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' OPPOSITION TO MOTION TO STAY ISSUANCE OF MANDATE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellees-Cross-Appellants 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 of stock.

INTRODUCTION

This Court should deny the ConnectU Founders' motion to stay the mandate. The ConnectU Founders have not met their burden of demonstrating that the mandate should be stayed just because they want to file a cert. petition. This case does not present an issue worthy of Supreme Court review, and even if it did, the ConnectU Founders have not shown the requisite good cause by arguing that they would prefer to avoid the expense of filing a frivolous motion in Massachusetts that has already been denied by the district court in California. There is little this Court can do to prevent the ConnectU Founders from ignoring its admonition that "[a]t some point, litigation must come to an end. That point has now been reached." Slip op. at 6292. But this Court should not encourage them by preventing the courts below from tying up the loose ends and terminating this litigation once and for all.

ARGUMENT

Back when the district court enforced the Settlement Agreement, the ConnectU Founders twice moved this Court to stay the execution of the judgment pending appeal. *See* August 11, 2008 Emergency Mot. to Stay Execution of July 2, 2008 Judgment, as Amended by Order of August 12, 2008; November 25, 2008 Emergency Mot. to Stay and Alternative Petition for Writ of Mandamus. This Court denied both stay motions even though, at that point, it had not had the

opportunity to fully consider the merits of the appeal and even though the ConnectU Founders could plausibly argue that enforcing the Settlement Agreement—and particularly Facebook's acquisition of ConnectU—would yield results that could not be undone. *See* Dkt. Nos. 15 & 51. Now that this Court has rejected the appeal as meritless, and denied rehearing en banc, the ConnectU Founders' concerns about uncertainty of outcome are even weaker than when the district court first issued its judgment. And now that the acquisition has long-since been consummated, and the ConnectU Founders' only basis for a stay is the interest in preserving resources on one last-ditch motion, the justification for a stay of the mandate is vastly weaker.

This Court does not routinely grant motions to stay the mandate, *see* 9th Cir. R. 41-1, and the ConnectU Founders have not come close to satisfying the requisite elements.

First, the ConnectU Founders have not carried their burden of establishing that their "certiorari petition would present a substantial question" that merits Supreme Court review. Fed. R. App. Pro. 41(d)(2)(A). This Court merely applied the age-old principle that an agreement is binding when sophisticated parties sit down to negotiate a deal in the midst of acrimonious litigation, sign a deal, and say it is binding and enforceable. And contrary to the ConnectU Founders' assertion in their Motion to Stay Issuance of Mandate that the Court's opinion "conflicts with

decisions of other Circuits" giving rise to "substantial federal questions," Mot. at 7[1], no circuit has ever rejected this principle. Slip op. at 6287 (citing the cases of other circuits). Similarly, the ConnectU Founders do not come close to demonstrating that the circuits are split over the application of "a mediation confidentiality agreement to bar evidence of securities fraud occurring in the mediation." Mot. at 6. These issues are no more worthy of Supreme Court review than they were of en banc review.

Second, the ConnectU Founders have not established "good cause for a stay" of the mandate. Fed. R. App. Pro. 41(d)(2)(A). The only basis they offer for staying the mandate is that they want to avoid the expense of filing a motion in the District of Massachusetts. Mot. at 2-3. To refresh the Court's recollection, the parties had been litigating parallel actions in California and Massachusetts. *See ConnectU v. Facebook, et al*, No. 07-10593-DPW. The Settlement Agreement resolved both cases. The Massachusetts court had stayed the action there pending the outcome of this appeal. Accordingly, it terminated all outstanding motions without prejudice to any party to reassert them within 30 days of the issuance of this Court's mandate. Once the mandate issues from this Court, the Settlement Agreement will go into effect and the Massachusetts court will dismiss that case.

[1] Appellants' Motion to Stay the Mandate is cited as "Mot." and their Excerpts of Record are cited as "ER." Facebook's Supplemental Excerpts of Record are cited as "SER." This Court's docket entries for the consolidated appeals are cited as "Dkt."

