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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

**DECLARATION OF DAVID A. STRAITE IN  
SUPPORT OF 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

1 **DECLARATION OF DAVID A. STRAITE**

2 I, David A. Straite, declare as follows:

3 1. I am an attorney admitted *pro hac vice* to practice before this Court in this matter. I am  
4 an attorney at the law firm of Kaplan Fox & Kilsheimer LLP, Interim Co-Lead Class Counsel in this  
5 class action against Defendant Facebook, Inc.

6 2. I submit this supplemental declaration in support of plaintiffs’ motion to compel (the  
7 “Motion”). The following statements are based on my personal knowledge and review of the files in  
8 this case and, if called on to do so, I could and would testify competently thereto.

9 3. Last year, on March 12, 2015, this Court appointed me Co-Lead Class Counsel. ECF  
10 No. 80. Prior to that date, I assisted Class Counsel with various discovery matters as a member of the  
11 Steering Committee at the direction of or with permission of former Class Counsel.

12 4. On November 5, 2012, plaintiffs served 31 requests for documents on defendant  
13 Facebook, Inc. Although objections were due in the ordinary course, the parties agreed that documents  
14 responsive to the request would not be produced until five days after the Court approved a stipulated  
15 protective order.

16 5. On March 6, 2014, I contacted Kyle Wong, counsel for Facebook, raising the issue of  
17 the proposed protective order still pending approval with the Court. I wrote, “I think the court will be  
18 concerned that discovery has not been taken in this case.” I conferred telephonically with Mr. Wong on  
19 March 14, 2014, at which time Mr. Wong stated his position that Facebook would not produce  
20 documents until 5 days after the proposed protective order was approved.

21 6. Following the teleconference on the same day, March 14, 2014, I emailed Mr. Wong  
22 asking whether Facebook would be amenable to one of two proposals. I first asked whether Facebook  
23 would exchange document discovery on a temporary “attorneys-eyes-only” basis pending approval of  
24 the protective order. The second option would be for the parties to jointly approach the Court with a  
25 reminder of the pending request to approve the order.

26 7. On March 26, 2014, Mr. Wong rejected both proposals, saying: “In our view, the Court  
27 is aware that the parties submitted the proposed Protective Order, and we should await the Court’s  
28 decision as agreed.” Mr. Wong continued, “We also do not believe the parties need to approach the

1 Court again. . . . The Court is [] fully aware of the case and we would not feel comfortable contacting  
2 the Court again at this time given this procedural history.”

3 8. The following week, plaintiffs’ counsel notified the Court of the pending protective  
4 order (without Facebook joining the notice). ECF No. 74. The protective order was approved with  
5 modifications on April 11, 2014.

6 9. On April 16, 2014, exactly five days after the entry of the Protective Order, Facebook  
7 produced 12,804 documents totaling approximately 60,000 pages. Only three individual custodians  
8 were identified, with a small number of additional documents sourced from “Facebook” without further  
9 identification.

10 10. On May 12, 2014, plaintiffs filed a notice of new authority with the Court. ECF No. 76.

11 11. On June 26, 2014, plaintiffs filed another notice of new authority. ECF No. 77.

12 12. On August 15, 2014, plaintiffs filed another notice of new authority. ECF No. 78.

13 13. On September 23, 2014, I sent a letter to Mr. Wong notifying him of a potentially  
14 privileged document that was likely inadvertently produced by Facebook. Our document reviewers  
15 noticed inconsistent redactions among similar documents and without taking a position on the validity  
16 of the claim, brought the issue to Facebook’s attention as a courtesy.

17 14. On September 25, 2014, plaintiffs produced documents to Facebook in response to  
18 Facebook’s request for documents.

19 15. On September 29, 2014, plaintiffs produced a supplemental batch of documents to  
20 Facebook.

21 16. On September 30, 2014, Mr. Wong confirmed the inconsistent redactions identified in  
22 my letter of September 23, 2014, claimed inadvertent production, and clawed back the document.  
23 Plaintiffs’ counsel complied, and Facebook provided a replacement document.

24 17. On October 8, 2014, I sent a letter to Facebook counsel confirming destruction of the  
25 clawed back document discussed above, and asking to meet and confer with Facebook counsel  
26 regarding deficiencies in the April 16, 2014 production of documents and regarding objections made to  
27 various categories of documents. Mr. Wong responded that he was not available until October 30, and  
28 the parties thereafter agreed to meet telephonically on November 3, 2014.

