

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

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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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,

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

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**DECLARATION OF THERESA A. SUTTON IN SUPPORT OF  
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**

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I, Theresa A. Sutton, declare as follows:

1. I am an Associate with the law firm of Orrick, Herrington & Sutcliffe LLP, counsel for Facebook, Inc. and Mark Zuckerberg. I am a member of the State Bar of California and the Ninth Circuit. I make this declaration in support of Appellees-Cross-Appellants' Opposition To Appellants/ Cross-Appellees' Motion To File Over-Length Opening Brief And To Withdraw Opposition To Facebook's Motion To Dismiss. I make this declaration of my own personal knowledge and, if called as a witness, I could and would testify competently to the truth of the matters set forth herein.

2. Attached hereto as **Exhibit 1** is a true and correct copy of the October 6, 2008, Brief of Appellants, Dkt No. 18, Case No. 08-16849.

**[CONFIDENTIAL – FILED UNDER SEAL].**

3. Attached hereto as **Exhibit 2** is a true and correct copy of ConnectU Founders' March 5, 2009 Opposition to Facebook's February 18, 2009, Motion to Dismiss, Dkt. No. 74, Case No. 08-16745.

4. Attached hereto as **Exhibit 3** is a true and correct redacted copy of the parties' Term Sheet and Settlement Agreement.

5. Attached hereto as **Exhibit 4** is a true and correct copy of the June 25, 2008, Order Granting Facebook's Confidential Motion to Enforce in the District Court, Case No. CV-07-01389-JW (N. D. Cal.).

6. Attached hereto as **Exhibit 5** is a true and correct copy of the September 2, 2009 Order Granting ConnectU's Motion to Disqualify Counsel, in the District Court, Case No. CV-07-01389-JW (N. D. Cal.).

7. Attached hereto as **Exhibit 6** is a true and correct copy of a January 21, 2010 email from Appellants' counsel to Facebook's counsel.

8. Appendix A to Facebook's Opposition reflects the number of words (as required by Rule 32(a)(7)) in each of the Appellants' October 2008 and February 2010 opening appeal briefs. My colleagues and I used the Microsoft Word "word count" tool to count the number of words per section in each brief. We also counted the words manually to arrive at the numbers reflected in Appendix A. In comparing the two methods, I determined that the Microsoft Word tool erroneously counts words separated by ellipses, or joined by hyphens, as one word (*e.g.*, "short...and" and "tax-deferred") rather than two. Consequently, I believe the manual count is the more accurate method, and is thus reflected in Appendix A. For these reasons, the numbers reflected in Appendix A differ slightly from the total word count attested to in Appellants' two appeal briefs.

9. The "Ratio" is calculated by dividing the number of words in the New Brief column by the number of words in the corresponding Old Brief column. The result reflects the relative growth or reduction of each section in the New Brief (*i.e.*, how much each section in Appellants' New Brief differs from the Old Brief).

10. The Original Brief addressed the merits of the securities fraud claim in just 2,316 words. The New Brief is nearly one and a half times that amount, totaling 3,587 words. More than 620 words in this section form an entirely new—and unpreserved—argument that Facebook engaged in a “device, scheme, or artifice” prohibited by the 1934 Act.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 24th day of February 2010, at Menlo Park, California.

/s/ Theresa A. Sutton /s/

Theresa A. Sutton

## **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/*

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I. Neel Chatterjee