

Case No. 09-15021, 09-15133

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' MOTION TO CONSOLIDATE
CASE NOS. 09-15021 AND 09-15133 WITH CASE NOS. 08-16745, 08-
16849, 08-16973**

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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

Appellees-Cross-Appellants, The Facebook, Inc. and Mark Zuckerberg (collectively “Facebook”) respectfully move this Court for an order that consolidates this appeal and cross-appeal, Nos. 09-15021 and 09-15133, with the already consolidated appeals and cross-appeal docketed under numbers 08-16745, 08-16849, 08-16973. These appeals arise from the same case, involve the same parties, and all concern the District Court’s decision to enforce a Settlement Agreement entered into between Appellants ConnectU, Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra and Appellee Facebook.

In addition, Facebook asks this Court to order a single briefing schedule. Currently, there are two briefing schedules— one for Case Nos. 09-15021 and 09-15133 and another for the previously consolidated appeal, Case Nos. 08-16745, 08-16849, 08-16973. If not addressed, this Court will be faced with two sets of briefs that contain substantially overlapping issues. It also means that Appellants unnecessarily get twice as much room as allowed under the rules to make these arguments. Both judicial economy and fairness suggest that a single briefing schedule would best serve these appeals.

II. FACTUAL BACKGROUND

A. The First Appeal

The parties entered into a Settlement Agreement on February 22, 2008. When Appellants reneged on their obligations, Facebook sought and obtained an

order enforcing the Settlement Agreement, that the District Court entered on June 25, 2008. Declaration of Tina L. Naicker to Appellees-Cross-Appellants Motion to Consolidate Case Nos. 09-15021 and 09-15133 with Case Nos. 08-16745, 08-16849, 08-16973 (“Naicker Decl.”), Ex. 1. The Judgment enforcing the Settlement Agreement was entered on July 02, 2008. *Id.* Ex. 2. Subsequently, Appellants Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra (collectively “the ConnectU Founders”) moved to intervene in order to challenge the decision to enforce the Settlement Agreement. In an Order dated August 8, 2008, the Court denied the motion to intervene. *Id.* Ex. 3.

In July 2008, Appellant ConnectU filed a notice of appeal from the June Order and the July Judgment.¹ *Id.* Ex. 4, Case No. 08-16745. In August 2008, the ConnectU Founders filed a notice of appeal from the June Order, the July Judgment and the denial of the motion to intervene. *Id.* Ex. 5, Case No. 08-16873. Facebook also filed a conditional cross-appeal. *Id.* Ex. 6, Case No. 08-16849.

The ConnectU Founders identified ten issues on appeal. All ten issues concern the decision of the District Court to enforce the Settlement Agreement and the denial of the motion to intervene. *Id.* Ex. 7. Facebook cross-appealed an earlier granted motion to dismiss. *Id.* Ex. 8.

This Court consolidated these appeals on August 29, 2008. *Id.* Ex. 9.

¹ ConnectU, Inc. filed a voluntary motion to withdraw its appeal on December 22, 2008. This motion is currently pending before the Court.

Pursuant to the briefing schedule then set, Appellants filed their Joint Opening Brief on October 6, 2008. To date, no other briefs have been filed.

B. The District Court Holds A Hearing And Enters Orders And A Final Judgment

After ConnectU and the ConnectU Founders filed their notices of appeal and their Opening Brief in the consolidated appeal, the District Court held a hearing concerning the enforcement of the Settlement Agreement on October 28, 2008. Naicker Decl., Exs. 10, 11. In the Orders and Judgments dated November 3, 2008 and November 21, 2008, the District Court fully implemented and enforced the Settlement Agreement. *Id.* Exs. 11, 12, 13, 14.

On December 15, 2008, the District Court entered a final dismissal order that dismissed all parties and all claims. *Id.* Ex. 15.

