

1 MAYER BROWN LLP
John Nadolenco (SBN 181128)
2 350 South Grand Avenue
25th Floor
3 Los Angeles, CA 90071-1503
4 Telephone: (213) 229-9500
jnadolenco@mayerbrown.com

5
6 Lauren R. Goldman (*pro hac vice*)
1221 Avenue of the Americas
7 New York, NY 10020
Telephone: (212) 506-2647
8 lrgoldman@mayerbrown.com

9 Archis A. Parasharami (*pro hac vice*)
1999 K Street, N.W.
10 Washington, D.C. 20006-1101
11 Telephone: (202) 263-3328
aparasharami@mayerbrown.com

12 *Counsel for Defendant Facebook, Inc.*

13
14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**
16 **SAN FRANCISCO DIVISION**

17 IN RE FACEBOOK BIOMETRIC
18 INFORMATION PRIVACY LITIGATION

Master Docket No.: 3:15-CV-03747-JD

**DEFENDANT FACEBOOK, INC.'S
ANSWER AND AFFIRMATIVE
DEFENSES TO PLAINTIFFS'
COMPLAINT**

19
20 THIS DOCUMENT RELATES TO:
21 ALL ACTIONS

Hon. James Donato

1 Defendant Facebook, Inc. (“Facebook”), by and through its attorneys, submits its Answer
2 and Affirmative Defenses in response to the Consolidated Class Action Complaint (the
3 “Complaint”) of Plaintiffs Carlo Licata, Adam Pezen, and Nimesh Patel.

4 For ease of reference, Facebook’s Answer tracks the Complaint’s section headings, but
5 Facebook specifically denies any and all allegations and inferences of wrongdoing that may be
6 contained in those headings. Facebook further states as follows:
7

8 NATURE OF THE ACTION

9 1. Defendant Facebook operates the largest social network in the world, with over
10 one billion active users.

11 ANSWER: Admitted.

12 2. Facebook users can use its platform to, among other things, upload and share
13 photographs with friends and relatives. Once a user uploads a photograph on Facebook, the user
14 can “tag” (*i.e.*, identify by name) other Facebook users and non-users who appear in the
15 photograph.

16 ANSWER: Facebook admits that people with Facebook accounts can use its platform to
17 upload photographs and tag other people who appear in the photographs. Facebook denies that a
18 tag necessarily identifies the tagged individual by name, and denies the allegations in Paragraph
19 2 to the extent they might suggest that the “Tag Suggestions” feature applies to people who do
20 not have Facebook accounts.

21 3. To encourage use of the tagging feature, Facebook launched a program in 2010
22 called “Tag Suggestions.” Tag Suggestions functions by scanning photographs uploaded by the
23 user and then identifying faces appearing in those photographs. If Tag Suggestions recognizes
24 and identifies one of the faces appearing in the photograph, Facebook will suggest that
25 individual’s name or automatically tag them.

26 ANSWER: Facebook admits that it began offering the “Tag Suggestions” feature in
27 2010 to people with Facebook accounts. Facebook denies the other allegations in Paragraph 3.

1
2 4. Facebook conceals that Tag Suggestions uses proprietary facial recognition
3 software to extract from user-uploaded photographs the unique biometric identifiers (*i.e.*,
4 graphical representations of facial features, also known as facial geometry) associated with
5 people’s faces and identify who they are. Facebook does not disclose its biometrics data
6 collection to its users, nor does it even ask users to acknowledge, let alone consent to, these
7 practices.

8 ANSWER: Facebook denies the allegations in Paragraph 4.

9 5. Through these practices, Facebook not only disregards its users’ privacy rights; it
10 also violates the Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* (the “BIPA”), which
11 was specifically designed to protect Illinois residents from practices like Facebook’s. In
12 particular, Facebook violated (and continues to violate) the BIPA because it did not:

- 13 • Properly inform Plaintiffs or the Class in writing that their biometric identifiers (face
14 geometry) were being generated, collected or stored;
- 15 • Properly inform Plaintiffs or the Class in writing of the specific purpose and length of
16 time for which their biometric identifiers were being collected, stored, and used;
- 17 • Provide a publicly available retention schedule and guidelines for permanently
18 destroying the biometric identifiers of Plaintiffs and the Class (who do not opt-out of
19 “Tag Suggestions”); and
- 20 • Receive a written release from Plaintiffs or the Class to collect, capture, or otherwise
21 obtain their biometric identifiers.

22 ANSWER: Facebook denies the allegations in Paragraph 5.

23 6. Accordingly, this Complaint seeks an order: (i) declaring that Facebook’s conduct
24 violates the BIPA; (ii) requiring Facebook to cease the unlawful activities discussed herein; and
25 (iii) awarding statutory damages to Plaintiffs and the proposed Class.

26 ANSWER: Facebook admits that Plaintiffs seek declaratory relief, injunctive relief, and
27 statutory damages on behalf of themselves and the putative class, but denies all remaining
28 allegations in Paragraph 6 and that Plaintiffs are entitled to any relief.

PARTIES

1
2 7. Plaintiff Adam Pezen (“Pezen”) is a natural person and Facebook user. Plaintiff is
3 a resident and citizen of the State of Illinois.

4 ANSWER: Facebook admits that Plaintiff Pezen is a natural person and that he has a
5 Facebook account, but Facebook lacks knowledge or information sufficient to form a belief
6 about the truth of the other allegations in Paragraph 7 and on that basis denies them.
7

8 8. Plaintiff Carlo Licata (“Licata”) is a natural person and Facebook user. Plaintiff is
9 a resident and citizen of the State of Illinois.

10 ANSWER: Facebook admits that Plaintiff Licata is a natural person and that he has a
11 Facebook account, but Facebook lacks knowledge or information sufficient to form a belief
12 about the truth of the other allegations in Paragraph 8 and on that basis denies them.
13

14 9. Plaintiff Nimesh Patel (“Patel”) is a natural person and Facebook user. Plaintiff is
15 a resident and citizen of the State of Illinois.

