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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

MATTHEW CAMPBELL and MICHAEL HURLEY, Plaintiffs, v. FACEBOOK, INC., Defendant.	Case No. C 13-05996 PJH (SK) **DEFENDANT FACEBOOK, INC.'S OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF SOURCE CODE** No Hearing Unless Requested By Court (Dkt. 203) The Honorable Phyllis J. Hamilton

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Nine months ago, Plaintiffs filed a Motion for Class Certification in which they represented to the Court that their review of Facebook's "***operational computer source code***" had "confirmed" that "Facebook's routine business practices . . . reveal rampant abuses of its users' privacy, ***continuing to this day***." (Dkt. 178-1 at 1 (emphasis added).) In that same Motion, Plaintiffs raised—for the very first time—challenges to new practices that had not been raised in the operative complaint. (*Id*. at 1, 5-10.) As this Court explained in its ruling, "Plaintiffs' motion makes clear that these new allegations are derived from a review of Facebook's source code, which had not yet been produced at the time that the operative complaint was filed." (Dkt. 192 at 4.) This Court credited Plaintiffs' new assertions and certified a Rule 23(b)(2) class for injunctive and declaratory relief.

Having secured an expanded class certification order and conformed their pleading to the new practices, Plaintiffs still are not satisfied. They have not processed (or accepted) the Court's repeated statements at the last Case Management Conference that discovery must be confined to the practices addressed in the class certification ruling. (Dkt. 203.) Specifically, in the instant Motion to Compel, Plaintiffs request additional source code up to the date of certification "to understand and analyze the full scope of Facebook's interception and use of URLs in Private Messages during the entire class period." (Mot. at 5.) In other words, they wish to hit the reset button once again, and take another fishing trip through Facebook's sensitive and highly proprietary source code.

This Court should deny Plaintiffs' request. Plaintiffs already have all the source code discovery they need concerning the practices challenged in this case. *Indeed, they cited this evidence extensively in obtaining partial certification*. The Court set a schedule for the remainder of this case that anticipated and accommodated a short period of a few months to *close out* fact discovery—not another 86 days of source code review. Facebook has offered reasonable compromises and is in the process of providing additional reasonable and proportional discovery limited to the challenged practices identified in the certification order. But another lengthy exploration through an additional 3.5 *years* of Facebook's sensitive source code is not warranted, especially given Plaintiffs' representations in connection with class certification and the narrowed scope of their claims following that ruling.

In addition, the Court should deny Plaintiffs' Motion for at least three reasons:

First, given the "extensive" discovery they have already received (including millions of lines of source code through the end of 2012) and the limited practices framed by the Court's certification order, the production of another 3.5 years of Facebook's highly confidential source code is not proportional to the needs of the case. Plaintiffs claim to need evidence regarding the ongoing creation of EntShares and the discontinuation of the three "uses" of EntShares at issue, but Plaintiffs already have the evidence they claim to need or can obtain it through less intrusive means.

Second, Plaintiffs are requesting additional source code in the transparent hope of identifying new practices to challenge, but the Court already made it clear that "additional discovery is confined to the limitations necessitated by the Court's class certification ruling." (Dkt. 203.) In other words, Plaintiffs should not be permitted to go on a fishing expedition through additional source code.

Third, granting this Motion would all but ensure that the existing schedule would need to be continued, as Plaintiffs will continue to attempt to expand the scope of this action. Facebook intends to provide additional discovery confirming the cessation of the practices, which will supplement the existing "extensive" discovery record while also keeping the parties on track. Before granting access to further source code, Plaintiffs should exhaust these less intrusive avenues of discovery.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed this lawsuit in late 2013, challenging the practice of alleged "scanning" of messages with URLs to increment the counter next to Facebook's "Like" social plugin. (Dkt. 25 ¶¶ 2, 4, 25, 27, 31.) Following the Court's motion-to-dismiss ruling, the parties commenced discovery, which was *not* phased or limited to class certification issues. Towards the beginning of that process, Plaintiffs demanded that Facebook produce the source code for the challenged practice. Facebook initially opposed this request, concerned about the sensitive nature of the code, the unprecedented request for source code in a consumer class action, and its concerns that Plaintiffs' review of the code would spawn endless requests for explanations and ancillary discovery.

