

GIBSON, DUNN & CRUTCHER LLP
JOSHUA A. JESSEN, SBN 222831
JJessen@gibsondunn.com
JEANA BISNAR MAUTE, SBN 290573
JBisnarMaute@gibsondunn.com
PRIYANKA RAJAGOPALAN, SBN 278504
PRajagopalan@gibsondunn.com
ASHLEY M. ROGERS, SBN 286252
ARogers@gibsondunn.com
1881 Page Mill Road
Palo Alto, California 94304
Telephone: (650) 849-5300
Facsimile: (650) 849-5333

GIBSON, DUNN & CRUTCHER LLP
CHRISTOPHER CHORBA, SBN 216692
CChorba@gibsondunn.com
333 South Grand Avenue
Los Angeles, California 90071
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

Attorneys for Defendant
FACEBOOK, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

MATTHEW CAMPBELL and MICHAEL
HURLEY,

Plaintiffs,

v.

FACEBOOK, INC.,

Defendant.

Case No. C 13-05996 PJH (MEJ)

**DEFENDANT FACEBOOK, INC.'S
REQUEST FOR TELEPHONIC
DISCOVERY CONFERENCE**

Facebook respectfully requests a telephonic conference before May 23 with Magistrate Judge James to discuss two threshold issues that have arisen in connection with four discovery letter briefs that Plaintiffs have prepared over the last several months. Earlier this week, counsel for Facebook asked Plaintiffs' counsel to provide three dates and times during which they could be available for a telephonic discovery conference. Plaintiffs provided no dates, but instead—*without any advance notice to Facebook*—filed a 10-page brief and 6-page declaration this afternoon, the singular purpose of which was to smear Facebook. (Dkt. 186.) In response to that filing—which is replete with misstatements and misrepresentations—the Court ordered the parties to meet and confer (something Plaintiffs have repeatedly resisted doing) on May 23. (Dkt. 188.) In addition to this in-person meeting, Facebook also respectfully requests that the Court hold a telephonic conference sometime before May 23 (all parties are available on May 18, 19, and 20 (Dkt. 186)) to address the threshold issues discussed below.

The Court should hold a hearing before May 23 for two reasons:

First, although Facebook has agreed to submit its portions of the discovery briefs now, it has explained to Plaintiffs' counsel that further discovery motions practice is improper given that Plaintiffs' Motion for Class Certification is fully briefed, was argued on March 16, and is currently awaiting a decision. As Plaintiffs' counsel repeatedly has observed in this case, there is currently no discovery cut-off, and therefore no prejudice to Plaintiffs in deferring these issues until the Court rules on the pending class certification motion. Awaiting that ruling is particularly appropriate given the shifting nature of Plaintiffs' theories to date. As Judge Hamilton noted during the hearing, Plaintiffs' Motion for Class Certification focused on new practices not alleged in the complaint, and the proposed class definition was a "moving target." (Declaration of Jeana Bisnar Maute ("Maute Decl."), Ex. A (Tr. of Hr'g, Mar. 16, 2016) at 4:24-5:7, 17:13-18:5.)

Second, even if the Court does not defer these discovery disputes until there is a ruling on class certification, this Court should hold a discovery conference for the separate reason that Plaintiffs' counsel have repeatedly rewritten both the substance and requested relief in their letter briefs over an extended period, forcing Facebook to waste time and money responding to constantly-shifting targets. By way of example, Plaintiffs would have had Facebook rewrite its portions of

1 Plaintiffs’ evolving “predictive coding” brief no less than *three times*: In September 2015, Plaintiffs
2 met and conferred with Facebook regarding a dispute over the predictive coding process that
3 Facebook had proactively explained to Plaintiffs’ counsel over the preceding months. (Maute Decl.
4 ¶¶ 3-4.) In the first draft of their letter brief (served on October 2, 2015), Plaintiffs’ counsel
5 requested an order that Facebook “produce and identify the ‘seed’ or training documents that
6 Facebook [had] used to train its predictive coding software.” (*Id.* ¶ 5.) After Facebook spent
7 significant time redrafting its portion of the letter brief and preparing a detailed declaration from its
8 discovery analyst, Plaintiffs’ counsel simply abandoned the letter brief in October 2015. (*Id.* ¶ 6.)

