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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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.

On Appeal From The United States District Court For The Northern District of California, No. CV-07-01389-JW, The Honorable James Ware

APPELLANT CONNECTU, INC.'S MOTION TO DISQUALIFY COUNSEL

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CORPORATE DISCLOSURE STATEMENT

This statement is made pursuant to Federal Rule of Appellate Procedure 26.1. As of December 15, 2008, Defendant-Appellant ConnectU, Inc. is a wholly-owned subsidiary of The Facebook, Inc., a privately held corporation.

NOTICE OF MOTION AND MOTION

Defendant-Appellant ConnectU, Inc. ("ConnectU"), hereby moves to disqualify the law firms of Boies, Schiller & Flexner LLP ("BSF"), Finnegan, Henderson, Farabow, Garrett & Dunner, LLP ("Finnegan") and O'Shea Partners LLP ("O'Shea") from representing the founders of ConnectU -- Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra ("Founders") -- based on a conflict of interest in violation of California Rule of Professional Conduct 3-310, as well as ABA Model Rules of Professional Conduct 1.7 and 1.9.

Specifically, in accord with both sets of Rules of Professional Conduct, BSF, O'Shea and Finnegan may not represent joint clients whose interests are adverse in the same proceeding, and may not take an adverse position to either a current or former client. When an actual conflict arises between two joint clients, as exists here between ConnectU and the Founders, the lawyers must withdraw from representing both clients. The Boies firm has thus far refused to withdraw as counsel of record in this Appeal. The Finnegan firm belatedly moved to withdraw, after an initial refusal that forced ConnectU's new counsel to file a motion to substitute the previous counsel of record for counsel of its choosing[1]. O'Shea previously represented ConnectU and the Founders at the trial court level, and thus has a conflict between its current and former client in the same litigation.

For these reasons, this Court should disqualify BSF, Finnegan and O'Shea from continuing to represent the Founders.

INTRODUCTION

This case presents the rare circumstance of a transfer in ownership of a corporate party in the midst of litigation. This unusual circumstance is the result of a settlement agreement that shifted control of ConnectU from the Founders to the

[1] On December 22, 2008, ConnectU filed a separate motion to require Finnegan and BSF to withdraw as ConnectU's counsel of record in this appeal.

other party in the litigation -- Facebook. Although the factual circumstances may be uncommon, the ethical implications for the attorneys who previously represented both ConnectU and the Founders are neither complex nor unusual.

When attorneys begin representing joint clients, and later actual adversity develops between these clients, then the attorneys are precluded from representing either former joint client against the other. That is precisely what has occurred in this case. BSF, O'Shea and Finnegan previously represented joint clients -- ConnectU and the Founders. Then, as a result of the settlement as enforced by the trial court in this case, ownership of ConnectU transferred from the Founders to Facebook. Thus, there is now a direct and palpable conflict between ConnectU and the Founders.

Because of that direct conflict, BSF, O'Shea and Finnegan are now ethically precluded from continuing to represent the Founders. To allow continued representation would violate those attorneys' duties of loyalty and confidentiality to ConnectU. ConnectU has demanded that BSF, O'Shea and Finnegan withdraw from representing the Founders. All firms declined to do so, necessitating the filing of this motion and ConnectU's request that the Court order the disqualification of BSF, O'Shea and Finnegan from representing the Founders[2].

Finally, ConnectU is entitled by law to delivery of its client files so that it may properly assess the corporation's rights and obligations, including potential litigation, and therefore requests the Court order delivery of those files forthwith.

FACTUAL BACKGROUND

A. Settlement of the Pending Actions

As this Court is no doubt aware, this action has a long and complex history.

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[2] Finnegan belatedly moved to withdraw on December 29, 2008, a week after ConnectU's new counsel had been compelled to file a motion seeking Finnegan's withdrawal.

For purposes of this motion, the salient facts have less to do with the merits of the underlying case; rather, they relate mainly to the history of ConnectU and the Founders' representation during the course of the pending actions.

In February 2008, ConnectU, the Founders, Facebook, and Mark Zuckerberg agreed to mediate all of the pending claims between them. At that time, there were three actions pending: *ConnectU LLC v. Zuckerberg*, Appeal No. 07-1796 (1st Cir.); *ConnectU, Inc. v. Facebook, Inc.*, Case No. 1:07-CV-10593-DPW (D. Mass.); and *Facebook, Inc. v. ConnectU, Inc.*, Case No. 5:07-CV-01389(RS) (N.D. Cal.). At various points throughout the litigation, Finnegan, O'Shea, and BSF were counsel of record, jointly representing ConnectU and the Founders[3].

At the conclusion of the mediation, the parties signed a "Term Sheet and Settlement Agreement" ("the Settlement Agreement"), which was binding by its express terms. The Settlement Agreement stated that the parties intended to resolve all of the claims between them in exchange for certain mutual consideration, including the exchange of cash and stock. Specifically, the Settlement Agreement called for the transfer of 100% of the outstanding shares of ConnectU to Facebook and for Facebook to transfer cash and certain shares of Facebook stock to the Founders. The Settlement Agreement also specifically stated that the U.S. District Court for the Northern District of California would retain jurisdiction for purposes of enforcing the Settlement Agreement.

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[3] Because the Founders (through their counsel) have refused to turn over ConnectU's files to ConnectU's new ownership, the exact details about the attorney-client relationship(s) between ConnectU, the Founders, and Boies, O'Shea, and BSF are unclear. ConnectU is currently unable to advise this Court of the precise dates on which Boies, O'Shea and BSF began and ceased representing ConnectU and/or the Founders. However, it is undisputed that at some point during this litigation, each of these firms simultaneously represented ConnectU and the Founders, as evidenced by their various applications for *pro hac vice* admission.

B. Facebook's Motion to Enforce the Settlement Agreement

Shortly after the parties signed the Settlement Agreement, the Founders refused to comply with the terms of the agreement. As a result, on April 23, 2008, Facebook filed a motion to enforce the Settlement Agreement. ConnectU opposed the motion to enforce. (The Founders did not oppose Facebook's motion.)

After briefing and oral argument, on July 2, 2008, the court entered an order granting Facebook's motion to enforce the Settlement Agreement. During this time frame, ConnectU and the Founders filed notices of appeal relating to the court's ruling on the motion to enforce.

C. Transfer of Consideration

Following the court's order granting Facebook's motion to enforce, the court appointed George Fisher as Special Master. Pursuant to the court's order, Fisher was to conduct various administrative activities identified in the court's July 3, 2008 Judgment Enforcing Settlement Agreement.

The court originally ordered that the exchange of consideration was to occur on November 24, 2008. In a November 21, 2008 Amended Judgment, the court extended the transfer date to December 15, 2008, to afford ConnectU the opportunity to seek a stay from the Ninth Circuit regarding the exchange of settlement consideration. This Court denied ConnectU's motion to stay on December 12, 2008.

Accordingly, on December 15, 2008, all of ConnectU's outstanding shares were conveyed to Facebook. As a result of this transfer, ConnectU is now a wholly owned subsidiary of Facebook.

D. ConnectU's Counsel Threatens Their Client and Refuses to Follow the Instructions of Their Client

Upon transfer of ConnectU to Facebook, ConnectU appointed a new sole officer and director. ConnectU then made several board resolutions, including the

appointment of James E. Towery of the law firm Hoge Fenton Jones & Appel as ConnectU's lead counsel in all matters[4]. Following the transfer of ConnectU to Facebook, Mr. Towery contacted Finnegan, O'Shea and BSF on December 16, 2008, on behalf of ConnectU and advised counsel that Finnegan, O'Shea and BSF were no longer authorized to take action on behalf of ConnectU. In this same correspondence, ConnectU requested that its counsel at Finnegan, O'Shea and BSF sign substitutions of counsel. See the Declaration of James E. Towery filed concurrently with this motion ("Towery Decl."), Exhibits A, B and C.

O'Shea responded on December 17, 2008, claiming that O'Shea did not represent ConnectU in the pending Ninth Circuit Appeal. Towery Decl., Ex. D.

ConnectU's lawyers at Finnegan and BSF responded by demanding "proof" of Mr. Towery's authority to act on behalf of ConnectU -- including demanding correspondence directly from the new sole officer and director of ConnectU and copies of ConnectU's most recent board resolutions. Towery Decl., Exs. G and I. Although not obligated to provide such documentation, ConnectU did so on December 18, 2008 in order facilitate the transition of ConnectU's representation. Towery Decl., Ex. H and J. Yet, even after receiving the requested "proof," rather than complying with their client's requests, ConnectU's lawyers at both Finnegan and BSF took the following extraordinary steps:

1. Finnegan and BSF refused to sign a substitution of counsel. In fact, both Finnegan and BSF took the position (either affirmatively or by inaction) that instead of their signing a stipulation for substation of counsel, ConnectU would either need to indemnify the lawyers and/or would need to undergo the time and

[4] At this time ConnectU also determined that pursuing an appeal directly adverse to its parent company, Facebook, is not in ConnectU's interest. ConnectU stipulated with Facebook for voluntary dismissal of the appeal, and then moved to voluntarily dismiss the pending appeal.

incur the expense to file a motion for substitution[5]. Towery Decl., Exs. G and K. Finnegan later moved to withdraw December 29, 2008, a week after ConnectU's new counsel had been compelled to file a motion seeking Finnegan's withdrawal;

2. BSF threatened ConnectU, its own client, warning that if ConnectU were to take any action adverse to BSF's other joint client -- the Founders -- the Founders would hold a fraudulent conveyance claim against ConnectU. Towery Decl., Ex. K; and

3. Finnegan and BSF refused to provide ConnectU's files to ConnectU, greatly prejudicing ConnectU's ability to assess its pending litigation matters. Towery Decl., Exs. L and M.

