

December 20, 2024

E-Filed

The Honorable Thomas S. Hixson
United States District Court for the Northern District of California
San Francisco Courthouse, Courtroom E – 15th Floor
450 Golden Gate Avenue
San Francisco, CA 94102

Re: *Kadrey, et al v. Meta Platforms, Inc.*; Case No. 23-cv-03417-VC (TSH)

Dear Judge Hixson:

The parties jointly submit this letter brief concerning Plaintiffs' request to reopen depositions of certain Meta fact witnesses. The parties met and conferred on December 17, 2024, but were unable to reach a resolution.

I. PLAINTIFFS' STATEMENT

Just two hours before the close of fact discovery, around 10 P.M. on Friday, December 13, Meta produced **2,404 documents** totaling almost **21 GB of data**. Although Plaintiffs are still analyzing this massive, eleventh hour document dump, the subset Plaintiffs *have* reviewed shows that Meta held back key documents until the very end of discovery. The production contains internal communications showing that Meta [REDACTED] a decision that was escalated to Meta's CEO, Mark Zuckerberg. *See, e.g.,* Meta_Kadrey_000211699. This is astonishing because, on December 17, Mr. Zuckerberg testified under oath that he knew nothing about Meta's use of [REDACTED]. Ex. C.

As Plaintiffs scrambled to process and begin reviewing Meta's new production, a disturbing fact appeared in the document metadata. According to the "File Paths" of these newly produced documents, it appears hundreds were collected by Meta as early as *June* 2024, and hundreds more in *September* 2024. Yet Meta withheld them until the last hours of fact discovery. In the six months it apparently took Meta to advance from document collection to production, Plaintiffs deposed nearly 20 witnesses—all the while, Meta knew these critical documents existed and withheld them. This gamesmanship was especially pernicious given Meta witnesses' massive failures of recollection—repeated testimony professing ignorance of [REDACTED] contents, even though these new communications show those same witnesses directly acknowledged that [REDACTED] contains pirated works. While Plaintiffs are mindful that fact discovery recently concluded, Meta's production of this massive pile of "hot" documents on the last night of fact discovery creates extraordinary prejudice that warrants at least some additional examination of certain key witnesses.

A. Meta's 12/13 Production Warrants Further Depositions of Key Witnesses.

Rule 26(b)(2)(C) sets forth the factors for reopening depositions: (i) whether the discovery sought is unreasonably cumulative or duplicative; (ii) whether the party seeking the discovery has had ample opportunity to obtain the discovery in the action; and (iii) whether the discovery is relevant and nonprivileged. The quintessential cause for a further deposition is "when new information comes to light that creates the need for further questioning." *PlayUp, Inc. v. Mintas*, 344 F.R.D. 429, 436 (D. Nev. 2023); *see also Vincent v. Mortman*, 2006 WL 726680, at *1 (D. Conn. Mar. 17, 2006) (explaining "courts frequently permit a deposition to be reopened where . . . new information comes to light triggering questions that the discovering party would not have thought to ask at the first deposition") (cleaned up); *Kanman v. Apple Inc.*, 2019 WL 4668112, at *3 (N.D. Cal. Sept. 25, 2019) (reopening deposition where "Apple has made a showing that some documents it sought in discovery in advance of [witness's] deposition were not timely produced" and the witness "may have withheld an unknown quantity of documents on grounds of privilege").

Meta's 12/13 production includes hundreds of key documents that Meta collected in June and September. These highly probative documents implicate at least the following fact witnesses, who were deposed *after* the documents were collected but before they were produced: Melanie Kambadur; Sergey Edunov; Joelle Pineau; Eleonora Presani; and Nikolay Bashlykov. The newly-produced documents reflect statements made by these witnesses or, at minimum, were housed in their custodial files. Plaintiffs provide examples for each witness (there are many more):¹

¹ Plaintiffs do not attach the cited documents due to the Court's exhibit type limitations for letter briefs. Plaintiffs can submit those documents upon request; their contents are probative of the relief requested.

- Melanie Kambadur testified she [REDACTED] Ex. A. But Ms. Kambadur wrote in a WorkChat that [REDACTED] Meta_Kadrey_00211273. She also is the custodian of a Meta document that [REDACTED] Meta_Kadrey_00211699 at -699, -702. Meta collected both documents in June 2024 but did not produce them until December 13.
- Sergey Edunov wrote in a WorkChat, “[REDACTED] Meta_Kadrey_00209134. Meta collected this document in June 2024 but did not produce it until December 13.
- Joelle Pineau testified she [REDACTED] Ex. B. But Ms. Pineau was the addressed recipient of the internal memo that [REDACTED] Meta_Kadrey_00211699. She also is custodian of a WorkChat where Eleonora Presani wrote, “[REDACTED] Meta_Kadrey_00218170 at -171. Meta collected these documents in June 2024 but did not produce them until December 13.
- Eleonora Presani, for her part, sent the above-referenced WorkChat, along with another one where she wrote that [REDACTED] Meta_Kadrey_00218893. Meta collected that document in September 2024 but did not produce it until December 13.
- Nikolay Bashlykov wrote in a WorkChat that [REDACTED] Meta_Kadrey_00204223. Meta collected that document in September 2024 but did not produce it until December 13. Meta also continues to argue to this Court that the evidence it [REDACTED] is merely “alleged.” Dkt. No. 329 at 2.

Finally, while Mr. Zuckerberg was deposed four days after Meta’s document production, there was not enough time to review and vet the entire 2,404-document production in preparation for his deposition in Kauai. At his deposition, Mr. Zuckerberg claimed to have no knowledge of [REDACTED] or involvement in its use. Ex. C. Plaintiffs now know, however, that a newly produced document directly states that [REDACTED] Meta_Kadrey_000211699. That document was collected in *June*.

In sum, Meta’s 12/13 production contains some of Meta’s most damning documents: admissions from employees that [REDACTED] Meta sandbagged by sitting on these documents until the final day of fact discovery. It is hard to conceive of better “cause” to reopen depositions.

B. Requested Relief

Plaintiffs request an order compelling the following witnesses to each sit for two additional hours of 30(b)(1) testimony: Melanie Kambadur; Sergey Edunov; Joelle Pineau; Eleonora Presani; Nikolay Bashlykov. Plaintiffs also request one additional hour with Mark Zuckerberg. Plaintiffs are mindful that discovery has closed, *see* Dkt. No. 209, and will file an administrative motion before Judge Chhabria requesting leave to conduct any further depositions ordered by this Court.

II. META'S STATEMENT

This brief continues an ongoing pattern of baseless finger-pointing by Plaintiffs to justify discovery beyond that authorized by the Court. To be clear, there was no eleventh-hour document “dump” by Meta. Friday was the close of fact discovery, and Meta—unsurprisingly—completed its production on that date. Plaintiffs did the same, producing many of their documents at or near the end of the fact discovery period, and *after* their depositions.² All along, Plaintiffs were fully on notice that Meta was diligently continuing its collection and production of documents from new Court-ordered custodians (Dkt. 212), in response to Plaintiffs’ new RFPs and numerous requests in meet and confers, and in response to recent Court Orders requiring supplementation and/or additional document collections (Dkt. 288 (Nov. 25, 2024); Dkt. 315 (Dec. 6, 2024)). This is not “sandbagging”; Meta was complying with discovery obligations and court orders. Any request for additional deposition time based on recent document productions is improper and unjustified.

Plaintiffs incorrectly argue that Meta held back certain documents that should have been produced earlier, and thus would have been available for the six depositions they now seek to reopen. This is unfounded and ignores the timing of Plaintiffs’ own requests and the Court’s orders. Plaintiffs’ *first* wave of requests, which were served by April, were relatively narrow. Meta conducted a reasonable search, collected from potentially relevant custodians, and then reviewed and responded to *those specific requests* in advance of the July substantial document completion deadline and the original September 30 fact discovery cut-off. Plaintiffs then sought to extend discovery and Meta responded to a *second* wave of broader RFPs over the last few months: **September 30** (Meta Resp. to Pltfs’ RFPs 76-78, 4th Set); **November 8** (Meta Resp. to Pltfs’ RFPs 79-130, 5th Set); **November 18** (Meta Resp. to Pltfs’ RFPs 131-136, 6th set). On October 4, the Court also granted Plaintiffs’ request to add five (5) ESI custodians and ordered Meta to produce documents from those custodians. (Dkt. 212). As Meta explained, this process took over 8 weeks to complete for its original custodians (Dkt. 190 at 8; Dkt. 190-8 ¶¶ 2-4). Plaintiffs never challenged that production timetable. Meta’s production over the last several weeks, culminating in its December 13 production, reflects those custodial searches and its updated productions in response to Plaintiffs’ 4th through 6th set of RFPs.

