IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA, *Plaintiff,* v. FACEBOOK, INC., *Defendant.*	Civil Action No. 2018 CA 008715 B Judge Fern Flanagan Saddler Next Event: Close of Fact Discovery Date: December 17, 2021

THE DISTRICT OF COLUMBIA'S OPPOSED
MOTION TO EXTEND THE SCHEDULING ORDER

Pursuant to SCR-Civil 16(b)(7), Plaintiff District of Columbia ("District"), by its Office of the Attorney General ("OAG"), moves for an order extending the deadlines in the Scheduling Order dated August 5, 2021.[1] The current close of fact discovery is December 17, 2021. But despite the District's diligence—including beginning depositions in earnest while Facebook was still dragging out document productions, filing motions to compel where necessary, and continuing to press Facebook to comply with its discovery obligations at every turn—fact discovery is not complete. Facebook has a number of outstanding discovery obligations, including completing its document productions. An extension of discovery is needed now so that the District can, based on recently produced documents and information yet to be provided by Facebook, take further depositions, raise issues of privilege, and issue follow-up discovery requests—as Facebook has stonewalled the District's earlier efforts.

[1] Pursuant to SCR-Civil 16(b)(7)(A), the District appends to this Motion: (i) a copy of the current Scheduling Order (Exh. A), (ii) a Proposed Revised Scheduling Order (Exh. B), (iii) a certificate regarding discovery (Exh. C), and (iv) a discovery plan (Exh. D).

Facebook has indicated it opposes this motion. But its reasons have nothing to do with discovery itself. Instead, Facebook is motivated by the presently-pending motion to amend the complaint to add Facebook CEO Mark Zuckerberg as a defendant, which Facebook opposes on the ground that the amendment is supposedly late, and would somehow be prejudicial to Facebook. But as explained below, the underlying premise that the District is "late" in the game is completely manufactured. Facebook's "rolling" production of documents relating to the Parties' agreed search terms and custodians—which started in October 2020 and has occurred at a frankly glacial pace—is not complete.[2] Indeed, Facebook has only recently begun claiming that its document production, on requests propounded nearly *three* years ago, is *almost* complete. But once that concludes, the District—as this Court very recently recognized—is allowed to propound targeted discovery requests in response to deficiencies in Facebook's productions. (*See* December 6, 2021 Order on District's Motion to Compel Facebook to Produce Documents, attached as Exhibit E-1.)[3] Additionally, Facebook was recently ordered to produce a privilege log (which it has so far flatly refused to do) by January 20, 2022. (*See* December 6, 2021 Motion to Compel Facebook to Produce a Privilege Log, attached as Exhibit E-2.) The District will of course be entitled to probe Facebook's assertions of privilege, and seek the production of documents improperly withheld. Even beyond those obvious issues, the District has raised enormous deficiencies in Facebook's document production to date, to which Facebook gave no answer until four days ago on December 6, 2021, and even now is completely refusing to

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[2] While Facebook has made several productions before October 2020, these productions largely included documents from the District's pre-litigation investigation.

[3] All references to E-1 through E-26 refer to exhibits attached as a single appendix to the Declaration of J. Eli Wade-Scott (Exhibit E). The appendix is consecutively paginated, and pincites refer to the consecutively-paginated page numbers.

engage. (*See* December 6, 2021 Facebook's Letter to District, attached as Exhibit E-3.) And of course, depositions are not complete. In short, Facebook's attempts to persuade this Court to let it shut discovery down in this action now lack any basis in the law. It is also inconsistent with allowing the District a full opportunity to develop its case on behalf of the hundreds of thousands of District consumers who were affected by Facebook's wrongdoing.

Discovery should be extended. The District will file every motion, push every request, and take every deposition necessary to complete fact discovery in six months—with or without Facebook's cooperation, which it has now made clear it has no intention of providing. The District's motion should accordingly be granted, and discovery extended as set forth below.

Background

The District filed this lawsuit on December 19, 2018, alleging that Facebook violated the Consumer Protection Procedures Act ("CPPA") by misleading consumers in the District of Columbia regarding the security of personal information entrusted to Facebook. Facebook's publicly available policies promised that the company would protect user data. (Compl. ¶¶ 5, 46.) But, the District alleges, Facebook allowed developers to access and collect vast troves of personal consumer data, without proper oversight or enforcement to ensure that data was used properly. (*Id.* ¶¶ 18-19.) Facebook's lax oversight led to one of those developers taking more than 70 million users' information from the Platform and handing that data over to Cambridge Analytica. (*Id.* ¶ 2.)

Given the importance of the claims at stake—which implicate the rights of hundreds of thousands of District residents—the District has moved quickly in discovery since litigation commenced. The District launched its first set of discovery requests just three weeks after filing the Complaint, on January 9, 2019. (*See* District's First Requests For Production of Documents

("First Requests"), attached as Exhibit E-4.) But the following describes how actually getting *responses* to those requests has been a project spanning nearly two years, and the District cannot even be sure that document production in response to those initial requests is complete as of today's filing. As discovery developed, the District issued additional requests as well, to which Facebook has similarly drawn out its responses. Facebook cannot be rewarded for this approach, and discovery should be extended.

A. Facebook dragged out negotiations over search terms and custodians for nearly a year.

Although the District's first requests were issued in early January 2019, it was not until two months after the Court's denial of Facebook's motion to dismiss, on July 31, 2019, that Facebook responded to those Requests, and then largely only to lodge objections. The Parties then engaged in numerous meet and confers—during which Facebook further obstructed discovery efforts—before the District proposed search terms and custodians on December 19, 2019 to streamline discussions. (*See* December 19, 2019 District's Letter to Facebook, attached as Exhibit E-5.) Facebook first refused to negotiate on the District's proposed search terms until a custodian list was finalized, for which it initially advocated for only eight document custodians despite the massive number of people across Facebook that worked on the technology at issue in this case, or on Facebook's response to the Cambridge Analytica incident. (*See* January 24, 2020 Facebook's Letter to District attached as Exhibit E-6; *see also* April 28, 2020 Facebook's Letter to District at 1-2, 4, attached as Exhibit E-7.) Negotiations over whose files would be searched and based on what search terms were ongoing for *eight months* before the District was eventually forced to file a motion to compel on July 17, 2020. (*See* Motion to Compel Facebook to Designate Document Custodians and Provide Search Terms, attached as Exhibit E-8.)

B. Facebook finally begins producing ESI discovery but refuses to continue negotiating additional search terms and resists producing a hit report. [4]

On September 9, 2020, *twenty months* after the District issued its first document requests, immediately following the hearing on the District's motion to compel, the District acquiesced to Facebook's proposed search terms in an effort to finally begin receiving productions of electronically stored information ("ESI") (i.e., electronic documents such as emails and other documents discovered using search terms and specific custodians) from Facebook—due in large part to Facebook's oral representation at the hearing that it stood "ready to begin its review and production of the documents from those 21 custodians" to which the Parties had so far agreed. (September 9, 2020 H'g ("Tr") at 31:7–10, attached as Exhibit E-9; *see also* September 9, 2020 District's Letter to Facebook, attached as Exhibit E-10.) The District was clear, however, that any production of documents would not foreclose the District from seeking additional search terms or custodians following its review of documents produced—the Parties simply needed to start the discovery process. (*See* Exh. E-10 at 2.) Facebook finally began rolling productions of ESI but doubled down on its refusal to negotiate further search terms or produce *any* substantive ESI beyond its proposed terms and flatly refused to provide hit reports identifying the scope of potential responsive documents if Facebook were to expand its search terms—a routine part of ESI discovery in cases like this one—by calling it a "waste of the parties' time and resources." (*See* September 15, 2020 Facebook's letter to District at 1-2, attached as Exhibit E-11.)

Facebook asserted in its opposition to the District's motion to compel that its "preliminary" estimate of the number of documents produced by the District's search terms was

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[4] Search term hit reports provide information about the number of unique documents generated by search terms across a database. Accordingly, hit reports provide helpful data on whether a search term is generating a burdensome or appropriate number of document results.

2.5 *million* documents. (Facebook's Response to District's Motion to Compel at 3, attached as Exhibit E-12.) But as Facebook slowly began actually producing those documents over the course of the last year—"rolling" out selections of a few thousand documents every month or so—they have produced much less than that, only 57,792 documents since October 2020. The District continued negotiating modifications to Facebook's proposed search terms, but Facebook continued dragging its feet and refusing to provide a hit report. Over two years after discovery was first propounded, Facebook eventually relented and produced a hit report on March 15, 2021, which unsurprisingly accelerated negotiations and allowed the Parties to agree on search terms within ten weeks. (*See* March 15, 2021 Facebook's Letter to District at App'x A, attached as Exhibit E-13; *see also* May 24, 2021 District's Letter to Facebook, attached as Exhibit E-14.)

C. The District begins taking depositions to move the case forward, despite document production being incomplete.

Though document production was far from complete, the District took the unusual step of beginning to take depositions in earnest in order to keep the case moving. But those efforts similarly were met with opposition: Facebook attempted to warn the District off from even beginning depositions until document production was finished by noting that Facebook would refuse to reopen depositions after any subsequent production of documents. (*See* February 1, 2021 Email from Amanda Aycock to Eli Wade-Scott ("To the extent that the District elects to proceed with depositions prior to Facebook's document productions being completed, please be advised that Facebook will not agree to reopen these depositions at a later date based on subsequently produced documents."), attached as Exhibit E-15.)

If the District had hewed to Facebook's desired path, not a single deposition in this action would have been taken so far, rather than the **nine** the District has completed. However, depositions are far from complete in this case and Facebook has also long been aware that the

District would seek depositions beyond the presumptive ten allowed by SCR-Civil 30(a)(2)(A)(i) given the complexity of the case,[5] but this issue cannot be resolved by December 17, nor is it reasonable to ask the District to *complete* depositions when document production is not even complete.[6] The District's pressing forward with some testimonial discovery despite Facebook's slow-rolling of document discovery demonstrates an extraordinary level of commitment to moving the case forward; Facebook's efforts to spin that in favor of *closing* fact discovery should be rejected.

D. The District propounds additional discovery, but those requests are similarly opposed, further delaying the production of responsive documents.

Meanwhile, as the District has identified new gaps and areas of inquiry from its review of produced documents, the District issued additional discovery requests. But these requests were met with even more aggressive stonewalling—forcing the District to file motions to compel which were only just resolved and in orders that themselves make clear that fact discovery is not complete. For example, search terms weren't finalized for the District's Third or Fourth Document Requests until April 23, 2021—more than eleven months after the District propounded its Third Requests, and seven months after its Fourth Requests. (*See* April 23, 2021 Facebook's Letter to District, attached as Exhibit E-17.) And even once the Parties agreed on

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[5] In the parallel private federal multidistrict litigation ("MDL"), *In re Facebook, Inc. Consumer Privacy User Profile Litigation*, No. 3:18-MD-02843-VC-JSC (N.D. Cal.) (the "Facebook MDL"), the final number of depositions is not yet set but will exceed twenty-five. (*See* Dkt. 755, Special Master's Order Establishing Deposition Scheduling Protocol, attached hereto as Exhibit 16.)

[6] Without Facebook's cooperation, the District will need to file a motion for leave to conduct additional depositions, but it cannot reasonably do so before completing its review of Facebook's document productions and assessing what remaining depositions are necessary. *See* SCR-Civil 26(b)(2)(C)(i) (noting the court may grant depositions beyond the ten permitted under Rule 30(a) as long as the requested depositions are not "unreasonably cumulative or duplicative.").

search terms, Facebook did not begin producing documents relevant to these requests for another month-and-a half. (*See id.* at 1; *see also* June 7, 2021 Facebook's Letter to District (the next production after the April 23, 2021 Facebook Letter), attached as Exhibit E-18.) Facebook's production in response to these requests is, similarly, not complete.

Facebook has also made substantial objections to the District's pending Second and Fifth Requests, refusing to produce documents in response to some or all of the District's requests. The District's Second Requests concern documents related to Facebook's 2018 App Audit Investigation ("ADI"), in which 200 Facebook applications were apparently suspended for misusing consumer data. (*See* District's Second Requests for Production of Documents, attached as Exhibit E-19; *see* August 8, 2019 District's Letter to Facebook, attached as Exhibit E-20.) The District has been actively negotiating with Facebook regarding these Second Requests, but Facebook recently confirmed that it will not produce further documents unless compelled to do so, meaning this discovery will be the subject of additional motions practice. (*See* November 22, 2021 Email from Eli Wade-Scott to Chelsea Mae Thomas, attached as Exhibit E-21.) The District's Fifth Requests seek documents from the teams responsible for business decisions at Facebook, which Facebook flatly refused to produce despite the efforts of the District to meet and confer on them. On August 11, 2021 the District filed a motion to compel after Facebook refused to meaningfully engage. (*See* District's Motion to Compel Facebook to Produce Documents, attached as Exhibit E-22.) The Court denied that motion without prejudice on December 6, 2021, allowing the District to serve more "narrowed and targeted requests for production" on these requests—which the District intends to do. (*See* Exh. E-1.) However, the very requests contemplated by the Court's December 6 order are impossible without an extension to the schedule. *See* SCR-Civil 16(b)(5)(A)(i) ("No interrogatories, requests for

admission, requests for production or inspection, or motions for physical or mental examinations may be served less than 30 days before the date set for the end of discovery.").

If the dilatory pace of Facebook's document discovery in this case seems extraordinary, it is: in the parallel multidistrict litigation concerning similar issues, which Facebook agrees "implicates nearly identical discovery," the Court has appointed a special master primarily to move document production forward. (*See* Facebook's Opp. To Mot. for Prot. Order at 1 (Sept. 27, 2019), attached as Exhibit E-23; *see also* Facebook MDL, Dkt. 709, Order Appointing Special Discovery Master.) Since his appointment in August 2021, the Special Master has resolved at least seven different discovery disputes. *See* Dkt. 742, Order Regarding the Use of TAR; Dkt. 745, Order Regarding Motion to Compel Mark Zuckerberg Notebooks; Dkt. 746, Supplemental Order Regarding the Use of TAR; Dkt. 753, Order Regarding Motion to Compel Mark Zuckerberg and Sheryl Sandberg as Document Custodians; Exh. E-16; Dkt. 761-3, Order Regarding Outstanding ADI Issues; Dkt. 762-3, Order re: Business Partners; and Dkt. 763-3, Order re: Facebook's Motion for Protective Order Against Production of API Call Logs. It's also worth noting that the Special Master is the third court-appointed individual in the Facebook MDL to specifically handle discovery issues. The Court first appointed a magistrate judge for discovery (Dkt. 390, Pretrial Order 37: Referral to Magistrate Judge for Discovery). There, the magistrate judge became increasingly frustrated with the parties for not making progress resolving disputes—and specifically with Facebook for delaying the production of deposition transcripts over Facebook's insistence on redacting them to hide supposedly irrelevant information. *See* Dkt. 635, Transcript of Proceedings held on Mar. 4, 2021 at 10-11. The parties next hired a discovery mediator, but mediation broke down in June 2021. *See* Dkt. 688,

Plaintiffs' Status Update. At that time, Plaintiffs advocated for the appointment of a Special Master "[g]iven the number of unresolved issues" regarding discovery. *Id.* at 1.

Hoping to avoid the need to raise a similar volume of discovery disputes in this parallel case, the District waited amid Facebook's promises that more discovery was coming, to raise similar disputes and to take important depositions—including Facebook's CEO Mark Zuckerberg, Privacy and Policy Manager Allison Hendrix. But now, with productions still incomplete, and with the District still needing to challenge Facebook's claims of privilege, complete depositions, and evaluate production deficiencies, it is clear that this case requires an extension of the scheduling order. It is also clear this Court will need to weigh in, and timely resolve, additional discovery disputes, so that basic fact discovery can be completed.[7]

Legal Standard

The Court may modify the scheduling order, including extending discovery deadlines, "on a showing of good cause." SCR-Civil 16(b)(7)(A). Such a decision is "committed to the trial court's discretion." *Briggs v. Israel Baptist Church*, 933 A.2d 301, 303 (D.C. 2007). Good cause may be established "if the party seeking relief can show that the deadlines cannot reasonably be met despite the party's diligence." *Watt v. All Clear Bus. Sols., LLC*, 840 F. Supp. 2d 324, 326 (D.D.C. 2012).

Argument

As discussed above, the District has attempted to move fact discovery in this important case forward diligently. But despite those efforts, discovery is not complete. Significant

[7] Both Parties in this action have recognized the need for additional Court oversight to move discovery towards a place of completion. The District moved, unopposed, for assignment to the Civil 1 complex case docket on December 22, 2020, which the Court denied on February 9, 2021.

discovery remains outstanding—both document production and substantial oral discovery—and a number of discovery disputes remain that will likely need to be presented to the Court. Indeed, the plaintiffs in the parallel Facebook MDL are facing similar delays, and an argument from Facebook in that case that discovery was somehow complete would surely fall as flat as it should here. In the Facebook MDL, depositions are being phased—as they typically are—to start only *after* the production of documents, which Facebook has been ordered to substantially complete by January 31, 2022. *See* Facebook MDL, Dkt. 706; Exh. E-16. Facebook's about-face in this case to claim discovery is complete—in order to support a baseless argument on the motion to amend—should not be countenanced. The discovery period must be extended, for the reasons below.

First, with only a week remaining until the current close of fact discovery, Facebook still hasn't completed its production of documents. Unless the discovery period is extended, Facebook will strip the District of an opportunity to make final determinations about deficiencies in Facebook's productions and identify any further fact-specific needs in the case. Based on Facebook's productions to date, the District has identified several striking deficiencies that remain in dispute and are the subject of a deficiency letter sent to Facebook on November 9, 2021. (*See* November 9, 2021 District's Letter to Facebook, attached as Exhibit E-24.) Chief among these deficiencies is that Facebook has produced a shockingly low number of documents for certain agreed-upon search terms and custodians. For example, there are *just nine* custodial documents for Facebook's former Director of Product Management from 2010-2015. These deficiencies implicate potentially thousands of documents that Facebook is currently withholding (or has not yet produced) but are relevant to the case and responsive to the District's requests. But as is par for the course, Facebook just now responded (a month later) refusing to engage with

any of these deficiencies because it is supposedly too "late" to raise deficiencies—with a production that is just now *nearly* complete. (*See* Exh. E-3.)[8] To make this point clear: if the schedule is not extended, the District will lose access to the most basic discovery practice—reviewing a full production for deficiencies and, if necessary, bringing those deficiencies before the Court. Facebook cannot be allowed to simply "run out the clock" and avoid its discovery obligations.

Second, without the benefit of receiving and reviewing completed document productions, the District is unable to assess whether additional document custodians are warranted. Ending discovery before Facebook has even finished producing documents responsive to requests issued *years* ago is facially improper, but it is also at odds with the Court's own guidance to the Parties: this Court specifically built in time for the District to review Facebook's documents *after* it completed production to enable the District to assess whether it is necessary to add four Facebook executives as additional custodians. (*See* January 19, 2021 Order (denying without prejudice the District's Motion to Compel Custodians and holding the District "should first review the documents to be produced for the already agreed upon twenty-one custodians before requesting the addition of the Facebook Executives[.]"), attached as Exhibit E-25.) The Court has similarly given the District leave to issue additional targeted document requests—which presumably must be justified by gaps in Facebook's existing production (which the District has not had the opportunity to fully assess). (*See* Exh. E-1.) Facebook has not only failed to complete productions from the initial 21 custodians the Court ordered searched, but also flatly rejected all attempts to add any other document custodians—even if additional custodians are necessary to adequately respond to subsequent discovery requests. Instead of working with the District,

[8] Facebook's refusal to engage with discovery deficiencies is ironic given that Facebook issued its own deficiency letter concerning the District's discovery responses on November 24, 2021.

Facebook has used the Court's January 19, 2021 Order to dodge adding any custodians beyond the 21 initially agreed to by the District (to which the District only agreed to get discovery in this case finally started). Facebook's opposition comes notwithstanding the fact that the Facebook MDL has at least 81 custodians. *See* Facebook MDL, Dkt. 599, Joint Status Update at 6. Moreover, Facebook's newly-revealed view that discovery is complete is contrary to positions it has taken throughout the litigation on this issue: it has said that it would only consider the need to add additional document custodians "following document productions from these 21 custodians." (*See, e.g.*, June 3, 2020 Facebook's Letter to District at 1, attached as Exhibit E-26.) Without an extension to the discovery deadline, Facebook will have evaded the Court's ruling through repeated production delays, backtracked on the discovery incrementalism it insisted on throughout the case, and blocked the District from re-asserting this issue when informed by all of the discovery it is entitled to.

Third, Facebook has, throughout the entire pendency of this case, flatly refused to produce a privilege log. The District was ultimately forced to file a motion to compel, which this Court granted, ordering Facebook to produce a privilege log within forty-five days. (*See* Exh. E-2.) Given the number of documents produced so far—as compared to Facebook's predictions—it is likely that Facebook has withheld hundreds of thousands of documents under an assertion of privilege, which the District is likely to challenge. Because Facebook has yet to produce a substantive privilege log in the case and does not have to do so until late in January 2022, it is impossible on the current schedule to determine the completeness of Facebook's document production or to assess the appropriateness of any privilege claims. At the eve of the current fact discovery deadline, Facebook has left no time for the District to address any disputes—foreclosing the District's ability to file any motions to compel documents withheld as privileged,

and without having to further impose on the Court's time to ask for leave. *See* SCR-Civil 16(b)(5)(E) ("Close of Discovery. After this date, no deposition or other discovery may be had, nor motion relating to discovery filed, except by leave of court on a showing of good cause.").

Fourth, depositions in the case are far from complete. As discussed above, the District attempted to negotiate with Facebook for some time about the appropriate number of depositions in the case. When it became clear that the Parties were at an impasse on this point, the District's intention was to review Facebook's productions and identify with particularity all further deponents that would be needed in the case—that is, fleshing out the grounds for an opposed motion, as it seemed that one would be necessary. *See* SCR-Civil 30(a)(2) ("[T]he court must grant leave to the extent consistent with Rule 26(b)(1) and (2)."); *see also* SCR-Civil 26(b)(2)(C)(i) (noting that limiting discovery principles must be assessed include whether "the discovery sought is unreasonably cumulative or duplicative[.]"). But it is not possible to make those decisions when document productions aren't complete, and where Facebook has said it would refuse to reopen depositions where relevant documents are later produced. Now that Facebook has indicated it will oppose this motion to extend, it has secured a massive tactical advantage: it forced the District to prematurely notice essential, apex depositions in the case (Mark Zuckerberg, Allison Hendrix, and a 30(b)(6) witness). The District only started taking depositions in this case to move litigation forward, and Facebook is now refusing to leave the District any opportunity to take depositions once discovery productions are actually complete.

In light of the issues that remain outstanding and Facebook's deliberate delay of the discovery process in this case, good cause exists to extend the Scheduling Order in this action. And given Facebook's view that discovery should not continue, the District intends to ask for a deadline that it can keep—with or without Facebook's cooperation. In light of extensive issues

remaining to be determined in the case, however, the District's position is that the deadline should be extended by at least six months to allow for sufficient time to resolve the myriad discovery disputes remaining, review all of Facebook's productions (including those documents that are still forthcoming and any additional documents the District may seek after its complete review of Facebook's productions), finish conducting additional depositions (both those currently noticed and additional deponents as the Court allows), resolve any disputes caused by that significant process, and review Facebook's forthcoming privilege log. The District does not intend to seek a further extension of the Scheduling Order particularly if Facebook lives by its newfound discovery urgency and the Court can timely resolve forthcoming discovery disputes.

The District therefore proposes that the Court extend the Scheduling Order as set forth below:

Event	Current Date	Proposed Revised Date
Close of Fact Discovery	December 17, 2021	June 17, 2021
Close of Expert Discovery	March 17, 2021	September 16, 2022
Filing Motions	May 17, 2022	November 17, 2022
Dispositive Motions Decided	July 25, 2022	January 25, 2023
Mediation	September 12, 2022 at 11:00 am	March 13, 2023 at 11:00 am
Pretrial Conference	October 12, 2022 at 9:30 am	April 12, 2023 at 9:30 am

Conclusion

For the foregoing reasons, and for good cause shown, the District respectfully requests that the Court grant its motion to extend discovery deadlines by six months and enter the attached Proposed Revised Scheduling Order.

Dated: December 10, 2021

Respectfully submitted,

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IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA, *Plaintiff*, *v.* FACEBOOK, INC., *Defendant*.	Civil Action No. 2018 CA 008715 B Judge Fern Flanagan Saddler Next Event: Close of Fact Discovery Date: December 17, 2021

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT Of THE DISTRICT OF COLUMBIA'S OPPOSED MOTION TO EXTEND THE SCHEDULING ORDER

In support of District of Columbia's Opposed Motion to Extend the Scheduling Order, the District submits the following points and authorities:

1. SCR-Civil 26(b);
2. SCR-Civil 30(a);
3. *In re Facebook, Inc. Consumer Privacy User Profile Litigation*, No. 3:18-MD-02843-VC-JSC (N.D. Cal.);
4. SCR-Civil 16(b);
5. *Briggs v. Israel Baptist Church*, 933 A.2d 301 (D.C. 2007);
6. *Watt v. All Clear Bus. Sols., LLC*, 840 F. Supp. 2d 324 (D.D.C. 2012);
7. The inherent power of the Court; and
8. The entire record.

Respectfully submitted,

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Dated: December 10, 2021

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Attorneys for Plaintiff District of Columbia

RULE 12-I(a) CERTIFICATION

Counsel for the District of Columbia contacted counsel for Defendant to obtain consent to relief requested in this Motion. Counsel for Defendant opposes the relief requests in this Motion.

/s/ J. Eli Wade-Scott
J. Eli Wade-Scott
Attorney for the District of Columbia

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 10, 2021, I caused the foregoing to be served on all counsel of record via the Court's e-filing service.

/s/ J. Eli Wade-Scott
J. Eli Wade-Scott
Attorney for the District of Columbia

PUBLIC FILING

EXHIBIT A

PUBLIC FILING

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA,	)	
Plaintiff,	)	**Case Number: 2018 CA 8715 B**
v.	)	
	)	
FACEBOOK, INC.,	)	**Judge Fern Flanagan Saddler**
Defendant.	)	
	)	

ORDER GRANTING JOINT MOTION TO EXTEND SCHEDULING ORDER

Upon consideration of the parties' Joint Motion to Extend Scheduling Order; the entire record herein; and for good cause shown; it is this 5th day of August 2021, hereby

ORDERED that the parties' Joint Motion to Extend Scheduling Order is **GRANTED**. It is

FURTHER ORDERED that the Scheduling Order is modified as follows:

Close of Discovery	December 17, 2021
Close of Expert Discovery	March 17, 2022
Filing Motions	May 17, 2022
Dispositive Motions Decided	July 25, 2022
Mediation	**September 13, 2022 at 11:00 a.m.**
Pretrial Conference	**October 12, 2022 at 9:30 a.m.**

Fern Flanagan Saddler

FERN FLANAGAN SADDLER
ASSOCIATE JUDGE

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PUBLIC FILING

EXHIBIT B

PUBLIC FILING

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA, *Plaintiff,* v. FACEBOOK, INC., *Defendant.*	Civil Action No. 2018 CA 008715 B Judge Fern Flanagan Saddler Next Event: Close of Fact Discovery Date: December 17, 2021

ORDER GRANTING DISTRICT OF COLUMBIA'S MOTION TO EXTEND THE SCHEDULING ORDER

Upon consideration of Plaintiff District of Columbia's Motion to Extend the Scheduling Order; the entire record herein; and for good cause shown, it is the ___ day of December, 2021, hereby **ORDERED** that Plaintiff District of Columbia's Motion to Extend the Scheduling Order is **GRANTED**.

It is **FURTHER ORDERED**, that the Scheduling Order in this matter shall be amended as follows:

Close of Fact Discovery	June 17, 2022
Close of Expert Discovery	September 16, 2022
Filing Motions	November 17, 2022
Dispositive Motions Decided	January 25, 2023
Mediation	March 13, 2023 at 11:00 am
Pre-trial Conference	April 12, 2023 at 9:30 am

_____
FERN FLANAGAN SADDLER
ASSOCIATE JUDGE

For service via CaseFileXpress:

All counsel of record

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EXHIBIT C

CERTIFICATE REGARDING DISCOVERY

As of the date of the filing of this Joint Motion, the following discovery has occurred in this case:

1. On January 9, 2019, the District served the following discovery:
    a. District of Columbia's First Set of Requests for the Production of Documents to Facebook, Inc.; and
    b. District of Columbia's First Set of Interrogatories to Facebook, Inc.

2. On January 31, 2019, the District served the following discovery:
    a. District of Columbia's Second Set of Requests for the Production of Documents to Facebook, Inc.

3. On July 31, 2019, Facebook served the following written responses:
    a. Defendant Facebook, Inc.'s Responses and Objections to the District's First Set of Requests for the Production of Documents;
    b. Defendant Facebook, Inc.'s Responses and Objections to the District of Columbia's First Set of Interrogatories; and
    c. Defendant Facebook, Inc.'s Responses and Objections to the District of Columbia's Second Set of Requests for the Production of Documents.

4. On July 2, 2019, the District served the following third-party discovery:
    a. Subpoena for Documents to the District of Columbia Office of Tax and Revenue; and
    b. Subpoena for Documents to Sandy Parakilas.

5. On August 28, 2019, Facebook served the following discovery:
    a. Defendant Facebook, Inc.'s First Set of Requests to Plaintiff for the Production of Documents; and
    b. Defendant Facebook, Inc.'s First Set of Interrogatories.

6. On October 28, 2019, the District served the following written responses:
    a. District's Responses to Facebook, Inc.'s First Set of Requests for Production; and
    b. District's Responses to Facebook, Inc.'s First Set of Interrogatories.

7. On January 6, 2020, the District took the deposition of Ezra Justin Lee.

8. On April 9, 2020, the District served the following third-party discovery:
    a. Subpoena for Documents to Best Buy; and
    b. Subpoena for Documents to Anheuser-Busch Companies, LLC.

9. On May 6, 2020, Facebook served the following discovery:
    a. Facebook's Second Set of Requests to Plaintiff for the Production of Documents; and
    b. Facebook's Second Set of Interrogatories.

10. On May 7, 2020, Facebook served the following discovery:
    a. Subpoena for Documents to the District of Columbia Office of the Chief Technology Officer; and
    b. Subpoena for Documents to the District of Columbia Department of Consumer and Regulatory Affairs.

11. On May 7, 2020, the District served the following discovery:
    a. District of Columbia's Third Set of Requests for the Production of Documents to Facebook, Inc.

12. On May 21, 2020, Facebook served the following written responses:
    a. Defendant Facebook, Inc.'s Responses and Objections to the District's Notice of Issuance of Subpoena to Best Buy Co., Inc.; and
    b. Defendant Facebook, Inc.'s Responses and Objections to the District's Notice of Issuance of Subpoena to Anheuser-Busch Companies, LLC; and

13. On June 3, 2020, the District served the following written response:
    a. District's Supplemental Responses to Facebook, Inc.'s First Set of Requests for Production.

14. On July 24, 2020, Facebook served the following written responses:
    a. Defendant Facebook, Inc.'s Responses and Objections to the District's Third Set of Requests for the Production of Documents.

15. On July 24, 2020, the District served the following written response:
    a. District of Columbia Department of Consumer and Regulatory Affairs's Responses to Facebook, Inc.'s Subpoena for the Production of Documents; and
    b. District of Columbia Office of the Chief Technology Officer's Responses to Facebook, Inc.'s Subpoena for the Production of Documents.

16. On September 22, 2020, the District served the following discovery:
    a. District of Columbia's Fourth Set of Requests for the Production of Documents to Facebook, Inc.

17. On October 22, 2020, Facebook served the following written responses:
    a. Defendant Facebook, Inc.'s Responses and Objections to the District's Fourth Set of Requests for the Production of Documents.

18. On November 12, 2020, the District took the deposition of Marie Hagman.

19. On February 1, 2021, the District served the following discovery:
    a. District of Columbia's Fifth Set of Requests for the Production of Documents to Facebook, Inc.

20. On March 17, 2021, Facebook served the following written responses:

a. Defendant Facebook, Inc.'s Responses and Objections to the District's Fifth Set of Requests for the Production of Documents.

21. On April 15, 2021, the District took the deposition of Claire Gartland.

22. On April 20, 2021, the District served the following discovery:
    a. District of Columbia's Second Set of Interrogatories to Facebook, Inc.

23. On May 11, 2021, the District took the deposition of Peter Fleming.

24. On May 20, 2021, Facebook served the following written responses:
    a. Defendant Facebook, Inc.'s Responses and Objections to the District's Second Set of Interrogatories.

25. On June 18, 2021, the District took the deposition of Simon Cross.

26. On June 21, 2021, the District took the deposition of Sandy (Alexander) Parakilas.

27. On July 13, 2021, the District took the deposition of

28. On July 21, 2021, the District took the deposition of Eddie O'Neil.

29. On October 1, 2021, the District took the deposition of James Barnes.

30. On November 17, 2021, Facebook served the following discovery:
    a. Facebook's Third Set of Requests to Plaintiff for the Production of Documents; and
    b. Facebook's Third Set of Interrogatories.

31. On December 2, 2021, the District noticed the depositions Mark Zuckerberg and Allison Hendrix.

32. On December 3, 2021, the District notice a Rule 30(b)(6) deposition.

33. Facebook has served the following partial production to the District:
    a. January 31, 2020 partial production in response to the District's Requests for the Production of Documents and the District's Subpoena for Documents to Sandy Parakilas;
    b. March 20, 2020 partial production in response to the District's Requests for the Production of Documents;
    c. May 12, 2020 partial production in response to the District's Requests for the Production of Documents;
    d. June 30, 2020 partial production in response to the District's Requests for the Production of Documents;
    e. August 17, 2020 partial production in response to the District's Requests for the Production of Documents;

f. August 18, 2020 partial production in response to the District's Requests for the Production of Documents;
g. October 2, 2020 partial production in response to the District's Requests for the Production of Documents;
h. October 13, 2020 partial production in response to the District's Requests for the Production of Documents;
i. October 23, 2020 partial production in response to the District's Requests for the Production of Documents;
j. October 30, 2020 partial production in response to the District's Requests for the Production of Documents;
k. November 6, 2020 partial production in response to the District's Requests for the Production of Documents;
l. December 11, 2020 partial production in response to the District's Requests for the Production of Documents;
m. February 12, 2021 partial production in response to the District's Requests for the Production of Documents;
n. March 31, 2021 partial production in response to the District's Requests for the Production of Documents;
o. June 7, 2021 partial production in response to the District's Requests for the Production of Documents;
p. July 8, 2021 partial production in response to the District's Requests for the Production of Documents; and
q. September 18, 2021 partial production in response to the District's Requests for the Production of Documents.

34. The District has served the following partial productions to Facebook:
a. February 21, 2020 partial production in response to Facebook's Requests for the Production of Documents;
b. March 13, 2020 partial production in response to Facebook's Requests for the Production of Documents;
c. June 4, 2020 partial production in response to Facebook's Requests for the Production of Documents;
d. July 30, 2020 production in response to Facebook's Subpoena to the District of Columbia Office of the Chief Technology Officer;
e. July 30, 2020 partial production in response to Facebook's Request for the Production of Documents;
f. August 11, 2021 partial production in response to Facebook's Request for the Production of Documents; and
g. October 13, 2021 partial production in response to Facebook's Request for the Production of Documents.

Dated: December 10, 2021 *_/s/ J. Eli Wade-Scott_*

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EXHIBIT D

DISCOVERY PLAN

To date, Plaintiff District of Columbia (the "District") has served multiple rounds of interrogatories and requests for the production of documents to Defendant Facebook, Inc. ("Facebook"). The District has also responded in writing and made multiple document productions to Facebook. Though Facebook has not yet certified that document production is complete, the District further anticipates—given the number of material disputes still remaining—that Facebook will continue to make future document productions. The extended discovery period will permit the District time to complete its review of Facebook's documents when production is complete. An extended discovery period will also allow the District time to review Facebook's yet-unproduced privilege log and assess the merits of any privilege claims, while also leaving time to for the parties to resolve any disputes over privilege.

The extended discovery period will also permit the District to complete the necessary depositions in this case, and assess whether more are needed after its review of Facebook's document productions. Though there are three depositions currently noticed (including a Rule 30(b)(6)), the District intends to seek more depositions beyond the presumptive ten allowed by SCR-30(a)(2)(A)(i). Given the upcoming holidays, the District also anticipates that the pace of depositions will slow due to the schedules of the deponents, particularly planned vacations.

Finally, the extended discovery period will also allow the parties time to resolve any outstanding discovery disputes—including deficiencies that the District has already identified in Facebook's productions.

