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15
16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**
18 **SAN JOSE DIVISION**

19
20 IN RE: FACEBOOK, INC.
21 INTERNET TRACKING
22 LITIGATION

No. 5:12-md-02314-EJD

23 **SUPPLEMENTAL JOINT CASE**
24 **MANAGEMENT STATEMENT**

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

1 Plaintiffs Perrin Davis, Cynthia Quinn, Brian Lentz, and Matthew Vickery (collectively,
2 “Plaintiffs”) and Defendant Facebook, Inc. (“Facebook”) (Plaintiffs and Facebook collectively,
3 the “Parties”) jointly submit this Supplemental Joint Case Management Statement in advance of
4 the April 28, 2016 Case Management Conference, supplementing the prior joint statement dated
5 June 22, 2012 (ECF No. 41) (the “2012 CMC Statement”).

6 **Case Status**

7 The last case management conference occurred on June 29, 2012. *See* Tr., ECF No. 48.
8 The following events have occurred since that date.

9 On July 2, 2012, Facebook filed a motion to dismiss the First Amended Complaint (the
10 “FAC”) (ECF No. 44). After briefing concluded, the Court held oral arguments on the motion on
11 October 5, 2012. *See* Tr., ECF No. 60.

12 The parties held their 26(f) conference on July 13, 2012 and exchanged initial disclosures.
13 The parties served document requests (and Facebook also served interrogatories) following the
14 October 5, 2012 hearing on the motion to dismiss. The Parties also filed a Joint Statement
15 Concerning Case Schedule on July 27, 2012 (ECF No. 50). A more detailed discussion of the
16 status of discovery can be found in Section 8 below, and in the Motion to Stay Discovery and
17 Motion to Compel Discovery and to Compel Compliance with Protective Order, both discussed in
18 Section 4.B. below.

19 On October 23, 2015, the Court granted Facebook’s motion to dismiss the FAC with leave
20 to amend (ECF No. 87). Plaintiffs filed their Second Amended Complaint (the “SAC”) on
21 November 30, 2015. The SAC was filed under seal because it quoted and included copies of
22 material obtained in discovery and designated confidential by defendant. A redacted version was
23 filed publicly (ECF No. 93). Facebook moved to dismiss, and briefing has concluded.

24 The parties have reached an impasse in discovery, and the issues are described in more
25 detail in Sections 4.B. and 8 below. The following changes have occurred since the 2012 CMC
26 Statement.

27 **2. Facts:**

28 The Plaintiffs have supplemented the SAC with additional facts learned in discovery.

Each Party's view of the facts alleged in the SAC is summarized in detail in the motion to dismiss and related briefing, discussed in Section 4.B. below. Portions of the SAC and attached documents obtained in discovery have been filed under seal. The sealing motions are outstanding and are also discussed in Section 4.B. below.

3. Legal Issues:

The SAC adds four new claims not found in the FAC, and drops four claims:

Claim	First Amended Complaint	Second Amended Complaint
Violation of the Federal Wiretap Act	Count I	Count I
Violation of the Federal Stored Communications Act	Count II	Count II
Violation of the Federal Computer Fraud and Abuse Act	Count III	[dropped]
Invasion of Privacy	Count IV	Count IV
Intrusion upon Seclusion	Count V	Count V
Conversion	Count VI	[dropped]
Trespass to Chattels	Count VII	Count IX
California Unfair Competition Law ("UCL")	Count VIII	[dropped]
California Penal Code § 502 (computer crime law)	Count IX	Count X
California Invasion of Privacy Act ("CIPA")	Count X	Count III
California Consumer Legal Remedies Act	Count XI	[dropped]
Breach of Contract	[not asserted]	Count VI
Breach of Duty of Good Faith and Fair Dealing	[not asserted]	Count VII
Civil Fraud	[not asserted]	Count VIII
California Statutory Larceny	[not asserted]	Count XI

The legal issues associated with these claims are set forth in defendant's motion to dismiss and related briefing, discussed in Section 4.B. below.

4. Motions:

A. Motions Decided after the June 29, 2012 CMC

On September 6, 2013, the Parties filed a stipulated proposed protective order governing the exchange of confidential information (ECF No. 68). The Court granted the proposed protective order on April 11, 2014 (ECF No. 75).

On October 23, 2015, the Court granted Facebook's motion to dismiss the FAC with leave to amend (ECF No. 87).

B. Pending Motions

The following motions are pending, and all have been fully briefed:

1. ***Motion to Dismiss the SAC*** (ECF Nos. 101, 140-3, 109).

2. *Motion to File SAC Under Seal* (ECF Nos. 92, 94, 95, 97, 98).
3. *Motion to File Response Under Seal* (ECF Nos. 104-107).
4. *Motion For Protective Order Temporarily Staying Discovery* (ECF Nos. 108, 111, 112).
5. *Motion to Compel Discovery and to Compel Compliance with Protective Order* (ECF Nos. 110, 114-116).
6. *Administrative Motion to Streamline Class Counsel Leadership* (ECF No. 113). The motion is unopposed.

C. Future Motions

The Parties do not anticipate filing any further motions until one or more of the current outstanding motions are resolved.

