

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

E.K.D., by her next friend Melissa K.)	
Dawes, and C.M.D., by his next friend)	
Jennifer E. DeYong, individually and on)	
behalf of all others similarly situated,)	Cause No: 3:11-cv-00461-GPM-SCW
)	
Plaintiffs,)	CLASS ACTION
)	
vs.)	
)	
FACEBOOK, INC.,)	
)	
Defendant.)	

**DECLARATION OF MATTHEW D. BROWN IN SUPPORT OF
FACEBOOK’S MOTION TO TRANSFER VENUE**

Matthew D. Brown hereby declares under penalty of perjury as follows:

1. I am an attorney licensed to practice law in the State of California, and I am admitted pro hac vice in the above-captioned matter before this Court. I am a partner with the law firm of Cooley LLP, attorneys for Defendant Facebook, Inc. (“Facebook”) in this action. I make this declaration in support of Facebook’s Motion to Transfer Venue of this action to the Northern District of California. I have personal knowledge of the facts stated in this declaration, except as otherwise stated below, and if called upon to testify, could and would competently testify thereto.

Facebook’s Efforts to Identify Plaintiffs’ Facebook Accounts

2. The Complaint in this action gives only the initials for the named Plaintiffs, both of whom are alleged to be minors. I understand from Facebook that this information is not sufficient to easily and definitively identify Plaintiffs’ Facebook accounts. As such, I have on multiple occasions requested that counsel for Plaintiffs provide the User ID (“UID”), Username, and email address associated with each Plaintiff’s account.

3. On November 9, 2011, I requested Plaintiffs' UIDs, Usernames, and email addresses associated with their Facebook accounts in an email to Plaintiffs' counsel, Aaron Zigler. I received no response.

4. On November 16, 2011, in another email to Mr. Zigler, I again requested that he provide the UIDs, Usernames, and email addresses for the named Plaintiffs. I again received no response.

5. We also sought to obtain Plaintiffs' UIDs, Usernames, and email addresses through formal discovery. On October 28, 2011, the Parties exchanged initial discovery requests, including Interrogatories and Requests for Production. In its twelfth Request for Production to each Plaintiff, Facebook requested "DOCUMENTS sufficient to show any and all USERNAMES for YOUR FACEBOOK account(s), and any and all user IDs for your FACEBOOK account(s), any and all email addresses associated with YOUR FACEBOOK account(s) and the opening and/or closing dates of YOUR FACEBOOK account(s)." The Parties initially agreed that these responses would be due on December 7, 2011.

6. On November 21, 2011, I attended a telephonic status conference conducted by the Honorable Stephen C. Williams, Magistrate Judge for the Southern District of Illinois. Plaintiffs' counsel, Aaron Zigler, was also in attendance. Attached as **Exhibit A** is a true and correct copy of pages 63-72 of the transcript from the November 21, 2011 status conference (the cover page of the transcript erroneously refers to the date of the hearing as November 22, 2011). During the conference, I informed Judge Williams of my efforts to obtain Plaintiffs' UIDs, Usernames, and email addresses, including Facebook's pending discovery request for the same information. (Ex. A at 63:8-64:14.) At that time, Plaintiffs' counsel again declined to provide any of this identifying information concerning Plaintiffs' accounts, and suggested that Plaintiffs

may object to providing that information in formal discovery. Plaintiffs' counsel provided his assurance, however, that "the minors have Facebook accounts that are active[.]" (*Id.* at 69:15-16.) He additionally stated that Plaintiffs' forthcoming discovery responses "will more than confirm the kids' use of Facebook." (*Id.* at 64:16-25.)

7. On November 29, 2011, I attended a follow-up telephonic conference before Judge Williams. Plaintiffs' counsel, Mr. Zigler, was also in attendance. During the conference, Judge Williams inquired into the status of the UID issue. At that time, Plaintiffs' counsel intimated that Plaintiffs may not provide their UIDs or other identifying information in response to Facebook's formal discovery requests, or that a protective order may be sought before the information is provided. (No transcript of the November 29, 2011 conference has been prepared.)

8. On December 5, 2011, Plaintiffs' counsel requested a one-week extension of the deadline for their discovery responses. Facebook granted the extension, and the Parties' discovery responses are now due on December 14, 2011.

