

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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PAUL D. CEGLIA,

Plaintiff,

v.

MARK ELLIOT ZUCKERBERG, Individually, and  
FACEBOOK, INC.

Defendants.

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Civil Action No. : 1:10-cv-00569-RJA

**REPLY TO DEFENDANTS'**  
**RESPONSE TO MOTION TO**  
**DISQUALIFY**

Respectfully submitted,

/s/Dean Boland

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## **PRELIMINARY STATEMENT**

While the wording of the relevant rules on conflict of interest have changed since April 2009, the interpretation by courts has not. Courts continue to cite pre-April 2009 cases considering dual representation issues. The April 2009 rule change does not alter the underlying legal analysis. There is no substantial difference between the prior rule and the new code except to make it more stringent to engage in dual representation. The new code also required written consent to conflicts of interest inherent in dual representation. While there are situations permitting dual representation under certain circumstances, this is not one of them.

Defendants counsel seek to avoid disqualification by raising standing issues, contesting the timing of the motion and questioning the specific rule references that their conduct violates. Even if Defendants obtained consents, they are invalid because Defendant Zuckerberg is charged with a fraud, one that when proven becomes a fraud against Defendant Facebook as well.

The Plaintiff intends to rely on the jury to weigh the evidence and continue to rely on the court to administer this case without bias to either side.

### **THERE ARE TWO DISTINCT TYPES OF DISQUALIFICATION MOTIONS**

Disqualification motions based upon successive representation and those considering dual representation rely on different standards.

#### **Successive Representation Disqualification**

Successive representation has its own test for disqualification. Successive representation disqualification involves considering whether a party, or someone related to them, was formerly represented by what is now opposing counsel. The burden is on the moving party in successive representation disqualifications. In dual representation disqualifications, the burden to avoid

disqualification is on the non-moving party. See *Strategem Dev Corp.*, et al below. Plaintiff's motion is a dual representation disqualification motion, therefore, no successive representation disqualification opinions apply.

The court's opinion, Doc. No. 451, comments on standing, a facet of successive representation disqualifications. Standing is not a factor in dual representation disqualifications. Defendants' successive representation case citations and quotes led the court down the wrong path.

### **Dual Representation Disqualification**

When considering dual representation courts apply a per se prohibition against dual representation. *Stratagem Dev. Corp. v. Heron Int'l N.V.*, 756 F. Supp. 789, 792 (S.D.N.Y. 1991). See also, *Cinema 5 Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir.1976). "[I]n a disqualification situation, any doubt is to be resolved in favor of disqualification." *Schmidt v. Magnetic Head Corp.* 476 N.Y.S.2d 151. *Schmidt* has been cited favorably by the Second Circuit. See *Hull v Celanese Corp.* 513 F.2d 568, 571.

### **PLAINTIFF AND PLAINTIFFS COUNSEL HAS STANDING TO BRING THIS MOTION**

The court in Doc. No. 451 mentions Plaintiff's lack of standing to raise the dual representation disqualification on Defendant Facebook's behalf. *Id.* at 7. The court reasons that Plaintiff's lack of ownership of stock in Defendant Facebook negates his standing. The law does not require stock ownership in Defendant Facebook to confer standing on Plaintiff to raise the dual representation disqualification.

"[S]ince an attorney has the authority and obligation to bring a possible ethical violation to the attention of the court...the adverse party may properly move to disqualify the attorney for

an opposite party on the ground of conflict of interest”. 7A C.J.S., Attorney and Client, § 157, p. 224; *SMI Industries Canada, Ltd. v. Caelter Industries, Inc.* 586 F.Supp. 808, 815 (N.D.N.Y. 1984). Any lack of standing argument “must give way to a maxim that adequately addresses the need to ensure both clients and the general public that lawyers will act within the bounds of ethical conduct.” *Vegetable Kingdom, Inc. v. Katzen* 653 F.Supp. 917, 923, n. 4 (N.D.N.Y.1987); Code of Professional Responsibility Disciplinary Rule 1–103(A), 22 NYCRR 1200.4(a).

Defendants’ cite to one case for the proposition that dual representation disqualification motions require some standing. Doc. No. 452 at 4. However, Defendants’ cases do not consider a lawyer’s ethical obligations which trump any standing argument.

#### **TIMELINESS OF DISQUALIFICATION MOTION**

Although the court in Doc. No. 451 gave no credence to Defendants’ timeliness argument, it must be addressed nonetheless.

Successive representation disqualification motions involve information that a moving party knows at the outset of litigation. In that circumstance, timeliness arguments have merit. In contrast, lawyers engaged in dual representation encounter conflicts on an evolving basis. Unknown or unanticipated conflicts at the outset of litigation emerge as the case proceeds. Defendants’ cite cases involving disqualification motions made on the eve of trial. This matter has not even begun regular discovery making Defendants’ cases on this point inapplicable. Defendants’ argue, without case law support, that Plaintiff’s counsel’s duty to raise ethics violations within dual representation have an expiration date. In fact, this precise motion is properly raised multiple times throughout the litigation if facts develop causing Defendants’ interests to collide. Evidence from Defendant Zuckerberg’s Harvard era computers or via

deposition of Defendant Zuckerberg will confirm the authenticity of the Facebook Contract. Once that occurs, it will cause an inarguable direct, nonconsentable conflict among Defendants.

