CA Nos. 08-16745, 08-16849, 08-16873, 09-15021, 09-15133 (consolidated)
DC No. C 07-01389 JW

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE FACEBOOK, INC., ET AL.,
Plaintiffs/Appellees/Cross-Appellants,

v.

CONNECTU, INC.,
Defendant/Appellee,
and
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' REPLY IN SUPPORT OF MOTION TO FILE OVER-LENGTH OPENING BRIEF; DECLARATION OF SEAN M. SELEGUE

JEROME B. FALK, JR. (No. 39087)
SEAN M. SELEGUE (No. 155249)
JOHN P. DUCHEMIN (No. 250501)
NOAH S. ROSENTHAL (No. 240742)
HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
A Professional Corporation
Three Embarcadero Center, 7th Floor
San Francisco, California 94111-4024
Telephone: 415/434-1600
Facsimile: 415/217-5910

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

INTRODUCTION

These appeals have faced a long road to the merits panel, and Appellees/Cross-Appellants Facebook, Inc. and Mark Zuckerberg (collectively "Facebook") now seek to impose yet another barrier to the Court reaching and deciding the merits of these appeals, nearly two years after the first notice of appeal was filed. After having disqualified prior counsel for Appellants and Cross-Appellees Cameron Winklevoss, Tyler Winklevoss and Divya Narendra (the ConnectU "Founders"), Facebook now objects to the Founders, through their new counsel, filing a complete brief on the merits.

Facebook's opposition is simply incorrect in arguing that this case is simple, that the Founders have not been discerning in selecting issues to the present in their brief on appeal and that it would be more efficient for the merits panel to read through motion papers rather than having all issues presented through the briefs. The Founders respectfully request that their proposed brief be filed, for the reasons explained below.

DISCUSSION

A. The Founders Were Discerning In Selecting Arguments To Assert In The Proposed Brief

Contrary to Facebook's suggestion that the Founders were not diligent in controlling the length of their brief, or in making "hard choices" about what to include (Facebook, Inc.'s Opposition to Appellants'/Cross-Appelles' Motion ("Opp.") at 10), the Founders omitted a number of significant points from their brief in the interests of brevity.

First, as Facebook's detailed chart comparing the new brief to the withdrawn brief demonstrates, the Founders *dropped two arguments* they previously asserted in the withdrawn brief, saving a total of 1,500 words. Opp., Appendix A at 2 (arguments regarding "evidentiary hearing" and "intervention" dropped).[1]

Second, the Founders truncated their argument concerning the disqualification of their former counsel, omitting a substantive analysis of the District Court's reasoning. Declaration of Sean M. SeLegue ("SeLegue Decl.") ¶¶2-3. Before deciding to omit that substantive analysis, the Founders' present counsel had prepared a draft. The Founders' decision to omit that argument from the proposed brief *eliminated at least 1,600 words* from the proposed brief. *Id.* ¶5

[1]The Founders have not undertaken to verify the accuracy of Facebook's chart.

Third, the Founders' revised briefing concerning Facebook's motion to dismiss these appeals *eliminated 13 pages* by comparison to the length of the opposition to Facebook's motion already on file. The proposed brief's discussion of Facebook's motion consists of seven pages, including a summary of the relevant facts (Appellants/Cross-Appellees' Opening Brief ("AOB") at 28-35), whereas the Founders' opposition to Facebook's motion to dismiss totaled 20 pages. Sutton Decl., Exh. 2. In addition, as Facebook acknowledges, the Founders' revised argument on Facebook's motion to dismiss drops some contentions previously made, thus lightening the merits panel's workload. Opp. at 10-11.

Fourth, the Founders forewent addressing the question of whether federal law recognizes mediation privilege. *See* AOB at 57 & n.10. Instead of making that argument, the Founders limited their briefing to the contention that, to the extent federal law recognizes a mediation privilege, it is subject to an exception to permit the establishment of defenses to any agreement reached during a mediation. AOB at 55-61. Briefing whether the mediation privilege exists in federal court would take five to ten additional pages, and the Founders' selectivity in presenting arguments saved the panel from that additional reading and study.

B. Facebook's Objections To An Expanded Brief Are Baseless

Facebook contends that this appeal is "simple" and, accordingly, the Founders should not be allowed to file their proposed brief. Facebook's

contention notwithstanding, certain objective facts about the complexity of this case cannot be denied.

1. The Statement Of The Case Is Concise In Light Of This Matter's Complexity And Will Be Helpful To The Merits Panel

Facebook contends that the proposed brief's Statement of the Case is too long, but Facebook is wrong. There is not an ounce of fat in the Statement of the Case. It is lengthy because the procedural history in this case is unusually complicated. Not only are there two District Court cases, but the proceedings in the District Court related to enforcement of the disputed settlement were complicated. Facebook's contention that the Court should assess the proposed brief's Statement of the Case by comparing it to the withdrawn brief's version is absurd for a number of reasons.

First, the withdrawn brief did not include a classic Statement of the Case that set out the procedural history of the case. *See* Withdrawn Brief ("WB") at 5; FED. R. APP. P. 28(a)(6); CHRISTOPHER A. GOELZ, ET AL., FEDERAL NINTH CIRCUIT APPELLATE PRACTICE ¶8-49 ("Ninth Circuit judges generally prefer that the statement of the case be limited to a chronological presentation of the procedural history from the inception of the case to the filing of the notice of appeal"). The withdrawn brief's one-page Statement of the Case was more in the nature of an introduction and overview of the issues. WB at 5. The withdrawn brief included some of the procedural history in the Statement of Facts. *See id.* at 19-21. The Founders' new

counsel moved most of the procedural history from the Statement of Facts to the Statement of the Case. Consistent with that decision, Facebook's chart shows that the proposed brief's Statement of Facts is much shorter—by nearly 2,000 words—than the Statement of Facts in the withdrawn brief. Opp., Appendix A at 1.

Second, the withdrawn brief was filed before most of the events described in the proposed brief's Statement of the Case even took place. At the time the withdrawn brief was submitted in October 2006, the District Court proceedings were not complete, and Facebook (and ConnectU, under Facebook's control) had yet to file their various motions in this Court. Most of the proposed brief's Statement of the Case (5½ pages, about 1,200 words) is devoted to these later events that were not addressed at all in the withdrawn brief. AOB at 12-17. The docket *in this Court* now lists an extraordinary 131 items, most of which were filed after the withdrawn brief was submitted. It would be highly confusing to the merits panel to omit or truncate the Statement of the Case summarizing the relevant procedural events, as the accompanying declaration of the Founders' new counsel on appeal demonstrates. SeLegue Decl. ¶¶2-4[2].

---

[2]Facebook's asserts incorrectly that the proposed brief's Statement of the Case discusses appellate motions that are not relevant to the issues on appeal. With the exception of passing references to motions for stay on appeal that were denied, most of the discussion of appellate motions at pages 14-17 of the proposed brief relate to an important ruling by the motions panel concerning ConnectU's motion to dismiss its own appeal (AOB at 14-15)

(continued . . .)

Third, in what may be the very definition of "sound and fury, signifying nothing" (WILLIAM SHAKESPEARE, MACBETH, Act V, Scene V), Facebook's chart reveals that the withdrawn brief's Statement of Facts and Statement of the Case together consisted of almost 4,200 words. Opp., Appendix A at 1. Those same two sections in the proposed brief total almost 4,300 words (*id.)*, hardly any difference at all despite the fact that the proposed brief had to convey much more information about the procedural status and history of this matter than did the withdrawn brief.

2. Addressing Facebook's Motion To Dismiss In The Merits Briefs Is Efficient And Appropriate

Facebook objects to the proposed brief's discussion of Facebook's motion to dismiss these appeals, claiming that it would be "unfair and inefficient" for the Founders to address the motion to dismiss in the Founders' brief on the merits. Opp. at 1. Whatever Facebook's views may be, from the perspective of the merits panel, the Founders' proposal to discuss the motion to dismiss in their proposed brief will no doubt be beneficial.

To begin with, the proposed brief's discussion of the motion to dismiss is *65% shorter* than the Founders' opposition to the motion. And (contrary to Facebook's contention that the Founders were not discerning in selecting

---

(. . . continued)
and two motions that are at issue before the merits panel. *Id. at* 15-16; Opp. at 6.

issues for appeal), the Founders have dropped from their proposed brief several points the Founders raised in the opposition to Facebook's motion to dismiss. Opp. at 10-11. Facebook claims that the Founders' decision to drop certain points is somehow "unfair" but undoubtedly the merits panel would prefer that the arguments put before it be pruned.

Next, Facebook complains that the arguments the Founders include in their proposed brief differ in some ways from those presented in the opposition to Facebook's motion to dismiss. Facebook is correct that, in some respects, the opposition's arguments have been honed and simplified and that, in addition, two new arguments have been added. One of the those two new arguments could not have been included in the withdrawn brief, because this new argument relies on an order from the motions panel that did not exist at the time the Founders filed their opposition to the motion to dismiss. AOB at 35 (point 4). The second new argument, namely that Facebook is estopped from seeking dismissal of these appeals due to Facebook's inconsistent positions (*id.* at 33-35), consumes less than two pages and makes a critical point about the manifest injustice Facebook seeks to impose by urging dismissals of these appeals. The Founders should be permitted to present all of their arguments concerning the motion to dismiss through their proposed brief, which will be more efficient for all of the reasons described above. *See People of Village of Gambell v. Hodell*, 774 F.2d 1414, 1426-27 (9th Cir. 1985) (in order to prevent "manifest injustice,"

reviewing legal issue that was "central to the case and important to the public" in spite of technical waiver), rev'd on other grounds, *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531 (1987); *Duff v. Page*, 249 F.2d 137, 139-40 (9th Cir. 1957) ("[c]ourts of review have a higher function than to be impregnable citadels of technicality") (internal quotation marks omitted).