Dated: December 10, 2021 *[/s/ J. Eli Wade-Scott]*

PUBLIC FILING

EXHIBIT E

PUBLIC FILING

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA, *Plaintiff,* v. FACEBOOK, INC., *Defendant.*	Civil Action No. 2018 CA 008715 B Judge Fern Flanagan Saddler Next Event: Close of Fact Discovery Date: December 17, 2021

DECLARATION OF J. ELI WADE-SCOTT

Pursuant to D.C. Superior Court Rule of Civil Procedure 9-I (c)(1)(A), I declare and state as follows:

1. My name is J. Eli Wade-Scott. I am an attorney of record in the above-captioned matter. I make the following declaration on personal knowledge, except where otherwise noted.

2. I am a partner at the law firm of Edelson PC, which has been retained as outside counsel to represent the named Plaintiff in the above-captioned matter, the District of Columbia ("District"). I am entering this declaration in support of Plaintiff District of Columbia's Opposed Motion to Extend the Scheduling Order.

3. Attached hereto as Exhibit E-1 is a true and accurate copy of the Court's December 6, 2021 Order on the District's Motion to Compel Facebook to Produce Documents.

4. Attached hereto as Exhibit E-2 is a true and accurate copy of the Court's December 6, 2021 Order on the District's Motion to Compel Facebook to Produce a Privilege Log.

5. Attached hereto as Exhibit E-3 is a true and accurate copy of counsel for Facebook's correspondence with the District, sent on December 6, 2021.

6. Attached hereto as Exhibit E-4 is a true and accurate copy of the District's First Set of Requests for the Production of Documents to Facebook.

7. Attached hereto as Exhibit E-5 is a true and accurate copy of the District's correspondence with counsel for Facebook, sent on December 19, 2019.

8. Attached hereto as Exhibit E-6 is a true and accurate copy of counsel for Facebook's correspondence with the District, sent on January 24, 2020.

9. Attached hereto as Exhibit E-7 is a true and accurate copy of counsel for Facebook's correspondence with the District, sent on April 28, 2020.

10. Attached hereto as Exhibit E-8 is a true and accurate copy of the District's Motion to Compel Facebook to Designate Document Custodians and Provide Search Terms, filed on July 17, 2020.

11. Attached hereto as Exhibit E-9 is a true and accurate copy of the September 9, 2020 Hearing Transcript on the District's Motion to Compel Facebook to Designate Document Custodians and Provide Search Terms.

12. Attached hereto as Exhibit E-10 is a true and accurate copy of the District's correspondence with counsel for Facebook, sent on September 9, 2020.

13. Attached hereto as Exhibit E-11 is a true and accurate copy of counsel for Facebook's correspondence with the District, sent on September 15, 2020.

14. Attached hereto as Exhibit E-12 is a true and accurate copy of Defendant Facebook's Opposition to the District's Motion to Compel Custodians, filed on August 21, 2020.

15. Attached hereto as Exhibit E-13 is a true and accurate copy of counsel for Facebook's correspondence with the District, sent on March 15, 2021.

16. Attached hereto as Exhibit E-14 is a true and accurate copy of the District's correspondence with counsel for Facebook, sent on May 24, 2021.

17. I exchanged a series of emails with counsel for Facebook between February 1, 2021 and November 22, 2021. Attached hereto as Exhibit E-15 is a true and accurate copy of an email I exchanged with Facebook, dated February 1, 2021.

18. Attached hereto as Exhibit E-16 is a true and accurate copy of the Special Master's Order Establishing Deposition Scheduling Protocol filed in *In re Facebook, Inc. Consumer Privacy User Profile Litigation*, No. 3:18-MD-02843-VC-JSC (N.D. Cal.) at Dkt. 755.

19. Attached hereto as Exhibit E-17 is a true and accurate copy of counsel for Facebook's correspondence with the District, sent on April 23, 2021.

20. Attached hereto as Exhibit E-18 is a true and accurate copy of Facebook's production letter to the District, sent on June 7, 2021.

21. Attached hereto as Exhibit E-19 is a true and accurate copy of the District's Second Set of Requests for the Production of Documents to Facebook.

22. Attached hereto as Exhibit E-20 is a true and accurate copy of the District's correspondence with counsel for Facebook, sent on August 8, 2019.

23. Attached here to as Exhibit E-21 is a true and accurate copy of an email I exchanged with Facebook on November 22, 2021.

24. Attached hereto as Exhibit E-22 is a true and accurate copy of the District's Motion to Compel Facebook to Produce Documents, filed on August 11, 2021.

25. Attached hereto as Exhibit E-23 is a true and accurate copy of Facebook's Opposition to Motion for Protective Order, filed on September 27, 2019.

26. Attached hereto as Exhibit E-24 is a true and accurate copy of the District's deficiency letter sent to counsel for Facebook, sent on November 9, 2021.

27. Attached hereto as Exhibit E-25 is a true and accurate copy of this Court's January 19, 2021 Order on the District's Motion to Compel Custodians.

28. Attached hereto as Exhibit E-26 is a true and accurate copy of counsel for Facebook's correspondence with the District, sent on June 3, 2020.

* * *

I declare under the penalty of perjury that the above and foregoing is true and correct. Executed on this 10th day of December, 2021 in Chicago, Illinois.

Respectfully submitted,

/s/ J. Eli Wade-Scott
J. Eli Wade-Scott

Exhibit E-1

Filed
D.C. Superior Court
12/06/2021 15:02PM
Clerk of the Court

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA,	)	
Plaintiff,	)	**Case Number: 2018 CA 8715 B**
v.	)	
	)	
FACEBOOK, INC.,	)	**Judge Fern Flanagan Saddler**
Defendant.	)	
	)	

ORDER DENYING PLAINTIFF DISTRICT OF COLUMBIA'S MOTION TO COMPEL DEFENDANT FACEBOOK, INC. TO PRODUCE DOCUMENTS

This matter is before the Court on Plaintiff District of Columbia's Motion to Compel Defendant Facebook, Inc. to Produce Documents, filed on August 11, 2021; Defendant Facebook, Inc.'s opposition thereto, filed on September 8, 2021; Plaintiff's reply thereto, filed on September 17, 2021; Defendant's supplemental submission, filed on October 1, 2021; and Plaintiff's supplemental submission, filed on October 6, 2021. Based upon the parties' submissions, the oral arguments heard at the September 28, 2021 Motion Hearing, and the entire record herein, this Court denies Plaintiff's Motion to Compel Defendant to Produce Documents.

LEGAL STANDARD

Pursuant to District of Columbia Superior Court Rule of Civil Procedure Rule 26(b)(1), parties may

> . . . obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the

> amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

D.C. Super Ct. Civ. R. 26(b)(1). The Court has "broad discretion" in deciding whether to grant or deny a motion to compel discovery. *Kay v. Pick,* 711 A.2d 1251, 1256 (D.C. 1998). In assessing the merits of a motion to compel discovery, the "relevancy [of the information sought] to the subject matter is construed most liberally." *Daniels v. Potomac Elec. Power Co.*, 100 A.3d 139, 145 (D.C. 2014). The information sought may be relevant if the discovery requests appear to be "reasonably calculated to lead to the discovery of admissible evidence." *Id.* A motion to compel discovery may be denied if the discovery requests are "not warranted by facts and circumstances of [the] incident." *Phelan v. City of Mount Rainier,* 805 A.2d 930, 942 (D.C. 2002) (internal quotation marks omitted). Rule 26(b)(2)(C) provides that the Court **must** limit the frequency or extent of discovery if it determines that "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive."

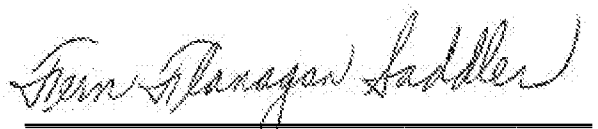
THE COURT'S RULING

In the instant matter, this Court finds that the scope of Plaintiff District of Columbia's request is overly broad and not proportional to the needs of the case. The Court finds that requiring Defendant Facebook, Inc. to provide the discovery

sought in their motion would be unduly burdensome at this stage. The Court notes that Plaintiff District of Columbia is not precluded from serving narrowed and targeted requests for production to better serve the proportional needs of the case.

Accordingly, upon consideration of the parties' submissions, the oral arguments heard at the September 28, 2021 Motion Hearing, and the entire record herein, it is this 6th day of December 2021, hereby

ORDERED that Plaintiff District of Columbia's Motion to Compel Defendant Facebook, Inc. to Produce Documents is **DENIED**.



FERN FLANAGAN SADDLER
ASSOCIATE JUDGE

COPIES TO:

Jimmy Rock, Esquire
Benjamin Wiseman, Esquire
Kathleen Konopka, Esquire
Jennifer M. Rimm, Esquire
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Robert K. Hur, Esquire
Daniel J. Nadratowski, Esquire
Alison Watkins, Esquire
Chantale Fiebig, Esquire
Aaron Smith, Esquire
Counsel for Defendant Facebook, Inc.
(via e-service)

Exhibit E-2

Filed
D.C. Superior Court
12/06/2021 15:08PM
Clerk of the Court

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA,	)	
Plaintiff,	)	**Case Number: 2018 CA 8715 B**
v.	)	
	)	
FACEBOOK, INC.,	)	**Judge Fern Flanagan Saddler**
Defendant.	)	
	)	

ORDER GRANTING PLAINTIFF DISTRICT OF COLUMBIA'S OPPOSED MOTION TO COMPEL DEFENDANT FACEBOOK, INC. TO PRODUCE A PRIVILEGE LOG

This matter is before the Court on Plaintiff District of Columbia's Opposed Motion to Compel Defendant Facebook, Inc. to Produce a Privilege Log, filed on August 17, 2021; Defendant Facebook, Inc.'s opposition thereto, filed on August 31, 2021; Plaintiff's reply thereto, filed on September 3, 2021. Based upon the parties' submissions, the oral arguments heard at the September 28, 2021 Motion Hearing, and the entire record herein, this Court grants Plaintiff's Motion to Compel Defendant to Produce a Privilege Log.

LEGAL STANDARD

Pursuant to District of Columbia Superior Court Rule of Civil Procedure Rule 26(b)(1), parties may

> . . . obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in

> resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

D.C. Super Ct. Civ. R. 26(b)(1). The Court has "broad discretion" in deciding whether to grant or deny a motion to compel discovery. *Kay v. Pick,* 711 A.2d 1251, 1256 (D.C. 1998). In assessing the merits of a motion to compel discovery, the "relevancy [of the information sought] to the subject matter is construed most liberally." *Daniels v. Potomac Elec. Power Co.*, 100 A.3d 139, 145 (D.C. 2014). The information sought may be relevant if the discovery requests appear to be "reasonably calculated to lead to the discovery of admissible evidence." *Id.* A motion to compel discovery may be denied if the discovery requests are "not warranted by facts and circumstances of [the] incident." *Phelan v. City of Mount Rainier,* 805 A.2d 930, 942 (D.C. 2002) (internal quotation marks omitted). Rule 26(b)(2)(C) provides that the Court must limit the frequency or extent of discovery if it determines that "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive."

Superior Court Rule of Civil Procedure 26(b)(5) provides,

> When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: i) expressly make the claim; and ii) describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

D.C. Super. Ct. Civ. R. 26(b)(5). Further, section 19(e) of the parties December 13, 2019 Protective Order states, "the parties shall exchange their respective privilege logs at a time to be agreed upon by the parties following the production of documents, or as otherwise ordered by the Court." Dec. 13, 2019 Prot. Order § 19(e).

THE COURT'S RULING

In the instant matter, this Court finds that pursuant to Superior Court Rule 26 and Section 19(e) of the parties' December 13, 2019 Protective Order, Defendant Facebook, Inc. must produce a privilege log of any withheld privileged materials from their production of documents in a timely manner. The Court finds that a plain reading of the Protective Order indicates that privilege logs will be produced once a party has withheld privileged materials from their production of documents, so that the other party may assess the claims.

Accordingly, upon consideration of the parties' submissions, the oral arguments heard at the September 28, 2021 Motion Hearing, the entire record herein, and for good cause shown, it is this 6th day of December 2021, hereby

ORDERED that Plaintiff District of Columbia's Opposed Motion to Compel Defendant Facebook, Inc. to Produce a Privilege Log is **GRANTED**. It is

FURTHER ORDERED that within forty-five (45) days of the date of this Order, Defendant Facebook Inc. shall produce a privilege log that complies with the directives of Superior Court Rule 26(b)(5), and identifies the documents and

information Defendant has withheld from discovery under a claim of privilege or as trial-preparation material.

FERN FLANAGAN SADDLER
ASSOCIATE JUDGE

COPIES TO:

Jimmy Rock, Esquire
Benjamin Wiseman, Esquire
Kathleen Konopka, Esquire
Jennifer M. Rimm, Esquire
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Robert K. Hur, Esquire
Daniel J. Nadratowski, Esquire
Alison Watkins, Esquire
Chantale Fiebig, Esquire
Aaron Smith, Esquire
Counsel for Defendant Facebook, Inc.
(via e-service)

Exhibit E-3
(Filed Under Seal)

Exhibit E-4

PUBLIC FILING

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA, *Plaintiff*, v. FACEBOOK INC., *Defendant*.	Civil Action No.: 2018 CA 008715 B

DISTRICT OF COLUMBIA'S FIRST SET OF REQUESTS FOR THE PRODUCTION OF DOCUMENTS TO DEFENDANT FACEBOOK, INC.

The District of Columbia (District), by and through its Attorney General and pursuant to Superior Court Rule of Civil Procedure 34, hereby serves its First Set of Requests for the Production of Documents to Defendant Facebook, Inc. (Facebook). Defendant Facebook is directed to produce within thirty (30) days a written response to this First Set of Requests for the Production of Documents and to produce the requested documents for inspection and copying at the Office of the Attorney General, Office of Consumer Protection, 441 Fourth Street, N.W., Suite 630 South, Washington, D.C., 20001, at that same time.

DEFINITIONS

1. **"And"** and **"or"** are terms of inclusion and not of exclusion and shall be construed either disjunctively or conjunctively, as necessary, to bring within the scope of these requests any document or information that might otherwise be construed to be outside its scope.

2. **"App"** refers to the application named *thisisyourdigitallife*, which launched on the Facebook Platform in approximately November 2013.

3. **"Third-party application"** refers to any third-party software application that operates or has operated on the Facebook Platform.

4. "**Document(s)**" means written, recorded and graphic material of every kind, including all Electronically Stored Information. The term "document(s)" includes electronic correspondence, drafts of documents, and copies of documents that are not identical duplicates of the originals. Document(s) includes the labels or metadata associated with each original or copy.

5. "**Electronically Stored Information**," or "**ESI**," means the complete original and any non-identical copy (whether different from the original because of notations, different metadata, or otherwise) of any electronically created or stored information, including but not limited to e-mail, instant messaging, videoconferencing, SMS, MMS, or other text messaging, and other electronic correspondence (whether active, archived, unsent, or in a sent or deleted-items folder), word-processing files, spreadsheets, databases, unorganized data, document metadata, presentation files, and sound recordings, regardless of how or where the information is stored, including if it is on a mobile device.

6. **"Facebook consumer"** refers to an individual who has created a Facebook account.

7. **"Facebook consumer data"** refers to all information associated with a Facebook consumer that is collected and/or maintained by Facebook, including, but not limited to, profile information, location history, and "likes" on Facebook.

8. **"Friend data"** refers to data of a Facebook consumer's Facebook "friend" that is accessible to a third party through the Facebook consumer.

9. **"Graph API V1"** refers to the application program interface (API) that governed third-party applications' access to Facebook consumer data through the Facebook Platform that was applicable to new applications launched on the Facebook Platform from at least November 2013 through April 30, 2014.

10. **"Graph API V2"** refers to the API that governed third-party applications' access to Facebook consumer data through the Facebook Platform that was applicable to new applications launched on the Facebook Platform after April 30, 2014.

11. **"Identify"** means:

a. when applied to a natural person, to state the full name, job title, and present or last known address, email address, and telephone number of the person;
b. when applied to a company, business, or other entity, to state the entity's full name, telephone number, and present address;
c. when applied to a document, to state the title, date, author(s), addressee(s), recipient(s), and present location and custodian of the document, or alternatively, if the document has already been produced to the District, specify the date of production and any other available identifying information; and
d. when applied to a communication, to provide the names of parties, date, and substance of the communication.

12. **"Integration partnerships"** means any entity or individual with which Facebook licensed an API in order to provide specific integrations and/or access to data.

13. **"Data-sharing partnerships"** means any entity or individual with which Facebook entered into an oral, written, or implied agreement to share data in excess of what that entity or individual could have otherwise accessed through the restrictions imposed by any

applicable Facebook Platform API, not including third-party applications and/or integration partnerships.

14. **"Privacy Settings"** means the manner by which a Facebook consumer controls how their data is shared with other Facebook consumers.

15. **"Application Settings"** means the manner by which a Facebook consumer controls how their data is shared with third-party applications.

16. **"Relevant time period"** means from January 1, 2013 to the present. Unless otherwise specified, requests for production of documents concern the relevant time period.

17. **"You," "your,"** and **"Facebook"** mean Defendant Facebook, Inc. and includes all of its parent entities, predecessor entities, divisions, subsidiaries, affiliated enterprises, agents, contractors, consultants, attorneys and law firms and other persons engaged directly or indirectly (*e.g.*, employee of a consultant) by or under the control of Facebook, Inc. (including all business units and persons previously referred to).

INSTRUCTIONS

1. **Documents No Longer in Your Possession/Destroyed Documents**. If any responsive document was, but no longer is, in your possession, custody or control, produce a description of each such document. The description shall include the following:

a. the name of each author, sender, creator, and initiator of such document;
b. the name of each recipient, addressee, or party for whom such document was intended;
c. the date the document was created;
d. the date(s) the document was in use;
e. a detailed description of the content of the document;
f. the reason it is no longer in your possession, custody or control; and
g. the document's current location.

If the document is no longer in existence, in addition to providing the information indicated above, state on whose instructions the document was destroyed or otherwise disposed of, and the date and manner of the disposal.

2. **Format and Organization of Responses**. If your response to these document requests, in total, will exceed 1,000 pages, documents shall be produced in the following searchable electronic format that can be loaded into a document review program: single-page Tagged Image Format files (.tiff), an index file containing relevant metadata, and all file, record, instructions, codes, or other information necessary to retrieve or interpret the data. If your response, in total, will be less than 1,000 pages, documents may be produced as individual, searchable PDF files.

If any portion of your production consists of ESI and cannot be produced in the above-format, those documents should be produced in their native format. You should take reasonable steps to maintain any responsive ESI in its original native format. For responsive

information contained in databases, produce the database in its native format as well as converted into an Excel spreadsheet format (.xls), or if not possible, a comma-separated text file (.csv) format.

Regardless of the format of production, all documents must be marked with a unique, consecutive control number (i.e. Bates stamp). Responsive documents shall also be accompanied by an index that identifies: (i) the name of the custodian of the document; (ii) the full Bates-range for that document; (iii) the request or requests to which the document responds; and (iv) the format of the original document (such as hardcopy, email, electronic document, etc.).

You must submit each separate production on a CD, DVD, USB thumb drive or hard drive, using the media requiring the least number of deliverables. Each production should be accompanied by a cover letter setting out the Bates-range for the production, a list of each piece of media included in the production, and an updated document index required by the prior paragraph.

3. **Privileged Documents**. If any responsive document is withheld under any claim of privilege, provide a detailed privilege log that contains at least the following information for each document that you have withheld:

a. the name of each author, writer, sender, creator, or initiator of such document;
b. the name of each recipient, addressee, or party for whom such document was intended;
c. the date of such document, or an estimate thereof if no date appears on the document;
d. the general subject matter of the document; and
e. the claimed grounds for withholding the document, including, but not limited to, the nature of any claimed privilege and grounds in support thereof.

4. **Duty to Supplement**. All document requests are continuing in nature until otherwise directed so as to require supplementary production if you obtain further responsive documents or information. You are also required to amend your responses to these requests if you discover that the previous response was incorrect or incomplete.

5. **Duty to Preserve Documents**. All documents and/or other data which relate to the subject matter of this case or these requests must be preserved. Any destruction involving such documents must cease, even if it is your normal or routine course of business to delete or destroy such documents or data and even if you believe such documents or data are privileged or otherwise need not be produced.

DOCUMENT REQUESTS

1. All versions of agreements entered into between Facebook and Facebook consumers throughout the relevant time period, including Terms of Service, Data Policies, and Cookies Policies.

2. Documents that refer or relate to how material changes to the agreements identified in response to Request No. 1 would have appeared to a Facebook consumer at the time of the

material change, including but not limited to screenshots of the Facebook website and the Facebook mobile application.

3. All manuals, guidelines, memoranda, correspondence, and other documents that refer or relate to Facebook's policies, practices, and procedures relating to exempting third-party applications from the Facebook Platform API's restrictions on access to consumer data.

4. Documents that refer or relate to all third-party applications identified in response to Interrogatory Nos. 4 and 5 that relate to the nature of the third-party application's exemption from Graph API V1 and/or Graph API V2 or the third-party application's access to Facebook consumer data, including but not limited to reports, correspondence, emails, memoranda, and agreements.

5. All manuals, guidelines, memoranda, correspondence, and other documents that refer or relate to Facebook's policies, practices, and procedures for integration partnerships.

6. Documents that refer or relate to all entities or individuals identified in response to Interrogatory No. 6 that relate to the nature of the integration partnership or the entity/individual's access to Facebook consumer data.

7. All manuals, guidelines, memoranda, correspondence, and other documents that refer or relate to Facebook's policies, practices, and procedures for data-sharing partnerships.

8. Documents that refer or relate to all entities or individuals identified in response to Interrogatory No. 7 that relate to the nature of the data-sharing partnership or the entity/individual's access to Facebook consumer data.

9. Documents that refer or relate to any Facebook review or approval processes, if any, of third-party applications that had access to Facebook consumer data throughout the relevant time period, including but not limited to, written policies, memoranda, and correspondence.

10. Documents that refer or relate to any Facebook audit processes, if any, of third-party applications that had access to Facebook consumer data throughout the relevant time period, including but not limited to, written policies, memoranda, and correspondence.

11. Documents that refer or relate to any Facebook enforcement processes, if any, of third-party applications that had access to Facebook consumer data throughout the relevant time period, including but not limited to, written policies, memoranda, and correspondence.

12. Documents that refer or relate to all Facebook enforcement processes taken against the third-party applications identified in response to Interrogatory No. 9.

13. For each third-party application identified in Interrogatory No. 10, documents that refer or relate to the third-party application's failure to comply with Facebook's Platform Policy.

14. Documents that refer or relate to the App, including but not limited to:

a. Documents that refer or relate to any Facebook enforcement processes, if any, as applied to the App;
b. Documents that refer or relate to any Facebook review or approval processes, if any, as applied to the App;
c. Documents that refer or relate to any Facebook audit processes, if any, that were applied to the App;
d. Documents that refer or relate to all Facebook consumer data that the App requested permission to access;
e. Documents that refer or relate to all Facebook consumer data that the App accessed; and
f. Documents that refer or relate to all agreements, disclosures, and correspondence made by the App to Facebook consumers.

15. Documents that refer to, relate to, or include Dr. Aleksandr Kogan, including but not limited to correspondence, memoranda, and agreements.

16. Documents that refer to, relate to, or include representatives from Global Science Research, including but not limited to correspondence, memoranda, and agreements.

17. Documents that refer to, relate to, or include representatives from Cambridge Analytica, including but not limited to correspondence, memoranda, and agreements.

18. Documents that refer to, relate to, or include representatives from Strategic Communication Laboratories Group, including but not limited to correspondence, memoranda, and agreements.

19. Documents that refer or relate to all notices provided by Facebook to consumers regarding any third-party application's use of their data in violation of Facebook's Platform Policy.

20. Documents that refer or relate to an application named "Ark," including but not limited to correspondence, memoranda, and agreements.

21. Documents that refer or relate to an application named "Klout," including but not limited to correspondence, memoranda, and agreements.

22. Documents that refer or relate to an application named "Socialbakers," including but not limited to correspondence, memoranda, and agreements.

23. Documents that refer or relate to the names, addresses, email addresses, and phone numbers of any District of Columbia residents whose data was accessed by the App and also downloaded the App.

24. Documents that refer or relate to the names, addresses, email addresses, and phone numbers of any District of Columbia residents whose data was accessed by the App and also had not downloaded the App.

25. Documents that refer or relate to the names, addresses, email addresses, and phone numbers of any District of Columbia residents whose data was obtained by Cambridge Analytica and also downloaded the App.

26. Documents that refer or relate to the names, addresses, email addresses, and phone numbers of any District of Columbia residents whose data was obtained by Cambridge Analytica and also had not downloaded the App.

27. Documents that refer or relate to the manner in which a Facebook consumer could control how their data was shared through their Privacy Settings and Application Settings throughout the relevant time period, including but not limited to screenshots of the Facebook website and the Facebook mobile application.

28. Documents that refer or relate to any user testing, evaluation, or assessment of Facebook's Privacy Settings and Application Settings, including but not limited design documents, correspondence, analyses, and/or reports.

29. All documents previously produced to the District of Columbia in response to the District of Columbia's March 20, 2018 subpoena and in connection with any related investigation.

30. Copies of all productions already made to other state or federal government bodies concerning third-party applications, integration partnerships, and/or data-sharing partnerships' access to Facebook consumer data.

31. Any documents identified in response to or relied upon in answering any interrogatories issued to Defendant Facebook in this matter.

Dated: January 9, 2019

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

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Deputy Attorney General
Public Advocacy Division

JIMMY R. ROCK
Assistant Deputy Attorney General
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/s/ Benjamin M. Wiseman
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Attorneys for the District of Columbia

CERTIFICATE OF SERVICE

I, Randolph T. Chen, certify that on January 9, 2019, a copy of the foregoing First Set of Requests for Production of Documents to Defendant Facebook, Inc. was served by first-class mail and e-mail to:

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Counsel for Defendant Facebook, Inc.

/s/ Randolph T. Chen
RANDOLPH T. CHEN
Assistant Attorney General

Exhibit E-5

PUBLIC FILING

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

ATTORNEY GENERAL
KARL A. RACINE

Office of Consumer Protection

December 19, 2019

Via Electronic Mail

Chantale Fiebig
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue N.W.
Washington, D.C. 20036
cfiebig@gibsondunn.com

Re: DC v. Facebook (2018 CA 008715 B) – District of Columbia's First Set of Requests for Production of Documents to Facebook, Inc.

Dear Counsel:

I write regarding the District of Columbia's ("District") First Set of Requests for Production of Documents" ("First RFPs") to Facebook, Inc. ("Facebook" or the "Company") dated January 9, 2019. Facebook responded to the First RFPs on July 31, 2019 and the parties have engaged in multiple meet-and-confers since.

Facebook has objected to numerous First RFPs as, among other things, overbroad and unduly burdensome. While the parties have had constructive discussions about possible ways to narrow the scope of certain First RFPs, the District is concerned that the discussions to date have not produced concrete proposals that balance the District's interest in obtaining information relevant to this litigation with Facebook's objections as to breadth and burden. We therefore write to make a concrete request as to certain First RFPs.

In short, the District requests that for certain First RFPs, Facebook provide proposed search terms and a list of custodians to locate responsive documents (subject to negotiation between the parties). This approach would balance the District's discovery rights in this action against Facebook's objections and it would facilitate negotiations that address Facebook's concerns regarding a document production reasonably proportionate to the needs of this action. This approach would also promote efficiency in discovery. For example, the District recognizes that there are areas where First RFPs may overlap with one another—and a search term and custodian list approach would allow Facebook to produce responsive documents to multiple First RFPs in a consolidated and consistent manner. The District's specific requests are set forth in more detail below.

First, the District specifically requests that Facebook provide proposed search terms to the First RFPs listed below. In a good faith attempt to facilitate the development of search terms, the District has grouped RFPs by category in order to outline areas of overlap between First RFPs that can be efficiently responded to by adopting a search term and custodian list approach. In addition, for each category, the District has provided examples of the types of information it is seeking with those First RFPs. These examples are not exhaustive, but rather reflect the District's good faith effort to assist Facebook in responding to the District's request for proposed search terms. The First RFPs for which the District is requesting proposed search terms are listed below and grouped by category (description in **bold**):

A. **First RFPs relating to third-party applications and integration partners that had access to consumer data that was not otherwise accessible through the operative Public API.**[1] Documents responsive to these First RFPs may include, but are not limited to, Facebook policies and correspondence relating to: allowing or denying third-party applications or integration partners access to consumer data not otherwise accessible through the operative Public API (*e.g.*, through a non-public API or a grandfathered API); third-party applications and integration partners' access to consumer data not otherwise accessible through the operative Public API; and Facebook's App Review process introduced in 2014.

- *First RFP No. 3*. All manuals, guidelines, memoranda, correspondence, and other documents that refer or relate to Facebook's policies, practices, and procedures relating to exempting third-party applications from the Facebook Platform API's restrictions on access to consumer data.

- *First RFP No. 4*. Documents that refer or relate to all third-party applications identified in response to Interrogatory Nos. 4 and 5 that relate to the nature of the third-party application's exemption from Graph API V1 and/or Graph API V2 or the third-party application's access to Facebook consumer data, including but not limited to reports, correspondence, emails, memoranda, and agreements.

- *First RFP No. 5*. All manuals, guidelines, memoranda, correspondence, and other documents that refer or relate to Facebook's policies, practices, and procedures for integration partnerships.

- *First RFP No. 6*. Documents that refer or relate to all entities or individuals identified in response to Interrogatory No. 6 that relate to the nature of the integration partnership or the entity/individual's access to Facebook consumer data.

B. **First RFPs relating to Facebook enforcement processes and practices relating to third-party applications.** Documents responsive to these First RFPs may include, but are not limited to, Facebook policies and correspondence relating to: enforcement

[1] The term "Public API" is used as defined in Facebook's Response to the District of Columbia's First Set of Interrogatories at 5, 10-11.

practices and mechanisms regarding third-party applications; preliminary review and approval of third-party applications prior to their operation on the Facebook Platform; audits conducted against third-party applications; analysis regarding third-party applications' compliance with Facebook policies; enforcement actions taken against third-party applications; and declinations to take enforcement action against third-party applications.

- *First RFP No. 9*. Documents that refer or relate to any Facebook review or approval processes, if any, of third-party applications that had access to Facebook consumer data throughout the relevant time period, including but not limited to, written policies, memoranda, and correspondence.

- *First RFP No. 10*. Documents that refer or relate to any Facebook audit processes, if any, of third-party applications that had access to Facebook consumer data throughout the relevant time period, including but not limited to, written policies, memoranda, and correspondence.

- *First RFP No. 11*. Documents that refer or relate to any Facebook enforcement processes, if any, of third-party applications that had access to Facebook consumer data throughout the relevant time period, including but not limited to, written policies, memoranda, and correspondence.

- *First RFP No. 12*. Documents that refer or relate to all Facebook enforcement processes taken against the third-party applications identified in response to Interrogatory No. 9.

- *First RFP No. 13*. For each third-party application identified in Interrogatory No. 10, documents that refer or relate to the third-party application's failure to comply with Facebook's Platform Policy.

C. **First RFPs relating to the "*thisisyourdigitallife*" application (the "App") and the Cambridge Analytica incident.** Documents responsive to these First RFPs may include, but are not limited to, Facebook correspondence or memoranda relating to the App, Aleksandr Kogan, Global Science Research, Cambridge Analytica, or Strategic Communication Laboratories Group regarding consumer data, enforcement processes, or review and approval processes; agreements between Facebook, Aleksandr Kogan, Global Science Research, Cambridge Analytica, or Strategic Communication Laboratories Group; and disclosures made by the App to Facebook users.

- *First RFP No. 14*. Documents that refer or relate to the App, including but not limited to: (a) Documents that refer or relate to any Facebook enforcement processes, if any, as applied to the App; (b) Documents that refer or relate to any Facebook review or approval processes, if any, as applied to the App; (c) Documents that refer or relate to any Facebook audit processes, if any, that were applied to the App; (d) Documents that refer or relate to all Facebook

consumer data that the App requested permission to access; (e) Documents that refer or relate to all Facebook consumer data that the App accessed; and (f) Documents that refer or relate to all agreements, disclosures, and correspondence made by the App to Facebook consumers.

- *First RFP No. 15.* Documents that refer to, relate to, or include Dr. Aleksandr Kogan, including but not limited to correspondence, memoranda, and agreements.

- *First RFP No. 16.* Documents that refer to, relate to, or include representatives from Global Science Research, including but not limited to correspondence, memoranda, and agreements.

- *First RFP No. 17.* Documents that refer to, relate to, or include representatives from Cambridge Analytica, including but not limited to correspondence, memoranda, and agreements.

- *First RFP No. 18.* Documents that refer to, relate to, or include representatives from Strategic Communication Laboratories Group, including but not limited to correspondence, memoranda, and agreements.

D. **First RFP relating to notices provided by Facebook to consumers regarding third-party application use of their data in violation of Facebook's Platform Policy.** Documents responsive to this First RFP may include, but are not limited to: Facebook communications with consumers providing notice relating to a third-party application or misuse of consumer data (including notices issued relating to the App or Cambridge Analytica, and any other third-party applications who may have misused, or been suspected of misusing, consumer data); Facebook policies and correspondence relating to deciding whether or not to issue such notices; Facebook policies and correspondence regarding the substance of such notices; and Facebook policies and correspondence regarding identifying affected consumers who are to receive such notices.

    - *First RFP No. 19.* Documents that refer or relate to all notices provided by Facebook to consumers regarding any third-party application's use of their data in violation of Facebook's Platform Policy.

E. **First RFPs relating to specific third-party applications.** Documents responsive to these First RFPs may include, but are not limited to, Facebook correspondence or memoranda relating to: the specific third-party applications' access to consumer data; the specific third-party applications' compliance or non-compliance with Facebook policies; any enforcement actions taken against the specific third-party applications; and agreements or contracts entered into with the specific third-party application.

    - *First RFP No. 20.* Documents that refer or relate to an application named "Ark," including but not limited to correspondence, memoranda, and agreements.

- *First RFP No. 21*. Documents that refer or relate to an application named "Klout," including but not limited to correspondence, memoranda, and agreements.

- *First RFP No. 22*. Documents that refer or relate to an application named "Socialbakers," including but not limited to correspondence, memoranda, and agreements.

F. **First RFPs relating to Facebook's Privacy Settings and Application Settings.** Documents responsive to these First RFPs may include, but are not limited to, screenshots sufficient to show how a user could control their Privacy Settings and Application Settings throughout the relevant time period; Facebook policies, correspondence, and memoranda relating to the design of the Privacy Settings and Application Settings interfaces; and Facebook analyses, studies, or assessments relating to consumer use of Facebook's Privacy Settings and Application Settings.

- *First RFP No. 27*. Documents that refer or relate to the manner in which a Facebook consumer could control how their data was shared through their Privacy Settings and Application Settings throughout the relevant time period, including but not limited to screenshots of the Facebook website and the Facebook mobile application.

- *First RFP No. 28*. Documents that refer or relate to any user testing, evaluation, or assessment of Facebook's Privacy Settings and Application Settings, including but not limited design documents, correspondence, analyses, and/or reports.

Second, the District requests that Facebook provide a list of custodians by identifying Facebook employees or former employees whose records are likely to contain a significant amount of responsive information to the District's First RFPs. The District is open to negotiating a custodian document collection protocol, but would expect, at a minimum, that Facebook would collect custodial email inboxes and company files (digital and hard copy), as well as non-custodial sources where responsive information is likely to be found. The parties' agreed-upon search terms could then be run against the collected documents to identify documents responsive to the District's First RFPs. The District would expect that any list of custodians would reasonably balance the District's interest in a comprehensive response while taking into account Facebook's size and complexity, and include Facebook employees and former employees of varying levels of seniority. For example, to address the District's First RFPs relating to enforcement against third-party applications (Category B, *supra*), the District would expect a custodian list that includes both DevOps and Platform Integrity personnel, as well as senior company executives who played an active role in enforcement.

Please advise by January 8, 2020 whether the Company will provide the District with the requested search terms and list of custodians. In the event that Facebook is amenable to proceeding in this manner, please also provide an expected date that the Company will provide proposed search terms and list of custodians. We are also available to meet and confer to clarify any questions the Company may have regarding the District's request.

Finally, the District requests that Facebook produce the documents the Company committed to produce in its Response to the District's First RFPs within forty-five (45) days of the Court's entry of the December 13, 2019 Protective Order.

Sincerely,

KARL A. RACINE
Attorney General for the District of Columbia

/s/ Randolph T. Chen
Randolph T. Chen
Assistant Attorney General

Attorneys for the District of Columbia

Exhibit E-6
(Filed Under Seal)

Exhibit E-7
(Filed Under Seal)

Exhibit E-8

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA, *Plaintiff*, v. FACEBOOK, INC., *Defendant*.	Civil Action No.: 2018 CA 008715 B Judge Fern Flanagan Saddler Next Event: Status Conference Date: July 21, 2020 **ORAL HEARING REQUESTED**

DISTRICT OF COLUMBIA'S OPPOSED MOTION TO COMPEL DEFENDANT FACEBOOK, INC. TO DESIGNATE DOCUMENT CUSTODIANS AND PROVIDE SEARCH TERMS

Pursuant to SCR-Civil 37(a), Plaintiff District of Columbia ("District") respectfully moves the Court to compel Defendant Facebook, Inc. ("Facebook") to designate four Facebook corporate executives as document custodians in this action and set a date certain by which Facebook must provide search terms to locate custodial documents responsive to the District's discovery requests.

To briefly summarize the events that have led up to this Motion, the parties have engaged in extensive negotiations and conducted multiple meet-and-confers in a good faith attempt to resolve disputes relating to the District's discovery requests. These efforts have been productive to some extent, and the parties have been able to reach agreement on a number of issues: the adoption of a search term and custodian approach to locate documents responsive to the District's discovery requests, the designation of 21 specific document custodians, and reaching some agreement as to appropriate search terms.

However, the parties have now reached an impasse as to the designation of four Facebook executives as document custodians: Mark Zuckerberg (Chief Executive Officer), Sheryl Sandberg (Chief Operating Officer), Joel Kaplan (Vice President of Global Public Policy), and Elliot

Schrage (Former Vice President of Communications and Public Policy) (together, the "Facebook Executives").

The question propounded by this Motion is thus whether the Facebook Executives should be designated as document custodians in this action. The District contends that they should under SCR-Civil 26(b) because they exercised unique decision-making authority relating to the company's actions that are challenged in this lawsuit and accordingly possess relevant information proportional to the needs of this case. Facebook contends that they should not, objecting on relevance and burden grounds. The company has also taken the position that negotiations regarding search terms should not proceed until the parties have finalized a list of document custodians.

The District thus moves the Court to resolve this dispute. As set forth in the attached memorandum, Facebook's objections are without merit and this Motion should be resolved in the District's favor.

Respectfully submitted,

Date: July 17, 2020

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Attorneys for the District of Columbia

RULE 12-I(a) CERTIFICATION

Counsel for the District of Columbia contacted counsel for Defendant to obtain consent to the relief requested in this Motion. Counsel for Defendant opposes the relief requested in this Motion.

/s/ Randolph T. Chen
Attorney for the District of Columbia

CERTIFICATE OF SERVICE

I certify that on July 17, 2020, I caused a copy of the foregoing Motion and appended Memorandum of Points and Authorities in Support to be served on all counsel of record via CaseFileXpress.

/s/ Randolph T. Chen
Attorney for the District of Columbia

RULE 26(h) AND 37(a) CERTIFICATION

Plaintiff District of Columbia's ("District") Motion to Compel concerns Defendant Facebook, Inc.'s ("Facebook") failure to provide complete responses to the District's First Set of Requests for the Production of Documents ("First RFP"), served on January 1, 2019. The First RFP seeks information relating to the District's claims that, as relevant here, allege Facebook made misrepresentations about protecting consumer data and made material omissions in failing to timely notify consumers whose data was improperly sold to Cambridge Analytica, a political consulting firm.

The specific question propounded by this Motion is whether four Facebook executives (the "Facebook Executives") should be designated as document custodians in this action. The Facebook Executives are Mark Zuckerberg (Chief Executive Officer), Sheryl Sandberg (Chief Operating Officer), Joel Kaplan (Vice President of Global Public Policy), and Elliot Schrage (Former Vice President of Communications and Public Policy). The District contends that the Facebook Executives should be designated as document custodians under SCR-Civil 26(b) because they exercised unique decision-making authority relating to the company's actions that are challenged in this lawsuit and accordingly possess relevant information proportional to the needs of this case. Facebook contends that they should not, objecting on relevance and burden grounds. The company has also taken the position that negotiations regarding search terms should not proceed until the parties have finalized a list of document custodians.

This impasse has crystallized over the course of several months, where the parties have engaged in repeated good faith attempts to resolve disputes relating to the First RFP. These attempts have included multiple telephonic meet-and-confers (conducted on September 24, 2019, October 18, 2019, and November 14, 2019) and extensive written letter negotiations (dated December 19, 2019, January 8, 2020, January 24, 2020, February 13, 2020, March 18, 2020,

April 28, 2020, May 21, 2020, June 3, 2020, and July 6, 2020) to narrow the scope of discovery. Through these efforts, the parties have reached compromise agreements on numerous issues, including: an agreement to adopt a search term and custodian approach to locate potentially responsive documents, an agreement to 21 specific document custodians, and the exchange of proposed search terms. However, after narrowing the scope of disputed issues, the parties have ultimately reached a point where they cannot agree as to the designation of the Facebook Executives as document custodians in this case.

The parties held a final telephonic meet-and-confer on July 13, 2020 at 11:00am EST to attempt to resolve the dispute regarding the Facebook Executives, but were unable to do so. The parties have agreed to stipulate that in light of health concerns raised by the ongoing COVID-19 pandemic, that teleconference satisfied SCR-Civil 37(a)'s requirement that the parties meet "in person" to attempt to resolve the disputed matter prior to the filing of a motion to compel discovery.

/s/
RANDOLPH T. CHEN
Attorney for the District of Columbia

CERTIFICATE OF DISCOVERY

As of the date of the filing of this Motion, the following discovery has occurred in this case:

1. On January 9, 2019, the District served the following discovery:
   a. District of Columbia's First Set of Requests for the Production of Documents to Facebook, Inc.; and
   b. District of Columbia's First Set of Interrogatories to Facebook, Inc.

2. On January 31, 2019, the District served the following discovery:
   a. District of Columbia's Second Set of Requests for the Production of Documents to Facebook, Inc.

3. On July 2, 2019, the District served the following third-party discovery:
   a. Subpoena for Documents to the District of Columbia Office of Tax and Revenue; and
   b. Subpoena for Documents to Sandy Parakilas.

4. On July 31, 2019, Facebook served the following written responses:
   a. Facebook, Inc.'s Responses and Objections to the District's First Set of Requests for Production of Documents;
   b. Facebook, Inc.'s Responses and Objections to the District's First Set of Interrogatories; and
   c. Facebook, Inc.'s Responses and Objections to the District's Second Set of Requests for Production of Documents.

5. On August 28, 2019, Facebook served the following discovery:
   a. Facebook, Inc.'s First Set of Requests to Plaintiff for Production of Documents; and
   b. Facebook, Inc.'s First Set of Interrogatories.

6. On October 28, 2019, the District served the following written responses:
   a. District of Columbia's Responses to the Facebook, Inc.'s First Set of Requests for Production; and
   b. District of Columbia's Responses to the Facebook, Inc.'s First Set of Interrogatories.

7. On January 6, 2020, the District took the deposition of Ezra Justin Lee.

8. On April 29, 2020, the District served the following third-party discovery:
   a. Subpoena for Documents to Best Buy Co., Inc.; and
   b. Subpoena for Documents to Anheuser-Busch, Inc.

9. On May 6, 2020, Facebook served the following discovery:
   a. Facebook, Inc.'s Second Set of Requests to Plaintiff for Production of Documents; and
   b. Facebook, Inc.'s Second Set of Interrogatories.

10. On May 7, 2020, Facebook served the following third-party discovery:
    a. Subpoena for Documents to District of Columbia Office of the Chief Technology Officer; and
    b. Subpoena for Documents to District of Columbia Department of Consumer and Regulatory Affairs.

11. On May 7, 2020, the District served the following discovery:
    a. District of Columbia's Third Set of Requests for the Production of Documents.

12. Facebook has served the following partial productions to the District:
    a. January 31, 2020 partial production in response to the District's Requests for the Production of Documents and the District's Subpoena for Documents to Sandy Parakilas;
    b. March 20, 2020 partial production in response to the District's Requests for the Production of Documents;
    c. May 12, 2020 partial production in response to the District's Requests for the Production of Documents; and
    d. June 30, 2020 partial production in response to the District's Requests for the Production of Documents.

13. The District has served the following partial productions to Facebook:
    a. February 21, 2020 partial production in response to Facebook's Requests for the Production of Documents;
    b. March 13, 2020 partial production in response to Facebook's Requests for the Production of Documents; and
    c. June 4, 2020 partial production in response to Facebook's Requests for the Production of Documents.

/s/ Randolph T. Chen
RANDOLPH T. CHEN
Attorney for the District of Columbia

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA, *Plaintiff*, v. FACEBOOK, INC., *Defendant*.	Civil Action No.: 2018 CA 008715 B Judge Fern Flanagan Saddler Next Event: Status Conference Date: July 21, 2020 **ORAL HEARING REQUESTED**

DISTRICT OF COLUMBIA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSED MOTION TO COMPEL DEFENDANT FACEBOOK, INC. TO DESIGNATE DOCUMENT CUSTODIANS AND PROVIDE SEARCH TERMS

Plaintiff District of Columbia ("District") moves this Court pursuant to SCR-Civil 37(a) to compel Defendant Facebook, Inc. ("Facebook") to designate four Facebook senior executives as document custodians in this action: Mark Zuckerberg (Chief Executive Officer), Sheryl Sandberg (Chief Operating Officer), Joel Kaplan (Vice President of Global Public Policy), and Elliot Schrage (Former Vice President of Communications and Public Policy) (together, the "Facebook Executives"). The District also seeks an order setting a date certain by which Facebook must provide search terms to locate custodial documents responsive to the District's discovery requests. While the parties have, over many months, successfully resolved numerous disputes regarding custodians and search terms through the meet-and-confer process, the parties have now reached an impasse on the Facebook Executives and search term negotiations. The District thus moves the Court to resolve this dispute.

This is a consumer protection enforcement case brought by the District against Facebook for misleading hundreds of thousands of District consumers about the security of their personal data. As relevant here, the District's claims seek to resolve at least two key questions. First, did Facebook misrepresent to consumers how it would protect the security of their personal data?

Second, should Facebook have notified consumers earlier that their personal data was improperly harvested and sold to Cambridge Analytica, a political consulting firm, in order to target political advertising during the 2016 United States Presidential Election (a fact Facebook knew and did not disclose for over two years)?

The Superior Court Rules of Civil Procedure authorize the District to obtain discovery regarding information that is relevant to its claims and proportional to the needs of the case. It is clear that the Facebook Executives possess information relevant to these questions. Facebook's own documents (appended to this Motion) show that the Facebook Executives each played unique managerial and decision-making roles regarding Facebook's data security operations and the failure to notify consumers when Facebook first learned that their data was improperly sold to Cambridge Analytica. The Facebook Executives' documents are thus relevant, unique, and critical to the District's claims.

Nor can it be seriously contended that designating the Facebook Executives as document custodians would be disproportionate to this case's needs. Facebook's protests to the contrary boil down to an objection that the Facebook Executives possess information that is duplicative of other custodians and producing their documents would be costly and burdensome. But this objection fails because Facebook has declined to substantiate it with any factual support whatsoever. Indeed, even had Facebook articulated specific costs, they would be a pittance compared to the company's considerable resources. Any costs would be further outweighed by the interests of hundreds of thousands of District consumers implicated in this lawsuit and the critical role the Facebook Executives played in managing the company actions (and inactions) challenged by the District. Designating the Facebook Executives as custodians is thus squarely within the proportions of this case and the Court should grant the District's Motion.

BACKGROUND

A. The District's claims in this action.

Facebook is among the world's largest social networking companies, with over two billion users worldwide, including hundreds of thousands in the District. (Compl. ¶ 10.) The District alleges that Facebook violated the Consumer Protection Procedures Act ("CPPA") by misleading District consumers regarding the security of their personal data. (*Id.* ¶¶ 72-76.) Two of the District's key claims are relevant to this Motion:

First, the District alleges that Facebook's "public statements, terms of service, and policies" made representations about protecting consumers' data that were misleading in light of the company's "lack of oversight and enforcement relating to third parties." (*Id.* ¶¶ 5, 46.) In particular, the Complaint alleges that Facebook "failed to exert meaningful review or compliance mechanisms to enforce" its own policies and "did not implement or maintain reasonable privacy safeguards." (*Id.* ¶¶ 36, 53.)

Second, the District alleges that Facebook knew as early as December 2015 that Facebook consumers' personal data was—in violation of Facebook's own policies—improperly sold to a political consulting firm called Cambridge Analytica in order to target digital political advertising during the 2016 United States Presidential Election. (*Id.* ¶¶ 34-35.) In all, the data of over 340,000 District consumers was sold to Cambridge Analytica, and Facebook did not notify these affected consumers until over two years later in April 2018. (*Id.* ¶¶ 30, 41.) The District alleges that this belated notice was a material omission because a significant number of consumers would have found this information important in determining how they used Facebook's social networking services. (*See id.* ¶ 42 (alleging timelier disclosure would have influenced consumers to "share less information on Facebook" or "deactivate" Facebook accounts).)

B. Facebook's refusal to designate the Facebook Executives as document custodians.

The parties have met and conferred extensively to negotiate the document custodians to be designated in this action. The District originally served its First Set of Requests for the Production of Documents ("First RFP") on January 9, 2019. (Attached as Exh. A at APPX001-009.[1]) In its First RFP, the District sought documents relating to Facebook's oversight and enforcement processes, as well as documents relating to Cambridge Analytica. (*See id.* at APPX005-006 (First RFP Nos. 9-18).) After the Court denied Facebook's motion to dismiss on May 31, 2019, Facebook responded to the District's First RFP on July 31, 2019. (Attached as Exh. B at APPX010-52.). Facebook's response raised numerous objections, including a recurring refrain that the requests were "overly broad, unduly burdensome, and disproportionate to the needs of the case." (*Id.* at APPX025-37 (Facebook's Objections and Responses to District's First RFP Nos. 9-18).)

The parties next engaged in multiple telephonic meet-and-confers to discuss the District's requests and Facebook's objections on September 24, 2019, October 18, 2019, and November 14, 2019. Seeking to compromise, the District ultimately sent Facebook a letter on December 19, 2019, proposing the use of search terms and custodians to narrow the scope of the District's requests and promote efficiency in locating responsive documents. (Attached as Exh. C at APPX053-58.)

[redacted]

[1] All Exhibits to this Motion are included in the attached Appendix and are consecutively paginated using the "APPX" prefix. For ease of reference, the District has included citations to the Appendix pagination.

The District responded on March 18, 2020, counter-proposing 35 additional custodians and additional search terms. (Attached as Exh. G at APPX072-80.) [redacted]

On May 21, 2020, the District sent Facebook a compromise proposal regarding the remaining requested custodians, offering to withdraw its request for 14 custodians if Facebook would agree to designate 9 custodians—including the Facebook Executives. (Attached as Exh. I at APPX085-90.) In connection with this proposal, the District provided a non-exhaustive description of why each requested custodian was likely to possess documents relevant to the District's claims and included supporting citations to public statements and Facebook documents involving the requested custodian. (*See id.* at APPX086-89.) [redacted]

On July 6, 2020, the District sent Facebook another compromise proposal, offering to again reduce its requested custodians to just four—the Facebook Executives. (Attached as Exh. K at

APPX099-100.) On May 13, 2020, the parties met-and-conferred by telephone regarding the District's request and were ultimately unable to resolve the issue—the District continues to maintain that the Facebook Executives should be document custodians in this action and Facebook continues to object that they should not. The parties agreed to stipulate that in light of health concerns raised by the ongoing COVID-19 pandemic, the teleconference satisfied SCR-Civil 37(a)'s requirement that the parties meet "in person" to attempt to resolve the disputed matter prior to the filing of a motion to compel discovery.

LEGAL STANDARD

SCR-Civil 26(b)(1) permits parties to obtain discovery regarding "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." The proportionality determination requires a court to weigh six factors: "[1] the importance of the issues at stake in the action, [2] the amount in controversy, [3] the parties' relative access to relevant information, [4] the parties' resources, [5] the importance of the discovery in resolving the issues, and [6] whether the burden of expense of the proposed discovery outweighs its likely benefit." SCR-Civil 26(b)(1). "No single factor is designed to outweigh the other factors in determining whether the discovery sought is proportional, and all proportionality determination must be made on a case-by-case basis." *Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co.*, 322 F.R.D. 1, 6 (D.D.C. 2017).

The party seeking to compel discovery bears the initial burden of showing "how the requested information is relevant"—and once satisfied, the burden shifts to the non-movant to "explain why discovery should not be permitted." *Id.* "[I]n order to successfully resist a motion to compel, [a party must] specifically object and show that a discovery request would impose an undue burden or expense or is otherwise objectionable." *Id.*

ARGUMENT

A. The Facebook Executives possess unique information directly relevant to the District's claims.

SCR-Civil 26(b)(1) entitles the District to discover information that is "relevant" to its claims. Relevance is "construed most liberally, to the point that discovery should be granted where there is any possibility that the information sought may be relevant to the subject matter of the action." *Daniels v. Potomac Elec. Power Co.*, 100 A.3d 139, 145 (D.C. 2014). Relevant information is discoverable even if it would not "be admissible at trial" so long as the "discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id.*

The District's claims in this lawsuit raise two fundamental questions that frame the relevancy determination:

1. Did Facebook misrepresent to consumers how it would protect the security of their personal data?

2. Should Facebook have notified consumers sooner that their data was improperly sold to Cambridge Analytica in order to target political advertising during the 2016 United States Presidential Election (a fact Facebook knew and did not disclose for over two years)?

(*See* Compl. ¶¶ 72, 74.) Each of the Facebook Executives played pivotal and decision-making roles with respect to Facebook's data protection operations, Cambridge Analytica, or both. They thus possess information directly relevant to answering these critical questions and should be designated as document custodians in this action.

1. Mark Zuckerberg (Chief Executive Officer)

Mr. Zuckerberg's singular position as Facebook's CEO ensures that he possesses documents relevant to both the company's data security representations and Cambridge Analytica. On data security, Mr. Zuckerberg has himself made public representations to consumers regarding how Facebook protects their personal data. To provide just a few examples, Mr. Zuckerberg

published a Facebook Post on November 29, 2011, expressing a commitment to "making Facebook the leader in transparency and control around privacy" and informing consumers, "We do privacy access checks literally tens of billions of times each day to ensure we're enforcing that only the people you want see your content."[2] In a March 21, 2018 Facebook Post where Mr. Zuckerberg made his first public remarks about Cambridge Analytica, he described the events as a "breach of trust between Facebook and the people who share their data with us and expect us to protect it"; he also stated that the company had a "responsibility to protect your [consumers'] data."[3] These are the exact kinds of public statements and assurances that the District alleges misled consumers about the security of their data on Facebook—and by making these statements on behalf of the company, Mr. Zuckerberg is certain to possess documents relevant to this claim.

Mr. Zuckerberg also possesses documents relevant to Facebook's failure to notify consumers about Cambridge Analytica—he has stated that the buck stops with him on this issue. In the same March 21 Facebook Post, Mr. Zuckerberg accepted responsibility for Cambridge Analytica, stating, "I started Facebook, and at the end of the day I'm responsible for what happens on our platform." In an interview with CNN the next day, Mr. Zuckerberg went even further, expressing "regret" for Facebook's failure to notify consumers earlier about Cambridge Analytica and acknowledging that the company "got that wrong":

> And going forward when we identify apps that are similarly doing sketchy things [as Cambridge Analytica] we're going to make sure that we tell people then too, right. That's definitely something that looking back on this—you know, I regret that we didn't do it at the time. And I think we got that wrong and we're committed to getting that right going forward.[4]

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[2] M. Zuckerberg Facebook Post (Nov. 29, 2011), *available at* https://www.facebook.com/notes/facebook/our-commitment-to-the-facebook-community/10150378701937131/ (emphasis added).

[3] M. Zuckerberg Facebook Post (Mar. 21, 2018), *available at* https://www.facebook.com/zuck/posts/10104712037900071 (emphasis added).

[4] Tr. Interview with M. Zuckerberg, CNN (Mar. 22, 2018), *available at* http://transcripts.cnn.com/TRANSCRIPTS/1803/22/cnr.17.html (emphasis added).

Mr. Zuckerberg's admission that Facebook's delayed notice was "wrong" highlights the relevance of his documents to the District's Cambridge Analytica claim. Documents bearing on how and why Mr. Zuckerberg reached the conclusion that it was "wrong" for Facebook to wait over two years to notify consumers affected by Cambridge Analytica are directly relevant to whether a reasonable consumer would find that belated notice to be a materially misleading omission.

Moreover, Mr. Zuckerberg is certain to possess unique documents not maintained by other custodians. [redacted]

These documents merely confirm the obvious. The District's claims in this action directly bear on Cambridge Analytica and data security—both matters of significant import to Facebook. As the company's chief executive, Mr. Zuckerberg possesses unique and critical documents relevant to both issues that cannot be obtained through other document custodians.

2. Sheryl Sandberg (Chief Operating Officer)

Ms. Sandberg, as Facebook's Chief Operating Officer, possesses unique documents relevant to Facebook's data protection operations. Documents bearing on how Facebook's data protection operations actually functioned in practice are critical to assessing the District's claim that Facebook made misrepresentations to consumers about the security of their personal data. That Ms. Sandberg possesses such documents are confirmed by her own public statements. In an April 5, 2018 interview with Bloomberg News, Ms. Sandberg took "personal[]" responsibility for operational "mistakes" that allowed for the misuse of consumers' Facebook data:

> I feel deeply personally responsible because there are real mistakes that we made and that I made. . . . What we didn't do until recently and what we are doing now is just take a broader view looking to be more restrictive in ways data could be misused. We also didn't build our operations fast enough—and that's on me.[5]

[redacted]

[5] Interview with S. Sandberg, *Sheryl Sandberg Says Facebook Needs To Do Better Protecting Data*, Bloomberg (Apr. 5, 2018), *available at* https://tinyurl.com/y8c2l28r (emphasis added).

[redacted] Moreover, her role ensures she possesses documents essential to evaluating what Facebook's data protection operations actually looked like in practice over time and how Facebook's leadership prioritized those operations. This information goes to the heart of the District's claim that in light of Facebook's representations about data protection, the company's operations were not up to snuff.

3. Joel Kaplan (Vice President of Global Public Policy)

Mr. Kaplan is a senior Facebook executive who played a significant decision-making role managing Facebook's response to Cambridge Analytica. [redacted]

[redacted]

Because Mr. Kaplan exercised significant decision-making authority regarding the Cambridge Analytica events, his documents are directly relevant to the District's claim that Facebook's failure to notify consumers affected by Cambridge Analytica was a material omission. [redacted] His documents are therefore crucial to understanding what (and when) Facebook knew about Cambridge Analytica, how the company contemporaneously assessed Cambridge Analytica's conduct, whether the company evaluated public reaction in considering an earlier disclosure, and why Facebook ultimately took over two

years to notify affected consumers. Each of these issues is germane to whether a reasonable consumer would have found Facebook's belated notification materially misleading.

4. Elliot Schrage (Former Vice President of Communications and Public Policy)

Mr. Schrage is another senior Facebook executive whose documents bear on the Cambridge Analytica question. As a communications executive, Mr. Schrage's correspondence provides unique insight into public perception of Facebook's messaging—which is directly relevant to the reasonable consumer standard. [redacted]

> [redacted]

[redacted]

6 [redacted]

[redacted]

B. Designating the Facebook Executives as document custodians is proportional to the needs of this case.

As the Facebook Executives possess relevant information, it is Facebook's burden to demonstrate that designating them as custodians is disproportionate to the needs of the case applying the factors set out in SCR-Civil 26(b)(1). *See Oxbow Carbon & Minerals, LLC v. Union Pac. R.R. Co.*, 322 F.R.D. 1, 6 (D.D.C. 2017). Facebook has not met this burden. The only objections that Facebook has proffered to date relate to the burden factor, asserting in conclusory fashion that designating the Facebook Executives would be merely "[redacted]" of other

custodians and thus "[redacted]" of discovery. (Exh. J at APPX096-97.) These arguments lack merit.

1. **The Facebook Executives are not duplicative of other custodians.**

Facebook's primary objection to producing the Facebook Executives' files is that they are "[redacted]."[7] (*Id.* at APPX093.) This objection fails. Courts have routinely designated senior corporate executives (including CEOs) as document custodians, recognizing that due to their executive capacities, such officers "would most likely have information lower-level employees do not." *Vasudevan Software, Inc. v. Microstrategy, Inc.*, 2012 WL 5637611, at *6 (N.D. Cal. Nov. 15, 2012) (compelling designation of software company CEO); *see also Oxbow Carbon*, 322 F.R.D. at 8 (compelling designation of energy company CEO).

[redacted]

Notably, some of the Facebook Executives have already been designated as document custodians in other lawsuits involving Cambridge Analytica. *See In re Facebook, Inc. Section 220 Litig.*, 2019 WL 2320842, at *18 (Del. Ch. May 30, 2019) (in shareholder suit to inspect corporate records regarding alleged mismanagement relating to Cambridge Analytica, designating Mr. Zuckerberg

[7] Facebook's objection that the Facebook Executives' files are duplicative is almost beside the point. As senior executives with decision-making authority, the Facebook Executives' documents are critical to establishing the company's liability. They should accordingly be designated as custodians regardless of whether some other custodians might possess duplicative documents. *See MariCal, Inc. v. Cooke Aquaculture, Inc.*, 2016 WL 9459260, at *2 (D. Me. Aug. 9, 2016) (designating CEO as custodian in patent infringement suit because his "position of prominence" in corporate management indicated he possessed "information regarding [the corporation's] knowledge and view of the scope of the patents").

and Ms. Sandberg as custodians possessing "necessary and essential" information to the claim). Their designation here would thus hardly be novel.

Facebook makes an ancillary argument that there is nothing to see in the Facebook Executives' files because the correspondence cited by the District "[redacted]" other already-designated custodians. (*E.g.*, Ex. J at APPX095). This is not compelling. "The mere fact that many documents have already been produced is not sufficient to establish that there are no relevant materials to be found." *Family Wireless #1, LLC v. Auto. Techs., Inc.*, 2016 WL 2930887, at *3 (D. Conn. May 19, 2016). Critically, Facebook has not designated the Facebook Executives as custodians in the first place—so it is not surprising that all the documents involving them produced to date copy other custodians. Facebook's designation of other (mostly subordinate) custodians thus cannot foreclose the possibility that the Facebook Executives possess additional, unique documents not in those subordinate custodians' possession.

At bottom, it is impossible to verify Facebook's objection because the company has not undertaken any efforts to quantify the extent of duplication. Facebook has not, for example, provided any estimates of the Facebook Executives' documents that are unique versus duplicative of already-designated custodians. *Cf. Oxbow Carbon*, 322 F.R.D. at 4-5 (party resisting discovery reviewed "sampling" of disputed custodian's files to estimate responsiveness). Nor has Facebook addressed why "de-dupe" technology widely available in complex civil litigation would not "resolve any duplication issue." *See Garcia Ramirez v. U.S. Immigration & Customs Enforcement*, 331 F.R.D. 194, 198 (D.D.C. 2019). The Court should reject an objection substantiated entirely by the company's own say-so.

2. **The cost burden of adding the Facebook Executives as custodians is minimal in comparison to the SCR-Civil 26(b)(1) factors.**

Facebook's cost objection can be readily dismissed because it, too, is conclusory. Cost objections do not hold water where a party fails to "provide any evidence or specific factual allegations to support their assertion that discovery from the additional custodians would unduly add to the cost or time needed to process the necessary documents." *Garcia Ramirez*, 331 F.R.D. at 198. Facebook has likewise failed to provide any detail as to the increased costs of designating the Facebook Executives aside from a general objection that the costs would be "[redacted]."[8] (Exh. J at APPX097.) And notably, in complex civil litigations like this one, even specific cost objections are routinely set aside because it is well understood that extensive discovery and lengthy custodian lists are warranted—and indeed, par for the course. *E.g.*, *Oxbow Carbon*, 322 F.R.D. at 9 ($142,000 in discovery costs "not so unreasonably high" when amount in controversy involved "tens of millions of dollars"); *United States v. AT&T, Inc.*, 2011 WL 5347178, at 5 (D.D.C. Nov. 6, 2011) (in large corporate litigation, "440,000 pages of documents are not overwhelming"); *Garcia Ramirez*, 331 F.R.D at 198 (34 document custodians was proportionate to needs of nationwide class action).

Moreover, weighing the SCR-Civil 26(b)(1) factors, it is difficult to imagine a situation where the cost of designating the Facebook Executives as custodians would come out to anything more than marginal. First, the issues at stake in this action are undoubtably important; this is a government consumer protection enforcement action regarding how the personal data of over 340,000 District consumers—nearly half of the District's population—was harvested and sold

[8] Nor can Facebook claim that it lacked opportunity to put these costs together. The District originally requested the Facebook Executives be designated as custodians over three months ago on March 18, 2020, (*see* Exh. G at APPX072-73), included the same executives in its narrowed requested custodian list on May 21, 2020, (*see* Exh. I at APPX085-89), and once more in its final request made on July 6, 2020, (*see* Exh. K at APPX099-100).

without their knowledge. Second, the amount in controversy is likewise significant because the District is entitled to recover up to $5,000 in civil penalties per violation of the CPPA (in addition to damages, costs, and attorneys' fees). *See* D.C. Code § 28-3909(b). To provide just one example of potential exposure, should a factfinder determine that Facebook's failure to notify the 340,000 District consumers affected by Cambridge Analytica was a material omission, applying a penalty for each affected consumer implicates an amount in controversy well into the millions of dollars. Third, as to the relative access factor, Facebook has exclusive access to the Facebook Executives' documents and there is no other way for the District to obtain them aside from moving to compel their production. Fourth, on Facebook's resources—they are significant. Facebook is a powerful, multinational corporation that in 2019, generated an annual revenue north of $70.6 billion.[9] The production costs associated with four Facebook Executives are thus a minute fraction of the company's bottom line. Fifth, for the reasons set out in Section A, *infra*, the Facebook Executives possess documents that are vital to resolving the District's claims in this action. Together, these factors show that even had Facebook articulated specific cost objections (which it did not do), they would be far outweighed by the benefit of designating the Facebook Executives—who each play a critical and central role in this action.

CONCLUSION

For the foregoing reasons, the Court should grant the District's Motion to Compel.

[9] *See* Facebook Press Release, *Facebook Reports Fourth Quarter and Full Year 2019 Results*, *available at* https://investor.fb.com/investor-news/press-release-details/2020/Facebook-Reports-Fourth-Quarter-and-Full-Year-2019-Results/default.aspx

Respectfully submitted,

Date: July 17, 2020

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APPENDIX

[Appendix documents provided *in camera* to Chambers]

Exhibit E-9

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA, Plaintiff,	:	Docket Number: 2018 CAB 008715
vs.	:	
FACEBOOK, INC., Defendant.	:	
	:	Wednesday, September 9, 2020
	:	Washington, D.C.

The above-entitled action came on for a hearing before the Honorable FERN FLANAGAN SADDLER, Associate Judge, in Courtroom Number 100.

APPEARANCES:

On Behalf of the Plaintiff:

JIMMY R. ROCK, Esquire
Washington, D.C.

On Behalf of the Defendant:

CHANTALE FIEBIG, Esquire
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20-02615

P R O C E E D I N G S

THE COURT: Okay, Ms. Davenport.

THE DEPUTY CLERK: Yes, Your Honor. All parties in the matter before the Honorable Judge Saddler draw now and give your attention. This Honorable Court is now in session.

Your Honor, now calling Case No. 2018 CA 8715 in the matter of District of Columbia v. Facebook, Inc. Will parties please state and spell your first and last name for the record, beginning with the plaintiff.

MR. ROCK: Good morning, Your Honor. This is Jimmy Rock, J-I-M-M-Y, last name R-O-C-K, and I'm an Assistant Deputy Attorney General with the District. There are other counsel for the District on today, but I will be addressing the District's motion to compel.

THE COURT: Okay, so, all other counsel, Mr. Rock, are just observing?

MR. ROCK: That’s correct, Your Honor.

THE COURT: Okay, good morning, Mr. Rock. Thank you.

MR. ROCK: Good morning.

THE COURT: Ms. Davenport.

THE DEPUTY CLERK: Yes, Your Honor.

THE COURT: Defense counsel.

THE DEPUTY CLERK: Will you please state and

spell your first and last names for the record.

MS. FIEBIG: Yes, good morning. This is Chantale Fiebig, first name is C-H-A-N-T-A-L-E, last name is F-I-E-B-I-G. And I am appearing from Gibson Dunn & Crutcher on behalf of defendant, Facebook. There are --

THE COURT: Good morning. Go ahead, Ms. Fiebig. You said there are.

MS. FIEBIG: Yes, there other counsel for Facebook also on the line, but as with the District, they will not speaking this morning with respect to the motion.

THE COURT: Okay. They're just observing. Is that correct?

MS. FIEBIG: Yes, Your Honor.

THE COURT: Okay, good morning to all, again. This is Judge Fern Flanagan Saddler, and I am appearing telephonically today for this hearing that is set for, was set for 10 o'clock a.m. It's a motion hearing and the Court notes for the record that plaintiff, District of Columbia complaint is for deceit and misrepresentation.

Before we get started with this remote hearing, there are a few rules that I want to set forth on the record. Please let me know if you do not understand any of the rules. The first one is that each time counsel

BS

speaks, and you've already spelled your first and last name, but each time you speak, you can just give your last name. That way, we don't have to, if anybody's listening telephonically, rely on voice recognition. So, it could be, for example, Mr. Rock on behalf of plaintiff, District of Columbia, and do that each time you speak.

Secondly, the second rule for the hearing is that you must speak slowly, clearly and distinctly and almost in an exaggerated tone. That way if we have to play back the record, it will be much clearer to my chambers if we have to play it back, or if anyone has to play it back.

The third rule is that, and this is a precatory statement. The proceedings are being recorded by the Superior Court of the District of Columbia and are available by transcript or by hearing. But at this point, you cannot, no one, observers, counsel, parties or anyone are permitted to record these proceedings in any way. They are not to be recorded at all. And just for the record, these are rules that I state in every hearing, every single hearing. But I do want to make sure everybody is clear that these are Court ordered. Is that clear, Mr. Rock?

MR. ROCK: That, that's clear, Your Honor.

THE COURT: Okay. On behalf of Facebook, is that clear, Ms. Fiebig?

MS. FIEBIG: Yes, Your Honor, thank you.

THE COURT: Okay and thank you all for appearing for this hearing. You all did request a hearing and I think the hearing can be helpful for what is before the Court. And so, what I would like to do first of all is make sure you can hear me clearly. Can you, Mr. Rock?

MR. ROCK: Yes, Your Honor. I can hear you. Are you able to hear me, as well?

THE COURT: Yes, very clearly. Ms. Fiebig, are you able to hear me clearly?

MS. FIEBIG: Yes, Your Honor.

THE COURT: Okay, I hear you clearly also. The Court is going to set forth the background, the procedural background of the case before today, the matter before the Court today. If you feel I have misstated or incorrectly stated any portion of the background, please wait until I finish my recitation and then, you can weigh in.

The Court now -- that this matter is before me today, September 9, 2020, for a motion hearing on plaintiff, District of Columbia, opposed motion to compel defendant, Facebook, Inc., to designate document

custodian and provide search terms. That was filed on July 17th, 2020. As further background, the Court notes that the parties were last before the Court on July 21st, 2020 for a status hearing. At that hearing, plaintiff, District of Columbia's counsel, represented that the parties conferred and plan to file a joint motion proposing a briefly schedule for the instant motion.

The Court did schedule a motion hearing for today so that the parties may present oral arguments concerning plaintiff's motion. Additionally, the Court notes that on yesterday, which was September the 8th, 2020, plaintiff, District of Columbia counsel, emailed chamber a PowerPoint presentation that plaintiff's counsel requested to present at today's hearing.

Defense counsel objected to plaintiff's use of the presentation, contending that the presentation contains material designated "confidential/highly confidential" pursuant to the protective order. And that defense counsel did not receive advance notice regarding plaintiff's counsel intention to use the presentation.

First of all, let me just, that was a short recitation. Do you believe the Court's recitation is correct, Mr. Rock, on behalf of plaintiff?

MR. ROCK: Yes, Your Honor, that's correct.

THE COURT: All right, Ms. Fiebig, on behalf of

defendant, Facebook, do you believe the Court's procedural recitation about the procedure posture this case that is, was correct? Is correct?

MS. FIEBIG: Yes, Your Honor.

