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 AUTHORITIES IN SUPPORT OF MOTION TO PRESERVE INFORMATION NEEDED FOR RULE 60(b) MOTION

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I. INTRODUCTION

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"])[1] 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 (including appeals) have concluded.

On April 20, 2011, the Founders announced their intention 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 (or alternatively, "Facebook") 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. Dkt. 334, p. 5. This motion concerns a series of allegedly *bona fide* Instant Message communications leaked in the online press in mid-2010 ("IMs").[2]

The Founders are presently preparing this Rule 60 motion, which they expect to file shortly. Yet, on August 5, 2011, Facebook, seeking to thwart this motion before this Court can rule on its merits, sent emails to all counsel instructing them to destroy all documents produced in this action and "erase and scrub" all data on the very hard drives that presumably contain the suppressed evidence. *See* Declaration of Michael Schrag ("Schrag Decl."), Exs. 1-2. Facebook claims that the Protective Order and Protocol require this data cleansing and document

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[1] 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.

[2] 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."

destruction, but Facebook misreads both documents. The Protocol and Protective Order respectively require the destruction or return of data and documents upon the "termination" and "completion" of this litigation, including appeals. Dkt. 103, ¶ 13; 1:04-cv-11923 Dkt. 35, ¶ 15. Given the Founders' forthcoming Rule 60 motion, this litigation is neither terminated nor completed.

Furthermore, Facebook ignores the clause in Paragraph 15 of the Protective Order that states that even after the completion of the litigation "trial counsel for each party may retain one copy of all such documents . . ." 1:04-cv-11923 Dkt. 35, ¶ 15. This clause alone belies Facebook's interpretation that the Protective Order requires all counsel to destroy or return all copies of produced documents.

Preserving the evidence produced in this action and, most importantly, the evidence on the hard drive in forensic expert Jeff Parmet's possession is necessary for the Court to analyze the Founders' Rule 60 motion under the framework set forth in *Anderson v. Cryovac, Inc.*, 862 F.2d 910. *Anderson* requires an inquiry to determine first whether Facebook intentionally or inadvertently withheld evidence and then whether the suppression substantially interfered with the Founders' trial preparation. *Id.* at 926. Destroying the suppressed data and produced documents would unjustly impede this inquiry. In addition, the Facebook Defendants' insistence on immediate destruction of evidence contravenes the observation in *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) that "[M]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." Like all litigants, the Founders have a right to seek post-judgment relief under Rule 60. Premature destruction of evidence would unfairly sabotage this right.

In the alternative, if the Court agrees with Facebook's interpretation of the Protective Order and Protocol, the Founders ask that both of these Orders be modified to allow all parties to preserve all evidence pending the resolution of the Founders' Rule 60 motion, including any appeals.

II. BACKGROUND

A. Procedural Background.

On July 6, 2005, this Court, by stipulation, entered the Protective Order to govern the handling of confidential information. 1:04-cv-11923 Dkt. 35. Paragraph 15 of this Protective Order provides as follows:

> Within thirty (30) calendar days after the completion of the litigation and all appeals, the parties shall return *or* destroy all Documents and deposition transcripts (or portions thereof) marked "CONFIDENTIAL" and all copies, abstracts, extracts, excerpts, and summaries of such Documents and deposition transcripts (or portions thereof), *except that trial counsel for each party may retain one copy of all such documents, as well as copies of Documents and deposition transcripts (or portions thereof) designated as CONFIDENTIAL INFORMATION* (and abstracts, extracts, excerpts, and summaries of such Documents and deposition transcripts (or portions thereof)) incorporated into counsel's working files.

1:04-cv-11923 Dkt. 35, p. 10, ¶ 15 (emphasis added).

