

SCANNED BY SS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORIGINAL

THE FACEBOOK, INC., et al.,
Plaintiffs-Appellees-Cross-Appellants,

v.

CONNECTU, INC. (formerly known as CONNECTU LLC), CAMERON
WINKLEVOSS, TYLER WINKLEVOSS, DIVYA NARENDRA,
Defendants-Appellants-Cross-Appellees,

Appeal from the United States District Court Northern District of California,
Case No. CV 07-01389-JW, The Honorable James Ware

**DECLARATION OF THERESA A. SUTTON IN SUPPORT OF
APPELLEES/CROSS-APPELLANTS FACEBOOK, INC. AND MARK
ZUCKERBERG'S MOTION TO DISMISS**

RECEIVED
OFFICE OF THE CLERK
U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT
SAN FRANCISCO, CA
DEC 16 2008
FILED
DELETED
DATE
ORIGINAL

**VOLUME 2 of 2
(EXHIBITS K - U)**

I. NEEL CHATTERJEE (STATE BAR NO. 173985)
WARRINGTON S. PARKER, III (STATE BAR NO. 148003)
MONTE COOPER (STATE BAR NO. 196746)
THERESA A. SUTTON (STATE BAR NO. 211857)
YVONNE P. GREER (STATE BAR NO. 214072)
ORRICK, HERRINGTON & SUTCLIFFE LLP

1000 Marsh Road
Menlo Park, CA 94025
Telephone: 650-614-7400
Facsimile: 650-614-7401

Attorneys for Appellees/Cross-Appellants Facebook, Inc. and Mark Zuckerberg

I, Theresa A. Sutton, declare as follows:

1. I am an Associate with the law firm of Orrick, Herrington & Sutcliffe LLP, counsel for Facebook, Inc. and Mark Zuckerberg. I am a member of the State Bar of California and the Ninth Circuit. I make this declaration in support of Appellees-Cross-Appellants' Motion to Dismiss. I make this declaration of my own personal knowledge and, if called as a witness, I could and would testify competently to the truth of the matters set forth herein.

2. Attached hereto as **Exhibit K** is a true and correct copy of the parties' February 23, 2008, Term Sheet and Settlement Agreement. This version has been redacted as indicated on the document.

3. Attached hereto as **Exhibit L** is a true and correct copy of the June 25, 2008, Order Granting Plaintiffs' Confidential Motion To Enforce The Settlement Agreement in Case No. CV-07-01389-JW (N. D. Cal.). 24, 2008, Proof of Service in *ConnectU, Inc., et al. v. Facebook, Inc., et al.*, Case No. 07-cv-10593 (DPW)(District of Massachusetts).

4. Attached hereto as **Exhibit N** is a true and correct copy of the April 23, 2008, Proof of Service in Case No. CV-07-01389-JW (N. D. Cal.).

5. Attached hereto as **Exhibit O** is a true and correct copy of excerpts from the June 2, 2008, Hearing Transcript from ConnectU's Emergency Motion in

ConnectU, Inc., et al. v. Facebook, Inc., et al., Case No. 07-cv-10593 (DPW)

(District of Massachusetts).

6. Attached hereto as **Exhibit P** is a true and correct copy of the July 2, 2008, Judgment Enforcing Settlement Agreement.

7. Attached hereto as **Exhibit Q** is a true and correct copy of the July 29, 2008, Notice Of Motion And Motion To Intervene By Cameron Winklevoss, Tyler Winklevoss And Divya Narendra.

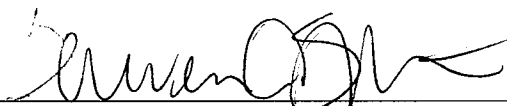
8. Attached hereto as **Exhibit R** is a true and correct copy of the August 8, 2008, Order Denying The ConnectU Founders' Motion To Intervene; Denying ConnectU's Motion To Stay Execution Of Judgment.

9. Attached hereto as **Exhibit S** is a true and correct copy of ConnectU's July 30, 2008, Notice of Appeal.

10. Attached hereto as **Exhibit T** is a true and correct copy of the August 11, 2008, Notice of Appeal by Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra.

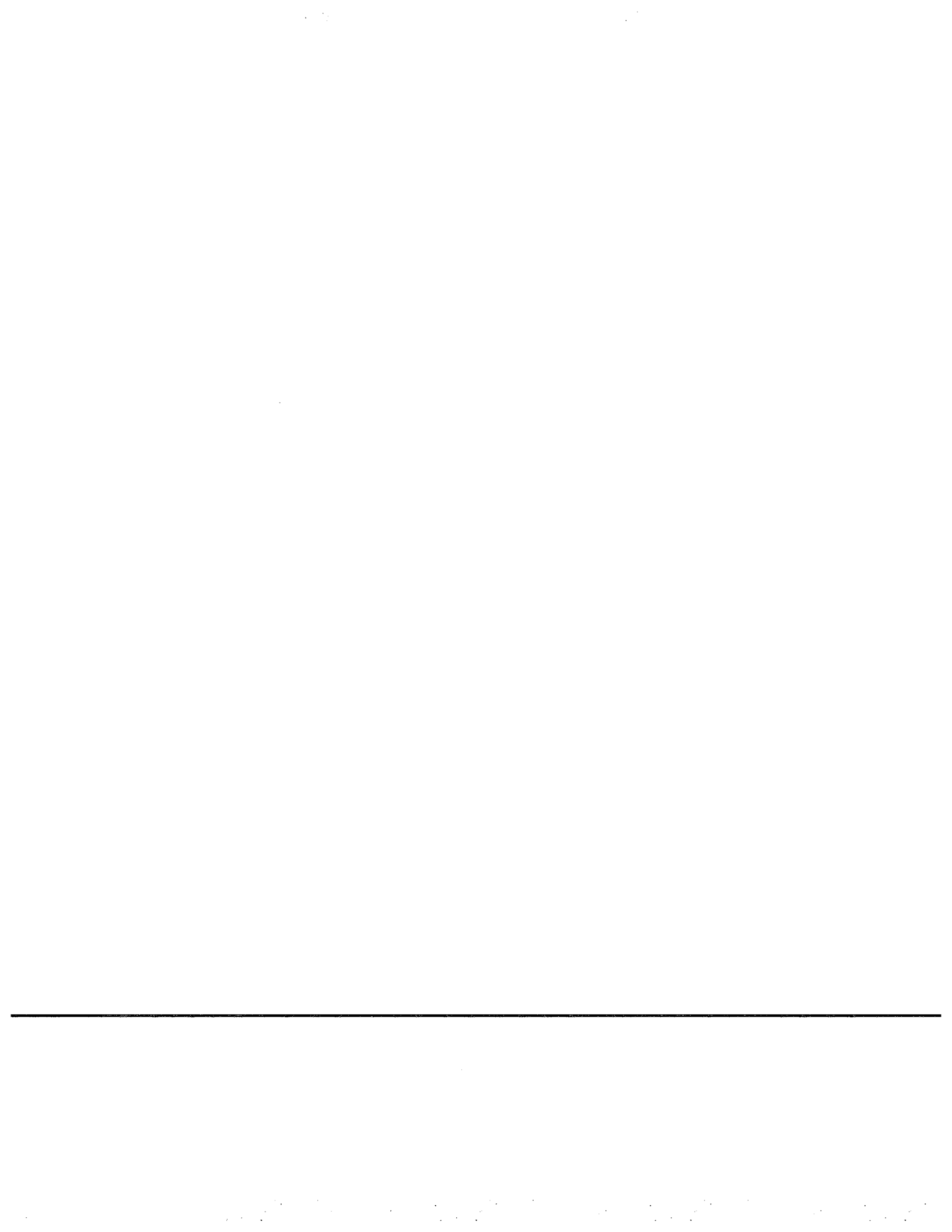
11. Attached hereto as **Exhibit U** is a true and correct copy of the Founders' December 19, 2008, [Second] Notice of Appeal.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 18th day of February 2009, at Menlo Park, California.



Theresa A. Sutton

EXHIBIT K



Term Sheet & Settlement Agreement

- 1) The following will settle all disputes between Connect U and its related parties, on the one hand and Facebook and its related parties, on the other hand.
- 2) All parties get mutual releases as broad as possible and all cases are dismissed with prejudice. Each side bears their own attorneys fees and costs.
- 3) All terms of agreement are confidential, no party disparages any other parties and no party will comment further publicly related to facts underlying or related to this dispute. The parties will agree on any public statements. A violation of the publicity and confidentiality provision of this paragraph shall be submitted to a binding arbitrator who may award injunctive relief and damages up to [REDACTED] million. Redacted
- ~~4) This Agreement is subject to the continuing enforcement of the court in San Jose in the current actions.~~
- 4) The parties stipulate that the San Jose Federal court shall have jurisdiction to enforce this agreement.
- 5) The parties agree that they ^{may} execute more formal documents but these terms are binding and ^{this document} may be submitted into evidence to enforce this agreement.
- 6) Connect U founders represent and warrant (1) they have no further right to assert against Facebook (2) they have no further claims against Facebook & its related parties. Redacted
- 7) All connect U stock in exchange for [REDACTED] cash & [REDACTED] common shares in Facebook. The terms of the shares shall include a requirement that all votes related to the

Redacted

(1)

* consistent with a lock and cash for stock acquisition.

shares will be voted in accordance with the Board of Director's recommendations and be subject to the same anti-dilution protections afforded to Series D preferred stock. ~~Facebook~~ Facebook will determine the form & documentation of the acquisition of Connect U's shares. Facebook represents that it currently has [REDACTED] fully diluted shares outstanding.

Redacted

MR Z
Facebook, Inc.

[Signature]
Connect U, Inc.

MR Z
Mark Zuckerberg

[Signature]
Cameron Winklevoss

[Signature]
Tyler Winklevoss

[Signature]
Divya Narendra

EXHIBIT L

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

The Facebook, Inc., et al.,
Plaintiffs,
v.
ConnectU, Inc., et al.,
Defendants.

NO. C 07-01389 JW

**ORDER GRANTING PLAINTIFFS’
CONFIDENTIAL MOTION TO ENFORCE
THE SETTLEMENT AGREEMENT**

I. INTRODUCTION

Plaintiffs in this lawsuit are The Facebook Inc. and Mark Zuckerberg (collectively, “Facebook”). Plaintiffs bring this action against ConnectU, Inc., Pacific Northwest Software, Inc., Winston Williams, and Wayne Chang (collectively, “Defendants”) alleging, *inter alia*, misappropriation of trade secrets, unfair competition, and violations of 18 U.S.C. § 1030, *et seq.* In essence, Facebook alleges that ConnectU gained unauthorized access to Facebook’s servers and website and took information for its own unlawful use. The parties are engaged in at least two other lawsuits over these matters; in those cases, ConnectU is the Plaintiff and Facebook is the Defendant.

In the course of this lawsuit, the parties engaged in private mediation. On February 22, 2008, as the result of the mediation, the parties signed a written “Term Sheet & Settlement Agreement.” In the Agreement, the parties agreed to resolve all of their disputes and to dismiss the pending lawsuits. The Agreement provides that they “may execute more formal documents but these terms are binding.” After signing the Agreement, the parties attempted to draft formal

1 documents but failed to reach a consensus on certain terms. In the Agreement, the parties stipulate
2 that the federal court in San Jose, California has jurisdiction to enforce it. Based on a belief that a
3 court order is necessary to enforce the February 22, 2008 Agreement, Facebook filed the present
4 motion in this Court.¹

5 The question for decision by the Court is whether the February 22, 2008 Agreement contains
6 sufficiently definite and essential terms that it may be enforced. For the reasons stated below, the
7 Court finds that the Agreement is enforceable and orders its enforcement.

8 **II. BACKGROUND**

9 As stated above, this action is one of three separate actions between the parties in various
10 federal courts.² On January 22, 2008, United States Magistrate Judge Richard Seeborg ordered the
11 parties to participate in Alternative Dispute Resolution. (Docket Item No. 270.) The parties elected
12 to participate in private mediation.

13 On February 22, 2008, the parties engaged in mediation before Antonio Piazza. Both sides
14 were represented by counsel. As the result of the mediation, the parties signed a handwritten
15 document entitled, "Term Sheet & Settlement Agreement" ("Agreement"). (Second Declaration of
16 Evan A. Parke, Ex. A., hereafter, "Parke Decl.," filed under seal.)

17 With the precise financial terms redacted,³ the Agreement provides, as follows:⁴

18
19 _____
20 ¹ (hereafter, "Motion," Docket Item No. 329, filed under seal.)

21 ² The other actions are ConnectU LLC v. Zuckerberg, Appeal No. 07-1796 (1st Cir.) and
ConnectU, Inc. v. Facebook, Inc., Case No. C 07-10593-DPW (D. Mass.).

22 ³ The Agreement recites that all of its terms are "confidential." At the hearing on the
23 motion, the Court expressed its need to discuss the Agreement in its Order. The Court now
24 determines that it can protect the confidentiality of the Agreement if references to the amount of
25 consideration which the parties agreed to exchange as a part of the settlement are omitted.
Moreover, since neither Facebook nor ConnectU are publicly traded companies at this time, the
Court finds good cause to keep the transcript of the proceedings under seal as requested by the
parties to protect their financial information.

26 ⁴ (Declaration of Theresa A. Sutton in Support of Plaintiffs' Confidential Motion, hereafter,
27 "Sutton Decl.," Ex. A at 1-2, filed under seal.) For authenticity purposes, the Court leaves all
typographical errors and strikeouts in the Agreement unchanged.

The Term Sheet & Settlement Agreement

- 1) The following will settle all disputes between ConnectU and its related parties, on the one hand and Facebook and its related parties, on the other hand.
- 2) All parties get mutual releases as broad as possible and all cases are dismissed with prejudice. Each side bears their own attorneys fees and costs.
- 3) All terms of agreement are confidential, no party disparages any other parties and no party will comment further publicly related to facts underlying or related to this dispute. The parties will agree on any public statements. A violation of the publicity and confidentiality provision of this paragraph shall be submitted to a binding arbitrator who may award injunctive relief and damages up to [REDACTED] million.
- ~~4) This Agreement is subject to the continuing enforcement of the court in San Jose to the current action.⁵~~
- 4) The parties stipulate that the San Jose Federal Court shall have jurisdiction to enforce this agreement.
- 5) The parties agree that they may execute more formal documents but these terms are binding and this document may be submitted into evidence to enforce this agreement.
- 6) ConnectU founders represent and warrant (1) They have no further right to assert against Facebook (2) They have no further claims against Facebook & its related parties.
- 7) All ConnectU stock in exchange for [REDACTED] in cash & [REDACTED] common shares in Facebook. The terms of the shares shall include a requirement that all votes related to the shares will be voted in accordance with the Board of Director's recommendations and be subject to the same anti-dilution protections afforded to Series D preferred stock. ~~The form~~⁶ Facebook will determine the form & documentation of the acquisition of ConnectU's shares [Consistent with a stock and cash for stock acquisition].⁷ Facebook represents that it currently has [REDACTED] fully diluted shares outstanding.

The Agreement was signed by Mark Zuckerberg, individually and on behalf of Facebook, and by Cameron Winklevoss, individually and on behalf of ConnectU. Tyler Winklevoss and Divya Narendra also signed the Agreement. (Sutton Decl., Ex. A at 2.) These individuals are principals of their respective companies.

⁵ Strikeout in the original.

⁶ Strikeout in the original.

⁷ Interlineation in original

1 Plaintiffs' motion to enforce the Agreement is made on the grounds that the Agreement
2 unambiguously sets forth all material terms of the parties' settlement and Defendants should be
3 ordered to comply with it. (Motion at 6.) Defendants contend that Facebook's motion to enforce the
4 Agreement should be denied because (1) the agreement is missing material terms, (2) the terms
5 which are included were not agreed upon, and (3) Facebook committed fraud in the procurement of
6 the Agreement. (ConnectU's Opposition to Facebook's Confidential Motion at 6, hereafter,
7 "Opposition," filed under seal.) In its reply, Plaintiffs contend that the Agreement was not procured
8 by fraud. (Reply in Support of Confidential Motion at 9, hereafter, "Reply," filed under seal.) The
9 Court considers each issue in turn.

10 III. DISCUSSION

11 A. The Court's Jurisdiction

12 Before considering the motion to enforce the Agreement, the Court considers its jurisdiction
13 to act on such a motion. The Court also considers issues raised at the hearing, namely, whether
14 Plaintiffs are required to file an action to enforce the Agreement, to which Defendants would be
15 allowed to plead their objections to enforcement as affirmative defenses.

16 "It is well settled that a district court has the equitable power to enforce summarily an
17 agreement to settle a case pending before it." Callie v. Near, 829 F.2d 888, 890 (9th Cir. 1987);
18 Decaney v. Mendoza, 573 F.2d 1075, 1078 (9th Cir. 1978); TNT Mktg., Inc. v. Agresti, 796 F.2d
19 276, 278 (9th Cir. 1986); In re City Equities Anaheim, Ltd., 22 F.3d 954, 957 (9th Cir. 1994). Once
20 a settlement has been reached in a pending action, any party to the agreement may bring a motion to
21 enforce it. See Doi v. Halekulani Corp., 276 F.3d 1131, 1135 (9th Cir. 2002). Specifically,
22 California law provides:

23 If parties to pending litigation stipulate, in a writing signed by the parties outside the
24 presence of the court or orally before the court, for settlement of the case, or part thereof, the
court, upon motion, may enter judgment pursuant to the terms of the settlement.

25 Cal. Civ. Proc. Code § 664.6. In addition to the statutory power to enter a judgment, the court's
26 enforcement powers include the inherent authority to order a party's specific performance of acts

1 required by the settlement agreement and to award damages or other sanctions for noncompliance.
2 TNT Mktg., 796 F.2d at 278.

3 In this case, in addition to its inherent authority and the authority conferred by California
4 law, in Paragraph 4 of the Agreement, the parties explicitly stipulated that the Court has authority to
5 exercise enforcement. Therefore, the Court is satisfied that it has the jurisdiction and authority to
6 enforce the Agreement without requiring additional pleadings.

7 However, the power to enforce a settlement agreement can only be exercised if the terms
8 have been agreed to by the individuals authorized to make decisions behalf of the parties. See
9 Harrop v. W. Airlines, Inc., 550 F.2d 1143, 1145 (9th Cir. 1977). At the hearing, Defendants raised
10 two issues regarding the authority of the Court to enforce the Agreement against the individuals and
11 the corporations.

12 First, Defendants question whether there is a bases for the Court to exercise personal
13 jurisdiction over ConnectU's individual shareholders, i.e., the three principals who signed the
14 Agreement.⁸ The Court finds that by signing the Agreement with explicit statements such as those
15 in Paragraphs 1, 2, and 4, each of the signatories subjected him or herself to the Court's jurisdiction
16 for the limited purpose of enforcing the Agreement. Second, Defendants question whether
17 ConnectU's individual shareholders received proper notice of the proceedings. The Court finds the
18 three principals of ConnectU have had adequate notice since they are plaintiffs in the Massachusetts
19 action where the parties have vigorously litigated discovery issues relating to the enforcement of this
20 Agreement. (See June 3, 2008, Memorandum and Order, No. 07-10593-DPW, D. Mass.) It is
21 incongruous to argue that these individuals did not receive notice of the motion since Judge
22
23
24

25 ⁸ Defendants first made these contentions in their sur-reply. (Defendants' Sur-Reply in
26 Opposition to Confidential Motion to Enforce, hereafter, "Sur-Reply," Docket Item No. 438.) The
27 Court grants Defendants' motion for leave to file the sur-reply, and considers the contentions raised
in the sur-reply.

1 Woodlocks' June 3, 2008 order in the Massachusetts action specifically addressed the hearing on the
2 motion to enforce the Agreement in this Court.⁹ (Id. at 2.)

3 **B. The Material Terms**

4 The construction and enforcement of settlement agreements are governed by principles of
5 local law that apply to the interpretation of contracts, even if the underlying cause of action is
6 federal. United Commercial Ins. Serv., Inc. v. Paymaster Corp., 962 F.2d 853, 856 (9th Cir. 1992).
7 Thus, challenges to a settlement agreement based on interpretation of ambiguous terms, fraud in the
8 inducement, or indefiniteness of a term all turn on the applicable state law. See White Farm Equip.
9 Co. v. Kupcho, 792 F.2d 526, 529 (5th Cir. 1986); see, e.g., Doi, 276 F.3d at 1135.

10 California has a strong policy in favor of enforcing settlement agreements. Osumi v. Sutton,
11 151 Cal. App. 4th 1355, 1357 (2007). Under California law, a settlement agreement "must be
12 interpreted as to give effect to the mutual intention of the parties as it existed at the time of
13 contracting." Roden v. Bergen Brunswig Corp., 107 Cal. App. 4th 620, 625 (2003); see Cal. Civ.
14 Code, § 1636. When the agreement is in writing, "the intention . . . is to be ascertained from the
15 writing alone, if possible." Brinton v. Bankers Pension Serv., Inc., 76 Cal. App. 4th 550, 559
16 (1999); see Cal. Civ. Code § 1639. "[C]ourts will not set aside contracts for mere subjective
17 misinterpretation." Hedging Concepts, Inc. v. First Alliance Mortgage Co., 41 Cal. App. 4th 1410,
18 1421 (1996). "A settlement agreement, like any other contract, is unenforceable if the parties fail to
19 agree on a material term or if a material term is not reasonably certain." Lindsay v. Lewandowski,
20 139 Cal. App. 4th 1618, 1622 (2006) (citing Weddington Productions, Inc. v. Flick, 60 Cal. App. 4th
21 793, 811 (1998)).

22 First, the Agreement clearly states the consideration for the performance required and how it
23 must be paid. (Sutton Decl., Ex. A at 1-2.) In exchange for a specified amount of cash and stock in
24

25
26 ⁹ At the hearing, counsel for ConnectU's individual shareholders argued that they are not
27 "plaintiffs" in the Massachusetts action. The Court declines to entertain the notion since counsel
admitted that the individual shareholders added themselves as plaintiffs to the amended complaint in
that action.

1 Facebook, ConnectU founders are required under the Agreement to represent and warrant “they
2 have no further right to assert against Facebook” and “they have no further claims against Facebook
3 and its related parties.” (Id.)

4 Second, the Agreement clearly defines the structure of the transaction. (Sutton Decl., Ex. A
5 at 1-2.) Paragraph 7 recites that all ConnectU stock is to be exchanged for a sum certain amount of
6 cash and a precise number of common shares in Facebook; it is a stock and cash for stock
7 acquisition. Subsequent negotiations might have proposed a different structure for the transaction or
8 other additional terms, but those proposal were, apparently, rejected. (Id., Ex. B.) The Court cannot
9 considered subsequent negotiations as evidence that there was no “meeting of the minds” with the
10 respect to the Agreement. The Court must determine the parties’ intent from the four corners of the
11 Agreement, not from the extrinsic evidence. Brinton, 76 Cal. App. 4th at 559; Cal. Civ. Code §
12 1639.

13 Third, the principals of each company, who are persons authorized to make decisions for the
14 parties, all signed the handwritten version of the Agreement and none of the signatures are disputed.
15 However, Defendants point out that one stockholder in ConnectU, Howard Winklevoss, was not a
16 party to, and did not sign the Agreement. (Opposition at 10.) Therefore, the issue becomes whether
17 the lack of Howard Winklevoss’ signature makes the Agreement unenforceable.

18 ConnectU is a Connecticut corporation. (Id. at 1.) Under Connecticut law, a share exchange
19 transaction only needs to be approved by majority vote. See Conn. Gen. Stat. § 33-816(a). As of
20 May 23, 2006, Howard Winklevoss owned 1% of the outstanding shares in ConnectU. (Declaration
21 of Neel Chatterjee in Support of Plaintiffs’ Reply, Ex. B at 10, filed under seal.) There is no
22 evidence his ownership interest changed as of the date of the Agreement. The shareholders who
23 signed the Agreement own 99% of the outstanding shares. Since a majority of ConnectU’s
24 shareholders have agreed to the transaction, the consent of Howard Winklevoss is unnecessary to
25 make the Agreement binding on him. Therefore, the lack of Howard Winklevoss’ signature is not an
26 impediment to enforcing the Agreement.

1 Defendants contend that the Agreement was only a starting point for negotiating more formal
 2 documentation. (Opposition at 7-9.) However, the Agreement itself provides that the parties “*may*
 3 execute more formal documents,” but that the Agreement is “binding.” (Sutton Decl., Ex. A at 1,
 4 emphasis added.) It is significant that the parties used the word “may” in this instance as opposed to
 5 “will,” which they had readily used in other contexts. (See e.g., Agreement ¶¶ 1, 3, 7.) On the face
 6 of the Agreement, it is clear that, had the parties wished to require more formal documents, they
 7 could have indicated they *will* or *shall* execute more formal documents. Instead, they elected to use
 8 the word, “may,” and made clear that the Agreement is binding in and of itself.

9 In sum, the Court finds that the Agreement reached by the parties does not display on its face
 10 a failure to agree or any uncertainty regarding its material terms. Accordingly, the Court finds that
 11 the Agreement is enforceable.

12 **C. Whether the Agreement Was Procured by Fraud**

13 Defendants contend that Facebook’s motion to enforce the Agreement should be denied
 14 because Plaintiffs fraudulently procured the Agreement by misrepresenting Facebook’s present
 15 value. (Opposition at 14.)

16 A contract is not enforceable if it was induced by fraud. Jones v. Grieve, 15 Cal. App. 561,
 17 566-67 (1911). To prove fraud in the inducement of a contract, a party must establish the elements
 18 of common law fraud. Id. The elements of fraud are (1) misrepresentation; (2) scienter; (3)
 19 justifiable reliance; and (4) resulting damage. Buckland v. Threshold Enterprises, Ltd., 155 Cal.
 20 App. 4th 798, 806-07 (2007); Wilke v. Coinway, Inc., 257 Cal. App. 2d 126, 136 (1967) (quoting
 21 Cortez v. Weymouth, 235 Cal. App. 2d 140 (1965)). These legal principles apply to a contract to
 22 settle a lawsuit. See Merced County Mut. Fire Ins. Co. v. The State of California, 233 Cal. App. 3d
 23 765, 771 (1991).

24 Where a party is represented by counsel, or where the alleged misrepresentation was made
 25 by an adversary during the course of negotiations, courts have held that reliance is unjustifiable. See
 26 Scognamill v. Credit Suisse First Boston LLC, 2005 WL 2045807 (N.D. Cal. 2005) (holding as a
 27

1 matter of law that reliance on representation of adversary in execution of merger agreement was
2 unjustifiable where parties were represented by counsel during the negotiation process); Wilhelm v.
3 Pray, Price, Williams & Russell, 186 Cal. App. 3d 1324 (1986) (holding that the fraud claim failed
4 because plaintiff was represented by counsel at the time of the allegedly fraudulent statement, and it
5 was not “reasonable for plaintiff to accept defendant’s statements without an independent inquiry or
6 investigation”).

7 **1. ConnectU’s Proffer Regarding Facebook’s Valuation**

8 Defendants contend that they were defrauded during the settlement negotiations because
9 Plaintiffs did not disclose a valuation of Facebook common stock which had been made by the
10 Facebook Board of Directors. (Opposition at 6.)

11 Apparently, in October 2007, Facebook and Microsoft issued a press release stating
12 Microsoft would “take a \$240 million stake in Facebook’s next round of financing at a \$15 billion
13 valuation.” (Parke Decl., Ex. J.) Defendants proffer evidence that subsequent to the press release,
14 in the regular course of its operations, Facebook’s Board of Directors determined a value of the
15 company’s “shares” which was different than the valuation disclosed in the press release.
16 (Declaration of Robert T. Clarkson ¶ 11, filed under seal.)

17 Defendants do not challenge the accuracy of the press release itself. Thus, there is no claim
18 that the statement in the release was not true when it was made. (Declaration of Ted Wang in
19 Support of Plaintiffs’ Confidential Motion ¶ 2, filed under seal.) Plaintiffs do not deny that the
20 Facebook Board of Directors made a subsequent valuation of Facebook shares which was a different
21 value from the value Microsoft attributed to the company. However, Plaintiffs did not make any
22 representations or warranties in the Agreement about the value of Facebook common stock.¹⁰

24 ¹⁰ Defendants provide no authority to support their contention that either Facebook or
25 Zuckerberg had a duty to disclose the Board’s valuation to Defendants in the context of the
26 settlement or to correct any subjective valuation which Defendants might have made when
27 determining what demand to make in the mediation. It is clear that generally one has a duty to
28 correct a disclosure which is misleading when made, but usually, there is no duty to a correct
statement which is true at the time it is made. See Brody v. Transitional Hospitals Corp., 280 F.3d
997, 1006 (9th Cir. 2002); Backman v. Polaroid Corp., 910 F.2d 10, 17 (1st Cir. 1990). Intentional

1 Moreover, it is undisputed that the shares the parties agreed to exchange in the Agreement and the
2 shares involved in the Microsoft's transaction are of different classes. Accordingly, the failure to
3 disclose the difference in the valuations cannot be fraudulent as a matter of law.

4 Further, the Agreement does not attribute a specific value to the outstanding shares of
5 Facebook's stock; there is no admissible evidence that Plaintiffs made any such representation while
6 negotiating the settlement.¹¹ Rather, the only representation evident from the Agreement is the
7 number of fully diluted shares which Facebook currently has outstanding. (Parke Decl., Ex. A.)
8 Defendants have failed to show that this representation was false or that there were any other
9 misrepresentations made by Plaintiffs upon which Defendants could have justifiably relied.

10 In sum, the Court finds Defendants have failed to establish that Plaintiffs made a
11 misrepresentation during the negotiation. The individual signatories to the Agreement are
12 sophisticated business parties who were represented by reputable counsel at the mediation. Either
13 party could have chosen to condition the financial exchange being negotiated on representations and
14 warranties of the value of the stock involved or to conduct their own due diligence with respect to
15 Facebook's valuation. Neither party chose these courses of conduct. Notably, in his June 3, 2008
16 order denying ConnectU's motion to compel production of documents, Judge Woodlock stated:

17 From all that appears, the parties were prepared to settle their disputes then, despite the fact
18 that aspects of discovery in this case—most pertinently for present purposes, document
production—had not been completed and unresolved discovery issues remained outstanding.

19 (See June 3, 2008, Memorandum and Order at 2, No. 07-10593-DPW, D. Mass.) Thus, the parties
20 elected to proceed with their settlement negotiations knowing they lacked potentially relevant

21 _____
22 concealment exists only "when a party to a transaction, who is under no duty to speak, nevertheless
23 does speak and suppresses facts which materially qualify the facts stated." Persson v. Smart
Inventions, Inc., 125 Cal. App. 4th 1141, 1164 (2005).

24 ¹¹ Defendants proffer evidence of statements made during mediation that resulted in the
25 Agreement. Under ADR Local Rule 6-11, "anything that happened or was said, any position taken,
26 and any view of the merits of the case formed by any participant in connection with any mediation
... shall not be ... (2) disclosed to the assigned judge; or (3) used for any purpose, including
impeachment, in any pending or future proceeding in this court." Pursuant to this privilege, the
27 Court declines to conduct a hearing or consider evidence regarding the details of the parties'
negotiations in their mediation.

1 information. Without a showing by Defendants of a material misrepresentation or omission in the
2 negotiations, the Court finds no basis to decline enforcement.

3 **2. Securities Fraud**

4 In their opposition and sur-reply, Defendants contend that the Agreement is not enforceable
5 because Plaintiffs committed securities fraud, making the Agreement voidable. (Opposition at 14;
6 Sur-Reply at 7.)

7 Neither Plaintiffs nor Defendants have cited authority that an agreement to exchange shares
8 of closely held corporations pursuant to settlement of litigation between the companies is voidable
9 by showing securities fraud. The cases which Defendants cite in their sur-reply regarding a duty to
10 disclose "material non-public information" all fall within the context of insider trading, which is not
11 an issue in this case. (Sur-Reply at 10.)

12 On June 24, 2008, the day after the hearing, Defendants requested leave to file additional
13 authority to provide precedent for voiding a purported settlement agreement on the basis of
14 securities fraud.¹² While Defendants cite one case where a settlement was found void under § 29 of
15 the Securities Exchange Act, that case involved an agreement which violated the margin
16 requirements of Regulation T because the defendant failed to recover capital after the settlement.
17 Pearlstein v. Scudder and German, 429 F.2d 1136, 1142-43 (2d Cir. 1970). Contrary to Pearlstein,
18 the Ninth Circuit has held that a broad release in a signed settlement agreement operates to prevent a
19 party from collaterally attacking the agreement by alleging it violates the securities laws under § 29.
20 Petro-Ventures, Inc. v. Takessian, 967 F.2d 1337 (9th Cir. 1992). Specifically, the Ninth Circuit
21 noted:

22 [w]hen, as here, a release is signed in a commercial context by parties in a roughly
23 equivalent bargaining position and with ready access to counsel, the general rule is that, if
24 'the language of the release is clear, . . . the intent of the parties [is] indicated by the language
25 employed.'

26 ¹² (See Docket Item No. 454.) While Plaintiffs have not had an opportunity to respond, the
27 Court finds good cause to grant Defendants leave and considers the authority presented in
28 Defendants' papers.

1 Id. at 1342 (quoting Locafrance U.S. Corp. v. Intermodal Sys. Leasing, Inc., 558 F.2d 1113, 1115
2 (2d Cir. 1977)). Thus, in Petro-Ventures, the Ninth Circuit effectuated the parties' intent to bring
3 about "general peace" by finding that their settlement agreement cannot be voided under § 29. Id.

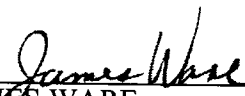
4 As in Petro-Ventures, this case involves a settlement agreement reached by the parties, who
5 were represented by counsel, in which they intended to undertake to give mutual releases that were
6 "as broad as possible." (Agreement ¶ 2.) There is no doubt that the language of the release in
7 Paragraph 2 of the Agreement conveys the intent of the parties to release all claims. Thus, the
8 Agreement cannot be collaterally attacked using § 29.

9 Accordingly, the Court finds that Defendants have failed to tender sufficient evidence of
10 fraud in the circumstances proffered to the Court to create a genuine dispute as to whether the
11 Agreement was fraudulently induced.

12 **V. CONCLUSION**

13 The Court GRANTS Plaintiffs' Motion to Enforce the Parties' Settlement Agreement. The
14 parties are ordered to appear on **July 2, 2008 at 10 a.m.** to show cause why a judgment should not
15 be entered ordering the parties to take the actions required of them by the Settlement Agreement.
16 On or before **June 30, 2008**, the parties are directed to submit a proposed form of judgment
17 consistent with this Order.

18
19 Dated: June 25, 2008

20 
21 _____
22 JAMES WARE
23 United States District Judge
24
25
26
27

United States District Court
For the Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

- Chester Wren-Ming Day cday@orrick.com
- D. Michael Underhill MUnderhill@BSFLLP.com
- David A. Barrett dbarrett@bsflfp.com
- Evan A. Parke eparke@bsflfp.com
- George Hopkins Guy hopguy@orrick.com
- I. Neel Chatterjee nchatterjee@orrick.com
- Jonathan M. Shaw jshaw@bsflfp.com
- Kalama M. Lui-Kwan klui-kwan@fenwick.com
- Monte M.F. Cooper mcooper@orrick.com
- Scott Richard Mosko scott.mosko@finnegan.com
- Sean Alan Lincoln slincoln@orrick.com
- Steven Christopher Holtzman sholtzman@bsflfp.com
- Theresa Ann Sutton tsutton@orrick.com
- Tyler Alexander Baker Tbaker@fenwick.com
- Valerie Margo Wagner valerie.wagner@dechert.com
- Yvonne Penas Greer ygreer@orrick.com

Dated: June 25, 2008

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy

EXHIBIT M

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

Plaintiff,

v.

FACEBOOK, INC., MARK ZUCKERBERG,
EDUARDO SAVERIN, DUSTIN
MOSKOVITZ, ANDREW MCCOLLUM, and
FACEBOOK, LLC,

Defendants.

Civil Action No. 1:07-CV-10593-DPW

PROOF OF SERVICE

PROOF OF SERVICE

I am more than eighteen years old and not a party to this action. My place of employment and business address is 1000 Marsh Road, Menlo Park, CA 94025.

On **April 24, 2008**, I delivered to the below listed individuals the following document(s):

1. CONFIDENTIAL NOTICE OF FILING OF MOTION (Document Submitted Under Seal)

	By transmitting via facsimile the document(s) listed above to the fax number(s) set forth below before 5:00 p.m. on April 24, 2008 .
	By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Menlo Park, California addressed as set forth below on April 24, 2008 .
	By causing personal delivery by WESTERN MESSENGER of the document(s) listed above to the person(s) at the address(es) set forth below.
X	By placing a true and correct copy of the document(s) in a Federal Express envelope addressed as set forth below and then sealing the envelope, affixing a pre-paid Federal Express air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.

ATTORNEYS FOR PLAINTIFF CONNECTU

John F. Hornick, Esq.
Meredith H. Schoenfeld, Esq.
Margaret A. Esquenet, Esq.
Daniel P. Kaufman, Esq.
 Finnegan, Henderson, Farabow, Garrett &
 Dunner, LLP
 901 New York Ave.
 Washington, D.C. 20001
 Telephone: (202) 408-4000
Facsimile: (202) 408-4400
 Email: john.hornick@finnegan.com
 meredith.schoenfeld@finnegan.com
 margaret.esquenet@finnegan.com
 daniel.kaufman@finnegan.com

Daniel P. Tighe, Esq.
Scott McConchie, Esq.
 Griesinger, Tighe & Maffei, LLP
 176 Federal Street
 Boston, MA 02110
 Telephone: (617) 542-9900
Facsimile: (617) 542-0900
 Email: dtighe@gtmllp.com
 sm@gtmllp.com

ATTORNEYS FOR DEFENDANT EDUARDO SAVERIN


Robert B. Hawk, Esq.
Heller Ehrman, LLP
275 Middlefield Road
Menlo Park, CA 94025
Telephone: (650) 324-7000
Facsimile: (650) 324-0638
Email: robert.hawk@hellerehrman.com

Annette Hurst, Esq.
Nathan E Shafroth, Esq.
Heller Ehrman, LLP
333 Bush Street
San Francisco, CA 94104
Telephone: (415) 772-6000
Facsimile: (415) 772-6268
Email: annette.hurst@hellerehrman.com
nathan.shafroth@hellerehrman.com

Bhanu Sadasivan, Esq.
Heller Ehrman LLP
275 Middlefield Road
Menlo Park, CA 94025
Telephone: (650) 324-7169
Facsimile: (650) 324-6074
Email: bhanu.sadasivan@hellerehrman.com

Daniel K. Hampton, Esq.
Gordon P. Katz, Esq.
Holland & Knight, LLP
10 St. James Avenue, 11th Floor
Boston, MA 02116
Telephone: (617) 523-2700
Facsimile: (617) 523-6850
Email: dan.hampton@hklaw.com
gordon.katz@hklaw.com

Executed on **April 24, 2008**, at Menlo Park, California. I declare under penalty of perjury that the foregoing is true and correct.



Abby Ako Nai

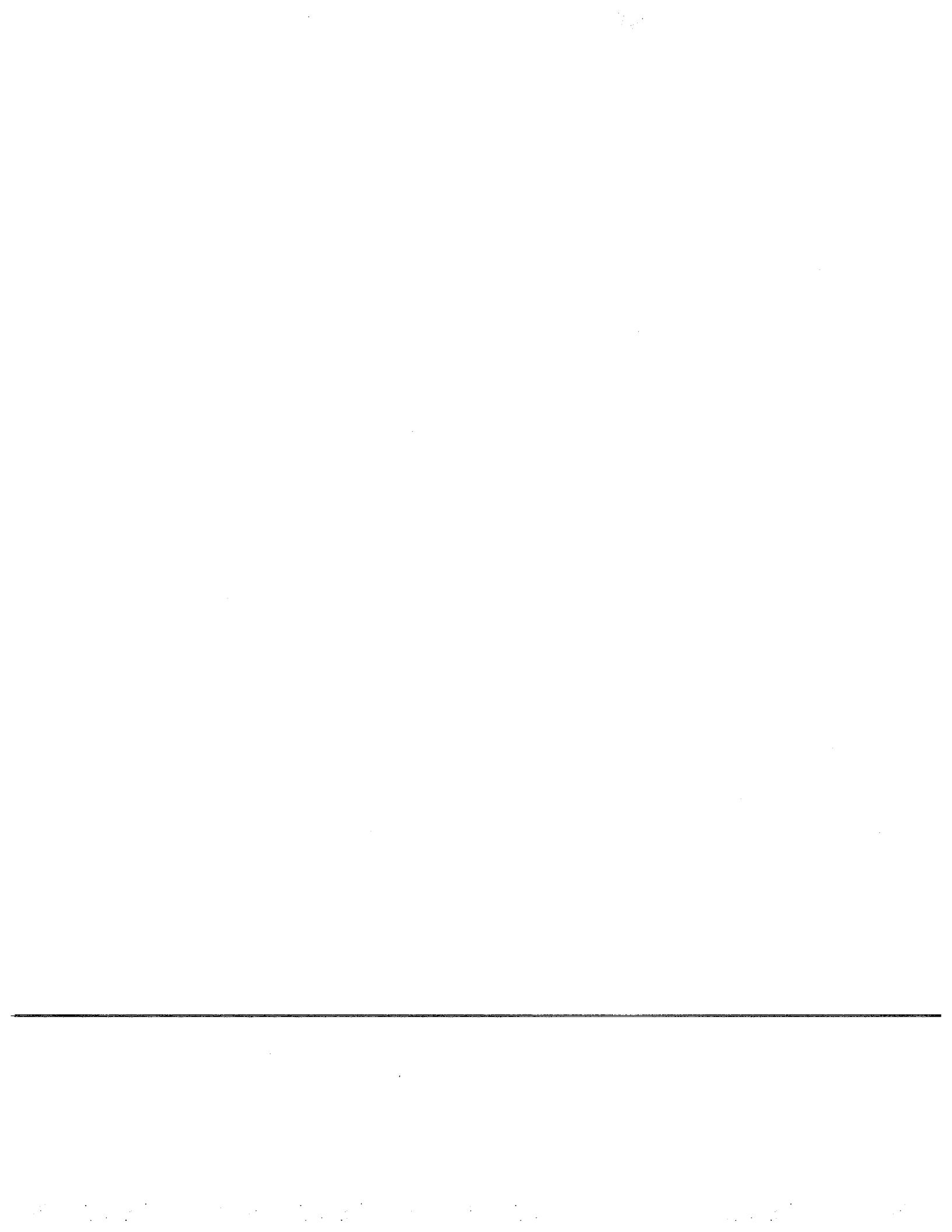


EXHIBIT N

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
 THE FACEBOOK, INC. and MARK ZUCKERBERG
 10

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

15 THE FACEBOOK, INC. and MARK
 ZUCKERBERG,

16 Plaintiffs,
 17

18 v.
 19

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

22 Defendants.
 23
 24
 25
 26

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

PROOF OF SERVICE

**VIA FEDERAL EXPRESS AND/OR
 HAND DELIVERY***

PROOF OF SERVICE

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action. On April 23, 2008, I served the within document(s):

1. **FACEBOOK, INC. AND MARK ZUCKERBERG'S CONFIDENTIAL MOTION WITH [PROPOSED] ORDER GRANTING CONFIDENTIAL MOTION;**
2. **DECLARATION OF GREG ROUSSEL IN SUPPORT OF FACEBOOK, INC. AND MARK ZUCKERBERG'S CONFIDENTIAL MOTION (EXHIBITS ATTACHED);**
3. **DECLARATION OF MARK HOWITSON IN SUPPORT OF FACEBOOK, INC. AND MARK ZUCKERBERG'S CONFIDENTIAL MOTION;**
4. **DECLARATION OF THERESA A. SUTTON IN SUPPORT OF FACEBOOK, INC. AND MARK ZUCKERBERG'S CONFIDENTIAL MOTION (EXHIBITS ATTACHED).**

	By transmitting via facsimile the document(s) listed above to the fax number(s) set forth below before 5:30 p.m. on April 23, 2008.
	By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Menlo Park, California addressed as set forth below on August 9, 2007.
X	By placing a true and correct copy of the document(s) in a Federal Express envelope addressed as set forth below and then sealing the envelope, affixing a pre-paid Federal Express air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.
X	By causing personal delivery by Careful Courier of the document(s) listed above to the person(s) at the address(es) set forth below.

ATTORNEYS FOR DEFENDANTS CONNECTU INC., NORTHWEST SOFTWARE, INC., WINSTON WILLIAMS AND WAYNE CHANG

Scott Mosko, Esq.
 Finnegan, Henderson, Farabow, Garrett
 & Dunner, LLP
 3300 Hillview Avenue
 Palo Alto, California 94304-1203
 Telephone: (650) 849-6600
 Facsimile: (650) 849-6666
***Hand Delivery**

Richard I. Werder, Jr., Esq.
Peter Calamari, Esq.
Adam Wolfson, Esq.
 QUINN EMANUEL URQUHART OLIVER &
 HEDGES, LLP
 51 Madison Avenue, 22nd Floor
 New York, New York 10010-1601
 Telephone: (212) 849-7000
 Facsimile: (212) 849-7100

David Azar, Esq.
 QUINN EMANUEL URQUHART OLIVER &
 HEDGES, LLP
 865 S Figueroa Street, 10th Floor
 Los Angeles CA 90017
 Telephone: (213) 443-3000
 Facsimile: (213) 443-3100

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

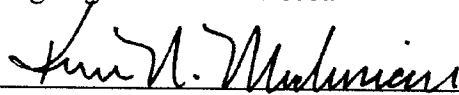
ATTORNEYS FOR EDUARDO SAVERIN

Robert B. Hawk, Esq.
Heller Ehrman, LLP
275 Middlefield Road
Menlo Park, CA 94025
Telephone: (650) 324-7000
Facsimile: (650) 324-0638

Daniel K. Hampton, Esq.
Holland & Knight, LLP
10 St. James Avenue
Boston, MA 02116
Telephone: (617) 573-2700
Facsimile: (617) 523-6850

I am readily familiar with my firm's practice for collection and processing correspondence for delivery via Federal Express, to wit, that correspondence be deposited with the Federal Express Courier this same day in the ordinary course of business.

Executed on April 23, 2008 at Menlo Park, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



Karen N. Mudurian

From: Origin ID: HGTA (650)614-7400
Stephanie Hart
Orrick Herrington & Sutcliffe LLP
1000 Marsh Road

Menlo Park, CA 94025



CLS 12/17/2004

Ship Date: 23APR08
ActWgt: 3 LB
System#: 1350775/WBUS0200
Account#: S *****

Delivery Address Bar Code

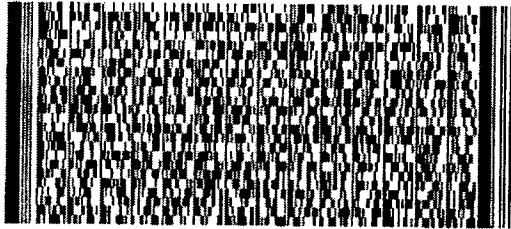


Ref # 0016069-000004/010113
Invoice #
PO #
Dept #

SHIP TO: (212)849-7000 **BILL SENDER**

Richard I. Werder, Jr.
Quinn Emanuel Urquhart et al.
51 Madison Ave
Fl 22
New York, NY 100101603

RELEASE#: 3785346

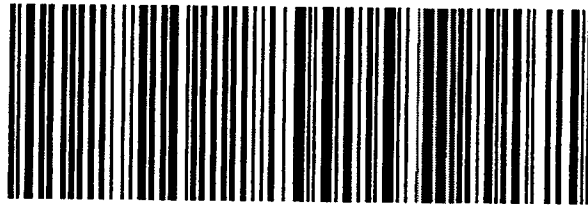


TRK# 7984 2684 9491
0201

THU - 24APR A1
STANDARD OVERNIGHT

XA NBPA

10010
NY-US
EWR



FOLD on this line and place in shipping pouch with bar code and delivery address visible

1. Fold the first printed page in half and use as the shipping label.
2. Place the label in a waybill pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.
3. Keep the second page as a receipt for your records. The receipt contains the terms and conditions of shipping and information useful for tracking your package.

From: Origin ID: HGTA (650)614-7400
Stephanie Hart
Orrick Herrington & Sutcliffe LLP
1000 Marsh Road

Menlo Park, CA 94025



CLS 12/7/7/21/24

Ship Date: 23APR08
ActWgt: 3 LB
System#: 1350775/WBUS0200
Account#: S *****

Delivery Address Bar Code

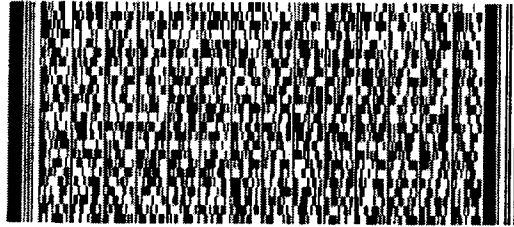


Ref # 0016069-000004/010113
Invoice #
PO #
Dept #

SHIP TO: (213)443-3000 **BILL SENDER**

David Azar, Esq.
Quinn Emanuel Urquhart et al.
865 S Figueroa St
Fl 10
Los Angeles, CA 900172543

RELEASE#: 3785346

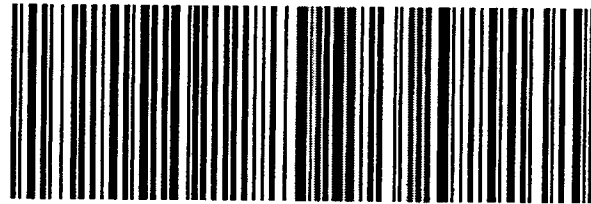


TRK# 7989 2678 3086
0201

THU - 24APR A1
STANDARD OVERNIGHT

WZ EMTA

90017
CA-US
LAX



FOLD on this line and place in shipping pouch with bar code and delivery address visible

1. Fold the first printed page in half and use as the shipping label.
2. Place the label in a waybill pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.
3. Keep the second page as a receipt for your records. The receipt contains the terms and conditions of shipping and information useful for tracking your package.

From: Origin ID: HGTA (650)614-7400
Stephanie Hart
Orrick Herrington & Sutcliffe LLP
1000 Marsh Road

Menlo Park, CA 94025



CLS 529797/2124

Ship Date: 23APR08
ActWgt: 3 LB
System#: 1350775AWBUS0200
Account#: S *****

Delivery Address Bar Code



Ref # 0016069-000004/010113
Invoice #
PO #
Dept #

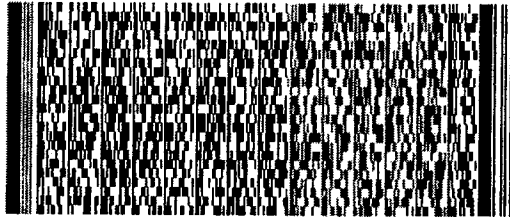
SHIP TO: (650)324-7000

BILL SENDER

Robert B. Hawk, Esq.
Heller Ehrman LLP
275 Middlefield Rd

Menlo Park, CA 940253592

RELEASE#: 3785346

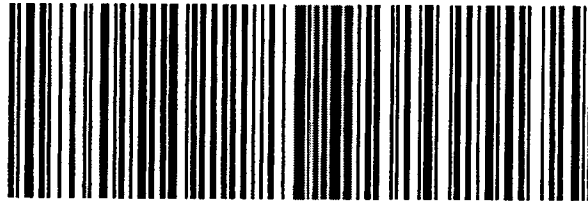


TRK# 7989 2678 5067
0201

THU - 24APR A2
STANDARD OVERNIGHT

WA HGTA

94025
CA-US
SFO



FOLD on this line and place in shipping pouch with bar code and delivery address visible

1. Fold the first printed page in half and use as the shipping label.
2. Place the label in a waybill pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.
3. Keep the second page as a receipt for your records. The receipt contains the terms and conditions of shipping and information useful for tracking your package.

From: Origin ID: HGTA (650)614-7400
Stephanie Hart
Ornick Herrington & Sutcliffe LLP
1000 Marsh Road

Menlo Park, CA 94025



CLB 12/7/2004

Ship Date: 23APR08
Act/Wgt: 3 LB
System#: 1350775/WBUS0200
Account#: S *****

Delivery Address Bar Code



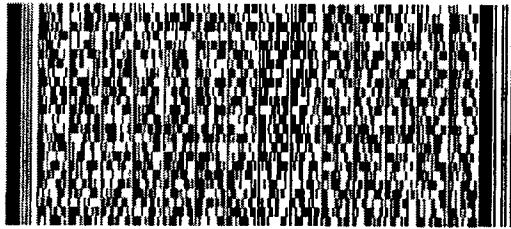
Ref # 0016069-000004/010113
Invoice #
PO #
Dept #

SHIP TO: (617)573-2700

BILL SENDER

Daniel K. Hampton, Esq.
Holland & Knight LLP
10 Saint James Ave.
Ste 1200
Boston, MA 021163889

RELEASE#: 3785346

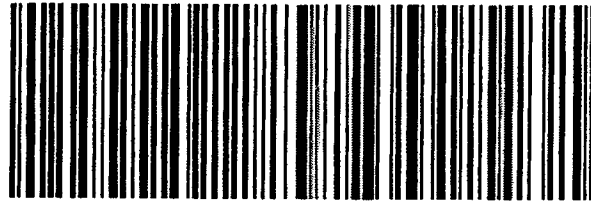


TRK# 7904 9967 9828
0201

THU - 24APR A1
STANDARD OVERNIGHT

XH GBRA

02116
MA-US
BOS



FOLD on this line and place in shipping pouch with bar code and delivery address visible

1. Fold the first printed page in half and use as the shipping label.
2. Place the label in a waybill pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.
3. Keep the second page as a receipt for your records. The receipt contains the terms and conditions of shipping and information useful for tracking your package.



EXHIBIT O

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS

2 -----X
3 CONNECTU, INC. : DOCKET NUMBER CA0710593
4 PLAINTIFF :
5 versus : UNITED STATES COURTHOUSE
6 FACEBOOK, INC., ET AL :
7 DEFENDANTS : BOSTON, MASSACHUSETTS
8 -----X

6 JUNE 2, 2008
7 2:30 p.m.

8 TRANSCRIPT OF MOTION HEARING

9 **UNSEALED HEARING ONLY**

10 BEFORE: THE HONORABLE DOUGLAS P. WOODLOCK
11 UNITED STATES DISTRICT JUDGE

12 APPEARANCES:

13 ATTORNEYS FOR THE PLAINTIFF:

14 FINNEGAN HENDERSON FARABOW GARRETT & DUNNER LLP

15 BY: JOHN F. HORNICK, ESQUIRE
16 901 NEW YORK AVENUE, NW
17 WASHINGTON, DC 20001-4413
18 TELEPHONE: 202-408-4076
19 E-MAIL: john.hornick@finnegan.com
20 FAX: 202-4080-4400

21 OFFICIAL COURT REPORTER

22 DIANE M. MOLAS, RPR, DE CSR, AND NJ CCR
23 OFFICIAL COURT REPORTER
24 UNITED STATES DISTRICT COURT - DISTRICT OF MASSACHUSETTS
25 ONE COURTHOUSE WAY
THIRD FLOOR - SUITE 3200
BOSTON, MA 02210
TELEPHONE: (267) 977-2909
E-MAIL: Dmolas1@aol.com

~~PROCEEDINGS REPORTED USING MACHINE STENOGRAPHY.~~
25 TRANSCRIPT PRODUCED EMPLOYING COMPUTER-AIDED TECHNOLOGY.

DIANE M. MOLAS, RPR, DE CSR, and NJ CCR
USDC - MAD
OFFICIAL COURT REPORTER

1 APPEARANCES (CONTINUED):

2 AND

3 BY: TOM JENKINS, ESQUIRE
4 901 NEW YORK AVENUE, NW
5 WASHINGTON, DC 20001-4413
6 TELEPHONE: 202-408-4000
7 FAX: 202-4080-4400

8 BY: SCOTT R. MOSKO, ESQUIRE
9 3300 HILLVIEW AVENUE
10 PALO ALTO, CA 94304-1203
11 TELEPHONE: 650-849-6600
12 E-MAIL: scott.mosko@finnegan.com
13 FAX: 650-849-6666

14 BY: MEREDITH H. SCHOENFELD, ESQUIRE
15 901 NEW YORK AVENUE, NW
16 WASHINGTON, DC 20001-4413
17 TELEPHONE: 202-408-4393
18 FAX: 202-4080-4400

19 BY: DANIEL P. TIGHE, ESQUIRE
20 176 FEDERAL STREET
21 BOSTON, MA 02110-2214
22 TELEPHONE: 617-542-9900393
23 E-MAIL: dtighe@gtmlp.com
24 FAX: 617-542-0900

25 AND

PRO-HAC-VICE-PENDING ATTORNEY FOR THE PLAINTIFF:

BOIES, SCHILLER & FLEXNER LLP

BY: D. MICHAEL UNDERHILL, ESQUIRE, PRO HAC
VICE PENDING
5301 WISCONSIN AVENUE, N.W.
WASHINGTON, DC 20015
TELEPHONE: 202-237-2727
E-MAIL: munderhill@bsfllp.com
FAX: 202-237-6131

1 APPEARANCES (CONTINUED):

2 ATTORNEYS FOR THE ALL DEFENDANTS, EXCEPT EDUARDO SAVERIN:

3 ORRICK, HERRINGTON & SUTCLIFFE LLP

4 BY: I. NEEL CHATTERJEE, ESQUIRE
5 1000 MARSH ROAD
6 MENLO PARK, CA 94025-1015
7 TELEPHONE: 650-614-7356
8 E-MAIL: nchatterjee@orrick.com
9 FAX: 650-614-740110 BY: THERESA A. SUTTON, ESQUIRE
11 1000 MARSH ROAD
12 MENLO PARK, CA 94025-1015
13 TELEPHONE: 650-614-7356
14 E-MAIL: tsutton@orrick.com
15 FAX: 650-614-7401

16 AND

17 PROSKAUER ROSE LLP

18 BY: STEVEN M. BAUER, ESQUIRE
19 ONE INTERNATIONAL PLACE
20 BOSTON, MA 02110-2600
21 TELEPHONE: 617-526-9700
22 E-MAIL: sbauer@proskauer.com
23 FAX: 617-526-9899

24 AND

25 BY: JEREMY P. OCZEK, ESQUIRE
ONE INTERNATIONAL PLACE
BOSTON, MA 02110-2600
TELEPHONE: 617-526-9651
E-MAIL: joczek@proskauer.com
FAX: 617-526-9899

1 APPEARANCES (CONTINUED):

2 ATTORNEYS FOR THE DEFENDANT, EDUARDO SAVERIN:

3 HOLLAND & KNIGHT LLP

4 BY: DANIEL K. HAMPTON, ESQUIRE
5 10 ST. JAMES AVENUE
6 ELEVENTH FLOOR
7 BOSTON, MA 02116
8 TELEPHONE: 617-573-5886
9 E-MAIL: dan.hampton@hklaw.com
10 FAX: 617-523-6850

11 AND

12 HELLER EHRMAN LLP

13 BY: ROBERT B. HAWK, ESQUIRE
14 275 MIDDLEFIELD ROAD
15 MENLO PARK, CA 940252116
16 TELEPHONE: 650-324-7165
17 E-MAIL: robert.hawk@hellerehrman.com
18 FAX: 650-324-6016

19 ATTORNEYS FOR THE WITNESS, JEFFREY PARMET:

20 GESMER UPDEGROVE LLP

21 BY: LEE T. GESMER, ESQUIRE
22 AND JOSEPH LAFERRERA
23 40 BROAD STREET
24 BOSTON, MA 02109
25 TELEPHONE: 617-350-6800
E-MAIL: lee.gesmer@gesmer.com
FAX: 617-350-6878

AND

BY: CHRISTOPHER SHEEHAN, ESQUIRE
40 BROAD STREET
BOSTON, MA 02109
TELEPHONE: 617-350-6800
FAX: 617-350-6878

1 OFFICIAL COURT REPORTER:

2 DIANE M. MOLAS, RPR, DE CSR, and NJ CCR
3 OFFICIAL COURT REPORTER
4 UNITED STATES DISTRICT COURT - DISTRICT OF MASSACHUSETTS
5 ONE COURTHOUSE WAY
6 THIRD FLOOR - SUITE 3200
7 BOSTON, MA 02210
8 TELEPHONE: (267) 977-2909
9 E-MAIL: Dmolas1@aol.com

10 - - -
11
12
13
14 P R O C E E D I N G S

15
16 THE DEPUTY CLERK: All rise.

