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FACEBOOK, Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE:
FACEBOOK PRIVACY LITIGATION

Case No. 10-cv-02389-JW

DEFENDANT FACEBOOK, INC.'S ADMINISTRATIVE MOTION TO CONSIDER WHETHER CASES SHOULD BE RELATED

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Please Take Notice, pursuant to Civil Local Rules 3-12 and 7-11, that Defendant Facebook, Inc. ("Facebook"), by and through its undersigned counsel, hereby submits this administrative motion seeking an Order relating (a) the class action in this District captioned *Marfeo v. Facebook, Inc.* ("*Marfeo*"), Case No. 10-cv-05301-BZ,[1] to (b) the above-captioned

[1] *Marfeo* was originally filed in the United States District Court for the District of Rhode Island (Original Case No. 10-cv-262-WS) on June 17, 2010 and served on October 13, 2010. Plaintiff filed a First Amended Complaint on October 18, 2010. The action was transferred to this District by Order dated November 1, 2010, and was opened on the docket in this Court on November 23, 2010, and assigned Case No. 10-cv-05301-BZ.

consolidated class action, *In re Facebook Privacy Litigation*, Case No. 10-cv-02389-JW,[2] the lower numbered action pending in this Court before the Honorable James Ware. This motion is supported by the stipulation of Facebook and Plaintiff in *Marfeo*, filed herewith.

For the Court's convenience, the Consolidated Class Action Complaint in *In re Facebook Privacy Litigation* is attached hereto as **Exhibit A**, and the First Amended Complaint in *Marfeo* is attached hereto as **Exhibit B**.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF OTHER RELATED CASES

The Court has already related *In re Facebook Privacy Litigation* to several other similar pending actions, by Orders issued November 12, 2010 and November 19, 2010. The Court found that the actions involved substantially the same transactions, events, and parties. (*In re Facebook Privacy Litigation*, Case No. 10-cv-02389-JW, Dkt. Nos. 47, 53.) The Court also found the actions involved substantially overlapping causes of action and factual inquiries and posed substantial risk for inconsistent judgments. (*Id.*) The Court has therefore ordered the following nine actions to be related:

- *In re Facebook Privacy Litigation*, No. 10-cv-02389-JW;
- *Graf v. Zynga*, No. 10-cv-04680-JW;
- *Albini v. Zynga*, No. 10-cv-04723-JW;
- *Gudac & Beiles v. Zynga*, No. 10-cv-04793-JW;
- *Schreiber v. Zynga*, No. 10-cv-04794-JW;
- *Swanson v. Zynga*, No. 10-cv-04902-JW;
- *Carmel-Jessup v. Facebook & Zynga,* No. 10-cv-04930-JW;[3]
- *Phee & O'Hara v. Facebook & Zynga*, No. 10-cv-04935-JW; and
- *Bryant & Brock v. Facebook & Zynga*, No. 10-cv-05192-JW.

[2] By Order of August 20, 2010, the Court consolidated *Gould v. Facebook, Inc.*, Case No. 10-cv-02389-JW, and *Robertson v. Facebook, Inc.*, Case No. 10-cv-02408-JF, and ordered the new caption to be *In re Facebook Privacy Litigation*, Case No. 10-cv-02389-JW (and ordered Case No. 10-cv-02408-JW to be closed).

[3] *Carmel-Jessup* was later voluntarily dismissed on November 22, 2010.

Additionally, *Moskowitz v. Facebook & Zynga*, No. 10-cv-05287-HRL, was filed on November 22, 2010. Plaintiff in that case indicated that it should be related to *In re Facebook Privacy Litigation* in a Notice of Related Action filed on the docket for *Moskowitz* (Case No. 10-cv-05287, Dkt. 3) but apparently did not file an Administrative Motion to Consider Whether Cases Should be Related on the docket for *In re Facebook Privacy Litigation*, the lower numbered case. Plaintiff did file a brief regarding consolidation, in response to this Court's Orders of November 12 and 19, in which Plaintiff indicated that her case involves the same facts and parties as those in the nine cases listed above as well as *Marfeo*, and requested that the Court consolidate the actions. (*In re Facebook Privacy Litigation*, Case No. 10-cv-02389-JW, Dkt. No. 57, at 3.) To the extent that the Court does not treat Plaintiff's Notice of Related Case as an administrative motion to relate the *Moskowitz* case to *In re Facebook Privacy Litigation*, Facebook anticipates either Plaintiff or Facebook will file such an administrative motion shortly.

