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

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 REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS PORTIONS OF APPELLANTS' CAMERON WINKLEVOSS, TYLER WINKLEVOSS AND DIVYA NARENDRA'S APPEALS

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INTRODUCTION

The motion filed by Plaintiffs-Appellees Facebook, Inc. and Mark Zuckerberg (collectively "Facebook") to dismiss portions of the appeal by Defendants-Appellants Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra (collectively "the Founders") due to waiver is proper and should be granted. The Motion results from the Founders' own strategic choices, including the fact that along with their co-defendant ConnectU, Inc., they filed three appeals from the District Court's enforcement of the parties' settlement agreement entered on July 2, 2008, two of which were premature. Waiver exists because at no time prior to July 2, 2008 did the Founders object to the District Court's actions enforcing the underlying settlement agreement, despite having notice of the proceedings, and despite their lending evidentiary support to ConnectU. Dismissal is appropriate under these circumstances.

ARGUMENT

A. Facebook's Motion to Dismiss is Timely and Proper

The Founders initially argue that Facebook's Motion to Dismiss should be denied because they contend that the waiver arguments should have been raised in an earlier Motion to Dismiss (Case No. 08-16745, Dkt. No. 40) that Facebook filed on November 14, 2008 directed to the question of whether all of the then-pending appeals and cross-appeals were premature. Founders' Opp. at 1, 8-11. However, that earlier Motion to Dismiss was filed only after the District Court by Order

dated November 3, 2008, clarified that "although the July 2 Judgment is prefatory to a final adjudication, it is interlocutory in nature," and further held that "[a]lthough a matter for the Ninth Circuit to decide, implicit in the Court's findings is that *the current appeals by Defendants are imperfect*." Evan A. Parke Decl. in Supp. of Opp'n to Mot. to Dismiss ("Parke Decl."), Ex.A, at 4 & 5 n.5 (emphasis added). Inasmuch as the District Court had specifically informed the parties that the July 2, 2008 Judgment was non-final and invited the parties to raise that fact with the Ninth Circuit, Facebook had no choice but to move to dismiss ConnectU's and the Founders' appeals (as well as its own cross-appeal) for lack of subject matter jurisdiction. *See Zucker v. Maxicare Health Plans*, 14 F.3d 477, 481-85 (9th Cir. 1994). The Court of Appeals needed to address whether the July 2, 2008 Order was final *before* it considered any other issue, such as the Founders' waiver, because a threshold question existed whether the Court could even exercise jurisdiction over any appeal. *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 1919 (5th Cir. 2001) ("federal courts must address jurisdictional questions whenever they are raised and must consider jurisdiction *sua sponte* if not raised by the parties"; footnote omitted).

The Founders offer virtually no appellate or other authority which holds that successive Motions to Dismiss are impermissible under either FRAP 27 or 9th Cir. R. 27-1 when subject matter jurisdiction is challenged. Instead, the Founders rely

on District Court cases which hold that successive motions for summary judgment are generally impermissible where they are based on the same facts. *See, e.g.*, *Boise Tower Assoc., LLC v. Washington Capital Joint Master Trust*, No. CV03-141-5-MHW, 2007 WL 1035158, at *13-14 (D. Idaho 2007). These cases are inapposite not only because they are predicated on a different rule, but also because even under the Federal Rules of Civil Procedure, successive motions to dismiss *always* are permitted where subject matter jurisdiction is challenged. *See Wilson-Combs v. California Dept. of Consumer Affairs*, 555 F. Supp. 2d 1110, 1113 (E.D. Cal. 2008). Further, even successive motions for summary judgment are permissible when they address different issues or new facts. *Breeland v Southern Pac. Co.*, 231 F.2d 576, 579 (9th Cir. 1955); *Cable & Computer Tech. Inc. v. Lockheed Sanders, Inc.*, 214 F.3d 1030, 1038 (9th Cir. 2000). Accordingly, no procedural rule bars Facebook from now seeking to dismiss the Founders' appeals due to their waiver.

B. The Founders Did Not Object to Enforcement of the Settlement Agreement Prior to July 2, 2008

The Founders further argue that the appeal should not be dismissed due to waiver because they supposedly "objected" to the Motion to Enforce Settlement prior to July 2, 2008. *See* Opp. at 3-6, 11-17. In so arguing, the Founders are confusing the fact that while they admittedly had notice of the Motion to Enforce the Settlement Agreement, they nonetheless failed to object to the District Court's

granting of that Motion prior to the entry of Judgment on July 2, 2008.

The underlying Settlement Agreement was signed by each of the Founders. Sutton Decl. Ex. K.. That Settlement Agreement not only settled all litigation between the parties in Massachusetts and California, but also included a provision stating that "[t]he parties stipulate that the San Jose Federal Court shall have jurisdiction to enforce this agreement." *Id.* ¶¶ 1, 2 &4. After the Founders sought to back out of the settlement, Facebook filed its Motion to Enforce the Settlement Agreement. *Id.* Ex. B. As part of that process, Facebook filed a Confidential Notice of Filing of Motion with the Massachusetts Court to ensure that the Founders were on notice of the need to object.[1] *Id.* Ex C.

