Case Nos. 08-16745, 08-16849, 08-16873, 09-15021, 09-15133

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE FACEBOOK, INC., et al.,
Plaintiffs-Appellees,

v.

CONNECTU, INC. (formerly known as CONNECTU, LLC),
Defendant-Appellee,

and

CAMERON WINKLEVOSS, TYLER WINKLEVOSS and
DIVYA NARENDRA,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California,
Case No. CV-07-01389-JW, The Honorable James Ware

BRIEF OF APPELLEE CONNECTU, INC.

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CORPORATE DISCLOSURE STATEMENT

Appellee ConnectU, Inc. makes this statement pursuant to Federal Rules of Appellate Procedure rule 26.1. As of December 15, 2008, Appellee ConnectU, Inc. is a wholly-owned subsidiary of Facebook, Inc., a privately held corporation.

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STATEMENT OF ISSUES

In this Court, Appellants (the "ConnectU Founders") challenge the District Court's decision to enforce the Settlement Agreement at issue here, as well as its subsequent decision to disqualify the ConnectU Founders' prior counsel on the basis of a conflict of interest. Appellees Facebook, Inc. *et. al* ("Facebook") comprehensively address the ConnectU Founders' claims on the Settlement Agreement. In this brief, Appellee ConnectU, Inc. ("ConnectU") addresses only the District Court's disqualification order. The question presented is whether, in the unlikely event this matter is remanded to the District Court, the District Court's decision to disqualify the ConnectU Founders' prior counsel—a decision the ConnectU Founders do not challenge on the merits—would necessarily be reversed?[1]

STATEMENT OF FACTS

As recounted in more detail in Facebook's brief, on July 2, 2008, the District Court entered an order granting Facebook's motion to enforce the Settlement Agreement. ER 48-60. As a result, on December 15, 2008, after all the ConnectU Founders' efforts to stay the District Court's order had

[1] As explained in more detail below, although ConnectU previously filed an appeal from the District Court's ruling to enforce the Settlement Agreement, it subsequently dismissed that appeal. ConnectU is therefore an Appellee in this matter and is entitled to defend the District Court's disqualification order, which the District Court issued on ConnectU's motion.

been rejected, ConnectU's outstanding shares were transferred to Facebook, and ConnectU became a wholly-owned subsidiary of Facebook. ER 23-25 (amended judgment), ER 26-32 (original order).

As a result of that transfer, ConnectU's interests became adverse to the ConnectU Founders' interests. Specifically, the ConnectU Founders continued to press their desire to invalidate the Settlement Agreement and unwind Facebook's acquisition of ConnectU. ConnectU, by contrast, harbored no such desire.

On December 22, 2008, ConnectU filed a motion to voluntarily dismiss its appeal of the District Court's order enforcing the Settlement Agreement. Dkt. No. 52. The ConnectU Founders opposed ConnectU's efforts to dismiss its appeal. Dkt. No. 57. On December 11, 2009, this Court construed ConnectU's motion as a motion to withdraw from the appeal and granted ConnectU's motion. Dkt. No. 94.

In light of the adversity between ConnectU and the ConnectU Founders, and based on the ConnectU's lawyers' ongoing duty of loyalty to ConnectU, ConnectU also moved in this Court to disqualify the ConnectU Founders' lawyers,[2] who at the time were also ConnectU's lawyers. Dkt.

[2] Boies, Schiller & Flexner LLP, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, and O'Shea Partners LLP.

No. 63. This Court remanded ConnectU's Motion to Disqualify to the District Court. Dkt. No. 81. The District Court agreed with ConnectU and entered an order disqualifying the ConnectU Founders' counsel on September 2, 2008[3]. ER 1-20. The ConnectU Founders have appealed the District Court's disqualification order. ER 372-373.

