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 9 UNITED STATES DISTRICT COURT
 10 NORTHERN DISTRICT OF CALIFORNIA
 11 SAN FRANCISCO DIVISION

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

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

**FACEBOOK, INC.’S ANSWER TO
 SECOND AMENDED COMPLAINT
 AND COUNTERCLAIMS**

DEMAND FOR JURY TRIAL

Judge: Honorable William Alsup

1 Defendant Facebook, Inc. (“Facebook”) answers the Second Amended Complaint filed by
2 Daniel M. Miller (“Miller”) as follows:

3 **THE PARTIES**

4 1. Facebook lacks sufficient information to admit or deny and on that basis denies the
5 allegations of Paragraph 1 that Miller resides in Marietta, Georgia.

6 2. Facebook admits that it is a Delaware corporation with its principal place of
7 business at 1601 S. California Avenue, Palo Alto, California 94304. Except as expressly
8 admitted, Facebook lacks sufficient information to admit or deny and on that basis denies the
9 allegations of Paragraph 2.

10 3. Facebook lacks sufficient information to admit or deny and on that basis denies the
11 allegations of Paragraph 3 that Defendant Yeo is an individual with unknown address that was not
12 ascertainable after reasonable diligence.

13 **JURISDICTION AND VENUE**

14 4. Facebook neither admits nor denies the allegations contained in Paragraph 4
15 because those allegations are conclusions of law to which no response is required. To the extent
16 those allegations may be deemed allegations of fact, Facebook denies the allegations of Paragraph
17 4.

18 5. Facebook neither admits nor denies the allegations contained in Paragraph 5
19 because those allegations are conclusions of law to which no response is required. To the extent
20 those allegations may be deemed allegations of fact, Facebook lacks sufficient information to
21 admit or deny and on that basis denies the allegations of Paragraph 5.

22 6. Facebook neither admits nor denies the allegations contained in Paragraph 6
23 because those allegations are conclusions of law to which no response is required. To the extent
24 those allegations may be deemed allegations of fact, Facebook lacks sufficient information to
25 admit or deny and on that basis denies the allegations of Paragraph 6.

26 7. Facebook admits that it does business in the state of California, including within
27 the Northern District of California. Except as expressly admitted, Facebook denies the
28 allegations of Paragraph 7.

1 Paragraph 13.

2 14. Facebook denies that it hosted an application titled *ChainRxn*. Except as expressly
3 denied, Facebook neither admits nor denies the allegations contained in Paragraph 14 because
4 those allegations are not factual allegations asserted against Facebook. To the extent those
5 allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
6 sufficient information to admit or deny and on that basis denies the allegations contained in
7 Paragraph 14.

8 15. Facebook neither admits nor denies the allegations contained in Paragraph 15
9 because those allegations are not factual allegations asserted against Facebook. To the extent
10 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
11 sufficient information to admit or deny and on that basis denies the allegations contained in
12 Paragraph 15.

13 16. Facebook neither admits nor denies the allegations contained in Paragraph 16
14 because those allegations are not factual allegations asserted against Facebook and Facebook has
15 no personal knowledge of how or if Defendant Yeo created or published an application titled
16 *ChainRxn*. To the extent those allegations may be deemed allegations of fact asserted against
17 Facebook, Facebook lacks sufficient information to admit or deny and on that basis denies the
18 allegations contained in Paragraph 16.

19 17. Facebook admits that until sometime after the initial filing of this action on
20 October 9, 2009, an application titled *ChainRxn* was available through Facebook's Platform and
21 that the uniform resource locator for the application's canvas page was
22 www.facebook.com/zwigglers. Except as expressly admitted, Facebook denies the allegations
23 contained in Paragraph 17.

24 18. Facebook admits that until sometime after the initial filing of this action on
25 October 9, 2009, an application titled *ChainRxn* was available through Facebook's Platform and
26 that the uniform resource locator for the application's canvas page was
27 www.facebook.com/zwigglers. Except as expressly admitted, Facebook denies the allegations
28 contained in Paragraph 18.

1 19. Facebook denies the allegations contained in Paragraph 19.

2 20. Facebook neither admits nor denies the allegations contained in Paragraph 20
3 because those allegations are not factual allegations asserted against Facebook. To the extent
4 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
5 sufficient information to admit or deny and on that basis denies the allegations contained in
6 Paragraph 20.

7 21. Facebook admits that its Statement of Rights and Responsibilities (“SRR”), among
8 other things, permits Facebook to remove content or information posted on Facebook. Except as
9 expressly admitted, Facebook lacks sufficient information to admit or deny and on that basis
10 denies the allegations contained in Paragraph 21.

