Case Nos. 08-16745, 08-16849, 08-16873

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,

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

FACEBOOK INC.'S OPPOSITION TO APPELLANTS/ CROSS-APPELLEES' MOTION TO FILE OVER-LENGTH OPENING BRIEF AND TO WITHDRAW OPPOSITION TO FACEBOOK'S MOTION TO DISMISS

I. NEEL CHATTERJEE (CA Bar 173985)
MONTE COOPER (CA Bar 196746)
THERESA A. SUTTON (CA Bar 211857)
YVONNE P. GREER (CA Bar 214072)
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, CA 94025
Telephone: (650) 614-7400
Facsimile: (650) 614-7401

E. JOSHUA ROSENKRANZ (NY Bar 2224889)
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103-0001
Telephone: (212) 506 5380
Facsimile: (212) 506-5151

THEODORE W. ULLYOT (CA Bar 801092)
MARK S. HOWITSON (CA Bar 190308)
FACEBOOK, INC.
1601 California Avenue
Palo Alto, CA 94304

Attorneys for Appellees-Cross-Appellants Facebook, Inc. and Mark Zuckerberg

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellees-Cross-Appellants state that Mark Zuckerberg is an individual. No parent corporation owns 10% or more of the stock of Facebook, Inc., and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

Appellants seek to file an Opening Brief that exceeds the word limit by nearly 50%. The request should be denied. Appellants' prior counsel (before being disqualified) were able to file a brief that was nearly 500 words under the limit, and new counsel have not explained why they need so many more words than their able predecessors. One reason Appellants' brief is so long is that they seek permission to rebrief their opposition to a motion that has already been fully briefed and referred to the merits panel for decision. This request should also be denied. It is unfair and inefficient to allow Appellants to withdraw their opposition, and, with the benefit of a dry run, present entirely new and different arguments in their merits brief.

FACTUAL BACKGROUND[1]

Appellees Facebook, Inc. and its CEO Mark Zuckerberg (collectively "Facebook") had been locked in contentious bi-coastal litigation against Appellants Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra, the founders of a

[1] Declarations filed in connection with this motion are cited as "___ Decl.," according to the declarant's last name. The ConnectU Founders' present motion to file an oversized brief is cited as "Mot." Their original Opening Brief (appended as Sutton Decl. Ex. 1) is cited as "OB"; their New Brief is cited as "NB"; and their opposition to Facebook's motion to dismiss (appended as Sutton Decl. Ex. 2) is cited as "Opp." The Settlement Agreement (appended as Sutton Decl. Ex. 3) is cited as "SA." All citations to this Court's docket are from consolidated case number 08-16745 and are cited as "Dkt. No."

competing business, ConnectU, Inc. (the "ConnectU Founders"). In the course of mediation, the parties signed a two-page "Term Sheet & Settlement Agreement." That agreement, consisting of seven handwritten paragraphs on one-and-a-half pages, specifies a deal in which Facebook would acquire ConnectU, and the ConnectU Founders would be paid in cash and Facebook stock. SA ¶ 7. The Settlement Agreement states that it "settle[s] all disputes" on both coasts. The body of the Settlement Agreement refers to itself as an "agreement" three times, SA ¶¶ 3, 4, 5; specifies that "these terms are binding," SA ¶ 5; and twice declares that either side has the power "to enforce this agreement," SA ¶¶ 4, 5. All three ConnectU Founders signed the Settlement Agreement. Then they reneged.

The District Court enforced the Settlement Agreement, rejecting the ConnectU Founders' challenges to the agreement in a thorough opinion. *See* Sutton Decl. Ex. 4. The District Court ordered the exchange of ConnectU stock for the specified number of Facebook shares and cash. ConnectU and its Founders challenged that ruling on appeal. Both the District Court and this Court rejected their efforts to stay the District Court's ruling, and the transfers occurred as ordered.

Once Facebook acquired ConnectU's stock and controlled the company, ConnectU voluntarily moved to dismiss its appeal. That left only the ConnectU Founders to continue this appeal. Facebook moved this Court to dismiss the

ConnectU Founders' appeal because they had purposely declined to timely intervene in the California action to oppose the enforcement of the Settlement Agreement. Dkt. No. 69. The motion was fully briefed. After due consideration, the motions panel referred the motion to the merits panel. Dkt. No. 94.

On appeal, ConnectU and its Founders were both initially represented by Boies, Schiller. The firm filed an opening brief challenging the District Court's enforcement order (the "Original Brief"). *See* Sutton Decl. Ex. 1. According to its certification, the Original Brief was 13,548 words.

Meanwhile, ConnectU (now owned by Facebook) moved to disqualify Boies, Schiller because the firm had jointly represented both ConnectU and its Founders, whose interests now diverged. Dkt. No. 63. This Court remanded those issues to the District Court, *see* Dkt. No. 81, which disqualified Boies, Schiller. *See* Sutton Decl. Ex. 5.

The ConnectU Founders then enlisted new counsel to prosecute the appeal. New counsel proceeded to withdraw the Original Brief and have now filed a new brief (the "New Brief"). They sought and, without opposition, were granted, an extension of time for the filing of their New Brief, based partially on the ground that "we have a draft brief that is lengthy, we'd like to attempt to shorten it, and additional time will assist with that." Sutton Decl. Ex. 6. At 20,609 words, their New Brief is 52% longer than the Original Brief.

ARGUMENT

I. THE CONNECTU FOUNDERS HAVE NOT DEMONSTRATED THE "DILIGENCE" OR THE "SUBSTANTIAL NEED" TO JUSTIFY FILING A BRIEF THAT IS 50% LONGER THAN THE RULES PERMIT.

This is a simple appeal about the enforceability of a Settlement Agreement, involving simple facts and straightforward, well established legal principles. A lengthy brief is not necessary to argue these points.

For proof, this Court need look no further than the Original Brief that Boies, Schiller previously filed. *See* Sutton Decl. Ex. 1. A section-by-section comparison of word counts appears in Appendix A at the end of this opposition. The core argument sections have swelled to as much as two to four times their original length. Some arguments are completely new. Arguments that were addressed in a few brief paragraphs have mushroomed into multi-part sections. *Compare* OB 2-6 *with* NB 1-17; *compare also* OB 31-35 *with* NB 53-64. Short cites to basic propositions of law have blossomed into lengthy discussions of cases, *see, e.g.,* NB 36-37, 47-48, 50-51, 53, and 82-83, or long string cites with lengthy parentheticals, *see, e.g.,* NB 60 n.15, 69 n.19. Marginal points have expanded into long passages or run-on footnotes. *See, e.g.,* NB 38 n.5 and 78 n.21. The Statement of Facts does not even *start* until page 17. The brief does not get to the merits until page 35. And, the crux of this whole appeal—whether the District Court abused its discretion in determining that the Settlement Agreement was indeed a contract—

makes its first appearance at page 64.

None of this expanded briefing is justified by "substantial need," and its appearance is the opposite of the "diligence" this Court's rules demand. 9th Cir. Rule 32-2. The very existence of this Original Brief belies new counsel's insistence that "it is not possible to shorten the brief further without compromising quality and imposing additional burden on the Court that could result from not providing a complete and clear exposition of the relevant facts and law necessary to decided th[is] … appeal[]." SeLegue Decl. ¶ 9. At a minimum, it was incumbent on new counsel to explain why Boies, Schiller handily did what new counsel now claim was "not possible." *Id.* The failure to offer any explanation is especially revealing, since, by new counsel's own account, the only events that have changed (a motion to dismiss and a disqualification) account for only 2,175 words of the 7,061-word differential between the Original Brief and the New Brief. SeLegue Decl. ¶¶ 4-5.

The ConnectU Founders correctly assert that this appeal "involves a high-stakes dispute." *Id*. ¶ 2. But that does not mean that "[t]his appeal is complex both factually and legally." *Id.* Factually, the case is exceedingly simple—which is why the ConnectU Founders have submitted a brief with a Statement of Facts that is less than 2,300 words. *See* NB at 17-26.

Procedurally, to be sure, the two cases took many twists and turns en route to

the mediation that yielded the Settlement Agreement. But virtually none of that history bears any relevance to the issues of the enforceability of the Settlement Agreement. So, contrary to the ConnectU Founders' assertion, this Court does not need a Statement of the Case that recounts every twist and turn. SeLegue Decl. ¶ 2. Nor does this Court need an extensive summary of every motion that has been filed in this Court, when at most only two motions have any relevance to the issues on appeal. *See* NB 28-35 (addressing motion to dismiss), 83-85 (addressing motion to disqualify). The Original Brief covered it all in a Statement of the Case that was a mere 153 words. *See* OB 5. It was not necessary for the ConnectU Founders to expend more than 13 times that many words in a nine-page (1,994-word) Statement of the Case. *See* NB 9-17.

Legally, too, this case has little complexity. The law is clear on how to discern whether a contract's terms are sufficiently concrete to be enforceable when the parties explicitly agree that "these terms are binding." SA ¶ 5. In this context, the simple question is whether the Settlement Agreement's terms are "reasonably certain," and therefore enforceable, because a court can discern the parties' "obligations thereunder and determine whether those obligations have been performed or breached." *Elite Show Services, Inc. v. Staffpro, Inc.*, 119 Cal. App. 4th 263, 268 (2004). It does not take extensive analysis to argue whether the Settlement Agreement satisfied this standard. The Original Brief got the job done

in 863 words. *See* OB 45-47. The New Brief takes nearly four times the space (3328 words). *See* NB 64-80.

The New Brief expends even more words trying to overcome the District Court's straightforward conclusion that Facebook was not guilty of insider trading by opting not to open its books and volunteer valuation information to sworn enemies, represented by a bevy of counsel, negotiating at arm's-length, in a discussion that occurred entirely through a mediator acting as an intermediary. Here, too, the law has been clear for decades: Insider trading liability can be imposed only upon a showing that there was "a duty to disclose arising from a relationship of trust and confidence between parties to a transaction," *Chiarella v. United States*, 445 U.S. 222, 228 (1980); *see also Dirks v. SEC*, 463 U.S. 646, 654 (1983).

The question whether such a duty existed here is uncomplicated. The Original Brief addressed the merits of the securities fraud claim in just 2,316 words. The New Brief consumes more than one and a half times that amount—3,642 words. A significant portion of this expanded argument (758 words) is an entirely new—and unpreserved—argument that Facebook engaged in a "device, scheme, or artifice" prohibited by the 1934 Act. *See* NB 40-43 (quoting 17 C.F.R. § 240.10b-5); Sutton Decl. ¶ 10.

Equally straightforward is the District Court's conclusion that the mediation

privilege bars all the evidence on which the ConnectU Founders rely to allege securities fraud. The words of the local rule are unequivocal, and the dispute here—whether or not there is some exception that allows a party to a mediation to break the rule when he wishes to allege a securities fraud violation—is uncomplicated. The Original Brief covered the topic in 1,064 words. The New Brief devotes more than twice the space (2,456 words).

II. THIS COURT SHOULD DENY THE CONNECTU FOUNDERS' MOTION TO WITHDRAW THEIR OPPOSITION TO A MOTION THAT HAS ALREADY BEEN FULLY BRIEFED AND REFERRED TO THE MERITS PANEL AND SHOULD NOT GRANT MORE WORDS TO DO SO.

One of the ConnectU Founders' justifications for lengthening their brief is that they wish to rebrief their opposition to Facebook's motion to dismiss this appeal. SeLegue Decl. ¶ 4. But the ConnectU Founders' decision to include an extra argument in their brief is no reason to excuse them from the word limits that apply to all litigants, and, in any event, that motion was fully briefed and referred to the merits panel over a year ago. The ConnectU Founders are not entitled to a second bite at the apple now.

By way of background, the premise of Facebook's motion to dismiss is that when Facebook filed its motion to enforce the Settlement Agreement in California, and alerted the ConnectU Founders' lawyers to that filing, the ConnectU Founders made the express, strategic decision not to intercede. The reason was that they had

resisted Facebook's claims in California—which threatened them with substantial liability under the Federal CAN-SPAM Act—on personal jurisdiction grounds, and they wanted to preserve the argument that they were not bound by any ruling the District Court in California issued.

The ConnectU Founders grew to regret that strategic decision when the District Court enforced the Settlement Agreement and entered a series of orders transferring the ConnectU stock from the ConnectU Founders to Facebook. Those orders meant that the ConnectU Founders no longer controlled ConnectU, which now had no interest in challenging the Settlement Agreement or pursuing an appeal of the enforcement order.

Arguing that the ConnectU Founders should be held to their strategic decision not to oppose the motion to enforce the Settlement Agreement, Facebook filed a motion to dismiss the ConnectU Founders' appeal, over a year ago, on February 18, 2009. *See* Dkt. No. 69. The ConnectU Founders filed a 20-page opposition. *See* Sutton Ex. 2 (Dkt. No. 74). Facebook replied. *See* Dkt. No. 78. A motions panel read those briefs, and, on December 11, 2009, referred the full package of briefs to the merits panel for resolution. *See* Dkt. No. 94.

The ConnectU Founders now argue that (1) they should be permitted to withdraw the opposition they already submitted and substitute the argument they present in their merits brief; and (2) their desire to do so justifies a suspension of

the customary word limits. Both requests should be rejected.

