

1 COOLEY LLP
 2 MICHAEL G. RHODES (116127) (rhodesmg@cooley.com)
 3 MATTHEW D. BROWN (196972) (brownmd@cooley.com)
 4 JAMES M. PENNING (229727) (jpenning@cooley.com)
 5 101 California Street
 6 5th Floor
 7 San Francisco, CA 94111-5800
 8 Telephone: (415) 693-2000
 9 Facsimile: (415) 693-2222

10 Attorneys for Defendant
 11 FACEBOOK, Inc., a Delaware corporation

12 NASSIRI & JUNG LLP
 13 KASSRA P. NASSIRI (215405) (knassiri@nassiri-jung.com)
 14 CHARLES H. JUNG (217909) (cjung@nassiri-jung.com)
 15 47 Kearny Street, Suite 700
 16 San Francisco, California 94108
 17 Telephone: (415) 762-3100
 18 Facsimile: (415) 534-3200

19 EDELSON MCGUIRE LLP
 20 SEAN REIS (184044) (sreis@edelson.com)
 21 30021 Tomas Street, Suite 300
 22 Rancho Santa Margarita, CA 92688
 23 Telephone: (949) 450-2124
 24 Facsimile: (949) 459-2123

MICHAEL J. ASCHENBRENER
 (maschenbrener@edelson.com)
 BENJAMIN H. RICHMAN
 (brichman@edelson.com)
 350 North LaSalle Street, Suite 1300
 Chicago, Illinois 60654
 Telephone: (312) 589-6370
 Facsimile: (312) 589-6378

25 Attorneys for Plaintiffs and the Putative Class

26 UNITED STATES DISTRICT COURT
 27 NORTHERN DISTRICT OF CALIFORNIA
 28 SAN JOSE DIVISION

IN RE: FACEBOOK PRIVACY
 LITIGATION

Case No. 10-cv-02389-JW

JOINT CASE MANAGEMENT STATEMENT

CMC Date: Monday, October 4, 2010

Time: 10:00 a.m.

Judge: Hon. James Ware

1 For the initial case management conference (“CMC”) set for October 4, 2010, plaintiffs
2 David Gould and Mike Robertson (“Plaintiffs”) and defendant Facebook Inc. (“Defendant” and
3 collectively with Plaintiffs, the “Parties”) hereby submit this Joint Case Management Statement
4 pursuant to Federal Rule of Civil Procedure 26(f) and Civil Local Rule 16-9.

5 Pursuant to Federal Rule of Civil Procedure 26(f), the Parties held a telephonic meeting of
6 counsel on Friday, September 10, 2010. Michael J. Aschenbrenner participated for plaintiff David
7 Gould. Kassra P. Nassiri and Charles H. Jung participated for plaintiff Mike Robertson.
8 Matthew D. Brown and James Penning participated for Defendant.

9 **I. JURISDICTION AND SERVICE**

10 The Parties agree that this Court has subject matter jurisdiction under the Class Action
11 Fairness Act, 28 U.S.C. § 1332(d)(2). No issues exist regarding personal jurisdiction or venue
12 and no parties remain to be served.

13 **II. STATEMENT OF CLAIMS AND DEFENSES**

14 This putative class action involves all Facebook users in the United States who clicked on
15 a third-party advertisement displayed on Facebook between May 28, 2006 and March 21, 2010.
16 In short, Plaintiffs claim that Defendant transmitted personal user information belonging to the
17 class to third parties without authorization and in violation of Defendant’s agreement with its
18 members. Plaintiffs, on behalf of the class, allege (1) breach of contract; (2) breach of implied
19 contract; (3) breach of the implied covenant of good faith and fair dealing; (4) violation of the
20 Electronic Communications Privacy Act of 1986; (5) violation of the Stored Communications
21 Act; (6) unfair business practices in violation of California Business and Professions Code §
22 17200 *et seq.*; (7) violation of California Penal Code § 502; (8) violations of California Civil
23 Code §§ 1572, 1573; (9) negligence; (10) negligence per se; (11) unjust enrichment; and (12)
24 violations of California Civil Code § 1750 *et seq.*

25 Defendant Facebook denies liability as to all causes of action by Plaintiffs. Facebook
26 contends that it has not violated any agreements with its members or transmitted any information
27 belonging to its members to third parties without authorization. Facebook further denies that this
28 action meets the requirements of class certification under Fed. R. Civ. P. 23 (“Rule 23”).

