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13 *Attorneys for Plaintiffs and the Proposed Class*

14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16

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

20 Plaintiffs,

21 v.

22 FACEBOOK, INC.,

23 Defendant.
 24

Case No. 4:13-cv-05996-PJH (MEJ)

**DECLARATION OF DAVID T. RUDOLPH IN
 SUPPORT OF PLAINTIFFS' REQUEST FOR
 TELEPHONIC DISCOVERY CONFERENCE**

1 I, David T. Rudolph, hereby declare:

2 1. I am a member in good standing of the California State Bar and an attorney in the
3 law firm Lief, Cabraser, Heimann & Bernstein, LLP, counsel for the plaintiffs in the above-
4 captioned Action (“Plaintiffs”). I have personal knowledge of the facts set forth herein, and if
5 called to testify thereto, I could and would do so competently. I submit this declaration in support
6 of Plaintiffs’ Request for a Telephonic Discovery Conference.

7 2. On March 4, 2016, Plaintiffs sent Facebook, via email, drafts of four joint letter
8 briefs addressing the following topics, respectively: (1) missing documents related to damages
9 Requests for Production; (2) missing documents related to topics alluded to in Facebook’s current
10 production; (3) missing source code-related “configuration tables,” which contain information
11 regarding Facebook’s storage and use of Private Message data; and (4) critical deficiencies in
12 Facebook’s use of “predictive coding” to identify and produce documents throughout the
13 discovery process to date. (Email from M. Gardner to C. Chorba re Plaintiffs’ Portions of Letter
14 Briefs, March 4, 2016). Each of these letter briefs was preceded by at least one in-person meet-
15 and-confer with Facebook’s counsel.

16 3. In the March 4, 2016 email, and consistent with the parties’ prior agreement (a
17 proposal from Facebook’s counsel, in which the moving party would provide its portion of the
18 brief to the non-moving party, who would then have a week to craft its responsive portion),
19 Plaintiffs asked that Facebook provide its portions of the respective letter briefs by March 10, at
20 which time Plaintiffs would revise their sections prior to the proposed filing date of March 14. *Id.*

21 4. On March 8, 2016, counsel for Facebook sent an email response to Plaintiffs’
22 counsel, stating that Facebook would not provide its portions of the respective letter briefs.
23 (Email from C. Chorba to M. Gardner re Plaintiffs’ Portions of Letter Briefs, March 8, 2016).
24 Citing to the prior in-person meet-and-confers on each of the topics in each of the briefs—and
25 contending that these meetings did not represent “a good faith attempt to meet and confer”—
26 Facebook’s counsel contended that a further “good faith meet-and-confer” was needed. *Id.*
27 Following an exchange of several emails between the parties as to the sufficiency of the prior
28

1 meet-and-confers,¹ Facebook represented that it had “thoughts on potential compromises,” which
2 it would present to Plaintiffs only upon the condition of an additional meet-and-confer. (Email
3 from C. Chorba to H. Bates re Prior Meet and Confers and Proposing March 16, 2016 Meet and
4 Confer and Revised Briefing Schedule, March 9, 2016). Facebook proposed a meet-and-confer
5 on March 16, 2016, following the hearing on Plaintiffs’ Motion for Class Certification. *Id.*
6 Facebook further represented that, if the parties could not reach agreement, Facebook would
7 provide its portions of the four letter briefs on March 23, 2016. *Id.* Plaintiffs subsequently
8 agreed to this proposal. (Email from H. Bates to C. Chorba re March 16, 2016 Meet and Confer
9 and Revised Briefing Schedule, March 10, 2016).

10 5. On March 16, following the hearing on Plaintiffs’ Motion for Class Certification, I
11 participated in an in-person meet and confer with Facebook’s counsel. At the end of this meeting,
12 the parties agreed that an impasse had been reached on all topics except for the letter brief
13 addressing “predictive coding.” Plaintiffs requested, and Facebook agreed, that Facebook would
14 provide its portions of three letter briefs, as well as its proposal regarding a compromise related to
15 its implementation of predictive coding, on March 23, 2016.

