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FACEBOOK, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re: Facebook Internet Tracking Litigation

Case No. 5:12-md-02314 EJD

DEFENDANT FACEBOOK, INC.'S REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER TEMPORARILY STAYING FURTHER DISCOVERY PENDING RESOLUTION OF MOTION TO DISMISS SECOND AMENDED CONSOLIDATED COMPLAINT

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Confronted with Facebook's Motion to Stay Discovery ("Motion" or "Mot."), Plaintiffs' Opposition to Facebook's Motion ("Opposition" or "Opp.") attempts to explain away their years of disinterest in pursuing discovery in this matter. But in doing so, Plaintiffs have demonstrated precisely why a temporary stay of discovery pending Facebook's Motion to Dismiss ("MTD") is warranted. Plaintiffs admit they did not diligently pursue discovery over the more than four years since filing this case, having silently extended Facebook the "courtesy" of keeping "discovery burdens as small as possible" while the motion to dismiss the First Amended Complaint ("FAC") was pending because they recognized that if the FAC were to be dismissed on "legal grounds" any "discovery efforts would have been mooted." (Opp. at 5.) That is precisely what happened when the Court dismissed the FAC for failure to establish standing or to state a claim under binding Ninth Circuit precedent. (Order Granting Motion to Dismiss, Dkt. No. 87 ("Order").) Now, Plaintiffs inexplicably assert that the unspoken "courtesy" they gave Facebook is no longer necessary because their Second Amended Complaint ("SAC") is "much stronger." (Opp. at 4.) But this Court has already dismissed each and every one of Plaintiffs' claims in a careful and considered opinion, and now that Facebook is seeking dismissal of the SAC, with prejudice, on many of the same grounds, the "need to keep discovery so restrained" while the FAC was pending (Opp. at 2) has only grown. Thus, Plaintiffs' reliance on a statement made by the Court at a CMC nearly four years ago (Opp. at 2), before their FAC was dismissed wholesale, ignores the significantly changed circumstances and is therefore unavailing.

The Court has good cause to issue a protective order temporarily staying further discovery here. Plaintiffs acknowledge the two-prong standard applicable to this motion—i.e., whether the motion to dismiss is potentially dispositive and able to be decided without additional discovery—but attempt to apply it in a manner wholly at odds with case law, all while ignoring the facts particular to this case. Facebook's motion to dismiss is potentially dispositive and can and should be ruled on without additional discovery. And while Plaintiffs assert that Facebook has granted

itself a unilateral stay of discovery (Opp. at 4), Plaintiffs conveniently ignore Facebook's ongoing efforts to collect and produce additional documents and data, including the only discovery Plaintiffs claim is needed for any future amended complaint. Facebook has taken reasonable measures on discovery given this Court's Order on the motion to dismiss.

Moreover, Plaintiffs misrepresent the extent of their discovery efforts to date, which were minimal until the day Facebook filed its Motion to Dismiss the SAC. Plaintiffs' attempt to significantly expand the scope of Facebook's production while the MTD is pending is unwarranted, especially when the Court will be hearing the motion in just over a month. Because the two-prong test for staying discovery pending a motion to dismiss is satisfied here, the Court should grant Facebook's request for a temporary stay of discovery pending a ruling on its Motion to Dismiss.

II. ARGUMENT

A. Facebook's Motion to Dismiss is Potentially Dispositive.

Plaintiffs do not contest that Facebook's Motion to Dismiss is potentially dispositive of this entire case. Facebook has moved to dismiss with prejudice all causes of action, both for lack of standing under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6). Were this Court to grant Facebook's motion on either ground, it would dispose of the entire case. Even the lone authority on which Plaintiffs rely recognizes that the first prong is satisfied in these circumstances. *S.F. Tech. v. Kraco Enters. LLC,* No. 5:11-cv-00355 EJD, 2011 WL 2193397, at *3 (N.D. Cal. June 6, 2011) (holding where defendant's "motion [to dismiss] on either basis would dispose of this case completely . . . [defendant] meets its burden for this portion of the test").

Plaintiffs assert (without citation) that there must be "more than a theoretical possibility" that the motion to dismiss will succeed. (Opp. at 5:5-6.) This is not the standard. But even if it were, Facebook readily meets it as this Court has already dismissed Plaintiffs' FAC in its entirety for reasons that are equally applicable to the SAC. (Order.) Plaintiffs contend that the SAC cures the standing defects the Court identified in the FAC, but that is simply not the case. (Opp. at 5.) The SAC relies on the same, virtually unchanged allegations of harm that this Court has already

found insufficient.[1] Indeed, Plaintiffs acknowledge that their Opposition to the Motion to Dismiss essentially requires the court to "reconsider" its ruling. (Opp. at 5.) Recognizing their decidedly weak position, Plaintiffs now claim that they alleged new additional grounds for standing—invasion of privacy and unauthorized burdening of computer resources—suggesting that Facebook did not address these issues in its MTD. (Opp. at 5.) Although they cite page 9 of their Opposition to the Motion to Dismiss, these supposedly new standing arguments are nowhere to be found. Instead, Plaintiffs argued that "Viable State-Law Claims are a Basis for Standing." (MTD Opp. at 4.) Facebook expressly addressed this argument, demonstrating that it has been repeatedly rejected by the Ninth Circuit. (Reply ISO MTD at 4 (quoting *Lee v. American National Insurance Company*, 260 F.3d 997, 1001-1002 (9th Cir. 2001) ("[A] plaintiff whose cause of action is perfectly viable in state court under state law may nonetheless be foreclosed from litigating the same cause of action in federal court, if he cannot demonstrate the requisite injury.")).) Plaintiffs' reliance on phantom arguments to make it appear that their SAC is more likely to withstand scrutiny than the FAC speaks volumes.[2]

