EXHIBIT 3

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
BUSINESS LITIGATION SESSION
CIVIL ACTION NO. 09-5391-BLS1

WAYNE CHANG and THE I2HUB ORGANIZATION, INC.,

Plaintiffs,

v.

CAMERON WINKLEVOSS, TYLER WINKLEVOSS, DIVYA NARENDRA, HOWARD WINKLEVOSS, CONNECTU, INC. (f/k/a CONNECTU LLC), SCOTT R. MOSKO, and FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER LLP,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FOR WANT OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM BY DEFENDANTS FINNEGAN, HENDERSON, FARABOW GARRETT & DUNNER LLP AND SCOTT R. MOSKO

Defendants Scott R. Mosko and the law firm of Finnegan, Henderson, Farabow, Garrett & Dunner LLP ("Finnegan") submit this memorandum of law in support of their motion to dismiss the claims in the Complaint asserted against them – namely, the claims for legal malpractice and related torts asserted in Counts X through XIII. As set forth below, these claims should be dismissed for lack of subject matter jurisdiction under Mass. R. Civ. P. 12(b)(1) and for failure to state a claim under Mass. R. Civ. P. 12(b)(6).

INTRODUCTION

Among its many claims, the Complaint includes four counts against Mr. Mosko and Finnegan – the lawyer and firm that defended Plaintiff Wayne Chang in a California lawsuit

accusing him of misappropriating proprietary information.[1] Although the California claims against Mr. Chang were dismissed with prejudice, the Complaint alleges that Mr. Mosko and Finnegan committed malpractice and other related torts in the course of the representation. The central allegation in each of these counts is that Mr. Mosko and Finnegan deprived Mr. Chang of his share of the proceeds of the settlement of a separate case between some of the same parties (but not Mr. Chang). For several reasons, these counts must be dismissed.

First, the claims must be dismissed under Mass. R. Civ. P. 12(b)(1) for lack of standing. This is because Mr. Chang has not suffered the injury – the deprivation of a share of the settlement proceeds – on which the claims are based. The proceeds that Mr. Chang claims he has been deprived of have not been distributed to anyone. They are being held in trust for "any lawful claimant" pursuant to an order entered by the United States District Court for the Northern District of California. Mr. Chang's rights to these proceeds therefore remain fully intact. Nothing is stopping him from pursuing a claim to them. And, in any event, the settlement is the subject of an appeal. If the appeals court sets aside the putative settlement, then there will be no settlement proceeds for any party – and no proceeds that Mr. Chang could claim a share of. Thus, Mr. Chang's claim that he has been deprived of these proceeds is not cognizable.

Second, if the Court determines nonetheless that the injury alleged in the Complaint is sufficient to confer standing, then the claims against Mr. Mosko and Finnegan are necessarily time-barred and must be dismissed under Mass. R. Civ. P. 12(b)(6). The Complaint shows that more than one year before he commenced this case, Mr. Chang knew the salient alleged facts that make up his claim for malpractice, *i.e.*, that Mr. Mosko allegedly excluded him from the

[1] As a California lawyer who performed all of the legal work at issue in California, Mr. Mosko also is filing a motion to dismiss for lack of personal jurisdiction.

settlement negotiations. Under California's one-year statute of limitations for malpractice claims, which controls here, Mr. Chang's claims therefore are time-barred.

Third, the claims against Mr. Mosko and Finnegan must be dismissed because, in critical respects, the Complaint lacks factual allegations to support them as required by *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008). By way of example, while the Complaint alleges that Mr. Mosko and Finnegan aided and abetted other defendants in committing intentional torts against Mr. Chang, it fails wholesale to include any factual allegations that even remotely – much less plausibly – suggest that Mr. Mosko and Finnegan even knew that the other defendants supposedly were engaging in those intentional torts. For this reason and others, the Complaint simply fails to state a claim against Mr. Mosko and Finnegan.

BACKGROUND

A. The Relevant Allegations of the Complaint.

This case arises out of Mr. Chang's business dealings with other defendants in this lawsuit: namely, Cameron, Tyler and Howard Winklevoss and their colleague Divya Narendra (collectively, the "Winklevoss Defendants"). The Winklevoss Defendants were founders and/or directors of ConnectU, Inc. ("ConnectU"), an entity that operates a social networking website. Compl. ¶ ¶ 7-10, 20. ConnectU is a defendant here as well.

Mr. Chang is the developer of software called i2hub. *Id.* ¶ 17. According to the Complaint, Mr. Chang and the Winklevosses formed a partnership in the fall of 2004 to integrate the ConnectU website with the i2hub software. *Id.* ¶ ¶ 19-39. As part of the deal, the Complaint alleges that Mr. Chang received an option to exercise a 15% stake in ConnectU. *Id.* ¶ 38.

