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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 OAKLAND DIVISION
17

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

21 Plaintiff,

22 v.

23 FACEBOOK, INC.,

24 Defendant.

Case No. C 13-05996 PJH (MEJ)

**PLAINTIFFS' RESPONSE TO
DECLARATION OF DALE HARRISON**

Judge: Honorable Maria-Elena James

1 Pursuant to this Court’s Order of September 28, 2015 (Dkt. No. 118), Plaintiffs hereby
2 submit this Response to the Declaration of Dale Harrison.

3 **I. Introduction**

4 Facebook’s position as articulated in the Declaration of Dale Harrison is not plausible. It
5 asserts that only the [REDACTED] concerning the incremental increase in the Like
6 counter can be produced without undue burden. Quite conveniently, according to Facebook, *any*
7 production that goes beyond Facebook’s blatantly self-serving mischaracterization of the
8 Complaint is too burdensome.

9 The [REDACTED] Plaintiffs seek are essential to their claims because they
10 show: (1) what content Facebook acquires from users’ private messages, (2) where that content is
11 stored, and (3) how that content is used. Rather than establish the burden in producing this
12 information, Facebook seeks to limit its production to the [REDACTED]
13 [REDACTED] associated with the Like counter. This Court, during the hearing on
14 this motion, and in a prior ruling in this case, has rejected the notion that Plaintiffs’ claims are
15 limited to the incremental changes in the Like counter. The all-too-convenient line Facebook
16 attempts to draw on what is too burdensome to produce in this case falls on exactly this
17 erroneous, and previously rejected, rewriting of Plaintiffs’ Complaint. However, when Facebook
18 complained in prior briefing of Plaintiffs’ challenge to “any ‘interception’ of messages containing
19 URLs for *any* purpose,” the Court found that “Facebook does not explain or cite anything in the
20 record that would indicate that Plaintiffs are changing theories or fundamentally altering their
21 position.” Discovery Order at p. 7 (Dkt. No. 83) (emphasis original). Instead, the Court held that
22 Plaintiffs’ claims, which relate to all message scanning and content acquisition violative of ECPA
23 and CIPA, were substantiated by the CAC’s “detailed factual allegations.” *Id.* (citing CAC ¶¶ 63,
24 64, 73, 78-82, 86-67, 94, 96, 104-109).

25 Facebook offers no factual basis for why other [REDACTED] beyond those
26 concerning incrementing the Like counter would be too burdensome too produce. If the Court is
27 to accept Facebook’s position, Facebook will have successfully avoided production of
28 information critical to Plaintiffs’ allegations that Facebook obtained data from users’ private

1 messages “for the current or future objective of accumulating and analyzing user data and
2 thereafter refining user profiles and/or enhancing its targeted advertising efforts.” Consolidated
3 Amended Complaint (“CAC”) at ¶ 30 (Dkt. No. 25).

4 Per the Court’s Order on September 29, 2015, the purpose of the Declaration of Dale
5 Harrison on behalf of Defendant Facebook, Inc. (“Declaration”) was to “explain the burden of
6 extracting the information as discussed on the record.” (Dkt. No. 118). Facebook has not
7 demonstrated that it is too burdensome to supplement its response to Plaintiffs’ Interrogatory No.
8 8 and Request for Production No. 41 (“Requests”). Indeed, the seven-page Declaration contains
9 only two paragraphs (nineteen and twenty) focused on this topic, and those paragraphs contain
10 only conclusory statements (the rest of the Declaration explains Facebook’s production to date.).
11 The Declaration fails to substantiate that it would be too difficult to respond to Plaintiffs’
12 Requests. Moreover, as discussed in Section III, *infra*, Facebook concedes that there would be no
13 burden in collecting many of the documents Plaintiffs seek. Thus, Facebook fails to carry its
14 burden, and Plaintiffs are entitled to responses disclosing all content Facebook acquires from
15 messages, how that content is used, and how that content is stored.

