

EXHIBIT A

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THE FACEBOOK, INC. and MARK ZUCKERBERG

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

15 THE FACEBOOK, INC. and MARK
ZUCKERBERG,

16 Plaintiffs,

17 v.

18 TYLER WINKLEVOSS, CAMERON
19 WINKLEVOSS, DIVYA NARENDRA, and
20 QUINN EMANUEL URQUHART OLIVER
& HEDGES, LLP

21 Defendants.

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

**[PROPOSED] COMPLAINT IN
INTERPLEADER AND FOR
DECLARATORY RELIEF [28 U.S.C.
§ 1335]**

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1 diverse from another defendant claimant as required by 28 U.S.C. §§ 1332, 1335(a)(1).

2 10. Venue is properly laid in the Northern District of California, in that Plaintiffs are
3 informed and believe, and based thereon allege, that Defendant Quinn Emanuel practices has
4 offices in the Northern District of California, the settlement consideration is held in trust in the
5 Northern District of California, the Court administering the enforcement of the Settlement
6 Agreement providing for the transfer of settlement consideration from Facebook to Defendants
7 Cameron Winklevoss, Tyler Winklevoss and Divya Narendra is the District Court for the
8 Northern District of California, and Defendants Cameron Winklevoss, Tyler Winklevoss and
9 Divya Narendra agreed that Court for the Northern District of California would have continuing
10 jurisdiction to enforce the Settlement Agreement.

11 **FACTUAL BACKGROUND**

12 11. Facebook, on the one hand, and ConnectU, Inc. ("ConnectU") and Defendants
13 Cameron Winklevoss, Tyler Winklevoss and Divya Narendra on the other, were adverse parties
14 in lawsuits filed in the Northern District of California, 5:07-CV-01389-JW ("California Action")
15 and in the District of Massachusetts, 1:07-CV-10593-DPW ("Massachusetts Action"). Defendant
16 Quinn Emanuel represented ConnectU and Defendants Cameron Winklevoss, Tyler Winklevoss
17 and Divya Narendra in connection with the California and Massachusetts Actions.

18 12. On February 28, 2008, Plaintiffs, ConnectU and Defendants Cameron Winklevoss,
19 Tyler Winklevoss and Divya Narendra entered into a global binding Settlement Agreement that
20 resolved both the California Action and the Massachusetts Actions.

21 13. Pursuant to the terms of the Settlement Agreement, certain consideration, referred
22 to herein as settlement consideration, will be owed by Plaintiffs to Defendants Cameron
23 Winklevoss, Tyler Winklevoss and Divya Narendra. Each of the Defendants, Cameron
24 Winklevoss, Tyler Winklevoss and Divya Narendra, claim an interest in the settlement
25 consideration.

26 14. On April 24, 2008, Defendant Quinn Emanuel filed a Notice of Attorneys' Lien in
27 the Northern District of California against ConnectU and Defendants Cameron Winklevoss, Tyler
28 Winklevoss and Divya Narendra. Defendant Quinn Emanuel asserts a claim over any judgment,

1 settlement or any other recovery paid to Defendants Cameron Winklevoss, Tyler Winklevoss and
2 Divya Narendra in connection with the services it rendered in the California and Massachusetts
3 Actions.

4 15. On June 25, 2008, following a dispute concerning the enforcement of the
5 Settlement Agreement, the Court for the Northern District of California, the Honorable James
6 Ware, presiding, appointed a Special Master to oversee the execution of the Settlement
7 Agreement. The Court also ordered, among other things, Plaintiffs to deposit into the trust
8 account of a Special Master the settlement consideration. A true and correct copy of the Order
9 and the Judgment that followed is attached hereto as Exhibit 2 and Exhibit 3, respectively.

10 16. The settlement consideration deposited into the trust by Plaintiffs is subject to
11 conflicting claims of Defendants Cameron Winklevoss, Tyler Winklevoss and Divya Narendra
12 and Defendant Quinn Emanuel. Each of the them claims an interest in the settlement
13 consideration.

14 **THE CONFLICTING CLAIMS**

15 17. Pursuant to Paragraph 7 of the Settlement Agreement, Defendants Cameron
16 Winklevoss, Tyler Winklevoss and Divya Narendra have claimed an interest in the settlement
17 consideration Plaintiffs has placed in trust with a Special Master.

18 18. Defendant Quinn Emanuel also claims an interest in the settlement consideration.
19 *See* Exhibit 1, at 2:4-8. Defendant Quinn Emanuel further warns that any payment to Defendants
20 Cameron Winklevoss, Tyler Winklevoss and Divya Narendra exposes Plaintiffs to possible
21 liability for intentional interference with a contract. *Id.* at 2:9-13. Defendant Quinn Emanuel has
22 not exempted the settlement consideration from the scope of the lien.

23 19. Defendants Cameron Winklevoss, Tyler Winklevoss and Divya Narendra do not
24 recognize the claims of Defendant Quinn Emanuel and have not authorized Plaintiffs to use the
25 settlement consideration to satisfy the claims of Defendant Quinn Emanuel.

26 20. By reason of the conflicting claims of Defendants Cameron Winklevoss, Tyler
27 Winklevoss and Divya Narendra and Defendant Quinn Emanuel, an actual controversy exists and
28 Plaintiffs are in doubt as to which Defendant is entitled to recovery of the settlement

1 consideration or in how much.

2 21. Plaintiffs do not claim any interest in the settlement consideration.

3 22. It has been necessary for Plaintiffs to employ legal counsel and incur costs and
4 expenses in the investigation of the conflicting claims, the legal basis thereof, and the prosecution
5 of this Complaint, for which Plaintiffs are entitled to an award of reasonable attorneys' fees and
6 costs.

