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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE: FACEBOOK, INC. INTERNET TRACKING LITIGATION

No. 5:12-md-02314-EJD

PLAINTIFFS' MOTION TO COMPEL DISCOVERY AND TO COMPEL COMPLIANCE WITH PROTECTIVE ORDER

F.R.C.P. 26(c) and 37(a)
N.D. Cal. L.R. 37-1 and 37-2

Date:	April 28, 2016
Time:	9:00 a.m.
Courtroom:	4
Judge:	The Honorable Edward J. Davila
Trial Date:	None Set

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NOTICE OF MOTION

PLEASE TAKE NOTICE THAT, upon the Memorandum of Points and Authorities in Support of Motion to Compel Discovery and to Compel Compliance with Protective Order; the declarations of David A. Straite ("Straite Decl.") and Wilfred Gomes ("Gomes Decl.") in support thereof; and all other papers and proceedings herein, plaintiffs will move this Court on April 28, 2016 at 9:00am in Courtroom 4, before the Honorable Edward J. Davila, United States District Judge, pursuant to Rules 26(c) and 37(a) of the Federal Rules of Civil Procedure, for an order compelling discovery and compelling compliance with this Court's Stipulated Protective Order for Litigation Involving Confidential Information and Trade Secrets dated April 11, 2014 [ECF No. 75] (the "Protective Order").

STATEMENT OF RELIEF REQUESTED

Plaintiffs request the following relief:

- Order defendant Facebook to search for responsive documents within the files, custody, control or possession of additional Facebook employees.
- Order defendant Facebook to comply with outstanding requests for four priority categories of documents, including but not limited to documents related to the named plaintiffs.
- Order defendant Facebook to produce documents without "non-responsive" content redacted.
- Order defendant Facebook to re-assign confidentiality designations for all documents produced to date and order defendant to fully comply with the Protective Order with respect to any additional documents produced.

Dated: March 16, 2016

New York, New York

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Facebook has unilaterally granted itself a stay of discovery after searching only three employees for documents, and after this Court's decision that discovery should proceed and any motion for a stay would be denied. Facebook has also refused to produce several categories of documents on "burdens" grounds but refuses to discuss ways to narrow the scope of the requests absent an agreement from plaintiffs that discovery would be stayed. Facebook has even redacted portions of documents as non-responsive, despite admitting that the redacted material is not legally privileged. A motion to compel discovery is now unfortunately required.

Facebook has also violated the Protective Order by designating its entire document production as "confidential" or "highly confidential" except for a single PDF compilation of publicly available terms of service and privacy policies on the Facebook website, produced prior to the Protective Order. Since the date of the Protective Order, 100% of all documents produced – 12,804 in total – bear a confidentiality designation. Worse, of this total, only 4 are "confidential," and the remaining 12,800 are "highly confidential." Facebook's mass and indiscriminate designation of its entire production is a per se violation of the Protective Order and an abuse of the discovery process.

II. EFFORTS TO REDUCE DISCOVERY BURDENS ON DEFENDANT AND CERTIFICATION OF COMPLIANCE WITH MEET-AND-CONFER OBLIGATIONS

This Court stated at the June 29, 2012 case management conference that "if there is a request to stay discovery pending whatever, I would respectfully decline that invitation, and I think discovery should go forward as in any other case." Tr. at 8:3-7 (ECF No. 48). Plaintiffs are and have always been mindful, however, of the obligation in Fed. R. Civ. P. 26(b)(2) to weigh the burdens of discovery against the likely benefit, considering the needs of the case.[1] For example, although plaintiffs served document requests in 2012, see Facebook Motion to Stay Discovery dated March 2, 2016 (ECF No. 108), Wong Decl., Ex. A ("Motion to Stay"),[2] Facebook refused to produce responsive documents until the Court

[1] Although Rule 26(b)(2) was recently amended, the "key principles" are "substantially similar." *Campbell v. Facebook, Inc.*, 2015 WL 3533221, at *3, n. 1 (N.D. Cal. June 3, 2015).