17 This Honorable Court is now in session.

18 You may be seated.

19 Calling the case, Civil Action 07-10593,
20 ConnectU, Inc. versus Facebook, Inc., et al.

21 THE COURT: Well, at the outset, I do have a motion
22 to move this case in camera.

23 My general view is, unless there is some showing of
24 specific necessity beyond the generalized discussion, then, I
25 won't do that.

DIANE M. MOLAS, RPR, DE CSR, and NJ CCR
USDC - MAD
OFFICIAL COURT REPORTER

1 discussion of non-code documents?

2 Simplistic, that's it.

3 MR. CHATTERJEE: Yes, Your Honor.

4 If he does get into a document that isn't code, he
5 can look at it to see if it has what they say is the
6 syntactical style, that looks like it has code in it, but,
7 beyond that, he can't review it in detail.

8 Now, just to be clear, as to these documents that
9 he identified, even though we disputed the interpretation of a
10 protocol, we did log them, we provided the log to Mr. Parmet,
11 and Mr. Parmet was going to be given the opportunity to object
12 and to take it to court if he felt it was appropriate; so,
13 notwithstanding the fact that we disagreed with him under the
14 protocol, and we disagreed with what he did, and we felt he
15 had violated it, we were still willing to take this to court
16 to resolve the dispute.

17 THE COURT: Now, is it your position, then, that
18 all of this was pre-admitted by the settlement discussions and
19 the term agreement?

20 MR. CHATTERJEE: Yes, Your Honor.

21 (Pause.)

22 THE COURT: What do you want me to do?

23 MR. CHATTERJEE: Your Honor, what I'd like you to
24 do is dismiss this case.

25 THE COURT: Well, but that's a matter for

1 Judge Ware; I mean, the term agreement says that he's the one
2 who's got the responsibility for this, in reviewing it, and
3 now, of course, there is a dispute about whether it's actually
4 been settled.

5 Now, I don't think I'm going to go beyond what the
6 term agreement is. That's where the resolution of any
7 disputes regarding this should be; that is, in the San Jose
8 Division of the Northern District.

9 MR. CHATTERJEE: I agree with you, Your Honor.

10 THE COURT: Okay; so I'm not in a position to
11 dismiss the case, I don't think, but to await the outcome, now
12 that there's a dispute, before Judge Ware; so what else do you
13 want me to do?

14 MR. CHATTERJEE: So, Your Honor, the other thing
15 you can do is you can await the outcome of those proceedings
16 in front of Judge Ware.

17 If Your Honor believes that you have jurisdiction,
18 one thing you could do is refer this matter to Judge Collings,
19 for Mr. Parmet, to talk about in camera what he looked at --

20 THE COURT: Well, I'm not going to be doing that.

21 This is not a, you know, trick question.

22 It is a question of what it is that I'm really
23 being asked to do and what my authority is to do it.

24 The only provisional kind of authority I think I
25 have in this area -- or, at least, the only one that I would

1 exercise -- is contempt; that is to say, someone is in
2 violation of a court order and I maintain some sort of
3 authority to deal with that as a contempt.

4 I'm not sure if there's anything else, I mean, you
5 say I could dismiss the case. I suppose it's possible for me
6 to tee it up to dismiss the case by saying that I followed the
7 Massachusetts rules that you've identified, and they're
8 applicable here.

9 I'm loathe to do that when the parties have a
10 mechanism for resolving this locally, which is what they
11 wanted to do, apparently, so it's back again.

12 MR. CHATTERJEE: Okay.

13 Thank you, Your Honor.

14 Going back to your original question: What do we
15 want you to do?

16 If Your Honor is inclined to hold onto this case
17 until the proceedings before Judge Ware are resolved, I would
18 stay this case.

19 Your Honor, the only reason I had suggested
20 Judge Collings handle this is because he handled all the
21 issues leading up to the --

22 THE COURT: But he doesn't have contempt power, and
23 that's the reason I took it.

24 MR. CHATTERJEE: Correct, Your Honor.

25 He can do a court recommendation, but, if

UNSEALED HEARING

1 MR. HORNICK: Your Honor, I was saying that there
2 is a parallel to these cases, in that, in each one of those
3 three cases, there was material information that was withheld
4 by the opposing party before the parties entered into
5 settlement negotiations.

6 There is no reason to believe in any of those cases
7 that Discovery was complete, but it's not important.

8 What's important is that there was material
9 information that was withheld in all three of those cases from
10 the settling party, and, in all three of those cases,
11 The Court believed that that was a sufficient basis for your
12 opening settlement.

13 Now, we're not asking you to do that, Your Honor.

14 THE COURT: No, and I don't have the power to do
15 it. It's up to Judge Ware.

16 The question is: What do you want me to do?

17 And I'm back to that question: What do you want me
18 to do?

19 MR. HORNICK: The reason why we want Your Honor to
20 review these documents and not to give them to Judge Ware is
21 that these documents -- let me step back for a moment.

22 The California case was ordered to mediation on
23 January 22 of this year by Judge Ware. He did not order this
24 case to mediation.

25 The parties decided to make it a variable

1 discussion, so these documents are not relevant to the
2 California -- well, we don't know, but we don't think that
3 they're relevant to the California case, so, if we make -- so
4 the point is that this is the place.

5 This is the place to address whether these
6 documents are relevant to the disputes between the parties,
7 and, therefore, what we ask This Court to do is not to open
8 the settlement but, simply, to review the documents, determine
9 if they should have been produced in Discovery, and, then,
10 order that they be produced, if you find that they were
11 material or that they were responsive.

12 THE COURT: The parties agreed that the -- in
13 Paragraph 4 -- or, Section 4 of the settlement -- term sheet
14 and settlement agreement, that the cities and federal court
15 shall have jurisdiction to enforce this agreement.

16 This is a question over the enforceability of the
17 agreement.

18 The agreement deals with this case, as well as the
19 San Jose case.

20 That's what the breadth of what you've asked for
21 is, so --

22 MR. HORNICK: May I respond, Your Honor?

23 THE COURT: You always do.

24 MR. HORNICK: I want to make sure that it's okay.

25 Paragraph 4 doesn't say that the jurisdiction is

1 exclusive in the California court.

2 THE COURT: You mean, I have jurisdiction over the
3 California case, too?

4 MR. HORNICK: You have jurisdiction over your own
5 cases, Your Honor.

6 THE COURT: Well, that doesn't mean that I have
7 control over the California case, too?

8 That reading?

9 Here is a term sheet and settlement agreement.

10 I mean, let me ask you this: Are you asking me to
11 deal with the question of whether or not this is an
12 enforceable agreement?

13 MR. HORNICK: No, Your Honor.

14 THE COURT: Okay. I didn't think you would, okay?

15 So the short of it is that we have a dispute that
16 will be resolved in California over whether or not there is a
17 settlement agreement between the parties.

18 I have a vestigial; like, the vermiform appendix,
19 which exists solely to get inflamed and cause some upset, of
20 Discovery dispute in this case, and I keep asking the parties
21 what you want me to do.

22 What I understand from Facebook is that their
23 request is that I instruct Mr. Parmet not to discuss with any
24 other persons his findings.

25 I'm not sure what you're asking me to do. I know

1 now that you don't want me to enforce this rule on whether or
2 not this is an enforceable settlement agreement.

3 MR. UNDERHILL: May I have a short response,
4 Your Honor?

5 THE COURT: Well, let me just ask this; I mean, I'm
6 used to tag-team wrestling.

7 Are you admitted pro hac vice?

8 MR. UNDERHILL: I have applied, Your Honor.

9 My application is on file, as of today.

10 MR. HORNICK: Your Honor, we neglected to introduce
11 Mr. Underhill earlier.

12 THE COURT: Well, he introduced himself.

13 (Laughter.)

14 THE COURT: Mr. Underhill, as a stranger, but as
15 someone who apparently has some interest in this litigation,
16 of course, I'm hear you.

17 MR. UNDERHILL: Thank you, Your Honor.

18 I appreciate that, and I admittedly have quite a
19 bit of interest in this litigation.

20 In response to your question, Your Honor, I would
21 like to make sure that The Court understands the nature of the
22 proceedings that are before Judge Ware.

23 I actually have our briefs without exhibits, that's
24 intended to be merciful, if you would like for me to hand up
25 the briefs.

1 The Court ordered their production, then, you're done; then,
2 we've got to figure out what we're --

3 THE COURT: Why would I do that, when there is
4 pending in California an issue, as to which both parties have
5 apparently briefed, of whether or not there is a settlement
6 agreement that ends this case, and actually ended this case at
7 the time that the parties called the respective clerks and
8 told them the case was over?

9 Now, ordinarily, I'd, as a matter of course, to
10 deal with, what I'll call, buyer's remorse, issue a thirty-day
11 order of settlement if there isn't a clear stipulation filed
12 or some other document filed, but, from time to time, I have
13 to deal with buyer's remorse, and I deal with buyer's remorse
14 by determining whether or not there was, in fact, an
15 agreement, and somebody else is going to be making that
16 determination.

17 If there was an agreement, then, it is a matter
18 against which you argue on a variety of grounds; then, it is a
19 matter of indifference whether or not there were unresolved
20 Discovery matters in This Court.

21 MR. UNDERHILL: Your Honor, I would agree with you
22 fifty percent.

23 The fifty percent I agree with is: If it's a
24 binding agreement, then, as well, I agree 100 percent, if it's
25 a binding agreement, then, yes, this is completely relevant.

1 However --

2 THE COURT: Right.

3 MR. UNDERHILL: However -- however, Your Honor, if
4 we get those documents and if they're relevant, that's an
5 additional ground that we would apply to The Court for setting
6 aside the settlement agreement, which is, if there was
7 attorney misconduct, they withheld extremely important
8 documents, and, by the way, I'm only assuming that those are
9 the facts, but we're not going to know that those are the
10 facts, unless Your Honor is willing to look at the documents
11 in camera.

12 I do agree, Your Honor, that this idea of: Oh, you
13 settle cases. There is lots of Discovery out there; it's kind
14 of appealing to go there.

15 I think the difference here is that there was a
16 specific, heightened identification of a very small universe
17 of documents that, apparently, inferring from the documents,
18 was the smoking gun that was the difference between victory
19 and loss in the case, or, potentially, the difference between
20 victory and loss.

21 We're never going to know that, unless Your Honor
22 looks at the documents and has some kind of a reaction that we
23 can take to Judge Ware, as to --

24 THE COURT: Some kind of reaction?

25 Is that what is called an advisory opinion?

1 MR. UNDERHILL: No.

2 I'm talking about issuing the documents,
3 Your Honor, issue an order that they have to produce the
4 documents.

5 THE COURT: Right; but they don't have to produce
6 the documents if there is settlement; so the short and
7 sufficient answer, I think, is to say: Judge Ware is entitled
8 to make his determination about the enforceability of this
9 settlement, knowing that there is some sort of dispute about
10 Discovery in Massachusetts, in which you say there is a
11 smoking gun, nobody's indicated there is a smoking gun, but,
12 perhaps reading this in the light most favorable to you, he'll
13 say: Well, until we resolve that, we can't do anything about
14 it, but that's for him to decide, not for me, and not for me
15 to offer my reactions --

16 MR. UNDERHILL: Right.

17 THE COURT: -- to documents; so, if you want me to
18 read them and review them?

19 No.

20 If you want me to have them marked, then, I'll
21 think about that, marked and they're part of the record, and,
22 if Judge Ware thinks that it would be a good idea for somebody
23 in Massachusetts to look at these and decide whether or not
24 there was a failure of some sort of Discovery?

25 Well, I'm think about that.

C E R T I F I C A T I O N

I, DIANE M. MOLAS, a Registered Professional Reporter (RPR), a Certified Shorthand Reporter (CSR) in the State of Delaware, a Certified Court Reporter (CCR) in the State of New Jersey, and a Notary Public in the Commonwealth of Pennsylvania, do hereby certify that the foregoing is a true and accurate transcript of the proceedings reported by me, on June 2, 2008, and that I am neither counsel, nor kin, to any party or participant in said action, nor am I interested in the outcome thereof.

WITNESS my hand, this
Sixth Day of June, 2008.

Diane M. Molas, RPR, DE CSR, and NJ CCR
DE Certification Number 208-RPR
NJ Certification Number 30XI00228400

- - -

(The foregoing certification of this transcript does not apply to any reproduction of the same by any means, unless under the DIRECT CONTROL AND/OR SUPERVISION of the Certifying Court Reporter herself. THE COURT REPORTER'S CERTIFICATION NEVER APPEARS AS A PHOTOCOPIED SIGNATURE.)

- - -

EXHIBIT P

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

The Facebook, Inc., et al.,

NO. C 07-01389 JW

Plaintiffs,

**JUDGMENT ENFORCING SETTLEMENT
AGREEMENT**

v.

ConnectU, Inc., et al.,

Defendants.

Pursuant to the Court's June 25, 2008 Order Granting Plaintiffs' Confidential Motion to Enforce the Settlement Agreement (docket item no. 461), the parties appeared before the Court on July 2, 2008 to show cause why a judgment should not be entered. Based on the papers submitted and oral arguments of counsel,

JUDGMENT IS ENTERED ENFORCING "THE TERM SHEET & SETTLEMENT AGREEMENT" AS FOLLOWS:

(1) The Facebook, Inc. and Mark Zuckerberg:

- (a) Pursuant to Paragraphs 4 and 7 of the Agreement, unless otherwise ordered by the Court, on or before **August 4, 2008**, The Facebook, Inc. shall deposit with the Master, the amount of cash and the certificates representing the amount of The Facebook, Inc. common shares stated in Paragraph 7 of the Agreement, endorsed for transfer. The following legend shall appear on certificates of The Facebook, Inc. common stock issued pursuant to this Judgment:

1 THE SHARES REPRESENTED BY THIS CERTIFICATE HAVE NOT BEEN REGISTERED
2 UNDER THE SECURITIES ACT OF 1933, AS AMENDED. THEY MAY NOT BE SOLD, OFFERED FOR
3 SALE, PLEDGED OR HYPOTHECATED IN THE ABSENCE OF A REGISTRATION STATEMENT IN
4 EFFECT WITH RESPECT TO THE SECURITIES UNDER SUCH ACT OR AN OPINION OF COUNSEL
5 REASONABLY SATISFACTORY TO THE ISSUER THAT SUCH REGISTRATION IS NOT REQUIRED,
6 OR UNLESS SOLD PURSUANT TO RULE 144 OF SUCH ACT.

7 THE SHARES REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO AN AGREEMENT
8 WITH REGARD TO THE VOTING OF SUCH SHARES, AS PROVIDED IN THE CERTAIN TERM SHEET
9 & SETTLEMENT AGREEMENT PURSUANT TO WHICH SUCH SHARES WERE ORIGINALLY
10 ISSUED. THE HOLDERS OF SUCH SHARES ARE ENTITLED TO THE SAME ANTI-DILUTION
11 RIGHTS AFFORDED THE ISSUER'S SERIES D PREFERRED STOCK, AS PROVIDED IN SUCH TERM
12 SHEET & SETTLEMENT AGREEMENT. A COPY OF SUCH TERM SHEET & SETTLEMENT
13 AGREEMENT IS ON FILE IN THE OFFICE OF THE SECRETARY OF THE ISSUER.

14 (b) Pursuant to Paragraphs 2 and 4 of the Agreement, on or before **12 noon on**
15 **July 9, 2008**, The Facebook, Inc. and Mark Zuckerberg shall submit to the
16 Court for approval a proposed form of release. Upon approval by the Court,
17 the release shall be signed by The Facebook, Inc. and Mark Zuckerberg, and
18 shall have attached to it corporate authority given to the corporate signatory
19 and shall be notarized as to each signatory and shall be immediately deposited
20 with the Master;

21 (c) Pursuant to Paragraphs 2 and 4 of the Agreement, unless otherwise ordered by
22 the Court, on or before **August 4, 2008**, a legally sufficient dismissal with
23 prejudice of all cases by and between the parties pending as of the date of the
24 Agreement.¹ The dismissal shall recite that each party to the respective
25 litigation shall bear their own attorney fees and costs.

26 _____
27 ¹ The other two cases are ConnectU, LLC v. Facebook, Inc., et al., Case No. 1:04-cv-11923-
28 DPW, currently on appeal to the First Circuit Court of Appeals; and ConnectU, Inc., et al. v. Facebook, Inc., et al., Case No. 1:07-cv-10593-DPW, currently pending in the District of Massachusetts.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

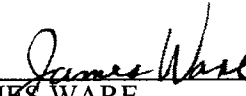
- (2) ConnectU Inc., Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra:
- (a) Pursuant to Paragraphs 4 and 7 of the Agreement, unless otherwise ordered by the Court, on or before **August 4, 2008**, ConnectU Inc. shall deposit with the Master all shares of ConnectU Inc., endorsed for transfer. To the extent the parties to the Agreement do not own any shares of ConnectU Inc., to fulfill the obligation of the transfer of "all ConnectU stock," the parties to the Agreement shall take such actions in their respective corporate and individual capacities as are necessary to effect the deposit with the Master of all shares of ConnectU stock;
- (b) Pursuant to Paragraphs 2 and 4 of the Agreement, on or before **12 noon on July 9, 2008**, ConnectU, Inc., Cameron Winklevoss, Tyler Winklevoss and Divya Narendra shall submit to the Court for approval a proposed form of release. Upon approval by the Court, the release shall be signed by these parties and shall have attached to it corporate authority given to the corporate signatory and shall be notarized as to each signatory and shall be immediately deposited with the Master;
- (c) Pursuant to Paragraphs 2 and 4 of the Agreement, unless otherwise ordered by the Court, on or before **August 4, 2008**, a legally sufficient dismissal with prejudice of all cases by and between the parties pending as of the date of the Agreement. The dismissal shall recite that each party to the respective litigation shall bear their own attorney fees and costs.
- (3) Upon further order of the Court, the parties shall deposit with the Master such other and further things which will facilitate the orderly exchange of the consideration and shall do the things ordered by the Court to ensure the operational integrity of the business entities that are parties to the Agreement.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(4) The deposits being made with the Master by the parties pursuant to this Judgement shall be transferred out of the deposit by the Master only upon further Order of the Court in enforcement of the Agreement.

The Court retains jurisdiction to enforce this Judgment.

Dated: July 2, 2008



JAMES WARE
United States District Judge

United States District Court
For the Northern District of California

United States District Court
For the Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

- Chester Wren-Ming Day cday@orrick.com
- D. Michael Underhill MUnderhill@BSFLLP.com
- David A. Barrett dbarrett@bsflp.com
- Evan A. Parke eparke@bsflp.com
- George Hopkins Guy hopguy@orrick.com
- I. Neel Chatterjee nchatterjee@orrick.com
- Jonathan M. Shaw jshaw@bsflp.com
- Kalama M. Lui-Kwan klui-kwan@fenwick.com
- Monte M.F. Cooper mcooper@orrick.com
- Scott Richard Mosko scott.mosko@finnegan.com
- Sean Alan Lincoln slincoln@Orrick.com
- Steven Christopher Holtzman sholtzman@bsflp.com
- Theresa Ann Sutton tsutton@orrick.com
- Tyler Alexander Baker Tbaker@fenwick.com
- Valerie Margo Wagner valerie.wagner@dechert.com
- Yvonne Penas Greer ygreer@orrick.com

Dated: July 2, 2008

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy

EXHIBIT Q

1 MARK A. BYRNE (CA SB #116657)
2 *markbyrne@byrnenixon.com*
3 BYRNE & NIXON LLP
4 800 West Sixth Street, Suite 430
5 Los Angeles, California 90017
6 Tel: (213) 620-8003
7 Fax: (213) 620-8012

8 SEAN F. O'SHEA (admitted pro hac vice)
9 *soshea@osheapartners.com*
10 O'Shea Partners LLP
11 90 Park Avenue, 20th Floor
12 New York, NY 10016
13 Tel: (212) 682-4426
14 Fax: (212) 682.4437

15 Attorney for Intervenors
16 Cameron Winklevoss, Tyler Winklevoss,
17 and Divya Narendra

18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

20 THE FACEBOOK, INC. and MARK
21 ZUCKERBERG,

22 Plaintiffs,

23 vs.

24 CONNECTU, INC. (formerly known
25 as CONNECTU, LLC), PACIFIC
26 NORTHWEST SOFTWARE, INC.,
27 WINSTON WILLIAMS, and
28 WAYNE CHANG,

Defendants.

CASE NO. 5:07-CV-01389-JW

**NOTICE OF MOTION AND
MOTION TO INTERVENE BY
CAMERON WINKLEVOSS,
TYLER WINKLEVOSS AND
DIVYA NARENDA**

Courtroom: 8
Judge: Hon. James Ware
Date: August 1, 2008
Time: 9:00 a.m.

[Filed concurrently with Application to
Hear Motion on Shortened Time]

1 TO THE HONORABLE JAMES WARE AND ALL PARTIES AND THEIR
2 ATTORNEYS OF RECORD:

3 Please take notice that on August 1, 2008, at 9:00 a.m., or as soon
4 thereafter as this matter may be heard, in Courtroom 8 of the United States
5 District Court for the Northern District of California, San Jose Division, located
6 at 280 South First Street, San Jose, California 95113, Cameron Winklevoss,
7 Tyler Winklevoss, and Divya Narendra ("ConnectU Shareholders") will and
8 hereby do move for an order permitting the ConnectU Shareholders to intervene
9 in this case, because their interests and rights are directly affected by the
10 Judgment Enforcing Settlement Agreement ("Judgment") entered by the Court on
11 July 2, 2008, and the Order Granting Plaintiffs' Confidential Motion to Enforce
12 the Settlement Agreement ("Order") entered by the Court on June 25, 2008.

13 The ConnectU Shareholders' motion is based on this notice of motion and
14 motion, the accompanying memorandum of points and authorities, and all
15 pleadings and papers that are of record and are on file in this case. The
16 ConnectU Shareholders file this motion without waiving any rights to appeal or
17 otherwise to set aside the Judgment and reserving all rights with respect thereto.

18
19
20
21
22
23
24
25
26

27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: July 29, 2008

Respectfully submitted,
BYRNE & NIXON, LLP

By: /s/ Mark A. Byrne
Mark A. Byrne

O'SHEA PARTNERS LLP

By: /s/ Sean F. O'Shea (admitted pro hac vice)
Sean F. O'Shea

Attorneys for Intervenors
CAMERON WINKLEVOSS, TYLER
WINKLEVOSS and DIVYA NARENDRA

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE JUDGMENT REQUIRES THE CONNECTU SHAREHOLDERS TO TENDER SHARES AND SUBMIT DISMISSALS AND RELEASES

On June 25, 2008, the Court granted the motion of The Facebook, Inc. and Mark Zuckerberg (together, "Facebook") to enforce a purported settlement agreement. Docket No. 461. On July 2, 2008, the Court issued its Judgment requiring "ConnectU Inc., Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra" to:

- submit proposed forms of release to the Court by July 9, 2008;
- provide a "legally sufficient dismissal with prejudice of all cases by and between the parties pending as of the date of the Agreement" to a special master ("Special Master") by August 4, 2008; and
- deposit the stock required to be exchanged under the provisions of the Term Sheet with the Special Master by August 4, 2008.

Docket No. 476 at 1-4.

II. THE CONNECTU SHAREHOLDERS SHOULD BE PERMITTED TO INTERVENE UNDER RULE 24

The ConnectU Shareholders should be permitted to intervene in order to protect their interests, including on appeal. *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 376 (1987) ("An intervenor, whether by right or by permission, normally has the right to appeal an adverse final judgment by a trial court."); *CFTC v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1113 (9th Cir. 1999) ("one who is not a party before the district court may not appeal a judgment"). "Rule 24 permits a third party to enter the proceedings in order to protect his own interests." *SEC v. Ross*, 504 F.3d 1130, 1150 (9th Cir. 2007). "Rule 24 is to be construed

1 liberally, and doubts resolved in favor of the proposed intervenor.” *Turn Key*
2 *Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081 (8th Cir. 1999).

3 **A. Intervention Is Appropriate Under Rule 24(a)(2)**

4 Intervention under Rule 24(a)(2) is proper where: (1) the motion is timely; (2)
5 the applicant claims a “significantly protectable” interest relating to the property or
6 transaction which is the subject of the action; (3) the applicant is so situated that the
7 disposition of the action may as a practical matter impair or impede its ability to
8 protect that interest; and (4) the applicant’s interest is inadequately represented by
9 the parties to the action. *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993).

10 *First*, the ConnectU Shareholders’ motion is timely because it was filed
11 within the time limit for the parties to the action to appeal. *United Airlines, Inc. v.*
12 *McDonald*, 432 U.S. 385, 395 (1977); *see also Pellegrino v. Nesbit*, 203 F.2d 463,
13 465 (9th Cir. 1953) (“Intervention should be allowed even after a final judgment
14 where it is necessary to preserve some right which cannot otherwise be
15 protected.”).^{1/} *Second*, the ConnectU Shareholders have protectable interests in their
16 stock and in their individual claims against Facebook. *See State ex rel. Lockyer v.*
17 *United States*, 450 F.3d 436, 441 (9th Cir. 2006) (recognized rights that are
18 protectable suffices). *Third*, the Judgment requires the ConnectU Shareholders to
19 execute releases, submit dismissals, and transfer their stock to the Special Master,
20 which may impair or impede their ability to protect these interests. *See id.* (where
21 there is a significant protectable interest, there is little difficulty in concluding that
22 disposition of the case may affect it); Fed. R. Civ. P. 24, advisory committee note
23 to 1966 amendment (“if an absentee would be substantially affected in a practical
24 sense by the determination made in an action, he should, as a general rule, be
25 entitled to intervene”).
26

27 ^{1/} Judgment was entered on July 2, 2008, and the 30-day time period for appeal has not
28 yet run. Fed. R. App. P. 4.

1 *Fourth*, the representation of the Shareholders' interests by ConnectU is
2 inadequate because it is unclear whether ConnectU would be able to appeal if it
3 complies with the Judgment. *See LG Elecs., Inc. v. Q-Lity Computer, Inc. v. Asustek*
4 *Computer, Inc.*, 211 F.R.D. 360, 365 (N.D. Ca. 2002) (“[t]he burden of showing
5 inadequacy is minimal”). Intervention would ensure that these interests are
6 advanced on appeal. *See Mission Hills Condominium Asso. M-1 v. Corley*, 570 F.
7 Supp. 453 (D. Ill. 1983) (individual residents permitted to intervene in suit by tenant
8 association to “fill the gap” where tenant association lacked standing). Additionally,
9 ConnectU is ill-positioned to protect the ConnectU Shareholders against contempt
10 charges should they withhold their shares in an effort to clearly preserve their rights
11 to appeal. *See Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983)
12 (“the requirement of inadequacy of representation is satisfied if the applicant shows
13 that representation of its interests ‘may be’ inadequate and that the burden of making
14 this showing is minimal); Charles Wright, Arthur Miller and Mary Kay Kane,
15 *Federal Practice And Procedure*, Vol. 7C, § 1909 at 395 (2007) (“An interest that
16 is not represented is surely not adequately represented and intervention must be
17 allowed.”). In this regard ConnectU’s interests are narrower than those of its
18 Shareholders and, thus, its representation is inadequate. *Californians for Safe &*
19 *Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998)
20 (because interests were “potentially more narrow” than the movant’s, movant
21 satisfied its burden of showing parties representation “may have been inadequate”).

22 **B. Intervention Is Appropriate Under Rule 24(b)**

23 The ConnectU Shareholders intend to challenge the enforceability of the
24 Term Sheet on appeal, which constitutes the requisite “defense in common with the
25 main action.” *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110 (9th Cir.
26 2002). Moreover, “Rule 24(b) intervention is readily permitted when proposed
27 intervenors demonstrate ... that they have real economic stakes in the outcome and

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 July 29, 2008.

