OPPOSITION TO EMERGENCY MOTION UNDER CIRCUIT RULE 27-3

Case Nos. 08-16745, 08-16849, 08-16873

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE FACEBOOK, INC., et al.,
Plaintiffs-Appellees-Cross-Appellants,

v.

CONNECTU, INC. (formerly known as CONNECTU LLC), CAMERON WINKLEVOSS, TYLER WINKLEVOSS, DIVYA NARENDRA,
Defendants-Appellants-Cross-Appellees,

Appeal from the United States District Court Northern District of California,
Case No. CV 07-01389-JW, The Honorable James Ware

APPELLEES-CROSS-APPELLANTS' OPPOSITION TO APPELLANTS' FOURTH EMERGENCY MOTION TO STAY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellees state that Mark Zuckerberg is an individual. No parent corporation owns 10% or more of the stock of Facebook, Inc. and there are no publicly-held corporations that own 10% or more its stock.

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INTRODUCTION

Appellants' belated emergency request to reconsider this Court's previous denial of their request for a stay should be denied.[1] With one exception, this renewed motion to stay, and the alternative writ, present no new facts or arguments than those previously presented to this Court, and rejected by this Court. *Compare* Parke, Ex. Q at CU299-309 with 11/25 Mot. to Stay at 7-11, 18-21.[2] Even that new argument was considered and over-ruled by the District Court in its latest ruling. Parke, Ex. V at CU345 & CU346 n.5 Motions for a stay have now been denied twice by the District Court and once by this Court.[3] Parke, Exs. F, I, V. Appellants thus bear a "substantially greater" burden of persuasion to receive any stay now from the appellate court. *See Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970) (Wisdom, J.). Appellants cannot meet this heightened burden.

The only new argument raised in this "emergency" filing is that the District Court lacked jurisdiction to implement its Judgment. Appellants are wrong for two

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[1] Appellants also claim alternatively that its filing is a petition for a writ of mandamus. Facebook sought guidance from the clerk as to how to proceed, and were instructed not to file papers with respect to the alternative writ petition unless separately instructed to do so by the Court. *See* Circuit Rule 21-4.

[2] Appellants' merits arguments cite to their 57-page Opening Brief, which they incorporate liberally by reference. Mot. at 8-11. Due to page limitations, Facebook presents an abbreviated argument justifying the denial of the motion to stay. Should this Court wish additional briefing, Facebook will provide it.

[3] For ease of reference, copies of this Court's and the District Court's earlier Orders denying requests for stays are attached hereto. Facebook also requests that this motion be referred to the Motions Panel that decided the prior stay motion. *See* Circuit Rule 27-1(4) advisory committee note.

reasons. First, Appellants' notice of appeal was defective, as even the District Court noted it had not yet issued a final appealable order. The District Court thus had jurisdiction to perform any acts after July 2, 2008 related to the case. Second, the District Court had jurisdiction to enforce its Judgment irrespective of an appeal.

Appellants also incorrectly claim that something is new because ConnectU's shares will be delivered to Facebook on December 15, 2008. Mot. at 6-8. The exact same argument was raised in the previous motion to stay. *Compare* Parke, Ex. Q at CU298-309 with 11/25 Mot. to Stay at 1. The Court rejected the argument then, and it should do so again now. Parke, Ex. I.

Appellants' claim of urgency also is without merit. The District Court previously found Appellants' delay to weigh against a finding of irreparable harm. *Id.*, Ex. F at CU092. From the time of this Court's original August 13, 2008 denial of their first "emergency" motion to stay, and November 21, 2008 (over three months), Appellants never sought further relief from this Court to stop the District Court's actions. Indeed, in denying the third motion to stay, the District Court noted that Appellants did not file a motion to stay or seek a writ to "stay [the District Court's] hand" after the September 19, 2008 Order to Show Cause issued. Declaration of Monte M.F. Cooper in Support of Appellee's Opposition to Appellants' Emergency Motion to Stay ("Cooper"), Ex. 1 at FB004-06. This motion for a stay—just like the last three—should be denied.

