CA Nos. 08-16745, 08-16849, 08-16873 (consolidated);
09-15021, 09-15133; 09-17050
(DC No. C 07-01389 JW)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE FACEBOOK, INC., ET AL.,

Plaintiffs/Appellees/Cross-Appellants,

v.

CONNECTU, INC., ET AL.,

Defendants/Appellants/Cross-Appellees.

Appeal From Judgment Of The United States District Court
For The Northern District Of California
(Hon. James Ware, Presiding)

CONNECTU FOUNDERS' REPLY REGARDING THEIR MOTION TO CONSOLIDATE APPEALS AND MOTION TO SET BRIEFING SCHEDULE

JEROME B. FALK, JR. (No. 39087)
SEAN M. SELEGUE (No. 155249)
HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
A Professional Corporation
Three Embarcadero Center, 7th Floor
San Francisco, California 94111-4024
Telephone: 415/434-1600
Facsimile: 415/217-5910

Attorneys for Appellants and Cross-Appellees Cameron Winklevoss, Tyler Winklevoss and Divya Narendra

Tyler Winklevoss, Cameron Winklevoss and Divya Narendra (the "Founders"), Appellants and Cross-Appellees in the above-entitled appeals, hereby request that the Court consider this Reply concerning the Founders' Motion to Consolidate Appeals and Motion to Set Briefing Schedule ("Founders' Motions"), Docket Number ("Dkt. No.") 86. (Docket references are keyed to Appeal No. 08-16745.)[1]

THE SETTLEMENT APPEALS SHOULD NOT BE DELAYED DUE TO THE DISQUALIFICATION ORDER

As is apparent from the parties' recent submissions, these related appeals—which have been pending for as long as 14 months—have become enmeshed in a procedural tangle. Facebook seeks to have the appeals delayed even further by splitting the issues into "phases" so that this Court will pause to address the question of whether the District Court erred in disqualifying the Finnegan and Boies firms before briefing on the merits even commences.

Such a delay is needless, because the Founders have chosen to retain new counsel (Howard Rice) to brief the appeal. The Founders' decision to retain new counsel on appeal should not be deemed a concession that the District Court's disqualification order was correct. To the contrary, the Founders

[1]The Founders proposed a stipulated resolution of certain issues presented in this Reply to the other parties involved in these appeals, but ultimately the parties did not agree. The effort to reach a stipulation caused some delay in filing this Reply.

respectfully contend that the District Court erred in granting new ConnectU's motion to disqualify the Finnegan and Boies firms. Although the Founders disagree with the disqualification order, they do not wish the appellate proceedings concerning the purported settlement with Facebook to be delayed further as a result of the District Court's disqualification order.[2]

Because the Founders are the aggrieved parties on the disqualification order, they are entitled to decide whether to seek review on the disqualification issue through the ordinary appellate process, as they are doing, rather than invoking some other procedure, such as a petition for mandamus. Yet Facebook and ConnectU (acting under Facebook's control) are attempting to take that decision away from the Founders by insisting that the disqualification issue take center stage while briefing on the merits remains frozen. *See* Facebook Response, Dkt. No. 89, at 2 (citing to *Christensen v. United States District Court*, 844 F.2d 694, 697 (9th Cir. 1988), a case that in which the aggrieved party on a disqualification order sought mandamus); ConnectU Response, Dkt. No. 88, at 4.

Facebook and ConnectU should not be permitted to use the disqualification order to create more delay in the resolution of the Founders'

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[2]Previously, in the Founders' Status Report and Motions, the Founders' new counsel stated that the District Court's disqualification order was ambiguous concerning whether the District Court disqualified O'Shea. In fact, upon further study, the District Court disqualified only Finnegan and Boies, not O'Shea. District Court 7/2/09 Order at 13:11, 18:19-21.

appeals concerning enforcement of the settlement. Nor should Facebook and ConnectU, having convinced the District Court to disqualify the Boies and Finnegan firms, now be permitted to interfere with the Founders' decision to retain new counsel on appeal. *See In re BellSouth Corp.*, 334 F.3d 941, 955-56 (11th Cir. 2003) (recognizing "constitutionally based" due process right to counsel of choice in civil cases); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1118 (5th Cir. 1980) ("a civil litigant has the constitutional right to retain hired counsel"). Accordingly, the Court should reject Facebook and ConnectU's proposal to put the settlement appeals on hold while the disqualification appeal is considered.

