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10 **UNITED STATES DISTRICT COURT**  
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
12 **SAN JOSE DIVISION**

13 FACEBOOK, ) No. 5:08-cv-05780-JW  
14 Plaintiff[s], )  
15 v. ) **NOTICE OF MOTION AND MOTION**  
16 POWER VENTURES, ) **FOR LEAVE TO FILE BRIEF OF**  
17 Defendant[s]. ) **AMICUS CURIAE ELECTRONIC**  
18 ) **FRONTIER FOUNDATION IN SUPPORT**  
19 ) **OF DEFENDANT POWER VENTURES’**  
20 ) **MOTION FOR SUMMARY JUDGMENT**  
21 ) **ON CAL. PENAL CODE 502(C)**  
22 )  
23 ) Date: June 7, 2010  
24 ) Time: 1:30 p.m.  
25 ) Dept.: Hon. Judge James Ware  
26 )  
27 )  
28 )

21 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

22 PLEASE TAKE NOTICE that *Amicus* Electronic Frontier Foundation (“EFF”) hereby  
23 moves pursuant to Civil Local Rule 7-11 for leave to file brief as *amicus curiae* supporting  
24 Defendant Power Venture’s Opposition to Facebook’s Motion for Summary Judgment on its  
25 California Penal Code section 502(c) claim. This motion is based on this Notice of Motion and  
26 Motion, the proposed *amicus* brief, proposed order and declaration of Jennifer Stisa Granick filed  
27 herewith and on the pleadings and the papers on file herein and on such other argument and  
28

1 evidence as may be presented to the Court.

2 Electronic Frontier Foundation (“EFF”) is a non-profit, member-supported digital civil  
3 liberties organization. As part of its mission, EFF has served as counsel or *amicus* in key cases  
4 addressing user rights to free speech, privacy, and innovation as applied to the Internet and other  
5 new technologies. With more than 14,000 dues-paying members, EFF represents the interests of  
6 technology users in both court cases and in broader policy debates surrounding the application of  
7 law in the digital age, and publishes a comprehensive archive of digital civil liberties information at  
8 one of the most linked-to web sites in the world, [www.eff.org](http://www.eff.org).

9 *Amicus* Electronic Frontier Foundation’s interest in this case is the sound and principled  
10 interpretation and application of the California computer crime statute, California Penal Code §  
11 502(c). *Amicus* believes that this brief may assist the Court in its consideration of consumer  
12 interests in this matter, as well as the proper scope of section 502(c). EFF has been instrumental to  
13 other courts in cases involving the application of computer crime statutes to modern  
14 communications technologies, including *United States v. Drew*, 259 F.R.D. 449, 465 (C.D. Cal.  
15 2009).

16 If *Amicus* were authorized to file a brief, it will argue that merely providing a technology to  
17 assist a user in accessing his or her own data, even if that manner is prohibited by a terms of  
18 service document or the subject of a cease and desist letter, cannot and should not form the basis  
19 for criminal liability. To hold otherwise would create a massive expansion of the scope of  
20 California criminal law and hobble user choice and interfere with follow-on innovation. It will also  
21 improperly hinge criminal liability on arbitrary and often confusing terms chosen by private parties  
22 in the contracts of adhesion they present to users. This creates both vagueness and the risk of  
23 capricious enforcement. While users who choose services such as Power’s may breach Facebook’s  
24 terms of use (if those terms are otherwise enforceable), breaches of these sorts of private contracts  
25 should not be turned into criminal conduct. *Amicus* is concerned that if Facebook’s proposed  
26 construction of section 502(c) in this case is correct, millions of otherwise innocent internet users  
27 are potentially violating criminal law through routine online behavior.

1 As noted in the Declaration of Jennifer Stisa Granick filed herewith, *Amicus* have  
2 discussed this brief with counsel for both the plaintiff and defendant. Counsel for the defendant  
3 Power.com have consented to the filing of this brief. Granick Declaration par. 3. Counsel for  
4 Facebook has stated that they object to the filing of this brief. Granick Declaration par. 4

5 *Amicus* EFF respectfully requests that the Court grant leave to file its brief as *Amicus*  
6 *Curiae* in Support of Defendant Power Ventures' Motion for Summary Judgment on Cal. Penal  
7 Code 502(c), which is filed conditionally with this Motion for Leave.

8 DATED: May 3, 2010

9 By /s/Jennifer Stisa Granick  
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