

EXHIBIT D

ORIGINAL FILED

JUL 05 2011

Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
San Jose

FILED

1 Mark J. Tamblyn (State Bar No. 179272)
Email: mjt@wexlerwallace.com
2 Ian J. Barlow (State Bar no. 262213)
Email: ijb@wexlerwallace.com
3 **WEXLER WALLACE LLP**
455 Capitol Mall, Suite 231
4 Sacramento, California 95814
Telephone: (916) 492-1100
5 Facsimile: (916) 492-1124

6 Lee Squitieri
Email: lec@sfcasslaw.com
7 Garry T. Stevens, Jr.
Email: garry@sfcasslaw.com
8 **SQUITIERI & FEARON, LLP**
32 E. 57th St., 12th Floor
9 New York, New York 10022
Telephone: (212) 421-6492
10 Facsimile: (212) 421-6553

11 *Attorneys for Plaintiffs*
[Additional counsel appear on signature page]

BY FAX

12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**

14 **SAN JOSE DIVISION**

CV 11-03287

15 J.N.D. AND J.B.D., minors, by and through
16 JIM DOWNEY as Guardian ad Litem, on
17 behalf of themselves and all others similarly
18 situated,
19 Plaintiffs,
20 v.
21 FACEBOOK, INC.,
22 Defendant.

Case No.
CLASS ACTION
COMPLAINT for Violations of:
(1) Civil Code sec. 3344
(2) Cal. Constitution Art. I, sec. 1

JURY TRIAL DEMANDED

23
24 Plaintiffs J.N.D. and J.B.D., minors, by and through JIM DOWNEY as father and general
25 guardian, individually and on behalf of all others similarly situated, alleges the following against
26 Facebook, Inc. (the "Company"), based on personal knowledge, information and belief, and their
27 counsel's investigation:

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17

JURISDICTION AND VENUE

1. This is an action for misappropriation of the names and likenesses of children, seeking compensatory damages and/or statutory penalties, injunctive relief and attorneys' fees due to violations by Facebook, Inc. of California Civil Code, section 3344, and the California Constitution, Article I, section 1.

2. Pursuant to Fed. R. Civ. P. 17(c), Plaintiffs, through their father and general guardian, bring this case as a class action on behalf of a consumer class consisting of all minors in the United States of America whose names or likenesses were used by Facebook, Inc. for commercial purposes without the consent of their parents or guardians of said minors.

3. This Court has jurisdiction over this action pursuant to the Class Action Fairness Act, codified at 28 U.S.C. § 1332(d), because there is the requisite diversity of citizenship between the plaintiff and/or at least one member of the purported class and defendant and because plaintiff believes the aggregate amount in controversy exceeds \$5 million. *See* 28 U.S.C. § 1332(d)(2).

4. Venue is proper in this District under 28 U.S.C. §1391(a)(1) because the defendant, Facebook, Inc., resides in and maintains its headquarters in this District.

18
19
20
21
22
23
24
25
26
27
28

THE PARTIES

5. Plaintiff J.N.D. is a minor residing in the State of New Jersey, and is a member of the Facebook social networking site ("Facebook") where her name and likeness has been appropriated by Facebook, Inc. for commercial advantage without the consent of her parents. Jim Downey is the parent and general guardian of J.N.D, and is a resident of the State of New Jersey. An Application for Appointment as Guardian ad Litem as required by California Code of Civil Procedure, Section 372 has or will be filed with this Court for approval.

6. Plaintiff J.B.D. is a minor residing in the State of New Jersey, and is a member of Facebook where his name and likeness has been appropriated by Facebook for commercial advantage without the consent of his parents. Jim Downey is the parent and general guardian of J.B.D., and is a resident of the State of New Jersey. An Application for Appointment as Guardian ad Litem as required by California Code of Civil Procedure, Section 372 has or will be filed with

1 this Court for approval.

2 7. Defendant Facebook, Inc. is a corporation organized and existing under the laws of
3 the State of Delaware, and has its headquarters and principal place of business in the State of
4 California, operating under and by authority of the laws of the State of California. Facebook, Inc.
5 privately owns and operates Facebook.

