

EXHIBIT 1

1 TYLER R. MEADE, ESQ. (SBN 160838)
tyler@meadeschrag.com
2 MICHAEL L. SCHRAG, ESQ. (SBN 185832)
michael@meadeschrag.com
3 MEADE & SCHRAG LLP
4 1816 Fifth Street
5 Berkeley, CA 94710
6 Telephone: (510) 843-3670
Facsimile: (510) 843-3679

7 Attorneys for Cameron Winklevoss,
8 Tyler Winklevoss and Divya Narendra

9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12

13 THE FACEBOOK, INC. AND
14 MARK ZUCKERBERG,

15 Plaintiffs,

16 v.

17 CONNECTU, INC. (F.K.A. CONNECTU, LLC);
18 PACIFIC NORTHWEST SOFTWARE, INC.;
19 WINSTON WILLIAMS; AND
WAYNE CHANG,

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

**ADMINISTRATIVE REQUEST OF
CAMERON WINKLEVOSS, TYLER
WINKLEVOSS AND DIVYA NARENDRA
TO PAY LIENHOLDERS AND COMPLETE
THE EXCHANGE OF CONSIDERATION**

Hearing Date: N/A
Courtroom: 9
Judge: Hon. James Ware

REDACTED VERSION

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1 I. INTRODUCTION

2 Cameron Winklevoss, Tyler Winklevoss and Divya Narendra (the “Founders”) bring this request
3 for an Order directing Boies Schiller & Flexner (“BSF”), which holds settlement proceeds in trust for the
4 Founders and two lienholders, to: (1) pay ██████████ to Finnegan Henderson Farabow Garrett & Dunner,
5 LLP (“Finnegan”) to satisfy that firm’s lien; (2) satisfy Quinn Emanuel Urquhart Oliver & Hedges, LLP’s
6 (“Quinn Emanuel”) attorney lien and related judgment with an agreed upon payment of ██████████
7 ██████████; and (3) release the remaining proceeds to the Founders’ and their designees
8 so that the exchange of consideration under the settlement can be completed.

9 In 2008, this Court ordered that the Term Sheet & Settlement Agreement signed at the 2008
10 mediation (the “Term Sheet”) be enforced as a settlement, and then supervised the enforcement of the
11 settlement to the extent possible. Complications relating to the Quinn Emanuel and Finnegan liens
12 prevented the Founders from taking possession of the cash and stock due to them under the settlement,
13 and so the Court ordered that BSF hold those proceeds in trust for the Founders and “any lawful
14 claimant.” The Court did so to ensure that the Quinn Emanuel and Finnegan liens were satisfied before
15 any settlement consideration passed to the Founders. The lien impediment has now been removed, the
16 propriety of this Court’s judgment has been affirmed, and the Ninth Circuit has issued its mandate.
17 Accordingly, it is now time for this Court to take the final steps in the enforcement process.

18 There is no reason to delay completion of the enforcement process. There are no other lawful
19 claimants other than Quinn Emanuel and Finnegan, whose liens are now resolved. Enforcement should be
20 completed expeditiously in order to preserve the bargain embodied in the Term Sheet. As this Court has
21 recognized previously, decisions regarding distribution of settlement proceeds must take into account
22 dynamic economic conditions and the related risk that fluctuations in stock value could materially change
23 the nature of the bargain that this Court has ordered enforced. Dkt. 653 at p. 5 (11/3/08 Order); *see also*
24 Dkt. 610 at p. 8; 8/6/08 Tr. at 32:2-33:25.¹ The Founders do not anticipate an objection to this request, as

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27
28 ¹ All docket citations are to Northern District of California Case No. 5:07-cv-01389 unless otherwise indicated.

1 Facebook has recognized that sequestration of the Founders' settlement proceeds is not necessary once the
2 liens are resolved. Dkt. 630 at p. 10.²

3 **II. BACKGROUND**

4 **A. This Court Strictly Adhered To The Term Sheet.**

5 This Court has closely adhered to the provisions of the hand written Term Sheet, consistently
6 declining to do more or less than was required to enforce its terms.

7 [REDACTED]
8 [REDACTED]
9 [REDACTED] 6/23/08 Tr. at 11:12-20, 12:12-20, 15:6-9, 16:1-18:3, 23:11-24:6, 36:4-7. [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED] 6/23/08 Tr. at 60:12-18
15 (emphasis added). [REDACTED]
16 [REDACTED] 6/23/08 Tr. at 62:7-63:4, 64:11-65:1, 66:17-21.