16 ANSWER: Facebook admits that Plaintiff Patel is a natural person and that he has a
17 Facebook account, but Facebook lacks knowledge or information sufficient to form a belief
18 about the truth of the other allegations in Paragraph 9 and on that basis denies them.
19

20 10. Defendant Facebook, Inc. is a Delaware corporation with its principal executive
21 offices and corporate headquarters located at 1601 Willow Road, Menlo Park, California 94025.
22 Facebook is a citizen of the States of Delaware and California. Facebook is also registered to
23 conduct business in the State of Illinois (file number 66267067) and maintains an office in Cook
24 County, Illinois. Facebook conducts business throughout this District, the State of Illinois, the
25 State of California, and the United States.

26 ANSWER: Facebook admits the allegations in the first, second, and third sentences of
27 Paragraph 10. The allegations in the last sentence of Paragraph 10 state legal conclusions to
28 which no response is required.

JURISDICTION AND VENUE

1
2
3 11. Jurisdiction is proper in this Court pursuant to the Class Action Fairness Act, 28
4 U.S.C. §1332(d) (“CAFA”), because: (i) the proposed Class consists of well over 100 members;
5 (ii) the parties are minimally diverse, as members of the proposed Class, including Plaintiffs, are
6 citizens of a state different from Defendant’s home state; and (iii) the aggregate amount in
7 controversy exceeds \$5,000,000, exclusive of interests and costs.

8
9 ANSWER: The allegations in Paragraph 11 state legal conclusions to which no response
10 is required.
11

12 12. This Court has personal jurisdiction over Plaintiffs because Plaintiffs submit to
13 the Court’s jurisdiction. This Court has personal jurisdiction over Defendant Facebook because
14 Defendant has submitted to this Court’s jurisdiction and has its corporate headquarters in Menlo
15 Park, California.

16 ANSWER: The allegations in Paragraph 12 state legal conclusions to which no response
17 is required.
18

19 13. Venue is proper in this District under 28 U.S.C. §1391(b) because Defendant
20 maintains its corporate headquarters and principal place of business in this District.

21 ANSWER: The allegations in Paragraph 13 state legal conclusions to which no response
22 is required.
23

INTRADISTRICT ASSIGNMENT

24 14. Pursuant to Civil Local Rule 3-2(d), this case should be assigned to the San
25 Francisco Division.

26 ANSWER: The allegations in Paragraph 14 state a legal conclusion to which no response
27 is required.
28

1 **FACTUAL BACKGROUND**

2 **I. Biometrics and Consumer Privacy**

3 15. “Biometrics” refers to technologies used to identify an individual based on unique
4 physical characteristics. Common biometric identifiers include retina or iris scans, fingerprints,
5 or hand or face geometry scans, which are all generally obtained by first acquiring an image or
6 photograph of the biometric identifier. One of the most prevalent uses of biometrics is facial
7 recognition technology, which works by scanning an image for human faces, extracting facial
8 feature data from a photograph or image of a human face, generating a “faceprint” from the
9 image through the use of facial-recognition algorithms, and then comparing, or “matching,” the
10 resultant faceprint to other faceprints stored in a “faceprint database.” If a database match is
11 found, a person may be identified.

12 ANSWER: Facebook denies the allegations in Paragraph 15.

13 16. The recent sophistication of facial recognition software has generated many
14 commercial applications of the technology, but also raised serious privacy concerns about its
15 massive scale, scope, and surreptitiousness.¹ During a 2012 U.S. Senate hearing, Senator Al
16 Franken noted that someone armed with a faceprint can find that person’s “name . . . social
17 networking account and . . . can find and track [them] in the street, in the stores [they] visit, the
18 government buildings [they] enter, and the photos [their] friends post online.”² Faceprints can
19 even be used to identify protesters from afar and then “target them for selective jailing and
20 prosecution.”³

21 ANSWER: Facebook lacks sufficient information to admit or deny whether the
22 allegations in Paragraph 16 accurately reflect statements made by Senator Franken, and
23 otherwise denies the allegations in Paragraph 16.

24 17. Unlike other identifiers such as Social Security or credit card numbers, which can
25 be changed if compromised or stolen, biometric identifiers linked to a specific voice or face
26

27 ¹ *What Facial Recognition Technology Means for Privacy and Civil Liberties: Hearing Before the Subcomm. on
28 Privacy Tech & the Law of the S. Comm. on the Judiciary*, 112th Cong. 1 (2012) (statement of Jennifer Lynch, Staff
Attorney, Electronic Frontier Foundation), available at https://www.eff.org/files/filenode/jenniferlynch_eff-senate-testimony-face_recognition.pdf.

² *What Facial Recognition Technology Means for Privacy and Civil Liberties: Hearing Before the Subcomm. on
Privacy Tech & the Law of the S. Comm. on the Judiciary*, 112th Cong. 1 (2012) (statement of Sen. Al Franken,
Chairman, Subcomm. on Privacy, Tech. & the Law of the S. Comm. on the Judiciary), available at
http://www.franken.senate.gov/?p=press_release&id=2144.

³ *Id.*

1 cannot. These unique and permanent biometric identifiers, once exposed, leave victims with no
2 means to prevent identity theft and unauthorized tracking. Recognizing this, the Federal Trade
3 Commission urged companies using facial recognition technology to ask for consent *before* ever
4 scanning and extracting biometric data from their digital photographs.⁴ Facebook has
5 deliberately ignored this prevailing view, which is expressly required under the BIPA, failed to
6 obtain user consent before launching its wide-spread facial recognition program, and continues
7 to violate millions of Illinois residents’ legal privacy rights.

8 ANSWER: Facebook lacks sufficient information to admit or deny whether the
9 allegations in Paragraph 17 accurately summarize the FTC’s statements, and otherwise denies
10 the allegations in Paragraph 17.

