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8 UNITED STATES DISTRICT COURT  
 9 NORTHERN DISTRICT OF CALIFORNIA  
 10 SAN FRANCISCO DIVISION

12 IN RE: FACEBOOK PRIVACY  
13 LITIGATION

Case No. 10-CV-02389-JW

**FACEBOOK, INC.'S OPPOSITION TO  
 PLAINTIFFS' MOTION TO ALTER OR AMEND  
 JUDGMENT, OR, ALTERNATIVELY, FOR RELIEF  
 FROM JUDGMENT**

Date: February 27, 2012  
 Time: 9:00 a.m.  
 Courtroom: 15 (18th Floor)  
 Judge: Hon. James Ware  
 Trial Date: Not Yet Set

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1 **I. INTRODUCTION**

2 Having lost two rounds of motions to dismiss, and having had their claims dismissed with  
3 prejudice, Plaintiffs now have filed a meritless motion for relief from the Judgment under Federal  
4 Rules of Civil Procedure 59(e) and 60(b). Plaintiffs claim that this Court committed “manifest  
5 errors of fact” in the portion of its November 22, 2011 Order dismissing Plaintiffs’ Stored  
6 Communications Act (“SCA”) claim. (Mot. at 1.) As Plaintiffs’ motion makes clear, however,  
7 the alleged “mistake of fact” is, in reality, an assertion that this Court “misconstrue[d]” Plaintiffs’  
8 *legal argument* in opposition to Facebook’s motion to dismiss the SCA claim. (*Id.* at 2-4.)  
9 Plaintiffs’ motion does precisely what is prohibited by Rule 59(e) and 60(b): it attempts to  
10 reargue convoluted and shifting theories of liability that were extensively argued and analyzed  
11 through briefing and oral argument by the parties and rejected by the Court. Indeed, literally a  
12 page and a half of Plaintiffs’ five-page motion is cut-and-paste from their opposition to  
13 Facebook’s motion to dismiss and the oral-argument transcript. Plaintiffs do not present the  
14 exceptional circumstances required for disturbing the Court’s well-reasoned final judgment  
15 dismissing the SCA and all other claims with prejudice, and the motion should be denied.

16 **II. LEGAL STANDARDS**

17 Amendment of a court’s judgment under Federal Rule of Civil Procedure 59(e) is an  
18 ““extraordinary remedy, to be used sparingly in the interests of finality and conservation of  
19 judicial resources.”” *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)  
20 (citation omitted); *accord Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011) (Rule  
21 59(e) is ““an extraordinary remedy which should be used sparingly””) (citation omitted);  
22 *Niedermeier v. Office of Baucus*, 153 F. Supp. 2d 23, 28 (D.D.C. 2001) (noting such motions are  
23 “disfavored and relief from judgment is granted only when the moving party establishes  
24 extraordinary circumstances”). “In general, there are four basic grounds upon which a Rule 59(e)  
25 motion may be granted: (1) if such motion is necessary to correct manifest errors of law or fact  
26 upon which the judgment rests; (2) if such motion is necessary to present newly discovered or  
27 previously unavailable evidence; (3) if such motion is necessary to prevent manifest injustice; or  
28 (4) if the amendment is justified by an intervening change in controlling law.” *Allstate*, 634 F.3d

1 at 1111. Simply restating arguments and facts that have already been raised in connection with  
2 the motion upon which the judgment is based is not permitted. *See Backlund v. Barnhart*, 778  
3 F.2d 1386, 1388 (9th Cir. 1985); *Anderson v. Am. Airlines, Inc.*, No. C 08–04195 WHA, 2011  
4 WL 1706514, at \*2 (N.D. Cal. May 5, 2011). Rule 59(e) motions must clear a “high hurdle,” and  
5 judgment is not properly reopened “absent highly unusual circumstances . . . .” *Weeks v. Bayer*,  
6 246 F.3d 1231, 1236 (9th Cir. 2001) (citation omitted).