17 Likewise, the Court stated [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 6/23/08 Tr. at 60:21-61:2; see also 7/2/08 Tr. at 40:13-18. Later, the Court stated: "*I'm trying to stick, for*

22 _____
23 ² The Order requested herein is not inconsistent with the Founders' efforts to pursue an inquiry into
24 whether Facebook intentionally or inadvertently suppressed evidence in the Massachusetts litigation. See
25 D.Mass. Case No. 1:07-cv-10593-DPW Dkts. 359-360, 368, 376 & 375. As the Founders noted in the
26 Massachusetts case, if Judge Woodlock vacates the Order of dismissal in the Massachusetts litigation
27 under Fed.R.Civ.P. 60, this Court would decide at that point whether the judgment here should be vacated
28 under Fed.R.Civ.P. 60(b)(6). D.Mass. Case No. 1:07-cv-10593-DPW Dkt. 375 at p. 10 ("If this Court
were to vacate its dismissal Order, Facebook would presumably have a legitimate basis to move to set
aside the judgment entered by Judge Ware in the California action pursuant to Rule 60(b)(6)"). In the
meantime, this Court is required by the Ninth Circuit's mandate to complete the process of implementing
the judgment in this matter. See § III.C., *supra*.

1 purposes of anyone questioning my role here in enforcing the settlement agreement and giving a
2 judgment, that if I start doing things that are outside the confines of that settlement agreement, I'm doing
3 something beyond enforcement.” 7/2/08 Tr. at 67:13-21 (emphasis added).

4 **B. The Attorney Liens Complicated Enforcement Of The Settlement.**

5 Quinn Emanuel and the Finnegan firm asserted attorneys’ liens, which complicated the Court’s
6 efforts to do nothing more or less than enforce the Term Sheet. Dkt. 337 (Quinn Emanuel notice of lien);
7 Dkt. 757 (Finnegan notice of lien). No other liens were asserted. See 7/2/08 Tr. 54:19-21.

8 Facebook’s sole concern was that it would be liable to these firms if it paid the settlement proceeds
9 without satisfying or otherwise providing for satisfaction of these liens. 6/23/08 Tr. at 14:3-20, 32:2-8,
10 34:14-20; 7/2/08 Tr. at 30:18-31:22, 65:14-66:2; see also Dkt. 337 at p. 2 (Quinn Emanuel’s lien citing
11 *Levin v. Gulf Ins. Group*, 69 Cal.App.4th 1282, 1287-88 (1999) regarding the potential for Facebook’s
12 liability to Quinn Emanuel); Dkt. 630 at pp. 5, 9-10 (Report No. 1 of Special Master citing *Levin* for same
13 proposition); Dkt. 636 at p. 3 (Facebook pleading citing *Levin*). Facebook never expressed a concern
14 about liability to non-lienholders.

15 Discussion of this issue was deferred after the Court appointed George Fisher as special master and
16 ordered Facebook and the Founders to turn all settlement proceeds over to him. 7/2/08 Tr. at 26:15-29:9,
17 32:2-8, 34:14-35:15; Dkts. 475 & 476. But the special master’s role was not intended to last long. See
18 7/2/08 Tr. at 35:11-15. The question of what to do after he completed his work resulted in several
19 different proposals and much discussion. The focus was on the Quinn Emanuel lien because Finnegan did
20 not immediately file a notice of lien and did not request that any specific action be taken to protect its
21 interests until it filed its notice of lien in 2011. 7/2/08 Tr. at 30:18-31:22; Dkt. 630 at p. 5. Nonetheless,
22 Facebook was legitimately concerned about both liens. 7/2/08 Tr. at 30:18-31:22, 65:14-66:2; *Brown v.*
23 *Superior Court*, 116 Cal.App.4th 320, 327 (2004).

