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Case Nos. 08-16745, 08-16849, 08-16873, 09-15021

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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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**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
PORTIONS OF APPELLANTS' CAMERON WINKLEVOSS, TYLER
WINKLEVOSS AND DIVYA NARENDRA'S APPEALS**

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Facebook, Inc. v. ConnectU, Inc.,
Case No. 5:07-CV-01389 (RS) 1

INTRODUCTION

Appellees / Cross-Appellants The Facebook, Inc. and Mark Zuckerberg (collectively, “Facebook”) request that this Court dismiss Appellants Cameron Winklevoss, Tyler Winklevoss and Divya Narendra’s (collectively the “Founders”) appeals from a number of orders and judgments issued by the district court enforcing a settlement agreement the Founders signed.

The Founders waived their right to challenge the enforcement of the Settlement Agreement when they did not oppose Facebook’s motion to enforce it. Indeed, the Founders made a strategic decision not to challenge the Settlement Agreement that is the subject of these appeals even though they had been served with it, assisted ConnectU with its opposition, attended related hearings, and launched collateral attacks in other jurisdictions to dismantle the settlement. Under these facts, dismissal of their appeal is appropriate.

FACTS

A. The Parties Enter Into A Settlement Agreement

On February 22, 2008, Facebook, ConnectU, the Founders and Howard Winklevoss (the father of two of the Founders and a shareholder in ConnectU) with their respective counsel participated in a global mediation to settle all pending disputes between the parties.¹ Declaration of Theresa A. Sutton in Support of

¹ At the time, the parties were engaged in two lawsuits and one appeal: *ConnectU, Inc. v. Facebook, Inc.* Case No. 1:07-cv-10593-DPW (D. Mass.);

Appellees/Cross-Appellants' Motion to Dismiss ("Sutton Decl."), Ex. A. That mediation was successful and resulted in a settlement of all pending actions pursuant to the terms set forth in a Term Sheet and Settlement Agreement (the "Settlement Agreement"). *Id.*, Ex. J.

As a result of the settlement, the Founders were to receive Facebook stock and cash. *Id.* ¶ 7. Facebook was to take ownership of ConnectU. *Id.* ConnectU and seven other parties in two cases were released from liability but none of them received financial consideration pursuant to the Settlement Agreement. *Id.*

The parties agreed that the Northern District of California would retain jurisdiction to enforce the Settlement Agreement. *Id.* ¶ 4. The Founders signed the Settlement Agreement in their individual capacities. *Id.* Cameron Winklevoss signed on behalf of ConnectU. *Id.*

B. Facebook Brings A Motion to Enforce The Settlement Agreement and Serves all Parties to the Litigation

For two months following mediation, the Founders sought to re-negotiate the terms of the Settlement Agreement. When Facebook would not agree to new terms, the Founders decided not to honor the Settlement Agreement. On April 23, 2008, Facebook filed a motion to enforce the agreement in the Northern District of California – the court in which the parties agreed the terms of the Settlement

ConnectU LLC v. Mark Zuckerberg, et al, Case No. No. 07-1796 (1st Cir.); and *Facebook, Inc. v. ConnectU, Inc.*, Case No. 5:07-CV-01389(RS) (N.D. Cal.). Sutton Decl., Ex. K, fn 2.

Agreement would be enforced. *Id.*, Ex. B. Facebook served its motion to enforce the Settlement Agreement on all counsel that had appeared in the Massachusetts action, as well as the California action, including counsel for the Founders, Quinn Emanuel and Finnegan Henderson. *Id.*, Exs. M and N. Facebook also filed a notice of motion in the District Court of Massachusetts to ensure that that court and the other defendants in the Massachusetts action were aware of the proceedings in California. *Id.*, Ex. C. Facebook attached its motion to the Notice. *Id.*

Following the filing of Facebook's motion, Boies, Schiller & Flexner appeared in the Northern District of California on behalf of ConnectU. The Boies firm repeatedly stated that it only represented ConnectU and *not* the Founders. At the same time, Finnegan Henderson continued to represent ConnectU and the Founders on both coasts, but took no positions in the enforcement proceedings.

C. Only ConnectU Opposes Or Appears In The Motion To Enforce Proceedings

Between April 23, 2008 and June 23, 2008, ConnectU and Facebook litigated the issues raised by the motion to enforce the Settlement Agreement. Notably, *only* the Founders had an interest in having the Settlement Agreement undone – they were to receive stock and cash as part of the Settlement Agreement, (*id.*, Ex. K, ¶ 7) and it was their dissatisfaction with the value of that consideration that was at issue in the enforcement proceedings and is at issue in these appeals. ConnectU, on the other hand, received only a change of ownership and a release of

claims as a result of the settlement.

Despite their unique interest in disrupting the Settlement Agreement, the Founders made a strategic decision not to challenge the enforcement motion Facebook filed. *Id.*, Ex. D. As a result, they did not challenge Facebook's motion to enforce the Settlement Agreement. *Id.* In its Reply brief, Facebook pointed out that only ConnectU objected to enforcement of the Settlement Agreement and was not in a position to protect shareholder interest. For that reason, Facebook argued, the non-opposing parties – including the Founders – waived their right to challenge the agreement. *Id.*, Ex. E, fn 1. Moreover, in that brief, Facebook argued that ConnectU was not a purchaser of shares and, thus, lacked standing to challenge the agreement.² *Id.* at 9:14-21. The Founders were served with the Reply brief, but did not file a challenge to the motion at any time.

D. The Founders Seek to Undermine the Settlement Agreement Without Subjecting Themselves to the Court's Jurisdiction

Three weeks after Facebook filed its motion, Finnegan Henderson, the firm representing both ConnectU and the Founders, separately attacked the settlement by filing an “emergency” motion to compel the production of documents in the District of Massachusetts. *Id.*, Ex. F. One of the Founders attended the hearing, as did Howard Winklevoss (father of the other two Founders who, at the time, were

² ConnectU's opposition to enforcement was premised on Facebook's alleged securities fraud in connection with the sale or purchase of its stock. The Founders – not ConnectU – were to receive Facebook stock as part of the settlement.

unavailable due to their Olympics training). The Founders did not join in the motion to compel.

During the hearing on its motion to compel, ConnectU argued that the Settlement Agreement should be undone. *Id.*, Ex. O at 53:12-54:17. Boies, Schiller also appeared at the hearing on ConnectU's behalf (but as a representative of the California enforcement proceedings) and likewise argued that the Settlement Agreement was not enforceable. *Id.* at 59:3-11. The court refused to grant the motion and ruled, instead, that the issue should be resolved in the Northern District of California. *Id.* at 33:5-8.

At the same time, the Founders continued their collateral attack on the Settlement Agreement in the California proceedings on ConnectU's behalf but not for themselves. Though they did not join ConnectU's opposition to Facebook's motion to enforce, one of the Founders (who described himself only as a ConnectU shareholder) submitted two declarations in support of ConnectU's opposition describing what the Founders believed the agreement to be. *Id.*, Ex. G. In addition, ConnectU's expert filed a declaration in which she detailed the adverse affects enforcement of the Settlement Agreement would have on the Founders – not ConnectU (and hence, why the Founders could not possibly be bound by the agreement). *Id.*, Ex. H.

Following the hearing, the Court granted Facebook's motion to enforce the

Settlement Agreement, and specifically noted that the Founders had been served with, and received notice of, the motion to enforce the Settlement Agreement. *Id.*, Ex. L. The district court then entered judgment against ConnectU and the Founders on July 2, 2008. *Id.*, Ex. P.

E. After The Court Grants The Motion To Enforce, The Founders Ask To Intervene

Recognizing that they should have opposed Facebook's motion to enforce the Settlement Agreement, the Founders filed a motion to intervene to challenge the July 2, 2008, Judgment. *Id.*, Ex. Q. The district court denied the Founders' motion in an Order dated August 8, 2008, finding the motion unnecessary because the Founders were already "parties for purposes of proceedings to enforce the Settlement Agreement." *Id.*, Ex. R.

F. The Appeal by ConnectU and the Founders

On July 30, 2008, ConnectU filed an appeal of the Court's June 25, 2008, Order granting Facebook's Motion to Enforce the Settlement Agreement and July 2, 2008, Judgment. *Id.*, Ex. S. On August 11, 2008, the Founders filed their own appeal of the Court's denial of their motion to intervene and all related orders (including the June 25 Order enforcing the Settlement Agreement). *Id.*, Ex. T. After the Ninth Circuit consolidated the appeals, ConnectU and the Founders filed a consolidated Brief of Appellants. *Id.*, Ex. I. On December 19, 2008, the Founders filed a second Notice of Appeal related to the District Court's November

and December 2008 rulings. *Id.*, Ex. U.

