

# **IN SUPPORT OF EMERGENCY MOTION**

Nos. 08-16745, 08-16849, 08-16873

## **IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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**The Facebook, Inc., et al.,**  
Non-Movants/Plaintiffs-Appellees/Cross-Appellants,

v.

**ConnectU, Inc., et al.,**  
Movants/Defendants-Appellants/Cross-Appellees.

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**IN RE: ConnectU, Inc., Cameron Winklevoss,  
Tyler Winklevoss, Divya Narendra,**  
Petitioners,

v.

**United States District Court  
for the Northern District of California,**  
Respondent.

**Real Parties in Interest:** The Facebook, Inc., Mark Zuckerberg, ConnectU, Inc.,  
Cameron Winklevoss, Tyler Winklevoss, Divya Narendra, Pacific Northwest Software,  
Inc., Wayne Chang, Winston Williams

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From Case No. 5:07-CV-01389-JW (N.D. Cal.)

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## **SUPPLEMENTAL DECLARATION OF EVAN A. PARKE IN SUPPORT OF EMERGENCY MOTION TO STAY OR ALTERNATIVE PETITION FOR WRIT OF MANDAMUS (and Exhibits 1-3)**

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David A. Barrett  
BOIES, SCHILLER & FLEXNER LLP  
575 Lexington Avenue  
New York, NY 10022  
(212) 446-2300

*Attorneys for Movants-Petitioners*

*Additional counsel listed on cover and  
signature pages of motion*

December 9, 2008

*An index of the documents follows this declaration.*

I, Evan Andrew Parke, declare as follows:

1. I am an Associate with the law firm of Boies, Schiller & Flexner LLP, counsel for Movants-Defendants-Appellants/Cross-Appellees/Petitioners ConnectU, Inc., Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra. I am a resident in the firm's Washington, D.C. office and am licensed to practice law in the District of Columbia. I am also admitted to various federal courts including the Courts of Appeals for the Federal Circuit. I appeared in the case below per an order of the district court granting my application to appear pro hac vice. I have been admitted to the Bar of this Court. Unless otherwise noted, I have personal knowledge of the facts set forth in this Supplemental Declaration.

2. Attached as Exhibit 1 to my Supplemental Declaration is an accurate copy of transcript excerpts from a hearing taking place before the district court on October 28, 2008.

3. Attached as Exhibit 2 to my Supplemental Declaration is accurate copy of Plaintiffs' Motion for Administrative Relief, Pursuant to Civil Local Rule 7-11, for Clarification of November 3, 2008, Orders, filed in the district court on November 10, 2008.

4. Attached as Exhibit 3 to my Supplemental Declaration is an accurate copy of Defendants' (I) Response to Plaintiffs' Admin. Motion to Correct/Strike; and (II) Response to Plaintiffs' Admin. Request for Clarification, filed in the district court on November 14, 2008.

I declare under penalty of perjury that the foregoing is true and correct  
to the best of my knowledge. Executed December 8th, 2008.



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Evan Andrew Parke  
BOIES, SCHILLER & FLEXNER LLP  
5301 Wisconsin Avenue NW  
Washington, D.C. 20015  
(202) 237-2727

*Attorneys for Movants-Petitioners*

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| <b>2</b> | Administrative Motion to Clarify, filed by Facebook in the district court on November 10.                                     |
| <b>3</b> | Appellants' opposition to Facebook's district court administrative motions, filed in the district court on November 14, 2008. |

# Exhibit 1



10:49:08 1 PREVIOUS PROCEEDINGS. THE CONNECTU FOUNDERS AND  
10:49:11 2 CONNECTU FILED AN EMERGENCY MOTION TO THE NINTH  
10:49:13 3 CIRCUIT TO STOP THE DISPOSITION OF THE ASSETS, THEY  
10:49:16 4 REFUSED TO PUT THE CONSIDERATION INTO THE SPECIAL  
10:49:18 5 MASTER'S HANDS BECAUSE OF THE NINTH CIRCUIT APPEAL  
10:49:22 6 AND BECAUSE OF THE SCHEDULING OF YOUR HONOR'S  
10:49:23 7 HEARINGS.

10:49:24 8 AND ALL OF THAT WAS DENIED. THE NINTH  
10:49:27 9 CIRCUIT HAS ADDRESSED THIS ISSUE. THEY HAVE  
10:49:30 10 ADDRESSED THE IMMINENCE OF THE CONSIDERATION  
10:49:34 11 TRANSFER TO FACEBOOK.

10:49:37 12 THAT WAS THE BASIS OF THE EMERGENCY  
10:49:39 13 APPEAL THAT CONNECTU AND THE CONNECTU FOUNDERS  
10:49:43 14 FILED.

10:49:43 15 THE COURT: IT'S A DIFFERENT SITUATION,  
10:49:44 16 BUT I AGREE THAT THE CIRCUIT HAS WEIGHED IN, AT  
10:49:48 17 LEAST WITH RESPECT TO THIS QUESTION OF A STAY OF  
10:49:50 18 EXECUTION.

10:49:51 19 YOUR COMMENT, THOUGH, PROMPTS ME TO ASK  
10:49:56 20 WHY, IF YOU'VE CONSIDERED IT, YOU HAVE NOT PURSUED  
10:50:02 21 THAT BEYOND THE COURT'S RULING.

10:50:07 22 YOU ASKED FOR AN EMERGENCY STAY OF  
10:50:08 23 EXECUTION, BUT SO FAR AS I KNOW, YOU HAVEN'T ASKED  
10:50:14 24 THE CIRCUIT TO ISSUE ANY ORDER TO ME TO STAY MY  
10:50:19 25 HAND BY WAY OF A WRIT OR ANYTHING OF THAT KIND,



10:50:26 1 WHICH WOULD BE BEYOND THE APPEAL ROUTE.

10:50:30 2 IF YOUR ARGUMENT IS I DON'T HAVE  
10:50:31 3 JURISDICTION AND I'M ABOUT TO DO SOMETHING BEYOND  
10:50:35 4 MY JURISDICTION, WHY HAVEN'T YOU PURSUED A WRIT?

10:50:38 5 MR. BARRETT: WELL, YOUR HONOR, WE -- I  
10:50:40 6 GUESS WE THOUGHT THAT THE, THAT IT WOULD BE  
10:50:41 7 APPROPRIATE TO PROCEED AS WE HAVE HERE TODAY,  
10:50:46 8 RAISING THE CHALLENGE TO THE COURT'S JURISDICTION  
10:50:49 9 IN THIS COURT IN THE FIRST INSTANCE, AS WELL AS  
10:50:54 10 MAKING THE REQUEST FOR A STAY IF THE COURT'S RULING  
10:50:57 11 WERE TO BE THAT THE SETTLEMENT CONSIDERATION IS  
10:50:59 12 DISTRIBUTED.