To respond to these requests, Meta, *inter alia*, re-reviewed the previously collected documents and conducted additional searches (including for the new custodians). Thus, to the extent the document metadata has a June capture date, this was because the document was collected, but not responsive to Plaintiffs’ earlier narrower requests. And to the extent the document has a September capture date but was not produced until more recently, this is simply due to the time it takes to review and produce documents, which Meta made clear to Plaintiffs. (Dkt. 190-8.) Meta did not deliberately hold back relevant materials but instead reviewed and produced documents based on Plaintiffs’

² Indeed, contrary to the Court’s scheduling order, many Plaintiffs produced the *majority* of their document productions after their depositions. See Ex. F (table illustrating Plaintiffs productions pre- and post-deposition). And on several occasions, Plaintiffs produced *thousands* of pages of documents the *day before* their depositions, yet Meta and its smaller team of outside lawyers expedited review and went forward with their depositions. As just one example, Mr. Farnsworth produced over 1,400 of his 1,449 documents a few business days before his deposition, yet Meta did the work and took his deposition as scheduled. No depositions should be reopened, but if the Court entertains Plaintiffs’ unjustified requests to reopen, then by the same logic all 13 Plaintiffs’ depositions would need to be reopened too.

newly served requests. In addition, over the past two months the parties engaged in various meet and confers about existing RFP responses and the Court issued several discovery orders. *See, e.g.* Dkt. 288. As a result, previously preserved and collected documents were re-reviewed for responsiveness as discovery parameters changed. Meta then diligently worked to produce these newly responsive documents in rolling productions before the close of discovery.³

In short, there is no basis for Plaintiffs to complain that they did not have documents in time for depositions, when they delayed serving RFPs calling for those documents and took those depositions, as the Court ordered, with full knowledge that document productions were ongoing. *See* Dkt. 231 (“The Court therefore needs to ensure that Plaintiffs expeditiously proceed with depositions with the documents they already have and don’t wait until they get more documents.”).

There is no justification for additional time with Ms. Kambadur, Dr. Presani, Mr. Bashlykov, and Mr. Edunov. Plaintiffs’ demand for more deposition time with the following witnesses rings particularly hollow given the timing of the depositions and Plaintiffs’ second wave of RFPs: Kambadur (September 17); Presani (September 26); Edunov (November 6); Pineau (November 6); and Bashlykov (December 5-6). At Plaintiffs’ election, the Kambadur and Presani depositions occurred *before* Plaintiffs even served the second wave of RFPs. Plaintiffs also chose to take Presani’s deposition *before* Presani was even added as a custodian (and asked Presani questions about the same language they now try to use to justify a new deposition). The remaining three depositions occurred during the windows specifically requested by Plaintiffs and in the midst of Plaintiffs’ second wave of RFPs (in some cases before Meta’s responses were even due).⁴

If Plaintiffs wanted to use certain documents with a witness, they should have either asked for the documents sooner or asked to depose the witnesses later in the discovery process. Meta diligently searched for and produced documents as requests were made, and it could not accelerate the timetable required for ESI review and production. In all events, Plaintiffs have provided no valid basis for deposition time with these 5 witnesses, particularly when they already have had a full 7 hours with 25 fact witnesses and over 16 hours of 30(b)(6) testimony, and were able to explore the very subjects, including licensing and ████████, they now want cumulative testimony on.

There is no justification for additional time with Mr. Zuckerberg. Plaintiffs’ request for more time with Mr. Zuckerberg—which Plaintiffs were determined to seek since even before his deposition—is a blatant effort to harass him and violate the parties’ agreement. To avoid motion practice, the parties agreed to certain conditions including 4.5 hours on the record. Plaintiffs used the *entire* 4.5 hours and completed his deposition on December 17. They strategically chose not to use certain documents at his deposition. Plaintiffs are not entitled to more time with him.

Notably, three days before the deposition (December 15), Plaintiffs complained about the documents they received from Mr. Zuckerberg’s custodial file on December 13. They claimed that “some of the documents” “*appear to be the most relevant produced in discovery* thus far,” and threatened to file a motion if Meta did not agree to postpone or extend the deposition. *Ex. D* (emphasis added). Meta investigated and responded to Plaintiffs’ baseless accusations, explaining

³ For example, Meta produced rolling productions of documents on October 2 and 7; November 1, 4, 8, 11, 12, 15, 18, 19, 25, and 29; and December 2, 4, 11, 12, and 13.

