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17 **IN THE UNITED STATE DISTRICT COURT**
 18 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 19 **SAN JOSE DIVISION**

13	Nancy Graf,	)	NO. C 10-04680 WHA
	_____ /	)	NO. C 10-04723 JL
14	Shelly Albin,	)	NO. C 10-04793 EMC
	_____ /	)	NO. C 10-04794 JCS
15	Valerie Gudac, <i>et al.</i>,	)	NO. C 10-04902 HRL
	_____ /	)	NO. C 10-04930 MEJ
16	Howard L. Schreiber,	)	NO. C 10-04935 SC
	_____ /	)	No. C 10-05192 PVT
17	John Swanson,)	
	_____ /	)	PLAINTIFFS' RESPONSE TO COURT
18	Zena Carmel-Jessup,	)	ORDER DATED NOVEMBER 12, 2010
	_____ /	)	REQUESTING COURT SEPARATELY
19	Iris Phee, <i>et al.</i>,	)	CONSOLIDATE RELATED CASES AS
	_____ /	)	IN RE: ZYNGA PRIVACY LITIGATION,
20	Karen Bryant, <i>et al.</i>,	)	AND DESIGNATE LEAD PLAINTIFFS
	_____ /	)	AND APPOINT CO-LEAD COUNSEL
21	Plaintiffs,)	
22	v.	)	Date: N/A
		)	Time: N/A.
23	Zynga Game Network, Inc., <i>et al.</i>	)	Judge: Hon. James Ware
)	
24	Defendants.)	
	_____ /)	

25 _____)
 26 THIS DOCUMENT RELATES TO:)
 27 ALL ACTIONS)

28
 PLNTFFS' RESPONSE TO CRT ORDER DATED NOV. 12, 2010 - Case No. C 10-04793 EMC

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION AND PROCEDURAL HISTORY 1

II. CONSOLIDATION 3

 A. The Zynga Cases Should Be Consolidated With One Another 3

 B. The Zynga Cases Should *Not* Be Consolidated With *In Re Facebook* 4

 1. The Zynga Cases and *In Re Facebook* Allege Different Disclosing Parties 4

 2. The Zynga Cases and *In Re Facebook* Allege Different PII Recipients 4

 3. The Zynga Cases and *In Re Facebook* Allege Breaches of Different Privacy Policies 5

 4. The Zynga Cases and *In Re Facebook* Allege Different Plaintiff Classes 5

 5. The Zynga Cases and *In Re Facebook* Allege Different Modes of PII Transmission 6

 6. Consolidating the Zynga Cases With *In Re Facebook* Will Impede Judicial Efficiency 7

 7. Consolidating the Zynga Cases With *In Re Facebook* Will Prejudice Plaintiffs in the Zynga Cases 8

 8. There Is No Risk of Inconsistent Judgments 9

 9. Any Purported Benefits to be Gained Through Consolidating the Zynga Cases With *In Re Facebook* Can Be Better Achieved Through Coordination – Plaintiffs’ Counsel Have Already Shown a Willingness to Engage in Such Coordination 9

III. LEADERSHIP 11

 A. Lead Plaintiffs 11

 B. Co-Lead Counsel 11

 1. Legal Standards For Appointment Under Rule 23(g) 12

 2. Argument 14

 (A) Proposed Co-Lead Counsel Satisfy The Rule 23(g)(1)(A) Factors For Appointment As Co-Lead Counsel 14

 (1) Proposed Co-Lead Counsel have extensively investigated the alleged sales and/or distribution of PII in this litigation and have substantially directed the overall development of the legal claims involved. 14

 (2) Proposed Co-Lead Counsel’s experience in handling class actions and other complex litigation – as well as their extensive knowledge of the applicable law, resulting from their extensive experience in the Internet privacy field – supports their requested leadership appointment here 15

 a. Adam J. Levitt, Wolf Haldenstein Adler Freeman & Herz LLC 16

 b. Jonathan Shub, Seeger Weiss LLP 19

 c. Michael Aschenbrener, Edelson McGuire LLC 20

 (3) Proposed Co-Lead Counsel have and will continue to commit significant resources on behalf of the Class 21

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(B) Strong Support for Proposed Co-Lead Counsel’s Undisputed Leadership
and the Resulting Proposed Three-Firm Lead Structure Are Additional
Pertinent Facts Favoring Their Appointment Under Rule 23(g)(1)(B). 21, 22

IV. CONCLUSION..... 23

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CASES	PAGE
<i>Alley v. Chrysler Credit Corp.</i> , 767 F.2d 138 (5th Cir. 1985)	7
<i>Blumofe v. Pharmatrak, Inc. (In re Pharmatrak, Inc. Privacy Litig.)</i> , 329 F.3d 9 (1st Cir. 2003)	17
<i>Campbell v. PricewaterhouseCoopers, LLP</i> , Nos. CIV. S-06-2376, CIV. S-080965, CIV. S-08-997, 2008 U.S. Dist. LEXIS 75756 (E.D. Cal. Aug. 14, 2008)	9
<i>Chance v. Avenue A, Inc.</i> , 165 F. Supp. 2d 1153 (W.D. Wash. 2001)	17
<i>Gaddy v. Elmcroft Assisted Living</i> , Nos. 3:04CV36, 3:04CV309, 3:04CV458, 2005 U.S. Dist. LEXIS 44471 (W.D.N.C. Nov. 2, 2005)	7
<i>In re Air Cargo Shipping Serv. Antitrust Litig.</i> , 240 F.R.D. 56 (E.D.N.Y. 2006)	13
<i>In re Amazon.Com, Inc./Alexa Internet Privacy Litigation</i> , MDL 1346 (W.D. Wash. filed Feb. 11, 2000)	17
<i>In re Apple & AT&TM Antitrust Litigation</i> , No. C 07-5152 JW (N.D. Cal. Apr. 15, 2008) (ECF No. 100)	18
<i>In re ATI Tech. HDCP Litig.</i> , Case No. 5:06-CV-01303 JW (N.D. Cal. Apr. 18, 2006)	23
<i>In re Comdisco Sec. Litig.</i> , 150 F. Supp. 2d 943 (N.D. Ill. 2001)	18
<i>In re Dole S’holders Litig.</i> , No. BC281949 (Cal. Super. Ct., Los Angeles County March 28, 2003)	19
<i>In re DoubleClick, Inc. Privacy Litigation</i> , No. 00 Civ. 0641 (S.D.N.Y. filed Jan. 31, 2000)	17, 19
<i>In Re Facebook PPC Advertising Litig.</i> , Nos. 09-3043, 09-3519, 09-3430 (N.D. Cal. filed July 7, 2009)	19
<i>In re Facebook Privacy Litig.</i> , No. C 10-02389 JW (N.D. Cal. Aug. 20, 2010)	22
<i>In Re Genetically Modified Rice Litigation</i> , MDL 1811 (E.D. Mo. filed Dec. 19, 2006)	16
<i>In re Google, Inc. Street View Elec. Comm’n Litig.</i> , No. C 10-MD-02184 JW (N.D. Cal. Oct. 8, 2010)	22
<i>In re Jamster Marketing Litig.</i> , MDL No. 1751, No. 05-0819 (S.D. Cal. filed April 18, 2005)	19
<i>In Re JPMorgan Chase Home Equity Line of Credit Litig.</i> , No. 10 C 3647 (N.D. Ill., July 16, 2010)	21
<i>In re Municipal Derivatives Antitrust Litig.</i> , 252 F.R.D. 184 (S.D.N.Y. 2008)	23

1	<i>In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.</i> ,	
2	MDL 05-1720 (JG) (JO),	
	2006 U.S. Dist. LEXIS 45727 (E.D.N.Y. Feb. 24, 2006).....	23
3	<i>In re Pet Food Prod. Liab. Litig.</i> ,	
	MDL 1850, No. 07-2867 (NLH) (D.N.J. Nov. 18, 2008).....	20
4	<i>In re RealNetworks, Inc. Privacy Litigation</i> ,	
	No. 00 C 1366 (N.D. Ill. filed March 5, 2000)	17, 19
5	<i>In re Repetitive Stress Injury Litig.</i> ,	
6	11 F.3d 368 (2d Cir. 1993).....	8
7	<i>In re Terazosin Hydrochloride Antitrust Litig.</i> ,	
	220 F.R.D. 672, 702 (S.D. Fla. 2004).....	16
8	<i>In re Ticketmaster Entm't S'holder Litig.</i> ,	
9	Co-Lead Case No. BC407677	
	(Cal. Super. Ct. Los Angeles County filed Feb. 13, 2009).....	18, 19
10	<i>In re T-Mobile Sidekick Litig.</i> ,	
	Case No. 5:09-CV-04854-JW (N.D. Cal. filed Oct. 13, 2009).....	21, 23
11	<i>In re Universal Serv. Fund Tel. Billing Practices Litig.</i> ,	
	219 F.R.D. 661 (D. Kan. 2004).....	23
12	<i>In re: Google Buzz Privacy Litigation</i> ,	
13	No. 10-CV-0672 (N.D. Cal. filed Feb. 17, 2010)	19
14	<i>Investors Research Co. v. U.S. Dist. Court for Cent. Dist. of Cal.</i> ,	
	877 F.2d 777 (9th Cir. 1989)	3
15	<i>Jackson v. Ford Consumer Finance Co., Inc.</i> ,	
	181 F.R.D. 537 (N.D. Ga. 1998).....	8
16	<i>Jolly v. Purdue Pharma L.P.</i> ,	
17	Case No. 05-CV-1452 H (POR),	
	2005 U.S. Dist. LEXIS 44599 (S.D. Cal. Sept. 27, 2005).....	9
18	<i>MacAlister v. Guterma</i> ,	
	263 F.2d 65 (2d Cir. 1958).....	11
19	<i>Owen v. Labor Ready Inc.</i> ,	
	146 Fed. Appx. 139 (9th Cir. 2005).....	3
20	<i>Parkinson v. Hyundai Motor Am.</i> ,	
21	No. SACV 06-345 AHS (MLGx) <i>et al.</i> ,	
	2006 U.S. Dist. LEXIS 59055 (C.D. Cal. Aug. 7, 2006).....	13
22	<i>Supnick v. Amazon.com, Inc.</i> ,	
	No. C00-0221P, 2000 U.S. Dist. LEXIS 7073 (W.D. Wash. May 18, 2000).....	17
23	STATUTES	
24	Electronic Communications Privacy Act (“ECPA”), 18 U.S.C.	
	§ 2510.....	7
25	RULES	
26	Federal Rules of Civil Procedure (Fed. R. Civ. P.)	
	Rule 23(g)	<i>passim</i>
27	Rule 23(g)(3).....	12
	Rule 23(g)(1)(A)	13, 14

1	Rule 23(g)(1)(B)	13
	Rule 23(g)(2).....	13
2	Rule 30(b)(6).....	10
	Rule 42(a).....	3
3	Rule 42(b)	9

OTHER AUTHORITIES

MANUAL FOR COMPLEX LITIGATION (FOURTH)

5	§ 10.224.....	13
	§ 11.455.....	10
6	§ 11.631.....	3
	§ 21.11.....	13

7	The Sedona Conference,	
8	<i>The Sedona Conference Cooperation Proclamation (2008)</i>	15

9
10
11
12
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1 **I. INTRODUCTION AND PROCEDURAL HISTORY**

2 In response to the Court’s Order dated November 12, 2010 (the “Related Case Order”),
3 plaintiffs in six of the eight related cases recently filed against Zynga Game Network, Inc.
4 (“Zynga”), Shelly Albini, Richard Beiles, Nancy Graf, Valerie Gudac, Howard L. Schreiber, and
5 John Swanson (collectively the “Majority Plaintiffs Group”), individually and on behalf of those
6 similarly situated, request the Court *not* consolidate the actions listed below with *In Re Facebook*
7 *Privacy Litigation*, Case No. CV-10-02389-JW (“*In Re Facebook*”), but rather that the Court
8 consolidate the following eight related cases into a separate action captioned *In Re Zynga*
9 *Litigation*, Lead Case No. CV-10-04680-JW:

- 10 • *Graf v. Zynga*, Case No. CV 10-04680 (filed Oct. 18, 2010);
- 11 • *Albini v. Zynga*, Case No. CV 10-04723 (filed Oct. 19, 2010);
- 12 • *Gudac et al. v. Zynga*, Case No. CV 10-04793 (filed Oct. 22, 2010);
- 13 • *Schreiber v. Zynga*, Case No. CV 10-04794 (filed Oct. 22, 2010);
- 14 • *Swanson v. Zynga*, Case No. CV 10-04902 (filed Oct. 28, 2010);
- *Carmel-Jessup v. Facebook; Zynga*, Case No. CV 10-04930 (filed Oct. 29, 2010);
- *Phee et al. v. Facebook; Zynga*, Case No. CV 10-04935 (filed Nov. 1, 2010); and
- *Bryant et al. v. Facebook; Zynga*, Case No. CV 10-5192 (filed Nov. 16, 2010).

15 These eight actions shall be collectively referred to herein as the “Zynga Cases.”¹ All of
16 the Zynga Cases concern allegations that Zynga sold, collected, and/or transmitted the Personally
17 Identifiable Information (“PII”) of tens of millions of Americans in violation of both federal and
18 state law, as well as in violation of Zynga’s own privacy policy. Zynga is the largest developer
19 of electronic social games in the United States, including such names as FarmVille, Café World,
20 Treasure Isle, Mafia Wars, and Vampire Wars. Plaintiffs and putative Class members played
21 Zynga’s games while logged into the Facebook social networking site.

22 Plaintiffs in the three last-filed Zynga Cases are not part of the Majority Plaintiffs Group.
23 These three last-filed cases are:

- 24 • *Carmel-Jessup v. Facebook; Zynga*, Case No. CV 10-04930;
- 25 • *Phee v. Facebook; Zynga*, Case No. CV 10-04935-SC; and
- 26 • *Bryant et al. v. Facebook; Zynga*, Case No. CV 10-5192-PVT.

 It is the Majority Plaintiffs Group’s understanding that counsel for the *Phee* and *Bryant*

27 ¹ The *Bryant* action was not listed in the Related Case Order because it was not filed until November 16, 2010.
28 However, it has been identified to the Court by Zynga as another related case, and was deemed related to the other
seven actions listed above in a separate Order dated November 17, 2010.

1 plaintiffs will be filing separate submissions in response to the Court's Order proposing different
2 Lead Plaintiffs and different Lead Counsel and that Ms. Carmel-Jessup will be dismissing her
3 lawsuit in its entirety. Significantly, counsel in not less than six of the seven pending Zynga
4 Cases² agree that those cases should *not* be consolidated with *In Re Facebook* and should be
5 consolidated into a separate action.³ In addition, it is plaintiffs' understanding that plaintiffs'
6 counsel in *In Re Facebook* similarly agree that the pending Zynga Cases should not be
7 consolidated into that action, but instead should collectively be treated as a separate action. *See*
8 Declaration of Adam J. Levitt in Support of Majority Group Plaintiffs' Response to Court Order
9 Dated November 12, 2010 Requesting Court Separately Consolidate Related Cases as *In re:*
10 *Zynga Privacy Litigation*, Designate Lead Plaintiffs and Appoint Interim Class Counsel ("Levitt
11 Decl.") ¶¶ 6-9 (filed concurrently herewith).

12 While there are several reasons plaintiffs here oppose consolidating the Zynga Cases with
13 *In Re Facebook*, the Majority Plaintiffs Group contend the most significant is that the Zynga
14 Cases do not share sufficient common questions of fact with *In Re Facebook*, as they are brought
15 on behalf of a separately-defined putative Class. Thus, rather than consolidate with *In Re*
16 *Facebook*, the Majority Plaintiffs Group respectfully submits that the Court should consolidate
17 the eight Zynga Cases into a separate action titled *In Re: Zynga Litigation*, and treat the matters
18 as related to *In Re Facebook* for purposes of coordinating discovery and motion practice in order
19 to avoid duplication of labor and expense.

20 The Majority Plaintiffs Group also proffer Richard Beiles, Nancy Graf, Howard L.
21 Schreiber, and John Swanson as Lead Plaintiffs, and Adam J. Levitt of Wolf Haldenstein Adler
22 Freeman & Herz LLC, Jonathan Shub of Seeger Weiss LLP, and Michael Aschenbrener of
23 Edelson McGuire LLC as Plaintiffs' Co-Lead Counsel. All of the plaintiffs comprising the
24 Majority Plaintiffs Group, and the twelve law firms representing them, support the nomination of
25 Messrs. Levitt, Shub, and Aschenbrener (collectively, "Proposed Co-Lead Counsel"). Their

26 ² Based upon the representations of Ms. Carmel-Jessup's counsel that she will be dismissing her lawsuit, Levitt
Decl. ¶ 7, the Majority Plaintiffs Group has excluded that action from further consideration in this Memorandum.

27 ³ Despite Proposed Co-Lead Counsel's repeated efforts to meet and confer with counsel for the *Bryant* plaintiffs
28 about this consolidation issue, they were unable to obtain a response reflecting those plaintiffs' position prior to the
deadline for filing this Memorandum.

1 nomination is the result of a comprehensive private ordering process and is the consensus
2 selection of virtually all of the plaintiffs and counsel in these actions – with the exception of the
3 *Phee* and *Bryant* plaintiffs – in light of the work of each in coordinating the prompt advancement
4 of these cases, and each meets the requirements for the appointment of interim class counsel
5 under Federal Rule of Civil Procedure 23(g). Moreover, and as more fully discussed below,
6 lawyers comprising the Proposed Co-Lead Counsel group have extensive experience in the field
7 of Internet privacy class action litigation – having been involved in the field from its inception –
8 and have led some of the key cases in the field that have been instrumental in developing the
9 jurisprudential framework for this type of litigation.

10 **II. CONSOLIDATION**

11 **A. The Zynga Cases Should Be Consolidated With One Another**

12 The Majority Plaintiffs Group supports consolidation of all Zynga Cases, but opposes
13 consolidating the Zynga Cases with *In Re Facebook*. Consolidation pursuant to Rule 42(a) is
14 proper when actions involve common questions of law and fact. Fed. R. Civ. P. 42(a); *see also*
15 *MANUAL FOR COMPLEX LITIGATION (FOURTH)* §11.631 (2004) (“MCL 4th”); *Owen v. Labor Ready*
16 *Inc.*, 146 Fed. Appx. 139, 141 (9th Cir. 2005). The Court has broad discretion under this rule to
17 consolidate cases pending within this District. *See Investors Research Co. v. U.S. Dist. Court for*
18 *Cent. Dist. of Cal.*, 877 F.2d 777 (9th Cir. 1989).

19 The Zynga Cases all allege claims on behalf of Zynga users whose PII Zynga transmitted
20 to third parties, including advertisers and data brokers, without those users’ consent. The Zynga
21 Cases name the same defendant – Zynga – and involve substantially similar factual and legal
22 issues. Common questions of law and fact include, among others:

- 23 a. The specific methods that Zynga used to transmit PII to third parties;
- 24 b. The time period during which Zynga transmitted PII to third parties;
- 25 c. Whether Zynga sold PII to third parties;
- 26 d. The extent of Zynga’s PII transmissions;
- 27 e. Whether Zynga’s actions, as described above, constitute violations of the
28 Electronic Communications Privacy Act or unjust enrichment;

1 f. Whether Plaintiffs and the other members of the proposed Class are entitled to
2 relief, and the nature of such relief.

3 Given the substantial overlap of the factual and legal issues presented by the instant matters, the
4 Zynga Cases should be consolidated with one another.

5 **B. The Zynga Cases Should *Not* Be Consolidated With *In Re Facebook***

6 Plaintiffs oppose consolidating the Zynga Cases with *In Re Facebook* chiefly because the
7 cases do not share sufficient common questions of fact. Indeed, there are significant factual
8 differences between the Zynga Cases and *In Re Facebook* that militate against consolidation.

9 The critical claims of each case – namely the unauthorized disclosure of PII to third
10 parties – involve different disclosing parties, different recipients of that information, different
11 privacy policies, different plaintiff classes, and different time periods of alleged wrongdoing.

12 **1. The Zynga Cases and *In Re Facebook* Allege Different Disclosing
13 Parties**

14 The clearest difference between the Zynga Cases and *In Re Facebook* is that Plaintiffs in
15 the Zynga Cases allege that *Zynga* wrongfully transmitted user PII to third parties.⁴ In *In Re
16 Facebook*, however, *Facebook* is the entity that wrongfully transmitted user PII. From this
17 significant factual difference flows many other distinctions (described below) that ultimately
18 distinguish the Zynga Cases from *In Re Facebook* such that while coordinating various discovery
19 and other pre-trial issues makes sense, consolidation would not benefit either the parties or the
20 Court.

21 **2. The Zynga Cases and *In Re Facebook* Allege Different PII Recipients**

22 Plaintiffs in the Zynga Cases allege that *Zynga* wrongfully transmitted user PII to various
23 third parties, including its advertisers and other Internet marketing companies.⁵ In contrast, the

24 ⁴ Plaintiffs in a small number of the Zynga Cases also name Facebook as a defendant. Conversely, on November 11,
25 2010, Plaintiff Albini dismissed Facebook as a defendant from her action (*Albini v. Zynga*, Case No. CV 10-04723),
26 leaving Zynga as the sole defendant in her case. Should discovery reveal that Facebook has played a substantial role
27 in Zynga’s alleged wrongdoing, the Majority Plaintiffs Group, considering the Class’s best interests, reserve the
28 right to reconsider their position on this consolidation issue.

⁵ See, e.g., *Schreiber v. Zynga Game Network, Inc.*, 10-CV-4794-JW, Complaint, ¶ 15 (ECF No. 1) (“*Schreiber*
Compl.”); *Gudac v. Zynga Game Network Inc.*, 10-CV-4793-JW, Complaint, ¶ 29 (ECF No. 1) (“*Gudac* Compl.”).

1 *In Re Facebook* plaintiffs allege that Facebook transmitted PII to Facebook’s advertisers.⁶ While
2 there is some overlap, not only are these different sets of third party PII recipients, but this also
3 means that contracts governing the respective advertising relationships materially differ.

4 **3. The Zynga Cases and *In Re Facebook* Allege Breaches of Different**
5 **Privacy Policies**

6 Plaintiffs in the Zynga Cases allege that Zynga separately violated Zynga’s Privacy
7 Policy and the Facebook App Developer Policy, which prohibits companies like Zynga from
8 transmitting Facebook User IDs to third parties.⁷ In contrast, the *In Re Facebook* plaintiffs
9 allege that Facebook violated Facebook’s user Privacy Policy, *not* its developer terms of service.
10 Thus the operative documents in the Zynga Cases and *In Re Facebook* are demonstrably
11 different from one another – another factor militating against consolidation.

12 **4. The Zynga Cases and *In Re Facebook* Allege Different Plaintiff**
13 **Classes**

14 Perhaps most significantly, the Zynga Cases and *In Re Facebook* allege different
15 proposed classes. In the Zynga Cases, the classes are defined as all Zynga users.⁸ In marked
16 contrast, the proposed class in *In Re Facebook* is defined as all persons who clicked a third-party
17 advertisement on Facebook.com.⁹

18 As a result, the *Zynga* class is both broader and narrower than the *In Re Facebook* class.
19 It is broader because it encompasses all users of Zynga games on the Facebook platform,
20 whereas the *In Re Facebook* class is limited to those who clicked on third-party advertisements

21 ⁶ See *In re: Facebook Privacy Lit.*, 10-CV-2389-JW, Consolidated Complaint, ¶¶ 27-30 (ECF No. 36) (“*In Re*
22 *Facebook* Compl.”).

23 ⁷ See, e.g., *Graf v. Zynga Game Network, Inc.*, 10-CV-4680-JW, Complaint, ¶ 15 (ECF No. 1) (“*Graf* Compl.”).
24 Moreover, with respect to the Facebook App Developer Policy, Plaintiffs allege that they are intended third-party
25 beneficiaries of this policy. *Id.* at ¶ 14.

26 ⁸ See, e.g., *Graf* Compl., ¶ 20 (“Plaintiff brings this action on behalf of herself and all other persons in the following
27 similarly-situated class: **all registered users of Facebook.com in the United States who, at any time after October**
28 **18, 2006 registered a profile with Zynga**”) (emphasis in original); *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.”).

⁹ See *In Re Facebook* Compl., ¶ 37 (“Plaintiff brings this action on behalf of himself and all other persons in the
following similarly-situated class: **all Facebook users in the United States who, at any time after May 28, 2006**
clicked on a third-party advertisement displayed on Facebook.com”) (emphasis in original).

1 on Facebook.com. But the *Zynga* class is also narrower because it is limited to Zynga users,
2 which consists of a subset of Facebook users – not all Facebook users play Zynga’s games, and
3 being a member of the *In Re Facebook* class does not mean one is also a member of the Zynga
4 class. Thus, consolidation would not promote efficiency.

5 **5. The Zynga Cases and *In Re Facebook* Allege Different Modes of PII**
6 **Transmission**

7 The Zynga Cases allege that Zynga automatically transmitted user PII to third-parties
8 when a Zynga user loaded a Zynga application into their browser, without requiring users to
9 click on advertisements.¹⁰ The *In Re Facebook* plaintiffs, on the other hand, allege that
10 Facebook transmitted PII to advertisers only when Facebook users clicked on advertisements
11 displayed on Facebook.com.¹¹

12 This is significant because in the Zynga Cases, users did not need to take any affirmative
13 action other than utilize one of the Zynga applications in order for Zynga to have violated their
14 privacy rights. But in *In Re Facebook*, users had to take affirmative action for Facebook to
15 transmit User PII in terms of clicking on an advertisement. This difference results from different
16 applications of different underlying technologies. Thus, while both cases concern the
17 transmission of User IDs via Referrer Headers, the actual technologies underpinning these
18 alleged wrongful acts are different.