The Founders then made the strategic decision not to challenge the ensuing enforcement proceedings, despite their consent to the California Court's jurisdiction. Only ConnectU responded. *See* Sutton Decl. Ex. D. In its Reply brief filed on June 9, 2008, Facebook specifically noted that the Founders' failed to object, and argued that they "waive[d] any objection to enforcement." *Id.*, Ex. E,

[1] The same law firm – Finnegan, Henderson, Farabow, Garrett & Dunner LLP – represented ConnectU, the Founders and all other Defendants in both the California and Massachusetts proceedings. Although the Founders had been conditionally dismissed for lack of subject matter prior to April 23, 2008 in the California proceedings, that Order was never certified as a final judgment pursuant to Fed. R. Civ. P. 54(b). *See* Reply Declaration of Theresa A. Sutton in Support of Appellees/Cross-Appellants' Motion to Dismiss ("Sutton Reply Decl."), Ex. V. The Founders and their counsel therefore received Electronic Court Filing (ECF) service of the Motion to Enforce both in the California and the Massachusetts proceedings. *See* Sutton Decl. Exs. C, N. *See also id.* Ex. L, at fn. 9.

fn 1. *See also id.* at 3. Even then, the Founders still made no record objection, and instead in a Sur-Reply ConnectU simply argued incorrectly that the Founders had not been served with the Motion, and that ConnectU "believe[d] that these principals do in fact oppose Plaintiff's position…." *See* Parke Decl., Ex.I at Sur-Reply, 7:9. Facebook at a June 23, 2008 hearing then again called to the District Court's attention the fact that the Founders had, in fact, been served with the motion and received notice of it in Massachusetts, had offered evidentiary support to ConnectU, and had even attended related discovery proceedings in Massachusetts. *Id.* Ex. C, at 72:7-73:8.

The District Court then entered an Order Enforcing Settlement Agreement dated June 25, 2008, in which it concluded:

> The Court finds that by signing the Agreement with explicit statements such as those in paragraphs 1, 2 and 4, each of the signatories subjected him or herself to the Court's jurisdiction for the limited purpose of enforcing the Settlement Agreement. Second, Defendants question whether ConnectU's individual shareholders received proper notice of the proceedings. The Court finds the three principals of ConnectU have had adequate notice since they are plaintiffs in the Massachusetts action where the parties have vigorously litigated discovery issues relating to the enforcement of this Agreement. (See June 3, 2008, Memorandum and Order, No. 07-10593-DPW, D. Mass.) It is incongruous to argue that these individuals did not receive notice since Judge Woodlock's June 3, 2008 order in the Massachusetts action specifically addressed the hearing on the motion to enforce the Agreement in this Court. (Id. at 2.)

Sutton Decl. Ex. L, at 5-6 (footnote omitted). *See also* Sutton Reply Decl. Ex. W at 2. The District Court thus specifically concluded that it not only had jurisdiction over the Founders via their explicit consent within the Settlement Agreement, but also that they had "notice" of the enforcement proceedings. Following this ruling, the District Court then entered judgment enforcing the Settlement Agreement against ConnectU and the Founders on July 2, 2008. *Id.*, Ex. P. The District Court also later denied the Founders' Motion to Intervene, again finding that they had received "[n]otice of the Enforcement Motion" prior to July 2, 2008, and further specifically noting that during the June 23, 2008 hearing, counsel for the Founders made an appearance in which he "described the status of the Massachusetts' litigation *but otherwise did not object to jurisdiction*." Sutton Decl. Ex. R, at 4 (emphasis added). For this reason, the Court also concluded that "the ConnectU Founders are parties for purposes of the proceedings to enforce the Settlement Agreement." *Id.*

Contrary to what the Founders now argue, this record reflects that even the District Court recognized that they never objected to the enforcement proceedings. Indeed, the District Court specifically noted the Founders' failure to object to jurisdiction in its August 8, 2008 Order denying the Founders' Motion to Intervene. Sutton Decl. Ex. R, at 4. The Founders' strategic election not to oppose the Motion to Enforce despite being served with it and aware of the

arguments being raised, amounts to waiver. *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). Where a party did not contest an issue before the District Court, "the issue is foreclosed …." *Squaw Valley Dev. Co. v. Goldberg*, 395 F.3d 1062, 1064 (9th Cir. 2005).

