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)

DECLARATION OF SEAN M. SELEGUE IN SUPPORT OF STATUS REPORT, MOTION TO CONSOLIDATE APPEALS AND MOTION TO SET BRIEFING SCHEDULE

JEROME B. FALK, JR. (No. 39087)
SEAN M. SELEGUE (No. 155249)
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Attorneys for Appellants and Cross-Appellees Cameron Winklevoss, Tyler Winklevoss and Divya Narendra

I, Sean M. SeLegue, declare as follows:

1. I am an attorney licensed to practice law in the State of California, and a member of the bar of this Court. I am an attorney at the law firm of Howard Rice Nemerovski Canady Falk & Rabkin, A Professional Corporation ("Howard Rice"), which is counsel of record for Appellants and Cross-Appellees Cameron Winklevoss, Tyler Winklevoss and Divya Narendra. I make this declaration based upon my personal knowledge of the matters stated herein, except where otherwise indicated. If called as a witness, I could and would testify competently to the facts stated herein.

2. Jerome Falk of this office was first contacted about representing the Founders on Tuesday, September 8. By Thursday, September 10, we had been retained, and I began work to understand the procedural posture of this case and the substantive issues to prepare the accompanying status report and motions. Having now reviewed many of the Ninth Circuit proceedings and selected portions of the District Court proceedings, it is clear that assuming responsibility for this matter as appellate counsel will be a substantial task.

3. My efforts to learn about the case were interrupted for a few hours when ConnectU's counsel sent a letter on Friday, September 11, to the Boies and Finnegan firms cautioning them not to share confidential information of ConnectU with the Founders' new appellate counsel, Howard Rice. A true and correct copy of the letter is attached as Exhibit A.

4. I was able to speak to ConnectU's lead counsel, James Towery, during

the afternoon of September 11, and the two of us agreed that Boies and Finnegan could provide Howard Rice with copies of pleadings and historical information about what had happened in the case. However, Mr. Towery contends that the District Court's disqualification order prohibits Boies and Finnegan from sharing their opinions or confidential work product with Howard Rice. A true and correct copy of my confirming letter to Mr. Towery is attached as Exhibit B.

5. Mr. Falk, lead counsel, is now out of the country on a previously planned trip. He will return on October 5, 2009. While I and others at Howard Rice will work on this matter while Mr. Falk is away, it is important that Mr. Falk have an opportunity to contribute to the opening brief. Therefore, we ask that the Court allow approximately 30 days after Mr. Falk's return for the Founders to file their opening brief. We therefore propose a due date of November 6, 2009, for that brief.

6. I respectfully ask the Court to consider not to order a due date for the Founders' opening brief before November 6 due to my long-planned trip to Europe scheduled for October 17 to October 28. The air tickets for that trip are prepaid, and I would incur a substantial penalty to change them. In addition, and more importantly, the primary purpose of the trip is to visit my young son, who presently resides in Europe, on his birthday.

7. Absent a change in circumstances beyond our control, I am confident that we will not require any extension of time beyond November 6, 2009, to file

the Founders' opening brief.

8. Attached hereto as Exhibit C is a copy of the District Court's order dated August 8, 2008, identified as Docket No. 610. (The copy of this order I used was attached as Exhibit D to the Founders' notice of appeal dated December 19, 2006, and designated Appeal No. 09-15021 by this Court.)

9. Attached hereto as Exhibit D is a copy of the District Court's order dated November 3, 2008, identified as Docket No. 653. (The copy of this order I used was attached as Exhibit C to the Founders' notice of appeal dated December 19, 2006, and designated Appeal No. 09-15021 by this Court.)

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this Declaration was executed on this 14th day of September, 2009, in San Francisco, California.

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

EXHIBIT A

HOGE, FENTON
JONES & APPEL, INC.

Attorneys at Law | Serving Northern California since 1952

Alison P. Buchanan
408.947.2415
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September 11, 2009

VIA EMAIL AND U.S. MAIL

D. Michael Underhill
Boies, Schiller & Flexner LLP
5301 Wisconsin Ave. NW
Washington, DC 20015

John F. Hornick
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP
901 New York Avenue, NW
Washington, DC 20001

Re: ConnectU, Inc., et al. v. Facebook, Inc., et al.
Our File No.: 80696

Dear Mr. Underhill and Mr. Hornick:

Please be advised that ConnectU does not authorize you, ConnectU's former counsel, to share any confidential information with the Founders' new counsel. You are ethically obligated to maintain all of ConnectU's confidences during the Founders' transition to new counsel. ConnectU fully expects your offices to observe your duties of loyalty to ConnectU throughout this litigation.

Sincerely,

HOGE, FENTON, JONES & APPEL, INC.

Alison P. Buchanan

APB: apb
cc: Mark Howitson (via email only)

EXHIBIT B

HOWARD
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September 11, 2009

James E. Towery, Esq.
Hoge Fenton Jones & Appel
60 South Market Street
San Jose, CA 95113-2396

Re: *The Facebook, Inc. et al. v. ConnectU, Inc. et al.*

Dear Jim:

Thank you for talking to me today about Howard Rice's transition into this case as counsel for Howard Winklevoss, Cameron Winklevoss, Tyler Winklevoss and Divya Narenda.

We agreed that notwithstanding the disqualification order, it is appropriate for the Boies and Finnegan firms to provide Howard Rice with copies of any and all pleadings filed in the Ninth Circuit or the District Court, as well as historical information about what has happened in the case (*e.g.*, what happened at a hearing, prior conversations between opposing counsel, etc.). We disagreed on whether Boies and Finnegan may share with Howard Rice the opinion work product of Boies and Finnegan. We agreed to disagree on this last question for the moment. Should we require a resolution about the extent to which Finnegan and Boies may share their opinions and prior work product with Howard Rice, we will either present that question to the Court or provide you with sufficient notice that you may go to the Court if you wish.

Very truly yours,

Sean M. SeLegue

SMS/pmm

cc: Jerome B. Falk, Jr., Esq.
D. Michael Underhill, Esq.
Evan A. Parke, Esq.
Scott R. Mosko, Esq.
John F. Hornick, Esq.

EXHIBIT C

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

[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.)

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[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]

[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:

Chester Wren-Ming Day cday@orrick.com
D. Michael Underhill Munderhill@BSFLLP.com
David A. Barrett dbarrett@bsfllp.com
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Dated: August 8, 2008

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy

EXHIBIT D

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

[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

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

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Dated: November 3, 2008

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy