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January 14, 2011

The Honorable William H. Alsup
United States District Judge
450 Golden Gate Avenue
San Francisco, CA 94102

Re: *Daniel M. Miller v. Facebook, Inc. and Yao Wei Yeo*
In the United States District Court for the Northern District of California
Civil Action No.: 5:10-CV-00264-WHA

Pursuant to Paragraph 25 of the Court's "Supplemental Order to Order Setting Initial Case Management Conference in Civil Cases Before Judge William Alsup":

Dear Judge Alsup:

On July 21, 2010, the Plaintiff propounded and served his First Consolidated Discovery Requests to Facebook. After much foot-dragging by Facebook and refusals to timely comply with the Plaintiff's requests (as set out in detail in the Plaintiff's Letter Brief to the Court dated November 19, 2010 (Dkt. No. 86) seeking to compel Facebook to respond to these requests) on December 20, 2010, undersigned counsel received a disk from Facebook containing approximately 490 Excel spreadsheet files and approximately 23,500 pages of electronic documents wherein each page was produced in a TIFF image format. The documents produced were gathered by Facebook through an electronic search and review process utilizing key words and terms either specifically identified in the Plaintiff's requests or of specific relevance to this litigation. A DAT file was also produced with the 23,500 page production. However, it is only a small 60 KB file containing beginning bates numbers and ending bates numbers for each "document" and contains nothing as to the electronic content or text for these TIFF image files thereby rendering these images unsearchable. During Facebook's search and review of its own documents in connection with this production, it is clear that Facebook had access to the electronic contents of these documents in a searchable format. However, the TIFF image files and DAT file produced by Facebook do not have any electronic content, such as OCR text or metadata, that would enable the Plaintiff to search these documents using key word and term searches. Thus, Facebook has made it impossible for the Plaintiff to effectively, and expeditiously, review Facebook's document production which creates an extreme risk of prejudice to the Plaintiff in preparing its case for trial within the time periods set by the Court's Case Management Order.

The removal of the electronic content of these documents, and the production of unsearchable TIFF image files, is not an acceptable discovery practice under Rule 34 of the Federal Rules of Civil Procedure. Rule 34(b)(2)(E)(ii), F.R.C.P., requires a party to produce electronically stored information ("ESI") in a form, or forms, in which it is ordinarily maintained or *in a reasonably usable form or forms* if the requesting party does not specify a form for the production of ESI. The Advisory Committee Notes to the 2006 "electronic discovery" amendments to the Federal Rules of Civil Procedure provide the following: "The rule does not require a party to produce electronically stored information in the form in which it is ordinarily maintained, as long as it is produced in a reasonably usable form. But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature."

In this regard, *L.H. v. Schwarzenegger*, 2008 WL 2073958 (E.D. Cal. May 14, 2008), is instructive. In that case, before production was made to opposing counsel, defense counsel converted native documents from their original format into a PDF format that was not searchable. (A PDF file that is not searchable is essentially the same as a TIFF image; however, the PDF file format is more complex than the TIFF format and can potentially, and generally does, include searchable text and other data.) The Court found the production to be inconsistent with Rule 34 because defense counsel produced documents which were not searchable while the original (native) documents had been searchable. The Court then awarded the plaintiff monetary sanctions in light of the defendant's "purposeful foot dragging on discovery" and resulting prejudice to the plaintiff's case. Other courts have likewise interpreted Rule 34 and concluded that is improper to take an electronically searchable document and either destroy or degrade the document's ability to be searched. See *Covad Communications Co. v. Revonet, Inc.*, 260 F.R.D. 5, 9 (D.D.C. 2009).

In accordance with the above-cited authority, at an absolute minimum, Facebook should provide electronic content for the produced documents to allow the Plaintiff to adequately search these documents rather than having to individually review every TIFF image page file for the entire 23,500 page production. On January 6, 2011, undersigned counsel and Julio Avalos, counsel for Facebook, conducted an extensive two-hour telephonic "meet and confer" regarding this issue and other discovery disputes that have arisen during the past three weeks. However, by the end of the "meet and confer", the Plaintiff was left with no assurances that Facebook would provide the electronic content sought by the Plaintiff, and has received none to date. Because of Facebook's failure to comply with Rule 34, the Plaintiff was forced to employ an outside vendor at his own expense to convert Facebook's production into an electronically searchable format. However, this conversion process, and the results obtained, are far inferior to a search utilizing the electronic content requested by the Plaintiff that is in the possession of Facebook and can be made available by Facebook in a DAT file like the one that has

already been produced. (Why the pertinent OCR text or metadata for the produced TIFF image files was not included in the produced DAT file has still not been adequately explained by Facebook.)

A comparison of the image files produced by Facebook bates labeled FBMI 106, 200, and 245, and those same files converted into a searchable text format (collectively attached hereto as Plaintiff's Exhibit "A") illustrate the problems with the approach forced upon the Plaintiff by Facebook's removal of searchable electronic content. Comparison of FBMI 106, a non-searchable image file, and the corresponding converted text file that can be searched using document review software, shows how the conversion completely fails for some documents. Likewise, comparison of FBMI 200 and the converted text file illustrates the average to best case scenario where the conversion picks up most of the words, but often not in a manner that would allow the document to be searched because of missing letters or automatically inserted punctuation that can throw off a word or terms search. Lastly, comparison of FBMI 245 and the corresponding converted text file shows how in some documents, a few words may be converted, but the majority of the document is not.

Lastly, in response to Facebook's requests for production, the Plaintiff produced source code and Excel spreadsheets on disk and emailed to defense counsel PDF files of approximately 400 pages of documents. In its opposition to this letter brief, Facebook will no doubt argue that the PDF files produced by the Plaintiff have no electronically searchable content, and the Plaintiff is trying to impose an undue burden on Facebook while at the same time failing to abide by the very rules and legal authority he cites to support the imposition of such a burden. The Plaintiff has had no confirmation from Facebook that the 400 pages of PDF files are unsearchable, and Plaintiff's counsel took no action to willfully or deliberately scrub metadata, remove electronic content, or alter these files in any way so as to render them unsearchable. Facebook has not requested that Plaintiff provide any electronic content for these files, but if they made such a request, the Plaintiff would honor it. Furthermore, even if the PDF files produced by the Plaintiff are electronically unsearchable, the burden on Facebook's attorneys associated with individually viewing each page of a 400-page production is minuscule, if not non-existent, when compared to the burden on Plaintiff's counsel associated with individually reviewing approximately 23,500 pages of documents (which is the only alternative to an unreliable and ineffective word and terms search of the converted image-to-text files should the Court not compel Facebook to provide the discovery sought herein.)

Therefore, for the reasons set forth above, the Plaintiff asks that the Court compel Facebook to either (1) provide the searchable electronic content, such as OCR text or metadata, for the approximate 23,500 TIFF image files so as to make these files searchable by electronic means, or (2) produce all 23,500 TIFF image files in the electronic form in which they are ordinarily maintained by Facebook, i.e. their native format. The Plaintiff is willing to accept whichever method will be the least costly and time-consuming for Facebook.

Sincerely,

Brian D. Hancock /CA

Brian D. Hancock
Counsel for the Plaintiff