⁴ Ms. Pineau and Mr. Bashlykov were deposed in Montreal and London, respectively, where they live and work. Setting aside that the request is unjustified, it would be logistically prohibitive to reopen these internationally based witness depositions given the holidays and expert deadlines.

that of the 1,436 total custodial documents for Mr. Zuckerberg produced in discovery, only 144 documents were produced on December 13. Meta objected to any further deposition and reiterated that the production “can and should be addressed as Plaintiffs’ counsel sees fit at Mr. Zuckerberg’s deposition tomorrow.” *Id.*

Then, the day before Mr. Zuckerberg’s deposition, Plaintiffs made another unspecified threat that the production “may also prompt a request for additional deposition time of Mr. Zuckerberg.” Ex. E. And on the parties’ meet and confer on December 17—just minutes after Mr. Zuckerberg’s deposition completed, Plaintiffs told Meta they would be requesting an additional hour with Mr. Zuckerberg. Plaintiffs then sent this motion, and its detailed discussion (and mischaracterization) of Meta_Kadrey_000211699, *less than 24 hours* after Mr. Zuckerberg’s deposition.

The record belies any notion that Plaintiffs found the document they now claim justifies more time with Mr. Zuckerberg only *after* the deposition. To the contrary, Plaintiffs intended to ask for more time regardless and did not take diligent steps to use the document they cite (and/or other documents about which they complain). Moreover, the document does not state what Plaintiffs allege; it was not drafted or sent to Mr. Zuckerberg; and it does not support the nefarious conclusions Plaintiffs seek to draw from it. Plaintiffs used their time with Mr. Zuckerberg as they chose—at times, asking the same questions over and over, and questioning him throughout on *others’* documents, not documents that were sent to or received by him. No additional time is warranted, let alone based on a single document that Plaintiffs had and chose not to use.

III. PLAINTIFFS’ REPLY

Meta attempts to explain why it waited six months to produce some of the most relevant documents) in the entire case: apparently, they simply “weren’t responsive” to Plaintiffs’ initial RFPs. Yet if Meta withheld *these* documents because they “weren’t responsive,” that is the worst possible explanation. It means a Meta attorney reviewed these documents long ago (which plainly hit on Meta’s original search terms, as shown in Dkt. No. 321-2), but conveniently decided that all the [REDACTED] were not responsive to *any* of Plaintiffs’ 50 original RFPs, including, but not limited to, RFPs about “The Training Data” for Llamas 1-3 and RFPs about any efforts to license training data from copyright holders.

Regardless of whether Meta intentionally withheld these documents, Plaintiffs’ request for additional deposition time with the listed witnesses is still warranted. These documents do not merely add color to the deposition testimony. Instead, they reflect repeated instances where answers in deposition were directly contradicted by documents. That is why Plaintiffs request further deposition time. And that includes Mr. Zuckerberg, who should be questioned, as Meta’s CEO, about [REDACTED]

[REDACTED] As it stands, because no other document (and, conspicuously, not a single witness) speaks to [REDACTED] it is especially important that he be questioned about that document. The document directly implicates him, but was not in his custodial files. Plaintiffs did review the new Zuckerberg custodial documents in time for his deposition, but this document was not one of them—it was one of the 2,300 other new documents.

As to any of Plaintiffs’ document productions that occurred after the corresponding plaintiffs were deposed, Meta misses the point. Plaintiffs acknowledge the inevitability that some documents would be produced after their depositions. The problem, again, is that Meta’s late-produced documents are the most probative documents in the entire case; were collected months before the depositions; and directly contradict the witnesses’ sworn testimony.

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Attorneys for Defendant Meta Platforms, Inc.

ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1(h)

I hereby attest that I obtained concurrence in the filing of this document from each of the other signatories. I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 20, 2024

BOIES SCHILLER FLEXNER LLP

/s/ Maxwell V. Pritt _____

Maxwell V. Pritt

Reed Forbush

Jay Schuffenhauer

Attorneys for Plaintiffs

EXHIBIT A
FILED UNDER SEAL

EXHIBIT B

FILED UNDER SEAL

EXHIBIT C
FILED UNDER SEAL

EXHIBIT D

From: Hartnett, Kathleen
Sent: Sunday, December 15, 2024 11:34 PM
To: Joshua Stein; z/Meta-Kadrey
Cc: Llama C-Counsel; adunning@cgsh.com
Subject: RE: Urgent Message re: MZ Deposition (Kadrey)

Counsel,

The accusations and innuendo in your email are inappropriate and incorrect. There is no basis for postponing the long-scheduled deposition of Mr. Zuckerberg. He will appear on Tuesday at 8:45 am local time and his deposition should go forward pursuant to the parties' agreement and the Court's Order. See Dkt. 277 (stipulated order).