10:51:00 13 THE COURT: IT'S NOT A STAY. YOU'VE  
10:51:01 14 ALREADY EXHAUSTED THAT, I THINK.

10:51:03 15 MR. BARRETT: WELL, YOUR HONOR --

10:51:04 16 THE COURT: BUT IT COULD BE THAT THE  
10:51:05 17 CIRCUIT WOULD RECONSIDER THE STAY.

10:51:08 18 A WRIT PROCEEDS FROM A DIFFERENT LEGAL  
10:51:10 19 PROPOSITION. IT IS THAT THE COURT IS ABOUT TO DO  
10:51:12 20 SOMETHING BEYOND ITS DISCRETION.

10:51:16 21 A STAY IS WITHIN THE COURT'S DISCRETION,  
10:51:19 22 AND IF YOUR ARGUMENT HERE IS THAT THE COURT HAS NO  
10:51:24 23 DISCRETION BUT TO HOLD THESE PROCEEDS AND IT CANNOT  
10:51:27 24 PROCEED BASED UPON THE PRESENCE OF AN APPEAL, THAT  
10:51:30 25 SEEMS TO ME TO INVITE -- IF I BELIEVE YOU'RE WRONG

10:51:36 1 AND I'M ABOUT TO TAKE AN ACTION IN RESPONSE TO THIS  
10:51:39 2 ORDER TO SHOW CAUSE, YOU HAD A BASIS FOR SEEKING  
10:51:41 3 THAT WRIT.

10:51:42 4 AND IT SEEMS TO ME THAT THE FAIREST THING  
10:51:44 5 FOR THE COURT TO DO, IF IT IS DETERMINED TO  
10:51:47 6 PROCEED, WOULD BE TO STAY ITS HAND FOR A DAY OR TWO  
10:51:50 7 TO ALLOW YOU TO SEEK THAT KIND OF A WRIT ASKING THE  
10:51:55 8 COURT TO, TO STOP ME ON THE GROUNDS THAT I'M  
10:52:00 9 EXCEEDING MY AUTHORITY.

10:52:01 10 MR. BARRETT: YOUR HONOR, PERHAPS, YOU  
10:52:06 11 KNOW, IT CERTAINLY WOULD BE AN AVAILABLE PROCEDURAL  
10:52:10 12 ROUTE.

10:52:10 13 I GUESS OUR VIEW WAS IF WE PRESENTED BOTH  
10:52:13 14 THAT ARGUMENT AND THE OTHER ARGUMENTS TO THIS  
10:52:17 15 COURT, YOU KNOW, THERE ARE MANY SITUATIONS IN WHICH  
10:52:20 16 THE COURT IS, IS PRESENTED WITH A, WITH AN ARGUMENT  
10:52:24 17 THAT IT LACKS JURISDICTION TO PROCEED.

10:52:29 18 AND I'M NOT SURE THAT THE CIRCUIT WOULD,  
10:52:32 19 YOU KNOW, WOULD LIKE COUNSEL WHO HAD THOSE  
10:52:34 20 ARGUMENTS TO BE SEEKING WRITS EVERY TIME WE BELIEVE  
10:52:39 21 THAT TO BE THE CASE.

10:52:42 22 AND I THINK THAT THE COURT WILL MAKE A  
10:52:44 23 FAIR DETERMINATION BASED ON ITS VIEW OF THE LAW AND  
10:52:47 24 THE FACTS.

10:52:48 25 I DO WANT TO ADDRESS, THOUGH,

10:52:51 1 MR. CHATTERJEE'S -- THE ARGUMENT THAT

10:52:54 2 MR. CHATTERJEE JUST MADE AND THAT THE COURT ALLUDED  
10:52:57 3 TO RELATING TO THE CIRCUIT'S PRIOR, OR PREVIOUS  
10:53:01 4 DENIAL OF THE MOTION FOR A STAY.

10:53:06 5 AND I THINK, YOUR HONOR, YOU WERE EXACTLY  
10:53:09 6 RIGHT WHEN YOU SAID THAT THE CIRCUMSTANCES ARE  
10:53:12 7 DIFFERENT NOW.

10:53:14 8 AND I THINK THE CLEAREST INDICATION OF  
10:53:17 9 THAT IS THE FACT THAT THE -- IN ITS DECISION, THE  
10:53:20 10 CIRCUIT DIDN'T GIVE MUCH, MUCH OF AN EXPLANATION.

10:53:25 11 ESSENTIALLY THE DECISION ON THE MERITS  
10:53:28 12 WAS, THE MOTION FOR A STAY IS DENIED, AND THEY  
10:53:32 13 CITED TWO CASES.

10:53:33 14 ONE WAS THE GOLDEN GATE CASE, WHICH I  
10:53:36 15 TAKE IT IS THE COURT'S MOST RECENT PRONOUNCEMENT ON  
10:53:40 16 THE GENERAL STANDARDS FOR A STAY PENDING APPEAL,  
10:53:44 17 AND I THINK FACTUALLY THAT IS NOT PARTICULARLY  
10:53:50 18 INSTRUCTIVE IN THIS CASE.

10:53:51 19 THE OTHER CASE, THE SECOND CASE WHICH THE  
10:53:53 20 COURT OF APPEALS CITED WAS THE CASE OF LOPEZ  
10:53:58 21 AGAINST HECKLER, WHICH I BELIEVE YOUR HONOR ALSO  
10:54:01 22 CITED, AND IT CITED IN PARTICULAR PAGE 1435 OF 713  
10:54:11 23 F.2D IN THAT LOPEZ CASE.

10:54:13 24 AND THE REASON, YOUR HONOR, THAT I THINK  
10:54:15 25 THAT IS SIGNIFICANT IS THAT ON THAT PAGE, THERE IS

10:54:17 1 A PARAGRAPH IN WHICH THE COURT DESCRIBES THE PRIOR  
10:54:22 2 HISTORY OF THE CASE IN WHICH THE SECRETARY OF  
10:54:26 3 HEALTH AND HUMAN SERVICES MOVED FOR A PARTIAL, OR  
10:54:30 4 FOR AN EMERGENCY STAY OF THE DISTRICT COURT ORDER,  
10:54:34 5 AND THE DISTRICT COURT ORDER IN THE LOPEZ CASE WAS  
10:54:40 6 THAT THE SOCIAL SECURITY ADMINISTRATION HAD TO GIVE  
10:54:45 7 NOTICE TO TENS OF THOUSANDS OF INDIVIDUALS WHO HAD  
10:54:50 8 HAD THEIR SOCIAL SECURITY DISABILITY PAYMENTS  
10:54:54 9 STOPPED ON THE GROUNDS THAT THEY WERE NO LONGER  
10:54:57 10 DISABLED.

