EXHIBIT B

BEFORE THE UNITED STATES JUDICIAL PANEL

ON MULTIDISTRICT LITIGATION

IN RE FACEBOOK USE OF NAME AND LIKENESS LITIGATION	MDL DOCKET NO. 2288

FACEBOOK, INC.'S CONSOLIDATED REPLY IN SUPPORT OF ITS 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 Reply in support of its Motion for Transfer of Related Actions to the Northern District of California Pursuant to 28 U.S.C. Section 1407 (the "Motion"). Facebook seeks an order from the Judicial Panel on Multidistrict Litigation (the "Panel") transferring three actions (the "Actions")[1] to a single Northern District of California judge to facilitate effective and efficient pretrial coordination and/or consolidation.

I. INTRODUCTION

Apparently in response to Facebook's Motion, plaintiffs in two of the five actions that Facebook originally identified in its Schedule of Actions voluntarily dismissed their claims. Now, based on the dismissal of those two actions—*Nastro v. Facebook, Inc.*, No. 11-cv-2128 (E.D.N.Y.) ("*Nastro*"), and *Downey v. Facebook, Inc.*, No. 11-cv-03287 (N.D. Cal.) ("*Downey*")[2]—Plaintiffs in the remaining Actions argue the Motion must be denied. To the contrary, the Actions still involve common questions of fact and law, and transfer will still serve the convenience of the parties and witnesses and promote the just and efficient conduct of the

[1] The Actions are: (1) *Cohen v. Facebook, Inc.*, No. 10-cv-05282 (N.D. Cal.) ("*Cohen*"), pending before the Honorable Richard Seeborg; (2) *Fraley v. Facebook, Inc.*, No. 11-cv-01726 (N.D. Cal.) ("*Fraley*"), pending before the Honorable Lucy H. Koh; and (3) *Dawes v. Facebook, Inc.*, No. 11-cv-00461 (S.D. Ill.) ("*Dawes*"), pending before the Honorable G. Patrick Murphy.

[2] Facebook filed its Motion before this Panel on August 1, 2011. On August 4, 2011, counsel for the *Nastro* plaintiffs filed a notice of voluntary dismissal of that action. (Notification of Developments (Dkt. No. 6).) The case was closed the same day. (*See id.*) On August 19, 2011, counsel for the *Downey* plaintiffs filed a notice of voluntary dismissal of that action. (*See* Notification of Developments (Dkt. No. 18).) Plaintiffs in *Downey* were represented by the same counsel who represented plaintiffs in *Nastro*. (*See* Brief in Support of Defendant Facebook, Inc.'s Motion (Dkt. No. 1) (the "Opening Brief") at 7-8.)

As noted in Facebook's Opening Brief, on June 24, 2011, other plaintiffs filed a class action in the Central District of California alleging violation of their rights of publicity based on "social ads" appearing on Facebook. That case, styled *Vanderweit v. Facebook, Inc.*, No. 11-cv-05305 (C.D. Cal.), was filed by the same counsel representing plaintiffs in the *David Cohen* action pending in California state court. (Opening Br. at 14.) On June 30, 2011, counsel for the *Vanderweit* plaintiffs voluntarily dismissed their action.

Actions. Transfer of the Actions to a single judge in the Northern District of California for pretrial coordination or consolidation is therefore still appropriate under 28 U.S.C. Section 1407.

Plaintiffs make a number of arguments directed at the merits of Facebook's Motion. For the reasons explained below, each of those arguments lacks merit. To deflect the Panel's attention from the key issues, Plaintiffs also make the inflammatory accusation that Facebook filed this Motion before the Panel to engage in forum shopping. The record does not support Plaintiffs' claim: Facebook filed the Motion only after four new class actions alleging similar claims were filed within a nine-week period. Facebook timely disclosed its consideration of the option to seek multidistrict coordination of the Actions to the judge presiding over the *Fraley* and *Downey* actions (the Honorable Lucy Koh). And Facebook provided timely notice to the Panel of the dismissal of the *Nastro* and *Dawes* actions. If anything, the filing of overlapping actions in jurisdictions across the country, followed by the strategic dismissal of certain actions and not others, suggests that *plaintiffs' counsel* has engaged in forum shopping. Accordingly, the Panel should reject Plaintiffs' baseless accusations.

