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January 18, 2011

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VIA ELECTRONIC FILING

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

Re: Miller v. Facebook, et al., No. 5:10-CV-00264-WHA

Dear Judge Alsup :

Facebook, Inc. ("Facebook") hereby responds to Plaintiff's January 14, 2011 letter requesting an order compelling further production. Plaintiff's request should be denied.

Plaintiff asks the Court to compel Facebook to produce "OCR text or metadata, for the approximate 23,500 TIFF image files" previously produced by Facebook. *See* Plaintiff's January 14, 2011 Letter ("Pl. Ltr.") at 3. In the alternative, Plaintiff asks that Facebook's December 17, 2010 production of 23,500 TIFF image files be scrapped and that Facebook go back, review, re-redact where appropriate, and then re-"produce all 23,500 TIFF image files in the electronic form in which they are ordinarily maintained by Facbook [sic], i.e. their native format." *Id.*

The Court should deny both requests for three reasons. *First*, the parties never agreed to production of OCR text or metadata. Three days before the parties exchanged document production, Facebook counsel discussed production format with plaintiff's counsel, Brian Hancock. Mr. Hancock said nothing of metadata. *See* Exhibit A, December 14, 2010 E-mail Chain. Accordingly, the parties both produced TIFF or PDF image documents and did not produce OCR text or metadata. *Second*, where no agreement exists, a party will generally not be compelled to produce metadata under the applicable law. *Third*, Plaintiff already has the requested metadata but appears to only be unhappy with its quality. This concern should be raised with Plaintiff's outside vendor, not the Court. While complaining about the quality of his vendor's work, Plaintiff makes no argument regarding how or why Facebook metadata is even relevant in this case, which he is required to do. Plaintiff's request should be denied.

I. The Parties Never Agreed That Metadata Would Be Produced.

The parties never agreed that OCR text or metadata would be produced. As summarized in Facebook's November 29, 2010 letter to the Court, the parties began negotiating a tailored

protective order in late September. *See* Dkt. No. 93. Those negotiations lasted for months. *Id.* Not once in the course of those negotiations did either party request metadata.

The only discussion of production format occurred on December 14, 2010, three days before the parties exchanged document production. The parties agreed that Facebook would be producing in an "electronic format," nothing more. Ex. A at 1. Plaintiff's counsel, Brian Hancock, agreed to this and stated that his client would be "producing electronically, however, there may be a few things we produce in paper." *Id.* Accordingly, when the parties exchanged document production on December 17, 2010, neither party produced metadata, as agreed. Facebook produced in native, Microsoft Excel format as well as single-page TIFF, an industry standard production format that has repeatedly been found consistent with Federal Rule of Civil Procedure 26. Plaintiff produced almost entirely in non-searchable Adobe PDF images. Plaintiff's counsel did not object to the form of Facebook's production until nearly three weeks had passed since he received it.

II. Facebook Is Not Required To Produce Metadata.

Under such circumstances, compelling Facebook to re-review, re-redact, and re-produce its document production in its entirety would be error. "There is a clear pattern in the case law concerning motions to compel the production of metadata. Courts generally have ordered the production of metadata when it is sought in the initial document request and the producing party has not yet produced the documents in any form." *Aguilar v. Immigration and Customs Enforcement*, 255 F.R.D. 350, 357 (S.D.N.Y. 2008) (citations omitted). "On the other hand, if metadata is not sought in the initial document request, and particularly if the producing party already has produced the documents in another form, courts tend to deny later requests, often concluding that the metadata is not relevant."[1] *Id.*, citing *Autotech Tech. v. Automationdirect.com, Inc., et al.*, 248 F.R.D. 556, 559-60 (N.D. Il. 2008) (refusing to compel production of metadata not sought in initial request); *D'Onofrio v. SFX Sports Group, Inc.*, 247 F.R.D. 43, 48 (D.D.C. 2008) (same); *In re Payment Card*, 2007 U.S. Dist. LEXIS 2650, at *4 (E.D.N.Y. 2007) (denying motion to compel metadata for documents already produced in TIFF format because another production would be unduly burdensome); *Wyeth v. Impax Labs., Inc.*, 248 F.R.D. 169, 171 (D. Del. 2006) (documents produced in TIFF format were sufficient since parties never agreed on form of production).