10:54:59 11 AND THE COURT HAD PREVIOUSLY RULED THAT  
10:55:03 12 THE SECRETARY COULDN'T STOP THOSE PAYMENTS UNTIL  
10:55:05 13 AFTER THE INDIVIDUALS HAD HAD NOTICE AND  
10:55:08 14 OPPORTUNITY TO BE HEARD.

10:55:10 15 THE SECRETARY HAD ANNOUNCED THAT SHE  
10:55:13 16 WASN'T GOING TO ABIDE BY THAT DECISION, AND THE  
10:55:15 17 PARTIES WENT BACK TO THE DISTRICT COURT.

10:55:17 18 THE DISTRICT COURT ISSUED AN ORDER THAT  
10:55:19 19 SAID, YES, YOU ARE, AND YOU'RE GOING TO SEND NOTICE  
10:55:22 20 TO ALL THESE PEOPLE BY A CERTAIN DATE, AND THEN IF  
10:55:26 21 THEY ASK YOU FOR IT, YOU'RE GOING TO CONDUCT  
10:55:28 22 HEARINGS, AND IF THEY'RE ENTITLED, YOU'RE GOING TO  
10:55:31 23 GIVE THEM BACK THEIR BENEFITS.

10:55:33 24 SO THAT WAS THE ORDER.

10:55:34 25 THE SECRETARY OF HEALTH AND HUMAN

10:55:37 1 SERVICES SOUGHT AN EMERGENCY STAY FOUR OR FIVE DAYS  
10:55:41 2 BEFORE THOSE TENS OF THOUSANDS OF NOTICES TO THE  
10:55:46 3 DENIED CLAIMANTS WERE GOING TO GO OUT, AND THE  
10:55:50 4 COURT GAVE TWO REASONS FOR DENYING THE EMERGENCY  
10:55:54 5 STAY.

10:55:55 6 THE FIRST REASON WAS THAT THE SECRETARY  
10:55:57 7 HAD WAITED ABOUT 50 OR 55 DAYS FROM THE DATE OF THE  
10:56:01 8 ORIGINAL ORDER UNTIL MAKING THAT STAY MOTION JUST  
10:56:05 9 FOUR DAYS BEFORE THE NOTICES WERE TO GO OUT.

10:56:10 10 NOW, THAT'S ARGUABLY, YOUR HONOR -- YOUR  
10:56:13 11 HONOR HAD SOME ISSUES WITH US NOT HAVING FILED THE  
10:56:17 12 NOTICE OF APPEAL SOONER.

10:56:21 13 RESPECTFULLY, WE DISAGREE, AND AS WE  
10:56:23 14 ARGUED AT THE TIME, WE THOUGHT THERE WERE SOME GOOD  
10:56:25 15 REASONS BASED ON FACEBOOK'S CONDUCT AND TRYING TO  
10:56:28 16 WORK OUT THE ISSUE THAT WE THOUGHT WE HADN'T BEEN  
10:56:32 17 DILATORY.

10:56:33 18 BUT IN ANY EVENT, THAT'S ONE ASPECT OF  
10:56:38 19 THE DECISION.

10:56:39 20 THE SECOND ASPECT OF THE DECISION,  
10:56:40 21 THOUGH, AND I THINK THIS IS REALLY CRUCIAL, WAS  
10:56:43 22 THAT THE COURT OF APPEALS SAID, "THE FACT THAT  
10:56:47 23 TERMINATED RECIPIENTS BE," AND I'M QUOTING HERE,  
10:56:51 24 "NOTIFIED BY AUGUST 15TH OF THEIR POTENTIAL  
10:56:54 25 ELIGIBILITY FOR BENEFITS WAS THE ONLY IMMEDIATE

1 OBLIGATION IMPOSED UPON THE GOVERNMENT.

2 "WE REASONED THAT THE BULK OF THE  
3 ADMINISTRATIVE COSTS AND THE COSTS OF REINSTATING  
4 BENEFITS, THE SOURCE OF THE INJURY WHICH THE  
5 SECRETARY ARGUES JUSTIFIES A STAY, WOULD NOT START  
6 TO ACCRUE UNTIL LATER WHEN THE FORMER RECIPIENTS  
7 BEGAN REAPPLYING FOR BENEFITS.

8 "THUS, WE SAW NO NECESSITY TO ISSUE A  
9 TEMPORARY STAY PENDING APPEAL ON AN EMERGENCY  
10 BASIS, ESPECIALLY GIVEN THE SECRETARY'S UNEXPLAINED  
11 DELAY."

12 SO WHAT THE COURT REALLY FOCUSSED ON WAS,  
13 WHAT WAS THE IMMEDIATE INJURY THAT WAS GOING TO BE  
14 SUFFERED BY THE PARTY SEEKING THE STAY?

15 YOUR HONOR, I THINK THAT IS REALLY  
16 EXACTLY ANALOGOUS TO THIS CASE.

17 AT THE TIME WE MADE THAT MOTION, THE  
18 ORDER OF THE COURT WAS, GIVE THE STOCK TO THE  
19 SPECIAL MASTER.

20 THAT TENDERING OF THE STOCK TO THE  
21 SPECIAL MASTER WAS SUBJECT TO THE FINAL PARAGRAPH  
22 OF THE FINAL JUDGMENT, WHICH SAID THE SPECIAL  
23 MASTER CAN'T DO ANYTHING WITHOUT FURTHER ORDER OF  
24 THE COURT.

25 SO IT'S OUR VIEW, YOUR HONOR, THAT WHEN

10:58:19 1 THE COURT OF APPEALS CITED THE LOPEZ CASE AS THE  
10:58:23 2 GROUND FOR DENYING THE STAY, WHAT -- CERTAINLY A  
10:58:29 3 VERY SIGNIFICANT PART OF THAT DECISION WAS THAT WE  
10:58:34 4 WERE NOT GOING TO SUFFER ANY IMMEDIATE IRREPARABLE  
10:58:39 5 INJURY BECAUSE THE STOCK WAS JUST GOING INTO THE  
10:58:41 6 HANDS OF THE SPECIAL MASTER WHERE THE INJURIES IN  
10:58:45 7 TERMS OF LOSS OF APPEAL RIGHTS AND SO FORTH,  
10:58:47 8 POTENTIAL LOSS OF APPEAL RIGHTS ACCORDING TO  
10:58:50 9 FACEBOOK, AND SO FORTH WOULD NOT BE SUFFERED.