To take the latter request first, the ConnectU Founders have not explained why there was a "substantial need" to completely rebrief all those same issues in their merits brief or how their decision to do so is consistent with the imperative to exercise "due diligence" in adhering to the word limits. Even if they could offer a persuasive reason for rebriefing, their desire to do so is not a basis for suspending the word limits that this Court routinely applies to all manner of appeals, many of which are more complex and have many more issues. If they feel a need to add an argument to their brief, the ConnectU Founders should make the hard choices all other litigants have to make as to which arguments to pare down.

Whatever the effect on word count, this Court should deny the ConnectU Founders' request to withdraw their opposition and substitute a new—and *completely different*—set of arguments. Upon the most cursory comparison between the ConnectU Founders' original opposition and the opposition they have now included in their New Brief, the differences are manifest:

- In their original opposition, the ConnectU Founders' main argument was that Facebook's motion to dismiss was untimely and was being used as a means of harassment. Opp. 10-11. The argument is gone.

- The ConnectU Founders have abandoned the fully briefed argument that the equities excused their waiver. Opp. 18-19.

- The ConnectU Founders also have abandoned their original argument that Facebook could not now raise the waiver issue, because it failed to cross-appeal from a statement by the District Court that they interpreted

as a "denial" of Facebook's waiver argument. Opp. 19.

- The ConnectU Founders also raise for the first time an entirely new argument that Facebook is judicially estopped from arguing waiver. NB 33-35.

This is not the way motions practice is supposed to work. FRAP 27 gives the ConnectU Founders one chance to file an opposition. It does not authorize them to conduct a trial run, withdrawing the arguments that fared the worst and asserting new arguments in their place. Such do-overs waste time for litigants and courts, alike.

The ConnectU Founders cite no authority for the proposition that disqualification of counsel entitles the new counsel to relitigate everything that has come before. Mot. 2. Where, as here, counsel were disqualified on a basis that bears no relation to the quality of the representation or the nature of the issues that were litigated in the original opposition, the ConnectU Founders should be required to follow orderly litigation procedures.

CONCLUSION

This Court should deny the ConnectU Founders' motion to file an overlength brief and to withdraw, and rebrief, their opposition to the motion to dismiss already fully briefed and presented to the merits panel.

/ / /

Dated: February 24, 2010 ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ I. Neel Chatterjee /s/

I. Neel Chatterjee
Attorneys for Plaintiffs-Appellees
THE FACEBOOK, INC., AND
MARK ZUCKERBERG

APPENDIX A

ORIGINAL BRIEF COMPARED TO NEW BRIEF*

SECTION/ ISSUE	ORIGINAL BRIEF ("OB") WORD COUNT	NEW BRIEF ("NB") WORD COUNT	RATIO (NB/OB)
REQUIRED SECTIONS			
Statement of Jurisdiction (OB 1; NB 1)	113	70	0.62
Statement of Issues (OB 2-4; NB 1-3)	518	462	0.89
Statement of Case (OB 5; NB 9-17)	153	1994	13.0
Statement of Facts (OB 6-21; NB 17-26)	4022	2274	0.57
Summary of Argument (OB 22-25; NB 3-8)	812	1392	1.71
Standards of Review (OB 26-27; NB 26-28)	473	405	0.86
Conclusion (OB 57; NB 85)	105	83	0.79
SECURITIES FRAUD			
Merits of Securities Fraud (OB 28-31, 36-4; NB 35-48, 51-53)	2316	3642	1.57
Mediation Privilege (OB 31-35; NB 53-64)	1064	2456	2.31
No Waiver by the Settlement Agreement (OB 41-45; NB 48-51)	1219	823	0.68

* Sutton Decl. ¶ 8 attests to the word counts.

ENFORCEABILITY OF THE SETTLEMENT AGREEMENT			
Extrinsic Evidence Admissible (OB 45-47; NB 67-71)	423	1200	2.84
No Agreement on Material Terms (OB 47-50; NB 64-66, 71-82)	863	3328	3.86
EVIDENTIARY HEARING/ DISCOVERY FOR FRAUD/ CONTRACT DEFENSES			
Evidentiary Hearing (OB 51)	242	Dropped	n/a
THE COURT'S JURISDICTION OVER THE FOUNDERS			
Intervention (OB 52-56)	1261	Dropped	n/a
REQUEST TO VACATE MOTION FOR FACEBOOK'S ENFORCEMENT			
Request to Vacate Order Granting Facebook's Motion to Enforce (NB 82-83)	n/a	414	New
FACEBOOK'S MOTION TO DISMISS			
Rebriefing of Motion to Dismiss (NB 28-35)	n/a	1800	New
ATTORNEY DISQUALIFICATION			
DQ of ConnectU Founders' Counsel (NB 83-85)	n/a	375	New

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ I. Neel Chatterjee /s/

I. Neel Chatterjee