

CA Nos. 08-16745, 08-16849, 08-16873 (consolidated), 09-15021, 09-15133
DC No. C 07-01389 JW

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

THE FACEBOOK, INC., ET AL.,
Plaintiffs/Appellees/Cross-Appellants,

v.

CONNECTU, INC., ET AL.,
Defendants/Appellants/Cross-Appellees.

Appeal From Judgment Of The United States District Court
For The Northern District Of California
(Hon. James Ware, Presiding)

**DECLARATION OF SEAN M. SELEGUE
IN SUPPORT OF STATUS REPORT,
MOTION TO CONSOLIDATE APPEALS
AND MOTION TO SET BRIEFING
SCHEDULE**

JEROME B. FALK, JR. (No. 39087)
SEAN M. SELEGUE (No. 155249)
HOWARD RICE NEMEROVSKI CANADY
FALK & RABKIN
A Professional Corporation
Three Embarcadero Center, 7th Floor
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*Attorneys for Appellants and Cross-
Appellees Cameron Winklevoss, Tyler
Winklevoss and Divya Narendra*

I, Sean M. SeLegue, declare as follows:

1. I am an attorney licensed to practice law in the State of California, and a member of the bar of this Court. I am an attorney at the law firm of Howard Rice Nemerovski Canady Falk & Rabkin, A Professional Corporation (“Howard Rice”), which is counsel of record for Appellants and Cross-Appellees Cameron Winklevoss, Tyler Winklevoss and Divya Narendra. I make this declaration based upon my personal knowledge of the matters stated herein, except where otherwise indicated. If called as a witness, I could and would testify competently to the facts stated herein.

2. Jerome Falk of this office was first contacted about representing the Founders on Tuesday, September 8. By Thursday, September 10, we had been retained, and I began work to understand the procedural posture of this case and the substantive issues to prepare the accompanying status report and motions. Having now reviewed many of the Ninth Circuit proceedings and selected portions of the District Court proceedings, it is clear that assuming responsibility for this matter as appellate counsel will be a substantial task.

3. My efforts to learn about the case were interrupted for a few hours when ConnectU’s counsel sent a letter on Friday, September 11, to the Boies and Finnegan firms cautioning them not to share confidential information of ConnectU with the Founders’ new appellate counsel, Howard Rice. A true and correct copy of the letter is attached as Exhibit A.

4. I was able to speak to ConnectU’s lead counsel, James Towery, during

the afternoon of September 11, and the two of us agreed that Boies and Finnegan could provide Howard Rice with copies of pleadings and historical information about what had happened in the case. However, Mr. Towery contends that the District Court's disqualification order prohibits Boies and Finnegan from sharing their opinions or confidential work product with Howard Rice. A true and correct copy of my confirming letter to Mr. Towery is attached as Exhibit B.

5. Mr. Falk, lead counsel, is now out of the country on a previously planned trip. He will return on October 5, 2009. While I and others at Howard Rice will work on this matter while Mr. Falk is away, it is important that Mr. Falk have an opportunity to contribute to the opening brief. Therefore, we ask that the Court allow approximately 30 days after Mr. Falk's return for the Founders to file their opening brief. We therefore propose a due date of November 6, 2009, for that brief.

6. I respectfully ask the Court to consider not to order a due date for the Founders' opening brief before November 6 due to my long-planned trip to Europe scheduled for October 17 to October 28. The air tickets for that trip are prepaid, and I would incur a substantial penalty to change them. In addition, and more importantly, the primary purpose of the trip is to visit my young son, who presently resides in Europe, on his birthday.

7. Absent a change in circumstances beyond our control, I am confident that we will not require any extension of time beyond November 6, 2009, to file

the Founders' opening brief.

8. Attached hereto as Exhibit C is a copy of the District Court's order dated August 8, 2008, identified as Docket No. 610. (The copy of this order I used was attached as Exhibit D to the Founders' notice of appeal dated December 19, 2006, and designated Appeal No. 09-15021 by this Court.)

9. Attached hereto as Exhibit D is a copy of the District Court's order dated November 3, 2008, identified as Docket No. 653. (The copy of this order I used was attached as Exhibit C to the Founders' notice of appeal dated December 19, 2006, and designated Appeal No. 09-15021 by this Court.)

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this Declaration was executed on this 14th day of September, 2009, in San Francisco, California.