10:58:53 10 NOW, HOWEVER, AND I -- THAT'S WHY I COME  
10:58:57 11 BACK TO THIS POINT. THE SITUATION HAS CHANGED.

10:59:00 12 WE ARE NOT TALKING ABOUT THAT LOSS BEING  
10:59:03 13 POTENTIALLY DAYS, WEEKS, MONTHS IN THE FUTURE, THAT  
10:59:08 14 LOSS OF APPEAL RIGHTS.

10:59:09 15 WE ARE TALKING ABOUT IT BEING IMMINENT.  
10:59:12 16 WE ARE TALKING ABOUT THE COURT'S VERY ACT OF  
10:59:15 17 ORDERING THE DISTRIBUTION WOULD RESULT IN OUR  
10:59:20 18 POTENTIALLY LOSING THE APPEAL, THE APPEAL RIGHTS IN  
10:59:24 19 VIEW OF FACEBOOK'S INTERPRETATION OF THE LAW.

10:59:27 20 SO YOU, YOU HAVE -- YOU HAVE A SITUATION  
10:59:31 21 WHERE, WHERE LOPEZ SEEMED TO SUGGEST THAT THE  
10:59:35 22 EARLIER STAY REQUEST WAS DENIED, IN EFFECT, BECAUSE  
10:59:39 23 IT WAS PREMATURE.

10:59:41 24 ALL WE WERE FACED WITH WAS, WAS DOING A  
10:59:44 25 QUASI MINISTERIAL ACT, GIVING THE SHARES TO THE

10:59:48 1 SPECIAL MASTER.

10:59:49 2 YES, WE WERE WORRIED AT THAT TIME ABOUT  
10:59:51 3 WHAT THE ULTIMATE RESULT MIGHT BE, BUT THAT  
10:59:54 4 COULDN'T HAPPEN UNTIL WE HAD EXACTLY THE  
10:59:57 5 OPPORTUNITY THAT WE HAVE HERE TODAY, WHICH IS TO  
10:59:59 6 HAVE NOTICE AND AN OPPORTUNITY TO PERSUADE THE  
11:00:01 7 COURT NOT TO MAKE THAT DISTRIBUTION.

11:00:04 8 BUT --

11:00:04 9 THE COURT: WELL, YOU'RE BEING QUITE  
11:00:06 10 COMPLETE, AND I REALLY APPRECIATE IT, IN YOUR  
11:00:09 11 RECITATION OF THE CIRCUMSTANCES, AND PART OF WHAT  
11:00:17 12 YOU'VE SAID I RECOGNIZE.

11:00:19 13 IT DOES SEEM TO ME A DIFFERENT  
11:00:22 14 PROPOSITION FOR THIS COURT TO ORDER A STAY SO THAT  
11:00:25 15 IT CAN CONSIDER MATTERS BEFORE IT THAN FOR THE  
11:00:29 16 COURT TO ORDER A STAY SO THAT THE NINTH CIRCUIT CAN  
11:00:32 17 CONSIDER MATTERS BEFORE IT --

11:00:34 18 MR. BARRETT: UM-HUM.

11:00:35 19 THE COURT: -- WHEN THE NINTH CIRCUIT IS  
11:00:36 20 PERFECTLY CAPABLE OF MAKING ITS OWN JUDGMENT ABOUT  
11:00:41 21 THAT.

11:00:41 22 AND FOR ME TO PROTECT THE JURISDICTION OF  
11:00:43 23 THE NINTH CIRCUIT BY ISSUING A STAY UNDER  
11:00:46 24 CIRCUMSTANCES WHERE I'VE ALREADY MADE MY JUDGMENT  
11:00:49 25 AND MY ASSESSMENT OF IT IS A DIFFERENT, A DIFFERENT



11:00:54 1 MATTER.

11:00:55 2 IF I UNDERSTANDING WHAT YOU'RE SAYING, IT  
11:00:59 3 IS THAT YOU NEED TO GO THROUGH THIS PROCEDURE TO  
11:01:02 4 PUT YOURSELF IN THE POSITION OF NOW SUBMITTING TO  
11:01:06 5 THE NINTH CIRCUIT EITHER A REQUEST FOR A STAY OR A  
11:01:10 6 REQUEST FOR A WRIT, AND I CAN UNDERSTAND, THEN, WHY  
11:01:13 7 YOU WOULD GO THROUGH THIS PROCESS, BECAUSE UNLESS  
11:01:22 8 I'M PERSUADED THAT I DON'T HAVE THE AUTHORITY, IT  
11:01:27 9 SEEMS TO ME THAT THERE ARE TWO SIDES TO THE APPEAL  
11:01:29 10 THAT YOU'RE CITING.

11:01:31 11 THERE IS THE SIDE THAT YOU'RE CITING,  
11:01:34 12 WHICH IS THE CONNECTU SIDE WHICH WOULD, IF IT HAS  
11:01:38 13 TO FOLLOW THROUGH WITH ITS SETTLEMENT, LOSE CONTROL  
11:01:42 14 OF THE COMPANY; AND THEN THERE'S THE FACEBOOK SIDE  
11:01:45 15 WHICH IS SEEKING TO GAIN CONTROL.

11:01:49 16 THAT'S -- THAT'S JUST DESCRIBING TO ME  
11:01:51 17 THE NATURE OF THE PROBLEM.

11:01:52 18 AND YOUR ARGUMENT IS THAT I SHOULD FAVOR  
11:01:56 19 ONE SIDE OVER THE OTHER IN THAT APPEAL BY SIMPLY  
11:02:00 20 SAYING THAT FACEBOOK WON'T SUFFER ANY INJURY IF  
11:02:04 21 IT'S DENIED THE CONTROL THAT IT BARGAINED FOR, AND  
11:02:08 22 I UNDERSTAND THAT THERE ARE SOME ECONOMIC REASONS  
11:02:11 23 WHY THAT ARGUMENT IS MADE INSOFAR AS CONNECTU IS  
11:02:15 24 CONCERNED .

11:02:16 25 THE ARGUMENT I'VE HEARD MADE IN THE PAST

11:02:18 1 IS, WELL, THE COMPANY ISN'T REALLY ACTIVE, IT  
11:02:22 2 REALLY DOESN'T MAKE ANY MONEY, IT'S NOT REALLY  
11:02:25 3 LOSING ANY MONEY, IT'S JUST THERE AND, THEREFORE,  
11:02:27 4 TO ALLOW IT TO BE THE WAY IT IS DOESN'T HURT  
11:02:30 5 FACEBOOK.

