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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE: FACEBOOK, INC. INTERNET TRACKING LITIGATION

No. 5:12-md-02314-EJD

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT FACEBOOK'S MOTION TO STAY DISCOVERY

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

I. INTRODUCTION

Facebook resisted discovery in this case even before discovery began. When Facebook counsel floated the idea of a discovery stay at the June 29, 2012 case management conference, however, this Court noted "if there is a request to stay discovery pending whatever, I would respectfully decline that invitation, and I think discovery should go forward as in any other case." Tr. at 8:3-7 (ECF No. 48). Thus discovery proceeded even during the pendency of a motion to dismiss the First Amended Complaint ("FAC"). Always mindful of the duty to pursue discovery proportional to the needs of the case, however, plaintiffs extended every courtesy to Facebook in an effort to keep discovery burdens as small as possible while awaiting a decision on the motion. Such courtesies included deferring depositions and instead focusing on a review and analysis of approximately 65,000 pages of documents produced by Facebook. Furthermore, while this figure suggests a robust production, the volume actually only came from three individual custodians, and Facebook even objected to approximately 50% of the document requests. Nevertheless, plaintiffs elected not to burden the Court or Facebook with a motion to compel further discovery until the Court rendered its opinion on the defendant's motion to dismiss the FAC.

After the Court dismissed the FAC with leave to re-plead (ECF No. 87) ("Order on MTD"), the plaintiffs were able to make substantial amendments to the Second Amended Complaint ("SAC") consistent with the Court's order, and there was no longer any need to keep discovery so restrained. Plaintiffs attempted to meet-and-confer as soon as Facebook had completed its motion to dismiss the SAC. Facebook, however, refused to continue discovery and plaintiffs' counsel said that a motion to compel would now be required. That motion to compel was filed earlier today. (ECF No. 110).

Being told that a motion to compel was inevitable, Facebook raced to file a preemptive and groundless Motion to Stay Discovery on March 2, 2016 (ECF No. 108) ("Motion to Stay"), the day after discovery negotiations broke down. The Ninth Circuit requires Facebook to make a "strong showing" with actual facts that a discovery stay is warranted, but remarkably, the motion replaces this duty with personal vindictive. Rather than acknowledging the overwhelming and demonstrable courtesies extended to Facebook during the pendency of a motion to dismiss (understanding that this case raises relatively new issues of law), Facebook now argues that if discovery was not pursued with rabid

intensity prior to filing the SAC, it should be completely stayed now. There is now basis in logic or law for this argument.

II. STATEMENT OF FACTS

This Court allowed discovery to proceed in the ordinary course. Plaintiffs are and have always been mindful, however, that "ordinary course" includes the obligation in Fed. R. Civ. P. 26(b)(2) to weigh the burdens of discovery against the likely benefit, considering the needs of the case. Here, a motion was filed to dismiss a high-profile case in a cutting-edge area of law, and the motion remained pending for three years while the law was still developing. Indeed, the parties filed numerous notices of new authority after briefing concluded; and this Court dismissed the FAC in part citing the reasoning of the district court in *In re: Google Cookie Inc. Cookie Placement Consumer Privacy Litigation*, reasoning which was reversed by the Third Circuit less than three weeks later. 806 F.3d 125 (3d Cir. Nov. 10, 2015). Under the circumstances, plaintiffs were obligated to balance discovery benefits and burdens, and Plaintiffs did so in courteous fashion.

For example, although plaintiffs served document requests in 2012, see Motion to Stay, Ex. A, Facebook correctly notes that documents could not be exchanged until the Court approved the Protective Order, which here did not happen until April 11, 2014 (ECF No. 75). The Motion to Stay omits to mention, however, that plaintiffs' counsel asked Facebook to consider producing documents on a temporary "attorneys eyes only" basis while the Protective Order remained under Court review. *See* Motion to Compel, Straite Decl. ¶ 7. Facebook declined. Given the likely sensitive nature of some portion of the documents, Plaintiffs acquiesced to Facebook's position. Also, in recognition of the procedural posture of the case, plaintiffs agreed to refrain from taking depositions while the first motion to dismiss was pending, choosing to focus on *document* discovery and not to inconvenience and burden witnesses in the interim. Plaintiffs further reduced burdens on defendant by proposing a streamlined privilege log procedure, which this Court approved. *See* Protective Order § 13.6. During the pendency of the motion to dismiss, plaintiffs also refrained from moving to compel discovery despite Facebook's facially inexcusable representation that only three custodians were likely to have discoverable information (discussed more fully in the Motion to Compel).

