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9
10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN FRANCISCO DIVISION**

13 IN RE FACEBOOK BIOMETRIC
INFORMATION PRIVACY LITIGATION

**FACEBOOK’S OPPOSITION TO
PLAINTIFFS’ MOTION FOR CLASS
CERTIFICATION**

Master Docket No.: 3:15-CV-03747-JD

15 THIS DOCUMENT RELATES TO:
16 ALL ACTIONS

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INTRODUCTION

1
2 Plaintiffs have attempted a bait-and-switch. After the close of two years of fact
3 discovery, they have moved to certify a class that is fundamentally different from the one defined
4 in their consolidated complaint—without seeking leave to amend their pleading or even
5 acknowledging the change. Plaintiffs’ motion should be denied for that threshold reason alone.
6 But more importantly, their new class definition does not help them: It only highlights and
7 exacerbates the problems with class treatment that have plagued these actions from the start.

8 Plaintiffs claim that Facebook violated the Biometric Information Privacy Act (“BIPA”)
9 by using facial-recognition technology to analyze their photos without giving them adequate
10 notice or obtaining their consent. The complaint defined the proposed class to encompass users
11 of Facebook who reside in Illinois and “had their biometric identifiers, faceprints, or face
12 templates collected, captured, received, or otherwise obtained by Facebook.” But plaintiffs now
13 seek to certify a class of all Illinois residents who have merely “*appeared* in a photo uploaded to
14 Facebook from Illinois”—regardless of whether any template, or even any *data*, has been
15 obtained from that photograph. The Court may not grant this motion; a “court is bound by the
16 class definition provided in the complaint.” *Berlowitz v. Nob Hill Masonic Mgmt.*, 1996 WL
17 724776, at *2 (N.D. Cal. Dec. 6, 1996). And it is clear why plaintiffs have attempted to change
18 their class definition silently: Any amendment of the complaint would be unfair after two years
19 of fact discovery and motion practice predicated on the proposed class defined in the complaint.

20 In any event, plaintiffs have not come close to satisfying the rigorous requirements for
21 class certification. Individualized issues will overwhelm these cases and defeat predominance
22 under Rule 23(b)(3). First off, BIPA’s private right of action is available only to someone
23 “aggrieved by a violation of this Act.” 740 ILCS 14/20. The Illinois Appellate Court held last
24 month that to be “aggrieved,” a plaintiff must prove an “injury or adverse effect” *beyond* the
25 alleged statutory violation; the claim fails when “the only injury he or she alleges is a violation
26 of [BIPA] by a private entity that collected his or her biometric identifiers and/or biometric
27 information without providing him or her the disclosures and obtaining the written consent
28

1 required by [the statute].” *Rosenbach v. Six Flags Entm’t Corp.*, __ N.E.3d __, 2017 IL App
2 (2d) 170317, ¶¶ 15, 23 (Dec. 21, 2017). This element of statutory liability—which is separate
3 from, and more stringent than, Article III standing—will require an individualized showing of
4 injury: Many absent class members will not claim an injury beyond the collection of their
5 alleged biometric data, and if others do make such a claim, the form of alleged injury will vary
6 tremendously. Standing alone, that precludes certification: “[T]o meet the predominance
7 requirement,” a plaintiff must be able to prove injury with “evidence that [is] common to the
8 class rather than individual to its members.” *Comcast Corp. v. Behrend*, 569 U.S. 27, 30 (2013).

9 [REDACTED]
10 [REDACTED] Thus, even on plaintiffs’ theory—that Facebook’s facial recognition
11 analysis involves a “scan of face geometry” under BIPA—the fact that someone is a member of
12 the class does not mean that Facebook collected *his* “scan of face geometry.” That determination
13 cannot be made without analyzing photos of each class member. And there is no case *less* fit for
14 class treatment than one requiring an analysis of millions of photos.

15 Nor can plaintiffs satisfy the superiority requirement. They make almost no attempt to
16 demonstrate that their proposed class action would be manageable, offering little more than the
17 vague assurance that there “should be no issues of manageability.” And their theory of damages
18 is nothing short of outrageous. Each plaintiff admitted at his deposition that he has suffered *no*
19 *harm* from Facebook’s alleged conduct, and plaintiffs do not give a reason to believe that *any*
20 class member is different in that respect. Yet they claim entitlement to *billions* of dollars based
21 on an aggregation of BIPA’s statutory damages provision. Neither Rule 23 nor federal due
22 process permits certification of a no-injury class seeking an aggregate award in the billions.

23 Finally, plaintiffs’ motion does not even satisfy Rule 23(a). The named plaintiffs fail the
24 typicality prong because they have not shown that they are *members* of their newly-minted
25 putative class. And they fail the adequacy prong because they made it strikingly clear at their
26 depositions that they know virtually nothing about this litigation, have done nothing on their own
27 to advance it, and do not understand their role as representatives. Their motion should be denied.

BACKGROUND¹

A. The Illinois Biometric Information Privacy Act

BIPA regulates the collection and storage of (1) “biometric identifiers” and (2) “biometric information.” 740 ILCS 14/10. “Biometric identifier means a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry,” and excludes “photographs.” *Id.* “Biometric information” means “any information . . . based on an individual’s biometric identifier used to identify an individual,” and “does not include information derived from items or procedures excluded under the definition of biometric identifiers” (like photographs). *Id.*

BIPA requires entities that “collect, capture, purchase . . . or otherwise obtain a person’s or a customer’s biometric identifier or biometric information” to first (1) inform the person of the collection or storage, as well as its purpose and length of term, “in writing”; and (2) obtain a “written release.” *Id.* 14/15(b). Such entities must also develop and publish a written policy on the retention and destruction of biometric data. *Id.* 14/15(a).

The statute provides a limited right of action for “[a]ny person aggrieved by a violation of th[e] Act.” *Id.* 14/20. For negligent violations, the plaintiff can obtain “liquidated damages of \$1,000 or actual damages, whichever is greater”; for intentional or reckless violations, a plaintiff can collect “liquidated damages of \$5,000 or actual damages, whichever is greater.” *Id.*

B. Facebook’s Facial-Recognition Analysis

Facebook’s Tag Suggestions feature simplifies the tagging of photos. When a person uploads a photo, Facebook will sometimes, but not always, employ facial-recognition technology to determine whether certain of the uploader’s Facebook friends appear in the photo; if so, Facebook may prompt the uploader to tag those friends. A user can turn the feature off at any time, in which case Facebook will delete any facial-recognition information previously derived from photos of that person and will no longer suggest that he be tagged when friends upload photos. When Facebook does apply facial recognition to a photo, the process has four steps. 1st Yadan Decl. (Ex. 1) ¶¶ 9, 11; Yadan Dep. (Ex. 2) at 84; Taigman Dep. (Ex. 3) at 128-29.²

¹ Unless indicated, all exhibits are attached to the Declaration of John Nadolenco.

² Yaniv Taigman and Omry Yadan are Facebook engineers who were closely involved

1 **1. Face detection:** First, Facebook’s software analyzes the pixels in a photo to
2 “determin[e] whether and where a face appears in an image”; [REDACTED]

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]

9 **2. Alignment:** [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 **3. Representation:** [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 **4. Classification:** [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25
26 with the development of this technology. Mr. Yadan has submitted sworn declarations both in
27 support of Facebook’s motion for summary judgment (“1st Yadan Decl.,” re-filed
28 contemporaneously) and its opposition to class certification (“2d Yadan Decl.”). Facebook’s
expert has served a report consistent with the facts below. *See* Turk Rpt. Part V.A (Ex. 4).

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]

5 **C. Plaintiffs' Complaint And Motion For Class Certification**

6 Plaintiffs allege that they are residents of Illinois with active Facebook accounts. Compl.
7 (Dkt. 40) ¶¶ 7-9, 32, 39, 46. They claim that Facebook “use[d] facial recognition software to
8 extract biometric data” from photos of them “through the use of an algorithm that calculates a
9 unique digital representation of the face (which it calls a ‘template’) based on geometric
10 relationship of their facial features.” *Id.* ¶ 23. The complaint further alleges that Facebook
11 “stored these biometric identifiers in a database” (*id.* ¶ 26); and that it violated BIPA by failing to
12 make the requisite disclosures to, and obtain adequate releases from, plaintiffs before collecting
13 and storing their templates (*id.* ¶¶ 65-67). In the complaint, plaintiffs sought to represent a class
14 of “[a]ll persons who had their biometric identifiers, faceprints, or face templates collected,
15 captured, received, or otherwise obtained by Facebook while residing in Illinois.” *Id.* ¶ 53.

16 Plaintiffs now seek certification under Rule 23(b)(3) of a class of “[a]ll Facebook users
17 living in Illinois whose face appeared in a photo uploaded to Facebook from Illinois between
18 June 7, 2011, and the final disposition of this action.” Pl. Mot. (Dkt. 255) at 5-6. They also
19 propose a subclass of “[a]ll people living in Illinois for whom Facebook has a stored ‘face
20 template’ that was created between June 7, 2011, and final disposition of this action.” *Id.*

21 **CLASS CERTIFICATION STANDARD**

22 “The class action is an exception to the usual rule that litigation is conducted by and on
23 behalf of the individual named parties only.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348
24 (2011) (internal quotation marks omitted). Rule 23 “imposes stringent requirements for
25 certification that in practice preclude most claims.” *Am. Express Co. v. Italian Colors Rest.*, 570
26 U.S. 228, 234 (2013). Plaintiffs “must affirmatively demonstrate [their] compliance with the
27 Rule,” and “certification is proper only if the trial court is satisfied, after a rigorous analysis,”
28

1 that the plaintiffs have met their burden of satisfying the four threshold requirements of Rule
2 23(a) and at least one of the three subdivisions of Rule 23(b). *Dukes*, 564 U.S. at 350-51.

3 ARGUMENT

4 **I. PLAINTIFFS' PROPOSED CLASS CANNOT BE CERTIFIED BECAUSE IT IS 5 FUNDAMENTALLY DIFFERENT FROM THE ONE IN THEIR COMPLAINT.**

6 A “court is bound by the class definition provided in the complaint.” *Berlowitz v. Nob*
7 *Hill Masonic Mgmt.*, 1996 WL 724776, at *2 (N.D. Cal. Dec. 6, 1996); *see also Gusman v.*
8 *Comcast Corp.*, 298 F.R.D. 592, 597 (S.D. Cal. 2014) (same); *Costelo v. Chertoff*, 258 F.R.D.
9 600, 604 (C.D. Cal. 2009) (same). When a party moves to certify a class that is *different* from
10 the one in the complaint, a court will consider that proposed class only (1) “when the proposed
11 modifications to the class definition are minor” or create a “narrower [class] than the class
12 alleged in the complaint,” *Davis v. AT&T Corp.*, 2017 WL 1155350, at *2 (S.D. Cal. Mar. 28,
13 2017) (alteration omitted); or (2) when the motion for class certification is accompanied by a
14 meritorious motion “seeking leave to amend [the] complaint,” *Gold v. Lumber Liquidators, Inc.*,
15 2017 WL 2688077, at *3 (N.D. Cal. June 22, 2017). Neither condition is satisfied here.

16 **A. Plaintiffs' New Proposed Class Definition Is Materially Broader.**

17 “While a party moving for class certification . . . can *narrow* the definition used in the
18 complaint,” it “cannot *expand* the class definition.” *Sandoval v. Cty. of Sonoma*, 2015 WL
19 1926269, at *2 (N.D. Cal. Apr. 27, 2015); *see Plascencia v. Lending 1st Mortg.*, 2012 WL
20 253319, at *4 (N.D. Cal. Jan. 26, 2012) (declining to “expand the class beyond the . . . operative
21 complaint”). Plaintiffs’ motion seeks to expand the class definition in two material respects.³

22 First, the complaint limited the class to users for whom Facebook had created and stored
23 a *template*—a string of numbers that is associated with an individual user’s face and is *stored* by
24 Facebook. A template is created only in limited circumstances: when the user (1) has been
25 tagged in at least one photo (or in some cases, when he has a recognizable profile photo); (2) has

26 ³ The proposed class is narrower in one respect: it is limited to photos uploaded from
27 Illinois. But as discussed below, that limitation introduces additional problems with plaintiffs’
28 proposal for class treatment. *See* Part III.A *infra*.

1 not opted out of Tag Suggestions; and (3) satisfies certain other privacy-based and regulatory
 2 criteria (for example, templates are not created for minors). Taigman Dep. at 239, 281. By
 3 contrast, the new class “center[s] on the face signature” (Pl. Mot. at 9), which is different from a
 4 template: A face signature is a series of numbers that represents an image of a face *in a*
 5 *particular photograph*. It is not associated with a particular user, exists only briefly, is not
 6 saved, and is used as a means of determining whether the face in a newly-uploaded photo
 7 matches any of the templates associated with the uploader’s Facebook friends. 1st Yadan Decl.
 8 ¶¶ 18, 20, 24-25. It is undisputed that there are many people without templates whose *face*
 9 *signatures* have been computed from photos. Pl. Mot. at 3.⁴

10 Second, the new class definition is not even limited to people for whom a face signature
 11 was computed; it encompasses everyone whose face appeared in *any* photograph uploaded to
 12 Facebook from Illinois during the class period. And so plaintiffs have done more than shift their
 13 theory of the case from templates to face signatures (a dramatic change that would be improper
 14 on its own); their class no longer depends on the collection of *data*. It is much broader.⁵

15 ⁴ Plaintiffs may respond that the complaint’s proposed class definition encompassed face
 16 signatures because it listed “faceprints” and “biometric identifiers” in addition to templates.
 17 Compl. ¶ 53. But it is clear that the complaint used all three of these terms to mean the same
 18 thing: a template. Plaintiffs used the terms “faceprint” and “template” interchangeably (as do
 19 Facebook employees at times, *see* FBBIPA_00038185 (2d Yadan Decl. Ex. 2) (“A face template
 20 . . . is a mathematical representation of the user’s ‘face print’ if you will.”)). And plaintiffs’
 21 claim was that a saved template—not an ephemeral face signature—was the “biometric
 22 identifier” that triggered BIPA’s requirements. As plaintiffs summarized: “The ‘template’ data
 23 (or, alternatively, faceprint data) stored by Facebook is a form of biometric identifier extracted
 24 from the image of a person’s face,” and Facebook “extracted biometric identifiers from [users’]
 25 uploaded photographs and previously tagged pictures, and stored these biometric identifiers in a
 26 database.” Compl. ¶¶ 24, 26. *See also id.* ¶ 25 (“The process for creating image-based biometric
 identifiers (including those Facebook collects) is largely the same. In each case, an algorithm is
 used to calculate an individual’s unique physical characteristics, which results in a biometric
 template that is separate and distinct from the image from which it was created.”); *id.* ¶ 27
 (“Facebook users unwittingly had their biometric identifiers extracted from photographs and then
 stored”); *id.* ¶¶ 36, 43, 50 (alleging, for each plaintiff, that “Facebook extracted from those
 photographs a unique faceprint or ‘template’ for him containing his biometric identifiers,”
 “identified who he was,” and “stored [his] biometric identifiers in its databases”).

27 ⁵ This difference is confirmed by plaintiffs’ proposal of a *subclass* that “center[s] on . . .
 28 the face template” (Pl. Mot. at 9)—essentially the class proposed in the complaint. The subclass
 has its own flaws. Most notably, it is not a true subclass at all, because it does not depend on an

1 **B. Plaintiffs Have Not Sought Leave To Amend Their Complaint, And Such An**
 2 **Amendment Would Be Inappropriate At This Late Stage.**

3 Plaintiffs’ failure to seek leave to amend is no mere procedural defect: “[I]f Plaintiffs
 4 were to seek leave to amend the complaint to encompass the expanded [class definition], they
 5 would have to overcome a number of issues, including establishing diligence in seeking to
 6 amend and a lack of prejudice to the opposing party given the advanced state of the litigation.”
 7 *Plascencia*, 2012 WL 253319, at *4. Plaintiffs could not establish diligence. The Court’s
 8 deadline for amendments to pleadings was over a year ago—September 30, 2016. Dkt. 137.
 9 Plaintiffs have long known the difference between face signatures and templates—Yaniv
 10 Taigman testified about these differences at his deposition in October 2016. Taigman Dep. at
 11 237-38, 273. Nor could plaintiffs show the absence of prejudice—two years of discovery and
 12 motion practice have been predicated on their original class definition and their core allegation
 13 that Facebook’s templates are the “biometric identifiers” allegedly triggering BIPA’s
 14 requirements. Indeed, just as in *Davis*, several of Facebook’s responses to plaintiffs’ discovery
 15 requests were expressly based on the original theory and definition.⁶ See 2017 WL 1155350, at
 16 *4 & n.2 (rejecting attempt to expand class definition 17 months after complaint; defendant had
 17 “objected to discovery requests seeking information” that it deemed “irrelevant” to the original

18 Illinois upload (*see id.* at 5), and is therefore in that respect *broader* than the main class. *See*,
 19 *e.g.*, *Sherman v. CLP Res., Inc.*, 2015 WL 13542762, at *8 n.9 (C.D. Cal. Feb. 4, 2015) (“These
 20 are not clearly *subclasses*. . . . [I]t appears that Plaintiffs have turned different theories of
 21 recovery affecting the broader . . . class into the ‘subclasses.’”). The subclass—and, for the same
 22 reasons, the class proposed in the complaint—also suffers from virtually all of the problems of
 23 the main class, including: Common issues do not predominate because an individualized
 24 analysis will be necessary to determine whether each class member is “aggrieved”; whether he
 25 has proposed a domestic application of BIPA; and whether his fact pattern fits within BIPA’s
 26 “photograph” exclusion. *See* Parts II.A.1, II.A.3-4 *infra*. A class action would not be superior
 27 because plaintiffs’ theory of damages is contrary to BIPA’s intent. *See* Part II.B.1 *infra*. And
 28 the named plaintiffs are neither typical nor adequate class representatives. *See* Part III *infra*.

⁶ *See, e.g.*, Def. Resp. to Pl. Interrogatory No. 14 (Ex. 5) (objecting to interrogatory because it departed from putative class definition by seeking “discovery of the number of photographs uploaded to Facebook from certain IP addresses [associated with Illinois]”); Def. Resp. to Pl. 1st Request for Admissions No. 9 (Ex. 6) (similar); Def. Resp. to Pl. 3d Requests for Production Nos. 2, 6 (Ex. 7) (“Facebook reserves the right to limit . . . the scope of its production . . . according to . . . Plaintiffs’ allegations and putative class definition.”).

1 class definition; reopening discovery “would impose additional costs and expenses on the parties
2 and further delay this case”). There is no legitimate reason why plaintiffs waited until now to
3 change their class definition so dramatically.⁷

4 **II. PLAINTIFFS FAIL BOTH PRONGS OF RULE 23(b)(3).**

5 **A. Common Issues Do Not Predominate.**

6 This Court may certify a Rule 23(b)(3) class only if it “finds that the questions of law or
7 fact common to class members predominate over any questions affecting only individual
8 members.” “If the main issues in a case require the separate adjudication of each class member’s
9 individual claim or defense, a Rule 23(b)(3) action would be inappropriate.” *Zinser v. Accufix*
10 *Research Inst.*, 253 F.3d 1180, 1189 (9th Cir. 2001).

11 Plaintiffs argue that three common questions are sufficient to support class treatment:
12 (1) whether Facebook’s facial-recognition analysis involves a “scan of face geometry” under
13 BIPA; (2) whether Facebook provided plaintiffs with sufficient notice of the use of its
14 technology and obtained a “written release” under BIPA; and (3) whether BIPA can be given
15 extraterritorial effect. Pl. Mot. at 9-12. Facebook believes that it is entitled to judgment on these
16 questions: It has already moved for summary judgment on the third, and will move for summary
17 judgment on the other two in March. But the fundamental problem is that all of these are
18 *threshold* questions; *even if plaintiffs were to prevail on all of these issues, that would not*
19 *establish liability to a single class member.* Significant individualized issues would still require
20 adjudication: (1) whether a class member has suffered a sufficient injury to invoke BIPA’s
21 private right of action; (2) whether facial recognition was performed on his photo; (3) whether
22 the application of BIPA to his claim would be impermissibly extraterritorial; and (4) whether his
23

24 ⁷ See *Whelan v. Miles Indus.*, 2012 WL 12920688, at *4 (N.D. Cal. Sept. 12, 2012)
25 (denying motion to amend a complaint to “expand the original class definition” because
26 “plaintiff ha[d] not shown diligence”; he did not seek leave until “after the briefing on the motion
27 for class certification was completed”); *In re Flash Memory Antitrust Litig.*, 2010 WL 2332081,
28 at *17 (N.D. Cal. June 9, 2010) (denying “as “untimely” motion to amend class action complaint
“because plaintiffs waited until after their class certification filing to request [the amendment]”);
Campion v. Old Repub. Home Prot. Co., 861 F. Supp. 2d 1139, 1152 (S.D. Cal. 2012).

1 fact pattern fits within this Court’s reading of BIPA’s exception for “information derived from”
2 photos and thus cannot support a claim. These issues will overwhelm any common ones.

