

Case Nos. 08-16745, 08-16873, 09-15021

R E C E I V E D
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U.S. COURT OF APPEALS

MAY 26 2010

FILED _____
DOCKETED _____
DATE INITIAL

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE FACEBOOK, INC. and MARK ZUCKERBERG,

Plaintiffs-Appellees,

v.

CAMERON WINKLEVOSS, TYLER WINKLEVOSS, DIVYA NARENDRA,

Defendants-Appellants.

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

**MOTION (1) TO DISMISS CROSS-APPEALS; AND (2) TO FILE
APPELLEES' BRIEF IN OPPOSITION IN EXCESS OF WORD LIMIT;
DECLARATION OF MONTE COOPER IN SUPPORT**

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Attorneys for Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellees state that Mark Zuckerberg is an individual. Facebook, Inc. is a privately held corporation. No publicly held corporation owns 10% or more of Facebook, Inc.'s stock.

Appellees The Facebook, Inc. and Mark Zuckerberg (collectively, “Facebook”) pursuant to FRAP 42(b) and 9th Circuit Rule 32-2, file this Motion (1) to Dismiss Cross-Appeals; and (2) to File Appellees’ Brief in Opposition in Excess of Word Limit. Appellants Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra (the “ConnectU Founders”) have been notified of the filing of this motion. Appellants do not oppose the motion to dismiss the cross-appeals in Case Nos. 08-16849 and 09-15133, but have not yet taken a position on whether they oppose the Motion to File an Over-Length brief. *See* Declaration of Monte M.F. Cooper (“Cooper Decl.”), Ex. 1.

Good cause and substantial need exists pursuant to 9th Cir. Rule 32-2 that warrants Facebook’s being permitted to file Brief in Opposition in excess of 14,000 words. Such good cause and substantial need arise from the fact that this Court already has granted the CU Founders the exact same relief and authorized them to file an Opening Appellant Brief of 17,500 words, and Facebook’s Brief in Opposition actually is more than 1,000 words shorter than the one the CU Founders filed.

I. UNOPPOSED MOTION TO DISMISS CROSS-APPEAL PURSUANT TO FRAP 42(B)

In this case, the district court enforced a settlement agreement against ConnectU and the CU Founders. The CU Founders appeal the judgment on various grounds. When they originally filed their appeals, though, Facebook

initially contemplated contingent cross-appeals to ConnectU's appeal in Case No. 08-16745, and the CU Founders appeals in Case Nos. 08-16873 and 09-15021. The contingent cross-appeals challenged the district court's decisions prior to settlement to dismiss the CU Founders from the underlying case for lack of personal jurisdiction, and to deny sanctions against the defendants related to their conflicting positions as to such jurisdiction. *See Vizcaino v. U.S. Dist. Ct.*, 184 F.3d 1070, 1070 (9th Cir. 1999) (order amending opinion) (noting availability of contingent cross-appeals). These contingent cross-appeals were assigned Case Nos. 08-16849 and 09-15133, and were ultimately consolidated with the CU Founders' and ConnectU's own appeals. *See Dkt. Nos. 22 & 94.*

The CU Founders themselves appear now in these remaining consolidated appeals, because (1) the District Court denied their request to intervene, having found they were already subject to the Court's personal jurisdiction; and (2) in the settlement agreement, they agreed that any enforcement action could be brought in the district court in California. However, by order dated December 11, 2009, the Court dismissed ConnectU as an appellant, but permitted the CU Founders to intervene in ConnectU's original appeal, Case No. 08-16745. *See Dkt. No. 94.*

Facebook's contingent cross-appeals will be moot if Facebook prevails and this Court affirms the enforcement action against the CU Founders. On reflection, Facebook has decided not to burden this Court with additional briefing that is only

contingent in nature. That said, Facebook does wish to preserve the right to appeal the personal jurisdiction and sanctions issues later, should this Court decide not to enforce the settlement agreement and instead to restore the case to the docket in California.