11 **II. Illinois’s Biometric Information Privacy Act**

12 18. The BIPA was enacted in 2008. Under the BIPA, companies may not “collect,
13 capture, purchase, receive through trade, or otherwise obtain a person’s or a customer’s
14 biometric identifier . . . unless it first:

- 15 (1) informs the subject . . . in writing that a biometric identifier . . . is being collected
16 or stored;
- 17 (2) informs the subject . . . in writing of the specific purpose and length of term for
18 which a biometric identifier . . . is being collected, stored, and used; and
- 19 (3) receives a written release executed by the subject of the biometric identifier”

20 740 ILCS 14/15(b).

21 ANSWER: Facebook admits that the BIPA was enacted in 2008. Facebook maintains
22 that the BIPA’s statutory language speaks for itself and denies the allegations in Paragraph 18 to
23 the extent they inaccurately quote from and/or mischaracterize the statute.

24 19. The statute defines “biometric identifier” to include “a retina or iris scan,
25 fingerprint, voiceprint, or scan of hand or face geometry.” 740 ILCS 14/10.

26 ⁴ See *Facing Facts: Best Practices for Common Uses of Facial Recognition Technologies*, Federal Trade
27 Commission (Oct. 2012), available at [http://www.ftc.gov/sites/default/files/ documents/reports/facing-facts-best-practices-common-uses-facial-recognition-technologies/121022facialtechrpt.pdf](http://www.ftc.gov/sites/default/files/documents/reports/facing-facts-best-practices-common-uses-facial-recognition-technologies/121022facialtechrpt.pdf).

1 ANSWER: Facebook maintains that the BIPA’s statutory language speaks for itself and
2 denies the allegations in Paragraph 19 to the extent they inaccurately quote from and/or
3 mischaracterize the statute.
4

5 20. The BIPA also regulates how companies must handle Illinois residents’ biometric
6 data. *See, e.g.*, 740 ILCS 14/15(c)–(d). For instance, the BIPA prohibits selling, leasing, trading,
7 or otherwise profiting from a person’s biometric data, 740 ILCS 14/15(c), and requires that
8 companies develop a publicly available written policy establishing a retention schedule and
9 guidelines for permanently destroying biometric data when the initial purpose for collecting such
data has been satisfied or within three years of the individual’s last interaction with the company,
whichever occurs first. 740 ILCS 14/15(a).

10 ANSWER: Facebook maintains that the BIPA’s statutory language speaks for itself and
11 denies the allegations in Paragraph 20 to the extent they inaccurately quote from and/or
12 mischaracterize the statute.
13

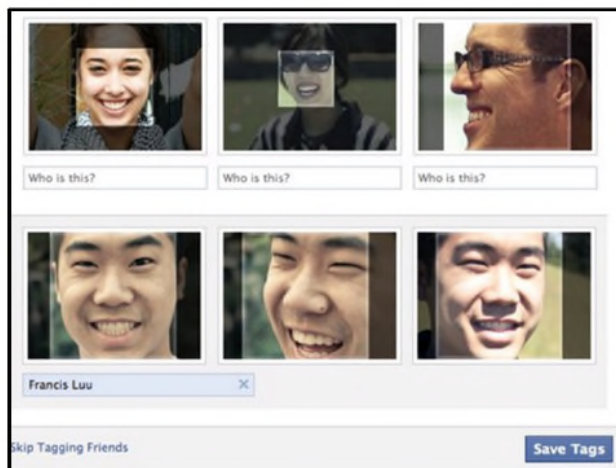
14 **III. Facebook Violates the Biometric Information Privacy Act**

15 21. In 2010, Facebook launched a program called “Tag Suggestions,” which claimed
16 to “automate the process of identifying and, if the user chooses, tagging friends in the photos he
or she uploads.”⁵

17 ANSWER: Facebook admits that it began offering the “Tag Suggestions” feature in
18 2010 to people with Facebook accounts. Answering further, Facebook maintains that the quoted
19 testimony of Robert Sherman speaks for itself and denies the allegations in Paragraph 21 to the
20 extent they inaccurately quote from and/or mischaracterize that testimony, and otherwise denies
21 the allegations in Paragraph 21.
22
23
24

25 ⁵ *What Facial Recognition Technology Means for Privacy and Civil Liberties: Hearing Before the Subcomm. on*
26 *Privacy, Tech. & the Law of the S. Comm. on the Judiciary*, 112th Cong. 1 (2012) (statement of Robert Sherman,
27 Manager of Privacy and Public Policy, Facebook, Inc.), available at
28 <http://www.judiciary.senate.gov/imo/media/doc/12-7-18ShermanTestimony.pdf>.

1 22. Unbeknownst to the public, Tag Suggestions relies on state-of-the-art facial
2 recognition technology to extract biometric identifiers from user-uploaded photographs in order
3 to determine who the people in the photographs are. Figure 1 below shows an example of what
4 Tag Suggestions looks like to a Facebook user.



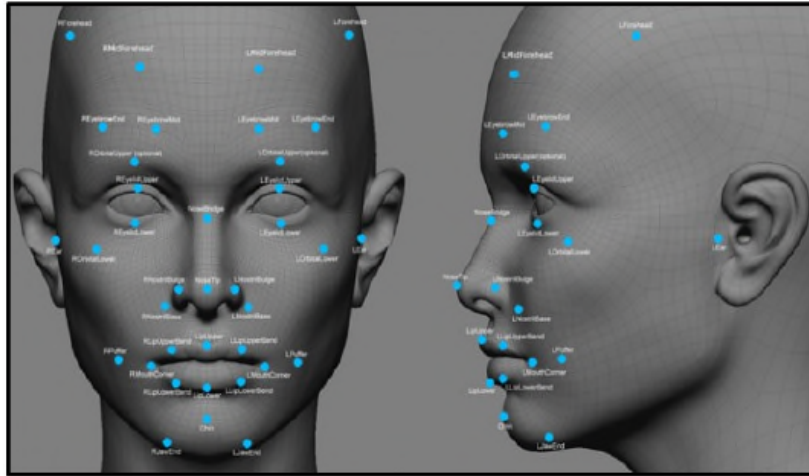
5
6
7
8
9
10
11
12 **(Fig. 1.)**

13 ANSWER: Facebook denies the allegations in Paragraph 22.

14
15 23. Facebook uses facial recognition software to extract biometric data from user-
16 uploaded photographs through the use of an algorithm that calculates a unique digital
17 representation of the face (which it calls a “template”) based on geometric relationship of their
18 facial features, like the distance between their eyes, nose and ears.

19 ANSWER: Facebook denies the allegations in Paragraph 23

20 24. “Template” data (or, alternatively, faceprint data) stored by Facebook is a form of
21 a biometric identifier extracted from the image of a person’s face (*i.e.*, including information
22 about the geometry of their face). (See Figure 2, showing an example of geometric data points of
23 a human face.)
24
25
26
27



(Fig. 2.)

ANSWER: Facebook denies the allegations in Paragraph 24.

25. The process for creating image-based biometric identifiers (including those Facebook collects) is largely the same. In each case, an algorithm is used to calculate an individual’s unique physical characteristics, which results in a biometric template that is separate and distinct from the image from which it was created.

ANSWER: Facebook denies the allegations in Paragraph 25.

26. Without even informing its users – let alone obtaining their informed written consent – Facebook through Tag Suggestions automatically enrolled them into its facial recognition program and extracted biometric identifiers from their uploaded photographs and previously tagged pictures, and stored these biometric identifiers in a database.

ANSWER: Facebook denies the allegations in Paragraph 26.

27. Because Facebook users were only allowed to opt out of the program *after the fact* (and even then, only if they knew to look for the opt-out mechanism), Facebook users unwittingly had their biometric identifiers extracted from photographs and then stored – a practice that continues to this day.

ANSWER: Facebook admits that people with Facebook accounts may turn off the Tag Suggestions feature, and that when a person turns Tag Suggestions off Facebook will not suggest that people tag the person in photographs, but otherwise denies the allegations in Paragraph 27.

1
2 **A. Facebook Never Requires Users to Acknowledge Its Biometric Data**
3 **Collection Practices, Never Obtains Their Express Written Consent to**
4 **Collect the Same, and, Instead, Hides the Fact that It Systematically Collects**
5 **Users' Biometrics**

6 28. Since Tag Suggestions debuted in 2010, Facebook has been intentionally elusive
7 in explaining how the technology works. First, Facebook does not directly inform users that it
8 collects, captures, and obtains faceprints from users. In fact, even though Tag Suggestions has
9 been in use for five years, Facebook still does not require users to acknowledge its collection of
10 their biometric data, much less obtain a written release from them before collecting their
11 faceprints. Instead, Facebook markets Tag Suggestions as a convenience feature, often with
12 advertisements under the heading "Photos are better with friends." And nothing in those
13 seemingly innocuous advertisements gives any indication that use of the feature would come at
14 the cost of users' biometric privacy rights.⁶

15 ANSWER: Facebook denies the allegations in Paragraph 28.

16 29. Second, Facebook's Tag Suggestions are an opt-out (not an opt-in) program, so
17 by default all users are automatically signed up. Facebook makes it difficult to opt out: In fact,
18 since the Tag Suggestions feature was rolled out, Facebook has kept its biometrics data
19 collection practices out of its privacy policies and has instead placed ambiguous statements about
20 the true nature of its Tag Suggestions program on remote sections of its website (such as in its
21 "Help Center" or the now defunct "Notes" sections). Uncovering these remote sections not only
22 requires a user to know about Tag Suggestions in the first place, but also requires them to
23 affirmatively seek out more information through multiple layers of additional pages.

24 ANSWER: Facebook denies the allegations in Paragraph 29.

25 30. Third, and compounding that problem and its violation of the BIPA, Facebook's
26 website does not have a written, publicly available policy identifying its biometrics retention
27 schedule, nor guidelines for permanently destroying users' (who do not opt-out of "Tag
28 Suggestions") biometric identifiers when they are no longer needed.

ANSWER: Facebook denies the allegations in Paragraph 30.

⁶ Facebook has not disclosed whether it will sell or lease its enormous database of faceprints to other companies for their facial recognition programs. *See, e.g., Facebook Hit With Tough Questions On Facial Recognition In Senate Hearing*, VentureBeat, available at <http://venturebeat.com/2012/07/18/facebook-hit-with-tough-questions-on-facial-recognition-in-senate-hearing/> (last visited Aug. 24, 2015).

1 31. By and through these actions, Facebook not only disregarded Plaintiffs and the
2 Class's privacy rights, but it also violated their statutorily protected rights under BIPA to control
3 the collection, use, and storage of their sensitive biometric data. Ignoring backlash over its
4 unlawful biometric data collection practices, Facebook continues to roll out new products using
5 facial recognition technology. Specifically, in June 2015, Facebook introduced a new mobile
6 application, called Moments, that purports to allow Facebook users to more easily share
7 photographs taken on users' mobile devices. This application also uses Facebook's proprietary
8 facial recognition technology to extract biometric identifiers (including their face geometry)
9 from photographs taken on a users' mobile device and identify others in those pictures. Facebook
10 does not offer Moments in the Europe Union because of regulators' concerns about its facial
11 recognition technology.

12 ANSWER: Facebook admits that it began offering a mobile application called Moments
13 in June 2015 and that Moments is not available in Europe. Facebook denies the remaining
14 allegations in Paragraph 31.

15 **IV. Plaintiffs' Experiences**

16 **A. Plaintiff Adam Pezen's Experience**

17 32. Plaintiff Adam Pezen has been a Facebook user since 2005. Since then, Pezen has
18 uploaded photographs to his account that include images of his face and has been tagged in many
19 of them. Pezen has also been tagged in photographs uploaded by other Facebook members
20 without his knowledge or consent.

21 ANSWER: Facebook admits that Plaintiff Pezen has had a Facebook account since 2005
22 but lacks knowledge or information sufficient to form a belief about the truth of the other
23 allegations in Paragraph 32 and on that basis denies them.

24 33. Pezen never consented, agreed, or gave permission – written or otherwise – to
25 Facebook to collect or store his biometric identifiers. Further, Pezen was never provided with nor
26 ever signed a written release allowing Facebook to collect or store his biometric identifiers.