In September 2005, the Winklevosses and ConnectU were sued in California state court by The Facebook Inc. ("Facebook") for misappropriating proprietary information. *Id.* ¶ ¶ 2, 94.

The case was later removed to the United States District Court for the Northern District of California (the "California District Court"). *Id.* ¶ 2. Mr. Chang was added as a defendant after removal. *Id.* ¶ ¶ 2, 95. Mr. Mosko and Finnegan were retained to represent all of the defendants in the California case, including Mr. Chang. *Id.* ¶ ¶ 96-98.

In January 2008, the California District Court ordered the parties to participate in alternative dispute resolution, and the case was mediated the following month. *Id.* ¶ 107; Ex. A at 2 (June 25, 2008 Order).[2] According to the Complaint, the mediation resulted in a settlement not only of the California case, but also of a separate earlier-filed case in the United States District Court for the District of Massachusetts involving some of the same parties. Compl. ¶ ¶ 2-3, 108. In the Massachusetts case, the roles were reversed: ConnectU was the plaintiff and Facebook was a defendant. ConnectU alleged that Facebook's founder, Mark Zuckerberg, had stolen the idea for what ultimately was launched as facebook.com from the Winklevosses and others. *Id.* ¶ 2. Mr. Chang was not a party to these claims by ConnectU. *Id.*

Pursuant to the putative agreement reached in the mediation, the California case was dismissed with prejudice – including all claims against Mr. Chang, without any payment or other consideration from him. Ex. B at 2 (Dec. 15, 2008 Order). The Massachusetts case – to which Mr. Chang was not a party – was to be dismissed as well. According to the Complaint, Facebook agreed to pay $20 million in cash and 1,253,326 shares of Facebook stock in exchange for all shares of Connect U. Compl. ¶ 109.

The putative settlement agreement did not apportion the proceeds owed by Facebook among any ConnectU stakeholder. Ex. A at 3 (court order setting forth settlement terms). It

[2] This Court may properly consider orders and records of other courts without converting this motion into one for summary judgment. *See Reliance Ins. Co. v. City of Boston*, 71 Mass. App. Ct. 550, 555 (2008). Likewise, it may properly consider documents – such as the settlement agreement – that the plaintiff relied on in framing the complaint. *Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 n.4 (2004).

simply identified the consideration that Facebook would pay in exchange for all ConnectU shares. *Id.* As explained below, the proceeds owed by Facebook have not been distributed to anyone yet.

Notwithstanding that Mr. Chang was not a party to the claims against Facebook, the Complaint alleges that he is entitled to a share of the settlement proceeds owed by Facebook by virtue of his alleged stake in ConnectU. *Id.* ¶ 4.

B. The California Litigation Over the Alleged Settlement.

After the mediation, a dispute arose over the terms of the alleged agreement, and ConnectU and the Winklevosses asserted that it was void. Ex. A at 8-11. Facebook filed a motion with the California District Court to enforce the putative settlement. *Id.* at 2, 4. After granting Facebook's motion, *id.* at 12, the District Court ordered Facebook to deposit the shares and cash it owed under the alleged agreement with a special master. Ex. C (July 2, 2008 Order).

A few months later, in November 2008, the Court ordered the special master to transfer the proceeds paid by Facebook to the law firm of Boies, Schiller & Flexner LLP ("Boies Schiller"), which had taken over the representation of the Winklevosses, Mr. Narendra, and ConnectU. Ex. D (Nov. 21, 2008 Order). The order directed Boies Schiller to hold the proceeds "in trust" and to do so not only for the benefit of its clients, but also for "any lawful claimant." *Id.* Boies Schiller has not distributed any cash or Facebook stock to anyone. Ex. E (Declaration of D. Michael Underhill) ¶ 4. Mr. Chang has not made a claim to Boies Schiller for any portion of these settlement proceeds. *Id.* ¶ 5.

The California District Court's decision to enforce the alleged settlement now is on appeal before the United States Court of Appeals for the Ninth Circuit. *See* Exs. F and G (Notices of Appeal). The appeal will address "[w]hether the district court properly enforced the

handwritten [settlement agreement] even though, among other things, it omits material terms necessary to make a binding contract," "was procured through Facebook's fraud," and "is voidable under federal securities laws and common law fraud principles...." Ex. H (Dec. 29, 2008 Statement of Issues). If the Winklevosses and Mr. Narendra prevail, the settlement agreement will be set aside.

Under the current schedule, briefing before the Ninth Circuit will be complete in April 2010. Ex. I (1/22/10 Letter to Clerk of Court regarding briefing schedule).

