IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CONNECTU, INC., CAMERON WINKLEVOSS, TYLER WINKLEVOSS, AND DIVYA NARENDRA,

Plaintiffs,

v.

FACEBOOK, INC., MARK ZUCKERBERG, EDUARDO SAVERIN, DUSTIN MOSKOVITZ, ANDREW McCULLUM, AND THEFACEBOOK LLC,

Defendants.

CIVIL ACTION NO. 1:07-cv-10593-DPW

(CONSOLIDATED WITH CIVIL ACTION NO. 1:04-cv-11923-DPW)

STATUS REPORT OF
CAMERON WINKLEVOSS, TYLER WINKLEVOSS AND DIVYA NARENDRA
CONCERNING MATERIAL DEVELOPMENTS

This Court's September 30, 2009 Order directed the parties to provide the Court with a status report within 10 days of any material developments concerning the continued vitality of the Northern District of California judgment. Dkt. 274, p. 3. On April 12, 2011, Defendants provided this Court with a copy of the Ninth Circuit's decision. Dkt. 332. Plaintiffs further advise the Court that they filed a Petition for Rehearing En Banc on April 18, 2011. A copy of this Petition is attached as Exhibit A. *See* Fed.R.App.P. 41(d)(1) (mandate stayed).

Plaintiffs bring the following additional matters to the Court's attention because the vitality of the California judgment is diminished if a judgment entered here pursuant to the California judgment is vacated due to these developments. Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra ("Founders") also wish to advise the Court of their intentions with respect to future motions. Beginning in mid-2010, the online press exposed many alleged

communications—requested, but apparently never produced in this action—that would have substantially aided the Founders' prosecution of their case. *The New Yorker* magazine reported that Facebook reviewed at least some of these leaked communications in January 2006. If true, this raises a serious issue as to whether or not Plaintiffs were deprived of critical evidence for over two years leading up to the February 2008 mediation.

Background: Plaintiffs requested all relevant communications at the outset of the litigation in 2005. *See, e.g.,* Dkt. 213-4[1] [labeled 213-5 on document], pp. 5-6 (Request No. 7); *see also* Dkt. 213, p. 2, ¶5. The Facebook Defendants agreed to produce any they found after a reasonable search. *Id.* Following their initial production, which is now believed to be incomplete, the Facebook Defendants repeatedly represented to Plaintiffs that they would promptly produce any newly found responsive documents, consistent with their obligation under Fed.R.Civ.P. 26(e). *See, e.g.,* Dkt. 213-11 [labeled 213-12 on document]; Dkt. 213-7 [labeled 213-8 on document], p. 1; Dkt. 213-3 [labeled 213-4 on document], p. 1. They also represented to the Court that they had complied with all of their discovery obligations. *See, e.g.,* 1:04-cv-11923 Dkt. 159, p. 1 ("At every opportunity, Facebook Defendants have complied with ConnectU's numerous requests for information from the various recovered electronic devices"); *see also* 1:04-cv-11923 Dkt. 170, p. 8 ("Facebook Has Not Suppressed Evidence"); 7/25/07 Tr. at 46:5-15 (Facebook attorney I. Neel Chatterjee states with respect to discovery: "We haven't slowed a single thing down on discovery"). Subsequent events indicate that the opposite is true.

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[1] Docket citations are to the docket number that appears on the online docket accessible through PACER. Notations in brackets indicate when the document itself bears a different docket number (due to apparent processing errors). All docket citations are to 1:07-cv-10593 except where another case number is specified. Page citations are based on the document's original pagination, rather than the docket pagination added at the top at the time of filing.

Leaked Instant Messages: In mid-2010, a series of allegedly *bona fide* instant messages ("IMs") supporting the Founders' claims began appearing in *Business Insider*. The online article is attached as Exhibit B.[2] For example, one alleged IM shows that after meeting with the ConnectU Founders, Mr. Zuckerberg apparently told his friend and business partner to check out their website, and then stated: "But they made a mistake haha. They asked me to make it for them. So I'm like delaying it so it won't be ready until after the facebook thing comes out." Ex. B, p. 4. In other leaked alleged IMs, Mr. Zuckerberg apparently acknowledged his deceptive intent. *See, e.g., id.* ("I feel like the right thing to do is finish the facebook and wait until the last day before I'm supposed to have their thing ready and then be like 'look yours isn't as good as this so if you want to join mine you can…otherwise I can help you with yours later.'") More bluntly, when another friend asked him what he was going to do about the other members of the ConnectU team, Zuckerberg allegedly wrote an instant message saying: "Yeah, I'm going to fuck them . . . probably in the [ear]." *Id.*, p. 6 (bracketed information reflects correction appearing on next line of alleged IM). These leaked alleged IMs were apparently not produced in discovery.[3] Reportedly, there are many more like these. Ex. C, p. 5.

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[2] N. Carlson, "At Last -- The Full Story Of How Facebook Was Founded," *Business Insider*, Mar. 5, 2010, <http://www.businessinsider.com/how-facebook-was-founded-2010-3> (accessed April 15, 2011).

[3] A First Amended Complaint filed in *Ceglia v. Zuckerberg*, Western District of New York Case No. 1:10-cv-00569, alleges what appears to be yet another email that, if genuine, should have been produced. *Id.* at Dkt. 39, ¶36 ("I have recently met with a couple of upperclassmen here at Harvard [presumably the ConnectU Founders] that are planning to launch a site very similar to ours. If we don't make a move soon, I think we will lose the advantage we would have if we release before them") (bracket information added). It is not presently known whether Defendants challenge the authenticity of this recently revealed email communication; press reports suggest they do. The Founders are not aware of any challenge to the authenticity of the leaked IMs referenced in the text in the year since they were disclosed. To the contrary, Mark Zuckerberg appears to have acknowledged them in *The New Yorker* article discussed below.

Report That Facebook And Its Attorneys Reviewed Leaked IMs Two Years Before The Mediation: *The New Yorker* Magazine reported that Facebook and its attorneys learned of – and indeed openly discussed – these IMs in January 2006. An article in the September 20, 2010 edition, which is attached as Exhibit C,[4] states in pertinent part:

> ***To prepare for litigation against the Winklevosses and Narendra, Facebook's legal team searched Zuckerberg's computer and came across Instant Messages he sent while he was at Harvard.***[5] Although the IMs did not offer any evidence to support the claim of theft,[6] according to sources who have seen many of the messages, the IMs portray Zuckerberg as backstabbing, conniving, and insensitive. ***A small group of lawyers and Facebook executives reviewed the messages, in a two-hour meeting in January, 2006, at the offices of Jim Breyer, the managing partner at the venture-capital firm Accel Partners, Facebook's largest outside investor.***
>
> . . .
>
> ***According to two knowledgeable sources, there are more unpublished IMs that are just as embarrassing and damaging to Zuckerberg****.*

Ex. C, p. 5 (emphasis added). According to the article, Mr. Breyer, a member of Facebook's board of directors, acknowledged this meeting and Mark Zuckerberg appeared to admit writing the IMs. *Id.*

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

[5] There is reason to believe that this statement is true. By January 2006, Mr. Zuckerberg's computer had been in the Orrick firm's possession for several weeks if not months, and the firm had already examined it. *See* Dkt. 213-7 [labeled 213-8 on document] (in a November 23, 2005 letter, the Facebook Defendants refer to ongoing analysis of resident information on the computer Mr. Zuckerberg used at Harvard and further state it "may have responsive information"), Dkt. 245-3 [labeled 245-4 on document] (Facebook Defendants produce responsive documents from Mr. Zuckerberg's computer on January 7, 2006); Dkt. 148-14, pp. 1-2 (***Facebook Defendants declare in a February 6, 2006 letter that "The hard drive from this laptop was thoroughly forensically examined and all recoverable files were recovered"***) (emphasis added); *see also* 11/18/2005 Tr. at 20:16-22:22 ("we've searched fairly thoroughly of all, all the electronic devices we've been able to find to date, *and we continue to do that*") (emphasis added); Dkt. 213-6 [labeled 213-7 on document] (deposition testimony regarding chain of custody of Mr. Zuckerberg's computer); 6/2/2008 Tr. at 30:22-31:2 (Facebook Defendants used same computer search methodology as Jeff Parmet).

[6] The prior focus on theft of code is very much related to Defendants' failure to produce evidence supporting Plaintiffs' other claims.

The Facebook Defendants' representations to Plaintiffs and this Court cannot be squared with this alleged January 2006 meeting.[7] The Founders respectfully submit that Fed.R.Civ.P. 60(b) and *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 928-930 (1st Cir. 1988) warrant an inquiry into whether the Facebook Defendants intentionally or inadvertently suppressed evidence. At the appropriate time,[8] the Founders intend to move for such an inquiry and, depending on the results of that inquiry, for appropriate relief under Rule 60(b) and/or this Court's inherent powers.

Dated: April 20, 2011

Respectfully submitted,

CAMERON WINKLEVOSS, TYLER WINKLEVOSS and DIVYA NARENDRA,

By their attorneys,

/s/ Tyler Meade

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[7] *The New Yorker* article also raises concerns about the June 2, 2008 hearing in this Court regarding the Parmet dispute, in which Plaintiffs' computer forensic expert uncovered documents that he felt should be produced by Defendants, and Defendants alleged Mr. Parmet had violated the Court-ordered search protocol. The Court asked Facebook's counsel a series of questions about these documents, which documents the Founders have never seen because the protocol prevented Mr. Parmet from communicating directly with them about what he found. Dkt. 103. First, the Court asked whether they were in "the production track" at the time the Parmet dispute arose (which was in December 2007) and Mr. Chatterjee answered affirmatively. 6/2/2008 Tr. at 29:20-30:2. Next, the Court asked "Well, where were these documents that Mr. Parmet referred to in the disclosure queue?" *Id.* at 30:15-16. Mr. Chatterjee responded that they were going to be produced "in mid-to-late February" 2008. *Id.* at 30:17-21. At first blush, there appears to be nothing wrong with Mr. Chatterjee's response, and an inquiry may reveal that it was appropriate. On the other hand, if (a) the leaked IMs are what Mr. Parmet found, and (b) *The New Yorker* article is accurate and Defendants and their litigation team had known about these communications for more than two years and not disclosed them, Mr. Chatterjee's response is incomplete at best. A more candid response would have disclosed that the Facebook Defendants had known about the documents for more than two years but not produced them, at which point the Court would have had the opportunity to inquire further.

[8] *See* Dkt. 274, pp. 2-3 (9/30/2009 Order).

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CERTIFICATE OF SERVICE

I, Tyler Meade, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as nonregistered participants on or before April 20, 2011.

/s/ Tyler Meade
Tyler Meade

CA Nos. 08-16745, 08-16873, 09-15021 (consolidated)
DC No. C 07-01389 JWW

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE FACEBOOK, INC. ET AL.,
Plaintiffs/Appellees/Cross Appellants,

v.

