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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

The Facebook, Inc., et al.,

NO. C 07-01389 JW

Plaintiffs,

v.

**ORDER DENYING THE CONNECTU
FOUNDERS' MOTION TO INTERVENE;
DENYING CONNECTU'S MOTION TO
STAY EXECUTION OF JUDGMENT**

ConnectU, Inc., et al.,

Defendants.

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.)

1 Presently before the Court are the ConnectU Founders' Motion to Intervene¹ and ConnectU's
2 Motion to Stay Execution of Judgment.² The Court conducted a hearing on August 6, 2008. Based
3 on the papers submitted to date and oral argument of counsel, the Court DENIES the ConnectU
4 Founders' Motion to Intervene on the ground that they have already been made parties to this action.
5 However, the Court GRANTS them an extension of time in which to file their appeal. Further, the
6 Court DENIES ConnectU's Motion to Stay Execution of Judgment.

7 **II. DISCUSSION**

8 **A. Motion to Intervene**

9 The ConnectU Founders move to intervene on the grounds that they have a real economic
10 stake in the outcome of this case and ConnectU will not sufficiently protect their interests.
11 (Intervene Motion at 4, 6.) The Judgment in this case treats the ConnectU Founders as parties; it
12 orders them and the other signatories to take action to comply with the Term Sheet and Settlement
13 Agreement ("Settlement Agreement"). Therefore, before reaching the necessity of allowing them to
14 intervene, the Court reviews the ConnectU Founders' status as existing parties to this action and to
15 the other lawsuits covered by the Settlement Agreement.

16 The Ninth Circuit has held that when a federal court has a basis for jurisdiction over a
17 dispute involving a final settlement agreement, the court may "interpret and apply its own judgment
18 to the future conduct contemplated" by a agreement. See Flanagan v. Arnaiz, 143 F.3d 540, 544-45
19 (9th Cir. 1998). The requisite independent basis for jurisdiction may be supplied by a provision in
20 the settlement agreement. Id. at 544. Such a provision, "empowers a district court to protect its
21 judgment" from subsequent attempts to frustrate "the purpose of the settlement agreement and
22 order." Sandpiper Village Condominium Ass'n., Inc. v. Louisiana-Pacific Corp., 428 F.3d 831, 841

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¹ (hereafter, "Intervene Motion," Docket Item No. 574.)

26 ² (hereafter, "Stay Motion," Docket Item No. 578.). Subject to being permitted to intervene,
27 the ConnectU Founders join in the Motion to Stay Enforcement.

1 (9th Cir. 2005). Under this power, individuals may be bound to take actions as long as they had
2 notice and an ability to contest the judgment or order enforcing the settlement agreement. See id.

3 On August 8, 2007, the ConnectU Founders and ConnectU, Inc., were named Plaintiffs in a
4 First Amended Complaint in Civil Action No. 1:07-CV-10593-DPW pending in the District of
5 Massachusetts. The Facebook, Inc., Mark Zuckerberg and others were named as Defendants in that
6 action. In this action, Facebook and Mark Zuckerberg have been named as Plaintiffs and
7 ConnectU, Inc., has been named as a Defendant. Although the ConnectU Founders were named in
8 a Second Amended Complaint in this case, the Court found that it lacked personal jurisdiction over
9 them and dismissed them. (See Docket Item Nos. 136, 232.)

10 On February 22, 2008, the parties entered into a Settlement Agreement, and the ConnectU
11 Founders individually obligated themselves to perform the terms of the agreement. Among the
12 obligations undertaken by the ConnectU Founders were agreements to dismiss the Massachusetts
13 action and to give mutual releases as broad as possible.³ Notably, the ConnectU Founders expressly
14 stipulated to the jurisdiction of this Court for the limited purpose of enforcement of the agreement.
15 (Id.)

