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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: FACEBOOK PRIVACY LITIGATION

Case No. 10-cv-02389-JW

CLASS ACTION

PLAINTIFFS' RESPONSE TO DKT. NO. 47 REQUESTING BRIEFING ON CONSOLIDATION AND LEADERSHIP

ACTION FILED: 05/28/10

Date: N/A
Time: N/A
Judge: Hon. James Ware

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I. Introduction

On November 15, 2010, this Court entered an Order relating the instant case, *In Re: Facebook Privacy Litigation* ("*In Re Facebook*") with seven other cases that concern allegations of privacy violations by Zynga Game Network, Inc. (the "Zynga Actions").[1] Dkt. 47. In this Order, the Court invited all parties in the related actions to submit brief on or before November 22, 2010 concerning the following issues:

- whether the eight Zynga Actions should be consolidated with the instant matter or consolidated as a separate action;
- nominations for Lead Plaintiffs; and,
- nominations for Lead Counsel.

Plaintiffs respectfully request that this Court *not* consolidate the Zynga Actions with *In Re Facebook*"). Furthermore, Plaintiffs hereby request that the Court renew its appointment of Michael Aschenbrener of Edelson McGuire, LLC and Kassra Nassiri of Nassiri & Jung LLP as interim co-lead counsel in *In Re Facebook*. Dkt. 16.

Plaintiffs' understanding is that plaintiffs' counsel in all Zynga Actions agree that the Zynga Actions should not be consolidated with *In Re Facebook*. Declaration of Michael Aschenbrener ¶ 2. ("Aschenbrener Decl.") Plaintiffs in the Zynga Actions and the *In Re Facebook* plaintiffs have submitted their claims under different sets of facts that allege different defendants engaged in different conduct to the detriment of different classes. Under these circumstances, consolidation would impede judicial efficiency and unfairly prejudice the *In Re Facebook* plaintiffs. Any

[1] To date, the Court has related *In Re Facebook* with the following cases: *Graf v. Zynga*, Case No. CV 10-04680 (filed Oct. 18, 2010) ("*Graf*"); *Albini v. Zynga*, Case No. CV 10-04723 (filed Oct. 19, 2010) ("*Albini*"); *Gudac v. Zynga*, Case No. CV 10-04793 (filed Oct. 22, 2010) ("*Gudac*"); *Schreiber v. Zynga*, Case No. CV 10-04794 (filed Oct. 22, 2010) ("*Schreiber*"); *Swanson v. Zynga*, Case No. CV 10-04902 (filed Oct. 28, 2010) ("*Swanson*"); *Carmel-Jessup v. Facebook, Zynga*, Case No. CV 10-04930 (filed Oct. 29, 2010) ("*Carmel-Jessup*"); *Phee v. Facebook, Zynga*, Case No. CV 10-04935 (filed Nov. 1, 2010) ("*Phee*"); and *Bryant et al. v. Facebook; Zynga*, Case No. CV 10-5192 (filed Nov. 16, 2010) ("*Bryant*").

efficiencies that might come from consolidation can, and should, be secured through the cooperation of counsel and a coordinated discovery schedule.

Concerning appointment of Lead Counsel, Plaintiffs' current Lead Counsel—Michael Aschenbrener and Kassra Nassiri—have exceeded all requirements of Lead Counsel and have aggressively litigated *In Re Facebook* to the benefit of putative class members. Accordingly, this Court should renew their appointment as Interim Co-Lead Counsel, thus allowing them to continue working to the benefit of the putative class.

II. Legal Standard for Consolidation

To determine whether to consolidate, a district court "weighs the saving of time and effort consolidation would produce against any inconvenience, delay, or expense that it would cause." *Huene v. U.S.*, 743 F.2d 703, 704 (9th Cir. 1984). "The mere existence of common issues, a prerequisite to consolidation, does not require consolidation." *Waste Distillation Tech., Inc. v. Pan Am. Res., Inc.*, 775 F. Supp. 759, 761 (D. Del. 1991). Considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial. *Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir.1990), cert. denied 498 U.S. 920 (1990).

