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

18 In Re FACEBOOK INTERNET TRACKING  
 19 LITIGATION

No. 5:12-md-02314-EJD

**JOINT CASE MANAGEMENT STATEMENT**

Date: June 29, 2012  
 Time: 2:00 p.m.  
 Judge: Hon. Edward J. Davila  
 Trial Date: None Set

20  
 21 Plaintiffs Perrin Davis, Cynthia Quinn, Brian Lentz, and Matthew Vickery (collectively,  
 22 “Plaintiffs”) and Defendant Facebook, Inc. (“Facebook”) (Plaintiffs and Facebook collectively,  
 23 the “Parties”) jointly submit this Joint Case Management Statement pursuant to the Court’s April  
 24 3, 2012 Order Granting Plaintiffs’ Motion to Consolidate and Appoint Interim Class Counsel, the  
 25 Standing Order for All Judges of the Northern District of California dated July 1, 2011, and Civil  
 26 Local Rule 16-9.

1           **1.        JURISDICTION AND SERVICE**

2           This Court has subject matter jurisdiction over the federal claims asserted in the Related  
3           Actions under 28 U.S.C. §§ 1331 and 1332. This Court has personal jurisdiction over Defendant  
4           Facebook, Inc. (“Facebook”) because it is headquartered in the State of California. Venue is  
5           proper by agreement under 28 U.S.C. § 1391(b) and through assignment from the Judicial Panel  
6           on Multidistrict Litigation. Facebook is the only named Defendant in any of the Related Actions  
7           and was served with a summons and complaint, or agreed to waive service pursuant to Federal  
8           Rule of Civil Procedure 4(d), in all cases except *Maguire v. Facebook, Inc.*, No. 5:12-cv-00807-  
9           EJD.

10           **2.        STATEMENT OF FACTS AND FACTUAL DISPUTES**

11                   **a.        Plaintiffs’ Statement of Facts**

12           Defendant Facebook operates the world’s largest social networking web site, with more  
13           than 800 million users globally, and 150 million users in the United States. Although Facebook  
14           members are not required to pay a monetary subscription fee, membership is conditioned upon  
15           users providing sensitive personal information to Facebook upon registration, including name,  
16           birth date, gender and email address. More importantly, use of Facebook is conditioned upon the  
17           user accepting numerous Facebook cookies on the user’s computer which track browsing history.  
18           This information, including the member’s unique Facebook identifier, is then harvested by  
19           Facebook from the user’s computer. Facebook uses the information to generate approximately \$4  
20           billion of revenue annually for the company.

21           Facebook installs two types of cookies on members’ computers: session cookies, and  
22           tracking cookies. According to the Electronic Frontier Foundation in San Francisco:

23                   *Session cookies are set when you log into Facebook and they include data like*  
24                   *your unique Facebook user ID. They are directly associated with your Facebook*  
25                   *account. When you log out of Facebook, the session cookies are supposed to be*  
26                   *deleted.*

27                   *Tracking cookies - also known as persistent cookies - don’t expire when you leave*  
28                   *your Facebook account. Facebook sets one tracking cookie known as 'datr' when*  
                  *you visit Facebook.com, regardless of whether or not you actually have an*

1 *account. This cookie sends data back to Facebook every time you make a request*  
2 *of Facebook.com, such as when you load a page with an embedded Facebook 'like'*  
3 *button. This tracking takes place regardless of whether you ever interact with a*  
4 *Facebook 'like' button. In effect, Facebook is getting details of where you go on*  
5 *the Internet.*

6 *When you leave Facebook without logging out and then browse the web, you have*  
7 *both tracking cookies and session cookies. Under those circumstances, Facebook*  
8 *knows whenever you load a page with embedded content from Facebook (like a*  
9 *Facebook 'like' button) and also can easily connect that data back to your*  
10 *individual Facebook profile.*

11 Use of Facebook is governed by the Statement of Rights and Responsibilities and a  
12 number of other documents and policies, including a Data Use Policy and a Privacy Policy.  
13 Although the governing documents make clear that users consent to Facebook installing cookies  
14 on the user's computer, and although the users consent to these cookies tracking and transmitting  
15 to Facebook data regarding each user's web browsing, such consent was limited to internet usage  
16 while the user is logged on to Facebook. Users do not consent to having records of their web  
17 browsing tracked after logging out of Facebook, because the session cookies were supposed to be  
18 deleted. On Facebook's online help center, Facebook clearly and unambiguously emphasized,  
19 "When you log out of Facebook, we remove the cookies that identify your particular account."