Dated: July 29, 2008

Respectfully submitted,

/s/ Mark A. Byrne

EXHIBIT R

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

The Facebook, Inc., et al.,
Plaintiffs,
v.
ConnectU, Inc., et al.,
Defendants.

NO. C 07-01389 JW

**ORDER DENYING THE CONNECTU
FOUNDERS' MOTION TO INTERVENE;
DENYING CONNECTU'S MOTION TO
STAY EXECUTION OF JUDGMENT**

I. INTRODUCTION

Initially, Plaintiffs the Facebook, Inc. and Mark Zuckerberg (collectively, "Facebook") brought this action against ConnectU, Inc. ("ConnectU"), Pacific Northwest Software, Inc., Winston Williams, and Wayne Chang alleging, *inter alia*, misappropriation of trade secrets, unfair competition, and violations of 18 U.S.C. § 1030, *et seq.* The parties were engaged in at least two other lawsuits over these matters; in those cases, ConnectU and its founders, Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra (collectively, the "ConnectU Founders"), were plaintiffs and Facebook was a defendant. Based on a series of events and motions, on July 2, 2008, the Court entered Judgment enforcing a settlement agreement between the parties to all of the actions. (hereafter, "Judgment," Docket Item No. 476.)

1 Presently before the Court are the ConnectU Founders' Motion to Intervene¹ and ConnectU's
 2 Motion to Stay Execution of Judgment.² The Court conducted a hearing on August 6, 2008. Based
 3 on the papers submitted to date and oral argument of counsel, the Court DENIES the ConnectU
 4 Founders' Motion to Intervene on the ground that they have already been made parties to this action.
 5 However, the Court GRANTS them an extension of time in which to file their appeal. Further, the
 6 Court DENIES ConnectU's Motion to Stay Execution of Judgment.

7 II. DISCUSSION

8 A. Motion to Intervene

9 The ConnectU Founders move to intervene on the grounds that they have a real economic
 10 stake in the outcome of this case and ConnectU will not sufficiently protect their interests.
 11 (Intervene Motion at 4, 6.) The Judgment in this case treats the ConnectU Founders as parties; it
 12 orders them and the other signatories to take action to comply with the Term Sheet and Settlement
 13 Agreement ("Settlement Agreement"). Therefore, before reaching the necessity of allowing them to
 14 intervene, the Court reviews the ConnectU Founders' status as existing parties to this action and to
 15 the other lawsuits covered by the Settlement Agreement.

16 The Ninth Circuit has held that when a federal court has a basis for jurisdiction over a
 17 dispute involving a final settlement agreement, the court may "interpret and apply its own judgment
 18 to the future conduct contemplated" by a agreement. See Flanagan v. Arnaiz, 143 F.3d 540, 544-45
 19 (9th Cir. 1998). The requisite independent basis for jurisdiction may be supplied by a provision in
 20 the settlement agreement. Id. at 544. Such a provision, "empowers a district court to protect its
 21 judgment" from subsequent attempts to frustrate "the purpose of the settlement agreement and
 22 order." Sandpiper Village Condominium Ass'n., Inc. v. Louisiana-Pacific Corp., 428 F.3d 831, 841

25 ¹ (hereafter, "Intervene Motion," Docket Item No. 574.)

26 ² (hereafter, "Stay Motion," Docket Item No. 578.). Subject to being permitted to intervene,
 27 ~~the ConnectU Founders join in the Motion to Stay Enforcement.~~

1 (9th Cir. 2005). Under this power, individuals may be bound to take actions as long as they had
2 notice and an ability to contest the judgment or order enforcing the settlement agreement. See id.

3 On August 8, 2007, the ConnectU Founders and ConnectU, Inc., were named Plaintiffs in a
4 First Amended Complaint in Civil Action No. 1:07-CV-10593-DPW pending in the District of
5 Massachusetts. The Facebook, Inc., Mark Zuckerberg and others were named as Defendants in that
6 action. In this action, Facebook and Mark Zuckerberg have been named as Plaintiffs and
7 ConnectU, Inc., has been named as a Defendant. Although the ConnectU Founders were named in
8 a Second Amended Complaint in this case, the Court found that it lacked personal jurisdiction over
9 them and dismissed them. (See Docket Item Nos. 136, 232.)

10 On February 22, 2008, the parties entered into a Settlement Agreement, and the ConnectU
11 Founders individually obligated themselves to perform the terms of the agreement. Among the
12 obligations undertaken by the ConnectU Founders were agreements to dismiss the Massachusetts
13 action and to give mutual releases as broad as possible.³ Notably, the ConnectU Founders expressly
14 stipulated to the jurisdiction of this Court for the limited purpose of enforcement of the agreement.

15 (Id.)

16 On April 23, 2008, Facebook filed a motion before this Court to enforce the agreement
17 against the parties to the agreement (“Enforcement Motion”), because disputes arose among the
18 parties with respect to execution of the agreement. (Docket Item No. 329.) Rather than file the
19 Enforcement Motion as a new ancillary proceeding, the motion was filed in this action. As noted
20 above, the ConnectU Founders were not existing parties to this action before the Enforcement
21 Motion was filed because they had been dismissed. Nevertheless, the motion sought enforcement
22 against the ConnectU Founders and ConnectU, Inc., because in the agreement, each of the Founders
23 submitted to the jurisdiction of this Court to enforce the agreement. (Enforcement Order at 3; see
24 Declaration of I. Neel Chatterjee, Ex. F, hereafter, “Chatterjee Decl.,” Docket Item No. 596.)

25
26
27 ³ (Order Granting Plaintiffs’ Confidential Motion to Enforce the Settlement Agreement at 3,
hereafter, “Enforcement Order,” Docket Item No. 461.)

1 Notice of the Enforcement Motion was given to counsel for the ConnectU Founders. This
 2 was accomplished by filing a notice of the motion in the Massachusetts action in which the
 3 ConnectU Founders were parties and by serving that notice on counsel for the ConnectU Founders
 4 in the Massachusetts action. (Enforcement Order at 5; Chatterjee Decl., Ex. G.) At a hearing in the
 5 Massachusetts action, the parties acknowledged they were aware of the proceedings in this Court.
 6 (Id., Chatterjee Decl., Ex. H.)

7 At the hearing on the Enforcement Motion in this case, the Court raised a question with
 8 respect to enforcement against the individuals who, although signatories to the agreement, were not
 9 formal parties to the present action. (Transcript of Hearing at 74-75.) Counsel for Facebook took
 10 the position that the ConnectU Founders had consented to jurisdiction and that on that basis, the
 11 Court could proceed to enter judgment enforcing the agreement against them. (Id.) Counsel for the
 12 ConnectU Founders made an appearance at the hearing. Their counsel described the status of the
 13 Massachusetts' litigation but otherwise did not object to jurisdiction. (Id.) Thus, like ConnectU,
 14 Inc., the ConnectU Founders are parties for purposes of proceedings to enforce the Settlement
 15 Agreement.

16 In its Enforcement Order, the Court ordered the parties to appear for a hearing and to show
 17 cause why a judgment should not be entered ordering the signatories to take actions required of them
 18 by the Settlement Agreement. (Enforcement Order at 12.) In its Order, the Court specifically cited
 19 the ConnectU Founders' consent to jurisdiction and their receipt of notice of the Enforcement
 20 Motion as the basis for the exercise of personal jurisdiction to enforce the agreement against them.
 21 (Id.) A copy of the Order to Show Cause was served on counsel for all signatories to the agreement,
 22 including counsel for the ConnectU Founders.⁴

23
 24

25 ⁴ The service list shows that attorney Scott Mosko of the Finnegan, Henderson, Farabow
 26 was served. (Enforcement Order, certificate of service page.) The Finnegan firm previously
 27 represented the ConnectU Founders in this action prior to their dismissal; however, the Finnegan
 28 firm has represented ConnectU, Inc., since the commencement of this lawsuit and has represented
 ConnectU, Inc., and the ConnectU Founders since the commencement of the Massachusetts actions.

1 On July 2, 2008, a show cause hearing was held. Counsel for all signatories to the agreement
2 appeared, including counsel for the ConnectU Founders. (See n.4, supra.) After the hearing, the
3 Court entered Judgment Enforcing the Settlement Agreement against all the signatories to the
4 agreement and appointed a Special Master to perform steps necessary to enforce the agreement.
5 (Judgment at 1-2; Notice of Appointment of a Master; Nomination of Individual to Serve as Master,
6 Docket Item No. 475.) Among others, the Judgment ordered the ConnectU Founders to perform acts
7 necessary to comply with the Judgment with respect to this action and the Massachusetts action.
8 (Judgment at 3.)

9 In sum, the Court confirms its previous finding that the Motion to Enforce the Term Sheet
10 and Settlement Agreement, although filed under a case number in which the ConnectU Founders
11 were not already parties, was an ancillary proceeding in which Facebook and Zuckerberg were
12 nominal Plaintiffs and ConnectU and the ConnectU Founders were nominal Defendants. As the
13 Supreme Court has noted, “[e]nforcement of [a] settlement agreement . . . whether through award of
14 damages or decree of specific performance, is more than just a continuation or renewal” of
15 underlying proceedings. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 378 (1994).
16 Although the ConnectU Founders were not made parties by virtue of being served with a summons
17 and complaint, as signatories to the Settlement Agreement they consented to personal jurisdiction
18 being exercised over them by this Court and to proceedings limited to enforcement of the agreement.
19 The ConnectU Founders had fair notice that Facebook sought enforcement of the agreement through
20 a motion, and they had ample opportunity to oppose that motion. Through counsel, the ConnectU
21 Founders participated in and were aware of these proceedings. Thus, the Judgment enforcing the
22 Settlement Agreement is binding on them and they may appeal that Judgment.⁵

23
24
25 _____
26 ⁵ The Court notes that even a non-party may be permitted to appeal when “(1) the appellant,
27 though not a party, participated in the district court proceedings, and (2) the equities of the case
weigh in favor of hearing the appeal.” Bank of Am. v. M/V Executive, 797 F.2d 772, 774 (9th Cir.
1986).

1 Accordingly, the Court DENIES the motion to intervene as unnecessary because the
2 ConnectU Founders are already parties to these proceedings to enforce the Settlement Agreement.
3 The unique procedural posture of the case, however, persuades the Court to grant the ConnectU
4 Founders additional time to appeal for good cause shown pursuant to Rule 4(a)(5) of Federal Rules
5 of Appellate Procedure.

6 The Court addresses separately the proposed Complaint in Intervention. With their motion
7 to intervene, the ConnectU Founders have tendered a Complaint in Intervention which essentially
8 seeks to relitigate the issues concerning the enforceability of the Settlement Agreement. (See
9 Docket Item No. 577.) The Court addressed these issues at a hearing before granting Facebook's
10 motion to enforce the settlement and entering Judgment. As parties to the case, parties may tender
11 pleadings. However, at this procedural stage, the Court finds that the Complaint in Intervention is
12 improper because intervention is unnecessary. Further, if the Complaint in Intervention is allowed
13 to be filed after Judgment, it would re-open matters covered by the Judgment; this would be
14 improper unless or until the Judgment is set aside and new pleadings are allowed by the Court.
15 Accordingly, the Court STRIKES the ConnectU Founders' Complaint in Intervention.

16 **B. Motion to Stay**

17 ConnectU moves to stay enforcement of the Judgment entered by the Court on the grounds
18 that it may be irreparably harmed and the balance of hardships tips in its favor. (Stay Motion at 5,
19 7.)

20 Federal Rule of Civil Procedure 62(d), which provides for a stay upon court approval of a
21 supersedeas bond, pertains primarily, if not exclusively, to monetary judgments. See NLRB v.
22 Westphal, 859 F.2d 818, 819 (9th Cir. 1988). Thus, whether a district court should grant a stay of
23 the enforcement of a non-monetary judgment is governed by Rule 62(c), which provides that
24 "[w]hen an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying
25 an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during
26

1 the pendency of the appeal.” Spieler ex rel. Spieler v. Mt. Diablo Unified School Dist., 2007 WL
2 3245286, at *2-3 (N.D. Cal. 2007).

3 The standard for granting a stay pending appeal under Rule 62(c) is similar to that for a
4 preliminary injunction. Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983). A party seeking a
5 stay must show “(1) whether the stay applicant has made a strong showing that he is likely to
6 succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3)
7 whether issuance of the stay will substantially injure the other parties interested in the proceeding;
8 and (4) where the public interest lies.” Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Lopez, 713
9 F.2d at 1435. To satisfy steps (1) and (2), a court may accept proof either that the applicant has
10 shown “a strong likelihood of success on the merits [and] . . . a possibility of irreparable injury to the
11 [applicant],” or “that serious legal questions are raised and that the balance of hardships tips sharply
12 in its favor.” Golden Gate Restaurant v. City and County of San Francisco, 512 F.3d 1112, 1115-16
13 (9th Cir. 2008). When the district court has already ruled on the legal issue being appealed, the
14 court need not conclude that it is likely to be reversed on appeal in order to grant the stay. Strobel v.
15 Morgan Stanley Dean Witter, 2007 WL 1238709, at *1 (S.D. Cal. 2007). However, the court may
16 consider that delay in filing an appeal and seeking a stay vitiates the force of allegations of
17 irreparable harm. Cf. Beame v. Friends of the Earth, 434 U.S. 1310, 1313 (1977).

18 In this case, ConnectU cannot show irreparable harm from execution of the Judgment
19 because the only effect of enforcing the settlement is the transfer of ownership of ConnectU.
20 Barring evidence to the contrary, the Court presumes that Facebook has an equal interest in
21 preserving the value of ConnectU as do ConnectU’s current owners. Moreover, ConnectU filed its
22 motion seeking a stay only days before turnover of its stock was ordered to take place. This delay
23 on the part of ConnectU tends to vitiate its contention that it will be irreparably harmed. See Beame,
24 434 U.S. at 1313.

25 With respect to the issues of the balance of hardships, ConnectU contends that Facebook may
26 somehow adversely affect its right to appeal. (Stay Motion at 5-6.) However, ConnectU admits that

1 it will pursue other litigations with respect to its former counsel related to this case and incur
2 liabilities to its lawyers. Thus, the hardship upon Facebook may be equally as great if the litigation
3 diminishes the value of ConnectU. In essence, the longer the Court delays in enforcing the
4 settlement between the parties, the more likely the value of the consideration subject of the
5 settlement (i.e., the value of the stock of each company) will change. This means that the status quo
6 cannot be preserved with a stay. The Court is concerned that any further delay in enforcing the
7 settlement will create a serious risk of prejudice to Facebook, as well as to ConnectU.

8 Accordingly, the Court DENIES ConnectU's motion to stay enforcement of the Judgment
9 entered in this case.

10 III. CONCLUSION

11 The Court DENIES the ConnectU Founders' Motion to Intervene as unnecessary because
12 they have already been made parties to these proceedings by their consent and by service of the
13 Enforcement Motion. The Court STRIKES the ConnectU Founders' Complaint in Intervention.
14 The Court GRANTS the ConnectU Founders additional time in which to file an appeal. Since
15 ConnectU filed a timely Notice of Appeal on August 1, 2008, (see Docket Item No. 585), the
16 ConnectU Founders shall have until **August 22, 2008** to file their appeal.

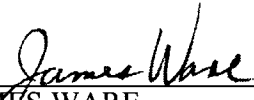
17 The Court DENIES ConnectU's Motion to Stay Execution of Judgment. The Judgment
18 requires that on or before August 4, 2008, ConnectU and its Founders to deposit with the Master all
19 shares of ConnectU, Inc., endorsed for transfer, and to submit legally sufficient dismissal with
20 prejudice of all cases by and between the parties pending as of the date of the Settlement Agreement.
21 (Judgment at 2.) At the hearing on these motions, it was brought to the Court's attention that while
22 Facebook and Mark Zuckerberg have complied with the Court's Judgment, ConnectU, Inc., and its
23 Founders have failed to do so. Counsel for ConnectU, Inc., and counsel for the ConnectU Founders
24 contend that since the Court had granted a hearing on the Motion to Stay Judgment just two days
25 after the due date, they had a good faith belief that they had a period of reprieve from the Judgment.
26

1 The Court finds good cause to not hold ConnectU and its Founders in contempt for failing to comply
2 with its Judgment as of August 4, 2008.

3 Accordingly, ConnectU and the ConnectU Founders shall comply with the turnover
4 requirements of the Court's July 2, 2008 Judgment Enforcing Settlement Agreement on or before
5 **August 12, 2008.**

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: August 8, 2008



JAMES WARE
United States District Judge

United States District Court
For the Northern District of California

- 1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**
- 2 Chester Wren-Ming Day cday@orrick.com
- 3 D. Michael Underhill Munderhill@BSFLLP.com
- 4 David A. Barrett dbarrett@bsfllp.com
- 5 Evan A. Parke eparke@bsfllp.com
- 6 George Hopkins Guy hopguy@orrick.com
- 7 I. Neel Chatterjee nchatterjee@orrick.com
- 8 Jonathan M. Shaw jshaw@bsfllp.com
- 9 Kalama M. Lui-Kwan klui-kwan@fenwick.com
- 10 Mark A. Weissman mweissman@osheapartners.com
- 11 Mark Andrew Byrne markbyrne@byrmenixon.com
- 12 Monte M.F. Cooper mcooper@orrick.com
- 13 Rachel E. Matteo-Boehm rachel.matteo-boehm@hro.com
- 14 Roger Rex Myers roger.myers@hro.com
- 15 Scott Richard Mosko scott.mosko@finnegan.com
- 16 Sean Alan Lincoln slincoln@Orrick.com
- 17 Sean F. O'Shea soshea@osheapartners.com
- 18 Steven Christopher Holtzman sholtzman@bsfllp.com
- 19 Theresa Ann Sutton tsutton@orrick.com
- 20 Tyler Alexander Baker Tbaker@fenwick.com
- 21 Valerie Margo Wagner valerie.wagner@dechert.com
- 22 Yvonne Penas Greer ygreer@orrick.com

Dated: August 8, 2008

Richard W. Wicking, Clerk

**By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy**



EXHIBIT S

ORIGINAL FILED *Feelard*

2008 JUL 30 P 3 46

RICHARD W. WIEKING
CLERK
U.S. DISTRICT COURT
NO. DIST. OF CA. S.J.

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

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

9 Attorneys for Defendant
CONNECTU, INC.

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

14 THE FACEBOOK, INC. and MARK
15 ZUCKERBERG,

16 Plaintiffs,

17 v.

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

21 Defendants.

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

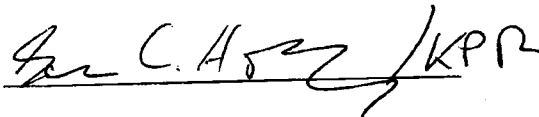
**NOTICE OF APPEAL
BY CONNECTU, INC.**

1 Notice is hereby given that CONNECTU, INC., defendant in the above named case, hereby
2 appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment
3 Enforcing Settlement Agreement (Docket No. 476) entered in this action on July 2, 2008, and all
4 related orders including but not limited to the June 25, 2008, Order Granting Plaintiffs' Confidential
5 Motion To Enforce The Settlement Agreement (Docket No. 461); and the June 10, 2008, Order
6 Granting In Part and Denying In Part Motions Posted As Docket Items Nos. 366, 374 and 393
7 (Docket No. 428).

8
9 July 30, 2008

Respectfully submitted,

10
11 BOIES, SCHILLER & FLEXNER LLP

12
13 
14

Steven C. Holtzman

Attorneys for Defendant ConnectU, Inc.



EXHIBIT T

Filed

FILED

2008 AUG 11 11:38

RICHARD W. WIEKING
CLERK
U.S. DISTRICT COURT
NO. DIST. OF CA. S.J.

1 MARK A. BYRNE (CA SB #116657)
markbyrne@byrnenixon.com
2 BYRNE & NIXON LLP
800 West Sixth Street, Suite 430
3 Los Angeles, California 90017
Tel: (213) 620-8003
4 Fax: (213) 620-8012

5 SEAN F. O'SHEA (*pro hac vice*)
soshea@osheapartners.com
6 MARK A. WEISSMAN (*pro hac vice*)
mweissman@osheapartners
7 O'SHEA PARTNERS LLP
90 Park Avenue, 20th Floor
8 New York, NY 10016
Tel: (212) 682-4426
9 Fax: (212) 682-4437

10 Attorneys for Nominal Defendants
Cameron Winklevoss, Tyler Winklevoss,
11 and Divya Narendra

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

15 THE FACEBOOK, INC. and MARK
16 ZUCKERBERG,

17 Plaintiffs,

18 v.

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

22 Defendants.
23

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

**NOTICE OF APPEAL BY
CAMERON WINKLEVOSS, TYLER
WINKLEVOSS, AND DIVYA NARENDRA**

24
25
26
27
28
FAXED

ORIGINAL

1 Notice is hereby given that CAMERON WINKLEVOSS, TYLER WINKLEVOSS, and
2 DIVYA NARENDRA, nominal defendants in the above named case, hereby appeal to the United
3 States Court of Appeals for the Ninth Circuit from the final Judgment Enforcing Settlement
4 Agreement (Docket No. 476) entered in this action on July 2, 2008, the Order dated August 8, 2008
5 Denying the ConnectU Founders' Motion to Intervene and Denying ConnectU's Motion to Stay
6 Execution of Judgment (Docket No. 610), and all related orders including but not limited to the June
7 25, 2008, Order Granting Plaintiffs' Confidential Motion To Enforce The Settlement Agreement
8 (Docket No. 461); and the June 10, 2008 Order Granting In Part and Denying In Part Motions Posted
9 As Docket Items Nos. 366, 374 and 393 (Docket No. 428).

10
11 August 11, 2008

Respectfully submitted,

12
13 O'SHEA PARTNERS, LLP

14
15 
16 Sean F. O'Shea

17
18 90 Park Avenue
19 New York, New York 10016

20 *Attorneys for Nominal Defendants*
21 *Cameron Winklevoss, Tyler Winklevoss,*
22 *and Divya Narendra*

EXHIBIT U

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

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

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

13 Attorneys for Cameron Winklevoss,
Tyler Winklevoss, and Divya Narendra.
14

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN JOSE DIVISION

18 THE FACEBOOK, INC. and MARK
19 ZUCKERBERG,

20 Plaintiffs,

21 v.

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

25 Defendants.
26

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

NOTICE OF APPEAL

1 Notice is hereby given that CAMERON WINKLEVOSS, TYLER WINKLEVOSS and
2 DIVYA NARENDRA¹ appeal to the United States Court of Appeals for the Ninth Circuit from the
3 following orders and judgment and all related orders:

- 4 (a) the December 15, 2008, Order of Dismissal (Docket No. 667), a copy of which is
5 attached as Exhibit A;
- 6 (b) the November 21, 2008 Amended Judgment Ordering Specific Performance of
7 Settlement Agreement and Declaratory Judgment of Release (Docket No. 665), a copy of
8 which is attached as Exhibit B; and
- 9 (c) the November 3, 2008, Order Directing the Special Master to Deliver the Property Being
10 Held in Trust to the Parties in Accordance with the Terms of their Settlement Agreement
11 (Docket No. 653), a copy of which is attached as Exhibit C.

12 This notice is in addition to, and related to, their prior notice of appeal filed on August 11,
13 2008 (Docket No. 611), which is incorporated by reference. In order to preserve all rights to appeal,
14 notice is again provided that CAMERON WINKLEVOSS, TYLER WINKLEVOSS, and DIVYA
15 NARENDRA appeal from the following orders and judgment and all related orders:

- 16 (d) the August 8, 2008, Order Denying the ConnectU Founders' Motion to Intervene;
17 Denying ConnectU's Motion to Stay Execution of Judgment, entered by the district court
18 on August 8, 2008 (Docket No. 610), a copy of which is attached as Exhibit D;

19
20
21 ¹ To the extent Cameron Winklevoss, Tyler Winklevoss and Divya Narendra and their
22 counsel have any existing rights or obligations with respect to ConnectU, Inc. (all of the stock of
23 ConnectU having been transferred to The Facebook, Inc. on December 15, 2008, as part of the
24 settlement transaction which is at issue on appeal), Notice would hereby be given on ConnectU's
25 behalf. Otherwise, no new notice is provided with respect to ConnectU. *See* ConnectU's Notice of
26 Appeal (Docket No. 582), attached as Exhibit H, and hereby incorporated by reference. *See also*
27 ConnectU and Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra's Emergency Motion
28 to Stay and Alternative Petition for Mandamus, filed with the United States Court of Appeals for the
Ninth Circuit on November 24, 2008 (Docket No. 43 in Appeal No. 08-16745), also incorporated by
reference, providing notice on that date that ConnectU was seeking relief from, among other things,
the November 3 Order attached as Exhibit C and November 21 Amended Judgment attached as
Exhibit B.

1 (e) the July 2, 2008, final Judgment Enforcing Settlement Agreement (Docket No. 476), a
2 copy of which is attached as Exhibit E;

3 (f) the June 25, 2008, Order Granting Plaintiffs' Confidential Motion to Enforce the
4 Settlement Agreement (Docket No. 461), a copy of which is attached as Exhibit F; and

5 (g) the June 10, 2008, Order Granting in Part and Denying in Part Motions Posted As Docket
6 Items Nos. 366, 374 and 393 (Docket No. 428), a copy of which is attached as Exhibit G.
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

26
27
28

1 December 19, 2008

Respectfully submitted,

Evan A. Parke /KPR

Evan A. Parke
BOIES, SCHILLER & FLEXNER LLP

*Attorneys for Cameron Winklevoss, Tyler
Winklevoss, and Divya Narendra.*

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT A



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
 THE FACEBOOK, INC. and MARK ZUCKERBERG

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

15 THE FACEBOOK, INC. and MARK
 ZUCKERBERG,

16 Plaintiffs,

17 v.

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

21 Defendants.

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


~~PROPOSED~~ ORDER OF
 DISMISSAL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

On July 2, 2008, the Court entered a Judgment Enforcing Settlement Agreement (Docket Item No. 476) and on November 21, 2008, the Court entered an Amended Judgment Ordering Specific Performance of Settlement Agreement and Declaratory Judgment Release (Docket Item No. 665). Pursuant to the Judgment and Amended Judgment, all claims asserted against Defendants ConnectU, Inc., Pacific Northwest Software, Inc., Winston Williams, and Wayne Change, are dismissed with prejudice.

The parties shall bear their own attorney fees and costs. The Clerk shall close this file.

Dated: December 15, 2008



JAMES WARE
United States District Judge

EXHIBIT B

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

The Facebook, Inc., et al.,
Plaintiffs,
v.
ConnectU, Inc., et al.,
Defendants.

NO. C 07-01389 JW

**AMENDED JUDGMENT ORDERING
SPECIFIC PERFORMANCE OF
SETTLEMENT AGREEMENT AND
DECLARATORY JUDGMENT OF
RELEASE**

In this ancillary proceeding, having found the "Term Sheet & Settlement Agreement" enforceable, pursuant to the stipulation of the parties to the "Term Sheet & Settlement Agreement" that "the San Jose Federal Court shall have jurisdiction to enforce this agreement," and having found good cause to vacate the judgment entered on November 3, 2008 and to enter this Amended Judgment:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that

The Judgment entered on November 3, 2008 is vacated and this Judgment entered in its place:

Judgment is entered in favor of the Facebook, Inc. and Mark Zuckerberg and against ConnectU, Inc., Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra specifically enforcing the "Term Sheet and Settlement Agreement." The parties to the "Term Sheet & Settlement Agreement," having previously made deposits with the Special Master, in specific enforcement of the "Term Sheet & Settlement Agreement," on **December 15, 2008**, the Master shall:

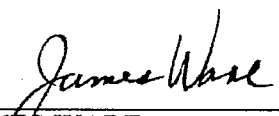
United States District Court
For the Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- (1) transfer to the Facebook, Inc. the shares of ConnectU, Inc. being held by the Master;
and
- (2) transfer to Boies, Schiller & Flexner LLP, 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; and
- (3) file in the appropriate courts, the motions to dismiss being held by the Master.

The "Term Sheet & Settlement Agreement" provides: "All parties get mutual releases as broad as possible." The parties having stipulated that this Court shall have jurisdiction to enforce the "Term Sheet & Settlement Agreement," the Court declares that as of February 22, 2008, the date of the Settlement Agreement, the Facebook, Inc., Mark Zuckerberg, ConnectU, Inc., Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra, and each of them, jointly, severally and mutually released each other as broadly as possible from all claims.

Dated: November 21, 2008



 JAMES WARE
 United States District Judge

United States District Court
For the Northern District of California

1 THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

- 2 Bruce Eric Van Dalsem brucevandalsem@quinnemanuel.com
- 3 Chester Wren-Ming Day cday@orrick.com
- 4 D. Michael Underhill Munderhill@BSFLLP.com
- 5 David A. Barrett dbarrett@bsflfp.com
- 6 Evan A. Parke eparke@bsflfp.com
- 7 George C. Fisher georgecfisher@gmail.com
- 8 George C. Fisher georgecfisher@gmail.com
- 9 George Hopkins Guy hopguy@orrick.com
- 10 I. Neel Chatterjee nchatterjee@orrick.com
- 11 Jonathan M. Shaw jshaw@bsflfp.com
- 12 Kalama M. Lui-Kwan klui-kwan@fenwick.com
- 13 Mark A. Weissman mweissman@osheapartners.com
- 14 Mark Andrew Byrne markbyrne@byrnenixon.com
- 15 Monte M.F. Cooper mcooper@orrick.com
- 16 Rachel E. Matteo-Boehm rachel.matteo-boehm@hro.com
- 17 Randy Garteiser randygarteiser@quinnemanuel.com
- 18 Roger Rex Myers roger.myers@hro.com
- 19 Scott Richard Mosko scott.mosko@finnegan.com
- 20 Sean Alan Lincoln slincoln@Orrick.com
- 21 Sean F. O'Shea soshea@osheapartners.com
- 22 Steven Christopher Holtzman sholtzman@bsflfp.com
- 23 Theresa Ann Sutton tsutton@orrick.com
- 24 Tyler Alexander Baker Tbaker@fenwick.com
- 25 Valerie Margo Wagner valerie.wagner@dechert.com
- 26 Warrington S. Parker wparker@orrick.com
- 27 Yvonne Penas Greer ygreer@orrick.com

16 Dated: November 21, 2008

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy

EXHIBIT C

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

The Facebook, Inc., et al.,
Plaintiffs,
v.
ConnectU, Inc., et al.,
Defendants.

