

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

Nos. 09-15021, 09-15133

**THE FACEBOOK, INC., *et al.*,
Plaintiffs—Appellees,**

v.

**CONNECTU, INC., *et al.*,
Defendants—Appellants.**

**CONNECTU FOUNDERS' RESPONSE TO MOTION TO
CONSOLIDATE APPEALS**

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February 4, 2009

Appellants Cameron Winklevoss, Tyler Winklevoss and Divya Narendra (the founders and prior shareholders of ConnectU, collectively, “Founders”) hereby respond to the motion of Appellees Facebook and Mark Zuckerberg to consolidate the following pending appeals: Appeal Nos. 09-15021, 09-15133, 08-16745, 08-16849, 08-16973 (“Pending Appeals”).

The Founders and Appellees are in agreement that (i) the Pending Appeals should be consolidated with a single briefing schedule; and (ii) the Pending Appeals should be heard by the same merits panel. However, the Founders disagree with Appellees’ request that the Court deem as “withdrawn” the Founders’ opening appeal brief (the “Brief”) and three volumes of record excerpts served and filed on October 6, 2008, and require the Founders to re-file a largely duplicative brief and record excerpts. Rather, the interests of efficiency and expedition would best be served by allowing the October papers to stand. These papers fully and properly address the issues raised by the Founders’ first Notice of Appeal.

Although the Founders’ second Notice of Appeal raised two new issues, these issues readily can be briefed in a short submission by March 2, 2009. This proposal is consistent with the Circuit Rules; conserves resources; addresses the “fairness” concerns raised in Appellees’ Motion; and keeps the briefing schedule on-track.

Relevant Facts

On August 11, 2008, the Founders filed a Notice of Appeal (“First Notice”) from adverse rulings of the district court relating to the enforcement of a purported settlement agreement. On October 6, 2008, the Founders served and filed their opening Brief addressing those rulings. *See* Brief of Appellants (Docket No. 33 in Appeal 08-16745) (filed under seal).

On December 19, 2008, the Founders filed a second Notice of Appeal (“Second Notice”), which added requests for relief from orders that the district court had entered *after* October 6, 2008, *i.e.*, after the filing of the Founders’ opening Brief. The Founders’ December 29, 2008, Initial Notice and Statement of the Issues served pursuant to Circuit Rule 10-3 with respect to the Second Notice lists the following two additional issues that were not included in the Founders’ Statement of the Issues corresponding to the First Notice:

11. Whether the district court’s July 2, 2008, Judgment Enforcing Settlement Agreement was a final judgment and, if not, whether the district court’s November 21, 2008, Amended Judgment and December 15, 2008, Order cures any prematurity attaching to the July 2 Judgment and/or the currently pending consolidated appeal.

12. Whether the district court had jurisdiction to enter any of its orders from October, November, and December, 2008, after all parties had previously filed notices of appeal and after ConnectU and the Founders served and filed their opening appeal brief in early October of 2008.

See Exhibits 7 and 17 to the Declaration of Tina L. Naicker in support of Appellees' Motion.

ARGUMENT

The Founders disagree that the Court should deem as “withdrawn” the Founders' October 6 Brief and supporting papers, which include three volumes of record excerpts.¹

Withdrawal is wholly unnecessary. The Founders' Brief and record excerpts already address the issues raised by the Founders' first Notice of Appeal. Withdrawal also would be a wasteful exercise. It would require the Founders to incur significant costs in preparing, printing and filing new papers, and would cause the Court unnecessarily to expend judicial resources.

Appellees argue that withdrawal is required because it would be unfair for the Founders to file multiple briefs on the “same issues.” Motion at 5-6. But the Founders do not intend to file multiple briefs on the same issues. Rather, the Founders request that they be permitted to file by March 2, 2009, a short, additional brief — of 1850 words or less — addressing the two new issues raised by the Second Notice of Appeal.

The proposed 1850-word limit is consistent with the Circuit Rules.

¹ The supporting papers also include a motion to file the Brief and record excerpts under seal and exhibits in support of the motion to seal.

Because the Founders' October 6 Brief was a joint brief filed on behalf of all the then-appealing parties, the applicable word limit was 15,400 words. *See* Circuit Rule 28-4. But the Founders' Brief was only 13,548 words. *See* Certificate of Compliance, Brief of Appellants (Docket No. 33 in Appeal 08-16745) (filed under seal) at 59. Allowing the Founders up to 1850 words—a word allowance that was previously available to them but not used—to argue the two additional issues in a brief would not disadvantage Appellees, who would then have the same 15,400 words per Circuit Rule 28-4 to respond to all issues.

Under the Founders' proposal, all parties would thus have the same opportunity to brief all relevant issues, subject to the same word-limits, without any need for an expensive, duplicative filing. This proposal also would keep the briefing schedule on-track, reduce redundancy, and permit this long-delayed appeal to proceed promptly on the merits. To this end, the Founders propose the following briefing schedule that advances the dates in the Court's January 22, 2009 Time Schedule Order by one month:

Date	Schedule from Court's January 22 Time Schedule Order	Founders' Proposed Schedule
Monday, March 2, 2009	n/a	Due date for Founders' 1850-word brief on two new issues raised in the Second Notice of Appeal October 6 brief is not withdrawn and is allowed to stand
Monday, April 6, 2009	Due date for first brief on cross-appeal	Due date for second brief on consolidated cross-appeal to be filed by Facebook parties Brief not to exceed 15,400 words
Tuesday, May 5, 2009	Due date for second brief on cross-appeal	Due date for third brief on consolidated cross-appeal to be filed by Founders Optional cross-appeal reply brief due 14 days after service of third brief
Thursday, June 4, 2009	Due date for third brief on cross-appeal Optional cross-appeal reply brief due 14 days after service of third brief	n/a

Date: February 4, 2009

Respectfully submitted,

/s/ Evan A. Parke

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CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants.

DATED: February 4, 2009

Respectfully submitted,

/s/ Evan A. Parke

Evan A. Parke