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November 29, 2010

The Honorable William J. Alsup
United States District Judge
Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94012

Re: Miller v. Facebook, Inc. and Yao Wei Yeo, 5:10-CV-00264-WHA

Dear Judge Alsup:

Facebook, Inc. (“Facebook”) hereby responds to Plaintiff’s November 19, 2010 letter requesting an order compelling certain discovery responses. Plaintiff’s request should be denied. For starters, the request is both premature and unnecessary. Prior to seeking the Court’s intervention, Plaintiff’s counsel never met and conferred on Mr. Miller’s discovery requests. In fact, following the start of the parties’ protective order negotiations, Plaintiff never so much as asked for such a meet and confer; the November 19 filing was the first Facebook heard of it.

Following Plaintiff’s November 19 filing, Facebook requested—and the parties held—the first substantive meet and confer in this case. The meet and confer took place on Friday, November 26, 2010. During that conference, Plaintiff’s counsel, Brian Hancock, refused Facebook’s offer to go through Plaintiff’s discovery requests one-by-one. Mr. Hancock represented that he believed that doing so would take too long and that instead the parties should stipulate to a new scheduling order in which Facebook would be required to produce documents three weeks before Plaintiff would produce anything responsive to Facebook’s already pending requests. Nevertheless, and at Facebook counsel’s insistence, the parties engaged in some substantive discussion on Miller’s discovery requests to Facebook. At the same time, however, Mr. Hancock was unwilling to discuss Facebook’s discovery served upon Mr. Miller.

Plaintiff’s recitation of the record leading up to this motion is inaccurate. For the most part, Plaintiff’s November 19 letter cherry-picks from outdated communications that took place between counsel two and three months ago. For nearly two months, Facebook has been regularly seeking to get a stipulated protective order on file in this matter.

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Plaintiff's failure to agree to standard protective order terms is what has caused delays in this case. Given the sensitive nature of the information at issue, the parties have long been in agreement that no production would take place until a protective order was in place. On October 13, 2010, Facebook counsel wrote to Plaintiff's counsel regarding such a protective order. Given the particularly sensitive nature of some of the discovery likely to be at issue in this litigation, Facebook counsel suggested that the parties' proposed protective order needed to have "different categories of protected documents." "So for instance" Facebook counsel wrote, "we're proposing that rather than having one catch-all category, we would have a base level of protection for documents marked CONFIDENTIAL and then a higher-level of protection for documents marked HIGHLY CONFIDENTIAL." A true and correct copy of this e-mail is attached hereto as Exhibit A. Later that day, Plaintiff's counsel responded that he had no problem with such distinctions. *Id.*

Facebook e-mailed its proposed draft to Plaintiff's counsel on October 19, 2010. With the exception of some minor redactions, the draft was taken verbatim from the Northern District of California's standard protective order governing the production of sensitive information. A true and correct copy of this e-mail is attached hereto as Exhibit B. Three days later, on October 22, 2010, Plaintiff's counsel responded with a multi-page objection to Facebook's proposal. He objected primarily to certain standard Northern District provisions regarding the vetting of expert witnesses and the inspection of sensitive source code. According to Plaintiff, these provisions had been proposed by Facebook in order to cause undue delay and cost in this litigation. A true and correct copy of this e-mail is attached hereto as Exhibit C. On October 27, 2010, defense counsel responded that a "meet and confer may be required" with respect to these objections. "Both of the provisions," defense counsel noted, "are taken virtually verbatim from the Northern District of California's standard protective order for cases in which there is highly sensitive material at issue." Facebook counsel provided Plaintiff's counsel with a link to the form order. A true and correct copy of this e-mail is attached hereto as Exhibit D.

Following that e-mail, Facebook tried to wrap up any outstanding protective order issues. On November 11, 2010, Facebook counsel alerted Plaintiff that the protective order had a possible gap with respect to source code inspection logs. In that e-mail, Facebook counsel cited to *HTI IP LLC v. Webtech Wireless Inc.*, an October 20, 2010 Central District of California opinion concerning a protective order dispute dealing with sensitive source code. No. 10cv1783 DMS (NLS), 2010 U.S. Dist. LEXIS 111441 (S.D. Cal. Oct. 20, 2010). Rather than risk litigating the issue later on, Facebook suggested that the parties come to an agreement on the issue now. A true and correct copy of this e-mail is attached hereto as Exhibit E. Plaintiff's counsel indicated that he was amenable to modifying the protective order. A true and correct copy of this e-mail is attached hereto as Exhibit F.

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That was the last communication between the parties. Without warning, one week later Plaintiff's counsel blindsided Facebook with three separate, multijurisdictional filings. On November 19, 2010, Plaintiff filed a Motion for Entry of Protective Order and the instant letter brief seeking a motion to compel discovery responses here in the Northern District of California. In the Northern District of Georgia, Plaintiff also filed a Motion to Quash certain third-party discovery, a motion that has since been transferred to this Court. A true and correct copy of the transfer order is attached hereto as Exhibit G.

On November 23, 2010, Facebook proposed that the parties hold an initial meet and confer on the parties' outstanding discovery. As defense counsel stated in a follow-up e-mail to Plaintiff, "[i]t remains our position that the issues raised in your motions are better resolved through discussion than motion practice." A true and correct copy of this e-mail is attached hereto as Exhibit H.

The meet and confer was held on Friday, November 26, 2010. Facebook counsel began by suggesting that the parties go through Mr. Miller's discovery requests, one-by-one. Plaintiff's counsel declined, stating that this process would take too long and that it was unlikely to be productive. Instead, Plaintiff's counsel suggested that the parties agree to a new discovery and case schedule. All dates in the case would be pushed out six weeks. Facebook would have until December 20 to supplement its discovery responses. Plaintiff's supplemental discovery responses would be served three weeks later. Defense counsel noted that there was no reason why Plaintiff's discovery responses should come nearly a month after Facebook's. Plaintiff was obligated to respond, the responses were already due, and nothing in Facebook's supplemental responses would affect Plaintiff's production.

Also, despite Plaintiff's counsel initial resistance, defense counsel suggested that the parties would be better served by engaging in at least some substantive discussion regarding Plaintiff's discovery requests. Defense counsel explained Facebook's objections to a number of Plaintiff's requests and discussed the current state of Facebook's document collection. The parties failed to come to any concrete agreements during the parties' initial conference. However, the call was productive and demonstrates why further discussion between the parties—and not premature, time-consuming Court intervention—is required here.

Very truly yours,
/s/ Julio C. Avalos

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