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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 (MEJ)

DEFENDANT FACEBOOK, INC.'S MOTION FOR RELIEF FROM NONDISPOSITIVE PRETRIAL ORDER OF MAGISTRATE JUDGE REGARDING CERTAIN OF PLAINTIFFS' REQUESTS FOR PRODUCTION OF DOCUMENTS (DKT. 130)

[N.D. CAL. LOCAL RULE 72-2]

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that, pursuant to Federal Rules of Civil Procedure 26, 34, and 72, Civil Local Rule 72-2, and 28 U.S.C. § 636(b)(1)(A), Defendant Facebook, Inc. respectfully seeks limited relief from a nondispositive order of the Magistrate Judge regarding discovery purportedly relating to Plaintiffs' claims for monetary damages in this action (Dkt. 130) (the "Order"). While Facebook respectfully objects to many portions of the 18-page Order (which addressed three separate discovery letter briefs) and the requested discovery as incredibly burdensome and exceeding the scope of Plaintiffs' claims in this case—Facebook has undertaken extensive efforts to comply with the order, and it seeks very limited review of two specific requests:

- **Plaintiffs' Request for Production No. 53**, which seeks *all documents and ESI* concerning efforts to assign a "monetary value" to "Facebook Users" *generally*. The request is overbroad and untethered to the challenged conduct and any damages Plaintiffs could possibly seek under their two remaining claims (Wiretap Act and Cal. Pen. Code § 631). (Dkt. 130 at 10.)
- **Plaintiffs' Request for Production No. 60**, which seeks *all documents and ESI* relating to Facebook's efforts to "increase and/or maximize the presence of the Like Social Plugin on Third Party websites." This lawsuit focuses on *Facebook messages*, and more particularly, it challenges the alleged "interception" of messages containing URLs to *increment* the anonymous, aggregate "Like" *counter* associated with some Like button social plugins on third party websites. Plaintiffs do *not* challenge the Like button social plugin itself, and therefore it was improper to order the production of "all documents and ESI" related to Facebook's efforts to increase the presence of the Like button social plugin on third party websites generally (conduct that is not disputed, in any event). And like Request No. 53, Request No. 60 is not tied to any form of damages recoverable by Plaintiffs. In short, whatever efforts were made to promote adoption of the Like button social plugin have nothing to do with whether Facebook "profited" from the challenged conduct (alleged "interception" of messages).

Despite the plain irrelevance and burden imposed by these requests, and the wide latitude that Plaintiffs have received to conduct far-ranging discovery in this case, Facebook does not object to producing *representative* responsive documents—something it proposed to Plaintiffs as a

compromise to avert this appeal (an offer Plaintiffs rejected). But Facebook should not be required to produce "all documents and ESI" related to these broad, irrelevant categories that have nothing to do with any damages Plaintiffs may seek here.

Unfortunately, the Order did not individually analyze each of Plaintiffs' eight requests for production, but instead evaluated them *en masse* and ordered production in response to each of them, regardless of their relevance (or lack thereof) to Plaintiffs' claims or requested damages. (Dkt. 130 at 10-13.) The Order also incorrectly held that, because Facebook itself had not "determined a method of valuing profits" from the challenged conduct (because there were no profits as a result of the challenged conduct—conduct Plaintiffs mischaracterize, in any event), and had not "suggested an alternative way of producing information to assist Plaintiffs with obtaining the basic information they seek," "Plaintiffs should be permitted somewhat broader discovery to be able to establish a model or methodology for class-wide relief." (*Id.* at 13.) This ruling turns Rule 26's discovery standard (which requires that the *requesting party* establish relevance) on its head and unfairly penalizes for Facebook not having documents to support a baseless theory. In other words, Magistrate Judge James should not have ordered Facebook to produce irrelevant and overbroad categories of documents on the basis that Facebook did not have relevant documents. This ruling was erroneous and contrary to law pursuant to Rule 72, and Facebook respectfully requests review of it.