Nonetheless, Facebook ultimately agreed to provide the source code to avoid another discovery dispute. In July of 2015, Facebook made the source code containing Facebook's messaging product available for Plaintiffs' review. ***Pursuant to the parties' agreement***, the source

code covered a specific time period (September 2009 to December 2012 (Dkt. 209-2 at 2)), which included the discontinuation of the challenged practice in December 2012 (Dkt. 84-11 ¶ 37). At no time prior to this court's certification order did Plaintiffs request any additional source code. Unfortunately, Facebook's initial concerns about producing the code proved to be prophetic: Plaintiffs' counsel used three different experts and consultants to review the code for approximately 86 days over the span of seven months, they had numerous follow-up questions about the code, and they proffered additional onerous discovery requests, including a lengthy Rule 30(b)(6) deposition notice in response to which Facebook was required (over its objection) to make two software engineers available to walk Plaintiffs through the relevant source code, line-by-line. (*See* Dkt. 114-1 ¶ 16; Dkt. 202 at 5.) And to this day, Plaintiffs continue to seek further intrusive discovery as a result of their lengthy source code review (e.g., "configuration tables"). (Dkt. 207.) Now they propose to embark on a review of an additional 3.5 years' worth of source code (the code from January 1, 2013 to May 18, 2016).

The reality is that Plaintiffs have now had access to the relevant source code for over a year, and their expert opined extensively on "EntShares" (the storage of URL previews and Plaintiffs' alleged "interception") and the three challenged "uses" in their certification papers: (1) the counter next to the "Like" button social plugin, (2) "recommendations for other users" in Facebook's Recommendations plugin, and (3) the "sharing of user data with third parties" through Facebook's "Insights" product. The Court credited those assertions in its certification order. (*See, e.g.*, Dkt. 192 at 10-11 ("Dr. Golbeck explains that, when a message is sent with a URL attachment, a share object called an 'EntShare' is created in Facebook's source code.").) In fact, the Court certified a Rule 23(b)(2) class based on Plaintiffs' argument that Facebook "'utilized a uniform system architecture and ***source code*** to intercept and catalog its users' private message content,' and thus, has 'acted or refused to act on grounds generally applicable to the class.'" (*Id.* at 28 (emphasis added).)

Given this background, Plaintiffs' demand for additional source code is stunning. In fact, there is only one phrase that adequately captures Plaintiffs' approach here (i.e., obtaining partial certification based on representations to this Court regarding Facebook's "***operational computer source code***" that Plaintiffs claimed "confirmed" practices "***continuing to this day***" (Dkt. 178-1 at 1

(emphasis added)), but now seeking another 3.5 years' worth of additional source code on the basis that they cannot hope to prove their case without it): "bait and switch." Respectfully, this Court should not permit it. Indeed, at the Case Management Conference, the Court signaled that it was not going to allow another lengthy review of new source code. (Dkt. 203.)

III. LEGAL STANDARD

"[A] party seeking discovery of relevant, non-privileged information must show, before anything else, that the discovery sought is proportional to the needs of the case." *Gilead Scis., Inc. v. Merck & Co, Inc*., No. 13-04057-BLF, 2016 WL 146574, at *1 (N.D. Cal. Jan. 13, 2016). Moreover, the Court "must" limit discovery if "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive." Fed. R. Civ. P. 26(b)(2)(C).

