

EXHIBIT B

1 ALLEN RUBY, State Bar No. 47109
LAW OFFICES OF ALLEN RUBY
2 125 South Market Street
San Jose, CA 95113
3 Telephone: (408) 998-8500
Facsimile: (408) 998-8503

4 BORIS FELDMAN, State Bar No. 128838
5 WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
6 650 Page Mill Road
Palo Alto, CA 94304-1050
7 Telephone: (650) 493-9300
Facsimile: (650) 565-5100

8 Attorneys for Plaintiffs/Cross-Defendants
9 Facebook, Inc., thefacebook, LLC and
Mark E. Zuckerberg

G. Duarte

UCS

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SANTA CLARA

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

16 Plaintiffs,)

17 v.)

18 EDUARDO SAVERIN, an individual,)

19 Defendant.)
20)
21)

22 AND CROSS-COMPLAINT)
23)
24)
25)
26)
27)
28)

CASE NO.: 105 CV-039867

**PLAINTIFFS' AND CROSS-
DEFENDANTS' NOTICE OF MOTION
AND MOTION FOR LEAVE TO AMEND
COMPLAINT**

Date: July 15, 2008

Time: 9:00 a.m.

Dept: 19

Before: Honorable James Emerson

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

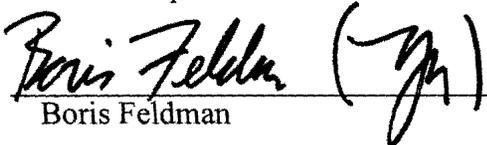
2 PLEASE TAKE NOTICE THAT on July 15, 2008 at 9:00 a.m., or as soon thereafter as
3 this matter may be heard, in Department 19 of the above-captioned Court, located at 161 N. First
4 Street, San Jose, California, the undersigned Plaintiffs and Cross-Defendants will and hereby do
5 move this Court, pursuant to Cal. Code of Civ. Proc. § 473, for an Order granting leave to file the
6 proposed Third Amended Complaint.

7 This Motion will be based upon this Notice, the Memorandum of Points and Authorities,
8 the Declaration of Boris Feldman, the Declaration of Bryan J. Ketrosor, the files and records in
9 this action, and such argument and evidence as may be presented at the hearing.

10
11 Dated: July 1, 2008

LAW OFFICES OF ALLEN RUBY
By: Allen Ruby

12
13 WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

14 By:  (y)
15 Boris Feldman

16 Attorneys for Plaintiffs/and Cross-Defendants
17 Facebook, Inc., thefacebook, LLC and
18 Mark E. Zuckerberg

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FILED

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KIRI TORRE
CHIEF EXEC. OFFICER/CLERK
SUPERIOR COURT OF CA
COUNTY OF SANTA CLARA
DEPUTY

JCS

CASE NO.: 105 CV-039867

**PLAINTIFFS' AND CROSS-
DEFENDANTS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR LEAVE
TO AMEND COMPLAINT**

Date: July 15, 2008

Time: 9:00 a.m.

Dept: 19

Before: Honorable James Emerson

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1 Plaintiffs and Cross-Defendants Facebook, Inc. (the "Company"), thefacebook, LLC (the
2 "LLC") and Mark E. Zuckerberg ("Zuckerberg") respectfully submit this Memorandum of Points
3 and Authorities in support of their Motion for Leave to Amend Complaint (the "Motion"). The
4 proposed Third Amended Complaint asserts three new claims: (1) Breach of settlement
5 agreement; (2) Breach of release; and (3) Breach of agreement not to sue. It also omits four
6 claims present in the current complaint: (1) Misappropriation of trade secrets; (2) Tortious
7 interference with prospective economic advantage; (3) Conversion; and (4) Breach of fiduciary
8 duty. A copy of the proposed Third Amended Complaint is attached hereto as Exhibit 1.¹ In
9 addition, and for the Court's convenience, a redline showing the differences between the Second
10 Amended Complaint and proposed Third Amended Complaint is attached hereto as Exhibit 2.

11 INTRODUCTION

12 This lawsuit concerns the validity of several agreements signed by the parties on or about
13 October 31, 2004 (the "October 2004 Agreements"). Prior to entering into the agreements,
14 Zuckerberg and Defendant Eduardo Saverin ("Saverin") worked together on a business venture
15 known as Facebook. However, during the summer of 2004, Saverin attempted to take control of
16 the business by, among other things, improperly seizing funds and holding the business hostage.
17 Saverin also failed to perform agreed-upon tasks assigned to him. Accordingly, the October
18 2004 Agreements were essentially a bill of divorce between Saverin, on the one hand, and
19 Zuckerberg and the business, on the other hand. As part of that split, Saverin received fully
20 vested stock in the Company, in return for which he agreed that the October 2004 Agreements
21 represented "settlement in full of all outstanding obligations owed" to him by Plaintiffs. In the
22 agreements, Saverin also "fully and forever release[d]" and "agree[d] not to sue" Plaintiffs
23 concerning "any claim . . . relating to any matters of any kind . . . that [Saverin] may possess
24 arising from any omissions, acts, facts or circumstances that have occurred up until and including
25 the date of this Agreement."

26
27 ¹ All references to "Ex. ___" are to the exhibits attached to the declaration of Bryan J.
28 Ketroser, filed herewith.

1 Plaintiffs filed this action in response to an April 20, 2005 letter in which Saverin
2 asserted, clearly and unequivocally, that the October 2004 Agreements were invalid and that he
3 would sue Plaintiffs if he was not given additional stock in the Company. Plaintiffs' complaint
4 sought a judicial declaration that the October 2004 Agreements, which were attached to the
5 complaint, were valid and enforceable. Saverin subsequently filed a cross-complaint asserting
6 claims for, among other things, breach of fiduciary duty, fraud, and declaratory relief, again
7 based on the October 2004 Agreements. The presently operative pleadings – the Second
8 Amended Complaint and the First Amended Cross-Complaint – still focus on the validity of the
9 October 2004 Agreements (including Saverin's settlement and release therein), the events
10 leading up to their execution, and the events leading up to Saverin's April 20, 2005 letter.

11 By this Motion, Plaintiffs seek to add contractual claims for Saverin's breach of his
12 settlement and release, as well as remove several claims currently pleaded in the Second
13 Amended Complaint. Plaintiffs' contractual claims are based on the same October 2004
14 Agreements that have been at the center of this dispute for more than three years. Saverin will
15 not be prejudiced by Plaintiffs' amendment. Plaintiffs are merely asserting new claims based on
16 the same general factual allegations and legal theories that have been part of this case since its
17 inception. In any event, no trial date has been set in this matter, and discovery remains open.

18 Accordingly, Plaintiffs respectfully request that this Court grant the Motion.

19 **FACTUAL AND PROCEDURAL BACKGROUND**

20 **A. Summary of Facts Relevant to This Motion**

21 In or about January 2004, while he was a college student, Zuckerberg conceived the idea
22 of an online directory that connects people through social networks at colleges and universities.
23 Second Amended Complaint ("SAC") ¶ 8. Zuckerberg approached Saverin, a Harvard
24 classmate, with the idea, and the two orally agreed that Zuckerberg would run the technical side
25 of the business, and that Saverin would handle the financial aspects of the business. *Id.*; First
26 Amended Cross-Complaint ("FACC") ¶ 11. Soon thereafter, Zuckerberg and Saverin recruited
27 Zuckerberg's college roommate, Dustin Moskovitz, to work on the business, and the three
28 informally agreed that the equity ownership of the enterprise would be as follows: Zuckerberg =

1 65%; Saverin = 30%; Moskowitz = 5%. SAC ¶ 8; FACC ¶ 14. On April 13, 2004, the business
2 was organized as a limited liability company under Florida law. SAC ¶ 10; FACC ¶ 17.

3 In or about June 2004, Zuckerberg and Moskowitz moved from Massachusetts to Palo
4 Alto, California, to work on the business. SAC ¶ 11; FACC ¶ 20. Saverin, in contrast, refused to
5 move to California, moving to New York instead. SAC ¶¶ 11, 15.

6 In early to mid-July 2004, disputes developed over Saverin's management role in, and
7 ownership of, the business. While Zuckerberg and Moskowitz were pursuing investment capital
8 for the business, Saverin wrote to Zuckerberg, asserting that he was entitled to control over the
9 business, and that until he received written authority reflecting that control, he would obstruct
10 Zuckerberg's efforts to advance the business. SAC ¶ 12. Saverin froze the LLC's bank account,
11 to which Saverin was the sole signatory, forcing Zuckerberg to invest \$85,000 in personal funds
12 to keep the business afloat. *Id.* ¶ 13. Saverin also attempted to force Zuckerberg to sign a
13 limited liability operating agreement on the condition that Zuckerberg do so without legal
14 consultation. *Id.* ¶ 14. Zuckerberg refused. *Id.*

15 On July 29, 2004, in an attempt to clean up the affairs of the business and attract potential
16 investors, Zuckerberg and Moskowitz decided to form the Company by incorporating in
17 Delaware and to assign to the Company both their intellectual property rights in the business and
18 their membership interests in the LLC. SAC ¶ 15; FACC ¶ 26. When Harvard classes resumed
19 in the fall of 2004, Saverin elected to return to school; Zuckerberg and Moskowitz remained in
20 California, working on the business. FACC ¶ 25.

21 Soon thereafter, on or about October 31, 2004, Saverin entered into a number of
22 agreements with the Company regarding the exchange of his LLC interests and purchase of
23 ownership interests in the Company. SAC ¶ 16 & Exs. A-D; FACC ¶ 30. Because Saverin
24 would not be a Company employee or manager going forward, he was informed (and the
25 October 2004 Agreements reflected) that he would be receiving a specified number of Company
26 shares and that all of such shares would be fully vested upon receipt. SAC ¶ 15; FACC ¶ 32. By
27 contrast, Zuckerberg and Moskowitz received their Company shares subject to a vesting
28 schedule. SAC ¶ 15; FACC ¶ 32. The October 2004 Agreements provided that Saverin's rights

1 to obtain Company shares thereunder represented “*settlement in full* of all outstanding
2 obligations owed to [Saverin] by the Company and its officers . . . and subsidiaries [including
3 the] LLC.” SAC Ex. A ¶ 7 (emphasis added). The agreements further provided that Saverin
4 “*fully and forever releases* the Company and its officers [and] subsidiaries [including the] LLC .
5 . . from, and *agree[s] not to sue* concerning, any claim . . . relating to any matters of any kind . . .
6 that [Saverin] may possess arising from any omissions, acts, facts or circumstances that have
7 occurred up until and including the date of this Agreement” SAC Ex. C ¶ 4 (emphasis
8 added). Finally, the agreements provided that they “set[] forth the entire agreement and
9 understanding of the parties relating to the subject matter herein and merge[] all prior discussions
10 between them.” SAC Ex. A ¶ 8(b).

11 Thereafter, Saverin continued to perform certain tasks for the Company as a consultant.
12 SAC ¶ 17.

13 On April 20, 2005, as the Company was seeking further investment from venture
14 capitalists, Saverin sent the Company a letter claiming that the October 2004 Agreements were
15 invalid and that he owned 30% of the Company’s shares rather than the number of Company
16 shares specified in the October 2004 Agreements. SAC ¶ 20; FACC ¶ 46. The letter stated that
17 the October 2004 Agreements were “void and unenforceable,” because Saverin allegedly signed
18 them “[b]ased on fraudulent misrepresentations,” “on Mr. Zuckerberg’s coercion,” and “under
19 duress.” Ex. 3. Saverin threatened that he would “take all appropriate steps to protect and
20 enforce his rights” if he was not let out of the October 2004 Agreements, and “demand[ed]” that
21 his claimed “30% equity stake in the Company . . . be acknowledged and recognized
22 immediately.” *Id.*

23 In response to the April 20 letter, Zuckerberg promptly notified Saverin that he was no
24 longer a representative of Facebook. SAC ¶ 20; FACC ¶ 47. This lawsuit followed.

