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FACEBOOK, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISON

MATTHEW CAMPBELL and MICHAEL HURLEY, Plaintiffs, v. FACEBOOK, INC., Defendant.	Case No. C 13-05996 PJH (MEJ) **DECLARATION OF JEANA BISNAR MAUTE IN SUPPORT OF FACEBOOK'S REQUEST FOR TELEPHONIC DISCOVERY CONFERENCE**

I, Jeana Bisnar Maute, declare as follows:

1. I am an attorney admitted to practice law before this Court. I am an associate in the law firm of Gibson, Dunn & Crutcher LLP, and I am one of the attorneys responsible for representing Defendant Facebook, Inc. ("Facebook") in the above-captioned action. I submit this declaration in support of Facebook's Request for a Discovery Teleconference. Unless otherwise stated, the following facts are within my personal knowledge and, if called and sworn as a witness, I could and would testify competently to these facts.

2. Attached as **Exhibit A** is a true and correct copy of relevant excerpts of the hearing on Plaintiffs' Motion for Class Certification before Judge Hamilton on March 16, 2016.

3. During the period of April through June 2015, the parties negotiated and ultimately agreed on custodians, date ranges, and search terms for identifying documents for Facebook's review and potential production. On June 19, 2015, given the large volume of documents these search terms had returned, Facebook informed Plaintiffs of its intention to utilize predictive coding to identify responsive documents faster and more efficiently. In July 2015, Facebook made its discovery analysts available for a telephonic conference with Plaintiffs' discovery consultant, and in August and September 2015 Facebook answered several letters from Plaintiffs' counsel. This correspondence contained dozens of detailed questions about the predictive coding process. During this period, Facebook worked extensively with its discovery experts to respond to all of Plaintiffs' detailed questions. Facebook performed the exact process disclosed to Plaintiffs.

4. In September 2015, unsatisfied, Plaintiffs requested that Facebook produce the "training set" documents that Facebook used to develop the predictive coding model. Facebook agreed to (and did) identify and produce the ***relevant*** documents in that set, but Facebook objected to producing ***irrelevant*** documents. The parties met and conferred on September 25, 2015 but were unable to resolve the dispute.

5. On October 2, 2015, Plaintiffs' counsel therefore sent Facebook the first draft of their portion of a letter brief requesting an order that Facebook "produce and identify the 'seed' or training documents that Facebook has used to train its predictive coding software.'"

6. Facebook revised its portion of the joint letter brief in light of Plaintiffs' revised portion, and provided its draft to Plaintiffs' counsel one week later, on October 9, 2015. Facebook also worked with its discovery analysts to prepare a declaration explaining the predictive coding process for the benefit of the Court. But after forcing Facebook to spend considerable time and money preparing these documents, Plaintiffs never even filed the joint letter brief and were silent on this issue for nearly five months.

7. Then, on March 4, 2016 (shortly before the hearing on Plaintiffs' Motion for Class Certification), Plaintiffs sent Facebook a new letter brief seeking entirely different relief. Specifically, the new letter brief requested "that Facebook first conduct another keyword search . . . using both the previously agreed-upon search terms as well as additional search terms proposed" by Plaintiffs, and "that Facebook then re-train its predictive coding software . . . and re-run the process of predictive coding . . . ." This was one of four letter briefs that Plaintiffs sent Facebook on March 4, 2016. Plaintiffs demanded that Facebook provide its portions for the joint letter briefs within *one week* (and less than a week before the class certification hearing). Plaintiffs had never substantively met and conferred with Facebook regarding Plaintiffs' requested relief.

8. At Facebook's insistence, the parties met and conferred in person after the hearing on class certification on March 16, 2016. Following the meet and confer, in an attempt to avoid wasteful motion practice and reach a compromise, Facebook developed a proposal for some additional discovery, including search terms, custodians, and date ranges for identifying additional documents for review. Facebook sent its proposal to Plaintiffs on April 7, 2016.

9. Plaintiffs rejected the proposal, claiming it was not a "good-faith" attempt to address their demands, and insisted that Facebook provide its portion of the predictive coding letter brief by April 20, 2016. Facebook encouraged Plaintiffs to provide a counter proposal, but Plaintiffs declined to do so, and Facebook sent its portion of the letter brief to Plaintiffs on April 20, 2016.

