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12 FACEBOOK, INC.

13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN JOSE DIVISION**

17 FACEBOOK, INC., a Delaware
18 corporation,

19 Plaintiff,

20 v.

21 JEREMI FISHER; PHILIP POREMBSKI;
22 RYAN SHIMEALL; and JOHN DOES 1-
23 25, individuals; and CHOKO SYSTEMS
24 LLC; HARM, INC.; PP WEB SERVICES
LLC; iMEDIA ONLINE SERVICES LLC;
and JOHN DOES 26-50, corporations,

25 Defendants.

Case No. C-09-05842-JF

**PLAINTIFF FACEBOOK INC.'S
ADMINISTRATIVE REQUEST PURSUANT
TO LOCAL RULE 7-11 FOR LEAVE TO
CONDUCT DISCOVERY PRIOR TO
RULE 26 CONFERENCE**

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27
28 Administrative Request Pursuant to Local Rule 7-11 for
Leave To Conduct Discovery Prior to Rule 26 Conference
Case No. C-09-05842-JF

60406-0005/LEGAL18427017.1

1 Pursuant to Local Rule 7-11, Facebook, Inc. (“Facebook”) seeks an order allowing it to
2 conduct discovery for the limited purpose of obtaining (1) possession of Defendant Philip
3 Porembski’s computer containing property stolen from Facebook (“Porembski’s Computer”),
4 which has been recovered by the Sacramento, California Sheriff’s Department, (2) a copy of
5 police reports and witness statements associated with the recovery of Porembski’s Computer, and
6 (3) other discovery directly related to the recovery of Porembski’s Computer or information that
7 is contained on Porembski’s Computer.

8 **MEMORANDUM OF POINTS AND AUTHORITY**

9 **I. SUMMARY OF MOTION**

10 Facebook filed this lawsuit against Defendants for numerous misuses and abuses of
11 Facebook's website, network and the Facebook Platform, including large-scale phishing¹ and
12 spamming campaigns. Defendants are currently enjoined from conducting any activity on
13 Facebook. After stipulating to injunctive relief, Defendants stopped participating in this litigation
14 and are in default. In the course of preparing its request for entry of permanent injunctive relief
15 against Defendants Porembski and PP Web Services, Inc., and request for entry of default
16 judgment awarding damages, Facebook recently learned that Defendant Porembski attempted to
17 dispose of a computer containing information stolen from Facebook as well as other evidence of
18 the illegal Facebook-related activities perpetrated by Defendants. Facebook believes that this
19 evidence is likely to provide further support for its request for damages under the CAN-SPAM,
20 the Computer Fraud and Abuse Act (“CFAA”), California Business and Professional Code
21 § 22948, California Penal Code § 502, and Breach of Contract claims pled in its Complaint.
22 Facebook, therefore, requests that the Court allow it to conduct limited discovery to recover the
23 information that was discarded by Defendant Porembski and understand the circumstances
24 regarding the discovery of Porembski’s Computer.

25
26
27 ¹ “Phishing” describes the attempt to acquire sensitive information such as usernames and
28 passwords by masquerading as a trustworthy entity in an electronic communication.

1 A stipulation was not obtained from defendants Jeremi Fisher, Philip Porembski, Ryan
2 Shimeall, Choko Systems LLC, PP Web Services LLC, and iMedia Online Services LLC,
3 because all defendants are in default. Declaration of Joseph Cutler in Support of Plaintiff
4 Facebook Inc.'s Administrative Request for Expedited Discovery Prior to Rule 26 Conference
5 ("Cutler Decl."), ¶ 2. Pursuant to L.R. 7-11, Facebook will deliver the motion and all attachments
6 to each of the defendants at their last known physical and email addresses.

