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UNITED STATES DISTRICT COURT

Northern District of California

San Francisco Division

IN RE HULU PRIVACY LITIGATION

No. C 11-03764 LB

ORDER RE ECF NO. 223 AND
SCHEDULING

INTRODUCTION

In this putative class action, viewers of Hulu’s on-line video content allege that Hulu wrongfully disclosed their video-viewing selections and personal identification information to Facebook in violation of the Video Privacy Protection Act (“VPPA”), 18 U.S.C. § 2710. *See* First Amended Consolidated Class Action Complaint, ECF No. 37 at 18.¹ The parties filed a joint letter brief about Plaintiffs’ request for additional discovery including (1) discovery to follow up on Hulu’s production to date, (2) discovery about Hulu’s knowledge under the VPPA, which is an issue that Hulu will address in a renewed motion for summary judgment, and (3) discovery relevant to the court’s order denying without prejudice Plaintiffs’ class certification motion primarily on the ground that Plaintiffs did not establish an ascertainable class. *See* ECF No. 223. Hulu objects to the discovery on the grounds that Plaintiffs did not establish good cause to modify the scheduling order and did not move to compel discovery. Fact discovery closed on January 13, 2014, expert

¹ Citations are to the Electronic Case File (“ECF”) with pin cites to the electronic page number at the top of the document.

1 disclosures were due that same day, and expert discovery closed on February 28, 2014.

2 The court held a case management conference on July 10, 2014 and rules as follows.

3 **ANALYSIS**

4 **I. FOLLOW-UP TO “PLUG HOLES” IN DISCOVERY**

5 According to Plaintiffs, Hulu provided substantial discovery as late as January 11, 2014. *See id.*
6 at 7. They point to Hulu’s rolling productions. *Id.* Hulu updated its disclosures on January 13 and
7 identified potential new witnesses. *Id.* at 7-8. Although it was willing to produce source code as of
8 January 8, 2014, Hulu now apparently does not want to. *Id.* at 8. (Hulu countered at the conference
9 that the delay about source code was Plaintiffs’ fault more or less because the issue was discussed in
10 July 2013, as shown by an email, and abandoned thereafter.) Plaintiffs submitted a chart, *see* ECF
11 No. 223-1, that noted on a high level that productions were incomplete and needed follow up, and
12 stated that they might need to depose the new witnesses and the developers of the source code. *Id.*
13 At the hearing, Plaintiffs elaborated that the source code (and accompanying programmers’ notes)
14 are relevant to Hulu’s renewed summary judgment motion regarding its knowledge of the VPPA
15 violation.

16 At the case management conference, and based on the timing of Hulu’s rolling disclosures, the
17 court ordered that Plaintiffs could review the discovery produced and follow up to plug any holes.
18 Hulu agreed that reasonable follow-up was appropriate. The parties did not propose a time line.
19 They should meet and confer and agree on one.

20 As to the source code, Hulu did not challenge the request on the basis of relevance or burden.
21 The court’s best guess is that the delay resulted partly from the parties’ failure to settle on a
22 protective order and partly from the time expended on Hulu’s several summary judgment motions
23 and a protracted class certification process. The court allowed the multiple summary judgment
24 motions to narrow the litigation, and Hulu accomplished that. Given that approach, and the
25 possibility (as Plaintiffs suggest) that Plaintiffs raised the impact on the scheduling order in
26 September 2013 at a case management conference, the court finds no lack of diligence that would
27 militate against extending the time period in the court’s scheduling order and finds good cause to do
28 so to permit production of the source code and accompanying notes pursuant to a protective order.

1 The Northern District of California has a model protective order (as the parties know). Hulu
2 consented to this approach at the hearing and agreed to it as part of a compromise approach that
3 allowed it a mechanism for challenging discovery about the ascertainability of the class.

4 **II. EXPERT DISCOVERY AND ADDITIONAL FACT DISCOVERY**

5 The court previously set expert disclosure deadlines that matched the fact discovery cut-off. On
6 reflection, the court now concludes that this approach did not consider the need to review fact
7 discovery, including source code.

8 Generally, as to the expert deadlines, unless disclosures are relevant to class certification or
9 Hulu's early summary judgment motion regarding its knowledge, the disclosure deadlines should
10 fall after class certification. Plaintiffs' proposals in the chart at ECF No. 223-2 are reasonable on
11 this record. Boiled down, the basis for this conclusion is that it takes time to review fact discovery
12 and the source code, and expert disclosures necessarily have to follow that review. Depending on
13 the timing and holding of the court's decision on class certification, the court will entertain the
14 parties' post-decision request to modify the expert discovery deadlines.

15 A related issue is that if expert evidence is relevant to class certification or Hulu's knowledge
16 within the meeting of the VPPA, then disclosures must be earlier. The parties must confer on this
17 timing.