On April 20, 2011, the ConnectU Founders informed the Massachusetts court of their intention to move to vacate any judgment in that action pursuant to Rule 60(b). Request for Judicial Notice in Support of Appellants/Intervenors' Motion to Stay Issuance of Mandate, Ex. B at 5. Their motion is based on allegations of discovery fraud. They now argue that they would prefer to avoid the expense of litigating that motion until after the Supreme Court rules on their cert. petition.

What the ConnectU Founders fail to mention is that they (technically, ConnectU) litigated these very same discovery allegations in the district court in this case, lost, and waived any further relief by failing to appeal to this Court. Shortly after Facebook moved to enforce the Settlement Agreement in April 2008 the ConnectU Founders presented the Massachusetts court with allegations of discovery fraud. The Massachusetts court refused to address the allegations, in deference to the California court, which has exclusive jurisdiction to enforce the Settlement Agreement. Declaration of Theresa A. Sutton ("Sutton Decl."), Ex. A at 4. The Massachusetts court directed that "[i]t is for Judge Ware to determine what additional discovery, if any, is necessary to the resolution of any settlement dispute." *Id*. It added that "[f]rom all that appears, the parties were prepared to settle their disputes [upon signing the Settlement Agreement], despite the fact that aspects of discovery in this case . . . had not been completed and unresolved

discovery issues remained outstanding." *Id.*

ConnectU presented the Massachusetts motion to the California district court when it opposed the motion to enforce the Settlement Agreement. ER 780-781; *see also* ER 58; Sutton Decl. Ex. B. ConnectU argued that the alleged discovery fraud was an alternative basis for declining to enforce the Settlement Agreement. ER 780-781. The California district court rejected the allegations of discovery fraud. It held that "the parties elected to proceed with their settlement negotiations knowing they lacked potentially relevant information. Without a showing by Defendants of a material misrepresentation or omission in the negotiations, the Court finds no basis to decline enforcement." ER 57-58. The ConnectU Founders never appealed that ruling to this Court.

The interest in saving the cost of having to litigate one last motion of *any sort* while the cert. petition is pending is not good cause to justify a stay of the mandate. But that is especially so where the motion is so plainly frivolous. Even if the California court had not already rejected the motion, and even if the ConnectU Founders have not waived the issue by declining to appeal it, the ConnectU Founders have overlooked a fatal flaw on the merits of their motion: If allegations of securities fraud could not overcome the definitive release they agreed to in the Settlement Agreement, allegations of discovery violations do not survive either.

The ConnectU Founders purport to be interested not just in saving themselves the expense of litigating a motion, but also in "reliev[ing] [Facebook] of the obligation to respond to the motions that will proceed in Massachusetts" while their cert. petition is pending, Mot. at 3 n.2, and in "judicial efficiency," Mot. at 3. Facebook, for its part, finds the burden minimal, especially in light of the fact that the motion has already been litigated and decided. No doubt, the Massachusetts court, too, will be undaunted. That said, if the Massachusetts court agrees with the ConnectU Founders that "it is sensible for the Massachusetts proceedings to remain on hold until the Supreme Court rules on their anticipated petition for certiorari," Mot. 2, it is free to hold the motion in abeyance. It was, after all, the Massachusetts court that decided, of its own accord, to put the case on hold pending appeal in the first instance. The Massachusetts court does not need this Court's help in managing its own docket.

Facebook bargained for litigation peace. The district court enforced the bargain and this Court affirmed. The time to end this litigation has long since passed. A meritless cert. petition should not stand in the way of resolving the last meritless motion that will end this case once and for all.

CONCLUSION

For these reasons, the ConnectU Founders' motion should be denied.

/ / /

Dated: June 8, 2011 ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ E. Joshua Rosenkranz /s/

E. Joshua Rosenkranz
Attorneys for Plaintiffs-Appellees
THE FACEBOOK, INC., AND
MARK ZUCKERBERG

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2011, I electronically filed the foregoing document **FACEBOOK, INC.'S OPPOSITION TO MOTION TO STAY MANDATE** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

Dated: June 8, 2011 *_/s/ E. Joshua Rosenkranz /s/_*
E. Joshua Rosenkranz

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