19 These non-overlapping facts may result in different factual inquiries into liability and
20 damages. Although the allegations of the complaints may appear to be similar, the factual
21 contexts of the claims in the Zynga Cases on the one hand and *In Re Facebook* on the other are
22 distinct. Thus, while being related for common discovery issues and other pretrial matters will
23 be more convenient and efficient, consolidation for all purposes simply inappropriate in these

24 ¹⁰ See, e.g., *Gudac* Compl., ¶ 29 (“In order to determine which advertisements will be displayed with the iframe,
25 Zynga’s applications surreptitiously and automatically forwards ‘referrer’ information to third party data brokers,
26 advertisers, and others, all of it unbeknownst to users.”).

27 ¹¹ See *In Re Facebook* Compl., ¶ 28 (“When a Facebook user clicks on an advertisement posted on Facebook’s
28 website, Facebook sends a ‘Referrer Header’ to the corresponding advertiser. The Referrer Header reveals the
specific web page address the user was viewing prior to clicking the advertisement. Through the design of the
Facebook website, Facebook’s web page addresses, and Facebook’s advertisement system, Facebook has caused
users’ browsers to send Referrer Header transmissions that report the user ID or username of the user who clicked an
ad, as well as the page the user was viewing just prior to clicking on the ad.”).

1 circumstances. *See, e.g., Alley v. Chrysler Credit Corp.*, 767 F.2d 138, 140 (5th Cir. 1985)
2 (“Although the same van was involved in the two cases, the transactions forming the basis of the
3 lawsuits were entirely separate. We do not find abuse of discretion [by the district court] in
4 refusing to consolidate the cases, and accordingly affirm [its] denial of the motion to
5 consolidate.”). Thus, consolidation is not appropriate. *See also Gaddy v. Elmcroft Assisted*
6 *Living*, Nos. 3:04CV36, 3:04CV309, 3:04CV458, 2005 U.S. Dist. LEXIS 44471, at *3
7 (W.D.N.C. Nov. 2, 2005) (“[W]hile these three cases involve *some* common questions of fact,
8 they are separate and distinct cases. And so, consolidation for summary judgment purposes
9 would be inappropriate.”). These same guiding principles apply in the instant matters – Plaintiffs
10 in the Zynga Cases and the *In Re Facebook* plaintiffs have submitted their claims under different
11 sets of facts that allege different defendants engaged in different conduct to the detriment of
12 different classes.

13 **6. Consolidating the Zynga Cases With *In Re Facebook* Will Impede** 14 **Judicial Efficiency**

15 Given the substantial differences between the classes at issue and the different
16 technologies implicated in the Zynga Cases and *In Re Facebook*, consolidation could actually
17 impede, rather than enhance, judicial efficiency and complicate case management and trial.

18 For example, the Zynga Cases and *In Re Facebook* all allege violations of the Electronic
19 Communications Privacy Act (“ECPA”), 18 U.S.C. § 2510. Whether violations of the ECPA are
20 viable claims in these cases will depend on whether Zynga and/or Facebook are electronic
21 communications service providers, remote computing service providers, or both. But because
22 Zynga and Facebook offer substantially different services to their respective users, adjudicating a
23 motion to dismiss will require separate and distinct briefing *vis-à-vis* application of the ECPA to
24 Zynga, on the one hand, and Facebook, on the other.

25 Consolidation is not likely to yield any efficiencies on the motions for class certification.
26 At this early stage of the litigation, there is no evidence of how much overlap there will be
27 between the *In Re Facebook* class and the class alleged in the Zynga Cases. But, as described in
28

1 section II.B.4, *supra*, there may be relatively little overlap between the two classes.¹²

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

9 **7. Consolidating the Zynga Cases With *In Re Facebook* Will Prejudice**
10 **Plaintiffs in the Zynga Cases**

11 Because consolidation is likely to protract the litigation, the Zynga Cases will likely be
12 subject to unnecessary delay. And to the extent that discovery and motion practice relate only to
13 the *In Re Facebook* plaintiffs' claims, plaintiffs in the Zynga Cases will bear a disproportionate
14 amount of attorneys' fees and costs "monitoring and appearing in numerous cases to which they
15 have no relation." *See Jackson v. Ford Consumer Finance Co., Inc.*, 181 F.R.D. 537, 540 (N.D.
16 Ga. 1998); *see also In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 374 (2d Cir. 1993) ("A
17 party may not use aggregation as a method of increasing the costs of its adversaries – whether
18 plaintiffs or defendants – by forcing them to participate in discovery or other proceedings that
19 are irrelevant to their case.").

20 Moreover, given the factual dissimilarities between the cases, consolidation poses a
21 substantial risk of prejudice at trial. As numerous courts have recognized, consolidation does not
22 merge the lawsuits into a single action. Each party is entitled to present evidence pertaining to

23 ¹² Consolidated discovery may also present significant case management problems and materially hinder the
24 progress of each case. For example, the *In Re Facebook* plaintiffs and plaintiffs in the Zynga Cases will require
25 discovery from Facebook and Zynga, respectively, of voluminous server log data to prove who was affected by the
26 alleged disclosures, and to what extent they were affected. Because Facebook and Zynga are independent entities,
27 each with proprietary infrastructure and databases, what may be burdensome for one defendant may not be for the
28 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 plaintiffs in the Zynga Cases will seek discovery from Zynga advertisers and various, currently unknown, Internet marketing companies. While there may be some overlap between these third party advertisers, there is no evidence before the Court that discovery from these two possibly distinct sets of third parties will not 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 thus likely result in inefficiency and delay.

1 their individual claims or defenses at trial. This is especially significant here, where the *In Re*
2 *Facebook* plaintiffs and plaintiffs in the Zynga Cases may be largely distinct groups. Adding to
3 this complexity, if the ECPA claims are tried, for example, defendants are likely to present
4 separate factual defenses pertaining to whether they are electronic communications service
5 providers and/or remote computing service providers under the statute. Because a jury could
6 very well lose track of which facts pertain to which parties, there is a substantial likelihood that
7 one or more parties would move to bifurcate trials under Rule 42(b) of the Federal Rules of Civil
8 Procedure.

9 **8. There Is No Risk of Inconsistent Judgments**

10 Defendants may argue that if the Court does not consolidate the Zynga Cases with *In Re*
11 *Facebook*, there is a risk of inconsistent judgments. Trying the *In Re Facebook* and the Zynga
12 Cases separately, however, poses little or no risk of inconsistent rulings for at least two reasons.
13 First, whether or not these matters are consolidated, they are now pending in the same Court and
14 before the same Judge. As such, it is reasonable to expect that, to the extent there are
15 overlapping questions of law, they will be resolved in a consistent manner. *See, e.g., Jolly v.*
16 *Purdue Pharma L.P.*, Case No. 05-CV-1452 H (POR), 2005 U.S. Dist. LEXIS 44599, at *8 (S.D.
17 Cal. Sept. 27, 2005) (acknowledging that venue related cases in the same court helps “avoid
18 duplicative proceedings and inconsistent results”).

19 Second, the cases involve different classes. As such, the factual determinations will be
20 different for each defendant and claim. Thus, a defense verdict in one case and a verdict for
21 plaintiffs in another would not necessarily be inconsistent “because they would be decided on the
22 basis of different records.” *Campbell v. Pricewaterhouse Coopers, LLP*, Nos. CIV. S-06-2376,
23 CIV. S-080965, CIV. S-08-997, 2008 U.S. Dist. LEXIS 75756, at *10 (E.D. Cal. Aug. 14, 2008).

24 **9. Any Purported Benefits to be Gained Through Consolidating the**
25 **Zynga Cases With *In Re Facebook* Can Be Better Achieved Through**
26 **Coordination – Plaintiffs’ Counsel Have Already Shown a Willingness**
27 **to Engage in Such Coordination**

28 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

1 discovery, however, the parties have a shared interest in avoiding duplicative discovery.