3 **1. BIPA’s Statutory Injury Requirement Defeats Predominance.**

4 BIPA’s statutory injury requirement—the “aggrieved” provision in its private right of
5 action—squarely precludes class certification. The Illinois Appellate Court held in December
6 that a private plaintiff is not aggrieved, and cannot sue under BIPA, where “the only injury he or
7 she alleges is a violation of [BIPA] by a private entity that collected his or her biometric
8 identifiers and/or biometric information without providing him or her the disclosures and
9 obtaining the written consent required by” the statute. *Rosenbach v. Six Flags Entm’t Corp.*, ___
10 N.E.3d ___, 2017 IL App (2d) 170317, ¶ 15 (Dec. 21, 2017). The plaintiff must show that he
11 “suffered an actual injury” *over and above* the alleged collection of his biometric data without
12 notice and consent. *Id.* ¶ 13. This showing is necessarily individualized. And under Supreme
13 Court and Circuit law, the need for an individualized showing of injury defeats predominance.⁸

14 **a. BIPA’s “Aggrieved” Provision Requires A Showing Of Injury
15 Beyond The Alleged Statutory Violation.**

16 BIPA provides that “[a]ny person *aggrieved by* a violation of this Act shall have a right
17 of action . . . against an offending party.” 740 ILCS 14/20 (emphasis added). Until recently,
18 there was a split among the lower courts over whether this provision requires a plaintiff to show
19 that he has been actually injured by the statutory violation. Two federal district courts had held
20 that it does,⁹ and two state trial courts had drawn a contrary conclusion.¹⁰ Last month, the

21 ⁸ This issue is distinct from Article III standing. Facebook has a pending motion to dismiss
22 these cases for lack of standing on the ground that plaintiffs have not suffered any real-world
23 harm as a result of Facebook’s alleged conduct. Dkt. 227. But even if the Court concludes that a
24 violation of BIPA’s notice-and-consent provisions is sufficient to satisfy Article III, it is *not*
25 sufficient to satisfy the “aggrieved” requirement under *Rosenbach*, as discussed below.

26 ⁹ See *Vigil v. Take-Two Interactive Software, Inc.*, 235 F. Supp. 3d 499, 520 (S.D.N.Y.
27 2017) (“[T]he inclusion of ‘aggrieved’ in BIPA limits a private right of action to a party that can
28 link an injury to a statutory violation.”), *aff’d in part, rev’d in part on other grounds*, 2017 WL
5592589 (2d Cir. Nov. 21, 2017); *McCullough v. Smarte Carte, Inc.*, 2016 WL 4077108, at *4
(N.D. Ill. Aug. 1, 2016) (“[B]y limiting the right to sue to persons aggrieved by a violation of
[BIPA], the Illinois legislature intended to include only persons having suffered an injury.”).

¹⁰ See *Sekura v. Krishna Schaumberg Tan, Inc.*, 2017 WL 1181420 (Ill. Cir. Ct. Feb. 9,

1 Illinois Appellate Court sided with the federal courts in a written decision, which “federal courts
2 are bound to follow . . . unless there is convincing evidence that the state’s highest court would
3 reach a different conclusion.” *Emery v. Clark*, 604 F.3d 1102, 1118 (9th Cir. 2010).

4 In *Rosenbach*, the plaintiff claimed that when her son “purchased a season pass for a
5 Great America theme park,” the “defendants fingerprinted him without properly obtaining
6 written consent or disclosing their plan for the collection, storage, use, or destruction of his
7 biometric identifiers.” 2017 IL App (2d) 170317, ¶ 1. She alleged that “had she known of
8 defendants’ conduct, she would not have allowed [her son] to purchase the pass,” but did not
9 claim “any actual injury.” *Id.* The trial court denied the defendants’ motion to dismiss but
10 certified for interlocutory appeal the question of “whether an individual is an aggrieved person
11 . . . when the only injury he or she alleges is a violation of [BIPA] by a private entity that
12 collected his or her biometric identifiers and/or biometric information without providing him or
13 her the disclosures and obtaining the written consent required by [the statute].” *Id.* ¶ 15.

14 The Appellate Court answered unanimously “in the negative,” holding that “[i]f a person
15 alleges only a technical violation of the Act without alleging any injury or adverse effect, then he
16 or she is not aggrieved and may not recover.” *Id.* ¶¶ 28, 30 (emphasis added). “[I]f the Illinois
17 legislature intended to allow for a private cause of action for every technical violation of the Act,
18 it could have omitted the word ‘aggrieved’ and stated that every violation was actionable”; the
19 plaintiff’s reading “would render the word ‘aggrieved’ superfluous.” *Id.* ¶ 23. It was also
20 insufficient that the plaintiff asserted that her son’s “right to privacy . . . ha[d] been adversely
21 affected,” because she had not claimed *resulting* “actual injury” to that privacy right. *Id.* ¶ 20.

22 BIPA’s “aggrieved” requirement is necessarily more stringent than Article III’s standing
23 requirement. Under Illinois law, like under Article III, “[s]tanding requires some injury-in-fact
24 to a legally cognizable interest”; “[f]ederal standing principles are similar to those in Illinois.”
25 *Maglio v. Advocate Health & Hosps. Corp.*, 40 N.E.3d 746, 752-53 (Ill. Ct. App. 2015) (citing
26 *Greer v. Ill. Hous. Dev. Auth.*, 122 Ill. 2d 462, 492-93 (1988)). Thus, when the General
27 2017) (reconsideration granted and complaint partially dismissed in light of *Rosenbach*);
28 *Rosenbach v. Six Flags Entm’t Corp.*, 16-CH-13 (Ill. Cir. Ct. June 17, 2016).

1 Assembly enacted BIPA, it was legislating against the backdrop of the injury-in-fact
 2 requirement, and deliberately required a showing of injury (the “aggrieved” rule) *beyond* what is
 3 required for state and federal standing. *See, e.g., Sharemaster v. SEC*, 847 F.3d 1059, 1068 (9th
 4 Cir. 2017) (“[I]t is reasonable . . . to assume that Congress legislate[s] against the backdrop of
 5 . . . standing doctrines.”). And as discussed next, that showing is inherently individualized.

6 **b. Proof Of Injury In This Case Will Be Individualized.**

7 There can be no question that BIPA’s statutory injury requirement will necessitate
 8 individualized assessments of each of the millions of people that plaintiffs claim to be members
 9 of their proposed class. Pl. Mot. at 6. Some class members will not claim any injury beyond the
 10 collection of their alleged biometric data, and their claims will fail under *Rosenbach*. The named
 11 plaintiffs, for example, have affirmatively *disavowed* that they have suffered any injury resulting
 12 from the alleged violation of their BIPA rights. As their lawyer explained in November:

13 THE COURT: You’re not contending that Facebook sold
 14 [biometric data to] a third party, used it for advertising purposes or
 15 did anything else downstream from the actual collection that has
 16 harmed your client; is that right?

16 MR. TIEVSKY: No. We don’t believe that any consequential
 17 harm—we don’t know if any consequential harm resulted. We
 18 haven’t found that it happened.

18 11/30/2017 Hr’g Tr. at 8-9; *see* Licata Dep. (Ex. 8) at 146; Pezen Dep. (Ex. 9) at 173-74; Patel
 19 Dep. (Ex. 10) at 133-35.

20 If other class members do claim that they suffered consequential harm, such allegations
 21 are certain to come in various forms, and Facebook would be entitled to probe both the legal
 22 sufficiency and the credibility of those claims. For example, if a class member claims harm to
 23 his privacy rights, but (like the plaintiff in *Rosenbach*) does not identify the specific harm
 24 flowing from the alleged privacy violation, he is not “aggrieved.” *See* 2017 IL App (2d) 170317,
 25 ¶ 20. Or if (again like *Rosenbach*) a plaintiff claims only that he would have opted out with
 26 adequate notice, he would not be “aggrieved.” *See id.* ¶ 1. Another class member might *allege*
 27 an arguably sufficient harm (like emotional distress) but then concede that he knew all of the
 28

1 relevant facts from Facebook’s disclosures, and that he was free to (but did not) opt out of the
 2 feature. Those concessions would undermine any claim of injury, and there would need to be a
 3 determination by a fact-finder regarding whether or not that class member could recover.¹¹

4 **c. The Need For An Individualized Showing Of Injury Defeats**
 5 **Predominance Under Rule 23(b)(3).**

6 In *Comcast*, the Supreme Court held “that to meet the predominance requirement,” a
 7 plaintiff must “show [] that the existence of individual injury resulting from [an alleged statutory
 8 violation is] capable of proof at trial through evidence that [is] *common to the class rather than*
 9 *individual to its members.*” 569 U.S. at 30 (emphasis added). “The Supreme Court made clear
 10 in . . . *Comcast* . . . that the linchpin to certification is assuring that determination of whether
 11 defendant’s conduct caused injury to each class member can be made classwide and without
 12 resort to individualized assessments of each class member’s circumstances.” MCLAUGHLIN ON
 13 CLASS ACTIONS § 5:23 (14th ed. 2017). “[P]redominance will not be satisfied if plaintiffs must
 14 prove that each class member suffered personal or economic injury.” *Id.*

15 Even before *Comcast*, the Ninth Circuit held that a statutory injury requirement defeats
 16 predominance when it requires individualized proof. In *Stearns v. Ticketmaster Corp.*, 655 F.3d
 17 1013 (9th Cir. 2011) (abrogated on other grounds by *Comcast*), the plaintiffs claimed that the
 18 defendants had “participated in a deceptive internet scheme, which induced numerous
 19 individuals to unwittingly sign up for a fee-based rewards program.” *Id.* at 1016. The Ninth
 20 Circuit concluded that the plaintiffs could not obtain class certification for their claim under
 21 California’s Consumer Legal Remedies Act, which required them to show that the deceptive
 22 conduct “caused them harm.” *Id.* at 1022. Because no *inference* of harm could be applied to the
 23 class, and because there were “myriad reasons” why someone “who was not misled” might have

24 ¹¹ Plaintiffs’ new class definition exacerbates these problems, because it will inevitably lead
 25 to even more material variations between class members. As discussed in Part II.A.2 below,
 26 some class members may never have had their faces detected by Facebook’s facial-recognition
 27 technology. Others may have had their faces detected, but without any face signature created.
 28 Others may have had a face signature created, but there was no attempt to recognize their face.
 For others, no template was created. And still others may have opted out of Tag Suggestions and
 therefore had any templates deleted.

1 “intentionally signed up” for the program, “the class could not be certified.” *Id.* at 1024. So too
2 here: [REDACTED]

3 [REDACTED] As this
4 illustrates, there are “myriad reasons” why a fully-informed person would “intentionally” choose
5 to participate in Tag Suggestions, and Facebook is entitled to investigate those circumstances.

6 Similar district court cases abound. In *De Stefan v. Frito-Lay, Inc.*, 2011 WL 13176229
7 (C.D. Cal. June 6, 2011), the plaintiff sued his former employer based on an inaccurate pay stub.
8 *Id.* at *8. He invoked a statute that, just like BIPA, required “an ‘actual injury,’ above and
9 beyond a technical violation of the statute.” *Id.*; compare *Rosenbach*, 2017 IL App (2d) 170317,
10 ¶ 28 (“If a person alleges only a technical violation of [BIPA] without alleging any injury or
11 adverse effect, then he or she is not aggrieved.”). The court held that because it could not
12 “presume injury based simply on a showing that the class members’ pay stubs were inaccurate,
13 . . . evaluation of the injury prong would require individualized inquiries into the way that
14 alleged inaccuracies affected each class member,” and “[c]lass certification [was] not
15 appropriate.” *De Stefan*, 2011 WL 13176229, at *8. Again, the same is true here: Because this
16 Court “cannot presume injury based simply on a showing that the class members’ [biometric data
17 was collected without notice and consent], . . . [c]lass certification is not appropriate.” *Id.*¹³

18
19 ¹² Oddly, plaintiffs assert that “none” of the named plaintiffs “has opted out of Tag
20 Suggestions.” Pl. Mot. at 14. It is unclear why they believe that would support their position,
21 but it is false: [REDACTED]

22
23 ¹³ See also *ABC Distrib., Inc. v. Living Essentials LLC*, 2017 WL 2603311 at *4 (N.D. Cal.
24 Apr. 7, 2017) (denying class certification where statute required “particularized showings of
25 injury” that would be “individualistic”); *Moore v. Apple Inc.*, 309 F.R.D. 532, 543 (N.D. Cal.
26 2015) (denying certification because of “individualized inquiries necessary to determine whether
27 an individual has . . . suffered an injury”); *Bruce v. Teleflora, LLC*, 2013 WL 6709939, at *7
28 (C.D. Cal. Dec. 18, 2013) (“When a case turns on individualized proof of injury, separate trials
are in order.”); *Campion v. Old Repub. Home Prot. Co.*, 272 F.R.D. 517, 533 (S.D. Cal. 2011)
(denying class certification because “[i]ndividual inquiries and proof would . . . be required to
determine whether the alleged ‘unfair’ conduct actually caused injury to each class member”).

1 **2. Even On Plaintiffs’ Theory, Determining Whether Facebook Has**
 2 **Obtained A “Scan of Face Geometry” From A Putative Class Member**
 3 **Would Require A Photo-By-Photo Analysis.**

4 Although plaintiffs assert (at 9) that the “[c]lass’s claims center on the face signature,”
 5 class membership does not actually depend on whether Facebook created a face signature from
 6 the person’s photo. To the contrary, plaintiffs’ proposed class definition encompasses every
 7 Illinois resident whose “face appeared in a photo uploaded to Facebook from Illinois” during the
 8 class period. [REDACTED]

9 [REDACTED] Accordingly, even if plaintiffs were correct that
 10 Facebook’s technology involves a “scan of face geometry” within the meaning of BIPA, a
 11 photo-by-photo analysis would be required to determine whether each individual class member
 12 has a valid BIPA claim. This problem is fatal to class treatment.

13 Plaintiffs assert that “Facebook will have created a face signature for all (or nearly all)
 14 members of the proposed Class,” that “most photos were uploaded in a way that triggered the
 15 facial-recognition process,” and that the chances “seem[] vanishingly small” that a class member
 16 has never appeared in a photo analyzed with facial recognition. Pl. Mot. at 9-10. Plaintiffs cite
 17 to absolutely nothing—not record evidence, and not expert testimony—for these vague and
 18 qualified suppositions, which plainly cannot support their burden as the party moving for
 19 certification. *Fields v. Mobile Messengers Am., Inc.*, 2013 WL 6073426, at *4 (N.D. Cal. Nov.
 20 18, 2013) (“burden is on plaintiffs, the party moving for class certification,” to provide
 21 “documented evidence” showing “compliance with Rule 23”).¹⁴

22 The absence of citations is unsurprising, because plaintiffs’ suppositions are *wrong*: As
 23 discussed above (at 4-5), and as shown in documents produced to plaintiffs during discovery,
 24 [REDACTED]

25 [REDACTED]

26 _____
 27 ¹⁴ Plaintiffs assert (at 3) that Facebook’s “process [is] best explained by the experts,” but
 28 not only do they fail to provide any expert support for their motion; they have now served their
 expert report, and he has *not* addressed this point.

1 [REDACTED] Even if the Court
 2 concludes that Facebook’s facial-recognition technology involves a “scan of face geometry,” it
 3 will be necessary to determine, for each class member, whether a photo of *his* face was *analyzed*
 4 with that technology. *See* 2d Yadan Decl. ¶ 10.

5 That determination will not be *possible* for many class members: [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]

13 [REDACTED] Common issues cannot predominate if each class member would
 14 have to prove liability on a photo-by-photo basis, and particularly if there is no feasible way of
 15 determining whether a class member was even subjected to the challenged practice. *See Mazza*
 16 *v. Am. Honda Motor Co.*, 666 F.3d 581, 595-96 (9th Cir. 2012) (district court abused discretion
 17 in certifying class where “many class members were never exposed to the allegedly misleading
 18 advertisements”); *Lightbourne v. Printroom Inc.*, 307 F.R.D. 593, 602 (C.D. Cal. 2015) (no
 19 predominance where “a photo-by-photo inquiry would be required”).

20 **3. If the Court Denies Facebook’s Motion For Summary Judgment,**
 21 **Extraterritoriality Will Present Another Individualized Issue.**

22 In its motion for summary judgment, Facebook demonstrated that each of the plaintiffs’
 23 claims is barred by Illinois’ extraterritoriality doctrine and the Constitution’s dormant Commerce
 24 Clause. Dkt. 257. BIPA contains no “express provision[.]” giving the statute extraterritorial
 25 effect. *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 184-85 (2005). To bring a BIPA
 26 claim, a plaintiff must prove that the alleged statutory violation took place “primarily and
 27 substantially” in Illinois—*i.e.*, that “the majority of circumstances related to the alleged
 28 violation” occurred in that State. *Landau v. CNA Fin. Corp.*, 381 Ill. App. 3d 61, 63-65 (2008)

1 (quoting *Avery*, 216 Ill. 2d at 187).¹⁵ If an event “essential to [Facebook’s] liability” under BIPA
2 took place outside Illinois, *Graham v. Gen. U.S. Grant Post No. 2665, V.F.W.*, 43 Ill. 2d 1, 4
3 (1969), a class member would have “no cause of action” under the statute, *Avery*, 216 Ill. 2d at
4 190 (emphasis added), and any application of BIPA to that person’s claim would be
5 unconstitutional, *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320 (9th Cir. 2015) (en banc).

6 Facebook’s motion establishes that there is no genuine dispute of material fact on these
7 issues: (a) the conduct giving rise to this lawsuit—Facebook’s facial-recognition process and its
8 creation and storage of templates—takes place on its servers outside Illinois; and (b) plaintiffs
9 have offered no evidence of any relevant Illinois connection other than their own residency,
10 which courts have repeatedly deemed insufficient. Dkt. 257 at 6-15. If, however, the Court
11 concludes that Facebook is not entitled to summary judgment and certifies the proposed class, it
12 would need to conduct a fact-intensive inquiry into whether each class member’s proposed
13 application of BIPA is domestic—if not, he has “no cause of action.” *Avery*, 216 Ill. 2d at 190.

14 Each class member may attempt to prove an Illinois connection in different ways. He
15 may contend that he was in Illinois when he signed up for Facebook. He may contend that a
16 photo of him was taken in Illinois and then uploaded to Facebook from Illinois. He may contend
17 that he was in Illinois at the time that the photo was uploaded, or at the time Facebook performed
18 a facial-recognition analysis. Or he may claim that his alleged injury took place in Illinois—for
19 example, that he was in Illinois when he found out about Tag Suggestions and immediately
20 became distraught, or that his co-workers in Illinois saw a damaging photo of him and he was
21 fired as a result. Other class members may be unable to make any of these claims—for example,
22 if they only recently moved to Illinois or if they were traveling elsewhere at the time of the
23 sign-up, facial-recognition analysis, or alleged injury. Plaintiffs’ proposed subclass would be
24

25 ¹⁵ Plaintiffs suggest here that BIPA *was* intended to apply extraterritorially, and that the
26 *Avery* test does not apply outside the context of the Consumer Fraud Act. *See* Pl. Mot. at 12-13
27 & n.3. But in their subsequent opposition to Facebook’s summary judgment motion, plaintiffs
28 “agree[d]” that “BIPA does not apply extraterritorially,” and that they can invoke BIPA only if
the violation took place “primarily and substantially” in Illinois. Dkt. 272 at 12 & n.24.

1 subject to even more variability: That class definition does *not* depend on an Illinois upload (*see*
2 *n.5 supra*); it includes people whose faces appear in photos taken and uploaded from *anywhere*.

3 Courts have commonly concluded that a class should not be certified where there are
4 distinctions in the abilities of putative class members to invoke a state statute. In *Avery* itself, for
5 example, the plaintiff brought a purported class action against State Farm under Illinois’
6 Consumer Fraud Act (“CFA”), alleging that State Farm had misrepresented the quality of an
7 equipment manufacturer’s parts. 216 Ill. 2d at 109. The Supreme Court reversed the trial court’s
8 certification of a nationwide class. *Id.* at 204. It held that because the CFA did not expressly
9 apply extraterritorially, the trial court had erred in certifying a class that “included class members
10 whose [insurance] claims proceedings took place outside of Illinois.” *Id.* at 190; *see also Cruz v.*
11 *Lawson Software, Inc.*, 2010 WL 890038, at *9 (D. Minn. Jan. 5 2010) (certification improper
12 where statute did “not apply extraterritorially and an individualized inquiry into each putative
13 class member would be necessary to determine whether the [statute] could be applied”).

14 Plaintiffs try to evade this problem by misstating the test, arguing that Facebook could
15 “comply with . . . BIPA” either by turning off Tag Suggestions in Illinois or by declining to
16 create templates until a user affirmatively opts in to the program, and that “[b]oth theories permit
17 resolution of these issues in one stroke.” Pl. Mot. at 12. But the question is not whether
18 Facebook could theoretically comply with BIPA by doing something differently in Illinois; the
19 question is whether Facebook had any *duty* to comply with BIPA in the first place—which turns
20 on whether the “circumstances related to the alleged violation” affecting each class member
21 happened “primarily and substantially” in Illinois. *Landau*, 381 Ill. App. 3d at 65.