1 **III. LEGAL ISSUES**

2 The Parties anticipate that disputed legal issues will concern each of the causes of action
3 asserted by Plaintiffs, as well as whether this case may be certified as a class action under Rule
4 23.

5 **IV. MOTIONS**

6 **The following motions have been previously filed in this action:** On July 21, 2010,
7 Plaintiff Mike Robertson filed an Administrative Motion to Consider Whether Cases Should be
8 Related, seeking to relate *Robertson v. Facebook, Inc.*, No. 10-cv-02306-JF and *Gould v.*
9 *Facebook, Inc.*, No. 10-cv-02389-JW. The motion was granted on July 26, 2010.

10 **Possible future motions include the following:** Motion(s) to Dismiss; Motion to Certify
11 Class; Motions for Summary Judgment; discovery motions as necessary, and pre-trial motions.
12 The Parties reserve the right to file other motions.

13 **V. AMENDMENT OF PLEADINGS**

14 On August 10, 2010 the Parties filed a Stipulation and Proposed Order Consolidating
15 Cases for All Purposes (“Consolidation Stipulation”) where the Parties had agreed that Plaintiffs
16 would file a consolidated complaint by August 27, 2010. (*See Consolidation Stipulation ¶ 5.*) On
17 August 20, 2010, the Court adopted the Consolidation Stipulation with certain modifications.
18 The Parties disagree on whether the Court’s order adopted the stipulated deadline for Plaintiffs to
19 file their consolidated complaint.

20 Plaintiffs request that the Court set October 11, 2010, as the deadline to file a consolidated
21 complaint, and that Defendant’s response be due 30 days thereafter. Defendant is not opposed to
22 Plaintiffs’ proposal.

23 The Parties propose that a deadline for the amendment of pleadings should be set for a
24 reasonable period before the conclusion of merits discovery. Since the Parties are including
25 herein a proposed schedule through the end of class certification proceedings, the Parties propose
26 that a specific deadline be included in a later proposed case management schedule to be submitted
27 after a decision on class certification.

28

1 **VI. EVIDENCE PRESERVATION**

2 The Parties are aware of their obligation to preserve potentially relevant evidence,
3 including electronically stored information, and have taken steps to comply with their obligations.

4 Plaintiffs sent a letter to Defendant dated August 24, 2010, which set forth the categories
5 of evidence that, at a minimum, Plaintiffs contend should be preserved. During the Rule 26
6 conference, Plaintiffs' counsel inquired about what steps Defendant has taken to preserve
7 potentially relevant information. Defendant's counsel stated that they had received Plaintiffs'
8 evidence preservation correspondence and that, although not agreeing with the scope of the
9 obligations set forth in the letter, they have taken steps to comply with their obligations, including
10 putting a litigation hold in place. The Parties have agreed to continue to meet and confer on
11 evidence preservation issues with an eye towards meeting their respective obligations to preserve
12 potentially relevant information.

13 **VII. DISCLOSURES**

14 The Parties agree that initial disclosures will be made three weeks following Defendant's
15 response to Plaintiffs' consolidated amended complaint.

16 **VIII. DISCOVERY**

17 No discovery has been taken to date.

18 **A. Bifurcation of Discovery**

19 The Parties agree that discovery should be bifurcated, with discovery on matters not
20 bearing on class certification issues to be conducted only after the Court issues a decision on class
21 certification. Phased discovery of this sort (precertification discovery first, followed later by
22 merits discovery) is contemplated by the MANUAL FOR COMPLEX LITIGATION (*see, e.g.*, §§ 21.11,
23 21.14), which states that allowing full merits discovery before a decision on certification "can
24 create unnecessary and extraordinary expense and burden" (*id.* § 21.14). The Parties recognize
25 that the line between merits and class discovery is not always easy to delineate and agree to meet
26 and confer in good faith on disagreements to determine appropriate limits to class discovery.

27
28

1 **B. Scope of Discovery**

2 **1. Plaintiffs' Statement**

3 Plaintiffs anticipate both written and oral discovery on both the merits of the case and on
4 issues concerning class certification. Plaintiffs identify the following categories of discovery
5 listed below. Plaintiffs reserve the right to add to or otherwise modify these categories as
6 additional facts and legal issues become known to Plaintiffs in preparing for trial.

