

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

THE FACEBOOK, INC., ET AL., **RECEIVED**  
*Plaintiffs/Appellees/Cross-Appellants,* MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

FEB 16 2010

v.

CONNECTU, INC.,  
*Defendant/Appellee,*  
and

FILED \_\_\_\_\_  
DOCKETED \_\_\_\_\_ DATE \_\_\_\_\_ INITIAL \_\_\_\_\_

CAMERON WINKLEVOSS, TYLER WINKLEVOSS  
and DIVYA NARENDRA,  
*Defendants/Appellants/Cross-Appellees.*

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

**APPELLANTS'/CROSS-APPELLEES' MOTION TO  
(1) FILE OVER-LENGTH OPENING BRIEF; (2) FILE  
OPENING BRIEF UNDER SEAL; AND (3) WITHDRAW  
OPPOSITION TO FACEBOOK'S MOTION TO DISMISS;  
DECLARATION OF SEAN M. SELEGUE**

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*Attorneys for Appellants and Cross-  
Appellees Cameron Winklevoss, Tyler  
Winklevoss and Divya Narendra*

I.

**APPELLANTS/CROSS-APPELLEES NEED TO FILE AN  
OPENING BRIEF THAT EXCEEDS THE 14,000-WORD  
LIMIT.**

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Appellants and Cross-Appellees (“Appellants”) Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra (the “Founders”) are lodging, along with this motion, their Opening Brief and Excerpts of Record. Pursuant to Circuit Rule 32-2, the Founders request leave to file that opening brief, which consists of 20,609 words. The reasons are detailed in the accompanying Declaration of Sean M. SeLegue.

II.

**THE OPENING BRIEF SHOULD BE FILED  
UNDER SEAL.**

The Founders also request leave pursuant to Ninth Circuit Rule 27-13 to file their proposed Opening Brief under seal because the Opening Brief refers to and quotes from matters that were sealed below. Appellants request that the brief be maintained by the Court under seal. Neither the names of the parties nor this motion need be sealed.

The Founders will prepare a redacted version of their proposed opening brief for public filing and will seek agreement with Appellees and Cross-Appellants The Facebook, Inc. and Mark Zuckerberg (collectively, “Facebook”) concerning what limited portions of the brief should be redacted for the Court’s public file. Should the parties be unable to agree on

the appropriate form of a redacted brief, the Founders will present the issue for determination by the Court.

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III.

**THE FOUNDERS SEEK TO WITHDRAW THEIR  
EARLIER OPPOSITION TO FACEBOOK'S MOTION TO  
DISMISS.**

On February 18, 2009, Facebook moved in this Court to dismiss portions of the Founders' appeals. Docket No. 69. The Founders on March 5, 2009, filed an opposition to that motion. On December 11, 2009, the motions panel referred Facebook's motion to dismiss to the merits panel. Docket Nos. 74-75.

In Part I of the accompanying proposed brief, the Founders address the merits of Facebook's motion to dismiss. As a result, there is no need for the merits panel also to review the opposition the Founders earlier filed to the motion. In addition, the March 5, 2009 opposition was prepared by prior counsel who were disqualified. As with the opening brief filed by prior counsel, which the Court permitted the Founders to withdraw in lieu of a new brief prepared by current counsel (Docket No. 94), the Founders' new counsel should be permitted to present the issues related to the motion to dismiss as current counsel deems appropriate. Accordingly, the Founders request that their previously submitted March 5, 2009 opposition to the

motion to dismiss be withdrawn so that the merits panel may have all issues before it addressed in a single set of briefs.

DATED: February 12, 2010.

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Respectfully,

JEROME B. FALK, JR.  
SEAN M. SELEGUE  
JOHN P. DUCHEMIN  
NOAH S. ROSENTHAL  
HOWARD RICE NEMEROVSKI CANADY  
FALK & RABKIN  
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By   
SEAN M. SELEGUE

*Attorneys for Appellants and Cross-  
Appellees Cameron Winklevoss, Tyler  
Winklevoss and Divya Narendra*

## **DECLARATION OF SEAN M. SELEGUE**

I, Sean M. SeLegue, declare as follows:

1. I am an attorney licensed to practice law in the State of California, a certified specialist in appellate law certified by the State Bar of California Board of Legal Specialization and a member of the bar of this Court. I am a director at the law firm of Howard Rice Nemerovski Canady Falk & Rabkin, A Professional Corporation, counsel to Appellants Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra. I make this Declaration based upon my personal knowledge of the matters stated herein, except where otherwise indicated (thereupon testifying from information and belief). If called as a witness, I could and would testify competently to the facts stated herein.