16 On April 23, 2008, Facebook filed a motion before this Court to enforce the agreement
17 against the parties to the agreement (“Enforcement Motion”), because disputes arose among the
18 parties with respect to execution of the agreement. (Docket Item No. 329.) Rather than file the
19 Enforcement Motion as a new ancillary proceeding, the motion was filed in this action. As noted
20 above, the ConnectU Founders were not existing parties to this action before the Enforcement
21 Motion was filed because they had been dismissed. Nevertheless, the motion sought enforcement
22 against the ConnectU Founders and ConnectU, Inc., because in the agreement, each of the Founders
23 submitted to the jurisdiction of this Court to enforce the agreement. (Enforcement Order at 3; see
24 Declaration of I. Neel Chatterjee, Ex. F, hereafter, “Chatterjee Decl.,” Docket Item No. 596.)

26 ³ (Order Granting Plaintiffs’ Confidential Motion to Enforce the Settlement Agreement at 3,
27 hereafter, “Enforcement Order,” Docket Item No. 461.)

1 Notice of the Enforcement Motion was given to counsel for the ConnectU Founders. This
2 was accomplished by filing a notice of the motion in the Massachusetts action in which the
3 ConnectU Founders were parties and by serving that notice on counsel for the ConnectU Founders
4 in the Massachusetts action. (Enforcement Order at 5; Chatterjee Decl., Ex. G.) At a hearing in the
5 Massachusetts action, the parties acknowledged they were aware of the proceedings in this Court.
6 (Id., Chatterjee Decl., Ex. H.)

7 At the hearing on the Enforcement Motion in this case, the Court raised a question with
8 respect to enforcement against the individuals who, although signatories to the agreement, were not
9 formal parties to the present action. (Transcript of Hearing at 74-75.) Counsel for Facebook took
10 the position that the ConnectU Founders had consented to jurisdiction and that on that basis, the
11 Court could proceed to enter judgment enforcing the agreement against them. (Id.) Counsel for the
12 ConnectU Founders made an appearance at the hearing. Their counsel described the status of the
13 Massachusetts' litigation but otherwise did not object to jurisdiction. (Id.) Thus, like ConnectU,
14 Inc., the ConnectU Founders are parties for purposes of proceedings to enforce the Settlement
15 Agreement.

16 In its Enforcement Order, the Court ordered the parties to appear for a hearing and to show
17 cause why a judgment should not be entered ordering the signatories to take actions required of them
18 by the Settlement Agreement. (Enforcement Order at 12.) In its Order, the Court specifically cited
19 the ConnectU Founders' consent to jurisdiction and their receipt of notice of the Enforcement
20 Motion as the basis for the exercise of personal jurisdiction to enforce the agreement against them.
21 (Id.) A copy of the Order to Show Cause was served on counsel for all signatories to the agreement,
22 including counsel for the ConnectU Founders.⁴

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25 ⁴ The service list shows that attorney Scott Mosko of the Finnegan, Henderson, Farabow
26 was served. (Enforcement Order, certificate of service page.) The Finnegan firm previously
27 represented the ConnectU Founders in this action prior to their dismissal; however, the Finnegan
28 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.

1 On July 2, 2008, a show cause hearing was held. Counsel for all signatories to the agreement
2 appeared, including counsel for the ConnectU Founders. (See n.4, supra.) After the hearing, the
3 Court entered Judgment Enforcing the Settlement Agreement against all the signatories to the
4 agreement and appointed a Special Master to perform steps necessary to enforce the agreement.
5 (Judgment at 1-2; Notice of Appointment of a Master; Nomination of Individual to Serve as Master,
6 Docket Item No. 475.) Among others, the Judgment ordered the ConnectU Founders to perform acts
7 necessary to comply with the Judgment with respect to this action and the Massachusetts action.
8 (Judgment at 3.)