- 7 • The identities of putative class members;
- 8 • Defendant's current and past terms and conditions with its members, and any press
9 releases or communications concerning those terms and conditions as they may relate to
10 third-party advertising;
- 11 • Defendant's receipt, interception, records, and electronic storage of all member
12 information, communications and activities;
- 13 • Defendant's relationship with its advertisers, including, but not limited to, contracts,
14 transactions, payments, and data transmission between Defendant and its advertisers or
15 advertiser-intermediaries, and any press releases or communications related thereto;
- 16 • All tracking and accounting data related to advertiser impressions, views, clicks and
17 transactions;
- 18 • All authorizations related to Defendant's disclosure of member information to any third
19 party; and
- 20 • Defendant's knowledge, investigations, reports, analyses, policies, deliberations and
21 efforts (including, but not limited to, remedial efforts) concerning the transmission or non-
22 transmission of Facebook member information to advertisers or advertiser-intermediaries.

23 The Parties have conferred concerning the disclosure of electronically-stored information.
24 The Parties have not reached agreement on the appropriate format for production of electronically
25 stored information. The Parties have agreed to confer further, with the assistance of technical
26 consultants as appropriate, to attempt to reach a mutually satisfactory agreement on the
27 appropriate format for production of electronically stored information that is responsive to
28 particular discovery requests.

29 **2. Defendant's Statement**

30 Defendant has not yet been served with Plaintiffs' consolidated amended complaint and,
31 thus, its analysis of Plaintiffs' claims against it and potential defenses is necessarily ongoing.
32 Presently, Defendant anticipates that it will seek discovery on subjects including but not limited

1 to the following: class certification-related issues; Plaintiffs' alleged damages; Plaintiffs'
2 knowledge of the operation of the Facebook website; and Plaintiffs' use of the Facebook website.

3 **C. Changes to the F.R.C.P. and Local Rule Limits on Discovery**

4 **1. Timing of Discovery**

5 The Parties have conferred regarding the timing of discovery and agree that responses to
6 discovery propounded by either Party will not be due until a reasonable time after the Court
7 determines the legal sufficiency of Plaintiffs' claims (*i.e.*, until after any motions to dismiss are
8 decided). Notwithstanding this agreement with respect to discovery propounded by a Party, as
9 stated in section VII, the Parties will make their initial disclosures three weeks following
10 Defendant's response to Plaintiffs' consolidated amended complaint

11 **2. Modification to Discovery Rules**

12 **a. Plaintiffs' Statement**

13 Plaintiffs propose ten depositions per side in each phase of the discovery (*i.e.*, ten
14 depositions per side related to class certification issues, and ten additional depositions per side for
15 full merits discovery). Given the complexity of the case, Plaintiffs request at this time that the
16 Court extend the limit during each phase of discovery to two sets of Rule 30(b)(6) topics.

17 Given the complexity of the case, Plaintiffs will likely require more than twenty-five
18 interrogatories to prove their case. The facts at issue, which are largely in Defendant's control,
19 are technically complex and likely involve millions of putative class members. Interrogatories
20 regarding Defendant's data and systems infrastructures, and Defendant's transmission of millions
21 of user's information to third parties, will involve detailed and voluminous data. Relying
22 primarily on other discovery devices, such as depositions, to obtain this information would be
23 inefficient for all Parties. Plaintiffs request at this time that they be allowed to propound up to
24 twenty-five (25) additional interrogatories.

25 Plaintiffs reserve the right to seek further modification of the limitations on discovery
26 imposed by the Federal Rules of Civil Procedure or by local rule other than as provided in this
27 report.

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

b. Defendant’s Statement

Defendants do not currently see a need for a modification to the discovery limits set forth in the Federal Rules of Civil Procedure but reserve the right to move for additional depositions or interrogatories if they believe the need arises.

D. Proposed Discovery Plan

See section XVII (“Scheduling”) below.

IX. CLASS ACTIONS

A. Plaintiffs’ Statement

Plaintiffs contend that the instant case is maintainable as a class action and plan to move for class certification pursuant to Fed. R. Civ. P. 23. Please see section XVII (“Scheduling”) below for a proposal on the timing.

B. Defendant’s Statement

Defendant denies that a class should be certified in this action and will oppose any motion for class certification.

X. RELATED CASES

The two related cases, *Gould* and *Robertson*, have now been consolidated. The Parties are not aware of any other related cases pending in the Northern District of California.