27 ANSWER: Facebook denies the allegations in Paragraph 33.

28 34. Facebook never informed Pezen by written notice or otherwise that he could
prevent Facebook from collecting, storing or using his biometric identifiers.

1 ANSWER: Facebook admits that Plaintiff Licata has had a Facebook account since 2009
2 but lacks knowledge or information sufficient to form a belief about the truth of the other
3 allegations in Paragraph 39 and on that basis denies them.
4

5 40. Licata never consented, agreed, or gave permission – written or otherwise – to
6 Facebook to collect or store his biometric identifiers. Further, Licata was never provided with
7 nor ever signed a written release allowing Facebook to collect or store his biometric identifiers.

8 ANSWER: Facebook denies the allegations in Paragraph 40.

9 41. Facebook never informed Licata by written notice or otherwise that he could
10 prevent Facebook from collecting, storing or using his biometric identifiers.

11 ANSWER: Facebook denies the allegations in Paragraph 41.

12 42. Likewise, Licata was never provided with an opportunity to prohibit or prevent
13 Facebook from collecting, storing or using his biometric identifiers.

14 ANSWER: Facebook denies the allegations in Paragraph 42.

15
16 43. Nevertheless, when Licata uploaded photographs to his account and made them
17 his profile pictures and also when he was tagged in photographs, Facebook extracted from those
18 photographs a unique faceprint or “template” for him containing his biometric identifiers,
19 including his facial geometry, and identified who he was. Facebook subsequently stored Licata’s
20 biometric identifiers in its databases.

21 ANSWER: Facebook denies that it has collected, stored, or used any “biometric
22 identifier” associated with Plaintiff Licata, and on that basis denies the allegations in Paragraph
23 43.

24 44. As a result of Facebook’s unauthorized collection and use of Licata’s biometric
25 identifiers, Licata was deprived of his control over that valuable information. By depriving him
26 of his control over this valuable information, Facebook misappropriated the value of his
27 biometric identifiers.

28 ANSWER: Facebook denies the allegations in Paragraph 44.

1
2 45. Licata has additionally suffered damages in the diminution in value of his
3 sensitive biometric identifiers.

4 ANSWER: Facebook denies the allegations in Paragraph 45.

5 **C. Plaintiff Nimesh Patel's Experience**

6 46. Plaintiff Nimesh Patel has been a Facebook user since at least 2008. Since then,
7 Patel has uploaded photographs to his account and has been tagged in photographs by friends.

8 ANSWER: Facebook admits that Plaintiff Patel has had a Facebook account since 2008
9 but lacks knowledge or information sufficient to form a belief about the truth of the other
10 allegations in Paragraph 46 and on that basis denies them.

11
12 47. Patel never consented, agreed, or gave permission – written or otherwise – to
13 Facebook to collect or store his biometric identifiers. Further, Patel was never provided with nor
14 ever signed a written release allowing Facebook to collect or store his biometric identifiers.

15 ANSWER: Facebook denies the allegations in Paragraph 47.

16 48. Facebook never informed Patel by written notice or otherwise that he could
17 prevent Facebook from collecting, storing or using his biometric identifiers.

18 ANSWER: Facebook denies the allegations in Paragraph 48.

19 49. Likewise, Patel was never provided with an opportunity to prohibit or prevent
20 Facebook from collecting, storing or using his biometric identifiers.

21 ANSWER: Facebook denies the allegations in Paragraph 49.

22
23 50. Nevertheless, when Patel uploaded photographs to his account and when he was
24 tagged in photographs, Facebook extracted from those photographs a unique faceprint or
25 "template" for him containing his biometric identifiers, including his facial geometry, and
26 identified who he was. Facebook subsequently stored Patel's biometric identifiers in its
27 databases.

1 Civil Procedure 23. To the extent the allegations of this Paragraph are conclusions of law, no
2 response is required, but to the extent a response is required, Facebook denies them. Facebook
3 otherwise denies the allegations in Paragraph 53.
4

5 54. **Numerosity:** The exact number of Class members is unknown to Plaintiffs at this
6 time, but it is clear that individual joinder is impracticable. Defendant has collected, captured,
7 received, or otherwise obtained biometric identifiers from at least thousands (and potentially
8 even millions) of individuals who fall into the definition of the Class. Ultimately, the Class
9 members will be easily identified through Defendant's records.

10 ANSWER: Facebook lacks knowledge or information sufficient to form a belief as to the
11 truth of Plaintiffs' allegations concerning the number of absent members of the putative class.
12 Facebook denies that this action may be properly maintained as a class action or that it otherwise
13 meets the requirements of Federal Rule of Civil Procedure 23. To the extent the allegations of
14 this Paragraph are conclusions of law, no response is required, but to the extent a response is
15 required, Facebook denies them. Facebook otherwise denies the allegations in Paragraph 54.

16 55. **Commonality and Predominance:** There are many questions of law and fact
17 common to the claims of Plaintiffs and the Class, and those questions predominate over any
18 questions that may affect individual members of the Class. Common questions for the Class
19 include the following:

20 (a) whether Facebook collected, captured, received, or otherwise obtained
21 Plaintiffs' and the Class's biometric identifiers;

22 (b) whether Facebook properly informed Plaintiffs and the Class that it
23 collected, used, and stored their biometric identifiers;

24 (c) whether Facebook obtained a written release (as defined in 740 ILCS
25 14/10) from Plaintiffs and the Class to collect, capture, or otherwise obtain their biometric
26 identifiers;

27 (d) whether Facebook has sold, leased, traded, or otherwise profited from
28 Plaintiffs' and the Class's biometrics identifiers;

1 (e) whether Facebook had and made available to the public, a written policy
2 establishing a retention schedule and guidelines for permanently destroying biometric identifiers
in compliance with the BIPA; and

3 (f) whether Facebook's violations of the BIPA were committed intentionally,
4 recklessly, or negligently.

