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14 and Divya Narendra.

15
16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN JOSE DIVISION

19 THE FACEBOOK, INC. and MARK
20 ZUCKERBERG,

21 Plaintiffs,

22 v.

23 CONNECTU, INC. (formerly known as
24 CONNECTU, LLC), PACIFIC NORTHWEST
SOFTWARE, INC., WINSTON WILLIAMS,
25 and WAYNE CHANG,

26 Defendants.

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

DEFENDANTS'

- (I) **RESPONSE TO PLAINTIFFS'**
ADMIN. MOTION TO
CORRECT/STRIKE (Dkt. No. 657);
and
(II) **RESPONSE TO PLAINTIFFS'**
ADMIN. REQUEST FOR
CLARIFICATION (Dkt. No. 659).

1 **I. DEFENDANTS' RESPONSE TO MOTION TO CORRECT/STRIKE**

2 On Monday evening, November 10, 2008, Plaintiffs filed an administrative motion
3 (Dkt. No. 657) that asked the Court to strike the reference to the ConnectU Founders in the
4 following sentence from the Court's November 3 Order:

5 On June 25, 2008, over objections by ConnectU and the Founders
6 (collectively, "ConnectU"), the Court granted the motion to enforce
7 the Agreement.

8 *Id.* (citing November 3 Order (Dkt. No. 653)). But the reference to the Founders should not
9 be stricken because it properly describes the record and the Court's prior findings.

10 The Court has previously found that "Counsel for the ConnectU Founders made an
11 appearance" at the June 25 hearing on the motion to enforce and that "like ConnectU, Inc.,
12 the ConnectU Founders are parties for purposes of proceedings to enforce the Settlement
13 Agreement."¹ At the July 2, 2008, show cause hearing, the Court recognized that "ConnectU
14 and others" (with "others" being understood to include the ConnectU Founders) were not
15 "waiving *your objection to my Order in the first place.*" See Declaration of Evan A. Parke
16 ("Parke Decl.") at Exhibit A (transcript excerpts) at 26:5-14 (emphasis added). In response,
17 counsel for ConnectU and the Founders stated "That is correct." *Id.* Because the Court's
18 statement in its November 3 Order accurately reflects the record, the Court should deny
19 Plaintiffs' administrative motion to correct/strike.

20 **II. DEFENDANTS' RESPONSE TO MOTION TO CLARIFY**

21 The Court's November 3 Judgment requires Facebook's counsel to hold the
22 ConnectU stock "in trust for its clients and any lawful claimant," just as it requires
23 ConnectU's counsel to hold Facebook's stock and cash settlement consideration "in trust for
24 its clients and any lawful claimant." See November 3 Judgment (Dkt. No. 654) at 1-2. On
25 Monday evening, November 10, Facebook filed a second administrative motion asking the
26 Court to "clarify" that the ConnectU Founders are not "lawful claimants." (Dkt. No. 659).

27

¹ See Order Denying Motion to Intervene; Denying ConnectU's Motion to Stay Execution
28 of Judgment (Dkt. No. 610) at 4, ll.13-15.

1 This request should be denied. The Judgment is unambiguous and needs no “clarification.”
2 The ConnectU Founders are indeed lawful claimants to the ConnectU stock. To the extent
3 that Facebook alternatively asks the Court to modify its Judgment, that request should be
4 denied as well.

5 Black’s Law Dictionary defines “claimant” as “[o]ne who asserts a right or demand.”
6 BLACK’S LAW DICTIONARY (West 2004). Courts commonly rely on this definition in
7 determining whether various parties or entities are, in fact, “claimants.” *See, e.g., In re*
8 *Matter of Magone*, 892 P.2d 540, 543 (Mon. 1995) (relying on “everyday meaning[]” of
9 “claimant” in Black’s Law Dictionary to reverse district court’s ruling that person was not a
10 “claimant”); *State v. Mark Marks, P.A.*, 654 So. 2d 1184, 1193 (Ct. App. Fla. 1995) (relying
11 on Black’s Law Dictionary to find that a third-party injured by another was a “claimant”).
12 Similarly, Black’s Law Dictionary defines “lawful” as “permitted by law.” BLACK’S LAW
13 DICTIONARY (West 2004).