The Order on MTD granted leave to re-plead (ECF No. 87). With the Court's guidance in that order, plaintiffs filed a Second Amended Complaint ("SAC") taking full advantage of the Facebook document production and addressing all deficiencies noted by the Court. The much stronger SAC now supports full discovery, even when considering plaintiffs' obligations to balance burden against benefit. Thus on January 14, 2016, the same day that Facebook filed its motion to dismiss the SAC, plaintiffs requested a meet-and-confer teleconference with Facebook. In response, as outlined in the Straite Declaration accompanying the Motion to Compel (ECF No. 110-1) and the Wong Declaration accompanying the Motion to Stay (ECF No. 108-1), Facebook essentially granted itself a discovery stay at the precise moment when fuller discovery became warranted. Facebook refused to discuss deposition dates, and Facebook even refused to discuss its objections to producing whole categories of documents absent an agreement to stay discovery. When plaintiffs noted that a motion to compel seemed inevitable, Facebook raced to file the Motion to Stay, and insulted plaintiffs' many courtesies and willingness to keep burdens low. *See* Motion to Stay at 1 ("Plaintiffs have taken a subdued and half-hearted approach to discovery"); at 12 ("These actions suggest opportunistic gamesmanship rather than a sincere desire to litigate this case."). Apparently it is true: no good deed goes unpunished.

III. ARGUMENT

A request to stay discovery is a protective order under Fed. R. Civ. P. 26(c)(1) and is only issued if the party seeking the stay demonstrates "good cause." *San Francisco Tech. v. Kraco Enterprises LLC*, 2011 WL 2193397, at *2 (N.D. Cal. Jun. 6, 2011). It is thus the burden of the moving party to show "that specific prejudice or harm will result if no protective order is granted." *Id*. (citing *Foltz v. State Farm Mut. Auto Ins. Co*., 331 F.3d 1122, 1130 (9th Cir. 2003)); *see also Beckham Indus., Inc. v. Int'l Ins. Co*., 966 F.2d 470, 476 (9th Cir. 1993) ("Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.").

A motion to stay all discovery pending a motion to dismiss is rarely granted, because the "harm" is simply discovery itself. In such a case, the moving party must also make a "strong showing" that it has good cause to stay discovery completely. *Kraco*, 2011 WL 2193397, at *2 (citing *Blankenship v. Hearst Corp*., 519 F.2d 418, 429 (9th Cir. 1975)). "This is because the Federal Rules of Civil Procedure

do not provide for automatic or blanket stays of discovery. . . . In fact, district courts tend to look unfavorably upon such blanket stays." *Id*. (citations omitted).

To pass the "strong showing" test, the movant must satisfy two prongs articulated in *Kraco*. First, the movant must demonstrate that the pending motion could be dispositive of the entire case. *Id*. This is more than a theoretical possibility, otherwise any motion to dismiss, no matter how baseless, would satisfy this prong. Second, the court must "determine whether the potentially dispositive motion can be decided without discovery." *Id*. Plaintiffs are not without sympathy for Facebook's argument – and in fact it is why plaintiffs extended so many courtesies in this case during the pendency of the motion to dismiss the FAC. Plaintiffs recognize that if a case were dismissed on legal grounds, if no set of facts no matter how ugly could support a claim, discovery efforts would have been mooted. But that is not the case here, and Facebook has failed to meet the two-prong *Kraco* test.

Facebook makes two broad arguments in support of the first prong. First, it argues that plaintiffs made no effort to "correct the fatal defects" with respect to pleading standing. Motion to Stay at 9. But this is simply untrue. With respect to common law claims, the SAC alleged three types of concrete harm (misappropriation of data, invasion of privacy, and unauthorized burdening of computer resources) whereas the FAC was limited to the first harm. Facebook only addressed the first harm in its motion to dismiss the SAC, ignoring the other two. In their opposition to the motion to dismiss, plaintiffs repeated that any one of these three harms confers standing. *See* Brief in Opposition to Motion to Dismiss SAC dated February 18, 2016, at 9. But again Facebook's Reply failed to address whether the other two harms can grant standing. It is obviously an open question whether misappropriation of personal data is sufficient economic injury to confer standing when plaintiffs cannot demonstrate diminution of their ability to monetize the data. In the Order on MTD, this Court said no, and in the briefing the plaintiffs urge this Court to reconsider and adopt the reasoning of the Third Circuit on this point. But even if the Third Circuit's reasoning is rejected, Facebook chose not to challenge plaintiffs' two other bases for harm, and thus Facebook's motion to dismiss the common law claims for lack of standing is unlikely to succeed.

