EXHIBIT A

BEFORE THE UNITED STATES JUDICIAL PANEL

ON MULTIDISTRICT LITIGATION

IN RE FACEBOOK USE OF NAME AND LIKENESS LITIGATION	MDL DOCKET NO. _____

BRIEF IN SUPPORT OF DEFENDANT FACEBOOK, INC.'S MOTION FOR TRANSFER OF RELATED ACTIONS TO THE NORTHERN DISTRICT OF CALIFORNIA PURSUANT TO 28 U.S.C. § 1407

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Defendant Facebook, Inc. ("Facebook") respectfully submits this Brief in Support of its Motion for Transfer of Related Actions to the Northern District of California Pursuant to 28 U.S.C. Section 1407. Facebook requests that the Judicial Panel on Multidistrict Litigation ("the Panel") transfer one action filed in the Eastern District of New York, one action filed in the Southern District of Illinois, and three actions filed in the Northern District of California to a single Northern District of California judge to facilitate effective and efficient pretrial coordination and/or consolidation of these five actions (the "Actions").[1]

I. PRELIMINARY STATEMENT

Facebook is a free social networking website that enables people to connect and share with their friends, families, and communities. Each Facebook user ("User") may establish a personal network of Facebook "Friends" and create a profile page on which the User and his or her Friends can share content. To create a profile, a User need only agree to Facebook's terms of service, provide his or her real name, age, gender, and a valid e-mail address. The User may also, but is not required to, upload a "profile picture," which can be whatever the User chooses: the User's face, his or her pet, a landscape, a drawing, etc. Users can share virtually anything through Facebook, subject to the privacy settings they choose: vacation photos; what they did over the weekend; links to websites, brands, products, or other content they think is interesting; information about where they are and/or what they are doing; or opinions about world events. As one court recently observed, "Facebook exists because its users *want* to share information—often about themselves—and to obtain information about others, within and among groups and subgroups of persons they already know or with whom they become acquainted through using Facebook."[2] Since its founding in 2004, hundreds of millions of people across the globe have joined and continue to use Facebook because of the innovative ways it enables them to communicate and share their lives with the people with whom they choose to connect.

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[1] *See* the concurrently-filed Schedule of Actions.

[2] *Cohen v. Facebook, Inc.*, --- F. Supp. 2d ---, 2011 WL 3100565, at *1 (N.D. Cal. 2011) (emphasis in original).

Facebook is currently facing five putative class actions arising from overlapping and, in some cases, identical claims. Three Actions are pending in the Northern District of California, one is in the Eastern District of New York, and one is in the Southern District of Illinois. Facebook is the only defendant in each of the Actions. The first-filed Action, which has been pending for eight months, and the second-filed Action, which has been pending for four months, are both venued in the Northern District of California.

Pursuant to 28 U.S.C. Section 1407, Facebook requests that the Actions be transferred to a single judge in the Northern District of California for pretrial coordination or consolidation. The key inquiry before the Panel is whether the Actions present common questions of fact. Here, the core allegations of all five Actions are virtually the same: according to the plaintiffs, Facebook allegedly violated Users' rights of publicity and/or privacy by displaying their names and profile pictures (alleged to be their "likenesses") on the Facebook website: (1) alongside or as part of alleged advertising (alleged in four of the five Actions) and/or (2) next to the display of a free utility that enables Users to find more friends on Facebook, which the plaintiffs refer to as the "friend finder service" (alleged in three of the five Actions). The Actions assert claims for misappropriation of the statutory right of publicity or violation of the right to privacy (under various states' laws); common law misappropriation of the right of publicity; violations of California's Unfair Competition Law, Business and Professions Code section 17200 (the "California UCL"), based on the alleged misappropriation; unjust enrichment; and/or violations of the right to privacy under the California State Constitution. All five Actions are putative class actions.[3]

The overlapping factual and legal issues in the Actions weigh strongly in favor of transfer. In each of the Actions, the plaintiffs claim that Facebook used their names and likenesses for its own benefit and without their consent. In each, Facebook contends that the

[3] In bringing this motion, Facebook in no way concedes that certification of the putative classes is proper under Federal Rule of Civil Procedure 23. Facebook seeks transfer and consolidation or coordination of the Actions before a single judge for all pre-trial matters for convenience, efficiency and judicial economy.

plaintiffs consented to the very uses of their names and likenesses they now challenge, that plaintiffs have suffered no cognizable injury and/or that the plaintiffs' claims are precluded or preempted by federal statute. These five separate actions, thus, present numerous common questions of fact and law.