[2] Facebook's Motion to Stay provides some but not all materials cited in today's Motion to Compel as exhibits. To minimize duplication, this Motion will refer to those exhibits where possible.

approved the Protective Order, which here did not happen until April 11, 2014 (ECF No. 75). Facebook further refused to produce documents on a temporary "attorneys eyes only" basis while the Protective Order remained under Court review. *See* Straite Decl. ¶ 7. Given the likely sensitive nature of some portion of the documents, Plaintiffs acquiesced to Facebook's position. Also, in recognition of the procedural posture of the case, plaintiffs agreed to refrain from taking depositions while the first motion to dismiss was pending, choosing to focus on *document* discovery and not to inconvenience and burden witnesses in the interim. The plaintiffs even offered a modification to the privilege log to reduce unnecessary burdens on Defendant, which was approved by this Court. Protective Order § 13.6.

Plaintiffs' approach to document discovery has been consistently courteous and mindful of the difficult balance of benefit and burdens during the pendency of a motion to dismiss. So, for example, in April 2014 Facebook produced 12,804 documents following the entry of the Protective Order. Despite the large volume, all documents came from only three individual custodians and a few internal databases, Gomes Decl. ¶ 4, and many categories of documents were not produced based primarily on burdens grounds. Motion to Stay, Ex. B. In November 2014, part-way through the review of the documents, plaintiffs requested a meet-and-confer teleconference to address the small number of custodians searched, and the number of categories of documents withheld. Teleconferences were held on November 3, 2014 and November 19, 2014, at which time the plaintiffs agreed to complete their review of all documents before identifying additional custodians to be searched and suggesting proposals to address Facebook's objections. Straite Decl. ¶ 19.

On October 23, 2015, this Court granted Facebook's motion to dismiss the First Amended Complaint ("FAC"), with leave to re-plead (ECF No. 87) ("Order on MTD"). On November 30, 2015, plaintiffs filed their Second Amended Complaint ("SAC") in conformity with the Order on MTD taking full advantage of the Facebook document production. Four claims were dropped, and the SAC included a number of Facebook documents, 14 of which were filed under seal. These documents not only support several of the claims originally asserted but also provide support for a more serious fraud claim. They also support a second basis for plaintiffs' original claims, not yet publicly known.

On January 14, 2016, the same day that Facebook filed its motion to dismiss the SAC, plaintiffs requested a meet-and-confer teleconference with Facebook to address the earlier-identified document

deficiencies and to schedule depositions of the only three witnesses to have produced documents. *See* Motion to Stay, Ex. D. On February 2, 2016, Facebook agreed to meet telephonically with plaintiffs but essentially refused to participate in any further discovery until a ruling on the new motion to dismiss. *See* Motion to Stay, Ex. E. The parties held a meet-and-confer teleconference on February 3, 2016, during which time Facebook repeated its position that discovery should be stayed. Facebook refused to discuss deposition dates, and Facebook even refused to discuss its objections to producing whole categories of documents absent an agreement to stay discovery. Plaintiffs noted that a motion to compel seemed inevitable. Straite Decl. ¶ 26.

On February 16, 2016, Facebook wrote to plaintiffs, offering some limited discovery but otherwise conditioning further discussions on plaintiffs agreeing to a discovery stay. Barring an agreement, they threatened to formally move to stay discovery. *See* Motion to Stay, Ex. F. The next day, plaintiffs responded by letter and proposed an additional meet-and-confer teleconference to discuss a compromise whereby the parties would prioritize further discovery during the pendency of their renewed motion to dismiss, but rejecting Facebook's demand for a full stay. Straite Decl. Ex. 1. The final meet-and-confer teleconference was held on February 23, 2016, see Motion to Stay Ex. G, at which time the parties discussed plaintiffs' "prioritization" compromise. Facebook counsel asked for time to confer with their client. On March 1, 2016 Facebook rejected the proposals, and formally moved to stay all discovery on March 2, 2016.

In short, plaintiffs' approach to discovery has been the model of professional courtesy and willingness to keep burdens low during the three-year pendency of the original motion to dismiss. Rather than return the courtesy, however, Facebook has done its utmost to frustrate the discovery process and has now granted itself a unilateral discovery stay. Only when faced with a motion to compel did Facebook formally move to stay discovery. However, this Court long ago stated its preference that a stay was inappropriate. Now that the SAC addresses several of the issues identified in Order on MTD and includes fairly damning evidence produced from only three employees, the argument for allowing discovery to continue is even more compelling than in 2012. Facebook should not be allowed to stall discovery any further.