BACKGROUND

In this putative class action, Plaintiffs allege that for a certain period of time up to 2012, when a Facebook user sent a "private message" to another user that included a link to a website (a Uniform Resource Locator, or "URL"), Facebook "scanned" the URL and then increased the anonymous, aggregate counter (if any) associated with the "Like" social plugin displayed on that webpage. They also allege that this "passive like" data was used to compile user profiles in order to deliver targeted advertising to users. Plaintiffs contend that this conduct (which they continue to mischaracterize, although that is an issue for another day) violates two criminal "wiretapping" statutes, the Federal Wiretap Act and Cal. Penal Code § 631. Plaintiffs can seek three types of monetary relief under these laws: (1) statutory damages; (2) "actual damages"; and (3) "profits made by [Facebook] as a result of the [alleged] violation" under ECPA. Cal. Pen. Code § 632.7(a); 18 U.S.C. § 2520(b)-(c).

The Order, in pertinent part, concerns Plaintiffs' Third Set of Requests for Production of Documents (Request Nos. 53-60), which Plaintiffs contend are relevant to their damages claims. Some of these requests arguably seek relevant information (such as information about the monetary value (if any) of data contained in messages (Request No. 54)[1]), and Facebook already agreed to search for documents responsive to these requests. But many of the requests go much further and, ***by Plaintiffs' own admission***, seek documents "to discover how Facebook generates profit." (Dkt. 112 at 2.) But Plaintiffs are not entitled to general documents about how Facebook "generates profits." Rather, they are entitled to documents (if any) relevant to their specific claims and the permissible damages under those laws (*i.e.*, documents showing that they suffered "damages" or that Facebook "profited" from the alleged "interceptions"). Request Nos. 53 and 60 are well beyond this permissible scope of discovery, yet the Order did not distinguish among any of the requests and compelled production in full. This was clear error and contrary to law.

Following entry of the Order, ***Plaintiffs' counsel*** asked Facebook whether there were potential compromises that the parties could reach to avert an appeal of the order. (Chorba Decl. ¶ 4.) In response to this request, Facebook proposed a reasonable compromise on these two requests in which it would: (1) produce *representative* documents in response to Request No. 60 or stipulate that Facebook made efforts during the relevant time period to encourage website developers to implement the "Like" button social plugin (which is not disputed); and (2) limit the production in response to Request No. 53 to average revenue per user calculations, which is a simple calculation of total revenue divided by the number of users, rather than produce all of the underlying data and calculations (which is completely irrelevant to Plaintiffs' claims). (*Id.* ¶ 6; Ex. 1.) Plaintiffs rejected this offer and insisted on a full production of *all* documents. (*Id.* ¶ 7.) In light of Plaintiffs' refusal to compromise, Facebook files this Motion for Relief pursuant to Local Rule 72-2 to narrow the scope of information to be produced in response to Request Nos. 53 and 60.

ARGUMENT

A magistrate judge's decision is final unless it is "clearly erroneous or is contrary to law."

[1] The notion that the data contained in Plaintiffs' messages had "monetary value" is without merit. Indeed, this Court dismissed Plaintiffs' UCL claim with prejudice on the basis that Plaintiffs had not alleged any "lost money or property" as a matter of law. (Dkt. 43 at 19.)

Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A). *See also Guidiville Rancheria of Cal. v. United States*, No. 12-1326-YGR, 2013 WL 6571945, at *1 (N.D. Cal. Dec. 13, 2013) ("The magistrate's factual determinations are reviewed for clear error, and the magistrate's legal conclusions are reviewed [*de novo*] to determine whether they are contrary to law.").