Transfer will also serve the convenience of the parties and minimize the burdens placed upon them. Facebook is headquartered within the San Jose Division of the Northern District of California, and discovery regarding the alleged conduct that is central to all the Actions will likely focus on the documents, data, and personnel located at Facebook's offices. Nine of the fifteen named plaintiffs also reside in California. Of the six named plaintiffs that do not live in California, three chose to file their suits in the Northern District of California and one is relatively nearby in Seattle, Washington.

Transfer to a single judge in the Northern District of California is essential to prevent duplicative and potentially conflicting motion practice and discovery, which has already occurred and is certain to continue if these five Actions are litigated by four different sets of plaintiffs' lawyers, in three different district courts, before four different judges. Transfer under 28 U.S.C. Section 1407 would also create a single forum for proceedings for any additional "tag-along" actions filed in the future.

The Northern District of California is the best forum for the Actions for numerous reasons. As mentioned, three of the five Actions were filed in that district, Facebook's headquarters are located there, and the bulk of the plaintiffs also reside in California. Additionally, the first two Actions filed, both of which were brought in the Northern District of California, have progressed further than either of the cases pending outside that district. Indeed, the court (the Honorable Richard Seeborg) in the first-filed case has already ruled on Facebook's motion to dismiss the original complaint, and will soon be receiving briefing on a motion to dismiss an amended complaint. The putative classes in the Actions filed in the Northern District of California also appear to be the broadest in scope, and they encompass the putative classes sought in the Actions filed in the other districts. Each plaintiff also agreed to Facebook's terms

of service, which requires that any federal court action against Facebook be brought in the Northern District of California.

The Northern District of California also has the resources and judicial expertise to properly and efficiently conduct this litigation. Because Judge Seeborg has ruled upon a motion to dismiss in the first-filed Action, he is already familiar with many of the factual and legal issues in the plaintiffs' complaints, as well as several of the statutes at issue in the Actions. Judge Seeborg thus is particularly well positioned to oversee these cases efficiently.

For these reasons and those discussed below, Facebook respectfully requests that the Panel transfer the Actions to a single judge in the Northern District of California for pretrial coordination or consolidation.

II. FACTUAL BACKGROUND

Plaintiffs in each of the Actions allege that Facebook misappropriated their names and likenesses without their consent. The Actions rest on the same basic theories of liability, seek similar or identical forms of relief, and will seek class certification for similar and, in some cases, overlapping groups of putative class members.

A. *R. Cohen v. Facebook, Inc.* (Northern District of California, the Honorable Richard Seeborg)

The *Cohen* Action was filed on November 22, 2010, and is brought on behalf of a putative nationwide class of "[a]ll Facebook users whose names, photographs or digital images and/or likenesses have been used without consent or compensation on Facebook.com for the purpose of advertising Facebook's Friend Finder service . . . ." (Ex. 1 ("*Cohen* complaint") ¶ 44.)[4] All five named plaintiffs are alleged to reside in California. (*Id.* ¶¶ 19-21.) The *Cohen* complaint alleges that Facebook misappropriated Users' names and likenesses by displaying them to promote its friend finder utility. (*Id.* ¶¶ 35-43.) The *Cohen* plaintiffs assert claims for violations of: California's common law right to publicity; California's statutory right to

[4] All references to "Ex. [X]" shall refer to the exhibits to the concurrently filed declaration of Matthew D. Brown ("Brown Decl.").

publicity, Civil Code Section 3344 ("Section 3344"); and the California UCL. (*Id.* ¶¶ 55-85.) The complaint seeks statutory damages under Section 3344, actual damages, equitable relief in the form of restitution and/or disgorgement, injunctive relief, and attorneys' fees. (*Id.* Prayer for Relief.)

On June 28, 2011, Judge Seeborg granted Facebook's motion to dismiss the *Cohen* complaint without prejudice, on the grounds that the plaintiffs had not adequately alleged any cognizable injury. *Cohen*, 2011 WL 3100565, at *6-7. On July 18, 2011, the *Cohen* plaintiffs filed their First Amended Class Action Complaint. (Brown Decl. ¶ 2.) Facebook's response to the First Amended Complaint is due today, August 1, 2011. (*Id.*)

Regarding discovery, the *Cohen* plaintiffs have served: (1) two sets of Requests for Production of Documents containing a total of 85 requests; (2) one set of 13 Interrogatories; and (3) one notice of a Rule 30(b)(6) "person most knowledgeable" deposition calling for testimony on 27 topics. (*Id.* ¶ 3.) On July 19, 2011, the *Cohen* plaintiffs filed a motion to compel further responses to some of this discovery. (*Id.*) On July 21, 2011, Facebook filed a motion for protective order from discovery. (*Id.*) On July 29, 2011, the magistrate judge appointed by the court denied plaintiffs' motion to compel without prejudice and directed the parties to meet and confer regarding the outstanding discovery disputes. (*Id.*) The hearing on Facebook's motion for a protective order is scheduled for August 25, 2011. (*Id.*)

