

EXHIBIT A TO:

**NOTICE OF FILING OF DEFENDANT FACEBOOK, INC.'S STIPULATED
ADMINISTRATIVE MOTION (CIV. L.R. 3-12) IN *DAVIS v. FACEBOOK, INC.*,
CASE NO. 11-CV-04834 (N.D. CAL.)**

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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION
11

12 PERRIN AIKENS DAVIS, PETERSEN
13 GROSS, DR. BRIAN K. LENTZ,
TOMMASINA IANNUZZI, TRACY
14 SAURO, JENNIFER SAURO, and LISA
15 SABATO, individually and on behalf of all
others similarly situated,

16 Plaintiffs,

17 v.

18 FACEBOOK, INC.,
a Delaware Corporation

19 Defendant.
20

Case No. 11-CV-04834-EJD-PSG

**DEFENDANT FACEBOOK, INC.’S
STIPULATED ADMINISTRATIVE MOTION
TO CONSIDER WHETHER CASES SHOULD
BE RELATED (CIV. L.R. 3-12)**

ACTION FILED: September 30, 2011

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TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, pursuant to Civil Local Rule 3-12, Defendant Facebook, Inc. (“Facebook”), by and through counsel, hereby submits this administrative motion seeking an order relating the action captioned *Brkic v. Facebook, Inc.*, No. 11-cv-04935, (“*Brkic*”) to the action captioned *Davis v. Facebook, Inc.*, No. 11-cv-04834 (“*Davis*”).¹ The *Brkic* action involves substantially the same parties, events, and issues of law and fact as the *Davis* action. If the actions are not related, it is likely that there will be unduly burdensome duplication of efforts and expense and/or conflicting pretrial rulings. Moreover, relation of the actions is supported by the plaintiffs themselves, who have each stipulated to this administrative motion to relate.

Facebook’s motion is based on this Motion and Memorandum of Points and Authorities and the Declaration of Matthew D. Brown (“Brown Declaration”) and Stipulation filed herewith.²

MEMORANDUM OF POINTS AND AUTHORITIES**I. FACTUAL BACKGROUND**

Facebook is a social networking website that enables people to connect and share with their friends, families, and communities. Facebook is free. To join, Facebook users (“Users”) need only provide their name, age, gender, and a valid e-mail address, and agree to Facebook’s terms of service. Once Users register, they create a profile page and may begin connecting with other Users by inviting them to become Facebook “Friends.” Users can share virtually anything through Facebook—vacation photos, news about their everyday lives, links to websites or articles they think are interesting, or opinions about world events.

Facebook offers Users an array of options for sharing content and communicating with each other both on Facebook and third-party websites. Options include the Facebook “Like”

¹ Civil Local Rule 3-12(f) states that “the Judge in this District who is assigned to the earliest-filed case will decide if the cases are or are not related.” *Davis* is the earliest-filed case. In accordance with Civil Local Rule 3-12(b), all parties in both cases are being served with this motion, and chambers copies are being lodged in both cases.

² For the Court’s convenience, the operative complaints are attached as exhibits to the Brown Declaration. The Complaint in *Davis* is attached as **Exhibit A** (“Ex. A”) and the Complaint in *Brkic* is attached as **Exhibit B** (“Ex. B”).

1 button, which allows Users to click a button associated with some particular content that will
2 result in the User's "Like" statement potentially being displayed to Facebook Friends who visit
3 the third-party website, as well as on the User's profile page on Facebook. Users may choose to
4 share content on a third-party website to communicate to their Facebook Friends that they like an
5 article on a newspaper's website, a product on a retailer's website, a song or video on a media
6 website, an entry on a blog, and so on. Plaintiffs concede that, while they are logged in to
7 Facebook, they have consented to Facebook collecting data in order to provide these services.