CONNECTU, INC.,
Defendant/Appellee,

and

CAMERON WINKLEVOSS, TYLER WINKLEVOSS and DIVYA NARENDRA,

Defendants/Appellants/Cross-Appellees.

Appeal From Judgment Of The United States District Court
For The Northern District Of California
(Hon. James Ware, Presiding)

PETITION FOR REHEARING *EN BANC*

Panel Decision by Judges Kozinski, Wallace and Silverman
April 11, 2011

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American courts have long held that a settlement agreement procured by fraud may be rescinded. The Panel's opinion in this case, applying federal common law, abruptly rejected that rule (seemingly without acknowledging its existence). It held that standard broad releases found in settlement agreements render the agreements invulnerable against claims that they were procured by fraud. That holding has broad implications. For example, a settlement obtained by falsely representing that the defendant has no liability insurance policy would be enforceable despite proof of deliberate fraud.

The opinion also conflicts with numerous federal court decisions regarding the "anti-waiver" provision of the Securities Exchange Act of 1934, 15 U.S.C. §78cc(a). Section 29(a) of that Act, which mirrors like provisions in several other securities statutes (*see* 15 U.S.C. §§77aaaa (Trust Indenture Act), 80a-46 (Investment Company Act of 1940), 80b-15 (Investment Advisors Act of 1940)), prohibits any agreement "to waive compliance with any provision of this chapter or of any rule or regulation thereunder." The Panel held that applying a mediation confidentiality agreement to bar evidence of securities fraud occurring in the mediation did not run afoul of Section 29(a) because the agreement did not *expressly* waive rights under the Exchange Act but merely "frustrate[d]" such claims. Again, the Panel's decision conflicts with other federal decisions that construe

Section 29(a) and its counterpart antiwaiver provisions to prohibit agreements that even indirectly impair enforcement of the securities laws (a conflict not acknowledged in the Panel's opinion). Because these holdings raise fundamental conflicts with federal (and state) law on important legal issues, rehearing *en banc* is required.[1]

ISSUES PRESENTED

1. Did the Panel err in holding that, under federal common law governing the validity of a settlement of federal claims, the settlement's release of all claims bars a defense to enforcement on the ground that the settlement agreement itself was procured by fraud?

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[1]On rehearing *en banc*, the Court should not reiterate the Panel's *dicta* (Appendix A (attached) at 4906-07)—which is not supported by the record (*see* Appellants' Motion to Strike (Dkt. 163) at 1-2)—about the supposed legal and commercial sophistication of Appellants and their counsel. A plaintiff's sophistication is no defense to a claim that the defendant failed to disclose material facts in connection with the sale or exchange of securities. *See Wheat v. Hall*, 535 F.2d 874, 876 (5th Cir. 1976) ("Even sophisticated investors are entitled to the protections of" the securities laws); *see also TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448 (1976); *United States v. Reyes*, 577 F.3d 1069, 1075 (9th Cir. 2009). Nor would sophistication support a defense of non-reliance in a nondisclosure case, where reliance is presumed so long as the undisclosed facts are material. *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54 (1972).

Likewise, the gratuitous statement (also unsupported by the record) that Appellants were "bested by a competitor" (Appendix A at 4911) is an inappropriate way to describe the misappropriation and use of Appellants' business idea by someone they trusted.

2. If so, does the Panel's holding conflict with *Burgess v. Premier Corp.*, 727 F.2d 826 (9th Cir. 1984), which held that waivers of unknown securities law claims are invalidated by Section 29(a) of the Exchange Act?

3. Does use of a mediation confidentiality agreement to preclude evidence of securities fraud that induced the settlement violate Section 29(a) of the Exchange Act?

STATEMENT OF FACTS

In the underlying litigation, Appellants alleged that, during their junior year at Harvard, they conceived the idea of creating a website that would connect people through networks of friends and common interests. *See* 2-ER-150 ¶12. In November 2003, Appellee Zuckerberg—then a fellow Harvard student—entered into a partnership with Appellants and agreed to complete the computer programming necessary to finish the website. *Id.* ¶14.

Zuckerberg repeatedly assured Plaintiffs that he would complete the programming in time to launch the website before the end of the 2004 school year. 2-ER-150-51 ¶¶15-16. But just days after reconfirming his intention in writing, Zuckerberg registered the domain name "TheFaceBook.com" and launched his own website, thereby misappropriating Appellants' ideas and intellectual property. 2-ER-

151-52 ¶¶19-20. Zuckerberg and Facebook thereafter exploited the advantage they appropriated for great personal gain, which led to litigation in federal courts in Massachusetts and California. *See* 2-ER-153-59 ¶¶21-76, 2-ER-111-19.

In February 2008, the parties attended a mediation to discuss resolution of both cases. 5-ER-800 ¶1. Prior to the mediation, they signed a form contract agreeing that everything said in the mediation would be privileged and would not be offered as evidence in any legal proceeding. 4-ER-665. At the conclusion of the mediation, they signed a handwritten 1-1/3 page Term Sheet (the "Term Sheet"). 5-ER-800 ¶5; 4-ER-482-83; 5-ER-845:13-19. The Term Sheet called for Facebook's acquisition of ConnectU, the release of claims against Facebook, payment by Facebook of $20 million, and the issuance of 1,253,326 shares of Facebook stock to the Founders. That figure was calculated by Facebook on the basis of approximately $35.90 per share, the parties having agreed that the total value of the stock component of the settlement would be $45 million. 5-ER-800-01 ¶¶2-7.

That valuation derived from a then-recent public announcement by Facebook that Microsoft had invested in Facebook based upon a $15 billion valuation of the company. 5-ER-729-31. That resulted in a per-share value of approximately $35.90. 5-ER-801 ¶7. However,

unknown to Appellants at the time they signed the Term Sheet, Facebook's Board of Directors had recently obtained, and thereafter approved, an expert valuation of Facebook's stock at $8.88 per share. 5-ER-801 ¶8, 702 ¶9. Facebook obtained that valuation for purposes of valuing and issuing stock options for tax purposes. The valuation was highly credible because issuance of stock options below the share's fair value triggers adverse tax consequences. Facebook did not disclose the $8.88 per share valuation to Appellants at the mediation. *See* 5-ER-801 ¶8. Had Appellants known of the $8.88 valuation, they would have challenged the $35.90 value on which Facebook's settlement offer was based.

After Appellants learned of this undisclosed fact, they sought to rescind the settlement. The District Court ordered the settlement enforced. 1-ER-48-60. The Panel affirmed. Appendix A (attached).

A brief comment on a statement at the conclusion of the Panel's opinion is required. The opinion states:

> With the help of a team of lawyers and a financial advisor, [Appellants] made a deal that appears quite favorable in light of recent market activity. *See* Geoffrey A. Fowler & Liz Rappaport, *Facebook Deal Raises $1 Billion*, Wall St. J., Jan. 22, 2011, at B4 (reporting that investors valued Facebook at $50 billion—3.33 times the value the Winklevosses claim they thought Facebook's shares were worth at the mediation. For whatever reason, they now want to back out. (Appendix A at 4911-12)

There is no mystery about Appellants' reason for their now over three-year-long objection to the enforcement of the settlement: it was procured by securities fraud—the failure to disclose a contemporaneous stock valuation (and issuance of stock options) at one-quarter the price being offered to them. Rescinding a securities transaction on the ground of fraud is hardly "backing out."

As for the opinion's characterization of the settlement as "quite favorable" based on a comparison between a recent valuation reported in the *Wall Street Journal* and the valuation Appellants relied on at the mediation, those valuations are separated by nearly three years. During that period, the value of Facebook shares has increased immensely. That does not cure a securities fraud that affected the number of shares Appellants were defrauded into accepting in settlement of their claims several years ago.

The opinion's implication that Appellants should take the now-more-valuable stock and stop complaining about Facebook's blatant violation of Rule 10b-5 inappropriately minimizes federal securities laws that command honest dealing and full disclosure in the sale or exchange of securities. Whether Appellants would be better off financially keeping the proceeds of the settlement rather than rescinding and proceeding with their lawsuit against Facebook is a personal judgment for *them*—not an appellate court—to make. And

there certainly was no basis for the opinion to disparage their choice—reflecting a willingness to forgo retention of a very valuable block of stock in Facebook—to trust in the legal system's capacity to fairly adjudicate their claims against Facebook.

ARGUMENT

I.

THE PANEL'S HOLDING THAT A GENERAL RELEASE IN A SETTLEMENT AGREEMENT BARS A CLAIM THAT A SETTLEMENT AGREEMENT WAS ITSELF OBTAINED BY FRAUD CONFLICTS WITH FEDERAL AND STATE PRECEDENT.

A. A General Release In A Settlement Agreement Does Not Bar A Claim That The Agreement Was Procured By Fraud.

The validity of a settlement agreement is ordinarily a question of state law. However, the validity of a release or waiver of a federal claim is a question of federal common law. *Petro-Ventures, Inc. v. Takessian*, 967 F.2d 1337, 1340 (9th Cir. 1992). In this case, the Panel declared a new federal common law rule: a settlement agreement that contains a release of claims (as all settlements do) bars a defense to enforcement on the ground that the settlement agreement was procured by fraud. Appendix A at 4908-09. This ruling sharply conflicts with well-established precedent in federal courts around the country and in state courts (including California, where this controversy arose) as well.

Many federal cases hold that a settlement agreement does not bar a claim that the settlement was procured by fraud. "[T]he correct federal rule is that . . . a release of rights under the [Federal Employers' Liability] Act is void when the employee is induced to sign it by the deliberately false and material statements of the railroad's authorized representatives made to deceive the employee as to the contents of the release." *Dice v. Akron, C. & Y. R. R.*, 342 U.S. 359, 362 (1952). "[T]he existence of fraud or mutual mistake can justify reopening an otherwise valid settlement agreement" concerning claims under 42 U.S.C. §1983 and the Rehabilitation Act. *Brown v. County of Genesee*, 872 F.2d 169, 174 (6th Cir. 1989); *see also Nicklin v. Henderson*, 352 F.3d 1077, 1081 (6th Cir. 2003) (following *Brown* in the context of the settlement of a federal employment discrimination claim); *Mallory v. Eyrich*, 922 F.2d 1273, 1280 (6th Cir. 1991) (noting the *Brown* rule in the context of settlement of constitutional claims and claims under Section 1983 and the Voting Rights Act); *Estate of Jones v. Comm'r*, 795 F.2d 566, 573 (6th Cir. 1986) (settlement with IRS voided because of taxpayer's misrepresentations).

