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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re: Facebook Internet Tracking Litigation

Case No. 5:12-md-02314 EJD

DEFENDANT FACEBOOK, INC.'S OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL

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

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I. INTRODUCTION

Plaintiffs' Motion to Compel ("Motion") demonstrates the subdued and half-hearted approach to discovery they have taken in this case. For instance, Plaintiffs seek to compel the production of documents from 26 additional custodians, but make no effort to show why any of this additional discovery is relevant and proportional. Plaintiffs also contest Facebook's confidentiality designations under the Protective Order, but entirely ignore the procedural requirements set forth in that Order for challenging such designations. These significant defects and the many others discussed below warrant the Motion's denial.

As an initial matter, Plaintiffs' Motion makes no effort to comply with Civil Local Rule 37-2, which requires that a party moving to compel discovery "detail the basis for the party's contention that it is entitled to the requested discovery and must show how the proportionality and other requirements of Fed. R. Civ. P. 26(b)(2) are satisfied." Plaintiffs don't even identify which of the 26 individuals referenced in the Motion they want to compel production from, let alone provide the detailed explanation of relevance and proportionality required by the Rule. Given that Facebook has already produced nearly 13,000 documents and 65,000 pages of discovery to date, Plaintiffs' failure to satisfy the basic requirements of the Rule is particularly glaring. Plaintiffs similarly do not provide the requisite information for the document requests on which they have moved. Having failed to meet their burden, Plaintiffs' Motion should be denied with respect to expanded discovery.

Likewise, Plaintiffs contend that certain redactions in Facebook's production are improper but do not attach even a single example of a redaction they claim is objectionable. The minor redaction of which Plaintiffs complain covers at most one or two words in a multi-page document. The redaction contains highly sensitive business information that is completely irrelevant to this case. More importantly, Plaintiffs do not contend or even suggest that the limited redactions hide relevant information.

Plaintiffs also did not challenge Facebook's confidentiality designations within the time frame required by the Protective Order, which states that failure to file a motion with the Court in the allotted time "*shall automatically waive any challenge*." Plaintiffs exacerbated their blatant

disregard for the Protective Order by refusing to follow the only method for challenging confidentiality provided in the Order: the identification of *specific documents* whose designations they felt were improper. This mechanism, as Facebook repeatedly noted during the meet-and-confer process, exists both to encourage the resolution of disputes without Court intervention and to give the designating party time to consider the challenging party's arguments. Even were the Court to overlook these fundamental violations (which it should not), Facebook did not mass-designate documents for confidentiality but instead undertook a document-by-document review to make its determination as the Protective Order mandates.

Finally, the Motion tries to create a false sense of urgency that is utterly at odds with Plaintiffs' discovery efforts thus far. The meet-and-confer process for the requests at issue dragged on for well over a year because of Plaintiffs' laxity. Plaintiffs took 14 months, for instance, to identify potential new custodians and to renew discussions on the disputed requests for production. All these demands, moreover, came only *after* this Court granted Facebook's Motion to Dismiss in its entirety and on the same day that Facebook filed its Motion to Dismiss the Second Amended Complaint.

For these reasons and those that follow, Facebook respectfully requests the Court deny the Motion in its entirety.

II. STATEMENT OF FACTS

A. Procedural Background

This Court granted Facebook's motion to dismiss the first amended complaint ("FAC") in its entirety on October 23, 2015 ("Order") based on Plaintiffs' failure to establish standing and to plead statutory claims adequately. Plaintiffs filed a second amended complaint ("SAC") on November 30, 2015. (Dkt. No. 93.) The SAC included new allegations regarding how the Internet and cookies function, based on publicly available information, and did not add a single allegation on this topic from any of the thousands of documents Facebook produced while the motion to dismiss the FAC was pending. (*See* SAC ¶¶ 28-42.) The SAC also left the allegations regarding Plaintiffs' alleged harm unchanged—adding nothing from Facebook's productions. (*Compare* FAC ¶¶ 10-14, 111-125 *with* SAC ¶¶ 129-143.) Facebook's Motion to Dismiss the

SAC (Dkt. No. 101) was filed on January 14, 2016 and will be heard by this Court in less than a month, on April 28, 2016. In the pending Motion to Dismiss, Facebook demonstrates why Rule 12(b)(1), (6), and this Court's previous Order require dismissal of the SAC with prejudice.

