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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MATTHEW CAMPBELL, and MICHAEL HURLEY, on behalf of themselves and all others similarly situated, Plaintiffs, v. FACEBOOK, INC., Defendant.	Case No. 4:13-cv-05996-PJH (MEJ) **PLAINTIFFS' REQUEST FOR TELEPHONIC DISCOVERY CONFERENCE**

I. INTRODUCTION

Yesterday, Facebook took two actions within hours of each other. First, it decided to pull out of Your Honor's procedure for resolving discovery disputes, refusing to provide its final version of its portion of letter briefs regarding issues that the parties have been conferring on for months, including multiple in-person meetings, and instead announced its intention to seek a new procedure more to its liking along with a stay of discovery. Second, a few hours later, Facebook filed with Judge Hamilton an "errata" to correct a misrepresentation it made in its opposition to class certification which included a partial Facebook document which had theretofore been withheld, and which is the very same type of document Plaintiffs have been pursuing through Your Honor's discovery procedures, but which Facebook claimed lacked relevancy and refused to produce. Accordingly, Plaintiffs respectfully request a telephonic discovery conference for the purpose of obtaining an order that Facebook provide its portions of four letter briefs, that comply with the applicable page limits, within two weeks, *i.e.*, on or before May 26, 2016, and that the four letter briefs then be filed the next day, *i.e.*, May 27, 2016.

II. ARGUMENT

Throughout the course of this case, Facebook has consistently engaged in obstruction of, and outright stonewalling within, the discovery process. In its latest effort to thwart Plaintiffs' ability to bring these deficiencies to this Court for resolution, and after many weeks of refusing to provide its portion of four outstanding joint discovery letter briefs, Facebook has now taken the position that it will not engage in the Court-ordered joint letter writing-process at all, and will instead seek to stay discovery altogether. However, as Facebook's recently filed "errata" demonstrates, Facebook's about-face is a desperate attempt to hide from discovery documents and data that controvert key factual assertions made by Facebook's employees in support of Facebook's opposition to class certification. Facebook's direct violation of this Court's Discovery Standing Order forces Plaintiffs to seek a telephonic conference to obtain Facebook's compliance with it.

A. Facebook's Delay in Providing Its Portions of the Joint Letter Briefs.

Over two months ago, on March 4, 2016, Plaintiffs sent Facebook drafts of four joint discovery letter briefs, pursuant to the procedure required by this Court's Discovery Standing Order. *See* Declaration of David Rudolph, filed herewith ("Rudolph Decl."), ¶ 2. These four briefs address distinct (and major) deficiencies in Facebook's production, including: (1) missing documents related to damages Requests for Production; (2) missing documents related to topics alluded to in Facebook's current production; (3) missing source code-related "configuration tables," which contain information regarding Facebook's storage and use of Private Message data; and (4) defects in Facebook's use of "predictive coding" to identify and produce documents throughout the discovery process to date.

Plaintiffs requested that, consistent with the parties' prior agreement, Facebook provide its portions of the letter briefs a week later on March 10, 2016 with final versions of the briefs to be filed on March 14, 2016. Rudolph Decl. ¶ 3. Rather that provide its portions, however, Facebook took the position that, despite the fact that the parties had *already* met-and-conferred *in person* on each subject of the letter briefs, Plaintiffs had not done so in "good faith," and therefore Facebook would not provide its portions of the letter briefs until the parties met and conferred in-person *a second time* on each topic. *Id*, ¶ 4.

