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9 UNITED STATES DISTRICT COURT
 10 NORTHERN DISTRICT OF CALIFORNIA

11
 12 FACEBOOK, INC. and MARK
 ZUCKERBERG,
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 Plaintiffs,
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 v.
 15 CONNECTU LLC, (now known as CONNECTU
 16 INC.) ET AL.,
 Defendants.
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CASE NO. C 07-01389 RS

**DEFENDANTS' CIVIL L.R. 6-3
 MOTION FOR ORDER ENLARGING
 TIME TO OPPOSE PLAINTIFFS'
 MOTION FOR PARTIAL SUMMARY
 JUDGMENT; DECLARATION OF
 SCOTT R. MOSKO; AND
 [PROPOSED] ORDER**

Courtroom: 4
 Mag. Judge: Hon. Richard Seeborg

**(Filed Concurrently With Defendants'
 Rule 56(f) Motion for Discovery
 Necessary to Oppose Plaintiffs' Motion
 for Partial Summary Judgment and
 Supporting Declaration of Scott R.
 Mosko)**

1 **CIVIL L. R. 6-3 MOTION FOR ORDER ENLARGING TIME**

2 Defendants respectfully move this Court pursuant to Civil L.R. 6-3 for an order enlarging the
3 time in which Defendants shall file their opposition to Plaintiffs' Motion for Partial Summary
4 Judgment, filed on January 7, 2008, and currently scheduled for hearing on February 13, 2008. This
5 application also seeks a postponement of this hearing. Filed concurrently with this Civil L.R. 6-3
6 Application is a formal motion seeking relief pursuant to Fed. R. Civ. P. 56(f). Defendants
7 essentially seek an order that their Rule 56(f) motion be heard prior to their having to oppose
8 Plaintiffs' recently-filed summary judgment motion.

9 Pursuant to Fed. R. Civ. P. 56(f), Defendants seek additional time to conduct discovery
10 necessary to oppose Plaintiffs' motion. As shown below, Plaintiffs have prevented Defendants from
11 completing their discovery as it concerns the issues raised in the summary judgment motion.
12 Plaintiffs' discovery stalling activities include (1) their failure to timely respond to discovery
13 requests, (2) their long overdue production of documents, some of which were served two days after
14 their summary judgment motion was filed, and (3) their November 2007 production of hard drives,
15 the contents of which will exculpate Defendants from all of the asserted claims. Each of these
16 stalling activities above support the accompanying Rule 56(f) request. Because the review of
17 recently-produced documents and hard drives and the necessary follow-up discovery cannot occur
18 before Defendants' opposition to the summary judgment motion is due, this Civil L.R. 6-3
19 application is appropriate and should be granted.

20 On January 7, 2008, Plaintiffs filed a Motion for Partial Summary Judgment with the Court.
21 Plaintiffs' summary judgment motion requests in part, that the Court find that Defendants have
22 violated California Penal Code § 502(c) and that Defendants ConnectU, Inc. ("ConnectU") and
23 Pacific Northwest Software, Inc. ("PNS") have violated the CAN-SPAM Act, 15 U.S.C. §§
24 7704(a)(1). Plaintiffs' motion for summary judgment, however, is premature. If heard before
25 Defendants complete necessary discovery, which Plaintiffs have effectively delayed for at least 4
26 months regarding one set of discovery requests, and nearly two years regarding a different set of
27 discovery requests, Defendants' due process rights will be violated. *Incredibly, two days after*
28 *Plaintiffs filed their summary judgment motion, they produced 80+ documents in response to*

1 *discovery requests propounded by Defendants in August.* Even more surprisingly, some of these
2 recently-produced documents are relied upon and cited in Plaintiffs' expert's declaration, filed in
3 support of Plaintiffs' motion. These documents, combined with an expected Rule 30(b)(6)
4 deposition, which Defendants will notice after they have had sufficient time to digest this recent
5 production, will not only negate many assertions in Plaintiffs' summary judgment motion, they will
6 support summary judgment in favor of Defendants. The timing of this production proves Plaintiffs
7 are trying to avoid the effects of this evidence by rushing forward with their summary judgment
8 motion before Defendants have had a chance to review the evidence, and conduct further discovery
9 that will vindicate their position. Rule 56(f) was designed specifically to avoid this gamesmanship
10 demonstrated by Plaintiffs.

11 As the accompanying Rule 56(f) Motion establishes, during the summer months of 2007,
12 Defendants propounded detailed discovery requests concerning the operation of Plaintiffs' servers
13 and systems that control the websites in question in this action. (*See* Mosko Declaration in Support
14 of the Rule 56(f) Motion concurrently filed with this Civil L.R. 6-3 Application, at Exhibit D)
15 Instead of timely responding to these requests, Plaintiffs initiated a game of stall tactics. Plaintiffs
16 took over 3 months before they produced a single new document, and then another month and a half
17 to make another production. (*See Id.*: Exhibits M and P.) Then, Plaintiffs effectively blocked
18 Defendants from noticing the appropriate depositions regarding this production by asserting their
19 production was incomplete, and that further productions would occur on a "rolling basis". (*See Id.*:
20 Exhibits G, H, L. M. and N.) Defendants communicated with Plaintiffs no less than 5 times
21 requesting that they confirm the production was completed, or produce all responsive documents.
22 Each time Plaintiffs insisted their production was not complete. (*Id.*)

