Case Nos. 08-16745, 08-16849, 08-16873 (consolidated),
09-15133, 09-15021, 09-17050

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' RESPONSE AND OPPOSITION TO THE FOUNDERS' MOTION TO CONSOLIDATE APPEALS AND MOTION TO SET BRIEFING SCHEDULE

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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 its stock.

I. INTRODUCTION

Facebook opposes the proposed consolidation of the Founders' recent interlocutory appeal of the District Court's September 2, 2009, disqualification order and the pending motions to dismiss with the Founders' appeal on the merits. As is contemplated by Ninth Circuit Rule 27-11, the appeal of the disqualification of ConnectU's former counsel and the motions to dismiss are threshold issues that should be decided prior to evaluation of the merits of the already pending appeal. Until the disqualification order and the motions to dismiss are resolved, all other aspects of the Founders' motion are premature.

II. BACKGROUND

These consolidated appeals comprise an appeal by ConnectU, three appeals by the Founders of ConnectU, Inc., and a cross-appeal filed by Facebook, Inc. and Mark Zuckerberg from various orders and judgments entered in the Northern District of California last year. In addition, the Founders have recently filed an improper interlocutory appeal of the District Court's order disqualifying their counsel. *See Christiansen v. United States District Court, et al*, 844 F.2d 694, 697 (9th Cir. 1988) ("An order disqualifying counsel is not a collateral order subject to immediate appeal").

These appeals have a lengthy history. Following several actions by the District Court, ConnectU and the Founders sought emergency relief twice from

this Court. Court of Appeals Docket No. 08-16745, Doc. Nos. 8, 43.[1] On both occasions, ConnectU and the Founders sought review on the merits and an order to stop the District Court from executing its judgment. *Id.* In each instance, this Court denied the request for relief and, as a result, the Founders transferred ConnectU to Facebook. Doc. Nos. 12, 51.

Two motions to dismiss are pending. First, ConnectU (since changing hands) filed a motion to voluntarily dismiss its appeal. Doc. No. 52. Second, Facebook and Mr. Zuckerberg filed a separate motion to dismiss the Founders' appeal because the Founders waived their right to appeal by failing to oppose Facebook's motion to enforce the parties' Settlement Agreement. Doc. No. 69. Both of these motions to dismiss have been fully briefed and are ripe for determination by the motions panel. Pursuant to this Court's rules, all further merits briefing was stayed due to the pendency of motions to dismiss. 9th Cir. R. 27-11.

In addition to the motions to dismiss, in January 2009 ConnectU filed a Motion to Disqualify its former counsel who insisted on continued representation of the Founders, despite an obvious conflict of interest. Doc. No. 63. The Motion also requested the turnover of client files of ConnectU. *Id.* In July 2009, the Court remanded these consolidated (and related) appeals for the "limited purpose of

[1] All Document Number ("Doc. No.") references hereinafter are to Court of Appeals Docket No. 08-16745.

enabling the district court to consider the issues raised in ConnectU, Inc.'s motion to disqualify counsel" and related filings. Doc. No. 81. Under the rules of this Circuit, the filing of the Motion to Disqualify provided a separate and independent basis to stay briefing on the merits. 9th Cir. R. 27-11(a)(6). Indeed, this Court stayed the briefing on the merits during the pendency of the referral to the District Court and required the parties to submit periodic status reports. Doc. No. 81.

On September 2, 2009, the District Court ruled on the remanded disqualification motion: the Court disqualified ConnectU's former counsel from representing the Founders in this matter and ordered that a Magistrate Judge supervise and review materials related to the turnover of client files. Declaration of Theresa A. Sutton in Support of Opposition to Motion to Consolidate ("Sutton Decl.") Ex. A. The Founders then filed a Notice of Appeal prior to the referral being completed. *Id.* Ex. B. Namely, the District Court has not yet resolved the issues related to client files and instead has referred the matter to a Magistrate. *Id.* Ex. A. The District Court did not issue a final order incident to the remand.