The party moving for consolidation bears the burden of proving that consolidation is appropriate. *See, e.g., Medlock v. Taco Bell Corp.*, Nos. CV-F-07-1314, CV-F-08-1081, CV-F-09-0200, CV-F-09-0246, 2009 WL 1444343, at *1 (E.D. Cal. May 19, 2009). *See also In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 374 (2d Cir. 1993) ("The burden is on the party seeking aggregation to show common issues of law or fact; the burden is not on the party opposing aggregation to show divergences").

III. The Court Should Not Consolidate the Zynga Actions with *In Re Facebook*

A. Material Facts and Allegations Forming the Bases of the Cases Are Entirely Separate.

The fundamental claims in *In Re Facebook* and the Zynga Actions, respectively, are entirely distinct. Each involves different disclosing parties, different recipients of that information, different privacy policies, different plaintiff classes, different modes of transmission, and different time periods.

1. *The Cases Allege Different Disclosing Parties.*

The *In Re Facebook* plaintiffs allege that Facebook wrongly transmitted its users' personally-identifiable information ("PII").[2] The *Zynga* plaintiffs, on the other hand, allege that Zynga wrongly transmitted its users' PII. This distinction alone, as described in more detail below, demands that the *In Re Facebook* plaintiffs and the Zynga plaintiffs pursue substantially different discovery, resulting in substantially different litigation trajectories, such that consolidation would not benefit either the parties or the Court.[3]

2. *The Cases Allege Different Recipients of the Private Information.*

The *In Re Facebook* plaintiffs allege that Facebook disclosed user PII to Facebook's advertisers.[4] The Zynga plaintiffs, on the other hand, allege that Zynga disclosed user PII to Zynga's advertisers and Internet marketing companies.[5] Because the recipients of PII differ, the contracts governing the respective advertising relationships will also differ, as will third party discovery.

3. *The Cases Allege Breaches of Different Privacy Policies.*

The *In Re Facebook* plaintiffs allege that Facebook violated Facebook's Privacy Policy.[6] The Zynga plaintiffs, on the other hand, allege that Zynga violated Zynga's Privacy Policy and the Facebook App Developer Policy.[7] Thus the operative contracts in *In Re Facebook* and the Zynga Actions are entirely distinct.

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[2] *In Re Facebook*, Dkt. 36, Consolidated Complaint ("*Facebook* Compl.") ¶¶ 3, 27-33.

[3] The consolidated complaint in *In Re Facebook* makes no mention whatsoever of Zynga or any application developers.

[4] *Facebook* Compl. ¶¶ 27-30.

[5] *See, e.g.*, *Schreiber*, Dkt. 1, Complaint ¶ 15 ("*Schreiber* Compl."); *Gudac*, Dkt. 1, Complaint ¶ 29 ("*Gudac* Compl.").

[6] *Facebook* Compl. ¶¶ 100-109.

[7] *See, e.g.*, *Graf v. Zynga Game Network, Inc*., 10-CV-4680-JW, Dkt. 1, Complaint ¶ 15 ("*Graf* Compl."). With respect to the Facebook App Developer Policy, the Zynga Plaintiffs allege that they are intended third-party beneficiaries of this policy. *Id*. ¶ 14.

4. *The Cases Allege Different Plaintiff Classes.*

Plaintiffs in *In Re Facebook* seek to certify a class of Facebook users who clicked on a third-party advertisement.[8] The Zynga plaintiffs, on the other hand, seek to certify a class of all users of Zynga's Facebook applications,[9] and there is no evidence before the Court indicating any substantial overlap between the two classes. As described below, of the thirteen named plaintiffs now before this Court, only three would fit into both putative classes.[10]

5. *The Cases Allege Different Modes of Transmission.*

The *In Re Facebook* plaintiffs allege that PII was transmitted only when a Facebook user clicked on an advertisement.[11] The Zynga plaintiffs, on the other hand, allege that PII was transmitted when a Zynga user loaded a Zynga application into their browser, irrespective of whether the user clicked on an advertisement.[12] As described below, this critical distinction reflects substantial differences in the underlying technologies at issue. Because the technologies are materially different, the factual inquiries and evidence of liability will differ. As related to the technology issues in the cases, no efficiencies will result from consolidating the Zynga Actions with *In Re Facebook*.

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[8] *Facebook* Compl. ¶ 37.