24 The Founders exhausted available means of halting the exchange of consideration with several
25 different motions and requests. Dkts. 578 & 637; 9th Cir. Case No. 08-16745 Dkts. 15 & 51; 8/6/08 Tr. at
26 4:8-10, 61:25-62:3; 10/28/08 Tr. at 24:19-27:18; see also Dkt. 630 at pp. 8-9. In denying the first of these
27 motions, the Court noted that the value of the stock could fluctuate during the pendency of the stay,
28 fundamentally altering the bargain memorialized in the Term Sheet – a point that applies equally to

1 continued sequestration of the settlement proceeds after resolution of the liens. Dkt. 610 at p. 8 (“In
2 essence, the longer the Court delays in enforcing the settlement between the parties, the more likely the
3 value of the consideration subject of the settlement (i.e., the value of the stock of each company) will
4 change”); Dkt. 653 at p. 5 (in denying a second stay motion, the Court noted “the rapidly changing United
5 States economy and a highly competitive market for Internet products and services”); *see also* 8/6/08 Tr.
6 at 32:2-33:25 (where the Court expressed the same concern at the hearing on the stay motion).

7 Facebook’s first proposal for dealing with the liens was to escrow all cash and stock due to the
8 Founders until the liens were resolved, by agreement or otherwise. 7/2/08 Tr. at 31:23-32:23, 51:21-52:1,
9 53:3-7, 65:14-66:2; 10/28/08 Tr. at 8:5-9:14; Dkt. 630 at p. 10 (“Facebook requested any escrow or trust
10 be disbursed only upon a judgment with respect to any fee dispute or a joint letter detailing how the
11 distribution of funds and stock should occur”). Mr. Fisher, the special master, also noted this as an option.
12 Dkt. 630 at pp. 9-10. Quinn Emanuel indicated an escrow could be structured to its satisfaction. 7/2/08
13 Tr. at 53:8-14, 55:17-56:12. The Founders objected to Facebook receiving its consideration (the
14 ConnectU stock) while all of the cash and stock due to them were sequestered to satisfy a much smaller
15 lien. 10/28/08 Tr. at 61:24-62:19, 64:4-11, 69:14-18; Dkt. 637 at pp. 2, 12.

16 The Founders were not opposed to placing a portion of the settlement proceeds into an escrow or
17 trust account to protect Quinn Emanuel’s lien. 7/2/08 Tr. at 51:21-25; 10/28/08 Tr. at 61:24-62:19; Dkt.
18 630 at p. 10. Unfortunately, the parties could not agree on how much to sequester, which effectively
19 precluded this option, as there was a consensus that it would be inappropriate for this Court to decide the
20 appropriate amount to sequester, or do anything else that could be interpreted as an adjudication of the
21 lien. 10/28/08 Tr. at 44:3-46:25, 64:12-65:10 (the Founders’ argument on this issue); *id.* at 50:15-51:2,
22 51:11-52:8, 54:13-55:25 (Quinn Emanuel’s argument on this issue); Dkt. 630 at p. 10 (the special master’s
23 position on this issue); 10/28/08 Tr. at 56:1-57:1, 62:20-63:6 (the Court’s comments in accord); 69:14-
24 70:22 (further discussion of this issue); *see also* *Carroll v. Interstate Brands Corp.*, 99 Cal.App.4th 1168,
25 1173 (2002).

26 Quinn Emanuel proposed that its name be included as a payee on the settlement draft and as a
27 transferee on the stock certificates, which would mean that the cash and stock could not be negotiated or
28 sold without its consent. 7/2/08 Tr. at 52:2-53:8, 55:3-55:16, 68:22-69:8; 10/28/08 Tr. at 48:20-51:10,

1 53:7-56:21, 59:14-60:12; Dkt. 644; *see also* Dkt. 636 at p. 3 (where Facebook noted this as an option).
2 The Court expressed reservations about this proposal. 10/28/08 Tr. at 60:8-61:23.

3 Towards the end of the process, Facebook proposed interpleader as an alternative. 10/28/08 Tr.
4 10:16-11:17; Dkt. 636 at pp. 3-4. The Founders objected to interpleader. 10/28/08 Tr. at 69:8-14. So did
5 Quinn Emanuel, noting it would result in duplicative litigation over their lien, and also might violate the
6 principle that the trial court in the underlying action should not adjudicate the lien. 10/28/08 Tr. at 57:2-
7 24 (citing *Carroll*, 99 Cal.App.4th 1168). The Court viewed interpleader as problematic, in part because
8 the Court was not set up to take possession of stock and also because it fell short of fully effectuating the
9 settlement. 10/28/08 Tr. at 57:25-59:2, 69:8-12.