16 **II. Facebook has not identified any burden substantial enough to justify its refusal to**
17 **respond to Plaintiffs’ Requests.**

18 The presumption of discoverability is Facebook’s to rebut—if a requesting party shows
19 that it both sought relevant documents and then made a good faith effort to meet and confer with
20 its opponent, “the resisting party then carries a ‘heavy burden’ of demonstrating why discovery
21 should be denied.” *In re Mgm Mirage Secs. Litig.*, 2014 U.S. Dist. LEXIS 165486, at *10-11 (D.
22 Nev. Nov. 25, 2014) (quoting *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975));
23 *see also La. Pac. Corp. v. Money Mkt. 1 Institutional Inv. Dealer*, 285 F.R.D. 481, 485 (N.D. Cal.
24 2012) (“[T]he party opposing discovery has the burden of showing that discovery should not be
25 allowed, and also has the burden of clarifying, explaining and supporting its objections with
26 competent evidence.”).

27 Facebook’s Declaration lacks the requisite specificity, and thus fails to carry this burden.
28 In a conclusory fashion, Facebook’s declarant states that it [REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

Declaration at ¶ 19 (emphasis added). Mr. Harrison further states that he [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* Put another way, Mr. Harrison takes the position that he cannot

identify or produce [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This is simply a restatement of what Plaintiffs’ asked Facebook to do through their Requests; it is not a suitable articulation of burden.¹

Moreover, even where Mr. Harrison departs from generalities, his statements are always conditional: [REDACTED]

[REDACTED]

[REDACTED] Declaration at ¶ 19 (emphasis added). Such conclusory

allegations, and nothing more, fail to rebut the presumption of discoverability and the

proportionality of Plaintiffs’ Requests. *La. Pac. Corp.*, 285 F.R.D. at 485.

The fundamental problem with Facebook’s Declaration is that it sets up a false dichotomy between Facebook’s minimal production to date and the purportedly [REDACTED]

[REDACTED]

[REDACTED] Plaintiffs are not asking the impossible, but they are asking

for a production that goes beyond Facebook’s intentionally and impermissibly narrow reading of

Plaintiffs’ claims. The Declaration does not [REDACTED]

¹ Similarly, in Paragraph 20, Mr. Harrison states that it would be [REDACTED]

[REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED] Facebook nonetheless can and should conduct further
5 investigation to respond to Plaintiffs' Requests.

6 Further, Facebook's methodology in identifying [REDACTED]

7 [REDACTED]
8 [REDACTED]
9 [REDACTED] *Id.* at ¶ 19 (emphasis
10 original). However, Mr. Harrison does not say [REDACTED]

11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED] *Id.* at ¶ 18. On its face, the
15 Declaration suggests that further, reasonable investigation would enable Facebook to identify and
16 produce [REDACTED].

17 In contrast to the conclusory statements offered by Facebook in regard to its purported
18 burden, Plaintiffs' need for the information at issue in the Requests is specific, immediately
19 apparent, and pressing. The extent to which Facebook acquires message content and the manner
20 in which it does so is critical to the issues at play in Facebook's impending Motion for Summary
21 Judgment and Plaintiffs' impending Motion for Class Certification. *See*, Order re Motion to
22 Enlarge Deadlines (Dkt. No. 117) (setting a deadline of November 13, 2015). Accordingly,
23 pursuant to the proportionality analysis required by Fed. R. Civ. Proc. 26, Plaintiffs' need for
24 relevant discovery outweighs Facebook's conclusory and implausible statements regarding
25 burden, and Facebook should be compelled to provide fulsome responses to Plaintiffs' Requests.
26 *Munoz v. PHH Corp.*, 2013 U.S. Dist. LEXIS 24671, *17 (E.D. Cal. Feb. 22, 2013) (finding
27 relevance outweighed minimal burden, where resisting party made "generalized assertions and
28 suggestions devoid of any tangible detail."); *Ramirez v. Trans Union, LLC*, 2013 U.S. Dist.

1 LEXIS 34916, *4-5 (N.D. Cal. Mar. 13, 2013) (“Under the proportionality analysis called for by
2 Federal Rule of Civil Procedure 26 the Court must weigh Plaintiff’s need for this information
3 against the burden on Defendant of providing this discovery....Defendant conceded it did not
4 know how long it would take to compile the requested information...Given Plaintiff’s need for
5 this information and in the absence of evidence regarding any specific burden, the Court grants
6 Plaintiff’s request to compel responses to these interrogatories.”).

