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

13 THE FACEBOOK, INC. and MARK  
14 ZUCKERBERG,

15 Plaintiffs,

16 v.

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

19 Defendants.  
20

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

**CONNECTU, INC.'S MOTION TO  
STAY EXECUTION OF JUDGMENT  
PENDING APPEAL**

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1 **NOTICE OF MOTION**

2 TO THE PARTIES OF RECORD:

3 PLEASE TAKE NOTICE that on October 27, 2008, at 9:30 A.M., or as soon  
4 thereafter as it may be heard, in Courtroom 8 of this Court, before the Honorable James  
5 Ware, Defendant ConnectU, Inc. will move for an order staying the execution of the  
6 JUDGMENT ENFORCING SETTLEMENT AGREEMENT (“Judgment”) entered by  
7 the Court on July 2, 2008. ConnectU’s motion is based on the accompanying  
8 Memorandum, the Declaration of D. Michael Underhill, and all pleadings and papers that  
9 are of record and are on file in this case. ConnectU files this motion without waiving any  
10 rights to appeal or otherwise to set aside the Judgment and reserving all rights with  
11 respect thereto.

12 In accordance with the Court’s individual practices, this motion bears a return  
13 date of October 27, 2008. Because, however, of recent positions taken by Plaintiffs  
14 relating to the upcoming Judgment deadline, filed herewith is a Motion to Shorten Time  
15 requesting expedited consideration of the instant motion on August 14, 2008. ConnectU  
16 would not object to the Court addressing the instant motion on an earlier date, including  
17 on August 6, 2008, during the hearing currently scheduled on the Motion to Intervene by  
18 Cameron Winklevoss, Tyler Winklevoss and Divya Narendra (Docket No. 574).

1

2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I. INTRODUCTION**

4 ConnectU respectfully submits that to prevent irreparable injury to ConnectU, this  
5 Court should stay enforcement of the Judgment pending appeal. If ConnectU’s  
6 shareholders are forced to tender their shares to the Special Master and those shares are  
7 conveyed to Facebook, then Facebook would effectively control ConnectU. Given that  
8 control, Facebook would attempt to dismiss or otherwise hamper ConnectU’s appeal  
9 from the Judgment, as well as any malpractice claim it may have against its former  
10 attorneys. Facebook may also argue that if it has control of ConnectU, it is entitled to  
11 ConnectU’s books and records. Such access would pose a substantial risk of  
12 compromising privileged communications between ConnectU and its counsel.

13 Whether or not such tactics would succeed, they would at a minimum complicate  
14 the appeal and threaten to irreparably impair ConnectU’s value, even if the Ninth Circuit  
15 overturns the Court’s order on appeal — and for no good reason. Because neither of the  
16 underlying lawsuits between Facebook and ConnectU will proceed while the appeal is  
17 pending, Facebook’s legitimate interests will not be harmed if this Court stays its  
18 judgment pending appeal.

19 **II. STATEMENT OF FACTS**

20 The facts leading up to the Judgment are detailed in ConnectU’s Opposition and  
21 Surreply (together with supporting declarations) filed in connection with Plaintiffs’  
22 Confidential Motion to Enforce, which we incorporate by reference.

23 **A. The Judgment requires ConnectU and its shareholders to tender shares  
24 and submit dismissals and releases.**

25 On June 25, 2008, the Court granted Facebook’s motion to enforce a handwritten  
26 “Term Sheet & Settlement Agreement” (“Term Sheet”). *See* Docket No. 461. The Court  
27 ordered the parties to appear for a hearing on July 2, 2008, to show cause as to why

1 judgment should not be entered and to address the form of the judgment. *Id.*

2 At the July 2 hearing, the Court stated that it was contemplating entering a  
3 judgment that would order the parties to submit to a special master the documents and  
4 cash that they were to deliver under the Term Sheet. Ex. A to the Declaration of D.  
5 Michael Underhill (“Underhill Decl.”) (hearing transcript), at 27:1-28:7. The Court  
6 thereafter entered the Judgment (Docket No. 476) and entered a Notice appointing  
7 attorney George Fisher as Special Master. *See* Docket No. 475. The Notice provided  
8 that the Special Master would, *inter alia*, accept and maintain documents, money, and  
9 other things deposited by the parties, subject to disbursement upon further Order of the  
10 Court. *Id.* By its terms, the Judgment required the parties:

- 11 ● to submit proposed forms of release to the Court by July 9, 2008;
- 12 ● to 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  
14 the Special Master by August 4, 2008; and
- 15 ● to deposit the cash and stock required to be exchanged under the  
16 provisions of the Term Sheet with the Special Master by August 4,  
17 2008.

18 Docket No. 476 at 1-4.

19 **B. Facebook has refused to agree not to interfere with ConnectU’s appeal if**  
20 **it obtains control of ConnectU.**

21 Facebook and ConnectU both initially proposed forms of judgment that would  
22 unquestionably have preserved ConnectU’s ability to appeal. For example, Facebook’s  
23 proposed documentation for the judgment filed before the show cause hearing provided  
24 that the date for exchanging the cash and stock and the “effective date” of the releases  
25 would be five days after all appeals from the judgment enforcing the Term Sheet became  
26 final. (Docket No. 469-2 at 3-4, 10). But Facebook later changed its position. At the  
27 show cause hearing, Facebook asked that the judgment provide it with “all of the stock to

1 the company [ConnectU] within 30 days of entry of judgment.” Ex. A to the Underhill  
2 Decl. at 33:8-11; *see id.* at 34:9-13 (explaining Facebook’s intention to “get control of the  
3 company [ConnectU] through owning the shares”). Later, Facebook sought to make the  
4 releases effective upon approval by the Court. *See* Docket No. 479 at 1 (“[t]his Release  
5 of Claims...shall be effective upon approval of the Court”).<sup>1</sup>

6 ConnectU has repeatedly tried without success to reach an agreement with  
7 Facebook that would protect ConnectU’s rights pending appeal. Now, in response to  
8 direct questions from ConnectU’s counsel, Facebook’s counsel has conveyed his client’s  
9 refusal to agree to refrain from interfering with ConnectU’s appeal and its malpractice  
10 claim. Instead, Facebook’s counsel has stated that although Facebook will evaluate its  
11 options after Facebook receives the ConnectU stock, “it would be reasonable to assume  
12 that Facebook would act in its own interests.” Declaration of D. Michael Underhill at ¶ 3  
13 and Ex. B. And on July 25 Facebook’s counsel told ConnectU’s counsel that “if you  
14 want to file a motion to stay, we will respond in due course.” *Id.*, Ex. B.

15 It requires little imagination to conclude that Facebook is unlikely to view as in its  
16 interests a continued appeal by ConnectU to obtain reversal of the Judgment. And  
17 whether out of vindictiveness or a desire to pressure ConnectU’s shareholders, it is  
18 entirely plausible that Facebook would either release ConnectU’s malpractice claim  
19 against Quinn Emanuel or threaten to do so, which would harm third-party Howard  
20 Winklevoss, who guaranteed payment of Quinn’s fees if ConnectU does not pay them,  
21 and would substantially impair ConnectU’s value if the Ninth Circuit reverses the  
22 Judgment.

### 23 **III. ARGUMENT**

24 ConnectU respectfully requests that the Court stay the Judgment because (a)  
25 absent a stay, ConnectU and its shareholders would be irreparably harmed, while a stay

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26  
27 <sup>1</sup> ConnectU filed objections to Facebook’s proposed release. Docket No. 488.

1 would not harm Facebook, and (b) at a minimum, ConnectU’s appeal raises serious legal  
2 questions that should be heard by the Ninth Circuit.

3 **A. The Ninth Circuit’s standard for a stay pending appeal is fully satisfied**  
4 **here.**

5 There are “two interrelated tests” in this Circuit for whether to stay a judgment  
6 pending appeal. *Golden Gate Rest. Ass’n v. City and County of San Francisco*, 512 F.3d  
7 1112, 1115 (9th Cir. 2008). “At one end of the continuum, the moving party is required  
8 to show both a probability of success on the merits and the possibility of irreparable  
9 injury.” *Id.* (internal citations omitted). “At the other end of the continuum, the moving  
10 party must demonstrate that serious legal questions are raised and that the balance of  
11 hardships tips sharply in its favor.” *Id.* at 1116 (inner citations omitted). These tests  
12 “represent two points on a sliding scale” where “the required degree of irreparable harm  
13 increases as the probability of success decreases.” *Id.* Both tests are satisfied here.

