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,	
Plaintiffs,	CLASS ACTION
vs.	Redacted, Publicly-Filed Version
FACEBOOK, INC., Defendant.	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT FACEBOOK, INC.'S MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a)

Defendant Facebook, Inc. ("Facebook") respectfully moves the Court pursuant to 28 U.S.C. § 1404(a) ("§ 1404(a)") to transfer this action to the United States District Court for the Northern District of California ("Northern District of California" or "Northern District").

I. INTRODUCTION

Plaintiffs filed this suit on behalf of a putative class of teenage Facebook users ("Users") whose names and profile pictures allegedly were displayed next to "advertisements" on Facebook. The two named Plaintiffs reside in Illinois, but they purport to assert claims on behalf of "hundreds of thousands" of teenage Users who reside throughout the United States or, alternatively, in five particular states. Plaintiffs were required by contract to file their claims, if at all, in the Northern District of California, and the interests of justice and all the other relevant factors under § 1404(a) support transfer of this action to the Northern District of California.

First, Facebook's terms of service expressly provide that the Northern District of California is the *exclusive* federal forum for any action against Facebook arising out of a User's use of the Facebook website. Plaintiffs are bound by Facebook's terms because they agreed to

them when they registered for Facebook and, since then, have continued to use and enjoy the benefits of the Facebook website, including *after* they filed this suit.

In addition, other factors, such as the convenience of the witnesses, the situs of the material events, and the ease of access to the relevant sources of proof, also all weigh heavily in favor of transfer to the Northern District of California. The bulk of the key witnesses in the case are certain to be the Facebook employees who work on the advertising and marketing products at issue from the Northern District of California where Facebook maintains its corporate headquarters. Likewise, the bulk of the challenged conduct—the decision-making as to under what circumstances the alleged "advertisements" would appear next to User content—also occurred in the Northern District. Plaintiffs' choice of forum, by contrast, is entitled to little or no weight because: (a) Plaintiffs contractually agreed to bring their action in the Northern District of California; and (b) they purport to represent a *nationwide* class of Users.

Finally, the Judicial Panel on Multidistrict Litigation's ("JPML" or "Panel") previous denial of Facebook's motion to transfer and consolidate this action with other pending cases under 28 U.S.C. § 1407 does not bear on Facebook's motion for § 1404(a) transfer here. The legal considerations that support transfer of *this action* under § 1404(a) are substantially different from those considered by the JPML in evaluating centralization and transfer of *multiple actions*.

For these and the other reasons discussed below, Facebook respectfully requests that the Court transfer this action to the Northern District of California pursuant to § 1404(a).

II. FACTUAL BACKGROUND

A. The Parties and the Dispute.

Facebook operates a free social networking website that allows Users aged thirteen and older throughout the world to share information and content with their friends and to communicate with one another over the Internet. (Compl. ¶¶ 12, 14.) Facebook is a Delaware

corporation, with its principal place of business in Menlo Park, California. (Declaration of Sandeep N. Solanki ("Solanki Decl.") ¶ 13.) The great majority of Facebook's over 3,000 employees work in Facebook's offices located in the Northern District of California. (*Id.*) Facebook has only 23 employees—primarily sales, account management, and ad operations staff—in its Illinois office, which is in Chicago. (*Id.* ¶ 15.) Facebook currently believes none of these Illinois employees have information relevant to any disputed issue in this case. (*Id.*)

On June 1, 2011, Plaintiffs, E.K.D., by her next friend Melissa K. Dawes ("Dawes"), and C.M.D., by his next friend Jennifer E. DeYong ("DeYong") (collectively "Plaintiffs"), filed this putative class action seeking damages under unspecified "State law" for Facebook's alleged misappropriation of Plaintiffs' names and likenesses for commercial use without the consent of Plaintiffs' parents or guardians. (Compl. ¶¶ 23, 36-41, Prayer for Relief.) Both Plaintiffs are residents of the Southern District of Illinois. (*Id.* ¶¶ 2-3.) Plaintiffs have pled two alternative putative classes: one includes all Users in the United States who had their name allegedly used in an "advertisement" while they were minors, and the other includes Users of the same description who reside in California, Ohio, Nevada, Illinois, or Indiana. (*Id.* ¶ 24.) Plaintiffs claim that members of the putative class "number in at least the hundreds of thousands and are geographically dispersed throughout the United States." (*Id.* ¶ 25.)

On August 1, 2011, Facebook filed a Motion for More Definite Statement or Dismissal. (Dkt. 12.) Plaintiffs filed their opposition on September 6, 2011. (Dkt. 24.) On October 28, 2011, the Parties exchanged initial discovery requests. (Declaration of Matthew D. Brown ("Brown Decl.") ¶ 5.) The Parties initially agreed that the discovery responses would be due on December 7, 2011. (*Id.*) On December 5, 2011, Plaintiffs' counsel requested a one-week extension of the response deadline, which Facebook granted. (*Id.* ¶ 8.) On November 29, 2011,

Plaintiffs filed a "Preliminary Motion for Class Certification" (Dkt. 51), but asked the Court to defer ruling until Plaintiffs file a memorandum of points and authorities, which is due by April 3, 2012, per the Court's order (Dkt. 45, at ¶ 8).