**DEFENDANTS ADMIT DIVERGENT INTERESTS**

A reasonable lawyer would conclude that dual representation in this case involves the lawyer representing differing interests. Defendants' counsel have admitted a potential conflict by virtue of requiring their clients sign informed consents. Defendants should be ordered to produce those written consents from both parties in compliance with the rules. What conflicts did the Defendants consent to? Who consented on behalf of Defendant Facebook? When did they consent? If Defendants consented before Plaintiff's experts evaluated the Facebook Contract, it is impossible that Defendant Facebook knew of many emerging conflicts those expert reports now present. Plaintiff knows the Facebook Contract is authentic as his experts' undisputed analysis has proven. Can Defendant Facebook merely ignore that undisputed fact proving the authenticity of the Facebook Contract and plunge forward as if their co-defendant has honestly informed them about their risk?

Defendant Facebook

**REDACTED**

See Exhibit A. **REDACTED**

This conflict of waiving a right in one agreement, the signed consents Defendants' counsel claims they obtained, while one Defendant **REDACTED**

Exhibit A, is nonconsentable.

Defendant Facebook has reserved its right to introduce “separate and additional defenses” in this litigation. See Doc. No. 40 at 22, Affirmative Defenses. Emphasis added. Defendant Facebook logically reserved this right recognizing that facts may develop during litigation further separating its most advantageous defense position from Defendant Zuckerberg’s. It would have been a breach of its fiduciary duty to do otherwise. Those facts are now here, especially as of June 4, 2012, and yet Defendant Facebook has failed to introduce those defenses - a result of the conflicted dual representation.

In a dual representation disqualification case, one Defendant reserving such rights mandated disqualification. *Paladino v. Skate Safe, Inc.*, Slip Copy (2010), 28 Misc.3d 1227(A), 2010 N.Y. Slip Op. 51512(U). “The conflict is not [resolved] by the attorneys' assertion [that one Defendant] did nothing wrong and did not intentionally harm the plaintiff.” *Id.*

**DEFENDANTS CONFLICTS WERE UNFORESEEN AND ARE NON CONSENTABLE**

Only if a jury finds Defendant Zuckerberg did not sign the Facebook Contract will Defendants’ lack of conflict argument be realized. Plaintiff’s experts’ overwhelming and largely undisputed conclusions will disable a jury from that finding. The unlikely scenario of a jury ignoring Plaintiff’s undisputed expert testimony mandates Defendant Facebook file a cross claim to protect the company’s interest.

Now that the Facebook Contract is established scientifically, indisputably authentic (See below) the dual representing lawyers for Defendants now have a conflict. If both Defendants are found liable, damages will be apportioned between them. Inversely, if only one Defendant is found liable, that Defendant will be responsible for the full amount of damages. Defendants have conflicting interests in defining their respective duties of care, notice, and breach because each

benefits from shifting liability to the other. *Id.* Those purported consents obtained by Defendants' counsel necessarily prohibit Defendant Facebook from exiting the case (e.g. arguing lack of successor liability, lack of knowledge of Defendant Zuckerberg's fraud, etc.). This prohibition on Defendant Facebook's legal arguments applies regardless of whether that option is in its best interest at the time. Defendant Facebook's answers to the Amended Complaint disavow knowledge about nearly every aspect of Plaintiff's claim. Therefore, Defendant Facebook could not possibly intelligently waive unknown conflicts while reserving rights in Exhibit A and honoring its fiduciary duty to all shareholders. This "lack of knowledge" answer to the claims in the Amended Complaint was interposed by Defendant Facebook instead of the flat denial submitted by Defendant Zuckerberg. Obviously, if Defendant Facebook believed Defendant Zuckerberg's denials in the Amended Complaint were accurate and true, it would never have answered the Amended Complaint with "lack of knowledge" denials.

"A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question." Rules of Professional Conduct Rule 1.7, cmt. 23.

#### **THE CONFLICTS IN THIS CASE ARE NONCONSENTABLE**

"Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph [Rule 1.7(b)], some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." Rules of Professional Conduct Rule 1.7, cmt. 14. Emphasis added.

Diligent representation required by 1.7(b)(1) of the Rules of Professional Conduct require Defendant Facebook's lawyer to have filed a cross-claim against Defendant Zuckerberg protecting it in the conceivable event that either or both Defendants were found liable. See fn. 1. How could counsel for Defendant Facebook diligently represent Defendant Facebook in its claims against Defendant Zuckerberg when the Facebook Contract is determined to be authentic?

After the court's careful review of all of Plaintiff's experts' reports and conclusions, the most significant of which are undisputed, it will be undeniable that Defendant Facebook's failure to file a cross-claim is a clear breach of its fiduciary duty to shareholders other than Defendant Zuckerberg. This is one of those cases in which the dual representation is "so fraught with the potential for irreconcilable conflict" that it should not be allowed. *Greene v. Greene*, 47 N.Y.2d 447, 451– 452 (1979).