II. ARGUMENT

Despite plaintiffs' voluntary dismissal of the *Nastro* and *Downey* actions, transfer of the Actions to a single judge in the Northern District of California is still appropriate under 28 U.S.C. Section 1407. Transfer of actions is appropriate under 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. Those elements are satisfied here.

A. The Actions Still Involve Common Questions of Fact.

The Actions still involve common questions of fact, despite the dismissal of the *Nastro* and *Downey* actions. The core allegation of each Action is that Facebook misappropriated the names and likenesses of plaintiffs and other Facebook users ("Users") in the putative class by displaying them, without consent, alongside content that plaintiffs allege to be advertising. (*See*

Opening Br. at 4-11.) Each Action either alleges violations of California's Civil Code Section 3344 ("Section 3344") (*see* Opening Br. at 4-5 (*Cohen* and *Fraley* complaints)) or references that statute along with other, similar "state law" (*see* Decl. of Matthew D. Brown, filed with Facebook's Motion, Ex. 4 (hereafter, "*Dawes* complaint") ¶ 20). Facebook still denies these allegations, still denies that any of the Actions should be certified as a class action, and still asserts numerous defenses, including that the plaintiffs have suffered no cognizable injury, that they consented to the conduct they now challenge, and/or that the plaintiffs' claims are precluded or preempted by the federal Communications Decency Act (47 U.S.C. § 230) (the "CDA") and/or the Children's Online Privacy Protection Act (15 U.S.C. §§ 6501-08)—all of which presents additional common questions. (*See* Opening Br. at 10-11.)

Plaintiffs attempt to obfuscate these obvious similarities, but their attempts should fail. For example, the *Dawes* plaintiffs describe their own allegations as "relate[d] specifically to Facebook's misappropriation of minors' names and likenesses in connection with Facebook's 'targeted' or 'enhanced' advertisements displayed to other Facebook users." (Pl. E.K.D.'s Resp. in Opp. to Facebook's Mot. for Transfer and Coordination or Consolidation Under 28 U.S.C. § 1407 (Dkt. No. 17) ("*Dawes* Opp.") at 5.) But the *Dawes* class definition does not appear to be so limited. As the *Dawes* plaintiffs explain in their Opposition, they "assert claims on behalf of a nationwide class of Facebook users 'who during a time that facebook records identified them to be under the age of 18, had their names and likenesses used in connection *with a facebook advertisement*.'" (*Id.* (emphasis added).)

The *Dawes* plaintiffs then attempt to distinguish the *Cohen* action as not "assert[ing] claims specific to . . . Facebook's advertising." (*Id.* at 6.) But that is simply incorrect: the *Cohen* complaint plainly alleges that Facebook Users' names and likenesses are used in *advertisements* for the "friend finder" service. (*See, e.g.,* Decl. of Matthew D. Brown, filed with Facebook's Motion, Ex. 1 Preamble ("Plaintiffs . . . file this First Amended Class Action Complaint individually and on behalf of all other similarly situated residents of the United States whose

names, images, and/or or likenesses have been used . . . to *advertise and/or promote* Facebook's 'Friend Finder' service." (emphasis added)); *id.* ¶¶ 35-43 (alleging that Facebook misappropriated Users' names and likenesses by displaying them to promote its friend finder utility); *id.* ¶ 44 (alleging 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 . . . .").)

Similarly, the *Dawes* plaintiffs attempt to distinguish the *Fraley* allegations as "limited to a particular Facebook service or activity – 'Sponsored Stories.'" (*Dawes* Opp. at 8.) But, once again, a central allegation of the *Fraley* complaint is that "Sponsored Stories" are advertisements. (*See* Opening Br. at 5 (quoting *Fraley* complaint ¶ 95) (*Fraley* complaint alleges a class who "had their names, photographs, likenesses or identities associated with that account used in a Facebook Sponsored Story *advertisement*" (emphasis added).) In fact, the *Fraley* plaintiffs describe "[a] Sponsored Story [as] *simply a paid advertisement*" in their Opposition. (Br. in Support of Fraley Plaintiffs' Opp. to Mot. for Transfer (Dkt. No. 19) ("*Fraley* Opp.") at 6 (emphasis added).) Similar arguments made by the *Fraley* plaintiffs (*see id.* at 8-11) are unavailing for the same reasons.[3]

The *Dawes* and *Cohen* plaintiffs also attempt to distinguish the *Dawes* and *Fraley* actions because the *Fraley* claims are "not tied to the age of the user nor Facebook's failure to obtain the consent of minor users' parents or guardians." (*Dawes* Opp. at 7; *see* Pls.' Statement in Resp. to Facebook, Inc.'s Mot. to Transfer (Dkt. No. 22) ("*Cohen* Opp.") at 4-5.) But the *Fraley* plaintiffs themselves admit the issue of minor consent is an "aspect" of the *Fraley* action. (*Fraley* Opp. at 13.) In fact, they state in their Opposition:

> The theory of the *Fraley* case with respect to the minor subclass (and the entire basis of the *Dawes* case) is that the members of the Minor Subclass cannot have consented to having their names and likenesses in ads, only their legal guardian can.

[3] Although the *Fraley* plaintiffs attempt to minimize overlap among the cases, they concede seven times that the cases overlap. (*See Fraley* Opp. at 1, 2, 9, 10, 11 (twice), 13.)

(*Id.* at 14.) Indeed, although each plaintiff attempts to minimize the obvious overlap between the *Fraley* and *Dawes* class definitions, describing the overlap as "limited" (*Dawes* Opp. at 8; *Fraley* Opp. at 9-11) or lacking meaning (*Cohen* Opp. at 4), each acknowledges that the overlap exists (*Dawes* Opp. at 8; *Fraley* Opp. at 1, 2, 9, 10, 11, 13; *Cohen* Opp. at 4).

The *Dawes* plaintiffs attempt to further obfuscate the similarities among the Actions by arguing that each Action raises distinct legal issues that the other Actions do not raise. (*See Dawes* Opp. at 5-8; *see also Cohen* Opp. at 4-5.) But, as explained in the Opening Brief, the existence of variations among the Actions does not defeat centralization where there exists a core of allegations amenable to resolution in a coordinated fashion. (*See* Opening Br. at 11.) Further, the few differences the *Dawes* plaintiffs do identify are red herrings. For example, the *Dawes* plaintiffs find the existence of claims under California's Unfair Competition Law (the "UCL") in *Cohen* and *Fraley* but not *Dawes* significant. (*See Dawes* Opp. at 7-8.) However, as the *Fraley* plaintiffs acknowledge, "[t]he UCL claim in part piggybacks upon the Civil Code Section 3344 claim." (*See Fraley* Opp. at 17.) Although the *Dawes* complaint does not appear to state a cause of action under any specific statute (*see Dawes* compl. ¶¶ 36-41), and rather cryptically states that Facebook's actions violate "State law" (*id.* Prayer for Relief), the complaint does reference Section 3344 along with other, similar "state law" (*id.* ¶ 20). The *Dawes* plaintiffs also seek to distinguish their action from the *Fraley* and *Cohen* actions by asking this Court to find that 47 U.S.C. Section 230 ("CDA 230"), a section of the federal Communications Decency Act that grants broad immunity to websites such as Facebook, does not apply to their misappropriation claims. (*See Dawes* Opp. at 6.) But circuit court authority, which the *Dawes* plaintiffs conveniently do not cite, has squarely held misappropriation claims to be preempted by CDA 230, *see Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003), and Section 1407 does not authorize the Panel to assess the *Dawes* plaintiffs' claim on its merits, *see In re DeepWater Horizon*, 764 F. Supp. 2d 1352, 1353 n.1 (J.P.M.L. 2011).