18 The next issue is about categories 6 and 7 in ECF No. 223-3, which is discovery from Hulu and
19 third parties geared toward ascertaining class members based on objective criteria. The descriptions
20 in ECF No. 223-3 are general. Plaintiffs provided more detail at the hearing, including obtaining
21 email lists from Hulu and Facebook, which they would cross-reference to narrow the class. Then
22 Plaintiffs discussed ways that one might analyze server retention data to determine objectively
23 whether a Hulu user was logged into Facebook and necessarily transmitted the Facebook ID to
24 Facebook when the Like button loaded. Hulu responded that these specifics were not raised in the
25 letter brief, Plaintiffs ought to provide specific draft requests, and Hulu then will be able to respond
26 to the requests.

27 The parties also discussed whether Plaintiffs had established good cause to modify the court's
28 scheduling order to conduct this extra discovery aimed at the ascertainability and predominance

1 elements of the class certification analysis. On the one hand, Hulu might argue (and more or less did
2 so at the conference) that Plaintiffs took their chance with a self-reporting theory and did not act
3 diligently when they failed to conduct discovery aimed at objective criteria or Facebook data about
4 its users. On the other hand, Plaintiffs argue that they acted diligently in the context of how this
5 litigation progressed. The parties disagreed strongly about whether Hulu acquiesced in a course of
6 conduct that contemplated a more flexible approach to discovery deadlines.

7 To address Hulu's concern about being sandbagged at the case management conference by
8 Plaintiffs' more particular discovery requests, the court ordered Plaintiffs to provide draft requests
9 within one week from the date of the conference (meaning, by July 17). Hulu must respond within
10 one week. Any disputes must be raised with the court jointly.

11 As to whether Plaintiffs have established good cause, the court noted that it had a tough time on
12 this record finding the lack of diligence that normally militates against finding good cause to modify
13 a scheduling order. Hulu's categorical objection to extending deadlines also would shut down
14 Plaintiffs' class certification motion when, as Plaintiffs argue, discovery might establish the
15 objective criteria to ascertain a class that the court ruled was a prerequisite to class certification.
16 Plaintiffs also suggested that they have no desire to make a class certification motion that will not
17 satisfy the issues raised in the court's decision about ascertainability. At the conference, the court
18 said that despite its concerns about ascertainability, it would keep an open mind and also told Hulu
19 to be mindful of the procedural context of the litigation (meaning in part the timing of Hulu's
20 productions, the reality of Plaintiffs' ability to review those productions and confer thereafter with
21 Hulu on the sufficiency of the productions, and the court's allowing Hulu a second shot at renewing
22 its motion on knowledge to provide a more robust fact record). In addition, any joint discovery
23 letter brief should cite and analyze cases that address the interplay between deciding class
24 certification motions on the merits and the need for discovery after a scheduling order's deadlines
25 based on a court's decision that illuminates the need for additional discovery.

26 A final discovery issue is that the court is not clear whether Plaintiffs seek additional discovery
27 about Hulu's knowledge under the VPPA beyond that related to the source code. As the court said
28 at the hearing, it might be best to wait and see Hulu's evidence in its renewed summary judgment

1 motion. Hulu pointed to the protections of Rule 56(d), which provides a process for additional
2 discovery. That said, again, given that the court is giving Hulu a second chance at establishing its
3 lack of knowledge, the court will not preclude Plaintiffs from reasonable discovery geared toward
4 Hulu's knowledge. Plaintiffs may make those requests within two weeks, and Hulu must respond
5 two weeks thereafter (absent stipulation of the parties or further order of the court).

6 **III. SCHEDULING ORDER**

7 The court adopts the schedule in the chart at ECF No. 223-2. The issue outstanding is the
8 interplay between Hulu's motion for summary judgment and Plaintiffs' renewed class certification
9 motion. Hulu's summary judgment motion will be briefed and heard on the schedule in the chart.
10 On reflection, the court's view is that class discovery—if the court ultimately orders it—probably
11 should happen quickly, and Plaintiffs' deadline for filing the renewed class certification motion
12 should remain on the schedule in ECF No. 223-2. The reason is (again) that the court—while
13 keeping an open mind—is not convinced that Plaintiffs will be able to file a renewed motion that
14 addresses the court's concerns about certifying a class. It seems more efficient to keep the motion
15 moving on a parallel track to advance the litigation one way or another.

16 If the parties nonetheless agree that the summary judgment motion should be heard before
17 discovery or briefing on the class certification motion, the court will revisit this decision. If they
18 disagree, then the new scheduling order is set forth in 223-2, which the court incorporates by this
19 reference.

20 **IV. EXTENSION OF TIME FOR HULU'S MOTION FOR RECONSIDERATION**

21 The court extends the time period for Hulu to move for reconsideration or to certify the order for
22 interlocutory review to 30 days after the court's order on Hulu's summary judgment motion
23 regarding its knowledge. *See* ECF Nos. 162, 195.

24 **CONCLUSION**

25 This disposes of ECF No. 223.

26 **IT IS SO ORDERED.**

27 Dated: July 14, 2014



28 LAUREL BEELER
United States Magistrate Judge