5 ANSWER: Facebook denies that this action may be properly maintained as a class action
6 or that it otherwise meets the requirements of Federal Rule of Civil Procedure 23. To the extent
7 the allegations of this Paragraph are conclusions of law, no response is required, but to the extent
8 a response is required, Facebook denies them. Facebook otherwise denies the allegations in
9 Paragraph 55.
10

11 56. **Typicality**: Plaintiffs' claims are typical of the claims of all other members of the
12 Class. Plaintiffs and the Class members sustained substantially similar damages as a result of
13 Defendant's uniform wrongful conduct, based upon the same transactions that were made
uniformly with Plaintiffs and the Class.

14 ANSWER: Facebook denies that this action may be properly maintained as a class action
15 or that it otherwise meets the requirements of Federal Rule of Civil Procedure 23. To the extent
16 the allegations of this Paragraph are conclusions of law, no response is required, but to the extent
17 a response is required, Facebook denies them. Facebook otherwise denies the allegations in
18 Paragraph 56.
19

20 57. **Adequate Representation**: Plaintiffs will fairly and adequately represent and
21 protect the interests of the Class. Plaintiffs have retained counsel with substantial experience in
22 prosecuting complex class actions. Plaintiffs and their counsel are committed to vigorously
23 prosecuting this action on behalf of the members of the Class, and have the financial resources to
do so. Neither Plaintiffs nor their counsel have any interest adverse to those of the other
members of the Class, and Defendant has no defenses unique to Plaintiffs.

24 ANSWER: Facebook denies that this action may be properly maintained as a class action
25 or that it otherwise meets the requirements of Federal Rule of Civil Procedure 23. To the extent
26

1 the allegations of this Paragraph are conclusions of law, no response is required, but to the extent
2 a response is required, Facebook denies them. Facebook otherwise denies the allegations in
3 Paragraph 57.
4

5 **58. Policies Generally Applicable to the Class:** Defendant has acted or failed to act
6 on grounds generally applicable to Plaintiffs and the other members of the Class, requiring the
7 Court's imposition of uniform relief to ensure compatible conduct towards the Class.

8 ANSWER: Facebook denies that this action may be properly maintained as a class action
9 or that it otherwise meets the requirements of Federal Rule of Civil Procedure 23. To the extent
10 the allegations of this Paragraph are conclusions of law, no response is required, but to the extent
11 a response is required, Facebook denies them. Facebook otherwise denies the allegations in
12 Paragraph 58.
13

14 **59. Superiority:** A class action is superior to all other available methods for the fair
15 and efficient adjudication of this controversy and joinder of all members of the Class is
16 impracticable. The damages suffered by the individual members of the Class are likely to have
17 been small relative to the burden and expense of individual prosecution of the complex litigation
18 necessitated by Defendant's wrongful conduct. Thus, it would be virtually impossible for the
19 individual members of the Class to obtain effective relief from Defendant's misconduct. Even if
20 members of the Class could sustain the cost of such individual litigation, it would not be
21 preferable to a class action because individual litigation would increase the delay and expense to
22 all parties due to the complex legal and factual controversies presented in this Complaint, and
23 present a tremendous burden for the courts. By contrast, a class action presents far fewer
24 management difficulties and provides the benefits of single adjudication, economies of scale, and
25 comprehensive supervision by a single court. Economies of time, effort, and expense will be
26 fostered and uniformity of decisions will be achieved.

27 ANSWER: Facebook denies that this action may be properly maintained as a class action
28 or that it otherwise meets the requirements of Federal Rule of Civil Procedure 23. Facebook
denies that class treatment would be superior to other methods of adjudication. To the extent the
allegations of this Paragraph are conclusions of law, no further response is required, but to the

1 extent a response is required, Facebook denies them. Facebook otherwise denies the allegations
2 in Paragraph 59.

3
4 **FIRST CAUSE OF ACTION**

5 **Violation of 740 ILCS 14/15(b)**
6 **(On Behalf of Plaintiffs and the Class)**

7 60. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

8 ANSWER: Facebook incorporates its responses and denials as to the foregoing
9 allegations.

10
11 61. The BIPA makes it unlawful for any private entity to, among other things,
12 “collect, capture, purchase, receive through trade, or otherwise obtain a person’s or a customer’s
13 biometric identifier . . . unless it first: (1) informs the subject . . . in writing that a biometric
14 identifier . . . is being collected or stored; (2) informs the subject . . . in writing of the specific
15 purpose and length of term for which a biometric identifier . . . is being collected, stored, and
16 used; *and* (3) receives a written release executed by the subject of the biometric identifier”
17 740 ILCS 14/15(b) (emphasis added).

18 ANSWER: Facebook maintains that the BIPA’s statutory language speaks for itself and
19 denies the allegations in Paragraph 61 to the extent they inaccurately quote from and/or
20 mischaracterize the statute.

21 62. Facebook is a Delaware corporation and thus qualifies as a “private entity” under
22 the BIPA. *See* 740 ILCS 14/10.

23 ANSWER: Facebook admits it is a Delaware corporation. The remaining allegations of
24 this Paragraph are conclusions of law, and therefore no further response is required, but to the
25 extent a response is required, Facebook denies the remaining allegations.

26 63. As explained in detail in Section III, above, Plaintiffs’ and the Class’s faceprints
27 or face geometry are “biometric identifiers” pursuant to 740 ILCS 14/10.

1 68. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

2 ANSWER: Facebook incorporates its responses and denials as to the foregoing
3 allegations.
4

5 69. Section 15(a) of the BIPA requires that any “private entity in possession of
6 biometric identifiers . . . must develop a written policy, made available to the public, establishing
7 a retention schedule and guidelines for permanently destroying biometric identifiers . . . when the
8 initial purpose for collecting or obtaining such identifiers . . . has been satisfied or within 3 years
9 of the individual’s last interaction with the private entity, whichever occurs first.” 740 ILCS
10 14/15(a).

11 ANSWER: Facebook maintains that the BIPA’s statutory language speaks for itself and
12 denies the allegations in Paragraph 69 to the extent they inaccurately quote from and/or
13 mischaracterize the statute.
14

15 70. For users who do not opt-out of Tag Suggestions, Facebook does not publicly
16 provide a retention schedule or guidelines for permanently destroying their biometric identifiers
17 as specified by the BIPA. *See* 740 ILCS 14/15(a).

