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.*

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

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## RESPONSE TO OCTOBER 9, 2009 ORDER REGARDING JURISDICTION OVER FOUNDERS' APPEAL OF DISQUALIFICATION OF COUNSEL

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Appellants Tyler Winklevoss, Cameron Winklevoss and Divya Narendra (collectively, the "Founders") hereby respond to the Court's order that they either (1) move for voluntary dismissal of their appeal of the September 2, 2009 District Court order disqualifying two law firms from representing the Founders in these appellate proceedings, or (2) demonstrate why this Court has jurisdiction over that appeal.

## DISCUSSION

A detailed summary of the procedural posture of the various appeals in this matter may be found in the Founders' September 14, 2009 Status Report, Motion To Consolidate Appeals And Motion To Set Briefing Schedule (Dkt. No. 86, hereafter "Status Report").[1] The Founders respectfully refer the Court to that summary and will not repeat it here.

The appeal about which the Court has inquired (No. 09-17050) seeks review of an order disqualifying two law firms from representing the Founders in these Ninth Circuit proceedings. The Court's order cited to *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 440-41 (1985), in which the Supreme Court held that disqualification orders may be appealed only upon entry of final judgment in the case as a whole. (Appeal No. 09-17050, Dkt. No. 6). The Founders acknowledge that rule, but note that final

[1]Unless otherwise noted, all docket references refer to Appeal No. 08-16745.

judgment in this case was entered no later than July 2, 2008. *See* Status Report 3. The disqualification order was not merged into that judgment because the disqualification order had not been entered at the time the District Court entered judgment. The disqualification order is therefore not subject to the *Richardson-Merrell* rule, because the disqualification order is not an interlocutory ruling in a pending action. Instead, the disqualification order is a post-judgment order and appealable on that basis. *See United States v. State of Washington*, 761 F.2d 1404, 1406 (9th Cir. 1985).

With that said, there are some other issues for the Court to consider in assessing its appellate jurisdiction over the disqualification order. First, the Founders have retained new counsel, Howard Rice Nemerovski Canady Falk & Rabkin, to represent them before the Ninth Circuit in these related appeals. The issue of whether the District Court erred in disqualifying two other firms from representing the Founders in these Ninth Circuit proceedings is therefore moot. Since the disqualification order is limited to these Ninth Circuit proceedings, and since the District Court has indicated the disqualification order will be reconsidered if control of ConnectU is returned to the Founders,[2] there would seem nothing left to dispute concerning the disqualification matter.

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[2]*See* Disqualification Order 19 ("This Order does not address the circumstances on appeal or afterward should the interests of ConnectU and the Founders merge.").

There is, however, a second aspect to the District Court's disqualification order that requires discussion. In the disqualification order, the District Court ordered the two disqualified firms, Finnegan, Henderson, Farabow, Garrett & Dunner LLP ("Finnegan") and Boies, Schiller & Flexner LLP ("Boies"), to turn over certain documents to "new" ConnectU. The District Court ruled that "ConnectU is entitled to all documents pertaining to ConnectU's general business, including but not limited to documents relating to ConnectU's financials, assets, and liabilities." Disqualification Order 17-18. However, the District Court denied new ConnectU's request that Finnegan and Boies turn over files pertaining to this litigation. *Id.* Later in the same order, the District Court referred the parties "to Chief Magistrate Judge James for further proceedings with respect to which documents should be turned over to the current owners." *Id.* at 18-19.

Facebook contends that the District Court's order is not a final or complete ruling on ConnectU's motion to disqualify because of the pending referral to a Magistrate Judge. (Dkt. No. 89). The Founders disagree, because the District Court ruled completely on ConnectU's request for files and then referred the parties to a Magistrate Judge for proceedings concerning which documents should be turned over under the District Court's ruling. In ruling on whether a particular document constitutes a "business" document or a "litigation" document, the Magistrate Judge would be interpreting or enforcing the District Court's ruling on ConnectU's

request for documents, not reconsidering or revisiting the District Court's ruling. Therefore, the disqualification order, including its resolution of ConnectU's request for documents, was final and properly appealable by the Founders.