10. Two weeks later, on May 4, 2016, Plaintiffs' counsel sent Facebook a substantially revised version of their portion of the letter brief (as well as substantially revised versions of Plaintiffs' three other letter briefs). The revised letter brief included a request for entirely new relief:

that the Court order Facebook "to abandon its predictive coding process" and "produce all non-privileged documents containing any of the previously-searched keywords in addition to those documents containing the search terms" proposed by Plaintiffs, and, in the alternative, "compel Facebook: (1) to implement a predictive coding protocol that . . . does not use keyword culling; (2) to meet and confer with Plaintiffs' counsel to agree upon a standard for relevance that corresponds to the scope of this case; (3) to apply that standard, through Equivio, to all custodians and document sources identified thus far by Facebook; and (4) to produce documents responsive to Plaintiffs' requests, as identified, on a rolling basis." Plaintiffs demanded that Facebook revise its portion of this letter brief (and Plaintiffs' other letter briefs) within four business days (by May 10, 2016). Once again, Plaintiffs had not met and conferred with Facebook regarding this new requested relief.

11. The above is just one example of Plaintiffs changing the relief they seek and forcing Facebook to spend considerable time and money re-writing letter briefs. To provide another example, in October 2015, Plaintiffs requested that Facebook produce several specific, extraordinarily large databases and all "production databases necessary for the operation of Facebook's source code." Facebook responded to Plaintiffs' request, and the parties met and conferred in person on November 23, 2015, though Plaintiffs' refused to explain the basis for the request on the grounds that it was "work product." Plaintiffs then appeared to drop the request.

12. But as with their request for the "training documents" Facebook used for predictive coding, several months later, on March 4, 2016, Plaintiffs resurrected their request and sent Facebook a draft letter brief requesting different relief. This time, Plaintiffs' letter brief requested all "Configuration Table[s] associated with the operation of Facebook's source code," as well as "configuration tables" for the specific databases that Plaintiffs had mentioned four months earlier.

13. After Facebook's efforts to reach a compromise with Plaintiffs failed, Facebook sent its portions of the letter brief in response to Plaintiffs' new request on April 20, 2015. However, on May 4, 2016, Plaintiffs sent yet *another* revised version of their portion of the joint letter brief with yet *another* different request for relief. This time Plaintiffs demanded "configuration tables" for the named databases, as well as, "any other configuration table for any other database which contains

data derived from Private Message content."

14. Plaintiffs' counsel's conduct has repeatedly forced Facebook to waste both time and money in preparing, rewriting, and then rewriting again its portions of a constantly-shifting set of demands.

15. Counsel for the parties are available for a telephonic conference on May 18, 19, and 20.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I executed this Declaration in Palo Alto, California, on May 12, 2016.

/s/ Jeana Bisnar Maute
Jeana Bisnar Maute

ATTORNEY ATTESTATION

I, Christopher Chorba, attest that concurrence in the filing of this Declaration of Jeana Bisnar Maute has been obtained from the signatory. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 12th day of May, 2016, in Los Angeles, California.

Dated: May 12, 2016

/s/ Christopher Chorba
Christopher Chorba

Exhibit A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – OAKLAND DIVISION

HONORABLE PHYLLIS J. HAMILTON, U.S. DISTRICT JUDGE

– – –

MATTHEW CAMPBELL and MICHAEL HURLEY,	)	
	)	
PLAINTIFFS,	)	**Case No.**
	)	
vs.	)	**C 13-05996-PJH**
	)	
FACEBOOK, INC.,	)	
	)	
DEFENDANT.	)	
_____	)	

REPORTER'S TRANSCRIPT OF
MOTION FOR CLASS CERTIFICATION
WEDNESDAY, MARCH 16, 2016
OAKLAND, CALIFORNIA

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MS. RAJAGOPALAN: Good morning your Honor. Priyanka Rajagopalan on behalf of defendant Facebook.

THE COURT: Good morning. All right.