B. Discovery to Date

The Parties' Productions. As explained in more detail in Facebook's Motion for Protective Order Temporarily Staying Further Discovery ("Motion for Protective Order," Dkt. No. 108), Plaintiffs have only marginally engaged in discovery during the four-plus years this case has been pending. Although discovery commenced on June 29, 2012, Plaintiffs waited five months, until November 2012, to serve their first (and to date *only*) discovery requests, which consisted of thirty-one requests for production. (*See* Wong Decl., Ex. A.)[1] On January 25, 2013, Facebook served objections and responses to Plaintiffs' Requests for Production and produced all non-sensitive documents. (Wong Decl., Ex. B; Wong Decl. ¶ 4.)[2] The Parties agreed that both parties would produce confidential documents within five days of the approval of a stipulated protective order. (Declaration of Adam Trigg in support of Facebook's Opposition to Plaintiffs' Motion to Compel ("Trigg Decl.") ¶ 5.) Plaintiffs thereafter failed to respond to Facebook's proposed revisions to a draft stipulated protective order for *six months*. The stipulated protective order was eventually finalized on September 2013, and approved on April 11, 2014 (Dkt. No. 75). Five days later, Facebook produced approximately 13,000 documents, totaling almost 65,000 pages, from Facebook's internal repositories and three custodians with the information most relevant to Plaintiffs' claims. (Wong Decl. ¶ 7.) During the same time period, the four named plaintiffs produced less than 50 documents (505 pages total). (*Id.*)

Facebook's production came from central repositories, public-facing facebook.com pages, and several Facebook engineers who had the most familiarity with the facts alleged in the FAC.

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[1] Plaintiffs support their Motion with citations to the Declaration of Kyle Wong filed in support of Facebook's Motion for Protective Order (Dkt. No. 108-1 ("Wong Decl.")). To avoid duplication and confusion, Facebook will also cite, where possible, to the documents attached to the Wong Declaration.

[2] Although Plaintiffs contend that Facebook did not produce any documents until the Court approved a protective order, Facebook did, in fact, produce public documents before the Protective Order was entered, as the parties had agreed. (Wong Decl. ¶¶ 4-5.)

(Trigg Decl. ¶ 2.) Attorneys reviewed each document to determine, among other things, if it was responsive to the document requests, privileged, confidential, and/or whether redactions were needed. (*Id*. ¶ 3.)

An attorney reviewed documents for highly sensitive business information and approximately 140 of the nearly 13,000 documents Facebook produced (1% of the total production) were partially redacted to protect information regarding non-relevant business projects so highly sensitive that most Facebook employees are not even aware of them. (*Id.* ¶ 6; Declaration of Natalie Naugle in support of Facebook's Opposition to Plaintiffs' Motion to Compel ("Naugle Decl.") ¶ 2.) As with the other produced documents, each redacted document was reviewed individually by an attorney for relevance. (Trigg Decl. ¶ 6.) The redactions were narrowly tailored—the great majority of them are less than a sentence long—and do not conceal any material relevant to the issues in the case. (*Id.*)

The Meet-and-Confer Process. Plaintiffs did not follow up on Facebook's discovery responses for almost seven months, until November 3, 2014. The Parties held a meet-and-confer on that date and again on November 19, 2014, during which Plaintiffs committed to producing a list of custodians from which they believed Facebook should collect and produce documents. (Wong Decl. ¶ 8.) During these meet-and-confers, Plaintiffs did not raise any issues with respect to the confidentiality designations or redactions. (Trigg Decl. ¶ 7.) Plaintiffs then did nothing for *14 months*. On January 14, 2016, Plaintiffs finally followed up on the November 2014 meet-and-confers. (Wong Decl., Ex. D.) Plaintiffs acknowledged that they had not yet finished reviewing the documents Facebook had produced almost *two years earlier* but nonetheless indicated that they believed that production from and depositions of at least 20 additional custodians was warranted—all without providing any explanation of the relevance of 17 of the additional 20. (*Id.* at 1.)

Throughout the meet-and-confer process, Facebook made every effort to narrow or resolve the dispute, taking into account the procedural posture of the case. Over the past two months, Facebook has met and conferred with Plaintiffs regarding various discovery issues, including those that are the subject of this Motion, in an effort to avoid burdening the Court. Far

from granting itself a unilateral stay, as Plaintiffs have charged (Mot. at 2), Facebook agreed that regardless of its move for a *temporary* stay, it would collect and produce certain documents and data requested by Plaintiffs, including Help Center pages, Google Docs produced in emails, and certain cookie data related to named Plaintiffs. This latter undertaking is no easy feat; Facebook must attempt to query cookie data from the relevant time period to determine whether it can locate and produce Plaintiffs' cookie data regarding their Internet browsing history. (Wong Decl., Ex. H.) Additionally, Facebook further proposed to schedule depositions, expand the number of custodians, and provide a subset of the documents identified in Plaintiffs' RFPs shortly after the Court's decision on the Motion to Dismiss. (Trigg Decl., Ex. 1.) Plaintiffs refused, and this Motion and Facebook's Motion for Protective Order followed. (*Id.*)

III. LEGAL STANDARD

Plaintiffs, as the moving party, bear the burden to show that the discovery sought is "relevant to any party's claim or defense and proportional to the needs of the case . . . ." Fed. R. Civ. P. 26(b)(1); *Apple Inc. v. Samsung Elecs. Co.*, No. 12-CV-0630-LHK (PSG), 2013 U.S. Dist. LEXIS 116493, at *29 (N.D. Cal. Aug. 14, 2013). Specifically, Plaintiffs "detail the basis for the party's contention that it is entitled to the requested discovery and must show how the proportionality and other requirements of Fed. R. Civ. P. 26(b)(2) are satisfied," as Civil Local Rule 37-2 requires.