NO. C 07-01389 JW

**ORDER DIRECTING THE SPECIAL
MASTER TO DELIVER THE PROPERTY
BEING HELD IN TRUST TO THE
PARTIES IN ACCORDANCE WITH THE
TERMS OF THEIR SETTLEMENT
AGREEMENT**

I. INTRODUCTION

On February 22, 2008, the parties to civil cases pending in this Court and the District of Massachusetts signed a "Term Sheet & Settlement Agreement." The Agreement provided: "The parties stipulate that the San Jose Federal court shall have jurisdiction to enforce this agreement."¹ On April 23, 2008, The Facebook, Inc., filed a motion with this Court to enforce the Agreement. The motion was docketed in an action pending in this Court. However, it was in legal effect an ancillary proceeding to the pending action.²

On June 25, 2008, over objections by ConnectU and the Founders (collectively, "ConnectU"), the Court granted the motion to enforce the Agreement. (Enforcement Order at 4.) The Court appointed a Special Master to gather and hold the property and cash which the parties had

¹ (Order Granting Plaintiffs' Confidential Motion to Enforce the Settlement Agreement at 3, hereafter, "Enforcement Order," Docket Item 461.)

² The ancillary nature of the motion was addressed in the Court's August 8, 2008 Order. (See Order Denying the ConnectU Founders' Motion to Intervene; Denying ConnectU's Motion to Stay Execution of Judgment at 5, hereafter, "Deny Stay Order," Docket Item No. 610.)

United States District Court
For the Northern District of California

1 agreed to exchange in the Agreement. (Docket Item No. 475.) On July 2, 2008, the Court issued a
2 Judgment Enforcing Settlement Agreement (hereafter, "July 2 Judgment," Docket Item No. 476), in
3 which the Court ordered the parties to deposit with the Special Master stock, cash and various other
4 documents.

5 On September 5, 2008, the Special Master issued a report stating that he received the stock,
6 cash and documents. (hereafter, "Special Master's Report," Docket Item No. 630.) Pursuant to the
7 Court's appointment Order, the Special Master also provided the Court with his recommendations of
8 action which the Court should take in the enforcement of the Agreement. (Special Master's Report
9 at 6.) On September 19, 2008, the Court issued an order for the parties to appear on October 28,
10 2008 and show cause, if any, why the Court should not order the Master to deliver the property
11 being held by him to the parties in accordance with the terms of the Agreement. (Docket Item No.
12 634.)

13 At the October 28th hearing, counsel appearing for ConnectU and the Founders advised the
14 Court that on July 30, 2008, ConnectU had noticed an appeal from the July 2 Judgment, and that on
15 August 11, 2008, the Founders had also noticed an appeal from the July 2 Judgment. (See Docket
16 Item Nos. 582, 611, respectively.) Defendants contended that because of their appeals, the Court
17 lacked jurisdiction to order the Master to deliver the things held by him in enforcement of the
18 Agreement.³

19 Also appearing were counsel for Quinn Emanuel Urquhart Oliver & Hedges, LLP,
20 requesting the Court to honor a lien the firm has asserted on the settlement proceeds. (Docket Item
21 Nos. 337, 644.)

22 Since Defendants' challenge to the Court's jurisdiction is a threshold issue, the Court
23 proceeds to address this issue first. The Court will also consider Quinn Emanuel's lien on the
24 proceeds.

25 _____
26 ³ (Defendants' Response to Order to Show Cause on Disbursement of Settlement
27 Consideration, and Renewed Motion to Stay at 1, hereafter, "Defendants' Response," Docket Item
No. 637.)

1 **II. DISCUSSION**

2 **A. Jurisdiction**

3 Defendants contend that the Court lacks jurisdiction to take further action because any such
4 action would be taken after an appeal has been filed from the July 2 Judgment, which was final and
5 appealable. (Defendants' Response at 1.)

6 As a general matter, "[o]nce a notice of appeal is filed, the district court is divested of
7 jurisdiction over the matters being appealed." Natural Resources Defense Council, Inc. v.
8 Southwest Marine, Inc., 242 F.3d 1163, 1166 (9th Cir. 2001) (citing Griggs v. Provident Consumer
9 Discount Co., 459 U.S. 56, 58 (1982)). However, there are, several exceptions to the principle of
10 exclusive appellate jurisdiction. Id. An appeal to the Ninth Circuit must be from a final judgment of
11 the district court. 28 U.S.C. §1291. The district court is not divested of jurisdiction to take action if
12 a party files a premature appeal. FirsTier Mortgage Co. v. Investors Mortgage Ins. Co., 498 U.S.
13 269, 272-73 (1991).

14 Presuming ConnectU and the Founders have a right to appeal,⁴ the issue becomes whether
15 the appeals they have filed divest the Court of the power granted in their stipulation to issue an
16 enforcement decision.

17 This ancillary civil action to enforce the Agreement is tantamount to an action in equity for
18 specific performance. Adams v. Johns-Manville Corp., 876 F.2d 702, 709 (9th Cir. 1989) (A
19

20 ⁴ In its June 25, 2008 Order, the Court discussed its general equitable power to enforce an
21 agreement to settle a case pending before it. (Enforcement Order at 4.) However, as a threshold
22 matter, the Court emphasizes that none of the following discussion of jurisdiction should be
23 construed as a finding by this Court that an appeal may be taken from its enforcement decision. The
24 enforcement power of the Court is derived from a stipulation of all the parties to a private mediation.
25 As a component of their private mediation, the parties stipulated that a United States District Court
26 Judge is empowered to enforce their mediated settlement. Thus, this case is distinguishable from
27 one in which the parties to a federal lawsuit reach an out-of-court settlement, request the federal
28 court to adopt the settlement as a judgment in the case, and the federal judge, who has retained
jurisdiction to enforce the judgment, makes a post-judgment order.

Although the Agreement in this case affects a pending action, because in the Agreement the
parties agreed to dismiss it, these current proceedings are independent of the underlying action.
Under the Agreement, no judgment will be entered in the underlying action (or actions) because they
will be dismissed. Thus, the appealability of the enforcement order must be judged based its nature
as an independent, albeit ancillary proceeding.

1 “motion to enforce [a] settlement agreement essentially is an action to specifically enforce a
2 contract.”). In a specific performance action, the appealable judgment is the judgment which orders
3 performance of the acts agreed upon, leaving nothing further for the court to do. An order of
4 specific performance is injunctive in nature. It is appealable as a final judgment when it requires
5 conduct that is “specific in terms [and] describe[d] in reasonable detail, and not by reference to [any]
6 other document, the act or acts” to be performed. Petrello v. White, 533 F.3d 110, 115-16 (2d Cir.
7 2008) (quoting Fed. R. Civ. P. 65(d)).

8 Judgments and orders where “money is directed to be paid into court, or property delivered
9 to a receiver,” however, “are interlocutory only and [are] intended to preserve the subject matter in
10 dispute from waste or dilapidation, and to keep it within the control of the court until the rights of
11 the parties concerned can be adjudicated by a final decree.” Forgay v. Conrad, 47 U.S. 201, 204-05
12 (1848). A district court’s judgment can only be final when “it requires the immediate turnover of
13 property and subjects the party to irreparable harm if the party is forced to wait until the final
14 outcome of the litigation.” In re Hawaii Corp., 796 F.2d 1139, 1143 (9th Cir. 1986).

15 The Court finds that although the July 2 Judgment is prefatory to entry of a final
16 adjudication, it is interlocutory in nature. The July 2 Judgment orders the parties to deposit the cash,
17 stock and other documents with a Special Master, subject to further order of the Court; it does not
18 identify specific acts the parties are to perform with respect to one another. See Petrello, 533 F.3d at
19 115-116. All of the Court’s directives are made in reference to the underlying Agreement, which
20 prevents the July 2 Judgment from being considered a final adjudication. See id. Instead, the July 2
21 Judgment directs the parties to take a number of preparatory actions, which place the Special Master
22 as a temporary intermediary, pending further action of the Court. None of the terms of the July 2
23 Judgment “require immediate turnover of property” to the parties, nor “subject [either] party to
24 irreparable harm.” In re Hawaii Corp., 796 F.2d at 1143. Furthermore, the purpose of the October
25 28th hearing was to provide the parties with an opportunity to show cause why a final adjudicatory
26 action ordering specific performance should not be entered.

27

28

1 Accordingly, the Court finds that the previously filed appeal to the Ninth Circuit from the
2 July 2 Judgment does not deprive it of jurisdiction to enter a final adjudication ordering
3 performance.⁵

4 **B. Stay of Execution**

5 In the alternative, Defendants renew their motion for a stay of execution pending their
6 appeal. (Defendants' Response at 14.)

7 As the Court stated on the record, a stay of execution pending appeal from a final judgment
8 ordering specific performance raises issues which are not present in a stay of execution on a money
9 judgment. In cases involving a money judgment, an appellant may obtain a stay by posting a
10 supersedeas bond. Fed. R. Civ. P. 62(d). Of course, denial of a stay or failure to post a bond
11 empowers the judgment creditor to execute on the judgment, notwithstanding the appeal. Id.

12 In a specific performance action, the prosecuting party seeks immediate performance of
13 some act due from the responding party. If the responding party appeals the judgment and moves
14 the Court to stay performance pending appeal, before granting the stay, the Court must consider
15 whether the party in whose favor the judgment has been entered can be provided with security,
16 comparable to that provided by a supersedeas bond. Federal Rule of Civil Procedure 62(c) provides
17 that while an appeal is pending from an injunction, the Court may "suspend, modify, restore, or
18 grant an injunction on terms for bond or other terms that secure the opposing party's rights."

19 Here, the consideration which ConnectU and the Founders seek to withhold pending the
20 appeal are corporate stock, freedom from expensive on-going litigation and peace of mind from a
21 broad mutual release. Security for this consideration must be evaluated in light the rapidly changing
22 United States economy and a highly competitive market for Internet products and services. The
23 Court finds that ConnectU and the Founders have not proposed any security which would protect
24 Facebook from devaluation of that consideration pending appeal.

25 _____
26 ⁵ Although a matter for the Ninth Circuit to decide, implicit in the Court's findings is that
27 the current appeals by Defendants are imperfect. However, the Court proceeds under the assumption
28 that upon issuance of a final adjudicatory decision, the pending appeals will be perfected and
become effective.

1 Accordingly, the Court DENIES Defendants' renewed motion for a stay of execution.
2 However, to afford Defendants a limited right to seek a stay from the Ninth Circuit, the judgment
3 will order transfer on **November 24, 2008**.

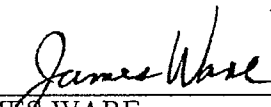
4 **C. Lien on the Settlement Proceeds**

5 At the October 28, 2008 hearing Quinn Emanuel, appeared and requested that any disbursal
6 of the settlement proceeds be made jointly in the name of the Defendants and the law firm. Since
7 Quinn Emanuel is not a party to this case and has otherwise not foreclosed on any lien, the Court
8 declines to grant its request. Instead, the Court will order that the proceeds be delivered in trust to
9 Defendants' counsel. However, nothing in this Order is intended to affect Quinn Emanuel's right to
10 assert its lien on the proceeds in the hands of Defendants or Defendants' counsel.

11 **III. CONCLUSION**

12 For the reasons stated above and pursuant to the stipulation of the parties that this Court
13 enforce the Agreement, the Court will issue a final adjudicatory order. The Court declines to take
14 any action with respect to the lien by Quinn Emanuel.

15
16 Dated: November 3, 2008



JAMES WARE
United States District Judge

United States District Court
For the Northern District of California

27
28

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

- 2 Bruce Eric Van Dalsem brucevandalsem@quinnemanuel.com
3 Chester Wren-Ming Day cday@orrick.com
4 D. Michael Underhill Munderhill@BSFLLP.com
5 David A. Barrett d Barrett@bsfllp.com
6 Evan A. Parke eparke@bsfllp.com
7 George C. Fisher georgecfisher@gmail.com
8 George C. Fisher georgecfisher@gmail.com
9 George Hopkins Guy hopguy@orrick.com
10 I. Neel Chatterjee nchatterjee@orrick.com
11 Jonathan M. Shaw jshaw@bsfllp.com
12 Kalama M. Lui-Kwan klui-kwan@fenwick.com
13 Mark A. Weissman mweissman@osheapartners.com
14 Mark Andrew Byrne markbyrne@byrnenixon.com
15 Monte M.F. Cooper mcooper@orrick.com
16 Rachel E. Matteo-Boehm rachel.matteo-boehm@hro.com
17 Randy Garteiser randygarteiser@quinnemanuel.com
18 Roger Rex Myers roger.myers@hro.com
19 Scott Richard Mosko scott.mosko@finnegan.com
20 Sean Alan Lincoln slincoln@Orrick.com
21 Sean F. O'Shea soshea@osheapartners.com
22 Steven Christopher Holtzman sholtzman@bsfllp.com
23 Theresa Ann Sutton tsutton@orrick.com
24 Tyler Alexander Baker Tbaker@fenwick.com
25 Valerie Margo Wagner valerie.wagner@dechert.com
26 Warrington S. Parker wparker@orrick.com
27 Yvonne Penas Greer ygreer@orrick.com

16 **Dated: November 3, 2008**

Richard W. Wieking, Clerk

18 By: /s/ JW Chambers
19 **Elizabeth Garcia**
20 **Courtroom Deputy**

EXHIBIT D



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

The Facebook, Inc., et al.,

NO. C 07-01389 JW

Plaintiffs,

v.

**ORDER DENYING THE CONNECTU
FOUNDERS' MOTION TO INTERVENE;
DENYING CONNECTU'S MOTION TO
STAY EXECUTION OF JUDGMENT**

ConnectU, Inc., et al.,

Defendants.

I. INTRODUCTION

Initially, Plaintiffs the Facebook, Inc. and Mark Zuckerberg (collectively, "Facebook") brought this action against ConnectU, Inc. ("ConnectU"), Pacific Northwest Software, Inc., Winston Williams, and Wayne Chang alleging, *inter alia*, misappropriation of trade secrets, unfair competition, and violations of 18 U.S.C. § 1030, *et seq.* The parties were engaged in at least two other lawsuits over these matters; in those cases, ConnectU and its founders, Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra (collectively, the "ConnectU Founders"), were plaintiffs and Facebook was a defendant. Based on a series of events and motions, on July 2, 2008, the Court entered Judgment enforcing a settlement agreement between the parties to all of the actions. (hereafter, "Judgment," Docket Item No. 476.)

United States District Court
For the Northern District of California

1 Presently before the Court are the ConnectU Founders' Motion to Intervene¹ and ConnectU's
2 Motion to Stay Execution of Judgment.² The Court conducted a hearing on August 6, 2008. Based
3 on the papers submitted to date and oral argument of counsel, the Court DENIES the ConnectU
4 Founders' Motion to Intervene on the ground that they have already been made parties to this action.
5 However, the Court GRANTS them an extension of time in which to file their appeal. Further, the
6 Court DENIES ConnectU's Motion to Stay Execution of Judgment.

7 **II. DISCUSSION**

8 **A. Motion to Intervene**

9 The ConnectU Founders move to intervene on the grounds that they have a real economic
10 stake in the outcome of this case and ConnectU will not sufficiently protect their interests.
11 (Intervene Motion at 4, 6.) The Judgment in this case treats the ConnectU Founders as parties; it
12 orders them and the other signatories to take action to comply with the Term Sheet and Settlement
13 Agreement ("Settlement Agreement"). Therefore, before reaching the necessity of allowing them to
14 intervene, the Court reviews the ConnectU Founders' status as existing parties to this action and to
15 the other lawsuits covered by the Settlement Agreement.

16 The Ninth Circuit has held that when a federal court has a basis for jurisdiction over a
17 dispute involving a final settlement agreement, the court may "interpret and apply its own judgment
18 to the future conduct contemplated" by a agreement. See Flanagan v. Arnaiz, 143 F.3d 540, 544-45
19 (9th Cir. 1998). The requisite independent basis for jurisdiction may be supplied by a provision in
20 the settlement agreement. Id. at 544. Such a provision, "empowers a district court to protect its
21 judgment" from subsequent attempts to frustrate "the purpose of the settlement agreement and
22 order." Sandpiper Village Condominium Ass'n., Inc. v. Louisiana-Pacific Corp., 428 F.3d 831, 841

23
24
25 _____
26 ¹ (hereafter, "Intervene Motion," Docket Item No. 574.)

27 ² (hereafter, "Stay Motion," Docket Item No. 578.). Subject to being permitted to intervene,
28 the ConnectU Founders join in the Motion to Stay Enforcement.

1 (9th Cir. 2005). Under this power, individuals may be bound to take actions as long as they had
2 notice and an ability to contest the judgment or order enforcing the settlement agreement. See id.

3 On August 8, 2007, the ConnectU Founders and ConnectU, Inc., were named Plaintiffs in a
4 First Amended Complaint in Civil Action No. 1:07-CV-10593-DPW pending in the District of
5 Massachusetts. The Facebook, Inc., Mark Zuckerberg and others were named as Defendants in that
6 action. In this action, Facebook and Mark Zuckerberg have been named as Plaintiffs and
7 ConnectU, Inc., has been named as a Defendant. Although the ConnectU Founders were named in
8 a Second Amended Complaint in this case, the Court found that it lacked personal jurisdiction over
9 them and dismissed them. (See Docket Item Nos. 136, 232.)

10 On February 22, 2008, the parties entered into a Settlement Agreement, and the ConnectU
11 Founders individually obligated themselves to perform the terms of the agreement. Among the
12 obligations undertaken by the ConnectU Founders were agreements to dismiss the Massachusetts
13 action and to give mutual releases as broad as possible.³ Notably, the ConnectU Founders expressly
14 stipulated to the jurisdiction of this Court for the limited purpose of enforcement of the agreement.
15 (Id.)

16 On April 23, 2008, Facebook filed a motion before this Court to enforce the agreement
17 against the parties to the agreement (“Enforcement Motion”), because disputes arose among the
18 parties with respect to execution of the agreement. (Docket Item No. 329.) Rather than file the
19 Enforcement Motion as a new ancillary proceeding, the motion was filed in this action. As noted
20 above, the ConnectU Founders were not existing parties to this action before the Enforcement
21 Motion was filed because they had been dismissed. Nevertheless, the motion sought enforcement
22 against the ConnectU Founders and ConnectU, Inc., because in the agreement, each of the Founders
23 submitted to the jurisdiction of this Court to enforce the agreement. (Enforcement Order at 3; see
24 Declaration of I. Neel Chatterjee, Ex. F, hereafter, “Chatterjee Decl.,” Docket Item No. 596.)

25

26
27 ³ (Order Granting Plaintiffs’ Confidential Motion to Enforce the Settlement Agreement at 3,
hereafter, “Enforcement Order,” Docket Item No. 461.)

28

1 Notice of the Enforcement Motion was given to counsel for the ConnectU Founders. This
2 was accomplished by filing a notice of the motion in the Massachusetts action in which the
3 ConnectU Founders were parties and by serving that notice on counsel for the ConnectU Founders
4 in the Massachusetts action. (Enforcement Order at 5; Chatterjee Decl., Ex. G.) At a hearing in the
5 Massachusetts action, the parties acknowledged they were aware of the proceedings in this Court.
6 (Id., Chatterjee Decl., Ex. H.)

7 At the hearing on the Enforcement Motion in this case, the Court raised a question with
8 respect to enforcement against the individuals who, although signatories to the agreement, were not
9 formal parties to the present action. (Transcript of Hearing at 74-75.) Counsel for Facebook took
10 the position that the ConnectU Founders had consented to jurisdiction and that on that basis, the
11 Court could proceed to enter judgment enforcing the agreement against them. (Id.) Counsel for the
12 ConnectU Founders made an appearance at the hearing. Their counsel described the status of the
13 Massachusetts' litigation but otherwise did not object to jurisdiction. (Id.) Thus, like ConnectU,
14 Inc., the ConnectU Founders are parties for purposes of proceedings to enforce the Settlement
15 Agreement.

16 In its Enforcement Order, the Court ordered the parties to appear for a hearing and to show
17 cause why a judgment should not be entered ordering the signatories to take actions required of them
18 by the Settlement Agreement. (Enforcement Order at 12.) In its Order, the Court specifically cited
19 the ConnectU Founders' consent to jurisdiction and their receipt of notice of the Enforcement
20 Motion as the basis for the exercise of personal jurisdiction to enforce the agreement against them.
21 (Id.) A copy of the Order to Show Cause was served on counsel for all signatories to the agreement,
22 including counsel for the ConnectU Founders.⁴

23
24
25 ⁴ The service list shows that attorney Scott Mosko of the Finnegan, Henderson, Farabow
26 was served. (Enforcement Order, certificate of service page.) The Finnegan firm previously
27 represented the ConnectU Founders in this action prior to their dismissal; however, the Finnegan
28 firm has represented ConnectU, Inc., since the commencement of this lawsuit and has represented
ConnectU, Inc., and the ConnectU Founders since the commencement of the Massachusetts actions.

1 On July 2, 2008, a show cause hearing was held. Counsel for all signatories to the agreement
 2 appeared, including counsel for the ConnectU Founders. (See n.4, *supra*.) After the hearing, the
 3 Court entered Judgment Enforcing the Settlement Agreement against all the signatories to the
 4 agreement and appointed a Special Master to perform steps necessary to enforce the agreement.
 5 (Judgment at 1-2; Notice of Appointment of a Master; Nomination of Individual to Serve as Master,
 6 Docket Item No. 475.) Among others, the Judgment ordered the ConnectU Founders to perform acts
 7 necessary to comply with the Judgment with respect to this action and the Massachusetts action.
 8 (Judgment at 3.)

9 In sum, the Court confirms its previous finding that the Motion to Enforce the Term Sheet
 10 and Settlement Agreement, although filed under a case number in which the ConnectU Founders
 11 were not already parties, was an ancillary proceeding in which Facebook and Zuckerberg were
 12 nominal Plaintiffs and ConnectU and the ConnectU Founders were nominal Defendants. As the
 13 Supreme Court has noted, “[e]nforcement of [a] settlement agreement . . . whether through award of
 14 damages or decree of specific performance, is more than just a continuation or renewal” of
 15 underlying proceedings. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 378 (1994).
 16 Although the ConnectU Founders were not made parties by virtue of being served with a summons
 17 and complaint, as signatories to the Settlement Agreement they consented to personal jurisdiction
 18 being exercised over them by this Court and to proceedings limited to enforcement of the agreement.
 19 The ConnectU Founders had fair notice that Facebook sought enforcement of the agreement through
 20 a motion, and they had ample opportunity to oppose that motion. Through counsel, the ConnectU
 21 Founders participated in and were aware of these proceedings. Thus, the Judgment enforcing the
 22 Settlement Agreement is binding on them and they may appeal that Judgment.⁵

25
 26 ⁵ The Court notes that even a non-party may be permitted to appeal when “(1) the appellant,
 27 though not a party, participated in the district court proceedings, and (2) the equities of the case
 weigh in favor of hearing the appeal.” *Bank of Am. v. M/V Executive*, 797 F.2d 772, 774 (9th Cir.
 1986).

1 Accordingly, the Court DENIES the motion to intervene as unnecessary because the
2 ConnectU Founders are already parties to these proceedings to enforce the Settlement Agreement.
3 The unique procedural posture of the case, however, persuades the Court to grant the ConnectU
4 Founders additional time to appeal for good cause shown pursuant to Rule 4(a)(5) of Federal Rules
5 of Appellate Procedure.

6 The Court addresses separately the proposed Complaint in Intervention. With their motion
7 to intervene, the ConnectU Founders have tendered a Complaint in Intervention which essentially
8 seeks to relitigate the issues concerning the enforceability of the Settlement Agreement. (See
9 Docket Item No. 577.) The Court addressed these issues at a hearing before granting Facebook's
10 motion to enforce the settlement and entering Judgment. As parties to the case, parties may tender
11 pleadings. However, at this procedural stage, the Court finds that the Complaint in Intervention is
12 improper because intervention is unnecessary. Further, if the Complaint in Intervention is allowed
13 to be filed after Judgment, it would re-open matters covered by the Judgment; this would be
14 improper unless or until the Judgment is set aside and new pleadings are allowed by the Court.
15 Accordingly, the Court STRIKES the ConnectU Founders' Complaint in Intervention.

16 **B. Motion to Stay**

17 ConnectU moves to stay enforcement of the Judgment entered by the Court on the grounds
18 that it may be irreparably harmed and the balance of hardships tips in its favor. (Stay Motion at 5,
19 7.)

20 Federal Rule of Civil Procedure 62(d), which provides for a stay upon court approval of a
21 supersedeas bond, pertains primarily, if not exclusively, to monetary judgments. See NLRB v.
22 Westphal, 859 F.2d 818, 819 (9th Cir. 1988). Thus, whether a district court should grant a stay of
23 the enforcement of a non-monetary judgment is governed by Rule 62(c), which provides that
24 "[w]hen an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying
25 an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during

26

27

28

1 the pendency of the appeal.” Spieler ex rel. Spieler v. Mt. Diablo Unified School Dist., 2007 WL
2 3245286, at *2-3 (N.D. Cal. 2007).

3 The standard for granting a stay pending appeal under Rule 62(c) is similar to that for a
4 preliminary injunction. Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983). A party seeking a
5 stay must show “(1) whether the stay applicant has made a strong showing that he is likely to
6 succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3)
7 whether issuance of the stay will substantially injure the other parties interested in the proceeding;
8 and (4) where the public interest lies.” Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Lopez, 713
9 F.2d at 1435. To satisfy steps (1) and (2), a court may accept proof either that the applicant has
10 shown “a strong likelihood of success on the merits [and] . . . a possibility of irreparable injury to the
11 [applicant],” or “that serious legal questions are raised and that the balance of hardships tips sharply
12 in its favor.” Golden Gate Restaurant v. City and County of San Francisco, 512 F.3d 1112, 1115-16
13 (9th Cir. 2008). When the district court has already ruled on the legal issue being appealed, the
14 court need not conclude that it is likely to be reversed on appeal in order to grant the stay. Strobel v.
15 Morgan Stanley Dean Witter, 2007 WL 1238709, at *1 (S.D. Cal. 2007). However, the court may
16 consider that delay in filing an appeal and seeking a stay vitiates the force of allegations of
17 irreparable harm. Cf. Beame v. Friends of the Earth, 434 U.S. 1310, 1313 (1977).

18 In this case, ConnectU cannot show irreparable harm from execution of the Judgment
19 because the only effect of enforcing the settlement is the transfer of ownership of ConnectU.
20 Barring evidence to the contrary, the Court presumes that Facebook has an equal interest in
21 preserving the value of ConnectU as do ConnectU’s current owners. Moreover, ConnectU filed its
22 motion seeking a stay only days before turnover of its stock was ordered to take place. This delay
23 on the part of ConnectU tends to vitiate its contention that it will be irreparably harmed. See Beame,
24 434 U.S. at 1313.

25 With respect to the issues of the balance of hardships, ConnectU contends that Facebook may
26 somehow adversely affect its right to appeal. (Stay Motion at 5-6.) However, ConnectU admits that

1 it will pursue other litigations with respect to its former counsel related to this case and incur
2 liabilities to its lawyers. Thus, the hardship upon Facebook may be equally as great if the litigation
3 diminishes the value of ConnectU. In essence, the longer the Court delays in enforcing the
4 settlement between the parties, the more likely the value of the consideration subject of the
5 settlement (i.e., the value of the stock of each company) will change. This means that the status quo
6 cannot be preserved with a stay. The Court is concerned that any further delay in enforcing the
7 settlement will create a serious risk of prejudice to Facebook, as well as to ConnectU.

8 Accordingly, the Court DENIES ConnectU's motion to stay enforcement of the Judgment
9 entered in this case.

10 **III. CONCLUSION**

11 The Court DENIES the ConnectU Founders' Motion to Intervene as unnecessary because
12 they have already been made parties to these proceedings by their consent and by service of the
13 Enforcement Motion. The Court STRIKES the ConnectU Founders' Complaint in Intervention.
14 The Court GRANTS the ConnectU Founders additional time in which to file an appeal. Since
15 ConnectU filed a timely Notice of Appeal on August 1, 2008, (see Docket Item No. 585), the
16 ConnectU Founders shall have until **August 22, 2008** to file their appeal.

17 The Court DENIES ConnectU's Motion to Stay Execution of Judgment. The Judgment
18 requires that on or before August 4, 2008, ConnectU and its Founders to deposit with the Master all
19 shares of ConnectU, Inc., endorsed for transfer, and to submit legally sufficient dismissal with
20 prejudice of all cases by and between the parties pending as of the date of the Settlement Agreement.
21 (Judgment at 2.) At the hearing on these motions, it was brought to the Court's attention that while
22 Facebook and Mark Zuckerberg have complied with the Court's Judgment, ConnectU, Inc., and its
23 Founders have failed to do so. Counsel for ConnectU, Inc., and counsel for the ConnectU Founders
24 contend that since the Court had granted a hearing on the Motion to Stay Judgment just two days
25 after the due date, they had a good faith belief that they had a period of reprieve from the Judgment.