23 Further discovery delays occasioned by Plaintiffs have prevented Defendants from
24 discovering other key evidence relevant to the issues before this Court. In response to discovery
25 requests propounded in 2005, Plaintiffs finally identified the hard drives that were utilized in certain
26 computers owned by principals of Thefacebook, Inc. in 2004. Plaintiffs did not produce these hard
27 drives until late in 2007. (*See Id.*: Exhibit K) These hard drives include key evidence relevant to the
28 issues in this case, which evidence will exculpate Defendants from many if not all of the claims

1 asserted in this action, and will support additional counterclaims against Plaintiffs. One key piece of
2 evidence found in these hard drives, that Plaintiffs have effectively hid from Defendants for over two
3 years, strongly suggests that Plaintiff Mark Zuckerberg attempted to hack into Defendant's website,
4 www.connectu.com. Defendants should be entitled to fully analyze these hard drives and thereafter
5 pursue appropriate discovery, including the noticing and taking of at least two depositions. (*See Id.*
6 at ¶ 17.)

7 Additional reasons support Defendants' Rule 56(f) application and this Civil L.R. 6-3
8 request. Plaintiffs' motion for summary judgment includes an expert's declaration. Plaintiffs have
9 never disclosed the existence of this expert until this motion was filed. Six exhibits are attached to
10 this declaration, three of which have never been produced by Plaintiffs despite the fact that they
11 appear to be responsive to many of Defendants' previously-propounded document requests.
12 Approximately 60 additional documents were lodged in support of Plaintiffs' motion. Plaintiffs'
13 motion for summary judgment should be postponed at least until the three supporting declarations
14 can be digested, and after Plaintiffs produce their expert and the factual declarant for deposition,
15 which Defendants will notice once the declarations and the exhibits have been fully reviewed.

16 Further, at least with respect to recently added Defendants David Gucwa and Wayne Chang,
17 insufficient time has elapsed to enable them to fully understand the claims asserted against them, and
18 prepare their defenses. Plaintiffs have known about these Defendants for several years, but only
19 recently decided to bring them into the case. These Defendants should not be prejudiced by having
20 to respond to a massive summary judgment motion filed only 4 months after they entered an
21 appearance.

22 Because the discovery identified above and in the accompanying Rule 56(f) motion cannot
23 be completed prior to Defendants' deadline pursuant to Civil L.R. 7-3 to respond to Plaintiff's
24 summary judgment motion, Defendants respectfully move this Court for an order postponing the
25 hearing and the filing of the opposition to Defendants' motion for summary judgment. Defendants
26 cannot adequately respond to Plaintiffs' summary judgment motion without at least the above
27 mentioned discovery described in the Rule 56(f) Motion.

1 Counsel for Defendants requested that Plaintiffs agree to this postponement on two
2 occasions. Plaintiffs sent a non-responsive correspondence to Defendants' initial response, and
3 failed to respond to Defendants' second request to postpone the summary judgment activities, which
4 has necessitated this Civil L.R. 6-3 application. (See Exhibits 1 and 2 attached hereto)

5 Respectfully submitted,

6 Dated: January 10, 2008

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

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8
9 By: _____ /s/
10 Scott R. Mosko
11 Attorneys for Defendants
12 ConnectU, LLC, Pacific Northwest
13 Software, Inc., Winston Williams, and
14 Wayne Chang

15 **DECLARATION OF SCOTT R. MOSKO**

16 I, Scott R. Mosko declare,

17 1. I am an attorney duly licensed to practice law in the state of California and before the
18 Northern District of California. I am a member of Finnegan, Henderson, Farabow, Garrett &
19 Dunner, LLP, attorneys of record for Defendants ConnectU, Winston Williams and Pacific
20 Northwest Software, Inc. The matters referred to in this declaration are based on my personal
21 knowledge and if called as a witness I could, and would, testify competently to those matters.

22 2. Attached as Exhibits 1 and 2 are the correspondence exchanged between the parties
23 concerning Defendants' requests that Plaintiffs agree to an extension of time and/or postpone the
24 briefing and hearing on their motion for summary judgment. Plaintiffs refused Defendants' requests.

25 I declare under penalty of perjury under the laws of the United States that the foregoing is
26 true and correct and that this declaration was executed in Palo Alto, California on January 10, 2008.

27 _____ /s/
28 Scott R. Mosko

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[Proposed] Order

Upon good cause shown, it is hereby ordered that Defendant’s Rule 56(f) Motion for Discovery Necessary to Oppose Plaintiff’s Partial Motion for Summary Judgment Motion shall be removed from the court’s calendar. During the currently-scheduled Case Management Conference, the Court will set a schedule that will allow for Defendants to take the discovery they believe is necessary to oppose this motion, and will thereafter set a briefing schedule and a hearing date for mutual motions for summary judgment.

Dated: January __, 2008

The Honorable Richard Seeborg,
United States Magistrate Judge