IV. ARGUMENT

A. Plaintiffs' Motion Should Be Denied for the Reasons Articulated in Facebook's Motion for a Temporary Protective Order.

If Facebook prevails on its Motion for Protective Order seeking a stay of discovery pending resolution of Facebook's Motion to Dismiss, Plaintiffs' Motion to Compel should correspondingly be denied. *See, e.g.*, *Reyes v. Horel*, No. C 08-4561 RMW (PR), 2009 U.S. Dist. LEXIS 63850, at *6 (N.D. Cal. July 14, 2009) (simultaneously granting defendants' motion to stay discovery and denying plaintiff's motion to compel discovery). As Facebook articulated in its Motion for Protective Order, the pending Motion to Dismiss is potentially (and likely) dispositive of all claims in this case. The Court already dismissed Plaintiffs' FAC, and their SAC

does not overcome the fatal defects identified in the Court's Order. (Motion for Protective Order at 10; Reply ISO Protective Order at 3.) Moreover, no additional discovery is necessary to decide the Motion to Dismiss and Plaintiffs never claim that the discovery they seek here is relevant to that Motion. (Motion for Protective Order at 11; Reply ISO Protective Order at 4.) Under these circumstances, Facebook's Motion for Protective Order should be granted and Plaintiffs' Motion to Compel should be denied. But even if the Court denies Facebook's Motion for Protective Order, Plaintiffs' Motion should be denied, as explained *infra*.

B. Plaintiffs Fail to Show that 26 Additional Custodians Have Discoverable Information Under Rule 26(b)(1).

Even if Plaintiffs' request for a massive expansion of discovery to include another 26 custodians was not unreasonable given the procedural posture of this case, Plaintiffs fail to establish that this additional discovery is warranted at this time for several key reasons.

As an initial matter, Plaintiffs' request is procedurally improper. Plaintiffs' Motion vaguely requests that Facebook be compelled to search "more than 3 employees," but then proceeds to list by name 11 employees and to reference a meet-and-confer letter that lists 26 employees, without explaining, among other things, the precise relief that they seek. Facebook cannot determine which (or how many) additional custodian searches Plaintiffs are seeking to have compelled, a challenge that is compounded by Plaintiffs' failure to file a proposed order (in violation of Civil Local Rule 7-2(c)). Moreover, Plaintiffs' Motion to Compel lists at least two employees (Matt Kelly and Aimee Westbrook) who Plaintiffs have not mentioned before, and for which Plaintiffs have therefore failed to satisfy their meet-and-confer obligations under Civil Local Rule 37-1.

Plaintiffs also fail to explain the relevance of any of the individuals listed in their motion or in their meet-and-confer correspondence and fail to show how the proportionality factors have been met, as required by Civil Local Rule 37-2. *Apple Inc.*, 2013 U.S. Dist. LEXIS 116493, at *29. First, Plaintiffs do not offer a single fact to support the relevance of 11 of the 26 additional custodians they seek to add. Their failure to meet their burden mandates denial of the Motion. *See Weidenhamer v. Expedia, Inc.*, No. C14-1239RAJ, 2015 U.S. Dist. LEXIS 154746, at *19

(W.D. Wash. Nov. 13, 2015) (denying motion to add custodians where plaintiff failed to show that the search would reveal any more relevant information).

Second, Plaintiffs vaguely reference 12 additional proposed custodians by pointing to various paragraphs in the SAC. (Mot. at 6.) These paragraphs, however, do not "detail the basis for the [Plaintiffs'] contention that [they are] entitled to the requested discovery" nor do they "show how the proportionality and other requirements of Fed. R. Civ. P. 26(b)(2) are satisfied" as required under Civil Local Rule 37-2. For example, Plaintiffs point to a paragraph in the SAC that merely identifies three individuals as recipients of emails from third parties. (SAC ¶¶ 45, 77.) Another set of paragraphs simply mention several Facebook employees who wrote emails allegedly discussing Facebook's efforts regarding logged-in users.[3] (SAC ¶¶ 68, 69.) But these threadbare allegations do not demonstrate the relevance of these proposed custodians to the issues alleged in the SAC. *See Brown v. W. Corp.*, No. 8:11CV284, 2013 U.S. Dist. LEXIS 116278, at *22 (D. Neb. Aug. 16, 2013) (denying motion to compel additional custodians, noting that the fact that individuals "have either sent or received communications regarding the plaintiff" was not specific enough to show the relevance of the requested discovery).