7 II. STATEMENT OF THE FACTS

8 Facebook owns and operates the world's largest social network. Defendants participated
9 in a phishing and spamming campaign against Facebook that continued unabated until Facebook
10 filed this lawsuit and obtained injunctive relief from this Court. After the Court issued a
11 temporary restraining order against all defendants, Defendant Porembski and PP Web Services,
12 Inc. stipulated to a Preliminary Injunction and the other Defendants stipulated Permanent
13 Injunctions. Docket Entry ("DE") 21, 29, 30, 33.

14 Defendants Porembski and PP Web Services were represented by counsel until March 15,
15 2010, at which time the court permitted Porembski's counsel to withdraw and provided
16 Defendants with 30 days to secure substitute counsel and to file a responsive pleading. DE 43.
17 Defendants did not retain replacement counsel and on April 21, 2010, Default was entered against
18 all Defendants. DE 51. No defendant filed an Answer and the parties have not conducted a Rule
19 26(f) conference.

20 On May 28, 2010, Deputy Hunt on behalf of the Sacramento Sheriff's Department,
21 contacted Facebook's counsel and informed counsel that a citizen had recovered an abandoned
22 computer and determined that the computer had previously belonged to Defendant Porembski.
23 Cutler Decl., ¶ 3. Deputy Hunt indicated that the reporting citizen had determined that the
24 computer contained information belonging to Facebook. *Id.* The computer is currently residing
25 in the Sacramento Sheriff's Department evidence locker. *Id.* ¶ 4. The Sacramento Sheriff's
26 Department has informed Facebook that it would release the computer and related reports to
27 Facebook upon presentation of a subpoena from Facebook. *Id.* ¶ 5. The Sheriff's Department
28

1 refused to provide Facebook with the identity of the reporting citizen, but stated that this
2 information was contained in the police report, which would be disclosed to Facebook in response
3 to a court order. *Id.* ¶ 6.

4 Facebook understands that the computer contains information belonging to Facebook and
5 likely contains information that is directly relevant to the issues in this case, including
6 Defendants' illegal activities and damages suffered by Facebook. *Id.* ¶ 7.

7 III. ARGUMENT

8 Rule 45 authorizes issuance of a subpoena to command a nonparty to produce designated
9 documents, electronically stored information, or tangible things in its possession, custody or
10 control. Fed. R. Civ. P. 45(a)(1)(A)(iii). “[T]he scope of discovery through subpoena is the same
11 as that applicable to Rule 34 and the other discovery rules.” *See* Advisory Committee Notes
12 (1970). Rule 34 states that “[a] party may serve on any other party a request within the scope of
13 Rule 26(b).” Fed. R. Civ. P. 34(a). Rule 26(b) states that “[p]arties may obtain discovery
14 regarding any nonprivileged matter that is relevant to any party's claim or defense.” Fed. R. Civ.
15 P. 26(b). While the scope of discovery is broad, it is subject to certain limitations and is not
16 without “ultimate and necessary boundaries.” *Gonzales v. Google, Inc.*, 234 F.R.D. 674, 680
17 (N.D.Ca. 2006).

18 Under Rule 26, a court must limit the frequency or extent of discovery if it determines any
19 of the following:

- 20 (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained
21 from some other source that is more convenient, less burdensome, or less expensive;
- 22 (ii) the party seeking discovery has had ample opportunity to obtain the information by
23 discovery in the action; or
- 24 (iii) the burden or expense of the proposed discovery outweighs its likely benefit,
25 considering the needs of the case, the amount in controversy, the parties' resources, the
26 importance of the issues at stake in the action, and the importance of the discovery in
27 resolving the issues.

28 *See* Fed. R. Civ. P. 26(b)(2)(C)(i)-(iii).