Following the Court's ruling disqualifying the Founders' counsel, ConnectU and the Founders each filed a status report in this Court. Doc. Nos. 83 (ConnectU), 86 (Appellants). In their status report, the Founders seek further consolidation of appeals, a briefing schedule, and referral of the motions to dismiss and the District Court's disqualification Order to the merits panel (rather than the

motions panel). Doc. No. 86. Facebook and Zuckerberg oppose the Founders' request.

III. ARGUMENT

Consolidation of the pending motions to dismiss and appeal of the September disqualification order is inappropriate. Instead, consistent with the rules of this Court, phasing of the proceedings is appropriate. 9th Cir. R. 27-11.

A. The Proceedings Should be Phased

1. The Review of the Motion to Disqualify Should be Resolved Prior to Briefing on the Merits.

The Founders ask the Court to defer to the merits panel the Motion to Disqualify. The Founders' suggested approach makes little sense. The appeal of the Motion to Disqualify should be resolved before any other motion. The Founders claim in their motion that their new counsel should be permitted to withdraw the Founders' merits brief in order to present the brief in the "voice" of their current counsel. Doc. No. 86 at 7. However, the issue of which brief and appellate strategy is followed goes to the heart of the disqualification issue. The parties should not be left to guess whose brief on the merits is at issue and which brief the Founders want to present.

Facebook's approach also is consistent with the position already taken by this Court. Doc. No. 81. This Court stayed briefing on the merits while the disqualification and related issues were handled by the District Court. *See* 9th Cir.

R. 27-11(a)(6) (staying briefing on merits pending motion for appointment or withdrawal of counsel). This Court merely sought regular status reviews to ensure the District Court proceeded expeditiously. Such expeditious review is now occurring. No reason exists to depart from the sound case management strategy already followed by this Court.

2. The Motions to Dismiss should be resolved prior to the proceedings on the merits.

Facebook's and ConnectU's motions to dismiss also should be heard and resolved before the merits are heard. This approach is consistent with the Court's own rules for staying consideration of the merits of an appeal pending resolution of other dispositive motions. "The motions panel rules on substantive motions, including motions to dismiss… ." *See* Cir. Advisory Committee Note to Rule 27-1(3)(a). The Founders' request, if granted, will eviscerate the efficiencies behind this rule, which requires "[m]otions requesting [dismissal to] stay the schedule for record preparation and briefing pending the court's disposition of the motion." 9th Cir. R. 27-11(a)(1). *See* 9th Cir. R. 27-10 and Cir. Advisory Committee Note to Rule 27-1(4).

Whereas the Founders' request to consolidate "motions" with the "merits" will result in unnecessary, avoidable inefficiencies, resolution of the motions to dismiss prior to considering the merits will afford the Court an opportunity to streamline – or even eliminate – issues raised in the merits briefing. Indeed, the

motions to dismiss have been fully briefed and are ripe for review. Doc. Nos. 52, 69.

The Founders incorrectly assert that the issue raised by Facebook's Motion to Dismiss is "inextricably related" to their appeal. Doc. No. 86 at 9. The motion to dismiss is based on the Founders' procedural waiver of their right to appeal the underlying judgment by failing to oppose Facebook's motion to enforce the parties' Settlement Agreement. Doc. No. 69. The procedural record below demonstrates that the Founders failed to challenge the motion to enforce the Agreement. *Id.* at 7. Resolution of the merits of the Founders' appeal, in contrast, requires an analysis of disputed facts on the merits and substantive securities and common law issues. Consequently, the issues raised in the "motion" are distinct from those raised on the "merits," requiring entirely separate analyses.

The Founders also claim that their grievance will escape substantive review if the motions to dismiss are granted, thereby precluding them from relief. Doc. No. 86 at 1. To the contrary, the Founders and ConnectU (prior to changing hands) sought relief on the merits *twice* through their emergency appeals. Doc. Nos. 8, 43. Both efforts were denied. Doc. Nos. 12, 51. In addition, as set forth in the Motion to Dismiss, the Founders made a strategic election not to oppose the substance of the underlying enforcement proceedings, perhaps because they had spent years in litigation trying to avoid submitting to jurisdiction in California.

