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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MATTHEW CAMPBELL and MICHAEL HURLEY, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

FACEBOOK, INC.,

Defendant.

Case No. C 13-05996 PJH

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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

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I. INTRODUCTION

Plaintiffs trust that the Court will not be fooled by Facebook's latest misdirection which opens its Opposition, falsely claiming that this litigation concerns nothing more than displaying previews of URLs within Private Messages. The record incontrovertibly puts at issue Facebook's systematic capturing and cataloging of the content of its users' Private Messages, and redirecting and repurposing that content through a host of undisclosed, privacy-invasive practices. That Facebook's practices are an exploitation, and *not* a natural extension, of its provision of electronic communication services, is evident from the very nature of those practices which Facebook does not deny, including mining the content to provide "recommendations" to Facebook users; providing analytics to third-party websites and developers; and broadcasting the content via plugin counters on third-party websites.

Facebook trivializes these privacy invasions, comparing itself to the *New York Times* compiling a bestseller list, or *Billboard* charting the top 100 hits. The comparisons are wholly inapt because neither the *Times* nor *Billboard* gather the identities of purchasers, nor secretly obtain the information from communications which it holds out to be "private." By prominently highlighting this ill-fitting analogy, Facebook betrays its fundamental disregard for the importance of not only the legal strictures of ECPA and CIPA, but the long-established common law heritage embodied in those statutes which recognizes the vital importance of privacy to our democratic values. ECPA and CIPA ensure that this guarantee of privacy extends to electronic communications, as they become the dominant medium of the 21st Century. Yet without obtaining consent—and taking pains to hide its actions from public view to this day—Facebook has engineered its system architecture to intercept and catalog the URLs people are discussing and sharing with each other in communications that *Facebook* itself represents as being "private." Facebook then utilizes these data for the current and future objective of accumulating, analyzing and refining user data and enhancing its targeted advertising efforts. CAC ¶ 31. Facebook's interception of Private Message content breaches the barrier traditionally respected by common carriers in the context of postal mail and telephone calls.

Facebook's attempts to disregard—and consign to the past—ECPA's and CIPA's legal limits cannot distract from the core, common concern of this litigation: Facebook structured its system to

capture content of Private Messages, to use that information for its own, undisclosed purposes, and to store that information in perpetuity. This privacy intrusion is common to a class of users ascertainable from Facebook's data. It was effectuated by a uniform functionality engineered by Facebook to generate and detect URL attachments and create and log the corresponding data. The predominant questions of liability and the appropriate remedies—statutory damages and equitable and injunctive relief—are suitable for class treatment under Rule 23(b)(3) or alternatively Rule 23(b)(2).

II. ARGUMENT

A. Plaintiffs and their Counsel are Adequate Under Federal Rule 23(a)(4)

Matthew Campbell and Michael Hurley are exemplary representative plaintiffs. They are completely fulfilling their duties as class representatives. They remain informed of developments in the litigation, communicate with counsel, review pleadings prior to filing, and timely respond to discovery.[1] They are fairly and adequately protecting the interests of the class. Facebook's challenges to their adequacy are baseless.

In a case centered on Facebook's internal, surreptitious processing of information which no class member would have any reason to suspect, Plaintiffs learning of their claims from counsel is unsurprising and entirely proper. "[T]hat is simply the nature of a claim of this type." *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 111 (N.D. Cal. 2008) (finding adequacy where plaintiffs learned of claims from law firm advertisement; noting, "[t]he average person would have no reason to [know of his claims] particularly when a substantial part of the allegations involve the concealment of material information."). Moreover, far from being "recruited," Campbell and Hurley affirmatively volunteered to serve as class representatives.[2] Therefore, Facebook's accusation that this is a "lawyer-driven" case is baseless.

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[1] Ex. 2 (Campbell Dep. 17:3-7; 77:3-16; 128:8-22; 132:17-22; 139:3-23); Ex. 3 (Hurley Dep. 65:18-66:1; 70:19-72:5; 77:19-80:2; 84:8-85:9). Unless otherwise noted, all cited Exhibits are to the Declaration of David Slade ("Slade Decl.").

[2] Dkt. 158-161; 163 (Facebook Appendix of Evidence, ("App.")), at 5:6-7; 485-86. Furthermore, "[t]here is nothing inherently improper with the recruitment of class representatives." *See Guido v. L'Oreal, USA, Inc.*, No. 11-1067, 2013 WL 3353857, at *8 (C.D. Cal. July 1, 2013) (citing Manual for Complex Litigation (Fourth) § 21.26); *Gutierrez v. Wells Fargo Bank, N.A.*, No. 7-5923, 2008 WL 4279550, at *18 (N.D. Cal. Sept. 11, 2008) (Alsup, J.) (plaintiff solicited through

Facebook incorrectly asserts that Plaintiffs have unduly deferred to counsel. In fulfilling their duties as class representatives, Plaintiffs hired competent counsel to prosecute this case. *See Stuart v. Radioshack Corp.*, No. 7-4499, 2009 WL 281941, at *10 (N.D. Cal. Feb. 5, 2009).[3] Adequacy does not require that Plaintiffs participate in "legal strategy" or draft discovery requests. Nor do Plaintiffs' prior relationships with associates in the offices of the firms proposed as class counsel undermine their independence. *But see Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir. 2003) ("[T]his circuit does not favor denial of class certification on the basis of speculative conflicts"); *In re Online DVD Rental Antitrust Litig.*, No. 9-2029, 2010 WL 5396064, at *4 (N.D. Cal. Dec. 23, 2010), *aff'd*, 779 F.3d 934 (9th Cir. 2015) (same); *Banks v. Nissan N. Am., Inc.*, 301 F.R.D. 327, 334 (N.D. Cal. 2013) (rejecting "purely speculative" argument that plaintiff was inadequate). Plaintiffs' independence is particularly exemplified by Mr. Campbell, who, in addition to being a lawyer himself, is an accomplished investigative journalist who has broken stories leading to the resignation or termination of Arkansas's Lieutenant Governor, a district judge, and the superintendent of the Little Rock School District.[4]

Facebook's speculation finds no support in the law. "While some courts have expressed reservations about the adequacy of a proposed class representative when he or she is a close family member of an attorney representing the class . . . they have not expressed similar concerns when proposed class representatives are merely friends or acquaintances of the class members' attorney." *Poulos v. Caesars World, Inc.*, No. 94-1126, 2002 WL 1991180, at *6 n.9 (D. Nev. June 25, 2002) *aff'd in part*, 379 F.3d 654 (9th Cir. 2004). Moreover, "courts routinely observe [that] a named plaintiff will not be disqualified simply because of a close or familial relationship

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radio advertisement adequate); *Zhu v. UCBH Holdings, Inc.*, 682 F. Supp. 2d 1049, 1054-55 (N.D. Cal. 2010) (White, J.) (plaintiff solicited through press releases adequate), *Edwards v. First Am. Corp.*, 289 F.R.D. 296, 302-03 (C.D. Cal. 2012) (plaintiff solicited by counsel who came to her house and knocked on her door adequate).