22 **4. Many Photos Uploaded To Facebook Are Derived From Paper Prints**
23 **And Therefore Would Fall Within This Court’s Interpretation Of**
BIPA’s “Photographs” Exclusion.

24 As discussed above, BIPA excludes both “photographs” and “information derived from”
25 photographs. 740 ILCS 14/10. At the pleading stage, this Court held that “[p]hotographs’ is
26 better understood to mean paper prints of photographs, not digitized images stored as a computer
27 file and uploaded to the Internet.” *In re Facebook Biometric Info. Privacy Litig.*, 185 F. Supp.

1 3d 1155, 1171 (N.D. Cal. 2016). If the Court adheres to that reading,¹⁶ it would present yet
2 another question for each class member: whether the photos of him *are* derived from “paper
3 prints.” *Id.* Many photos uploaded to Facebook fit that description, and when a
4 facial-recognition analysis is performed on such photos, the analysis proceeds in the exact same
5 way as when the photo originated as a digital image. *See* Taigman Dep. at 134-36. To be sure,
6 paper photos are *converted* to digital form before upload. But if the paper version is a
7 “photograph” under BIPA, the digital version is “information derived from” that photo and thus
8 excluded. 740 ILCS 14/10.

9 In short, a plaintiff-by-plaintiff, photo-by-photo inquiry will be necessary to determine
10 virtually every element of the alleged BIPA violation. Common issues do not predominate.

11 **B. A Class Action Is Not Superior To Individual Cases.**

12 Plaintiffs had to establish that a “class action is superior to other available methods for
13 fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). Their one-page
14 argument on this requirement (at 17-18) is remarkably breezy, and disregards the intractable
15 problems that will arise from both their theory of damages and their proposed class definition.

16 **1. Plaintiffs’ Damages Theory Confirms The Impropriety Of Class
17 Treatment And Is Contrary To Due Process.**

18 Each named plaintiff admitted at his deposition (and counsel later confirmed) that he has
19 not been harmed by Facebook’s alleged conduct. Nor have plaintiffs offered a reason to believe
20 that *any* member of the putative class has been harmed. Yet plaintiffs claim entitlement to
21 *billions* of dollars in damages: They estimate that there are at least 6 million people in their
22 proposed class, and contend that each class member should be awarded either \$1,000 or \$5,000
23 based on BIPA’s statutory damages provision. Pl. Mot. at 6, 17. That is extraordinary.

24 Even when these damages are viewed on an *individual* basis, a \$1,000 or \$5,000 award is
25 sufficient to create an incentive to sue. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 616

26 ¹⁶ Facebook respectfully disagrees with the Court’s decision. As the Court contemplated
27 (185 F. Supp. 3d at 1172), Facebook will present evidence in its forthcoming summary judgment
28 motion that all photos uploaded to Facebook fit squarely within BIPA’s exception, and that this
exception bars plaintiffs’ claims in their entirety.

1 (1997) (“denial of a class action” appropriate where “the stake of each member bulks large”);
2 Fed. R. Civ. P. 23(b)(3)(A). In TCPA cases, courts have held that a \$500 statutory penalty
3 creates a sufficient incentive.¹⁷ Plaintiffs assert that “a \$1,000 or \$5,000 recovery is dwarfed by
4 litigation costs.” Pl. Mot. at 17. But the General Assembly expressly contemplated those costs
5 when it estimated the appropriate statutory award for a BIPA claim, providing that a prevailing
6 plaintiff may recover—in addition to damages—“reasonable attorneys’ fees and costs, including
7 expert witness fees and other litigation expenses.” 740 ILCS 14/20(3). Under plaintiffs’ theory,
8 class treatment would be superior in any case involving complicated facts and expert opinion.
9 That is not the law under Rule 23, and plaintiffs have offered no evidence (or argument) that the
10 General Assembly contemplated that every BIPA lawsuit be resolved by a class action.

11 More importantly, the *total* figure that plaintiffs are seeking—at least \$6 billion—is
12 beyond the pale; under Ninth Circuit precedent, the superiority rule precludes “class actions [that
13 seek] outrageous amounts in statutory penalt[ies].” *Kline v. Coldwell, Banker & Co.*, 508 F.2d
14 226, 233-34 (9th Cir. 1974). In *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir.
15 2010), the Ninth Circuit clarified that *Kline*’s principle applies where “the potential for enormous
16 liability” “would be inconsistent with [the legislative] intent in enacting the statutory damages
17 provision.” *Id.* at 715, 722; *cf. id.* at 718 (finding that, in enacting the statute at issue, Congress
18 expressed no intent to foreclose large aggregated statutory awards, in part because “Congress
19 provided for punitive damages in addition to any actual or statutory damages”). Post-*Bateman*
20 authorities have reaffirmed that a disproportionately large statutory award in a class action not
21 only violates Rule 23, but also “implicate[s] due process concerns.” *Fraley v. Batman*, 638
22 F. App’x 594, 597 (9th Cir. 2016); *see also In re Hulu Privacy Litig.*, 2014 WL 2758598, at *23
23 (N.D. Cal. June 17, 2014) (“The aggregation of statutory damages claims potentially distorts the
24

25
26 ¹⁷ *See Smith v. Microsoft Corp.*, 297 F.R.D. 464, 469 (S.D. Cal. 2014) (“[t]he TCPA allows
27 a litigant to seek statutory damages for each violation,” and “this statutory remedy is designed to
28 provide adequate incentive for an individual plaintiff to bring a suit on his own behalf”); *Vigus v.*
S. Ill. Riverboat/Casino Cruises, Inc., 274 F.R.D. 229, 238 (S.D. Ill. 2011).

1 purpose of both statutory damages and class actions, and if it does, it creates a potentially
2 enormous aggregate recovery for plaintiffs that in turn may induce an unfair settlement.”).

3 By creating a private BIPA action only for an “aggrieved” person, the General Assembly
4 expressed a clear intent to limit BIPA damages to people who have suffered an actual injury. *See*
5 Part II.A.1 *supra*. “[I]f the Illinois legislature intended to allow for a private cause of action for
6 every technical violation of the Act, it could have omitted the word ‘aggrieved’ and stated that
7 every violation was actionable.” *Rosenbach*, 2017 IL App (2d) 170317, ¶ 23. Certification of a
8 class that holds the potential for billions of dollars of liability absent any showing of harm would
9 fly in the face of that legislative decision. *See Bateman*, 623 F.3d at 715, 722. Indeed, one
10 district court has already expressed concerns about this sort of BIPA action. In *Rivera v. Google*
11 *Inc.*, No. 16-cv-2714 (N.D. Ill.), the court denied Google’s motion for certification of an
12 interlocutory appeal of a separate issue, but emphasized that its “conclusion d[id] not . . .
13 constitute an endorsement of . . . [BIPA]’s damages provisions”; “[t]here is room to debate
14 whether a mandatory-minimum damages scheme is appropriate for violations—*any* violation, on
15 a *per* violation basis, without regard to extent of actual injury—of a statute that deals with
16 rapidly advancing technology.” *Rivera* 1292(b) Order (Ex. 11) at 2.

17 Fortunately, this issue need not be debated, because the General Assembly itself
18 foreclosed plaintiffs’ theory in this case by limiting relief to persons “aggrieved” by a violation.
19 But if BIPA *did* permit huge statutory damages awards in the absence of harm, class treatment
20 would be impermissible under Rule 23 and federal due process.

21 **2. Plaintiffs’ Proposed Class Definition Is Unworkable.**

22 A key factor under Rule 23(b)(3) is “the likely difficulties in managing a class action.”
23 *See Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1127-28 (9th Cir. 2017) (Rule 23
24 incorporates a “manageability criterion”). A class is unmanageable when “there is no good way
25 to identify [] individuals” in the class or to provide them with notice, a judgment, or a
26 settlement. *Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011).¹⁸

27 ¹⁸ *See also Gannon v. Network Tel. Servs., Inc.*, 2013 WL 2450199, at *3 (C.D. Cal. June 5,
28 2013) (“certification is improper” where “the process to identify [] class members would be . . .

1 Plaintiffs speculate that there “should be no issues of manageability . . . because class
 2 members . . . can be identified in large part using data maintained by Facebook.” Pl. Mot. at 18.
 3 That is woefully deficient. Plaintiffs cannot satisfy their burden under Rule 23 with glib
 4 assurances that their proposed class action “should” work or that a “large part” of the class can
 5 be identified. *See Fields*, 2013 WL 6073426, at *4.

6 In any event, their factual premise is incorrect. There is no feasible way for Facebook to
 7 identify all, or even most, users whose faces appear in photos uploaded to the service. ■

8 ■

9 ■

10 ■ *See p. 4-5 supra.* Nor
 11 could Facebook necessarily determine whether the face belongs to a *putative class member*—a
 12 person residing in Illinois whose photo was uploaded from Illinois. Plaintiffs do not explain how
 13 Facebook could determine the residency of every person who merely appears in an uploaded
 14 photo. They do contend that Facebook can determine the location of the *upload* “using IP
 15 addresses” (Pl. Mot. at 7), but even that assertion is ill-founded: IP addresses provide only a
 16 rough estimate of location for *some* devices; for others, they provide no meaningful information
 17 about location at all. Not all IP addresses are accurately associated with a geographic location.
 18 *See Ruan Decl.* ¶¶ 4-5. And the IP address associated with a particular device will not always
 19 match the *location* of that device. *Id.* ¶¶ 6-7.

20 All of this stems from the basic flaw in plaintiffs’ proposed class definition: it requires a
 21 plaintiff-by-plaintiff and photo-by-photo analysis. Plaintiffs cannot evade these problems with
 22 casual assertions about what Facebook can do with its technology.¹⁹

23 unmanageable”); *Thomas v. Baca*, 2012 WL 994090, at *3 (C.D. Cal. Mar. 22, 2012)
 24 (decertifying class where there was no “feasible way to reliably identify or notify members of the
 25 class”); *Tidenberg v. Bidz.com*, 2010 WL 135580, at *2 (C.D. Cal. Jan. 7, 2010) (“[T]he need for
 26 a definition that permits identification of class members is particularly important where a
 plaintiff seeks certification under Rule 23(b)(3), because it determines those who would be
 (1) entitled to relief, (2) bound by any judgment, or (3) both.”).

27 ¹⁹ Nor can plaintiffs simply promise to present evidence on this issue after a determination
 of the merits. Rule 23(b)(3) requires them to establish the superiority prong at the *class*
 28 *certification* stage. *Fields*, 2013 WL 6073426, at *4. And even if absent class members tried to

1 **III. THE NAMED PLAINTIFFS ARE NEITHER TYPICAL NOR ADEQUATE**
 2 **CLASS REPRESENTATIVES.**

3 **A. The Named Plaintiffs Are Not Typical Because There Is No Competent**
 4 **Evidence That Their Faces Appeared In A Photo Uploaded From Illinois.**

5 Plaintiffs’ motion fails on another basic level: they have not adduced competent proof of
 6 their own membership in the proposed class. The complaint does not allege that any photo of
 7 any plaintiff was uploaded to Facebook *from Illinois*. In their motion for certification, plaintiffs
 8 make the remarkably weak assertion that they have “*reason to believe* that at least one photo
 9 showing their face was uploaded from Illinois.” Pl. Mot. at 14 (emphasis added). This claim is
 10 backed up only by a conclusory declaration executed by each plaintiff saying that “[a]t least one
 11 photo” of his face was uploaded from Illinois. Dkt. 255-2 ¶ 4; Dkt. 255-3 ¶ 4; Dkt. 255-4 ¶ 2.

12 Plaintiffs’ failure to declare *who* uploaded the photos is fatal to their attempt to establish
 13 an Illinois upload. They do not say that each plaintiff *himself* uploaded a photo of his face from
 14 Illinois—which plaintiffs would have a foundation to declare if they were, in fact, the
 15 uploaders—and they do not attach the photos. Since the photos apparently were uploaded by
 16 other people, plaintiffs need declarations from the *uploaders*, and Facebook is entitled to depose
 17 them. Courts routinely deny motions for class certification that are unsupported by adequate
 18 evidence of essential facts. *See, e.g., Juarez v. Jani-King of Cal. Inc.*, 2010 WL 3766649, at *2
 19 (N.D. Cal. Sept. 24, 2010) (denying motion for certification where declaration was “conclusory”
 20 and declarant “lack[ed] personal knowledge”); *Evans v. IAC/Interactive Corp.*, 244 F.R.D. 568,
 21 571, 579 (C.D. Cal. 2007) (plaintiff failed to establish “knowledge of [] information contained
 22 in his declaration”; “[c]ounsel’s lax approach to the preparation of declarations in a case where
 23 they seek to represent hundreds of thousands of people and seek millions of dollars is simply
 24 unacceptable”). This Court should do the same.

25 self-identify with an individualized showing that photos of them were uploaded from Illinois and
 26 analyzed with facial recognition, Facebook would be entitled to contest that showing—requiring
 27 discovery and millions of mini-trials. *See Dukes*, 554 U.S. at 367 (class action defendant is
 28 “entitled to litigate its . . . defenses to individual claims”); *Carrera v. Bayer Corp.*, 727 F.3d 300,
 307 (3d Cir. 2013) (“A defendant has a . . . due process right to challenge the proof used to
 demonstrate class membership.”).

1 **B. The Named Plaintiffs Are Inadequate Because They Know Almost Nothing**
2 **About, And Have Contributed Almost Nothing To, These Actions.**

3 To satisfy Rule 23(a)(4), a party seeking class certification must demonstrate that he will
4 “prosecute the action vigorously on behalf of the class.” *Hanlon v. Chrysler Corp.*, 150 F.3d
5 1011, 1020 (9th Cir. 1998). “[T]he Court must ensure that the litigation is brought by a named
6 Plaintiff who understands and controls the major decisions of the case,” *Sanchez v. Wal-Mart*
7 *Stores, Inc.*, 2009 WL 1514435, at *3 (E.D. Cal. May 28, 2009), because when counsel acts “on
8 behalf of an essentially unknowledgeable client,” that “risk[s] a denial of due process to the
9 absent class members,” *Burkhalter Travel Agency v. MacFarms Int’l, Inc.*, 141 F.R.D. 144, 154
10 (N.D. Cal. 1991). *See, e.g., In re Facebook, Inc., PPC Advert. Litig.*, 282 F.R.D. 446, 454 (N.D.
11 Cal. 2012) (named plaintiff inadequate because “he testified in his deposition that he knows
12 essentially nothing about the case, and . . . would defer to counsel in prosecuting th[e] action”).²⁰

13 The named plaintiffs in these cases have freely admitted that they know almost nothing
14 about their cases, that they are contributing almost nothing to this litigation, and that the suits are
15 being driven entirely by their lawyers. Specifically, Mr. Pezen testified that he:

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 Mr. Licata testified that he:

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 ²⁰ *See also Bodner v. Oreck Direct, LLC*, 2007 WL 1223777, at *2-3 (N.D. Cal. Apr. 25,
26 2007) (class representative inadequate where it was “clear from the record that plaintiff’s
27 counsel, and not the plaintiff, [wa]s the driving force behind th[e] action”); *Welling v. Alexy*, 155
28 F.R.D. 654, 659 (N.D. Cal. 1994) (representatives must “serve the necessary role of check[ing]
 the otherwise unfettered discretion of counsel”).

1 [REDACTED]
2 [REDACTED]
3 Mr. Patel was deposed about a month later—more than enough time for counsel to
4 educate him about these issues if they cared to do so. Yet Mr. Patel still testified that he:

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 Although plaintiffs devote several pages of their brief (at 15-17) to establishing the
10 qualifications of class *counsel*, they are able to muster only a single sentence in support of the
11 named *plaintiffs*' contribution: "Each proposed representative has already sat for multiple
12 depositions and responded to numerous discovery requests, demonstrating their commitment to
13 prosecuting this action." *Id.* at 15. That is nowhere near sufficient. A named plaintiff does not
14 "prosecute [his] action vigorously," *Hanlon*, 150 F.3d at 1020, by doing nothing more than what
15 is required under penalty of judicial sanction. Plaintiffs have not pointed to a single decision
16 they have made to advance their claims in this case, and their deposition testimony makes clear
17 that they do not understand the nature of their claims, the relief they are seeking, or their
18 obligations as putative class representatives.

19 **CONCLUSION**

20 The Court should deny plaintiffs' motion for class certification.

21 Dated: January 26, 2018

MAYER BROWN LLP

By: /s/ John Nadolenco

John Nadolenco

Lauren R. Goldman

Counsel for Defendant Facebook, Inc.

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9 Facebook, Inc.

10
11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

14
15 IN RE FACEBOOK BIOMETRIC
INFORMATION PRIVACY LITIGATION

16
17 THIS DOCUMENT RELATES TO:
18 ALL ACTIONS

Master Docket No.: 3:15-CV-03747-JD

DECLARATION OF BENJAMIN STRAHS IN SUPPORT OF FACEBOOK, INC.'S OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Date: March 29, 2018
Time: 10:00 a.m.
Location: Courtroom 11

Hon. James Donato

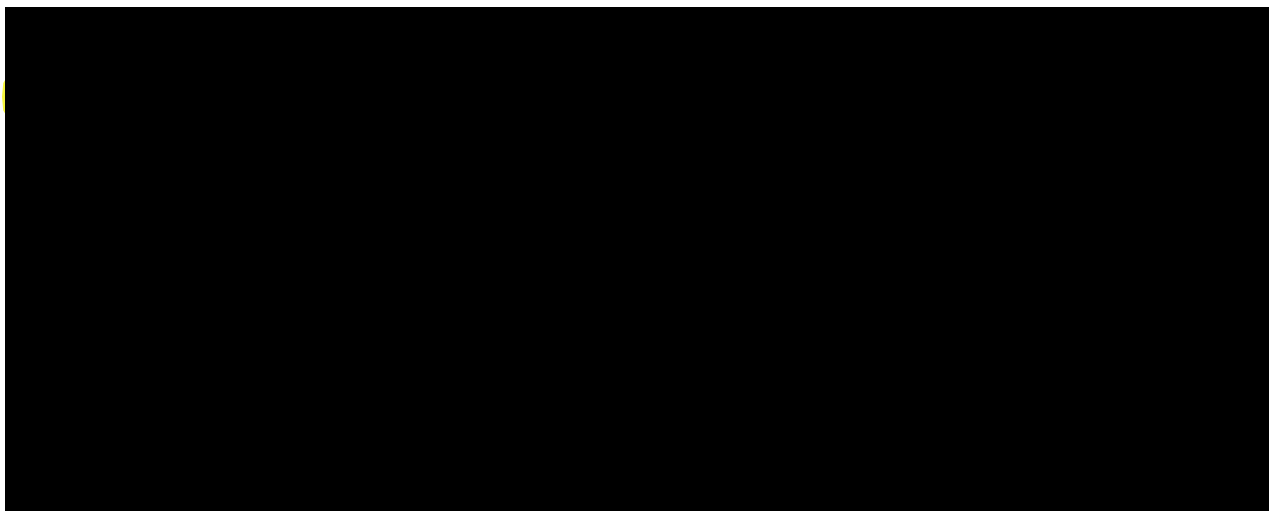
REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED

1 I, Benjamin Strahs, under penalty of perjury of the laws of the United States, depose and
2 state as follows:

3 1. I have been employed by Facebook, Inc. (“Facebook”) as a software engineer
4 since August 2009. In my role at Facebook, I am familiar with Facebook user account settings
5 and how those settings are stored and maintained on Facebook’s computer systems. I am
6 familiar with the matters set forth below based on personal knowledge, and from my review of
7 records kept and made by Facebook in the regular course of business. If called as a witness, I
8 could and would testify competently as to each of the matters below.

9 2. Facebook users can opt out of Tag Suggestions by disabling the feature in their
10 account settings. Each Facebook user’s Tag Suggestions settings are maintained by Facebook in
11 a database, which is automatically updated in the ordinary course of business as users access and
12 change their settings.

13 3. On November 14, 2017, I queried Facebook’s database for the Tag Suggestions
14 settings associated with the three named plaintiffs in the *Facebook Biometric* matter: Adam
15 Pezen, Carlo Licata, and Nimesh Patel. Attached as Exhibit 1 (FBBIPA_00044568) is a true and
16 correct copy of the output that I obtained from my query, which lists each plaintiff’s Facebook
17 account user ID, his Tag Suggestions setting on that date, when that setting was first accessed
18 (the “created” field in Exhibit 1), and when it was last updated.



27 5. Facebook considers the above information disclosing the account settings selected
28 by Facebook users to be non-public information, and takes steps to prevent such information

1 from becoming publicly available or available to people outside of Facebook.

2
3 I declare under penalty of perjury of the laws of the United States that the foregoing is
4 true and correct. Executed on January 25, 2018 in Washington, District of Columbia.

