

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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE FACEBOOK, INC.; MARK ZUCKERBERG,
Plaintiffs-Appellees,

DIVYA NARENDRA; CAMERON WINKLEVOSS;
TYLER WINKLEVOSS,
Intervenors,

v.

PACIFIC NORTHWEST SOFTWARE, INC.;
WAYNE CHANG; WINSTON WILLIAMS,
Defendants.

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

MOTION TO RECALL MANDATE

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Appellants and Intervenors Cameron Winklevoss, Tyler Winklevoss and Divya Narendra (“Appellants”) hereby move this Court to recall the mandate issued in the above-captioned appeal on May 16, 2011. This request is made to prevent potentially unnecessary proceedings from going forward in the District of Massachusetts.

As noted in Appellants’ Opening Brief, the disputed settlement at issue on this appeal related to two cases, one in the Northern District of California and another in the District of Massachusetts. In September 2009, the Massachusetts court put the action before it on hold pending completion of proceedings in the Ninth Circuit. Request for Judicial Notice in Support of Appellants/Intervenors’ Motion to Recall Mandate (“RJN”) Ex. A at 2. The Massachusetts court noted that “there [was] no need to keep these cases active in this Court while the fundamental question of the enforceability of the settlement agreement moves toward resolution [in the Ninth Circuit].” To that end, the Massachusetts court terminated all pending motions before it and ordered that those motions could be “reassert[ed] . . . no later than 30 days after the issuance of any mandate of the United States Court of Appeals for the Ninth Circuit.” *Id.* at

2-3. That 30-day deadline began running on May 16, 2011, when the Clerk of this Court issued the mandate.¹

Among the motions that the Massachusetts court terminated pursuant to the above-described order was Appellants' motion to impose a sanction of non-dismissal due to the failure of Facebook and Mr. Zuckerberg to produce certain documents in discovery. Recently, in a status report to the Massachusetts court, Appellants stated their intention to file a Rule 60 motion based on discovery misconduct in the event that the disputed settlement is not rescinded. RJD Ex. B. Under the Massachusetts court's order, those matters will proceed there unless this Court recalls the mandate.

Appellants believe that it is sensible for the Massachusetts proceedings to remain on hold until the Supreme Court rules on their

¹The mandate appears to have issued prematurely. Pursuant to Rule 41 of the Federal Rules of Appellate Procedure, “[t]he court’s mandate must issue . . . 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.” However, the Clerk issued the mandate on the same day that rehearing was denied, without a ruling that exceptional circumstances warranted immediate issuance. *See* Ninth Cir. Gen. Order 4.6.a (“It is the policy of this court that only in exceptional circumstances should a panel order the issuance of mandate forthwith . . .”). Accordingly, Appellants did not have the opportunity to seek a stay of issuance of the mandate. *See also* CHRISTOPHER A. GOELZ & MEREDITH J. WATTS, NINTH CIRCUIT CIVIL APPELLATE PRACTICE ¶10:509 (2011) (immediate issuance of the mandate only occurs “in *exceptional circumstances*”) (emphasis in original).

anticipated petition for certiorari. If certiorari is granted and the settlement is ultimately rescinded as Appellants request, then any proceedings that have taken place in Massachusetts based on the assumption that the settlement was enforceable would either be moot or need to be reconsidered in light of the new development that the settlement has been rescinded. For this reason alone, this Court should exercise its discretion to recall the mandate. *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988) (mandate may be recalled for “good cause” or to “prevent injustice”) (citation and internal quotation marks omitted).

In addition, this Court’s rules recognize that recalling the mandate is often appropriate when a petition for certiorari will be filed, unless the petition is frivolous. LOCAL RULE 41-1 Ninth Circuit advisory committee’s note. Here, the grounds on which Appellants intend to seek certiorari are set forth in Appellants’ Petition For Rehearing *En Banc*. Although the Court declined to rehear this appeal *en banc*, the issues presented by Appellants are substantial and far from frivolous. In any event, it would make no sense for the Massachusetts proceedings to resume while the Supreme Court decides whether to take up the case. Appellees Facebook and Zuckerberg will face no prejudice from the mandate being recalled. To the contrary, they will

be relieved of the obligation to respond to the motions that will proceed in Massachusetts if this Court does not recall its mandate.

For the foregoing reasons, Appellants respectfully request that the Court recall the mandate issued on May 16, 2011, and instruct the Clerk that the mandate should issue forthwith if the Supreme Court denies certiorari or upon further order of the Court.²

DATED: May 21, 2011.

Respectfully,

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By _____ */s/ Sean M. SeLegue*
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²Appellants will apprise the Clerk when they learn whether Appellees intend to oppose this motion.

PROOF OF SERVICE

I hereby certify that I electronically filed the foregoing **MOTION TO RECALL MANDATE** with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 21, 2011.

Participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. On May 21, 2011, the foregoing document, described as **MOTION TO RECALL MANDATE**, was mailed by placing the document for deposit in the United States Postal Service through the regular mail collection process at the law offices of Howard Rice Nemerovski Canady Falk & Rabkin, located at Three Embarcadero Center, Seventh Floor, San Francisco, California, to the following non-CM/ECF participants:

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