Third Amended Complaint

No. 105CV039867.
July, 2008.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

UNLIMITED JURISDICTION

FACEBOOK, INC., a Delaware Corporation, THEFACEBOOK, LLC, a Florida limited liability company, and MARK E. ZUCKERBERG, an individual,

Plaintiffs,

v.

EDUARDO SAVERIN, an individual,

Defendant.

THIRD AMENDED COMPLAINT FOR:

(1) DECLARATORY RELIEF;

(2) BREACH OF SETTLEMENT AGREEMENT;

(3) BREACH OF RELEASE;

(4) BREACH OF AGREEMENT NOT TO SUE; AND

(5) FURTHER DECLARATORY RELIEF.

JURY TRIAL DEMANDED

Plaintiffs Facebook, Inc. ("Facebook" or the "Company"), thefacebook, LLC (the "LLC") and Mark E. Zuckerberg ("Zuckerberg") (collectively, "Plaintiffs") hereby allege for their Third Amended Complaint against Defendant Eduardo Saverin ("Saverin" or "Defendant"), on personal knowledge as to their own actions and on information and belief as to the actions of others, as follows:

SUMMARY OF THE ACTION

1. This is an action for declaratory relief and damages arising out of various improper acts perpetrated by Saverin. Plaintiffs seek a declaration that written agreements signed by Saverin in October 2004 are valid and enforceable, that such agreements establish Saverin's precise ownership interest in the Company to the exclusion of any oral agreement or promise alleged by Saverin, and that Saverin is not entitled to any additional ownership interest in the Company beyond that established by the written agreements. Furthermore, those written agreements have already settled and released all claims set forth in Saverin's cross-complaint herein, as well as in the demand letter that Saverin sent Plaintiffs on April 20, 2005 and that prompted the instant litigation. In essence, Saverin's demand letter and cross-complaint seek to revive a dispute that had already been "fully and forever" settled. Accordingly, Plaintiffs further seek a declaration that the instant dispute has already been settled, and that Saverin has already released, and agreed not bring suit on, the claims in his demand letter and cross-complaint. Moreover, because the sending of the demand letter and the filing of the cross-complaint violated the terms of Saverin's settlement agreement and release, Plaintiffs have sustained damages herein, including not only the fees and costs expended to bring the instant action and to defend against Saverin's cross-claims but also the premium consequently paid to secure investment capital for the Company.

2. The written agreements were essentially a bill of divorce between Saverin, on the one hand, and the Company and Zuckerberg, on the other hand. The divorce was necessitated by Saverin's pattern of misconduct in connection with the LLC, the Company's effective predecessor. That misconduct included improperly seizing the business's gravely needed funds, holding the business hostage, and intentionally interfering with its growth. By these acts, Saverin attempted to take control of the business. But that control was undeserved: While Facebook cofounders Zuckerberg and Dustin Moskovitz ("Moskovitz") dropped out of Harvard to spend thousands of hours working on and growing the business into a success, Saverin stayed at Harvard and refused to contribute any sought-after or meaningful efforts towards the business. Saverin's misdeeds did not go unaddressed. In the sum-

mer of 2004, as Saverin was freezing the business's funds and attempting to derail its first round of financing, Zuckerberg and Moskovitz formed the Company. Saverin, acknowledging that his bid to seize control of the business was now over, agreed to give up his role in its management. Accordingly, the LLC's owners - Zuckerberg, Saverin and Moskovitz - entered into the above-mentioned written agreements, in which they exchanged their interests in the LLC for shares in the Company, and in which Saverin agreed to forego his voting rights associated with those shares and to settle and release any claims he might have. In return, Saverin received a unique and extraordinary benefit: Whereas Zuckerberg and Moskovitz, who were continuing with the Company, received all of their Company shares subject to a vesting schedule, Saverin received all of his Company shares fully *vested.* But Saverin still was not satisfied. He continued his campaign of misconduct - now using the Company as his personal cash cow - by misappropriating the Company's trade secrets, usurping corporate opportunities, diverting sales from the Company's customers to a competing company, interfering with investment in the business, and placing unauthorized advertisements on the Company's website. These acts culminated in Saverin's litigation-precipitating threat to sue Plaintiffs if they did not give him 30% of the Company. In short, now that the Company has had publicized successes, Saverin again seeks to extort from it an undeserved personal benefit.

