IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CROSS ATLANTIC CAPITAL PARTNERS, INC.,

CIVIL ACTION

Plaintiff,

NO. 07-CV-02768-JP

٧.

JURY TRIAL DEMANDED

FACEBOOK, INC. and THEFACEBOOK, LLC,

Defendants.

DECLARATION OF MARK R.WEINSTEIN IN SUPPORT OF FACEBOOK'S MOTION FOR PROTECTIVE ORDER

- I, Mark R. Weinstein, declare:
- 1. I am an attorney with White & Case LLP, counsel of record in this action for defendants Facebook, Inc. and Thefacebook, LLC (collectively "Facebook"). I make this declaration in support of Facebook's Motion for Protective Order. I have personal knowledge of the facts contained within this declaration, and if called as a witness, could testify competently to the matters contained herein.
- 2. On February 4, 2008, plaintiff Cross Atlantic Capital Partners, Inc. ("XACP") noticed the deposition of Mark Zuckerberg for Philadelphia, Pennsylvania. Mr. Zuckerberg was the first named individual that XACP sought to depose in this litigation.
- 3. On February 8, 2008, Facebook asked XACP to withdraw its deposition notice or provide information showing that Mr. Zuckerberg possesses unique or superior knowledge of discoverable information. Attached hereto as **Exhibit A** is a true and correct copy of a letter from Sam O'Rourke (counsel for Facebook) to Patrick Keenan (counsel for XACP), dated February 8, 2007.

- 4. On February 11, 2008, XACP responded that it did not accept Facebook's position and that it expected to proceed with his deposition as noticed. Attached hereto as **Exhibit B** is a true and correct copy of a letter from Patrick Keenan to Sam O'Rourke, dated February 11, 2008.
- 5. On February 15, 2008, I spoke with Patrick Keenan and Frederick Tecce (counsel for XACP) about various discovery issues. During the call, I asked XACP to postpone the deposition of Mr. Zuckerberg until after XACP had taken the deposition testimony of lower level, more knowledgeable employees, as that might obviate the need to depose Mr. Zuckerberg. XACP responded that it intended to depose Mr. Zuckerberg regardless of what information they obtain from other deponents.
- 6. I certify that the parties, after reasonable effort, have been unable to resolve the dispute regarding the notice of deposition of Mark Zuckerberg.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 4, 2008 in Palo Alto, California.

/s/	Mark R	. Weinstein	
	Mark R	. Weinstein	

CERTIFICATE OF SERVICE

This is to hereby certify that on this 4th day of March, 2008, I caused a true and correct copy of the foregoing document: DECLARATION AND CERTIFICATION OF MARK WEINSTEIN IN SUPPORT OF FACEBOOK'S MOTION FOR PROTECTIVE ORDER to be served via this Court's Electronic Filing ("ECF") System, upon the following:

Frederick A. Tecce, Esq. McShea/Tecce, P.C. The Bell Atlantic Tower – 28th Floor 1717 Arch Street Philadelphia, PA 19103 ftecce@mcshea-tecce.com

Thomas J. Duffy, Esq.
Patrick J. Keenan, Esq.
Duffy & Keenan
One Liberty Place, 55th Floor
1650 Market Street
Philadelphia, PA 19103
pjk@duffykeenan.com

Counsel for plaintiff Cross Atlantic Capital Partners, Inc.

> <u>/s/ Heidi Keefe</u> Heidi Keefe

EXHIBIT A

to

Declaration of Mark Weinstein in Support of Facebook's Motion for Protective Order

Cross Atlantic Capital Partners, Inc. v Facebook, Inc. and Thefacebook, LLC

USDC ED PA Case No. 07-CV-02768-JP

White & Case LLP 3000 El Camino Real 5 Palo Alto Square, 9th Floor Palo Alto, California 94306 Tel + 1 650 213 0300 Fax + 1 650 213 8158 www.whitecase.com

February 8, 2008

VIA FACSIMILE and US MAIL

Patrick Keenan Duffy & Keenan One Liberty Place 1650 Market Street, 55th Floor Philadelphia, PA 19103-7301