25 **B. Procedural History Relevant to This Motion**

26 On April 21, 2005, Plaintiffs filed their complaint for declaratory relief concerning the
27 validity and enforceability of the October 2004 Agreements. On July 20, 2005, Plaintiffs filed an
28 Amended Complaint for: (1) Declaratory relief; (2) Misappropriation of trade secrets; (3)

1 Tortious interference with prospective economic advantage; (4) Conversion; and (5) Breach of
2 fiduciary duty. On February 3, 2006, the Court sustained in part Saverin's demurrer to the
3 Amended Complaint. On March 7, 2006, Plaintiffs filed a Second Amended Complaint asserting
4 the same causes of action as their First Amended Complaint. On April 24, 2006, Saverin filed
5 his Cross-Complaint for: (1) Breach of fiduciary duty; (2) Fraud; (3) Negligent
6 misrepresentation; (4) Interference with prospective economic advantage; (5) Unjust enrichment;
7 and (6) Declaratory relief. On September 18, 2006, the Court sustained in part Plaintiffs'
8 demurrer to the Cross-Complaint. On October 5, 2006, Saverin filed a First Amended Cross-
9 Complaint asserting the same causes of action as did the Cross-Complaint.

10 In mid-May, 2008, Boris Feldman, counsel for Plaintiffs, informed Allan Steyer,
11 Saverin's counsel, that Plaintiffs wished to amend, and inquired whether Saverin would be
12 willing to stipulate to the filing of an amended complaint. Feldman Decl. ¶ 2.² Steyer told
13 Feldman that a response to the request would be forthcoming. *Id.* Feldman subsequently sent
14 emails to Steyer on May 27, 2008 and June 1, 2008, seeking an answer to the request. *Id.* ¶ 3.
15 The issue was raised again during a June 2, 2008 phone call between Feldman and Steyer. *Id.* ¶
16 4. On June 5, 2008, Feldman relayed the request for a stipulation yet again. *Id.* ¶ 5. Finally, on
17 June 13, 2008, Saverin's counsel stated that they needed to see a copy of the proposed amended
18 complaint before they could decide whether to stipulate to its filing. *Id.* ¶ 6. On June 17, 2008,
19 Plaintiffs' counsel provided a copy of the proposed Third Amended Complaint to Saverin's
20 counsel with a request that Saverin's counsel state by June 23, 2008 whether they would stipulate
21 to the amendment. *Id.* ¶ 7. On June 24, 2008, Steyer stated that he would consent provided that
22 Plaintiffs' counsel would agree to a trial date in November 2008. *Id.* ¶ 8. As that trial date
23 would not have permitted Plaintiffs' counsel to prepare and make its defenses to Saverin's cross-
24 claims, Plaintiffs' counsel proposed a January 2009 trial date. *Id.* Because a January 2009 trial
25 date would have been adequate for Plaintiffs only if Saverin's First Amended Cross-Complaint
26 would remain the operative pleading, Plaintiffs' counsel requested that Saverin's counsel agree

27 _____
28 ² All references to "Feldman Decl. ___" are to the declaration of Boris Feldman, filed
herewith.

1 not to amend the FACC. *Id.* On June 27, 2008, Saverin’s counsel refused to agree to Plaintiffs’
2 proposal and made no counter-proposal. *Id.* ¶ 9.

3 **ARGUMENT**

4 **I. CALIFORNIA LIBERALLY PERMITS AMENDMENT OF PLEADINGS**

5 California Code of Civil Procedure Section 473(a)(1) states that “[t]he Court may, in the
6 furtherance of justice, and on any terms as may be proper, allow a party to amend any
7 pleading...” Cal. Civ. Proc. § 473(a)(1). Such amendments may be allowed at any time. *See,*
8 *e.g., Higgins v. Del Faro*, 123 Cal. App. 3d 558, 564 (1981) (“A court, at any time before or after
9 commencement of trial, may allow an amendment to a pleading in furtherance of justice.”);
10 *Berman v. Bromberg*, 56 Cal. App. 4th 936, 945 (1997) (amendment permissible “at any stage of
11 the proceedings”). Absent prejudice to the other party, California courts allow amendments to
12 pleadings with great liberality. *See, e.g., Kittredge Sports Co. v. Superior Court*, 213 Cal. App.
13 3d 1045, 1047 (1989) (trial court’s discretion “should be exercised liberally in favor of
14 amendments, for judicial policy favors resolution of all disputed matters in the same lawsuit”);
15 *Higgins*, 123 Cal. App. 3d at 564 (“Where no prejudice is shown to the adverse party, the liberal
16 rule of allowance prevails.”).³ Accordingly, “it is a rare case in which a court will be justified in
17 refusing a party leave to amend his pleadings so that he may properly present his case.”
18 *Redevelopment Agency v. Herrold*, 86 Cal. App. 3d 1024, 1031 (1978) (citation and internal
19 quotation marks omitted). The California Supreme Court has noted that, when the trial court has
20 denied a request to amend, “reversals are common where the appellant makes a reasonable
21 showing of prejudice from the ruling.” *Mesler v. Bragg Mgmt. Co.*, 39 Cal. 3d 290, 296-97
22 (1985) (citation and internal quotation marks omitted).

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26 ³ *See also Title Trust Deed Service Co. v. Pearson*, 132 Cal. App. 4th 168, 174 n.2 (2005)
27 (“The motion for leave to amend the answer, which was filed seven months after the answer was
28 filed, was timely, and there is nothing in the record to suggest that the delay in raising the
homestead exemption was in any way prejudicial to Heritage or Billingslea[.]”).

1 **II. THE AMENDMENT IS NECESSARY TO ALLOW PLAINTIFFS TO ASSERT**
2 **MERITORIOUS CLAIMS**

3 By this Motion, Plaintiffs seek to amend in order to assert three new claims: (1) Breach
4 of settlement agreement; (2) Breach of release; and (3) Breach of agreement not to sue. These
5 contractual claims are based on the same October 2004 Agreements that were and are the subject
6 of Plaintiffs' existing claim for declaratory judgment. Based on their discovery efforts to date,
7 Plaintiffs believe these claims are meritorious.

8 In the October 2004 Agreements, Saverin explicitly agreed to release all claims against
9 Plaintiffs for all prior acts and omissions, and agreed not to sue Plaintiffs therefor. The October
10 2004 Agreements also constituted a "settlement in full" of all obligations owed by Plaintiffs to
11 Saverin. SAC Exs. A-D. On April 20, 2005, Saverin sent Plaintiffs a letter declaring the
12 October 2004 Agreements invalid, threatening to sue, and alleging fraudulent inducement,
13 coercion, and duress. Ex. 3. After Plaintiffs' consequent action for declaratory judgment,
14 Saverin filed his cross-complaint against Plaintiffs, alleging, among other things, fraudulent
15 inducement and negligent misrepresentation.

16 Settlement agreements, releases, and covenants not to sue are subspecies of contract.
17 *See, e.g., Hernandez v. Board of Educ.*, 126 Cal. App. 4th 1161, 1176 (2004) ("A settlement
18 agreement is simply a contract."); *River Garden Farms, Inc. v. Superior Court*, 26 Cal. App. 3d
19 986, 1000 (1972) ("A release or covenant not to sue is a species of contract.").⁴ As such, they
20 are capable of breach like any other contract. *See, e.g., Waffer Int'l Corp. v. Khorsandi*, 69 Cal.
21 App. 4th 1261, 1266 (1999) ("Waffer cross-complained alleging breach of the settlement
22 agreement . . . [and] obtained a writ of attachment on its cross-complaint against purchaser
23 Edison in the amount of \$2,475,000."); *Rosenstock v. Rosenstock*, 20 Cal. App. 3d 847, 851
24 (1971) ("The agreement relied on is, in effect, a covenant not to sue, as to which . . . the

25 _____
26 ⁴ *See also Nelson v. Anderson*, 72 Cal. App. 4th 111, 130 (1999) ("A settlement agreement is
27 a contract, governed by the same legal principles which apply to contracts generally."); *General*
28 *Motors Corp. v. Superior Court*, 12 Cal. App. 4th 435, 439 (1993) ("We begin our analysis with
the axiom that the interpretation of a release or settlement agreement is governed by the same
principles applicable to any other contractual agreement.").

1 coventee's [sic] sole remedy is either to plead the covenant as a defense or to sue for damages for
2 its breach.”).

3 For the reasons set forth above, Plaintiffs believe that Saverin breached his settlement
4 agreement, release, and agreement not to sue contained in the October 2004 Agreements. In any
5 event, the contractual claims are based on the same general set of facts as Plaintiffs' existing
6 claim for declaratory judgment. Accordingly, the amendment to add the contractual claims
7 should be permitted. To the extent that Saverin opposes these claims on the merits, Plaintiffs
8 note that a motion for leave to amend is not the appropriate vehicle for testing the legal
9 sufficiency of the claims. *See, e.g., Kittredge Sports*, 213 Cal. App. 3d at 1048 (“[E]ven if the
10 proposed legal theory is a novel one, the preferable practice would be to permit the amendment
11 and allow the parties to test its legal sufficiency by demurrer, motion for judgment on the
12 pleadings or other appropriate proceedings.”) (citation and internal quotation marks omitted);
13 *Atkinson v. Elk Corp.*, 109 Cal. App. 4th 739, 760 (2003) (“Assuming without deciding that
14 Elk’s assertion is true, we believe that the better course of action would have been to allow
15 Atkinson to amend the complaint and then let the parties test its legal sufficiency in other
16 appropriate proceedings.”).

17 **III. PLAINTIFFS’ MOTION IS TIMELY AND, IF GRANTED, WILL NOT RESULT**
18 **IN PREJUDICE TO SAVERIN**

19 Plaintiffs’ motion to amend is timely. California law allows amendment of pleadings at
20 any stage of the proceedings, up to and including trial. *See* Cal. Civ. Proc. § 473(a)(1); *Higgins*,
21 123 Cal. App. 3d at 564. A trial date has not yet been set for this matter; indeed, the trial setting
22 conference, currently scheduled for July 22, 2008, is several weeks away.⁵ Saverin was
23 informed of Plaintiffs’ intention to amend in mid-May, 2008, at which time Saverin was asked to
24 stipulate to an amendment. This request was repeatedly renewed in the weeks that followed.

25 _____
26 ⁵ Compare *Kittredge Sports*, 213 Cal. App. 3d at 1048 (“Finally, Marker contends Kittredge
27 unreasonably delayed moving to amend. Even if this were so, it is an abuse of discretion to deny
28 leave to amend where the opposing party was not misled or prejudiced by the amendment.”) with
Magpali v. Farmers Group, Inc., 48 Cal. App. 4th 471, 486 (1996) (upholding denial of
amendment where it was “proposed on the eve of trial”).

1 Nevertheless, Saverin did not respond to the request until June 15, when he asked for a copy of
2 the proposed amendment. Plaintiffs' conduct in this matter has been anything but dilatory.

