UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

MATTHEW CAMPBELL, MICHAEL HURLEY, and DAVID SHADPOUR,

Plaintiffs,

v.

FACEBOOK, INC.,

Defendant.

Case No. C 13-05996 PJH (MEJ)

ATTESTATION IN SUPPORT OF JOINT LETTER REGARDING PLAINTIFF DAVID SHADPOUR

Date: TBD
Time: TBD
Location: San Francisco Courthouse
Courtroom B – 15th Floor
450 Golden Gate Avenue
San Francisco, CA 94102

Pursuant to the Discovery Standing Order for Magistrate Judge Maria-Elena James, undersigned counsel hereby attest that they met and conferred in person in a good faith attempt to resolve their disputes prior to filing the below joint letter.

Dated: June 18, 2015

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: */s/*
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June 18, 2015

VIA ECF

The Honorable Maria-Elena James, Chief Magistrate Judge
United States District Court, Northern District of California
San Francisco Courthouse, Courtroom B - 15th Floor
450 Golden Gate Avenue, San Francisco, CA 94102

Re: *Campbell v. Facebook, Inc.*, N.D. Cal. Case No. 13-cv-05996-PJH (MEJ)

To The Hon. Maria-Elena James:

Plaintiffs and Defendant Facebook, Inc. jointly submit this letter brief pursuant to the Court's Discovery Standing Order.

I. Background

This putative privacy class action challenges the alleged "scanning" of messages sent on Facebook's social media website, which Plaintiffs contend violates the federal Wiretap Act and Cal. Penal Code § 631. Two of the named Plaintiffs (Matthew Campbell and Michael Hurley) filed the initial complaint on December 30, 2013, and the third Plaintiff (David Shadpour) filed a similar lawsuit on January 21, 2014. Judge Hamilton consolidated the actions, appointed interim class counsel, and ordered the filing of a consolidated complaint.

On January 26, 2015, Plaintiffs (jointly) and Facebook exchanged written discovery requests. On March 17, 2015, Plaintiffs' interim class counsel informed Facebook's counsel that Mr. Shadpour intended to withdraw as a Plaintiff. Facebook responded that it would not stipulate to Mr. Shadpour's withdrawal unless he responded to all outstanding discovery requests, produced documents, and sat for a deposition. Facebook sent a proposed notice for Mr. Shadpour's deposition (along with the other named Plaintiffs) in mid-April (*see* Dkt. 85-1, Jessen Decl., Ex. E), and Plaintiffs' counsel sent a draft stipulation to dismiss Mr. Shadpour from the case.

Having conferred in person, the parties are now at an impasse and submit this joint letter brief pursuant to the Court's Discovery Standing Order. By way of this letter brief, Facebook requests a deposition of Mr. Shadpour and complete responses to its outstanding discovery requests, including a document production (Ex. A), and Plaintiffs' interim class counsel seek an Order pursuant to Rules 21 and/or 41(a)(2) of the Federal Rules of Civil Procedure to dismiss Mr. Shadpour as a party to this action, and to relieve him of any outstanding discovery obligations.

II. Facebook's Position

Plaintiff David Shadpour filed his initial complaint approximately three weeks after the *Campbell* action was filed. Mr. Shadpour's attorneys at Pomerantz, LLP were appointed as part of "Plaintiffs' Executive Committee" and "Interim Class Counsel" by Order dated April 15, 2014 (Dkt. 24). Along with the two other named Plaintiffs, Mr. Shadpour has served substantial discovery on Facebook, including two sets of document requests (52 total requests), two sets of interrogatories, and one set of requests for admission. Mr. Shadpour (along with his co-Plaintiffs) served a second round of discovery requests on Facebook on May 26, 2015—after his counsel notified Facebook that he intended to withdraw. Plaintiffs' expansive discovery requests have placed a substantial burden and expense on Facebook.

