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 THE FOUNDERS' OPPOSITION TO CONNECTU, INC.'S MOTION TO DISQUALIFY COUNSEL

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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

It is axiomatic that a lawyer owes a duty of loyalty to his or her clients, as well as a duty to maintain the confidences of both former and current clients. It is also axiomatic that a lawyer may not, in any circumstance, represent two parties on the opposite sides of a dispute.

Despite the Founders' contentions to the contrary, ConnectU and the Founders, though once aligned, are now on opposite sides of this dispute. Boies, Finnegan and O'Shea have each represented both ConnectU and the Founders at some point in this and related litigation. It is on this basis that ConnectU requests that this Court disqualify the above-referenced firms from continuing to represent ConnectU's adversaries, the Founders. The legal authority that the Founders cite in support of their Response to ConnectU's Motion to Disqualify (most of which is distinguishable on its face) does not abrogate these well-settled principles, which serve as the basic and unwavering cornerstones of an attorney's ethical obligations.

In addition, in their Response to ConnectU, Inc.'s Motion to Disqualify Counsel, the Founders go to great lengths to characterize this motion as a litigation tactic but the Founders miss the point. Disqualification of Founders' counsel is based on well-settled ethical principles and the relationships between counsel, the Founders, and ConnectU; these principles are not driven by nor should any analysis of them be impacted by any speculative benefit to anyone but Connect U. Most importantly the Founders' lawyers make no attempt to rebut evidence that they have threatened Connect U, used confidential information to harm Connect U, and generally violated their ongoing duties of loyalty and confidentiality to ConnectU.

Finally, the Founders continue to seek -- for all practical purposes -- the equivalent of a stay on the basis that the Founders hope a victory on the merits is imminent; this Court has repeatedly denied the Founders' previous requests for a

stay and should do so again here. The Founders can cite no authority to support their position that this Court should refrain from ruling on ConnectU's meritorious motion simply because the Founders are optimistic about their appeal.

In short, Boies, Finnegan and O'Shea want to continue representing their current and/or former client's adversaries despite well-settled authority holding that such representation is improper. This Court has a more than compelling basis upon which to grant ConnectU's Motion to Disqualify Founders' Counsel, and ConnectU respectfully requests that this Court grant ConnectU's motion.

ARGUMENT

A. The Applicable Legal Authority Does Not Support Boies, Finnegan, and O'Shea's Continued Representation of the Founders

The Founders cannot deny the existence of an attorney-client relationship between Founders' counsel and ConnectU in this matter. Nor can the Founders legitimately deny that their interests are now directly adverse to the interests of ConnectU, a wholly-owned subsidiary of Facebook. The applicable legal authority supports disqualification of Founders' counsel, regardless of whether this Court considers ConnectU to be a current or former client of Boies, Finnegan and O'Shea.

Prevailing ethical principles and the Founders' counsels' numerous ethical breaches to ConnectU not only justify, but require, disqualification.

i. The Founders' Current Client Analysis Is Incorrect; Applicable Authority Supports Disqualification of Boies and Finnegan

The ABA Model Rules of Professional Conduct and the California Rules of Professional Conduct both prohibit attorneys from representing two clients with opposing interests in the same litigation. ABA MRCP Rule 1.7; CRPC Rule 3-310(C)(2). In such circumstances, disqualification of counsel is automatic. Such

is the exact situation here, where ConnectU remains a current client of Boies and Finnegan.

In this case, the Founders sit on one side of the litigation (that is, wanting the Court to overturn the district court's decision to enforce the settlement), while Facebook and ConnectU (as a wholly-owned subsidiary of Facebook) sit squarely on the opposite side of the litigation (that is, wanting the Court to uphold the district court's ruling to enforce the settlement). To claim, as the Founders have, that ConnectU and the Founders are not on opposite sides of the litigation is incorrect. The adverse nature of the two parties is highlighted by letters from December 18, 2008 and December 22, 2008 from Boies to ConnectU's counsel (Hoge, Fenton), wherein Boies threatens to sue ConnectU on behalf of the Founders and demands that ConnectU not interfere with the Founders' pending appeal. (See Exhibits G and K to the Declaration of James E. Towery in Support of ConnectU's Motion to Disqualify Founders' Counsel)[1].

The Founders also confuse the issue of what has caused this ethical dilemma. Despite the Founders' assertions to the contrary, ConnectU did not switch sides in this litigation; rather, ConnectU changed hands as a result of the enforcement of the settlement agreement. Counsel chose to continue representing the Founders at the detriment of ConnectU. However, what the ethical rules and authority demonstrate is that once ConnectU changed hands, Boies, Finnegan and O'Shea had no good choice and could not have ethically continued to represent either ConnectU or the Founders. Just as it was unethical for those firms to continue to representing the Founders, it would have been equally improper for

[1] In this correspondence, Boies also references "substantial debts [owed] to the Founders." (Ex. G to the Declaration of James E. Towery). Of course, being deprived of access to its files, ConnectU has no idea what Boies is referring to here but Boies appears to be using confidential Connect U information to Connect U's detriment.

them to choose to continue representing ConnectU at the detriment of the Founders. The Founders' contention that ConnectU created this conflict is incorrect and ignores the policy behind the ethical rules at issue.

This Court's decision in *Unified Sewerage Agency of Washington County, Or. v. Jelco, Inc*., 646 F.2d 1339 (9th Cir. 1982) supports the principle that counsel jointly representing two clients cannot "drop" or pick one of those clients in order to avoid disqualification based on a conflict of interest (i.e., the "hot potato" doctrine). This Court in *Unified Sewerage, supra*, held that the Court will apply the current client analysis in such instances when a lawyer drops one client to keep the other. *Id*. at 1345, fn. 4; see also *Truck Ins. Exchange v. Fireman's Fund Ins. Co*. (1992) 6 Cal.App.4th 1050, 1060.

The Founders' effort to distinguish *Unified Sewerage, supra,* and *Truck Ins. Exchange, supra*, on the basis that the Founders' attorneys claim they are not at fault ignores the undeniable fact that they choose to represent the Founders and not Connect U (indeed they choose to threaten Connect U on behalf of the Founders).

A lawyer's duties to his or her clients include, among others, a duty of confidentiality and a duty of loyalty. By choosing to continue representing the Founders in this and related litigation, and choosing to take position adverse to ConnectU, Boies, Finnegan, and O'Shea have each violated their ethical obligations to ConnectU.

On these grounds, the Court should disqualify Boies, Finnegan and O'Shea from representing the Founders against ConnectU.

ii. Disqualification Is Warranted Where, Even Under a Former Client Analysis, Founders' Counsel Are Prohibited From Representing Interests Adverse to ConnectU in This Matter

Should the Court treat ConnectU as a former client of Boies, Finnegan and O'Shea, rather than a current client, disqualification of Founders' counsel remains

appropriate.

California Rules of Professional Conduct Rule 3-310 (E) and ABA Rule 1.9(a) both prohibit a lawyer from representing a client whose interests actually conflict with those of a former client in a substantially related matter. As discussed in great detail in ConnectU's original moving papers, these rules are designed to protect client confidences and are not altered by a change in corporate control. *Metro-Goldwyn Meyer, Inc. v. Tracinda Corp*. (1995) 36 Cal.App.4th 1832; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621.

The Founders attempt to circumvent these basic principles by arguing that the substantial relationship test does not apply because ConnectU and the Founders, while jointly represented, had no expectation that their lawyers would keep secrets between the two parties. However, here, the subject matter is not merely substantially related but, rather the exact same matter. There can be no more perfect example of a conflict than this. After representing ConnectU for months (in the case of Boies and O'Shea) or years (in the case of Finnegan), ConnectU's counsel now represent interests exactly opposite to ConnectU. The Founders' counsel maintain that they should be allowed to do so because ConnectU should have had no expectation that these law firms would keep their confidences.

Brennan's Inc. v. Brennan's Restaurants, Inc., 580 F.2d 168 (5th Cir. 1979) is directly on point. In that case, the Fifth Circuit explained:

> [T]he ethical duty is broader than the evidentiary privilege: "This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge."ABA Code of Professional Responsibility, EC 4-4 (1970)."A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client . . . ."*Id*.EC 4-5. The use of the word "information" in these 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. See id., DR 4-101(A). 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.** *NCK Organization v. Bregman*, 542 F.2d 128, 133 (2d Cir.