Re: Cross Atlantic Capital Partners, Inc. v Facebook, Inc. and Thefacebook LLC

USDC ED PA 2:07-CV-02768-JP

Pat:

I write concerning XACP's Notice of Deposition of Mark Zuckerberg dated February 8, 2008. As you know, Mr. Zuckerberg is the CEO of Facebook and has no real involvement in the matters at issue in this case. Before XACP would be entitled to depose Mr. Zuckerberg, it must meet its burden of showing that Mr. Zuckerberg possesses unique or superior knowledge of discoverable information, and that less intrusive avenues of discovery have been exhausted. See Baine v. General Motors Corp., 141 F.R.D. 332 (M.D. Ala. 1991). Unless you can provide substantive information demonstrating that XACP can meet its burden under the applicable case law, Facebook will move for a protective order to prevent this deposition. Please either withdraw your deposition notice or provide the requisite information by the close of business on Tuesday, February 12, 2008, or Facebook will have no choice but to file its motion.

Very truly yours,

-Sam O'Rourke

cc:

Frederick A. Tecce Dennis P. McCooe

EXHIBIT B

to

Declaration of Mark Weinstein In Support of Facebook's Motion for Protective Order

Cross Atlantic Capital Partners, Inc. v Facebook, Inc. and Thefacebook, LLC USDC ED PA Case No. 07-CV-02768-JP

→ PALO ALTO FAX 2001/002 NO.942 P. 1

DUFFY & KEENAN

Attorneys at Law One Liberty Place 1650 Market Street, 55th Floor Philadelphia, PA 19103 215.238.8700 tel 215.238.8710 fax

FAX

		_	
DATE:	February 11, 2008	PAGES:	2
TO:	Sam O'Rourke Frederick A. Tecce	FROM:	Patrick J. Keenan
FAX:	650-213-8158 215-599-0888	PHONE:	215-238-8707
RE:	Cross Atlantic Capital Partners v. Facebook, Inc.		
NOTE:	PLEASE ADVISE IF ALL	PAGES AS SPECIF	IED ABOVE ARE NOT RECEIVED.
FILE #:			

MESSAGE:

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DUFFY & KEENAN Aliorneys at law

PATRICK J. KEENAN DIRECT DIAL 215.238.8707

February 11, 2008

Via Facsimile and Regular Mail

Sam O'Rourke, Esquire White & Case 3000 El Camino Real 5 Palo Alto Square, 9th Floor Palo Alto, CA 94306

RE: Cross Atlantic Capital Partners, Inc. v. Facebook, Inc. and Thefacebook, LLC U.\$.D.C., E.D.Pa. 2:07-cv-02768-JP

Dear Sam:

I am in receipt of your letter dated February 8, 2008 regarding the deposition of Mark Zuckerberg. In the United States District Court for the Eastern District of Pennsylvania, and elsewhere, "the party seeking discovery ... may name a specific officer, director, or managing agent to give deposition testimony on behalf of a party corporation pursuant to Fed. R.C.P. 30(b)(1)." *Triple Crown America, Inc. v. Biosynth AG*, 1998 U.S. Dist. LEXIS 6117 (E.D. Pa. April 30, 1998); *United States v. Afram Lines*, 159 F.R.D. 408, 413 (S.D.N.Y. 1994). There is no "unique or extraordinary knowledge" requirement. Additionally, in response to our client's Interrogatory No. 7, Facebook has identified only four individuals "who significantly contributed to the creation, development and design of Facebook's Groups application," one of whom is Mark Zuckerberg. Mr. Zuckerberg has also publicly taken credit for the founding of Facebook and the infringing website. Therefore, we cannot accept your position that Mr. Zuckerberg may not be deposed and expect to proceed with his deposition as noticed.

If you have any questions, please feel free to contact me.

Sincerely,

PATRICK J. KEENAN

PJK/mk

cc: Frederick A. Tecce, Esquire

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