Federal common law is ordinarily based on the common law prevailing among the states. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 98 (1991) ("federal courts should 'incorporat[e] [state law] as the

federal rule of decision,' unless 'application of [the particular] state law [in question] would frustrate specific objectives of the federal programs'") (citation omitted)). The vast majority of state courts also hold that a settlement agreement can be challenged on the ground of fraud despite a general release within it. For example, in California, a contract provision purporting to release claims of fraud in connection with the contract is invalid because "fraud renders the whole agreement voidable, including the waiver provision." 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* §304 (10th ed. 2005) (emphasis omitted); *see also, e.g.*, *Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Dev. Corp.*, 32 Cal. App. 4th 985, 996 (1995); *Manderville v. PCG&S Group, Inc.*, 146 Cal. App. 4th 1486, 1499-1502 (2007).

The rule in state courts around the country is the same. *See, e.g.*, *Jones v. Roth*, 31 So. 3d 115, 117 (Ala. Civ. App. 2009); *Esteves v. Esteves*, 680 A.2d 398, 401 & n.1 (D.C. 1996); *James v. Chicago Transit Auth.*, 356 N.E.2d 834, 836 (Ill. Ct. App. 1976); *Krantz v. Univ. of Kansas*, 21 P.3d 561, 567 (Kan. 2001); *Associated Ins. Serv. v. Garcia*, 307 S.W.3d 58, 69 (Ky. 2010); *Millet v. Millet*, 888 So. 2d 291, 293-94 (La. Ct. App. 2004); *Shinberg v. Garfinkle*, 278 N.E.2d 738, 742 (Mass. 1972); *In re Estate of Lobaina*, 705 N.W.2d 34, 36 (Mich. Ct. App. 2005); *Nolan ex rel. Nolan v. Lee Ho*, 577 A.2d 143,

146 (N.J. 1990); *Galasso v. Galasso*, 320 N.E.2d 618, 618 (N.Y. 1974); *Morgan v. Vandevers Dry Goods Co.*, 370 P.2d 830, 834 (Okla. 1962); *Rugemer v. Rhea*, 957 P.2d 184, 187 (Or. Ct. App. 1998); *Pennsbury Village Assocs. v. McIntyre*, 11 A.3d 906, 914-15 (Pa. 2011); *Boyd v. Boyd*, 67 S.W.3d 398, 404-05 (Tex. App. 2002); *Howard v. Howard*, 163 A.2d 861, 865 (Vt. 1960); *Nationwide Mut. Ins. Co. v. Martin*, 171 S.E.2d 239, 242 (Va. 1969); *Haller v. Wallis*, 573 P.2d 1302, 1306 (Wash. 1978); *Smith v. Monongahela Power Co.*, 429 S.E.2d 643, 652 (W.Va. 1993); *Phone Partners Ltd. P'ship v. C.F. Commc'ns Corp.*, 542 N.W.2d 159, 161 (Wis. Ct. App. 1995); *see also First Nat'l Bank of Cincinnati v. Pepper*, 454 F.2d 626, 632 (2d Cir. 1972) (applying New York law).

Indeed, so well established is the rule that settlements procured by fraud will not be enforced that the Uniform Mediation Act contains an explicit exception to mediation privilege for evidence of fraud. *Id.* §6(b)(2) (2003) ("no [mediation] privilege" in "a proceeding to prove a claim to rescind . . . a contract arising out of the mediation"). The Act's drafters concluded that, as "with other privileges, the mediation privilege must have limits, and nearly all existing state mediation statutes provide them." *Id.* Prefatory Note, §1.[2] An

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[2] *See, e.g.*, James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look At Litigation About Mediation*, 11 HARV. (continued . . .)

exception to mediation privilege for evidence of fraud would be pointless if settlements were invulnerable to claims of fraud.

The Panel asserted that the distinction between the release of claims that "arose out of facts that occurred prior to the settlement" and the release of a claim that the settlement itself was procured by fraud "is a distinction without a difference." Appendix A at 4909. To the contrary, that distinction is dispositive in federal courts as well as in numerous state courts. As the California Supreme Court explained in a leading case:

> [W]hen the agreement itself is procured by fraud, none of its provisions have any legal or binding effect. . . . The fraud which was the inducing cause of the execution of the contract renders the whole instrument vulnerable—the clause in question as well as all other provisions. . . . The clause which it is claimed estops plaintiff to complain of the fraud cannot be made to survive the rest of the transaction as a shield and protection to defendants, when false representations were the efficient and inducing cause of the contract. (*Vai v. Bank of America*, 56 Cal. 2d 329, 344 (1961) (citation and internal quotation marks omitted))

(. . . continued)
NEGOT. L. REV. 43, 69-72 (Spring 2006) (in most states, "relevant mediation communications appear to be used regularly in court to establish or refute contractual defenses such as fraud, mistake, or duress"); *see also FDIC v. White*, No. 3-96-CV-0560-BD, 1999 WL 1201793, at *2 (N.D. Tex. Dec. 14, 1999) ("unlikely" that Congress intended to create a federal mediation privilege that "would effectively bar a party from raising well-established common law defenses such as fraud, duress, coercion, and mutual mistake . . . under the guise of preserving the integrity of the mediation process").

Rehearing *en banc* should be granted to resolve the conflict between the new rule announced by the Panel and the authorities holding that settlements that were procured by fraud will not be enforced.

B. If The Release Were Found To Bar A Claim That The Settlement Agreement Was Procured By Securities Fraud, The Release Would Violate Section 29(a) Of The Exchange Act.

Section 29(a) of the Exchange Act states that any "condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder . . . shall be void." 15 U.S.C. §78cc(a). The law of this Circuit is that under Section 29(a), waivers of unknown securities fraud claims are invalid. *Petro-Ventures,* 967 F.2d at 1340-41; *Burgess v. Premier Corp.*, 727 F.2d 826, 831 (9th Cir. 1984).

That principle was correctly followed in *Dresner v. Utility.Com, Inc.*, 371 F. Supp. 2d 476 (S.D.N.Y. 2005). There, the defendant argued that broadly worded releases of unknown claims contained in a merger agreement barred a securities fraud action based on the merger agreement. The court held that Section 29(a) "invalidates releases that attempt to insulate beneficiaries from compliance with the Exchange Act." *Id.* at 490. The court explained:

> Section 29(a) does not prohibit parties from executing valid releases in connection with securities fraud claims that have already matured . . . . The releases at issue here . . . purported prospectively to waive plaintiffs' rights to pursue causes of

> action of which they were not yet aware. Section 29(a) forbids enforcement of that type of contract to bar Exchange Act claims. (*Id.* (citations omitted))

Petro-Ventures carved a narrow exception to this rule for settlements of litigation in which *pre-existing* securities law claims, known or unknown, are waived. As the Panel acknowledged, however, the releases in *Petro-Ventures* "arose out of facts that occurred *prior to* the settlement." Appendix A at 4909 (emphasis added). The Court in *Petro-Ventures* held that settlement of a dispute about a transaction could release *another* claim arising from that *same* transaction. Appellants' Reply Motion for Judicial Notice (Dkt. 160), Ex. 1, at 1-5.

Here, the claim is that the securities transaction that was part of the settlement agreement *itself* was procured by fraud. As noted, the Panel said that "[t]his is a distinction without a difference." Appendix A at 4909. Not so. As we've shown, it is a distinction regularly drawn by federal and state courts. *See* pp.11-12, *supra.* It is one thing to settle securities fraud claims by agreeing to release known and unknown securities fraud claims concerning prior transactions in return for an agreed settlement amount. It is quite another to release claims that the settlement agreement was itself procured by fraud. Nothing in *Petro-Ventures* addresses the latter circumstance. Accordingly, *Burgess* and *Dresner* establish the governing principle, which is that Section 29(a) bars the release of an

unknown securities law claim of fraud in the inducement of the very agreement containing the release.

The Panel's opinion sets a dangerous precedent. Take a garden-variety example: a federal claim is settled based upon the defendant's false representation that the defendant has no insurance. As we have shown, upon proof that this was a lie, federal and state courts would unhesitatingly uphold a claim of rescission The Panel holds that it would have to be enforced.

Rehearing *en banc* is therefore required to resolve the conflict between the Panel's opinion and these authorities, and to correct the Panel's misapplication of the narrow exception approved in *Petro-Ventures* for releases of *pre-existing* claims of securities fraud as part of a negotiated settlement of litigation.

II.

THE PANEL'S HOLDING THAT SECTION 29(a) DOES NOT PREVENT A STANDARD MEDIATION CONFIDENTIALITY PROVISION FROM BARRING EVIDENCE THAT A SETTLEMENT AGREEMENT WAS THE PRODUCT OF FRAUD CONFLICTS WITH FEDERAL PRECEDENT.

The Panel also held that a mediation confidentiality agreement barred Appellants' fraudulent inducement defense to enforcement of the settlement. The agreement stated that anything said at the mediation was privileged and "inadmissible for any purpose

including in any legal proceeding" and that "[n]o aspect of the mediation shall be relied upon or introduced as evidence in any arbitral, judicial, or other proceeding." Appendix A at 4910 (emphasis omitted).

If the mediation agreement had provided that "if a settlement results from this mediation, any claim that such settlement was procured by fraud, including securities fraud in violation of Rule 10b-5, is hereby waived," that provision would unquestionably run afoul of Section 29(a) as to securities fraud claims. The Panel held, however, that the confidentiality provision did not violate Section 29(a) because it is not a direct waiver of the securities law but "merely precludes both parties from introducing evidence of a certain kind" (Appendix A at 4910)—*i.e.*, "any evidence of what Facebook said, *or did not say*, during the mediation" (*id.* (emphasis added))—thereby "frustrat[ing] the securities claims the Winklevosses chose to bring." *Id.* at 4910-11.

The distinction is unacceptably formalistic. The result of the contract provision is that the "Winklevosses can't show that Facebook misled them about the value of its shares or that disclosure of the tax valuation would have significantly altered the mix of information available to them . . . ." *Id.* at 4910. The mediation confidentiality provision, as interpreted by the Panel, has exactly the same effect as

an express waiver of securities law claims that would be void under Section 29(a). As construed by the Panel,[3] the mediation confidentiality provision confers a license to commit securities fraud with impunity by prospectively waiving any fraud defense to a settlement agreement reached at the mediation.

The Panel's application of the mediation confidentiality provision to the Winklevoss' claim of fraud in the inducement would mean that, by agreeing to participate in the mediation, they gave up the protections and remedies afforded by the Exchange Act for securities fraud occurring *subsequent to signing the mediation confidentiality agreement.* This kind of advance waiver of the Act's protection is exactly what Section 29(a)'s anti-waiver rule prohibits. *See Pearlstein v. Scudder & German*, 429 F.2d 1136, 1143 (2d Cir. 1970) (advance waiver would "contravene public policy"); *see also Fox v. Kane-Miller Corp.*, 398 F. Supp. 609, 624 (D. Md. 1975) (waiver of securities claims viewed with "very strong disfavor"), *aff'd*, 542 F.2d 915 (4th Cir. 1976). As one court explained:

---

[3]The Panel silently rejected Appellants' sensible suggestion that the mediation confidentiality provision be read to exclude application to claims of fraud or invalidity, just as the Uniform Mediation Act proposes. *See* pp.10-11, *supra.* That interpretation would be consistent with the reasonable expectation of parties who sign a mediator's standard form agreement.