3 Nor would Saverin suffer any prejudice if Plaintiffs are allowed to amend. The new
4 claims proposed by Plaintiffs are based on the same general set of facts set forth in the existing
5 complaint. As a result, it is highly unlikely that Saverin will require additional discovery on
6 these matters. *See, e.g., Burkle v. Burkle*, 141 Cal. App. 4th 1029, 1042 (2006) ("As Carrie
7 observes, the proposed amendment did not seek to introduce new facts or new primary rights, but
8 merely to allege claims at law for damages, 'based upon the same dispute . . . about whether
9 Carrie's capital investment to Yucaipa Monterey was a loan or a gift from her father Ronald.");
10 *Berman*, 56 Cal. App. 4th at 945 ("[I]t is irrelevant that new legal theories are introduced as long
11 as the proposed amendments relate to the same general set of facts.") (citation and internal
12 quotation marks omitted).⁶ In any event, fact discovery in this case is ongoing: Saverin's
13 deposition has not yet been concluded, Zuckerberg's deposition has not yet begun, and numerous
14 other depositions remain on calendar.⁷

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⁶ *See also Mesler*, 39 Cal. 3d at 297 ("[D]efendant could hardly have been surprised by
23 plaintiff's reliance on the [new] theory. As the court stated, there had been much discovery on
24 the issue before defendant's and Bragg Crane's motions for summary judgment."); *North 7th*
25 *Street Assocs. v. Constante*, 92 Cal. App. 4th Supp. 7, 10-12 (2001) ("If the same set of facts
26 supports merely a different theory . . . no prejudice can result.") (citation and internal quotation
27 marks omitted) (finding it improper to grant amendment to complaint on eve of trial when based
28 on new facts and when trial court denied motion for continuance).

⁷ *Cf. Estate of Murphy*, 82 Cal. App. 3d 304, 311 (1978) ("We do not see any abuse of
discretion in the trial court's refusal to broaden the issues in the case under the circumstances
presented. Discovery had been completed The jury was in the box. The trial was ready to
proceed.").

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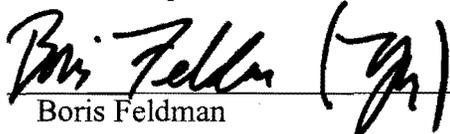
CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant the Motion.

Dated: July 1, 2008

LAW OFFICES OF ALLEN RUBY
By: Allen Ruby

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By:  _____
Boris Feldman

Attorneys for Plaintiffs/Cross-Defendants
Facebook, Inc., thefacebook, LLC and
Mark E. Zuckerberg

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LAW OFFICES OF ALLEN RUBY
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San Jose, CA 95113
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Palo Alto, CA 94304-1050
7 Telephone: (650) 493-9300
Facsimile: (650) 565-5100
8
9 Attorneys for Plaintiffs/Cross-Defendants
Facebook, Inc., thefacebook, LLC and
Mark E. Zuckerberg

FILED
2008 JUL -2 AM 9:20
KIRI TORRE
CHIEF EXEC. OFFICER/CLERK
SUPERIOR COURT OF CA
COUNTY OF SANTA CLARA
DEPUTY

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SANTA CLARA

13 FACEBOOK, INC., a Delaware Corporation,)
THEFACEBOOK, LLC, a Florida limited)
14 liability company, and MARK E.)
ZUCKERBERG, an individual,)
15 Plaintiffs,)
16 v.)
17 EDUARDO SAVERIN, an individual,)
18 Defendant.)
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AND CROSS-COMPLAINT)

CASE NO.: 105 CV-039867
**DECLARATION OF BORIS
FELDMAN IN SUPPORT OF
PLAINTIFFS' AND CROSS-
DEFENDANTS' MOTION FOR
LEAVE TO AMEND COMPLAINT**
Date: July 15, 2008
Time: 9:00 a.m.
Dept: 19
Before: Honorable James Emerson

1 I, Boris Feldman, declare as follows:

2 1. I am an attorney duly licensed to practice law in the State of California and before
3 this Court. I am a member of the law firm of Wilson Sonsini Goodrich & Rosati, Professional
4 Corporation, counsel for Plaintiffs and Cross-Defendants Facebook, Inc., thefacebook, LLC and
5 Mark E. Zuckerberg. I respectfully submit this declaration in support of Plaintiffs' and Cross-
6 Defendants' Motion for Leave to Amend Complaint. I have personal knowledge of the facts
7 stated herein, and, if called to testify, could and would testify competently thereto.

8 2. In mid-May 2008, I informed Allan Steyer, counsel for Defendant Eduardo
9 Saverin, that Plaintiffs wished to amend their complaint, and inquired whether Saverin would be
10 willing to stipulate to the filing of an amended complaint. Mr. Steyer stated that a response to
11 the request would be forthcoming.

12 3. On May 27, 2008 and again on June 1, 2008, I emailed Mr. Steyer, seeking a
13 response to the request for a stipulation.

14 4. On June 2, 2008, I again discussed the request to stipulate with Mr. Steyer during
15 a phone conversation.

16 5. On June 5, 2008, I again emailed Mr. Steyer, seeking a response to the request for
17 a stipulation.

18 6. On June 13, 2008, Lisa Black, counsel for Saverin, stated that they needed to
19 review a copy of the proposed amended complaint before they could decide whether to stipulate
20 to its filing.

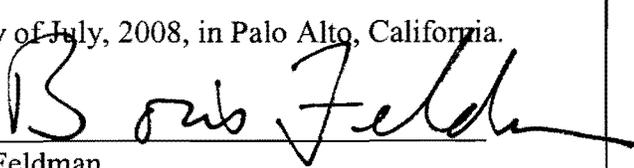
21 7. On June 17, 2008, Saverin's counsel was provided a copy of the proposed Third
22 Amended Complaint, along with a request that they state by June 23, 2008 whether they would
23 stipulate to the amendment.

24 8. On June 24, 2008, Mr. Steyer informed my colleague, Gideon Schor, that he
25 would consent to Plaintiffs' filing the proposed Third Amended Complaint provided that
26 Plaintiffs' counsel would agree to a trial date in November 2008. As that trial date would not
27 have permitted Plaintiffs' counsel to prepare and make its defenses to Saverin's cross-claims,
28 Plaintiffs' counsel proposed a January 2009 trial date. Because a January 2009 trial date would

1 have been adequate for Plaintiffs only if Saverin's First Amended Cross-Complaint ("FACC")
2 would remain the operative pleading, Plaintiffs' counsel requested that Saverin's counsel agree
3 not to amend the FACC.

4 9. On June 27, 2008, Saverin's counsel refused to agree to Plaintiffs' proposal and
5 made no counter-proposal.

6 I declare under penalty of perjury under the laws of the State of California that the
7 foregoing is true and correct. Executed this 1 day of July, 2008, in Palo Alto, California.

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9 Boris Feldman
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1 ALLEN RUBY, State Bar No. 47109
2 LAW OFFICES OF ALLEN RUBY
3 125 South Market Street
4 San Jose, CA 95113
5 Telephone: (408) 998-8500
6 Facsimile: (408) 998-8503

7 BORIS FELDMAN, State Bar No. 128838
8 WILSON SONSINI GOODRICH & ROSATI
9 Professional Corporation
10 650 Page Mill Road
11 Palo Alto, CA 94304-1050
12 Telephone: (650) 493-9300
13 Facsimile: (650) 565-5100

14 Attorneys for Plaintiffs/Cross-Defendants
15 Facebook, Inc., thefacebook, LLC and
16 Mark E. Zuckerberg

17 SUPERIOR COURT OF THE STATE OF CALIFORNIA

18 COUNTY OF SANTA CLARA

19 FACEBOOK, INC., a Delaware Corporation,)
20 THEFACEBOOK, LLC, a Florida limited)
21 liability company, and MARK E.)
22 ZUCKERBERG, an individual,)

23 Plaintiffs,)

24 v.)

25 EDUARDO SAVERIN, an individual,)

26 Defendant.)

27 AND CROSS-COMPLAINT)
28

FILED

JUL 22 2008

KIRI TORRE
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY _____ DEPUTY

G. Duarte

CASE NO.: 105 CV-039867

**DECLARATION OF BRYAN
KETROSER IN SUPPORT OF
PLAINTIFFS' AND CROSS-
DEFENDANTS' MOTION FOR
LEAVE TO AMEND COMPLAINT**

Date: July 15, 2008

Time: 9:00 a.m.

Dept: 19

Before: Honorable James Emerson

1 I, Bryan J. Ketroser, declare as follows:

2 1. I am an attorney duly licensed to practice law in the State of California and before
3 this Court. I am associated with the law firm of Wilson Sonsini Goodrich & Rosati, Professional
4 Corporation, counsel for Plaintiffs and Cross-Defendants Facebook, Inc., thefacebook, LLC and
5 Mark E. Zuckerberg. I respectfully submit this declaration in support of Plaintiffs' and Cross-
6 Defendants' Motion for Leave to Amend Complaint. I have personal knowledge of the facts
7 stated herein, and, if called to testify, could and would testify competently thereto.

8 2. The primary effect of the amendment is to assert new claims for breach of
9 settlement agreement, breach of release, and breach of agreement not to sue, thereby making
10 more explicit certain claims that are part of the declaratory judgment claim in the Second
11 Amended Complaint. The amendment also *eliminates* certain claims, including claims for
12 misappropriation of trade secrets, tortious interference with prospective economic advantage,
13 conversion, and breach of fiduciary duty.

14 3. The amendment is necessary and proper because it conforms the complaint to
15 Plaintiffs' theory of the case, and because it is based on the same general set of factual
16 allegations as the Second Amended Complaint.

17 4. The amendment is not based on the discovery of new facts.

18 5. Plaintiffs requested that Defendant stipulate to the filing of the amendment
19 approximately six weeks ago. Wilson Sonsini Goodrich & Rosati became counsel for Plaintiffs
20 in this matter in November 2007, and drafted the amendment after becoming sufficiently familiar
21 with the documents and factual and legal allegations at issue in the matter.

22 6. Attached hereto as Exhibit 1 is a true and correct copy of the proposed Third
23 Amended Complaint.

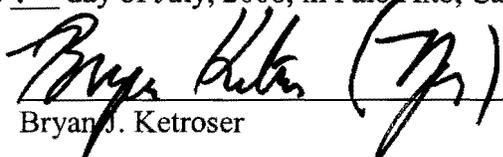
24 7. Attached hereto as Exhibit 2 is a true and correct copy of a redline showing the
25 differences between the Second Amended Complaint and proposed Third Amended Complaint.

26 8. Attached hereto as Exhibit 3 is a true and correct copy of an April 20, 2005 letter
27 from John R. Baraniak, Jr. of Choate, Hall & Stewart LLP to Mark E. Zuckerberg.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 1st day of July, 2008, in Palo Alto, California.


Bryan J. Ketroser

1 ALLEN RUBY, State Bar No. 47109
LAW OFFICES OF ALLEN RUBY
2 125 South Market Street
San Jose, CA 95113
3 Telephone: (408) 998-8500
Fax: (408) 998-8503
4

5 BORIS FELDMAN, State Bar No. 128838
WILSON SONSINI GOODRICH & ROSATI
6 Professional Corporation
650 Page Mill Road
7 Palo Alto, CA 94304-1050
Telephone: (650) 493-9300
8 Fax: (650) 565-5100

9 Attorneys for Plaintiffs and Cross-Defendants
Facebook, Inc., thefacebook, LLC and
10 Mark E. Zuckerberg

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SANTA CLARA
13 UNLIMITED JURISDICTION
14

15 FACEBOOK, INC., a Delaware
16 Corporation, THEFACEBOOK, LLC, a
Florida limited liability company, and
17 MARK E. ZUCKERBERG, an
individual,
18 Plaintiffs,
19 v.
20 EDUARDO SAVERIN, an individual,
21 Defendant.
22

CASE NO. 105 CV-039867

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

1 **Zuckerberg and Dustin Moskovitz (“Moskovitz”)** dropped out of Harvard to spend thousands of
2 hours working on and growing the business into a success, Saverin stayed at Harvard and refused to
3 contribute any sought-after or meaningful efforts towards the business. Saverin’s misdeeds did not
4 go unaddressed. In the summer of 2004, as Saverin was freezing the business’s funds and
5 attempting to derail its first round of financing, Zuckerberg and Moskovitz formed the Company.
6 Saverin, acknowledging that his bid to seize control of the business was now over, agreed to give
7 up his role in its management. Accordingly, the LLC’s owners – Zuckerberg, Saverin and
8 Moskovitz – entered into the above-mentioned written agreements, in which they exchanged their
9 interests in the LLC for shares in the Company, and in which Saverin agreed to forego his voting
10 rights associated with those shares and to settle and release any claims he might have. In return,
11 Saverin received a unique and extraordinary benefit: Whereas Zuckerberg and Moskovitz, who
12 were continuing with the Company, received all of their Company shares subject to a vesting
13 schedule, Saverin received all of his Company shares *fully vested*. But Saverin still was not
14 satisfied. He continued his campaign of misconduct – now using the Company as his personal cash
15 cow – by misappropriating the Company’s trade secrets, usurping corporate opportunities, diverting
16 sales from the Company’s customers to a competing company, interfering with investment in the
17 business, and placing unauthorized advertisements on the Company’s website. These acts
18 culminated in Saverin’s litigation-precipitating threat to sue Plaintiffs if they did not give him 30%
19 of the Company. In short, now that the Company has had publicized successes, Saverin again
20 seeks to extort from it an undeserved personal benefit.

21 **PARTIES**

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

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

26 5. Plaintiff Zuckerberg is an individual who resides in Santa Clara County, California.
27 Zuckerberg is, and at all relevant times has been, the inventor, co-founder, Chief Executive Officer
28

1 and largest shareholder of the Company. Zuckerberg was also listed as a managing member of the
2 LLC in its Articles of Organization and was the majority holder of the LLC's interests.

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

7 VENUE AND JURISDICTION

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

18 FACTUAL BACKGROUND

19 8. In or about January 2004, Zuckerberg, while an undergraduate at Harvard, conceived
20 the idea of an online directory that connects people through social networks at colleges and
21 universities and planned to turn his idea into a business. Zuckerberg approached Saverin, a college
22 classmate, in January 2004 regarding his new idea. Zuckerberg and Saverin each orally agreed to
23 invest \$1,000 to start the business. The business was not initially organized as any specific legal
24 entity, but Zuckerberg and Saverin did come to an oral agreement about their respective ownership
25 interests in the business and management responsibilities. They agreed that Zuckerberg would
26 serve as CEO and run the technical side of the business – designing and running the website,
27 creating new web content, and building and maintaining hardware to operate the site – and Saverin
28

1 would serve as CFO and take care of the finance aspects of the business. Zuckerberg and Saverin
2 also agreed to divide the ownership rights as follows: 67% for Zuckerberg and 33% for Saverin.

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

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

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

25 12. On or about July 15, 2004, Zuckerberg, Moskowitz and Parker were working on new
26 features for the website and trying to raise additional capital. Zuckerberg was in contact with
27 several angel investors and identified two who wanted to invest. However, before Zuckerberg
28 could execute a term sheet with the investors, Saverin sent Zuckerberg a letter asserting that the

1 parties had originally agreed to give Saverin control over the business, and that, until Saverin
2 received written authority to do what he wanted with the business, Saverin would obstruct the
3 efforts of the other owners of the business and the advancement of the business itself. Saverin also
4 stated that since he owned 30% of the business, he would make it impossible for the business to
5 raise any financing until this matter was resolved. Saverin's obstruction was disclosed to the angel
6 investors, who consequently became concerned about making an equity investment. Eventually, on
7 or around September 27, 2004, the investors signed a term sheet in which they took a convertible
8 note rather than equity. The disruption caused by Saverin interfered with the business's ability to
9 gain financing, and the value and structure of the investment reflected the investors' knowledge of
10 Saverin's conduct and were thus less beneficial to the business than they otherwise would have
11 been.

12 13. Meanwhile, Saverin attempted to hijack the business by seizing control of the LLC's
13 bank account. In June 2004, Saverin had opened a bank account for and in the name of the LLC
14 and made himself the sole signatory on the account. On or about July 28, 2004, Saverin froze that
15 account and refused to release any of the funds unless he was given greater control over the
16 business. The business desperately needed these funds to cover basic expenses, pay employees and
17 purchase new servers and other equipment necessary for operation and growth. Consequently,
18 Zuckerberg was forced to invest an additional \$85,000 of his own personal funds, including
19 \$28,000 on 25 new servers, in order to keep the business going. The funds invested by Zuckerberg
20 were originally earmarked for his college tuition.

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

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

23 16. On or about October 31, 2004, Saverin entered into a number of agreements with the
24 Company regarding the exchange of his LLC interests and purchase of ownership interests in the
25 Company. Specifically, Saverin entered into a Common Stock Purchase Agreement ("Purchase
26 Agreement I") wherein he agreed to purchase 1,250,000 shares of the Company's common stock
27 for a purchase price of \$10,750. Saverin also agreed pursuant to Purchase Agreement I to assign all
28 of his intellectual property rights (if any) and all information, rights and interest that he obtained or

1 created while working on the business, including customer lists, to the Company, and is
2 information confidential. A copy of Purchase Agreement I is attached hereto as Exhibit A and is
3 incorporated herein by this reference. Saverin also entered into a second Common Stock Purchase
4 Agreement ("Purchase Agreement II") in which he agreed to purchase 78,334 shares of common
5 stock of the Company for a price of \$673.68. A copy of Purchase Agreement II is attached hereto
6 as Exhibit B and is incorporated herein by this reference. That same day, Saverin, along with
7 Moskowitz and Zuckerberg, executed an Exchange Agreement, whereby each agreed to exchange
8 their interests in the LLC for shares in the newly-incorporated Company. A copy of the Exchange
9 Agreement is attached hereto as Exhibit C and is incorporated herein by this reference. As a result
10 of the exchange, the following shares of common stock in the Company were issued: to
11 Zuckerberg, 169,273; to Saverin, 78,334; to Moskowitz, 13,056. As a result of these agreements,
12 the Company acquired all right, title and interest in the LLC and all membership interests therein.
13 Accordingly, the Company became the sole member of the LLC. Purchase Agreement I further
14 provided that Saverin (i) agrees that his being permitted to purchase shares under the agreement
15 represents settlement in full of all outstanding obligations owed to Saverin by, *inter alia*, the
16 Company and its officers, employees and subsidiaries (including the LLC), and (ii) fully and
17 forever releases, and agrees not to sue concerning, all known or unknown claims that he may
18 possess against, *inter alia*, the Company and its officers, employees and subsidiaries (including the
19 LLC) as of the date of the agreement. The Exchange Agreement contains essentially identical
20 language. On October 31, 2004, Saverin also entered into a Holder Voting Agreement, in which
21 Saverin agreed to relinquish voting rights associated with his common stock and to vote in various,
22 specified ways. A copy of the Holder Voting Agreement is attached hereto as Exhibit D and is
23 incorporated herein by this reference.

24 17. In the winter of 2004-05, the Company hired a new sales representative to officially
25 replace Saverin. Effective as of the signing of the October 31, 2004 agreements referenced above
26 in Paragraph 16, Saverin agreed that he would not thereafter work for the Company as an employee
27 and would immediately transition all matters to the Company's new sales representative, including
28 all of his knowledge about the Company's customers and advertising, and the systems that the

1 Company had in place. On information and belief, Saverin never
2 assignment. Instead, Saverin kept communicating directly with advertising customers. Insofar as
3 Saverin was ever an employee of the Company or LLC, any such employment ceased by October
4 31, 2004, but Saverin agreed that he would thereafter do consulting work on some small projects
5 for the Company and that he would be paid at an hourly consulting rate. For this work, Saverin
6 never submitted any timecards or requests for payment, even though Zuckerberg had repeatedly
7 asked him to do so. Although Saverin never executed the consulting agreement prepared for him
8 by the Company, both the Company and Saverin understood that the Company would pay Saverin
9 as a consultant, rather than as an employee, for this work.

10 18. After the Company's new sales representative took over all of the advertising accounts,
11 the Company received 20-30 emails from customers stating that they were pleased that someone
12 new was taking over the accounts because Saverin had been difficult to work with and was hard to
13 get in touch with. These advertising customers said that Saverin never answered his phone, that his
14 voicemail was always full and that he rarely returned emails, even on days when advertising
15 campaigns were scheduled to go live. Individuals in contact with Saverin said that he did very little
16 work on the Company's business during this period. Nonetheless, Saverin claimed to be working
17 80 hours a week even after he was directed to cease all such activity.

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

1 Company was able to block his ability to access its servers. In total, Saverin
2 thousands of dollars' worth of advertising from the Company.

3 20. In or about April 2005, the Company sought investments from various venture capital
4 firms. When Saverin learned of this, he used the information to try to hold the Company hostage
5 once again – implying that he would not allow the Company to move forward with any financing
6 without some special compensation for him. On April 20, 2005, Saverin sent a letter to the
7 Company, through his attorney, stating, *inter alia*, that he challenged the validity of the October
8 2004 agreements attached hereto as Exhibits A through D. Saverin's letter demanded recognition
9 of his "rightful equity position" and threatened that, if his concerns were not "resolved promptly,"
10 he would "take all appropriate steps to protect and enforce his rights." In response, the Company
11 informed Saverin on April 20, 2005 that he was not an employee of the Company, had no
12 responsibilities with the Company and should cease all communications with the Company's
13 advertising customers immediately. The venture capital round of financing was completed despite
14 Saverin's conduct – which was disclosed to the investor – but the ultimate transaction value
15 reflected Saverin's conduct. Indeed, Saverin's conduct forced the Company to make significant
16 concessions to the investor in order to secure the investment.

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

20 21. Plaintiffs incorporate herein all the allegations contained in Paragraphs 1 through 20 of
21 this Third Amended Complaint.

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

28

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

6 **SECOND CAUSE OF ACTION BY ALL PLAINTIFFS AGAINST DEFENDANT**

7 **SAVERIN FOR BREACH OF SETTLEMENT AGREEMENT**

8 24. Plaintiffs incorporate herein all the allegations contained in Paragraphs 1 through 23 of
9 this Third Amended Complaint.

10 25. In the October 2004 written agreements referenced in Paragraph 16, Saverin agreed that
11 being permitted to purchase Company shares under Purchase Agreement I "represents *settlement in*
12 *full* of all outstanding obligations owed to [Saverin] by the Company and its officers, board
13 members, stockholders, managers, supervisors, affiliates, agents, employees and subsidiaries
14 (including but not limited to TheFacebook LLC)." Exhibit A, ¶ 7 (emphasis added). Similarly,
15 Saverin agreed that his exchange of his LLC interest for Company shares under the Exchange
16 Agreement (which exchange was completed by Purchase Agreement II) "represents *settlement in*
17 *full* of all outstanding obligations owed to [Saverin] by the Company and its officers, board
18 members, stockholders, managers, supervisors, affiliates, agents, employees and subsidiaries and/or
19 by TheFacebook LLC, and its officers, board members, stockholders, managers, supervisors,
20 affiliates, agents, employees and subsidiaries." Exhibit C, ¶ 4 (emphasis added).

