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

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

20 Plaintiffs,

21 v.

22 FACEBOOK, INC.,

23 Defendant.

Case No. C 13-05996 PJH (MEJ)

**JOINT CASE MANAGEMENT
CONFERENCE STATEMENT**

Date: June 30, 2016

Time: 2:00 p.m.

Place: Courtroom 3, 3rd Floor

The Honorable Phyllis J. Hamilton

1 Pursuant to Civil Local Rule 16-10(d), Plaintiffs Matthew Campbell and Michael Hurley
2 (“Plaintiffs”) and Defendant Facebook, Inc. (“Facebook”) respectfully submit this Joint Case
3 Management Conference Statement in connection with the June 30, 2016 Case Management
4 Conference.

5 **I. PROCEDURAL STATUS**

6 On May 18, 2016, the Court issued its Order Granting in Part and Denying in Part Motion
7 for Class Certification (“Cert Order”) (Dkt. 192), certifying for class treatment Plaintiffs’ claims
8 for injunctive relief under the Electronic Communications Privacy Act (“ECPA”) and Section 631
9 of the California Invasion of Privacy Act (“CIPA”) pursuant to Fed. R. Civ. P. 23(b)(2), defining
10 the class as follows:

11 All natural-person Facebook users located within the United States
12 who have sent, or received from a Facebook user, private messages
13 that included URLs in their content (and from which Facebook
14 generated a URL attachment), from within two years before the
filing of this action up through the date of the certification of the
class [May 18, 2016].

15 The Cert Order denied certification of a damages class pursuant to Fed. R. Civ. P. 23(b)(3).

16 Neither Plaintiffs nor Facebook sought review of the Cert Order pursuant to Fed. R. Civ.
17 P. 23(f).

18 Because Plaintiffs had revised their class definition from the one set forth in their prior
19 complaint and added new allegations “regarding the sharing of data with third parties . . . based
20 on a review of discovery that was not available at the time of the complaint’s filing,” the Cert
21 Order instructed Plaintiffs to file an amended complaint “(1) revising the class definition to
22 reflect the definition set forth in the class certification motion, and (2) adding allegations
23 regarding the sharing of data with third parties.” (Dkt. 192 at 6.) On June 7, 2016, Plaintiffs filed
24 their Second Amended Class Action Complaint (“SAC”). (Dkt. 196.) On June 9, 2016, the Court
25 granted the parties’ previously filed stipulation to allow Plaintiffs to further amend the complaint
26 by dropping a previously-dismissed named plaintiff (David Shadpour) and removing allegations
27 concerning claims dismissed by the Court’s Order Granting in Part and Denying in Part Motion to
28 Dismiss (Dkt. 43). (Dkt. 198.)

1 Pursuant to a Civil L.R. 6-1(a) stipulation, Facebook’s response to the Second Amended
2 Complaint is due on June 28, 2016. (Dkt. 200.) The parties have agreed to and propose the
3 following briefing schedule for Facebook’s forthcoming motion to dismiss.¹

- 4 1. Facebook’s Motion to Dismiss shall be filed and served no later than **June 28,**
5 **2016.**
- 6 2. Plaintiffs’ Opposition shall be filed and served no later than **July 29, 2016.**
- 7 3. Facebook’s Reply shall be filed and served no later than **August 24, 2016.**
- 8 4. Facebook’s Motion to Dismiss shall be heard on **September 7, 2016 at 9:00 a.m.**

9 The parties respectfully request that the Court adopt this briefing schedule.

10 **II. DISCOVERY**

11 On May 17, 2016, Magistrate Judge James entered a Discovery Order deferring certain
12 pending discovery issues until after the ruling on class certification. (*See* Dkt. 190.) That
13 Discovery Order also ordered the parties to meet and confer to discuss the appropriate scope of
14 discovery after the District Court ruled on the then pending class certification motion. After the
15 Cert Order, the parties met and conferred in person, and continue to meet and confer in good
16 faith, in attempt to narrow areas of dispute.

17 **A. Plaintiffs’ Statement**

18 Plaintiffs are entitled to discovery pertinent to the entire class period, *i.e.*, December 30,
19 2011 through May 18, 2016.

20 The proper scope of Plaintiffs’ discovery is set by the allegations of the SAC.
21 Specifically, Plaintiffs are entitled to discovery related to Facebook’s scanning of private
22 messages for purposes of acquiring message content, discovery related to the manner in which
23 Facebook catalogs and stores intercepted private message content, and discovery related to how
24 Facebook redirects and uses that private message content (and the data sets created therefrom).
25 Discovery to date has enabled Plaintiffs to identify key, internal terms and concepts used by

26
27 ¹ Pursuant to the stipulation, “Plaintiffs consent solely to extending the time for Facebook
28 to respond to the SAC, but otherwise expressly reserve their rights to oppose the Motion on any
grounds, including challenging the Motion as procedurally improper.” Dkt No. 200.

1 Facebook in the course of engaging in these practices (described in further detail in Plaintiffs’
2 class certification briefing, the accompanying expert reports of Dr. Jennifer Golbeck, and
3 Plaintiffs’ SAC). At present, the parties are attempting to resolve disputes related to Facebook’s
4 prior production (including, but not limited to, Facebook’s failure to utilize key terms such as
5 “EntShare” and “EntGlobalShare” in its searches for responsive documents). Moving forward,
6 Plaintiffs anticipate seeking additional discovery related to the newly-identified terms and
7 architecture and newly-identified custodians.

8 Therefore, Plaintiffs’ continued discovery will include: (1) the manner and technical
9 means by which Facebook scans the content of users’ private messages (including all source code
10 and related databases or other data stores, through the entire class period); (2) the manner and
11 technical means by which that private message content is then stored, used, maintained, and
12 shared with third parties(including all source code and related databases or other data stores,
13 through the entire class period); (3) Facebook’s representations to customers regarding
14 Facebook’s private messaging service; (4) Facebook’s internal policies and practices regarding
15 the private messaging service, and the development of those policies and practices; (5)
16 Facebook’s internal policies and practices regarding interception, collection, redirection and use
17 of such user data; (6) data and user profiles assembled from, in whole or in part, the private
18 messages of Plaintiffs and the putative class members; and (6) documents and information
19 regarding Facebook’s operations in California.

20 While, as noted above, Plaintiffs continue to attempt to meet-and-confer in good faith with
21 Facebook regarding discovery issues, as explained in prior pleadings, Facebook has repeatedly
22 delayed and obstructed Plaintiffs’ efforts at discovery, including continuing to withhold critical
23 discovery and refusing to engage in the Court-order joint letter-briefing process. *See* Dkt. Nos.
24 186, 187. Substantial discovery disputes regarding requests that have been pending for well over
25 a year still remain, and will likely need to be adjudicated by the Court. Even now, as of the date
26 of the filing of this statement, Facebook has not provided a concrete agreement to provide *any*
27 further document or source code discovery, and appears intent on further delaying discovery
28 through yet another time-consuming and procedurally improper round of dispositive briefing.

1 Indeed, Facebook’s proposed schedule anticipates that the parties engage in substantial
2 dispositive briefing through August, only to cut off discovery a month after the hearing on the
3 motion, and possibly before a ruling on the motion has even issued. Facebook’s proposed
4 schedule is transparently designed to thwart further discovery, not facilitate it.

5 While specific discovery-related issues have been referred to Magistrate James for
6 adjudication, Plaintiffs note that Facebook improperly argues that any further discovery should be
7 limited to “confirmation” of Facebook’s self-serving (and demonstrably false (*see* Dkt. Nos. 185,
8 187)) claim that the practices have “ceased.” Indeed, Facebook implicitly takes the position that,
9 despite the fact that the class period has been extended by over two years (from December 30,
10 2013 to May 18, 2016), Plaintiffs are not entitled to discovery extended beyond the timeframe for
11 which it previously agreed to produce documents, *i.e.*, December 2013. In light of the substantial
12 outstanding discovery disputes and likely motion practice before any such documents are
13 produced, Facebook’s proposed schedule is neither appropriate nor realistic. Because Plaintiffs
14 have received virtually no document discovery (and no source code at all) post-dating December
15 2013, Plaintiffs cannot yet determine the full scope of Facebook’s illegal practices, as articulated
16 in the SAC, dating through May of 2016. Plaintiffs anticipate that it will take further significant
17 time for their experts to review and analyze post-2013 discovery once such discovery is produced,
18 likely after further motion practice before Magistrate Judge James. Accordingly, Plaintiffs
19 respectfully submit that it is premature at this juncture to set a discovery cutoff date, and that such
20 a date should be determined once the contours of further discovery have been determined by the
21 Court.