Lastly, with respect to the three employees Plaintiffs claim are knowledgeable about "key issue[s]" (Mot. at 6), their arguments are insufficient. Plaintiffs rest their relevance arguments on two emails in which current custodians suggest that other Facebook employees were also knowledgeable about certain issues—the lu cookie and whether cookies could be associated with a person's location. But the mere mention of these individuals as knowledgeable about Facebook cookies does not establish that they were involved in any of the conduct at issue in this case. Plaintiffs are not entitled to discovery from every single one of Facebook's many engineers who may know something about a cookie. *See Fort Worth Emples. Ret. Fund v. J.P. Morgan Chase & Co.*, 297 F.R.D. 99, 107 (S.D.N.Y. 2013) (denying motion to compel discovery from additional

[3] For example, Aimee Westbrook was listed as a recipient (among many others) of an email from a third party. (SAC Ex. X.) Westbrook did not participate in any manner on the resulting email chain, and was subsequently dropped from the chain when Facebook engineers began discussing technical issues. Neither Aimee Westbrook nor Matt Kelly have been mentioned by Plaintiffs in prior meet-and-confer correspondence.

custodians where plaintiffs failed to show that the additional custodians would provide unique relevant information not already obtained); *Brown*, 2013 U.S. Dist. LEXIS 116278, at *22. As it is Plaintiffs' burden to establish the relevance of the discovery they seek, their Motion to Compel should be denied. *Apple Inc.*, 2013 U.S. Dist. LEXIS 116493, at *29.

Plaintiffs' request for a massive expansion of discovery is also unwarranted as it would impose a substantial burden that is entirely unjustified. Fed. R. Civ. P. 26(b)(1). Recognizing this, Plaintiffs fail to address the proportionality requirements of Rule 26(b)(1) and thus violate Civil Local Rule 37-2. Civil L.R. 37-2 (a party bringing a motion to compel "must show how the proportionality and other requirements of Fed. R. Civ. P. 26(b)(2) are satisfied"). Facebook has already provided more than 65,000 pages from the three custodians identified as most likely to possess relevant information. The burden of expanding discovery to an additional 26 custodians is extraordinary. Production of documents from these individuals will require a considerable number of hours of attorney time to review for relevancy, confidentiality, and privilege.

Moreover, any presumed importance and urgency of the discovery sought here is belied by Plaintiffs' substantial delay in seeking it. Plaintiffs first asked that Facebook search additional custodians in November 2014. After Facebook suggested that Plaintiffs identify additional custodians to be searched, Plaintiffs acknowledged that they were unable to do so because they had not even finished reviewing the documents Facebook produced six months earlier. Plaintiffs finally provided a list of 26 additional custodians in a letter on January 14, 2016, well over a year later. If these additional custodians were "importan[t] . . . in resolving the issues," Fed. R. Civ. P. 26(b)(1), Plaintiffs might have considered requesting discovery from them sometime in the past four years. Plaintiffs' failure to do so suggests opportunistic gamesmanship rather than a sincere desire to obtain information relevant to the merits of their case.

C. Plaintiffs' Four Requests for Production Seek Documents that Are Not Relevant to the Case and Are Unduly Burdensome.

Plaintiffs' Motion also fails to show why the broad categories of documents they seek meet the standard set forth under Rule 26(b)(1). Plaintiffs instead quote an obsolete version of Rule 26(b)(1) (Mot. at 5) and fail to address the rule's new mandate—applicable since December

1, 2015—that discovery must be both "relevant to any party's claim or defense and proportional to the needs of the case," again violating Civil Local Rule 37-2. Facebook has already agreed to investigate whether it can locate and produce cookie data related to the named Plaintiffs for the class period. Plaintiffs' remaining requests are overbroad and irrelevant, and thus Plaintiffs' Motion to Compel should be denied.

***Request No. 16*:** Plaintiffs seek "[a]ll documents concerning the named Plaintiffs." As an initial matter, Facebook has agreed to, and is in the process of trying to identify whether it can locate and produce cookie data from April 22, 2010 to September 26, 2011 for the named Plaintiffs that relates to their Internet browsing. But Plaintiffs want even more, making the unsupported contention that they are entitled to *all* documents concerning the named Plaintiffs, "*without limitation*." (Mot. at 7 (emphasis added).) Plaintiffs' request is overbroad, not relevant, and unduly burdensome, and should therefore be denied.

First, Plaintiffs' request is not confined to the matters at issue in this case, potentially encompassing, *inter alia*, documents dated long before and long after the time period at issue; documents related to Plaintiffs' personal profile and use of Facebook's site that are clearly unrelated to Plaintiffs' claims and are equally available to Plaintiffs; and documents that include Facebook users who are not plaintiffs here, like Facebook Messages with non-parties, and Likes and Shares of non-parties' Facebook posts. Plaintiffs' request is thus properly denied as overly broad. *See In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. MDL No. 1917, 2015 U.S. Dist. LEXIS 139387, at *169 (N.D. Cal. July 9, 2015) (document requests that were unbounded in time and not limited to the subject matter in dispute were properly objectionable).

Second, Plaintiffs do not explain the relevancy of their expansive request, again violating Civil Local Rule 37-2. Instead, Plaintiffs claim that the SAC "also alleges improper gathering and aggregation of other personal information" and they obliquely suggest that Facebook has improper motives for withholding the requested documents.[4] (Mot. at 8.) But Plaintiffs do not

[4] Plaintiffs' suggestion that there is some mystery as to why Facebook has offered to produce the named Plaintiffs' cookie data regarding their Internet browsing history during the relevant period, and not "all documents" without limitation is disingenuous at best. As Facebook explained in meet-and-confer calls and letters, Plaintiffs' request for "all documents" related to each of the

cite to any allegation in the SAC addressing this newly-minted claim of "improper gathering and aggregation of other personal information." Nor do Plaintiffs explain how the aggregation of information other than Internet browsing history relates to either party's claims or defenses.