18 ANSWER: Facebook denies the allegations in Paragraph 70.
19

20 71. Accordingly, on behalf of themselves and the Class, Plaintiffs seek: (i) injunctive
21 and equitable relief as is necessary to protect the interests of Plaintiffs and the Class by requiring
22 Facebook to establish and make publicly available a policy for the permanent destruction of
23 biometric identifiers compliant with 740 ILCS 14/15(a); (ii) statutory damages of \$5,000 per
24 intentional or reckless violation of the BIPA pursuant to 740 ILCS 14/20(2) and statutory
25 damages of \$1,000 per negligent violation of the BIPA pursuant to 740 ILCS 14/20(1); and (iii)
26 reasonable attorneys’ fees and costs and other litigation expenses pursuant to 740 ILCS 14/20(3).

27 ANSWER: Facebook admits that Plaintiffs seek the damages and other remedies
28 discussed in the allegations in Paragraph 71, but denies that Plaintiffs and absent members of the
putative class are entitled to any of those damages and remedies.

AFFIRMATIVE OR OTHER DEFENSES

1 Without assuming any burden of proof not otherwise legally assigned to it, Facebook
2 asserts the following separate and additional defenses to the Complaint brought against it:
3

4 **FIRST AFFIRMATIVE DEFENSE**

5 **(Failure to State a Claim Upon Which Relief Can Be Granted)**

6 The Complaint, and each purported cause of action asserted therein, fail to state a claim
7 upon which relief can be granted. Among other deficiencies in the Complaint, the conduct
8 alleged is not regulated or prohibited by the BIPA.
9

10 **SECOND AFFIRMATIVE DEFENSE**

11 **(Lack of Standing)**

12 Plaintiffs lack standing to seek the relief demanded because, for example, Plaintiffs have
13 not suffered a sufficient injury in fact from the conduct alleged in the Complaint.
14

15 **THIRD AFFIRMATIVE DEFENSE**

16 **(Consent)**

17 Upon information and belief, Facebook alleges that every person who signs up for
18 Facebook accepts terms of service and thereby consents to the conduct alleged in the Complaint.
19 Upon information and belief, Facebook alleges that Plaintiffs and members of the asserted
20 putative class so consented to the conduct alleged in the Complaint. Further, upon information
21 and belief, Facebook alleges that Plaintiffs and members of the asserted putative class consented
22 to the conduct alleged in the Complaint because they continued using Facebook after being put
23 on notice of the Tag Suggestions feature and how it worked. Therefore, upon information and
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26

1 belief, Facebook alleges that each of the claims asserted by Plaintiffs is barred because Plaintiffs
2 and members of the asserted putative class consented to the activities of which they now
3 complain.
4

5
6 **FOURTH AFFIRMATIVE DEFENSE**

7 **(Choice of Law)**

8 Upon information and belief, Facebook alleges that the terms of service accepted by
9 Plaintiffs and members of the asserted putative class when they signed up for Facebook and/or
10 through their continued use of Facebook required California law to govern any claim that might
11 arise between Plaintiffs and/or member of the asserted putative class and Facebook. Therefore,
12 upon information and belief, Facebook alleges that each of the claims asserted by Plaintiffs is
13 barred because Plaintiffs and members of the asserted putative class may not bring claims under
14 Illinois law.
15

16
17 **FIFTH AFFIRMATIVE DEFENSE**

18 **(Laches)**

19 Upon information and belief, Facebook alleges that the Complaint and each purported
20 cause of action asserted therein are barred by the doctrine of laches if, for example, Plaintiffs
21 and/or members of the asserted putative class unreasonably delayed before pursuing their
22 purported rights.
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SIXTH AFFIRMATIVE DEFENSE**(Release)**

Upon information and belief, Facebook alleges that by virtue of signing up for Facebook and accepting the terms for using Facebook, persons who signed up for Facebook released Facebook from liability for the conduct of which Plaintiffs now complain. Upon information and belief, Facebook further alleges that the Complaint and each purported cause of action asserted therein are thus barred by a release of those claims.

SEVENTH AFFIRMATIVE DEFENSE**(Failure to Mitigate Damages)**

Plaintiffs and/or members of the asserted putative class failed to mitigate the alleged damages, and to the extent of such failure to mitigate, any damages awarded to Plaintiffs and/or members of the asserted putative class should be reduced accordingly. Upon information and belief, Facebook alleges that, among other things, Plaintiffs and members of the asserted putative class failed to mitigate any damages by continuing to use Facebook, by continuing to allow the Tag Suggestions feature to suggest that people tag them in photographs, and/or by taking or failing to take other conduct.

EIGHTH AFFIRMATIVE DEFENSE**(Unclean Hands)**

Upon information and belief, Facebook alleges that Plaintiffs and members of the asserted putative class consented to and, in some cases, participated in the uploading and “tagging” of photographs of which they now complain. Upon information and belief, Facebook

1 alleges that the Complaint and each purported cause of action alleged therein are thus barred, in
2 whole or in part, by the doctrine of unclean hands.
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4
5 **NINTH AFFIRMATIVE DEFENSE**

6 **(Lack of Causation)**

7 The Complaint and each purported cause of action alleged therein are barred to the extent
8 that Facebook’s conduct was not the actual or proximate cause of any loss suffered by Plaintiffs
9 and/or members of the asserted putative class.
10

11 **TENTH AFFIRMATIVE DEFENSE**

12 **(Statute of Limitations)**

13 No damages or other relief can be recovered by Plaintiffs and/or members of the asserted
14 putative class to the extent the Complaint and each purported cause of action alleged therein are
15 barred, in whole or in part, by an applicable contract provision and/or the statute of limitations.
16 *See, e.g.,* 735 ILCS 5/13-202 (two-year limitations period to recover a statutory penalty); 735
17 ILCS 5/13-205 (five-year limitations period for “all civil actions not otherwise provided for”).
18 Upon information and belief, Facebook alleges that Plaintiffs and/or members of the asserted
19 putative class failed to bring their causes of action with respect to certain of the alleged
20 violations within the periods required by the statutes of limitations.
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ELEVENTH AFFIRMATIVE DEFENSE**(Waiver)**