Accordingly, Facebook moves pursuant to FRAP 42(b) for voluntary dismissal of its contingent cross-appeals in Case Nos. 08-16849 and 09-15133. The issues raised in the cross-appeals have not yet been briefed, so no party will be prejudiced by this request. The CU Founders do not oppose dismissal. Cooper Decl., Ex. 1. However, they have not taken a position on whether the dismissal should be with or without prejudice. *See id.* ¶ 8 & Ex. 2. Dismissal should be without prejudice and without any award of costs, because the cross-appeals always were contingent in nature, and Facebook is taking this step in deference to this Court's busy docket, to narrow the issues that this Court needs to decide here and now.

This Court may fix the terms of dismissal pursuant to FRAP 42(b). *See* FRAP 42(b); *Suntharalinkam v. Keisler*, 506 F.3d 822, 823 (9th Cir. 2007) (en banc). Because the issues on contingent cross-appeal have not even been briefed, and because the CU Founders' position will not be harmed by dismissal without prejudice, this Court should grant dismissal of Facebook's cross-appeals without prejudice and should order that the parties bear their own costs. *Suntharalinkam*,

506 F.3d at 823 (overruling government's request that voluntary dismissal be conditioned upon payment of costs).

II. MOTION TO FILE OVER-LENGTH BRIEF PURSUANT TO CIRCUIT RULE 32-2

With the dismissal of its cross-appeals, Facebook's Brief in Opposition now is limited pursuant to FRAP 32(a)(7) to 14,000 words. The word count of the attached brief is 16,272 words. However, Facebook can demonstrate the diligence and substantial need required by Circuit Rule 32-2 to exceed the 14,000 word limit prescribed by FRAP 32(a)(7). Cooper Decl. ¶¶ 3-4. Facebook thus respectfully requests that this Court grant permission to exceed the 14,000 word limit by 2,270 words.

In particular, on March 29, 2010, this Court granted in part the CU Founders leave to file an oversized Opening Brief. *See* Dkt No. 135. This Court instructed the CU Founders that their Opening Brief was not to exceed 17,500 words. *Id.* Subsequently, on April 26, 2010, the CU Founders filed their Opening Brief, and certified that it contained 17,324 words. *See* Appellants' Opening Brief, "Certificate of Compliance Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit Rule 32-1 For Case Number C 07-01389." *See also* Cooper Decl. ¶ 2.

In responding to the CU Founders over-length brief with an Appellee Brief that actually is shorter in terms of content, Facebook's counsel has used diligent efforts and responded to the CU Founders as efficiently as practical. Cooper Decl.

¶¶ 3-4. As reflected by the fact this Court already has granted the CU Founders leave to file an over-length brief, these consolidated appeals present an unusual situation. *Id.* The numerous arguments raised by the ConnectU Founders in the additional 3,324 words beyond those permitted by FRAP 32(a)(7)(b)(i), including the CU Founders raising new issues that were not even presented to the district court, demonstrate that there is substantial need for Facebook to respond with more than 14,000 words. *Id. Cf. United States v. Molina-Tarazon*, 285 F.3d 807, 808 (9th Cir. 2002) (“To satisfy this standard [set forth in 9th Cir. R. 32-2], counsel must show that the additional space is justified by something unusual about the issues presented, the applicable caselaw or some other aspect of the case”). A section-by-section comparison of the CU Founders’ brief to Facebook’s reveals that at every step of the way, Facebook’s brief is sparer and more parsimonious with words than the CU Founders’. Hence, it also is shorter.

Absent the granting of this motion, Facebook will be unable to fairly present the Court with an adequate analysis of the issues raised in the ConnectU Founders’ oversized Opening Brief. Cooper Decl. ¶¶ 3-4. Facebook will be prejudiced in its efforts to defend itself in this action. Accordingly, Facebook respectfully requests that this Court grant permission to file a brief totaling 16,272 words.