The *Fraley* plaintiffs argue that Facebook's CDA 230 defense argument does not provide a basis for transfer. (*Fraley* Opp. at 16, 18.) They cite to *In re Eastern Airlines, Inc. Flight Attendant Weight Program*, 391 F. Supp. 763, 764 (J.P.M.L. 1973), for the proposition that "where the commonality between or among actions rests solely on questions of law, transfer under Section 1407 would be inappropriate." (*Fraley* Opp. at 16 (brackets and emphasis omitted).) But the *Fraley* citation is incomplete, as *Eastern Airlines* went on to hold that transfer was warranted because the defense asserted in that case "raise[d] many factual issues common to both actions." 391 F. Supp. at 764. The *Fraley* plaintiffs' arguments regarding CDA 230 show that, if the cases were to proceed beyond the motion to dismiss stage, the CDA 230 defense will raise just these kinds of common factual questions. The *Fraley* plaintiffs explain that they will argue that CDA 230 does not apply because Facebook does not simply publish "information posted by third party information content providers," but rather "that Facebook has created new and original content—the advertisements in question . . . ." (*Fraley* Opp. at 18.) Facebook, in contrast, argues that it is republishing information content provided by others, and that its actions are well within the range of editorial discretion that CDA 230 allows, and therefore that Facebook is entitled to immunity under CDA 230. As can be seen from the parties' arguments, if the complaints are allowed to proceed beyond the motion to dismiss stage, resolving this legal question will likely require resolution of common factual questions.

Finally, the *Fraley* and *Cohen* plaintiffs argue that Facebook's failure to use administrative procedures within the Northern District of California to relate the *Fraley* and *Cohen* actions demonstrates that Facebook does not believe the two actions are related. (*See Fraley* Opp. at 2; *Cohen* Opp. at 3.) Facebook has not taken the position that the *Fraley* and *Cohen* actions are related on their own. That is, Facebook has not advocated that those two cases, standing alone, would need to be heard by a single judge. However, if *Dawes* and *Fraley* are transferred to a single judge for coordinated or consolidated treatment (which Facebook strongly urges, as set forth in its Opening Brief and this Reply), a single judge should preside

over *Cohen* as well. Since the filings of the *Nastro*, *Dawes*, and *Downey* actions, it has become clear that *Fraley* and *Cohen* are two points on the continuum of cases in which the courts will be asked to consider whether and how Facebook's display of Users' names and profile pictures in connection with their activity on the site implicates Users' rights of publicity and other state laws. If one judge is tasked with working through, for multiple named plaintiffs and their associated putative nationwide classes, the complex issues of standing/injury, application of Section 3344 to Facebook's use of Users' names and likenesses on Facebook.com, etc., then the same judge should also be ruling on those same issues in *Cohen* to avoid the risk of inconsistent rulings. Moreover, unlike in *Fraley*, where the theory of injury appears to be limited to Sponsored Stories, it is not clear what theory the *Dawes* plaintiffs will advance, other than alleged improper conduct concerning Facebook "advertisements." The *Dawes* plaintiffs may also consider the "friend finder" suggestions published by Facebook to be within the ambit of challenged "advertisements," just as the *Cohen* plaintiffs themselves claim that those suggestions are advertisements.

The Actions raise the same core factual allegations and implicate similar questions of law. Plaintiffs have failed to show otherwise. Therefore, transfer of the Actions to a single Northern District of California judge is appropriate under Section 1407.

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

Because the Actions rely upon similar factual allegations and present similar legal questions, the discovery the parties seek in each Action is likely to overlap with the discovery sought in the other Actions. Pretrial coordination is therefore still essential to minimize the immense burden that Facebook would face in responding to three different sets of substantively similar and substantially overlapping but non-identical discovery. (*See* Opening Br. at 11-12.)

Plaintiffs in *Fraley* argue that centralization of the Actions is unlikely to lead to efficiencies related to discovery. (*Fraley* Opp. at 2, 8-14; *see also Dawes* Opp. at 6.) For example, the *Fraley* plaintiffs argue that there will be little need for depositions related to the

issue of consent because most of the information related to that issue is publicly available. (*Fraley* Opp. at 2.) However, both the *Fraley* and *Cohen* plaintiffs have served "person most knowledgeable" deposition notices targeted at the issue of consent. For example, the *Cohen* plaintiffs have requested depositions related to:

> 26. The manner(s) in which YOU believe USERS have consented to placement of their names and likenesses next to statements encouraging use of FRIEND FINDER.
>
> 27. Whether and how YOUR privacy settings permit USERS to give or withdraw consent to placement of their names and likenesses next to statements encouraging the use of FRIEND FINDER.

