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4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA  
6 SAN JOSE DIVISION  
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8 ROBERT HEATH, ET AL.,

9 Plaintiffs,

10 v.

11 GOOGLE LLC,

12 Defendant.

Case No. [15-cv-01824-BLF](#) (VKD)

**ORDER RE JOINT DISCOVERY  
LETTER RE PLAINTIFFS'  
SUPPLEMENTAL RULE 26  
DISCLOSURES**

Re: Dkt. No. 346

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14 Defendant Google LLC challenges the sufficiency of plaintiffs' supplemental disclosures  
15 under Rule 26(a)(1)(A) of the Federal Rules of Civil Procedure and moves to compel further  
16 disclosures. The parties submitted a joint discovery letter on September 6, 2018 and the Court  
17 conducted a hearing on the matter on September 18, 2018.

18 Having considered the submissions of the parties and the arguments of counsel at the  
19 hearing, the Court denies the relief Google seeks without prejudice.

20 **I. BACKGROUND**

21 This is an action for alleged violation of the Age Discrimination in Employment Act  
22 ("ADEA"), 29 U.S.C. § 621 et seq. Dkt. No. 218. Plaintiffs claim that they were well-qualified  
23 for various positions at Google, but were not hired because of their age. They allege that Google  
24 has a practice of giving preferential treatment to workers under 40 years old, and hires them in  
25 significantly greater numbers than older workers. *Id.*

26 Judge Freeman conditionally certified the action as a collective action on October 5, 2016.  
27 Dkt. No. 118. Thereafter, 265 people opted in to the case as plaintiffs, and at least 232 opt-in  
28 plaintiffs remain in the case. Dkt. No. 346 at 4, fn. 1. On August 1, 2018, Judge Freeman denied

1 Google's motion for decertification. Dkt. No. 317.

2 On August 21, 2018, plaintiffs supplemented their Rule 26(a)(1)(A) disclosures. The  
3 supplemented disclosures included the following disclosure about the opt-in plaintiffs:

4 All Opt-In Plaintiffs likely have discoverable information relating to  
5 potential work opportunities with Google, their applications and  
6 interviews for employment with Google, and harm from Google's  
7 discrimination.

8 Dkt. No. 346, Ex. 1 at 2; see also *id.* at 9 (representing that opt-in plaintiffs who have provided  
9 discovery also maintain documents on these subject matters). In addition, plaintiffs provided an  
10 attachment to their supplemental disclosures which they describe as follows:

11 Salary information for Plaintiff Fillekes and 223 Opt-In Plaintiffs is  
12 attached hereto as Exhibit A. Google produced compensation data,  
13 including salary range, bonus target, and number of Google Stock  
14 Units for SWE, SRE, and SysEng employees during the class period  
15 based on the employee's job level and job location. See GOOG-  
16 HEATH-00100514. The data was combined with Google's gHire  
17 applicant data, allowing Plaintiffs to match Plaintiff Fillekes and the  
18 individual Opt-Ins to an appropriate salary range for the positions  
19 they interviewed for at Google, using information concerning the  
20 applicants' job code, job level, compensation region, and date of  
21 rejection. Plaintiffs then took the average salary for these positions  
22 and subtracted the individual's salary since the time of his or her on-  
23 site interview. Damages were calculated from the month following  
24 the individual's on-site interview (the approximate date of rejection)  
25 up until the time he or she obtained permanent employment at an  
26 equal of higher salary (if ever) or until the applicant's anticipated  
27 retirement date. Using this method, Plaintiffs calculate damages  
28 from lost salary of \$90.9 million (or \$345,466 per individual).

19 *Id.*, Ex. 1 at ECF pp. 18-19 (footnotes omitted) and Ex. A. Plaintiffs also supplemented their  
20 disclosures to include calculations of other categories of damages. *Id.* at ECF p. 19-20. With the  
21 exception of the lost salary damages reflected on Exhibit A to their supplemental disclosures,  
22 plaintiffs do not provide plaintiff-specific information regarding damages, but rather calculations  
23 based on averages and estimates for the collective class as a whole.

24 Google contends that the supplemental disclosures inappropriately lump all 265 plaintiffs  
25 together and provide only a generic statement that each will testify about "potential work  
26 opportunities with Google, their applications and interviews for employment with Google, and  
27 harm from Google's discrimination." Dkt. No. 346 at 3, Ex. 1, at ECF p.10. Google argues that  
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1 these disclosures are not sufficiently specific to enable the company to prepare for trial.  
2 Additionally, Google argues that plaintiffs' supplemental disclosures do not reveal the facts that  
3 form the bases for their damages calculations or show how the calculations were made, and  
4 therefore, Google cannot rebut or even test plaintiffs' damages claims.

5 Plaintiffs contend that Google's challenge to their supplemental disclosures is really an  
6 attempt to subvert a prior discovery order in which Judge Lloyd set limits on the discovery Google  
7 could obtain from the opt-in plaintiffs. In that earlier order, and following direction from Judge  
8 Freeman, Judge Lloyd permitted Google to serve four interrogatories and three document requests  
9 on up to 75 opt-in plaintiffs and to depose 35 opt-in plaintiffs (regardless of whether they had been  
10 served with written discovery) for up to three hours each. Dkt. No. 185. Judge Freeman  
11 subsequently denied Google's request for relief from that discovery order. Dkt. No. 207.

