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15 Attorney for Intervenors and Third Party
 16 Plaintiffs Cameron Winklevoss, Tyler
 17 Winklevoss, 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,

and

CAMERON WINKLEVOSS,
 TYLER WINKLEVOSS and DIVYA
 NARENDRA,

Intervenors and
 Third Party
 Plaintiffs.

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

**THIRD PARTY COMPLAINT
 AGAINST THE FACEBOOK, INC.
 AND MARK ZUCKERBERG**

REDACTED

1 Intervenors and Third-Party Plaintiffs CAMERON WINKLEVOSS,
2 TYLER WINKLEVOSS and DIVYA NARENDRA ("Intervenors"), by and
3 through their undersigned attorneys, as and for their Third-Party Complaint
4 against Plaintiffs, THE FACEBOOK, INC. and MARK ZUCKERBERG
5 ("Plaintiffs") hereby allege as follows:

6 1. Intervenors are individuals and shareholders of ConnectU, Inc., a
7 Defendant in this Action. None of the Intervenors were parties to this case at the
8 time Facebook filed its Confidential Motion to enforce a purported settlement
9 agreement, each of them having been dismissed from the case for lack of personal
10 jurisdiction, and Facebook did not serve the motion on Intervenors.

11 2. Plaintiff The Facebook, Inc. ("Facebook") is corporation organized
12 under the laws of Delaware. Plaintiff Mark Zuckerberg is an individual.
13 Zuckerberg is the CEO of Facebook.

14 3. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §
15 1367 and 28 U.S.C. § 1331 as this Third-Party Complaint arises in part under the
16 Securities Exchange Act of 1934. Venue is proper pursuant to 28 U.S.C. § 1391
17 in that a substantial part of the events or omissions giving rise to Intervenor's
18 claims occurred in this District.

19 4. On February 22, 2008, the parties entered into mediation in an
20 attempt to resolve federal and state law claims at issue in the underlying
21 litigation, as well as contract, fraud, copyright infringement and other claims
22 brought by ConnectU against Facebook in the District of Massachusetts.

23 5. The mediation produced a 1½-page, handwritten document titled
24 "Term Sheet & Settlement Agreement" (the "Term Sheet"), which is incorporated
25 herein by reference and which stated in part: "All ConnectU stock in exchange
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1 for [REDACTED]^{1/} cash & [REDACTED] common shares in Facebook." The
2 Term Sheet also stated: "Facebook represents that it currently has [REDACTED]
3 fully diluted shares [of common stock] outstanding."

4 6. The Intervenors executed the Term Sheet in the early hours of
5 February 23, 2008. A fourth ConnectU shareholder, Howard Winklevoss, did
6 not sign the Term Sheet.

7 7. Intervenors understood that the number of Facebook shares set forth
8 in the Term Sheet was based on a recent public press release by Facebook which
9 stated that the company was valued at approximately \$15 billion. Based on that
10 valuation and the number of outstanding shares represented by Facebook in the
11 Term Sheet, Facebook common stock was worth approximately [REDACTED]
12 per share. At that price, the value of [REDACTED] shares was [REDACTED],
13 which when added to the [REDACTED] in cash, equaled [REDACTED], as
14 described in the Second Declaration of Cameron Winklevoss dated June 18,
15 2008, which is incorporated herein by reference.

16 8. In the weeks following the mediation, the parties, through their
17 counsel, attempted to negotiate a merger agreement that would accomplish the
18 goals set forth in the Term Sheet. An attorney at Fenwick & West LLP
19 ("Fenwick") representing Facebook, informed ConnectU (through its counsel) for
20 the first time that Facebook's Board of Directors had, for purposes of compliance
21 with Section 409A of the Internal Revenue Code and pursuant to a report by an
22 independent appraisal firm, set the fair market value of Facebook common stock
23 at [REDACTED] or only approximately one-quarter of the [REDACTED] value
24

25 _____
26 ^{1/} Certain items have been redacted from this Third Party Complaint in accordance with
27 the Court's treatment of other public filings in this Action. Intervenors are prepared to
28 furnish unredacted versions of this pleading to the Court and to Plaintiffs.

1 derived by dividing Facebook's publicly-disclosed \$15 billion valuation by the
2 number of outstanding shares set forth in the Term Sheet.

3 9. Around March 28, 2008, ConnectU's counsel asked to reallocate the
4 merger consideration to provide more cash and less stock, using the
5 [REDACTED] value derived from Facebook's publicly-disclosed \$15 billion
6 valuation. [REDACTED].

7 10. Based on Facebook's fair market valuation of [REDACTED] per
8 share which was not disclosed to Intervenors, the stock portion of the
9 consideration set forth in the Term Sheet was worth approximately one-quarter of
10 the value it would be worth if the stock were valued in accordance with
11 Facebook's public valuation.

12 11. Facebook said nothing prior to the mediation to change or to correct
13 its publicly disclosed \$15 billion valuation or the [REDACTED] per share value
14 derived therefrom, nor did it disclose that its Board of Directors had established
15 [REDACTED] as the fair market value pursuant to the Internal Revenue Code.
16 As a company that was trading in its own stock, Facebook was a corporate
17 insider that must abide by the "disclose or abstain" rule.^{2/} Facebook violated that
18 rule here.

19 12. By making affirmative statements publicly and in the Term Sheet,
20 Facebook undertook a duty to speak fully and truthfully in connection with those
21 subjects.