6 8. Since Facebook was founded in February, 2004 by Facebook, Inc., the social
7 utility has garnered world-wide success, reporting over 500 million active users – users who have
8 accessed the site within the preceding 30 days – as of July 21, 2010. The number of users under
9 the age of 18 residing in California is currently unknown but based on the demographic is
10 believed to be hundreds of thousands of individuals. Because Facebook, Inc. is a privately held
11 company, figures regarding its use and sources of revenue are not publicly available, but because
12 younger persons are generally seen to be early adapters to new technologies for communication,
13 the number of users under the age of 18 is believed to be equal to or greater than their
14 proportionate share of the population at large.

15 **CLASS ACTION ALLEGATIONS**

16 9. **Class Definition:** Pursuant to Rules 23(a); (b)(1), (b)(2) and (b)(3), Plaintiffs bring
17 this action on their own behalf and in a representative capacity on behalf of all persons similarly
18 situated (the “Class”):

19 All persons who, from November 6, 2007 through the present: (1)
20 were under the age of 18 years; (2) were residents in one of the fifty
21 states of the United States; (3) were members of Facebook and (4)
22 while under the age of 18 years, had their names or likenesses used
23 on a Facebook feed or in an advertisement sold by Facebook, Inc.,
24 without the consent of their parent or guardian.

25 10. Excluded from this Class are: Defendant, its officers, directors, agents, trustees,
26 corporations, trusts, representatives, employees, principals, servants, partners, joint ventures or
27 entities controlled by Defendant; the Judge assigned to this action, any member of the Judge’s
28 immediately family; and counsel for Plaintiffs.

1 11. Subject to additional information obtained through further investigation and
2 discovery, the Class definition may be expanded or narrowed by amendment or amended
3 complaint.

4 12. **Numerosity:** Plaintiff does not know the exact size of the Class since such
5 information is exclusively in the control of Defendant. Plaintiffs believe that there are thousands
6 of Class members, and that they are sufficiently numerous and geographically dispersed
7 throughout the state so that joinder of all members is impracticable.

8 13. **Commonality:** There are questions of law and fact common to the members of
9 the Class, and those common questions predominate over any question which may affect only
10 individual members of the Class, because Defendant has acted on grounds generally applicable to
11 the entire class. Among the predominant questions of law and fact common to the Class are:

- 12 a. whether Defendant violated Civil Code section 3344;
- 13 b. whether Defendant violated the California Constitution
- 14 c. the amount of gross revenue and profit obtained by Defendant attributable
15 to their violations of Civil Code section 3344; and
- 16 d. the appropriate nature of class-wide injunctive and equitable relief.

17 14. **Typicality:** Plaintiffs' claims are typical of the claims of the members of the Class
18 because Plaintiffs and all Class members were damaged by the same wrongful conduct of
19 defendant.

20 15. **Adequacy:** Plaintiffs will fairly and adequately protect the interests of the Class.
21 The interests of the Plaintiffs coincide with and are not antagonistic to, those of the Class. In
22 addition, Plaintiffs are represented by counsel who are experienced and competent in the
23 prosecution of complex class action and antitrust litigation.

24 16. **Rule 23(b)(1)(B) Requirements:** Class action status in this action is warranted
25 under Rule 23(b)(1)(B) because prosecuting separate actions for members of the Class would
26 create a risk of adjudications with respect to individual members of the Class that would, as a
27 practical matter, be dispositive of the interests of the other members not parties to the actions, or
28 substantially impair or impede their ability to protect their interests.

1 workplace, high school, or college.

2 22. Once the online application for membership to Facebook has been approved, users
3 are immediately encouraged to fill in their Profile information and upload a photo. Aside from
4 their name and age, users can fill out as much or as little as this personally identifying
5 information as they choose.

6 23. As prompted Plaintiffs J.N.D. and J.B.D. each uploaded a picture of likenesses of
7 themselves upon completing their Facebook application.

8 24. Each new User is assigned a unique profile page ("Profile"). A user's Profile
9 displays personally identifying information about the user, including, among other things, a user's
10 name, schools, employers, birthday, hometown and relationship status. The Profile also displays
11 a photo of the user.