7 **CAUSE OF ACTION INTERPLEADER AND FOR DECLARATORY RELIEF**

8 23. Plaintiffs reallege and incorporate herein by reference, as though set forth in full,
9 the allegations of paragraph 1-22, inclusive above.

10 24. Plaintiffs do not claim any interest in the settlement consideration. Defendants,
11 and each of them, do claim an interest.

12 25. Plaintiffs cannot determine the validity of the claims of Defendants to the
13 settlement consideration. Plaintiffs cannot pay the settlement consideration or any portion thereof
14 without the danger of being subject to multiple and inconsistent liability.

15 26. Plaintiffs seek to have declaratory relief provided as to the amount due under the
16 Settlement Agreement by judgment of this Court and to which Defendant. To that end, Plaintiffs
17 seek direction from the Court regarding the disposition of the settlement consideration.
18 Furthermore, Plaintiffs should be discharged from any further participation in this proceeding
19 other than a judgment barring any further claims against Plaintiffs as to the settlement
20 consideration.

21 **WHEREFORE** Plaintiffs demand judgment and seek declaratory relief against
22 Defendants as follows:

23 1. That Defendants be required to interplead and settle among themselves their
24 respective rights to the settlement consideration, and that Plaintiffs be discharged from any other
25 or further liability to Defendants, or any of them;

26 2. That the Court declare which Defendant, Cameron Winklevoss, Tyler Winklevoss,
27 Divya Narendra or Quinn Emanuel, is entitled to what amount or portion of the settlement
28 consideration.

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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 October 10, 2008.

Dated: October 10, 2008.

Respectfully submitted,

/s/

EXHIBIT 1

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FILED

2008 APR 24 1:32

RICHARD W. WIEHING
CLERK
U.S. DISTRICT COURT
NO. DIST. OF CA. S.J.

12 [Additional attorneys listed on signature page]

13 Former Attorneys for ConnectU, Inc., Cameron
14 Winklevoss, Tyler Winklevoss, and Divya
15 Narendra

16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN JOSE DIVISION

ORIGINAL

19 FACEBOOK, INC. and MARK
20 ZUCKERBERG,

21 Plaintiffs,

22 vs.

23 CONNECTU, INC. (formerly known as
24 CONNECTU, LLC), CAMERON
25 WINKLEVOSS, TYLER WINKLEVOSS,
26 DIVYA NARENDRA, PACIFIC
27 NORTHWEST SOFTWARE, INC.,
28 WINSTON WILLIAMS, WAYNE CHANG,
and DAVID GUCWA AND DOES 1-25,

Defendants.

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

NOTICE OF ATTORNEYS' LIEN

Judge: Honorable Richard Seeborg

Date: April 24, 2008

TO ALL PARTIES AND TO THEIR COUNSEL, AND TO ALL OTHER
PERSONS OR ENTITIES INTERESTED IN THIS ACTION:

PLEASE TAKE NOTICE THAT the undersigned law firm, Quinn Emanuel
Urquhart Oliver & Hedges, LLP ("QEUEO&H"), was formerly counsel of record for defendants
ConnectU, Inc., Cameron Winklevoss, Tyler Winklevoss and Divya Narendra ("ConnectU
Parties") in *ConnectU, Inc., et al. v. Facebook, Inc., et al.*, 07-CV-10593 (DPW) (D. Mass.) (the

1 "Massachusetts Action"), an action related to this case in that, among other things, discovery in
2 this action and the Massachusetts Action was coordinated and effectively consolidated.

3 QEUO&H has provided legal services to the ConnectU Parties in connection with this action.

4 PLEASE TAKE FURTHER NOTICE THAT by virtue of a written attorneys' lien,
5 QEUO&H has and claims a lien over the claims and causes of action of, and any judgment,
6 settlement or other recovery paid to, the ConnectU Parties or any of them, or their successors or
7 assigns, in connection with this action for the purpose of securing payment of attorneys' fees, costs
8 and expenses to QEUO&H on account of its representation of the ConnectU Parties.

9 PLEASE TAKE FURTHER NOTICE THAT payment of any amount to the
10 ConnectU Parties in consideration of their claims in this action without giving effect to, or making
11 provision for, the lien of QEUO&H shall create liability for intentional interference with the
12 undersigned counsel's economic and contractual rights. *See Levin v. Gulf Ins. Group*, 69
13 Cal.App.4th 1282, 1287-88 (1999).

14
15 DATED: April 24, 2008

Respectfully submitted,

16
17 QUINN EMANUEL URQUHART OLIVER &
HEDGES, LLP

18
19 By Randall Garteiser

Bruce E. Van Dalsem
Randall T. Garteiser
David E. Azar

20
21
22 Of Counsel:

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26
27 Former Attorneys for ConnectU, Inc., Cameron
Winklevoss, Tyler Winklevoss, and Divya
Narendra
28

PROOF OF SERVICE

I am employed in the County of San Mateo, State of California. I am over the age of 18 and not a party to the within action; my business address is: Quinn Emanuel Urquhart Oliver & Hedges, LLP, 555 Twin Dolphin Drive, Suite 560, Redwood Shores, California 94065.

On April 24, 2008, I served the foregoing document described as **NOTICE OF ATTORNEYS' LIEN** on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

BY MAIL – I deposited such envelope in the mail at Redwood Shores, California. The envelope was mailed with postage thereon fully prepaid.

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Redwood Shores, California in the ordinary course of business. I am aware that on motion of the party served, services is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on April 24, 2008 at Redwood Shores, California.

(STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Rachel Arripez
Type or Print Name

Rachel Arripez
Signature

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CONNECTU, LLC,

Plaintiff,

v.