Rule 26(d) (1) further states, “A party may not seek discovery from any source before the

1 parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial
2 disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court
3 order.” *See* Fed R. Civ. P. 26(d) (1). Courts in this district apply the “good cause” standard in
4 determining whether discovery should proceed prior to a Rule 26(f) conference. *See Semitool,*
5 *Inc. v. Tokyo Electron Am.*, 208 F.R.D. 273, 276 (N.D.Cal.2002). “Good cause may be found
6 where the need for expedited discovery, in consideration of the administration of justice,
7 outweighs the prejudice to the responding party.” *Id.*

8 Here, Facebook requests an order allowing it to subpoena third parties to obtain
9 Poremski’s Computer, which was abandoned by Poremski, and to obtain the police report and
10 other information related to the recovery of Poremski’s Computer. As a result of Defendants’
11 refusal to participate in this litigation, Facebook has not conducted formal discovery. Had
12 Defendants’ appeared, Facebook would have conducted discovery directly from Defendant
13 Poremski, which would have included the discovery that it seeks through this administrative
14 request.

15 Good cause exists to obtain this information because Facebook has been informed that
16 Poremski’s Computer contains information that belongs to Facebook and there is reason to
17 believe that this evidence will be directly relevant to the remaining issues in this case. Cutler
18 Decl. ¶ 7. Default has been entered against defendants, and Facebook now needs to present
19 evidence to the court to support its request for entry of permanent injunctive relief against
20 defendants Poremski and PP Web Services, Inc. as well as an award of damages against all
21 defendants.

22 Evidence related to Defendant Poremski’s unauthorized access of Facebook, illegal use
23 of purloined Facebook accounts to send unsolicited commercial messages to Facebook users, and
24 other wrongful activities that may be contained on Poremski’s computer is likely to be directly
25 relevant to Facebook’s claim for damages pursuant to each of its five counts raised in the
26 Complaint. Complaint at 13-19. Defendant’s refusal to participate in this litigation has
27 prejudiced Facebook by preventing it from obtaining this information directly from Defendant.
28

1 Moreover, it appears that Defendant Porembski has engaged in spoliation of evidence by
2 attempting to dispose of his computer containing information relevant to this matter.

3 Facebook's need for the requested limited discovery outweighs any prejudice to the
4 responding parties or defendants. The Sacramento Sheriff's Department contacted Facebook and
5 has voluntarily offered to provide the information requested in this Administrative request
6 provided that it receives a subpoena authorizing it to release Porembski's Computer and related
7 information to Facebook. Depending on the information obtained from the Sacramento Sheriff's
8 Department, Facebook may also need to follow-up with the citizen who found Porembski's
9 Computer and turned it over to law enforcement. Facebook therefore requests the ability to
10 conduct discovery, if needed, on the reporting citizen that is limited to issues related to how
11 Porembski's Computer came into the possession of the reporting citizen and what activities led
12 the reporting citizen to contact law enforcement.

13 There is also no prejudice to Defendants as they have refused to participate in this
14 litigation and Defendant Porembski has intentionally attempted to keep this information from
15 Facebook by attempting to dispose of the subject computer.

16 CONCLUSION

17 For the reasons set forth above, Facebook respectfully requests that the Court promptly
18 grant this motion for leave for expedited third-party discovery.

19 DATED: June 4, 2010

PERKINS COIE LLP

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21 By: /s/ James R. McCullagh

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Facebook, Inc.

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CERTIFICATE OF SERVICE

I certify that on June 4, 2010, I sent the foregoing ADMINISTRATIVE REQUEST PURSUANT TO LOCAL RULE 7-11 FOR LEAVE TO CONDUCT DISCOVERY PRIOR TO RULE 26 CONFERENCE, which was filed with the Clerk of the Court using the CM/ECF system, via U.S. Mail and electronic mail to the following Defendants:

Jeremi Fisher
Choko Systems LLC
35 Jackson Street
Akron, New York 14001
chokosystems@gmail.com

Philip Poremsbki
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Rancho Cordova, California 95670
phil420@gmail.com

Ryan Shimeall
iMedia Online Services LLC
10299 Julian Court
Westminster, Colorado 80031
ryanlinx@yahoo.com

I certify under penalty of perjury that the foregoing is true and correct.

DATED this 4th day of June 2010.

By: /s/ James R. McCullagh
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