Though Plaintiffs had already fulfilled their in-person meet and confer obligations, in order to avoid burdening this Court with a request for a telephonic conference, Plaintiffs, relying on Facebook's counsel's representation that Facebook was considering "potential compromises" related to the disputes, agreed to meet and confer in person a second time following the class certification hearing conducted on March 16, 2016. Rudolph Decl. ¶ 4. During the meet and confer, the parties agreed impasses had been reached on all issues except Facebook's implementation of "predictive coding," or technology assisted document review. *Id.*, ¶ 5. Plaintiffs requested, and Facebook agreed, that Facebook would provide its portions of three letter briefs, as well as its proposal regarding a compromise related to its implementation of predictive coding, one week later, on March 23, 2016. *Id*. However, rather than provide the draft brief revisions and compromise proposal on March 23, 2016, as agreed, Facebook instead requested

additional time to draft its responses and proposal. *Id.*, ¶ 6.

Two weeks later, on April 5, 2016, Facebook provided its portion of the letter brief regarding damages-related documents, but did not provide its portion of the two outstanding letter briefs or its proposal regarding predictive coding. *Id.*, ¶ 7. On April 7, 2016, Facebook provided a "compromise" proposal regarding predictive coding, which consisted of an offer to search for a small subset of search terms proposed by Plaintiffs for only *3 of the more than 30 custodians* Facebook had identified thus far. *Id*. Notably, Facebook continued to refuse to produce documents containing the terms "share_stats" or "scribeh_share_stats"—key terms related to Facebook's scanning of Private Message content, discussed at length in the parties' class certification submissions.[1] Given that Facebook's proposal was not a good-faith attempt to resolve Plaintiffs' concerns regarding the deficiencies in Facebook's document production, on April 13, 2016, Plaintiffs requested that the parties proceed with the briefing on this issue and requested that Facebook provide their portion by April 20, 2016. *Id.*, ¶ 9. Additionally, on April 11, 2016, Plaintiffs' counsel requested that, in the absence of any agreement by Facebook to produce the source code-related configuration tables, Facebook similarly provide its portion of the letter brief devoted that issue on April 20, 2016. *Id.*, ¶ 8. Facebook responded on April 15, 2016 that it was still "continu[ing] to investigate" production of the configuration tables. *Id.*, ¶ 10. The configuration tables contain data showing how Facebooks stores and configures Private Message content after it successfully intercepts it. The production of this configuration data is particularly crucial in light of Facebook's employee's testimony that the "share_stats" table containing data intercepted from Private Messages was deleted prior to the class period (which, as it turns out, is false).

On April 18, 2016, after weeks of Facebook failing to abide by agreed-upon deadlines and refusing to provide a date certain by which it would provide its portions of the letter briefs, Plaintiffs' counsel requested Facebook's counsel's availability for a telephonic conference with

[1] *See, e.g,* Dkt. 172 (Plaintiffs' Response to Defendant's Objection to and Request to Strike New Evidence and Misstatements of Fact), at 7, questioning the veracity of Facebook's unsupported assertions regarding the deletion of the "share_stats" table containing Private Message data during the class period and noting that the issue could only be resolved through the production of requested but as-yet-unproduced configuration data.

this Court in order to compel Facebook to participate in the Court-mandated joint letter writing process. *Id.*, ¶ 11. Only in response to this request did Facebook finally agree to provide its portions of the letter briefs on April 20, 2016—*six weeks* after it received Plaintiffs' portions of the briefs. *Id*.

Facebook finally provided its portions of the three outstanding letter briefs, and specifically "reserve[d] the right to make further edits to its sections based on changes Plaintiffs make to their sections." *Id.*, ¶ 12. However, every single one of the portions of the letter briefs Facebook provided to Plaintiffs exceeded (in some cases by 100 percent) Facebook's allotted space within the Court-mandated 5-page limit, thus guaranteeing that yet another round of revisions would be required to file briefs that comply with the Court's page limits. *Id*. On May 4, 2016 Plaintiffs provided revisions to their sections addressing certain changes and additions to Facebook's positions on the discovery issues as articulated in prior meet and confers. Plaintiffs' portions complied with the Court's page limits, and Plaintiffs requested that Facebook provide revisions to its portions by May 10, 2016 that complied with the Court's page limits, or confirm that Facebook declined to do so. *Id.*, ¶ 13.