MARK ZUCKERBERG, EDUARDO
SAVERIN, DUSTIN MOSKOVITZ, ANDREW
MCCOLLUM, CHRISTOPHER HUGHES,
AND THEFACEBOOK.COM,

Defendants.

1:04-CV-11923 (DPW)

Related Action: Civil Action No. 07-CV-
10593 (DPW)

District Judge Douglas P. Woodlock

Magistrate Judge Robert B. Collings

MARK ZUCKERBERG, EDUARDO
SAVERIN, DUSTIN MOSKOVITZ, ANDREW
MCCOLLUM, CHRISTOPHER HUGHES,
AND THEFACEBOOK.COM,

Counterclaim-Plaintiffs,

v.

CONNECTU, LLC,

Counterclaim-Defendants.

NOTICE OF ATTORNEYS' LIEN

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT by virtue of a written contract and the provisions of Mass. Gen. Laws ch. 221, § 50, Quinn Emanuel Urquhart Oliver & Hedges (“QEUEO&H”) has a lien over the claims and causes of action of, and any judgment, settlement or other recovery paid to, plaintiffs ConnectU, Inc. (formerly known as ConnectU, LLC) (“ConnectU”), Cameron

Winklevoss, Tyler Winklevoss, and Divya Narendra, or any of them, or their successors or assigns (collectively "Plaintiffs"), in Civil Action No. 04-CV-11923 (DPW) (D. Mass.) for the purpose of securing payment of attorneys' fees, costs and expenses to QEUO&H on account of its representation of Plaintiffs.

Dated: April 29, 2008

Respectfully submitted,

QUINN EMANUEL URQUHART OLIVER &
HEDGES, LLP

/s/ David E. Azar
David E. Azar (*pro hac vice*)
QUINN EMANUEL URQUHART OLIVER &
HEDGES, LLP
51 Madison Avenue, 22nd Floor
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Certificate of Service

I hereby certify that this document 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 (a) those indicated as non-registered participants, and (b) Plaintiffs on April 29, 2008.

/s/ Adam B. Wolfson

Adam B. Wolfson

EXHIBIT 2

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

The Facebook, Inc., et al.,

NO. C 07-01389 JW

Plaintiffs,

**ORDER GRANTING PLAINTIFFS’
CONFIDENTIAL MOTION TO ENFORCE
THE SETTLEMENT AGREEMENT**

v.

ConnectU, Inc., et al.,

Defendants.

I. INTRODUCTION

Plaintiffs in this lawsuit are The Facebook Inc. and Mark Zuckerberg (collectively, “Facebook”). Plaintiffs bring this action against ConnectU, Inc., Pacific Northwest Software, Inc., Winston Williams, and Wayne Chang (collectively, “Defendants”) alleging, *inter alia*, misappropriation of trade secrets, unfair competition, and violations of 18 U.S.C. § 1030, *et seq.* In essence, Facebook alleges that ConnectU gained unauthorized access to Facebook’s servers and website and took information for its own unlawful use. The parties are engaged in at least two other lawsuits over these matters; in those cases, ConnectU is the Plaintiff and Facebook is the Defendant.

In the course of this lawsuit, the parties engaged in private mediation. On February 22, 2008, as the result of the mediation, the parties signed a written “Term Sheet & Settlement Agreement.” In the Agreement, the parties agreed to resolve all of their disputes and to dismiss the pending lawsuits. The Agreement provides that they “may execute more formal documents but these terms are binding.” After signing the Agreement, the parties attempted to draft formal

1 documents but failed to reach a consensus on certain terms. In the Agreement, the parties stipulate
2 that the federal court in San Jose, California has jurisdiction to enforce it. Based on a belief that a
3 court order is necessary to enforce the February 22, 2008 Agreement, Facebook filed the present
4 motion in this Court.¹

5 The question for decision by the Court is whether the February 22, 2008 Agreement contains
6 sufficiently definite and essential terms that it may be enforced. For the reasons stated below, the
7 Court finds that the Agreement is enforceable and orders its enforcement.

8 **II. BACKGROUND**

9 As stated above, this action is one of three separate actions between the parties in various
10 federal courts.² On January 22, 2008, United States Magistrate Judge Richard Seeborg ordered the
11 parties to participate in Alternative Dispute Resolution. (Docket Item No. 270.) The parties elected
12 to participate in private mediation.

13 On February 22, 2008, the parties engaged in mediation before Antonio Piazza. Both sides
14 were represented by counsel. As the result of the mediation, the parties signed a handwritten
15 document entitled, "Term Sheet & Settlement Agreement" ("Agreement"). (Second Declaration of
16 Evan A. Parke, Ex. A., hereafter, "Parke Decl.," filed under seal.)

17 With the precise financial terms redacted,³ the Agreement provides, as follows:⁴

18
19 _____
20 ¹ (hereafter, "Motion," Docket Item No. 329, filed under seal.)

21 ² The other actions are ConnectU LLC v. Zuckerberg, Appeal No. 07-1796 (1st Cir.) and
ConnectU, Inc. v. Facebook, Inc., Case No. C 07-10593-DPW (D. Mass.).

22 ³ The Agreement recites that all of its terms are "confidential." At the hearing on the
23 motion, the Court expressed its need to discuss the Agreement in its Order. The Court now
24 determines that it can protect the confidentiality of the Agreement if references to the amount of
25 consideration which the parties agreed to exchange as a part of the settlement are omitted.
Moreover, since neither Facebook nor ConnectU are publicly traded companies at this time, the
Court finds good cause to keep the transcript of the proceedings under seal as requested by the
parties to protect their financial information.

