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

17 MATTHEW CAMPBELL and MICHAEL
 HURLEY,

18 Plaintiffs,

19 v.

20 FACEBOOK, INC.,

21 Defendant.

Case No. C 13-05996 PJH

PUTATIVE CLASS ACTION

**DEFENDANT FACEBOOK, INC.'S
 OPPOSITION TO PLAINTIFFS' MOTION
 FOR CLASS CERTIFICATION**

**APPENDIX OF EVIDENCE (INCLUDING
 SUPPORTING DECLARATIONS AND
 REBUTTAL EXPERT REPORTS)
 SUBMITTED CONCURRENTLY**

HEARING:

Date: March 16, 2016
 Time: 9:00 a.m.
 Place: Courtroom 3, 3rd Floor
 The Honorable Phyllis J. Hamilton

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

3 Plaintiffs’ lawsuit challenges a simple feature—called “URL preview”—that enables people
4 who receive and send messages on Facebook to see a thumbnail or snapshot of a website link (called
5 a URL) that is being shared. Instead of having to decipher a string of characters in a URL (such as
6 <http://www.website.com/abc!123?>), Facebook, like many other online services, provides a
7 convenient, and entirely optional, way for people to preview what information appears on the website
8 to which the link points so they can confirm they want to send the link or whether they want to click
9 on it. Plaintiffs claim that this feature somehow infringes upon people’s privacy rights and violates a
10 litany of federal and state laws, including criminal laws that prohibit wiretapping. Plaintiffs are
11 wrong. No one’s “private message content” was ever shared with, or disclosed to, any third party by
12 Facebook, or used in the allegedly unauthorized ways that Plaintiffs challenge.

13 Instead, this lawsuit has devolved into a technical attack on basic elements of computer
14 programming, such as the use of data structures (“objects”) to efficiently manage the sharing of
15 information across Facebook’s service, and the internal “logging” of these processes. Plaintiffs also
16 challenge the use of these objects to tabulate anonymous, aggregate information about the number of
17 times people across Facebook have shared a particular link on Facebook. Far from “reading its users’
18 personal, private Facebook messages” (Dkt. 1 ¶ 1) and “divin[ing] the ... messages content” (Mot.
19 at 3), the information at issue in this case is more akin to *The New York Times* publishing a list of
20 bestselling books, Nielsen publishing TV ratings, and Billboard charting the top 100 songs—in each
21 instance, the anonymized and aggregated data is used to indicate the popularity of information.

22 Not only is there no merit to their claims, but Plaintiffs also have failed to satisfy the
23 requirements of Rule 23 to certify a proposed nationwide class of anyone on Facebook who has ever
24 sent or received Facebook messages “that included URLs in their content (and from which Facebook
25 generated a URL attachment)”¹ from December 2011 to the present. Plaintiffs’ Motion for Class
26 Certification repeatedly misstates the underlying Facebook technology, and it ignores the significant

27 _____
28 ¹ A URL preview is an attachment to the message that was sometimes generated if a message containing a URL was sent under a specific set of conditions, described in detail below.

1 amount of variability surrounding the challenged practices. Notably, Plaintiffs departed from the class
2 definition included in the operative complaint, now adding the language “(and from which Facebook
3 generated a URL attachment)” because they learned in discovery that Facebook’s systems did not
4 operate in the way alleged in their complaint, or in a way that is amenable to classwide adjudication.
5 But Plaintiffs cannot solve their problems by revising the class definition, and they have failed to carry
6 their evidentiary burden to establish any of the Rule 23 requirements:

7 First, an individualized inquiry would be necessary to ascertain the proposed class. Plaintiffs’
8 own Facebook messages—which are conspicuously absent from their Motion and accompanying
9 expert reports—demonstrate that the proposed class is not ascertainable without individual proof. For
10 example, even the cherry-picked set of their own messages that Plaintiffs selected for further discovery
11 revealed that Facebook could not determine whether several messages were part of the new class
12 definition, and that determining class membership would be a laborious *person-by-person, browser-*
13 *by-browser, URL-by-URL, and message-by-message* inquiry. Contrary to Plaintiffs’ suggestion, there
14 is no computerized “short cut” to overcome these hurdles, because Plaintiffs’ technical expert
15 acknowledged in her deposition that her proposals (write new “code” or a “database query”) would not
16 reliably identify putative class members. Self-identification also is not an option, because, among
17 other things, Plaintiffs admitted in discovery that they do not recall whether the messages that they
18 sent or received over a five-plus year period contained URL attachments.

19 Second, Plaintiffs cannot demonstrate that they (or their counsel) are adequate to represent a
20 putative class, because counsel recruited their close, longtime friends to bring this action—an
21 approach to class litigation that courts in this District have rejected as putting the “cart before the
22 horse.” Plaintiffs also have deferred all decision-making in this case to their close friends, which
23 further undermines their adequacy. Further, counsel’s mistreatment of Plaintiff David Shadpour—
24 waiting months to pass along his request to withdraw from this case, ignoring his follow-up inquiries,
25 filing and serving papers without his authorization, and other conduct that “frustrated” him and caused
26 him to hire independent counsel to withdraw—independently precludes a finding of adequacy.

27 Third, Plaintiffs have not even attempted to meet their burden of showing common issues
28 pursuant to Rule 23(a)(2); instead, they misstate Facebook’s position in a case management statement,

1 without citing (much less carrying their burden of *proving*) alleged “common” issues. In light of the
2 inherently individualized nature of putative class members’ experiences with Facebook’s messages
3 product—each involving a unique combination of user-specific choices in composing the message,
4 computer settings, and distinct attributes of the URL chosen—it is impossible to develop “common”
5 questions (much less common *answers*) that will “drive the resolution of the litigation.”

6 Fourth, Plaintiffs cannot meet the requirements of Rule 23(b). For starters, *no* court has
7 certified a Rule 23(b)(3) class in these “message scanning” suits. Judge Koh rejected such an attempt
8 in the *Gmail* case because she concluded that implied consent—which is a full defense to Plaintiffs’
9 claims here—is an inherently factual inquiry that takes into account the individual knowledge and
10 understanding of each party to each alleged “interception”—not only the named plaintiffs, but their
11 message correspondents. This is why the plaintiffs in the other “email scanning” lawsuit that inspired
12 this case (*Yahoo Mail*) did not even seek certification under Rule 23(b)(3). Those same problems exist
13 here: (a) as in *Gmail*, many public sources disclosed the challenged practices; (b) the “URL preview”
14 feature put senders on notice that the URL was being processed; (c) by defining the class to the present
15 day, Plaintiffs have included people (including themselves) who knew about the challenged practices
16 and consented by continuing to send messages; and (d) Plaintiffs do not (and cannot) know whether
17 their message correspondents consented. These issues predominate and defeat certification here.

18 Nor have Plaintiffs met their burden of offering a classwide damages methodology under
19 Rule 23(b)(3). Their proposed damages expert (Fernando Torres) does not even offer a methodology
20 that aligns with Plaintiffs’ theory of injury (a basic and disqualifying flaw under Supreme Court
21 precedent), or that tracks the remedies available under either statute at issue. The Court should strike
22 his report for this reason, as well as the other methodological and evidentiary flaws described below.

23 Finally, Plaintiffs cannot meet the requirements for Rule 23(b)(2) certification for injunctive
24 relief. Their alternate request for such relief is an afterthought, relegated to a short paragraph at the
25 end of their brief. (Mot. at 24:9–25.) But the extraordinary relief that Plaintiffs seek—“cessation of
26 the practice, destruction of any records created from illegally-obtained private message content, and a
27 declaration that such conduct violates” federal and state law (*id.* at 24:20–21)—is an improper class-
28 wide remedy, because they do not and cannot show, as they must under binding precedent, (1) that the

1 conduct “can be enjoined or declared unlawful only as to all of the class members or as to none of
2 them” (both because many people consented to the conduct, *and* because putative class members
3 disagreed about the accepted level of “processing” of their messages); and (2) that monetary relief is
4 merely “incidental” to their requested injunction, because Plaintiffs seek a massive damages award.

5 In sum, Plaintiffs have not met their evidentiary burden of showing—through a “rigorous
6 analysis”—the requirements for certification, and the Court should deny their Motion.

7 II. FACTUAL AND PROCEDURAL BACKGROUND

8 A. The Named Plaintiffs And Their Action

9 Plaintiff Matthew Campbell was recruited to bring this putative class action lawsuit by his
10 friend and interim class counsel David Slade. (Appendix of Evidence (“App.”) at 392, 731, 972-73.)
11 Mr. Slade recruited Mr. Campbell through a Facebook message in which Mr. Slade explained that he
12 was “putting together a privacy case against Facebook” and was “trying to think about the best
13 possible plaintiffs.” (*Id.*) Counsel likewise recruited the other two Plaintiffs (Michael Hurley and
14 David Shadpour), both of whom also were longtime friends of counsel. (*Id.* 485-89, 509, 731.) None
15 of the Plaintiffs contemplated bringing this lawsuit before speaking with counsel. (*Id.* 390, 487, 507-
16 08.) Even after they filed suit, Plaintiffs continued to send and receive Facebook messages containing
17 URLs (*id.* 386-87, 449, 574, 706), as did their technical expert (Dr. Jennifer Golbeck) (*id.* 1130-1132).

18 As discussed in detail below, Plaintiffs’ Consolidated Amended Complaint (Dkt. 25) focuses
19 on a basic feature—the URL preview—that many Internet services, including Facebook, use to make
20 it easier for people to know what is being shared when they send or receive a link. Plaintiffs claim that
21 Facebook’s use of this feature violates (1) the federal Wiretap Act (18 U.S.C. § 2510, *et seq.*), (2) the
22 California Invasion of Privacy Act (“CIPA”)/Cal. Penal Code § 631, (3) CIPA/Cal. Penal Code § 632,
23 and (4) California’s Unfair Competition Law (Cal. Bus. & Prof. Code § 17200; “UCL”).²

24 B. Facebook And The Technology At Issue In This Action

25 1. **Facebook And Its Messages Product.** Facebook operates a social networking service that
26 aims to make the world more open and connected. Its services enable people to post and share text,

27 ² The Court dismissed the UCL and CIPA § 632 claims with prejudice (because, *inter alia*, Plaintiffs
28 had not lost any money/property), but it allowed the Wiretap Act and CIPA § 631 claims to proceed
because it was unable to resolve several of Facebook’s challenges on the pleadings. (Dkt. 43 at 4–17.)

