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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

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

20 Plaintiff,

21 v.

22 FACEBOOK, INC.,

23 Defendant.

Case No. C 13-05996 PJH (MEJ)

**PLAINTIFFS' OBJECTIONS TO
FACEBOOK'S ERRATA TO EVIDENCE
FILED IN SUPPORT OF FACEBOOK'S
OPPOSITION TO PLAINTIFFS' MOTION
FOR CLASS CERTIFICATION**

1 **I. INTRODUCTION**

2 Plaintiffs object to Facebook’s filing of supplemental evidence and production of
3 documents after the briefing on class certification has been completed, the hearing held, and the
4 matter submitted. *See* Dkt. 185. Facebook’s “Errata” reveals that it provided inaccurate
5 representations to the Court and incorrect testimony from its key witness Alex Himel concerning
6 “facts” Facebook heavily relied upon in its opposition to class certification. The Errata itself is
7 based on a self-serving, partial disclosure of a relevant category of information about which
8 Facebook continues to refuse to produce documents and data, and is the subject of one of four
9 pending discovery disputes which the parties have met and conferred upon and which are the
10 subject of a Request for Telephonic Conference before Magistrate Judge James. As for the
11 document Facebook produces with its Errata, it appears to be a recently fashioned excerpt,
12 strategically tailored specifically for this litigation, and therefore does not even comprise a
13 reliable record of the company. Accordingly, Plaintiffs respectfully request that the Court strike
14 Facebook’s improper Errata and accompanying declaration.

15 **II. ARGUMENT**

16 **A. Facebook’s “Errata” is Based on a Document It Has Cherry Picked From a**
17 **Category of Documents It Has Refused to Produce.**

18 It is an elementary principle of discovery that a party cannot withhold an entire category
19 of documents from production, but then selectively cherry-pick information from that withheld
20 category to produce. That is precisely what Facebook has done here: it refuses to produce
21 “configuration tables,” *i.e.*, the information showing how Facebook stores and configures Private
22 Message content after it successfully intercepts it, yet it offers self-serving testimony about them.
23 It also offers a document which does not appear to be a document kept in the ordinary course of
24 business, and appears to reflect Facebook’s lawyer’s editing to address a contested issue presently
25 before the Court. *See* Declaration of David Rudolph in Support of Plaintiffs’ Request for
26 Telephonic Conference, filed May 12, 2016, ¶ 18 (metadata associated with document purporting
27 to demonstrate deletion of “share_stats” table indicates document was created on May 10, 2016).

28 Facebook’s inaccurate representations to the Court on this issue (which it now

1 acknowledges) highlight the importance of fulsome discovery in order to test the credibility and
2 veracity of witness statements.¹ The configuration tables from which Facebook cherry-picked this
3 document go to the heart of the parties' dispute regarding the ongoing wrongful interception of
4 users' Private Message content during the proposed class period. As described in Plaintiffs' class
5 certification reply briefing expert report and in their reply to Facebook's improper "objection to
6 reply evidence," Plaintiffs contend that Facebook has continued to log Private Message content
7 via the "scribeh_share_stats" functionality.² While Facebook contended (as it now admits,
8 incorrectly), that the "share_stats" Hive table was deleted prior to the class certification period, it
9 has produced *no evidence* suggesting that the "scribeh_share_stats" functionality does not log
10 data into a *different* Hive table. Facebook's selective production of a single entry from a
11 configuration table which purports to show that the "share_stats" table was deleted (and which in
12 any event has not been the subject of expert analysis or witness testimony) only highlights the
13 necessity of Facebook producing *all* of the Hive configuration data. Plaintiffs should have the
14 ability to obtain this entire category of documents, which they have been seeking for several
15 months.

16 **B. Facebook Continues to Withhold the Very Documents From Which it Now**
17 **Cherry-Picks Data for Production.**

18 Incredibly, Facebook *continues* to withhold production of the very data sources upon
19 which it now relies in its Errata. There is simply no excuse for this and Facebook's continued
20 refusal to produce such documents and data constitutes discovery misconduct. As Plaintiffs have
21 explained, Mr. Himel's assertion that the "share_stats" table was deleted prior to the class period
22 was a bald statement unsupported by any documentary evidence.³ During his deposition, Mr.

23
24 ¹ Apparently, Facebook's counsel's exhortation to the Court at the class certification hearing "to
25 carefully check the citations to the record that are provided if the Court's crediting anything in
26 [Plaintiffs'] briefing," would have been more productively directed at themselves. March 16,
27 2016 Hrg. Tr. at 101:1-15. *Cf.* Facebook's counsel statement at 87:16-20 ("And they spent a lot
of time on the share stats table. That was deleted in 2011 before the class period. So I don't even
know why we're talking about it. It was deleted before. It had nothing to do with this case. It was
deleted beforehand.").

² *See, e.g.,* Dkt. 178-5, at 6-7.

³ *See* Dkt. 172, at 7.

1 Himel revealed that he consulted *requested but unproduced* configuration data as the basis for
2 this (false) assertion.⁴ Following his deposition, Facebook agreed to produce this narrow sliver of
3 data—the data upon which Mr. Himel purported to rely—but refused to produce the larger data
4 set from which this sliver would be drawn. Plaintiffs rejected this proposal, and instead properly
5 insisted on Facebook producing the full data set from which this data was allegedly cherry-
6 picked. However, even this newly-produced entry from a larger table does not support Mr.
7 Himel’s former assertions as to the date of the deletion of the table, and there is simply no
8 legitimate dispute regarding whether Facebook should be required to produce the actual
9 documents and data from which this information was drawn. But not only does Facebook refuse
10 to produce this data, as described in Plaintiffs’ concurrently-filed Request for Telephonic
11 Conference, it is seeking to actively block Plaintiffs from even requesting that the Court compel
12 the production of this data.

13 **C. Facebook’s Conduct is Emblematic of The Discovery Issues in This Case.**

14 Throughout the course of this case, Facebook has repeatedly taken the position that the
15 production of key data, such as Facebook’s source code, was unnecessary, or that the production
16 of key witnesses and evidence was “impossible,” only to be eventually forced to do so by the
17 Court. Plaintiffs’ analysis of the source code that Facebook initially refused to produce as
18 “unnecessary” has revealed significant further information regarding Facebook’s interception and
19 use of Private Message content. Facebook’s position that the small subset of documents it has
20 chosen to produce, in addition to its employees’ self-serving (but in this case false) “sworn
21 testimony,” is sufficient disclosure can no longer be credited, and Facebook must produce the
22 documents and data needed to test the veracity of those assertions. Only then can the factual
23 disputes common to the class be resolved.

24 **III. CONCLUSION**

25 For the foregoing reasons, Plaintiffs respectfully request that the Court strike Facebook’s
26 improper Errata and accompanying declaration. Facebook’s conduct and admission demonstrate
27 that there are material facts in dispute which are common to the class and make certification

28 ⁴ See Himel Dep. Vol. 1, at 203:7-204:1.

1 appropriate, and that further discovery is necessary to determine the full extent of Facebook's
2 interception and use of Private Message content during the proposed class period.

3 Dated: May 12, 2016

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