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

8 Plaintiffs in the Zynga Cases may seek discovery from Facebook. However, to the extent
9 that Facebook is subject to Rule 30(b)(6) depositions regarding technology matters that may be
10 relevant to both the *In Re Facebook* and the Zynga Cases, for example, coordination will ensure
11 that Facebook need produce each witness only once. See Fed. R. Civ. P. 30(b)(6). Similarly, if
12 there is any overlap between Facebook advertisers and Zynga advertisers, coordination will
13 ensure that they are not subject to duplicative discovery.¹³

14 The fact that the Zynga Cases have been related and transferred to this Court addresses
15 many of the concerns likely to be raised by proponents of consolidation. Inconsistent results will
16 be avoided in the related actions because this Court will decide the issues in all cases. Judicial
17 economy in deciding motions arising out of the related cases will be achieved for that same
18 reason. The Court will be able to familiarize itself with any common issues that exist and
19 recognize economies by, for example, holding case management conferences in these actions at
20 the same time, or by holding “technology seminars” with all the parties present. Duplication of
21 discovery, to the extent it might otherwise exist, can be avoided by an agreed plan to share
22 discovery in the related actions and to limit defendants’ discovery obligation to one-time
23 productions, to the extent applicable. Indeed, the procedures for related actions contemplate
24 coordination and are intended to avoid conflicts and duplication. David F. Herr, Annotated MCL
25 4th § 11.455. The fact that efficiencies can be realized with a less drastic remedy is another

26 ¹³ All parties appear to be in agreement that consolidated discovery would be appropriate, which can occur without
27 consolidating the Zynga Cases with *In Re Facebook*. In conference calls between counsel for the *In Re Facebook*
28 plaintiffs and a majority of the *Zynga* plaintiffs – prior to this Court’s order relating the Zynga Cases – counsel
agreed that relating the *Zynga* Cases to *In Re Facebook* would be the most efficient way to ensure coordinated
Facebook-related discovery.

1 reason to decline consolidation of the Zynga Cases with *In Re Facebook*. See *MacAlister v.*
2 *Guterman*, 263 F.2d 65, 69-70 (2d Cir. 1958) (holding that while consolidation is discretionary, it
3 “should not be resorted to where other more conventional remedies will suffice,” such as relating
4 the actions before a single judge).

5 For these reasons the Zynga Plaintiffs respectfully submit that the Court should not
6 consolidate the Zynga Cases with *In Re Facebook Privacy Litigation* and that the proper course
7 of action would be for the Court to consolidate the Zynga Cases into a separate action captioned
8 *In Re: Zynga Litigation*.

9 **III. LEADERSHIP**

10 **A. Lead Plaintiffs**

11 Pursuant to the Court’s November 12, 2010 Order, the Majority Plaintiffs Group
12 respectfully advises the Court that they intend to proffer Richard Beiles, Nancy Graf, Howard L.
13 Schreiber, and John Swanson, as Lead Plaintiffs.

14 **B. Co-Lead Counsel**

15 Pursuant to the Court’s November 12, 2010 Order, the Majority Plaintiffs Group
16 respectfully nominate Adam J. Levitt of Wolf Haldenstein Adler Freeman & Herz LLC,
17 Jonathan Shub of Seeger Weiss LLP, and Michael Aschenbrenner of Edelson McGuire LLC as
18 Plaintiffs’ Co-Lead Counsel.

19 From the earliest stages of this litigation, Proposed Co-Lead Counsel have reached out
20 and built constructive relationships among all plaintiffs’ counsel, as well as with Zynga’s
21 counsel, in an effort to expedite the coordination and consolidation of these cases. Levitt Decl.
22 ¶ 17-19. For example, Proposed Co-Lead Counsel:

- 23 • Filed the first class action complaints against Zynga;
- 24 • Organized an efficient and broad coalition from the beginning leading to
25 substantial work already performed in many areas, including:
 - 26 ○ Consultation with the leading experts in the field;
 - 27 ○ E-discovery preparation;
 - 28 ○ Document preservation; and

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- Correspondence with Zynga’s counsel proposing and demanding immediate corrective conduct to protect Plaintiffs and the other members of the proposed Class;
- Communicated with all Plaintiffs’ counsel in an effort to work cooperatively and efficiently, including scheduling and hosting the initial organizational conference call and actively initiating and implementing subsequent private ordering efforts among all plaintiffs;
- Arranged with defendants’ counsel to have a single, coordinated response date to the various complaints in order to minimize possible duplicative or unnecessary effort that can be resolved through the filing of a Consolidated Amended Complaint;
- Met with Zynga’s counsel to meet and confer on the direction of this litigation.

Levitt Decl. ¶ 19.

The attorneys nominated by the Majority Plaintiffs Group for Co-Lead Counsel, individually and/or collectively, were pioneers in the electronic privacy class action field, have been continuously recognized as national leaders in electronic privacy class action litigation, and both individually and collectively possess vast knowledge of the applicable law, having litigated some of the largest consumer class actions in the country on this issue, including numerous electronic privacy cases against such companies as Microsoft, Amazon, DoubleClick, Google, Avenue A, RealNetworks, Toys R’Us, Facebook, T-Mobile, RockYou, Storm8, AdZilla, NebuAd, Palm, and Spokeo. Levitt Decl. ¶¶ 22-24.

Based on their substantial and substantive knowledge and experience, their support from the vast majority of plaintiffs and plaintiffs’ counsel involved, their commitment to devote the required resources to this litigation, and inclusive leadership structure proposed, the Court should appoint Messrs. Levitt, Shub, and Aschenbrener as Co-Lead Counsel for all the Zynga Cases.

1. Legal Standards For Appointment Under Rule 23(g)

Rule 23(g)(3) authorizes the court to “designate interim class counsel to act on behalf of a

1 putative class before determining whether to certify the action as a class action.”¹⁴ While neither
2 Rule 23(g) nor the Advisory Committee Notes to that Rule explicitly set forth the standards to be
3 applied in choosing interim class counsel, courts have held that the same factors that apply in
4 choosing class counsel at the class certification stage apply in choosing interim class counsel.
5 *Parkinson v. Hyundai Motor Am.*, No. SACV 06-345 AHS (MLGx) *et al.*, 2006 U.S. Dist LEXIS
6 59055, at *6 (C.D. Cal. Aug. 7, 2000) (citing MCL 4th § 21.11); *In re Air Cargo Shipping Serv.*
7 *Anitrust Litig.*, 240 F.R.D. 56, 57 (E.D.N.Y. 2006).

8 Rule 23(g)(1)(A) states that the following factors are relevant in appointing class counsel:

- 9 (i) the work counsel has done in identifying or investigating potential claims in the
10 action,
11 (ii) counsel’s experience in handling class actions, other complex litigation, and
12 claims of the type asserted in the action,
13 (iii) counsel’s knowledge of the applicable law, and
14 (iv) the resources counsel will commit to representing the class.

15 Fed. R. Civ. P. 23(g)(1)(A). While all of these factors are relevant, no single one of these factors
16 is determinative. *See* Advisory Committee Notes to the 2003 Amendments to Fed. R. Civ. P.
17 23(g) (“In evaluating prospective class counsel, the court should weigh all pertinent factors. No
18 single factor should necessarily be determinative in a given case.”). In addition, the Court may
19 also “consider any other matter pertinent to counsel’s ability to fairly and adequately represent
20 the interests of the class.” Fed. R. Civ. P. 23(g)(1)(B). In this regard, courts evaluate whether
21 proposed interim class counsel have worked cooperatively with opposing counsel and the court
22 and whether counsel commands the respect of colleagues. *See* MCL 4th § 10.224. Where there
23 are competing applications for appointment, a court must appoint counsel “best able to represent
24 the interests of the class.” Fed. R. Civ. P. 23(g)(2).

25 Appointing Proposed Co-Lead Counsel here is appropriate as those leadership nominees
26 best satisfy each of the specific factors enumerated by Rule 23(g)(1)(A). Their undisputed

27 ¹⁴ *See also, e.g.*, MCL 4th § 21.11 (Appointment of interim class counsel “is necessary to protect the interests of
28 class members” because it “clarifies responsibility for protecting the interests of the class during precertification
activities, such as making and responding to motions, conducting any necessary discovery, moving for class
certification, and negotiating settlement.”)

1 leadership in organizing these cases and coordinating with both plaintiffs' and defendant's
2 counsel, their nomination by the majority of the plaintiffs and firms involved (many of whom, in
3 their own right, have substantial consumer and Internet privacy class action litigation experience)
4 who actively support their appointment, and the efficient leadership structure proposed as a result
5 of such organizational efforts are additional matters the Court should consider.

6 **2. Argument**

7 **(A) Proposed Co-Lead Counsel Satisfy The Rule 23(g)(1)(A)**
8 **Factors For Appointment As Co-Lead Counsel.**

9 Proposed Co-Lead Counsel's experience in leading the national consortium of attorneys
10 involved in this matter renders them particularly suited for appointment as interim class counsel
11 under the four enumerated Rule 23(g)(1)(A) factors.

12 **(1) Proposed Co-Lead Counsel have extensively**
13 **investigated the alleged sales and/or distribution of**
14 **PII in this litigation and have substantially directed**
15 **the overall development of the legal claims involved.**

16 Proposed Co-Lead Counsel have been at the forefront of this litigation from the outset.
17 Levitt Decl. ¶¶ 15-21. After engaging in extensive research and consultation with experts, they
18 were the first to file a class action relating to Zynga's alleged dissemination of PII to third-
19 parties. Levitt Decl. ¶ 16. Proposed Co-Lead Counsel have already performed substantial work
20 and dedicated substantial resources to this litigation. Significantly, as part of their substantial
21 efforts, Proposed Co-Lead Counsel have retained and are presently working with the top experts
22 in the Internet privacy field in their continued investigation and pursuit of plaintiffs' claims in
23 this litigation. Levitt Decl. ¶ 19.

