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15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17

18 MATTHEW CAMPBELL, MICHAEL
HURLEY, and DAVID SHADPOUR, on
19 behalf of themselves and all others
similarly situated,

20 Plaintiffs,

21 v.

22 FACEBOOK, INC.,

23 Defendant.
24
25
26
27
28

Case No. C 13-05996 PJH (MEJ)

**PLAINTIFFS' MOTION TO ENLARGE
TIME AND EXTEND DEADLINES**

Judge: Honorable Phyllis J. Hamilton

1 Pursuant to Civil L.R. 6-1 and 6-3, Plaintiffs hereby move for an order to extend by 90
2 days the current deadlines set forth in the Court’s scheduling order, entered on March 12, 2015
3 (Dkt. No. 62), including the pending class certification and summary judgment deadlines.

4 **I. ARGUMENT**

5 Since the entry of the current scheduling order, Facebook has caused unnecessary and
6 extensive delay in producing discovery, prejudicing Plaintiffs’ efforts to prepare for class
7 certification and summary judgment. *See* Declaration of David T. Rudolph (“Rudolph Decl.”).
8 To begin with, despite this Court’s clear indication that computer source code will be relevant to
9 determine liability, Facebook wasted over *five months* resisting production of its source code.
10 First, Facebook refused to even entertain a Protective order or ESI Protocol that addressed source
11 code. It then objected to the production of source code, forcing, after a lengthy meet and confer
12 process, a hearing with Magistrate Judge James on the issue. There, Facebook sought a
13 cumbersome and lengthy process for producing documents and information in lieu of source
14 code. But, even then, it resisted producing for deposition its declarant accompanying the
15 alternative production. Only after engaging the Court, the Magistrate, and the Plaintiffs in this
16 drawn-out objection process, did Facebook spontaneously volunteer to produce the source code.
17 By that time, however, Facebook’s conduct had achieved a significant delay in the prosecution of
18 the case.

19 As fully documented herein and in the accompanying declaration, Facebook’s response
20 across the entire discovery spectrum has been so dilatory that nine months in, and only one month
21 before critical deadlines, it has produced only 1600 documents (including duplicates) and its
22 production has virtually ground to a halt, with live disputes for Magistrate James to address on
23 multiple topics critical to Plaintiffs’ case and Facebook’s defenses. In its Order on Facebook’s
24 motion to dismiss, this Court noted two key issues that it must resolve with a fulsome factual
25 record: whether Facebook’s interception of the content of the putative class members’ messages
26 occurred when the message was “in transit,” and whether such interception occurs within the
27 “ordinary course of business.” The Court noted, and Plaintiffs agree, that the resolution of these
28 two issues turns on the functioning of Facebook’s code. However, Facebook’s five-month delay

1 in producing its massive and enormously complicated source code, coupled with its truncated
2 document production, have left Plaintiffs with insufficient time to analyze these issues in
3 preparation for the class certification and summary judgment briefing. Without detailed
4 information showing the specific types of data and interconnections Facebook created when it
5 scanned the putative class members' private messages, Plaintiffs will be hampered in crafting a
6 proposal for injunctive relief. Without discovery into the revenue Facebook has generated from
7 this process and related platforms, Plaintiffs will be hampered in formulating a class-wide
8 damages theory.

9 Plaintiffs requested Facebook's consent to a 90-day extension and, at Facebook's request,
10 offered to refrain from propounding further written discovery in exchange for its consent.
11 Rudolph Decl. ¶ 3. In response, Facebook offered a 30-day extension. *Id.* ¶ 4. Given the many
12 ongoing discovery disputes, most of which require Court intervention, Plaintiffs responded that a
13 30-day extension is insufficient and that a 90-day extension is warranted.¹ *Id.*