5. Amendment of Pleadings:

If the court grants Defendant's motion to dismiss on a basis that can be cured by pleading additional facts contained in documents in the custody, control or possession of defendant, plaintiffs would request further opportunity to amend the complaint to include the additional facts.

7. Disclosures:

The Parties held a joint Rule 26(f) teleconference on July 13, 2012. Initial disclosures were exchanged on July 27, 2012. Plaintiffs contend that Facebook's initial disclosures are incomplete under Rule 26(a) and 26(g), and have provided a copy to the Court in connection with the Motion to Compel discussed above in Section 4.B. (ECF No. 115-4). Facebook contends that its initial disclosures and subsequent productions satisfy Rule 26(a) and 26(g), and notes that Plaintiffs did not contest the adequacy of Facebook's disclosures until January 2016, more than three years after the disclosures.

8. Discovery:

Pursuant to counsel agreement, exchange of discovery material required Court approval of the stipulated protective order, which occurred on April 11, 2014 (ECF No. 75). Both sides have since produced documents. Defendant also served interrogatories and plaintiffs have responded.

1 A more detailed account of discovery to date is outlined in the Motion to Stay and Motion to
2 Compel, both listed in Section 4.B. above.

3 **9. Class Actions:**

4 The SAC asserts class claims pursuant to Rules 23(a) and (b)(3) of the Federal Rules of
5 Civil Procedure on behalf of a Class of all persons who had active Facebook accounts and used
6 Facebook between April 22, 2010 and September 26, 2011. The proposed class period is longer
7 than the class period originally proposed in the FAC as a result of information obtained in
8 discovery (the proposed class period in the FAC started on May 27, 2010). The SAC also asserts
9 a subclass of Facebook users who used Microsoft's Internet Explorer web browser between April
10 22, 2010 and September 17, 2010. Excluded from the Class and the IE Subclass are Facebook,
11 and its officers, directors, employees, affiliates, legal representatives, predecessors, successors
12 and assigns, and any entity in which any of them have a controlling interest.

13 Facebook denies that this action meets the requirements for class certification under
14 Federal Rule of Civil Procedure 23.

15 **10. Related Cases:**

16 1. ***Ung v. Facebook:*** On March 16, 2012, Facebook filed a Notice of Pending Action
17 pursuant to Civil Local Rule 3-13 to inform the Court of a related case, *Ung v. Facebook, Inc.*,
18 No. 112-cv-217244, pending in Santa Clara Superior Court. Facebook moved for a stay of the
19 *Ung* case in favor of the present case, and also filed a demurrer. The court denied in part and
20 granted in part the demurrer on July 2, 2012, and plaintiffs attached a copy of the order to the
21 SAC as exhibit HH. The Superior Court also granted defendant's motion for a stay in favor of
22 this case, and the next status conference is scheduled for October 13, 2016.¹

23 **12. Settlement and ADR:**

24 The Parties have not discussed any ADR process or settlement since the 26(f) conference
25 in 2012. The parties do not believe that any ADR process is appropriate at this juncture but the
26 Parties will confer with one another if that view changes.

27
28 ¹ Plaintiffs identify Schrems v. Facebook Ireland Ltd. pending in the Austrian Supreme Court as a second related case,
and provide their view of the case in paragraphs 146 to 153 of the SAC.

1 **17. Scheduling:**

2 There are no pending issues related to the case schedule. After filing the 2012 CMC
3 Statement, the Parties filed a Joint Statement Concerning Case Schedule on July 27, 2012, see
4 ECF No. 50, but the dates in this Joint Statement would only be triggered upon resolution of the
5 motion to dismiss and filing of an Answer. The Court has not issued any ruling with respect to
6 the schedule proposed in the Joint Statement. The Parties propose that within 30 days of the
7 Court's ruling on the pending motion to dismiss, the Parties will, if necessary, meet and confer
8 concerning a schedule for any remaining aspect of the case and submit a supplemental joint
9 statement concerning the case schedule for the Court's consideration, with a further Case
10 Management Conference to be held thereafter.

11 **18. Trial:**

12 As discussed in Section 17 above, trial has not yet been scheduled for this action.
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14 [signatures on next page]
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1
2 DATED: April 21, 2016

KAPLAN FOX & KILSHEIMER LLP
Laurence D. King
David A. Straite

3
4 By: /s/ David A. Straite

5 *Interim Co-Class Counsel*

6
7 DATED: April 21, 2016

SILVERMAN THOMPSON
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10 *Interim Co-Class Counsel*

11 DATED: April 21, 2016

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16 Attorneys for Defendant FACEBOOK,
INC.

ECF ATTESTATION

I, Matthew D. Brown, am the ECF User whose ID and password are being used to file the following: **SUPPLEMENTAL JOINT CASE MANAGEMENT STATEMENT**. In compliance with General Order 45, X.B., I hereby attest that all signatories have concurred in this filing.

DATED: April 21, 2016

COOLEY LLP

By: /s/ Matthew D. Brown
MATTHEW D. BROWN
Attorneys for Defendant FACEBOOK, INC.

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