/s/ Sean M. SeLegue

SEAN M. SELEGUE

EXHIBIT A



HOGE, FENTON
JONES & APPEL, INC.

Attorneys at Law | Serving Northern California since 1952

Alison P. Buchanan
408.947.2415
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September 11, 2009

VIA EMAIL AND U.S. MAIL

D. Michael Underhill
Boies, Schiller & Flexner LLP
5301 Wisconsin Ave. NW
Washington, DC 20015

John F. Hornick
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP
901 New York Avenue, NW
Washington, DC 20001

Re: ConnectU, Inc., et al. v. Facebook, Inc., et al.
Our File No.: 80696

Dear Mr. Underhill and Mr. Hornick:

Please be advised that ConnectU does not authorize you, ConnectU's former counsel, to share any confidential information with the Founders' new counsel. You are ethically obligated to maintain all of ConnectU's confidences during the Founders' transition to new counsel. ConnectU fully expects your offices to observe your duties of loyalty to ConnectU throughout this litigation.

Sincerely,

HOGE, FENTON, JONES & APPEL, INC.

Alison P. Buchanan

APB: apb
cc: Mark Howitson (via email only)

EXHIBIT B

HOWARD
RICE
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September 11, 2009

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James E. Towery, Esq.
Hoge Fenton Jones & Appel
60 South Market Street
San Jose, CA 95113-2396

Re: *The Facebook, Inc. et al. v. ConnectU, Inc. et al.*

Dear Jim:

Thank you for talking to me today about Howard Rice's transition into this case as counsel for Howard Winklevoss, Cameron Winklevoss, Tyler Winklevoss and Divya Narendra.

We agreed that notwithstanding the disqualification order, it is appropriate for the Boies and Finnegan firms to provide Howard Rice with copies of any and all pleadings filed in the Ninth Circuit or the District Court, as well as historical information about what has happened in the case (*e.g.*, what happened at a hearing, prior conversations between opposing counsel, etc.). We disagreed on whether Boies and Finnegan may share with Howard Rice the opinion work product of Boies and Finnegan. We agreed to disagree on this last question for the moment. Should we require a resolution about the extent to which Finnegan and Boies may share their opinions and prior work product with Howard Rice, we will either present that question to the Court or provide you with sufficient notice that you may go to the Court if you wish.

Very truly yours,



Sean M. SeLegue

SMS/pmm

cc: Jerome B. Falk, Jr., Esq.
D. Michael Underhill, Esq.
Evan A. Parke, Esq.
Scott R. Mosko, Esq.
John F. Hornick, Esq.

EXHIBIT C

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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

The Facebook, Inc., et al.,
Plaintiffs,
v.
ConnectU, Inc., et al.,
Defendants.

NO. C 07-01389 JW

**ORDER DENYING THE CONNECTU
FOUNDERS' MOTION TO INTERVENE;
DENYING CONNECTU'S MOTION TO
STAY EXECUTION OF JUDGMENT**

I. INTRODUCTION

Initially, Plaintiffs the Facebook, Inc. and Mark Zuckerberg (collectively, "Facebook") brought this action against ConnectU, Inc. ("ConnectU"), Pacific Northwest Software, Inc., Winston Williams, and Wayne Chang alleging, *inter alia*, misappropriation of trade secrets, unfair competition, and violations of 18 U.S.C. § 1030, *et seq.* The parties were engaged in at least two other lawsuits over these matters; in those cases, ConnectU and its founders, Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra (collectively, the "ConnectU Founders"), were plaintiffs and Facebook was a defendant. Based on a series of events and motions, on July 2, 2008, the Court entered Judgment enforcing a settlement agreement between the parties to all of the actions. (hereafter, "Judgment," Docket Item No. 476.)

1 Presently before the Court are the ConnectU Founders' Motion to Intervene¹ and ConnectU's
 2 Motion to Stay Execution of Judgment.² The Court conducted a hearing on August 6, 2008. Based
 3 on the papers submitted to date and oral argument of counsel, the Court DENIES the ConnectU
 4 Founders' Motion to Intervene on the ground that they have already been made parties to this action.
 5 However, the Court GRANTS them an extension of time in which to file their appeal. Further, the
 6 Court DENIES ConnectU's Motion to Stay Execution of Judgment.