22 Plaintiffs’ pending discovery requests are proportional to the needs of the case, and are in
23 fact laser-focused on highly technical issues related to the specific implementation of Facebook’s
24 source code devices for intercepting and using private message content. Facebook’s argument
25 that, because this case is now “only” about injunctive relief as opposed to damages, merits
26
27
28

1 discovery is necessarily more limited, is without merit. Plaintiffs respectfully request that the
2 Court adopt Plaintiffs' proposed schedule articulated below.²

3 **B. Facebook's Statement**

4 Plaintiffs filed this lawsuit approximately two and a half years ago (December 2013), and
5 they began propounding very broad discovery approximately 18 months ago (January 2015).
6 Since then, Plaintiffs have served, and been permitted, wide-ranging discovery, and they have not
7 followed this Court's statement at the Initial Case Management Conference in March 2015 that
8 the Court "agree[d]" with Facebook that the parties should focus their discovery on class
9 certification issues and the issues identified in this Court's ruling on the Motion to Dismiss.
10 (Dkt. 114-1.) Among other things, Plaintiffs have served 60 requests for production (in response
11 to which Facebook has produced more than 27,000 pages of documents), propounded 8
12 interrogatories (to which Facebook has provided detailed responses), reviewed Facebook's highly
13 confidential and proprietary source code for approximately 86 days, and taken 8 days of
14 deposition testimony from Facebook's fact witnesses (including three days of Rule 30(b)(6)
15 deposition testimony) and two days of deposition testimony from Facebook's experts.

16 Plaintiffs represented to the Court at the class certification hearing that, because of the
17 "extensive" discovery they had received, they had learned of new practices (practices not alleged
18 in their previous complaint) that had led them to revise their proposed class definition and
19 challenge new practices in their Motion for Class Certification. (Mar. 16, 2016 Hrg. Tr. (Dkt.
20 177) at 4:22-23; 6:4-5; 18:8-11, 19:22-23.) Because of these new allegations, the Court directed
21 Plaintiffs to file a Second Amended Complaint. (Dkt. 192 at 6.) But the Court denied Plaintiffs'
22 request to certify a Rule 23(b)(3) damages class and instead certified a Rule 23(b)(2) injunctive
23 relief class based on Plaintiffs' representation that they were seeking "only declaratory and
24 injunctive relief in the alternative request for certification pursuant to Rule 23(b)(2)." (*Id.* at 29.)

25
26
27 ² Contrary to Facebook's assertion below that "Plaintiffs' schedule would delay resolution
28 indefinitely," Plaintiffs clearly propose that that trial be held as soon as the Court's schedule
permits after the proposed October 23, 2017 Pretrial Conference.

1 Against this factual backdrop—where (i) the Court has already permitted Plaintiffs to file
2 a further amended complaint based on their new allegations and class because of the wide-
3 ranging discovery taken by Plaintiffs to date, (ii) Plaintiffs’ damages claims are no longer at issue,
4 and (iii) the case is now only about declaratory and injunctive relief—Plaintiffs appear to suggest
5 that they should be permitted at least another year of extensive discovery. Tellingly, Plaintiffs do
6 not even propose a fact discovery cutoff in their proposed case schedule.

7 Facebook does not disagree that *some* additional discovery is appropriate, and Facebook is
8 continuing to meet and confer with Plaintiffs in good faith regarding the scope of that additional
9 discovery. But the scope of any additional discovery must be tailored to Plaintiffs’ specific
10 claims, class, and class period. For example, Plaintiffs’ class does not consist of all Facebook
11 users who had their messages “scanned,” but rather is limited to “Facebook users . . . who have
12 sent, or received from a Facebook user, private messages *that included URLs in their content*
13 *(and from which Facebook generated a URL attachment).*” (Dkt. 192 at 2-3 (emphasis added).)
14 Similarly, as this Court stated in its class certification order, Plaintiffs challenge three “uses” of
15 information derived from messages containing URL previews: (1) the “Like” counter, (2)
16 “recommendations for other users,” and (3) the “sharing of user data with third parties” through
17 Facebook’s “Insights” product. (*Id.* at 3-5.) Any additional discovery should be limited to these
18 challenged practices.

19 Furthermore, revised Federal Rule of Civil Procedure 26(b)(1) expressly states that
20 discovery must be “proportional to the needs of the case, considering the importance of the issues
21 at stake in the action, the amount in controversy, the parties’ relative access to relevant
22 information, the parties’ resources, the importance of the discovery in resolving the issues, and
23 whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R.
24 Civ. P. 26(b)(1). As Chief Justice Roberts has explained, the new rules “crystalize[] the concept
25 of reasonable limits on discovery through increased reliance on the common-sense concept of
26 proportionality,” and the “pretrial process must . . . eliminate unnecessary or wasteful discovery”
27 with a “careful and realistic assessment of actual need.” 2015 Year-End Report on the Federal
28 Judiciary available at <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>.