B. Facebook's Outright Refusal to Participate in the Court-Ordered Joint Letter Brief Process.

On May 10, 2016, after remaining silent as to any alleged deficiencies in Plaintiffs' revisions to the letter briefs, Facebook announced that rather than provide finalized revisions to its portions of the briefs so that Plaintiffs could finally seek resolution of these issues from the Court, it would instead seek a telephonic conference with this Court in order "to fashion an alternative procedure that would require Plaintiffs to file their requests and argument with the Court, and then require Facebook to respond in a separate filing." Facebook alleged that Plaintiffs had "made substantive changes to the actual relief that they are seeking in many of the briefs," and, therefore, rather than respond to any such alleged changes in its revisions to the letter briefs, Facebook would simply seek to opt out of the Court-mandated joint letter process and instead fashion a discovery process that was more to its liking, including a request to stay discovery pending a ruling on the class certification. *Id.*, ¶ 14.

In an attempt to avoid burdening the Court with a request for a telephonic conference, Plaintiffs proposed to provide Facebook with an additional two weeks in which to revise its responses—more than enough time to respond to any alleged "substantive changes to the actual relief that [Plaintiffs] are seeking." *Id.*, ¶¶ 14-15. However, Facebook rejected this proposal, stating that Facebook "need[s] a new path going forward" and asserting Plaintiffs' proposed extension was not sufficient. Facebook also declared it would seek a telephonic conference with the Court to propose changing the Court's procedures.[2]

However, within hours of rejecting Plaintiffs proposal, Facebook produced documents and data which directly controverted key factual assertions made by its witnesses in support of its opposition to Class Certification, and immediately filed an "errata" with the Court outlining its "discovery" of this "error." (Dkt. 185 (Errata)); Rudolph Decl. ¶ 18. As described below, it is now apparent that Facebook's sudden request to halt the discovery process is a transparent attempt to delay the production of further documents and data that controvert its defenses.

C. Facebook's Conduct Is Part of a Larger Pattern of Delay and Obstruction.

Facebook's eleventh-hour refusal to abide by this Court's Standing Order is part of a clear, months-long pattern of attempting to delay the Court's resolution of these discovery issues, including: (1) improperly insisting on multiple in-person meet and confers before agreeing to provide its portion of the discovery briefs despite the fact that this Court's order only requires one such in-person meeting; (2) failing to abide by agreed-upon deadlines; (3) further delaying providing its portion of the letter briefs under the guise of seeking to fashion "compromise" proposals, and then offering bad-faith proposals that do not legitimately seek to resolve the discovery disputes; (4) providing portions of the letter briefs that are overlong, therefore guaranteeing further revisions to the letter briefs before finalization, and (5) on the eve of joint

[2] Facebook's request for a telephonic conference would be procedurally improper and is itself a departure from the Court's procedures set forth in its Discovery Standing Order. It does not allow a non-moving party to request a telephonic conference in order to seek *relief* from the Court's joint letter brief process; only a moving party may seek such a conference in order to *enforce* the Court's Standing Order: "If the parties are unable to meet and confer as directed above, or a moving party is unable to obtain the opposing party's portion of a joint letter after the meet and confer session, the moving party shall file a written request for a telephonic conference for the purpose of enforcing the Court's meet and confer requirement, or for the Court to fashion an alternative procedure." Discovery Standing Order, Section 3 (emphasis added).

filing the letter briefs after months of delay, instead seeking to fashion an "alternative procedure" that would essentially require the briefing to start from scratch, and to further (and inconsistently) request that all discovery be stayed. Rudolph Decl. ¶ 14. Facebook has thus turned the Court's collaborative, efficient joint letter process on its head, and instead uses it as tool to impede Plaintiffs from seeking relief from this Court.