[9] *See, e.g., Graf* Compl. ¶ 20 ("Plaintiff brings this action on behalf of herself and all other persons in the following similarly situated class: ***all registered users of Facebook.com in the United States who, at any time after October 18, 2006 registered a profile with Zynga***"); *Schreiber* Compl. ¶ 21 ("Plaintiff brings this action . . . on behalf of himself and all other persons in the following class: all persons in the United States who registered with Zynga while on the Facebook web site"); *Gudac* Compl. ¶ 41 ("Plaintiff bring[s] this action on behalf of . . . a class defined as all users of Zynga's Facebook applications from the time of Zynga's founding through the present day.").

[10] Two of the Zynga Cases, *Phee* and *Bryant*, seek to certify two classes each—one class coinciding with the class alleged in the other Zynga Actions, and the other class coinciding with the *In Re Facebook* putative class. *Phee*, Dkt. 1, Complaint ¶ 23 ("*Phee* Compl."); *Bryant*, Dkt. 1, Complaint ¶ 30 ("*Bryant* Compl."). Plaintiffs respectfully request that if the *Phee* and *Bryant* plaintiffs do not amend their respective complaints to remove the *In Re Facebook* class definition, the Court should sever those claims. *See* n. 18, *infra*.

[11] *Facebook* Compl. ¶ 28.

[12] *See, e.g., Gudac* Compl. ¶ 29.

6. *The Cases Involve Different Time Frames.*

The *In Re Facebook* plaintiffs allege that Facebook engaged in wrongful disclosure of PII for a limited time—February 2010 through May 21, 2010.[13] The Zynga plaintiffs, on the other hand, allege that Zynga engaged in wrongful disclosure of PII for an unspecified time. Each Zynga complaint, however, refers to an article published on October 18, 2010 in the *Wall Street Journal* revealing Zynga's transmission of personally-identifiable information.[14] The *Wall Street Journal* article was published approximately five months after Facebook allegedly ceased its non-consensual transmissions on May 21, 2010.[15] Discovery will likely reveal that Zynga's transmissions continued well past May 21, 2010.

Thus, the critical factual inquiries into liability and damages in the *In Re Facebook* case and the Zynga Actions are separate, distinct, and non-overlapping, and do not support consolidation.

Parties (if any) arguing for consolidation will seek to brush these material differences aside by asserting that all cases involve "referrer headers" and wrongful disclosure of Facebook user identification numbers ("UID"). But the fundamentals of how Internet browsers have worked since the advent of the web (i.e., "referrer headers")[16] and the fact that all plaintiffs and classes are drawn from among the hundreds of millions of Facebook users are *not* the operative facts in any of the cases before the Court. Although the allegations of the complaints may be similar, the factual contexts of the claims in these actions are wholly distinct. Consolidation is not appropriate in these circumstances. *See, e.g., Alley v. Chrysler Credit Corp.*, 767 F.2d 138, 140 (5th Cir. 1985) ("Although the same van was involved in the two cases, the transactions forming the basis of the

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[13] *Facebook* Compl. ¶¶ 31-33.

[14] *See, e.g., Gudac* Compl. ¶ 38.

[15] *Id.*

[16] In response to a Congressional inquiry regarding alleged privacy violations, Facebook itself asserted that "referrer headers" are common to all internet browsers. Aschenbrener Decl. ¶ 18, Exhibit A at p. 2, Letter from Marne Levine, Facebook's Vice President, Global Public Policy, to Congressman Edward J. Mackey (Oct. 29, 2010) ("[T]he inadvertent sharing of UIDs, not by Facebook itself, but rather by applications – **is a by-product of how Internet browser work**") (emphasis supplied).

lawsuits were entirely separate. We do not find abuse of discretion [by the district court] in refusing to consolidate the cases, and accordingly affirm [its] denial of the motion to consolidate.")

This conclusion is not altered even when the cases involve common theories of recovery. In *Gaddy v. Elmcroft Assisted Living*, for example, the court found that while the three cases before it involved common question of law and fact, consolidation for summary judgment purposes would be inappropriate:

> While there are similarities between the cases (i.e., all three claims involve assertions of hostile work environment and retaliation under Title VII against the same defendants; all three suits are brought by former employees of Elmcroft whose employment temporally overlapped; and attorney Howard Widis represents all three plaintiffs, while Philip Van Hoy and Bryan Adams represent the defendants in all three cases), each of the Plaintiffs have submitted their claims under different sets of facts. Specifically, the ways in which each Plaintiff allegedly notified the Defendant of the un-welcomed, harassing behavior, and the ways in which the Defendant allegedly retaliated against the Plaintiffs vary significantly in each case.

