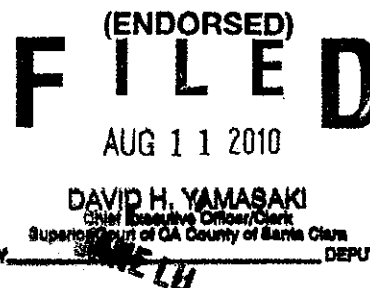


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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 10 COUNTY OF SANTA CLARA

12 KAREN BETH YOUNG,
 13 Plaintiff,
 14 v.
 15 FACEBOOK, INC.,
 16 Defendant.

CASE NO. 110 CV 178574

**DEFENDANT FACEBOOK, INC.'S
 EX PARTE APPLICATION FOR AN
 ORDER VACATING, OR, IN THE
 ALTERNATIVE, MODIFYING
 COURT'S TEMPORARY
 RESTRAINING ORDER OF AUGUST
 9, 2010 PURSUANT TO C.C.P.
 SECTIONS 533 AND 1008**

19 **I. INTRODUCTION.**

20 On August 9, 2010, the Court entered an ex parte temporary restraining order (the
 21 "August 9 TRO") requiring Facebook, Inc. ("Facebook") to preserve certain categories of
 22 evidence allegedly related to Plaintiff's pro per Complaint. Though present outside the
 23 courtroom, Facebook's counsel did not have the opportunity to participate in the ex parte
 24 proceeding. The Court apparently entered the TRO based on Plaintiff's representation that it was
 25 Facebook policy to preserve these categories of electronic data for 90 days, and so there would be
 26 minimal prejudice to Facebook in memorializing its own preservation policy in a TRO.
 27 However, Plaintiff's representation was wrong. Though Facebook does generally maintain
 28 certain access logs for 90 days, it does not maintain the overbroad categories of information that

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EX PARTE APPL. FOR ORDER VACATING COURT'S AUGUST 9, 2010 ORDER RE TRO
 CASE NO.: 110 CV 178574

1 Plaintiff seeks to preserve. Nor should it have to. Indeed, compliance with the Court's order
2 would be overwhelmingly onerous, if possible at all. For example, the Court has ordered
3 Facebook to preserve all electronic account information "past, present and future" related to a
4 Facebook group page that is altered every few minutes by one of its over 1 million users. The
5 order requires such preservation regardless of whether the information has anything whatsoever
6 to do with Plaintiff's complaint. It is overly burdensome and prejudicial to require Facebook—
7 under penalty of violating a Court order—to seek out and preserve electronically stored
8 information that is almost certainly irrelevant to the underlying case and that Plaintiff would have
9 no right to obtain through discovery. This is doubly true where, as here, no risk of destruction of
10 any relevant evidence has or could be shown. Accordingly, and because this state's discovery
11 rules already provide Plaintiff with the relief that she seeks, Facebook respectfully requests that
12 the Court vacate, or, in the alternative, modify the August 9 TRO.

13 **II. BACKGROUND OF RELEVANT FACTS.**

14 **A. Plaintiff's Complaint Against Facebook.**

15 Plaintiff filed her Complaint in pro per against Facebook on July 31, 2010. (*See*
16 Declaration of Julio C. Avalos In Support of Facebook's Ex Parte Application ["Avalos Decl."] ¶
17 2) Although the "Factual History" recited in the Complaint is not altogether clear, it appears that
18 Plaintiff's grievances against Facebook center around her "bipolar emotional disability" and
19 Facebook's alleged failure to accommodate this condition. (Dkt. No. 1 at ¶ 7) Plaintiff alleges
20 that Facebook's alleged "hurtful handling of the Plaintiffs [sic] account by showing a lack of
21 regard and careless conduct," give rise to a variety of claims, including multiple constitutional
22 violations. (*Id.* at ¶¶ 16-72)

23 **B. Plaintiff's Ex Parte Application.**

24 On August 6, 2010, Plaintiff served Facebook with an ex parte application seeking a
25 preliminary injunction "for the preservation of evidence." (*Id.*) Plaintiff's proposed order sought:
26 (1) "Any/all of the 'Karen Beth Young' electronic account information be preserved
27 as evidence to include all; pages, messages, instant messages, photos, posts or other information
28 pertaining to the account;"

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1 (2) That "[a]ny/all of the ... electronic account information, past, present and future
2 [related to a certain "Dear Lord" webpage] be preserved as evidence"; and

3 (3) "Any/all of the 'Petition to remove facebook group praying for President Obama's
4 death' electronic account information, past, present and future be preserved evidence."
5 (*Id.*)

6 **C. The August 9, 2010 Hearing On Plaintiff's Ex Parte Application.**

7 Facebook counsel was present outside the Department 2 courtroom on August 9, 2010, but
8 was not advised by the clerk that the Court was hearing ex parte proceedings in the Court's
9 antechambers and/or chambers rather than the courtroom. (*Id.* at ¶¶ 4-7) Counsel waited outside
10 the locked doors to the courtroom for approximately an hour. (*Id.*) Shortly after 9:00 a.m., after
11 knocking on the locked courtroom doors, a clerk came out and led counsel to the judge's
12 chambers. (*Id.*)

13 In a brief conversation with Facebook counsel, Judge Elfving represented that he was
14 covering for Judge McKenney on that day, that Plaintiff had in fact shown up through Judge
15 Elfving's antechamber to present her ex parte application in the Judge's chambers, and that he
16 had converted her ex parte request for a preliminary injunction into a temporary restraining order.
17 (*Id.*) Other than changing the styling of the injunction, the substance of that order was kept the
18 same. (*Id.*)

19 According to Judge Elfving, the Court had not thought it proper to issue a preliminary
20 injunction on an ex parte basis. (*Id.* ¶ 7) However, Judge Elfving stated that Plaintiff had
21 represented that it was Facebook's stated policy on its website to maintain all electronic
22 information stored on its service for 90 days. (*Id.*) The Court stated that based on this fact, he did
23 not perceive prejudice to Facebook in issuing a temporary restraining order requiring Facebook to
24 preserve all of the data listed in Plaintiff's proposed order, as Facebook apparently was already
25 preserving this data for several months. (*Id.*) The August 9 temporary restraining order adopts in
26 full the categories of data listed in Plaintiff's proposed order. (*Id.* at Ex. A)

27 **D. Facebook's Notice To Plaintiff Of This Ex Parte Proceeding.**

28 At approximately 4:00 p.m. on August 9, 2010, Facebook counsel Julio Avalos and Tom

1 Gray telephoned Plaintiff at the telephone number listed in her Complaint. (*Id.* at ¶ 9) Facebook
2 counsel left a voicemail message for Plaintiff providing her notice that at 8:15 a.m. on
3 Wednesday, August 11, 2010, Facebook would be filing an ex parte application with Judge
4 Elfving requesting that the August 9 temporary restraining order be dissolved, vacated, and/or
5 otherwise modified. (*Id.*)

6 On August 10, 2010, Plaintiff telephoned both Mr. Avalos and Mr. Gray to advise them
7 that she would be opposing this application. (*Id.* at ¶ 10) Plaintiff also e-mailed Mr. Avalos and
8 Mr. Gray to confirm her opposition to the ex parte application. (*Id.* at ¶ 10)

9 **III. ARGUMENT.**

10 The Court should vacate the August 9 TRO for three reasons. First, the TRO was
11 premised on incorrect facts relating to what data Facebook was preserving or could preserve.
12 Second, as currently drafted, it is overwhelmingly burdensome—if not flatly impossible—for
13 Facebook to comply with the TRO. It is doubtful that Facebook could preserve all past, present
14 and future posts to a group site with over 1 million users constantly uploading data to the group
15 site without first expending unreasonable amounts of resources. Nor should Facebook have to
16 risk violating a court order by not preserving many gigabytes of data that have nothing
17 whatsoever to do with Plaintiff's complaint. The ends of justice would be served by the
18 modification or dissolution of the TRO. Third, basic discovery obligations are already imposed
19 on Facebook requiring it to preserve evidence reasonably related to the current litigation between
20 the parties. No threat of destruction of relevant evidence exists.

21 **A. A Motion To Vacate, Dissolve, Or Modify A Temporary Restraining Order**
22 **Should Be Granted Where New Or Different Facts Require Reconsideration**
Of The Order Or Where Such Dissolution Would Serve The Ends Of Justice.