24 Proposed Co-Lead Counsel have also proactively communicated with Zynga's counsel in
25 an effort to reach agreements, at the earliest stage of this litigation, to preserve relevant evidence
26 and establish electronic discovery protocols. Levitt Decl. ¶¶ 17, 19. In a case in which the
27 central allegations concern the misuse of electronic information, working early to preserve
28 potential evidence and to establish appropriate protocols for the handling of such evidence is of

1 utmost importance to achieving eventual benefit for putative Class members.¹⁵ Proposed Co-
2 Lead Counsel also worked with all plaintiffs’ counsel to develop a uniform position on the
3 related case issue and to establish a uniform response date to minimize duplication of effort, at
4 the request of Zynga’s counsel. Levitt Decl. ¶¶ 19, 21.

5 In furtherance of those efforts, on November 16, 2010, Proposed Co-Lead Counsel met
6 with Zynga’s counsel in San Francisco to further address the above matters and others including
7 possible means by which Zynga could protect Plaintiffs’ and the other Class members’
8 personally identifiable information and ensure the cessation of their alleged wrongful conduct.
9 Levitt Decl. ¶¶ 19, 21. Thus, Majority Plaintiffs Group’s Proposed Co-Lead Counsel have
10 already developed a working relationship with Zynga’s counsel.

11 Proposed Co-Lead Counsel are also in the process of coordinating the research and
12 preparation of a consolidated amended complaint based on the likelihood of the Zynga Cases
13 being consolidated so that a Consolidated Amended Complaint can be filed within twenty-one
14 (21) days of these cases being consolidated. Proposed Co-Lead Counsel are undertaking these
15 efforts now so that this litigation will be positioned to move to the merits as quickly as
16 practicable. Levitt Decl. ¶¶ 18-19, 21. Significantly, proposed Co-Lead Counsel undertook and
17 performed all this work well before the *Bryant* action was even filed.

18 **(2) Proposed Co-Lead Counsel’s experience in handling class**
19 **actions and other complex litigation – as well as their extensive**
20 **knowledge of the applicable law, resulting from their extensive**
21 **experience in the Internet privacy field – supports their**
22 **requested leadership appointment here.**

23 The Majority Plaintiff Group’s Co-Lead Counsel nominees – Adam J. Levitt, Jonathan
24 Shub, and Michael Aschenbrener – and their respective law firms are particularly qualified to
25 lead this litigation. Levitt Decl. ¶¶ 22-25. In addition to their substantial class action and related
26 complex litigation experience in general, Levitt Decl. ¶ 22, they have contributed significantly to
27 the development and progression of Internet privacy litigation. The combined knowledge,
28 capacity, and credentials of these attorneys and their respective law firms make them uniquely

¹⁵ See The Sedona Conference, *The Sedona Conference Cooperation Proclamation* (2008) (available at http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf) (promoting “open and forthright information sharing . . . to facilitate cooperative, collaborative, transparent discovery.”).

1 well-suited to, and capable of, leading this action on behalf of all Plaintiffs and other Class
2 members.

3 As a result of their experience and collective resources expended in this and other
4 Internet privacy cases, Proposed Co-Lead Counsel have a better understanding of the underlying
5 technology, the claims, and the legal theories at issue than perhaps any other group of lawyers in
6 the country. Indeed, Proposed Co-Lead Counsel have served in leadership positions in similar
7 litigation against DoubleClick, Amazon.com, Google, Facebook, RockYou, (an Internet
8 application developer), Avenue A, RealNetworks, Storm8 (an iPhone software maker), Spokeo
9 (an Internet Search Engine), NebuAd, and Adzilla, among others, bring a unique perspective to
10 the claims at issue here and through their in-court efforts and their outside work as well, have
11 acquired an unparalleled in-depth familiarity with the applicable law. Levitt Decl. ¶ 24.

12 This point should not be taken lightly, as it – along with the third Rule 23(g) factor – is
13 considered the most persuasive factor and thereby demonstrates that these three firms are best
14 qualified for appointment as Co-Lead Counsel here. *See, e.g., In re Terazosin Hydrochloride*
15 *Antitrust Litig.*, 220 F.R.D. 672, 702 (S.D. Fla. 2004) (explaining that the “most persuasive”
16 factor in choosing lead counsel pursuant to Rule 23(g) is proposed counsel’s “experience
17 in, and knowledge of, the applicable law in [the] field”).

18 **a. Adam J. Levitt, Wolf Haldenstein Adler Freeman & Herz LLC**

19 Leading the prosecution of these cases for Wolf Haldenstein is Adam J. Levitt, a partner
20 in the Firm’s Chicago office, working closely with the Firm’s San Diego office. Substantially all
21 of Mr. Levitt’s practice is focused on complex commercial litigation and class actions, and Mr.
22 Levitt has extensive experience in consumer protection and technology law. Since 1993, Mr.
23 Levitt has served as lead counsel, co-lead counsel, and in other leadership positions in numerous
24 class and other complex litigations throughout the United States. A detailed survey of Mr.
25 Levitt’s class leadership, including his current designation as Co-Lead Counsel in *In Re*
26 *Genetically Modified Rice Litigation*, MDL 1811 (E.D. Mo. filed Dec. 19, 2006), in which he is
27 representing the interests of United States long-grain rice producers seeking to recover damages
28 they sustained resulting from the contamination of the U.S. rice supply with unapproved,

1 genetically-modified rice seed traits, is reflected in Wolf Haldenstein's Firm Resume, attached to
2 the Levitt Declaration as Exhibit 1.

3 Mr. Levitt was one of the pioneers in the field of electronic privacy class action litigation
4 and continues to demonstrate leadership in the field to this day. He was lead or co-lead counsel
5 in each of the following seminal electronic privacy actions: *In re Amazon.Com, Inc. / Alexa*
6 *Internet Privacy Litigation*, MDL 1346 (W.D. Wash. filed Feb. 11, 2000), *In re RealNetworks,*
7 *Inc. Privacy Litigation*, No. 00 C 1366 (N.D. Ill. filed March 5, 2000), *In re DoubleClick, Inc.*
8 *Privacy Litigation*, No. 00 Civ. 0641 (S.D.N.Y. filed Jan. 31, 2000), and *Chance v. Avenue A,*
9 *Inc.*, No. C00-1964 C (W.D. Wash. filed Nov. 20, 2000).

10 Several of the Internet privacy cases Mr. Levitt has led, including those listed above, are
11 the key cases in the Internet privacy field and have been instrumental in creating the
12 jurisprudential framework for this type of class and direct litigation. *See, e.g., Supnick v.*
13 *Amazon.com, Inc.*, No. C00-0221P, 2000 U.S. Dist. LEXIS 7073, at *3-5 (W.D. Wash. May 18,
14 2000) (first ECPA case in which nationwide class was certified; court held that "interpretation of
15 the relevant privacy policies presents a common question of law or fact that can be resolved by
16 this Court."); *Chance v. Avenue A, Inc.*, 165 F. Supp. 2d 1153, 1162 (W.D. Wash. 2001)
17 (denying defendant's summary judgment motion and defining the "consent" issue in the ECPA
18 context, holding, *inter alia*, that "[i]t is implicit in the web pages' code instructing the user's
19 computer to contact Avenue A, either directly or via DoubleClick's server, that the web pages
20 have consented to Avenue A's interception of the communication between them and the
21 individual user."); *Blumofe v. Pharmatrak, Inc. (In re Pharmatrak, Inc. Privacy Litig.)*, 329 F.3d
22 9, 21-22 (1st Cir. 2003) (reversing district court on grounds that defendant pharmaceutical
23 companies did not give data aggregator the requisite consent to collect PII from website users
24 and that and that collection of information from URL query string referrer header constitutes an
25 interception under the ECPA).

26 Mr. Levitt has also lectured on electronic privacy litigation issues, being the sole
27 plaintiffs' lawyer invited to address the International Association of Privacy Professionals at its
28 2009 conference: "Privacy Litigation: The Evolution in Theories and Outcomes," International

1 Association of Privacy Professionals “Privacy Academy” 2009 (Boston, Massachusetts,
2 September 2009). In addition, Mr. Levitt is an elected member of the American Law Institute
3 (“ALI”) and participates in the ALI’s Members Consultative Groups on, *inter alia*, the Principles
4 of the Law of Aggregate Litigation and the Restatement of the Law (Third) Torts: Liability for
5 Economic Loss. In recognition of his achievements to date, Mr. Levitt has achieved an “AV”
6 rating by Martindale-Hubbell and was named one of Avenue Magazine’s “Legal Elite” (2010).
7 Mr. Levitt has also received a “10” “Superb” Avvo.com rating and his most recent article
8 “CAFA and Federalized Ambiguity: The Case for Discretion in the Unpredictable Class Action”
9 will be published in the Yale Law Journal [online] in early 2011.