Notably, Facebook and ConnectU do not specify exactly what they propose should transpire with regard to the disqualification appeal while the briefing of the settlement appeals remains on hold. While, as noted above, Facebook cites to a case in which this Court reviewed a disqualification order on a petition for mandamus, the Founders have filed an appeal, not a mandamus petition. The correct procedure for processing the Founders' disqualification appeal is for the parties to brief the appeal in the usual manner, as discussed in the next section.

THE FIVE MERITS APPEALS, BUT NOT THE DISQUALIFICATION APPEAL, SHOULD BE CONSOLIDATED

Facebook and ConnectU raise no objection to consolidating all of the appeals, except for the disqualification appeal. Therefore, those appeals

should be consolidated. (For a summary of the various pending appeals, please see the Founders' Status Report and Motions, Dkt. No. 86, at 3-5.)

The disqualification appeal presents a different question. Facebook and ConnectU's view that the disqualification appeal is "interlocutory" or "improper" renders consolidation impractical. ConnectU has suggested that it intends to move to dismiss the disqualification appeal. Accompanying Declaration of Sean M. SeLegue ("SeLegue Decl.") ¶2. Since a motion to dismiss will cause the very delay that the Founders have sought to avoid by retaining new counsel on appeal, the disqualification appeal should not be consolidated with the five merits appeals. *See* DOROTHY W. NELSON ET AL., NINTH CIRCUIT APPELLATE PRACTICE ¶6:165.5 (2009) (where one appeal is ready to brief and another appeal arising from the same district court case is not ready to brief, consolidation may not be appropriate).

Notably, if ConnectU and Facebook are correct that the disqualification order is not yet final and appealable, then considerable time may pass before the disqualification order is in fact final and appealable. Facebook and ConnectU contend that the disqualification order is not final because ConnectU's motion to disqualify sought not only disqualification but also "recovery" of ConnectU's documents from Finnegan and Boies. ConnectU Response 4. ConnectU contends that "the district court has empowered a magistrate judge to resolve the document issue; that issue remains pending." *Id.*; *see also* Facebook Response 2 (contending that the disqualification

appeal is an "improper interlocutory appeal"). No party has yet initiated any proceedings before the magistrate judge, and it is not clear that any such proceedings ever will be necessary. *See* SeLegue Decl. ¶3 & Exhs. A-C.[3]

In light of this situation, the Founders withdraw their motion to consolidate the disqualification appeal (No. 09-17050) with the other pending appeals. Since Facebook and ConnectU have opposed consolidation of the disqualification appeal with the merits appeals, all parties are in agreement on this point. The Court has already issued a time-schedule order concerning the disqualification appeal. Therefore, the Court need take no further action on the disqualification appeal at this time unless and until Facebook and/or ConnectU file a motion to dismiss the appeal.[4]

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[3]To avoid confusion, the Founders note that ConnectU cites to an overruled case to contend that the disqualification appeal should be resolved before the Court considers the settlement appeals on their merits. *See* ConnectU Response 3 (citing *Gough v. Perkowski*, 694 F.2d 1140 (9th Cir. 1982)). In *Gough*, this Court held that a disqualification order is immediately appealable as a collateral order. Apparently the standard electronic research sources do not identify *Gough* as having been overruled, but it has been. In *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 426 (1985), the Supreme Court held that disqualification orders are interlocutory and appealable only upon entry of final judgment. *See also Christensen*, 844 F.2d at 697. Here, the basis for appellate jurisdiction over the disqualification order is not that it is a collateral order. Instead, appellate jurisdiction arises because the disqualification order at bench was entered after final judgment and, therefore, is appealable as a post-judgment order.