First, as we have explained to you previously, the location and timing of this deposition are not an "accommodation" to Meta. The parties' agreement concerning this deposition resolved a conflict after Meta provided a date for Mr. Zuckerberg in October (in the Bay Area), Plaintiffs refused to take it, and Meta had briefed a motion seeking to limit the deposition both in terms of length and for it to occur via Zoom. The parties' agreement is binding, and Plaintiffs' repeated attempts to undo the agreement after having reached it are not well-taken.

Second, there was no document "dump" by Meta—either on Friday or at any point. Friday was the close of fact discovery, and both parties thus—unsurprisingly—completed their productions and served revised discovery responses on that date. Plaintiffs produced voluminous productions on Friday. Moreover, Plaintiffs repeatedly produced significant portions of their document productions after their depositions, but Meta took their depositions anyway, as Judge Hixson directed the parties to do. See Dkt. 231 (directing parties to "promptly take their allotted depositions with the documents they have from discovery requests they served and from the custodians they identified months ago"). In any event, Plaintiffs were fully on notice that Meta would be making a production in accordance with its ongoing production of documents from other custodians, production of documents in response to RFPs served in October (responses to which were not due until November 8 and 18), additional collections of documents in response to Plaintiffs' numerous requests in meet and confers, and recent court orders requiring supplementation and/or additional collections of documents by Meta (Dkt. 288 (Nov. 25, 2024); Dkt. 315 (Dec. 6, 2024)). This is not "sandbagging" but complying with discovery obligations and court orders.

Third, you are wrong that Meta did not substantially complete Mr. Zuckerberg's document production by November 1, that Meta did not make reasonable efforts to complete its production by that date, and/or that Meta breached the parties' agreement regarding his deposition in any way. Notably, your email makes broad allegations about Meta's production but does not point to anything specific. In contrast, the actual data (all available to you) shows that Meta met its obligation under the parties' agreement—it produced nearly 80% of Mr. Zuckerberg's total custodial documents by October 31, and the documents it produced after that date largely resulted from new RFPs (to which responses were not due until after November 1) and/or new court orders, including orders issued just the week before the close of discovery. Plainly Meta's reasonable efforts included continuing to produce documents called for by RFPs and court orders with post-November 1 deadlines. The data shows as follows:

Total custodial documents for Mr. Zuckerberg produced during discovery: 1,436

Total last week: 222 (~15% of his production)

Friday's production: 144 (~10%) (largely part of an additional review to ensure compliance with a recent court order re licensing)

Production earlier last week: 78 (60 are Messenger/Instagram Direct messages with reporters)

Total produced after 10/31: 320 (~22%) (generally responsive to new search terms for new RFPs; small number of WhatsApp/other messaging services)

As to the hit counts you reference, those were for Mr. Zuckerberg's Messenger and Instagram Direct data. The vast majority of the documents with hits were unsolicited messages from members of the public which contained hits on our broad search terms but had no relevance to this case—including, for example, the Spanish world "llama." After our review of these documents for responsiveness, approximately 60 documents from this data source were ultimately produced earlier last week. And as to Meta's privilege log, we do not understand your reference to "650 entries" in the "redaction log" (there is not a "redaction log"). Mr. Zuckerberg is a custodian for 11 documents on the non-email privilege log (9 of which are priv-redact), and 410 documents on the email privilege log. However, the 410 number is family complete and includes non-privileged documents in the family for context. Thus, of these 410 documents, only 228 are privileged, only 138 are priv-redact, and only 39 were produced last week.

In sum, there is no basis for Plaintiffs' latest attempt to claim a breach of the parties' agreement and postpone this deposition. The deposition will take place on December 17 at 8:45 am local time. There also is no basis for Plaintiffs to file a motion by 5 PST tomorrow, which, in any event, under the Court's rules must be a joint statement to which Meta responds (and is given adequate time to do so).