Facebook respectfully submits that the Order is "contrary to law" for two primary reasons:

First, the Order erroneously treated Request Nos. 53-60 *en masse*, rather than conducting an individualized relevance analysis of each Request. *See, e.g.*, *Alcala v. Monsanto Co.*, No. 08-04828 PJH (DMR), 2014 WL 1266204, at *2-5 (N.D. Cal. Mar. 24, 2014) (addressing "each category of RFPs in turn" in ruling on motion to compel); *United States v. Real Prop. & Improvements*, No. 13-CV-02027-JST (MEJ), 2014 WL 5335266, at *1-4 (N.D. Cal. Oct. 17, 2014) (same).

Additionally, the Order's conclusion that "Facebook has not shown why Plaintiffs' requests are overbroad or irrelevant" (Dkt. 130 at 12) ignored Facebook's specific contentions that:

- Request No. 53 is overbroad because it does not relate to the Facebook Messages product at issue in this case, or the "profits" made by allegedly "intercepting" messages, and instead seeks very general information regarding the "monetary value" of all "Facebook users" and their data generally. These documents have no connection to Plaintiffs' claims or alleged injuries, and Facebook certainly should not be required to produce "all documents and ESI" related to this irrelevant (and very broad) category. (Dkt. 112 at 5.)
- Request No. 60, which sought *all* documents relating to efforts by Facebook or third parties to increase or maximize the presence of "Like" button social plugins on third party websites, is also irrelevant to Plaintiffs' claims. Here too, Facebook should not be required to produce "all documents and ESI," because this case challenges alleged processing of messages in a way that increases a number next to a social plugin. Efforts to increase *how many* of those plugins existed in the abstract is unrelated to whether the inclusion of URLs in messages *increased* the aggregated counter, much less to damages.

Second, the Order improperly expanded the scope of discovery on the basis that no discovery supports or proves Plaintiffs' underlying theory. In other words, because the discovery to date had not substantiated Plaintiffs' damages theory—namely, that Facebook had analyzed the value to Facebook

of messages sent or received by the people who use its service—Plaintiffs should be allowed to obtain information about financial analyses *unrelated* to their damages theory or even the general issues in this case. The Order noted that Facebook "has not itself determined a method of valuing profits obtained from scanning users' private messages" (Dkt. 130 at 13)—which is not surprising given that Facebook has been explaining to Plaintiffs from the outset of this lawsuit that it did *not* serve targeted advertisements based on information contained in messages (including URLs) during the relevant time period. (*See, e.g.*, Dkt. 29 at 1:5.) Yet the Order appears to blame Facebook for this lack of evidence supporting a baseless theory, holding that because "Facebook has not suggested an alternative way of producing information to assist Plaintiffs with obtaining that basic information they seek, the Court finds it reasonable that Plaintiffs should be permitted ***somewhat broader discovery*** to be able to establish a model or methodology for class-wide relief." (Dkt. 130 at 13 (emphasis added).) As Magistrate Judge James explained in a different case, however, "a mere hunch about . . . relevance is insufficient" and "[t]he parties should be able to articulate how the discovery they seek might well demonstrate . . . relevant facts." *Real Action Paintball, Inc. v. Advanced Tactical Ordnance Sys., LLC*, No. 14-02435-MEJ, 2014 WL 5829374, at *6 (N.D. Cal. Nov. 10, 2014) (granting, in part, motion for relief); *see also Alcala*, 2014 WL 1266204 at *5 (rejecting document requests as "overbroad and burdensome" that went beyond the scope of the plaintiff's claims, including requests about defendant's products that plaintiff did not use). Plaintiffs did not meet their burden here, and Facebook should not be penalized because it cannot provide documents about conduct that did not occur.

Facebook respectfully requests that the Court grant this Motion and permit Facebook to (1) limit the production in response to Request No. 53 to representative documents showing average revenue per user calculations; and (2) produce representative documents in response to Request No. 60 or stipulate that Facebook made efforts during the relevant time period to encourage website developers to implement the "Like" button social plugin. Granting this relief still provides Plaintiffs with a significant amount of information and does not prejudice them at all.

Dated: October 28, 2015

Respectfully submitted,
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