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

17 In re: Facebook Internet Tracking Litigation

18 Case No. 12-md-02314 EJD

19 **JOINT STATEMENT CONCERNING CASE  
20 SCHEDULE**

21 **JUDGE:** Edward J. Davila  
22 **COURTROOM:** 4  
23 **TRIAL DATE:** Not Set

24 Plaintiffs Perrin Davis, Cynthia Quinn, Brian Lentz, and Matthew Vickery (collectively,  
25 “Plaintiffs”) and Defendant Facebook, Inc. (“Facebook”) (Plaintiffs and Facebook collectively,  
26 the “Parties”), by and through their respective counsel, jointly submit this Joint Statement  
27 Concerning Case Schedule pursuant to the Court’s Minute Entry following the Case Management  
28 Conference held on June 29, 2012, which requires the Parties to submit a joint case management  
statement two weeks after the Rule 26(f) conference that proposes a schedule for the case.

The Parties have met and conferred concerning a proposed schedule for this case. The Parties agree on all aspects of the case schedule, with the exception of: (1) whether discovery should be bifurcated between matters relevant to class certification and matters relevant only to

1 the merits and (2) the limitation on the number of depositions. Immediately below, Plaintiffs  
2 provide a short statement explaining why they believe discovery should not be bifurcated, and  
3 Facebook provides a short statement explaining why it believes discovery should be bifurcated.  
4 Next, Plaintiffs state their proposal for an expansion of the 10 deposition limit set forth in Rule 30  
5 (a)(2)(A)(i), and Facebook states its bases for opposing that expansion. Following these  
6 statements, the Parties provide the proposed schedule, which is a joint proposal except for two  
7 entries as noted, which reflect Facebook's position that discovery should be bifurcated.

8 **Plaintiffs' Statement Concerning Bifurcation of Discovery:**

9 The Federal Rules of Civil Procedure do not provide for a stay of merits discovery  
10 pending class certification. This Court advised the parties at the last status conference that it saw  
11 no reason to stay discovery. The plaintiffs believe that issues related to class certification and  
12 issues related to the merits of the case are so intertwined as to make any bifurcation of discovery  
13 impractical. As stated in Newberg on Class Actions § 7:8 (4th ed.), "Discovery on the merits  
14 should not normally be stayed pending so-called class discovery, because class discovery is  
15 frequently not distinguishable from merits discovery, and classwide discovery is often necessary  
16 as circumstantial evidence even when the class is denied. Such a discovery bifurcation will often  
17 be counterproductive in delaying the progress of the suit for orderly and efficient adjudication."

18 Of course, the Court has broad discretion to issue protective orders to control discovery  
19 but in this case defendant cannot demonstrate the "strong showing" necessary to warrant a partial  
20 stay of discovery. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9<sup>th</sup> Cir. 1975); *Gray v. First*  
21 *Winthrop Corp.*, 133 F.R.D. 39, (N.D. Cal. 1990). Defendant has suggested staying discovery on  
22 "knowledge and intent" issues but such a broad and vague description would allow defendant to  
23 withhold discovery on a wide array of issues important to class certification. And the Court will  
24 retain the authority to address any discovery limitations that the defendant believes are  
25 appropriate in response to specific discovery requests. A blanket stay of broad classes of  
26 discovery at this stage is neither justified nor necessary.

1 In the event the Court wishes to consider any sort of discovery bifurcation that would  
2 change the Court's previous statement that discovery should not be stayed, the plaintiffs request  
3 an opportunity to fully brief the issue.

4 **Facebook's Statement Concerning Bifurcation of Discovery:**

5 Facebook believes that discovery should be bifurcated, with discovery relevant to class  
6 certification first and discovery that relates solely to the merits of Plaintiffs' claims to be  
7 conducted only after the Court issues a decision on class certification. Phased discovery of this  
8 sort is contemplated by the federal Manual for Complex Litigation (*see, e.g.*, §§ 21.11, 21.14),  
9 which states that allowing full merits discovery before a decision on certification "can create  
10 unnecessary and extraordinary expense and burden" (*id.* § 21.14). Of course, class determination  
11 frequently "entail[s] some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart*  
12 *Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Even so, federal courts frequently allow  
13 bifurcation in class actions. *See Hager v. Vertrue, Inc.*, No. 09-11245-GAO, 2011 WL 4501046,  
14 at \*1 (D. Mass. Sept. 28, 2011) (acknowledging bifurcation of class and merits discovery); *Harris*  
15 *v. Option One Mortg. Corp.*, 261 F.R.D. 98, 111 (D.S.C. 2009) (granting bifurcation on the  
16 ground that doing so "will promote the interests of fairness and efficiency"); *Am. Nurses' Assoc.*  
17 *v. Illinois*, 1986 WL 10382, at \*2-3 (N.D. Ill. Sept. 12, 1986) (granting bifurcation because it  
18 would "expedite the decision on class certification in accord with Federal Rule 23").

19 Bifurcating class certification discovery from merits discovery is necessary here to avoid  
20 imposing the costs and burdens of full (and potentially needless) merits discovery on Facebook  
21 before the Court determines whether this case may proceed as a class action. *See NOW*,  
22 *Farmington Valley Chapter v. Sperry Rand Corp.*, 88 F.R.D. 272, 277 (D. Conn. 1980) (ordering  
23 bifurcation of discovery because, in pre-certification stage, "the defendant must be protected from  
24 discovery which is overly burdensome, irrelevant, or which invades privileged or confidential  
25 areas") (citation omitted); *see also, e.g., Miles v. Merrill Lynch & Co. (In re Initial Pub. Offering*  
26 *Sec. Litig.)*, 471 F.3d 24, 41 (2d Cir. 2006) ("[A] district judge has ample discretion to  
27 circumscribe . . . the extent of discovery concerning Rule 23 requirements . . . in order to assure  
28 that a class certification motion does not become a pretext for a partial trial of the merits."). For

1 example, although Facebook expects that the parties will need to explore the operation of  
2 Facebook's HTTP cookies in order to resolve whether class certification is appropriate, the  
3 parties need not expend the significant time and resources required to explore certain other  
4 substantive issues. In particular, Facebook's *intent* in implementing its practices with respect to  
5 HTTP cookies or *knowledge* of any alleged misconduct<sup>1</sup> are likely to have no bearing on class  
6 certification, and discovery on these topics need not be undertaken at this time. Moreover, this  
7 Court's ruling on Plaintiffs' anticipated motion for class certification may significantly narrow or  
8 reshape the issues the Parties must address in merits discovery by denying certification or  
9 changing the scope of the case. "If class certification is denied, the scope of permissible  
10 discovery may be significantly narrowed; if a class is certified, defining that class should help  
11 determine the limits of discovery on the merits." *Am. Nurses' Assoc.*, 1986 WL 10382, at \*3.

12 **Plaintiffs' Statement Concerning Depositions:**

13 Because of the size and complexity of these consolidated MDL cases, plaintiffs believe  
14 that the limit of 10 depositions set forth in Rule 30 (a)(2)(A)(i) is impractical. Plaintiffs suggest  
15 that the number of depositions per side be initially limited to 20, absent a showing of good cause,  
16 and that Rule 30(b)(6) deposition notices count as one deposition regardless of how many  
17 individual witnesses are designated by a party to testify in response to such notice. Defendant  
18 Facebook opposes this suggestion.

19 **Facebook's Statement Concerning Depositions:**

20 Plaintiffs have not demonstrated good cause to expand the number of depositions of  
21 Facebook witnesses in this case beyond the limit set forth in Federal Rule of Civil Procedure

22 <sup>1</sup> Establishing Facebook's intent and knowledge will be an element of several of Plaintiffs' claims  
23 at the merits stage. *See* Federal Wiretap Act, 18 U.S.C. § 2511(1) (requiring defendant to act  
24 "intentionally"); Stored Communications Act, 18 U.S.C. § 2701(a) (same); Computer Fraud and  
25 Abuse Act, 18 U.S.C. § 1030 (requiring defendant to act "knowingly" or "intentionally"); Cal.  
26 Penal Code § 502(c) (requiring defendant to act "knowingly"); Cal. Penal Code § 631(a)  
27 (requiring defendant to act "intentionally"); Invasion of Privacy, *Medical Laboratory*  
28 *Management Consultants v. ABC, Inc.*, 306 F.3d 806, 812 (9th Cir. 2002) (same); Conversion,  
*Bank of New York v. Fremont General Corp.*, 523 F.3d 902, 914 (9th Cir. 2008) (conversion is an  
"intentional tort"); Trespass to Chattels, *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342, 1350-51 (2003)  
(trespass requires an "intentional interference").

1 30(a)(2)(A)(i). Expanding the limit would be inconsistent with Rule 26(b)(2) and would impose  
2 undue burden on Facebook. Further, Plaintiffs' request for a modification of the limits set forth  
3 by the Federal Rules of Civil Procedure is inconsistent with the position they took at the most  
4 recent CMC. At that time, they agreed with the Court's conclusion that discovery should not be  
5 stayed pending resolution of Facebook's motion to dismiss because the case was not so different  
6 from other cases in federal court that it warranted deviation from the default provisions of the  
7 Federal Rules. Today, Plaintiffs take the inconsistent position (not raised at the CMC) that the  
8 case is so different that the Federal Rules need to be modified to allow Plaintiffs to take more  
9 depositions than they would otherwise be permitted to take. Plaintiffs' request lacks merit, and a  
10 general reference to the "size and complexity" of the case is not a sufficient showing. Similarly,  
11 there is no reason to count each Rule 30(b)(6) deposition notice as only one deposition, regardless  
12 of the number and variety of topics included in the notice and regardless of the number of  
13 Facebook witnesses that reasonably must be made available to testify on those topics (for  
14 example, a deposition notice containing 15 topics that results in 3 depositions of 3 different  
15 Facebook employees). Plaintiffs' request should be denied.

**Jointly Proposed Schedule:**

Event	Proposed Date
Rule 26(a)(1) Initial Disclosures	July 27, 2012
Answer	<p>If Facebook's Motion to Dismiss is (1) denied in its entirety or (2) denied in part and granted in part without giving Plaintiffs leave to amend, Facebook shall file its answer no later than 30 days after the decision on Facebook's Motion to Dismiss.<sup>2</sup></p> <p>If Facebook's Motion to Dismiss is (1) denied in part and granted in part and Plaintiffs are given leave to amend or (2) granted entirely with leave to amend, Facebook shall file either an answer or a renewed motion to dismiss 30 days after amendment of the complaint. If the Motion to Dismiss was granted only in part and no amendment is filed, Facebook shall file an answer 30 days after the deadline to file an amendment passes. If Facebook files a renewed motion to dismiss after amendment of the complaint, Facebook's deadline to answer will be continued until set by further order of the Court.</p> <p>The date on which Facebook files its answer, if that occurs, shall be deemed the "Answer Date."</p>
Deadline for Disclosure of Plaintiffs' Class Certification Expert Witnesses (name, address, qualifications, résumé, and written report)	14 days before deadline to file motion to certify class
Deadline to File Motion to Certify Class	150 days after Answer Date
Deadline for Completion of Class Certification Fact Discovery, Including Fact Witness Depositions	Facebook: 150 days after Answer Date Plaintiffs: N/A
Deadline for Disclosure of Facebook's Class Certification Expert Witnesses (name, address, qualifications, résumé, and written report)	60 days after deadline to file motion to certify class
Deadline to File Any Opposition to Motion to Certify Class	60 days after deadline to file motion to certify class

<sup>2</sup> If any deadline provided for in this schedule falls on a weekend or Court holiday, the deadline will be continued until the next Court day.

<b>Event</b>	<b>Proposed Date</b>
Deadline to File Any Reply in Support of Motion to Certify Class	30 days after deadline to file opposition to motion to certify class
Hearing on Class Certification Motion	At Court's convenience
First Day for Serving of Merits Discovery	Facebook: Day of decision on class certification motion Plaintiffs: N/A
Deadline for Completion of Fact Discovery, Including Fact Witness Depositions	180 days after decision on class certification motion
Parties to Meet and Confer to Propose a Schedule for Pre-trial Conference, Pre-trial Motions, and Trial	180 days after decision on class certification motion
Deadline for Disclosure of Plaintiffs' Expert Witnesses to be Presented at Trial (name, address, qualifications, résumé, and written report)	35 days after completion of merits fact discovery
Deadline for Disclosure of Facebook's Expert Witnesses to be Presented at Trial (name, address, qualifications, résumé, and written report)	42 days after disclosure of Plaintiffs' expert witnesses to be presented at trial
Deadline for Completion of Merits Expert Discovery, including Expert Depositions	21 days after disclosure of Facebook's expert witnesses to be presented at trial
Last Day to File Motion for Summary Judgment	30 days after close of merits expert discovery
Deadline to File Any Opposition to Motion for Summary Judgment	35 days after deadline to file motion for summary judgment
Deadline to File Any Reply in Support of Motion for Summary Judgment	21 days after deadline to file opposition to motion for summary judgment
Hearing on Summary Judgment Motion	At Court's convenience
Pre-trial Conference, Pre-trial Motions, and Trial	To be determined

1 Respectfully submitted,

2 Dated: July 27, 2012

COOLEY LLP

3 /s/ Jeffrey M. Gutkin

4 JEFFREY M. GUTKIN

5 Attorneys for Defendant FACEBOOK, INC.

6 Dated: July 27, 2012

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**ATTESTATION**

In accordance with Northern District of California Civil Local Rule 5-1(i)(3), I hereby attest that I have obtained concurrence in the filing of this document from each of the other signatories.

/s/ Jeffrey M. Gutkin  
JEFFREY M. GUTKIN

**PROOF OF SERVICE**  
**(FRCP 5)**

I hereby certify that on July 27, 2012, I filed the foregoing document with the Clerk of Court using the CM/ECF system:

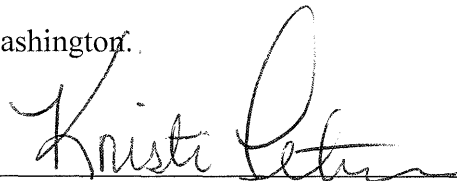
**Joint Statement Concerning Case Schedule**

This document was served on all counsel who are deemed to have consented to electronic service via the CM/ECF system in this action.

This document and the notice of electronic filing were also served via U.S. Mail on the following:

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Executed on July 27, 2012, at Seattle, Washington.



Kristi Peterson

2635706/ST