The record is clear that the Founders simply did not object to enforcement of the Settlement Agreement prior to July 2, 2008. In an effort to avoid waiver, the Founders suggest that the District Court acknowledged that they had objected to enforcement in a November 3, 2008 Order. Parke Decl. Ex. A. There, the District Court noted that "[o]n June 25, 2008, over objections by ConnectU and the Founders …, the Court granted the motion to enforce the Agreement." Parke Decl. Ex. A, at 1. However, after Facebook sought to correct that statement in light of the record, the District Court in a November 21, Order clarified that "the Court finds that the language in the November 3, Order … is consistent with its prior Orders *recognizing the Founders' presence and the Court's exercise of jurisdiction over them*." *Id.* Ex. H, at 2 (emphasis added). The Court cited: (1) the fact the Founders' counsel appeared at the June 23, 2008 hearing; (2) the Court's exercise of personal jurisdiction; and (3) the Court's earlier conclusion that the Founders were parties to the proceedings. *Id.* Thus, the Court correctly noted that by using the expression "objections," it was only referring to same issues concerning the

assertion of jurisdiction and the Founders' notice that it had discussed in its June 25, 2008 Order – not to any particular formal "objection" directed at the enforcement proceedings by the Founders.

The Founders alternatively argue that they are entitled to rely upon the objections and arguments raised by ConnectU to avoid waiver, because it was a closely-held corporation and because it raised the same issues that the Founders now seek to have resolved. Tellingly, the Founders cannot cite a single case which has ever held that shareholders of a closely-held corporation may raise for the first time on appeal the same arguments that originally were raised by the corporation. Instead, the Founders cite cases in which the objection of a criminal co-defendant to a jury instruction can preserve the challenge for other co-defendants, or in which a petitioner relies upon the arguments of another party to obtain administrative review. *See, e.g.*, *U.S. v. Bagby*, 451 F.2d 920, 927 (9th Cir. 1971); *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1525 n.14 (10th Cir. 1992). However, these situations are hardly analogous to the present situation, where the Founders deliberately elected not to object to the enforcement proceedings directed at them and to which they had consented jurisdiction, even after Facebook noted their waiver. Sutton Decl., Ex. E at 1, fn 1 & at 4, fn 3.

The Founders also attempt to rely upon the fact that Cameron Winklevoss submitted two Declarations in support of ConnectU's Opposition, and that

ConnectU's expert offered an analysis of the economic impact of the settlement. These documents were not submitted by the Founders in objection to the enforcement proceedings, but rather by ConnectU. The Founders cannot simply re-constitute themselves as ConnectU for purposes of record objection, where they originally strategically elected not to take any position with respect to the enforcement proceedings. Dismissal is proper.

C. The Equities Do Not Excuse the Founders' Waiver

This Court also should reject the Founders' alternative request to hold that waiver amounts to "manifest injustice," and that there are "exceptional circumstances" which excuse their failure to object to the enforcements proceedings regarding the Settlement Agreement. *See* Opp. at 18-19. However, given that waiver resulted from a deliberate litigation strategy in which they were actually put on notice before July 2, 2008 of the need to object to the enforcement proceedings, the equities clearly do not weigh in favor of excusing the Founders' behavior. *Citibank Int'l v. Collier-Traino, Inc.*, 809 F.2d 1438, 1441 (9th Cir. 1987) (finding that equities do not favor permitting raising an issue for the first time on appeal arising from a strategic choice by the appellant not to subject itself to jurisdiction). Moreover, the Founders intentionally elected not to actively participate in the enforcement proceedings and filed no papers prior to the Motion to Intervene. The Ninth Circuit has held such minimal activity is insufficient for a

non-party show exceptional circumstances so as to challenge a District Court's action on appeal. *Southern Cal. Edison Co. v. Lynch*, 307 F.3d 794, 804 (9th Cir. 2002). In any event, the Founders cannot even rely upon the exceptional circumstances rule at all, because the District Court found that they were, in fact, parties to the proceedings. *See* Sutton Decl. Ex. R, at 4.

D. Facebook Was Not Required To Cross-Appeal

The Founders also contend that pursuant to FRAP 3(c), Facebook was required to specifically raise the waiver issue in its Notice of Cross-Appeal, because the District Court supposedly already rejected this argument. Opp. at 19. Inasmuch as the District Court *agreed* with Facebook that the Founders had notice of the enforcement proceedings and did not object to jurisdiction, this argument is wholly specious. Parke Decl. Ex. H, at 2; Sutton Decl., Ex. L, at 5-6; Ex. R, at 4. Moreover, the Founders' interpretation of FRAP 3(c) was recently rejected by the Ninth Circuit. *See Le v. Astrue*, No. 07-55559 (9th Cir. Mar. 10, 2009).

CONCLUSION

Facebook respectfully requests that this Court dismiss portions of the Founders' appeal of 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: March 12, 2009 ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Theresa A. Sutton /s/

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

CERTIFICATE OF SERVICE VIA ELECTRONIC FILING

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copied will be sent to those indicated as non-registered participants,

Dated: March 12, 2009 Respectfully Submitted,

/s/ Theresa A. Sutton /s/
THERESA A. SUTTON