Based on BSF and Finnegan's remarkable refusal to cooperate with their own client, and the firms' implied and express threats made to ConnectU, ConnectU concluded that: (1) a conflict exists between BSF and Finnegan's joint clients ConnectU and the Founders; and (2) BSF and Finnegan have deliberately favored one joint client over the other by taking actions directly adverse to ConnectU in their continued representation of the Founders. Furthermore, given the actual conflict between ConnectU and the Founders, O'Shea's continued representation of the Founders directly conflicts with O'Shea's continued duty of confidentiality to its former client, ConnectU. On these grounds, ConnectU now moves for this Court to disqualify Finnegan, O'Shea and BSF from representing the Founders in any matter relating to ConnectU, including this case.

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[5] Having no alternative, ConnectU filed its motion to withdraw and substitute counsel on December 22, 2008. On January 6, 2009, BSF filed a response on behalf of the Founders wherein BSF opposed the withdrawal and substitution. Incredibly, BSF asked the Court to allow BSF to represent a non-existent entity (i.e., the interests of "old" ConnectU). BSF presented no authority to support its request.

ISSUES ADDRESSED BY MOTION

i. The Actual Conflict Between Joint Clients ConnectU and Its Founders Requires Mandatory Disqualification of Counsel from Representing Either;

ii. BSF, O'Shea and Finnegan Owe the Same Duties to ConnectU as to Any Former Client, and Therefore May Not Take Action Adverse to ConnectU; and

iii. ConnectU Is Entitled to Its Entire Client Files so It May Properly Evaluate the Corporation's Rights and Obligations, Including Potential Litigation.

ARGUMENT

A. Applicable Law

Courts have the authority to regulate the conduct of attorneys appearing before them, including the power to disqualify attorneys when warranted. "A trial court's authority to disqualify an attorney derives from the power inherent in every court '[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto' (CCP § 128(a)(5))." *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems* (1999) 20 Cal.4th 1135, 1145 (additional citations omitted).

The Northern District of California, from which this appeal was taken, applies the California state law standard to motions to disqualify counsel, including the California Rules of Professional Conduct. *Certain Underwriters at Lloyd's, London v. Argonaut Ins. Co.,* 264 F.Supp.2d 914 (N.D.Cal.2003); Ca. Code Civ. Proc. §128(a)(5); Local Rules of Court for the Northern District of California, Rule 11-4(a).

Here, the California Rules of Professional Conduct (hereinafter the "CRPC") and California law apply. In their settlement, the parties to this Appeal conferred jurisdiction to the Northern District to enforce the Settlement Agreement, and the Appeal was taken from the Northern District, which applies the CRPC and California law. In addition, both BSF and Finnegan maintain offices in California,

employ attorneys who are members of the State Bar of California, and their attorneys of record for this Appeal are either licensed in California or were admitted to practice before the Northern District Court or this Court.

This Court also may rely upon the ABA Model Rules of Professional Conduct ("ABA Rules"). *See, e.g., Brennan's, Inc. v. Brennan's Restaurants, Inc.,* 590 F.2d 168, 172 fn.5 (5th Cir. 1979) ("As the profession's own expression of its ethical standards, the [ABA] Code of Professional Responsibility, Ethical Considerations, and Disciplinary Rules provide substantial guidance to federal courts in evaluating the conduct of attorneys appearing before them.")[6]

Under both the California and ABA Rules, the Founders' counsel have an impermissible conflict based on two separate duties: (1) their duty of loyalty to joint clients ConnectU and the Founders; and (2) their duty of confidentiality to both clients. "An attorney's ethical duties to maintain undivided loyalty to his or her clients and to preserve the confidentiality of client communications require that the attorney refrain from simultaneous or successive representation of clients with adverse interests." *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 23.

B. The Actual Conflict Between Joint Clients ConnectU and the Founders Requires Mandatory Disqualification of BSF and Finnegan from Representing Both Clients

ConnectU and the Founders are joint clients of BSF and Finnegan. Following the change in control of ConnectU in December 15, 2008, BSF and Finnegan refused to withdraw as counsel for ConnectU. ConnectU has taken steps to remove BSF and Finnegan; however, as of this filing BSF and Finnegan remain

[6] The relevant ABA Rules regarding client conflicts, 1.7 and 1.9, as applied to disqualification, were cited with approval by the California Supreme Court in *Flatt v. Superior Court* (1994) 9 Cal. 4th 275, 282 fn. 2.

counsel of record for ConnectU. The Court also should apply the concurrent client analysis because the conflict arises from BSF and Finnegan's joint representation of ConnectU and the Founders concurrently.

A basic rule of professional responsibility is that a lawyer may not represent joint clients whose interests actually conflict. ABA Rule 1.7 prohibits an attorney from representation where "the representation of one client will be directly adverse to another client" or "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

California also prohibits an attorney from representing two current clients with actual conflicting interests, absent informed written consent. The California rule states that "[a] member shall not, without the informed written consent of each client . . .[a]ccept or continue representation of more than one client in a matter in which the interests of the clients actually conflict." CRPC 3-310(C)(2).

The most egregious instance of actual adversity is when an attorney seeks to represent two clients with opposing interests in the same litigation. In such circumstances, as are present in this case, disqualification is automatic. *Flatt v. Sup. Ct.* (1994) 9 Cal. 4th 275. "In all but a few instances, the rule of disqualification in simultaneous representation cases is a *per se* or 'automatic' one." *Id.* at 284; *Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp.* (1995) 36 Cal.App.4th 1832, 1840.

Joint clients in the same litigation may not consent to waive a conflict in a contested proceeding where the interests of joint clients become adverse, and therefore the lawyer must withdraw from representing both clients. *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 898-9. "[I]t would be unthinkable to permit an attorney to assume a position at a trial or hearing where he could not advocate the interests of one client without adversely injuring those of the other."

Id. at 898. Like California, the ABA Rules also prohibit continued representation that involves the "assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." ABA Rule 1.7(b)(3).

BSF and Finnegan undertook representation of joint clients whose interests could potentially become adverse. That potential has become reality. Now that ConnectU and the Founders are in direct conflict, it is no longer possible for BSF and Finnegan to advocate for the interests of one client without adversely injuring the interests of the other. Thus, the two firms cannot continue representation of either joint client.

i. No Valid Waiver Exists

BSF and Finnegan cannot rely upon consent to solve their ethical dilemma. First, an actual conflict between two clients in simultaneous representation is not consentable. *Flatt, supra*; *Klemm, supra*. Even if consent were theoretically available, ConnectU has not consented and does not consent to BSF and Finnegan continuing to represent the Founders. Since the time the conflict became actual, BSF and Finnegan have not purported to disclose the conflict, and ConnectU has not consented to waive it. After ConnectU became a wholly owned subsidiary of Facebook, ConnectU also took the precautionary step of revoking any possible prior consent (although its present management is unaware of any such prior consent). Therefore, ConnectU has not consented to BSF and Finnegan's continued representation of the Founders.

ii. Ending The Attorney-Client Relationship Does Not Cure this Conflict

BSF and Finnegan cannot solve their ethical dilemma by terminating their representation of ConnectU. "[A] law firm that knowingly undertakes adverse

concurrent representation may not avoid a disqualification by withdrawing from representation of less favored client before hearing on disqualification; automatic disqualification rule may not be avoided by unilaterally converting present client into former client." *Truck Ins. Exchange v. Fireman's Fund Ins. Co.* (1992) 6 Cal.App.4th 1050, 1060, rehearing denied and modified, review denied; *Unified Sewerage Agency of Washington County, Or. v. Jelco Inc.,* 646 F.2d 1339, 1345, fn. 4 (9th Cir. 1982).

Following the change in control on December 15, 2008, ConnectU made a simple and unambiguous request to its counsel, BSF and Finnegan, that they withdraw as counsel of record for this Appeal. Both firms refused.[7] The BSF firm also attempted to extract an agreement from its own client -- ConnectU -- in exchange for BSF's cooperation. Specifically, BSF refused to withdraw unless "Facebook, Inc. and ConnectU, Inc. agree to completely indemnify BSF from any liabilities arising from or relating to such substitution" and that counsel "confirm that ConnectU will not take any actions to interfere with the pending appeal." Towery Decl., Ex. K.

BSF's conduct is a manifest breach of its duty of loyalty to ConnectU, and illustrates why disqualification is necessary. BSF not only disregarded its own client's instructions, BSF also exploited its position as ConnectU's counsel to advocate for its other clients, the Founders, to the detriment of ConnectU.

Clients should not have the burden of enforcing their counsel's ethical obligations. Under CRPC 3-310, attorneys have the obligation to avoid the representation of adverse interests. As soon as the conflict between ConnectU and the Founders came into existence, BSF and Finnegan should have withdrawn. Having failed to do so, BSF and Finnegan certainly should have honored their

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[7] Finnegan filed a "conditional withdrawal" as counsel in the Massachusetts action *ConnectU et. al v. Facebook et. al* (1:07-cv-10593) on December 23, 2008.

client's request that they withdraw. This Court should grant the instant motion, and thereby remove BSF and Finnegan from their untenable stance.