12 Plaintiffs say that they will not call at trial any opt-in plaintiff who has not provided some  
13 individual discovery to Google, but they reserve the right to call opt-in plaintiffs who have only  
14 provided written discovery and not deposition testimony. Plaintiffs insist that they have already  
15 provided detailed damages computations, although they maintain that their final computations  
16 depend on information that Google has not yet produced in discovery. Moreover, plaintiffs argue  
17 that they have already produced all salary information for the opt-in plaintiffs that they possess  
18 based on discovery from Google and privileged communications with the opt-in plaintiffs,  
19 including the information in Exhibit A to their supplemental disclosures. Plaintiffs contend that  
20 they should not be compelled to produce any additional damages-related discovery at this time,  
21 although further disclosure may be appropriate in advance of a trial on damages.

22 Pending before Judge Freeman is Google's recent motion for clarification and  
23 reconsideration of Judge Lloyd's discovery order, in which Google contends that the earlier limits  
24 on discovery should be lifted or modified now that the case has proceeded beyond the certification  
25 stage. Dkt. No. 357.

26 **II. DISCUSSION**

27 The Court is sympathetic to Google's argument that if a particular opt-in plaintiff will  
28 testify at trial Google should be permitted to take that plaintiff's deposition or, at the very least,

1 obtain more detailed disclosures from such plaintiff. The Court also agrees with Google that, as a  
2 general matter, the approach to discovery in collective actions described in *Blair v. TransAm*  
3 *Trucking, Inc.*, No 09-2443-EFM-KGG, 2017 WL 5068885, at \*5 (D. Kan., Nov. 3, 2017) strikes  
4 a reasonable balance between efficiency and the need for plaintiff-specific discovery of non-  
5 cumulative evidence.

6 Although Google says it is not asking this Court to order additional depositions of the opt-  
7 in plaintiffs, it is apparent from the arguments presented that the present discovery dispute arises  
8 from Google’s concern about which plaintiffs will be called to testify at trial and whether Google  
9 has obtained sufficient discovery from them. Google maintains that it does not believe that  
10 representative discovery is appropriate in this case and that it is entitled to more detailed  
11 disclosures as to all of the plaintiffs. At the very least, Google says it needs better disclosures as  
12 to those plaintiffs who will testify at trial. Dkt. No. 346 at 3.

13 The relief Google seeks presently is foreclosed by prior orders of this Court and now  
14 depends partly, if not entirely, on whether Google is permitted to take discovery beyond the  
15 specific discovery permitted by Judge Lloyd. That issue will be addressed by Judge Freeman.

16 Google’s thesis that the mandatory disclosures required by Rule 26 are not “discovery” and  
17 therefore are not subject to the existing, court-ordered limitations on discovery is not persuasive.  
18 Both Rule 26 disclosures and formal discovery requests are means by which parties exchange  
19 information pertinent to the claims and defenses in the case. As Judge Lloyd made clear, the  
20 purpose of the earlier discovery order was to “give Google limited discovery that will inform it on  
21 areas of legitimate interest, but not impose a[n] undue burden on the opt-ins or their attorneys to  
22 respond to discovery that may only be tangentially relevant.” Dkt. No. 185 at 2. The careful  
23 balance the Court attempted to construct by limiting discovery would be upset if Rule 26 could be  
24 used to demand the disclosure of documents and information whose discovery the Court has  
25 already foreclosed by means of formal discovery.

26 With respect to damages, Google’s challenge to plaintiffs’ supplemental disclosures raises  
27 additional issues. First, plaintiffs concede that their damages calculations (as reflected in Exhibit  
28 A for the collective class) are not complete, as they depend in part on discovery plaintiffs say they

1 expect to receive later this week from Google. At least some further disclosure by plaintiffs will  
2 be necessary after they receive this additional information.

3 Second, plaintiffs’ damages calculations for lost salary appear not to be based on  
4 representative proof, but on plaintiff-specific evidence, some of which is in a form that, plaintiffs  
5 say, cannot be disclosed to Google without compromising the protections afforded their privileged  
6 communications with plaintiffs’ counsel. Plaintiffs’ approach to damages is troubling as it  
7 appears that they seek the benefits of plaintiff-specific evidence to support their claims, while at  
8 the same time they argue for the Court to enforce the earlier discovery limitations that limit  
9 Google’s ability to take plaintiff-specific discovery.

10 Finally, plaintiffs acknowledge that additional discovery may well be necessary with  
11 respect to a damages “phase” of this case, but they argue that ordering such discovery now is  
12 premature, even though they concede the Court has not bifurcated discovery between liability and  
13 damages. See Dkt. No. 346 at 5. Plaintiffs’ hope and expectation that more damages discovery  
14 will be permitted is not based on any current guidance from Judge Freeman; instead, it seems to be  
15 based on a candid assessment of the current state of discovery on damages.

16 At this point, plaintiffs have not produced all of the evidence that supports the damages  
17 they describe in their supplemental Rule 26 disclosures. However, until Google’s motion for  
18 clarification and reconsideration is resolved, it is difficult for the undersigned to determine  
19 whether Google may obtain relief by means of further discovery, or whether the appropriate  
20 remedy lies with the district judge who will decide the admissibility of evidence at trial.

21 **III. CONCLUSION**

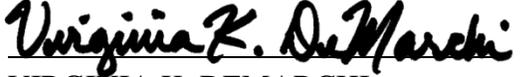
22 Accordingly, the Court denies without prejudice Google’s motion to compel plaintiffs to  
23 provide more information in their supplemental disclosures under Rule 26(a)(1)(A). Google may  
24 renew its motion, if warranted, following resolution of Google’s pending motion for clarification  
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and reconsideration (Dkt. No. 357).

**IT IS SO ORDERED.**

Dated: September 19, 2018

  
VIRGINIA K. DEMARCHI  
United States Magistrate Judge