ARGUMENT

The ConnectU Founders do not challenge the merits of the District Court's disqualification order. Instead, they assert only that, "[i]f …the Court reverses the District Court's orders and judgments enforcing" the Settlement Agreement, it must likewise reverse the disqualification order, apparently on the assumption that Facebook would no longer own ConnectU. Appellants' Opening Brief 72.

The ConnectU Founders' position is, at best, premature. Even on their own theory, the Court should review or reconsider the disqualification order only in the event the Court determines that the Settlement Agreement is unenforceable and the transaction it contemplates is unwound. Accordingly, if the Court affirms the District Court's order enforcing the Settlement Agreement—as Facebook contends is warranted in its brief—the

[3] The District Court disqualified the Boies and Finnegan firms, but did not disqualify O'Shea Partners LLP, presumably based on its representation to the District Court that O'Shea Partners LLP did not represent ConnectU.

Court need not reach the disqualification order at all. Indeed, even if the Court were to reverse the District Court's ruling on the enforceability of the Settlement Agreement, it would be for the District Court in the first instance to revisit its disqualification order, if and to the extent it were to become warranted at the conclusion of any remand proceeding.

The ConnectU Founders' position appears to hinge on the assumption that reversal of the District Court's ruling on the Settlement Agreement in this Court would necessarily mean that the Settlement Agreement is unenforceable and the transaction it contemplates should be unwound. Appellants are mistaken. Take, for example, Appellants' securities law claim. Even if Appellants were able to overcome the many obstacles necessary to win reversal in this Court—including their release of the claim in the Settlement Agreement itself, their failure to plead a viable securities fraud claim, and their disregard of the mediation privilege—it would lead at most to a remand proceeding in which the parties would be permitted to develop a record and the District Court would rule on the basis of that record. And even if Appellants were to prevail in that proceeding, the District Court would still be required to consider remedies short of rescission before concluding that Facebook's acquisition of ConnectU must be unwound. *See, e.g., Royal Air Properties, Inc. v. Smith*, 312 F.2d 210, 213

(9th Cir. 1962) (recognizing that the defendant in a § 29(b) claim may invoke waiver and estoppel as equitable defenses to rescission); *cf. also In re First Alliance Mortg. Co.*, 471 F.3d 977 (9th Cir. 2006) (holding that "[t]he proper measure of damages in fraud actions under California law… is 'out-of-pocket' damages."). If, at the end of any remand proceeding, Facebook still owned ConnectU—either because the ConnectU Founders were unable to prove their fraud claim or because the District Court concluded that any claim the ConnectU Founders could prove did not warrant unwinding a transaction that was consummated in December 2008—then the basis for disqualification would still stand.

The same is true of Appellants' assertion that the Settlement Agreement is indefinite and therefore unenforceable. In this respect, Appellants' central claim in this Court is that extrinsic evidence shows that the Settlement Agreement was indefinite as to the form and documentation of Facebook's acquisition of ConnectU, notwithstanding the Settlement Agreement's plain language committing those issues to Facebook's discretion. Appellants' Opening Brief 1, 2, 44-54. The District Court correctly excluded that extrinsic evidence on the ground that the Settlement Agreement is not susceptible to Appellants' reading. In the unlikely event that this Court were to disagree, it would presumably remand for the District

Court to consider the extrinsic evidence it refused to consider previously. And, again, if, at the end of any remand proceeding, Facebook still owned ConnectU, there would be no basis for revisiting the disqualification order.

CONCLUSION

Appellants' claim that the Court should reverse the District Court's disqualification order is premature.

Dated: May 26, 2010

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

By /s/ James E. Towery
James E. Towery
Attorneys for
Appellee Connect U, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure rule 32(a)(7)(C) and Ninth Circuti Rule 32-1, I certify that the attached answering brief is proportionally spaced, as a typeface of 14 points or more, and contains 1,109 words.

Dated: May 26, 2010

HOGE, FENTON, JONES & APPEL, INC.

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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 May 26, 2010.

Dated: May 26, 2010

HOGE, FENTON, JONES & APPEL, INC.

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