

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 DATED: July 29, 2008

Respectfully submitted,
BYRNE & NIXON, LLP

2
3 By: /s/ Mark A. Byrne
Mark A. Byrne

4
5 O'SHEA PARTNERS LLP

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

8 Attorneys for Intervenors
9 CAMERON WINKLEVOSS, TYLER
WINKLEVOSS and DIVYA NARENDA

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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. THE JUDGMENT REQUIRES THE CONNECTU**
3 **SHAREHOLDERS TO TENDER SHARES AND SUBMIT**
4 **DISMISSALS AND RELEASES**

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

- 10
- 11 ● submit proposed forms of release to the Court by July 9, 2008;
 - 12 ● provide a “legally sufficient dismissal with prejudice of all cases by
13 and between the parties pending as of the date of the Agreement” to a
14 special master (“Special Master”) by August 4, 2008; and
 - 15 ● deposit the stock required to be exchanged under the provisions of the
16 Term Sheet with the Special Master by August 4, 2008.

16 Docket No. 476 at 1-4.

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

19

20 The ConnectU Shareholders should be permitted to intervene in order to
21 protect their interests, including on appeal. *See Stringfellow v. Concerned*
22 *Neighbors in Action*, 480 U.S. 370, 376 (1987) (“An intervenor, whether by right or
23 by permission, normally has the right to appeal an adverse final judgment by a trial
24 court.”); *CFTC v. Topworth Int’l, Ltd.*, 205 F.3d 1107, 1113 (9th Cir. 1999) (“one
25 who is not a party before the district court may not appeal a judgment”). “Rule 24
26 permits a third party to enter the proceedings in order to protect his own interests.”
27 *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
28

1 that the likelihood of future harm to their interest is significant.” *See, e.g., Alabama*
2 *v. U.S. Army Corps of Engineers*, 229 F.R.D. 669 (D. Ala. 2005); *Palmer v. Nelson*,
3 160 F.R.D. 118, 122 (D. Neb. 1994); *Textile Workers Union of America, CIO v.*
4 *Allendale Co.*, 226 F.2d 765, 769 (D.D.C. 1955). The ConnectU Shareholders have
5 a “real economic stake in the outcome” because enforcement of the Judgment would
6 force them to surrender their shares in ConnectU and give up their claims against
7 Facebook. *Id.*

8 **III. CONCLUSION**

9 For the foregoing reasons, the ConnectU Shareholders respectfully request the
10 Court grant their motion to intervene.
11

12
13 DATED: July 29, 2008

Respectfully submitted,
BYRNE & NIXON, LLP

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

16 O’SHEA PARTNERS LLP

17
18 By: /s/ Sean F. O’Shea (admitted pro hac vice)
Sean F. O’Shea

19 Attorneys for Intervenors
20 CAMERON WINKLEVOSS, TYLER
21 WINKLEVOSS and DIVYA NARENDIA
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

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