11:02:31 6 BUT THAT DENIES FACEBOOK THE RIGHT TO  
11:02:33 7 MAKE THE COMPANY INTO SOMETHING BETTER THAN IT IS,  
11:02:36 8 TO PURSUE IT ON AN ECONOMICALLY VIABLE BASIS, TO  
11:02:40 9 EXPLOIT IT IN THE WAY THAT IT WOULD WANT TO EXPLOIT  
11:02:43 10 IT SO THAT THE TIME VALUE OF AN EIGHT MONTH DELAY  
11:02:46 11 HAS AN EFFECT ON FACEBOOK.

11:02:48 12 SO I CAN'T IGNORE ONE IN FAVOR OF THE  
11:02:52 13 OTHER, ESPECIALLY UNDER CIRCUMSTANCES WHERE I'M  
11:02:55 14 PERSUADED THAT THE PARTIES SAT DOWN AT A BARGAINING  
11:02:58 15 TABLE AND THEY AGREED TO THAT EXCHANGE.

11:03:00 16 MR. BARRETT: SURE, SURE.

11:03:02 17 WELL, YOUR HONOR, IF I COULD -- YOUR  
11:03:03 18 HONOR SUMMED IT UP VERY WELL, AND IF I COULD JUST  
11:03:06 19 RESPOND BRIEFLY TO THAT?

11:03:07 20 I DO THINK IT IS A SITUATION WHERE, YOU  
11:03:10 21 KNOW, YOU REALLY ARE BALANCING THE HARDSHIPS OR  
11:03:15 22 DETRIMENTS TO THE PARTIES, IF YOU WILL.

11:03:20 23 AND I'LL JUST REMIND THE COURT THAT THE  
11:03:22 24 RECORD DOES INDICATE THAT, FIRST OF ALL, ANY COSTS  
11:03:26 25 ASSOCIATED WITH ANY LITIGATION THAT CONNECTU IS

# Exhibit 2

1 SEAN A. LINCOLN (State Bar No. 136387)  
salincoln@orrick.com  
2 I. NEEL CHATTERJEE (State Bar No. 173985)  
nchatterjee@orrick.com  
3 MONTE COOPER (State Bar No. 196746)  
mcooper@orrick.com  
4 THERESA A. SUTTON (State Bar No. 211857)  
tsutton@orrick.com  
5 YVONNE P. GREER (State Bar No. 214072)  
ygreer@orrick.com  
6 ORRICK, HERRINGTON & SUTCLIFFE LLP  
1000 Marsh Road  
7 Menlo Park, CA 94025  
Telephone: 650-614-7400  
8 Facsimile: 650-614-7401

9 Attorneys for Plaintiffs  
10 THE FACEBOOK, INC. and MARK ZUCKERBERG

11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA  
13 SAN JOSE DIVISION  
14

15 THE FACEBOOK, INC. and MARK  
16 ZUCKERBERG,

17 Plaintiffs,

18 v.

19 CONNECTU, INC. (formerly known as  
20 CONNECTU, LLC), PACIFIC  
NORTHWEST SOFTWARE, INC.,  
21 WINSTON WILLIAMS, and WAYNE  
CHANG,

22 Defendants.  
23  
24  
25  
26  
27  
28

Case No. 5:07-CV-01389-JW

**PLAINTIFFS' MOTION FOR  
ADMINISTRATIVE RELIEF,  
PURSUANT TO CIVIL LOCAL  
RULE 7-11, FOR CLARIFICATION  
OF NOVEMBER 3, 2008, ORDERS**

1 **I. REQUESTED RELIEF**

2 Pursuant to Civil Local Rule 7-11, Plaintiffs seek clarification of the Court's November 3,  
3 2008, Order Directing Special Master to Deliver Property per Settlement Agreement (Doc. No.  
4 653) and Judgment Ordering Specific Performance of Settlement Agreement and Declaratory  
5 Judgment of Release (Doc. No. 654). In both of these orders, the Court orders the transfer of  
6 specified stock and cash to counsel for the parties "in trust for [counsel's] clients and any lawful  
7 claimant."<sup>1</sup>

8 The terms "in trust" and "lawful claimant" are not included in the parties' Settlement  
9 Agreement. The parties disagree about Plaintiffs' obligations arising out of the Court's use of  
10 these terms. ConnectU and its Founders recently asserted that this language is meant to include at  
11 least Tyler and Cameron Winklevoss and Divya Narendra, ConnectU's Founders. ConnectU and  
12 its Founders assert that the language requires Plaintiffs' counsel to hold the ConnectU stock "in  
13 trust" for them. Plaintiffs disagree. While at least two "lawful claimants" apparently exist with  
14 regard to the stock and cash transferred from Facebook to ConnectU, *i.e.*, Quinn Emanuel and  
15 Finnegan Henderson, there are no similarly situated persons interested in the ConnectU stock  
16 transferred to Plaintiffs. Thus, the "in trust" and "lawful claimant" language with regard to  
17 consideration transferring from Facebook to ConnectU is appropriate. It is not a reciprocal  
18 requirement.

19 Consequently, Plaintiffs request that the Court clarify that, through its November 3  
20 Orders, the transfer of ConnectU stock to Plaintiffs need not be held "in trust" for "any lawful  
21 claimant," and specifically not for Tyler, Cameron or Howard Winklevoss or Divya Narendra.

22 **II. BACKGROUND**

23 On November 3, 2008, the Court issued an Order Directing Special Master to Deliver  
24 Property per Settlement Agreement (Doc. No. 653).<sup>2</sup> The Order directs the Special Master, in  
25 relevant part, to:

26 <sup>1</sup> To the extent the Court considers the relief sought to be a substantive change, Plaintiffs request  
27 that the Court consider this a Motion for Reconsideration of its November 3, 2008, Orders.

28 <sup>2</sup> On that same day, the Court also issued a Judgment Ordering Specific Performance of  
Settlement Agreement and Declaratory Judgment of Release (Doc. No. 654). The language at  
issue in this Administrative Request is identical in both November 3rd Orders.

