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 FACEBOOK, INC.  
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8 UNITED STATES DISTRICT COURT  
 9 NORTHERN DISTRICT OF CALIFORNIA  
 10 SAN FRANCISCO DIVISION  
 11

12 DANIEL M. MILLER,  
 13 Plaintiff,  
 14 v.  
 15 FACEBOOK, INC. and YAO WEI YEO,  
 16 Defendants.

Case No. 3:10-CV-00264 (WHA)

**NOTICE OF MOTION, MOTION AND  
 MEMORANDUM OF POINTS AND  
 AUTHORITIES FOR SUMMARY  
 JUDGMENT OF FACEBOOK'S FIRST  
 COUNTERCLAIM FOR BREACH OF  
 CONTRACT**

Date: April 7, 2011  
 Time: 8:00 A.M.  
 Court: Courtroom 9, 19th Floor  
 Judge: Honorable William Alsup

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1 **NOTICE OF MOTION AND MOTION**

2 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

3 PLEASE TAKE NOTICE that on April 7, 2011 at 8:00 a.m. or as soon thereafter as the  
4 matter may be heard, in the courtroom of the Honorable William Alsup, United States District  
5 Court, 450 Golden Gate Avenue, San Francisco, CA 94102, Facebook, Inc. (“Facebook”) will  
6 move the court for summary judgment on Facebook’s first counterclaim for breach of contract  
7 against Counterdefendant Daniel M. Miller (“Miller”). This motion is based on the Notice of  
8 Motion and Motion, the supporting Memorandum of Points and Authorities, the Declaration of  
9 Krista Holt filed in support thereof, the Declaration of Julio C. Avalos in support thereof, all  
10 pleadings on file in this action, and any other matter that may be submitted at the hearing.  
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13 Dated: March 3, 2011

ORRICK, HERRINGTON & SUTCLIFFE LLP

14 */s/ Julio C. Avalos*

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16 Julio C. Avalos  
17 Attorneys for Defendant  
18 FACEBOOK, INC.  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Counter-Plaintiff Facebook, Inc. (“Facebook”) moves this court for Summary Judgment  
4 with respect to its first counterclaim for breach of contract. The facts here are simple, undisputed,  
5 and, in large part, already law of the case. Counter-Defendant Daniel M. Miller (“Miller”)  
6 became a registered Facebook user on February 12, 2006. As a condition of registering, Miller  
7 agreed to Facebook’s Terms of Use. In so doing, Miller contractually agreed that if any dispute  
8 arose between Miller and Facebook about or involving Facebook, “you [Miller] agree that the  
9 dispute will be governed by the laws of the State of California ...[and] you [Miller] also agree to  
10 the exclusive jurisdiction and venue of the courts of the state and federal courts of Santa Clara  
11 County, California.” In breach of this term, Miller subsequently sued Facebook in the Northern  
12 District of Georgia on an alleged dispute “about or involving Facebook.” On January 15, 2010,  
13 the Honorable Judge Vining found that Miller had agreed to the forum-selection provision, that  
14 the provision was enforceable against Miller, and consequently transferred this matter here to this  
15 Court. It follows from these findings that Miller breached his contract with Facebook by suing  
16 Facebook in an improper forum. Because no material facts are disputed, Facebook is entitled to  
17 summary judgment and a finding of liability on its breach of contract counterclaim.

18 **II. STATEMENT OF UNISPURED MATERIAL FACTS**

19 **A. Miller’s Breach Of Facebook’s Terms Of Use**

20 Miller registered for a Facebook account on February 12, 2006. *See* Dkt. 71, Facebook’s  
21 Answer to Plaintiff’s Second Amended Complaint and Counterclaims (“Counterclaims”) at ¶ 15;  
22 *see also* Dkt. 111, ¶ 2. In doing so, Miller agreed to Facebook’s Terms of Use. *Id*; *see also* Dkt.  
23 17 at 2 (“The plaintiff [Miller] does not dispute that he agreed to the terms of the [Terms of  
24 Use]”). Despite agreeing to the Terms of Use and its requirement that disputes about or involving  
25 Facebook be pursued, if at all, in California, on October 9, 2009, Miller initiated this action  
26 against Facebook in the Northern District of Georgia. Dkt. 1. Facebook subsequently moved to  
27 enforce the parties’ forum selection clause and thus transfer the case to the Northern District of  
28 California. Dkt. 13.

1 On January 15, 2010, the Court granted Facebook’s motion to enforce the forum selection  
2 provision. Dkt. 17. In so doing, the Court noted that Miller “does not dispute that he agreed to  
3 the [Terms of Use].” *Id.* at 2. It then ruled that Facebook’s Terms of Use was an enforceable  
4 contract, that the forum-selection clause was an enforceable contract term that the parties had  
5 agreed to, that Miller’s complaint fell within the scope of that clause, and that the case should  
6 therefore be transferred to this Court. *Id.* at 3-4.

