CA Nos. 08-16745, 08-16849, 08-16873 (consolidated), 09-15021, 09-15133
DC No. C 07-01389 JW

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE FACEBOOK, INC., ET AL.,
Plaintiffs/Appellees/Cross-Appellants,

v.

CONNECTU, INC., ET AL.,
Defendants/Appellants/Cross-Appellees.

Appeal From Judgment Of The United States District Court
For The Northern District Of California
(Hon. James Ware, Presiding)

STATUS REPORT, MOTION TO CONSOLIDATE APPEALS AND MOTION TO SET BRIEFING SCHEDULE

JEROME B. FALK, JR. (No. 39087)
SEAN M. SELEGUE (No. 155249)
HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
A Professional Corporation
Three Embarcadero Center, 7th Floor
San Francisco, California 94111-4024
Telephone: 415/434-1600
Facsimile: 415/217-5910

Attorneys for Appellants and Cross-Appellees Cameron Winklevoss, Tyler Winklevoss and Divya Narendra

INTRODUCTION

This case presents the question of whether the District Court properly enforced a Term Sheet setting forth a purported settlement of litigation pending between ConnectU LLC ("ConnectU") and its founders Tyler Winklevoss, Cameron Wiklevoss and Divya Narendra (the "Founders"), on the one hand, and the Facebook, Inc. ("Facebook") and its CEO, Mark Zuckerberg, on the other hand.[1]

In a judgment dated July 2, 2008, the District Court enforced the settlement based on a 1½ page term sheet (the "Term Sheet"). After entry of that judgment, proceedings in the District Court continued, resulting in, among other things, an order on December 15, 2008, specifically enforcing the purported settlement. As a result of the specific performance order, control of ConnectU was transferred from its Founders to Facebook.

Since Facebook took control of ConnectU, Facebook and "new" ConnectU (*i.e.*, ConnectU as controlled by Facebook) have each filed motions to dismiss. ConnectU, having switched sides in the litigation, seeks to dismiss its own appeal. Facebook seeks dismissal of the Founders' appeals. If both motions were granted, then the District Court's enforcement orders would escape appellate review. These two motions to dismiss remain pending.

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[1]For simplicity, Facebook and Zuckerberg will be referred to collectively as "Facebook."

In addition, under Facebook's control, ConnectU moved to disqualify three law firms that had represented "old" ConnectU and the Founders jointly. This Court remanded to the District Court for consideration of the disqualification motion. On September 2, 2009, the District Court granted the disqualification motion. The Founders have now retained new counsel on appeal. Through new counsel, the Founders provide a status report to the Court along with a motion for appropriate relief, as the Court directed in its July 1, 2009 remand order.

For the reasons discussed below, the Founders request that (1) their opening brief on the first round of appeals, which the Founders filed jointly with ConnectU, be withdrawn, (2) the five pending appeals described below be consolidated along with the new appeal that the Founders are filing of the disqualification order, (3) the motions panel allow the merits panel to consider the merits of the pending motions to dismiss, and (4) a briefing schedule for the consolidated appeals be established that allows the Founders' new counsel adequate time to study the case and prepare a new opening brief.

PROCEDURAL BACKGROUND

ConnectU and its Founders sued Facebook and its CEO, Mark Zuckerberg, in the District of Massachusetts.[2] Facebook later sued ConnectU, the Founders and others in California Superior Court, an action that was removed to the

[2] *ConnectU LLC v. Zuckerberg* et al., Case No. 1:04-CV-11923 (DPW) (D. Mass. Sept. 9, 2004); Excerpts of Record filed Oct. 8, 2009 at A382-416 (First Amended Complaint, filed Oct. 28, 2004).

Northern District of California. Five notices of appeal are now pending in this Court arising from the Northern District of California action, and a sixth notice of appeal will be filed by tomorrow.

A. The Five Pending Notices Of Appeal.

The first three notices of appeal have been consolidated. Appeal Nos. 08-16745, 08-16873, 08-16849 (*see* Docket Entry 22 for consolidation order). These three notices of appeal arise from the following events in the District Court of the Northern District of California. On July 2, 2008, the District Court entered a judgment and related orders enforcing the Term Sheet. ConnectU, then controlled by the Founders, appealed that judgment on July 30, 2008. That appeal was designated Appeal No. 08-16745. Facebook cross-appealed on August 13, 2008. This cross-appeal challenged the District Court's November 3, 2007 dismissal of the Founders for lack of personal jurisdiction and also the denial of a sanctions motion. (That dismissal of the Founders as defendants in the Northern District of California case took place before the February 2008 mediation at which the Term Sheet was signed.) Facebook's cross-appeal was designated Appeal No. 08-16849.