Nonetheless, as with the disqualification ruling, the Founders have decided (with a caveat noted below) they do not wish to challenge on appeal the District Court's ruling that new ConnectU is entitled to "business," but not "litigation," documents from the Finnegan and Boies firms. "New" ConnectU has not appealed the District Court's ruling, and it has become final as to ConnectU.

The caveat is that new ConnectU is apparently not satisfied that the Finnegan and/or Boies firms have produced all documents required by the District Court's order. *See* Declaration of Sean M. SeLegue In Support Of ConnectU Founders' Reply Regarding Their Motion To Consolidate Appeals (Dkt. No. 86) at Exs. A-C. As the cited correspondence indicates, the only dispute ConnectU has raised to date is its request that Finnegan provide an index to all of its litigation files, a request that is both unduly burdensome and improperly intrusive into matters the District court has ruled should remain confidential from new ConnectU. *Id.* On October 16, 2009, ConnectU asked Magistrate Judge James to set a briefing and hearing schedule concerning unspecified issues related to the document-turnover request. Accompanying Declaration of John Duchemin ("Duchemin Decl.")

Ex. A. In response, Magistrate Judge James expressed concern regarding whether she has jurisdiction in light of the pending appeal and ordered the parties to meet and confer and report to her after this Court rules on whether it has jurisdiction over the Founders' appeal from the disqualification order. *Id.* Ex. B.

## PROPOSED DISPOSITION

For the reasons noted above, the Founders believe this Court has jurisdiction over the Founders' appeal from the disqualification appeal. However, because the Founders have retained new counsel on appeal, it should not be necessary for that appeal to be briefed.

The Founders are hopeful that the document turnover issue may likewise be concluded without the necessity for briefing in this Court. In hopes of achieving that goal, the Founders request that the Court confirm that Magistrate Judge James may proceed with the referral so that the document turnover issue may indisputably be considered resolved in the District Court. If, after that process is complete in the District Court, the universe of litigation-related documents possessed by Finnegan and Boies remains confidential from "new" ConnectU, the Founders anticipate dismissing their appeal of the disqualification order. In the (hopefully unlikely) event that the Founders appeal from a future order by Magistrate Judge James concerning

the documents, it would be sensible for that appeal to be briefed together with the appeal from the District Court's disqualification order.

Accordingly, the Founders respectfully request that the Court (1) confirm that Magistrate Judge James may complete the referral to her described in the September 2, 2009 disqualification order and (2) direct the parties to report to this Court within 14 days after entry of Magistrate Judge James' order confirming the completion of that referral. In addition, the Founders respectfully request (as previously stated) that the Court issue a briefing schedule on the remaining appeals concerning the District Court's enforcement of the purported settlement agreement so that those merits appeals are not further delayed by the document turnover issue.

DATED: October 30, 2009.

Respectfully,

JEROME B. FALK, JR.
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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 30, 2009, I electronically filed the foregoing **RESPONSE TO OCTOBER 9, 2009 ORDER REGARDING JURISDICTION OVER FOUNDERS' APPEAL OF DISQUALIFICATION OF COUNSEL, and DECLARATION OF JOHN DUCHEMIN IN SUPPORT OF CONNECTU FOUNDERS' RESPONSE TO OCTOBER 9, 2009 ORDER REGARDING JURISDICTION OVER FOUNDERS' APPEAL OF DISQUALIFICATION OF COUNSEL** 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 30, 2009, I dispatched the foregoing documents described as **RESPONSE TO OCTOBER 9, 2009 ORDER REGARDING JURISDICTION OVER FOUNDERS' APPEAL OF DISQUALIFICATION OF COUNSEL; DECLARATION OF JOHN DUCHEMIN IN SUPPORT OF CONNECTU FOUNDERS' RESPONSE TO OCTOBER 9, 2009 ORDER REGARDING JURISDICTION OVER FOUNDERS' APPEAL OF DISQUALIFICATION OF COUNSEL** 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:

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