7 **III. ARGUMENT**

8 **A. Summary Judgment Standard**

9 Summary judgment is appropriate where “there is no genuine issue as to any material  
10 fact” and “the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c).  
11 “Material facts are those which may affect the outcome of the case.” *ViCHIP Corp. v. Lee*, 438  
12 F. Supp.2d 1087, 1092-93 (N.D. Cal. 2006) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,  
13 248 (1986)). “The moving party has the initial burden of identifying relevant portions of the  
14 record that demonstrate the absence of a fact or facts necessary for one or more essential elements  
15 of each cause of action upon which the moving party seeks judgment.” *Greenwich Ins. Co. v.*  
16 *Media Breakaway, LLC*, No. CV08-937 CAS (CTx), 2009 U.S. Dist. LEXIS 63454, at \*13 (C.D.  
17 Cal. Jul. 22, 2009) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

18 “If the moving party has sustained its burden, the nonmoving party must then identify  
19 specific facts, drawn from materials on file, that demonstrate that there is a dispute as to material  
20 facts on the elements that the moving party has contested.” *Id.* at \*13 -14, citing Fed. R. Civ. P.  
21 56(c). Based upon the uncontested facts from the pleadings and from Miller’s testimony, there  
22 are no material facts in dispute.

23 **B. Miller Breached His Contract With Facebook.**

24 This is a simple breach of contract matter. To prevail on such a claim, Facebook must  
25 establish: (1) the existence of a contract, (2) Facebook’s performance or excuse for  
26 nonperformance, (3) Miller’s breach, and (4) the resulting damages to Facebook. *See Andrew*  
27 *Smith Co. v. Paul’s Pak, Inc.*, No. C-08-048202 RMW, 2010 U.S. Dist. LEXIS 122023, at \*4-5  
28 (N.D. Cal. 2010) (citing *Durell v. Sharp Healthcare*, 183 Cal. App. 4<sup>th</sup> 1350, 1367 (2010)).

1 Based on the undisputed facts, Facebook has established all the elements for its breach of contract  
2 claim against Miller.

3 First, it is undisputed that Miller is a registered Facebook user and that he agreed to the  
4 Terms of Use contract. *See* Dkt. 111, ¶ 2; Dkt. 17 at 2. It is further undisputed—and indeed law  
5 of the case—that the Terms of Use is a contract that is valid and enforceable against Miller in this  
6 litigation. Dkt. 17 at 3 (“[i]t is standard contract doctrine that when a benefit is offered subjected  
7 to stated conditions, and the offeree makes a decision to take the benefit with the knowledge of  
8 the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly  
9 become binding to the offeree”) (citing *Register.com, Inc., v. Verio, Inc.*, 356 F.3d 393, 403 (2d  
10 Cir. 2004) (finding defendant’s online terms of service binding on plaintiff where “benefit [was]  
11 offered subject to stated conditions, and the offeree [made] a decision to take the benefit with  
12 knowledge of the terms of the offer”) (other citations omitted). The law of the case doctrine  
13 requires this Court to recognize and adopt issues previously decided in the same litigation,  
14 including those relating to contract enforcement. *See DiSimone v. Browner*, 121 F.3d 1262,  
15 1266-67 (9th Cir. 1997) (“no litigant deserves an opportunity to go over the same ground twice,  
16 hoping that the passage of time or changes in the composition of the court will provide a more  
17 favorable result the second time”); *Shum v. Intel Corp.*, No. C-02-03262-DLJ, 2008 U.S. Dist.  
18 LEXIS 83005 (N.D. Cal. Sept. 26, 2008) (court found that where it had already made several pre-  
19 trial rulings on the meaning of contract terms, they remained “law of the case”); *see also Maxit*  
20 *Designs, Inc. v. Coville, Inc.*, No. CIV. S-05-1040 WBS DAD, 2006 U.S. Dist. LEXIS 68838  
21 (E.D. Cal. Sept. 25, 2006) (“law of the case” doctrine applied to enforce arbitration clause found  
22 in numerous contracts between the parties where the court had previously enforced an identical  
23 arbitration clause in a different contract between the parties).

24 Second, there is no dispute regarding Facebook’s performance; Miller has enjoyed access  
25 to Facebook since 2006 (including access to Facebook’s Platform where he made at least one  
26 application available presumably for profit) and has testified that he is today an active Facebook  
27 user. *See* Declaration of Julio Avalos, Ex. A.

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1 Third, there is no dispute that Miller breached the forum selection clause – he initiated this  
2 action in Georgia rather than California. Dkt. 1. The Georgia court’s decision to transfer this  
3 case to this court definitively establishes that Miller breached the parties’ forum-selection clause  
4 when he sued where he did, and, as the court in *E & J Gallo Winery v. Andina Licores S.A.*, 440  
5 F. Supp. 2d 1115, 1132 (E.D. Cal. 2006), held, a breach of a forum-selection clause constitutes  
6 breach of contract.

7 Finally, Facebook was harmed by the breach, in that it expended considerable time and  
8 resources, including attorneys’ fees and costs, in order to enforce the contract and transfer this  
9 case to the agreed-upon jurisdiction. *Id.* at \*9 (awarding attorney fees and costs in defending  
10 action filed in Ecuador); *see also* Declaration of Krista Holt (“Holt Decl.”).

11 **IV. CONCLUSION**

12 For the foregoing reasons, Facebook respectfully requests that the Court grant Facebook’s  
13 Motion for Summary Judgment on its first breach of contract counterclaim.

14 Dated: March 3, 2011

ORRICK, HERRINGTON & SUTCLIFFE LLP

15  
16 /s/ Julio C. Avalos

17 Julio C. Avalos  
18 Attorneys for Defendant  
19 FACEBOOK, INC.  
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