20 Sometime in 2010, an Australian technology writer, Nik Cubrilovic, discovered that the  
21 session cookies Facebook placed on its users' computers were still active even after users had  
22 logged off of Facebook. Mr. Cubrilovic warned Facebook of this problem on at least two  
23 occasions starting in November, 2010, but Facebook failed to take corrective action and  
24 continued to collect data from its millions of active cookies worldwide.

25 Mr. Cubrilovic went public with his research on September 25, 2011. The next day, on  
26 September 26, 2011, Facebook publicly admitted that its session cookies continued to remain  
27 even after logoff, and agreed to fix the "bug" as the company called it. The next day, the Irish  
28 Government announced an audit of Facebook under EU privacy rules (Facebook's primary

1 European data center is in Ireland). Two days later, U.S. Representatives Edward Markey and  
2 Joe Barton, Co-Chairman of the Congressional Bi-Partisan Privacy Caucus, sent a letter to the  
3 Federal Trade Commission demanding to know what action the FTC was taking under Section 5  
4 of the FTC Act.

5  
6 The following day, on September 29, 2011, the Electronic Privacy Information Center,  
7 joined by the American Civil Liberties Union, the American Library Association, the Bill of  
8 Rights Defense Committee, the Center for Digital Democracy, the Center for Media and  
9 Democracy, Consumer Action, Consumer Watchdog, Privacy Activism, and Privacy Times also  
10 recommended that the FTC investigate. In their letter to the FTC, the group added that Facebook  
11 might not have actually fixed the problem as claimed.

12  
13 Finally, despite Facebook's claim that it fixed the "bug," researchers are uncovering yet  
14 more methods whereby Facebook is able to track its users even after logout. For example, a  
15 researcher at Stanford University has discovered instances in which Facebook was setting  
16 tracking cookies on browsers of people when they visited sites other than Facebook.com. These  
17 tracking cookies were being set when individuals visited certain Facebook Connect sites. As a  
18 result, people who never interacted with a Facebook.com widget, and who never visited  
19 Facebook.com, were still facing tracking by Facebook cookies. The EFF notes in the October 11,  
20 2011 report that Facebook now can track web browsing history without cookies:

21  
22 *Facebook is able to collect data about your browser – including your IP address*  
23 *and a range of facts about your browser – without ever installing a cookie. They*  
24 *can use this data to build a record of every time you load a page with embedded*  
25 *Facebook content. They keep this data for 90 days and then presumably discard or*  
*otherwise anonymize it. That's a far cry from being able to shield one's reading*  
*habits from Facebook.*

26 The Plaintiffs believe that the principal factual issues in dispute include but are not limited to:

27 (a) Whether or not Defendant Facebook's Terms of Use and other governing  
28 documents and policies permitted Facebook to track the internet use of its members post-

1           logout;

2                   (b)    Whether or not Defendant Facebook tracked the internet use of its  
3 members post-logout;

4                   (c)    Whether or not Facebook members consented to being tracked post-logout;

5                   (d)    Whether or not Facebook members sustained compensable harm under  
6 relevant law as a result of Facebook’s actions;

7                   (e)    The methods by which Facebook tracked the internet use of its members,  
8 including but not limited to session cookies, tracking cookies, tracking pixels, javascript,  
9 or other;

10                  (f)    The extent of information tracked and gathered by Facebook from its  
11 members;

12                  (g)    Whether the information intercepted by Facebook was “in flight” within  
13 the meaning of relevant statutes;

14                  (h)    Whether and to what extent Facebook remedied the problem; and

15                  (i)    The extent to which Facebook maintained or is still maintaining data  
16 improperly tracked; and

17                  (j)    Whether Facebook’s post-logout tracking was done knowingly.

