IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CONNECTU, INC., CAMERON WINKLEVOSS, TYLER WINKLEVOSS, AND DIVYA NARENDRA, Plaintiffs, v. FACEBOOK, INC., MARK ZUCKERBERG, EDUARDO SAVERIN, DUSTIN MOSKOVITZ, ANDREW McCULLUM, AND THEFACEBOOK LLC, Defendants.	CIVIL ACTION NO. 1:07-cv-10593-DPW (CONSOLIDATED WITH CIVIL ACTION NO. 1:04-cv-11923-DPW)

CAMERON WINKLEVOSS, TYLER WINKLEVOSS AND DIVYA NARENDRA'S MEMORANDUM OF POINTS AND AUTHORITES IN SUPPORT OF MOTION FOR ACCESS TO PLEADINGS AND DISCOVERY FILES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Articles

Other Authorities

I. INTRODUCTION

Following ConnectU's motion to disqualify the Finnegan and Boise Schiller firms as counsel for Cameron and Tyler Winklevoss and Divya Narendra ("the Founders"), the Founders retained new counsel, Meade & Schrag, to represent their interests in this case. Tyler Meade and Michael Schrag were admitted *pro hac vice* on April 15, 2011. These new attorneys have since requested the complete pleadings and discovery files from the Founders' former attorneys at the Finnegan firm. Finnegan has declined to produce this information based on the objections of the Facebook Defendants and ConnectU. The Founders move for an Order requiring that the requested information be turned over because these objecting parties have not shown "substantial justification" to deny access.[1]

This motion is based on three firmly rooted principles: First, there is a strong presumption that a client is entitled to files maintained by a former attorney that relate to the client's matter. Second, the presumption that the client is entitled to his files is even stronger when the client reasonably needs the files to protect his or her interests. Third, our system of justice depends on an advocate's ability to analyze all relevant information and develop appropriate strategies without interference from opposing counsel.

In this case, information designated as confidential and pleadings filed under seal cannot be turned over to Cameron and Tyler Winklevoss and Divya Narendra directly because the Second Stipulated Protective Order bars this. But the objecting parties cannot show "substantial

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[1] The Ninth Circuit has issued the mandate in the related Ninth Circuit appeal. 9th Cir. Case No. 08-16745 Dkt. 214. Based on the wording of this Court's 9/30/2009 Order, the Founders' understanding is that the stay ended with issuance of the mandate. If that is not correct, the Founders respectfully request leave to file this motion now on the assumption that the stay will soon be lifted in accordance with the 9/30/2009 Order. Dkt. 274, pp. 2-3.

justification" for denying new counsel access to such information. The Second Stipulated Protective Order expressly provides that new counsel is entitled to Confidential Information.

The Facebook Defendants have argued that new counsel has no need for these files because, in their mind, "These cases are closed." However, the law gives all litigants certain post-judgment rights. *E.g.*, Fed.R.Civ.P. 60(b); 12, *Moore's Federal Practice*, § 60.43[1][a] at p. 60-138 (under Rule 60(b), both intentional and unintentional misrepresentations and failures to disclose material information can be a sufficient basis to vacate a judgment). The Founders are entitled to the effective assistance of counsel of their choosing to advise them on these rights, and to have their counsel provide advice based on unfettered access to the relevant information. Simply stated, the information requested is needed and there is no legitimate reason to deny the Founders' counsel access to basic information that the other parties possess.

II. BACKGROUND

Boies, Schiller & Flexner LLP ("Boies Schiller") served as lead counsel for the Founders until ConnectU moved to disqualify them on January 22, 2009. Dkt. 262.[2] The Founders were also represented by the Finnegan firm until it was targeted in the same disqualification motion and moved to withdraw. Dkts. 262, 324. Pending resolution of Boies Schiller's role in this case, the Founders retained Meade & Schrag LLP ("new counsel") to advise and represent them in this action. On April 15, 2011, the Court granted permission for Tyler Meade and Michael Schrag to appear *pro hac vice* as counsel of record. Dkt. 333 (and related docket entry).