Courts should only order production of source code if the requesting party can show that the source code is both sufficiently "relevant and necessary" to its case to outweigh the risk that accompanies disclosure. *See, e.g.*, *In re Apple and AT&TM Antitrust Litig*., No. 07-5152 JW, 2010 WL 1240295, at *3 (N.D. Cal. Mar. 26, 2010). Speculation or mere belief that source code may be relevant or necessary is insufficient to compel production. *Id.* at *3 (denying motion to compel where the plaintiffs "only speculate that the additional source code may be relevant"). Moreover, disclosure of source code should not be required when the party seeking discovery can obtain the requested information through less intrusive means. *See, e.g.*, *Abarca Health, LLC v. PharmPix Corp*., 806 F. Supp. 2d 483, 491 (D.P.R. 2011) (refusing to compel defendants to produce certain source code when it "would be unnecessary and would merely burden defendants without commensurate benefit"). Production of source code is unusual in a consumer protection action, and is usually instead reserved for intellectual property disputes where it is absolutely necessary.

IV. ARGUMENT

A. Plaintiffs' Request Is Not Proportional Because They Already Have The Relevant Technical Information Or It Is Available Through Less Intrusive Means

As their counsel admitted several times at the class certification hearing, Plaintiffs have already received "extensive discovery" regarding the practices at issue, including their functionality

and dates of discontinuation. (Dkt. 177.) Plaintiffs repeatedly claimed in their certification papers that the *source code* they reviewed showed that Facebook's practices were *ongoing*. (*See* Dkt. 138 at 1, 4, 7, 10; Dkt. 167 at 13.) The only facts they have identified for which they claim to need *additional* source code are (1) confirming the continuing creation of EntShares (a point they note is "undisputed"), and (2) confirming the discontinuation of each of the challenged "uses." (Mot. at 4-8.) But Plaintiffs have not established the need (and there is no need) for another protracted process whereby they spend several months reviewing an additional 3.5 years of Facebook's proprietary and highly confidential source code. Facebook has already provided the relevant information, or it is available through far less intrusive means for each of the four practices at issue in this case.

1. Creation of EntShares. An "EntShare" (or "share object") is the name of a specific data structure used in Facebook's internal systems. Specifically, EntShares are used to store a number of different types of data within Facebook's systems, including attachments (such as URL previews, photos, videos, stickers, and so on) to messages, posts, comments, and other actions. Plaintiffs challenge the use of EntShares to store URL attachments (or URL "previews") to Facebook messages. The EntShare is simply the storage of the URL preview, and it allows both the sender of the message and the recipient to see the attachment displayed. (Dkt. 184-11 at 5; Dkt. 183-12 at 3.) All of this information is reflected in the voluminous source code that Plaintiffs have had access to for over a year, as well as in myriad declarations, depositions, and written discovery responses.[1] Additionally, Facebook has produced exported versions of a number of EntShares associated with the named Plaintiffs' individual messages, *including EntShares from URLs sent with messages as late as 2014*. (Dkt. 182-14 at 4-6; Dkt. 183-8 at Exhibit A.)[2]

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[1] *See, e.g.*, the Declarations of Alex Himel (Dkt. 184-1 & 184-11); Facebook's First Supplemental Responses and Objections to Plaintiffs' First Set of Interrogatories (Dkt. 199-25); Facebook's Second Supplemental Responses and Objections to Plaintiffs' Narrowed Second Set of Interrogatories (Dkt. 183-8); the Expert Report of Dr. Benjamin Goldberg (as well as the source code he identifies) (Dkt. 183-12); and deposition testimony from Facebook engineers Ray He, Alex Himel, and Michael Adkins (Dkt. 180-3 & 180-6; Dkt. 180-13; Dkt. 183-6).