7 II. DISCUSSION

8 **A. Motion to Intervene**

9 The ConnectU Founders move to intervene on the grounds that they have a real economic
 10 stake in the outcome of this case and ConnectU will not sufficiently protect their interests.
 11 (Intervene Motion at 4, 6.) The Judgment in this case treats the ConnectU Founders as parties; it
 12 orders them and the other signatories to take action to comply with the Term Sheet and Settlement
 13 Agreement ("Settlement Agreement"). Therefore, before reaching the necessity of allowing them to
 14 intervene, the Court reviews the ConnectU Founders' status as existing parties to this action and to
 15 the other lawsuits covered by the Settlement Agreement.

16 The Ninth Circuit has held that when a federal court has a basis for jurisdiction over a
 17 dispute involving a final settlement agreement, the court may "interpret and apply its own judgment
 18 to the future conduct contemplated" by a agreement. See Flanagan v. Arnaiz, 143 F.3d 540, 544-45
 19 (9th Cir. 1998). The requisite independent basis for jurisdiction may be supplied by a provision in
 20 the settlement agreement. Id. at 544. Such a provision, "empowers a district court to protect its
 21 judgment" from subsequent attempts to frustrate "the purpose of the settlement agreement and
 22 order." Sandpiper Village Condominium Ass'n., Inc. v. Louisiana-Pacific Corp., 428 F.3d 831, 841

25 ¹ (hereafter, "Intervene Motion," Docket Item No. 574.)

26 ² (hereafter, "Stay Motion," Docket Item No. 578.). Subject to being permitted to intervene,
 27 the ConnectU Founders join in the Motion to Stay Enforcement.

1 (9th Cir. 2005). Under this power, individuals may be bound to take actions as long as they had
2 notice and an ability to contest the judgment or order enforcing the settlement agreement. See id.

3 On August 8, 2007, the ConnectU Founders and ConnectU, Inc., were named Plaintiffs in a
4 First Amended Complaint in Civil Action No. 1:07-CV-10593-DPW pending in the District of
5 Massachusetts. The Facebook, Inc., Mark Zuckerberg and others were named as Defendants in that
6 action. In this action, Facebook and Mark Zuckerberg have been named as Plaintiffs and
7 ConnectU, Inc., has been named as a Defendant. Although the ConnectU Founders were named in
8 a Second Amended Complaint in this case, the Court found that it lacked personal jurisdiction over
9 them and dismissed them. (See Docket Item Nos. 136, 232.)

10 On February 22, 2008, the parties entered into a Settlement Agreement, and the ConnectU
11 Founders individually obligated themselves to perform the terms of the agreement. Among the
12 obligations undertaken by the ConnectU Founders were agreements to dismiss the Massachusetts
13 action and to give mutual releases as broad as possible.³ Notably, the ConnectU Founders expressly
14 stipulated to the jurisdiction of this Court for the limited purpose of enforcement of the agreement.
15 (Id.)

16 On April 23, 2008, Facebook filed a motion before this Court to enforce the agreement
17 against the parties to the agreement (“Enforcement Motion”), because disputes arose among the
18 parties with respect to execution of the agreement. (Docket Item No. 329.) Rather than file the
19 Enforcement Motion as a new ancillary proceeding, the motion was filed in this action. As noted
20 above, the ConnectU Founders were not existing parties to this action before the Enforcement
21 Motion was filed because they had been dismissed. Nevertheless, the motion sought enforcement
22 against the ConnectU Founders and ConnectU, Inc., because in the agreement, each of the Founders
23 submitted to the jurisdiction of this Court to enforce the agreement. (Enforcement Order at 3; see
24 Declaration of I. Neel Chatterjee, Ex. F, hereafter, “Chatterjee Decl.,” Docket Item No. 596.)

25
26 ³ (Order Granting Plaintiffs’ Confidential Motion to Enforce the Settlement Agreement at 3,
27 hereafter, “Enforcement Order,” Docket Item No. 461.)

1 Notice of the Enforcement Motion was given to counsel for the ConnectU Founders. This
2 was accomplished by filing a notice of the motion in the Massachusetts action in which the
3 ConnectU Founders were parties and by serving that notice on counsel for the ConnectU Founders
4 in the Massachusetts action. (Enforcement Order at 5; Chatterjee Decl., Ex. G.) At a hearing in the
5 Massachusetts action, the parties acknowledged they were aware of the proceedings in this Court.
6 (Id., Chatterjee Decl., Ex. H.)

