

1 Stephen G. Grygiel (*admitted pro hac vice*)
2 **SILVERMAN THOMPSON**
3 **SLUTKIN WHITE LLC**
4 201 N. Charles Street, 26TH Floor
5 Baltimore, MD 21201
6 Tel.: (410) 385-2225
7 Fax: (410) 547-2432
8 *sgrygiel@mdattorney.com*

Frederic S. Fox (*admitted pro hac vice*)
David A. Straite (*admitted pro hac vice*)
KAPLAN FOX & KILSHEIMER LLP
850 Third Avenue, 14th Floor
New York, NY 10022
Tel.: (212) 687-1980
Fax: (212) 687-7714
dstraite@kaplanfox.com

Laurence D. King (206423)
Mario Choi (243409)
KAPLAN FOX & KILSHEIMER LLP
350 Sansome Street, 4th Floor
San Francisco, CA 94104
Tel.: (415) 772-4700
Fax: (415) 772-4707
lking@kaplanfox.com

12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN JOSE DIVISION**

15
16 IN RE: FACEBOOK, INC. INTERNET
17 TRACKING LITIGATION

No. 5:12-md-02314-EJD

18 **PLAINTIFFS' REPLY TO DEFENDANT**
19 **FACEBOOK INC.'S RESPONSE TO**
20 **ADMINISTRATIVE MOTION TO FILE**
21 **UNDER SEAL**

22 Next Hearing Date: January 14, 2016

Judge: The Honorable Edward J. Davila

23
24
25
26
27
28
No. 5:12-md-02314-EJD
PLAINTIFFS' REPLY TO DEFENDANT
FACEBOOK INC.'S RESPONSE TO
ADMINISTRATIVE MOTION TO SEAL

1 **I. INTRODUCTION**

2 In September 2011 the public learned that Facebook had been secretly tracking its subscribers’
3 web browsing without consent by failing to delete certain cookies upon logout. This privacy class
4 action followed. During discovery, class counsel obtained documents shedding important light on this
5 practice, and providing additional support for the claims.

6 Facebook contends that information about these practices – constituting the basis for this action –
7 must remain shrouded in secrecy. Indeed, because Facebook has designated most of the information
8 “Highly Confidential,” class counsel cannot even fully inform the named plaintiffs of the full basis for
9 their claims. However, it is Facebook’s burden to make the particularized showing of compelling
10 reasons to overcome the strong presumption in favor of public access. Facebook has not come close to
11 meeting this burden. Facebook’s request to keep the information under seal should be denied.

12 **II. PROCEDURAL HISTORY**

13 Plaintiffs filed their public redacted Second Amended Complaint (the “SAC”) on November 30,
14 2015. [ECF No. 93]. Pursuant to Local Rules 7-11 and 79-5, on the same day plaintiffs filed an
15 administrative motion to file under seal certain documents attached to the SAC that Facebook had
16 designated “Highly Confidential.” [ECF No. 92]. These documents included the full unredacted SAC
17 (together, the “Documents”). Plaintiffs filed the Documents under seal to comply with obligations under
18 the Stipulated Protective Order dated April 11, 2014 [ECF No. 75] (the “Protective Order”). In the
19 sealing motion, plaintiffs took no position regarding the confidentiality of the Documents, waiting to see
20 Facebook’s response. Facebook filed a response to the motion to seal on December 4, 2015 in
21 accordance with Local Rule 79-5(e)(1) [ECF No. 94] (“Facebook Response”). Having reviewed the
22 Facebook Response and justifications for sealing the Documents, plaintiffs file this reply to address
23 Facebook’s failure to make the required particularized showing for sealing the Documents.

24 **III. LEGAL STANDARD**

25 Public policy favors public access to court records. *See Foltz v. State Farm Mutual Auto*
26 *Insurance Co.*, 331 F.3d 1124, 1134 (9th Cir. 2003); *see also Nixon v. Warner Communications, Inc.*,
27 435 U.S. 589, 597 (1978) (recognizing a “general right to inspect and copy public records and
28 documents, including judicial records and documents.”). “Unless a particular court record is one

1 ‘traditionally kept secret,’ a ‘strong presumption in favor of access’ is the starting point.” *Kamakana v.*
2 *City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (quoting *Foltz*, 331 F.3d at 1135). “In
3 order to overcome this strong presumption, a party seeking to seal a judicial record must articulate
4 justifications for sealing that outweigh the public policies favoring disclosure.” *Dunbar v. Google, Inc.*,
5 No. 5:12-cv-003305-LHK, 2012 WL 6202719, at *1 (N.D. Cal. Dec. 12, 2012); *see also Foltz*, 331 F.3d
6 at 1130 (party seeking to seal records bears the burden).