C. BSF, O'Shea and Finnegan Owe the Same Duty of Confidentiality to ConnectU as to Any Former Client, and Therefore May Not Act Adverse to ConnectU in this Litigation

ConnectU is a former client of O'Shea in this matter. BSF and Finnegan may well argue that ConnectU is a former, rather than current, client of theirs as well. Regardless of whether the Court considers ConnectU a current or former client of BSF and Finnegan, the Court should disqualify the two firms and O'Shea from continuing to represent the ConnectU Founders.

Both the California and ABA Rules prohibit a lawyer from representing or continuing to represent a client whose interests actually conflict with those of a former client in a substantially related matter. CRPC 3-310(E); ABA Rule 1.9(a). Although an attorney may have a lessened (not absent) duty of loyalty to a former client, most courts analyzing successive conflict issues emphasize the duty of attorneys to maintain the confidences of the former clients as the rationale necessitating disqualification.

An attorney has a duty to "maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client." Ca. Bus. & Prof. Code §6068(e). This duty of confidentiality survives after the termination of the attorney-client relationship. *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 847.

"Where the representation is successive -- that is when an attorney is engaged to represent the interest of a party that are adverse to a former client of the attorney's -- 'courts have recognized that the chief fiduciary value jeopardized is that of client confidentiality.'" *Metro-Goldwyn-Mayer, Inc., supra*, 36 Cal.App.4th at 1839, citing *Flatt, supra*, 9 Cal. 4th at 283.

An actual breach of confidentiality is not required to compel

disqualification. "The test used for disqualification in those instances is whether there is a 'substantial relationship' between the subject of the former and current representations." *Metro-Goldwyn-Mayer, Inc., supra*, 36 Cal.App.4th at 1839. If the matter is "substantially related," potential for breach of confidentiality is presumed and disqualification is proper. *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1038; *Brennan's, Inc., supra,* 590 F.2d at 172.

In the present case, the substantial relationship is obvious. BSF, O'Shea and Finnegan have represented (and BSF and Finnegan continue to represent) ConnectU and its Founders in the very same matter -- the present case.

The Court should disqualify an attorney where there is any potential for breach -- an actual breach is not required. In disqualifying a former attorney for American Airlines from testifying as an expert witness for American's adversary in subsequent litigation, the California Appellate Court reasoned:

> It was not necessary for American to establish that Long answered the questions, thus revealing confidential information, in order to prove that Long breached his fiduciary duty to American. He placed the noose around American's neck, without its consent, promising all the while not to kick over the chair on which it stood, blithely ignoring the sweat forming on the corporate brow… The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent.

American Airlines, supra, 96 Cal.App.4th at 704-05.

Even though an actual breach of confidentiality is not required to disqualify counsel, there already has been an actual breach in this action to the detriment of ConnectU. In correspondence to ConnectU's successor counsel, BSF attorney Michael Underhill used confidential corporate information to demand that his own

client -- ConnectU -- act against its own interest by maintaining this Appeal, and to threaten his own client with legal action on behalf of the Founders if ConnectU did not do as he demanded. Towery Decl., Ex. G. Mr. Underhill wrote:

> Finally, on behalf of the Founders, we request that ConnectU not take any action that would interfere with the pending appeal. As you are probably aware, ConnectU owes substantial debts to the Founders, and ConnectU's most significant assets are its claims against Facebook and persons associated with Facebook. Consequently, we believe that any attempt by ConnectU to benefit its current shareholder by extinguishing that claim would be a fraudulent conveyance and legally actionable.

Towery Decl., Ex. G. BSF has also refused to provide ConnectU with its files, depriving ConnectU of the right to evaluate all of ConnectU's rights and obligations, including potential litigation.

In this letter, BSF used confidential corporate information regarding the alleged loan "on behalf of the Founders" and to the detriment of his client ConnectU[8]. This is precisely the kind of conduct that Rules 3-310 and 1.7 prohibit. The fact that BSF, O'Shea and Finnegan represent or have represented the Founders in the same litigation is enough to satisfy the substantial relationship test and compel disqualification. The further evidence that BSF already has breached its duties should remove the benefit of any doubt. The present case amply illustrates why courts should not tolerate successive conflicts of interest. Simply put, lawyers in this conflicted position cannot serve two masters. They cannot protect the confidences of a former joint client who is adverse to a current one. The Court should grant the present motion.

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[8] Despite Underhill's use of the phrase, "as you know," ConnectU and its new management does not know anything about the loan referenced by Underhill. Ignorance of such information illustrates precisely why ConnectU must be allowed access to its files.

i. A Lawyer's Duty to Preserve Client Confidences Is Not Altered by a Former Joint Client Relationship with Shared Confidences

BSF, O'Shea and Finnegan cannot violate their duty of confidentiality to ConnectU based on a previous joint client relationship in which ConnectU and the Founders may have waived the privilege with respect to one communication with the two firms.

In a Fifth Circuit case applying ABA Ethical Considerations (the predecessor to the current Rules), the court disqualified a lawyer in circumstances similar to this case. *Brennan's, Inc., supra,* 590 F.2d at 172. The *Brennan's* court held that the lawyer, who had jointly represented a restaurant corporation and its multiple original shareholders, could not represent that corporation and its remaining shareholders as defendants against the Founders in a later trademark dispute. *Id*. The *Brennan's* defendants argued that the duty of confidentiality embodied in Canon 4 (now ABA Rule 1.9) could not apply because as joint clients the parties had waived confidentiality with respect to one another. *Id*. The Fifth Circuit disagreed. Citing the predecessors to ABA Rules 1.6(a) and 1.9(c), the court held:

> [T]he ethical duty is broader than the evidentiary privilege…The use of the word 'information' in these [ABA] Ethical Considerations as opposed to 'confidence' or 'secret' is particularly revealing of the drafters' intent to protect all knowledge acquired from a client, since the latter two are defined terms. Information so acquired is sheltered from use by the attorney against his client by virtue of the existence of the attorney-client relationship. This is true without regard to whether someone else may be privy to it.

Id.

The current ABA Rules retain the word "information," so this reasoning still applies. Rule 1.9(b) specifically prohibits a lawyer from using confidential information acquired in the course of the prior representation to the disadvantage

of the former client. It does not matter that ConnectU and the Founders may have waived confidentiality with respect to one another during the time they were joint clients. BSF, O'Shea and Finnegan must protect "at every peril" to themselves, the information learned from ConnectU "without regard to whether someone else may be privy to it," including the Founders.

ii. A Lawyer's Duty to Preserve Corporate Client Confidences Is Not Altered by a Change in Corporate Control

The fact that there was a change in control of ConnectU on December 15, 2008, does not alter the professional responsibilities of BSF, O'Shea and Finnegan to ConnectU. A former corporate client is entitled to the same protection of its confidential information as any other former client. *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621. The California Appellate Court denied fees to the former in-house counsel for a corporation for his later representation of shareholders in a proxy fight because such representation was adverse to his former corporate client and therefore violated California law and the California Rules of Professional Conduct. *Goldstein, supra,* 46 Cal.App.3d. at 619. The *Goldstein* court held that the lawyer's duty to his former corporate client made his representation of the shareholders improper:

> Clearly, if Kirshman were [current] counsel to the corporation, he could not, consistently with his position as general counsel, act as proxy for one contending group of shareholders. … "In acting as the corporation's legal adviser he must refrain from taking part in any controversies or factional differences which may exist among shareholders as to its control… This duty to act without bias or prejudice does not dissolve merely because the attorney has been discharged.

Id at 623. As one court noted, "[a] successor corporation succeeds to the prior corporation's rights and liabilities, including the prior corporation's right to protect confidential information transmitted to the prior corporation's counsel." *Waid v. Eighth Judicial Dist. Ct.,* 119 P.3d 1219, 1224 (Nev. 2005).

A leading case in circumstances analogous to the present case is *Tekni-Plex, Inc. v. Meyner and Landis* (1996) 89 N.Y.2d 123. In *Tekni-Plex,* the New York Court of Appeals affirmed disqualification of counsel for the former owner of a corporation in litigation initiated by the corporation's buyer to remedy alleged breaches of the agreement relating to the corporation's acquisition. *Id.* At 127. The court affirmed disqualification there because the attorney-client relationship continued with the newly formed entity. *Id.*[9]

iii. A Corporation's Current Management Controls Its Confidential Information -- Not Counsel, Not Former Management

When there is a change in corporate control, the corporation's attorney-client privilege also transfers to new management. *Commodity Futures Trading Com'n v. Weintraub* (1985) 471 U.S. 343, 349. In *Weintraub*, the United States Supreme Court held that the privilege passes to new management and consequently, "Displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties." *Id.* (emphasis added). In addition, the *Goldstein* court distinguished between the confidential information known to directors and the more limited information available to shareholders, holding that "shareholder status does not in and of itself entitle an individual to unfettered access to corporate confidences and secrets." *Goldstein,*

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[9] ConnectU anticipates that the Founders will rely on *Forrest v. Baeza* (1997) 58 Cal.App.4th 65, 82, wherein the court disqualified the lawyer (who had jointly represented two corporations and their shareholders) from representing the corporations, but permitted the lawyer to continue representing the shareholders on the basis that the distinction between the individual defendants and the corporations were purely fictional. *Id.* Any reliance on *Forrest* here would be misplaced. *Forrest* involved a shareholder's derivative action in which the corporations were nominal defendants; the *Forrest* court specifically stated that its holding is limited to the context of a shareholder's derivative action. *Id.* at 74, 80. As the *Brennan* court held, a lawyer's duty of confidentiality to a former client persists "without regard to whether someone else may be privy to it." *Brennan's, supra,* 590 F.2d at 172.

supra, 46 Cal.App.3d at 621.