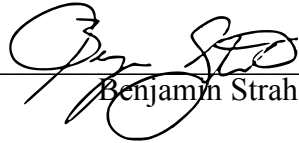
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Exhibit 1 to

Strahs Declaration

PLACEHOLDER FOR DOCUMENT
SOUGHT TO BE SEALED

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Facebook, Inc.

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11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

14
15 IN RE FACEBOOK BIOMETRIC
INFORMATION PRIVACY LITIGATION

16
17 THIS DOCUMENT RELATES TO:
18 ALL ACTIONS

Master Docket No.: 3:15-CV-03747-JD

**DECLARATION OF QIZHEN RUAN IN
SUPPORT OF FACEBOOK, INC.'S
OPPOSITION TO PLAINTIFFS'
MOTION FOR CLASS CERTIFICATION**

Date: March 29, 2018
Time: 10:00 a.m.
Location: Courtroom 11

Hon. James Donato

**REDACTED VERSION OF DOCUMENT
SOUGHT TO BE SEALED**


1 I, Qizhen Ruan, under penalty of perjury of the laws of the United States, depose and
2 state as follows:

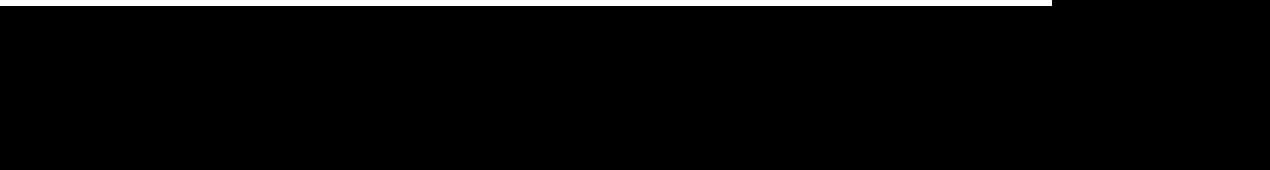
3 1. I have been employed by Facebook, Inc. ("Facebook") as a software engineer
4 since July 2015. I have a Bachelor's Degree from Southeast University in Nanjing, Jiangsu
5 Province, China. I also have a Master of Engineering in Bioengineering and Biomedical
6 Engineering from Shanghai Jiao Tong University and a Master of Science from Northeastern
7 University in Boston, Massachusetts.

8 2. I am familiar with the matters set forth below based on personal knowledge, and
9 from my review of records kept and made by Facebook in the regular course of business. If
10 called as a witness, I could and would testify competently as to each of the matters below.

11 3. An Internet Protocol ("IP") address is a unique string of numbers used to identify
12 desktop computers, laptops, mobile phones, and other devices that connect to the Internet. In the
13 course of my work at Facebook as a software engineer, I have become knowledgeable about how
14 IP address information associated with Facebook user activity (including photo uploads) is
15 maintained on Facebook's computer systems, and how that information is used by Facebook to
16 associate IP addresses with geographic locations.

17 4. There is no official or universally-recognized source of information that matches
18 IP addresses to specific regions within the United States, such as cities or states. Commercial
19 data providers purport to associate IP addresses, or parts thereof, with certain geographic
20 locations. However, each data provider that purports to do this employs different criteria, with
21 inconsistent results, and acknowledges significant limitations in the accuracy of its data.

22 5. Using a licensed third-party dataset in conjunction with its own proprietary
23 dataset, Facebook can assign a geographic region to many IP addresses. 

24 

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27 6. The IP address assigned to a mobile device can change frequently over time as
28 available IP addresses are re-assigned by the network provider (the mobile carrier) to devices in

1 the network. Carriers often withdraw an IP address from one device and instantly reallocate it to
2 another device in a different city (or state). Thus, the IP address associated with a mobile device
3 will not always match the location of that device.

4 7. In addition, any device can use a proxy server, which is a computer that acts as a
5 conduit between the device and the rest of the Internet. A proxy server can be located anywhere
6 in the world. A Facebook user who accesses Facebook through a proxy server will present an IP
7 address to Facebook that is associated with the proxy server, not the user's device. Similarly,
8 many devices access Facebook while on a VPN, which will present an IP address to Facebook
9 that is associated with the VPN, not the device. For these reasons, the IP address associated with
10 any device using a proxy server or a VPN is not indicative of the device's geographic location.

11 8. Facebook maintains the information in my declaration set forth above regarding
12 the accuracy of Facebook's IP-to-region dataset as a trade secret. Public release of this
13 information would cause Facebook competitive harm, including with advertisers. For these
14 reasons, Facebook takes steps to ensure that the information in my declaration set forth above is
15 not disclosed to competitors or otherwise made publicly known.

16
17 I declare under penalty of perjury of the laws of the United States that the foregoing is
18 true and correct. Executed on January 25, 2018 in Boston, Massachusetts.

19 *Qizhen Ruan*

20 _____
Qizhen Ruan

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8 Attorneys for Defendant
9 Facebook, Inc.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE FACEBOOK BIOMETRIC
INFORMATION PRIVACY LITIGATION

Master Docket No.: 3:15-CV-03747-JD

**DECLARATION OF OMR YADAN IN
SUPPORT OF FACEBOOK, INC.'S
OPPOSITION TO PLAINTIFFS'
MOTION FOR CLASS CERTIFICATION**

THIS DOCUMENT RELATES TO:

ALL ACTIONS

Date: March 29, 2018
Time: 10:00 a.m.
Location: Courtroom 11

Hon. James Donato

**REDACTED VERSION OF DOCUMENT
SOUGHT TO BE SEALED**

1 I, Omry Yadan, under penalty of perjury of the laws of the United States, depose and
2 state as follows:

3 1. I have been employed by Facebook, Inc. (“Facebook”) as a software engineer
4 since October 2012. Prior to joining Facebook, I was a software engineer at Face.com, a
5 facial-recognition technology company that Facebook acquired in 2012.

6 2. I am familiar with the matters set forth below based on personal knowledge, and
7 from my review of records kept and made by Facebook in the regular course of business. If
8 called as a witness, I could and would testify competently as to each of the matters below.

9 3. On December 7, 2017, I provided a declaration in support of Facebook’s motion
10 for summary judgment. As discussed in my prior declaration, Facebook’s facial-recognition
11 technology involves four steps: (i) “detection” (the process of determining whether and where a
12 face appears in an image), (ii) “alignment,” (iii) “representation,” and (iv) “classification” (the
13 actual process of recognizing a face).

14 4. [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 5. [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 6. [REDACTED]
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28 7. [REDACTED]

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9. [REDACTED]

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* * *

10. [REDACTED]

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[REDACTED]

[REDACTED]

11. [REDACTED]

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[REDACTED]

The Details of Facebook’s Facial-Recognition System Described Above are Confidential and Proprietary

13. Facebook maintains the details of how its facial-recognition technology works as a trade secret, particularly the details described above concerning the percentage of faces in uploaded photos that are detected and the percentage of detected faces that are “recognizable.” Public release of this information would cause Facebook harm by providing competitors—particularly those who also use facial recognition—with insight into Facebook’s proprietary facial-recognition technology. For these reasons, among others, Facebook takes steps to ensure that the information set forth in my declaration above is not disclosed to competitors or otherwise made publicly known.

Additional Facebook Business Records

14. Based upon my review, the following are true and correct copies of documents created and maintained by Facebook in the ordinary course of its business, created at or around the time of the subject matter to which they pertain:


- a. The document produced at FBBIPA_00038185 (Exhibit 2) is a copy of an April 9, 2013 email from Matthew Sundquist to Dan Barak and Anne-Marie Lentini regarding Facebook’s facial-recognition technology. Exhibit 2 contains confidential details regarding the nature of the templates that are created in connection with Facebook’s facial-recognition technology. In addition, the personal email address and certain Facebook account information associated with a Facebook employee has been redacted.
- b. The document produced at FBBIPA_00001756 (Exhibit 3) is a copy of a July 13, 2015 activity report generated in connection with Task #5286906. Exhibit 3 references details about Facebook's photo tagging system that are considered proprietary and confidential. In addition, certain information—the user ID of a

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Facebook employee—has been redacted.

- c. The document produced at FBBIPA_00044567 (Exhibit 4) is a summary of information obtained from Facebook’s computer systems related to the photos produced at GULLEN-00001 and GULLEN-00002. I discussed this document in my prior declaration.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed on January 25, 2018 in Menlo Park, California.



Omry Yadan

Exhibit 1 to

Yadan Declaration

**PLACEHOLDER FOR DOCUMENT
SOUGHT TO BE SEALED**

Exhibit 2 to

Yadan Declaration

**PLACEHOLDER FOR DOCUMENT
SOUGHT TO BE SEALED**

Exhibit 3 to

Yadan Declaration

**PLACEHOLDER FOR DOCUMENT
SOUGHT TO BE SEALED**

Exhibit 4 to

Yadan Declaration

**PLACEHOLDER FOR DOCUMENT
SOUGHT TO BE SEALED**

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8 Attorneys for Defendant
9 Facebook, Inc.

10
11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

14
15 IN RE FACEBOOK BIOMETRIC
INFORMATION PRIVACY LITIGATION

16
17 THIS DOCUMENT RELATES TO:
18 ALL ACTIONS

**DECLARATION OF JOHN
NADOLENCO IN SUPPORT OF
FACEBOOK, INC.'S OPPOSITION TO
PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION**

Master Docket No.: 3:15-CV-03747-JD

Date: March 29, 2018
Time: 10:00 a.m.
Location: Courtroom 11

Hon. James Donato

1 I, John Nadolenco, under penalty of perjury of the laws of the United States, depose and
2 state as follows:

3 1. I am an attorney licensed to practice before the courts of the State of California
4 and this Court. I am a partner with the law firm of Mayer Brown LLP, counsel for defendant
5 Facebook, Inc. (“Facebook”) in the above-captioned matter.

6 2. I make this declaration on my own personal knowledge and, if called upon as a
7 witness to do so, I could and would competently testify as to the matters set forth herein.

8 3. Attached hereto as Exhibit 1 is a true and correct copy of the Declaration of Omry
9 Yadan in Support of Facebook, Inc.’s Motion for Summary Judgment (*In re Facebook Biometric*
10 *Dkt. 257-9; Gullen Dkt. 105-9*).

11 4. Attached hereto as Exhibit 2 are true and correct copies of excerpts from the
12 deposition of Omry Yadan dated October 26, 2017.

13 5. Attached hereto as Exhibit 3 are true and correct copies of excerpts from the
14 deposition of Yaniv Taigman dated October 18, 2016.

15 6. Attached hereto as Exhibit 4 is a true and correct copy of the Expert Report of Dr.
16 Matthew Turk as served by Facebook, Inc. on December 22, 2017.

17 7. Attached hereto as Exhibit 5 is a true and correct copy of Facebook, Inc.’s
18 Amended and Supplemental Response to Plaintiffs’ Second Set of Interrogatories dated October
19 5, 2017.

20 8. Attached hereto as Exhibit 6 is a true and correct copy of Facebook, Inc.’s
21 Response to Plaintiffs’ First Set of Requests for Admission dated July 15, 2016.

22 9. Attached hereto as Exhibit 7 is a true and correct copy of Facebook, Inc.’s
23 Response to Plaintiffs’ Third Set of Requests for Production of Documents dated July 15, 2016.

24 10. Attached hereto as Exhibit 8 are true and correct copies of excerpts from the
25 deposition of Carlo Licata dated October 24, 2017.

26 11. Attached hereto as Exhibit 9 are true and correct copies of excerpts from the
27 deposition of Adam Pezen dated October 24, 2017.

28 12. Attached hereto as Exhibit 10 are true and correct copies of excerpts from the

1 deposition of Nimesh Patel dated December 7, 2017.

2 13. Attached hereto as Exhibit 11 is a true and correct copy of an Order dated June
3 27, 2017, filed in *Rivera v. Google Inc.*, No. 16 C 02714 (N.D. Ill.) (“*Rivera* 1292(b) Order”).

4 14. Attached hereto as Exhibit 12 is a true and correct copy of a document Bates-
5 numbered GULLEN-000001, produced by plaintiff during discovery in No. 3:16-cv-00937-JD.

6 15. Attached hereto as Exhibit 13 is a true and correct copy of a document Bates-
7 numbered GULLEN-000002, produced by plaintiff during discovery in No. 3:16-cv-00937-JD.

8 16. Attached hereto as Exhibit 14 are true and correct copies of excerpts from the
9 deposition of Frederick William Gullen dated October 25, 2017.

10 I declare under penalty of perjury under the laws of the State of California and the United
11 States that the foregoing is true and correct.

12 Executed this 26th day of January, 2018, in Los Angeles, California.

13
14
15 /s/ John Nadolenco
16 John Nadolenco
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Exhibit 1 to

Nadolenco Declaration

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1 MAYER BROWN LLP
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11 New York, NY 10020-1001
12 Telephone: (212) 506-2500
13 Facsimile: (212) 262-1910

14 Attorneys for Defendant
15 Facebook, Inc.

16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN FRANCISCO DIVISION

19 IN RE FACEBOOK BIOMETRIC
20 INFORMATION PRIVACY LITIGATION

21 **DECLARATION OF OMRY YADAN IN
22 SUPPORT OF FACEBOOK, INC.'S
23 MOTION FOR SUMMARY JUDGMENT**

24 Master Docket No.: 3:15-CV-03747-JD

25 THIS DOCUMENT RELATES TO:
26 ALL ACTIONS

27 Date: January 25, 2018
28 Time: 10:00 a.m.
Location: Courtroom 11

Hon. James Donato

29 _____
30 FREDERICK WILLIAM GULLEN, on behalf
31 of himself and all others similarly situated,

32 Plaintiff,

33 Case No. 3:16-cv-00937-JD

34 v.

35 **REDACTED VERSION OF
36 DOCUMENT(S) SOUGHT TO BE SEALED**

37 FACEBOOK, INC.,

38 Defendant.

REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED

1 1, Omry Yadan, under penalty of perjury of the laws of the United States, depose and
2 state as follows:

3 1. I have been employed by Facebook, Inc. ("Facebook") as a software engineer
4 since October 2012. Prior to joining Facebook, I was a software engineer at Face.com, a
5 facial-recognition technology company that Facebook acquired in 2012.

6 2. I am familiar with each of the matters set forth below based on personal
7 knowledge, or from my review of records kept and made by Facebook as its regular practice. If
8 called as a witness, I could and would testify competently as to the matters set forth below.

9 3. In 2010, Facebook licensed certain face-detection and facial-recognition software
10 from Face.com for use in connection with Facebook's Tag Suggestions feature. Informally, we
11 referred to this software as "Facer" at Face.com, and it is has become known as Facer at
12 Facebook as well.

13 4. As an employee of Face.com, I helped Facebook integrate Facer into Facebook's
14 computer systems. Among other things, I wrote some of the computer code that Facer uses to
15 communicate with other computer servers on Facebook's network and with the computer code
16 ([REDACTED]) that operates Facebook's
17 website. Following the Face.com acquisition in 2012, in my role as a Facebook software
18 engineer I have continued to work on developing, implementing, and improving aspects of
19 Facebook's facial-recognition software and the Tag Suggestions feature.

20 5. In connection with my work, I am knowledgeable about the general network
21 architecture of Facebook's computer systems, the hardware (*i.e.*, the computers and servers)
22 associated with those systems, and how those systems are used in connection with facial
23 recognition.

24 **Facebook's Data Centers**

25 6. The computers, servers, and databases used to provide services to people with
26 Facebook accounts are located in nine "Data Centers" maintained by Facebook. Six Data
27 Centers are located within the United States, in (i) Prineville, Oregon ("PRN"), (ii) Santa Clara,
28 California ("SNC"), (iii) Altoona, Iowa ("ATN"), (iv) Fort Worth, Texas ("FTW"), (v) Ashburn,

REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED

1 Virginia ("ASH"), and (vi) Forest City, North Carolina ("FRC"). Attached as Exhibit 1
2 (FBBIPA_00044570) is a true and correct copy of excerpts from an internal "Wiki" page
3 maintained by Facebook that shows the location of each current Data Center, and additional data
4 centers that are now under construction.

5 7. None of Facebook's Data Centers is located in Illinois, nor has Facebook
6 maintained any Data Centers in Illinois at any point since Facebook first began using
7 facial-recognition technology in 2010. Facebook is in the process of developing additional Data
8 Centers in the United States and in other countries, but none is in Illinois.

9 8. In addition, none of the Facebook or former Face.com employees involved in
10 developing Facebook's facial-recognition technology, or the facial-recognition technology that
11 Facebook initially licensed from Face.com, is based in Illinois, nor are any of the Facebook
12 employees who work with that technology today based in Illinois. None of the work that has
13 ever been done to design, engineer, or implement Facebook's facial-recognition technology has
14 taken place in Illinois.

15 **Facebook's Facial-Recognition Technology**

16 9. Facebook's facial-recognition technology is used on certain photos that are
17 uploaded to Facebook. The process involves four steps: (i) "detection" (the process of
18 determining whether and where a face appears in an image), (ii) "alignment,"
19 (iii) "representation," and (iv) "classification" (the actual process of recognizing a face). [REDACTED]

20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

26 10. In this declaration, I will not explain in great detail exactly how Facebook's
27 facial-recognition technology works. Rather, the purpose of my declaration is to explain whether
28 and the extent to which each step of the facial-recognition process occurs (i) "server-side," *i.e.*,

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on Facebook's network of computer servers, which are located in Facebook's Data Centers; or
(ii) "client-side," i.e., locally on the computers and devices used by people who use Facebook.

11. As further detailed below, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

12. I discuss each of these steps below.

Face Detection

13. As I explained above, face detection is the process of determining whether and where a face appears in an image. It does not attempt to identify whose face is present. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

14. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

15. [REDACTED]
[REDACTED]
[REDACTED]

16. [REDACTED]

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1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]

Alignment

7
8 17. [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]

Representation

12
13 18. [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 19. This process always takes place server-side— [REDACTED]

19 [REDACTED]
20 20. [REDACTED]
21 [REDACTED]
22 [REDACTED]

Classification

23
24 21. [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]

28 22. [REDACTED]

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[REDACTED]

23. [REDACTED]

[REDACTED]

[REDACTED] In short, templates exist only on Facebook's servers.

24. During classification, [REDACTED]

[REDACTED]

[REDACTED] This entire process takes place server-side.

25. [REDACTED]

[REDACTED]

[REDACTED] However, tag suggestions do not contain any information that could be used to create a template or a face signature, or which otherwise could be used to perform facial recognition.

Plaintiff Gullen's Photographs

26. I have reviewed information that is maintained by Facebook's computer systems in the normal course of business associated with the Facebook photos produced at GULLEN-00001 and GULLEN-00002, by cross-referencing the unique ID numbers associated with each photo displayed in the Facebook URL that appears above each photo in GULLEN-00001 and GULLEN-00002.

27. Business and other organizations maintain Facebook "Page" accounts to interact

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1 with Facebook users and post photos, among other things. However, facial recognition is not
2 performed on photos that are posted on business or other organization Facebook Pages. The
3 photo at GULLEN-00001 was posted to the Facebook Page "Glenview Patch" on April 23, 2012.
4 No faces were detected in the photo, no steps of the facial-recognition process were performed
5 on the photo, no tag suggestions were made in connection with the photo, and no user-created
6 tags exist for the photo.

7 28. [REDACTED]
8 [REDACTED]
9 [REDACTED]

10 [REDACTED] For the photo produced at GULLEN-00002, Facebook's records show that it was
11 uploaded ("published") by Facebook user [REDACTED] on May 20, 2015, from an IP address
12 associated with the zip code [REDACTED]. [REDACTED] created two tags for
13 the photo, one of which reads, "Frederick W. Gullen." While the photo was uploaded in May
14 2015, the tags were created three months later, on August 20, 2015.

15 29. A true and correct summary of the foregoing information obtained from
16 Facebook's computer systems related to the photos produced at GULLEN-00001 and GULLEN-
17 00002 is attached to this declaration as Exhibit 2 (FBBIPA_00044567). The names and
18 Facebook user IDs associated with the people who posted GULLEN-00001 and GULLEN-
19 00002, as well as the Facebook users who are tagged in GULLEN-00002, are referenced in
20 Exhibit 2. Facebook considers the information contained in Exhibit 2 that identifies Facebook
21 users and their activities on Facebook to be non-public information, and takes steps to prevent
22 such information from becoming publicly available or available to people outside of Facebook.

23 **Facial Recognition and Non-Users**

24 30. Templates are created and maintained only for Facebook users. Facebook does
25 not create, save, or store templates for non-users.

26 [REDACTED]
27 [REDACTED]
28 [REDACTED] Because Facebook does not create, save, or store

REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED

1 templates for non-users, [REDACTED]
2 [REDACTED]
3 [REDACTED]

4 32. It would be impossible to disable this process for non-users whose faces happen
5 to appear in photos uploaded to Facebook without disabling the entire system. Like all facial-
6 recognition systems, Facebook's software works by analyzing all eligible images and then
7 discarding its analysis of images that do not match existing templates on its servers. [REDACTED]
8 [REDACTED]
9 [REDACTED]

10 33. Because Facebook cannot disable those steps of the facial-recognition process for
11 non-users generally, it cannot disable those steps for non-users who live in a particular state.