> 1976). The obligation of an attorney not to misuse information acquired in the course of representation serves to vindicate the trust and reliance that clients place in their attorneys. A client would feel wronged if an opponent prevailed against him with the aid of an attorney who formerly represented the client in the same matter. As the court recognized in *E. F. Hutton & Co. v. Brown*, 305 F.Supp. 371, 395 (S.D.Tex.1969), this would under-mine public confidence in the legal system as a means for adjudicating disputes. We recognize that this concern implicates the principle embodied in Canon 9 that attorneys "should avoid even the appearance of professional impropriety."ABA Code of Professional Responsibility, Canon 9 (1970).

Id. at 172 (emphasis added).

The Founders contend that *Brennan's, Inc., supra*, is inapplicable because that case involved an attorney, not a party, switching sides. (Founders' Response, p. 13, fn. 9). The Founders' position in this regard is incorrect. The *Brennan's, Inc.* court made no distinction between instances where an attorney or a party switches sides. The policy reasons referenced by the *Brennan's Inc*. court dictate that this Court should decline to consider that distinction here, as well.

In short, it is one thing for a client to understand that the client's former lawyer may know confidential information that the client's new-found opponent also knows; it is quite another when the lawyer (as has happened here) actually uses that information against its former client -- to the benefit of the other client -- in the same litigation.

For the reasons discussed above, and for the reasons more fully discussed in ConnectU's original moving papers, there is ample basis to support this Court's disqualification of Boies, Finnegan and O'Shea from representing the Founders.

B. The Founders' Claimed Prejudice Is Unsupported by the Facts and Irrelevant; Rather, ConnectU's Former and/or Current Counsel's Ethical Obligations Necessitate Disqualification Here

In the Response to ConnectU's Motion to Disqualify Counsel, the Founders claim that ConnectU seeks 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." (Founders' Response, p. 2).

However, this statement misses the point of the present motion. The Founders omit mentioning that the same counsel that represented the Founders since 2004 also represented ConnectU since 2004.

According to the Founders' own Response, Finnegan is the only of the three firms (although the Founders utilize the term "some") that represented either the Founders or ConnectU since 2004. Both O'Shea and Boies did not appear for either the Founders or ConnectU until 2008. Specifically, the Founders acknowledge that O'Shea first represented ConnectU only; further, O'Shea did not make its first appearance for the Founders until almost two months after the district court enforced the settlement agreement in June 2008. O'Shea switched clients prior to the transfer of ConnectU to Facebook, most likely in anticipation of the day when O'Shea would no longer be authorized to represent ConnectU. Such a tactical shift is directly contradictory to the Founders' bold characterization that the conflict here is one that the corporation, not counsel, created.

In short, the ethical rules regarding conflicts of interest, concurrent clients, former clients, and duties of loyalty and confidentially are the factors that this Court should consider when deciding whether to grant ConnectU's Motion to Disqualify Founders' Counsel. Conversely, the Court should not consider the self-serving version of facts presented by the Founders, who care not for their counsel's ethical obligations to another party.

C. The Founders and Their Counsel Do Not Deny That Founders' Counsel Have Repeatedly Violated Their Ethical Obligations to Their Client ConnectU

The Founders do not address the actual issues encompassed in ConnectU's Motion -- the ethical violations that the Founders' counsel have perpetrated since the transfer of ConnectU to Facebook occurred. The violations by Founders' counsel include, but are not limited to:

(1) ignoring their client ConnectU's instructions when counsel refused to execute substitutions;

(2) refusing to withdraw as counsel for ConnectU;

(3) refusing to provide ConnectU its own files;

(4) taking action directly adverse to (and threatening) their client ConnectU using the very same information the lawyers refuse to give Connect U; and

(5) violating duties of confidentiality to ConnectU by communicating confidential information to the Founders.

The Founders and Founders' counsel have not denied any of the above-referenced ethical violations.