1 photos, video, links, and other information with one another. (Dkt. 25 ¶ 15.) Facebook provides its
2 service, and hosts all the information that people share, for free.

3 There are many different ways for people to share information on Facebook. One way is by
4 posting on their personal profile page (a “Timeline”), which is viewable by the audience they select
5 (specific individuals, all friends, the public, or many other options in between). People also can share
6 information directly to their Timelines by affirmatively clicking on “**Like**” or “**Share**” buttons (“**social**
7 **plugins**”) that appear on other websites (e.g., *The New York Times* or ESPN). Another way to share
8 information is by sending a Facebook message to one or more people (similar to email), which can be
9 viewed in the sender’s and recipient’s messages folder.

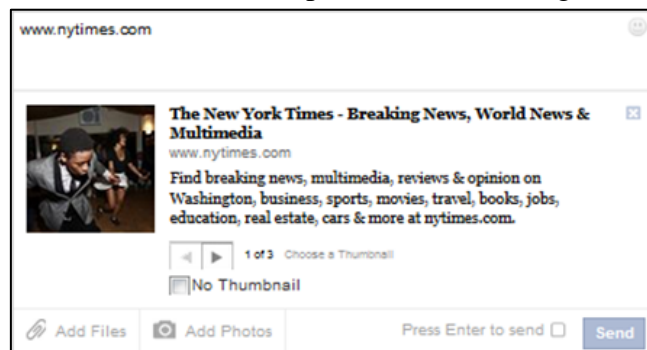
10 **2. URL Previews And “Share Objects” That Store Them On Facebook’s System.**³ Plaintiffs
11 challenge the core functionality of Facebook’s “**URL preview**” feature in messages, and the
12 subsequent logging and use of data derived from that feature. In simple terms, when a person shares a
13 link or URL (which may look like this: <http://www.website.com/abc!123?>) in a message, Facebook’s
14 systems may provide a “preview” of the actual information found via that link (for example, the title
15 of a news article along with a picture that appears in the article). This is done for two main reasons:
16 (i) the sender may have shared the wrong link, in which case the preview will make that clear to the
17 sender; and (ii) the recipient will have some sense of what the link is about so she can determine
18 whether she wants to click on it. The “URL preview” feature is optional. If the sender does not want
19 to include a preview, she can delete the preview by clicking an “x” at the top right of the preview (“x
20 out”). If the sender clicks “x”, the recipient will only see the link (<http://www.website.com/abc!123?>).
21 On the other hand, once the preview appears, the sender may remove the URL itself from the message
22 and send only the preview, in which case the recipient will see only the preview.

23 When people elect to include a URL preview when they send a message, Facebook’s internal
24 systems may create something called a “**share object**,” which is simply an entry in an internal

25 _____
26 ³ Plaintiffs have presented this Court with a superficial description of complex, technical material,
27 which Facebook has rebutted here and in its concurrently-filed Declarations of Facebook Engineering
28 Director Alex Himel, Engineering Manager Dan Fechete, and Engineering Manager Michael Adkins,
as well as the rebuttal expert report of Dr. Benjamin Goldberg of New York University. To the extent
the Court finds it necessary or helpful, Facebook can make any of these declarants available for live
testimony at the hearing pursuant to Local Rule 7-6.

1 Facebook system that stores the information about that URL with the information about the message
2 with which it was shared, in order to display that URL preview again when the sender and recipient
3 view that message in their inboxes. (App. 1513, 1515, 1947, 1962-63, 1990.) Facebook also may use
4 data from its internal systems to display aggregate and anonymous statistics about how many times
5 people have interacted with a particular link, so that people can see what links are popular with other
6 Facebook users. This appears in the form of a number (e.g., “573”) next to the “Share” or “Like”
7 button on third-party websites. The number may be incremented (e.g., from “573” to “574”) when
8 someone interacts with the URL in a specified way—for example, by sharing it in a post, or, for a
9 period of time that ended over a year before this lawsuit was filed, in a Facebook message. (*Id.* 1520.)
10 Importantly, during the class period, no other person or website ever learned about the specific links
11 shared between two specific people in a Facebook message. (*Id.* 1522, 1527, 1529, 1695, 1977.)
12 Everything described above (and below) occurred internal to Facebook’s systems. (*Id.*)

13 The creation of the “share object” and how Facebook has used it in aggregate ways is at the
14 core of Plaintiffs’ claims. (Mot. at 5–6; Dkt. 138-4 [Golbeck Report] at 9–12.) For these reasons, it is
15 important to understand from a technical perspective exactly how these systems and features work. A
16 summary follows below, and is expanded upon in Facebook’s declarations and expert report. (*Supra*
17 n.3.) During the time period at issue here, a “URL preview” could appear in a message from the
18 Facebook website under a specific set of conditions.⁴ *At a minimum*, a person (1) had to type a URL
19 or paste into the text field of a message, and (2) had to have JavaScript (a programming language)
20 enabled in her web browser. If both of those conditions existed, a URL preview might appear in the
21 draft message. (App. 1513-14.) Here is an example of a draft message including a URL preview:



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23
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26
27
28 ⁴ URLs entered into messages sent from Facebook’s stand-alone Messenger mobile application do **not** generate URL previews. (App.1516.)

1 There are *many instances* in which a URL preview would *not* be generated even when a message
2 contains a URL. (App. 1515-16.) As one example, Facebook maintains a list of known malicious
3 URLs, which it updates regularly. (*Id.* 1930-31.) If a person types a URL that is on that list, Facebook
4 will not create a preview and may instead block transmission of the URL. (*Id.* 1515, 1931-33.)

5 URL previews are stored on Facebook’s servers in the form of “global” share objects. (*Id.*
6 1514, 1958, 1961, 1991.) A global share object is simply a data structure that includes information for
7 rendering a preview of a given URL. (*Id.*) Global share objects have many uses and benefits, such as
8 eliminating the need to send repeated requests to the website associated with the URL to create a
9 preview, which can cause a website to crash or negatively impact its performance. (*Id.*)

10 If a person is able to successfully send a message with a URL preview (which, as seen above,
11 is an “attachment” to the message), another share object (not the “global” share object, but rather one
12 specific to the *sent message*) may be created once the message reaches and is stored on a Facebook
13 server, to display that URL preview in the sender’s and recipient’s inboxes. (*Supra* p. 6.) But, as
14 noted, no share object is created in many cases, such as when (i) no URL preview was created; (ii) a
15 URL preview was created but the user deleted it (“x out”) before hitting send; or (iii) the message was
16 not sent or was blocked by Facebook’s security systems. (*Id.* 1515-16, 1972-74, 1931-32.)

17 To prevail, Plaintiffs must show with common proof that every person who sent a message
18 with a URL was impacted by the challenged practice. But as described above, the circumstances will
19 vary person-by-person, browser-by-browser, URL-by-URL, and message-by-message. As detailed
20 below, discovery confirmed that Plaintiffs Campbell, Hurley, and Shadpour, and the putative class
21 members with whom they exchanged Facebook messages and who provided deposition testimony in
22 this case [REDACTED], had varied experiences with these practices.

23 **3. The “Like” Button Social Plugin.** Facebook also provides “social plugins,” such as the
24 “Like” and “Share” buttons, to third-party websites so people can easily share links to Facebook.
25 Sometimes, but not always, these plugins may include a number (or counter) that reflects the number
26 of times Facebook users have interacted with that link, and that is incremented when other people
27 interact with the same link, for example by sharing that link in a post. The following is an example:
28



As noted above, however, the website on which the counter appears does not receive any identifying information about who shared or received the URL in a Facebook message. (App. 1603.)

The counter generally derives this information from the same internal Facebook system that stores the URL preview—*i.e.*, the global share object, specifically, a field called “tracking_info” that contains, among other things, anonymous, aggregate counters reflecting the number of times the URL preview has been shared on the Facebook platform in various ways. (*Id.* 1517-18.) These internal counters do not necessarily reflect the total number of times a particular URL was shared on Facebook (in a message or otherwise), because there are many instances where share objects are *not* created, and because server and database limitations or failures may prevent the counters from incrementing even when a share object *was* created. (*Id.* 1518-19.) Nor does this internal field include any information about the specific people who sent or received the message. (*Id.* 1517-18.)

4. News Coverage And Public Information About The Practices. Information about the URL preview feature and its potential use in relation to social plugin counters was disseminated widely in several places. Facebook’s public developer guidance stated as early as March 2011—nine months before the start of the proposed class period—that the number shown next to a “Like” button social plugin “is the sum of” several items, including “[t]he number of *inbox messages* containing this URL as an attachment.” (*Id.* 141 (emphasis added).) According to Google Analytics data, there were at least **7 million** unique visits in the U.S. to this Facebook guidance through December 20, 2012 (when the practice of including URL attachments in messages in this counter ceased). (*Id.* 1495, 1502.)

Several news organizations also reported on this occurrence, as well as Facebook’s processing (or “scanning,” as Plaintiffs characterize it) messages for a number of reasons, including to combat spam and abuse, to guard against criminal misuse of its service (including to prevent the sharing of child exploitation images and abuse of minors), and to filter messages. (*Id.* 39-60.) Stated differently, there was a lot of public information about these practices, and this widespread publicity was why Plaintiffs filed this lawsuit. For instance, on October 3, 2012, *The Wall Street Journal* published a

1 blog post titled “*How Private Are Your Private Facebook Messages?*” (*Id.* 122.) Plaintiffs admit that
2 this post made “national news” (Dkt. 31 at 3), and the post reported that Facebook “scans the links
3 you’re sending—registering them as though you ‘Like’ the page you sent. It’s just one example of
4 how online messages that seem private are often actually examined by computers for data” (App. 122).
5 The blog post specifically acknowledged that Facebook’s developer guidance disclosed this practice:
6 “The company’s guidance for developers also says that ‘the number of inbox messages containing’ a
7 link to a page will count as ‘Likes’” (*Id.*) Dozens of other articles describing Facebook’s message
8 processing practices appeared both before and after this article. (*Id.* 39-376.)

9 In December 2012, Facebook stopped incrementing its social plugin counters based on share
10 objects created from URL attachments in messages.⁵ Of course, share objects—basic elements of
11 computer programming—are still generated in the circumstances described above, and the global share
12 object still keeps track internally of the number of times a URL attachment had been shared, including
13 in messages. But this internal counter is no longer included in any public counts, and, as before,
14 Facebook’s systems do not link that aggregate count to specific individuals. (*Id.* 1521-22, 1978-79.)