III. LEGAL STANDARDS AND SUMMARY OF PROTECTIVE ORDER

A. Motion to Compel Discovery

"A lawsuit is supposed to be a search for the truth, and the tools employed in that search are the rules of discovery." *Metropolitan Opera Ass'n, Inc. v. Local 100, Hotel Employees and Restaurant Employees Int'l Union*, 212 F.R.D. 178, 181 (S.D.N.Y. 2003) (internal citations omitted). As such, discovery is permitted not only of admissible evidence, but of any information that is "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Rule 34 allows for a party to request access to discoverable documents, subject to proper objections, and Rule 26(g) requires counsel to certify that the objections are made in good faith. "Rule 26(g) imposes on counsel an affirmative duty to engage in pretrial discovery responsibly." *Metropolitan Opera Ass'n*, 212 F.R.D. at 219. Rule 37 allows a party to move to compel disclosure after conferring in good faith with the non-compliant party. Fed. R. Civ. P. 37(a)(1); *accord*, N.D. Cal. L.R. 37-1.

B. The Protective Order

Public policy favors public access to court records. *See Foltz v. State Farm Mutual Automobile Insurance Co.*, 331 F.3d 1124, 1134-35 (9th Cir. 2003); *see also Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (recognizing "a general right to inspect and copy public records and documents, including judicial records and documents"). Furthermore, "a party seeking to seal a judicial record must articulate justifications for sealing that outweigh the public policies favoring disclosure." *Dunbar v. Google, Inc.*, 2012 WL 6202719, at *1 (N.D. Cal. Dec. 12, 2012). However, not all documents produced in discovery will end up being court records and therefore in complex litigation courts typically use an "umbrella" protective order which would initially protect all documents designated by a party in good faith as "confidential." *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1122 (3d Cir. 1986).

Even when an umbrella order is used, the burden of justifying confidentiality of any document remains with the designating party; "any other conclusion would turn Rule 26(c) on its head." *Id.* Therefore, implicit in any umbrella protective order is a good faith obligation not to over-designate, which is the obvious danger in any such protective order. *Id.* at 1122, n. 17. In fact the Protective Order in this case has an explicit duty of good faith in the designation process, see Section 2.2, and "[m]ass,

indiscriminate, or routinized designations are prohibited." Protective Order § 5.1. The failure of a designating party "to obey a protective order's prohibition against indiscriminate designations is covered by Rule 37." *Humphreys v. Regents of University of California*, 2006 WL 3302444, at *2 (N.D. Cal. Nov. 14, 2006).

IV. ARGUMENT

A. Facebook Should be Compelled to Search More than 3 Employees for Documents

Given the serious nature of the facts uncovered in discovery thus far (a sample of which is appended under seal to the SAC), it is understandable that Facebook would want to thwart discovery at all costs. But Facebook counsel cannot in good conscience represent under Rule 26(g) that only three Facebook employees (Alex Himel, Gregg Stefancik and Scott Renfro) are likely to have discoverable information. But counsel did, when signing their initial disclosures, and also when limiting their document search to the same three employees. Such a representation constitutes a bad faith refusal to participate in discovery and is a violation of Rule 26(g).

Facebook's refusal to identify and search more than three employees is also indefensible in light of the documents produced from the three employees. Mr. Renfro himself identified a different Facebook employee as the person who knew the most about a key issue in the case, see Motion to Stay, Ex. D at 2, but that additional employee was never searched. Two additional Facebook employees were identified in an email as knowledgeable people with respect to a different key issue, *id*., and again these two employees were never searched. The email is only known to plaintiffs' counsel because by happenstance it was sent to one of the three searched custodians.

The SAC alone identifies more than a dozen additional employees who wrote material important enough to be quoted in the SAC and still Facebook refuses to search their documents. *See* SAC ¶ 43 (Matt Jones); ¶ 45 (Matt Kelly and Ethan Beard); ¶ 59 (sealed); ¶ 66 (Adam Wolf); ¶ 68 (Austin Haugen); ¶ 69 (sealed); ¶ 73 (Chuck Rossi); ¶ 77 (Aimee Westbrook); ¶ 78 (Douglas Purdy); and ¶ 80 (Kent Schoen, Gregory Luc Dingle and Timothy Kendall). In all, plaintiffs' counsel identified 26 additional custodians who are likely to have discoverable information, simply based on a review of documents produced from the first three employees. Motion to Stay, Ex. D, Attachment A. Although plaintiffs concede that these three employees produced a large volume of documents (approximately

60,000 pages, more than 12,000 documents), such volume alone does not give Facebook the right to violate Rules 26 and 34.

