

Case Nos. 08-16745, 08-16849, 08-16873 (consolidated), 09-15021, 109-151-133

**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 RESPONSE TO THE FOUNDERS'
MOTION TO CONSOLIDATE APPEALS AND MOTION TO SET
BRIEFING SCHEDULE**

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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.

INTRODUCTION

ConnectU's due process rights are inextricably linked to the sequence in which this Court considers and decides issues before it. This is particularly so when related to issues of attorney disqualification. ConnectU opposes the Founders' current motion to consolidate appeals and withdraw their opening brief to the extent that the Founders have filed a Notice of Appeal relating to the Motion to Disqualify and where the Founders request a delayed decision on ConnectU's Motion to Voluntarily Dismiss.

RELEVANT PROCEDURAL BACKGROUND

ConnectU became a wholly owned subsidiary of Facebook on December 15, 2008. Following ConnectU's transfer of ownership, ConnectU no longer intends to pursue an appeal against Facebook, ConnectU's parent company. In December 2008, ConnectU moved this Court to allow it to voluntarily dismiss its pending appeal. (Court of Appeals Docket No. 08-16745¹, Document No. 52). The Founders opposed ConnectU's motion, filing a Response to ConnectU's motion on February 6, 2009. (Document No. 57). In the Founders' January 2009 responsive brief, the Founders requested that this Court refer ConnectU's motion to the Merits Panel. (Document No. 57, p. 1). Importantly, the Founders also sought – on several separate occasions – a stay of the judgment from this Court (as well as in the district court). (Document Nos. 8, 42). In each instance the Court denied the Founders' request. Thus far this Court has not ruled on ConnectU's motion to voluntarily dismiss its appeal.

¹ All references to the record will be to Court of Appeals Docket No. 08-16745, unless otherwise specified.

ARGUMENT

By once again² asking this Court to refer ConnectU's motion to voluntarily dismiss to the Merits Panel, the Founders seek to deny ConnectU its due process rights. ConnectU is wholly owned and operated by Facebook. Connect U should not be required to pursue an appeal it no longer wishes to pursue where its "opponent" is its own parent company. Should the Court grant the Founders' request to refer ConnectU's Motion to Voluntarily Dismiss to the Merits Panel, ConnectU's Motion to Voluntarily Dismiss the Appeal will be heard simultaneously with the pending appeal on the merits. The Court will have thus effectively denied ConnectU the relief it seeks because ConnectU will already have been forced to prosecute an untenable appeal against its parent company.³

In any event, the Founders' appeal of the order granting disqualification should be resolved before this matter proceeds on the merits. *Gough v. Perkowski*, 694 F.2d 1140 (9th Cir. 1982) (holding that if appeals relating to disqualification motions were not addressed *before* the court addressed the merits, "[f]rom a

² In January 2009, the Founders asked this Court to refer ConnectU's Motion to Voluntarily Dismiss to the Merits Panel. (Document No. 57). The Court has not ruled on ConnectU's Motion to Dismiss and has not referred the Motion to Dismiss to the merits panel. The Founders omit this key procedural history from their current motion.

³ Given that ConnectU no longer intends to pursue its appeal and has filed a Motion to Voluntarily Dismiss its appeal, ConnectU takes no specific position regarding whether the Founders may withdraw their opening brief, consolidate the appeals, or adjust the briefing schedule. To the extent ConnectU's parent company, Facebook, opposes the Founders' motion on these issues, ConnectU joins in Facebook's opposition with respect to those issues.

practical standpoint, we believe the disqualification issue would be “effectively unreviewable” on appeal.)

Furthermore, the district court has not completed its mandate from this Court: to rule on ConnectU’s motion for disqualification and ConnectU’s recovery of its documents. (See the Order Granting ConnectU’s Motion to Disqualify, which ConnectU provided to this Court on September 9, 2009, Document No. 83). Indeed, the district court has empowered a magistrate judge to resolve the document issue; that issue remains pending.

Thus, the Court should address any issues relating to the district court’s disqualification of Founders’ counsel first and then address ConnectU’s pending Motion to Voluntarily Dismiss. Only after addressing those two issues, in that order, should this Court address the Founders’ current motions to consolidate and withdraw their opening brief.

Finally, should the Court grant ConnectU’s Motion to Voluntarily Dismiss its Appeal, the Founders’ appeal concerning the disqualification of its counsel will be moot (except to the extent there are any lingering issues surrounding the return of ConnectU’s documents).

CONCLUSION

For these reasons, ConnectU respectfully requests that this Court first address any issues relating to the Founders’ appeal of the district court’s disqualification of Founders’ counsel, then allow the Motions Panel to determine ConnectU’s Motion to Voluntarily Dismiss, and then address the substantive procedural issues raised in the Founders’ current motion.

DATED: September 28, 2009

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

By /s/ Alison P. Buchanan
Alison P. Buchanan
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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 September 28, 2009.

DATED: September 28, 2009

Respectfully submitted,

By /s/ Alison P. Buchanan
Alison P. Buchanan