14 The Founders satisfy these common-sense, common-usage definitions. The Founders
15 have lawfully asserted, and continue to lawfully assert, their right to return of the ConnectU
16 stock that they were required to turn over to the Special Master. The Founders have properly
17 asserted that right before this Court and the Court of Appeals, where the Founders have
18 already filed their opening appeal brief. *See Ctr. for Int’l Env’tl. Law v. Office of the United*
19 *States Tr. Rep.*, 240 F. Supp. 2d 21, 22-23 (D.D.C. 2003) (parties have the “basic right to
20 appeal”). Indeed, the Court has held that the Founders may appeal its prior orders and
21 judgments,² underscoring that their appellate claims, like their claims before this Court, are
22 “permitted by law” and therefore “lawful.” *See* FED. R. APP. P. 3(a)(1) (“[a]n appeal
23 *permitted by law as of right* from a district court to a court of appeals may be taken only be
24 filing a notice of appeal”) (emphasis added). If the Founders prevail on appeal, their

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26 ² *See* Ex. D to Parke Decl. at 47:6-8 (“I have to put the opposing party to my judgment in
27 a position so they can challenge my judgment”), 46:18-19 (“I won’t deny the right to
28 appeal”). *See* Dkt. No. 610 at 5 (Founders had a right to “appeal that Judgment”).

1 ConnectU stock *must* be returned to them. *See Caldwell v. Puget Sound Elec. Apprenticeship*
2 *Trust*, 824 F.2d 765, 767 (9th Cir. 1987) (“The right to recover what one has lost by the
3 enforcement of a judgment subsequently reversed is well established.”) (quoting *Baltimore*
4 *and Ohio R.R. v. United States*, 279 U.S. 781, 786 (1929)).

5 Facebook also asks the Court to “clarify” what it means to hold property in trust for
6 another. (Dkt. No. 659, at 2-3). Facebook’s request is unnecessary. Black’s Law Dictionary
7 explains that a “trust” is “[t]he right...to the beneficial enjoyment of property to which
8 another person holds the legal title.” BLACK’S LAW DICTIONARY (2004). Similarly, the
9 Restatement (Second) of Trusts provides

10 [A] trust involves three elements, namely, (1) a trustee, who holds the
11 trust property and is subject to equitable duties to deal with it for the
12 benefit of another; (2) a beneficiary, to whom the trustee owes
equitable duties to deal with the trust property for his benefit; (3) trust
property, which is held by the trustee for the beneficiary.

13 Restatement (Second) of Trusts § 2 cmt. h (1959). Law firms—no doubt including
14 Facebook’s firm—routinely hold funds and other property in trust. The prerequisites for a
15 “trust” are clearly met in this case. Accordingly, it is appropriate for Facebook’s counsel to
16 hold the ConnectU property in trust for “any lawful claimants,” including the Founders.

17 Facebook also argues that even if ConnectU’s counsel must hold cash and Facebook’s
18 stock in trust for the Founders’ prior counsel (Quinn Emanuel), Facebook’s counsel need not
19 hold the ConnectU stock in trust for the Founders. Facebook claims that the Quinn Emanuel
20 contractual lien should result in non-reciprocal obligations. Facebook is wrong. In *both*
21 situations, the evident purpose of the trust is to preserve the integrity of assets until the
22 claimants’ right to the asset is fully adjudicated, in one case by the Ninth Circuit, in the other
23 by an arbitration panel. *See Foster v. Hallco Manufacturing Co.*, 835 F. Supp. 1235, 1236
24 (D. Ore. 1993) (“It is in the interest of fairness that the money remain in a separate trust until
25 resolution of the controversy [on appeal].”). It is the arbitration panel that will decide what –
26 if any – amount of cash or stock may be due to Quinn Emanuel. The fact that Quinn
27 Emanuel may have a lien does not change the operative facts. Quinn’s “claim” to settlement

1 proceeds is no more certain than the Founders'. Both are "lawful claimants" who, if they
2 ultimately prevail, may become entitled to property held in trust. Indeed, as the Court stated
3 at oral argument on October 28, Quinn Emanuel's lien has not been adjudicated and there is
4 no way to know if Quinn will recover anything. *See* Ex. E to the Parke Decl. (October 28
5 hearing tr.) at 51:11-13 ("The obligation that you're citing [is] of a contractual lien [that] has
6 not been adjudicated as of yet.").