7 At the hearing on the Enforcement Motion in this case, the Court raised a question with
8 respect to enforcement against the individuals who, although signatories to the agreement, were not
9 formal parties to the present action. (Transcript of Hearing at 74-75.) Counsel for Facebook took
10 the position that the ConnectU Founders had consented to jurisdiction and that on that basis, the
11 Court could proceed to enter judgment enforcing the agreement against them. (Id.) Counsel for the
12 ConnectU Founders made an appearance at the hearing. Their counsel described the status of the
13 Massachusetts' litigation but otherwise did not object to jurisdiction. (Id.) Thus, like ConnectU,
14 Inc., the ConnectU Founders are parties for purposes of proceedings to enforce the Settlement
15 Agreement.

16 In its Enforcement Order, the Court ordered the parties to appear for a hearing and to show
17 cause why a judgment should not be entered ordering the signatories to take actions required of them
18 by the Settlement Agreement. (Enforcement Order at 12.) In its Order, the Court specifically cited
19 the ConnectU Founders' consent to jurisdiction and their receipt of notice of the Enforcement
20 Motion as the basis for the exercise of personal jurisdiction to enforce the agreement against them.
21 (Id.) A copy of the Order to Show Cause was served on counsel for all signatories to the agreement,
22 including counsel for the ConnectU Founders.⁴

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24
25 ⁴ The service list shows that attorney Scott Mosko of the Finnegan, Henderson, Farabow
26 was served. (Enforcement Order, certificate of service page.) The Finnegan firm previously
27 represented the ConnectU Founders in this action prior to their dismissal; however, the Finnegan
28 firm has represented ConnectU, Inc., since the commencement of this lawsuit and has represented
ConnectU, Inc., and the ConnectU Founders since the commencement of the Massachusetts actions.

1 On July 2, 2008, a show cause hearing was held. Counsel for all signatories to the agreement
2 appeared, including counsel for the ConnectU Founders. (See n.4, supra.) After the hearing, the
3 Court entered Judgment Enforcing the Settlement Agreement against all the signatories to the
4 agreement and appointed a Special Master to perform steps necessary to enforce the agreement.
5 (Judgment at 1-2; Notice of Appointment of a Master; Nomination of Individual to Serve as Master,
6 Docket Item No. 475.) Among others, the Judgment ordered the ConnectU Founders to perform acts
7 necessary to comply with the Judgment with respect to this action and the Massachusetts action.
8 (Judgment at 3.)

9 In sum, the Court confirms its previous finding that the Motion to Enforce the Term Sheet
10 and Settlement Agreement, although filed under a case number in which the ConnectU Founders
11 were not already parties, was an ancillary proceeding in which Facebook and Zuckerberg were
12 nominal Plaintiffs and ConnectU and the ConnectU Founders were nominal Defendants. As the
13 Supreme Court has noted, “[e]nforcement of [a] settlement agreement . . . whether through award of
14 damages or decree of specific performance, is more than just a continuation or renewal” of
15 underlying proceedings. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 378 (1994).
16 Although the ConnectU Founders were not made parties by virtue of being served with a summons
17 and complaint, as signatories to the Settlement Agreement they consented to personal jurisdiction
18 being exercised over them by this Court and to proceedings limited to enforcement of the agreement.
19 The ConnectU Founders had fair notice that Facebook sought enforcement of the agreement through
20 a motion, and they had ample opportunity to oppose that motion. Through counsel, the ConnectU
21 Founders participated in and were aware of these proceedings. Thus, the Judgment enforcing the
22 Settlement Agreement is binding on them and they may appeal that Judgment.⁵

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25 _____
26 ⁵ The Court notes that even a non-party may be permitted to appeal when “(1) the appellant,
27 though not a party, participated in the district court proceedings, and (2) the equities of the case
28 weigh in favor of hearing the appeal.” Bank of Am. v. M/V Executive, 797 F.2d 772, 774 (9th Cir.
1986).

1 Accordingly, the Court DENIES the motion to intervene as unnecessary because the
2 ConnectU Founders are already parties to these proceedings to enforce the Settlement Agreement.
3 The unique procedural posture of the case, however, persuades the Court to grant the ConnectU
4 Founders additional time to appeal for good cause shown pursuant to Rule 4(a)(5) of Federal Rules
5 of Appellate Procedure.