New counsel has requested the following information from the Finnegan firm through a request made to its outside counsel, Thomas B. Mason: "Complete, un-redacted copies of all (a)

[2] Docket citations are to the docket number that appears on the online docket accessible through PACER. All docket citations are to 1:07-cv-10593 except where another case number is specified. Page citations are based on the document's original pagination, rather than the docket pagination added at the top at the time of filing.

documents and other tangible things produced by all parties, including all documents designated confidential, (b) pleadings (defined in the broadest possible terms to include not only motions, status reports, and other court filings, but also deposition notices, discovery requests, discovery responses and other discovery documents), including those filed under seal and/or designated confidential, (c) deposition transcripts and exhibits, including those filed under seal and/or designated confidential, and (d) court transcripts, sealed and unsealed." Meade Decl., Ex. 2.[3]

On June 2, 2011, new counsel advised I. Neel Chatterjee, counsel for the Facebook Defendants,[4] by email that new counsel "intend[ed] to obtain certain information from prior counsels' files." *Id.* at Ex. 8, p. 2. Noting that some of the requested information was designated confidential and some of it was filed under seal, new counsel attached the Second Stipulated Protective Order (Dkt. 35) to the email and stated: "we'd like to confirm that the attached is the operative protective order." Meade Decl., Ex. 8, p. 2. Mr. Chatterjee objected the next day on behalf of the Facebook Defendants, and thus began the meet and confer. *Id.* at p. 1.

Mr. Chatterjee initially stated two concerns: First, he indicated that disqualified counsel (apparently referring to attorneys targeted in the above-referenced disqualification motion) should not be "collaborating" with new counsel. Second, he stated Facebook was concerned about adherence to "protective order restrictions." *Id.* On June 6, 2011, new counsel clarified that (a) there is no collaboration between new counsel and counsel targeted in the disqualification motion, (b) the information sought consists of the pleadings and discovery files rather than any work product, (c) this information is needed to prepare the motions announced in the Founders' April 20, 2011 status report (Dkt. 334), (d) new counsel sought to confirm the

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[3] The request for sealed transcripts is not intended to access any transcripts that the Court has decided to withhold from counsel for the Founders.

[4] This term refers to parties represented by Orrick, Herrington & Sutcliffe LLP ("Orrick"), Mr. Chatterjee's firm.

operative protective order because new counsel intend to and will adhere to its terms, and (d) Paragraph 7(a) of the Second Stipulated Protective Order allows counsel of record access to Confidential Information. *Id.*

Apparently unaware of these clarifications, Alison Buchanan, an attorney for ConnectU, stated in a June 23, 2011 letter to Boies Schiller and other firms targeted in the disqualification motion: "It has come to our attention that one or more of ConnectU's former counsel may be communicating with and/or assisting [new counsel] . . . ." Meade Decl., Ex. 7, p. 2. That same day, Ms. Buchanan informed new counsel that ConnectU objected to new counsel obtaining any files or information from prior counsel. *Id.*, p. 1. Two days later, Mr. Chatterjee alleged prior violations of the protective order, suggested that further motions should be filed in the California action, and argued that "These matters are closed." *Id.* at Ex. 6, p. 1. Mr. Schrag replied to Ms. Buchanan and Mr. Chatterjee on June 13, 2011:

> First, I will reiterate what I previously told Neel: we are not collaborating with any of the firms disqualified by Judge Ware or targeted in the parallel disqualification motion filed in Massachusetts. We have merely contacted the Finnegan firm's outside counsel to request the following material: documents produced by all parties in the litigation, all pleadings and attached exhibits, and deposition transcripts and exhibits. Included within our request are all documents/pleadings/testimony filed under seal and/or designated confidential. A copy of our initial email correspondence with Neel is enclosed for your reference.
>
> Second, Alison is not correct that we asked Facebook (or ConnectU) for its consent to receive this material. As new counsel of record in the case for Cameron and Tyler Winklevoss and Divya Narendra, we do not need such consent. The Second Stipulated Protective Order (Dkt. 35), which expressly applies to "new counsel," allows outside counsel of record access to confidential information. (The two additional documents that Neel attached to his June 10 email, which we appreciate receiving, do not provide otherwise.) We sent this protective order to Neel merely to confirm that we were reviewing the operative protective order to ensure we followed the correct protocol. Nothing in Judge Ware's 9/2/09 disqualification order (attached to Alison's letter) in any way suggests that new counsel for Tyler, Cameron and Divya are not entitled to review materials designated as confidential under the protective order.