15 **5. The New Conduct Challenged In Plaintiffs’ Motion.** Because their complaint focused on a
16 practice that ceased more than three years ago, Plaintiffs have now shifted gears in their Motion to
17 challenge the core computer programming practices that are basic to the operation of services like
18 Facebook that enable people to share information, including (i) the very *creation* of share objects,
19 (ii) the incrementing of the anonymous, aggregate *internal counter* in global share objects, and
20 (iii) various basic forms of *internal “logging.”* (Mot. at 5–10.) But as discussed above and detailed in
21 Facebook’s declarations, the creation of share objects and the incrementing of internal counters
22 involve a host of individualized information about each user, browser, URL, and message, and no
23 user-specific information has ever been disclosed. (App. 1515-19, 1523-26, 1967-74.) And the same
24 thing is true of Plaintiffs’ new “logging” allegations. (*Id.* 1523-26, 1975-76.)

25 Additionally, Plaintiffs now challenge Facebook’s alleged *use* of the anonymous, aggregate
26 information from the global share objects or other internal counters for analytics purposes and to help

27 ⁵ Facebook believed the practice ceased in October 2012 (which was the company’s understanding,
28 and the information Facebook’s counsel had at the time of the last hearing), but subsequent
investigation revealed that the practice was completely stopped in December 2012. (*Id.* 1615.)

1 identify trends in what information people are sharing on Facebook and may find interesting.⁶ None of
2 these practices is mentioned in the complaint, and Plaintiffs are wrong about many of the particulars of
3 these challenged “uses.” (*See, e.g., id.* 1705.) Regardless, whether or not a particular URL in a
4 message sent by a particular person was ever “used” in one of the innocuous ways Plaintiffs now
5 challenge remains a highly variable inquiry (including, but not only, because the practices changed
6 over time and have been discontinued), and there is no administratively feasible way to determine
7 whether a given URL was ever used in a specific way. (*Infra* pp. 11–13.)

8 III. THE LEGAL STANDARDS GOVERNING THIS MOTION

9 A “class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of
10 individual named parties only.’” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011);
11 *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (same). Rule 23 “imposes stringent
12 requirements for certification that in practice exclude most claims.” *Am. Express Co. v. Italian Colors*
13 *Rest.*, 133 S. Ct. 2304, 2310 (2013). Specifically, it “does not set forth a mere pleading standard,”
14 *Dukes*, 131 S. Ct. at 2551, and “[m]ere invocation of the language of Rule 23 ... is no mystical legal
15 talisman guaranteeing class treatment,” *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1312 (9th Cir.
16 1977). Instead, the plaintiff “must affirmatively demonstrate his compliance with the Rule—that is, he
17 must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of
18 law or fact, etc.” “and that certification is proper only if ‘the trial court is satisfied, after a rigorous
19 analysis,’ that plaintiff met its burden. *Dukes*, 131 S. Ct. at 2551; *Comcast*, 133 S. Ct. at 1432 (same).

20 IV. STATEMENT OF ISSUE TO BE DECIDED PURSUANT TO RULE 7-4(a)(3)

21 Have Plaintiffs met their burden to affirmatively demonstrate through a “rigorous analysis”
22 that each of the Rule 23 requirements has been satisfied in this case?

23 V. AN INDIVIDUALIZED ANALYSIS IS REQUIRED TO DETERMINE WHETHER 24 PUTATIVE CLASS MEMBERS WERE SUBJECTED TO THE CHALLENGED PRACTICES

25 As a threshold matter, whether a particular person was impacted by the challenged practices

26 ⁶ In their Motion, Plaintiffs take issue with use of aggregated and anonymous statistics about share
27 objects to (i) display information on third-party websites about what URLs are popular (“Activity” and
28 “Recommendation” feeds), (ii) provide anonymous and aggregate demographic data to third-party
website administrators about the types of people interacting with their sites, and (iii) provide basic
statistics about the *number* of times URLs were shared. (Mot. at 5–6.) All of these practices varied
over time and with different user behavior, and none continue to involve URLs shared in messages.

1 depends on a variety of factors specific to each person, browser, URL, message, and time period.
2 This individualized inquiry precludes a finding of ascertainability, commonality, or predominance.

3 **1. Creation of Share Objects.** As discussed above, a share object could be created only in
4 the specific circumstance where a URL preview was generated and successfully sent with a message.
5 (*Supra* p. 7.) All other instances in which a URL was shared in a message did not create a share
6 object. (App. 1513-15.) Plaintiffs claim that only in “rare” circumstances will a message containing
7 a URL not create a share object (Mot. at 15 n.48), but they provide no evidence to support that
8 assertion. In fact, several of their own messages that they selected for further discovery included
9 URLs and did not result in a share object. (App. 5-6, 1544-55.) Determining which messages with
10 URLs resulted in the creation of share objects (and which did not) is an individual inquiry:

11 First, and most obviously, if a person only sent or received Facebook messages *without* a
12 URL, there would be no URL attachment or object. Many people who send Facebook messages do
13 not send messages containing URLs, such as Plaintiffs’ proposed damages expert. (*Id.* 1037-38.)

14 Second, URLs entered into messages sent from Facebook’s stand-alone Messenger mobile
15 application (*e.g.*, on a smartphone or other mobile device) do not generate URL previews. (*Id.* 1516.)

16 Third, if an individual included a URL in the body of a message but sent the message before a
17 URL preview could be generated, or deleted the URL preview before hitting send, then *no* share object
18 would have been created. (*Id.* 1514-15, 1575.) There was significant variability among the named
19 Plaintiffs and putative class members on this issue: **Campbell** recalls deleting the preview at times,
20 although he could not recall specific messages or URLs for which he did this (*id.* 416, 419); **Hurley**,
21 ██████████ recall leaving URL previews intact (*id.* 459, 1391, 1422); and even Plaintiffs’
22 technical expert (Dr. Golbeck) testified that sometimes she deletes URL previews. (*Id.* 1127.)

23 Fourth, if a person composing a Facebook message did not have JavaScript enabled in her
24 browser, Facebook would not have generated a URL preview or share object. (*Id.* 1514-15, 1575.)
25 Once again, there is significant variability among the putative class with respect to whether the
26 browsers they used had JavaScript enabled. (*Id.* 420-22, 461, 550, 1363, 1392-93, 1433-44.) And
27 while Dr. Golbeck speculated in her expert report that most modern browsers have JavaScript enabled,
28 she admitted at her deposition that at least *one million* U.S. Internet users do not. (*Id.* 1219-20.) In

1 fact, the number is likely much higher. (*Id.* 1219-20; Dkt. 138-4 at 22.)

2 Fifth, if the URL in the message was on Facebook’s list of malicious URLs, or if the message
3 was otherwise “blocked” by anti-abuse checks, no URL preview or share object would have been
4 generated. (*Id.* 1516, 1575, 1973-74.)

5 **2. Incrementing The Social Plugin Count.** With respect to the primary practice challenged in
6 the complaint—alleged “scanning” of Facebook messages to detect a URL and increment the social
7 plugin counter (Dkt. 25 ¶¶ 2, 4, 25, 27, 31)—there is additional variability arising from the fact that
8 many third-party websites did not display Facebook social plugins (or ones with counters). (App.
9 1521.) For example, of the **19** messages that Plaintiffs asked Facebook to locate, **18** (or 95%) did not
10 even have a possibility of incrementing a social plugin counter on a third-party website:

- 11 • 7 of the 19 messages did not have a share object (App. 5-6, 1547-55);
- 12 • 10 of the 19 messages had a share object but no corresponding social plugin on the
13 website (according to available information for the relevant time period) (*id.*);
- 14 • 1 of the 19 messages had a share object and *may have* had a corresponding social
15 plugin counter on the website (Facebook was unable to locate the information for the
16 time period), but the message was sent in April 2014 (*after* Facebook stopped
17 incrementing social plugin counters for messages) (*id.*); and
- 18 • the remaining message—the only one that had any possibility of incrementing the
19 counter—was sent to Plaintiffs’ counsel (*id.*).

17 Further, some counters in social plugins displayed unrelated information like the number of
18 people who “liked” a particular page on Facebook (a “fan count”) (*id.* 1520). Given all of these
19 unknowns, it is not surprising that Plaintiffs were unable to say whether the social plugin counters
20 were incremented as a result of URLs in any of their messages. (*See, e.g., id.* 563 (“Plaintiff
21 [Campbell] is not aware of whether the websites associated with such URLs contained a Facebook
22 plug-in at the time these messages were sent or received.”); *id.* 425, 461-62, 482, 551, 1393, 1438.)
23 There also is variability over time, because, as explained above, URL attachments shared in Facebook
24 messages have not been included in any social plugin counters since December 2012. (*Id.* 1520-21.)

25 **3. Other Challenged Practices.** The foregoing variability also impacts Plaintiffs’ new
26 challenges to the various logs and internal counters (Nectar, share_stats, global share object counter;
27 *see* Mot. at 5) and “uses” (Recommendations/Activity Feeds, Insights, and various APIs) (*see id.* at 5,
28 8; Dkt. 138-4 [Golbeck Report] at 12–22). For example, if no URL attachment was sent with the

1 message, then no share object would have been created, and none of the logs (except Nectar) and
2 internal counters that Plaintiffs now attack could have been incremented. (App. 1518, 1523.) And
3 even if a share object was created, there is more variability around each specific log: (1) Nectar
4 logged certain events *before* send, and only for a tiny sample of URLs in messages (**0.01%**) (*id.* 1524-
5 1525, 1965, 1970); (2) the global share object counter and “share_stats” may not have been
6 incremented or logged due to technical complexities described in detail in the Himel Declaration (*id.*
7 1518-19, 1523-24); and (3) if a URL shared in a message did not result in an increment in the relevant
8 counter, the URL share would not have been included or reflected in any of the other challenged
9 processes (Recommendations/Activity Feeds, Insights, and various APIs). (*Id.* 1527, 1530-31, 1700-
10 04.)⁷ In addition, there was considerable variability over time in the challenged practices (as explained
11 in detail in the Goldberg Report, the Fechete and Himel Declarations, and Exhibits D & PP (*id.* 30-37,
12 1508-33, 1693-1710, 1939-92)), and some of the practices were discontinued before the proposed
13 class period. (*Id.* 1520-21, 1523, 1527, 1530, 1703, 1706.)

