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15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA

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

19 Plaintiffs,

20 v.

21 FACEBOOK, INC.,

22 Defendant.

Case No. C 13-05996 PJH (MEJ)

**PLAINTIFFS' RENEWED MOTION TO
CONTINUE DEADLINES**

Judge: Honorable Phyllis J. Hamilton

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1 **I. INTRODUCTION**

2 Plaintiffs respectfully submit this motion, pursuant to Civil Local Rules 6-1 and 6-3,
3 requesting more time to amass a complete record upon which to base their motion for class
4 certification and oppose summary judgment. This motion is based upon the extraordinary
5 grounds that Defendant, Facebook, Inc., has failed to honor the representations it made to the
6 Court when opposing Plaintiffs' initial motion to continue the deadlines for class certification and
7 summary judgment.

8 Specifically, Facebook has (1) failed to adhere to its representation that it would
9 substantially complete the production of documents relevant and necessary to these potentially
10 dispositive motions by September 30, (2) continued to withhold entire categories of documents,
11 standing on objections overruled by Magistrate Judge Maria-Elena James, even though it does not
12 appeal her order with respect to those categories, and (3) further delayed the substantial
13 completion of necessary discovery by filing objections to aspects of Judge James's Order. The
14 documents Facebook continues to hide are potentially critical to the upcoming dispositive
15 motions in the case.

16 As a result, Plaintiffs have not received access to the record to which they are entitled to
17 build their case against Facebook, and to assess Facebook's defenses and Plaintiffs' theories for
18 proving damages on a class-wide basis. For these reasons, and as described below, Plaintiffs
19 respectfully seek a further 60-day extension of the deadlines for class certification and summary
20 judgment.

21 **II. FACTUAL BACKGROUND AND ARGUMENT**

22 The parties, jointly, proposed a relatively aggressive schedule for this litigation in their
23 Joint Case Management Conference Statement, which the Court approved, setting October 14,
24 2015 as the deadline to file motions for class certification and summary judgment. (Dkt. 60; Dkt.
25 62). On September 16, in light of time-consuming disputes over discovery that had previously
26 been resolved, as well as several disputes then-pending before Magistrate Judge Maria-Elena
27 James, Plaintiffs sought a 90-day extension of these deadlines. (Dkt. 109). Facebook opposed
28 the motion, arguing that an extension of just 30 days would provide sufficient time for Plaintiffs

1 and their experts to review, analyze, and incorporate all of the relevant and necessary discovery,
2 which, Facebook claimed, had largely already been produced, or shortly would be produced.
3 (Dkt. 114).

4 In support of its contentions, Facebook relied heavily upon its own representations that its
5 document production would be “substantially complete” by September 30. *See* Dkt. 114-1,
6 (Jessen Decl.), ¶ 21; Dkt. 114, at 4-5 (“. . . Facebook expects that its production will be
7 substantially completed by **September 30.**”) (emphasis original). Reasonably crediting
8 Facebook’s representations and sworn declaration, the Court granted just a 30-day extension, to
9 November 13, and expressly held that no further extensions of time would be granted. (Dkt.
10 117).

11 Since then, Facebook has materially reneged on its own representations, leaving Plaintiffs
12 very little time to review potentially critical discovery, which is *still* being produced. For
13 example, despite promising substantial completion of discovery by September 30, Facebook
14 waited until October 13 to produce 2,656 pages of documents, constituting 19% of its total,
15 current, document production. Facebook produced another 24% of its total production near
16 midnight on October 28, a full month after September 30.

17 In short, **43% of Facebook’s entire production**,¹ comprising documents important to
18 Plaintiffs’ motion for class certification and ability to defend against summary judgment, **was**
19 **made after the September 30 deadline** upon which this Court relied in setting November 13 as
20 the deadline to move for class certification. Indeed, Facebook’s largest single-day production to
21 date, representing about one-quarter of its entire production, was made at midnight last night.
22 Moreover, Facebook’s midnight production contains, for the first time in any substantial sense,
23 many documents in native format (such as data spreadsheets), which will require intensive
24 review.

25 Plaintiffs’ motion for class certification will be unfairly prejudiced if Plaintiffs are not
26 granted the time necessary to review and analyze these documents.² Facebook’s October 28

27 ¹ As measured by number of pages in the production. *See* Sobol Decl. ¶¶ 4-5.