16 6. On March 23, 2016, rather than provide the draft brief revisions and compromise
17 proposal, Facebook instead requested additional time to draft its responses and proposal.

18 7. On April 5, 2016, Facebook provided its portion of the damages letter brief, but
19 did not provide its portion of the two outstanding letter briefs or its proposal regarding predictive
20 coding. On April 7, 2016, Facebook provided a proposed compromise regarding predictive
21 coding. (Email from J. Bisnar-Maute to D. Rudolph re Proposed Search Terms and Custodians,
22 April 7, 2016). The proposal consisted of an offer to search for a small subset of search terms
23 proposed by Plaintiffs for only 3 custodians (Facebook had identified over 30 custodians, to date).
24 *Id.* This same email also indicated that Facebook had “been looking into the databases raised in
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27 ¹ Email from H. Bates to C. Chorba re Prior Meet and Confers, March 8, 2016; Email from C.
28 Chorba to H. Bates re Prior Meet and Confers and Proposing March 16, 2016 Meet and Confer
and Revised Briefing Schedule, March 9, 2016; Email from H. Bates to C. Chorba re March 16,
2016 Meet and Confer and Revised Briefing Schedule, March 10, 2016.

1 [Plaintiffs'] draft joint letter brief," and that Facebook had follow-up questions regarding this
2 matter.

3 8. On April 11, 2016, I had a telephonic conversation with Facebook's counsel, Jeana
4 Bisnar-Maute, regarding the missing databases and configuration tables. In the conversation, Ms.
5 Bisnar-Maute indicated that Facebook was attempting to locate information related to the
6 databases sought by Plaintiffs, and that she would provide additional information by Friday, April
7 15, 2016. I sent an email to Ms. Bisnar-Maute on April 11, 2016, memorializing our conversation
8 and stating that Plaintiffs required a list of all databases and configuration tables that Facebook
9 would produce no later than April 15, 2016. (Email from D. Rudolph to J. Bisnar-Maute, April
10 11, 2016). To the extent that Facebook did not intend to produce the databases and configuration
11 tables sought in Plaintiffs' letter brief, I requested that Facebook provide its portion of that joint
12 letter brief by April 20, 2016. *Id.*

13 9. On April 13, 2016, I emailed Facebook's counsel concerning the proposed
14 predictive coding compromise sent on April 7. The email rejected the proposal and detailed the
15 deficiencies that made it unworkable for Plaintiffs (including the truncated list of search terms
16 and custodians). (Email from D. Rudolph to J. Bisnar-Maute, April 13, 2016). The email
17 requested that Facebook provide its portion of the predictive coding letter brief by April 20, 2016.
18 *Id.*

19 10. On April 15, 2016, Facebook replied that it "continue[d] to investigate potentially
20 responsive information about logs and databases," but that it could not "agree to the full scope of
21 production requested by Plaintiffs." (Email from J. Bisnar-Maute to D. Rudolph, April 15, 2016).

22 11. On April 18, 2016, I sent an email to Facebook's counsel reiterating Plaintiffs'
23 position regarding the need for letter briefing on predictive coding and database/configuration
24 tables. (Email from D. Rudolph to J. Bisnar-Maute, April 18, 2016). Additionally, I sought
25 confirmation from Facebook that it would be producing its portions of the three outstanding letter
26 briefs by close of business on April 20, 2016. *Id.* Alternatively, I sought Facebook's availability
27 for a telephonic conference with the Court, in the event that Facebook refused to provide its
28 portions of the briefs. *Id.* Facebook confirmed that it would provide its portions of the letter

1 briefs in a subsequent email on April 18, 2016. (Email from J. Bisnar-Maute to D. Rudolph,
2 April 18, 2016).