> Judicial hostility toward waivers generally requires that the right of private suit for alleged violations be scrupulously preserved against unintentional or involuntary relinquishment. Otherwise, recognition of settlements would indeed undermine, rather than abet, the cause of effective enforcement of the interest which the community as a whole, as well as the aggrieved individual, has in regulation of securities markets. (*Cohen v. Tenney Corp.*, 318 F. Supp. 280, 284 (S.D.N.Y. 1970))

The Panel's holding that Section 29(a) was inapplicable because the statute only "applie[s] to express waivers of non-compliance" (Appendix A at 4910) conflicts with numerous authorities holding that Section 29(a) applies to direct *or indirect* waivers. *See Can-Am Petroleum Co. v. Beck*, 331 F.2d 371, 373 (10th Cir. 1964) ("the remedial aspects of [the Securities Act] cannot be waived *either directly or indirectly*") (emphasis added); *see also AES Corp. v. Dow Chem. Co.*, 325 F.3d 174, 180 (3d Cir. 2003) (refusing to enforce contract provision that disclaimed reliance on representations in prospectus); *McMahan & Co. v. Wherehouse Entm't, Inc.*, 65 F.3d 1044, 1051 (2d Cir. 1995) (rejecting argument that clause imposing conditions on recovery merely established "a procedure that must be followed before an action may be brought"); *Rogen v. Ilikon*, 361 F.2d 260, 265, 268 (1st Cir. 1966) (representation that plaintiff was familiar with company's business and was "not relying on any . . . obligations to make full disclosure" invalid under Section 29(a)); *Special Transp. Servs. v. Balto*, 325 F. Supp. 1185, 1187 (D. Minn.

1971) (anti-waiver provision applies to a contract that "waive[s] statutory liabilities . . . by indirection"). As the First Circuit observed in *Rogen*:

> [W]e see no fundamental difference between saying, for example, "I waive any rights I might have because of your representations or obligations to make full disclosure" and "I am not relying on your representations or obligations to make full disclosure." Were we to hold that the existence of this provision constituted the basis . . . for finding non-reliance as a matter of law, we would have gone far toward eviscerating Section 29(a). (361 F.2d at 268)

These cases prohibiting terms that directly or indirectly have the effect of waiving fraud are consistent with the rule in states such as California (where the Confidentiality Agreement was entered into). *See* CAL. CIV. CODE §1668 (contracts that exempt a person from fraud "directly *or indirectly*" violate public policy) (emphasis added); *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 163 (2005) (invalidating class action waiver clause where the "waiver becomes *in practice* the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another'") (quoting Section 1668) (emphasis added). The Panel's opinion profoundly conflicts with settled precedent on this point as well.

CONCLUSION

Regardless of whether or not one thinks that the settlement gave Appellants "enough," the fact remains that the settlement was based

on the issuance of securities resulting from a settlement in which Facebook perpetrated a garden-variety securities fraud. The Panel's opinion immunizes this fraud by enforcing a general release found in the fraudulently induced agreement and by applying a routine mediation confidentiality provision to bar evidence of the fraud. The Panel's Opinion is so profoundly at odds with federal and state precedent, with dreadful ramifications, that rehearing *en banc* is required.

DATED: April 18, 2011.

Respectfully,

JEROME B. FALK, JR.
SEAN M. SELEGUE
SHAUDY DANAYE-ELMI
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By /s/ *Jerome B. Falk, Jr.*
JEROME B. FALK, JR.

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W03 041811-180060001/L12/1645702/F

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32 AND CIRCUIT RULES 35-4 AND 40-1 FOR CASE NUMBERS 08-16745, 08-16873, 09-15021 (CONSOLIDATED)

Pursuant to Federal Rule of Appellate Procedure 32 and Ninth Circuit Rule 35-4 and 40-1, I certify that the attached Petition for Rehearing *En Banc* is proportionally spaced, in a typeface of 14 points or more and contains 4,170 words, exclusive of those materials not required to be counted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

DATED: April 18, 2011.

/s/ *Jerome B. Falk, Jr.*
JEROME B. FALK, JR.

PROOF OF SERVICE

I hereby certify that I electronically filed the foregoing **PETITION FOR REHEARING *EN BANC*** with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 18, 2011.

Participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. On April 18, 2011, I have mailed the foregoing document described as **PETITION FOR REHEARING *EN BANC*** by placing the document for deposit in the United States Postal Service through the regular mail collection process at the law offices of Howard Rice Nemerovski Canady Falk & Rabkin, located at Three Embarcadero Center, Seventh Floor, San Francisco, California or have dispatched it to a third party commercial carrier for delivery within 3 days to the following non-CM/ECF participant:

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BUSINESS INSIDER

At Last -- The Full Story Of How Facebook Was Founded

Nicholas Carlson | Mar. 5, 2010, 4:10 AM | 1,888,967 | 242

The origins of Facebook have been in dispute since the very week a 19-year-old Mark Zuckerberg launched the site as a Harvard sophomore on February 4, 2004.

Image: denisyerrin

Then called "thefacebook.com," the site was an instant hit. Now, six years later, the site has become one of the biggest web sites in the world, visited by 400 million people a month.

The controversy surrounding Facebook began quickly. A week after he launched the site in 2004, Mark was accused by three Harvard seniors of having stolen the idea from them.

This allegation soon bloomed into a full-fledged lawsuit, as a competing company founded by the Harvard seniors sued Mark and Facebook for theft and fraud, starting a legal odyssey that continues to this day.

New information uncovered by *Silicon Alley Insider* suggests that some of the complaints against Mark Zuckerberg are valid. It also suggests that, on at least one occasion in 2004, Mark used private login data taken from Facebook's servers to break into Facebook members' private email accounts and read their emails--at best, a gross misuse of private information. Lastly, it suggests that Mark hacked into the competing company's systems and changed some user information with the aim of making the site less useful.

The primary dispute around Facebook's origins centered around whether Mark had entered into an "agreement" with the Harvard seniors, Cameron and Tyler Winklevoss and a classmate named Divya Narendra, to develop a similar web site for them -- and then, instead, stalled their project while taking their idea and building his own.

The litigation never went particularly well for the Winklevosses.

In 2007, Massachusetts Judge Douglas P. Woodlock called their allegations "tissue thin." Referring to the agreement that Mark had allegedly breached, Woodlock also wrote, "Dorm room chit-chat does not make a contract." A year later, the end finally seemed in sight: a judge ruled against Facebook's move to dismiss the case. Shortly thereafter, the parties agreed to settle.

But then, a twist.

After Facebook announced the settlement, but before the settlement was finalized, lawyers for the Winklevosses suggested that the hard drive from Mark Zuckerberg's computer at Harvard might contain evidence of Mark's fraud. Specifically, they suggested that the hard drive included some damning instant messages and emails.

The judge in the case refused to look at the hard drive and instead deferred to another judge who went on to approve the settlement. But, naturally, the possibility that the hard drive contained additional evidence set inquiring minds wondering what those emails and IMs revealed. Specifically, it set inquiring minds wondering again whether Mark had, in fact, stolen the Winklevoss's idea, screwed them over, and then ridden off into the sunset with Facebook.

Unfortunately, since the contents of Mark's hard drive had not been made public, no one had the answers.

But now we have some.

Over the past two years, we have interviewed more than a dozen sources familiar with aspects of this story -- including people involved in the founding year of the company. We have also reviewed what we believe to be some relevant IMs and emails from the period. Much of this information has never before been made public. None of it has been confirmed or authenticated by Mark or the company.

Based on the information we obtained, we have what we believe is a more complete picture of how Facebook was founded. This account follows.

And what does this more complete story reveal?

We'll offer our own conclusions at the end. But first, here's the story:

Continue onto page 2 →

"We can talk about that after I get all the basic functionality up tomorrow night."

In the fall of 2003, Harvard seniors Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra were on the lookout for a web developer who could bring to life an idea the three say Divya first had in 2002: a social network for Harvard students and alumni. The site was to be called HarvardConnections.com.

The three had been paying Victor Gao, another Harvard student, to do coding for the site, but at the beginning of the fall term Victor begged off the project. Victor suggested his own replacement: Mark Zuckerberg, a Harvard sophomore from Dobbs Ferry, New York.

Back then, Mark was known at Harvard as the sophomore who had built Facemash, a "Hot Or Not" clone for Harvard. Facemash had already made Mark a bit of a celebrity on campus, for two reasons.

The first is that Mark got in trouble for creating it. The way the site worked was that it pulled photos of Harvard students off of Harvard's Web sites. It rearranged these photos so that when people visited Facemash.com they would see pictures of two Harvard students and be asked to vote on which was more attractive. The site also maintained a list of Harvard students, ranked by attractiveness.

On Harvard's politically correct campus, this upset people, and Mark was soon hauled in front of Harvard's disciplinary board for students. According to a November 19, 2003 *Harvard Crimson* article, he was charged with breaching security, violating copyrights, and violating individual privacy. Happily for Mark, the article reports that he wasn't expelled.

The second reason everyone at Harvard knew about Facemash and Mark Zuckerberg was that Facemash had been an instant hit. The same *Harvard Crimson* story reports that after two weeks, "the site had been visited by 450 people, who voted at least 22,000 times." That means the average visitor voted 48 times.

winklevoss

It was for this ability to build a wildly popular site that Victor Gao first recommended Mark to Cameron, Tyler, and Divya. Sold on Mark, the Harvard Connection trio reached out to him. Mark agreed to meet.

They first met in an early evening in late November in the dining hall of Harvard College's Kirkland House. Cameron, Tyler, and Divya brought up their idea for Harvard Connection, and described their plans to A) build the site for Harvard students only, by requiring new users to register with Harvard.edu email addresses, and B) expand Harvard Connection beyond Harvard to schools around the country. Mark reportedly showed enthusiastic interest in the project.

Later that night, Mark wrote an email to the Winklevoss brothers and Divya: "I read over all the stuff you sent and it seems like it shouldn't take too long to implement, so we can talk about that after I get all the basic functionality up tomorrow night."

The next day, on December 1, Mark sent another email to the HarvardConnections team. Part of it read, "I put together one of the two registration pages so I have everything working on my system now. I'll keep you posted as I patch stuff up and it starts to become completely functional."

These two emails sounded like the words of someone who was eager to be a part of the team and working away on the project. A few days later, however, Mark's emails to the HarvardConnection team started to change in tone. Specifically, they went from someone who seemed to be hard at work building the product to someone who was so busy with schoolwork that he had no time to do any coding at all.

December 4: "Sorry I was unreachable tonight. I just got about three of your missed calls. I was working on a problem set."

December 10: "The week has been pretty busy thus far, so I haven't gotten a chance to do much work on the site or even think about it really, so I think it's probably best to postpone meeting until we have more to discuss. I'm also really busy tomorrow so I don't think I'd be able to meet then anyway."