Thanks,
Kathleen

Kathleen R. Hartnett

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Pronouns: she, her, hers

From: Joshua Stein <jstein@bsflp.com>

Sent: Sunday, December 15, 2024 5:21 PM

To: z/Meta-Kadrey <zmetakadrey@cooley.com>

Cc: Llama C-Counsel <llama_cocounsel@bsflp.com>

Subject: Urgent Message re: MZ Deposition (Kadrey)

Importance: High

[External]

Counsel:

As you are aware, our agreement regarding Mr. Zuckerberg’s deposition required Meta, by November 1, 2024, to “substantially complete Mr. Zuckerberg’s document production no later than November 1, 2024,” and to “take reasonable steps to complete the production by November 1, 2024.” On November 1, Meta made a production that Meta stated satisfied this obligation. Plaintiffs questioned how this meager production could have possibly constituted substantial completion, but Meta repeatedly insisted—including in draft court filings—that it had produced all or nearly all responsive Zuckerberg documents. On that understanding, Plaintiffs proceeded with scheduling Mr. Zuckerberg’s deposition for December 17, 2025, including agreeing to a joint motion seeking leave of Court to hold the deposition on that date. To accommodate Mr. Zuckerberg, we agreed to fly to a remote Hawaiian island where we have no office. Accordingly, we have had to complete our deposition preparation, including curation of exhibits, well in advance of December 17.

In light of the above, we were surprised to receive from Meta, just two hours before the close of discovery on Friday night, December 13, a document production of 21 GBs. Because of the timing of the production (late on a Friday night) and its size, we are still processing it to understand just what Meta dumped on Plaintiffs at the close of discovery. But what is immediately apparent is that the production includes many documents for which Mr. Zuckerberg is the custodian and/or that are relevant to his deposition. Indeed, some of the documents—and we are far from through the production—appear to be the most relevant produced in discovery thus far. Meta also for the first time late Friday produced search term hit counts that show many thousands of hits for Mr. Zuckerberg and a privilege log for these productions that includes 650 entries with Mr. Zuckerberg in just the redaction log.

This late-night, last-minute production of documents, including Mr. Zuckerberg’s highly relevant documents, appears to be sandbagging at its worst. Meta has violated the parties’ agreement to “substantially complete Mr. Zuckerberg’s document production no later than November 1, 2024,” and to “take reasonable steps to complete the production by November 1, 2024.” Meta’s actions are also inconsistent with the [Northern District’s guidelines for professional conduct](#) to, inter alia, “not delay producing documents to prevent opposing counsel from inspecting documents prior to scheduled depositions or for any other tactical reason.”

Given Meta’s prejudicial and improper conduct, there are now two options to permit Plaintiffs the time necessary to ingest, review, and potentially use in Mr. Zuckerberg’s deposition the documents and communications that Meta untimely produced:

1. the parties agree to file a stipulation and proposed order tomorrow to postpone Mr. Zuckerberg's deposition to early January; or
2. Plaintiffs proceed to depose Mr. Zuckerberg on December 17 and then, after Plaintiffs have processed Meta's late-produced documents, Mr. Zuckerberg will appear at BSF's San Francisco office for the remainder of his deposition.

Please let us know by 9 am PST tomorrow December 16 (as our flight leaves at 10am)

which of the foregoing options Meta prefers. We anticipate Meta's prompt cooperation so that we can avoid raising with the Court Meta's improper and prejudicial conduct. If Meta does not respond with agreement to one of the two options above by 10am tomorrow, Plaintiffs will file a motion with the Court by 5pm PST on December 16. Plaintiffs reserve all rights, including but not limited to the right to reopen any deposition and to sanctions, fees, and costs as appropriate.

Thank you.

Best,
Josh

Joshua Michelangelo Stein

Partner

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EXHIBIT E

From: Jay Schuffenhauer <Jschuffenhauer@bsflp.com>
Sent: Monday, December 16, 2024 6:24 PM
To: z/Meta-Kadrey; Dunning, Angela L.
Cc: Llama C-Counsel
Subject: Kadrey v. Meta - Discovery Letters for 12/20

[External]

Counsel,

In light of the Friday deadline for raising discovery disputes with the Court, we intend to brief the following topics unless the issues can be resolved via meet-and-confer. These topics all originated from recent depositions and/or Meta's 12/13 document productions and privilege logs. We propose conducting this M&C immediately after Mr. Zuckerberg's deposition concludes tomorrow.