C. The ConnectU Founders File A Second Notice of Appeal

One issue that has been litigated in this case is whether the District Court had jurisdiction to continue to enforce the Settlement Agreement following the filing of the notice of appeal in Case Nos. 08-16745, 08-16849, 08-16973. ConnectU and the ConnectU Founders have contended that the District Court did not have jurisdiction to continue enforcing the Settlement Agreement. The District Court rejected this argument. *Id.* Ex. 11.

Facebook has contended that the District Court retained jurisdiction and that this Court did not have jurisdiction to consider the appeals of ConnectU and the

ConnectU Founders because they did not appeal from a valid final judgment. *See* Motion to Dismiss filed with this Court on November 14, 2008. This Court denied Facebook's motion without prejudice allowing Facebook to address the issue before the Merits Panel. *Id.* Ex. 16.

The ConnectU Founders filed a subsequent notice of appeal on December 19, 2008, Case No. 09-15021. *Id.* Ex. 17. In turn, Facebook filed a notice of cross-appeal, Case No. 09-15133. *Id.* Ex. 18. The ConnectU Founders' notice of appeal incorporates by reference their August 2008 notice of appeal and then purports to appeal from the Orders and Judgment of November 3, November 22, and December 15, 2008, all of which concern the decision to enforce the Settlement Agreement. *Id.* Ex. 17.

For this second notice of appeal the ConnectU Founders identified twelve issues on appeal. *Id.* Ex. 19. All but two of the issues are the same as those identified in connection with their first notice of appeal. *See Id.* Ex. 19 and Ex. 7. As for the two additional issues, they relate to the jurisdictional arguments raised by the parties in connection with the District Court's enforcement of the Settlement Agreement. *See Id.* Ex. 19. (Issues 11 and 12: jurisdictional issues relating to the enforcement orders and judgment).

This Court has ordered Appellants' Opening Brief to be filed by April 6, 2009. *Id.* Ex. 20.

III. ARGUMENT

A. The Appeals Should Be Consolidated

This appeal raises many of the same issues between the same parties as the previously consolidated appeal. This case should therefore be consolidated with Case Nos. 08-16745, 08-16849, 08-16973. To do otherwise means either having two panels issue different decisions on the same set of facts or having multiple briefs that discuss overlapping issues. Accordingly, as found previously, this Court should consolidate the appeals.

B. The ConnectU Founders Should Withdraw and Re-File A New Opening Brief Consistent with the Court's Scheduling Order

In addition to ordering this case consolidated with the already consolidated appeals and cross-appeal docketed under Case Nos. 08-16745, 08-16849, 08-16973, this Court should withdraw the brief Appellants filed on October 6, 2008. Appellants should then be allowed to submit a single brief consistent with the scheduling order entered in this appeal and cross-appeal, Case Nos. 09-15021 and 09-15133.

There are two reasons for this request. First, the October 6 Opening Brief predates the October 28 hearing, the November 2008 Orders & Judgments and the Final Judgment of December 15, 2008, all of which relate—as reflected in the issues identified by Appellants—to the Settlement Agreement. Rather than have another round of briefing where the underlying facts are the same and where the

arguments will be virtually (if not completely) identical, one set of briefs can capture all arguments Appellants wish to make.

Second, there is the matter of fairness. The ConnectU Founders should not be allowed to file multiple briefs on what will be the same issues. They should not have (and do not need) twice the amount of space to make the argument that the District Court should not have enforced the Settlement Agreement and did not have jurisdiction to do so.

IV. CONCLUSION

For these reasons, this Court should consolidate Case Nos. 09-15021 and 09-15133 with Case Nos. 08-16745, 08-16849, 08-16973. As well, this Court should withdraw the October 6, 2008 brief and order briefing consistent with its schedule for Case Nos. 09-15021 and 09-15133.

Dated: January 23, 2009

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ I. Neel Chatterjee

I. Neel Chatterjee

Attorneys for Plaintiffs-Appellees

THE FACEBOOK, INC., AND

MARK ZUCKERBERG