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25 ^{2/} See, e.g., *McCormick v. Fund Am. Cos.*, 26 F.3d 869, 876 (9th Cir. 1994) (*citing* VII
26 Louis Loss & Joel Seligman, *Securities Regulation* 1505 (3d ed. 1991) ("When the issuer
27 itself wants to buy or sell its own securities, it has a choice: desist or disclose"); and
28 Ricahrd Jennings & Harold Marsh, *Securities Regulation*, 1044 n. 12 (6th ed. 1987) ("the
issuer itself is, of course, also covered" by insider trading laws.)

1 13. What Facebook knew at the mediation but failed to disclose (and
2 ConnectU did not learn until well after the mediation had ended) was the material
3 fact that Facebook's Board of Directors, in reliance on an independent appraisal
4 expert, had determined that its common stock had a fair market value of only
5 approximately one-quarter of the value derived from Facebook's \$15 billion
6 public valuation.

7 14. Upon information and belief, both Facebook's CEO (and member of
8 the Board of Directors) Mark Zuckerberg and Facebook's Chief Financial
9 Officer, Gideon Yu, knew of the Board of Directors' fair market value
10 determination based on an independent appraisal. Zuckerberg is a member of
11 Facebook's Board of Directors who obtained the independent appraisal. Both
12 Zuckerberg and Yu attended the mediation and Zuckerberg signed the Term
13 Sheet.

14 15. Facebook violated its duty by failing to disclose the Facebook
15 Board's official valuation of the company's common stock, which was a material
16 fact not known to Intervenors at the mediation and was necessary to make
17 Facebook's prior public press release of a \$15 billion valuation not misleading,
18 and to satisfy the duty of an inside trader to "disclose or abstain."

19 16. Facebook had a duty to disclose the Board's [REDACTED] fair
20 market value for Facebook common stock.

21 17. Facebook's material omissions led to execution of the Term Sheet
22 and defrauded ConnectU out of a significant amount of consideration.

23 18. The Term Sheet is also missing material terms necessary to render it
24 a complete, enforceable contract.

25 19. The material terms not contained in the Term Sheet include the
26 structure of the transaction (merger or stock acquisition); the consideration
27 offered and how it will be paid; the representations and warranties in general
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1 form that the parties will be required to make; any material conditions to the
2 closing of the transaction; and termination provisions.

3 20. The complex set of documents (totaling over 100 pages) that
4 Facebook initially proffered as "required" to enforce the alleged agreement
5 between the parties are strong additional proof of the ambiguity and
6 incompleteness of the Term Sheet.

7 **COUNT I:**

8 **DECLARATORY JUDGMENT**

9 21. Intervenors restate and reallege the allegations set forth in
10 Paragraphs 1 through 20 as if set forth fully herein.

11 22. An actual, substantial, immediate, and real controversy exists
12 between the parties regarding the enforceability of the Term Sheet.

13 23. Intervenors seek a declaration that the Term Sheet is void and
14 unenforceable because it fails to include terms that are material to a transaction
15 of the sort at issue here and is therefore an incomplete agreement.

16 **COUNT II:**

17 **FRAUD UNDER SECURITIES EXCHANGE ACT OF 1934**

18 24. Intervenors restate and reallege the allegations set forth in
19 Paragraphs 1 through 23 as if set forth fully herein.

20 25. At the time of the mediation, Facebook's public press release had
21 proclaimed that the company was valued at \$15 billion. By disclosing facts in
22 connection with the negotiation of the Term Sheet, which was a securities
23 transaction, Facebook assumed a duty to speak fully and truthfully on those
24 subjects.

25 26. Facebook said nothing prior to the mediation to change or correct
26 that publicly disclosed \$15 billion valuation.

1 **PROOF OF SERVICE**

2 I am employed in the County of Los Angeles, State of California. I am over the
3 age of 18 and not a party to the within action. My business address is **800 West Sixth
Street, Suite 430, Los Angeles, California 90017.**

4 I have caused the service of **THIRD PARTY COMPLAINT
AGAINST THE FACEBOOK, INC. AND MARK ZUCKERBERG**
5 **REDACTED** on the following parties by electronically filing the foregoing with the
6 Clerk of the District Court using its ECF System, which electronically notified the
7 following:

8 Chester Wren-Ming Day (cday@orrick.com)
9 D. Michael Underhill (munderhill@bsflp.com)
10 David A. Barrett (dbarrett@bsflp.com)
11 Evan A. Parke (eparke@bsflp.com)
12 George C. Fisher (georgecfisher@gmail.com)
13 George Hopkins Guy (hopguy@orrick.com)
14 I. Neel Chatterjee (nchatterjee@orrick.com)
15 Jonathan M. Shaw (jshaw@bsflp.com)
16 Kalama M. Lui-Kawn (klui-kwan@fenwick.com)
17 Monte M.F. Cooper (mcooper@orrick.com)
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20 Scott Richard Mosko (scott.mosko@finnegan.com)
21 Sean Alan Lincoln (slincoln@orrick.com)
22 Steven Christopher Holtzman (sholtzman@bsflp.com)
23 Theresa Ann Sutton (tsutton@orrick.com)
24 Tyler Alexander Baker (tbaker@fenwick.com)
25 Valerie Margo Wagner (valerie.wagner@dechert.com)
26 Yvonne Penas Greer (ygreer@orrick.com)

27 I declare under penalty of perjury that the foregoing is true and correct.

28 Executed on **July 31, 2008**, at Los Angeles, California.

/s/ Leticia Rosales (lettyrosales@byrnenixon.com)
Leticia Rosales