(*See* Decl. of Matthew D. Brown, filed herewith ("Brown Decl."), ¶ 2.) Directly contradicting the *Fraley* plaintiffs' argument that "the consent issue is not likely to be a driver as far as discovery" (*Fraley* Opp. at 14), the *Fraley* plaintiffs have served Facebook with *fifteen* deposition topics arguably related to consent, including, among others:

> 5. PMK REGARDING how Facebook obtained members' consent to individual Facebook SPONSORED STORIES.
>
> 7. PMK REGARDING how Facebook makes members aware of SPONSORED STORIES.
>
> 10. PMK REGARDING whether MEMBERS should re-affirm consent to the TERMS before appearing in SPONSORED STORIES.
>
> 43. PMK REGARDING Facebook terms that comprise the complete agreement between Facebook and members from [sic] including changes from January 2011 to present.
>
> 47. PMK REGARDING the Terms of Use for Facebook members as those terms pertain to SPONSORED STORIES.
>
> 48. PMK REGARDING the Statement of Rights and Responsibilities for Facebook members as those terms pertain to SPONSORED STORIES.
>
> 49. PMK REGARDING the Facebook's [sic] Privacy Policy as it pertains to SPONSORED STORIES.
>
> 50. PMK REGARDING the content of the Facebook Help Center as it pertains to SPONSORED STORIES.

(*See* Brown Decl. ¶ 5.)

The agreements between Facebook and its Users, the content of Facebook's website terms and Help Center, and other mechanisms for providing consent will each have significant overlap in how they apply to the "friend finder" service or "Sponsored Stories" or "social ads" despite the happenstance of how that discovery is propounded. The same is likely to be true if the propounded discovery seeks information related to teenagers' use of Facebook, technical information regarding how Facebook displays Users' names and likenesses, or any of the other common factual issues that exist among the Actions.[4]

Perhaps recognizing that there will be significant overlap in discovery between the three Actions, plaintiffs claim that they could coordinate that discovery in order to create the efficiencies that would otherwise be provided by centralization. (*Dawes* Opp. at 8-11; *Fraley* Opp. at 15-16; *Cohen* Opp. at 7-8.) But this promise of voluntary coordination rings hollow. The first Facebook heard of plaintiffs' suggestion was in their briefing before the Panel, even though Facebook has had substantial meet-and-confer conferences regarding discovery with counsel in both the *Cohen* and *Fraley* action since the filing of the Motion. (Brown Decl. ¶¶ 3, 5.) And far from trying to coordinate discovery, the separate plaintiffs' counsel have plowed ahead with their own individual discovery, which is now well underway, with no attempt at coordination whatsoever. In the *Cohen* action, Facebook has responded to 85 requests for production and 13 interrogatories. (*Id.* ¶ 3.) After meeting with counsel for the *Cohen* plaintiffs, Facebook agreed to provide amended responses to 9 requests for production and 13 interrogatories in early September, to begin producing documents in September, and to hold Rule 30(b)(6) depositions in October. (*Id.* ¶ 3.) In the *Fraley* action, Facebook has responded to 63 requests for production, 52 requests for admission, and 15 interrogatories. (*Id.* ¶ 6.) The *Fraley*

[4] To the extent consent is not found as a matter of law under Facebook's terms of service, which it should be, whether a User consented to Facebook's use of his or her name or profile picture could be a question individual to each class member. In any event, the discovery served relating to this issue will overlap and should be coordinated to maximize efficiency.

plaintiffs have also noticed Rule 30(b)(6) depositions of Facebook on 40 topics on five days in September. (*Id.* ¶ 5.)

Centralization of the Actions before a single judge in California, where Facebook and nine of the twelve named plaintiffs reside[5] (*see* Opening Br. at 4-8), will also minimize the burdens on the parties whenever court appearances are required. As explained in the Opening Brief, transfer to the Northern District would maximize the convenience of all the parties because Facebook, and likely all of its witnesses and documents, are located there. (*Id.* at 15.)