B. *Fraley v. Facebook, Inc.* (Northern District of California, the Honorable Lucy H. Koh)

The *Fraley* Action was first filed on March 11, 2011, and is brought on behalf of a putative nationwide class of "[a]ll natural persons in the United States who had an account registered on facebook.com as of January 24, 2011, and had their names, photographs, likenesses or identities associated with that account used in a Facebook Sponsored Story advertisement." (Ex. 2 ("*Fraley* complaint") ¶ 95.) The *Fraley* complaint also asserts claims on behalf of a proposed subclass of minors: "All persons in the Plaintiff Class who additionally have had their names, photographs, likenesses or identities used in a Facebook Sponsored Stories ad while

under 18 years of age." (*Id.*) Four of the named plaintiffs are alleged to reside in California, with one residing in Seattle, Washington. (*Id.* ¶¶ 6-10.) The *Fraley* complaint alleges that Facebook misappropriated Users' names and likenesses by displaying them in "Sponsored Stories." Facebook Users generate stories by sharing content with their Friends, who may view the stories on their own Facebook home page, as well as the User's profile page. As a result of sponsorship by a business or organization, some stories may also receive more prominent placement on the Facebook home page of Friends authorized by the User to view the story. (*Id.* ¶¶ 42-49.) The *Fraley* complaint asserts claims for violations of Section 3344 and the California UCL, and for unjust enrichment. (*Id.* ¶¶ 107-35.) The complaint seeks statutory damages under Section 3344, actual damages, equitable relief in the form of restitution and/or disgorgement, injunctive relief, and attorneys' fees. (*Id.* Prayer for Relief.)

On March 18, 2011, the *Fraley* plaintiffs filed an amended complaint. (Brown Decl. ¶ 4.) Facebook filed a motion to dismiss the First Amended Complaint on May 18, 2011. (*Id.*) The *Fraley* plaintiffs amended their complaint again on June 6, 2011. (*Id.*) Facebook moved to dismiss the Second Amended Complaint on July 1, 2011. (*Id.*) The hearing on Facebook's motion to dismiss is scheduled for September 29, 2011. (*Id.*)

Regarding discovery, the *Fraley* plaintiffs have served: (1) five sets of Requests for Admission containing a total of 53 requests; (2) five sets of Requests for Production of Documents containing a total of 63 requests; (3) one set of Interrogatories containing 15 questions; and (4) five notices of Rule 30(b)(6) "person most knowledgeable" depositions calling for testimony on 50 topics. (*Id.* ¶ 5.)

C. *Nastro v. Facebook, Inc.* (Eastern District of New York, the Honorable Frederic Block)

The *Nastro* Action was filed on May 2, 2011 and is brought on behalf of a putative class of "[a]ll persons who, from November 6, 2007 through the present . . . (1) were under the age of 18 years; (2) were New York residen[t]s; (3) were members of Facebook and (4) while under the age of 18 years, had their names or likenesses used on a Facebook feed or in an advertisement

sold by Facebook, Inc., without the consent of their parent or guardian." (Ex. 3 ("*Nastro* complaint") ¶ 9.) The named plaintiff is alleged to reside in New York. (*Id.* ¶ 5.) The *Nastro* complaint alleges that Facebook misappropriated Users' names and likenesses by displaying them alongside third-party advertisements on Facebook, called "Social Ads" (*id.* ¶ 32), and to promote the "friend finder" utility (*id.* ¶ 42). The *Nastro* complaint asserts that Facebook violated New York's statute concerning use of names and likenesses for purposes of advertising or trade, New York Civil Rights Code Section 50. (*Id.* ¶¶ 52-59.) The *Nastro* plaintiff seeks damages, equitable relief in the form of restitution and/or disgorgement, and injunctive relief. (*Id.* Prayer for Relief.) The attorneys representing the plaintiff in *Nastro* also represent the plaintiffs in *Downey v. Facebook, Inc.* (discussed below), which was filed in the Northern District of California. (*Compare id. with* Ex. 5 ("*Downey* complaint").) In addition, the same counsel has been representing multiple plaintiffs in a consolidated putative class action, pending in Los Angeles County Superior Court since August 26, 2010 (*D. Cohen v. Facebook, Inc.*, Case No. BC 444482 (Cal. Super. Ct.) ("*D. Cohen*")), which also involves alleged misappropriation of Users' names and likenesses in connection with third-party advertisements (but which, because it is pending in state court, is not included in this motion). (Ex. 6 ("*D. Cohen* complaint"), Brown Decl. ¶ 9.)