D. The Court Should Deny the Founders' Third Attempt to Stay These Proceedings

The Founders ask this Court to defer ruling on ConnectU's Motion to Disqualify Counsel until such time as the Court also rules on the merits of the pending appeals, claiming that the facts underlying the pending motion and the merits of the pending appeal are "inextricably intertwined." (Founders' Response, p. 9). However, the Founders never identify the precise facts or circumstances that are allegedly intertwined. Instead, they cite their own potential prejudice as a basis for this Court postponing a ruling on disqualification, ignoring the harm and prejudice that ConnectU has already suffered (and continues to suffer) at the hands of its current and/or former counsel, Boies, Finnegan and O'Shea.

In essence, the Founders are asking this Court -- for a third time[2] -- to stay all activity until the Court makes a decision on the merits. As this Court has before, the Court should again decline to enter any sort of stay relative to these proceedings.

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[2] ConnectU and the Founders filed joint emergency motions to stay enforcement of the judgment in this Court in August 2008 and November 2008, The Court denied both of these motions.

E. The Court Should Order Counsel to Provide ConnectU Its Files; The Founders Fail to Cite Any Authority Disproving ConnectU's Contention That It Is Entitled to Its Files From Former and/or Current Counsel

Pursuant to ABA Rule 1.16(d) and CRPC 3-700(D), a client is entitled to its files. This entitlement exists regardless of whether the client is a current one or a former one.

Here, ConnectU transferred to Facebook in December 2008 and is under new management. This does not mean that ConnectU is any less entitled to its files. In fact, ConnectU's right to its files is even more important where ConnectU's new management has no information regarding ConnectU's existing rights and obligations, including potential litigation, but must defend against threats from its former lawyers.

As ConnectU anticipated, the Founders rely on New York authority, *Tekni-Plex, Inc. v. Meyner and Landis*, 674 N.E.2d 633, 668 (N.Y. 1996) to support their position that ConnectU should not receive its files. But the Founders' reliance on *Tekni-Plex* is misplaced where a thorough reading of the entire *Tekni-Plex* decision indicates that -- at the bare minimum -- ConnectU is at the very least entitled to ConnectU's pre-transfer general business communications. *Id*. at 666, 670.

Moeller v. Superior Court (1997) 16 Cal.4th 1124, a California Supreme Court Case, is controlling. The *Moeller* court considered *Tekni-Plex* in its analysis and then decided that in California, the post-transfer corporation is entitled to <u>all</u> of its pre-transfer files. *Id*. at 1137-9. The Founders fail to provide a sufficient explanation why this Court should not apply *Moeller, supra,* here.

The Founders characterize ConnectU's repeated requests for its files as a tactic. However, as demonstrated by Boies' December 18, 2008 letter to ConnectU's counsel, Hoge, Fenton, (Ex. G to the Towery Declaration in Support

of ConnectU's Motion to Disqualify), ConnectU's own counsel is referencing rights and obligations of which ConnectU is totally ignorant. Given the apparent existence of actual (and potentially imminent) rights and obligations, ConnectU *must* have access to its files so that it can defend itself against its lawyers' threats.

Finally, the Founders claim that there were no secrets between the Founders and ConnectU, so the Founders cannot ever expect that anything communicated to their joint counsel would be confidential as between them. Really, if the Founders wanted to protect their confidentiality, they should have had Connect U retain its own counsel; they decided not to do so.

The decision by the Founders' counsel to pick the Founders' interests over Connect U's when convenient is illustrative of their willingness to compromise their ethical obligations to suit their interests.

CONCLUSION

The Court should disqualify Boies, Finnegan and O'Shea from representing the Founders where such representation is a breach of the lawyers' duties of loyalty and confidentiality to ConnectU. Furthermore, ConnectU is entitled to its files from these lawyers, and requests that this Court order Boies, Finnegan and O'Shea to promptly turn over ConnectU's files to its new management to allow ConnectU to operate with full knowledge of all its rights and obligations.

DATED: February 26, 2009

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

By /s/ James E. Towery
James E. Towery
Attorneys for Defendant-Appellant
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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 February 26, 2009.

DATED: February 26, 2009

Respectfully submitted,

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