B. Facebook Should be Compelled to Produce Additional Categories of Documents

Plaintiffs requested 31 categories of documents from Facebook. Motion to Stay, Ex. A. Of these, Facebook has objected to complying with approximately half of them. *Id*. Ex. B. For some, Facebook simply refused to produce anything or unilaterally re-wrote the request, see Request Nos. 3, 4, 5, 8, 9, 13, 14, 16 and 26, and for others, Facebook offered to meet and confer to discuss ways to address the objections, see Request Nos. 7, 10, 12, 21, 24 and 27. In either case, however, Facebook now refuses to discuss any of the objections unless and until plaintiffs agree to a discovery stay. Straite Decl. ¶ 26.

As noted above, plaintiffs are willing to prioritize discovery during the pendency of the motion to dismiss. In that spirit, plaintiffs ask the Court to compel production of the following four categories of documents as priority documents. If the motion is granted, plaintiffs are confident that Facebook would return to the negotiating table and discuss the other categories perhaps without further intervention from the Court.

1. *Request No. 16, "all documents concerning the named plaintiffs."*

Four plaintiffs are currently serving as representatives of the putative class. On the merits, plaintiffs have a right to know what information Facebook has collected about them, without limitation. It is a core issue in the case. Furthermore, as potential class representatives, plaintiffs must demonstrate adequacy and typicality, and while these burdens are low, it should be beyond argument that Facebook must produce any documents concerning the named plaintiffs, without limitation.

Facebook objected that it would be "unduly burdensome" to produce everything, and its solution has thus been to produce nothing, and then to argue in its motion to dismiss that plaintiffs failed to allege precisely what personal information was intercepted by Facebook. It seems unlikely that Facebook is truly overburdened by a request to produce documents concerning only four individuals. More importantly, if the volume of information collected on these individuals really is so great as to cause significant burden, that would be a clarifying moment in the case and a fact that the lead plaintiffs have a right to know. How much data does Facebook really have on the named plaintiffs?

Faced with a motion to compel, Facebook has only belatedly agreed to search for requested documents, but only if they relate to internet search history. Straite Decl. ¶ 29. This proposed narrow slice of responsive documents is inappropriately narrow and raises important questions – why not produce everything Facebook has? Why was this narrow category proposed but no others? The SAC alleges improper interception of URLs, but it also alleges improper gathering and aggregation of other personal information. Why would Facebook want to shield this other information from production? There is nothing unusual in a class action about requesting the production of all documents defendant has on the named plaintiffs, and such request is even more appropriate in a case alleging illegal tracking of these same plaintiffs.

2. ***Request No. 8, "all documents related to studies, analyses or evaluations of Facebook's actual or potential revenue or profits associated with personalized advertisements whereby Facebook users or non-users are described as users of a particular product or service."***

This request should be fairly straight-forward: Facebook's internal analyses or studies of profits associated with personalized advertisements. Profit motive is relevant in a case where some causes of action require establishing Facebook acted willfully, and disgorgement of ill-gotten profits is a remedy for others. Facebook objects to producing any documents in response to this request, however, arguing that it is vague, burdensome, ambiguous, and overbroad; fails to describe documents with reasonable particularity; is not reasonably limited in time; is not relevant; and protected by legal privilege. It does not appear that any objection was spared, but none hit the mark. Plaintiffs have attempted to meet and confer on this Request, but Facebook refuses to discuss anything unless plaintiffs agree to a discovery stay. Straite Decl. ¶ 26.

3. ***Request No. 9, "all documents concerning studies, analyses or evaluations by Facebook of the value, including monetary value, of PII."***

This request mirrors Request No. 8 except it requests studies of the monetary value of PII. The request is limited to those studies actually performed by Facebook, and yet Facebook objects that the request is "irrelevant." In fact, Facebook duplicated the same objections it made in response to Request No. 8. But plaintiffs have alleged that the improperly tracked PII has actual monetary value, and it is odd indeed to argue that Facebook's internal analysis of the monetary value of PII is somehow beyond

the scope of this litigation, which is another objection made by Facebook. As with Request No. 8 above, plaintiffs have attempted to meet and confer on this Request, but Facebook refuses to discuss anything unless plaintiffs agree to a discovery stay.