FACTS

A. Facebook, Mark Zuckerberg and Appellants Settle

In February 2008, Facebook, Mark Zuckerberg, and Appellants attended a mediation to try and resolve three separate actions between the parties in California and Massachusetts. Cooper, Ex. 7 at FB053. Appellants were represented by six lawyers from two separate law firms. *Id.* At the end of the mediation, Appellants entered into a Settlement Agreement ("Agreement"). Parke, Ex. P at CU252-53.

The Agreement had multiple specific terms, including dismissals of all three cases, release terms, warranties and financial terms.[4] *Id.* However, it included no representations as to the value of any stock exchanged as consideration. *Id.* It also had specific confidentiality and dispute resolution clauses for certain types of disputes. *Id.* The Agreement provided that as executed it was binding and "this document may be submitted into evidence to enforce this agreement." *Id.* at CU252. While it also contemplated that the parties "may execute more formal documents," such other formal documents were not required for the Agreement itself to be binding. *Id.* Lastly, it called for any enforcement proceedings to be heard by "the San Jose Federal Court." *Id.* Despite these clear terms, Appellants

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[4] Appellants include a misleading strikethrough to suggest an earlier cash monetary value for the Agreement. *See* 11/25 Mot. to Stay at 3. To the contrary, a review of the original Agreement reflects the strikethrough is illegible, and that it always was written as a stock for cash-and-stock Agreement. *See* Parke, Ex. P at CU252-53. Appellants' new intimation as to what monetary value they claim was stricken is wholly inaccurate, and also was never presented to the District Court.

refused to honor the Agreement. Facebook filed a motion to enforce the Agreement as a result. Cooper, Ex. 8 at FB055.

B. The Court Finds That The Agreement Is Enforceable

ConnectU opposed Facebook's motion claiming that it was an "agreement to agree." *Id.*, Ex. 9 at FB073. ConnectU also claimed that the Agreement was procured by fraud, and was void for violating securities laws. *Id.* ConnectU claimed an old Facebook press release announcing an investment by Microsoft somehow misled Appellants about the value of a different class of stock the Founders obtained through the Agreement. *Id.* These arguments all were rejected by the District Court. Parke, Ex. S.

First, the Court found that the Agreement contained all material terms, including 1) "consideration for the performance required and how it must be paid," 2) the specified amount of cash and stock, to be paid by Facebook, and 3) the required signatures of ConnectU and the Founders, evidencing an intent to be bound. *Id.* at CU317-18.

Second, while noting that the parties contemplated the possibility of execution of additional documents, the Court held, "it is clear that had the parties wished to require more formal documents, they could have indicated they *will* or *shall* execute more formal documents. Instead, they elected to use the word, may, and made clear that the Agreement is binding in and of itself." *Id.* at CU319.

(emphasis in original).

Third, the Court found "that Defendants have failed to tender sufficient evidence of fraud . . ." and that "Defendants have failed to establish that Plaintiffs made a misrepresentation during the negotiation." Parke, Ex. S at CU320-23. In so doing, the Court acknowledged that Appellants did not challenge the accuracy of the October 2007 press release related to the Microsoft investment. *Id.* at CU320-23. Furthermore, the Court found that the stock at issue in the October 2007 press release was a different class of stock from the stock to be exchanged pursuant to the Agreement. *Id.* The Court also found the Agreement made no representation as to the value of the stock. *Id.*

The Court also applied the logic of the Massachusetts District Court, which previously had denied Appellants discovery which Appellants claimed would prove they had been defrauded when in entering into the settlement:

> From all that appears, the parties were prepared to settle their disputes then, despite the fact that aspects of discovery in this case—most pertinently for present purposes, document production—had not been completed and unresolved discovery issues remained outstanding.

Id.; *see also* Cooper, Ex. 10 at FB105. Applying the same reasoning, the District Court found there were no misrepresentations concerning stock value, because Appellants could have demanded warranties as to such value, or conducted their own diligence before entering into the Agreement. Parke, Ex. S at CU320-21. For

the same reasons, as well as because of this Court's opinion in *Petro-Ventures, Inc. v. Takessian*, 967 F.2d 1337 (9th Cir. 1992), the District Court also rejected ConnectU's claim of securities fraud. Parke, Ex. S at CU322-23.

C. The District Court Appoints A Special Master

On July 2, 2008, the District Court entered a Judgment Enforcing Settlement Agreement. *Id.*, Ex. B. To assist with implementation of the Judgment, the Court appointed a Special Master to oversee the exchange of cash and stock required by the Agreement. *Id.*, Ex. K. The Court explained its reasons for the appointment and that additional steps would be necessary to enforce the Agreement:

> The reason that I'm contemplating is that you all were unable to do it on your own and you came to the Court and asked me to enforce it and in the enforcing of it, it requires steps. And it's not a matter that I can do without putting someone in the middle to collect things in order to make sure everything is, is, is -- goes according to the agreement. So that's why I'm contemplating requires the master in the first place and also requiring that the parties share the cost of that . . .
>
> My focus is on the form of the judgment as I outlined it. If you want to address those matters further. It does seem to me that there is going to be -- the reason I'm put in this position is that there will be the necessity of the Court taking further action to enforce the judgment once the judgment is in place that I can't contemplate the -- those orders at this point.

Cooper, Ex. 2 at FB016:24-25:15; FB020:21-21:18.

D. Appellants' Motion To Stay Is Denied At The District And Appellate Courts

Following the entry of the Order and Judgment enforcing the Agreement,

ConnectU and the Founders appealed and moved to stay the Order and Judgment. Parke, Ex. D. Facebook opposed, noting that the Founders were squandering ConnectU and engaging in acts that threatened its value. Parke, Ex. A; *see also* Cooper, Exs. 3; 11 at FB112-144.

The District Court denied ConnectU's motion to stay. Parke, Ex. F. The Court found that Appellants were not irreparably harmed because they significantly delayed filing the motion to stay until days before the cash and stock consideration was due. *Id.* at CU092. Additionally, the Court found that Facebook faced harm if a stay were granted because the Founders were engaged in activities that threatened the business and value of ConnectU. *Id.*

Appellants then sought emergency relief from this Court. Parke, Ex. Q. Appellants contended that complying with the Judgment and the impending execution would "convey ownership of [ConnectU's] stock to Facebook," and that "[c]ompliance with the judgment would effectively extinguish ConnectU's right to appeal if, as the district court has suggested it will do, it passes ownership of the ConnectU stock to Facebook." *Id.* at CU290-91. Following emergency briefing, this Court denied ConnectU and the Founders' motion to stay. Parke, Ex. I.

E. The District Court Continues To Enforce The Agreement

Following the Special Master's Report related to enforcement of the Agreement and after the emergency motion to this Court was denied, the District

Court issued an Order to Show Cause to authorize the Special Master to release the consideration and dismiss all pending cases. Parke, Ex. J. The parties submitted their responses to the Order. *Id.*, Ex. X ; *see also* Cooper Exs. 4, 5. In its briefing, Appellants argue that their notices of appeal deprived the District Court of jurisdiction to execute the Order to Show Cause.

While the Order to Show Cause proceedings were pending, Appellants did not seek any relief from this Court. At oral argument on the Order to Show Cause, ConnectU's counsel once again argued that the District Court lacked jurisdiction. In response, the Court recognized that this Court had denied a stay and asked about ConnectU's delay in seeking relief:

> Your comment, though, prompts me to ask why, if you've considered it, you have not pursued that beyond the Court's ruling. You asked for an emergency stay of execution, but as far as I know, you haven't asked the Circuit to issue any order to me to stay my hand by way of a writ or anything of that kind, which would be beyond the appeal route. If your argument is I don't have jurisdiction and I'm about to do something beyond my jurisdiction, why haven't you pursued a writ?

Cooper, Ex. 1 at FB004:19-05:4. ConnectU responded that it believed it should seek a stay of the execution of the Order to Show Cause. The Court responded that ConnectU had exhausted its rights to seek a stay and that it needed to seek a writ if it wanted to stop the District Court. The Court explained:

> A stay is within the Court's discretion, and if your argument here is that the Court has no discretion but to

> hold these proceeds and it cannot proceed based upon the presence of an appeal, that seems to me to invite – if I believe you're wrong and I'm about to take action in response to this Order to Show Cause, you had a basis for seeking a writ.

Cooper, Ex. 1 at FB005:21-06:3. Until the current motion, no attempt at a writ was ever made.