PARTIES

3. Plaintiff Facebook is a Delaware corporation with its principal place of business in Palo Alto, California. The Company operates an online directory that connects people through social networks.

4. Plaintiff LLC is a Florida limited liability company that was acquired by the Company.

5. Plaintiff Zuckerberg is an individual who resides in Santa Clara County, California. Zuckerberg is, and at all relevant times has been, the inventor, co-founder, Chief Executive Officer and largest shareholder of the Company. Zuckerberg was also listed as a managing member of the LLC in its Articles of Organization and was the majority holder of the LLC's interests.

6. Defendant Saverin is an individual, who, on information and belief, resides in Boston, Massachusetts. Saverin is also a shareholder of the Company. Saverin was listed as a managing member of the LLC in its Articles of Organization and, at relevant times, held himself out as the Chief Financial Officer of the business.

VENUE AND JURISDICTION

7. Venue is proper, pursuant to California Code of Civil Procedure section 395 because: (1) Defendant consented to venue in Santa Clara County in the contracts that are the subject of this action, which are attached hereto as Exhibits A through D; (2) Plaintiff Facebook has its principal place of business in Palo Alto, California, and Zuckerberg resides in Santa Clara County, California; (3) the injuries to Plaintiffs arose and/or were suffered in Palo Alto, California; and (4) some or all of the wrongful conduct complained of herein took place in Santa Clara County, California. Additionally, this Court has personal jurisdiction over Defendant. In the contracts that are the subject of this action, which are attached hereto as Exhibits A through D, Defendant expressly agreed that Santa Clara County, California, would be the exclusive jurisdiction for any disputes concerning such contracts and consented to personal jurisdiction here.

FACTUAL BACKGROUND

8. In or about January 2004, Zuckerberg, while an undergraduate at Harvard, conceived the idea of an online dir-

ectory that connects people through social networks at colleges and universities and planned to turn his idea into a business. Zuckerberg approached Saverin, a college classmate, in January 2004 regarding his new idea. Zuckerberg and Saverin each orally agreed to invest $1,000 to start the business. The business was not initially organized as any specific legal entity, but Zuckerberg and Saverin did come to an oral agreement about their respective ownership interests in the business and management responsibilities. They agreed that Zuckerberg would serve as CEO and run the technical side of the business - designing and running the website, creating new web content, and building and maintaining hardware to operate the site - and Saverin would serve as CFO and take care of the finance aspects of the business. Zuckerberg and Saverin also agreed to divide the ownership rights as follows: 67% for Zuckerberg and 33% for Saverin.

9. Zuckerberg and Saverin launched the business's website, www.thefacebook.com, in February 2004 and quickly realized that they needed assistance to run the business. As a result, they recruited Zuckerberg's college roommate, Moskovitz, to work on the business. The principals informally restructured the ownership as follows: 65% for Zuckerberg; 30% for Saverin; and 5% for Moskovitz. Up until this point, the business was being run as an unincorporated association or informal partnership.

10. On April 13, 2004, Saverin formed the LLC, which was organized as a limited liability company under Florida law. Zuckerberg, Moskovitz and Saverin are each listed as members and managers of the LLC in the Articles of Organization. At no time were the intellectual property rights in the business ever assigned to the LLC. At no time did those rights ever belong to the LLC.

11. In or about June 2004, Zuckerberg and Moskovitz left Harvard and moved to California to work full time on the business. Up to this point, the three founders had been running the business from Massachusetts while they attended college. But because the business was beginning to grow, Zuckerberg and Moskovitz moved to California to devote all their time and energy to the business. Saverin, however, chose not to move to California with the other founders. At or around this time, Zuckerberg was introduced to Sean Parker ("Parker") who began doing some work for the business, and Zuckerberg and Saverin agreed to each invest $20,000 in the business to fund future expenses. In or about July 2004, as the business continued to grow, Zuckerberg and Moskovitz decided that they would not return to Harvard for the fall term but would remain in California to work on the business full time. Despite repeated urgings by Zuckerberg and Moskovitz to do the same, Saverin chose to return to Harvard for the fall term.