7 When evaluating whether an effort to seal a judicial record overcomes the presumption of public
8 access, courts employ either a “good cause” standard or a stricter “compelling reasons” standard. The
9 “good cause” standard only applies to non-dispositive motions or other documents that “are often
10 unrelated, or only tangentially related, to the underlying cause of action.” *Pintos v. Pac. Creditors*
11 *Ass’n*, 605 F.3d 665, 678 (9th Cir. 2010). A request to seal information in a complaint, on the other
12 hand, is evaluated under the “compelling reasons” standard “because a complaint is the foundation of a
13 lawsuit.” *In re: Google Inc. Gmail Litig.*, 13-MD-2430, 2013 WL 5366963 at *2 (N.D. Cal. 2013) (“In
14 re: Google Gmail”). Facebook agrees that the stricter “compelling reasons” standard applies here. *See*
15 Facebook Response at 1 (citing *In re Google Gmail*). Either standard requires a “particularized
16 showing” that can “warrant preserving the secrecy of sealed discovery material.” *Kamakana*, 447 F.3d
17 at 1180. “Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning,” are
18 insufficient. *In re High-Tech*, 2013 WL 163799, at *2 (quoting *Beckman Industries, Inc. v. Int’l*
19 *Insurance Co.*, 966 F.2d 470, 476 (9th Cir. 1992)).

20 **IV. ARGUMENT**

21 **A. Facebook Has Failed to Make a Particularized Showing to Warrant the Sealing of** 22 **Any of the Documents**

23 Facebook has failed to make any showing – let alone a particularized showing of compelling
24 reasons – to justify its conclusory contention that “compelling reasons exist.” *See* ECF No. 94 at 2.
25 Facebook simply refers the Court to an accompanying two-page declaration of Natalie Naugle [ECF No.
26 94-1]. The only support for sealing the SAC is set forth in paragraph 2 of the Naugle Declaration, a
27 generalized allegation of harm apparently applicable to each and every one of the redactions in the SAC.
28 Paragraph 5 applies to eleven different exhibits, and simply refers back to paragraph 2 of the declaration.

1 Comparison to a request for sealing in an unrelated data privacy case in this district shows why
2 Facebook’s generalized “it’s all confidential” approach fails. In *Dunbar v. Google, Inc.*, the predecessor
3 to *In re: Google Gmail*, defendant Google sought to seal portions of three documents (an amended
4 complaint and two exhibits). Like Facebook in the case at bar, Google failed to articulate in *Dunbar*
5 how it would be harmed if the information were not sealed. Such lack of specificity was held
6 insufficient to satisfy the particularized showing needed to overcome the presumption of public access.
7 See *Dunbar*, 2012 WL 6202719, at *4-6, 7, 8. In fact, Google’s declaration was far more detailed than
8 the Facebook declaration (despite describing fewer documents), contending that the documents “include
9 information ‘that describes how Google scans for, uses, and stores data in connection with its Gmail
10 system, including of the delivery of personalized advertising.’” *Id.* at *3. Google argued that its
11 processes were proprietary and developed by Google “at substantial cost,” and the information could be
12 used by competitors to design their own systems and could allow hackers and spammers to gain “insight
13 into how the Gmail system works.” *Id.* Despite these contentions, the Court held that Google had failed
14 to explain “how this information could be used by a competitor in developing its own process or by a
15 hacker or spammer ‘to circumvent Google’s spam and virus protections.’” *Id.* at *6.

16 At the end of this brief is a side-by-side comparison of the contentions made by Google in
17 *Dunbar* to justify sealing three documents and the contentions made by Facebook to justify sealing 12
18 documents. See Attachment A. Google’s contentions were more detailed than Facebook’s contentions,
19 yet were still insufficient for sealing because they failed to address how disclosure of the information
20 would cause competitive harm. Because Facebook’s “[b]road allegations of harm” are “unsubstantiated
21 by specific examples or articulated reasoning,” *Beckman*, 966 F.2d at 476, Facebook has failed to meet
22 its burden of demonstrating compelling reasons.

