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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' MOTION TO DISMISS APPEAL

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FILED
2008 14 FEB 2:51
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INTRODUCTION

Appellees-Cross-Appellants The Facebook, Inc. and Mark Zuckerberg (collectively “Facebook”) request that this Court dismiss this appeal because it does not have jurisdiction. With very few exceptions, an appellate court has jurisdiction over appeals arising from a final adjudication dismissing all parties. None of the exceptions to the general rule apply to this case. No final judgment dismissing all parties exists. As a result, dismissal is warranted.

A dismissal of this appeal also is necessary to avoid piecemeal litigation before this Court. Following a July 2, 2008, Judgment that generated these appeals, additional litigation occurred resulting in a November 3, 2008, Order that set forth a plan for dismissals of all parties. The Court’s November 3, 2008, Order also addressed several substantive disputed matters, as well as the form and timing of the dismissals. Cameron Winklevoss, Tyler Winklevoss and Divya Narendra (the “Founders”) and ConnectU opposed the Court’s Order to Show Cause leading up to the November 3, 2008, Order, creating a risk that ConnectU and the Founders will also challenge the Court’s November 3, 2008, rulings. Without a dismissal of this appeal, this Court will confront two separate sets of briefs raising disputed, interrelated matters. Accordingly, dismissal is warranted to avoid piecemeal litigation.

FACTUAL BACKGROUND

A. This Appeal Arises From A Dispute Over The Enforcement Of A Settlement Agreement

This appeal arises from the District Court's decision to enforce a settlement agreement. On February 22, 2008, Appellees and Appellants entered into a Term Sheet and Settlement Agreement ("Settlement Agreement") that settled all matters pending between them. Declaration of I. Neel Chatterjee in Support of Appellees-Cross-Appellants' Motion to Dismiss Appeal ("Chatterjee Decl."), Ex. A. Since then, the issue has been whether that agreement is enforceable.

B. The District Court Enters An Order And Judgment And The Parties Appeal

On June 25, 2008, the District Court entered an Order granting Facebook's motion to enforce the Settlement Agreement. Chatterjee Decl., Ex. B. On July 2, 2008, the District Court entered a Judgment enforcing the Settlement Agreement. *Id.*, Ex. C. In addition, the Court appointed a Special Master to supervise and manage the settlement transaction and dismissals of the case. *Id.*, Ex. D.

The July 2, 2008, Judgment *did not* dismiss the action or any of the parties. *Id.*, Ex. C. Rather, the Judgment contemplated that the District Court would take additional steps to bring the case to resolution and the court expressly reserved the right to take all steps necessary to enforce the Settlement Agreement. *Id.*

The notices of appeal on file with this Court followed from the July 2, 2008, Judgment. Chatterjee Decl., Exs. E, F. To ensure its rights were not compromised,

Facebook followed with a cross-appeal. Chatterjee Decl., Ex. G. As the notices of appeal were not perfected, litigation relating to the execution of the judgment and dismissals continues.

The Special Master assisted in implementing the July 2, 2008, Judgment. The Special Master, consistent with his appointment, issued a report to the District Court making the following recommendations: 1) that the Court issue an order on the forms of releases and order that the releases be effective as of February 22, 2008; 2) that the Court order the parties to file dismissals of all claims and defenses in the Massachusetts and California actions; 3) that the Court authorize a simultaneous transfer of ConnectU shares to Facebook, and Facebook shares and cash to ConnectU and Quinn Emanuel; 4) that the Court authorize the transfer of Facebook shares and cash to an escrow or trust for the benefit of ConnectU and Quinn Emanuel, or jointly to ConnectU and Quinn Emanuel. *Id.*, Ex. H.

The District Court then acted. On September 19, 2008, the District Court issued an Order to Show Cause asking the parties why it should not: 1) deliver the ConnectU shares to Facebook; 2) simultaneously deliver cash and Facebook shares to the principals of ConnectU; 3) simultaneously file tendered dismissals; and 4) simultaneously file the tendered releases. *Id.*, Ex. I. In addition, the Court requested that the parties provide positions and argument related to any third party liens in existence. *Id.* Facebook, ConnectU, the Founders and Quinn Emanuel (a

third party lien claimant against ConnectU and the Founders) responded to the Order to Show Cause. Chatterjee Decl., Exs. J, K, L.

The parties and Quinn Emanuel appeared at the hearing for the Order to Show Cause on October 28, 2008. *Id.*, Ex. M. ConnectU and the Founders contended the Court did not have jurisdiction because ConnectU and the Founders had filed notices of appeal. *Id.* at 11-12. The District Court disagreed.

The District Court found that the July 2, 2008, Judgment was not a final appealable judgment. Chatterjee Decl., Ex. N. In relevant part, the Court concluded “[t]he Court finds that although the July 2 Judgment is prefatory to entry of a final adjudication, it is interlocutory in nature. The July 2 Judgment orders the parties to deposit the cash, stock and other documents with a Special Master, subject to further order of the Court; it does not identify specific acts the parties are to perform with respect to one another.” *Id.* at 4. Acknowledging the appeal filed by ConnectU and the Founders, the Court stated “[a]lthough a matter for the Ninth Circuit to decide, implicit in the Court’s findings is that the current appeals by Defendants are imperfect.” *Id.* at 5 fn 5.