[3] *See also Astiana v. Ben & Jerry's Homemade, Inc.*, No. 10-4387, 2014 WL 60097, at *8 (N.D. Cal. Jan. 7, 2014) ("The plaintiff's burden of showing adequacy is fairly minimal."); *Lee v. Pep Boys-Manny Moe & Jack of Cal.*, No. 12-5064, 2015 WL 9480475, at *10 (N.D. Cal. Dec. 23, 2015) ("a party . . . will be deemed inadequate only if [he or] she is 'startlingly unfamiliar' with the case."); *L'Oreal, USA*, 2013 WL 3353857, at *7-8 ("A representative plaintiff's lack of detailed, comprehensive knowledge about the legal technicalities of the claims asserted in class litigation . . . provides no basis on which to deny a motion for class certification.").

[4] *See, e.g.*, Exs. 4 & 5.

with one of the attorneys representing the class." *In re TFT-LCD Antitrust Litig.*, 267 F.R.D. 583, 594-95 (N.D. Cal. 2010); *In re Static Random Access Memory Antitrust Litig.*, 264 F.R.D. 603, 609 (N.D. Cal. 2009) ("[d]efendants have not shown how . . . these relationships have manifested a conflict nor have they provided legal authority . . . that these relationships establish conflicts").

Facebook cites three out-of-District cases which concerned manifest evidence—not present here—of an actual conflict or inadequate diligence, distinct from a mere friendship between the plaintiff and one of the counsel. *See London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 (11th Cir. 2003) (counsel had deposited a large sum with the plaintiff (his friend and stock broker) following resolution of a lawsuit similar to the one for which plaintiff proposed to represent the class); *Bohn v. Pharmavite, LLC*, No. 11-10430, 2013 WL 4517895, at *3 (C.D. Cal. Aug. 7, 2013) (plaintiff was inadequate, in part, because her deposition testimony and lack of diligence "raise[d] serious questions about her interest and commitment to protecting the interest of the classes")*; Moheb v. Nutramax Labs. Inc.*, No. 12-3633, 2012 WL 6951904, at *5 (C.D. Cal. Sept. 4, 2012) (conflating adequacy and typicality inquiries, holding that plaintiff was inadequate, in part, because her claims and injuries were not typical).[5] Likewise, Facebook cites *Bodner v. Oreck Direct, LLC*, where plaintiff displayed "undeniable and overwhelming ignorance regarding the nature of [the] action, the facts alleged, and the theories of relief." No. 6-4756, 2007 WL 1223777, at *2 (N.D. Cal. Apr. 25, 2007) (noting also that the same counsel and plaintiff had been the subject of controversy in a past case). *See Trosper v. Stryker Corp.*, No. 13-607, 2014 WL 4145448, at *13-14 (N.D. Cal. Aug. 21, 2014) (finding defendant's reliance on *Bodner* "unpersuasive" given "lack of any allegations or showing of impropriety concerning class counsel").

[5] Facebook's other citations each found plaintiffs inadequate on grounds with no analog here. *See In re Facebook, Inc., PPC Advert. Litig.*, 282 F.R.D. 446, 454 (N.D. Cal. 2012) (plaintiff who knew "essentially nothing about the case" inadequate); *Sanchez v. Wal-Mart Stores, Inc.*, No. 6-2573, 2009 WL 1514435, at *3 (E.D. Cal. May 28, 2009) (plaintiff who made claim-splitting decision that "create[d] a conflict" with the class inadequate); *Welling v. Alexy*, 155 F.R.D. 654, 659 (N.D. Cal. 1994) (plaintiff with "demonstrated level of disinterest in [the] lawsuit [and] vast experience as a . . . class action plaintiff render[ing] him subject to unique defenses" inadequate).

Next, Facebook presents misleading excerpts of the deposition testimony of a former plaintiff dismissed from the case, David Shadpour, to suggest improprieties of proposed class counsel. Mr. Shadpour filed a copycat complaint through not the proposed class counsel, but other counsel which no longer seeks appointment to represent the class. To the extent that Mr. Shadpour may not have been keeping up with his duties as a class representative (such as, failing to review the complaint or the major pleadings, which were timely provided to his counsel), (Supp. Gardner Decl. ¶¶ 5-13), it does not impugn the class representatives or class counsel proposed here. Indeed, immediately upon learning, in late May 2015, that Shadpour was concerned about his representation, LCHB sent pleadings directly to Shadpour's personal email address in addition to his counsel for pre-filing review. *Id.* ¶ 12. Further, when LCHB and CBP found out in March of 2015 that Mr. Shadpour wanted to withdraw from the case, they promptly took steps to effectuate such withdrawal (*id.* ¶¶ 6-10), including by litigating his right to leave the case without a deposition for which he was unwilling to sit.[6] If Mr. Shadpour told his counsel, Lesley Portnoy, that he wished to withdraw his claims prior to March of 2015, proposed Class Counsel were unaware. *Id.* ¶ 6. Accordingly, Facebook's misleading attempt to tar proposed class counsel with questions concerning the adequacy of Mr. Shadpour and his lawyers (Pomerantz LLP, Tostrud Law Group, and Glancy Prongay & Murray LLP), who have not been proposed to serve the class, should be rejected outright.