23 **B. Public Interest Would be Served if the Documents Were Not Sealed**

24 In addition to Facebook failing to demonstrate compelling reasons for sealing the Documents,
25 public policy would be served if the Documents were made public, with the exceptions noted below.

26 **1. Additional Proof Regarding Tracking of Logged Out Users**

27 The First Amended Complaint filed in 2012 (“FAC”) alleged that Facebook had been tracking
28 the internet browsing of users post-logout, based on publicly available information confirming that

1 Facebook failed to delete certain cookies upon logout. [ECF No. 35]. Discovery has revealed
2 substantially more detailed information that form an additional basis for these claims. Class counsel
3 were only aware of the new facts from confidential discovery material and therefore redacted them from
4 the SAC. *See* paragraphs 70, 72-77 and 104. Plaintiffs also attached five representative documents
5 obtained in discovery to support the new allegations, and filed them under seal as well. *See* Exhibits S
6 through W. In its response, Facebook confirms that these new facts are “confidential.” Facebook is,
7 therefore, admitting that the proposed class is not aware of a new basis for the claims.

8 **2. *LU Cookie***

9 The “last user” or “LU” cookie contains the user ID of the last Facebook subscriber to use a
10 browser. Only through discovery have class counsel learned additional information about this cookie
11 relevant to the claims in this action. The new facts appear in paragraphs 59, 78 and 107 of the SAC, and
12 are supported by Exhibits V, Y and AA. In its Response, Facebook confirms that these new facts are
13 “confidential.” Again, Facebook is admitting that the public is unaware of these new facts, yet the
14 undisclosed nature of these new facts is precisely what the public has a right to know.

15 **3. *Presence Cookie***

16 The Facebook “presence” cookie describes the user’s “chat state.” Through discovery, class
17 counsel learned additional information about this cookie relevant to the claims in this action. This new
18 information was included in paragraphs 66 and 67 of the SAC, and supported by Exhibit M. In its
19 Response, Facebook confirms that these new facts are “confidential,” which is yet another Facebook
20 admission that the public is generally unaware of Facebook’s doings. The proposed class and the public
21 at large have a right to know these previously undisclosed facts about this cookie.

22 **4. *Facebook’s Knowledge***

23 In the FAC, Lead Plaintiffs alleged that Facebook knowingly failed to delete cookies upon
24 logout that could be used to track Internet browsing. This allegation was based on publicly available
25 information from independent researcher Nick Cubrilovic who disclosed that he notified Facebook of
26 the problem three times over the course of ten months. Discovery has revealed additional facts related
27 to this allegation, set forth in paragraphs 4, 103 and 105 of the SAC. In its Response, Facebook
28 confirms that these new facts are “confidential.” Again, this is another Facebook admission that the

1 public is generally unaware of facts related to the core allegations in this action. The proposed class and
2 the public at large have a right to know the extent of Facebook’s knowledge of the post-logout tracking.

3 **5. *Percentage of Users Who Log Out When They Leave Facebook***

4 Paragraph 68 of the SAC cites certain data learned in discovery regarding the percentage of
5 Facebook subscribers who affirmatively logged out of their accounts when leaving the website during
6 the proposed class period. Paragraph 69 cites to a document providing certain important context for this
7 data. Exhibits N, O and P are attached to the SAC to support these allegations. The proposed class and
8 the public at large have a right to know these facts.

9 **6. *Communications With (and Identity of) Facebook Partners***

10 Facebook seeks to seal documents containing conversations with (and disclosing the identify of)
11 certain Facebook partners. See Exhibits Q, X and AA, and paragraphs 45, 77 and 107 of the SAC.

12 While Facebook has failed to articulate any “compelling reasons” for sealing this information, Plaintiffs
13 agree for now, reserving their rights to challenge later, that this information should be sealed.

14 **7. *The Name of an Internal Facebook Database***

15 In paragraphs 48 and 49, the SAC discloses the internal name of a database maintained by
16 Facebook. In its Response, Facebook claims this information is “confidential.” Reserving their rights to
17 make a later challenge, Plaintiffs take no position now as to whether this information should be sealed.

