The Facebook, Inc., et al v. ConnectU, Inc., et al Doc. 47

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 MOTION TO DISQUALIFY COUNSEL

James E. Towery (BAR NO. 74058)
Alison P. Buchanan (BAR NO. 215710)
Jill E. Fox (BAR NO. 243945)
HOGE, FENTON, JONES & APPEL, INC.
Sixty South Market Street, Suite 1400
San Jose, California 95113-2396
Phone: (408) 287-9501
Fax: (408) 287-2583
Attorneys for Appellant ConnectU, Inc.

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CORPORATE DISCLOSURE STATEMENT

This statement is made pursuant to Federal Rule of Appellate Procedure 26.1. As of December 15, 2008, Defendant-Appellant ConnectU, Inc. is a wholly-owned subsidiary of The Facebook, Inc., a privately held corporation.

NOTICE OF MOTION AND MOTION

Defendant-Appellant ConnectU, Inc. ("ConnectU"), hereby moves to disqualify the law firms of Boies, Schiller & Flexner LLP ("BSF"), Finnegan, Henderson, Farabow, Garrett & Dunner, LLP ("Finnegan") and O'Shea Partners LLP ("O'Shea") from representing the founders of ConnectU -- Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra ("Founders") -- based on a conflict of interest in violation of California Rule of Professional Conduct 3-310, as well as ABA Model Rules of Professional Conduct 1.7 and 1.9.

Specifically, in accord with both sets of Rules of Professional Conduct, BSF, O'Shea and Finnegan may not represent joint clients whose interests are adverse in the same proceeding, and may not take an adverse position to either a current or former client. When an actual conflict arises between two joint clients, as exists here between ConnectU and the Founders, the lawyers must withdraw from representing both clients. The Boies firm has thus far refused to withdraw as counsel of record in this Appeal. The Finnegan firm belatedly moved to withdraw, after an initial refusal that forced ConnectU's new counsel to file a motion to substitute the previous counsel of record for counsel of its choosing[1]. O'Shea previously represented ConnectU and the Founders at the trial court level, and thus has a conflict between its current and former client in the same litigation.

For these reasons, this Court should disqualify BSF, Finnegan and O'Shea from continuing to represent the Founders.

INTRODUCTION

This case presents the rare circumstance of a transfer in ownership of a corporate party in the midst of litigation. This unusual circumstance is the result of a settlement agreement that shifted control of ConnectU from the Founders to the

[1] On December 22, 2008, ConnectU filed a separate motion to require Finnegan and BSF to withdraw as ConnectU's counsel of record in this appeal.

other party in the litigation -- Facebook. Although the factual circumstances may be uncommon, the ethical implications for the attorneys who previously represented both ConnectU and the Founders are neither complex nor unusual.

When attorneys begin representing joint clients, and later actual adversity develops between these clients, then the attorneys are precluded from representing either former joint client against the other. That is precisely what has occurred in this case. BSF, O'Shea and Finnegan previously represented joint clients -- ConnectU and the Founders. Then, as a result of the settlement as enforced by the trial court in this case, ownership of ConnectU transferred from the Founders to Facebook. Thus, there is now a direct and palpable conflict between ConnectU and the Founders.

Because of that direct conflict, BSF, O'Shea and Finnegan are now ethically precluded from continuing to represent the Founders. To allow continued representation would violate those attorneys' duties of loyalty and confidentiality to ConnectU. ConnectU has demanded that BSF, O'Shea and Finnegan withdraw from representing the Founders. All firms declined to do so, necessitating the filing of this motion and ConnectU's request that the Court order the disqualification of BSF, O'Shea and Finnegan from representing the Founders[2].

Finally, ConnectU is entitled by law to delivery of its client files so that it may properly assess the corporation's rights and obligations, including potential litigation, and therefore requests the Court order delivery of those files forthwith.

FACTUAL BACKGROUND

A. Settlement of the Pending Actions

As this Court is no doubt aware, this action has a long and complex history.

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[2] Finnegan belatedly moved to withdraw on December 29, 2008, a week after ConnectU's new counsel had been compelled to file a motion seeking Finnegan's withdrawal.