10 Wolf Haldenstein Adler Freeman & Herz, LLP (“Wolf Haldenstein”), Mr. Levitt’s firm,
11 is among the most experienced class action law firms in the United States and has repeatedly
12 been recognized for its successful class action leadership. Levitt Decl. ¶ 22; *see also, e.g., In re*
13 *Comdisco Sec. Litig.*, 150 F. Supp. 2d 943, 951 (N.D. Ill. 2001) (confirming Wolf Haldenstein’s
14 credentials as being “exemplary”).¹⁶

15 This Court is well aware of Wolf Haldenstein’s qualifications and credentials, having
16 appointed the Firm as Lead Counsel in *In re Apple & AT&TM Antitrust Litigation*, No. C 07-
17 5152 JW (N.D. Cal. Apr. 15, 2008) (ECF No. 100), converting that appointment into a Class
18 Counsel appointment on July 8, 2010, in conjunction with certifying a nationwide class in that
19 action. (ECF No. 466).

20 Also significant is Wolf Haldenstein’s substantial California presence. Conveniently
21 located in Southern California, Wolf Haldenstein’s San Diego office has served as lead counsel
22 in numerous high-profile consumer and securities class actions in both state and federal court
23 throughout California. *See, e.g., In re Ticketmaster Entm’t S’holder Litig.*, Co-Lead Case No.

24 ¹⁶ In granting final approval to the settlement of the *Comdisco* action, Judge Shadur further recognized the high level
25 of Wolf Haldenstein’s work in a difficult case, stating:

[T]he efforts that have been expended on behalf of the plaintiff class in the face of these obstacles
26 were exemplary. And in my view they reflected the kind of professionalism that the critics of class
27 actions . . . are never willing to recognize . . . I really cannot speak too highly of the services
28 rendered by class counsel in an extraordinarily difficult situation . . .

In re Comdisco Sec. Litig., No. 01-C-2110, transcript at 3 (N.D. Ill. July 14, 2005) (Shadur, J.).

1 BC407677 (Cal. Super. Ct. Los Angeles County filed Feb. 13, 2009) (class action challenging
2 the merger of Ticketmaster with Live Nation); *In re Dole S'holders Litig.*, No. BC281949 (Cal.
3 Super. Ct., Los Angeles County March 28, 2003) (Wolf Haldenstein served as co-lead counsel
4 and recovered \$172 million on behalf of Dole's shareholders). For instance, in one recently
5 concluded consumer action prosecuted in the United States District Court for the Southern
6 District of California, class members received full refunds for unauthorized mobile telephone
7 services as well as changes in billing and advertising practices. *See In re Jamster Marketing*
8 *Litig.*, MDL No. 1751, No. 05-0819 (S.D. Cal. filed April 18, 2005).

9 Wolf Haldenstein's full Firm Resume is attached to the Levitt Declaration as Exhibit 1.

10 **b. Jonathan Shub, Seeger Weiss LLP**

11 Jonathan Shub, the managing partner of Seeger Weiss' Philadelphia office, is recognized
12 as one of the nation's leading consumer advocates. He has gained notable attention in the areas
13 of defective consumer electronics and computer hardware as a result of many leadership
14 positions in class action cases against companies such as Hewlett-Packard, Maytag, IBM, and
15 Palm. In fact, *Maximum PC Magazine*, a leading legal technology publication, said that "Shub is
16 becoming renowned for orchestrating suits that have simultaneously benefited consumers and
17 exposed buggy hardware."

18 Mr. Shub also has extensive experience in privacy and electronic communications class
19 actions. He was actively involved in the early privacy cases against Real Networks and
20 DoubleClick: *In re RealNetworks, Inc. Privacy Litigation*, No. 00 C 1366 (N.D. Ill. filed March
21 5, 2000) and *In re DoubleClick, Inc. Privacy Litigation*, No. 00 Civ. 0641 (S.D.N.Y. filed Jan.
22 31, 2000). Most recently, he served as counsel in a class action against Google related to privacy
23 violations relating to its social networking program known as "Buzz," *In re: Google Buzz*
24 *Privacy Litigation*, No. 10-CV-0672 (N.D. Cal. filed Feb. 17, 2010). Mr. Shub was also recently
25 appointed interim class counsel in *In Re Facebook PPC Advertising Litig.*, Nos. 09-3043, 09-
26 3519, 09-3430 (N.D. Cal. filed July 7, 2009).

27 With offices in California, New York, New Jersey, Pennsylvania, Oklahoma, and
28 California, Seeger Weiss's experienced trial lawyers have earned their reputation as a "go to"

1 law firm with their adept work on a broad array of complex litigation. Known for the breadth of
2 their experience and the ingenuity of their solutions, Seeger Weiss handles lawsuits in consumer
3 litigation, securities and investment fraud, pharmaceutical injury, personal injury, antitrust,
4 environmental and asbestos exposure, commercial disputes, medical malpractice and product
5 defects.

6 Lauded by the legal community and major publications – Seeger Weiss has “gained the
7 respect of the plaintiffs and defense bar alike for its willingness to ‘always take on the tough
8 cases’ and ‘jump right into the heart of everything when everyone else is afraid,’” according to
9 *Legal 500*. The *National Law Journal* observes that Seeger Weiss attorneys consistently “rank
10 among the country’s top plaintiffs’ lawyers.” The *NLJ* has named Seeger Weiss to its prestigious
11 “Plaintiffs’ Hot List” three years running. The Firm’s lawyers have received individual praise on
12 national and regional stages, and are consistently selected for inclusion in *Best Lawyers*, *Super*
13 *Lawyers* (New York, New Jersey, and Pennsylvania), and *Law Dragon 500* and *3000*.

14 Seeger Weiss’s full Firm Resume is attached to the Levitt Declaration as Exhibit 2.

15 **c. Michael Aschenbrener, Edelson McGuire LLC**

16 Edelson McGuire is a leader in plaintiffs’ class and mass action litigation, with a
17 particular emphasis on technology class actions, and has been called a “class action ‘super firm’”
18 by the Decalogue Society of Lawyers. As has been recognized by federal courts, Edelson
19 McGuire has an “extensive histor[y] of experience in complex class action litigation, and [is a]
20 well-respected law firm[] in the plaintiffs’ class action bar.” *In re Pet Food Prod. Liab. Litig.*,
21 MDL 1850, No. 07-2867 (NLH) (D.N.J. Nov. 18, 2008). A leading arbitrator concurred: “The
22 proof of [the firm’s] experience, reputation, and abilities is extraordinary. . . . Each [of their
23 cases] elaborates on the experience and unique success [they] have had in achieving leading roles
24 in the area of ‘technology consumer protection class actions.’” (Arbitration award in mobile
25 content class action settlement, August 6, 2009). The Firm’s reputation for leadership in class
26 action litigation has led state and federal courts to routinely appoint its members as lead counsel
27 in many high-profile class action suits. For example, in appointing Edelson McGuire interim co-
28 lead counsel in one of the most high-profile cases in the country, a federal court pointed to the

1 firm's ability to be "vigorous advocates, constructive problem-solvers, and civil with their
2 adversaries." *In Re JPMorgan Chase Home Equity Line of Credit Litig.*, No. 10 C 3647 (N.D.
3 Ill., July 16, 2010). Additionally, Michael Aschenbrener, Chair of the firm's Technology and
4 Privacy practice group, was recently appointed by this Court to serve as interim class counsel in
5 *In Re: Facebook Privacy Litigation*, giving him a unique perspective on the similarities and
6 differences between the two cases. Levitt Decl. ¶ 23. This Court also recently appointed
7 Michael Aschenbrener as one of the interim class counsel in *In Re: T-Mobile Sidekick Litigation*,
8 5:09-cv-4854-JW (N.D. Cal. filed Oct. 13, 2009) (ECF No. 39), another case concerning
9 electronic communications. Levitt Decl. ¶ 23.¹⁷

10 Edelson McGuire's full Firm Resume is attached to the Levitt Declaration as Exhibit 3.

11 Accordingly, and as amply demonstrated above, the requirements of Rule 23(g)(1)(A)(ii)
12 and (iii) that the Court consider both the applicants' general experience managing class actions
13 and complex litigation, as well as their familiarity with the particular claims at issue, favors the
14 appointment of Messrs. Levitt, Shub, and Aschenbrener as Co-Lead Counsel here.