After the District Court entered its July 2, 2008 judgment, the Founders moved to intervene to ensure they would have the right to appeal the order. On August 8, 2008, the District Court denied intervention, ruling that the Founders were already parties to the proceeding to enforce the settlement. Declaration of

Sean M. SeLegue in Support of Status Report, Motion to Consolidate Appeals and Motion to Set Briefing Schedule ("SeLegue Decl."), Exh. C. In denying intervention, the District Court reasoned that while the Founders had previously been dismissed from the action, proceedings to enforce settlements may be binding on non-parties who have "notice and an ability to contest the judgment or order." *Id.* at 3:1-2. On August 11, 2008, the Founders filed a notice of appeal challenging the July 2 judgment, the District Court's denial of the Founders' motion to intervene and other related orders. The Founders' appeal was assigned Appeal No. 08-16873.

On October 6, 2008, ConnectU and the Founders jointly submitted an opening brief on appeal to this Court under seal. The Court received that brief on October 6, 2008 and filed it on November 4, 2008. No further briefs on the merits have been filed.

On November 3, 2008, the District Court ordered ConnectU and the Founders to deliver to a Special Master various items of consideration, including the Founders' stock in ConnectU. SeLegue Decl., Exh. D. In so ruling, the District Court rejected the contention of ConnectU and its Founders that the District Court lacked jurisdiction due to the pending appeals. *Id.* Subsequently, on November 21, the District Court entered an Amended Judgment in favor of Facebook and against ConnectU and its Founders. That Amended Judgment specifically enforced the Term Sheet and directed the District Court's Special Master to deliver the ConnectU stock to Facebook. On

December 19, 2008, the Founders filed a notice of appeal from the Amended Judgment and other orders. That appeal has been designated No. 09-15021.

On January 7, 2009, Facebook filed a cross-appeal challenging the November 7, 2007 dismissal of the Founders from the action. That cross-appeal has been designated Appeal No. 09-15133.

B. Motion Practice In This Court.

By December 22, 2008, Facebook had taken control of ConnectU.[3] On that date, Facebook caused ConnectU to file a motion to voluntarily dismiss its appeal. Docket No. 52, Appeal No. 08-16849. The Founders opposed ConnectU's motion. The Court has not yet ruled on ConnectU's motion to dismiss.

Next, on January 20, 2009, ConnectU filed a motion to disqualify three firms that had represented ConnectU and the Founders as joint clients: Finnegan, Henderson, Farabow, Garrett & Dunner LLP ("Finnegan"); Boies, Schiller & Flexner LLP ("Boies"); and O'Shea Partners LLP ("O'Shea"). ConnectU asserted that its interests were now aligned with Facebook's and, therefore, that Finnegan, Boies and O'Shea were disqualified from representing the Founders adverse to ConnectU.

[3]The original ConnectU was formed as an LLC. "New" ConnectU appears as "ConnectU, Inc."

On January 23, 2009, Facebook moved to consolidate the two latest appeals (09-15021 and 09-15133) and also to deem the Founders' October 6, 2008 merits brief "withdrawn" so that all issues could be briefed in a single set of briefs. In response, the Founders agreed that all five appeals should be consolidated but did not agree that their merits briefs should be deemed withdrawn. The Founders proposed filing a short supplement to their existing brief and proceeding with a briefing schedule under which the remaining three merits briefs in the four-brief cross-appeal sequence would be filed.

On February 18, 2009, Facebook made a second motion to dismiss the Founders' appeals. In this motion, Facebook contends that "portions" of the Founders' appeals should be dismissed because the Founders failed to oppose the motion to enforce the purported settlement and, therefore, waived their right to appeal. The Court has not yet ruled on this motion.

On July 1, 2009, this Court issued an order remanding ConnectU's motion to disqualify to the District Court for consideration. On September 2, 2009, the District Court issued its order granting the motion to disqualify Finnegan and Boies.[4] In light of the disqualification order, the Founders obtained new counsel

[4]The District Court's order is ambiguous as to whether O'Shea is also disqualified. The District Court's order granted ConnectU's motion to disqualify but, in describing its order, mentioned only Finnegan and Boies as the firms that were disqualified. For present purposes, the Founders interpret the disqualification order to include O'Shea and are proceeding accordingly. At this time, only the Howard Rice firm is appearing on behalf of the Founders in these appellate proceedings.

on appeal and will file tomorrow a notice of appeal from the disqualification ruling. In addition, through this document, the Founders respond to the Court's directive in its July 1, 2009 order that, within seven days of the District Court's ruling on ConnectU's disqualification order, the parties are to submit a report to this Court along with a motion for appropriate relief.[5]

DISCUSSION

A. Briefing Schedule.

The Founders now agree with Facebook that the joint merits brief the Founders submitted along with ConnectU on October 6, 2008, should be withdrawn. The Founders are now adverse to "new" ConnectU and, as discussed below, the various issues presented by pending motions should be addressed by the merits panel. Equally important, the Founders' new appellate counsel should be able to prepare and file a merits brief in their own voice to carry out their responsibility to the Court and to the Founders. It is very difficult for new counsel to prepare a reply brief and present oral argument based on a brief prepared by prior counsel, no matter how talented. Here, where Facebook itself insisted that the Founders' prior counsel be disqualified and previously sought to have the October 6, 2008 brief "withdrawn," Facebook will

[5]Pursuant to Rule 26(a)(2) of the Federal Rules of Appellate Procedure, the seven-day period consisted of court days, not calendar days.

not be prejudiced by allowing the Founders to file a new, comprehensive brief through their counsel.