> Third, we decline to debate whether or not Mr. Parmet, attorneys at O'Shea, or our clients have violated the protective order(s) in the past because it is irrelevant to the issue of whether we, as current counsel of record, can review confidential materials. Again, the operative protective order clearly says we can. We will of course be bound by the terms of the protective orders and will adhere to those terms.
>
> Fourth, we also decline to debate which court should hear our Rule 60(b) motion. No matter where the motion is heard, we still need access to all the documents referenced above. To say that a Rule 60(b) motion is not proper because the "matters are closed" makes no sense given that the purpose of any Rule 60(b) motion or inquiry is to re-open closed matters.
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> Finally, as I told Neel, for the time being we need not address the issue of whether we are entitled to review attorney-client privileged materials prepared by counsel who formerly jointly represented ConnectU and our clients. We believe we are entitled to these privileged materials, but are not seeking access to them now. We'll address this issue another day.

Id. at Ex. 4, pp. 1-2. New counsel requested to continue the meet and confer with a conference call on three occasions, but neither Ms. Buchanan nor Mr. Chatterjee accepted these invitations. *Id.* at Ex. 4, p. 2, Ex. 3, pp. 1-2.

On June 22, Finnegan responded to new counsel's request for information as follows: "Given Facebook's position and the posture of the [cases pending in Massachusetts], Finnegan requests that you obtain court authorization for your firm to receive any of the confidential or sealed materials that you seek." *Id.* at Ex. 1.

III. ARGUMENT

A. A Client's Right To Former Counsel's Files.

In 1947, the Supreme Court stated a bedrock principle relating to our system of litigation: "Proper preparation of a client's case demands that [the lawyer] assemble information, sift what he[/she] considers to be the relevant from the irrelevant facts, prepare his[/her] legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers work in our system of jurisprudence to promote justice and to

protect their clients' interests." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). A necessary corollary to the principle that a lawyer must have latitude to prepare without interference is that opposing counsel must not interfere with the lawyer's access to basic litigation files (*e.g.*, pleadings files, discovery files, etc.). As the Supreme Court further noted in *Hickman*: "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Id.* at 507.

It is beyond dispute that a client, or the client's attorney, must have access to a former attorney's litigation files, absent "substantial grounds" for denying access. The Massachusetts Rules of Professional Conduct, which govern attorneys practicing in this Court pursuant to Local Rule 83.6, provide in pertinent part that "A lawyer must make available to a former client, within a reasonable time following the client's request for his or her file, the following: . . . [¶] (2) all pleadings and other papers filed with or by the court or served by or upon any party. . . . [¶] (3) all investigatory or discovery documents . . . , including but not limited to . . . depositions, and demonstrative evidence." Mass. R. Prof. C. 1.16(e). The limitations on this right of access are few and not applicable to this motion.

The Restatement (Third) of Law Governing Lawyers states this principle as follows: "a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, *unless substantial grounds exist to refuse*." *See* Rest.3d of Law Governing Lawyers § 46(2) (2000) (emphasis added); *see also id.* at subd. (3) ("Unless a client or former client consents to non-delivery or substantial grounds exist for refusing to make delivery, a lawyer must deliver to the client or former client, at an appropriate time and in any event promptly after the representation ends, such originals and copies of other documents possessed by the lawyer relating to the representation *as the client or former client reasonably*

needs") (emphasis added); *id.* at cmt. c, p. 328 ("As stated in Subsection (3) a client is entitled to retrieve documents in possession of a lawyer relating to representation of the client"); *id.* at cmt. d, p. 329 ("Even without a client's request or the discovery order of a tribunal, a lawyer must voluntarily furnish originals or copies of such documents *as a client reasonably needs in the circumstances*") (emphasis added).

Courts use sweeping language to describe a client's right to a former attorney's files: The Tenth Circuit has stated: "So far as we can determine, it is a general principle of law that client files belong to the client and indeed the Court may order them surrendered to the client or another attorney on request of the client . . . ." *In re Grand Jury Proceedings*, 727 F.2d 941, 943 (10th Cir. 1984). Before ordering that the entire file of former counsel be turned over, the district court in *Resolution Trust Corporation v. H----, P.C.*, 128 F.R.D. 647 (N.D. Tex. 1989), noted: "The parties admitted at the hearing the virtually universal practice of former attorneys transferring the entire file to new counsel." *Id.* at 648. In *Matter of Kaleidoscope, Inc.*, 15 B.R. 232 (Bankr.N.D.Ga 1981), *rev'd on other grounds* 25 B.R. 729 (D.C.Ga. 1982), the bankruptcy court stated: "Simply put, the client is entitled to the entire file of his attorney, and, on the contrary, the attorney is not entitled to refuse to turn over that file or any portion thereof." *Id.* at 241.[5]

Notably, the right to information from former counsel's files does not end with a judgment. In *Spivey v. Zant*, 683 F.2d 881 (5th Cir. 1982), the Fifth Circuit held that a prisoner pursuing a habeas corpus petition was entitled to his former attorney's file to aid in his collateral challenge to his conviction. *Id.* 885-886. Because the district court denied the prisoner access to

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[5] At present, this Court need not address the question whether new counsel is entitled to former counsel's work product, as that information has not been requested. *See* Meade Decl., Exs. 2 & 4. Therefore, the Founders do not address analysis in the case law regarding the right of access to such information.

that information, the Fifth Circuit held the prisoner was entitled to a new hearing. In so ruling, the Fifth Circuit stated:

> The district court's error tainted the evidentiary hearing by denying Spivey, and the court, access to materials which might have helped resolve the factual issues which precipitated the hearing and as to which other, dispositive, evidence was not available. We therefore vacate the order of the district court and remand for further proceedings. Spivey must be permitted to inspect the materials in [the former attorney's possession] which may bear on the factual issues before the court. The court must then reopen the evidentiary hearing and allow Spivey a full and fair opportunity to cross-examine Schloth based on those materials, and to present whatever additional evidence the materials divulge.

Id. at 886. Thus, *Spivey* makes clear that the right to a former attorney's file continues in post-judgment proceedings.

B. The Second Stipulated Protective Order Expressly Allows New Counsel To Obtain The Requested Files.

"Substantial grounds" justifying a refusal to turn over a file may exist where the former lawyer would violate a protective order by turning over the requested information. *See* Rest.3d of the Law Governing Lawyers § 46, cmt. c, p. 329; *see also* Cal. R. Prof. Conduct 3-700(D)(1). That is not an issue here. The challenged request is that Finnegan turn over sealed pleadings and confidential documents *to new counsel*, not to the Founders as individuals. Thus, the provisions of the Second Stipulated Protective Order barring client access to such information are not implicated. Dkt. 35, p. 6. As officers of this Court, new counsel will abide by the Second Stipulated Protective Order.

With respect to new counsel's entitlement to sealed and confidential information, the Second Stipulated Protective Order is clear: Paragraph 7 clearly states that "Outside counsel of record for a party" may have access to Confidential Information. Dkt. 35, p. 6. Thus, the Second Stipulated Protective Order supports the requested Order allowing new counsel access to the litigation files. Indeed, when Orrick itself joined this litigation, it presumably obtained the

information exchanged in discovery as of that date as well as all pleadings filed with the Court. That is standard practice for new lawyers entering an existing case. Meade & Schrag similarly became counsel of record for the Founders in these consolidated cases when the Court granted their applications for admission *pro hac vice*, and should be similarly allowed to obtain the information exchanged and filed in this case. Dkt. 333 (and related docket entry).

