/>, and/or any of its predecessor applications/versions. [¶] **REQUEST NO. 11:** [¶] DOCUMENTS sufficient to show the number of subscribers from 2004 through the present for CoStar Tenant, described at <http://www.costar.com/products/>, and/or any of its predecessor applications/versions. [¶] . . . [¶] **REQUEST NO. 16:** [¶] All DOCUMENTS that refer or relate to YOUR COMMUNICATIONS with [*sic*] RELATING TO RE3W and/or Richard Frost between January 1, 2000 and December 31, 2009. [¶] **REQUEST NO 17:** All DOCUMENTS that refer or relate to RE3W and/or RE3W’s property search application between January 1, 2000 and December 31, 2009.”

CoStar contacted plaintiffs' lawyer to discuss the subpoena. Plaintiffs' lawyer gave CoStar a copy of a protective order to which the parties in the case had stipulated.

CoStar timely served its responses and objections. First, it explained it had no documents responsive to the Group No. 1 requests (product financials) because it did not track its revenues and profits for individual products. Second, it objected to the Group No. 2 requests (subscriber totals) as being "overbroad" and "unduly burdensome." It also stated its subscriber totals were irrelevant, proprietary, and confidential. Third, it objected to the Group No. 3 requests (10 years of RE3W documents) as being "overbroad" and "unduly burdensome."

After additional meet and confer communications, plaintiffs moved to compel CoStar to produce the three groups of documents. In response, CoStar offered to search its e-mail servers for the term "RE3W" and produce any responsive documents under an "attorneys' eyes only" designation. Plaintiffs refused. CoStar then filed a written opposition and supporting declarations. Its counsel stated in one declaration: "I spent 19 hours preparing CoStar's opposition to RE3W's motion to compel My billing rate applicable to this matter is \$550.00 per hour. Accordingly, CoStar has incurred \$10,450.00 in attorneys' fees in opposing RE3W's motion to compel."

At the hearing, the court denied plaintiffs' motion and stated it was "not inclined to award [CoStar] sanctions." It agreed to take the sanction request "under submission and give it a closer look." A week later, the court issued a minute order awarding "\$8,800.00 (16 hours at \$550 per hour)" to CoStar for its reasonable expenses incurred in opposing the motion.

DISCUSSION

An order denying a motion to compel is nonappealable. (*Datig v. Dove Books, Inc.* (1999) 73 Cal.App.4th 964, 984.) But an order imposing sanctions exceeding \$5,000 is directly appealable (Code Civ. Proc., § 904.1, subd. (a)(12))² and reviewed for an abuse of discretion (*Foothill Properties v. Lyon/Copley Corona Associates* (1996) 46 Cal.App.4th 1542, 1557).

“Discovery procedures are generally less onerous for strangers to the litigation.” (*Monarch Healthcare v. Superior Court* (2000) 78 Cal.App.4th 1282, 1289 (*Monarch*)). “While all discovery devices are available against a party, only deposition subpoenas can be directed to a nonparty. . . . [¶] The distinction between parties and nonparties reflects the notion that, by engaging in litigation, the parties should be subject to the full panoply of discovery devices, *while nonparty witnesses should be somewhat protected from the burdensome demands of litigation.*” (*Id.* at p. 1290.) “[W]hen dealing with an entity which is not even a party to the litigation, the court should attempt to structure discovery in a manner which is least burdensome to such an entity.” (*Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 222 (*Calcor*)).

A party may serve a nonparty with a deposition subpoena commanding the production of business records for copying. (§§ 2020.010, subs. (a)(3), (b), 2020.020, subd. (b).) The deposition subpoena must “designate the business records to be produced either by specifically describing each individual item or by reasonably particularizing each category of item.” (§ 2020.410, subd. (a).)

Specific description is needed to ensure the “great burden” of determining whether responsive documents exist is “borne by the party seeking the discovery.” (*Calcor, supra*, 53 Cal.App.4th at p. 222.) The requesting party cannot conscript the

² All further statutory references are to the Code of Civil Procedure.

nonparty “to search its extensive files, at many locations, to see what it can find to fit [the requesting party’s] definitions, instructions and categories.” (*Ibid.*) “The ‘reasonably’ in the statute implies a requirement such categories be reasonably particularized from the standpoint of the party who is subjected to the burden of producing the materials. Any other interpretation places too great a burden on the party on whom the demand is made.” (*Ibid.*) If the requesting party is unsure how to reasonably identify the desired documents pursuant “to the manner in which [the nonparty] maintains its records,” the requesting party may have to first depose the nonparty’s custodian of records. (*Ibid.*) “To the extent such burdens rest on parties seeking the discovery . . . we deem the burden is properly placed where it belongs.” (*Ibid.*)