THE COURT: Okay. Let me just make a preliminary ruling that could change in the future. But I am going to say this, considering the late submission of plaintiff, District of Columbia counsel's presentation, that he did not provide the presentation to defense counsel beforehand, it's likely that I'm going to deny plaintiff's counsel request.

The Court is advising all that plaintiff counsel have and will be given the opportunity to make representations regarding the contents of plaintiff's motion on the record. That is all subject to the fact that the Court may allow the submission of plaintiff's counsel presentation at a, at a next hearing, which would, could be soon to allow defense counsel to understand it, to file anything it deems appropriate. Demonstrative evidence is always helpful to the Court. And, but, given the procedural posture of the presentation, plaintiff's counsel demonstrative evidence, I'm going to deny it without prejudice. But we will proceed today.

MR. ROCK: Your Honor, this is, is Mr. Rock.

Could I briefly address that point?

THE COURT: Yes, you may. You can put what you would like on the record.

MR. ROCK: And, and to be clear, the District was not seeking to introduce into the record the PowerPoint. It is merely a demonstrative aid that is consistent with other demonstrative aids the District has used during oral argument in this case to highlight certain points. And there is nothing in the presentation that was not included in the District's motion to compel. The District was following the procedure that it had used throughout this case at both an earlier motion for a protective order on discovery and the motion to dismiss, providing it to the Court and Facebook the day before the hearing.

But just to be clear, it was simply an aid to guide the argument today. And there is nothing in there that was not already in the record.

THE COURT: All right. Thank you very much, Mr. Rock for that clarification. Ms. Fiebig, counsel has argument that this is and has been done previously to aid the Court. It has been permitted, and I believe there was no objection at previous hearings to this type of presentation. It is, plaintiff is not seeking to enter this as an evidentiary type of document or whatever. So,

would you please reply to that. Why shouldn't the Court allow it?

MS. FIEBIG: Yes, Your Honor. This is Ms. Fiebig on behalf of Facebook. The District should not be allowed to use this presentation today for the reasons that you stated in your opening comments, which is that Facebook first learned of this presentation late yesterday at the same time that the Court learned of it.

The protective order in this case requires sufficient notice to allow the parties to ensure that only people, that the only people present are those who have agreed to be bound by the protective order when there will be confidential or highly confidential material displayed.

Now, we understand the District's position is that they were not seeking to enter the presentation into the record. But given the nature of these proceedings being both public and recorded, we think that this is a different circumstance than in prior proceedings where the District may have submitted similar, demonstrative. Here, there is information in the presentation that is in the Court record, but it is not in the public record. And that is because the parties have, in accordance with the protective order, filed their brief under seal and redacted the confidential and highly confidential

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materials from the public record.

If the District were permitted to use their presentation and display it by Webex today, the public would be able to view the contents, the substance and the contents of the confidential and highly confidential information. Now, that information includes sensitive business information, including about statements, Facebook's enforcement efforts. If that information were to become public, it would violate the terms of the protective order. Now, in the event that the District is interested in using the presentation at a future hearing, then, we are happy to work with the District and the Court to establish protocol that would allow the District to use its demonstrative, without violating the protective order. But that process is not in place for today's public hearing.

And for those reasons, the Court should not permit the District to proceed as it may have been permitted to proceed with prior demonstratives that does not reveal the contents and substance of confidential and highly confidential documents.

MR. ROCK: Your Honor, this is Mr. Rock. May I briefly respond?

THE COURT: Yes, sir.

MR. ROCK: So, Facebook is simply misreading

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the protective order in this case. There is a paragraph, paragraph, Section 7 of the protective order. The very final paragraph discusses giving another party notice if a hearing will involve the discussion of confidential information. About 55 days ago, the District filed its motion to compel in this case and requested a hearing and attached to that motion to compel, documents that Facebook had marked confidential. There could be no more notice that Facebook had been provided that today's hearing would involve discussions of those confidential records.

Since Facebook is disputing the relevancy of the four key participants that are, whose document discovery is at issue in today's motion, the protective order than made it Facebook's obligation if it wanted to seek a closed hearing today. Which it did not do.

So, again, the PowerPoint objection that Facebook is making on the confidentiality is really a red herring for the fact that the confidential records were already in the record. There was a public hearing set for today where those would come up. If Facebook wanted today's hearing to be closed, it should have followed the protective order and itself and sought that closed hearing.

That being said, at this point in time, it does

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not appear that the Court is conducting a video hearing. So, the Court has the PowerPoint electronically. The District is fine having the Court follow along with it. And we can follow the same protocol that was in place at the motion to dismiss hearing. The District doesn't have to directly quote from the particular documents at issue, which are at Slides 6 through 12. The District can simply characterize those.

THE COURT: All right, I would like to hear from Ms. Fiebig at this time. Plaintiff, District of Columbia, has said that the, among other things, it has argued in terms of this request, that the defendant, Facebook, did not seek a closed hearing. The Court, just parenthetically, notes that it decided to, perhaps, is considering denying plaintiff's motion without prejudice. Thereby, allowing Facebook to seek a closed hearing. So, it's denied without prejudice.

Why shouldn't the Court follow the suggestions of plaintiff, District of Columbia's counsel today? So, I would like to hear your response.

MS. FIEBIG: Your Honor, this is Ms. Fiebig on behalf of Facebook. I was hoping to ask a point of clarification. When Your Honor said that you are considering denying the District's motion without prejudice, are you referring to denying the motion to

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compel without prejudice? Or are you considering denying the District's motion to use this exhibit without prejudice?

THE COURT: Thank you for that question. It is the latter. The Court is considering denying plaintiff, District of Columbia's request to make the presentation and would deny it without prejudice to also allowing defendant, Facebook, to file a motion for a closed hearing. So, it's the latter motion, not the motion to compel. Thank you for that question.

MS. FIEBIG: Thank you, Your Honor.

THE COURT: I hope that clarifies everything.

MS. FIEBIG: Yeah, yes, Your Honor, thank you. This is Ms. Fiebig on behalf of Facebook.

As an initial matter, Facebook would note that the District has conceded that there isn't anything in the presentation that is not referenced in the District's brief. And so, we view the demonstrative as unnecessary. However, if the Court believes that the demonstrative would be helpful in the Court's deliberation around the motion to compel, then, Facebook has no objection to the Court denying the District's request to use the PowerPoint at a future hearing where Facebook would have an opportunity to seek a closed hearing or the Court could propose a process through which it would like to

conduct the proceedings in a manner that would be consistent with the protective order.

THE COURT: All right. All of that is on the record. Anything else, Mr. Rock, before the Court rules on that issue of the demonstrative presentation?

MR. ROCK: This is Jimmy Rock on behalf of the District. No, Your Honor, other than to make the point that the District is prepared to just proceed with the oral argument at this point, given that we're all here today. And this is, you know, really in a vacuum quite an easy discovery issue, and so, to the extent the PowerPoint is becoming an obstacle to proceeding with the hearing today, the District is fine proceeding with just oral argument.

FINDINGS OF THE COURT

All right. And I will also, again, say that demonstrative evidence is always helpful to this Court. I've heard argument on that particular issue and I have decided not to allow the presentation today, September the 9th, 2020. It's denied without prejudice.

Again, should Facebook file what it deems appropriate, including a request for a closed hearing, which would be very soon, but would not be allowed today. Do you understand what I just ruled, Counsel Rock?

MR. ROCK: Yes, Your Honor.

THE COURT: Do you understand what just ruled, Counsel Fiebig?

MS. FIEBIG: Yes, Your Honor.

THE COURT: So, we will proceed today, September 9th, 2020 with oral argument. And if the District, again, would like to supplement that with demonstrative evidence, it can. And the District and Facebook, that is, I'm sorry, may file what it deems appropriate in the interim.

All right, so, we're going to proceed with argument. And I want to thank counsel for your very, for your very good submissions to the Court. They were very helpful, very good. And so, what I will, you not have to reargue what you have already submitted. However, you can elucidate any particular issue that you think would be helpful.

MR. ROCK: Thank you, Your Honor. This is Mr. Rock for the District.

The District's motion to compel presents a straightforward and very, actually very simple discovery issue. And the issue is, in terms of document discovery, is the District entitled under the rules at this point in time to document production from four key participants in the unfair and deceptive trade practices that are at issue in this case? And the Superior Court's rules, Rule

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26 set out two tests to answer that question.

The first is, is the information relevant? And the Court of Appeals in the Davis v. PEPCO case, which the District cited in its papers, set out that the relevancy burden, the relevancy question is an incredibly law bar. And at this point in time, the question for the Court to answer is. Is there any chance that these four individuals will have documents relevant to the District's claims? And the answer to that question is, yes.

The second part of the test is. Is the document discovery the District seeks proportional to this case? The answer to that question is absolutely, yes.

Let's first look at what the District's relevant claims are in this case. That these four key participants have relevant documents that relate to. There are, are two key questions that these four individuals have relevant documents related to. The first is, one of the District's key claims in this case. Did Facebook misrepresent how it would protect its consumers' data? The second key question on the relevancy point is. Should Facebook have notified its consumers earlier about the Cambridge Analytica incident? Both of those are key parts of the District's consumer

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protection claims here.

So, the relevancy question is. Is it at all possible that these four key participants and the company's conduct would have relevant documents? And the answer is, yes. And on the question of, did Facebook misrepresent how it would protect user data? Which is a key part of the District's case. We know that CEO Mark Zuckerberg of Facebook, the Chief Operating Officer, Cheryl Sandberg, have made public statement where they, themselves, on behalf of the company have taken responsibility for the company's failure to adequately protect its users' data in relation to the third-party applications. And this includes failures to protect over 300,000 District consumers that were impacted by the Cambridge Analytica incident. We know that they both have, have made, we know that their CEO, Mr. Zuckerberg, as early as 2011 and continuing up to the present, has made personal statements on behalf of the company, which he's the CEO and controlling shareholder of assuring its consumers that the company would take responsibility to protect consumers' data. And the District alleges in this case the company failed to do that.

In terms of the second question, the second part of the District's claim that goes to relevancy here. Should Facebook have notified users earlier about the

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Cambridge Analytica incident? Again, all four of the individuals that are at issue in this motion were key participants in the company's failure to timely notify its users about the Cambridge Analytica incident. We know from documents that were included with the District's motion that all of the decisions about what the company would be doing about Cambridge Analytica, including how it would respond when it became public in March of 2018 about what had happened, were made at the level of the CEO and the COO, Mr. Zuckerberg and Ms. Sandberg. That all of the key questions, all of the key actions of the company were made at that level.

We also know that, so, its, its clear under the standard in Davis that it is much more than likely, or much more than just possible they will have relevant documents. We, we know from what has already been produced that they, in fact, will have relevant documents.

As far as Mr. Schrage, who was a former Vice President at the company, and Joe Kaplan, who was also, who is also a Vice President of the company, we know from documents that were already produced that they were involved and have relevant information to the claims that the District make, makes that Facebook failed to timely notify its consumers of the Cambridge Analytica incident.

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And in the March 2018 time frame, individuals inside of Facebook were asking Mr. Schrage, why hadn't the company notified the public and its users earlier about this? What was the real story, Mr. Schrage is being asked, even if we aren't going to be able to put that out in public? And, so, clearly, he, he knows the answers to those. And the answer to those questions are, are key to the District's case here. And the District is entitled under the relevancy standard to discovery of those documents.

And then, similarly, Mr. Kaplan from documents that have already been produced, we know that Mr. Kaplan was aware of the Cambridge Analytica incident as early as 2015. Again, that's years before the company, before there was public reporting and the company took steps to inform its consumers, including hundreds of thousands of District consumers that their data had been improperly used and obtained by Cambridge Analytica.

So, all four of these executives were active participants here in the unlawful trade practices that are at issue in the District's case. And that's what makes this different than some of the Apex custodian cases that Facebook cites in its papers. This is not an incident where you have four executives who are sitting up, removed from the conduct at issue. These four individuals, the District has already shown by the

documents attached to its motion were, in fact, direct participants in the, in the company's unlawful trade practices. And that makes them the subject of discovery at this point in time.

Again, the Davis case, you saw the Court of Appeals overturning and finding an abuse of discretion for a Superior Court Judge denying the relevancy of documents at this early stage of discovery. And that's because the Court of Appeals has set an incredibly low bar for meeting relevance. Any chance that the individuals are likely to have relevant documents, satisfies the relevancy standard, and the District easily meets that here.

Having met relevancy, you turn to proportionality. And, again, Facebook's arguments on proportionality are simply not credible. When you boil it down, Facebook is taking the position that it would be undue burden and disproportional for one of the world's largest technology companies to search for and produce documents from four individuals that work at the company. And that's simply, simply is not a credible argument. When you look at the specific factors the courts look at in deciding whether or not the defendant, because here on, on the proportionality prong, the burden shifts to Facebook as to whether or not the defendant has met their

burden on proportionality. All of the factors favor the District. These four individuals' documents are uniquely relevant to the District's claims, and the Court can see that from the exhibits that are appended to the motion to compel, where it's clear that all four of these individuals were directing and participating in the unlawful conduct at issue.

There's a significant amount in controversy. Facebook tries to cabin the value of this case at the $2 million point. That is vastly off the mark. Facebook's exposure in this case is well in excess of $300 million when you apply the penalty scheme available under the CPPA through the fact that we already know by Facebook's own admission there were more than 300,000 District consumers that were impacted. And, and Facebook point on, on this rings especially hollow because it has already paid the largest fine ever levied by the Federal Trade Commission, the Federal Consumer Protection Regulator, a $5 billion fine for this exact same conduct. And prior to that $5 million fine the largest, similar fine levied by the FTC had been 22 million. So, again, the idea that there is not a significant amount of controversy here is simply incorrect.

On the factor of who has access to the documents. These particular documents are only in

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Facebook's possession, which, again, favors the District on the proportionality prongs. These are also critical documents. Why Facebook decided to act like it did. Why they failed to notify its users that they had been impacted by Cambridge Analytica. The direct statements that it made mislead its consumers. All of those, these four individuals were actively involved in.

And finally, the last factor as to proportionality. The benefit of discovery here to the District of documents vastly outweighs any prejudice to Facebook at having to produce them. And let's be clear on this point because Facebook sets up a strong-man argument in its papers, Your Honor, on this point. Which Facebook argues that it can't be the case that there, that these executives are going to have to produce documents in every case that gets filed against the company. And that is not at all what the District is advocating. Nor is that the case here. These four individuals are properly subject to discovery in this case because they are the key actors. They have, they are the ones, especially in the cased of Mr. Zuckerberg and Ms. Sandberg, who took control of the company's response to Cambridge Analytica, they are the key participants. And that makes discovery against them appropriate her. And the District even cites the case

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from Delaware where there has been a securities action related to Cambridge Analytica, where we saw, when Mr. Zuckerberg's being already subject to discovery on this issue.

So, again, when you look at relevancy, the District clearly meets the low bar there. In terms of proportionality, Facebook cannot meet its burden there. And at this point in time, Your Honor, in order to keep discovery in this case moving, the District needs an order from this clear making it clear that these four individuals, these four key participants will be subject to discovery.

I want to close with two points. The first is, Facebook argues that there should be further meet and confer. And, and that position is simply defendants doing what defendants do in cases like this, which is delay, delay, delay. There has been more than an 80-month meet and confer process. During that process, Facebook made it very clear to the District that it first wanted an agreement on the individuals whose documents would be produced before it would engage seriously in the issue of search terms. It was only when the District moved to finally resolve the dispute and include these four key participants that Facebook now comes back and says, no, no. Let's have further negotiations on this.

And, Your Honor, it's clear from the District, from Facebook's briefing on this, that they are not going to willingly agree to the production of these four individuals. It is, it's very clear through the meet and confer process that just as a practical matter, the company will not agree to produce these individuals' documents absent a Court order. And the District is easily entitled to them under the relevant discovery standards.

And finally, Your Honor --

THE COURT: May I interrupt?

MR. ROCK: Yes.

THE COURT: Because defendant, Facebook, did note that the parties were engaging in negotiations regarding the search terms when plaintiff filed the instant motion. And so, you have a draft, somewhat be standard for these negotiations. But are you saying that the negotiations have definitely occurred and have not been fruitful? Or you're just surmising that they would not probably be fruitful?

MR. ROCK: So, two points.

THE COURT: Did you understand that?

MR. ROCK: Yes, I understand the question. So, Facebook made it very clear during the course of the meet and confer negotiations that what it wanted was an

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agreement first, a resolution of the issue of whose documents would be searched before it was willing to engage in final negotiations over the search terms. And if you look in the motion to compel, we attach letters from Facebook to the District in April of this year, and again, in June of this year. Where they make that position very clear. And so, the District took them at their word. And they said, and we, we've bent over as far as we could in terms of trying to reach an agreement on whose documents would be searched, and we could not come to that final agreement. So, we moved forward with this motion to compel. It was as we were preparing to file the motion to compel and after the meet and confer process had gone on for months, at that point, about seven months, that Facebook came back and said, no, no. Let's now go ahead and pick back up on the search terms, don't file the motion. And, and, and so, it is, it really is the issue of these four key participants in order to have their documents produced as well. That in the end of the day, practically, is going to drive a resolution of the search terms issues. And, and, you know, so, that was Facebook's position up until the District was ready to ask the Court to resolve the issue of whose documents would be searched.

Does that answer your question, Your Honor?

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THE COURT: It does. And, may I ask another question, please?

MR. ROCK: Yes.

THE COURT: For you to respond to the Court. And you did address the main issue regarding whether four Facebook executives should be designated as document custodians in this matter. The Court notes in defendant's opposition that defendant, Facebook, noted that the parties were engaging in negotiations regarding the search terms when plaintiff filed the instant motion. And you have addressed what you see as the status of these negotiations.

The Court would like plaintiff's counsel to also provide argument as to why plaintiff contends that the 21 agreed-upon custodians are insufficient. Specifically, the Court would like, Mr. Rock, you to address defendant, Facebook's representation that plaintiff counsel, plaintiff's counsel seeks to add the four Facebook executives as custodians without a sense in whether the 21 agreed-upon custodians will sufficiently provide the information plaintiff's counsel seeks. Would you in your argument address that contention?

MR. ROCK: Yes, Your Honor. And, and this is an issue that Facebook points to in some of the cases that it cites, where there are instances where you would

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have a rolling production like this, and the key executives wait -- that is not appropriate in this case because the four individuals that are the source of dispute here are key participants in the unlawful trade practices. And that makes it different than the cases that Facebook cites. And so, while the, while there is agreement on the 21 other custodians, these four individuals are also direct participants in the unlawful conduct at issue, as well. And so, they, their documents the District is entitled to get them at this point in time.

Now, there are a couple of points that Facebook makes related to this that simply don't hold water. The fist is Facebook argues, well, these individuals aren't going to have relevant documents anyways. They're all going to be duplicative of what's in the other 21. If that's the case, then, Facebook should have already run search terms for that. And if that's truly the case that only duplicative, then, they can easily be sorted out in the production process, and there cannot then be any burden on Facebook of going ahead and producing these documents.

On the other hand, Facebook argues its going to be an incredible burden to search for and produce these four individuals' documents. Both of those things cannot

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be true at the same point in time. But then, it simply is the case that these four individuals are key participants. Now, and so, the District's entitled to discovery of them, and to keep this case moving, it needs an order on the production now. Otherwise, we're be having this dispute down the road.

Now, imagine, Your Honor, if we were here on a standard medical malpractice case. And the plaintiff was trying to get documents, the notes from the, the surgeon at the hospital, who botched the operation. And the defendant came back and said, well, wait a minute, we'll give you the documents from the receptionist that day. We'll give you the documents from the nurse. Look at those and then tell us if you really need the surgeon's notes about the operation. That's exactly Facebook's position here, Your Honor. And it throws discovery on its head. These are not four, distant, uninvolved executives. These are four key participants in the unlawful trade practices. The District is entitled to the discovery of their documents. And remember, we're only asking for documents at this point, at this point in the discovery process.

THE COURT: Okay.

Unless you have any questions, Your Honor, that's all from the District at this time.

THE COURT: Thank you very much, sir. That clarified two big questions the Court had. Am I speaking loud enough?

MR. ROCK: I can hear you.

THE COURT: Mr. Rock.

MR. ROCK: Yes, yes.

THE COURT: Am I speaking loud enough, Ms. Fiebig?

MS. FIEBIG: Yes, Your Honor.

THE COURT: Okay. And so, I'd like to hear what you have to say. And, particularly, Ms. Fiebig, would you address the analogy that was just given by Mr. Rock to a medical malpractice, hypothetical medical malpractice case, which you just heard? Why shouldn't the Court require the four Facebook executives be designated as supplement custodians in this matter?

MS. FIEBIG: Thank you, Your Honor.

THE COURT: I'm sorry. And what other, any other points you would like, salient points you'd like to make that you think would help the Court.

MS. FIEBIG: Thank you, Your Honor. This is Ms. Fiebig on behalf of Facebook. I'd like to respond to medical malpractice points and then also address the prematurity of the motion and respond to the District's points on proportionality.

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Your Honor, with respect to the medical malpractice analogy, we think that that is inapposite here for several reasons. You know, most importantly, there is already a tremendous amount of discovery that the District has requested and that Facebook agreed to that the District will already receive. Much of which will include documents from the custodians that the District is requesting be separately designated. Which is just patently unnecessary here for reasons that I will address. You know, in an ordinary medical malpractice case, we are not talking about millions of documents or millions of dollars in discovery. But that is what we are talking about here, which makes the Court's analysis quite different than it might be in a medical malpractice context.

Here, the Court has to decide whether or not this additional discovery that is being requested by the District before the District has received aspect discovery, the District had already claimed as critical and that Facebook has agreed to. Now, here the District is asking for additional discovery before it had even bothered to review the material that it will already receive. That puts the --

THE COURT: Very briefly, just for clarification. You're saying, or contending that the

District of Columbia has not even reviewed the discovery burden between what agreed-upon custodians.

MS. FIEBIG: Yes, Your Honor, that's correct.

THE COURT: Okay.

MS. FIEBIG: And just for clarification, the District has not even received the production from the 21 agreed-upon custodians. And the reason for that is because, although Facebook stands ready to begin its review and production of the documents from those 21 custodians, the District has, instead, elected to litigate about these four, additional custodian at this very early stage without bothering to wait to receive and review the documents from the other 21 custodians. And that's significant. Because the other 21 custodians that the parties have already reached agreement on are themselves current and former, high-ranking Facebook officials or executives.

Now, the District contends that these four additional, new custodians are critical decision makers and suggest that that distinguishes this case from other cases in which courts have taken the very sensible approach that the party requesting additional discovery first review the discovery that is available to them. And I would draw Your Honor's attention to the Harris case, which Facebook recited in its papers. And in

Harris the plaintiff took the same position that the District is taking here. Claiming that the CEO of that company was directly, this is a quote, "directly involved as a decision maker." And in Harris as in the other cases cited by Facebook, including Lawrence -- the court determined that it was premature to grant a motion to compel documents from that individual before the requesting party had conducted the rest of the discovery.

Here, Your Honor, it's plainly sensible to order the District to receive and review the materials from the 21 agreed-upon custodians before the Court can be expected to make a ruling on whether additional discovery is possible, or necessary. So, I make sure the discovery is productive and as efficient as possible. But that has not happened here, which is precisely why the District's motion is premature.

Unless the Court has questions on that, I'd like to respond to the District's arguments regarding proportionality of this additional discovery on top of the 21 custodians that have already been agreed to.

THE COURT: No, I found your arguments to be clear. I didn't have any further questions. It was responsive to my questions already.

MS. FIEBIG: Okay, thank you, Your Honor. So, then, I just respond briefly to the District's

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characterization of the factors on proportionality.

Now, when you start with the baseline proposition that there are already 21 custodians, whose documents will be produced in this case, and that that will amount to a review of potentially 2-1/2 million documents. And it will, undoubtedly, cost Facebook millions of documents, then, the notion that this additional discovery is proportional is not credible.

Now, the District claims that the documents in these four custodians' documents will be uniquely relevant to their claim. But that's incorrect. They're neither relevant nor unique. Now, on pages 11 to 12 of Facebook's brief, we've identified the many other custodians whose documents on these issues are likely to be duplicative from these four custodians. And that is largely because there are other custodians who have very closely related job functions or report directly to the additional custodians Facebook is now seeking to add. Nor would these individuals' documents be uniquely relevant, but they may be uniquely relevant if none of the custodians were likely to have them, but that's not the case. Or they may be uniquely relevant if these individuals' intentions were at issue, but they are not.

The reasonable consumer standard does not turn on any given individuals -- state, and that's clear from

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the D.C. case -- and really what D.C. seeks to explore here, we believe, is whether D.C. consumers were mislead based on what was happening at the company. But what was happening at the company will be documented in the files of those who are managing the day-to-day enforcement and policy work. And those individuals are already custodians.

Now, the District contends that because there's a significant amount in controversy here, any expense would be proportionate. But that is also incorrect. Facebook does not dispute that several million dollars is a significant amount of money. But Facebook has already agreed to conduct discovery that will itself likely cost several million dollars. So, any additional or unwanted costs would be disproportionate. In light of that, to attempt to justify or this expansion of discovery, D.C. claims that it could have came, what we heard today for the first time $300 million. You know but that assumes that D.C. could obtain, you know, thousands of dollars per violation. But that is incorrect. During the relevant time period, the per violation penalty was lower than that contended by the District in its briefs. So, whatever estimates the District put forward based on their inaccurate calculations for the actual amount in controversy is only a fraction of that.

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The District also claims that these documents held by these custodians are solely in Facebook custody, and that has also not true. And the District cites about ten documents in its motion, all of which are highly cherry picked for purposes of the position that forced in the brief. But several of those are public safety documents are in the public realm. With respect to the internal emails, Facebook has already given many of their documents to the District in previous discovery or during initial discovery in this case, which includes many of the documents cited in their motions.

Now, also importantly, we understand that the District is also receiving materials from other Government entities, potentially, including the FTC, the District referenced. Which is accorded also investigating Cambridge Analytica. And, you know, perhaps, most importantly, Facebook is not refusing to produce these documents. As we said, many of them will be in the files of other custodians, so will be captured by other production. So, whether these documents are solely in Facebook's custody is not really the question. The question is whether potentially relevant documents from these four additional executives is solely in their custody. As opposed to also in the files of others that the parties have already agreed on. So, Facebook

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contends that, rather the District contends that these documents are critical to resolving their claim. We disagree.

Your Honor, this is a clear play to fish around in the in boxes of Facebook executives, and not to increase the party's ability to resolve these claims. The custodians that have already been designated are those most likely to have relevant information. D.C. doesn't actually dispute that. They just argue that they need these executives too. And at times they, in their briefs, they argue that they need these executives in addition to the others, simply because they're executives. But let me just reiterate, that Facebook has already agreed to 21 other high-ranking executives.

So, the District has also argued that the benefit of discovery here, in fact, they outweigh Facebook's burden. But, but, with all due respect, the District cannot credibly take that position. Because as Your Honor referenced it has not yet reviewed the other documents that it will receive, so, it cannot possibly know what marginal benefit there might be to adding these new custodians. Until the District has reviewed and assessed the vast amount of discovery that Facebook has already agreed to produced, it's an entirely speculative statement.

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So, for all of those reasons we think that the Court should deny the District's motion and order the District to review the documents from the 21 other already agreed-upon, high-ranking Facebook executives.

MR. ROCK: Your Honor, this is Mr. Rock. May I briefly respond?

THE COURT: Yes.

MR. ROCK: Thank you. I, I'd like to make two main points. And first, let's start with the observation that discovery, especially document discovery under the rules, is not a place to hide the ball. It's an opportunity for the plaintiff to get a full accounting and understanding of the facts relevant to its claims. And that's why the Court of Appeals in the Davis set the bar so low on relevancy. And, and framed the question of, is it at all likely these individuals are going to have documents that are relevant?

So, against that, let's pivot to the Harris case, which Facebook relies on. Because Facebook was, did not accurately cite that case. Because what that case actually said is, supports the District's position here. And so, I'm going to read just a portion of it, where in that Harris decision, the court observes that defendant contends that in this instance the CEOs are not appropriate custodians in the search for relevant emails.

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Because they weren't, not directly involved in the creation implementation and revision of the program at issue. And defendant argues there's no discovery that is indicated that current or former CEO made any of the decisions regarding the relevant program. And based on that, the court found there wasn't a sufficient showing that at that point in time, the executives were, should be subject to discovery. That is exactly the opposite of where we are in this case.

There have already been documents produced that confirm that Mr. Zuckerberg and Ms. Sandberg were key participants in deciding how Facebook would respond to the Cambridge Analytica incident. So, there is already record evidence that they are, in fact, unlike Harris, do have relevant documents and should be subject to discovery here. And Facebook is simply trying to hide the ball on this. We know from exhibits that are attached to the motion to compel the decisions about how the company would respond to Cambridge Analytica were being made by Mr. Zuckerberg and Ms. Sandberg. So, to the extent, they are having communications between themselves, those are not going to be inside of the 21 custodians that the parties have agreed to. The District's entitled to that discovery now.

And on the 21-custodian piece, you know, the

BS

District has been incredibly reasonable in the fact that it has agreed to 21 custodians, should not be used against it. In the parallel multi-district litigation, there have been more than 80 custodians that have been designated for document production there.

And then, the final point I want to make. Is simply even this, is just to observe that, even at this hearing Facebook cannot land on a, on a consistent position about whether or not searching these four key participant custodians is going to be a burden or no burden at all. Facebook just said that well, whatever they've got is only going to be duplicative. But then, on the other hand, searching them is going to be very costly. Both of those cannot be true, and the fact that Facebook cannot land on a consistent position, just illustrates the fact that this is an issue the Court needs to resolve.

The District has met the relevancy standard. The District, Facebook has not and cannot meet the proportionality standard, and these four key participants' documents should be ordered searched and produced. Thank you.

MS. FIEBIG: Your Honor, may I respond?

THE COURT: Yes.

MS. FIEBIG: Thank you, this is Ms. Fiebig on

BS

behalf of the District [sic]. And I just want to briefly respond to several of the points that Mr. Rock made.

The first is that, you know, he's being, he raised the potential that there would be documents simply between the CEO and COO. And if that is true, then, the parties can identify a way to detect those documents without having to conduct a full-scale review of all of the documents that all four key additional custodians may have. That would be a very narrow category of documents the parties could discuss in a reasonable way, which is quite different from the very broad and expansive discovery that the District is asking Facebook to undertake with respect to these four custodians.

Now, sort of highlighting how broad the District seeks to cast its net, I think it's helpful to look at the example that Mr. Rock just brought up about the MDL. There, there are 80 custodians. But that is a nationwide consumer class action. That affects the overwhelming majority of the population of the United States essentially. That is quite distinct from this case in which we are only talking about consumers in the District of Columbia, and we have already agreed to designate 21 custodians on a single claim. Where as in the MDL, there are many multiple claims that are not at issue in this action.

BS

Your Honor, and finally, the District contends that we have not been able to choose a position on this question of burden. So, with all due respect, this is not a zero-sum game. There is burden inherent in having to collect, review and produce the documents of the existing 21 custodians. There is additional burden that the company must also collect, review and produce the documents of an additional number of custodians, whoever that may be. That's just common sense. That burden is just particularly unwarranted here because the final outcome of the collection review is that the company would probably be producing highly duplicative documents of those original 21 custodians, which the District should be ordered to review first. Thank you, Your Honor.

THE COURT: Thank you very much. One question I would like to ask of plaintiff, District of Columbia counsel is that. And first let me say as a prefatory statement the Court will take plaintiff, District of Columbia's motion under advisement. I believe and feel that the arguments that have been presented today are very, very helpful to the Court toward the resolution of the motion.

Nevertheless, negotiations can still occur. Is that clear, Mr. Rock?

MR. ROCK: Yes, that's clear, Your Honor.

THE COURT: Is that clear, Ms. Fiebig?

MS. FIEBIG: Yes, Your Honor.

THE COURT: Okay, and so, both of you gave very clear, precise, concise arguments that are helpful to the Court to permit it to reach a, a resolution of the motion. And, again, I say, negotiations may still occur. Let the Court know if it, if any issues are resolved. But the Court will take the matter under advisement and issue a written opinion on, and/or order of the Court on that issue of the instant motion. Is that clear?

MR. ROCK: This is Mr. Rock. Yes, it's clear on behalf of the District, Your Honor.

MS. FIEBIG: This is Ms. Fiebig. It's clear on behalf of Facebook, as well. Thank you, Your Honor.

THE COURT: Okay, and I'm about to end this proceeding. I want to thank counsel, parties, everyone for your cooperation and your patience during these unusual, unique times concerning the Corona virus local pandemic and other issues, for being patient during these remote proceedings. I appreciate everything you have done, all you have submitted that has, and it has been very helpful. And I hope that each of you counsel will stay safe and healthy and continue to look out for the Court's order. But let the Court know if anything during

possible future negotiations have occurred. Okay, folks, stay safe and healthy. And thank you so much.

MR. ROCK: Thank you, Your Honor.

MS. FIEBIG: Thank you, Your Honor.

THE COURT: Okay, Ms. Davenport, this matter is concluded today. All are free to hang out.

(Thereupon, the proceedings were concluded.)

√ Digitally signed by Bernadette Smith

ELECTRONIC CERTIFICATE

I, Bernadette Smith, transcriber, do hereby certify that I have transcribed the proceedings had and the testimony adduced in the case of DISTRICT OF COLUMBIA V. FACEBOOK, INC., Case No. 2018 CAB 008715 in said Court, on the 9th day of September 2020.

I further certify that the foregoing 43 pages constitute the official transcript of said proceedings as transcribed from audio recording to the best of my ability.

In witness whereof, I have hereto subscribed my name, this 11th day of September 2020.

Transcriber

Exhibit E-10

PUBLIC FILING

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

ATTORNEY GENERAL
KARL A. RACINE

PUBLIC ADVOCACY DIVISION

September 9, 2020

VIA EMAIL

Chantale Fiebig
GIBSON, DUNN & CRUTCHER LLP
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cfiebig@gibsondunn.com

Re: ***District of Columbia v. Facebook, Inc.*****, 2018 CA 008715 B (D.C. Super. Ct.)**
Facebook Custodians and Search Terms

Ms. Fiebig:

At the hearing today on the District's motion to compel a search of four custodians—Mark Zuckerberg, Sheryl Sandberg, Joel Kaplan, and Elliott Schrage (the "Facebook Executives")—you represented that Facebook would be willing to run a targeted search on those individuals. You also reiterated Facebook's position that the District should review the electronically-stored information ("ESI") of the twenty-one custodians that Facebook has already identified as appropriate custodians. The District would like to take you up on both offers.

Whatever the Court may rule on the motion, a targeted search of the Facebook Executives is appropriate, as is a production of the ESI from the twenty-one already-agreed custodians. If the Court rules in favor of Facebook, that will define the scope of Facebook's current obligations to make any additional production from the Facebook Executives. If the Court rules in favor of the District, Facebook will only have to do the additional review to complete the production consistent with the Court's order. Starting now will advance the case either way—and failure to do so will needlessly halt it.

As to the Facebook Executives, the District requests that Facebook perform a search of the Four Executives using the search terms you have already proposed, limited to communications by and among any of the Facebook Executives, and produce responsive documents. This proposal, which Facebook indicated it would be open to at today's hearing, would, by design, exclude any communications that are supposedly duplicative of the other

twenty-one custodians.[1] And the burden of reviewing documents by and among any of the four Facebook Executives, on Facebook's narrow proposed terms, is presumably minimal—particularly if the Four Executives do not have any relevant information, as Facebook suggests.

As to the agreed-upon custodians, the District requests that Facebook produce the ESI according to its last-round of proposed search terms reflected in your August 17, 2020 letter. This much should be straightforward, as the searches are based your proposed terms and the documents are likely already in a database, as you suggested to the Court today. The District will tender a list of expansions of the search terms, after which Facebook should tell the District how many additional hits—beyond what Facebook's terms produced—those expansions generate. The District will thus be able to begin review of documents while the Parties are working through the need or propriety of any additional searches.

There is, similar to the above, no need to hinge production on a final resolution of the search terms to be used in the case, as they will only serve to marginally expand the search. Moreover, it is well past time to begin producing ESI. Facebook has repeatedly taken the position that the District first review information produced from the twenty-one custodians, but nearly eight months into discovery, has yet to produce a single document. Facebook will need to perform its own proposed requested searches and reviews either way, and it should begin now.

We look forward to your response.

Sincerely,

KARL A. RACINE
Attorney General for the District of Columbia

/s/ Jimmy R. Rock
Assistant Deputy, Public Advocacy Division

Attorney for the District of Columbia

[1] The proposal also, of course, excludes a body of non-duplicative material beyond this held by the Four Executives—not held by the twenty-one custodians—which the District is still seeking by motion. Presumably Facebook is not willing to engage in further negotiations about this material, but if it is, it should advise the District how many "hits" Facebook's own search terms generate that are unique to the Facebook Executives after de-duping against the other twenty-one custodians.