18 **8. *Communication with CNET reporter Chris Matyszczyk***

19 Exhibit R contains an email from a reporter to Facebook at the beginning of the class period.
20 Facebook designated it as “highly confidential” in discovery. Plaintiffs filed this document under seal
21 and redacted portions of paragraph 71 of the SAC that quote from the email. Facebook has withdrawn
22 the designation, see Facebook Response at 2, and does not request sealing of the information.

23 **V. CONCLUSION**

24 Because Facebook has failed to make a particularized showing of compelling reasons to
25 overcome the presumption of public access, the Court should deny the sealing motion with the exception
26 of the redacted material paragraphs 45 and 77 of the SAC, the name of the Facebook partner in
27 paragraph 107 of the SAC, and Exhibits Q and X. Plaintiffs take no position on Facebook’s request to
28 seal the name of the database in paragraphs 48 and 49 of the SAC.

1 Dated: December 8, 2015

KIESEL LAW LLP

2 By: /s/ Paul R. Kiesel

3 Paul R. Kiesel (SBN 119854)
4 8648 Wilshire Blvd.
5 Beverly Hills, CA 90211-2910
6 Telephone: (310) 854-4444
7 Facsimile: (310) 854-0812
8 *kiesel@kiesel-law.com*

Interim Liaison Counsel

9 **SILVERMAN, THOMPSON, SLUTKIN &
10 WHITE LLC**

11 By: /s/ Stephen G. Grygiel

12 Stephen G. Grygiel (admitted *pro hac vice*)
13 201 N. Charles St., #2600
14 Baltimore, MD 21201
15 Telephone (410) 385-2225
16 Facsimile: (410) 547-2432
17 *sgrygiel@mdattorney.com*

Interim Co-Lead Counsel

KAPLAN, FOX & KILSHEIMER LLP

18 By: /s/ David A. Straite

19 Frederic S. Fox (admitted *pro hac vice*)
20 David A. Straite (admitted *pro hac vice*)
21 850 Third Avenue
22 New York, NY 10022
23 Telephone: (212) 687-1980
24 Facsimile: (212) 687-7714
25 *dstraite@kaplanfox.com*

26 Laurence D. King (206423)
27 Mario Choi (243409)
28 350 Sansome Street, 4th Floor
San Francisco, CA 94104
Tel.: (415) 772-4700
Fax: (415) 772-4707
lking@kaplanfox.com

Interim Co-Lead Counsel

ATTACHMENT A

COMPARISON OF FACEBOOK SEALING REQUEST TO GOOGLE SEALING REQUEST

<p>Google Contentions – Request to Seal Amended Complaint Plus 2 Exhibits</p> <p><i>REJECTED BY COURT AS INSUFFICIENT</i></p> <p>Declaration of Deepak Jindal dated Sept. 4, 2012 (ECF No. 209) Dunbar v. Google, Inc. 12-CV-3305-LHK (N.D. Cal.)</p>	<p>Facebook Contentions – Request to Seal Amended Complaint Plus 11 Exhibits</p> <p>Declaration of Natalie Naugle dated Dec. 4, 2015 (ECF No. 94-1) In re Facebook Internet Tracking Litig. 12-MD-2314 (N.D. Cal.)</p>
<p>Paragraph 4:</p> <p>“the Motion contains information that Google designated ‘CONFIDENTIAL’ or ‘CONFIDENTIAL – ATTORNEYS’ EYES ONLY’ because it describes how Google scans for, uses, and stores data in connection with its Gmail system, including for the delivery of personalized advertising. These methods are proprietary procedures that Google designed and implemented at substantial cost for its own business purposes to enable it to deliver benefits to Gmail users and advertisers. The information reflected in the Motion reveals confidential information on: (i) the types of data that Google scans for in connection with emails sent to and from the Gmail system, (ii) the data scanned for specifically in connection with the emails of Cable One users, (iii) when the processes related to personalized advertisements allegedly occur in relation to other steps in the email delivery process, (iv) the types of users and the categories of emails that these processes are applied to, and (v) how the data is used. This information is highly confidential and proprietary. Given its sensitivity, Google guards against disclosure of this information through a number of means, including requiring Google employees to sign nondisclosure agreements as part of their employment. Public disclosure of this information would harm Google by, among other things, giving Google’s competitors an unfair advantage in designing their own systems by examining the mechanisms that Google designed for its own proprietary use. It would also harm Google users, by, among other things, giving potential hackers and spammers insight into how the Gmail system works. Disclosure of this proprietary and confidential information would therefore cause significant economic harm to Google, its users, and its</p>	<p>Paragraph 2:</p> <p>“Plaintiffs’ Amended Complaint contains non-public, confidential, propriety Facebook business information that Facebook designated Highly Confidential . . . Specifically, Plaintiffs’ Amended Complaint (at paragraphs 4, 45, 48, 49, 59, 66-69, 72-78, 103-105) includes information regarding Facebook’s internal discussions regarding Facebook’s use of cookies. Facebook has spent significant time and resources developing the operation of its website, including its use of cookies, which are used to deliver, secure, and understand products, services and ads, on and off Facebook’s website. The Amended Complaint contains information regarding Facebook’s strategic decisions with respect to how it uses cookies. Public disclosure of the identified information would cause competitive harm to Facebook by allowing its competitors access to sensitive information, which could be used to gain an unfair advantage against Facebook.”</p> <p>Paragraph 5:</p> <p>“Exhibits M through P, S through W, Y and AA all include non-public, confidential, proprietary information designated as Highly Confidential pursuant to the Protective Order regarding its use of cookies, as discussed above in paragraph 2. The public disclosure of this information would cause competitive harm to Facebook for the same reasons identified in paragraph 2.”</p>