9 In sum, the Court confirms its previous finding that the Motion to Enforce the Term Sheet
10 and Settlement Agreement, although filed under a case number in which the ConnectU Founders
11 were not already parties, was an ancillary proceeding in which Facebook and Zuckerberg were
12 nominal Plaintiffs and ConnectU and the ConnectU Founders were nominal Defendants. As the
13 Supreme Court has noted, “[e]nforcement of [a] settlement agreement . . . whether through award of
14 damages or decree of specific performance, is more than just a continuation or renewal” of
15 underlying proceedings. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 378 (1994).
16 Although the ConnectU Founders were not made parties by virtue of being served with a summons
17 and complaint, as signatories to the Settlement Agreement they consented to personal jurisdiction
18 being exercised over them by this Court and to proceedings limited to enforcement of the agreement.
19 The ConnectU Founders had fair notice that Facebook sought enforcement of the agreement through
20 a motion, and they had ample opportunity to oppose that motion. Through counsel, the ConnectU
21 Founders participated in and were aware of these proceedings. Thus, the Judgment enforcing the
22 Settlement Agreement is binding on them and they may appeal that Judgment.⁵

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26 ⁵ The Court notes that even a non-party may be permitted to appeal when “(1) the appellant,
27 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).

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1 the pendency of the appeal.” Spieler ex rel. Spieler v. Mt. Diablo Unified School Dist., 2007 WL
2 3245286, at *2-3 (N.D. Cal. 2007).

3 The standard for granting a stay pending appeal under Rule 62(c) is similar to that for a
4 preliminary injunction. Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983). A party seeking a
5 stay must show “(1) whether the stay applicant has made a strong showing that he is likely to
6 succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3)
7 whether issuance of the stay will substantially injure the other parties interested in the proceeding;
8 and (4) where the public interest lies.” Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Lopez, 713
9 F.2d at 1435. To satisfy steps (1) and (2), a court may accept proof either that the applicant has
10 shown “a strong likelihood of success on the merits [and] . . . a possibility of irreparable injury to the
11 [applicant],” or “that serious legal questions are raised and that the balance of hardships tips sharply
12 in its favor.” Golden Gate Restaurant v. City and County of San Francisco, 512 F.3d 1112, 1115-16
13 (9th Cir. 2008). When the district court has already ruled on the legal issue being appealed, the
14 court need not conclude that it is likely to be reversed on appeal in order to grant the stay. Strobel v.
15 Morgan Stanley Dean Witter, 2007 WL 1238709, at *1 (S.D. Cal. 2007). However, the court may
16 consider that delay in filing an appeal and seeking a stay vitiates the force of allegations of
17 irreparable harm. Cf. Beame v. Friends of the Earth, 434 U.S. 1310, 1313 (1977).

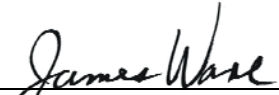
18 In this case, ConnectU cannot show irreparable harm from execution of the Judgment
19 because the only effect of enforcing the settlement is the transfer of ownership of ConnectU.
20 Barring evidence to the contrary, the Court presumes that Facebook has an equal interest in
21 preserving the value of ConnectU as do ConnectU’s current owners. Moreover, ConnectU filed its
22 motion seeking a stay only days before turnover of its stock was ordered to take place. This delay
23 on the part of ConnectU tends to vitiate its contention that it will be irreparably harmed. See Beame,
24 434 U.S. at 1313.

25 With respect to the issues of the balance of hardships, ConnectU contends that Facebook may
26 somehow adversely affect its right to appeal. (Stay Motion at 5-6.) However, ConnectU admits that
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1 The Court finds good cause to not hold ConnectU and its Founders in contempt for failing to comply
2 with its Judgment as of August 4, 2008.

3 Accordingly, ConnectU and the ConnectU Founders shall comply with the turnover
4 requirements of the Court's July 2, 2008 Judgment Enforcing Settlement Agreement on or before
5 **August 12, 2008.**

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7 Dated: August 8, 2008



JAMES WARE
United States District Judge

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Dated: August 8, 2008

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy