IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 08-16745, 08-16849, 08-16873 (consolidated)

THE FACEBOOK, INC., *et al.*,
Plaintiffs—Appellees,

v.

CONNECTU, INC., *et al.*,
Defendants—Appellants.

CONNECTU FOUNDERS' RESPONSE TO MOTION TO DISQUALIFY COUNSEL

David A. Barrett
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue
New York, NY 10022
(212) 446-2300

D. Michael Underhill
Evan A. Parke
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue NW
Washington, D.C. 20015
(202) 237-2727

Steven C. Holtzman
BOIES, SCHILLER & FLEXNER LLP
1999 Harrison Street
Oakland, CA 94612
(510) 874-1000

Scott R. Mosko
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER LLP
Stanford Research Park
3300 Hillview Avenue
Palo Alto, CA 94304-1203
(650) 849-6600

Sean F. O'Shea
O'SHEA PARTNERS LLP
521 Fifth Avenue
New York, NY 10175
(212) 682-4426

Attorneys for Non-Movants / Defendants / Appellants Cameron Winklevoss, Tyler Winklevoss and Divya Narendra

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INTRODUCTION

This Court applies "particularly strict scrutiny" to litigants' efforts to gain tactical advantage by seeking to disqualify their adversaries' counsel. This high standard applies because "[t]he cost and inconvenience to clients and the judicial system from misuse of the [ethical] rules for tactical purposes is significant." *Optyl Eyeware v. Style Cos. Ltd.*, 760 F.2d 1045, 1050 (9th Cir. 1985); *see CRS Recovery, Inc. v. Laxton*, 2008 WL 4408001, at *1 (N.D. Cal. Sept. 26, 2008) (disqualification motions "should be granted only when of absolute necessity"). The pending motion is just such an effort. Facebook, Inc., through its newly-captive subsidiary ConnectU, Inc., seeks to use conflict of interest rules to cripple its long-time litigation adversaries, Cameron Winklevoss, Tyler Winklevoss and Divya Narendra (the "Founders" of ConnectU), by depriving them of their chosen counsel midway through the appeal process.

Facebook is an appellee or cross-appellant, and the Founders are appellants or cross-appellees, in five related appeals before this Court. The Founders' appeals challenge the district court's decision to enforce summarily a purported settlement agreement, without allowing discovery or an evidentiary hearing. *See* Brief of Appellants (No. 33 in Appeal No. 08-16745) (filed under seal).[1] The district court did so, even though the Founders produced unrebutted evidence that Facebook had fraudulently induced them to enter into the alleged settlement agreement and that the alleged settlement agreement lacked material terms. *Id.* at 8-12 (evidence of alleged fraud), 13-18 (evidence of incompleteness), 28-37 (analysis regarding securities fraud), 45-50 (analysis regarding incompleteness). Over the Founders' repeated objections, the district court ordered the Founders to tender their

[1] Unless otherwise noted, citations to specific docket numbers in this Opposition correspond to docket entries in Appeal No. 08-16745.

ConnectU stock to a Special Master in August 2008, and the Special Master to transfer the ConnectU stock to Facebook – ConnectU and the Founders' litigation adversary since 2004 – on December 15, 2008.

As a result of the forced stock transfer, ConnectU is now a wholly-owned Facebook subsidiary, and its sole director and officer is Facebook's Assistant General Counsel. In the pending motion, Facebook attempts to use its newly-acquired control of ConnectU to disrupt the litigation and severely prejudice the Founders by disqualifying the Founders' lawyers – some of whom have represented them since these disputes began in 2004 – and accessing the entire contents of their lawyers' files.

Neither ethics rules nor case law support Facebook's litigation tactics. The Founders' counsel have always been adverse to Facebook's interests, and Facebook's initial victory in the district court, which is now on appeal, is the sole reason why ConnectU has changed allegiance. If the Court adopts the Founders' position on appeal, reverses the district court, and orders Facebook to return the ConnectU shares to the Founders, then the interests of ConnectU and the Founders will once again be aligned. Disqualifying the Founders' counsel and disclosing the files to their adversaries during the pending appeal irreparably injures the Founders in the event of reversal and would serve no legitimate purpose in the meantime; indeed, as shown below, the files should not be disclosed even if this Court were to affirm the decisions below.

The Founders respectfully request that the Court consider this motion together with the merits of the pending appeals on an expedited basis. If the motion is not mooted by reversal on the merits, it should be denied for the reasons set forth below.

Alternatively, the Founders request a hearing on the instant motion to facilitate "particularly strict scrutiny," which the Court applies to such motions. *See Optyl*, 760 F.2d at 1050.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Massachusetts Action

As alleged in several complaints, in early 2004, Mark Zuckerberg broke with his Harvard classmates and business partners – the Founders – and launched a social networking website, Facebook.com, to compete with the Founders' planned website, which was initially called Harvardconnection.com and later renamed Connectu.com. *See, e.g., ConnectU LLC v. Zuckerberg* et al., Case No. 1:04-CV-11923 (DPW) (D. Mass.) (No. 13, First Amended Complaint, filed Oct. 28, 2004, at ¶¶ 11-23).[2] As alleged, using the Founders' ideas, the Facebook site was an instant and huge commercial and cultural success. *Id.* In response, ConnectU brought suit against Facebook in the District of Massachusetts alleging, *inter alia*, misappropriation of trade secrets.

Finnegan Henderson Farabow Garrett & Dunner LLP ("Finnegan") has represented two of the Founders since the inception of the Massachusetts action in September 2004, the third Founder since 2005, and continues to this day as their counsel in Massachusetts. Boies Schiller & Flexner LLP ("Boies") became counsel of record for the Founders in the Massachusetts action in December 2008.

With respect to ConnectU, Finnegan represented it in the Massachusetts action from September 2004 until December 23, 2008, when it filed a notice of conditional withdrawal, with the caveat that it will likely return as ConnectU's

[2] A copy of the First Amended Complaint is attached as Ex. A to the Declaration of Evan A. Parke ("Parke Decl.").

counsel should the Founders regain control of ConnectU from Facebook.[3] Boies' representation of ConnectU in the Massachusetts action began in June 2008.

On November 21, 2008, the Founders moved in the Massachusetts action for sanctions against Facebook and Mr. Zuckerberg based on alleged serious discovery violations, involving an alleged willful failure to produce key evidence prior to mediation, despite representing that all documents responsive to certain then-pending discovery requests had been produced; that motion is currently pending. *See ConnectU LLC v. Zuckerberg, et al*., No. 1:07-CV-10593 (DPW) (D. Mass.) (No. 212). ConnectU also recently filed a motion in the Massachusetts action that, like the motion before this Court, seeks to disqualify all of the counsel representing the Founders and to obtain counsel's privileged communications and work product related to the Massachusetts action. *See id.* (No. 262).

B. California Trial Court Proceedings

Facebook counter-sued ConnectU and the Founders in the Superior Court of California, County of Santa Clara, in August 2005, alleging that ConnectU and the Founders had improperly obtained E-mail addresses of Facebook users. The Superior Court dismissed the claims against the Founders for lack of personal jurisdiction. After Facebook amended its complaint to add federal claims, ConnectU removed to the Northern District of California (*Facebook, Inc. v.*

[3] The law firm of Quinn Emanuel Urquhurt Oliver & Hedges, LLP ("Quinn") represented ConnectU in the Massachusetts action from September 2007 to April 2008, but it is no longer representing any party. In April 2008, Quinn filed a claim for fees against ConnectU, the Founders and Howard Winklevoss before the American Arbitration Association (AAA). The Founders and Howard Winklevoss have counter-claimed for malpractice. O'Shea Partners LLP ("O'Shea") represents each of the four individual respondents and counterclaimants. O'Shea no longer represents ConnectU in the arbitration.

ConnectU, Inc., Case No. 5:07-CV-01389 (JW) (N.D. Cal.)). There, Facebook's attempt to add claims against the Founders failed for lack of personal jurisdiction.

ConnectU and the Founders were represented by Finnegan throughout the California proceedings, from which the current appeals before this Court were taken. Boies became co-counsel in April 2008. O'Shea entered an appearance for ConnectU in June 2008, and in August 2008, on behalf of the Founders only, moved to intervene in order to appeal.

C. The February 2008 Mediation and Litigation Concerning the Alleged Settlement Agreement

In February 2008, the Founders, ConnectU, Facebook and Mr. Zuckerberg mediated all of the pending claims in the Massachusetts and California proceedings. *See* Brief of Appellants at 7-8. Quinn and Finnegan represented the Founders and ConnectU. The mediation concluded with the signing of a "Term Sheet and Settlement Agreement" (the "Term Sheet"). Among other things, the Term Sheet provided for the transfer of all shares of ConnectU to Facebook in exchange for a cash payment and transfer of certain shares of Facebook stock to the Founders. *Id.*

The Founders and ConnectU (then still owned and aligned with the Founders) soon determined that the Term Sheet had been procured by fraud and was otherwise invalid. *See id.* at 8-12. Litigation concerning enforceability of the Term Sheet ensued in the Northern District of California. In a series of rulings, and without permitting any discovery, the district court summarily held that the Term Sheet was binding and enforceable and declined to stay its implementation. Those rulings below, and the denial of personal jurisdiction over the Founders, are the subject of the appeals before this Court. *See, e.g.*, Ex. B to Parke Decl. at 3-6.

D. Facebook Causes ConnectU to Switch Sides

On December 15, 2008, pursuant to the Northern District's enforcement of the Term Sheet, and over the Founders' repeated objections, all of the stock of ConnectU was delivered to Facebook. ConnectU thereby became a wholly-owned subsidiary of Facebook, which installed Mark Howitson, its Assistant General Counsel, as ConnectU's sole director and officer. *See* Exs. F, H and J to Declaration of James E. Towery (No. 63) ("Towery Decl."). Immediately after Facebook assumed control, ConnectU demanded that Finnegan and Boies turn over all files concerning their representation of ConnectU. *See, e.g.*, Exs. J, L, and M to Towery Decl. ConnectU also moved this Court to dismiss the appeal that ConnectU had filed challenging the Term Sheet – a motion joined by Facebook, its parent and nominal adversary. *See* Nos. 52-54, 64.[4] Finally, ConnectU filed the instant motion (and the companion motion in Massachusetts) seeking to disqualify the Founders' lawyers and obtain their privileged files.

[4] Facebook's present attempt to dismiss ConnectU's appeal flatly contradicts prior representations that Facebook made to the Court in opposition to the Founders' November 25, 2008, Emergency Motion to Stay.

Specifically, on November 25 the Founders moved to stay the transfer of the ConnectU stock to Facebook, arguing that if the transfer were made, Facebook would seek to dismiss ConnectU's appeal (including under the doctrine of *dominus litis*), which would cause irreparable harm. In response, Facebook represented that the alleged "harm—the loss of an appeal—*is speculative*." *See* Ex. F to Parke Decl., at 18 (emphasis added). The Court denied the requested stay and the stock was given to Facebook on December 15. Facebook then took steps to use its new control of ConnectU to do precisely what it had said was "speculative" on November 25: it converted ConnectU into a subsidiary of Facebook and then moved to dismiss ConnectU's appeal, including pursuant to the doctrine of *dominus litis*. *See* Ex. C to the Parke Decl. (Founders' Response to Motion to Dismiss) at 2-9.

E. Pending Appeals before this Court

There are five pending appeals involving Facebook, ConnectU or the Founders. Three have been consolidated (*see* No. 22):

08-16745: an appeal in July 2008 by ConnectU, then owned by the Founders, and represented by Boies and Finnegan, from the lower court's July 2 judgment and related orders enforcing the Term Sheet;

08-16849: a cross-appeal by Facebook in August 2008, challenging dismissal of Facebook's claims against the Founders for lack of personal jurisdiction; and

08-16873: an appeal in August 2008 by the Founders, represented by O'Shea, from the judgment enforcing the Term Sheet and from the denial of their motion to intervene.

Subsequent to the consolidation order, two additional appeals were filed:

09-15021: an appeal in December 2008 by the Founders, represented by Boies, from dismissal of the California litigation and related orders enforcing the Term Sheet; and

09-15133: a cross-appeal by Facebook in January 2009, again challenging dismissal of claims against the Founders for lack of personal jurisdiction.

On January 23, 2009, Facebook moved to consolidate these two additional appeals with the earlier appeals. *See* Appeal No. 09-15021 (No. 10). The Founders responded on February 4, *see id.* (No. 12), and Facebook replied on February 11. *See* Ex. D to Parke Decl. That motion is pending.

Finnegan has filed a still-pending motion to withdraw as counsel of record for ConnectU. *See* No. 56. Boies, for its part, is awaiting ruling on a motion for

withdrawal and appointment of substitute counsel filed by Hoge. *See* Ex. C to Parke Decl., at 10-12. O'Shea has never represented ConnectU in this Court.

ARGUMENT

Under the ethics rules applicable to current and former client relationships, ConnectU cannot demonstrate that Boies, Finnegan or O'Shea has a conflict of interest that precludes them from continuing to represent the Founders. First, ConnectU is not a client of Boies, Finnegan or O'Shea. As instructed by ConnectU shortly after Facebook obtained control, the firms have taken no further actions in ConnectU's name.[5] Second, the conflict rules that govern former client relationships do not apply where multiple clients were previously engaged in a joint representation. In this case, the three law firms jointly represented ConnectU and the Founders until Facebook gained control of ConnectU. Under the law of this Circuit, the "substantial relationship" test cited by ConnectU to argue for disqualification does not apply and disqualification is not required where, as here, it is the client, not the lawyer, who has switched sides.

ConnectU also seeks to obtain the litigation files of Boies, Finnegan and O'Shea. It is not entitled to these files. Facebook, as the Founders' long-time and current adversary, cannot use ConnectU as its stalking horse to obtain its adversaries' privileged and work product materials. Where, as here, the client has

[5] The Founders' December 19, 2008, Notice of Appeal, filed by Boies and attached as Ex. E to Parke Decl., stated that "[t]o the extent Cameron Winklevoss, Tyler Winklevoss and Divya Narendra and their counsel have any existing rights or obligations with respect to ConnectU, Inc. (all of the stock of ConnectU having been transferred to The Facebook, Inc. on December 15, 2008, as part of the settlement transaction which is at issue on appeal), Notice would hereby be given on ConnectU's behalf. Otherwise, no new notice is provided with respect to ConnectU." *See also* Ex. B at fn. 2 (similar language in C.R. 10-3 initial notice).

(involuntarily) switched sides, granting such disclosure would have a chilling effect on protected communications at the heart of attorney-client relations.

A. The Pending Appeals and the Motion to Disqualify Are Inextricably Intertwined and Should Be Heard Together.

Because the facts underlying the pending motion are inextricably intertwined with the merits of the pending appeals, the Founders respectfully urge this Court to consider these issues together, on an expedited basis.

In the main appeal, the Founders argue that the Term Sheet was procured by Facebook's fraud, that it lacks material terms, and that the parties' initial notices of appeal divested the district court of jurisdiction to order the ConnectU stock to be transferred to Facebook in December 2008. *See* Ex. B to Parke Decl. at 3-6. If the Founders prevail, Facebook will be compelled to return the ConnectU stock, and the Founders will resume litigation of their underlying fraud claims against Facebook and Mr. Zuckerberg. Should this occur, ConnectU – which would again be controlled by the Founders – would obviously not seek to disqualify the Founders' counsel. The Founders would be irreparably harmed if, before this Court adjudicates the merits of these appeals, the Founders' chosen law firms were disqualified, or if Facebook were permitted access to its adversaries' litigation files. Because a determination that the district court erred in enforcing the Term Sheet would obviate the need for this Court to decide the disqualification issue, the Founders urge this Court to consider this motion together with the merits of the appeals on an expedited basis.[6]

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[6] Expedition is also warranted because Facebook and ConnectU have repeatedly sought to delay the Court from reaching the merits of the appeals.

The Founders served and filed their Principal Brief on October 6. Facebook then obtained a telephonic extension, which delayed the due date of its Principal Brief to November 19. On November 14, however, Facebook moved to dismiss the appeals as premature, which stayed the briefing schedule. After the Court

Alternatively, the Founders request a hearing on the instant motion to facilitate "particularly strict scrutiny," which the Court applies to such motions. *See Optyl*, 760 F.2d at 1050.

B. There Is No Current Client Conflict because Boies and Finnegan Are Not Now Representing ConnectU in the Appeals before this Court and O'Shea Has Never Represented ConnectU before this Court.

Relying on the California Rules of Professional Conduct ("CRPC") and the ABA Model Rules of Professional Conduct ("ABA Rules"), ConnectU argues that when lawyers or law firms "represent two clients with opposing interests in the same litigation . . . disqualification is automatic." ConnectU, Inc.'s Motion to Disqualify Counsel ("Mot.") at 10, citing CRPC 3-310(C)(2), ABA Rule 1.7.[7] The former precludes "representation of more than one client in a matter in which the

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denied Facebook's motion on December 12 and reset the briefing schedule (No. 51), Facebook, through ConnectU, filed another motion to dismiss on December 22, which again stayed the briefing schedule.

Most recently, in Facebook's February 11, 2009, Reply in support of its motion to consolidate (Ex. D to Parke Decl.), Facebook stated that it would be filing a *third* motion to dismiss – on grounds that could have been asserted in its original motion to dismiss. Facebook's gamesmanship is underlined by the fact that Facebook, in initially moving to consolidate, specifically requested that the Court set "a single briefing schedule" for all pending appeals (*see* No. 10 in Appeal No. 09-15021, at 1) without disclosing its intention to obtain a stay of that very schedule by filing yet another motion to dismiss.

[7] Typically disqualification motions are made in trial courts and then reviewed by appellate courts. In such circumstances, the appellate court can look to the specific ethics rules, defining conflicts of interest and the like, adopted by the trial court. *See, e.g.*, Rule 11-4(a) of the Local Rules of the United States District Court for the Northern District of California. This matter, however, arises in the first instance in this Court, which has not adopted any particular ethics rules. Nevertheless, various ethics provisions that might be applied are generally consistent. *See* ABA Rule 1.7; CRPC 3-310; District of Columbia Rule of Professional Conduct 1.7; New York Disciplinary Rule 5-105.

interests of the clients actually conflict." CRPC 3-310(C)(2). The latter provides that a conflict of interest exists if "the representation of one client will be directly adverse to another client." ABA Rule 1.7

The well-established principle embodied in these rules does not support disqualification here. Neither Boies, Finnegan nor O'Shea represents two clients with adverse interests in any of the pending appeals. Since ConnectU became a Facebook subsidiary on December 15, 2008, only one firm (Hoge) has represented it and acted on its behalf; Boies and Finnegan have not done so, though this Court has not yet ruled on Hoge's motion to replace Boies or on Finnegan's motion to withdraw. O'Shea has never represented ConnectU in this Court. The conflict that the ethics rules prohibit – a lawyer arguing for opposing sides in the same proceeding – has not, and will not, occur. Moreover, ConnectU's interests (as opposed to Facebook's) are not adverse to the Founders. Neither ConnectU nor the Founders have pending claims against the other, and none were asserted below.

Indeed, ConnectU's only evidence that Boies and Finnegan are actually still representing it is a pure technicality – the Court's docket sheet that continues to identify Boies and Finnegan as counsel for ConnectU pending disposition of the motions to withdraw and for substitution. That argument elevates form over substance. ConnectU knows that Boies and Finnegan are no longer acting on its behalf, regardless of the docket sheet or the pending motions. Under all of these circumstances, there is no basis to find any violation of CRPC 3-310(C)(2) or ABA Rule 1.7.

The cases cited by ConnectU to argue that Boies and Finnegan should be disqualified (Mot. at 12) are inapposite. In *Truck Ins. Exch. v. Fireman's Fund Ins. Co.*, 8 Cal. Rptr. 2d 228, 232 (Cal. Ct. App. 1992), a law firm was disqualified because it had commenced a new matter, with full knowledge that it conflicted

with several on-going representations. The firm attempted to cure the conflict by withdrawing. The court held that "a law firm that *knowingly* undertakes adverse concurrent representation may not avoid disqualification by withdrawing from the representation of the less favored client before hearing." *Id.* (emphasis added). The court specifically distinguished the situation that is present in this case, however, finding that where the conflict was *not* created by the law firm's conduct, withdrawal precludes application of the concurrent representation rule. *Id.* at 233-34. Unlike in *Truck*, where the law firm deliberately entered into a second representation knowing there was a conflict, Boies and Finnegan did nothing to create any conflict.

Nor does *Unified Sewerage Agency of Washington County, Oregon v. Jelco Inc.*, 646 F.2d 1339 (9th Cir. 1981), support disqualification. Like *Truck*, it involved a conflict that resulted from an affirmative decision of the law firm to accept a conflicting representation. *Unified* did not involve a scenario where a client switched sides. Indeed, the Court in *Unified* upheld the *denial* of disqualification.

C. There Is No Conflict of Interest under the Rules Governing Former Clients Because There Is No Expectation of Confidentiality where Clients Were Previously Represented Jointly.

ConnectU argues alternatively that it is a former client of Boies, Finnegan and O'Shea and that disqualification is mandated by CRPC 3-310(E) and ABA Rule 1.9(a), which govern former client relationships.[8] These rules stand for the

[8] Here again, the Court need not address the issue of which ethics rules govern, since there is general agreement among the potentially relevant ethics codes concerning former client conflicts. *See* CRPC 3-310(E), ABA Rule 1.9(a); District of Columbia Rule of Professional Conduct 1.9; Massachusetts Rule of Professional Conduct 1.9(a); New York Disciplinary Rule 5-108(A).

uncontroversial proposition that a lawyer may not represent another person in the same or a substantially related matter in which that person's interests are materially adverse to those of the former client. ABA Rule 1.9(a); CRPC 3-310(E).

The purpose of these rules is to prevent a lawyer from using confidential information obtained from a former client against it on behalf of an adversary. *See Christensen v. United States District Court for the Central District of California*, 844 F.2d 694, 698 (9th Cir. 1988) (citations and internal quotations omitted) ("[T]he most important facet of the professional relationship served by this rule . . . is the preservation of secrets and confidences communicated to the lawyer by the client."). However, where, as here, the former and current clients were previously engaged in a joint representation, there cannot possibly exist any expectation of confidentiality that the rules might protect. On the contrary, in the joint representation context, each client is aware that its confidences are being shared with the other. Accordingly, the substantial relationship test does not apply and counsel should not be disqualified under such circumstances. *See, e.g.*, *Christensen*, 844 F.2d at 699.[9]

In *Christensen*, the lawyer originally represented the "management group" that took over a corporation. After the takeover, the lawyer represented the corporation. Later, the corporation was placed into receivership and the lawyer represented members of the management group in litigation against the corporation. This Court vacated the lawyer's disqualification because it found that the corporation knew that any information it conveyed to its lawyer prior to its

[9] ConnectU cites *Brennan's, Inc. v. Brennan's Rests., Inc.*, 590 F.2d 168 (5th Cir. 1979), to argue that a lawyer's duty to preserve client confidences is not altered by a former joint client relationship involving shared confidences. But that case involved an *attorney* switching sides – a wholly different scenario inapplicable here. *Id.* at 171-72.

receivership would be shared with the management group. *Christensen*, 844 F.2d at 698. The Court held "that the substantial relationship test is inapplicable when the former client has no reason to believe that information given to counsel will not be disclosed to the firm's current client." *Id.* at 699; *see also Allegaert v. Perot*, 565 F.2d 246, 250 (2d Cir. 1977) ("before the substantial relationship test is even implicated, it must be shown that the attorney was in a position where he could have received information which his former client might reasonably have assumed the attorney would withhold from his present client").

In *Bass Pub. Ltd. Co. v. Promus Cos., Inc.*, 1994 WL 9680 (S.D.N.Y. Jan. 10, 1994), Holiday Corp. agreed to sell its Holiday Inn business to Bass, while retaining other assets. Holiday Corp. became a subsidiary of Bass, while the non-Holiday Inn assets were transferred to a new corporation called Promus. Latham & Watkins represented Holiday Corp. in negotiating the sale with Bass. After the transaction closed, Bass sued Promus for breach of contract and other claims, and sought to disqualify Latham. The court recognized that this was not the typical former client situation where the attorney switches sides after the representation of a former client has ended. *Id.* at *7. Instead, the Court rejected disqualification because "'it [was] the client, and not the attorney, who ha[d] changed position.'" *Id.* (citations omitted).

Similarly, in *Occidental Hotels Mgmt. B.V. v. Westbrook Allegro L.L.C.*, 440 F.Supp.2d 303 (S.D.N.Y. 2006), the court denied disqualification in a lawsuit between (i) the former owner of a corporation, and (ii) the corporation sold by the former owner and the buyers. The lawyer had represented both the former owner and the corporation prior to the sale. Like ConnectU, the corporation that had changed hands asserted that it was a former client of the lawyer and that the current lawsuit was related to the lawyer's work for the corporation. The court denied

disqualification because it "would not serve the purpose of protecting a former client's expectation of loyalty and confidentiality. It is [the clients], rather than [the lawyer], that have changed positions from alignment with [the seller and former owner] to alignment with [the buyers]." As in the present case, the lawyer, unlike the client, had "consistently represented" the same interests. *Id.* at 311.

As in *Christensen* and *Allegaert*, the existence of joint representation here meant ConnectU did not have any expectation that its counsel would keep its information confidential from the Founders. Like *Bass* and *Occidental Hotels*, Boies, Finnegan and O'Shea have at all times represented the same interests – those of the Founders against Facebook – and at no point did they undertake a conflicting representation. Because Boies, Finnegan and O'Shea have not switched sides in these appeals, ConnectU cannot use its own change in position to deprive the Founders of their chosen attorneys.[10]

D. ConnectU Is Not Entitled to the Files of Boies, Finnegan or O'Shea.

Stripped to its essence, Facebook, through its captive subsidiary ConnectU, is asking this Court to order that its adversaries' counsel produce their entire files to Facebook. Mot. at 19-20. The guise that these files somehow belong to ConnectU is a smokescreen to cripple Facebook's adversaries by peering into their counsel's attorney-client and work product materials.

As a preliminary matter, ConnectU's request for counsel's files is not properly before this Court and should be denied on this basis alone. Respectfully, this Court lacks jurisdiction to determine ConnectU's right to files that were not the subject of any order at issue in the pending appeals. *See, e.g., Broad v.*

[10] ConnectU seeks to disqualify counsel "from representing the Founders *in any matter relating to ConnectU*, including this case." Mot. at 7 (emphasis added). But there is no authority for ConnectU's apparent assertion that this Court may disqualify counsel in matters not before it or in a lower court of this Circuit.

Sealaska Corp., 85 F.3d 422, 430 (9th Cir. 1996) (before an argument may be considered on appeal, "the argument must be raised sufficiently for the trial court to rule on it") (citations and quotation omitted); FED. R. APP. P. 27(a)(2)(B)(iii) (requiring the party filing a "motion seeking substantive relief" also to file "a copy of the trial court's opinion [deciding the issue] . . . as a separate exhibit").[11]

In any event, ConnectU's demand for the files of its adversaries' lawyers should be denied. Granting ConnectU's request for "the delivery of its client files" (Mot. at 3, 20) would eviscerate fundamental considerations underpinning the attorney-client privilege, work product protections and applicable Rules of Professional Conduct.

The attorney-client privilege permits a client to confide freely in an attorney with the expectation that the communications will remain private and undisclosed to adversaries. *See, e.g., Estate of Kime*, 193 Cal. Rptr. 718, 722-723 (Cal. Ct. App. 1983). Courts commonly reject specious arguments or technical applications of rules that, if adopted, would threaten this "sacred" privilege. *See Sullivan v. Superior Court*, 105 Cal. Rptr. 241, 245-46 (Cal. Ct. App. 1972); *United States v. Bauer*, 132 F.3d 504, 510 (9th Cir. 1997) (in the interest of justice, legal assistance "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"), *quoting Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). Similar policies support protection of attorney work product. *See* RESTATEMENT 3D OF LAW GOVERNING LAWYERS, § 46, cmt c (2000) (the "need [of attorneys] to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret").

[11] For similar reasons, this Court lacks jurisdiction to rule whether counsel should be ordered to turn over files relating to the Massachusetts action.

Ordering disclosure of attorney files in this case, of course, is the equivalent of giving them to Facebook. ConnectU's sole director and officer is Mark Howitson, Facebook's Assistant General Counsel. Disclosure would destroy all of the various protections of confidentiality inherent in attorney-client relationships. For instance, if these files are reviewed by attorney Howitson or anyone else connected to Facebook, it would thereafter be impossible to "unscramble the eggs" if the Court invalidates the Term Sheet and returns the ConnectU stock and lawyer files to the Founders. *Cf. Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (staying production of documents pending outcome of appeal because "[o]nce the documents are surrendered pursuant to the lower court's order, confidentiality will be lost for all time. The status quo could never be restored."). Also, the Founders and Facebook remain adverse to each other in these appeals, and the Court should not force the Founders to proceed with their cards revealed to their adversaries.[12]

Moreover, Facebook has never rebutted the Founders' evidence showing that it misrepresented the value of its stock in procuring the Term Sheet. *See* Brief of Appellants at 37. Whether that misrepresentation constitutes actionable fraud is at issue on appeal, and giving Facebook full access to its adversaries' legal counsel's files *prior* to the Court deciding that issue – and prior to Facebook filing its appeal briefs – would undercut the general principle precluding a party from reaping benefits from a fraud. *See Smyth v. United States*, 302 U.S. 329, 358 (1937); *see also* CAL. CIV. CODE §1668. Facebook should not be allowed to take

[12] Virtually all ConnectU litigation files also relate to the Founders' litigation positions due to the parties' joint representation by counsel as described previously and because ConnectU was a closely-held corporation consisting of the three Founders and Howard Winklevoss, the father of two of the Founders.

advantage of its allegedly fraudulent conduct before that conduct is fully reviewed on appeal.

The transfer of ConnectU's stock to Facebook was a hotly disputed matter below, which the Founders unsuccessfully sought to stay pending appeal. *See* Ex. C to Parke Decl. at 8-9 (describing efforts to avoid the transfer). During this period, Facebook never sought to obtain ConnectU's legal files, notwithstanding its stated belief that it was ConnectU's beneficial owner. *See* Ex. G to Parke Decl., Facebook Opposition to Motion to Stay, at 5, n.7. Yet while Facebook remained silent, counsel for ConnectU and the Founders were continuing to generate advice and work product, including with respect to the instant appeals. Facebook's failure to object effectively waived any rights to litigation counsel's files. *Cf. Bass*, 1994 WL 9680 at *4, 7 (denying motion to disqualify).

The leading case in this area is *Tekni-Plex, Inc. v. Meyner and Landis*, 674 N.E.2d 663, 668 (N.Y. 1996). There, the New York Court of Appeals rejected arguments by the buyer of a corporation that it had unfettered rights to obtain attorney files pre-dating the merger. Like ConnectU, the buyer demanded all files of the corporation's pre-merger attorneys who had counseled the corporation on various legal matters for many years. The buyer also requested material relating to a disputed merger transaction, based on a claim that it inherited the attorney-client relationship by acquiring the corporation.

Although the court required counsel to turn over files pertaining to "general business communications" (such as environmental compliance) it denied disclosure of any files relating to representation of the corporation with regard to the merger. *Id.* at 666, 670. The court recognized that "disputes arising from the merger transaction remain independent from – and, indeed, adverse to – the rights of the buyer." *Id.* at 671. "[T]o grant [the buyer] control over the attorney-client

privilege as to communications concerning the merger transaction would thwart, rather than promote, the purposes underlying the privilege," *id.*, "and would significantly chill attorney-client communication." *Id*. at 672.

As in *Tekni-Plex*, granting ConnectU (and therefore, Facebook) access to these files "would thwart, rather than promote, the purposes underlying the privilege." *Id.* at 671; *see also Orbit One Commc'ns, Inc. v. Numerex Corp.*, 2008 WL 4778133 *4-5 (S.D.N.Y. Oct. 31, 2008) (successor entity had no right to attorneys' files relating to the matter that led to change in control); *Int'l Elect. Corp. v. Flanzer*, 527 F.2d 1288, 1292 (2d Cir. 1975) (rejecting claim that counsel representing predecessor company during merger negotiations had any duty to successor company because companies were "on opposite sides of the negotiations" during the course of counsel's representation).[13] Indeed, the facts here are even more compelling than *Tekni-Plex*, because Boies, Finnegan and O'Shea have *only* represented the Founders and ConnectU in the litigation that ultimately led to Facebook's contested acquisition of ConnectU.[14]

In addition, transfer of these files to ConnectU would significantly undermine each counsel's relationship with the Founders. *See Commercial Standard Title Co. v. Superior Court*, 155 Cal. Rptr. 393, 400 (Cal. Ct. App. 1979) (attorney owes obligation to both present and former clients to "preserve the

[13] Although there is no expectation of confidentiality among clients who jointly agree at the outset of a matter to common representation, *Tekni-Plex, Orbit One* and *Flanzer* all teach that a former client who changes sides in mid-stream cannot vitiate the confidentiality rights of the other clients.

[14] To the extent the Founders' counsel have general business documents, they were gathered from ConnectU in response to discovery requests and have already been produced to Facebook.

secrets of his client" and it is the "policy of the court to encourage confidence and to preserve inviolate this relationship of client-lawyer") (citations omitted); RESTATEMENT 3D OF LAW GOVERNING LAWYERS, § 46, comment c (2000) ("A lawyer may deny a client's request to retrieve, inspect, or copy documents when compliance would violate the lawyer's duty to another….").

The cases cited by ConnectU (Mot. at 19-20) are inapposite. Neither case involved a client "switching sides" and then seeking access to communications regarding litigations or communications about a contested corporate transaction. *Moeller* was premised on considerations specific to equitable trusts. *See Moeller v. Superior Court*, 947 P.2d 279, 285-286 (Cal. 1997) (disclosure "is…not unfair in light of the nature of a trust and the trustee's duties" to "manage the property for the benefit of another"). *Weintraub* was premised on considerations specific to bankruptcy. *See Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352, 355 n.7 (1985) ("[t]he powers and duties of a bankruptcy trustee are extensive," involving fiduciary duties to both shareholders and creditors, which can challenge "[t]he propriety of the trustee's waiver of the attorney-client privilege"). Here, different policy considerations require that ConnectU be denied access to litigation counsel's files.

CONCLUSION

"[P]articularly strict judicial scrutiny," *Optyl Eyewear*, 760 F.2d at 1050, applies to prevent litigants from doing precisely what ConnectU (as Facebook's stalking horse) is attempting here: to misuse ethics rules in an attempt to deprive adversaries and former jointly-represented allies of their chosen counsel for tactical gain. Having failed to make a showing that even remotely approaches "absolute necessity," *CRS Recovery*, 2008 WL 4408001, at *1, ConnectU's motion to disqualify and request for files should be denied.

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Respectfully submitted,

/s/ Evan A. Parke

David A. Barrett
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue
New York, NY 10022

D. Michael Underhill
Evan A. Parke
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue NW
Washington, D.C. 20015

Steven C. Holtzman
BOIES, SCHILLER & FLEXNER LLP
1999 Harrison Street
Oakland, CA 94612

Attorneys for Defendants and Appellants Cameron Winklevoss, Tyler Winklevoss and Divya Narendra

/s/ Scott R. Mosko

Scott R. Mosko
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER LLP
Stanford Research Park
3300 Hillview Avenue
Palo Alto, CA 94304-1203

/s/ Sean F. O'Shea

Sean F. O'Shea
O'SHEA PARTNERS LLP
521 Fifth Avenue
New York, NY 10175

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DATED: February 13, 2009

Respectfully submitted,

/s/ Evan A. Parke

Evan A. Parke