Exhibit E-11

GIBSON DUNN

Gibson, Dunn & Crutcher LLP

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VIA ELECTRONIC MAIL

September 15, 2020

Jimmy R. Rock, Esq.
Assistant Attorney General
Office of Consumer Protection, Public Advocacy Division
Office of the Attorney General for the District of Columbia
441 Fourth Street, N.W.
Washington, D.C. 20001

Re: *DC v. Facebook (2018 CA 008715 B)*

Dear Counsel:

We write on behalf of our client, Facebook, Inc. ("Facebook") to respond to the District's recent correspondence regarding "Facebook custodians and search terms." *See* September 9, 2020 Letter from J. Rock to C. Fiebig ("September 9 Letter"). We appreciate the District's effort to identify potential avenues in which discovery can move forward in a more reasonable manner, and look forward to continuing to work with the District towards practicable and workable solutions on these issues.

To do so, however, it is necessary to correct inaccuracies in the District's September 9 Letter. In particular, Facebook did not represent during the course of the September 9, 2020 hearing "that Facebook would be willing to run a targeted search on" the four senior executives the District's motion sought to compel as custodians, *see* September 9 Letter at 1, and Facebook makes no such offer now.[1] As Facebook has consistently maintained, the

[1] The District's claim that Facebook made such an "offer" is a distortion of the record. During the hearing, the District argued it was entitled to discovery of executives because communications between the CEO and COO would not be included in productions from the 21 agreed-upon custodians. *See* Tr. 38:17-24. In addressing that point, counsel for Facebook observed that the example presented by the District was in sharp contrast to the requests set forth in prior discussions and in the District's Motion to Compel, and could have been the basis of a reasonable negotiation had the District not elected to instead file its motion seeking unduly expansive discovery. *Id.* at 40:9-13 ("That would be a very narrow category of documents the parties could discuss in a reasonable way, which is quite different from the very broad and expansive discovery that the District is asking Facebook to undertake with respect to these four custodians."). Contrary to the District's suggestion, Facebook did not "offer" to conduct such discovery, and, as the

District has not met its burden to show that discovery from these executives is either relevant or proportionate to the needs of this case. Nevertheless, in an effort to minimize disputes necessitating the Court's involvement, Facebook offered a potential compromise to the District in the week prior to the District filing its motion. Rather than accept—or even seriously consider—Facebook's offered compromise, the District rejected it and proceeded to file its motion to compel. Accordingly, now that the matter is pending before the Court, Facebook will not conduct a search of the four new custodians' documents unless and until the Court directs it to do so. Until the Court issues a decision, a partial collection, review, and production would be inefficient and a waste of resources.

Facebook agrees that discovery can proceed with regards to the 21 agreed-upon custodians, and is willing to do so in a good-faith effort to advance discovery despite the pendency of the District's motion to compel. Facebook is presently collecting, uploading, and processing those custodians' documents, and agrees to begin searching those documents for review based on the search terms proposed in Facebook's August 17, 2020 letter, and making rolling productions of those documents once they are available. In order to proceed, Facebook understands the September 9 Letter to represent the District's agreement to the terms proposed in Facebook's August 17 letter. Once Facebook begins review of documents, it may become apparent that particular terms yield large numbers of non-responsive documents, thus requiring further refinement and/or other techniques to eliminate irrelevant results and streamline review. Facebook reserves the right to modify these search terms based on its review or use other techniques to ensure an efficient and effective review process, and will provide notice to the District of any necessary adjustments.

Finally, Facebook does not agree to engage in multiple rounds of running expanded search terms from the District and providing the District with hit reports. *See* September 9 Letter at 2. Such an exercise would be a waste of the parties' time and resources. Facebook will not accept the expanded list of search terms that the District has suggested it will provide, and, if the District seeks to further expand terms in the future, the District will bear the burden of demonstrating that it is necessary and that the search terms Facebook has used are inadequate. *See Prasad v. George Washington Univ.*, 323 F.R.D. 88, 94 (D.D.C. 2017) (rejecting plaintiff's request that defendants "perform a new search with broader terms . . . and a more generous proximity specification" where "no specific deficiency [was] shown in [defendants'] production") (citation omitted).

District is aware, requested the Court to deny the District's request for any discovery from the four additional custodians altogether. *Id.* at 37:1-4.

Facebook will begin its rolling productions of documents from the 21 agreed-upon custodians as soon as practicable, and will await the Court's decision with respect to the District's motion to compel additional custodians.

Sincerely,

/s/ Chantale Fiebig

Chantale Fiebig
GIBSON, DUNN & CRUTCHER LLP
Counsel for Defendant Facebook, Inc.

Exhibit E-12

PUBLIC FILING
REDACTED PUBLIC FILING

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA, *Plaintiff*, v. FACEBOOK INC., *Defendant*.	CIVIL ACTION NO.: 2018 CA 008715 B Judge Fern Flanagan Saddler Next Court Date: September 9, 2020 Event: Hearing **ORAL HEARING REQUESTED**

FACEBOOK, INC.'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF DISTRICT OF COLUMBIA'S MOTION TO COMPEL DOCUMENT CUSTODIANS AND SEARCH TERMSf

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INTRODUCTION

Facebook, Inc. ("Facebook") has agreed to designate 21 senior- and executive-level custodians for document discovery in this case. Without bothering to review documents from those 21 custodians, the District of Columbia ("District") has moved to compel Facebook to add four *more* executive-level custodians (the "Proposed Additional Custodians"), including Facebook Chief Executive Officer Mark Zuckerberg and Chief Operating Officer Sheryl Sandberg, two of the most recognized public figures in the world, who are responsible on a daily basis for the functioning of a global company serving billions of Facebook users.

The District's motion to compel should be denied because it is premature. The District cannot make a good faith showing that any additional custodians are necessary until it has received and reviewed the documents from the custodians on which the parties have already agreed, which include high-level executives throughout the company, such as the [redacted], [redacted], and [redacted]. The far more efficient and practicable way to proceed would be to require: (1) the District to review the voluminous documents they will receive from the existing 21 custodians, as well as from non-custodial files; and (2) the parties to meet and confer at that juncture to discuss whether any additional custodians are necessary.

To the extent the Court is inclined to resolve the District's premature motion on the merits, it should be denied because the District has not met its burden to demonstrate that the four Proposed Additional Custodians are necessary and likely to have uniquely relevant documents. Indeed, the District has done nothing more than identify four of the most senior individuals at the company and demand their documents based on cites to a handful of news articles and internal emails. That is not sufficient. Discovery must be limited to the allegations in the District's single-count complaint, which alleges that Facebook misled consumers in

violation of the District of Columbia Consumer Protection Procedures Act ("CPPA"). But the District offers no basis to conclude that the Proposed Additional Custodians' files would have anything unique to add on this issue. Indeed, the District cannot make this showing without first reviewing and analyzing the documents Facebook anticipates it will produce from the 21 custodians it has already agreed to. Only then might the District be able to make the showing necessary to justify additional custodians. To the extent the District contends that the "decision-making" of these particular executives is somehow uniquely relevant, that is an incorrect statement of the law. The alleged violations of the CPPA do not turn on the mental state or intent of the company or any particular actor within the company. Therefore, documents relating to the personal intent or decision-making roles of these custodians are simply not relevant to the District's claims.

The District has also failed to demonstrate the Proposed Additional Custodians are likely to possess unique documents that are not duplicative of those found in the files of the 21 existing custodians, which include many of their direct colleagues and subordinates. And particularly because the documents are likely to be duplicative, the District has failed to provide any basis that could justify the additional expense and burden of expanding discovery to include the Proposed Additional Custodians. Since the District has failed to meet its burden, there is no basis to order discovery so disproportionate to the needs of this case, in which Facebook has already agreed to conduct discovery from the custodial files of over 20 very senior current and former employees.

For all of these reasons, Facebook requests that the Court deny the District's motion and direct the parties to meet and confer regarding the Proposed Additional Custodians—and whether some or all of them are reasonable or necessary additions—after the District has

received and had the opportunity to review and analyze the documents from the other 21 custodians.

BACKGROUND

The parties engaged in good-faith negotiations over the course of several months to reach agreement on designating 21 current and former senior-level employees as document custodians in this case. To initiate negotiations, Facebook proposed 8 custodians whom it had identified as those most likely to possess relevant information. *See* District's App., Ex. E; *id.* at Ex. F at 1–5. In response, the District proposed an additional 35 individuals whom it had identified as potentially relevant through its own investigation and review of documents Facebook had produced. *See id.* at Ex. G at 1–2. Through several rounds of negotiations, Facebook agreed to 13 of the additional custodians proposed by the District, bringing the total number of agreed-upon custodians to 21. *See id.* at Ex. H at 2–3; *id.* at Ex. J at 7.

These 21 custodians include executive- and management-level employees who have involvement and visibility into nearly every aspect of Facebook's business operations, including public relations, data security, engineering, and business partnerships. They include, among others, the [redacted], [redacted], [redacted], and [redacted]. A preliminary estimate of the discovery to be collected and reviewed for just these 21 custodians using the District's proposed terms is approximately 2.5 million documents.

These documents have not yet been reviewed or produced because the parties are still negotiating search terms. The District has captioned its motion as a motion to compel both custodians and search terms, but Facebook has already proposed search terms to the District, and has responded to the District's counter-proposal. *See id.* at Ex. F at App. A. As Facebook advised the District in transparent and good-faith negotiations, the breadth of the search terms to

which Facebook could reasonably agree is inextricably linked to the number of custodians to whom those search terms must be applied—to proceed otherwise runs the risk of Facebook agreeing to review and produce documents on a scale that would be simply impossible in light of discovery schedules. *See id.* at Ex. J at 7–8. To demonstrate the problems with the District's proposed search terms and the Proposed Additional Custodians, Facebook offered to provide the District with analytics from its document vendor, but the District declined that offer and instead rushed to file its motion to compel.[1] And since the District elected to file this motion rather than compromise on custodians or search terms, Facebook has not been able to commence productions for the 21 agreed-upon custodians (and the District has not made any meaningful arguments in its motion to address these practical, real-world challenges).

In addition to the enormous number of documents the District will receive from the 21 agreed-upon custodians, as well as from non-custodial files, Facebook has produced over 45,000 additional documents already, and continues to make productions of documents on a rolling basis in an effort to avoid disputes with the District.

LEGAL STANDARD

The court has "broad discretion" to decide "whether discovery should be compelled." *Franco v. District of Columbia*, 39 A.3d 890, 896 (D.C. 2012) (quoting *Phelan v. City of Mount Rainer*, 805 A.2d 930, 942–943 (D.C. 2002)) (internal quotations omitted). Under the Superior Court of the District of Columbia rules, discovery must be proportional to the needs of the case,

[1] Facebook has consistently taken the position that it is willing to work with the District on search terms and custodians in an effort to conserve resources and make discovery efficient. In its motion, the District claims that Facebook did not provide specific cost objections, and that Facebook cannot "claim that it lacked an opportunity to put" such costs together. *See* District's Mem. at 17 n.8. However, during a telephonic meet and confer on July 13, 2020, Facebook offered to run preliminary internal analytics on the documents of the Proposed Additional Custodians. The District responded that it was ready to file a motion to compel, and indeed filed the present motion four days later. Facebook had not previously provided any cost estimates or analytics to the District because the parties were continuing to negotiate about whether any additional custodians were necessary.

and the parties must balance the need for relevant information with the burden and cost of reviewing additional materials. Super. Ct. Civ. R. 26(b)(1). To achieve this balance, in determining whether discovery is proportionate, courts consider: (1) "the importance of the issues at stake in the action;" (2) "the amount in controversy;" (3) "the parties' relative access to relevant information;" (4) "the parties' resources;" (5) "the importance of the discovery in resolving the issues;" and (6) "whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* The Court "must limit" discovery when "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive." Super. Ct. Civ. R. 26(b)(2)(C)(i). As countless courts have recognized, "discovery is not limitless." *See, e.g.*, *Lauris v. Novartis AG*, No. 1:16-cv-00393-LJO-SAB, 2016 WL 7178602, at *4 (E.D. Cal. Dec. 8, 2016).

ARGUMENT

I. The District's Motion to Compel is Premature.

The District's motion is premature because it seeks to add new custodians without making *any* assessment of whether the 21 other custodians already agreed upon suffice for purposes of discovery in this case. Indeed, the existing 21 current and former senior-level document custodians will produce an enormous amount of documents relating to a broad range of business activities, including: (i) enforcement policies and decisions, as well as the development of those policies; (ii) public relations and official statements; (iii) security; (iv) data and engineering; (v) the non-privileged internal investigation of Cambridge Analytica; (vi) policy development and communication, including privacy policies; and (vii) partnerships with other businesses and products. These 21 custodians reflect Facebook's efforts to identify individuals most likely to possess relevant documents, as requested by the District, and over half of them were selected by the District itself. *See* District's App., Ex. C at 1–5. Facebook is

prepared to begin reviewing and producing their documents as soon as the parties have finalized their search term negotiations. Nevertheless, the District now speculates that these documents will not provide an adequate amount of discovery on which to assess the District's single-count complaint.

Courts typically reject these types of premature discovery motions, even by government parties. For example, in *Lauris v. Novartis AG*, the court rejected plaintiffs' request to expand the list of custodians to include "four high level executives" before the other custodians' documents had been produced and reviewed. 2016 WL 7178602, at *4–5. The court reasonably ruled that, "[i]f after production of responsive documents based upon the search of [the agreed upon custodians], the parties dispute whether further production is warranted, the Court [would] revisit" the subject. *Id.* at 5. Indeed, even in *Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co.*, on which the District relies, the motion to compel was presented to the court only *after* production from nineteen other custodians had been completed and reviewed, and the motion was based on the movant's "review of the documents already produced from the other Oxbow Custodians." 322 F.R.D. 1, 4 (D.D.C. 2017). The same sequence is appropriate here and the District has not offered any justification for deviating from this well-established and logical process.

The District also cites *Garcia Ramirez v. U.S. Immigration and Customs Enforcement* to justify its request, but that case does not support its position either. District's Mem. at 16–17 (citing 331 F.R.D. 194, 198 (D.D.C. 2019)). In *Garcia Ramirez*, the defendants moved for a protective order to limit discovery to the files of 18 agreed-upon custodians, arguing that the plaintiffs' request for additional custodians was disproportionate to the needs of the case, and that designation of any additional custodians was premature because productions from the initial

set were still ongoing. 331 F.R.D. 194, 197–198 (D.D.C. 2019). The court denied the defendants' motion for the protective order, explaining that their prematurity argument was moot in addition to being unconvincing "because the delays experienced during the first wave of productions resulted entirely from the use of dilatory tactics by Defendants." *Id.* at 197 n.1. The District does not and cannot make such claims here. Facebook has made every effort to accommodate the District, including by accepting over one dozen District-selected custodians, and agreeing to designate 21 high-ranking current and former Facebook employees as custodians in this case. Facebook also has engaged in meaningful negotiations with the District regarding search terms, and is prepared to begin reviewing and producing documents as soon as the parties reach agreement on those terms. In the meantime, Facebook has produced over 45,000 other documents responsive to the District's document requests. Unlike the defendants in *Garcia Ramirez*, Facebook has not moved for a protective order; to the contrary, even on the eve of the District's motion to compel, Facebook offered to provide the District with analytics from its document vendor to further advance the parties' discussions. The District, in contrast—and despite Facebook's multiple attempts at compromise—refused to confer further and instead elected to prematurely litigate these discovery disputes rather than proceed with discovery.

In light of the extensive discovery Facebook has already agreed to produce from the 21 agreed-upon custodians, the Court should deny the District's motion and revisit the need for any additional custodians if and when the District has actually reviewed and analyzed the broad range of documents Facebook has already agreed to produce, and made a good-faith assessment as to whether any additional custodians are actually necessary to this suit.

II. The Proposed Additional Custodians Are Not Proper Subjects of Discovery in This Suit or at This Time.

Even if the District's motion were not premature, the Proposed Additional Custodians are not proper additions in this action because their documents are not likely to be relevant to the single cause of action alleged in the complaint, are likely to be duplicative of those the District will receive from other custodians the parties have already agreed to, and are disproportionate to the needs of this case.

Not relevant. The District has failed to satisfy its initial "burden of demonstrating the relevance of the information to the lawsuit." *Bethea v. Comcast*, 218 F.R.D. 328, 329 (D.D.C. 2003); *see also BankDirect Cap. Finance, LLC v. Cap. Premium Financing, Inc.*, No. 15 C 10340, 2018 WL 946396 at *3–4 (N.D. Ill. Feb. 20, 2018) (denying motion to compel on grounds that discovery rules are "not intended to be a ticket to an unlimited, never-ending exploration of every conceivable matter that captures an attorney's interest"). The District's complaint alleges only a single cause of action based on alleged violations of the CPPA, which are assessed "in terms of how the practice would be viewed and understood by a reasonable consumer." *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442 (D.C. 2013).

To meet its burden, the District must demonstrate that the Proposed Additional Custodians are likely to possess unique documents relevant to the issues in this case. *See EEOC v. George Washington Univ.*, No. 17-CV-1978, 2020 WL 3489478, at *7 (D.D.C. June 26, 2020) (denying motion to compel in part because the requests were "not designed to capture, relevant, unique information"). Although the District claims that some—though not all—of the Proposed Additional Custodians made public statements relating to the events alleged in the complaint, District's Mem. at 7–10, the District has not made *any* showing that these individuals are likely to have relevant documents unique to them.

On the question of relevance, the District argues that the documents of "senior executives with decision-making authority" are "critical to establishing the company's liability" under the CPPA. District's Mem. at 7, 15 n.7. That is incorrect as a matter of law. The District of Columbia Court of Appeals has clearly held that "intent to deceive and scienter" are not elements of the District's claims under the CPPA. *Saucier*, 64 A.3d at 442. Rather, "Section 28-3904(e) and (f) reflect the same intent of other legislators enacting 'State consumer protection statutes … to overcome the pleadings problem associated with common law fraud claims by eliminating the requirement of proving certain elements such as intent to deceive and scienter.'" *Id.* (quoting *Fort Lincoln Civic Ass'n Inc. v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1074 n.20 (D.C. 2008)); *see also Frankeny v. Dist. Hosp. Partners, LP*, 225 A.3d 999, 1005 (D.C. 2020) (recognizing that with respect to § 28-3904(e) and § 28-3904(f), "the D.C. Council did not explicitly state that intent or knowledge is necessary to sustain a CPPA claim"). In other words, the statute the District relies on is written to protect consumers by *not* requiring evidence of the intent of the actor at issue. *Frankeny*, 255 A.3d at 1004–5.

In any event, the District has not established why *these* particular senior executives would be "critical to establishing the company's liability." District's Mem. at 15 n.7. The mere fact that they are senior executives is not enough—particularly since many other senior executives are already agreed-upon custodians. *See Lutzeier v. Citigroup Inc.*, No. 4:14-cv-00183-RLW, 2015 WL 430196, at *6–7 (E.D. Mo. Feb. 2, 2015) (denying request to add high level executives to a custodial list because "[a]t this stage of the litigation, Plaintiff has not satisfied his burden to show that these high level executives have unique or personal knowledge of the subject matter that warrants their information").

The District's request to name Mr. Zuckerberg and Ms. Sandberg in particular is misplaced. In their roles as CEO and COO, they are "senior executives with decision-making authority" on nearly every issue at Facebook. District's Mem. at 15 n.7. But it is both impracticable and inconsistent with the discovery rules to designate them as discovery custodians in every single case, particularly in light of their day-to-day responsibilities of running a global company that serves billions of users around the world. *See Assured Guar. Mun. Corp. v. UBS Real Estate Sec. Inc.*, No. 12 CIV. 1579 HB JCF, 2013 WL 1195545, at *3–*4 (S.D.N.Y. Mar. 25, 2013) (denying motion to compel inclusion of defendant's CEO and COO because plaintiffs failed to demonstrate the proposed custodians possessed relevant documents that the other custodians did not); *Harris v. Union Pac. R.R. Co.*, No. 8:16-cv-381, 2018 WL 2729131, at *4 (D. Neb. June 6, 2018) (denying motion to compel production of CEO's emails because "there has not been a sufficient showing that this information is necessary and not cumulative of other materials," and agreeing only to "reconsider" "[s]hould further discovery reveal that [the CEO has] unique knowledge").

Duplicative. The District is not entitled to pursue discovery that is likely to be duplicative of information it will receive from other custodians. *See* Super. Ct. Civ. R. 26(b)(2)(C)(i) (requiring the Court to limit discovery if it finds the discovery sought is unreasonably cumulative or duplicative); *Helmert v. Butterball, LLC*, No. 4:08CV00342 JLH, 2010 WL 2179180, at *6 (E.D. Ark. May 27, 2010) (denying motion to compel custodial designation of a member of the upper management group of defendant organization because "any emails to which [he] was a party almost surely would have included [] others whose emails will be searched").

The District argues that the Proposed Additional Custodians should be designated because as corporate executives, they will have documents that other custodians do not. District's Mem. at 2, 7, 9–10, 16. But that argument fails as a matter of law. In support of its position, the District cites *Vasudevan Software, Inc. v. Microstrategy Inc.* *Id.* at 15 (citing No. 11-CV-06637-RS-PSG, 2012 WL 5637611 (N.D. Cal. Nov. 15, 2012)). In *Vasudevan Software*, however, the court allowed the inclusion of additional custodians on the basis that the defendant had "not named any specific lower-level employees whose emails would be a sufficient and more convenient substitute, such that [plaintiff]'s request might appear duplicative or unreasonable." 2012 WL 5637611, at *6 (N.D. Cal. Nov. 15, 2012). Unlike in *Vasudevan Software*, for each Proposed Additional Custodian in this case, Facebook has already identified to the District (and lists again below) the names of other high-level executives, already designated as custodians, who were likely to have duplicative documents. *See* District's App., Ex. J at 3–5.

By way of example only, the following custodians are likely to have the same or highly duplicative documents for each of the Proposed Additional Custodians:

- Mark Zuckerberg, Chief Executive Officer: At least five of the other senior and executive custodians are likely to have files largely duplicative of Mr. Zuckerberg's files. They include: (1) [redacted]; (2) [redacted]; (3) [redacted]; (4) [redacted]; and (5) [redacted]. All five, among other already designated custodians, were copied on communications with Mr. Zuckerberg that are cited in the District's motion, and are likely to have been a party to or recipient of many of the same documents responsive to the District's discovery requests.

- Sheryl Sandberg, Chief Operating Officer: At least three other senior and executive custodians are likely to have files largely duplicative of Ms. Sandberg's files. They include: (1) [redacted]; (2) [redacted]; and (3) [redacted]. These and other custodians appear on the documents

cited in the District's motion and their documents reflect their overlapping or closely related responsibilities. For example, the District seeks the designation of Ms. Sandberg because her role "ensures she possesses documents essential to evaluating what Facebook's data protection operations actually looked like over time." District's Mem. at 11. But Facebook has already designated [redacted]. Notably, [redacted], *id.* at 10–11, and accordingly those communications would already be captured by [redacted] existing designation as a custodian.

- Joel Kaplan, Vice President of Global Public Policy: At least four other senior and executive custodians are likely to have files largely duplicative of Mr. Kaplan's files. They include: (1) [redacted]; (2) [redacted]; (3) [redacted]; and (4) [redacted]. The documents relied on by the District in its motion have these and other agreed upon custodians appearing throughout. The District argues Mr. Kaplan should be designated because he "was a senior executive who served as a point of escalation for issues regarding Cambridge Analytica," District's Mem. at 11–12, but Facebook has already designated [redacted], who is responsible for [redacted], as well as [redacted], who handles [redacted].

- Elliot Schrage, former Vice President of Communications and Public Policy: At least four other senior and executive custodians are likely to have files largely duplicative of Mr. Schrage's files. They include: (1) [redacted]; (2) [redacted]; (3) [redacted]; and (4) [redacted]. As with the other Proposed Additional Custodians, the documents cited to and appended to the District's motion confirm the overlap between Mr. Schrage and these already agreed upon custodians. For example, the District seeks the designation of Mr. Schrage because "as a communications executive, Mr. Schrage's correspondence provides unique insight into public perception of Facebook's messaging," District's Mem. at 13–14, but Facebook has already designated [redacted], who is responsible for [redacted], as well as [redacted], who oversees [redacted], and [redacted].

Unable to refute the obvious redundancy and overlaps, the District argues the Proposed Additional Custodians "should . . . be designated as custodians *regardless* of whether some other

custodians might possess duplicative documents." District's Mem. at 15 n.7 (emphasis added). But that is not the law, and the District does not even attempt to explain its basis for such an assertion. Instead, the District cites *MariCal, Inc. v. Cooke Aquaculture, Inc.*, No. 1:14-cv-00366-JDL, 2016 WL 9459260, at *1 (D. Me. Aug. 9, 2016), a case that provides neither an explanation nor support for the District's position. In *MariCal*, plaintiffs moved to compel defendants to designate the corporate defendant's CEO as a document custodian to obtain discovery regarding prior patent infringements by defendants and the course of business between the parties. 2016 WL 9459260, at *2. The court granted plaintiffs' motion, ordering the designation of defendant's CEO not merely because of his "position of prominence," as the District suggests, but because the court was "not convinced that all of [the CEO]'s relevant information would be included within the electronically stored information maintained by the other designated custodians." *Id*. In other words, in *MariCal*, the plaintiff carried its burden of demonstrating that the additional requested custodian was likely to have a sufficient number of relevant and unique documents, such that the additional burden imposed by adding him as a custodian was justified and proportional. *MariCal* offers no support for designation of a custodian whose documents will be duplicative of the many other, already agreed-upon senior-level custodians.[2]

Disproportionate. Requests for relevant discovery are denied as disproportionate when the burden of complying with the request outweighs any benefit. *See George Washington Univ.*,

[2] The District quotes *Family Wireless #1, LLC v. Auto. Techs., Inc.*, to argue that receiving documents on which Mr. Zuckerberg and Ms. Sandberg are copied does not "establish there are no relevant materials to be found." District's Mem. at 16 (citing to 3:15-CV-01310-JCH, 2016 WL 2930887 (D. Conn. May 19, 2016)). But to the extent there are relevant materials, the District has already received them (which is what allows the District to cite them in the first place) or *will* receive them in a variety of other ways, including through the already named custodians or through other document productions that will contain materials from their files. And the salient analysis for purposes of assessing the District's motion is not whether there are *any* relevant materials to be found, but rather whether the volume of *unique* documents these Proposed Additional Custodians may possess warrant the additional burden, expense, and intrusion of expanding discovery.

2020 WL 3489478, at *5 (limiting requested discovery because "the burden imposed on [defendant] to comply with the[] discovery requests as written outweighs the likely benefit"); *see also Assured Guar.*, 2013 WL 1195545, at *3 ("The metrics set forth in Rule 26(b)(2)(C)(iii) provide courts significant flexibility and discretion to assess the circumstances of the case and limit discovery accordingly to ensure that the scope and duration of discovery is reasonably proportional to the value of the requested information, the needs of the case, and the parties' resources." (internal quotation omitted)).

The District's request for the Proposed Additional Custodians is disproportionate to the needs of this case. Indeed, particularly because the additional custodians are likely to have files duplicative of other custodians, the additional burden of producing their documents materially outweighs any likely benefit. *See George Washington Univ.*, 2020 WL 3489478, at *7 (finding the requests were not proportional, noting they were "not designed to capture, relevant, *unique* information") (emphasis added).

The effort and expense necessary to review and produce the documents of the Proposed Additional Custodians—in *addition* to the burden and expense that Facebook will incur in relation to the 21 existing custodians—is significant. Indeed, preliminary reports using the District's currently proposed terms and the already agreed upon custodians yield roughly 2.5 million documents. By even a conservative estimate, reviewing and producing such a voluminous amount of documents will cost millions of dollars. Adding the Proposed Additional Custodians would only add to this already disproportionate cost, which is further unjustified given the amount of discovery the District has already received (over 45,000 documents, equaling close to 200,000 pages) and will receive from the custodians already designed in this case, as well as from non-custodial files. *See Lauris*, 2016 WL 7178602, at *4 (denying

plaintiff's request to expand a list of document custodians when discovery costs were anticipated to exceed $1 million); *Gross v. Chapman*, No. 19 C 2743, 2020 WL 4336062, at *3 n.1 (N.D. Ill. July 28, 2020) (finding requested discovery not proportionate to the needs of the case, explaining that the true "balancing concern" raised by the proportionality requirement of Rule 26 is to "afford a fair opportunity to develop and prepare the case," which was met by the plaintiffs' previous receipt of thousands of documents in discovery).

The District contends that the amount in controversy justifies this expense. District's Mem. at 17–18. Not so. As an initial matter, the District has not set forth a particular amount in controversy, and refers vaguely in its motion to "an amount in controversy well into the millions of dollars." *Id.* at 18. While the District is fuzzy about the amount, it is clear that the discovery requested by the District will certainly result in expenses incurred by Facebook "well into the millions of dollars," which only confirms that the burden of additional custodians would be disproportionate in this case. *Id.* Moreover, the District's estimate assumes that the "District is entitled to recover up to $5,000 in civil penalties per violation of the CPPA (in addition to damages, costs, and attorneys' fees)," District's Mem. at 18 (citing D.C. Code § 28-3909(b)), but civil penalties for the CPPA during the relevant time period were only authorized up to $1,000 per violation, which meaningfully reduces the amount in controversy in this case. In addition, Facebook is not aware of any civil penalty imposed under the CPPA that has ever exceeded $2.6 million dollars, and even those penalties have been reserved for cases in which the District has alleged the most serious and extreme consumer harm.[3]

[3] The two highest published penalties under the CPPA of which Facebook is aware were for $2.5 million and $2.62 million respectively. *See* Release, Attorney General Racine Announces $570 Million National Settlement with Volkswagen, $2.5 Million Penalty to the District (June 28, 2016), https://oag.dc.gov/release/attorney-general-racine-announces-570-million (calling actions "one of the worst cases of corporate wrongdoing we have ever seen" and announcing $2.5 million penalty for deceiving consumers regarding the environmental impacts

The District also dismisses the additional burden and expense of this duplicative and disproportionate discovery as "marginal" due to Facebook's corporate size and resources. *See* District's Mem. at 17. But "consideration of the parties' resources does not . . . justify unlimited discovery requests." *George Washington Univ.*, 2020 WL 3489478, at *5 (quoting Fed. R. Civ. P. 26, advisory committee's note to 2015 amendments). While Facebook is a large company, its resources to litigate are not endless. As courts have routinely recognized, even large corporate defendants are entitled to develop a "reasonably comprehensive search strategy"—which Facebook has done here—and are not obligated "to examine every document in its voluminous files to comply with discovery obligations." *Lauris*, 2016 WL 7178602, at *4 (citing *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 374 (S.D.N.Y. 2006)).

III. The Court Should Order The Parties To Meet-and-Confer To Reach Resolution.

In the week prior to the District filing its motion, despite Facebook's significant concerns about the District's basis for seeking to designate these custodians, Facebook made a final good-faith effort to amicably resolve this dispute with the District by offering analytics regarding the files of the Proposed Additional Custodians, and asking whether the District would consider a compromise to resolve the dispute. Rather than accept—or even seriously consider—Facebook's offer of compromise, thereby conserving the resources of the Court and the parties, the District summarily dismissed Facebook's offer and filed this motion instead.

The Court should deny the District's motion for the reasons set forth in this opposition, including that it is premature and will result in unnecessary and duplicative discovery. However,

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of its vehicles and for marketing, selling, and leasing motor vehicles equipped with devices designed to circumvent emissions standards); Release, AG Racine Reaches $148 Million Nationwide Settlement Over Uber Data Breach (Sept. 26, 2018), https://oag.dc.gov/release/ag-racine-reaches-148-million-nationwide (settling charges that Uber Technologies, Inc. concealed from users and the government that hackers gained access to consumers' personal data including drivers' license information).

if the Court does not deny the District's motion, Facebook respectfully requests in the alternative that the Court order the parties to meet and confer to reach a reasonable agreement to accommodate the District's requests. This could include reaching a compromise with respect to the Proposed Additional Custodians, or agreeing to a more limited set of search terms to be applied to these or all custodians. In either event, Facebook submits that with an additional opportunity to conclude their negotiations, the parties will be able to reach an agreement regarding custodians and search terms that is both proportionate to the needs of this case and will minimize unduly duplicative discovery.

CONCLUSION

For the foregoing reasons, the District's motion should be denied, and the parties should be ordered to meet and confer to negotiate search terms based on the agreed upon 21 custodians.

Dated: August 21, 2020

Respectfully submitted,

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PUBLIC FILING
REDACTED PUBLIC FILING

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA, *Plaintiff*, v. FACEBOOK INC., *Defendant*.	CIVIL ACTION NO.: 2018 CA 008715 B Judge Fern Flanagan Saddler Next Court Date: September 9, 2020 Event: Hearing

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2020, I caused a copy of the foregoing to be served upon all counsel of record via CaseFileXpress.

Dated: August 21, 2020

Respectfully submitted,

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Attorneys for Defendant Facebook, Inc.

Exhibit E-13
(Filed Under Seal)

Exhibit E-14

PUBLIC FILING

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

ATTORNEY GENERAL
KARL A. RACINE

PUBLIC ADVOCACY DIVISION

May 24, 2021

VIA EMAIL

Chantale Fiebig
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Re: ***District of Columbia v. Facebook, Inc.*, 2018 CA 008715 B (D.C. Super. Ct.)**
Search Terms for the District's First RFPs

Ms. Fiebig:

We write to follow up on Facebook's May 18, 2021 letter regarding the Parties' search term negotiations for the District's First RFPs. The District is pleased that the Parties have now reached full agreement on all twenty-six search terms responsive to District's First RFPs. For ease of reference, the District is attaching Appendix A and Appendix B, which provide a full accounting of the Parties' agreed-upon search terms associated with the District's First, Third, and Fourth RFPs respectively.

With respect to the two proposed modifications in Facebook's May 18, 2021 letter, the District states as follows:

1. ((app or partner) w/25 (malicious or scraping or violat*) w/50 ("private API" or "private extended API" or "graph API" or "platform 3.0" or ps12n))

    a. The District accepts Facebook's proposed modification.

2. ((survey* or stud* or feedback or react* or concern*) w/10 (confus* or sensit* or trust or expect* or surpris* or *understand* or permission* or personal*)) and ("app settings" or "application settings" or wizard or privacy or settings) w/50 (user w/3 data))

    a. The District accepts Facebook's proposed modification.

* * *

Should Facebook have any remaining questions about any of the agreed-upon search terms in the Appendixes below, the District is available to confer at your convenience.