6 The Court addresses separately the proposed Complaint in Intervention. With their motion
7 to intervene, the ConnectU Founders have tendered a Complaint in Intervention which essentially
8 seeks to relitigate the issues concerning the enforceability of the Settlement Agreement. (See
9 Docket Item No. 577.) The Court addressed these issues at a hearing before granting Facebook's
10 motion to enforce the settlement and entering Judgment. As parties to the case, parties may tender
11 pleadings. However, at this procedural stage, the Court finds that the Complaint in Intervention is
12 improper because intervention is unnecessary. Further, if the Complaint in Intervention is allowed
13 to be filed after Judgment, it would re-open matters covered by the Judgment; this would be
14 improper unless or until the Judgment is set aside and new pleadings are allowed by the Court.
15 Accordingly, the Court STRIKES the ConnectU Founders' Complaint in Intervention.

16 **B. Motion to Stay**

17 ConnectU moves to stay enforcement of the Judgment entered by the Court on the grounds
18 that it may be irreparably harmed and the balance of hardships tips in its favor. (Stay Motion at 5,
19 7.)

20 Federal Rule of Civil Procedure 62(d), which provides for a stay upon court approval of a
21 supersedeas bond, pertains primarily, if not exclusively, to monetary judgments. See NLRB v.
22 Westphal, 859 F.2d 818, 819 (9th Cir. 1988). Thus, whether a district court should grant a stay of
23 the enforcement of a non-monetary judgment is governed by Rule 62(c), which provides that
24 "[w]hen an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying
25 an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during
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1 the pendency of the appeal.” Spieler ex rel. Spieler v. Mt. Diablo Unified School Dist., 2007 WL
2 3245286, at *2-3 (N.D. Cal. 2007).

3 The standard for granting a stay pending appeal under Rule 62(c) is similar to that for a
4 preliminary injunction. Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983). A party seeking a
5 stay must show “(1) whether the stay applicant has made a strong showing that he is likely to
6 succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3)
7 whether issuance of the stay will substantially injure the other parties interested in the proceeding;
8 and (4) where the public interest lies.” Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Lopez, 713
9 F.2d at 1435. To satisfy steps (1) and (2), a court may accept proof either that the applicant has
10 shown “a strong likelihood of success on the merits [and] . . . a possibility of irreparable injury to the
11 [applicant],” or “that serious legal questions are raised and that the balance of hardships tips sharply
12 in its favor.” Golden Gate Restaurant v. City and County of San Francisco, 512 F.3d 1112, 1115-16
13 (9th Cir. 2008). When the district court has already ruled on the legal issue being appealed, the
14 court need not conclude that it is likely to be reversed on appeal in order to grant the stay. Strobel v.
15 Morgan Stanley Dean Witter, 2007 WL 1238709, at *1 (S.D. Cal. 2007). However, the court may
16 consider that delay in filing an appeal and seeking a stay vitiates the force of allegations of
17 irreparable harm. Cf. Beame v. Friends of the Earth, 434 U.S. 1310, 1313 (1977).

18 In this case, ConnectU cannot show irreparable harm from execution of the Judgment
19 because the only effect of enforcing the settlement is the transfer of ownership of ConnectU.
20 Barring evidence to the contrary, the Court presumes that Facebook has an equal interest in
21 preserving the value of ConnectU as do ConnectU’s current owners. Moreover, ConnectU filed its
22 motion seeking a stay only days before turnover of its stock was ordered to take place. This delay
23 on the part of ConnectU tends to vitiate its contention that it will be irreparably harmed. See Beame,
24 434 U.S. at 1313.

25 With respect to the issues of the balance of hardships, ConnectU contends that Facebook may
26 somehow adversely affect its right to appeal. (Stay Motion at 5-6.) However, ConnectU admits that
27

1 it will pursue other litigations with respect to its former counsel related to this case and incur
2 liabilities to its lawyers. Thus, the hardship upon Facebook may be equally as great if the litigation
3 diminishes the value of ConnectU. In essence, the longer the Court delays in enforcing the
4 settlement between the parties, the more likely the value of the consideration subject of the
5 settlement (i.e., the value of the stock of each company) will change. This means that the status quo
6 cannot be preserved with a stay. The Court is concerned that any further delay in enforcing the
7 settlement will create a serious risk of prejudice to Facebook, as well as to ConnectU.