For purposes of this motion, the salient facts have less to do with the merits of the underlying case; rather, they relate mainly to the history of ConnectU and the Founders' representation during the course of the pending actions.

In February 2008, ConnectU, the Founders, Facebook, and Mark Zuckerberg agreed to mediate all of the pending claims between them. At that time, there were three actions pending: *ConnectU LLC v. Zuckerberg*, Appeal No. 07-1796 (1st Cir.); *ConnectU, Inc. v. Facebook, Inc*., Case No. 1:07-CV-10593-DPW (D. Mass.); and *Facebook, Inc. v. ConnectU, Inc.*, Case No. 5:07-CV-01389(RS) (N.D. Cal.). At various points throughout the litigation, Finnegan, O'Shea, and BSF were counsel of record, jointly representing ConnectU and the Founders[3].

At the conclusion of the mediation, the parties signed a "Term Sheet and Settlement Agreement" ("the Settlement Agreement"), which was binding by its express terms. The Settlement Agreement stated that the parties intended to resolve all of the claims between them in exchange for certain mutual consideration, including the exchange of cash and stock. Specifically, the Settlement Agreement called for the transfer of 100% of the outstanding shares of ConnectU to Facebook and for Facebook to transfer cash and certain shares of Facebook stock to the Founders. The Settlement Agreement also specifically stated that the U.S. District Court for the Northern District of California would retain jurisdiction for purposes of enforcing the Settlement Agreement.

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[3] Because the Founders (through their counsel) have refused to turn over ConnectU's files to ConnectU's new ownership, the exact details about the attorney-client relationship(s) between ConnectU, the Founders, and Boies, O'Shea, and BSF are unclear. ConnectU is currently unable to advise this Court of the precise dates on which Boies, O'Shea and BSF began and ceased representing ConnectU and/or the Founders. However, it is undisputed that at some point during this litigation, each of these firms simultaneously represented ConnectU and the Founders, as evidenced by their various applications for *pro hac vice* admission.

B. Facebook's Motion to Enforce the Settlement Agreement

Shortly after the parties signed the Settlement Agreement, the Founders refused to comply with the terms of the agreement. As a result, on April 23, 2008, Facebook filed a motion to enforce the Settlement Agreement. ConnectU opposed the motion to enforce. (The Founders did not oppose Facebook's motion.)

After briefing and oral argument, on July 2, 2008, the court entered an order granting Facebook's motion to enforce the Settlement Agreement. During this time frame, ConnectU and the Founders filed notices of appeal relating to the court's ruling on the motion to enforce.

C. Transfer of Consideration

Following the court's order granting Facebook's motion to enforce, the court appointed George Fisher as Special Master. Pursuant to the court's order, Fisher was to conduct various administrative activities identified in the court's July 3, 2008 Judgment Enforcing Settlement Agreement.

The court originally ordered that the exchange of consideration was to occur on November 24, 2008. In a November 21, 2008 Amended Judgment, the court extended the transfer date to December 15, 2008, to afford ConnectU the opportunity to seek a stay from the Ninth Circuit regarding the exchange of settlement consideration. This Court denied ConnectU's motion to stay on December 12, 2008.

Accordingly, on December 15, 2008, all of ConnectU's outstanding shares were conveyed to Facebook. As a result of this transfer, ConnectU is now a wholly owned subsidiary of Facebook.

D. ConnectU's Counsel Threatens Their Client and Refuses to Follow the Instructions of Their Client

Upon transfer of ConnectU to Facebook, ConnectU appointed a new sole officer and director. ConnectU then made several board resolutions, including the

appointment of James E. Towery of the law firm Hoge Fenton Jones & Appel as ConnectU's lead counsel in all matters[4]. Following the transfer of ConnectU to Facebook, Mr. Towery contacted Finnegan, O'Shea and BSF on December 16, 2008, on behalf of ConnectU and advised counsel that Finnegan, O'Shea and BSF were no longer authorized to take action on behalf of ConnectU. In this same correspondence, ConnectU requested that its counsel at Finnegan, O'Shea and BSF sign substitutions of counsel. See the Declaration of James E. Towery filed concurrently with this motion ("Towery Decl."), Exhibits A, B and C.

