

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
MOTION TO PRESERVE INFORMATION NEEDED FOR RULE 60(b) MOTION**

Cameron and Tyler Winklevoss and Divya Narendra (“the Founders”) invoke this Court’s jurisdiction under Fed.R.Civ.P. 60 (“Rule 60”) to move for an Order pursuant to the Second Stipulated Protective Order governing confidential material (1:04-cv-11923 Dkt. 35 [“Protective Order”]) and the Order For Discovery Of Computer Memory Devices (Dkt. 103 [“Protocol”]) compelling all parties to preserve all evidence produced in or relating to this action until all proceedings under Rule 60 have concluded. This motion is based on the language in (1) the Protocol stating that data destruction can occur only “upon termination of this litigation and all appeals” and (2) the Protective Order that (a) destruction of documents is not required until 30 days after the “completion of the litigation and all appeals” and (b) “trial counsel for each party may retain one copy of all such documents . . .”

This litigation has been neither completed nor terminated because, as they announced on April 20, 2011, the Founders intend to seek an inquiry under Rule 60 and *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 928-930 (1st Cir. 1988), into whether the Facebook Defendants and/or their counsel intentionally or inadvertently suppressed evidence and, depending on the results of that inquiry, for appropriate relief under Rule 60(b) and/or this Court's inherent powers. The Founders are presently preparing this motion, which they expect to file shortly. This motion is necessary because, despite knowing about the Rule 60 motion since April, Facebook has instructed all counsel in this action that the Protocol requires immediate data cleansing and the Protective Order requires counsel to return or destroy *all* produced documents by August 21, 2011. Without an Order stating that Facebook's instructions misread the Protective Order and Protocol, the evidence that the Founders claim was suppressed and the evidence the Founders need to prepare for trial in the event the judgment is set aside under Rule 60 will be prematurely destroyed. Moreover, the framework for analyzing Rule 60 motions set forth in *Anderson v. Cryovac, Inc.*, 862 F.2d 910, cannot be followed if the relevant information is prematurely destroyed. In addition, the Facebook Defendants' insistence on immediate destruction of evidence contravenes the following observation in *Hickman v. Taylor*, 329 U.S. 495, 507 (1947): "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."

In the alternative, if the Court agrees with Facebook's interpretation of the Protocol and Protective Order, the Founders ask that both the Protocol and Protective Order be modified to provide that all documents and evidence must be preserved until the conclusion of all proceedings pursuant to Rule 60, including all appeals.

REQUEST FOR ORAL ARGUMENT

The Founders believe that oral argument may assist the Court and request a hearing.

Dated: August 15, 2011

Respectfully submitted,

CAMERON WINKLEVOSS, TYLER WINKLEVOSS and
DIVYA NARENDRA,

By their attorneys,

/s/ Michael Schrag

Tyler Meade, Cal. State Bar No. 160838 (*Pro Hac Vice*)

tyler@meadeschrag.com

Michael Schrag, Cal. State Bar No. 185832 (*Pro Hac Vice*)

michael@meadeschrag.com

MEADE & SCHRAG, LLP

1816 Fifth Street

Berkeley, CA 94710

(510) 843-3670

(510) 843-3679 (fax)

CERTIFICATION PURSUANT TO LOCAL RULE 7.1(a)(2)

I, Michael Schrag, hereby certify that counsel for the Founders and the Facebook Defendants have conferred and have attempted in good faith to resolve or narrow the issue presented herein.

/s/ Michael Schrag

Michael Schrag

CERTIFICATE OF SERVICE

I, Michael Schrag, 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 August 15, 2011.

/s/ Michael Schrag

Michael Schrag