26

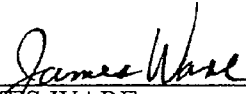
27

28

1 The Court finds good cause to not hold ConnectU and its Founders in contempt for failing to comply
2 with its Judgment as of August 4, 2008.

3 Accordingly, ConnectU and the ConnectU Founders shall comply with the turnover
4 requirements of the Court's July 2, 2008 Judgment Enforcing Settlement Agreement on or before
5 **August 12, 2008.**

6
7 Dated: August 8, 2008



JAMES WARE
United States District Judge

United States District Court
For the Northern District of California

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States District Court
For the Northern District of California

1 THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

- 2 Chester Wren-Ming Day cday@orrick.com
- 3 D. Michael Underhill Munderhill@BSFLLP.com
- 4 David A. Barrett dbarrett@bsflp.com
- 5 Evan A. Parke eparke@bsflp.com
- 6 George Hopkins Guy hopguy@orrick.com
- 7 I. Neel Chatterjee nchatterjee@orrick.com
- 8 Jonathan M. Shaw jshaw@bsflp.com
- 9 Kalama M. Lui-Kwan klui-kwan@fenwick.com
- 10 Mark A. Weissman mweissman@osheapartners.com
- 11 Mark Andrew Byrne markbyrne@byrnenixon.com
- 12 Monte M.F. Cooper mcooper@orrick.com
- 13 Rachel E. Matteo-Boehm rachel.matteo-boehm@hro.com
- 14 Roger Rex Myers roger.myers@hro.com
- 15 Scott Richard Mosko scott.mosko@finnegan.com
- 16 Sean Alan Lincoln slincoln@Orrick.com
- 17 Sean F. O'Shea soshea@osheapartners.com
- 18 Steven Christopher Holtzman sholtzman@bsflp.com
- 19 Theresa Ann Sutton tsutton@orrick.com
- 20 Tyler Alexander Baker Tbaker@fenwick.com
- 21 Valerie Margo Wagner valerie.wagner@dechert.com
- 22 Yvonne Penas Greer ygreer@orrick.com

23
24
25
26
27
28
Dated: August 8, 2008

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy

EXHIBIT E



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

The Facebook, Inc., et al.,

NO. C 07-01389 JW

Plaintiffs,

**JUDGMENT ENFORCING SETTLEMENT
AGREEMENT**

v.

ConnectU, Inc., et al.,

Defendants.

Pursuant to the Court's June 25, 2008 Order Granting Plaintiffs' Confidential Motion to Enforce the Settlement Agreement (docket item no. 461), the parties appeared before the Court on July 2, 2008 to show cause why a judgment should not be entered. Based on the papers submitted and oral arguments of counsel,

JUDGMENT IS ENTERED ENFORCING "THE TERM SHEET & SETTLEMENT AGREEMENT" AS FOLLOWS:

(1) The Facebook, Inc. and Mark Zuckerberg:

(a) Pursuant to Paragraphs 4 and 7 of the Agreement, unless otherwise ordered by the Court, on or before **August 4, 2008**, The Facebook, Inc. shall deposit with the Master, the amount of cash and the certificates representing the amount of The Facebook, Inc. common shares stated in Paragraph 7 of the Agreement, endorsed for transfer. The following legend shall appear on certificates of

The Facebook, Inc. common stock issued pursuant to this Judgment:

1 THE SHARES REPRESENTED BY THIS CERTIFICATE HAVE NOT BEEN REGISTERED
2 UNDER THE SECURITIES ACT OF 1933, AS AMENDED. THEY MAY NOT BE SOLD, OFFERED FOR
3 SALE, PLEDGED OR HYPOTHECATED IN THE ABSENCE OF A REGISTRATION STATEMENT IN
4 EFFECT WITH RESPECT TO THE SECURITIES UNDER SUCH ACT OR AN OPINION OF COUNSEL
5 REASONABLY SATISFACTORY TO THE ISSUER THAT SUCH REGISTRATION IS NOT REQUIRED,
6 OR UNLESS SOLD PURSUANT TO RULE 144 OF SUCH ACT.

7 THE SHARES REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO AN AGREEMENT
8 WITH REGARD TO THE VOTING OF SUCH SHARES, AS PROVIDED IN THE CERTAIN TERM SHEET
9 & SETTLEMENT AGREEMENT PURSUANT TO WHICH SUCH SHARES WERE ORIGINALLY
10 ISSUED. THE HOLDERS OF SUCH SHARES ARE ENTITLED TO THE SAME ANTI-DILUTION
11 RIGHTS AFFORDED THE ISSUER'S SERIES D PREFERRED STOCK, AS PROVIDED IN SUCH TERM
12 SHEET & SETTLEMENT AGREEMENT. A COPY OF SUCH TERM SHEET & SETTLEMENT
13 AGREEMENT IS ON FILE IN THE OFFICE OF THE SECRETARY OF THE ISSUER.

14 (b) Pursuant to Paragraphs 2 and 4 of the Agreement, on or before **12 noon on**
15 **July 9, 2008**, The Facebook, Inc. and Mark Zuckerberg shall submit to the
16 Court for approval a proposed form of release. Upon approval by the Court,
17 the release shall be signed by The Facebook, Inc. and Mark Zuckerberg, and
18 shall have attached to it corporate authority given to the corporate signatory
19 and shall be notarized as to each signatory and shall be immediately deposited
20 with the Master;

21 (c) Pursuant to Paragraphs 2 and 4 of the Agreement, unless otherwise ordered by
22 the Court, on or before **August 4, 2008**, a legally sufficient dismissal with
23 prejudice of all cases by and between the parties pending as of the date of the
24 Agreement.¹ The dismissal shall recite that each party to the respective
25 litigation shall bear their own attorney fees and costs.

26
27 ¹ The other two cases are ConnectU, LLC v. Facebook, Inc., et al., Case No. 1:04-cv-11923-
28 DPW, currently on appeal to the First Circuit Court of Appeals; and ConnectU, Inc., et al. v.
Facebook, Inc., et al., Case No. 1:07-cv-10593-DPW, currently pending in the District of
Massachusetts.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

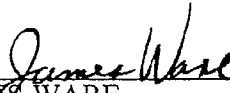
- (2) ConnectU Inc., Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra:
- (a) Pursuant to Paragraphs 4 and 7 of the Agreement, unless otherwise ordered by the Court, on or before **August 4, 2008**, ConnectU Inc. shall deposit with the Master all shares of ConnectU Inc., endorsed for transfer. To the extent the parties to the Agreement do not own any shares of ConnectU Inc., to fulfill the obligation of the transfer of "all ConnectU stock," the parties to the Agreement shall take such actions in their respective corporate and individual capacities as are necessary to effect the deposit with the Master of all shares of ConnectU stock;
- (b) Pursuant to Paragraphs 2 and 4 of the Agreement, on or before **12 noon on July 9, 2008**, ConnectU, Inc., Cameron Winklevoss, Tyler Winklevoss and Divya Narendra shall submit to the Court for approval a proposed form of release. Upon approval by the Court, the release shall be signed by these parties and shall have attached to it corporate authority given to the corporate signatory and shall be notarized as to each signatory and shall be immediately deposited with the Master;
- (c) Pursuant to Paragraphs 2 and 4 of the Agreement, unless otherwise ordered by the Court, on or before **August 4, 2008**, a legally sufficient dismissal with prejudice of all cases by and between the parties pending as of the date of the Agreement. The dismissal shall recite that each party to the respective litigation shall bear their own attorney fees and costs.
- (3) Upon further order of the Court, the parties shall deposit with the Master such other and further things which will facilitate the orderly exchange of the consideration and shall do the things ordered by the Court to ensure the operational integrity of the business entities that are parties to the Agreement.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(4) The deposits being made with the Master by the parties pursuant to this Judgment shall be transferred out of the deposit by the Master only upon further Order of the Court in enforcement of the Agreement.

The Court retains jurisdiction to enforce this Judgment.

Dated: July 2, 2008



JAMES WARE
United States District Judge

United States District Court
For the Northern District of California

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

2 Chester Wren-Ming Day cday@orrick.com
3 D. Michael Underhill MUnderhill@BSFLLP.com
4 David A. Barrett dbarrett@bsflfp.com
5 Evan A. Parke eparke@bsflfp.com
6 George Hopkins Guy hopguy@orrick.com
7 I. Neel Chatterjee nchatterjee@orrick.com
8 Jonathan M. Shaw jshaw@bsflfp.com
9 Kalama M. Lui-Kwan klui-kwan@fenwick.com
10 Monte M.F. Cooper mcooper@orrick.com
11 Scott Richard Mosko scott.mosko@finnegan.com
12 Sean Alan Lincoln slincoln@Orrick.com
13 Steven Christopher Holtzman sholtzman@bsflfp.com
14 Theresa Ann Sutton tsutton@orrick.com
15 Tyler Alexander Baker Tbaker@fenwick.com
16 Valerie Margo Wagner valerie.wagner@dechert.com
17 Yvonne Penas Greer ygreer@orrick.com

18 **Dated: July 2, 2008**

Richard W. Wieking, Clerk

19 **By: /s/ JW Chambers**
20 **Elizabeth Garcia**
21 **Courtroom Deputy**

EXHIBIT F



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

The Facebook, Inc., et al.,

NO. C 07-01389 JW

Plaintiffs,

**ORDER GRANTING PLAINTIFFS'
CONFIDENTIAL MOTION TO ENFORCE
THE SETTLEMENT AGREEMENT**

v.

ConnectU, Inc., et al.,

Defendants.

I. INTRODUCTION

Plaintiffs in this lawsuit are The Facebook Inc. and Mark Zuckerberg (collectively, "Facebook"). Plaintiffs bring this action against ConnectU, Inc., Pacific Northwest Software, Inc., Winston Williams, and Wayne Chang (collectively, "Defendants") alleging, *inter alia*, misappropriation of trade secrets, unfair competition, and violations of 18 U.S.C. § 1030, *et seq.* In essence, Facebook alleges that ConnectU gained unauthorized access to Facebook's servers and website and took information for its own unlawful use. The parties are engaged in at least two other lawsuits over these matters; in those cases, ConnectU is the Plaintiff and Facebook is the Defendant.

In the course of this lawsuit, the parties engaged in private mediation. On February 22, 2008, as the result of the mediation, the parties signed a written "Term Sheet & Settlement Agreement." In the Agreement, the parties agreed to resolve all of their disputes and to dismiss the pending lawsuits. The Agreement provides that they "may execute more formal documents but these terms are binding." After signing the Agreement, the parties attempted to draft formal

1 documents but failed to reach a consensus on certain terms. In the Agreement, the parties stipulate
2 that the federal court in San Jose, California has jurisdiction to enforce it. Based on a belief that a
3 court order is necessary to enforce the February 22, 2008 Agreement, Facebook filed the present
4 motion in this Court.¹

5 The question for decision by the Court is whether the February 22, 2008 Agreement contains
6 sufficiently definite and essential terms that it may be enforced. For the reasons stated below, the
7 Court finds that the Agreement is enforceable and orders its enforcement.

8 II. BACKGROUND

9 As stated above, this action is one of three separate actions between the parties in various
10 federal courts.² On January 22, 2008, United States Magistrate Judge Richard Seeborg ordered the
11 parties to participate in Alternative Dispute Resolution. (Docket Item No. 270.) The parties elected
12 to participate in private mediation.

13 On February 22, 2008, the parties engaged in mediation before Antonio Piazza. Both sides
14 were represented by counsel. As the result of the mediation, the parties signed a handwritten
15 document entitled, "Term Sheet & Settlement Agreement" ("Agreement"). (Second Declaration of
16 Evan A. Parke, Ex. A., hereafter, "Parke Decl.," filed under seal.)

17 With the precise financial terms redacted,³ the Agreement provides, as follows:⁴

18
19 _____
20 ¹ (hereafter, "Motion," Docket Item No. 329, filed under seal.)

21 ² The other actions are ConnectU LLC v. Zuckerberg, Appeal No. 07-1796 (1st Cir.) and
ConnectU, Inc. v. Facebook, Inc., Case No. C 07-10593-DPW (D. Mass.).

22 ³ The Agreement recites that all of its terms are "confidential." At the hearing on the
23 motion, the Court expressed its need to discuss the Agreement in its Order. The Court now
24 determines that it can protect the confidentiality of the Agreement if references to the amount of
25 consideration which the parties agreed to exchange as a part of the settlement are omitted.
Moreover, since neither Facebook nor ConnectU are publicly traded companies at this time, the
Court finds good cause to keep the transcript of the proceedings under seal as requested by the
parties to protect their financial information.

26 ⁴ (Declaration of Theresa A. Sutton in Support of Plaintiffs' Confidential Motion, hereafter,
27 "Sutton Decl.," Ex. A at 1-2, filed under seal.) For authenticity purposes, the Court leaves all
typographical errors and strikeouts in the Agreement unchanged.

The Term Sheet & Settlement Agreement

- 1) The following will settle all disputes between ConnectU and its related parties, on the one hand and Facebook and its related parties, on the other hand.
- 2) All parties get mutual releases as broad as possible and all cases are dismissed with prejudice. Each side bears their own attorneys fees and costs.
- 3) All terms of agreement are confidential, no party disparages any other parties and no party will comment further publicly related to facts underlying or related to this dispute. The parties will agree on any public statements. A violation of the publicity and confidentiality provision of this paragraph shall be submitted to a binding arbitrator who may award injunctive relief and damages up to [REDACTED] million.
- ~~4) This Agreement is subject to the continuing enforcement of the court in San Jose to the current action.⁵~~
- 4) The parties stipulate that the San Jose Federal Court shall have jurisdiction to enforce this agreement.
- 5) The parties agree that they may execute more formal documents but these terms are binding and this document may be submitted into evidence to enforce this agreement.
- 6) ConnectU founders represent and warrant (1) They have no further right to assert against Facebook (2) They have no further claims against Facebook & its related parties.
- 7) All ConnectU stock in exchange for [REDACTED] in cash & [REDACTED] common shares in Facebook. The terms of the shares shall include a requirement that all votes related to the shares will be voted in accordance with the Board of Director's recommendations and be subject to the same anti-dilution protections afforded to Series D preferred stock. ~~The form~~⁶ Facebook will determine the form & documentation of the acquisition of ConnectU's shares [Consistent with a stock and cash for stock acquisition].⁷ Facebook represents that it currently has [REDACTED] fully diluted shares outstanding.

The Agreement was signed by Mark Zuckerberg, individually and on behalf of Facebook, and by Cameron Winklevoss, individually and on behalf of ConnectU. Tyler Winklevoss and Divya Narendra also signed the Agreement. (Sutton Decl., Ex. A at 2.) These individuals are principals of their respective companies.

⁵ Strikeout in the original.

⁶ Strikeout in the original.

⁷ Interlineation in original.

1 Plaintiffs' motion to enforce the Agreement is made on the grounds that the Agreement
2 unambiguously sets forth all material terms of the parties' settlement and Defendants should be
3 ordered to comply with it. (Motion at 6.) Defendants contend that Facebook's motion to enforce the
4 Agreement should be denied because (1) the agreement is missing material terms, (2) the terms
5 which are included were not agreed upon, and (3) Facebook committed fraud in the procurement of
6 the Agreement. (ConnectU's Opposition to Facebook's Confidential Motion at 6, hereafter,
7 "Opposition," filed under seal.) In its reply, Plaintiffs contend that the Agreement was not procured
8 by fraud. (Reply in Support of Confidential Motion at 9, hereafter, "Reply," filed under seal.) The
9 Court considers each issue in turn.

10 III. DISCUSSION

11 A. The Court's Jurisdiction

12 Before considering the motion to enforce the Agreement, the Court considers its jurisdiction
13 to act on such a motion. The Court also considers issues raised at the hearing, namely, whether
14 Plaintiffs are required to file an action to enforce the Agreement, to which Defendants would be
15 allowed to plead their objections to enforcement as affirmative defenses.

16 "It is well settled that a district court has the equitable power to enforce summarily an
17 agreement to settle a case pending before it." Callie v. Near, 829 F.2d 888, 890 (9th Cir. 1987);
18 Decanay v. Mendoza, 573 F.2d 1075, 1078 (9th Cir. 1978); TNT Mktg., Inc. v. Agresti, 796 F.2d
19 276, 278 (9th Cir. 1986); In re City Equities Anaheim, Ltd., 22 F.3d 954, 957 (9th Cir. 1994). Once
20 a settlement has been reached in a pending action, any party to the agreement may bring a motion to
21 enforce it. See Doi v. Halekulani Corp., 276 F.3d 1131, 1135 (9th Cir. 2002). Specifically,
22 California law provides:

23 If parties to pending litigation stipulate, in a writing signed by the parties outside the
24 presence of the court or orally before the court, for settlement of the case, or part thereof, the
court, upon motion, may enter judgment pursuant to the terms of the settlement.

25 Cal. Civ. Proc. Code § 664.6. In addition to the statutory power to enter a judgment, the court's
26 enforcement powers include the inherent authority to order a party's specific performance of acts

1 required by the settlement agreement and to award damages or other sanctions for noncompliance.
2 TNT Mktg., 796 F.2d at 278.

3 In this case, in addition to its inherent authority and the authority conferred by California
4 law, in Paragraph 4 of the Agreement, the parties explicitly stipulated that the Court has authority to
5 exercise enforcement. Therefore, the Court is satisfied that it has the jurisdiction and authority to
6 enforce the Agreement without requiring additional pleadings.

7 However, the power to enforce a settlement agreement can only be exercised if the terms
8 have been agreed to by the individuals authorized to make decisions behalf of the parties. See
9 Harrop v. W. Airlines, Inc., 550 F.2d 1143, 1145 (9th Cir. 1977). At the hearing, Defendants raised
10 two issues regarding the authority of the Court to enforce the Agreement against the individuals and
11 the corporations.

12 First, Defendants question whether there is a bases for the Court to exercise personal
13 jurisdiction over ConnectU's individual shareholders, i.e., the three principals who signed the
14 Agreement.⁸ The Court finds that by signing the Agreement with explicit statements such as those
15 in Paragraphs 1, 2, and 4, each of the signatories subjected him or herself to the Court's jurisdiction
16 for the limited purpose of enforcing the Agreement. Second, Defendants question whether
17 ConnectU's individual shareholders received proper notice of the proceedings. The Court finds the
18 three principals of ConnectU have had adequate notice since they are plaintiffs in the Massachusetts
19 action where the parties have vigorously litigated discovery issues relating to the enforcement of this
20 Agreement. (See June 3, 2008, Memorandum and Order, No. 07-10593-DPW, D. Mass.) It is
21 incongruous to argue that these individuals did not receive notice of the motion since Judge
22
23
24

25
26 ⁸ Defendants first made these contentions in their sur-reply. (Defendants' Sur-Reply in
27 Opposition to Confidential Motion to Enforce, hereafter, "Sur-Reply," Docket Item No. 438.) The
28 Court grants Defendants' motion for leave to file the sur-reply, and considers the contentions raised
in the sur-reply.

1 Woodlocks' June 3, 2008 order in the Massachusetts action specifically addressed the hearing on the
2 motion to enforce the Agreement in this Court.⁹ (Id. at 2.)

3 **B. The Material Terms**

4 The construction and enforcement of settlement agreements are governed by principles of
5 local law that apply to the interpretation of contracts, even if the underlying cause of action is
6 federal. United Commercial Ins. Serv., Inc. v. Paymaster Corp., 962 F.2d 853, 856 (9th Cir. 1992).
7 Thus, challenges to a settlement agreement based on interpretation of ambiguous terms, fraud in the
8 inducement, or indefiniteness of a term all turn on the applicable state law. See White Farm Equip.
9 Co. v. Kupcho, 792 F.2d 526, 529 (5th Cir. 1986); see, e.g., Doi, 276 F.3d at 1135.

10 California has a strong policy in favor of enforcing settlement agreements. Osumi v. Sutton,
11 151 Cal. App. 4th 1355, 1357 (2007). Under California law, a settlement agreement "must be
12 interpreted as to give effect to the mutual intention of the parties as it existed at the time of
13 contracting." Roden v. Bergen Brunswick Corp., 107 Cal. App. 4th 620, 625 (2003); see Cal. Civ.
14 Code, § 1636. When the agreement is in writing, "the intention . . . is to be ascertained from the
15 writing alone, if possible." Brinton v. Bankers Pension Serv., Inc., 76 Cal. App. 4th 550, 559
16 (1999); see Cal. Civ. Code § 1639. "[C]ourts will not set aside contracts for mere subjective
17 misinterpretation." Hedging Concepts, Inc. v. First Alliance Mortgage Co., 41 Cal. App. 4th 1410,
18 1421 (1996). "A settlement agreement, like any other contract, is unenforceable if the parties fail to
19 agree on a material term or if a material term is not reasonably certain." Lindsay v. Lewandowski,
20 139 Cal. App. 4th 1618, 1622 (2006) (citing Weddington Productions, Inc. v. Flick, 60 Cal. App. 4th
21 793, 811 (1998)).

22 First, the Agreement clearly states the consideration for the performance required and how it
23 must be paid. (Sutton Decl., Ex. A at 1-2.) In exchange for a specified amount of cash and stock in
24

25
26 ⁹ At the hearing, counsel for ConnectU's individual shareholders argued that they are not
27 "plaintiffs" in the Massachusetts action. ~~The Court declines to entertain the notion since counsel~~
28 admitted that the individual shareholders added themselves as plaintiffs to the amended complaint in
that action.

1 Facebook, ConnectU founders are required under the Agreement to represent and warrant “they
2 have no further right to assert against Facebook” and “they have no further claims against Facebook
3 and its related parties.” (Id.)

4 Second, the Agreement clearly defines the structure of the transaction. (Sutton Decl., Ex. A
5 at 1-2.) Paragraph 7 recites that all ConnectU stock is to be exchanged for a sum certain amount of
6 cash and a precise number of common shares in Facebook; it is a stock and cash for stock
7 acquisition. Subsequent negotiations might have proposed a different structure for the transaction or
8 other additional terms, but those proposal were, apparently, rejected. (Id., Ex. B.) The Court cannot
9 considered subsequent negotiations as evidence that there was no “meeting of the minds” with the
10 respect to the Agreement. The Court must determine the parties’ intent from the four corners of the
11 Agreement, not from the extrinsic evidence. Brinton, 76 Cal. App. 4th at 559; Cal. Civ. Code §
12 1639.

13 Third, the principals of each company, who are persons authorized to make decisions for the
14 parties, all signed the handwritten version of the Agreement and none of the signatures are disputed.
15 However, Defendants point out that one stockholder in ConnectU, Howard Winklevoss, was not a
16 party to, and did not sign the Agreement. (Opposition at 10.) Therefore, the issue becomes whether
17 the lack of Howard Winklevoss’ signature makes the Agreement unenforceable.

18 ConnectU is a Connecticut corporation. (Id. at 1.) Under Connecticut law, a share exchange
19 transaction only needs to be approved by majority vote. See Conn. Gen. Stat. § 33-816(a). As of
20 May 23, 2006, Howard Winklevoss owned 1% of the outstanding shares in ConnectU. (Declaration
21 of Neel Chatterjee in Support of Plaintiffs’ Reply, Ex. B at 10, filed under seal.) There is no
22 evidence his ownership interest changed as of the date of the Agreement. The shareholders who
23 signed the Agreement own 99% of the outstanding shares. Since a majority of ConnectU’s
24 shareholders have agreed to the transaction, the consent of Howard Winklevoss is unnecessary to
25 make the Agreement binding on him. Therefore, the lack of Howard Winklevoss’ signature is not an
26 impediment to enforcing the Agreement.

27
28

1 Defendants contend that the Agreement was only a starting point for negotiating more formal
 2 documentation. (Opposition at 7-9.) However, the Agreement itself provides that the parties “*may*
 3 execute more formal documents,” but that the Agreement is “binding.” (Sutton Decl., Ex. A at 1,
 4 emphasis added.) It is significant that the parties used the word “may” in this instance as opposed to
 5 “will,” which they had readily used in other contexts. (See e.g., Agreement ¶¶ 1, 3, 7.) On the face
 6 of the Agreement, it is clear that, had the parties wished to require more formal documents, they
 7 could have indicated they *will* or *shall* execute more formal documents. Instead, they elected to use
 8 the word, “may,” and made clear that the Agreement is binding in and of itself.

9 In sum, the Court finds that the Agreement reached by the parties does not display on its face
 10 a failure to agree or any uncertainty regarding its material terms. Accordingly, the Court finds that
 11 the Agreement is enforceable.

12 **C. Whether the Agreement Was Procured by Fraud**

13 Defendants contend that Facebook’s motion to enforce the Agreement should be denied
 14 because Plaintiffs fraudulently procured the Agreement by misrepresenting Facebook’s present
 15 value. (Opposition at 14.)

16 A contract is not enforceable if it was induced by fraud. Jones v. Grieve, 15 Cal. App. 561,
 17 566-67 (1911). To prove fraud in the inducement of a contract, a party must establish the elements
 18 of common law fraud. Id. The elements of fraud are (1) misrepresentation; (2) scienter; (3)
 19 justifiable reliance; and (4) resulting damage. Buckland v. Threshold Enterprises, Ltd., 155 Cal.
 20 App. 4th 798, 806-07 (2007); Wilke v. Coinway, Inc., 257 Cal. App. 2d 126, 136 (1967) (quoting
 21 Cortez v. Weymouth, 235 Cal. App. 2d 140 (1965)). These legal principles apply to a contract to
 22 settle a lawsuit. See Merced County Mut. Fire Ins. Co. v. The State of California, 233 Cal. App. 3d
 23 765, 771 (1991).

24 Where a party is represented by counsel, or where the alleged misrepresentation was made
 25 by an adversary during the course of negotiations, courts have held that reliance is unjustifiable. See
 26 ~~Seognamill v. Credit Suisse First Boston LLC, 2005 WL 2045807 (N.D. Cal. 2005) (holding as a~~

1 matter of law that reliance on representation of adversary in execution of merger agreement was
2 unjustifiable where parties were represented by counsel during the negotiation process); Wilhelm v.
3 Pray, Price, Williams & Russell, 186 Cal. App. 3d 1324 (1986) (holding that the fraud claim failed
4 because plaintiff was represented by counsel at the time of the allegedly fraudulent statement, and it
5 was not “reasonable for plaintiff to accept defendant’s statements without an independent inquiry or
6 investigation”).

7 **1. ConnectU’s Proffer Regarding Facebook’s Valuation**

8 Defendants contend that they were defrauded during the settlement negotiations because
9 Plaintiffs did not disclose a valuation of Facebook common stock which had been made by the
10 Facebook Board of Directors. (Opposition at 6.)

11 Apparently, in October 2007, Facebook and Microsoft issued a press release stating
12 Microsoft would “take a \$240 million stake in Facebook’s next round of financing at a \$15 billion
13 valuation.” (Parke Decl., Ex. J.) Defendants proffer evidence that subsequent to the press release,
14 in the regular course of its operations, Facebook’s Board of Directors determined a value of the
15 company’s “shares” which was different than the valuation disclosed in the press release.
16 (Declaration of Robert T. Clarkson ¶ 11, filed under seal.)

17 Defendants do not challenge the accuracy of the press release itself. Thus, there is no claim
18 that the statement in the release was not true when it was made. (Declaration of Ted Wang in
19 Support of Plaintiffs’ Confidential Motion ¶ 2, filed under seal.) Plaintiffs do not deny that the
20 Facebook Board of Directors made a subsequent valuation of Facebook shares which was a different
21 value from the value Microsoft attributed to the company. However, Plaintiffs did not make any
22 representations or warranties in the Agreement about the value of Facebook common stock.¹⁰

23 _____
24 ¹⁰ Defendants provide no authority to support their contention that either Facebook or
25 Zuckerberg had a duty to disclose the Board’s valuation to Defendants in the context of the
26 settlement or to correct any subjective valuation which Defendants might have made when
27 ~~correct a disclosure which is misleading when made, but usually, there is no duty to a correct~~
28 statement which is true at the time it is made. See Brody v. Transitional Hospitals Corp., 280 F.3d
997, 1006 (9th Cir. 2002); Backman v. Polaroid Corp., 910 F.2d 10, 17 (1st Cir. 1990). Intentional

1 Moreover, it is undisputed that the shares the parties agreed to exchange in the Agreement and the
2 shares involved in the Microsoft's transaction are of different classes. Accordingly, the failure to
3 disclose the difference in the valuations cannot be fraudulent as a matter of law.

4 Further, the Agreement does not attribute a specific value to the outstanding shares of
5 Facebook's stock; there is no admissible evidence that Plaintiffs made any such representation while
6 negotiating the settlement.¹¹ Rather, the only representation evident from the Agreement is the
7 number of fully diluted shares which Facebook currently has outstanding. (Parke Decl., Ex. A.)
8 Defendants have failed to show that this representation was false or that there were any other
9 misrepresentations made by Plaintiffs upon which Defendants could have justifiably relied.