Likewise, Facebook argues that the Supreme Court might change the law of statutory standing, see Motion to Stay at 12, n. 8, but Facebook has already conceded statutory standing under current law,

and furthermore never moved for a *Spokeo* stay pending the Supreme Court's decision. It appears then that Facebook is using this general Motion to Stay as a back-door *Spokeo* motion.[1]

As to the second prong, Facebook is also incorrect that further discovery would not impact the motion to dismiss, at least as Facebook has presented its argument. First, Facebook has argued that plaintiffs fail to adequately allege which specific data of the plaintiffs Facebook intercepted. Yet Facebook has refused to produce documents responsive to the basic request for "all documents concerning the named plaintiffs." *See* Motion to Compel at 7. Plaintiffs believe the SAC adequately alleges the interception of content, but if Facebook is correct that added specificity is required, Facebook cannot meet the second *Kraco* prong because it is the party withholding the data. Similarly, Facebook claims that the failure to attach a copy of the Facebook "Help Pages" to the SAC supports dismissal. *See* Defendant's Motion to Dismiss SAC dated January 14, 2016 (ECF No. 101) at 6, 34. If correct, further discovery is needed because Facebook has failed to produce relevant Help Pages as requested, except two. Thus Facebook again cannot meet the second *Kraco* prong.

Finally, Facebook raises the alternative argument that if discovery stay is not *generally* warranted, it is warranted on these facts because plaintiffs insist on a "massive expansion" of discovery. This statement is simply untrue. Searching 26 custodians is hardly unusual in a case of this size, and Facebook cites to no case law in support of its argument. Furthermore, 26 is an "expansion" only because Facebook inappropriately limited discovery to 3 people in the past. Facebook also failed to inform the Court in its Motion to Stay that plaintiffs offered to prioritize 10 custodians during the pendency of the motion to dismiss, and Facebook rejected it. *See* Motion to Compel, Straite Decl. ¶¶ 28-29. Facebook also says that deposing three witnesses would be burdensome, see Motion to Stay at 11, while at the same time claiming that plaintiffs' decision to defer these same depositions earlier showed a lack of diligence. Facebook also argues for a full discovery stay because it "presumes" that plaintiffs will insist on depositions for all new custodians searched. There is no basis in fact to make this presumption, and of course no court has ever stayed discovery based on an opposing party's guess that large numbers of depositions might someday be requested.

[1] If plaintiffs can pass the "standing" hurdle, defendant admits that further discovery may be justified. *See* Motion to Stay at 12.

Here, plaintiffs have been the model of professional courtesy when balancing discovery burdens against benefits during the pendency of the motion to dismiss the FAC. Plaintiffs have continued to respect Facebook's legitimate desire to keep the burdens at an appropriate level, and to that end the plaintiffs have proposed compromise after compromise. Plaintiffs proposed to limit depositions to three witnesses until hearing further from the Court, and Facebook rejected it. Plaintiffs proposed to prioritize 10 custodians out of the 26 custodians identified by plaintiffs as having discoverable information, and again Facebook rejected it. Even in the Motion to Compel, plaintiffs only raised the four most serious deficiencies in Facebook's objections to discovery. Facebook cannot now argue that it is subject to inappropriate burdens during the pendency of its motion to dismiss the SAC.

IV. CONCLUSION

Plaintiffs respectfully request that this Court deny defendant Facebook's motion to stay discovery.

Dated: March 16, 2016

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ATTESTATION OF E-FILED SIGNATURE

I, David A. Straite, court-appointed interim lead counsel for the proposed Class, am the ECF User whose ID and password are being used to file the foregoing. In compliance with Civil L.R. 5-1(i)(3), I hereby attest that Paul R. Kiesel and Stephen Grygiel have concurred in this filing.

/s/ David A. Straite
David A. Straite