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

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

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

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1 29. In defending against Saverin's cross-complaint he
2 to enforce each settlement agreement as set forth above, Plaintiffs have incurred and paid
3 fees and costs.

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

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

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

12 **THIRD CAUSE OF ACTION BY ALL PLAINTIFFS AGAINST DEFENDANT**

13 **SAVERIN FOR BREACH OF RELEASE**

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

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

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

20 on his own behalf, and on behalf of his agents, heirs, family members, executors,
21 and assigns, hereby *fully and forever releases* the Company and its officers, . . .
22 employees, . . . subsidiaries (including but not limited to TheFacebook, LLC),
23 predecessor and successor corporations, and assigns (the "Releasees"), from . . .
24 *any claim, duty, obligation or cause of action relating to any matters of any kind,*
25 *whether presently known or unknown, suspected or unsuspected, matured or*
26 *unmatured,* that [Saverin] may possess arising from any omissions, acts, facts or
27 circumstances that have occurred up until and including the date of this Agreement
28 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]

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

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

11 36. Similarly, in the Exchange Agreement, Saverin agreed that he

12 on his own behalf, and on behalf of his agents, heirs, family members, executors,
13 and assigns, hereby *fully and forever releases* the Company and its officers, . . .
14 employees, . . . subsidiaries, predecessor and successor corporations, and assigns,
15 and TheFacebook, LLC and its officers, . . . employees, . . . subsidiaries,
16 predecessor and successor corporations, and assigns, from . . . *any claim, duty,*
17 *debt, liability, obligation or cause of action relating to any matters of any kind,*
18 *whether presently known or unknown, suspected or unsuspected, matured or*
19 *unmatured*, that [Saverin] may possess arising from any omissions, acts, facts or
20 circumstances that have occurred up until and including the date of this Agreement
21 including, without limitation:

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

25 (b) any and all claims relating to, or arising from, [Saverin]'s right to
26 purchase, or actual purchase of, or holding of, any shares of capital stock of any
27 nature of the TFB, including, without limitation, any claims for fraud,
28 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.

1 39. Further, by filing his cross-complaint herein against
2 breached each release as set forth above.

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

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

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

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

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

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

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

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

23 on his own behalf, and on behalf of his agents, heirs, family members, executors,
24 and assigns, hereby *fully and forever . . . agree[s] not to sue* concerning[] *any*
25 *claim, duty, obligation or cause of action relating to any matters of any kind,*
26 *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:

27 (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;

28 (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

1 **nature of the TFB, including, without limitation, any claims for fraud,**
2 **misrepresentation, breach of fiduciary duty, breach of duty under applicable state**
3 **corporate law, and securities fraud under any state or federal law; [and]**

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

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

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

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

23 (a) any and all claims relating to or arising from [Saverin]’s
24 employment relationship with the Company or TheFacebook, LLC (together,
25 “TFB”), if any, and the termination of that relationship;

26 (b) any and all claims relating to, or arising from, [Saverin]’s right to
27 purchase, or actual purchase of, or holding of, any shares of capital stock of any
28 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.

1 demand letter of April 20, 2005, and that Saverin's settlement agreements, re
2 not to sue in the October 2004 written agreements are valid and enforceable, not void.

3 **PRAYER FOR RELIEF**

4 WHEREFORE, the Plaintiffs pray for the following relief:

- 5 1. For a declaration that Purchase Agreement I, Purchase Agreement II, the Exchange
6 Agreement and the Holder Voting Agreement are valid and enforceable;
- 7 2. For a declaration that Purchase Agreement I, Purchase Agreement II, the Exchange
8 Agreement and the Holder Voting Agreement set forth Saverin's precise ownership interest in the
9 Company to the exclusion of any oral agreement or promise alleged by Saverin;
- 10 3. For a declaration that Saverin is not entitled to any additional ownership interest in the
11 Company beyond that established in Purchase Agreement I, Purchase Agreement II, the Exchange
12 Agreement and the Holder Voting Agreement;
- 13 4. For an award of damages in an amount to be proven at trial;
- 14 5. For an award of reasonable attorneys' fees and costs; and
- 15 6. For such other and further relief as the Court deems just and proper.

16 **JURY DEMAND**

17 Plaintiffs demand a trial by jury.

18 Dated: July , 2008

RUBY & SCHOFIELD
By: Allen Ruby

20 WILSON SONSINI GOODRICH & ROSATI
21 Professional Corporation

22 By: _____
23 Boris Feldman

24 Attorneys for Plaintiffs/Cross-Defendants
25 Facebook, Inc., thefacebook, LLC and
26 Mark E. Zuckerberg
27
28

1 JAMES E. BURNS, JR. (State Bar No. 53250)
2 PENELOPE A. GRABOYS (State Bar No. 214742)
3 KENNETH P. HERZINGER (State Bar No. 209688)
4 JUSTIN MYER LICHTERMAN (State Bar No. 225734)
5 ORRICK, HERRINGTON & SUTCLIFFE LLP
6 The Orrick Building
7 405 Howard Street
8 San Francisco, California 94105
9 Telephone: (415) 773-5700
10 Facsimile: (415) 773-5759

11 Attorneys for Plaintiffs
12 Facebook, Inc., thefacebook, LLC and
13 Mark E. Zuckerberg
14 ALLEN RUBY, State Bar No. 47109
15 LAW OFFICES OF ALLEN RUBY
16 125 South Market Street
17 San Jose, CA 95113
18 Telephone: (408) 998-8500
19 Fax: (408) 998-8503

20 BORIS FELDMAN, State Bar No. 128838
21 WILSON SONSINI GOODRICH & ROSATI
22 Professional Corporation
23 650 Page Mill Road
24 Palo Alto, CA 94304-1050
25 Telephone: (650) 493-9300
26 Fax: (650) 565-5100

27 Attorneys for Plaintiffs and Cross-Defendants
28 Facebook, Inc., thefacebook, LLC and
29 Mark E. Zuckerberg

30 SUPERIOR COURT OF THE STATE OF CALIFORNIA

31 CITY AND

32 COUNTY OF SANTA CLARA

33 UNLIMITED JURISDICTION

34 FACEBOOK, INC., a Delaware
35 Corporation, THEFACEBOOK, LLC, a
36 Florida limited liability company, and
37 MARK E. ZUCKERBERG, an
38 individual,

Plaintiffs,

v.

EDUARDO SAVERIN, an individual,

CASE NO. 105 CV-039867

**SECOND THIRD AMENDED COMPLAINT
FOR:**

**(1) DECLARATORY RELIEF;
(2) MISAPPROPRIATION OF TRADE
SECRETS;
(2) BREACH OF SETTLEMENT
AGREEMENT;
(3) TORTIOUS INTERFERENCE WITH
PROSPECTIVE ECONOMIC ADVANTAGE;**

SECOND AMENDED COMPLAINT

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Defendant.

~~(4) CONVERSION; AND~~
~~(5) BREACH OF FIDUCIARY DUTY.~~
RELEASE;
(4) BREACH OF AGREEMENT NOT TO
SUE; AND
(5) FURTHER DECLARATORY RELIEF.

JURY TRIAL DEMANDED

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

6 **SUMMARY OF THE ACTION**

7 1. This is an action for declaratory, ~~injunctive and monetary relief and damages~~ arising
8 out of various improper acts perpetrated by the Defendant. ~~Plaintiffs hereby bring this suit against~~
9 Saverin for, among other things, ~~improperly seizing business funds when they were gravely~~
10 ~~needed, twice holding the business hostage and insisting on receiving a 30% stake in the business,~~
11 ~~misappropriating trade secrets, intentionally interfering with the growth of the business, usurping~~
12 ~~corporate opportunities, diverting sales from the business' customers to a competing company,~~
13 ~~placing unauthorized advertisements on the business' website and breaching his fiduciary~~
14 ~~duties~~ Saverin. **Plaintiffs seek a declaration that written agreements signed by Saverin in**
15 **October 2004 are valid and enforceable, that such agreements establish Saverin's precise**
16 **ownership interest in the Company to the exclusion of any oral agreement or promise alleged**
17 **by Saverin, and that Saverin is not entitled to any additional ownership interest in the**
18 **Company beyond that established by the written agreements. Furthermore, those written**
19 **agreements have already settled and released all claims set forth in Saverin's cross-complaint**
20 **herein, as well as in the demand letter that Saverin sent Plaintiffs on April 20, 2005 and that**
21 **prompted the instant litigation. In essence, Saverin's demand letter and cross-complaint seek**
22 **to revive a dispute that had already been "fully and forever" settled. Accordingly, Plaintiffs**
23 **further seek a declaration that the instant dispute has already been settled, and that Saverin**
24 **has already released, and agreed not bring suit on, the claims in his demand letter and cross-**
25 **complaint. Moreover, because the sending of the demand letter and the filing of the cross-**
26 **complaint violated the terms of Saverin's settlement agreement and release, Plaintiffs have**
27 **sustained damages herein, including not only the fees and costs expended to bring the instant**

1 action and to defend against Saverin's cross-claims but also the premium consequently paid
2 to secure investment capital for the Company.

3 2. While ~~Zuckerberg, Dustin Moskovitz ("Moskovitz") and others at the Company~~
4 ~~spent~~The written agreements were essentially a bill of divorce between Saverin, on the one
5 hand, and the Company and Zuckerberg, on the other hand. The divorce was necessitated by
6 Saverin's pattern of misconduct in connection with the LLC, the Company's effective
7 predecessor. That misconduct included improperly seizing the business's gravely needed
8 funds, holding the business hostage, and intentionally interfering with its growth. By these
9 acts, Saverin attempted to take control of the business. But that control was undeserved:
10 While Facebook co-founders Zuckerberg and Dustin Moskovitz ("Moskovitz") dropped out
11 of Harvard to spend thousands of hours working on and growing the business into a success,
12 Saverin stayed at Harvard and refused to contribute any sought-after or meaningful efforts
13 towards the business. Instead, he attempted to derail the business while it was seeking its first
14 round of financing by demanding 30% of the business. Eventually, Saverin voluntarily gave up his
15 role in the management of the business and agreed to forgo his voting rights for shares in the
16 newly formed Company. However, this apparently did not satisfy Saverin, because Saverin's
17 misdeeds did not go unaddressed. In the summer of 2004, as Saverin was freezing the
18 business's funds and attempting to derail its first round of financing, Zuckerberg and
19 Moskovitz formed the Company. Saverin, acknowledging that his bid to seize control of the
20 business was now over, agreed to give up his role in its management. Accordingly, the LLC's
21 owners – Zuckerberg, Saverin and Moskovitz – entered into the above-mentioned written
22 agreements, in which they exchanged their interests in the LLC for shares in the Company,
23 and in which Saverin agreed to forego his voting rights associated with those shares and to
24 settle and release any claims he might have. In return, Saverin received a unique and
25 extraordinary benefit: Whereas Zuckerberg and Moskovitz, who were continuing with the
26 Company, received all of their Company shares subject to a vesting schedule, Saverin
27 received all of his Company shares *fully vested*. But Saverin still was not satisfied. He

1 continued his campaign of misconduct – now using the Company as his personal cash cow –
2 by misappropriating the Company’s trade secrets, usurping corporate opportunities,
3 diverting sales from the Company’s customers to a competing company, interfering with
4 investment in the business, and placing unauthorized advertisements on the Company’s
5 website. These acts culminated in Saverin’s litigation-precipitating threat to sue Plaintiffs if
6 they did not give him 30% of the Company. In short, now that the Company has had some
7 publicized successes, he Saverin again seeks to extort from it some undeserved personal benefit.
8 Furthermore, Defendant has misappropriated the business’ trade secrets, including its valuable
9 customer lists, and provided them to one of its competitors.