14 **1. Absent a stay pending appeal, ConnectU and its shareholders may be**  
15 **irreparably harmed.**

16 ConnectU and its shareholders would be irreparably harmed if actions they take to  
17 comply with the Judgment deprive them of their “basic right[s] to appeal.” *Ctr. for Int’l*  
18 *Env’tl. Law v. Office of the United States Tr. Rep.*, 240 F. Supp. 2d 21, 22-23 (D.D.C.  
19 2003); *EEOC v. Quad/Graphics*, 875 F. Supp. 558, 560 (E.D. Wis. 1995). Indeed, many  
20 courts have found irreparable harm where, absent a stay pending appeal, the appellant  
21 stood to lose its ability to appeal. *See, e.g., Country Squire Assocs., L.P. v. Rochester*  
22 *Community Sav. Bank*, 203 B.R. 182, 183 (2nd Cir. BAP 1996) (holding that the prospect  
23 of a mooted appeal if stay were denied “would be the ‘quintessential form of  
24 prejudice’”).<sup>2</sup> Facebook’s refusal to undertake not to interfere with ConnectU’s appeal

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25 <sup>2</sup> *Accord, e.g., In re Norwich Historic Pres. Trust, LLC*, No. 3:05CV12, 2005 U.S.  
26 Dist. LEXIS 7171, 2005 WL 977067, at \*3 (D. Conn. 2005) (acknowledging  
27 “persuasive” arguments that although foreclosure sale would not injure appellant,  
28 appellant’s concern that his appeal would be mooted satisfied the irreparable harm

1 makes clear that, without a stay, ConnectU’s right to appeal would be at risk — and given  
2 Facebook’s obvious interest in avoiding an appeal it is likely that Facebook would  
3 attempt to do so.<sup>3</sup> And giving Facebook control of ConnectU — including such of its  
4 books and records as are protected by attorney-client privilege and the work-product  
5 doctrine and, potentially, the right to waive those protections — would further threaten  
6 irreparable harm to ConnectU and its shareholders.

7 Moreover, giving Facebook control of ConnectU could also potentially affect the  
8 malpractice claim that ConnectU and its shareholders may assert against their former  
9 counsel Quinn Emanuel. For example, if ConnectU, controlled by Facebook, were to  
10 release Quinn, it would at a minimum complicate the claim and could injure Howard  
11 Winklevoss, who has guaranteed ConnectU’s obligations to Quinn. *See Perfect 10, Inc.*  
12 *v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1191 (C.D. Cal. 2002) (considering

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13  
14 requirement); *In re St. Johnsbury Trucking Co.*, 185 B.R. 687, 690 (S.D.N.Y. 1995)  
15 (finding sufficient irreparable injury where denying a stay would threaten government’s  
16 ability to appeal); *In re Advanced Mining Sys., Inc.*, 173 B.R. 467, 468-69 (S.D.N.Y.  
17 1994) (finding irreparable injury where, absent a stay, the distribution of assets to  
18 creditors would moot any appeal and thus quintessentially prejudice appellants); *In re*  
19 *Grandview Estates Assocs., Ltd.*, 89 B.R. 42, 42-43 (Bankr. W.D. Mo. 1988) (declining to  
20 stay the foreclosure sale of an asbestos-ridden apartment complex, but holding that  
21 irreparable injury is clearly shown where such sales moot any appeal, and concluding that  
22 to hold otherwise would preclude appellate review, thus running “contrary to the spirit of  
the bankruptcy system [and also] subvert[ing] the entire legal process”). *Cf. In re “Agent*  
*Orange” Prod. Liab. Litig.*, 804 F.2d 19, 20 (2d Cir. 1986) (declining to lift stay of  
distribution of a settlement award because objecting parties had “a right to appellate  
review,” and “[d]istribution of the challenged settlement award before its validity [could  
be] tested would deprive those parties of that right”).