9. Attached hereto as **Exhibit B** is a true and correct copy of Plaintiffs' Initial Disclosures. In these disclosures, the only potential witnesses identified by Plaintiffs were "the named plaintiffs' personal representatives," "Plaintiffs' counsel," and "corporate representatives of Facebook Inc." Plaintiffs did not provide any information concerning the named Plaintiffs, and did not disclose them as potential witnesses in the case. Plaintiffs additionally indicated that "none" of the relevant documentary evidence is in their "possession, custody, or control," and, thus, Plaintiffs contend that the relevant evidence and documents in this case will come from Facebook.

10. Attached hereto as **Exhibit C** is a true and correct copy of an order and slip

opinion from *Miller v. Facebook*, No. 1:09-cv-2810-RLV (N.D. Ga. Jan. 15, 2010), granting Facebook's motion for transfer under 28 U.S.C. § 1404(a) based on the forum-selection clause in the Statement of Rights and Responsibilities ("SRR") (which, at the time, was denominated "Terms of Use").

Related Cases and Proceedings Before Judicial Panel on Multidistrict Litigation

11. This action is one of five related putative class actions filed against Facebook, in which plaintiffs generally alleged that Facebook misappropriated Users' names and likenesses without their consent, or in some cases, without the consent of their parents. Three of these actions were filed in the Northern District of California, including *Robyn Cohen v. Facebook*, No. 3:10-05282 (N.D. Cal.) ("*Robyn Cohen*"), *Fraleley v. Facebook*, No. 5:11-01726 (N.D. Cal.) ("*Fraleley*"), and *Downey v. Facebook*, No. 5:11-03287 (N.D. Cal.) ("*Downey*"). The other action, *Nastro v. Facebook*, No. 1:11-02128 (E.D.N.Y.) ("*Nastro*"), was filed in the Eastern District of New York.

12. Attached as **Exhibit D** is a true and correct copy of the Complaint from *Downey v. Facebook*, No. 5:11-03287 (N.D. Cal.), which was filed in July 2011 by counsel for Plaintiffs in this case, Mark Tamblyn. Highly similar to this case, the core allegation in *Downey* was that "Facebook, Inc. has regularly and repeatedly used the names and/or likenesses of [minor] Plaintiffs and the members of the class for the commercial purpose of marketing, advertising, selling and soliciting the purchase of goods and services" (Ex. D ¶ 52), and that it "did not first obtain prior consent of the parents or legal guardians of the Plaintiffs and members of the Class . . ." (*Id.* ¶ 56). (*Compare E.K.D. Compl.* ¶ 39 ("Facebook knowingly used and continues to use Plaintiffs' name and photographs for the purpose of marketing, advertising, selling and soliciting the purchase of goods and services without the consent of Plaintiffs' parents or guardians . . .

.”).)

13. On August 1, 2011, Facebook filed a motion with the Judicial Panel on Multidistrict Litigation (“JPML”) requesting consolidation and transfer of these five related actions to the Northern District of California pursuant to 28 U.S.C. § 1407 (“the MDL motion”). After Facebook filed the MDL motion, intervening events reduced the number of cases at issue from five to three. Before the hearing on the MDL motion, the plaintiffs in both *Downey* and *Nastro* voluntarily dismissed their actions, and Facebook notified the Panel. As to *Robyn Cohen*, that action had previously been dismissed with leave to amend on June 28, 2011, and Facebook filed a renewed motion to dismiss on August 1, 2011. I was informed by my law partner, who attended the September 27, 2011 hearing on the MDL motion in person, that no one representing the *Robyn Cohen* plaintiffs appeared at the MDL hearing. The *Robyn Cohen* action was dismissed with prejudice on October 27, 2011.

14. On October 6, 2011, the JPML denied Facebook’s MDL motion. Attached hereto as **Exhibit E** is a true and correct copy of the JPML Order dated October 6, 2011.

15. According to the ECF notices I received, Mark Tamblyn, counsel for the *Downey* plaintiffs, moved for pro hac vice admission in this action less than one hour after the JPML issued its order denying Facebook’s MDL motion. (Dkt. 32.) His associate Ian J. Barlow moved for admission approximately four days later. (Dkt. 37.)