B. The Forum Selection Clause and Plaintiffs' Assent to It.

Plaintiffs allege that they are Facebook Users (Compl. ¶ 37), and their counsel recently represented that both Plaintiffs maintain "active" Facebook accounts (Brown Decl. Ex. A (Status Conf. Hr'g Tr. 64:20-25, 69:15-16, Nov. 21, 2011)). Facebook has been attempting to identify the Plaintiffs' Facebook accounts in connection with this motion, to confirm that Plaintiffs have continued using Facebook since filing this action, as discussed in Section IV(B)(2) below. However, Plaintiffs' counsel has refused to identify either Plaintiff by name, Facebook User ID ("UID"), or even email address, despite numerous requests for this information, including pending requests in formal discovery. (Brown Decl. ¶¶ 2-6.) Additionally, Plaintiffs' counsel has intimated that Plaintiffs' formal discovery responses may omit this information or that a protective order may be sought before it is provided. (*Id.* ¶ 7.) In light of these facts, coupled with Plaintiffs' request, two days ago, to further extend the deadline for Plaintiffs' responses to the pending discovery requests, Facebook is proceeding with this motion while it continues to await Plaintiffs' confirmation of their UIDs.

Based on allegations in the Complaint—for example, Plaintiffs' initials, Plaintiffs' parents' names, and Plaintiffs' residence—Facebook believes it has identified the Plaintiffs' Facebook accounts. (Solanki Decl. ¶¶ 3-4.) Facebook's internal records show that Plaintiffs E.K.D. and C.M.D. appear to have registered for Facebook on [redacted] and [redacted], respectively. (*Id.* ¶ 5.) Consistent with Plaintiffs' counsel's representations, both Plaintiffs have continued to access and use their Facebook accounts [redacted] since they filed this lawsuit. (*Id.* ¶ 12.) Plaintiff E.K.D., for example, appears to have logged onto Facebook

[redacted] since the Complaint was filed on June 1, 2011 [redacted] and Plaintiff C.M.D. appears to have logged onto Facebook [redacted] since July 6, 2011. (*Id.*)

When Plaintiffs registered for the Facebook site, they were required, like all prospective Facebook Users, to agree to Facebook's terms of service, known as the "Statement of Rights and Responsibilities" ("SRR"). Plaintiffs had to affirm that they had "read and agree[d] to the Terms of Use and Privacy Policy." (*Id.* ¶ 6.) The underlined text for "Terms of Use" was a hyperlink to the full text of the SRR. (*Id.*) In addition, the SRR was then, and remains today, available at www.facebook.com/terms.php and via a blue "Terms" link, which appears at the bottom of virtually every page of the site, including the www.facebook.com homepage. (*Id.* ¶ 8.)

Facebook's SRR governs all aspects of Facebook's "relationship with users" including privacy, safety, and dispute resolution. Users are informed at the very top of the SRR that: "[b]y using or accessing Facebook, you agree to this Statement." (*Id.* Ex. A (Current SRR).) Section 15 of the SRR (titled "**Disputes**") sets forth both the *mandatory* fora and the governing law for all disputes "arising out of or relating to" Facebook, providing:

> You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook *exclusively in a state or federal court located in Santa Clara County*. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for the purpose of litigating all such claims.

(*Id.* Ex. A § 15.1 (emphasis added).) A virtually identical provision also appeared in the SRR when each Plaintiff registered for Facebook. (Solanki Decl. ¶ 11; *id.* Ex. A (Current SRR) § 15.1; *id.* Ex. B § 15.1 (Apr. 22, 2010 SRR); *id.* Ex. C § 15.1 (Dec. 21, 2009 SRR).)

C. Related Actions and Motion to the Judicial Panel on Multidistrict Litigation.

This action is one of five, related putative class actions filed against Facebook in federal court alleging that Facebook misappropriated Users' names and/or likenesses. (Brown Decl. ¶

11.) Three of these actions were filed in the Northern District of California: *Robyn Cohen v. Facebook*, No. 3:10-05282 (N.D. Cal.), *Fraley v. Facebook*, No. 5:11-01726 (N.D. Cal.), and *Downey v. Facebook*, No. 5:11-03287 (N.D. Cal.). (*Id.*) The other action, *Nastro v. Facebook*, No. 1:11-02128 (E.D.N.Y), was filed in the Eastern District of New York. (*Id.*) On August 1, 2011, Facebook filed a motion with the JPML seeking centralization and transfer of these five cases to the Northern District pursuant to 28 U.S.C. § 1407 ("the MDL motion"). (*Id.* ¶ 13.)

After Facebook filed the MDL motion, intervening events reduced the number of cases at issue from five to three. Before the scheduled hearing date, the plaintiffs in both *Downey* and *Nastro* voluntarily dismissed their actions, and Facebook notified the Panel. (*Id.*) 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. (*Id.*) No one representing the *Robyn Cohen* plaintiffs appeared at the September 27, 2011 hearing on the MDL motion. (*Id.*)[1]

On October 6, 2011, the Panel denied the MDL motion, reasoning that "centralization does not appear necessary, given the limited overlap among the three putative classes." (*See id.* Ex. E (JPML Order), at 1.) The JPML additionally explained that "any shared factual questions are [in]sufficiently complex or numerous to justify centralization." (*Id.*)

Less than *one hour* after the MDL Panel denied transfer, Mark Tamblyn, counsel for the *Downey* plaintiffs, applied for admission pro hac vice to represent the Plaintiffs in this action. (Brown Decl. ¶ 15; Dkt. No. 32.) His associate, Ian J. Barlow, sought admission pro hac vice a few days later. (Brown Decl. ¶ 15; Dkt. No. 37.) Relatedly, for nearly a year prior to their appearance in this case, Messrs. Tamblyn and Barlow represented a different group of plaintiffs in virtually identical litigation against Facebook in California state court, captioned *David*

[1] The *Robyn Cohen* case was dismissed *with prejudice* on October 27, 2011. (*Id.* ¶ 11.)

Cohen, et al. v. Facebook, No. BC454799 (L.A. Super. Ct.). (Brown Decl. ¶ 16.) However, before Messrs. Tamblyn and Barlow appeared as counsel in this action, the court in the *David Cohen* action ruled that the complaint was preempted by the Children's Online Privacy Protection Act and dismissed it, without prejudice. (*Id.* ¶ 18.) Counsel then voluntarily dismissed the *David Cohen* action, noting that *this case* (*E.K.D., et al. v. Facebook*) "would potentially protect the interests of Plaintiffs [in *David Cohen*], as well as the putative class members in [that] action." (*Id.* Ex. I.)

Fraley v. Facebook, Inc., No. 11-cv-01726 LHK, remains pending in the Northern District of California. (*Id.* ¶ 19.) Like Plaintiffs here, the *Fraley* plaintiffs allege that Facebook misappropriated Users' names and likenesses in connection with alleged "advertisements." (*Id.* Ex. K, at ¶¶ 52, 54.) The *Fraley* action alleges a subclass of minors, and asserts claims under California Civil Code Section 3344 (*Id.* Ex. K, at ¶¶ 94, 107-18), which is one of the statutes referenced in Plaintiffs' Complaint here (Compl. ¶ 20). Unlike the *Dawes* action, where discovery is only beginning, discovery is well underway in *Fraley*. Facebook has served numerous written discovery responses and has produced more than 6,000 documents, and Plaintiffs have taken Rule 30(b)(6) depositions on 35 topics. (Brown Decl. ¶ 20.)

III. LEGAL STANDARD

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). Transfer is appropriate if: (1) the action could have been brought in the transferee district; and (2) transfer will serve the convenience of the parties and witnesses and the interest of justice. *United Air Lines, Inc. v. Mesa Airlines, Inc.*, 8 F. Supp. 2d 796, 798 (N.D. Ill. 1998). Additionally, a valid, contractual forum-selection clause is "a significant factor that figures centrally in the district court's calculus." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22,

29-30 (1988); *see also In re LimitNone, LLC*, 551 F.3d 572, 575-76 (7th Cir. 2008).

IV. ARGUMENT

A. Plaintiffs Could Have Filed This Case in the Northern District of California.

The Northern District of California has personal jurisdiction over the Parties and subject matter jurisdiction over this dispute. Facebook has its principal place of business in Menlo Park, California and is, therefore, subject to personal jurisdiction in the Northern District. (Solanki Decl. ¶ 13.) Additionally, as set forth above, Plaintiffs have agreed to "submit to the personal jurisdiction of the courts located in Santa Clara County, California," which is in the Northern District. (*Id.* ¶¶ 6, 10-11.) Like this Court, the Northern District has subject matter jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(6). (Compl. ¶ 5.)

For venue selection purposes, an action based on diversity of citizenship may be brought in "a judicial district where any defendant resides, if all defendants reside in the same State." 28 U.S.C. § 1391(a)(1). A corporate defendant is "deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." 28 U.S.C. § 1391(c). Facebook is the sole defendant in this action; thus, venue is proper in the Northern District of California. Indeed, Plaintiffs' counsel cannot dispute that venue and jurisdiction are proper in the Northern District of California, as Messrs. Tamblyn and Barlow previously filed (and dismissed) a highly similar lawsuit, *Downey*, in that district. (Brown Decl. ¶¶ 12-13.)

B. The Forum-Selection Clause in the SRR Weighs Strongly in Favor of Transfer to the Northern District of California.

1. A valid, contractual forum-selection clause is controlling "in all but the most exceptional cases."

"In considering a motion to transfer venue, the presence of a forum selection clause is relevant both as a matter of convenience and as an interest of justice: it is 'a significant factor that figures centrally in the district court's calculus.'" *Methode Elecs., Inc. v. Delphi Auto. Sys.*

LLC, 639 F. Supp. 2d 903, 908 (N.D. Ill. 2009) (quoting *Stewart Org.*, 487 U.S. at 29-30). Where, as here, the forum-selection clause is mandatory, rather than permissive, the Seventh Circuit recognizes a "strong presumption" in favor of enforcement. *IFC Credit Corp. v. Aliano Bros. Gen. Contractors, Inc.*, 437 F.3d 606, 613 (7th Cir. 2006). Indeed:

> [This presumption] can be overcome ... only if there is inconvenience to some third party ... or to the judicial system itself, as distinct from inconvenience to the party seeking [to avoid the clause]. That party's inconvenience has no weight if the clause is valid, because the party waived any objection based on inconvenience to it by agreeing to the clause.

Id. at 613 (citations omitted). Accordingly, under § 1404(a), courts accord "a valid forum-selection clause . . . controlling weight in all but the most exceptional cases." *Schwarz v. Sellers Mkts., Inc.*, No. 11 C 501, 2011 U.S. Dist. LEXIS 100712, at *25 (N.D. Ill. Sept. 7, 2011) (quoting *Stewart Org.*, 487 U.S. at 33); *see also In re Ricoh Corp.*, 870 F.2d 570, 574 (11th Cir. 1989) (compelling a district court to grant § 1404(a) transfer to enforce forum-selection clause).

Nationwide, courts have consistently enforced forum-selection clauses for websites, *including Facebook's*, that require users to agree to the terms of service when they register. *See, e.g., Miller v. Facebook*, No. 1:09-cv-2810-RLV (N.D. Ga. Jan. 15, 2010) (attached hereto as Brown Decl. Ex. C) (ordering transfer under § 1404(a) based on forum-selection clause in Facebook's SRR); *DeJohn v. .TV Corp. Int'l*, 245 F. Supp. 2d 913, 916, 921 (N.D. Ill. 2003) (collecting cases) (online agreement enforceable, including forum-selection clause, where user could not complete registration without first accepting terms); *Burcham v. Expedia, Inc.*, 2009 U.S. Dist. LEXIS 17104, at *12-13 (E.D. Mo. Mar. 6, 2009). For example, in *Miller v. Facebook*, the court granted Facebook's motion for a § 1404(a) transfer from a federal court in Georgia to the Northern District of California, over the plaintiff's objections, based on the forum-selection clause in Facebook's terms. (Brown Decl. Ex. C (slip. op.) at 1, 3, 9.) The court held that a contrary ruling would "wreak havoc on the entire social-networking internet

industry," with "adverse consequences for the users of Facebook's social networking site and for other internet companies." (*Id.* at 3.) These same considerations compel transfer here.

Plaintiffs' continued use of Facebook after registration, and after filing this lawsuit (Solanki Decl. ¶ 12), provides an additional basis for the enforcement of the forum-selection clause. As set forth above, Facebook conditions Users' access to the site on their ongoing assent to the SRR, providing: "[b]y using or accessing Facebook, you agree to this Statement." (*Id.* Ex. A (Current SRR).) Based on these terms, "in the act of accessing or using the Facebook website alone, [Plaintiffs] acceded to the Terms of Use and became bound by them." *Facebook, Inc. v. Power Ventures, Inc.*, No. C 08-05780 JW, 2010 U.S. Dist. LEXIS 93517, at *22 n.20 (N.D. Cal. July 20, 2010); *see also Cairo, Inc. v. Crossmedia Servs., Inc.*, No. C 04-04825 JW, 2005 U.S. Dist. LEXIS 8450, at *13-14 (N.D. Cal. Apr. 1, 2005); *Greer v. 1-800-Flowers.com, Inc.*, No. H-07-2543, 2007 U.S. Dist. LEXIS 73961, at *5-6 (S.D. Tex. Oct. 3, 2007).

Here, Plaintiffs lack any basis to avoid the forum-selection clause, because they indisputably had both "actual [and] constructive knowledge" of the SRR. *Sw. Airlines Co. v. BoardFirst, L.L.C.*, No. 3:06-CV-0891-B, 2007 U.S. Dist. LEXIS 96230, at *15-16 (N.D. Tex. Sept. 12, 2007). First, at the bottom of virtually every page of the site, Facebook displays a fixed menu bar, which includes a link called "Terms." (Solanki Decl. ¶ 8.) The word "Terms" is recognizable as a link not only because of its positioning, but because each page is programmed to display the text "Review our Terms of Service" when Users hover their mouse cursor over the word. (*Id.*) As numerous courts have recognized, this is more than sufficient to put Users on constructive notice of a website's terms. *See, e.g.*, *Power Ventures*, 2010 U.S. Dist. LEXIS 93517, at *22; *Burcham*, 2009 U.S. Dist. LEXIS 17104, at *12 (plaintiff bound by website's terms because link to full text of user agreement found at bottom of every page); *Greer*, 2007

U.S. Dist. LEXIS 73961, at *7-8; *Cairo, Inc.*, 2005 WL 756610, at *2; *Register.com, Inc. v. Verio, Inc.*, 356 F. 3d 393, 403 (2d Cir. 2004).

Additionally, it is undisputed that Plaintiffs had *actual knowledge* of the SRR when they filed their Complaint. Plaintiffs' Complaint quotes Section 10.1 of the SRR at length (Compl. ¶ 21), and acknowledges the SRR's choice-of-law provision, *which is contained in the sentence immediately preceding the SRR's forum-selection clause.* (*Id.* ¶ 20 n.1 (referring to SRR § 15.1).) Thus, Plaintiffs' own allegations confirm that they had actual knowledge of the SRR and its terms when they filed their suit in violation of the agreed-to forum-selection clause. And, as discussed, Plaintiffs chose to continue using the site after filing this action. (Solanki Decl. ¶ 12.)

Plaintiffs, therefore, are bound by the SRR's forum-selection clause.

2. Being minors does not allow Plaintiffs to avoid the SRR's terms.

Plaintiffs may argue that, as minors, they may "disaffirm" their contract with Facebook, and avoid the forum-selection clause. This claim is contrary to the law and should be rejected.