12. On or about July 15, 2004, Zuckerberg, Moskovitz and Parker were working on new features for the website and trying to raise additional capital. Zuckerberg was in contact with several angel investors and identified two who wanted to invest. However, before Zuckerberg could execute a term sheet with the investors, Saverin sent Zuckerberg a letter asserting that the parties had originally agreed to give Saverin control over the business, and that, until Saverin received written authority to do what he wanted with the business, Saverin would obstruct the efforts of the other owners of the business and the advancement of the business itself. Saverin also stated that since he owned 30% of the business, he would make it impossible for the business to raise any financing until this matter was resolved. Saverin's obstruction was disclosed to the angel investors, who consequently became concerned about making an equity investment. Eventually, on or around September 27, 2004, the investors signed a term sheet in which they took a convertible note rather than equity. The disruption caused by Saverin interfered with the business's ability to gain financing, and the value and structure of the investment reflected the investors' knowledge of Saverin's conduct and were thus less beneficial to the business than they otherwise would have been.

13. Meanwhile, Saverin attempted to hijack the business by seizing control of the LLC's bank account. In June 2004, Saverin had opened a bank account for and in the name of the LLC and made himself the sole signatory on the account. On or about July 28, 2004, Saverin froze that account and refused to release any of the funds unless he was given greater control over the business. The business desperately needed these funds to cover basic expenses, pay employees and purchase new servers and other equipment necessary for operation and growth. Consequently, Zuckerberg was forced to invest an additional $85,000 of his own personal funds, including $28,000 on 25 new servers, in order to keep the business going. The funds invested by Zuckerberg were originally earmarked for his college tuition.

14. On or about July 28, 2004, Saverin further attempted to wrest control of the business from Zuckerberg by requesting that Zuckerberg sign a limited liability operating agreement prepared by Saverin. Saverin informed Zuckerberg that he would allow Zuckerberg to see the agreement only if Zuckerberg agreed to sign it without showing it to his lawyers or personal advisors. Zuckerberg refused, but attempted to resolve the situation by having the parties' oral agreement about the parties' respective ownership interests and management responsibilities memorialized in an operating agreement. However, Saverin refused to sign the agreement.

15. At this point, in an attempt to clean up the affairs of the business and to be more attractive to potential investors, Zuckerberg and Moskovitz decided to incorporate in Delaware and assign all of their intellectual property rights in the business and their membership interests in the LLC to the Company. The Company was incorporated under Delaware law on July 29, 2004. Both Zuckerberg's and Moskovitz's shares in the Company were subject to a vesting schedule, contingent upon their continuing employment with the Company. Saverin was informed that he would be permitted to exchange his LLC interests for an equal percentage of the Company and to buy additional shares in the Company. However, Zuckerberg explained that because Saverin was offered the opportunity but refused to relocate to California to work as a full-time employee and had failed to execute the tasks that he had agreed to perform for the business, he would not be asked to be an employee or part of the management team of the Company going forward. Because Saverin would not be part of the management team, Saverin was also informed that, unlike Zuckerberg and Moskovitz, his shares in the Company would not be subject to vesting but would, of course, be subject to additional dilution as existing and future employees of the Company received additional equity as their employment continued or began and as new investors purchased shares. Zuckerberg further explained that Zuckerberg, Moskovitz and the Company's potential investors did not want Saverin to have any managerial or other control over the Company. Zuckerberg made it clear to Saverin that this meant that Saverin's percentage interest in the Company would decline over time, while Zuckerberg, Moskovitz and other existing employees would likely receive additional equity as the Company grew. On information and belief, Saverin stated that he understood this, and was willing to execute documents reflecting and relating to his equity ownership, vesting obligations, lack of future employment, and lack of voting rights.

