

EXHIBIT 9

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 04-11923-DPW

CONNECTU LLC
Plaintiff

v.

MARK ZUCKERBERG, et al
Defendants

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE ROBERT B. COLLINGS
UNITED STATES MAGISTRATE JUDGE
HELD ON NOVEMBER 18, 2005

APPEARANCES:

For the plaintiff: John F. Hornick, Esquire, Jonathan M. Gelchinsky, Esquire, Margaret A. Esquet, Esquire, Troy Grabow, Esquire, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, 901 New York Avenue, N.W., Washington, DC 20001, (202) 408-4000.

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P R O C E E D I N G S

(Court called into session)

THE CLERK: The Honorable Robert B. Collings presiding. The case of ConnectU LLC v. Mark Zuckerberg, Civil Action No. 04-11923 will now be heard before this Court. Will counsel please identify themselves for the record.

MR. HORNICK: Good morning, Your Honor, I'm John Hornick from the firm of Finnegan, Henderson, for the plaintiff and I have with me my colleagues, Margaret Esquenet, Troy Grabow and John Gelchinsky.

THE COURT: Good morning.

MR. CHATERJEE: Good morning, Your Honor, Neel Chatterjee for all of the defendants and counterclaimants except for Eduardo Saverin. With me is Rob Nagel. We're both from the Orrick Herrington firm and then Jeremy Oczeck from the Proskauer Rose firm is also joining us.

MR. HAMPTON: Good morning, Your Honor, Daniel Hampton representing defendant Eduardo Saverin, and with me as co-counsel is Robert Hawk from Heller Ehrman.

MR. HAWK: Good morning, Your Honor.

THE COURT: All right. This case has been referred to me now for all pretrial proceedings, so what I wanted to do, I know there's a motion to extend the schedule that Judge Woodlock set and there's a motion we're going to hear today and there's a bunch of other motions, which I'll talk to you about

1 and I'm going to set them up for decision, either with or
2 without a hearing.

3 Tell me, let me hear from the plaintiff as to where
4 you are with respect to discovery and what type of deadlines
5 you want to put into the case. Go ahead.

6 MR. HORNICK: Yes, thank you, Your Honor. Where we
7 are is that party discovery--

8 THE COURT: Excuse me.

9 MR. HORNICK: Oh, I'm sorry, Your Honor.

10 THE COURT: Will you stand when you address the
11 Court, please.

12 MR. HORNICK: I'm sorry. I was assuming because of
13 the set up here with the microphone on the table we were
14 supposed to remain seated. I apologize.

15 THE COURT: That's all right.

16 MR. HORNICK: Where we are with discovery is that
17 party discovery at least has been at a standstill since about
18 mid July with a few exceptions. The defendants have made some
19 sporadic productions of documents, and in fact and I mean,
20 confer two days ago, said that they recognized the duty to
21 produce documents that helped their case and they've been doing
22 that, but since August 18th at least, the defendants have
23 refused to allow any depositions. We have five depositions
24 noticed. We haven't been able to take any of them, and the
25 defendants are withholding so much discovery that our experts

1 can't perform their analysis, our tech expert can't do his
2 comparison of the code of the two website sites for purposes of
3 copyright infringement analysis, and he can't compare the
4 websites as the face book launched for purposes of any of our
5 other analyses for our claims. And our damages expert--

6 THE COURT: Is all the discovery that you claim
7 they're withholding the subject of these motions?

8 MR. HORNICK: Yes, Your Honor, with the exception of
9 a second set of discovery records in which we're meeting and
10 conferring at this time.

11 THE COURT: Okay.

12 MR. HORNICK: And then our damages expert needs
13 withheld financial information and documents so that it can
14 complete his report, and even though we have these five
15 depositions noticed and although the defendants are refusing to
16 allow them, we don't feel like we could really take them anyway
17 at this particular time because there's so many documents that
18 we need to prepare for them properly.

19 As I said, we're now meeting and conferring on a
20 second set of requests, which may or may not get resolved. We
21 are taking some third party discovery. We've just started that
22 and we've also served our first set of requests for admissions.
23 But basically, on party discovery, we're at a standstill and
24 have been so for several months.

25 THE COURT: Okay. Let me hear from the defendants.

1 MR. CHATTERJEE: Thank you, Your Honor. We
2 appreciate your giving us the time today.

3 Our view is there has been fairly extensive
4 production here. The primary discovery issues that are out
5 there are - this is a trade secret copyright infringement case.

6 THE COURT: Oh, I just love it, scant discovery, lot
7 of discovery.

8 MR. CHATTERJEE: I'm sure you've heard--

9 THE COURT: I guess it's the name of the game, but go
10 ahead.

11 MR. CHATTERJEE: I'm sure you've heard it all before,
12 Your Honor.

13 The discovery issues that are outstanding, just to
14 encapsulate them, is, they want to seek a mirror image, the
15 motion that's subject to Your Honor's hearing today, of every
16 hard disk drive in our company and I can provide you with a
17 list but you have a sense of that--

18 THE COURT: All right, well, we'll get to that
19 motion.

20 MR. CHATTERJEE: We've, you know, we've tried to take
21 the deposition and tried to get their trade secrets identified.
22 There's a trade secret case that really lies--

23 THE COURT: How many depositions, have any
24 depositions been taken at all in the case?

25 MR. CHATTERJEE: There has been one 30(b)(6), which

1 was one of our attempts to try and get them to identify their
2 trade secrets. That is the subject of a motion to compel, Your
3 Honor.

4 THE COURT: Okay. And how many other depositions do
5 you have noticed or how many others would you like to take once
6 these discovery disputes are resolved?

7 MR. HORNICK: There probably will be a fair number of
8 third party depositions. I would say at least five or six.
9 We'll want to take individual depositions. That's probably
10 going to be three or four individual depositions and one
11 further 30(b)(6), Your Honor, so I'd say roughly 10.

12 THE COURT: Okay. Okay. Now, let's see, so all you
13 want this motion to do is basically lift the deadlines in
14 paragraphs two, four and six?

15 MR. HORNICK: Yes, Your Honor.

16 THE COURT: All right.

17 MR. CHATTERJEE: Well, Your Honor, also in paragraph
18 three, that's the close of discovery.

19 THE COURT: I'm sorry, two through four and six.

20 (Pause)

21 THE COURT: Well, I suppose one of the questions I
22 ask you is does it make sense to - I mean, I know it was set up
23 so that expert reports would be due November 1st and December 1st
24 and close of all discovery on December 15th. Does it make more
25 sense to get a date for the completion of the fact discovery

1 and then have the expert discovery schedule?

2 MR. HORNICK: Your Honor, I think so. The problem
3 we've run into with expert and fact discovery closing on
4 December 15th is that we need important fact discovery for the
5 experts to do their reports by November 1st. They haven't been
6 able to due that because of fact discovery being still open.
7 So I--

8 THE COURT: I'm going to give you an extension. I
9 just want to try and get--

10 MR. HORNICK: I would suggest--

11 THE COURT: --one that is going to work.

12 MR. HORNICK: I would suggest that we have expert
13 discovery closing after fact discovery.

14 THE COURT: What's the defendants' position?

15 MR. CHATTERJEE: You're Honor, I agree with you. I
16 actually think that's a better way to go.

17 THE COURT: All right. Now, once I resolve all these
18 discovery motions, what timeframe would you need to complete
19 non-expert discovery?

20 MR. HORNICK: Your Honor, we were going to propose
21 three months from the time the motions are resolved. If they
22 were resolved today, we'd propose February 15th, which is
23 roughly three months from now.

24 THE COURT: They're not going to be - one might be
25 resolved today, but the rest of them aren't going to be

1 resolved today. I mean I'll get to them when I can get to
2 them, but that number of discovery disputes is quite a burden
3 on the Court. I'm very happy to do it, but, you know, I've got
4 other cases and other mediations I've got to do, so I'll get to
5 it when I can.

6 What do you say as to the timeframe you need for
7 non-expert discovery once the motions are decided?

8 MR. CHATTERJEE: Your Honor, I think it's probably
9 going to be closer to five months; however, there is a motion
10 to dismiss also pending and that may, of course--

11 THE COURT: Well, I'm not going to stay any discovery
12 while that - I mean I'll get to that also. I've got to do a
13 report and recommendation on that, but I'm not going to stay
14 any discovery, so you're going to go forward with the case,
15 with discovery. So you think five months?

16 MR. CHATTERJEE: I think five months and then we'll
17 deal with experts after that, Your Honor.

18 THE COURT: Well, no, we're going to get that done
19 right now. Now, once the fact discovery is completed, there
20 was a - how much time would you need to get your expert reports
21 in, plaintiff?

22 MR. HORNICK: We were going to propose that we finish
23 them two weeks after fact discovery closes and that rebuttal
24 reports be due a month later and that--

25 THE COURT: Well, did he set it up with - oh, he set

1 it up with those things you have the burden of proof on?

2 MR. HORNICK: That's right, Your Honor. So what
3 we're proposing is that--

4 THE COURT: Two weeks and then rebuttal reports how
5 long after?

6 MR. HORNICK: Month, one month, and then depositions
7 being completed one month after that.

8 THE COURT: You mean the expert deposition?

9 MR. HORNICK: Yes.

10 THE COURT: What's defendants' view on that?

11 MR. CHATTERJEE: That seems like a workable schedule,
12 Your Honor. I think that the opening expert reports, two weeks
13 may be a little bit short, but not to a huge extent.

14 THE COURT: All right. I'm sorry, you said expert
15 depositions being completed 30 days after the rebuttal
16 Reports are due?

17 MR. HORNICK: Yes, Your Honor.

18 THE COURT: Okay. I will set such a schedule. I'll
19 make the decision between those things you disagree on, but I
20 will, I will put a new schedule in place, and I'll vacate the
21 deadlines that Judge Woodlock had set so that you're not,
22 you're not in violation of his order, you know, at any time.

23 All right, let me hear the issue with respect to the
24 mirror image, please.

25 MR. HORNICK: Yes, Your Honor. This motion that

1 we're hearing today actually seeks two very different things
2 and it could be two completely separate motions. We combined
3 them because we had the pages to do it so we did so. The two
4 things that the motion seeks are the face book code from the
5 time prior to launch and the time of launch and complete code
6 from after launch all the way up through October of 2004, and
7 in fact there's elements missing from the code that's been
8 produced even after that date. So basically what we're looking
9 for is complete face book code from the time of inception to
10 date. And in addition to that, we're looking for some code for
11 something called face match, something called course match and
12 also an on-line journal that Mr. Zuckerberg kept relating to
13 face match. And then the second thing, the second distinct
14 thing that the motion seeks is documents that were created on
15 or after May 21st of 2004. Now, by blocking the discovery of
16 both, the defendants have effectively blocked the big picture
17 of this case. By blocking the code and the database
18 definitions that would go--

19 THE COURT: Of those things you're requesting, how
20 many of them do they say exist but they refused to produce them
21 and how much, what of them do they say do not exist?

22 MR. HORNICK: Well, with respect to the code, they
23 don't give very clear explanations at all as to what exists and
24 what doesn't exist. They do say that there are 600 to 800
25 memory devices. Well, we don't need imaging from nearly that

1 many, and I have a specific suggestion of what we can do that
2 would be a fairly pretty limited amount of imaging. With
3 respect to the documents--

4 THE COURT: Well, why do you need imaging, if I order
5 them to produce them, they produce them, why do you need
6 imaging?

7 MR. HORNICK: Well, I believe their position is going
8 to be that they cannot find this code.

9 THE COURT: Well, that's why I was asking. They say
10 it doesn't exist?

11 MR. HORNICK: Well, they say that it doesn't exist.
12 That's right. I don't think anyone disputes that it existed at
13 one time. There obviously had to be code the day that the
14 website launched. There had to be code to develop that
15 website, but that code doesn't exist. They say the earliest
16 code they can give us from October of 2004 and the website
17 launched in February of 2004. So there's a whole eight months
18 there that aren't accounted for. So I believe their position
19 is going to be that that code doesn't exist. What we've asked
20 for in the motion is that the Court order that the code be
21 produced if it's found, but in addition that we want to image
22 certain memory devices where we are likely to find that code
23 then an expert can--

24 THE COURT: Well, why would you be able to find it if
25 they can't find it and say it doesn't exist?

1 MR. HORNICK: Well, we're not sure that they have
2 actually looked for it, but here is what imaging is all about,
3 Your Honor.

4 Imaging is simply a process to allow an expert to go
5 and then look for the code. Now, if you delete something from
6 your computer, you may think it's gone--

7 THE COURT: Oh, I know.

8 MR. HORNICK: --but it's not. It probably isn't, and
9 if the hard drive or whatever kind of memory device it happens
10 to be is imaged, an expert can then go take that and look in
11 the deleted areas and look all through it and try to find code
12 that is supposedly deleted. Now, I don't think that the
13 defendants are going to represent that they've taken that step.
14 We want to take that step because they say they have simply
15 looked for the code in existing storage files and they can't
16 find it. I think there's also a reason to suspect whether
17 their clients would be forthright with them with respect to
18 producing code. So depending on what steps they've taken to
19 look for it, it could even be there. That's why we ask that
20 the Court order it to be produced if it's found, and also that
21 we're permitted to do imaging so that our, or a, I should say,
22 an expert, an independent expert can look for it and try to
23 recover it. After which, if it's recovered, it can be
24 produced.

25 THE COURT: All right, now you were saying, you said

1 you had a simple suggestion when I interrupted you with my
2 question.

3 MR. HORNICK: Yes, yes I do. The, what we really
4 need, and I think what we need to be practical is to get what
5 I'm going to name on a rolling basis in this order. If we find
6 what we want at the beginning we wouldn't have to keep rolling
7 down, down the line. Number one would be the individual
8 defendants' memory devices, since October of 2003, including
9 any crashed hard drives plus the FaceBook.com's devices or
10 servers at the time of launch, up to the time of launch, and
11 any backups. First we'd look at that because that takes us to
12 the time prior to launch and up to launch and it also takes us
13 into the individuals' devices that they've held since this all
14 started in October of 2003.

15 THE COURT: Well wouldn't, let me ask you this,
16 wouldn't, if in fact everyone can, is, agrees that this, these
17 codes existed on the defendants' computers at one time,
18 although they quote, don't exist, or it's alleged they don't
19 exist now, aren't the defendants able to specify as to what
20 memory devices these codes were on at any particular time?

21 MR. HORNICK: Well in interrogatories answer we've
22 tried to get identification of what memory devices there were,
23 and we haven't been able to get that information. So what
24 we're doing--

25 THE COURT: What do you mean you haven't been able to

1 get them?

2 MR. HORNICK: Well, we hadn't, we, in, in response to
3 this motion the defendants put in a declaration saying there
4 were 600 to 800 memory devices plus computers. And so we
5 served an interrogatory, identify them. Well, we got was a
6 printout that identified serial numbers for 500 of something,
7 we don't know what. We don't know what the date of it was or
8 anything. We don't know what it was 500 of. So we've been
9 meeting and conferring to try to get an identification as that
10 word is defined in the local rules of what memory devices they
11 have. But you see, although we want to get that, and I think
12 we're entitled to get that information in response to an
13 interrogatory, we believe we can find the code by taking a more
14 surgical approach to particular memory devices. We can't
15 identify them with specificity because we haven't been given
16 that information, but I can certainly say that we'd like to
17 image whatever memory devices were being used up to the time of
18 launch and at the time of launch, and then after the time of
19 launch, assuming we don't find what we're looking for in there,
20 we'd want to look at the servers that were used for the
21 FaceBook after launch. At the time of launch it was launched
22 at one server at a server company. Server companies back up.
23 They have to back up. They'd have huge liability if they
24 don't. And in addition to that, the defendants were on notice
25 of these claims six days after launch, so they certainly should

1 have informed their server companies to maintain whatever they
2 had. They should have maintained whatever they had in their
3 own possession. Now within two months after launch, the
4 FaceBook was on five servers, so if we can't find what we need
5 on those original, that original one server, we go to the five.
6 On April 14th of 2004, it was moved to a different server. If
7 we can't find what we need in the earlier things, we go to that
8 one. And then after that, we can simply look at whatever
9 servers are used to run the FaceBook in various colleges, and
10 I'd start with Harvard. So we don't need 600 memory devices.
11 We don't even need to take them offline to do this. All we
12 need is to get access to their personal hard drives and other
13 devices, the server companies they no longer use, so there's no
14 burden there--

15 THE COURT: What's this there's, and I'm not, I will
16 tell you right up front that I'm not someone who's
17 technologically expert, what is the distinction between a
18 server and hard drive?

