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10 **IN THE UNITED STATES DISTRICT COURT**  
 11 **NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION**

12 IN RE: FACEBOOK PRIVACY  
 13 LITIGATION

CASE NO. 10-cv-02389-JW

14 **MEMORANDUM OF POINTS AND**  
 15 **AUTHORITIES IN OPPOSITION OF**  
 16 **CONSOLIDATION AND IN SUPPORT OF**  
 17 **APPOINTMENT OF CO-LEAD**  
 18 **PLAINTIFF AND CO-LEAD COUNSEL**

19 JUDGE: Honorable James Ware  
 20 CTRM: 8

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1 Plaintiff Wendy Marfeo (“Ms. Marfeo”), through her attorneys, The Law Offices of Peter  
2 N. Wasylyk, The Law Offices of Andrew S. Kierstead, and Stanley • Iola, LLP (“Plaintiff’s  
3 Counsel”), hereby respectfully submits this memorandum in opposition of the consolidation of all  
4 cases related to the instant case, and for support of the appointment of herself as Co-Lead Plaintiff  
5 and Plaintiff’s Counsel as Co-Lead Counsel pursuant to Fed. R. Civ. P. 23(g)(3) and pursuant to  
6 this Court’s Order [Doc. 47] of November 15, 2010.

7 **I. PROCEDURAL HISTORY AND INTRODUCTION**

8 Plaintiff Wendy Marfeo commenced a class action against Facebook, Inc. (“Facebook”) on  
9 June 17, 2010 in the United States District Court for the District of Rhode Island (Cause No. 10-  
10 cv-262). In her Complaint, Ms. Marfeo alleged causes of action against Facebook for violations of  
11 the Stored Communications Act, 18 U.S.C. §§ 2701, *et seq.*, breach of contract, breach of the  
12 implied covenant of good faith and fair dealing, and unjust enrichment based on Facebook’s  
13 disclosure of her unique Facebook user ID to third parties via referrer headers when she and  
14 thousands of other users clicked on third-party advertisements displayed on Facebook’s website.

15 On October 18, 2010, Ms. Marfeo filed an Amended Class Action Complaint on behalf of  
16 herself and two distinct classes (the “Classes”) defined as follows: all Facebook users who reside  
17 in the United States, who interacted with Facebook’s authorized applications on Facebook’s social  
18 networking website, and as a result of such interactions had their user ID’s transmitted to third-  
19 party advertisers and/or internet tracking companies (the “Application Class”); and all Facebook  
20 users who reside in the United States, whose user ID was embedded in the URL referrer header,  
21 and who clicked on a third-party advertisement displayed on Facebook’s social networking  
22 website, anytime on or before May 21, 2010 (the “Advertiser Class”).

23 On November 1, 2010, pursuant to stipulation between Plaintiff’s Counsel and Facebook’s  
24 counsel, Ms. Marfeo’s case was ordered transferred to this Court by the United States District  
25 Court for the District of Rhode Island. A true and correct copy of Ms. Marfeo’s First Amended  
26 Class Action Complaint is attached hereto as Exhibit A, and a true and correct copy of the  
27 Stipulation and Order Transferring Case to Northern District of California is attached hereto as  
28 Exhibit B. In preparation for the prosecution of her case before this Court, Ms. Marfeo became

1 aware of this Court's Order [Doc. 47] of November 15, 2010 requesting briefing by November 22,  
2 2010 regarding whether the numerous cases recently filed against Zynga Game Network  
3 ("Zynga") should also be consolidated into the instant action, and requesting nominations for Lead  
4 Plaintiffs and Lead Counsel.

5 Ms. Marfeo opposes the consolidation of the Zynga cases into the instant action, but  
6 respectfully requests that the Court appoint her a Co-Lead Plaintiff and appoint Plaintiff's Counsel  
7 as Co-Lead Counsel in the In Re: Facebook Privacy Litigation, Case No. CV 10-02389-JW.  
8 Ms. Marfeo respectfully requests these appointments whether or not this Honorable Court  
9 consolidates the related Zynga actions into the current Facebook action.