Nos. 3:04CV36, 3:04CV309, 3:04CV458, 2005 WL 2989658, *1 (W.D.N.C. Nov. 2, 2005).

B. Consolidation Will Impede Judicial Efficiency

Given the substantial differences between the facts necessary to prove liability and damages, consolidation will considerably complicate case management and trial.

For example, *In Re Facebook* and the Zynga Actions allege violations of the Electronic Communications Privacy Act ("ECPA"), which are, in large part, issues of first impression. Whether violations of the ECPA are viable claims will depend on whether Facebook (and, in a separate inquiry, Zynga) is an electronic communications service provider, remote computing service provider, or both. But because Facebook and Zynga offer substantially different services to their users, deciding a motion to dismiss will require wholly separate and distinct briefing vis-à-vis application of the ECPA to Facebook, on the one hand, and to Zynga, on the other. And, for example, should Zynga alone succeed in dismissing the Zynga plaintiffs' ECPA claims, then the *In Re Facebook* plaintiffs will have to sit on the sidelines while the consolidated complaint is amended and Zynga's renewed motions to dismiss are decided. This alone could delay proceedings for months.

Consolidation is also not likely to yield any efficiencies on the motions for class certification. At this early stage of the litigation, there is no evidence of how much overlap there will be between the *In Re Facebook* classes and the Zynga classes. But the evidence before the Court suggests that there may be relatively little overlap. For example, the *In Re Facebook* plaintiffs, Mike Robertson and David Gould, have not alleged any facts giving them standing to bring claims against Zynga because neither used any Zynga application. (In fact, the *Facebook* complaint makes no mention whatsoever of Zynga or any application developers.) Similarly, there is no evidence before the Court that any of the plaintiffs in *Graf*, *Albini*, *Gudac*, *Schreiber*, *Swanson*, and *Carmel-Jessup* ever click on a third-party ad displayed on Facebook.com, which is required to have standing to bring the *In Re Facebook* claims against Facebook. Of the thirteen plaintiffs before this Court, only three have alleged facts supporting their standing to pursue all claims in a consolidated suit.[17] Because no *In Re Facebook* plaintiff has standing to bring claims against Zynga, and because the great majority of Zynga plaintiffs lack standing to bring *In Re Facebook* claims, no single class can be certified. Instead, each set of plaintiffs will submit a separate class certification application and present separate evidence, and each class will seek to be certified as wholly distinct from the other.

Consolidated discovery is also likely to present significant case management problems and may greatly delay the progress of the case. For example, the *In Re Facebook* plaintiffs and the Zynga plaintiffs will require discovery from Facebook and Zynga, respectively, of each company's voluminous server log data to prove who was affected by the alleged disclosures, and to what extent. Because Facebook and Zynga are wholly-independent entities, each with their own proprietary infrastructure and unique databases, what may be burdensome for one defendant may not be for the other, and the character and scope of the data which exist may vary greatly by defendant. Similarly, the *In Re Facebook* plaintiffs will seek discovery from Facebook advertisers, while the Zynga plaintiffs will seek discovery from Zynga advertisers and various, currently unknown Internet

[17] *See Phee* Compl. ¶ 20 (plaintiff Iris Phee alleges to have "clicked on at least one third-party advertisement that appeared on Facebook's website"); *Bryant* Compl. ¶ 27 ("Plaintiffs Karen Bryant and Christopher Brock . . . have each clicked on third party advertisements on Facebook").

marketing companies. While there may be some overlap between the third-party advertisers, there is no evidence before the Court that forcing consolidated discovery from these two possibly distinct sets of third parties won't present significant delays for one set of plaintiffs or the other. While these differences present no problem when each case is allowed to proceed at its own pace, consolidation will result in one unwieldy and massive action.