In *Nastro*, no discovery has yet been served by either party. (Brown Decl. ¶ 6.) On July 26, 2011, consistent with Judge Block's motion practices, Facebook submitted a letter request to the court seeking permission to move to dismiss the *Nastro* complaint. (*Id.* ¶ 6.)

D. *Dawes v. Facebook, Inc.* (Southern District of Illinois, the Honorable G. Patrick Murphy)

The *Dawes* Action was filed on June 1, 2011 and is brought on behalf of a putative nationwide class of "[a]ll facebook users, who during a time that facebook records identified them to be under the age of 18, had their names used in connection with a facebook advertisement." (Ex. 4 ("*Dawes* complaint") ¶ 24.) In the alternative, the *Dawes* complaint alleges a class comprising "[a]ll facebook users, who during a time that facebook records

identified them to be under the age of 18 and a resident of California, Ohio, Nevada, Illinois, or Indiana and [sic] had their name used in connection with a facebook advertisement." (*Id.*) The two named plaintiffs are both alleged to reside in Illinois. (*Id.* ¶¶ 2-3.) The *Dawes* complaint alleges that Facebook misappropriated Users' names and likenesses by displaying them in connection with advertisements. (*Id.* ¶ 16.) The *Dawes* complaint does not appear to state a cause of action under any specific statute (*see id.* ¶¶ 36-41), but rather states that Facebook's actions violate "State law" (*id.* Prayer for Relief). The complaint seeks statutory damages under (unspecified) state laws, costs, interest, and attorneys' fees. (*Id.*)

No discovery has yet been served by either party. (Brown Decl. ¶ 7.) Facebook's response to the *Dawes* complaint is due today, August 1, 2011. (*Id.*)

E. *Downey v. Facebook, Inc.* (Northern District of California, the Honorable Lucy H. Koh)

The *Downey* Action was filed on July 5, 2011 and is brought on behalf of a putative nationwide class of "[a]ll persons who, from November 6, 2007 through the present: (1) were under the age of 18 years; (2) were residents in one of the fifty states of the United States; (3) were members of Facebook and (4) while under the age of 18 years, had their names or likenesses used on a Facebook feed or in an advertisement sold by Facebook, Inc., without the consent of their parent or guardian." (Ex. 5 ("*Downey* complaint") ¶ 9.) The two named plaintiffs are both alleged to reside in New Jersey. (*Id.* ¶¶ 5-6.) The *Downey* complaint alleges that Facebook misappropriated Users' names and likenesses by displaying them in connection with "Social Ads" (*id.* ¶ 33), and to promote the "friend finder" utility (*id.* ¶ 41). The *Downey* complaint asserts claims for violations of California's Section 3344 and the California Constitution's right to privacy. (*Id.* ¶¶ 51-65). The complaint seeks statutory damages under Section 3344, actual damages, equitable relief in the form of restitution and/or disgorgement, injunctive relief, and attorneys' fees. (*Id.* Prayer for Relief). As mentioned, the attorneys representing the plaintiffs in *Downey* also represent the plaintiff in *Nastro* and the plaintiffs in *D. Cohen*. (*See* Section II.C, *supra*.)

No discovery has yet been served in *Downey*. (Brown Decl. ¶ 8.) Facebook's response to the *Downey* complaint is due September 19, 2011. (*Id.*)

* * * *

While the plaintiffs in the Actions plead with different levels of specificity and points of emphasis, they all allege that Facebook misappropriated Users' names and likenesses by displaying them in connection with alleged advertisements and/or to promote the friend finder utility. Four of the underlying complaints allege (and in *Dawes* vaguely imply) that Facebook violated California's Section 3344, and each Action requests virtually the same relief. The five Actions also bring their claims on behalf of overlapping putative classes.

III. ARGUMENT

Transfer of actions is appropriate under 28 U.S.C. Section 1407 when: (i) the actions "involv[e] one or more common questions of fact;" (ii) the transfer would "be for the convenience of parties and witnesses;" and (iii) the transfer "will promote the just and efficient conduct" of the actions. All of those requirements are met here and, accordingly, Facebook respectfully requests that the Panel transfer the Actions to a single judge in the Northern District of California.

A. The Actions Involve Common Questions of Fact.

Section 1407 authorizes the transfer and coordination of cases that involve "common questions of fact." 28 U.S.C. § 1407(a). "[T]ransfer under Section 1407 does not require a complete identity or even majority of common factual issues . . . ." *In re MLR, LLC, Patent Litig.*, 269 F. Supp. 2d 1380, 1381 (J.P.M.L. 2003); *see also Nat'l Sec. Agency Telecomms. Records Litig.*, 444 F. Supp. 2d 1332, 1334 (J.P.M.L. 2006) (same); *In re AT&T Corp. Sec. Litig.*, Case No. 1399, 2001 WL 34834425, at *1 (J.P.M.L. Apr. 19, 2001) (same). "Nor is the presence of additional or differing legal theories significant when the underlying actions still arise from a common factual core . . . ." *AT&T Corp.*, 2001 WL 34834425, at *1. As the Panel has long recognized, common issues of fact exist where cases share the same factual allegations.