A week later: "Sorry I have not been reachable for the past few days. I've basically been in the lab the whole time working on a cs problem set which I'm still not finished with."

Finally, on January 8:

> Sorry it's taken a while for me to get back to you. I'm completely swamped with work this week. I have three programming projects and a final paper due by Monday, as well as a couple of problem sets due Friday. I'll be available to discuss the site again starting Tuesday.
>
> I'm still a little skeptical that we have enough functionality in the site to really draw the attention and gain the critical mass necessary to get a site like this to run...Anyhow, we'll talk about it once I get everything else done.

So what happened to change Mark's tune about HarvardConnection? Was he so swamped with work that he was unable to finish the project? Or, as the HarvardConnection founders have alleged, was he stalling the development of HarvardConnection so that he could build a competing site and launch it first?

Our investigation suggests the latter.

As a part of the lawsuit against Facebook and Mark Zuckerberg, the above emails from Mark have been public for years. What has never been revealed publicly is what Mark was telling his friends, parents, and closest confidants at the same time.

Let's start with a December 7th (IM) exchange Mark Zuckerberg had with his Harvard classmate and Facebook cofounder, Eduardo Saverin.

Continue -->

"They made a mistake haha. They asked me to make it for them."

Former PayPal CEO Peter Thiel gets a lot of credit for being the first investor in Facebook, because he led the first formal Facebook round in September of 2004 with a $500,000 investment at a $5 million valuation. But the real "first investor" claim to fame should actually belong to a Harvard classmate of Mark Zuckerberg's named Eduardo Saverin.

To picture Eduardo, what you need to know is that he was the kid at Harvard who would wear a suit to class. He liked to give people the impression that he was rich -- and maybe somehow connected to the Brazilian mafia. At one point, in an IM exchange, Mark told a friend that Eduardo -- "head of the investment society" -- was rich because "apparently insider trading isn't illegal in Brazil."

Eduardo Saverin wasn't directly involved with Facebook for long: During the summer of 2004, when Mark moved to Palo Alto to work on Facebook full time, Eduardo took a high-paying internship at Lehman Brothers in New York. While Mark was still at Harvard, however, Eduardo appears to have bankrolled Facebook's earliest capital expenses, thus becoming its initial investor.

In January, however, Mark told a friend that "Eduardo is paying for my servers." Eventually, Eduardo would agree to

invest $15,000 in a company that would, in April 2004, be formed as Facebook LLC. For his money, Eduardo would get 30% of the company.

Eduardo was also involved in Facebook's earliest days, as a confidant of Mark Zuckerberg.

In December, 2003, a week after Mark's first meeting with the HarvardConnection team, when he was telling the Winklevosses that he was too busy with schoolwork to work on or even think about HarvardConnection.com, Mark was telling Eduardo a different story. On December 7, 2003, we believe Mark sent Eduardo the following IM:

> Check this site out: www.harvardconnection.com and then go to harvardconnection.com/datehome.php. Someone is already trying to make a dating site. **But they made a mistake haha. They asked me to make it for them. So I'm like delaying it so it won't be ready until after the facebook thing comes out.**

This IM suggests that, within a week of meeting with the Winklevosses for the first time, Mark had already decided to start his own, similar project--"the facebook thing." It also suggests that he had developed a strategy for dealing with his would-be competition: Delay developing it.

Continue -->

"I feel like the right thing to do is finish the facebook and wait until the last day before I'm supposed to have their thing ready and then be like look yours isn't as good"

A few weeks after the initial meeting with the HarvardConnection team, after Mark sent the IM to Eduardo Saverin talking about developing "the facebook thing" and delaying his development of HarvardConnection, Mark met with the HarvardConnection folks, Cameron, Tyler, and Divya, for a second time.

This time, instead of meeting in the dining hall of Mark's residential hall, Kirkland House, the four met in Mark's dorm room. Divya is said to have arrived late.

In Kirkland House, the dorm rooms aren't laid out in cinder-block-cube style: Mark's room had a narrow hallway connecting it to his neighbor's. As Cameron and Tyler sat down on a couch in Mark's room, Cameron spotted something in the hallway. On top of a bookshelf there was a white board. It was the kind Web developers and product managers everywhere use to map out their ideas.

On it, Cameron read two words, "Harvard Connection." He got up to go look at it. Immediately, Mark asked Cameron to stay out of the hallway.

Eventually Divya arrived and the four of them talked about plans for Harvard Connection. One feature Mark brought up was designed to keep more popular and sought-after Harvard Connection users from being stalked and harassed by crowds of people.

In this second meeting, Mark still appeared to be actively engaged in developing Harvard Connection. But he never showed the HarvardConnection folks any site prototypes or code. And they didn't insist on seeing them.

During the weeks in which Mark was juggling the two projects in tandem, he also had a series of IM exchanges with a friend named Adam D'Angelo (above).

Adam and Mark went to boarding school together at Phillips Exeter Academy. There, the pair became friends and coding partners. Together they built a program called Synapse, a music player that supposedly learned the listener's taste and then adapted to it. Then, in 2002 Mark went to Harvard and Adam went to Cal Tech. But the pair stayed in close touch, especially through AOL instant messenger. Eventually, Adam became Facebook's CTO.

Through the Harvard Connection-Facebook saga and its aftermath, Mark kept Adam apprised of his plans and thoughts.

One purported IM exchange seems particularly relevant on the question of how Mark distinguished between the two projects--the "facebook thing" and "the dating site"--as well as how he was considering handling the latter:

> Zuck: So you know how I'm making that dating site

Zuck: I wonder how similar that is to the Facebook thing

Zuck: Because they're probably going to be released around the same time

Zuck: **Unless I fuck the dating site people over and quit on them right before I told them I'd have it done.**

D'Angelo: haha

Zuck: Like I don't think people would sign up for the facebook thing if they knew it was for dating

Zuck: and I think people are skeptical about joining dating things too.

Zuck: But the guy doing the dating thing is going to promote it pretty well.

Zuck: I wonder what the ideal solution is.

Zuck: I think the Facebook thing by itself would draw many people, unless it were released at the same time as the dating thing.

Zuck: In which case both things would cancel each other out and nothing would win. Any ideas? Like is there a good way to consolidate the two.

D'Angelo: We could make it into a whole network like a friendster. haha. Stanford has something like that internally

Zuck: Well I was thinking of doing that for the facebook. The only thing that's different about theirs is that you like request dates with people or connections with the facebook you don't do that via the system.

D'Angelo: Yeah

Zuck: I also hate the fact that I'm doing it for other people haha. Like I hate working under other people. I feel like the right thing to do is finish the facebook and wait until the last day before I'm supposed to have their thing ready and then be like "look yours isn't as good as this so if you want to join mine you can...otherwise I can help you with yours later." Or do you think that's too dick?

D'Angelo: I think you should just ditch them

Zuck: The thing is they have a programmer who could finish their thing and they have money to pour into advertising and stuff. Oh wait I have money too. My friend who wants to sponsor this is head of the investment society. Apparently insider trading isn't illegal in Brazil so he's rich lol.

D'Angelo: lol

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"I'm going to fuck them."

Eduardo Saverin and Adam D'Angelo were not the only people Mark discussed his Harvard Connection - Facebook situation with. We believe he also had many IM exchanges about it with relatives and a close female Harvard friend.

In January 2004, Mark met with the Winklevoss brothers and Divya Narendra for what would be the last time. The meeting was on January 14, 2004, and it was held at the same place Mark met with the HarvardConnection team for the first time -- in the dining hall of Mark's residence, Kirkland House.

By this point, Mark's site, thefacebook.com, wasn't complete, but he was working hard on it. He'd arranged for Eduardo Saverin to pay for his servers. He had already told Adam that "the right thing to do" was to not complete Harvard Connection and build TheFacebook.com instead. He had registered the domain name.

He therefore had a choice to make: Tell Cameron, Tyler and Divya that he wanted out of their project, or string them along until he was ready to launch thefacebook.com.

Mark sought advice on this decision from his confidants. One friend told him, in so many words, you know me. I don't ever think anyone should do anything bad to anybody.

Mark and this friend also had the following IM exchange about how Mark planned to resolve the competing projects:

> Friend: So have you decided what you're going to do about the websites?
>
> Zuck: Yeah, I'm going to fuck them
>
> Zuck: Probably in the year
>
> Zuck: *ear

And so, it appears, he did. (In a manner of speaking).

On January 14, 2004, Mark Zuckerberg met with Cameron, Tyler, and Divya for the last time. During the meeting at Kirkland House, Mark expressed doubts about the viability of HarvardConnection.com. He said he was very busy with personal projects and school work and that he wouldn't be able to work on the site for a while. He blamed others for the site's delays.

He did not say that he was working on his own project and that he was not planning to complete the HarvardConnection site.

After the meeting, Mark had another IM exchange with the friend above. He told her, in effect, that he had wimped out. He hadn't been able to break the news to Cameron and Tyler, in part, he said, because he was "intimidated" by them. He called them "poor bastards."

So then what happened?

Three days earlier, on January 11, 2004, Mark had registered the domain THEFACEBOOK.COM.

On February 4, he opened the site to Harvard students.

On February 10, Cameron Winklevoss sent Mark a letter accusing him of breaching their agreement and stealing their idea.

In late May, after going through two more developers, Cameron, Tyler and Divya launched HarvardConnection as ConnectU, a social network for 15 schools.

On June 10, 2004, a commencement speaker mentioned the amazing popularity of Mark's site, thefacebook.com.

In the summer of 2004, Mark moved to Palo Alto to work on Facebook full time and soon received a $500,000 investment from Peter Thiel.

In September 2004, HarvardConnection, now called ConnectU, sued Mark Zuckerberg and the now-incorporated "Facebook" for allegedly breaching their agreement and stealing their idea.

In February 2008, Facebook and ConnectU agreed to settle the lawsuit.

In June 2008, ConnectU appealed the settlement in California's ninth district, accusing Facebook of trading its stock without disclosing material information. This appeal is on-going.

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The $65 million question

When we described the specifics of this story to Facebook, the company had the following comment:

> "We're not going to debate the disgruntled litigants and anonymous sources who seek to rewrite Facebook's early history or embarrass Mark Zuckerberg with dated allegations. The unquestioned fact is that since leaving

> Harvard for Silicon Valley nearly six years ago, Mark has led Facebook's growth from a college website to a global service playing an important role in the lives of over 400 million people."

On the latter point, we agree. What Mark Zuckerberg has accomplished with Facebook over the past six years has been nothing short of amazing.

So, having revisited the founding of Facebook with additional information, what do we conclude?

First, we have seen no evidence of any formal contract between Mark Zuckerberg and the Winklevosses in which Mark agreed to develop Harvard Connection.

Second, any agreement the parties may have had--as well as most of the purported IMs and emails we have reviewed from the period--appear to have been at the level of, as Judge Ware described them, "dorm-room chit-chat." (Albeit interesting and entertaining chit-chat.)