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3 Upon information and belief, Facebook alleges that Plaintiffs and members of the
4 asserted putative class consented to and, in some cases, participated in the uploading and
5 “tagging” of photographs of which they now complain. Facebook further alleges that the
6 Complaint and each purported cause of action alleged therein are thus barred, in whole or in part,
7 by the doctrine of waiver.
8

TWELFTH AFFIRMATIVE DEFENSE**(Intervening Acts And/Or Omissions)**

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11
12 Facebook alleges that all or part of the damages alleged in the Complaint were caused by
13 the acts and/or omissions of other persons or entities (including, without limitation, acts and/or
14 omissions of Plaintiffs and/or members of the asserted putative class and/or persons who acted
15 on their behalf), for whose conduct Facebook is not legally responsible, which intervened
16 between the alleged acts and/or omissions of Facebook and the alleged damages of Plaintiffs
17 and/or members of the asserted putative class. The alleged damages, if any, are therefore not
18 recoverable from Facebook. In the alternative, any damages which Plaintiffs and/or members of
19 the asserted putative class may be entitled to recover against Facebook must be reduced to the
20 extent that such damages are attributable to persons or entities other than Facebook.
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1 **THIRTEENTH AFFIRMATIVE DEFENSE**

2 **(Comparative Fault or Offset)**

3 Facebook alleges that all or part of the damages alleged in the Complaint were caused by
4 the acts and/or omissions of other persons or entities (including, without limitation, acts and/or
5 omissions of Plaintiffs and/or members of the asserted putative class and/or persons who acted
6 on their behalf), for whose conduct Facebook is not legally responsible. Therefore, if Plaintiffs
7 and/or members of the asserted putative class are found to be entitled to recover any of the
8 alleged damages, Facebook's share thereof must be apportioned or reduced to the extent that
9 such damages are attributable to persons or entities other than Facebook.
10

11
12 **FOURTEENTH AFFIRMATIVE DEFENSE**

13 **(No Ascertainable Class)**

14 Facebook alleges as an affirmative defense that the putative class asserted in the
15 Complaint is inappropriate for class certification because there is no ascertainable class.
16

17
18 **FIFTEENTH AFFIRMATIVE DEFENSE**

19 **(Numerosity)**

20 Facebook alleges as an affirmative defense that the putative class asserted in the
21 Complaint is inappropriate for class certification because the class is not so numerous that
22 joinder of all members is impracticable.
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SIXTEENTH AFFIRMATIVE DEFENSE

(Predominance)

Facebook alleges as an affirmative defense that the putative class asserted in the Complaint is inappropriate for class certification because common issues of law and fact do not predominate over individual issues.

SEVENTEENTH AFFIRMATIVE DEFENSE

(No Community of Interest – Common Questions of Law and Fact)

Facebook alleges as an affirmative defense that the putative class asserted in the Complaint is inappropriate for class certification because there is no well-defined community of interest in or commonality between the questions of law and fact involved in this putative class action.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Typicality)

Facebook alleges as an affirmative defense that the putative class asserted in the Complaint is inappropriate for class certification because Plaintiffs’ claims are not typical of the claims of other members of the asserted putative class.

1 **NINETEENTH AFFIRMATIVE DEFENSE**

2 **(Superiority)**

3 Facebook alleges as an affirmative defense that the putative class asserted in the
4 Complaint is inappropriate for class certification because a class action is not superior to other
5 methods for fairly and efficiently adjudicating this controversy.
6

7
8 **TWENTIETH AFFIRMATIVE DEFENSE**

9 **(Adequate Representation)**

10 Facebook alleges as an affirmative defense that the putative class asserted in the
11 Complaint is inappropriate for class certification because neither Plaintiffs nor their counsel is
12 able to fairly and adequately protect the interest of all members of the alleged putative class.
13

14
15 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

16 **(Impropriety of Class-Wide Injunctive Relief)**

17 Facebook alleges as an affirmative defense that the putative class asserted in the
18 Complaint is inappropriate for class certification because Facebook has not acted or refused to
19 act on grounds that apply generally to the class, and neither final injunctive relief nor
20 corresponding declaratory relief is appropriate respecting the class a whole.
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TWENTY-SECOND AFFIRMATIVE DEFENSE

(Injunctive Relief)

To the extent Plaintiffs are seeking injunctive relief, such relief is barred because Plaintiffs and/or members of the asserted putative class have not suffered irreparable harm and/or there is no real or immediate threat of injury.

RESERVATION OF ADDITIONAL DEFENSES

Facebook reserves the right to raise any additional defenses, affirmative or otherwise, and any counterclaims which may become apparent through discovery in the course of this action.

WHEREFORE, Facebook respectfully requests entry of judgment against Plaintiffs and in favor of Facebook and that the Court award Facebook any such relief as this Court deems just and appropriate.

1 Dated: June 2, 2016

Respectfully submitted,

2
3 By: /s/ John Nadolenco
4 John Nadolenco (SBN 181128)
5 MAYER BROWN LLP
6 350 South Grand Avenue
7 25th Floor
8 Los Angeles, CA 90071-1503
9 Telephone: (213) 229-9500
10 jnadolenco@mayerbrown.com

11
12 Lauren R. Goldman (*pro hac vice*)
13 MAYER BROWN LLP
14 1221 Avenue of the Americas
15 New York, NY 10020
16 Telephone: (212) 506-2647
17 lrgoldman@mayerbrown.com

18
19 Archis A. Parasharami (*pro hac vice*)
20 MAYER BROWN LLP
21 1999 K Street, N.W.
22 Washington, D.C. 20006-1101
23 Telephone: (202) 263-3328
24 aparasharami@mayerbrown.com

25
26 *Counsel for Defendant Facebook, Inc.*