The requesting party may move for “an order . . . directing compliance with” a deposition subpoena served on a nonparty. (§ 1987.1, subd. (a); see also § 2020.030 [subpoena statutes govern nonparty discovery].) “[T]rial judges must carefully weigh the cost, time, expense and disruption of normal business resulting from an order compelling the discovery against the probative value of the material which might be disclosed if the discovery is ordered. A carelessly drafted discovery order may result in cost and inconvenience far outweighing the potential usefulness of the material ordered to be produced.” (*Calcor, supra*, 53 Cal.App.4th at p. 223.)

“[T]he court may in its discretion award the amount of the reasonable expenses incurred in making or opposing the motion [to compel], including reasonable attorney’s fees, if the court finds the motion was made or opposed in bad faith or without substantial justification or that one or more of the requirements of the subpoena was oppressive.” (§ 1987.2, subd. (a).) “[J]udges must become more aggressive in curbing [discovery] abuses. Courts must insist discovery devices be used as tools to facilitate litigation rather than as weapons to wage litigation. These tools should be well calibrated; the lancet is to be preferred over the sledge hammer.” (*Calcor, supra*, 53 Cal.App.4th at p. 221.)

Here, the court permissibly imposed sanctions against plaintiffs. It reasonably concluded plaintiffs' motion to compel "was made without substantial justification," and the Group No. 3 requests "were overly burdensome and oppressive."

As for the Group No. 1 requests, plaintiffs offered no evidence that any responsive documents existed. (*Calcor, supra*, 53 Cal.App.4th at pp. 223-224.) Plaintiffs sought documents regarding revenues and profits for individual CoStar products. But a CoStar officer explained in a declaration that CoStar markets and sells its products "in bundles," and varies its fees depending on "the number and types of other services to which a customer subscribes." Thus, CoStar does not compile "actual revenues for individual products" or "separately track cost or profit information for individual products." The court credited that declaration, noting "CoStar had previously advised plaintiff[s] . . . that no such documents existed."

Plaintiffs offered no contrary evidence. How could they? Plaintiffs had not deposed CoStar's custodian of records to determine how CoStar keeps its documents. (See *Calcor, supra*, 53 Cal.App.4th at p. 222 [requesting party bears burden to determine "the manner in which [the responding party] maintains its records"].) Plaintiffs weakly note on appeal, as they did at the hearing, that other RE3W competitors were able to produce revenue and profit information for their products. But this fails to show CoStar has similar documents. And it is immaterial whether, as plaintiffs asserted at oral argument, CoStar has the capability to determine revenue and profits for its individual products. CoStar has no obligation to analyze its data and create responsive documents to suit plaintiffs.

Nor is there any reasonable basis, as plaintiffs now insist, for CoStar to produce "at a minimum, any publicly-available information" it might have about its products' revenues and profits. It is "entirely improper" for plaintiffs to "attempt to place the burden and cost of supplying information equally available to both solely upon" CoStar. (*Calcor, supra*, 53 Cal.App.4th at p. 225.) "As between parties to

litigation and nonparties, the burden of discovery should be placed on the latter only if the former do not possess the material sought to be discovered.” (*Ibid.*) Publicly available information about CoStar is, by definition, already available to plaintiffs. They cannot foist the burden of gathering and sorting that information upon CoStar.

As for the Group No. 2 requests, the court could properly decline to compel CoStar to turn over its subscriber totals. Plaintiffs insist this information is relevant because it may help them prove the existence and amount of lost profit damages. It relies upon *Parlour Enterprises, Inc. v. Kirin Group, Inc.* (2007) 152 Cal.App.4th 281, 290 (“one way to prove prospective profits is through the experience of comparable businesses”) and *Kids’ Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 885 (“the experience of similar businesses is one way to prove prospective profits”). But in neither case did the court compel an objecting third party to produce any such records. Plaintiffs cite no case in which a California court compelled a nonparty to produce its financial data and customer information to a competitor seeking to show lost profits.³