10 **II. THE COURT SHOULD NOT CONSOLIDATE ALL RELATED ACTIONS INTO**  
11 **THE CURRENT ACTION**

12 As the Court recognizes in its November 15 Order [Doc. 47], the gravamen of all the  
13 related actions filed against Zynga and Facebook involves allegations that unique Facebook user  
14 IDs were disclosed to third parties, thereby allowing third parties to obtain additional information  
15 about the users. The recently-related cases and the current consolidated case present different  
16 questions of law and fact. Different contractual agreements and representations govern users'  
17 relationships with Facebook as compared to users' relationships with Zynga.

18 Ms. Marfeo therefore opposes the consolidation of all related cases into the current action.  
19 Additionally, Ms. Marfeo requests that she be appointed a Co-Lead Plaintiff and that Plaintiff's  
20 Counsel are appointed Co-Lead Counsel whether or not this Honorable Court consolidates the  
21 related cases into the current action.

22 **III. THE COURT SHOULD APPOINT MS. MARFEO AS CO-LEAD PLAINTIFF AND**  
23 **HER COUNSEL AS CO-LEAD COUNSEL**

24 The duty of adequate representation requires counsel to represent the class competently and  
25 vigorously and without conflicts of interest with the class. *See Amchem Prods., Inc. v. Windsor*,  
26 521 U.S. 591, 626 n.20 (1997); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir.1998);  
27 *Rutherford v. City of Cleveland*, 137 F.3d 905, 909 (6th Cir.1998); *Andrews v. Bechtel Power*  
28 *Corp.*, 780 F.2d 124, 130 (1st Cir.1985). The duty to avoid conflicts is serious. Class counsel are

1 fiduciaries to the class. *Rodriguez v. W. Publishing Co.*, 563 F.3d 948, 968 (9th Cir.2009); *see*  
2 *also Sondel v. Nw. Airlines, Inc.*, 56 F.3d 934, 938 (8th Cir.1995).

3 Rule 23(g)(3) provides this Court with authority to appoint co-lead class counsel prior to  
4 determining whether this action can proceed as a class action. The criteria for appointment of co-  
5 lead class counsel are the same as the criteria for the appointment of class counsel following  
6 certification. The standard in federal law for determining whether counsel is adequate to serve as  
7 co-lead counsel requires that the court consider the work the counsel has done in identifying or  
8 investigating potential claims in the action; counsel's experience with and handling of class  
9 actions, other complex litigation, and claims of the type asserted in the action; counsel's  
10 knowledge of the applicable law; and resources counsel will commit to representing the class. *See*  
11 Fed. R. Civ. P. 23(g)(1)(C); *Parkinson v. Hyundai Motors America*, 2006 WL 2289801, \*2-\*3  
12 (C.D. Cal. Aug. 7, 2006) (in appointing interim class counsel, the court considered the experience  
13 of counsel in the underlying litigation and the resources of class counsel). Plaintiff's Counsel  
14 clearly meet these criteria and should accordingly be appointed Co-Lead Counsel, and Ms. Marfeo  
15 should be appointed a Co-Lead Plaintiff.

16 Initially, appointment of interim class counsel in this case is necessary to ensure that the  
17 rights of absent potential class members are adequately protected during the precertification phase  
18 of a class action. This is particularly important as to Ms. Marfeo and the members of the  
19 Application Class, whose claims against Facebook based on interactions with Facebook-  
20 authorized applications are not being prosecuted in the current case, and, as noted above, would be  
21 jeopardized if all of the related cases are not consolidated. However, Ms. Marfeo and Plaintiff's  
22 Counsel are uniquely situated to protect the interests of this Class, and they should accordingly  
23 serve as Co-Lead Plaintiff and Co-Lead Counsel respectively as to all claims against Facebook.

24 Indeed, Plaintiff's Counsel have devoted considerable time and resources to independently  
25 investigate the claims asserted in this litigation. In developing and drafting Ms. Marfeo's original  
26 complaint and her amended complaint, Plaintiff's Counsel consulted extensively with multiple  
27 technology experts, including Craig E. Wills, Professor of Computer Science at Worcester  
28 Polytechnic Institute, whose seminal paper *On the Leakage of Personally Identifiable Information*

1 *Via Online Social Networks* was the first study to discuss the computer science of unique user ID  
2 leakage by social networking sites such as Facebook's.

3 As a result of their initial investigation, Plaintiff's Counsel filed a complaint on behalf of  
4 Ms. Marfeo and a nationwide Class of Facebook users whose information was leaked by clicking  
5 on third-party advertisements in June of this year – on information and belief, only the third such  
6 complaint to be filed in the nation, and a full four to five months before the bevy of recently  
7 related cases were filed. After substantial further investigation, Ms. Marfeo and her counsel then  
8 filed their First Amended Complaint. Plaintiff's Counsel are accordingly amply familiar with the  
9 facts and theories underlying the current consolidated case, are in consultation with highly  
10 knowledgeable experts in the related technology field, have spoken on multiple occasions with  
11 Facebook's counsel and with other counsel for plaintiffs in the current and related actions, and can  
12 therefore greatly enhance the effectiveness of the legal representation available to all class  
13 members by joining as Co-Lead Counsel, with Ms. Marfeo as a Co-Lead Plaintiff.

14 Moreover, Plaintiff's Counsel have extensive experience in handling large, complex class  
15 action litigation such as the instant matter, and have been approved as class counsel in many  
16 significant and successful class actions, as detailed on the firm resumes of Stanley • Iola, LLP  
17 (attached hereto as Exhibit C), The Law Offices of Peter N. Wasylyk (attached hereto as  
18 Exhibit D), and The Law Offices of Andrew S. Kierstead (attached hereto as Exhibit E). The  
19 firms' resumes contain representative lists of the many cases each has prosecuted as lead or  
20 primary counsel, and detail the results achieved in those cases class actions and their experience in  
21 representing large plaintiff classes. Plaintiff's Counsel also possess the ability and willingness to  
22 expend the financial and human resources necessary to prosecute this litigation to its conclusion.

23 As well, Plaintiff's Counsel also have experience handling cases involving privacy issues  
24 that are similar to those raised in the instant case. Specifically, The Law Offices of Peter N.  
25 Wasylyk participated as plaintiff's counsel in *In re Doubleclick Inc. Privacy Litigation*, No. 00-  
26 Civ. 0641 in the United States District Court for the Southern District of New York; and Plaintiff's  
27 Counsel all participated in *In re National Security Agency Telecommunications Records*  
28 *Litigation*, No. 3:06-md-01791-VRW in the United States District Court for the Northern District

1 of California, San Francisco Division.

2 In sum, consideration of the work that Plaintiff's counsel have performed in identifying  
3 and investigating potential claims in this case, their experience in handling class actions, other  
4 complex litigation, and claims of the type asserted in the action, their knowledge of the applicable  
5 law, and the resources that they will commit to prosecuting all claims in this litigation should lead  
6 the Court to conclude that Plaintiff's Counsel will represent the Classes fairly and adequately.  
7 Accordingly, the Court at this time should appoint Ms. Marfeo as Co-Lead Plaintiff and appoint  
8 Plaintiff's Counsel as Co-Lead Counsel during the precertification phase of these proceedings  
9 whether this Honorable Court does or does not consolidate the related Zynga actions with the  
10 already consolidated Facebook action.

11 **IV. CONCLUSION**

12 Ms. Marfeo respectfully asks this Court not to consolidate all related cases into the current  
13 action, to appoint her as a Co-Lead Plaintiff, and to appoint Plaintiff's Counsel as Co-Lead  
14 Counsel in the In Re Facebook Privacy action whether or not the related Zynga actions are  
15 consolidated into the current consolidated Facebook action and authorize them to direct and  
16 supervise the activities and conduct of the action. Ms. Marfeo also requests the granting of such  
17 other relief that the Court deems just and proper.

18 DATED: November 22, 2010

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