12 **The Details of Facebook's Facial-Recognition System and its Network Architecture**
13 **are Confidential and Proprietary**

14 34. Facebook maintains as a trade secret both the (a) network architecture of its
15 computer systems described above, and (b) the way in which those systems interact with and
16 support Facebook's facial-recognition technology. Public release of this information would
17 cause Facebook harm by providing competitors—particularly those who also use facial
18 recognition—with insight into how Facebook designs its computer systems and its proprietary
19 facial-recognition technology. Further, public disclosure of information related to Facebook's
20 network architecture and how its architecture is used in connection with facial recognition could
21 put Facebook and the people who use Facebook at increased risk of cyber attack by malicious
22 actors. For these reasons, among others, Facebook takes steps to ensure that the information set
23 forth in my declaration above is not disclosed to competitors or otherwise made publicly known.

24 **Additional Facebook Business Records**

25 35. The following are true and correct copies of documents created and maintained by
26 Facebook in the ordinary course of its business, created at or around the time of the subject
27 matter to which they pertain:

28 a. The document produced at FBBIPA_00001456 (attached as Exhibit 3) is a copy

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of a presentation titled “Facer Infrastructure” that I created within the scope of my employment at Facebook. Like the information contained in my declaration above, Exhibit 3 contains confidential information related to both (a) the network architecture of Facebook’s computer systems, and (b) the way in which those systems interact with and support Facebook’s facial-recognition technology.

- b. The document produced at FBBIPA_00027204 (Exhibit 4) is a copy of posts made by myself, Yaniv Taigman, and other Facebook employees between April 27 and April 30, 2015, in the internal Facebook Group “Face Recognition Core.” Among other things, this Group post contains confidential information regarding research and development work being performed by Facebook’s Applied Machine Learning (“AML”) team.
- c. The document produced at FBBIPA_00027112 (Exhibit 5) is a copy of a July 10, 2013 activity report generated in connection with Task #2132409. This Task references details about Facebook’s image processing system that are considered proprietary and confidential.
- d. The document produced at FBBIPA_00001756 (Exhibit 6) is a copy of a July 13, 2015 activity report generated in connection with Task #5286906. This Task references details about Facebook’s photo tagging system that are considered proprietary and confidential. In addition, certain information—the user ID of a Facebook employee—has been redacted.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed on December 7, 2017 in Menlo Park, California.

Omry Yadan 

Exhibit 2 to

Nadolenco Declaration

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE FACEBOOK BIOMETRIC INFORMATION PRIVACY
LITIGATION,

Master Docket No.: 3:15-CV-03747-JD

_____ /

FREDERICK WILLIAM GULLEN,
Plaintiff,

vs. NO. 3:16-cv-00937-JD

FACEBOOK, INC.,
Defendant.

_____ /

** TRANSCRIPT MARKED HIGHLY CONFIDENTIAL **

VIDEOTAPED DEPOSITION OF OMRY YADAN
Palo Alto, California
Friday, October 26, 2017

Reported By:
LINDA VACCAREZZA, RPR, CLR, CRP, CSR. NO. 10201
JOB NO. 62536

1 Q. In the context of facial recognition at
2 Facebook, what do you understand those terms to
3 refer to?

4 MR. NADOLENCO: Form and foundation.

5 THE WITNESS: In the context of face
6 recognition at Facebook , detect can mean detect
7 faces. Align can mean align faces. Represent can
8 mean represent faces. And classify can mean
9 classify faces, also known as recognizing faces.

10 BY MR. RHODES:

11 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1 Q. When you say "cache information," what
2 does that mean to cache information?

3 A. To cache information is to remember the
4 information for some period of time.

5 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

12 MR. NADOLENCO: Form. Foundation.

13 THE WITNESS: Yes.

14 BY MR. RHODES:

15 Q. Okay. And what is your understanding?

16 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1 wherever they are, and you would use a face
2 detection request.

3 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

8 BY MR. RHODES:

9 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

16 BY MR. RHODES:

17 Q. And that would happen automatically based
18 on how the system is set up; is that correct?

19 MR. NADOLENCO: Objection. Foundation.

20 THE WITNESS: That will happen
21 automatically for most of the images uploaded or to
22 the images uploaded for some of the venues that I
23 mentioned earlier. Not necessarily for all of
24 them.

25 BY MR. RHODES:

[REDACTED]

16 Q. Okay. And let's break that down. What is
17 -- what does "detect" refer to specifically?

18 MR. NADOLENCO: Same objection.

19 THE WITNESS: Detect is referring to --
20 detect is referring to finding the photos and the
21 face. So it's finding the faces in the photo.

22 BY MR. RHODES:

23 Q. Okay. And how is that done?

24 A. I'm not familiar with the details of face
25 detection.

1 Q. You're not familiar with it?

2 A. I'm not familiar. I mean, I know high
3 level but I'm not familiar with the details. I did
4 not write it and --

5 Q. What is your high-level understanding of
6 it?

7 MR. NADOLENCO: Okay. I object to the
8 extent it lacks foundation.

9 MR. RHODES: Okay. That's great.

[REDACTED]

1 Q. Okay. So you have a general understanding
2 of what the code does on that collection of
3 machines that you're describing?

4 A. Yes.

5 Q. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

4

A. I do.

5

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

13

MR. NADOLENCO: Objection. Foundation.

14

THE WITNESS: No.

15

BY MR. RHODES:

16

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1 MR. NADOLENCO: Objection. Foundation.

2 THE WITNESS: I believe so.

3 BY MR. RHODES:

4 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

Exhibit 3 to

Nadolenco Declaration

**REDACTED VERSION OF DOCUMENT
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Yaniv Taigman

Highly Confidential
Attorneys' Eyes Only

In re Facebook Biometric
Information Privacy Litigation

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re FACEBOOK BIOMETRIC INFORMATION PRIVACY
LITIGATION,

CASE NOS. 3:15-cv-03747-JD
3:16-cv-00937-JD

This Document Relates To:

ALL ACTIONS.

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY
VIDEOTAPED DEPOSITION OF YANIV TAIGMAN
Palo Alto, California
Tuesday, October 18, 2016

Reported By:
Ashley Soevyn,
CSR No. 12019

Job No.: 10028056

Yaniv Taigman

Highly Confidential
Attorneys' Eyes Only

In re Facebook Biometric
Information Privacy Litigation

1 pipeline. Not -- like, to convert that into
2 something else, you will need to go through, for
3 example, business logics, products, and stuff like
4 that, but.

5 BY MR. RHODES:

6 Q Well, you referred to a pipeline just
7 now, right?

8 A Yeah.

9 Q So what pipeline were you referring to?

10 A A collection of functions. So you start
11 with something, you continue to do the other. That
12 kind of pipeline.

13 Q Okay. But were you referring to a
14 specific pipeline with respect to facer?

15 A Yes.

16 Q Okay. And can you please describe that
17 pipeline.

18 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Yaniv Taigman

Highly Confidential
Attorneys' Eyes Only

In re Facebook Biometric
Information Privacy Litigation

1 Q That's the pipeline.

2 Can you take a look at Exhibit 2, the
3 DeepFace paper.

4 A Sure.

5 Q Does this paper accurately reflect how
6 face detection and face recognition works at
7 Facebook?

8 MR. NADOLENCO: Objection. Form.

9 THE WITNESS: No.

10 BY MR. RHODES:

11 Q No?

12 A It's not accurate.

13 Q Why is it not accurate? In what --
14 strike that.

15 In what ways is it not accurate?

16 A Well, this is a research paper. That we
17 published.

18 Q Uh-huh.

19 A About our research work. Some elements
20 here are, like, we can go and talk to them.

21 Q Uh-huh.

22 A For example, pipelines. But regarding
23 your question, whether it accurately explained
24 something that -- so, no, it's not accurate with
25 respect to Facebook.

Yaniv Taigman

Highly Confidential
Attorneys' Eyes Only

In re Facebook Biometric
Information Privacy Litigation

1 Q Well, and I'm asking which parts of it
2 are not accurate with respect to how Facebook
3 employs facial recognition.

4 MR. NADOLENCO: Objection to form.

5 THE WITNESS: For example, this paper
6 talks about the face verification. So, given two
7 images, like, you have to decide whether they are
8 showing the same person or not. And this has some
9 interest to the research community, but it's not
10 like there could be other forms of running, for
11 example, face detection. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

17 Q Okay. Well, let's -- let's walk through
18 it and see which parts of it are and are not used at
19 Facebook.

20 So the very beginning here, in the
21 abstract, talks about the conventional pipeline,
22 which consists of four stages: Detect, align,
23 represent, and classify.

24 MR. NADOLENCO: Sorry. Where are you at,
25 Corban?

Yaniv Taigman

Highly Confidential
Attorneys' Eyes Only

In re Facebook Biometric
Information Privacy Litigation

1 MR. RHODES: The very top of Page 1.

2 THE WITNESS: All right.

3 BY MR. RHODES:

4 Q So is that the pipeline that you were
5 referring to before that facer uses?

6 A Yes.

7 Q So, at least at this level, these four
8 stages accurately describe the way that the process
9 works at Facebook.

10 MR. NADOLENCO: Form.

11 MR. RHODES: You don't have to look at
12 him.

13 MR. NADOLENCO: He was just seeing if I
14 object.

15 THE WITNESS: No. This is -- it's not
16 accurate how it works at Facebook. This is, like I
17 said, a specific pipeline. There could be other
18 pipelines. This is just one of them.

19 BY MR. RHODES:

20 Q But is it one -- is it the pipeline
21 that's used at Facebook?

22 MR. NADOLENCO: Same objection. Form.

23 THE WITNESS: So, at Facebook, we used
24 detection, alignment, representation, and
25 classification for creating face signature.

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Information Privacy Litigation

1 BY MR. RHODES:

2 Q Okay. And so let's start with the --
3 well, I'm wondering if there's kind of the -- or
4 maybe you would consider it part of the detection
5 phase. But when an image is very first uploaded to
6 Facebook, is that part of the detection phase of the
7 pipeline?

8 A I can explain what happens when an image
9 gets uploaded to Facebook.

10 Q Yes. Can you please explain what happens
11 when an image gets uploaded to Facebook.

12

[REDACTED]

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1

[REDACTED]

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1

[REDACTED]

1 BY MR. RHODES:

2 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

7 Q Okay. Sorry. I'll rephrase it.

8 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

16 Q And then unload it to Facebook.

17 A Yeah, you can upload it into Facebook.

18 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

24 THE WITNESS: You're using the word
25 "system" again, which I'm not sure what we're

1 referring to.

2 BY MR. RHODES:

3

[REDACTED]

13 BY MR. RHODES:

14 Q Okay.

15

[REDACTED]

22 Q Okay. I thought that's what we were
23 doing. And I will try and use the correct
24 terminology.

25 A Okay.

1

[REDACTED]

13 Q Okay. That's my question.

14 A I just don't see the difference, so if
15 it's a JPG, answer is yes.

16 [REDACTED]

21 Q That's my fault. You're right.

22 A That's fine.

23 Q Okay. So let's turn back to the -- the
24 DeepFace paper that you said you co-authored. Who
25 are those other co-authors listed at the top here,

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1 by the way?

2 A Ming Yang and Marc' Aurelio Ranzato are
3 both Facebook employees.

4 Q Okay. And who is Lior Wolf?

5 A Lior Wolf, he's a professor at Tel Aviv
6 University.

7 Q Okay.

8 A Which we collaborated on writing this
9 paper.

10 Q Okay. And are Ming Yang and Marc'
11 Aurelio Ranzato, were they employees at Facebook
12 before you joined Facebook?

13 A No.

14 Q No.

15 When did they join Facebook?

16 A Ming joined in 2013, and Marc' Aurelio as
17 well.

18 MR. RHODES: Sorry. What do I press to
19 make this -- uh?

20 BY MR. RHODES:

[REDACTED]

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1

[Redacted text block containing approximately 25 lines of blacked-out content]

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1

[Redacted text block containing approximately 28 lines of blacked-out content]

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1

[Redacted text block containing multiple lines of blacked-out content]

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1

[Redacted text block containing multiple lines of blacked-out content]

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1

[Redacted text block containing approximately 25 lines of blacked-out content]

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1

[REDACTED]

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1 BY MR. RHODES:

2

[REDACTED]

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1

[REDACTED]

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1 algorithm does?

2 A The DeepFace, in this case, is, you know,
3 code name for an algorithm described in this paper,
4 which we published. And it's used, yes, as, like,
5 internally, when we refer to portion of it inside a
6 source code, but it's not like -- it's not as you
7 describe it.

8 Q Okay. So why don't you just walk me
9 through, described in your own words, the process
10 from, you know, the uploading of an image onto
11 Facebook, through the identification of an
12 individual in that image. How does that happen?

13 MR. NADOLENCO: Objection. Form.

14 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1 Now, identity is not a face signature.

2

[REDACTED]

13 Q And that's -- so the identity is tied
14 to -- strike that.

15

[REDACTED]

24 MR. NADOLENCO: That's okay.

25 THE WITNESS: The answer is no.

1 BY MR. HEDIN:

2 [REDACTED]

[REDACTED]

4 MR. NADOLENCO: Objection. Form.

5 BY MR. HEDIN:

6 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

14 BY MR. HEDIN:

15 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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Information Privacy Litigation

1

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1

[REDACTED]

23 Q Right. Okay.

24 [REDACTED]

1 A No.

2 MR. NADOLENCO: Objection. Form.

3 THE WITNESS: No.

4 BY MR. HEDIN:

5 **Q How long does Facebook store that data?**

6 MR. NADOLENCO: Form. What data? The
7 one that he said he didn't save?

8 THE WITNESS: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

21 **Q And then the last column here in this**
22 **page, in Exhibit 5. It says "recognize user." Can**
23 **you tell me what that data represents.**

24 MR. NADOLENCO: Form and scope.
25 Foundation.

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1

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1

[REDACTED]

12

MR. RHODES: I guess, Exhibit 9.

13

(Taigman Exhibit 9 marked for identification.)

14

THE REPORTER: Hold on. There you go.

15

THE WITNESS: Thank you.

16

BY MR. RHODES:

17

Q You've been handed a document that's

18

Exhibit 9. The first Bates number ends in 1006, and

19

it goes back to 1014.

20

A Yes.

21

Q Take a moment to review it. Do you

22

recognize this document?

23

MR. NADOLENCO: 1212.

24

MR. RHODES: What did I say?

25

MR. NADOLENCO: One four.

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Information Privacy Litigation

1 BY MR. RHODES:

2

[REDACTED]

1 THE WITNESS: Nothing. Everything is
2 discarded.

3 BY MR. NADOLENCO:

4 Q [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

1 THE WITNESS: I think so, yes.

2 BY MR. NADOLENCO:

3 Q Do non-users have templates or
4 hyperplanes?

5 A I'm sorry?

6 Q Do non-users --

7 A No. Not -- for sure, no.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Exhibit 4 to

Nadolenco Declaration

**PLACEHOLDER FOR DOCUMENT
SOUGHT TO BE SEALED**

Exhibit 5 to

Nadolenco Declaration

REDACTED VERSION OF DOCUMENT
SOUGHT TO BE SEALED

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12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN FRANCISCO DIVISION**

15 IN RE FACEBOOK BIOMETRIC
16 INFORMATION PRIVACY LITIGATION

Master Docket No. 3:15-cv-03747-JD

17 THIS DOCUMENT RELATES TO:

**FACEBOOK INC.'S AMENDED AND
18 SUPPLEMENTAL RESPONSE TO
19 PLAINTIFFS' SECOND SET OF
20 INTERROGATORIES**

21 ALL ACTIONS

Hon. James Donato

**CONFIDENTIAL – CONTAINS
22 INFORMATION SUBJECT TO
23 PROTECTIVE ORDER**

24 PROPOUNDING PARTY: Plaintiffs Carlo Licata, Nimesh Patel, and Adam Pezen

25 RESPONDING PARTY: Defendant Facebook, Inc.
26
27
28

1 Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, Defendant Facebook,
2 Inc. (“Facebook”), by and through its counsel of record, hereby provides these amended and
3 supplemental responses to Interrogatories 14 and 17 of Plaintiffs’ Second Set of Interrogatories to
4 Defendant Facebook, Inc. (collectively, the “Interrogatories,” individually an “Interrogatory”) as
5 follows.

6 **PRELIMINARY STATEMENT**

7 Facebook’s supplemented and amended responses to the Interrogatories are made solely
8 for the purpose of this action. Each response is made subject to all objections as to competence,
9 relevance, materiality, propriety, admissibility, privilege, privacy, proprietary information, trade
10 secrets and the like, and any and all other objections on grounds that would require the exclusion
11 of any response herein if such were offered in Court, all of which objections and grounds are
12 reserved and may be interposed at any time, including at the time of trial. Facebook’s responses
13 are not intended to be, and shall not be construed as, a waiver by Facebook of any or all
14 objection(s) to these Interrogatories.

15 No incidental or implied admissions are intended in these responses. Facebook’s response
16 to any Interrogatory should not be taken as an admission that Facebook accepts or admits the
17 existence of any fact(s) or any information assumed by that Interrogatory or that such response
18 constitutes admissible evidence. Facebook’s response to any such Interrogatory is not intended to
19 be, and shall not be construed as, a waiver by Facebook of any or all objection(s) to the
20 Interrogatory. Facebook has not completed its (a) investigation of the facts relating to this case,
21 (b) discovery in this action, or (c) preparation for trial. The following responses are based upon
22 information known at this time and are given without prejudice to Facebook’s right to amend,
23 supplement or revise these responses with any subsequently discovered information.

24 **GENERAL OBJECTIONS**

25 Facebook makes and hereby incorporates by reference the following general objections,
26 whether or not separately set forth, in response to each Interrogatory:
27
28

1 1. Facebook objects to each Interrogatory to the extent that it seeks information
2 protected by the attorney-client privilege, the work-product doctrine, a confidentiality agreement,
3 and/or information that is otherwise privileged, protected or confidential pursuant to any
4 applicable doctrine, statute or rule. Such responses as may hereafter be given shall not include
5 any information protected by such privileges, doctrines, statutes or rules, and inadvertent
6 disclosure of such information shall not be deemed a waiver of any such privilege, protection or
7 confidentiality.

8 2. Facebook objects to each Interrogatory to the extent it is overly broad or is
9 otherwise not reasonably limited as to time or subject matter.

10 3. Facebook objects to each Interrogatory to the extent that the discovery burden it
11 seeks to impose on Facebook is not proportional to the needs of the case in accordance with Rule
12 26(b)(1) and/or is not relevant to any party's claim or defense or reasonably likely to lead to the
13 discovery of admissible evidence.

14 4. Facebook objects to each Interrogatory to the extent it seeks information that is
15 publicly available, already in Plaintiffs' possession, custody, or control, or equally available to
16 Plaintiffs, as compliance would be unduly burdensome given that there is no legitimate reason for
17 requiring Facebook to assume the burden of providing such information.

18 5. Facebook objects to each Interrogatory to the extent it assumes facts not in
19 evidence. By responding and objecting to these Interrogatories, Facebook does not admit or
20 agree with any explicit or implicit assumptions made in these Interrogatories.

21 6. Facebook objects to each Interrogatory to the extent it is vague, ambiguous or
22 unintelligible, or otherwise fails to identify the information requested.

23 7. Facebook objects to each Interrogatory to the extent that it is compound,
24 conjunctive, or disjunctive.

25 8. Facebook objects to each Interrogatory to the extent it seeks private, proprietary,
26 trade secret, confidential business or technical information, and/or private or personal
27 information, including any information that is protected under any provision of law, including
28

1 without limitation Article I of the California Constitution. To the extent that an otherwise
2 properly framed Interrogatory calls for such information, Facebook will only provide this
3 information in accordance with the Stipulated Protective Order (Dkt. 87) governing discovery in
4 this action, as entered by the Court on February 12, 2016 (Dkt. 88).

5 9. Facebook objects to these Interrogatories to the extent they exceed the limit of 25
6 written interrogatories allowed under Federal Rule of Civil Procedure 33(a)(1). On December 1,
7 2015, Plaintiff Pezen served a First Set of Interrogatories to Facebook, Inc., consisting of seven
8 separate interrogatories and on December 18, 2015 Plaintiff Patel—represented by the same
9 counsel who represent Plaintiff Pezen and all Plaintiffs in this matter—served an Expedited First
10 Set of Interrogatories to Facebook, Inc., consisting of twelve separate interrogatories. Plaintiffs
11 then served a “Second Set of Interrogatories” containing eight additional interrogatories, for a
12 total of twenty-seven interrogatories. As such, these Interrogatories exceed the limit proscribed by
13 Rule 33(a)(1). Any responses as may be provided by Facebook to these Interrogatories
14 notwithstanding the limit imposed by Rule 33(a)(1) are without prejudice to this objection.

15 10. Facebook objects to Plaintiffs’ definitions of “Facebook,” “Defendant,” “You,” or
16 “Your” as vague, ambiguous, overly broad, and unduly burdensome to the extent that they
17 purport to require Facebook to provide responses on behalf of any entity other than Facebook.