26 ⁴ (Declaration of Theresa A. Sutton in Support of Plaintiffs' Confidential Motion, hereafter,
27 "Sutton Decl.," Ex. A at 1-2, filed under seal.) For authenticity purposes, the Court leaves all
typographical errors and strikeouts in the Agreement unchanged.

The Term Sheet & Settlement Agreement

- 1) The following will settle all disputes between ConnectU and its related parties, on the one hand and Facebook and its related parties, on the other hand.
- 2) All parties get mutual releases as broad as possible and all cases are dismissed with prejudice. Each side bears their own attorneys fees and costs.
- 3) All terms of agreement are confidential, no party disparages any other parties and no party will comment further publicly related to facts underlying or related to this dispute. The parties will agree on any public statements. A violation of the publicity and confidentiality provision of this paragraph shall be submitted to a binding arbitrator who may award injunctive relief and damages up to [REDACTED] million.
- ~~4) This Agreement is subject to the continuing enforcement of the court in San Jose to the current action.⁵~~
- 4) The parties stipulate that the San Jose Federal Court shall have jurisdiction to enforce this agreement.
- 5) The parties agree that they may execute more formal documents but these terms are binding and this document may be submitted into evidence to enforce this agreement.
- 6) ConnectU founders represent and warrant (1) They have no further right to assert against Facebook (2) They have no further claims against Facebook & its related parties.
- 7) All ConnectU stock in exchange for [REDACTED] in cash & [REDACTED] common shares in Facebook. The terms of the shares shall include a requirement that all votes related to the shares will be voted in accordance with the Board of Director's recommendations and be subject to the same anti-dilution protections afforded to Series D preferred stock. ~~The form~~⁶ Facebook will determine the form & documentation of the acquisition of ConnectU's shares [Consistent with a stock and cash for stock acquisition].⁷ Facebook represents that it currently has [REDACTED] fully diluted shares outstanding.

The Agreement was signed by Mark Zuckerberg, individually and on behalf of Facebook, and by Cameron Winklevoss, individually and on behalf of ConnectU. Tyler Winklevoss and Divya Narendra also signed the Agreement. (Sutton Decl., Ex. A at 2.) These individuals are principals of their respective companies.

⁵ Strikeout in the original.

⁶ Strikeout in the original.

⁷ Interlineation in original.

1 Plaintiffs' motion to enforce the Agreement is made on the grounds that the Agreement
2 unambiguously sets forth all material terms of the parties' settlement and Defendants should be
3 ordered to comply with it. (Motion at 6.) Defendants contend that Facebook's motion to enforce the
4 Agreement should be denied because (1) the agreement is missing material terms, (2) the terms
5 which are included were not agreed upon, and (3) Facebook committed fraud in the procurement of
6 the Agreement. (ConnectU's Opposition to Facebook's Confidential Motion at 6, hereafter,
7 "Opposition," filed under seal.) In its reply, Plaintiffs contend that the Agreement was not procured
8 by fraud. (Reply in Support of Confidential Motion at 9, hereafter, "Reply," filed under seal.) The
9 Court considers each issue in turn.

10 **III. DISCUSSION**

11 **A. The Court's Jurisdiction**

12 Before considering the motion to enforce the Agreement, the Court considers its jurisdiction
13 to act on such a motion. The Court also considers issues raised at the hearing, namely, whether
14 Plaintiffs are required to file an action to enforce the Agreement, to which Defendants would be
15 allowed to plead their objections to enforcement as affirmative defenses.

16 "It is well settled that a district court has the equitable power to enforce summarily an
17 agreement to settle a case pending before it." Callie v. Near, 829 F.2d 888, 890 (9th Cir. 1987);
18 Decanay v. Mendoza, 573 F.2d 1075, 1078 (9th Cir. 1978); TNT Mktg., Inc. v. Agresti, 796 F.2d
19 276, 278 (9th Cir. 1986); In re City Equities Anaheim, Ltd., 22 F.3d 954, 957 (9th Cir. 1994). Once
20 a settlement has been reached in a pending action, any party to the agreement may bring a motion to
21 enforce it. See Doi v. Halekulani Corp., 276 F.3d 1131, 1135 (9th Cir. 2002). Specifically,
22 California law provides:

23 If parties to pending litigation stipulate, in a writing signed by the parties outside the
24 presence of the court or orally before the court, for settlement of the case, or part thereof, the
court, upon motion, may enter judgment pursuant to the terms of the settlement.

25 Cal. Civ. Proc. Code § 664.6. In addition to the statutory power to enter a judgment, the court's
26 enforcement powers include the inherent authority to order a party's specific performance of acts

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1 required by the settlement agreement and to award damages or other sanctions for noncompliance.
2 TNT Mktg., 796 F.2d at 278.

3 In this case, in addition to its inherent authority and the authority conferred by California
4 law, in Paragraph 4 of the Agreement, the parties explicitly stipulated that the Court has authority to
5 exercise enforcement. Therefore, the Court is satisfied that it has the jurisdiction and authority to
6 enforce the Agreement without requiring additional pleadings.

7 However, the power to enforce a settlement agreement can only be exercised if the terms
8 have been agreed to by the individuals authorized to make decisions behalf of the parties. See
9 Harrop v. W. Airlines, Inc., 550 F.2d 1143, 1145 (9th Cir. 1977). At the hearing, Defendants raised
10 two issues regarding the authority of the Court to enforce the Agreement against the individuals and
11 the corporations.