The Opposition, moreover, completely ignores that Facebook has also moved to dismiss each of Plaintiffs' claims on Rule 12(b)(6) grounds. The Court dismissed the FAC's statutory claims based on binding Ninth Circuit precedent for failing to plead that Facebook received the "content" of any communications (Order at 16 (citing *In re Zynga Privacy Litig.*, 750 F.3d 1098, 1100 (9th Cir. 2014)) and because "[p]laintiffs could not have held a subjective expectation of privacy in their browsing histories" (Order at 12 n.5 (citing *United States v. Forrester*, 512 F.3d 500, 510 (9th Cir. 2007)). Plaintiffs' SAC does not and cannot remedy these defects. Moreover, as Facebook's Motion to Dismiss details, Plaintiffs fail to include allegations to support all elements of each of their state law claims. Thus, it is beyond dispute that the Court's ruling on Facebook's MTD is potentially dispositive.

[1] *Compare* FAC ¶¶ 10-14, 111-125 *with* SAC ¶¶ 129-143.

[2] Plaintiffs' claim that "Facebook has already conceded statutory standing under current law" is incorrect. (*See* MTD at 9-10.)

B. Discovery is Not Needed to Decide the Pending Motion to Dismiss.

Plaintiffs ignore the case law demonstrating that Facebook's Motion to Dismiss can be ruled on without any further discovery. (*Compare* Mot. at 9-10 & nn.6-7 *with* Opp. at 6.) Plaintiffs' arguments to the contrary are meritless.

First, Plaintiffs contend that discovery can assist them in developing yet another complaint, but the test asks whether the "***pending*** dispositive motion can be decided absent discovery." *Hall*, 2010 WL 539679, at *2 (emphasis added). The Court need not consider the vague possibility of some future amended complaint. Plaintiffs do not cite any case law to the contrary. Where, as here, the motion to dismiss has already been fully briefed by the parties, no discovery is needed to decide it and the second prong is satisfied. *See Barker v. Gottlieb*, 2014 WL 1569477, at *2 (D. Haw. Apr. 16, 2014), *report and recommendation adopted*, 2014 WL 2214052 (D. Haw. May 27, 2014) (issuing a stay of discovery where the motion to dismiss was fully briefed).

Second, Plaintiffs rely on the assumption that if their SAC is dismissed, they will be given a *third* bite at the apple. While such an assumption might be reasonable when the motion to dismiss at issue is the first such motion and no discovery has been conducted at all, *see Kraco*, 2011 WL 2193397, at *3, that is simply not the reality here. The Court has already dismissed Plaintiffs' claims once, largely on jurisdictional grounds, but also under Ninth Circuit precedent that the Court indicated Plaintiffs cannot overcome. (Order at 16.) And Plaintiffs have had *over three years* to pursue discovery to develop their SAC. Facebook has already produced 65,000 pages of documents, a number of which plaintiffs have used to try to support their claims.[3] Notably, those documents were not used to remedy the deficiencies the Court identified in the FAC—they do not support any allegations of harm to establish standing or demonstrate that the information at issue is "content" under the relevant statutes. Now, after more than four years, Plaintiffs claim they need additional discovery to meet their burden to plead plausible claims. As the Ninth Circuit has held, "where the plaintiff has previously been granted leave to amend and

[3] In contrast, all four named Plaintiffs have produced only 42 documents, totaling 505 pages. (Wong Decl. ¶ 7.)

has subsequently failed to add the requisite particularity to its claims, '[t]he district court's discretion to deny leave to amend is *particularly broad*.'" *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009) (citation omitted) (emphasis added). Here there is a strong argument for dismissal with prejudice, which, as Plaintiffs themselves concede, would render any further discovery moot. (Opp. at 5.)

Third, Plaintiffs' Opposition claims that additional discovery regarding Plaintiffs' browsing history and Facebook's public Help Center pages would be helpful in developing a hypothetical third amended complaint.[4] But that discovery would not cure the deficiencies in their SAC and has long been available to Plaintiffs. Plaintiffs initially claim they need "all documents concerning the named plaintiffs" to support their claim that the information Facebook allegedly intercepted is "content." (Opp. at 6.) But the only information Facebook is alleged to have improperly received here is referer URLs, which this Court already held are not contents under binding Ninth Circuit precedent. (Order at 16 (citing *Zynga*, 750 F.3d at 1100).) Because this reasoning is based on how the Internet works and not any facts specific to Facebook, further discovery cannot overcome this "significant hurdle." (*Id.*) Moreover, it is unclear why Plaintiffs need this information from Facebook. Plaintiffs have already represented to the Court in the SAC that they visited "URLs [that] contain detailed file paths containing the content of GET and POST communications" and that those URLs are "available to show the Court in camera if needed." (SAC ¶¶ 115, 118, 121, 124.) And in their Opposition to the Motion to Dismiss, Plaintiffs admitted that "[f]or the SAC, plaintiffs reviewed the URLs of websites visited while logged out of Facebook . . . ." (Opp. to MTD at 8.) Plaintiffs have thus twice represented to the Court that they have the browsing information they need to support their complaint.