14 **A. Source Code**

15 Facebook inexcusably delayed producing source code in this case by over five months. On
16 December 23, 2014, this Court issued its order granting in part and denying in part Facebook's
17 motion to dismiss ("Order"). (Dkt, No. 43). In ruling on Facebook's arguments, the Court noted
18 that it could not decide those issues in the absence of details regarding Facebook's source code.
19 *See, e.g.,* Order at 12:21-28.² Despite this clear directive from the Court, Facebook steadfastly
20 refused to produce its source code. After multiple conferences with the Court, after the setting of
21 a detailed and involved motion to compel schedule, and after Plaintiffs were forced to seek the
22 Court's assistance in securing a deposition date for Facebook's declarant, on June 26, 2015—just

23
24 ¹ Facebook also responded to Plaintiffs' request for extension by imposing additional discovery
25 burdens on Plaintiffs, propounding another round of discovery which will become due within just
26 days of the current class certification deadline. Rudolph Decl. ¶ 4.

27 ² **"Simply put, the application of the 'ordinary course of business' exception to this case**
28 **depends upon the details of Facebook's software code**, and those details are simply not before
the court on a motion to dismiss, and thus, the court must deny Facebook's motion on that basis.
However, the court may re-address the 'ordinary course of business' exception at the summary
judgment stage of the case, **with a more complete evidentiary record before the court.**"
(emphasis added)

1 days prior to the motion deadline—Facebook completely reversed course, and voluntarily agreed
2 to produce all relevant source code. Rudolph Decl. ¶¶ 7-17. This five-month delay significantly
3 prejudiced Plaintiffs. Given the size and complexity of Facebook’s source code (which consists of
4 over 10 million lines of code), Plaintiffs’ experts require additional time to review and analyze
5 Facebook’s code in anticipation of Facebook’s early summary judgment motion, which Facebook
6 has indicated will turn on technical issues related to 1) whether Facebook’s interception of the
7 content of the class members’ Private Messages occurred “in transit,” and 2) whether such
8 interception was part of the ordinary course of Facebook’s business. Rudolph Decl. ¶ 16; Joint
9 Case Management Conference Statement (Dkt. No. 60). Without the requested extension,
10 Plaintiffs will be in the position of opposing Facebook’s motion with an incomplete analysis of
11 the functioning of Facebook’s source code.

12 **B. Facebook’s Response to Plaintiffs’ Initial Discovery Requests**

13 To date, Facebook’s production has been limited to approximately 1,600 documents,
14 totaling 6,175 pages. Rudolph Decl. ¶ 18. Many of these documents are duplicates, arising from
15 only a handful of email conversations from October, 2012, or else consist of publicly available
16 documents such as third-party articles. *Id.* Plaintiffs also have identified multiple, significant
17 deficiencies in Facebook’s responses, including entire categories of critical documents. *Id.* ¶ 20.
18 However Facebook maintains that it is *still* searching for and producing documents on a “rolling”
19 basis, including documents responsive to Plaintiffs’ *initial* discovery set, served nearly eight
20 months ago. *Id.* ¶ 22. Facebook has provided no estimate of when its production process will be
21 complete and, thus, Plaintiffs have no idea when, if ever, all responsive documents relevant to key
22 summary judgment and class certification issues will be produced. *Id.* ¶ 21.

23 This uncertainty and delay are compounded by Facebook’s implementation of “predictive
24 coding” (also called TAR, or technology assisted review) to identify relevant and responsive
25 documents. *Id.* ¶¶ 23-28. The method Facebook unilaterally implemented for predictive coding
26 fails to follow best practices. Facebook “pre-screened” the available universe of documents by
27 searching via keywords, *and then* employed predictive coding to further cull the subset of
28 screened documents, rather than using keyword searches to assemble a subset of responsive

1 documents which are examined to inform reasonable predictive coding parameters. Facebook's
2 method, done without prior consultation with Plaintiffs, likely severely limits the extent of the
3 production of responsive documents. *Id.* ¶ 28. Beyond this basic flaw, Facebook still refuses to
4 reveal key pieces of its methodology, including identifying the documents it has used to train its
5 software, and this will likely be the subject of further motion practice. *Id.* Therefore, the efficacy
6 of Facebook's predictive coding process remains uncertain, and hampers Plaintiffs' ability to
7 improve the process to ensure a fulsome production.