In addition, in July 2007, the parties agreed to create a protocol for the imaging and analysis of Defendants' various electronic devices.[3] The Court adopted the final version of the

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[3] The parties initially disagreed on the breadth of the search that the Founders' forensic expert Jeff Parmet would perform. Dkt. 65, pp. 2-3, 6-9. The Facebook Defendants insisted on and obtained 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. 6-9; Dkt. 65-2 pp. 5-6, 8. Ostensibly, these measures were necessary to protect personal information and Mr. Zuckerberg's privacy. Dkt. 65-2, p. 3; 1:04-cv-11923 Dkt. 159, p. 2 & 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.").

Protocol on September 13, 2007 and Mr. Parmet's analysis began. Dkt. 103. By December 2007, Mr. Parmet apparently located relevant undisclosed information on Mr. Zuckerberg's laptop ("Parmet documents"). Reportedly, Mr. Parmet raised this issue with Orrick on December 14, 2007. 6/3/2008 Transcript, pp. 7-8. 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 p. 23. The Founders believe those documents were never produced.

Paragraph 13 of the Protocol governs the handling of information obtained by Mr. Parmet after litigation has ended:

> Upon termination of this litigation and all appeals, Parmet and Associates shall erase and scrub the memory devices containing any code, fragments, or other data retained by Parmet and Associates and certify to Facebook Defendants' counsel that the code, fragments, and/or other data have been irretrievably deleted therefrom, and delete and destroy all work materials associated with Facebook Hard Drives, including all information copied to any computer in connection with the searches of the Facebook Hard Drives, and certify such deletion and destruction to Facebook Defendants' counsel.

Dkt. 103, pp. 15-16, ¶ 13.

Meade & Schrag LLP, have been the Founders' lead counsel of record since their admission *pro hac vice* on April 15, 2011, but have yet to obtain access to the pleadings and discovery files due to an objection asserted by the Facebook Defendants. On April 20, 2011, the Founders filed a Status Report announcing that they intended to seek post-judgment relief under Rule 60 and outlining the grounds for such relief. Dkt. 334. The Founders reiterated this intention in several subsequent pleadings. Dkt. 334, p. 5; Dkt. 337, p. 1; Dkt. 339; Dkt. 349; Dkt. 352.

On July 1, 2011, the Founders sought an Order requiring the Founders' prior counsel to turn over the pleadings and discovery files to Meade & Schrag so that they could prepare the

Rule 60 motion. Dkt. 339. On July 15, 2011, the Founders moved for a Scheduling Order that would govern proceedings under Rule 60. Dkts. 348-349.

On July 21, 2011, the Founders acknowledged that a judgment of dismissal was required by the 2008 settlement, while reiterating their intention to pursue proceedings under Rule 60. Dkt 352. On July 22, 2011, this Court issued an Order of dismissal and terminated all pending motions as moot. Dkt. 353.

On August 5, 2011, Facebook counsel sent to two emails to all counsel. The first stated that the Protective Order required all parties and their consultants to return or destroy all documents produced in this action by August 21, 2011.[4] Schrag Decl., Ex. 1. In the second email, Facebook stated that the Protocol required Mr. Parmet to immediately erase and scrub the data from all memory devices in his possession, including Mr. Zuckerberg's hard drive that likely contains suppressed evidence. Schrag Decl., Ex. 2.

In response, on August 8, 2011, the Founders' counsel sent two emails to all counsel reiterating that the litigation was not over given the Founders previously announced intention to file a Rule 60 motion; thus, neither the Protective Order nor the Protocol required the return or destruction of documents and data. Schrag Decl., Exs. 3-4. The Founders also informed all counsel that Facebook's instructions were contrary to the Protective Order for the additional reason that trial counsel are entitled to keep one copy of all documents for their files. Facebook sent two emails on August 8, 2011 reiterating its prior position that the litigation is over despite the Founders' announced motions under Rule 60. Schrag Decl., Exs. 5-6. Facebook did not respond to the Founders' observation that the Protective Order allows trial counsel to retain one copy of all files. *Id.*

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[4] Facebook also cited the protective order entered in the California action. Schrag Decl., Ex. 1.