7 Similarly, “Rule 60(b) authorizes relief in only the most exceptional of cases.” *Espinosa*  
8 *v. United Student Aid Funds, Inc.*, 553 F.3d 1193, 1199 (9th Cir. 2008) (quoting *Gaydos v.*  
9 *Guidant Corp.*, 496 F.3d 863, 866 (8th Cir. 2007)). Rule 60(b) “strictly cabins the circumstances  
10 under which a judgment can be reopened after it becomes final.” *Id.* Relief under Rule 60(b) is  
11 appropriate “only upon a showing of (1) mistake, surprise, or excusable neglect; (2) newly  
12 discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6)  
13 ‘extraordinary circumstances’ which would justify relief.” *See School Dist. No. 1J, Multnomah*  
14 *County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (citation omitted).

15 Plaintiffs base their motion on what they assert were “manifest errors of fact” by this  
16 Court. A “manifest error is synonymous with a clear error.” *See Pet Food Exp. Ltd. v. Royal*  
17 *Canin USA, Inc.*, No. C–09–1483 EMC, 2011 WL 6140874, at \*4 (N.D. Cal. Dec. 8, 2011)  
18 (citing *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001)). Further, “the error  
19 must be one on which the final judgment was predicated, [and] the error must be one that would  
20 alter the outcome of the case.” *Id.*; *see also Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d  
21 Cir. 1995); *Herschaft v. N.Y. City Campaign Fin. Bd.*, 139 F. Supp. 2d 282, 283-84 (E.D.N.Y.  
22 2001) (noting that a Rule 59(e) motion for reconsideration is only appropriate where the moving  
23 party can demonstrate the court overlooked “factual matters that were put before it on the  
24 underlying motion . . . and which, had they been considered, might have reasonably altered the  
25 result before the court” (quoting *Range Road Music, Inc. v. Music Sales Corp.*, 90 F. Supp. 2d  
26 390, 392 (S.D.N.Y.2000)); *see also* CHARLES ALAN WRIGHT, ET AL., FED. PRAC. & PROC. §  
27 2810.1 (2nd ed. 1982) (stating that “amendment of the judgment will be denied if it would serve  
28 no useful purpose”). Thus, even if a court were to find some error, the motion should be denied if

1 the error is harmless. Indeed, Rule 61 provides: “Unless justice requires otherwise, no error in  
2 admitting or excluding evidence—or any other error by the court or a party—is ground . . . for  
3 vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the  
4 proceeding, the court must disregard all errors and defects that do not affect any party’s  
5 substantial rights.” FED. R. CIV. P. 61.

### 6 III. ARGUMENT

#### 7 **Plaintiffs’ Motion Fails to Demonstrate Any Extraordinary Circumstances That** 8 **Would Warrant Disturbing the Judgment.**

9 Plaintiffs assert that this Court committed “manifest errors of fact” by “misconstruing”  
10 their legal argument in opposition to Facebook’s motion to dismiss the SCA claim. (Mot. at 1, 2-  
11 4.) Specifically, Plaintiffs quote the following portion of the Court’s November 22, 2011 Order:

12 “Plaintiffs contend that Defendant acted as an RCS provider for purposes of  
13 Plaintiffs’ claim under the SCA. . . . [I]f Defendant was acting as an RCS provider  
14 for purposes of the Plaintiffs’ claim, then it must be the case that Plaintiffs’  
15 communications consisted of ‘data’ which Plaintiffs sent to Defendant for  
16 ‘processing or storage.’ However, Plaintiffs allege that the communications at  
17 issue were requests to be connected to advertisements, not data to be processed or  
18 stored. [¶] Accordingly, the Court finds that Plaintiffs fail to state a claim under  
19 the SCA.”