4. *Request No. 24, "all documents relating to U.S. Patent Application No. 20110231240, filed February 8, 2011 and published September 22, 2011."*

In early 2011, during the proposed class period, three Facebook employees filed a patent for "a method of tracking information about the activities of users of a social networking system while on another domain" and "receiving one or more communications from a third-party website having a different domain than the social network system . . . and correlating the logged actions with one or more advertisements presented to one or more users." *See* SAC ¶ 80. In other words, Facebook patented the very activity which is the subject of this lawsuit, and documents related to this patent are demonstrably relevant. Facebook, however, repeated verbatim the exact same objections as noted above. Also as above, when plaintiffs asked to meet and confer Facebook refused, absent an agreement to stay discovery.

C. Facebook Should be Compelled to Produce Documents in Full Form

Facebook has elected to redact documents simply because Facebook deems the material "non-responsive" to a document request. For example, the document with bates number 4555 has material replaced with a text box in which appears the phrase "non-responsive content redacted." Gomes Decl. ¶ 5. It is not yet known how many documents have been redacted in this fashion, in part because the designation is written in less than 3-point type that must be enlarged several hundred percent on a computer screen to be legible, *id*.; in addition, Facebook has not produced a log of such redactions. The undersigned raised the issue with Facebook counsel, without success.

There is no basis for Facebook's unusual practice. In the absence of a legal privilege, doctrine or immunity, "a party may not redact information that it unilaterally deems sensitive, embarrassing, or irrelevant." *Delaware Display Group LLC v. Lenovo Group Ltd.*, 2016 WL 720977, at *6 (D. Del., Feb. 23, 2016). Permitting redactions of portions of documents deemed "irrelevant" by the producing party opens a Pandora's box of problems:

> Defendant's novel interpretation of their discovery obligations is not supported by the text of Fed. R. Civ. P. 34 and would open a fertile new field for discovery battles. Rule 34 talks about production of "documents," as opposed to relevant information contained in those documents. It is at least implicit that the duty to "produce documents as they are kept in the usual course of business" includes the substantive contents of those documents. . . . There is no express or implied support for the insertion of another step in the process (with its attendant expense and delay) in which a party would scrub responsive documents of non-responsive information.

Orion Power Midwest, L.P. v. American Coal Sales Co., 2008 WL 4462301, at *2 (W.D. Pa., Sept. 30, 2008). If the redacted material is sensitive personal information which the Protective Order failed to address, the solution is to move to modify the order, see *Delaware Display Group*, 2016 WL 720977 at *6, or at a minimum to provide a log of redacted material with corresponding bates numbers to enable the opposing party to evaluate the claim. *McNabb v. City of Overland Park*, 2014 WL 1152958, at *6 (D. Kan., Mar. 21, 2014). Facebook did neither, and should be prohibited from redacting portions of documents it deems "non-responsive."

D. Facebook's Blanket Confidentiality Designations Violate the Protective Order

The Protective Order has two categories of confidential documents. Material is "confidential" if it qualifies for protection under Federal Rule of Civil Procedure 26(c) or if it contains "trade secrets, proprietary business information, competitively sensitive information, personal identifying information, or other information the disclosure of which would, in the good faith judgment" of the designating party, be "detrimental to the conduct of that party's business or personal affairs." Protective Order § 2.2. "Good faith" is an explicit requirement. "Confidential" material can be deemed "highly confidential" only if the material is "extremely sensitive" and its disclosure "would create a substantial risk of serious harm that could not be avoided by less restrictive means." *Id*. § 2.6. The Protective Order requires designating parties to "take care to limit any such designation to specific material that qualifies under the appropriate standards. To the extent it is practical to do so, the Designating Party must designate for protection only those parts of material . . . that qualify. . . . *Mass, indiscriminate, or routinized designations are prohibited*." *Id*. § 5.1 (emphasis added).