23 A motion to vacate or modify an order is appropriate when "new or different facts,
24 circumstances, or law" dictate that that a court's original basis for issuing that order should be
25 reconsidered. (C.C.P. § 1008) "If the trial court believes reconsideration is warranted, it can
26 amend, modify or revoke its previous order." (*Glade v. Glade* (1995) 38 Cal.App.4th 1441, 1457
27 [45 Cal. Rptr. 2d 695]) Under California Code of Civil Procedure Section 333, "[i]n any action,
28 the court may on notice modify or dissolve an injunction or temporary restraining order upon a

1 showing that there has been a material change in the facts upon which the injunction or temporary
2 restraining order was granted ... or that the ends of justice would be served by the modification or
3 dissolution of the injunction or temporary restraining order.” (C.C.P. § 333)

4 **B. Facebook Cannot Reasonably Comply With the Court’s Order.**

5 Based on Plaintiff’s representations of Facebook business policy, the Court perceived no
6 prejudice from granting Plaintiff’s ex parte application for a temporary restraining order because
7 Facebook in any event preserved the targeted information for 90 days. (Avalos Decl. ¶ 7) But
8 Plaintiff’s representation was wrong. Facebook cannot preserve all of the electronic information
9 generated by its over 500 million users. It would be extremely technically difficult and
10 prohibitively expensive to do so, if possible at all.

11 For the same reason Facebook cannot comply with the Court’s TRO. For instance, the
12 order currently requires Facebook to preserve “any/all of the ‘DEAR-LORD-THIS-YEAR-YOU-
13 TOOK-MY-FAVORITE-ACTOR-PATRICK-SWAYZIE-YOU-TOOK-MY-FAVORITE-
14 ACTRESS-FARAH-FAWCETT-YOU-TOOK-MY-FAVORITE-SINGER-MICHAEL-
15 JACKSON-I-JUST-WANTED-TO-LET-YOU-KNOW-MY-FAVORITE-PRESIDENT-IS-
16 BARACK-OBAMA-AMEN’ electronic account information, past present and future’ as
17 evidence.” This Facebook group page has over one million active users. (Avalos Decl. at Ex. B)
18 Updates to the page are made by any number of users every couple of minutes, if not seconds,
19 and the overwhelming majority of these updates, if not all of them, are wholly irrelevant to
20 Plaintiff’s pro per Complaint. (*Id.* ¶ 11). If content exists within the page that Plaintiff believes
21 and shows is relevant to her claims, she should identify it with particularity.

22 Similarly, Facebook cannot comply with the Court’s order that Facebook preserve
23 anything and everything associated with Plaintiff’s account pages. Consistent with its discovery
24 obligations, Facebook has and will preserve data reasonably within its control relevant to
25 Plaintiff’s claims. But Facebook cannot preserve content or information that is not in its
26 possession or reasonably accessible to it, such as “instant messages.”

27 And finally, for the same reasons, Facebook cannot comply with the Court’s order that it
28 preserve “[a]ny/all of the Petition to remove facebook group praying for President Obama’s

1 death' electronic account information, past, present and future." First, there are at least three
2 groups on Facebook with this title and Plaintiff fails to provide any information that would allow
3 Facebook to identify which group she even contends is at issue. Second, at least one of these
4 groups has nearly 1 million users updating information on a constant basis. Moreover, there is no
5 conceivable connection between any of these groups and this litigation. (*Id.* ¶ 12)

6
7 **C. Basic Discovery Obligations Already Provide Plaintiff With The Relief She**
8 **Seeks.**

9 In addition to being virtually impossible to comply with, the August 9 TRO is also
10 unnecessary. Plaintiff, representing herself, may be unaware that parties to a litigation are
11 required to preserve discovery reasonably relevant to a litigation. The statute on which Plaintiff
12 bases her request, California Civil Procedure Code 2035.010, does in fact provide some rights
13 relating to the preservation of evidence, but only *before* a litigation has begun. Once a litigation
14 is instituted, normal discovery obligations are triggered, making additional protections
15 superfluous. The plaintiff has made no showing of any risk of destruction of relevant evidence.
16 Accordingly, the Court's TRO is unnecessary and materially prejudicial to Facebook. Should
17 Plaintiff come to feel that Facebook has not complied with its discovery obligations, she will have
18 recourse to discovery sanctions and other remedies against Facebook. The Court's TRO actually
19 hinders, rather than promotes, justice.

20 **D. CONCLUSION.**

21 Accordingly, Facebook respectfully requests that the August 9, 2010 temporary
22 restraining order against Facebook be dissolved or vacated, or otherwise modified in the form
23 attached in the concurrently-filed proposed order.
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1 Dated: August 10, 2010

Respectfully submitted,

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3
4 I. NEEL CHATTERJEE
5 THOMAS J. GRAY
6 JULIO C. AVALOS

7 Attorneys for Defendant
8 FACEBOOK, INC.
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