B. <u>The Class Is Ascertainable through Facebook's Databases</u>

As explained in the opening and rebuttal reports of Dr. Golbeck, the class members can be readily ascertained for the purposes of Rule 23(b)(3) through Facebook's own database records—a fact that, despite nitpicking the particular code example Dr. Golbeck provides, Facebook never denies. When a Private Message is sent with a URL attachment, Facebook source code automatically creates an object called an "EntShare" which references the Private Message's URL. Each EntShare has its own unique numeric identifier ("ID") and has coded with it the Facebook user ID of the sender.[7] Once a Private Message is sent, Facebook stores data related to

[6] Ex. 6 (Shadpour Dep. 67:4-69:8); *See also* Dkt. 89, 94, 96, 105.
[7] Dkt. 138 (Plaintiffs' Motion for Class Certification), at 4:15-22.

it in the Private Message database, referred to as "Titan." The Titan database contains all the information needed to identify the members of the class. As shown in Exhibit 7, the "Titan info" includes: (a) the date and time the message was sent (highlighted in yellow); (b) the sender's user ID (green); (c) the recipient's user ID (blue); and (d) the EntShare ID (red) denoting the message contained a URL attachment.[8] A relatively straightforward query can retrieve these data points from Titan and thus identify all class members—that is, all Facebook users who sent or received a Private Message with a URL attachment during the Class Period.[9]

Facebook's contention that Dr. Golbeck's method of identifying class members is both over- and under-inclusive is simply a reframing of its meritless "variabilities" argument addressed in the following section. The simple fact is that Facebook stores all Private Messages in an easily-retrievable and queryable format—as evidenced by the fact that Facebook users can quickly retrieve their Private Messages at any time from Titan—and code can be written to retrieve the information necessary to identify the class members.[10] There are no "barriers" to readily ascertaining the class.

C. Facebook's Manufactured "Variabilities" Are Irrelevant to Resolving the Material Legal and Factual Issues Through Common Proof

The commonality requirement of Rule 23(a) is "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation," and commonality fails only where there are "*[d]issimilarities within the proposed class* [that] impede the generation of common answers." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quotation omitted) (emphasis added). The predominance inquiry, while more rigorous and only relevant to the Rule 23(b)(3) inquiry, still revolves around common issues, requiring that "common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998) (citation

[8] Ex. 1 (Golbeck Rebuttal Rpt.), at ¶¶ 8-10; Ex. 7 (example of Titan database record).
[9] Golbeck Rpt., at ¶¶ 98-106; Ex. 1 (Rebuttal Rpt.), at ¶¶ 8-10.
[10] Facebook maintains geographic data on all users, and that data can likewise be used to identify which Facebook users reside within the United States. Ex. 1 (Rebuttal Rpt.), at ¶ 17.i.

omitted). Facebook's arguments regarding purported "variabilities" or "individualized issues" fail to defeat a finding of commonality and predominance here.

As a threshold matter, Facebook does not dispute that the core functionality used to intercept Private Message content—the code used to detect the presence of a URL attachment and create and store EntShares cataloging that content—was the same throughout the class period.[11] Contrary to Facebook's assertion, the technical refinement of the class definition to specify the inclusion of the URL attachment within the Private Message simply reflects a full understanding of the message transmission functionality, derived from the detailed source code review. This refinement allows for both precision in the class definition and ascertainment of the members. Indeed, it is this specification of the URL attachment that nullifies all of the "variability" arguments Facebook repeats throughout its Opposition brief. Accordingly, each class member was subjected to uniform conduct because when each class member sent or received a Private Message containing a URL attachment, such message was subject to the same interception of content. A determination of whether such conduct violates ECPA and CIPA will be decided uniformly as to all class members.

Facebook's irrelevant parade of "variabilities" fall into two, broad categories: (1) variables that simply determine that a user falls *outside* the class, and (2) variabilities in Facebook's *post-interception* use of the redirected and stored message content.

First, Facebook lists a variety of situations in which a user could send a Private Message that does not include a URL attachment (thus precluding Facebook from generating and logging an EntShare during the message's transmission). These "variabilities" are simply instances where the user would *not* qualify for membership in the class and would *not* be included in Dr. Golbeck's method of ascertaining class members: (1) a user could have sent a private message without a URL; (2) a user could send a Private Message via Facebook's mobile application, which does not render a URL attachment; (3) a Private Message could be sent before a URL attachment was generated; (4) a user could delete the URL attachment before sending the Private

[11] Golbeck Rpt., at ¶¶ 32-55, 107, 116-118; *see also,* App. at 1606-1692 (Jun. 1, 2015 Decl. of Alex Himel).

Message; (5) a user could send a Private Message in a JavaScript-disabled browser and therefore never even had the option to include a URL attachment; and (6) Facebook could have "blocked" the message from being sent, or the URL attachment from being generated, as an anti-spam or site-integrity measure.[12] These are not "dissimilarities" *within* the proposed class; they are simply examples of instances that fall *outside* the class definition—instances where a user did not send or receive a Private Message with a URL attachment. As such, these variables are irrelevant to the issues to be determined *within* the class.[13]

Second, Facebook lists several post-interception uses of Private Message content, asserting that each use creates a separate path to liability. Plaintiffs do allege that Facebook used and warehoused the unlawfully obtained Private Message content in several ways, as such demonstrates that the interception was both for purposes other than transmission of the message and outside the ordinary course of Facebook's business.[14] These uses also show how Facebook unjustly enriched itself in multiple ways. However, proof of Facebook's use outside the course of ordinary business is common to all class members because, as Plaintiffs' analysis of Facebook's source code shows, Facebook made at least one of those uses—creating and logging EntShares—with respect to all the Private Messages sent which would qualify users for class membership. *See,* Golbeck Rpt., at ¶¶ 32-42 (detailing the code used to create EntShares from Private Message content); *Id*. at ¶¶ 98-105 (illustrating a methodology for identifying class members based upon user-specific data contained in EntShares); Ex. 1, (Golbeck Rebuttal Rpt.) at ¶¶ 8-12 (illustrating a methodology to confirm, through Titan records, whether or not an EntShare was created with regard to the transmission of any Private Message exchanged between any Facebook users). That there are a host of other illicit purposes to which Facebook may put the data, in perpetuity, is immaterial to liability but evinces Facebook's unjust enrichment. If anything, Facebook's

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[12] Opp. at 11:11-28, 12:1-4; 17:12-13; 18:12-16; 22:13-17; 23:14-17.

[13] Facebook also misconstrues the class definition with its hypothetical where a user types or inserts a URL and then once the URL Attachment is generated and visible within the message deletes the URL text that prompted its inclusion. The class definition does not require that the URL be included in the Private Message twice as both (a) the original text that prompts the creation of the URL attachment and (b) the URL attachment. Once is enough.

[14] *See, e.g.*, Dkt. 29 (Motion to Dismiss), at 14-15.

reference to these many uses highlights the significance of its underlying interception by creating and logging EntShares, as once created (in violation of ECPA and CIPA), these data structures can be used in a panoply of ways that change over time and that users cannot expect. While the scope of Facebook's exploitation of message content is immaterial to commonality and predominance, it underscores the significance of the privacy intrusion and the importance of the injunctive relief sought by Plaintiffs.

In addition, none of the cases Facebook cites support its proposition that the URL's included within Private Messages may not constitute "content." In *In re Zynga Privacy Litig*., 750 F.3d 1098, 1105 (9th Cir. 2014), the Ninth Circuit addressed the question of whether "HTTP referer information" (metadata about a particular web request) constituted the contents of a communication, and held that it does not. Specifically, the court drew a distinction between the "contents" of a communication and "record information" related to that communication, such as who sent the communication or where it was sent from, holding "the term 'contents' refers to the intended message conveyed by the communication, and does not include record information regarding the characteristics of the message that is generated in the course of the communication". *Id.*, at 1106-107. Facebook does not—and cannot— argue that URLs sent by users *within* their Private Messages constitute "record information" as opposed to the "intended message" of the communication, and thus *Zynga* is inapposite, as are its progeny cited by Facebook. *See In re Facebook Internet Tracking Litig*., No. 12-2314, 2015 WL 6438744, at *9 (N.D. Cal. Oct. 23, 2015) (no ECPA claim where plaintiffs alleged interception of "cookies [which] contain only a Facebook user's unique identification information and a record of browsing history" as opposed to the contents of a communication); *In re Nickelodeon Consumer Privacy Litig*., No. 12-7829, 2014 WL 3012873, at *1, *15 (D.N.J. July 2, 2014) (no interception of contents of communication where defendants collected cookies linking IP addresses to videos and webpages viewed). Finally, Facebook illogically claims Plaintiffs did not redact the URLs from Private Messages produced in discovery because "they do not view the URLs as 'content,'" (Opp. Br., at 23), while knowing full well Plaintiffs disclosed this private content only for the purposes of furthering discovery and pursuant to the privacy safeguard of the Protective Order.

D. Facebook's Affirmative Defense of Implied Consent Does Not Defeat Predominance

In the context of ECPA, "[c]ourts have cautioned that implied consent applies only in a narrow set of cases [and] should not be 'cavalierly implied.'" *In re Google Inc. Gmail Litig.*, No. 13-2430, 2013 WL 5423918, at *12 (N.D. Cal. Sept. 26, 2013) (quoting *Watkins v. L.M. Berry & Co*., 704 F.2d 577, 581 (11th Cir. 1983)). Facebook has deposed each named Plaintiff, as well as three putative class members it hand-picked, and has yet to uncover *any* evidence of actual notice of—and thus implied consent to—any of the practices identified and challenged by Plaintiffs. Indeed, Facebook's brief declines to *mention*, let alone *address*, implied consent to the overwhelming majority of interceptions identified by Plaintiffs: Taste, the Recommendations Plugin, the Activity Feed, the Insights product, or Facebook APIs. As to the one interception Facebook does take on (redirecting URL content to increase Like counts) Facebook's discursive arguments *still* do not identify a *single* class member who impliedly consented, nor do they provide evidence reasonably sufficient to imply consent.

1. Facebook's Interception and Use of Private Message Content Extends Beyond Inflating Like Counts

Critically, Facebook does not argue that *a single* user was put on notice to any additional interceptions or uses of Private Message content identified by Plaintiffs through discovery. The full extent of Facebook's scanning practices is still unknown.[15] Its own declarant concedes that identifying *every* use of message content "would require consulting with engineers in every group who have worked on every past or present product or feature at Facebook."[16] Although Facebook admits that its redirection of intercepted message content is limitless, it points to no circumstances that could inform its users as much, and therefore it offers no basis to imply consent. Thus Facebook can only mention, but not distinguish the instant ligation from, *Ades v. Omni Hotels*

[15] This point is underscored by Facebook's counsel's statements at the October 1, 2015 hearing for the Motion to Dismiss. Despite being asked multiple times by this Court about what scanning, beyond endeavoring to inflate Like counts, Facebook engaged in, counsel only pointed to examples of scanning for spam, or otherwise maintaining site integrity. Dkt. 45, at 5:10-9:16; 24:19-27:23.

[16] Dkt. 125, Ex. A (Decl. of Dale Harrison), at ¶ 19.

Mgmt. Corp., a case squarely on point, finding that issues of implied consent did not defeat predominance where "[d]espite extensive discovery, [the defendant] has not produced evidence that a single person meeting the class definition actually consented" to the plaintiff's alleged violations of CIPA. No. 13-02468, 2014 WL 4627271, at *12 (C.D. Cal. Sept. 8, 2014).

2. Facebook Fails to Point to Sufficient Evidence from which Consent to Interceptions for Inflating Like Counts Could Be Implied

Facebook trumpets the supposed existence of "*various* [Facebook] sources," from which users could have learned of the incrementing of Like counts, but it actually cites only *one* Facebook document: a developer guidance on Facebook's website from mid-2011 until December, 2012.[17] Directed to web developers as an overview of how to encode a Like button on a third-party website, it appears *nowhere* in Facebook's Statement of Rights and Responsibilities or its Data Use Policy directed at its users.[18] The reference itself is obscure,[19] as even Facebook employees concede: "Whether it is written in the small print of the platform or not, *the understanding of 99.9% of people* is that like is an explicit action. . . . I fear that we will get dashed against the rocks in Europe for this."[20]

Facebook similarly overstates the significance of the brief coverage that its practice of increasing the Like counter received. A review of Exhibit E to Facebook's brief reveals that, of

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[17] Opp. Br., at 20:1-4

[18] *See, e.g.*, App. 139 (FB000000163).

