

1 Michael W. Sobol (State Bar No. 194857)
msobol@lchb.com
2 Melissa A. Gardner (State Bar No. 289096)
mgardner@lchb.com
3 LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
4 San Francisco, CA 94111-3339
Telephone: 415.956.1000
5 Facsimile: 415.956.1008

6 Rachel Geman
rgeman@lchb.com
7 Nicholas Diamand
ndiamand@lchb.com
8 LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
9 New York, NY 10013-1413
Telephone: 212.355.9500
10 Facsimile: 212.355.9592

11 Hank Bates (State Bar No. 167688)
hbates@cbplaw.com
12 Allen Carney
acarney@cbplaw.com
13 David Slade
dslade@cbplaw.com
14 CARNEY BATES & PULLIAM, PLLC
11311 Arcade Drive
15 Little Rock, AR 72212
Telephone: 501.312.8500
16 Facsimile: 501.312.8505

17 *Attorneys for Plaintiffs and the Proposed Class*

18 *[Additional Counsel listed on Signature page]*

19 UNITED STATES DISTRICT COURT

20 NORTHERN DISTRICT OF CALIFORNIA

21 MATTHEW CAMPBELL, MICHAEL
22 HURLEY, and DAVID SHADPOUR, on
behalf of themselves and all others
23 similarly situated,

24 Plaintiffs,

25 v.

26 FACEBOOK, INC.,

27 Defendant.

Jeremy A. Lieberman
Lesley F. Portnoy
info@pomlaw.com
POMERANTZ, LLP
600 Third Avenue, 20th Floor
New York, New York 10016
Telephone: 212.661.1100
Facsimile: 212.661.8665

Patrick V. Dahlstrom
pdahlstrom@pomlaw.com
POMERANTZ, LLP
10 S. La Salle Street, Suite 3505
Chicago, Illinois 60603
Telephone: 312.377.1181
Facsimile: 312.377.1184

Case No. C 13-05996 PJH

**PLAINTIFFS' REPLY IN SUPPORT OF
MOTION TO WITHDRAW PUTATIVE
CLASS REPRESENTATIVE AND
DISMISS CLAIMS WITHOUT
PREJUDICE**

Date: September 9, 2015
Time: 9:00 a.m.
Crtrm: 3, Third Floor
Judge: Honorable Phyllis J. Hamilton

1 **I. INTRODUCTION**

2 Plaintiffs’ interim class counsel file this Reply in support of their motion for an order (i)
3 permitting putative Class representative David Shadpour to be dismissed as a party to this
4 litigation; (ii) withdrawing Mr. Shadpour’s claims without prejudice as to his rights as an absent
5 member of the putative Class; (iii) declaring that Mr. Shadpour need not appear for a noticed
6 deposition nor complete document production in this action; and (iv) prohibiting Defendant
7 Facebook, Inc. (“Facebook”) from propounding further discovery as to Mr. Shadpour. Facebook
8 has failed to establish that it will suffer any legal prejudice from such a result. Accordingly,
9 Plaintiffs’ interim class counsel respectfully submit that the Court should grant their motion.

10 **II. ARGUMENT**

11 **A. Facebook Has Not Established Plain Legal Prejudice Should Mr. Shadpour’s**
12 **Claims Be Withdrawn Without Discovery Conditions**

13 The Ninth Circuit is clear: the standard for applying discovery conditions upon the
14 withdrawal of a putative class representative is demonstration by the defendant of “plain legal
15 prejudice.” “[A] district court should grant a motion for voluntary dismissal unless a defendant
16 can show that it will suffer some plain legal prejudice as a result.” *Smith v. Lenches*, 263 F.3d
17 972, 975 (9th Cir. 2001) (quoting *Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 583 (9th Cir. 1987)).
18 Facebook has not established such prejudice. Neither Facebook’s assertion that Mr. Shadpour
19 may have information “relevant” to Facebook’s opposition to class certification (Defendant
20 Facebook, Inc.’s Opposition to Plaintiffs’ Motion to Withdraw Plaintiff David Shadpour Without
21 Prejudice (“Facebook’s Opposition”), at 8) nor its claims of Mr. Shadpour’s continued use of the
22 Facebook messaging product at issue in this litigation support the requisite showing.

23 Indeed, the authorities cited in Facebook’s Opposition frame their analysis with the “plain
24 legal prejudice” standard. *See Fraley v. Facebook, Inc.*, No. 11-01726, 2012 WL 893152, at *3
25 (N.D. Cal. Mar. 13, 2012) (“The Ninth Circuit has held that a Rule 41(a)(2) motion for voluntary
26 dismissal should be granted ‘unless a defendant can show that it will suffer some plain legal
27 prejudice as a result.’”) (quoting *Smith*); *Sherman v. Yahoo! Inc.*, No. 13-0041, 2015 WL 473270,
28 at *7 (S.D. Cal. Feb. 5, 2015) (“[T]he inability to conduct sufficient discovery for a defense can

1 amount to legal prejudice. . . A court may, but need not, condition a Rule 41(a)(2) dismissal on a
2 plaintiff’s deposition or production of discovery.”); *Pappas v. Naked Juice Co. of Glendora*, No.
3 11-8276, 2012 WL 12248744, at *2 n.2 (C.D. Cal. Dec. 7, 2012) (applying “plain legal prejudice”
4 standard to ascertain whether withdrawal of named plaintiff should be conditioned on additional
5 discovery).