7 Finally, Facebook suggests that Defendants should be precluded from asserting that
8 they are lawful claimants because, according to Facebook, they did not make that argument
9 after the Special Master originally recommended transferring the ConnectU stock to
10 Facebook. (Dkt. No. 659, at 3, ll. 20-25). Of course Defendants did not make that argument;
11 the Special Master never recommended that Facebook's counsel hold the ConnectU stock "in
12 trust for...any lawful claimant." But Defendants *did* object to the transfer of their stock to
13 Facebook, in compliance with the Court's show cause order. (Dkt. No. 637). The Court
14 considered the parties' respective arguments and ordered Facebook's counsel to hold the
15 stock in trust for Facebook and all lawful claimants.

16 **REQUEST TO RESTORE TIMELINE FOR SEEKING**
17 **EMERGENCY APPELLATE RELIEF**

18 The Court's November 3 Order and Judgment directed the Special Master not to
19 implement the Judgment until November 24, 2008, so that ConnectU and the Founders
20 would have sufficient time to file (and the Court of Appeals sufficient time to rule on) a
21 motion or petition for appellate relief.³ The November 3 Judgment provided that Facebook's
22 counsel should hold the ConnectU stock "in trust...for any lawful claimant." On the
23 morning of Thursday, November 6, Defendants' counsel emailed a letter to counsel for
24 Facebook to confirm that they would hold the ConnectU stock in trust for Facebook and the
25 Founders. To avoid delay, a response was requested by noon on Friday, November 7. *See*
26 Ex. B to the Parke Decl. Facebook's counsel, however, did not answer until Monday,

27 ³ *See* November 3 Order (Dkt. No. 653) at 6; November 3 Judgment (Dkt. No. 654) at 1.

1 November 10, stating that they did not consider ConnectU Founders to be “lawful claimants”
2 for whom counsel would hold the ConnectU stock in trust; and that Facebook would move
3 for clarification of the Judgment in this regard. Ex. C to the Parke Decl.

4 If the Court denies Facebook’s clarification motion and rules that Facebook’s counsel
5 must hold the ConnectU stock in trust for the Founders as “lawful claimants,” Defendants
6 would not expect to seek emergency relief through motion or petition for mandamus, but
7 would raise any issues through the normal appellate process.⁴

8 However, if the Court alters its Judgment and rules that Facebook’s counsel need not
9 hold the ConnectU stock in trust for Facebook and the Founders, Defendants intend to seek
10 immediate appellate relief. They therefore respectfully request that the Court grant an
11 additional 21 days from the date of its ruling on Facebook’s administrative request to allow
12 time for such proceedings.

13 CONCLUSION

14 Defendants request that the Court deny Facebook’s two administrative motions. If
15 the Court rules that Facebook’s counsel need not hold the ConnectU stock in trust for
16 Facebook and the Founders, Defendants respectfully request that the Court grant an
17 additional 21 days from the date of its ruling to restore the time provided in the November 3
18 Judgment for seeking immediate appellate relief.

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27 ⁴ Defendants maintain their objection to the filing of dismissals in the Massachusetts action
and reserve the right to seek relief from any dismissal of their claims.

1
2 November 14, 2008

Respectfully submitted,

3
4 /s/Steven C. Holtzman

5 Steven C. Holtzman
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15 Divya Narendra*

16 **CERTIFICATE OF SERVICE**

17 I hereby certify that this document(s) filed through the ECF system will be sent
18 electronically to the registered participants as identified on the Notice of Electronic Filing
19 (NEF) and paper copies will be sent to those indicated as non-registered participants on
20 November 14, 2008.

21 Dated: November 14, 2008

22 /s/ Steven C. Holtzman

23 Steven C. Holtzman

24 *Attorneys for Defendants' ConnectU, Inc.,
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