9 But five months later, and shortly before the hearing on class certification (in early March
10 2016), and without any advance notice to Facebook, Plaintiffs resurrected the brief to seek *entirely*
11 *new relief*. (*Id.* ¶ 7.) Specifically, Plaintiffs’ revised letter brief demanded “that Facebook first
12 *conduct another keyword search . . . using both the previously agreed-upon search terms as well as*
13 *additional search terms proposed [by Plaintiffs]’* and “that Facebook *then re-train its predictive*
14 *coding software . . . and re-run the process of predictive coding . . .*” (*Id.* (emphases added).)
15 Plaintiffs had never met and conferred on this new relief, yet they demanded that Facebook respond
16 to the brief within one week (which was the week before the class certification hearing). (*Id.*)
17 Ultimately, and only after Facebook insisted that Plaintiffs comply with this Court’s Discovery
18 Standing Order, the parties met and conferred in person on March 16, 2016. (*Id.* ¶ 8.) Facebook
19 subsequently developed a proposed compromise to avoid this dispute. (*Id.*) After Plaintiffs’ counsel
20 rejected Facebook’s compromise as allegedly not a “good faith” attempt to address Plaintiffs’ brand
21 new demands, Facebook prepared its portion of the letter brief and provided it to Plaintiffs on April
22 20, 2016. (*Id.* ¶ 9.)

23 Two weeks later, Plaintiffs’ counsel sent Facebook a revised version of the letter brief. (*Id.*
24 ¶ 10.) Plaintiffs had substantially revised their portion of the brief, and, remarkably, they now
25 requested *entirely new relief*—specifically, that the Court order Facebook “to *abandon its predictive*
26 *coding process*” and “*produce all non-privileged documents containing any of the previously-*
27 *searched keywords in addition to those documents containing the [new] search terms [proposed by*
28

1 **Plaintiffs]**.¹ (*Id.* (emphasis added).) Plaintiffs never met and conferred with Facebook regarding
2 this newly requested-relief (which would preclude Facebook from utilizing predictive coding
3 altogether and further would not permit Facebook to withhold *irrelevant documents* from
4 production), and yet they demanded that Facebook provide a new response to Plaintiffs’ new letter
5 brief within four business days. (*Id.*)

6 In another stark example, Plaintiffs have continually revised their requests for certain database
7 information. Specifically, in October 2015, Plaintiffs requested several specific, extraordinarily large
8 databases and all “production databases necessary for the operation of Facebook’s source code.” (*Id.*
9 ¶ 11.) After Facebook responded to Plaintiffs’ request, Plaintiffs appeared to drop the issue last fall.
10 (*Id.*) Then, on March 4, 2016 (the same day they sent the second iteration of their letter brief
11 regarding predictive coding, as well as two other draft letter briefs), Plaintiffs sent a draft letter brief
12 requesting entirely different relief—specifically, all “**Configuration Table[s]** associated with the
13 operation of Facebook’s source code,” including (but not limited to) tables for the specific databases
14 they mentioned four months prior. (*Id.* ¶ 12 (emphasis added).) Facebook took the time to draft a
15 response to the new request, only to have Plaintiffs *once again* send a revised portion of the joint
16 letter brief with yet *another new request for relief*. (*Id.* ¶ 13.)

17 These are just two of many examples across several discovery letter briefs in this litigation.
18 In light of Plaintiffs’ conduct, and the considerable time and expense Facebook has incurred (and
19 wasted) as result of it, Facebook requests that the Court implement a new procedure for discovery
20 briefs in this case, whereby Plaintiffs’ counsel is required to meet and confer in person regarding the
21 relief they actually plan to request, and then file their portion of any letter brief with this Court, to
22 which Facebook would respond in seven days.² This process would avoid another “moving target” in
23

24 ¹ In the alternative, Plaintiffs’ new letter brief requested that the Court “compel Facebook: (1) to
25 implement a predictive coding protocol that ... does not use keyword culling; (2) to meet and confer
26 with Plaintiffs’ counsel to agree upon a standard for relevance that corresponds to the scope of this
27 case; (3) to apply that standard, through Equivio, to all custodians and document sources identified
28 thus far by Facebook; and (4) to produce documents responsive to Plaintiffs’ requests, as identified,
on a rolling basis.” (*Id.* ¶ 10.)

² Facebook reserves its right to request additional pages from the Court for letter briefs in which
Plaintiffs request relief that would be extremely costly and/or burdensome for Facebook—such as
where Plaintiffs request an order compelling Facebook to “re-do” predictive coding or to undertake
[Footnote continued on next page]

connection with the many discovery disputes that Plaintiffs' counsel continues to manufacture in this action.

Accordingly, Facebook respectfully requests a telephonic conference before May 23 (specifically, May 18, 19, or 20) to discuss these threshold issues.

Dated: May 12, 2016

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: _____ /s/
Christopher Chorba

Attorneys for Defendant FACEBOOK, INC.

[Footnote continued from previous page]

an overly broad, unduly burdensome, and disproportionate document production. *See, e.g.*, Fed. R. Civ. P. 26(b)(1) (discovery must be “proportional to the needs of the case”).