28 ² The trial court will apply a “rigorous analysis” to Plaintiffs’ class certification motion. *Comcast*

1 production contains information potentially crucial to Plaintiffs’ expert’s analysis of class-wide
2 proof of damages, as well as Plaintiffs’ understanding of Facebook’s core processes for scanning
3 and utilizing content obtained from private messages, which will be at issue on Facebook’s
4 motion for summary judgment. *See* Dkt. 130 (Oct. 14, 2015 Discovery Order), at 7, 12-13
5 (holding that the requests to which Facebook was compelled to respond go “not only to Plaintiff’s
6 affirmative claims, but also Facebook’s defenses,” and/or “could assist [Plaintiffs] in establishing
7 a model or methodology for class-wide relief.”) Under the November 13 deadline to move to
8 certify the class, Plaintiffs and their experts will have just two weeks to fully analyze and
9 incorporate this information into their argument and analyses.

10 Moreover, based upon the limited review Plaintiffs have done since receiving it late last
11 night, Facebook’s court-ordered production appears to be deficient. In response to several
12 categories of class-wide damages requests, Facebook has merely renewed its already-overruled
13 objections, and stated that subject to such objections, and subject “to the ongoing nature of
14 discovery in this action,” Facebook was unable to locate a single responsive document – a
15 contention that will require additional meet and confer discussions, and possibly further briefing
16 before Judge James. *See* Sobol Decl. Ex. 1 (Suppl. Resps. to RFPs 54, 55, 57).

17 In addition, on October 28, Facebook filed a formal motion for relief from Judge James’s
18 October 14 Order as applied to two of eight categories of documents that had been adjudicated
19 relevant to damages and class-wide relief. (Dkt. 133). Even if this Court were to resolve that
20 motion for relief in Plaintiffs’ favor today, the motion has already further delayed substantial
21 completion of Facebook’s production, potentially until after the current deadline of November 13
22 to move for class certification.

23 Another short extension would not unduly delay this litigation, particularly in light of
24 Facebook’s failure to honor the representations that it has previously made to the Court about the
25 status of its document production. Nor would an additional 60-day extension result in a case
26 schedule longer than the typical schedule in similar class action lawsuits.³

27 *Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

28 ³ Plaintiffs recognize that every court, and every case, is different. Nevertheless, it has been

1 **III. CONCLUSION**

2 Plaintiffs bring this motion reluctantly, and only due to the extraordinary discrepancy
3 between Facebook’s prior representations about the discovery that Plaintiffs would receive by
4 September 30, and the timing of the production that Plaintiffs have actually received. Class
5 certification, which is not a determination on the merits, nevertheless “generally involves
6 considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of
7 action.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011). Accordingly,
8 Plaintiffs were constrained to raise these issues again with the Court, prior to submitting their
9 motion for class certification based upon a record substantially and materially less complete than
10 the record to which Plaintiffs are entitled at this stage in the proceedings, and less complete than
11 the record which this Court was previously informed that Plaintiffs would receive.

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

16 Should the Court deny Plaintiffs’ motion, Plaintiffs will be prepared to move for class
17 certification based upon a limited review of the recently-produced discovery, on November 13, as
18 currently scheduled.

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21 suggested, incorrectly, that this Court should deny any further extension of time because it would
22 delay this case as compared to *In re Gmail Litig.*, No. 13-md-02430-LHK (N.D. Cal.) and *In re*
23 *Yahoo Mail Litig.*, No. 13-cv-04980-LHK (N.D. Cal.). See Dkt. 114-1 (Jessen Decl.) ¶ 3. In
24 reality, the *Gmail* litigation had been pending for approximately four years when the Court issued
25 its final ruling on class certification (See *Dunbar v. Google, Inc.*, No. 10-cv-00194 (E.D. Texas)
26 (later consolidated in this District)), and discovery had begun approximately three years prior to
27 that ruling. *Dunbar*, No. 10-cv-00194, Dkt. 221-2, Ex. A, at 3:17-3:28; Dkt. 224. Likewise,
28 *Yahoo Mail*, filed three months before this case on October 2, 2013, has proceeded on
approximately the same schedule as this litigation, with major case events occurring within 3-4
months of one another. The sole notable exception, that the *Yahoo Mail* plaintiffs filed an early
motion for class certification (in February 2015) does not support the conclusion that a longer
schedule would be inappropriate in this case. Critically, in *Yahoo Mail*, the putative class did not
seek to recover monetary damages (No. 13-cv-04980, Dkt. 60, Ex. 3) – obviating, for that class,
the need for the type of damages discovery that Plaintiffs need from Facebook here, and in
response to which Facebook failed to provide a single responsive document until October 28.

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Dated: October 29, 2015

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