In accord with *Weintraub* and *Goldstein*, BSF, O'Shea and Finnegan may not use any confidential information learned from the Founders, and the Founders may not waive the privilege with respect to that information in order to use it on their own behalf. This was the court's basis for denying fees to the lawyer in *Goldstein* -- he was privy to information as a prior director that he could not put into the service of shareholders. *Id*. Rules 3-310 and 1.9 serve to preclude the honest practitioner from having to choose between conflicting duties or reconciling conflicting interests, "rather than to enforce to their full extent the rights of the interest which he should alone represent." *American Airlines, supra,* 96 Cal.App.4th at 705. The Court should likewise disqualify BSF, O'Shea and Finnegan.

Further, whoever controls ConnectU is entitled to properly assess the corporation's rights and obligations, including potential litigation. Thus, it is even more important that BSF, O'Shea and Finnegan are not allowed unfettered use of confidential corporate information. As noted in *Goldstein*, "The board of directors, not corporate counsel, has the right to control the affairs of the corporation. (Corp. Code, § 800.)" *Goldstein, supra*, 46 Cal.App.3d at 623. Should this Court not disqualify BSF, O'Shea and Finnegan, the Court will allow BSF, O'Shea and Finnegan to operate the corporation.

D. ConnectU is Entitled to Its Entire Client Files

A client is entitled to its files. CRPC 3-700(D); ABA Rule 1.16(d). The United States Supreme Court and two California Supreme Court cases specifically hold that a successor corporation is entitled to its client file. *Weintraub, supra,* 471 U.S. at 353; *HLC Properties, Ltd. v. Superior Court* (2005) 35 Cal.4th 54, 64; and *Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1138. In *Moeller,* the California Supreme Court reasoned that a corporation's new management has a

right to its entire file because the of the client's need to assess the corporation's rights and obligations. *Id*.

BSF and Finnegan have refused to turn over ConnectU's files. BSF mistakenly relies on *Tekni-Plex, supra*, to support its refusal to turn over its client's files. BSF's reliance on *Tekni-Plex,* is misplaced where the California Supreme Court analyzed *Tekni-Plex,* in *Moeller, supra,* to reach the opposite conclusion -- the successor corporation is entitled to its files from prior to the change in control. *Moeller, supra*, 16 Cal.4th at 1137-9.

Finnegan initially provided ConnectU with copies of the Ninth Circuit pleadings and other publicly available materials, but no other files. After a follow-up request from ConnectU, Finnegan, through counsel, has represented that it is unwilling to provide ConnectU its files, also improperly relying on *Tekni-Plex*.

ConnectU has an immediate and continuing need to assess its rights and obligations, including any potential litigation. Delivery of its client files is required and imperative. This imperative is made more obvious by Mr. Underhill's threat of litigation against ConnectU based on facts unknown to ConnectU's sole officer and director. Therefore, ConnectU requests the Court compel BSF, O'Shea and Finnegan to deliver ConnectU's complete file to ConnectU forthwith.

RELIEF SOUGHT

For the reasons stated herein, Appellant ConnectU requests that this Court disqualify BSF, O'Shea and Finnegan from continuing to represent the Founders in this Appeal and all related or consolidated actions.

DATED: January 20, 2009

Respectfully submitted,
HOGE, FENTON, JONES & APPEL, INC.

By /s/ James E. Towery
James E. Towery
Attorneys for Defendant-Appellant
Connect U, Inc.

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 January 20, 2009.

DATED: January 20, 2009

Respectfully submitted,

By /s/ James E. Towery
James E. Towery

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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.

On Appeal From The United States District Court For The Northern District of California, No. CV-07-01389-JW, The Honorable James Ware

---

DECLARATION OF JAMES E. TOWERY IN SUPPORT OF APPELLANT CONNECTU, INC.'S MOTION TO DISQUALIFY COUNSEL

James E. Towery (BAR NO. 74058)
Alison P. Buchanan (BAR NO. 215710)
Jill E. Fox (BAR NO. 243945)
HOGE, FENTON, JONES & APPEL, INC.
Sixty South Market Street, Suite 1400
San Jose, California 95113-2396
Phone: (408) 287-9501
Fax: (408) 287-2583
Attorneys for Appellant ConnectU, Inc.

I, James E. Towery, declare:

1. I am a shareholder in the law firm of Hoge, Fenton, Jones & Appel, Inc., counsel for ConnectU, Inc ("ConnectU"). I am a member of the State Bar of California and the Ninth Circuit. I make this declaration in support of Appellant-Defendant ConnectU's Motion to Disqualify.

2. On December 15, 2008, ownership of ConnectU, Inc. transferred to Plaintiffs-Appellees The Facebook, Inc. and Mark Zuckerberg ("Facebook").

3. Attached hereto as Exhibit A is a true and correct copy of correspondence from Hoge, Fenton, Jones & Appel, Inc. to Boies, Schiller & Flexner LLP ("BSF"), dated December 16, 2008.

4. Attached hereto as Exhibit B is a true and correct copy of correspondence from Hoge, Fenton, Jones & Appel, Inc. to Finnegan, Henderson, Farabow, Garrett & Dunner, LLP ("Finnegan"), dated December 16, 2008.

5. Attached hereto as Exhibit C is a true and correct copy of correspondence from Hoge, Fenton, Jones & Appel, Inc. to O'Shea Partners LLP ("O'Shea"), dated December 16, 2008.

6. Attached hereto as Exhibit D is a true and correct copy of correspondence from O'Shea to Hoge, Fenton, Jones & Appel, Inc., dated December 17, 2008.

7. Attached hereto as Exhibit E is a true and correct copy of correspondence from Finnegan to Hoge, Fenton, Jones & Appel, Inc., dated December 17, 2008.

8. Attached hereto as Exhibit F is a true and correct copy of correspondence from Hoge, Fenton, Jones & Appel, Inc. to Finnegan, dated December 17, 2008.

9. Attached hereto as Exhibit G is a true and correct copy of correspondence from BSF to Hoge, Fenton, Jones & Appel, Inc., dated December 18, 2008.

10. Attached hereto as Exhibit H is a true and correct copy of correspondence from Hoge, Fenton, Jones & Appel, Inc. to BSF, dated December 18, 2008.

11. Attached hereto as Exhibit I is a true and correct copy of correspondence from Finnegan to Hoge, Fenton, Jones & Appel, Inc., dated December 18, 2008.

12. Attached hereto as Exhibit J is a true and correct copy of correspondence from Hoge, Fenton, Jones & Appel, Inc. to BSF and Finnegan, dated December 18, 2008 (the enclosures to this correspondence -- ConnectU's board resolutions -- are not included as part of this Exhibit).

13. Attached hereto as Exhibit K is a true and correct copy of correspondence from BSF to Hoge, Fenton, Jones & Appel, Inc., dated December 22, 2008.

14. Attached hereto as Exhibit L is a true and correct copy of correspondence from Finnegan to Hoge, Fenton, Jones & Appel, Inc., dated December 22, 2008.

15. Attached hereto as Exhibit M is a true and correct copy of correspondence from Zuckerman Spaeder (counsel for Finnegan) to Hoge, Fenton, Jones & Appel, Inc., dated January 7, 2008.

I declare under penalty of perjury under the laws of the United States that the above facts are within my personal knowledge; that I can testify to

the same if called to do so in a court of law; that the foregoing is true and correct; and that this declaration was executed on the 20th day of January, 2009, at San Jose, California.

/s/ James E. Towery
JAMES E. TOWERY

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 January 20, 2009.

DATED: January 20, 2009

Respectfully submitted,

By /s/ James E. Towery
James E. Towery

EXHIBIT A

HOGE, FENTON
JONES & APPEL, INC.

Attorneys at Law | San Jose | Pleasanton | East Palo Alto | Hollister

James E. Towery
408.947.2432
jet@hogefenton.com

December 16, 2008

VIA FACSIMILE, U.S. MAIL AND EMAIL

D. Michael Underhill
Boies, Schiller & Flexner LLP
5301 Wisconsin Avenue, N.W.
Washington, D.C. 20015

Re: The Facebook, Inc. v. ConnectU, Inc.
Our File No.: 80696

Dear Mr. Underhill:

We have been informed that the Special Master, George Fisher, has completed all tasks necessary on his part to culminate the settlement agreement between the parties, as of Monday morning. Accordingly, ConnectU, Inc. is now a wholly owned subsidiary of The Facebook, Inc.

The purpose of this letter is to advise you that this firm has been retained to represent ConnectU, Inc. in all pending litigation. You are hereby notified that you and your firm no longer have authority to take any legal action on behalf of ConnectU, Inc., in any forum.

Enclosed is a stipulation for your withdrawal as counsel of record in the matter pending before the Ninth Circuit Court of Appeals. Please review, sign and return the stipulation to my office via facsimile by noon (Pacific Standard Time) tomorrow, Wednesday, December 17, 2008. If you fail to do so, we will promptly file a motion for substitution before the Ninth Circuit. I trust that will not be necessary. Please do not hesitate to contact me if you have any questions.

Very truly yours,

HOGE, FENTON, JONES & APPEL, INC.