In their “Brief of Appellants,” the Founders challenge the denial of their motion to intervene, and also seek to join with ConnectU in all arguments related to the district court’s earlier orders. *Id.* at 2-4. The Founders join in these arguments despite the fact that the Founders did *not* join ConnectU in any of these same arguments when the motion to enforce was pending. In fact, the Founders specifically note that they might not be entitled to appeal on the issues associated with the June 25, 2008, Order granting the motion to enforce the Settlement Agreement. *Id.* at 52-53 (“The Founders therefore appeal the August 8, 2008, Order only to the extent that this Court determines that the Founders are not otherwise entitled to appeal on all issues”). Indeed, the Founders correctly anticipate that this Court must dismiss for lack of jurisdiction as it relates to arguments they elected not to raise with the district court prior to its June 25, 2008 Order enforcing the Settlement Agreement, and the July 2, 2008 Judgment.

ARGUMENT

The Founders waived their right to appeal the district court’s decision on Facebook’s motion to enforce. The Founders strategically elected not to oppose the motion despite being served with it and aware of the arguments being raised by the parties. Having decided to intentionally proceed in this manner, they cannot now change their mind to have this Court pass on their arguments in the first

instance. “[I]t is well-established that an appellate court will not consider issues that were not properly raised before the district court. It follows that if a party fails to raise an objection to an issue before judgment, he or she waives the right to challenge the issue on appeal.” *Doi v. Halekulani Corp.*, 276 F.3d 1131, 1140 (9th Cir. 2002); *see also Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1007 (9th Cir. 2008) (refusing to consider argument not raised before the district court).

Dismissal is appropriate where, as here, a party makes a strategic decision not to object to an issue before judgment. *See, e.g., Citibank Int’l v. Collier-Traino, Inc.*, 809 F.2d 1438 (9th Cir. 1987). In *Citibank*, the court found a nonparty’s strategic decision not to join the proceedings “because it feared subjecting itself to the jurisdiction of the district court on related claims” was fatal to its ability to appeal. The *Citibank* nonparty had ample notice and opportunity to seek leave to intervene in the proceedings but chose not to, leading the court to conclude the nonparty should not be permitted to appeal. So should be the result here.

Like the *Citibank* nonparty, the Founders belatedly realized their interests had not been protected in the underlying proceedings. As a result, the Founders sought to intervene in the California action, but argued their intervention should be limited to the enforcement proceedings (and not for any other litigation). Sutton Decl., Ex. Q. The Founders also argued that the district court did not have

jurisdiction over them because it was not clear that the Settlement Agreement is enforceable and because they had not been served with the motion.³ *Id.*, Ex. J at 15:9-11. The district court rejected these arguments and, instead, held that the Founders already were parties to the enforcement proceedings and, thus, denied their motion to intervene. *Id.*, Ex. R. Further, the Founders attended hearings and assisted in ConnectU's challenge, but refused to enter an appearance to oppose Facebook's motion to enforce. *Id.*, Exs. G, O, and P. Under these circumstances, they waived their right to appeal. Like the nonparty in *Citibank* (who avoided any association with the underlying proceedings until it was too late), the Founders – who are parties and helped from the sidelines – “must accept the disadvantages as well as the advantages that flow from” their strategic elections. *Id.* at 1441.

Because it is undisputed that the Founders were served with, and had notice of, the motion to enforce the Settlement Agreement prior to the Court's Order and Judgment and intentionally elected to remain silent, this Court must dismiss so much of the Founders' arguments as they are waived.

CONCLUSION

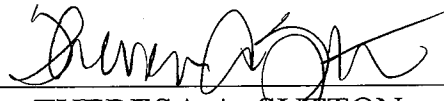
Accordingly, Facebook respectfully requests that this Court dismiss (due to the Founders' waiver) portions of the Founders' appeal to the extent it challenges

³ The basis for the argument that they had not been served was that although they were named plaintiffs in the District of Massachusetts, Facebook had moved to dismiss that complaint and the court had not yet ruled on that motion. *Id.*, Ex. J at 74:23-75:13.

the July 2, 2008, Judgment enforcing Settlement Agreement and related Orders and Judgments including the June 10, 2008, Order; June 25, 2008 Order; August 8, 2008, Order; November 3, 2008, Judgment; November 21, 2008, Amended Judgment; and December 15, 2008, Order.

Dated: February 18, 2009

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