As argued below, any benefits that might be attained through consolidation are better achieved by coordination, particularly since all of the related cases are presently before this Court. And coordination, as opposed to consolidation, will avoid the risk that one or more parties will seek to sever their claims at summary judgment or trial in order to avoid prejudice. If the cases are consolidated, however, the slowest moving case will dictate the pace and timing of motions for motions to dismiss, discovery, class certification, motions for summary judgment and trial, and delay adjudication of the other cases that would otherwise occur much sooner.

C. Consolidation Will Result in Prejudice to the *In Re Facebook* Plaintiffs

Because consolidation is likely to protract the litigation, the *In Re Facebook* plaintiffs will likely be subject to unnecessary delay. And to the extent that discovery and motion practice relate only to the *Zynga* claims, the *In Re Facebook* plaintiffs will bear a disproportionate amount of attorneys' fees and costs "monitoring and appearing in numerous cases to which they have no relation," and vice versa. *Jackson v. Ford Consumer Finance Co., Inc.*, 181 F.R.D. 537, 540 (N.D. Ga. 1998); *see also In re Repetitive Stress Injury Litig.*, 11 F.3d at 374 ("A party may not use aggregation as a method of increasing the costs of its adversaries—whether plaintiffs or defendants—by forcing them to participate in discovery or other proceedings that are irrelevant to their case").

Moreover, given the factual dissimilarity between the cases, consolidation poses a substantial risk of prejudice at trial. As numerous courts have recognized, consolidation does not merge the lawsuits into a single action. Each party is entitled to present evidence pertaining to their individual claims or defenses at trial. This is especially significant here, where the *In Re Facebook* plaintiffs and the plaintiffs in the Zynga Actions may be largely distinct groups that have standing for only a

subset of claims, used different services, were parties to different privacy agreements, and have different liability and damages claims. Adding to this complexity, if the ECPA claims are tried, for example, defendants are likely to present separate factual defenses pertaining to whether each is an electronic communications service provider and/or remote computing service provider under the statute. Because a jury could very well lose track of which facts pertain to which parties, there is a substantial likelihood that one or more parties would move to bifurcate trials under Federal Rule of Civil Procedure 42(b). The fact that the Zynga Actions may be properly subject to severance under Rule 42(b) serves to reemphasize the point that they do not lend itself to consolidation with *In Re Facebook*.[18]

D. There is No Risk of Inconsistent Judgments

Defendants may argue that if the Court does not consolidate the cases, there is a risk of inconsistent judgments. Trying the *In Re Facebook* and Zynga Actions separately, however, poses little or no risk of inconsistent rulings for at least two reasons. First, whether or not these matters are consolidated, they are now pending in the same Court and before the same Judge. Under principles of *stare decisis*, the Court will be obligated to follow its legal rulings in the first-filed case when it rules upon the second-filed case, thereby eliminating the danger of inconsistent judgments. As such, it is reasonable to expect that to the extent there are overlapping questions of law, they will be resolved in a consistent manner. *See, e.g., Antoninetti v. Chipotle Mexican Grill, Inc.*, Nos. 05-CV-1660-J and 06-CV-2671-J, 2007 WL 2669531, at *3 (S.D. Cal. Sept. 7, 2007) (denying motion to consolidate).

[18] To the extent that two of the Zynga Actions—*Phee* and *Bryant*—include allegations "merging" the *Privacy* and *Zynga* claims and classes (*see* n. 10, *supra*), the Court is reminded of its power to sever the claims into two distinct cases. Under Federal Rule of Civil Procedure 21, this Court may "add or drop a party [or] sever any claim against any party." And Rule 20 allows this Court to "issue orders—including an order for separate trials—to protect a party against . . . delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts not claim against the party."

Second, the cases involve different defendants and different services used at different times by different plaintiffs who were subject to different privacy policies. As such, the factual determinations will be individualized to each defendant and claim. Because each case involves different claims directed at different defendants, a defense verdict in one case and a verdict for plaintiffs in another would not be inconsistent "because they would be decided on the basis of different records." *Campbell v. PricewaterhouseCoopers*, Nos. CIV. S-09-2376, S-08-965 to S-08-997, 2008 WL 3836972, at *4 (E.D. Cal. Aug. 14, 2008).

E. Any Benefits from Consolidation Can Be Better Achieved Through Coordination – Plaintiffs' Counsel Have Already Shown a Willingness to Engage in Such Coordination.