Third, only a week after beginning development of Harvard Connection, which he referred to as "the dating site," Mark had begun work on a separate project -- "the facebook thing." Mark appears to have considered the products as competing for the attention of the same users, but he also appears to have regarded them as different in some key ways.

Fourth -- and because of this foreseen competition -- Mark does appear to have intentionally strung along the Harvard Connection folks with the goal of making his project, thefacebook.com, have a more successful launch.

Bottom line, we haven't seen anything that makes us think that, whatever Mark did to the Harvard Connection folks, it was worth more than the $65 million they received in the lawsuit settlement. In fact, this seems like a huge sum of money considering that the entire dispute took place over two months in 2004 and that, in the six years since, Mark has built Facebook into a massive global enterprise.

That said, in the course of our investigation, we also uncovered two additional anecdotes about Mark's behavior in Facebook's early days that are more troubling. These episodes -- an apparent hacking into the email accounts of Harvard Crimson editors using data obtained from Facebook logins, as well as a later hacking into ConnectU -- are described in detail here.

> How Mark Zuckerberg Hacked The Harvard Crimson Using Data From TheFacebook.com
> How Mark Zuckerberg Hacked Into Rival ConnectU In The Summer Of 2004
> Don't Miss: Our Exclusive Interview With Mark Zuckerberg (Before The Social Network, When He Was Almost Famous)

Tags: Online, Features, Facebook, People, Mark Zuckerberg, ConnectU | Get Alerts for these topics »

THE NEW YORKER

LETTER FROM PALO ALTO

THE FACE OF FACEBOOK

Mark Zuckerberg opens up.

BY JOSE ANTONIO VARGAS

SEPTEMBER 20, 2010

The C.E.O. of Facebook wants to create, and dominate, a new kind of Internet.

Mark Zuckerberg founded Facebook in his college dorm room six years ago. Five hundred million people have joined since, and eight hundred and seventy-nine of them are his friends. The site is a directory of the world's people, and a place for private citizens to create public identities. You sign up and start posting information about yourself: photographs, employment history, why you are peeved right now with the gummy-bear selection at Rite Aid or bullish about prospects for peace in the Middle East. Some of the information can be seen only by your friends; some is available to friends of friends; some is available to anyone. Facebook's privacy policies are confusing to many people, and the company has changed them frequently, almost always allowing more information to be exposed in more ways.

According to his Facebook profile, Zuckerberg has three sisters (Randi, Donna, and Arielle), all of whom he's friends with. He's friends with his parents, Karen and Edward Zuckerberg. He graduated from Phillips Exeter Academy and attended Harvard University. He's a fan of the comedian Andy

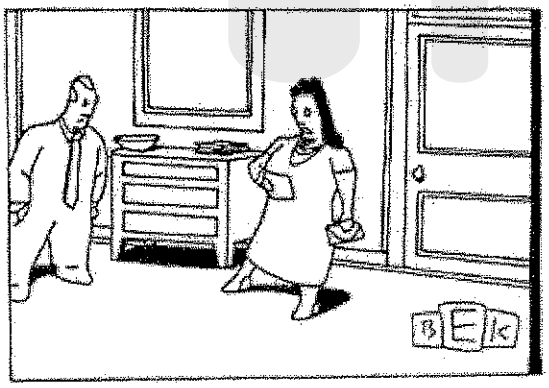
Samberg and counts among his favorite musicians Green Day, Jay-Z, Taylor Swift, and Shakira. He is twenty-six years old.

Zuckerberg cites "Minimalism," "Revolutions," and "Eliminating Desire" as interests. He likes "Ender's Game," a coming-of-age science-fiction saga by Orson Scott Card, which tells the story of Andrew (Ender) Wiggin, a gifted child who masters computer war games and later realizes that he's involved in a real war. He lists no other books on his profile.

Zuckerberg's Facebook friends have access to his e-mail address and his cell-phone number. They can browse his photograph albums, like one titled "The Great Goat Roast of 2009," a record of an event held in his back yard. They know that, in early July, upon returning from the annual Allen & Company retreat for Hollywood moguls, Wall Street tycoons, and tech titans, he became Facebook friends with Barry Diller. Soon afterward, Zuckerberg wrote on his Facebook page, "Is there a site that streams the World Cup final online? (I don't own a TV.)"

Since late August, it's also been pretty easy to track Zuckerberg through a new Facebook feature called Places, which allows users to mark their location at any time. At 2:45 A.M., E.S.T., on August 29th, he was at the Ace Hotel, in New York's garment district. He was back at Facebook's headquarters, in Palo Alto, by 7:08 P.M. On August 31st at 10:38 P.M., he and his girlfriend were eating dinner at Taqueria La Bamba, in Mountain View.

Zuckerberg may seem like an over-sharer in the age of over-sharing. But that's kind of the point. Zuckerberg's business model depends on our shifting notions of privacy, revelation, and sheer self-display. The more that people are willing to put online, the more money his site can make from advertisers. Happily for him, and the prospects of his eventual fortune, his business interests align perfectly with his personal philosophy. In the bio section of his page, Zuckerberg writes simply, "I'm trying to make the world a more open place."



"It says in lieu of gifts, we should not show up."

The world, it seems, is responding. The site is now the biggest social network in countries ranging from Indonesia to Colombia. Today, at least one out of every fourteen people in the world has a Facebook account. Zuckerberg, meanwhile, is becoming the boy king of Silicon Valley. If and when Facebook decides to go public, Zuckerberg will become one of the richest men on the planet, and one of the youngest billionaires. In the October issue of *Vanity Fair*, Zuckerberg is named No. 1 in the magazine's power ranking of the New Establishment, just ahead of Steve Jobs, the leadership of Google, and Rupert Murdoch. The magazine declared him "our new Caesar."

Despite his goal of global openness, however, Zuckerberg remains a wary and private person. He doesn't like to speak to the press, and he does so rarely. He also doesn't seem to enjoy the public appearances that are increasingly requested of him. Backstage at an event at the Computer History Museum, in Silicon Valley, this summer, one of his interlocutors turned to Zuckerberg, minutes before

they were to appear onstage, and said, "You don't like doing these kinds of events very much, do you?" Zuckerberg replied with a terse "No," then took a sip from his water bottle and looked off into the distance.

This makes the current moment a particularly awkward one. Zuckerberg, or at least Hollywood's unauthorized version of him, will soon be starring in a film titled "The Social Network," directed by David Fincher and written by Aaron Sorkin. The movie, which opens the New York Film Festival and will be released on October 1st, will be the introduction that much of the world gets to Zuckerberg. Facebook profiles are always something of a performance: you choose the details you want to share and you choose whom you want to share with. Now Zuckerberg, who met with me for several in-person interviews this summer, is confronting something of the opposite: a public exposition of details that he didn't choose. He does not plan to see the film.

Zuckerberg—or Zuck, as he is known to nearly everyone of his acquaintance—is pale and of medium build, with short, curly brown hair and blue eyes. He's only around five feet eight, but he seems taller, because he stands with his chest out and his back straight, as if held up by a string. His standard attire is a gray T-shirt, bluejeans, and sneakers. His affect can be distant and disorienting, a strange mixture of shy and cocky. When he's not interested in what someone is talking about, he'll just look away and say, "Yeah, yeah." Sometimes he pauses so long before he answers it's as if he were ignoring the question altogether. The typical complaint about Zuckerberg is that he's "a robot." One of his closest friends told me, "He's been overprogrammed." Indeed, he sometimes talks like an Instant Message—brusque, flat as a dial tone—and he can come off as flip and condescending, as if he always knew something that you didn't. But face to face he is often charming, and he's becoming more comfortable onstage. At the Computer History Museum, he was uncommonly energetic, thoughtful, and introspective—relaxed, even. He addressed concerns about Facebook's privacy settings by relaying a personal anecdote of the sort that his answers generally lack. ("If I could choose to share my mobile-phone number only with everyone on Facebook, I wouldn't do it. But because I can do it with only my friends I do it.") He was self-deprecating, too. Asked if he's the same person in front of a crowd as he is with friends, Zuckerberg responded, "Yeah, same awkward person."

Zuckerberg grew up in a hilltop house in Dobbs Ferry, New York. Attached to the basement is the dental office of his father, Edward Zuckerberg, known to his patients as "painless Dr. Z." ("We cater to cowards," his Web site reads.) There's a hundred-and-sixty-gallon fish tank in the operating room, and the place is packed with marine-oriented tchotchkes that Dr. Zuckerberg's patients have brought him. Mark's mother, Karen, is a psychiatrist who stopped practicing to take care of the children and to work as her husband's office manager.

Edward was an early user of digital radiography, and he introduced Atari BASIC computer programming to his son. The house and the dental office were full of computers. One afternoon in 1996, Edward declared that he wanted a better way of announcing a patient's arrival than the receptionist yelling, "Patient here!" Mark built a software program that allowed the computers in the house and the office to send messages to one another. He called it ZuckNet, and it was basically a primitive version of AOL Instant Messenger, which came out the following year. The receptionist used it to ping Edward, and the kids used it to ping each other. One evening while Donna was working in

her room, downstairs, a screen popped up: the computer contained a deadly virus and would blow up in thirty seconds. As the machine counted down, Donna ran up the stairs shouting, "Mark!"

Some kids played computer games. Mark created them. In all of our talks, the most animated Zuckerberg ever got—speaking with a big smile, almost tripping on his words, his eyes alert—was when he described his youthful adventures in coding. "I had a bunch of friends who were artists," he said. "They'd come over, draw stuff, and I'd build a game out of it." When he was about eleven, his parents hired a computer tutor, a software developer named David Newman, who came to the house once a week to work with Mark. "He was a prodigy," Newman told me. "Sometimes it was tough to stay ahead of him." (Newman lost track of Zuckerberg and was stunned when he learned during our interview that his former pupil had built Facebook.) Soon thereafter, Mark started taking a graduate computer course every Thursday night at nearby Mercy College. When his father dropped him off at the first class, the instructor looked at Edward and said, pointing to Mark, "You can't bring him to the classroom with you." Edward told the instructor that his son was the student.

Mark was not a stereotypical geek-klutz. At Exeter, he became captain of the fencing team. He earned a diploma in classics. But computers were always central. For his senior project at Exeter, he wrote software that he called Synapse. Created with a friend, Synapse was like an early version of Pandora—a program that used artificial intelligence to learn users' listening habits. News of the software's existence spread on technology blogs. Soon AOL and Microsoft made it known that they wanted to buy Synapse and recruit the teen-ager who'd invented it. He turned them down.