Because the SRR specifies that California law governs (Compl. ¶ 20 n.1), the scope of Plaintiffs' right of disaffirmance is controlled by California law.[2] Under California law, a minor's power to disaffirm a contract is limited in several important respects. As an initial and dispositive matter, Plaintiffs cannot disaffirm the SRR because they continue, even today, to receive the benefits of the contract by using and enjoying the Facebook service. (Solanki Decl. ¶

[2] As a general matter, Illinois law "respects the contract's choice-of-law clause as long as the contract is valid." *Kohler v. Leslie Hindman, Inc.*, 80 F.3d 1181, 1185 (7th Cir. 1996). The parties' choice of law governs questions concerning the voidability of a contract, whether based on disaffirmance or other grounds. *See, e.g., NYC Mgmt. Group Inc. v. Brown-Miller*, No. 03 CIV 2617 (RJH), 2004 U.S. Dist. LEXIS 8652, at *11-12 n.2 (S.D.N.Y. May 13, 2004) (applying parties' choice of law to analyze minor's attempt to disaffirm contract); *see also Woodling v. Garrett Corp.*, 813 F.2d 543, 552 (2d Cir. 1987) ("The issues of the validity and enforceability or voidability of a release are plainly matters of substance as to which the parties' choice of law will be honored."); *In re Amica, Inc.*, 135 B.R. 534, 545 (Bankr. N.D. Ill. 1992) ("The effect of misrepresentation is to make a contract voidable, and issues of voidability are matters of substance as to which the parties' choice of law will be honored." (citation omitted)).

12.) A minor cannot continue to receive the benefits of a contract he purports to disaffirm, because he must either remain bound by the contract or "disaffirm the entire contract, not just the irksome portions." *Holland v. Universal Underwriters Ins. Co.*, 270 Cal. App. 2d 417, 421 (1969). Plaintiffs' continued enjoyment of the benefits of Facebook—which they have both accessed [redacted] since they filed this lawsuit—is irreconcilable with the "unequivocal intent to repudiate [the SRR's] binding force and effect" that would be required to disaffirm it and avoid the forum-selection clause. *Spencer v. Collins*, 156 Cal. 298, 303 (1909).

In addition, Plaintiffs cannot avoid the forum-selection clause even if they now close their accounts and stop using Facebook. Their longstanding receipt of the benefits of the contract, both before and after they filed suit, precludes disaffirmance. In *Paster v. Putney Student Travel, Inc.*, CV 99-2062 RSWL, 1999 U.S. Dist. LEXIS 9194 (C.D. Cal. June 7, 1999), the plaintiff sued in the Central District of California for injuries she sustained during a travel program sponsored by the defendant. *Id.* at *1-3. When the defendant moved to enforce the parties' forum-selection clause, the plaintiff sought to disaffirm on the ground that she was a minor when she entered the relevant contract. *Id.* at *7. Applying California law, the court rejected that defense, holding that "Plaintiff . . . cannot accept the benefits of a contract and then seek to void it in an attempt to escape the consequences of a clause that do[es] not suit her," namely, "to avoid the application of the forum selection clause." *Id.* at *7-8. That result is even more appropriate here, because, unlike the *Paster* plaintiff, Plaintiffs have not only received the past benefits of the SRR, but they have continued to benefit from it, even after they filed suit.[3]

Plaintiffs thus have no basis to avoid the forum-selection clause, and this action should be transferred to the Northern District of California pursuant to § 1404(a).

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[3] *See also Sheller v. Frank's Nursery & Crafts*, 957 F. Supp. 150, 153-54 (N.D. Ill. 1997); *Harden v. Am. Airlines*, 178 F.R.D. 583, 587 (M.D. Ala. 1998).

C. The Convenience of the Witnesses and the Parties Strongly Favors Transfer to the Northern District of California.

1. The bulk of the recognized factors for evaluating the convenience of the witnesses and parties weigh in favor of transfer.

In analyzing the convenience of the parties and witnesses, "courts look at the following five factors: '(1) the plaintiff's choice of forum,[4] (2) the situs of the material events, (3) the relative ease of access to sources of proof, (4) the convenience of the parties, and (5) the convenience of the witnesses.'" *Jaramillo v. DineEquity, Inc.*, 664 F. Supp. 2d 908, 913-14 (N.D. Ill. 2009) (quoting *Amoco Oil Co. v. Mobil Oil Corp.*, 90 F. Supp. 2d 958, 960 (N.D. Ill. 2000)). These factors militate strongly in favor of transfer to the Northern District of California.

"'The convenience of witnesses is often viewed as the most important factor in the transfer balance." *Hanley v. Omarc, Inc.*, 6 F. Supp. 2d 770, 775 (N.D. Ill. 1998) (quoting *Rose v. Franchetti*, 713 F. Supp. 1203, 1214 (N.D. Ill. 1989)). "It makes little sense to litigate a case in Illinois when virtually every material witness resides in [another jurisdiction], unless some other compelling reason motivates that decision." *Simonoff v. Kaplan, Inc.*, No. 09 C 5017, 2010 U.S. Dist. LEXIS 26884, at *5 (N.D. Ill. Mar. 17, 2010). As detailed in the Complaint, Plaintiffs' allegations center on Facebook's alleged "knowing[] use[] and [continued use of] Plaintiffs' name[s] 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." (Compl. ¶ 39.) Given this, the bulk of witnesses in the case will be employees of Facebook who have knowledge of Facebook's marketing and advertising activities, practices, and policies. (*See* Solanki Decl. ¶ 14.) Facebook disclosed nine employees in its Initial Disclosures that it currently believes possess information relevant to this litigation, all of whom

[4] This factor is entitled to no weight here, for the reasons discussed in Section IV(C)(2) immediately below.

are based out of Facebook's headquarters in Northern California.[5] (*Id.* ¶¶ 13-15; *id.* Ex. D.) Plaintiffs apparently agree that the case will revolve around the testimony of Facebook's employees, as, apart from Plaintiffs' representatives and attorneys, the only witnesses listed in their Initial Disclosures are "Corporate Representatives of Facebook Inc." (Brown Decl. ¶ 9.) They additionally represented that "*none*" of the relevant documentary evidence is located in the Southern District of Illinois. (*Id.*) Thus, a California forum would be substantially more convenient for the bulk of the relevant witnesses.

The "situs of the material events" is also in the Northern District of California. Plaintiffs' allegations revolve around what Facebook did in connection with operating its website and displaying the alleged "advertisements." (*See, e.g.*, Compl. ¶¶ 16-17, 38-40.) Accordingly, virtually all of the significant Facebook decision-making and conduct that appear to be relevant to the allegations in this case took place in the Northern District. (Solanki Decl. ¶ 14.) By comparison, the named Plaintiffs' conduct, as well as that of the "hundreds of thousands" of purported class members, amounts to no more than the use of Facebook, and is no more connected to this jurisdiction than it is to any other district. Thus, this factor too favors transfer. *See, e.g.*, *Simonoff*, 2010 U.S. Dist. LEXIS 26884, at *4 (situs of material events favored transfer where the "focus of a court's inquiry will be with respect to the defendant's conduct, not the plaintiff's" and where defendant's conduct occurred in New York, where defendant conducted his business); *Jaramillo*, 664 F. Supp. 2d at 914 (transfer appropriate where case concerned defendants' conduct and decisions, which would have been made at defendants' headquarters).

In addition to the witnesses, the bulk of the documents and other sources of proof relevant to this case will be found at Facebook's headquarters in Menlo Park, California, where

[5] One of the individuals identified is a former Facebook employee. He also resides in the Northern District of California. (Solanki Decl. ¶ 14.)

Facebook maintains and accesses records and data in the regular course of its business. (Solanki Decl. ¶ 16.) Indeed, Plaintiffs' initial disclosures reveal *no* documentary evidence in the Southern District of Illinois. (Brown Decl. ¶ 9.) Plaintiffs' discovery requests seek documents and information largely, or entirely, to be found at Facebook's corporate headquarters. For example, Plaintiffs requested that Facebook produce "company directories," income projections, and "exemplar copies of all marketing materials provided to potential advertisers." (Solanki Decl. Ex. E (Plaintiffs' First Set of Requests for Production).) Virtually every document responsive to these requests will be found in the Northern District of California. (*Id.* ¶ 16.)

2. Any arguable inconvenience to Plaintiffs is irrelevant, and Plaintiffs' choice of forum is entitled to no deference.

Plaintiffs' own convenience in litigating in the district of their alleged domicile is irrelevant. First, "[w]hile courts normally defer to a plaintiff's choice of forum, such deference is inappropriate where the plaintiff has already freely contractually chosen an appropriate venue." *Unisys Corp. v. Access Co., Ltd.*, No. C05-3378 TEH, 2005 WL 3157457, at *5 (N.D. Cal. Nov. 23, 2005) (quoting *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3d Cir. 1995)) (internal quotations omitted). In such a case, "the plaintiffs bear the burden of demonstrating why they should not be bound by their contractual choice of forum." *Id.* Additionally, "[t]he inconvenience to [a party to a forum-selection clause] of litigating in the [transferee forum] is irrelevant under § 1404(a). The only basis for declining to enforce the clause is that transfer 'would impose significant costs on third parties or on the judicial system.'" *Schwarz*, 2011 U.S. Dist. LEXIS 100712, at *27. Here, by agreeing to the SRR, Plaintiffs waived their right to assert their own inconvenience as a basis for resisting transfer.[6] Plaintiffs also cannot show that transfer would adversely affect third parties or the judicial system.

[6] Facebook would not object to deposing the named Plaintiffs and any other Illinois-based witnesses in the Southern District of Illinois.

Second, the named Plaintiffs' chosen forum and convenience are accorded little weight because Plaintiffs "purport[] to represent a nationwide class," and "[s]hould litigating this case in the [transferee forum] prove too inconvenient for the named Plaintiff, then another named plaintiff can be substituted[.]"[7] *Simonoff*, 2010 U.S. Dist. LEXIS 26884, at *4-6 (N.D. Ill. Mar. 17, 2010); *see also Georgouses v. NaTec Res., Inc.*, 963 F. Supp. 728, 730 (N.D. Ill. 1997) ("[When] plaintiff alleges a class action, plaintiff's home forum is irrelevant."). Here, Plaintiffs have explicitly alleged a class "number[ing] at least in the hundreds of thousands and [] geographically dispersed throughout the United States," including, at the least, residents of California, Nevada, Indiana, and Ohio. (Compl. ¶ 25.) Because the putative class includes "individuals who [undoubtedly] would find Illinois to be an inconvenient forum," Plaintiffs' choice of forum has little or no bearing upon the convenience analysis. *McInnis v. Ecolab Inc.*, No. 11 C 1208, 2011 U.S. Dist. LEXIS 84898, at *4 (N.D. Ill. Aug. 2, 2011).