Facebook has attempted to thwart discovery at every stage of this case:

- Facebook initially refused to produce source code, arguing that the source code was unnecessary and highly confidential, but then, after five months, on the eve of motion practice on that issue, did an about-face and finally agreed to produce the code, consuming a substantial portion of Plaintiffs' pre-certification discovery period in the process.
- Facebook refused to timely provide its portion of a letter brief regarding Facebook's refusal to timely provide its declarant, Alex Himel, for deposition, which deposition was subsequently ordered over Facebook's objections. (*See* Dkt. 88).
- Facebook refused to provide deponents regarding the operation of its source code on the basis that preparing a deponent to do so was "impossible," an argument which the Court found to have not "much merit" (Dkt. 130 (October 16, 2015 Order), at 16), and Facebook was subsequently ordered to produced such deponents. (*Id.*).
- In the same Order, this Court similarly rejected Facebook's argument that it was "impossible" to produce all objects and associations created when Facebook scanned the Plaintiffs' Private Messages (*id.*, at 7-10), and rejected Facebook's argument that Plaintiffs' discovery requests related to damages documents were premature, overbroad, and unmoored to the practices challenged by Plaintiffs. (*Id.*, at 10-13).

D. <u>Facebook's Reasons For Seeking an "Alternative" Discovery Briefing Procedure Are Pretextual.</u>

Through its present conduct, Facebook apparently seeks to avoid, or at the very least significantly delay, further rulings from the Court rejecting its meritless challenges to Plaintiffs' proper discovery requests. Facebook's reasons for refusing to further engage in the joint letter briefing process—after conducting multiple meet and confers and providing initial drafts of its

positions—are clearly pretextual.

First, Facebook's claim that "Plaintiffs have never met and conferred on the new relief they now seek (such as a prohibition on predictive coding)" (Rudolph Decl. ¶ 16) misstates the record. Plaintiffs have always objected to Facebook's use of predictive coding on keyword culled documents, and Plaintiffs' position has always been that predictive coding is designed to be used in lieu of, as opposed to in addition to, keyword searches. This is a position which Plaintiffs have repeatedly articulated in correspondence, meet and confers, and in drafts of their letter brief on this topic. In response to Facebook's argument in its portion of the letter brief that applying predictive coding to all relevant documents irrespective of keyword searches would require Facebook "to review potentially millions of documents for each custodian," Plaintiffs proposed—specifically to address Facebook's concerns regarding burden—that, as an alternative to predictive coding, Facebook be required to produce all documents containing the relevant keywords. Thus, Plaintiffs suggested *shifting the burden* of document review from Facebook to Plaintiffs. This additional proposal—suggested as an alternative to Plaintiffs' original proposal requesting that Facebook apply predictive coding to all potential relevant documents—is hardly legitimate grounds for Facebook to refuse to engage in the letter briefing process. Nor does Facebook explain why it is unable to address Plaintiffs' proposal in their portion of the letter brief. Finally, Facebook provides no suggestion that further meeting and conferring on this topic—which the parties have already met and conferred on in person at least *three* times—would result in any compromise solutions. Simply put, Plaintiffs have fulfilled their meet and confer obligations, and this topic is ripe for resolution by the Court.

Second, Facebook complains that "there is no way for Facebook to recoup the significant costs it has already incurred by drafting responses to the earlier, different requests." Rudolph Decl. ¶ 16. As an initial matter, the *only* "different request[s]" that Facebook has articulated is Plaintiffs' additional compromise proposal related to the predictive coding issue, described above. In any event, Facebook's complaints ring hollow in light of the fact that Facebook has extended and delayed the letter briefing process for months, only to, at the eleventh-hour, announce that it will no longer participate in the letter briefing process and that instead discovery should be

stayed. Had Facebook filed a properly noticed motion to stay discovery at the beginning of the letter briefing process, that issue would have been resolved prior to *all parties* expending significant resources on drafting and refining letter briefs that Facebook now wants to abandon—indeed, Facebook's demand that the parties now abandon the letter briefs and start the process over from scratch ignores the significant time and resources Plaintiffs' counsel have devoted to the letter briefs thus far.

