

Exhibit A

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

19 THE FACEBOOK, INC. and
20 MARK 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.
27
28

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

**EXHIBIT A TO FOUNDERS' MOTION
TO FILE SUPPLEMENTAL BRIEFING:**

**CAMERON WINKLEVOSS,
TYLER WINKLEVOSS, AND DIVYA
NARENDRA'S SUPPLEMENTAL BRIEF
IN OPPOSITION TO CONNECTU, INC.'S
MOTION TO DISQUALIFY COUNSEL**

1 At the hearing held on August 17, 2009, the Court and counsel discussed the decisions by
2 the Ninth Circuit in *Christiansen v. United States District Court*, 844 F.2d 694 (9th Cir. 1988), and
3 the New York Court of Appeals in *Tekni-Plex, Inc. v. Meyer and Landis*, 674 N.E.2d 663 (N.Y.
4 1996). As detailed below, *Christiansen* strongly supports the Founders’ position and *Tekni-Plex*
5 is distinguishable insofar as it ordered disqualification.

6 *Christiansen* addresses a number of issues raised by the Court at the August 17, 2009, oral
7 argument; specifically, (i) how joint representation affects alleged conflicts of interests, (ii) the role of
8 the substantial relationship test, and (iii) considerations of public perceptions regarding lawyer-client
9 relationships. Both the reasoning and the holding in *Christiansen* require denial of the motion to
10 disqualify.

11 First, *Christiansen* involved the requested disqualification of a law firm which had jointly
12 represented multiple clients — a corporation and its old management. As with ConnectU, ownership
13 and control of the corporate entity (a bank) changed and new management sought to disqualify the
14 bank’s former lawyers, who continued to represent prior management in defending against new
15 management’s claims of misconduct. The Ninth Circuit granted mandamus and reversed the district
16 court’s order disqualifying the law firm, even though counsel’s previous work for the bank was
17 “substantially related” to the current suit.

18 Second, the Ninth Circuit held that the “substantial relationship” test does not apply where
19 “the former client [the bank] has no reason to believe that information given to counsel will not be
20 disclosed to the firm’s current client [prior management].” *Id.* at 699. Any confidences that the law
21 firm could have learned from the bank were available to it from its current clients, just as is true here.
22 *See, e.g.*, cmt 1. to ABA Model Rule of Professional Conduct 1.13 (“An organizational client is a
23 legal entity, but it cannot act except through its officers, directors, employees, shareholders and other
24 constituents.”). Indeed, unlike the bank in *Christiansen*, ConnectU has had minimal operations and
25 revenues, such that any “confidences” it might have are certainly known to the Founders.

26 The Ninth Circuit’s holding accords with the general rule that lawyers may be adverse to
27 former clients, except for those instances to which the substantial relationship test applies: A lawyer
28 is “bound to the [client] for a specific purpose only, not in perpetual servitude.” Geoffrey C. Hazard,

1 W. William Hodes, Peter R. Jarvis, *The Law of Lawyering*, § 13.2 (3rd ed. 2009). Because the
2 “substantial relationship” test was “inapplicable,” 844 F.2d at 699, the Ninth Circuit did not fashion
3 an alternative test, but applied this general rule and allowed the adverse representation.

4 Third, as to the issue of public perceptions, the Ninth Circuit reversed disqualification in
5 *Christiansen* even though it was sought by government regulators who had taken over the failed
6 bank and were alleging mismanagement by former officers to the public detriment. Thus, the Ninth
7 Circuit’s public interest calculus necessarily included its assessment of public perceptions regarding
8 ethical lawyering as well as the strong public interest in ensuring the integrity and soundness of the
9 banking system — yet it still barred disqualification. Here, additional facts suggest that public
10 perceptions do not require disqualification: (i) it is the Founders’ consistent adversary Facebook
11 that controls ConnectU and is now dictating its conduct: (ii) the law firms that ConnectU seeks to
12 disqualify have brought no affirmative claims against ConnectU; and (iii) the Founders are only
13 seeking relief from Facebook, not ConnectU.¹ Moreover, if disqualification were to occur here, the
14 Founders will be deprived of the services of their attorneys because they complied with a court order
15 to turn over their company to their adversary.

16 With respect to the *Tekni-Plex* case, we note that among the circumstances which led to
17 the Meyer firm’s disqualification was that “the record fails to establish that [Meyer] also represented
18 Tang individually on these matters,” and therefore “the exception to the privilege for co-clients who
19 subsequently become adversaries is inapplicable.” *Id.* at 666. The facts in our case are in sharp
20 contrast; the record is undisputed that law firms jointly represented ConnectU and the Founders under
21 circumstances where ConnectU “ha[d] no reason to believe that information given [by ConnectU] to
22 counsel will not be disclosed to the firm’s current client [the Founders].” *Christiansen*, 844 F.2d at
23 699.

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26 ¹ To the extent that there is any concern about the law firms’ bringing claims for debts owed to the
27 Founders or Howard Winklevoss by ConnectU, that can be addressed by a prophylactic order limited
28 to such claims, rather than the drastic remedy being sought by ConnectU. See *UMG Recordings v.
MySpace, Inc.*, 526 F. Supp. 2d 1046 (C.D. Cal. 2007) (conditioning denial of motion to disqualify
on dropping affirmative defense which created conflict between law firm and former client).

1 In conclusion, courts must give disqualification motions “particularly strict judicial scrutiny”
2 and consider “[t]he cost and inconvenience to clients,” *Optyl Eyewear v. Style Cos. Ltd.*, 760 F.2d
3 1045, 1050 (9th Cir. 1985), especially where individuals with a substantial investment in the lawyer-
4 client relationship are involved. Disqualification in the matters pending in this Circuit would severely
5 prejudice the Founders. Currently pending before the Ninth Circuit are several complex and inter-
6 related appeals. Disqualification would deprive the Founders of their long-time counsel at a crucial
7 time, as well as the irreplaceable institutional knowledge of the long-running and complex underlying
8 cases.²

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10 Dated: August 21, 2009

BOIES SCHILLER & FLEXNER LLP

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By: /s/ D. Michael Underhill
D. Michael Underhill

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FINNEGAN, HENDERSON, FARABOW,
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By: /s/ Scott R. Mosko
Scott R. Mosko

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Attorneys for CAMERON WINKLEVOSS,
TYLER WINKLEVOSS, and DIVYA NARENDRA

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25 ² The law firms involved in this matter also represent the Founders and Howard Winklevoss in other
26 proceedings outside of this Circuit: O’Shea in an arbitration proceeding in New York which is set for
27 a merits hearing in October; and Boies and Finnegan in Massachusetts court proceedings. This Court
28 can only address the on-going proceedings in this Circuit. ConnectU has filed a separate motion to
disqualify in the Massachusetts action which remains pending. ConnectU has not sought disqualifi-
cation in the arbitral forum or from any court having jurisdiction over the arbitration.