1 *See also Gilead Scis., Inc. v. Merck & Co, Inc.*, No. 5:13-CV-04057-BLF, 2016 WL 146574, at
2 *1 (N.D. Cal. Jan. 13, 2016) (“No longer is it good enough to hope that the information sought
3 might lead to the discovery of admissible evidence. In fact, the old language to that effect is
4 gone. Instead, a party seeking discovery of relevant, non-privileged information must show,
5 before anything else, that the discovery sought is proportional to the needs of the case.”).
6 Plaintiffs’ suggestion that their further “discovery requests are proportional to the needs of the
7 case, and are in fact laser-focused,” is belied by the fact they have proposed a case schedule that
8 suggests a trial in approximately *a year and a half and has no discovery cut-off*.

9 Facebook has already incurred significant expense on Plaintiffs’ wide-ranging discovery
10 requests in this matter, and “the amount in controversy” is now zero. Additionally, as Facebook
11 explained in its class certification papers, each of the three “uses” of information derived from
12 messages containing URL previews ceased many years ago³ (Dkt. 178-2 at 9-10), so, with respect
13 to Plaintiffs alleged “uses,” discovery should be limited to Plaintiffs’ confirmation regarding
14 when the practices ceased. Separate and apart from the challenged “uses,” Plaintiffs challenge
15 the creation of “EntShares” (which are simply the storage of URL previews) as alleged
16 “interceptions,” but it remains unclear what additional information (if any) they need about
17 EntShares. Indeed, their technical expert opined extensively about EntShares. (*See generally*
18 Dkt. 199-2.) Plaintiffs’ claims are also limited to injunctive relief, and discovery should be
19 limited accordingly.

20 Plaintiffs’ argument that “Facebook has repeatedly delayed and obstructed Plaintiffs’
21 efforts at discovery” is meritless. It was Plaintiffs—not Facebook—who flouted this Court’s
22 instruction over a year ago that discovery should be focused on class certification issues and the
23 issues identified in this Court’s ruling on the Motion to Dismiss. (Dkt. 114-1.) As a result,
24 Plaintiffs admit that they received “extensive” discovery over the past 18 months that allowed
25 them to revise their proposed class and make new allegations in their Motion for Class

26 ³ Plaintiffs’ statement that this is “demonstrably false” is mystifying – and simply wrong.
27 Regardless, Facebook has not denied Plaintiffs discovery into their three challenged “uses.” On
28 the contrary, the discovery provided by Facebook permitted Plaintiffs to learn of or confirm these
uses in the first place.

1 Certification. (Mar. 16, 2016 Hrg. Tr. (Dkt. 177) at 4:22-23; 6:4-5; 18:8-11, 19:22-23.) And
2 while they claim they are entitled to significant amounts of additional discovery since the “class
3 period has been extended by over two years,” they apparently believed when they filed their
4 Motion for Class Certification that they had a sufficient factual basis under the Federal Rules of
5 Civil Procedure to expand the class period to May 18, 2016. Again, while Facebook does not
6 disagree that *some* additional discovery is appropriate, there must be reasonable limits, and
7 Plaintiffs should not be permitted to engage in further fishing expeditions.

8 Facebook will continue to work with Plaintiffs to agree upon the appropriate scope of
9 additional discovery. Facebook also plans to pursue additional limited discovery from the
10 Plaintiffs. Facebook also respectfully requests that the Court set a fact discovery cutoff of
11 October 3, 2016. Such a discovery cutoff is not “designed to thwart further discovery,” but rather
12 to focus any remaining discovery and begin to bring this matter—which has been pending for two
13 and a half years—to a conclusion (either via a dispositive motion or trial).

14 This Court previously rejected—on *two separate occasions* (Dkt. 117, 136)—Plaintiffs’
15 attempts to extend the class certification deadlines by three months, and this Court should
16 likewise reject Plaintiffs’ attempts to drag this case out another year or two. Facebook therefore
17 respectfully requests that the Court enter a Scheduling Order that secures the parties’ right to a
18 “just, speedy, and inexpensive determination” of this action. *See* Fed. R. Civ. P. 1; *see also* 2015
19 Year-End Report on the Federal Judiciary (“The new passage [of Fed. R. Civ. P. 1] highlights the
20 point that lawyers—though representing adverse parties—have an affirmative duty to work
21 together, and with the court, to achieve prompt and efficient resolutions of disputes.”). Notably,
22 in *In re Yahoo Mail Litig.*, Case No. 13-CV-04980-LHK (N.D. Cal.) (“*Yahoo*”), one of the e-mail
23 “scanning” lawsuits that inspired this lawsuit (and which was filed less than three months before
24 the present case), the District Court rendered its decision on class certification on May 26, 2015.
25 *See Yahoo*, No. 13-CV-04980-LHK, 2015 WL 3523908 (N.D. Cal. May 26, 2015). The District
26 Court subsequently set a deadline for dispositive motions of September 18, 2015 (less than 4
27 months after the class certification decision) and a trial date of February 8, 2016 (less than 9
28 months after the class certification decision and less than two and a half years since the case was