Third, the discovery sought through Request Number 16 is disproportional to the needs of the case. Because Plaintiffs have failed to articulate any reason the discovery is necessary in resolving the issues in this case, the burden of the discovery by definition outweighs its likely benefit. *Cf. Compaq Computer Corp. v. Packard Bell Elecs., Inc.*, 163 F.R.D. 329, 335-36 (N.D. Cal. 1995) ("[I]f the sought-after documents are not relevant nor calculated to lead to the discovery of admissible evidence, then *any burden whatsoever* . . . would be by definition 'undue.'"). Moreover, identifying, collecting and producing *all* documents about the named Plaintiffs would require substantial amounts of employee and attorney time to identify, review, and prepare data and documents for production. (Wong Decl. ¶ 16.)

The other requirements of Rule 26(b)(1) further counsel against permitting the requested discovery. Request Number 16 includes information about Plaintiffs' Facebook profile and other information Plaintiffs have posted to Facebook that is equally accessible to Plaintiffs. (Wong Decl., Ex. B at 16.) Plaintiffs' Request also encompasses private messages with other Facebook users and thus implicates the privacy interests of non-parties.

***Request No. 8*:** Plaintiffs seek "[a]ll documents relating 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." First, this request is facially overbroad. Delivery of personalized advertisements to *non-users* of Facebook has no relevance to Plaintiffs' claims, which are based on allegations that Facebook was able to link Internet browsing activity with Facebook users' profiles.

Second, even if this request was confined to studies, analyses or evaluations of revenue associated with delivering personalized advertisements to Facebook users, it would still not be relevant to any party's claim or defense. The SAC does not allege that the Internet browsing

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named plaintiffs is, *inter alia*, vastly overbroad and burdensome, and seeks irrelevant information.

history information that Facebook allegedly collected while Facebook users were logged off was used to display personalized advertisements. In fact, the SAC concedes that Facebook only provides advertisers the ability to engage with Facebook users based on information that Facebook users voluntarily provide to Facebook. (SAC ¶ 131 (alleging that Facebook explains to advertisers that ads are personalized based on "information [Facebook users] have chosen to share with us such as their age, location, gender, or interests").) Thus the documents that Plaintiffs seek would not establish the amount of any profits attributable to the conduct of which Plaintiffs complain. Likewise, since the documents sought do not establish profits, they certainly would not establish a "profit motive," relevant to willfulness under Cal. Penal Code § 631(a) or Cal. Penal Code § 502(e)(4).

***Request No. 9*:** Plaintiffs seek "[a]ll documents concerning studies, analyses or evaluations by Facebook of the value, including monetary value, of PII [personally identifiable information]." This request is facially overbroad to the extent that it encompasses more than evaluations of the value of the Internet browsing history of logged out Facebook users.

However, even if Plaintiffs' request was confined to Facebook's studies, analyses, or evaluations of the value of Internet browsing history, it would still not be relevant. Plaintiffs allege that Facebook's studies concerning the value of personally identifiable information are relevant because "plaintiffs have alleged that the improperly tracked PII has actual monetary value . . . ." (Mot. at 8-9.) But the allegations in Plaintiffs' SAC are only relevant to the extent that they bear on the claims and defenses at issue in the case. Fed. R. Civ. P. 26(a). Plaintiffs' SAC alleges that the Internet browsing history allegedly obtained by Facebook has value. (SAC ¶¶ 129-143.) Plaintiffs have used these allegations to attempt to establish standing and damages. But this Court has previously held that allegations about the value of PII does not establish economic harm, and thus are not relevant to the issues of standing or of damages. (Order at 10.) Thus, any analyses performed by Facebook of the value of PII are irrelevant to the claims or defenses in the case.

***Request No. 24*:** This request seeks documents related to U.S. Patent Application No. 20110231240. The documents sought under this request are not discoverable because the

technical process disclosed in the patent application is unrelated to the techniques and technology at issue in this case. Plaintiffs incorrectly contend that Facebook "patented the very activity which is the subject of this lawsuit." (Mot. at 9.) As the SAC acknowledges, U.S. Patent Application No. 20110231240 involves use of a "tracking pixel" to log actions taken on a third party website, not cookies. (SAC ¶ 81.) Plaintiffs do not contend that this invention was utilized to track Plaintiffs' Internet browsing history. The timing of the patent's filing—nearly a year *after* Plaintiffs allege the tracking began—further indicates that the methods covered by the patent are not at issue here. Again, Plaintiffs fail to show that the documents are relevant and that the discovery burden is outweighed by any benefit.