The *Dawes* plaintiffs argue that the Panel should not change their selected venue because the *Dawes* action involves minors. (*See Dawes* Opp. at 11.) But this should pose no obstacle to transferring *Dawes*. First, Facebook is willing to stipulate to deposing the *Dawes* plaintiffs near their homes in the Southern District of Illinois should the Panel decide to centralize the Actions. The *Dawes* plaintiffs' alleged concerns about the time and expense of having to travel to another jurisdiction, therefore, should have minimal impact on the Motion.[6] Second, the case the *Dawes* plaintiffs cite in support of their argument, *Swanson v. Badger Mutual Insurance Co.*, is readily distinguishable, because it involves an *individual* personal injury action in which the minor plaintiff was undergoing treatment in the transferor forum. *See* 275 F. Supp. 544, 546-47 (S.D. Ill. 1967). Those are clearly not the facts here: plaintiffs bring claims on behalf of themselves and a putative nationwide class alleging that a free website available throughout the United States misappropriated their names and likenesses without consent. Finally, plaintiffs in class actions are entitled to little, if any, deference in their choice of forum, especially when they allege a nationwide class, as the *Dawes* plaintiffs do, and pledge to "vigorously protect" the rights of putative class members residing in other states. (*Dawes* Compl. ¶ 26.) *See Lou v.*

[5] A tenth plaintiff has signaled her preference for the Northern District of California by bringing her claim there, even though she resides outside of California. (Opening Br. at 5-6.)

[6] The *Dawes* plaintiffs also argue that their guardians will be unable to supervise the *Dawes* action if it is transferred to the Northern District of California. (*Dawes* Opp. at 11.) But, as the *Dawes* plaintiffs say themselves in the very same paragraph, "there is usually no need for the parties . . . to travel for depositions or otherwise during pre-trial proceedings." (*Id.* at 11-12.)

Belzburg, 834 F.2d 730, 739 (9th Cir. 1987) ("Although great weight is generally accorded plaintiff's choice of forum, when an individual brings a derivative suit or represents a class, the named plaintiff's choice of forum is given less weight." (internal citations omitted)).

For these reasons, transfer of the Actions will serve the convenience of the parties, the witnesses, and counsel throughout the pretrial proceedings.

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

Transfer of the Actions will still promote the interests of judicial economy and fairness. For the reasons stated above and in the Opening Brief, transfer will prevent duplicative discovery in the Actions. (*See supra* § II(B); Opening Br. at 11-15.) Transfer will also prevent the risk of duplicative and potentially conflicting pretrial motion practice. (*See* Opening Br. at 13-15.) Plaintiffs raise several arguments alleging that transfer will not provide these efficiencies, but each of their arguments lacks merit.

First, plaintiffs argue that the three actions are too few and insufficiently complex to justify transfer under Section 1407. (*Dawes* Opp. at 4; *Fraley* Opp. at 15; *Cohen* Opp. at 2-6.) However, the Panel often grants motions to transfer that identify three actions, especially where, as here, there are clear efficiencies to be gained from transfer because of the common questions raised by the actions. *See, e.g.*, *In re Regions Bank ATM Fee Notice Litig.*, 763 F. Supp. 2d 1372, 1372 (J.P.M.L. 2011) (transferring three actions involving common questions related to the operation of a bank's automatic teller machines); *In re Conseco Life Ins. Co. Lifetrend Ins. Mktg. & Sales Practices Litig.*, 672 F. Supp. 2d 1372, 1372-73 (J.P.M.L. 2010) (transferring three actions involving common questions related to insurance policy premiums); *In re Federal Home Loan Mortg. Corp. (Freddie Mac) Sec. Litig.*, 643 F. Supp. 2d 1378, 1380 (J.P.M.L. 2009) (transferring three actions pending in two districts involving common questions related to the undercapitalization of Freddie Mac). As explained in the Opening Brief and above, the Actions raise common factual and legal issues and will involve overlapping discovery on behalf of putative *nationwide classes* of tens, if not hundreds, of millions of Facebook Users (*see* Opening

Br. at 11-13; *supra* §§ II(A), (B)), the consideration of which will lead to "substantial savings of time and effort for court and counsel" *see In re CBS Licensing Antitrust Litig.*, 328 F. Supp. 511, 512 (J.P.M.L. 1971).