19 MR. HORNICK: Yes, well, in some sense there isn't a
20 big distinction, you Honor, but basically what happens is if
21 you were to create a website, if you would, and you did it on
22 your computer, it would be stored on the hard drive on your
23 computer. You might back it up to some other memory device,
24 like a disk maybe, or one of those little drives that plugs
25 into the back of the computer. You might also back it up to

1 the server here at the court that runs your whole network.
2 That's what a server is. It's just a hard drive in a different
3 place that a lot of people are linked into. Now--

4 THE COURT: But is it, to, to get on the server's
5 hard drive, does it have to be backed by an individual off of
6 an individual computer?

7 MR. HORNICK: You might, you might store something on
8 that server, but if we wanted to take an image of it, we would
9 then go to that server, take an image of that. Now, what I'm
10 saying about what happens--

11 THE COURT: No, my question is, why, when you're
12 saying that things from an individual computer's hard drive get
13 on the hard drive of the server when someone backs them up, so
14 isn't the server then, you know, isn't the best evidence so to
15 speak the individual hard drive of the computer?

16 MR. HORNICK: Well, it depends on what we're looking
17 for here, Your Honor. If we're looking for the Harvard
18 connection code that Mr. Zuckerberg worked on, that's probably
19 going to be in the individual's computer. It's probably not
20 going to be in the server that ran the website. If we're
21 looking for that face match code or the course match code or
22 that online journal, it's probably going to be on the
23 individual computers. But if we're looking for the FaceBook
24 code up to the time of launch, it probably was on
25 Mr. Zuckerberg's computer. On the day of launch, it was on

1 some third party server. He uploads it to that server. The
2 server then runs it, runs the website. They no longer use that
3 server, so you'd want to go that one, image it and it's not
4 going to be any burden to, I mean, they don't have to take down
5 the business to do that. And then at some point in time, they
6 moved to another server. So what I'm saying is that if we
7 start with the personal computers and the server on the date of
8 launch, we may find what we need and we might not have to go
9 any farther.

10 THE COURT: Okay. We may hear from the defendant.

11 MR. CHATTERJEE: Your Honor, it just, it seems to me
12 that this is a very focused issue they want to get certain
13 code. We've searched for it. We have--

14 THE COURT: How have you searched for it? Tell me
15 what you've done.

16 MR. CHATTERJEE: We, we, we have actually gone to the
17 facilities. We've actually gone to Marc Zuckerberg, the
18 founder of FaceBook and really the person with the fulcrum of
19 this case. We've gone to his home and we've actually
20 physically searched his home without, without him participating
21 and we've gone--

22 THE COURT: Now, how have you searched his home?

23 MR. CHATTERJEE: We've actually gone through, you
24 know, all of his, you know, his room where he keeps all of his
25 electronic equipment. We've gone through the, the other people

1 in the house that live there, there are a number of people
2 that live there, they're a bunch of college students,
3 essentially living together. We've gone to the FaceBook
4 offices and physically searched it. We've produced code that,
5 one of the things that wasn't entirely clear from the
6 presentation was that, it creates the inference that there's
7 been no code provided. We've provided a fair amount of code.
8 There's one memory stick that we have where we produced that
9 code and it was a corrupted file. Now, the server that
10 Mr. Hornick was talking about, originally when the FaceBook was
11 created, the server actually was a laptop computer. It was one
12 in the same. As the, as the needs of the system grew, they
13 exported it to other places in order to support, you know,
14 dozens, hundreds, millions of people accessing the system, but
15 there would be new versions of the up code created as the
16 system grew and the needs changed. We produced all of the code
17 that we've been able to find from those earlier days. We
18 continue searching and we've actually, now that the FaceBook
19 has grown there's a person in charge of operations and there's
20 also a person in charge of the IT infrastructure. We continue
21 working with them to see if we can locate the additional that
22 would be responsive that deals with the source of--

23 THE COURT: I take it there's no dispute that they're
24 entitled to the source codes and the only issue is whether they
25 exist or not, is that true or not?

1 MR. CHATTERJEE: Your Honor, I, I think there's one
2 refinement on that. It's, when you say the source code--

3 THE COURT: Or source codes.

4 MR. CHATTERJEE: Right, the, I, I think after a
5 certain point in time, the source codes totally change and
6 there's really no, no need or relevance for that, but, however,
7 during the relevant time period, the pre-launch--

8 THE COURT: Is there a dispute as to the relevant
9 time period?

10 MR. CHATTERJEE: I think there is, Your Honor. That,
11 that's actually the second part.

12 THE COURT: What do you say the, oh, that's the, the
13 May 21, 2004 issue?

14 MR. CHATTERJEE: Yes, Your Honor, although we have
15 produced the source codes.

16 THE COURT: Okay. Now when you say you searched,
17 what have you done with respect to hard drives?

18 MR. CHATTERJEE: We have, do you mean have we imaged
19 them, is that your question? We--

20 THE COURT: Have you looked for deleted items on
21 them?

22 MR. CHATTERJEE: Yes. We've, I mean obviously
23 there's--

24 THE COURT: Have you, have you done what they, if
25 they got the mirror image, have you done what they're going to

1 do?

2 MR. CHATTERJEE: We've done some of it. We're trying
3 to do some more of it because, we notified them yesterday. We
4 think we've found some additional material. We're not sure
5 what it is, and we're trying to take the forensic images and
6 provide that information to them if it's responsive.

7 THE COURT: Well, it seems to me that the way, the
8 way things work is that the plaintiff makes a request for
9 evidence that's relevant to the claims and defenses of either
10 party of which they're entitled to under the rules. If they've
11 requested this stuff and you have not objected to it, then it
12 seems to me it's your burden to produce it. And I normally
13 would not go to allowing one party to have a mirror image of
14 another party's computer unless I was, unless I had some reason
15 to believe number one that it wasn't being, that, you know,
16 that the defendant wasn't doing it to the extent that they were
17 obligated to do it under the federal rules, or there was some
18 sort of chicanery involved, and I think that's, that's where we
19 are on, on this particular things.

20 MR. CHATTERJEE: We, we've produced everything we've
21 been able to find and we've searched fairly thoroughly of all,
22 all the electronic devices we've been able to find to date, and
23 we continue to do that. So, Your Honor, I mean, we've produced
24 the code that we've been able to find. Now what the plaintiff
25 wants to find, is they want to find the Harvard connection

1 code--

2 THE COURT: Right.

3 MR. CHATTERJEE: --on these laptops. It isn't there.
4 They may not be happy about that, but that's a truism. They
5 want to find Harvard connection code copied into the FaceBook
6 code that that we produced. That isn't there. They're not
7 happy about that. We've, there are some pieces of
8 information--

9 THE COURT: Well, they're not convinced it's not
10 there. That, that's the issue.

11 MR. CHATTERJEE: Right, and Your Honor, we searched
12 and, and--

13 THE COURT: Right.

14 MR. CHATTERJEE: --some evidence simply may not exist
15 anymore. We, we've looked thoroughly for it, and I'm not sure
16 the Draconian relief of mirror imaging every single one of
17 these systems is going--

