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

IN THE 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.

On Appeal From The United States District Court For The Northern District of California, No. CV-07-01389-JW, The Honorable James Ware

APPELLANT CONNECTU, INC.'S REPLY TO RESPONSE TO APPELLANT'S MOTION TO VOLUNTARILY DISMISS APPEAL PURSUANT TO FRAP 42(B) AND APPELLANT'S MOTION FOR WITHDRAWAL AND APPOINTMENT OF SUBSTITUTE COUNSEL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

"Who and what are you?" Scrooge demanded.
"I am the Ghost of Christmas Past."
"Long past?" inquired Scrooge, mindful of its dwarfish stature.
"No. Your past."

- Charles Dickens, *A Christmas Carol*

The question of corporate autonomy is the key issue in ConnectU's two motions and underlies all of the issues Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra ("the Founders") raise in their Response to ConnectU's two pending motions[1]. ConnectU, Inc. ("ConnectU") became a wholly-owned subsidiary of The Facebook, Inc. ("Facebook") and appointed Mark Howitson as ConnectU's sole officer and director on December 15, 2008, while ConnectU's Appeal was pending.

The issue is whether ConnectU, as it exists today, has the right to make its own choices regarding this Appeal. Specifically, does ConnectU: (1) have a right to the counsel of its choice; and (2) have a right to determine its own litigation position? Despite the adamant protests of the Founders, the plain reality is ConnectU absolutely is entitled to its counsel of choice, and to determine its own litigation strategy, including whether to seek dismissal of the instant Appeal. The law and sound policy both squarely support ConnectU's rights on both issues.

I. CONNECTU HAS THE RIGHT TO COUNSEL OF ITS CHOICE

A. Present Management Makes Corporate Decisions -- Not Prior Management and Not Founders' Counsel

Counsel may not force itself on an unwilling corporate client. "The board of

[1] This Reply responds to the Founders' single Response to both of ConnectU's pending motions, the Motion to Voluntarily Dismiss this Appeal and the Motion for Withdrawal and Substitution of Counsel, thus the length of the brief. Further, although the Founders entitle their brief a "Response," their brief is, in fact, an opposition to both of ConnectU's pending motions.

directors, not corporate counsel, has the right to control the affairs of the corporation. (Corp. Code, § 800.) The board of directors thus has the power to retain and discharge corporate counsel." *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 623. ConnectU, like any corporate client, has a basic right to the counsel of its choice.

A corporation's former directors or shareholders do not control that corporation's attorney-client relationship. *Commodity Futures Trading Com'n v. Weintraub* (1985) 471 U.S. 343, 349 ("[W]hen control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well. . . . Displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties.").

There is only one ConnectU, the present ConnectU, and it has the manifest right to counsel of its choice. This is the only issue this Court need consider. ConnectU has the same corporate status and same day-to-day operations it had while under the Founders' control. It has a new, properly appointed director and officer. No matter how much the Founders may wish it, ConnectU has not "merged" with Facebook, and it has not ceased to exist. Ownership of ConnectU has simply changed hands.

BSF boldly seeks to condition its withdrawal on indemnification and a coerced conflict waiver. There is no basis for such conditions, and even BSF's requests are starkly hostile to the interests of ConnectU, which remains at this writing a current client of BSF. The Court should grant ConnectU's Motion for Withdrawal and Substitution of Counsel unconditionally.

B. BSF Cannot Represent the "Ghost of ConnectU Past"

The Founders appear to request affirmative relief such that "the Founders' existing counsel can continue to represent the Founders and the interest of 'old' ConnectU." (See Cameron Winklevoss, Tyler Winklevoss and Divya Narendra's (I) Response to "Appellant's Motion to Voluntarily Dismiss Appeal Pursuant to FRAP 42(b)' and Stipulation of Dismissal, and (II) Response to "Motion to Withdrawal and Appointment of Substitute counsel for Defendant-Appellant ConnectU, Inc. ("Response"), p. 10.) However, BSF may not represent former "interests," nor take a position adverse to its *present client* in the same litigation.

First, an attorney cannot represent "interests" of a non-existent client (the "Ghost of ConnectU Past"). BSF offers no authority for this proposition, and common sense defies it. How would BSF establish the attorney-client relationship? Communicate with previous "interests"? Determine the holder of the attorney-client privilege? In the event of a solely monetary award, who would cash the check? A ghost is not a client, particularly when the actual client is alive and well.