16. Prior to their appearance in this case, Mr. Tamblyn and Mr. Barlow also represented a different group of plaintiffs in virtually identical litigation against Facebook in California state court, captioned *David Cohen, et al. v. Facebook*, No. BC454799 (L.A. Super. Ct.). Mr. Tamblyn and Mr. Barlow became involved in the *David Cohen* case on February 9, 2011, when they filed a putative class action against Facebook captioned *Meth v. Facebook*, No.

BC454799 (L.A. Super. Ct.), which alleged, inter alia, violations of California Civil Code section 3344. Attached as **Exhibit F** is a true and correct copy of the *Meth* complaint. On June 28, 2011, *Meth* was consolidated with *David Cohen*, which was designated as the lead case.

17. After consolidation, the plaintiffs filed their First Master Class Action Complaint on July 5, 2011. Attached hereto as **Exhibit G** is a true and correct copy of the First Master Class Action Complaint in *David Cohen*. As in this action, the putative class sought in *David Cohen* was for “minors. . . whose names or likenesses were used . . . in a [F]acebook advertisement without the consent of the parents or guardians of said minors.” (Ex. D ¶ 5; see *E.K.D. Compl.* ¶ 39 (“Facebook knowingly used and continues to use Plaintiffs’ name and photographs for the purpose of marketing, advertising, selling and soliciting the purchase of goods and services without the consent of Plaintiffs’ parents or guardians . . .”).)

18. Mr. Tamblyn and Mr. Barlow litigated the *David Cohen* case until September 22, 2011, when the court dismissed their complaint with leave to amend, ruling that each of Plaintiffs’ claims was preempted by the Children’s Online Privacy Protection Act. Attached hereto as **Exhibit H** is a true and correct copy of the Notice of Entry of Order Granting Facebook’s Demurrer in *David Cohen*. After filing an amended complaint, the *David Cohen* plaintiffs filed a request for voluntary dismissal of the entire action. The accompanying declaration acknowledged that the request for voluntary dismissal was based in part on “the pendency of a proposed nationwide class action case based on similar allegations pending in the Southern District of Illinois, *E.K.D. v. Facebook, Inc.*, Case No. 3:11-cv-00461-GPM-SCW. The *E.K.D.* action, if certified as a class action, would potentially protect the interests of Plaintiffs herein, as well as the putative class members in this action.” Attached as **Exhibit I** is a true and correct copy of the Declaration of Antony Stuart (co-counsel with Messrs. Tamblyn and

Barlow) In Support of Plaintiffs' Request for Voluntary Dismissal Without Prejudice. The court dismissed the action without prejudice on November 28, 2011. Attached as **Exhibit J** is a true and correct copy of the *David Cohen* court's dismissal order.

19. *Fraleley v. Facebook, Inc.*, No. 11-cv-01726 LHK, remains pending in the Northern District of California. Attached as **Exhibit K** is a true and correct copy of the operative complaint in *Fraleley*, which is the Second Amended Complaint. Like Plaintiffs here, the *Fraleley* plaintiffs allege that Facebook misappropriated Users' names and likenesses in connection with alleged "advertisements." (Ex. K ¶¶ 52, 54.) The *Fraleley* action alleges a subclass of minors, and asserts claims under California Civil Code Section 3344, which is one of the statutes referenced in Plaintiffs' Complaint here. (Ex. K ¶¶ 107-18; *E.K.D.* Compl. ¶ 20.)

20. Discovery is well underway in *Fraleley*. In that action, Facebook has responded to (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 104 requests; (3) and one set of Interrogatories containing 15 interrogatories. In addition, Facebook is currently preparing its responses to two additional sets of Requests for Production, totaling 41 requests, and one set of Interrogatories containing 4 interrogatories. Facebook has produced more than 6,000 documents totaling more than 18,000 pages in seven separate productions. The five named plaintiffs in *Fraleley* have each responded to discovery requests from Facebook, which have included more than 50 requests for production and 15-16 interrogatories per plaintiff. In addition, the plaintiffs have conducted four days of Rule 30(b)(6) depositions, covering at least 35 different topics.

21. In this case, by contrast, discovery is in its infancy. Although both sides have served their initial disclosures and initial written discovery requests, neither side has taken any depositions, served any discovery responses, or produced any documents.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 8, 2011, at San Francisco, California.

/s/ Matthew D. Brown

Matthew D. Brown