James E. Towery

JET
ENCLOSURE

cc: Mark Howitson

JAMES E. TOWERY -- BAR NO. 74058
ALISON P. BUCHANAN -- BAR NO. 215710
JILL E. FOX -- 243945
HOGE, FENTON, JONES & APPEL, INC.
Sixty South Market Street, Suite 1400
San Jose, California 95113-2396
Phone: (408) 287-9501
Fax: (408) 287-2583

Attorneys for
CONNECTU, INC. (formerly known as CONNECTU, LLC)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE FACEBOOK, INC. and MARK ZUCKERBERG Plaintiffs-Appellees, vs. CONNECTU, INC. (formerly known as CONNECTU, LLC), Defendant-Appellant, and PACIFIC NORTHWEST SOFTWARE, INC., WINSTON WILLIAMS, and WAYNE CHANG, Defendants.	No. 08-16745 (Consolidated with Case Nos. 08-16849 and 08-16873) D.C. No. 5:07-cv-01389-JW Northern District of California, San Jose STIPULATION AND [PROPOSED] ORDER FOR WITHDRAWAL AND SUBSTITUTION OF COUNSEL FOR DEFENDANT-APPELLANT CONNECTU, INC.

THE COURT AND ALL PARTIES AND THEIR ATTORNEYS OF RECORD, BE INFORMED that Defendant-Appellant ConnectU, Inc. makes the following substitution of counsel:

1. Former counsel Boies Schiller & Flexner LLP and Finnegan, Henderson, Farabow, Garrett & Dunner LLP hereby withdraw as counsel of record for ConnectU, Inc.; and

2. New counsel Hoge Fenton Jones & Appel, Inc. is hereby substituted as the attorneys of record for ConnectU, Inc.

The undersigned consent to this substitution. The contact information for new counsel is as follows:

JAMES E. TOWERY -- BAR NO. 74058
ALISON P. BUCHANAN -- BAR NO. 215710
JILL E. FOX – BAR NO. 243945
HOGE, FENTON, JONES & APPEL, INC.
Sixty South Market Street, Suite 1400
San Jose, California 95113-2396
Phone: (408) 287-9501
Fax: (408) 287-2583
jet@hogefenton.com
apb@hogefenton.com
jef@hogefenton.com

DATED: December __, 2008

Mark Howitson
Sole Officer and Director
CONNECTU, INC.

DATED: December __, 2008

D. Michael Underhill,
BOIES SCHILLER & FLEXNER, LLP

DATED: December __, 2008

Scott Mosko
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP

DATED: December 15, 2008

James E. Towery
HOGE, FENTON, JONES & APPEL, INC.

EXHIBIT B

HOGE, FENTON
JONES & APPEL, INC.

Attorneys at Law | San Jose | Pleasanton | East Palo Alto | Hollister

James E. Towery
408.947.2432
jet@hogefenton.com

December 16, 2008

VIA FACSIMILE, U.S. MAIL AND EMAIL

Scott R. Mosko
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP
Stanford Research Park
3300 Hillview Avenue
Palo Alto, CA 94304-1203

John F. Hornick
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP
901 New York Avenue, NW
Washington, DC 20001

Re: The Facebook, Inc. v. ConnectU, Inc.
Our File No.: 80696

Dear Mr. Mosko and Mr. Hornick:

We have been informed that the Special Master, George Fisher, has completed all tasks necessary on his part to culminate the settlement agreement between the parties, as of Monday morning. Accordingly, ConnectU, Inc. is now a wholly owned subsidiary of The Facebook, Inc.

The purpose of this letter is to advise you that this firm has been retained to represent ConnectU, Inc. in all pending litigation. You are hereby notified that you and your firm no longer have authority to take any legal action on behalf of ConnectU, Inc., in any forum.

Enclosed is a stipulation for your withdrawal as counsel of record in the matter pending before the Ninth Circuit Court of Appeals. Please review, sign and return the stipulation to my office via facsimile by noon (Pacific Standard Time) tomorrow, Wednesday, December 17, 2008. If you fail to do so, we will promptly file a motion for substitution before the Ninth Circuit. I trust that will not be necessary.

\\HFJAFS\NDrive\80696\Let\375020.doc

Please do not hesitate to contact me if you have any questions.

Sincerely,

HOGE, FENTON, JONES & APPEL, INC.

James E. Towery

JET

ENCLOSURE

cc: Mark Howitson

JAMES E. TOWERY -- BAR NO. 74058
ALISON P. BUCHANAN -- BAR NO. 215710
JILL E. FOX -- 243945
HOGE, FENTON, JONES & APPEL, INC.
Sixty South Market Street, Suite 1400
San Jose, California 95113-2396
Phone: (408) 287-9501
Fax: (408) 287-2583

Attorneys for
CONNECTU, INC. (formerly known as CONNECTU, LLC)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE FACEBOOK, INC. and MARK ZUCKERBERG Plaintiffs-Appellees, vs. CONNECTU, INC. (formerly known as CONNECTU, LLC), Defendant-Appellant, and PACIFIC NORTHWEST SOFTWARE, INC., WINSTON WILLIAMS, and WAYNE CHANG, Defendants.	No. 08-16745 (Consolidated with Case Nos. 08-16849 and 08-16873) D.C. No. 5:07-cv-01389-JW Northern District of California, San Jose STIPULATION AND [PROPOSED] ORDER FOR WITHDRAWAL AND SUBSTITUTION OF COUNSEL FOR DEFENDANT-APPELLANT CONNECTU, INC.

THE COURT AND ALL PARTIES AND THEIR ATTORNEYS OF RECORD, BE INFORMED that Defendant-Appellant ConnectU, Inc. makes the following substitution of counsel:

1. Former counsel Boies Schiller & Flexner LLP and Finnegan, Henderson, Farabow, Garrett & Dunner LLP hereby withdraw as counsel of record for ConnectU, Inc.; and

2. New counsel Hoge Fenton Jones & Appel, Inc. is hereby substituted as the attorneys of record for ConnectU, Inc.

The undersigned consent to this substitution. The contact information for new counsel is as follows:

JAMES E. TOWERY -- BAR NO. 74058
ALISON P. BUCHANAN -- BAR NO. 215710
JILL E. FOX – BAR NO. 243945
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San Jose, California 95113-2396
Phone: (408) 287-9501
Fax: (408) 287-2583
jet@hogefenton.com
apb@hogefenton.com
jef@hogefenton.com

DATED: December __, 2008

Mark Howitson
Sole Officer and Director
CONNECTU, INC.

DATED: December __, 2008

D. Michael Underhill,
BOIES SCHILLER & FLEXNER, LLP

DATED: December __, 2008

Scott Mosko
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP

DATED: December 15, 2008

James E. Towery
HOGE, FENTON, JONES & APPEL, INC.

HOGE FENTON JONES & APPEL INC.

Attorneys at Law | San Jose | Pleasanton | Modesto | Hollister

San Jose Office

60 South Market Street
Suite 1400, San Jose, CA 95113
Ph: 408.287.9501 Fax: 408.287.2583

Pleasanton Office

6155 Stoneridge Drive
Pleasanton, CA 94588
Ph: 925.224.7780 Fax: 925.224.7782

FAX COVER SHEET

TO: John F. Hornick

FAX NO: 2024084400

FROM: Jim Towery

MATTER: The Facebook, Inc. v. ConnectU, Inc.

DATE: 12/16/2008 9:01:55 AM

NO PAGES: 5

MESSAGE:

Please see attached.

If this fax is incomplete or difficult to read, please call (408) 287-9501

EXHIBIT C

HOGE, FENTON
JONES & APPEL, INC.

Attorneys at Law | San Jose | Pleasanton | East Palo Alto | Hollister

James E. Towery
408.947.2432
jet@hogefenton.com

December 16, 2008

VIA FACSIMILE, U.S. MAIL AND EMAIL

Sean F. O'Shea
O'Shea Partners LLP
90 Park Avenue, 20th Floor
New York, NY 10016

Re: The Facebook, Inc. v. ConnectU, Inc.
Our File No.: 80696

Dear Mr. O'Shea:

We have been informed that the Special Master, George Fisher, has completed all tasks necessary on his part to culminate the settlement agreement between the parties, as of Monday morning. Accordingly, ConnectU, Inc. is now a wholly owned subsidiary of The Facebook, Inc.

The purpose of this letter is to advise you that this firm has been retained to represent ConnectU, Inc. in all pending litigation. You are hereby notified that you and your firm no longer have authority to take any legal action on behalf of ConnectU, Inc., in any forum.

Enclosed is a stipulation for your withdrawal as counsel of record in the matter pending before the Ninth Circuit Court of Appeals. Please review, sign and return the stipulation to my office via facsimile by noon (Pacific Standard Time) tomorrow, Wednesday, December 17, 2008. If you fail to do so, we will promptly file a motion for substitution before the Ninth Circuit. I trust that will not be necessary.

Sincerely,

HOGE, FENTON, JONES & APPEL, INC.