18 11. Facebook objects to Plaintiffs’ definition of “User(s)” as overly broad and unduly
19 burdensome to the extent that it purports to require Facebook to provide information related to
20 any individual that has at any point in time had a Facebook account.

21 12. Facebook objects to the term “Relevant Time Period” as overly broad and unduly
22 burdensome for several reasons, including that the Challenged Technology was not developed for
23 Facebook or made available to people with Facebook accounts before 2010. Moreover, the
24 claims at issue in this litigation are subject to applicable limitations periods of two years under
25 735 ILCS 5/13-202 (two-year limitations period to recover a statutory penalty) and/or five years
26 under 735 ILCS 5/13-205 (five-year limitations period for “all civil actions not otherwise
27 provided for”). Unless otherwise indicated, Facebook’s responses to each Interrogatory will be
28

1 limited to the time period from January 1, 2010 to August 28, 2015 (the date that the
2 Consolidated Amended Complaint was filed in this matter).

3 13. Facebook objects to Plaintiffs' definitions of "Biometric Identifier(s),"
4 "Faceprint(s)," and "Face Template(s)" as vague, ambiguous, overly broad, and circular insofar
5 as Plaintiffs purport to define "Biometric Identifier(s)" as a "Faceprint" or "Template," which are
6 in turn defined by Plaintiffs as "Biometric Identifier(s)" Further, Facebook objects to
7 Plaintiffs' definitions of "Faceprint(s)" and "Face Template(s)" to the extent they suggest or
8 imply that Facebook has created, obtained, stored, or used any "Biometric Identifier(s)," as that
9 term is defined in 740 ILCS 14/10. Any of use of Plaintiffs' defined terms in the course of
10 responding to these Interrogatories shall not and will not constitute Facebook's agreement with
11 Plaintiffs' terms or that any information created, obtained, stored (if stored), and/or used in
12 connection with tag suggestions constitutes a "Biometric Identifier" as that term is defined in 740
13 ILCS 14/10, *i.e.*, "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry,"
14 but not "photographs" or "information derived from" photographs.

15 14. Facebook objects to all other "Definitions" and "Instructions" to the extent they
16 are vague, ambiguous, overly broad, and/or unduly burdensome or exceed the obligations
17 imposed by the Federal Rules of Civil Procedure or other applicable rules.

18 15. Facebook objects to each Interrogatory to the extent that it purports to impose any
19 obligations not imposed by the Federal Rules of Civil Procedure, the Federal Rules of Evidence,
20 the Northern District of California Civil Local Rules, the Court's standing orders, or any other
21 applicable rules or law. Facebook will respond to these Interrogatories in accordance with its
22 obligations under applicable rules and law.

23 16. Facebook objects to each Interrogatory to the extent that it seeks information with
24 respect to persons not parties to this action, including putative class members, as this action has
25 not been certified as a class action. Consequently, Interrogatories pertaining to putative class
26 members or which relate to the merits of putative class members' claims are overly broad and/or
27

28

1 call for irrelevant information, and would impose discovery burdens on Facebook that are not
2 proportional to the needs of the case.


3 17. Facebook objects to the instructions contained in Section I, para. 6 to the extent
4 that they are vague, ambiguous, unduly burdensome, unreasonably expensive in light of their
5 likely benefit, and not proportional to the needs of the case. Facebook further objects to the
6 extent that these instructions purport to impose any obligations not imposed by the Federal Rules
7 of Civil Procedure, the Federal Rules of Evidence, the Northern District of California Civil Local
8 Rules, the Court's standing orders, or any other applicable rules or law. Further, as the parties are
9 currently negotiating a Stipulated Order Re: Discovery of Electronically Stored Information,
10 Facebook reserves its right to produce documents pursuant to Federal Rule of Civil Procedure
11 33(d), if applicable, in accordance with that Order upon its approval and entry by the Court.

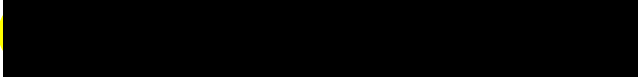
12 18. Facebook objects to each Interrogatory as overbroad and unduly burdensome to
13 the extent it is duplicative or overlapping of discovery requests as may be propounded in *Gullen*
14 *v. Facebook, Inc.*, Case No. 3:16-cv-00937-JD. Consistent with the Court's instructions during
15 the parties' joint case management conference held on June 29, 2016, Facebook reserves the right
16 to make combined production(s) of documents or information that are responsive to either or both
17 sets of discovery requests in these matters to the extent doing so will save Facebook from
18 incurring unnecessary burden or expense.

19 * * * * *

20 19. Facebook reserves the right to assert additional general and specific objections to
21 the Interrogatories as appropriate and to supplement these objections and responses. Facebook
22 also reserves the right to assert additional general and specific objections arising from matters
23 discovered during the course of this litigation.

24 20. To the extent Facebook has objected to or refused to respond to any given
25 Interrogatory, and to the extent that Plaintiffs take issue with any such objection or refusal,
26 Facebook is willing to meet and confer with Plaintiffs to determine whether a reasonable,
27 mutually acceptable compromise might be reached.

1 12, above. 

2 

3 Subject to and without waiving these or its General Objections, Facebook states that

4 during the parties' subsequent meet and confer discussions following the Court's January 9, 2017

5 discovery ruling (Dkt. 183) directing Plaintiffs to "identify a reasonable proxy that is workable

6 and less burdensome for Facebook," the Plaintiffs agreed to limit this Interrogatory to

7 photographs they uploaded. Facebook's response is limited accordingly, and is further limited to

8 calendar years 2011 through 2015 based on available information, as noted above. In addition,

9 Facebook's response is based on whether Facebook's then-existing technology indicated the

10 possible presence of one or more faces in Plaintiffs' photographs. Without further investigation

11 into each individual photograph, which would be unduly burdensome, Facebook cannot verify

12 whether the photograph actually "has faces," and if does, whether those faces belong to the

13 Plaintiffs or to others. Moreover, because "there is no official source of IP-to-Region

14 information," *see* <https://www.iplocation.net/>, Facebook has relied on information reasonably

15 available to it to approximate whether the IP addresses associated with Plaintiffs' photo uploads

16 are linked to Illinois. Facebook's response is subject to these limitations and accordingly should

17 be understood as an approximation of the requested information:

18 2011 2012 2013 2014 2015

19 Nimesh Patel 

20 Carlo Licata

21 Adam Pezen

22 **INTERROGATORY NO. 17:**

23 State by name and location any Database or server on which the Company stores Face

24 Templates generated by photographs or images uploaded by Facebook Users including, but not

25 limited to, Haystack.

26 **RESPONSE TO INTERROGATORY NO. 17:**

27 Facebook incorporates by reference its Preliminary Statement and General Objections set

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Data Center Locations



**Exhibit 6 to
Nadolenco Declaration**

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12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN FRANCISCO DIVISION**

15
16 IN RE FACEBOOK BIOMETRIC
INFORMATION PRIVACY LITIGATION

17 THIS DOCUMENT RELATES TO:
18 ALL ACTIONS

Master Docket No. 3:15-cv-3747-JD

**FACEBOOK INC.'S RESPONSE TO
PLAINTIFFS' FIRST SET OF
REQUESTS FOR ADMISSION**

Hon. James Donato

19
20
21
22
23 PROPOUNDING PARTY: Plaintiffs Carlo Licata, Nimesh Patel, and Adam Pezen

24 RESPONDING PARTY: Defendant Facebook, Inc.
25
26
27
28

1 Pursuant to Rules 26 and 36 of the Federal Rules of Civil Procedure, Defendant Facebook,
2 Inc. (“Facebook”) responds to Plaintiffs Carlo Licata, Nimesh Patel, and Adam Pezen’s
3 (“Plaintiffs”) First Set of Requests for Admission (collectively, the “Requests,” individually a
4 “Request”) as follows.

5 **PRELIMINARY STATEMENT**

6 Facebook’s responses to the Requests are made solely for the purpose of this action.
7 Each response is made subject to all objections as to competence, relevance, materiality,
8 propriety, admissibility, privilege, privacy, proprietary information, trade secrets and the like, and
9 any and all other objections on grounds that would require the exclusion of any response herein if
10 such were offered in Court, all of which objections and grounds are reserved and may be
11 interposed at any time, including at the time of trial. Facebook’s responses are not intended to be,
12 and shall not be construed as, a waiver by Facebook of any or all objection(s) to the Requests.

13 No incidental or implied admissions are intended in these responses. Facebook’s response
14 to any Request should not be taken as an admission that Facebook accepts or admits the
15 existence of any fact(s) or any document(s) assumed by that Request or that such response
16 constitutes admissible evidence. Facebook’s response to any such Request is not intended to be,
17 and shall not be construed as, a waiver by Facebook of any or all objection(s) to the Request.
18 Facebook has not completed its (a) investigation of the facts relating to this case, (b) discovery in
19 this action, or (c) preparation for trial. The following responses are based upon information
20 known at this time and are given without prejudice to Facebook’s right to amend, supplement or
21 revise these responses with any subsequently discovered information.

22 **GENERAL OBJECTIONS**

23 Facebook makes and hereby incorporates by reference the following general objections,
24 whether or not separately set forth, in response to each Request:

25 1. Facebook objects to each Request to the extent that it seeks information protected
26 by the attorney-client privilege, the work-product doctrine, a confidentiality agreement, and/or
27 information that is otherwise privileged, protected or confidential pursuant to any applicable
28 doctrine, statute or rule. Such responses as may hereafter be given shall not include any

1 information protected by such privileges, doctrines, statutes or rules, and inadvertent disclosure of
2 such information shall not be deemed a waiver of any such privilege, protection or
3 confidentiality.

4 2. Facebook objects to each Request to the extent it seeks private, proprietary, trade
5 secret, confidential business or technical information, and/or private or personal information,
6 including any information that is protected under any provision of law, including without
7 limitation Article I of the California Constitution. To the extent that an otherwise properly
8 framed Request calls for the production of such information, Facebook will produce this
9 information only in accordance with the Stipulated Protective Order (Dkt. 87) governing
10 discovery in this action, as entered by the Court on February 12, 2016 (Dkt. 88).

11 3. Facebook objects to each Request to the extent it is overly broad or is otherwise
12 not reasonably limited as to time or subject matter.

13 4. Facebook objects to each Request to the extent that the discovery burden it seeks
14 to impose on Facebook is not proportional to the needs of the case in accordance with Rule
15 26(b)(1) and/or is not relevant to any party's claim or defense or reasonably likely to lead to the
16 discovery of admissible evidence.

17 5. Facebook objects to each Request to the extent it assumes facts not in evidence.
18 Unless expressly admitted, Facebook does not admit or agree with any explicit or implicit
19 assumptions made in these Requests.

20 6. Facebook objects to each Request to the extent it is vague, ambiguous,
21 unintelligible, or otherwise lacking in particularization.

22 7. Facebook objects to Plaintiffs' definition of "Biometric Identifier(s),"
23 "Faceprint(s)," and "Face Template(s)" as vague, ambiguous, overly broad, and circular insofar
24 as Plaintiffs purport to define "Biometric Identifier(s)" as a "Faceprint" or "Template," which are
25 in turn defined by Plaintiffs as "Biometric Identifier(s) ..." In responding to these Requests,
26 Facebook will interpret the term "Biometric Identifier(s)" consistent with its definition as set forth
27 in 740 ILCS 14/10, i.e., "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face
28 geometry," but not "photographs" or "information derived from" photographs. Further, Facebook

1 objects to Plaintiffs' definitions of "Faceprint(s)" and "Face Template(s)" to the extent they
2 suggest or imply that Facebook has created, stored, or used any "Biometric Identifier(s)," as that
3 term is defined in 740 ILCS 14/10. To the extent that Facebook references the terms
4 "Faceprint(s)" or "Face Template(s)" in the course of responding to these Requests, such
5 reference does not and should not be construed to indicate Facebook's agreement with Plaintiffs'
6 definitions for the terms.

7 8. Facebook objects to Plaintiffs' definitions of "Face Recognition," "Facial
8 Recognition," and "Face Finding" as vague, ambiguous, and overly broad. In responding to these
9 Requests, Facebook will interpret the terms "Face Recognition," "Facial Recognition," and "Face
10 Finding" to mean the process by which Facebook derives information from a photograph
11 uploaded by a person with a Facebook account and compares it to information previously derived
12 from pictures of that person's Facebook friends in order to suggest a "tag" (the "Challenged
13 Technology").

14 9. Facebook objects to Plaintiffs' definitions of "Facebook," "Defendant," "You," or
15 "Your" as vague, ambiguous, overly broad, and unduly burdensome to the extent that they
16 purport to require Facebook to provide responses on behalf of any entity other than Facebook.

17 10. Facebook objects to Plaintiffs' definition of "User(s)" as overly broad and unduly
18 burdensome to the extent that it purports to require Facebook to provide information related to
19 any individual that has at any point in time had a Facebook account.

20 11. Facebook objects to the term "Relevant Time Period" as overly broad and unduly
21 burdensome for several reasons, including that the Challenged Technology was not developed for
22 Facebook or made available to people with Facebook accounts before 2010. Moreover, the
23 claims at issue in this litigation are subject to applicable limitations periods of two years under
24 735 ILCS 5/13-202 (two-year limitations period to recover a statutory penalty) and/or five years
25 under 735 ILCS 5/13-205 (five-year limitations period for "all civil actions not otherwise
26 provided for"). Unless otherwise indicated, Facebook's responses to each Request will be limited
27 to the time period from January 1, 2010 to August 28, 2015 (the date that the Consolidated
28 Amended Complaint was filed in this matter).

1 18. Facebook incorporates by reference these General Objections into each and every
2 specific objection and response below. The fact that an answer is given by Facebook does not
3 waive any of its general or specific objections.

4 In addition to the above-stated objections to all of the Requests in general, Facebook also
5 has specific objections to each Request as explained below.

6 **RESPONSE TO REQUESTS FOR ADMISSION**

7 **REQUEST FOR ADMISSION NO. 1:**

8 Admit that Facebook’s Facial Recognition technology has generated Faceprints or Face
9 Templates when photographs or images that containing faces were uploaded to Facebook.

10 **RESPONSE TO REQUEST FOR ADMISSION NO. 1:**

11 Facebook incorporates by reference its Preliminary Statement and General Objections set
12 forth above. Facebook objects to the use of the phrase “photographs or images that containing
13 [*sic*] faces” in this Request as vague, ambiguous, overly broad, unduly burdensome, and to the
14 extent that this phrase suggests or implies that any aspect of Facebook’s services is subject to the
15 BIPA. Facebook further objects to the use of the terms “Faceprints,” “Face Templates,” and
16 “Facial Recognition” in this Request for the reasons set forth in General Objection Nos. 7 and 8,
17 above. Facebook further objects to this Request to the extent that it seeks discovery with respect
18 to persons not parties to this action, including putative class members, as this action has not been
19 certified as a class action. Facebook further objects to this Request on the ground that it is unduly
20 argumentative and calls for a conclusion of law.

21 Subject to and without waiving these or its General Objections: Denied. Facebook
22 specifically denies that it has collected, stored, or used any “biometric identifiers” or “biometric
23 information” as those terms are defined in 740 ILCS 14/10.

24 **REQUEST FOR ADMISSION NO. 2:**

25 Admit that Facebook’s Facial Recognition technology has collected Biometric Identifiers
26 from photographs or images containing faces that were uploaded to Facebook.

27 **RESPONSE TO REQUEST FOR ADMISSION NO. 2:**

28 Facebook incorporates by reference its Preliminary Statement and General Objections set

1 forth above. Facebook objects to the use of the phrase “photographs or images containing faces”
2 in this Request as vague, ambiguous, overly broad, unduly burdensome, and to the extent that this
3 phrase suggests or implies that any aspect of Facebook’s services is subject to the BIPA.

4 Facebook further objects to the use of the terms “Biometric Identifiers” and “Facial Recognition”
5 in this Request for the reasons set forth in General Objection Nos. 7 and 8, above. Facebook
6 further objects to this Request to the extent that it seeks discovery with respect to persons not
7 parties to this action, including putative class members, as this action has not been certified as a
8 class action. Facebook further objects to this Request on the ground it is unduly argumentative
9 and calls for a conclusion of law.

10 Subject to and without waiving these or its General Objections: Denied. Facebook
11 specifically denies that it has collected, stored, or used any “biometric identifiers” or “biometric
12 information” as those terms are defined in 740 ILCS 14/10.

13 **REQUEST FOR ADMISSION NO. 3:**

14 Admit that Facebook’s Facial Recognition technology converts the measurements of
15 facial features or Biometric Identifiers from faces uploaded in photographs or images into
16 mathematical codes that constitute a Faceprint or Face Template.

17 **RESPONSE TO REQUEST FOR ADMISSION NO. 3:**

18 Facebook incorporates by reference its Preliminary Statement and General Objections set
19 forth above. Facebook objects to the use of the phrases “measurements of facial features,” “faces
20 uploaded in photographs,” and “mathematical codes” in this Request as vague, ambiguous, overly
21 broad, unduly burdensome, and to the extent that these phrases suggest or imply that any aspect
22 of Facebook’s services is subject to the BIPA. Facebook further objects to the use of the terms
23 “Biometric Identifiers,” “Facial Recognition,” “Faceprint,” and “Face Template” in this Request
24 for the reasons set forth in General Objection Nos. 7 and 8, above. Facebook further objects to
25 this Request to the extent that it seeks discovery with respect to persons not parties to this action,
26 including putative class members, as this action has not been certified as a class action. Facebook
27 further objects to this Request on the ground that it is unduly argumentative and calls for a
28 conclusion of law.

1 Subject to and without waiving these or its General Objections: Denied. Facebook
2 specifically denies that it has collected, stored, or used any “biometric identifiers” or “biometric
3 information” as those terms are defined in 740 ILCS 14/10.

4 **REQUEST FOR ADMISSION NO. 4:**

5 Admit that Facebook stored Faceprints or Face Templates created from information
6 extracted from photographs or images that contain faces uploaded by Facebook Users.

7 **RESPONSE TO REQUEST FOR ADMISSION NO. 4:**

8 Facebook incorporates by reference its Preliminary Statement and General Objections set
9 forth above. Facebook objects to the use of the phrases “extracted from” and “photographs or
10 images that contain faces” in this Request as vague, ambiguous, overly broad, unduly
11 burdensome, and to the extent that these phrases suggest or imply that any aspect of Facebook’s
12 services is subject to the BIPA. Facebook further objects to the use of the terms “Faceprints,”
13 “Face Templates,” and “Users” in this Request for the reasons set forth in General Objection Nos.
14 7 and 10, above. Facebook further objects to this Request to the extent that it seeks discovery
15 with respect to persons not parties to this action, including putative class members, as this action
16 has not been certified as a class action. Facebook further objects to this Request on the ground
17 that it is unduly argumentative and calls for a conclusion of law.

18 Subject to and without waiving these or its General Objections: Denied. Facebook
19 specifically denies that it has collected, stored, or used any “biometric identifiers” or “biometric
20 information” as those terms are defined in 740 ILCS 14/10.

21 **REQUEST FOR ADMISSION NO. 5:**

22 Admit that the Face Templates generated by Facebook’s Facial Recognition technology
23 has been based on facial measurements between facial features including, but not limited to, the
24 distance between a person’s eyes, nose and ears.

25 **RESPONSE TO REQUEST FOR ADMISSION NO. 5:**

26 Facebook incorporates by reference its Preliminary Statement and General Objections set
27 forth above. Facebook objects to the use of the phrases “facial measurements between facial
28 features” and “distance between a person’s eyes, nose and ears” in this Request as vague,

1 ambiguous, overly broad, unduly burdensome, and to the extent that these phrases suggest or
2 imply that any aspect of Facebook’s services is subject to the BIPA. Facebook further objects to
3 the use of the terms “Face Templates” and “Facial Recognition” in this Request for the reasons
4 set forth in General Objection Nos. 7 and 8, above. Facebook further objects to this Request on
5 the ground that it is unduly argumentative and calls for a conclusion of law.

6 Subject to and without waiving these or its General Objections: Denied. Facebook
7 specifically denies that it has collected, stored, or used any “biometric identifiers” or “biometric
8 information” as those terms are defined in 740 ILCS 14/10.

9 **REQUEST FOR ADMISSION NO. 6:**

10 Admit that during the Relevant Time Period, Facebook’s ability to suggest tags of photos
11 involved the scanning of photos or images of faces uploaded to Facebook by Facebook Users and
12 comparing them to other photos, images or templates stored by Facebook.