16. On or about October 31, 2004, Saverin entered into a number of agreements with the Company regarding the exchange of his LLC interests and purchase of ownership interests in the Company. Specifically, Saverin entered into a Common Stock Purchase Agreement ("Purchase Agreement I") wherein he agreed to purchase 1,250,000 shares of the Company's common stock for a purchase price of $10,750. Saverin also agreed pursuant to Purchase Agreement I to assign all of his intellectual property rights (if any) and all information, rights and interest that he obtained or created while working on the business, including customer lists, to the Company and to keep such information confidential. A copy of Purchase Agreement I is attached hereto as Exhibit A and is incorporated herein by this reference. Saverin also entered into a second Common Stock Purchase Agreement ("Purchase Agreement II") in which he agreed to purchase 78,334 shares of common stock of the Company for a price of $673.68. A copy of Purchase Agreement II is attached hereto as Exhibit B and is incorporated herein by

this reference. That same day, Saverin, along with Moskowitz and Zuckerberg, executed an Exchange Agreement, whereby each agreed to exchange their interests in the LLC for shares in the newly-incorporated Company. A copy of the Exchange Agreement is attached hereto as Exhibit C and is incorporated herein by this reference. As a result of the exchange, the following shares of common stock in the Company were issued: to Zuckerberg, 169,273; to Saverin, 78,334; to Moskovitz, 13,056. As a result of these agreements, the Company acquired all right, title and interest in the LLC and all membership interests therein. Accordingly, the Company became the sole member of the LLC. Purchase Agreement I further provided that Saverin (i) agrees that his being permitted to purchase shares under the agreement represents settlement in full of all outstanding obligations owed to Saverin by, *inter alia,* the Company and its officers, employees and subsidiaries (including the LLC), and (ii) fully and forever releases, and agrees not to sue concerning, all known or unknown claims that he may possess against, *inter alia,* the Company and its officers, employees and subsidiaries (including the LLC) as of the date of the agreement. The Exchange Agreement contains essentially identical language. On October 31, 2004, Saverin also entered into a Holder Voting Agreement, in which Saverin agreed to relinquish voting rights associated with his common stock and to vote in various, specified ways. A copy of the Holder Voting Agreement is attached hereto as Exhibit D and is incorporated herein by this reference.

17. In the winter of 2004-05, the Company hired a new sales representative to officially replace Saverin. Effective as of the signing of the October 31, 2004 agreements referenced above in Paragraph 16, Saverin agreed that he would not thereafter work for the Company as an employee and would immediately transition all matters to the Company's new sales representative, including all of his knowledge about the Company's customers and advertising, and the systems that the Company had in place. On information and belief, Saverin never followed through with this assignment. Instead, Saverin kept communicating directly with advertising customers. Insofar as Saverin was ever an employee of the Company or LLC, any such employment ceased by October 31, 2004, but Saverin agreed that he would thereafter do consulting work on some small projects for the Company and that he would be paid at an hourly consulting rate. For this work, Saverin never submitted any timecards or requests for payment, even though Zuckerberg had repeatedly asked him to do so. Although Saverin never executed the consulting agreement prepared for him by the Company, both the Company and Saverin understood that the Company would pay Saverin as a consultant, rather than as an employee, for this work.

18. After the Company's new sales representative took over all of the advertising accounts, the Company received 20-30 emails from customers stating that they were pleased that someone new was taking over the accounts because Saverin had been difficult to work with and was hard to get in touch with. These advertising customers said that Saverin never answered his phone, that his voicemail was always full and that he rarely returned emails, even on days when advertising campaigns were scheduled to go live. Individuals in contact with Saverin said that he did very little work on the Company's business during this period. Nonetheless, Saverin claimed to be working hours a week even after he was directed to cease all such activity.

19. In or around February 2005, Saverin and a few of his friends launched a "job networking" website for college students called "Joboozle," which was remarkably similar to www.thefacebook.com. On information and belief, despite Saverin's obligation to maintain the confidentiality of the Company's intellectual property rights and trade secrets, including customer lists, pursuant to Purchase Agreement I, Saverin misappropriated the Company's trade secrets and provided them to Joboozle. Not surprisingly, many, if not all, of Joboozle's advertisers during the relevant period were advertising customers of the Company. In addition, at or about this time, Saverin placed unauthorized advertisements for Joboozle and other personal projects on the Company's website. When the Company learned that Saverin was misappropriating advertising space on its website, it instructed him to cease immediately. However, on information and belief, Saverin continued to place unauthorized advertisements

on the Company's website until the Company was able to block his ability to access its servers. In total, Saverin misappropriated thousands of dollars' worth of advertising from the Company.