12 25. Each Profile has two versions – the publicly available version designed to allow
13 users to find one another and the version available to a user's Facebook Friends.

14 26. In addition to a Profile, each user has a personalized Home page. The Home page
15 contains a feed, designed by Facebook, Inc. to publish the activities of a User's Facebook friends.

16 **Facebook Pages and Social Networking**

17 27. Facebook, Inc. offers Users and Business Owners the opportunity to create
18 Facebook Pages (formerly Fan pages) or Events. A Page is a Facebook-designed profile for a
19 business or organization, and an Event is a Facebook-designed event listing that displays the date,
20 time and description of an event. While the content is provided by the Page/Event administrator,
21 the format and design are created and maintained by Facebook, Inc.

22 28. When a User interacts with one of these Pages or Events (in the case of Pages by
23 "Liking" the page or "Becoming a Fan" and in the case of an Event, by responding to the RSVP
24 request), a corresponding message is automatically created and displayed on the Page or Event
25 along with the User's name and likeness announcing that User's activity. Additionally, that same
26 Facebook-created message is published to the User's Friends' Home page along with the User's
27 name and likeness.

28 ///

1 **Facebook Advertisements and the Generation of Revenue**

2 29. Since late 2007, Facebook, Inc. has been selling advertisements on Facebook as its
3 sole means of generating income. From that point forward, each Facebook redesign has focused
4 heavily on displaying more ads with greater prominence.

5 30. With complete access to the information provided in users' profiles as well as the
6 information generated through users' networking activities, Facebook, Inc. is uniquely able to
7 offer advertisers the ability to direct their ads to very specific demographics.

8 31. Facebook advertisements are designed by Facebook, Inc. to be displayed in a
9 Facebook-designated space as Users navigate among the different pages on Facebook. An
10 advertiser only has to provide Facebook with a short bit of text and an optional image, and plugs
11 that information into its pre-existing code to display the ad in the proper Facebook-created
12 format.

13 32. Facebook generates income by what is called a Cost-Per-Click ("CPC") method.
14 With the CPC, an advertiser pays Facebook every time a user clicks through an ad to the
15 advertiser's designated landing page.

16 33. On or about November 6, 2007, Facebook unveiled "Social Ads" or ads that, in
17 addition to the advertisement displayed by the advertiser, were enhanced by displaying the names
18 and/or likenesses of a user's Facebook Friends who had interacted with the ad or the advertiser's
19 brand page.

20 34. This type of endorsement-advertising has existed in one form or another since
21 November of 2007. Currently, advertisements for Pages or Events are displayed on Facebook
22 along with a "Like" button or, in the case of Events, the ability to RSVP through the ad itself. As
23 with unpaid Pages or Events, when a user "Likes" a Facebook page or responds to an Event, a
24 corresponding message is automatically generated and displayed on the Facebook Page or Event
25 page along with the user's name and likeness. Additionally, that same Facebook-created message
26 is pushed to the User's Friends' Home page along with the User's name and likeness.

27 35. With respect to advertisements, if a User "Likes" a page through an ad or responds
28 to an Event through an ad, that activity is considered a "click" under the CPC guidelines.

1 36. Thus, all User interaction through an ad, whether by clicking the ad itself, clicking
2 the Facebook-created "Like" button, or filling in the Facebook-created RSVP form, is considered
3 a "click" and generates income for Facebook, Inc.

4 37. Facebook, Inc. offers its advertisers the ability to direct ads to specific age groups
5 so that target markets will be most likely to click through to the ad and cost the advertiser money.

6 38. The apparent endorsement of a good or service in an advertisement by one user
7 who is recognizable to other users will generate more clicks for an advertiser, and thereby
8 generate more revenue for Facebook, Inc.

9 39. In the course of using the names and likenesses of Facebook members in
10 advertising, Facebook, Inc. regularly and frequently includes the names and likenesses of minors
11 without obtaining consent for that use. Children are a large marketing audience, so that
12 endorsements that include the names and likenesses of other children in advertisements and
13 solicitations generate a great increase in the revenue and profits to Facebook, Inc. This increased
14 revenue and profit occurs in the case of endorsement advertisements by increasing exposure of
15 the ads within preexisting social groups, and thereby increasing the chance that the advertisement
16 will be clicked.