23 <sup>3</sup> Under some circumstances, a party may give up appellate rights by complying with  
24 a court order. *See Sea Ranch Assoc. v. California Coastal Com.*, 552 F. Supp. 241, 245  
25 (N.D. Cal. 1982) (rights to appeal mooted by complying with terms of settlement  
26 agreement); *see also Gould v. Control Laser Corp.*, 866 F.2d 1391, 1394 (Fed. Cir. 1989)  
27 (holding a case moot where, “[b]y virtue of the settlement agreement, Patlex has become  
the *dominus litis* on both sides”). Although *Sea Ranch* and *Gould* are distinguishable —  
and ConnectU reserves all its rights to argue that any attempt to interfere with its appeal  
would not be effective — this body of law would at a minimum complicate the appeal.

1 impact on third parties in balancing the harms).<sup>4</sup>

2 Indeed, to preserve its right to appeal, ConnectU would have no choice but to  
3 seriously — albeit reluctantly — consider risking contempt if ordered to comply with the  
4 Judgment by causing its shareholders to convey their stock to the Special Master. *See,*  
5 *e.g., United States v. Cleveland Electric Illuminating Co.*, 689 F.2d 66, 68 (6th Cir. 1982)  
6 (appeal dismissed because party failed to court contempt to preserve right to appeal).

7 The irreparable harm flowing from this situation warrants a stay. *See NLRB v. GMC*, 510  
8 F. Supp. 341, 343 (S.D. Ohio 1980) (“There is no question that the respondents will  
9 suffer irreparable harm if this stay is denied. If they obey the subpoenas, their appeal is  
10 mooted; if they ignore them, they could be held in contempt of court. If a trade-off is  
11 necessary, it must favor rights. We will not force such a choice”); *United States v. Leach*,  
12 1990 U.S. Dist. LEXIS 12728, at \*2-3 (D. Kan. Sept. 14, 1990) (same).

13 **2. *Because staying the Judgment pending appeal would not harm***  
14 ***Facebook’s legitimate interests, the balance of hardships tips sharply***  
15 ***in ConnectU’s favor.***

16 Although Facebook would doubtless prefer to dispense with an appeal altogether,  
17 staying the Judgment pending completion of an appeal would cause it no legally  
18 cognizable harm. Apart from the appeal — and Facebook can hardly complain that  
19 ConnectU’s exercise of its fundamental right to appeal constitutes cognizable harm<sup>5</sup> —  
20 Facebook will face no further litigation either here or in Massachusetts unless the Ninth  
21 Circuit reverses the Judgment. Although Facebook has expressed concern that

22 \_\_\_\_\_  
23 <sup>4</sup> It also remains unclear whether Quinn can or will contend that the malpractice claim  
24 would be affected if the shareholders transfer their shares to the Special Master. If so,  
25 this would be further significant harm to ConnectU and Howard Winklevoss that weighs  
26 in favor of a stay.

27 <sup>5</sup> *See FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980) (“the expense and  
28 annoyance of litigation is part of the social burden of living under government.... Mere  
litigation expense, even substantial and unrecoupable cost, does not constitute irreparable  
injury.”) (internal citations and quotations omitted).

1 ConnectU’s value might diminish during the course of the appeal and suggested posting a  
2 bond (July 2 Tr. at 50) pursuant to FRCP 62, as a practical matter there is no such risk in  
3 this case. First, ConnectU has offered to allow the Special Master or even Facebook to  
4 oversee its day-to-day business operations. (July 2 Tr. at 37-38.) And if the Court grants  
5 the requested stay, ConnectU is prepared to make no operational — as distinct from  
6 litigation — decisions without the approval of the Special Master. Second, Facebook  
7 could seek to offset any proven damages against the cash and stock it would be required  
8 to pay ConnectU’s shareholders if the Judgment is upheld on appeal.

9 Balancing the complete lack of cognizable harm to Facebook against the potential  
10 harm to ConnectU’s rights shows that the balance of hardships tips sharply in  
11 ConnectU’s favor.