See In re Ford Motor Co. Crown Victoria Police Interceptor Prods. Liab. Litig., 229 F. Supp. 2d 1377, 1378 (J.P.M.L. 2002) (holding that common factual questions exist where all actions focused on allegations regarding design of Ford vehicle fuel tanks); *In re Baldwin-United Corp. Litig.*, 581 F. Supp 739, 740 (J.P.M.L. 1984) (holding that common questions of fact exist where each action alleged that the defendant breached fiduciary duties and violated securities laws in its treatment of a specific type of annuity).

The Actions easily meet this test. The core allegation of each Action is that Facebook misappropriated the names and likenesses of the plaintiffs and other Users in the putative class by displaying them: (1) along with commercial content (*Fraley*, *Nastro*, *Dawes*, and *Downey*) and/or (2) to promote the friend finder utility (*R. Cohen*, *Nastro*, and *Downey*). (*See* Section II, *supra*.) Facebook denies these allegations, denies that any of the Actions should be certified as a class action, and asserts numerous defenses, including that the plaintiffs have suffered no cognizable injury, that they consented to the conduct they now challenge, and that the plaintiffs' claims are precluded or preempted by the federal Communications Decency Act (47 U.S.C. § 230) and/or the Children's Online Privacy Protection Act (15 U.S.C. § 6501-08).

There can be no real dispute that all the Actions present common factual and legal issues. For example, in response to the allegations that are common among the Actions, Facebook will show that:

- Under Facebook's terms of service, Users consented to the use of their names and likenesses that they now challenge;
- Users have no plausible claim to have suffered an injury in fact as result of the use of their names and likenesses;
- Users' claims are precluded and preempted by federal law;
- The challenged display of Users' names and profile pictures violated no state law, including California's Section 3344; and
- The alleged display of Users' names and profile pictures are "newsworthy" and, therefore, exempt from liability under the state laws the plaintiffs assert.

Thus, the Actions present common questions of fact and law that would be better resolved in a single action, rather than five separate actions, before four separate judges.

Given the many common issues of fact that the Actions present, the minimal variations between them create no barrier to transfer. *In re Vonage Marketing and Sales Practices Litigation* involved four actions based on allegedly improper marketing of the defendant's Internet phone services, alleging violation of numerous different state consumer protection laws on behalf of some state-specific and some nationwide putative classes. *See* 505 F. Supp. 2d 1375, 1376 (J.P.M.L. 2007). Nonetheless, the Panel ordered transfer because the underlying facts giving rise to the differing state law theories were common to all of the actions. *Id.*; *see also In re Celotex Corp. "Technifoam" Prods. Liab. Litig.*, 68 F.R.D. 502, 505 (J.P.M.L. 1975) (holding that the potential to raise different legal issues due to application of different state laws is an "insufficient ground for denying transfer of [] litigation under Section 1407 since such issues can be presented to and resolved by the transferee judge").

The Panel should do the same here. The Actions raise the same core factual allegations and implicate similar questions of law, and transfer of the Actions to a single Northern District of California judge is accordingly appropriate under Section 1407.

B. Transfer Will Serve the Convenience of the Parties and the Witnesses.

Because the Actions rely upon virtually the same factual allegations and present similar legal questions, the discovery the parties seek in each Action is likely to be largely duplicative of the discovery sought in the other Actions. Pretrial coordination is essential to minimize the immense burden that Facebook would face in responding to five different sets of substantively similar and substantially overlapping, but non-identical discovery about, for example:

- How Social Ads, Sponsored Stories, and the friend finder utility work;
- The purpose(s) of each product;
- Who developed the products and when;
- Who works on the products now;

- If the product(s) evolved or changed over time and why and when they did;
- Product analyses and tests;
- The terms of service that apply to these products; and
- Communications with Users and advertisers about these products.

The parties are certain to seek many of the same documents, serve many of the same interrogatories and requests for admission, and notice depositions of many of the same witnesses in order to ask many of the same questions. The benefits of coordination in this circumstance are undeniable, both to Facebook and to the plaintiffs who will otherwise needlessly duplicate one another's efforts.

