

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLRB HANSON INDUSTRIES, LLC
d/b/a INDUSTRIAL PRINTING, and
HOWARD STERN, on behalf of
themselves and all others similarly
situated,

Plaintiffs-Appellees,

v.

WEISS & ASSOCIATES, PC,

Objector-Appellant,

v.

GOOGLE, INC.,

Defendant-Appellee.

No. 09-17380

APPELLEES' OPPOSITION TO
APPELLANT WEISS &
ASSOCIATES, P.C.'S OUT OF
TIME MOTION FOR EXTENSION
OF TIME TO FILE REPLY BRIEF

Appellant Weiss & Associates, P.C.'s "Out of Time Motion for an Extension of Time to File Reply Brief" should be denied because Appellant has failed to demonstrate good cause under Federal Rule of Appellate Procedure 26(b) and has failed to make the requisite showing of diligence and substantial need under Circuit Rule 31-2.2(b); and has failed to meet the procedural requirements of Circuit Rule 31-2.2. Moreover, the resolution of this case has already been delayed substantially, and Appellant's request of nearly a month of extra time is unjustifiable and unnecessary and will only serve to continue to delay the distribution of a large settlement fund to the class members.

Rule 26(B) of the Federal Rules of Appellate Procedure states that the court may grant an extension of time for “good cause.” Circuit Rule 31-2.2(b) further mandates that a written motion for an extension of time be “supported by a showing of diligence and substantial need.” Appellant has made no such showing.

Indeed, Appellant does not even claim good cause, diligence, or substantial need. Instead, Appellant merely cites to an alleged “calendar error.” But Appellant’s “calendar error” explanation is dubious at best, is supported by a number of untrue statements, and does not demonstrate good cause.

Appellant makes the following misstatements in support of its “calendar error” excuse:

First, Appellant wrongly states that its brief was “deemed filed” on February 23, 2010. (Mot. ¶ 1.) On January 29, 2010, Appellant requested and received a fourteen-day extension on its opening brief due that day, making its brief due on February 12, 2010. (Docket Entry No. 22.) Appellant filed its brief on February 12, 2010.

Second, Appellant wrongly states that Appellees’ “Answer Briefs were due on March 25, 2010.” (Mot. ¶ 2.) When Appellant received a telephonic extension for its opening brief, Appellant was informed that the answering brief was due March 15, 2010. (Docket Entry No. 22.) The court’s docket entry states:

14 day oral extension of time granted to appellant Weiss & Associates, PC. The opening brief is due 2/12/2010; the answering

brief is due 3/15/2010; and the optional reply brief is due 14 days after service of the answering brief.

(Docket Entry No. 22.)

Third, Appellant wrongly states that “the last Answer Brief was filed on Tuesday, March 16, 2010.” (Mot. ¶ 4.) Appellees filed their brief on the date it was due – March 15, 2010.

Finally, Appellant wrongly states that its reply brief “should have been filed and served on Tuesday, March 30, 2010.” (Mot. ¶ 4.) Pursuant to Federal Rules of Appellate Procedure 26(c) and 31(a)(1), as well as the Court’s order (Docket Entry No. 22), its reply was due April 1, 2010.

Appellant also asserts that it erroneously calendared its reply brief as due on April 8, 2010. (Mot. ¶ 3.) To make such an error, Appellant would have had to ignore both the Court’s oral extension and the Court’s subsequent docket entry setting forth the due date for Appellees’ answering brief. Moreover, although Appellant claims to have made the calendaring “error” in reliance on Federal Rule of Appellate Procedure 31(a)(1), it completely ignored Rule 31(a)(1)’s requirement that a reply brief be filed “within 14 days after service of the appellee’s brief” – which was served by the Appellate ECF system on March 14, 2010. Fed. R. App. Proc. 31(a)(1) (emphasis added). A “calendaring error” that ignores clear deadlines and federal rules does not show good cause or diligence; nor does the failure to submit an optional reply brief show the requisite substantial need. *See*

Magraff v. Lowes HIW, Inc., 217 Fed. Appx. 759, 762-63, 2007 WL 521179, at *2 (10th Cir. 2007) (finding no abuse in discretion in district court’s conclusion “that the calendaring error caused the delay and did not constitute excusable neglect or good cause to justify an extension to file the notice of appeal”); *Hubbard v. Twin Oaks Health & Rehabilitation Ctr.*, No. 03-0725, 2004 WL 3643820, at *1 (E.D. Cal. July 15, 2004) (denying motion for extension of expert disclosure deadline where movants “provide no showing of good cause, but instead admit that a calendaring error and lack of due diligence are the cause of their oversight”).

Appellant has also failed to meet the procedural requirements of Circuit Rule 31-2. Circuit Rule 31-2.2(b) requires that any motion for extension be filed “at least 7 days before the expiration of the time prescribed for filing the brief.” Appellant filed its motion on April 8, 2010, a full week **after** its reply brief was due.¹ The motion should be denied on this basis alone.

Circuit Rule 31-2.2 also requires the motion to “be accompanied by a declaration stating,” among other things, “movant’s representation that movant has exercised diligence and that the brief will be filed within the time requested.” Circuit Rule 31-2.2(b)(5). Appellant not only failed to support its motion with a declaration, but the motion itself demonstrates that Appellant failed to exercise

¹ Indeed, the motion was not even filed 7 days before the erroneous deadline Appellant claims to have calendared.

diligence. Indeed, Appellant seeks a **26 day** extension (until April 27, 2010, which is 19 days after it allegedly **thought** the brief was due) without any explanation whatsoever as to why it needs almost **four more weeks** (for a total of **43 days** from the date of Appellee's answering brief) to draft an optional reply brief. The motion should be denied on this basis as well.