1           18.     A follow-up teleconference was held on November 19, 2014. On behalf I lead counsel, I  
2 attended both teleconferences.

3           19.     On the meet-and-confer teleconferences, I noted with concern that only 3 custodians  
4 were searched for responsive documents. Facebook counsel refused to identify any other custodians  
5 likely to have discoverable information and instead asked me to identify custodians and bases for  
6 believing they would have documents. The parties agreed on the call to table further discussions until  
7 the first batch of documents was completely reviewed to facilitate a more informed conversation.

8           20.     On March 12, 2015, I was appointed interim Co-Lead Class Counsel. From that date  
9 onward I supervised the review of documents produced by Facebook.

10          21.     On October 23, 2015, this Court granted Facebook's motion to dismiss the First  
11 Amended Complaint, with leave to re-plead. ECF No. 87.

12          22.     On November 3, 2015, I spoke with Mr. Wong regarding the Second Amended  
13 Complaint and we discussed a proposed briefing schedule on any renewed motion to dismiss.

14          23.     By this point, review of the Facebook documents had neared completion and plaintiffs'  
15 counsel were able to append significant Facebook documents to the Second Amended Complaint (14 of  
16 them under seal) on November 30, 2015.

17          24.     On January 14, 2016, I contacted Mr. Wong to request a meet-and-confer regarding the  
18 earlier-identified deficiencies (including the overbroad objections and the narrow search list) in  
19 accordance with the parties' agreement of November 19, 2014. *See* Facebook Motion to Stay  
20 Discovery dated March 2, 2016 (ECF No. 108), Wong Declaration (hereinafter "Motion to Stay"), Ex.  
21 D.

22          25.     On February 2, 2016, Mr. Wong agreed to speak, but noted his belief that discovery  
23 should no longer continue given the renewed motion to dismiss. Motion to Stay, Ex. E.

24          26.     On February 3, 2016, I conferred telephonically with Mr. Wong. We discussed a  
25 number of peripheral topics but Mr. Wong refused to agree to search further custodians and also  
26 refused to even discuss any of the overbroad objections to specific document requests absent an  
27 agreement to stay discovery. Mr. Wong also refused my request to schedule depositions of the three  
28

1 witnesses whose documents had been produced. I noted on the call that a motion to compel now  
2 seemed inevitable, and asked Mr. Wong to reconsider his position.

3 27. On February 16, 2016, Mr. Wong wrote to me to follow up on the February 3rd  
4 teleconference. He was willing to address a few issues on the call, but still insisted on a broad  
5 discovery stay and still would not address any objections made to specific document requests absent an  
6 agreement to stay discovery. *See* Motion to Stay, Ex. F.

7 28. The following day, February 17, 2016, I wrote to Mr. Wong and rejected his request for  
8 a stipulated discovery stay. However, I proposed a compromise whereby the parties would prioritize  
9 certain discovery during the pendency of the renewed motion to dismiss. The letter is attached to this  
10 Declaration as Exhibit 1, as it was not included as an exhibit to the Motion to Stay.

11 29. On February 23, 2016, the parties held one final meet-and-confer teleconference to  
12 discuss plaintiffs' offer to prioritize discovery. Mr. Wong said he needed to check with his client, and  
13 the parties agreed to refrain from filing discovery motions for at least one week. On March 1, 2016,  
14 Mr. Wong rejected plaintiffs' offer. *See* Motion to Stay, Ex. H. He agreed, however, to search for  
15 documents related to the named plaintiffs, but only if related to their "internet search history."

16 30. Facebook filed the Motion to Stay on the night of March 2, 2016.

17 31. The following morning, March 3, 2016, I emailed Mr. Wong as a courtesy to inform him  
18 that Facebook had inadvertently disclosed material in the Motion to Stay designated "highly  
19 confidential" by Facebook. I said, "attached to your declaration last night is exhibit D, my letter of  
20 January 14, 2016 requesting a discovery meet-and-confer. In several places this letter quotes or refers  
21 to discovery material designated 'highly confidential' . . . Given that you have now disclosed this  
22 information publicly, we interpret your filing last night to be a withdrawal of certain confidentiality  
23 designations, but it would be helpful to know precisely which documents (or portions of documents)  
24 you have de-designated, by bates number."