Consistent with the Court’s findings, under the express language of the Judgment entered on November 3, 2008, the parties are not yet dismissed. Chatterjee Decl., Ex. O. The Judgment stated that all parties to the action will be subject to motions to dismiss *on November 24, 2008*. *Id.* Since the entry of the

November 3, 2008, Order and Judgment, Facebook has filed a motion seeking clarification of them. Chatterjee Decl., Ex. P. That motion is pending.

During the foregoing proceedings, no party moved for an interlocutory appeal for entry of a final judgment with respect to an individual party pursuant to Federal Rule of Civil Procedure 54(b) or under 28 U.S.C. § 1292(b).

ARGUMENT

A. No Final Judgment Dismissing All Parties Has Been Entered

An appeals court is of limited jurisdiction and only has jurisdiction over final decisions of a district court or over sufficiently important or certified interlocutory orders. *See* 28 U.S.C. §§ 1291, 1292(b); Fed. R. Civ. P. 54(b). A final judgment has been defined by the courts as one that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Catlin v. United States*, 324 U.S. 229, 233 (1945). While the final judgment rule is not technical, an order, at minimum, must dispose of *all* the claims against *all* parties to be considered final for purposes of § 1291. *Ashker v. Cal. Dep't of Corr.*, 350 F.3d 917, 920 n.1 (9th Cir. 2003) (emphasis added). If matters remain that must be attended to by the district court even after entry of a document entitled judgment, that judgment is not a final order from which an appeal may be taken. *Zucker v. Maxicare Health Plans*, 14 F.3d 477, 481 (9th Cir. 1994) (finding that a judgment was not a final order because “the contingent nature of this Judgment means that

the District Court must still take action; the District Court has more to do than simply execute the Judgment”).

A final decision dismissing all parties has not yet been entered. None of the orders or judgments constitute a final decision for purposes of Section 1291 because questions and acts required for purposes of finalizing the judgment remain. *Zucker*, 14 F.3d at 481; *see also Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142 (1993) (finding that an “[a]ppeal is thereby precluded . . . from any fully consummated decisions, where they are but steps towards final judgment in which they will merge”). Here, the transfer of the cash and stock consideration by the parties and the filing of dismissals were required acts contemplated by the Settlement Agreement and the July 2, 2008 Judgment. Chatterjee Decl., Exs. A, C. In fact, the form of dismissal and other matters related to finally dismissing the parties generated briefing and another round of hearings before the District Court. As of today, the Court has only required filing of a motion to dismiss on November 24, 2008. *Id.*, Ex. O. Consequently, no final judgment has issued for purposes of appeal under 28 U.S.C. § 1291.

B. No Exceptions To The General Rule Apply

The two exceptions to the general rule that allow for appeals prior to a final judgment dismissing all parties do not apply. First, the Court has not entered a

final judgment pursuant to Federal Rule of Civil Procedure 54(b) or sought a discretionary interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Federal Rule of Civil Procedure 54(b) requires that when a party or a claim in a multi-party and multi-claim action is dismissed, the court must direct entry of final judgment as to one or more parties for the judgment to be appealable. Fed. R. Civ. P. 54(b); *SEC v. Capital Consultants LLC*, 453 F.3d 1166, 1175 (9th Cir. 2006). Because there was no final judgment and no party has sought entry of final judgment pursuant to Rule 54(b), this appeal should be dismissed.

Second, this appeal is not an interlocutory appeal pursuant to 28 U.S.C. §1292. An interlocutory appeal under Section 1292 requires the Court to make findings that there is a “controlling question of law to which there is a substantial ground for difference of opinion” to support an immediate interlocutory appeal. 28 U.S.C. § 1292(b). No request has ever been made for an interlocutory appeal, and the District Court has not made the required findings. Accordingly, the current appeal cannot be considered an interlocutory appeal.

CONCLUSION

For the foregoing reasons above, Facebook respectfully requests this Court to dismiss the appeal.¹

¹ Pursuant to Circuit Rule 27-11, Facebook respectfully requests that this Court stay and re-set the briefing schedule until disposition of this motion.

Dated: November 14, 2008

ORRICK, HERRINGTON & SUTCLIFFE LLP

A handwritten signature in black ink, appearing to read 'I. Neel Chatterjee', is written over a horizontal line. The signature is stylized and somewhat cursive.

I. Neel Chatterjee
Attorneys for Plaintiffs-Appellees
THE FACEBOOK, INC., AND
MARK ZUCKERBERG

PROOF OF SERVICE VIA FEDERAL EXPRESS

I am more than eighteen years old and not a party to this action. My business address is Orrick, Herrington & Sutcliffe LLP, 1000 Marsh Road, Menlo Park, California 94025.

On November 14, 2008, I served the following document(s):

APPELLEES-CROSS APPELLANTS' MOTION TO DISMISS APPEAL

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I am readily familiar with my firm's practice for collection and processing correspondence for overnight delivery by Federal Express, to wit, that correspondence be deposited with Federal Express this same day in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 14, 2008 at Menlo Park, California.



Josie Pollack

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