Also, on December 6, 2010 Facebook removed to this Court another substantially similar case captioned *Scherek v. Facebook & Zynga*, Case No. 10-cv-05528-LB (previously in San Francisco Superior Court, Case No. CGC-10-504986). Facebook will file an administrative motion to relate the *Scherek* case to *In re Facebook Privacy Litigation* shortly.

Marfeo should be related to *In re Facebook Privacy Litigation* just as the other eight actions have previously been related to *In re Facebook Privacy Litigation*, and as we anticipate the *Moskowitz* and *Scherek* cases will also be related.

II. ARGUMENT: *MARFEO* SHOULD BE RELATED TO *IN RE FACEBOOK PRIVACY LITIGATION*

Under Civil Local Rule 3-12, actions are related when: "(1) [t]he actions concern substantially the same parties, property, transaction or event; and (2) [i]t appears likely that there will be an unduly burdensome duplication of labor and expense or conflicting results if the cases are conducted before different Judges." Here, as in the cases listed above that were previously related, these criteria are met.

First, both *Marfeo* and *In re Facebook Privacy Litigation* (as well as *Phee & O'Hara*, *Bryant & Brock*, *Moskowitz*, and *Scherek*) name Facebook as a defendant.

Second, the cases allege substantially similar factual allegations. As detailed in Facebook's Motion to Consolidate for All Purposes (*In re Facebook Privacy Litigation*, Case No. 10-cv-02389-JW, Dkt. 58), all of the claims in the eleven pending cases arise from allegations that html code called a "referrer header" within some users' web browsers caused user information to be sent to third parties when users took certain actions on facebook.com or within applications on Facebook's online social networking platform. There are two species of "referrer header" allegations found in the complaints to date. The first type of allegation is that in certain instances, when individuals clicked on third-party advertising links on facebook.com, their browsers would cause certain information to be transmitted to those third parties. The referrer header, which contained the address of the web page the user had been viewing when he or she clicked on the ad, allegedly sometimes contained the user's unique Facebook User ID ("UID"). Allegedly this allowed third parties to obtain information from Facebook users' profile pages without their consent. The second type of allegation arises from the fact that in addition to operating the website at facebook.com, Facebook, through the operation of the Facebook Platform, enables third-party developers to deploy applications for use by Facebook users. Allegedly developers who create applications for use on the Facebook Platform, such as co-defendant Zynga, experienced a similar issue with referrer headers in their applications, whereby when Facebook users used certain applications, their browsers sent referrer headers containing Facebook UIDs to third parties.

The complaint in *In re Facebook Privacy Litigation* contains the first type of referrer header allegation, as does *Marfeo* (and as do the complaints in *Phee & O'Hara v. Facebook & Zynga*, No. 10-cv-04935-JW, and *Bryant & Brock v. Facebook & Zynga*, No. 10-cv-05192-JW).

The *Marfeo* FAC also contains the second type of referrer header allegation, as do the following pending cases: *Graf v. Zynga*, No. 10-cv-04680-JW, *Albini v. Zynga*, No. 10-cv-04723-JW, *Gudac & Beiles v. Zynga*, No. 10-cv-04793-JW, *Schreiber v. Zynga*, No. 10-cv-04794-JW, *Swanson v. Zynga*, No. 10-cv-04902-JW, *Moskowitz v. Facebook & Zynga*, No. 10-cv-05287-HRL, and *Scherek v. Facebook & Zynga*, No. 10-cv-05528-LB.

Marfeo, *Phee & O'Hara*, and *Bryant & Brock* contain *both* the first type of allegation *and* the second type of allegation.

Third, *Marfeo* alleges several of the same causes of action asserted in *In re Facebook Privacy Litigation* and many other related cases, including violations of the Stored Communications Act, breach of contract, the implied covenant of good faith and fair dealing, and unjust enrichment. For the Court's convenience, a chart summarizing the parties, factual allegations, and legal claims in each of the eleven pending cases has been attached as **Exhibit C**.

Fourth, along the lines of the cases' factual allegations, the complaints in the cases allege substantially similar and overlapping class definitions. A chart detailing the substantially similar class definitions has been attached as **Exhibit D**.

Given the similarity of parties, factual allegations, and legal claims, there would be an unduly burdensome duplication of labor and expense as well as a significant danger of conflicting results if the cases are not related. Accordingly, pursuant to Local Rule 3-12, Facebook respectfully submits that *Marfeo* should be deemed related to *In re Facebook Privacy Litigation* and assigned to the Honorable James Ware. Plaintiff in *Marfeo* agrees that the actions should be related and has entered a stipulation with Facebook in support of this motion.

Dated: December 7, 2010

COOLEY LLP

/s/ Matthew D. Brown
Matthew D. Brown

Attorneys for Defendant FACEBOOK, Inc.