10 At the conclusion of the final hearing on this issue, Facebook asked the Court to hold the
11 Founders' consideration in abeyance until the Quinn Emanuel lien was resolved, while indicating it was
12 agnostic as to the best device for accomplishing that goal. 10/28/08 Tr. at 73:8-18. Quinn Emanuel cited
13 authority for the proposition that it would be an abuse of discretion for the Court to distribute the
14 settlement proceeds before it had the chance to foreclose on its lien in the separate proceeding required by
15 *Carroll*. 10/28/08 Tr. at 73:19-74:14 (citing *Brown*, 116 Cal.App.4th at 335).

16 In short, the Court faced a difficult choice regarding the best way to effectuate the settlement while
17 protecting the lienholders. *See* 10/28/08 Tr. at 66:11-67:17, 74:15-17.³

18 **C. The Court Ordered That Boies Schiller & Flexner Hold Proceeds in Trust.**

19 On November 3, 2008, the Court ordered that Facebook receive the ConnectU stock and that BSF
20 hold the other settlement proceeds in trust for the Founders and any lawful claimant. Dkt. 653 at p. 6

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22
23 ³ Underscoring the lack of an obvious mechanism for enforcing the settlement while protecting the
24 lienholders, discussion circled back to options that were essentially dismissed as inadequate in earlier
25 discussions. *See* 10/28/08 at 63:7-64:3 (where, well after the Founders' motion for a stay was rejected,
26 Quinn Emanuel proposes a brief stay to obtain an Order from the fee arbitration about how much to
27 sequester); *id.* at 68:23-69:12 (where Quinn Emanuel returns to the idea of interpleader, even though the
28 Court had noted the problems with that option); *id.* at 70:13-17 (where Quinn Emanuel's counsel states:
"Which, Your Honor, brings me full circle back to our suggestion, which is we don't sequester all the
money"); *id.* at 70:18-22 (where the Court asks for the right amount to sequester and nobody suggests an
appropriate amount); *id.* at 70:23-71:2 (where Quinn Emanuel's counsel returns to the idea that his client
be added as a payee on the settlement draft and transferee on the stock).

1 (11/3/08 Order); *see also* Dkt. 654. On November 21, 2008, this Court stated the purpose of the Order as
2 follows:

3 [T]he requirement that the distribution be held ‘in trust’ for ‘any lawful claimant’ was intended to
4 enforce the Settlement Agreement, but in doing so, to permit the Quinn Emanuel law firm to
5 perfect any lien and to assert any perfected lien against the proceeds in the hands of the Boies,
Schiller & Flexner LLP law firm.

6 Dkt. 664 at p. 3 (11/21/08 Order).

7 BSF has declared that it will not release any funds or stock from the trust without an Order of this
8 Court. *See* Dkt. 751 at p. 3, ¶ 8. Although the Court did not make that an explicit requirement, BSF’s
9 stance seems consistent with the Court’s intent: When the Court ordered that the consideration be
10 transferred to the special master, it specified that no proceeds could be released without a further Order.
11 Dkt. 475 at p. 2, ¶ (A)(7). In comments that same day, the Court signaled its intention to issue further
12 Orders to carry out the settlement. 7/2/08 Tr. at 39:1-10 (stating “... there will be the necessity of the
13 Court taking further action to enforce the judgment once the judgment is in place that I can’t contemplate
14 the – those Orders at this time” and noting the possibility that the judgment will have to be amended); *id.*
15 at 67:22-24 (“After I give that judgment, I can do things that will respect the various economic interests of
16 the parties to carry that out”); *id.* at 70:9-14 (where the Court acknowledged that subsequent proceedings
17 may be required to address the names in which the stock is issued).

18 **D. Quinn Emanuel Has Obtained A Judgment**

19 On August 23, 2010, an American Arbitration Association panel issued a judgment that
20 adjudicates the amount of Quinn Emanuel’s lien. Specifically, the judgment provides [REDACTED]

21 [REDACTED]
22 [REDACTED] Declaration of Tyler
23 Meade in Support of Administrative Request (“Meade Decl.”) ¶ 2, Ex. A.