11 22. Facebook admits that its SRR, among other things, permits it to disable an
12 account, when appropriate, for repeated infringement of intellectual property rights. Except as
13 expressly admitted, Facebook lacks sufficient information to admit or deny and on that basis
14 denies the allegations contained in Paragraph 22.

15 23. Facebook denies the allegations contained in Paragraph 23.

16 24. Facebook denies the allegations contained in Paragraph 24.

17 25. Facebook neither admits nor denies the allegations contained in Paragraph 25
18 because those allegations are not factual allegations asserted against Facebook. To the extent
19 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
20 sufficient information to admit or deny and on that basis denies the allegations contained in
21 Paragraph 25.

22 26. Facebook lacks sufficient information to admit or deny and on that basis denies the
23 allegations contained in Paragraph 26.

24 27. Facebook denies the allegations contained in Paragraph 27.

25 28. Facebook denies the allegations contained in Paragraph 28.

26 29. Facebook denies the allegations contained in Paragraph 29.

27 30. Facebook denies the allegations contained in Paragraph 30.

28 31. Facebook neither admits nor denies the allegations contained in Paragraph 31

1 because those allegations are not factual allegations asserted against Facebook. To the extent
2 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
3 sufficient information to admit or deny and on that basis denies the allegations contained in
4 Paragraph 31.

5 32. Facebook neither admits nor denies the allegations contained in Paragraph 32
6 because those allegations are not factual allegations asserted against Facebook. To the extent
7 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
8 sufficient information to admit or deny and on that basis denies the allegations contained in
9 Paragraph 32.

10 33. Facebook denies the allegations contained in Paragraph 33.

11 34. Facebook denies the allegations contained in Paragraph 34.

12 **COUNT ONE**

13 **Copyright Infringement by Defendant Yeo**

14 35. Facebook refers to and incorporates its responses set forth above to each and every
15 allegation in Paragraphs 1-34 as if fully set forth herein.

16 36. Facebook neither admits nor denies the allegations contained in Paragraph 36
17 because those allegations are not factual allegations asserted against Facebook. To the extent
18 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
19 sufficient information to admit or deny and on that basis denies the allegations contained in
20 Paragraph 36.

21 37. Facebook neither admits nor denies the allegations contained in Paragraph 37
22 because those allegations are not factual allegations asserted against Facebook. To the extent
23 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
24 sufficient information to admit or deny and on that basis denies the allegations contained in
25 Paragraph 37.

26 38. Facebook neither admits nor denies the allegations contained in Paragraph 38
27 because those allegations are not factual allegations asserted against Facebook. To the extent
28 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks

1 sufficient information to admit or deny and on that basis denies the allegations contained in
2 Paragraph 38.

3 39. Facebook neither admits nor denies the allegations contained in Paragraph 39
4 because those allegations are not factual allegations asserted against Facebook. To the extent
5 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
6 sufficient information to admit or deny and on that basis denies the allegations contained in
7 Paragraph 39.

8 40. Facebook neither admits nor denies the allegations contained in Paragraph 40
9 because those allegations are not factual allegations asserted against Facebook. To the extent
10 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
11 sufficient information to admit or deny and on that basis denies the allegations contained in
12 Paragraph 40.

13 41. Facebook neither admits nor denies the allegations contained in Paragraph 41
14 because those allegations are not factual allegations asserted against Facebook. To the extent
15 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
16 sufficient information to admit or deny and on that basis denies the allegations contained in
17 Paragraph 41.

18 42. Facebook neither admits nor denies the allegations contained in Paragraph 42
19 because those allegations are not factual allegations asserted against Facebook. To the extent
20 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
21 sufficient information to admit or deny and on that basis denies the allegations contained in
22 Paragraph 42.

23 **COUNT TWO**

24 **Contributory Copyright Infringement as to Defendant Facebook, Inc.**

25 43. Facebook refers to and incorporates its responses set forth above to each and every
26 allegation in Paragraph 1-42 as if fully set forth herein.

27 44. Facebook denies the allegations of Paragraph 44.

28 45. Facebook denies the allegations of Paragraph 45.

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Eighth Defense

Miller is barred from recovering the damages against Facebook, in whole or in part, by contractual limitations on liability.

Ninth Defense

Each of Miller’s claims is barred by the doctrine of copyright misuse.

Tenth Defense

Each of Miller’s claims is barred by the doctrine of fraud on the Copyright Office.

