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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-NC

**PLAINTIFFS' ADMINISTRATIVE MOTION
TO SCHEDULE SUBSEQUENT CASE
MANAGEMENT CONFERENCE**

Fed. R. Civ. P. 16(a) and (c)
N.D. Cal. L.R. 16-10(c) and (d)

Judge: Hon. Edward J. Davila
Trial Date: Not yet set

1 **I. Introduction**

2 Plaintiffs respectfully request that the Court schedule a case management conference to address
3 the parties' discovery impasse. Alternatively, plaintiffs ask that the Court refer the outstanding
4 discovery motions to Magistrate Judge Nathanael Cousins. The most recent case management
5 conference was held approximately one year ago, on April 28, 2016 and the most recent Supplemental
6 Joint Case Management Statement was submitted on April 21, 2016 (ECF No. 117). However, the
7 Court did not address discovery issues at that time.

8 Plaintiffs' counsel contacted counsel for defendant via email on April 7, 2017 to ask whether
9 they would support or oppose this request, but never received a response. By letter dated April 11, 2017
10 (ECF No. 141), plaintiffs wrote to the Court asking for the relief requested in today's administrative
11 motion. As defendant Facebook, Inc. correctly noted in its response dated April 14, 2017 (ECF No.
12 142), this Court's Standing Order for Civil Cases dated January 25, 2017 provides that requests for
13 Court action should be made by stipulation or motion rather than by letter, and plaintiffs therefore
14 submit this motion in place of the letter. In defendant's April 14, 2017 response, defendant represented
15 that it opposes scheduling a case management conference. Accompanying today's administrative
16 motion is a declaration of David A. Straite pursuant to Civil L.R. 7-11.

17 **II. Legal Standard**

18 "In any action, the court may order the attorneys and any unrepresented parties to appear for one
19 or more pretrial conferences." Fed. R. Civ. P. 16(a). The purpose of such conferences can include,
20 among other things, "establishing early and continuing control so that the case will not be protracted
21 because of lack of management." Rule 16(a)(2). Matters for consideration at a case management
22 conference specifically include "controlling and scheduling discovery," Rule 16(c)(2)(F), "referring
23 matters to a magistrate judge or a master," Rule 16(c)(2)(H) and "disposing of pending motions." Rule
24 16(c)(2)(K). In addition to the initial scheduling conference, the Court may schedule subsequent case
25 management conferences *sua sponte* or on motion. N.D. Cal. L.R. 16-10(c).

1 **III. Discussion**

2 ***A. Facebook Has Granted Itself a Full Discovery Stay Without Court Authorization***

3 The Court has never stayed discovery. At the June 29, 2012 case management conference at the
4 beginning of this case, this Court noted that “if there is a request to stay discovery pending whatever, I
5 would respectfully decline that invitation, and I think discovery should go forward as in any other case.”
6 Tr. at 8:3-7 (ECF No. 48). Despite the Court’s clear statement, defendant Facebook, Inc. has
7 unilaterally granted itself a discovery stay and refuses to participate in this litigation.

8 Defendant has only produced documents from three employees. Simply based on a review of the
9 documents produced, some of which were used to support additional allegations in the Second Amended
10 Complaint dated Nov. 30, 2015 (ECF No. 93), it is clear that more than two dozen senior employees
11 authored or received discoverable documents. The records of these custodians should be searched and
12 the responsive documents produced. Defendant also refuses to produce documents related to entire
13 categories of requested documents – *including any documents related to the named plaintiffs* –
14 improperly impeding plaintiffs’ ability to move for class certification. Defendant also inappropriately
15 designated more than 99% of the current production “Highly Confidential Attorneys-Eyes-Only” in
16 violation of the protective order prohibiting “[m]ass, indiscriminate, or routine designations,” see ECF
17 No. 75 at § 5.2, making their use at deposition nearly impossible as a practical matter.