(Mot. at 2 (quoting Order at 5-6).)<sup>1</sup>

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18 <sup>1</sup> The entirety of that section of the Order, with the with the portion quoted by Plaintiffs  
19 underlined, is as follows:

20 Upon review, the Court finds that Plaintiffs’ argument relies on two mutually inconsistent  
21 propositions. On the one hand, Plaintiffs allege that the communications at issue in this  
22 case were requests to be connected to specific advertisements; that the requests were  
23 addressed to advertisers; and that Defendant merely acted as the “intermediary” for those  
24 communications. (FAC ¶¶ 69, 74, 81.) On the other hand, Plaintiffs contend that  
25 Defendant acted as an RCS provider for purposes of Plaintiffs’ claim under the SCA.  
26 (Opp’n at 2.) On the first view, if the communications were addressed to advertisers, then  
27 they were not sent to Defendant in order for Defendant to provide the “processing or  
28 storage” of Plaintiffs’ “data,” which means that Defendant was not acting as an RCS  
provider with respect to the communications. Quon, 529 F.3d at 901-02. By contrast, on  
the second view, if 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. [Footnote 7] [¶] Accordingly, the Court finds that Plaintiffs fail to  
state a claim under the SCA.

(Order at 5-6.)

1 Plaintiffs assert that the Court must have misunderstood the crux of their argument  
2 regarding Facebook’s liability under the SCA—*i.e.*, that “the communications at issue were not  
3 requests to be connected to advertisers, but rather were communications between Plaintiffs and  
4 Facebook concerning their private Facebook browsing and virtual filing cabinet activities.”  
5 (Mot. at 2.) But the Court’s Order reflects that it carefully considered Plaintiffs’ arguments and  
6 rejected them. Plaintiffs’ attempt to reargue their opposition to Facebook’s motion to dismiss is  
7 not a proper basis for relief under either Rule 59(e) or Rule 60(b).

8 As an initial matter, Plaintiffs’ own motion makes clear that Plaintiffs advanced, and the  
9 Court considered, the same legal arguments on which they now base their motion. In fact, a page  
10 and a half of Plaintiffs’ five-page motion is comprised of single-space block quotations from  
11 Plaintiffs’ oral argument at the hearing on Facebook’s motion to dismiss and arguments made in  
12 Plaintiffs’ opposition to Facebook’s motion to dismiss. (Mot. at 2-3.) A party, however, may not  
13 simply restate arguments that already were raised in opposition to the motion on which the  
14 judgment is based, in support of amendment of or relief from the judgment. *See Backlund*, 778  
15 F.2d at 1388 (rejecting plaintiff’s motions for reconsideration under Rule 59(e) and Rule 60(b) as  
16 these motions “presented no arguments that had not already been raised in opposition to summary  
17 judgment”). A court in this District recently rejected a similar motion to amend a judgment under  
18 Rule 59(e) which argued that the court had committed “manifest errors of law and fact” by  
19 “ignoring certain facts” regarding the contracts at issue. *See Anderson*, 2011 WL 1706514, at \*5.  
20 In denying the Rule 59(e) motion, the court noted that the facts and arguments about the contract  
21 were a part of the summary judgment record, and that the judgment was made after considering  
22 all facts and argument presented in the briefs. *Id.* The court held that the plaintiff’s attorney’s  
23 “conclusory statement” that the enumerated facts had been ignored “serves only as an excuse to  
24 restate arguments that were or could have been made in opposition to summary judgment” and  
25 “therefore does not justify relief under Rule 59(e).” *Id.*

26 Similarly, here, each “fact” and argument on which Plaintiffs rely in their motion to  
27 amend the Judgment was before the Court when it considered Facebook’s motion to dismiss.  
28 (*E.g.*, Mot. at 3 (quoting oral argument by Plaintiffs’ counsel: “Then when I click on an ad, they

1 take information that they had about what I was looking at when they were providing the storage  
2 service to me, and they pass it on to the advertiser, via the click on the ad. And they embed it, by  
3 choice, into the URL, and send it off to the advertiser.”); *id.* (quoting Plaintiffs’ opposition to  
4 Facebook’s motion to dismiss: “Plaintiffs also allege that they sent communications (i.e.,  
5 communications concerning their identities and which of their own stored content or friends’  
6 stored content they wished to view) to Facebook for the specific and sole purpose of using  
7 Facebook’s remote computing services”).) Plaintiffs simply disagree with the Court’s decision;  
8 there was no “manifest error of fact” related to the arguments Plaintiffs made.

9 Further, the Order (Order at 1) specifically incorporated “the factual background of this  
10 case” from the Court’s previous May 12, 2011 Order, which dismissed Plaintiffs’ same SCA  
11 claim with leave to amend. The “Background” section of the May 12, 2011 Order quoted the  
12 same allegations which Plaintiffs now assert the Court misconstrued. (*See* Order Granting in Part  
13 and Denying in Part [Facebook’s] Motion to Dismiss at 2-3, May 12, 2011 (quoting Plaintiffs’  
14 allegations: “When a user of Defendant’s website clicks on an advertisement posted on the  
15 website, Defendant sends a ‘Referrer Header’ to the corresponding advertiser. (Complaint ¶ 28.)  
16 This Referrer Header reveals the specific webpage address that the user was looking at prior to  
17 clicking on the advertisement. (*Id.*) Thus, Defendant has caused users’ Internet browsers to send  
18 Referrer Header transmissions which report the user ID or username of the user who clicked on  
19 an advertisement, *as well as information identifying the webpage the user was viewing just prior*  
20 *to clicking on that advertisement.* (*Id.*”) (emphasis added)).) The November 22, 2011 Order  
21 thus reflected the Court’s consideration of all allegations that were material to Plaintiffs’ SCA  
22 claim,<sup>2</sup> including the claim that Facebook was somehow liable under the SCA as a “remote  
23 computing service” (“RCS”) provider.

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24  
25 <sup>2</sup> Even if the November 22, 2011 Order had not incorporated the earlier-recited factual background by  
26 reference (which is not required), there would be no reason to believe that the Court did not consider all  
27 material “facts” in connection with Plaintiffs’ SCA claim—the “facts” for purposes of a Rule 12(b)(6)  
28 motion being the factual allegations contained in the operative complaint. Moreover, the November 22,  
2011 Order specifically notes that it is based on the papers submitted by the parties and oral argument, in  
both of which Plaintiffs assert the very “facts” upon which they now base their motion. (Order at 1.)

1 Finally, the alleged “communications” at issue do not state a claim under the SCA,  
2 regardless of whether they are characterized as “communications” (1) between Plaintiffs and  
3 advertisers or (2) “between Plaintiffs and Facebook concerning their private Facebook browsing  
4 and virtual filing cabinet activities” (Mot. at 2). The SCA provides that neither an electronic  
5 communications service (“ECS”) provider nor a RCS provider may be held liable for divulging  
6 communications to or with the consent of “an addressee or intended recipient.” 18 U.S.C.  
7 §§ 2702(b)(1), (b)(3).<sup>3</sup> And, despite Plaintiffs advancing both theories based on the alleged  
8 disclosure of “communications” via “referrer headers,” this Court has twice dismissed their  
9 claims.

10 Plaintiffs’ motion has no merit, and there is no basis for taking the extraordinary step of  
11 amending the Judgment in this case.

12 **IV. CONCLUSION**

13 For the foregoing reasons, Plaintiffs’ Motion to Alter or Amend Judgment, Or,  
14 Alternatively, For Relief From Judgment should be denied.

15  
16 Dated: January 20, 2012

COOLEY LLP

17  
18 /s/ Matthew D. Brown  
Matthew D. Brown (196972)

19 Attorneys for Defendant FACEBOOK, INC.  
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24 <sup>3</sup> There are a number of other grounds on which the Court could have dismissed Plaintiffs’ SCA claim,  
25 including: (1) Facebook was not acting as an RCS provider in connection with the alleged disclosures of  
26 “communications” at issue; (2) the allegedly disclosed “communications” were not carried by or  
27 maintained on Facebook “solely for the purpose of providing storage or computer processing services” to  
28 Plaintiffs (as required for liability as an RCS provider under the SCA); and (3) the disclosures did not  
involve the “contents of communications” that are protected by the SCA. (*See* Facebook’s Mot. to  
Dismiss First Amended Consolidated Class Action Compl. at 9-17; Facebook’s Reply in Support of Mot.  
to Dismiss at 3-11.)