2. This appeal is complex both factually and legally and involves a high-stakes dispute. The underlying litigation involves two actions, one pending in the Northern District of California and the other in the District of Massachusetts. In addition, the California action was originally filed in state court and, after substantial litigation in that forum, was removed to federal court. The procedural events relating to the present appeals are also complex, as described in the Statement of the Case. Those events, which include the entry of multiple “judgments” by the District Court, required substantial amounts of time to review and understand. In my view, the procedural posture would be extremely confusing to the Court and require undue amounts of the Court’s time to figure out if not explained carefully in

the Statement of the Case.

3. The procedural history of these appeals in this Court is also unusually complicated. Due to the manner in which events unfolded, there are five notices of appeal and cross-appeal in this matter, plus a sixth now-dismissed notice of appeal that has been folded into the five consolidated appeals. On top of this, substantial motion practice took place before this Court, all of which needed to be summarized in the Statement of the Case. As a result of this complexity at the trial and appellate levels, the Statement of the Case comprises approximately 2,000 words.

4. Another procedural issue that lengthened the brief arose from a motion to dismiss portions of the Founders' appeals that Facebook filed. If granted, the motion to dismiss would eliminate the Founders' right to appellate review of the District Court's rulings enforcing the disputed settlement of the California and Massachusetts actions. The motions panel referred Facebook's motion to the merits panel. The Founders have fully briefed their position on the motion to dismiss in the accompanying brief, obviating the need for the panel to review the Founders' earlier opposition to the Founders' motion. While Facebook's position is entirely without merit, preservation of the Founders' right to appellate review is a matter of the utmost importance to them and to procedural fairness in this case. The discussion of Facebook's motion, which requires consideration of the complicated procedural history of the matter overall, consists of

approximately 1,838 words.

5. Another matter that needed to be addressed in this brief apart from the core “merits” is the disqualification of prior counsel for the Founders, a matter about which the Founders had filed a separate notice of appeal. The motions panel folded that separate appeal into the five consolidated appeals and cross-appeals now pending before this Court. Docket No. 94. The discussion of this issue in the proposed brief is extremely short, at 387 words. While more could have been said on the topic of the disqualification order, we shortened the discussion to avoid burdening the Court.

6. Taken together, the Statement of the Case, the discussion of Facebook’s motion to dismiss and the disqualification order total approximately 4,255 words, which is 30% of the usual 14,000-word limit for an opening brief. The remaining 9,745 words ordinarily allowed would not be sufficient to brief the core legal issues, which constitute substantial and important questions.

7. Part II of the proposed brief presents the important question of whether, as the District Court ruled, a securities transaction that is entered into as part of a litigation settlement is exempt from the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. As part of this discussion, the contours and legal basis of mediation privilege in federal court are also discussed, a topic that this Court has not addressed in a published opinion. Given the increasing use of mediations to settle cases of all types, these

issues are important not only to the parties to this case but to the development of the law.

8. Part III presents the recurring and important question of how to assess whether settlement agreements cobbled together under rushed circumstances at mediations or settlement conferences are sufficient to form enforceable contracts. Resolution of this issue in any particular case is often fact specific, which means that the Court's decision on this issue will also be significant to the development of precedent for other cases.

9. For the reasons given above, lead counsel on this case, Jerome B. Falk, Jr. (also a certified specialist in appellate law) and I believe that the additional length of the proposed brief is justified. In our opinion, 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 decide these consolidated appeals.

I declare under penalty of perjury that the foregoing is true and correct.  
Executed this 12th day of February 2010, in San Francisco, California.

  
SEAN M. SELEGUE



## **PROOF OF SERVICE BY FEDERAL EXPRESS**

I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is Three Embarcadero Center, Seventh Floor, San Francisco, California 94111-4024.

I am readily familiar with the practice for collection and processing of documents for delivery by overnight service by Federal Express of Howard Rice Nemerovski Canady Falk & Rabkin, A Professional Corporation, and that practice is that the document(s) are deposited with a regularly maintained Federal Express facility in an envelope or package designated by Federal Express fully prepaid the same day as the day of collection in the ordinary course of business.

On February 12, 2010, I served the following document(s) described as **APPELLANTS'/CROSS-APPELLEES' MOTION TO (1) FILE OVER-LENGTH OPENING BRIEF; (2) FILE OPENING BRIEF UNDER SEAL; AND (3) WITHDRAW OPPOSITION TO FACEBOOK'S MOTION TO DISMISS; DECLARATION OF SEAN M. SELEGUE**

on the persons listed below by placing the document(s) for deposit with Federal Express through the regular 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 overnight Federal

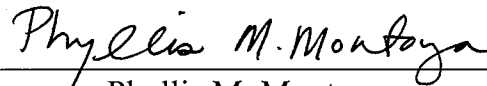
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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed at San Francisco, California on February 12, 2010.

  
\_\_\_\_\_  
Phyllis M. Montoya

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