The Founders request that their new merits brief be due on November 6, 2009. The Founders' new counsel need adequate time to study and brief this matter, particularly because ConnectU has taken the position that Finnegan and Boies are prohibited from sharing their opinions and prior confidential work product with new counsel. SeLegue Decl., Exhs. A, B. In addition, travel schedules of the two appellate specialists acting as Founders' counsel make it impractical to complete the brief any earlier than November 6. SeLegue Decl. ¶¶ 5-6.

Based on Facebook's January 7, 2009 notice of appeal (No. 09-15133), it appears that Facebook's cross-appeal will address only the question of whether the District Court erred in dismissing the Founders for lack of personal jurisdiction. In that event, the Founders believe that each side should be able to prepare the remaining three cross-appeal briefs within the usual periods. The Founders therefore propose the following schedule:

- Second cross-appeal brief: 30 days after opening brief filed
- Third cross-appeal brief: 30 days after second cross-appeal brief
- Optional reply cross-appeal brief: 14 days after third cross-appeal brief

This schedule would permit the Court, if it so chooses, to schedule argument for April or May 2010, which would be approximately 19 or 20 months after the first notice of appeal was filed in this matter on August 2008.

B. Consolidation.

As explained above, the parties previously agreed that the five pending appeals should be consolidated. In addition, the Founders hereby move that their appeal of the disqualification order, which will be filed tomorrow, be consolidated with the five pending appeals. Consolidation will allow the Founders to address all issues in one brief rather than in multiple briefs and motions.

C. Pending Motions To Dismiss.

Besides the motions to consolidate, two motions remain pending: (1) New ConnectU's motion to dismiss "old" ConnectU's appeal and (2) Facebook's motion to dismiss the Founders' appeals. These motions, taken together, seek to terminate the Founders' appeals without the Ninth Circuit reviewing the merits of the District Court's orders enforcing the Term Sheet. Neither of these motions should be decided by the motions panel, because the motions are inextricably related to the merits of the appeal. In such situations, the motions panel frequently refers motions to the merits panel. *See, e.g.*, *Reynolds v. Wagner*, 55 F.3d 1426, 1428 (9th Cir. 1995) (motion to dismiss based on claim that district court abused discretion in extending time to file notice of appeal); *Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*, 893 F.2d 1012, 1014 (9th Cir. 1989) (motion to dismiss appeal as moot); *Richardson v. Koshiba*, 693 F.2d 911, 913 (9th Cir. 1982) (motion to dismiss appeal as (1) moot and (2) barred by defendants' absolute immunity). For the reasons discussed below

and in the already-filed oppositions to the two motions, the motions to dismiss, if not denied outright, should be referred to the merits panel.

1. ConnectU's Motion To Dismiss.

ConnectU is seeking to abandon its own appeal because Facebook—ConnectU's former adversary—now controls ConnectU. But Facebook's control of ConnectU is only valid if the District Court's ruling enforcing the Term Sheet is upheld. Since ConnectU's motion to dismiss reflects nothing more than Facebook's desire to frustrate appellate review of the District Court's enforcement of the settlement agreement, ConnectU's motion should be referred to the merits panel for consideration in context with the merits of the Founders' appeal.

2. Facebook's Motion To Dismiss Portions Of The Founders' Appeals.

Facebook's motion to dismiss contends that the Founders failed to oppose Facebook's motion to enforce the settlement, thereby waiving their right to appeal that order and related orders. Motion at 1. In so moving, Facebook disregards the District Court's finding that the Founders *did* oppose the motion to enforce. SeLegue Decl., Exh. D 1:22-23 (Nov. 3, 2003 Order). Indeed, the District Court commented that the Founders should be permitted to appeal his orders enforcing the purported settlement. SeLegue Decl., Exh. C at 5:21-22 (Aug. 8, 2008 Order); Parke Decl. Opp. Motion to Dismiss, Exh. D at 46:18-19

("I won't deny the right to appeal"); *id.* at 47:6-8 ("I have to put the opposing party to my judgment in a position so they can challenge my judgment").