18 THE COURT: You're saying it would do no good because
19 you've already done it, and you can't find it.

20 MR. CHATTERJEE: Yes, Your Honor.

21 THE COURT: That's your position.

22 MR. CHATTERJEE: Yes, Your Honor.

23 THE COURT: All right.

24 MR. HAMPTON: Your Honor, if I might be heard
25 briefly--

1 THE COURT: Sure.

2 MR. HAMPTON: --on behalf of defendant Saverin.

3 Defendant Saverin's situation illustrates I think a bit of a
4 problem with the plaintiff's monolithic approach here. Even
5 with Mr. Hornick's proposal for a rolling search, he's
6 requested the images of all the individual defendants' hard
7 drive. Mr. Saverin is one of the individual defendants. In
8 opposition to this motion, he submitted a declaration stating
9 under oath that he never had any of the code, either for the
10 Harvard connection or for the FaceBook, and his involvement
11 with this whole case was brief. He's an economics student who
12 was providing some inside on the business model for the
13 FaceBook, never had the relevant code. The situation is even
14 worse, however, Your Honor, because he longer has the hard
15 drive for the relevant period we're talking about. The
16 computer that he was using at the time he's given to his
17 mother, who is a clinical psychologist in Florida. She now has
18 the computer and is using that in the conduct of her business
19 and presumably that has highly sensitive patient information on
20 it. So the plaintiff's proposal, although it seems reasonable
21 to say well we just want to start with the individual hard
22 drives of the individual defendants and the servers of the
23 FaceBook, really shows that at least with respect to defendant
24 Saverin how overbroad and unjustified that request is. I'm
25 sure you'll hear from Mr. Hornick about what he thinks of where

1 we are on that issue now, but as I just heard his proposal
2 today, he would still propose that we provide the image of Mr.
3 Saverin's individual hard drive, and there's no record evidence
4 whatsoever that that is reasonably calculated to lead to
5 anything that's relevant in the case, particularly the source
6 code that they claim is really what they're after here.

7 MR. HORNICK: Your Honor, if I might?

8 THE COURT: Go ahead.

9 MR. HORNICK: There's a very important reason to do
10 imaging other than what we've heard. They say, and this is the
11 first we've heard that they've made these steps, there's a lot
12 of unexplained things about the background of this code, but
13 there's a very important reason to do imaging other than to
14 find the code and that's to find if it was deleted, for example
15 after claims were asserted in this case. That's something
16 that, that an expert would look for. Five years ago, ten years
17 ago--

18 THE COURT: Wait a minute, hold on.

19 MR. HORNICK: Yes.

20 THE COURT: Hold on. Are, are you looking, is your
21 search including a search for deleted documents that may be on
22 the hard drive that an expert would have been able to retrieve?

23 MR. CHATTERJEE: Your Honor, we've searched for, for
24 code anywhere on these devices.

25 THE COURT: Answer the question specifically.

1 MR. CHATTERJEE: Yes.

2 THE COURT: At, does your, has the search that you've
3 conducted involve a search that would involve the search of
4 deleted items that might be recovered?

5 MR. CHATTERJEE: Yes, and it continues to this day.

6 THE COURT: Continue, Mr. Hornick.

7 MR. HORNICK: So the issue is not just whether the
8 information might have been deleted, but when it was deleted
9 and in what situation, what concept.

10 THE COURT: Well, if they can't find the deleted
11 items, how are they going to find when it was deleted?

12 MR. HORNICK: Well an expert may be able to confirm
13 those things. Five years ago, ten years ago, imaging hard
14 drives was unusual. But today--

15 THE COURT: I know.

16 MR. HORNICK: --it has become very common.

17 THE COURT: I know, but it's uncommon for one side in
18 a dispute to get a mirror image of another side's computer.
19 That is not the usual way the things are done in litigation.
20 That, that, that's an extraordinary remedy which is the reason
21 that I'm trying to assess the need, your asserted need and what
22 their position is.

23 MR. HORNICK: Well, Your Honor, I would say that
24 although that it is unusual that it may not happen on the every
25 day course, but it is not so drastic because all it is is the

1 device to help try to recover documents that everybody admits
2 existed at one time.

3 THE COURT: Yes, but one of the problems with it is
4 you got the whole hard drive and you get tons of documents on
5 there that are, that are not, not relevant, not necessary for
6 the particular purpose and it's a, it's, a lot of defendants or
7 opposing parties see it as a gross invasion of the privacy of
8 their business. That's the problem with it.

9 MR. HORNCICK: Well other courts have considered that
10 very issue and the problem is that you can't do an image of
11 just the part that you need.

12 THE COURT: I know, that's the--

13 MR. HORNCICK: Because you don't know what part you
14 need.

15 THE COURT: --reason why it's an extraordinary remedy
16 to give people mirror images of other people's computers.

17 MR. HORNCICK: But we've built into the particular
18 protocol that we're proposing protections against finding and
19 using information that is not what we're looking for. First of
20 all, we originally proposed that our expert would do this. We
21 don't want it to be our expert now for various reasons. We
22 would propose an independent expert do this. And the
23 independent expert is to look only for code. And the
24 independent expert, we will not be present while he does his
25 work. He'll sign the protective order. There will, nothing

1 that he does will disclose any attorney/client privilege.

2 THE COURT: And it will be at your expense?

3 MR. HORNCICK: And it will be at our expense, that's
4 right. What he finds will be provided to both counsel and to,
5 and we can provide it to the Court or he can provide it to the
6 Court. He maintains the copies of that, those devices,
7 whatever they are in a secure fashion or he can provide them to
8 the Court to maintain in a secure fashion until the case is
9 over. The courts that have considered this issue have looked
10 at all of these issues about whether the, whether you're
11 providing access to privileged information or confidential
12 information or other types of information, and they've said
13 that you have to, have to weigh the needs of the case versus
14 the burden. And in many cases have found that the needs of the
15 case outweigh the burden and what they do is they put into
16 place a protocol that protects the parties' rights so that,
17 that burden is minimized.

18 THE COURT: All right. What's your problem with that
19 protocol?

20 MR. CHATTERJEE: Your Honor, it's, it's exactly the
21 escalation procedure that Mr. Hornick identified. First off--

22 THE COURT: But in what, what, why is there, why is
23 that a, why is his proposal a problem from your point of view?
24 The person who's going to look at it is not connected with
25 them. In other words, they're not going to, you're not going

1 to have the problem of information that otherwise would not be
2 disclosed to them, being disclosed to them. And it's going to
3 be done at their expense, and the person is willing to sign
4 whatever protective order is necessary to protect you. Why do
5 you object to it?

6 MR. CHATTERJEE: It's, it, it's an issue of burden,
7 Your Honor. I mean this is a--

8 THE COURT: Why is it a burden on you--

9 MR. CHATTERJEE: It's because of--

10 THE COURT: --as opposed to them?

11 MR. CHATTERJEE: It's because of the business
12 disruption that would flow from it. If they just want to--

13 THE COURT: How is mirror, making a mirror image of
14 hard drives disrupt the business? I thought that was something
15 that was fairly easily done?

16 MR. CHATTERJEE: It, it is not, Your Honor. In, in
17 order to image our entire server architecture, that's where the
18 600 devices come into play. You can't, you have to shut down
19 the system in order to make copies of all of these things.

20 THE COURT: And how long does that take?

21 MR. CHATTERJEE: It could take up to two weeks to do,
22 Your Honor. And, and if, if we follow Mr. Hornick's procedure,
23 and let me offer maybe--

24 THE COURT: And is that the, but that is the problem
25 you have with it, that it's, it's the burden on your business

1 and the disruption, that's your objection?