Second, plaintiffs cite to *In re Student-Athlete Name & Likeness Litigation*, 763 F. Supp. 2d 1379 (J.P.M.L. 2011), apparently in the belief that it supports an argument that actions alleging right of publicity claims are insufficiently complex to benefit from transfer by the Panel. (*See Dawes* Opp. at 4; *Fraley* Opp. at 15; *Cohen* Opp. at 4.) Plaintiffs misrepresent *Student-Athlete*. In fact, the movant in *Student-Athlete* sought an order centralizing actions alleging two different types of claims—one group of plaintiffs alleged right of publicity claims, the other alleged violations of various antitrust laws. *See Student-Athlete*, 763 F. Supp. 2d at 1379. Electronic Arts, the only defendant common to the actions being considered for consolidation, *opposed* transfer because it "believe[d] that centralization would be disruptive to the efficient conduct of each action with little overall benefit." *See id.* at 1380. In other words, Electronic Arts opposed transfer because the differing legal claims meant there would be few to no judicial efficiencies arising from centralization. Unsurprisingly, the Panel agreed. *See id.* *Student-Athlete* has little to say about the centralization of the Actions here, which Facebook favors rather than opposes, and where each of the Actions makes similar allegations that Facebook misappropriated Facebook Users' names and likenesses on its website.

Third, the *Fraley* plaintiffs argue that the Motion is "premature" because pending motions to dismiss may resolve the other actions (but not their action), thereby eliminating the multidistrict character of the Motion. (*Fraley* Opp. at 1, 8.) However, the *Fraley* plaintiffs misapprehend Panel precedent, as one of the *purposes* of 28 U.S.C. Section 1407 is to prevent inconsistent rulings on pretrial motions, including motions to dismiss. *See, e.g.*, *In re Lead Contaminated Fruit Juice Prods. Mktg. & Sales Practices Litig.*, MDL No. 2231, --- F. Supp. 2d ---, 2011 WL 1466934 (J.P.M.L. Apr. 19, 2011) (granting transfer under Section 1407 specifically in order to prevent inconsistent rulings on defendants' motions to dismiss). As the

Panel explained just this February, in another action where a party suggested that an order transferring cases pursuant to Section 1407 was premature because of pending motions to dismiss: "We decline to delay centralization, as it only invites inconsistent rulings, a result that Section 1407 is designed to avoid." *In re Camp Lejeune, N.C. Water Contamination Litig.*, 763 F. Supp. 2d 1381, 1382 (J.P.M.L. 2011); *see also In re Kaplan Higher Educ. Corp. Qui Tam Litig.*, 626 F. Supp. 2d 1323, 1324 (J.P.M.L. 2009) (noting that transfer under Section 1407 ensures coordination of pretrial proceedings, including motions to dismiss). Indeed, the prevention of inconsistent rulings on Facebook's motions to dismiss is actually another ground *for* transfer of the Actions to a single forum.

Concerns of efficiency and fairness therefore still weigh strongly in favor of transfer.

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

The Northern District of California is still the most appropriate forum for pretrial proceedings. Two of the three Actions are already pending there (including the first- and second-filed Actions) and, as explained above and in Facebook's Opening Brief, transfer to the Northern District of California would maximize the convenience of all the parties because Facebook's headquarters, and likely all of its witnesses and documents, are located there. (*See* Opening Br. at 15; *supra* § II(B).) Transfer to the Northern District of California is also still appropriate for the reasons set forth in Facebook's Opening Brief. (Opening Br. at 15-18.) Plaintiffs in *Fraley* agree that the Northern District of California is the most appropriate forum, should the Panel issue an order transferring the Actions. (*Fraley* Opp. at 19.)

Plaintiffs in the Actions accuse Facebook of forum shopping in recommending that the Panel transfer the Actions to Judge Seeborg. (*Dawes* Opp. at 2-3; *Fraley* Opp. at 2; *Cohen* Opp. at 6-7.) In truth, as Facebook noted in its Opening Brief, "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." (Opening Br. at 17 (emphasis added).) In recommending Judge Seeborg, Facebook was following the Panel's precedent. The Panel often

