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 FACEBOOK, INC.

13
 14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 OAKLAND DIVISION

17 MATTHEW CAMPBELL, MICHAEL
 HURLEY, and DAVID SHADPOUR,

18 Plaintiffs,

19 v.

20 FACEBOOK, INC.,

21 Defendant.

Case No. C 13-05996 PJH (MEJ)

**DECLARATION OF JOSHUA JESSEN IN
 SUPPORT OF DEFENDANT FACEBOOK,
 INC.'S OPPOSITION TO PLAINTIFFS'
 MOTION TO ENLARGE TIME AND
 EXTEND DEADLINES**

1 I, Joshua Jessen, declare as follows:

2 1. I am an attorney admitted to practice law before this Court. I am a partner in the law
3 firm of Gibson, Dunn & Crutcher LLP, and I am one of the attorneys responsible for representing
4 Defendant Facebook, Inc. (“Facebook”) in the above-captioned action. I submit this declaration in
5 support of Facebook’s Opposition to Plaintiffs’ Motion to Enlarge Time and Extend Deadlines (Dkt.
6 109; the “Motion”). Unless otherwise stated, the following facts are within my personal knowledge
7 and, if called and sworn as a witness, I could and would testify competently to these facts.

8 **I. Scheduling In This Action And Other Email “Scanning” Class Actions**

9 2. Plaintiffs filed this action on December 30, 2013 (Dkt. 1). They filed their
10 Consolidated Amended Complaint on April 25, 2014 (Dkt. 25). A hearing is currently scheduled on
11 Plaintiffs’ motion for class certification and Facebook’s motion for summary judgment (as to the
12 named Plaintiffs) on February 17, 2016 (Dkt. 62), which is more than two years after Plaintiffs
13 initially filed suit.

14 3. By comparison, in the two e-mail “scanning” lawsuits that inspired this lawsuit against
15 Facebook—*In re Google Inc. Gmail Litig.*, Case No. 13–MD–02430–LHK (N.D. Cal.) (“*Gmail*”),
16 and *In re Yahoo Mail Litig.*, Case No. 13-CV-04980-LHK (N.D. Cal.) (“*Yahoo*”)—orders regarding
17 class certification already have been entered. The District Court rendered its decision on class
18 certification in *Gmail* on March 18, 2014, and in *Yahoo* on May 26, 2015. *See Gmail*, No. 13-MD-
19 02430-LHK, 2014 WL 1102660 (N.D. Cal. Mar. 18, 2014); *Yahoo*, No. 13-CV-04980-LHK, 2015
20 WL 3523908 (N.D. Cal. May 26, 2015). The consolidated complaint in *Gmail* was filed on May 16,
21 2013, so less than a year passed between that event and a ruling on class certification. The first
22 *Yahoo* case (ultimately several were filed and consolidated) was filed less than three months before
23 the present case, and approximately fifteen months elapsed between the filing of a consolidated
24 complaint in that case (on February 12, 2014) and a ruling on class certification (on May 26, 2015).

25 4. If Plaintiffs’ Motion is granted, a decision on class certification and summary
26 judgment in this matter likely will not be made until mid 2016—approximately two and half years
27 after Plaintiffs filed suit.

1 **II. The Parties’ Dispute Regarding The Scope Of Discovery In This Action**

2 5. This Court held a Case Management Conference on March 12, 2015 (Dkt. 62). In
3 advance of that Conference, the parties filed a Joint Case Management Statement (Dkt. 60). In that
4 Joint Statement, Plaintiffs “stat[ed] that the parties have conferred as required by Rule 26(f) and
5 accordingly discovery is open for all purposes.” (*Id.* at 9.) In contrast, Facebook “submit[ted] that
6 the parties should focus their discovery on class certification issues and the issues identified in this
7 Court’s ruling on the Motion to Dismiss.” (*Id.*) During the Case Management Conference, the Court
8 stated that it “agree[d]” with Facebook. (There is no transcript of that conference, but I was present
9 and recall the Court’s statement.)

10 6. Since the Case Management Conference, Plaintiffs have not focused their discovery
11 efforts on class certification issues and the issues identified in this Court’s ruling on the Motion to
12 Dismiss. On the contrary, they have propounded and pursued wide-ranging discovery on topics
13 having nothing to do with their claims. The current discovery disputes they cite in their brief
14 (discussed in greater detail below) are illustrative. The reason there are disputes pending before
15 Magistrate Judge James on discovery that Plaintiffs served in the past few months is not because
16 Facebook has refused to produce information relevant to Plaintiffs’ claims (it has produced such
17 information), but rather because Plaintiffs have requested a vast amount of information that is not
18 relevant to their claims (such as information about the “monetary value” of Facebook users in general
19 and technical information not tethered to the challenged conduct). (*See* Dkt. 112, 113 (two pending
20 discovery letter briefs).) Plaintiffs also wasted time filing a motion to compel communications
21 between Facebook’s European affiliate (Facebook Ireland) and a foreign regulator (the Irish Data
22 Protection Commissioner) that were irrelevant to Plaintiffs’ claims, which the Magistrate properly
23 denied. (Dkt. 101.)

24 7. To date, Plaintiffs have taken only one deposition (of Facebook employee Jiakai Liu
25 on June 30, 2015).

26 **A. Source Code**

27 8. As acknowledged in Plaintiffs’ Motion and the supporting declaration of David T.
28

1 Rudolph (Dkt. 109-2), Plaintiffs were aware of Facebook’s objection to producing source code in this
2 action in advance of the March 12 Case Management Conference. In fact, Plaintiffs raised the issue
3 during the Case Management Conference, and this Court referred the parties to Magistrate Judge
4 James (Dkt. 62).

5 9. Contrary to Mr. Rudolph’s statement, Facebook’s objection to producing source code
6 was not based on the “time and effort requir[ed] to negotiate the terms of a protective order providing
7 for source code production.” (Dkt. 109-2, ¶¶ 7, 14.) Rather, Facebook’s objection was that
8 production of its valuable and sensitive source code was not warranted in a consumer class action and
9 that Plaintiffs had less intrusive means of obtaining the information they needed for their case. Given
10 this position, Facebook objected to including provisions regarding the production of source code in
11 the initial Stipulated Protective Order (which could have been read to assume that source code was
12 proper for production in this case). Plaintiffs, on the other hand, were unwilling to agree to a
13 Stipulated Protective Order that did not contain source code provisions.

14 10. During the April 13 Discovery Conference, Magistrate Judge James agreed with
15 Facebook that the parties should initially enter into a protective order that did not contain provisions
16 governing the treatment of source code. Accordingly, the parties filed a Stipulated Protective Order
17 without such provisions, and they included this additional statement regarding their dispute: “The
18 parties disagree about the relevance of source code in this action, and they agree that should the
19 production of source code become necessary, they will need to amend or supplement the terms of this
20 Order. To the extent production of source code becomes necessary in this case, the parties will work
21 expeditiously to propose amendments to this Order to cover any production of source code.” (Dkt.
22 76.) This had been Facebook’s suggestion all along—defer the dispute over source code so that
23 Facebook could prioritize (and begin producing) other materials. This Court signed the Stipulated
24 Protective Order on April 17, 2015. (*Id.*)

25 11. Mr. Rudolph’s statement that “Facebook has repeatedly stipulated to protective orders
26 providing for the production of source code” (Dkt. 109-2 ¶ 8) is misleading and shows just how
27 unusual Plaintiffs’ request for source code here was. The three protective orders that he attaches to
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1 his declaration are all from patent cases. (*Id.*, Exs. 3-5.)

2 12. During the April 13 Discovery Conference, Magistrate Judge James also agreed with
3 Facebook that Plaintiffs first should explore less intrusive means of discovery. To that end, she set a
4 schedule for Facebook to “produce technical and other relevant documents in response to Plaintiffs’
5 source code discovery requests, which will include a declaration explaining why the produced
6 documents respond to Plaintiffs’ requests without producing the source code itself.” (Dkt. 68.) This
7 thoughtful and reasonable approach also required the parties to meet and confer *after* that production,
8 and established a briefing schedule for Plaintiffs’ motion to compel (only if necessary), which would
9 be heard on August 13, 2015. (*Id.*)

10 13. Pursuant to the Magistrate’s Order, Facebook produced a significant number of
11 documents on June 1, 2015, including many technical documents, as well as the core e-mails relevant
12 to Plaintiffs’ claims. In addition, and pursuant to the Magistrate’s Order, Facebook provided a
13 declaration from a senior Facebook Engineering Director (Alex Himel) (the “Himel Declaration”),
14 which explained in detail the processes and functionality at issue and attached key technical
15 documents explaining relevant portions of the source code (while redacting the source code itself).

16 14. The parties subsequently met and conferred in June, and during that process, in the
17 interests of compromise and to avoid wasteful motion practice and further delay, Facebook agreed to
18 make the source code available. Plaintiffs’ assertion that Facebook resisted making Mr. Himel
19 available for a deposition (Dkt. 109 at 1) is incorrect. The only issue was *when* the deposition would
20 take place given the demands of Mr. Himel’s schedule. (Dkt. 85.) Plaintiffs had not requested a
21 deposition as part of the briefing schedule, and so the parties had not incorporated it into the
22 schedule. (*Id.*) This was one of the reasons Facebook ultimately relented to provide its source
23 code—Plaintiffs were manufacturing new disputes and the entire process was wasting time.

24 15. The parties then negotiated an amended protective order containing detailed
25 provisions to govern the treatment of source code, which this Court entered on July 1, 2015. (Dkt.
26 93.) Shortly after the amended protective order was entered, my colleagues and I began the process
27 of working to gather the source code relevant to Plaintiffs’ claims (which is not *all* of Facebook’s
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1 source code but only certain code for the period of time from September 2009 to December 2012)
2 and make it accessible for review on a secured, non-networked computer. This was a time-
3 consuming process, and Mr. Rudolph’s statement that the “production of source code was not
4 forthcoming in a timely manner” (Dkt. 109-2, ¶ 15) is baseless. In fact, as I informed Mr. Rudolph
5 on July 17, we anticipated that the source code would be ready for inspection by July 29. In fact, it
6 turned out to be ready for inspection during the week of July 20. But Plaintiffs’ expert did not begin
7 reviewing the code until August 4, 2015. This was still more than a week before the hearing that
8 Magistrate Judge James had initially set on any motion by Plaintiffs to compel production of source
9 code. (Dkt. 68.)

10 16. Since August 4, Plaintiffs have had three different experts collectively spend four
11 weeks reviewing the source code, and the review is continuing this week. It is surprising that the
12 review has lasted this long, especially given that Plaintiffs and their experts have the Himel
13 Declaration to guide them.

14 **B. Facebook’s Responses To Plaintiffs’ Initial Discovery Requests, Facebook’s**
15 **Document Production, And Facebook’s Use Of Predictive Coding**

16 17. On January 26, 2015, Plaintiffs served their First Set of Requests for Production of
17 Documents to Facebook, which consisted of forty document requests. (Dkt. 109-4, Ex. 2.) The
18 requests were incredibly overbroad and burdensome when compared to the reasonably discrete
19 practice challenged in Plaintiffs’ Consolidated Amended Complaint, so Facebook affirmatively and
20 proactively reached out to Plaintiffs—even before its written responses were due—to engage
21 Plaintiffs in a constructive dialogue regarding the proper scope of discovery in this case. During a
22 lengthy telephone conference on February 11, 2015, to begin discussing Facebook’s concerns about
23 the breadth of the requests, Plaintiffs suggested that Facebook serve its written responses and
24 objections (including proposed compromises on these requests) on March 9 (which Facebook did),
25 after which point the parties would meet and confer. The parties continued to dispute the proper
26 scope of discovery, and Facebook noted its concerns in the parties’ Joint Case Management
27 Statement. (Dkt. 60 at 10-11.) As noted above, at the March 12 Case Management Conference, this
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1 Court stated that it “agree[d]” with Facebook that the parties should focus their discovery efforts on
2 the open issues from the Motion to Dismiss ruling and information necessary for class certification.

3 18. Shortly after the Case Management Conference, on March 17, Facebook engaged in a
4 lengthy, four-hour telephonic conference with Plaintiffs to discuss the document requests, during
5 which time Plaintiffs refused to provide answers to several straightforward questions—including,
6 most fundamentally, whether the class definition alleged in the Complaint (which is limited to
7 Facebook users who sent URLs in messages between December 2011 and the end of 2012) accurately
8 reflected the purported class that Plaintiffs seek to represent in this lawsuit. Specifically, Plaintiffs
9 refused to answer the following question: Is a Facebook user who sent a Facebook message that did
10 *not* contain a URL part of the putative class?

11 19. The parties continued to confer, including in Magistrate Judge James’ courtroom after
12 the April 13 Discovery Conference. During that discussion, Plaintiffs’ counsel dismissed Facebook’s
13 concerns about the breadth of the discovery requests by stating “You know how the game is played.”
14 (*See* also Dkt. 109-2, Ex. 12.)

15 20. On April 1, 2015, Facebook served its Responses to Plaintiffs’ First Set of
16 Interrogatories. Those Responses were extremely detailed and provided a narrative description of
17 how the challenged practice operated.

18 21. To date, Facebook has produced more than 2,000 documents totaling 6,713 pages.
19 This volume of documents is not surprising given that Plaintiffs challenge a very discrete practice
20 that ended nearly three years ago. Nonetheless, Facebook has undertaken extensive searches for
21 relevant materials, identifying more than twenty document custodians, collecting more than two
22 million documents, and then using search terms (to which both parties agreed) and predictive coding
23 to narrow the reviewed universe to approximately 275,000 documents. Facebook anticipates that its
24 document production will be substantially complete by the end of September. (This is one of the
25 reasons Facebook has agreed to a more modest extension of 30 days.)

26 22. Throughout this process, Plaintiffs have critiqued Facebook’s extensive efforts (most
27 recently by challenging predictive coding), but, despite Facebook’s repeated attempts to affirmatively
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1 and proactively engage with them, Plaintiffs have never offered a counter proposal for how else
2 Facebook should conduct a proportional and time-effective document review in this matter. Instead,
3 Plaintiffs have consistently attempted to misrepresent the history of the parties' exchanges and
4 manufacture disputes about the process. (Dkt. 109-2, Exs. 12, 17.) For example, in Facebook's *June*
5 *19* letter to Plaintiffs, Facebook's counsel recounted the relevant history and noted:

6 [I]t is only in the *last few weeks* that we have been able to reach agreement on the
7 custodians, search terms, and date range for Plaintiffs' document requests.
8 Accordingly, your complaints about the volume of the production to date, and your
9 assertion that there has been 'five months' of delay, plainly misstates the record.
10 Over the last several weeks, we have worked diligently and at great expense to our
11 client to continue to collect responsive materials from the custodians identified in our
12 May 13 and June 12 correspondence.

(Dkt. 109-2 Ex. 12.)

11 23. More recently, at the beginning of September, Plaintiffs have challenged the
12 combination of predictive coding and Facebook's use of search terms, stating that "Facebook's
13 counsel did not indicate in [a] May 13, 2015 letter"—the same letter in which Facebook proposed a
14 set of search terms for Plaintiffs' consideration (*Id.* Ex. 10)—"that Facebook intended to implement
15 predictive coding as part of its document collection and review process." (*Id.* ¶ 24.). But it was not
16 until after Facebook's May 13 letter—when Plaintiffs agreed to the search terms and offered no new
17 ones (on May 27 (*id.* Ex. 11))—that Facebook could proceed to process all of the documents it had
18 collected to determine the volume of potentially responsive documents for review. When the
19 application of the agreed-upon search terms resulted in 600,000 documents for review from (at the
20 time) 17 custodians, it became clear that further steps were needed to effect a timely, proportional,
21 and cost-efficient review. At this juncture, Facebook informed Plaintiffs on June 19 of its intent to
22 use predictive coding to cull this large volume of material to a reasonable volume for review. (*Id.* Ex.
23 12.) Plaintiffs made no objection.

24 24. Facebook repeatedly encouraged an open discussion and engagement on the predictive
25 coding process, including by offering—during a meet-and-confer conference on June 30, 2015—to
26 arrange a call between its technical e-discovery personnel and Plaintiffs' technical team to facilitate a
27 dialogue and address any concerns. When this call occurred on July 17, 2015, Plaintiffs' counsel
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1 posed a number of queries about the size of the potential review population discussed in Facebook’s
2 June 19 letter (*id.*), and what that population did or did not include, while Facebook instead attempted
3 to advance the discussion with an explanation of its predictive coding process.

4 25. Plaintiffs then sent Facebook a letter on July 23, 2015, containing over 25 substantive
5 inquiries about various aspects of Facebook’s predictive coding process (most of which were new
6 and had not been raised during the July 17 call). (*Id.* Ex. 13.) This exchange required Facebook to
7 work with various e-discovery technical staff members to draft a response that would sufficiently
8 clarify several of Plaintiffs’ misconceptions and substantially address their various technical queries.
9 Facebook ultimately provided a 7-page letter on August 20, 2015, that substantively responded to all
10 of Plaintiffs’ various multi-part queries about the predictive coding process and once again affirmed
11 that its goal was to engage in a productive discussion with Plaintiffs to make the discovery process
12 proportionate and efficient. (*Id.* Ex. 15.)

13 26. Plaintiffs did not propose any alternative and instead responded with additional
14 queries and demands regarding predictive coding. Facebook responded on September 15, and just
15 this evening, as we were finalizing Facebook’s Opposition, Plaintiffs’ counsel announced that they
16 intend to file yet another letter brief with Magistrate Judge James on this issue—bringing their total
17 to 5 discovery briefs (and 4 briefs in the last few weeks since they requested an extension to the
18 schedule).

19 27. Further, as noted above, Facebook’s production of around 2,000 documents totaling
20 nearly 7,000 pages in this case—what Plaintiffs call a “relatively small set”—is a result not of
21 predictive coding, but of the fact that Plaintiffs’ claims in this case concern the functionality
22 underlying the Facebook Messages product, which Plaintiffs have argued (Dkt. 109-2, ¶ 7) is
23 contained in Facebook’s source code and other technical documentation, *not* in custodial emails and
24 their attachments.

25 28. Yet, rather than productively engaging with Facebook to understand the process and
26 its results, or at least providing alternative solutions to make the discovery process as efficient and
27 effective as possible, Plaintiffs have initiated a number of needless sideshows—demanding
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1 production of non-responsive documents, attempting to rescind their previous agreement regarding
2 the use of search terms, and moving to compel the production of irrelevant materials.

3 **C. Facebook's Responses To Plaintiffs' Interrogatory No. 8 And Request For**
4 **Production No. 41**

5 29. On June 29, 2015, Facebook served its responses and objections to Plaintiff's
6 Interrogatory No. 8 and Plaintiffs' Second Set of Requests for Production (which included Request
7 for Production No. 41). Those requests sought a vast amount of technical information about the
8 messages containing URLs that Plaintiffs had sent on Facebook's platform. Specifically,
9 Interrogatory No. 8 asked Facebook to:

10 Identify all facts relating to the Processing of each Private Message sent or received
11 by Plaintiffs containing a URL, including, for each Private Message:

- 12 (A) all Objects that were created during the Processing of the Private Message,
13 including the (id) and the Object Type for each Object, as well as any Key ->
14 Value Pair(s) contained in each Object;
- 15 (B) all Objects that were created specifically when the embedded URL was
16 shared, including the (id) and the Object Type for each Object, as well as any
17 Key -> Value Pair(s) contained in each Object;
- 18 (C) all Associations related to each Private Message, identified by the Source
19 Object, Association Type, and Destination Object, as well as any Key ->
20 Value Pair(s) contained in each Association;
- 21 (D) the database names and table names in which each Association and Object is
22 stored;
- 23 (E) each application or feature in Facebook that uses the Objects or Associations
24 created for each Private Message; and
- 25 (F) how each Object associated with the Private Message was used by Facebook.

26 (Dkt. 109-2 Ex. 18.)

27 30. Request for Production No. 41, in turn, sought the production of "[a]ll Documents and
28 ESI relied upon, reviewed, or referenced by [Facebook] in answering Interrogatory No. 8." (*Id.*)

31. In its written responses, Facebook offered to meet and confer with Plaintiffs on the
proper scope of these overly broad and ambiguous requests, and the parties subsequently discussed
them in July and August. During this process, Plaintiffs narrowed the requests to a subset of 19

1 messages sent by Plaintiffs. Facebook then searched for these 19 messages, located 16 of them (after
2 considerable time and effort), and produced to Plaintiffs the objects and associations (if any) related
3 to the URLs included in those on September 1, 2015. Facebook also produced other technical
4 information for each message and served supplemental interrogatory responses. The production
5 totaled almost 700 pages. Plaintiffs thus are now in possession of the “objects” and “associations”
6 that are relevant to their claims regarding purported URL “scanning.”

7 32. Unsatisfied, Plaintiffs also demanded the production of *any* “objects” and
8 “associations” related to these 16 messages, regardless of the fact that they have no conceivable
9 relevance to Plaintiffs’ allegations of “scanning” *URLs* to increase the “like” counter. As Facebook
10 explained in the pending letter brief on this issue, extracting the data comprising objects and
11 associations into producible form—which Facebook’s systems were never designed to do—
12 especially for objects that are irrelevant to Plaintiffs’ claims, is overbroad and unduly burdensome.
13 (Dkt. 113.) Nonetheless, on September 18, Facebook produced additional objects associated with
14 these messages that it located after a reasonable search. But Plaintiffs have no need for this irrelevant
15 information (or any additional information about these messages) to prepare their motion for class
16 certification or to oppose Facebook’s future motion for summary judgment.

17 33. Additionally, for the record, Mr. Rudolph is incorrect that “[d]uring [an] August 11,
18 2015 meet and confer, Facebook’s counsel stated that Facebook would produce the requested
19 documents within two weeks.” In fact, there was no “meet and confer” on August 11. There was a
20 meet-and-confer conference on August 10, but Mr. Rudolph was not part of it. Rather, I spoke with
21 other Plaintiffs’ attorneys (Hank Bates and Allen Carney) and told them that accessing the requested
22 data (to the extent it existed) for the 19 messages was a time-consuming process and that Facebook
23 hoped to have it gathered (to the extent it was accessible) within two weeks. I will not comment on
24 Mr. Rudolph’s statement regarding discussions that occurred during the August 19 mediation (as
25 those discussions are confidential), except to say that it misstates what Facebook’s counsel told the
26 mediator.

1 **D. Damages Documents**

2 34. On August 3, 2015, Facebook served its responses and objections to Plaintiff’s Third
3 Set of Requests for Production, which Plaintiffs had served on June 29 and which they now assert are
4 relevant to their purported damages for their Wiretap Act and California Invasion of Privacy Act
5 claims. As Facebook explained in the pending letter brief on this issue, however, the majority of
6 Plaintiffs’ requests are overbroad and untethered to Plaintiffs’ two surviving claims and the damages
7 they are permitted to seek pursuant to those laws, which are limited to (1) statutory damages, (2)
8 actual damages, and (3) “profits made by [Facebook] as a result of the [alleged] violation” under
9 ECPA (*see* Cal. Pen. Code § 632.7(a); 18 U.S.C. § 2520(b)-(c)). (*See* Dkt. 112.) In yet another
10 example of Plaintiffs not focusing their discovery efforts on issues relevant to class certification,
11 Plaintiffs are seeking to compel the production of documents related to the theoretical “monetary
12 value” of generic “Facebook users” (and similar categories of irrelevant documents) despite the fact
13 that this Court dismissed Plaintiffs’ Unfair Competition Law (Cal. Bus. & Prof. Code § 17200) claim
14 with prejudice on the basis that “Plaintiffs argue that they have a property interest in their personal
15 information, including the content of their messages, but courts have consistently rejected such a
16 broad interpretation of ‘money or property.’” (Dkt. 49 at 19.)

17 35. For the handful of Plaintiffs’ damages discovery requests that arguably seek relevant
18 information, Facebook already conducted a reasonable search and diligent inquiry and did not locate
19 responsive documents during the relevant time period. (Dkt. 112.) As Plaintiffs know, this is not
20 surprising since discovery has shown that Plaintiffs’ core “damages” theory—that Facebook
21 previously “scanned” URLs in messages to compile user profiles to deliver “targeted advertising” to
22 users during the relevant time period—has no basis in fact.

23 **E. Plaintiffs’ Recently-Served Rule 30(b)(6) Deposition Notice**

24 36. Plaintiffs did not attempt to notice a Rule 30(b)(6) deposition of Facebook until a few
25 weeks ago (on August 28, 2015), when they sent us a proposed Rule 30(b)(6) deposition notice.
26 Categories 1 and 2 of the proposed notice ask Facebook to prepare a corporate witness to identify all
27 of the relevant source code—the same source code Plaintiffs and their experts have had access to for
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