24 A New York state court confirmed this judgment. The Appellate Division of the New York court
25 issued a notice of entry of judgment on October 11, 2011. Meade Decl., ¶ 3, Ex. B. Recognizing that,
26 with a few additional *pro forma* steps, this judgment entitles Quinn Emanuel to collect on funds held in
27 trust by BSF, the Founders have met and conferred with Quinn Emanuel regarding the correct payoff
28

1 calculation for Quinn Emanuel. Meade Decl., ¶ 7. Based on these discussions, the Founders and Quinn
2 Emanuel agree that the correct payoff number is the sum of the following:

- 3 (a) [REDACTED]
- 4 (b) [REDACTED]
- 5 (c) [REDACTED]
- 6 (d) [REDACTED]
- 7 (e) [REDACTED]
- 8 (f) [REDACTED]
- 9 (g) [REDACTED]

16 ⁴ [REDACTED]

17 [REDACTED]

18 ⁵ [REDACTED]

19 [REDACTED]

20 ⁶ [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 ⁷ [REDACTED]

26 ⁸ [REDACTED]

27 [REDACTED]

28 [REDACTED]

1 A simplified description of the agreed-upon payoff amount to Quinn Emanuel is [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 **E. Agreement With Finnegan**

5 The Founders and Finnegan have agreed that Finnegan's lien should be satisfied by the payment [REDACTED]

6 [REDACTED] from funds held in trust by BSF. Meade Decl., ¶ 4, Ex. C.

7 **III. ARGUMENT**

8 **A. This Court's Has Jurisdiction To Effectuate The Settlement.**

9 This Court has repeatedly affirmed its jurisdiction to enforce this settlement. Dkt. 461 at pp. 4-5

10 (6/25/08 Order); 6/23/08 Tr. at 39:9-10 ([REDACTED])

11 [REDACTED]; 7/2/08 Tr. at 29:3-7 ("The Court does intend to retain jurisdiction to enforce the judgment,

12 and I think that is also inherent in the agreement itself to retain jurisdiction given to it by the parties to

13 enforce the terms of the agreement itself"); *id.* at 71:15-19 ("I'm not willing to accept that my loss of

14 jurisdiction over the issue of *whether* the judgment should be entered deprives me of jurisdiction to do

15 certain things under the judgment") (emphasis added); *see also id.* at 49:1-18; 8/6/08 Tr. at 6. The law is

16 in accord with these comments. *See In re Padilla*, 222 F.3d 1184, 1190 (9th Cir. 2000) (even after an

17 appeal is taken, the district court retains jurisdiction to implement its judgment enforcing the settlement);

18 *see also* authorities cited in § III.C., *infra*, regarding compliance with the mandate.

19 **B. The Liens Have Been Negotiated And The Lienholders Should Be Paid.**

20 As this Court has acknowledged, the parties may stipulate to the resolution of the liens. *See, e.g.,*

21 7/2/08 Tr. at 29:22-30:3. Facebook has recognized this as well. Dkt. 630 at p. 10 ("Facebook requested

22 any escrow or trust be disbursed only upon a judgment with respect to any fee dispute or a joint letter

23 detailing how the distribution of funds and stock should occur"). The relevant parties have now done

24 precisely that: The Founders and Finnegan agree to the payment of [REDACTED] from the trust to Finnegan

25 in full satisfaction of the Finnegan lien. Meade Decl., at ¶ 4, Ex. C. The Founders and Quinn Emanuel

26 agree that the BSF should pay [REDACTED]

27 [REDACTED] from trust

28 account funds to fully satisfy the Quinn Emanuel lien and judgment. Meade Decl., at 7.

1 **C. The Trust Should Be Dissolved.**

2 After determining that the settlement should be enforced, this Court worked diligently to do no
3 more or less than effectuate the bargain reflected in the Term Sheet. Unfortunately, the Court was stymied
4 by the twin requirements that it protect the lienholders but not adjudicate their liens in any way. *See* §
5 II.B., *supra* (discussing 10/28/08 Tr. at 44:3-46:25, 50:15-51:2, 51:11-52:8, 54:13-55:25, 56:1-57:1,
6 62:20-63:6, 64:12-65:10; Dkt. 630 at p. 10; and *Carroll*, 99 Cal.App.4th at 1173). The liens effectively
7 prevented the Court from completing the exchange of consideration required by the settlement. Multiple
8 options were proposed and discussed, but none stood out as an obvious choice.⁹ Ultimately, the Court
9 ordered that BSF hold the Founders' proceeds in trust for the Founders and any lawful claimant. *See* §
10 II.C., *supra*. The reason for the trust has now expired, as the liens have been resolved and there is
11 agreement that the lienholders should be paid. Accordingly, there is no longer reason to delay the
12 Founders' receiving their consideration.