1 initiated). *See Yahoo*, Dkt. 107, No. 13-CV-04980-LHK (N.D. Cal. May 27, 2015). Facebook
2 has proposed a similar—though slightly longer—schedule here. By contrast, Plaintiffs’ schedule
3 would delay resolution indefinitely.

4 **III. MOTIONS**

5 **A. Plaintiffs’ Statement**

6 Plaintiffs respectfully suggest that the Court should set forth a schedule for the remaining
7 litigation of this case which provides the parties a single opportunity to file one pre-trial
8 dispositive motion (*i.e.*, summary judgment, judgment on the pleadings, dismissal) after the close
9 of discovery.

10 During the Initial Case Management Conference on March 12, 2015, the Court instructed
11 the parties on its typical practice of allowing parties the opportunity to file one summary
12 judgment motion prior to trial. *See* Pretrial Instructions (“Only one summary judgment motion
13 may be filed by each side, absent leave of court”). During the conference, Facebook urged the
14 Court to consider its request to challenge Plaintiffs’ claims contemporaneously with the Court’s
15 consideration of the class certification motion, and then again at (or near) the close of discovery.
16 In response, the Court issued a Minute Order approving the filing of an early summary judgment
17 motion, *requiring* that it be filed on the same day as the class certification motion. Although it
18 obtained leave of Court to do so, Facebook nonetheless voluntarily forfeited its opportunity to file
19 an early summary judgment motion when it failed to file a motion on the date set by the Court.

20 Having waived that opportunity, Facebook now attempts to unilaterally avail itself of an
21 additional round of dispositive motion practice, not contemplated by the Court’s Standing Order.
22 Facebook represents that it plans to file another motion to dismiss, and presumably reserve the
23 opportunity to file a summary judgment motion at a later date. The recent, post-class
24 certification, amendments to the complaint present no new theories, and merely amplify on
25 certain general allegations previously made, consistent with notice pleading standards.
26 Facebook’s attempt at multiple pretrial dispositive motions not only defies the Court’s
27 requirement specific to this case that an early dispositive motion be considered together with class
28 certification, it impedes the Court’s Standing Order and its ability to conserve limited judicial

1 resources, while delaying the case to Plaintiffs’ prejudice. Moreover, other than seeking to
2 challenge Plaintiffs’ Article III standing under *Spokeo*, Facebook provides no articulation of any
3 further basis upon which it will seek to “challenge” the “new allegations.” The notion that
4 Facebook has not yet had the opportunity to mount such a challenge is manifestly incorrect;
5 Facebook proffered collectively hundreds of pages of briefing and expert testimony seeking
6 precisely to challenge these “new allegations” in its class certification opposition, and Facebook’s
7 proposed further motion practice on these issues appears yet another attempt to mount an end-run
8 around the Court’s scheduling order and page limits. *See* Dkt No. 146 (order denying Facebook’s
9 request for an additional 15 pages of class certification briefing and granting instead 5 additional
10 pages); Dkt No. 192 (denying Facebook’s request to file supplemental surreply class certification
11 briefing and striking such briefing).

12 Concerns of judicial economy and conservation of resources dictate that any further
13 dispositive challenges to Plaintiffs’ allegations should be heard together in a single round of
14 briefing, after the close of discovery. “Every court has the inherent power to control the
15 disposition of the causes on its docket with economy of time and effort for itself, for counsel, and
16 for litigants.” *United States v. Flores-Arvizu*, 476 F. App’x 156, 157 (9th Cir. 2012) (citation and
17 quotation marks omitted); *Johnson v. Inos*, 619 F. App’x 651 (9th Cir. 2015) (same). *See also*
18 *United States v. W.R. Grace*, 526 F.3d 499, 509 (9th Cir. 2008) (“[F]ederal courts are vested with
19 inherent powers enabling them to manage their cases and courtrooms effectively and to ensure
20 obedience to their orders.”). Accordingly, Plaintiffs respectfully submit that the Court should,
21 pursuant to its inherent powers to manage this case effectively and efficiently, summarily deny
22 Facebook’s second motion to dismiss, without prejudice to raising the arguments therein as may
23 be appropriate in a later, Court-scheduled, dispositive motion.