12 First, Defendants question whether there is a bases for the Court to exercise personal
13 jurisdiction over ConnectU's individual shareholders, i.e., the three principals who signed the
14 Agreement.⁸ The Court finds that by signing the Agreement with explicit statements such as those
15 in Paragraphs 1, 2, and 4, each of the signatories subjected him or herself to the Court's jurisdiction
16 for the limited purpose of enforcing the Agreement. Second, Defendants question whether
17 ConnectU's individual shareholders received proper notice of the proceedings. The Court finds the
18 three principals of ConnectU have had adequate notice since they are plaintiffs in the Massachusetts
19 action where the parties have vigorously litigated discovery issues relating to the enforcement of this
20 Agreement. (See June 3, 2008, Memorandum and Order, No. 07-10593-DPW, D. Mass.) It is
21 incongruous to argue that these individuals did not receive notice of the motion since Judge
22
23
24

25 ⁸ Defendants first made these contentions in their sur-reply. (Defendants' Sur-Reply in
26 Opposition to Confidential Motion to Enforce, hereafter, "Sur-Reply," Docket Item No. 438.) The
27 Court grants Defendants' motion for leave to file the sur-reply, and considers the contentions raised
28 in the sur-reply.

1 Woodlocks' June 3, 2008 order in the Massachusetts action specifically addressed the hearing on the
2 motion to enforce the Agreement in this Court.⁹ (Id. at 2.)

3 **B. The Material Terms**

4 The construction and enforcement of settlement agreements are governed by principles of
5 local law that apply to the interpretation of contracts, even if the underlying cause of action is
6 federal. United Commercial Ins. Serv., Inc. v. Paymaster Corp., 962 F.2d 853, 856 (9th Cir. 1992).
7 Thus, challenges to a settlement agreement based on interpretation of ambiguous terms, fraud in the
8 inducement, or indefiniteness of a term all turn on the applicable state law. See White Farm Equip.
9 Co. v. Kupcho, 792 F.2d 526, 529 (5th Cir. 1986); see, e.g., Doi, 276 F.3d at 1135.

10 California has a strong policy in favor of enforcing settlement agreements. Osumi v. Sutton,
11 151 Cal. App. 4th 1355, 1357 (2007). Under California law, a settlement agreement "must be
12 interpreted as to give effect to the mutual intention of the parties as it existed at the time of
13 contracting." Roden v. Bergen Brunswig Corp., 107 Cal. App. 4th 620, 625 (2003); see Cal. Civ.
14 Code, § 1636. When the agreement is in writing, "the intention . . . is to be ascertained from the
15 writing alone, if possible." Brinton v. Bankers Pension Serv., Inc., 76 Cal. App. 4th 550, 559
16 (1999); see Cal. Civ. Code § 1639. "[C]ourts will not set aside contracts for mere subjective
17 misinterpretation." Hedging Concepts, Inc. v. First Alliance Mortgage Co., 41 Cal. App. 4th 1410,
18 1421 (1996). "A settlement agreement, like any other contract, is unenforceable if the parties fail to
19 agree on a material term or if a material term is not reasonably certain." Lindsay v. Lewandowski,
20 139 Cal. App. 4th 1618, 1622 (2006) (citing Weddington Productions, Inc. v. Flick, 60 Cal. App. 4th
21 793, 811 (1998)).

22 First, the Agreement clearly states the consideration for the performance required and how it
23 must be paid. (Sutton Decl., Ex. A at 1-2.) In exchange for a specified amount of cash and stock in
24

25 ⁹ At the hearing, counsel for ConnectU's individual shareholders argued that they are not
26 "plaintiffs" in the Massachusetts action. The Court declines to entertain the notion since counsel
27 admitted that the individual shareholders added themselves as plaintiffs to the amended complaint in
that action.

1 Facebook, ConnectU founders are required under the Agreement to represent and warrant “they
2 have no further right to assert against Facebook” and “they have no further claims against Facebook
3 and its related parties.” (Id.)

4 Second, the Agreement clearly defines the structure of the transaction. (Sutton Decl., Ex. A
5 at 1-2.) Paragraph 7 recites that all ConnectU stock is to be exchanged for a sum certain amount of
6 cash and a precise number of common shares in Facebook; it is a stock and cash for stock
7 acquisition. Subsequent negotiations might have proposed a different structure for the transaction or
8 other additional terms, but those proposal were, apparently, rejected. (Id., Ex. B.) The Court cannot
9 considered subsequent negotiations as evidence that there was no “meeting of the minds” with the
10 respect to the Agreement. The Court must determine the parties’ intent from the four corners of the
11 Agreement, not from the extrinsic evidence. Brinton, 76 Cal. App. 4th at 559; Cal. Civ. Code §
12 1639.

13 Third, the principals of each company, who are persons authorized to make decisions for the
14 parties, all signed the handwritten version of the Agreement and none of the signatures are disputed.
15 However, Defendants point out that one stockholder in ConnectU, Howard Winklevoss, was not a
16 party to, and did not sign the Agreement. (Opposition at 10.) Therefore, the issue becomes whether
17 the lack of Howard Winklevoss’ signature makes the Agreement unenforceable.

18 ConnectU is a Connecticut corporation. (Id. at 1.) Under Connecticut law, a share exchange
19 transaction only needs to be approved by majority vote. See Conn. Gen. Stat. § 33-816(a). As of
20 May 23, 2006, Howard Winklevoss owned 1% of the outstanding shares in ConnectU. (Declaration
21 of Neel Chatterjee in Support of Plaintiffs’ Reply, Ex. B at 10, filed under seal.) There is no
22 evidence his ownership interest changed as of the date of the Agreement. The shareholders who
23 signed the Agreement own 99% of the outstanding shares. Since a majority of ConnectU’s
24 shareholders have agreed to the transaction, the consent of Howard Winklevoss is unnecessary to
25 make the Agreement binding on him. Therefore, the lack of Howard Winklevoss’ signature is not an
26 impediment to enforcing the Agreement.

