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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 ENLARGE TIME AND EXTEND DEADLINES

The Honorable Phyllis J. Hamilton

The Court should deny Plaintiffs' "Motion to Enlarge Time and Extend Deadlines." This case has been pending for nearly 21 months, and there is a class certification and summary judgment hearing scheduled for February 17, 2016. By then, this case will have been pending for over two years—at tremendous expense to Facebook. Yet Plaintiffs ask the Court to continue the schedule by another three months, which would postpone the hearing until mid-2016. By contrast, the courts in the *Gmail* and *Yahoo* cases that inspired this lawsuit already decided class certification motions—*Gmail* within ten months of the filing of a consolidated complaint and *Yahoo* (which was filed three months before this case) approximately fifteen months after the filing of a consolidated complaint.

Under Rule 16(b), Plaintiffs have the burden to show "good cause" to modify this Court's scheduling order. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992). The "good cause" standard "primarily considers the diligence of the party seeking the amendment." *Id.* at 609. If the party seeking the modification "was not diligent, the inquiry should end." *Id*.

Here, although Plaintiffs relentlessly attack Facebook (these baseless and disappointing attacks are addressed below and in the accompanying Jessen Declaration), they have not been diligent and have refused to follow this Court's instruction in March that the parties should focus their discovery efforts on issues relevant to class certification and the open issues from the Court's motion-to-dismiss order. This case challenges a very discrete practice—the alleged "scanning" of URLs sent in "private messages" to increase the "like" counter on third-party websites before the end of 2012. (Dkt. 25 ¶ 3, 59.) But Plaintiffs have requested a vast amount of information that is irrelevant to their claims (such as the "monetary value" of Facebook users generally (Dkt. 112), technical information unrelated to the challenged conduct (Dkt. 113), and communications between Facebook's European affiliate and a foreign regulator (Dkt. 101)). They also complain about delay in reviewing Facebook's highly sensitive source code (the production of which is unusual in a non-patent case), but they have had access to the code for nearly *two months* and have had *three* experts spend a total of *four* weeks reviewing it (an unusually long time—even in a patent case). (Jessen Decl. ¶¶ 16, 36.) As another court explained, discovery disputes "are a common component of any civil matter," "they should be anticipated," and they "are not the sort of event that renders a litigant unable to comply with the scheduling order's deadlines . . ." *Gerawan Farming, Inc. v. Rehrig Pac. Co.*, 2013 WL 492103, at *7

(E.D. Cal. Feb. 8, 2013). Plaintiffs have not met their burden and granting the requested extension would reward their unfocused approach and further delay a case that is ripe for adjudication.

A. Source Code

Plaintiffs' Motion rests primarily on the assertion that "Facebook wasted over five months resisting production of its source code." (Dkt. 109 at 1.) Even if that characterization of events were accurate (it is not—*see* Jessen Decl. ¶¶ 17-28), Plaintiffs *admit* that they knew about Facebook's objection to producing source code well in advance of the Case Management Conference in March 2015. (Dkt. 109-2 ¶ 7.) In fact, this dispute over the production of source code is the very reason Plaintiffs requested a discovery conference. (*Id.* ¶ 9.) Yet they did not object to this Court's entry of the agreed-upon Scheduling Order at that time, when a dispute regarding source code was not only "reasonably foresee[able]," *Gerawan*, 2013 WL 492103, at *7, ***but had already arisen***. They cannot now rely upon this previously-known dispute to show "good cause" for extending the schedule.

Plaintiffs also misstate this Court's ruling on Facebook's Motion to Dismiss, suggesting that this Court "prejudged" the relevance of the source code, even though no party mentioned source code in their briefing. Obviously, this Court made no such discovery ruling on the motion to dismiss,[1] and when presented with this issue at the April 13 discovery conference, Magistrate Judge James *agreed with Facebook* that Plaintiffs first should explore less intrusive means of discovery. Specifically, she set a schedule for Facebook to "produce technical and other relevant documents in response to Plaintiffs' source code discovery requests, which will include a declaration explaining why the produced documents respond to Plaintiffs' requests without producing the source code itself." (Dkt. 68.) This process also required the parties to confer after that production, and established a briefing schedule for a motion to compel (if necessary), which would be heard on **August 13, 2015**. (*Id.*)