(1) transfer to the law firm of Orrick, Herrington & Stuchliffe [sic], LLP, counsel for The Facebook, Inc., and Mark Zuckerberg, **in trust** for its clients and **any lawful claimant**, the shares of ConnectU being held by the Master; and

(2) transfer to Boies, Schiller & Flexner, as counsel for ConnectU, Inc., Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra, **in trust** for its clients and **any lawful claimant**, (a) the cash or its equivalent in the form of a bank check or cashiers check and (b) The Facebook Inc., common shares being held by the Master;

Doc. Nos. 653, 654 (emphasis added). These provisions appear to be in response to the Special Master's September 5, 2008, Report No. 1 in which the Master recommended that the Court instruct him to transfer: a) all ConnectU stock in his possession **to Facebook** (Doc. No. 630, pg. 8 (Recommendation #3)) (emphasis added); and b) the Facebook cash and stock, for the ConnectU Founders and Quinn Emanuel, **into an escrow or trust** account (or to ConnectU founders and Quinn Emanuel jointly). *Id.* (Recommendation #4) (emphasis added).<sup>3</sup>

On November 6, 2008, counsel for ConnectU wrote to Plaintiffs' counsel contending, for the first time, that they believe Messrs. Winklevoss and Narendra are "lawful claimants" to the ConnectU stock and are, therefore, entitled to 10 days' notice of any proposed transfer of ConnectU stock by Plaintiffs' counsel. Declaration of Theresa A. Sutton in Support of Motion for Administrative Relief ("Sutton Decl."), Ex. A. Plaintiffs disagree that anyone other than they are "lawful claimants" to the ConnectU stock.

### III. DISCUSSION

Plaintiffs seek clarification of the terms "in trust" and "lawful claimants" in Section (1) of the Court's November 3, 2008, Order. Although titled an order apparently designed to effectuate the Settlement Agreement (*i.e.*, deliver property "**in accordance** with the terms of their Settlement Agreement"), the Court's Order contains language not found in the Settlement Agreement. Specifically, the Court orders the Special Master to transfer ConnectU stock to Orrick, Herrington & Sutcliffe LLP "in trust" for Plaintiffs and "any lawful claimant." Doc. No.

<sup>3</sup> In a September 19, 2008, Order to Show Cause, the Court also acknowledged that "that claims or liens have been asserted by third-parties." This is apparently a reference to the Notice of Lien filed by the Quinn Emanuel law firm, and perhaps Finnegan Henderson, with regard to the stock and cash paid by Facebook to ConnectU's Founders as a result of the Settlement Agreement. Neither of these parties, or any other third party, has asserted an interest in the ConnectU stock.

1 653. No such “claimants” exists, nor is there a requirement in the Settlement Agreement that  
2 Plaintiffs’ counsel hold the consideration in trust for them or anyone else.

3 By its terms, the Settlement Agreement requires Facebook to transfer a specified amount  
4 of cash and number of shares of Facebook stock to Messrs. Winklevoss and Narendra. In  
5 exchange for this transfer, the Settlement Agreement requires the transfer of “all ConnectU  
6 stock,” to Plaintiffs. Because the “in trust” and “lawful claimant” language does not appear in the  
7 Settlement Agreement, Plaintiffs ask that the Court clarify its use of these terms. More  
8 specifically, Plaintiffs request that the Court specify that the Order was not intended to identify  
9 Tyler, Cameron and Howard Winklevoss and Divya Narendra as “lawful claimants” to the  
10 ConnectU stock, and that Plaintiffs’ counsel need not hold such stock “in trust.”

11 Clarification is necessary because ConnectU has recently asserted that Messrs.  
12 Winklevoss and Narendra are “lawful claimants” pursuant to the Order. Sutton Decl., Ex. A.  
13 Plaintiffs disagree. Unlike the Facebook stock and cash in which the Quinn Emanuel firm asserts  
14 an interest (and has filed a Notice of Lien), no person has filed a Notice of Lien or other notice of  
15 interest in the ConnectU stock. Consequently, the parties are not similarly situated.<sup>4</sup> Placing  
16 restrictions on the consideration Plaintiffs are entitled to pursuant to the Settlement Agreement  
17 and the November 3 Order is, therefore, inappropriate.

18 For the same reasons, Plaintiffs also seek clarification of the term “in trust,” as nothing in  
19 the Settlement Agreement requires Plaintiffs’ counsel to hold the ConnectU stock in trust for  
20 anyone, including any nonexistent third party “lawful claimants.” Indeed, the Special Master, in  
21 his Report, recommended that the Court instruct him to transfer the ConnectU stock directly to  
22 Facebook. *See* Recommendation #3. Further, in response to this recommendation, the Court  
23 issued an Order to Show Cause why it should not do so. Doc. No. 634, 1:18. Neither ConnectU  
24 or its Founders objected to the recommended transfer on the ground that the Founders are lawful  
25 claimants. Doc. No. 637, pg. 16. They objected solely to the timing of the transfer to the extent it

26 <sup>4</sup> The consideration flowing from Facebook to the ConnectU founders pursuant to the Settlement  
27 Agreement cannot be transferred at this time directly to the founders because Quinn Emanuel has  
28 filed a Notice of Lien asserting an interest in those proceeds. As a result, restrictions on that part  
of the transaction are appropriate and necessary to protect Quinn Emanuel’s (a “lawful claimant”) interest in the settlement proceeds.

1 would affect their rights on appeal. *Id.*

2 **IV. CONCLUSION**

3 For these reasons, Plaintiffs seek clarification of the terms “in trust” and “lawful  
4 claimant,” as used in Section (1) of the Order, to ensure Plaintiffs are in full compliance thereof.  
5 Specifically, Plaintiffs request that the Court specify that Tyler, Cameron, and  
6 Howard Winklevoss, and Divya Narendra are not “lawful claimants” pursuant to Section (1) of  
7 the Order, and Plaintiffs are not required to hold the ConnectU stock “in trust.”

8  
9 November 10, 2008

10  
11 /s/ Theresa A. Sutton /s/  
12 Theresa A. Sutton  
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**CERTIFICATE OF SERVICE**

I hereby certify that this document(s) 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 non registered participants on November 10, 2008.

Dated: November 10, 2008.

Respectfully submitted,

/s/ Theresa A. Sutton /s/  
Theresa A. Sutton

# Exhibit 3

STEVEN C. HOLTZMAN (State Bar No. 144177)  
sholtzman@bsflp.com  
BOIES, SCHILLER & FLEXNER LLP  
1999 Harrison Street, Suite 900  
Oakland, CA 94612  
Telephone: (510) 874-1000  
Facsimile: (510) 874-1460

DAVID A. BARRETT (*pro hac vice*)  
dbarrett@bsflp.com  
BOIES, SCHILLER & FLEXNER LLP  
575 Lexington Ave., 7th Floor  
New York, NY 10022  
Telephone: (212) 446-2300  
Facsimile: (212) 446-2350

D. MICHAEL UNDERHILL (*pro hac vice*)  
munderhill@bsflp.com  
BOIES, SCHILLER & FLEXNER LLP  
5301 Wisconsin Avenue NW  
Washington, D.C. 20015  
Telephone: (202) 237-2727  
Facsimile: (202) 237-6131

Attorneys for Defendants ConnectU, Inc.,  
Cameron Winklevoss, Tyler Winklevoss,  
and Divya Narendra.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

THE FACEBOOK, INC. and MARK  
ZUCKERBERG,

Plaintiffs,

v.