10 In sum, the Court finds Defendants have failed to establish that Plaintiffs made a
11 misrepresentation during the negotiation. The individual signatories to the Agreement are
12 sophisticated business parties who were represented by reputable counsel at the mediation. Either
13 party could have chosen to condition the financial exchange being negotiated on representations and
14 warranties of the value of the stock involved or to conduct their own due diligence with respect to
15 Facebook's valuation. Neither party chose these courses of conduct. Notably, in his June 3, 2008
16 order denying ConnectU's motion to compel production of documents, Judge Woodlock stated:

17 From all that appears, the parties were prepared to settle their disputes then, despite the fact
18 that aspects of discovery in this case—most pertinently for present purposes, document
production—had not been completed and unresolved discovery issues remained outstanding.

19 (See June 3, 2008, Memorandum and Order at 2, No. 07-10593-DPW, D. Mass.) Thus, the parties
20 elected to proceed with their settlement negotiations knowing they lacked potentially relevant

21 _____
22 concealment exists only "when a party to a transaction, who is under no duty to speak, nevertheless
23 does speak and suppresses facts which materially qualify the facts stated." Persson v. Smart
Inventions, Inc., 125 Cal. App. 4th 1141, 1164 (2005).

24 ¹¹ Defendants proffer evidence of statements made during mediation that resulted in the
25 Agreement. Under ADR Local Rule 6-11, "anything that happened or was said, any position taken,
26 and any view of the merits of the case formed by any participant in connection with any mediation
... shall not be ... (2) disclosed to the assigned judge; or (3) used for any purpose, including
impeachment, in any pending or future proceeding in this court." Pursuant to this privilege, the
27 Court declines to conduct a hearing or consider evidence regarding the details of the parties'
negotiations in their mediation.

1 information. Without a showing by Defendants of a material misrepresentation or omission in the
2 negotiations, the Court finds no basis to decline enforcement.

3 **2. Securities Fraud**

4 In their opposition and sur-reply, Defendants contend that the Agreement is not enforceable
5 because Plaintiffs committed securities fraud, making the Agreement voidable. (Opposition at 14;
6 Sur-Reply at 7.)

7 Neither Plaintiffs nor Defendants have cited authority that an agreement to exchange shares
8 of closely held corporations pursuant to settlement of litigation between the companies is voidable
9 by showing securities fraud. The cases which Defendants cite in their sur-reply regarding a duty to
10 disclose "material non-public information" all fall within the context of insider trading, which is not
11 an issue in this case. (Sur-Reply at 10.)

12 On June 24, 2008, the day after the hearing, Defendants requested leave to file additional
13 authority to provide precedent for voiding a purported settlement agreement on the basis of
14 securities fraud.¹² While Defendants cite one case where a settlement was found void under § 29 of
15 the Securities Exchange Act, that case involved an agreement which violated the margin
16 requirements of Regulation T because the defendant failed to recover capital after the settlement.
17 Pearlstein v. Scudder and German, 429 F.2d 1136, 1142-43 (2d Cir. 1970). Contrary to Pearlstein,
18 the Ninth Circuit has held that a broad release in a signed settlement agreement operates to prevent a
19 party from collaterally attacking the agreement by alleging it violates the securities laws under § 29.
20 Petro-Ventures, Inc. v. Takessian, 967 F.2d 1337 (9th Cir. 1992). Specifically, the Ninth Circuit
21 noted:

22 [w]hen, as here, a release is signed in a commercial context by parties in a roughly
23 equivalent bargaining position and with ready access to counsel, the general rule is that, if
24 'the language of the release is clear, . . . the intent of the parties [is] indicated by the language
25 employed.'

26 ¹² (See Docket Item No. 454.) While Plaintiffs have not had an opportunity to respond, the
27 Court finds good cause to grant Defendants leave and considers the authority presented in
28 Defendants' papers.

1 Id. at 1342 (quoting Locafrance U.S. Corp. v. Intermodal Sys. Leasing, Inc., 558 F.2d 1113, 1115
2 (2d Cir. 1977)). Thus, in Petro-Ventures, the Ninth Circuit effectuated the parties' intent to bring
3 about "general peace" by finding that their settlement agreement cannot be voided under § 29. Id.

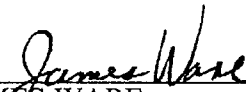
4 As in Petro-Ventures, this case involves a settlement agreement reached by the parties, who
5 were represented by counsel, in which they intended to undertake to give mutual releases that were
6 "as broad as possible." (Agreement ¶ 2.) There is no doubt that the language of the release in
7 Paragraph 2 of the Agreement conveys the intent of the parties to release all claims. Thus, the
8 Agreement cannot be collaterally attacked using § 29.

9 Accordingly, the Court finds that Defendants have failed to tender sufficient evidence of
10 fraud in the circumstances proffered to the Court to create a genuine dispute as to whether the
11 Agreement was fraudulently induced.

12 **V. CONCLUSION**

13 The Court GRANTS Plaintiffs' Motion to Enforce the Parties' Settlement Agreement. The
14 parties are ordered to appear on **July 2, 2008 at 10 a.m.** to show cause why a judgment should not
15 be entered ordering the parties to take the actions required of them by the Settlement Agreement.
16 On or before **June 30, 2008**, the parties are directed to submit a proposed form of judgment
17 consistent with this Order.

18
19 Dated: June 25, 2008



JAMES WARE
United States District Judge

United States District Court
For the Northern District of California

United States District Court
For the Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

- Chester Wren-Ming Day cday@orrick.com
- D. Michael Underhill MUnderhill@BSFLLP.com
- David A. Barrett dbarrett@bsflfp.com
- Evan A. Parke eparke@bsflfp.com
- George Hopkins Guy hopguy@orrick.com
- I. Neel Chatterjee nchatterjee@orrick.com
- Jonathan M. Shaw jshaw@bsflfp.com
- Kalama M. Lui-Kwan klui-kwan@fenwick.com
- Monte M.F. Cooper mcooper@orrick.com
- Scott Richard Mosko scott.mosko@finnegan.com
- Sean Alan Lincoln slincoln@orrick.com
- Steven Christopher Holtzman sholtzman@bsflfp.com
- Theresa Ann Sutton tsutton@orrick.com
- Tyler Alexander Baker Tbaker@fenwick.com
- Valerie Margo Wagner valerie.wagner@dechert.com
- Yvonne Penas Greer ygreer@orrick.com

Dated: June 25, 2008

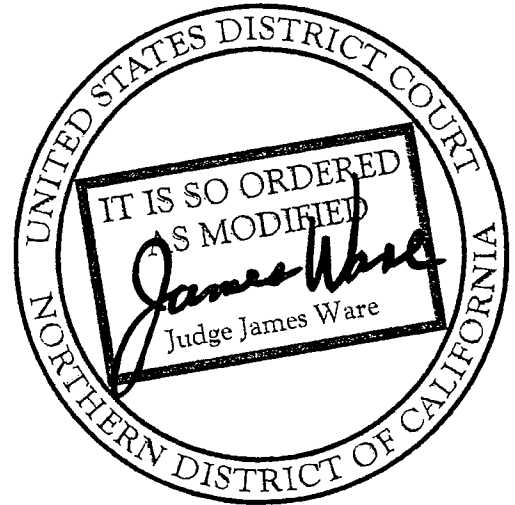
Richard W. Wieking, Clerk

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy

EXHIBIT G



1 SEAN A. LINCOLN (State Bar No. 136387)
 2 salincoln@orrick.com
 3 I. NEEL CHATTERJEE (State Bar No. 173985)
 4 nchatterjee@orrick.com
 5 MONTE COOPER (State Bar No. 196746)
 6 mcooper@orrick.com
 7 THERESA A. SUTTON (State Bar No. 211857)
 8 tsutton@orrick.com
 9 YVONNE P. GREER (State Bar No. 214072)
 10 ygreer@orrick.com
 11 ORRICK, HERRINGTON & SUTCLIFFE LLP
 12 1000 Marsh Road
 13 Menlo Park, CA 94025
 14 Telephone: 650-614-7400
 15 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

15 THE FACEBOOK, INC. and MARK
 16 ZUCKERBERG,

17 Plaintiffs,

18 v.

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

24 Defendants.

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

25 **STIPULATION AND [PROPOSED] ORDER ENLARGING TIME TO FILE A JOINT PROPOSED ORDER RE SEALING; AND**

26 **ORDER GRANTING IN PART DENYING IN PART MOTIONS POSTED AS DOCKET ITEM NOS. 366, 374 AND 393**

27 This Stipulation is entered into by and among Plaintiffs Facebook, Inc., and
 28 Mark E. Zuckerberg and Defendant ConnectU, Inc., through its respective attorneys of record.

WHEREAS, on May 27, 2008, the Court issued an order requesting that the parties submit, by June 9, a Joint Proposed Order regarding "all sealing motions that are pending as of the date of the Jointed Proposed Order is filed";

1 WHEREAS, Plaintiffs Facebook, Inc. and Mark E. Zuckerberg will be filing their
2 Reply Memorandum and supporting documents in support of their Confidential Motion (Docket
3 No. 329) under seal today;

4 WHEREAS, the parties believe that an extension of time to file the Joint Proposed
5 Order, until tomorrow, June 10, is necessary in order to include Plaintiffs' June 9 filing;

6 IT IS HEREBY STIPULATED AND AGREED THAT the parties' Joint Proposed
7 Order Re: Sealing is due on June 10, 2008.

8
9 Dated: June 9, 2008

ORRICK, HERRINGTON & SUTCLIFFE LLP

11 /s/

12 Theresa A. Sutton
13 Attorneys for Plaintiffs
14 THE FACEBOOK, INC. and MARK
15 ZUCKERBERG

16 Dated: June 9, 2008

BOIES SCHILLER & FLEXNER LLP

17 /s/

18 Evan Parke
19 Attorneys for Defendant
20 CONNECTU, INC.

21 ***** ORDER *****

22 For good cause shown, the Court GRANTS the parties' Stipulation regarding the filing of the
23 Joint Proposed Order Re: Sealing motions. In addition, the Court addresses the following outstanding
24 motions in advance of the **June 23, 2008** hearing on Plaintiffs' Confidential Motion:

25 (1) Plaintiffs' Motion for Leave to File Rely and Motion to Strike is DENIED.
(Docket Item No. 366).

26 (2) Defendants' Motion to Shorten Time for Hearing, and Motion to Expedite Discovery is
27 DENIED. (Docket Item No. 374.)

28 (3) Motion to Seal the Request for Reschedule Hearing on Plaintiffs' Confidential Motion is
GRANTED to the extent that it seeks to SEAL the request, DENIED to the extent it seeks to continue
the hearing. (Docket Item No. 393.)

There have been voluminous filings in this case in just the last month, which have required
extensive judicial resources to manage. The parties are strongly encouraged to work in a collaborative
manner to conserve judicial resources.

Dated: June 10, 2008

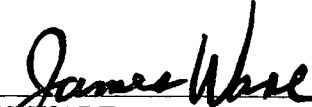

JAMES WARE
United States District Judge

EXHIBIT H

ORIGINAL FILED *Feibach*

2008 JUL 30 P 3 46

RICHARD W. WIEKING
CLERK
U.S. DISTRICT COURT
NO. DIST. OF CA. S.J.

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

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

9 Attorneys for Defendant
 CONNECTU, INC.

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

14 THE FACEBOOK, INC. and MARK
 15 ZUCKERBERG,

16 Plaintiffs,

17 v.

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

21 Defendants.

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

**NOTICE OF APPEAL
BY CONNECTU, INC.**

1 Notice is hereby given that CONNECTU, INC., defendant in the above named case, hereby
2 appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment
3 Enforcing Settlement Agreement (Docket No. 476) entered in this action on July 2, 2008, and all
4 related orders including but not limited to the June 25, 2008, Order Granting Plaintiffs' Confidential
5 Motion To Enforce The Settlement Agreement (Docket No. 461); and the June 10, 2008, Order
6 Granting In Part and Denying In Part Motions Posted As Docket Items Nos. 366, 374 and 393
7 (Docket No. 428).

8

9 July 30, 2008

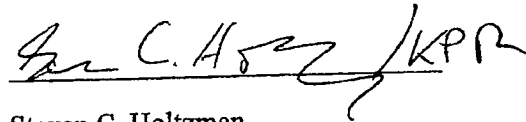
Respectfully submitted,

10

BOIES, SCHILLER & FLEXNER LLP

11

12



13

Steven C. Holtzman

14

Attorneys for Defendant ConnectU, Inc.

15

16

17

18

19

20

21

22

23

24

25

26

27

28

A-11 (rev. 7/00) Page 1 of 2

USCA DOCKET # (IF KNOWN)



**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
CIVIL APPEALS DOCKETING STATEMENT**

PLEASE ATTACH ADDITIONAL PAGES IF NECESSARY.

TITLE IN FULL: THE FACEBOOK, INC. and MARK ZUCKERBERG, Plaintiffs, vs. CONNECTU, INC. (formerly known as CONNECTU, LLC), PACIFIC NORTHWEST SOFTWARE, INC., WINSTON WILLIAMS, and WAYNE CHANG, Defendants.	DISTRICT: Northern District of California JUDGE: Honorable James Ware	
	DISTRICT COURT NUMBER: 5:07-cv-01389 JW	
	DATE NOTICE OF APPEAL FILED: 7/30/08	IS THIS A CROSS-APPEAL? YES <input type="checkbox"/>
	IF THIS MATTER HAS BEEN BEFORE THIS COURT PREVIOUSLY, PLEASE PROVIDE THE DOC KET NUMBER AND CITATION (IF ANY):	
BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW: District Court granted judgment enforcing a purported settlement agreement. Defendants-appellants dispute the enforceability of that purported agreement.		
PRINCIPAL ISSUES PROPOSED TO BE RAISED ON APPEAL: 1) Whether the District Court erred in summarily enforcing a purported settlement agreement without holding an evidentiary hearing notwithstanding disputed issues of fact as to whether the parties agreed to all material terms. 2) Whether the District Court erred in refusing to void a purported settlement agreement under Section 29(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78cc(b), because it was procured through securities fraud. Appellants reserve the right to appeal additional issues, including but not limited to evidentiary rulings.		
PLEASE IDENTIFY ANY OTHER LEGAL PROCEEDING THAT MAY HAVE A BEARING ON THIS CASE (INCLUDE PENDING DISTRICT COURT POSTJUDGMENT MOTIONS): Motion to Stay Judgment in the District Court.		
DOES THIS APPEAL INVOLVE ANY OF THE FOLLOWING:		
<input type="checkbox"/> Possibility of settlement <input type="checkbox"/> Likelihood that intervening precedent will control outcome of appeal <input checked="" type="checkbox"/> Likelihood of a motion to expedite or to stay the appeal, or other procedural matters (Specify): <u>Motion to Expedite Appeal; Motion to Stay Judgment, if stay is denied by District Court.</u> <input type="checkbox"/> Any other information relevant to the inclusion of this case in the Mediation Program		
Possibility parties would stipulate to binding award by Appellate Commissioner in lieu of submission to judges <input type="checkbox"/>		
LOWER COURT INFORMATION		

JURISDICTION		DISTRICT COURT DISPOSITION	
FEDERAL	APPELLATE	TYPE OF JUDGMENT/ORDER APPEALED	RELIEF
<input checked="" type="checkbox"/> FEDERAL QUESTION	<input checked="" type="checkbox"/> FINAL DECISION OF DISTRICT COURT	<input type="checkbox"/> DEFAULT JUDGMENT	<input type="checkbox"/> DAMAGES: SOUGHT \$ _____ AWARDED \$ _____
<input checked="" type="checkbox"/> DIVERSITY	<input type="checkbox"/> INTERLOCUTORY DECISION APPEALABLE AS OF RIGHT	<input type="checkbox"/> DISMISSAL/JURISDICTION	<input checked="" type="checkbox"/> INJUNCTIONS:
<input type="checkbox"/> OTHER (SPECIFY):	<input type="checkbox"/> INTERLOCUTORY ORDER CERTIFIED BY DISTRICT JUDGE (SPECIFY):	<input type="checkbox"/> DISMISSAL/MERITS	<input type="checkbox"/> PRELIMINARY
	<input type="checkbox"/> OTHER (SPECIFY):	<input type="checkbox"/> SUMMARY JUDGMENT	<input checked="" type="checkbox"/> PERMANENT
		<input checked="" type="checkbox"/> JUDGMENT/COURT DECISION	<input checked="" type="checkbox"/> GRANTED
		<input type="checkbox"/> JUDGMENT/JURY VERDICT	<input type="checkbox"/> DENIED
		<input type="checkbox"/> DECLARATORY JUDGMENT	<input type="checkbox"/> ATTORNEY FEES: SOUGHT \$ _____ AWARDED \$ _____
		<input type="checkbox"/> JUDGMENT AS A MATTER OF LAW	<input type="checkbox"/> PENDING
		<input type="checkbox"/> OTHER (SPECIFY):	<input type="checkbox"/> COSTS: \$ _____

CERTIFICATION OF COUNSEL

I CERTIFY THAT:

1. COPIES OF ORDER/JUDGMENT APPEALED FROM ARE ATTACHED.
2. A CURRENT SERVICE LIST OR REPRESENTATION STATEMENT WITH TELEPHONE AND FAX NUMBERS IS ATTACHED (SEE 9TH CIR. RULE 3-2).
3. A COPY OF THIS CIVIL APPEALS DOCKETING STATEMENT WAS SERVED IN COMPLIANCE WITH FRAP 25.
4. I UNDERSTAND THAT FAILURE TO COMPLY WITH THESE FILING REQUIREMENTS MAY RESULT IN SANCTIONS, INCLUDING DISMISSAL OF THIS APPEAL



Signature

July 31, 2008

Date

COUNSEL WHO COMPLETED THIS FORM

NAME: Evan Parke

FIRM: Boies, Schiller & Flexner LLP

ADDRESS: 5301 Wisconsin Ave. N.W., Washington, D.C. 20015

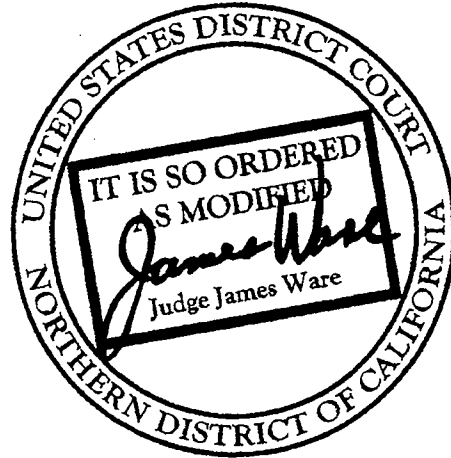
E-MAIL: eparke@bsflp.com

TELEPHONE: (202) 274-6131

FAX: (202) 237-6131

***THIS DOCUMENT SHOULD BE FILED IN THE DISTRICT COURT WITH THE NOTICE OF APPEAL *
*IF FILED LATE, IT SHOULD BE FILED DIRECTLY WITH THE U.S. COURT OF APPEALS***

1 SEAN A. LINCOLN (State Bar No. 136387)
 2 salincoln@orrick.com
 3 I. NEEL CHATTERJEE (State Bar No. 173985)
 4 nchatterjee@orrick.com
 5 MONTE COOPER (State Bar No. 196746)
 6 mcooper@orrick.com
 7 THERESA A. SUTTON (State Bar No. 211857)
 8 tsutton@orrick.com
 9 YVONNE P. GREER (State Bar No. 214072)
 10 ygreer@orrick.com
 11 ORRICK, HERRINGTON & SUTCLIFFE LLP
 12 1000 Marsh Road
 13 Menlo Park, CA 94025
 14 Telephone: 650-614-7400
 15 Facsimile: 650-614-7401



16 Attorneys for Plaintiffs
 17 THE FACEBOOK, INC. and MARK ZUCKERBERG

18 UNITED STATES DISTRICT COURT
 19 NORTHERN DISTRICT OF CALIFORNIA
 20 SAN JOSE DIVISION

21 THE FACEBOOK, INC. and MARK
 22 ZUCKERBERG,

23 Plaintiffs,

24 v.

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

Defendants.

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

STIPULATION AND [PROPOSED]
 ORDER ENLARGING TIME TO
 FILE A JOINT PROPOSED ORDER
 RE SEALING; AND

ORDER GRANTING IN PART
 DENYING IN PART MOTIONS
 POSTED AS DOCKET ITEM NOS.
 366, 374 AND 393

This Stipulation is entered into by and among Plaintiffs Facebook, Inc., and
 Mark E. Zuckerberg and Defendant ConnectU, Inc., through its respective attorneys of record.

WHEREAS, on May 27, 2008, the Court issued an order requesting that the parties
 submit, by June 9, a Joint Proposed Order regarding "all sealing motions that are pending as of
 the date of the Jointed Proposed Order is filed";

1 WHEREAS, Plaintiffs Facebook, Inc. and Mark E. Zuckerberg will be filing their
2 Reply Memorandum and supporting documents in support of their Confidential Motion (Docket
3 No. 329) under seal today;

4 WHEREAS, the parties believe that an extension of time to file the Joint Proposed
5 Order, until tomorrow, June 10, is necessary in order to include Plaintiffs' June 9 filing;

6 IT IS HEREBY STIPULATED AND AGREED THAT the parties' Joint Proposed
7 Order Re: Sealing is due on June 10, 2008.

8
9 Dated: June 9, 2008

ORRICK, HERRINGTON & SUTCLIFFE LLP

10

11

/s/

12

Theresa A. Sutton
Attorneys for Plaintiffs
THE FACEBOOK, INC. and MARK
ZUCKERBERG

13

14

15 Dated: June 9, 2008

BOIES SCHILLER & FLEXNER LLP

16

17

/s/

18

Evan Parke
Attorneys for Defendant
CONNECTU, INC.

19

20 ***** ORDER *****

21 For good cause shown, the Court GRANTS the parties' Stipulation regarding the filing of the
22 Joint Proposed Order Re: Sealing motions. In addition, the Court addresses the following outstanding
23 motions in advance of the **June 23, 2008** hearing on Plaintiffs' Confidential Motion:

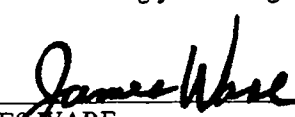
24 (1) Plaintiffs' Motion for Leave to File Rely and Motion to Strike is DENIED.
(Docket Item No. 366).

25 (2) Defendants' Motion to Shorten Time for Hearing, and Motion to Expedite Discovery is
26 DENIED. (Docket Item No. 374.)

27 (3) Motion to Seal the Request for Reschedule Hearing on Plaintiffs' Confidential Motion is
28 GRANTED to the extent that it seeks to SEAL the request, DENIED to the extent it seeks to continue
the hearing. (Docket Item No. 393.)

There have been voluminous filings in this case in just the last month, which have required
extensive judicial resources to manage. The parties are strongly encouraged to work in a collaborative
manner to conserve judicial resources.

Dated: June 10, 2008


JAMES WARE
United States District Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

The Facebook, Inc., et al.,
Plaintiffs,
v.
ConnectU, Inc., et al.,
Defendants.

NO. C 07-01389 JW
**ORDER GRANTING PLAINTIFFS’
CONFIDENTIAL MOTION TO ENFORCE
THE SETTLEMENT AGREEMENT**

I. INTRODUCTION

Plaintiffs in this lawsuit are The Facebook Inc. and Mark Zuckerberg (collectively, “Facebook”). Plaintiffs bring this action against ConnectU, Inc., Pacific Northwest Software, Inc., Winston Williams, and Wayne Chang (collectively, “Defendants”) alleging, *inter alia*, misappropriation of trade secrets, unfair competition, and violations of 18 U.S.C. § 1030, *et seq.* In essence, Facebook alleges that ConnectU gained unauthorized access to Facebook’s servers and website and took information for its own unlawful use. The parties are engaged in at least two other lawsuits over these matters; in those cases, ConnectU is the Plaintiff and Facebook is the Defendant.

In the course of this lawsuit, the parties engaged in private mediation. On February 22, 2008, as the result of the mediation, the parties signed a written “Term Sheet & Settlement Agreement.” In the Agreement, the parties agreed to resolve all of their disputes and to dismiss the pending lawsuits. The Agreement provides that they “may execute more formal documents but these terms are binding.” After signing the Agreement, the parties attempted to draft formal

1 documents but failed to reach a consensus on certain terms. In the Agreement, the parties stipulate
2 that the federal court in San Jose, California has jurisdiction to enforce it. Based on a belief that a
3 court order is necessary to enforce the February 22, 2008 Agreement, Facebook filed the present
4 motion in this Court.¹

5 The question for decision by the Court is whether the February 22, 2008 Agreement contains
6 sufficiently definite and essential terms that it may be enforced. For the reasons stated below, the
7 Court finds that the Agreement is enforceable and orders its enforcement.

8 II. BACKGROUND

9 As stated above, this action is one of three separate actions between the parties in various
10 federal courts.² On January 22, 2008, United States Magistrate Judge Richard Seeborg ordered the
11 parties to participate in Alternative Dispute Resolution. (Docket Item No. 270.) The parties elected
12 to participate in private mediation.

13 On February 22, 2008, the parties engaged in mediation before Antonio Piazza. Both sides
14 were represented by counsel. As the result of the mediation, the parties signed a handwritten
15 document entitled, "Term Sheet & Settlement Agreement" ("Agreement"). (Second Declaration of
16 Evan A. Parke, Ex. A., hereafter, "Parke Decl.," filed under seal.)

17 With the precise financial terms redacted,³ the Agreement provides, as follows:⁴

18
19 _____
20 ¹ (hereafter, "Motion," Docket Item No. 329, filed under seal.)

21 ² The other actions are ConnectU LLC v. Zuckerberg, Appeal No. 07-1796 (1st Cir.) and
ConnectU, Inc. v. Facebook, Inc., Case No. C 07-10593-DPW (D. Mass.).

22 ³ The Agreement recites that all of its terms are "confidential." At the hearing on the
23 motion, the Court expressed its need to discuss the Agreement in its Order. The Court now
24 determines that it can protect the confidentiality of the Agreement if references to the amount of
25 consideration which the parties agreed to exchange as a part of the settlement are omitted.
Moreover, since neither Facebook nor ConnectU are publicly traded companies at this time, the
Court finds good cause to keep the transcript of the proceedings under seal as requested by the
parties to protect their financial information.

26 ⁴ (Declaration of Theresa A. Sutton in Support of Plaintiffs' Confidential Motion, hereafter,
27 "Sutton Decl.," Ex. A at 1-2, filed under seal.) For authenticity purposes, the Court leaves all
typographical errors and strikeouts in the Agreement unchanged.

The Term Sheet & Settlement Agreement

- 1) The following will settle all disputes between ConnectU and its related parties, on the one hand and Facebook and its related parties, on the other hand.
- 2) All parties get mutual releases as broad as possible and all cases are dismissed with prejudice. Each side bears their own attorneys fees and costs.
- 3) All terms of agreement are confidential, no party disparages any other parties and no party will comment further publicly related to facts underlying or related to this dispute. The parties will agree on any public statements. A violation of the publicity and confidentiality provision of this paragraph shall be submitted to a binding arbitrator who may award injunctive relief and damages up to [REDACTED] million.
- ~~4) This Agreement is subject to the continuing enforcement of the court in San Jose to the current action.⁵~~
- 4) The parties stipulate that the San Jose Federal Court shall have jurisdiction to enforce this agreement.
- 5) The parties agree that they may execute more formal documents but these terms are binding and this document may be submitted into evidence to enforce this agreement.
- 6) ConnectU founders represent and warrant (1) They have no further right to assert against Facebook (2) They have no further claims against Facebook & its related parties.
- 7) All ConnectU stock in exchange for [REDACTED] in cash & [REDACTED] common shares in Facebook. The terms of the shares shall include a requirement that all votes related to the shares will be voted in accordance with the Board of Director's recommendations and be subject to the same anti-dilution protections afforded to Series D preferred stock. The form⁶ Facebook will determine the form & documentation of the acquisition of ConnectU's shares [Consistent with a stock and cash for stock acquisition].⁷ Facebook represents that it currently has [REDACTED] fully diluted shares outstanding.

The Agreement was signed by Mark Zuckerberg, individually and on behalf of Facebook, and by Cameron Winklevoss, individually and on behalf of ConnectU. Tyler Winklevoss and Divya Narendra also signed the Agreement. (Sutton Decl., Ex. A at 2.) These individuals are principals of their respective companies.

⁵ Strikeout in the original.

⁶ Strikeout in the original.

⁷ Interlineation in original.

United States District Court
 For the Northern District of California

1 Plaintiffs' motion to enforce the Agreement is made on the grounds that the Agreement
2 unambiguously sets forth all material terms of the parties' settlement and Defendants should be
3 ordered to comply with it. (Motion at 6.) Defendants contend that Facebook's motion to enforce the
4 Agreement should be denied because (1) the agreement is missing material terms, (2) the terms
5 which are included were not agreed upon, and (3) Facebook committed fraud in the procurement of
6 the Agreement. (ConnectU's Opposition to Facebook's Confidential Motion at 6, hereafter,
7 "Opposition," filed under seal.) In its reply, Plaintiffs contend that the Agreement was not procured
8 by fraud. (Reply in Support of Confidential Motion at 9, hereafter, "Reply," filed under seal.) The
9 Court considers each issue in turn.

10 **III. DISCUSSION**

11 **A. The Court's Jurisdiction**

12 Before considering the motion to enforce the Agreement, the Court considers its jurisdiction
13 to act on such a motion. The Court also considers issues raised at the hearing, namely, whether
14 Plaintiffs are required to file an action to enforce the Agreement, to which Defendants would be
15 allowed to plead their objections to enforcement as affirmative defenses.