C. Mr. Chang's Claims Against Mr. Mosko and Finnegan.

The Complaint asserts counts against Mr. Mosko and Finnegan for professional negligence (Count X), conspiracy (Count XI), aiding and abetting (Count XII), and tortious interference (Count XIII).[3] Each of these counts is based on the allegation that Mr. Mosko and Finnegan deprived Mr. Chang of his share of the settlement proceeds paid by Facebook. *See id.* ¶ 175 (Count X) (alleging that Mosko and Finnegan are responsible for "depriving Chang of his rightful share of the proceeds of the Facebook settlement"); *id.* ¶ 181 (Count XI) (alleging that Mosko and Finnegan caused Chang to be "deprived of his rightful share of the settlement proceeds"); *id.* ¶ 186 (Count XII) (same); *id.* ¶ 191 (Count XIII) (alleging that Mosko and Finnegan "exclude[d] Chang ... from asserting his rights in the settlement proceeds").

Mr. Mosko and Finnegan dispute the Complaint's allegations, but accept them as true for purposes of this motion, as required by Rule 12(b)(6).

[3] Although Mr. Chang's company i2hub is a named plaintiff in addition to Mr. Chang himself, the Complaint does not allege any conduct by Mr. Mosko and Finnegan against i2hub. We therefore assume that the claims against Mr. Mosko and Finnegan are asserted only by Mr. Chang. To the extent they are asserted by i2hub as well, they are subject to dismissal given the lack of supporting allegations.

ARGUMENT

I. MR. CHANG LACKS STANDING.

It is well-settled that, to proceed with his or her claims, a plaintiff must have standing. *Barbara F. v. Bristol Div. of Juvenile Court Dept.*, 432 Mass. 1024, 1024 (2000). This means that "a litigant must show that the challenged action has caused the litigant injury." *Id.*; *Go Best Assets Ltd. v. Goldings*, No. 010577BLS1, 2007 WL 3054814, *4 (Mass. Super. Sept. 19, 2007).[4] Injuries that are "speculative," "remote," or "indirect" are insufficient. *Ginther v. Comm' of Ins.*, 427 Mass. 319, 323 (1998); *see also Slama v. Attorney Gen.*, 384 Mass. 620, 624-25 (1981). Indeed, to confer standing, the injury suffered by the plaintiff must have been a "'direct consequence of the complained of action.'" *Barbara F.*, 432 Mass. at 1024 (quoting *Ginther*, 427 Mass. at 323).

This elementary requirement is of "critical significance" – for it ensures that courts are called upon to adjudicate only actual controversies. *Barbara F.*, 432 Mass. at 1024. Because it goes to the question of whether a "litigant is entitled to have the court decide the merits of the dispute," standing presents an issue of subject matter jurisdiction. *Id.*; *Ginther*, 427 Mass. at 322. Accordingly, it is appropriately raised under Mass. R. Civ. P. 12(b)(1), and the court may consider affidavits and other matters outside the face of the Complaint. *Ginther*, 427 Mass. at 322 n.6 & accompanying text.[5]

In keeping with these well-established principles, Mr. Chang's claims against Mr. Mosko and Finnegan must be dismissed for lack of standing. Each is based on the allegation that Mr.

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[4] Copies of all unpublished and state cases outside of Massachusetts have been provided in the Appendix submitted herewith.

[5] Relief may be granted here under Rule 12(b)(6) as well. Mr. Chang's lack of standing can be established by the pertinent count orders standing alone, and court orders may be properly considered on a Rule 12(b)(6) motion. *See Reliance Ins.*, 71 Mass. App. Ct. at 555.

Mosko and Finnegan deprived Mr. Chang of his alleged share of the settlement proceeds paid by Facebook. *See* Compl. ¶ ¶ 175, 181, 186, 191. As noted above, however, these proceeds are being held in trust for "any lawful claimant" pursuant to an order of the California District Court. *See* Ex. D (Nov. 21, 2008 Order). Thus, Mr. Chang has not been deprived of his alleged share of the settlement proceeds. To the contrary, any rights he has to them remain fully intact. Indeed, if Mr. Chang establishes that he is a "lawful claimant," he will obtain his share of the proceeds if and when they are distributed. Accordingly, Mr. Chang has not suffered the injury that forms the basis of his claims against Mr. Mosko and Finnegan.

Making these claims even more remote is the pending appeal before the Ninth Circuit. The appeal will decide whether the putative settlement agreement is enforceable. *See* Ex. H. If the Ninth Circuit declares the settlement void, then the settlement will be rolled back, and there will be no settlement proceeds at all. In that event, there would be nothing for Mr. Chang to claim a share of and no share for him to be deprived of.