13 **RESPONSE TO REQUEST FOR ADMISSION NO. 6:**

14 Facebook incorporates by reference its Preliminary Statement and General Objections set
15 forth above. Facebook objects to the use of the terms/phrases “scanning of photos or images of
16 faces” and “comparing them to other photos, images, or templates” in this Request as vague,
17 ambiguous, overly broad, unduly burdensome, and to the extent that these terms/phrases suggest
18 or imply that any aspect of Facebook’s services is subject to the BIPA. Facebook further objects
19 to the use of the terms “Relevant Time Period” and “Users” in this Request for the reasons set
20 forth in General Objections Nos. 10 and 11, above. Facebook further objects to this Request to
21 the extent that it seeks discovery with respect to persons not parties to this action, including
22 putative class members, as this action has not been certified as a class action. Facebook further
23 objects to this Request to the extent that it is unduly argumentative and calls for a conclusion of
24 law.

25 Subject to and without waiving these or its General Objections: Denied. In 2010,
26 Facebook started rolling out a feature called “Tag Suggestions” to make it easier for people to tag
27 their Facebook friends in photos. Tag Suggestions uses facial recognition software to suggest
28 tags for photos of people with Facebook accounts under certain conditions. If an adult in the

1 United States with a Facebook account is (1) tagged in a photo uploaded by him or one of his
2 Facebook friends, and (2) the person’s privacy settings permit his Facebook friends to see tag
3 suggestions when photographs that look like him are uploaded, then Facebook may suggest that
4 the person be tagged by friends in other photographs. To facilitate this, Facebook creates a
5 numerical summary of data derived from the person’s face as it appears in tagged photos of him.
6 This numerical summary, which is created using machine learning, is known as a “template.” In
7 no event are templates collected or saved for any people who do not have Facebook accounts.
8 When a person with a Facebook account uploads a new photograph that appears to display faces,
9 Facebook compares information about those faces to the templates of the Facebook friends with
10 whom the uploader interacts most frequently. Facebook then uses that comparison, with the
11 limitations discussed above, to make suggestions about which Facebook friends, if any, should be
12 tagged in the photo. The uploader can then accept or reject the tag. If the tag is accepted, then
13 the information derived from the uploaded photo will be used to update and refine the tagged
14 person’s template. If the tag is rejected or subsequently removed (including by the person who is
15 tagged), then no information derived from that photo is stored in connection with Tag
16 Suggestions. Facebook specifically denies that it has collected, stored, or used any “biometric
17 identifiers” or “biometric information” as those terms are defined in 740 ILCS 14/10.

18 **REQUEST FOR ADMISSION NO. 7:**

19 Admit that Facebook did not receive written prior consent from any Plaintiff to collect,
20 obtain or store any of Plaintiff’s Biometric Identifiers.

21 **RESPONSE TO REQUEST FOR ADMISSION NO. 7:**

22 Facebook incorporates by reference its Preliminary Statement and General Objections set
23 forth above. Facebook objects to the use of the phrases “written prior consent” and “collect,
24 obtain or store” in this Request as vague, ambiguous, overly broad, unduly burdensome, and to
25 the extent that these phrases suggest or imply that any aspect of Facebook’s services is subject to
26 the BIPA. Facebook further objects to the use of the term “Biometric Identifiers” in this Request
27 for the reasons set forth in General Objection No. 7, above. Facebook further objects to this
28 Request on the ground that it is unduly argumentative and calls for a conclusion of law.

1 Subject to and without waiving these or its General Objections: Denied. Facebook
2 specifically denies that it has collected, stored, or used any “biometric identifiers” or “biometric
3 information” as those terms are defined in 740 ILCS 14/10.

4 **REQUEST FOR ADMISSION NO. 8:**

5 Admit that during the Relevant Time Period, Facebook did not have a written policy,
6 made available to the public, establishing a retention schedule and guidelines for permanently
7 destroying Biometric Identifiers that it collected.

8 **RESPONSE TO REQUEST FOR ADMISSION NO. 8:**

9 Facebook incorporates by reference its Preliminary Statement and General Objections set
10 forth above. Facebook objects to the use of the terms/phrases “written policy,” “available to the
11 public,” “collected,” and “retention schedule and guidelines for permanently destroying” in this
12 Request as vague, ambiguous, overly broad, unduly burdensome, and to the extent that these
13 terms/phrases suggest or imply that any aspect of Facebook’s services is subject to the BIPA.
14 Facebook further objects to the use of the terms “Biometric Identifiers” and “Relevant Time
15 Period” in this Request for the reasons set forth in General Objection Nos. 7 and 10, above.
16 Facebook further objects to this Request on the ground that it is unduly argumentative and calls
17 for a conclusion of law.

18 Subject to and without waiving these or its General Objections: Denied. Facebook
19 specifically denies that it has collected, stored, or used any “biometric identifiers” or “biometric
20 information” as those terms are defined in 740 ILCS 14/10.

21 **REQUEST FOR ADMISSION NO. 9:**

22 Admit that Facebook is in possession of Biometric Identifiers collected from Facebook
23 Users’ photos or images uploaded from IP addresses in the State of Illinois.

24 **RESPONSE TO REQUEST FOR ADMISSION NO. 9:**

25 Facebook incorporates by reference its Preliminary Statement and General Objections set
26 forth above. Facebook objects to the use of the phrase “collected from ... photos or images
27 uploaded from IP addresses in the State of Illinois” in this Request as vague, ambiguous, overly
28 broad, unduly burdensome, and to the extent that this phrase suggests or implies that any aspect

1 of Facebook's services is subject to the BIPA. Facebook further objects to the use of the terms
2 "Biometric Identifiers" and "Users" in this Request for the reasons set forth in General Objection
3 Nos. 7 and 10, above. Facebook further objects to this Request as overbroad, unduly
4 burdensome, and not relevant to any party's claim or defense or proportional to the needs of the
5 case. The putative class that Plaintiffs seek to represent in this litigation is defined as "[a]ll
6 persons who had their biometric identifiers, faceprints, or face templates collected, captured,
7 received, or otherwise obtained by Facebook while residing in Illinois." Complaint ¶ 53. This
8 Request, however, seeks an admission from Facebook regarding photographs uploaded from
9 certain IP addresses, regardless of whether (1) those photographs are of people with Facebook
10 accounts who are Illinois residents, or (2) any information derived from those photographs has
11 been collected, stored, or used in connection with the Challenged Technology. Facebook further
12 objects to this Request to the extent that it seeks discovery with respect to persons not parties to
13 this action, including putative class members, as this action has not been certified as a class
14 action. Facebook further objects to this Request on the ground that it is unduly argumentative and
15 calls for a conclusion of law.

16 Subject to and without waiving these or its General Objections: Denied. Facebook
17 specifically denies that it has collected, stored, or used any "biometric identifiers" or "biometric
18 information" as those terms are defined in 740 ILCS 14/10.

19 **REQUEST FOR ADMISSION NO. 10:**

20 Admit that Facebook is in possession of Biometric Identifiers collected from Facebook
21 Users whose profiles identify them as living in Illinois.

22 **RESPONSE TO REQUEST FOR ADMISSION NO. 10:**

23 Facebook incorporates by reference its Preliminary Statement and General Objections set
24 forth above. Facebook objects to the use of the phrases "collected from" and "whose profiles
25 identify them as living in Illinois" in this Request as vague, ambiguous, overly broad, unduly
26 burdensome, and to the extent that these phrases suggest or imply that any aspect of Facebook's
27 services is subject to the BIPA. Facebook further objects to the use of the terms "Biometric
28 Identifiers" and "Users" in this Request for the reasons set forth in General Objection Nos. 7 and

1 10, above. Facebook further objects to this Request to the extent that it seeks discovery with
2 respect to persons not parties to this action, including putative class members, as this action has
3 not been certified as a class action. Facebook further objects to this Request on the ground that it
4 is unduly argumentative and calls for a conclusion of law.

5 Subject to and without waiving these or its General Objections: Denied. Facebook
6 specifically denies that it has collected, stored, or used any “biometric identifiers” or “biometric
7 information” as those terms are defined in 740 ILCS 14/10.

8 **REQUEST FOR ADMISSION NO. 11:**

9 Admit that Facebook intentionally collected Biometric Identifiers from faces detected in
10 photos or images uploaded to Facebook’s website.

11 **RESPONSE TO REQUEST FOR ADMISSION NO. 11:**

12 Facebook incorporates by reference its Preliminary Statement and General Objections set
13 forth above. Facebook objects to the use of the phrases “intentionally collected” and “faces
14 detected in photos or images uploaded to Facebook[]” in this Request as vague, ambiguous,
15 overly broad, unduly burdensome, and to the extent that these phrases suggest or imply that any
16 aspect of Facebook’s services is subject to the BIPA. Facebook further objects to the use of the
17 term “Biometric Identifiers” in this Request for the reasons set forth in General Objection No. 7,
18 above. Facebook further objects to this Request to the extent that it seeks discovery with respect
19 to persons not parties to this action, including putative class members, as this action has not been
20 certified as a class action. Facebook further objects to this Request on the ground that it is unduly
21 argumentative and calls for a conclusion of law.

22 Subject to and without waiving these or its General Objections: Denied. Facebook
23 specifically denies that it has collected, stored, or used any “biometric identifiers” or “biometric
24 information” as those terms are defined in 740 ILCS 14/10.

25 **REQUEST FOR ADMISSION NO. 12:**

26 Admit that Facebook did not receive prior written consent from any individual to collect,
27 obtain or store that individual’s Biometric Identifiers.

28 **RESPONSE TO REQUEST FOR ADMISSION NO. 12:**

1 Facebook incorporates by reference its Preliminary Statement and General Objections set
2 forth above. Facebook objects to the use of the phrases “prior written consent” and “collect,
3 obtain, or store” in this Request as vague, ambiguous, overly broad, unduly burdensome, and to
4 the extent that these phrases suggest or imply that any aspect of Facebook’s services is subject to
5 the BIPA. Facebook further objects to the use of the term “Biometric Identifiers” in this Request
6 for the reasons set forth in General Objection No. 7, above. Facebook further objects to this
7 Request to the extent that it seeks discovery with respect to persons not parties to this action,
8 including putative class members, as this action has not been certified as a class action. Facebook
9 further objects to this Request on the ground that it is unduly argumentative and calls for a
10 conclusion of law.

11 Subject to and without waiving these or its General Objections: Denied. Facebook
12 specifically denies that it has collected, stored, or used any “biometric identifiers” or “biometric
13 information” as those terms are defined in 740 ILCS 14/10.

14 **REQUEST FOR ADMISSION NO. 13:**

15 Admit that Facebook did not inform any individual of the specific purpose for which it
16 intended to create a Face Template of that individual before Facebook collected Biometric
17 Identifiers from that individual.

18 **RESPONSE TO REQUEST FOR ADMISSION NO. 13:**

19 Facebook incorporates by reference its Preliminary Statement and General Objections set
20 forth above. Facebook objects to the use of the terms/phrases “inform,” “collected,” and “specific
21 purpose for which it intended” used in this Request as vague, ambiguous, overly broad, unduly
22 burdensome, and to the extent that these terms/phrases suggest or imply that any aspect of
23 Facebook’s services is subject to the BIPA. Facebook further objects to the use of the terms
24 “Biometric Identifiers” and “Face Template” in this Request for the reasons set forth in General
25 Objection No. 7, above. Facebook further objects to this Request to the extent that it seeks
26 discovery with respect to persons not parties to this action, including putative class members, as
27 this action has not been certified as a class action. Facebook further objects to this Request on the
28 ground that it is unduly argumentative and calls for a conclusion of law.

1 Subject to and without waiving these or its General Objections: Denied. Facebook
2 specifically denies that it has collected, stored, or used any “biometric identifiers” or “biometric
3 information” as those terms are defined in 740 ILCS 14/10.

4 **REQUEST FOR ADMISSION NO. 14:**

5 Admit that Facebook did not inform any individual of the length or term for which that
6 individual’s Biometric Identifiers were being collected, stored and used, prior to collection.

7 **RESPONSE TO REQUEST FOR ADMISSION NO. 14:**

8 Facebook incorporates by reference its Preliminary Statement and General Objections set
9 forth above. Facebook objects to the use of the terms/phrases “inform,” “length or term,” and
10 “collected, stored, and used” in this Request as vague, ambiguous, overly broad, unduly
11 burdensome, and to the extent that these terms/phrases suggest or imply that any aspect of
12 Facebook’s services is subject to the BIPA. Facebook further objects to the use of the term
13 “Biometric Identifiers” in this Request for the reasons set forth in General Objection No. 7,
14 above. Facebook further objects to this Request to the extent that it seeks discovery with respect
15 to persons not parties to this action, including putative class members, as this action has not been
16 certified as a class action. Facebook further objects to this Request on the ground that it is unduly
17 argumentative and calls for a conclusion of law.

18 Subject to and without waiving these or its General Objections: Denied. Facebook
19 specifically denies that it has collected, stored, or used any “biometric identifiers” or “biometric
20 information” as those terms are defined in 740 ILCS 14/10.

21
22 Dated: July 15, 2016

MAYER BROWN LLP
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28

Exhibit 7 to
Nadolenco Declaration

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12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN FRANCISCO DIVISION**

15 IN RE FACEBOOK BIOMETRIC
16 INFORMATION PRIVACY LITIGATION

17 THIS DOCUMENT RELATES TO:
18 ALL ACTIONS

Master Docket No. 3:15-cv-03747-JD

**FACEBOOK INC.'S RESPONSE TO
PLAINTIFFS' THIRD SET OF
REQUESTS FOR PRODUCTION OF
DOCUMENTS**

Hon. James Donato

23 PROPOUNDING PARTY: Plaintiffs Carlo Licata, Nimesh Patel, and Adam Pezen

24 RESPONDING PARTY: Defendant Facebook, Inc.

1 Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, Defendant Facebook,
2 Inc. (“Facebook”), by and through its counsel of record, hereby objects and responds to Plaintiffs’
3 Third Set of Requests for Production of Documents to Defendant Facebook, Inc. (collectively, the
4 “Requests,” individually a “Request”) as follows.¹

5 **PRELIMINARY STATEMENT**

6 Facebook’s responses to the Requests are made solely for the purpose of this action. Each
7 response is made subject to all objections as to competence, relevance, materiality, propriety,
8 admissibility, privilege, privacy, proprietary information, trade secrets and the like, and any and
9 all other objections on grounds that would require the exclusion of any response herein if such
10 were offered in Court, all of which objections and grounds are reserved and may be interposed at
11 any time, including at the time of trial. Facebook’s responses are not intended to be, and shall not
12 be construed as, a waiver by Facebook of any or all objection(s) to the Requests.

13 No incidental or implied admissions are intended in these responses. Facebook’s response
14 to any Request should not be taken as an admission that Facebook accepts or admits the existence
15 of any fact(s) or any document(s) assumed by that Request or that such response constitutes
16 admissible evidence. Facebook’s response to any such Request is not intended to be, and shall
17 not be construed as, a waiver by Facebook of any or all objection(s) to the Request. Facebook
18 has not completed its (a) investigation of the facts relating to this case, (b) discovery in this
19 action, or (c) preparation for trial. The following responses are based upon information known at
20 this time and are given without prejudice to Facebook’s right to amend, supplement or revise
21 these responses with any subsequently discovered information.

22 **GENERAL OBJECTIONS**

23 Facebook makes and hereby incorporates by reference the following general objections,
24 whether or not separately set forth, in response to each Request:

25
26
27 ¹ Facebook notes that Plaintiffs previously served a “Third Set of Requests for the
28 Expedited Production of Documents Directed to Facebook, Inc.” in this matter on January 20,
2016, to which Facebook served responses on February 1, 2016.

1 7. Facebook objects to Plaintiffs’ definition of “Biometric Identifier(s),”
2 “Faceprint(s),” and “Face Template(s)” as vague, ambiguous, overly broad, and circular insofar
3 as Plaintiffs purport to define “Biometric Identifier(s)” as a “Faceprint” or “Template,” which are
4 in turn defined by Plaintiffs as “Biometric Identifier(s) ...” In responding to these Requests,
5 Facebook will interpret the term “Biometric Identifier(s)” consistent with its definition as set forth
6 in 740 ILCS 14/10, *i.e.*, “a retina or iris scan, fingerprint, voiceprint, or scan of hand or face
7 geometry,” but not “photographs” or “information derived from” photographs. Further, Facebook
8 objects to Plaintiffs’ definitions of “Faceprint(s)” and “Face Template(s)” to the extent they
9 suggest or imply that Facebook has created, stored, or used any “Biometric Identifier(s),” as that
10 term is defined in 740 ILCS 14/10. To the extent that Facebook references the terms
11 “Faceprint(s)” or “Face Template(s)” in the course of responding to these Requests, such
12 reference does not and should not be construed to indicate Facebook’s agreement with Plaintiffs’
13 definitions for the terms.

14 8. Facebook objects to Plaintiffs’ definition of “Communications” as vague,
15 ambiguous, overly broad, and unduly burdensome. Facebook further objects to the definition of
16 “Communications” as vague and ambiguous insofar as it includes “documents,” another term for
17 which no definition has been provided. In responding to these Requests, Facebook will interpret
18 the terms “communications” and “documents” in accordance with their ordinary usage and
19 common understanding.

20 9. Facebook objects to Plaintiffs’ definitions of “Facebook,” “Defendant,” “You,” or
21 “Your” as vague, ambiguous, overly broad, and unduly burdensome to the extent that they
22 purport to require Facebook to collect or produce documents or information from any entity other
23 than Facebook.

24 10. Facebook objects to Plaintiffs’ definitions of “Face Recognition,” “Facial
25 Recognition,” and “Face Finding” as vague, ambiguous, and overly broad. In responding to these
26 Requests, Facebook will interpret the terms “Face Recognition,” “Facial Recognition,” and “Face
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1 Finding” to mean the process by which Facebook derives information from a photograph
2 uploaded by a person with a Facebook account and compares it to information previously derived
3 from pictures of that person’s Facebook friends in order to suggest a “tag” (the “Challenged
4 Technology”).

5 11. Facebook objects to the term “Relevant Time Period” as overly broad and unduly
6 burdensome for several reasons, including that the Challenged Technology was not developed for
7 Facebook or made available to people with Facebook accounts before 2010. Moreover, the
8 claims at issue in this litigation are subject to applicable limitations periods of two years under
9 735 ILCS 5/13-202 (two-year limitations period to recover a statutory penalty) and/or five years
10 under 735 ILCS 5/13-205 (five-year limitations period for “all civil actions not otherwise
11 provided for”). Unless otherwise indicated, Facebook’s responses to each Request will be limited
12 to the time period from January 1, 2010 to August 28, 2015 (the date that the Consolidated
13 Amended Complaint was filed in this matter).

14 12. Facebook objects to all other “Definitions” and “Instructions” to the extent they
15 are vague, ambiguous, overly broad, and/or unduly burdensome or exceed the obligations
16 imposed by the Federal Rules of Civil Procedure or other applicable rules.

17 13. Facebook objects to each Request to the extent that it purports to impose any
18 obligations not imposed by the Federal Rules of Civil Procedure, the Federal Rules of Evidence,
19 the Northern District of California Civil Local Rules, the Court’s standing orders, or any other
20 applicable rules or law. Facebook will respond to these Requests in accordance with its
21 obligations under applicable rules and law.

22 14. Facebook objects to each Request to the extent that it seeks information with
23 respect to persons not parties to this action, including putative class members, as this action has
24 not been certified as a class action. Consequently, Requests pertaining to putative class members
25 or which relate to the merits of putative class members’ claims are overly broad and/or call for
26

1 irrelevant information, and would impose discovery burdens on Facebook that are not
2 proportional to the needs of the case.

3 15. Facebook objects to the instructions contained in Sections III and IV to the extent
4 that they are vague, ambiguous, unduly burdensome, unreasonably expensive in light of their
5 likely benefit, and not proportional to the needs of the case. Facebook further objects to the
6 extent that these instructions purport to impose any obligations not imposed by the Federal Rules
7 of Civil Procedure, the Federal Rules of Evidence, the Northern District of California Civil Local
8 Rules, the Court's standing orders, or any other applicable rules or law. Further, as the parties are
9 currently negotiating a separate Stipulated Order Re: Discovery of Electronically Stored
10 Information, Facebook will only produce documents and information responsive to these
11 Requests in accordance with that Order upon its approval and entry by the Court.

12 16. Facebook objects to each Request as overbroad and unduly burdensome to the
13 extent it is duplicative or overlapping of discovery requests as may be propounded in *Gullen v.*
14 *Facebook, Inc.*, Case No. 3:16-cv-00937-JD. Consistent with the Court's instructions during the
15 parties' joint case management conference held on June 29, 2016, Facebook reserves the right to
16 make combined production(s) of documents or information that are responsive to either or both
17 sets of discovery requests in these matters to the extent doing so will save Facebook from
18 incurring unnecessary burden or expense.

19 * * * * *

20 17. Facebook's responses below indicating that documents will be produced means
21 that Facebook will produce documents responsive to a Request if they exist, are in Facebook's
22 possession, custody, or control after a reasonable search of appropriate sources, and are not
23 privileged or otherwise protected from discovery.

24 18. Facebook reserves the right to assert additional general and specific objections to
25 the production of documents as appropriate and to supplement these objections and responses.

1 Facebook also reserves the right to assert additional general and specific objections arising from
2 matters discovered during the course of this litigation.