Zuckerberg decided, instead, to enter Harvard, in the fall of 2002. He arrived in Cambridge with a reputation as a programming prodigy. He sometimes wore a T-shirt with a little ape on it and the words "Code Monkey." He joined the Jewish fraternity Alpha Epsilon Pi, and, at a Friday-night party there, Zuckerberg, then a sophomore, met his current girlfriend, Priscilla Chan, a Chinese-American from the Boston suburbs. They struck up a conversation while waiting in line for the bathroom. "He was this nerdy guy who was just a little bit out there," Chan told me. "I remember he had these beer glasses that said 'pound include beer dot H.' It's a tag for C++. It's like college humor but with a nerdy, computer-science appeal."

Zuckerberg had a knack for creating simple, addictive software. In his first week as a sophomore, he built CourseMatch, a program that enabled users to figure out which classes to take based on the choices of other students. Soon afterward, he came up with Facemash, where users looked at photographs of two people and clicked a button to note who they thought was hotter, a kind of sexual-playoff system. It was quickly shut down by the school's administration. Afterward, three upperclassmen—an applied-math major from Queens, Divya Narendra, and twins from Greenwich, Connecticut, Cameron and Tyler Winklevoss—approached Zuckerberg for assistance with a site that they had been working on, called Harvard Connection.

Zuckerberg helped Narendra and the Winklevoss twins, but he soon abandoned their project in order to build his own site, which he eventually labelled Facebook. The site was an immediate hit, and, at the end of his sophomore year, Zuckerberg dropped out of Harvard to run it.

As he tells the story, the ideas behind the two social networks were totally different. Their site, he says, emphasized dating, while his emphasized networking. The way the Winklevoss twins tell it,

Zuckerberg stole their idea and deliberately kept them from launching their site. Tall, wide-shouldered, and gregarious, the twins were champion rowers who competed in the Beijing Olympics; they recently earned M.B.A.s from Oxford. "He stole the moment, he stole the idea, and he stole the execution," Cameron told me recently. The dispute has been in court almost since Facebook was launched, six years ago. Facebook eventually reached a settlement, reportedly worth sixty-five million dollars, with the Winklevosses and Narendra, but they are now appealing for more, claiming that Facebook misled them about the value of the stock they would receive.

To prepare for litigation against the Winklevosses and Narendra, Facebook's legal team searched Zuckerberg's computer and came across Instant Messages he sent while he was at Harvard. Although the IMs did not offer any evidence to support the claim of theft, according to sources who have seen many of the messages, the IMs portray Zuckerberg as backstabbing, conniving, and insensitive. A small group of lawyers and Facebook executives reviewed the messages, in a two-hour meeting in January, 2006, at the offices of Jim Breyer, the managing partner at the venture-capital firm Accel Partners, Facebook's largest outside investor.

The technology site Silicon Alley Insider got hold of some of the messages and, this past spring, posted the transcript of a conversation between Zuckerberg and a friend, outlining how he was planning to deal with Harvard Connect:

FRIEND: so have you decided what you are going to do about the websites?
ZUCK: yea i'm going to fuck them
ZUCK: probably in the year
ZUCK: *ear

In another exchange leaked to Silicon Alley Insider, Zuckerberg explained to a friend that his control of Facebook gave him access to any information he wanted on any Harvard student:

ZUCK: yea so if you ever need info about anyone at harvard
ZUCK: just ask
ZUCK: i have over 4000 emails, pictures, addresses, sns
FRIEND: what!? how'd you manage that one?
ZUCK: people just submitted it
ZUCK: i don't know why
ZUCK: they "trust me"
ZUCK: dumb fucks

According to two knowledgeable sources, there are more unpublished IMs that are just as embarrassing and damaging to Zuckerberg. But, in an interview, Breyer told me, "Based on everything I saw in 2006, and after having a great deal of time with Mark, my confidence in him as C.E.O. of Facebook was in no way shaken." Breyer, who sits on Facebook's board, added, "He is a brilliant individual who, like all of us, has made mistakes." When I asked Zuckerberg about the IMs that have already been published online, and that I have also obtained and confirmed, he said that he "absolutely" regretted them. "If you're going to go on to build a service that is influential and that a lot of people rely on, then you need to be mature, right?" he said. "I think I've grown and learned a lot."

Zuckerberg's sophomoric former self, he insists, shouldn't define who he is now. But he knows that it does, and that, because of the upcoming release of "The Social Network," it will surely continue to do so. The movie is a scathing portrait, and the image of an unsmiling, insecure, and sexed-up young man will be hard to overcome. Zuckerberg said, "I think a lot people will look at that stuff, you know, when I was nineteen, and say, 'Oh, well, he was like that. . . . He must still be like that, right?' "

In Hollywood's version, the early founding of Facebook is, as Sorkin said in an interview, "a classical story of friendship, loyalty, betrayal, and jealousy." Sorkin described Zuckerberg as a "brilliant guy who's socially awkward and who's got his nose up against the window of social life. It would seem he badly wanted to get into one of these final clubs"—one of the exclusive, élite-within-élite party clubs at Harvard. The Winklevoss twins were members of the Porcellian Club, the most prestigious.

In the movie's opening scene, according to a script that was leaked online, Zuckerberg and his girlfriend, Erica, a student at Boston University, sit in a campus bar, exchanging disparaging zingers. ("You don't have to study," he tells her. "How do you know I don't have to study?" she asks. "Because you go to B.U.!") Erica takes his hand, stares at him and says, "Listen. You're going to be successful and rich. But you're going to go through life thinking that girls don't like you because you're a tech geek. And I want you to know, from the bottom of my heart, that that won't be true. It'll be because you're an asshole."

The movie is based on "The Accidental Billionaires," by Ben Mezrich, a book about the founding of Facebook. Mezrich is also the author of a best-seller, published in 2003, about college students striking it rich. The book, titled "Bringing Down the House," used invented scenes, composite characters, and re-created dialogue. The new book has been criticized for using similar methods. Mezrich says that the book is not "an encyclopedic" description of Facebook's founding but is nevertheless "a true story that Zuckerberg would rather not be told," written in what he called a "thriller-esque style." The book draws heavily on interviews that Mezrich conducted with Eduardo Saverin, Facebook's initial business manager, who had a falling out with Zuckerberg and sued him. Mezrich did not talk to Zuckerberg. (The producer of "The Social Network," Scott Rudin, tried to talk to Zuckerberg and other Facebook executives, but he was rebuffed.) Mezrich sold the movie rights to the book even before it was completed. He called Sorkin his "first reader," and handed over chapters as soon as he finished them.

Sorkin said that creating Zuckerberg's character was a challenge. He added that the college students were "the youngest people I've ever written about." Sorkin, who is forty-nine, says that he knew very little about social networking, and he professes extreme dislike of the blogosphere and social media. "I've heard of Facebook, in the same way I've heard of a carburetor," he told me. "But if I opened the hood of my car I wouldn't know how to find it." He called the film "The Social Network" ironically. Referring to Facebook's creators, Sorkin said, "It's a group of, in one way or another, socially dysfunctional people who created the world's great social-networking site."

Sorkin insisted that "the movie is not meant as an attack" on Zuckerberg. As he described it, however, Zuckerberg "spends the first one hour and fifty-five minutes as an antihero and the last five minutes as a tragic hero." He added, "I don't want to be unfair to this young man whom I don't know,

who's never done anything to me, who doesn't deserve a punch in the face. I honestly believe that I have not done that."

As it happens, Sorkin's "The West Wing" is one of Zuckerberg's favorite television shows. He discovered it while on a trip to Spain with Chan, whom he has been dating, with a brief interruption, since 2003. In Madrid, they both got sick, and ended up watching the first season of the show in bed. In a Spanish department store, they bought DVDs of the six other seasons and eventually watched them all. Zuckerberg said that he liked the authenticity of the series—the way it captured the truth, at least as friends of his described it, of working in Washington.

I told Sorkin that his TV series was one of Zuckerberg's favorites. He paused. "I wish you hadn't told me that," he said finally. When I asked Sorkin to guess the episode that Zuckerberg liked best, he said, "The Lemon-Lyman episode"—the one in Season Three where Josh Lyman, the deputy chief of staff, played by Bradley Whitford, discovers that he has a following on an online message board and unwisely interacts with its members.

Actually, Zuckerberg's favorite episode, he told me, was "Two Cathedrals," at the end of Season Two, in which Martin Sheen, who plays President Josiah Bartlet, grieves at the death of his longtime secretary and, after disclosing that he has multiple sclerosis, ponders whether he should seek reëlection. He is inside the National Cathedral and orders that it be temporarily sealed. He curses God in Latin and lights a cigarette. "It's, like, even in journeys like Facebook, we've had some very serious ups and downs," Zuckerberg said.

Zuckerberg says that many of the details he has read about the film are just wrong. (He had, for example, no interest in joining any of the final clubs.) When pressed about the movie and what it means for his public persona, he responded coolly: "I know the real story."

A few days after we spoke, Zuckerberg changed his Facebook profile, removing "The West Wing" from his list of favorite TV shows.

On a recent Thursday afternoon, Zuckerberg took me for a stroll around the neighborhood in Palo Alto where he both lives and works. As he stepped out of the office and onto a street of expensive houses, he told me about his first trip to Silicon Valley. It was during winter break in January, 2004, a month before Facebook's launch. He was nineteen. "I remember flying in, driving down 101 in a cab, and passing by all these tech companies like Yahoo!," he said. His gray T-shirt was emblazoned with the word "hacker." "I remember thinking, Maybe someday we'll build a company. This probably isn't it, but one day we will."

We arrived at his house. Parked outside was a black Acura TSX, which he bought a couple of years ago, after asking a friend to suggest a car that would be "safe, comfortable, not ostentatious." He drives a lot to relax and unwind, his friends say, and usually ends up at Chan's apartment. She lives not far from Golden Gate Park and is a third-year medical student at the University of California, San Francisco. They spend most weekends together; they walk in the park, go rowing (he insists that they go in separate boats and race), play bocce or the board game the Settlers of Catan. Sundays are reserved for Asian cuisine. They usually take a two-week trip abroad in December. This year, they're planning to visit China.

Zuckerberg has found all his homes on Craigslist. His first place was a sparse one-bedroom apartment that a friend described as something like a "crack den." The next apartment was a two-bedroom, followed by his current place, a two-story, four-bedroom house that he told me is "too big." He rents. ("He's the poorest rich person I've ever seen in my life," Tyler Winklevoss said.) As we crossed the driveway, we spotted Chan, sitting on a chair in the back yard, a yellow highlighter in her hand, reading a textbook; she plans to be a pediatrician. There was a hammock and a barbecue grill nearby. Surprised, Zuckerberg approached her and rubbed her right shoulder. "I didn't know you were going to be here," he said. She touched his right hand and smiled.

He walked into the house, which is painted in various shades of blue and beige, except for the kitchen, which is a vibrant yellow. Colors don't matter much to Zuckerberg; a few years ago, he took an online test and realized that he was red-green color-blind. Blue is Facebook's dominant color, because, as he said, "blue is the richest color for me—I can see all of blue." Standing in his kitchen, leaning over the sink, he offered me a glass of water.