[19] Only at the bottom, at the end of an FAQ section, Facebook stated that the number of "Likes" for a given social plugin included, inter alia, "the number of inbox messages containing this URL as an attachment." App. 139 (FB000000163). The developer guidance says nothing about Facebook's use of Private Message content in its Insights product, Recommendations Plugin, Activity Feed, share_stats table, Taste product, Nectar logs, or Facebook APIs. Moreover, this statement does not put the reader on notice that the "attachment" would then be converted into a specific data structure that personally identified the user (an EntShare), which Facebook would retain, in perpetuity.

[20] Statement from Facebook's Pan-Euro Communications Manager. Nov. 13 Gardner Decl. ISO Class Cert., Ex. 28 (emphasis added); The Google Analytics data relied upon by Facebook supports this proposition. While the webpage with Facebook's developer guidance received 4.3 million views in 2011 and 2.5 million views in 2012, visitors spent an average of *78 seconds* viewing the page in 2011, and only *42 seconds* viewing the page in 2012. (App. 1496, 1502 at entry #1). Given the average time spent on this multipage document, the bulk of which was devoted to substantive coding instructions, it is not credible that a meaningful percentage of viewers even *saw* the FAQs.

the 77 articles listed, only 29 address the scanning of messages to increase Like counts.[21] With regard to those, Facebook acknowledges that they were published right round the time Facebook changed its code and ceased inflating Like counts. As Alex Himel stated in his deposition, "[a]fter the [Wall Street Journal] article was published, it was a few days later that we removed the feature and so—or we changed the way the feature works and *so it would have been surprising to hear sentiment after we changed the way the feature worked*."[22]

In short, Facebook cites to a single disclosure not directed at its users and minimal media coverage spanning "a few days" before its claimed change in practices. Accordingly, the instant matter is readily distinguishable from *Gmail,* where the court found "a panoply of sources," stretching back almost a decade. *In re Google Inc. Gmail Litig.*, No. 13-2430, 2014 WL 1102660, at *17 (N.D. Cal. Mar. 18, 2014).[23] To the extent that such a paucity of sources would alert some subset of Facebook users to the *lone* practice of scanning messages to inflate Like counts, this does not create an individualized issue sufficient to defeat predominance. *Ellsworth v. U.S. Bank, N.A.*, No. 12-2506, 2014 WL 2734953, at *29 (N.D. Cal. June 13, 2014) ("Courts traditionally have been reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses may be available against individual members . . . instead, where common issues otherwise predominated, courts have usually certified rule 23(b)(3) classes even though individual issues were present in one or more affirmative defenses.") (quoting *Smilow v. Sw. Bell Mobile Sys., Inc*., 323 F.3d 32, 39 (1st Cir. 2003)). Further, as discussed above, *none* of the

[21] Source nos. 6, 8, 10, 12, 14, 16, 17, 19, 22, 23, 24, 25, 32, 34, 36, 38, 46, 46, 50, 51, 52, 53, 66, 67, 69, 70, 71, 72, and 73. Additionally, Facebook lists its developer guidance twice (source nos. 3 and 4). The remaining 36 articles address subjects not challenged in this litigation.

[22] Ex. 8 (Feb. 4, 2016 Dep. of Alex Himel 251:4-8).

[23] The analysis is the same with regard to *Backhaut v. Apple Inc*., which included, *inter alia*, multiple disclosures by the defendant, articles in news media outlets and "technical journals" spanning a period of several months, and the named plaintiff's own admission that there was "a who[l]e host of information online regarding" the interceptions at issue. No. 14-2285, 2015 WL 4776427, at *14 (N.D. Cal. Aug. 13, 2015). Facebook's reliance on *Murray v. Fin. Visions, Inc*., is equally misplaced. No. 7-2578, 2008 WL 4850328 (D. Ariz. Nov. 6, 2008). There, the defendant re-routed the putative class's emails in order to comply with SEC regulations, and thus the court's analysis turned on an inquiry into express consent, based upon the defendant's stated policy. *Id*. at *1-4. Finally, *Gannon v. Network Tel. Servs*., concerned ascertainability, and not implied consent. No. 13-56813, 2016 WL 145811 (9th Cir. 2016).

information cited to by Facebook addresses the *additional* interceptions and uses identified by Plaintiffs.

3. Facebook Continues to Hide Its Scanning to Present Day

Facebook's position that Plaintiffs impliedly consented to message scans because they "continued to send Facebook messages containing URLs even after filing this lawsuit and receiving discovery requests"[24] is untenable. Facebook has repeatedly—albeit incorrectly—stated that it ceased scanning messages as of October 2012.[25] Indeed, at their depositions, Plaintiffs uniformly testified that they were unaware of any continued scanning.[26] Moreover, Facebook's *continued and additional* violations of ECPA and CIPA revealed during discovery still could not put the named Plaintiffs on notice. The Protective Order in place in this litigation prevents counsel from revealing to Plaintiffs any information designated "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEY'S EYES ONLY" by Facebook.[27]

4. Facebook's "URL Preview" Is a Separate Functionality From the Interceptions and Uses Challenged by Plaintiffs

The presence of the "URL preview" in a private message provides no evidence of implied consent. Indeed, Facebook argues only that the preview "alerted people … that the URL had been 'processed'" or "stored by Facebook."[28] The preview is a separate functionality from the multiple interceptions and uses challenged by Plaintiffs. *Supra*, at D.1. Therefore, the "URL preview" simply puts a user on notice that Facebook has created a URL preview, and nothing more.