On November 3, 2008, the Court issued an Order stating that it had jurisdiction to issue a judgment specifically enforcing the Agreement. In so doing, the Court also noted that Appellants' appeals were imperfect because the Court's previous judgment was interlocutory in nature and prefatory to a final order of the Court. Parke, Ex. V at CU346 n.5.

The Court also denied Appellants' renewed request for a stay. *Id.* at CU346-47. Despite Appellants' delay in seeking relief, however, the Court delayed execution of the judgment "to afford Defendants a limited right to seek a stay from the Ninth Circuit." *Id.* at 347.

The Court also issued a Judgment and instructed the Special Master to 1) transfer the ConnectU shares; 2) transfer the cash and Facebook shares; 3) file the tendered dismissals; and 4) grant releases "as broad as possible" as of February 22, 2008. Parke, Ex. W. The Court later amended the instructions in the Judgment based upon an administrative request filed by Facebook and enlarged the time to December 15, 2008, for the Special Master to perform. *Id.*, Ex. DD.

Between the time of the Order to Show Cause on September 19, 2008 and the Order issued on November 21, 2008, Appellants did not seek any urgent relief whatsoever from this Court.

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION TO ENFORCE THE SETTLEMENT

Appellants incorrectly contend that the District Court lacked jurisdiction to implement its Judgment. This argument is the only argument raised in this motion that was not raised with the Court of Appeals in the previously denied stay motion. Appellants' jurisdictional argument is wrong for two reasons.

First, as recognized by the District Court, Appellants' notice of appeal is imperfect and therefore did not deprive the District Court of jurisdiction. *Ruby v. Secretary of the United States Navy*, 365 F.2d 385, 387-88 (9th Cir. 1966)("If, by reason of defects in form or execution, a notice of appeal does not transfer jurisdiction to the Court of appeals, then such jurisdiction must remain in the District Court"). As set forth in the concurrently pending motion to dismiss, the District Court's judgments have consistently contemplated further action, which renders the appeal not ripe. *Zucker v. Maxicare Health Plans*, 14 F.3d 477, 481 (9th Cir. 1994); *see also Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142 (1993). The District Court correctly recognized that a final order had not issued, no one has been dismissed from the case and the earlier

judgments were prefatory. *See, e.g., Dannenberg v. Software Toolworks, Inc.*, 16 F.3d 1073, 1074-75 (9th Cir. 1994). These statements by the District Court about its specific intentions are entitled to deference. *Peterson v. Lindner*, 765 F.2d 698, 704 (7th Cir. 1985); *United States v. Hunt*, 513 F.2d 129, 136 (10th Cir. 1975).

Second, irrespective of the existence of an appeal, the District Court retains power to enforce its own judgments. *In re Rains,* 428 F.3d 893, 904 (9th Cir. 2005). Indeed, a court retains the authority to enforce its judgment even if a party's rights are affected by execution of the judgment. *See Bennett v. Gemmill*, 557 F.2d 179, 190 (9th Cir. 1977); *see also Deering Milliken, Inc. v. F.T.C.* , 647 F.2d 1124, 1129 n. 11 (D.C. Cir. 1978).

Appellants incorrectly argue that the District Court exceeded its authority by altering or enlarging its Judgment. Appellants cannot point to any specific examples where the Court enlarged or altered its Judgment. Mot. at 16-18. Indeed, the Court's efforts to implement its Judgment by requiring specific performance in steps is entirely consistent with the Court's powers and does not alter the rights of the parties in any way.

II. THIS COURT SHOULD DENY APPELLANTS' REQUEST FOR RECONSIDERATION

Other than the jurisdictional argument, all of Appellants other arguments are merely restatements of the previously rejected motion to stay. In this regard, the current motion is nothing more than an untimely and procedurally defective motion

for reconsideration. *See* Circuit Rule 27-10.