O'Shea responded on December 17, 2008, claiming that O'Shea did not represent ConnectU in the pending Ninth Circuit Appeal. Towery Decl., Ex. D.

ConnectU's lawyers at Finnegan and BSF responded by demanding "proof" of Mr. Towery's authority to act on behalf of ConnectU -- including demanding correspondence directly from the new sole officer and director of ConnectU and copies of ConnectU's most recent board resolutions. Towery Decl., Exs. G and I. Although not obligated to provide such documentation, ConnectU did so on December 18, 2008 in order facilitate the transition of ConnectU's representation. Towery Decl., Ex. H and J. Yet, even after receiving the requested "proof," rather than complying with their client's requests, ConnectU's lawyers at both Finnegan and BSF took the following extraordinary steps:

1. Finnegan and BSF refused to sign a substitution of counsel. In fact, both Finnegan and BSF took the position (either affirmatively or by inaction) that instead of their signing a stipulation for substation of counsel, ConnectU would either need to indemnify the lawyers and/or would need to undergo the time and

[4] At this time ConnectU also determined that pursuing an appeal directly adverse to its parent company, Facebook, is not in ConnectU's interest. ConnectU stipulated with Facebook for voluntary dismissal of the appeal, and then moved to voluntarily dismiss the pending appeal.

incur the expense to file a motion for substitution[5]. Towery Decl., Exs. G and K. Finnegan later moved to withdraw December 29, 2008, a week after ConnectU's new counsel had been compelled to file a motion seeking Finnegan's withdrawal;

2. BSF threatened ConnectU, its own client, warning that if ConnectU were to take any action adverse to BSF's other joint client -- the Founders -- the Founders would hold a fraudulent conveyance claim against ConnectU. Towery Decl., Ex. K; and

3. Finnegan and BSF refused to provide ConnectU's files to ConnectU, greatly prejudicing ConnectU's ability to assess its pending litigation matters. Towery Decl., Exs. L and M.

Based on BSF and Finnegan's remarkable refusal to cooperate with their own client, and the firms' implied and express threats made to ConnectU, ConnectU concluded that: (1) a conflict exists between BSF and Finnegan's joint clients ConnectU and the Founders; and (2) BSF and Finnegan have deliberately favored one joint client over the other by taking actions directly adverse to ConnectU in their continued representation of the Founders. Furthermore, given the actual conflict between ConnectU and the Founders, O'Shea's continued representation of the Founders directly conflicts with O'Shea's continued duty of confidentiality to its former client, ConnectU. On these grounds, ConnectU now moves for this Court to disqualify Finnegan, O'Shea and BSF from representing the Founders in any matter relating to ConnectU, including this case.

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[5] Having no alternative, ConnectU filed its motion to withdraw and substitute counsel on December 22, 2008. On January 6, 2009, BSF filed a response on behalf of the Founders wherein BSF opposed the withdrawal and substitution. Incredibly, BSF asked the Court to allow BSF to represent a non-existent entity (i.e., the interests of "old" ConnectU). BSF presented no authority to support its request.

ISSUES ADDRESSED BY MOTION

i. The Actual Conflict Between Joint Clients ConnectU and Its Founders Requires Mandatory Disqualification of Counsel from Representing Either;

ii. BSF, O'Shea and Finnegan Owe the Same Duties to ConnectU as to Any Former Client, and Therefore May Not Take Action Adverse to ConnectU; and

iii. ConnectU Is Entitled to Its Entire Client Files so It May Properly Evaluate the Corporation's Rights and Obligations, Including Potential Litigation.

ARGUMENT

A. Applicable Law

Courts have the authority to regulate the conduct of attorneys appearing before them, including the power to disqualify attorneys when warranted. "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).

The Northern District of California, from which this appeal was taken, applies the California state law standard to motions to disqualify counsel, including the California Rules of Professional Conduct. *Certain Underwriters at Lloyd's, London v. Argonaut Ins. Co.,* 264 F.Supp.2d 914 (N.D.Cal.2003); Ca. Code Civ. Proc. §128(a)(5); Local Rules of Court for the Northern District of California, Rule 11-4(a).

Here, the California Rules of Professional Conduct (hereinafter the "CRPC") and California law apply. In their settlement, the parties to this Appeal conferred jurisdiction to the Northern District to enforce the Settlement Agreement, and the Appeal was taken from the Northern District, which applies the CRPC and California law. In addition, both BSF and Finnegan maintain offices in California,

employ attorneys who are members of the State Bar of California, and their attorneys of record for this Appeal are either licensed in California or were admitted to practice before the Northern District Court or this Court.

This Court also may rely upon the ABA Model Rules of Professional Conduct ("ABA Rules"). *See, e.g., Brennan's, Inc. v. Brennan's Restaurants, Inc.,* 590 F.2d 168, 172 fn.5 (5th Cir. 1979) ("As the profession's own expression of its ethical standards, the [ABA] Code of Professional Responsibility, Ethical Considerations, and Disciplinary Rules provide substantial guidance to federal courts in evaluating the conduct of attorneys appearing before them.")[6]

Under both the California and ABA Rules, the Founders' counsel have an impermissible conflict based on two separate duties: (1) their duty of loyalty to joint clients ConnectU and the Founders; and (2) their duty of confidentiality to both clients. "An attorney's ethical duties to maintain undivided loyalty to his or her clients and to preserve the confidentiality of client communications require that the attorney refrain from simultaneous or successive representation of clients with adverse interests." *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 23.

B. The Actual Conflict Between Joint Clients ConnectU and the Founders Requires Mandatory Disqualification of BSF and Finnegan from Representing Both Clients

ConnectU and the Founders are joint clients of BSF and Finnegan. Following the change in control of ConnectU in December 15, 2008, BSF and Finnegan refused to withdraw as counsel for ConnectU. ConnectU has taken steps to remove BSF and Finnegan; however, as of this filing BSF and Finnegan remain

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[6] The relevant ABA Rules regarding client conflicts, 1.7 and 1.9, as applied to disqualification, were cited with approval by the California Supreme Court in *Flatt v. Superior Court* (1994) 9 Cal. 4th 275, 282 fn. 2.

counsel of record for ConnectU. The Court also should apply the concurrent client analysis because the conflict arises from BSF and Finnegan's joint representation of ConnectU and the Founders concurrently.

A basic rule of professional responsibility is that a lawyer may not represent joint clients whose interests actually conflict. ABA Rule 1.7 prohibits an attorney from representation where "the representation of one client will be directly adverse to another client" or "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

California also prohibits an attorney from representing two current clients with actual conflicting interests, absent informed written consent. The California rule states that "[a] member shall not, without the informed written consent of each client . . .[a]ccept or continue representation of more than one client in a matter in which the interests of the clients actually conflict." CRPC 3-310(C)(2).

The most egregious instance of actual adversity is when an attorney seeks to represent two clients with opposing interests in the same litigation. In such circumstances, as are present in this case, disqualification is automatic. *Flatt v. Sup. Ct.* (1994) 9 Cal. 4th 275. "In all but a few instances, the rule of disqualification in simultaneous representation cases is a *per se* or 'automatic' one." *Id.* at 284; *Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp.* (1995) 36 Cal.App.4th 1832, 1840.

Joint clients in the same litigation may not consent to waive a conflict in a contested proceeding where the interests of joint clients become adverse, and therefore the lawyer must withdraw from representing both clients. *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 898-9. "[I]t would be unthinkable to permit an attorney to assume a position at a trial or hearing where he could not advocate the interests of one client without adversely injuring those of the other."

Id. at 898. Like California, the ABA Rules also prohibit continued representation that involves the "assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." ABA Rule 1.7(b)(3).

BSF and Finnegan undertook representation of joint clients whose interests could potentially become adverse. That potential has become reality. Now that ConnectU and the Founders are in direct conflict, it is no longer possible for BSF and Finnegan to advocate for the interests of one client without adversely injuring the interests of the other. Thus, the two firms cannot continue representation of either joint client.

i. No Valid Waiver Exists

BSF and Finnegan cannot rely upon consent to solve their ethical dilemma. First, an actual conflict between two clients in simultaneous representation is not consentable. *Flatt, supra*; *Klemm, supra*. Even if consent were theoretically available, ConnectU has not consented and does not consent to BSF and Finnegan continuing to represent the Founders. Since the time the conflict became actual, BSF and Finnegan have not purported to disclose the conflict, and ConnectU has not consented to waive it. After ConnectU became a wholly owned subsidiary of Facebook, ConnectU also took the precautionary step of revoking any possible prior consent (although its present management is unaware of any such prior consent). Therefore, ConnectU has not consented to BSF and Finnegan's continued representation of the Founders.

ii. Ending The Attorney-Client Relationship Does Not Cure this Conflict

BSF and Finnegan cannot solve their ethical dilemma by terminating their representation of ConnectU. "[A] law firm that knowingly undertakes adverse

concurrent representation may not avoid a disqualification by withdrawing from representation of less favored client before hearing on disqualification; automatic disqualification rule may not be avoided by unilaterally converting present client into former client." *Truck Ins. Exchange v. Fireman's Fund Ins. Co.* (1992) 6 Cal.App.4th 1050, 1060, rehearing denied and modified, review denied; *Unified Sewerage Agency of Washington County, Or. v. Jelco Inc.,* 646 F.2d 1339, 1345, fn. 4 (9th Cir. 1982).

Following the change in control on December 15, 2008, ConnectU made a simple and unambiguous request to its counsel, BSF and Finnegan, that they withdraw as counsel of record for this Appeal. Both firms refused.[7] The BSF firm also attempted to extract an agreement from its own client -- ConnectU -- in exchange for BSF's cooperation. Specifically, BSF refused to withdraw unless "Facebook, Inc. and ConnectU, Inc. agree to completely indemnify BSF from any liabilities arising from or relating to such substitution" and that counsel "confirm that ConnectU will not take any actions to interfere with the pending appeal." Towery Decl., Ex. K.

BSF's conduct is a manifest breach of its duty of loyalty to ConnectU, and illustrates why disqualification is necessary. BSF not only disregarded its own client's instructions, BSF also exploited its position as ConnectU's counsel to advocate for its other clients, the Founders, to the detriment of ConnectU.

Clients should not have the burden of enforcing their counsel's ethical obligations. Under CRPC 3-310, attorneys have the obligation to avoid the representation of adverse interests. As soon as the conflict between ConnectU and the Founders came into existence, BSF and Finnegan should have withdrawn. Having failed to do so, BSF and Finnegan certainly should have honored their

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[7] Finnegan filed a "conditional withdrawal" as counsel in the Massachusetts action *ConnectU et. al v. Facebook et. al* (1:07-cv-10593) on December 23, 2008.

client's request that they withdraw. This Court should grant the instant motion, and thereby remove BSF and Finnegan from their untenable stance.

C. BSF, O'Shea and Finnegan Owe the Same Duty of Confidentiality to ConnectU as to Any Former Client, and Therefore May Not Act Adverse to ConnectU in this Litigation

ConnectU is a former client of O'Shea in this matter. BSF and Finnegan may well argue that ConnectU is a former, rather than current, client of theirs as well. Regardless of whether the Court considers ConnectU a current or former client of BSF and Finnegan, the Court should disqualify the two firms and O'Shea from continuing to represent the ConnectU Founders.

Both the California and ABA Rules prohibit a lawyer from representing or continuing to represent a client whose interests actually conflict with those of a former client in a substantially related matter. CRPC 3-310(E); ABA Rule 1.9(a). Although an attorney may have a lessened (not absent) duty of loyalty to a former client, most courts analyzing successive conflict issues emphasize the duty of attorneys to maintain the confidences of the former clients as the rationale necessitating disqualification.

An attorney has a duty to "maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client." Ca. Bus. & Prof. Code §6068(e). This duty of confidentiality survives after the termination of the attorney-client relationship. *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 847.

"Where the representation is successive -- that is when an attorney is engaged to represent the interest of a party that are adverse to a former client of the attorney's -- 'courts have recognized that the chief fiduciary value jeopardized is that of client confidentiality.'" *Metro-Goldwyn-Mayer, Inc., supra*, 36 Cal.App.4th at 1839, citing *Flatt, supra*, 9 Cal. 4th at 283.

An actual breach of confidentiality is not required to compel

disqualification. "The test used for disqualification in those instances is whether there is a 'substantial relationship' between the subject of the former and current representations." *Metro-Goldwyn-Mayer, Inc., supra*, 36 Cal.App.4th at 1839. If the matter is "substantially related," potential for breach of confidentiality is presumed and disqualification is proper. *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1038; *Brennan's, Inc., supra,* 590 F.2d at 172.

In the present case, the substantial relationship is obvious. BSF, O'Shea and Finnegan have represented (and BSF and Finnegan continue to represent) ConnectU and its Founders in the very same matter -- the present case.

The Court should disqualify an attorney where there is any potential for breach -- an actual breach is not required. In disqualifying a former attorney for American Airlines from testifying as an expert witness for American's adversary in subsequent litigation, the California Appellate Court reasoned:

> It was not necessary for American to establish that Long answered the questions, thus revealing confidential information, in order to prove that Long breached his fiduciary duty to American. He placed the noose around American's neck, without its consent, promising all the while not to kick over the chair on which it stood, blithely ignoring the sweat forming on the corporate brow… The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent.

American Airlines, supra, 96 Cal.App.4th at 704-05.

Even though an actual breach of confidentiality is not required to disqualify counsel, there already has been an actual breach in this action to the detriment of ConnectU. In correspondence to ConnectU's successor counsel, BSF attorney Michael Underhill used confidential corporate information to demand that his own

client -- ConnectU -- act against its own interest by maintaining this Appeal, and to threaten his own client with legal action on behalf of the Founders if ConnectU did not do as he demanded. Towery Decl., Ex. G. Mr. Underhill wrote:

> Finally, on behalf of the Founders, we request that ConnectU not take any action that would interfere with the pending appeal. As you are probably aware, ConnectU owes substantial debts to the Founders, and ConnectU's most significant assets are its claims against Facebook and persons associated with Facebook. Consequently, we believe that any attempt by ConnectU to benefit its current shareholder by extinguishing that claim would be a fraudulent conveyance and legally actionable.

Towery Decl., Ex. G. BSF has also refused to provide ConnectU with its files, depriving ConnectU of the right to evaluate all of ConnectU's rights and obligations, including potential litigation.

In this letter, BSF used confidential corporate information regarding the alleged loan "on behalf of the Founders" and to the detriment of his client ConnectU[8]. This is precisely the kind of conduct that Rules 3-310 and 1.7 prohibit. The fact that BSF, O'Shea and Finnegan represent or have represented the Founders in the same litigation is enough to satisfy the substantial relationship test and compel disqualification. The further evidence that BSF already has breached its duties should remove the benefit of any doubt. The present case amply illustrates why courts should not tolerate successive conflicts of interest. Simply put, lawyers in this conflicted position cannot serve two masters. They cannot protect the confidences of a former joint client who is adverse to a current one. The Court should grant the present motion.

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[8] Despite Underhill's use of the phrase, "as you know," ConnectU and its new management does not know anything about the loan referenced by Underhill. Ignorance of such information illustrates precisely why ConnectU must be allowed access to its files.

i. A Lawyer's Duty to Preserve Client Confidences Is Not Altered by a Former Joint Client Relationship with Shared Confidences

BSF, O'Shea and Finnegan cannot violate their duty of confidentiality to ConnectU based on a previous joint client relationship in which ConnectU and the Founders may have waived the privilege with respect to one communication with the two firms.

