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16 UNITED STATES DISTRICT COURT
 17 NORTHERN DISTRICT OF CALIFORNIA
 18 SAN JOSE DIVISION
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20 THE FACEBOOK, INC. and MARK
 ZUCKERBERG,

21 Plaintiffs,

22 v.

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

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

**FACEBOOK, ZUCKERBERG, AND
 CONNECTU'S JOINT STIPULATED
 FACTS RE: MOTION TO
 DISQUALIFY BY CONNECTU, INC.**

Hearing Date: August 17, 2009
 Time: 10:00 A.M.
 Courtroom:
 Judge: The Honorable James Ware

1 The parties endeavored to prepare a joint stipulation, as requested by the Court. However,
2 the parties were unable to reach an agreement on a joint submission. Thus, the following
3 response constitutes the joint response of Facebook, Inc., Mark Zuckerberg, and ConnectU, Inc.
4 To understand the Founders' contentions, Facebook, Inc., Mark Zuckerberg, and ConnectU, Inc.
5 respectfully refer the Court to the Founders' separate submission.

6 **1. With respect to each appeal and cross-appeal pending before the Ninth Circuit:**

7 a. **List the names of each appellant and respondent.**

8 The Appellants are Divya Narendra, Cameron Winklevoss, and Tyler Winklevoss.
9 The Respondents are Facebook, Inc., and Mark E. Zuckerberg. ConnectU, Inc., while originally
10 an Appellant, has recently sought to dismiss its appeal against Facebook, Inc. and Mark E.
11 Zuckerberg.

12 b. **Briefly describe the contentions made by each and against whom;**

13 The Founders and ConnectU now have adverse interests with respect to the
14 appellate brief. The only appellate brief filed was jointly filed by ConnectU and the Founders.
15 Since filing the appellate brief, ConnectU and the Founders have taken positions adverse to each
16 other. Namely, ConnectU filed a motion to dismiss its appeal but the Founders did not. That
17 Motion is still pending.

18 In their appeal, the Founders make numerous contentions against Facebook and
19 Zuckerberg. They contend that the District Court abused its discretion by deciding the Motion to
20 Enforce without an evidentiary hearing. The Founders also argue that the Settlement Agreement
21 was procured by fraud. As a result of the alleged fraud, the Founders argue, the agreement is
22 void. The Founders also assert that the agreement is unenforceable because it lacks material
23 terms.

24 Due to the pendency of the Motion to Disqualify and the Motion to Dismiss,
25 Facebook and Zuckerberg have not yet filed their opposition brief. See 9th Cir. R. 27-11(a).
26 However, each of the arguments raised by the Founders also was raised before this Court and the
27 Court of Appeals in four separate Emergency Motions for Stays Pending Appeal. Both this Court
28 and two separate motion panels of the Ninth Circuit denied all four requests.

1 c. **Briefly describe the relief sought by each and against whom;**

2 ConnectU and the Founders disagree as to the relief necessary on appeal. The
3 Founders ask the Ninth Circuit to reverse this Court's judgment enforcing the Settlement
4 Agreement. Specifically, the Founders seek to undo the settlement and to obtain possession of
5 ConnectU once again and to resurrect their released claims. ConnectU anticipates that Facebook
6 and Zuckerberg will ask the Ninth Circuit to affirm this Court's Judgments and Orders.
7 ConnectU may join in Facebook and Zuckerberg's opposition to the Founder's position.
8 Nevertheless, ConnectU has sought to dismiss its appeal which originally sought the same relief
9 currently sought by the Founders.

10 d. **Except for the Motion remanded to this Court, describe any motions made**
11 **and pending in the Ninth Circuit by each party and the relief sought;**

12 The following three motions are currently pending before the Ninth Circuit:

13 i. Facebook Inc. and Mark Zuckerberg's Motion to Dismiss Portions of
14 Appeal based on Founders' Waiver. Facebook and Zuckerberg seek dismissal of portions of the
15 Founders' appeal to the extent it challenges the July 2, 2008, Judgment enforcing Settlement
16 Agreement and related Orders and Judgments including the June 10, 2008, Order; June 25, 2008
17 Order; August 8, 2008, Order; November 3, 2008, Judgment; November 21, 2008, Amended
18 Judgment; and December 15, 2008, Order.

19 ii. ConnectU Inc.'s Motion to Voluntarily Dismiss Appeal. ConnectU seeks
20 dismissal of the appeal on the ground that it is moot. ConnectU is now owned by Facebook and,
21 thus, does not wish to litigate against its parent corporation.

