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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THE FACEBOOK, INC., AND
MARK ZUCKERBERG

ATTACHMENT 1

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.)

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

II. DISCUSSION

A. Motion to Intervene

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

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

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

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

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

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

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

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

[3] (Order Granting Plaintiffs' Confidential Motion to Enforce the Settlement Agreement at 3, hereafter, "Enforcement Order," Docket Item No. 461.)

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

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

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

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[4] The service list shows that attorney Scott Mosko of the Finnegan, Henderson, Farabow was served. (Enforcement Order, certificate of service page.) The Finnegan firm previously represented the ConnectU Founders in this action prior to their dismissal; however, the Finnegan 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.

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

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

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

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

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

B. Motion to Stay

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

Federal Rule of Civil Procedure 62(d), which provides for a stay upon court approval of a supersedeas bond, pertains primarily, if not exclusively, to monetary judgments. See NLRB v. Westphal, 859 F.2d 818, 819 (9th Cir. 1988). Thus, whether a district court should grant a stay of the enforcement of a non-monetary judgment is governed by Rule 62(c), which provides that "[w]hen an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during

the pendency of the appeal." Spieler ex rel. Spieler v. Mt. Diablo Unified School Dist., 2007 WL 3245286, at *2-3 (N.D. Cal. 2007).

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

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

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

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

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

III. CONCLUSION

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

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

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

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

Dated: August 8, 2008

JAMES WARE
United States District Judge

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

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Dated: August 8, 2008

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy

ATTACHMENT 2

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE FACEBOOK, INC.; et al., Plaintiffs - Appellees, v. CONNECTU, INC., formerly known as ConnectU, LLC, Defendant - Appellant, and PACIFIC NORTHWEST SOFTWARE, INC.; et al., Defendants.	No. 08-16745 D.C. No. 5:07-cv-01389-JW Northern District of California, San Jose AMENDED ORDER

Before: CANBY, LEAVY and KLEINFELD, Circuit Judges.

Appellant's unopposed motions to file under seal its emergency motion to stay execution of the district court's July 2, 2008 judgment, as amended by the district court's August 8, 2008 order, and exhibits and reply in support of that motion are granted. *See* 9th Cir. R. 27-13; *see also Gator.Com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1128 n.2 (9th Cir. 2005) (en banc) (citing Ninth Circuit Rule

27-13). Appellees' unopposed motion to file under seal its opposition to the emergency motion and exhibits in support of that opposition is granted. *See id.*

Appellant's emergency stay motion is denied. *See Golden Gate Rest. Ass'n v. City & County of San Francisco*, 512 F.3d 1112, 1115-16 (9th Cir. 2008); *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983).

The briefing schedule established previously shall remain in effect.

LL/MOATT

ATTACHMENT 3

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

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[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.)

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

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

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

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

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

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[3] (Defendants' Response to Order to Show Cause on Disbursement of Settlement Consideration, and Renewed Motion to Stay at 1, hereafter, "Defendants' Response," Docket Item 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

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[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.

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

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

The 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. See Petrello, 533 F.3d at 115-116. All of the Court's directives are made in reference to the underlying Agreement, which prevents the July 2 Judgment from being considered a final adjudication. See id. Instead, the July 2 Judgment directs the parties to take a number of preparatory actions, which place the Special Master as a temporary intermediary, pending further action of the Court. None of the terms of the July 2 Judgment "require immediate turnover of property" to the parties, nor "subject [either] party to irreparable harm." In re Hawaii Corp., 796 F.2d at 1143. Furthermore, the purpose of the October 28th hearing was to provide the parties with an opportunity to show cause why a final adjudicatory action ordering specific performance should not be entered.

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

B. Stay of Execution

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

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

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

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

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

Accordingly, the Court DENIES Defendants' renewed motion for a stay of execution. However, to afford Defendants a limited right to seek a stay from the Ninth Circuit, the judgment will order transfer on **November 24, 2008**.

C. Lien on the Settlement Proceeds

At the October 28, 2008 hearing Quinn Emanuel, appeared and requested that any disbursal of the settlement proceeds by made jointly in the name of the Defendants and the law firm. Since Quinn Emanuel is not a party to this case and has otherwise not foreclosed on any lien, the Court declines to grant its request. Instead, the Court will order that the proceeds be delivered in trust to Defendants' counsel. However, nothing in this Order is intended to affect Quinn Emanuel's right to assert its lien on the proceeds in the hands of Defendants or Defendants' counsel.

III. CONCLUSION

For the reasons stated above and pursuant to the stipulation of the parties that this Court enforce the Agreement, the Court will issue a final adjudicatory order. The Court declines to take any action with respect to the lien by Quinn Emanuel.

Dated: November 3, 2008

JAMES WARE
United States District Judge

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Dated: November 3, 2008

Richard W. Wieking, Clerk

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Elizabeth Garcia
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