C. Defendants Failed To State "Substantial Grounds" To Block The Transfer Of The Requested Files.

The objections necessitating this motion were made by Mr. Chatterjee on behalf of the Facebook Defendants and Ms. Buchanan on behalf of ConnectU. Meade Decl., Exs. 3-8. In the meet and confer process, neither articulated substantial grounds for preventing the transfer of the requested information. *See* Meade Decl., Exs. 3-8. New counsel's request is consistent with the express terms of the Second Stipulated Protective Order, and there is no other conceivable basis to deny counsel of record access to the pleadings and discovery files in the hands of the other parties. New counsel should not be the only attorneys in this case without access to such basic litigation files.

D. New Counsel Needs The Basic Litigation Files To Investigate And Prepare Post-Judgment Motions.

There is a reasonable need for the information sought. The Founders have announced their intention to seek an inquiry into whether the Facebook Defendants intentionally or inadvertently failed to produce a series of allegedly *bona fide* instant message communications between Mark Zuckerberg and others that began appearing in the online press in mid-2010 ("IMs").[6] *See* Dkt. 334. If genuine, the leaked IMs would have been critical evidence of the

[6] As indicated, the Founders do not know whether these IMs are genuine. The "allegedly *bona fide*" qualification stated in the text applies to each reference to "IMs." Likewise, the

Founders' breach of fiduciary duty, unjust enrichment, intentional interference with contract/business relations, and fraud claims (among others). 1:04-cv-11923 Dkt. 1, pp. 7-10 (initial complaint); Dkt. 1, pp. 14-17 (subsequent complaint); *see also* Dkt. 334-2 (the leaked IMs). Indeed, this case has always been about much more than theft of code.

Many cases settle before discovery is completed. The Founders recognize that most actions cannot be reopened merely because a party later discovers evidence that the party did not previously receive. But, if a September 2010 article in *The New Yorker* entitled "The Face of Facebook" is correct, and Facebook's attorneys found and reviewed the leaked IMs in January 2006, this is not a typical case. *See* Dkt. 334-3 (*The New Yorker* article).

1. Circumstances Indicating Suppression Of Evidence.

The Founders served their initial discovery requests in April 2005, requesting among other things: "All email(s) and other communications between Mark Zuckerberg and any other person relating in any way to the website that was to be known as Harvard Connection." Dkt. 213-5, pp. 5-6 (Request No. 7). The Facebook Defendants responded in pertinent part: "Defendants will produce non-privileged responsive documents to the extent such documents exist in their possession and are located by a reasonable search." *Id.*

If *The New Yorker* article is accurate, the leaked IMs were sent from the computer Mr. Zuckerberg used at Harvard. Dkt. 334-3, p. 5. Circumstances suggest this computer was a laptop that has been variously described as "Device 371-01," Mr. Zuckerberg's "original computer he used at Harvard," and the "hard drive" he used in the 2003-2004 timeframe.[7] *See*

Founders do not know whether *The New Yorker* article is accurate. Any reference to that article in this brief should be viewed with this understanding in mind.

[7] Max Kelly, the person whom the Facebook Defendants designated most knowledgeable about their forensic review of computers, testified that Mr. Zuckerberg used this laptop until late

Dkt. 245-4; 1:04-cv-11923 Dkts. 43-3 at p. 15, 148-15 at p. 1, 148-30, 155 at 19:9-11 & 159 at p. 12, p. 1.

In late 2005, the Facebook Defendants apparently began a thorough forensic analysis of all relevant computers, including this laptop. Dkt. 213-8, p. 1. On November 18, 2005, Mr. Chatterjee described the Facebook Defendants' search to the Court:

> THE COURT: Okay. Now when you say you searched, what have you done with respect to hard drives?
> MR. CHATTERJEE: We have, do you mean have we imaged them, is that your question? We—
> THE COURT: Have you looked for deleted items on them?
> MR. CHATTERJEE: Yes. We've, I mean obviously there's –
> THE COURT: *Have you, have you done what they, if they got the mirror image, have you done what they're going to do?*
> MR. CHATTERJEE: *We've done some of it. We're going to do some more of it because, we notified them yesterday. We think we've found some additional material. We're not sure what it is, and we're trying to take the forensic images and provide that information to them if it's responsive.*
> THE COURT: Well, it seems to me that the way, the way things work is that the plaintiff makes a request for evidence that's relevant to the claims and defenses of either party of which they're entitled to under the rules. *If they've requested this stuff and you have not objected to it, then it seems to me it's your burden to produce it.* And I normally would not go to allowing one party to have a mirror image of another party's computer unless I was, unless I had some reason to believe number one that it wasn't being, that, you know, that defendant wasn't doing it to the extent that they were obligated to do it under the federal rules, or there was some sort of chicanery involved, and I think that's, that's where we are on, on this particular things.
> MR. CHATTERJEE: *We, we've produced everything we've been able to find and we've searched fairly thoroughly of all, all the electronic devices we've been able to find to date, and we continue to do that.* So, Your Honor, I mean, we've produced the code that we've been able to find. Now what the plaintiff wants to find, is they want to find the Harvard connection code –
> THE COURT: Right.
> MR. CHATTERJEE: – on these laptops. It isn't there. They may not be happy about that, but that's a truism. They want to find Harvard connection code copied into the Facebook code that we produced. That isn't there. They're not happy about that. We've, there are some pieces of information –

July 2005. Dkt. 213-7; *see also* 1:04-cv-11923 Dkt. 159, p. 3. Initially, Defendants' counsel reported that this laptop was lost. 1:04-cv-11923 Dkt. 43-3; Dkt. 214, p. 2, ¶ 3. Later, Defendants acknowledged that Facebook turned the laptop over to Orrick in October 2005. 1:04-cv-11923 Dkt. 159, p. 15.

> THE COURT: Well, they're not convinced it's not there. That, that's the issue.
> MR. CHATTERJEE: Right, and Your Honor, we searched and, and –
> THE COURT: Right.
> MR. CHATTERJEE: – some evidence simply may not exist anymore. We, we've looked thoroughly for it, and I'm not sure the Draconian relief of mirror imaging every single one of these systems is going –
> THE COURT: *You're saying it [mirror imaging] would do no good because you've already done it, and you can't find it.*
> MR. CHATTERJEE: *Yes, Your Honor.*[8]

1:04-cv-11923 Dkt. 155, pp. 20-22 (11/18/2005 transcript) (emphasis added).

On November 23, 2005, Orrick attorney Robert D. Nagel sent a letter indicating that Defendants' ongoing analysis had progressed sufficiently for him to report that Defendants believed that these devices contain "responsive information." Dkt. 213-8. By January 7, 2006, Defendants' analysis of Mr. Zuckerberg's laptop was sufficiently complete for them to produce selected documents. Dkt. 245-4. Defendants produced additional documents from Mr. Zuckerberg's laptop the following month. 1:04-cv-11923 Dkt. 148-30. New counsel are informed and believe that the leaked IMs were not among the documents produced by the Facebook Defendants. (New counsel cannot confirm this without obtaining the documents produced in discovery, *i.e.*, documents sought in this motion.)

By February 6, 2006, Defendants' forensic examination of the laptop was apparently complete. Mr. Nagel declared in a letter: "*The hard drive from this laptop was thoroughly forensically examined and all recoverable files were recovered.*" 1:04-cv-11923 Dkt. 148-15, p. 2 (emphasis added).

Throughout the litigation, Orrick attorneys represented to the Founders that they would promptly produce any newly found responsive documents, consistent with their obligation under

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[8] Curiously, Mr. Chatterjee told the Court that Defendants were still looking for the computer that Mr. Zuckerberg had used at Harvard, even though the above discussion shows that Orrick already had the computer by this time. *Cf.* 1:04-cv-11923 Dkt. 155, p. 29:7-11 (11/18/2005 transcript) & 1:04-cv-11923 Dkt. 159, p. 15.