D. The Interests of Justice Favor the Northern District of California.

In considering the interests of justice, courts analyze such factors as the interest in trying the case before a judge who is familiar with the applicable law and the pendency of related litigation. *See Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1293 (7th Cir. 1989); *Methode Elecs.*, 639 F. Supp. 2d at 907. Courts also consider "the relation of the respective communities to the occurrence at issue." *Digital Background Corp. v. Apple, Inc.*, No. 07-CV-803-JPG, 2008 U.S. Dist. LEXIS 21101, at *6 (S.D. Ill. Mar. 17, 2008). Each of these considerations also weighs in favor of transfer here.

Transfer is appropriate when it will place an action before "federal judges . . . who are familiar with the applicable state law." *See Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 221

[7] The convenience of Plaintiffs' counsel also does not factor in the §1404(a) analysis. *See Simonoff*, 2010 U.S. Dist. LEXIS 26884, at *5; *Jaramillo*, 664 F. Supp. 2d at 915.

(7th Cir. 1986). As set forth above and admitted in Plaintiffs' Complaint, the SRR prescribes application of California law to "all claims" between Users and Facebook. (Solanki Decl. Ex. A (current SRR) § 15.1); Compl. ¶ 20 n.1.) While Facebook does not doubt this Court's ability to interpret and apply California law, the relatively greater experience of judges in the Northern District of California, and efficiencies that experience may create, favor a transfer.

Additionally, "[p]erhaps one of the most important elements involved in a consideration of where a dispute will be most efficiently resolved is the existence of a related action in federal court. In fact, a motion to transfer should be granted, if a related action is pending in the proposed transferee district." *HFC Comm'l Realty, Inc. v. Levine*, No. 90 C 2921, 1990 U.S. Dist. LEXIS 15319, at *15 (N.D. Ill. Nov. 9, 1990); *see also Coffey*, 796 F.2d at 221; *Avante Int'l Tech., Inc. v. Hart InterCivic, Inc.*, No. 08-636-GPM, 2009 U.S. Dist. LEXIS 74684, at *15 (S.D. Ill. July 22, 2009).[8] Here, a related putative class action is pending before the Honorable Lucy H. Koh in the Northern District of California.[9] *See Fraley*, No. 11-cv-01726 LHK; (Brown Decl. ¶ 19 & Ex. K (*Fraley* Second Amended Complaint).) Like *Dawes*, the *Fraley* action involves allegations that Facebook misappropriated Users' names and likenesses in connection with alleged "advertisements." (Brown Decl. Ex. K, at ¶¶ 52, 54.) The *Fraley* action is brought on behalf of Facebook Users of all ages, but alleges a subclass of minors. (*Id.* ¶ 95.) It also asserts claims under California Civil Code Section 3344, which is one of the statutes mentioned

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[8] This factor weighs even more strongly in favor of transfer given the substantial discovery conducted in the *Fraley* action, and the minimal discovery to date in this case. (Brown Decl. ¶¶ 20-21); *Avante Int'l Tech., Inc. v. Hart InterCivic, Inc.*, No. 08-636-GPM, 2009 U.S. Dist. LEXIS 74684, at *14-16 (S.D. Ill. July 22, 2009) (transfer particularly appropriate when far more "extensive discovery" has been conducted in related litigation in transferee forum).

[9] As discussed below, although the JPML denied centralization, it observed that *Dawes* and *Fraley* share "general factual overlap" and "involve some similar allegations concerning the use of plaintiffs' names or likenesses in what plaintiffs characterize as advertisements on Facebook.com." (Brown Decl. Ex. E.) The pendency of a related suit favors transfer "even if the cases would not be subject to consolidation[.]" *HFC*, 1990 U.S. Dist. LEXIS 15319, at *13.

in Plaintiffs' Complaint here. (Compl. ¶ 20 (citing Cal. Civil Code § 3344); Brown Decl. Ex. K, at ¶¶ 107-17 (Count for violation of Cal. Civil Code § 3344).)

The Northern District of California also has a stronger "relation to . . . the occurrence at issue" than does the Southern District of Illinois. *See Digital Background*, 2008 U.S. Dist. LEXIS 21101, at *6. As discussed above, the Northern District is the location of Facebook's headquarters and the relevant events. *See Forcillo v. LeMond Fitness, Inc.*, 220 F.R.D. 550, 554 (S.D. Ill. 2004) (transfer appropriate where Southern District of Illinois had only "de minimus connection with operative facts giving rise to" litigation, while transferee forum was location of defendant's headquarters). The Southern District of Illinois, by contrast, is no more connected to the litigation than is any other district in the country. *See Nelson v. Aim Advisors, Inc.*, No. 01-CV-0282-MJR, 2002 U.S. Dist. LEXIS 5101, at *20 (S.D. Ill. Mar. 8, 2002) ("[A]lthough there are certainly putative class members in the Southern District of Illinois, as there are nationwide, there is no special relation between this community and the alleged occurrences").