To be clear, this is not merely an issue of timing. Going forward, either (1) Mr. Chang will assert a claim to the undistributed proceeds and will be determined to have a rightful interest in them by virtue of his alleged interest in ConnectU (in which case, he will get his share); (2) Mr. Chang will assert a claim to the proceeds and will be determined to have no rightful interest in ConnectU and thus no rightful interest in proceeds (in which case, he will have no claim that he has been deprived of a "rightful" share); (3) Mr. Chang will fail to assert a claim to the proceeds (in which case, he will only have himself to blame); or (4) the Ninth Circuit will void the alleged settlement (in which case, there will be no proceeds for Mr. Chang to claim deprivation of). Regardless, Mr. Chang will not, now or in the future, have a basis to pursue the claims he has pled against Mr. Mosko and Finnegan.

Courts routinely dismiss, under a variety of doctrines, legal malpractice claims in similar postures, where the underlying issues are not yet resolved and may not be resolved in an injurious fashion. For instance, in *Wehringer v. Powers & Hall, P.C.*, 874 F. Supp. 425 (D. Mass. 1995), a diversity action decided under Massachusetts law, a client sued his attorney for malpractice in connection with litigation to recover damages for the unlawful tape recording of the client by third parties. The court dismissed, holding that a cause of action for legal malpractice did not lie: "accepting as true plaintiff's allegation that the defendant acted negligently . . . plaintiff may not press his claim for damages without proof that he probably would have succeeded in his underlying lawsuit. . . . [Plaintiff] cannot offer such proof until the underlying lawsuit has been resolved." 874 F. Supp. at 427-28. *See also Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 271 (Ky. Ct. App. 2005) (dismissing malpractice action, because the underlying cases in which the malpractice allegedly occurred was still unresolved: "when a claim for legal malpractice is based on litigation negligence, whether the attorney's negligence has caused any injury or damages necessarily is contingent on the final outcome of the underlying case."); *Parametric Capital Mgmt. LLC v. Lacher*, 791 N.Y.S.2d 10, 10 (N.Y App. Div. 2005) (upholding dismissal of malpractice action "since subject matter of [lawyer's] services []was still pending . . . [and] there was no adverse decision that--but for defendants' alleged negligence--would have been more favorable to plaintiffs"); *Bierman v. Miller*, 639 So.2d 627, 628 (Fla. Dist. Ct. App. 1994)("no cause of action for legal malpractice 'should have been deemed to have accrued until the existence of redressable harm has been established'") (citations omitted); *City of Plaquemine v. Brand*, 755 F. Supp. 698, 700 (M.D. La. 1990)(dismissing legal malpractice case because underlying suit still pending); *Swanson v. Sheppard*, 445 N.W.2d 654, 659 (N.D. 1989) (reversing a malpractice judgment against an

attorney, because the client still could pursue the remedy that he claimed the attorney overlooked); *Semenza v. Nevada Med. Liab. Ins. Co.*, 765 P.2d 184, 186 (Nev. 1988) (reversing malpractice judgment and holding that "where damage has not been sustained or where it is too early to know whether damage has been sustained, a legal malpractice action is premature and should be dismissed"); *Chapman v. Garcia*, 463 So.2d 528, 529 (Fla. Dist. Ct. App. 1985) (rejecting claim that a plaintiff's lawyer committed malpractice by letting the statute of limitations lapse, for the underlying malpractice claim was still pending; "so long as the medical malpractice claim against the defendants remains viable and pending, there can be no cause of action against plaintiffs' counsel for negligently allowing the statute of limitations to expire"); *Eddleman v. Dowd*, 648 S.W.2d 632, 633-34 (Mo. Ct. App. 1983) (dismissing legal malpractice case because underlying suit was still pending); *Pudalov v. Brogan*, 427 N.Y.S.2d 345, 348 (N.Y. Sup. Ct. 1980) (dismissing malpractice claim, holding that claim lacked the 'necessary element" of damages because the underlying case was not yet resolved); *Philips v. Giles*, 620 S.W.2d 750, 750-51 (Tx. Civ. Ct. App. 1981) (holding that no cause of action for malpractice in connection with the provision of tax advice had accrued because the IRS had not yet issued any determination that the lawyer's advice was incorrect or assessed any liability with respect to the transaction); *Wright v. Diebold*, 217 N.Y.S.2d 238, 239 (N.Y. Sup. Ct. 1961) (dismissing malpractice action because the underlying action in which the malpractice allegedly occurred was still pending, stating: "Damage is an essential element in the successful pleading of a cause of action in malpractice, and it is conceded that if plaintiff succeeds in the collection of the debt, damage will not be recoverable....").

This case is even more extreme. Not only is Mr. Chang presently unable to establish the injury that forms the basis of his claims against Mr. Mosko and Finnegan, he has not

demonstrated that he will be able to do so in the future. Thus, under well-settled Massachusetts principles of standing and subject matter jurisdiction, these claims must be dismissed under Mass. R. Civ. P. 12(b)(1).[6]

II. MR. CHANG'S CLAIMS ARE TIME-BARRED.

For the reasons stated above, Mr. Chang has not suffered the injury on which his claims against Mr. Mosko and Finnegan are based and therefore lacks standing. If the Court rejects this position, however, and determines that the injury alleged in the Complaint is sufficient to confer standing, then Mr. Chang's claims are necessarily barred by the statute of limitations.[7] This is evident from the face of the Complaint. Thus, in the alternative, Mr. Chang's claims against Mr. Mosko and Finnegan must be dismissed with prejudice on statute of limitations grounds under Rule 12(b)(6). *See Epstein v. Siegel*, 396 Mass. 278, 279 (1985) (Rule 12(b)(6) motion "is an appropriate vehicle" for raising statute of limitations defense); *Babco Indus., Inc. v. New England Merch. Nat'l. Bank*, 6 Mass. App. Ct. 929, 929 (1978) (Rule 12(b)(6) motion "lies against a complaint which shows on its face that the statute of limitations has run prior to the date the action was commenced").

A. Mr. Chang's Negligence Claim (Count X) Is Barred By the Statute of Limitations.

According to the Complaint, Mr. Chang learned of the conduct underlying his purported negligence claim against Mr. Mosko and Finnegan (their alleged exclusion of him from the settlement negotiations) more than one year prior to commencing this action. His alleged negligence claim therefore is time-barred.

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[6] Alternatively, the Court could achieve the same result by finding that Mr. Chang has not pled facts to support an element of each of his claims – damages – and thus has failed to state a claim under Rule 12(b)(6).

[7] The applicable statute of limitation is tolled if there is no injury. Cal. Civ. Code § 340.6(a)(1) (West 2010). If the Court determines that there is a cognizable injury (and thus finds standing), then this tolling provision does not apply.

1. California's One-Year Statute of Limitations Applies.

California has a one-year statute of limitations for legal malpractice. Cal. Civ. Code § 340.6 (West 2010). Under Massachusetts choice of law principles, this statute applies here. In *New England Telephone & Telegraph Co. v. Gourdeau Constr. Co.*, 419 Mass. 658 (1995), the Supreme Judicial Court "departed from the traditional rule of law that characterized limitations statutes as procedural and automatically applied the statute of limitations of the forum state." *Nierman v. Hyatt Corp.*, 441 Mass. 693, 695 (2004) (applying shorter Texas statute to bar to claim against hotel chain). In its place, it "adopted instead a functional approach that treats the issue as a choice of law question. . . ." *Id.*; *see also Shamrock Realty Co. v. O'Brien*, 72 Mass. App. Ct. 251, 255-57 (2008) (discussing Massachusetts choice of law analysis regarding statutes of limitations). Under this approach, if a state with a closer connection to the case has a shorter statute of limitations that would bar the case, the shorter statute applies, absent a compelling interest by the forum state.

Nierman is illustrative. It involved a claim for injuries sustained by Massachusetts residents at a Dallas-Fort Worth hotel. *Nierman*, 441 Mass. at 694. The defendant, Hyatt, operated a hotel in Massachusetts and regularly solicited business in Massachusetts. *Id.* Because the Massachusetts statute would permit the claim whereas the Texas statute would bar it, the court considered: 1) whether Massachusetts had a substantial interest in permitting the claim to go forward; and 2) whether Texas had a more significant relationship to the parties and the negligence claim. *Id.* at 696. The court determined that all of the events constituting the alleged negligence took place in Texas, and that Massachusetts did not have a substantial interest that would be advanced by the plaintiffs' claims, even though they were Massachusetts residents. *Id.*

at 697. It therefore applied the Texas statute and declared the claims time-barred, noting that Texas "has the dominant interest in having its own limitations statute enforced." *Id.* at 698.

This approach requires application of California's statute of limitations here. While Mr. Chang is a Massachusetts resident, he sought Finnegan and Mr. Mosko's assistance in a matter brought against him in California. Mr. Mosko's representation of Mr. Chang took place in California. The mediation that produced the alleged settlement – and in which Mr. Chang claims Mr. Mosko and Finnegan were negligent – took place in California and in fact was ordered by a California court. And the *res* of this case – the settlement proceeds that Mr. Chang seeks – are being held pursuant to California court orders. The substantial interest here clearly belongs to California. Massachusetts' interest in a professional negligence action against a California lawyer based on his performance in a California settlement negotiation ordered by a California court simply does not compare.[8]

2. Mr. Chang's Legal Malpractice Claim Is Barred by the One-Year Statute of Limitations.

The Complaint alleges that Mr. Mosko sent Mr. Chang an email on February 25, 2008, more than one year before the commencement of this action, advising him that ConnectU and Facebook had reached a settlement of all claims in the pending cases. Compl. ¶ 114. This allegation establishes that the negligence claim against Mr. Mosko and Finnegan is time-barred.

Under California law, "an action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission..." Cal. Civ. Code § 340.6(a) (West 2010). This one-year limitations period is triggered by the client's discovery of

[8] Additional facts establishing California's nexus to the case are discussed in Mr. Mosko's motion to dismiss for lack of personal jurisdiction filed herewith at pp. 2-5.

the facts constituting the wrongful act or omission, not by his discovery that such acts constitute professional negligence. *Peregrine Funding, Inc. v. Sheppard Mullin Richter& Hampton, LLP*, 133 Cal. App. 4th 658, 685 (Cal. Ct. App. 2005) ("It is irrelevant that the plaintiff is ignorant of his legal remedies or the legal theories underlying his cause of action."); *McGee v. Weinberg*, 97 Cal. App. 3d 798, 803 (Cal. Ct. App. 1979) ("[t]he test is whether the plaintiff has information of circumstances sufficient to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his or her investigation"). "Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." *Jolly v. Eli Lilly & Co*, 44 Cal. 3d 1103, 1111 (Cal. 1988).

Here, the negligence claim against Mr. Mosko and Finnegan is based on the allegations that Mr. Mosko excluded Mr. Chang from the settlement negotiations and deprived him of information pertaining to the putative settlement that resulted. Compl. ¶ ¶ 106, 107, 111, 115-17. The Complaint makes clear, however, that Mr. Chang learned of this alleged conduct on February 25, 2008 – when Mr. Mosko emailed him to inform him that ConnectU and Facebook had reached a settlement. *Id.* ¶ 114. Indeed, this email necessarily revealed that an alleged settlement had been negotiated in Mr. Chang's absence and that the terms were not being shared with him – *i.e.*, that he was being excluded. Thus, as of the date of that email, Mr. Chang had "information ... sufficient to put a reasonable person on inquiry" regarding his claims against Mr. Mosko and Finnegan. *McGee v. Weinberg*, 97 Cal. App. 3d at 803. Yet Mr. Chang waited more than a year and a half, until December 21, 2009, to file his complaint. Mr. Chang's legal malpractice claim is therefore time-barred by the one-year statute and should be dismissed with prejudice.

B. Mr. Chang's Remaining Claims Against Mr. Mosko and Finnegan Also Are Time-Barred.

In addition to professional negligence, the Complaint alleges three other counts against Finnegan and Mr. Mosko: civil conspiracy (Count XI); aiding and abetting (Count XII) and tortious interference (Count XIII). However, Counts XI, XII and XIII are merely malpractice claims re-pled as other causes of action and therefore should be dismissed as well under the one-year statute of limitations.

"The statute of limitations to be applied is determined by the nature of the right sued upon or the principal purpose of the action, not by the form of the action or the relief requested." *Barton v. New United Motor Mfg.*, 43 Cal.App.4th 1200, 1207 (Cal. Ct. App. 1996). In this regard, any claim arising out of the provision of legal services is subject to California's one-year statute of limitations, regardless of how the claim is characterized. *Quintilliani v. Mannerino*, 62 Cal.App.4th 54 (Cal. Ct. App. 1998) (one-year statute of limitations governed claims against lawyer for breach of fiduciary duty, breach of contract, and negligent misrepresentation).

Although characterized differently, Counts XI, XII and XIII are based upon the very same allegations as the malpractice claim. Indeed, each is based on alleged conduct by Mr. Mosko and Finnegan related to the negotiation of the settlement (conduct, which by its very definition, arises from their legal representation of Mr. Chang). *See* Compl. ¶ ¶ 179, 184. And each boils down to the allegation that Mr. Mosko and Finnegan were responsible for Mr. Chang's alleged loss of his share of the settlement proceeds (an allegation which, again, arises from their legal representation of Mr. Chang). *See id.* ¶ ¶ 181, 186, 191. These allegations fall squarely within the rubric of a legal malpractice claim and should be treated as such. Thus, Counts XI, XII and XIII also should be dismissed as time-barred.

III. MR. CHANG FAILS TO ALLEGE FACTS TO SUPPORT HIS CLAIMS.

Even assuming that Mr. Chang had standing to pursue his claims against Mr. Mosko and Finnegan, and even assuming that the claims were not barred by the controlling statute of limitations, Mr. Chang's claims against Mr. Mosko and Finnegan still must be dismissed for failure to state a claim under Rule 12(b)(6) – because the Complaint lacks factual allegations to support them.

The Supreme Judicial Court has made clear that a Complaint must contain "more than labels and conclusions." *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). It must contain "factual allegations." *Id.* And those factual allegations "must be enough to raise a right to relief above the speculative level ...." *Id.* In this regard, it is not sufficient if the factual allegations in a Complaint are merely consistent with an entitlement to relief. *Id.* Rather, the Complaint's factual allegations must "plausibly suggest[]" an entitlement to relief. *Id.* As set forth below, the Complaint's allegations against Mr. Mosko and Finnegan fail to meet this standard.

A. Negligence (Count X).

As noted above, Mr. Chang contends in the negligence count that Mr. Mosko and Finnegan engaged in malpractice by allegedly excluding him from settlement discussions and thereby depriving him of his supposed share of the proceeds. *See* Compl. ¶ ¶ 174-75. The Complaint alleges that Mr. Chang was entitled to this share by virtue of his status as a ConnectU shareholder. *Id.* ¶ ¶ 1,4. The Complaint, however, fails to allege any facts to support a critical element of this claim – that, but for the alleged negligence, "a better result could have been obtained. . ." *Orrick, Herrington & Sutcliffe, LLP v. Superior Court*, 104 Cal.App.4th 1052, 1057 (Cal. Ct. App. 2003). It does not identify any particular result that would have been better.

Nor does it allege what could have been done to obtain such a result. Indeed, it does not even allege this element in boilerplate terms.[9] And for good reason. The facts, as incorporated into the Complaint, actually establish the contrary.

The alleged settlement agreement – which is integral to the Complaint and deemed part of it for purposes of this motion, *see Marram*, 442 Mass. at 45, n.4 – did not apportion the settlement proceeds among any of the ConnectU shareholders. *See* Ex. A at 3 (court order setting out settlement terms). Rather, it simply identified the total consideration that Facebook agreed to pay in exchange for all ConnectU shares. *Id.* Thus by its plain terms, the alleged agreement did not deprive Mr. Chang of any supposed interest in the settlement. It left Mr. Chang in the same position as every other ConnectU shareholder.

To the extent that Mr. Chang believes that Mr. Mosko should or could have somehow altered the wording of the putative settlement to explicitly apportion Mr. Chang's alleged share of the proceeds (a theory which, again, is not pled in the Complaint), Mr. Chang is wrong *as a matter of law* based on the decision of the California District Court in the underlying matter. This is because, as the Complaint makes clear, Mr. Chang's only interest in the putative settlement was as a minority shareholder of ConnectU, the corporation whose shares were transferred to Facebook in exchange for the settlement proceeds. Compl. ¶ 4. Indeed, the largest possible interest Mr. Chang alleges he owned in ConnectU was a 15% share. *Id.* ¶ 1.[10] And as

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[9] The Complaint does not even allege that Mr. Chang ever told Mr. Mosko that he had interest in ConnectU and was entitled to a share of any settlement. To the contrary, the Complaint makes clear that Mr. Chang never raised the issue. Compl. ¶ ¶ 101-103. Although the Complaint alleges, in cursory fashion and without any explanation, that Mr. Mosko was somehow "aware of" Mr. Chang's interest nevertheless, a mere "conclusion" such as this, absent supporting factual allegations, is insufficient. *Iannacchino*, 451 Mass. at 636.

[10] While the Complaint alleges that Mr. Chang owned a larger interest in a different company (WCG), which purportedly operated as some sort of holding company, it makes clear that ConnectU was a distinct legal entity. *Id.* ¶ 11. Moreover, the Complaint concedes that WCG was dissolved approximately three years prior to the time of the settlement negotiations. *Id.* ¶ ¶ 90-92.

the California District Court held, the putative settlement required only majority approval of ConnectU's shareholders (which the Court found was obtained). *See* Ex. A at 4.

Given that (1) the alleged settlement agreement, by its plain terms, treated all of the shareholders equally, did not apportion the proceeds among any of them, and left Mr. Chang's alleged share of the proceeds fully intact, and (2) Mr. Chang allegedly was just a minority shareholder in the company whose shares were traded in the settlement, the Complaint contains no factual allegations that plausibly suggest that Mr. Mosko could have obtained a better result for Mr. Chang. It therefore fails to state a claim for professional negligence.

B. Conspiracy / Aiding & Abetting (Counts XI and XII).

The Complaint also alleges counts against Mr. Mosko and Finnegan for *intentional* torts. Specifically, it alleges that they are liable for conspiring with and aiding and abetting the Winklevoss Defendants in allegedly denying Mr. Chang his share of the settlement.

The Complaint, however, lacks factual allegations to support a basic element of these claims – that Mr. Mosko *knew* that the Winklevoss Defendants allegedly planned to wrongfully deprive Mr. Chang of his share of the settlement. *See Kidron v. Movie Acquisition Corp.*, 47 Cal. Rptr.2d 752, 758 (Cal. Ct. App. 1995) (civil conspiracy requires that the defendants "have actual knowledge that a tort is planned and concur in the tortious scheme with knowledge of its unlawful purpose"); *Casey v. U.S. Bank Nat'l. Assoc.*, 26 Cal. Rptr.3d 401, 406 (Cal. Ct. App. 2005) ("liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted"). Indeed, the Complaint includes no allegations of fact that even remotely suggest that Mr. Mosko and Finnegan had "actual knowledge that a tort [was being] planned." It does not allege that any of the Winklevoss Defendants ever told Mr. Mosko that they intended to deprive Mr. Chang of his interest in the

settlement. It does not allege that Mr. Chang ever communicated to Mr. Mosko a concern that the Winklevoss Defendants might not honor his alleged interest. Nor does it even allege that either Mr. Chang or a Winklevoss Defendant told Mr. Mosko that there was a dispute between them over Mr. Chang's alleged interest (not that such an allegation, alone, would be enough).

Indeed, the most that the Complaint alleges is that Mr. Mosko was "aware" that Mr. Chang might have an interest in ConnectU (and thus in the settlement proceeds) and "should have known" that Mr. Chang would be deprived of that interest. Compl. ¶ ¶ 99-100, 110. But even to the extent that these allegations are anything more than mere "conclusions," which *Iannacchino* declared are insufficient, they sound in negligence, not an intentional tort. They do not come close to "plausibly" suggesting that Mr. Mosko actually knew that the Winklevoss Defendants were planning to commit intentional torts against Mr. Chang.[11]

C. Tortious Interference (Count XIII).

Mr. Chang's final claim against Mr. Mosko and Finnegan – for tortious interference – suffers from the same flaw. This claim asserts that Mr. Mosko interfered in Mr. Chang's relationship with the Winklevoss Defendants in a fashion that deprived him of his share of the settlement proceeds. Naturally, the essential element of such a claim is that the defendant engaged in intentional acts that caused "actual disruption of the relationship." *Korea Supply Co. v. Lockheed Martin Corp.*, 131 Cal.4th 1134, 1153 (Cal. 2003). The Complaint, however, fails to identify any acts by Mr. Mosko that caused "actual disruption" to Mr. Chang's relationship with the Winklevoss Defendants. Rather, it alleges that the disruption to the relationship was caused by the Winklevoss Defendants. Indeed, it alleges that the Winklevoss Defendants

[11] Although the "Fact" section of the Complaint is conspicuously silent on the issue, the conspiracy and aiding and abetting counts themselves include a boilerplate allegation of knowledge in the course of parroting the elements of each offense. *See* Compl. ¶ 178, 184. As noted above, however, conclusory assertions such as these, unsupported as they are by any allegations of fact, are insufficient under *Iannacchino*.

themselves terminated their relationship with Mr. Chang – and that they did so three years before the settlement negotiations and thus three years before any alleged conduct by Mr. Mosko. Compl. ¶ ¶ 85-93. Likewise, it alleges that the Winklevoss Defendants themselves "refused to honor Chang's ownership in ConnectU, including by refusing to provide Chang with his share of the proceeds ...." *Id.* ¶ 129. It does not allege that Mr. Mosko or Finnegan had any influence, or played any role, in these supposed decisions by the Winklevoss Defendants.

The Complaint seems to base the interference claim on the allegation that Mr. Mosko excluded Mr. Chang from the settlement discussions. *See id.* ¶ ¶ 106-117. But this alleged act did not cause any "actual disruption" to Mr. Chang's relationship with the Winklevoss Defendants. As noted above, the putative settlement agreement did not apportion the settlement proceeds among any of the ConnectU stakeholders. *See* Ex. A at 3. It therefore left Mr. Chang's rights to them untouched. Thus, even accepting as true the allegation that Mr. Mosko excluded Mr. Chang from the negotiations, such conduct did not cause any "actual disruption" to Mr. Chang's rights under his alleged agreements with the Winklevoss Defendants.

CONCLUSION

For the reasons set forth above, Mr. Mosko and Finnegan respectfully request that the Court dismiss all claims against them.

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