2 MR. CHATTERJEE: Yes, Your Honor. If, now, the other
3 piece of it of course is if we're going to, if we're going to
4 do any kind of mirror imaging, I think we should focus on the
5 place of where it's likely to be. And to me, I think
6 Mr. Hampton talked about one of the defendants. The other
7 defendants were also non-technical people. The person at the
8 fulcrum is Mark Zuckerberg and if, if we, we don't have the,
9 the computer we, we are still looking for it, and we may find
10 it, that he had during the relevant time period, that's the
11 issue. But, if we wanted to image, for example, his hard drive
12 and look for source code on that hard drive during any of the
13 relevant time periods on his personal computer, that might be
14 one thing we could do, and if we can't go, we've tried to go
15 back to the outsourced server, architectural people that we
16 signed an agreement with to get it, they, they didn't have it
17 anymore. We can try and find some additional materials that
18 are not in service that are during this relevant early time
19 period for FaceBook, and we could image those. But that's a
20 very narrow inquiry. If it's not there, it's not going to be
21 anywhere. And we've already looked there.

22 THE COURT: Well, what, let me ask the plaintiff's
23 counsel, what do you say to his, which seems to be the only
24 objection to doing this is this burden and interruption.

25 MR. HORNICK: Yes. First of all there'd be no

1 disruption of their business because to image the individual's
2 devices won't disrupt their business. To image the server that
3 was used at the time of launch and shortly after launch will
4 not interrupt their business because they're not using those
5 servers anymore, and if we ever get to the point where we need
6 to image their servers that they're using today, first of all,
7 we'd only want to image the one that is running Harvard, that's
8 not their whole business; secondly, I'd be very surprised if a
9 company like this is not using redundant servers. That means
10 you're running both at the same time. You have a backup. If
11 one dies, you have a backup that's running. So you can image
12 one, the company runs on the other one. No disruption of the
13 business. Now, in addition to that, I heard a very interesting
14 fact. They asked the third party server if they have it. They
15 said we don't have it anymore. I'm sure they didn't go in and
16 image their hard drive and look for it, and that's what we want
17 to do.

18 THE COURT: Well let's, let me ask you this. If we,
19 if, if you were doing it so you were not disrupting their, I
20 mean, does it make sense to do it, you talked about a rolling
21 basis, just do a discreet number initially and have your expert
22 look at that, and if that, if we did it that way, what would,
23 what would be the discreet number you'd start with, just go
24 down the list?

25 MR. HORNICK: Well, I'd start with the devices of the

1 individuals, and I don't know how many they have. Let's
2 assume they each have one laptop or one computer, so there are
3 five individuals, and by the way those individuals are
4 important because Mr. Moskowitz, Mr. Zuckerberg has said in the
5 press, Mr. Moskowitz, this was as much his website as it was
6 mine.

7 THE COURT: Okay.

8 MR. HORNICK: And Mr. McCollum, he's a programmer
9 too, and he's a graphics guy, neither of the other two are, so
10 he would have probably been involved in the graphics.

11 THE COURT: So you've got five individuals.

12 MR. HORNICK: Five individuals plus whatever server
13 was used to run that launch. Now if it was one of their
14 individual computers, we've already, that's already on the
15 list, but if it was a third party computer, it would be--

16 THE COURT: I thought he, they represented to you
17 that it was launched, the website was launched from an
18 individual computer and it was only later that it was expanded,
19 isn't that what you told me?

20 MR. CHATTERJEE: Yes, Your Honor.

21 THE COURT: Okay.

22 MR. HORNICK: Fine, so we've got that one on the
23 list. Then, the moment that it went on to some third party
24 server, which was sometime between February 4th and sometime in
25 March of 2004, we want to go to that company, and we don't know

1 who it was. We, we have a suspicion of who it was but we
2 don't really know.

3 THE COURT: That's the one that they said they asked
4 and they couldn't--

5 MR. HORNICK: I assume so. I don't really know that.

6 THE COURT: Okay.

7 MR. HORNICK: We want to go to that company and we
8 want to go and look at whatever server they were using to run
9 the FaceBook. And then if we didn't find it there, on April
10 14th they went to yet a different company. We'd want to go to
11 them. And then by the end of May they were on yet a different
12 company, I believe, and we'd want to go to them. So I assume
13 they only need one server to run Harvard at the time that they
14 were just shortly after launch. They, I think they had 30
15 schools by the end of May, if I recall correctly. So if we
16 were to look at the server that was running Harvard in that
17 time period, we'd probably find what we were looking for or not
18 find it at all. So to go back and recap the list--

19 THE COURT: Well why wouldn't we at least start with
20 the individuals and then the server of the, of the company that
21 had the server on the, at the time of launch? Why wouldn't we
22 start with that and see if that got you the information you
23 wanted before you went to others?

24 MR. HORNICK: That's what I'm saying, Your Honor, a
25 rolling basis.

1 THE COURT: Well I'm not, I'm, you're saying
2 rolling, that means it rolls without any court intervention.
3 I, what I was, and what I, what I'm thinking of is, you know,
4 allowing it as to a certain, sort of holding the rest in
5 abeyance.

6 MR. HORNICK: At, that actually, the more the Court
7 is involved in it, the happier I would be, Your Honor. So--

8 THE COURT: I'm not sure the happier I'd be, but,
9 okay, go ahead.

10 MR. CHATTERJEE: Your Honor, we don't, to the best of
11 my knowledge, and I could be wrong on this, I'd have to check
12 with my client, we don't have a relationship with that company
13 anymore. So, I, I'm not that they can even be heard on this
14 issue.

15 THE COURT: Have you, have they asked you the name of
16 the company?

17 MR. CHATTERJEE: They, I believe the name of the
18 company was Equinex (ph).

19 THE COURT: No, did they ask you on interrogatories
20 what the name of the company was?

21 MR. CHATTERJEE: I don't think they did. I can't
22 recall for certainty. They may have. But I, I can't--

23 THE COURT: Well, do you have any problems letting
24 them know the name of the company and the address of the
25 company?

1 MR. CHATTERJEE: No.

2 THE COURT: Okay. All right. Well, I, you know, if
3 it's not within your possession, custody or control, then it's
4 going to require another method of obtaining discovery.
5 Anything else you wanted to say on this.

6 MR. CHATTERJEE: Your Honor, as I've said, we've, all
7 places that Mr. Hornick is recommending--

8 THE COURT: I know, but if, they, if you don't object
9 except on the grounds of burden and it's not a burden to you,
10 and it's at their expense and you have all the protections, I
11 don't see a basis for denying it.

12 MR. CHATTERJEE: Your Honor, I'm fine with that with
13 respect to Mr. Zuckerberg. It's the other individual
14 defendants--

15 THE COURT: Well, I know the--

16 MR. CHATTERJEE: --that are not involved--

17 THE COURT: --this gentleman has a particular
18 problem, which I'll get to, but, do any of the other defendants
19 besides Saverin have a problem? You represent all of them,
20 except for him.

21 MR. CHATTERJEE: I represent all of them and, and
22 none of them were doing code development. That, that's their
23 issue. They don't, they, they haven't been involved in the
24 code at all. And they certainly don't--

25 THE COURT: Well, are there, there, I haven't looked

1 at the papers in a while. Are there affidavits from them
2 indicating that the codes were never on their computers?

3 MR. CHATTERJEE: We did and we'd be happy to submit
4 that.

5 THE COURT: I mean are you representing that to me?

6 MR. CHATTERJEE: I, I am representing that to you.

7 THE COURT: Other than Mr. Zuckerberg, none, no code
8 was ever on the, any of the computers of any of the other
9 individuals?

10 MR. CHATTERJEE: That, that's my understanding, Your
11 Honor.

12 THE COURT: All right.

13 MR. HORNICK: Your Honor, interestingly when we were
14 doing this briefing, Saverin did put in declarations. None of
15 the other people put in declarations. And if you looked at the
16 briefs, there's very little information about what really
17 happened. I'm hearing a lot of it for the first time today.
18 What Mr. Zuckerberg said in the press, this site is as much
19 Mr. Moskovitz' as it is mine. And he was doing code
20 development, and there are documents to show that.