CONNECTU, INC. (formerly known as  
CONNECTU, LLC), PACIFIC NORTHWEST  
SOFTWARE, INC., WINSTON WILLIAMS,  
and WAYNE CHANG,

Defendants.

Case No. 5:07-CV-01389-RS

**DEFENDANTS'**

- (I) **RESPONSE TO PLAINTIFFS'**  
**ADMIN. MOTION TO**  
**CORRECT/STRIKE (Dkt. No. 657);**  
**and**  
(II) **RESPONSE TO PLAINTIFFS'**  
**ADMIN. REQUEST FOR**  
**CLARIFICATION (Dkt. No. 659).**

1           **I. DEFENDANTS' RESPONSE TO MOTION TO CORRECT/STRIKE**

2           On Monday evening, November 10, 2008, Plaintiffs filed an administrative motion  
3 (Dkt. No. 657) that asked the Court to strike the reference to the ConnectU Founders in the  
4 following sentence from the Court's November 3 Order:

5                       On June 25, 2008, over objections by ConnectU and the Founders  
6                       (collectively, "ConnectU"), the Court granted the motion to enforce  
7                       the Agreement.

8           *Id.* (citing November 3 Order (Dkt. No. 653)). But the reference to the Founders should not  
9 be stricken because it properly describes the record and the Court's prior findings.

10          The Court has previously found that "Counsel for the ConnectU Founders made an  
11 appearance" at the June 25 hearing on the motion to enforce and that "like ConnectU, Inc.,  
12 the ConnectU Founders are parties for purposes of proceedings to enforce the Settlement  
13 Agreement."<sup>1</sup> At the July 2, 2008, show cause hearing, the Court recognized that "ConnectU  
14 and others" (with "others" being understood to include the ConnectU Founders) were not  
15 "waiving *your objection to my Order in the first place.*" See Declaration of Evan A. Parke  
16 ("Parke Decl.") at Exhibit A (transcript excerpts) at 26:5-14 (emphasis added). In response,  
17 counsel for ConnectU and the Founders stated "That is correct." *Id.* Because the Court's  
18 statement in its November 3 Order accurately reflects the record, the Court should deny  
19 Plaintiffs' administrative motion to correct/strike.

20           **II. DEFENDANTS' RESPONSE TO MOTION TO CLARIFY**

21          The Court's November 3 Judgment requires Facebook's counsel to hold the  
22 ConnectU stock "in trust for its clients and any lawful claimant," just as it requires  
23 ConnectU's counsel to hold Facebook's stock and cash settlement consideration "in trust for  
24 its clients and any lawful claimant." See November 3 Judgment (Dkt. No. 654) at 1-2. On  
25 Monday evening, November 10, Facebook filed a second administrative motion asking the  
26 Court to "clarify" that the ConnectU Founders are not "lawful claimants." (Dkt. No. 659).

27          <sup>1</sup> See Order Denying Motion to Intervene; Denying ConnectU's Motion to Stay Execution  
28 of Judgment (Dkt. No. 610) at 4, ll.13-15.

1 This request should be denied. The Judgment is unambiguous and needs no “clarification.”  
 2 The ConnectU Founders are indeed lawful claimants to the ConnectU stock. To the extent  
 3 that Facebook alternatively asks the Court to modify its Judgment, that request should be  
 4 denied as well.

5 Black’s Law Dictionary defines “claimant” as “[o]ne who asserts a right or demand.”  
 6 BLACK’S LAW DICTIONARY (West 2004). Courts commonly rely on this definition in  
 7 determining whether various parties or entities are, in fact, “claimants.” *See, e.g., In re*  
 8 *Matter of Magone*, 892 P.2d 540, 543 (Mon. 1995) (relying on “everyday meaning[]” of  
 9 “claimant” in Black’s Law Dictionary to reverse district court’s ruling that person was not a  
 10 “claimant”); *State v. Mark Marks, P.A.*, 654 So. 2d 1184, 1193 (Ct. App. Fla. 1995) (relying  
 11 on Black’s Law Dictionary to find that a third-party injured by another was a “claimant”).  
 12 Similarly, Black’s Law Dictionary defines “lawful” as “permitted by law.” BLACK’S LAW  
 13 DICTIONARY (West 2004).

14 The Founders satisfy these common-sense, common-usage definitions. The Founders  
 15 have lawfully asserted, and continue to lawfully assert, their right to return of the ConnectU  
 16 stock that they were required to turn over to the Special Master. The Founders have properly  
 17 asserted that right before this Court and the Court of Appeals, where the Founders have  
 18 already filed their opening appeal brief. *See Ctr. for Int’l Envtl. Law v. Office of the United*  
 19 *States Tr. Rep.*, 240 F. Supp. 2d 21, 22-23 (D.D.C. 2003) (parties have the “basic right to  
 20 appeal”). Indeed, the Court has held that the Founders may appeal its prior orders and  
 21 judgments,<sup>2</sup> underscoring that their appellate claims, like their claims before this Court, are  
 22 “permitted by law” and therefore “lawful.” *See* FED. R. APP. P. 3(a)(1) (“[a]n appeal  
 23 *permitted by law as of right* from a district court to a court of appeals may be taken only be  
 24 filing a notice of appeal”) (emphasis added). If the Founders prevail on appeal, their

25 \_\_\_\_\_  
 26 <sup>2</sup> *See* Ex. D to Parke Decl. at 47:6-8 (“I have to put the opposing party to my judgment in  
 27 a position so they can challenge my judgment”), 46:18-19 (“I won’t deny the right to  
 28 appeal”). *See* Dkt. No. 610 at 5 (Founders had a right to “appeal that Judgment”).

1 ConnectU stock *must* be returned to them. *See Caldwell v. Puget Sound Elec. Apprenticeship*  
 2 *Trust*, 824 F.2d 765, 767 (9th Cir. 1987) (“The right to recover what one has lost by the  
 3 enforcement of a judgment subsequently reversed is well established.”) (quoting *Baltimore*  
 4 *and Ohio R.R. v. United States*, 279 U.S. 781, 786 (1929)).