12 **3. *At a minimum, ConnectU’s appeal raises serious legal questions that***  
13 ***should be heard by the Ninth Circuit.***

14 At a minimum, ConnectU’s appeal raises serious legal questions that should be  
15 heard by the Ninth Circuit. ConnectU respectfully submits that the Court erred in  
16 rejecting its contract and securities fraud defenses to the motion to enforce.<sup>6</sup>

17 *a. Contract defenses.*

18 With respect to ConnectU’s contract defenses, ConnectU intends to argue, among  
19 other things, the following grounds for reversal in the Court of Appeals:

20 *First*, the Court should not have limited its review of the evidence to “the four  
21 corners of the Agreement.” Order at 7. Well-established California case law holds that  
22 conduct subsequent to the execution of a purported settlement is to be considered in  
23 determining the enforceability of the alleged agreement. *See Weddington Prods., Inc. v.*  
24 *Flick*, 60 Cal. App. 4th 793, 800-01 (Cal. Ct. App. 1998). The Court also did not  
25

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26 <sup>6</sup> This motion does not contain an exhaustive description of ConnectU’s grounds for  
27 appeal; ConnectU reserves the right to raise other issues on appeal.

1 consider the complex set of documents (totaling over 100 pages) that Facebook initially  
2 proffered as “required” to enforce the alleged agreement between the parties. Those  
3 documents are strong proof of the ambiguity and incompleteness of the Term Sheet under  
4 *Weddington* and other cases.

5 *Second*, the Order incorrectly concluded that the Term Sheet “clearly defines the  
6 structure of the transaction.” Order at 7. At the least, the Court should have held an  
7 evidentiary hearing in light of the sworn expert declaration submitted by a Columbia  
8 University School of Business professor and other evidence establishing that the Term  
9 Sheet was ambiguous as to the material question of the form of the transaction.<sup>7</sup>

10 Professor Donna Hitscherich’s declaration stated that the Term Sheet was ambiguous as  
11 to whether the transaction was a stock purchase from the ConnectU shareholders or a  
12 merger. Corrected Declaration of Donna M. Hitscherich ¶ 12. Professor Hitscherich  
13 also offered sworn testimony that this ambiguity was highly material because “the  
14 structure of the transaction is of primary importance to the seller for a variety of reasons,  
15 including but not limited to, tax planning where a principal goal of the seller is to  
16 maximize its after-tax proceeds attendant to the sale of its asset.” *Id.*, ¶ 12. This  
17 ambiguity as to a highly material term – the structure of the transaction – rendered the  
18 Term Sheet unenforceable. “If no meeting of the minds has occurred on the material  
19 terms of a contract, basic contract law provides that no contract formation has occurred.  
20 If no contract formation has occurred, there is no settlement agreement to enforce. . . .”  
21 *Weddington*, 60 Cal. App. 4th at 797.

22 *Third*, with regard to the expert declaration referenced above and other evidence,  
23 the Court should have held an evidentiary hearing prior to summary enforcement. *Callie*  
24 *v. Near*, 829 F.2d 888, 891 (9th Cir. 1987); *see also Ozyagcilar v. David*, 701 F.2d 306,  
25 307-08 (4th Cir. 1983). The Court should have heard testimony regarding the

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26 <sup>7</sup> Indeed, the documents Facebook initially proffered to enforce the Term Sheet  
27 characterize the transaction both as a “merger” and as a “stock acquisition.”

1 enforceability of the Term Sheet.

2 *Fourth*, the Court placed undue reliance on the Term Sheet’s recitation that it was  
3 “binding.” Order at 8. In *Weddington*, the term sheet had provided that it was  
4 “enforceable,” 60 Cal. App. 4th at 800, but the court there gave such recitation little  
5 weight and denied enforcement.

6 *Finally*, the Term Sheet is not properly enforceable as a “share exchange  
7 transaction” under Connecticut law. Order at 7. Under Connecticut law, a foreign  
8 corporation, such as Facebook, may be a party to a share exchange transaction with a  
9 Connecticut corporation, such as ConnectU, only if “[t]he share exchange is permitted by  
10 the law of the state . . . under which such corporation . . . is organized or by which it is  
11 governed . . . .” CONN. GEN. STAT. § 33-816(b). Facebook is a Delaware corporation.  
12 Delaware does not permit share exchange transactions. LOU R. KLING, NEGOTIATED  
13 ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS § 1.02[5]. Thus, enforcing  
14 the Term Sheet as a “share exchange transaction” was error.