Sincerely,

KARL A. RACINE
Attorney General for the District of Columbia

/s/Jimmy Rock
Assistant Deputy, Public Advocacy Division

Attorney for the District of Columbia

Appendix A
District of Columbia v. Facebook, Inc.
District's First RFPs

Agreed-upon Search Terms: District's First RFPs
1. Whitelist* w/50 "user data"
2. (app or partner) and (malicious or scraping or violat*) and ("private API" or "private extended API" or "graph API" or "platform 3.0" or ps12n)
3. ((app* w/3 review) w/20 (approv* or restrict* or permission or permit* or access*)) w/50 "user data"
4. (exempt* or except* or exclud* or approv* or restrict* or permission* or permit* or access*) w/50 ((integrat* w/2 partner) or ((device or mobile) w/5 (manufact* OR mfg or integrat* or maker or partner))) and "user data"
5. ((exempt* or except* or exclud* or approv* or restrict* or permission* or permit* or access*) and (Accedo or Acer or Aircel or Airtel or Alcatel or TCL or Alibaba or Amazon or AOL or ICQ or Mail.ru or Apple or AT&T or Blackberry or Comcast or Dell or DNP or Docomo or Garmin or Gemalto or GMX-Mail.com or HP or Palm or HipLogic or HTC or Huawei or INQ or "IQ Zone" or Kodak or LG or MediaTek or Mstaror Mercedes-Benz or Microsoft or Miyowa or "Hape Esia" or Mobinnova or Motorola or Lenovo or Mozilla or mSonar or Myriad or Nexian or Nintendo or Nokia or Nuance or O2 or "Opentech ENG" or Opera or OPPO or Orange or Pantech or PocketNet or PeugeotCitroen or Qualcomm or Roamware or Rockmelt or Samsung or Sony or Spreadtrum or Sprint or T-Mobile or Telstra or "Three UK" or TIM or Tobii or U2topia or Verisign or Verizon or "Virgin Mobile" or Vodafone or "Warner Bros" or "Western Digital" or Yahoo or Yandex or "Zing Mobile") w/15 "user data")
6. (((“cease-and-desist” or “c/d” or suspen* or terminat* or disabl* or restrict* or deprec*) w/20 (developer* or “third part*” or app*)) w/20 (compl* or violat*)) w/50 “user data”
7. (((compl* or violat*) w/5 (polic* or priva*)) w/50 (transfer* or sell* or buy* or purchas* or purpos* or profit* or *author*)) w/50 “user data”
8. ((audit* or delet* or certif* or sweep*) w/20 (enforc* or ensur*)) w/50 “user data”

9. ((enforc* or DevOps or "Developer Operations" or *compl* or rubric) w/10 (weak* or improv* or *suffic* or resourc* or lax or ramp* or strength* or under* or mistak* or risk* or problem* or staff*)) w/20 "user data"
10. ("platform policy compliance" or "app compliance benchmark" or "compliance rate") w/25 ("app" or "platform")) and "user data"
11. ("friend* data" or "full friend*" or ("non app" w/3 friend)) w/30 (compl* or violat* or deprec* or audit* or enforc* or suspend* or terminat* or disabl*)
12. ((grant* or deny or deni* or restrict* or deprec*) w/10 (exten* or optic* or function* or access* or permiss* or relation*)) w/25 "user data"
13. (bad w/5 (use or case or actor*)) w/50 "user data"
14. "Cube You" w/50 data
15. (IDPC or DPC or (irish w/5 commiss*)) w/25 (loophole or unlawful)
16. ((user and control*) w/5 (data or info* or setting* or priva*)) w/50 (optic* or messag* or risk* or public* or commit*)
17. ("Privacy Settings" or "App Settings" or "Application Settings") w/10 (unclear or understand* or disclos* or confus* or hide or hidden) w/50 data[1]
18. ((survey* or stud* or feedback or react* or concern*) w/10 (confus* or sensit* or trust or expect* or surpris* or *understand* or permission* or personal*)) and ("app settings" or "application settings" or wizard or privacy or settings) w/50 (user w/3 data))
19. ((audit* or enforc* or suspen* or terminat* or disabl* or restrict* or deprec*) w/10 (developer* or "third part*" or app*)) w/10 (compl* or violat* or *auth* or misus* or harvest* or scrap*)

[1] The District is confirming that it is accepting Facebook's proposed construction of this search term as written in Facebook's April 23, 2021 Letter. *See* Facebook's April 23 Letter at 8; *see also* Facebook's May 18, 2021 Letter at 1.

20. (notif* or notic* or disclos*) w/20 (data w/5 (stol* or steal* or sold or sell* or buy or bought or purchas* or transfer* or abus* or harvest or scrap* or violat*))
21. (notif* or notic* or disclos*)) w/20 (Cambridge or Analytica or Turbocharge or "Turbo Charge" or Kogan or SCL or GSR or "Global Science Research" or tiydl or thisisyourdigitallife or "this is your digital life")
22. Reciprocity and "user data"
23. ("friend data" or "friends data" or "full friend*" or "custom audience" or "user's friends" or ("non app" w/3 friend)) w/25 (Cambridge or Analytica or Kogan or SCL or GSR or "Global Science Research" or Eunoia or Wylie)
24. AIQ and data
25. ("Privacy Settings" or "App Settings" or "Application Settings" or setting* or tool*) w/20 ("friend data" or "friends data" or "full friend*" or "user's friends" or "users' friends" or ("non app" w/3 friend))
26. "Action Syncing Protocol"

Appendix B
District of Columbia v. Facebook, Inc.
District's Third and Fourth RFPs

Agreed-upon Search Terms: District's Third and Fourth RFPs
1. ("Graph API" or V1 or V2) w/20 ("user data" or "personal data" or "behavioral data")
2. (complaint or report or feedback) w/10 ("user data" or "consumer data" or "personal data" or "behavioral data")
3. "Facebook: Transparency and Use of Consumer Data"
4. ("Energy and Commerce" w/3 Committee) and (transparen* or "consumer data")
5. Kosinski
6. "Private traits and attributes are predictable from digital records of human behavior" or "Computer-based personality judgments are more accurate than those made by humans"
7. Stillwell
8. Wylie
9. (To/from/cc/bcc: @fb.com) AND (to/from/cc/bcc:) @Sclgroup.cc or Nix or alexander.nix@sclgroup.cc or (Alex* w/2 Tayler) or Oczkowski or Schweikert or Atkinson or (Kyle w/2 Smith) or ksmith or n6a.com
10. *Walrus* or (Music w/ 3 walrus)
11. "MusicWalrus"
12. "Sex Compass"

13. "SexCompass"
14. Bridgetree
15. "Bridge Tree"
16. "Awareness Analytics Partners" or "Awareness Analytics" or "a2p.io"
17. A2P
18. AggregateIQ or "Aggregate IQ"
19. AIQ
20. (Polic* or pract*) w/5 ("user data*" or "consumer data*") w/5 violat* w/5 (platform or policy)
21. (Brittany w/2 Kaiser) or (Kaiser w/25 ("Cambridge Analytica" or CA))
22. (Acxiom or AppNexus or MediaMath) w/20 "consumer data" or "user data" or "Friend data"
23. ((polic* or practice) w/5 ("user data" or "personal data" or "behavioral data")) w/50 (disclos* or shar*)
24. (Audit or investigat*) w/25 (CA or "Cambridge Analytica")
25. LiveRamp w/20 data; LiveRamp and (contract or agreement)
26. ("complaint" or "report" or "feedback") w/10 ("Cambridge Analytica" or "CA" or "SCL" or "Global Science" or "GSR" or "Kogan" or "thisisyourdigitallife")

27. (hearing or congress) w/10 ("consumer data" or "privacy wizard" or "privacy setting*" or "app setting*" or "access to user data" or "platform polic*" or misu* or harvest*); ((hearing or congress) w/10 transparen*) and ("consumer data" or "user data")

* * *

Exhibit E-15

Edelson

Eli Wade-Scott <ewadescott@edelson.com>

DC v. Facebook: Notices

Aycock, Amanda M. <AAycock@gibsondunn.com> Mon, Feb 1, 2021 at 1:03 PM
To: Eli Wade-Scott <ewadescott@edelson.com>, "Fiebig, Chantale" <CFiebig@gibsondunn.com>, "Lipshutz, Joshua S." <JLipshutz@gibsondunn.com>, "Snyder, Orin" <OSnyder@gibsondunn.com>, "Goldnick, Zoey G." <ZGoldnick@gibsondunn.com>, "Kuntz, Andrew" <AKuntz@gibsondunn.com>
Cc: "Rock, Jimmy (OAG)" <jimmy.rock@dc.gov>, "Wiseman, Benjamin (OAG)" <benjamin.wiseman@dc.gov>, "Rimm, Jennifer (OAG)" <Jennifer.Rimm@dc.gov>, Jay Edelson <jedelson@edelson.com>, Rafey Balabanian <RBALABANIAN@edelson.com>, David Mindell <dmindell@edelson.com>, Theo Benjamin <tbenjamin@edelson.com>, Emily Penkowski <epenkowski@edelson.com>

Eli,

We will accept notices of deposition on behalf of Claire Theresa Gartland and Annie Kornblut. However, Facebook has not concluded its rolling document productions. To the extent that the District elects to proceed with depositions prior to Facebook's document productions being completed, please be advised that Facebook will not agree to reopen these depositions at a later date based on subsequently produced documents.

Best,

Amanda

Amanda M. Aycock

GIBSON DUNN

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From: Eli Wade-Scott <ewadescott@edelson.com>
Sent: Thursday, January 28, 2021 7:45 PM
To: Fiebig, Chantale <CFiebig@gibsondunn.com>; Lipshutz, Joshua S. <JLipshutz@gibsondunn.com>; Aycock, Amanda M. <AAycock@gibsondunn.com>; Snyder, Orin <OSnyder@gibsondunn.com>; Goldnick, Zoey G. <ZGoldnick@gibsondunn.com>; Kuntz, Andrew <AKuntz@gibsondunn.com>
Cc: Rock, Jimmy (OAG) <jimmy.rock@dc.gov>; Wiseman, Benjamin (OAG) <benjamin.wiseman@dc.gov>; Rimm, Jennifer (OAG) <Jennifer.Rimm@dc.gov>; Jay Edelson <jedelson@edelson.com>; Rafey Balabanian <RBALABANIAN@edelson.com>; David Mindell <dmindell@edelson.com>; Theo Benjamin <tbenjamin@edelson.com>; Emily Penkowski <epenkowski@edelson.com>
Subject: DC v. Facebook: Notices

[External Email]

All -

Will you accept a notice of deposition for Claire Theresa Gartland and Annie Kornblut? Our understanding is that both are current employees. (If not, we're happy to issue them subpoenas.) Please let us know by the end of the day on Monday.

Best,

Eli

--

Eli Wade-Scott | Edelson PC

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Exhibit E-16

PUBLIC FILING

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE: FACEBOOK, INC. CONSUMER PRIVACY USER PROFILE LITIGATION, This document relates to: ALL ACTIONS	MDL No. 2843 CASE NO. 3:18-MD-02843-VC-JSC Hon. Vince Chhabria Hon. Jacqueline Scott Corley Courtroom 4 – 17th Floor Special Master: Daniel Garrie, Esq. **ORDER ESTABLISHING DEPOSITION SCHEDULING PROTOCOL** **JAMS REF. NO: 1200058674**

DEPOSITION SCHEDULING PROTOCOL ORDER

According to the court's order of July 20, 2021, Daniel Garrie ("Special Master") was appointed as Discovery Special Master to resolve discovery disputes that the parties cannot resolve in mediation. The parties were not able to establish a protocol for depositions and impasse was declared.

The purpose of this Deposition Scheduling Protocol Order ("Order") is to set out the protocol for the scheduling and conduct of depositions in the above-referenced action including: (1) those actions transferred to this Court by the Judicial Panel on Multidistrict Litigation ("JPML") pursuant to its order entered on June 6, 2018 (see Case MDL No. 2843, Dkt. No. 140), (2) any tag-along actions transferred to this Court by the JPML pursuant to Rules 7.1 and 7.2 of the Rules of Procedure of the Panel, after the filing of the final transfer order by the Clerk of the Court, and (3) all related actions originally filed in this Court or transferred or removed to this Court and assigned thereto as part of In re: Facebook, Inc. Consumer Privacy User Profile Litigation, MDL No. 2843, Case No. 18-md-02843-VC ("MDL 2843"). These actions are collectively referred to as the MDL Proceedings.

I. DEFINITIONS

1. "Court Reporter" shall mean the individual designated by the Court Reporting Agency to administer and record the Remote Deposition.

2. "Court Reporting Agency" shall mean any entity agreed to and designated by the Parties to select a Court Reporter, Videographer, and Operator for each Remote Deposition.

3. "Defending Attorney" shall mean the "first chair" attorney representing the Witness at the Remote Deposition. If the Witness is a current or former employee of one of the Parties, an attorney appearing on behalf of that Party may elect at the start of the Remote Deposition to be considered a Defending Attorney.

4. "Noticing Attorney" shall mean any attorney listed below the signature block of the deposition notice of the Remote Deposition and any individual affiliated with the attorney's law firm and authorized by the law firm to communicate about matters relating to the Remote

Deposition.

5. "Operator" shall mean the individual designated by the Court Reporting Agency to provide remote technical support to all Participants during the Remote Deposition.

6. "Participant" shall mean the Witness, any person providing in-room technical support to the Witness, Questioning Attorney, Defending Attorney, other attorneys appearing on behalf of one of the Parties, paralegals, testifying experts, non-testifying consultants, or other individuals providing support to the attorneys, Court Reporter, Videographer, and Operator. A testifying expert or non-testifying consultant for a party who is not a fact witness may attend a deposition only if the party employing that expert or non-testifying consultant provides: (a) at least two (2) business days advance notice of their attendance; and (b) confirmation that the expert or consultant has signed attestations confirming adherence to all applicable protective orders. If a party objects to the attendance of a testifying expert or non-testifying consultant to a deposition, the parties shall confer in good faith. If resolution cannot be reached, any party that objects to the attendance of such expert or consultant may seek relief from the Court in advance of the deposition. Under no circumstances shall a person attend any part of a deposition in person, or by any remote means such as telephone, internet link-up, videoconference, or any other kind of remote-access communication, without being identified on the record.

7. "Questioning Attorney" shall mean an attorney questioning the Witness on the record during the Remote Deposition for the purpose of eliciting sworn testimony.

8. "Remote Deposition Video Platform" shall mean any videoconferencing service platforms jointly agreed to and designated by the Parties for hosting the Remote Deposition.

9. "Remote Deposition Exhibit Platform" shall mean any software applications jointly agreed to by the Parties for displaying exhibits during the Remote Deposition.

10. "Videographer" shall mean the individual designated by the Court Reporting Agency to record the Remote Deposition by videographic means.

11. "Witness" shall mean the individual who gives sworn testimony on the record during the Remote Deposition.

II. SCHEDULING OF DEPOSITIONS

The Parties are to continue the currently noticed deposition dates. Depositions will be scheduled under Section II. of this Order. The Parties shall consult before Depositions are noticed and shall make reasonable efforts to schedule depositions (including non- party depositions) on dates and locations convenient for the witnesses and counsel.

A. Deposition Phases

1. The Parties will take depositions in three phases (each a "Phase"). For each Phase, the Parties shall prepare and exchange a good faith list, in accordance with the deadlines set forth below, of the witnesses that they reasonably believe their side will want to depose during the Phase.

2. Phase I: On October 25, 2021, pursuant to Special Master Mr. Daniel Garrie, Esq.'s October 25, 2021 instruction to the Parties, the Parties exchanged lists of ten anticipated witnesses and two proposed deposition dates for each anticipated Witness for the purpose of scheduling depositions in November, December, and January ("Phase I"). The Parties shall confirm the final list of the deponents and deposition dates for Phase I, as of that date, not later than seven calendar days before the beginning of Phase I.

3. Phase II: On December 13, 2021, the Parties shall exchange and provide to the Special Master lists of anticipated witnesses and two proposed deposition dates for each proposed Witness for the purpose of scheduling depositions between January 31, 2022, and April 1, 2022 ("Phase II"). Each Party may propose a maximum of fifteen (15) depositions during Phase II, unless otherwise agreed by the Parties or ordered by the Special Master. The Parties shall confirm with each other, the Special Master, and the Special Master's case manager the final list of the deponents and deposition dates for Phase II, as of that date, not later than 28 calendar days before the beginning of Phase II.

4. Phase III: On February 14, 2022, the Parties shall exchange and provide to the Special Master lists of anticipated witnesses and two proposed deposition dates for each proposed Witness for the purpose of scheduling depositions between April 4, 2022, and June 17,

2022 ("Phase III"). The Parties are to meet and confer in good faith with the other Party about the number of depositions permitted in Phase III. The Parties shall confirm with each other, the Special Master, and the Special Master's case manager the final list of the deponents and deposition dates for Phase III, as of that date, not later than 28 calendar days before the beginning of Phase III.

5. Unavailable Witness on Witness List: In the event a witness who is identified on either Party's list cannot be scheduled on the originally proposed dates, the Parties shall use good faith efforts to schedule the deposition of the Witness on another date in the same Phase or as soon as possible in the next Phase. If a witness is on any kind of formal leave from their place of employment during one or more of the Phases, their deposition will be scheduled during a Phase in which they are not on formal leave unless the Parties agree otherwise.

6. Modifications to Schedule: To the extent necessary, the Parties will promptly confer in good faith regarding any requested changes, or additions to the deposition schedule in any Phase. After the exchange of witness lists, or during a Phase, a Party may remove, substitute or notice additional depositions as long as the Party provides sufficient notice of the new or additional deposition, the Witness(es) and their counsel agree to the schedule change, and the change does not result in exceeding the number of depositions per day allowed during that Phase. The Parties will be responsible for payment of the Special Master's day rate for rescheduling depositions fewer than five (5) business days in advance.

7. Total Number of Depositions: The Parties will use their best efforts to reach agreement on the number of depositions each Party may take in Phase III. If the Parties do not agree on a number of depositions for Phase III by January 12, 2022, the Parties may ask the Discovery Mediators to declare impasse. If impasse is declared, the issue will be subject to briefing pursuant to the Protocol for Resolving Discovery Disputes – Order No. 1, entered on August 20, 2021.

B. Deposition of Witness with a Produced Prior Deposition Transcript

1. Showing of Good Cause: The presumption is that Plaintiffs may not depose a witness for whom Defendant has already produced a copy of a prior deposition transcript. Should Plaintiffs seek to take a deposition of a witness for whom Defendant has already produced a copy of a prior deposition transcript, Plaintiffs must show good cause as to why the deposition is necessary including but not limited to: (i) identifying, in good faith, any non-duplicative topic(s) which Plaintiffs seek to examine the Witness on, about which the Witness has material personal knowledge, and that would not be duplicative of other witnesses' testimony; and (ii) demonstrating that Plaintiffs have made a good faith effort to obtain the sought after information from other witnesses for whom they do not have a prior deposition transcript but have not been able to obtain that information from those witnesses.

Upon Plaintiffs' submission, the Parties shall meet and confer in good faith about the proposed deposition and the requested topic(s). If the Parties are unable to reach an agreement on the deposition of a witness with whom Plaintiffs have received a prior deposition transcript and/or the topic(s) to be covered for that Witness the issue shall be addressed to Discovery Special Master Daniel Garrie, Esq. pursuant to the Protocol for Resolving Discovery Disputes – Order No. 1.

2. Limits on Deposition: Any deposition of a witnesses for whom Defendant has already produced a deposition transcript will be limited to the topic(s) agreed upon by the Parties or ordered by Discovery Special Master Mr. Daniel Garrie, Esq.

C. Scheduling Procedures

1. Notice and Subpoena: All deposition notices shall comply with the requirements of Federal Rule of Civil Procedure 30(b). All depositions noticed or properly cross noticed in the MDL Proceedings are subject to this deposition protocol. All deposition notices shall be served to email addresses provided by the Parties. All third-party subpoenas seeking deposition testimony shall comply with Federal Rule of Civil Procedure 45. A copy of this Protocol shall be attached to each third-party subpoena issued or served in the MDL Proceedings requesting

deposition testimony.

2. Days on Which Depositions May Be Scheduled: Depositions may be scheduled Monday through Friday. Absent good cause or extraordinary circumstances, only one deposition per day may be scheduled during Phase I and II, and no more than two depositions per day may be scheduled during Phase III. To the extent feasible, the Parties will avoid scheduling any deposition that would require one counsel for one Party to take, and counsel for the other Party to defend, depositions on consecutive days.

No depositions may be scheduled on the days of or the day before an in-person Court hearing in the Action, or any national or religious holidays. For purposes of this Deposition Scheduling Protocol, such holidays are New Year's Eve, New Year's Day, Martin Luther King, Jr.'s Birthday, Presidents' Day, Passover (2 days), Good Friday, Easter Monday, Memorial Day, Juneteenth, Independence Day, Labor Day, Rosh Hashanah (2 days), Yom Kippur (2 days), Columbus Day, Veterans' Day, Thanksgiving (Wednesday, Thursday, and Friday), Christmas Eve, and Christmas Day.

3. Time of Depositions: The Parties shall make reasonable efforts to schedule depositions to begin at 9 a.m. (time zone of deposition) on Monday through Thursday and to begin at 8 a.m. (time zone of deposition) on Friday, unless otherwise agreed to by counsel. The Parties shall meet and confer regarding the timing for all remote depositions when the participants are located in different time zones.

4. Location of Depositions: To the extent possible and consistent with the Federal Rules of Civil Procedure, the county where the Witness resides or works is the preferred location for depositions. If a witness does not agree to appear in the county where they reside or work, the location of the deposition will be set in accordance with the Federal Rules of Civil Procedure, and the Parties will make a good faith effort to conduct the deposition near a commercial airport.

If multiple witnesses' depositions will take place in the same city, the Parties shall use their best efforts to schedule those depositions during the same week or weeks of a particular phase in order to reduce the amount of travel required by the Parties and their counsel.

III. CONDUCT OF DEPOSITIONS

1. Duration: Absent agreement of the Parties, a Court order allowing additional time, or for good cause shown, the time limit for the noticing party of a fact witness depositions is one day for seven (7) hours of examination pursuant to Fed. R. Civ. P. 30(d)(1). Examination by the non-noticing side or non-noticing party shall not count against the 7-hour limit for the noticing party. To the extent the party defending the deposition or other counsel involved in the deposition anticipates that its questioning will exceed ninety (90) minutes, it will provide notice at least two (2) calendar days before the scheduled deposition.

2. Number of Examiners: Consistent with Judge Chhabria's May 5, 2020 order (Dkt. 433), unless otherwise agreed by the Parties, questioning of a witness shall be conducted by no more than one examiner.

3. Objections: Counsel shall comply with Rule 30(c)(2) of the Federal Rules of Civil Procedure and the Northern District of California Guidelines on Professional Conduct regarding
objections at a deposition. Counsel shall refrain from engaging in colloquy during a deposition. No speaking objections are allowed and professionalism is to be maintained by all counsel at all times. Counsel shall not make objections or statements that might suggest an answer to or coach a witness.

4. Rule 30(b)(6) Depositions: Each side may serve one Rule 30(b)(6) deposition notice on any Party or non-Party Witness that is an organization. Additional Rule 30(b)(6) deposition notices may be served upon a showing of good cause to the Special Master. Any Rule 30(b)(6) deposition notice shall describe with reasonable particularity the proposed matters for examination. It shall be narrowly tailored to assist the noticing Party with identifying relevant

discovery concerning live, non-stayed categories of allegations in the MDL Proceedings. See Dkt. 298; see also Dkt. 557 at 2. The Parties are to confer in good faith about the matters for examination in advance of a Party serving a Rule 30(b)(6) deposition notice. A Party may move for a protective order and seek expenses for unnecessarily responding to or defending an improper Rule 30(b)(6) deposition notice. A Party that receives a notice of deposition under Rule 30(b)(6) of the Federal Rules of Civil Procedure shall provide written notice of designating one or more designees to testify on its behalf within 28 calendar days of receiving the Rule 30(b)(6) deposition notice. If the party is designating more than one designee, its written notice shall identify the topic(s) on which each designee will be designated. Where a party designates more than one individual to respond to topics contained in a Rule 30(b)(6) notice, the combined total deposition time for all witnesses may not exceed 7 hours, unless otherwise agreed by the Parties or ordered by the Special Master or the Court upon a showing of good cause. Any Rule 30(b)(6) depositions taken by a Party shall count against the agreed upon or Court ordered number of depositions the taking Party is permitted to take in the Action.

5. No Additional Deposition Time Based on Status of Document Production: The Parties understand that if either Party chooses to depose a Party or non-Party Witness before the substantial completion of document production on January 31, 2022, the fact that document production was not substantially complete before the deposition will not constitute good cause to reopen the deposition of that Witness, or seek additional deposition time with that Witness, at any later date.

6. Production of Documents: Parties often request documents in a Notice of Deposition. Documents responsive to such requests that are identical to documents already produced by the Parties or that are publicly available, do not have to be re-produced by a deponent. If a party or third party witness does not provide documents by seven (7) calendar days before the date of a scheduled deposition, the noticing party shall have the right to reschedule the deposition to allow time for inspection of the documents before the examination commences.

7. Transcript and Time to Review Transcript: The Party that noticed the deposition

shall be responsible for procuring a written transcript and any video record of the deposition. Without the need for a request by the deponent or a Party before the deposition is completed, all witnesses shall be allowed 30 calendar days after being notified by the officer that the transcript or recording of the deposition is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

8. Confidentiality Provisions: Counsel shall have thirty (30) calendar days from receipt of the deposition transcript to designate any portion thereof as "Confidential" or "Highly Confidential – Attorney's Eyes Only" pursuant to the Protective Order entered by the Honorable Vince Chhabria on August 17, 2018 at Dkt. No. 122. Such designations shall indicate the specific portion of the transcript by page and line number that counsel seeks to have designated as "Confidential" or "Highly Confidential – Attorney's Eyes Only." Until thirty (30) calendar days from receipt of the deposition transcript has elapsed, a deposition transcript shall be presumed "Confidential" and is subject to the Stipulated Protective Order entered by the Honorable Vince Chhabria, Dkt. 122.

If a deponent is questioned about any document or exhibit marked "Confidential" or "Highly Confidential – Attorney's Eyes Only"—or the information contained therein, persons to whom disclosure is not authorized under the Protective Order entered by the Honorable Judge Chhabria, Dkt. 122, will be excluded from the deposition for that portion of the examination. Any portion of a deposition transcript containing "Confidential" or "Highly Confidential – Attorney's Eyes Only" information shall be sealed so as not to waive confidentiality

IV. REMOTE DEPOSITIONS

Due to the restrictions resulting from the COVID-19 pandemic, at either Party's request, any deposition scheduled during Phase I may be taken remotely under Rules 29(a) and 30(b)(4) of the Federal Rules of Civil Procedure (the "Remote Depositions"). Nothing in this Order precludes the Parties from agreeing to conduct a deposition during Phase I in person rather than as a Remote Deposition.

The following procedures will apply to the scheduling and conduct of any Remote Deposition taken in 2021. The Parties are to meet and confer at a later date about whether depositions taken during 2022 may be taken remotely.

A. Technology Requirements, Court Reporter, Videographer and Operator

13. Technology Requirements. All video depositions will be stenographically recorded by a court reporter with real-time feed capabilities. Each attendee of a deposition conducted by video must have a webcam-equipped device (such as a desktop, laptop, or tablet), and access to an Internet connection (preferably hard-wired) with at least 5 mbps upload and download speeds. In addition to these requirements, the deponent and any attorney who will question the deponent or object to questions must have a telephone for calling into the deposition if necessary.

14. Court Reporter and Videographer. In accordance with Fed. R. Civ. P. 30(b)(5), which provides that "[u]nless the parties stipulate otherwise," "an officer appointed or designated under Rule 28," must place the deponent under oath, the deposition will be deemed to have been conducted "before" that officer, even though the officer is not physically present with the deponent, so long as that officer is able to identify the deponent.

15. Official Record. The court reporter's transcript (as corrected by errata in accordance with Fed. R. Civ. P. 30(e)), and the videographer's recording (if any), shall constitute the official record of the deposition for all purposes.

16. Other Recording. No Participant other than the court reporter and videographer (if any) may record or photograph any of the proceedings. Nothing in this provision prevents or limits the taking of notes by those identified on the record.

17. The Court Reporting Agency may designate an Operator to attend each Remote Deposition and troubleshoot any technical issues that may arise.

B. Notice

18. At least four (4) calendar days prior to the noticed deposition date, each individual planning to attend the deposition must notify the party noticing the deposition of his/her

intent to attend and provide the following information to the noticing party: (a) name, (b) email address, and (c) phone number. The noticing party will share this information with the vendor arranging the deposition for the limited purpose of facilitating each attending person's access to the video web portal for the deposition.

C. Conduct of the Remote Depositions

19. Unless otherwise set forth herein, the Federal Rules of Civil Procedure, Federal Rules of Evidence, and other applicable authority shall govern as though the deposition was conducted in-person. Nothing in this Deposition Protocol shall be construed to abrogate the Federal Rules of Civil Procedure or the Local Rules of this Court.

20. Each individual attending the deposition (including counsel for the deponent) must have an active video stream and audio connection for the duration of the deposition dedicated solely to the deposition. Each such individual should attend from a quiet, private location and will comply with the governing protective order, Dkt. No. 122.

21. The Witness is not required to have any other individual physically present in the room with them during the Remote Deposition, but if the Defending Attorney (or any other attorney representing the Witness) intends to be physically present in the room with the Witness, the Defending Party shall notify the Opposing Party no later than five (5) business days before the Remote Deposition, and counsel to the Opposing Party will be entitled to have a representative physically present in the same room.

22. Immediately upon commencement of the Remote Deposition, following the Court Reporter's introduction, all Participants shall announce their names and affiliations on the record. Under no circumstances may a person attend the Remote Deposition in any manner without identifying themselves on the record upon commencement of the Remote Deposition.

23. Any of the following methods for administering exhibits may be employed during a Remote Deposition, or a combination of one or more methods:

(i) If any Participant is physically present with the Witness during the Remote Deposition, pursuant to Paragraph 28, the Noticing Attorneys may designate an attorney to provide in-

person physical copies of documents to the Witness when directed to do so by the Questioning Attorney.

(ii) The Noticing Attorneys may choose to mail physical copies of documents that may be used during the Remote Deposition to the Witness, Defending Attorney, other Party's counsel, and Court Reporter. In the event physical copies are mailed, the Noticing Attorneys shall so inform the Defending Attorney, other Party's counsel, and Court Reporter prior to mailing the documents, shall include a pre-paid return label, and shall provide tracking information for the package. Such documents shall be delivered by 12:00 pm (either in the time zone of the Remote Deposition or in the agreed upon time zone for the Remote Deposition if the Participants are in different time zones) the business day before the deposition. The Defending Attorney, other Party's counsel, and Court Reporter shall confirm receipt of the package by electronic mail to the Noticing Attorney. If physical copies are mailed, every recipient of a mailed package shall keep the package sealed until the Remote Deposition begins and shall only unseal the package on the record, on video, and during the deposition when directed to do so by the Questioning Attorney. This same procedure shall apply to any mailed physical copies of documents any other counsel intends to use for examining the Witness. The Noticing Attorney shall include a pre-paid return shipping label in any package of documents mailed to a Witness.

(iii) The Noticing Attorneys may choose to send a compressed .zip file or FTP of the documents that may be used during the deposition via electronic mail to the Witness, Defending Attorney, other Party's counsel, and Court Reporter. The .zip file or FTP link shall be delivered by 12:00 pm (in the time zone of the Remote Deposition) the business day before the deposition. The Defending Attorney, other Party's counsel, and Court Reporter shall confirm receipt of the .zip file or FTP link by electronic mail to the Noticing Attorney. The .zip file or FTP link shall be password protected, and the Questioning Attorney shall supply the password via electronic email immediately prior to the commencement of the deposition. Every recipient of a .zip file or FTP link shall not open the .zip file until the Remote Deposition begins and when directed to

do so by the Questioning Attorney. If sending documents by electronic mail, the Parties will be mindful of file size limitations, which presumptively should be less than 50 MB. Before the close of the Remote Deposition, the Witness shall delete the documents from his or her computer and electronic mail, and state for the record and on video that the documents have been deleted.

(iv) Counsel may introduce exhibits electronically during the deposition, by using the Remote Deposition Exhibit Platform. Prior to the Remote Deposition, the Questioning Attorney may convert intended exhibits to Portable Document Format ("PDF") provided that such conversion does not alter in any way the content of the exhibits. The Questioning Attorney shall confirm that the Witness and Defending Attorney can access each published exhibit prior to questioning the Witness about the exhibit. Exhibits marked and shown to the Witness using the Remote Deposition Exhibit Platform shall be attached to the deposition record to the same extent as if the exhibits were physically marked and shown to the Witness.

24. The Noticing Attorneys shall inform the Defending Attorney, other Party's counsel, and Court Reporter at least seventy-two (72) hours prior to the Remote Deposition if the Noticing Attorneys will administer exhibits pursuant to the methods in Paragraphs 23(i) – (iii) above. Notwithstanding Paragraph 23, the Noticing Attorneys taking a Remote Deposition pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure shall also provide the Defending Attorneys with copies of exhibits at least seventy-two (72) hours prior to the start of the Remote Deposition.

25. All Witnesses receiving documents before or during a Remote Deposition pursuant to Paragraph 23 above, shall destroy or return the documents to the Noticing Attorney who sent them originally or the attorney who provided them in-person and shall not retain them in any manner. If the documents were received pursuant to Paragraphs 23(ii) – (iv) above, the Witness shall certify in writing to the Noticing Attorney that the documents have been destroyed or returned within two business days following the completion of the Remote Deposition.

26. Counsel for the Parties may retain a copy of any exhibit introduced during the

deposition. When doing so, counsel shall comply with the Protective Order entered by the Honorable Vince Chhabria on August 17, 2018 at Dkt. No. 122. Counsel for the Parties shall destroy or return any documents received pursuant to Paragraphs 23(ii) – (iv) and not introduced as an exhibit during the Remote Deposition to the Noticing Attorney who sent them originally, shall not retain them in any manner, and shall certify in writing to the Noticing Attorney that the documents have been destroyed or returned within two business days following the completion of the Remote Deposition.

27. Counsel for non-party witnesses may keep any document used during the deposition, pursuant to the Protective Order entered by the Honorable Vince Chhabria on August 17, 2018 at Dkt. No. 122, and shall destroy or return any documents received pursuant to Paragraphs 23(ii) – (iv) and not used during the Remote Deposition to the Noticing Attorney who sent them originally, shall not retain them in any manner, and shall certify in writing to the Noticing Attorney, if the documents were received pursuant to Paragraphs 23(ii) – (iv) above, that the documents have been destroyed or returned within two business days following the completion of the Remote Deposition.

28. Except as otherwise provided in this Order, Participants shall take reasonable steps to ensure that no one who is not a Participant can hear or view the Remote Deposition while it is being conducted. The Witness may not consult in any fashion with anyone other than Defending Attorney(s) during questioning.

29. If the video feed or audio connection of the deponent, questioning attorney, or objecting attorney is interrupted (e.g., the video feed becomes hidden from view), the deposition shall be suspended, and the Parties will go back on the record only when such person's functionality has been restored. Disruptions due to technical problems shall not be counted against record time.

30. Witnesses may not use any communication devices other than those necessary to the deposition during questioning. While on the record, counsel for the deponent shall not communicate with the deponent outside of the deposition-dedicated video and audio connection.

This prohibition bars, among other communications, emails, instant messaging, and text messaging.

31. Recorded Remote Depositions may be used at a trial or hearing to the same extent that an in-person deposition may be used at trial or hearing, and the Parties are not to object to the use of these video recordings on the basis that the Remote Deposition was taken remotely. The Parties reserve all other objections to any use of any Remote Deposition testimony at trial.

32. This Order also shall govern any Remote Depositions of non-party witnesses during Phase I. To the extent it is consistent with his schedule, Special Master Daniel Garrie will attend each deposition unless both Parties agree that his attendance is not necessary at least 20 calendar days before the deposition. The Parties shall split the Special Master fees and actual expenses for that attendance equally, subject to reallocation upon showing good cause. If the Parties fail to give notice that Special Master Daniel Garrie is not required 20 calendar days prior, the Parties are responsible for the Special Master's day rate. The deposing party shall provide notice to the Special Master and opposing counsel, together with any counsel for the Witness, at least 20 calendar days before the deposition unless the Special Master finds good cause to shorten the time for notice.

Disputes that arise during the deposition that cannot be resolved by the Parties shall be addressed to Special Master Daniel Garrie. If Special Master Daniel Garrie is not present during the deposition to resolve the dispute, the Parties shall continue the Remote Deposition as to matters not in dispute, reserving all rights under the Federal Rules of Civil Procedure and relevant rules.

V. DISPUTES

Unless specifically referenced herein, any disputes arising out of this Deposition Protocol shall be resolved in accordance with Protocol for Resolving Discovery Disputes – Order No. 1, entered on August 20, 2021.

VI. AMENDMENTS

The Parties may modify this Deposition Scheduling Protocol as appropriate by mutual agreement or by order of the Court.

IT IS SO ORDERED.

November 12, 2021

Daniel Garrie
Discovery Special Master

Exhibit E-17
(Filed Under Seal)

Exhibit E-18
(Filed Under Seal)

Exhibit E-19

PUBLIC FILING

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA, *Plaintiff*, v. FACEBOOK INC., *Defendant*.	Civil Action No.: 2018 CA 008715 B

DISTRICT OF COLUMBIA'S SECOND SET OF REQUESTS FOR THE PRODUCTION OF DOCUMENTS TO DEFENDANT FACEBOOK, INC.

The District of Columbia (District), by and through its Attorney General and pursuant to Superior Court Rule of Civil Procedure 34, hereby serves its Second Set of Requests for the Production of Documents to Defendant Facebook, Inc. (Facebook). Defendant Facebook is directed to produce within thirty (30) days a written response to this Second Set of Requests for the Production of Documents and to produce the requested documents for inspection and copying at the Office of the Attorney General, Office of Consumer Protection, 441 Fourth Street, N.W., Suite 630 South, Washington, D.C., 20001, at that same time.

DEFINITIONS AND INSTRUCTIONS

The District incorporates by reference the Definitions and Instructions contained in its First Set of Requests for the Production of Documents to Facebook and adds the following additional definition:

1. **"App Audit"** refers to the investigation or review regarding third-party applications' access to Facebook consumer data announced by Facebook on March 21, 2018, available at https://www.facebook.com/zuck/posts/10104712037900071.