21 Mr. McCollum, same thing is true. Mr. Hughes, maybe not. But
22 I'll tell you something about Mr. Saverin, on January 12th of
23 2004, Mr. Zuckerberg sent an email saying I want to show you
24 the website, this website that was being developed. And it's
25 entirely possible that the website might have been emailed to

1 Mr. Saverin. He didn't deny that in his declaration. He just
2 said he never had the code on his computer. But it's possible
3 that he may have received emails, and there could have been
4 attachments to emails. So, even Mr. Saverin could have
5 something on his computer, which isn't covered by his
6 declaration. Now, I would object to there being declarations
7 filed today that say that none of these people ever had
8 anything on their computer when those should have been provided
9 in the briefing process. It would have been a natural thing to
10 do. Saverin did it. We didn't get any explanation whatsoever,
11 any declarations whatsoever from the other defendants.

12 THE COURT: Well I - yes, go ahead.

13 MR. HAMPTON: Well, Your Honor, I, I, I think that
14 you understand the position with Mr. Saverin. We've heard an
15 interesting theory as to how it's conceivably possible that
16 there might be code on Mr. Saverin's computer but that doesn't,
17 that's not the kind of showing that you would need in the face
18 of Mr. Saverin's declaration that there's no code there. The
19 plaintiff's have a theory here that they're desperately in
20 search of some evidence to support it. I would suggest that
21 they ought to start looking in the logical places, and if
22 during that process they come up with some actual information
23 to suggest that Mr. Saverin's perjured himself and his
24 declaration says he doesn't have any code, that would be the
25 appropriate time to talk about imaging his hard drive.

1 THE COURT: Was the name of the company that he
2 mentioned the one that you suspected it was?

3 MR. HORNICK: Yes, it was, Your Honor. And we did
4 ask for that information in discovery--

5 THE COURT: And now who was, who were, what is the
6 name of the corporation and where are they located?

7 MR. HORNICK: Equinex. I don't know where they are
8 located.

9 THE COURT: Where are they located? What's their
10 business address?

11 MR. CHATTERJEE: I can't recall off the top of my
12 head, Your Honor. My, I, I'd have to go back to--

13 THE COURT: I take it it's on this planet, right.

14 MR. CHATTERJEE: It's in the U.S. and it's on the
15 east coast.

16 THE COURT: It's in the U.S., all right, okay. It's
17 on the, what coast?

18 MR. CHATTERJEE: I think it's on the east coast, Your
19 Honor.

20 THE COURT: East coast.

21 MR. HORNICK: They are the, what's called the master
22 service agreement from Equinex is confidential Exhibit 20 to
23 our motion, and we suspected it because there's a date that's
24 almost illegible on it, but the, the document itself is almost
25 illegible and this is, part of the problem is we've been asking

1 for all of this information about server companies that they
2 use, and we haven't been able to get, that's covered by their
3 motions as a matter of fact. So we do have something that
4 identifies Equinex, but we don't have any, enough information
5 to go on for purposes of doing a, a subpoena for example.

6 THE COURT: What do you need?

7 MR. HORNICK: Well, we need to know where they are,
8 their--

9 THE COURT: Right.

10 MR. HORNICK: --address and that would probably be
11 enough.

12 THE COURT: Is their address readily accessible to
13 the defendants?

14 MR. CHATTERJEE: Your Honor, I can, I can check with
15 my client. I'm, I'm fairly certain I should be able to find
16 that out.

17 MR. HORNICK: Your Honor, we'd also like to know the
18 dates that they actually used Equinex. We don't know that
19 either.

20 THE COURT: And this, this was asked for in discovery
21 and refused?

22 MR. HORNICK: Yes, Your Honor.

23 THE COURT: On what basis was--

24 MR. HORNICK: We have, that's covered by other
25 motions--

1 THE COURT: I know, what, on what basis was the
2 basis for its refusal?

3 MR. HORNICK: I don't recall specifically at the
4 moment, Your Honor. There were, there was more than plain
5 objections to all of these requests and that one, I believe was
6 104, 103, something like that.

7 MR. CHATTERJEE: Your Honor, they asked us to
8 identify the, the web hosting services and we did. We listed
9 Equinex right here in the interrogatory response. They didn't
10 ask for the dates of particular usage, but we can provide them.
11 I mean I don't have an issue with providing them with the
12 earliest server company we worked with.

13 THE COURT: Well I suppose as I, I should just put
14 the question to you again, Mr. Chatterjee. Other than, as to
15 the individual defendants that you represent, even though you
16 indicate that you claim they don't have the codes on their hard
17 drives, do you, do you object to them doing the mirror imaging
18 of those computers in the manner and according to the protocol
19 they've mentioned?

20 MR. CHATTERJEE: Your Honor, we do object because
21 there's no--

22 THE COURT: On what basis do you object?

23 MR. CHATTERJEE: --because, and argue, the law
24 requires the have a, they have to give a showing of a
25 particular likelihood of finding the materials, when, we, we've

1 searched them and they're not.

2 THE COURT: All right. This is what I'm going to do.
3 First of all, you can, I, I want the defendants to turn over to
4 the plaintiffs the who information with respect to this outfit
5 that evidently was the one that they uploaded the codes on in
6 order to launch the thing and that you can go ahead and take
7 discovery with respect to that organization. I will also allow
8 the plaintiff to take discovery as to, and you may, I don't
9 know if you want to wait on this or not, but you may take
10 discovery as to what the defendants have done to look for these
11 codes. I mean it seems to me that, that even though it is
12 somewhat simple and it is a situation where, you know, the
13 basic rule that the producing party has the obligation to find
14 this stuff and turn it over if it's relevant and we're not
15 hearing anything like you know, the *Zubalight* (ph) case where
16 there, it is an undue burden to look at this stuff and find
17 this stuff. Mr. Chatterjee basically represents to me that his
18 client has done what you're going, what you propose to do with
19 respect to the hard drives of the individuals that he
20 represents and the, and the servers of the, any hard drives
21 within his custody, control or possession of he or any of his
22 clients. And upon that representation, I'm not sure you're
23 entitled to an order of the Court that you get, be able to
24 mirror image this. But I think you're entitled to do
25 discovery, to, you know, find out exactly what they've done and

1 then come back and tell me if what they've done is less than
2 what you do and that you had some basis for saying if you were
3 allowed to do it, you're going to find something. So that,
4 that's the way I'm going to, I'm going to handle this
5 particular motion.

6 MR. HORNICK: Could I respond, Your Honor.

7 THE COURT: Sure.

8 MR. HORNICK: Just a couple of points. One is that
9 I'd be very interested to know if the defendants have made
10 images of any devices. If they haven't, I don't know how they
11 could have done what we want to do. Secondly, this approach
12 doesn't, will never allow us to find out whether this code was
13 deleted by one of the defendants, and third--

14 THE COURT: Well it will if they've done what you are
15 planning to do. He's indicated to me that they've gone through
16 the, and looked for among the deleted documents. But see
17 that's the reason, but you don't know exactly what they've
18 done, which is the reason I, I think before I make a ruling,
19 I'd like to have a more substantial record and have you know
20 exactly what they've done. And I'm, you know, I'm willing to
21 if, if this discovery reveals that these representations that
22 are made to me here, that they've done exactly what you would
23 have done are untrue, I'll shift, I'll do some, you know, some
24 cost shifting. But, you know, the way it works is that you
25 seek discovery from the other side. It's their obligation to

1 give it to you if it's relative to claim or defense of the
2 party. They say they've done it, and they've done exactly what
3 you would, your independent expert would do. And in the face
4 of that, I don't think that I am, the record is such that I can
5 order them over their objection to let you do mirror images of
6 their hard drives. But the server's a different question, the
7 server that they launched it from is a different question
8 because they haven't, I don't know what they've done to that,
9 but I don't think they've made a mirror image of that, which
10 is the reason I'm going to let you go right ahead and do
11 discovery on that. But that's the, that's the reason for doing
12 it the way I'm doing it. Now, you find out exactly what
13 they're doing and if, if it turns out that these
14 representations that have been made to me, are, they're untrue,
15 that's obviously going to affect the next step.

16 MR. HORNICK: Your Honor, I'm going to assume that
17 privilege, attorney/client privilege and work product aren't
18 going to get in the way of this discovery.

19 THE COURT: Well, we haven't heard anything about
20 that yet. As I, as I--

21 MR. CHATTERJEE: I doubt that the individuals had
22 anything to do with this. This is all something that would
23 have been done by counsel with experts, and I can see a lot of
24 objections coming to the discovery that--

25 THE COURT: No, they, you can do discovery on what

1 they did to, what counsel did and what anyone did to obtain
2 the discovery that you've requested and, because that's where
3 the, that's where the issue is. They say they've done
4 everything that you would do and it's not there. You disagree
5 with them. Well, I'm going to let you do some discovery and
6 make a record if you can that there's stuff they haven't done
7 and and if you are able to do that we'll, we'll take further
8 action.

9 MR. HORNICK: Thank you. I think that would be a
10 good start, Your Honor.

11 THE COURT: Okay, so that we're clear. Discovery can
12 go forward against the person whose server was used to launch
13 it, and the defendants will give any identifying information
14 about that corporation to the plaintiffs that they need in
15 order to issue a subpoena and the plaintiffs may take discovery
16 of the efforts that you've made, the defendants have made to
17 obtain discovery that's sought and is the subject of this
18 motion. All right?

19 MR. HAMPTON: Your Honor, does the Court contemplate
20 that there'll be further discovery as to defendant Saverin?
21 It's our representation that the, it's not there, that it's
22 never been there and--

23 THE COURT: If they want to question him about that,
24 they may. And they may ask him questions about attachments and
25 all of that sort of thing. They may take discovery of the

1 defendants, including Mr. Saverin, yes.

2 MR. HAMPTON: Thank you, Your Honor.

3 THE COURT: Okay. All right. I will go through
4 these, these motions, these other motions to the extent that
5 I'm able to. If I find that in reading them that there hasn't
6 been, you know, if I'm, if I'm reading them and I, I get to the
7 situation that someone is asking for something and the other
8 side says we've already given it, or, you know, I very well may
9 ask you to confer further on it. But as I say, I haven't had a
10 chance to go through them all, which is the reason I haven't
11 put it on for hearing today.

12 Okay, anything else I need to take up?

13 MR. HORNICK: Yes, Your Honor, this motion also
14 covered--

15 THE COURT: Oh that's right, yes.

16 MR. HORNICK: --documents after May 21st of 2004.

17 THE COURT: That's right. Okay, I'm, I'm sorry about
18 that.

19 MR. HORNICK: The defendants agreed to produce
20 responsive pre May 21st documents "irrespective of relevance".
21 So relevance is not an issue with respect to producing
22 documents created after May 21st, and we're only--

23 THE COURT: Wait a minute, wait a minute, you better
24 say that again.

25 MR. HORNICK: Yes. We have document requests that

1 are identified in the motion on the--

2 THE COURT: Right.

3 MR. HORNICK: --number 63, 67 and some others, and
4 those aren't limited in time. Therefore, the whole relevant
5 time period which goes back to probably that, those requests
6 probably asks for information back to October of 2003, roughly.
7 And they're not limited in time in the future. So the
8 defendants produced documents up to May 21st of 2004 without any
9 objection to relevance, but then they cutoff production on May
10 21st of 2004.

11 THE COURT: Well, do they object to producing any
12 documents after May 21, 2004?

13 MR. HORNICK: Yes, they do. They're withholding all
14 documents created after May 21, 2004 except documents that they
15 view as supporting their case, which are a few financial
16 documents that they've produced. And we're only seeking
17 documents that are relevant to the lawsuit and they admit that
18 they're withholding them. Their arguments were that this is
19 just a trade secret case. Mr. Chatterjee, said today this is a
20 trade secret and a copyright case. In their motion to dismiss,
21 they say this is mostly a common law claims case. In fact,
22 this case has several claims. We don't know which are going to
23 predominate at this time, and the discovery that we're seeking
24 isn't limited to trade secret issues, but they say because we
25 had not identified our trade secrets, they weren't going to

1 produce any documents created after May 21, 2004. How the two
2 things connect, I still haven't figured out. Now, we're
3 entitled to those documents after that date just as much as
4 we're entitled to them before that date, and there are probably
5 no more than a few hundred documents. The defendants argue
6 that it's 1/5 the quantity of documents in the Library of
7 Congress, but we argue there are probably only a few hundred,
8 and in their opposition to our motion to compel documents, they
9 admitted that there is relatively a small number of documents
10 that fall into that category, specifically at pages 6 and 7 of
11 their opposition to our motion to compel documents, which is
12 Docket No. 82. They argue that the documents that they have
13 after May 21st grew exponentially after that date, but that's
14 unlikely because they deal with college students, summer
15 vacation started around that time, and we've tried to take
16 discovery on the growth of their website. They've blocked
17 that, so we don't really know if that allegation is true. But
18 what happened on May 21st of 2004 is that our clients' website
19 launched. And here's a crucial fact; nobody knew, on the
20 defendants' side at least, nobody knew that that was going to
21 happen. So leading up to the time of May 21st of 2004, the
22 defendants were cruising along running their website. They
23 don't know whether ConnectU is going to launch. They don't
24 know when it's going to launch. Then on May 21st it launches.
25 Now, it's fair to assume that on that day and after that day

1 there were emails and other documents generated where they
2 would be discussing the launch of ConnectU, whether we have any
3 problems, whether there's any infringement we need to purge,
4 whether we are at risk in some way, but all of those documents
5 are being withheld. They won't give us anything from May 21st
6 of 2004 onward. We say that there's no basis whatsoever for
7 withholding them, Your Honor, and we ask that they be ordered
8 to produce them.

9 THE COURT: Okay. Let me hear the defendants on that
10 aspect, please.

11 MR. HAWK: Your Honor, Robert Hawk for defendant
12 Saverin. And I should address this issue I think in the first
13 instance that we were actually a counsel for all defendants at
14 the time the responses to these first set of document requests,
15 170 requests were put together. And this is not a, an issue of
16 a May 21, 2004 arbitrary date cutoff issue. It is an issue of
17 over breadth with regard to specific document requests that we
18 objected to. The way that we got to this May 21, 2004 request,
19 well first of all, there were a number of requests that we did
20 not object to producing documents that were generated after May
21 21st. And a number of those requests where we produce documents
22 and agree to produce documents generated after May 21st. But
23 those requests were ones that were not totally overbroad and
24 objectionable in seeking essentially every document in the
25 company. Where we use the May 21, 2004 date, it was really,

1 Your Honor, just a, an attempt by us to reach some kind of
2 compromise to offer the plaintiff some of the documents that
3 they had asked for even though the requests themselves were
4 vastly overbroad. For example, counsel, where we interpose
5 that that objection is where, for example where plaintiff asked
6 for all documents that relate to the development of the
7 website. And there were two reasons that that was just not,
8 not a practical kind of request. It would, if Microsoft, for
9 example, were the, were the defendant in this case, they'd be
10 asking for, you know, reams and tons of material and this
11 company, it's certainly not Microsoft, but it is a company that
12 has grown exponentially since May 21st of 2004. And the reason
13 we selected a date is that we tried to get a non-arbitrary date
14 where we could compromise and give plaintiff a lot of the
15 documents that they were looking for and ones that were likely
16 to be more relevant, but not take on the huge burden of
17 producing documents, a huge volume of documents where plaintiff
18 did not specify the kind of request that the, where the
19 requests were simply overbroad, Your Honor. Where the requests
20 were not overbroad, we went ahead and agreed to produce
21 documents, regardless of timeframe. And so what we asked
22 plaintiff to do was to give us more specific requests. If they
23 were going to not limit the documents by time, they needed not
24 to give us overbroad requests.

25 THE COURT: And what was their response?

1 MR. HAWK: Their response was no, there might be
2 something, Your Honor, there might be something out there that
3 we're entitled to and we are not willing to narrow these
4 overbroad requests. And that's, that's really why we weren't
5 able to come to a compromise that worked on this particular
6 issue.