Having a unified set of document requests, which the plaintiffs can pool resources to create and share in the burden of reviewing, will redound to the benefit of all parties. Transfer and pretrial coordination will also ensure that Facebook witnesses will not have to appear multiple times at depositions or hearings across the country and will help to ensure that all the relevant questions are asked during such proceedings. Because of the similarity of the underlying cases, it is only reasonable that one judge should "structure pretrial proceedings to accommodate all parties' legitimate discovery needs while ensuring that the common party and witnesses are not subjected to discovery demands that duplicate activity that will or has occurred in other actions." *In re M3Power Razor Sys. Mktg. & Sales Practices Litig.*, 398 F. Supp. 2d 1363, 1364-65 (J.P.M.L. 2005). To the extent minor differences exist among the Actions, the Panel has recognized that transfer under Section 1407 has the "salutary effect" of placing all actions before a single judge who can formulate a single program that both addresses the uncommon issues and streamlines pretrial proceedings. *In re Vonage*, 505 F. Supp. 2d at 1376-77; *see also In re Cobra Tax Shelters Litig.*, 408 F. Supp. 2d 1348, 1349 (J.P.M.L. 2005).

Additionally, as referenced, having all the Actions transferred to a single judge in California, where Facebook and nine of the fifteen named plaintiffs reside, will minimize the burdens on the parties whenever court appearances are required. Of the six named plaintiffs that do not live in California, three chose to file their suits in the Northern District of California, and,

thus, have already signaled their preference for that jurisdiction. Moreover, counsel for one of the remaining three out-of-state plaintiffs (in the *Nastro* Action) is also counsel in one of the Northern District of California Actions (*Downey*), as well as a related state court action against Facebook (*D. Cohen*) that they elected to bring in California. Therefore, those attorneys cannot claim to be inconvenienced by transfer.

Thus, transfer of the Actions would serve the convenience of the parties, the witnesses, and counsel throughout the pretrial proceedings.

C. Transfer Will Promote the Just and Efficient Conduct of These Actions.

The transfer of the Actions will also promote the interests of judicial economy and fairness by preventing duplicative (and potentially conflicting) discovery and pretrial motion practice, including rulings on motions for class certification.

The Panel has consistently recognized that centralization is necessary in cases that pose a risk of "duplicative discovery" or "inconsistent pretrial rulings . . . [to] conserve the resources of the parties, their counsel and the judiciary." *In re Vonage*, 505 F. Supp. 2d at 1376; *see also In re TMJ Implants Prods. Liability Litig.*, 844 F. Supp. 1553, 1554 (J.P.M.L. 1994) (same); *In re Multi-Piece Rim Prods. Liab. Litig.*, 464 F. Supp. 969, 974 (J.P.M.L. 1979) (holding that centralization of the cases was necessary despite individual factual allegations "to prevent duplication of discovery and eliminate the possibility of conflicting pretrial rulings concerning [the] common factual issues"). As discussed above, Facebook has already obtained dismissal of one of the Actions without prejudice (*R. Cohen*), and Facebook has either filed or shortly intends to file motions to dismiss the other Actions. Given the substantial degree of factual and legal overlap between the Actions, to have these motions heard separately, by four different judges, not only wastes judicial resources but also introduces a substantial risk of inconsistent rulings on the common legal issues (e.g., whether through Facebook's terms of service, the plaintiffs consented to the conduct they now challenge, whether the plaintiffs have any cognizable injury, etc.). Moreover, Facebook has already received discovery requests in two of the Actions (*R.*

Cohen and *Fraley*) that were not coordinated to avoid duplication. Additional, duplicative discovery is likely to follow in the three remaining matters.

The Panel also has held that transfer "is appropriate, if not necessary, where the possibility of inconsistent class determinations exists." *In re Sugar Indus. Antitrust Litig.*, 395 F. Supp. 1271, 1273 (J.P.M.L. 1975); *see also In re Vonage*, 505 F. Supp. 2d at 1376; *In re TMJ Implants*, 844 F. Supp. at 1554. The possibility of inconsistent class determinations clearly exists here. Four of the Actions seek certification of nationwide classes of Facebook Users (some limited to minors and some not) and the fifth seeks to certify a class of New York minors. The putative class alleged in each Action also overlaps with those alleged in the other Actions. For example, the *Nastro* Action alleges a putative class that would be contained entirely in the putative class alleged in *Downey*, and is at least partially covered by the putative classes alleged in *Cohen*, *Fraley*, and *Dawes*. (*See* Section II, *supra*.) The putative class alleged in *Downey* also appears to subsume the putative class alleged in *Dawes*. (*See id.*) Contradictory class certification findings or other inconsistent substantive court orders in these cases could impose conflicting obligations on Facebook or could subject putative class members in multiple Actions to irreconcilable determinations concerning their entitlement to relief. Allowing these cases to go forward in three different districts and before four different judges would not only needlessly squander scarce judicial resources; it also could produce incompatible and inequitable results.