3 12. On April 20, 2016, Facebook provided its portions of the remaining three letter
4 briefs, stating that it “reserve[d] the right to make further edits to its sections based on changes
5 Plaintiffs make to their sections.” (Email from J. Bisnar-Maute to Plaintiffs’ Counsel, April 20,
6 2016). In each of the letter briefs, Facebook’s portion exceeded the page space allotted by the
7 Court (in some cases by 100 percent).

8 13. On May 4, 2016, Plaintiffs provided their revised portions of all four letter briefs.
9 These revisions included edits to the briefs to ensure that Plaintiffs’ portions were responsive to
10 Defendant’s written position and stayed within the space allotted under the Court’s page limit.
11 (Email from D. Rudolph to C. Chorba, J. Jessen, *et al.*, May 4, 2016). Plaintiffs requested that
12 Facebook provide versions of Facebook’s portions that complied with the Court’s 5-page limit, or
13 confirm that Facebook declined to abide the Court’s page limits, by close of business on May 10.

14 14. On May 10, 2016, Facebook’s counsel sent an email stating that it declined to
15 provide its revised portions of the four letter briefs. (Email from J. Jessen to D. Rudolph, May
16 10, 2016). Taking issue with Plaintiffs’ revisions to their briefs, Facebook indicated it would
17 seek a telephonic discovery conference with the Court “to fashion an alternative procedure that
18 would require Plaintiffs to file their requests and argument with the Court, and then require
19 Facebook to respond in a separate filing.” *Id.* Facebook alleged that Plaintiffs “made substantive
20 changes to the actual relief that they are seeking in many of the briefs.” Facebook also indicated
21 that, during the telephonic conference, it planned “to ask the Magistrate Judge to defer the merits
22 of discovery briefs until the District Court rules on the pending class certification motion.” *Id.*

23 15. On May 11, 2016, Plaintiffs proposed granting Facebook an additional two weeks
24 to revise its portions of the letter briefs in light of any perceived, substantive changes in any of the
25 briefs. (Email from D. Rudolph to J. Jessen, May 11, 2016).

26 16. Later that day, Facebook responded to and declined Plaintiffs’ offer, stating that
27 Facebook “need[ed] a new path going forward.” Facebook asserted that “(1) Plaintiffs have never
28 met and conferred on the new relief they now seek (such as a prohibition on predictive coding),

1 (2) there is no way for Facebook to recoup the significant costs it has already incurred by drafting
2 responses to the earlier, different requests, and (3) it provides Facebook no assurance that
3 Plaintiffs will not once again change the nature of the relief they are requesting after Facebook
4 incurs additional costs drafting new briefs.” (Email from J. Jessen to D. Rudolph, May 11, 2016).

5 17. Additionally, Facebook’s email stated that while “allegations regarding
6 ‘share_stats’ and Nectar logging are not pled in Plaintiffs’ operative Complaint and were only
7 raised for the first time in Plaintiffs’ Motion for Class Certification, in the interests of
8 compromise we will today be producing documents relating to these issues as discussed in the
9 January 14, 2016 Declaration of Alex Himel.” *Id.*

10 18. Subsequently, Facebook filed an “Errata” with the Court outlining its “discovery”
11 of an “error” in factual assertions made by its witnesses in support of its opposition to Class
12 Certification. (Dkt. 185). Concurrently with this filing, Facebook provided Plaintiffs with a
13 document that controverted factual assertions made by Facebook witnesses in its opposition brief.
14 (Email from J. Bisnar-Maute to Plaintiffs’ counsel, May 11, 2016). The metadata associated with
15 this document appears to indicate the document was created on May 10, 2016.

16 I declare under penalty of perjury that the foregoing is true and correct and that this
17 Declaration was signed in San Francisco, California, on May 12, 2016.

18 Dated: May 12, 2016

19 By: /s/ David T. Rudolph
David T. Rudolph

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23 **ATTESTATION**

24 I, Michael W. Sobol, am the ECF user whose identification and password are being used
25 to file this document. I hereby attest that David Rudolph has concurred in this filing.

26
27 Dated: May 12, 2016

/s/ Michael W. Sobol
Michael W. Sobol