The burdens on Mr. Shadpour have been comparatively minimal—one set of Requests for Production of Documents, one set of Interrogatories, and a proposed deposition notice. Although Mr. Shadpour responded in writing to Facebook's discovery requests in March and April, and promised to produce responsive documents (Ex. B), he has yet to produce a single document. Facebook is entitled to Mr. Shadpour's responsive documents and his deposition.

Rule 30(a) authorizes the deposition of any party, and the Ninth Circuit requires a "strong showing …before a party will be denied entirely the right to take a deposition." *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975). Plaintiffs have made no such showing at all—they have not offered any declaration or other evidence from Mr. Shadpour citing *any* burdens—and Facebook is willing to take his deposition in his hometown of Los Angeles at a convenient time. In sum, he is still a party to this lawsuit, and "[i]t is beyond dispute that Defendant[] [is] entitled to take the deposition of a party." *Colo. Cross-Disability Coal. v. Abercrombie & Fitch Co.*, 2011 U.S. Dist. LEXIS 134930, at *4 (D. Colo. Nov. 22, 2011). The district courts in this Circuit routinely require that class representatives sit for deposition, even if they seek to dismiss themselves. *E.g.*, *Dysthe v. Basic Research, LLC*, 273 F.R.D. 625, 628-30 (C.D. Cal. 2011); *Fraley v. Facebook, Inc.*, 2012 U.S. Dist. LEXIS 21501, at *6-10 (N.D. Cal. Feb. 21, 2011); *Sherman v. Yahoo! Inc.*, 2015 WL 473270, at *7 (S.D. Cal. Feb. 5, 2015); *Pappas v. Naked Juice Co.*, 2012 WL 12248744 (C.D. Cal. Dec. 7, 2012); *Nilon v. Natural-Immunogenics Corp.*, 2014 WL 3779006, at *4 (S.D. Cal. July 31, 2014).

As for Plaintiffs' assertion that evidence regarding Mr. Shadpour is "common" and available from the other putative class representatives, that assertion is not supported by any evidence and it *assumes* the answer to the very inquiry that must be conducted pursuant to Rule 23(a). Facebook is entitled to discovery to probe grounds to oppose class certification. In particular, the Federal Rules "clearly provide that parties may obtain discovery regarding matters relevant to the action … [and] commonality is an issue that is relevant to Plaintiffs' class certification efforts." *Dysthe*, 273 F.R.D. at 628-29. As a named plaintiff and putative class member, Mr. Shadpour's testimony is relevant to the parties' claims and defenses. *Id*.

(explaining that a putative class representative's deposition testimony is "highly likely to be relevant to class certification issues, including commonality and the typicality of the class representative's claims").[1] Mr. Shadpour's discovery responses also indicate that he has information relevant to class issues and the merits of Plaintiffs' allegations. *See* Ex. B.

Mr. Shadpour has not filed a noticed motion to withdraw, and Plaintiffs' counsel now attempts to secure that relief through this discovery brief. But even if this Court (or the District Court) were to eventually dismiss Mr. Shadpour, the dismissal can and should be conditioned on completing his deposition and document production. Where, as here, defendant answered the complaint, courts may impose "terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). One condition courts regularly impose is completing outstanding discovery obligations, including depositions. *See, e.g.*, *Fraley*, 2012 U.S. Dist. LEXIS 21501, at *9 (ordering deposition of named plaintiff seeking dismissal because the protective order addressed plaintiff's concerns, and "[i]f anything, the fact that [plaintiff] may soon be dismissed from the lawsuit makes even more relevant Facebook's discovery into the basis for [plaintiff's] allegations that will be a part of the record").[2] Facebook respectfully requests that Mr. Shadpour complete his deposition and document production.