20. In or about April 2005, the Company sought investments from various venture capital firms. When Saverin learned of this, he used the information to try to hold the Company hostage once again - implying that he would not allow the Company to move forward with any financing without some special compensation for him. On April 20, 2005, Saverin sent a letter to the Company, through his attorney, stating, *inter alia,* that he challenged the validity of the October 2004 agreements attached hereto as Exhibits A through D. Saverin's letter demanded recognition of his "rightful equity position" and threatened that, if his concerns were not "resolved promptly," he would "take all appropriate steps to protect and enforce his rights." In response, the Company informed Saverin on April 20, 2005 that he was not an employee of the Company, had no responsibilities with the Company and should cease all communications with the Company's advertising customers immediately. The venture capital round of financing was completed despite Saverin's conduct - which was disclosed to the investor - but the ultimate transaction value reflected Saverin's conduct. Indeed, Saverin's conduct forced the Company to make significant concessions to the investor in order to secure the investment.

FIRST CAUSE OF ACTION BY ALL PLAINTIFFS AGAINST DEFENDANT SAVERIN FOR DECLARATION THAT THE OCTOBER 2004 WRITTEN AGREEMENTS ARE VALID AND ESTABLISH SAVERIN'S OWNERSHIP INTEREST IN THE COMPANY

21. Plaintiffs incorporate herein all the allegations contained in Paragraphs I through 20 of this Third Amended Complaint.

22. An actual controversy has arisen and now exists between Plaintiffs and Saverin regarding the validity and enforceability of October 2004 written agreements referenced in Paragraph 16 and the parties' respective ownership pursuant to these written agreements. Saverin contends that these written agreements are not valid and that he should be given a 30% equity stake in the Company. Plaintiffs on the other hand contend that these written agreements are valid and binding, and establish Saverin's equity interest in the Company.

23. Plaintiffs request a judicial determination that these written agreements are valid and enforceable, and establish Saverin's precise ownership interest in the Company to the exclusion of any oral agreement or promise alleged by Saverin. Plaintiffs further seek a judicial determination that Saverin is not entitled to any additional ownership interest in the Company beyond that established in these written agreements.

SECOND CAUSE OF ACTION BY ALL PLAINTIFFS AGAINST DEFENDANT SAVERIN FOR BREACH OF SETTLEMENT AGREEMENT

24. Plaintiffs incorporate herein all the allegations contained in Paragraphs I through 23 of this Third Amended Complaint.

25. In the October 2004 written agreements referenced in Paragraph 16, Saverin agreed that being permitted to purchase Company shares under Purchase Agreement I "represents *settlement in full* of all outstanding obligations owed to [Saverin] by the Company and its officers, board members, stockholders, managers, supervisors, affiliates, agents, employees and subsidiaries (including but not limited to TheFacebook LLC)." Exhibit A, ¶ 7 (emphasis added). Similarly, Saverin agreed that his exchange of his LLC interest for Company shares under the Exchange Agreement (which exchange was completed by Purchase Agreement II) "represents *settlement in full* of all outstanding obligations owed to [Saverin] by the Company and its officers, board members, stockholders,

managers, supervisors, affiliates, agents, employees and subsidiaries and/or by TheFacebook LLC, and its officers, board members, stockholders, managers, supervisors, affiliates, agents, employees and subsidiaries." Exhibit C, ¶ 4 (emphasis added).

26. By sending his letter of April 20, 2005, Saverin breached each settlement agreement as set forth above.

27. Saverin's April 20, 2005 letter caused the Company to make significant concessions to an investor in order to secure its investment and diminished the value of the Company.

28. Further, by filing his cross-complaint herein against Plaintiffs, Saverin independently breached each settlement agreement as set forth above.

29. In defending against Saverin's cross-complaint herein and in bringing the instant action to enforce each settlement agreement as set forth above, Plaintiffs have incurred and paid attorneys' fees and costs.

30. Plaintiffs are contractually entitled to attorneys' fees and costs from Saverin. Each of the October 2004 written agreements referenced in Paragraph 16 provides: "[Saverin] agrees that the prevailing party in any legal action shall be awarded its reasonable attorneys' fees and costs." Exhibit A, ¶ 8(a); Exhibit B, ¶ 7(a); Exhibit C, ¶ 6; Exhibit D, ¶ 6.5.