16 "It is well settled that a district court has the equitable power to enforce summarily an
17 agreement to settle a case pending before it." Callie v. Near, 829 F.2d 888, 890 (9th Cir. 1987);
18 Decaney v. Mendoza, 573 F.2d 1075, 1078 (9th Cir. 1978); TNT Mktg., Inc. v. Agresti, 796 F.2d
19 276, 278 (9th Cir. 1986); In re City Equities Anaheim, Ltd., 22 F.3d 954, 957 (9th Cir. 1994). Once
20 a settlement has been reached in a pending action, any party to the agreement may bring a motion to
21 enforce it. See Doi v. Halekulani Corp., 276 F.3d 1131, 1135 (9th Cir. 2002). Specifically,

22 California law provides:

23 If parties to pending litigation stipulate, in a writing signed by the parties outside the
24 presence of the court or orally before the court, for settlement of the case, or part thereof, the
court, upon motion, may enter judgment pursuant to the terms of the settlement.

25 Cal. Civ. Proc. Code § 664.6. In addition to the statutory power to enter a judgment, the court's
26 enforcement powers include the inherent authority to order a party's specific performance of acts

1 required by the settlement agreement and to award damages or other sanctions for noncompliance.
2 TNT Mktg., 796 F.2d at 278.

3 In this case, in addition to its inherent authority and the authority conferred by California
4 law, in Paragraph 4 of the Agreement, the parties explicitly stipulated that the Court has authority to
5 exercise enforcement. Therefore, the Court is satisfied that it has the jurisdiction and authority to
6 enforce the Agreement without requiring additional pleadings.

7 However, the power to enforce a settlement agreement can only be exercised if the terms
8 have been agreed to by the individuals authorized to make decisions behalf of the parties. See
9 Harrop v. W. Airlines, Inc., 550 F.2d 1143, 1145 (9th Cir. 1977). At the hearing, Defendants raised
10 two issues regarding the authority of the Court to enforce the Agreement against the individuals and
11 the corporations.

12 First, Defendants question whether there is a bases for the Court to exercise personal
13 jurisdiction over ConnectU's individual shareholders, i.e., the three principals who signed the
14 Agreement.⁸ The Court finds that by signing the Agreement with explicit statements such as those
15 in Paragraphs 1, 2, and 4, each of the signatories subjected him or herself to the Court's jurisdiction
16 for the limited purpose of enforcing the Agreement. Second, Defendants question whether
17 ConnectU's individual shareholders received proper notice of the proceedings. The Court finds the
18 three principals of ConnectU have had adequate notice since they are plaintiffs in the Massachusetts
19 action where the parties have vigorously litigated discovery issues relating to the enforcement of this
20 Agreement. (See June 3, 2008, Memorandum and Order, No. 07-10593-DPW, D. Mass.) It is
21 incongruous to argue that these individuals did not receive notice of the motion since Judge
22
23
24

25 ⁸ Defendants first made these contentions in their sur-reply. (Defendants' Sur-Reply in
26 Opposition to Confidential Motion to Enforce, hereafter, "Sur-Reply," Docket Item No. 438.) The
27 Court grants Defendants' motion for leave to file the sur-reply, and considers the contentions raised
in the sur-reply.

1 Woodlocks' June 3, 2008 order in the Massachusetts action specifically addressed the hearing on the
2 motion to enforce the Agreement in this Court.⁹ (Id. at 2.)

3 **B. The Material Terms**

4 The construction and enforcement of settlement agreements are governed by principles of
5 local law that apply to the interpretation of contracts, even if the underlying cause of action is
6 federal. United Commercial Ins. Serv., Inc. v. Paymaster Corp., 962 F.2d 853, 856 (9th Cir. 1992).
7 Thus, challenges to a settlement agreement based on interpretation of ambiguous terms, fraud in the
8 inducement, or indefiniteness of a term all turn on the applicable state law. See White Farm Equip.
9 Co. v. Kupcho, 792 F.2d 526, 529 (5th Cir. 1986); see, e.g., Doi, 276 F.3d at 1135.

10 California has a strong policy in favor of enforcing settlement agreements. Osumi v. Sutton,
11 151 Cal. App. 4th 1355, 1357 (2007). Under California law, a settlement agreement "must be
12 interpreted as to give effect to the mutual intention of the parties as it existed at the time of
13 contracting." Roden v. Bergen Brunswick Corp., 107 Cal. App. 4th 620, 625 (2003); see Cal. Civ.
14 Code, § 1636. When the agreement is in writing, "the intention . . . is to be ascertained from the
15 writing alone, if possible." Brinton v. Bankers Pension Serv., Inc., 76 Cal. App. 4th 550, 559
16 (1999); see Cal. Civ. Code § 1639. "[C]ourts will not set aside contracts for mere subjective
17 misinterpretation." Hedging Concepts, Inc. v. First Alliance Mortgage Co., 41 Cal. App. 4th 1410,
18 1421 (1996). "A settlement agreement, like any other contract, is unenforceable if the parties fail to
19 agree on a material term or if a material term is not reasonably certain." Lindsay v. Lewandowski,
20 139 Cal. App. 4th 1618, 1622 (2006) (citing Weddington Productions, Inc. v. Flick, 60 Cal. App. 4th
21 793, 811 (1998)).

22 First, the Agreement clearly states the consideration for the performance required and how it
23 must be paid. (Sutton Decl., Ex. A at 1-2.) In exchange for a specified amount of cash and stock in
24

25 _____
26 ⁹ At the hearing, counsel for ConnectU's individual shareholders argued that they are not
27 "plaintiffs" in the Massachusetts action. The Court declines to entertain the notion since counsel
admitted that the individual shareholders added themselves as plaintiffs to the amended complaint in
that action.

1 Facebook, ConnectU founders are required under the Agreement to represent and warrant “they
2 have no further right to assert against Facebook” and “they have no further claims against Facebook
3 and its related parties.” (Id.)

4 Second, the Agreement clearly defines the structure of the transaction. (Sutton Decl., Ex. A
5 at 1-2.) Paragraph 7 recites that all ConnectU stock is to be exchanged for a sum certain amount of
6 cash and a precise number of common shares in Facebook; it is a stock and cash for stock
7 acquisition. Subsequent negotiations might have proposed a different structure for the transaction or
8 other additional terms, but those proposal were, apparently, rejected. (Id., Ex. B.) The Court cannot
9 considered subsequent negotiations as evidence that there was no “meeting of the minds” with the
10 respect to the Agreement. The Court must determine the parties’ intent from the four corners of the
11 Agreement, not from the extrinsic evidence. Brinton, 76 Cal. App. 4th at 559; Cal. Civ. Code §
12 1639.

13 Third, the principals of each company, who are persons authorized to make decisions for the
14 parties, all signed the handwritten version of the Agreement and none of the signatures are disputed.
15 However, Defendants point out that one stockholder in ConnectU, Howard Winklevoss, was not a
16 party to, and did not sign the Agreement. (Opposition at 10.) Therefore, the issue becomes whether
17 the lack of Howard Winklevoss’ signature makes the Agreement unenforceable.

18 ConnectU is a Connecticut corporation. (Id. at 1.) Under Connecticut law, a share exchange
19 transaction only needs to be approved by majority vote. See Conn. Gen. Stat. § 33-816(a). As of
20 May 23, 2006, Howard Winklevoss owned 1% of the outstanding shares in ConnectU. (Declaration
21 of Neel Chatterjee in Support of Plaintiffs’ Reply, Ex. B at 10, filed under seal.) There is no
22 evidence his ownership interest changed as of the date of the Agreement. The shareholders who
23 signed the Agreement own 99% of the outstanding shares. Since a majority of ConnectU’s
24 shareholders have agreed to the transaction, the consent of Howard Winklevoss is unnecessary to
25 make the Agreement binding on him. Therefore, the lack of Howard Winklevoss’ signature is not an
26 impediment to enforcing the Agreement.

1 Defendants contend that the Agreement was only a starting point for negotiating more formal
2 documentation. (Opposition at 7-9.) However, the Agreement itself provides that the parties “may
3 execute more formal documents,” but that the Agreement is “binding.” (Sutton Decl., Ex. A at 1,
4 emphasis added.) It is significant that the parties used the word “may” in this instance as opposed to
5 “will,” which they had readily used in other contexts. (See e.g., Agreement ¶¶ 1, 3, 7.) On the face
6 of the Agreement, it is clear that, had the parties wished to require more formal documents, they
7 could have indicated they *will* or *shall* execute more formal documents. Instead, they elected to use
8 the word, “may,” and made clear that the Agreement is binding in and of itself.

9 In sum, the Court finds that the Agreement reached by the parties does not display on its face
10 a failure to agree or any uncertainty regarding its material terms. Accordingly, the Court finds that
11 the Agreement is enforceable.

12 **C. Whether the Agreement Was Procured by Fraud**

13 Defendants contend that Facebook’s motion to enforce the Agreement should be denied
14 because Plaintiffs fraudulently procured the Agreement by misrepresenting Facebook’s present
15 value. (Opposition at 14.)

16 A contract is not enforceable if it was induced by fraud. Jones v. Grieve, 15 Cal. App. 561,
17 566-67 (1911). To prove fraud in the inducement of a contract, a party must establish the elements
18 of common law fraud. Id. The elements of fraud are (1) misrepresentation; (2) scienter; (3)
19 justifiable reliance; and (4) resulting damage. Buckland v. Threshold Enterprises, Ltd., 155 Cal.
20 App. 4th 798, 806-07 (2007); Wilke v. Coinway, Inc., 257 Cal. App. 2d 126, 136 (1967) (quoting
21 Cortez v. Weymouth, 235 Cal. App. 2d 140 (1965)). These legal principles apply to a contract to
22 settle a lawsuit. See Merced County Mut. Fire Ins. Co. v. The State of California, 233 Cal. App. 3d
23 765, 771 (1991).

24 Where a party is represented by counsel, or where the alleged misrepresentation was made
25 by an adversary during the course of negotiations, courts have held that reliance is unjustifiable. See
26 Scognamill v. Credit Suisse First Boston LLC, 2005 WL 2045807 (N.D. Cal. 2005) (holding as a

1 matter of law that reliance on representation of adversary in execution of merger agreement was
2 unjustifiable where parties were represented by counsel during the negotiation process); Wilhelm v.
3 Pray, Price, Williams & Russell, 186 Cal. App. 3d 1324 (1986) (holding that the fraud claim failed
4 because plaintiff was represented by counsel at the time of the allegedly fraudulent statement, and it
5 was not “reasonable for plaintiff to accept defendant’s statements without an independent inquiry or
6 investigation”).

7 **1. ConnectU’s Proffer Regarding Facebook’s Valuation**

8 Defendants contend that they were defrauded during the settlement negotiations because
9 Plaintiffs did not disclose a valuation of Facebook common stock which had been made by the
10 Facebook Board of Directors. (Opposition at 6.)

11 Apparently, in October 2007, Facebook and Microsoft issued a press release stating
12 Microsoft would “take a \$240 million stake in Facebook’s next round of financing at a \$15 billion
13 valuation.” (Parke Decl., Ex. J.) Defendants proffer evidence that subsequent to the press release,
14 in the regular course of its operations, Facebook’s Board of Directors determined a value of the
15 company’s “shares” which was different than the valuation disclosed in the press release.
16 (Declaration of Robert T. Clarkson ¶ 11, filed under seal.)

17 Defendants do not challenge the accuracy of the press release itself. Thus, there is no claim
18 that the statement in the release was not true when it was made. (Declaration of Ted Wang in
19 Support of Plaintiffs’ Confidential Motion ¶ 2, filed under seal.) Plaintiffs do not deny that the
20 Facebook Board of Directors made a subsequent valuation of Facebook shares which was a different
21 value from the value Microsoft attributed to the company. However, Plaintiffs did not make any
22 representations or warranties in the Agreement about the value of Facebook common stock.¹⁰

23 _____
24 ¹⁰ Defendants provide no authority to support their contention that either Facebook or
25 Zuckerberg had a duty to disclose the Board’s valuation to Defendants in the context of the
26 settlement or to correct any subjective valuation which Defendants might have made when
27 determining what demand to make in the mediation. It is clear that generally one has a duty to
28 correct a disclosure which is misleading when made, but usually, there is no duty to a correct
statement which is true at the time it is made. See Brody v. Transitional Hospitals Corp., 280 F.3d
997, 1006 (9th Cir. 2002); Backman v. Polaroid Corp., 910 F.2d 10, 17 (1st Cir. 1990). Intentional

1 Moreover, it is undisputed that the shares the parties agreed to exchange in the Agreement and the
2 shares involved in the Microsoft's transaction are of different classes. Accordingly, the failure to
3 disclose the difference in the valuations cannot be fraudulent as a matter of law.

4 Further, the Agreement does not attribute a specific value to the outstanding shares of
5 Facebook's stock; there is no admissible evidence that Plaintiffs made any such representation while
6 negotiating the settlement.¹¹ Rather, the only representation evident from the Agreement is the
7 number of fully diluted shares which Facebook currently has outstanding. (Parke Decl., Ex. A.)
8 Defendants have failed to show that this representation was false or that there were any other
9 misrepresentations made by Plaintiffs upon which Defendants could have justifiably relied.

10 In sum, the Court finds Defendants have failed to establish that Plaintiffs made a
11 misrepresentation during the negotiation. The individual signatories to the Agreement are
12 sophisticated business parties who were represented by reputable counsel at the mediation. Either
13 party could have chosen to condition the financial exchange being negotiated on representations and
14 warranties of the value of the stock involved or to conduct their own due diligence with respect to
15 Facebook's valuation. Neither party chose these courses of conduct. Notably, in his June 3, 2008
16 order denying ConnectU's motion to compel production of documents, Judge Woodlock stated:

17 From all that appears, the parties were prepared to settle their disputes then, despite the fact
18 that aspects of discovery in this case—most pertinently for present purposes, document
production—had not been completed and unresolved discovery issues remained outstanding.

19 (See June 3, 2008, Memorandum and Order at 2, No. 07-10593-DPW, D. Mass.) Thus, the parties
20 elected to proceed with their settlement negotiations knowing they lacked potentially relevant

21 _____
22 concealment exists only "when a party to a transaction, who is under no duty to speak, nevertheless
23 does speak and suppresses facts which materially qualify the facts stated." Persson v. Smart
Inventions, Inc., 125 Cal. App. 4th 1141, 1164 (2005).

24 ¹¹ Defendants proffer evidence of statements made during mediation that resulted in the
25 Agreement. Under ADR Local Rule 6-11, "anything that happened or was said, any position taken,
26 and any view of the merits of the case formed by any participant in connection with any mediation
27 . . . shall not be . . . (2) disclosed to the assigned judge; or (3) used for any purpose, including
impeachment, in any pending or future proceeding in this court." Pursuant to this privilege, the
Court declines to conduct a hearing or consider evidence regarding the details of the parties'
negotiations in their mediation.

1 information. Without a showing by Defendants of a material misrepresentation or omission in the
2 negotiations, the Court finds no basis to decline enforcement.

3 **2. Securities Fraud**

4 In their opposition and sur-reply, Defendants contend that the Agreement is not enforceable
5 because Plaintiffs committed securities fraud, making the Agreement voidable. (Opposition at 14;
6 Sur-Reply at 7.)

7 Neither Plaintiffs nor Defendants have cited authority that an agreement to exchange shares
8 of closely held corporations pursuant to settlement of litigation between the companies is voidable
9 by showing securities fraud. The cases which Defendants cite in their sur-reply regarding a duty to
10 disclose "material non-public information" all fall within the context of insider trading, which is not
11 an issue in this case. (Sur-Reply at 10.)

12 On June 24, 2008, the day after the hearing, Defendants requested leave to file additional
13 authority to provide precedent for voiding a purported settlement agreement on the basis of
14 securities fraud.¹² While Defendants cite one case where a settlement was found void under § 29 of
15 the Securities Exchange Act, that case involved an agreement which violated the margin
16 requirements of Regulation T because the defendant failed to recover capital after the settlement.
17 Pearlstein v. Scudder and German, 429 F.2d 1136, 1142-43 (2d Cir. 1970). Contrary to Pearlstein,
18 the Ninth Circuit has held that a broad release in a signed settlement agreement operates to prevent a
19 party from collaterally attacking the agreement by alleging it violates the securities laws under § 29.
20 Petro-Ventures, Inc. v. Takessian, 967 F.2d 1337 (9th Cir. 1992). Specifically, the Ninth Circuit
21 noted:

22 [w]hen, as here, a release is signed in a commercial context by parties in a roughly
23 equivalent bargaining position and with ready access to counsel, the general rule is that, if
24 'the language of the release is clear, . . . the intent of the parties [is] indicated by the language
25 employed.'

26 ¹² (See Docket Item No. 454.) While Plaintiffs have not had an opportunity to respond, the
27 Court finds good cause to grant Defendants leave and considers the authority presented in
28 Defendants' papers.

1 Id. at 1342 (quoting Locafrance U.S. Corp. v. Intermodal Sys. Leasing, Inc., 558 F.2d 1113, 1115
2 (2d Cir. 1977)). Thus, in Petro-Ventures, the Ninth Circuit effectuated the parties' intent to bring
3 about "general peace" by finding that their settlement agreement cannot be voided under § 29. Id.


4 As in Petro-Ventures, this case involves a settlement agreement reached by the parties, who
5 were represented by counsel, in which they intended to undertake to give mutual releases that were
6 "as broad as possible." (Agreement ¶ 2.) There is no doubt that the language of the release in
7 Paragraph 2 of the Agreement conveys the intent of the parties to release all claims. Thus, the
8 Agreement cannot be collaterally attacked using § 29.

9 Accordingly, the Court finds that Defendants have failed to tender sufficient evidence of
10 fraud in the circumstances proffered to the Court to create a genuine dispute as to whether the
11 Agreement was fraudulently induced.

12 V. CONCLUSION

13 The Court GRANTS Plaintiffs' Motion to Enforce the Parties' Settlement Agreement. The
14 parties are ordered to appear on **July 2, 2008 at 10 a.m.** to show cause why a judgment should not
15 be entered ordering the parties to take the actions required of them by the Settlement Agreement.
16 On or before **June 30, 2008**, the parties are directed to submit a proposed form of judgment
17 consistent with this Order.

18
19 Dated: June 25, 2008



JAMES WARE
United States District Judge

United States District Court
For the Northern District of California

1 THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

- 2 Chester Wren-Ming Day cday@orrick.com
- 3 D. Michael Underhill MUnderhill@BSFLLP.com
- 4 David A. Barrett dbarrett@bsflfp.com
- 5 Evan A. Parke eparke@bsflfp.com
- 6 George Hopkins Guy hopguy@orrick.com
- 7 I. Neel Chatterjee nchatterjee@orrick.com
- 8 Jonathan M. Shaw jshaw@bsflfp.com
- 9 Kalama M. Lui-Kwan klui-kwan@fenwick.com
- 10 Monte M.F. Cooper mcooper@orrick.com
- 11 Scott Richard Mosko scott.mosko@finnegan.com
- 12 Sean Alan Lincoln slincoln@orrick.com
- 13 Steven Christopher Holtzman sholtzman@bsflfp.com
- 14 Theresa Ann Sutton tsutton@orrick.com
- 15 Tyler Alexander Baker Tbaker@fenwick.com
- 16 Valerie Margo Wagner valerie.wagner@dechert.com
- 17 Yvonne Penas Greer ygreer@orrick.com

18
19
20
21
22
23
24
25
26
27
28

Dated: June 25, 2008

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy

United States District Court
For the Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

The Facebook, Inc., et al., NO. C 07-01389 JW
Plaintiffs, JUDGMENT ENFORCING SETTLEMENT
v. AGREEMENT
ConnectU, Inc., et al.,
Defendants.

Pursuant to the Court's June 25, 2008 Order Granting Plaintiffs' Confidential Motion to Enforce the Settlement Agreement (docket item no. 461), the parties appeared before the Court on July 2, 2008 to show cause why a judgment should not be entered. Based on the papers submitted and oral arguments of counsel,

JUDGMENT IS ENTERED ENFORCING "THE TERM SHEET & SETTLEMENT AGREEMENT" AS FOLLOWS:

- (1) The Facebook, Inc. and Mark Zuckerberg:
 - (a) Pursuant to Paragraphs 4 and 7 of the Agreement, unless otherwise ordered by the Court, on or before **August 4, 2008**, The Facebook, Inc. shall deposit with the Master, the amount of cash and the certificates representing the amount of The Facebook, Inc. common shares stated in Paragraph 7 of the Agreement, endorsed for transfer. The following legend shall appear on certificates of The Facebook, Inc. common stock issued pursuant to this Judgment:

United States District Court
For the Northern District of California

1 THE SHARES REPRESENTED BY THIS CERTIFICATE HAVE NOT BEEN REGISTERED
2 UNDER THE SECURITIES ACT OF 1933, AS AMENDED. THEY MAY NOT BE SOLD, OFFERED FOR
3 SALE, PLEDGED OR HYPOTHECATED IN THE ABSENCE OF A REGISTRATION STATEMENT IN
4 EFFECT WITH RESPECT TO THE SECURITIES UNDER SUCH ACT OR AN OPINION OF COUNSEL
5 REASONABLY SATISFACTORY TO THE ISSUER THAT SUCH REGISTRATION IS NOT REQUIRED,
6 OR UNLESS SOLD PURSUANT TO RULE 144 OF SUCH ACT.

7 THE SHARES REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO AN AGREEMENT
8 WITH REGARD TO THE VOTING OF SUCH SHARES, AS PROVIDED IN THE CERTAIN TERM SHEET
9 & SETTLEMENT AGREEMENT PURSUANT TO WHICH SUCH SHARES WERE ORIGINALLY
10 ISSUED. THE HOLDERS OF SUCH SHARES ARE ENTITLED TO THE SAME ANTI-DILUTION
11 RIGHTS AFFORDED THE ISSUER'S SERIES D PREFERRED STOCK, AS PROVIDED IN SUCH TERM
12 SHEET & SETTLEMENT AGREEMENT. A COPY OF SUCH TERM SHEET & SETTLEMENT
13 AGREEMENT IS ON FILE IN THE OFFICE OF THE SECRETARY OF THE ISSUER.

14 (b) Pursuant to Paragraphs 2 and 4 of the Agreement, on or before **12 noon on**
15 **July 9, 2008**, The Facebook, Inc. and Mark Zuckerberg shall submit to the
16 Court for approval a proposed form of release. Upon approval by the Court,
17 the release shall be signed by The Facebook, Inc. and Mark Zuckerberg, and
18 shall have attached to it corporate authority given to the corporate signatory
19 and shall be notarized as to each signatory and shall be immediately deposited
20 with the Master;

21 (c) Pursuant to Paragraphs 2 and 4 of the Agreement, unless otherwise ordered by
22 the Court, on or before **August 4, 2008**, a legally sufficient dismissal with
23 prejudice of all cases by and between the parties pending as of the date of the
24 Agreement.¹ The dismissal shall recite that each party to the respective
25 litigation shall bear their own attorney fees and costs.

26
27 ¹ The other two cases are ConnectU, LLC v. Facebook, Inc., et al., Case No. 1:04-cv-11923-
28 DPW, currently on appeal to the First Circuit Court of Appeals; and ConnectU, Inc., et al. v.
Facebook, Inc., et al., Case No. 1:07-cv-10593-DPW, currently pending in the District of
Massachusetts.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28


- (2) ConnectU Inc., Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra:
- (a) Pursuant to Paragraphs 4 and 7 of the Agreement, unless otherwise ordered by the Court, on or before **August 4, 2008**, ConnectU Inc. shall deposit with the Master all shares of ConnectU Inc., endorsed for transfer. To the extent the parties to the Agreement do not own any shares of ConnectU Inc., to fulfill the obligation of the transfer of "all ConnectU stock," the parties to the Agreement shall take such actions in their respective corporate and individual capacities as are necessary to effect the deposit with the Master of all shares of ConnectU stock;
- (b) Pursuant to Paragraphs 2 and 4 of the Agreement, on or before **12 noon on July 9, 2008**, ConnectU, Inc., Cameron Winklevoss, Tyler Winklevoss and Divya Narendra shall submit to the Court for approval a proposed form of release. Upon approval by the Court, the release shall be signed by these parties and shall have attached to it corporate authority given to the corporate signatory and shall be notarized as to each signatory and shall be immediately deposited with the Master;
- (c) Pursuant to Paragraphs 2 and 4 of the Agreement, unless otherwise ordered by the Court, on or before **August 4, 2008**, a legally sufficient dismissal with prejudice of all cases by and between the parties pending as of the date of the Agreement. The dismissal shall recite that each party to the respective litigation shall bear their own attorney fees and costs.
- (3) Upon further order of the Court, the parties shall deposit with the Master such other and further things which will facilitate the orderly exchange of the consideration and shall do the things ordered by the Court to ensure the operational integrity of the business entities that are parties to the Agreement.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(4) The deposits being made with the Master by the parties pursuant to this Judgement shall be transferred out of the deposit by the Master only upon further Order of the Court in enforcement of the Agreement.

The Court retains jurisdiction to enforce this Judgment.

Dated: July 2, 2008



JAMES WARE
United States District Judge

United States District Court
For the Northern District of California

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

2 Chester Wren-Ming Day cday@orrick.com
3 D. Michael Underhill MUnderhill@BSFLLP.com
4 David A. Barrett dbarrett@bsflp.com
5 Evan A. Parke eparke@bsflp.com
6 George Hopkins Guy hopguy@orrick.com
7 I. Neel Chatterjee nchatterjee@orrick.com
8 Jonathan M. Shaw jshaw@bsflp.com
9 Kalama M. Lui-Kwan klui-kwan@fenwick.com
10 Monte M.F. Cooper mcooper@orrick.com
11 Scott Richard Mosko scott.mosko@finnegan.com
12 Sean Alan Lincoln slincoln@Orrick.com
13 Steven Christopher Holtzman sholtzman@bsflp.com
14 Theresa Ann Sutton tsutton@orrick.com
15 Tyler Alexander Baker Tbaker@fenwick.com
16 Valerie Margo Wagner valerie.wagner@dechert.com
17 Yvonne Penas Greer ygreer@orrick.com

18
19
20
21
22
23
24
25
26
27
28
Dated: July 2, 2008

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy

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

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

9 Attorneys for Defendant
CONNECTU, INC.

10
11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION

14 THE FACEBOOK, INC. and MARK
15 ZUCKERBERG,

16 Plaintiffs,

17 v.

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

21 Defendants.
22

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

**REPRESENTATION STATEMENT OF
CONNECTU, INC. PURSUANT TO
NINTH CIRCUIT RULE 3-2**

1 ConnectU, Inc. files this Representation Statement in accordance with Ninth Circuit Rule 3-

2 2. The parties to the suit and their respective counsel, including their contact information, are as
3 follows:

4
5 **Parties:**

6 The Facebook, Inc. (plaintiff)
7 Mark Zuckerberg (plaintiff)

8 **Counsel:**

9 I. Neel Chatterjee (SBN 173985)
10 Monte Cooper (SBN 196746)
11 Theresa A. Sutton (SBN 211857)
12 Yvonne P. Greer (SBN 214072)
13 ORRICK, HERRINGTON
& SUTCLIFFE LLP
14 1000 Marsh Road
15 Menlo Park, CA 94025
16 Telephone: 650-614-7400
17 Facsimile: 650-614-7401

Party:

ConnectU, Inc. (formerly known as
ConnectU, LLC) (defendant)

Counsel:

Steven C. Holtzman (SBN 144177)
BOIES SCHILLER & FLEXNER LLP
1999 Harrison Street, Suite 900
Oakland, CA 94612
Telephone: (510) 874-1000
Facsimile: (510) 874-1460

D. Michael Underhill (*pro hac vice*)
Jonathan M. Shaw (*pro hac vice*)
Evan A. Parke (*pro hac vice*)
BOIES SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue NW
Washington, D.C. 20015
Telephone: (202) 237-2727
Facsimile: (202) 237-6131

David A. Barrett (*pro hac vice*)
BOIES SCHILLER & FLEXNER LLP
575 Lexington Avenue, 7th Floor
New York, NY 10022
Telephone: (212) 446-2300
Facsimile: (212) 446-2350

Scott R. Mosko (SBN106070)
FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.
Stanford Research Park
3300 Hillview Avenue
Palo Alto, California 94304
Telephone: (650) 849-6600
Facsimile: (650) 849-6666

26

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Parties:

Pacific Northwest Software, Inc.
(defendant)
Wayne Chang (defendant)
Winston Williams (defendant)

Counsel:

Scott R. Mosko (SBN106070)
FINNEGAN, HENDERSON,
FARABOW, GARRETT
& DUNNER, L.L.P.
Stanford Research Park
3300 Hillview Avenue
Palo Alto, California 94304
Telephone: (650) 849-6600
Facsimile: (650) 849-6666

Parties:

Cameron Winklevoss (proposed
intervenor)
Tyler Winklevoss (proposed intervenor)
Divya Narendra (proposed intervenor)

Counsel:

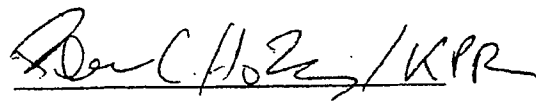
Mark A. Byrne (SBN116657)
BYRNE & NIXON LLP
800 West Sixth Street, Suite 430
Los Angeles, California 90017
Telephone: (213) 620-8003
Facsimile: (213) 620-8013

Sean F. O'Shea (*pro hac vice*)
O'SHEA PARTNERS LLP
90 Park Avenue, 20th Floor
New York, NY 10016
Telephone: (212) 682-4426
Facsimile: (212) 682-4437

July 30, 2008

Respectfully submitted,

BOIES, SCHILLER & FLEXNER LLP



Steven C. Holtzman

Attorneys for Defendant ConnectU, Inc.