1. Meta's inadequate supplemental RFA/ROG responses.

12/13 RFA Responses

Plaintiffs intend to submit a letter brief challenging the following RFA responses absent Meta's agreement to amend them:

- Meta's "subject to and without waiving the foregoing" language: This language obscures whether any of Meta's objections qualify its responses.
- Meta's "except as expressly admitted" denials: Tacking on unexplained partial denials to most of the RFA responses is improper.
- RFAs 3-7, 17, 20, 23, 34, 43, 45-91, 94 & 96: Meta does not respond to the RFAs as written. The RFAs ask about copyrighted works and/or books. Meta is not allowed to answer in terms of "text" or "some text." If Meta needs to qualify its admission to account for the CMI that it stripped from these works, then it can say so after admitting the RFAs.
- Meta's RFA 7 response's limitations to "one or more Datasets" and "one or more copyrighted books" are improper.
- Meta's RFA 8 response's qualification of "claim in this action to have authored" is improper. If Meta has a basis to believe any particular plaintiff did not author any work at issue in the Datasets used to train Llama then it should say so and deny the RFA as to that plaintiff. But otherwise Meta should admit the RFA without this qualification.
- Meta's RFA 9 response's qualifications of "purportedly authored" and "to the extent those Datasets included the content of books they purportedly authored" is improper. If Meta has a basis to believe any particular plaintiff did not author any work at issue and/or any Dataset does not include the work, then it can say so and deny the RFA as to that work and/or dataset but otherwise admit the RFA without those qualifications.
- Meta's "portion of" and "some content" limitations in RFAs 16, 19, and 22 do not answer the question as asked. To the extent Meta denies it uses any portion of Books3, LibGen and/or The Pile then it can say what portions in a partial denial. We note that Meta deponents testified Meta used b3g, which includes Books3. Further, Meta should admit it used all the works in the datasets it produced.
- Meta's response to RFA 26 does not answer the RFA as written.
- Meta fails to support its relevance and proportionality objections in response to RFA 35.
- Meta's response to RFA 39 does not answer the RFA as written.

Further, Meta fails to answer RFAs 38, 44, and 98 but offers to meet and confer. There is nothing ambiguous about these RFAs and Meta must answer them as written. Regarding RFA 38, to the extent you are unsure what “store” means, it means maintain a copy or copies of, however arranged in part or in whole. Regarding RFA 98, to the extent you are unsure what “sourced” means, you can omit that word; the RFA is the same with or without that word.

12/13 ROG Responses

- Meta’s Responses to Plfs’ ROGs, Set 1
 - These responses continue to improperly limit Meta’s responses to Llamas 1-3 only.
 - The responses improperly limit the plain meaning of “agreements,” including per Judge Hixon’s orders in this case.
 - Meta improperly limits the definition of training data to Books3.
 - ROG 2: Meta failed to respond.
 - ROG 1: Meta’s response does not include Llamas 4 or 5.
 - ROGs 3 & 7: It is unclear whether Meta’s response includes Llamas 4 and 5. And, regardless, it fails to describe in any detail how the model was fine-tuned as to any Llama model, let alone all of them. The responses similarly is scant on details of the specifics of Meta’s efforts around memorization with respect to the Llama models.
 - ROG 4: Meta’s response fails to identify or explain all of the “risks” it references or the “mitigation” it supposedly employed.
 - ROG 8: Does not address Llamas 3 and thereafter.
 - ROG 10: Fails to provide the information requested for each copy Meta made of the datasets it uses in pre- and/or post-training.
 - ROG 13: Does not address Llamas 4 or 5, and the documents identified do not provide all the information requested.
- Meta’s Responses to Plfs’ ROGs, Set 2
 - These responses continue to improperly limit Meta’s responses to Llamas 1-3 only.
 - The responses improperly limit the plain meaning of “agreements,” including per Judge Hixon’s orders in this case.
 - Meta improperly limits the definition of training data to Books3.
 - ROG 16: The incorporation by reference without citation at 15:6-8 is improper.
- Meta’s Responses to Plfs’ ROGs, Set 3
 - These responses continue to improperly limit Meta’s responses to Llamas 1-3 only.
 - Meta improperly restricts the definition of shadow datasets to the extent it excludes any dataset it used for any Llama model.
 - Meta improperly limits the definition of training data to Books3.
 - ROG 19: Meta fails to set forth the revenue its anticipated receiving through [REDACTED]
 - ROG 22: This ROG does not ask Meta for its opinion about what it needed to do or didn’t need to do. If Meta didn’t do anything then it should just say so and that’s the end of it. See Dkt. 315 at 5.
 - ROG 23: Meta’s response fails to identify what datasets it obtained from Anna’s Archive. It’s also unclear from Meta’s response whether it obtained datasets from any other sources for any of the Llama models or if it’s only the three listed.