31. At all relevant times, Plaintiffs have performed their obligations under the October 2004 written agreements referenced in Paragraph 16.

32. As a direct and proximate result of Saverin's breach of each settlement agreement as set forth above, Plaintiffs have been damaged in an amount to be proven at trial.

THIRD CAUSE OF ACTION BY ALL PLAINTIFFS AGAINST DEFENDANT SAVERIN FOR BREACH OF RELEASE

33. Plaintiffs incorporate herein all the allegations contained in Paragraphs 1 through 32 of this Third Amended Complaint.

34. In the October 2004 written agreements referenced in Paragraph 16, Saverin agreed to release all known and unknown claims that he may possess against, *inter alia,* the Company and its officers, employees and subsidiaries (including the LLC) as of the date of the agreements.

35. Thus, in Purchase Agreement I, Saverin agreed that he

on his own behalf, and on behalf of his agents, heirs, family members, executors, and assigns, *hereby fully and forever releases* the Company and its officers, ... employees, ... subsidiaries (including but not limited to TheFacebook, LLC), predecessor and successor corporations, and assigns (the "Releasees"), from ... *any claim, duty, obligation or cause of action relating to any matters of any kind, whether presently known or unknown, suspected or unsuspected, matured or unmatured,* that [Saverin] may possess arising from any omissions, acts, facts or circumstances that have occurred up until and including the date of this Agreement including, without limitation:

(a) any and all claims relating to or arising from [Saverin]'s employment relationship with the Company or TheFacebook, LLC (together, "TFB"), if any, and the termination of that relationship;

(b) any and all claims relating to, or arising from, [Saverin]'s right to purchase, or actual purchase of, or holding of, any shares of capital stock of any nature of the TFB, including, without limitation, any claims for fraud, mis-

representation, breach of fiduciary duty, breach of duty under applicable state corporate law, and securities fraud under any state or federal law; [and]
(c) any and all claims under the law of any jurisdiction including, but not limited to, wrongful discharge of employment; constructive discharge from employment; termination in violation of public policy; discrimination; breach of contract, both express and implied; breach of a covenant of good faith and fair dealing, both express and implied; promissory estoppel; negligent or intentional infliction of emotional distress; negligent or intentional misrepresentation; negligent or intentional interference with contract or prospective economic advantage; unfair business practices; defamation; libel; slander; negligence; personal injury; assault; battery; invasion of privacy; false imprisonment; and conversion ....

Exhibit A, ¶ 7(a)-(c) (emphases added).

36. Similarly, in the Exchange Agreement, Saverin agreed that he
on his own behalf, and on behalf of his agents, heirs, family members, executors, and assigns, hereby *fully and forever releases* the Company and its officers,... employees,... subsidiaries, predecessor and successor corporations, and assigns, and TheFacebook, LLC and its officers,... employees, ... subsidiaries, predecessor and successor corporations, and assigns, from ... *any claim, duty, debt, liability, obligation or cause of action relating to any matters of any kind, whether presently known or unknown, suspected or unsuspected, matured or unmatured,* that [Saverin] may possess arising from any omissions, acts, facts or circumstances that have occurred up until and including the date of this Agreement including, without limitation:
(a) any and all claims relating to or arising from [Saverin]'s employment relationship with the Company or TheFacebook, LLC (together, "TFB"), if any, and the termination of that relationship;
(b) any and all claims relating to, or arising from, [Saverin]'s right to purchase, or actual purchase of, or holding of, any shares of capital stock of any nature of the TFB, including, without limitation, any claims for fraud, misrepresentation, breach of fiduciary duty, breach of duty under applicable state corporate law, and securities fraud under any state or federal law; [and]
(c) any and all claims under the law of any jurisdiction including, but not limited to, wrongful discharge of employment; constructive discharge from employment; termination in violation of public policy; discrimination; breach of contract, both express and implied; breach of a covenant of good faith and fair dealing, both express and implied; promissory estoppel; negligent or intentional infliction of emotional distress; negligent or intentional misrepresentation; negligent or intentional interference with contract or prospective economic advantage; unfair business practices; defamation; libel; slander; negligence; personal injury; assault; battery; invasion of privacy; false imprisonment; and conversion....

Exhibit C, ¶ 4(a)-(c) (emphases added).