E. The JPML's Denial of the Request for Transfer Under 28 U.S.C. § 1407 Does Not Weigh Against Transfer Under § 1404(a).

Facebook anticipates that Plaintiffs will argue that the JPML's denial of Facebook's request to consolidate or coordinate this action with several other actions under 28 U.S.C. § 1407 weighs against granting a transfer under § 1404(a) now. That is not the law.

It is well settled that "the legal considerations that support transfer under Section 1404(a) are different from those under Section 1407." *Wilson v. DirectBuy, Inc.*, Nos. 3:09-cv-590 (JCH), 3:11-cv-1093 (JCH), 3:11-cv-1142,--- F. Supp. 2d ---, 2011 WL 5176799, at *2, *10-11 (D. Conn. Oct. 27, 2011); *see also, e.g., In re Regents of Univ. of Cal.*, 964 F.2d 1128, 1133 (Fed. Cir. 1992) ("The considerations pertinent to a change of venue under § 1404(a) are not the same as those pertinent to coordination of pretrial proceedings in multiple cases involving

common parties." (citation omitted)); *accord In re RadioShack Corp. "ERISA" Litig.*, 528 F. Supp. 2d 1348, 1349 (J.P.M.L. 2007) ("Factors in a denial of Section 1404(a) transfer are different from the criteria for Section 1407 centralization."). In contrast to the multi-factored balancing test conducted under § 1404(a), motions under § 1407 are granted only when the JPML makes the predicate determination that "*centralization*" will serve the convenience of the witnesses and the parties. *See, e.g., In re Avaulta Pelvic Support Sys. Prods. Liab. Litig.*, 746 F. Supp. 2d 1362, 1363-64 (J.P.M.L. 2010); *In re BP P.L.C. Sec. Litig.*, 734 F. Supp. 2d 1376, 1378 (J.P.M.L. 2010) (granting § 1407 motion because "centralization under Section 1407 will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation."); *In re Diversified Lending Grp., Inc. Sec. Litig.,* 732 F. Supp. 2d 1377, 1379 (J.P.M.L. 2010). Whether "centralization" is appropriate turns primarily on whether multiple "actions involve common questions of fact," such that "[c]entralization will eliminate duplicative discovery; prevent inconsistent pretrial rulings; and conserve the resources of the parties, their counsel, and the judiciary." *See, e.g., In re Le Nature's, Inc. Comm'l Litig.*, 609 F. Supp. 2d 1372, 1373 (J.P.M.L. 2009); *see also In re TD Bank, N.A. Gift Card Fees Litig.*, 703 F. Supp. 2d 1380, 1381 (J.P.M.L. 2010). Absent an initial determination that centralization is appropriate, the JPML does not address whether *transfer* alone would promote convenience and justice.[10]

Here, the JPML denied Facebook's motion under § 1407 based on its conclusion that this action and the two actions pending in the Northern District of California did not present shared factual questions "sufficiently complex or numerous to justify centralization." (Brown Decl. Ex. E (JPML Order), at 1.) Instead, the Panel found, "[t]he various plaintiffs have persuaded us that

[10] *See, e.g. In re Hercules Offshore, Inc., Sec. & Derivative Litig.*, MDL No. 2285, 2011 U.S. Dist. LEXIS 115974 (J.P.M.L. Oct. 6, 2011); *In re PPG Indus. Wage & Hour Emp't Practices Litig.*, 701 F. Supp. 2d 1379, 1380 (J.P.M.L. 2010).

individual factual issues contained in these actions are likely to predominate over any alleged common fact questions." (*Id.*) Because the Panel found that "centralization" was not warranted, it did not independently address whether *transfer* alone would serve the interests of convenience and justice, and thus did not address the factors relevant to the § 1404(a) motion here, including, notably, the forum-selection clause to which Plaintiffs agreed. (*See id.*) Consequently, the JPML's denial of Facebook's motion under § 1407 has no bearing on Facebook's motion for transfer under § 1404(a) here.

V. CONCLUSION

For the reasons set forth above, Facebook respectfully requests that the Court transfer this action to the United States District Court for the Northern District of California.

Respectfully submitted,

Date: December 8, 2011

/s/ Matthew D. Brown
Michael G. Rhodes (*admitted pro hac vice*)
Matthew D. Brown (*admitted pro hac vice*)
Jeffrey M. Gutkin (*admitted pro hac vice*)
COOLEY LLP
101 California Street, Fifth Floor
San Francisco, CA 94111-5800
Phone: (415) 693-2000
Fax: (415) 693-2222
rhodesmg@cooley.com
brownmd@cooley.com
jgutkin@cooley.com

Charles J. Swartwout
Michael C. Hermann
BOYLE BRASHER LLC
5000 West Main Street
P.O. Box 23560
Belleville, IL 62223
Telephone: 618-277-9000
cswartwout@boylebrasher.com
mhermann@boylebrasher.com

Attorneys for Defendant Facebook, Inc.

CERTIFICATE OF SERVICE

I, Matthew D. Brown, an attorney, certify that I electronically filed the foregoing with the Clerk of Court using the CM/ECF system on December 8, 2011, which will send notification and service of such filing to all counsel of record.

/s/ Matthew D. Brown

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