In a Fifth Circuit case applying ABA Ethical Considerations (the predecessor to the current Rules), the court disqualified a lawyer in circumstances similar to this case. *Brennan's, Inc., supra,* 590 F.2d at 172. The *Brennan's* court held that the lawyer, who had jointly represented a restaurant corporation and its multiple original shareholders, could not represent that corporation and its remaining shareholders as defendants against the Founders in a later trademark dispute. *Id*. The *Brennan's* defendants argued that the duty of confidentiality embodied in Canon 4 (now ABA Rule 1.9) could not apply because as joint clients the parties had waived confidentiality with respect to one another. *Id*. The Fifth Circuit disagreed. Citing the predecessors to ABA Rules 1.6(a) and 1.9(c), the court held:

> [T]he ethical duty is broader than the evidentiary privilege…The use of the word 'information' in these [ABA] Ethical Considerations as opposed to 'confidence' or 'secret' is particularly revealing of the drafters' intent to protect all knowledge acquired from a client, since the latter two are defined terms. Information so acquired is sheltered from use by the attorney against his client by virtue of the existence of the attorney-client relationship. This is true without regard to whether someone else may be privy to it.

Id.

The current ABA Rules retain the word "information," so this reasoning still applies. Rule 1.9(b) specifically prohibits a lawyer from using confidential information acquired in the course of the prior representation to the disadvantage

of the former client. It does not matter that ConnectU and the Founders may have waived confidentiality with respect to one another during the time they were joint clients. BSF, O'Shea and Finnegan must protect "at every peril" to themselves, the information learned from ConnectU "without regard to whether someone else may be privy to it," including the Founders.

ii. A Lawyer's Duty to Preserve Corporate Client Confidences Is Not Altered by a Change in Corporate Control

The fact that there was a change in control of ConnectU on December 15, 2008, does not alter the professional responsibilities of BSF, O'Shea and Finnegan to ConnectU. A former corporate client is entitled to the same protection of its confidential information as any other former client. *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621. The California Appellate Court denied fees to the former in-house counsel for a corporation for his later representation of shareholders in a proxy fight because such representation was adverse to his former corporate client and therefore violated California law and the California Rules of Professional Conduct. *Goldstein, supra,* 46 Cal.App.3d. at 619. The *Goldstein* court held that the lawyer's duty to his former corporate client made his representation of the shareholders improper:

> Clearly, if Kirshman were [current] counsel to the corporation, he could not, consistently with his position as general counsel, act as proxy for one contending group of shareholders. … "In acting as the corporation's legal adviser he must refrain from taking part in any controversies or factional differences which may exist among shareholders as to its control… This duty to act without bias or prejudice does not dissolve merely because the attorney has been discharged.

Id at 623. As one court noted, "[a] successor corporation succeeds to the prior corporation's rights and liabilities, including the prior corporation's right to protect confidential information transmitted to the prior corporation's counsel." *Waid v. Eighth Judicial Dist. Ct.,* 119 P.3d 1219, 1224 (Nev. 2005).

A leading case in circumstances analogous to the present case is *Tekni-Plex, Inc. v. Meyner and Landis* (1996) 89 N.Y.2d 123. In *Tekni-Plex,* the New York Court of Appeals 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 affirmed disqualification there because the attorney-client relationship continued with the newly formed entity. *Id.*[9]

iii. A Corporation's Current Management Controls Its Confidential Information -- Not Counsel, Not Former Management

When there is a change in corporate control, the corporation's attorney-client privilege also transfers to new management. *Commodity Futures Trading Com'n v. Weintraub* (1985) 471 U.S. 343, 349. In *Weintraub*, the United States Supreme Court held that the privilege passes to new management and consequently, "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." *Id.* (emphasis added). In addition, the *Goldstein* court distinguished between the confidential information known to directors and the more limited information available to shareholders, holding that "shareholder status does not in and of itself entitle an individual to unfettered access to corporate confidences and secrets." *Goldstein,*

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[9] ConnectU anticipates that the Founders will rely on *Forrest v. Baeza* (1997) 58 Cal.App.4th 65, 82, wherein the court disqualified the lawyer (who had jointly represented two corporations and their shareholders) from representing the corporations, but permitted the lawyer to continue representing the shareholders on the basis that the distinction between the individual defendants and the corporations were purely fictional. *Id.* Any reliance on *Forrest* here would be misplaced. *Forrest* involved a shareholder's derivative action in which the corporations were nominal defendants; the *Forrest* court specifically stated that its holding is limited to the context of a shareholder's derivative action. *Id.* at 74, 80. As the *Brennan* court held, a lawyer's duty of confidentiality to a former client persists "without regard to whether someone else may be privy to it." *Brennan's, supra,* 590 F.2d at 172.

supra, 46 Cal.App.3d at 621.

