

1 COOLEY LLP
2 MICHAEL G. RHODES (116127)
3 (rhodesmg@cooley.com)
4 MATTHEW D. BROWN (196972)
5 (brownmd@cooley.com)
6 KYLE C. WONG (224021)
7 (kwong@cooley.com)
8 ADAM C. TRIGG (261498)
9 (atrigg@cooley.com)
10 101 California Street, 5th Floor
11 San Francisco, CA 94111-5800
12 Telephone: (415) 693-2000
13 Facsimile: (415) 693-2222

14 Attorneys for Defendant
15 FACEBOOK, INC.

16 UNITED STATES DISTRICT COURT
17
18 NORTHERN DISTRICT OF CALIFORNIA
19
20 SAN JOSE DIVISION

21 In re: Facebook Internet Tracking Litigation

22 Case No. 5:12-md-02314 EJD

23 **DEFENDANT FACEBOOK, INC.'S NOTICE**
24 **OF MOTION AND MOTION FOR**
25 **PROTECTIVE ORDER TEMPORARILY**
26 **STAYING FURTHER DISCOVERY PENDING**
27 **RESOLUTION OF MOTION TO DISMISS**
28 **SECOND AMENDED CONSOLIDATED**
COMPLAINT, AND MEMORANDUM OF
POINTS AND AUTHORITIES

FED. R. CIV. P. 26(c)

Date: April 28, 2016
Time: 9:00 a.m.
Courtroom: 4
Judge: Hon. Edward J. Davila
Trial Date: None Set

TABLE OF CONTENTS

	Page
NOTICE OF MOTION	1
STATEMENT OF RELIEF SOUGHT	1
STATEMENT OF ISSUE TO BE DECIDED	1
MEMORANDUM OF POINTS AND AUTHORITIES	1
I. INTRODUCTION	1
II. STATEMENT OF FACTS	3
A. Procedural Background.....	3
B. Plaintiffs' Lack of Diligence on Discovery to Date.....	4
III. LEGAL STANDARDS.....	7
IV. ARGUMENT	8
A. Discovery Should Be Stayed Temporarily Pending Resolution of Facebook's Motion to Dismiss Because the Motion Could Potentially Dispose of the Entire Case and Can Be Decided Without Any Further Discovery.	8
B. Protection from Further Discovery Pending the Motion to Dismiss is Particularly Appropriate Here Where the Additional Discovery Sought Will Be Costly, Unnecessary, and Unduly Burdensome.	11
V. CONCLUSION	13

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	9
<i>Barker v. Gottlieb</i> , Civ. No. 13-00236 LEK-BMK, 2014 WL 1569477 (D. Haw. Apr. 16, 2014)	8, 9, 11, 12
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007)	9
<i>Dura Pharms., Inc. v. Broudo</i> , 544 U.S. 336 (2005)	9
<i>Fields v. Roberts</i> , No. 1:06-cv-00407-AWI-GSA-PC, 2013 WL 5230034 (E.D. Cal. Sept. 16, 2013)	8, 11, 12
<i>Gibbs v. Carson</i> , No. C-13-0860 THE (PR), 2014 WL 172187 (N.D. Cal. Jan. 15, 2014)	8, 11
<i>Hall v. Tilton</i> , No. C 07-3233 RMW (PR), 2010 WL 539679 (N.D. Cal. Feb. 9, 2010)	8, 10, 11
<i>Hamilton v. Rhoads</i> , No. C 11-0227 RMW (PR), 2011 WL 5085504 (N.D. Cal. Oct. 25, 2011)	8, 11
<i>Harris v. Am. Gen. Fin. Servs. LLC</i> , No. 2:10-cv-01662-GMN-LRL, 2010 WL 9517401 (D. Nev. Dec. 2, 2010)	8, 11
<i>Janis v. Biesheuvel</i> , 428 F.3d 795 (8th Cir. 2005)	7
<i>Jarvis v. Regan</i> , 833 F.2d 149 (9th Cir. 1987)	7, 9
<i>Johnson v. N.Y. Univ. Sch. of Educ.</i> , 205 F.R.D. 433 (S.D.N.Y. 2002)	7
<i>Little v. City of Seattle</i> , 863 F.2d 681 (9th Cir. 1988)	7
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985)	7

TABLE OF AUTHORITIES

(continued)

Page(s)