[2] Throughout their Motion, Plaintiffs repeatedly state that Facebook has "admitted" that it "continues to intercept and log Private Message content." (Mot. at 2.) Nonsense. An "Entshare" is the *storage* of the URL preview attachment, which permits the attachment to be displayed to the sender and recipient. By definition it cannot be an "interception." Plaintiffs' expert admitted at her deposition that she did not understand the central role that EntShares play in displaying URL previews. (Dkt. 199-23 at 230:19-231:6.) Plaintiffs' challenge of this critical feature is

Plaintiffs cited and relied upon this evidence (and their expert's opinions) to make arguments and representations about this functionality to the Court in connection with their class certification motion. And even though, by agreement of the parties, Plaintiffs had access to source code up to the end of 2012, their expert testified at her deposition that she "fe[lt] comfortable giving [her] opinions about the operation of Facebook's messaging system *after December 2012*," including regarding EntShares, "on the assumption that there have not been any material changes since that time." (Dkt. 199-23 ("Golbeck Dep.") 203:2-7 (emphasis added).) As noted at the Case Management Conference, Facebook is willing to stipulate that EntShares continue to be created through the end of the class period when a URL attachment is successfully sent with a message (or included in a post, etc.). Indeed, if they were not created, message recipients would be unable to see the URL previews in their messages. Plaintiffs have no need for further source code to understand EntShares.

2. Increase In Counter Next to the "Like" Button Social Plugin. Nor do Plaintiffs have any need for additional source code to confirm that URL attachments sent in messages no longer are included in the anonymous, aggregate counter displayed next to a Facebook "Like" button social plugin on a third-party website. Plaintiffs' expert *acknowledged* that this practice stopped in December 2012, and she admitted that the change is reflected in the source code she reviewed. (Dkt. 199-2 ¶¶ 88-89, 92; Golbeck Dep. 136:25-137:7.)[3]

3. Insights. Insights is a resource available to website domain owners that provides non-personally-identifying data regarding interaction with their websites, including the total number of times their URLs were shared on Facebook and basic demographic information (in anonymous, aggregate form) regarding the people engaging with those URLs. (*See* Dkt. 184-11 ¶¶ 58-60.) Before October 11, 2012, a URL attachment sent with a message may have increased an aggregate,

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100% litigation-driven (a fact that will be clear when this case reaches summary judgment). Regardless, there is no dispute that EntShares continue to be created for URL attachments, and Plaintiffs therefore have no need for additional source code on this point.

[3] Dr. Golbeck and Plaintiffs also relied heavily on emails between and among Facebook employees concerning this change to the source code. The Court even addressed these emails in its Order. (Dkt. 192 at 22.) Plaintiffs cannot credibly assert that they do not have sufficient evidence that this practice was discontinued. Facebook also produced a code differential record that reflects the precise change to the source code (on December 19, 2012) that resulted in the discontinuation of this practice. (Dkt. 184-1, Ex. G.)

anonymous counter in Facebook's Insights product. (*Id.* ¶ 61.) The same source code, discovery, declarations, and deposition testimony noted above (*see supra* n.1) already provide Plaintiffs with all of the information they need relating to the functionality of this practice and its cessation in October 2012. And the June 2015 Himel Declaration (which preceded Facebook's production of the source code) also included a code differential record ("DIFF") that reflects the precise change to the code in October 2012 that discontinued this practice. (Dkt. 184-1 at 62 (Ex. E).) Therefore, Plaintiffs not only have the source code from before the change *and* after the change, they also have the record of the code change itself. They have no need for further source code relating to this practice.

4. Recommendations Feed. Plaintiffs' final challenged "use" concerns Facebook's Recommendations Feed, which was a social plugin offered to website developers that displayed a list of URLs representing the most recommended webpages on that developer's site (e.g., a list of articles displayed in a plugin on *The New York Times* homepage). (Dkt. 184-13 ¶ 8.) During the class period, the primary system for determining the URLs in the Feeds was a system called Taste. ***Taste did not utilize information related to URLs in messages in any way during the class period.*** (*Id.* ¶¶ 19, 35.) Plaintiffs' expert admitted that she did not have any evidence of the primary system using message data during the class period, but instead only for a short period ***before the class period***. (Golbeck Dep. 311:17-314:22.) During the class period, if (and only if) the Taste system failed, the ***backup*** system would provide the URLs for the Feed, and the backup system utilized information that included the aggregate, anonymous counts of URLs shared in messages. (Dkt. 184-13 ¶¶ 6, 21, 28, 34, 36.) But Facebook removed the backup system on July 9, 2014, and discontinued the Feed altogether on June 23, 2015. (*Id.* ¶¶ 21, 28-29.)