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1 Defendants contend that the Agreement was only a starting point for negotiating more formal
2 documentation. (Opposition at 7-9.) However, the Agreement itself provides that the parties “*may*
3 execute more formal documents,” but that the Agreement is “binding.” (Sutton Decl., Ex. A at 1,
4 emphasis added.) It is significant that the parties used the word “may” in this instance as opposed to
5 “will,” which they had readily used in other contexts. (See e.g., Agreement ¶¶ 1, 3, 7.) On the face
6 of the Agreement, it is clear that, had the parties wished to require more formal documents, they
7 could have indicated they *will* or *shall* execute more formal documents. Instead, they elected to use
8 the word, “may,” and made clear that the Agreement is binding in and of itself.

9 In sum, the Court finds that the Agreement reached by the parties does not display on its face
10 a failure to agree or any uncertainty regarding its material terms. Accordingly, the Court finds that
11 the Agreement is enforceable.

12 **C. Whether the Agreement Was Procured by Fraud**

13 Defendants contend that Facebook’s motion to enforce the Agreement should be denied
14 because Plaintiffs fraudulently procured the Agreement by misrepresenting Facebook’s present
15 value. (Opposition at 14.)

16 A contract is not enforceable if it was induced by fraud. Jones v. Grieve, 15 Cal. App. 561,
17 566-67 (1911). To prove fraud in the inducement of a contract, a party must establish the elements
18 of common law fraud. Id. The elements of fraud are (1) misrepresentation; (2) scienter; (3)
19 justifiable reliance; and (4) resulting damage. Buckland v. Threshold Enterprises, Ltd., 155 Cal.
20 App. 4th 798, 806-07 (2007); Wilke v. Coinway, Inc., 257 Cal. App. 2d 126, 136 (1967) (quoting
21 Cortez v. Weymouth, 235 Cal. App. 2d 140 (1965)). These legal principles apply to a contract to
22 settle a lawsuit. See Merced County Mut. Fire Ins. Co. v. The State of California, 233 Cal. App. 3d
23 765, 771 (1991).

24 Where a party is represented by counsel, or where the alleged misrepresentation was made
25 by an adversary during the course of negotiations, courts have held that reliance is unjustifiable. See
26 Scognamill v. Credit Suisse First Boston LLC, 2005 WL 2045807 (N.D. Cal. 2005) (holding as a

1 matter of law that reliance on representation of adversary in execution of merger agreement was
2 unjustifiable where parties were represented by counsel during the negotiation process); Wilhelm v.
3 Pray, Price, Williams & Russell, 186 Cal. App. 3d 1324 (1986) (holding that the fraud claim failed
4 because plaintiff was represented by counsel at the time of the allegedly fraudulent statement, and it
5 was not “reasonable for plaintiff to accept defendant’s statements without an independent inquiry or
6 investigation”).

7 **1. ConnectU’s Proffer Regarding Facebook’s Valuation**

8 Defendants contend that they were defrauded during the settlement negotiations because
9 Plaintiffs did not disclose a valuation of Facebook common stock which had been made by the
10 Facebook Board of Directors. (Opposition at 6.)

11 Apparently, in October 2007, Facebook and Microsoft issued a press release stating
12 Microsoft would “take a \$240 million stake in Facebook’s next round of financing at a \$15 billion
13 valuation.” (Parke Decl., Ex. J.) Defendants proffer evidence that subsequent to the press release,
14 in the regular course of its operations, Facebook’s Board of Directors determined a value of the
15 company’s “shares” which was different than the valuation disclosed in the press release.
16 (Declaration of Robert T. Clarkson ¶ 11, filed under seal.)

17 Defendants do not challenge the accuracy of the press release itself. Thus, there is no claim
18 that the statement in the release was not true when it was made. (Declaration of Ted Wang in
19 Support of Plaintiffs’ Confidential Motion ¶ 2, filed under seal.) Plaintiffs do not deny that the
20 Facebook Board of Directors made a subsequent valuation of Facebook shares which was a different
21 value from the value Microsoft attributed to the company. However, Plaintiffs did not make any
22 representations or warranties in the Agreement about the value of Facebook common stock.¹⁰

23 _____
24 ¹⁰ Defendants provide no authority to support their contention that either Facebook or
25 Zuckerberg had a duty to disclose the Board’s valuation to Defendants in the context of the
26 settlement or to correct any subjective valuation which Defendants might have made when
27 determining what demand to make in the mediation. It is clear that generally one has a duty to
28 correct a disclosure which is misleading when made, but usually, there is no duty to a correct
statement which is true at the time it is made. See Brody v. Transitional Hospitals Corp., 280 F.3d
997, 1006 (9th Cir. 2002); Backman v. Polaroid Corp., 910 F.2d 10, 17 (1st Cir. 1990). Intentional

1 Moreover, it is undisputed that the shares the parties agreed to exchange in the Agreement and the
2 shares involved in the Microsoft’s transaction are of different classes. Accordingly, the failure to
3 disclose the difference in the valuations cannot be fraudulent as a matter of law.

4 Further, the Agreement does not attribute a specific value to the outstanding shares of
5 Facebook’s stock; there is no admissible evidence that Plaintiffs made any such representation while
6 negotiating the settlement.¹¹ Rather, the only representation evident from the Agreement is the
7 number of fully diluted shares which Facebook currently has outstanding. (Parke Decl., Ex. A.)
8 Defendants have failed to show that this representation was false or that there were any other
9 misrepresentations made by Plaintiffs upon which Defendants could have justifiably relied.