14 VI. PLAINTIFFS CANNOT MEET THE REQUIREMENTS OF RULE 23(a)

15 A. Plaintiffs’ Proposed Class Is Not Ascertainable

16 Plaintiffs concede (Mot. at 14–15), and this Court has held, that ascertainability is a Rule 23
17 requirement. *See Astiana v. Ben & Jerry’s Homemade, Inc.*, No. 10-4387-PJH, 2014 WL 60097, at *3
18 (N.D. Cal. Jan. 7, 2014) (“Because plaintiff has not shown that a method exists for determining
19 who ... fits within the proposed class, the class is not ascertainable.”). Plaintiffs cannot satisfy their
20 burden to show that the class is objectively ascertainable.

21 In their Motion, Plaintiffs contend that “any Facebook user can readily determine whether she
22 sent or received a Facebook message containing a URL within the relevant time period.” (Mot. at 15.)
23 But that overly simplistic suggestion sidesteps the technical complexities described above, while
24 simultaneously ignoring Plaintiffs’ own class definition, which is *not* limited to individuals who “sent
25 or received a Facebook message containing a URL,” but rather everyone who sent or received

26 _____
27 ⁷ Dr. Golbeck acknowledged in her deposition that other than one “edge case” that occurred
28 inadvertently (and briefly) about a year before the class period, the other challenged “uses” of URL
message shares “all use[d] aggregated data that reasonably seems to be ***not personally identifiable***.”
(App. 1304-05 (emphasis added).)

1 Facebook messages (1) “that included URLs in their content” and (2) “from which Facebook
2 generated a URL attachment.” (*Id.* at 10, 15 n.48.) As detailed above, however, there are several
3 individualized circumstances in which a “URL attachment” would not have been created or would not
4 have been sent with the message (and thus, no share object created). (*Supra* pp. 11–12.)

5 To overcome these barriers, Plaintiffs attempt to shift their evidentiary burden to Facebook,
6 suggesting in Dr. Golbeck’s report that Facebook could use a “database query” or write new “code” to
7 identify putative class members. (Dkt. 137-6, ¶¶ 103–105.) But these proposals are not only
8 speculative, they would be futile: Dr. Golbeck’s subsequent deposition testimony confirmed that the
9 proposals in her report would not produce a reliable, much less accurate, list of putative class
10 members. For example, her proposals would not identify (i) message recipients, (ii) message senders
11 whose URLs were blocked as malicious by Facebook’s internal systems or otherwise failed to create a
12 share object, (iii) senders who had deleted URL attachments, or (iv) senders who had deleted URLs in
13 the body of the message. She also admitted that her proposals would not distinguish between
14 (v) people “located within the United States” and people in other countries, (vi) people who sent
15 messages before or during the proposed class period, or (vii) individuals who indisputably knew about
16 and consented to Facebook’s practices. (App. 1324-26, 1329-34, 1340-42.) Nor could she identify
17 individuals whose URLs were “logged” (*id.* 1334-36) or whether any given share object was “used” in
18 any of the aggregate, anonymous ways discussed in her report—she admitted that this was a “case-
19 specific issue” (*id.* 1337), and in fact it is unascertainable. Facebook has submitted evidence to
20 confirm these and other barriers to identifying the putative class. (*Id.* 1511-12.)

21 Nor is self-identification an option, as Plaintiffs admit that they “do[] not recall whether any of
22 the URLs included in [Facebook] messages that Plaintiff has sent or received ... contained a ‘preview’
23 at the time it was sent or received.” (*Id.* 563, 694.)⁸

24 _____
25 ⁸ Because the proposed class is not ascertainable, Plaintiffs also do not meet their burden of showing
26 Rule 23(a)(1) numerosity. They offer only conclusory assumptions on this element—they “assum[e]
27 an even distribution among active message users worldwide,” and speculate that “as many as tens of
28 millions of [putative class] members exist in the United States.” (Mot. at 11–12.) But “Rule 23 does
not set forth a mere pleading standard,” *Dukes*, 131 S. Ct. at 2551, and assumptions and speculation
are cannot satisfy numerosity. *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 597 (3d Cir. 2012) (by
relying on “common sense,” district court “crossed the line separating inference and speculation,”
“[g]iven the complete lack of evidence” of numerosity); *Davis v. Astrue*, 250 F.R.D. 476, 486 (N.D.

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1 **B. Plaintiffs And Their Counsel Are Not Adequate Under Rule 23(a)(4)**

2 Rule 23(a)(4) also requires that “the representative parties will fairly and adequately protect the
3 interests of the class,” and class representatives have a strict fiduciary duty to represent and protect the
4 interests of absent class members, *Hansberry v. Lee*, 311 U.S. 32, 43 (1940). This factor is paramount
5 in a class action, because in order “[t]o satisfy constitutional due process concerns, unnamed class
6 members must be afforded adequate representation before entry of a judgment which binds them.”
7 *Soto v. Commercial Recovery Sys., Inc.*, No. 09-2842-PJH, 2011 WL 6024514, at *6 (N.D. Cal.
8 Dec. 5, 2011). Plaintiffs and their counsel are inadequate for several reasons.

9 **1. This Lawsuit Was Initiated And Is Driven By Class Counsel.** Plaintiffs admitted that
10 interim class counsel recruited them to bring this action and none of them contemplated suing
11 Facebook before speaking with counsel. (App. 391-92, 485-87, 507-08.) As another court in this
12 District observed, “such a ‘cart before the horse’ approach to litigation is not the proper mechanism for
13 the vindication of legal rights.” *Bodner v. Oreck Direct, LLC*, No. 06-4756-MHP, 2007 U.S. Dist.
14 LEXIS 30408, at *5–6 (N.D. Cal. Apr. 25, 2007) (“It is clear from the record that plaintiff’s counsel,
15 and not plaintiff, is the driving force behind this action.”). Plaintiffs have “deferred to [counsel] for all
16 legal strategy,” let counsel direct the course of the litigation, and have not been involved in strategy
17 and decision-making. (App. 398-400, 403, 454-55, 544.) These facts alone warrant denial of the
18 Motion. *See, e.g., In re Facebook, Inc., PPC Adv. Litig.*, 282 F.R.D. 446, 454 (N.D. Cal. 2012);
19 *Sanchez v. Wal-Mart Stores, Inc.*, No. 06-02573, 2009 WL 1514435, at *3 (E.D. Cal. May 28, 2009);
20 *Welling v. Alexy*, 155 F.R.D. 654, 659 (N.D. Cal. 1994).

21 **2. Plaintiffs’ Close Relationships With Class Counsel.** Plaintiffs’ close relationships with
22 class counsel also undermine their independence as class representatives. In fact, all of the Plaintiffs
23 were recruited to join this lawsuit by their longtime friends:

- 24 • **Campbell** has been friends with Plaintiffs’ counsel David Slade (of Carney Bates &
25 Pulliam, PLLC) for approximately three years (App. 379-80).
- **Hurley** and Plaintiffs’ counsel Melissa Gardner (of Lief Cabraser Heimann &

26 [Footnote continued from previous page]

27 Cal. 2008) (plaintiff “failed to put forth non-speculative evidence of the number of members included
28 in the proposed class”); *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 681–82 (S.D. Cal. 1999) (“Mere
speculation as to satisfaction of this numerosity requirement does not satisfy Rule 23(a)(1).”).

1 Bernstein) have been “close friends” for 15 years (*id.* 488), they speak by phone
2 “almost weekly” (*id.* 451a), they have traveled together (*id.* 488-90), and Mr. Hurley
3 “volunteered right away” as a Plaintiff when Ms. Gardner contacted him (*id.* 486a).

- 4 • **Shadpour** has been a “very, very good” friend of Plaintiffs’ counsel Lesley Portnoy
5 (then of Pomerantz, LLP, currently with Glancy Prongay) for 20 years (*id.* 509), he has
6 sent Facebook messages to Mr. Portnoy (*id.* 510), and he learned about the facts
7 underlying the suit from Mr. Portnoy (*id.* 507-08, 731).

8 Several courts have held that these close relationships render the named plaintiffs inadequate.

9 *See, e.g., Bohn v. Pharmavite, LLC*, No. 11-10430, 2013 WL 4517895, at *3 (C.D. Cal. Aug. 7, 2013);

10 *Moheb v. Nutramax Labs. Inc.*, No. 12-3633, 2012 WL 6951904, at *5 (C.D. Cal. Sept. 4, 2012);

11 *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 (11th Cir. 2003).

12 **3. Counsel’s Mistreatment Of Shadpour.** Finally, counsel’s mistreatment of former plaintiff
13 Shadpour “creates a serious doubt that counsel will represent the class loyally [and] requires denial of
14 class certification.” *Kulig v. Midland Funding, LLC*, No. 13-4715, 2014 U.S. Dist. LEXIS 137254,
15 at *8–9 (S.D.N.Y. Sept. 26, 2014). During the deposition that Plaintiffs’ counsel actively sought to
16 prevent (*see* Dkt. 89, 94, 96, 105), Mr. Shadpour testified that:

- 17 • He did not review or receive his original complaint before it was filed. (App. 539-43.)
- 18 • Counsel provided information to Facebook and the Court without Mr. Shadpour’s
19 permission, and he never saw or signed off on *anything* submitted on his behalf—which
20 “frustrated” him then, and continues to frustrate him today. (*Id.* 521, 523, 545, 547.)
- 21 • Plaintiffs’ counsel inexplicably delayed by *several* months pursuing Mr. Shadpour’s
22 withdrawal from this case. (*Id.* 518-20.)
- 23 • Mr. Shadpour asked about his withdrawal at least a “dozen” times, and asked Plaintiffs’
24 counsel for “documentation” that they had requested his dismissal. (*Id.* 515, 547-48.)
- 25 • During his contacts with Plaintiffs’ counsel regarding his withdrawal requests, Mr.
26 Shadpour “became uncomfortable” and “frustrated” with counsel, and ultimately had to
27 take the extraordinary step of retaining new counsel (apparently unable to find
28 sufficient representation among the three law firms and eight different lawyers who
have appeared in this case) to assist him in withdrawing from the case. (*Id.* 502-06.)
- Mr. Shadpour also disputed Plaintiffs’ counsel’s representation to counsel for Facebook
that the reason Mr. Shadpour was unavailable for deposition was because Plaintiffs’
counsel had “lost contact” with him. (*Id.* 516-17.)

