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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

MATTHEW CAMPBELL, MICHAEL HURLEY, and DAVID SHADPOUR,

Plaintiffs,

v.

FACEBOOK, INC.,

Defendant.

Case No. C 13-05996 PJH

DEFENDANT FACEBOOK, INC.'S OPPOSITION TO PLAINTIFFS' MOTION TO WITHDRAW PLAINTIFF DAVID SHADPOUR WITHOUT PREJUDICE

Date: September 9, 2015
Time: 9:00 a.m.
Location: Courtroom 3, Third Floor
The Honorable Phyllis J. Hamilton

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant Facebook, Inc. respectfully requests that the Court order Plaintiff David Shadpour to sit for his noticed deposition and complete the document production that he promised in early March 2015 before he is dismissed and/or permitted to withdraw from this action.

This is a modest imposition and a routine condition that courts regularly impose before permitting the withdrawal of named plaintiffs in putative class actions. Here, Plaintiffs have offered no justification to excuse Mr. Shadpour from his discovery obligations, and there are compelling grounds for requiring his compliance:

- At the time of the briefing before Magistrate Judge James, Mr. Shadpour was (and still is) a party to this case. Federal Rule of Civil Procedure 30 authorizes the deposition of any party, and the Ninth Circuit requires a "strong showing . . . before a party will be denied entirely the right to take a deposition." (*Infra* p. 5.)
- Plaintiffs have made no such showing here (let alone a "strong showing")—at no point during this dispute have Plaintiffs offered *any* evidence explaining why Mr. Shadpour cannot complete his document production and sit for the noticed deposition, which Facebook is willing to take at a mutually convenient time in Mr. Shadpour's hometown.
- Mr. Shadpour has served substantial affirmative discovery on Facebook, and he (along with his fellow named plaintiffs) even served two additional sets of document requests *after* his counsel indicated that he intended to withdraw from this action and *after* Facebook sought to compel his deposition and document production.
- Instead of seeking an order from this Court to dismiss Mr. Shadpour, Plaintiffs sought this relief through the procedurally improper means of Facebook's discovery letter brief, which caused Magistrate Judge James to refer the issue to this Court and which further delayed Facebook's ability to secure basic discovery from Plaintiffs in this case.

In their Motion, Plaintiffs assert (without any supporting evidence) that the "testimony, discovery responses, or documents that Mr. Shadpour might possess are equally available from the other Plaintiffs." (Dkt. 96 at 5.) But this conclusory assertion ignores both the law and the facts—first, it misstates the law by assuming the answer to the Rule 23 inquiry that this Court must conduct; and second, the evidence and testimony provided to date reveals varying degrees of the named plaintiffs' usage and understanding of Facebook (including the Facebook Messages product at issue in this case). In particular, Mr. Shadpour's limited discovery responses to date reveal that he sent and received Facebook messages containing URLs even after filing his initial (and distinct) complaint in these consolidated actions, and that Mr. Shadpour used other social networking and/or email services

that purportedly "scan" messages during the class period (which is relevant to the issue of implied consent). Accordingly, Mr. Shadpour possesses information relevant to the parties' claims and defenses in this case, and Facebook is entitled by Rule to his deposition and document production.

Moreover, Facebook need not show that it would suffer "plain legal prejudice" before it is permitted to take this routine discovery from a party, and the case Plaintiffs cite (*Waller v. Fin. Corp. of Am.*, 828 F.2d 579 (9th Cir. 1987)) stands for no such proposition. Nonetheless, Facebook's efforts to gather evidence to oppose Plaintiffs' forthcoming motion for class certification would be impaired if Mr. Shadpour, who filed suit against Facebook more than 18 months ago, were allowed to withdraw from the case without satisfying his minimal discovery obligations. In sum, district courts in this Circuit regularly require named plaintiffs to sit for depositions in putative class actions before dismissal or withdrawal, and Facebook respectfully requests that relief here.

II. STATEMENT OF ISSUE TO BE DECIDED

Should this Court require Plaintiff David Shadpour to complete his promised document production and noticed deposition before granting his request to withdraw from the case, which conditions courts regularly impose pursuant to Federal Rules of Civil Procedure 21 and 41(a)(2)?

III. FACTUAL BACKGROUND

In this putative class action, Plaintiffs allege that for a certain period of time up to 2012, when a Facebook user sent a "private message" to another user that included a link to a website (a Uniform Resource Locator, or "URL"), Facebook "scanned" the URL and then increased the aggregate "Like" count displayed on that webpage. (Dkt. 25 ¶ 2.) Plaintiffs contend that this alleged "scanning" violates the federal Wiretap Act and Cal. Penal Code Section 631. (*Id.*) Two of the named plaintiffs (Matthew Campbell and Michael Hurley) filed their initial complaint on December 30, 2013, and the third Plaintiff (David Shadpour) filed a separate lawsuit on January 21, 2014. This Court consolidated the actions, appointed interim class counsel, and ordered the filing of a consolidated complaint. (Dkt. 17, 24, 25.) Mr. Shadpour's attorneys at Pomerantz, LLP were appointed as part of "Plaintiffs' Executive Committee" and "Interim Class Counsel" on April 15, 2014. (Dkt. 24.)

After this Court's ruling that granted in part and denied in part Facebook's Motion to Dismiss (Dkt. 43), the parties exchanged written discovery requests. Along with the two other named

plaintiffs, Mr. Shadpour has served substantial discovery on Facebook, including three sets of document requests (60 total requests), two sets of interrogatories, and one set of requests for admission. (Dkt. 89.) Plaintiffs also have insisted on examining Facebook's source code, which Facebook ultimately agreed to provide (notwithstanding its concerns and the proprietary nature of this code) in order to avoid a protracted discovery dispute over this issue. (Dkt. 92.) The discovery served on Mr. Shadpour has been comparatively minimal—one set of Requests for Production of Documents, one set of Interrogatories, and a deposition notice. Mr. Shadpour provided responses to Facebook's document requests on March 9, 2015, in which he promised to "produce any responsive, non-privileged documents in his possession, custody, or control, if any" in response to all of Facebook's Document Requests (Declaration of Christopher Chorba ¶ 7 & Ex. 4), but he has yet to produce a single document in response to those requests.

On March 17, 2015, Plaintiffs' counsel informed Facebook that Mr. Shadpour intended to seek permission to withdraw from the case. (*Id*. ¶ 2.) Facebook responded that it would evaluate the request, but that it could not stipulate to Mr. Shadpour's withdrawal unless and until he responded to the outstanding discovery requests, produced documents, and sat for a deposition. (*Id*.) Two weeks later, in early April, Mr. Shadpour served his responses to Facebook's interrogatories. (*Id.* ¶ 8, Ex. 5.) The parties continued to discuss this issue, and Facebook confirmed that it would require Mr. Shadpour's deposition and complete document production before it would agree to stipulate to his dismissal from the action. (*Id*. ¶¶ 4-5.) Facebook then served a proposed notice for the named plaintiffs' depositions (including Mr. Shadpour) in mid-April (*id*. ¶ 3 & Ex. 1), and two weeks later (and three days *after* Plaintiffs served Supplemental Initial Disclosures reiterating that Mr. Shadpour was in possession of relevant information), Plaintiffs' counsel sent a draft stipulation to dismiss Mr. Shadpour from the case (*id*. ¶ 4 & Ex. 2). Facebook again explained that it could not stipulate to the dismissal unless Mr. Shadpour agreed to produce the documents that he agreed to produce in his written discovery responses, and sit for the noticed deposition. (*Id*.) Plaintiffs' counsel did not file any motion to dismiss Mr. Shadpour (*id*. ¶ 5), and Facebook sought dates for his deposition on at

least *six* separate occasions in May (*id*. ¶ 3).[1] During this time, Mr. Shadpour (along with his co-Plaintiffs) continued to serve additional discovery on Facebook, including additional document requests served on May 26, 2015 (*after* his counsel notified Facebook that Mr. Shadpour intended to withdraw), and even more document requests on June 29, 2015 (*after* the parties briefed Facebook's motion to compel his deposition and document production). (*Id*. ¶ 6.)

