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APPLE INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MARC OPPERMAN, et al.,

Plaintiffs,

v.

PATH, INC., et al.,

Defendants.

CASE NO. 13-CV-00453-JST

DEFENDANT APPLE INC.'S MOTION FOR RELIEF FROM NONDISPOSITIVE PRETRIAL ORDER OF MAGISTRATE JUDGE

I. INTRODUCTION

Defendant Apple respectfully submits this Motion for Relief from Magistrate Judge Spero's order regarding discovery disputes issued Feb. 11, 2016, (Dkt. 643, the "Order") pursuant to Fed. R. Civ. P. 72(a), 28 U.S.C. § 636(b)(1), and Civil Local Rule 72-2. Apple objects to the Order because it denies Apple direct access to information the Magistrate found to be relevant, *i.e.*, contacts data and other apps data on Plaintiffs' devices—even though that data would be fully protected by the existing Protective Orders. Indeed, it is the same contacts data that three plaintiffs testified they provided voluntarily to various apps, including to two of the defendants in this case. Rather than requiring Plaintiffs to produce this basic evidence relating to their invasion of privacy claims, the Order instead limits Defendants to asking each Plaintiff two uniform sets of interrogatories: five interrogatories concerning apps data and ten concerning contacts data. Requiring Defendants to rely exclusively on Plaintiffs' unchecked analysis and characterization of their contacts and apps data in interrogatory answers—rather than permitting Defendants and their experts to examine and analyze this key evidence—unfairly prejudices Defendants' efforts to respond to the pending class certification motion and to prepare for trial and dispositive motions. Because the Order deprives Defendants of important, relevant evidence, and because Plaintiffs have shown no prejudice that would result from producing the evidence at issue under the existing Protective Orders, Apple respectfully requests that this Court order that Plaintiffs promptly produce contacts data and apps data.

Since August 2015, Apple has sought discovery of contacts data and apps data from Plaintiffs' mobile devices. Plaintiffs objected to the production of both on the grounds of relevance and privacy. After months of negotiation, Apple sought the Court's intervention, briefing the dispute twice following reference to Judge Spero. Dkts. 620, 633. On both occasions, Apple requested that the Court order that Plaintiffs produce the data at issue.

Following a hearing on Feb. 11, 2016, Judge Spero issued the Order. He found that discovery regarding both sets of data was warranted, but declined to order production of the actual data because he held it "not proportional" to the needs of the case at the class certification stage. Dkt. 643 at 2–3. Instead he allowed Defendants to propound ten interrogatories regarding

the contacts data, and five interrogatories regarding apps data. *Id.*; Dkt. 649 at 56–67. Plaintiff Jason Green's responses to these interrogatories were served on Feb. 15, 2016; the remaining Plaintiffs' interrogatory responses are due Feb. 29.

II. ARGUMENT

A district court may set aside a magistrate judge's nondispositive order where the order "is clearly erroneous or contrary to law," 28 U.S.C. 636(b)(1)(A)—where the court is left with the definite and firm conviction that a mistake has been committed. *United States v. Real Prop. & Improvements*, No. 13-cv-2027-JST, 2014 WL 325151, at *1 (N.D. Cal. Jan. 29, 2014). Here, Judge Spero's refusal to order the requested discovery is clearly erroneous; the requested discovery is relevant, important, and proportional to the current needs of the case.

A. The Requested Discovery Is Relevant and Proportional.

Plaintiffs' contacts and apps data is directly relevant to the merits of their invasion of privacy claims, including core liability issues and the existence and extent of claimed damages. As this Court has previously observed, under the common law of multiple states, invasion of privacy turns on whether the Defendants' alleged conduct may be deemed *highly* offensive to a reasonable person under the circumstances. Dkt. 471 at 45–46. To prevail on an invasion claim, a plaintiff must show "an actual, subjective expectation of seclusion" and that the expectation was objectively reasonable. *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., Inc.*, 306 F. 3d 806, 812 (9th Cir. 2002). The substance of what was intruded upon is a critical factor in proof of the claim. *See In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016, 1040–41 (N.D. Cal. 2014) (dismissing privacy invasion claim for misappropriation of emails because allegations were limited to asserted interests in "email generally," not specific email content).

The contents of individual Plaintiffs' contacts—showing how they use their contacts, and the number and nature of individual entries—plainly bears on the existence and degree of offensiveness and the credibility of any claim that the alleged invasion experienced by that Plaintiff would be highly offensive to a reasonable person. For the same reasons, the substance of individual contacts has obvious relevance to allegations of alleged actual damages (*e.g.*, emotional upset, reduction of contacts' value) and thus punitive damages. For class certification,

Defendants seek contacts and apps data to show that consumers *create*, *store* and *share* contacts in different ways, affecting the offensiveness of any given alleged intrusion and the extent of any individual injury and damages—key predominance issues. Plaintiffs' operative Complaint, in fact, contains multiple allegations about the substance of Plaintiff's contacts data, *e.g.*, Dkt. 478 at ¶¶ 245, 257, 258, 312. Plaintiffs' pending class certification motion also contains multiple such references. Dkts. 651 at 1–9, 651-17, 651-38.

Judge Spero acknowledged the relevance of contacts data to the merits. Dkt. 649 at 7, 26 ("The merits stuff . . . I see your point . . . the individual's contacts may have to do with the viability of their arguments about privacy. . . ." "[S]ome of the information in there is relevant."). He did the same for apps data. Dkt. 643 at 3 ("How Plaintiffs treated their address book data with respect to other apps is more relevant. . . ."). But he held Apple "was not entitled to all relevant evidence," Dkt. 649 at 12, because he concluded that the issues on class certification, as opposed to the merits, were narrower, *id*. at 32, and because differences in the way that people use contacts "are not controversial, that no one is going to dispute." *Id*. at 21; Dkt. 643 at 2.

Judge Spero erred, however, in concluding that Defendants are not now entitled to evidence bearing on key issues of liability, injury, commonality, predominance and damage. To be sure, Plaintiffs' counsel stipulated on the record to a number of important facts in responding to Judge Spero's questions: "some people share their contacts freely;" "some people just put non-friends on their contacts;" some just use contacts "to have records of businesses." Dkt. 649 at 22–23; Dkt. 643 at 2. But that is not enough: Plaintiffs have not conceded commonality, predominance, or *Comcast* damages model issues, and it is unfair and contrary to Federal Rules of Civil Procedure 26 and 30 to deprive Defendants of important evidence on these issues.

B. Asserted Privacy Interests Do Not Justify Non-Production.

Relevance not reasonably in doubt, Judge Spero's Order relies on "Plaintiffs' privacy interests" in denying production of the actual evidence. Dkt. 643 at 2. But that conclusion is contrary to the law and the record in this case. First, no Plaintiff has submitted evidence showing his or her contacts to be highly sensitive, or indeed, private at all—and certainly they have not

shown sensitivity that cannot be addressed through production under a protective order. With respect to apps data, Plaintiffs have not even articulated a colorable argument for why such data could be considered private. Courts regularly require rigorous evidentiary showings of the bases for privacy or confidentiality before relevant evidence can be sealed from the public record—let alone withheld from discovery. *See* Order Denying Administrative Motion to File Under Seal, Dkt. 642 at 1–2. Second, Plaintiffs have themselves put their contacts and apps data at issue by bringing this action, incurring the obligation to disclose it in discovery. *E.g.*, *Lachrichi v. Lumera Corp.*, 433 Fed. App'x 519 (9th Cir. 2011) (therapist-patient privilege waived); *Herskowitz v. Apple Inc.*, No. 12-CV-02131-LHK, (N.D. Cal. Feb. 12, 2014), Dkts. 96, 98 (compelling production of computer data over privacy objections). Third, Path Plaintiffs have testified that they *willingly shared their contacts data with multiple apps*. Since the filing of his claims, Jason Green granted permission to Instagram and Twitter (the very defendants Plaintiffs accuse of invading their privacy in 2012) and other social networking apps to access his contacts. Ex. A at 80, 85, 168. Lauren Carter voluntarily shared her contacts with another Defendant, Foodspotting, Ex. B at 124:18–21, and Stephanie Cooley consented to sharing her contacts data with several apps, including Safari, Oggl, LinkedIn, and Pinterest. Ex. C at 92:6–13. If Plaintiffs for their own purposes share their contacts with multiple apps, there is no justification for withholding them from discovery in their own lawsuit. Fourth, this case's Protective Orders, Dkts. 444-1, 447 and 619, adequately address Plaintiffs' asserted privacy concerns. Courts routinely hold protective orders sufficient to protect privacy concerns. *E.g.*, *Minns v. Advanced Clinical Emp't Staffing LLC*, No. C 13-03249 SI, 2014 WL 4352343, at *2 (N.D. Cal. May 9, 2014).

Defendants, of course, have produced extremely valuable, highly confidential information, *including source code*, pursuant to the Protective Orders. But when Judge Spero questioned Plaintiffs' counsel about why the Protective Orders would not protect any privacy interests at issue, Dkt. 649 at 25, Plaintiffs' counsel offered no meaningful response. *See id.* at 25–26. The Order creates an imbalance regarding the parties' respective asserted interests in keeping information private. It is unfair and improper for this reason alone.

C. Interrogatories are an Inadequate Substitute for the Requested Data.

While conceding the relevance of the data sought, Judge Spero nonetheless permitted Defendants only a single, uniform set of interrogatories directed to all Plaintiffs, asking them to analyze and report on the data at issue. But for good reason, courts and commentators routinely recognize that interrogatory responses are intrinsically self-serving and inferior to direct evidence. *E.g.*, *Hill v. Tangherlini*, 724 F.3d 965, 967 (7th Cir. 2013) ("[R]esponses to interrogatories [] by their nature are self-serving."); *Spieker v. Quest Cherokee, LLC*, No. 07-1225-EFM, 2009 WL 2168892, at *4 (D. Kan. July 21, 2009) ("[D]ocuments and correspondence are powerful evidence and a party is generally entitled to review relevant documents rather than take an opposing party's word."); *see also Transamerica Life Ins. Co. v. Lambert*, 2013 WL 4028275, at *2 (E.D. Mo. Aug. 7, 2013) (granting motion to compel inspection of devices in life insurance dispute, ruling "production of copies of cell phone text messages and a non-forensic copy of the computer hard drive are insufficient to respond to Lambert's second request for production of the cell phone and computer themselves, as the copies provided do not allow for forensic examination of the devices"); 8B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRACTICE AND PROCEDURE § 2169. Plaintiffs' counsel's analyses and characterizations of the underlying evidence and answers carefully crafted by counsel are simply no substitute for the opportunity to analyze the actual data and cross-examine Plaintiffs about that data. The only interrogatory responses served to date, of Plaintiff Green, well illustrate the inadequacy of interrogatories in this context.[1]

III. CONCLUSION

Apple respectfully requests that the Court set aside the Order and require that Plaintiffs produce forthwith their contacts data and apps data.

[1] Green responded to one of the prescribed interrogatories by stating, without explanation, that 136 of his 165 total contacts entries contained non-public information. In response to deposition questions concerning that interrogatory answer, Green testified that "everything is quote/unquote nonpublic. . . ." Ex. A at 108:21–112:4. And, because Apple had no access to Green's actual contacts, it was further limited in cross-examining him about his interrogatory answer, for instance, by showing him the overlap between his contacts entries and his public Facebook posting showing the identities and other information for all of his 267 Facebook friends. Ex. A at 159. Without resort to his contacts, not surprisingly, Green could not testify to the degree of overlap, *id*. at 157–162, and Apple cannot show that overlap itself with the evidence.

Dated: February 25, 2016

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