17 40. The revenue for Facebook, Inc. associated with its social networking site has been
18 reported to be close to or approximately \$800 million in the year 2009. Facebook, Inc. is not a
19 publicly held or traded company so its income figures are not generally available to the public.

20 **Friend Finder**

21 41. Facebook, Inc. appears to be continually seeking new ways to use the names and
22 likenesses of its members, including children, for its own marketing purposes. In addition to
23 displaying users' names and likenesses as detailed above, Facebook also displays users' names
24 and likenesses to promote its own recruitment utility, Friend Finder.

25 42. Friend Finder can appear in the margin of any Facebook page, with a message
26 encouraging users to supply their login information to various third-party applications so that
27 Facebook can import the user's third-party contacts and compare those contacts with its own
28 membership. Once the login information is confirmed, Friend Finder displays two groups of

1 results: (i) third-party contacts with existing Facebook accounts; and (ii) email addresses for
2 third-party contacts without existing Facebook accounts. Users are encouraged to add those
3 contacts with memberships as their Facebook Friends and to invite their third-party contacts
4 without accounts to Facebook by simply selecting that option and clicking a button.

5 43. Thus, Friend Finder serves the dual purpose of both connecting Facebook users
6 and increasing Facebook's own membership which increases the size of Facebook's advertising
7 market and generates significantly more revenue for Facebook. Thus, Friend Finder itself serves
8 as an advertisement for Facebook.

9 44. In addition to its message encouraging users to import their contacts, Friend Finder
10 typically displays the names and/or likenesses of any Facebook Friends who used the Friend
11 Finder utility in the past. This is a further commercial use of the names and likenesses of minors
12 without legal consent.

13 45. The business model of Facebook indicates that using the names and likenesses of
14 its members, including children, for marketing and revenue generating purposes is integral to its
15 operating system and will continue and likely increase in the future.

16 **Advertising and Minors**

17 46. Facebook does not obtain consent to use the names and likeness of minors for
18 commercial and marketing purposes. Pursuant to Cal. Civ. Code § 3344, consent of a parent or
19 legal guardian is required prior to using a minor's name or likeness in an advertisement.

20 47. The use of Plaintiffs' names and likeness in advertisements, as with all members
21 of the Class, increases the value of Facebook's advertisements. Each "endorsement" increases
22 the likelihood that an ad or product will be seen by a larger network of people, and consequently
23 increases the value of the cost per click on the enhanced ad, generating more income for
24 Facebook.

25 48. At no time does Facebook seek or obtain the consent of any parent or guardian of
26 its minor users to use or sell the name and likeness of the child for commercial use by Facebook
27 or third-party advertisers.

28 49. Plaintiffs have each liked several Pages and responded to several Events on

1 Facebook, including through advertisements, which, upon information and belief, resulted in
2 payments from the advertiser to Facebook, Inc. on a CPC basis. Following each of these actions,
3 Facebook, Inc., without obtaining consent from Plaintiffs' parents, immediately created and
4 published Plaintiffs' interaction with the advertisements, thereby increasing the value and the cost
5 per click of the advertisements.

6 50. Plaintiffs have also each utilized Facebook's Friend Finder application to find
7 and/or invite their friends to Facebook. Following each of these actions, Facebook, Inc., without
8 obtaining consent from Plaintiffs' parents, immediately created and published Plaintiffs'
9 interaction with Friend Finder, thereby increasing the notoriety and frequency of use of Friend
10 Finder, ultimately creating a larger User base and giving Facebook, Inc. greater leverage to
11 charge more to advertisers for the costs per click.

12 **FIRST CAUSE OF ACTION**
13 **(Violation of Civil Code § 3344)**

14 51. Plaintiffs incorporate the allegations contained in the paragraphs above as if fully
15 set forth herein.

16 52. From November, 2007 and continuing to the present, Facebook, Inc. has regularly
17 and repeatedly used the names and/or likenesses of Plaintiffs and the members of the Class for the
18 commercial purpose of marketing, advertising, selling and soliciting the purchase of goods and
19 services.