D. Facebook's Limited Redactions Are Appropriate.

As described above, Facebook produced 1% of its production with narrow redactions of non-relevant business projects so highly sensitive that most Facebook employees are not even aware of them. The great majority of redactions, reviewed individually by an attorney, are less than a sentence long and none of them conceal any material relevant to the case. Without claiming any actual relevance, Plaintiffs seek removal of these redactions, but their arguments are without merit.

First, Plaintiffs claim Facebook has "no basis" to redact highly sensitive, non-relevant information from a limited set of documents, and they seek the production of all documents redacted on relevance grounds. (Mot. at 9.) Yet, the very cases they cite explicitly recognize that a number of federal courts have permitted parties to redact in certain instances. *See, e.g.*, *Delaware Display Grp. LLC v. Lenovo Grp. Ltd.*, Nos. 13-2108-RGA, 13-2109-RGA, 13-2112-RGA, 2016 WL 720977, at *6 n.11 (D. Del. Feb. 23, 2016) (collecting cases). Indeed, a number of courts have refused to compel production of unredacted information where, as here, the plaintiffs have made no showing that a single redaction improperly includes responsive material relevant to the case. *See, e.g.*, *Abbott v. Lockheed Martin Corp.*, No. 06-cv-0701 MJR, 2009 WL 511866, at *3 (N.D. Ill. Feb. 27, 2009) ("This Court concludes that the redaction of information regarding the defined benefit plans is acceptable because that information is not relevant to the issues in this case and not reasonably calculated to lead to the discovery of admissible

evidence."); *Schiller v. City of N.Y.*, Nos. 04Civ.7922(KMK)(JCF), 04Civ.7921(KMK)(JCF), 05Civ.8453(KMK)(JCF), 2006 WL 3592547, at *7 (S.D.N.Y. Dec. 7, 2006) (finding that minutes from a protest movement meeting could be unilaterally redacted where the content was irrelevant); *Beauchem v. Rockford Prods. Corp.*, No. 01-C 50134, 2002 WL 1870050, at *1-2 (N.D. Ill. Aug. 13, 2002) (finding good cause to prevent disclosure of redacted, non-relevant information in produced documents). Plaintiffs' Motion merely alludes to a single document without explaining why they believe the miniscule redaction (which is no longer than one or two words in a multi-page document) contains information relevant to the issues in this case or reasonably calculated to lead to discovery of admissible evidence. (Mot. at 9.) On this basis alone, the Motion should be denied. *Abbott*, 2009 WL 511866, at *2.[5]

Second, Plaintiffs argue that "[p]ermitting redactions of portions of documents deemed 'irrelevant' by the producing party opens a Pandora's box of problems" because it would "open a fertile new field for discovery battles." (Mot. at 9-10 (quoting *Orion Power Midwest, L.P.*, 2008 WL 4462301, at *2).) But limited redactions of irrelevant information in discovery are neither unusual nor uncommon. Plaintiffs themselves agreed that Facebook could redact personal information like phone numbers and social security numbers (Trigg Decl. ¶ 9), a position wholly at odds with their new-found insistence that a party may never "scrub responsive documents of non-responsive information." (Mot. at 10 (quoting *Orion Power Midwest, L.P.*, 2008 WL 4462301, at *2).) Moreover, the *Orion* court's dire prediction has not come to pass. Not only have a number of courts expressly permitted redactions of non-relevant information, but such decisions do not appear to have resulted in a flood of wasteful or inefficient litigation. The "fertile new field for discovery battles" has turned out to be anything but.

Lastly, as with the bulk of this Motion, Plaintiffs' demands here are premature. Instead of suggesting a sensible solution, Plaintiffs filed a motion with this Court without even attaching a

[5] Two of Plaintiffs' own cited cases recognized that redactions could be appropriate in certain circumstances. *Orion Power Midwest, L.P. v. Am. Coal Sales Co.*, No. 2:05-cv-555, 2008 WL 4462301, at *2 (W.D. Pa. Sept. 30, 2008) (Special Master determined that redaction of social security numbers was proper); *McNabb v. City of Overland Park*, No. 12CV-2331 CM/TJJ, 2014 WL 1152958, at *6 (D. Kan. Mar. 21, 2014) (allowing redaction of certain third-party personal information).

single document to show the (very narrow) redactions at issue or suggesting that any relevant information is to be gained from this exercise.

E. Plaintiffs' Request for Facebook to Re-Assign its Confidentiality Designations Should Be Denied.

1. Plaintiffs Have Waived Their Challenges to Facebook's Designations.

Plaintiffs have waived their right to challenge Facebook's confidentiality designations by failing to follow the mandatory procedures set forth in the Protective Order, which provides that a party challenging a confidentiality designation must:

> [F]ile and serve a motion challenging the confidentiality designation under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5 and General Order 62, if applicable) *within 20 business days of the initial notice of challenge or within 10 business days of the parties agreeing that the meet and confer process will not resolve their dispute, whichever is earlier.* . . . *Failure by the Challenging Party to make such a motion including the required declaration within 20 business days (or 10 business days, if applicable) shall automatically waive any challenge* to the confidentiality designation for each challenged designation.

