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

12 **UNITED STATES DISTRICT COURT**

    NORTHERN DISTRICT OF CALIFORNIA
13
    SAN FRANCISCO DIVISION
14

15 | | |
    |---|---|
    | | Case No. 10-cv-02389-JW |
16 | | |
    | | <u>CLASS ACTION</u> |
17 | | |
    | | **PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO ALTER OR AMEND JUDGMENT, OR, ALTERNATIVELY, FOR RELIEF FROM JUDGMENT AND SUPPORTING MEMORANDUM** |
18 | IN RE: FACEBOOK PRIVACY LITIGATION | |
19 | | |
    | | ACTION FILED: 05/28/10 |
20 | | |
21 | | Date: February 27, 2012 |
    | | Time: 9:00 a.m. |
22 | | Judge: Hon. James Ware |
23

24

25

26

27

28

PLAINTIFFS' REPLY IN SUPPORT OF
MOTION TO ALTER OR AMEND
JUDGMENT

        10-cv-2389-JW

I. INTRODUCTION

Facebook erroneously characterizes Plaintiffs' motion as an attempt to re-litigate decided issues. To the contrary, Plaintiffs respectfully contend that the Court's November 22, 2011 Order (Dkt. No. 106, the "Order") was based on a manifest error of fact, thus Plaintiffs' arguments and critical issues in the case were not properly considered and/or decided.[1]

As Plaintiffs alleged in their Amended Complaint (Dkt. No. 92), the communications at issue were not requests to be connected to advertisers, but rather were communications between Plaintiffs and Facebook solely concerning the use of Facebook's storage or computer processing services. Because of this mistake of fact (i.e., that the click on an ad was the communication at issue), Plaintiffs respectfully request that the Court amend the Order granting Facebook's motion to dismiss and instead deny Facebook's motion to dismiss Plaintiffs' Stored Communications Act ("SCA") claim, or in the alternative, grant Plaintiffs leave to amend their complaint to clarify any ambiguities concerning their SCA claim.

II. DISCUSSION

Contrary to what Facebook asserts, Plaintiffs do not "simply disagree with the Court's decision." Rather, Plaintiffs contend that the Court's decision was based on a manifest error of fact concerning Plaintiff's allegations. In the Order, the Court detailed its reasoning for its decision, but that detailed reasoning reveals that the Court erred in construing Plaintiffs' allegations. (Order at 3-6.) Here is the specific language that reveals the Court's manifest error of fact:

> 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,

---

[1] Defendant also accuses Plaintiffs of re-hashing and cutting and pasting previous arguments. Plaintiffs certainly included in the present motion portions of arguments previously raised, but not to re-hash the arguments. Rather, Plaintiffs restated their positions out of necessity—to identify for the Court where Plaintiffs previously discussed their allegations with the Court. Plaintiffs are expressly *not* trying to re-litigate any arguments, and instead only seek to identify for the Court that Plaintiffs previously discussed how their communications were not requests for advertisers, but were RCS-related communications.

1

                Plaintiffs allege that the communications at issue were requests to
            be connected to advertisements, not data to be processed or stored.

2 (Order at 5:26-6:3.)

3   In the passage above, the first sentence is a correct and relevant recitation of applicable

4 law. But the second sentence incorrectly states Plaintiffs' allegations. Plaintiffs do not allege that

5 the communications at issue were "requests to be connected to advertisements," but instead

6 allege that the communications at issue were communications between Plaintiffs and Facebook

7 solely concerning the use of Facebook's storage or computer processing services.

8   More precisely, Plaintiffs allege that Facebook, acting in its capacity as a Remote

9 Computing Service ("RCS") provider[2], unlawfully shared Plaintiffs' RCS-related data with

10 advertisers by combining their usernames with their RCS-related virtual filing cabinet activities.

11 (Dkt. No. 92, at ¶¶ 76-77 ("users do not expect, intend or consent for Facebook to add or pass

12 along [to advertisers] PII [including usernames along with what Facebook page those users were

13 viewing when they clicked on the ad]".).