10 PARTIES

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

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

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

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

25 VENUE AND JURISDICTION

26 7. Venue is proper, pursuant to California Code of Civil Procedure section 395 because:
27 (1) the contracts that are the subject of this action were entered into in Palo Alto, California; (2) the

1 Defendant consented to venue in Santa Clara County in the contracts that are the subject of this
2 action; (3, which are attached hereto as Exhibits A through D; (2) Plaintiff Facebook has its
3 principal place of business in Palo Alto, California, and Zuckerberg resides in Menlo Park Santa
4 Clara County, California; (43) the injuries to the Plaintiffs arose and/or were suffered in Palo Alto,
5 California; and (54) some or all of the wrongful conduct complained of herein took place in Santa
6 Clara County, California. Additionally, this Court has personal jurisdiction over Defendant. In the
7 contracts that are the subject of this action, which are attached hereto as Exhibits A through D,
8 Defendant expressly agreed that Santa Clara County, California, would be the exclusive
9 jurisdiction for any disputes concerning such ~~contract~~ contracts and consented to personal
10 jurisdiction here.

11 **FACTUAL BACKGROUND**

12 8. In or about January 2004, Zuckerberg, while a college student ~~an undergraduate at~~
13 **Harvard**, conceived the idea of an online directory that connects people through social networks at
14 colleges and universities and planned to turn his idea into a business. Zuckerberg approached
15 Saverin, a college classmate, in January 2004 regarding his new idea. Zuckerberg and Saverin each
16 orally agreed to invest \$1,000 to start the business. The business was not initially organized as any
17 specific legal entity, but the parties **Zuckerberg and Saverin** did come to an oral agreement about
18 the parties' **their** respective ownership interests in the business and management responsibilities.
19 The parties **They** agreed that Zuckerberg would serve as CEO and run the technical side of the
20 business— — designing and running the website, creating new web content, and building and
21 maintaining hardware to operate the site— — and Saverin would serve as CFO and take care of the
22 finance aspects of the business. Zuckerberg and Saverin also agreed to divide the ownership rights
23 as follows: 67% held by ~~for~~ **Zuckerberg** and 33% by ~~for~~ **Saverin**.

24 9. Zuckerberg and Saverin launched the business' **business's** website,
25 www.thefacebook.com, in February 2004 and quickly realized that they needed assistance to run
26 the business. As a result, they recruited Zuckerberg's college roommate, Moskovitz, to work on
27 the business. The principals informally restructured the equity ownership as follows: **Zuckerberg**

1 ~~=65%; Saverin =%~~ for Zuckerberg; 30% for Saverin; and 5% for Moskowitz =5%. Up until
2 this point, the business was being run as an unincorporated association or informal partnership.

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

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

20 12. On or about July 15, 2004, Zuckerberg, Moskowitz and Parker were working on new
21 features for the website and trying to raise additional capital. Zuckerberg was in contact with
22 several angel investors and identified two who wanted to invest. However, before Zuckerberg
23 could execute a term sheet with the investors, Saverin sent Zuckerberg a letter asserting that the
24 parties had originally agreed ~~that to give Saverin would have control over the business, and that,~~
25 until he had Saverin received written authority to do what he wanted with the business, he Saverin
26 would obstruct the efforts of the other ~~shareholders~~ owners of the business and the advancement
27 of the business itself. Saverin also stated that since he owned 30% of the business, he would make

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SECOND AMENDED COMPLAINT

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1 it impossible for the business to raise any financing until this matter was resolved. Saverin's
2 obstruction was disclosed to the angel investors, who ~~refused to sign the term sheet~~.consequently
3 **became concerned about making an equity investment.** Eventually, the investors purchased
4 equity in the business on or around September 27, 2004, but the investors signed a term sheet in
5 **which they took a convertible note rather than equity.** The disruption caused by Saverin
6 delayed the business **interfered with the business's** ability to gain financing, and the value at
7 which the angel investors were willing to invest was set with their **and structure of the investment**
8 **reflected the investors' knowledge of Saverin's conduct and reflected that fact and was** were thus
9 **nevertheless beneficial to the business than it**they otherwise would have been.

10 13. On or about July 28, 2004 **Meanwhile,** Saverin attempted to hijack the business by
11 seizing its **control of the LLC's** bank account and trying to wrest control of the business from
12 Zuckerberg by forcing an operating agreement on him. **In June 2004,** Saverin had opened a bank
13 account for the business **and in the name of the business LLC** and made himself the sole signatory

on the account. On or about July 28, 2004, Saverin froze the bank **that** account and refused to
14 release any of the funds unless he was given greater control over the business. The business
15 desperately needed these funds to ~~paycover~~ basic expenses, pay employees and to purchase new
16 servers and other equipment which were necessary to operate and grow the business **for operation**
17 **and growth.** Consequently, Zuckerberg was forced to invest an additional \$85,000 of his own
18 personal funds, including \$28,000 on 25 new servers, in order to keep the business going. The
19 funds invested by Zuckerberg were originally earmarked for his college tuition.

20 14. On or about July 28, 2004, Saverin also requested **further attempted to wrest control**
21 **of the business from Zuckerberg by requesting that Zuckerberg sign a limited liability operating**
22 agreement that he had prepared by Saverin. Saverin informed Zuckerberg that he would only
23 allow Zuckerberg to see the agreement **only** if Zuckerberg agreed to sign it without showing it to
24 his lawyers or personal advisors. Zuckerberg refused, but attempted to resolve the situation by
25 having the parties' oral agreement about the parties' respective ownership interests and
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SECOND AMENDED COMPLAINT

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Third Amended Complaint
Case No. 105 CV-039867

1 management responsibilities memorialized in an operating agreement. However, Saverin refused
2 to sign the agreement.

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

26 16. On or about October 31, 2004, Saverin entered into a number of agreements with the
27 Company regarding the exchange of his LLC interests and purchase of ownership interests in the
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1 Company. Specifically, Saverin entered into a Common Stock Purchase Agreement ("Purchase
2 Agreement I") wherein he agreed to purchase 1,250,000 shares of the Company's common stock
3 for a purchase price of \$10,750. Saverin also agreed pursuant to Purchase Agreement I to assign all
4 of his intellectual property rights (if any) and all information, rights and interest that he obtained or
5 created while working on the business, including customer lists, to the Company and to keep such
6 information confidential. A copy of the Purchase Agreement I is attached hereto as Exhibit A and
7 is incorporated herein by this reference. Defendant Saverin also entered into a second Common
8 Stock Purchase Agreement ("Purchase Agreement II") in which he agreed to purchase 78,334
9 shares of common stock of the Company for a price of \$673.68. A copy of the Purchase
10 Agreement II is attached hereto as Exhibit B and is incorporated herein by this reference. That
11 same day, Defendant Saverin, along with Moskowitz and Zuckerberg, executed an Exchange
12 Agreement, whereby each agreed to exchange their interests in the LLC for shares in the newly-
13 incorporated Company. A copy of the Exchange Agreement is attached hereto as Exhibit C and is
14 incorporated herein by this reference. As a result of the exchange, the following shares of common
15 stock in the Company were issued: to Zuckerberg=, 169,273; to Saverin=, 78,334; to Moskowitz
16 =, 13,056. As a result of these agreements, the Company acquired all right, title and interest in the
17 LLC and all membership interests therein. Accordingly, the Company became the sole member of
18 the LLC. Each of these agreements contained a full release of all known or unknown claims that
19 Saverin had against the Company and its officers, directors, board members and stockholders as of
20 the date of those agreements. **Purchase Agreement I further provided that Saverin (i) agrees**
21 **that his being permitted to purchase shares under the agreement represents settlement in full**
22 **of all outstanding obligations owed to Saverin by, *inter alia*, the Company and its officers,**
23 **employees and subsidiaries (including the LLC), and (ii) fully and forever releases, and**
24 **agrees not to sue concerning, all known or unknown claims that he may possess against, *inter***
25 ***alia*, the Company and its officers, employees and subsidiaries (including the LLC) as of the**
26 **date of the agreement. The Exchange Agreement contains essentially identical language. On**
27 **October 31, 2004, Defendant Saverin also entered into a Holder Voting Agreement, in which**

1 ~~Defendant Saverin~~ agreed to relinquish voting rights ~~ever associated with his common~~
2 to vote in various, specified ways. A copy of the Holder Voting Agreement is attached hereto as
3 Exhibit D and is incorporated herein by this reference.

4 17. In the ~~fall~~winter of 2004-05, the Company hired a new sales representative to officially
5 replace Saverin ~~because Saverin was no longer an employee of the Company~~. Effective as of the
6 signing of the October 31, 2004 agreements referenced above in ~~paragraph 16~~Paragraph 16,
7 Saverin agreed that he would ~~no longer~~not thereafter work for the Company as an employee and
8 would immediately transition all matters to the Company's new sales representative, including all
9 of his knowledge about the Company's customers, ~~and~~ advertising, and the systems that the
10 Company had in place. On information and belief, Saverin never followed through with this
11 assignment. Instead, Saverin kept communicating directly with advertising customers. ~~Saverin~~
12 ~~also continued to~~Insofar as Saverin was ever an employee of the Company or LLC, any such
13 employment ceased by October 31, 2004, but Saverin agreed that he would thereafter do
14 consulting work on some small projects for the Company and the Company offered to pay Saverin
15 as a consultant for this work. ~~However, Saverin failed to execute the~~that he would be paid at an
16 hourly consulting agreement that the Company offered to him and rate. For this work, Saverin
17 never submitted any timecards or requests for payment, even though Zuckerberg had repeatedly
18 asked him to do so. Although Saverin never executed the consulting agreement prepared for
19 him by the Company, both the Company and Saverin understood that the Company would
20 pay Saverin as a consultant, rather than as an employee, for this work.

21 18. After the Company's new sales representative took over all of the advertising accounts,
22 the Company received 20-30 emails from customers stating that they were pleased that someone
23 new was taking over the accounts because Saverin had been difficult to work with and was hard to
24 get in touch with. These advertising customers said that Saverin never answered his phone, that
25 his voicemail was always full and that he rarely returned emails, even on days when advertising
26 campaigns were scheduled to go live. ~~Not surprisingly, individuals~~Individuals in contact with
27 Saverin said that he did very little work on Facebook's ~~the~~ Company's business during this period;

1 ~~but he~~. **Nonetheless, Saverin claimed to still be doing be working 80 hours of work a week even**
2 after he was directed to cease all such activity.

3 19. ~~On~~In or around February 2005, Saverin and a few of his friends launched a “job
4 networking” website for college students called “Joboozle,” which ~~is~~ was remarkably similar to
5 www.thefacebook.com. On information and belief, despite Saverin’s obligation to maintain the
6 confidentiality of Facebook’s ~~the~~ **Company’s** intellectual property rights and trade secrets,
7 including customer lists, pursuant to Purchase Agreement I, Saverin misappropriated the
8 Company’s trade secrets and provided them to Joboozle. Not surprisingly, many, if not all, of
9 Joboozle’s advertisers during the relevant period were advertising customers of Facebook. ~~the~~
10 **Company**. In addition, at or about this time, Saverin placed unauthorized advertisements for
11 Joboozle and other personal projects on Facebook’s ~~the~~ **Company’s** website. When the Company
12 learned that Saverin was misappropriating advertising space on its website, it instructed him to
13 cease immediately. However, on information and belief, Saverin continued to place unauthorized
14 advertisements on the Company’s website until the Company was able to block his ability to access
15 its servers. In total, Saverin misappropriated thousands of ~~dollars in free~~ **dollars’ worth of**
16 advertising from the Company.