6 In the Ninth Circuit, “‘legal prejudice’ means ‘prejudice to some legal interest, some legal
7 claim, some legal argument.’” *Sherman*, at *2 (quoting *Smith*). The court in *Roberts v.*
8 *Electrolux Home Prods., Inc.*, No. 12-1644, 2013 U.S. Dist. LEXIS 115870 (C.D. Cal. Aug. 14,
9 2013), applied this standard. While not expressly citing Federal Rule of Civil Procedure 41, the
10 court relied upon *In re Vitamins Antitrust Litig—Id.* at *4 (citing 198 F.R.D. 296, 304 (D.D.C.
11 2000) (“[i]n federal practice, [under Federal Rule of Civil Procedure 41], voluntary dismissals
12 sought in good faith are generally granted ‘unless the defendant would suffer prejudice other than
13 the prospect of a second lawsuit or some tactical advantage.’”)—and *Doe v. Arizona Hosp. &*
14 *Healthcare Ass’n—Id.* (citing 2009 WL 1423378, at *13 (D. Ariz. Mar. 19, 2009) (applying the
15 same standard under Federal Rule of Civil Procedure 41, granting motion for dismissal of
16 putative Class representative’s claims, without discovery conditions)).

17 In an attempt to turn the relevant standard on its head, Facebook relies on Federal Rule of
18 Civil Procedure 30(a) which authorizes the depositions of parties. Mr. Shadpour would no longer
19 be a party to this litigation if Facebook had stipulated to his withdrawal without unnecessary
20 discovery conditions, as Plaintiffs’ counsel requested months before Facebook initiated a letter
21 brief to compel Mr Shadpour’s deposition, and necessitated the involvement of this Court.
22 Facebook also relies upon inapposite cases that were decided in the context of a motion for a
23 protective order by a named plaintiff who had not yet formally sought to withdraw from the case.
24 *See e.g., Pappas v. Naked Juice Co. of Glendora*, No. 11-8276, 2012 WL 12248744, at *3 (C.D.
25 Cal. Dec. 7, 2012) (denying, in part, motion for protective order who stated he had not sought to
26 withdraw because he was still negotiating a stipulation for dismissal with defense counsel).

27 Here, like the defendants in *Electrolux*, and *Arizona Hospital*, no “plain legal prejudice”
28 to Facebook’s defenses would result if Facebook is not allowed to condition Mr. Shadpour’s

1 withdrawal on his deposition and additional discovery. Facebook incorrectly contends that it
2 needs Mr. Shadpour’s document production and deposition testimony in order to defend against
3 the upcoming motion for class certification. To establish plain legal prejudice in this context, a
4 defendant must show that without the discovery sought, the plaintiff’s withdrawal would result in
5 an “*inability* to conduct sufficient discovery for a defense.” *Sherman*, 2015 WL 473270, at *7.

6 Facebook cannot demonstrate plain legal prejudice. Instead, Facebook claims that Mr.
7 Shadpour, who no longer seeks to represent the Class, may have information “relevant” to
8 Facebook’s opposition to class certification. (Facebook Opposition at 8). Substantively,
9 Facebook points to indications that Mr. Shadpour continued to use the Facebook messaging
10 product and other social media after filing his complaint (as, for example, did Plaintiff Matthew
11 Campbell), and to the Plaintiffs’ common allegations regarding Facebook’s public disclosures
12 about private messages. As discussed in the opening brief on this motion, that is not the type of
13 individualized, otherwise unobtainable, information that defendants have been entitled to obtain
14 from withdrawing plaintiffs in cases like *Dysthe v. Basic Research, LLC*, 273 F.R.D. 625, (C.D.
15 Cal. 2011); *Fraley v. Facebook, Inc.*, No. 11-1726, 2012 WL 555071 (N.D. Cal. Feb. 21, 2012)
16 (Grewal, M.J.); and *Colo. Cross-Disability Coal. v. Abercrombie & Fitch Co.*, No. 09-02757,
17 2011 WL 5865059 (D. Colo. Nov. 22, 2011). Rather, the generalized information that Facebook
18 purports to need from Mr. Shadpour regarding putative Class members’ use of Facebook and
19 other social media has already been obtained from Plaintiffs Campbell and Hurley during their
20 depositions on June 19 and July 9, respectively.

21 Facebook relies on authority that is both procedurally and substantively inapposite. *Nilon*
22 *v. Natural-Immunogenics Corporation*, for example, concerned a defendant’s motion to compel
23 the deposition of the sole lead plaintiff extremely late in the litigation—after the fact discovery
24 deadline had passed—and who had failed to appear for, or canceled, his noticed deposition
25 several times over the course of fourteen months before the defendant filed the motion to compel.
26 No. 12- 00930, 2014 WL 3779006, at *1-*3 (S.D. Cal. July 31, 2014). Unlike this case, where
27 the record reflects interim Class counsel’s efforts to dismiss Mr. Shadpour’s claims by agreement
28 going back to the first months of fact discovery, in *Nilon*, Plaintiff’s counsel provided “no

1 explanation” for why they did not seek to substitute a new named plaintiff until after the
2 defendant brought a motion to compel. *Id.* at *4. Likewise, *Funke v. Life Financial Corporation*
3 also does not support Facebook here. No. 99-11877, 2003 WL 21182763 (S.D.N.Y. May 20,
4 2003). *Funke* concerned enforcement of an existing order to appear for a deposition against a
5 lead plaintiff whose deposition had been ordered *before* the plaintiff filed a notice of withdrawal,
6 and who had made “no mention” of his intent to withdraw when the issue had been briefed just
7 weeks before. *Id.* at *2.

8 **B. Facebook’s Claim That Discovery Has Been Asymmetrical Is Neither Correct**
9 **Nor Availing**

10 Contrary to Facebook’s claim that discovery in this action has been “asymmetrical,”
11 (Facebook Opposition at 11) the discovery propounded by Facebook has been exceptionally
12 invasive and burdensome. In this case brought to enforce the right to privacy in private
13 correspondence, Plaintiffs Campbell and Hurley have responded to Facebook’s document
14 requests by producing partially redacted copies of all of the non-privileged private messages
15 containing URLs stored in their password-protected Facebook accounts. Declaration of Melissa
16 Gardner (“Gardner Decl.”), ¶ 2. For Mr. Campbell, this required divulging nearly 200 pages of
17 personal correspondence. *Id.* ¶ 3. In response to Facebook’s Interrogatories, they provided not
18 only the names of the friends and acquaintances with whom they had shared these private
19 communications, but also links to those absent Class members’ Facebook profiles. *Id.* ¶ 4.
20 Subsequently, in July 2015, Facebook served subpoenas on four of those parties, noticing the
21 depositions of two individuals who had sent or received messages from Mr. Campbell, and of two
22 who had sent or received messages from Mr. Hurley.¹ *Id.* ¶ 5.

23 Facebook has failed to show why, given that Mr. Shadpour has made no unique
24 allegations in the operative Complaint, and no longer seeks to represent the Class, Facebook
25 cannot make its implied consent or other arguments against class certification without obtaining
26 additional specific details about Mr. Shadpour’s private messaging history, contacts, and use of

27 ¹ Three of those depositions are scheduled to take place in the first two weeks of August. Gardner
28 Dec. ¶ 6.

1 social media. Thus, Facebook has not met its burden to show that Mr. Shadpour's dismissal
2 without discovery conditions would result in plain legal prejudice to its legal arguments, claims,
3 or defenses. *Smith*, 263 F.3d at 976.

4 **III. CONCLUSION**

5 Accordingly, for the foregoing reasons and for the reasons stated in their opening brief,
6 Plaintiffs' interim Class counsel respectfully request that this Court dismiss Mr. Shadpour as a
7 party, and deny Facebook's request that such dismissal be conditioned upon his deposition or any
8 additional discovery responses.

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

1 Dated: August 3, 2015

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

2 By: /s/ Melissa A. Gardner
3 Melissa A. Gardner

4 Michael W. Sobol (State Bar No. 194857)
msobol@lchb.com
5 Melissa A. Gardner (State Bar No. 289096)
mgardner@lchb.com
6 LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
7 San Francisco, CA 94111-3339
Telephone: 415.956.1000
8 Facsimile: 415.956.1008

9 Rachel Geman
rgeman@lchb.com
10 Nicholas Diamand
ndiamand@lchb.com
11 LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
12 New York, NY 10013-1413
Telephone: 212.355.9500
13 Facsimile: 212.355.9592

14 Hank Bates (State Bar No. 167688)
hbates@cbplaw.com
15 Allen Carney
acarney@cbplaw.com
16 David Slade
dslade@cbplaw.com
17 CARNEY BATES & PULLIAM, PLLC
11311 Arcade Drive
18 Little Rock, AR 72212
Telephone: 501.312.8500
19 Facsimile: 501.312.8505

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Jeremy A. Lieberman
Lesley F. Portnoy
info@pomlaw.com
POMERANTZ, LLP
600 Third Avenue, 20th Floor
New York, NY 10016
Telephone: 212.661.1100
Facsimile: 212.661.8665

Patrick V. Dahlstrom
pdahlstrom@pomlaw.com
POMERANTZ, LLP
10 S. La Salle Street, Suite 3505
Chicago, IL 60603
Telephone: 312.377.1181
Facsimile: 312.377.1184

Jon Tostrud (State Bar No. 199502)
jtostrud@tostrudlaw.com
TOSTRUD LAW GROUP, PC
1925 Century Park East, Suite 2125
Los Angeles, CA 90067
Telephone: 310.278.2600
Facsimile: 310.278.2640

Attorneys for Plaintiffs and the Proposed Class