13 In fact, the Ninth Circuit's affirmance and mandate compels this Court to complete the exchange
14 of consideration required by the settlement. *Pit River Tribe v. U.S. Forest Service*, 615 F.3d 1069, 1079,
15 1080 (2010) (district courts must implement both the letter and the spirit of the mandate); *California Dept.*
16 *of Social Services v. Leavitt*, 523 F.3d 1025, 1033 (9th Cir. 2008) (referring to the district court's inherent
17 power to enforce its judgments); *United States v. Thrasher*, 483 F.3d 977, 981 (2007) (district court is
18 bound by the appellate court's decision and must carry it into execution without varying it or examining it
19 for any purpose beyond execution); Goelz, Watts & Benson, *California Practice Guide: Federal Ninth*
20 *Circuit Civil Appellate Practice*, § 12:318 (TRG 2011) ("Lower courts are bound to execute the terms of
21 the Ninth Circuit's mandate"); *see also* 9th Cir. Case No. 08-16745 Dkt. 214 (9th Cir. mandate). Failing to
22 do so would contravene the Ninth Circuit's decision.

23 _____
24 ⁹ As indicated, the Court did not want to stay the exchange of consideration because the value of
25 the stock could fluctuate, altering the bargain memorialized in the Term Sheet. Interpleader was
26 administratively problematic for the Court and, as Quinn Emanuel argued, might result in duplicative
27 litigation or violate the holding in *Carroll*, 99 Cal.App.4th at 1173. With respect to the escrow option,
28 the Founders noted the lack of symmetry if Facebook was allowed to obtain the ConnectU stock while
the Founders were denied their consideration due to a much smaller lien. Yet, because the parties could
not agree on a lesser sum to be placed into escrow, the only effective option was to place all of stock and
cash owed to the Founders in escrow.

1 In addition to being contrary to the mandate, any further delay would threaten to impair the value
2 of the consideration bargained for in the settlement. This Court has itself consistently noted this danger in
3 conjunction with its earlier efforts to enforce the settlement. Dkt. 610 at p. 8 (8/8/08 Order) (“In essence,
4 the longer the Court delays in enforcing the settlement between the parties, the more likely the value of the
5 consideration subject of the settlement (i.e., the value of the stock of each company) will change”); Dkt.
6 653 at p. 3 (noting the “rapidly changing United States economy and a highly competitive market for
7 Internet products and services” as a factor in denying the Founders request that ConnectU stock not be
8 turned over to Facebook until after the appeal was decided); 8/6/08 Tr. at 33:1-8 (“And it does seem to
9 me, as the Court that issued the judgment, I have to pay attention to the fact that the value of this judgment
10 to both parties, as I saw it, was a timely combination of exchange of cash and stock, and that it seemed to
11 me that the parties were, were – are affected by a delay which might affect the value of the
12 consideration”).

13 **D. There Are No Other Lawful Claimants.**

14 A party cannot be considered a lawful claimant without first asserting a claim in this Court. In this
15 case, only two parties have taken this threshold step – Quinn Emanuel and Finnegan. The question
16 whether others *could have* asserted claims is not relevant.

17 It should be noted, however, that there is no evidence that the Court intended for the term “any
18 lawful claimant” to be an invitation to anyone with a dispute with the Founders to make a claim to the
19 settlement proceeds. The impetus for the Order was the Quinn Emanuel lien. *See* Dkt. 664 at p. 3
20 (11/21/08 Order). Most people with a grievance are not entitled to a lien at all, and attorney lienholders
21 enjoy special status among lienholders. Their liens are perfected at the time the fee contract is signed,
22 even if no notice of lien is ever filed. *See Brown*, 116 Cal.App.4th at 327; *see also* 10/28/08 Tr. at 73:19-
23 74:14 (where Quinn Emanuel, citing *Brown*, 116 Cal.App.4th at 335, argued that it would be an abuse of
24 discretion if the Court did not give it an opportunity to foreclose on its lien before settlement proceeds
25 passed to the Founders).