15 **(3) Proposed Co-Lead Counsel have and will continue to commit
16 significant resources on behalf of the Class.**

17 Proposed Co-Lead Counsel have the capital and personnel resources necessary to
18 represent the proposed class and have already demonstrated a willingness to expend these
19 resources to properly and efficiently prosecute these actions. Levitt Decl. ¶¶ 27-28. Indeed,
20 based on their prior experience in filing and successfully litigating pursuing Internet privacy
21 class action litigation, Proposed Co-Lead Counsel fully understand the substantial investment of
22 time and resources necessary to properly pursue and lead such litigations and are committed to
23 devoting the necessary resources to this case. Levitt Decl. ¶ 28.

24 **(B) Strong Support for Proposed Co-Lead Counsel's Undisputed
25 Leadership and the Resulting Proposed Three-Firm Lead Structure**

26 ¹⁷ Edelson McGuire is also highly proficient at pursuing eDiscovery as currently is necessary in all complex class
27 litigation. Edelson McGuire partner Steven Tepler serves on the Seventh Circuit's eDiscovery Committee and as
28 co-Chair of the American Bar Association's Electronic Discovery and Digital Evidence Committee. Levitt Decl. ¶
23. And in May 2010, Edelson McGuire co-hosted the Electronic Discovery and Digital Evidence Practitioners'
Workshop at Chicago-Kent College of Law. Levitt Decl. ¶ 23.

1 **Are Additional Pertinent Facts Favoring Their Appointment Under**
2 **Rule 23(g)(1)(B).**

3 Proposed Co-Lead Counsel have demonstrated the type of leadership that will benefit the
4 proposed Class by avoiding conflicts and duplication of effort. They have been instrumental in
5 securing the cooperation between, and ultimate self-ordering of, the plaintiffs' counsel, as
6 demonstrated by the fact that the majority of the law firms involved in these cases are signatories
7 to the instant motion. Proposed Co-Lead Counsel's demonstrated leadership, their extensive
8 experience in the Internet privacy litigation field (as shown above), and their strong support by
9 the bulk of plaintiffs and counsel in these actions, are thus other pertinent matters under Rule
10 23(g)(1)(B) that strongly militate in favor of their appointment here. Levitt Decl. ¶¶ 15, 19, 21.¹⁸

11 Where, as here, the vast majority of plaintiffs have reached consensus regarding case
12 leadership, appointment of that proposed leadership is especially appropriate. Indeed, this is
13 *precisely* the conclusion this Court reached in its recent leadership appointment in *In re Google,*
14 *Inc. Street View Elec. Comm'n Litig.*, No. C 10-MD-02184 JW (N.D. Cal. Oct. 8, 2010) (ECF
15 No. 47) ("*Google Street View*"). In *Google Street View*, this Court appointed a majority-
16 supported, three-firm leadership group, holding that a critical factor in appointing interim
17 leadership is whether the proposed lead counsel have the majority support of counsel in the
18 related actions ("More importantly, [proposed Co-Lead Counsel] share the support of a majority
19 of counsel and Plaintiffs in this action and would be best positioned to leverage the resources,
20 energy and experience of the various firms involved."). The same is true here.¹⁹

21 Moreover, as is evident from the numerous cases in which courts – *including this Court*²⁰
– have appointed multi-firm leadership structures in similar complex litigations, appointment of

22 ¹⁸ As discussed above, from the outset of this litigation, members of the Proposed Co-Lead Counsel group contacted
23 every law firm involved in these actions to not only discuss and share information and analysis about the legal
24 landscape but also to offer cooperation and assistance going forward. Levitt Decl. ¶¶ 17, 21. As further discussed
25 above, Proposed Co-Lead Counsel have already been successful, acting together, in organizing these cases with
26 respect to leadership, preliminary scheduling and case management issues, both among themselves and with
27 Zynga's counsel. Levitt Decl. ¶ 21.

28 ¹⁹ Further, and as explained above, Proposed Co-Lead Counsel here also satisfies each of the other criteria this Court
considered in conjunction with its leadership appointment in *Google Street View*. The *Google Street View* opinion is
attached as Exhibit 4 to the Levitt Declaration. See Levitt Decl. ¶ 29.

²⁰ Where an appropriate multi-firm co-lead counsel structure has been proposed and has been broadly supported, this
Court – in addition to its recent leadership appointment in *Google Street View* – has appointed other proposed multi-
firm leadership structures. See, e.g., *In re Facebook Privacy Litig.*, No. C 10-02389 JW (N.D. Cal. Aug. 20, 2010)

1 the three-firm leadership structure proposed herein is well supported.²¹ *See, e.g., In re Municipal*
2 *Derivatives Antitrust Litig.*, 252 F.R.D. 184, 187 (S.D.N.Y. 2008) (appointing three firms as
3 interim lead counsel in municipal derivatives antitrust class action).²²

4 As discussed above, Proposed Co-Lead Counsel are the attorneys who have already done
5 the “heavy lifting” with respect to investigating and crafting the claims at issue in these cases and
6 working expeditiously to get these actions coordinated in one venue to avoid duplicating effort of
7 both defendants and the Court. This proposed leadership team brings the experience with
8 complex cases generally and the issues involved in electronic privacy litigation in particular to
9 successfully prosecute and resolve these suits. As a result, Proposed Co-Lead Counsel represent
10 the best choice to lead these actions and to protect the interests of the Class.

11 **IV. CONCLUSION**

12 For all of the foregoing reasons, the Majority Plaintiffs Group respectfully submits that
13 the Court consolidate *Graf v. Zynga*, Case No. CV 10-04680-WHA; *Albini v. Zynga, Inc.*, Case
14 No. CV 10-04723-JL; *Gudac v. Zynga*, Case No. CV 10-04793-EMC; *Schreiber v. Zynga*, Case
15 No. CV 10-04794-JCS; *Swanson v. Zynga*, Case No. CV 10-04902-HRL; *Carmel-Jessup v.*
16 *Facebook; Zynga*, Case No. CV 10-04930-MEJ; *Phee v. Facebook; Zynga*, Case No. CV 10-
17 04935-SC; and *Bryant v. Facebook; Zynga*, Case No. CV 10-5192-PVT as *In re: Zynga*
18 *Litigation*, but not consolidate the Zynga Cases with *In Re Facebook*; appoint Richard Beiles,
19 Nancy Graf, Howard L. Schreiber, and John Swanson as Lead Plaintiffs; and appoint Adam J.

20 (appointing two firms as co-lead counsel); *In re T-Mobile Sidekick Litig.*, Case No. 5:09-CV-04854-JW (N.D. Cal.
21 Feb 4, 2010) (appointing a four-firm leadership group); *In re ATI Tech. HDCP Litig.*, Case No. 5:06-CV-01303 JW
(N.D. Cal. Apr. 18, 2006) (appointing two firms as interim class counsel and co-lead counsel).

22 ²¹ Proposed Co-Lead Counsel’s three firms’ proven ability to work together ensures that inefficiencies likely to
23 occur in different and more diffuse leadership groups will be avoided. Moreover, the proposed three-firm Co-Lead
24 Counsel group – which is of optimal size and experience to provide the personnel and resources necessary to
25 oversee and lead the prosecution of this litigation – intend to call upon other plaintiffs’ counsel in this litigation,
26 subject to their respective abilities and strengths, to work on this litigation, under Proposed Co-Lead Counsel’s
27 direction, authorization, and supervision, on an as-needed basis.

28 ²² *See also, In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, MDL 05-1720 (JG) (JO), 2006
U.S. Dist. LEXIS 45727, at *29 (E.D.N.Y. Feb. 24, 2006) (appointing three member group as co-lead plaintiffs
counsel in class action by merchants against credit card networks and their member banks); *In re Universal Serv.*
Fund Tel. Billing Practices Litig., 219 F.R.D. 661, 684 (D. Kan. 2004) (appointing three firms as lead counsel in
multidistrict litigation consisting of numerous putative class action lawsuits arising from telecommunications
companies’ practice of charging their customers to recoup their contributions to the federal Universal Service Fund
program).

1 Levitt of Wolf Haldenstein Adler Freeman & Herz LLC; Jonathan Shub of Seeger Weiss LLC;
2 and Michael Aschenbrener of Edelson McGuire LLC as Plaintiffs' Co-Lead Counsel.

3 Dated: November 22, 2010

Respectfully submitted,

4 */s/ Francis M. Gregorek*

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Plaintiffs' Proposed Co-Lead Counsel

***Plaintiffs and Law Firms Comprising the "Majority Plaintiffs Group"
and Supporting Appointment of Plaintiffs' Co-Lead Counsel Set Forth Above***²³

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²³ For ease of reference, counsel for each of the cases comprising the Majority Plaintiffs Group are listed in this section, including those counsel being proposed as the Majority Plaintiffs Group's Co-Lead Counsel nominees, who are also listed above.

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