transfers actions for pretrial proceedings to the judge overseeing the first-filed and most advanced action. *See, e.g.*, *In re Countrywide Financial Corp. Mortgage-Backed Sec. Litig.*, MDL No. 2265, 2011 WL 3569969, at *2-3 (J.P.M.L. Aug. 15, 2011) (transferring litigation in order to "take advantage of [a judge's] familiarity with the issues in this litigation and make efficient use of judicial resources"); *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 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). As Facebook explained in its Motion, Judge Seeborg has already decided a motion to dismiss in *Cohen*, and briefing on Facebook's *second* motion to dismiss began the same day the Motion before the Panel was filed. (Opening Br. at 5.) Indeed, Judge Seeborg is scheduled to hear arguments on the second motion on September 15.[7] (Brown Decl. ¶ 4.) Facebook has engaged and continues to engage in extensive discovery in the *Cohen* action. (*See supra* § II(B).)

Plaintiffs base their accusations of forum shopping on highly misleading representations of an Initial Case Management Conference and hearing in *Fraley* held before Judge Koh on July 28, 2011. That hearing was not on a dispositive motion, but on a motion for a protective order to stay discovery pending resolution of Facebook's motion to dismiss under Rule 12. Briefing on the motion to dismiss had not yet been completed. As Judge Koh explained at the hearing, to grant such a stay, she viewed Ninth Circuit law as requiring the Court to conclude that Facebook was likely to succeed in moving to dismiss the *Fraley* action. (*See* Trans. of Procs. Before Judge Koh (Brown Decl. Ex. A) ("*Fraley* Hearing Trans.") at 54.) In holding that Facebook had not

[7] Judge Seeborg has also scheduled the *Cohen* plaintiffs' motion for class certification to be heard no later than March 1, 2012. (Brown Decl. Ex. A at 1.)

met that burden, Judge Koh explained she believed there were "a lot of . . . close calls" regarding dismissal and that her ruling was "based on a tentative and very early and very preliminary review of this case law, which is quite complex." (*See id.*) In fact, on the issue of standing, Judge Koh engaged in the following exchange with the *Fraley* plaintiffs' counsel:

> [MR. ARNS:] We feel, obviously, strongly with our belief that we will get by any motion to dismiss, and it is—
>
> THE COURT: We'll have to see about that, right?
>
> MR. ARNS: That's correct.
>
> THE COURT: You didn't even answer the Article III standing. I read your thing and I thought, 'Wow, they've got nothing to say. They've got nothing to say."
>
> You know, I always assume people start with the strongest arguments. I kept thinking, 'The Article III has got to be here somewhere," but I never saw it.
>
> I think there's a hot, live issue there.

(*Id.* at 35.) There is no basis for plaintiffs to suggest that Facebook filed its Motion before this Panel for any improper purpose.

Further, the *Fraley* and *Cohen* plaintiffs' suggestion that Facebook decided to file this Motion before the Panel based on what occurred at the July 28 hearing before Judge Koh is nonsense. (*Fraley* Opp. at 2; *Cohen* Opp. at 7.) Counsel for Facebook timely disclosed to Judge Koh *at the same July 28 hearing* that Facebook was considering filing a motion before the Panel. (*Fraley* Hearing Trans. at 41-43.) Facebook's counsel walked Judge Koh through each of the five then-pending federal cases, and also noted two similar cases in state court that would not be subject to the federal MDL process. (*Id.*)[8] There is simply nothing to plaintiffs' accusations.

[8] The *Dawes* plaintiffs assert that Facebook did not file its Motion until after it had received a favorable ruling before Judge Seeborg, although "multiple cases have been pending since early Spring," insinuating that the timing of the Motion is suspicious. (*Dawes* Opp. at 4.) But Judge Seeborg issued his ruling on June 28, 2011, *see Cohen v. Facebook, Inc.*, No. C 10-5282 RS, --- F. Supp. 2d ---, 2011 WL 3100565 (N.D. Cal. June 28, 2011), *before* the *Downey* action was even filed (on July 5), only a few weeks after the *Dawes* complaint was filed (on June 1), and a little less than eight weeks after the *Nastro* complaint was filed (on May 2) (*see* Opening Br. at

III. CONCLUSION

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

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6-7). The facts simply do not support the suggestion of improper motive. If anything, the filing of overlapping actions in jurisdictions across the country, followed by the strategic dismissal of certain actions and not others, suggests that *plaintiffs' counsel* has engaged in forum shopping.