The Protective Order is an example of an "umbrella" or "blanket" order that, when used in good faith, provides "a mechanism for the court to resolve discovery disputes concerning confidential designations without the need for document-by-document adjudication." *Minter v. Wells Fargo Bank*,

N.A., 2010 WL 5418910, at *3 (D. Md. Dec. 23, 2010). However, umbrella protective orders "do not relieve the parties of their burden to consider vigilantly the need for protection of each document. The utility of this approach is eviscerated when parties liberally over-designate in the first instance." *Id*.

Here, Facebook produced a single PDF containing publicly available terms of service (prior to the date of the Protective Order) without a confidentiality designation. Gomes Decl. ¶ 2, fn. 1. Since then, every single document has been produced with some level of confidentiality designation, *id*. ¶ 6, which is per se bad faith. None of the documents were partly designated as required by Section 5.1 of the Protective Order. Worse, all but four of these documents were produced as "highly confidential," *id*., making them subject to attorneys-eyes only restrictions, among other restrictions.

Courts routinely find such abuse to be a per se violation of umbrella protective orders. For example, the District of Colorado recently found that designating 90% of a production as confidential under an umbrella order was "absurd" and per se bad faith:

> The Court agrees that [a complex patent case] calls for designating an unusually high portion of documents as Confidential, and an usually high portion of those as OAEO. But 90% is an absurd number – made all the more absurd by Defendants' failure to designate a single document as Confidential but not OAEO. The Court finds that Defendants acted in bad faith by indiscriminately designating nearly their entire production of documents as OAEO.

Healthtrio, LLC v. Aetna, Inc., 2014 WL 6886923, at *3 (D. Colo. Dec. 5, 2014). If 90% is "absurd" and bad faith, surely 100% must be.

Indeed, Facebook counsel (Cooley LLP) made this exact argument last year on behalf of a different party in an unrelated case. *See Procaps S.A. v. Patheon Inc.*, 2015 WL 4430955 (S.D. Fla. July 20, 2015). Counsel argued that the designating party's designation of 91% of the production as "highly confidential" was bad faith, and the court agreed. *Id*. at *7 ("designation percentages of 95% -- such as the rate used here by Procaps – have frequently been condemned. In fact, many courts confronted with this level of designations (and lower designations) brand the percentage as 'absurd'" (citing cases)).

Facebook's presumptive bad faith is underscored by an analysis of the 14 "highly confidential" documents attached to the SAC and filed under seal; material from four is now publicly available. Facebook purposefully de-designated one of the documents entirely following the motion to seal the

SAC, and Facebook inadvertently disclosed material from three more just two weeks ago. *See* Motion to Stay, Ex. D, p. 2. The Northern District provides a mechanism to correct e-filing errors and to seal mistakenly disclosed documents, and the undersigned recently used the procedure to correct an e-filing error in an unrelated case. *See In re: Yahoo Mail Litig*., 5:13-cv-4980-LHK (N.D. Cal.), Motion to Remove Incorrectly Filed Document dated Sept. 23, 2015 (Yahoo ECF No. 142). Here, upon seeing Facebook's inadvertent disclosure of "highly confidential" discovery material in Exhibit D to its Motion to Stay, the undersigned immediately notified Facebook counsel as a courtesy. Facebook counsel shrugged off the error, declined to remove the material from the public docket, but claimed that the material remains "highly confidential." Straite Decl. ¶ 32.[3]

During recent meet-and-confer teleconferences, plaintiffs' counsel asked Facebook counsel to re-designate the production in accordance with the Protective Order. Facebook Counsel refused, offering instead two inadequate solutions. The first solution was for plaintiffs' counsel to identify those documents believed to be improperly designated. However, this solution inappropriately shifts discovery burdens to the receiving party and as noted above, turns Rule 26(c) on its head. *Cipollone*, 785 F.2d at 1122. Plaintiffs know of no court ever shifting the burden to the receiving party after finding bad faith indiscriminate designations:

> Defendants argue that, pursuant to the objection process set forth in the protective order, Plaintiff may not make a blanket challenge to its designation but, rather, must challenge individual documents or pages. Defendants are wrong – because Defendants waived the provisions of the protective order by acting in bad faith.