In accord with *Weintraub* and *Goldstein*, BSF, O'Shea and Finnegan may not use any confidential information learned from the Founders, and the Founders may not waive the privilege with respect to that information in order to use it on their own behalf. This was the court's basis for denying fees to the lawyer in *Goldstein* -- he was privy to information as a prior director that he could not put into the service of shareholders. *Id*. Rules 3-310 and 1.9 serve to preclude the honest practitioner from having to choose between conflicting duties or reconciling conflicting interests, "rather than to enforce to their full extent the rights of the interest which he should alone represent." *American Airlines, supra,* 96 Cal.App.4th at 705. The Court should likewise disqualify BSF, O'Shea and Finnegan.

Further, whoever controls ConnectU is entitled to properly assess the corporation's rights and obligations, including potential litigation. Thus, it is even more important that BSF, O'Shea and Finnegan are not allowed unfettered use of confidential corporate information. As noted in *Goldstein*, "The board of directors, not corporate counsel, has the right to control the affairs of the corporation. (Corp. Code, § 800.)" *Goldstein, supra*, 46 Cal.App.3d at 623. Should this Court not disqualify BSF, O'Shea and Finnegan, the Court will allow BSF, O'Shea and Finnegan to operate the corporation.

D. ConnectU is Entitled to Its Entire Client Files

A client is entitled to its files. CRPC 3-700(D); ABA Rule 1.16(d). The United States Supreme Court and two California Supreme Court cases specifically hold that a successor corporation is entitled to its client file. *Weintraub, supra,* 471 U.S. at 353; *HLC Properties, Ltd. v. Superior Court* (2005) 35 Cal.4th 54, 64; and *Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1138. In *Moeller,* the California Supreme Court reasoned that a corporation's new management has a

right to its entire file because the of the client's need to assess the corporation's rights and obligations. *Id*.

BSF and Finnegan have refused to turn over ConnectU's files. BSF mistakenly relies on *Tekni-Plex, supra*, to support its refusal to turn over its client's files. BSF's reliance on *Tekni-Plex,* is misplaced where the California Supreme Court analyzed *Tekni-Plex,* in *Moeller, supra,* to reach the opposite conclusion -- the successor corporation is entitled to its files from prior to the change in control. *Moeller, supra*, 16 Cal.4th at 1137-9.

Finnegan initially provided ConnectU with copies of the Ninth Circuit pleadings and other publicly available materials, but no other files. After a follow-up request from ConnectU, Finnegan, through counsel, has represented that it is unwilling to provide ConnectU its files, also improperly relying on *Tekni-Plex*.

ConnectU has an immediate and continuing need to assess its rights and obligations, including any potential litigation. Delivery of its client files is required and imperative. This imperative is made more obvious by Mr. Underhill's threat of litigation against ConnectU based on facts unknown to ConnectU's sole officer and director. Therefore, ConnectU requests the Court compel BSF, O'Shea and Finnegan to deliver ConnectU's complete file to ConnectU forthwith.

RELIEF SOUGHT

For the reasons stated herein, Appellant ConnectU requests that this Court disqualify BSF, O'Shea and Finnegan from continuing to represent the Founders in this Appeal and all related or consolidated actions.

DATED: January 20, 2009

Respectfully submitted,
HOGE, FENTON, JONES & APPEL, INC.

By /s/ James E. Towery
James E. Towery
Attorneys for Defendant-Appellant
Connect U, Inc.

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 20, 2009.

DATED: January 20, 2009

Respectfully submitted,

By /s/ James E. Towery
James E. Towery