Pursuant to the Magistrate's Order, on **June 1**, Facebook produced documents (including the core internal e-mails relevant to Plaintiffs' claims) and provided a declaration from a senior Facebook

[1] Instead, here is what the Court said: "Simply put, the application of the 'ordinary course of business' exception to this case depends upon the details of Facebook's software code, and those details are simply not before the court on a motion to dismiss, and thus, the court must deny Facebook's motion on that basis. However, the court may re-address the 'ordinary course of business' exception at the summary judgment stage of the case, with a more complete evidentiary record before the court." (Dkt. 43 at 12.) Obviously, Facebook could provide the "*details*" of its "software code" without producing the *actual* source code. But it has done both in this case.

Engineering Director (Alex Himel) that explained in detail the processes and functionality at issue and attached key technical documents explaining relevant portions of the source code. (Jessen Decl. ¶ 13.) The parties subsequently conferred, and during that process, in the interests of compromise and to avoid wasteful motion practice and further delay, Facebook agreed to make the source code available.[2] The parties then negotiated an amended protective order containing detailed provisions to govern the treatment of source code, which this Court entered on July 1, 2015. (Dkt. 93.) The source code (which had to be gathered for the relevant time period) was available for inspection as early as **the week of July 20**, and Plaintiffs' experts began reviewing it on **August 4, 2015**—which was more than a week *before* the hearing that Magistrate Judge James had initially set on any motion by Plaintiffs to compel production of source code, and which belies Plaintiffs' claims that Facebook has caused any prejudicial delay. Since then, Plaintiffs have had *three* different experts spend a collective total of *four weeks* reviewing the source code. (Jessen Decl. ¶¶ 16, 36.) This is a significant amount of time, especially given that the Himel Declaration provided a roadmap of the relevant code.

B. Facebook's Responses to Plaintiffs' Initial Discovery Requests

Plaintiffs' complaints about Facebook's document production are likewise meritless and do not justify a three-month extension for several reasons:

First, after Plaintiffs propounded incredibly overbroad and burdensome discovery requests on January 26, 2015, Facebook affirmatively and proactively reached out to Plaintiffs—*even before its written responses were due*—to engage Plaintiffs in a constructive dialogue regarding the proper scope of discovery in this case. (*Id*. ¶ 17.) At that time, Plaintiffs suggested that Facebook serve its written responses on March 9, after which point the parties would meet and confer. (*Id*.) The parties continued to dispute the proper scope of discovery, and Facebook noted its concerns in the parties' Joint Rule 26(f) Report. (Dkt. 60 at 10-11.) At the Case Management Conference, this Court stated

[2] Facebook did not "resist[]" producing Mr. Himel for a deposition, as Plaintiffs claim. (Dkt. 109 at 1.) The only issue was *when* the deposition would occur given Mr. Himel's schedule. Plaintiffs had not requested a deposition and the parties had not incorporated it into the schedule. This was one of the reasons Facebook ultimately relented and agreed to provide source code—Plaintiffs were creating new disputes, elevating process over substance, and wasting valuable time. Facebook also relented because the source code established that there were no unlawful "interceptions" (a point that should have been apparent from Facebook's interrogatory responses and document production) and it hoped to foreclose further burdensome and irrelevant requests. That hope proved to be overly optimistic.

that it "agreed" with Facebook that the parties should focus their discovery efforts on the open issues from the Motion to Dismiss ruling and information necessary for class certification. (Jessen Decl. ¶ 17.) And, shortly after that conference, the parties engaged in a lengthy, four-hour conference call to discuss the requests, during which time Plaintiffs refused to provide answers to several basic questions—including whether the class definition alleged in the Complaint (which is limited to Facebook users who sent URLs in messages between December 2011 and December 2012) accurately reflected the putative class that Plaintiffs seek to represent. (*Id*. ¶ 18.)[3]

Second, since those discussions, Facebook produced (on June 1) the core documents relevant to Plaintiffs' claims and made several other productions totaling more than 2,000 documents (6,713 pages). (*Id*. ¶ 21.) Facebook also provided detailed responses to Plaintiffs' interrogatories to describe the challenged practice. (*Id*. ¶ 20.) Accordingly, Plaintiffs are seeking an extension not because they do not have the primary documents and information relevant to their claims, but because the discovery reveals their claims to be meritless and inappropriate for class treatment. By dragging out the schedule longer, Plaintiffs apparently hope they can uncover another basis for their lawsuit (or, perhaps, a new lawsuit altogether).

Third, Plaintiffs complain about the volume of Facebook's production, but the volume is not surprising because this case challenges a very discrete practice that ended nearly three years ago. Nonetheless, Facebook has undertaken expansive and significant searches for relevant materials, identifying more than *twenty* custodians, collecting more than *two million* documents, and then using search terms (agreed to by Plaintiffs) and predictive coding to narrow the universe to approximately 275,000 reviewed documents. (*Id*. ¶ 21.) Throughout this process, Plaintiffs have critiqued Facebook's efforts (most recently by challenging predictive coding), but, despite Facebook's repeated attempts to affirmatively and proactively engage with them, Plaintiffs have never offered a counter proposal for how else Facebook should conduct a proportional review. (*Id*. ¶ 22.)[4] In any event,

[3] The parties continued to confer, including in Magistrate Judge James' courtroom after the April 13 discovery conference. During that discussion, Plaintiffs' counsel dismissed Facebook's concerns by stating that Facebook's counsel should know "how the game is played." (*Id*. ¶ 19.)

[4] Just this evening, as Facebook was finalizing its Opposition, Plaintiffs' counsel announced their intent to file yet another discovery brief with Magistrate Judge James on the predictive coding issue—their *fourth* such brief in the last few weeks since they first requested an extension to the schedule.

Facebook expects that its production will be substantially completed by ***September 30***. Again, Plaintiffs have had the core documents for months, but this is why Facebook does not oppose a modest, 30-day extension.

C. Other Discovery Disputes

Plaintiffs identify three other discovery disputes that are either pending before Magistrate Judge James (Dkt. 112, 113) or will soon be briefed, but none of them warrants an extension to the schedule because they all concern discovery served relatively recently. Further, Plaintiffs' motion ignores that Facebook has agreed to produce (and *has* produced) documents relevant to Plaintiffs' claims and has limited its objections to the production of irrelevant materials. The third dispute concerns Plaintiffs' improper request for a Rule 30(b)(6) deposition (requested only in the past few weeks) of a Facebook witness to explain the source code—the same source code that Plaintiffs and their experts have had complete access to for almost two months and have reviewed for four weeks (with the benefit of the Himel Declaration). This latter dispute is precisely why Facebook agreed to provide the code itself, but its experience confirms that if Plaintiffs have more time, they will use it to manufacture new disputes and seek to place even greater burdens on Facebook.[5]

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Plaintiffs have not met their burden to show "good cause" for a three-month extension of the schedule, and their Motion should be denied. However, Facebook does not object to a one-month extension of the schedule, provided that Plaintiffs do not use this extra time to serve more discovery on Facebook, and instead concentrate on completing the existing discovery and depositions. This condition should be acceptable to Plaintiffs, because they agreed to it when proposing a 90-day extension. (Dkt. 109-2 ¶ 3 & Ex. 1.) Facebook respectfully requests that the Court enter its proposed order extending the schedule by approximately one month on that condition.

Dated: September 21, 2015

By: */s/ Joshua A. Jessen*
Attorneys for Defendant FACEBOOK, INC.

[5] Nor may Plaintiffs obtain additional time because of the modest additional discovery requests that Facebook recently served. This discovery is primarily relevant to Facebook's *Opposition* to Plaintiffs' Motion for Class Certification, which is not due until mid-December under the existing schedule. It in no way affects *Plaintiffs'* ability to move for class certification by the current deadline. If Plaintiffs require more time, they should request it. The parties have granted such extensions in the past.