15 *b. Securities fraud defense.*

16 The Order rejected ConnectU’s securities fraud defense under section 29(b) of the  
17 Securities Exchange Act of 1934, on the grounds that (a) the prohibition of the securities  
18 laws against fraud in the inducement does not apply in the settlement context, and (b)  
19 apparently as a matter of law, this case was outside “the context of insider trading.” Order  
20 at 11-12. These determinations broke new ground and are inconsistent with the statutory  
21 language, contrary to controlling case-law, and unsupported by the authorities cited.

22 *First*, the summary conclusion that, apparently as a matter of law, insider trading  
23 is “not an issue in this case,” Order at 11, cannot be squared with binding Ninth Circuit  
24 case law establishing that a company that trades in its own stock is a corporate insider  
25 that must abide by the “disclose or abstain” rule. *See, e.g., McCormick v. Fund Am. Cos.*,  
26 26 F.3d 869, 876 (9th Cir. 1994) (*citing* VII Louis Loss & Joel Seligman, *Securities*

1 *Regulation* 1505 (3d ed. 1991) (“When the issuer itself wants to buy or sell its own  
2 securities, it has a choice: desist or disclose”); and Richard Jennings & Harold Marsh,  
3 *Securities Regulation* 1044 n.12 (6th ed. 1987) (“the issuer itself is, of course, also  
4 covered” by insider trading laws)).

5 *Second*, the conclusion — based on *Petro-Ventures, Inc. v. Takessian*, 967 F.2d  
6 1337, 1338, 1342 (9th Cir. 1992) — that “a broad release in a signed settlement  
7 agreement operates to prevent a party from collaterally attacking the agreement by  
8 alleging it violates the securities laws under § 29,” Order at 11, is not supported by case  
9 law. *Petro-Ventures* does not bar a claim that a settlement agreement induced by  
10 securities fraud is void under § 29(b). Rather, that case addressed a very different  
11 question under § 29(a) of the 1934 Act:

12 The plaintiff had settled an underlying lawsuit in which it had asserted state-law  
13 claims but not securities claims. *Petro-Ventures*, 967 F.3d at 1338. The settlement  
14 agreement released all claims, ““whether or not said claims have been set forth in the  
15 [underlying litigation],”” and expressly waived the plaintiff’s rights under Cal. Civ. Code  
16 § 1542.<sup>8</sup> *Id.* The plaintiff later filed a new lawsuit alleging only securities fraud claims.

17 \_\_\_\_\_  
18 <sup>8</sup> Here, although the Term Sheet called for “releases as broad as possible,” it did not  
19 even mention a waiver of the parties’ rights under § 1542. Such waivers may not be  
20 implied from broad release language. *Casey v. Proctor*, 59 Cal. 2d 97, 105 (Cal. 1963)  
21 (“It therefore appears beyond reasonable doubt that Civil Code section 1542 was intended  
22 by its drafters to preclude the application of a release to unknown claims in the absence  
23 of a showing, *apart from the words of the release* of an intent to include such claims”)  
24 (emphasis added). In any event, even an express waiver of rights under § 1542 does not  
25 bar a claim that the agreement containing that waiver is void due to fraud in the  
26 inducement. *See, e.g., Hanig v. Qualcomm Inc.*, 2002 Cal. App. Unpub. LEXIS 11288 at  
\*13 (4th Dist., Dec. 6, 2002) (“the existence of the section 1542 waiver in the release  
does not bar . . . this action. Fraud in the inducement renders the whole agreement  
voidable, including this waiver. (See 1 Witkin, Summary of Cal. Law (9th ed. 1987)  
Contracts, § 410, pp. 368-369.)”). Note that in predicting what the state courts would  
hold state law to be, federal courts should consider unpublished appellate opinions as an  
indication of how the state’s highest court would rule. *Employers Ins. of Wausau v.*  
*Granite State Ins. Co.*, 330 F.3d 1214, 1220 n.8 (9th Cir. 2003).

27 Nor does the Term Sheet contain a waiver of rights under Cal. Civ. Code § 1668,

1 *Id.* When the defendants moved to dismiss the new lawsuits as barred by the release, the  
2 plaintiff argued that when it signed the release it did not know that it could have asserted  
3 securities law claims *in the underlying litigation* and that § 29(a) barred the release of  
4 securities fraud claims unless the releasing party had actual knowledge of those claims.  
5 *Id.* at 1338, 1342. The Ninth Circuit held that the release of all claims connected to the  
6 underlying securities transaction ““regardless of whether or not said claims have been set  
7 forth in this litigation referred to . . . in this agreement”” coupled with the plaintiff’s  
8 express waiver of Section 1542 rights made clear the plaintiff’s intent to waive its  
9 securities claims relating to the underlying transaction and that this was not barred by  
10 § 29(a). *Id.* at 1342.