7 THE COURT: Okay. Mr. Chatterjee.

8 MR. CHATTERJEE: Your Honor, there's two additional
9 things that I wanted to discuss in addition to Mr. Hawk. Let
10 me, let me just read to you what some of the document requests
11 say. All documents relating in any way to the development of
12 the FaceBook.com website. That's request No. 33, the very
13 first one they're seeking to compel on. That is the company.
14 All documents in the possession, custody or control of Mark
15 Zuckerberg, the FaceBook Inc., and all the other defendants
16 relating in any way to the subject matter of this lawsuit. I,
17 I, I couldn't even begin to pretend how to respond to that.
18 That's again, that's the entire company, the subject matter of
19 the lawsuit is the FaceBook and is that something that the
20 plaintiff can claim some sort of title to? And that, that,
21 that is an enormously broad request. We've tried to pare it
22 down, and frankly, Your Honor, when I deal with cases like
23 this, the way I typically do meet and confers is I say, okay,
24 we have these document requests, somewhat an antiquated
25 approach in the context of electronic discovery. Here's the

1 bright line rules that we've applied to try and figure out how
2 to conquer the shapes of discovery. What is it, what else is
3 it that you think you really need that will move the ball
4 forward? Can you specify what it is you think you really need,
5 rather than working through each of the individual requests,
6 although you may get to that in the process of meet and confer.
7 Rather than follow that approach, which is one we suggested in
8 the meet and confer, we engaged in a seven hour meet and confer
9 where we went through each and every one of these, where you
10 had to recite the same script over and over again. It just
11 seems to me to be, I mean, these, these requests are so broad,
12 we should really be focusing on, what is the specific thing
13 that people really need.

14 The second point I wanted to make is this case, and I
15 think Your Honor's holding in the *Microwave Research* case a, a
16 number of years ago is quite telling. That's--

17 THE COURT: Boy, you're going way back now?

18 MR. CHATTERJEE: It goes back to 1986, Your Honor,
19 and that was actually a breach of contract case and trade
20 secret case and a common law and fair competition, many of the
21 same claims that one has here, where Your Honor adopted an
22 approach basically saying the plaintiff has to put their cards
23 on the table. They have to have, show a well founded belief of
24 the fact that their trade secrets misappropriated or that the
25 other cause of action is viable before they're given the keys

1 to the company to just start fishing within it. That well-
2 founded belief is what frames the discovery. We are struggling
3 as we sit here today to understand what are the contours of
4 really what's at issue here. We also have a motion to compel,
5 which isn't scheduled for today related to interrogatory No. 2,
6 where we've asked them to specify their trade secrets. We also
7 have a motion to compel related to the 30(b)(6) deposition
8 where we tried to do the same thing. These are all somewhat
9 interrelated. I'm not even sure if it makes sense to resolve
10 this single piece of the motion without looking at the context
11 of the other motions in order to frame what the correct scope
12 of discovery should be, if there's any to be framed at all.

13 Thank you, Your Honor.

14 THE COURT: All right, let me hear you in response--

15 MR. HORNICK: Yes.

16 THE COURT: --to this allegation that these are
17 overbroad and you refuse to engage in any limitations on them.

18 MR. HORNICK: Yes. Your Honor, first I should point
19 out that the plaintiffs in this case haven't withheld any
20 documents in production. And we've been very cooperative, and
21 we're not getting any cooperation back. We're blocked at every
22 turn. And on these particular requests, I think it's worth
23 pointing out that the defendants had no objection to producing
24 documents responsive to them as long as they were dated before
25 May 21st. So our point is how can they possibly be overbroad if

1 you are willing to produce responsive documents prior to that
2 date. How can they possibly be overbroad?

3 THE COURT: Well, because I take it, because
4 according to what I'm hearing from the defendant is that since
5 that time the company has grown to such an extent that the
6 amount of documentation is so large that it would be burdensome
7 and it's not all relevant.

8 MR. HORNICK: Well, Your Honor, we're only asking
9 them to apply the criteria of relevance that they applied when
10 they produced pre-May 21st documents, and as I said earlier in a
11 later brief, they admitted that we were right, that there is a
12 relatively small quantity of documents that they are
13 withholding that are responsive to these requests. I've
14 pointed the Court before to their opposition to our motion to
15 compel documents. At page six they say, "FaceBook defendants
16 are only withholding some financial documents and corporate
17 documents created after May 21, 2004."

18 THE COURT: Well, yes, but that's just, that's just
19 the financial documents. That doesn't, I mean, that does, is,
20 is that a statement as to the universe of documents--

21 MR. HORNICK: If, if you read that--

22 THE COURT: requested after May 21st?

23 MR. HORNICK: Yes, if you read that paper, they were,
24 in context, they were talking about what they were withholding
25 as stated after May 21st, and they said we are only withholding

1 some financial and corporate documents created after May 21,
2 2004. So we don't think the quantity is this large quantity
3 that they're talking about. We think it's a relatively small
4 quantity, and we don't see why they can't produce them, because
5 they did not object to the relevance with respect to documents
6 before that date.

7 With respect to what we're looking for, well, Your
8 Honor, we don't know what they have. They want us to tell us
9 what--

10 THE COURT: Now hold on just a second.

11 Mr. Chatterjee, what about that point? They're only
12 withholding a small number of documents after May 21st, 2004?

13 MR. CHATTERJEE: That's just flat out wrong, Your
14 Honor. Your understanding is that, that you articulated is
15 exactly what our point was, which was with respect to this
16 narrow category of financial information, a certain kind of
17 financial information, there are certain things that we've
18 withheld and I can talk about that if you want. Those are
19 subjects of other motions. But that is a very different issue
20 that in saying documents relating in any way to the development
21 of the FaceBook website.

22 THE COURT: All right. That's enough. I've heard,
23 go ahead. You wanted to, as to what we're looking for.

24 MR. HORNICK: Yes, well, the reason that we have a
25 request that is basically asking for any documents that relate

1 to the lawsuit is because we don't know what they have and
2 what we can ask for. We have a lot of other document requests
3 and they have produced documents in response to some, and
4 they've promised to produce documents in response to others.
5 The ones where they promised, they withdrew the promise. We
6 have a separate motion pending. But this particular limited
7 set, they stood on their objection. We won't produce anything
8 created after May 21, 2004, and as a result, we don't have
9 things like email that these people exchanged after that date.
10 We don't have financial documents after that date, with few
11 exceptions. We don't have any corporate documents after that
12 date. We don't have any documents that relate to any efforts
13 that they might have made to cover up their wrongful acts after
14 that date. We don't have their communications with the media
15 after that date. And I don't know if Your Honor is aware of
16 this or not, but there are about five to 15 articles a day
17 published about the FaceBook.com. They are talking to the
18 media all the time. We don't have documents that talk about
19 how the FaceBook has grown since that date. All of this is
20 crucial for our, for our expert, but we don't want to name
21 particular categories and then have them say they object to
22 those because they don't understand them or they're holding
23 back things that we didn't simply ask for because they say oh,
24 it didn't technically fall within that category so, therefore,
25 we have some catchall requests that ask for any documents that

1 relate to the lawsuit. And that's not an unreasonable
2 request. We're entitled to discovery and anything related to
3 the claims, defenses or counterclaims. And they've just made
4 an arbitrary cutoff date on May 21st, which just happens to be
5 the date on which a lot of documents could start to be
6 generated because they found out that our client had now
7 launched their website and they may be in real trouble.

8 THE COURT: Okay. I'll take the matter under
9 advisement. Thank you very much and we'll remain in session to
10 hear the criminal matter.

11 MR. CHATTERJEE: Thank you, Your Honor.

12 MR. HORNICK: Thank you, Your Honor.

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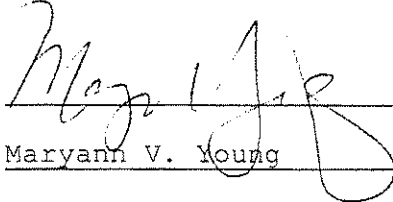
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CERTIFICATION

I, Maryann V. Young, court approved transcriber, certify that the foregoing is a correct transcript from the official digital sound recording of the proceedings in the above-entitled matter.



Maryann V. Young

January 11, 2006