¶

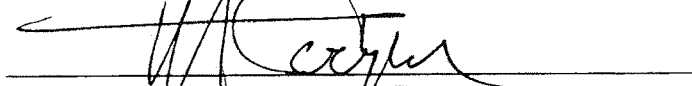
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CONCLUSION

Facebook respectfully requests that the contingent Cross-Appeals corresponding to Case Nos. 08-16849 and 09-15133 be dismissed without prejudice, each party to bear its own appellate costs. Facebook further respectfully requests that it be able to file the attached over-sized Appellees Brief in Opposition.

Dated: May 26, 2010

ORRICK, HERRINGTON & SUTCLIFFE LLP



Monte M.F. Cooper
Attorneys for Plaintiffs-Appellees
THE FACEBOOK, INC., AND
MARK ZUCKERBERG

DECLARATION OF MONTE M.F. COOPER

I, Monte M.F. Cooper, declare as follows:

1. I am Of Counsel at the law firm of Orrick, Herrington & Sutcliffe, LLP counsel for Appellees The Facebook, Inc. and Mark Zuckerberg (collectively, “Facebook”) in these consolidated appeals. I am a member in good standing of the Bars of the states of California and Colorado, as well as the Ninth Circuit. I make this declaration in support of Facebook’s Motion (1) to Dismiss Cross-Appeals; and (2) to File Appellees’ Brief in Opposition in Excess of Word Limit. 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. On March 29, 2010 this Court granted in part Appellants ConnectU, Inc., Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra (the “CU Founders”) leave to file an oversized Opening Brief. *See* Dkt No. 135. This Court instructed the CU Founders that their Opening Brief was not to exceed 17,500 words. *Id.* Subsequently, on April 26, 2010, the CU Founders filed their Opening Brief, and certified that it contained 17,324 words. *See* Appellants’ Opening Brief, “Certificate of Compliance Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit Rule 32-1 For Case Number C 07-01389.”

3. In responding to the CU Founders’ over-length Opening Brief, Facebook’s counsel has produced an Appellee Brief that actually is shorter in

terms of content. Facebook's counsel thus has used diligent efforts and responded to the CU Founders as efficiently as practical. As reflected by the fact this Court already has granted the CU Founders leave to file an over-length brief, these consolidated appeals present an unusual situation. The numerous arguments raised by the ConnectU Founders in the additional 3,324 words beyond those permitted by FRAP 32(a)(7)(b)(i), including the CU Founders raising new issues that were not even presented to the District Court, demonstrate that there is substantial need for Facebook to respond with more than 14,000 words. A section-by-section comparison of the CU Founders' brief to Facebook's reveals that at every step of the way, Facebook's brief is sparer and more parsimonious with words than the CU Founders'. Hence, it is also shorter by more than 1000 words.

4. Absent the granting of this motion, Facebook will be unable to fairly present the Court with an adequate analysis of the issues raised in the ConnectU Founders' oversized Opening Brief. Facebook will be prejudiced in its efforts to defend itself in this action. Accordingly, Facebook respectfully requests that this Court grant permission to file a brief totaling 16,272 words.

5. On May 20, 2010, Facebook's counsel contacted the CU Founders' counsel, to inquire whether they would oppose Facebook's Motion (1) to Dismiss Cross-Appeals; and (2) to File Appellees' Brief in Opposition in Excess of Word Limit. On May 24, 2010, the CU Founders' counsel responded by email, and

stated “We do not oppose Facebook’s anticipated motion to dismiss its cross-appeals.” The CU Founders’ counsel further indicated that “it is unlikely [the CU Founders] would oppose [the motion to file an over-length brief], subject to [the CU Founders] being granted permission to file a reply brief of sufficient length to respond fairly.”

6. Facebook does not object to ConnectU’s prospective concerns about the Reply Brief, and would suggest that the Court consistent with FRAP 32(a)(7)(ii) permit such a Reply to contain “no more than half of the type volume” permitted by this Court’s March 29, 2010 Order – e.g., 8750 words.

7. A true and correct copy of the May 24, 2010 email from the CU Founders’ counsel, Sean SeLegue, to Facebook’s counsel is attached hereto as Exhibit 1.

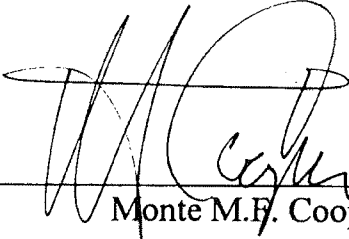
8. On May 26, 2010, Facebook’s counsel contacted the CU Founders’ counsel to inquire whether they would stipulate that dismissal of Facebook’s cross-appeals would be without prejudice, with each party bearing its own costs. On May 26, 2010, the CU Founders’ counsel responded by email stating in pertinent part “I said our clients would not object to Facebook dismissing its cross-appeals, but we did not discuss anything about costs.” The CU Founders’ counsel further stated “we are not in a position to sign a stipulation while I am traveling under

these circumstances,” and instructed “[p]lease file whatever motion you think is appropriate”

9. A true and correct copy of the May 26, 2010 email from the CU Founders’ counsel, Sean SeLegue, to Facebook’s counsel is attached hereto as Exhibit 2.

10. Pursuant to 9th Cir. Rule 32-2, a copy of Facebook’s proposed oversized brief, with the certification required by 9th Cir. Rule 32-1, accompanies this motion.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed this 26h day of May, 2010, at Menlo Park, California



Monte M.F. Cooper

EXHIBIT 1

Cooper, Monte

From: Sean SeLegue [sselegue@howardrice.com]
Sent: Monday, May 24, 2010 10:34 AM
To: Sutton, Theresa A.; John P. Duchemin
Cc: Dalton, Amy; Cooper, Monte
Subject: RE: Facebook's Proposed Redactions

Theresa, I've been travelling abroad so please excuse my delayed response. We do not oppose Facebook's anticipated motion to dismiss its cross-appeals. With regard to the length of the brief, I think it is unlikely we would oppose, subject to the our clients being granted permission to file a reply brief of sufficient length to respond fairly. Can we discuss when after I return at the end of this week?

-----Original Message-----

From: Sutton, Theresa A. [mailto:tsutton@orrick.com]
Sent: Thursday, May 20, 2010 5:26 PM
To: Sean SeLegue; John P. Duchemin
Cc: Dalton, Amy; Cooper, Monte
Subject: RE: Facebook's Proposed Redactions

Sean-

Facebook will be filing a motion to withdraw its Cross-Appeals and to file an overlength brief. Will Appellants oppose these motions? I do not have a word count on the brief yet, but it will not exceed the number of words in Appellants' opening brief.

Please let me know your position on this.
Theresa

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O R R I C K

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"EMF <orrick.com>" made the following annotations.

IRS Circular 230 disclosure:

To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication, unless expressly stated otherwise, was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any tax-related matter(s) addressed herein.

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IN ERROR, ANY REVIEW, USE, DISSEMINATION, DISTRIBUTION, OR COPYING OF THIS E-MAIL IS STRICTLY PROHIBITED. PLEASE NOTIFY US IMMEDIATELY OF THE ERROR BY RETURN E-MAIL AND PLEASE DELETE THIS MESSAGE FROM YOUR SYSTEM. THANK YOU IN ADVANCE FOR YOUR COOPERATION.

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EXHIBIT 2

Cooper, Monte

From: Sean SeLegue [sselegue@howardrice.com]
Sent: Wednesday, May 26, 2010 9:54 AM
To: Sutton, Theresa A.; John P. Duchemin
Cc: Cooper, Monte; Dalton, Amy; Jerome B. Falk, Jr.
Subject: RE: Withdrawal of Cross-Appeals

Theresa: Hold on. I said our clients would not object to Facebook dismissing its cross-appeals, but we did not discuss anything about costs. We can discuss when I return but we are not in a position to sign a stipulation while I am travelling under these circumstances. Please file whatever motion you think is appropriate, and if you would like to propose a stipulation, please send it along for our consideration.

Regards,
Sean

From: Sutton, Theresa A. [mailto:tsutton@orrick.com]
Sent: Wednesday, May 26, 2010 9:04 AM
To: John P. Duchemin
Cc: Sean SeLegue; Cooper, Monte; Dalton, Amy
Subject: Withdrawal of Cross-Appeals

John-

I just left you a voice message. Pursuant to FRAP 42(b), we need to include in our motion to withdraw the cross-appeals language indicating that the parties have stipulated to the dismissal of the cross-appeals and have agreed to bear their own costs.

Would you please reply to this email confirming this understanding, so that we may attach it to our motion today?

Thank you.
Theresa

O
ORRICK

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5/26/2010

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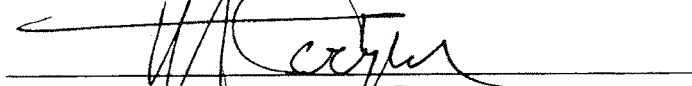
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CONCLUSION

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Dated: May 26, 2010

ORRICK, HERRINGTON & SUTCLIFFE LLP



Monte M.F. Cooper
Attorneys for Plaintiffs-Appellees
THE FACEBOOK, INC., AND
MARK ZUCKERBERG

DECLARATION OF MONTE M.F. COOPER

I, Monte M.F. Cooper, declare as follows:

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2. On March 29, 2010 this Court granted in part Appellants ConnectU, Inc., Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra (the “CU Founders”) leave to file an oversized Opening Brief. *See* Dkt No. 135. This Court instructed the CU Founders that their Opening Brief was not to exceed 17,500 words. *Id.* Subsequently, on April 26, 2010, the CU Founders filed their Opening Brief, and certified that it contained 17,324 words. *See* Appellants’ Opening Brief, “Certificate of Compliance Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit Rule 32-1 For Case Number C 07-01389.”

3. In responding to the CU Founders’ over-length Opening Brief, Facebook’s counsel has produced an Appellee Brief that actually is shorter in

terms of content. Facebook's counsel thus has used diligent efforts and responded to the CU Founders as efficiently as practical. As reflected by the fact this Court already has granted the CU Founders leave to file an over-length brief, these consolidated appeals present an unusual situation. The numerous arguments raised by the ConnectU Founders in the additional 3,324 words beyond those permitted by FRAP 32(a)(7)(b)(i), including the CU Founders raising new issues that were not even presented to the District Court, demonstrate that there is substantial need for Facebook to respond with more than 14,000 words. A section-by-section comparison of the CU Founders' brief to Facebook's reveals that at every step of the way, Facebook's brief is sparer and more parsimonious with words than the CU Founders'. Hence, it is also shorter by more than 1000 words.

4. Absent the granting of this motion, Facebook will be unable to fairly present the Court with an adequate analysis of the issues raised in the ConnectU Founders' oversized Opening Brief. Facebook will be prejudiced in its efforts to defend itself in this action. Accordingly, Facebook respectfully requests that this Court grant permission to file a brief totaling 16,272 words.

5. On May 20, 2010, Facebook's counsel contacted the CU Founders' counsel, to inquire whether they would oppose Facebook's Motion (1) to Dismiss Cross-Appeals; and (2) to File Appellees' Brief in Opposition in Excess of Word Limit. On May 24, 2010, the CU Founders' counsel responded by email, and

stated “We do not oppose Facebook’s anticipated motion to dismiss its cross-appeals.” The CU Founders’ counsel further indicated that “it is unlikely [the CU Founders] would oppose [the motion to file an over-length brief], subject to [the CU Founders] being granted permission to file a reply brief of sufficient length to respond fairly.”

6. Facebook does not object to ConnectU’s prospective concerns about the Reply Brief, and would suggest that the Court consistent with FRAP 32(a)(7)(ii) permit such a Reply to contain “no more than half of the type volume” permitted by this Court’s March 29, 2010 Order – e.g., 8750 words.

7. A true and correct copy of the May 24, 2010 email from the CU Founders’ counsel, Sean SeLegue, to Facebook’s counsel is attached hereto as Exhibit 1.

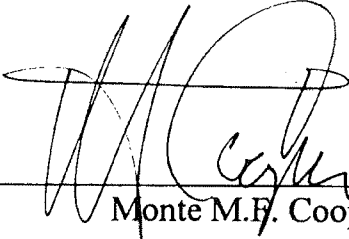
8. On May 26, 2010, Facebook’s counsel contacted the CU Founders’ counsel to inquire whether they would stipulate that dismissal of Facebook’s cross-appeals would be without prejudice, with each party bearing its own costs. On May 26, 2010, the CU Founders’ counsel responded by email stating in pertinent part “I said our clients would not object to Facebook dismissing its cross-appeals, but we did not discuss anything about costs.” The CU Founders’ counsel further stated “we are not in a position to sign a stipulation while I am traveling under

these circumstances,” and instructed “[p]lease file whatever motion you think is appropriate”

9. A true and correct copy of the May 26, 2010 email from the CU Founders’ counsel, Sean SeLegue, to Facebook’s counsel is attached hereto as Exhibit 2.

10. Pursuant to 9th Cir. Rule 32-2, a copy of Facebook’s proposed oversized brief, with the certification required by 9th Cir. Rule 32-1, accompanies this motion.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed this 26h day of May, 2010, at Menlo Park, California



Monte M.F. Cooper

EXHIBIT 1

Cooper, Monte

From: Sean SeLegue [sselegue@howardrice.com]
Sent: Monday, May 24, 2010 10:34 AM
To: Sutton, Theresa A.; John P. Duchemin
Cc: Dalton, Amy; Cooper, Monte
Subject: RE: Facebook's Proposed Redactions

Theresa, I've been travelling abroad so please excuse my delayed response. We do not oppose Facebook's anticipated motion to dismiss its cross-appeals. With regard to the length of the brief, I think it is unlikely we would oppose, subject to the our clients being granted permission to file a reply brief of sufficient length to respond fairly. Can we discuss when after I return at the end of this week?

-----Original Message-----

From: Sutton, Theresa A. [mailto:tsutton@orrick.com]
Sent: Thursday, May 20, 2010 5:26 PM
To: Sean SeLegue; John P. Duchemin
Cc: Dalton, Amy; Cooper, Monte
Subject: RE: Facebook's Proposed Redactions

Sean-

Facebook will be filing a motion to withdraw its Cross-Appeals and to file an overlength brief. Will Appellants oppose these motions? I do not have a word count on the brief yet, but it will not exceed the number of words in Appellants' opening brief.

Please let me know your position on this.
Theresa

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O R R I C K

Theresa A. Sutton
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"EMF <orrick.com>" made the following annotations.

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EXHIBIT 2

Cooper, Monte

From: Sean SeLegue [sselegue@howardrice.com]
Sent: Wednesday, May 26, 2010 9:54 AM
To: Sutton, Theresa A.; John P. Duchemin
Cc: Cooper, Monte; Dalton, Amy; Jerome B. Falk, Jr.
Subject: RE: Withdrawal of Cross-Appeals

Theresa: Hold on. I said our clients would not object to Facebook dismissing its cross-appeals, but we did not discuss anything about costs. We can discuss when I return but we are not in a position to sign a stipulation while I am travelling under these circumstances. Please file whatever motion you think is appropriate, and if you would like to propose a stipulation, please send it along for our consideration.

Regards,
Sean

From: Sutton, Theresa A. [mailto:tsutton@orrick.com]
Sent: Wednesday, May 26, 2010 9:04 AM
To: John P. Duchemin
Cc: Sean SeLegue; Cooper, Monte; Dalton, Amy
Subject: Withdrawal of Cross-Appeals

John-

I just left you a voice message. Pursuant to FRAP 42(b), we need to include in our motion to withdraw the cross-appeals language indicating that the parties have stipulated to the dismissal of the cross-appeals and have agreed to bear their own costs.

Would you please reply to this email confirming this understanding, so that we may attach it to our motion today?

Thank you.
Theresa

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ORRICK

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www.orrick.com

"EMF <orrick.com>" made the following annotations.

5/26/2010

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