Finally, Facebook's concern that it lacks "assurance[s] that Plaintiffs will not once again change the nature of the relief they are requesting after Facebook incurs additional costs drafting new briefs" (Rudolph Decl. ¶ 16) is misplaced. Plaintiffs have fully articulated the relief they intend to seek, and only request that Facebook be forced to provide its counter-positions. Indeed, as described below, it is Plaintiffs, not Facebook who lack assurances that Facebook will not significantly change the landscape of discovery without prior notice. Facebook's request to further delay the resolution of these discovery issues is a pretextual attempt to prevent the discovery of facts which contradict the sworn testimony of employees on issues related to class certification.

E. Facebook's Newly-"Discovered" "Error" Illustrates Why Discovery Must Proceed Apace.

Facebook's "Errata" filed yesterday demonstrates precisely why discovery should not and cannot be delayed any further. Just hours after Facebook unilaterally abandoned the Court's discovery procedures, it revealed that one of the key statements of its primary witness, Alex Himel, was false—and that this falsehood was demonstrated by *the very documents and data Plaintiffs have been seeking that Facebook produce for months and that are the subject of the pending letter briefs.* Mr. Himel represented to this Court in sworn declarations and deposition testimony under penalty of perjury that the "share_stats" table in which Facebook stored data intercepted from Private messages was deleted in 2011, prior to the start of the class period.[3] Facebook relied on this assertion as one of its key points in opposition to Plaintiffs' motion for

[3] Himel Dep. Vol. 1, at 203:7-205:12; Jan. 14, 2016 Himel Decl. iso Opp. to Ps.' Mot. for Class Cert. (Dkt. 184-11, ¶ 44; Feb. 26, 2016 Himel Decl. iso FB Obj. to Reply Ev. (Dkt. 184-21), ¶ 9.

class certification.[4] However, Mr. Himel and Facebook now admit that these statements were false—and that they allegedly discovered this falsehood while Mr. Himel was "re-reviewing" the configuration data that Plaintiffs have been seeking for months and which Facebook has consistently refused to produce as irrelevant. (Dkt. 185-1 (May 11, 2016 Himel Decl.), ¶¶ 3-4).

While refusing to produce this entire category of documents, Facebook produces a recently-fashioned excerpt of information strategically tailored for litigation. Rudolph Decl. ¶ 18. Having tactically cherry-picked a self-serving document from this category, Facebook then declares that it will no longer proceed under the Court's discovery rules and will seek a general stay of discovery to block any further inquiry into this area. It is manifestly apparent that Facebook's idea to pull out of the Court's discovery procedures—after months of dragging out the briefing process—is directly related to its "discovery" of the information that controverts key points in its class certification opposition, and a blatant attempt to conceal further relevant information from Plaintiffs that would defeat Facebook's defenses and opposition to class certification. Facebook should be required to produce the documents and data related to the challenged practices and should not be permitted to selectively withhold evidence from Plaintiffs and the Court.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request a telephonic discovery conference for the purpose of obtaining an order that Facebook provide its portions of four letter briefs, that comply with the applicable page limits, within two weeks, *i.e.*, on or before May 26, 2016, and that the four letter briefs then be filed the next day, *i.e.*, May 27, 2016.

Facebook's counsel has indicated that they are available for a telephonic conference on May 18, May 19, and May 20, for its intended request, so Plaintiffs assume they can be available on those days for this request as well. Plaintiffs' counsel is available on those dates.

[4] *See, e.g.*, Dkt. 178-2 (Opp. to Class Cert.), at 13; March 16, 2016 Hrg. Tr. at 87:16-20; Himel Decl. iso FB Obj. to Reply Ev. (Dkt. 184-21), ¶ 9.

Dated: May 12, 2016

By: */s/ Michael W. Sobol*
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