The District Court's view of the matter is important, because the purpose of the waiver rule on which Facebook relies is to avoid unfair second-guessing of the District Court by raising arguments on appeal that were not made to the District Court. *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992) ("A workable standard . . . is that the argument must be raised sufficiently for the trial court to rule on it. This principle accords to the district court the opportunity to reconsider its rulings and correct its errors") (citations and internal quotation marks omitted); *Morrow v. Greyhound Lines, Inc.*, 541 F.2d 713, 724 (8th Cir. 1976) ("The purpose of the [waiver] rule is to inform promptly the trial judge of possible errors so that he may have an opportunity to reconsider his ruling and make any changes deemed desirable"). Where the District Court itself believes that the issues have been preserved for appeal, then it follows that fairness to the District Court does not weigh in favor of waiver.

Nor can Facebook claim to have been "sandbagged" by an issue the Founders have raised for the first time on appeal. *Dream Palace v. County of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004) (waiver rule "prevents parties from sandbagging their opponents with new arguments on appeal"); *see also Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (purpose of waiver rule is to prevent litigants from being "surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence")

(citation and internal quotation marks omitted). Facebook does not contend, nor could it contend, that the issues raised by the Founders' appeal were not presented timely to the District Court by ConnectU. As a result, Facebook was, along with the District Court, placed on notice of the issues the Founders raise on appeal, negating Facebook's waiver contention.

While Facebook now claims that the Founders cannot rely on ConnectU's arguments below to preserve the Founders' right to appeal, it made the opposite contention to advance its view that the Founders were *bound* by the District Court's order enforcing the purported settlement. To that end, Facebook contended that ConnectU and the Founders were in "privity." Parke Decl. Supp. Founders' Opp. To Facebook's Motion to Dismiss (filed Mar. 5, 2009), Exh. E, at 12:13; *see also id.*, Exh. C at 72:16-17 (Facebook argued that the Founders "are the company [ConnectU] for all intents and purposes"). In fact, Facebook referred to ConnectU as a "representative" of the Founders. *Id.* at 12:28-13:1 ("[a] non-party can be bound by the litigation choices made by his virtual representative"). In other words, Facebook seeks to bind the Founders to ConnectU's "litigation choices" when it suits Facebook (enforcement of the settlement) but yet not allow the Founders to rely on ConnectU's "litigation choices" to preserve the Founders' right to appeal. Facebook's concession that the Founders could rely on ConnectU with regard to the motion to enforce settlement is itself sufficient to warrant denial of Facebook's motion, but the

better course would to allow a merits panel to assess the waiver issue in light of the complete record.

Another reason Facebook's motion to dismiss is better left to the merits panel for resolution is the highly unusual and apparently confusing procedural events surrounding enforcement of the settlement agreement. As the District Court noted, at the time Facebook brought its motion to enforce the settlement, the Founders had been dismissed from the action for lack of personal jurisdiction. In enforcing the settlement agreement, the District Court held that the Term Sheet itself granted the court "jurisdiction and authority to enforce the Agreement without requiring additional pleadings." 6/25/08 Order at 5:7-11. Based on that analysis, the District Court entered a Judgment that all parties treated as final and appealable (see above) until the District Court later concluded that the July 2 Judgment was in fact interlocutory. SeLegue Decl., Exh. D, at 3-4. This course of events seems to indicate some confusion about the nature of the settlement enforcement proceeding. Here again, the complexity of the issues presented by Facebook's motion indicate that the motion is better suited for disposition by a merits panel after full briefing.

Dismissing the Founders' appeal as Facebook urges would serve no valid purpose while granting Facebook an unjustified procedural windfall by depriving the Founders of the right to appellate review. *See, e.g., Deposit Guaranty Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 333 (1980) ("[A] party aggrieved by a judgment or order of a district court may exercise the

statutory right to appeal therefrom"); *Brown v. Bd. of Bar Examiners*, 623 F.2d 605, 608 (9th Cir. 1980) ("[A]ppellants should not be denied appellate review of orders by which they were aggrieved"). The Founders urge the Court to defer decision on this critical issue until the merits panel stage.[6]

CONCLUSION

The Founders respectfully request that the Court proceed as suggested above.

DATED: September 14, 2009.

Respectfully,

JEROME B. FALK, JR.
SEAN M. SELEGUE
HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
A Professional Corporation

By /s/ *Sean M. SeLegue*
SEAN M. SELEGUE

Attorneys for Cameron Winklevoss, Tyler Winklevoss and Divya Narendra

[6]Further, if the Court were to dismiss the Founders' appeal, and also to dismiss ConnectU's appeal at new ConnectU's request, then the Court would need to consider whether the District Court's orders would need to be vacated due to the lack of appellate review. *See* Founders' Opp. to ConnectU's Motion to Dismiss (dated Jan. 6, 2009), at 1-2.