Second, and most critically, the law outright prohibits an attorney from taking a position adverse to a concurrent client. California Rules of Professional Conduct ("CRPC") 3-310(C)(2) (An attorney shall not "[a]ccept or continue representation of more than one client in a matter in which the interests of the clients actually conflict."); ABA Model Rules of Professional Conduct ("ABA Rules"), Rule 1.7 (prohibiting an attorney from representation where "the representation of one client will be directly adverse to another client.").

BSF remarkably asks this Court to allow BSF to represent a current client against itself. ConnectU is not aware of any precedent allowing an attorney to represent previous interests of a current client against that same client in the same litigation. Such a premise defies all relevant conflicts law, and BSF offers no legal

basis for this Court to allow it.

Further, the reason ConnectU is still BSF's current client is that BSF has refused to withdraw despite ConnectU's repeated requests. BSF takes a position directly adverse to its own client -- ConnectU -- by preparing and filing the Founders' Response to the instant motions. BSF's conduct directly violates CRPC 3-310 and ABA Rule 1.7.

BSF may not evade the ethics rules and advance the interests of the Founders by inventing a non-existent Ghost of ConnectU Past. Further, even if such representation were possible from a practical standpoint, it would violate the Rules of Professional Conduct and California law.

C. BSF's Preemptory Objections to Disqualification are Irrelevant, and Beg the Question of Disqualification *Per Se*

BSF's fear that it may be disqualified from representing the Founders is not a reason to limit ConnectU's right to the counsel of its choice.

Nonetheless, since BSF raises the issue of disqualification, ConnectU submits that BSF is in fact compelled to withdraw from representing both ConnectU and the Founders, and this Court should disqualify BSF *sua sponte*.

When an attorney seeks to represent a current client against another current client in the same litigation, disqualification is automatic. *Flatt v. Sup. Ct.* (1994) 9 Cal. 4th 275, 284. "In all but a few instances, the rule of disqualification in simultaneous representation cases is a *per se* or 'automatic' one." *Id.*; see also *Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp.* (1995) 36 Cal.App.4th 1832, 1840.

Courts have both the authority and the responsibility to disqualify an attorney when the circumstances warrant. "A trial court's authority to disqualify an attorney derives from the power inherent in every court '[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining

thereto' (CCP § 128(a)(5))." *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems* (1999) 20 Cal.4th 1135, 1145 (additional citations omitted); see also *Sheller v. Superior Court* (2008) 158 Cal.App.4th 1697, 1710 ("In an appropriate case, the trial court may exercise its inherent power to control the conduct of its ministerial officers to disqualify an attorney in an action before it.").

This Court may exercise its inherent power to regulate these proceedings and disqualify BSF as to all joint clients without requiring ConnectU to bring a motion. BSF currently represents joint clients whose interests conflict. BSF should have withdrawn as to all clients, ConnectU and each of the Founders, once the actual conflict arose pursuant to CRPC 3-310 or ABA Rule 1.7. Obviously, BSF has refused to withdraw. Instead, BSF takes a position adverse to its own client, ConnectU, in this litigation. Given these facts, the Court should disqualify BSF "automatically," as articulated in *Flatt* and its progeny.

BSF asserts that it does not have a continuing duty to ConnectU based on holdings in *International Elecs. Corp. v. Flanzer,* 527 F2d 1288 (2d Cir. 1975) and *Bass Publishing v. Promus* 1994 U.S. Dist. LEXIS 136 (S.D.N.Y. Jan. 7, 1994). BSF is wrong for several reasons: (1) the cases BSF cites are not controlling in this Circuit, and are in any event distinguishable; and (2) BSF's position ignores contrary California law, which controls.

As a preliminary matter, the applicable law is California law because the District Court from which this appeal was taken applies California law and the California Rules to matters of disqualification. (Local Rules of Court for the Northern District of California, Rule 11-4(a).) New York state and Second Circuit holdings are not controlling.

Moreover, *Flanzer, supra,* is readily distinguishable from this case. *Flanzer* addressed disqualification based on a conflict with a <u>former client</u>, which is analyzed differently than conflicts between <u>concurrent clients</u> with adverse

interests in the same litigation. *Flatt, supra,* 9 Cal. 4th at 282. ConnectU is not a former client yet, despite its best efforts.