To try and avoid the previous unfavorable rulings, Appellants offer a reading of this Court's previous ruling that is unsupportable. Appellants claim that, in citing *Lopez v. Heckler*, 713 F.2d 1432 (9th Cir. 1983), "this Court may well have concluded that the irreparable harm 'would not start to accrue until later.'" Mot. at 7. The Court did not provide reasons for its denial of the motion to stay. Moreover, in addition to *Lopez v. Heckler*, this Court also cited *Golden Gate Rest. Ass'n v. City & County of San Francisco*, 512 F.3d 1112 (9th Cir. 2008). Both cases recite the high standard for a motion to stay. To the extent that Appellants call into question the reasoning set forth in this Court's August Order, Facebook respectfully requests that the Court reconstitute the August Motions Panel. Circuit Rule 27-1(4) advisory committee note. In any event, Appellants' motion should be denied for the same reasons as before.

A. Appellants Cannot Meet Their Burden For A Stay

To obtain a stay, Appellants must establish that they have made a strong showing that they can succeed on the merits of this appeal. *Lopez*, 713 F.2d at 1435-36; *see also Stormans, Inc. v. Selecky*, 526 F.3d 406, 408 (9th Cir. 2008). Appellants must show that they can establish that the District Court abused its discretion when it enforced the Agreement and that the Court clearly erred when it concluded that there were no facts evidencing fraud. *United States v. Oregon*, 913

F.2d 576, 580 (9th Cir. 1990). Appellants have never met this threshold in any of their three previous unsuccessful attempts to seek a stay.

B. Appellants Cannot Show A Likelihood of Success on the Merits

1. The District Court Correctly Found That The Parties Intended To Be Bound By The Agreement

Appellants incorrectly claim that the Agreement was not binding and enforceable. The parties, represented by able counsel, signed the Agreement to which they agreed to be bound. Parke, Ex. P at CU252-53. The Agreement had numerous specific terms. *Id.* They agreed that the Agreement could be enforced before the District Court. *Id.* As found by the District Court, had the parties wished the Agreement to remain unenforceable until resolution of additional matters, the parties could have said so. *Id.*, Ex. S.; s*ee also* Cooper, Ex. 6 at 46:17-19 (Court stating "The word 'enforce' means we've got something, and we need a place now to go make sure it takes place."). Instead, they agreed that the Agreement was final and enforceable but may permit future discussions if the parties wished to try to execute more formal documents.

The Court's ruling is consistent with established law. A legally enforceable contract requires mutuality of intent. Cal. Civ. Code § 1565. Intent, however, is judged on an objective standard, *see Meyer v. Benko*, 127 Cal. Rptr. 846, 848 (Cal. Ct. App. 1976), and, wherever possible, "the intention of the parties is to be ascertained from the writing alone," Cal. Civ. Code § 1639. "The language of a

contract is to govern its interpretation if the law is clear and explicit and does not involve an absurdity." Cal. Civ. Code § 1638; *see also Pierce Co. Hotel Employees and Restaurant Employees Health Trust et al. v. Elks Lodge*, 827 F.2d 1324, 1327 (9th Cir. 1987).

Here, the terms of the contract are clear on the parties' intent—they settled the matter without equivocation. Parties can also agree to binding terms even when additional documents may follow. *See e.g., Core-Vent Corp. v. Implant Innovations, Inc.*, 53 F.3d 1252 (Fed. Cir. 1995)(applying Ninth Circuit Law). Also, the parties need not agree on every consequence of an agreement. "[N]either law nor equity requires that every term and condition of an agreement be set forth in the contract." *Elite Show Services, Inc. v. Staffpro, Inc.*, 14 Cal. Rptr. 3d 184, 188 (Cal. App. 2004); *Sheng v. Starkey Labs*, 117 F.3d 1081, 1083 (8th Cir. 1997) (tax consequences not material). Further, claiming that the Agreement was an "agreement to agree" would contradict the plain meaning of the contract. *Klamath Water Users Protective Ass'n v. Patterson,* 204 F. 3d 1206, 1210 (9th Cir. 1999).

2. The District Court Properly Excluded Improper Extrinsic And Privileged Evidence

ConnectU claims that the District Court erred by not piercing the mediation privilege and refusing to hold an evidentiary hearing. This, again, is a proper discretionary decision of the District Court. If a district court has sufficient facts to approve the settlement intelligently, then "there is no reason to hold an additional

hearing on the settlement or to give appellants authority to renew discovery." *Oregon*, 913 F.2d at 582. An evidentiary hearing is only required if there is a disputed issue of material fact concerning the existence or terms of a settlement agreement. *In re City Equities Anaheim, Ltd.*, 22 F.3d 954, 958 (9th Cir. 1994). No such dispute exists. At best, the mediation privilege can only be pierced in compelling circumstances or limited grounds for waiver. *Foxgate Homeowners Ass'n v. Bramalea*, 26 Cal. 4th 1, 14-15 (2001). No compelling reason or waiver exists here. In addition, the statements made during the mediation are inadmissible hearsay, as none of the statements described by ConnectU was made by or on behalf of Facebook. Fed. R. Evid. 801. The District Court properly declined to pierce the privilege to unwind the Agreement based on ConnectU's bare allegations of fraud. Parke, Ex. S at CU321, n.11.

In support of its request for a hearing, ConnectU sought extensive discovery concerning documents exchanged after the Agreement was executed. Cooper, Ex. 12. As these communications were directed to the permissive opportunity to enter into more formal agreements, they were entirely irrelevant. Extrinsic evidence is not needed to interpret a contract when the terms are clear. *Klamath Water Users Protective Ass'n*, 204 F.3d at 1210; *see also Brinderson-Newberg Joint Venture v. Pacific Erectors, Inc.*, 971 F.2d 272, 280 (9th Cir. 1992)(finding that evidence may not be introduced to contradict the plain terms of a contract). For these reasons,

the District Court properly excluded extrinsic evidence and declined to pierce the mediation privilege when it enforced the Agreement.

3. There Is No Securities Fraud Because There Is No Fraud

Appellants incorrectly claim that Section 29(b) can void the Agreement. Section 29(b) requires a predicate securities claim and does not apply here because Appellants have not identified any viable predicate Securities Act violation. 15 U.S.C. § 78cc(b) (requiring contract made in violation of Securities Act); *Berckeley Inv. Group Ltd. v. Colkitt*, 455 F.3d 195, 205 (3d Cir. 2006) (noting same); *Pompano-Windy City Partners, Ltd. v. Bear Stearns & Co.*, 794 F. Supp. 1265, 1288 (S.D.N.Y. 1992) (same); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 754 (1975).

Appellants claim securities fraud on the basis that Facebook and Zuckerberg affirmatively represented the value of Facebook's stock. Mot. at 10. No evidence exists showing that Facebook or Zuckerberg made any affirmative representations concerning the value of the stock at issue in the Agreement. Cooper, Ex. 13. Indeed, the District Court evaluated the evidence and found that ConnectU offered no evidence of a representation as to stock value and specifically recognized that the Agreement had no representation as to stock price. Parke, Ex. S at CU320-23. Further, the Court found ConnectU offered no evidence to support a finding of fraud. *Id.*

In addition, the District Court found that the October 2007 press release was true when issued and it related to a different class of stock than that at issue in the Agreement. Parke, Ex. S at CU320-23. Further, Appellants knew—because they had the documents showing—that Facebook's valuations changed constantly and that different classes of stock had different prices. Cooper, Ex. 11 at FB151, 231, Ex. 14 at FB362-63. They knew that they could not rely on a press release issued three months earlier as proof of present-day valuation. In such circumstances, Appellants cannot claim fraud. *Atari Corp. v. Ernst & Whinney*, 981 F. 2d 1025, 1030 (9th Cir. 1992); *Wilhelm v. Pray, Price, Williams & Russell*, 186 Cal. App. 3d 1324 (1986); *Kennedy v. Josephthal & Co.*, 814 F. 2d 798, 805 (1st Cir. 1987); *Teamsters Local 282 Pension Trust Fund v. Angelos*, 762 F.2d 522, 530 (7th Cir. 1985). As no fraud existed, Section 29(b) does not apply. *See, e.g., Brody v. Transitional Hospitals Corp.*, 280 F. 3d 997, 1006 (9th Cir. 2002).

And though Appellants now argue that Facebook possessed a heightened duty similar to that of a corporate insider seeking to trade on confidential information, the District Court was correct in its observation that insider trading is "not an issue in this case." Parke, Ex. S at CU322. They were opponents in litigation who participated in an acrimonious dispute, were prepared to settle with imperfect information, and were well represented by counsel. *Chiarella v. United States*, 445 U.S. 222, 228 (1980) ("[T]he duty to disclose arises when one party has

information that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.").

4. Appellants Waived The Securities Claims

In settling the case, the parties waived their securities claims. The District Court properly relied on *Petro-Ventures, Inc. v. Takessian*, 967 F.2d 1337 (9th Cir. 1992) to support this waiver. In *Petro-Ventures*, the consideration used for settlement was, as here, the basis for the securities fraud allegation. The parties waived those claims. The parties bargained for a "'general peace,'" *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1463 (9th Cir. 1986), by seeking releases "as broad as possible." For this reason, a securities claim was not actionable because Appellants waived their rights.

C. Appellants Cannot Demonstrate Sufficient Irreparable Injury

Appellants once again raise the rejected argument that they will lose their right to appeal, causing irreparable injury. Appellants make no new showing of harm. The harm—the loss of an appeal—is speculative and is, in any case, not relevant. Rendering an appeal moot does not constitute irreparable injury.[5]

Moreover, as recognized by the District Court on several occasions, Appellants' delay in seeking a stay or writ both before and after the November 3

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[5] *In re Trans World Airlines, Inc.*, No. 01-0056 (PJW), 2001 WL 1820325, at * 10 (Bankr. D. Del. Mar. 27, 2001); *accord In re Best Prods. Co.*, 177 B.R. 791, 808 (S.D.N.Y.), *aff'd*, 69 F.3d 26 (2d Cir. 1995); *In re Sunflower Racing, Inc.*, 223 B.R. 222, 225 (D. Kan. 1998)(citing collection of cases).

Judgment undercuts their argument that they will suffer irreparable injury. *See Beame v. Friends of Earth*, 434 U.S. 1310, 1313 (1977). This delay is particularly inexcusable in light of Appellants' failure to act during the various events—the Order Granting the Motion to Enforce, the Special Master's Report, the September Order to Show Cause, the October hearing—that showed that the District Court would do exactly what it said it would: namely, enforce the Agreement.

D. The Balance Of Harm Tips In Facebook's Favor

A stay harms Facebook.[6] If execution of the Judgment is stayed, Facebook cannot ensure measures are taken to protect and use the business of ConnectU. Facebook cannot participate in important business decisions, such as the decision to initiate litigation or invest. Decisions like these impact and threaten the value of ConnectU. These decisions are being made independent of Facebook, even though Facebook purchased ConnectU months ago at great cost. As recognized by the District Court, this is harm. Parke, Ex. V at CU346; *Allegheny Energy, Inc., v. DQE, Inc.*, 171 F.3d 153 (3d Cir. 1999) (ordering specific performance of merger agreement based on a finding of irreparable harm); *see also Wisdom Imp. Sales Co., L.L.C. v. Labatt Brewing Co.*, 339 F.3d 101, 114 (2d Cir. 2003) ("denial of a controlling ownership interest in a corporation" or "[c]onduct that unnecessarily

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[6] Appellants have not proposed a bond in support of its request for a stay. Their request should require a bond one-and-a half times the value of the judgment. Fed. R. App. P. 8. Their failure to make such an offer highlights the weakness of Appellants' position.

frustrates efforts to obtain or preserve the right to participate in the management of a company may constitute irreparable harm.").

In addition, Appellants' arguments ignore the evidence before this Court and the District Court in the earlier motion to stay proceedings. While ConnectU was still in its control, the Founders were making decisions that affected, and potentially decreased, the value of the company, including initiating litigation against ConnectU's former counsel and further increasing liabilities. Cooper, Ex. 3, Ex. 11 at FB112-144. These facts, too, justify the denial of the instant motion.

E. The Public Interest Favors Against Granting A Stay

The only recognized public policy at issue is the one promoting private resolution of litigation through settlements such as that reached in this case. *See, e.g., Bianchi v. Perry*, 140 F.3d 1294, 1297 (9th Cir. 1998) (noting that there is a "compelling public interest and policy that favors the finality of settlements"). The District Court specifically recognized this important public interest. Cooper, Ex. 2 at FB012:21-13:7. To issue a stay would frustrate this important public purpose. Appellants' motion, therefore, should be denied.

CONCLUSION

For the reasons set forth above, the motion to stay should be denied.

Dated: December 5, 2008

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