24 **B. Facebook’s Statement**

25 Plaintiffs recently filed their Second Amended Complaint (“SAC”), which contains new
26 factual allegations. Because Plaintiffs did not seek leave of court to add these new allegations to
27 their complaint when they first learned of them last year (as they should have), but rather simply
28 added them to their Motion for Class Certification, Facebook has never had an opportunity to test

1 the sufficiency of Plaintiffs’ amended pleading pursuant to Federal Rule of Civil Procedure 12.
2 Moreover, the Supreme Court’s recent decision in *Spokeo, Inc. v. Robins*, 578 U.S. ___, 136 S. Ct.
3 1540, 1549 (2016), effects a change in Article III standing law that is directly relevant to whether
4 Plaintiffs have standing (and thus whether this Court has subject matter jurisdiction).
5 Accordingly, on June 28, 2016, Facebook plans to file a motion to dismiss the SAC pursuant to
6 Rule 12.

7 Plaintiffs’ argument that the Court should disregard the Federal Rules of Civil
8 Procedure—which indisputably permit a party to move to dismiss an amended complaint (*see*
9 Fed. R. Civ. P. 12(b) and 15(a)(3))—and “summarily deny” Facebook’s motion to dismiss is
10 extraordinary. Plaintiffs cite no authority for their proposal, and there is none. Moreover, as this
11 Court acknowledged at both the hearing and in its order regarding class certification, ***Plaintiffs***
12 ***revised their class definition from the definition pled in their previous complaint and added***
13 ***new allegations*** in their motion. (*See, e.g.* Dkt. 177 at 5, 18; Dkt. 192 at 6.) They did this despite
14 never having sought leave to amend their complaint. They now propose that Facebook should be
15 punished for *their* improper conduct. That is, they argue that Facebook should not have the
16 opportunity to challenge their amended complaint because they themselves did not follow the
17 proper procedure for amending their complaint—either (i) filing an amended complaint before the
18 court-ordered deadline of March 31, 2015,⁴ or (ii) seeking leave of court to file an amended
19 complaint after the deadline passed based on the discovery of new information.⁵ The Court
20 should reject their lawless proposal for several reasons:

24 ⁴ *See* Joint Case Management Statement, Mar. 5, 2015, Dkt. 60 (“Facebook ... respectfully
25 submits that the Court should set a deadline pursuant to Rule 16(b) for any amendments [because,
26 *inter alia*] doing so [would] help to define the claims and allegations and encourage the parties to
27 focus their discovery efforts on relevant issues”); Minute Order, March 12, 2015, Dkt. 62 (“The
28 deadline to amend the pleadings is 3/31/15. If new information is disclosed in discovery a future
amendment will be permitted.”).

⁵ In the parties’ previous Joint Case Management Conference Statement, Facebook expressly
“reserved all rights to oppose such proposed amendments.” (Dkt. 60 at 9.)

1 First, the Federal Rules of Civil Procedure expressly permit parties to move to dismiss
2 amended pleadings. *See* Fed. R. Civ. P. 12(b) and 15(a)(3). That should be the end of the
3 inquiry.

4 Second, the SAC indisputably contains new factual allegations that Facebook has never
5 had an opportunity to challenge via a motion to dismiss.⁶ In fact, the very reason that this Court
6 directed Plaintiffs to file an amended complaint was because Plaintiffs' Motion for Class
7 Certification alleged "new facts," contained "new allegations," and the Court found "that an
8 amendment of the complaint would be appropriate, in order to bring the complaint in line with
9 allegations, and the class definition as presented on th[e] motion for class certification." (Dkt.
10 192 at 6.) During the March 16, 2016 hearing regarding class certification, the Court also noted,
11 "It's not clear to me that th[e] three [challenged] uses are indeed pled in the complaint" and
12 asked, "isn't it a moving target if every motion that is filed, there's something different in the
13 class definition?" (Dkt. 177 at 5, 18.)⁷

14 Third, Plaintiffs' argument that because Facebook did not file an early summary judgment
15 motion directed at the claims of the named Plaintiffs (something it had the option, but not the
16 obligation, to do), Facebook is "now attempt[ing] to unilaterally avail itself of an additional round
17 of dispositive motion practice, not contemplated by the Court's Standing Order" is baseless. As
18 Facebook has previously explained, the reason Facebook refrained from filing an early summary
19 judgment motion (which would have been due the same day as Plaintiffs' Motion for Class
20 Certification) is precisely "because of Plaintiffs' shifting theories" (Dkt. 143 at 2 n.1)—which this
21 Court acknowledged in its class certification order. Given Plaintiffs' shifting theories and
22 allegations, an early motion for summary judgment would have been moot the minute it was filed.