Besides, relevance is the only first step in the discovery analysis — not the last. It is “entirely improper” for plaintiffs to “plac[e] more burden upon [CoStar] than the value of the [desired] information warrants.” (*Calcor, supra*, 53 Cal.App.4th at p. 225.) Courts “must carefully weigh the cost, time, expense and disruption of normal business resulting from an order compelling the discovery against the probative value of the [requested] material.” (*Id.* at p. 223.) And “courts should be particularly sensitive to the potential for creating an unfair commercial advantage to a party seeking discovery of materials” from a nonparty competitor. (*Id.* at p. 226; accord *Monarch, supra*, 78

³ A more traditional route to showing lost profits is to retain an industry expert. (See *Parlour Enterprises, Inc. v. Kirin Group, Inc.*, *supra*, 152 Cal.App.4th at p. 288; *Kids’ Universe v. In2Labs*, *supra*, 95 Cal.App.4th at pp. 884-885.) Plaintiffs have not shown any inability to find a qualified expert. They should not be able to dump the costs of proving up their damages case onto CoStar. (See generally *Calcor, supra*, 53 Cal.App.4th at pp. 222, 225 [burdens are properly placed on those seeking discovery].)

Cal.App.4th at p. 1289 [noting, in another context, “the potential for abuse ‘[by a] calculating litigant [who] might conclude that it could benefit from the opportunity to access information it might not otherwise have’”].) Whenever a failed restaurateur needs to show lost profits, can he or she simply subpoena McDonalds or Morton’s Steakhouse to make them disclose how they run their businesses? Courts rightfully keep a close eye on such tactics.

Plaintiffs dismiss any potential harm to CoStar in light of the stipulated protective order. But CoStar did not stipulate to anything. The court had discretion to determine whether the existing protective order protected CoStar and, if not, to issue an adequate protective order or simply deny the motion to compel. On this record, we see no abuse. Courts rightfully “structure discovery in a manner which is least burdensome to” a nonparty. (*Calcor, supra*, 53 Cal.App.4th at p. 222.)

And the court could reasonably find the Group No. 3 requests were “overly burdensome and oppressive.” Plaintiffs sought 10 years’ worth of CoStar’s documents and communications regarding themselves or the RE3W Application. Their requests were not limited by the identity of the documents’ creators, senders, or recipients — even though CoStar has over 1,300 employees. And their requests were not limited to any particular location — even though CoStar has over 25 offices across the country, three offices in the United Kingdom, and one in France. Having failed to restrict their requests to the manner in which CoStar maintains its records, plaintiffs cannot instead require CoStar “to search its extensive files, at many locations, to see what it can find” mentioning plaintiffs or their application. (*Calcor, supra*, 53 Cal.App.4th at p. 222.)

Moreover, plaintiffs offer a dubious justification for seeking the Group No. 3 documents. They claim these documents, like the Group Nos. 1 and 2 documents, would help them prove lost profits. But how? It is possible some CoStar documents tend to show the RE3W Application was a viable product — maybe CoStar performed some internal assessment of the RE3W Application. But plaintiffs cast a much wider net,

seeking 10 years' worth of documents mentioning them or their application in any context. While "'fishing expeditions' are permissible in discovery, there is a limit." (*Calcor, supra*, 53 Cal.App.4th at p. 224.) Plaintiffs exceeded that limit here. They cannot use their complaint to declare open season on their competitor's files.

Plaintiffs' other contentions are as unjustified as their motion to compel. First, CoStar did not offend any discovery protocol by declining to extend the meet and confer deadline upon plaintiffs' demand. Next, the court did not undermine its order by stating "I don't really have any jurisdiction over CoStar." Of course the court had jurisdiction to enforce the deposition subpoena. But we review the court's rulings, not its reasoning. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.) And taken in context, the court was likely just observing that discovery should be "less onerous" for nonparties. (*Monarch, supra*, 78 Cal.App.4th at p. 1289.) Next, the court did not violate plaintiffs' right to due process by awarding sanctions in its minute order. Its initial tentative ruling at the hearing has "no relevance on appeal." (*Wilshire Ins. Co. v. Tuff Boy Holding, Inc.* (2001) 86 Cal.App.4th 627, 638, fn. 9.) Moreover, the court unambiguously stated it was taking the sanctions request "under submission" for "a closer look." There is no due process violation in that.

Finally, the declaration of CoStar's counsel supports the sanctions amount of \$8,800. Plaintiffs complain the court awarded *less* than CoStar sought, and demand an explanation. Here is one: "'The 'experienced trial judge is the best judge of the value of professional services rendered in [her] court.'" (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) What is inexplicable is why plaintiffs vociferously challenge a reduction of the sanctions amount in their favor.

DISPOSITION

The order is affirmed. CoStar shall recover its costs on appeal.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.