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[1] Plaintiffs cite only two cases involving a withdrawal request and a deposition notice; both are inapposite: (1) the corporate plaintiff in *In re Urethane Antitrust Litig.*, 2006 WL 8096533, at *1-2 (D. Kan. 2006), offered evidence that it was "unable to protect the interests of class members due to its financial difficulties" and defendants had *already* "obtained [its] documents"—Plaintiff Shadpour offers no evidence of hardship and has not produced documents; and (2) the plaintiff in *Roberts v. Electrolux Home Prods.*, 2013 WL 4239050, at *2 (C.D. Cal. 2013), also offered evidence of "personal and family health concerns," and the court cited *Dysthe*, *Fraley*, & *Colo. Cross-Disab.* noting, "at best, these decisions stand for the proposition that a named plaintiff cannot avoid the obligation to sit for a deposition merely by filing a request to withdraw"—the same relief sought here. Plaintiffs' other cases involved very different circumstances: (1) the quoted portion of *Waller v. Fin. Corp. of Am.*, 828 F.2d 579 (9th Cir. 1987), addressed dismissal of *lawsuits* (not parties); (2) the plaintiff in *U.S. ex rel. Meyer v. Horizon Health Corp.*, 2006 WL 1490216, at *1 (N.D. Cal. 2006), offered "valid medical reasons" for withdrawal, and the court noted that the defendant could use third-party subpoenas to obtain the information it needed; (3) *James v. UMG Recordings*, 2012 WL 4859069, at *2 (N.D. Cal. 2012), involved a Rule 15(a) motion to file a consolidated complaint; and (4) *McConnell v. Red Robin Int'l*, 2012 WL 1357616, at *3 (N.D. Cal. 2012), involved the addition of a new named plaintiff (not withdrawal or a deposition notice).

[2] *See also Dysthe*, 273 F.R.D. at 629 (ordering the deposition of a named plaintiff who sought withdrawal, in part because he had been a plaintiff since the beginning of the suit and through several amendments to complaint); *Sherman*, 2015 WL 473270, at *7 (conditioning withdrawal on plaintiff's deposition); *Mashek v. Silberstein*, 20 F.R.D. 421, 422 (S.D.N.Y. 1957) (same); *In re Wellbutrin XL*, 268 F.R.D. 539, 544 (E.D. Pa. 2010) (conditioning plaintiff's dismissal upon document production).

III. Plaintiffs' Position

Plaintiffs' interim class counsel seek an Order pursuant to Federal Rules of Civil Procedure 21 and/or 41(a)(2) to dismiss Mr. Shadpour as a party to this action, and relieve him of any outstanding discovery obligations.[3] The two original plaintiffs in this action (Matthew Campbell and Michael Hurley) remain willing and able to zealously represent the class. The Class will not be prejudiced in any way by dismissal of Mr. Shadpour's individual claims.

"When considering whether to permit a named plaintiff to withdraw from a class action, courts have observed that '[a]bsent a good reason . . . a plaintiff should not be compelled to litigate if [he] doesn't wish to.'" *Roberts v. Electrolux Home Prods., Inc.*, No. 12-1644, 2013 WL 4239050, at *2 (C.D. Cal. Aug. 14, 2013) (citation omitted); *see also U.S. ex rel. Meyer v. Horizon Health Corp.*, No. 00-1303, 2006 WL 1490216, at *1 (N.D. Cal. May 25, 2006) (Armstrong, J.); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) (stating that potential class representatives must be able to "vigorously pursue" claims on behalf of the class.) Accordingly, "a district court should grant a motion for voluntary dismissal unless a defendant can show that it will suffer some plain legal prejudice as a result." *Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 583 (9th Cir. 1987).

Facebook would suffer no "plain legal prejudice" if it is not allowed to condition Mr. Shadpour's withdrawal on his deposition and additional discovery, for two principal reasons.