On August 9, 2008, the Founders advised Mr. Parmet of this dispute. Schrag Decl., Ex. 7.

B. 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). On May 31, 2005, 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.*

The leaked IMs are clearly communications from Mr. Zuckerberg relating to the Harvard Connection website. Yet Facebook Defendants apparently never produced the leaked IMs.

1. The Leaked IMs Were Reportedly Sent From The Laptop Mr. Zuckerberg Used At Harvard.

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

[5] *See* Dkt. 213-8 ("We currently have reason to believe the devices we have located are (a) Mark Zuckerberg's original computer which was used while Mr. Zuckerberg was at Harvard"); Dkt. 245-4 ("This CD contains . . . from Mark Zuckerberg's original computer he used at Harvard"); 1:04-cv-11923 Dkt. 43-3, p. 15 (stating that Mr. Zuckerberg "Frequently us[ed] his laptop as a server" while at Harvard); 1:04-cv-11923 Dkt. 148-15, p. 1 (referring to "the laptop computer that Mark Zuckerberg used at Harvard"); 1:04-cv-11923 Dkt. 148-30 ("this disk

Initially, the Facebook Defendants claimed this computer was lost. In an August 18, 2005 Court filing, Orrick attorney Joshua Walker wrote: "Plaintiff incorrectly makes much of the absence of Zuckerberg's computer that is no longer in his possession. Defendant Zuckerberg would be willing provide the hard drive he had during the winter of 2003-04, but despite extensive searches, he does not have it." 1:04-cv-11923 Dkt. 43-3, p. 15. In fact, Max Kelly, the person whom the Facebook Defendants designated most knowledgeable about their forensic review of the relevant Facebook computers, testified that this computer was not lost. According to Mr. Kelly, Mr. Zuckerberg used this laptop until late July 2005 when he turned it over to IT personnel at Facebook. Dkt. 213-7, pp. 177-178; *see also* 1:04-cv-11923 Dkt. 159, p. 3.

By October 2005 at the latest, Mr. Zuckerberg's laptop was in the possession of Orrick, Herrington & Sutcliffe ("Orrick"), counsel for the Facebook Defendants. Dkt. 213-7, pp. 177-179. In a November 17 email, Orrick attorney Joshua Walker announced that Orrick had "recently located additional electronic devices which may include data from early to mid 2004." Dkt. 213-12, p. 1. In a November 23 letter, Orrick attorney Robert Nagel identified one of these devices as "Mark Zuckerberg's original computer which was used while Mr. Zuckerberg was at Harvard." Dkt. 213-8.

2. The Facebook Defendants Conducted A "Thorough" Forensic Examination Of Mr. Zuckerberg's Laptop.

By their own admission, the Facebook Defendants thoroughly examined the contents of all relevant computers, including Mr. Zuckerberg's laptop. Dkt. 213-8, p. 1. On November 18, 2005, Mr. Chatterjee described the Facebook Defendants' search to the Court:

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contains . . . from Mark Zuckerberg's hard drive (previously designated 371-01"); 1:04-cv-11923 Dkt. 155, p. 19 ("when the Facebook was created, the server actually was a laptop computer"); 1:04-cv-11923 Dkt. 159, p. 12 ("device 371-01 is a hard drive that Mark Zuckerberg used in the 2003-2004 timeframe").

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 –
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.*[6]

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[6] Curiously, Mr. Chatterjee told the Court at this hearing that Defendants were still looking for the computer that Mr. Zuckerberg had used at Harvard, even though it was clearly in Orrick's possession by then. *Cf.* 1:04-cv-11923 Dkt. 155, p. 29 ("The person at the fulcrum is Mark Zuckerberg and if, if we, we don't have the, the computer we, we are still looking for it, and we may find it, that he had during the relevant time period, that's the issue") with 1:04-cv-11923

1:04-cv-11923 Dkt. 155, pp. 20-22 (emphasis added).