17 20. In or about April 2005, the Company sought investments from various venture capital
18 firms. When Saverin learned of this, he used the information to try to hold the Company hostage
19 once again— — implying that he would not allow the Company to move forward with any financing
20 without some special compensation for him. On April 20, 2005, Saverin sent a letter to the
21 Company, through his attorney, stating, *inter alia*, that he challenged the validity of the October
22 2004 agreements attached hereto as Exhibits A through D. **Saverin’s letter demanded**
23 **recognition of his “rightful equity position” and threatened that, if his concerns were not**
24 **“resolved promptly,” he would “take all appropriate steps to protect and enforce his rights.”**
25 In response, the Company informed Saverin on April 20, 2005 that he was not an employee of the
26 Company, had no responsibilities with the Company and should cease all communications with the
27 Company’s advertising customers immediately. ~~Despite Saverin’s conduct, which was disclosed to~~

1 ~~the investor, the~~The venture capital round of financing was completed; **despite Saverin's conduct**
2 **– which was disclosed to the investor –** but the ultimate transaction value reflected Saverin's
3 **conduct. Indeed, Saverin's conduct forced the Company to make significant concessions to**
4 **the investor in order to secure the investment.**

5 **FIRST CAUSE OF ACTION FOR DECLARATORY RELIEF BY ALL PLAINTIFFS**
6 **ZUCKERBERG, FACEBOOK, INC. AND THEFACEBOOK, LLC AGAINST**
7 **DEFENDANT SAVERIN FOR DECLARATION THAT THE OCTOBER 2004 WRITTEN**
8 **AGREEMENTS ARE VALID AND ESTABLISH SAVERIN'S OWNERSHIP INTEREST**
9 **IN THE COMPANY**

10 21. Plaintiffs incorporate herein all the allegations contained in ~~paragraphs~~**Paragraphs 1**
11 **through 20 of this Third Amended Complaint.**

12 22. An actual controversy has arisen and now exists between Plaintiffs and
13 ~~Defendant~~**Saverin** regarding the validity and enforceability of the ~~various contracts entered into by~~
14 ~~Defendant~~**October 2004 written agreements referenced in Paragraph 16** and the parties'
15 **respective ownership pursuant to** ~~these~~ **these written** agreements. ~~Defendant~~**Saverin** contends that
16 ~~these~~ **these written** agreements referenced in ~~Paragraph 16~~ are not valid and that he should be given a
17 **30% equity stake in the Company. Plaintiffs on the other hand contend that ~~these~~ **these written**
18 **agreements are valid, and binding, and establish Saverin's equity interest in the Company.****

19 23. Plaintiffs request a judicial determination that the ~~foregoing contracts are valid~~**these**
20 **written agreements are valid** and enforceable, and establish ~~Defendant's~~**Saverin's precise**
21 **ownership interests in the Company to the exclusion of any oral agreement or promise alleged**
22 **by Saverin. Plaintiffs further seek a judicial determination that ~~Defendant~~**Saverin** is not entitled
23 **to any additional equity ownership interests in the Company beyond that established in these**
24 **written agreements.****

25 **SECOND CAUSE OF ACTION FOR MISAPPROPRIATION OF TRADE**
26 **SECRETS BY ALL PLAINTIFFS FACEBOOK, INC. AND THEFACEBOOK, LLC**
27 **AGAINST DEFENDANT SAVERIN FOR BREACH OF SETTLEMENT AGREEMENT**

28 SECOND AMENDED COMPLAINT

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1 24. Plaintiffs incorporate herein all the allegations contained in ~~paragraphs~~**Paragraphs 1**
2 through 23 of this **Third Amended Complaint**.

3 ~~Facebook provided Saverin access to confidential business and technical~~
4 ~~information, which were trade secrets, including confidential customer lists, subject to certain~~
5 ~~confidentiality obligations so that Saverin could perform work for Facebook. Facebook took~~
6 ~~reasonable steps in order to maintain the confidentiality of that trade secret information.~~

7 ~~Facebook's trade secret information has substantial, independent economic~~
8 ~~value from not being known to the public or other persons who could obtain economic value from~~
9 ~~not being known to the public or to other persons who could obtain economic value from their~~
10 ~~disclosure or use.~~

11 ~~On information and belief, despite Saverin's obligation to maintain the~~
12 ~~confidentiality of all intellectual property rights and trade secrets, including customer lists,~~
13 ~~pursuant to Purchase Agreement I, Saverin has misappropriated the Company's confidential~~
14 ~~business and technical information, which are trade secrets. Specifically, on information and~~
15 ~~belief, Saverin provided confidential information constituting trade secrets to a competing website,~~
16 ~~Joboozle.~~

17 ~~Saverin's acts constitute misappropriation of trade secrets under the~~
18 ~~Uniform Trade Secrets Act, §§ 3426, et seq. of the California Civil Code.~~

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

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

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

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

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

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

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

17 31. At all relevant times, Plaintiffs have performed their obligations under the October
18 2004 written agreements referenced in Paragraph 16.

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

22 **THIRD CAUSE OF ACTION FOR TORTIOUS INTERFERENCE WITH**
23 **PROSPECTIVE ECONOMIC ADVANTAGE BY ALL PLAINTIFFS ZUCKERBERG,**
24 **FACEBOOK, INC. AND THEFACEBOOK, LLC AGAINST DEFENDANT SAVERIN**
25 **FOR BREACH OF RELEASE**

26 33. Plaintiffs incorporate herein all the allegations contained in paragraphs Paragraphs 1
27 through 2932 of this Third Amended Complaint.

1 ~~Facebook, and Plaintiffs therefore are entitled to an award of punitive or exemplary damages to~~
2 ~~punish Defendant's wrongful conduct and to make an example of it.~~

3 **FOURTH CAUSE OF ACTION FOR CONVERSION BY PLAINTIFFS ZUCKERBERG**
4 **AND THEFACEBOOK, LLC AGAINST DEFENDANT SAVERIN**

5 ~~Plaintiffs Zuckerberg and the LLC incorporate herein all the allegations~~
6 ~~contained in paragraphs 1 through 35 of this Amended Complaint.~~

7 ~~Saverin opened a bank account for the LLC and made himself the sole~~
8 ~~signatory on~~In the account.

9 ~~Saverin converted and refused to allow~~**October 2004 written agreements**
10 **referenced in Paragraph 16, Saverin agreed to release all known and unknown claims that**
11 **he may possess against, *inter alia*, the LLC or Zuckerberg to withdraw its funds from Company**
12 **and its bank account.**

13 34. As a direct and proximate result of Saverin's conversion, **officers, employees and**
14 **subsidiaries (including the LLC and Zuckerberg have been damaged in an amount to be proven at**
15 **trial, including lost profits from the business' loss) as of the use of the capital that Saverin refused**
16 **to release, the diminution in the business' market value caused by the business' inability to grow**
17 **the business by purchasing servers and other necessary equipment with the funds at that time, and**
18 **interest from the date of the conversion until the date that Saverin released the funds.**agreements.

19 ~~Plaintiffs Zuckerberg and the LLC are informed and believe, and on that~~
20 ~~basis allege, that Saverin's conversion was willful, malicious, oppressive and in furtherance of an~~
21 ~~effort to injure the business, and Plaintiffs Zuckerberg and the LLC therefore are entitled to an~~
22 ~~award of punitive or exemplary damages to punish Defendant's wrongful conduct and to make an~~
23 ~~example of it.~~

24 **FIFTH CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY BY PLAINTIFFS**
25 **ZUCKERBERG AND THEFACEBOOK, LLC**

26 ~~Plaintiffs Zuckerberg and the LLC incorporate herein all the allegations~~
27 ~~contained in paragraphs 1 through 40 of this Amended Complaint.~~

1 ~~_____ Saverin owed fiduciary duties to Plaintiffs Zuckerberg and the LLC as a~~
2 partner in a common law partnership, managing member of the LLC and an officer of the
3 business.

4 ~~_____ In total disregard of and contrary to his fiduciary duties, as alleged above,~~
5 Saverin, among other things, improperly seized business funds of the LLC when they were
6 gravely needed, twice held the business hostage and insisted on receiving a 30% stake in the
7 business, misappropriated trade secrets, intentionally interfered with the growth of the business,
8 usurped corporate opportunities, placed unauthorized advertisements for Joboosle and other
9 personal projects on the business' website and diverted sales from the business' customers to a
10 competing business.

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

12 **on his own behalf, and on behalf of his agents, heirs, family members,**
13 **executors, and assigns, hereby *fully and forever releases* the Company and its**
14 **officers, . . . employees, . . . subsidiaries (including but not limited to**
15 **TheFacebook, LLC), predecessor and successor corporations, and assigns (the**
16 **“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:

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

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

25 (c) any and all claims under the law of any jurisdiction including,
26 but not limited to, wrongful discharge of employment; constructive discharge
27 from employment; termination in violation of public policy; discrimination;
28 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

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

27 36. Similarly, in the Exchange Agreement, Saverin agreed that he

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SECOND-AMENDED COMPLAINT

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1 **on his own behalf, and on behalf of his agents, heirs, family members,**
2 **executors, and assigns, hereby fully and forever releases the Company and its**
3 **officers, . . . employees, . . . subsidiaries, predecessor and successor**
4 **corporations, and assigns, and TheFacebook, LLC and its officers, . . .**
5 **employees, . . . subsidiaries, predecessor and successor corporations, and**
6 **assigns, from . . . any claim, duty, debt, liability, obligation or cause of action**
7 **relating to any matters of any kind, whether presently known or unknown,**
8 **suspected or unsuspected, matured or unmatured, that [Saverin] may possess**
9 **arising from any omissions, acts, facts or circumstances that have occurred up**
10 **until and including the date of this Agreement including, without limitation:**

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

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

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

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

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

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

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

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

26 41. Plaintiffs are contractually entitled to attorneys' fees and costs from Saverin. Each
27 of the October 2004 written agreements referenced in Paragraph 16 provides: "[Saverin]

1 **agrees that the prevailing party in any legal action shall be awarded its reasonable attorneys'**
2 **fees and costs." Exhibit A, ¶ 8(a); Exhibit B, ¶ 7(a); Exhibit C, ¶ 6; Exhibit D, ¶ 6.5.**

3 42. At all relevant times, Plaintiffs have performed their obligations under the October
4 2004 written agreements referenced in Paragraph 16.

5 43. As a direct and proximate result of Saverin's breach of his fiduciary duties each release
6 as set forth above, Plaintiffs Zuckerberg and the LLC have been damaged in an amount to be
7 proven at trial, including a decrease in the value of the business, including the LLC's subsequent
8 market value and investment capital.

9 ~~Plaintiffs Zuckerberg and the LLC are informed and believe, and on that~~
10 ~~basis allege, that Saverin's breach of fiduciary duty was willful, malicious, oppressive and in~~
11 ~~furtherance of an effort to injure the business, and Plaintiffs therefore are entitled to an award of~~
12 ~~punitive or exemplary damages to punish Defendant's wrongful conduct and to make an example~~
13 ~~of it.~~

14 **FOURTH CAUSE OF ACTION BY ALL PLAINTIFFS AGAINST DEFENDANT**

15 **SAVERIN FOR BREACH OF AGREEMENT NOT TO SUE**

16 44. Plaintiffs incorporate herein all the allegations contained in Paragraphs 1 through
17 43 of this Third Amended Complaint.

