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FACEBOOK, INC.

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)

PUTATIVE CLASS ACTION

**DEFENDANT FACEBOOK, INC.'S
NOTICE OF FILING OF
PROPORTIONALITY DECLARATION
PURSUANT TO DKT. NO. 118**

1 Pursuant to the Court’s Minute Entry following the Telephonic Discovery Hearing on
2 September 29, 2015 (Dkt. 118), Defendant Facebook, Inc. (“Facebook”) respectfully submits the
3 attached Declaration of Dale Harrison (“Harrison Declaration”) in support of its opposition to
4 Plaintiffs’ request to compel additional information in response to Plaintiffs’ Interrogatory No. 8 and
5 Request for Production No. 41 (Dkt. 113). As explained in the Harrison Declaration, it would be a
6 significant burden for Facebook to be required to search for any additional information in response to
7 Plaintiffs’ requests. (Harrison Decl. ¶¶ 1, 9, 12, 19, 20.) Moreover, as explained in Facebook’s
8 portion of the parties’ joint letter (Dkt. 113), that burden would vastly outweigh the potential
9 relevance of any additional information that might be located after additional searching.

10 Plaintiffs’ Complaint challenges a very specific practice—namely, the alleged “scanning” *of*
11 URLs sent in “private messages” to increase the “like” counter on third-party websites before the end
12 of 2012. Specifically, Plaintiffs allege that:

13 [A]t least until October 2012, Facebook has scanned private messages to produce
14 ‘Likes’ for websites with an embedded ‘Like’ button, where the private message
15 contains that website’s URL. After scanning the content of private messages that
16 include a link to a third-party website, Facebook has searched for information
profiling the message-sender’s web activity, and manipulated code in the third-party
website to increase the number of ‘Likes’ indicated on the website’s Facebook plugin.

17 (Dkt. No. 25 (Plaintiff’s Consolidated Amended Compl.) ¶ 27.)¹

18 Plaintiffs have referred to “Likes” being generated through the alleged process of “scanning”
19 URLs in messages as “passive likes.” (See, e.g., Dkt. No. 112-1 at 4 (“‘Passive Likes’ means any
20 Likes that were not generated by Facebook Users affirmatively clicking on a Like button Social
21 PlugIn, and were instead generated as a result of Facebook scanning URLs contained within Private
22 Message (i.e., generated through the behavior described in the Wall Street Journal article “How
23

24 ¹ (See also *id.* ¶ 2 (alleging that “when [Plaintiffs’] ostensibly private messages contained links to
25 other websites, also known as ‘URLs,’ Facebook scanned those messages and then analyzed the URL
26 in the link. If the website contained a Facebook ‘Like’ button, Facebook treated the content of
27 Plaintiffs’ private messages as an endorsement of the website, adding up to two ‘Likes’ to the pages
28 count”); *id.* ¶ 59 & n.3 (seeking to represent a proposed class of “[a]ll natural-person Facebook users
located within the United States who have sent or received private messages that included URLs in
their content, from within two years before the filing of this action [December 30, 2011] up through
and including the date when Facebook ceased its practice,” which Plaintiffs allege was “at some point
after it was exposed in October 2012”).)

1 Private Are Your Private Facebook Messages [dated October 3, 2012])”). As explained in
2 Facebook’s portion of the joint letter and the Harrison Declaration, Facebook has already spent
3 considerable time and effort searching for, extracting, and producing (where available) the technical
4 message information relevant to Plaintiffs’ claims. (Dkt. 113; Harrison Decl. ¶¶ 4-8, 13-18.)
5 Plaintiffs also have been given access to Facebook’s extremely valuable and sensitive source code for
6 the relevant period of time (ending in December 2012), which they and their experts have now spent
7 over six weeks reviewing. Under any proportionality analysis, Plaintiffs’ request for additional
8 information should be denied. (*See* Fed. R. Civ. P. 26(b)(2)(C); N.D. Cal. ESI Discovery Guideline
9 1.03.)