Eleventh Defense

Each of Miller’s claims is barred by the doctrine of laches.

Twelfth Defense

Miller’s claim for Contributory Copyright Infringement as to Facebook is barred, in whole or in part, by the passive conduit exception to copyright infringement.

Thirteenth Defense

Miller’s claim for Contributory Copyright Infringement as to Facebook is barred, in whole or in part, by the safe harbor provisions of the DMCA, 17 U.S.C. § 512 (a)-(d).

Fourteenth Defense

Miller’s claim for Contributory Copyright Infringement as to Facebook is barred, in whole or in part, because he has not pursued his claims in good faith.

Fifteenth Defense

Each of Miller’s claims is barred, in whole or in part, because Defendants’ alleged actions come within the doctrine of fair use and/or de minimis copying of protectable elements, if any.

Sixteenth Defense

Each of Miller’s claims is barred, in whole or in part, because Miller’s alleged copyrighted work lacks originality.

Seventeenth Defense

Each of Miller’s claims is barred, in whole or in part, because Miller’s alleged copyrighted work constitutes nothing more than unprotectable scene a faire.

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Eighteenth Defense

Each of Miller’s claims is barred, in whole or in part, because Miller lacks standing to bring this action.

Nineteenth Defense

Each of Miller’s claims is barred, in whole or in part, because Miller has failed to prosecute this action and/or comply with court orders.

Twentieth Defense

Each of Miller’s claims is barred, in whole or in part, by licenses, express and implied, granted or authorized to be granted by Miller.

Twenty-first Defense

Each of Miller’s claims is barred, in whole or in part, because the accused work was independently created without reference to the claimed work.

Twenty-second Defense

Each of Miller’s claims is barred, in whole or in part, because the claimed work was abandoned.

Twenty-third Defense

Each of Miller’s claims is barred, in whole or in part, for failing to join indispensable parties.

Twenty-fourth Defense

Each of Miller’s claims is barred, in whole or in part, as Miller heretofore waived, licensed, abandoned or forfeited any rights in the claimed work.

Twenty-fifth Defense

Miller’s damages, if any, are limited by Facebook’s innocent intent.

Twenty-sixth Defense

Each of Miller’s claims is barred, in whole or in part, based on the doctrine of substantial non-infringing use, although Facebook submits that Miller bears the burden of proving the doctrine’s inapplicability.

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1 **COUNTERCLAIMS OF FACEBOOK, INC.**

2 Pursuant to Rule 13 of the Federal Rules of Civil Procedure, Facebook, Inc. (“Facebook”
3 or “Counterclaimant”) hereby asserts counterclaims against Daniel M. Miller (“Miller” or
4 “Counterdefendant”), and alleges as follows:

5 **Jurisdiction and Venue**

6 1. This Court has jurisdiction over the subject matter of these counterclaims under 28
7 U.S.C. § 1367(a) to the extent this Court has jurisdiction over Miller’s claims under 28 U.S.C. §
8 1331.

9 2. Jurisdiction and venue are proper in this jurisdiction pursuant to 28 U.S.C §§ 1331,
10 1332 and 1391(b).

11 **The Parties**

12 3. Facebook, Inc. is a Delaware corporation with its principal place of business at
13 1601 S. California Avenue, Palo Alto, California 94304.

14 4. On information and belief, Counterdefendant is an individual residing at 2079
15 Kinsmon Drive, Marietta, Georgia 30062.

16 **Factual Background**

17 5. Facebook is an interactive computer service that enables networking amongst
18 friends, family and co-workers. In addition, Facebook provides a platform for third-party
19 developers to offer their own applications (collectively, “Facebook’s Services”). Facebook was
20 founded in February 2004 and is the most popular networking site on the Internet with over 500
21 million users worldwide.

22 6. On February 12, 2006, Counterdefendant became a registered Facebook user.
23 When Counterdefendant registered, he was required to navigate through a series of web pages and
24 registration prompts where he provided a valid email address, created a password, selected a
25 password and agreed to Facebook’s Terms of Use (now referred to as the SRR). Specifically,
26 Counterdefendant was required to check a box representing that: “I have read and agree to the
27 Terms of Use.” The registration process could not be completed without fulfilling each of these
28 registration steps.

1 inclusive, of this countercomplaint as though fully set forth herein.

2 15. Counterdefendant entered into a contract with Facebook on February 12, 2006.

3 16. The contract provides that any “dispute will be governed by the laws of the State
4 of California” with the “exclusive jurisdiction and venue [in] the courts of the state and federal
5 courts of Santa Clara County, California.”