2. Meta’s assertion of attorney-client privilege over business documents.

- a. Meta’s 12/13 privilege logs appear to reflect numerous redacted and withheld documents whose primary purpose is business-related.

- b. Plaintiffs will circulate a full list of challenged documents along with their letter brief.
3. **Meta's assertion of attorney-client privilege over documents subject to the crime-fraud exception.**
 - a. Meta's 12/13 privilege logs appear to reflect numerous redacted and withheld documents where the attorney advice, if any, was used in furtherance of a crime or illegal scheme: in this case, [REDACTED]
[REDACTED]
 - b. Plaintiffs will circulate a full list of challenged documents along with their letter brief.
 4. **Requests for additional deposition time.**
 - a. Plaintiffs are still reviewing Meta's 12/13 document production, but it already is clear that the production contains some of the most important documents of the case. Based on the file path names, many of these documents were collected by Meta as early as June 2024 but were withheld until the very last night of fact discovery.
 - b. As of now, Plaintiffs believe that at least the following fact witnesses were deposed at a time where Meta had already collected (but had not produced) critical documents pertaining to their knowledge:
 - i. Melanie Kambadur; Sergey Edunov; Nikolay Bashlykov; Joelle Pineau; Eleonora Presani
 - c. As discussed via earlier emails, the belated production, including of Mark Zuckerberg's documents, may also prompt a request for additional deposition time of Mr. Zuckerberg.
 5. **Other RFP Refusals.**
 - a. Llama 4 and 5 datasets
 - i. Plaintiffs believe these are covered by RFP 81, particularly in light of Judge Hixson's orders regarding Llama 4-5 relevance.
 - b. Torrenting Materials
 - i. In addition to RFP 85, the items Plaintiffs requested via email are also covered by RFP 119 (processing of copyrighted material). Regardless of whether governed by RFP 85 or 119, Plaintiffs believe Meta's bit torrent client, application logs, and peer lists are relevant and should be produced. It also appears at least Mr. Bashlykov may have used personal devices to download/access datasets. See, e.g., Meta_Kadrey_00204223. Please confirm Mr. Bashlykov's personal computer(s) were preserved and searched. Please also confirm whether any other Meta employees used their personal computers to download/access datasets.
 - c. Supervised Fine Tuning Data
 - i. This data is relevant to Plaintiffs' RFPs 118 and 119, which encompass efforts to prevent Llama from emitting copyrighted material as well as Meta's processing of copyrighted material. The supervised fine tuning data directly serves this purpose.

In light of the large quantity of issues, Plaintiffs will submit their briefs to Meta on a rolling basis beginning tomorrow afternoon. All briefs will be with Meta no later than Wednesday at 3 PM PT. Plaintiffs are also open to discussing an omnibus letter brief if Meta would prefer.

Best,
Jay

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EXHIBIT F

Exhibit F

Plaintiff	Dep. Date	Pages Produced by Plaintiffs			Docs Produced by Plaintiffs		
		Total Pages	Pages Post-Depo	Percent Post-Depo	Total Docs	Docs Post-Depo	Percent Post-Depo
Hwang	9/16/24	1084	721	66.50%	232	110	47.40%
Golden	9/17/24	16930	14752	87.10%	305	265	86.90%
Lippman	9/17/24	5030	464	9.20%	142	86	60.60%
TerKeurst	9/23/24	26509	21310	80.40%	5072	3657	72.10%
Greer	9/24/24	592	388	65.50%	122	39	32%
Kadrey	9/25/24	4781	3962	82.90%	500	199	39.80%
Woodson	9/30/24	1813	534	29.50%	266	88	33.10%
Silverman	10/10/24	1402	1295	92.40%	259	227	87.70%
Diaz	11/20/24	654	323	49.40%	86	60	69.80%
Coates	11/21/24	781	241	30.90%	113	47	41.60%
Farnsworth	12/4/24	62220	43	0.07%	1449	7	0.48%
Klam	12/10/24	353	0	0	143	0	0
Snyder	12/11/24	473	19	4%	101	18	17.80%