They should not be heard to complain now, having made that strategic decision.

B. The Founders' Arguments in Opposition to Facebook's Motion Should be Rejected

To the extent the Founders seek to supplement their opposition to Facebook's Motion to Dismiss with new arguments, those arguments should be rejected. Dkt. No. 86 at 10-14. While the Court instructed the parties to move for "appropriate relief" upon resolution of the Motion to Disqualify, it did not authorize the Founders to supplement or reargue their opposition to the Motion to Dismiss.[2] Doc. No. 81 at 3. Importantly, none of the issues raised – new or old – supports the notion that the Motion to Dismiss should be resolved by the merits panel.

Specifically, the Founders incorrectly claim that the District Court expressed an understanding that the Founders opposed the motion to enforce. Dkt. No. 86 at 3. To the contrary, in footnote 1 of the District Court's disqualification order, the court stated, "There is a legal issue whether the Founders appeared in opposition to the motion to enforce the Settlement Agreement. Sutton Decl. Ex. A at 2 n1. However, there is no dispute that the Founders and ConnectU were jointly represented." *Id.* at 2.

[2] The Founders' argument that Facebook is somehow taking inconsistent positions with regard to the Founders' involvement in the enforcement proceedings has been fully briefed. Doc. Nos. 75 at 11-12; 78 at 3-9. Consequently, Facebook does not address this issue here.

The Founders also argue that the purported "confusing procedural events" during the enforcement proceedings warrant referral to the merits panel. Doc. No. 86 at 13. The only question raised by Facebook's Motion to Dismiss, however, is whether or not the Founders waived their right to appeal because they chose not to oppose the motion to enforce the Settlement Agreement even though they had full notice of the motion and an opportunity to oppose. *See, e.g., Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1007 (9th Cir. 2008); *Doi v. Halekulani Corp.*, 276 F.3d at 1140; *Slaven v. Am. Trading Transp. Co.*, 146 F.3d 1066, 1069 (9th Cir. 1998); *Squaw Valley Dev. Co. v. Goldberg*, 395 F.3d 1062, 1064 (9th Cir. 2005). No amount of "procedural complexity" will alter the simple issue presented. Any perceived "procedural complexities" have no bearing on the undisputed fact that the Founders made a choice not to challenge enforcement of the Settlement Agreement. They had notice of the enforcement proceedings. Doc. No. 69 at 2-3. Their counsel was present. *Id*. They did not oppose. *Id.* at 3-4. They should not be heard to complain now that they made a strategic procedural decision and lost.

Further, the new cases cited by the Founders do not support their position. For example, in *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992), the trial court had issued a contempt order against the defendant/appellant. The defendant moved for reconsideration, and the trial court declined to do so. By appeal, the defendant challenged the scope of the contempt order. The appellee

argued that the appeal should be denied because the appellant had not challenged the scope of the order. The court disagreed and found that "[b]y filing a motion for reconsideration, [appellant] gave the district court a clear opportunity to review the validity of its order." Consequently, the *Whittaker* court found, *appellant* had raised the issue in the lower court, and thus it had not waived its rights. Unlike *Whittaker*, the Founders' raised no objections in the District Court but, instead, strategically took no position while ConnectU challenged enforcement. *Morrow v. Greyhound Lines, Inc.*, 541 F.2d 713 (8th Cir. 1976), meanwhile, actually supports Facebook's position. Namely, Morrow recognized that "appellant's failure to properly object" precluded consideration of that issue on appeal. *Id.*

IV. CONCLUSION

For the foregoing reasons, Facebook respectfully requests this Court decide the threshold issues of the disqualification of ConnectU's former counsel, ConnectU's Motion to Dismiss Pursuant to FRAP 42(b), and Facebook's Motion to Dismiss the Founders' Appeal based on waiver. If any issues remain, the Court can schedule briefing subsequent to these threshold issues.

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Dated: September 28, 2009 ORRICK, HERRINGTON & SUTCLIFFE LLP

s/ I. Neel Chatterjee

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THE FACEBOOK, INC., AND
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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ I. Neel Chatterjee

I. Neel Chatterjee

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