8 Accordingly, the Court DENIES ConnectU's motion to stay enforcement of the Judgment
9 entered in this case.

10 III. CONCLUSION

11 The Court DENIES the ConnectU Founders' Motion to Intervene as unnecessary because
12 they have already been made parties to these proceedings by their consent and by service of the
13 Enforcement Motion. The Court STRIKES the ConnectU Founders' Complaint in Intervention.
14 The Court GRANTS the ConnectU Founders additional time in which to file an appeal. Since
15 ConnectU filed a timely Notice of Appeal on August 1, 2008, (see Docket Item No. 585), the
16 ConnectU Founders shall have until **August 22, 2008** to file their appeal.

17 The Court DENIES ConnectU's Motion to Stay Execution of Judgment. The Judgment
18 requires that on or before August 4, 2008, ConnectU and its Founders to deposit with the Master all
19 shares of ConnectU, Inc., endorsed for transfer, and to submit legally sufficient dismissal with
20 prejudice of all cases by and between the parties pending as of the date of the Settlement Agreement.
21 (Judgment at 2.) At the hearing on these motions, it was brought to the Court's attention that while
22 Facebook and Mark Zuckerberg have complied with the Court's Judgment, ConnectU, Inc., and its
23 Founders have failed to do so. Counsel for ConnectU, Inc., and counsel for the ConnectU Founders
24 contend that since the Court had granted a hearing on the Motion to Stay Judgment just two days
25 after the due date, they had a good faith belief that they had a period of reprieve from the Judgment.

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27

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1 The Court finds good cause to not hold ConnectU and its Founders in contempt for failing to comply
2 with its Judgment as of August 4, 2008.

3 Accordingly, ConnectU and the ConnectU Founders shall comply with the turnover
4 requirements of the Court's July 2, 2008 Judgment Enforcing Settlement Agreement on or before
5 **August 12, 2008.**

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Dated: August 8, 2008

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JAMES WARE
United States District Judge

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1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

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13
14 **Dated: August 8, 2008**

Richard W. Wieking, Clerk

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16 **By: /s/ JW Chambers**
Elizabeth Garcia
17 **Courtroom Deputy**
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EXHIBIT D

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

The Facebook, Inc., et al.,
Plaintiffs,
v.
ConnectU, Inc., et al.,
Defendants.

NO. C 07-01389 JW

**ORDER DIRECTING THE SPECIAL
MASTER TO DELIVER THE PROPERTY
BEING HELD IN TRUST TO THE
PARTIES IN ACCORDANCE WITH THE
TERMS OF THEIR SETTLEMENT
AGREEMENT**

I. INTRODUCTION

On February 22, 2008, the parties to civil cases pending in this Court and the District of Massachusetts signed a “Term Sheet & Settlement Agreement.” The Agreement provided: “The parties stipulate that the San Jose Federal court shall have jurisdiction to enforce this agreement.”¹ On April 23, 2008, The Facebook, Inc., filed a motion with this Court to enforce the Agreement. The motion was docketed in an action pending in this Court. However, it was in legal effect an ancillary proceeding to the pending action.²

On June 25, 2008, over objections by ConnectU and the Founders (collectively, “ConnectU”), the Court granted the motion to enforce the Agreement. (Enforcement Order at 4.) The Court appointed a Special Master to gather and hold the property and cash which the parties had

¹ (Order Granting Plaintiffs’ Confidential Motion to Enforce the Settlement Agreement at 3, hereafter, “Enforcement Order,” Docket Item 461.)

² The ancillary nature of the motion was addressed in the Court’s August 8, 2008 Order. (See Order Denying the ConnectU Founders’ Motion to Intervene; Denying ConnectU’s Motion to Stay Execution of Judgment at 5, hereafter, “Deny Stay Order,” Docket Item No. 610.)

1 agreed to exchange in the Agreement. (Docket Item No. 475.) On July 2, 2008, the Court issued a
2 Judgment Enforcing Settlement Agreement (hereafter, "July 2 Judgment," Docket Item No. 476), in
3 which the Court ordered the parties to deposit with the Special Master stock, cash and various other
4 documents.

5 On September 5, 2008, the Special Master issued a report stating that he received the stock,
6 cash and documents. (hereafter, "Special Master's Report," Docket Item No. 630.) Pursuant to the
7 Court's appointment Order, the Special Master also provided the Court with his recommendations of
8 action which the Court should take in the enforcement of the Agreement. (Special Master's Report
9 at 6.) On September 19, 2008, the Court issued an order for the parties to appear on October 28,
10 2008 and show cause, if any, why the Court should not order the Master to deliver the property
11 being held by him to the parties in accordance with the terms of the Agreement. (Docket Item No.
12 634.)

13 At the October 28th hearing, counsel appearing for ConnectU and the Founders advised the
14 Court that on July 30, 2008, ConnectU had noticed an appeal from the July 2 Judgment, and that on
15 August 11, 2008, the Founders had also noticed an appeal from the July 2 Judgment. (See Docket
16 Item Nos. 582, 611, respectively.) Defendants contended that because of their appeals, the Court
17 lacked jurisdiction to order the Master to deliver the things held by him in enforcement of the
18 Agreement.³

19 Also appearing were counsel for Quinn Emanuel Urquhart Oliver & Hedges, LLP,
20 requesting the Court to honor a lien the firm has asserted on the settlement proceeds. (Docket Item
21 Nos. 337, 644.)

22 Since Defendants' challenge to the Court's jurisdiction is a threshold issue, the Court
23 proceeds to address this issue first. The Court will also consider Quinn Emanuel's lien on the
24 proceeds.

25
26 ³ (Defendants' Response to Order to Show Cause on Disbursement of Settlement
27 Consideration, and Renewed Motion to Stay at 1, hereafter, "Defendants' Response," Docket Item
28 No. 637.)

II. DISCUSSION

A. Jurisdiction

Defendants contend that the Court lacks jurisdiction to take further action because any such action would be taken after an appeal has been filed from the July 2 Judgment, which was final and appealable. (Defendants' Response at 1.)

As a general matter, "[o]nce a notice of appeal is filed, the district court is divested of jurisdiction over the matters being appealed." Natural Resources Defense Council, Inc. v. Southwest Marine, Inc., 242 F.3d 1163, 1166 (9th Cir. 2001) (citing Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982)). However, there are, several exceptions to the principle of exclusive appellate jurisdiction. Id. An appeal to the Ninth Circuit must be from a final judgment of the district court. 28 U.S.C. §1291. The district court is not divested of jurisdiction to take action if a party files a premature appeal. FirsTier Mortgage Co. v. Investors Mortgage Ins. Co., 498 U.S. 269, 272-73 (1991).

Presuming ConnectU and the Founders have a right to appeal,⁴ the issue becomes whether the appeals they have filed divest the Court of the power granted in their stipulation to issue an enforcement decision.

This ancillary civil action to enforce the Agreement is tantamount to an action in equity for specific performance. Adams v. Johns-Manville Corp., 876 F.2d 702, 709 (9th Cir. 1989) (A

⁴ In its June 25, 2008 Order, the Court discussed its general equitable power to enforce an agreement to settle a case pending before it. (Enforcement Order at 4.) However, as a threshold matter, the Court emphasizes that none of the following discussion of jurisdiction should be construed as a finding by this Court that an appeal may be taken from its enforcement decision. The enforcement power of the Court is derived from a stipulation of all the parties to a private mediation. As a component of their private mediation, the parties stipulated that a United States District Court Judge is empowered to enforce their mediated settlement. Thus, this case is distinguishable from one in which the parties to a federal lawsuit reach an out-of-court settlement, request the federal court to adopt the settlement as a judgment in the case, and the federal judge, who has retained jurisdiction to enforce the judgment, makes a post-judgment order.

Although the Agreement in this case affects a pending action, because in the Agreement the parties agreed to dismiss it, these current proceedings are independent of the underlying action. Under the Agreement, no judgment will be entered in the underlying action (or actions) because they will be dismissed. Thus, the appealability of the enforcement order must be judged based its nature as an independent, albeit ancillary proceeding.