James E. Towery

JET
ENCLOSURE
cc: Mark Howitson

\\HFJAFS\NDrive\80696\Let\375025.doc

JAMES E. TOWERY -- BAR NO. 74058
ALISON P. BUCHANAN -- BAR NO. 215710
JILL E. FOX -- 243945
HOGE, FENTON, JONES & APPEL, INC.
Sixty South Market Street, Suite 1400
San Jose, California 95113-2396
Phone: (408) 287-9501
Fax: (408) 287-2583

Attorneys for
CONNECTU, INC. (formerly known as CONNECTU, LLC)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE FACEBOOK, INC. and MARK ZUCKERBERG Plaintiffs-Appellees, vs. CONNECTU, INC. (formerly known as CONNECTU, LLC), Defendant-Appellant, and PACIFIC NORTHWEST SOFTWARE, INC., WINSTON WILLIAMS, and WAYNE CHANG, Defendants.	No. 08-16745 (Consolidated with Case Nos. 08-16849 and 08-16873) D.C. No. 5:07-cv-01389-JW Northern District of California, San Jose STIPULATION AND [PROPOSED] ORDER FOR WITHDRAWAL AND SUBSTITUTION OF COUNSEL FOR DEFENDANT-APPELLANT CONNECTU, INC.

THE COURT AND ALL PARTIES AND THEIR ATTORNEYS OF RECORD, BE INFORMED that Defendant-Appellant ConnectU, Inc. makes the following substitution of counsel:

1. Former counsel Boies Schiller & Flexner LLP and Finnegan, Henderson, Farabow, Garrett & Dunner LLP hereby withdraw as counsel of record for ConnectU, Inc.; and

2. New counsel Hoge Fenton Jones & Appel, Inc. is hereby substituted as the attorneys of record for ConnectU, Inc.

The undersigned consent to this substitution. The contact information for new counsel is as follows:

JAMES E. TOWERY -- BAR NO. 74058
ALISON P. BUCHANAN -- BAR NO. 215710
JILL E. FOX -- BAR NO. 243945
HOGE, FENTON, JONES & APPEL, INC.
Sixty South Market Street, Suite 1400
San Jose, California 95113-2396
Phone: (408) 287-9501
Fax: (408) 287-2583
jet@hogefenton.com
apb@hogefenton.com
jef@hogefenton.com

DATED: December __, 2008

Mark Howitson
Sole Officer and Director
CONNECTU, INC.

DATED: December __, 2008

D. Michael Underhill,
BOIES SCHILLER & FLEXNER, LLP

DATED: December __, 2008

Scott Mosko
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP

DATED: December 15, 2008

James E. Towery
HOGE, FENTON, JONES & APPEL, INC.

EXHIBIT D

O'SHEA PARTNERS LLP
521 FIFTH AVENUE
25th FLOOR
NEW YORK, NEW YORK 10175

SEAN F. O'SHEA
MICHAEL E. PETRELLA
—
JONATHAN R. ALTSCHULER
MARC D. FEINGOLD
JULIE O'SHEA
ROBERT R. VIDUCICH
MARK A. WEISSMAN

(212) 682-4426
Fax (212) 682-4437
www.osheapartners.com

December 17, 2008

VIA EMAIL

James Towery, Esq.
Hoge, Fenton, Jones & Appel, Inc.
60 South Market Street
Suite 1400
San Jose, California 95113-2396

Re: *The Facebook, Inc. v. ConnectU, Inc.*

Dear Mr. Towery:

I am not counsel of record for ConnectU, Inc. in the Ninth Circuit as your letter of December 16, 2008 suggests. Therefore, I have not executed the stipulation as requested by your letter.

Very truly yours,

Sean F. O'Shea

EXHIBIT E

Quintana, Sandy

From: Hornick, John [John.Hornick@finnegan.com]
Sent: Wednesday, December 17, 2008 11:29 AM
To: Towery, James E.
Cc: Buchanan, Alison P.; Quintana, Sandy; Mosko, Scott; Washington, Tamara; Esquenet, Margaret; Schoenfeld, Meredith
Subject: RE: ConnectU, Inc.

Dear James:

We write in response to your letters of December 16, 2008. Please provide us with documentation that the requests contained in your letters have been authorized by a properly appointed officer of new ConnectU, Inc.

Sincerely,

John

John F. Hornick
Attorney at Law
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP
901 New York Avenue, NW, Washington, DC 20001-4413
202.408.4076 | fax 202.408.4400| john.hornick@finnegan.com | www.finnegan.com

FINNEGAN

From: Quintana, Sandy [mailto:SLQ@hogefenton.com]
Sent: Tuesday, December 16, 2008 12:45 PM
To: Mosko, Scott; Hornick, John
Cc: Towery, James E.; Buchanan, Alison P.
Subject: ConnectU, Inc.

Dear Counsel:

Please see attached correspondence from Jim Towery regarding the above-referenced matter.

EXHIBIT F

HOGE, FENTON JONES & APPEL, INC.

Attorneys at Law | San Jose | Pleasanton | East Palo Alto | Hollister

James E. Towery
408.947.2432
jet@hogefenton.com

December 17, 2008

VIA EMAIL AND FACSIMILE

Scott R. Mosko
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP
Stanford Research Park
3300 Hillview Avenue
Palo Alto, CA 94304-1203

John F. Hornick
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP
901 New York Avenue, NW
Washington, DC 20001

Re: The Facebook, Inc. v. ConnectU, Inc.
Our File No.: 80696

Dear Mr. Mosko and Mr. Hornick:

This letter serves to respond to your email earlier today wherein you requested "documentation that the requests contained in your letters have been authorized by a properly appointed officer of new ConnectU, Inc." Please be advised that pursuant to the District Court's Judgment of which you are no doubt aware, the new shareholder of all of the Connect U shares appointed Mark Howitson as the sole officer and director of ConnectU, Inc. ConnectU, Inc. retained my law firm as corporate counsel.

ConnectU, Inc. instructed my firm to obtain substitutions of counsel from Finnegan, Henderson, et al., as well as the other firms that previously represented ConnectU, Inc. Enclosed is written confirmation, from Mr. Howitson, that he is the sole officer and director of ConnectU, Inc. and that he has authorized Hoge, Fenton to obtain a substitution from your firm.

\\HFJAFS\NDrive\80696\Let\375020.doc

Please advise whether you will stipulate to the substitution as soon as possible. If we have not heard from you by five p.m. PST tomorrow (December 18, 2008), we will conclude that you are refusing to follow your client's request that you sign the substitution. Please also await further instruction from Connect U.

Sincerely,

HOGE, FENTON, JONES & APPEL, INC.

James E. Towery

JET
ENCLOSURE
cc: Mark Howitson (via email only)

Buchanan, Alison P.

From: Mark Howitson [connectuhq@gmail.com]
Sent: Wednesday, December 17, 2008 4:39 PM
To: Towery, James E.; Buchanan, Alison P.
Subject: Substitution

This confirms that I, Mark Howitson, have been appointed the sole officer and director of ConnectU, Inc. ConnectU, Inc. has retained James E. Towery and the law firm Hoge, Fenton, Jones & Appel to serve as corporate counsel for ConnectU, Inc. I previously instructed Mr. Towery to obtain substitutions of counsel from Finnegan, Henderson, et al., as well as the other firms that previously represented ConnectU, Inc. I hereby instruct Finnegan, Henderson, et al., as ConnectU, Inc.'s counsel of record in the pending Ninth Circuit Court of Appeals action, to immediately sign the substitution of counsel provided to it by Hoge, Fenton, Jones and Appel on December 16, 2008 and await further instruction.

Mark Howitson

HOGE FENTON JONES & APPEL INC.

Attorneys at Law | San Jose | Pleasanton | Modesto | Hollister

San Jose Office
60 South Market Street
Suite 1400, San Jose, CA 95113
Ph: 408.287.9501 Fax: 408.287.2583

Pleasanton Office
6155 Stoneridge Drive
Pleasanton, CA 94588
Ph: 925.224.7780 Fax: 925.224.7782

FAX COVER SHEET

TO: John F. Hornick

FAX NO: 2024084400

FROM: Jim Towery

MATTER: Facebook, Inc./ConnectU, Inc.

DATE: 12/17/2008 5:25:36 PM

NO PAGES: 4

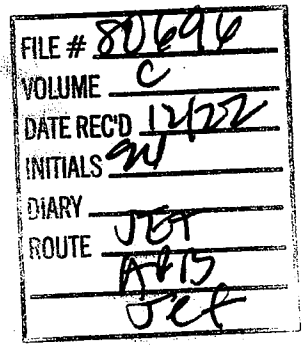
MESSAGE:

Please see attached.

EXHIBIT G

BOIES, SCHILLER & FLEXNER LLP

5301 Wisconsin Avenue N.W. * Washington, DC 20015-2015 * PH 202.237.2727 * FAX 202.237.6131



December 18, 2008

VIA EMAIL jet@hogefenton.com and US MAIL

James E. Towery
Hoge, Fenton, Jones & Appel
60 South Market Street
Suite 1400
San Jose, CA 95113-2396

RE: Facebook v. ConnectU

Dear Mr. Towery:

Your letter of today makes reference to the new shareholder appointing Mark Howitson as the sole officer and director of ConnectU, Inc. We request that you provide us with the appointment documents. And while we assume that the e-mail you provided us was sent by Mr. Howitson, we request the communication over his signature.

With respect to your request that we agree to substitute counsel, we believe that, given the rather unusual circumstances, it would be preferable for you to file a motion to substitute with the Ninth Circuit. That way, the position of all parties can be presented to the Court with respect to these matters of client representation.

Finally, on behalf of the Founders, we request that ConnectU not take any action that would interfere with the pending appeal. As you are probably aware, ConnectU owes substantial debts to the Founders, and ConnectU's most significant assets are its claims against Facebook and persons associated with Facebook. Consequently, we believe that any attempt by ConnectU to benefit its current shareholder by extinguishing that claim would be a fraudulent conveyance and legally actionable.

Thank you.

Very truly yours,

D. Michael Underhill

D. Michael Underhill

DMU/tle

EXHIBIT H

HOGE, FENTON JONES & APPEL, INC.

Attorneys at Law | San Jose | Pleasanton | East Palo Alto | Hollister

James E. Towery
408.947.2432
jet@hogefenton.com

December 18, 2008

VIA FACSIMILE AND EMAIL

D. Michael Underhill
Boies, Schiller & Flexner LLP
5301 Wisconsin Avenue, N.W.
Washington, D.C. 20015

Re: The Facebook, Inc. v. ConnectU, Inc.
Our File No.: 80696

Dear Mr. Underhill:

This letter serves to respond to your letter yesterday wherein you requested instructions directly from a duly-elected officer of ConnectU, Inc. Please be advised that pursuant to the District Court's Judgment of which you are no doubt aware, the new shareholder of all of the Connect U shares appointed Mark Howitson as the sole officer and director of ConnectU, Inc.

ConnectU, Inc. retained my law firm as corporate counsel and has instructed my firm to obtain substitutions of counsel from Boies Schiller, et al., as well as the other firms that previously represented ConnectU, Inc. Enclosed is written confirmation, from Mr. Howitson, that he is the sole officer and director of ConnectU, Inc. and that he has authorized Hoge, Fenton to obtain a substitution from your firm.

Please advise whether you will stipulate to the substitution as soon as possible. If we have not heard from you by five p.m. PST today, we will conclude that you are refusing to follow your client's request that you sign the substitution. Please also await further instruction from Connect U.

Very truly yours,

HOGE, FENTON, JONES & APPEL, INC.

James E. Towery

JET
ENCLOSURE
cc: Mark Howitson

Buchanan, Alison P.

From: Mark Howitson [connectuhq@gmail.com]
Sent: Thursday, December 18, 2008 9:28 AM
To: Towery, James E.; Buchanan, Alison P.
Subject: Boise Letter

This confirms that I, Mark Howitson, have been appointed the sole officer and director of ConnectU, Inc. ConnectU, Inc. retained James E. Towery and the law firm Hoge, Fenton, Jones & Appel to serve as its corporate counsel. I previously instructed Mr. Towery to obtain substitutions of counsel from Boise Schiller et al., as well as the other firms that previously represented ConnectU, Inc. I hereby instruct Boise Schiller, et al., as ConnectU, Inc.'s counsel of record in all actions anywhere, to immediately sign the substitution of counsel provided to it by Hoge, Fenton, Jones and Appel on December 16, 2008 and await further instruction. All communications concerning this matter should be exclusively through Mr. Towery's office.

- Mark Howitson

H F J & A HOGE FENTON JONES & APPEL INC.

Attorneys at Law | San Jose | Pleasanton | Modesto | Hollister

San Jose Office

60 South Market Street
Suite 1400, San Jose, CA 95113
Ph: 408.287.9501 Fax: 408.287.2583

Pleasanton Office

6155 Stoneridge Drive
Pleasanton, CA 94588
Ph: 925.224.7780 Fax: 925.224.7782

FAX COVER SHEET

TO: D. Michael Underhill

FAX NO: 2022376131

FROM: Jim Towery

MATTER: Facebook, Inc./ConnectU, Inc.

DATE: 12/18/2008 10:09:50 AM

NO PAGES: 3

MESSAGE:

Please see attached.

EXHIBIT I

FINNEGAN | FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP
WWW.FINNEGAN.COM

SCOTT R. MOSKO
650.849.6672
scott.mosko@finnegan.com

December 18, 2008

VIA E-MAIL

James E. Towery
Hoge, Fenton, Jones & Appel, Inc.
60 South Market Street
Suite 1400
San Jose, CA 95113-2396

Facebook and Zuckerberg v. ConnectU, et al.,Case No. 5:07-cv-01389
ConnectU, Inc. v. Facebook, Inc., Case No. 1:078-cv-10593-DPW
ConnectU LLC v. Zuckerberg, Case No. 1:04-cv-11923-DPW

Dear Jim:

Please send us a corporate resolution appointing Mark Howitson as new ConnectU's sole officer and director, and a signed letter from Mark Howitson that specifies the action he wants us to take. I will respond promptly, but given my schedule, I may not be able to get back to you within the specified timeframes.

Sincerely,

Scott R. Mosko

SRM/lmm

Quintana, Sandy

From: Towery, James E.
Sent: Friday, December 19, 2008 9:33 PM
To: Quintana, Sandy
Subject: FW: ConnectU

pp

From: Mosko, Scott [mailto:scott.mosko@finnegan.com]
Sent: Thursday, December 18, 2008 12:15 PM
To: Towery, James E.
Cc: Hornick, John
Subject: ConnectU

Please see attached.

Scott R. Mosko

Finnegan, Henderson, Farabow, Garrett & Dunner, LLP
3300 Hillview Ave, Palo Alto, CA 94304-1203
650.849.6672 | fax 650.849.6666 | scott.mosko@finnegan.com | www.finnegan.com

---

FINNEGAN

EXHIBIT J

HOGE, FENTON JONES & APPEL, INC.

Attorneys at Law | San Jose | Pleasanton | East Palo Alto | Hollister

James E. Towery
408.947.2432
jet@hogefenton.com

December 18, 2008

VIA FACSIMILE AND EMAIL

Scott R. Mosko
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP
Stanford Research Park
3300 Hillview Avenue
Palo Alto, CA 94304-1203

John F. Hornick
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP
901 New York Avenue, NW
Washington, DC 20001

D. Michael Underhill
Boies, Schiller & Flexner LLP
5301 Wisconsin Ave. NW
Washington, DC 20015

Re: Facebook, Inc. v. ConnectU, Inc.
Our File No.: 80696

Dear Mr. Mosko, Mr. Hornick and Mr. Underhill:

This letter serves to respond to your requests for communication directly from Mr. Howitson evidencing ConnnectU's request that you sign the stipulation to substitute, which we previously provided you. Although you are not entitled to either a letter directly from Mr. Howitson, or a copy of any board resolutions, we are providing those things to you so that ConnectU can protect its rights and assess its obligations. Therefore, enclosed is correspondence from Mr. Howitson, along with the board resolution appointing him ConnectU's sole officer and director.

Now that we have complied with your demands, please immediately sign the stipulation by noon PST on Friday, December 19, 2008. We enclose another copy of the stipulation for your convenience.

Also, please note that your refusal to follow your client's direct instructions to sign the stipulation and your failure to provide the client's documents, as requested, is obstructionist and harassment (not to mention a violation of the Cal. Rules of Prof Conduct Rule 3-700). Hopefully it will not be necessary to bring these issues to the court's attention, although we grow ever more

concerned that we are headed in that direction. It is undisputable that ConnectU has every right to your undivided loyalty.

Sincerely,

HOGE, FENTON, JONES & APPEL, INC.

Ali Bnch for

James E. Towery

ENCLOSURES

cc: Mark Howitson (via email only)

Connect U, Inc.

December 18, 2008

VIA FACSIMILE AND EMAIL

Scott R. Mosko
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP
Stanford Research Park
3300 Hillview Avenue
Palo Alto, CA 94304-1203

John F. Hornick
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP
901 New York Avenue, NW
Washington, DC 20001

D. Michael Underhill
Boies, Schiller & Flexner LLP
5301 Wisconsin Ave. NW
Washington, DC 20015

Re: Facebook, Inc. v. ConnectU, Inc.
Our File No.: 80696

Dear Mr. Underhill, Mr. Mosko and Mr. Hornick:

Pursuant to your request, attached is the ConnectU, Inc. board resolution appointing me the sole officer and director of the company. I have retained Hoge, Fenton, Jones & Appel to represent ConnectU, Inc. in all matters. As Hoge, Fenton has previously directed you (at my request), please do the following:

1. Cease all work on behalf of ConnectU, Inc.;

2. Immediately provide all ConnectU, Inc. documents in your possession, custody or control to Hoge, Fenton;

3. Confirm to me in writing that you will abide by your obligations of confidentiality and will not discuss this matter or your representation of Connect U (past or present) with anyone outside of your respective firms without my express written permission; and

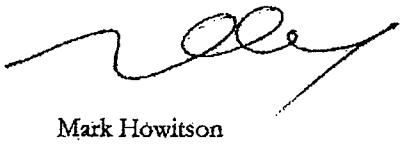
4. Immediately sign the enclosed stipulation to substitute counsel, which Hoge, Fenton previously provided to you. If they do not receive it by Friday noon PST, we will assume that you are disregarding your client's instructions.

Connect U hereby withdraws from any and all joint defense agreements, if any.

Please direct all communication to ConnectU through Hoge, Fenton. Finally, please note that any instructions you receive from Hoge, Fenton have been approved by me as the sole officer or director of ConnectU, Inc. I will not be communicating directly with you in the future.

Sincerely,

CONNECTU, INC.