All of the relevant functionality pertaining to this practice when it was active is in the source code that Plaintiffs have had for over a year, and it is also reflected in the Declaration of Dan Fechete (Dkt. 184-13), the Declaration of Dr. Benjamin Goldberg (and the code he identified) (Dkt. 183-12), and deposition testimony from Facebook engineers Ray He (Dkt. 180-3 & 180-6) and Dan Fechete. Moreover, discontinuation of the feed was public information. *See* Facebook Platform Changelog,

https://developers.facebook.com/docs/apps/changelog. This is a screenshot of the public notice:

- **Social Plugins** - The following are now deprecated and will no longer render after June 23, 2015:
  - Facepile Plugin
  - Recommendations Feed Plugin
  - Activity Feed Plugin
  - Like Box Social Plugin

Plaintiffs do not need additional source code merely to show the removal of the backup system, which is already described in the Declaration of Dan Fechete. (Dkt. 184-13.) Facebook also will produce the DIFF reflecting the code change removing the backup system.

In sum, because of the extensive discovery Plaintiffs already have received, they have no legitimate need for additional source code to prove any aspect of their case related to the creation of EntShares or the three "uses" at issue. Plaintiffs have not identified any need (and there is no need) for additional source code that is not addressed by evidence described above or the less burdensome means offered by Facebook, and it is not proportional.

B. Plaintiffs' Remaining Justifications Confirm That They Are Attempting To Fish For New Information Beyond The Practices At Issue In This Case

Plaintiffs' only other conceivable justification for requesting additional source code is to explore practices that are not in their complaint. For example, they assert that they are entitled to fish for information about any uses of EntShares and EntGlobalShares "for purposes beyond Private Message delivery." (Mot. at 5.) But pursuant to this Court's instruction, Plaintiffs' amended complaint challenges three specific uses of EntShare information for which they have everything they need (and enough to have made *factual representations* to the Court in connection with class certification). Anything more is beyond the scope of discovery under Rule 26. (Dkt. 203.)[4]

[4] Plaintiffs' assertions concerning "logging" of information to "[redacted]" and "scribeh_share_stats" (Mot. at 6-7) are outside the case; these tables bear no relationship to the challenged practices during the class period. Additionally, the [redacted] table no longer exists. (Dkt. 185-1 ¶¶ 3-4.) Plaintiffs continue to try to exploit Facebook's errata and suggest bad faith. Their attacks are as unseemly as they are meritless. In the interests of complete transparency, Facebook affirmatively corrected an immaterial point once it realized its mistake (i.e., that the [redacted] table was deleted 22 days into the class period rather than before the class period (an irrelevant detail in light of, among other things, the fact that the table never included any data from messages sent during the class period). (*Id.*) Facebook's transparency has been rewarded