11 But unlike this case, the party seeking to avoid the release in *Petro-Ventures* made  
12 no argument that the settlement agreement itself was procured through securities fraud;  
13 nor could it have since (unlike in this case) the settlement did not involve a securities  
14 transaction. Thus, *Petro-Ventures* does not support a rule under which a party can induce  
15 a settlement agreement through securities fraud with impunity.

16 And such a rule would be flatly inconsistent with: (a) the plain language of §  
17 29(b): “*Every contract made in violation of this title or any rule or regulation thereunder,*  
18 *shall be void . . .*” (emphasis supplied); (b) the plain language of § 10(b): “It shall be  
19 unlawful . . . to use or employ, in connection with the purchase or sale of *any security* . . .

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21 which provides that “[a]ll contracts which have for their object, directly or indirectly, to  
22 exempt anyone from responsibility for his own fraud . . . whether willful or negligent, are  
23 against the policy of the law.” This provision, too, bars waiver of a claim for fraud in the  
24 inducement. *McClain v. Octagon Plaza, Inc.*, 159 Cal. App. 4th 784, (2d Dist. 2008)  
25 (under § 1668 “as Witkin explains: ‘A party to a contract who has been guilty of fraud in  
26 its inducement cannot absolve himself or herself from the effects of his or her fraud by  
27 any stipulation in the contract, either that no representations have been made, or that any  
28 right that might be grounded upon them is waived. Such a stipulation or waiver will be  
ignored, and parol evidence of misrepresentations will be admitted, for the reason that  
fraud renders the whole agreement voidable, *including the waiver provision.*” (emphasis  
in original)).

1 any manipulative or deceptive device or contrivance . . . .” (emphasis supplied); and (c)  
2 the Supreme Court’s holding in *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404  
3 U.S. 6, 10-12 (1971) that the circumstances under which a securities transaction occurs  
4 are “irrelevant to the coverage of § 10(b),” which “prohibit[s] all fraudulent schemes in  
5 connection with the purchase or sale of securities,” including “unique form[s] of  
6 deception” and “[n]ovel or atypical methods.” *Id.* (“we read § 10(b) to mean that  
7 Congress meant to bar deceptive devices and contrivances in the purchase or sale of  
8 securities whether conducted in the organized markets or face to face”). (Emphasis  
9 supplied.) In short, no court has ever held that there is a settlement exception to the  
10 scope of the federal securities laws, and the only case to present the issue — *Pearlstein v.*  
11 *Scudder & German*, 429 F.2d 1136, 1142 (2d Cir. 1970) — held exactly the opposite,  
12 reversing the district court’s refusal to void a settlement agreement under § 29.<sup>9</sup>

13 At a minimum, the securities fraud issue presents serious questions of public  
14 policy and the proper interpretation of Federal laws as to which the Ninth Circuit may  
15 well reach a different conclusion than this Court did.<sup>10</sup> On this issue, as on the contract  
16 defenses, ConnectU has shown that there are at least serious legal questions to be heard  
17 by the Ninth Circuit, which more than meets ConnectU’s burden. *See, e.g., Republic of*  
18 *Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (*en banc*) (“[s]erious

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19  
20 <sup>9</sup> As the Court observed, *Pearlstein* voided a settlement agreement because margin  
21 requirements had been violated rather than because that agreement had been induced  
22 through securities fraud. We respectfully submit, however, that a rule under which  
23 settlement agreements are void if procured in violation of relatively minor technical rules  
24 but enforceable if procured by fraud — arguably a more serious violation of the securities  
25 laws — makes little sense.

26 <sup>10</sup> That the Ninth Circuit has not previously spoken to these issues further favors a  
27 stay. *See Bates v. Jones*, 958 F. Supp. 1446, 1472 (N.D. Cal. 1997) (that the case  
28 presented issues of first impression favored a stay); *Simon Property Group, Inc. v.*  
*Taubman Centers, Inc.*, 262 F. Supp. 2d 794, 797 (E.D. Mich. 2003) (“The Court finds  
that Defendants have raised serious legal questions . . . which have yet to be clearly  
addressed in this Circuit. Therefore, the Court finds that this element weighs in favor of  
granting a stay”).