DOCUMENT REQUESTS

1. All documents that refer or relate to the App Audit, including, but not limited to, reports, memoranda, emails, letters, other communications, interview transcripts, requests for information, and results of any audit performed.

2. All contracts or agreements that Facebook has entered into with any third parties for services relating to the App Audit.

3. Documents sufficient to identify all individuals or entities whose work involves the App Audit.

4. Documents sufficient to identify the costs Facebook has incurred, or will incur, in connection with the App Audit.

5. To the extent not produced in response to previous requests, all documents that Facebook has gathered or reviewed in connection with the App Audit.

6. All documents concerning the App Audit produced in any investigation or litigation.

Dated: January 31, 2019

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

ROBYN R. BENDER
Deputy Attorney General
Public Advocacy Division

JIMMY R. ROCK
Assistant Deputy Attorney General
Public Advocacy Division

/s/ Benjamin M. Wiseman
BENJAMIN M. WISEMAN [1005442]
Director, Office of Consumer Protection
Public Advocacy Division

/s/ Randolph T. Chen
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randolph.chen@dc.gov

Attorneys for the District of Columbia

CERTIFICATE OF SERVICE

I, Randolph T. Chen, certify that on January 31, 2019, a copy of the foregoing Second Set of Requests for Production of Documents to Defendant Facebook, Inc. was served by first-class mail and e-mail to:

Joshua S. Lipshutz, Esq.
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8217
jlipshutz@gibsondunn.com

Counsel for Defendant Facebook, Inc.

/s/ Randolph T. Chen
RANDOLPH T. CHEN
Assistant Attorney General

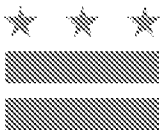
Exhibit E-20

PUBLIC FILING

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

ATTORNEY GENERAL
KARL A. RACINE

Office of Consumer Protection



August 8, 2019

Via Electronic Mail

Alison Watkins
1881 Page Mill Road,
Palo Alto, CA
94304-1211 USA
awatkins@gibsondunn.com

Re: D.C. v. Facebook (2018 CA 008715 B)

Dear Counsel,

We write in response to Facebook, Inc's ("Facebook" or the "Company") Objections and Responses to District of Columbia's Second Set of Requests for Production of Documents ("Response"), dated July 31, 2019. The District's six straightforward requests ("Second RFPs") sought documents related to the App Audit announced by Facebook's CEO on March 21, 2018, pursuant to which around 200 Facebook applications have apparently been suspended for potential misuse of consumer data.[1] Facebook's CEO (and controlling shareholder) promised Facebook users that the audit would result in a public accounting of the Company's breach of trust. More than six months ago, the District served its Second RFPs for basic documents surrounding this promised App Audit and public accounting. Surprisingly, Facebook's Response to the Second RFPs consisted of no actual documents and a series of boilerplate objections.

The App Audit is directly relevant to the District's allegation that Facebook failed to take reasonable steps—consistent with the Company's representations to its users—to protect consumers' personal data from access by third-party applications. *See* Compl. ¶¶ 1, 4, 5, 43, 48, 54-56. Yet, in its Response, Facebook agreed to produce only (1) communications between Facebook and third-party developers relating to the Audit and (2) the identity of third-party applications and developers that were suspended as a result of the Audit. Neither of these easily-available document categories were produced along with the Response.

---

[1] *See* Facebook, An Update on Our App Investigation and Audit, May 14, 2018, https://newsroom.fb.com/news/2018/05/update-on-app-audit/.

The Company's failure to provide a meaningful response to these Requests is unwarranted given that the District served its Second RFPs over six months ago, agreed to extend Facebook's deadline to respond to by an additional 30 days, and indicated a willingness to meet and confer about these RFPs a month before Facebook's responses were due, on our June 28, 2019 call. Facebook's evasive objections do not excuse the Company's incomplete response. For example, Facebook's objection to producing documents in response to RFPs 1 through 6 to the extent that responsive documents contain "trade secret, proprietary and/or confidential business information" is without merit. Confidential business information is not exempt from discovery in litigation. The District also provided a draft protective order to Facebook approximately five weeks ago. *See* 6/28/19 Rimm email to Leach and Fiebig. Facebook cannot rely on its own refusal in responding to this proposal to justify withholding relevant discovery.

Similarly, Facebook's objections to producing documents in response to RFP 1 through 6 because the Complaint does not allege any facts regarding third-party applications other than Aleksandr Kogan's app, and because the District has already received pre-suit discovery, do not support withholding responsive documents. As we discussed on our June 28, 2019 call, the Complaint is not limited to the events related to Aleksandr Kogan's app, which is described as "just one example" of the Company's pattern of lax oversight. Compl. ¶¶ 2, 43. By its own admission, in response to the Audit, Facebook has apparently identified over 200 additional noncompliant apps. Facebook's failure to detect and prevent similar misuse of personal data by other applications is squarely at issue in this case, *id.* ¶¶ 1, 4, 5, 43, 48, 54-56, and the Company's audit of potential misuse by hundreds of applications is therefore directly relevant to the District's claims. The fact that Facebook may have produced other documents as part of a pre-suit investigation does not in any way show that production of the additional, relevant discovery would be disproportionate to the needs of the case.

Facebook's other objections to individual Requests as overly broad or seeking irrelevant information do not warrant refusing to produce *any* internal documents regarding the App Audit pending a meet and confer. For example, Facebook did not affirmatively agree to produce any documents "concerning the App Audit" in response to RFP 6 on the tenuous ground, among others, that RFP 6 would include documents only "tangentially related to the App Audit." Likewise, Facebook failed to identify any individuals or entities whose work involves the App Audit in response to RFP 3 because this RFP could encompass individuals whose work involves the App Audit "only peripherally." To the extent Facebook legitimately believes that production of certain categories of documents called for by the Second RFPs would be unduly burdensome or disproportionate, it could have identified what categories of documents it will or will not produce; however, the Company's wholesale refusal to provide *any* response whatever to these RFPs on scope grounds is improper.

The Superior Court's Rules contemplate situations, like here, where a party's discovery responses are so evasive and incomplete as to constitute no response at all. *See* Sup. Ct. Civ. R. 37(a)(4) ("For purposes of Rule 37(a), an evasive or incomplete answer or response must be treated as a failure to answer or respond."). Facebook should fulfill its discovery obligations by responding to the Second RFPs without further delay. Pursuant to Rule 26(h)(2)(A), and

considering the 30-day extension already provided, the District requests these responses by no later than 10 days from the date of this letter.

Sincerely,

KARL A. RACINE
Attorney General for the District of Columbia

/s/ Randolph T. Chen
RANDOLPH T. CHEN
Assistant Attorney General

Attorneys for the District of Columbia

Exhibit E-21

PUBLIC FILING

Edelson

Theo Benjamin <tbenjamin@edelson.com>

DC-Facebook: ADI and notebooks

Eli Wade-Scott <ewadescott@edelson.com> Mon, Nov 22, 2021 at 3:13 PM
To: "Thomas, Chelsea Mae" <CThomas@gibsondunn.com>
Cc: Emily Penkowski <epenkowski@edelson.com>, "Goldnick, Zoey G." <ZGoldnick@gibsondunn.com>, "Hur, Robert K." <RHur@gibsondunn.com>, "Lipshutz, Joshua S." <JLipshutz@gibsondunn.com>, "Portlock, Karin" <KPortlock@gibsondunn.com>, "Powell, Nathan" <NPowell@gibsondunn.com>, "Rock, Jimmy (OAG)" <jimmy.rock@dc.gov>, "Snyder, Orin" <OSnyder@gibsondunn.com>, Theo Benjamin <tbenjamin@edelson.com>, "Wiseman, Benjamin (OAG)" <benjamin.wiseman@dc.gov>

Karin and all:

Thanks for the call. To summarize, there isn't much room for negotiation here. Please let me know if I have any of the below wrong.

It is Facebook's view that the MDL court was wrong to order it to produce materials related to the ADI (as set forth in our earlier correspondence), and Facebook will not replicate that production for the District without a court order compelling it to do so.

Facebook also will not produce anything from Mr. Zuckerberg's notebooks in this case, as it was ordered to in the MDL. You added here that the notebooks pre-date the time period in the case – which Facebook also argued unsuccessfully in the MDL – and that they would reflect only Mr. Zuckerberg's private thoughts and not Facebook's public statements. As we've previously explained in the correspondence, Facebook's internal thinking in contrast with its public statements is relevant to the case, of which Mr. Zuckerberg's notebooks are an obvious source. I noted that we appeared to be at an impasse on this issue as well – I asked if there were any limitations on the search of Mr. Zuckerberg's notebooks that Facebook would be amenable to, and you did not have any.

You did say that counsel responsible for the MDL – I believe these would also be from your firm, but please correct me if I'm wrong – had performed a search for Mr. Zuckerberg's notebooks and either had not located them or had not found any relevant information. I asked whether it was Facebook's position that the notebooks do not exist, because it seemed obvious to me that they did (as reported by third parties and given that the MDL ordered Facebook to search them), and that I would have to operate on the assumption that they do. If the notebooks do not exist, please let us know right away.

Eli

On Wed, Nov 17, 2021 at 5:42 PM Eli Wade-Scott <ewadescott@edelson.com> wrote:
[Quoted text hidden]
[Quoted text hidden]

Exhibit E-22

PUBLIC FILING
REDACTED PUBLIC VERSION

Filed
D.C. Superior Court
08/11/2021 15:19PM
Clerk of the Court

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA, *Plaintiff,* v. FACEBOOK, INC., *Defendant.*	Civil Action No. 2018 CA 008715 B Judge Fern Flanagan Saddler Next Event: Close of Fact Discovery Date: December 17, 2021 **ORAL HEARING REQUESTED**

DISTRICT OF COLUMBIA'S OPPOSED MOTION TO COMPEL DEFENDANT FACEBOOK, INC. TO PRODUCE DOCUMENTS

Pursuant to SCR-Civil 37(a), Plaintiff District of Columbia ("District") respectfully moves the Court to compel Defendant Facebook, Inc. ("Facebook") to produce documents relating to the District's Fifth Set of Requests for Production ("Fifth Requests"). The District's discovery requests concern a key, narrow category of relevant information to the case: documents relating to the business reasons why Facebook made consumers' personal data available to third-party developers, which the District alleges ultimately led to one developer taking more than 87 million users' information from the Facebook Platform.

To briefly summarize the events that led up to this Motion, the discovery produced so far in this case provides information about *how* the Facebook Platform worked. But these documents come largely from the "technical side" of Facebook, which builds and implements Facebook products under the direction of Facebook's leadership. But Facebook has refused to provide discovery on *why* Facebook made key decisions regarding its Platform—and, importantly, later changed its decision on a crucial issue. Here, Facebook initially opened the Facebook Platform to developers and accepted the obvious risk that a developer might amass user data for an improper

purpose—as Cambridge Analytica eventually did. But Facebook then later chose to limit the availability of certain user data. The technical side of Facebook has denied knowing the answers regarding why Facebook made these decisions. The District accordingly sought discovery from the "business side" of Facebook, specifically its Growth and Monetization Teams.

The parties have engaged in extensive negotiations and meet-and-confers in a good faith attempt to resolve disputes relating to the District's Fifth Requests. But Facebook has flatly refused to produce discovery on why it made certain business decisions. The parties have now reached an impasse.

The question propounded by this Motion is thus whether exploring Facebook's business decisions to give developers access to consumer data on the Platform is discoverable in this action. The District contends that learning *why* Facebook did so is necessary for the District to understand whether Facebook believed its representations regarding its privacy practices were material to consumers, and whether Facebook's representation that it would protect consumers' data tended to mislead consumers. This discovery is therefore relevant as it bears directly on the District's CPPA claims. Facebook's motivation behind these decisions may also affect the damages and penalties in this case. For its part, Facebook contends that discovery into its "business decisions" is not relevant to the case. But moreover, Facebook's view is that it is under no obligation to designate additional custodians on any discoverable subject matter because the Court denied the District's prior Motion to Compel Facebook to designate four Facebook Executives as custodians.

Accordingly, the District moves the Court for an Order compelling Facebook to search for and produce documents relevant to its Fifth Requests, including by designating additional custodians.

Respectfully submitted,

Dated: August 11, 2021

KARL A. RACINE
Attorney General for the District of Columbia

KATHLEEN KONOPKA
Deputy Attorney General
Public Advocacy Division

JIMMY R. ROCK
Assistant Deputy Attorney General
Public Advocacy Division

/s/ *Benjamin M. Wiseman*
BENJAMIN M. WISEMAN [1005442]
Director, Office of Consumer Protection

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/s/ *J. Eli Wade-Scott*
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* Admitted *pro hac vice.*

Attorneys for Plaintiff District of Columbia

RULE 12-I(a) CERTIFICATION

Counsel for the District of Columbia contacted counsel for Defendant to obtain consent to relief requested in this Motion. Counsel for Defendant opposes the relief requests in this Motion.

/s/ *J. Eli Wade-Scott*
J. Eli Wade-Scott

Attorney for the District of Columbia

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 11, 2021, I caused the foregoing to be served on all counsel of record via the Court's e-filing service.

/s/ *J. Eli Wade-Scott*
J. Eli Wade-Scott

Attorney for the District of Columbia

RULE 26(h) AND RULE 37(a) CERTIFICATION

Plaintiff District of Columbia's ("District") Motion to Compel concerns Defendant Facebook, Inc.'s ("Facebook") failure to provide complete responses to the District's Fifth Set of Requests for Production ("Fifth Requests"), served on February 1, 2021. The District's Fifth Requests seek information relating to the District's claims that, as relevant here, allege Facebook knew of the risks associated with giving developers access to large amounts of consumer data on the Facebook Platform, misrepresented the extent to which it was protecting that data, and failed to notify consumers whose data was compromised.

The parties' impasse has crystallized over the course of several months, including numerous lettered correspondences and meet-and-confers where the parties have engaged in repeated good faith attempts to resolve disputes relating to Facebook's business decisions. These attempts have included multiple written negotiations (dated January 12, 2021, February 1, 2021, February 22, 2021, March 15, 2021, April 1, 2021, April 15, 2021, April 23, 2021, May 7, 2021) culminating in a telephonic meet-and-confer (conducted on May 25, 2021).

Given health concerns raised by the ongoing COVID-19 pandemic, the parties have agreed to stipulate that teleconferences satisfy SCR-Civil 37(a)'s requirement that the parties meet "in person" to attempt to resolve the disputed matter prior to filing.

/s/ *J. Eli Wade-Scott*
J. Eli Wade-Scott

Attorney for the District of Columbia

CERTIFICATE OF DISCOVERY

As of the date of the filing of this Motion, the following discovery has occurred in this case:

1. On January 9, 2019, the District served the following discovery:
    a. District of Columbia's First Set of Requests for the Production of Documents to Facebook, Inc.; and
    b. District of Columbia's First Set of Interrogatories to Facebook, Inc.

2. On January 31, 2019, the District served the following discovery:
    a. District of Columbia's Second Set of Requests for the Production of Documents to Facebook, Inc.

3. On July 31, 2019, Facebook served the following written responses:
    a. Defendant Facebook, Inc.'s Responses and Objections to the District's First Set of Requests for the Production of Documents;
    b. Defendant Facebook, Inc.'s Responses and Objections to the District of Columbia's First Set of Interrogatories; and
    c. Defendant Facebook, Inc.'s Responses and Objections to the District of Columbia's Second Set of Requests for the Production of Documents.

4. On July 2, 2019, the District served the following third-party discovery:
    a. Subpoena for Documents to the District of Columbia Office of Tax and Revenue; and
    b. Subpoena for Documents to Sandy Parakilas.

5. On August 28, 2019, Facebook served the following discovery:
    a. Defendant Facebook, Inc.'s First Set of Requests to Plaintiff for the Production of Documents; and
    b. Defendant Facebook, Inc.'s First Set of Interrogatories.

6. On October 28, 2019, the District served the following written responses:
    a. District's Responses to Facebook, Inc.'s First Set of Requests for Production; and
    b. District's Responses to Facebook, Inc.'s First Set of Interrogatories.

7. On January 6, 2020, the District took the deposition of Ezra Justin Lee.

8. On April 9, 2020, the District served the following third-party discovery:
    a. Subpoena for Documents to Best Buy; and
    b. Subpoena for Documents to Anheuser-Busch Companies, LLC.

9. On May 6, 2020, Facebook served the following discovery:
    a. Facebook's Second Set of Requests to Plaintiff for the Production of Documents; and

b. Facebook's Second Set of Interrogatories.

10. On May 7, 2020, Facebook served the following discovery:
    a. Subpoena for Documents to the District of Columbia Office of the Chief Technology Officer; and
    b. Subpoena for Documents to the District of Columbia Department of Consumer and Regulatory Affairs.

11. On May 8, 2020, the District served the following discovery:
    a. District of Columbia's Third Set of Requests for the Production of Documents to Facebook, Inc.

12. On May 21, 2020, Facebook served the following written responses:
    a. Defendant Facebook, Inc.'s Responses and Objections to the District's Notice of Issuance of Subpoena to Best Buy Co., Inc.; and
    b. Defendant Facebook, Inc.'s Responses and Objections to the District's Notice of Issuance of Subpoena to Anheuser-Busch Companies, LLC.

13. On June 3, 2020, the District served the following written response:
    a. District's Supplemental Responses to Facebook, Inc.'s First Set of Requests for Production.

14. On July 24, 2020, Facebook served the following written responses:
    a. Defendant Facebook, Inc.'s Responses and Objections to the District's Third Set of Requests for the Production of Documents.

15. On July 24, 2020, the District served the following written responses:
    a. District of Columbia Department of Consumer and Regulatory Affairs's Responses to Facebook, Inc.'s Subpoena for the Production of Documents; and
    b. District of Columbia Office of the Chief Technology Officer's Responses to Facebook, Inc.'s Subpoena for the Production of Documents.

16. On September 22, 2020, the District served the following discovery:
    a. District of Columbia's Fourth Set of Requests for the Production of Documents to Facebook, Inc.

17. On October 22, 2020, Facebook served the following written responses:
    a. Defendant Facebook, Inc.'s Responses and Objections to the District's Fourth Set of Requests for the Production of Documents.

18. On November 12, 2020, the District took the deposition of Marie Hagman.

19. On February 1, 2021, the District served the following discovery:
    a. District of Columbia's Fifth Set of Requests for the Production of Documents to Facebook, Inc.

20. On March 17, 2021, Facebook served the following written responses:
    a. Defendant Facebook, Inc.'s Responses and Objections to the District's Fifth Set of Requests for the Production of Documents.

21. On April 20, 2021, the District served the following discovery:
    a. District of Columbia's Second Set of Interrogatories to Facebook, Inc.

22. On April 15, 2021, the District took the deposition of Claire Gartland.

23. On May 11, 2021, the District took the deposition of Peter Fleming.

24. On May 20, 2021, Facebook served the following written responses:
    a. Defendant Facebook, Inc.'s Responses and Objections to the District's Second Set of Interrogatories.

25. On June 18, 2021, the District took the deposition of Simon Cross.

26. On June 21, 2021, the District took the deposition of Sandy (Alexander) Parakilas.

27. On July 13, 2021, the District took the deposition of Anne Kornblut.

28. On July 21, 2021, the District took the deposition of Edward ("Eddie") O'Neil.

29. Facebook has served the following partial productions to the District:
    a. January 31, 2020 partial production in response to the District's Requests for the Production of Documents and the District's Subpoena for Documents to Sandy Parakilas;
    b. March 20, 2020 partial production in response to the District's Requests for the Production of Documents;
    c. May 12, 2020 partial production in response to the District's Requests for the Production of Documents;
    d. June 30, 2020 partial production in response to the District's Requests for the Production of Documents;
    e. August 17, 2020 partial production in response to the District's Requests for the Production of Documents;
    f. August 18, 2020 partial production in response to the District's Requests for the Production of Documents;
    g. October 2, 2020 partial production in response to the District's Requests for the Production of Documents;
    h. October 13, 2020 partial production in response to the District's Requests for the Production of Documents;
    i. October 23, 2020 partial production in response to the District's Requests for the Production of Documents;
    j. October 30, 2020 partial production in response to the District's Requests for the Production of Documents;

k. November 6, 2020 partial production in response to the District's Requests for the Production of Documents;
l. December 11, 2020 partial production in response to the District's Requests for the Production of Documents;
m. February 12, 2021 partial production in response to the District's Requests for the Production of Documents;
n. March 31, 2021 partial production in response to the District's Requests for the Production of Documents;
o. June 7, 2021 partial production in response to the District's Requests for the Production of Documents; and
p. July 8, 2021 partial production in response to the District's Requests for the Production of Documents.

30. The District has served the following partial productions to Facebook:
a. February 21, 2020 partial production in response to Facebook's Requests for the Production of Documents;
b. March 13, 2020 partial production in response to Facebook's Requests for the Production of Documents;
c. June 4, 2020 partial production in response to Facebook's Requests for the Production of Documents;
d. July 30, 2020 partial production in response to Facebook's Subpoena to the District of Columbia Office of the Chief Technology Officer; and
e. July 30, 2020 partial production in response to Facebook's Request for the Production of Documents.

Dated: August 11, 2021

/s/ *J. Eli Wade-Scott*
J. Eli Wade-Scott

Attorney for Plaintiff District of Columbia

PUBLIC FILING
REDACTED PUBLIC VERSION

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA, *Plaintiff,* v. FACEBOOK, INC., *Defendant.*	Civil Action No. 2018 CA 008715 B Judge Fern Flanagan Saddler Next Event: Close of Fact Discovery Date: December 17, 2021 **ORAL HEARING REQUESTED**

DISTRICT OF COLUMBIA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSED MOTION TO COMPEL DEFENDANT FACEBOOK, INC. TO PRODUCE DOCUMENTS

In this action, Plaintiff District of Columbia ("District") alleges that Defendant Facebook, Inc. ("Facebook") made millions of users' personal information available to third-party developers through the Facebook "Platform." This led to one of those developers taking more than 87 million users' information from the Platform—using the features made available to him by Facebook—and handing that vast trove of data over to Cambridge Analytica. All the while, the District alleges Facebook misled users about how safe their data was on the Facebook Platform.

The discovery produced so far in the case provides information about *how* the Facebook Platform worked, both during the period that user data was essentially open to developers and after Facebook implemented changes to close the Platform. These documents come largely from the technical side of Facebook, most often the "Platform Team." But Facebook has worked hard to obscure *why* any of this was done: why Facebook opened the Platform to developers in the first place, why Facebook looked the other way despite the obvious risk that a developer might amass user data for an improper purpose—as Cambridge Analytica did—and why it ultimately

made changes to limit what data was accessible to everyone except Facebook's chosen partners. The District has accordingly sought discovery from the "business side" of Facebook, namely Facebook's Growth and Monetization Teams. Facebook has refused to produce that discovery.

Facebook's effort to hem discovery into a factual description of how it set up the Platform should be rejected. If the District's allegations are proven true, Facebook dissembled to District residents about how private it was keeping their data in order to accomplish its own ends—and what those ends were is a permissible subject of discovery. Indeed, how Facebook balanced the risk to its users against its own profits, and how it decided to mete out information to users to prevent loss of Facebook's growth and profitability, are relevant or—at the very least—could lead to relevant evidence in the case. Accordingly, pursuant to SCR-Civil 37(a), Plaintiff moves the Court to compel Defendant to produce documents responsive to certain of the District's Fifth Set of Requests for Production, Request Nos. 24-33 ("Fifth Requests"). *See* Fifth Requests, attached as Exhibit 1, at 5-6.[1]

BACKGROUND

I. The District's allegations.

Through this action, the District alleges that Facebook violated the Consumer Protection Procedures Act ("CPPA"), D.C. Code §§ 28-3901 to 28-3913, by misleading consumers in the District of Columbia ("District consumers") regarding the security of their personal data. (Compl. ¶¶ 72-76.) Three of the District's key allegations are particularly relevant to this Motion:

First, the District alleges that Facebook is a massively successful company because it leverages consumer data—namely the personal information and preferences derived from each

[1] All references to Exhibits refer to exhibits attached to the Declaration of J. Eli Wade-Scott ("Wade-Scott Decl."), submitted contemporaneously herewith.

of its millions of consumers—to sell advertising space targeted toward the individual interests and preferences of each user. (*Id.* ¶¶ 12-17.) Thus, the growth and ongoing success of Facebook's business model is predicated on collecting more and more data from users. (*Id.* ¶ 17.)

Second, the District alleges that in 2007 Facebook launched the Facebook Platform, a software environment where third-party applications and developers could build and develop applications on Facebook's website. (*Id.* ¶¶ 18-19.) In the earliest versions of the Platform, Facebook allowed developers to access a vast trove of personal consumer data. Particularly, this version of the Platform allowed a developer to multiply one user's permission into the ability to access the data of that user's entire social network of Facebook's friends. (*Id.* ¶ 20.)

Third, while Facebook made massive amounts of its users' personal data available to third-party developers, the District alleges that Facebook's "public statements, terms of service, and policies" about protecting consumer data were misleading in light of the company's "lack of oversight and enforcement relating to third parties" who collected private consumer data through the Facebook Platform. (*Id.* ¶¶ 5, 46.) Facebook's data policies at the time claimed to allow a developer's application access to information "only in connection with the person that gave the permission, and no one else," when in reality, Facebook was not preventing developers from using data however they saw fit. (*Id.* ¶¶ 47, 48.)

The District has sought to discover why Facebook opened up the Facebook Platform to developers, what Facebook knew of the risks this policy posed to consumer data, and whether Facebook weighed its own business interests ahead of the safety of its users data. But Facebook has refused. The District accordingly files this Motion to Compel.

II. The Parties' discovery negotiations following the Court's January 19, 2021 Order.

Since the Court's January 19, 2021 Order on the District's Motion to Compel (the "Order"), the parties have continued to engage in discovery and negotiations regarding the

appropriate custodians and scope of search terms to identify documents responsive to the District's Requests. *See* Order, attached as Exhibit 2. At that time, the District moved to compel Facebook to designate four specific Facebook executives as custodians: Mark Zuckerberg, Sheryl Sandberg, Joel Kaplan, and Elliott Schrage. The Court's Order denied in part the District's Motion to Compel Custodians, without prejudice, holding that Facebook would not be required to designate these executives as custodians until the District reviewed documents set to be produced. (*See* Ex. 2 at 7-8.) While the District awaits completion of Facebook's document production,[2] it has been diligently reviewing existing documents to identify specific needs of the case otherwise not covered by any outstanding discovery requests or the parties agreed-upon search terms. One area that remains substantially unexplored is Facebook's business decisions relevant to the alleged actions and harm in this case.

The District sought to close this gap by requesting discovery relating to these business decisions and asking Facebook to apply the already agreed-upon search terms to two additional custodians. *See* the District's Jan. 12, 2021 Letter to Fiebig, attached as Exhibit 3. But, following several waves of correspondence, Facebook denied the District's Requests, asserting they were irrelevant to the issues raised in the District's Complaint. *See* Facebook's Feb. 1, 2021 Letter to Rock, attached as Exhibit 4; *see also* Mar. 15, 2021 Letter to Rock, attached as Exhibit 5.

On February 1, 2021, following the District's unsuccessful attempts to add two additional custodians as a means of seeking discovery into the reasoning behind business decisions relevant to this case, the District propounded its Fifth Requests. (*See* Ex. 1 at 5-6, Request Nos. 24-33.) To further narrow these Requests, the District sought discovery into two specifically identified

[2] Facebook has been unable to provide the District with a definitive timeline for when it expects to complete the production of documents already identified as relevant, only that it "anticipates that productions may continue into the fall." *See* July 7, 2021 Joint Motion to Extend the Scheduling Order.

teams at Facebook: (1) the "Growth Team"—the team responsible for growing the number of users or active users, *see* Request Nos. 24-29; and (2) the "Monetization Team"—the team responsible for monetizing Facebook's platform, site, or products, *see* Request Nos. 30-33. (*Id.*) The Requests asked for documents and communications that Growth and Monetization Team members wrote, sent, or reviewed related to Cambridge Analytica, Facebook's Integration and Data-sharing Partnerships, third-party access to Facebook consumers' data, and reviews of Facebook's privacy and application settings during the relevant timeframe. (*Id.*)

Facebook objected to the Requests as irrelevant and contrary to their interpretation of this Court's Order on the District's prior Motion to Compel. *See* Facebook's Responses and Objections to the District's Fifth Set of Requests for Production, Mar. 17, 2021, attached as Exhibit 6 at 40. Following several letters and meet and confers on the District's Requests, Facebook continues to rely on an expansive interpretation of the Court's earlier Order to assert that it has no obligation to designate additional custodians—evidently, on any subject—because the Court did not compel it to designate the four Facebook Executives at issue in the prior motion. *See* District's Apr. 15, 2021 Letter to Facebook, attached as Exhibit 7. The parties are accordingly at an impasse. S*ee* Facebook's May 7, 2021 Letter to Rock, attached as Exhibit 8.

LEGAL STANDARD

SCR-Civil 26(b)(1) permits parties to obtain discovery into "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Finding proportionality requires a court weigh: "[1] the importance of the issues at stake in the action, [2] the amount in controversy, [3] the parties' relative access to relevant information, [4] the parties' resources, [5] the importance of the discovery in resolving the issues, and [6] whether the burden of expense of the proposed discovery outweighs its likely benefit." SCR-Civil 26(b)(1). "No

single factor is designed to outweigh the other factors in determining whether the discovery sought is proportional, and all proportionality determination must be made on a case-by-case basis." *Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co.*, 322 F.R.D. 1, 6 (D.D.C. 2017).

The party seeking to compel discovery bears the initial burden to show "how the requested information is relevant"—and once satisfied, the burden shifts to the non-movant to "explain why discovery should not be permitted." *Id.* "[I]n order to successfully resist a motion to compel, [a party must] specifically object and show that a discovery request would impose an undue burden or expense or is otherwise objectionable." *Id.*

ARGUMENT

I. The District is entitled to discovery on Facebook's business decisions relating to allegations in the Complaint.

A. Facebook lacks any basis for denying discovery into the business purposes behind its decision to make consumer data accessible to external developers.

In 2014, Facebook made a decision that allowed Aleksandr Kogan and other app developers to accumulate massive sets of personal data about Facebook consumers. (Compl. ¶¶ 18-22.) Facebook has refused to designate any additional custodians—including from the two divisions of the company that deal with making money—to permit the District to explore *why* Facebook made that decision. (*Id.* ¶¶ 12-17, 46, 48, 53-58.) The custodians already agreed upon in the case are primarily individuals in technical roles whose documents describe the existing system.[3] The "why" remains a blank spot in the document productions made by Facebook to date, which the District is entitled to explore through additional discovery.

[3] [redacted]

Relevance in discovery is "construed most liberally, to the point that discovery should be granted where there is any possibility that the information sought may be relevant to the subject matter of the action." *Roberts-Douglas v. Meares*, 624 A.2d 405, 415 (D.C. 1992), *opinion modified on reh'g*, 624 A.2d 431 (D.C. 1993) (internal quotation marks omitted). The District must be able to explore why Facebook opened up the Platform in the first place, why it chose to make the representations that it did about the safety of user data during that period, and whether Facebook chose to prioritize profit over its promises to protect users' data. At the least, this discovery would cast light on whether Facebook's misrepresentations and omissions were material, which is a central element of claims under D.C. Code § 28-3904(e), (f), and (f-1). *See* Restatement (Second) of Torts § 538(2) ("The matter is material if . . . the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his [or her] choice of action."); *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442 (D.C. 2013) (adopting the Restatement's definition of materiality). As well, the District contends that Facebook misrepresented it would "protect the privacy of consumers' personal information." (Compl. ¶ 72.) Whether Facebook actually intended to protect that information is relevant to the statement's "tendency to mislead" consumers. *Mann v. Bahi*, 251 F. Supp. 3d 112, 126 (D.D.C. 2017) ("A reasonable consumer generally would not deem an accurate statement to be misleading.").

The discovery requests issued by the District are focused on two Facebook teams dedicated to growing and monetizing the social media site, a priority for Facebook since as early as 2007. *See* Steven Levy, *The Untold History of Facebook's Most Controversial Growth Tool*, Marker (Feb. 25, 2020), https://marker.medium.com/the-untold-history-of-facebooks-most-controversial-growth-tool-2ea3bfeaaa66. These teams make strategic decisions about how to

grow and monetize Facebook—in other words, making business decisions that impact revenue streams. *See, e.g.*, *Resol. Tr. Corp. v. Mass. Mut. Life Ins. Co.*, 200 F.R.D. 183, 197-98 (W.D.N.Y. 2001) (a company's "decision-making process" is relevant to claims).

[redacted]; *see also id.* at 43:22-44:1 ("I wasn't actually involved in the decision to design or launch the Graph API, so I'm not entirely sure the motivations of the team who built the Graph API originally would have been.") [redacted]

The District is permitted to further explore how Facebook weighed its profitability against user privacy, and the District has issued limited discovery requests to seek that information out. But Facebook has made clear that it does not plan to produce documents relating to these two teams, or the business side of Facebook generally. As Facebook's own documents and employees have shown, these teams played a key role in deciding what Facebook's Platform privacy policies were, and whether those policies benefited Facebook or its consumers. Facebook should be compelled to produce documents responsive to these Requests.

B. Discovery into Facebook's business decisions are proportional to the significance of the case.

Given the relevance of Facebook's business decisions, the burden falls to Facebook to demonstrate that further discovery or custodians are disproportionate to the needs of the case per the factors set out in SCR-Civil 26(b)(1). *See Oxbow Carbon*, 322 F.R.D. at 6. Facebook has not—and cannot—meet this burden. The only objections it has proffered to date are general boilerplate claiming the District's requests are "overly broad, unduly burdensome, and disproportionate to the needs of the case." (Ex. 6 at 39-55); *see also id.* These lack merit.

The cost burden of adding additional custodians is minimal in comparison to the other SCR-Civil 26(b)(1) factors. Cost objections do not hold water where a party fails to "provide any evidence or specific factual allegations to support their assertion that discovery from the additional custodians would unduly add to the cost or time needed to process the necessary documents." *Garcia Ramirez v. U.S. Immigr. & Customs Enf't*, 331 F.R.D. 194, 198 (D.D.C. 2019). Facebook has yet to provide any detail as to any burden it would face, or even cite cost as a potential factor in its objections. In any event, cost objections—even specific ones—are routinely outweighed in complex litigation like this, because extensive discovery and lengthy custodian lists are well-warranted and par for the course. *E.g.*, *id.* (holding that 34 document custodians was proportionate to needs of nationwide class action). Indeed, the multidistrict litigation arising out of the same matters related to this case has currently designated at least 81 custodians—many more than what the District requests here. *See* Dkt. 599, Joint Status Update at 6, *In re Facebook, Inc. Consumer Privacy User Profile Litig.*, No. 18-md-02843-VC-JSC (N.D. Cal Jan. 14, 2021).

Furthermore, any burden on Facebook is well outweighed by the other SCR-Civil 26(b)(1) factors in favor of discovery. First, the issues at stake in this action are unquestionably important: this is a government consumer protection enforcement action concerning how the personal data of over 340,000 District consumers—nearly half of the District's population—was harvested without their knowledge. (Compl. ¶¶ 2, 30.) Second, the amount in controversy is likewise significant—the District is entitled to recover up to $5,000 in civil penalties per violation of the CPPA (in addition to damages, costs, and attorneys' fees). *See* D.C. Code § 28-3909(b). Should a factfinder determine that Facebook's failure to notify the 340,000 District consumers affected by Cambridge Analytica was a material omission, a penalty for each affected

consumer implicates an amount easily into the hundreds of millions of dollars. Third, as to relative access, Facebook has exclusive access to documents. Fourth, Facebook's own resources are monumental: In 2019, it generated an annual revenue north of $70.6 billion, and the production costs associated with this document production are a minute fraction of the company's bottom line. Fifth, for the reasons set out above in Section I, custodians from the Growth and Monetization Teams possess documents that are key to resolving the District's claims in this action. Sixth, even had Facebook articulated specific cost objections, any burden would be far outweighed by the benefit of further discovery. The significance of this case, and of these issues to the case, dwarf any objection.

III. This Motion is not premature, as Facebook agrees that new custodians to respond to these discovery requests would provide unique information.