3 19. To the extent Facebook has objected to or refused to produce documents in
4 response to any given Request, and to the extent that Plaintiffs take issue with any such objection
5 or refusal, Facebook is willing to meet and confer with Plaintiffs to determine whether a
6 reasonable, mutually acceptable compromise might be reached.

7 20. Facebook reserves its right to limit its search for and review of documents to
8 document custodians who possess a direct connection to the subject matter of these Requests and
9 the claims and defenses at issue in this litigation. Similarly, Facebook reserves its right to use
10 electronic searching techniques, including but not limited to the use of reasonable search terms, to
11 avoid the need to manually inspect every potentially responsive document.

12 21. Facebook incorporates by reference these General Objections into each and every
13 specific objection and response below. The fact that an answer is given or documents are
14 provided by Facebook does not waive any of its general or specific objections.

15 In addition to the above-stated objections to all of the Requests in general, Facebook also
16 has specific objections to each Request as explained below.

17 **RESPONSE TO REQUESTS FOR PRODUCTION OF DOCUMENTS**

18 **REQUEST NO. 1:**

19 All Documents and Communications concerning the current or prospective monetization
20 or financial impact of Facial Recognition technologies.

21 **RESPONSE TO REQUEST NO. 1:**

22 Facebook incorporates by reference its Preliminary Statement and General Objections set
23 forth above. Facebook objects to the use of the phrase “current or prospective monetization or
24 financial impact” in this Request as undefined, vague, ambiguous, overly broad, and/or unduly
25 burdensome, and to the extent it suggests or implies that any aspect of Facebook’s services is
26 subject to the BIPA. Facebook further objects to the use of the term “Facial Recognition” in this
27

1 Request for the reasons set forth in General Objection No. 10, above. Facebook objects to this
2 Request as not relevant to any party’s claim or defense, or proportional to the needs of the case.
3 Plaintiffs do not allege or claim any violation of 740 ILCS 14/15(c), which places restrictions on
4 certain entities “in possession of a biometric identifier or biometric information” from “sell[ing],
5 leas[ing], trad[ing], or otherwise profit[ing] from a person’s or a customer’s biometric identifier
6 or biometric information,” and therefore the information sought by this Request is irrelevant to
7 whether Facebook has violated the BIPA as Plaintiffs allege. Facebook further objects to this
8 Request as overly broad, unduly burdensome, and not relevant to any claim or defense insofar as
9 any “financial impact” associated with the Challenged Technology itself—as opposed to the
10 financial value of any information derived from photographs that may be collected or stored in
11 connection with the Challenged Technology—is not subject to the BIPA and is therefore
12 irrelevant. Facebook further objects to this Request on the ground that it calls for production of
13 “[a]ll Documents and Communications” that may be responsive to the Request, a standard that is
14 overly broad and/or unduly burdensome, and unreasonably expensive in light of its likely benefit,
15 taking into account the needs of the case. Facebook further objects to this Request to the extent
16 that it seeks to impose obligations over and above those imposed by the Federal Rules of Civil
17 Procedure and the Local Rules of this Court, and to the extent that it requests information beyond
18 the scope of discovery delimited by Federal Rule of Civil Procedure 26(b)(1). Facebook further
19 objects to this Request to the extent it seeks the production of private, proprietary, trade secret or
20 confidential business or technical information absent appropriate safeguards for the production of
21 such information. Facebook further objects to this Request to the extent it seeks information
22 protected from disclosure by the attorney-client and/or work-product privileges.

23 Subject to and without waiving these or its General Objections, Facebook states that based
24 upon a reasonably diligent investigation, which remains ongoing, it does not have any documents
25 that are responsive to this Request.

1 **REQUEST NO. 2:**

2 All Documents and Communications relating to the storage of Biometric Identifiers
3 including, but not limited to, Face Prints or Face Templates.

4 **RESPONSE TO REQUEST NO. 2:**

5 Facebook incorporates by reference its Preliminary Statement and General Objections set
6 forth above. Facebook objects to the use of the term “storage” in this Request as undefined,
7 vague, ambiguous, overly broad, and/or unduly burdensome, and to the extent it suggests or
8 implies that any aspect of Facebook’s services is subject to the BIPA. Facebook further objects to
9 the use of the terms “Biometric Identifiers,” “Face Prints,” and “Face Templates” in this Request
10 for the reasons set forth in General Objection No. 7, above. Facebook further objects to this
11 Request on the ground that it calls for production of “[a]ll Documents and Communications” that
12 may be responsive to the Request, a standard that is overly broad and/or unduly burdensome, and
13 unreasonably expensive in light of its likely benefit, taking into account the needs of the case.
14 Facebook further objects to this Request to the extent that it seeks to impose obligations over and
15 above those imposed by the Federal Rules of Civil Procedure and the Local Rules of this Court,
16 and to the extent that it requests information beyond the scope of discovery delimited by Federal
17 Rule of Civil Procedure 26(b)(1). Facebook further objects to this Request to the extent it seeks
18 the production of private, proprietary, trade secret or confidential business or technical
19 information absent appropriate safeguards for the production of such information. Facebook
20 further objects to this Request to the extent it seeks information protected from disclosure by the
21 attorney-client and/or work-product privileges.

22 Subject to and without waiving these or its General Objections, Facebook will search for
23 and produce non-privileged documents sufficient to show how information derived from
24 photographs is stored in connection with the Challenged Technology, to the extent such
25 documents exist. Facebook reserves the right to limit the scope of its production in response to
26 this Request according to the subject matter of Plaintiffs’ allegations and putative class definition.

REQUEST NO. 3:

All Documents and Communications relating to any historic, current or prospective value, profit, loss, financial metric or business valuation or service offering in connection with Biometric Identifiers or Face Templates collected from photographs or images.

RESPONSE TO REQUEST NO. 3:

Facebook incorporates by reference its Preliminary Statement and General Objections set forth above. Facebook objects to the use of the terms/phrases “current or prospective value,” “financial metric,” “business valuation,” “service offering,” and “images” in this Request as vague, ambiguous, overly broad, unduly burdensome, and to the extent that these terms/phrases suggest or imply that any aspect of Facebook’s services is subject to the BIPA. Facebook further objects to the use of the terms “Biometric Identifiers” and “Face Templates” in this Request for the reasons set forth in General Objection No. 7, above. Facebook objects to this Request as not relevant to any party’s claim or defense, or proportional to the needs of the case. Plaintiffs do not allege or claim any violation of 740 ILCS 14/15(c), which places restrictions on certain entities “in possession of a biometric identifier or biometric information” from “sell[ing], leas[ing], trad[ing], or otherwise profit[ing] from a person’s or a customer’s biometric identifier or biometric information,” and therefore, the information sought by this Request is irrelevant to whether Facebook has violated the BIPA as Plaintiffs allege. Facebook further objects to this Request as overly broad, unduly burdensome, and not relevant to any claim or defense insofar as any “current or prospective value” associated with the Challenged Technology itself—as opposed to the financial value of any information derived from photographs that may be collected or stored in connection with the Challenged Technology—is not subject to the BIPA and is therefore irrelevant. Facebook further objects to this Request on the ground that it calls for production of “[a]ll Documents and Communications” that may be responsive to the Request, a standard that is overly broad and/or unduly burdensome, and unreasonably expensive in light of its likely benefit, taking into account the needs of the case. Facebook further objects to this Request to the extent

1 that it seeks to impose obligations over and above those imposed by the Federal Rules of Civil
2 Procedure and the Local Rules of this Court, and to the extent that it requests information beyond
3 the scope of discovery delimited by Federal Rule of Civil Procedure 26(b)(1). Facebook further
4 objects to this Request to the extent it seeks the production of private, proprietary, trade secret or
5 confidential business or technical information absent appropriate safeguards for the production of
6 such information. Facebook further objects to this Request to the extent it seeks information
7 protected from disclosure by the attorney-client and/or work-product privileges.

8 Subject to and without waiving these or its General Objections, Facebook incorporates its
9 objections and response to Request No. 1, above, as if fully set forth herein.

10 **REQUEST NO. 4:**

11 All Documents and Communications relating to the Illinois Biometric Information
12 Privacy Act including, but not limited to, any Documents regarding compliance, non-compliance,
13 amendments or proposed amendments and correspondence with any government or elected
14 official, their staff, or any lobbyist organization concerning the same.

15 **RESPONSE TO REQUEST NO. 4:**

16 Facebook incorporates by reference its Preliminary Statement and General Objections set
17 forth above. Facebook objects to the use of the terms “correspondence,” “compliance,” “non-
18 compliance,” and “lobbying organization” in this Request as undefined, vague, ambiguous, overly
19 broad, and/or unduly burdensome, and to the extent these terms suggest or imply that any aspect
20 of Facebook’s services is subject to the BIPA. Facebook further objects to this Request as overly
21 broad, unduly burdensome, and not relevant to any party’s claim or defense, or proportional to the
22 needs of the case. Facebook objects to producing any documents or communications created and
23 disseminated within Facebook related to whether the Challenged Technology is subject to, or
24 complies with, the BIPA, on the ground that such materials are protected by the attorney-client
25 privilege and work-product doctrine. As to any documents or “correspondence” with government
26 entities, officials, or any “lobbyist organization” pertaining to amendments or proposed

1 amendments to the BIPA, Facebook objects to producing such discovery on the ground that it has
2 no bearing or relevance to any claim or defense, and the burden of searching for and producing
3 such discovery outweighs its likely benefit. Facebook further objects to this Request on the
4 grounds that petitioning activities are protected by the First Amendment pursuant to the *Noerr-*
5 *Pennington* doctrine. See *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S.
6 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 659 (1965). Facebook
7 further objects to this Request on the ground that it seeks compliance-related, legislation-related,
8 and other information protected from disclosure by the attorney-client privilege, the work-product
9 doctrine, or any other applicable privilege or doctrine. Facebook further objects to this Request
10 on the ground that it calls for production of “[a]ll Documents and Communications” that may be
11 responsive to the Request, a standard that is overly broad and/or unduly burdensome, and
12 unreasonably expensive in light of its likely benefit, taking into account the needs of the case.
13 Facebook further objects to this Request to the extent that it seeks to impose obligations over and
14 above those imposed by the Federal Rules of Civil Procedure and the Local Rules of this Court,
15 and to the extent that it requests information beyond the scope of discovery delimited by Federal
16 Rule of Civil Procedure 26(b)(1). Facebook further objects to this Request to the extent it seeks
17 the production of private, proprietary, trade secret or confidential business or technical
18 information absent appropriate safeguards for the production of such information.

19 Subject to and without waiving these or its General Objections, Facebook does not intend
20 to search for or produce documents, if any, that may be responsive to this Request.

21 **REQUEST NO. 5:**

22 All Documents and Communications relating to the financial or technological feasibility
23 or effect of compliance with the Illinois Biometric Information Privacy Act including, but not
24 limited to, disabling Facebook’s Facial Recognition or Tag Suggestion features.

25 **RESPONSE TO REQUEST NO. 5:**

26 Facebook incorporates by reference its Preliminary Statement and General Objections set
27

1 forth above. Facebook objects to the use of the terms/phrases “financial or technological
2 feasibility or effect” and “Tag Suggestion” in this Request as undefined, vague, ambiguous,
3 overly broad, unduly burdensome, and to the extent these terms/phrases suggest or imply that any
4 aspect of Facebook’s services is subject to the BIPA. Facebook further objects to the use of the
5 term “Facial Recognition” in this Request for the reasons set forth in General Objection No. 10,
6 above. Facebook further objects to this Request as overly broad, unduly burdensome, and not
7 relevant to any party’s claim or defense, or proportional to the needs of the case; the discovery
8 sought in this Request is wholly irrelevant to whether Facebook has violated the BIPA, as
9 Plaintiffs allege. In addition, the documents and communications sought by this Request are not
10 described with “reasonable particularity” as required by Rule 34(b)(1)(A) or as necessary to
11 permit Facebook to determine whether and to what extent any responsive documents or
12 communications exist within its possession, custody, or control. Facebook further objects to this
13 Request on the ground that it calls for production of “[a]ll Documents and Communications” that
14 may be responsive to the Request, a standard that is overly broad and/or unduly burdensome, and
15 unreasonably expensive in light of its likely benefit, taking into account the needs of the case.
16 Facebook further objects to this Request to the extent that it seeks to impose obligations over and
17 above those imposed by the Federal Rules of Civil Procedure and the Local Rules of this Court,
18 and to the extent that it requests information beyond the scope of discovery delimited by Federal
19 Rule of Civil Procedure 26(b)(1). Facebook further objects to this Request to the extent it seeks
20 the production of private, proprietary, trade secret or confidential business or technical
21 information absent appropriate safeguards for the production of such information. Facebook
22 further objects to this Request to the extent it seeks information protected from disclosure by the
23 attorney-client and/or work-product privileges.

24 Subject to and without waiving these or its General Objections, Facebook states that it is
25 willing to meet and confer with Plaintiffs to understand why Plaintiffs contend that documents
26 related to “the financial or technological feasibility or effect of compliance” with the BIPA and/or
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1 the potential “disabling” of the Challenged Technology are relevant to any claim or defense at
2 issue in the litigation, and what specific types of documents or information are being sought by
3 Plaintiffs through this Request.

4 **REQUEST NO. 6:**

5 All Documents and Communications concerning the purposes for which Facebook
6 creates, stores and uses face templates or Biometric Identifiers.

7 **RESPONSE TO REQUEST NO. 6:**

8 Facebook incorporates by reference its Preliminary Statement and General Objections set
9 forth above. Facebook objects to the use of the terms/phrases “purposes” and “creates, stores,
10 and uses” in this Request as undefined, vague, overly broad, and/or unduly burdensome, and to
11 the extent these terms/phrases suggest or imply that any aspect of Facebook’s services is subject
12 to the BIPA. Facebook further objects to the use of the terms “Biometric Identifiers” and “Face
13 Templates” in this Request for the reasons set forth in General Objection No. 7, above. Facebook
14 further objects to this Request on the ground that it calls for production of “[a]ll Documents and
15 Communications” that may be responsive to the Request, which is overly broad and/or unduly
16 burdensome, and unreasonably expensive in light of its likely benefit, taking into account the
17 needs of the case. Facebook further objects to this Request to the extent that it seeks to impose
18 obligations over and above those imposed by the Federal Rules of Civil Procedure and the Local
19 Rules of this Court, and to the extent that it requests information beyond the scope of discovery
20 delimited by Federal Rule of Civil Procedure 26(b)(1). Facebook further objects to this Request
21 to the extent it seeks the production of private, proprietary, trade secret or confidential business or
22 technical information absent appropriate safeguards for the production of such information.
23 Facebook further objects to this Request to the extent it seeks information protected from
24 disclosure by the attorney-client and/or work-product privileges.

25 Subject to and without waiving these or its General Objections, Facebook will search for
26 and produce non-privileged documents sufficient to show the purpose(s) for which information

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2016 I caused the foregoing **FACEBOOK, INC.’s RESPONSE TO PLAINTIFFS’ THIRD SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS** to be electronically served on the following counsel of record via e-mail to the below e-mail addresses and/or by U.S. Mail to the below addresses.

SEE ATTACHED SERVICE LIST

Dated: July 15, 2016

By: /s/ John Nadolenco
John Nadolenco, MAYER BROWN LLP

SERVICE LIST

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Exhibit 8 to

Nadolenco Declaration

**PLACEHOLDER FOR DOCUMENT
SOUGHT TO BE SEALED**

Exhibit 9 to

Nadolenco Declaration

**PLACEHOLDER FOR DOCUMENT
SOUGHT TO BE SEALED**

Exhibit 10 to

Nadolenco Declaration

PLACEHOLDER FOR DOCUMENT
SOUGHT TO BE SEALED

**Exhibit 11 to
Nadolenco Declaration**

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

LINDABETH RIVERA and JOSEPH WEISS, on)	
behalf of themselves and all others similarly)	
situated,)	
)	
Plaintiffs,)	No. 16 C 02714
)	
v.)	
)	Judge Edmond E. Chang
GOOGLE INC.,)	
)	
Defendant.)	

ORDER

Google’s motion for an interlocutory-appeal certification [66] is denied. Before final judgment, 28 U.S.C. § 1292(b) allows district courts to certify questions for an appeal when the “judge ... shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation” 28 U.S.C. § 1292(b). “Unless *all* these criteria are satisfied, the district court may not and should not certify its order ... for an immediate appeal” *Ahrenholz v. Bd. of Trustees of Univ. of Ill.*, 219 F.3d 674, 676 (7th Cir. 2000) (emphasis in original) (“There are four statutory criteria for the grant of a section 1292(b) petition ... : there must be a question of *law*, it must be *controlling*, it must be *contestable*, and its resolution must promise to *speed up* the litigation.” (emphases in original)).

On whether there is a “substantial ground for difference of opinion,” the prior Opinion discussed each of Google’s arguments and explained why none are grounded in the statutory text. Of course, an interlocutory-appeal certification requires only a “substantial” ground for difference of opinion, not that the district court be convinced that it came this/close to getting the wrong answer. Indeed, this Court has certified a § 1292(b) appeal in a prior case, but there was Circuit authority (outside the Seventh Circuit) against the statutory and regulatory interpretation that this Court had adopted. *See Ballard v. Chicago Park Dist.*, 741 F.3d 838 (7th Cir. 2014). Here, there is literally no precedent on Google’s side when it argues that, in order to qualify as a “biometric identifier,” scans of face geometry must be conducted in person rather than generated from a photograph. In arguing that there is a substantial ground for difference of opinion, Google points out that the question is a matter of first impression, but not every legal question of first

impression produces a substantial ground for difference of opinion. Google also notes that this Court arrived at a different interpretation than *In re Facebook Biometric Info. Privacy Litig.*, 185 F. Supp.3d 1155, 1171 (N.D. Cal. 2016) (drawing a distinction between digital photographs and physical photographs). That is true, but that really only means that neither this Court nor *Facebook* interpreted “biometric identifier” to require an in-person scan. Any difference in statutory interpretation still points away from Google’s proposal.¹

Having said all that, there is no need to definitively hold that the substantial-ground element has not been met, because the other problem is that the appeal’s outcome might very well not advance the “ultimate” termination of the litigation. § 1292(b). Yes, a reversal would end the case, but an affirmance would not necessarily speed the case’s end. To defend against the case, Google’s dismissal motion also presented an extraterritorial-application statutory argument and a Dormant Commerce Clause argument (those arguments are also asserted in the now-filed answer). Those are substantial arguments, so an affirmance would not likely put the case in a settlement posture, whereas in other § 1292(b) instances, it is pretty obvious that an affirmance would produce a settlement as the very next step. Here, the litigation would go on. For this reason, no § 1292(b) certification will issue.

But the Court does raise, for the parties’ consideration, whether the most efficient way forward is to limit discovery to the merits of the Plaintiffs’ individual claims and to the defenses raised by Google, and postponing class-certification discovery. In proposed class-action cases, defendants may ask for a merits decision *before* a Rule 23 ruling, so long as the defendant is willing to forgo the preclusive effect of a victory (if the defense wins) and instead prefers to litigate one-by-one. *See Wiesmueller v. Kosobucki*, 513 F.3d 784, 787 (7th Cir. 2008) (citing *Cowen v. Bank United of Texas, FSB*, 70 F.3d 937, 941-42 (7th Cir. 1995)). As a case management matter, this might be the right case to take that approach. As mentioned in the prior Opinion, discovery should shed light on what is the actual conduct at issue, including where it is taking place, and should assist in evaluating the facts on potential liability as well as on Google’s defenses. R. 60 at 21, 25-26, 29-30. Indeed, in its answer, Google also has asserted a lack of standing, specifically alleging that insufficient injury was sustained for Article III standing; discovery would illuminate that issue too. If, after discovery on the merits of the individual claims and on Google’s defenses, the individual claims fail, then the expense of certification

¹ The Opinion’s conclusion does not, of course, constitute an endorsement of the scope of the Biometric Information Privacy Act, and in particular the damages provisions. There is room to debate whether a mandatory-minimum damages scheme is appropriate for violations—*any* violation, on a *per* violation basis, without regard to extent of actual injury—of a statute that deals with rapidly advancing technology.

litigation will be saved. And if, after that limited discovery, it is possible to tee up clean legal questions for the Seventh Circuit, then perhaps a § 1292(b) certification will be appropriate at that time, because the resolution of that appeal would supply the answers on the merits of all the claims and defenses, giving rise to a much better chance at ending the case, either via a defense victory or prompting a settlement upon the case's return. Any postponement of class-certification discovery would require some sort of reasonable litigation hold so that the Plaintiffs are not prejudiced.

At the next status hearing, the Court will ask for an update on discovery, and then solicit preliminary reactions, if any, to the postponement of class-certification discovery.

ENTERED:

s/Edmond E. Chang
Honorable Edmond E. Chang
United States District Judge

DATE: June 27, 2017

**Exhibit 12 to
Nadolenco Declaration**

**Exhibit 13 to
Nadolenco Declaration**

Exhibit 14 to

Nadolenco Declaration

**PLACEHOLDER FOR DOCUMENT
SOUGHT TO BE SEALED**