[4]As this document was being finalized, the Court directed that the Founders address the jurisdictional issue, and the Founders will do so.

RESOLUTION OF PENDING MOTIONS TO DISMISS AND BRIEFING SCHEDULE ON CONSOLIDATED APPEALS

The Founders agree with Facebook and ConnectU that, before setting a briefing schedule on the merits appeals, the motions panel needs to consider the two pending motions to dismiss, one by Facebook and the other by ConnectU. Facebook and ConnectU ask the motions panel to grant the motions; the Founders ask that these motions be referred to the merits panel unless the motions panel denies them outright.[5]

In light of the need for the motions panel to decide what to do concerning the motions to dismiss, the Founders propose that, unless the motions panel were to grant both motions to dismiss, briefing should proceed pursuant to the following schedule:

- Founders' opening brief: 30 days after the motions panel's ruling on the motions to dismiss;[6]

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[5]Facebook suggests that the Founders have moved to "consolidate 'motions' with the 'merits." Facebook Response 6. This confusing statement is not accurate. The Founders moved to consolidate the various appeals pending from the underlying District Court matter. With regard to the motions to dismiss that Facebook and ConnectU filed in this Court, the Founders have not made a motion to "consolidate." Rather, the Founders have suggested that the motions panel either deny those motions or refer them to the merits panel for resolution.

[6]This opening brief would replace the brief the Founders submitted jointly with ConnectU on October 6, 2008, before Facebook took control of ConnectU. Curiously, although the Founders have stated clearly that the October 6, 2008 joint brief should be withdrawn, Facebook seeks assurance that the "parties . . . not be left to guess whose brief on the merits is at issue and which brief the Founders want to present." Facebook Response 5. The

- Second cross-appeal brief: 30 days after opening brief filed;
- Third cross-appeal brief: 30 days after second cross-appeal brief; and
- Optional reply cross-appeal brief: 14 days after third cross-appeal brief.

This schedule is similar to what the Founders proposed in their motion, except that the due date for the Founders' opening brief will not be established until the motions panel acts on Facebook and ConnectU's respective motions to dismiss.

THE MOTIONS PANEL SHOULD NOT TAKE THE SEVERE STEP OF DISMISSING THE FOUNDERS' APPEALS

In an effort to avoid confusion, the Founders wish to respond briefly to certain points Facebook asserts in its latest filing in support of Facebook's motion to dismiss the Founders' appeals concerning enforcement of the settlement. First, none of the cases Facebook cites in its latest filing involved a situation comparable to the one at bench, in which (a) the relevant arguments *were* presented to the District Court, (b) the District Court considered and resolved those arguments on the merits and (c) the dispute on appeal concerned whether the appellant could rely on the fact that another party (here, ConnectU, closely held company) presented the argument. *See*

simple solution is, as the Founders requested in their motion, that the October 6, 2008 joint brief be deemed withdrawn.

Facebook's Response 9-10. By contrast, the Founders' opposition to the motion to dismiss cites several cases, *including two binding Ninth Circuit decisions*, that hold an appellant's appeal is preserved when another party presented the issue below. Founders' Opp. To Facebook's Motion To Dismiss, Dkt. No. 74, at 16.[7]

Second, the Founders must respond to Facebook's claim that the Founders had "full notice of the motion" to enforce the settlement and that there was no procedural confusion below. Not true. Facebook's motion to enforce the settlement was *not even addressed to the Founders.* Excerpts of Record, Dkt. 33, at 237:2-3.[8] This makes perfect sense because, as previously explained, the Founders had been dismissed from the action for lack of personal jurisdiction.