10 During the September 29 telephonic hearing, Plaintiffs attempted to walk away from their
11 Complaint and claim that their allegations went beyond the alleged scanning of URLs in connection
12 with Facebook’s social plug-in functionality. Those assertions are belied by their own Complaint and
13 several other representations Plaintiffs have made, including in their portion of the parties’ Joint Case
14 Management Statement. (Dkt. 60 at 3 (“Plaintiffs allege that Facebook scans the content of class
15 members’ private messages, and if there is a link to a web page contained in that message, Facebook
16 treats it as a ‘like’ of the page, and increases the page’s ‘like’ counter by one. Plaintiffs further allege
17 that Facebook uses this data regarding ‘likes’ to compile user profiles, which it then uses to deliver
18 targeted advertising to its users.”).) Indeed, their Complaint’s focus on the alleged “scanning” *of*
19 **URLs** is the only conceivable reason why Plaintiffs’ proposed class is limited to Facebook users
20 “who have sent or received private messages *that included URLs . . .*” (Dkt. No. 25 ¶ 59 (emphasis
21 added).) In short, if a putative class member did *not* send a Facebook message containing a URL,
22 that person is not a member of the class identified in the Complaint. In response to Facebook’s
23 request, and over Plaintiffs’ objection, Judge Hamilton set a deadline of March 31, 2015, to amend
24 the pleadings, and that deadline passed several months ago.² (Dkt. No. 62.)

25 ² Defendants are entitled to rely on the proposed class as alleged in mounting a defense. *See, e.g.,*
26 *Hughes v. LaSalle Bank, N.A.*, 2004 WL 414828, at *1-2 (S.D.N.Y. Mar. 4, 2004) (affirming order
27 limiting discovery to the putative class alleged in the complaint); *Flores v. Bank of America*, 2012
28 WL 6725842, at *2-4 (S.D. Cal. Dec. 27, 2012) (denying motion to compel discovery that fell outside
the class definition; such discovery “constitutes a ‘fishing expedition’ which would be unduly
burdensome for Defendants”).

1 Given the foregoing, Facebook respectfully requests that Plaintiffs' request be denied. In the
2 event the Court feels it is necessary to determine the proper scope of Plaintiffs' claims to resolve this
3 issue and does not have sufficient information to do so, Facebook respectfully requests that the Court
4 refer the issue to Judge Hamilton. Plaintiffs have indicated that they plan to file several additional
5 letter briefs implicating the scope of discovery in this action, so clarity on the scope of Plaintiffs'
6 claims will be important, especially with the November 13 class certification and summary judgment
7 motion deadlines nearing and Judge Hamilton's recent order that this deadline will not be extended
8 again.³ (Dkt. No. 117.)

9 Dated: October 6, 2015

Respectfully submitted,

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20 ³ During the September 29 telephonic hearing, Plaintiffs also suggested that their claims challenge
21 current—as opposed to historical—conduct. Again, this assertion is belied by the allegations in their
22 own Complaint (alleging that the challenged conduct ceased in 2012), as well as by the parties'
23 agreement in this case that no Facebook documents created after the filing of Plaintiffs' lawsuit (in
24 December 2013) need be produced. Moreover, as noted above, by agreement of the parties, Plaintiffs
25 have only been given access to Facebook's source code during the relevant period (*i.e.*, through the
26 end of 2012). The fact that, in the interests of compromise and at the request of Plaintiffs, Facebook
27 produced technical data on a handful of *Plaintiffs' messages* sent or received after the filing of
28 Plaintiffs' suit can hardly be held against Facebook (or used to require Facebook to produce present-
day documents). On the contrary, it is yet another illustration of Facebook's willingness to
compromise being used against it by Plaintiffs. (*See, e.g.*, Plaintiffs' attempt to compel Facebook to
produce a 30(b)(6) witness to explain its source code (Dkt. 122)—after Facebook compromised by
making the source code available and provided an explanatory declaration—and Plaintiffs'
forthcoming attempt to amend the stipulated protective order to allow its experts to bring networked
and recordable electronic devices into the secured source code review room.) This conduct by
Plaintiffs is contrary to the spirit of the Federal Rules and the Rules of this Court, which encourage
compromise and cooperation among the parties.