In resisting this discovery, Facebook primarily argues that this Court's prior Order relieves it from designating any additional custodians in the case. But the Court's Order denying—without prejudice—the District's Motion to Compel designation of four specific Facebook Executives as custodians was based on Facebook's representation that the documents held by those executives may be duplicative of existing custodians. (Ex. 2 at 5, 7 (finding that the additional custodians "may provide duplicative documentation"); *see also* Facebook's Opposition to the District's Motion to Compel, Aug. 21, 2020, attached as Exhibit 15 at 2, 10-13 ("[T]he District offers no basis to conclude that the Proposed Additional Custodians' files would have anything unique to add on this issue"; "The District has also failed to demonstrate the Proposed Additional Custodians are likely to possess unique documents that are not duplicative of those found in the files of the 21 existing custodians."). Facebook has made precisely the opposite representation here: Facebook admits this discovery would be unique from documents it has already produced or agreed to produce. (Ex. 6 at 39-55.) That is, Facebook objects to the

District's Requests because they "seek[] to require Facebook to collect and review documents beyond the Agreed-Upon Custodians, including 'any Growth Team member,'" an admission that the universe of documents already collected does not cover the subjects requested by the District. (*See id.* at 40.) If Facebook *must* add additional custodians to answer the request, then those custodians would, by definition, possess unique documents.[4] This Court need not wait for Facebook to complete its admittedly unrelated productions before resolving this dispute.

In any event, the status of the case has changed substantially since the Court decided that the District's previous Motion to Compel was premature. At that time, Facebook had produced no ESI discovery other than reproductions of pre-suit investigation documents. (Ex. 2 at 7-8.) But now, Facebook has produced over 80,000 documents and the District has substantially reviewed these productions for gaps—like the one at issue here. The District simply cannot wait on Facebook's uncertain production timelines before requesting any new discovery.

CONCLUSION

For the foregoing reasons, the Court should grant the District's Motion to Compel. The District respectfully requests the Court compel Facebook to (i) produce documents responsive to the Request Nos. 24-33; and (ii) designate additional custodians as necessary.

Respectfully submitted,

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Public Advocacy Division

[4] As discussed above, the Growth and Monetization Teams are not covered in the existing production. [redacted]

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Dated: August 11, 2021

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 11, 2021, I caused the foregoing to be served on all counsel of record via the Court's e-filing service.

/s/ *J. Eli Wade-Scott*
J. Eli Wade-Scott

Attorney for the District of Columbia

Exhibit E-23

PUBLIC FILING

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

CIVIL ACTION NO.: 2018 CA 008715 B
Judge Fern Flanagan Saddler
Next Court Date: October 16, 2019
Event: Status Hearing

FACEBOOK, INC.'S OPPOSITION TO PLAINTIFF'S MOTION FOR ENTRY OF PROTECTIVE ORDER

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INTRODUCTION

Corporate defendants—including Facebook, Inc.—are routinely requested to provide large amounts of data in response to plaintiffs' discovery requests, and are routinely provided with certain baseline protections in standard protective orders that secure, among other things, their confidential trade secrets and sensitive business information. This case is no different: The District of Columbia ("the District") has served dozens of discovery requests that probe Facebook's business model and its relationship with business partners and users. Because Facebook's business practices, user information, and other sensitive business materials will be subject to discovery—and because the overwhelming majority of the discovery burdens in this matter will asymetrically fall on Facebook—Facebook seeks the same baseline protections that other courts around the country have endorsed when discovery implicates confidential business information. Namely, Facebook has proposed a protective order that defines "confidential information" to be co-extensive with Superior Court Rule of Civil Procedure 26(c); allows especially sensitive documents to be designated "highly confidential"; and requires notice of experts and consultants who gain access to Facebook's highly confidential business documents.

Facebook's protective order is neither unprecedented nor unique. Indeed, similar terms appear in the existing protective order that is already governing the closely related multi-district litigation ("MDL") currently pending in the Northern District of California, Ex. 2, *In re: Facebook, Inc. Consumer Privacy User Profile Litig.*, Pretrial Order No. 10: Protective Order, No. 3:18-md-02843 (N.D. Cal. Aug. 17, 2018), ECF No. 122, which implicates nearly identical discovery. Ordering a different or competing set of provisions to govern the confidentiality of Facebook's sensitive business documents in this case will unduly compound the burdens on Facebook in responding to discovery requests in both cases, will frustrate efforts to coordinate discovery in the two cases, and will inevitably delay discovery.

Moreover, courts around the country have recognized that each of the provisions Facebook proposes is reasonable and warranted when a party expects to produce confidential business information. In fact, courts routinely call for these provisions in *model* protective orders, precisely because they appropriately balance party interests when sensitive and confidential business information is at stake. The District's proposed protective order, on the other hand, unreasonably omits critical protections for confidential business information that would materially jeopardize Facebook's ability to safeguard sensitive information.

In addition, the District's proposed protective order reflects a host of issues on which the parties had not yet meaningfully met-and-conferred, since the District communicated its position on those provisions to Facebook for the first time only *hours* before it filed its motion. This Court should not rule on these issues because the parties have not finished discussing whether a resolution can be reached. And the District's premature motion did not identify these issues as ripe (nor did it identify Facebook's objection to them), even though the District has asked this Court to enter its protective order in full. Facebook therefore respectfully requests that the Court deny the District's motion for a protective order, and reject its position on the three issues that are the subject of its motion. Facebook also requests that the Court order the parties to continue meeting and conferring until all remaining outstanding issues have been jointly resolved by the parties or, alternatively, to enter Facebook's proposed protective order rather than the District's.

BACKGROUND

Through a series of good-faith meet-and-confers, the parties have made substantial progress on a proposed protective order to govern discovery in this matter. There are three issues presented in the District's motion on which the parties were not able to reach agreement that the District has submitted for this Court's consideration. But the District omits several

provisions *not* addressed in its motion that it seeks approval and adoption of, despite the parties' ongoing negotiations about them.

The District initially sent Facebook a sample protective order that it had entered in another case. Facebook made a counter-proposal with its own version of a protective order in mid-August, Ex. 1, explaining that it was based on model protective orders designed for cases involving confidential information, and the parties subsequently met and conferred regarding Facebook's proposed order. The District identified five provisions from Facebook's proposal that it could not agree to. Ex. 3. The parties reached a resolution on two issues, but were unable to agree on three provisions:

- **The definition of "confidential information."** Facebook defines "confidential information" as information that "qualif[ies] for protection under Superior Court Rule of Civil Procedure 26(c)." Ex. 1 ¶ 1.1. The District would limit the definition to "information of a personal nature," the disclosure of which would be a "clearly unwarranted invasion of personal privacy," or "trade secret or commercial or financial information, to the extent disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained."

- **Creating a "highly confidential" designation.** Facebook proposed a separate designation of "highly confidential" for documents that are "extremely sensitive," Ex. 1 ¶ 1.3, while the District would require all documents to be either confidential or not confidential.

- **Disclosing the identity of recipients of highly confidential information.** For documents that are designated as "highly confidential," Facebook requests the District identify which experts, consultants, or witnesses receive those documents, and allow Facebook 14 days to object. Ex. 1 ¶ 6. The District refuses, and insists it may disclose any of Facebook's "highly confidential" documents to any purported expert, consultant or witness who agrees to the Protective Order, without informing Facebook of their identity.

Weeks later, the District proposed a new version of a generic protective order that excluded many of Facebook's provisions and made multiple other substantive changes—

including introducing entirely new provisions for the first time—that went beyond the issues the District had previously identified as in dispute. *See* Ex. 4. For example, the District:

- Added a provision that District attorneys and law enforcement agencies with whom Facebook documents are shared could use the documents or information for any purpose, rather than only using them for purposes of this litigation.

- Removed provisions under which parties would challenge a producing party's confidentiality designations before trial so that parties and this Court could determine in advance which documents are confidential, and that required each party to give the other party reasonable notice that confidential information would be used at pretrial or trial proceedings so that parties and this Court could ensure their confidentiality is preserved at depositions or hearings.

- Removed provisions governing access to confidential information overseas, where Facebook's information may be subject to foreign data privacy or export control laws that govern how data may be shared outside the United States.

The parties met and conferred about the District's counterproposal on September 13, 2019, at which time Facebook heard the District's positions on these new issues for the first time. Facebook indicated it was willing to continue discussing these new issues in further meetings. Nevertheless, the District proceeded to file its motion for a protective order several hours later. The proposed protective order the District has submitted to the Court reflects all of these new changes, but its motion does not acknowledge them. And now—despite the parties' ongoing negotiations regarding these new issues, and despite its failure to address them in its motion—the District asks the Court to adopt its proposed protective order in its entirety.

ARGUMENT

Facebook will bear nearly all of the burden of producing confidential information in this case. To mitigate its risks, Facebook has proposed routine and unremarkable confidentiality provisions that will protect its sensitive business information from widespread disclosure, and provide it with an opportunity to object if potentially "highly confidential" documents are shared by the District with Facebook's competitors or others.

The District has offered no compelling basis to reject Facebook's reasonable and moderate proposal, particularly in light of the undue burdens that Facebook will endure if it is forced to provide nearly identical discovery in two separate cases with inconsistent confidentiality designations. In addition, the inadequate protections afforded to Facebook's document productions by the District's proposed Order would prevent Facebook from obtaining what are widely recognized as commonplace protections for confidential business information. The Court should therefore deny the District's motion to enact an inadequate protective order in this case, and reject the District's position on the three issues presented in its motion. The Court should also order the parties to continue meeting and conferring to address the remaining issues in the protective order.

I. The District's Proposed Protective Order Does Not Adequately Protect Confidential Or Highly Confidential Information.

The parties dispute three issues raised in the District's motion: (1) the definition of "confidential" information; (2) whether additional protections are warranted for a small subset of information ("highly confidential" information); and (3) whether parties should have notice and the opportunity to object to the receipt by potential experts and consultants of "highly confidential" information. The District's proposals regarding the three disputed issues do not adequately protect Facebook's confidential documents and should be rejected. Facebook's provisions are commonplace, recognized as appropriate when a company will produce confidential documents, and do not impair the District's ability to litigate.

A. "Confidential" Information Should Be Defined By Rule 26(c).

Facebook's definition of confidential information, which permits designating documents as confidential when they qualify for protection under Superior Court Rule of Civil Procedure

26(c),[1] is widely accepted as an appropriate balance of competing interests. Courts have long recognized that defining "confidential information" to include "information . . . within the meaning of Rule 26(c)([G])" is "common practice where protective orders are concerned." *THK Am., Inc. v. NSK Co.*, 157 F.R.D. 637, 640–41 (N.D. Ill. 1993). Indeed, Facebook's proposed definition is so standard that multiple courts have model protective orders that similarly define "confidential information" to track Rule 26(c). *See* Ex. 5, Stipulated Protective Order ¶ 2 (N.D. Cal.); Ex. 6, Model Protective Order ¶ 2 (N.D. Tex.); Ex. 7, Discovery Confidentiality Order ¶ 1 (D.N.J.);[2] *see also* 3A West's Fed. Forms § 21:82 (5th ed.); Model U.S. Federal Court Protective Order ¶ 4, Sedona Conference (Jan. 2017). These impartial model forms are "presumptively reasonable." *Kelora Sys., LLC v. Target Corp.*, 2011 WL 6000759, at *2 (N.D. Cal. Aug. 29, 2011).

This Court has endorsed similar definitions. *See Cesarano v. Smith*, Order Granting Motion for Protective Order, 2003-CA-008644-B (Sup. Ct. Mar. 11, 2004) ("confidential documents . . . means documents . . . entitled to confidential treatment pursuant to Rule 26(c)"); *District of Columbia v. Riggs Bank, N.A.*, Order Granting Motion for Entry of Confidentiality Order, 2003-CA-005064-B (Sup. Ct. Dec. 8, 2003) ("confidential" means "confidential or sensitive non-public information protected under Rule 26(c)"). Federal courts in the District of

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[1] Rule 26(c)(1)(G) authorizes courts to "issue an order to protect a party" in discovery, including "requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way."

[2] The D.C. Superior Court and United States District Court for the District of Columbia have not published model protective orders. But Magistrate Judge Facciola of the U.S. District Court for the District of Columbia did, and he too defined "confidential information" as "information . . . or tangible things . . . that reveal a trade secret, or other confidential . . . information that is commercially sensitive, or that otherwise is entitled to protective treatment under [FRCP] 26(c)." Ex. 8 ¶ 2.2.

Columbia, interpreting the analogous federal rules, have similarly entered protective orders in which "[c]onfidential information" is "defined as" "any trade secret, or other confidential research, development, or commercial information, as such terms are used in Federal Rule of Civil Procedure 26(c)(7)"—even when the plaintiff wanted to protect a narrower subset of information. *Peskoff v. Faber*, 230 F.R.D. 25, 33 (D.D.C. 2005). The District's proposal to deviate from the language endorsed by all these courts is too restrictive, and would protect fewer documents than Superior Court Rule 26 contemplates.

Moreover, the District's definition imposes undue burden on Facebook. As this Court is aware, the ongoing consumer action in California federal court involves nearly identical issues about Facebook's policies. Facebook has the burden of producing documents in both cases (a likely voluminous amount, if the 130,000 pages of documents already turned over to the District in the pre-suit investigation are any indication), many of which will be the same, given the overlapping issues. *Compare* Complaint ¶ 49, *with In re: Facebook Consumer Privacy*, Pretrial Order No. 20 Granting in Part and Denying in Part Motion to Dismiss, 2019 WL 4261048, at *14 (N.D. Cal. Sept. 9, 2019). In that case, the court entered a protective order that defines "Confidential Information" as "information . . . or tangible things that qualify for protection under Federal Rule of Civil Procedure 26(c)." Ex. 2 ¶ 2.2. Facebook is simply requesting a parallel provision here. Producing documents under two separate standards for what constitutes "confidential information" would create significant duplicative work and an undue burden for Facebook—precisely what Rule 26 is designed to prevent. Sup. Ct. R. Civ. P. 26(c). Moreover, two separate standards would frustrate efforts to coordinate discovery in this case with that in the MDL, which would undoubtedly promote judicial economy in both courts.

That the government is the plaintiff here does not make Facebook's definition inappropriate, as the District contends. The United States has on multiple occasions agreed to, and the court subsequently entered, protective orders in which "confidential information" is defined to mean confidential commercial information "as such terms are used in" FRCP 26(c)—the same definition Facebook is proposing here. *See United States v. Aetna Inc.*, Second Amended Protective Order, No. 1:16-cv-01494 (D.D.C. Sept. 30, 2016), ECF 132; *United States v. AT&T Inc.*, Protective Order, No. 1:17-cv-02511, 2017 WL 6329012, at *1 (D.D.C. Dec. 8, 2017). The District cites two cases to suggest government enforcement actions are viewed differently, but neither are on point. Rather, both involve the public right to access judicial documents, not whether good cause exists to enter a protective order to safeguard confidential information in the discovery process of private litigation. *Upshaw v. United States*, 754 F. Supp. 2d 24 (D.D.C. 2010*); Doe v. Pub. Citizen*, 749 F.3d 246, 271 (4th Cir. 2014). The District is without legal support for its position.

Finally, the District's definition prejudices Facebook by requiring it to show that disclosure of documents would substantially harm the company, rather than simply letting Rule 26(c) govern the analysis. The District itself has previously agreed to protective orders in this Court that include broader definitions than what it proposes here, which directly contradicts its argument that its restrictive definition is as expansive as the law allows. *See* Ex. 9, Consent Motion for Entry of a Stipulated Protective Order 4-5, *District of Columbia v. InPhonic, Inc.*, No. 06-4390 (Sup. Ct. Sept. 29, 2006) ("'Confidential Information' shall mean any information or things . . . which constitutes or contains trade secrets, know how, proprietary data or other confidential information, including without limitation technical, sales, marketing, employee, business, financial, privacy and other proprietary information or other information (including

medial or personnel records) generally protected by law from dissemination."). The District's unwarranted restrictions to the definition of "confidential information" in the context of this case should be rejected.

B. Additional Protections For A Subset Of "Highly Confidential" Documents Are Warranted Here.

Every new person to whom confidential information is given adds risk for Facebook. As a result, Facebook proposed a second tier of "highly confidential" designations that seeks to reduce that risk for the most sensitive company documents by limiting access to those who truly need to see it. "In determining whether a party has shown good cause for entry of a two-tier protective order, the court should consider whether the more restrictive tier protects one party against business harm that would result from disclosure of sensitive documents to a competitor." *HydroChem LLC v. Keating*, 2018 WL 1466090, at *1 (D. Kan. Mar. 26, 2018). And courts have recognized that creating a higher tier of confidentiality with more limited access is appropriate in cases—like this one—involving companies "with a legitimate interest in the confidentiality of its financial and business information," particularly where "disclosure to the public would be harmful to that company." *Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc.*, 2007 WL 1183065, at *1 (E.D. Ky. Apr. 19, 2007); *see E3 Biofuels, LLC v. Biothane Corp.*, 2013 WL 3778804, at *3 (S.D. Ohio July 18, 2013).

Here, there is "good cause" to protect Facebook's highly confidential information from being disclosed unnecessarily to a broad range of individuals. In particular, a "highly confidential" tier is appropriate in this case because the District seeks to reserve the right to disclose any of Facebook's documents, including its most sensitive business documents, to any expert, consultant, witness, or even potential witness it may elect to use in this case—including

those who work with Facebook's competitors.[3] But disclosure of highly confidential documents, such as board presentations, senior management documents, and long-term planning and financial documents, would be harmful to Facebook because, for example, they would provide competitors with an inside look at Facebook's business and allow them to make strategic decisions based on this inside knowledge. A "highly confidential" designation would appropriately minimize the distribution of this most sensitive information.

As with Facebook's proposed definition of "confidential," Facebook's proposed "highly confidential" tier and related restrictions have been used in model protective orders and endorsed by other courts. *E.g.*, Ex. 5 ¶ 2.8 (N.D. Cal.); Ex. 6 ¶ 2 (N.D. Tex.). And the Protective Order entered in the MDL says that "extremely sensitive confidential [i]nformation or [i]tems" may be designated as "highly confidential—attorneys' eyes only." Ex. 2 ¶ 2.7. As a result, once again, Facebook would be burdened if it had to produce the same documents to overlapping requests under two separate frameworks for classifying documents.

In contrast, the District has not identified any discernable interest in disclosing Facebook's most sensitive business documents to anyone—an expert, consultant, vendor, or any other potential witness—even if they agree to the terms of the protective order. And, remarkably, the District goes so far as to contend that it can provide Facebook's confidential information to other individuals, such as private mediators, videographers, and law enforcement officials from other jurisdictions, even if they *have not* agreed to the protective order. A "highly

[3] The District has rejected Facebook's proposed provision that experts could not be employees of Facebook's competitors. Further, the District confirmed that its use of the term "witnesses," *see* D.C. Protective Order 3(h), could include *potential* witnesses never called to testify. Thus, the District appears to propose that these secret, uncalled witnesses—who could be current employees of competitors—could have access to any document Facebook produced merely by signing Exhibit A to the protective order.

confidential" designation in these situations, where a company is expected to produce sensitive company documents, "strikes the appropriate balance between a litigant's right to relevant discoverable information and the legitimate concerns surrounding disclosure of highly confidential and sensitive information to a direct competitor." *U.S. ex rel. Daugherty v. Bostwick Labs.*, No. 1:08-CV-354, 2013 WL 3270355, at *10 (S.D. Ohio June 26, 2013) (collecting cases). A "highly confidential" designation is warranted here.

C. Facebook Is Entitled To Notice Of Who Receives Its "Highly Confidential" Information.

Under the District's proposed Protective Order, Facebook would have no way to know who looked at or obtained its "highly confidential" information, either as a retained expert, an informal consultant, a witness, or just a "potential witness"—even if the person is employed by a direct competitor of Facebook and is never called in court. Facebook's request is modest: the District should notify Facebook of the identity of any expert or witness to whom it intends to show Facebook's "highly confidential" information, and provide Facebook a short period of time to object. Importantly, Facebook is *not* asking for a "veto" power over the District's experts. To the extent the District's concern is about the burden of seeking the Court's assistance should the parties disagree whether consent is unreasonably withheld, Facebook would agree to modify its proposal to take on the burden for itself.

Facebook's balanced approach is commonplace. Courts frequently enter protective orders, including joint stipulated orders, in which a similar notice-and-objection mechanism is used to safeguard confidential information. *Traffas v. Biomet, Inc.*, No. 19-2115-DDC, 2019 WL 3282801, at *3 (D. Kan. July 22, 2019) ("should any Party desire to disclose Confidential Documents to anyone, such Party shall provide the designating Party fourteen (14) days prior written notice . . . [and] the designating Party [may] object[] in writing"); *Dentsply Int'l Inc. v.*

Am. Orthodontics Corp., No. 15-CV-01706, 2016 WL 3916284, at *2 (M.D. Pa. July 20, 2016) (similar); *Wreal LLC v. Amazon.Com, Inc.*, 2014 WL 7273852, at *4 (S.D. Fla. Dec. 19, 2014) (similar); *In re Neubauer*, 173 B.R. 505, 508 (D. Md. 1994) (similar); *Aluminum Co. of Am. v. DOJ*, 444 F. Supp. 1342, 1347–48 (D.D.C. 1978) (government was "required to notify" private party "prior to the proposed disclosure" and permit private party to "object[] to the disclosure of the material"). And once again, similar provisions can be found in model court protective orders. *E.g.*, Ex. 10, Protective Order ¶ 3 (D. Utah), Ex. 5, Stipulated Protective Order ¶ 7.4(a)(2) (N.D. Cal.); Ex. 6, Protective Order ¶ 9 (N.D. Tex.).

The District claims that a "written acknowledgment to be bound by the terms of a protective order is sufficient to protect a party's confidential information." Mot. at 5. But that is not true, as Facebook recently experienced. In a different case in which the opposing party was not required to inform Facebook who accessed its confidential information, Facebook was forced to expend significant resources tracking down confidential information that was wrongly disclosed by a purported expert acting as a "media consultant" for the plaintiffs. Plaintiff and its counsel disclosed Facebook's confidential and highly confidential documents to this purported expert, who then served as an "anonymous witness" to confirm the contents of the documents for a reporter. *See* Ex. 11, Joint Discovery Letter 4-5, *Heeger v. Facebook Inc.*, No. 3:18-cv-06399 (N.D. Cal.), ECF No. 50; Ex. 12, Order re: Defendant Facebook Inc.'s Motion to Open Discovery and to Compel, *Six4three LLC v. Facebook, Inc.*, No. CIV533328 (Cal. Sup. Ct. Mar. 15, 2019) (finding *prima facie* evidence that opposing party engaged in a crime or fraud). Facebook cannot rely on Exhibit A alone.

To be clear, this provision is not only to address the risk of a witness or consultant *intentionally* misusing Facebook's confidential information. Rather, this provision also

recognizes the undeniable risk of *inadvertent* misuse, especially by industry players or Facebook competitors who may consult with the District. "The inescapable reality is that once an expert . . . learns the confidential information that is being sought, that individual cannot rid himself of the knowledge he has gained; . . . as courts in various contexts have recognized." *Fed. Trade Comm'n v. Advocate Health Care Network*, 162 F. Supp. 3d 666, 669–70 (N.D. Ill. 2016). "Despite the well-intentioned provisions of protective orders designed to guard confidential information, there may be circumstances in which even the most rigorous efforts of the recipient . . . may not prevent inadvertent compromise." *Drone Techs., Inc. v. Parrot S.A.*, 838 F.3d 1283, 1300 n.13 (Fed. Cir. 2016) (internal quotation marks omitted).

On the other side of the ledger, the District's concern about exposing its "litigation strategy" is overstated. Mot. at 5. The District would not have to tell Facebook *what* information it plans to share with any expert or consultant, only the *identity* of the recipient. While the District claims that "the *identity* of non-testifying experts is non-discoverable work product," *id.* (emphasis added), Rule 26(b)(4)(D) simply "does not prevent disclosure of the identity of a nontestifying expert, but only 'facts known or opinions held' by such an expert." *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 999 (9th Cir. 2012) (quoting parallel FRCP 26). The case on which the District relies reached a contrary result, *see MGP Ingredients, Inc. v. Mars, Inc.*, 2007 WL 756645, at *3 (D. Kan. Mar. 8, 2007), but a "relatively recent review" of "the case law" concluded that the "predomina[nt]" view is that *identities* of non-testifying experts are *not* protected work product. *Wreal LLC*, 2014 WL 7273852, at *4 n.4.

Moreover, even if this Court disagrees and finds that Rule 26 protects the identities of experts and consultants, "[t]he government has not demonstrated that unfair prejudice will result from anything less than uninhibited use of the Confidential Materials." *United States v. All*

Assets Held at Bank Julius Baer & Co., 312 F.R.D. 16, 22 (D.D.C. 2015). If a party's litigation strategy were compromised by disclosure of expert identities, courts would never enter protective orders with notice-and-objection provisions—but they do, regularly. Indeed, it is "commonplace" for experts and consultants "to be vetted so that trade secrets and other sensitive information will not fall into the hands of someone with an adverse position to the owner of the sensitive information." *Ibrahim*, 669 F.3d at 999. The District's purported, hypothetical interest in hiring secret experts and engaging secret witnesses does not outweigh Facebook's real, concrete interest in protecting its "highly confidential" information. *See Wreal LLC*, 2014 WL 7273852, at *4.

II. The Parties Had Not Meaningfully Conferred About Other Components of the District's Proposed Order And Remain In Discussions.

As noted above, the parties were in the midst of meet-and-confer discussions relating to the protective order when the District introduced a host of new revisions, none of which is addressed in the District's motion, but all of which appear in the District's proposed protective order. Many of these revisions were significant. By way of example, the District's proposed protective order includes a provision—discussed for the first time with Facebook only hours before it was submitted to the Court—that would allow it to use Facebook's confidential documents produced in this case for *any* purpose, and to share confidential documents with other law enforcement agencies, who also would be able to use the documents for *any* purpose without being subject to this Court's jurisdiction to enforce the terms of the protective order. This represents a dramatic departure from standard practice in Washington D.C. *See, e.g.*, Ex. 8, Sample Protective Order ¶ 6 (D.D.C.) (Facciola, J.) ("All protected information . . . shall be used only for purposes of this suit"). This Court should not endorse the District's end-run around the meet-and-confer process contemplated by the Rules.

Instead, the Court should limit any ruling to the three issues addressed in the District's motion. The Court should also order the parties to continue meeting and conferring on the remaining issues, which the parties first discussed only hours before the District filed its motion. *See United States v. Slough*, 669 F. Supp. 2d 51, 59 (D.D.C. 2009) ("[B]ecause the parties have yet to meet and confer regarding" a party's request, "the court denies this request as premature"). Facebook remains willing to continue negotiating the outstanding provisions of the protective order in a constructive effort to reach agreement with the District, including in a manner that will facilitate future coordination of discovery. *See* Ex. 13.

If the Court is inclined to pretermit the meet-and-confer process and enter a protective order in full, it should enter Facebook's, which does not introduce any new provisions that have not been discussed with the District, and which tracks model protective orders, aligns with the protective order entered in the parallel MDL litigation, and, as courts around the country have recognized, appropriately balances the interests at stake when a company's confidential information will be produced during discovery.

CONCLUSION

For the foregoing reasons, the District's Motion for a Protective Order should be denied, and order the parties to continue meeting and conferring until all outstanding issues have been jointly resolved by the parties.

Dated: September 27, 2019

Respectfully submitted,

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PUBLIC FILING

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA, *Plaintiff*, v. FACEBOOK, INC., *Defendant*.	CIVIL ACTION NO.: 2018 CA 008715 B Judge Fern Flanagan Saddler Next Court Date: October 16, 2019 Event: Status Hearing

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2019, I caused a copy of the foregoing to be served upon all counsel of record via CaseFileXpress.

Dated: September 27, 2019

Respectfully submitted,

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Exhibit E-24
(Filed Under Seal)

Exhibit E-25

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA,	)	
Plaintiff,	)	**Case Number: 2018 CA 8715 B**
v.	)	
	)	
FACEBOOK, INC.,	)	**Judge Fern Flanagan Saddler**
Defendant.	)	
	)	

ORDER DENYING IN PART PLAINTIFF DISTRICT OF COLUMBIA'S MOTION TO COMPEL

This matter is before the Court on Plaintiff District of Columbia's Motion to Compel Defendant Facebook, Inc. to Designate Document Custodians and Provide Search Terms, filed on July 17, 2020; Defendant Facebook Inc.'s Opposition thereto, filed on August 21, 2020; and Plaintiff District of Columbia's Reply thereto, filed on September 8, 2020. A Motion Hearing was held on September 9, 2020. Based upon the parties' representations, and the entire record herein, this Court denies in part Plaintiff's Motion to Compel.

BACKGROUND AND PLEADINGS

On December 19, 2018, Plaintiff District of Columbia filed a Complaint against Defendant Facebook, Inc. alleging that Defendant failed to honor its promise to protect consumers' personal data, in violation of the District of Columbia Consumer Protection Procedures Act (hereinafter, "CPPA"), D.C. Code §§ 28-3901 – 28-3913.

Plaintiff District of Columbia alleges that Defendant Facebook, Inc. collects and maintains a trove of consumers' personal data, and data concerning consumers' digital behavior both on and off of Defendant's website. Plaintiff alleges that Defendant permits third party developers, including developers of applications and mobile device makers, to access this sensitive information relating to offering mobile applications to Facebook users. Plaintiff alleges that Facebook users reasonably expect Defendant to take steps to maintain and protect their data, but Defendant fails to do so.

As support, Plaintiff District of Columbia cites to Defendant Facebook, Inc.'s instance of permitting Cambridge University researcher Aleksander Kogan to use a third-party application to harvest the personal data of approximately 70 million Facebook consumers in the United States, and then sell the data to Cambridge Analytica, a political consulting firm. Plaintiff represents that although Mr. Kogan's application was only installed by 852 Facebook consumers in the District of Columbia, the application allegedly collected the personal information of users' Facebook "friends," including more than 340,000 District of Columbia residents who did not download the application.

Plaintiff District of Columbia alleges that this particular sequence of events regarding Cambridge Analytica was caused by Defendant Facebook, Inc.'s failure to effectively oversee and enforce their consumer protection policies. Plaintiff

alleges that Defendant failed to review the terms of Mr. Kogan's application, which would have alerted Facebook to the fact that Mr. Kogan planned to improperly sell consumers' data. Plaintiff contends that Defendant should have taken reasonable steps to protect consumers' privacy by ensuring that the data was accounted for and deleted from Cambridge Analytica's databases. Finally, Plaintiff alleges that Defendant failed to alert the public, including District of Columbia residents, that millions of users' data was sold to Cambridge Analytica. Plaintiff also alleges that Defendant has engaged in similar schemes with other applications and companies, and that the Cambridge Analytica incident is not an isolated event.

Both parties have noted that several news articles were published regarding Facebook's alleged sale of consumers' private data to Cambridge Analytica in March 2018. In the wake of the publication of said news articles, the following two legal actions took place:

(1) More than thirty (30) consumer class actions were filed across the country and consolidated into a federal Multi-District Litigation (hereinafter, "MDL") in the Northern District of California.

(2) The Federal Trade Commission (hereinafter, "FTC") launched an investigation to determine whether Facebook violated a 2012 Consent Order between the FTC and Facebook.

The instant case concerns Plaintiff's Consumer Protection and Procedures Act (CPPA) claims against Defendant.

A. Plaintiff District of Columbia's Motion to Compel Defendant Facebook, Inc. to Designate Document Custodians and Provide Search Terms

On July 17, 2020, Plaintiff District of Columbia filed the instant Motion to Compel, pursuant to District of Columbia Superior Court Rule of Civil Procedure 37(a)(3)(B)(iv). In the motion, Plaintiff requests that the Court compel Defendant Facebook, Inc. to designate four Facebook corporate executives as document custodians in the matter, and to set a date certain by which Defendant must provide search terms to locate custodial documents responsive to Plaintiff's discovery requests. Plaintiff represents that these four Facebook executives are, namely, Chief Executive Officer Mark Zuckerberg; Chief Operating Officer Sheryl Sandberg; Vice President of Global Public Policy Joel Kaplan; and Former Vice President of Communications and Public Policy Elliot Schrage.[1] Plaintiff contends that the Facebook Executives should be designated as document custodians under Rule 26(b) because they exercised unique decision-making authority relating to Defendant's actions that are the subject of this lawsuit.

B. Defendant Facebook, Inc.'s Opposition

On August 2, 2020, Defendant Facebook, Inc. filed an Opposition to Plaintiff District of Columbia's Motion to Compel. In its Opposition, Defendant argues that

[1] These four Facebook executives are hereinafter referred to as the "Facebook Executives."

Plaintiff's motion is premature. Defendant represents that it has agreed to designate twenty-one senior and executive-level custodians for document discovery in the instant matter, and that Plaintiff has moved to compel Defendant to add four additional executives without reviewing the documents already agreed to. Defendant contends that if the Court is inclined to rule on the premature motion, the motion should be denied because Plaintiff has not met its burden to demonstrate that the Facebook Executives are necessary and likely to have uniquely relevant documents that are not duplicative of those found in the files of the twenty-one existing custodians. Defendant Facebook, Inc. argues that Plaintiff District of Columbia has not provided any basis that could justify the additional burden and expense of including the Facebook Executives, because the preliminary estimate of the discovery to be collected and reviewed for just the twenty-one custodians is approximately 2.5 million documents. Defendant contends that the breadth of the search terms to be agreed upon is linked to the number of custodians to whom those terms must be applied. Defendant represents that it was in negotiations regarding the custodians and search terms, but that Plaintiff elected to file the motion rather than compromise.

C. Plaintiff District of Columbia's Reply

On September 8, 2020, Plaintiff District of Columbia filed a Reply in support of its Motion to Compel. In the Reply, Plaintiff asserts that the instant Motion to

Compel is not premature and that the discovery dispute should be resolved now. Plaintiff District of Columbia contends that the four specifically-named Facebook Executives were the key decision-makers regarding Plaintiff's claims in this matter. Further, Plaintiff claims it is entitled to seek information regarding any nonprivileged matter relevant to any claim or defense and proportional to the needs of this case. Plaintiff contends that given the importance of the issues at stake in this matter and the amount at issue, Plaintiff's request is proportional to the case. Lastly, Plaintiff contends that Defendant has failed to provide any evidence to support its objections to discovery.

LEGAL STANDARD

Pursuant to District of Columbia Superior Court Rule of Civil Procedure Rule 26(b)(1), parties may

> . . . obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

D.C. Super Ct. Civ. R. 26(b)(1). The Court has "broad discretion" in deciding whether to grant or deny a motion to compel discovery. *Kay v. Pick,* 711 A.2d 1251, 1256 (D.C. 1998). In assessing the merits of a motion to compel discovery, the "relevancy [of the information sought] to the subject matter is construed most

liberally." *Daniels v. Potomac Elec. Power Co.*, 100 A.3d 139, 145 (D.C. 2014). The information sought may be relevant if the discovery requests appear to be "reasonably calculated to lead to the discovery of admissible evidence." *Id.* A motion to compel discovery may be denied if the discovery requests are "not warranted by facts and circumstances of [the] incident." *Phelan v. City of Mount Rainier,* 805 A.2d 930, 942 (D.C. 2002) (internal quotation marks omitted). Rule 26(b)(2)(C) provides that the Court **must** limit the frequency or extent of discovery if it determines that "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive."

THE COURT'S RULING

In the instant matter, this Court finds that Plaintiff District of Columbia should first review the documents to be produced for the already agreed upon twenty-one custodians before requesting the addition of the Facebook Executives, whose addition may provide duplicative documentation. The Court finds that requiring Defendant Facebook, Inc. to add the Facebook Executives would be unduly burdensome at this stage. However, the Court has decided to set a date certain by which Defendant must provide search terms to locate custodial documents responsive to Plaintiff's discovery requests. Defendant must provide these search terms by April 1, 2021. Thus, balancing the needs of the case and Defendant's

potential burden in complying with Plaintiff's requests, the Court denies in part and grants in part Plaintiff's Motion to Compel Defendant Facebook, Inc. to Designate Document Custodians and Provide Search Terms.

Accordingly, upon consideration of Plaintiff's motion; and the entire record herein, it is this 19th day of January 2021, hereby

ORDERED that Plaintiff District of Columbia's Motion to Compel Defendant Facebook, Inc. to Designate Document Custodians and Provide Search Terms is **DENIED in part** without prejudice to the extent that Plaintiff requests that the Court compel Defendant Facebook, Inc. to designate four specifically-named Facebook corporate executives as additional document custodians in the matter. It is

FURTHER ORDERED that Plaintiff District of Columbia's Motion to Compel Defendant Facebook, Inc. to Designate Document Custodians and Provide Search Terms is **GRANTED in part** to the extent that Defendant Facebook, Inc. must provide search terms to locate custodial documents responsive to Plaintiff District of Columbia's requests for the designated twenty-one custodians by **Thursday, April 1, 2021**.

FERN FLANAGAN SADDLER
ASSOCIATE JUDGE

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Exhibit E-26
(Filed Under Seal)