Third, and perhaps most important of all, Facebook offers no retort to the Founders' showing that the *purpose* of the waiver rule—to avoid unfairness

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[7]*E.g.*, *United States v. Hardy*, 289 F.3d 608, 612 n.1 (9th Cir. 2002) (co-defendant's objection "preserved the issue for both defendants"); *United States v. Bagby*, 451 F.2d 920, 927 (9th Cir. 1971) (co-defendants' objection "'called the matter to the judge's attention'") (citation omitted); *cf. Office of Commc'n of United Church of Christ v. FCC*, 779 F.2d 702, 706 (D.C. Cir. 1985) (on administrative review, considering issue petitioner raised, even though petitioner did not participate in proceedings below, because "other parties raised the same arguments").

[8]Facebook's notice of motion was filed under seal. To avoid another sealed filing, the Founders therefore cite to the excerpts of record filed in connection with the October 6, 2008 joint brief of ConnectU and the Founders.

to the opposing party and to the District Court—would be served by dismissing the Founders' appeals. Since the issues were fully aired below by Facebook and the District Court, neither Facebook nor the District Court was prejudiced or blindsided. Facebook implicitly concedes this point but nonetheless hopes the motions panel will grant Facebook a procedural windfall by dismissing the Founders' appeals. The Court should not grant Facebook such a windfall by foreclosing appellate review at this juncture. Contrary to Facebook's position, the basis for Facebook's motion to dismiss is bound up with merits issues such as the District Court's dismissal of the Founders for lack of personal jurisdiction (an issue on which Facebook has cross-appealed), the District Court's later conclusion that it did have jurisdiction over the Founders to enforce the settlement and the Founders' subsequent motion to intervene. This complicated fact pattern should in fairness be reviewed by a merits panel.

DATED: October 9, 2009.

Respectfully,

JEROME B. FALK, JR.
SEAN M. SELEGUE
HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
A Professional Corporation

By: /s/ *Sean M. SeLegue*
SEAN M. SELEGUE

Attorneys for Appellants and Cross-Appellees Cameron Winklevoss, Tyler Winklevoss and Divya Narendra

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2009, I electronically filed the foregoing **CONNECTU FOUNDERS' REPLY REGARDING THEIR MOTION TO CONSOLIDATE APPEALS AND MOTION TO SET BRIEFING SCHEDULE; DECLARATION OF SEAN M. SELEGUE IN SUPPORT OF CONNECTU FOUNDERS' REPLY REGARDING THEIR MOTION TO CONSOLIDATE APPEALS AND MOTION TO SET BRIEFING SCHEDULE** by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. On October 9, 2009, I dispatched the foregoing documents described as **CONNECTU FOUNDERS' REPLY REGARDING THEIR MOTION TO CONSOLIDATE APPEALS AND MOTION TO SET BRIEFING SCHEDULE; DECLARATION OF SEAN M. SELEGUE IN SUPPORT OF CONNECTU FOUNDERS' REPLY REGARDING THEIR MOTION TO CONSOLIDATE APPEALS AND MOTION TO SET BRIEFING SCHEDULE** by placing the documents for deposit in the United States Postal Service through the regular mail collection process at the law offices of Howard Rice Nemerovski Canady Falk & Rabkin, A Professional Corporation, located at Three Embarcadero Center, Seventh Floor, San Francisco, California to be served by mail to the following non-CM/ECF participants:

D. Michael Underhill
Boies, Schiller & Flexner, LLP
5301 Wisconsin Avenue Northwest
Washington, DC 20015

David A. Barrett
Boies Schiller & Flexner LLP
575 Lexington Avenue
New York, NY 10022

Jonathan M. Shaw
Boies, Schiller & Flexner, LLP
5301 Wisconsin Avenue Northwest
Washington, DC 20015

Mark A. Byrne
Byrne & Nixon LLP
800 W. Sixth Street, Suite 430
Los Angeles, CA 90017

Steven C. Holtzman
Boies, Schiller & Flexner, LLP
1999 Harrison Street, Suite 900
Oakland, CA 94612

John F. Hornick
Finnegan Henderson Farabow
Garrett & Dunner LLP
901 New York Avenue NW
Washington, DC 20001

/s/ *Sean M. SeLegue*
Sean M. SeLegue