Despite this court's invitation in Doc. No. 451, Defendants' provided no declarations verifying written consents by either Defendant. The content of those consents is a critical piece of the analysis this court must undertake to determine compliance with the relevant rules.

#### **DEFENDANT LIABILITY DIFFERS**

In the event both Defendants are found liable, it takes little contemplation to realize their relationship would become contentious. "In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated." Rules of Professional Conduct Rule 1.7, cmt. 29. Emphasis added. Differing liability demonstrates a nonconsentable conflict.

#### **DEFENDANT ZUCKERBERG CANNOT CONSENT FOR DEFENDANT FACEBOOK**



“If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.” Rules of Professional Conduct Rule 1.13(g). Emphasis added.

Therefore, the only person qualified under the rule to consent on Facebook’s behalf would be an independent director of the company after advice from counsel who is not Defendants current counsel and not Defendant Facebook’s General Counsel. Both Defendants’ current counsel and Defendant Facebook’s General Counsel are conflicted from advising the independent director whether to consent to the obvious conflicts. Defendant Facebook’s current counsel is Defendant Zuckerberg’s counsel and Defendant Facebook’s General Counsel is beholden to Defendant Zuckerberg for their employment.

Imagine if a court would have permitted dual representation of any of the following CEOs accused of fraud: Bernie Madoff, CEO of Bernard L. Madoff Investment Securities LLC, Dennis Kozlowski, CEO of TYCO Industries, Kenneth Lay, CEO of ENRON and Bernard Ebbers, CEO of WORLDCOM. Perhaps at the outset of those cases, a court may have held that it was unlikely that the interests of those CEOs would diverge from their corporate co-defendants. Obviously, in hindsight, such a determination would have been incorrect and been the cause of appellate issues, re-trials and various repeats of portions or all of that litigation once the obviously improper dual representation was identified by an appellate court. The prejudice to the Plaintiffs and shareholders of the corporate co-defendants noted above from dual representation would far outweigh the claimed prejudice of the parties needing to seek new, uncompromised counsel.

### **SOME OF DEFENDANTS' COUNSEL DO NOT OPPOSE DISQUALIFICATION**

The weakness of Defendants' arguments is proven by the fact that their co-counsel refused to sign their response. Defendants' counsel Lisa Simpson and the Orrick Law Firm do not oppose disqualification as they did not sign Doc. No. 452. In contrast, Defendants' counsel Gibson Dunn and Harris Beach, LLP insist that disqualification is improper. This conflicting position on disqualification among Defendants' counsel alone is sufficient to warrant disqualification of all Defendants' counsel. It certainly injects the type of doubt that the law requires a court to rely on to disqualify. See *Schmidt and Hull v Celanese Corp.* (2nd Cir.), above. Ms. Simpson and Orrick's decision to not oppose the disqualification is analogous to a summary judgment motion filed against multiple Defendants. Those non-responding defendants invite the court to grant the motion against them.

### **MERITS OF DISQUALIFICATION MOTION**

The Defendants ignore the merits of Plaintiff's motion. They make no attempt to dissuade this court of the obvious, detailed, existing conflicts inherent in the dual representation. They do not deny Defendant Facebook has a claim against Defendant Zuckerberg reliant upon the authenticated contract. They navigate around the substance with diversions into arguments about standing, timeliness and false claims of Plaintiff's ulterior motives. This court should not provide Defendants the pass they seek on confronting the merits of Plaintiff's motion.

Defendants' failure to specifically deny the merits of the obvious conflicts Plaintiff presented in their motion, leave their response as no support for an order denying the motion. Plaintiff's motion is not abstract. It lists with detail the existing and potential conflicts between the Defendants. Defendants have rebutted none of those obvious conflicts.

Defendants should be ordered to provide to the court for an in camera inspection the written consent waiver signed by both Defendants. They do not confirm the consents were signed by someone other than Defendant Zuckerberg on behalf of Defendant Facebook. Moreover, this court has no information about what conflicts the Defendants consented to waiving. If the consents were obtained at the outset of the dual representation, it is obvious that the facts developed thus far make those consents woefully inadequate.

The dual representation conflict analysis dramatically changed on June 4, 2012. With Plaintiff's experts' analysis and conclusion regarding the Facebook Contract, Defendant Facebook now knows Defendant Zuckerberg's denials of having signed the Facebook Contract are false. See Exhibit B. That reality necessarily means that both Defendants can no longer ethically be represented by the same lawyers.

### **CONCLUSION**

Plaintiff's counsel has standing to seek disqualification of Defendants' counsel. Defendants' counsel are conflicted in existing and potential ways mandating disqualification. The claimed signed consent waivers are insufficient to resolve the nonconsentable conflicts. Defendant Facebook cannot both waive conflicts in a consent waiver while simultaneously

**REDACTED** , disparate answers to claims in the Amended Complaint and Affirmative Defenses at the end of their answers. Along with the above conflicts, the introduction of Plaintiff's expert reports on June 4, 2012 changed everything making dual representation improper.

Respectfully submitted,

/s/Dean Boland

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