On August 10, 2010, Defendant filed a Notice of Pendency of Other Actions or Proceedings, listing a number of actions pending in other courts that involve all or a material part of the same subject matter and the same defendant as this action, including *Wendy Marfeo v. Facebook, Inc.*, Case No. 10-cv-00262-S-LDA (D.R.I. filed June 17, 2010) and *Rose v. Facebook, Inc.*, Case No. 10-cv-00232-S-DLM (D.R.I. filed May 21, 2010). Defendant has not been served in the *Marfeo* action. Plaintiffs contend that the *Rose* case is not related to the instant action.

XI. RELIEF

A. Plaintiffs’ Statement

Plaintiffs seek:

- An order certifying the class, directing that this case proceed as a class action, and

- 1 appointing Plaintiffs and their counsel to represent Plaintiffs and the class;
- 2 - An order declaring that the actions of Facebook constitute violations of each cause
- 3 of action alleged;
- 4 - An order entering judgment for all statutory and punitive damages authorized by
- 5 law;
- 6 - An order awarding restitution for all money to which Plaintiff and the Class are
- 7 entitled in equity;
- 8 - An order awarding Plaintiffs and the Class their reasonable litigation expenses and
- 9 attorneys' fees;
- 10 - An order awarding Plaintiffs and the Class all pre- and post-judgment interest, to
- 11 the extent allowable;
- 12 - An order entering injunctive relief and/or declaratory relief as necessary to protect
- 13 the interests of Plaintiffs and the Class; and,
- 14 - An order awarding such other relief as equity and the law may require.

15 **B. Defendant's Statement**

16 Defendant does not currently anticipate any counterclaims but reserves the right to add

17 such counterclaims in the event that facts arise to support them.

18 **XII. SETTLEMENT AND ADR**

19 Pursuant to ADR Local Rule 3-5(b), Plaintiffs and Defendant filed ADR Certifications by

20 Parties and Counsel on September 17, 2010. The Parties are scheduled to participate in an ADR

21 Phone Conference on September 29, 2010.

22 Defendant is amenable to non-judicial private mediation, with such mediation to be held

23 within 45 days of a decision on a class certification motion. Plaintiffs are amenable to non-

24 judicial private mediation but would like mediation to take place before a decision on class

25 certification.

26 **XIII. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES**

27 The Parties do not consent to proceed before a Magistrate Judge for all purposes.

28

1 **XIV. OTHER REFERENCES**

2 The Parties do not believe, at this time, that this case is suitable for reference to binding
3 arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

4 **XV. NARROWING OF ISSUES**

5 At this stage in the proceedings, the Parties are unaware of any issues that can be
6 narrowed by agreement or motion, other than the anticipated motions set forth above.

7 **XVI. EXPEDITED SCHEDULE**

8 The Parties agree that the case is not appropriate for expedited or streamlined procedures.

9 **XVII. SCHEDULING**

10 The following is the Parties' proposed schedule for class certification discovery, briefing,
11 and hearing.

Event	Proposed Deadline
Completion of Class Certification Fact Discovery	Six months from close of pleadings (<i>i.e.</i> , after any motions to dismiss have been decided and, if necessary, Defendant has filed an Answer).
Completion of Class Certification Expert Discovery (if Any)	Two months after completion of class certification fact discovery. During this period, the following will occur on a schedule to be worked out by the Parties: disclosure of experts, service of initial expert reports, rebuttal reports, and depositions.
Deadline to File Any Motion for or to Deny Class Certification	If class certification expert discovery takes place, then forty-five days after completion of class certification expert discovery. If there is no expert discovery, then forty-five days after the completion of class certification fact discovery or the Parties have confirmed that there will be no expert discovery, whichever is later.
Deadline to File Any Opposition to Motion for Class Certification	Forty-five days after motion for or to deny class certification.
Deadline to file Any Reply on Motion for Class Certification	Twenty-one days after filing of opposition to motion for class certification.
Class Certification Hearing	At the Court's convenience

12
13
14
15
16
17
18
19
20
21
22
23
24
25 **XVIII. TRIAL**

26 The Parties anticipate that trial is likely to last approximately 10 court days.
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: September 24, 2010

NASSIRI & JUNG LLP

/s/
Kassra P. Nassiri
Attorneys for Plaintiffs

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ATTESTATION PURSUANT TO GENERAL ORDER 45

I, Matthew D. Brown, attest that concurrence in the filing of this Joint Case Management Statement has been obtained from each of the other signatories.

/s/ Matthew D. Brown
Matthew D. Brown

885491 v3/HN