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

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

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

3 (b) any and all claims relating to, or arising from, [Saverin]'s right
4 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]

5 (c) any and all claims under the law of any jurisdiction including,
6 but not limited to, wrongful discharge of employment; constructive discharge
from employment; termination in violation of public policy; discrimination;
7 breach of contract, both express and implied; breach of a covenant of good
faith and fair dealing, both express and implied; promissory estoppel;
8 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;
9 slander; negligence; personal injury; assault; battery; invasion of privacy;
false imprisonment; and conversion

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

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

12 on his own behalf, and on behalf of his agents, heirs, family members,
13 executors, and assigns, hereby *fully and forever . . . agree[s] not to sue*
14 *concerning[] any claim, duty, debt, liability, obligation or cause of action relating*
15 *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:

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

18 (b) any and all claims relating to, or arising from, [Saverin]'s right
19 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]

20 (c) any and all claims under the law of any jurisdiction including,
21 but not limited to, wrongful discharge of employment; constructive discharge
from employment; termination in violation of public policy; discrimination;
22 breach of contract, both express and implied; breach of a covenant of good
faith and fair dealing, both express and implied; promissory estoppel;
23 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;
24 slander; negligence; personal injury; assault; battery; invasion of privacy;
false imprisonment; and conversion

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

1 **therein are void and not enforceable. Plaintiffs on the other hand contend that these written**
2 **agreements are valid and binding, and that the releases are valid and enforceable, not void.**

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

9 **PRAYER FOR RELIEF**

10 WHEREFORE, the Plaintiffs pray for the following relief:

- 11 1. For a declaration that Purchase Agreement I, Purchase Agreement II, the Exchange
12 Agreement; and the Holder Voting Agreement are valid and enforceable;
- 13 2. For a declaration that the Purchase Agreement I, Purchase Agreement II, the Exchange
14 Agreement; and the Holder Voting Agreement set forth Defendant's Saverin's precise ownership
15 interests in the Company; to the exclusion of any oral agreement or promise alleged by
16 Saverin;
- 17 3. For a declaration that Defendant Saverin is not entitled to any additional equity
18 ownership interests in the Company beyond that established in Purchase Agreement I,
19 Purchase Agreement II, the Exchange Agreement and the Holder Voting Agreement;
- 20 4. For an award of damages in an amount to be proven at trial;
 - 21 1. ~~For recovery for unjust enrichment as a result of Saverin's misappropriation~~
22 ~~of trade secrets, as well as damages and other relief provided for in the Uniform Trade Secrets~~
23 ~~Act, section 3426.3 of the California Civil Code;~~
 - 24 2. ~~For an order enjoining Saverin preliminarily and permanently from further~~
25 ~~use of Facebook's trade secrets under the Uniform Trade Secrets Act, section 3426.2 of the~~
26 ~~California Civil Code;~~
 - 27 3. ~~For punitive damages to the extent authorized by law;~~

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5. For an award of reasonable attorneys' fees and costs ~~(including those provided in the~~
~~Uniform Trade Secrets Act, section 3426.4 of the California Civil Code); and~~
6. For such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiffs demand a trial by jury.

Dated: ~~March 7, 2005~~ July , 2008 **RUBY & SCHOFIELD**

Respectfully submitted.

JAMES E. BURNS
ORRICK, HERRINGTON & SUTCLIFFE LLP
PENELOPE A. GRABOYS

James E. Burns, Jr.
By: Allen Ruby

**WILSON SONSINI GOODRICH &
ROSATI
Professional Corporation**

By: _____
Boris Feldman

Attorneys for Plaintiffs ~~Plaintiffs/Cross-~~
Defendants
Facebook, Inc., thefacebook, LLC and
~~and~~ Mark E. Zuckerberg

CHOATE, HALL & STEWART LLP

JOHN R. BARANIAK, JR.
DIRECT DIAL: (517) 248-2114
EMAIL: JH@CHOATE.COM

EXCHANGE PLACE
53 STATE STREET
BOSTON, MASSACHUSETTS 02109-2804
T (617) 248-5000 F (617) 248-4000
www.choate.com

April 20, 2005

By E-mail and Certified Mail

Mr. Mark E. Zuckerberg
1324 Sherman Avenue
Menlo Park, CA 94025
Zuck@thefacebook.com

By E-mail and Certified Mail

TheFacebook, Inc.
471 Emerson Street
Palo Alto, CA 94025

Attention: Mr. Mark E. Zuckerberg

Re: TheFacebook, Inc.

Gentlemen:

This firm has been engaged by Eduardo Saverin to represent him in connection with his interest in TheFacebook, Inc. (the "Company"). In that regard, we have reviewed certain documents, including the documents presented to Mr. Saverin for his signature earlier this month as well documents Mr. Saverin was asked to sign last fall, among others. Our review of those documents and further factual investigation has led us to conclude that Mr. Saverin's rights have been violated both by the Company and by Mr. Zuckerberg individually. The wrongful conduct includes the Company's and Mr. Zuckerberg's breach of agreements with Mr. Saverin, and Mr. Zuckerberg's breach of fiduciary duties he owes to Mr. Saverin. I write on Mr. Saverin's behalf to demand that: (i) Mr. Saverin's rightful equity position be acknowledged and recognized immediately; (ii) safeguards be put in place to prevent future breaches; and (iii) Mr. Saverin receive appropriate compensation for his past, present, and future services rendered to the Company.

As you know, Mr. Saverin and Mr. Zuckerberg founded the Company in February, 2004, dividing ownership one-third to Mr. Saverin, two-thirds to Mr. Zuckerberg. The Company was

Mr. Mark E. Zuckerberg
TheFacebook, Inc.
April 20, 2005
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not initially organized as a legal entity, but there was a clear understanding by all parties involved of Mr. Saverin's economic interest in the Company from day one, and Mr. Saverin has worked for the Company's benefit over the past year in reliance on that understanding. The Company later was organized as TheFacebook, LLC, a Florida limited liability company, in the summer of 2004. Our understanding is that the LLC was owned 65% by Mr. Zuckerberg, 30% by Mr. Saverin, and 5% by a third individual, Dustin Moskovitz.

In the fall of 2004, Mr. Zuckerberg presented Mr. Saverin with documents relating to the change of TheFacebook, LLC from a Florida LLC to a Delaware corporation. At that time, Mr. Zuckerberg informed Mr. Saverin that if Mr. Saverin did not sign the documents, then Mr. Saverin would lose his interest in the Company. Based on fraudulent misrepresentations Mr. Zuckerberg made to Mr. Saverin at the time both orally and in writing and on Mr. Zuckerberg's coercion, Mr. Saverin signed the documents under duress. One such document was a Holder Voting Agreement, pursuant to which Mr. Saverin relinquished to M. Zuckerberg certain voting rights he had as a shareholder. Due to the circumstance under which Mr. Saverin signed that Holder Voting Agreement, it is void and unenforceable.

In February, 2005, Mr. Zuckerberg apparently caused the Company to file a First Amended and Restated Certificate of Incorporation (the "Restated Charter") with the Delaware Secretary of State's office. The Restated Charter, among other things, increased the number of common shares the Company is authorized to issue by 9,000,000 shares. Mr. Saverin did not vote in favor of the Restated Charter and was not informed of this filing either before or after it was made as Delaware law requires. He only very recently learned of it on his own. The Restated Charter indicates that it was signed by Mr. Zuckerberg on January 7, 2005, and that it "has been duly adopted by this corporation's Board of Directors and stockholders in accordance with the applicable provisions of Sections 228, 242, and 245 of the General Corporation Law of the State of Delaware." In fact, it had not been. Mr. Saverin was presented with a written Consent dated January 14, 2005 (which purports to authorize and approve the Restated Charter) only earlier this month for execution. Since then, the Company and counsel purporting to act on the Company's behalf have repeatedly hounded Mr. Saverin to sign the January 14, 2005 Consent. If the Restated Charter was, as it indicates, duly adopted, then there would be no reason for the repeated after-the-fact demands for Mr. Saverin to sign the Consent.

The other documents presented to Mr. Saverin earlier this month for signature further evidence wrongful conduct by Mr. Zuckerberg and by the Company. Among those documents is a Consulting Agreement which purports to acknowledge and reaffirm a pre-existing agreement between the Company and Mr. Saverin, which agreement, in reality, does not exist and never existed. They also include three separate Actions by Written Consent of the Stockholder of the Company - the one dated January 14, 2005, discussed above, as well as Consents dated March 28, 2005, and April 4, 2005. All concern actions taken by the Company with no notice to Mr. Saverin and seek to "approve" or ratify actions well after the fact.

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Although each of the Consents is troubling, most troubling is the April 4, 2005 Consent, which purports to ratify the issuance, months earlier, of a large number of additional shares of common stock to Mr. Zuckerberg, Dustin Moskovitz, and Sean Parker. Mr. Saverin is not aware of any valid and sufficient consideration having been provided by these individuals for such issuances of stock. The impropriety of the purported issuances is evidenced by the way the Company approached them. The purported issuances were done secretly and without Mr. Saverin's knowledge or consent. The effect of these stock issuances (and others), if valid (which they are not) would be to dilute Mr. Saverin's equity interest in the Company significantly. Mr. Saverin believes that the controlling shareholders are simply attempting to increase their ownership interests in the Company prior to the first round of institutional financing and at the expense of Mr. Saverin.

Obviously, Mr. Saverin will not go along with such a scheme to deprive him of what is rightfully his. These attempted stock issuances are not in the best interests of the Company's stockholders and are, contrary to the language in the Consent which Mr. Zuckerberg and counsel purporting to act on behalf of the Company relentlessly have been urging Mr. Saverin to execute, in no sense of the words "fair," "just," or "reasonable."

Under the circumstances, Mr. Saverin does not intend to sign any of the documents presented to him earlier this month.

As you should know, under Delaware law, a majority shareholder of a closely held corporation owes a heightened fiduciary duty to a minority shareholder like Mr. Saverin not to use control of the Company for his own personal benefit at the expense of a minority shareholder. By their actions, the Company and Mr. Zuckerberg have done precisely that.

Mr. Saverin has worked tirelessly on behalf of the Company and continues to do so. He conceived of and created a sustainable infrastructure for revenue production, forging many significant relationships with advertisers and recruiting and training the Company's sales team. He has done so without being paid a salary or receiving free housing or cars like others, including Mr. Zuckerberg, have. He invested his own funds in the Company for use as working capital. Mr. Zuckerberg may have contributed some funds as well, but it is our understanding that if he did, the Company repaid him those funds. No such repayment was ever made to Mr. Saverin. Mr. Saverin believes that the Company has great promise and an enormous unfulfilled potential, and has no desire to cause it harm. He is committed to its success and growth. At the same time, Mr. Saverin will not sit idly by while Mr. Zuckerberg and others increase their ownership stakes and voting power at his expense.

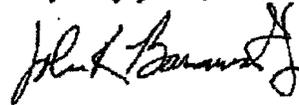
To that end, Mr. Saverin demands that his 30% equity stake in the Company and full voting rights be acknowledged and recognized immediately, that safeguards be put in place to prevent further wrongful conduct of this sort, and appropriate compensation for his past, present,

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and future services to the Company. Mr. Saverin expressly reserves all of his rights and remedies against the Company and Mr. Zuckerberg.

I am, of course, available to discuss these matters with you or with your counsel. Be advised that if these matters are not resolved promptly to Mr. Saverin's satisfaction, Mr. Saverin intends to take all appropriate steps to protect and enforce his rights.

Very truly yours,



John R. Baraniak, Jr.

cc: Steven Venuto, Esq.
Mr. Eduardo Saverin
William P. Gelnaw, Jr., Esq.
Robert V. Jahrling III, Esq.
Paul E. Bonanno, Esq.