Finally, Appellees oppose the instant motion because an extension will serve only to further delay the resolution of this appeal. This appeal has already delayed the distribution of a \$ 20 million settlement to class members who have been waiting almost five years since the case was filed to recover their losses. Appellant's litigation behavior evidences no interest in actually moving its appeal forward, but rather a desire simply to hold up the final resolution of this case. *See* Appellees' Mot. to Dismiss Appeal, Docket Entry No. 7111769, at 2 n.1 (discussing history of Appellant's principal and Appellant's attorneys of objecting to class settlements). In light of Appellant's complete failure to abide by the requirements of this Court's Circuit Rules—as well as Appellant's multiple requests for extensions, its complete lack of diligence, and its failure to show good cause—the Court should deny Appellant's out-of-time motion and move forward toward a resolution of this appeal.

For the foregoing reasons, Appellant's motion for an extension should be denied.

Dated: April 9, 2010.

Respectfully submitted,

LESTER L. LEVY
MICHELE FRIED RAPHAEL
WOLF POPPER LLP
845 Third Avenue
New York, NY 10022
Telephone: (212) 759-4600
Facsimile: (212) 486-2093
E-Mail: llevy@wolfpopper.com
E-Mail: mraphael@wolfpopper.com

STEPHEN D. SUSMAN (TXB #19521000)
SUSMAN GODFREY L.L.P.
1000 Louisiana Street, Suite 5100
Houston, TX 77002
Telephone: (713) 651-9366
Facsimile: (713) 654-6666
E-Mail: ssusman@susmangodfrey.com

MARC M. SELTZER (CSB #54534)
SUSMAN GODFREY L.L.P.
1901 Avenue of the Stars, Suite 950
Los Angeles, CA 90067-6029
Telephone: (310) 789-3100
Facsimile: (310) 789-3150
E-Mail: mseltzer@susmangodfrey.com

RACHEL S. BLACK (WSBA #32204)
DANIEL J. SHIH (WSBA #37999)
SUSMAN GODFREY L.L.P.
1201 Third Avenue, Suite 3800
Seattle, WA 98101
Telephone: (206) 516-3880
Facsimile: (206) 516-3883
E-Mail: rblack@susmangodfrey.com
E-Mail: dshih@susmangodfrey.com

By /s/ Daniel J. Shih
Daniel J. Shih
Attorneys for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 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.

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William M. Audet
Adel A. Nadji
Kevin Lee Thomason
AUDIT & PARTNERS, LLP
221 Main Street, Suite 1460
San Francisco, CA 94105

David T. Biderman,
Farschad Farzan
M. Christopher Jhang
Lisa Delehunt Olle
PERKINS COIE LLP
Four Embarcadero Center , Suite 2400
San Francisco, CA 94111-4131

Alan J. Sherwood
LAW OFFICE OF ALAN J. SHERWOOD
1300 Clay Street, Suite 600
Oakland, CA 94612

/s/ Daniel J. Shih

Jami L. Grounds

From: ca9_ecfnoticing@ca9.uscourts.gov

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United States Court of Appeals for the Ninth Circuit

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Case Name: CLRB Hanson Industries, LLC, et al v. Weiss & Associates, PC

Case Number: [09-17380](#)

Document(s): [Document\(s\)](#)

Docket Text:

Filed (ECF) Appellees CLRB Hanson Industries, LLC and Howard Stern response opposing motion (,motion to extend time to file brief,motion to file a late brief). Date of service: 04/09/2010. [7295924] (DS)

The following document(s) are associated with this transaction:

Document Description: Main Document

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[STAMP acecfStamp_ID=1106763461 [Date=04/09/2010] [FileNumber=7295924-0]

[14277c21733a82263b8e2ec92efa7457b0ed5c4d91769c78e10c8a133795ca4094915fd02c387f606242f85ff2468a68:

Notice will be electronically mailed to:

Tomlinson, Frank Hilton, Attorney

Gitterman, Judith B., Attorney

Mr. Bacharach, N. Albert, Jr., Attorney

Durie, Daralyn Jeannine, Attorney

Mr. Susman, Stephen D., Attorney

Mr. Kent, Ryan M., Attorney

Mr. Levy, Lester L., Attorney

Mr. Seltzer, Marc Morris, Attorney

Black, Rachel S.

Mrs. Raphael, Michele F., Attorney

Shih, Daniel

Case participants listed below will not receive this electronic notice:

Jhang, M. Christopher

Perkins Coie LLP

Suite 2400

4/9/2010

Four Embarcadero Center
San Francisco, CA 94111-4131

Audet, William M., Attorney
AUDIT & PARTNERS, LLP
Suite 1460
221 Main Street
San Francisco, CA 94105

Biderman, David T., Attorney
Perkins Coie LLP
Suite 2400
Four Embarcadero Center
San Francisco, CA 94111-4131

Nadji, Adel A.
Audet & Partners, LLP
221 Main Street
Suite 1460
San Francisco, CA 94105

Thomason, Kevin Lee
Audet & Partners, LLP
221 Main Street
Suite 1460
San Francisco, CA 94105

Farzan, Farschad
Perkins Coie LLP
Suite 2400
Four Embarcadero Center
San Francisco, CA 94111-4131

Olle, Lisa Delehunt
Perkins Coie LLP
Suite 2400
Four Embarcadero Center
San Francisco, CA 94111-4131

Sherwood, Alan J.
Law Office of Alan J. Sherwood
1300 Clay St.
Suite 600
Oakland, CA 94612

The following information is for the use of court personnel:

DOCKET ENTRY ID: 7295924

RELIEF(S) DOCKETED:

motion to extend time to file brief

motion to file a late brief

DOCKET PART(S) ADDED: 6920509, 6918327, 6918325, 6918326, 6920510