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 (MEJ) **ATTESTATION IN SUPPORT OF JOINT LETTER BRIEF REGARDING TOPICS ONE AND TWO OF PLAINTIFFS' 30(b)(6) NOTICE OF DEPOSITION** Date:　　TBD Time:　　TBD Location:　San Francisco Courthouse 　　　　　Courtroom B – 15th Floor 　　　　　450 Golden Gate Avenue 　　　　　San Francisco, CA 94102

Pursuant to the Discovery Standing Order for Magistrate Judge Maria-Elena James, undersigned counsel hereby attest that they met and conferred in person in a good faith attempt to resolve their disputes prior to filing the below joint letter.

Dated: October 1, 2015　　　　　　　　Respectfully submitted,

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The Honorable Maria-Elena James, Chief Magistrate Judge
United States District Court, Northern District of California
San Francisco Courthouse, Courtroom B - 15th Floor
450 Golden Gate Avenue, San Francisco, CA 94102

Re: *Campbell v. Facebook, Inc.*, N.D. Cal. Case No. 13-cv-05996-PJH (MEJ)

To The Hon. Maria-Elena James:

Plaintiffs and Defendant Facebook, Inc. jointly submit this letter brief pursuant to the Court's
Discovery Standing Order.

I.   Background

A dispute has arisen over Plaintiffs' Rule 30(b)(6) deposition notice, which asks Facebook to
designate a corporate representative to testify upon, *inter alia*, the following topics:

(1) "The identification of Facebook source code utilized to carry out each process
characterized in Facebook's Responses and Objections to Plaintiffs' Interrogatories
("Resp."), Interrogatories No. 2 and 3." ("Topic One"); and

(2) "The identification of Facebook source code utilized to carry out each process
characterized in Facebook's Responses and Objections to Plaintiffs' Interrogatories
("Resp."), Interrogatory No. 4." ("Topic Two")

On August 28, 2015, Plaintiffs sent Facebook a draft deposition notice and, pursuant to Civil
Local Rule 30-1, sought to meet and confer regarding scheduling prior to formally noticing the
deposition. On September 2, 2015, the parties held an in-person meet and confer, in which
Facebook stated that Topics One and Two were improper and that it would not produce a
deponent on those topics. Facebook invited Plaintiffs to propose an alternative to a Rule
30(b)(6) deposition on these topics. On September 4, 2015, Plaintiffs' counsel proposed, in lieu
of producing a 30(b)(6) designee on Topics One and Two, that Facebook allow Plaintiffs to run
Facebook's source code in an "Integrated Development Environment" ("IDE"), taking the
position that an IDE would enable Plaintiffs to see the full process that Facebook undertakes
when a user composes and sends a private message. Facebook subsequently informed Plaintiffs
of its position that Plaintiffs' suggestion to run Facebook's source code in an "Integrated
Development Environment" had no precedent and that it stood on its objection to designating a
witness for Topics One and Two. On September 18, Plaintiffs served their Rule 30(b)(6)
deposition notice (Ex. A). On September 22, Facebook served its Responses and Objections to
the Notice (Ex. B).

Having conferred in person, the parties are now at an impasse and submit this joint letter
pursuant to the Court's Discovery Standing Order.

II.   Plaintiffs' Position

Plaintiffs seek to depose a witness who can objectively explain—by pointing to the relevant source code—the processes that *Facebook* identified as being relevant to this litigation in its Responses to Plaintiffs' First Set of Interrogatories Nos. 2, 3, and 4 ("Responses") (Ex. C).[1] In these Responses, Facebook provides its characterization of how and when it scanned its users' private messages for URL content, ███████████████████████████████████████ ████████████████████████████ Likes associated with those URLs on third-party websites. Ex. C at 12:13-16. Within this narrative, Facebook also lays the groundwork for its defenses in this litigation, stating that these practices ███████████████ ███████ (Ex. C at 11:5-8), and occurred for purposes ███████████████████ ███████████████████████ (*Id*. at 11:8-10). Facebook has represented that these are the precise defenses it intends to raise in its motion for summary judgment. Joint Case Management Conference Statement, at 3-7 (Dkt. No. 60). The purpose of deposing a witness on Topics One and Two, therefore, is to identify the precise lines of code supporting Facebook's characterization of how the private message processing works.

Facebook claims that producing a witness to testify *about its own characterizations* of its message-scanning practices would be tantamount to forcing Facebook to "do [Plaintiffs'] work for them," but this objection is meritless. It is entirely appropriate for a 30(b)(6) designee to testify about relevant source code when the code at issue is "cabined to the products or components actually identified [in the plaintiff's claims]." *Vasudevan Software, Inc. v. MicroStrategy, Inc*., No. 11-06637, at p. 3 (N.D. Cal. Aug. 22, 2012) (Grewal, M.J.) (ECF No. 86) (ordering deponent to testify on the source code produced). *Vasudevan* is particularly instructive. There, like here, the defendant complained of undue burden in producing a 30(b)(6) witness "because it [would] require[] granular testimony regarding the operation of [defendant's] products," while "this information is best gleaned from the source code itself." *Id*. at p. 2. To require a deponent to walk the plaintiff through the source code "would effectively require MicroStrategy to identify for VSI the allegedly infringing aspects of its own software." *Id*. The court was not persuaded, finding such a request "standard fare"[3] and ordering the defendant to produce a deponent to "testify regarding the granular functionality of [the] source code…without delay." *Id*. at p. 5. *See also Nomadix, Inc. v. Hewlett-Packard Co., et. al*., No. 9-08441 (C.D. Cal. Jun. 21, 2011) (Kenton, M.J.) (ECF No. 395) (granting, in a tentative decision, motion to compel the use of source code at deposition).

The primary case law cited by Facebook is inapposite. *Callwave Commc'ns. LLC v. AT&T Mobility LLC* dealt with 30(b)(6) topics outside of the scope of the claims. 2015 U.S. Dist. LEXIS 86422, at *4 (D. Del. June 1, 2015) ("Google submits that Callwave has declined to limit its request to any discrete and relevant issue, or 'describe with reasonable particularity the matters for examination.'"). Similarly, in *CIF Licensing, LLC v. Agere Sys*., the defendants

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[1] Plaintiffs' 30(b)(6) Deposition Notice (Ex. A) cites to specific lines in Facebook's first Responses and Objections (Ex. C), served on April 1, 2015. Facebook served Supplemental Responses and Objections on September 8, 2015 (Ex. D), however all language contained therein is identical to that cited in Exhibit A.
[2] Specifically, Facebook's Responses discuss ███████████████████████████ ████████████████ *See, generally*, Ex. C.
   Facebook's attempt to distinguish this language in *Vasudevan* on the grounds that it dealt with patent litigation is surprising in light of the fact that Facebook's principal authority, *Callwave* and *CIF Licensing*, are also patent cases.

complained that their experts—who sat for depositions—could not map specific lines of code to specific practices "because [d]efendants currently lack the information that [p]laintiff seeks." 2009 U.S. Dist. LEXIS 5555, at *5 (D. Del. Jan. 23, 2009). Here, in contrast, Facebook has already identified the relevant functionalities *and* code (albeit in redacted form)—the Declaration of Alex Himel, for instance, includes seven exhibits of fully-redacted source code. Accordingly, neither Plaintiffs' requests nor their proposed compromise are off base. Indeed, in a separate opinion from a case cited by Facebook in this brief, the court held out both (1) a designee deponent on source code and (2) a "navigational tool" like the Integrated Development Environment proposed as a compromise by Plaintiffs as *optimal* methods of conducting the type of discovery at issue. *Apple Inc. v. Samsung Elecs. Co*., 2013 U.S. Dist. LEXIS 53409, at *17 (N.D. Cal. Apr. 12, 2013) (Grewal, M.J.) (admonishing Apple for "not request[ing] navigational tools or seek[ing] to depose a 30(b)(6) witness familiar with the [source] code.").

Facebook contends that it should not be required to produce a witness for Topics One and Two because it already has provided Plaintiffs with the entirety of its source code. However, as Facebook stated to this Court, its architecture is "complicated and vast," and Facebook "process[es], rout[es], and stor[es] content from billions of user actions per day" (Dkt. No. 113 at 6). The source code at issue consists of over 10 million lines. Topics One and Two are not harassing broadsides aimed at the entirety of Facebook's code; they are discrete inquiries into what Facebook, *itself*, purports to be the operative functionality at issue in this case. Facebook already has identified and characterized the entirety of the processes it deems relevant to this litigation, and Plaintiffs seek a deponent to talk about *only* these topics, and *only* as Facebook describes them. *Vasudevan*, *supra*, at p. 3. It is highly questionable that Facebook could not easily identify the code that supports its characterizations. Moreover, Plaintiffs have proposed using an IDE as an alternative to a deposition, which places no burden on Facebook, whatsoever.