He returned the conversation to the winter of 2004, describing how he and his friends "would hang out and go together to Pinocchio's, the local pizza place, and talk about trends in technology. We'd say, 'Isn't it obvious that everyone was going to be on the Internet? Isn't it, like, inevitable that there would be a huge social network of people?' It was something that we expected to happen. The thing that's been really surprising about the evolution of Facebook is—I think then and I think now—that if we didn't do this someone else would have done it."

Zuckerberg, of course, did do it, and one of the reasons that he has held on to it is that money has never seemed to be his top priority. In 2005, MTV Networks considered buying Facebook for seventy-five million dollars. Yahoo! and Microsoft soon offered much more. Zuckerberg turned them all down. Terry Semel, the former C.E.O. of Yahoo!, who sought to buy Facebook for a billion dollars in 2006, told me, "I'd never met anyone—forget his age, twenty-two then or twenty-six now—I'd never met anyone who would walk away from a billion dollars. But he said, 'It's not about the price. This is my baby, and I want to keep running it, I want to keep growing it.' I couldn't believe it."

Looking back, Chan said she thought that the time of the Yahoo! proposal was the most stressful of Zuckerberg's life. "I remember we had a huge conversation over the Yahoo! deal," she said. "We try to stick pretty close to what our goals are and what we believe and what we enjoy doing in life—just simple things," she said.

Friends expect Chan and Zuckerberg to marry. In early September, Zuckerberg wrote on his Facebook page, "Priscilla Chan is moving in this weekend. Now we have 2x everything, so if you need any household appliances, dishes, glasses, etc please come by and take them before we give them away."

Facebook's headquarters is a two-story building at the end of a quiet, tree-lined street. Zuckerberg nicknamed it the Bunker. Facebook has grown so fast that this is the company's fifth home in six years—the third in Palo Alto. There is virtually no indication outside of the Bunker's tenant. Upon walking in, however, you are immediately greeted by what's called the Facebook Wall, playing off the virtual chalkboards users have on their profiles. One day in early August, the Wall was covered with self-referential posts. An employee, addressing the constant criticism of the site's privacy settings, had

written, "How do I delete my post??? Why don't you care about my privacy? Why is the default for this app everyone??" Inside is a giant sea of desks—no cubicles, no partitions, just open space with small conference rooms named after bands (Run-DMC, New Edition, ZZ Top) and bad ideas (Knife at a Gunfight, Subprime Mortgage, Beacon—a controversial advertising system that Facebook introduced in 2007 and then scrapped).

Zuckerberg's desk is near the middle of the office, just a few steps away from his glass-walled conference room and within arm's length of his most senior employees. Before arriving each morning, he works out with a personal trainer or studies Mandarin, which he is learning in preparation for the trip to China. Zuckerberg is involved in almost every new product and feature. His daily schedule is typically free from 2 P.M. to 6 P.M., and he spends that block of time meeting with engineers who are working on new projects. Debate is a hallmark of the meetings; at least a dozen of his employees pointed out, unprompted, what an "intense listener" Zuckerberg is. He is often one of the last people to leave the office. A photograph posted by a Facebook employee over Labor Day weekend showed Zuckerberg sitting at a long table in a conference room surrounded by other workers—all staring at their computers, coding away.

In the early years, Facebook tore through a series of senior executives. "A revolving door would be an understatement—it was very unstable," Breyer said. Within ten days of hiring an executive, Breyer told me, Zuckerberg would e-mail or call him and say that the new hire needed to get the boot. Things calmed down in March, 2008, when Zuckerberg hired Sheryl Sandberg, a veteran of Google who was the chief of staff for Lawrence Summers when he was Secretary of the Treasury. She joined Facebook as the company's chief operating officer, and executives followed her from companies like eBay, Genentech, and Mozilla. A flood of former Google employees soon arrived, too.

Meanwhile, however, most of Zuckerberg's close friends, who worked for Facebook at the start, have left. Adam D'Angelo, who has been friends with Zuckerberg since their hacking and programming days at Exeter, teamed up with another former Facebook employee, Charlie Cheever, to start Quora.com, a social network that aggregates questions and answers on various topics. Chris Hughes, Zuckerberg's Harvard roommate, left to join the Obama campaign and later founded the philanthropic site Jumo.com.

In part, the exodus reflects the status that former Facebook employees have in the tech world. But the departures also point to the difficulty some people have working for Zuckerberg. It's hard to have a friend for a boss, especially someone who saw the site, from its inception, as "A Mark Zuckerberg production"—the tag line was posted on every page during Facebook's early days. "Ultimately, it's 'the Mark show,' " one of his closest friends told me.

In late July, Facebook launched the beta version of Questions, a question-and-answer product that seems to be a direct competitor of Quora. To many people, the move seemed a vindictive attack on friends and former employees. In an interview, Cheever declined to comment, as did Matt Cohler, another friend who left the company, and who invested in Quora.

Chris Cox, Facebook's vice-president of product, said that Facebook Questions is not an attack on Quora. "We've been talking about questions being the future of the way people search for stuff, so it

was a matter of time before we built it," Cox told me. "Getting there first is not what it's all about." He added, "What matters always is execution. Always."

Zuckerberg's ultimate goal is to create, and dominate, a different kind of Internet. Google and other search engines may index the Web, but, he says, "most of the information that we care about is things that are in our heads, right? And that's not out there to be indexed, right?" Zuckerberg was in middle school when Google launched, and he seems to have a deep desire to build something that moves beyond it. "It's like hardwired into us in a deeper way: you really want to know what's going on with the people around you," he said.

In 2007, Zuckerberg announced that Facebook would become a "platform," meaning that outside developers could start creating applications that would run inside the site. It worked. The social-game company Zynga—the maker of FarmVille and Mafia Wars—is expected to earn more than five hundred million dollars this year, most of it generated from people playing on Facebook. In 2008, Zuckerberg unveiled Facebook Connect, allowing users to sign onto other Web sites, gaming systems, and mobile devices with their Facebook account, which serves as a digital passport of sorts. This past spring, Facebook introduced what Zuckerberg called the Open Graph. Users reading articles on CNN.com, for example, can see which articles their Facebook friends have read, shared, and liked. Eventually, the company hopes that users will read articles, visit restaurants, and watch movies based on what their Facebook friends have recommended, not, say, based on a page that Google's algorithm sends them to. Zuckerberg imagines Facebook as, eventually, a layer underneath almost every electronic device. You'll turn on your TV, and you'll see that fourteen of your Facebook friends are watching "Entourage," and that your parents taped "60 Minutes" for you. You'll buy a brand-new phone, and you'll just enter your credentials. All your friends—and perhaps directions to all the places you and they have visited recently—will be right there.

For this plan to work optimally, people have to be willing to give up more and more personal information to Facebook and its partners. Perhaps to accelerate the process, in December, 2009, Facebook made changes to its privacy policies. Unless you wrestled with a set of complicated settings, vastly more of your information—possibly including your name, your gender, your photograph, your list of friends—would be made public by default. The following month, Zuckerberg declared that privacy was an evolving "social norm."

The backlash came swiftly. The American Civil Liberties Union and the Electronic Privacy Information Center cried foul. Users revolted, claiming that Facebook had violated the social compact upon which the company is based. What followed was a tug-of-war about what it means to be a private person with a public identity. In the spring, Zuckerberg announced a simplified version of the privacy settings.

I asked Zuckerberg about this during our walk in Palo Alto. Privacy, he told me, is the "third-rail issue" online. "A lot of people who are worried about privacy and those kinds of issues will take any minor misstep that we make and turn it into as big a deal as possible," he said. He then excused himself as he typed on his iPhone 4, answering a text from his mother. "We realize that people will probably criticize us for this for a long time, but we just believe that this is the right thing to do."

Zuckerberg's critics argue that his interpretation and understanding of transparency and openness are simplistic, if not downright naïve. "If you are twenty-six years old, you've been a golden child, you've been wealthy all your life, you've been privileged all your life, you've been successful your whole life, of course you don't think anybody would ever have anything to hide," Anil Dash, a blogging pioneer who was the first employee of Six Apart, the maker of Movable Type, said. Danah Boyd, a social-media researcher at Microsoft Research New England, added, "This is a philosophical battle. Zuckerberg thinks the world would be a better place—and more honest, you'll hear that word over and over again—if people were more open and transparent. My feeling is, it's not worth the cost for a lot of individuals."

Zuckerberg and I talked about this the first time I signed up for Facebook, in September, 2006. Users are asked to check a box to indicate whether they're interested in men or in women. I told Zuckerberg that it took me a few hours to decide which box to check. If I said on Facebook that I'm a man interested in men, all my Facebook friends, including relatives, co-workers, sources—some of whom might not approve of homosexuality—would see it.

"So what did you end up doing?" Zuckerberg asked.

"I put men."

"That's interesting. No one has done a study on this, as far as I can tell, but I think Facebook might be the first place where a large number of people have come out," he said. "We didn't create that—society was generally ready for that." He went on, "I think this is just part of the general trend that we talked about, about society being more open, and I think that's good."

Then I told Zuckerberg that, two weeks later, I removed the check, and left the boxes blank. A couple of relatives who were Facebook friends had asked about my sexuality and, at that time, at least, I didn't want all my professional sources to know that I am gay.

"Is it still out?" Zuckerberg asked.

"Yeah, it's still out."

He responded with a flat "Huh," dropped his shoulders, and stared at me, looking genuinely concerned and somewhat puzzled. Facebook had asked me to publish a personal detail that I was not ready to share.

In our last interview—this one over the phone—I asked Zuckerberg about "Ender's Game," the sci-fi book whose hero is a young computer wizard.

"Oh, it's not a favorite book or anything like that," Zuckerberg told me, sounding surprised. "I just added it because I liked it. I don't think there's any real significance to the fact that it's listed there and other books aren't. But there are definitely books—like the Aeneid—that I enjoyed reading a lot more."

He first read the Aeneid while he was studying Latin in high school, and he recounted the story of Aeneas's quest and his desire to build a city that, he said, quoting the text in English, "knows no boundaries in time and greatness." Zuckerberg has always had a classical streak, his friends and family told me. (Sean Parker, a close friend of Zuckerberg, who served as Facebook's president when the company was incorporated, said, "There's a part of him that—it was present even when he was twenty,

twenty-one—this kind of imperial tendency. He was really into Greek odysseys and all that stuff.") At a product meeting a couple of years ago, Zuckerberg quoted some lines from the Aeneid.

On the phone, Zuckerberg tried to remember the Latin of particular verses. Later that night, he IM'd to tell me two phrases he remembered, giving me the Latin and then the English: "fortune favors the bold" and "a nation/empire without bound."

Before I could point out how oddly applicable those lines might be to his current ambitions, he typed back:

> again though
> these are the most famous quotes in the aeneid
> not anything particular that i found. ♦

PHOTOGRAPH: CARLOS SERRAO