22 iii. Facebook Inc. and Mark Zuckerberg's Motion to Consolidate Case Nos.
23 09-15021 and 09-15133 with Case Nos. 08-16745, 08-16849, 08-16973. Facebook and
24 Zuckerberg seek an Order consolidating appeal and cross-appeal, Nos. 09-15021 and 09-15133,
25 with the already consolidated appeals and cross-appeal docketed under numbers 08-16745.

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1 e. **If a party has taken any position with respect to any existing or potential**
2 **motions, describe the position taken and the response, if any, that has been**
3 **tendered in opposition or response; and**

4 i. Facebook and Zuckerberg's Motion to Dismiss is based on the Founders'
5 failure to oppose the Motion to Enforce the Settlement Agreement in the District Court. Instead,
6 the Founders made a strategic decision not to challenge the Settlement Agreement that is the
7 subject of these appeals even though they had been served with it, assisted ConnectU with its
8 opposition, attended related hearings, and launched collateral attacks in other jurisdictions to
9 dismantle the settlement.

10 The Founders oppose the motion on the grounds that the Founders were parties
11 who participated in the proceedings below; opposed Facebook's motion to enforce the purported
12 settlement agreement; and objected to the district court's enforcement rulings that are the subject
13 of this appeal. The Founders also argued that Facebook and Zuckerberg should have raised this
14 issue in their first Motion to Dismiss for Lack of Personal Jurisdiction.

15 In Reply, Facebook and Zuckerberg noted that, although Cameron Winklevoss
16 submitted a declaration in opposition to the Motion to Enforce the Settlement Agreement, it was
17 on ConnectU's behalf. And, indeed, the Founders went out of their way to avoid a direct
18 challenge to the Settlement Agreement. With respect to the timing of this Motion, Facebook and
19 Zuckerberg argued it is proper and timely, because the first motion to dismiss was filed on the
20 ground that the appeal was premature.

21 ConnectU had not determined yet whether it intends to join Facebook and
22 Zuckerberg's Motion to Dismiss, and reserves the right to do so at a later time.

23 ii. ConnectU, Inc. filed a Motion to Dismiss its appeal on the following
24 grounds: 1) ConnectU and Facebook executed and filed a Stipulation dismissing the appeal
25 pursuant to Fed.R.App.P. 42(b); 2) ConnectU lacks standing to pursue its appeal, because it is not
26 in ConnectU's interests to do so; 3) the appeal is moot because the settlement consideration has
27 been transferred whereby Facebook now owns ConnectU, Inc. and, thus, ConnectU intends to
28 abide by the Settlement Agreement; and 4) the appeal is moot because Facebook and ConnectU
have entered a mutual release as to any and all claims between them.

1 The Founders opposed ConnectU's Motion on the following grounds: 1) the
2 Stipulation is procedurally improper; 2) because it was filed to evade appellate review of
3 contested orders and judgments; 3) any ruling will have a direct impact on ConnectU's interests;
4 and 4) because ConnectU filed several appeals, prior to its transfer to Facebook, those appeals
5 may have merit.

6 In Reply, ConnectU argued that it is entitled to decide its litigation strategy and
7 whether to maintain the appeal, and it is not obligated to pursue the appeal on the Founders'
8 behalf.

9 iii. Facebook and Zuckerberg moved to consolidate all of the appealing
10 appeals and cross-appeals and to set a briefing scheduled. The Founders do not oppose this
11 portion of the motion. Facebook and Zuckerberg also asked, however, that the Court deem
12 withdrawn the Founders and ConnectU's opening appeal brief. The Founders opposed that
13 request on the ground that withdrawal is unnecessary.

14 ConnectU had not determined yet whether it intends to join Facebook and
15 Zuckerberg's motion to consolidate all of the pending appeals and cross-appeals, and reserves the
16 right to do so at a later time.

17 f. **To the extent a party to the appeal takes the position that ConnectU is in an**
18 **adversary relationship with the Founders, describe the adversity.**

19 **In the initial proceedings related to the motion to enforce the settlement**
20 **agreement, the Boies firm represented only ConnectU and not the Founders.** The O'Shea and
21 Finnegan firms jointly represented ConnectU and the Founders. The Boies firm initially
22 represented ConnectU only. At some point after the Settlement Agreement was enforced by this
23 Court, the Boies firm began representing the Founders as well. The Founders and ConnectU now
24 have competing interests, as described below.