The possibility of "tag-along" actions is yet another factor favoring transfer. In the last three months, one new, related complaint has been filed against Facebook every month (*Nastro* in May, *Dawes* in June and *Downey* in July). An additional complaint asserting many of the same claims was also filed against Facebook in the Central District of California in June—*Vanderweit v. Facebook, Inc.*, No. 11−cv−05305 (C.D. Cal filed June 24, 2011)—by plaintiffs' lawyers who also represent plaintiffs in the *D. Cohen* action, but it was voluntarily dismissed. (Brown Decl. ¶ 10.) It would hardly be surprising if additional, closely-related actions are filed in the months to come. Centralization of these Actions would provide a ready forum for any new cases that may be filed. *In re Metopropol Succinate Patent Litig.*, 329 F. Supp. 2d 1368, 1370

(J.P.M.L. 2004) (considering potential for future tag-along actions in determining that transfer would lead to "just and expeditious resolution of all actions to the overall benefit of the parties and the courts").

Concerns of efficiency and fairness, thus, weigh strongly in favor of transfer here.

D. Transfer to the Northern District of California Would Best Fulfill the Goals of Section 1407.

The Northern District of California is the most appropriate forum for pretrial proceedings. Three of the five Actions are already pending there (including the first- and second-filed Actions) and Facebook's headquarters are located in that district. *See In re Wells Fargo Mortg. Lending Practices Litig.*, 545 F. Supp. 2d 1371, 1372 (J.P.M.L. 2008) (transferring litigation to the Northern District of California because "three of the five known actions—including the first-filed action—[were] pending" in that district and because defendant was headquartered in that district). Thus, transfer to a single judge in the Northern District of California would maximize convenience for all parties because Facebook, and likely all of its witnesses and documents, are located there. *See In re Am. Airlines, Inc., Privacy Litig.*, 342 F. Supp. 2d 1355, 1357 (J.P.M.L. 2004) (transferring putative privacy class action to the Northern District of Texas because it encompasses defendant's headquarters and "is likely to be the location of significant discovery"); *In re Jetblue Airways Corp. Privacy Litig.*, 305 F. Supp. 2d 1362, 1363 (J.P.M.L. 2004) (same).

The Northern District of California is also the most appropriate forum for pretrial proceedings for several other reasons. *First*, the litigation in the first- and second-filed cases, *R. Cohen* and *Fraley*, respectively, has proceeded further than either of the Actions outside of the Northern District of California. *See In re Park W. Galleries, Inc., Mktg. & Sales Practices Litig.*, 645 F. Supp. 2d 1358, 1360 (J.P.M.L. 2009) (transferring litigation to district where "action is measurably more advanced"). In the *R. Cohen* case, Judge Seeborg has already ruled upon Facebook's motion to dismiss the initial complaint, after considering a full round of briefing and argument. (Brown Decl. ¶ 2.) He is, therefore, likely to be more familiar with the relevant

factual and legal issues than any other Judge before whom any of the Actions is pending. In *Fraley*, Facebook moved to dismiss the First Amended Complaint, Plaintiffs filed a Second Amended Complaint, and Facebook has now moved to dismiss that complaint as well. (*Id.* ¶ 4.) Facebook also has been served with substantial discovery requests in both *R. Cohen* and *Fraley*. (*Id.* ¶¶ 3, 5.) By contrast, in the two cases venued outside of the Northern District of California, *Nastro* and *Dawes*, no discovery has been served and Facebook is only filing its response to the plaintiffs' complaints. (*Id.* ¶¶ 6-7.)

Second, the putative classes pled in the Actions in the Northern District of California have the broadest scope, and appear to subsume or duplicate the putative classes of the Actions filed in *Nastro* (Eastern District of New York) and *Dawes* (Southern District of Illinois). *See In re Pineapple Antitrust Litig.*, 342 F. Supp. 2d 1348, 1349 (J.P.M.L. 2004) (transferring litigation to district where "the purported classes . . . encompass . . . classes sought in" the other districts). Indeed, looking only at the Northern District of California *Downey* Action, the putative class pled (a nationwide class of minors that had their names and/or likenesses used either in an alleged advertisements or in connection with the friend finder utility) encompasses and exceeds the putative classes in both *Nastro* (same allegations but only for New York minors) and *Dawes* (a nationwide class of minors that had their names and/or likenesses used in alleged advertisements or, in the alternative, a class of Illinois, Indiana, Nevada, Ohio and California minors that had their names and/or likenesses used in an alleged advertisements). (*Compare* Ex. 5 ¶ 9 *with* Ex. 3 ¶ 9 *and* Ex. 4 ¶ 24.)