Further, *Flanzer* dealt with an alleged violation of Cannon 4 (the New York corollary to CRPC 3-310) in which the former client was a corporation that had ceased to exist as a result of its merger into a subsidiary of the acquiring company. *Flanzer* was essentially an asset transfer, which also is analyzed using a different standard than where, as here, the corporation survives in some form. ConnectU still exists -- as a wholly-owned subsidiary of Facebook. Moreover, ConnectU remains a party to this litigation.

In *Bass*, which BSF cites despite the fact that it is unreported, the Southern District of New York relied on a line of Second Circuit cases whose reasoning is generally questioned within that Circuit. *See, e.g., U.S. v. Moscony,* 697 F.Supp.888 (E.D.Pa., 1988).[2]

The New York Court of Appeals declined to follow both *Flanzer* and *Bass* in the widely-cited case of *Tekni-Plex, Inc. v. Meyner and Landis* (1996) 89 N.Y.2d 123. In *Tekni-Plex,* the court affirmed disqualification of counsel for the former owner of a corporation in litigation initiated by the corporation's buyer to remedy alleged breaches of the agreement relating to the corporation's acquisition. *Id*. at 127. The court held that the attorney-client relationship continued with the newly formed entity. *Id*.

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[2] This line of cases arises from joint representation in the same litigation where an unforeseen actual conflict arises due to some "fault" of the client seeking disqualification. For example, discovery of one joint client's fraud resulted in an actual conflict, and the court used the reasoning that the client, not the lawyer switched sides in order to avoid disqualifying the lawyer as to the other (innocent) client. *Kempner v. Oppenheimer & Co., Inc.* 662 F.Supp. 1271 (S.D.N.Y., 1987). *Bass* applied this reasoning to a joint representation in a corporate transaction that resulted in litigation years later between the acquiring corporation and the "seller" corporation (which had retained the same management team and counsel) where the buyer had permitted the representation in five other transactions over a four-year period before seeking disqualification.

As in *Tekni-Plex*, this dispute centers on an agreement relating to the corporation's acquisition that became subject to litigation. If ConnectU were a former client, *Tekni-Plex* would be more factually applicable than the cases cited by the Founders, though none is controlling.

As it stands today, BSF concurrently represents the Founders and the one and only ConnectU. There is more than a theoretical potential that BSF will take an adverse position to one of its own clients. BSF already has taken a position directly adverse to its own client by submitting its Response to these motions.

ConnectU urges this Court to disqualify BSF from representing both ConnectU and the Founders, as mandated by the California and ABA rules of professional conduct and California law.

II. THE COURT SHOULD GRANT CONNECTU'S MOTION TO VOLUNTARILY DISMISS THIS APPEAL

A. ConnectU May Change Its Litigation Strategy and Voluntarily Dismiss Its Own Appeal

ConnectU, under its new ownership, plainly has the legal right to decide its own litigation strategy. That right encompasses the right to seek dismissal of this Appeal. An organization's new directors have the right to determine the organization's litigation position, including the right to withdraw a pending appeal. *Weaver v. United Mine Workers of America,* 492 F.2d 580 (D.C. Circuit 1973).

In *United Mine Workers,* the D.C. Circuit granted an appellant organization's motion to withdraw its own appeal after a change in control of the appellant organization resulted in the appellant re-aligning its litigation position

with the appellees.[3] *Id*. at 582. The organization's former officers argued, as Founders do here, that the organization (UMWA) was compelled to maintain its appeal on behalf of its former officers. The Circuit Court disagreed:

> Clearly, the UMWA, like any labor organization, 'has an interest in formulating its own policies, making its own decisions, and conducting its own affairs.' It 'is free to say which side of a controversy involving a legitimate institutional interest it will take' . . . Although this decision is clearly within the newly-elected officers' authority, the [former] officer-appellants would have us compel the UMWA to maintain a defensive role. It simply is not the court's function to make that decision for the UMWA. No less in the prosecution of litigation that in the pursuit of other affairs is a union at liberty to shape its own destiny within the boundaries set by law.

Id. at 586 (citations omitted).

ConnectU has no less a right to shape its own destiny than it had prior to December 15, 2008. A corporation's rights are not diminished simply because it has a new owner and new management. ConnectU has maintained ConnectU's corporate status and respected all requisite corporate formalities. There is no "gamesmanship" in ConnectU's change of strategy -- it is a logical and predictable result of the December 15, 2008 change in ownership and control.

There is simply no legal basis to coerce ConnectU into maintaining this Appeal against ConnectU's present interests. Thus, ConnectU requests that this Court grant ConnectU the same liberty to shape its own destiny that the law affords

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[3] In *United Mine Workers,* a labor Union brought an appeal from a derivative action against the Union and its officers for an accounting and restitution of funds misappropriated by union officers. 492 F.2d at 582. While the appeal was pending, new Union officers were elected. *Id*. The Union, under the direction of its new officers, re-aligned its position with plaintiffs and moved to withdraw the appeal.

every other corporation, and dismiss this Appeal.

B. It is Unjust to Force ConnectU to Maintain this Appeal

The Founders' arguments regarding injustice obfuscate this key fact: no party's right to appeal is at issue in this motion. The only right at issue is ConnectU's right to decide for itself "which side of a controversy involving a legitimate institutional interest it will take." *United Mine Workers of America, supra,* 492 F.2d at 586.

The Founders imply that the Court denied their motion to stay the transfer of consideration based on Facebook's argument that a subsequent motion to dismiss by ConnectU was speculative. This implication is itself speculative and confuses the issue. The "irreparable injury" is not dismissal of an appeal, it is the "loss of basic right to appeal" per the authority cited by the Founders. *Providence Journal Co. V. FBI,* 595 F.2d 889, 890 (1st Cir. 1979) (emphasis added).

ConnectU did not "lose" its basic right to appeal as a result of the December 15, 2008 transfer. ConnectU still has the right to appeal, but certainly not the obligation.

Likewise, if the Court grants ConnectU's Motion to Voluntarily Dismiss, it has no legal effect on the Founders' right to appeal. The Founders are pursuing their own appeal, which must stand or fall on its own merits. Those merits are not at issue in these motions.

In a footnote, the Founders assert that they must be included in a stipulation to dismiss because they were the "real parties in interest at the time ConnectU's appeal was filed." (Response, p. 4, fn.2.) The Founders offer no authority for this proposition. ConnectU pursued this litigation in its own name for four years. There is no basis for the belated assertion that ConnectU, now that it is owned by Facebook, should suddenly lose its corporate autonomy and be forced to protect

the interests of its former shareholders.

The Founders further argue that dismissal would be unjust because briefs have been filed and "ConnectU has devoted significant resources to pursuing its appeal." (Response, p. 4.) In this argument, BSF makes use of ConnectU's confidential information to ConnectU's detriment, in violation of CRPC 3-310 and ABA Rule 1.7. In any event, the argument is immaterial. The real injustice would be if this Court allowed the Founders' assertion of "past interests" to override the present rights of ConnectU.

The parties to this Appeal are ConnectU, Facebook and Defendant-Appellee Mark Zuckerberg. All three parties have stipulated to dismiss. The Founders' consent is unnecessary and irrelevant to the parties' stipulation pursuant to Federal Rule of Appellate Procedure 42(b). This Court needs no further basis to dismiss.

C. The Founders' Other Arguments Fail

i. The Founders' Request to Defer to the Merits Panel Ignores ConnectU's Main Grounds for Dismissal and is Based on Speculation

The Founders' request ignores ConnectU's most critical and compelling grounds for voluntarily dismissal -- ConnectU's own corporate directive and the resulting stipulation among all the named parties to its Appeal. Standing and mootness are secondary grounds, argued in the alternative, and this Court may not even reach these issues.

Further, the request is based on pure speculation that Facebook will advance specific arguments and that they will be intertwined. ConnectU is not aware of the specific arguments Facebook plans to make in its Merits Brief, however, it stands to reason that any potential mootness or standing objections to the Founders' Appeal would require a different analysis of the facts as they apply to the different parties. Thus, ConnectU respectfully requests that the Court consider ConnectU's

motion to voluntarily dismiss this Appeal independently and on its own merits.

ii. "Evading Review" Argument Misstates the Applicable Law

The Founders argue that allowing voluntary dismissal of this Appeal will result in an evasion of review. However, the Founders misapply the applicable authority regarding this doctrine. Specifically, the Founders obfuscate the specific holding in *Washington Fisheries,* which is "If it appeared that an appellant sought dismissal for the purpose of evading appellate determination of certain questions in order to frustrate court orders in the continuing litigation, we might have grounds for exercising our discretion not to dismiss." *U.S. v. State of Wash., Dept. of Fisheries,* 573 F.2d 1117, 1118 (9th Cir. 1978). This language does not mean -- as the Founders argue -- "evading appellate review of contested orders and judgments below." (Response, p. 5.) The Founders' over-generalization, if accurate, would mean this Court could never dismiss an appeal. All dismissals seek to "evade" review of the actual rulings below.

