EXHIBIT 4

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

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

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Case No. C 13-05996 PJH (MEJ)

PLAINTIFFS' RESPONSE TO DECLARATION OF DALE HARRISON

Judge: Honorable Maria-Elena James

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

I. Introduction

Facebook's position as articulated in the Declaration of Dale Harrison is not plausible. It asserts that only the Objects and Associations concerning the incremental increase in the Like counter can be produced without undue burden. Quite conveniently, according to Facebook, *any* production that goes beyond Facebook's blatantly self-serving mischaracterization of the Complaint is too burdensome.

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

Facebook offers no factual basis for why other Objects and Associations beyond those concerning incrementing the Like counter would be too burdensome too produce. If the Court is to accept Facebook's position, Facebook will have successfully avoided production of information critical to Plaintiffs' allegations that Facebook obtained data from users' private

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

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

II. Facebook has not identified any burden substantial enough to justify its refusal to respond to Plaintiffs' Requests.

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

Facebook's Declaration lacks the requisite specificity, and thus fails to carry this burden. In a conclusory fashion, Facebook's declarant states that it "is *likely* impossible" to identify "all"

Objects created from users' private messages; in support, he states that doing so "***may*** require consulting with engineers in every group" whose work created Objects, and asking those engineers whether they believe said Objects could be created from private message content. Declaration at ¶ 19 (emphasis added). Mr. Harrison further states that he "would have to try to ascertain where in the Facebook system each of these types of Objects may exist," and would have to "assess what existing Facebook search functionality and tools are available for searching for…each such Object type." *Id*. Put another way, Mr. Harrison takes the position that he cannot identify or produce the Objects created from Facebook's scans of private messages because doing so would require him to (1) query the appropriate Facebook employees as to what Objects are created from private message content, (2) identify the databases where Facebook stores those Objects, and (3) determine whether those databases are searchable via "existing search functionality." *Id*. 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: he "*may*" have to consult with additional engineers; it "*might*" be necessary to write new code to identify Objects; it "*could* take hundreds of man hours" to search for and collect the Objects at issue in Plaintiffs' Requests. 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 "impossible" task of identifying every *conceivable* Object and Association that was ever created or used as a result of Facebook's private message function. 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 address whether *additional* information can

[1] Similarly, in Paragraph 20, Mr. Harrison states that it would be "outside the scope of any single engineer's personal knowledge…to develop a list of all possible uses of Objects and Associations" created from private message content, and that "the abstract hypothetical question as to all possible uses is likely impossible to answer." Tellingly, this only indicates that a "single" engineer cannot identify "all possible uses of Objects and Associations."

reasonably be provided; instead it starts from the flawed premise that Facebook must produce everything imaginable, or else produce nothing at all. Even if Facebook is correct that it engages in such prolific acquisition of its users' private message content that identification of "all" records and uses of that content is "impossible," Facebook nonetheless can and should conduct further investigation to respond to Plaintiffs' Requests.

Further, Facebook's methodology in identifying the Objects and Associations to be produced is profoundly opaque, with Mr. Harrison simply stating "I have inquired with others at Facebook who would know." *Id*. at ¶ 3. From this inquiry, Mr. Harrison says that he cannot conclusively determine "***all***" Objects related to Plaintiffs' messages. *Id*. at ¶ 19 (emphasis original). However, Mr. Harrison does not say that he is unaware of "any" additional Objects or Associations, nor does he say that a reasonable search would not identify additional Objects or Associations. Moreover, Mr. Harrison states that he has spent only 25 hours on providing the information thus far produced, and that an unspecified portion of that time was not actually spent searching for information, but rather was spent "with counsel." *Id*. at ¶ 18. On its face, the Declaration suggests that further, reasonable investigation would enable Facebook to identify and produce additional, relevant Objects and Associations.

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

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

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

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

The hyperlinked explanatory documents relating to [redacted] – As discussed previously with the Court, [redacted] contain explanatory text and a hyperlink to *more* explanatory text, stating in pertinent part: [redacted] Similarly, the same document contains additional hyperlinks that give further context to the documents Facebook has provided (and the way in which Objects and Associations are stored and rendered by Facebook). For example, hyperlinks exist that allow the viewer to [redacted]

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

discoverable and responsive to Plaintiffs' Requests. Each of these documents contains content related to how Facebook stores and utilizes Objects and Associations created from URLs within private messages.

In response, Facebook contends that [redacted].[2] As Plaintiffs seek injunctive relief related to Facebook's message scanning practices, having an understanding of the depth and breadth of Facebook's current functionality for data obtained from messages is critical.

Moreover, Facebook has not stated that *any* meaningful differences exist between its current code and prior iterations of the code. If other documents purport to provide additional clarification—as the above-referenced documents do—then they must be produced. Even taking Facebook's statements at face value, it is nonetheless clear that the content of the hyperlinked page would not be burdensome to produce and is highly relevant. Additionally, if there are *earlier* iterations of these documents in existence, from 2013 and before, Facebook must provide those and in fact should have produced those long ago. Among other things, these documents purport to describe [redacted] that Facebook always has maintained are central to this case. Refusal to produce relevant documents in this instance is particularly egregious, as these documents are clearly responsive to prior Requests for Production propounded by Plaintiffs on January 26, 2015. *See* Plaintiffs' First Set of Requests for Production, Requests Nos. 6,[3] 18,[4] 19,[5]

[2] The messages provided to Facebook spanned a date range of 2009 to 2014.

[3] Seeking "[a]ll Documents and ESI related to each Process and/or piece of Architecture involved 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.

and 21[6] (Ex. 3).

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

[redacted] created from private messages. In terms of identifying how [redacted] *Id*. at ¶ 20. Therefore, consistent with Plaintiffs' Requests, Facebook should provide an explanation of the purpose of each [redacted] thus far produced. This does not require Facebook to identify any new information, but simply requires Facebook to contextualize what it has so far produced. Doing so would, in Facebook's words, allow Plaintiffs to [redacted] *Id*. at ¶ 6. Accordingly, this information should be produced.

Identification of [redacted] – The Declaration makes reference to [redacted] that Mr. Harrison searched in order to acquire the information

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

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

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

produced thus far. *Id*. at ¶¶ 13, 17. However, no further context is given as to these systems, including whether they are identified by specific names, whether they have any additional purpose beyond [redacted] identified by Mr. Harrison, how they may be queried, who has access to them, and whether there are additional, comparable "systems" that may contain relevant Objects and Associations. 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 additional Objects and Associations created from user messages, 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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