(Dkt. No. 75 at 9 (emphasis added).) Plaintiffs initially provided notice of their challenge to Facebook's confidentiality designations on January 14, 2016 and Facebook indicated that it would stand by its confidentiality designations in a meet-and-confer call on February 3, 2016, memorialized in a letter sent February 16, 2016. (Wong Decl., Ex. F.) Plaintiffs did not file their Motion until March 16, 2016 (Dkt. No. 110), well after the 20-day requirement in the Order (which would have been February 11, 2016), or the 10-day requirement (which would have been March 1, 2016). As such, they have waived their challenge as a matter of law. *See Compsource Oklahoma v. BNY Mellon, N.A.*, No. CIV-08-469-KEW, 2011 WL 2472547, at *2 (E.D. Okla. June 21, 2011) (finding waiver regarding confidentiality designations where party failed to comply with protective order deadline and noting "[t]his Court adopted the terms of the Agreement and will enforce them as written").[6] Plaintiffs offer no justification for their failure

[6] In addition to being a court order, the protective order is also a contract. Courts strictly enforce conditions precedent, particularly where they require parties to attempt dispute resolution without resort to the courts. *See, e.g.*, *Lange v. Schilling*, 163 Cal. App. 4th 1412, 1418 (2008) (upholding denial of attorneys' fees to prevailing party for failure to comply with a condition precedent despite fact that defendant did not raise the failure to seek mediation *until after the trial* because the provision "means what it says"); *Platt Pac., Inc. v. Andelson*, 6 Cal. 4th 307, 311 (1993) (where agreement permitted either party to file a demand for arbitration but gave a specific, firm date by which to do so, plaintiffs' failure to timely file demand resulted in the loss of the right to arbitrate). That Facebook continued to seek a global resolution of the issues after Plaintiffs'

and notably do not certify anywhere in their papers that they satisfied this court-ordered requirement.[7]

Likewise, Plaintiffs failed to follow the provision in the Protective Order that requires the challenging party to "initiate the dispute resolution process by providing written notice of *each designation it is challenging and describing the basis for each challenge*." (Dkt. No. 75 at 9 (emphasis added).) If the challenging party has not specifically identified and explained its challenges, the party cannot "proceed to the next stage" and seek judicial intervention. (*Id.*) Numerous courts have held the challenging party to this requirement. *See Fiechtner v. Am. Family Mut. Ins. Co.*, No. 09-CV-02681-REB-MEH, 2010 WL 5072006, at *3 (D. Colo. Dec. 7, 2010) (rejecting objections to confidentiality designations where plaintiffs had not strictly adhered to the protective order's procedures).

Here, Facebook invited Plaintiffs on multiple occasions to identify any documents they felt were improperly designated. (Trigg Decl. ¶¶ 10-11.) Through this process, Facebook intended to make a good-faith review of the documents and evaluate whether Plaintiffs were correct that over-designation for confidentiality had occurred. (*Id.*) Plaintiffs rejected this proposal, claiming that it would essentially give Facebook its "hot documents," even though they also claimed they would file examples with their motion to compel—which they did not. (Trigg Decl., Ex. 1.) Thus, Plaintiffs' refusal to follow the procedures mandated by the Protective Order prevented the parties from resolving this issue without Court intervention. The Court should deny Plaintiffs' Motion and hold Plaintiffs to the procedures set forth in the Protective Order. *Fiechtner*, 2010 WL 5072006, at *3.

While Plaintiffs admit that they have failed to follow the Protective Order's mechanism for challenging designations, they claim that they are excused from such obligations by Facebook's alleged bad faith in the initial designation of documents. As detailed below,

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deadline passed–in an effort to avoid burdening the Court–does not change the unequivocal language of the Order or Plaintiffs' obligations thereunder.

[7] Had they wanted additional time to file, Plaintiffs could have sought relief from the Court under Civil Local Rule 6-2, which permits parties to seek changes to dates set by Court order (as here). Plaintiffs did not avail themselves of that option.

Facebook has not violated the Protective Order. Moreover, Plaintiffs rely on two out-of-circuit cases that offer no explanation as to why a party's alleged bad faith should render a court's unambiguous order establishing a single mechanism for challenging designations irrelevant or unenforceable. *Healthtrio, LLC v. Aetna, Inc.*, No. 12-cv-03229-REB-MJW, 2014 WL 6886923 (D. Colo. Dec. 5, 2014); *Procaps S.A. v. Pantheon Inc.*, No. 12-24356-CIV-GOODMAN, 2015 WL 4430955 (S.D. Fla. July 20, 2015). Nor is Facebook's decision not to seek to seal a few sentences from highly confidential documents that Plaintiffs placed in the record evidence of bad faith.[8] In the end, Plaintiffs are asking the Court to require Facebook to re-review nearly 13,000 documents without presenting Facebook or the Court with a single document it alleges has been incorrectly designated, as required by the Protective Order.