14   The following allegations from their Amended Complaint support Plaintiffs' position:

15

16   Instead, Facebook discloses an additional communication
              containing the user's username, and/or UID to the Advertiser in
              violation of 18 U.S.C. § 2702(a)(1).

17
(Dkt. No. 92, at ¶ 78(i).)

18

19   Alternatively, when a Facebook user clicks on an ad, the user is
              asking Facebook to send an electronic communication to the

20   Advertiser allowing the user to view the Advertiser's website.
              Instead, Facebook exceeds its authority to disclose records about

21   its users by sending usernames and/or UIDs to the Advertiser,
              instead of a simple request for the information needed to view the

22   Advertiser's website, in violation of 18 U.S.C. § 2702(a)(1).

23 (*Id.*, at ¶ 78(ii).)

24

25 [2] (Dkt. No. 92, Amended Complaint, ¶¶ 35, 44, 80 ("storage [of user information such as
pictures, political and sexual preferences, etc.] is one of the main services that Facebook

26 provides to its users"); 81 ("Because Facebook thus operates as a 'virtual filing cabinet' for its
users, allowing then to store and re-access at a later time their photos, messages, wall posts and

27 more, Facebook is also a 'remote computing service' provider pursuant to 18 U.S.C.
§ 2711(2).""))

28

PLAINTIFFS' REPLY IN SUPPORT OF   2
MOTION TO ALTER OR AMEND   10-cv-2389-JW
JUDGMENT

1   The confusion may stem from the fact that Facebook unlawfully shared the

2   communications at issue—RCS-related data—while also simultaneously and lawfully sharing

3   Plaintiffs' requests to be connected to advertisers. But Plaintiffs expressly allege that the requests

4   to be connected to advertisers are not the communications at issue. Rather, it is only the

5   communications concerning data stored or processed by Facebook that are at issue. And the two

6   communications—one, the RCS-related data; and two, the advertisement requests—are two

7   distinct sets of communications. But ¶ 78, as quoted above, demonstrates that the Court

8   incorrectly determined that Plaintiffs' alleged that the communications at issue were requests to

9   be connected to advertisers.

10   Furthermore, this error is manifest because, as the Order shows, the Court based its

11 decision not to reach the merits of Plaintiffs' SCA claim on this error. (Order at 6, n. 7. ("In light

12 of the Court's disposition of Plaintiffs' SCA claim, the Court does not reach the merits of

13 Plaintiffs' contention that only 'ECS providers, and not RCS providers like [Defendant], may

14 avail themselves of the SCA's 'intended recipient' exception. . . . [and] the Court does not reach

15 the question of whether Defendant was acting as an RCS provider."))

16   In short, the Court's basis for its decision is inconsistent with Plaintiffs' allegations. And

17 where a court bases a judgment on a manifest error of fact, the court should amend its judgment

18 as necessary. *Turner v. Burlington Northern Santa Fe R. Co.*, 338 F. 3d 1058, 1063 (9th Cir.

19 2003) (A Rule 59 motion may be granted where a party identifies "manifest errors of law or fact

20 upon which the judgment is based.").

21   For this reason, Plaintiffs respectfully request that the Court amend its Order granting the

22 motion to dismiss Plaintiffs' SCA claim by denying the motion to dismiss the SCA claim, or in

23 the alternative, by granting Plaintiffs leave to amend their complaint so they may clarify any

24 ambiguities concerning what communications are at issue, what data the communications at

25 issue contain, and from whom and to whom the communications at issue were made.

26

27

28

1   Dated: February 3, 2012   Respectfully submitted,
                                                NASSIRI & JUNG LLP

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

4

5

6   Dated: February 3, 2012   Respectfully submitted,
                                                ASCHENBRENER LAW, P.C.

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

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

CERTIFICATE OF SERVICE

The undersigned certifies that, on February 3, 2012, 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: February 3, 2012   ASCHENBRENER LAW, P.C.

                                                     By: s/ Michael Aschenbrener
                                                     Michael Aschenbrener