Mark Howitson

JAMES E. TOWERY -- BAR NO. 74058
ALISON P. BUCHANAN -- BAR NO. 215710
JILL E. FOX -- 243945
HOGE, FENTON, JONES & APPEL, INC.
Sixty South Market Street, Suite 1400
San Jose, California 95113-2396
Phone: (408) 287-9501
Fax: (408) 287-2583

Attorneys for
CONNECTU, INC. (formerly known as CONNECTU, LLC)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE FACEBOOK, INC. and MARK ZUCKERBERG Plaintiffs-Appellees, vs. CONNECTU, INC. (formerly known as CONNECTU, LLC), Defendant-Appellant, and PACIFIC NORTHWEST SOFTWARE, INC., WINSTON WILLIAMS, and WAYNE CHANG, Defendants.	No. 08-16745 (Consolidated with Case Nos. 08-16849 and 08-16873) D.C. No. 5:07-cv-01389-JW Northern District of California, San Jose STIPULATION AND [PROPOSED] ORDER FOR WITHDRAWAL AND SUBSTITUTION OF COUNSEL FOR DEFENDANT-APPELLANT CONNECTU, INC.

THE COURT AND ALL PARTIES AND THEIR ATTORNEYS OF RECORD, BE INFORMED that Defendant-Appellant ConnectU, Inc. makes the following substitution of counsel:

1. Former counsel Boies Schiller & Flexner LLP and Finnegan, Henderson, Farabow, Garrett & Dunner LLP hereby withdraw as counsel of record for ConnectU, Inc.; and

2. New counsel Hoge Fenton Jones & Appel, Inc. is hereby substituted as the attorneys of record for ConnectU, Inc.

The undersigned consent to this substitution. The contact information for new counsel is as follows:

JAMES E. TOWERY -- BAR NO. 74058
ALISON P. BUCHANAN – BAR NO. 215710
JILL E. FOX – BAR NO. 243945
HOGE, FENTON, JONES & APPEL, INC.
Sixty South Market Street, Suite 1400
San Jose, California 95113-2396
Phone: (408) 287-9501
Fax: (408) 287-2583
jet@hogefenton.com
apb@hogefenton.com
jef@hogefenton.com

DATED: December __, 2008

Mark Howitson
Sole Officer and Director
CONNECTU, INC.

DATED: December __, 2008

D. Michael Underhill,
BOIES SCHILLER & FLEXNER, LLP

DATED: December __, 2008

Scott Mosko
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP

DATED: December 15, 2008

James E. Towery
HOGE, FENTON, JONES & APPEL, INC.

H F J & A HOGE FENTON JONES & APPEL INC.

Attorneys at Law | San Jose | Pleasanton | Modesto | Hollister

San Jose Office
60 South Market Street
Suite 1400, San Jose, CA 95113
Ph: 408.287.9501 Fax: 408.287.2583

Pleasanton Office
6155 Stoneridge Drive
Pleasanton, CA 94588
Ph: 925.224.7780 Fax: 925.224.7782

FAX COVER SHEET

TO: D. Michael Underhill

FAX NO: 2022376131

FROM: Jim Towery

MATTER: Facebook, Inc./ConnectU, Inc.

DATE: 12/19/2008 7:50:16 AM

NO PAGES: 11

MESSAGE:

Please see attached.

EXHIBIT K

BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue N.W. * Washington, DC 20015-2015 * PH 202.237.2727 * FAX 202.237.6131

December 22, 2008

VIA EMAIL jet@hogefenton.com and US MAIL

James E. Towery
Hoge, Fenton, Jones & Appel
60 South Market Street
Suite 1400
San Jose, CA 95113-2396

RE: Facebook v. ConnectU

Dear Mr. Towery:

Our firm will stipulate to the proposed substitution of counsel for ConnectU, Inc. if The Facebook, Inc. and ConnectU, Inc. agree to completely indemnify BSF from any liabilities arising from or relating to such substitution. If not, we will accept the offer, made in your December 16 letter, for you to petition the Ninth Circuit for substitution, and will cooperate in any efforts to have your motion heard expeditiously. We are as interested as you are in resolving this matter promptly but need to ensure that the legal rights of the Founders are appropriately protected. In this regard, please confirm that ConnectU will not take any actions to interfere with the pending appeal.

Thank you.

Very truly yours,

D. Michael Underhill

D. Michael Underhill

DMU/tle

EXHIBIT L

FINNEGAN | FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP
WWW.FINNEGAN.COM

SCOTT R. MOSKO
650.849.6672
scott.mosko@finnegan.com

December 22, 2008

James E. Towery
Hoge, Fenton, Jones & Appel, Inc.
60 South Market Street
Suite 1400
San Jose, CA 95113-2396

VIA FEDERAL EXPRESS

Facebook and Zuckerberg v. ConnectU, et al.,Case No. 5:07-cv-01389
ConnectU, Inc. v. Facebook, Inc., Case No. 1:078-cv-10593-DPW
ConnectU LLC v. Zuckerberg, Case No. 1:04-cv-11923-DPW

Dear Jim:

As a courtesy, we are providing to you a copy of the pleadings in the Ninth Circuit proceeding that we have maintained during the course of our involvement.

If you have any questions, please let me know.

Sincerely,

Scott R. Mosko/lmm

Scott R. Mosko

SRM/lmm
Enclosures

FILE # 80696
VOLUME C
DATE REC'D 12/23
INITIALS SR
DIARY
ROUTE JET
AYB
JEF

EXHIBIT M

ZUCKERMAN SPAEDER LLP

1800 M STREET, NW SUITE 1000
WASHINGTON, DC 20036-5807
202.778.1800 202.822.8106 fax www.zuckerman.com

Thomas B. Mason
(202) 778-1844
tmason@zuckerman.com

January 7, 2009

Via Facsimile And Federal Express

James E. Towery, Esquire
Hoge, Fenton, Jones & Appel, Inc.
60 South Market Street
Suite 1400
San Jose, CA 95113-2396

Re: *Facebook, Inc. v. ConnectU, Inc.*

Dear Mr. Towery:

Zuckerman Spaeder LLP represents Finnegan, Henderson, Farabow, Garrett & Dunner LLP ("Finnegan") with regard to your December 23, 2008 request, on behalf of ConnectU, Inc. ("ConnectU"), that Finnegan provide you with files from its representation of ConnectU. For the reasons set forth below, ConnectU, under its current ownership, is not entitled to the files requested.

As of December 15, 2008, ConnectU ceased to exist as an independent corporate entity and became nothing more than an alter ego of Facebook, Inc. ("Facebook"). Facebook is ConnectU's sole shareholder, and its sole director, Mark Howitson, also serves as ConnectU's President, Secretary, Treasurer, and Chief Financial Officer. ConnectU has no other officers. In addition to serving as ConnectU's sole officer and director, Mr. Howitson is Deputy General Counsel of Facebook. Indeed, to Finnegan's knowledge, ConnectU presently has no other employees besides Mr. Howitson, no assets or revenues, and minimal, if any, business activities. In fact, ConnectU's only present activity appears to be to oppose the legal positions of its former owners.

Prior to December 15, 2008, ConnectU was owned and controlled by Tyler and Cameron Winklevoss and Mr. Divya Narendra, current clients of Finnegan. These individuals litigated and still continue to litigate against Facebook in the Ninth Circuit and the United States District Court for the District of Massachusetts. From 2004 until December 15, 2008, ConnectU, also represented by Finnegan, was similarly adverse to Facebook in the above proceedings. Mr. Howitson, ConnectU's current sole officer and director, is undoubtedly familiar with these proceedings. In his capacity as Deputy General Counsel of Facebook, he filed declarations on behalf of Facebook in the federal court proceeding in California. In addition, prior to joining

Facebook in November 2007, Mr. Howitson was a partner in the Menlo Park, California office of Orrick Herrington & Sutcliffe LLP ("Orrick"), the same office of Orrick that has represented Facebook in its litigations against Messrs. Winklevoss and Narendra since 2004.

Under the circumstances described above, ConnectU is not entitled to Finnegan's files concerning its prior representation of ConnectU. *E.g., Tekni-Plex v. Meyner and Landis*, 89 N.Y. 2d 123, 137-39 (1996) (holding that successor entity had no right to attorneys' files relating to the matter that led to the change in control); *Orbit One Communications, Inc. v. Numerex Corp.*, 2008 WL 4778133 *4-5 (S.D.N.Y. Oct. 31, 2008) (same). At all relevant times, Finnegan's representation of ConnectU was a joint representation with its current clients, the Winklevosses and Mr. Narendra. Those individuals continue to litigate against Facebook, ConnectU's controlling and indeed sole shareholder. Finnegan would be remiss in, and not in furtherance of, its ethical obligations if it were to turn over to you all of the materials that you have requested.

ConnectU's request for Finnegan's files has no purpose other than to harass Finnegan and its clients. ConnectU is now the same entity as Facebook, and it already has, within its custody and control, the pleadings, production documents, correspondence, deposition transcripts, etc. that it is requesting from Finnegan. Despite this, Finnegan, as a courtesy, promptly provided you with copies of the pleadings and the appellate record in the Ninth Circuit case. In response, you expanded your request to encompass work product and other protected materials. Finnegan is ethically prohibited from providing you with any such protected materials.

As a further courtesy, we enclose (with the hard copy of this letter) the docket sheets for the case that was pending in the United States District Court for the Northern District of California and for the case that is currently pending in the United States District Court for the District of Massachusetts. If there are specific pleadings or other items identified on these docket sheets that Mr. Howitson or Facebook do not already have and that you would like Finnegan to provide, please let me know.

Please feel free to contact me if you have any questions.

Sincerely yours,

Thomas B. Mason

TBM:gbh
Enclosures
cc: Scott Mosko, Esquire (w/o encl.)
John Hornick, Esquire (w/o encl.)