3. Facebook's Conclusory Assertion That These Appeals Are "Simple" Is Incorrect

The remainder of Facebook's contentions boil down to two points: (1) the withdrawn brief was shorter, which means the proposed brief must be too long; and (2) this appeal is so simple that extended briefing is not appropriate.

With regard to the first point, the Founders' present counsel disagree and respectfully submit that they should not be compelled to offer a blow-by-blow summary of why new counsel's approach to the case is, in certain respects, different from prior counsel's. Facebook, through its control of ConnectU, chose to seek the disqualification of the Founders' prior counsel and can hardly be heard to complain that the Founders' new counsel have a different approach. The old saying about the orphan who begs for mercy after killing his parents comes to mind. *Harbor Ins. Co. v. 257 Schnabel Found. Co.*, 946 F.2d 930, 937 n.5 (D.C. Cir. 1991) ("the legal definition of chutzpah . . . is a young man, convicted of murdering his parents, who argues for mercy on the ground that he is an orphan"). The withdrawn brief is just

that—withdrawn—and the Founders' proposed brief should be judged on its own merits.

The more important point is that these appeals are not simple. The mediation privilege issue is a good example. As the proposed brief's discussion of mediation privilege makes clear, much more needed to be said about the existence and scope of mediation privilege in federal court than was presented by the withdrawn brief. *Compare* AOB at 53-63 *with* WB at 31-35. The mediation privilege issue presents a question of first impression in this Court and, to the best of our knowledge, in all of the federal appellate courts. The merits panel's work will be impeded rather than furthered if the panel has to figure out for itself key aspects of the relevant law.

With regard to the other issues, Facebook's conclusory suggestion that the question of whether the Term Sheet was enforceable is a "simple" one is incorrect. There are a number of points for the merits panel to consider, both legally and factually, to address the issue. On this score, the Founders respectfully refer the Court to their proposed brief to see if the Court agrees with Facebook's contention that the contract issue is sufficiently simple that the briefing could be drastically reduced in length. AOB at 64-83.

CONCLUSION

For the foregoing reasons, the Founders respectfully request that the Court grant their motion to file an over-length opening brief and to withdraw their opposition to Facebook's motion to dismiss.[3]

DATED: March 8, 2010.

Respectfully,

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

By */s/ Sean M. SeLegue*
SEAN M. SELEGUE

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

[3]The parties' counsel are scheduled to meet and confer tomorrow on an agreed-upon redacted, public version of the proposed brief. The Founders hope to file the agreed-upon redacted version by the end of this week so that the Court may have before it all issues concerning the proposed brief.

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. If called as a witness, I could and would testify competently to the facts stated herein.

2. When my firm became appellate counsel for the ConnectU Founders, after the disqualification of the Finnegan and Boise Schiller firms, I needed to become familiar with the procedural history of the case to prepare a status report to this Court, which was filed on September 14, 2009. This was a very significant task and took me many hours of concerted effort to achieve, something on the order of 30 hours, including the drafting of the status report. Since that status report was filed on September 14, 2009, significant proceedings have continued in this Court. In addition, Facebook and ConnectU made various filings in the District Court to which we had to respond.

3. The Statement of the Case, in the proposed brief, is in my view a tightly distilled summary of those procedural events the merits panel needs to

understand to avoid reinventing the wheel in understanding the complicated procedural history of this case. In preparing the statement of the case, I sought to omit details the merits panel would not need to understand. Therefore, it is not a fair characterization on Facebook's part to suggest that the statement of the case includes a summary of each and every event in this Court that has taken place since the filings of the notice of appeal. Given that the docket in the lead appeal includes more than 130 items, it is evident that Facebook's characterization is incorrect.

4. In my opinion, if we were required to reduce the length of the Statement of the Case, as Facebook seems to advocate, the end result would be unnecessary burden the merits panel, which would need to figure out various procedural details on its own rather than having those details distilled and summarized in the statement of the case as they now are.

5. Before we submitted the proposed opening brief that is at issue on this motion, we had prepared a draft argument concerning why the District Court's reasoning for disqualifying the Boies and Finnegan firms was incorrect. We decided not to include that argument in the proposed brief to save space. That draft is approximately 1,600 words in length.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 8th day of March 2010, in San Francisco, California.

/s/ Sean M. SeLegue
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 March 8, 2010, I served the following document(s) described as **APPELLANTS'/CROSS-APPELLEES' REPLY IN SUPPORT OF MOTION TO FILE OVER-LENGTH OPENING BRIEF; DECLARATION OF SEAN M. SELEGUE** 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 Express delivery addressed as follows:

Mark A. Byrne
Byrne & Nixon LLP
800 W. Sixth Street, Suite 430
Los Angeles, CA 90017

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 March 8, 2010.

/s/ Kinson Yee
Kinson Yee