The parties were unable to resolve this dispute, and pursuant to the Court's Discovery Standing Order, they submitted a joint discovery letter brief to Magistrate Judge James on June 18, 2015 (Dkt. 89), in which Facebook requested an order compelling Mr. Shadpour's deposition and responses to the outstanding discovery requests. In their portion of the brief, Plaintiffs improperly sought an order from Magistrate Judge James dismissing Mr. Shadpour from this action. (*Id*.) On July 2, 2015, Magistrate Judge James issued the following order:

> Pending before the Court is the parties' Joint Discovery Letter, in which Plaintiffs seek an Order allowing co-Plaintiff David Shadpour to withdraw from the case pursuant to Federal Rules of Civil Procedure 21 or 41(a)(2), while Defendant Facebook Inc. seeks an Order compelling Mr. Shadpour to sit for deposition and provide discovery responses to outstanding requests before withdrawing from this action. Dkt. No. 89. Having reviewed the parties' requests, the undersigned finds these matters go beyond the scope of the discovery referral in this case and are therefore DENIED WITHOUT PREJUDICE to Plaintiffs noticing a motion before the presiding judge, the Honorable Phyllis J. Hamilton, pursuant to Civil Local Rule 7.

(Dkt. 94.) Plaintiffs have now filed a motion to dismiss Mr. Shadpour without prejudice, and without any requirement that he complete his promised document production and requested deposition.

IV. THE COURT SHOULD REQUIRE MR. SHADPOUR TO COMPLY WITH HIS DISCOVERY OBLIGATIONS BEFORE PERMITTING HIS WITHDRAWAL

Facebook is entitled, and has been entitled for several months, to Mr. Shadpour's responsive documents and his deposition pursuant to the Federal Rules of Civil Procedure. Rule 30(a) authorizes the deposition of any party, and the Ninth Circuit requires a "strong showing . . . before a

[1] Accordingly, the only reason that "[n]o date for such a deposition has been set" (Dkt. 96 at 3:2-3) is because Plaintiffs' counsel refused to provide one in response to Facebook's multiple inquiries. And, pursuant to Civil Local Rule 30-1, Facebook was required to meet and confer with Plaintiffs' counsel regarding proposed dates before serving a formal deposition notice with a specific date. Plaintiffs' counsel should not be permitted to use Facebook's compliance with this Local Rule as a basis for precluding the noticed deposition.

party will be denied entirely the right to take a deposition." *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975). Plaintiffs have made no such showing at all—at no point in the briefing before Magistrate Judge James or in their moving papers before this Court have they offered a declaration or any other evidence from Mr. Shadpour attesting to any burdens he would face in sitting for deposition or completing his promised document production. Facebook has offered to take Mr. Shadpour's deposition in his hometown of Los Angeles at a mutually convenient time. (Chorba Decl. ¶ 3.) At the time of the briefing before Magistrate Judge James, and as of this filing, Mr. Shadpour is still a party to this lawsuit, and "[i]t is beyond dispute that Defendant[] [is] entitled to take the deposition of a party." *Colo. Cross-Disability Coal. v. Abercrombie & Fitch Co.*, No. 09-2757, 2011 WL 5865059, at *1 (D. Colo. Nov. 22, 2011).

The district courts in this Circuit routinely require that class representatives sit for deposition, even if they seek to withdraw from a lawsuit. *See, e.g.*, *Fraley v. Facebook, Inc.*, No. 11-1726-LHK, 2012 U.S. Dist. LEXIS 21501, at *6-10 (N.D. Cal. Feb. 21, 2011) (ordering deposition of plaintiff seeking dismissal); *Dysthe v. Basic Research, LLC*, 273 F.R.D. 625, 628-30 (C.D. Cal. 2011) (ordering the deposition of named plaintiff who sought withdrawal, in part because he had been a plaintiff since the beginning of the suit and through several amendments to complaint and because his anticipated testimony was relevant to both class certification issues and the merits of the plaintiffs' claims); *Pappas v. Naked Juice Co.*, No. 11-8276, 2012 WL 12248744, at *1, *3 (C.D. Cal. Dec. 7, 2012) (ordering deposition of named plaintiff/putative class representative who sought to dismiss his claims with prejudice); *Sherman v. Yahoo! Inc.*, No. 13-0041, 2015 WL 473270, at *7 (S.D. Cal. Feb. 5, 2015) (holding that a named plaintiff's withdrawal "should be conditioned on [the defendant] being entitled to depose" him); *Nilon v. Natural-Immunogenics Corp.*, No. 12-930, 2014 WL 3779006, at *4 (S.D. Cal. July 31, 2014) (ordering deposition of named plaintiff/putative class representative who sought to substitute a new plaintiff).[2]

[2] *See also Funke v. Life Fin. Corp.*, No. 99-11877, 2003 WL 21182763, at *2-3 (S.D.N.Y. May 20, 2003) (ordering deposition of withdrawing plaintiff); *Mashek v. Silberstein*, 20 F.R.D. 421, 422 (S.D.N.Y. 1957) (same); *In re Wellbutrin XL*, 268 F.R.D. 539, 544 (E.D. Pa. 2010) (conditioning dismissal upon compliance with discovery by plaintiff who filed one of the original complaints).

Fraley is directly on point. In that right of publicity case against Facebook, one named plaintiff (Fraley) sought to withdraw "at least in part based on privacy concerns and potential embarrassment that she will suffer by her 'posts or decisions regarding pages or posts where [she] click[ed] "Like" on Facebook' being made public in the class certification motion." 2012 U.S. Dist. LEXIS 21501, at *3. In response, Facebook cited Ms. Fraley's status as a named plaintiff and the relevance of her testimony to plaintiffs' motion for class certification. *Id*. at *4. The court ordered the deposition because the existing protective order was sufficient to address any privacy concerns, and "[i]f anything, the fact that Fraley may soon be dismissed from the lawsuit makes even more relevant Facebook's discovery into the basis for Fraley's allegations that will be a part of the record in this case." *Id*. at *7-9.

Similarly, in *Dysthe*, one of the original named plaintiffs sought to dismiss his claims with prejudice because "he [did] not wish to subject himself to the 'rigor of litigation,' including discovery requests involving personal information." 273 F.R.D. at 627. Defendant sought to compel the named plaintiff's deposition, and the plaintiff sought to voluntarily dismiss his claims with prejudice. *Id*. The plaintiff in *Dysthe* contended that he should not be subject to deposition because by withdrawing from the case, he would no longer serve as a putative class member, and the defendant would not suffer any prejudice. *Id*. at 627-28. (Here, by contrast, Mr. Shadpour seeks to dismiss his claims *without* prejudice, and share in any classwide recovery. (Dkt. 96 at 1.)) The district court in *Dysthe* compelled the plaintiff's deposition, because although his "dismissal may be likely, it is not automatic," and the defendant was "certainly entitled" to depose a party pursuant to Rule 30(a). *Id*. at 628. Further, the plaintiff "claims to have been a consumer of the products challenged by Plaintiffs in this lawsuit," and "[h]is testimony regarding his experience with [those products] is therefore highly likely to be relevant to class certification issues, including commonality and the typicality of the class representative's claims, even if he no longer wishes to be burdened with this litigation." *Id*. at 629 (citing the plaintiff's "unique status" as a named plaintiff "since the filing of the original Complaint" and "through several amendments of the Complaint," and the defendant "properly noticed [plaintiff]'s deposition before [plaintiff] filed his motion for voluntary dismissal").

In contrast to the plaintiffs in *Fraley* and *Dysthe*, Plaintiffs here do not offer any evidence

from Mr. Shadpour or any explanation for why he seeks to withdraw, other than their conclusory statement that he "no longer seeks to carry on the duties and obligations as a class representative." (Dkt. 96 at 1.) Plaintiffs also assert that any evidence regarding Mr. Shadpour is common and "equally available" from the other putative class representatives. (*Id*. at 5.) But they have not supported this conclusory assertion with any evidence—nor could they, given Mr. Shadpour's refusal to produce documents or sit for deposition.