Washington Fisheries specifically contemplated evasion of "a question of law that is of substantial importance to the litigation and that is likely to recur." *Id.* (emphasis added). No such question is at issue in ConnectU's appeal and the Founders do not and cannot identify any such question. In *Washington Fisheries,* this Court granted the requested dismissal, and it should do so here.

iii. Standing Confers Neither the Right nor Obligation to Assert Another Party's Interests

The Founders argue that the general standing requirement obligates ConnectU to maintain its Appeal for the specific purpose of protecting the Founders' interests. Despite the Founders' arguments, ConnectU is not obligated to assert or protect the Founders' interests.

Standing confers a permissive right to appeal, not an obligation such that "a

party aggrieved by a final judgment may appeal from it." *Libby, McNeill & Libby v. City National Bank,* 592 F.2d 504, 511-12 (9th Cir. 1978) (emphasis added). The *Libby* court did not contemplate that standing would permit the Court to hold an appellant hostage for the benefit of a third party. Standing requires that an appeal be made to protect that party's "own interests" -- a point not refuted by the Founders.

ConnectU is not obligated to assert or protect the Founders' interests. The Founders do not offer any legal authority for compelling ConnectU to do so. The Founders have appealed themselves, in their own names, from the same proceedings below. ConnectU should not be compelled to use its standing to assert interests that conflict with its own. Thus, the Court should grant ConnectU's motion to voluntarily dismiss.

iv. *Vacateur* Based on Mootness Does Not Apply Here

The Founders assert that should the Court determine that this Appeal is moot, the Court must vacate the lower court's judgment[4]. The federal court's general practice of vacating a lower court judgment that has become moot on appeal does not apply here for at least three reasons.

First, the Founders omit the critical and distinguishing circumstance -- the Founders' own appeal, filed separately from ConnectU's appeal, is still pending. This Court need not even consider whether it should vacate the judgment below unless and until it finds that the Founders' separate appeal is moot. The Founders' separate appeal is not at issue in this motion.

Second, the Founders misstate the facts in their analysis of *Gould v. Control*

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[4] As a preliminary matter, ConnectU argued mootness as an alternative ground for dismissal, not the primary basis. If the Court does not reach the question of mootness, a discussion of *vacateur* is unnecessary.

Laser Corp., 866 F.2d 1391 (Fed. Cir. 1989). In *Gould,* as here, the pursuit of an appeal became moot based on a settlement agreement that eliminated controversy between the parties. *Id.* at 1394. The *Gould* court concluded that when settlement moots an appeal, "The *Munsingwear* requirement of vacating the judgment below when a case becomes moot on appeal therefore does not apply." *Id*.

Here, the required controversy for purposes of this Appeal is the controversy between ConnectU and Facebook. The Founders are not a party to this Appeal. The December 15, 2008 transfer of consideration pursuant to the Settlement Agreement mooted the adversity between Facebook and ConnectU, and, per *Gould*, the requirement of vacating the judgment below does not apply.

Finally, the Founders assert that *vacateur* is appropriate, yet grossly misstate the rule regarding *vacateur*. "Where the appellant ceases to press an appeal, the appeal does become moot, but this does not retroactively moot the controversy originally presented to the district court. '[D]ismissal of the suit, as distinguished from dismissal of the appeal, might result in unfairness to appellee by subjecting him to other vexatious actions by appellant.'" *Zemansky v. U.S. E.P.A.,* 767 F.2d 569, 573 n. 3 (9th Cir. 1985) (citations omitted). This Court should not subject any party to the potential for further vexatious actions, such as the prospect of re-litigating the entire proceedings below, based on an inapplicable doctrine.

CONCLUSION

For the reasons stated herein, Appellant ConnectU requests that this Court grant its motion to order withdrawal and substitution of counsel. Appellant further requests that this Court grant its motion to dismiss ConnectU's Appeal (No. 08-16745) with prejudice, each party to bear its own costs.

DATED: January 16, 2009

Respectfully submitted,

HOGE, FENTON, JONES & APPEL, INC.

By /s/
James E. Towery
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CERTIFICATE OF SERVICE

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 copies will be sent to those indicated as non registered participants on January 16, 2009.

DATED: January 16, 2009

Respectfully submitted,

By /s/ James E. Towery
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