18  
19                   **b.    Facebook’s Statement of Facts**

20  
21           As an initial matter, Facebook believes that Plaintiffs’ argumentative statement of the case  
22 is neither necessary nor appropriate for this case management statement. But since Plaintiffs  
23 insist on including it, Facebook is compelled to respond briefly.

24  
25           Facebook is a social networking website that enables people to connect and share with  
26 their friends, families, and communities. To join, Users need only provide their name, age,  
27 gender, and a valid e-mail address; they are also informed of Facebook’s Privacy Policy (now  
28 called the “Data Use Policy”), which specifically discloses that Facebook uses cookies for certain

1 purposes. Once Users register, they create a profile and may begin connecting with other Users  
2 by inviting them to become Facebook “Friends.” Facebook provides a service that hundreds of  
3 millions of people use every day to connect with the people they care about—for free.

4 Facebook offers Users an array of options for sharing content and communicating with  
5 each other both on Facebook and third-party websites. These options include the Facebook Like  
6 button, which allows Users to click a button associated with some particular content (e.g., a news  
7 article, a video, a blog post, or a video) in order to share or communicate their affinity for that  
8 content with their Facebook Friends.

9 The main allegations in these cases are based primarily on the September 2011 blog posts  
10 of Australian technology blogger, Nik Cubrilovic and concern Facebook’s alleged use of cookies  
11 to collect browsing history when Users were logged out of their Facebook account. Plaintiffs’  
12 inflammatory claims notwithstanding, the use of cookies is ubiquitous throughout the Internet.  
13 Most interactive websites with any level of meaningful functionality could not operate without  
14 them. Facebook uses cookies for a variety of functions including, for instance, offering features  
15 on other websites (e.g., the Like, Share, and Recommend buttons and other enhancements) and  
16 ensuring the security of the Facebook site and Facebook Users.

17 As Facebook will show, Plaintiffs do not state any claims in their Corrected First  
18 Amended Consolidated Class Action Complaint (“Complaint”), and neither the named Plaintiffs  
19 nor the members of the putative class have been harmed by the alleged conduct in any way.  
20 Facebook reserves any and all rights, defenses, and objections to the facts alleged by the  
21 Plaintiffs.

### 22 3. LEGAL ISSUES

23 Plaintiffs contend that the following are the main disputed points of law:

24 (a) Whether Facebook violated state and/or federal law by tracking the internet  
25 use of its members post-logout; and

26 (b) Whether the theft of personally identifiable information (“PII”) is a  
27 compensable injury sufficient to confer standing within Article III of the United States  
28 Constitution; and

1 (c) Whether the proposed class can be certified under Fed. R. Civ. P. 23.  
2 Facebook denies the allegations in the complaints and denies that the requirements of Rule  
3 23 can be met in any of the pending cases.

4 **4. MOTIONS**

5 **a.** There have been motions to appear Pro Hac Vice granted by this court. No  
6 such motions are outstanding.

7 **b.** Facebook has filed several motions to relate cases. The Court has granted  
8 all such motions but for certain *pro se* cases, which the Court has already  
9 ruled unrelated.

10 **c.** Facebook has filed a number of motions to extend time. None are  
11 currently pending.

12 **d.** Counsel for Plaintiffs filed a motion to consolidate related actions and  
13 appoint interim class counsel, which the Court granted on April 3, 2012.

14 **e.** Plaintiff Michael Singley in the action *Peddicord v. Facebook, Inc.*  
15 (formerly *Singley v. Facebook, Inc.*), No. 5:12-cv-00670-EJD filed a  
16 motion to withdraw as representative plaintiff and substitute Jane  
17 Peddicord on March 27, 2012, which the Court granted on March 30, 2012.

18 **f.** Plaintiff Laura Maguire in the action *Maguire v. Facebook, Inc.*, No. 5:12-  
19 cv-00807-EJD filed a motion to withdraw as a representative plaintiff on  
20 April 18, 2012, which the Court granted on April 18, 2012.

21 **g.** Plaintiffs filed a motion to substitute interim co-lead counsel on May 9,  
22 2012, which the Court granted on May 10, 2012.

23 **h.** The Parties submitted a stipulation requesting an order setting a briefing  
24 schedule and enlarging page limits regarding Facebook's anticipated  
25 motion to dismiss Plaintiffs' Complaint on June 6, 2012. The Court so  
26 ordered this briefing schedule and enlargement of page limits on June 18,  
27 2012.

28





1 ensure that all electronic records pertaining to Plaintiffs and the putative class members are being  
2 preserved, as well as all relevant non-electronic records.

### 3 **7. DISCLOSURES**

4 In accordance with their understanding of the Court's intention, expressed at the March  
5 30, 2012 case management conference, to divide the litigation of the action into four phases, the  
6 third of which is to involve the timing and sequence of "motion practice and discovery," the  
7 Parties have not met and conferred pursuant to Rule 26(f). The Parties await the Court's guidance  
8 as to when the Parties should hold the Rule 26(f) conference and propose to discuss the topic at  
9 the June 29, 2012 CMC.

10 Facebook believes no Rule 26(f) conference should be held until 14 days after any initial  
11 motion practice under Rule 12(b) regarding the Complaint or any amendments to the Complaint  
12 has been resolved.

13 Plaintiffs oppose any discovery stay in this case and believe that a Rule 26(f) conference  
14 should be held on or prior to July 6, 2012, and discovery should proceed normally as  
15 contemplated by the Federal Rules.

16 The Parties have agreed to seek the Court's guidance on the question of a discovery stay  
17 at the June 29, 2012 CMC, and the parties propose that, pursuant to Rule 26(a)(1)(C), initial  
18 disclosures be exchanged within 14 days after the Parties' Rule 26(f) conference.

### 19 **8. DISCOVERY**

20 No formal discovery has yet occurred. The Parties propose filing a joint proposed  
21 discovery plan promptly after the Rule 26(f) conference discussed in section 7 above.

22 In light of the number of causes of action pled in the complaint and the forthcoming  
23 motion to dismiss, Facebook believes that discovery should not commence until the Court  
24 resolves which, if any, claims will go forward.

25 Plaintiffs oppose any discovery stay and believe that discovery should proceed normally  
26 as contemplated by the Federal Rules.

27 The Parties have agreed to seek the Court's guidance on the question of a discovery stay  
28 at the June 29, 2012 CMC.

1           **9.       CLASS ACTION**

2           Plaintiffs have asserted class claims pursuant to Rules 23(a) and (b)(3) of the Federal  
3 Rules of Civil Procedure on behalf of a Class of all persons who had active Facebook accounts  
4 and used Facebook between May 27, 2010 and September 26, 2011, both dates inclusive, and  
5 whose privacy Facebook violated. Excluded from the Class are Facebook, and its officers,  
6 directors, employees, affiliates, legal representatives, predecessors, successors and assigns, and  
7 any entity in which any of them have a controlling interest.

8           Facebook denies that this action meets the requirements for class certification under Rule  
9 23.

10           **10.       RELATED CASES**

11           On March 16, 2012, Facebook filed a Notice of Pending Action pursuant to Civil Local  
12 Rule 3-13 to inform the Court of a related case, *Ung v. Facebook, Inc.*, No. 112-cv-217244,  
13 pending in Santa Clara Superior Court. Facebook moved for a stay of the *Ung* case pending the  
14 final outcome of the present case, and also filed a demurrer. The Superior Court held a hearing  
15 on June 19, 2012 and has taken the matter under advisement.

16           **11.       RELIEF SOUGHT**

17           Plaintiffs seek monetary relief in the form of damages including but not limited to actual  
18 damages, statutory damages, punitive damages, and attorneys fees. At this time the precise  
19 monetary amount is unknown as both the size of the class and method for calculating the non-  
20 statutory damages is not presently known to Plaintiffs. It can be said, however, that at the time of  
21 filing there were over 150 million Facebook users in the United States during the proposed Class  
22 Period (May 27, 2010 to September 26, 2011, inclusive), and 800 million users globally, and the  
23 claims for violations of one of the relevant statutes (the Federal Wiretap Act) provides for \$100  
24 per day for each day of violation or \$10,000, whichever is greater. Plaintiffs also seek injunctive  
25 relief.

26           Facebook denies that Plaintiffs are entitled to any relief whatsoever. Additionally,  
27 Facebook reserves all rights, claims, and defenses available under law.

28

1           **12. SETTLEMENT AND ADR**

2           The Parties do not believe that any ADR process is appropriate at this time.

3           **13. CONSENT TO MAGISTRATE JUDGE**

4           The Parties do not consent to have a magistrate judge conduct all further proceedings.

5           **14. OTHER REFERENCES**

6           The Parties in the MDL and related actions (except the Plaintiffs in *Maguire*) have  
7 previously appeared before the Judicial Panel on Multidistrict Litigation in this matter and appear  
8 before this transferee Court as a result of the order dated February 8, 2012 (MDL No. 2314). The  
9 Parties do not believe this case is suitable for other reference, be it binding arbitration or a special  
10 master.

11           **15. NARROWING OF ISSUES**

12           At this time, the Parties do not believe there are any issues that can be narrowed.

13           **16. EXPEDITED TRIAL PROCEDURE**

14           The Parties do not believe this case is of the type that can be handled on an expedited  
15 basis.

16           **17. SCHEDULING**

17           The Court has provided the following initial case scheduling: Facebook's deadline to  
18 answer, move to dismiss, or otherwise respond to the Complaint is July 2, 2012. The Parties have  
19 stipulated to (Dkt. 37) and the Court has granted (Dkt. 39) a briefing schedule for Facebook's  
20 anticipated motion to dismiss the Complaint. Plaintiffs' opposition to the motion is due July 31,  
21 2012. Facebook's reply in support of the motion is due August 22, 2012. A hearing on the  
22 motion is scheduled for September 21, 2012.

23           At the case management conference held on March 30, 2012 before this Court, the Parties  
24 understand that the Court stated its intention that scheduling for this litigation should proceed in  
25 four phases: (1) consolidation and appointment of interim class counsel, (2) initial case  
26 scheduling, (3) motion practice and discovery, and (4) pretrial and trial scheduling issues. The  
27 Plaintiffs believe that we are in the third phase, and discovery should commence now as provided  
28 by the Federal Rules, concurrently with the currently pending motion practice. Facebook does

1 not understand the case to have entered the discovery phase yet, and believes that, in any event,  
2 discovery should be stayed pending its forthcoming motion to dismiss all claims asserted in the  
3 Complaint. In light of these differing understandings of the timing of the phases outlined by the  
4 Court and Facebook's forthcoming motion to dismiss, the Parties believe it is premature to  
5 propose further deadlines in this Joint Statement until they receive guidance and input from the  
6 Court at the June 29, 2012 CMC.

7 **18. TRIAL**

8 As discussed in Section 17 above, in light of the phases outlined by this Court, the Parties  
9 believe it is premature to propose trial scheduling for this action until they receive guidance and  
10 input from the Court at the next case management conference.

11 **19. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS**

12 Facebook filed its Federal Rule of Civil Procedure 7.1 Disclosure Statement and Civil  
13 Local Rule 3-16 Certification of Interested Entities or Persons on April 13, 2012. Pursuant to  
14 Federal Rule of Civil Procedure 7.1 and Civil Local Rule 3-16, Facebook certifies that as of this  
15 date, other than the named parties, there is not such interest to report.

16 **20. OTHER MATTERS**

17 There are no additional matters to add to this joint statement.

18  
19  
20 Dated: June 22, 2012

COOLEY LLP

21 /s/ Jeffrey M. Gutkin  
22 JEFFREY M. GUTKIN

23 Attorneys for Defendant FACEBOOK, INC.  
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Dated: June 22, 2012

BARTIMUS, FRICKLETON, ROBERTSON, &  
GORN, P.C.

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**ATTESTATION PURSUANT TO GENERAL ORDER 45**

I, Jeffrey M. Gutkin, attest that concurrence in the filing of this document has been obtained from each of the other signatories. Executed this 22nd day of June, 2012, at San Francisco, California.

/s/ Jeffrey M. Gutkin  
JEFFREY M. GUTKIN