Plaintiffs also misrepresent an entirely unrelated aspect of Facebook's Graph API to try to convince the Court that "Facebook's sharing of URLs in Private Messages with third parties appears to be ongoing." (Mot. at 7-8.) This is false. Facebook's Graph API as it relates to global share objects ("EntGlobalShares") is another practice that is *not* at issue in Plaintiffs' case, which challenges the creation of "EntShares" from URL attachments in messages and three specific uses. Facebook's Graph API is an application programming interface—a tool for people to request certain information from Facebook and get something back in return—which (among other things) allows someone to request a URL from Facebook, provided the requester knows the identifier for that URL in Facebook's system. (Declaration of Neal Poole ("Poole Decl.") ¶¶ 8-9.) The API merely returns the public URL—nothing more. (*Id.* ¶¶ 8-10.) It does not return anything about the users who shared that URL, or whether they shared it in a message, or a post, or anywhere. (*Id.*) There is nothing new about this practice, which has been explained in detail on Facebook's public websites. *See* The Facebook Crawler, https://developers.facebook.com/docs/sharing/webmasters/crawler. (*Id.* ¶ 4.) This has nothing to do with the four practices challenged in Plaintiffs' complaint, and it also demonstrates Plaintiffs' lack of diligence in this case: Plaintiffs claim that "Facebook never disclosed this practice through discovery, and analysis of Facebook's up-to-date source code is necessary to understand how this functionality operates." (Mot. at 8.) This is not true. ***This functionality has been in place for years and is reflected in the source code that Plaintiffs already have***. (Poole Decl. ¶ 11.)

Further, contrary to Plaintiffs' assertions, Facebook's employees' reliance on source code to explain functionality does not support Plaintiffs' request for additional source code. Plaintiffs have had the source code reflecting the functionality of the challenged practices for over a year, and they claimed to understand it in their Motion for Certification. What they claim to need now is information as to whether the challenged practices were discontinued. For that, Facebook employees have relied not only on source code, but on DIFFs reflecting changes to the code, which Facebook has produced or agreed to produce. Indeed, while Plaintiffs assert that "Facebook's own key witness confirmed that the functionality at issue could only be understood through examination of the source

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by Plaintiffs' repeated and unwarranted suggestion that Facebook submitted "false" testimony.

code," citing to the June 1, 2015 declaration of Alex Himel, that declaration says no such thing, and, in fact, does not rely on the source code at all and instead relies on DIFFs to demonstrate changes to the code. (Dkt. 184-1 ¶¶ 10, 11, 13, 18, 20-22.) Moreover, Mr. Himel explains in that very document that DIFFs sufficiently "demonstrate the processes and functionality at issue." (*Id.* ¶ 8.)

C. Granting Plaintiffs' Request Would Materially Delay This Case

This Court should reject Plaintiffs' Motion, but if the Court were to order Facebook to produce additional source code, then it should do so without expecting Plaintiffs to abide by the existing schedule. The last production of source code involved *86 days* of review by Plaintiffs' counsel's various consultants and experts over the course of *seven months*, numerous follow-up requests (including the Motion to Compel "Configuration Tables"), and a Rule 30(b)(6) deposition with two Facebook software engineers to walk Plaintiffs line-by-line through the code. If this Court permits Plaintiffs to fish around in another 3.5 years Facebook's source code, it will inevitably lead to further discovery requests and motions to compel, defeating the very purpose of the schedule that the Court set and the limited discovery that it contemplated. Plaintiffs have identified no corresponding benefit to justify this delay—and there is none.

Facebook has proposed reasonable alternative discovery, including: (1) another Rule 30(b)(6) deposition; (2) additional document searches for the specific new practices at issue in the class certification ruling; and (3) further interrogatory responses. These proposals are more appropriately limited to the proper scope of discovery than Plaintiffs' request for another 3.5 years of source code. While Plaintiffs already have ample evidence showing that the challenged "uses" have ceased, Facebook has also offered additional discovery to confirm this fact and a stipulation that EntShares continue to be created for URL attachments sent in messages to the end of the class period.

V. CONCLUSION

Plaintiffs obtained partial certification based on their representations to the Court regarding their review of Facebook's "operational computer source code," which they claimed showed practices "continuing to this day." (Dkt. 178-1 at 1.) If they had a factual basis for their statements, they have no need for additional source code. For this reason and the other reasons explained above, their motion should be denied.

Dated: August 19, 2016

Respectfully submitted,

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