1 “motion to enforce [a] settlement agreement essentially is an action to specifically enforce a
2 contract.”). In a specific performance action, the appealable judgment is the judgment which orders
3 performance of the acts agreed upon, leaving nothing further for the court to do. An order of
4 specific performance is injunctive in nature. It is appealable as a final judgment when it requires
5 conduct that is “specific in terms [and] describe[d] in reasonable detail, and not by reference to [any]
6 other document, the act or acts” to be performed. Petrello v. White, 533 F.3d 110, 115-16 (2d Cir.
7 2008) (quoting Fed. R. Civ. P. 65(d)).

8 Judgments and orders where “money is directed to be paid into court, or property delivered
9 to a receiver,” however, “are interlocutory only and [are] intended to preserve the subject matter in
10 dispute from waste or dilapidation, and to keep it within the control of the court until the rights of
11 the parties concerned can be adjudicated by a final decree.” Forgay v. Conrad, 47 U.S. 201, 204-05
12 (1848). A district court’s judgment can only be final when “it requires the immediate turnover of
13 property and subjects the party to irreparable harm if the party is forced to wait until the final
14 outcome of the litigation.” In re Hawaii Corp., 796 F.2d 1139, 1143 (9th Cir. 1986).

15 The Court finds that although the July 2 Judgment is prefatory to entry of a final
16 adjudication, it is interlocutory in nature. The July 2 Judgment orders the parties to deposit the cash,
17 stock and other documents with a Special Master, subject to further order of the Court; it does not
18 identify specific acts the parties are to perform with respect to one another. See Petrello, 533 F.3d at
19 115-116. All of the Court’s directives are made in reference to the underlying Agreement, which
20 prevents the July 2 Judgment from being considered a final adjudication. See id. Instead, the July 2
21 Judgment directs the parties to take a number of preparatory actions, which place the Special Master
22 as a temporary intermediary, pending further action of the Court. None of the terms of the July 2
23 Judgment “require immediate turnover of property” to the parties, nor “subject [either] party to
24 irreparable harm.” In re Hawaii Corp., 796 F.2d at 1143. Furthermore, the purpose of the October
25 28th hearing was to provide the parties with an opportunity to show cause why a final adjudicatory
26 action ordering specific performance should not be entered.

1 Accordingly, the Court finds that the previously filed appeal to the Ninth Circuit from the
2 July 2 Judgment does not deprive it of jurisdiction to enter a final adjudication ordering
3 performance.⁵

4 **B. Stay of Execution**

5 In the alternative, Defendants renew their motion for a stay of execution pending their
6 appeal. (Defendants' Response at 14.)

7 As the Court stated on the record, a stay of execution pending appeal from a final judgment
8 ordering specific performance raises issues which are not present in a stay of execution on a money
9 judgment. In cases involving a money judgment, an appellant may obtain a stay by posting a
10 supersedeas bond. Fed. R. Civ. P. 62(d). Of course, denial of a stay or failure to post a bond
11 empowers the judgment creditor to execute on the judgment, notwithstanding the appeal. Id.

12 In a specific performance action, the prosecuting party seeks immediate performance of
13 some act due from the responding party. If the responding party appeals the judgment and moves
14 the Court to stay performance pending appeal, before granting the stay, the Court must consider
15 whether the party in whose favor the judgment has been entered can be provided with security,
16 comparable to that provided by a supersedeas bond. Federal Rule of Civil Procedure 62(c) provides
17 that while an appeal is pending from an injunction, the Court may "suspend, modify, restore, or
18 grant an injunction on terms for bond or other terms that secure the opposing party's rights."

19 Here, the consideration which ConnectU and the Founders seek to withhold pending the
20 appeal are corporate stock, freedom from expensive on-going litigation and peace of mind from a
21 broad mutual release. Security for this consideration must be evaluated in light the rapidly changing
22 United States economy and a highly competitive market for Internet products and services. The
23 Court finds that ConnectU and the Founders have not proposed any security which would protect
24 Facebook from devaluation of that consideration pending appeal.

25
26 ⁵ Although a matter for the Ninth Circuit to decide, implicit in the Court's findings is that
27 the current appeals by Defendants are imperfect. However, the Court proceeds under the assumption
28 that upon issuance of a final adjudicatory decision, the pending appeals will be perfected and
become effective.

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

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16 **Dated: November 3, 2008**

Richard W. Wieking, Clerk

18 **By: /s/ JW Chambers**
Elizabeth Garcia
Courtroom Deputy