The same is true for the Help Center pages. Plaintiffs do not indicate how these would remedy their deficient SAC. The pages would not identify any harm to Plaintiffs or show that

[4] Notably, Plaintiffs do *not* argue that depositions or the expansion of document production from an additional twenty or more custodians would provide any assistance in preparing an adequate complaint. (Opp. at 6.)

Facebook received any contents of communications.[5] Moreover, Plaintiffs clearly had access to these help pages when they filed their initial complaints. The complaints were filed within weeks of the end of the class period, yet somehow none of the dozens of named plaintiffs or their counsel in the separate actions across the country bothered to locate or preserve any copies of the supposedly misleading Help Center pages that were available on Facebook's website at the time. In any event, Facebook agreed to produce relevant Help Center pages and search for relevant browsing information for the named Plaintiffs prior to filing its Motion.

C. The History and Posture of the Case Provide Additional Support for a Temporary Stay.

Facebook's motion explained why the additional discovery Plaintiffs seek would be a massive expansion of discovery and attendant burden. Plaintiffs' Opposition attempts to brush this aside by claiming that the scope of discovery they seek is not unusual for a case of this size. (Opp. at 6.) But Plaintiffs disregard the case's current posture and the history leading up to this point. In doing so, they ignore Facebook's fundamental argument: the additional discovery they are demanding is unwarranted and unduly burdensome ***at this time*** with the Motion to Dismiss pending and given Plaintiffs' disinterest in discovery until two months ago. Facebook made these points repeatedly in its opening brief. (Mot. at 2, 11, 12.) Indeed, Facebook acknowledged that some of the discovery Plaintiffs seek might be appropriate if the Court were to deny Facebook's Motion to Dismiss. (Mot. at 12.)

As detailed in Facebook's opening brief and the declaration and exhibits attached thereto, Plaintiffs have not diligently pursued discovery in the more than four years that this action has been pending. Plaintiffs make a handful of excuses for their delay, based on misrepresentations or skewed versions of the facts. For example, Plaintiffs claim they "agreed" not to pursue depositions (Opp. at 3), but they point to no evidence of any such agreement because there was none. They simply did not seek any depositions until earlier this year after this Court had

[5] To the extent Plaintiffs think the Help Center pages would shore up their deficient contract and fraud claims, this reveals that Plaintiffs do not even know the content or location of language they allege was both part of the contract and fraudulent prior to bringing these claims against Facebook.

dismissed the FAC in its entirety.[6] Even with Plaintiffs' self-serving characterization of the case history, they do not contest Facebook's essential point, that Plaintiffs have not diligently pursued discovery in this matter.

Plaintiffs maintain their inattention was out of "courtesy" (that was never communicated to Facebook) and their delay in pursuing discovery was to await the outcome of the motion to dismiss the FAC, but now there is "no longer any need to keep discovery so restrained." (Opp. at 2.) But the need that Plaintiffs admit existed to keep discovery restrained pending the first motion to dismiss has only grown. The Court dismissed the FAC in its entirety and now there is a fully briefed motion to dismiss the SAC with prejudice pending before the Court with a hearing date just a month away. Plaintiffs' sudden insistence on multiple depositions and a massive expansion of document production before the fate of their claims is decided is indeed unwarranted.[7] The Court should grant Facebook's motion and stay discovery pending a decision on the Motion to Dismiss.

III. CONCLUSION

Facebook respectfully requests that this Court grant Facebook's motion for a protective order temporarily staying discovery pending resolution of Facebook's Motion to Dismiss.

Dated: March 23, 2016

COOLEY LLP

/s/ Matthew D. Brown
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[6] Plaintiffs also claim that they asked Facebook to produce documents on a temporary attorneys-eyes-only basis (Opp. at 3), but Plaintiffs waited five months after the proposed protective order was submitted to the Court before they made such a proposal (Straite Decl. ¶ 6). Plaintiffs claim that they waited on further discovery to "focus on document discovery" (Opp. at 3), but they had not even completed their review in January 2016—nearly two years after the document production. The story is the same for document custodians. Facebook asked Plaintiffs in November 2014 to identify additional custodians they believed would have relevant documents (Straite Decl. ¶ 19), but they waited more than a year to do so (Wong Decl. Ex. D).

[7] Plaintiffs claim there is no basis for arguing they will seek more than three depositions while the Motion to Dismiss is pending, but in fact, they said they would likely do just that. (Wong Decl. ¶ 14.)