5 Facebook also asks the Court to “clarify” what it means to hold property in trust for  
 6 another. (Dkt. No. 659, at 2-3). Facebook’s request is unnecessary. Black’s Law Dictionary  
 7 explains that a “trust” is “[t]he right...to the beneficial enjoyment of property to which  
 8 another person holds the legal title.” BLACK’S LAW DICTIONARY (2004). Similarly, the  
 9 Restatement (Second) of Trusts provides

10 [A] trust involves three elements, namely, (1) a trustee, who holds the  
 11 trust property and is subject to equitable duties to deal with it for the  
 12 benefit of another; (2) a beneficiary, to whom the trustee owes  
 equitable duties to deal with the trust property for his benefit; (3) trust  
 property, which is held by the trustee for the beneficiary.

13 Restatement (Second) of Trusts § 2 cmt. h (1959). Law firms—no doubt including  
 14 Facebook’s firm—routinely hold funds and other property in trust. The prerequisites for a  
 15 “trust” are clearly met in this case. Accordingly, it is appropriate for Facebook’s counsel to  
 16 hold the ConnectU property in trust for “any lawful claimants,” including the Founders.

17 Facebook also argues that even if ConnectU’s counsel must hold cash and Facebook’s  
 18 stock in trust for the Founders’ prior counsel (Quinn Emanuel), Facebook’s counsel need not  
 19 hold the ConnectU stock in trust for the Founders. Facebook claims that the Quinn Emanuel  
 20 contractual lien should result in non-reciprocal obligations. Facebook is wrong. In *both*  
 21 situations, the evident purpose of the trust is to preserve the integrity of assets until the  
 22 claimants’ right to the asset is fully adjudicated, in one case by the Ninth Circuit, in the other  
 23 by an arbitration panel. *See Foster v. Hallco Manufacturing Co.*, 835 F. Supp. 1235, 1236  
 24 (D. Ore. 1993) (“It is in the interest of fairness that the money remain in a separate trust until  
 25 resolution of the controversy [on appeal].”). It is the arbitration panel that will decide what –  
 26 if any – amount of cash or stock may be due to Quinn Emanuel. The fact that Quinn  
 27 Emanuel may have a lien does not change the operative facts. Quinn’s “claim” to settlement

proceeds is no more certain than the Founders'. Both are "lawful claimants" who, if they ultimately prevail, may become entitled to property held in trust. Indeed, as the Court stated at oral argument on October 28, Quinn Emanuel's lien has not been adjudicated and there is no way to know if Quinn will recover anything. *See* Ex. E to the Parke Decl. (October 28 hearing tr.) at 51:11-13 ("The obligation that you're citing [is] of a contractual lien [that] has not been adjudicated as of yet.").

Finally, Facebook suggests that Defendants should be precluded from asserting that they are lawful claimants because, according to Facebook, they did not make that argument after the Special Master originally recommended transferring the ConnectU stock to Facebook. (Dkt. No. 659, at 3, ll. 20-25). Of course Defendants did not make that argument; the Special Master never recommended that Facebook's counsel hold the ConnectU stock "in trust for...any lawful claimant." But Defendants *did* object to the transfer of their stock to Facebook, in compliance with the Court's show cause order. (Dkt. No. 637). The Court considered the parties' respective arguments and ordered Facebook's counsel to hold the stock in trust for Facebook and all lawful claimants.

#### REQUEST TO RESTORE TIMELINE FOR SEEKING EMERGENCY APPELLATE RELIEF

The Court's November 3 Order and Judgment directed the Special Master not to implement the Judgment until November 24, 2008, so that ConnectU and the Founders would have sufficient time to file (and the Court of Appeals sufficient time to rule on) a motion or petition for appellate relief.<sup>3</sup> The November 3 Judgment provided that Facebook's counsel should hold the ConnectU stock "in trust...for any lawful claimant." On the morning of Thursday, November 6, Defendants' counsel emailed a letter to counsel for Facebook to confirm that they would hold the ConnectU stock in trust for Facebook and the Founders. To avoid delay, a response was requested by noon on Friday, November 7. *See* Ex. B to the Parke Decl. Facebook's counsel, however, did not answer until Monday,

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<sup>3</sup> *See* November 3 Order (Dkt. No. 653) at 6; November 3 Judgment (Dkt. No. 654) at 1.

1 November 10, stating that they did not consider ConnectU Founders to be “lawful claimants”  
2 for whom counsel would hold the ConnectU stock in trust; and that Facebook would move  
3 for clarification of the Judgment in this regard. Ex. C to the Parke Decl.

4 If the Court denies Facebook’s clarification motion and rules that Facebook’s counsel  
5 must hold the ConnectU stock in trust for the Founders as “lawful claimants,” Defendants  
6 would not expect to seek emergency relief through motion or petition for mandamus, but  
7 would raise any issues through the normal appellate process.<sup>4</sup>

8 However, if the Court alters its Judgment and rules that Facebook’s counsel need not  
9 hold the ConnectU stock in trust for Facebook and the Founders, Defendants intend to seek  
10 immediate appellate relief. They therefore respectfully request that the Court grant an  
11 additional 21 days from the date of its ruling on Facebook’s administrative request to allow  
12 time for such proceedings.

### 13 CONCLUSION

14 Defendants request that the Court deny Facebook’s two administrative motions. If  
15 the Court rules that Facebook’s counsel need not hold the ConnectU stock in trust for  
16 Facebook and the Founders, Defendants respectfully request that the Court grant an  
17 additional 21 days from the date of its ruling to restore the time provided in the November 3  
18 Judgment for seeking immediate appellate relief.

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27 <sup>4</sup> Defendants maintain their objection to the filing of dismissals in the Massachusetts action  
28 and reserve the right to seek relief from any dismissal of their claims.



November 14, 2008

Respectfully submitted,

/s/Steven C. Holtzman

Steven C. Holtzman

BOIES, SCHILLER & FLEXNER LLP

*Attorneys for Defendants' ConnectU, Inc.,  
Cameron Winklevoss, Tyler Winklevoss,  
and Divya Narendra,*

/s/Sean F. O'Shea

Sean F. O'Shea

O'SHEA PARTNERS LLP

*Attorneys for Individual Defendants  
Cameron Winklevoss, Tyler Winklevoss &  
Divya Narendra*

**CERTIFICATE OF SERVICE**

I hereby certify that this document(s) 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 non-registered participants on November 14, 2008.

Dated: November 14, 2008

/s/ Steven C. Holtzman

Steven C. Holtzman

Attorneys for Defendants' ConnectU, Inc.,  
Cameron Winklevoss, Tyler Winklevoss, and  
Divya Narendra.