37. By sending his letter of April 20, 2005, Saverin breached each release as set forth above.

38. Saverin's April 20, 2005 letter caused the Company to make significant concessions to an investor in order to secure its investment and diminished the value of the Company.

39. Further, by filing his cross-complaint herein against Plaintiffs, Saverin independently breached each release as set forth above.

40. In defending against Saverin's cross-complaint herein and in bringing the instant action to enforce each release as set forth above, Plaintiffs have incurred and paid attorneys' fees and costs.

41. Plaintiffs are contractually entitled to attorneys' fees and costs from Saverin. Each of the October 2004 written agreements referenced in Paragraph 16 provides: "[Saverin] agrees that the prevailing party in any legal action shall be awarded its reasonable attorneys' fees and costs." Exhibit A, ¶ 8(a); Exhibit B, ¶ 7(a); Exhibit C, ¶ 6; Exhibit D, ¶ 6.5.

42. At all relevant times, Plaintiffs have performed their obligations under the October 2004 written agreements referenced in Paragraph 16.

43. As a direct and proximate result of Saverin's breach of each release as set forth above, Plaintiffs have been damaged in an amount to be proven at trial.

FOURTH CAUSE OF ACTION BY ALL PLAINTIFFS AGAINST DEFENDANT SAVERIN FOR BREACH OF AGREEMENT NOT TO SUE

44. Plaintiffs incorporate herein all the allegations contained in Paragraphs 1 through 43 of this Third Amended Complaint.

45. In the October 2004 written agreements referenced in Paragraph 16, Saverin agreed not to sue concerning all known and unknown claims that he may possess against, *inter alia,* the Company and its officers, employees and subsidiaries (including the LLC) as of the date of the agreements.

46. Thus, in Purchase Agreement I, Saverin agreed that he

on his own behalf, and on behalf of his agents, heirs, family members, executors, and assigns, hereby fully *and forever ... agree[s] not to sue* concerning[] *any claim, duty, obligation or cause of action relating to any matters of any kind, whether presently known or unknown, suspected or unsuspected, matured or unmatured,* that [Saverin] may possess arising from any omissions, acts, facts or circumstances that have occurred up until and including the date of this Agreement including, without limitation:

(a) any and all claims relating to or arising from [Saverin]'s employment relationship with the Company or TheFacebook, LLC (together, "TFB"), if any, and the termination of that relationship;

(b) any and all claims relating to, or arising from, [Saverin]'s right to purchase, or actual purchase of, or holding of, any shares of capital stock of any nature of the TFB, including, without limitation, any claims for fraud, misrepresentation, breach of fiduciary duty, breach of duty under applicable state corporate law, and securities fraud under any state or federal law; [and]

(c) any and all claims under the law of any jurisdiction including, but not limited to, wrongful discharge of employment: constructive discharge from employment; termination in violation of public policy; discrimination; breach of contract, both express and implied; breach of a covenant of good faith and fair dealing, both express and implied; promissory estoppel; negligent or intentional infliction of emotional distress; negligent or intentional misrepresentation; negligent or intentional interference with contract or prospective economic advantage; unfair business practices; defamation; libel; slander; negligence; personal injury; assault; battery; invasion of privacy; false imprisonment; and conversion...

Exhibit A, ¶ 7(a)-(c) (emphases added).

47. Similarly, in the Exchange Agreement, Saverin agreed that he

on his own behalf, and on behalf of his agents, heirs, family members, executors, and assigns, *hereby fully and forever ... agree[s] not to sue* concerning[] *any claim, duty, debt, liability, obligation or cause of action relating to any matters of any kind, whether presently known or unknown, suspected or unsuspected, matured or unma-*

tured, that [Saverin] may possess arising from any omissions, acts, facts or circumstances that have occurred up until and including the date of this Agreement including, without limitation:
(a) any and all claims relating to or arising from [Saverin]'s employment relationship with the Company or TheFacebook, LLC (together, "TFB"), if any, and the termination of that relationship;
(b) any and all claims relating to, or arising from, [Saverin]'s right to purchase, or actual purchase of, or holding of, any shares of capital stock of any nature of the TFB, including, without limitation, any claims for fraud, misrepresentation, breach of fiduciary duty, breach of duty under applicable state corporate law, and securities fraud under any state or federal law; [and]
(c) any and all claims under the law of any jurisdiction including, but not limited to, wrongful discharge of employment; constructive discharge from employment; termination in violation of public policy; discrimination; breach of contract, both express and implied; breach of a covenant of good faith and fair dealing, both express and implied; promissory estoppel; negligent or intentional infliction of emotional distress; negligent or intentional misrepresentation; negligent or intentional interference with contract or prospective economic advantage; unfair business practices; defamation; libel; slander; negligence; personal injury; assault; battery, invasion of privacy; false imprisonment; and conversion....