This matter is on for a hearing on the motion for class certification filed by plaintiffs. I'll simply say that I've read all your briefs, but I have about six or seven or eight Banker's boxes worth of materials, not even counting all of the sealing motions and materials, and I haven't even begun to get through all of the paper that has been submitted on this case, but I have read your briefs.

I'd like to give you an opportunity, obviously, to argue or emphasize any aspects of the moving papers that have -- that you've already filed, but we have plenty of time this morning if you wish to be heard on other subjects.

MR. SOBOL: Your Honor, it's our motion. We would proceed first if it's okay with the Court?

THE COURT: Yes.

MR. SOBOL: Okay. I'll try to give you -- I appreciate the volume of the record here, your Honor, and I think part of what I will try to address is an overview, both of the practices at issue as pled and as now revealed during our rather extensive discovery, and how the record shows that this case is now appropriate for class certification.

THE COURT: Okay. The practices as pled, your very first statement raises an issue.

It's not clear to me that the three uses of the communications that are at issue, it's not clear to me that those three uses are indeed pled in the complaint.

The issues surrounding the increase in the like counts is what's pled in the complaint, but the other two uses are not clearly pled in the complaint. If they are implicitly pled in the complaint, you're going to have to point it out to me.

MR. SOBOL: Very well, your Honor.

THE COURT: Okay.

MR. SOBOL: If -- if you recall, your Honor, at the -- at the motion to dismiss stage, we were looking at the allegations and one of the things that we talked about was the indicia of Facebook's interceptions of private message content. And that indicia was, in fact, its practice of incrementing a like count every time a user sent a private message with a URL attached.

And it raised the issue, I think for the Court at that hearing, and it raised the issue for the plaintiffs, and I will point out that in your order, you noted that there was allegations of a general nature that there were interceptions of private message content of which the like counter was simply an indicia, an end offshoot use of.

And it raised the concern at the motion to dismiss as to well, what exactly is Facebook doing with these private messages?

This is the process. This is the internal working. This is what happens. This is the common proof. It's a big case, right? There's a lot of people, but the proof is right here. The proof is not big. The proof is about what -- the focus on the defendant, and the commonality is explained.

The way that we have defined our class, I think from this also shows that it is ascertainable. One of the issues that Facebook spent some time trying to knock us down on saying we can't get over it. Well, it is ascertainable.

What we've inserted in our class definition is -- different from our complaint, is a technical improvement offered for precision and to knock out a bunch of issues --

THE COURT: Don't you think that parenthetical that you added to your class definition should be in the complaint?

MR. SOBOL: I don't think that we could possibly have known, your Honor.

THE COURT: I know. But at some point, I mean you're seeking to certify a class that is defined slightly differently than the class that is asserted in the complaint.

MR. SOBOL: Yes, your Honor.

THE COURT: I understand that discovery has resulted in your discovery of the other uses, in addition to the use that you were aware of at the time that you brought the complaint. In addition, it's given you a way -- the discovery has given you a way to ascertain the additional details that

are needed to make sure that the class can be ascertained, but at some point doesn't the complaint have to be amended to add that?

Otherwise, isn't it a moving target if every motion that is filed, there's something different in the class definition?

MR. SOBOL: Well, I might take issue with the notion that it's a moving target, your Honor. I think it's -- I think it's -- in my experience, limited as it is, it's par for the course to set out some general allegations, learn something from discovery, and not present a moving target, but a very fixed definition at the motion stage. And it's really -- I mean, it's a technical improvement. It says -- that parenthetical with the URL attachment, what it's saying is, well, what we found out is that these interceptions and uses don't occur unless you hit send and the source code says voila, you know, we're going to take this URL attachment and we're going to create a specific kind of EntShare out of it.

You know, we would not -- I don't see that as a moving target. I see -- I see that as, you know, informing a -- an informed decision at the time you bring a motion to do that.

Now, it's about being sent. It's about this message being sent, because right -- obviously that's also within the class definition because you can't have an interception if it's not being sent. So what the source code tells us is every time it's sent that -- with an attachment, this will happen. This

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Victoria L. Valine, CSR 3036, RMR, CRR

THURSDAY, MARCH 17, 2016