Additionally, Plaintiffs' entire argument *assumes* the answer to the very inquiry that must be conducted—through a "rigorous analysis"—pursuant to Rule 23(a). *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Plaintiffs cannot simply announce that they are all similarly situated, declare this key Rule 23 issue undisputed, and thereby foreclose Facebook's right to discover grounds to oppose class certification. As the Supreme Court has held, "Rule 23 does not set forth a mere pleading standard," and the moving party must establish through evidence all of the elements of this Rule. *Id*. As one district court observed, the Federal Rules "clearly provide that parties may obtain discovery regarding matters relevant to the action . . . [and] commonality is an issue that is relevant to Plaintiffs' class certification efforts." *Dysthe*, 273 F.R.D. at 628-29. As a named plaintiff and putative class member, Mr. Shadpour's testimony is relevant to the parties' claims and defenses. *See, e.g.*, *Sherman*, 2015 WL 473270, at *7 (the withdrawing plaintiff's "testimony regarding his experience with [defendant] is likely to be relevant to class certification issues"); *Dysthe*, 273 F.R.D. at 630 (a putative class representative's deposition testimony is "relevant to the commonality and the typicality of the class representative's claims, whether or not [the withdrawing plaintiff] is himself a putative or absent class member").[3]

[3] Plaintiffs also selectively quote portions of the parties' Joint Case Management Statement (Dkt. 96 at 5) to suggest that Facebook somehow conceded that the evidence regarding the named plaintiffs is "common." This contention omits Facebook's explicit and repeated position in that very Joint Statement that this case is *not* amenable to class certification because, among other reasons, the issue of consent, "which is a complete defense [to Plaintiffs' claims] under both [the Wiretap Act and the California Invasion of Privacy Act], is an inherently 'individualized' issue that will 'overwhelm any common questions.'" (Dkt. 60 at 5-6, 8, 12 (quoting *In re Google Inc. Gmail Litig*., No. 13-MD-02430, 2014 U.S. Dist. LEXIS 36957, at *66-67 (N.D. Cal. Mar. 18, 2014).) Plaintiffs may disagree with this position, but they cannot credibly contend that Facebook has not preserved it, and their disagreement with it simply underscores why Facebook is entitled to discovery to support its position.

Mr. Shadpour's discovery responses also indicate that he has information relevant to class issues and the merits of Plaintiffs' allegations. Specifically, in his written responses, Mr. Shadpour stated that he "will produce any responsive, non-privileged documents in his possession, custody, or control, if any" in response to *all* of Facebook's Document Requests. (Chorba Decl., Ex. 4.) To date, however, he has not produced any documents. (*Id*. ¶ 7.) And his interrogatory responses reveal that Mr. Shadpour sent and received Facebook messages containing URLs even after filing his initial (and distinct) complaint in these consolidated actions, and that he used other social networking and/or email services that purportedly "scan" messages during the class period (which is relevant to the issue of implied consent). (*Id*. ¶ 8, Ex. 5.) Moreover, in Plaintiffs' Supplemental Initial Disclosures served on April 27, 2015, Plaintiffs admitted that "Mr. Shadpour has knowledge of facts surrounding his own use of Facebook's private messages product, and Facebook's representations to him, as alleged in the [Consolidated Amended Complaint]." (*Id*. ¶ 9, Ex. 6 at 2-3.) In those same disclosures, Plaintiffs contended that under one of the "multiple potential mechanisms for calculating and awarding damages under both ECPA [the Wiretap Act/Electronic Communications Privacy Act] and CIPA [the California Invasion of Privacy Act]," "Mr. Shadpour . . . would seek statutory damages in the amount of $10,000 [under ECPA] . . . and $5,000 in statutory damages under CIPA." (*Id.* at 4.)