On November 23, 2005, Orrick attorney Robert D. Nagel sent a letter indicating that the Facebook Defendants' ongoing analysis had progressed sufficiently for him to report that Defendants believed that the recently located devices contained "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.

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); *see also id.* at p. 1 (making clear that the laptop referenced in the aforementioned quote is "the laptop computer that Mark Zuckerberg used at Harvard").

3. The Facebook Defendants Never Indicated They Were Withholding Responsive Communications.

The Facebook Defendants led the Founders and this Court to believe that they were withholding only two narrow categories of documents: For example, on August 18, 2005, after noting that they had produced "thousands of pages of documents," the Facebook Defendants told this Court: "The only documents being withheld are documents created after May 21, 2004, and student records of Mark Zuckerberg which predate his involvement in HC." 1:04-cv-11923 Dkt. 43-3, p. 6; *see also* 1:04-cv-11923 Dkt. 155, p. 52. Neither of those categories of withheld material describe Mr. Zuckerberg's electronic communications from late 2003 and early 2004 relating to the Harvard Connection project.

Dkt. 159, p. 15 (acknowledging that Mr. Zuckerberg's computer, *i.e.* Device 371-01, was turned over to Orrick in October 2005).

As the litigation progressed, the Facebook Defendants continued to represent that they had not withheld documents. In November 2005, Mr. Chatterjee told the Court: "[W]e've produced everything we've been able to find." 1:04-cv-11923 Dkt. 155, p. 21; *see also id.* at p. 14 ("Plaintiff's case appears to rest on the shortness of time taken by Mark Zuckerberg to complete thefacebook.com website. All documents from that time period(i.e. early 2004) have been produced, except pre-HC student records"). Likewise, in January 2006, the Facebook Defendants stated that they had "produced everything they have been able to find . . . based upon a thorough, diligent search." 1:04-cv-11923 Dkt. 148-15, p. 2.

Defendants told the Founders that they had produced all documents that predated May 21, 2004 "regardless of relevance." 1:04-cv-11923 Dkt. 155, p. 44 (the Founders' prior counsel puts on the record his understanding that "The defendants agreed to produce response pre May 21st documents 'irrespective of relevance'" which understanding was not corrected by Defendants); *id.* at pp. 47-48 (Defendant Saverin's counsel states: "Where we use the May 21, 2004 date, it was really, Your Honor, just a, an attempt by us to reach some kind of compromise to offer the plaintiff some of the documents that they had asked for even though the requests themselves were vastly overbroad"); *see also* 1:04-cv-11923 Dkt. 159, p. 1 ("At every opportunity, Facebook Defendants have complied with ConnectU's numerous requests for information from the various recovered electronic devices, *even where the requests were of questionable relevance*") (emphasis added).

4. Defendants Repeatedly Promised To Supplement Its Production And Represented To The Founders And The Court That They Were Not Withholding Documents.

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

Fed.R.Civ.P. 26(e), which provides: "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:

- The November 17, 2005, email from Orrick attorney Joshua Walker regarding the "additional electronic devices" that had been located included this representation: "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 stated the following with respect to the newly located devices and Orrick's continuing obligation to produce responsive information: "*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).

Yet, for the two years between the reported January 2006 meeting and the February 2008 pending mediation, Orrick apparently never produced the leaked IMs.

5. The January 2006 Meeting Reported In *The New Yorker* Article.

The Facebook Defendants did not produce the IM's, even though they reportedly discussed and reviewed them with counsel in a two hour meeting *in January 2006, two years before the February 2008 mediation.*

Indeed, the September 2010 article in *The New Yorker* included at least four revelations. 334-3 (*The New Yorker* article).[7] ***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:

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[7] J. Vargas, "The Face of Facebook," *The New Yorker*, Sept. 20, 2010, <http://www.newyorker.com/reporting/2010/09/20/100920fa_fact_vargas> (accessed April 15, 2011).

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).

6. The Facebook Defendants Repeatedly Claimed It Had Complied With All Discovery Obligations and Promised To Promptly Produce Responsive Documents As They Were Discovered.

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 the 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, p. 46 (emphasis added). Chatterjee made this claim a year and a half after the reported January 2006 review of IMs that were never produced.

The Facebook Defendants' representations to the Founders and this Court cannot be squared with the leaked allegedly *bona fide* IMs and the reported January 2006 meeting at which Facebook executives and counsel discussed them.

III. ANALYSIS

Contrary to Facebook's written request to all parties, neither the Protective Order nor the Protocol provides a basis for the parties to destroy or return documents and data at this time. The Protective Order requires the parties to return or destroy documents within 30 days "after the completion of the litigation and all appeals." 1:04-cv-11923 Dkt. 35, ¶ 15. The Protocol requires Mr. Parmet to "erase and scrub" memory devices in his possession "[u]pon the termination of this litigation and all appeals." Dkt. 103, ¶ 13. As discussed above, the Founders announced on April 20, 2011 that they intend to file a post-judgment motion under Rule 60. Rule 60 is an established mechanism under which an action continues even after judgment is entered. When a party announces the imminent filing of a Rule 60 motion, it defies logic and common sense to say that the litigation has completed or terminated. It is also possible the party that loses the Rule 60 motion could appeal the decision, so "all appeals" in this litigation have

not necessarily reached completion or termination. For these reasons, this litigation has neither terminated nor completed; therefore the "destroy or return" and "erase and scrub" clauses in the Protective Order and Protocol have simply not been triggered.

There is an additional clause in the Protective Order that supports an Order compelling preservation and holding that Facebook's instruction to return or destroy documents is improper. Paragraph 15 states that "trial counsel for each party may retain one copy of all such documents, as well as copies of Documents and deposition transcripts . . . ." 1:04-cv-11923 Dkt. ¶ 15. Thus, Facebook has no right to insist that the parties return or destroy *all* documents. This clause, alone, justifies an Order compelling the preservation of the evidence produced.

In the alternative, if the Court agrees with Facebook that the Protective Order and Protocol require destroying documents and scrubbing data before the Rule 60 motion is heard, then the Founders request limited relief from those orders to preserve evidence until the Rule 60 motion (including all appeals) is resolved. Preserving the evidence produced in this action and, most importantly, the evidence on the hard drive in forensic expert Jeff Parmet's possession is necessary for the Court to analyze the Founders' Rule 60 motion under the framework set forth in *Anderson v. Cryovac, Inc.*, 862 F.2d 910.

Anderson requires an inquiry to determine first whether a party intentionally or inadvertently withheld evidence and then whether the suppression substantially interfered with the Founders' trial preparation. *Id.* at 926. Destroying the suppressed data and produced documents would unjustly impede this inquiry. In particular, destroying the data in Mr. Parmet's possession would utterly sabotage the Founders' Rule 60 motion because the suppressed evidence likely exists on the Zuckerberg hard drive Mr. Parmet possesses. If this data is destroyed, the Founders will never learn whether the leaked IMs are among what Mr.

Parmet found and whether Facebook reviewed these documents in January 2006. The electronic information obtained by Mr. Parmet must be preserved if there is to be a meaningful inquiry into whether the Facebook Defendants and/or their counsel intentionally or inadvertently suppressed the leaked IMs.

In addition, Facebook's insistence on immediate destruction of evidence contravenes the observation in *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) that "[M]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." Like all litigants, the Founders have a right to seek post-judgment relief under Rule 60. Premature destruction of evidence would unfairly sabotage this right.

IV. CONCLUSION

Because neither the Protective Order nor the Protocol requires the parties to return or destroy documents or data until all proceedings, including the Founders' forthcoming Rule 60 motion and any subsequent appeals, have terminated and completed, the Founders' motion to compel the parties to preserve evidence should be granted.

Dated: August 15, 2011

Respectfully submitted,

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By their attorneys,

/s/ Michael Schrag

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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