In *Autotech*, the court denied a motion to compel the production of metadata for Microsoft Word documents after the plaintiff had already produced the documents in both PDF and paper format. 248 F.R.D. at 557. In concluding that production in PDF form constituted a reasonably usable form, the court relied upon the defendant's failure to ask for metadata at the outset. *Id.* at 559-60. The court stated that it "seems a little late to ask for metadata after documents responsive to a request have been produced in both paper and electronic format" and noted that "[o]rdinarily, courts will not compel the production of metadata when a party did not make that a part of its request." *Id.* (citations omitted). The requesting party, the court concluded, "was the master of its production requests; it must be satisfied with what it asked for." *Id.* at 560.

Moreover, "[t]he Federal Rules of Civil Procedure, case law, and the *Sedona Principles* all further emphasize that electronic discovery should be a party-driven process. Indeed, Rule 26(f)

[1] Here, Plaintiff fails even to argue that metadata is relevant to his case.

requires that the parties meet and confer to develop a discovery plan. That discovery plan must discuss 'any issues about disclosure or discovery of electronically-stored information, including the form or forms in which it should be produced." *Aguilar*, 255 F.R.D. at 358 (citing Fed. R. Civ. P. 26(f)(3)(C)) (emphasis omitted). "Thus, at the outset of any litigation, the parties should discuss whether the production of metadata is appropriate and attempt to resolve the issue without court intervention." *Id.*

Here, the parties engaged in protracted Rule 26 discussions relating to discovery. Protective order negotiations, during which respective counsel discussed all sorts of issues relating to document production, on their own lasted for months and never touched on metadata. Plaintiff should not be allowed to pass off significant burdens on Facebook at the eleventh hour of non-expert discovery.

Plaintiff relies almost entirely on *L.H. v. Schwarzenegger*, No. Civ-06-2042 LKK, 2008 WL 2073958 (E.D. Cal. May 14, 2008), misleadingly implying that a failure to produce metadata in that case led to "monetary sanctions." Plaintiff's Ltr. Br. at 2. But the *Schwarzenegger* plaintiff sought and was awarded sanctions against defendants not because of a failure to produce metadata, but for repeatedly violating discovery orders. *Schwarzenegger*, 2008 WL 2073958, at *1. As the court noted, "Defendants completed production almost two weeks after this court's order required it, forcing plaintiffs to file not only a motion to compel, but a motion for sanctions. As this is just one of many delays by defendants in this case, plaintiffs will be awarded sanctions." *Id.* at *2. With respect to metadata, defendants in that case produced in PDF files, Plaintiff Miller's chosen format, not Facebook's. The court did in fact eventually require defendants to produce in native format, but only because defendants had been stringing plaintiff along with promises that they would be producing "electronic documents in their native format 'as soon as possible,'" were apparently lying about that fact, and also flaunted several court orders requiring native format production. *Id.* at *3. Those facts are absent here, rendering *Schwarzenegger* completely inapplicable.

III. Plaintiff Already Has The Metadata He Seeks.

Plaintiff's motion also seems unnecessary. Plaintiff's submission makes clear that plaintiff has hired an outside vendor to extract OCR search data from Facebook's production, and that Plaintiff has already received the requested data. Plaintiff's remaining gripe seems to be with the quality of his vendor's work, not an issue with Facebook. This is hardly grounds for an order compelling further production. With the January 31, 2011 discovery cutoff looming, Plaintiff appears to be making a last-ditch effort to shift costs to Facebook and make up for its own month-long delay in reviewing Facebook's production. For these reasons, Plaintiff's request for an order compelling the production of metadata should be denied in its entirety.

Very truly yours,

Julio C. Avalos

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