Any dismissal of Mr. Shadpour can and should be conditioned on providing his responsive documents and relevant testimony. Where, as here, the defendant has answered the complaint, courts may impose "terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). One frequent condition is completing outstanding discovery obligations, including depositions. *See, e.g.*, *Fraley*, 2012 U.S. Dist. LEXIS 21501, at *9; *Dysthe*, 273 F.R.D. at 629; *Sherman*, 2015 WL 473270, at *7.

Plaintiffs have cited only two cases (Dkt. 96 at 5-6) involving both a withdrawal request and a deposition notice, but both are factually and/or legally inapposite:

- The corporate plaintiff in *In re Urethane Antitrust Litig.*, No. 04-MD-1616, 2006 WL 8096533, at *1-2 (D. Kan. June 9, 2006), offered evidence that it was "unable to protect the interests of class members due to its financial difficulties" and defendants had *already* "obtained [the plaintiff's] documents." Here, Mr. Shadpour has not offered *any* evidence of hardship, and he has not produced any documents to date (despite his promise to do so in his written responses).

- Similarly, the plaintiff in *Roberts v. Electrolux Home Prods.*, No. 12-1644, 2013 WL 4239050, at *2 (C.D. Cal. Aug. 14, 2013), offered evidence of "personal and family health concerns." Once again, Mr. Shadpour has not offered *any* evidence of hardship that would prevent him from sitting for deposition or completing his document production, and this failure is reason enough to deny his request to excuse him from completing his discovery obligations. *See, e.g.*, *Aguilar v. Boulder Brands, Inc.*, No. 12-01862, 2014 WL 4352169, at *11 (S.D. Cal. Sept. 2, 2014) (denying the named plaintiff's request for a protective order barring her from being deposed in part because she "provid[ed] no detail on the nature and extent of" the purported health issues that she claimed prevented her from sitting for deposition). Further, the court in *Roberts* also cited *Dysthe*, *Fraley*, and *Colo. Cross-Disab.*, noting that, "at best, these decisions stand for the proposition that a named plaintiff cannot avoid the obligation to sit for a deposition merely by filing a request to withdraw." *Id*. That is the same relief sought here—Plaintiff Shadpour should not avoid his obligation pursuant to Rule 30(a) to sit for deposition by seeking to withdraw from this action (an action he took only after receiving the deposition notice and only after Facebook sought to compel his deposition from Magistrate Judge James). Moreover, to the extent *Roberts* suggested that it is improper to condition a named plaintiff's withdrawal on the plaintiff's completion of his or her discovery obligations, this holding ignores the plain language of Rule 41(a)(2), which authorizes a dismissal conditioned on "terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). The court in *Roberts* did not cite or discuss Rule 41, which is the principal Rule upon which Plaintiffs rely in their Motion.[4]

Plaintiffs' remaining cases involved entirely distinct circumstances and did not even involve a request for deposition:

- Plaintiffs' citation to *Waller v. Fin. Corp. of Am.*, 828 F.2d 579 (9th Cir. 1987), is

[4] Plaintiffs also cite the court decision in *U.S. ex rel. Meyer v. Horizon Health Corp.*, No. 00-1303, 2006 WL 1490216 (N.D. Cal. May 25, 2006) (Dkt. 96 at 3, 5), but that brief decision does not indicate that there were any pending discovery requests directed at the withdrawing plaintiff. Further, that plaintiff offered "valid medical reasons" for her withdrawal, and the court noted that the defendant could use third-party subpoenas to obtain the information it needed. *Id*. at *1. Again, Plaintiffs have not explained why Mr. Shadpour cannot sit for his deposition and provide responsive documents, they cannot claim that Facebook may obtain his information from other sources, and they have not offered to provide the requested discovery in response to a third-party subpoena.

misleading. The legal issue in that case was whether a corporation's accountant had standing to object to a securities settlement, and the selected excerpt quoted in Plaintiff's Motion (Dkt. 96 at 4 ("a district court should grant a motion for voluntary dismissal unless a defendant can show that it will suffer some plain legal prejudice as a result")) addressed the dismissal of entire *lawsuits*, not parties. Obviously, Plaintiffs have not sought to dismiss their entire action; instead, they seek to dismiss Mr. Shadpour as a party (and only *without* prejudice).