Fed.R.Civ.P. 26(e) ("A party who has . . . responded to an interrogatory, request for production, or request for admission . . . must supplement or correct its . . . response: [¶] (A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing"). For example:

- A November 17, 2005, email from Orrick attorney Joshua Walker to the Founders' former counsel advised that "additional electronic devices" had been located. Mr. Walker added: "We currently have no information that suggests whether or not the devices contain responsive documents or relevant information. *If they do, and without prejudice to our present motions, we will supplement earlier responses and production as necessary, including those which you discussed with Monte Cooper and Rob Nagel on Wednesday, November 16.*" Dkt. 213-12 (emphasis added).
- The November 23, 2005 letter from Mr. Nagel of Orrick (mentioned above) clarified that one of the recently located electronic devices was believed to be "Zuckerberg's original computer which was used while Mr. Zuckerberg was at Harvard." With respect to the continuing obligation to produce responsive information, Mr. Nagel states: "*If responsive materials (including any software code) are found, we will immediately supplement our production . . .*" Dkt. 213-8 (emphasis added).
- A similar promise to supplement was made in a November 30, 2005 letter. Referring again to the newly discovered devices, Mr. Nagel promised: "If the existence of responsive content is confirmed, Facebook *Defendants will promptly*

supplement their production with any responsive information discovered on these devices." Dkt. 213-4 (emphasis added).

A September 2010 article in *The New Yorker* included at least four revelations. ***First, and most importantly, the author, Jose Antonio Vargas, reported that "Facebook's legal team" found the IMs in conjunction with "litigation against the Winklevosses."*** Second, Mr. Vargas reported that Facebook executives and attorneys openly discussed the leaked IMs in a January 2006 meeting, more than two years before the February 2008 mediation. Third, Mr. Vargas quotes a Facebook director and prominent venture capital investor who acknowledges reviewing the undisclosed IMs in January 2006. Fourth, Mr. Zuckerberg appears to publicly acknowledge that these IMs are genuine. Here is the most relevant part of the article:

> *To prepare for litigation against the Winklevosses and Narendra, Facebook's legal team searched Zuckerberg's computer and came across Instant Messages he sent while he was at Harvard.* Although the IMs did not offer any evidence to support the claim of theft, according to sources who have seen many of the messages, the IMs portray Zuckerberg as backstabbing, conniving, and insensitive. *A small group of lawyers and Facebook executives reviewed the messages, in a two-hour meeting in January, 2006, at the offices of Jim Breyer, the managing partner at the venture-capital firm Accel Partners, Facebook's largest outside investor.*
>
> The technology site Silicon Alley Insider got hold of some of the messages and, this past spring, posted the transcript of a conversation between Zuckerberg and a friend, outlining how he was planning to deal with Harvard Connect:
>
> FRIEND: so have you decided what you are going to do about the websites?
> ZUCK: yea i'm going to fuck them
> ZUCK: probably in the year
> ZUCK: *ear
>
> ...
>
> According to two knowledgeable sources, there are more unpublished IMs that are just as embarrassing and damaging to Zuckerberg. But, in an interview, *Breyer told me, "Based on everything I saw in 2006*, and after having a great deal of time with Mark, my confidence in him as C.E.O. of Facebook was in no way shaken." Breyer, who sits on Facebook's board, added, "He is a brilliant individual who, like all of us, has made mistakes." When I asked Zuckerberg about the IMs that have already been published online, and that I have also obtained and confirmed, he said that he "absolutely" regretted them. "If you're going to go on to build a service that is influential and that a lot of

> people rely on, then you need to be mature, right?" he said. "I think I've grown and learned a lot."

Dkt. 334-3, p. 5 (emphasis added).

Following the reported January 2006 meeting, the Facebook Defendants continued to represent that they would supplement their production of documents as new information was discovered. For example, in a March 29, 2006 court filing, two months after the reported January 2006 meeting at which Facebook and its attorneys reportedly discussed the IMs, Orrick attorney Monte Cooper wrote: "*If any existing discovery responses are incorrect or ambiguous, the Facebook Defendants will, of course, supplement them.*" 1:04-cv-11923 Dkt. 159, p. 16 (emphasis added).

Orrick also claimed that it had fully complied with its discovery obligations. In the March 29, 2006 filing, Mr. Cooper stated: "*At every opportunity, Facebook Defendants have complied with ConnectU's numerous requests for information from the various recovered electronic devices.*" *Id.* at p. 1. Likewise, in a related April 24, 2006 filing, approximately three months after the January 2006 meeting, Mr. Cooper declared: "Facebook Has Not Suppressed Evidence." 1:04-cv-11923 Dkt. 170, p. 8.

During a July 25, 2007 hearing regarding discovery, the Court stated that it would be "very disappointed" if there were a delay in discovery, adding "do you understand Mr. Chatterjee?" Orrick attorney Chatterjee responded: "I do, your Honor. *We haven't slowed a single thing down on discovery.*" 7/25/2007 transcript at 46:5-15 (emphasis added). Chatterjee made this claim a year and a half after the reported January 2006 review of IMs that were never produced.

In July 2007, the parties agreed to create a protocol for the imaging and analysis of Defendants' various electronic devices, but disagreed on the breadth of the search that the

Founders' forensic expert Jeff Parmet would perform. Dkt. 65. In reliance on Defendants' agreement to produce Mr. Zuckerberg's emails and other electronic communications and their many promises to supplement their production as they found new documents, the Founders' prior counsel had by this time focused their discovery efforts on a search for code rather than Mr. Zuckerberg's communications. 1:04-cv-11923 Dkt. 155, pp. 10-12 (11/18/2005 transcript).

The Facebook Defendants insisted on a strict protocol that would only allow a search for code and that also prevented the expert, Mr. Parmet, from communicating freely with the Founders and their counsel (the parties who hired him). Dkt. 65, pp. 6-10 & 22. Ostensibly, these measures were necessary to protect personal information and Mr. Zuckerberg's privacy. Dkt. 65-2, p. 3; *see also* 1:04-cv-11923 Dkt. 170, p. 6 ("Facebook and the individual defendants should not be required to turn their computers over to ConnectU to enable its 'expert' to leaf through irrelevant, private information belonging to the individual Defendants. The subject computers have been used not only for developing code, but by young men with private lives and other interests besides software."). Facebook's actual motive may have been different if, as *The New Yorker* reported, the company and its litigation team knew Mr. Zuckerberg's computer contained these very damaging IMs.

The Court adopted the final version of the Protocol in a September 13, 2007 Order. Dkt. 103. By December 2007, Mr. Parmet apparently located relevant undisclosed information on Zuckerberg's laptop ("Parmet documents"). Reportedly, Mr. Parmet raised this issue with Orrick on December 14, 2007. 6/3/2008 transcript at 7:22-8:1. Orrick apparently told Mr. Parmet that Defendants would produce the documents, or at least those that were responsive to discovery requests and not privileged. *Id.* at 23:20-25.

Without access to the Parmet documents, the Founders do not know whether the leaked

IMs are among what Mr. Parmet found. Presumably, they are – that is unless there are two categories of information on Mr. Zuckerberg's laptop that the Facebook Defendants failed to produce. The Founders will address this issue in their motion for discovery referenced in the April 20, 2011 status report. Dkt. 334.

2. The Founders Cannot Adequately Analyze This Issue Or Seek Appropriate Relief Without The Requested Material.

The Founders bear a heavy burden in post-judgment proceedings. They acknowledge and embrace that burden, as they agree that relief under Rule 60(b) should be the exception rather than the norm. For this very reason, the Founders should not be expected to proceed with one hand tied behind their back. All other parties in this case are represented by counsel who possess complete pleadings files, discovery files, and hearing transcripts. These other parties will have an unfair advantage if new counsel are forced to brief the important issues raised by the leaked IMs and *The New Yorker* article without confirming what has been produced in discovery, without knowing what has been stated in pleadings, and without knowing all representations made at hearings. As the Supreme Court stated in *Hickman v. Taylor*, 329 U.S. 495: "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Id.* at 507. This case is not an exception.

IV. CONCLUSION

For the reasons stated, the Founders respectfully request that Finnegan be Ordered to turn over the requested information, and that other counsel supply any requested information that Finnegan cannot supply.

Dated: July 1, 2011

Respectfully submitted,

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By their attorneys,

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CERTIFICATE OF SERVICE

I, Tyler Meade, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as nonregistered participants on or before July 1, 2011.

/s/ Tyler Meade
Tyler Meade