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24
25 ⁶ Plaintiffs' assertion that Facebook was able to "mount a challenge" to Plaintiffs' new allegations
26 via its "class certification opposition" is bizarre. An opposition to a motion for class certification
is not a motion to dismiss.

27 ⁷ In its January 2016 Administrative Motion to Enlarge the Page Limit for its Opposition to the
28 Motion for Class Certification, Facebook noted several of Plaintiffs' new allegations and
"reserve[d] its remaining objections to Plaintiffs' new theories, *which [Facebook] never had the
opportunity to address through a Rule 12 Motion.*" (Dkt. 143 at 2 n.1 (emphasis added).)

1 Again, Plaintiffs seek to be rewarded (and for Facebook to be punished) because Plaintiffs failed
2 to seek leave of court to amend their complaint earlier.⁸

3 Fourth, Facebook’s motion to dismiss the SAC will argue that Plaintiffs lack Article III
4 standing in light of the Supreme Court’s decision in *Spokeo*. Subject matter jurisdiction is an
5 issue that may be raised at any time. *See, e.g., FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230–31
6 (1990) (“[F]ederal courts are under an independent obligation to examine their own jurisdiction,
7 and standing ‘is perhaps the most important of [the jurisdictional] doctrines.’”) (quoting *Allen v.*
8 *Wright*, 468 U.S. 737, 750 (1984)). Do Plaintiffs seriously contend that this Court should not
9 evaluate jurisdiction in light of *Spokeo*, or that this inquiry should be deferred until 2017?

10 Fifth, Plaintiffs’ suggestion that this Court’s consideration of Facebook’s motion to
11 dismiss will “delay[] the case to Plaintiffs’ prejudice” is meritless. The motion may dispose of
12 the case altogether, but, in any event, Facebook offered to have the motion heard on the default
13 briefing schedule set forth in the local rules. Plaintiffs declined and agreed to the briefing
14 schedule set forth above. Although there is no dispute that this Court has discretion to manage its
15 docket, the authorities Plaintiffs cite have nothing to do with limiting a party’s right to file a
16 motion to dismiss—one is an unpublished memorandum decision concerning immigration
17 proceedings (*United States v. Flores-Arvizu*, 476 F. App’x 156, 157 (9th Cir. 2012)); another is
18 an unpublished memorandum decision concerning an *ex parte* motion to lift a stay (*Johnson v.*
19 *Inos*, 619 F. App’x 651 (9th Cir. 2015)); and the last concerns a pretrial witness disclosure order
20 (*United States v. W.R. Grace*, 526 F.3d 499, 509 (9th Cir. 2008)). And Plaintiffs’ sudden concern
21 with judicial economy is particularly disingenuous in light of their proposed schedule, which
22 seeks to delay trial until nearly *four years after* this case was initiated and delay the filing of
23 motions for summary judgment until *10 months after* this Court’s class certification order.

24 In short, the Court should reject Plaintiffs’ invitation to “summarily deny” Facebook’s
25 motion to dismiss. There is no authority for such a proposition, and Plaintiffs should not be
26

27 ⁸ At the previous case management conference in March 2015, this Court acknowledged that
28 Facebook would be permitted to challenge any class claims (in the event a class were certified)
though a motion for summary judgment.

1 rewarded for their failure to abide by the Federal Rules and this Court's instruction by not seeking
2 leave to amend their complaint months ago.

3 **IV. SETTLEMENT AND ADR**

4 On July 20, 2015, the Court appointed Catherine A. Yanni as a Mediator, pursuant to
5 A.D.R. Local Rule 6-3. On August 19, 2015, after submitting mediation statements, the parties
6 met with Ms. Yanni. No resolution was reached.

7 **A. Plaintiffs' Statement**

8 On March 16, 2016, after the Court held a hearing on Plaintiffs' Motion for Class
9 Certification, counsel for the parties agreed to communicate regarding further settlement
10 discussions. Without revealing the substance of any confidential settlement communications,
11 Plaintiffs report that prior to the Court's ruling on class certification, at Facebook's request they
12 provided a comprehensive settlement proposal, and were informed that a counterproposal thereto
13 would not be forthcoming. Contrary to Facebook's representation below, Plaintiffs had offered a
14 framework for a proposed settlement at the mediation before Ms. Yanni, but Facebook likewise
15 declined to offer any counterproposal then.