8 The main allegation in both the *Davis* and *Brkic* complaints is that Facebook collected
9 data regarding Users' Internet activity without their consent while Users were logged out of their
10 Facebook accounts. The actions involve substantially the same parties, factual allegations, issues
11 of law, defenses, and demands for relief, and it is likely that discovery and motion practice will
12 overlap such that the parties' and the Court's resources will be conserved by relating the actions.

13 The first-filed, *Davis* action, was filed on October 30, 2011 on behalf of a putative global
14 class of "all persons who had active Facebook accounts and used Facebook between May 27,
15 2010 and September 26, 2011, both dates inclusive, and whose privacy was violated by
16 Facebook." (Ex. A ¶ 31.) The *Davis* complaint alleges that, for a period ending September 26,
17 2011, Facebook collected data regarding Users' Internet activity without their consent while
18 Users were logged out of their Facebook accounts. (*Id.* ¶¶ 3, 20-30.) The *Davis* plaintiffs assert
19 claims for violations of the federal Wiretap Act, 18 U.S.C. § 2511; the Stored Electronic
20 Communications Act, 18 U.S.C. § 2701; and the Computer Fraud and Abuse Act, 18 U.S.C. §
21 1030. (*Id.* ¶¶ 37-56.) The complaint seeks compensatory and statutory damages, injunctive
22 relief, attorneys' fees, and costs. (*Id.* Prayer for Relief.)

23 The *Brkic* action was filed on October 5, 2011 on behalf of a putative nationwide class of
24 "[a]ll individuals in the United States who subscribe to Facebook and whose electronic internet
25 information was intercepted by Facebook when the individuals were not logged-in to Facebook."
26 (Ex. B ¶ 16.) The *Brkic* Action was brought on behalf of a single Facebook User against
27 Facebook and ten unnamed "directors, employees, agents, or contractors of Facebook." (*Id.* ¶ 6.)
28 *Brkic* alleges that, for a period ending September 23, 2011, Facebook collected data regarding

1 Users' Internet activity without their consent while Users were logged out of their Facebook
 2 accounts. (*Id.* ¶¶ 12-15.) The *Brkic* complaint asserts claims for violations of the Wiretap Act
 3 and for unjust enrichment, intrusion upon seclusion, and trespass to personal property. (*Id.* ¶¶ 24-
 4 45.) The complaint seeks actual and statutory damages, injunctive relief, attorneys' fees, and
 5 costs. (*Id.* Prayer for Relief.)

6 * * * *

7 On October 17, 2011, the *Davis* plaintiffs moved the Judicial Panel on Multidistrict
 8 Litigation to transfer the *Brkic* and *Davis* actions to a single judge in this District for coordinated
 9 or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. (Brown Decl. ¶ 4; Ex. C.) In
 10 the same motion, the *Davis* plaintiffs also moved to transfer to this District nine other related
 11 actions pending in other federal district courts. (*Id.*)

12 II. ARGUMENT

13 Under Civil Local Rule 3-12, actions are related when: "(1) [t]he actions concern
 14 substantially the same parties, property, transaction or event; and (2) [i]t appears likely that there
 15 will be an unduly burdensome duplication of labor and expense or conflicting results if the cases
 16 are conducted before different Judges." *Brkic* is related to *Davis*, and *Brkic* should be transferred
 17 to the judge presiding over *Davis*, the Honorable Edward J. Davila

18 A. The *Brkic* action alleges facts and claims substantially identical to those in the 19 *Davis* action.

20 The allegations in *Brkic* mirror those in *Davis* in numerous regards. *First*, Facebook is the
 21 only named defendant in the two actions. (*See* Exs. A, B.) The unnamed defendants in *Brkic* are
 22 clearly related to Facebook, being the "directors, employees, agents, or contractors of Facebook."
 23 (Ex. B. ¶ 6.)

24 *Second*, the allegations in *Davis* and *Brkic* arise from the same transaction or event. The
 25 main allegation of both complaints is that Facebook collected data regarding Users' Internet
 26 activity without their consent while those Users were logged out of Facebook. (*Compare* Ex. A
 27 ¶¶ 3, 20-30 (alleging that Facebook "installed cookies on users' computers that track the internet
 28 activity of users *even when they have logged off of Facebook*" (emphasis in original)), *with* Ex. B

1 ¶¶ 12-15 (“Facebook tracked, collected and stored its users’ wire or electronic communications,
2 including but not limited to portions of their Internet browsing history even when the users were
3 not logged-in to Facebook.”).)

4 *Third*, the plaintiffs in both cases each bring claims under the Wiretap Act and seek
5 damages under that statute, as well as claims for injunctive relief, attorneys’ fees, and costs.
6 (*Compare* Ex. A ¶¶ 37-45, Prayer for Relief, *with* Ex. B ¶¶ 24-33, Prayer for Relief.)

7 *Fourth*, Facebook will bring similar defenses in the two actions, such as that plaintiffs
8 have suffered no cognizable injury and that plaintiffs’ causes of action, including under the
9 Wiretap Act, fail to state a claim upon which relief may be granted.

10 *Fifth*, the putative class in *Davis* substantially overlaps with the *Brkic* putative class. (*See*
11 *supra* Part I.) The plaintiff in *Brkic*, who challenges Facebook’s conduct through September 23,
12 2011, seeks to represent “[a]ll individuals in the United States who subscribe to Facebook and
13 whose electronic internet information was intercepted by Facebook when the individuals were not
14 logged-in to Facebook.” The putative class sought in *Davis*—“all persons who had active
15 Facebook accounts and used Facebook between May 27, 2010 and September 26, 2011, both
16 dates inclusive, and whose privacy was violated by Facebook”—appears to be almost entirely
17 coextensive with (or to subsume) the *Burkic* class.

18 *Finally*, the plaintiffs in *Davis* and *Brkic* have stipulated to the relation of the two cases.
19 (*See* Stipulation, filed herewith.) Moreover, as referenced, the *Davis* plaintiffs have filed a
20 motion before the Judicial Panel on Multidistrict Litigation to transfer the *Davis* and *Brkic*
21 actions, along with nine other actions pending outside the Northern District of California, to a
22 single judge in this District for coordinated or consolidated pretrial proceedings pursuant to 28
23 U.S.C. § 1407. (Brown Decl. ¶ 7; Ex. C.)

24 **B. Relation will avoid wasteful duplication of efforts and conflicting results.**

25 Given the substantial degree of factual and legal overlap between *Davis* and *Brkic*,
26 relating the actions will promote the interests of judicial economy and fairness by preventing
27 duplicative discovery. Not relating the two actions also would waste judicial resources and
28 introduce a substantial risk of inconsistent rulings on legal issues—e.g., whether the plaintiffs

1 consented to the conduct they now challenge, whether the plaintiffs have any cognizable injury,
2 etc.—if pretrial motions were heard separately, by two different judges. Additionally, the
3 possibility of inconsistent class determinations clearly exists here because the *Davis* action seeks
4 certification of a global class of Users that substantially overlaps the putative classes in the *Brkic*
5 action. See *In re Facebook Privacy Litig.*, No. C 10-02389-JW, 2010 WL 5387616, at *1
6 (relating actions with “overlapping classes”); see also *In re Sugar Indus. Antitrust Litig.*, 395 F.
7 Supp. 1271, 1273 (J.P.M.L. 1975) (holding that transfer for pretrial coordination or consolidation
8 pursuant to 28 U.S.C. § 1407 “is appropriate, if not necessary, where the possibility of
9 inconsistent class determinations exists”).

10 III. CONCLUSION

11 For these reasons, the *Brkic* action should be related to the *Davis* action, and the *Brkic*
12 action should be transferred to the judge presiding over the *Davis* action, the Honorable Edward J.
13 Davila.

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15 Dated: October 28, 2011

COOLEY LLP

16
17 /s/ Matthew D. Brown
18 Matthew D. Brown (196972)

19 Attorneys for Defendant FACEBOOK, INC.

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