Through interrogatory responses and declarations, Facebook has provided its characterization of specific portions of the private message function. Plaintiffs disagree with much of that characterization, deeming it self-serving and inaccurate. Facebook has not produced *any* internal technical or summary documents that describe how the private message process works, instead providing self-serving narratives created specifically for the purposes of this litigation. Accordingly, these narratives are central to the case and Plaintiffs are entitled to test their veracity and accuracy. To this end, Plaintiffs simply ask Facebook to identify the specific source code – in other words, evidence – that provides the foundation for its characterizations. The fact that the evidence in this instance happens to include source code does not alter the rudimentary principles of proof and discovery. At trial, Facebook must identify the evidence that provides the foundation for any testimony characterizing the technical details of the private message process. Plaintiffs are entitled to disclosure of that evidence, including source code, in discovery. On the other hand, if Facebook cannot point to any source code as the foundation of its characterizations in verified pleadings, Plaintiffs are entitled to discover that as well.

III.   Facebook's Position

Once again, Plaintiffs insist on wasteful, meritless motion practice despite already having access to all the information they seek. Topics 1 and 2 ask Facebook to prepare a witness to explain Facebook's source code—the same source code that Facebook already has explained to Plaintiffs

and that Plaintiffs and their three experts have had complete access to for over two months and have reviewed for almost six weeks. Enough is enough. The law is clear: Plaintiffs cannot shift their burden of analyzing the source code they insisted they needed to Facebook or insist that Facebook prepare a witness on such burdensome, overbroad topics.

As this Court is aware, Facebook did not believe it was appropriate to produce any source code in this *non-patent* case, but Facebook compromised and produced all potentially relevant source code—the "black box" Plaintiffs told this Court they needed to understand Facebook's messages product. (*See* Dkt. 92.) Moreover, in lieu of producing source code, Facebook initially provided a declaration from a senior Facebook Engineering Director (Alex Himel) that explained the processes at issue and attached key technical documents explaining the relevant portions of the source code. Facebook also served detailed Responses to Plaintiffs' First Set of Interrogatories, which provide a narrative description of how the challenged practice operated. Plaintiffs thus have had—for many months—all of the data they need, but they apparently want Facebook to do more work for them, so they now demand that Facebook produce a corporate witness to "identify the *precise* lines of code supporting Facebook's characterization" of "each" of the processes discussed in its interrogatory responses. Unsurprisingly, courts reject such improper requests.[4]

In *CIF Licensing, LLC v. Agere Sys. Inc.*, 2009 WL 187823 (D. Del. Jan. 23, 2009), for example, the district court denied the plaintiff's motion to compel a Rule 30(b)(6) witness to testify about the "specific sections of Defendants' source code that perform[ed] specific functions" because the defendants already produced "the complete source code where this information would be contained, if it exists," and the plaintiff thus "already ha[d] access to the information" sought. *Id.* at *1. Plaintiffs misstate the posture of the case, which is materially similar to the posture here: "the question [was] whether Defendants should be compelled to … [spend[]] a significant amount of time analyzing the source code] … or whether Plaintiff should retain experts to do the analysis itself." *Id.* Rejecting the precise argument that Plaintiffs here assert —that their burden to identify and analyze the code is unreasonable—the court held that the *plaintiff* must "glean the requested information." *Id.* The court also found it persuasive that, as here, the source code was available to plaintiff's experts pursuant to a protective order, which the plaintiff "negotiated, renegotiated, and agreed to," and could not "now claim . . . [was] unduly burdensome." *Id.*

Similarly, in *Callwave Commc'ns LLC v. AT&T Mobility LLC*, 2015 WL 4039813 (D. Del. June 29, 2015), the court denied a motion to compel the defendant to produce a 30(b)(6) witness to testify as to the "structure and function operation" of its source code for the same reasons Facebook objects to Topics 1 and 2: (1) the topic was "unnecessary and burdensome, as it would be impossible to prepare a witness on the millions of lines of source code" produced; (2) the plaintiff "declined to limit its request to any discrete and relevant issue, or 'describe with reasonable particularity the matters for examination'"; and (3) compelling testimony "regarding the functionality of a source code would inappropriately shift the burden of analyzing and interpreting the code to the defendants." *Id.* at *1. Plaintiffs, again, misstate the posture of this