26 Understandably cautious in its administration of the trust, BSF apparently notified two individuals
27 who are not lienholders, let alone attorney lienholders, that settlement proceeds have been placed in trust
28 with BSF. Only one of these individuals, Wayne Chang, has a dispute with the Founders. He has elected

1 not to assert a claim in this Court, opting instead for Massachusetts state court as his forum. Having made
2 that election, he cannot now claim that this Court has any role in his dispute.¹⁰

3 More fundamentally, any request that this Court maintain the Trust to satisfy contingent claims
4 that have not been previously raised in this Court would contravene the requirement that this Court
5 effectuate the Ninth Circuit's mandate. The Court's obligation to "implement both the letter and the spirit
6 of the mandate" prevents it from entertaining other issues that don't further the cause of executing the
7 mandate. *Pit River Tribe*, 615 F.3d at 1079 (first quote); *Thrasher*, 483 F.3d at 981 (supporting the
8 remainder of the sentence). The only issues argued and briefed to this Court prior to the appeal,
9 affirmance and issuance of the mandate were whether the settlement should be enforced and how to
10 protect the attorney lienholders. It would thus be inappropriate to expand post-mandate proceedings in
11 this Court beyond that which remains to be done to enforce the settlement.

12 **E. Administrative Matters Necessary To Effectuate The Settlement.**

13 The Founders request that the Court Order that the cash held in trust by BSF be distributed as
14 follows:

- 15 • [REDACTED]
- 16 • [REDACTED]
- 17 [REDACTED]
- 18 • [REDACTED]
- 19 [REDACTED]
- 20 • [REDACTED]
- 21 [REDACTED]
- 22 • [REDACTED]

23 ¹⁰ Mr. Chang cannot litigate his claims in two fora, and so his decision to litigate in Massachusetts
24 means that the most he can request from this Court at this late date is an Order freezing assets while he
25 attempts to prove his contingent claim in his chosen forum. Any such request would run afoul of
26 Fed.R.Civ.P. 64 which confers authority to grant prejudgment attachment only where the action is
27 brought in the federal court in which attachment is sought. Further, Fed.R.Civ.P. 64 requires that the
28 federal court apply the prejudgment attachment law of the state where it sits. *See* 13, *Moore's Fed. Prac.*
& *Proc.*, § 64.02[1], *et seq.* (2011). There is no provision of California attachment law permitting
prejudgment attachment for claims asserted in Massachusetts state court. Any right Mr. Chang has to
prejudgment attachment must be pursued in Massachusetts state court, not here.

1 The Founders request that the shares of Facebook common stock held in trust by BSF (including
2 the additional shares issued pursuant to the anti-dilution provision) be allocated as follows:

- 3 • [REDACTED]
- 4 • [REDACTED]
- 5 • [REDACTED]
- 6 • [REDACTED]

7 The Founders request that the Court's Order direct BSF to return to Facebook the existing stock
8 certificates representing the shares held in trust by BSF, direct Facebook to issue replacement stock
9 certificates to the recipients identified above in the specified quantities, and direct Facebook to list the
10 recipients as the owners of record of the shares on its stock ledger and all other appropriate corporate
11 records. See 7/2/08 Tr. at 70:9-14 (where the Court acknowledged that subsequent proceedings may be
12 required to address the names in which the stock is issued); see also *California Practice Guide: Federal
13 Ninth Circuit Civil Appellate Practice*, § 12:319 (“[T]he rule of mandate is designed to permit flexibility
14 where necessary, not prohibit it. Accordingly, the district court may enter orders that deviate somewhat
15 from the mandate, so long as they are not counter to its spirit.”). The Founders further request that the
16 Court's Order direct Facebook to include on each replacement stock certificate only the two legends
17 prescribed by the Court's judgment enforcing the Term Sheet, with an update to one of the legends as
18 described below.

19 The Court's judgment enforcing the Term Sheet ordered that the stock certificates representing the
20 settlement shares bear two legends, including the following legend:

21 THE SHARES REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO AN
22 AGREEMENT WITH REGARD TO THE VOTING OF SUCH SHARES, AS PROVIDED IN
23 THE CERTAIN TERM SHEET & SETTLEMENT AGREEMENT PURSUANT TO WHICH SUCH
24 SHARES WERE ORIGINALLY ISSUED. THE HOLDERS OF SUCH SHARES ARE
25 ENTITLED TO THE SAME ANTI-DILUTION RIGHTS AFFORDED THE ISSUER'S SERIES
26 D PREFERRED STOCK, AS PROVIDED IN SUCH TERM SHEET & SETTLEMENT
27 AGREEMENT. A COPY OF SUCH TERM SHEET & SETTLEMENT AGREEMENT IS ON FILE
28 IN THE OFFICE OF THE SECRETARY OF THE ISSUER.