Exhibit C, ¶ 4(a)-(c) (emphases added).

48. By sending his letter of April 20, 2005, Saverin breached each agreement not to sue as set forth above.

49. Saverin's April 20, 2005 letter caused the Company to make significant concessions to an investor in order to secure its investment and diminished the value of the Company.

50. Further, by filing his cross-complaint herein against Plaintiffs, Saverin independently breached each agreement not to sue as set forth above.

51. In defending against Saverin's cross-complaint herein and in bringing the instant action to enforce each agreement not to sue as set forth above, Plaintiffs have incurred and paid attorneys' fees and costs.

52. Plaintiffs are contractually entitled to attorneys' fees and costs from Saverin. Each of the October 2004 written agreements referenced in Paragraph 16 provides: "[Saverin] agrees that the prevailing party in any legal action shall be awarded its reasonable attorneys' fees and costs." Exhibit A, ¶ 8(a); Exhibit B, ¶ 7(a); Exhibit C, ¶ 6; Exhibit D, ¶ 6.5.

53. At all relevant times, Plaintiffs have performed their obligations under the October 2004 written agreements referenced in Paragraph 16.

54. As a direct and proximate result of Saverin's breach of each agreement not to sue as set forth above, Plaintiffs have been damaged in an amount to be proven at trial.

FIFTH CAUSE OF ACTION BY ALL PLAINTIFFS AGAINST DEFENDANT SAVERIN FOR A FURTHER DECLARATION THAT THE INSTANT DISPUTE HAS ALREADY BEEN SETTLED

55. Plaintiffs incorporate herein all the allegations contained in Paragraphs 1 through 54 of this Third Amended Complaint.

56. An actual controversy has arisen and now exists between Plaintiffs and Saverin regarding whether the instant dispute has already been settled, and whether Saverin has already released, and agreed not to bring suit on, the

claims set forth in his cross-complaint herein, as well as in his demand letter of April 20, 2005. Saverin contends that the October 2004 written agreements referenced in Paragraph 16 are not valid and that the releases therein are void and not enforceable. Plaintiffs on the other hand contend that these written agreements are valid and binding, and that the releases are valid and enforceable, not void.

57. Plaintiffs request a judicial determination that the instant dispute has already been settled, that Saverin has already released, and agreed not to bring suit on, the claims in his cross-complaint herein, that Saverin had already released, and agree not to bring suit on, the claims in his demand letter of April 20, 2005, and that Saverin's settlement agreements, releases, and agreements not to sue in the October 2004 written agreements are valid and enforceable, not void.

PRAYER FOR RELIEF

WHEREFQRE, the Plaintiffs pray for the following relief:

1. For a declaration that Purchase Agreement I, Purchase Agreement II, the Exchange Agreement and the Holder Voting Agreement are valid and enforceable;

2. For a declaration that Purchase Agreement I, Purchase Agreement II, the Exchange Agreement and the Holder Voting Agreement set forth Saverin's precise ownership interest in the Company to the exclusion of any oral agreement or promise alleged by Saverin;

3. For a declaration that Saverin is not entitled to any additional ownership interest in the Company beyond that established in Purchase Agreement I, Purchase Agreement II, the Exchange Agreement and the Holder Voting Agreement;

4. For an award of damages in an amount to be proven at trial;

5. For an award of reasonable attorneys' fees and costs; and

6. For such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiffs demand a trial by jury.

Dated: July, 2008

RUBY & SCHOFIELD

By: Allen Ruby

WILSON SONSINI GOODRICH & ROSATI

Professional Corporation

By: _

Boris Feldman

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Third Amended Complaint
2008 WL 8099168

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