Next, Facebook's terms of service, which each User agrees to when they sign up for (and continue to use) Facebook, requires that any federal court claims brought against Facebook be filed in the Northern District of California. (Ex. 8 ("Terms of Service") § 15.1; Brown Decl. ¶ 11.) It also requires that would-be plaintiffs submit to the jurisdiction of that court and that California law will their govern their claims. (*Id.*)

Finally, the bench in the Northern District of California has unparalleled experience dealing with putative class actions implicating consumer privacy or publicity rights against

technology and Internet companies, including cases that have been centralized pursuant to Section 1407. *See, e.g.*, *In re Google Inc. Street View Elec. Commc'ns Litig.*, Case No. 10-md-02184 (N.D. Cal., filed Aug. 17, 2010), J.P.M.L. Docket No. 2184 (alleging that Internet company collected personal information from individuals' wireless internet connections); *In re Toys R Us Privacy Litig.*, Case No. 00-cv-2746 (N.D. Cal., filed Aug. 2, 2000), J.P.M.L. Docket No. 1381 (alleging that retailer's website tracked visitors' browsing history and collected other personal information); *In re Facebook Privacy Litig.*, Case No. 10-02389 (N.D. Cal., filed May 28, 2010) (consolidated class actions alleging disclosure of personally identifiable information to third parties by website); *In re Zynga Privacy Litig.*, Case No. 10-cv-04680 (N.D. Cal., filed Oct. 18, 2010) (consolidated class actions alleging disclosure of personally identifiable information to third parties by online game company); *Gaos v. Google, Inc.*, Case No. 10-cv-04809 (N.D. Cal., filed Oct. 25, 2010) (alleging disclosure by website of personal information to third parties); *In re iPhone Application Litig.*, No. 10-cv-05878 (N.D. Cal., filed Dec. 23, 2010) (alleging collection and disclosure of mobile device users' personal information by technology companies).

Although Facebook believes that any Judge in the Northern District of California would be an appropriate choice to preside over the pretrial coordination or consolidation of the Actions, Facebook respectfully suggests that the Panel transfer this action to the Honorable Richard Seeborg. As discussed, the *R. Cohen* Action before Judge Seeborg is both the first-filed and the furthest along of the pending cases. *See Park W. Galleries*, 645 F. Supp. 2d at 1359-60. Judge Seeborg has heard and decided Facebook's motion to dismiss the initial complaint, and is therefore likely more familiar with the relevant factual and legal issues than his counterparts. *See In re Progressive Corp. Ins. Underwriting & Rating Practices Litig.*, 259 F. Supp. 2d 1370, 1371 (J.P.M.L. 2003) (noting that most experienced judge stood out as potential transferee); *In re Int'l House of Pancakes Franchise Litig.*, 331 F. Supp. 556, 558 (J.P.M.L. 1971) (transferring litigation to judge with experience in the litigation, including hearing arguments on dispositive motions). Additionally, Judge Seeborg has previously handled other privacy-related litigation

involving Facebook. *Lane v. Facebook, Inc.*, Case No. 08-cv-03845 (N.D. Cal. filed Aug. 12, 2008). Judge Seeborg also has experience overseeing complex technology litigation transferred pursuant to Section 1407. *See In re Optical Disk Drive Prods. Antitrust Litig.*, Case No. 10-md-02143 (N.D. Cal. filed Apr. 7, 2010) J.P.M.L Docket No. 2143 (alleging a pricing conspiracy by optical disk drive manufacturers). Accordingly, interests of judicial economy favor a transfer of the Actions to Judge Seeborg.

IV. CONCLUSION

Transfer of the Actions to a single judge in the Northern District of California pursuant to 28 U.S.C. Section 1407 is appropriate. The Actions involve common questions of fact, because each contains similar allegations that Facebook misappropriated the names and profile photos of the plaintiffs and other Users, without their permission. Transfer to a single judge in the Northern District will also serve the convenience of the parties and the witnesses because Facebook's headquarters are located within the Northern District and the Northern District is where most of the plaintiffs in the Actions originally brought their claims. The just and efficient conduct of the Actions will be promoted by a transfer because it will reduce the risk of duplicative discovery and serve to limit the possibility of inconsistent class determinations and other rulings on the law. Finally, transfer to a single judge in the Northern District of California is appropriate because the judges in that district, and particularly Judge Seeborg, have the experience and knowledge to handle the Actions efficiently.

For the foregoing reasons, Facebook respectfully requests that the Panel grant its Motion for an order transferring the Actions to a single judge in the Northern District of California for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. Section 1407.

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