Plaintiffs’ counsel will cite Mr. Shadpour’s dismissal from the case (*see* Dkt. 123), but this
dismissal resulted from his “frustration” with interim class counsel, and evidence from dismissed
putative class representatives remains relevant to the certification inquiry.⁹ Rule 23(g)(1)(B)

⁹ *See, e.g., Dysthe v. Basic Res. LLC*, 273 F.R.D. 625, 629–30 (C.D. Cal. 2011) (even if plaintiff’s
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1 authorizes the Court to “consider any other matter pertinent to counsel’s ability to fairly and
2 adequately represent the interests of the class,” and the misconduct here should disqualify counsel
3 from representing any putative class in this action. Fed. R. Civ. P. 23(g)(1)(B).

4 **C. Plaintiffs Have Not Met Their Burden To Show Common Legal Or Factual Issues**

5 As this Court explained, “[w]hat matters to class certification ... is not the raising of common
6 ‘questions’—even in droves—but, rather the capacity of a classwide proceeding to generate common
7 answers apt to drive the resolution of the litigation.” *Daniel F. v. Blue Shield of Cal.*, 305 F.R.D. 115,
8 126 (N.D. Cal. 2014) (quoting *Dukes*, 131 S. Ct. at 2551). Plaintiffs “must pose a question that ‘will
9 produce a common answer to the crucial question’” in the litigation. *Ellis v. Costco Wholesale Corp.*,
10 657 F.3d 970, 981 (9th Cir. 2011); *Dukes*, 131 S. Ct. at 2551 (the “common contention ... must be of
11 such a nature that it is capable of class wide resolution—which means that determination of its truth or
12 falsity will resolve an issue that is central to the validity of each one of the claims in one stroke”). All
13 of the variability discussed above defeats any finding of commonality here. *See, e.g., Thomasson v.*
14 *GC Servs. Ltd. P’ship*, 539 F. App’x 809, 810 (9th Cir. 2013) (reversing certification order for lack of
15 commonality, because “[t]o establish the claim at issue here [alleged monitoring of phone calls
16 without consent] would require an individualized inquiry into hundreds of phone calls in order to
17 determine whether and when any warning was given in each call”).

18 Plaintiffs’ Motion does not bother to identify any questions that will produce common answers
19 apt to drive the resolution of this lawsuit. Instead, Plaintiffs rely on *Facebook’s* portion of a Joint
20 Case Management Statement filed in March 2015, and contend (falsely) that Facebook has conceded
21 that there are “common” questions in this case. (Mot. at 12 & n.45 (“In the Joint Case Management
22 Conference Statement, Facebook itself identifies relevant common issues which track the elements to
23 establish Facebook’s violations of ECPA and CIPA.”).) Alleged statements in a case management
24 statement, however, do not satisfy Plaintiffs’ burden. *See, e.g., Dukes*, 131 S. Ct. at 2551 (moving

25 _____
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26 claims are dismissed, “[h]is testimony regarding his experience ... is ... highly likely to be relevant to
27 class certification issues, including commonality and the typicality of the class representative’s claims,
28 even if he no longer wishes to be burdened with this litigation”); *Jones v. ConAgra Foods, Inc.*, No. 12-
1633-CRB (MEJ), 2013 U.S. Dist. LEXIS 99336, at *4–5 (N.D. Cal. July 16, 2013) (same); *Fralely v.*
Facebook, Inc., No. 11-1726-LHK, 2012 WL 555071, at *3 (N.D. Cal. Feb. 21, 2012) (same).

1 party must “affirmatively ... prove” commonality; “Rule 23 does not set forth a mere pleading
2 standard”). But more importantly, Plaintiffs affirmatively *misstate* Facebook’s portion of the Joint
3 Statement. At no point did Facebook concede that Plaintiffs’ claims are amenable to common proof;
4 to the contrary, Facebook stated repeatedly that this action is *not* appropriate for class treatment.
5 (Dkt. 60 at 5 (“Finally, *putting the merits to the side*, no class could be certified here for several
6 reasons ...”); *id.* at 6 (“Plaintiffs’ claims are ... not amenable to class certification”).) Plaintiffs’
7 citations relate to the portion of the Joint Statement about Facebook’s anticipated *merits* and *summary*
8 *judgment* defenses (which would be directed against the named Plaintiffs based upon the facts
9 applicable to each), and the issues that this Court was *unable* to resolve on the pleadings.

10 Plaintiffs hint that whether allegedly unlawful “interceptions” and “uses” occurred may be
11 common questions (Mot. at 12–13), but they are mistaken on both counts:

12 First, Plaintiffs identify several purported “interceptions,” but these “interceptions” did not
13 occur in all cases, nor did they apply uniformly. For any particular Facebook message, it would be
14 necessary to determine whether (1) a share object was created, (2) the anonymous, aggregate counter
15 in the global share object was incremented, and (3) the URL scrape or share was “logged.” (*Id.* 1516-
16 26, 1972-77; *see also* Dkt. 138-4 at 25-30.)

17 Second, it is impossible to determine on a classwide basis (to the extent it can be determined at
18 all) whether the various “uses” Plaintiffs allege of shared URLs occurred in any given case. Dr.
19 Golbeck admitted that this is a “case-specific issue” (*id.* 1337), and a message-by-message inquiry
20 would be necessary (although still insufficient) (*supra* pp. 12-13).

21 **VII. PLAINTIFFS CANNOT SATISFY THE REQUIREMENTS OF RULE 23(b)(3)**

22 **A. Individualized Factual And Legal Issues Regarding Liability Predominate Over Any** 23 **Alleged “Common” Issues (Which Plaintiffs Do Not Identify)**

24 To satisfy Rule 23(b)(3), Plaintiffs must demonstrate that the alleged common questions are “a
25 significant aspect of the case ... [that] can be resolved for all members of the class in a single
26 adjudication.” *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1068 (9th Cir. 2014) (quoting *Hanlon*
27 *v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998)). Individualized inquiries surround each issue
28 that Plaintiffs identify (Mot. at 15–22), defeating any finding of “predominance” here:

1 **1. Implied Consent.** The class action procedure cannot be used to abrogate Facebook’s due
2 process right “to litigate its statutory defenses to individual claims.” *Dukes*, 131 S. Ct. at 2561. As the
3 Court recognized (Dkt. 43 at 14), express or implied consent is a complete defense to a claim under
4 the Wiretap Act and CIPA. *See* 18 U.S.C. § 2511(2)(d); Cal. Penal Code § 631(a). But to determine
5 whether an individual putative class member impliedly consented to the alleged practice will require a
6 highly specific, class member-by-class member inquiry.

7 This barrier is one of the reasons why no court anywhere has agreed to certify a Rule 23(b)(3)
8 class in these “message scanning” lawsuits. As Judge Koh held in *Gmail*, “[i]mplied consent is an
9 intensely factual question that requires consideration of the circumstances surrounding the interception
10 to divine whether the party whose communication was intercepted was on notice that the
11 communication would be intercepted.” *In re Gmail Litig.*, No. 13-02430-LHK, 2014 WL 1102660,
12 at *16 (N.D. Cal. Mar. 18, 2014).¹⁰ Here, as in *Gmail*, “[s]ome Class members likely viewed some
13 [Facebook and non-Facebook] disclosures, but others likely did not.” *Id.* at *18. To differentiate, “[a]
14 fact-finder ... would have to evaluate to which of the various sources each individual user [i.e.,
15 individuals who sent and received Facebook messages with URLs] had been exposed and whether
16 each individual ‘knew about and consented to the interception’ based on the sources to which she was
17 exposed.” *Id.* This analysis “will lead to numerous individualized inquiries that will overwhelm any
18 common questions.” *Id.* As in *Gmail*, there are a “panoply of sources” from which people who sent
19 or received Facebook messages would have learned of the challenged conduct:

21 ¹⁰ *See also Backhaut v. Apple, Inc.*, No. 14-2285-LHK, 2015 WL 4776427, at *14 (N.D. Cal.
22 Aug. 13, 2015) (“[I]ndividualized issues with respect to consent would predominate” because
23 “proposed class members could have been put on notice of the alleged interceptions from Defendant’s
24 own disclosures, numerous online postings and websites, or third-party news articles.”); *Murray v.*
25 *Fin. Visions, Inc.*, 2008 WL 4850328, at *4 (D. Ariz. Nov. 7, 2008) (“The question of consent, either
express or implied, is often a fact-intensive inquiry and may vary with the circumstances of the
parties.”); *see also Gannon v. Network Tel. Servs.*, No. 13-56813, 2016 WL 145811, at *1 (9th Cir.
Jan. 12, 2016) (“The district court appropriately determined that it would be extremely difficult to
ascertain the identities of the individuals who had not consented to receive the messages.”).

26 Plaintiffs reach out-of-circuit to cite *Silbaugh v. Viking Magazine Servs.*, 278 F.R.D. 389, 393 (N.D.
Ohio 2012) (Mot. at 19), but that case did not involve the Wiretap Act, CIPA, or “implied consent”
27 issues, and the defendant “admitted at deposition that he did not have consent from any person” and
28 that he did not “take steps to confirm that consent was made.” Likewise, *Ades v. Omni Hotels*, No. 13-
02468, 2014 WL 4627271 (C.D. Cal. Sept. 8, 2014) (Mot. at 13, 19), distinguished *Gmail* on the basis
that the defendant also did not have any evidence of consent. *Id.* at *12. *Gmail* is on point here.

1 “*First*, Class members could have learned of the interceptions from various [Facebook]
2 sources.” *Id.* at *17. As early as March 7, 2011, Facebook’s publicly-available developer guidance
3 disclosed that the number shown next to a “Like” button “is the sum of” several items, including “[t]he
4 number of *inbox messages* containing this URL as an attachment.” (App. 141 (emphasis added).)
5 According to Google Analytics data, there were at least *7 million unique visits* in the U.S. to the
6 relevant developer guidance through December 20, 2012 (when the practice ceased). (*Id.* 1495, 1502.)

7 “*Second*, Class members may have learned about the alleged interceptions from various media
8 sources” (*Gmail*, 2014 WL 1102660, at *17), including the 77 sources Facebook produced regarding
9 alleged message “scanning” (or variations of it) from 2009 to 2013. These sources, which do not even
10 include media coverage of the instant lawsuit, are summarized in Exhibits F-K (App. 39-376).¹¹ As in
11 *Gmail*, “[s]ome Class members likely viewed some of these [Facebook] and non-[Facebook]
12 disclosures, but others likely did not.” *Id.* at *18. **Campbell, Hurley, ██████████** read
13 many of the sources that published these articles. (App. 440-44, 491-96, 1406-10, 1453-57.)

14 *Third*, the “URL preview” alerted people *before* a message was sent that the URL had been
15 “processed,” providing further evidence of implied consent. (App. 1514.) This is especially true
16 given that the new class definition includes only messages that generated “URL attachments” (Mot.
17 at 10), which never occurred without URL previews. **Campbell, Hurley, ██████████**
18 recalled seeing URL previews (App. 401, 458, 1389-90, 1421). ██████████ understood
19 that to generate the preview, Facebook is detecting the URL before the message is sent (*id.* 1392,
20 1432-33). The preview also appears in their inboxes after send, and they are therefore on notice that
21 the preview was stored by Facebook.

22 *Fourth*, by re-defining the putative class to extend to the present day (Mot. at 10), rather than
23 2012 (*see* Dkt. 25 ¶ 59 n.3), Plaintiffs have included *even more* individuals (including themselves)
24 who knew about the challenged practices and continued to send Facebook messages. By definition,
25

26 ¹¹ Facebook produced these documents at the outset of discovery, belying Plaintiffs’ assertion that
27 “Facebook has not produced relevant evidence from which actual notice can be reasonably implied.”
28 (Mot. at 19:12–13.) In any event, it is *Plaintiffs’* burden on this Motion to show common proof; not
Facebook’s burden to *prove* a lack of common evidence of implied consent. *See Dukes*, 131 S. Ct.
at 2551; *Doninger*, 564 F.2d at 1312.

1 the proposed class includes people who were aware of the alleged practices and continued to use
2 Facebook’s messaging service, evidencing their consent. *See, e.g., Mortensen v. Bresnan Commc’n,*
3 *L.L.C.*, No. 10-13, 2010 WL 5140454, at *4–5 (D. Mont. Dec. 13, 2010). Plaintiffs contend that the
4 challenged practices made “national news” (Dkt. 31 at 3) when “exposed by *The Wall Street Journal*
5 in early October 2012” (Mot. at 9; Dkt. 25 ¶ 39). *See Gmail*, 2014 WL 1102660, at *7, *17 (consent
6 can be implied from “various media sources,” and citing “media coverage of the instant ... and related
7 litigation”). Plaintiffs and putative class members continued to send Facebook messages containing
8 URLs even after filing this lawsuit and receiving discovery requests. (App. 386-87, 449, 575-600,
9 707, 1353, 1369, 1381, 1404-5, 1419-20.)

10 Fifth, in addition to assessing whether each Plaintiff and each putative class member
11 consented, “the ultimate merits inquiry [also] requires ... consideration of whether ... their
12 correspondents consented.” *Gmail*, 2014 WL 1102660, at *14. Plaintiffs’ technical expert (Dr.
13 Golbeck) conceded that users of social media have “vastly different understandings” regarding the
14 collection and processing of their data; she agreed that it is “true that there [are] varying levels of
15 understanding that people have on how that works.” (App. 1092a-92b.) Critically, all of the Plaintiffs
16 and putative class members deposed in this action admitted that they have *no way of knowing* what
17 information their message correspondents (*i.e.*, the other people with whom they exchanged messages)
18 knew about the challenged practices and whether they consented. (*Id.* 426-29, 434-39, 463, 466-79,
19 554-55, 1366-68, 1396-98, 1402, 1443-48.) Plaintiffs offer no basis—and there is none—for
20 presuming that these people did not consent.¹²

21 _____
22 ¹² Plaintiffs also assert that they “will present common evidence that rather than disclose its
23 practices ..., Facebook actively sought to conceal its practices from users” (Mot. at 20:5–7), but they
24 have not offered that evidence in support of their Motion, as they were required to do. And more
25 importantly, these accusations are *false*. Plaintiffs have taken documents out of context to mislead the
26 Court: they cite a document from February 2011 in which Facebook employees discussed what goes
27 into the social plugin count, and one employee noted that “[w]e have intentionally not proactively
28 messaged [developers] what this number is since it’s kind of sketchy how we construct it[,] but we will
tell people about links.getStats when they ask.” (App. 1491.) What Plaintiffs fail to tell the Court,
however, and what the rest of the document makes clear, is that this very discussion led Facebook to
publish developer documentation ***the following month***—in March 2011, more than ***nine months***
before the start of the class period—that disclosed the number shown on a social plugin counter may
be “the sum of” several items, including “[t]he number of ***inbox messages*** containing this URL as an
attachment.” (*Id.* 141.) Moreover, in response to the October 2012 *Wall Street Journal* blog post,
Facebook explained that “the system is working as expected. ‘Many websites that use Facebook’s

[Footnote continued on next page]

1 In sum, “[a] fact-finder, in determining whether Class members impliedly consented, would
2 have to evaluate ... whether each individual ‘knew about and consented to the interception’ based on
3 the sources to which she was exposed.” *Gmail*, 2014 WL 1102660, at *18, 21 (denying certification).

4 **2. Elements Of Wiretap Act/CIPA Claims.** Next, Plaintiffs contend that the elements of their
5 Wiretap Act and CIPA claims are subject to “common” proof. (Mot. at 16–18.) Once again, their
6 conclusory assertions fail to meet their burden. *See Dukes*, 131 S. Ct. at 2551; *Doninger*, 564 F.2d
7 at 1312. Notably, the only case that Plaintiffs cite in support of their argument—*In re Yahoo Mail*
8 *Litig.*, 308 F.R.D. 577 (N.D. Cal. 2015)—involved Rule 23(b)(2), and not Rule 23(b)(3). As the
9 Supreme Court has explained, Rule 23(b)(3)’s predominance criterion is “even more demanding than
10 Rule 23(a).” *Comcast*, 133 S. Ct. at 1432. Plaintiffs also ignore that the same District Court (Judge
11 Koh) *rejected* an attempt to certify a Rule 23(b)(3) class for Wiretap Act/CIPA claims for lack of
12 predominance. *See Gmail*, 2014 WL 1102660, at *10. Plaintiffs cannot show predominance here:

13 First, their conclusory claim that “proof of the elements of [the Wiretap Act] and CIPA is
14 necessarily common because it will focus upon *Facebook’s* uniform conduct” (Mot. at 12) ignores the
15 individualized inquiries necessary to determine who was exposed to the challenged practices. (*Supra*
16 pp. 11–13.) *See Lightbourne v. Printroom Inc.*, 307 F.R.D. 593, 602 (C.D. Cal. 2015) (the need to
17 conduct a “photo-by-photo inquiry” “weigh[ed] against a finding of predominance”).


18 Second, the Wiretap Act requires the “interception” of the “contents” of a communication. 18
19 U.S.C. § 2511(1). The Ninth Circuit has held that “contents” means “a person’s intended message to
20 another (i.e., the ‘essential part’ of the communication, the ‘meaning conveyed,’ and the ‘thing one
21 intends to convey’).” *In re Zynga Privacy Litig.*, 750 F.3d 1098, 1106 (9th Cir. 2014). Plaintiffs
22 assume, without evidence or authority, that URLs are “contents” (Mot. at 17:6), but courts have held
23 the opposite—with some limited, individualized exceptions such as when the URL is the subject of the
24 communication, is “the intended message conveyed,” or has identifiable embedded terms that reveal
25 the substance, purport, or meaning of the communication. *See, e.g., Zynga*, 750 F.3d at 1107; *In re*

26 _____
[Footnote continued from previous page]

27 ‘Like’, ‘Recommend’, or ‘Share’ buttons also carry a counter next to them. The counter reflects the
28 number of times people have clicked these buttons and also the number of times people have shared
that page’s link on Facebook,’ ***including over private messages.***” (*Id.* 123.) (All emphases added).

1 *Facebook Internet Tracking Litig.*, No. 12-02314-EJD, 2015 WL 6438744, at *9 (N.D. Cal. Oct. 23,
2 2015); *In re Nickelodeon Consumer Privacy Litig.*, MDL No. 2443, 2014 WL 3012873, at *15 (D.N.J.
3 July 2, 2014). Determining whether the URLs constituted the “contents” of a communication will
4 require an URL-by-URL, message-by-message, sender-by-sender analysis. Plaintiffs heavily redacted
5 all of the text in the Facebook messages they produced, leaving only URLs that do not indicate
6 *anything* about the “contents.” For example, here is a message that Mr. Campbell sent (App. 822):



10 To be clear, Plaintiffs did not produce unredacted copies, and the URL  conveys
11 nothing about the “content” or “meaning,” *Zynga*, 750 F.3d at 1106, and Plaintiffs’ decision to redact
12 everything *but the URL* indicates that they do not view the URLs as “content.”

13 Third, there are inherently individualized issues surrounding consent. (*Supra* pp. 19–22.)¹³

14 Fourth, whether there was an alleged “interception” (18 U.S.C. § 2511(1)(a)) under Plaintiffs’
15 theory turns on a number of fact-intensive inquiries, including whether the individual deleted the URL
16 preview and many other individualized factors. (*Supra* pp. 11-12.) The same is true of Plaintiffs’
17 challenged “uses.” (*Supra* pp. 12-13.)

18 **B. Plaintiffs Also Have Not Met Their Burden To Prove A Reliable, Classwide Damages**
19 **Methodology**

20 Under Rule 23(b)(3), Plaintiffs must submit “evidentiary proof” of a classwide damages model
21 that is consistent with their liability theory, *Comcast*, 133 S. Ct. at 1432, but they have not done so:

22 1. Actual Damages. Although they assert that “common proof” will establish that Facebook
23 “monetizes the content” of messages (Mot. at 1, 21), Plaintiffs do not offer “evidentiary proof” of a
24 classwide damages methodology that is consistent with their liability theory. *Comcast*, 133 S. Ct.

25 ¹³ Plaintiffs’ claims that “any engineer can build a system to add any associations between any
26 objects,” and that “the records that Facebook creates from its users’ private messages, and which are
27 stored indefinitely, have no limitation, and may be put to any use, for any reason, by any Facebook
28 employee, at any point in the future” (Mot. at 19:24–27) are false and ignore the Data Policy and
Statement of Rights and Responsibilities, which govern Facebook’s treatment of user data (Dkt. 29-1,
Exs. A-F), and laws like the Stored Communications Act (18 U.S.C. § 2701), which circumscribes
how companies like Facebook may disclose electronic communications in electronic storage.

1 at 1432–34. In *Daniel F.*, this Court denied class certification and criticized the plaintiff for not
2 “offering any proof that damages can be calculated on a classwide basis” and “suggest[ing] that any
3 inquiry into damages is irrelevant, citing *Leyva v. Medline Indus.*, 716 F.3d 510, 513 (9th Cir. 2013),
4 for the proposition that ‘damages calculations alone cannot defeat certification.’” 305 F.R.D. at 130.¹⁴
5 Plaintiffs cite the same authority and make the same improper argument here (Mot. at 21), and they
6 have not carried their burden of establishing a reliable, classwide damages methodology:

7 First, at best, they assert that “[a] reasonable value to Facebook of the intercepted content **can**
8 **be** assigned on a per URL basis, and **can be** allocated to class members on that basis” (*id.* at 22, citing
9 Torres Report ¶ 60 (emphases added)). Aside from the factual problems with this theory, Plaintiffs
10 must submit a capable model *now*, not later. *Daniel F.*, 305 F.R.D. at 130. They did not do so.

11 Second, Mr. Torres focuses exclusively on alleged “benefits to Facebook” (*id.*), a remedy that
12 is not available under the Wiretap Act or CIPA.¹⁵ For example, in *DirectTV, Inc. v. Huynh*, No. 04-
13 3496-CRB, 2005 WL 5864467 (N.D. Cal. May 31, 2005), *aff’d*, 503 F.3d 847 (9th Cir. 2007), Judge
14 Breyer noted that under the Wiretap Act, “Defendant’s benefit is a poor measure of plaintiff’s actual
15 losses.” *Id.* at *7. Thus, even if “benefits to a defendant” were “an appropriate measure of actual
16 damages, the Court would still be relying on speculation regarding the amount,” which is “not well-
17 supported.” *Id.* This flaw undermines Mr. Torres’s entire report.

18 Third, Plaintiffs’ damages model must “measure only those damages attributable to” their
19 liability theory, *Comcast*, 133 S. Ct. at 1433–34, but Mr. Torres’s first methodology regarding the
20 “Social Graph” (which is just a synonym for a social network) has nothing to do with the practices at
21 issue in this case. Although Mr. Torres devotes a third of his report to this theory (Dkt. 137-8, ¶¶ 35–
22 60), he admitted in his deposition that the value of the Social Graph “is not the amount of damages,”
23

24 ¹⁴ Likewise, in *Astiana*, 2014 WL 60097, at *13, this Court denied certification—even though
25 “plaintiff may have established that common questions predominate with regard to some elements of
26 some of the claims”—because “[m]ore importantly, [plaintiff’s] failure to offer a damages model that
27 is capable of measurement across the entire class for purposes of Rule 23(b)(3) bars her effort to
28 obtain certification of the class.” *See also In re Facebook PPC*, 282 F.R.D. at 459, 461 (same;
analyzing under the superiority prong).

¹⁵ Plaintiffs would be entitled to only three types of monetary relief if they prevailed on their claims:
(1) statutory damages, (2) actual damages, and/or (3) “profits” made by Facebook as a result of the
alleged violation of the Wiretap Act. *See* 18 U.S.C. § 2520(b)–(c); Cal. Penal Code § 632.7(a).

1 and that he has not even calculated alleged damages to the putative class. (App. 1074-76.) He also
2 deferred repeatedly on questions about Facebook functionality to Plaintiffs’ “technical” expert (Dr.
3 Golbeck), who conceded that she was not aware of any evidence that URL attachments went into the
4 Social Graph or were used for “targeted advertising” (*id.* 1215-16).

5 Fourth, even the section of Mr. Torres’s report that is loosely related to Plaintiffs’ claims in
6 this case—alleged incrementing of the social plugin counter—succeeds only in confirming the
7 individualized inquiries that render this case inappropriate for class treatment. For example, Mr.
8 Torres testified that if Coca-Cola’s social plugin counter is at 500,000 and it experiences an increment
9 of 1 or 2, “that is a miniscule less than a 1%” increase, and Coca-Cola “won’t be as influenced or as
10 impressed by the increase” as a company with a smaller count. (*Id.* 1047-48.) His expert report
11 ignores several other individualized issues, including: (1) the economic difference between an
12 individual (i) affirmatively clicking the “Like” button social plugin, and (ii) sending a URL in a
13 message (which at most only may have incremented the counter) (*id.* 2051-53); (2) that “each Like can
14 be leveraged in different ways so it’s valued differently” (*id.* 1078-79); (3) the difficulty in
15 determining whether a URL actually incremented the counter, which according to Mr. Torres would
16 require a sampling of “thousands” of individuals’ messages (*id.* 1083-84); and (4) the different
17 amounts (if any) that each third-party website (or “Marketer”) would be willing to pay to Facebook for
18 advertising (*id.* 2048-51). Nor may Plaintiffs cure these deficiencies. As explained in the expert
19 rebuttal report of Dr. Catherine Tucker of MIT’s Sloan School of Management, Mr. Torres makes no
20 effort to account for people who were unharmed by the alleged practice or who have actually
21 benefitted from it. (App. 3054.)¹⁶

22 **2. Statutory Damages.** Plaintiffs have not even attempted to argue, much less prove, that an
23 award of statutory damages here would meet Rule 23(b)(3) requirements. Nor can they—in deciding
24 whether to award statutory damages under the Wiretap Act, courts consider several factors: “(1) the

25 _____
26 ¹⁶ See, e.g., *Pecover v. EA Inc.*, No. 08-2820 VRW, 2010 WL 8742757, at *9 (N.D. Cal. Dec. 21,
27 2010) (“A class cannot be certified if class members benefit from the same acts alleged [by plaintiffs]
28 to be harmful to other members of the class.”); *Allied Orthopedic Appl., Inc. v. Tyco Health. Grp. LP*,
247 F.R.D. 156, 177 (C.D. Cal. 2007) (“[N]o circuit approves of class certification where some class
members derive a net economic benefit from the very same conduct alleged to be wrongful by the
named representatives of the class, let alone where some *named* plaintiffs derive such a benefit.”).

1 severity or minimal nature of the violation; (2) whether there was actual damage to the victim; (3) the
2 extent of any intrusion into the victim’s privacy; (4) the relative financial burdens of the parties;
3 (5) whether there was a reasonable purpose for the violation; and (6) whether there is any useful
4 purpose to be served by imposing the statutory damages amount.” *Dish Network LLC v. Gonzalez*,
5 No. 13-107, 2013 WL 2991040, at *8 (E.D. Cal. June 14, 2013), *rec. adopted by*, 2013 WL 4515967
6 (E.D. Cal. Aug. 26, 2013). Each of these factors turns on individualized issues: (a) Plaintiffs testified
7 that they have not suffered financial harm and many of the putative class members benefited from
8 Facebook (App. 381-85, 4 15,482, 524, 1378-1380, 1414-18); (b) “the extent of any [alleged]
9 intrusion” will vary dramatically based on the number of Facebook messages each putative class
10 member sent or received with URL attachments (*compare* App. 575-688 (809 Facebook messages
11 sent or received by Plaintiff Campbell containing URLs) *with id.* 707-08 (17 messages for Plaintiff
12 Hurley)); (c) the use of global share objects and share objects to generate and store URL previews is
13 beneficial, for the reasons noted above (*supra* p. 7); and (d) whether “any useful purpose [would] be
14 served by imposing the statutory damages amount” will vary from message-to-message (*see*
15 App. 2016-28 (explaining that many putative class members were unaffected and others benefited
16 from the alleged practices)).

17 Moreover, permitting a class action where the aggregated statutory damages would result in an
18 excessive and disproportionate penalty (as it certainly would here, where no one was harmed), would
19 raise due process concerns. *See Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 235 (9th Cir. 1974);
20 *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003) (due process requires that a
21 punitive award “have a nexus to the specific harm suffered by the plaintiff”); *see also Fraley v.*
22 *Facebook, Inc.*, No. 14-15595, 2016 U.S. App. LEXIS 518, at *5 (9th Cir. Jan. 6, 2016) (noting that
23 statutory penalty of \$750 per class member “could implicate due process concerns”); *but see Bateman*
24 *v. AMC, Inc.*, 623 F.3d 708, 711 (9th Cir. 2010).¹⁷

25 _____
26 ¹⁷ *See also Serna v. Big A Drug Stores, Inc.*, No. 07-276, 2007 WL 7665762, at *5–6 (C.D. Cal.
27 Oct. 9, 2007) (distinguishing *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948 (7th Cir. 2006) (cited in
28 Mot. at 21–22), on the ground that its approach of deferring constitutional impediments improperly
creates exorbitant settlement pressures on the defendant); *see also Shady Grove Orthopedic Assocs.,*
P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1465 n.3 (2010) (“[A] court’s decision to certify a class ...
places pressure on the defendant to settle even unmeritorious claims.”) (Ginsburg, J., dissenting).

1 **3. The Court Should Exclude Mr. Torres’s Expert Opinion.** Pursuant to Local Rule 7-3(a),
2 the Court should strike Mr. Torres’s report for several reasons. *See* Fed. R. Evid. 702; *Daubert v.*
3 *Merrell Dow Pharms. Inc.*, 509 U.S. 579 (1993).

4 First, his entire methodology should be excluded as incomplete. *Supra* p. 24; *see, e.g.*,
5 *Building Ind. Ass’n of Wash. v. WSBC*, 683 F.3d 1144, 1154 (9th Cir. 2012) (excluding incomplete
6 damages report); *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 552–53 (C.D. Cal. 2014) (same).¹⁸

7 Second, Mr. Torres’s proposed methodology improperly focuses on alleged “benefits to
8 Facebook” (App. 1035-36, 1042, 1080), which is not an available remedy under the Wiretap Act or
9 CIPA. This is not the first time Mr. Torres offered a legally unsupported and improper damages
10 model. *See, e.g., Hebrew Univ. of Jerusalem v. GM*, No. 10-03790, 2012 WL 12507522, at *5–6
11 (C.D. Cal. May 31, 2012) (striking Mr. Torres’s expert opinion as unreliable and lacking academic
12 support).