First, this motion comes early in the proceedings – no substantial resources have been expended specific to Mr. Shadpour, as his claims merely mirror those brought by the original plaintiffs. Moreover, Mr. Shadpour has not propounded any unique discovery on Facebook; instead, all discovery has been propounded by the plaintiffs collectively. It is unlikely that any preparation by Facebook for Mr. Shadpour's deposition, noticed a month *after* Facebook learned that Mr. Shadpour intended to withdraw, would not also apply to the Campbell and Hurley depositions. *See James ex rel. James Ambrose Johnson, Jr. v. UMG Recordings, Inc.*, No. 11-1613, 2012 WL 4859069, at *2 (N.D. Cal. Oct. 11, 2012) (Illston, J.) (granting substitution of named plaintiffs, finding "the nature of the litigation and the course of defense will not be substantially altered, and [defendant] will not suffer substantial prejudice" where proposed substitute plaintiffs and claims were substantially similar); *c.f., McConnell v. Red Robin Int'l, Inc.*, No. 11-03026, 2012 WL 1357616, at *3 (N.D. Cal. Apr. 17, 2012) (Alsup,

[3] Federal Rule of Civil Procedure 21 provides that "[o]n motion or on its own, the court may at any time, on just terms, add or drop a party." Rule 41(a)(2) provides that after an opposing party has served an answer, "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper."

J.) ("It is not clear . . . how the addition of [a new named plaintiff], absent additional claims, will so alter defendant's preparation for this case as to result in undue prejudice.").

Second, no allegation unique to Mr. Shadpour forms any fundamental part of the record. *See* Dkt. 25 (CAC); Dkt. 29-36; 43; 45 (Briefing, Hearing, and Order on Motion to Dismiss); Dkt. 53 (Answer). The allegations in Mr. Shadpour's tag-along complaint mirrored those in the original complaint filed by Mr. Campbell and Mr. Hurley. In the parties' March 5, 2015 Joint Case Management Statement, Facebook asserted that its "dispositive defenses" would dispose of the claims of "Facebook users" generally and, for example, "the people who use Facebook were aware that the URLs in their messages were being processed—and consented to that processing." (Dkt. 60 at 4-5). Any critical testimony, discovery responses, or documents that Mr. Shadpour might possess are equally available from the other Plaintiffs.

Unconditional dismissals are routinely granted under such facts. *See Roberts*, 2013 WL 4239050, at *2 (granting unconditional dismissal where withdrawal was sought before summary judgment or class certification, minimal resources were expended preparing for the plaintiffs' depositions, and another plaintiff continued to represent the class; holding that *Dysthe*, *Fraley*, & *Colo. Cross-Disab.* "do not stand for the proposition that . . . withdrawal can be conditioned upon the plaintiff's willingness to sit for a deposition"); *Meyer*, 2006 WL 1490216, at *1 (declining to require discovery as condition of dismissal, holding "[t]o the extent that [defendant] is concerned about its access to certain documents or information in [withdrawing plaintiff's] possession, this can be addressed, as appropriate and necessary, through third-party discovery."); *In re Urethane Antitrust Litig.*, No. 04-1616, 2006 WL 8096533, at *2 (D. Kan. June 9, 2006) (denying motion to compel withdrawing plaintiff's deposition, in part, because "[t]he information Defendants need regarding class certification issues may be obtained from the remaining class representatives.").

Courts have imposed conditions such as Facebook seeks where, unlike here, the circumstances so warranted. *See Sherman*, 2015 WL 473270, at *7 (requiring deposition, but not additional discovery, from original named plaintiff likely to give unique testimony, whose deposition had been rescheduled several times, and who sought dismissal late in the proceedings); *Dysthe* 273 F.R.D. at 629 (requiring discovery from original named plaintiff who possessed unique information, and sought dismissal late in the proceedings); *Fraley*, 2012 WL 555071, at *3 (requiring deposition of original named plaintiff who sought dismissal late in the proceedings, and whose individual allegations formed important part of the record). By contrast, this request comes early; minimal resources have been expended on Mr. Shadpour individually, and his allegations form no unique part of the record.

For the foregoing reasons, Plaintiffs respectfully request that this Court dismiss Mr. Shadpour as a party, and deny Facebook's request that such dismissal be conditioned upon his deposition and or any additional discovery responses.