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[4] Plaintiffs' claim that the "rudimentary principles of proof and discovery" require Facebook to designate a corporate witness to explain its source code is nonsensical and misleading. The source code is a form of documentary evidence (like other documents and ESI); Plaintiffs can no more demand that Facebook designate a 30(b)(6) witness to explain all of it than they can demand that Facebook designate a 30(b)(6) witness testify about how every document Facebook produced relates to the claims and defenses at issue in this case.

very recent case in a failed attempt to distinguish the holding, which is directly on point.[5]

Here, pursuant to the parties' Amended Stipulated Protective Order (Dkt. 93), Plaintiffs and their experts have had complete access to Facebook's relevant source code for months. Plaintiffs also may print relevant portions of the code and put them in front of percipient Facebook witnesses at those witnesses' depositions. (*Id.* ¶ 8(d).) Moreover, Facebook has identified several Facebook engineers in its initial disclosures and interrogatory responses (including Mr. Himel), whom Plaintiffs may depose in their individual capacities and ask about Facebook's source code. Plaintiffs already announced their intent to depose Mr. Himel.[6] But they cannot *also* require Facebook to prepare a corporate designee to explain all of the source code.

Additionally, Topics 1 and 2—which ask Facebook to prepare a witness to identify the source code related to "each process" described in its interrogatory responses and which include, but are "not limited to," 31 and 10 sub-parts, respectively—subject Facebook to an "impossible task." *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000) (quashing 30(b)(6) notice that "specifically listed the areas of inquiry" but "indicated that the listed areas are not exclusive"); *Apple, Inc. v. Samsung Elec. Co., Ltd.*, 2012 WL 1511901 at *2 (N.D. Cal. Jan. 27, 2012) (Rule 30(b)(6) "does not extend to burdening the responding party with production and preparation of a witness on every facet of the litigation."). Plaintiffs cannot "wield[] the discovery process as a club by propounding requests compelling [Facebook] to assume an excessive burden." *Smithkline Beecham Corp. v. Apotex Corp.*, 2000 WL 116082, at *9-10 (N.D. Ill. Jan. 24, 2000) (denying motion to compel Rule 30(b)(6) testimony regarding the company's discovery responses where the requesting party "failed to convince [the court] that the factual information they seek has not already been produced, or that it cannot be discovered through a less invasive method").

The emerging pattern in this case is that Plaintiffs *never* will be satisfied. When Plaintiffs demanded Facebook's source code, Facebook explained the technology in lieu of producing it. Plaintiffs insisted that they have the source code itself, so Facebook ultimately produced it. But now, Plaintiffs demand a Rule 30(b)(6) witness to explain it. Plaintiffs have also announced their intent to file *two more* discovery briefs (five in the last few weeks alone), including one to amend the Protective Order to require Facebook to allow Plaintiffs' experts to bring recordable devices into the source code room. At this point, Plaintiffs are simply manufacturing disputes in an attempt to increase the cost and burden of this meritless litigation on Facebook. Their request should be denied.

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[5] The cases Plaintiffs rely on are distinguishable: (1) The *Vasudevan* case provides only that 30(b)(6) testimony about source code is "standard fare in *patent* cases," not consumer class actions, and the language Plaintiffs misleadingly cite for the proposition that 30(b)(6) testimony about source code is proper if "cabined to" certain processes concerned a dispute over a damages-related interrogatory—*not* a 30(b)(6) topic; (2) In the *Nomadix* patent case, the parties' dispute concerned the *scope* of the source code to be used at a 30(b)(6) deposition and the security measures in place—*not* whether source code was a proper topic, and (3) In *Apple Inc. v. Samsung Elecs. Co.*, 2013 U.S. Dist. LEXIS 53409 (N.D. Cal. Apr. 12, 2013), the court *denied* Apple's motion to compel a response to an interrogatory that asked a party to identify "all files" in its source code related to the accused features and "match its source code to Apple's contentions" because the request "impermissibly require[d] [the defendant] to prove Apple's case." The court was not asked to consider the use of an IDE, for which Plaintiffs have cited *no precedent*.

[6] Plaintiffs declined Facebook's offer to make Mr. Himel available for deposition on September 16.