25 32. On Friday, March 4, 2016, Mr. Wong responded by email, "we do not withdraw any  
26 confidentiality designations for these documents. The January 14 letter, however, has now been filed  
27 on the court docket, and may be treated accordingly under the Protective Order."  
28

1 I declare under penalty of perjury under the laws of the United States that the foregoing is true  
2 and correct. Executed on this 16<sup>th</sup> day of March, 2016, at New York, NY.

3  
4 /s/ David Straite  
5 David A. Straite

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# Exhibit 1

February 17, 2016

**VIA EMAIL & U.S. MAIL**Kyle C. Wong, Esq.  
Cooley LLP  
101 California Street, 5<sup>th</sup> Floor  
San Francisco, CA 94111-5800Re: *In re Facebook Internet Tracking Litig.*, 5:12-md-2314-EJD (N.D. Cal.)

Dear Kyle,

By this letter, plaintiffs respond to your letter last night dated February 16, 2016.

**1. Facebook's Request for a Discovery Stay**

We cannot agree to your request for a discovery stay pending a decision on the motion to dismiss the Second Amended Complaint ("SAC"). As you know, at the June 29, 2012 case management conference, Judge Davila said "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]. A stay is completely within Judge Davila's discretion, Facebook's burden of showing good cause for a stay is heavy, and we are aware of no reason that Judge Davila's view would differ today.

More importantly, given the import of the discovery produced thus far (some of which was provided to the court with the SAC), we believe the argument for full discovery is more compelling today than in 2012. You have also refused to produce documents which, according to your motion to dismiss, are required to state a claim. These documents include Facebook Help Pages, which you mention in yesterday's letter and which were cited in the SAC. They also include any documents related to the named plaintiffs, which you have wrongly refused to produce for almost two years.

As we discussed at last months' telephonic meet-and-confer, plaintiffs have been exceedingly deferential to Facebook's concerns regarding discovery burdens prior to final resolution on the motion to dismiss. For example, you first produced documents in April 2014 and during our initial meet-and-confer teleconferences in November 2014, we noted with concern that only 3 custodians were searched. We were also concerned that some of the most



important categories of documents were withheld under various objections. In good faith, on those calls we agreed to table further discussions until we had reviewed the entirety of the document production – in part to enable us to have more informed discussions, and in part to accommodate your desire to minimize discovery burdens while the motion to dismiss remained outstanding.

In the subsequent months, plaintiffs reviewed the documents deliberately before approaching you again. We also refrained from noticing any depositions or serving interrogatories, again as a good faith effort to balance your concerns about discovery burdens against the Court's directive that discovery not be stayed.

In January 2016, we informed you that we completed our document review and the time had finally come to address the issues identified in November, 2014. There is nothing more we can do at this point, and your refusal to produce additional documents (and refusal to negotiate deposition dates) effectively violates Judge Davila's directive of June 29, 2012.

## **2. Opportunity for Compromise**

There is, however, an opportunity for continued compromise. There are some custodians not searched and some categories of documents withheld that, if searched and produced, respectively, we could prioritize for the time being while deferring noticing depositions until after the next court hearing. We propose discussing the priority documents and custodians on Friday, February 19, 2016 or Monday, February 22, 2016, at your convenience, after you have had a chance to review our brief being filed tomorrow. We can also address the other issues in yesterday's letter.

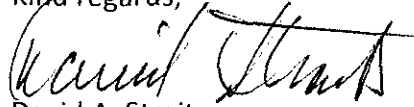
## **3. Request for Permission to Contact Judge Davila's Clerk**

If you are unwilling to discuss a compromise with us and insist on a full discovery stay, we agree that the appropriate next step would be your motion for a discovery stay and our opposition with cross-motion to compel discovery. I'm sure you saw that Magistrate Judge Cousins has been assigned to our case. While Judge Cousins' individual rules require parties to jointly approach the court with discovery disputes, our understanding is that we do not follow Judge Cousins's rules unless and until Judge Davila refers the dispute to him. We ask for permission to contact Judge Davila's clerk to confirm our understanding, or alternatively we can jointly call chambers.

\* \* \* \* \*

Please let us know if you are available to speak on Friday or Monday.

Kind regards,

  
David A. Straite

cc: Matthew D. Brown, Esq.  
Jeffrey M. Gutkin, Esq.  
Stephen G. Grygiel, Esq.