10 In sum, the Court finds Defendants have failed to establish that Plaintiffs made a
11 misrepresentation during the negotiation. The individual signatories to the Agreement are
12 sophisticated business parties who were represented by reputable counsel at the mediation. Either
13 party could have chosen to condition the financial exchange being negotiated on representations and
14 warranties of the value of the stock involved or to conduct their own due diligence with respect to
15 Facebook’s valuation. Neither party chose these courses of conduct. Notably, in his June 3, 2008
16 order denying ConnectU’s motion to compel production of documents, Judge Woodlock stated:

17 From all that appears, the parties were prepared to settle their disputes then, despite the fact
18 that aspects of discovery in this case—most pertinently for present purposes, document
production—had not been completed and unresolved discovery issues remained outstanding.

19 (See June 3, 2008, Memorandum and Order at 2, No. 07-10593-DPW, D. Mass.) Thus, the parties
20 elected to proceed with their settlement negotiations knowing they lacked potentially relevant

21 _____
22 concealment exists only “when a party to a transaction, who is under no duty to speak, nevertheless
23 does speak and suppresses facts which materially qualify the facts stated.” Persson v. Smart
Inventions, Inc., 125 Cal. App. 4th 1141, 1164 (2005).

24 ¹¹ Defendants proffer evidence of statements made during mediation that resulted in the
25 Agreement. Under ADR Local Rule 6-11, “anything that happened or was said, any position taken,
26 . . . shall not be . . . (2) disclosed to the assigned judge; or (3) used for any purpose, including
27 impeachment, in any pending or future proceeding in this court.” Pursuant to this privilege, the
Court declines to conduct a hearing or consider evidence regarding the details of the parties’
negotiations in their mediation.

1 information. Without a showing by Defendants of a material misrepresentation or omission in the
2 negotiations, the Court finds no basis to decline enforcement.

3 **2. Securities Fraud**

4 In their opposition and sur-reply, Defendants contend that the Agreement is not enforceable
5 because Plaintiffs committed securities fraud, making the Agreement voidable. (Opposition at 14;
6 Sur-Reply at 7.)

7 Neither Plaintiffs nor Defendants have cited authority that an agreement to exchange shares
8 of closely held corporations pursuant to settlement of litigation between the companies is voidable
9 by showing securities fraud. The cases which Defendants cite in their sur-reply regarding a duty to
10 disclose “material non-public information” all fall within the context of insider trading, which is not
11 an issue in this case. (Sur-Reply at 10.)

12 On June 24, 2008, the day after the hearing, Defendants requested leave to file additional
13 authority to provide precedent for voiding a purported settlement agreement on the basis of
14 securities fraud.¹² While Defendants cite one case where a settlement was found void under § 29 of
15 the Securities Exchange Act, that case involved an agreement which violated the margin
16 requirements of Regulation T because the defendant failed to recover capital after the settlement.
17 Pearlstein v. Scudder and German, 429 F.2d 1136, 1142-43 (2d Cir. 1970). Contrary to Pearlstein,
18 the Ninth Circuit has held that a broad release in a signed settlement agreement operates to prevent a
19 party from collaterally attacking the agreement by alleging it violates the securities laws under § 29.
20 Petro-Ventures, Inc. v. Takessian, 967 F.2d 1337 (9th Cir. 1992). Specifically, the Ninth Circuit
21 noted:

22 [w]hen, as here, a release is signed in a commercial context by parties in a roughly
23 equivalent bargaining position and with ready access to counsel, the general rule is that, if
24 ‘the language of the release is clear, . . . the intent of the parties [is] indicated by the language
25 employed.’

26 ¹² (See Docket Item No. 454.) While Plaintiffs have not had an opportunity to respond, the
27 Court finds good cause to grant Defendants leave and considers the authority presented in
28 Defendants’ papers.

1 Id. at 1342 (quoting Locafrance U.S. Corp. v. Intermodal Sys. Leasing, Inc., 558 F.2d 1113, 1115
2 (2d Cir. 1977)). Thus, in Petro-Ventures, the Ninth Circuit effectuated the parties' intent to bring
3 about "general peace" by finding that their settlement agreement cannot be voided under § 29. Id.

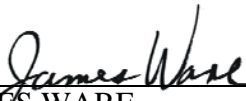
4 As in Petro-Ventures, this case involves a settlement agreement reached by the parties, who
5 were represented by counsel, in which they intended to undertake to give mutual releases that were
6 "as broad as possible." (Agreement ¶ 2.) There is no doubt that the language of the release in
7 Paragraph 2 of the Agreement conveys the intent of the parties to release all claims. Thus, the
8 Agreement cannot be collaterally attacked using § 29.

9 Accordingly, the Court finds that Defendants have failed to tender sufficient evidence of
10 fraud in the circumstances proffered to the Court to create a genuine dispute as to whether the
11 Agreement was fraudulently induced.

12 **V. CONCLUSION**

13 The Court GRANTS Plaintiffs' Motion to Enforce the Parties' Settlement Agreement. The
14 parties are ordered to appear on **July 2, 2008 at 10 a.m.** to show cause why a judgment should not
15 be entered ordering the parties to take the actions required of them by the Settlement Agreement.
16 On or before **June 30, 2008**, the parties are directed to submit a proposed form of judgment
17 consistent with this Order.

18
19 Dated: June 25, 2008



JAMES WARE
United States District Judge

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

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17 Yvonne Penas Greer ygreer@orrick.com

11 **Dated: June 25, 2008**

Richard W. Wieking, Clerk

13 **By: /s/ JW Chambers**
14 **Elizabeth Garcia**
15 **Courtroom Deputy**

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EXHIBIT 3

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

The Facebook, Inc., et al.,

NO. C 07-01389 JW

Plaintiffs,

**JUDGMENT ENFORCING SETTLEMENT
AGREEMENT**

v.

ConnectU, Inc., et al.,

Defendants.