2. Facebook Designated the Documents in Good Faith.

Even if Plaintiffs had complied with the Protective Order, they still should not prevail here because Facebook designated its productions in good faith. Facebook undertook a thorough review of the documents before production to determine whether each document, by itself, was responsive, privileged, or confidential, among other things. (Trigg Decl. ¶ 3.) Plaintiffs do not dispute this process and instead claim that the high percentage of documents bearing a confidentiality designation is *per se* evidence of "bad faith" in making the designations. Their arguments are meritless.

The relevant inquiry here is not whether some arbitrary percentage of documents has been marked confidential, but rather, whether the individual circumstances of the discovery merit the designations. A number of courts have rejected challenges to confidentiality designations for

[8] Plaintiffs conflate the differences between confidentiality and sealing when they claim Facebook's alleged bad faith is illustrated by its not removing "inadvertently disclosed material" from a public filing in this case just weeks ago. (Mot. at 12.) Facebook determined that the limited information disclosed in Plaintiffs' filing would not meet the evidentiary threshold required to merit redaction from public filings, which is a threshold that is different from that which governs the designations of confidential documents under the Protective Order. In fact, the Protective Order, agreed to by the parties, makes this distinction clear: "The Parties further acknowledge . . . that this Stipulated Protective Order does not entitle them to file confidential information under seal; Civil Local Rule 79-5 and General Order 62 set forth the procedures that must be followed and the standards that will be applied when a party seeks permission from the court to file material under seal." (Dkt. No. 75 at 2:9-13.)

productions where all or nearly all the documents were marked confidential. *See, e.g.*, *Bank of Montreal v. Optionable, Inc.*, No. 09 Civ. 7557 GBD JLC, 2011 WL 6259668, at *1 (S.D.N.Y. Dec. 15, 2011) (refusing to de-designate the entire production of 3.4 million pages which were all marked confidential). Moreover, Plaintiffs have themselves violated their own *per se* rule because 100% of the few non-public documents they produced are marked confidential. (Trigg Decl. ¶ 4.)

Ultimately, because the majority of the production involves highly technical discussions of bug reports, trace logs, and other highly sensitive documents that would create a substantial risk of competitive harm if disclosed (Naugle Decl. ¶¶ 3-8; Trigg Decl. ¶ 5.), the documents have been properly designated as confidential and highly confidential under the Protective Order.

3. Plaintiffs Are Not Prejudiced By Facebook's Designations.

Plaintiffs' initial meet-and-confer letter identified only one reason for their challenge to the confidentiality designations: the named Plaintiffs were unable to view documents marked "Highly Confidential" and thus have the "information needed to understand their claims and protect the class." (Wong Decl. Ex. D.) When Facebook offered to let the named plaintiffs have access to all documents designated "Highly Confidential" (Wong Decl. Ex. F), Plaintiffs quickly abandoned that argument to focus on the alleged "interference" this designation causes to the Plaintiffs' prosecution of the case. (Mot. at 13-14.) But each of these alleged consequences is either non-existent or of trivial importance:

- Use in Depositions. Contrary to Plaintiffs' contention, the Protective Order not only permits use of Highly Confidential documents in depositions where the deponent was the author or custodian (Mot. at 14) but also any "other person who otherwise possessed or knew the information." (Dkt. No. 75 ¶ 7.3(f).) Plaintiffs do not explain why the prosecution of the case would be hampered by this limitation.
- Affiliated Attorneys. In the three years of discovery, Plaintiffs have not once asked to show a single document to an affiliated attorney, nor do they explain how this provision interferes with their prosecution of the case.

- Patent Prosecution Bar. Plaintiffs' counsel has never suggested that they intend to prosecute patents or patent applications relating to the subject matter of the documents designated Highly Confidential in this case.

F. Plaintiffs' Motion is Premature and Therefore Should Be Denied or Held in Abeyance.

Given the procedural posture of the case, Facebook believes that further discovery at this time is irrelevant, unwarranted, and unduly burdensome. However, in the event that the Court denies Facebook's Motion for Protective Order temporarily staying discovery pending a decision on the motion to dismiss, Facebook believes that the discovery disputes Plaintiffs present in their Motion can likely be resolved by the parties without Court intervention. The parties have not adequately met and conferred with respect to the categories of documents Plaintiffs' seek—in fact, Facebook has already offered to produce some of the documents Plaintiffs' seek if the Motion for Protective Order is denied—and thus Court intervention at this point is both unnecessary and an inefficient use of Court and party resources. The Court has discretion to hold Plaintiffs' Motion to Compel in abeyance until the parties have determined whether these discovery disputes can be resolved. *See Doyle v. Gonzales*, No. CV-10-0030-EFS, 2011 U.S. Dist. LEXIS 85115, at *4 (E.D. Wash. Aug. 2, 2011) (holding motion to compel certain discovery requests in abeyance so that the parties could determine whether the requests were necessary).

V. CONCLUSION

For the foregoing reasons, Facebook respectfully requests that this Court deny Plaintiffs' Motion to Compel.

Dated: March 30, 2016

COOLEY LLP

/s/ Matthew D. Brown
Matthew D. Brown

Attorneys for Defendant FACEBOOK, INC.