E. Common Proof Establishes the Class's Entitlement to Monetary Recovery

1. Statutory Damages

Ignoring Plaintiffs' opening citations to authority recognizing the inherent superiority of class litigation in actions for statutory damages, Facebook relies on a single non-binding, non-

[24] Opp. Br., at 21:7-8.
[25] *See, e.g.*, Dkt. 45 (Oct. 1, 2015 Hearing Transcript), at 5:3-6, in which Facebook's counsel represented that "the Consolidated Amended Complaint challenges routine commercial conduct that was completely innocuous that Plaintiffs admit ceased over two years ago."
[26] Ex. 3 (Hurley Tr.) 49:10-12; 66:2-13; 157:5-6; Ex. 2 (Campbell Tr.) 196:16-197:24; 200:13-201:9; 205:15-22.
[27] *See generally* Dkt. 76.
[28] Opp. Br., at 20:14-15, 20-21.

class-action authority for the proposition that awarding statutory damages requires an "individualized' analysis. *See, e.g.*, Opening Br. at 21 citing *Holloway v. Full Spectrum Lending*, No. 6-5975, 2007 WL 7698843 at *8-9 (C.D. Cal. 2007) (finding superiority of class actions seeking statutory damages); Opp. Br., at 25-26.[29] To the contrary, ECPA's statutory damages provision demonstrates that:

> Congress has instructed courts to make a determination regarding the sufficiency of the case against defendant and the seriousness of the alleged conduct. Where the Court determines that such a threshold is met, it must award the particular amount determined by Congress, rather than engaging in the guesswork involved in gauging the defendant's culpability and the harm to the plaintiff based on minimal evidence and weak inferences.

DirecTV, Inc. v. Huynh, No. 4-3496, 2005 WL 5864467, at *8 (N.D. Cal. May 31, 2005) *aff'd*, 503 F.3d 847 (9th Cir. 2007). The statutory damages framework allows the Court to avoid speculation about pecuniary losses, and instead first make the determination of whether a violation of ECPA or CIPA occurred. If so, the set statutory damage amounts may be invoked if the Court agrees that the severity of Facebook's conduct warrants it.

The very criteria Facebook asserts will require individualized inquiry can be better addressed through common proof. Statutory damages serve to deter conduct which would violate ECPA or CIPA. *Huynh*, 2005 WL 5864467, at *8; *Omni Hotels*, 2014 WL 4627271, at *14 ("the Legislature evidently decided that minimum damages of $5,000 per violation serve CIPA's purposes"). As such, the primary consideration focuses on the conduct of the defendant. Facebook designed its source code to operate the same way across all users and acted indiscriminately towards the class by virtue of its uniform policies and business practices. Therefore, for example, determining the "extent of any intrusion," its "severity," or "purpose," must all focus on Facebook's uniform conduct. Indeed, statutory damages offer a path to class certification, not a barrier. *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006)

[29] Both the Eastern District of California case that Facebook cites, and the Fourth Circuit case upon which that case relies, are individual, non-class cases, and therefore quite unsurprisingly neither addresses how common proof can form the proper basis for an award of statutory damages applicable to a certified class. Opp. Br. at 26 citing *Dish Network LLC v. Gonzalez*, No. 13-107, 2013 WL 2991040 (E.D. Cal. 2013). See also *DirectTV v. Rawlins*, 523 F.3d 318 (4th Cir. 2008) (cited by *Gonzalez*).

(seeking certification of statutory damage claims avoids "the sort of person-specific arguments that render class treatment infeasible").

Moreover, the availability of statutory damages under the Wiretap Act, as later amended under ECPA, recognizes that quantifying actual pecuniary losses from violations of privacy may be too difficult. As the Supreme Court has stated, "liquidated damages serve a particular useful function when damages are uncertain in nature or amount or are unmeasurable." *Rex Trailer Co. v. U.S.*, 350 U.S. 148, 153 (1956). *See also Desilets v. Wal-Mart Stores, Inc.*, 171 F.3d 711, 716 (1st Cir. 1999) (noting that when Congress enacted ECPA, "it chose to fix liquidated damages").[30] "Damages for a violation of an individual's privacy are a quintessential example of damages that are uncertain and possibly unmeasurable. Since liquidated damages are an appropriate substitute for the potentially uncertain and unmeasurable actual damages of a privacy violation, it follows that proof of actual damages is not necessary for an award of liquidated damages." *Kehoe v. Fidelity Fed. Bank & Trust*, 421 F.3d 1209, 1213 (11th Cir. 2005) (Driver's Privacy Protection Act); *In re Hulu Privacy Litig.*, No. 11-3764, 2013 WL 6773794 (N.D. Cal. 2013) (same, Video Privacy Protection Act).[31] The same is true regarding Plaintiffs' CIPA claim. *Ades v. Omni Hotels Mgmt. Corp.*, 46 F. Supp. 3d 999, 1018 (C.D. Cal. 2014); Cal. Penal Code § 637.2(a), (c) (providing for damages of "the greater of" $5000 or "[t]hree times the amount of actual damages, *if any*, sustained by the plaintiff," and expressly not requiring a showing of actual damages) (emphasis added). The only harm or injury needed to be shown to invoke the statutory damage frameworks of ECPA and CIPA is the invasion of privacy manifested by the violation of

[30] The Wiretap Act, as originally enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968 (P.L. 90-351, Sec 802), contained an enforcement provision that provided for recovery of "liquidated damages" as an alternative to actual damages. In 1986, ECPA renamed these "statutory damages."

[31] Here, "proof of actual damages," means calculation of specific pecuniary loss, and not demonstration of harm or injury which is established by virtue of the violation of the statute itself. The Legislative history makes clear that statutory privacy protections are intended to remedy the invasion into private space rather than mere pecuniary injuries that may follow. In enacting the Wiretap Act, Congress noted that, "the right of privacy, the right to be left alone, and the right against unreasonable searches and seizures – the right, that is, to be personally secure – are among the most highly valued rights of an American citizen. These guarantees have been a part of Anglo-Saxon law ever since the 15th century." Cong. Rec. May 23, 1968 at S6 (also noting that the statute will represent a "landmark in the development of the historic right to privacy in our society").

the statute's substantive provisions. *See Vista Mktg., LLC v. Burkett*, No. 14-14068, 2016 WL 425165, *12 (11th Cir. 2016) (distinguishing the Stored Communications Act which, in contrast to ECPA, requires a showing of actual damages for entitlement to statutory damages).