20 53. Facebook, Inc. did not first obtain the consent of Plaintiffs and members of the
21 Class before using their names or likenesses for commercial and marketing purposes.

22 54. Even if Facebook, Inc. had obtained consent of minor Class members, such
23 consent is inadequate under Cal. Civ. Code § 3344.

24 55. Pursuant to Cal. Civ. Code § 3344,

25 Any person who knowingly uses another's name, voice, signature, photograph, or
26 likeness, in any manner, on or in products, merchandise, or goods, or for purposes
27 of advertising or selling, or soliciting purchases of, products, merchandise, goods
28 or services, without such person's prior consent, or, in the case of a minor, the
prior consent of his parent or legal guardian, shall be liable for . . . the injured
party or parties in an amount equal to the greater of seven hundred fifty dollars

1 (\$750) or the actual damages suffered by him or her as a result of the unauthorized
2 use, and any profits from the unauthorized use that are attributable to the use and
are not taken into account in computing the actual damages.

3 *Id.* (emphasis added).

4 56. Facebook, Inc. did not first obtain prior consent of the parents or legal guardians of
5 the Plaintiffs and members of the Class before using their names or likenesses for commercial and
6 marketing purposes.

7 57. Plaintiffs have sustained and will continue to sustain economic damages for loss of
8 advertising revenue as a result of their unauthorized, commercial use of their names and
9 likenesses, in an amount to be determined in accordance with proof at trial.

10 58. Plaintiffs have sustained and will continue to sustain non-economic damages, as a
11 result of the unauthorized, commercial use of their names and likenesses, including loss of
12 privacy, mental anguish, and the non-consensual commercial appropriation of their names and
13 likenesses. The amount of such damages will be stated according to proof at the time of trial.

14 59. California Civil Code § 3344 provides statutory damages in the sum of \$750 per
15 person for the violation of its provisions, or actual damages, whichever is greater, and Plaintiffs
16 assert their right to such damages in an amount to be determined in accordance with proof at trial.

17 60. Plaintiffs have incurred attorney's fees and costs which are recoverable under Civil
18 Code section 3344 in an amount to be determined according to proof at trial.

19
20 **SECOND CAUSE OF ACTION**
(Violations of California Constitution, Article I Section 1)

21 61. Plaintiffs incorporate the allegations contained in the paragraphs above as if fully
22 set forth herein.

23 62. The California Constitution, Article I, section 1 provides an actionable and
24 inalienable right of privacy as follows:

25 All people are by nature free and independent and have inalienable rights. Among
26 these are enjoying and defending life and liberty, acquiring possessing and
protecting property, and pursuing and obtaining safety, happiness, and privacy.

27 *Id.*

28

1 **DEMAND FOR JURY TRIAL**

2 Plaintiffs hereby demand a trial of this action by jury.

3 Dated: July 5, 2011

WEXLER WALLACE LLP

4
5 By: 

6 Mark J. Tamblyn

7 Ian J. Barlow
8 455 Capitol Mall, Suite 231
9 Sacramento, California 95814
10 Telephone: (916) 492-1100
11 Facsimile: (916) 492-1124
12 Email: mjt@wexlerwallace.com
13 Email: ijb@wexlerwallace.com

14 Kenneth A. Wexler
15 **WEXLER WALLACE LLP**
16 455 West Monroe Street, Suite 3300
17 Chicago, Illinois 60603
18 Telephone: (312) 346-2222
19 Facsimile: (312) 346-0022
20 Email: kaw@wexlerwallace.com

21 Lee Squitieri
22 Garry T. Stevens, Jr.
23 **SQUITIERI & FEARON, LLP**
24 32 East 57th Street, 12th Floor
25 New York, New York 10022
26 Telephone: (212) 421-6492
27 Facsimile: (212) 421-6553
28 Email: lee@sfclasslaw.com
Email: garry@sfclasslaw.com

Joseph R. Santoli
LAW OFFICES OF JOSEPH R. SANTOLI
340 Devon Court
Ridgewood, New Jersey 07450
Telephone: (201) 926-9200
Facsimile: (201) 444-1583
Email: jsantoli@santolilaw.com

Attorneys for Plaintiffs