6 17. Counterdefendant breached the agreement by filing his lawsuit in the Northern
7 District of Georgia making claims of alleged infringement of his intellectual property rights by
8 another Facebook user on Facebook’s networking internet service. In addition, Counterdefendant
9 breached the agreement by failing to notify Facebook of the alleged infringement pursuant to the
10 procedures outlined in the SRR.

11 18. Facebook has fulfilled all of its obligations under the contract and is not in breach
12 of the contract.

13 19. Counterdefendant’s breach of the agreement has caused damages to Facebook in
14 an amount to be determined at trial.

15 **SECOND CLAIM FOR RELIEF**
16 **(Breach of Contract)**

17 20. Facebook hereby realleges and incorporates by reference paragraphs 1 through 19,
18 inclusive, of this countercomplaint as though fully set forth herein.

19 21. On information and belief, on or about April 23, 2010, Counterdefendant created
20 an application entitled “Obechi” and made that application available through Facebook’s
21 Platform.

22 22. On information and belief, at least as early as April 23, 2010, Counterdefendant
23 agreed to Facebook’s Developer Principles & Policies (“DPP”) in connection with the Obechi
24 application.

25 23. Facebook’s DPP provide, among other things, that developers such as
26 Counterdefendant “must provide a link to [their] privacy policy and any other applicable policies
27 on every page of [their] application”; “must give users control over their data by posting a privacy
28 policy that explains what data [the developer] collect[s], and how [the developer] will use, store,

1 and/or transfer their data”; and “must not require users to grant additional permissions or add
2 Application Integration Points, and must only request extended permissions at reasonable times
3 when the user engages with features that would require the use.”

4 24. On information and belief, at least as early as December 7, 2009 to date,
5 Counterdefendant has failed to abide by the DPP.

6 25. Facebook has fulfilled all of its obligations under the DPP and is not in breach
7 thereof.

8 26. Counterdefendant’s breach of the DPP has caused damages to Facebook in an
9 amount to be determined at trial.

10 **THIRD CLAIM FOR RELIEF**

11 **(Breach of Implied Covenant of Good Faith and Fair Dealing)**

12 27. Facebook hereby realleges and incorporates by reference paragraphs 1 through 26,
13 inclusive, of this countercomplaint as though fully set forth herein.

14 28. The law implies a covenant of good faith and fair dealing by which
15 Counterdefendant promised to perform fairly, honestly, and reasonably the terms encompassed in
16 the SRR and Facebook’s DPP.

17 29. Counterdefendant breached the implied covenant of good faith and fair dealing by
18 failing to notify Facebook of the alleged infringement through the means outlined in the SRR and
19 by filing a lawsuit in the Northern District of Georgia rather than in the Northern District of
20 California as required by the SRR.

21 30. Counterdefendant also breached the implied covenant of good faith and fair
22 dealing by failing to abide by the DPP and failing to adhere to its terms.

23 31. Counterdefendant’s acts frustrated the purpose of the SRR and the DPP (the
24 “Agreements”) and prevented Facebook from receiving the benefit of the Agreements, which was
25 to allow free access to Facebook’s networking website and platform by both individual users and
26 developers in order to promote and enhance communication, creativity, and interaction among
27 users.

28 32. Facebook has fulfilled its obligations under the Agreements and is not in breach of

1 the Agreements.

2 33. As a result of Counterdefendant's breach of the implied covenant of good faith and
3 fair dealing, Facebook has been damaged in an amount to be proven at trial.

4 **PRAYER FOR RELIEF**

5 WHEREFORE, based upon the foregoing, Facebook prays for the following relief:

6 1. That the Second Amended Complaint be dismissed with prejudice and that
7 Counterdefendant take nothing by way of his Second Amended Complaint;

8 2. An entry of judgment in favor of Facebook and against Counterdefendant on all
9 causes of action;

10 3. Compensatory, consequential, and incidental damages including, without
11 limitation, compensatory damages reasonably incurred by Facebook to transfer the action to
12 California as required by the SRR, in an amount according to proof at trial;

13 4. For costs of suit and attorneys' fees incurred herein;

14 5. Such other relief that the Court may deem proper.

15 **JURY DEMAND**

16 Facebook hereby demands a trial by jury for all issues so triable.

17
18 Dated: August 9, 2010

ORRICK, HERRINGTON & SUTCLIFFE LLP

19
20 s/Thomas J. Gray/s

21 _____
22 Thomas J. Gray
23 Attorneys for Defendant
24 FACEBOOK, INC.