13 Third, Mr. Torres’s flawed methodology also purports to address many practices that are not
14 challenged in the complaint, such as the “Social Graph” (Dkt. 137-8, ¶¶ 35–60), and once again, his
15 opinions have been called into question on this basis. *In re Google, Inc. Privacy Policy Litig.*, No. 12-
16 001382-PSG, 2015 WL 4317479, at *5 (N.D. Cal. July 15, 2015) (“There is just one problem with
17 Torres’s various conclusions: they are not reflected anywhere in the [operative complaint].”).

18 Fourth, Mr. Torres’s exclusion of research and development costs from his damages model is
19 inconsistent with generally accepted valuation standards, and inflates his damages number by several
20 billion dollars. (App. 2044-47.) His methods also are unreliable under Rule 702(d), judging by the
21 **\$1.2 billion** math error in his report. (*Id.* 1051-64, 2044-45.)

22 _____
23 ¹⁸ To complete his analysis, Mr. Torres testified that he needs data that Plaintiffs have not requested
24 in discovery (App. 9-11, 1029, 1066)—even though they successfully moved to compel very broad
25 discovery on the basis that it was “critical to establishing” their damages theory, and that “expert
26 analysis of the [] information sought” would allow them to “accurately model the profits attributable to
27 the challenged conduct.” (Dkt. 112; Dkt. 130 at 12–13 (crediting these claims in granting “broader
28 discovery to be able to establish a model or methodology for class-wide relief”.) But their expert now
needs *different* information to complete his work. This Court should not entertain such a belated
request. *See, e.g., In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 506 (N.D. Cal.
2008) (“After eight months of discovery, plaintiffs should have the data to formulate their regression
analyses with more precision,” and they “should be able to provide more than promises at this late
stage of the litigation”).

1 **VIII. PLAINTIFFS CANNOT CERTIFY AN ALTERNATE RULE 23(b)(2) CLASS**

2 Plaintiffs’ alternative request for a Rule 23(b)(2) class for injunctive relief, which they relegate
3 to a lone paragraph at the end of their brief (Mot. at 24:10–25), also fails for several reasons.

4 **A. Injunctive Relief Would Not Impact All Class Members The Same Way**

5 Rule 23(b)(2) certification is permitted only if there is an “indivisible” class and a “single
6 injunction or declaratory judgment would provide relief to each member of the class.” *Dukes*, 131
7 S. Ct. at 2557. Indeed, “[t]he key to the (b)(2) class is ‘the indivisible nature of the injunctive or
8 declaratory remedy warranted—the notion that the conduct is *such that it can be enjoined or declared*
9 *unlawful only as to all of the class members or as to none of them.*” *Id.* (emphasis added; quotation
10 omitted). That is not the case here, where individual proof will show that many putative class
11 members *impliedly consented* to the challenged practices. (*Supra* pp. 19–22.) A practice to which
12 some percentage of putative class members consented, and to which some unknown percentage of
13 putative class members allegedly did not consent cannot be enjoined or declared unlawful “as to all of
14 the class members or as to none of them.” *Dukes*, 131 S. Ct. at 2557 (“In other words, Rule 23(b)(2)
15 applies only when a single injunction or declaratory judgment would provide relief to each member of
16 the class. It does not authorize class certification when each individual class member would be
17 entitled to a *different* injunction or declaratory judgment against the defendant.”).

18 Moreover, where “it isn’t clear that all members of the class feel the same way” about a
19 proposed injunction, “[s]uch injunctive relief for all class members, without notice and the right to opt-
20 out, would raise due process concerns.” *Schulken v. Wash. Mut. Bank*, No. 09-02708-LHK, 2012 WL
21 28099, at *6 (N.D. Cal. Jan. 5, 2012). There is little doubt that many members of the proposed class
22 here welcome the routine practices challenged here. By way of example, after *The Wall Street Journal*
23 blog post, one author wrote that Facebook’s practices were not a “privacy invasion” and that “[t]here
24 is no reason for anyone to be upset about Facebook doing this.” (*Id.* 180-84.) The author observed
25 that “e-mail providers like Gmail scan user e-mails all the time ... to show relevant ads, fight spam,
26 and slow down viruses,” and “services across the Internet use whatever method they can to keep track
27 of the popularity of Webpages. Google has a list of trends. *The New York Times* keeps track of the
28 most e-mailed stories.” (*Id.* 182-83.) “The truth is, there is nothing to see here. Move along.” (*Id.*)

1 Underscoring the point further, the named Plaintiffs and putative class members deposed in
2 this case themselves disagreed about the appropriate scope of message “scanning” (App. 17):

- 3 • **Campbell** offered an extreme (and patently unreasonable) view, objecting to
4 “scanning” or “processing” for “any purpose”—including purposes such as protecting
5 against malware, viruses and spam, filtering messages, detecting criminal conduct and
6 child exploitation images, and rendering URL previews. (*Id.* 403-09.)
- 7 • **Hurley** also objected to any kind of “scanning” of a message that is not “necessary” to
8 send the message, but he admitted that he does not actually know what is necessary to
9 send a Facebook message. He also admitted that he did not know whether other
10 individuals objected to the conduct he was challenging, and he admitted that he could
11 not speak to other putative class members’ expectations. (*Id.* 497-98.)
- 12 • ██████ objected to processing messages to increment the social plugin count and to serve
13 targeted advertising, but whether he objected to “processing” to detect criminal conduct
14 “depends” on the circumstances. He does not object to “processing” deliver, filter, or
15 store messages; to block malware, spam, and illegal pornography; to detect sexual
16 predators, enable keyword searching, or render URL previews. (*Id.* 1382-88.)
- 17 • Whether ██████ objected would depend on the specific means by which
18 Facebook “processed” messages, but he objected to the use of “computer code” to do
19 anything other than deliver messages to the intended recipients. (*Id.* 1425-28.)
- 20 • ██████ has no knowledge, belief, or understanding of any “processes” that Facebook
21 undertakes and did not have enough information to form an opinion. (*Id.* 1358-60.)

22 This is only a few opinions from putative class members, but it confirms that a “single injunction”
23 would not impact the class the same way. *Schulken*, 2012 WL 28099, at *6.

24 **B. The Primary Relief Sought By Plaintiffs Is Monetary Relief, Not Injunctive Relief**

25 “Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is
26 declaratory or injunctive.” *Zinser v. Accufix Res. Inst., Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2001);
27 *Moeller v. Taco Bell Corp.*, No. 02-5849 PJH, 2012 WL 3070863, at *4 (N.D. Cal. July 26, 2012)
28 (same); *see also Dukes*, 131 S. Ct. at 2557 (Rule 23(b)(2) “does not authorize class certification when
each class member would be entitled to an individualized award of monetary damages.”). Here,
Plaintiffs seek a massive damages award, rendering Rule 23(b)(2) treatment inappropriate.

Further, when plaintiffs seek both damages and injunctive relief—as here, but unlike in *Yahoo*
(Mot. at 24)—certification under Rule 23(b)(2) is improper unless plaintiffs demonstrate that “[they]
would have brought suit to obtain the injunctive relief they seek *even if they could not obtain a money*
recovery.” *Kavu v. Omnipak Corp.*, 246 F.R.D. 642, 649 (W.D. Wash. 2007) (emphasis added).¹⁹

¹⁹ *See also Connelly v. Hilton Grand Vacations Co.*, 294 F.R.D. 574, 579 (S.D. Cal. 2013) (because
[Footnote continued on next page]

1 Actions speak louder than words, and by continuing to send Facebook messages containing URLs
2 (App. 386-87), **Campbell** has made clear that he has no interest in injunctive relief.²⁰ By contrast,
3 **Hurley** testified that he would be unlikely to send Facebook messages in the future (App. 450),
4 illustrating that a plaintiff-by-plaintiff inquiry would be necessary, and that certification of a (b)(2)
5 class would be inappropriate here. Mr. Hurley’s testimony that he likely would not send Facebook
6 messages in the future also calls into question his standing under Article III to seek injunctive relief,
7 *see, e.g., O’Shea v. Littleton*, 414 U.S. 488, 495–96 (1974), creating another individualized inquiry.²¹

8 IX. CONCLUSION

9 Plaintiffs cannot certify a class in this action because there is significant variability surrounding
10 the challenged practices and Plaintiffs’ (and putative class members’) experiences with these practices,
11 and Plaintiffs have failed to carry their evidentiary burden to establish any of the Rule 23
12 requirements. Facebook respectfully requests that the Court deny Plaintiffs’ Motion.

13 Dated: January 15, 2016

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

15 By: _____ /s/
Christopher Chorba

16 Attorneys for Defendant FACEBOOK, INC.

17
18
19 [Footnote continued from previous page]

20 “each plaintiff is independently entitled to statutory damages ... Plaintiffs’ TCPA claims are ineligible
21 for Rule 23(b)(2) certification, regardless of Plaintiffs’ parallel request for injunctive relief.”) (citing
22 *Dukes*, 131 S. Ct. at 2557); *Ries v. Arizona Bevs. USA LLC*, 287 F.R.D. 523, 541 (N.D. Cal. 2012)
23 (“[A]lthough the monetary amount sought may be small per class member, in the aggregate they can
24 hardly be said to be incidental to the injunctive relief sought.”); *Mahfood v. QVC, Inc.*, No. 06-0659,
25 2008 WL 5381088, at *3–4 (C.D. Cal. Sept. 22, 2008) (same).

26 ²⁰ *See, e.g., Algarin v. Maybelline, LLC*, 300 F.R.D. 444, 459–60 (S.D. Cal. 2014) (requested
27 monetary relief was “not ‘incidental’” and plaintiffs “cannot possibly benefit from injunctive relief as
28 they are now (or at least should be) fully knowledgeable” of the challenged practice; thus, “monetary
relief is necessarily their ‘primary concern’”); *Gonzales v. Comcast Corp.*, No. 10-1010, 2012 WL
10621, at *17 (E.D. Cal. Jan. 3, 2012) (rejecting Rule 23(b)(2) certification because former customers
“have no interest in the requested injunctive relief” and therefore “[t]he monetary claims are [] the
only claims at issue” for them, and because “individual class members’ damages would differ from
one another” and “will necessarily require ‘individualized determinations’”), *rec. adopted by* 2012
U.S. Dist. LEXIS 7271 (E.D. Cal. Jan. 23, 2012).

²¹ Facebook also reserves its rights pursuant to *Robins v. Spokeo, Inc., cert granted*, 135 S. Ct. 1892
(2015), and *Bouaphakeo v. Tyson Foods Inc., cert granted*, 135 S. Ct. 2806 (2015).