1 questions need not promise a certainty of success, nor even present a probability of  
2 success”).

3 **B. The public interest favors a stay**

4 “The public interest inquiry primarily addresses impact on non-parties rather than  
5 parties.” *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002).  
6 Here, a stay would be in the public interest. It is in the public interest to preserve a  
7 party’s basic right to appeal. *GMC*, 510 F. Supp. at 343 (“[P]reservation of the  
8 respondents’ right to appeal is also within the public interest. . . . Allowing the stay will  
9 better serve the public interest.”). And this is particularly true when the appeal implicates  
10 both Federal and California public policy as expressed in the federal securities laws —  
11 *See Basic Inc. v. Levinson*, 485 U.S. 224, 234 (1988) (federal securities laws are designed  
12 to “substitute a philosophy of full disclosure for the philosophy of *caveat emptor*” and to  
13 “achieve a high standard of business ethics” in securities transactions) (internal citations  
14 omitted) — and in California Civil Code §§ 1542 and 1668. And where, as here, an order  
15 may create a challenge to the attorney-client privilege, the public interest strongly favors  
16 a stay. *United States v. Jones*, 84 A.F.T.R.2d (RIA) 6830 at \* 6-7 (D.S.C. 1999) (holding  
17 that “the public interest weighs in favor of issuing a stay” where the order to be appealed  
18 would put at risk the attorney-client privilege).

19 By contrast, there is no particular public interest in whether Facebook can obtain  
20 the ConnectU shares or the releases as quickly as it might like — particularly given the  
21 reality that, apart from the appeal, there will as a practical matter be no active litigation  
22 between the parties pending completion of the appeal.

23 **IV. THERE IS NO NEED FOR A BOND IN ADDITION TO THE MONEY**  
24 **AND STOCK TO BE HELD IN ESCROW BY THE SPECIAL MASTER**

25 This Court has discretion under FRCP 62 to dispense with the posting of a bond.  
26 Under Rule 62(c), the Court may “suspend, modify, restore, or grant an injunction on  
27 terms for bond *or other terms* that secure the opposing party’s rights.” (emphasis added).

1 The Ninth Circuit has noted (in a case where funds were deposited in an escrow account  
2 pending appeal, much as funds are deposited with the Special Master here) that the Court  
3 has “discretion to allow other forms of judgment guarantee” instead of a supersedeas  
4 bond. *International Telemeter Corp. v. Hamlin Int’l Corp.*, 754 F.2d 1492, 1495 (9th Cir.  
5 1985).

6 Here, no bond is needed, and Facebook is protected through “other forms of  
7 judgment guarantee.” *Id.* ConnectU is a company that has never made a profit, has no  
8 revenues, and whose website gets about a hundred hits per month. Moreover, ConnectU  
9 is willing not to make any operational decisions—as distinct from decisions concerning  
10 litigation strategies—without approval of the special master.

11 Finally, a bond would be particularly inappropriate here, where the Special  
12 Master will be holding both cash and Facebook shares far in excess of any possible  
13 diminution in ConnectU’s value. If Facebook succeeds on appeal, the cash and Facebook  
14 shares would be available to satisfy any claim if one were appropriately proven.

15 **V. CONCLUSION**

16 ConnectU respectfully requests that the Court stay the Judgment pending appeal.  
17 At a minimum, ConnectU’s appeal raises serious legal questions that the Ninth Circuit  
18 should decide. Absent a stay, ConnectU will suffer substantial irreparable harm.

19 Facebook, by contrast, will suffer no cognizable harm if a stay issues. Thus, the  
20 balance of hardships tips sharply in favor of a stay.

21  
22 July 31, 2008

BOIES, SCHILLER & FLEXNER LLP

23 \_\_\_\_\_  
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24 D. Michael Underhill

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26 Attorneys for Defendant ConnectU, 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 July 31, 2008.

Dated: July 31, 2008

\_\_\_\_\_  
/s/ Evan A. Parke

Evan A. Parke