<i>O'Meara v. Heineman</i> , No. 8:09CV0157, 2009 U.S. Dist. LEXIS 67487 (D. Neb. July 29, 2009)	7
<i>Panola Land Buyers Ass'n v. Shuman</i> , 762 F.2d 1550 (11th Cir. 1985).....	7
<i>Rae v. Union Bank</i> , 725 F.2d 478 (9th Cir. 1984).....	9
<i>Rutman Wine Co. v. E. & J. Gallo Winery</i> , 829 F.2d 729 (9th Cir. 1987).....	7, 8
<i>S.F. Tech. v. Kraco Enters. LLC</i> , No. 5:11-cv-00355 EJD, 2011 WL 2193397 (N.D. Cal. June 6, 2011).....	10
<i>Spokeo, Inc. v. Robins</i> , No. 13-1339 (cert. granted Apr. 27, 2015; argued Nov. 2, 2015).....	12
<i>Spokeo. Matera v. Google Inc.</i> , No. 15-CV-04062-LHK, 2016 U.S. Dist. LEXIS 15271 (N.D. Cal. Feb. 5, 2016)	12
<i>Universal Trading & Inv. Co. v. Dugsbery, Inc.</i> , 499 F. App'x 663 (9th Cir. 2012)	7
<i>Wenger v. Monroe</i> , 282 F.3d 1068 (9th Cir. 2002).....	7
<i>Wood v. McEwen</i> , 644 F.2d 797 (9th Cir. 1981).....	7
<i>In re Zynga Privacy Litig.</i> , 750 F.3d 1098 (9th Cir. 2014).....	4

Other Authorities

5 Wright & Miller, Federal Practice and Procedure § 1216	9
Fed. R. Civ. P.	
12(b)	7, 9
26(c)	1, 7, 10
26(b)(1)	11

1 **NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER**
2 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

3 PLEASE TAKE NOTICE that on April 28, 2016 at 9:00 am or as soon thereafter as this
4 motion may be heard in the above-entitled court, located at 280 South First Street, San Jose,
5 California, in Courtroom 4, 5th Floor, Defendant Facebook, Inc. (“Facebook”) will, and hereby
6 does, move for a protective order temporarily staying further discovery during the pendency of
7 Facebook’s motion to dismiss Plaintiffs’ Second Amended Consolidated Class Action Complaint
8 (“SAC”). Facebook’s motion is made pursuant to Federal Rule of Civil Procedure 26(c) and is
9 based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities,
10 the accompanying Declaration of Kyle C. Wong (“Wong Decl.”), and all pleadings and papers on
11 file in this matter, and upon such other matters as may be presented to the Court at the time of
12 hearing or otherwise. As required by Federal Rule of Civil Procedure 26(c)(1), Facebook
13 certifies that the Parties have conferred and attempted to resolve this dispute prior to Facebook
14 filing this motion. (*See* Wong Decl. ¶ 18.)

15 **STATEMENT OF RELIEF SOUGHT**

16 Facebook seeks a protective order temporarily staying further discovery pending the
17 Court’s resolution of Facebook’s motion to dismiss Plaintiffs’ SAC.

18 **STATEMENT OF ISSUE TO BE DECIDED**

19 Whether the Court should grant a temporary stay of further discovery in this action
20 pending the Court’s resolution of Facebook’s motion to dismiss Plaintiffs’ SAC.

21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 **I. INTRODUCTION**

23 In the more than four years since this case was filed, Plaintiffs have taken a subdued and
24 half-hearted approach to discovery. Although discovery commenced on June 29, 2012, Plaintiffs
25 did not serve their first request for production of documents until November 2012. They have
26 not, in four years, served a single deposition notice, request for admission, or interrogatory on
27 Facebook. Moreover, Plaintiffs sat for six months on Facebook’s proposed stipulated protective
28 order concerning the production of confidential documents, only to agree to the proposal without

1 any changes. After Facebook produced nearly 13,000 documents, Plaintiffs did not initiate a
2 meet-and-confer regarding Facebook’s objections and production of documents for six months.
3 At that point, they had not even reviewed the entire 13,000 document production. Then, in the
4 middle of the meet-and-confer process, Plaintiffs went silent for nearly *two years*.

5 It was not until after the Court issued its order (“Order”) dismissing Plaintiffs’ First
6 Amended Consolidated Class Action Complaint (“FAC”), after Plaintiffs filed their SAC, and
7 after Plaintiffs learned that Facebook intended to move to dismiss the SAC, that they suddenly
8 became interested in pursuing discovery. On January 14, 2016—the same day Facebook was
9 scheduled to file its Motion to Dismiss the SAC (“Motion to Dismiss”)—Plaintiffs sent a letter to
10 Facebook seeking a considerable expansion of discovery, including depositions of Facebook
11 employees and document production from twenty additional custodians. But Plaintiffs’ belated
12 insistence on dramatically expanding discovery is unwarranted while Facebook’s Motion to
13 Dismiss is pending, particularly given that this Court previously determined that Plaintiffs did not
14 have Article III standing to bring the vast majority of the claims asserted in their original
15 complaint. Nevertheless, in an attempt to avoid burdening the Court with motion practice,
16 Facebook offered to produce certain appropriately focused categories of additional documents.
17 Plaintiffs rejected that offer. Facebook now brings this motion for a protective order temporarily
18 staying further discovery¹ pending the resolution of its Motion to Dismiss, which is set to be
19 heard by the Court in less than two months, on April 28, 2016.

20 The “good cause” standard employed by courts in this circuit for staying discovery
21 pending a motion to dismiss is easily satisfied here. Such stays may be granted when (1) the
22 pending motion is potentially dispositive of the entire action, and (2) the motion can be decided
23 without additional discovery. Unquestionably, if granted, Facebook’s Motion to Dismiss, which
24 seeks to dismiss the SAC with prejudice, would end this action in its entirety. Also, Facebook’s
25 motion can be decided without any additional discovery. As an initial matter, the motion is
26 limited to the face of the complaint. Moreover, the Court dismissed the FAC largely on the basis

27 ¹ Facebook intends to produce the focused categories of documents already offered to Plaintiffs
28 regardless of the outcome of this motion.

1 of standing, and Facebook’s Motion to Dismiss again seeks dismissal on that basis. Further
2 discovery will not assist Plaintiffs in pleading a cognizable injury. Nor will it shed any light on
3 the basic operation of the Internet, upon which the Court based its prior dismissal of Plaintiffs’
4 remaining claims. If Plaintiffs actually needed the discovery they now seek in order to amend
5 their pleading, undoubtedly they would have asked for it long before now. Under these
6 circumstances, a temporary stay will not burden Plaintiffs, but rather, if the Court were to rule
7 that the case may move forward, it will ensure that discovery focuses only on the subjects that are
8 relevant to the operative complaint. For these reasons, Facebook asks the Court to order a
9 temporary stay of further costly and burdensome discovery while it determines whether Plaintiffs
10 have standing and whether their SAC states a claim upon which relief can be granted.

11 **II. STATEMENT OF FACTS**

12 **A. Procedural Background**

13 This case is a consolidated, multi-district lawsuit against Facebook, brought by and on
14 behalf of individuals with active Facebook accounts from May 27, 2010, through September 26,
15 2011. (Order at 1.) Plaintiffs claim that Facebook tracked and stored their post-logout Internet
16 usage using small text files—or “cookies”—which Facebook is alleged to have embedded in their
17 computers’ browsers. (*Id.*) Plaintiffs’ FAC asserted eleven federal, state, and common law
18 claims, including claims under the federal Wiretap Act, the federal Stored Communications Act
19 (“SCA”), and the California Invasion of Privacy Act (“CIPA”). (FAC, Dkt. No. 35.)

20 On October 23, 2015, the Court granted Facebook’s motion to dismiss the FAC in its
21 entirety with leave to amend. (Order, Dkt. No. 87.) In the Order, the Court held that Plaintiffs
22 failed to allege an injury-in-fact as required for Article III standing. (*Id.* at 11.) Specifically, the
23 Court held that Plaintiffs did not “articulate[] a cognizable basis for standing pursuant to Article
24 III” because they did “not demonstrate[] that Facebook’s conduct resulted in some concrete and
25 particularized harm” (*Id.* at 11.) The Court determined that the FAC failed to connect
26 whatever value there might be in the information allegedly collected by Facebook “to a realistic
27 economic harm or loss that is attributable to Facebook’s alleged conduct.” (*Id.* at 10.) Put
28 another way, “Plaintiffs [did] not show[], for the purposes of Article III standing, that they

1 personally lost the opportunity to sell their information or that the value of their information was
2 somehow diminished after it was collected by Facebook.” (*Id.*) This failure to plead any injury
3 resulted in dismissal of all but the three statutory claims noted above.

4 For the remaining statutory claims, the Court dismissed the Wiretap Act and CIPA claims
5 because the browsing information Plaintiffs alleged Facebook received was not “contents” of any
6 communications under *In re Zynga Privacy Litig.*, 750 F.3d 1098, 1106-07 (9th Cir. 2014).
7 (Order at 15-16.) In doing so, this Court recognized that the URL information Plaintiffs allege
8 was intercepted “is so similar to the referer headers addressed in *Zynga Privacy Litigation* [that]
9 Plaintiffs may never be able to state [a] Wiretap Act claim” (Order at 16.) The Court also
10 dismissed the SCA claim because Plaintiffs’ allegations did not demonstrate that Facebook
11 accessed any communications in “electronic storage” as required by the SCA. The Court
12 determined that Plaintiffs’ allegations of access to “persistent cookies” “cannot be reconciled with
13 the temporary nature of storage contemplated by the statutory definition.” (Order at 17.)

14 On November 30, 2015, Plaintiffs filed their SAC, which abandoned several of their
15 previous claims, but added new causes of action for fraud, breach of contract, and larceny. (Dkt.
16 No. 93.) The SAC included new allegations regarding how the Internet and cookies function, all
17 based on publicly available information. (*See* SAC ¶¶ 28-42.) The SAC notably left the
18 allegations regarding Plaintiffs’ alleged harm unchanged. (*Compare* FAC ¶¶ 10-14, 111-125 *with*
19 SAC ¶¶ 129-143.) On January 14, 2016, Facebook filed its Motion to Dismiss the SAC with
20 prejudice. The Motion to Dismiss seeks dismissal of the SAC with prejudice for lack of standing
21 and failure to state a claim. A hearing on the Motion to Dismiss is set for April 28, 2016.

22 **B. Plaintiffs’ Lack of Diligence on Discovery to Date**

23 The history of discovery in this action is characterized by Plaintiffs’ significant delay and
24 disinterest for years, followed by an unprompted and opportunistic insistence on expansive
25 additional discovery right when briefing on Facebook’s Motion to Dismiss was set to commence.
26 This inattention was obvious from the beginning. The parties attended a Case Management
27 Conference before the Court on June 28, 2012 (Dkt. No. 43), but Plaintiffs waited until November
28 2012 to serve their first (and to date *only*) discovery requests consisting of thirty-one requests for

1 production. (Ex. A.)² On January 25, 2013, Facebook served objections and responses to
2 Plaintiffs' Requests for Production³ and produced an initial set of responsive documents. (Ex. B;
3 Wong Decl. ¶ 4.) In December 2012, the Parties then began negotiating the terms of a stipulated
4 protective order, which Facebook required prior to producing sensitive or confidential internal
5 documents. (Wong Decl. ¶ 5.) The parties exchanged several versions of a proposed stipulated
6 protective order between December 2012 and February 2013. (*Id.*) Facebook sent Plaintiffs
7 proposed revisions to the draft stipulated protective order on February 20, 2013, but Plaintiffs did
8 not respond for *six months*, at which point they dropped all of their previous objections without
9 explanation. (Ex. C.) Shortly after Plaintiffs' response, the parties finalized and filed a Stipulated
10 Protective Order with the Court (Dkt. No. 68), which Judge Grewal signed on April 11, 2014
11 (Dkt. No. 75). Five days later, Facebook produced nearly 13,000 documents, totaling almost
12 65,000 pages, from Facebook's internal repositories and three custodians with the most relevant
13 information to Plaintiffs' claims. (Wong Decl. ¶ 7.) In contrast, all four named Plaintiffs
14 produced a total of 42 documents totaling 505 pages. (*Id.* ¶ 7.)

15 Plaintiffs then went silent again. They did not follow up on Facebook's responses until
16 November 3, 2014 on a phone call during which Plaintiffs raised issues regarding Facebook's
17 objections and responses from nearly *two years earlier* and Facebook's document production
18 from *six months* earlier. (Wong Decl. ¶ 8.) The Parties held a meet-and-confer on these issues
19 on November 19, 2014 that did not result in a resolution. (*Id.*)

20 After the November 2014 meet-and-confer, Plaintiffs did nothing for another *14 months*.
21 During this time, the Court granted Facebook's Motion to Dismiss and Plaintiffs filed their SAC.
22 Not once did Plaintiffs reach out to Facebook regarding discovery. (Wong Decl. ¶ 10.) Only on
23

24 ² All exhibits are to the Wong Declaration.

25 ³ Facebook objected on a number of grounds, particularly the vast overbreadth of the requests.
26 For example, Plaintiffs demanded "[a]ll documents concerning (a) Facebook's Statement of User
27 Rights and Responsibilities; (b) Facebook's Data Use Policy; and/or (c) Facebook's Terms of
28 Service" regardless of whether they related to Facebook's use of cookies (Ex. A, RFP No. 15);
and "[a]ll documents concerning the named Plaintiffs," which would include, *inter alia*, all of the
information named Plaintiffs' voluntarily posted on Facebook.com (e.g., pictures, status updates,
likes, messages), which have no relevance to this litigation (*id.* RFP No. 16).

1 January 14, 2016—the deadline for Facebook to file its Motion to Dismiss the SAC—did
2 Plaintiffs break their 14-month silence and follow up on the November 2014 meet-and-confer.
3 (Ex. D.) In their letter, Plaintiffs indicated that their “review of Facebook’s initial production is
4 nearing completion”—a remarkable statement given that Facebook produced those documents
5 almost two years earlier. Despite not having completed review of the documents Facebook
6 already produced, Plaintiffs indicated that they wanted document production from “at least 20
7 additional employees” as well as depositions. (*Id.* at 1.)

8 Facebook replied to Plaintiffs on February 2, 2016 and provided some of the information
9 regarding its production that Plaintiffs requested. (Ex. E.) Facebook also stated that given the
10 Order and the pending Motion to Dismiss, further discovery, particularly expanding the number
11 of custodians nearly seven-fold, would be unnecessary and unduly burdensome prior to the
12 Court’s ruling on the Motion to Dismiss. (*Id.*) In an attempt to avoid unnecessary motion
13 practice, Facebook also indicated that, while it believed any further discovery was unwarranted
14 while the Motion to Dismiss is pending, it would agree to produce a limited set of additional
15 documents if the parties could agree to hold off on further discovery until the resolution of the
16 Motion to Dismiss. (*Id.*)

17 The next day, Facebook and Plaintiffs met and conferred telephonically regarding the
18 discovery dispute. (Wong Decl. ¶ 12.) On the call, Facebook reiterated its position regarding the
19 burden of expanding discovery while the Motion to Dismiss is pending. (*Id.*) The parties
20 discussed what additional documents Facebook might produce, but Facebook insisted that any
21 additional production be contingent upon Plaintiffs’ agreement to otherwise postpone further
22 discovery until after the Motion to Dismiss is resolved. Plaintiffs refused. (*Id.*)

23 On February 16, 2016, Facebook followed up on the meet-and-confer and agreed to
24 produce an additional limited set of documents. (Ex. F.) Facebook also reiterated its position
25 regarding Plaintiffs’ attempt to expand discovery further, and asked that Plaintiffs reconsider its
26 insistence on further discovery while the Motion to Dismiss is pending. (*Id.*) Again, Plaintiffs
27 refused to do so. (Wong Decl. ¶ 13.) As of March 2, 2016, Plaintiffs have failed to respond
28 altogether to Facebook’s latest communication. (*Id.* ¶¶ 14-15.) This motion followed.

III. LEGAL STANDARDS

Federal courts are entrusted with expansive discretion to shape the scope and timing of discovery, including the power to stay discovery. *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988) (“The stay furthers the goal of efficiency for the court and litigants.”). This power comes from Federal Rule of Civil Procedure 26(c), which gives judges broad discretion to issue orders to “protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” Fed. R. Civ. Proc. 26(c). Where there is “good cause,” a court may issue a protective order under Rule 26(c) to limit or stay discovery all together. *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981). The Ninth Circuit has endorsed the use of this protective power to stay discovery pending a potentially dispositive motion. *E.g., Little*, 863 F.2d at 685 (affirming stay of discovery pending a motion to dismiss); *Universal Trading & Inv. Co. v. Dugsbery, Inc.*, 499 F. App’x 663, 665 n.9 (9th Cir. 2012) (same).⁴ Staying discovery is particularly appropriate if factual development will not assist the court in deciding the motion before it, such as when the court considers a motion to dismiss and therefore assumes the factual allegations to be true. *Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987).

Courts have regularly found good cause to issue protective orders under Rule 26(c) that stay discovery while the parties litigate a motion to dismiss, to protect parties from the hardships of potentially unnecessary discovery. *See, e.g., Wenger v. Monroe*, 282 F.3d 1068, 1077 (9th Cir. 2002), *as amended on denial of reh’g and reh’g en banc* (Apr. 17, 2002) (affirming stay of discovery once motion to dismiss was filed); *Jarvis*, 833 F.3d 149, 199 (same); *see also Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) (“The purpose of F.R.Civ.P.

⁴ Other federal courts have found the same. *E.g., Panola Land Buyers Ass’n v. Shuman*, 762 F.2d 1550, 1560 (11th Cir. 1985) (“Appellees are correct in declaring that a magistrate has broad discretion to stay discovery pending decision on a dispositive motion.”); *Janis v. Biesheuvel*, 428 F.3d 795, 800 (8th Cir. 2005) (predicate Rule 12(b)(6) issues should be resolved before subjecting defendants to “burdens of broad-reaching discovery”) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)); *Johnson v. N.Y. Univ. Sch. of Educ.*, 205 F.R.D. 433, 434 (S.D.N.Y. 2002) (granting stay of discovery during pendency of motion to dismiss where “plaintiff has not demonstrated that he would be prejudiced by a stay” and the motion to dismiss was “potentially dispositive and does not appear to be unfounded in the law”); *O’Meara v. Heineman*, No. 8:09CV0157, 2009 U.S. Dist. LEXIS 67487, at *4 (D. Neb. July 29, 2009) (granting defendant’s motion to stay discovery pending resolution of the defendant’s motion to dismiss).

1 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints without
2 subjecting themselves to discovery.”). The Ninth Circuit has held that “[i]t is sounder practice to
3 determine whether there is any reasonable likelihood that plaintiffs can construct a claim before
4 forcing the parties to undergo the expense of discovery.” *Rutman Wine*, 829 F.2d at 738.⁵

5 Following this precedent, district courts in California have established a two-prong test for
6 determining whether good cause exists to stay discovery pending a motion. *See, e.g., Hall*, 2010
7 WL 539679, at *1-2 (staying discovery where the discovery requests were not connected to the
8 pending 12(b)(6) motion); *Gibbs*, 2014 WL 172187, at *3 (same). “First, a pending motion must
9 be potentially dispositive of the entire case, or at least dispositive on the issue at which discovery
10 is directed. And second, the court must determine whether the pending dispositive motion can be
11 decided absent discovery.” *Hall*, 2010 WL 539679, at *2.

12 **IV. ARGUMENT**

13 The Court has good cause to issue a protective order temporarily staying further discovery
14 in the circumstances presented here. Because Facebook’s Motion to Dismiss is potentially
15 dispositive and can be ruled on without additional discovery, the Court should stay any further
16 discovery pending resolution of Facebook’s Motion to Dismiss. This is particularly true here,
17 where Plaintiffs are seeking to greatly expand discovery shortly before the Motion to Dismiss will
18 be heard.

19 **A. Discovery Should Be Stayed Temporarily Pending Resolution of Facebook’s** 20 **Motion to Dismiss Because the Motion Could Potentially Dispose of the Entire** 21 **Case and Can Be Decided Without Any Further Discovery.**

22 The circumstances presented here easily meet both prongs of the two-part test for staying
23 discovery pending a motion. On the first prong, Facebook has moved to dismiss the SAC with

24 ⁵ District courts in the Ninth Circuit have often stayed discovery pending a motion to dismiss.
25 *E.g., Gibbs v. Carson*, No. C-13-0860 THE (PR), 2014 WL 172187, at *3 (N.D. Cal. Jan. 15,
26 2014); *Barker v. Gottlieb*, Civ. No. 13-00236 LEK-BMK, 2014 WL 1569477, at *2 (D. Haw.
27 Apr. 16, 2014); *Fields v. Roberts*, No. 1:06-cv-00407-AWI-GSA-PC, 2013 WL 5230034, at *1
28 (E.D. Cal. Sept. 16, 2013); *Hamilton v. Rhoads*, No. C 11-0227 RMW (PR), 2011 WL 5085504,
at *1 (N.D. Cal. Oct. 25, 2011); *Harris v. Am. Gen. Fin. Servs. LLC*, No. 2:10-cv-01662-GMN-
LRL, 2010 WL 9517401, at *1 (D. Nev. Dec. 2, 2010); *Hall v. Tilton*, No. C 07-3233 RMW
(PR), 2010 WL 539679, at *2 (N.D. Cal. Feb. 9, 2010).

1 prejudice, and therefore the motion could dispose of the entire case. This Court already granted
2 Facebook's first motion to dismiss, largely on the legal question of standing. (Order at 11-13.)
3 Plaintiffs nevertheless filed an amended complaint that makes no attempt to correct the fatal
4 defects this Court identified in its Order, as Facebook has detailed in its pending Motion to
5 Dismiss. If Facebook's Motion is granted, any further discovery allowed in the interim will have
6 unnecessarily and disproportionately subjected Facebook to the heavy expense of the further
7 discovery Plaintiffs seek in addition to that which Facebook has already incurred in discovery to
8 date. *See Barker*, 2014 WL 1569477, at *2 (granting stay pending motion to dismiss to avoid
9 "the unnecessary expense of pursuing possibly fruitless discovery"). Indeed, the gross disparity
10 between the 13,000 documents Facebook has already produced and the 42 documents Plaintiffs
11 have produced (a ratio of nearly 310 to 1) further support this stay. Fed. R. Civ. P. 26(b)(1).

12 Likewise, as to the second prong, Facebook's Motion to Dismiss can be decided without
13 any further discovery. The motion addresses the pleading failures on the face of the SAC. No
14 factual development is needed to decide the motion. Instead, the court will assume all of the
15 factual allegations are true without considering any facts not already asserted in the SAC or
16 attachments to the SAC. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp.*
17 *v. Twombly*, 550 U.S. 544, 570 (2007)).⁶ The Court is well within its discretion to stay discovery
18 in these circumstances. *See, e.g., Jarvis*, 833 F.2d at 155 ("Discovery is only appropriate where
19 there are factual issues raised by a Rule 12(b) motion."); *Rae v. Union Bank*, 725 F.2d 478, 481
20 (9th Cir. 1984) ("[T]he district court did not abuse its discretion in staying Rae's discovery
21 pending resolution of the Rule 12(b) motion" where there were no "factual issues.").

22
23 ⁶ Consistent with the numerous Ninth Circuit authorities cited above, in the *Twombly* decision
24 itself, the United States Supreme Court warned that when "the allegations in a complaint,
25 however true, could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be
26 exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Bell Atl. Corp.*, 550 U.S. at 558 (quoting 5 Wright & Miller, Federal Practice and Procedure §
27 1216, at 233-34). The Court expressly recognized the "practical significance" holding plaintiffs
28 to their obligations to plead viable claims before permitting them to engage in discovery "lest a
plaintiff with 'a largely groundless claim' be allowed to 'take up the time of a number of other
people, with the right to do so representing an *in terrorem* increment of the settlement value.'" *Id.* (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

1 Any argument that further discovery should not be stayed pending the Motion to Dismiss
2 because the discovery could support a *third* amended complaint fails for at least three reasons.
3 First, the two-part test asks whether the “*pending*” dispositive motion can be decided absent
4 discovery.” *Hall*, 2010 WL 539679, at *2 (emphasis added). No consideration of a possible
5 amended complaint is required. *Id.* (staying discovery without considering its use in amending
6 the complaint). Second, Facebook’s Motion to Dismiss argues, supported by case law, that the
7 Court should dismiss the SAC *with prejudice* given that Plaintiffs have not remedied the fatal
8 defects this Court already identified in its Order. (*See* Motion at 40.) Third, no further discovery
9 in response to Plaintiffs’ broad discovery requests can cure the deficiencies in the SAC. The
10 foundational issue raised by Facebook’s Motion to Dismiss is whether Plaintiffs have adequately
11 alleged an injury-in-fact to establish Article III standing. Any facts supporting a particularized
12 injury to each of the named Plaintiffs are entirely in Plaintiffs’ control, not Facebook’s.
13 Discovery will also not lead to facts supporting the few remaining statutory claims. As the Court
14 ruled previously, the URLs of the webpages Plaintiffs visited that Plaintiffs allege Facebook
15 received are not “contents” under the various statutes. (Order at 16, 18.) No further discovery
16 from Facebook bears on this question, which concerns how the Internet works.⁷ Plaintiffs’ nearly
17 two-year delay in seeking further discovery is evidence enough of this. If Plaintiffs truly believed
18 that further discovery would assist them in amending their deficient complaint, they would have
19 sought that discovery long ago rather than waiting until the day Facebook was to file its motion to
20 dismiss the SAC. Any argument that further discovery cannot wait until the Court decides the
21 Motion to Dismiss rings hollow given Plaintiffs’ long delay in pressing for additional discovery.

22 Because Facebook’s pending Motion to Dismiss is both potentially dispositive and can be
23 decided without any further discovery, Facebook has demonstrated good cause under Rule 26(c)
24

25 ⁷ Because the Court already dismissed the FAC, and further discovery will not assist Plaintiffs in
26 remedying the insufficiencies the Court identified, this case is distinguishable from others that
27 have denied a stay of discovery pending a motion to dismiss because the discovery could assist in
28 amending the first complaint. *See, e.g., S.F. Tech. v. Kraco Enters. LLC*, No. 5:11-cv-00355
EJD, 2011 WL 2193397, at *3 (N.D. Cal. June 6, 2011) (denying stay of discovery pending *first*
motion to dismiss to allow plaintiffs to develop a “more detailed complaint”).

1 and the Court should order a temporary stay of further discovery until the Court determines
2 whether Plaintiffs have standing and have stated a claim upon which relief can be granted. *Gibbs*,
3 2014 WL 172187, at *3 (staying discovery pending motion to dismiss); *Barker*, 2014 WL
4 1569477, at *2 (same); *Fields*, 2013 WL 5230034, at *1 (same); *Hamilton*, 2011 WL 5085504, at
5 *1 (same); *Harris*, 2010 WL 9517401, at *1 (same); *Hall*, 2010 WL 539679, at *2 (same).

6 **B. Protection from Further Discovery Pending the Motion to Dismiss is**
7 **Particularly Appropriate Here Where the Additional Discovery Sought Will**
8 **Be Costly, Unnecessary, and Unduly Burdensome.**

9 As discussed in the previous section, there is ample authority for staying discovery
10 pending Facebook's potentially dispositive Motion to Dismiss regardless of the scope of the
11 additional discovery Plaintiffs seek. But a temporary stay is particularly appropriate here, where
12 the costs and burden of the requested discovery grossly outweigh any benefit of further discovery
13 at this point.

14 Plaintiffs insist on a massive expansion of the scope of the document production Facebook
15 has already provided. Facebook has already gone to great burden and expense to produce
16 documents in this action, unlike Plaintiffs who have made only a meager production. Now, as the
17 Motion to Dismiss is pending, Plaintiffs demand that Facebook should produce documents from
18 **20 additional custodians**. The time and effort to collect, review, and produce relevant documents
19 from these additional custodians will be extensive and costly, both monetarily and in disruption of
20 Facebook's business. (Wong Decl. ¶ 16.) This is particularly burdensome where discovery to
21 date has been so disproportionate, and will only become more so with the huge expansion of
22 discovery that Plaintiffs seek. Fed. R. Civ. P. 26(b)(1).

23 Plaintiffs also seek depositions for the three custodians whose documents have been
24 produced, and presumably will insist on depositions for the additional 20 custodians they have
25 proposed as well. This too will require valuable time and effort to prepare for and attend those
26 depositions, both for the attorneys and the individuals Plaintiffs seek to depose, some of whom
27 are no longer Facebook employees. (*Id.* ¶ 17.)

28 Plaintiffs' insistence on this massive expansion of the discovery undertaken thus far is
particularly unwarranted given their delay in pursuing discovery in this action. Plaintiffs waited

1 six months after Facebook's production of documents to meet and confer regarding Facebook's
2 production, then waited *more than a year* to follow up on that meet-and-confer. When they did
3 follow up, they did so on the day Facebook was scheduled to file its Motion to Dismiss the SAC,
4 admitting that they had not yet completed their review of the documents Facebook already
5 produced. These actions suggest opportunistic gamesmanship rather than a sincere desire to
6 litigate this case. While some of the additional discovery Plaintiffs seek may be justified if the
7 Court determines that Plaintiffs have standing and have adequately pled their claims, it is
8 unwarranted while Facebook's potentially dispositive Motion to Dismiss is pending.⁸

9 Moreover, a short stay of discovery pending the Court's ruling on the Motion to Dismiss
10 will promote efficiency and conserve both party and Court resources. If discovery goes forward,
11 there will likely be motion practice regarding the scope of that discovery, requiring the
12 expenditure of both party and Court resources, which will prove unnecessary if the Court grants
13 Facebook's Motion to Dismiss. Additionally, a temporary stay will ensure that the litigation
14 proceeds efficiently and that discovery focuses on the subjects that are relevant to the operative
15 complaint (if any) that the Court rules may move forward. *See Fields*, 2013 WL 5230034, at *1
16 (granting stay pending motion to dismiss in part because of the "merit" of the argument that "if
17 the court dismisses only some of Plaintiff's claims pursuant to the motion [to dismiss], Plaintiff
18 will be able to focus his discovery on any surviving claims, thus limiting time and expense for all
19 parties").

20 The benefits of staying discovery for a short time pending the Motion to Dismiss far
21 outweigh any costs of a short delay. *See Barker*, 2014 WL 1569477, at *2 ("The costs, if any, of
22 a brief delay are outweighed by the benefits of limiting the unnecessary expense of pursuing
23 possibly fruitless discovery."). The Court should grant Facebook's motion.

24
25 ⁸ Further discovery is particularly unwarranted in light of the fact that the Supreme Court soon
26 will rule in a case that may bear on the issue of statutory standing, *Spokeo, Inc. v. Robins*, No. 13-
27 1339 (cert. granted Apr. 27, 2015; argued Nov. 2, 2015). In fact, Judge Koh recently stayed a
28 similar class action involving Wiretap Act and CIPA claims in its entirety to await the outcome of
the Supreme Court's decision in *Spokeo*. *Matera v. Google Inc.*, No. 15-CV-04062-LHK, 2016
U.S. Dist. LEXIS 15271 (N.D. Cal. Feb. 5, 2016).

1 **V. CONCLUSION**

2 For the foregoing reasons, Facebook respectfully requests that this Court issue a protective
3 order temporarily staying discovery pending resolution of Facebook’s Motion to Dismiss.

4
5 Dated: March 2, 2016

COOLEY LLP

6 /s/ Matthew D. Brown

7 Matthew D. Brown

8 Attorneys for Defendant FACEBOOK, INC.

9
10 127312440