7 **III. In addition, Plaintiffs are entitled to the already-identified information and**
8 **documents that Facebook concedes impose no additional burden to produce.**

9 Plaintiffs have identified, and requested production of, several specific items of
10 information that Facebook concedes are not burdensome to produce. Moreover, these items of
11 information are referenced conspicuously in Facebook’s current production, and therefore directly
12 relate to documents that Facebook concedes are relevant. In addition to the information and
13 documents referenced above, Plaintiffs are entitled to receive the following items of information:

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]

28 Each of the above-described documents relates to information that Facebook *concedes* is

1 discoverable and responsive to Plaintiffs’ Requests. Each of these documents contains content
2 related to how [REDACTED]

3 [REDACTED]
4 In response, Facebook contends that [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]² As
12 Plaintiffs seek injunctive relief related to Facebook’s message scanning practices, having an
13 understanding of the depth and breadth of [REDACTED]
14 [REDACTED]

15 Moreover, [REDACTED]
16 [REDACTED] If other documents purport to provide additional
17 clarification—as the above-referenced documents do—then they must be produced. Even taking
18 Facebook’s statements at face value, it is nonetheless clear that the content of [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 [REDACTED] Refusal to produce relevant documents in this instance is particularly egregious, as these
24 documents are clearly responsive to prior Requests for Production propounded by Plaintiffs on
25 January 26, 2015. *See* Plaintiffs’ First Set of Requests for Production, Requests Nos. 6,³ 18,⁴ 19,⁵

26 _____
² The messages provided to Facebook spanned a date range of 2009 to 2014.

27 ³ Seeking “[a]ll Documents and ESI related to each Process and/or piece of Architecture involved
28 in the acquisition of data, metadata, or other content from Private Messages, for purposes of
creating, augmenting, or otherwise maintaining Facebook User Data Profiles.” Ex. 3 at p. 10.

1 and 21⁶ (Ex. 3).

2 Accordingly, the above-described documents, and any prior versions thereof, should be
3 produced.

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]

11 created from private messages. In terms of identifying how [REDACTED]

12 [REDACTED]

13 [REDACTED] *Id.* at ¶ 20.

14 Therefore, consistent with Plaintiffs' Requests, Facebook should provide an explanation of the
15 purpose of each [REDACTED] thus far produced.

16 This does not require Facebook to identify any new information, but simply requires Facebook to
17 contextualize what it has so far produced. Doing so would, in Facebook's words, allow Plaintiffs
18 to [REDACTED]

19 [REDACTED] *Id.* at ¶ 6. Accordingly, this information should be produced.

20 **Identification of [REDACTED]**

21 [REDACTED] The Declaration makes reference to [REDACTED]

22 [REDACTED]

23 *Footnote continued from previous page*

24 ⁴ Seeking "[a]ll Documents and ESI sufficient to identify each Process and/or piece of
25 Architecture involved in the creation, augmentation, or maintenance of Facebook User Data
26 Profiles." Ex. 3 at p. 12.

26 ⁵ Seeking "[a]ll Documents and ESI relating to how You use any Private Message Content,
27 including for purposes related to Facebook User Profiles and/or Targeted Advertising." Ex. 3 at p.
28 12.

27 ⁶ Seeking "[a]ll Documents and ESI relating to the use of Passive Likes – or any data, metadata,
28 or other information generated therefrom – as data points in Facebook User Data Profiles." Ex. 3
at p. 12.

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[REDACTED]

[REDACTED] Such clarification would not be burdensome to Facebook, but would be highly relevant to Plaintiffs, and accordingly it should be produced.

IV. Conclusion

Plaintiffs’ Requests—which seek to identify the content Facebook acquires from users’ private messages, where that content is stored, and how that content is used—ask for information that is foundational to this litigation. In contrast, Facebook’s argument against fulsome production is nothing more than a return to its consistently unsuccessful attempt to reframe this litigation to the narrowest possible portion of its conduct. Since Facebook’s Declaration provides no substantive evidence of burden from identifying [REDACTED] [REDACTED] it should be compelled to fully respond to Plaintiffs’ Requests. In addition, Plaintiffs are entitled to the information identified in Section III, *supra*, as Facebook has already conceded that it would face no burden in collecting those documents.

Dated: October 8, 2015

Respectfully submitted,

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