Accordingly, the assessment of the appropriate statutory damages is inherently well-suited for class treatment in privacy cases.[32]

2. Equitable Relief and Disgorgement of Profits

ECPA entitles prevailing Plaintiffs to "any profits made by the violator as a result of the violation," and, additionally, to "equitable relief," which may include disgorgement of ill-gotten gains (*i.e.*, unjust enrichment). 18 U.S.C. § 2520(b)(1), (c)(2)(A). As an alternative to statutory damages, Plaintiffs' economist, Fernando Torres, identifies a methodology which employs common proof to calculate Facebook's revenues derived from adding URL links into its targeted advertising platform, enhancing its analytics regarding user behavior, and inflating the Like count. In addition, he provides a method for an equitable allocation to class members on a per-URL basis that is consistent with Plaintiffs' liability theory.[33] That is what Rule 23(b)(3) requires. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1430 (2013).

In mischaracterizing Plaintiffs' request for equitable disgorgement as one, instead, seeking "actual damages," Facebook incorrectly concludes that Mr. Torres' model will lead to individualized issues of proof.[34] Questions of whether any particular interception of a class member's URL in fact increased a "Like" counter are correctly absent from his methodology. All putative class members are entitled to recovery for the violation of their privacy rights which defines their class membership. Whether or not Facebook successfully or fully exploited each

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[32] Facebook seemingly acknowledges that controlling Ninth Circuit precedent defeats its argument that the amount of potential aggregated statutory damages precludes class certification. Opp. Br., at 26 citing, as a "*but see*," *Bateman v. AMC, Inc.*, 623 F.3d 708, 711 (9th Cir. 2010) ("enormous" aggregate damages liability "is not an appropriate reason to deny class certification"); *see also Omni Hotels*, 2014 WL 4627271 (certifying CIPA claims for class treatment and rejecting argument that amount of potential statutory damages defeated superiority).

[33] Ex. 9 (Updated Rpt. of Fernando Torres iso Mot. for Class Certification), ¶¶ 11, 51-60, 72-74.

[34] Facebook's, and Dr. Catherine Tucker's primary challenge to Plaintiffs' damages methodology rests on this false characterization. Plaintiffs reserve their rights to strike as irrelevant the Expert Witness Report of Dr. Catherine Tucker to the extent it covers the "actual damages" prong of 18 U.S.C. § 2520(c)(2)(A) which are not addressed by Plaintiffs or Fernando Torres.

interception (such as where its otherwise ubiquitous social plugin was present alongside each interception), while arguably relevant to an actual damage theory, does not impact the profits and other benefits generated from its broad course of misconduct. Thus, by definition, Mr. Torres' model does not invite any of these or other individualized issues.[35]

Facebook suggests striking Mr. Torres' opinion on similarly faulty premises. First, Facebook engages in questionable semantics to argue that "benefits to Facebook," as opposed to unjust enrichment or "profits," are not available, as clearly the ECPA provides for them. 18 U.S.C. § 2520(c)(2)(A). Facebook's sole purported grounds for this argument is an out-of-context quote from *Huynh*, 2005 WL 5864467, which addressed the "actual damages" prong of ECPA, not the equitable relief or profits prong. It is irrelevant in this context that "Defendant's benefit is a poor measure of plaintiff's actual losses," (*id.*, at *7), and that, instead, the Plaintiff's "true *actual damages*" should be measured by a formula of losses the Plaintiff suffered. *Id.* (emphasis added).[36]

Second, Facebook's contention that Mr. Torres' reference in the damages model to Facebook's Social Graph "has nothing to do with the practices at issue" ignores Plaintiffs' theory that Facebook is unjustly enriched by its ability to enhance and augment its most powerful marketing tool with intercepted content from Private Messages.[37] Quite simply, the spoils from unlawful conduct are pertinent to this case.

Third, Facebook's own case law concisely demonstrates that Mr. Torres' methodology is sufficiently complete at this stage. "It is not necessary that plaintiffs show that their expert's

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[35] *Daniel F. v. Blue Shield of Cal.*, 305 F.R.D. 115 (N.D. Cal. 2014) is inapposite, as there this Court found, in an actual damages context, that the necessity of "mini-trials" and discovery on damages issues defeated predominance, where plaintiffs offered no methodology at all, but rather unsubstantiated claims that class members had "similar kinds of damages." *Id.*, at 128.

[36] *Hebrew Univ. of Jerusalem v. GM*, No. 10-3790, 2012 WL 12507522, at *5-6 (C.D. Cal. May 31, 2012) is also inapposite. Facebook does not, and cannot, contend that the Torres Report lacks academic support: among the supporting materials underpinning the Torres Report is "The Anatomy of the Facebook Social Graph" by Johan Ugander et al. (the "Ugander Study"). Ex. 9 (Torres Rpt.), at ¶ 49, n. 88-92. All four contributing authors are identified as affiliated with Facebook.

[37] Ex. 9 (Torres Rpt.), ¶¶ 35-60; Ex. 10 (Transcript of Deposition of Fernando Torres), 87:3-8: "I applied established valuation methodologies to value the social graph, and then established a method to attribute an increase of the value of that asset as a result of an increase in the number of edges within the social graph derived from the intercepted messages."

methods will work with certainty at [the class certification stage;] rather, plaintiffs' burden is to present the court with a likely method for determining class damages." *Pecover v. Elec. Arts Inc.*, No. 8-2820, 2010 WL 8742757, at *24 (N.D. Cal. Dec. 21, 2010) (internal quotation omitted). Moreover, in *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 552 (C.D. Cal. 2014), the court struck an expert declaration that "provide[d] no damages model at all," contrasting it with circumstances, as here, where the Court was presented with—and admitted—a damages model with "a structure or framework that could be used to analyze the [relevant] data." *Id.*, at 552-53 (internal citation omitted).

Lastly, Facebook's own expert has now correctly retreated from the claim that excluding research and development costs was inconsistent with generally accepted valuation standards. At her deposition, Dr. Tucker conceded that, not only had she never valued an intangible asset, but "that's something you would employ someone else to do."[38] Her testimony is compromised on that basis alone. Moreover, Dr. Tucker confirmed that "all [she] is saying is that there is at least a question mark for [her] over Mr. Torres' claim that it is an accepted valuation practice to exclude research and development expenditures."[39] In fact, the economic literature supports Mr. Torres' contention. For example, Aswath Damodaran,[40] in his authoritative treatise Damodaran on Valuation,[41] has established the valuation principle that "research and development expenses are designed to generate future growth and should be treated as capital expenditures."[42] Mr. Torres' expert testimony should not be excluded on this or any of the other bases that Facebook presents.

F. Alternatively, Plaintiffs Have Demonstrated that Certification is Appropriate Pursuant to Rule 23(b)(2)

Alternatively, Plaintiffs' claims for declaratory and injunctive relief satisfy Rule 23(b)(2) because, by utilizing a uniform system architecture and source code to intercept and catalog its

[38] Ex. 11 (Transcript of Deposition of Catherine Tucker), 176:18-21.
[39] *Id.*, 181: 10-14.
[40] http://pages.stern.nyu.edu/~adamodar/.
[41] *Damodaran on Valuation: Security Analysis for Investment and Corporate Finance*, 2nd Ed. 2006, John Wiley & Sons, NY, in Ch. 3 *Estimating Cash Flows*; Ch. 12 *The Value of Intangibles*.
[42] A. Damodaran, *Research and Dvlpt. Expenses: Implications for Profitability Measurement and Valuation*, (http://people.stern.nyu.edu/adamodar/pdfiles/papers/R&D.pdf), p.3.

users' Private Message content, Facebook has "acted or refused to act on grounds generally applicable to the class," and relief can be appropriately fashioned "with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). Showing Facebook's practice generally applicable to the putative class is all that is required pursuant to Rule 23(b)(2); there is no concurrent requirement to show predominance of common issues or superiority of class adjudication. *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998).[43]

Facebook's principal argument against certifying a 23(b)(2) class is a repetition of its meritless argument that some putative class members impliedly consented to having their messages scanned.[44] Facebook overlooks that this inquiry goes to predominance and is therefore immaterial in the 23(b)(2) context. As one court noted in a CIPA context where the "implied consent" affirmative defense had more legitimacy:

> Yahoo may well be correct that some class members do not have viable SCA or CIPA claims because they consented to Yahoo's conduct. That does not, however, vitiate the operative fact that the proposed Rule 23(b)(2) class challenges Yahoo's uniform policy of intercepting, scanning, and using contents of emails sent to and from Yahoo Mail subscribers by non-Yahoo Mail subscribers. As in *Rodriguez*, Plaintiffs complain of a pattern or practice that is generally applicable to the class as a whole. This is sufficient to satisfy Rule 23(b)(2).

In re Yahoo Mail Litig., 308 F.R.D. 577, 600 (N.D. Cal. 2015) (internal citations, quotations omitted).

Facebook's speculation that some class members may prefer to have their privacy invaded has no legal significance.[45] "A difference of opinion about the propriety of the specific relief sought in a class action among potential class members is not sufficient to defeat certification."

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[43] Additionally, while the Ninth Circuit has not considered whether ascertainability is required in the Rule 23(b)(2) context, all other Circuits addressing the issue have held that it is not. *Shelton v. Bledsoe*, 775 F.3d 554, 563 (3d Cir. 2015) ("The nature of Rule 23(b)(2) actions, the Advisory Committee's note on (b)(2) actions, and the practice of many of [sic] other federal courts all lead us to conclude that ascertainability is not a requirement for certification of a (b)(2) class seeking only injunctive and declaratory relief . . . ."); *Shook v. El Paso Cnty.*, 386 F.3d 963, 972 (10th Cir. 2004); *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1976). District courts in the Ninth Circuit have adopted this view. *P.P. v. Compton Unified Sch. Dist.*, No. 15-3726, 2015 WL 5752770, at *23 (C.D. Cal. Sept. 29, 2015); *Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1325-26 (W.D. Wash. 2015); *In re Yahoo*, 308 F.R.D. at 597-98.

[44] Opp. Br., at 28:5-17.

[45] "There is little doubt that many members of the proposed class here welcome the routine practices challenged here." *Id*. at 28:21-22.

Californians for Disability Rights, Inc. v. Cal. DOT, 249 F.R.D. 334, 348 (N.D. Cal. 2008); *accord, Walters*, 145 F.3d at 1047 ("All the class members need not be aggrieved by or desire to challenge the defendant's conduct in order for some of them to seek relief under Rule 23(b)(2).") (citing 7A Charles Alan Wright et al., Federal Practice & Procedure § 1775 (2d ed. 1986)). Moreover, despite Facebook's misleading citations to deposition testimony, all the deponents objected to Facebook's redirection and acquisition of Private Message content for purposes unrelated to the transmission of messages.[46] Thus, the requested relief addresses "a pattern or practice that is generally applicable to the class as a whole." *Walters*, 145 F.3d at 1047 (9th Cir. 1998). To the extent that Facebook implies that opinions may differ as to the precise scope of the ultimate relief, this argument is premature. *Ashker v. Governor of Cal*., No. 9-5796, 2014 WL 2465191, at *7 (N.D. Cal. June 2, 2014) (citation omitted) (plaintiffs do not need to articulate injunctive relief "with exacting precision at the class certification stage").

Finally, Plaintiffs' request for certification pursuant to 23(b)(2) would be *in lieu* of the 23(b)(3) class. As clearly pled, Plaintiffs seek damages and declaratory and injunctive relief in their request for class certification pursuant to Rule 23(b)(3), but only declaratory and injunctive relief in the alternative request for certification pursuant to Rule 23(b)(2).[47] The authority cited by Facebook is thus inapposite, as the proposed classes in those cases sought damages *and* injunctive relief concurrently in a 23(b)(2) context. Accordingly, Facebook's arguments are without merit. *Kanter v. Warner-Lambert Co*., 265 F.3d 853, 860 (9th Cir. 2001) (When "injunctive relief is the primary relief sought," class actions "are properly brought under Rule 23(b)(2).")

III. CONCLUSION

Accordingly, Plaintiffs request that the Court grant their motion for class certification.

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[46] Opp. Br., at 29:1-14. Contrary to Facebook's assertion that absent class member [redacted] "has no knowledge, belief, or understanding of any 'processes' that Facebook undertakes," the cited-to deposition testimony makes plain that [redacted] took no position about whether, or to what extent, Facebook could or should scan Private Message content in order to effectuate site security measures. App. 1358-1360. Regarding the *challenged* practices, [redacted] stated "I don't like Facebook accessing my messages or the possibility that a Like increase is going to happen on a page that I'm not aware of." App. At 1370.

[47] Opening Br. at 24: 23-25.

Dated: February 19, 2016

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