25 **Boies represents the Founders Against ConnectU.** As a result of the settlement
26 agreement enforced by this Court, ownership of ConnectU transferred from the Founders to
27 Facebook. Facebook, Inc., now owns ConnectU, Inc. ConnectU has decided it has no interest in
28 pursuing the appeal, whereas the Founders seek to change ownership and undo the Settlement

1 Agreement. Counsel for the Founders and the Founders are in possession of attorney-client
2 communications involving ConnectU, as well as ConnectU's confidential business information.

3 Following are several key examples of the adversity between ConnectU and its
4 former lawyers, who continue to represent the Founders:

- 5 1. The Founders, through their counsel, have opposed ConnectU's
6 Motion to Voluntarily Dismiss the Appeal. This demonstrates
7 actual adversity between ConnectU and its former counsel.
- 8 2. The Founders' counsel has threatened their former client,
9 ConnectU. Specifically, on December 18, 2008, the Boies firm
10 warned ConnectU that, "we believe that any attempt by ConnectU
11 to benefit its current shareholder by extinguishing that claim would
12 be a fraudulent conveyance and legally actionable." This threat is
13 documented in Exhibit G to the Declaration of James E. Towery in
14 Support of ConnectU's Motion to Disqualify.
- 15 3. ConnectU's former counsel has refused to provide ConnectU its
16 business and litigation files based solely on the fact that these
17 lawyers continue to represent the Founders. This refusal makes
18 Founders' counsel directly adverse to ConnectU. The following
19 two examples demonstrate how counsel for the Founders' refusal to
20 provide ConnectU its files has prejudiced ConnectU:
 - 21 a. ConnectU has sought, without avail, to gain access to and
22 control over its website, www.ConnectU.com. ConnectU
23 has thus far been denied access to its own website. Without
24 access to ConnectU's business files, ConnectU does not
25 have the information necessary to gain control of its own
26 website; and
 - 27 b. ConnectU is informed and believes that the Founders have
28 asserted a legal malpractice claim against their former

1 counsel, Quinn Emanuel. To the extent that the Founders
2 hold viable claims against Quinn Emanuel, so would
3 ConnectU. However, without access to ConnectU's
4 previous litigation files, ConnectU cannot evaluate its
5 potential claims.

6 **ConnectU Wishes to Abide by Settlement And Founders Do Not.** The basic
7 adversity is that ConnectU wishes to have finality by honoring the settlement, whereas the
8 Founders do not. Thus, there is now a conflict between ConnectU and the Founders.
9 Specifically, the Founders are pursuing an appeal on their behalf that ConnectU believes is not in
10 its interests. ConnectU has filed a motion to dismiss the appeal, and that motion is currently
11 pending before the Ninth Circuit.

12 iv. **To the extent the Founders contend that they are owed money by**
13 **ConnectU, state whether a claim for those funds are part of the**
14 **Ninth Circuit's appeal remanded to this Court for a limited**
15 **purpose. If not, describe what effect this Court should give to**
16 **that debt in deciding the remanded Motion.**

17 ConnectU is not aware of any claim for funds by the Founders, other than the
18 general statement in the Boies firm's December 18, 2008 letter, "[a]s you are probably aware,
19 ConnectU owes substantial debts to the Founders...." (See Exhibit G to the Declaration of James
20 E. Towery in Support of ConnectU's Motion to Disqualify).

21 v. **State whether the Founders are being represented in the demand**
22 **for or collection of a debt from ConnectU by the same attorneys**
23 **who jointly represented the Founders and ConnectU when the**
24 **debt was created or during any period of time before the**
25 **ConnectU stock was transferred to Facebook as part of the**
26 **execution of the Judgment from which the current appeal is**
27 **being taken.**

28 ConnectU is not a party to the fee litigation currently pending between the
Founders and their former counsel and thus ConnectU has no basis upon which to respond to this
question.

vi. **With respect to ConnectU's client files, state whether there is a**
general business versus litigation breakdown.

Because ConnectU does not have access to its files, ConnectU does not have

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sufficient information to respond to this request.

DATED: August 7, 2009

/s/

James E. Towery
HOGE, FENTON, JONES & APPEL, INC.
Attorneys for ConnectU, Inc.

DATED: August 7, 2009

/s/

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Mark E. Zuckerberg

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 August 7, 2009.

DATED: August 7, 2009

/s/

James E. Towery
HOGE, FENTON, JONES & APPEL, INC.
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