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Interim Co-Class Counsel

**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

**SUPPLEMENTAL JOINT CASE  
MANAGEMENT STATEMENT**

CMC Date: July 28, 2017  
Time: 10:00 a.m.  
Courtroom: 4  
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, the  
3 “Parties”) jointly submit this Supplemental Joint Case Management Statement in advance of the  
4 July 28, 2017 Case Management Conference set by Order dated June 28, 2016 (ECF No. 147),  
5 supplementing the prior joint statement dated April 21, 2016 (ECF No. 117).

### 6 **Case Status**

7 The last case management conference occurred on April 28, 2016. *See* Tr., ECF No. 123.  
8 The following key events have occurred since that date.

9 On June 30, 2017, the Court granted Facebook’s Motion to Dismiss the Second Amended  
10 Complaint. ECF No. 148. Counts I through V and VIII through XI were dismissed with prejudice.  
11 Count VI (breach of contract) and Count VII (breach of implied covenant of good faith and fair  
12 dealing) were dismissed with leave to amend. Plaintiffs intend to file a Third Amended Complaint  
13 asserting these two claims. In the same Order, the Court also denied Facebook’s motion to stay  
14 discovery and terminated Plaintiffs’ motion to compel discovery with leave to refile with the  
15 assigned magistrate judge.

### 16 **Motions**

17 There are no pending motions. Defendant anticipates filing a motion to dismiss with  
18 prejudice the forthcoming Third Amended Complaint. The plaintiffs also anticipate discovery  
19 motion practice, but pursuant to this Court’s Order dated June 30, 2017 (ECF No. 148), slip op. at  
20 14, plaintiff will address any such motions to Magistrate Judge Nathanael Cousins.

### 21 **Status of Related Case in State Court**

22 A related case, *Ung v. Facebook, Inc.*, No. 112-cv-217244, is pending in Santa Clara  
23 Superior Court. The case is stayed pending final resolution of this federal MDL. The *Ung* plaintiffs  
24 and Facebook have reached an agreement in principle, subject to negotiation and execution of a  
25 formal written agreement, whereby Facebook will provide certain documents from this federal  
26 MDL subject to the terms of the Protective Order entered by this Court (to which the *Ung* plaintiffs  
27 are anticipated to become Parties) and additional agreed-upon terms.  
28

1 **ADR**

2 The Parties have not discussed any ADR process since the Rule 26(f) conference in 2012.  
3 Plaintiffs believe mediation at this juncture might be productive, consonant with mandate of Fed.  
4 R. Civ. P. 1. Facebook does not believe that an ADR process is appropriate at this juncture.

5 **Scheduling**

6 The Parties believe that the following events will need to be scheduled:

7 **Third Amended Complaint:**

8 **Plaintiffs' position.** Plaintiffs intend to file a Third Amended Complaint asserting claims  
9 for breach of contract and breach of implied covenant of good faith and fair dealing. During a meet-  
10 and-confer call prior to filing this joint statement, to enhance efficiency, plaintiffs requested the  
11 production of two discrete categories of documents in advance of filing the Third Amended  
12 Complaint, documents that were requested in plaintiffs' first request for production of documents  
13 dated Nov. 5, 2012 (see ECF No. 108-2) but to date have not been produced. Defendant declined  
14 the request.

15 First, plaintiffs requested production of the "Help Center" pages which plaintiffs allege are  
16 incorporated by reference into the defendant's privacy policy (including the "Data Use Policy") and  
17 which plaintiffs contend form a part of the contract with subscribers. Second Amended Complaint  
18 ¶¶ 17-27. In its motion to dismiss the contract claim, defendant based its argument in part on the  
19 plaintiffs' failure to include copies of the relevant Help Center pages with the Second Amended  
20 Complaint. *See* Motion to Dismiss at 34-35. It would be grossly inefficient to allow defendant to  
21 continue its multi-year refusal to produce the very documents that it claims should be included with  
22 a complaint. Second, plaintiffs requested production of documents related to the named plaintiffs  
23 that are in the custody, control or possession of defendant.

24 Once the two discrete categories of documents are produced, plaintiffs propose to file the  
25 Third Amended Complaint within 21 days of production.

26 **Facebook's Position.** Facebook proposes that Plaintiffs file their Third Amended  
27 Complaint by August 7, 2017, 10 days after the CMC. Plaintiffs' suggestion that its discovery  
28 requests are a proper matter for this CMC runs directly contrary to this Court's Order terminating

1 Plaintiffs’ Motion to Compel and directing that Plaintiffs may refile such motion “in accordance  
2 with the procedures of the assigned magistrate judge.” (ECF No. 148 at 14.) Further, Plaintiffs’  
3 suggestion that Facebook should be burdened with discovery when Plaintiffs have no operable  
4 complaint cannot be squared with any reasonable interpretation of the scope of discovery. *See* Fed.  
5 R. Civ. Proc. 26(b)(1) (discovery must be “relevant to any party’s claim or defense and proportional  
6 to the needs of the case”).

7 Moreover, as Facebook will demonstrate in the context of a properly noticed motion before  
8 Judge Cousins, Facebook has fully complied with its discovery obligations and thus Plaintiffs’  
9 requests for two additional categories of documents are unwarranted. First, Plaintiffs never  
10 requested production of all Help Center pages. In responding to one request (that did not ask for  
11 Help Center pages), Facebook produced a collection of documents that included a few Help Center  
12 pages, in full compliance with its discovery obligations as to that request.<sup>1</sup> Second, while Plaintiffs  
13 did request production of “all documents concerning the named plaintiffs,” they unreasonably  
14 rejected Facebook’s offer to produce all documents concerning the named Plaintiffs’ browsing  
15 history—the only information that is at issue in this case.

16 Plaintiffs’ attempt to interject its terminated motion to compel into this CMC is additionally  
17 inappropriate because Plaintiffs provide no conceivable basis for why discovery prior to filing their  
18 Third Amended Complaint is required. Plaintiffs’ Second Amended Complaint demonstrates that  
19 they already have access to the information concerning themselves that they now request. Plaintiffs  
20 alleged that Facebook collected the URLs of the pages that Plaintiffs visited and that those URLs  
21 are “available to show the Court in camera if needed.” (Second Amended Complaint ¶¶ 115, 118,  
22 121, 124.) Further, Plaintiffs had access to the entirety of the Help Center when they filed their  
23 lawsuits in 2011.<sup>2</sup>

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25 <sup>1</sup> Plaintiffs’ Motion to Compel did not seek to compel production of additional Help Center pages.  
26 (*See* ECF No. 110.)

27 <sup>2</sup> Plaintiffs’ stated inability to point to the language they contend comprises the alleged contract that  
28 was allegedly breached further underscores just how tenuous the two contract-related claims are.  
Burdening Facebook with such discovery prior to a determination that Plaintiffs’ claim is viable  
would outweigh its likely benefit. Fed. R. Civ. Proc. 26(b)(1).

1 **Briefing on Facebook's Anticipated Motion to Dismiss the Third Amended Complaint:**

2 The Parties agree that Facebook's anticipated motion to dismiss should be filed within 30  
3 days of the deadline for filing the Third Amended Complaint, with Plaintiffs' opposition due 30  
4 days following the deadline to file the motion, and the reply (if any) due 15 days after the deadline  
5 to file the opposition. The Parties also agree that each of these proposed dates would be adjusted  
6 if necessary so that the deadline would fall on the first day after a weekend or court holiday.

7  
8  
9 DATED: July 21, 2017

**KAPLAN FOX & KILSHEIMER LLP**

Laurence D. King

David A. Straite

By: /s/ David A. Straite

*Interim Co-Class Counsel*

12  
13 DATED: July 21, 2017

**SILVERMAN THOMPSON**

**SLUTKIN WHITE LLC**

Stephen G. Grygiel

By: /s/ Stephen G. Grygiel

*Interim Co-Class Counsel*

17  
18 DATED: July 21, 2017

**COOLEY LLP**

Michael G. Rhodes

Matthew D. Brown

Kyle C. Wong

By: /s/ Matthew D. Brown

*Attorneys for Defendant FACEBOOK, INC.*

1                   **ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1(i)(3)**

2                   I, David A. Straite, am the ECF User whose ID and password are being used to file the  
3 following: **SUPPLEMENTAL JOINT CASE MANAGEMENT STATEMENT**. In  
4 compliance with Civil Local Rule 5-1(i)(3), I hereby attest that all signatories have concurred in  
5 this filing.

6  
7                   DATED: July 21, 2017

8                   **KAPLAN FOX & KILSHEIMER LLP**  
9                   LAURENCE D. KING  
10                  DAVID A. STRAITE

11                  By: /s/ David Straite  
12                  DAVID A. STRAITE  
13                  Interim Co-Class Counsel