advertisers.”

Paragraph 5:

“Exhibits A, F, G, and I to the Tapley Decl. also contain documents and information that Google designated ‘CONFIDENTIAL’ or ‘CONFIDENTIAL – ATTORNEYS’ EYES ONLY’ under the Protective Order in this matter. These Exhibits contain confidential and sensitive business information that would cause competitive harm to Google and its business partners if disclosed.”

Paragraph 6:

“Exhibit A to the Tapley Decl. is the Proposed Third Amended Complaint. The Proposed Third Amended Complaint contains the same types of confidential information described above in connection with Plaintiff’s Motion, including (i) the types of data that Google scans for in connection with emails sent to and from the Gmail system, (ii) the data scanned for specifically in connection with the emails of Cable One users, (iii) when the processes related to personalized advertisements allegedly occur in relation to other steps in the email delivery process, (iv) the types of users and the categories of emails that these processes are applied to, and (v) how the data is used.”

Paragraph 7:

“Exhibit F is an example of the specific data that Google scanned for related to certain email messages in Plaintiff Keith Dunbar’s inbox. This document shows the specific types of data that Google scans for and uses in connection with the proprietary processes described above and further shows how Google stores that information. The information is generated based on Google’s internal proprietary processes and is not publicly available.”

Paragraph 8:

“Exhibit G is a schematic illustrating and explaining Google’s proprietary processes in handling email sent to Google-powered email accounts (Gmail and email systems powered by Google Apps). It details Google’s processes related to identifying ‘spam’ email, protecting users from viruses, and scanning for data for use in personalized advertising. Exhibit G and the information contained therein are not publicly available. Pursuant to the Protective Order, Google designated this information ‘CONFIDENTIAL – ATTORNEYS’ EYES ONLY.’ The information contained in Exhibit G is highly specific and would

1 provide Google's competitors with substantial insight
2 into how Google conducts its operations, potentially
3 allowing them to use Google's proprietary internal
4 information to obtain a competitive advantage against
5 Google. In addition, someone armed with this
6 proprietary information could potentially use it in an
7 attempt to circumvent Google's spam and virus
8 protections for Gmail users."
9
10
11
12
13
14
15
16
17
18

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on December 8, 2015, I caused the foregoing to be electronically filed with
3 the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail
4 addresses denoted on the Electronic Mail Notice List, and I hereby certify that I caused the foregoing
5 document or paper to be mailed via the United States Postal Service to the non-CM/ECF participants
6 indicated on the Manual Notice List.

7 I certify under penalty of perjury under the laws of the United States of America that the
8 foregoing is true and correct. Executed on December 8, 2015.

9
10 DATED: December 8, 2015

Respectfully Submitted,

11
12 KIESEL LAW LLP

13
14 By: /s/ Paul R. Kiesel

15 Paul R. Kiesel
16 *kiesel@kiesel-law.com*
17 8648 Wilshire Boulevard
18 Beverly Hills, California 90211
19 Tel.: (310) 854-4444
20 Fax: (310) 854-0812