Dkt. 476 at p. 2 (emphasis added). As written, this legend would require a prospective transferee to
review a confidential document (i.e., the hand-written Term Sheet) in order to be fully advised of the
restrictions and rights applicable to the shares. It would direct the prospective transferee to obtain a copy

1 of the Term Sheet from Facebook. Facebook would be confronted by the decision whether to breach its
2 obligations of confidentiality with respect to the Term Sheet or refuse to share it with the prospective
3 transferee, effectively creating a new restriction on transfer that was not contemplated by the settlement.

4 To remedy this problem, the Founders propose that the Court's Order direct that this legend on the
5 reissued stock certificates read as indicated in the following redlined version of the original legend:

6 THE SHARES REPRESENTED BY THIS CERTIFICATE MUST BE VOTED IN
7 ACCORDANCE WITH THE RECOMMENDATIONS OF THE BOARD OF DIRECTORS OF
8 THE ISSUER ARE SUBJECT TO AN AGREEMENT WITH REGARD TO THE VOTING OF
9 SUCH SHARES, AS PROVIDED IN THE CERTAIN TERM SHEET & SETTLEMENT
10 AGREEMENT PURSUANT TO WHICH SUCH SHARES WERE ORIGINALLY ISSUED.
11 THE HOLDERS OF SUCH SHARES ARE ENTITLED TO THE SAME ANTI-DILUTION
12 RIGHTS AFFORDED THE ISSUER'S SERIES D PREFERRED STOCK, AS PROVIDED IN
13 SUCH TERM SHEET & SETTLEMENT AGREEMENT. A COPY OF SUCH TERM SHEET &
14 SETTLEMENT AGREEMENT IS ON FILE IN THE OFFICE OF THE SECRETARY OF THE
15 ISSUER. THERE ARE NO OTHER STIPULATIONS OR RESTRICTIONS IMPOSED BY THE
16 AGREEMENT PURSUANT TO WHICH THESE SHARES WERE ISSUED.

17 Rather than directing a prospective transferee to obtain a copy of the Term Sheet from Facebook, the
18 updated legend would describe the rights and restrictions applicable to the shares using the phrasing from
19 the Term Sheet itself. The rights and restrictions would be evident to any prospective transferee,
20 permitting unfettered transfer without compromising the confidentiality of the Term Sheet.

21 By removing a potential obstacle to transfer, the updated legend comports with the understanding
22 of the Court and the parties that this stock was intended to be transferable. *See, e.g.,* 6/23/08 Tr. at 60:21-
23 61:2 ([REDACTED]

24 [REDACTED]). Indeed, the Founders put on the record their
25 understanding that there were no restrictions on the shares beyond the voting agreement and limitations, if
26 any, imposed by applicable federal securities laws. 7/2/08 Tr. at 41:6-14, 42:2-5. Facebook did not
27 contend otherwise in its response, not even after the Court reiterated its presumption that the stock is
28 negotiable. *Id.* at 42:20-24.

IV. CONCLUSION

For the reasons stated, the Founders respectfully request an Order directing the following:

1. That BSF distribute the cash in the trust account as follows:

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- a. [REDACTED]
- b. [REDACTED]
- c. [REDACTED]
- d. [REDACTED]
- e. [REDACTED]

- 2. That BSF return to Facebook the existing stock certificates representing the shares held in trust by BSF.
- 3. That Facebook issue replacement stock certificates to the following recipients in the following quantities:
 - a. [REDACTED]
 - b. [REDACTED]
 - c. [REDACTED]
- 4. That Facebook list these recipients as the owners of record of such shares on its stock ledger and all other appropriate corporate records.
- 5. That Facebook include on each replacement stock certificate only the following two legends:

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

THE SHARES REPRESENTED BY THIS CERTIFICATE MUST BE VOTED IN ACCORDANCE WITH THE RECOMMENDATIONS OF THE BOARD OF DIRECTORS OF THE ISSUER. THE HOLDERS OF SUCH SHARES ARE ENTITLED TO THE SAME ANTI-DILUTION RIGHTS AFFORDED THE ISSUER'S SERIES D PREFERRED STOCK. THERE ARE NO OTHER STIPULATIONS OR RESTRICTIONS IMPOSED BY THE AGREEMENT PURSUANT TO WHICH THESE SHARES WERE ISSUED.