8 **C. Facebook's Responses to Plaintiffs' Discovery Regarding How Facebook**
9 **Stores and Uses the Content it Acquires from Private Messages**

10 Plaintiffs' Interrogatory No. 8 and Request for Production No. 41 seek information and
11 ESI concerning the data Facebook created when it scanned the named Plaintiffs' messages
12 containing URLs. *Id.* ¶ 29. Rather than timely produce this data, Facebook dragged its heels for
13 months, repeatedly stating that it was investigating the feasibility of responding to these requests.
14 *Id.* ¶¶ 31-32. Facebook untimely produced substantially incomplete responses on September 1,
15 2015, and Plaintiffs are in the process of moving to compel further responses. *Id.* The
16 information sought in these discovery requests directly relates to essential issues in this case:
17 *what* content Facebook acquires when it intercepts its users' private messages, *where* it stores that
18 content, and *how* that content is subsequently used. This discovery is not only critical to
19 Plaintiffs' claims, but also to Facebook's defenses. Indeed, Facebook does not challenge
20 relevancy, but instead states that it is still in the process of providing complete responses.

21 **D. Facebook's Responses to Plaintiffs' Document Requests Regarding Damages**

22 Plaintiffs' Third Set of Requests for Production seeks documents and ESI relevant to the
23 parties' assessment of class-wide damages in this Action. Despite multiple meet-and-confers,
24 Facebook refuses to produce a *single* document relating to Plaintiffs' damages requests. *Id.* ¶ 35.
25 Accordingly, Plaintiffs intend to move to compel the production of these documents, and the
26 parties have agreed to a joint briefing schedule through which the motion will be filed on
27 September 18, 2015. Documents responsive to these requests are directly relevant to the issues of
28 damages suffered by the class as well as the appropriate injunctive relief in this matter, and are,

1 thus, necessary for Plaintiffs to fashion a theory of class-wide relief for their class certification
2 briefing.

3 **E. Plaintiffs' 30(b)(6) Deposition Notice**

4 Among other topics, Plaintiffs seek Rule 30(b)(6) deposition testimony regarding the
5 source code related to Facebook's description of its Private Message system in its interrogatory
6 responses. Rudolph Decl. ¶ 37. Such testimony is sought to determine the factual basis for
7 Facebook's characterization of its message-scanning functionality. Facebook has objected that
8 preparing a deponent to testify on this topic is both improper and "impossible." As a
9 compromise to avoid potential motion practice on this issue, Plaintiffs suggested that, in lieu of a
10 Rule 30(b)(6) deposition related to source code, Facebook install on its source code review
11 computer an "integrated development environment," which would allow Plaintiffs' expert to trace
12 the path of a Private Message through Facebook's source code. *Id.*, ¶ 39. Facebook has not
13 agreed to this proposed compromise, requiring even more time-consuming motion practice. *Id.*

14 **F. This Discovery Is Required For Class Certification and to Oppose Summary
Judgment and Facebook Will Suffer No Prejudice from a 90-Day Extension**

15 A 90-day extension will allow both parties to establish a more fulsome factual record prior
16 to summary judgment, lessening the likelihood that Plaintiffs will be required to seek a Rule
17 54(d) extension to respond to Facebook's summary judgment motion. Facebook would suffer no
18 prejudice and has articulated none in declining to stipulate to a 90-day extension, instead merely
19 stating "we do not believe any extension is warranted." *Id.* ¶ 1, Ex. 1. Facebook may believe no
20 extension is necessary because Plaintiffs, unlike Facebook, have produced virtually every
21 responsive document in their possession, made themselves available for depositions, and timely
22 facilitated Facebook's depositions of three non-parties who exchanged messages with the
23 Plaintiffs. The extension has been necessitated by Facebook's delays, not Plaintiffs'.

24 **II. CONCLUSION**

25 For the foregoing reasons, Plaintiffs request that the Court modify the schedule as follows:
26 The summary judgment motion and class certification motion shall be filed by January 20, 2016;
27 oppositions shall be filed by March 23, 2016; replies shall be filed by April 20, 2016 with a
28 hearing to be noticed for May 18, 2016 at 9:00 a.m, or as the Court's calendar permits.

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Dated: September 16, 2015

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