18 Between January 14, 2016 and February 23, 2016, the parties met and conferred repeatedly
19 regarding the impasse. *See generally* ECF No. 110-1. Plaintiffs said on February 23, 2016 that a motion
20 to compel was unavoidable, but agreed to refrain from filing for at least one week to give defense
21 counsel time to confer with its client. *Id.* Defendant instead used that week to draft a motion to stay and
22 filed it exactly one week later on March 2, 2016. ECF No. 108. Plaintiffs moved to compel discovery
23 on March 16, 2016 (ECF No. 110), and briefing on the cross-motions continued in parallel.¹

24 Both discovery motions remain outstanding, and discovery has not progressed for more than year
25 since then. *See also* Local Rule 7-13 Notice dated October 17, 2016 (ECF No. 138). However,
26 plaintiffs are unaware of any case, statute or rule supporting Facebook’s unilateral grant to itself of a full

27 ¹ Plaintiffs’ Reply in Further Support of the Motion to Compel dated April 6, 2016 (ECF No. 115) also
28 contains a motion to strike portions of two Facebook declarations (ECF Nos. 114-1 and 114-2) not made
on personal knowledge. The motion to strike remains outstanding.

1 discovery stay during the pendency of a motion to compel and motion to stay. Discovery should
2 progress in the ordinary course unless and until the Court orders otherwise. For this reason, plaintiffs
3 believe a case management conference would be enormously useful.

4 ***B. Outstanding Administrative Motions***

5 In addition to the outstanding discovery motions (ECF Nos. 108 & 110), also pending before the
6 Court are two administrative motions regarding the sealing of certain discovery material used in the
7 second amended complaint (ECF Nos. 92, 94, 97 and 98) and in the brief in opposition to the motion to
8 dismiss (ECF Nos. 104 and 106). Plaintiffs submit that it would be useful to address these outstanding
9 motions at the next CMC as well.

10 ***C. Update on Related State Court Case Ung v. Facebook, Inc.***

11 As the Court is aware, a parallel state-court action is proceeding in Santa Clara County on behalf
12 of an overlapping proposed California class. The Superior Court has already denied Facebook's
13 demurrer as to the invasion of privacy claim – a claim also asserted in this case. *See Ung v. Facebook,*
14 *Inc.*, Case No. 1-12-CV-217244, Order re: Demurrer dated July 2, 2012 (Cal. Super. Ct., Santa Clara
15 County), provided to the Court as Ex. HH to the Second Amended Complaint dated Nov. 30, 2015 (ECF
16 No. 93-34). However, the Superior Court stayed discovery in *Ung* on July 3, 2012 in deference to the
17 MDL. *See* Stipulation and Order to Continue Case Status Conference dated April 13, 2017, attached as
18 Exhibit A. The plaintiffs in *Ung* informed Facebook that they may move to lift the stay in light of the
19 discovery delay in the MDL and may seek to coordinate discovery between the cases. *Id.* The *Ung*
20 parties are now conferring on plaintiffs' request and the Superior Court continued the Case Status
21 Conference to May 23, 2017 to facilitate discussions. *Id.*

22 Although the *Ung* parties represented that they will confer in good faith, Facebook represented in
23 the stipulation that "its current view is that the factors that necessitated the original stay, including the
24 interests of comity and judicial economy and the need to avoid inconsistent rulings between courts in
25 different jurisdictions, continue to apply." *Id.* Facebook's continued refusal to participate in discovery
26 in the MDL therefore will certainly negatively affect the *Ung* case as well as further delay progress in
27 this one. Lead Counsel in the MDL are more than willing to coordinate discovery between the cases and
28 have already so informed all counsel in *Ung*. Plaintiffs therefore believe that a case management

conference in advance of the May 23, 2017 Superior Court status conference will assist the progress of both cases.

IV. Conclusion

Plaintiffs therefore respectfully request a Case Management Conference to address outstanding discovery issues. Lead class counsel are available at the Court's convenience. In the alternative, plaintiffs respectfully request referral of the discovery motions to Magistrate Judge Cousins.

Dated: April 18, 2017

Respectfully submitted,

KAPLAN, FOX & KILSHEIMER LLP

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By: /s/ Stephen G. Grygiel

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/s/ *David A. Straite*