Healthtrio, 2014 WL 6886923 at *3; *accord, Procaps*, 2015 WL 4430955, at *7 ("Procaps' indiscriminate designation of documents as highly confidential should not lead to the result of improperly shifting the cost of review of confidentiality to Pantheon" (citations omitted)).

Facebook counsel's second alternative solution was to offer the four lead plaintiffs (but no other plaintiffs) access to the "highly confidential" documents, on condition that documents otherwise be treated as "highly confidential." However, such a solution does not address the problems caused by

[3] Of the four documents designated "confidential," two are just blank placeholder pages indicating that the actual document could not be converted. Gomes Decl. ¶ 6(b).

designating 100% of the production "confidential" regardless of whether also "highly confidential." As the *Minter* court noted:

> Initial confidentiality designations have consequences. Dissemination is restricted; when disseminated to deponents, witnesses and experts, written acknowledgement of the binding nature of the confidentiality order must be obtained for some, verbal for others. Deposition transcripts are truncated into confidential and non-confidential sections. Litigants must decide whether to challenge or acquiesce in the designation. In short, over-designation makes litigation more expensive and more complicated without worthwhile purpose.

Minter, 2010 WL 5418910, at *7.

In addition, maintaining the "highly confidential" designation will continue to interfere with the prosecution of this action even with Facebook' offer of access to the lead plaintiffs. As summarized in the chart below, there are substantial differences in the level of protection afforded confidential documents based on whether they are designated "confidential" or the more restrictive "highly confidential." By definition, "highly confidential" documents are a subset of "confidential" documents, see Protective Order § 2.6, but there are four additional consequences to the plaintiffs when Facebook designates a document "highly confidential":

1. Lead Counsel may not share highly confidential documents with "affiliated counsel," only "contract attorneys," and only then if the disclosure is "reasonably necessary."
2. Lead Counsel may not share "highly confidential" documents with the plaintiffs.
3. Lead Counsel may not use any "highly confidential" documents at a deposition of anyone other than the author or custodian of the document.
4. Lead Counsel (or any contract attorney) is forever barred from prosecuting a patent claim against Facebook on the subject matter of the "highly confidential" material, whereas such bar is absent if the material is merely "confidential."

A full comparison of the two levels of confidentiality is illustrated here:

Access to Material	Confidential	Highly Confidential
Outside Counsel of Record	**Yes**. See §7.2(a).	**Yes**. See §7.3(a).
Affiliated Attorneys of Outside Counsel	**Yes**. See §7.2(a).	**No**. Access only permitted for those contract attorneys retained by outside counsel and to whom it is "reasonably necessary" to disclose the information. See §7.3(a).
In-house counsel	**Yes**. See §7.2(b).	**Yes**. See §7.3(b).
Parties	**Yes**, including employees as "reasonably necessary." See §7.2(c)	**No**. See §7.3(a).
Experts	**Yes**, if "reasonably necessary." See §7.2(d)	**Yes**, if "reasonably necessary." See §7.3(c)
Deponents	**Yes**, if "reasonably necessary," see §7.2(g), or if the deponent was the author or custodian of the document. See §7.2(h)	**No**, unless the deponent was the author or custodian of the document. See §7.3(f)
Prosecution Bar if counsel has access?	**No**. See § 8.	**Yes, counsel subject to prosecution bar**. See § 8.

Facebook counsel's limited offer to allow the lead plaintiffs access to "highly confidential" documents only addresses one of the four consequences of the higher designation. Most importantly, plaintiffs would still be unable to use any document (except 5 of the 12,805) in depositions, the unfairness of which is plainly apparent.

V. CONCLUSION

Plaintiffs respectfully request that this Court order defendant Facebook to search additional Facebook employees; to comply with outstanding requests for documents, including but not limited to documents related to the named plaintiffs; and to produce documents without "non-responsive" content redacted.

Plaintiffs also respectfully request that this Court order defendant to re-assign confidentiality designations for all documents produced to date and order defendant to fully comply with the Protective Order with respect to any additional documents produced.

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ATTESTATION OF E-FILED SIGNATURE

I, David A. Straite, court-appointed interim lead counsel for the proposed Class, am the ECF User whose ID and password are being used to file the foregoing. In compliance with Civil L.R. 5-1(i)(3), I hereby attest that Paul R. Kiesel and Stephen Grygiel have concurred in this filing.

/s/ David A. Straite
David A. Straite