Pursuant to the Court’s June 25, 2008 Order Granting Plaintiffs’ Confidential Motion to Enforce the Settlement Agreement (docket item no. 461), the parties appeared before the Court on July 2, 2008 to show cause why a judgment should not be entered. Based on the papers submitted and oral arguments of counsel,

JUDGMENT IS ENTERED ENFORCING “THE TERM SHEET & SETTLEMENT AGREEMENT” AS FOLLOWS:

- (1) The Facebook, Inc. and Mark Zuckerberg:
 - (a) Pursuant to Paragraphs 4 and 7 of the Agreement, unless otherwise ordered by the Court, on or before **August 4, 2008**, The Facebook, Inc. shall deposit with the Master, the amount of cash and the certificates representing the amount of The Facebook, Inc. common shares stated in Paragraph 7 of the Agreement, endorsed for transfer. The following legend shall appear on certificates of The Facebook, Inc. common stock issued pursuant to this Judgment:

1 THE SHARES REPRESENTED BY THIS CERTIFICATE HAVE NOT BEEN REGISTERED
2 UNDER THE SECURITIES ACT OF 1933, AS AMENDED. THEY MAY NOT BE SOLD, OFFERED FOR
3 SALE, PLEDGED OR HYPOTHECATED IN THE ABSENCE OF A REGISTRATION STATEMENT IN
4 EFFECT WITH RESPECT TO THE SECURITIES UNDER SUCH ACT OR AN OPINION OF COUNSEL
5 REASONABLY SATISFACTORY TO THE ISSUER THAT SUCH REGISTRATION IS NOT REQUIRED,
6 OR UNLESS SOLD PURSUANT TO RULE 144 OF SUCH ACT.

7 THE SHARES REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO AN AGREEMENT
8 WITH REGARD TO THE VOTING OF SUCH SHARES, AS PROVIDED IN THE CERTAIN TERM SHEET
9 & SETTLEMENT AGREEMENT PURSUANT TO WHICH SUCH SHARES WERE ORIGINALLY
10 ISSUED. THE HOLDERS OF SUCH SHARES ARE ENTITLED TO THE SAME ANTI-DILUTION
11 RIGHTS AFFORDED THE ISSUER'S SERIES D PREFERRED STOCK, AS PROVIDED IN SUCH TERM
12 SHEET & SETTLEMENT AGREEMENT. A COPY OF SUCH TERM SHEET & SETTLEMENT
13 AGREEMENT IS ON FILE IN THE OFFICE OF THE SECRETARY OF THE ISSUER.

14 (b) Pursuant to Paragraphs 2 and 4 of the Agreement, on or before **12 noon on**
15 **July 9, 2008**, The Facebook, Inc. and Mark Zuckerberg shall submit to the
16 Court for approval a proposed form of release. Upon approval by the Court,
17 the release shall be signed by The Facebook, Inc. and Mark Zuckerberg, and
18 shall have attached to it corporate authority given to the corporate signatory
19 and shall be notarized as to each signatory and shall be immediately deposited
20 with the Master;

21 (c) Pursuant to Paragraphs 2 and 4 of the Agreement, unless otherwise ordered by
22 the Court, on or before **August 4, 2008**, a legally sufficient dismissal with
23 prejudice of all cases by and between the parties pending as of the date of the
24 Agreement.¹ The dismissal shall recite that each party to the respective
25 litigation shall bear their own attorney fees and costs.

26
27 ¹ The other two cases are ConnectU, LLC v. Facebook, Inc., et al., Case No. 1:04-cv-11923-
28 DPW, currently on appeal to the First Circuit Court of Appeals; and ConnectU, Inc., et al. v.
Facebook, Inc., et al., Case No. 1:07-cv-10593-DPW, currently pending in the District of
Massachusetts.

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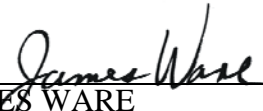
- (2) ConnectU Inc., Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra:
- (a) Pursuant to Paragraphs 4 and 7 of the Agreement, unless otherwise ordered by the Court, on or before **August 4, 2008**, ConnectU Inc. shall deposit with the Master all shares of ConnectU Inc., endorsed for transfer. To the extent the parties to the Agreement do not own any shares of ConnectU Inc., to fulfill the obligation of the transfer of “all ConnectU stock,” the parties to the Agreement shall take such actions in their respective corporate and individual capacities as are necessary to effect the deposit with the Master of all shares of ConnectU stock;
- (b) Pursuant to Paragraphs 2 and 4 of the Agreement, on or before **12 noon on July 9, 2008**, ConnectU, Inc., Cameron Winklevoss, Tyler Winklevoss and Divya Narendra shall submit to the Court for approval a proposed form of release. Upon approval by the Court, the release shall be signed by these parties and shall have attached to it corporate authority given to the corporate signatory and shall be notarized as to each signatory and shall be immediately deposited with the Master;
- (c) Pursuant to Paragraphs 2 and 4 of the Agreement, unless otherwise ordered by the Court, on or before **August 4, 2008**, a legally sufficient dismissal with prejudice of all cases by and between the parties pending as of the date of the Agreement. The dismissal shall recite that each party to the respective litigation shall bear their own attorney fees and costs.
- (3) Upon further order of the Court, the parties shall deposit with the Master such other and further things which will facilitate the orderly exchange of the consideration and shall do the things ordered by the Court to ensure the operational integrity of the business entities that are parties to the Agreement.

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(4) The deposits being made with the Master by the parties pursuant to this Judgement shall be transferred out of the deposit by the Master only upon further Order of the Court in enforcement of the Agreement.

The Court retains jurisdiction to enforce this Judgment.

Dated: July 2, 2008



JAMES WARE
United States District Judge

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

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Dated: July 2, 2008

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy