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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

**DEFENDANT FACEBOOK, INC.'S  
 OPPOSITION TO PLAINTIFFS'  
 RENEWED MOTION TO CONTINUE  
 DEADLINES**

The Honorable Phyllis J. Hamilton

1 This Court should deny Plaintiffs’ second request to extend the class certification schedule in  
2 this case. On September 24, 2015, this Court denied Plaintiffs’ first request for a three-month  
3 extension and stated that “[n]o further extension of these dates will be granted.” (Dkt. 117.)  
4 Facebook had opposed Plaintiffs’ initial request and noted, among other things, that a three-month  
5 extension should not be granted because Plaintiffs had failed to follow the Court’s clear instruction at  
6 the March 12, 2015 Case Management Conference that the parties should focus their discovery  
7 efforts on the open issues from the Motion to Dismiss ruling and the information necessary for class  
8 certification. (Dkt. 114.) Nevertheless, Facebook did not oppose—and this Court ultimately  
9 granted—an additional month for Plaintiffs’ class certification motion. (Dkt. 117.)

10 Plaintiffs now “renew” their previous failed Motion—seeking the same three-month extension  
11 they previously sought—on what they describe as the “extraordinary grounds” that Facebook “has  
12 failed to honor the representations it made to the Court when opposing Plaintiffs’ initial motion . . . .”  
13 (Dkt. 134 at 2; *see also id.* at 3 (asserting that Facebook has “materially reneged on its own  
14 representations”).) This accusation is demonstrably false, and Plaintiffs’ renewed request (which  
15 they did not even bother to notify Facebook they intended to file, as required by Local Rule 6-  
16 3(a)(2)) is replete with more inaccurate statements and baseless attacks on Facebook and its counsel.

17 In opposing Plaintiffs’ prior Motion, which argued that Plaintiffs had not had sufficient time  
18 to review Facebook’s source code, Facebook explained (among other things) that Plaintiffs have been  
19 in possession of the “core documents relevant to [their] claims” since June 1, and have had access to  
20 the relevant source code—the “black box” Plaintiffs claimed they needed to understand Facebook’s  
21 processes—since the week of July 20. (Dkt. 114 at 5.) Facebook also noted at the time  
22 (September 21) that “[i]n any event, Facebook expects that its production will be substantially  
23 completed by **September 30**.” (*Id.* at 5-6.) It was for this reason that “Facebook [did] not oppose a  
24 modest, 30-day extension” of the case deadlines (*id.*), which the Court granted (Dkt. 117).

25 Plaintiffs now claim that Facebook “failed to adhere to its representation” regarding when it  
26 expected its document production to be substantially complete (*i.e.*, by September 30). Plaintiffs are  
27 incorrect. In fact, based upon the documents Facebook had agreed to produce (not documents that  
28 were the subject of the pending disputes before Magistrate Judge James as of September 21),

1 Facebook’s document production *was* substantially complete by September 30. (Jessen Decl. ¶¶ 2-4.)  
2 It is true that there were two additional productions made after September 30, but Plaintiffs  
3 intentionally mislead the Court about those productions:

- 4 • Facebook’s additional production on October 13—which was one month *before* the extended,  
5 November 13 deadline for Plaintiffs’ class certification motion—contained a large number of  
6 documents that Facebook had previously identified to Plaintiffs as near-duplicates and which  
7 were produced (in full) at *Plaintiffs’ request*. (*Id.* ¶ 3 & Ex. 1.) Specifically, Facebook asked  
8 Plaintiffs if they wanted Facebook to produce approximately *900 copies of the same*  
9 *document*, or if they preferred one copy with a list of all recipients. (*Id.*) In response,  
10 Plaintiffs asked for *all* copies. (*Id.*) These pages constituted roughly *one-third* of the 2,656  
11 pages produced on October 13. (*Id.*) Plaintiffs selectively omit this information in their  
12 renewed Motion. They also include all of these duplicates in support of their “calculation”  
13 that the October 13 production “constitut[ed] 19% of [Facebook’s] total, current, document  
14 production.” (Dkt. 134 at 3.) Excluding the duplicates, the October 13 production constitutes  
15 approximately 13% of Facebook’s production to date. (Jessen Decl. ¶ 4.) And Plaintiffs’  
16 calculation ignores entirely Facebook’s previous production of what Plaintiffs have described  
17 as “over 10 million lines of [source] code” (Dkt. 109-2 ¶ 16). (*Id.*)
- 18 • Plaintiffs also fail to disclose that Facebook’s more recent, October 28 production of 3,292  
19 pages was in response to Magistrate Judge James’ discovery order requiring Facebook to  
20 produce additional documents by that date. (Dkt. 130.) Other than filing a limited appeal on  
21 two discrete portions of that order (Dkt. 133), Facebook took extensive steps and *complied*  
22 with the order by producing additional documents and information on October 28, even  
23 though Facebook did not—and does not—believe these materials are relevant to Plaintiffs’  
24 claims or alleged damages. Rather than provide the Court with this important background,  
25 Plaintiffs accuse Facebook of “fail[ing] to honor the representations it made to the Court” in a  
26 September 21 filing (Dkt. 134 at 2) based on an order issued nearly three weeks *later*, and a  
27 document production made *in compliance with that order*.

1 Plaintiffs’ lack of candor with the Court regarding these two post-September 30 document  
2 productions and their baseless attacks on Facebook (themes that unfortunately also pervaded  
3 Plaintiffs’ previous Motion) are disappointing and should not be rewarded with yet another extension.  
4 As explained in Facebook’s previous Opposition (Dkt. 114), Plaintiffs have had all the information  
5 they need to move for class certification (and oppose any early summary judgment motion<sup>1</sup>) for many  
6 months; they just do not like what the information shows. Facebook has granted Plaintiffs complete  
7 access to the relevant source code, which shows how message processing worked during the relevant  
8 time period. Incredibly, Plaintiffs and their experts collectively have spent approximately **48 days**  
9 reviewing this code. (Jessen Decl. ¶ 9.) Moreover, on October 28 (again in response to the discovery  
10 order), Facebook produced two experienced software engineers who provided *extensive* 30(b)(6)  
11 deposition testimony on the relevant portions of Facebook’s source code. (*Id.* ¶ 8.) Plaintiffs do not  
12 mention any of this discovery in their brief. Nor do they inform the Court that (again in response to  
13 the discovery order), Facebook provided a lengthy supplemental interrogatory response—which took  
14 considerable time to research and assemble—providing even more detailed technical information  
15 about Facebook’s systems. (*Id.* ¶ 7.) As a result, Plaintiffs’ assertion—accompanied by no  
16 evidentiary citation—that “Facebook continues to hide” documents is baseless. (Dkt. 134 at 2.)

17 In short, in response to the October 14 discovery order, Facebook and its counsel worked  
18 tirelessly to produce *additional* information to Plaintiffs (much of which is not even relevant to  
19 Plaintiffs’ claims). Those efforts should not be used *against* Facebook to extend the schedule. But  
20 that is precisely what Plaintiffs propose here—in response to these efforts, and Facebook’s  
21 production of information that *Plaintiffs moved to compel*, Plaintiffs filed an unannounced,  
22 “renewed” motion to extend the case deadlines.<sup>2</sup>

23 \_\_\_\_\_  
24 <sup>1</sup> During the Case Management Conference and in its minute order that followed, this Court stated  
25 that it would permit Facebook to file an “early” summary judgment motion directed at the claims of  
26 the named Plaintiffs. (Dkt. 62.) Facebook is still evaluating whether to bring such an early motion.

27 <sup>2</sup> Plaintiffs knew this information was coming pursuant to the discovery order, yet they waited until  
28 almost 10:00 p.m. on October 29 to file their “renewed” motion. Plaintiffs also violated Civil Local  
Rule 6-3(a)(2), which requires that the party seeking an extension “[d]escribe[] the efforts the party  
has made to obtain a stipulation to the time change.” L.R. 6-3(a)(2). Plaintiffs made **no** attempt to  
meet and confer with Facebook in advance of their “renewed” motion, and this failure to comply with  
the Rule is particularly indefensible here, given this Court’s instruction that “[n]o further extension of  
the dates will be granted” (Dkt. 117), Plaintiffs’ conversations with Facebook’s counsel regarding

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1 Plaintiffs’ remaining arguments are equally meritless. First, Plaintiffs claim that Facebook  
2 has “continued to withhold entire categories of documents, standing on objections overruled by  
3 Magistrate Judge Maria-Elena James, even though it does not appeal her order with respect to those  
4 categories.” (Dkt. 134 at 2.) This statement is false. As Facebook explained in its first supplemental  
5 responses to these three document requests—responses that reflect what Facebook told Plaintiffs *over*  
6 *two weeks before* Plaintiffs filed their motion on these requests on September 18—“Facebook has  
7 conducted a reasonable search and diligent inquiry, and it has not located any non-privileged  
8 documents” responsive to these requests during the relevant time period. (Dkt. 134-2 at 10, 12, 14.)  
9 In response to the discovery order, Facebook renewed its search for documents responsive to these  
10 requests, but again found none. (Jessen Decl. ¶ 6.) Facebook is not withholding documents  
11 responsive to these requests; rather, several searches have revealed that no such documents exist.

12 Second, Plaintiffs also complain that Facebook has appealed two discrete portions of the  
13 discovery order (Dkt. 133), but they do not even attempt to explain (nor could they) how the  
14 overbroad requests Facebook has appealed (which seek *all documents and ESI* regarding (i) the  
15 “monetary value” of “Facebook users” *generally*, and (ii) Facebook’s undisputed and uncontroversial  
16 efforts during the relevant time period to encourage website developers to implement the “Like”  
17 button social plugin) are relevant to their claims or alleged damages, much less to their motion for  
18 class certification. Moreover, Facebook produced *representative* documents in response to these two  
19 requests on October 28. (Jessen Decl. ¶ 10.)

20 Setting aside Plaintiffs’ lack of candor, their argument for a further extension ultimately boils  
21 down to the assertion that they purportedly need two additional months added to the schedule because  
22 of the outcome of the parties’ recent discovery disputes. But this Court was fully aware of these

23 \_\_\_\_\_  
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24 whether Facebook would appeal the October 14 discovery order (Dkt. 133-1 ¶¶ 4-7), and the  
25 Rule 30(b)(6) deposition on the day before this filing, when Plaintiffs’ counsel was in a room with a  
26 Facebook attorney all day. (Jessen Decl. ¶ 8.) This noncompliance with the Rule is reason enough to  
27 deny Plaintiffs’ renewed request. *See, e.g., Centillium Comms., Inc. v. Atlantic Mut. Ins. Co.*, No.06-  
28 7824-SBA, 2008 WL728639, at \*6 (N.D. Cal. Mar. 17, 2008) (striking motion where the movant  
failed to meet and confer prior to filing its motion); *Lucas v. Hertz Corp.*, No. 11-01581-LB, 2012  
WL 3638568, at \*4 (N.D. Cal. Aug. 22, 2012) (denying motion to shorten time under Rule 6-3 in part  
because plaintiff failed to “describe the efforts he made to obtain a stipulation to the time change”).

1 discovery disputes when it denied Plaintiffs’ previous request for a three-month extension—in fact,  
2 this Court extended the schedule by one month “based on the ongoing discovery disputes.” (Dkt.  
3 117.) And Magistrate Judge James ordered the accelerated production date of October 28 in part  
4 because of “the impending motions deadlines.” (Dkt. 130 at 18.) All of the circumstances presented  
5 in Plaintiffs’ renewed request were presented to this Court last time, and Plaintiffs have presented no  
6 new information to the Court (other than the outcome of those previously-known discovery disputes)  
7 that provides any basis for reconsidering this Court’s ruling that “[n]o further extension of these dates  
8 will be granted.” (Dkt. 117.) *See also* L.R. 7-9(b) (motion for reconsideration not appropriate unless  
9 (1) “a material difference in fact or law exists from that which was presented to the Court before,”  
10 and the moving party “show[s] that in the exercise of reasonable diligence [it] did not know such fact  
11 or law at the time of the interlocutory order”; (2) “[t]he emergence of new material facts or a change  
12 of law occurring after the time of such order”; or (3) “[a] manifest failure by the Court”).

13 \*\*\*

14 As Facebook noted in its prior Opposition, “[b]y dragging out the schedule longer, Plaintiffs  
15 apparently hope they can uncover another basis for their lawsuit (or, perhaps, a new lawsuit  
16 altogether).” (Dkt. 114 at 5.) Discovery has shown Plaintiffs’ allegations of “wiretapping” to be  
17 without merit and inappropriate for class treatment, and Plaintiffs therefore appear to be searching for  
18 new areas to explore. But Plaintiffs have failed to show good cause for their requested three-month  
19 extension. This case has been pending for almost two years. The Motion should be denied.<sup>3</sup>

20 Dated: November 2, 2015

By: /s/ Joshua A. Jessen

Attorneys for Defendant FACEBOOK, INC.

21 \_\_\_\_\_  
22 <sup>3</sup> Facebook observed in its previous Opposition that the courts in the *Gmail* and *Yahoo* cases (the  
23 cases that inspired this lawsuit) already decided class certification motions—*Gmail* within ten months  
24 of the filing of a consolidated complaint and *Yahoo* (which was filed three months before this case)  
25 approximately fifteen months after the filing of a consolidated complaint. (Dkt. 114 at 2; 114-1 ¶ 3.)  
26 Plaintiffs do not dispute this, though they claim earlier iterations of the *Gmail* case in Texas permitted  
27 “three years” of discovery (apparently the type of protracted schedule that Plaintiffs believe is  
28 acceptable). They also claim the putative class in the *Yahoo* case “did not seek to recover monetary  
damages ... obviating ... the need for the type of damages discovery that Plaintiffs need from  
Facebook here.” (Dkt. 134 at 4 n.3.) But while it is true that the *Yahoo* plaintiffs did not seek to  
certify a Rule 23(b)(3) damages class for strategic reasons, there is no indication that the plaintiffs  
there did not seek discovery on all topics (including damages), and the early case management  
statements in that case show that the plaintiffs planned to pursue monetary damages. *See In re Yahoo  
Mail Litig.*, Case No. 13-CV-04980-LHK (N.D. Cal.), Dkt. Nos. 24 at 8-9 & 42 at 8.