- *James v. UMG Recordings*, No. 11-1613-SI, 2012 WL 4859069, at *2 (N.D. Cal. Oct. 11, 2012), involved a Rule 15(a) motion to file a consolidated complaint that would have dropped certain named plaintiffs and added others. Of course, Plaintiffs here had an opportunity to file a Consolidated Amended Complaint (*see* Dkt. 25), and they made the decision to retain Mr. Shadpour as a named plaintiff and putative class representative. Also, *James* did not involve a pending request for a deposition.

- *McConnell v. Red Robin Int'l*, No. 11-3026-WHA, 2012 WL 1357616, at *3 (N.D. Cal. Apr. 17, 2012), involved the *addition* of a new named plaintiff on a noticed motion to amend the complaint, not the withdrawal of a named plaintiff or a pending deposition notice.

V. TO THE EXTENT IT GRANTS PLAINTIFFS' REQUEST, THE COURT SHOULD DISMISS MR. SHADPOUR'S CLAIMS *WITH* PREJUDICE AND AMEND ITS INTERIM CLASS COUNSEL ORDER

Finally, if the Court permits Mr. Shadpour to withdraw from the case, it should impose two further conditions (in addition to requiring his document production and deposition):

First, the Court should dismiss Mr. Shadpour's claims *with prejudice*, and prevent him from later attempting to sue Facebook in another similar action or later seeking to re-join this action as a named plaintiff. *See, e.g.*, *Dysthe*, 273 F.R.D. at 628 (addressing request by named plaintiff/class representative to dismiss claims with prejudice); *Sherman*, 2015 WL 473270, at *4 (noting that plaintiffs had expressly requested that the dismissal be conditioned on the named plaintiff refraining from re-filing his individual claims against the defendant, so the defendant was not subject to the risk of additional litigation). To the extent the Court permits Mr. Shadpour to remain in the putative class, then it should permit Facebook to take his deposition as an absent class member. This was the

situation presented in *Dysthe*, and after analyzing the defendant's right to the deposition of a "party" pursuant to Rule 30(a), the district court concluded that "even if [the party seeking to withdraw] was not a named plaintiff, Defendants have satisfied the heightened requirements applying to the discovery of putative or absent class members" because his use of the products at issue rendered him a "percipient witness" with relevant testimony. 273 F.R.D. at 629. "As such," the court concluded, "[his] testimony is therefore likely to be relevant to class certification issues." *Id*.; *id*. at 630 ("These experiences are relevant to the commonality and typicality of the class representative's claims, whether or not [the party seeking to withdraw] is himself a putative or absent class member.").

Second, the Court should amend its Order Relating Actions and Appointing Interim Counsel (*see* Dkt. 24, ¶¶ 2, 8) to remove Mr. Shadpour's attorneys at Pomerantz, LLP from "Plaintiffs' Executive Committee" and withdraw these attorneys from serving as "Interim Class Counsel" pursuant to Rule 23(g)(2)(A). This additional condition should not be controversial; to Facebook's knowledge, these lawyers have had no substantive involvement in this case. (Chorba Decl. ¶ 10.)

VI. CONCLUSION

The discovery burdens in any class action weigh more heavily on the defendant, but these burdens are particularly asymmetrical in this case: All of the named plaintiffs—including Mr. Shadpour—have sought substantial discovery from Facebook, while the burdens on the named plaintiffs have been comparatively minimal. Plaintiffs have offered no legal or factual justification for excusing Mr. Shadpour from completing his document production and sitting for his noticed deposition before his withdrawal from the case, and his documents and testimony indisputably are relevant to class certification. Facebook respectfully requests that the Court require Mr. Shadpour to complete his modest discovery obligations, dismiss his claims with prejudice, and amend its order to remove his attorneys as interim class counsel in this case.

Dated: July 27, 2015

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Christopher Chorba
Christopher Chorba

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