1 KASSRA P. NASSIRI (215405)
   (knassiri@nassiri-jung.com)
2 CHARLES H. JUNG (217909)
   (cjung@nassiri-jung.com)
3 NASSIRI & JUNG LLP
   47 Kearny Street, Suite 700
4 San Francisco, California 94108
   Telephone: (415) 762-3100
5 Facsimile: (415) 534-3200

6 MICHAEL J. ASCHENBRENER (277114)
   (mja@aschenbrenerlaw.com)
7 ASCHENBRENER LAW, P.C.
   795 Folsom Street, First Floor
8 San Francisco, California 94107
   Telephone: (415) 813-6245
9 Facsimile: (415) 813-6246

10 *ATTORNEYS FOR PLAINTIFF AND THE PUTATIVE CLASS*

11
              UNITED STATES DISTRICT COURT
12
            NORTHERN DISTRICT OF CALIFORNIA
13
              SAN FRANCISCO DIVISION
14

	Case No. 10-cv-02389-JW
	<u>CLASS ACTION</u>
	PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT, OR, ALTERNATIVELY, FOR RELIEF FROM JUDGMENT AND SUPPORTING MEMORANDUM
IN RE: FACEBOOK PRIVACY LITIGATION	ACTION FILED: 05/28/10
	Date: January 30, 2012
	Time: 9:00 a.m.
	Judge: Hon. James Ware

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PLAINTIFFS' MOTION TO ALTER OR   10-cv-2389-JW
AMEND JUDGMENT

1   **I.   INTRODUCTION & PROCEDURAL BACKGROUND**

2   On November 22, 2011, the Court granted Facebook's Motion to Dismiss Plaintiffs' First

3   Amended Complaint with Prejudice. (Dkt. No. 106 (the "Order").) The Court further concluded

4   that because Plaintiffs had thus far failed to allege specific facts supporting its claims,

5   amendment would be futile. (Order at 9-10.) Plaintiffs respectfully contend that the Court's

6   Order contains manifest errors of fact concerning Plaintiffs' Stored Communications Act

7   ("SCA") claim, and thus the Court should amend its judgment to deny Defendant's motion to

8   dismiss the SCA claim, or in the alternative, to grant leave to amend to allow Plaintiffs to clarify

9   any ambiguities concerning their SCA claim.[1]

10   **II.   LEGAL STANDARD**

11   Motions to alter or amend a judgment are permissible in cases, like here, where the court

12   enters an order of dismissal. *Roque v. City of Redlands*, 79 F.R.D. 433 (C.D. Cal. 1978).

13   Plaintiffs recognize that Rule 59(e) and 60(b) motions are granted sparingly and that such

14   motions may not be used to re-litigate old matters or present new arguments or allegations that

15   could have been introduced prior to the entry of judgment. The Ninth Circuit, however, has held

16   that a Rule 59(e) motion may be granted where a party identifies "manifest errors of law or fact

17   upon which the judgment is based." *Turner v. Burlington Northern Santa Fe R. Co.*, 338 F.3d

18   1058, 1063 (9th Cir. 2003). "Since specific grounds for a motion to amend or alter are not listed

19   in the rule, the district court enjoys considerable discretion in granting or denying the motion."

20   *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011). In this case, Plaintiffs

21   respectfully contend that there are manifest errors of fact requiring the relief requested.

22   Similarly, a Rule 60(b) motion may provide relief from a judgment due to: "(1) mistake,

23   inadvertence, surprise, or excusable neglect; … or (6) any other reason justifying relief from the

24   operation of the judgment." *In re Sasson*, 424 F.3d 864, 875 (9th Cir. 2005). Plaintiffs

25   respectfully contend that there are mistakes and other reasons inherent in the Court's judgment

26

27   _____

     [1] This motion is directed solely at Plaintiffs' SCA cause of action, and not any of Plaintiffs' other
     causes of action.

28

PLAINTIFFS' MOTION TO ALTER OR   1
AMEND JUDGMENT   10-cv-2389-JW

1 | that entitle Plaintiffs to relief from that judgment.

2 | **III.   DISCUSSION**

3 | Plaintiffs contend that the Court's dismissal of the SCA claim was based on a mistake of

4 | fact. That mistake is most clearly evidenced by the following excerpt from the Order:

> Plaintiffs contend that Defendant acted as an RCS provider for purposes of Plaintiffs' claim under the SCA. … [I]f Defendant was acting as an RCS provider for purposes of Plaintiffs' claim, then it must be the case that Plaintiffs' communications consisted of "data" which Plaintiffs sent to Defendant for "processing or storage." However, **Plaintiffs allege that the communications at issue were requests to be connected to advertisements, not data to be processed or stored.**
>
> Accordingly, the Court finds that Plaintiffs fail to state a claim under the SCA.

11 | (Order at 5-6 (emphasis added).)

12 | As Plaintiffs argued in their Opposition to Facebook's Motion to Dismiss (Dkt. No. 101)

13 | and at oral argument on the motion, the communications at issue were not requests to be

14 | connected to advertisers, but rather were communications between Plaintiffs and Facebook

15 | concerning their private Facebook browsing and virtual filing cabinet activities. Facebook

16 | unnecessarily disclosed Plaintiffs' private RCS communications to third parties when Plaintiffs

17 | later clicked on advertisements. Although sharing Plaintiffs' advertisement requests with the

18 | advertisers was permissible, it was not permissible (or necessary) to bundle Plaintiffs' private

19 | RCS communications with the otherwise permissible and unrelated advertisement requests.

> **THE COURT**: As I understand the allegation here, it's the click that is the subject of this lawsuit, not the establishment of a page.
>
> **MR. NASSIRI**: It's not, Your Honor. The click-through is just the means by which the improper disclosure is made.

23 | (October 17, 2011 Hearing Transcript at 52:19-24.)

> **MR. NASSIRI:** So if I've stored my pictures on Facebook, and they're acting as a virtual filing cabinet, and I'm going through -- using their service to go through my picture and browse through my albums, I'm communicating with Facebook.
>
> They know what pictures I'm looking at, everything I've done that day, because -- and they're holding that information, because that's

how they provide to service to me. They're holding that information about what pictures I'm looking at, solely to provide that service to me.

Then when I click on an ad, they take information that they had about what I was looking at when they were providing the storage service to me, and they pass it on to the advertiser, via the click on the ad. And they embed it, by choice, into the URL, and send it off to the advertiser.

So what they've done is they've revealed to advertiser what I was looking at as I was browsing my virtual filing cabinet.

THE COURT: Now, you're closer. In other words, that gets to the issue, in other words, whether or not the statute covers whatever is sent along with your click-through.

(Transcript at 53:7-54:2; *see also* Transcript at 27:25-30:23.)

Although Facebook allows users to send private messages to one another (the ECS function), Plaintiffs' claims concern Facebook's remote computing service. Plaintiffs allege Facebook provided to them computer storage and processing services by allowing them to process, store, and share content, including pictures, videos, biographical information and more. (FAC ¶¶ 80-81.) Plaintiffs further allege that Facebook allows its users the choice to grant certain other users a license to view information stored on its remote computing service. (*Id.*) This content storage and sharing function forms the crux of Plaintiffs' claims and makes Facebook an RCS provider subject to section 2702(a)(2) of the SCA. *See, e.g., Viacom Int'l Inc. v. YouTube, Inc.*, 253 F.R.D. 256 (S.D.N.Y. 2008) (holding that YouTube is an RCS provider because it provides storage, processing and sharing of videos); *Crispin*, 717 F. Supp. 2d at 990 (holding that Facebook is an RCS provider and subject to § 2702(a)(2)).

Plaintiffs allege that the non-consensual disclosures occurred while Facebook users browsed stored content on Facebook's site (an RCS function). (FAC ¶ 44.) Plaintiffs also allege that they sent communications (i.e., communications concerning their identities and which of their own stored content or friends' stored content they wished to view) to Facebook for the specific and sole purpose of using Facebook's remote computing services and did not authorize Facebook to use those communications for any other purpose. (*Id*. ¶ 76.) Accordingly, in the context of Plaintiffs' allegations, Facebook was acting as an RCS provider and did not have Plaintiffs' consent to further divulge the subject communications to third parties. By divulging the contents of those communications to third-party advertisers without Plaintiffs' consent, Facebook violated section 2702(a)(2).

(Dkt. No. 101, Plaintiffs' Opposition, 3-4.)

Because the Order misconstrues Plaintiffs' position as demonstrated above, the Court did not reach the "merits of Plaintiffs' contention that 'only ECS providers, and not RCS providers like [Defendant], may avail themselves of the SCA's 'intended recipient' exception.'" (Order at 6, n. 7.) The Court also "[did] not reach the question of whether Defendant was acting as an RCS provider." (*Id.*)

Plaintiffs respectfully contend that had the Order correctly construed Plaintiffs' claims, the Court would not have dismissed Plaintiffs' SCA claim at all, much less with prejudice. Plaintiffs SCA claim is properly summarized as follows:

(a)   Plaintiffs communicated data to Defendant concerning their private browsing/virtual filing cabinet activities on Facebook's website;

(b)   Defendant was acting as an RCS provider when it received those virtual filing cabinet-related communications from Plaintiffs and thus, the intended recipient exception does not apply; and

(c)   Defendant divulged those communications to third-party advertisers when Plaintiffs clicked on ads by unnecessarily and intentionally embedding the virtual filing cabinet information into the ad request URLs.

Plaintiffs submit that if the Court views the arguments advanced in Plaintiffs' Opposition to the Motion to Dismiss and at the hearing on the motion with the proper understanding of the communications alleged to have been wrongly disclosed, it will reach a different conclusion—the Court will deny Defendant's motion to dismiss Plaintiffs' SCA claim. Accordingly, Plaintiffs respectfully request that the Court alter its prior Judgment to allow Plaintiffs to proceed with their claim under the SCA. *See, e.g., All West Pet Supply Co. v. Hill's Pet Products Div.*, 847 F. Supp. 858 (D. Kan. 1994) (appropriate grounds for motion to reconsider include court's obvious misapprehension of party's position, facts, or law).

Alternatively, if the Court determines that Plaintiffs' contentions here, in Plaintiffs' Opposition to the Motion to Dismiss, and at the hearing, are not adequately supported by the

First Amended Complaint, then the Court should alter its prior Judgment to allow Plaintiffs to amend. *See, e.g., Flett v. W. A. Alexander & Co.*, 302 F.2d 321 (D. Ill. 1962), cert. denied, 83 S. Ct. 71, 371 U.S. 841, 9 L.Ed.2d 77 (plaintiff whose complaint had been dismissed could have filed motion under this rule for modification of judgment dismissing action and for leave to file amended complaint).

"[L]eave to amend should be granted 'if it appears at all possible that the plaintiff can correct the defect.'" *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 701 (9th Cir. 1990) (quoting 3 Moore, Federal Practice, Sec. 15.10 at 838 (2d ed. 1948)). If the Court can merely "conceive of facts" that would render Plaintiffs' claim viable, then leave to amend should be granted. *Id.* (quoting *Scott v. Eversole Mortuary*, 522 F.2d 1110, 1116 (9th Cir. 1975)). As Plaintiffs' Opposition to the Motion to Dismiss and the transcript of the hearing on the motion demonstrate, Plaintiffs can correct the pleading defect through amendment by clarifying the details concerning Facebook's status as an RCS, what communications Facebook impermissibly shared with third parties, and how Facebook impermissibly shared those communications. Doing so would allow the Court to rule on the merits of Plaintiffs' argument that Facebook, in its role as an RCS, may not rely on the intended recipient exception to avoid liability under the SCA— which the Court has thus far declined to do. (Order at 6, n. 7.)

Dated: December 20, 2011

Respectfully submitted,
NASSIRI & JUNG LLP

s/ Kassra P. Nassiri
Kassra P. Nassiri
Attorneys for Plaintiffs and the Putative Class

Dated: December 20, 2011

Respectfully submitted,
ASCHENBRENER LAW, P.C.

s/ Michael Aschenbrener
Michael Aschenbrener
Attorneys for plaintiffs and the Putative Class

CERTIFICATE OF SERVICE

The undersigned certifies that, on December 20, 2011, he caused this document to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of filing to counsel of record for each party.

Dated: December 20, 2011   ASCHENBRENER LAW, P.C.

By: s/ Michael Aschenbrener
Michael Aschenbrener