As argued above, the evidence currently before the Court does not suggest that there will be a tremendous amount of overlap in discovery. Directing discovery to one consolidated complaint, rather than two consolidated complaints, will not yield substantial, if any, benefits. But to the extent there is overlap in discovery, however, the parties have a shared interest in avoiding duplicative discovery.

The *In Re Facebook* plaintiffs will not seek discovery from Zynga on any issues related to the claims raised in the Zynga Actions. This is true for the simple reason that the *In Re Facebook* plaintiffs have no claims against Zynga; Zynga's privacy policy is not implicated in the *In Re Facebook* claims, and Zynga is not alleged by the *In Re Facebook* plaintiffs to have disclosed any PII. To the extent that the *In Re Facebook* plaintiffs will seek discovery from Zynga, it will be directed only to Zynga's role as one of Facebook's many advertisers.

Plaintiffs in the Zynga Actions may seek discovery from Facebook. However, to the extent that Facebook is subject to 30(b)(6) depositions regarding technology matters that may be relevant to both the *In Re Facebook* and Zynga Actions, for example, coordination will ensure that Facebook need produce each witness only once. Similarly, if there is any overlap between Facebook advertisers and Zynga advertisers, coordination will ensure that those advertisers are not subject to

duplicative discovery. Any efficiencies that might come from consolidation can, and should, be secured through the cooperation of counsel and a coordinated discovery schedule.[19]

The fact that the Zynga Actions have been related and transferred to this Court addresses many of the concerns likely to be raised by proponents of consolidation. Inconsistent results will be avoided in the related actions because a this Court will decide the issues in all cases. Judicial economy in deciding motions arising out of the related cases will be achieved for that same reason. The Court will be able to familiarize itself with any common issues that exist and recognize economies by, for example, holding case management conferences in these actions at the same time, or by holding "technology seminars" with all the parties present. Duplication of discovery, to the extent it might otherwise exist, can be avoided by an agreed plan to share discovery in the related actions and to limit defendants' discovery obligation to one-time productions, to the extent applicable. Indeed, the procedures for related actions contemplate coordination and are intended to avoid conflicts and duplication. David F. Herr, Annotated Manual for Complex Litigation, 4th ed. § 11.455 at p. 116. The fact that efficiencies can be realized with a less drastic remedy is another reasons to deny any request for consolidation. *See MacAlister v. Guterma*, 263 F.2d 65, 69-70 (2d Cir. 1958) (holding that consolidation "should not be resorted to where other more conventional remedies will suffice").

IV. The Court Should Affirm Its Previous Appointment of Interim Class Counsel

On August 20, 2010, this Court appointed Michael Aschenbrener of Edelson McGuire LLC and Kassra Nassiri of Nassiri & Jung LLP as Interim Co-Lead Counsel in *In Re Facebook*. Dkt. 16. Messrs. Aschenbrener and Nassiri have exceeded all requirements of Lead Counsel and have aggressively litigated the matter. Accordingly, this Court should renew their appointment as Interim Co-Lead Counsel, thus allowing them to continue working to the benefit of the putative class.

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[19] All parties appear to be in agreement that consolidated discovery would be appropriate, which can occur without a consolidating the *In Re Facebook* with the Zynga Actions. In conference calls between counsel for the *In Re Facebook* plaintiffs and counsel for a majority of the Zynga plaintiffs—prior to this Court's order relating the Zynga Actions—all counsel agreed that relating the Zynga Actions to *In Re Facebook* would be the most efficient way to proceed with any overlapping discovery.

Since their appointment, Messrs. Aschenbrener and Nassiri have:

- Organized the work in the most efficient and productive manner possible;
- discussed settlement options with defendant Facebook;
- worked with Facebook to develop a discovery plan;
- filed a consolidated complaint;
- issued dozens of subpoenas to locate, preserve, and gather potentially relevant evidence;
- consulted extensively with recognized experts to advance the case;
- conducted e-discovery preparation;
- worked with Facebook to preserve potentially relevant evidence;
- propounded written discovery on Facebook; and,
- communicated with Plaintiffs' counsel in the Zynga Actions to reach agreement on coordination of discovery.

Aschenbrener Decl. ¶¶ 3-12.

In short, Messrs. Aschenbrener and Nassiri have done everything possible to advance the case to the benefit of putative class members.

A. Messrs. Aschenbrener and Nassiri Exceed the Legal Standards for Renewed Appointment Under Fed. R. Civ. P. 23(g).

Rule 23(g)(3) authorizes the Court to "designate interim class counsel to act on behalf of a putative class before determining whether to certify the action as a class action." FED. R. CIV. P. 23(g)(3). Rule 23(g) does not specify the standards for designating interim class counsel, but courts have held the factors used to appoint class counsel for class certification should also be used to designate interim class counsel. *See, e.g.*, *In re Air Cargo Shipping Antitrust Lit.*, 240 F.R.D. 56, 57 (E.D.N.Y. 2006).

Rule 23(g)(1)(A) specifies the following factors for appointing class counsel:

(1) the work counsel has done in identifying or investigating potential claims in the action,

(2) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,

(3) counsel's knowledge of the applicable law, and

(4) the resources counsel will commit to representing the class.

FED. R. CIV. P. 23(g)(1)(A).

While the Court should consider all factors, no one factor is dispositive. *See* Advisory Committee Notes to the 2003 Amendments to FED. R. CIV. P. 23(g). Additionally, the Court may "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." FED. R. CIV. P. 23(g)(1)(B).

Not only do Messrs. Aschenbrener and Nassiri satisfy and exceed each of these factors by virtue of their respective experience, but they have also demonstrated through their work in this case as already-appointed interim class counsel that they exceed the criteria. Thus, there can be no doubt as to their ability to continue as interim class counsel.

In addition, the fact that all plaintiffs' counsel in the related Zynga Actions have decided to oppose consolidation with the instant matter further demonstrates that Messrs. Aschenbrener and Nassiri have already ably performed their duties and will continue to do so. Aschenbrener Decl. ¶ 2.

B. This Court Should Renew Messrs. Aschenbrener and Nassiri's Appointment as Interim Co-lead Counsel.

1. *Counsel Have Performed Extensive Investigation into the Claims Asserted.*

Counsel have demonstrated their commitment to this case by devoting substantial resources to the litigation. Counsel have already worked extensively with experts who have helped perform extensive investigation into Facebook's alleged transmission to its advertisers of user PII. Aschenbrener Decl. ¶ 8. This work has led directly to the filing of a consolidated complaint (Dkt. 36) and the propounding of discovery. Aschenbrener Decl. ¶¶ 6, 7, 11. Counsel have also proactively communicated with Facebook to preserve relevant evidence and establish electronic discovery protocols. Aschenbrener Decl. ¶ 10. Notably, Counsel have performed all this before any of the Zynga Actions were even filed.

Additionally, Counsel have also communicated with plaintiffs' counsel in the Zynga Actions to reach agreement on issues of case relation and discovery coordination. Aschenbrener Decl. ¶ 12.

2. *Counsel Have Extensive Experience Litigating Class Actions, Including Many Concerning the Issues Present in the Instant Case.*

Messrs. Aschenbrener and Nassiri, and their respective law firms, are particularly well-suited to continue as interim class counsel. Not only are they experienced class action litigators, but they also possess significant experience in the field of Internet privacy. Aschenbrener Decl. ¶ 13. Specifically, they have litigated Internet privacy cases against Amazon, Google, Facebook, RockYou, Storm8, Spokeo, NebuAd, and AdZilla, among others. *Id.*

a. Michael Aschenbrener of Edelson McGuire LLC

Edelson McGuire is a leader in plaintiffs' class and mass action litigation, with a particular emphasis on technology class actions, and has been called a "class action 'super firm'" by the Decalogue Society of Lawyers. *See* Aschenbrener Decl. ¶ 19, Exhibit B (Edelson McGuire LLC firm resume). As has been recognized by federal courts, Edelson McGuire has an "extensive histor[y] of experience in complex class action litigation, and [is a] well-respected law firm[] in the plaintiffs' class action bar." *In re Pet Food Prod. Liab. Litig*., MDL 1850, No. 07-2867 (NLH) (D.N.J. Nov. 18, 2008). A leading arbitrator concurred: "The proof of [the firm's] experience, reputation, and abilities is extraordinary. . . . Each [of their cases] elaborates on the experience and unique success [they] have had in achieving leading roles in the area of 'technology consumer protection class actions.'" (Arbitration award in mobile content class action settlement, August 6, 2009). The Firm's reputation for leadership in class action litigation has led state and federal courts to routinely appoint its members as lead counsel in many high-profile class action suits. For example, in appointing Edelson McGuire interim co-lead counsel in one of the most high profile cases in the country, a federal court pointed to the firm's ability to be "vigorous advocates, constructive problem-solvers, and civil with their adversaries." *In Re JPMorgan Chase Home Equity Line of Credit Litig*., No. 10 C 3647 (N.D. Ill., July 16, 2010). This Court also recently appointed Michael Aschenbrener as one of the interim class counsel in *In Re: T-Mobile Sidekick Litigation*, 5:09-cv-4854-JW (N.D. Cal.) (Dkt. 39), another case concerning electronic

communications. Mr. Aschenbrener was also appointed as Class Counsel in *Turner v. Storm8, LLC*, 4:09-cv-5324-CW (N.D. Cal.). Aschenbrener Decl. ¶¶ 13-15.[20]

b. Kassra Nassiri of Nassiri & Jung LLP

Leading the prosecution of *In Re Facebook* for Nassiri & Jung LLP is Kassra P. Nassiri, a partner in the firm's San Francisco office. The firm's lawyers have litigated numerous class actions and have been recognized as among the best young lawyers in Northern California. *See* Aschenbrener Decl. ¶ 20, Exhibit C (Nassiri & Jung LLP firm resume). Substantially all of Mr. Nassiri's practice is focused on complex commercial litigation and class actions. Mr. Nassiri, a graduate of Harvard Law School, has litigated numerous complex litigations over the past decade, including the following federal class actions: *Settlement Recovery Center, LLC v. Valueclick, Inc.* (C.D. Cal.); *Morgenstein v. AT&T Mobility LLC* (N.D. Cal.); *Clark v. Sprint Spectrum L.P.* (N.D. Cal.); *Gaos v. Google, Inc.* (N.D. Cal.); *Kemp v. 51job, Inc.* (S.D.N.Y.); *Hanrahan v. Hewlett-Packard Co.* (N.D. Cal.); *In re Intrabiotics Pharmaceuticals, Inc. Sec. Litig.* (N.D. Cal.); *In re LeapFrog Enterprises, Inc. Sec. Litig.* (N.D. Cal.); *In re Read-Rite Corp. Sec. Litig.* (N.D. Cal.); and numerous state court class actions. *Id.*

3. *Counsel Have and Will Continue to Commit Significant Resources on Behalf of the Putative Class.*

Counsel have already demonstrated leadership and resource commitment in this litigation, and will continue to do so in order to effectively prosecute the matter and secure benefit for the putative class. Aschenbrener Decl. ¶ 17.

V. Conclusion

Because the allegations in *In Re Facebook* and the Zynga Actions pertain to different defendants and different services used at different times by different plaintiffs who were subject to

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[20] Edelson McGuire is also more than proficient at pursuing eDiscovery as currently is necessary in all complex class litigation. Edelson McGuire partner Steven Teppler serves on the Seventh Circuit's eDiscovery Committee and as co-Chair of the American Bar Association's Electronic Discovery and Digital Evidence Committee. Aschenbrener Decl. ¶ 16. And in May 2010, Edelson McGuire co-hosted the Electronic Discovery and Digital Evidence Practitioners' Workshop at Chicago-Kent College of Law. *Id.*

different privacy policies, this Court should not consolidate the cases. For the reasons set forth above, consolidation would prejudice the *In Re Facebook* plaintiffs and impede judicial efficiency. Any benefits that might be gained by consolidating the cases are better achieved through coordination. And because Interim Class Counsel have diligently and effectively advanced this case on behalf of plaintiffs and the putative class, this Court should affirm its previous appointment of Michael Aschenbrener and Kassra Nassiri as Interim Class Counsel.

Dated: November 22, 2010

Respectfully submitted,
NASSIRI & JUNG LLP

/s/ Kassra P. Nassiri
Kassra P. Nassiri
Attorneys for Plaintiffs and the Putative Class

Dated: November 22, 2010

Respectfully submitted,
EDELSON MCGUIRE, LLP

/s/ Michael J. Aschenbrener
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