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 14 FACEBOOK, Inc., a Delaware corporation

15 UNITED STATES DISTRICT COURT
 16 NORTHERN DISTRICT OF CALIFORNIA
 17 SAN JOSE DIVISION

18 IN RE:
 19 FACEBOOK PRIVACY LITIGATION.

Case No. 10-cv-02389-JW

**DECLARATION OF JAMES M. PENNING IN
 SUPPORT OF DEFENDANT’S
 ADMINISTRATIVE MOTION TO EXTEND
 DEADLINE TO RESPOND TO PLAINTIFFS’
 CONSOLIDATED CLASS ACTION
 COMPLAINT**

20 I, James M. Penning, hereby declare as follows:

21 1. I am an attorney duly licensed to practice law in the State of California and am an
 22 associate with the firm of Cooley LLP, counsel of record for Defendant Facebook, Inc.
 23 (“Facebook”) in this action. I have personal knowledge of the facts set forth herein, and, if called
 24 as a witness, I could and would competently testify thereto.

25 2. Since Plaintiffs’ Consolidated Complaint was filed, seven related actions have
 26 been filed in the Northern District of California that contain allegations against Facebook, Zynga
 27 Game Network Inc. (“Zynga”), or some combination thereof, that are substantially similar to
 28 those in In Re: Facebook Privacy Litigation. Those matters are:

- 1 • *Graf v. Zynga*, No. 3:10-cv-04680-WHA (“Graf”);
- 2 • *Albini v. Zynga; Facebook Inc.*, No. 3:10-cv-04723-JL (“Albini”);
- 3 • *Gudac v. Zynga*, No. 3:10-cv-04793-EMC;
- 4 • *Schreiber v. Zynga*, No. 3:10-cv-04794-JCS;
- 5 • *Swanson v. Zynga*, No. 5:10-cv-4902-HRL;
- 6 • *Carmel-Jessup v. Facebook; Zynga*, No. 3:10-cv-4930-MEJ; and
- 7 • *Phee v. Facebook; Zynga*, No. 3:10-cv-4935-SC.

8 3. On October 13, 2010, Facebook was served with the complaint in the related
9 action captioned *Wendy Marfeo v. Facebook, Inc.*, Case No. 10-cv-00262-S-LDA (D.R.I.)
10 (“*Marfeo*”), to which Facebook previously alerted the Court by notice filed August 10, 2010.

11 4. October 18, 2010, an amended complaint was filed in the *Marfeo* action adding
12 additional allegations against Facebook related to applications developed and utilized on
13 Facebook’s online social networking platform.

14 5. All of the claims in the above eight actions arise from allegations that “referrer
15 headers” within some Facebook users’ web browsers caused user information to be leaked to
16 third parties when users took certain actions on Facebook or on applications developed on
17 Facebook’s online social networking platform. The actions also involve overlapping legal claims.
18 and overlapping parties on both the plaintiff and defense sides, and overlapping legal counsel on
19 both sides too.

20 6. Extension of Facebook’s deadline to respond to Plaintiffs’ Consolidated Class
21 Action Complaint will allow the parties to address the outstanding procedural issues in an
22 efficient and logical manner. It will also avoid substantial harm to the parties by conserving
23 valuable party and Court resources and eliminating unnecessary duplication of efforts that will be
24 required if a response is required now and then the actions are consolidated and an Amended
25 Consolidated Class Action Complaint filed.

26 7. Prior to consolidation of *Gould* and *Robertson* into this action, the parties
27 stipulated to extensions of Facebook’s deadline to respond to the individual complaints and the
28 Court entered Orders granting these extensions on June 14, July 27, and August 11 in *Robertson*,

1 and on June 24, July 27, and August 11 in *Gould*. The parties previously agreed to Facebook
2 being allowed thirty days from the date the Consolidated Complaint was filed to file its response.
3 This agreed upon deadline to respond to the Consolidated Complaint has not been extended prior
4 to this request.

5 8. In August 2010, the parties in this case began discussing procedural logistics
6 related to *Marfeo*, which was then pending in the District of Rhode Island but had yet to be served
7 on Facebook. On October 13, 2010, Facebook was served with the *Marfeo* complaint.

8 9. On October 27, 2010, a stipulation to transfer *Marfeo* was filed, and on November
9 1, 2010, the District Court in Rhode Island ordered *Marfeo* be transferred to the Northern District
10 of California.

11 10. On October 22, Facebook's counsel initiated meet-and-confer discussions with
12 Plaintiffs' counsel regarding procedural issues pertaining to the anticipated transfer of *Marfeo* to
13 this Court and the additional actions being filed in this Court—the first two of which were filed
14 on October 18 and 19. (On October 18, Plaintiffs' counsel filed the *Graf* action naming Zynga as
15 a defendant. On October 19, the *Albini* action was filed naming Facebook and Zynga as
16 defendants.)

17 11. I advised Plaintiffs' counsel that a stipulation to transfer the *Marfeo* action to this
18 Court would be filed in the near future and inquired about Plaintiffs' intentions with respect to
19 consolidation of the actions. Plaintiffs' counsel advised they agreed that the original complaint
20 filed in *Marfeo* should be consolidated into this action, however, they needed additional time to
21 consider the impact of the additional allegations *Marfeo* raised in his amended complaint. In
22 addition, the fact that they had recently filed an action asserting allegations similar to the
23 allegations added by *Marfeo* against Zynga without naming Facebook as a defendant was
24 something they also wanted to consider. The parties agreed to re-convene the meet-and-confer
25 the following week.

26 12. On October 29, the parties met and conferred on the potential relation and
27 consolidation of *Marfeo* and the additional actions which had been filed—at that time, three
28 actions naming Facebook and Zynga as defendants and three actions naming only Zynga as a

1 defendant. The parties discussed whether this action should be stayed pending a determination on
2 whether the actions should be related and then consolidated but made no decisions on how to
3 proceed and agreed they needed additional information to make a final decision. The parties
4 agreed to meet-and-confer on the issue the following week.

5 13. On November 3, the parties met and conferred again. At that time, I advised that
6 Facebook's position was that the actions all should be related and then consolidated. Plaintiffs'
7 counsel advised that they had begun preliminary discussions regarding these procedural issues
8 with counsel in the other actions and that there was no consensus on the issues. I requested a 30-
9 day extension of Facebook's deadline (currently less than a week away, on November 10) to
10 respond to the Consolidated Complaint, to allow the parties to present the relatedness and
11 consolidation issues to the Court for a determination. Plaintiffs' counsel declined to agree to the
12 extension. Plaintiffs' counsel also advised that the Court was currently scheduling motion
13 hearings for February 14, 2011 or later, and that their decision was not tied to when the hearing
14 would be held, but merely a reflection of their belief that the action should continue to move
15 forward.

16 14. According to this Court's website, currently the first available hearing date for
17 Facebook's anticipated motion to dismiss is February 14, 2011.¹

18 I declare under penalty of perjury under the laws of the United States that the foregoing is
19 true and correct. Executed this 4th day of November, 2010 at Palo Alto, California.

20 /s/James M. Penning
21 James M. Penning

22 1198864 v1/SF

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28 ¹ See <http://www.cand.uscourts.gov/cand/calendar.nsf/ExtraInfoLinkDocs/JW>. (last accessed
November 3, 2010).