16 Plaintiffs are willing to engage in further mediation at any time.

17 **B. Facebook's Statement**

18 Facebook objected to Plaintiffs' characterization of the parties' settlement discussions in
19 the immediately preceding section as a breach of the mediation privilege, and it asked Plaintiffs
20 on several occasions to delete this discussion and replace it with the following neutral statement:

21 On July 20, 2015, the Court appointed Catherine A. Yanni as a Mediator,
22 pursuant to A.D.R. Local Rule 6-3. On August 19, 2015, after submitting
mediation statements, the parties met with Ms. Yanni. No resolution was reached.
23 Since then, the parties have had informal settlement discussions, and the parties
24 are open to renewed formal discussions to see if they can resolve this dispute now
that the Court has ruled on class certification.

25 This entirely neutral statement should be all that the Court is reading about ADR at this
26 stage of the case. (*See* Civil Local Rule 16-10(d) (stating that Subsequent Case Management
27 Statements "must report the parties' views about whether using some form of ADR would be
28 appropriate").) But Plaintiffs not only refused to submit a neutral statement, they repeatedly

1 refused to explain the reasons why. Nor did they explain why—with the very first draft and
2 through each iteration—they insisted on characterizing the parties’ discussions, and each time
3 attempted through their revisions to leave the Court with the misimpression that Facebook has not
4 engaged Plaintiffs in a good faith discussion. The facts are precisely the opposite. The reason
5 Plaintiffs made a settlement proposal this spring is because they did not make one at the August
6 2015 mediation. At any rate, without revealing the substance of the parties’ discussions, but by
7 way of response to Plaintiffs’ above statement (which has needlessly opened this door), Facebook
8 provided a substantive response to Plaintiffs’ “comprehensive settlement proposal” and also
9 discussed—in substance and with the mediator—Plaintiffs’ supposed “framework” as it was
10 conveyed to Facebook.

11 Nevertheless, given this Court’s refusal to certify a Rule 23(b)(3) class for any monetary
12 relief, Facebook is open to renewed discussions to see if the parties could resolve this dispute on
13 reasonable terms and without further protracted litigation. Facebook has proposed an ultimate
14 mediation deadline of March 2017 in connection with the pretrial schedule in the next section.

15 **V. PROPOSED SCHEDULE**

16 **A. Plaintiffs’ Statement**

17 Plaintiffs’ respectfully request that the Court enter a Scheduling Order consistent with the
18 following:

<u>Date</u>	<u>Event</u>
February 3, 2017	Disclosure of Trial Experts pursuant to Fed. R. Civ. P. 26(a)(2)(B).
March 3, 2017	File Motions For Summary Judgment
March 3, 2017	File Motions pursuant to Daubert v. Merrill Dow Pharm.
May 5, 2017	File Oppositions to MSJ and Daubert motions
May 26, 2017	File Replies on MSJ and Daubert motions
September 15, 2017	Last day to meet and confer regarding Joint Pretrial Statement
September 22, 2017	File Joint Pretrial Statement
October 23, 2017	Pretrial Conference
TBD	Trial (after the Pretrial Conference as the Court’s calendar permits.)

1 **B. Facebook's Statement**

2 Facebook respectfully requests that the Court enter a Scheduling Order consistent with the
3 following:

<u>Event</u>	<u>Date</u>
Proposed Fact Discovery Cutoff	October 3, 2016
Deadline for Dispositive Motions	October 4, 2016
Disclosure of Trial Experts Pursuant to Fed. R. Civ. P. 26(a)(2)(D)	January 17, 2017
Deadline for Parties to Meet and Confer regarding Joint Pretrial Statement	February 23, 2017
Deadline for Mediation	March 2017
Deadline for Joint Pretrial Statement	March 2, 2017
Deadline for Pretrial Disclosures Pursuant to Fed. R. Civ. P. 26(a)(3)(B)	March 17, 2017
Final Pretrial Conference	March 30, 2017, 2:00 p.m.
Trial	Monday, April 17, 2017

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18
19
20 Dated: June 23, 2016

LIEFF CABRASER HEIMANN & BERNSTEIN
LLP

21 By: /s/ Michael W. Sobol

22 Michael W. Sobol
23 Attorneys for Plaintiffs

24 GIBSON, DUNN & CRUTCHER, LLP

25 By: /s/ Joshua A. Jessen

26 Joshua A. Jessen
27 Attorneys for Defendant Facebook, Inc.
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ATTESTATION

I, Michael W. Sobol, am the ECF user whose identification and password are being used to file this document. I hereby attest that Joshua A. Jessen has concurred in this filing.

Dated: June 23, 2016

By: /s/ Michael W. Sobol
Michael W. Sobol