Case No. 08-16745
(Consolidated with Case Nos. 08-16849 and 08-16873)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE FACEBOOK, INC., et al.,

Plaintiffs-Appellees/Cross-Appellants,

v.

CONNECTU, INC. (formerly known as ConnectU, LLC), et al.,

Defendants-Appellants/Cross-Appellees,

and

PACIFIC NORTHWEST SOFTWARE, INC., et al.,

Defendants.

RESPONSE OF CNET NETWORKS, INC. TO APPELLEES/CROSS-APPELLANTS' REQUEST FOR CONTINUANCE OF DEADLINE TO OPPOSE CNET'S MOTION TO INTERVENE AND UNSEAL

From the United States District Court
for the Northern District of California
No. 5:07-CV-01389-JW

HOLME ROBERTS & OWEN LLP
Roger Myers (SBN 146164)
Rachel Matteo-Boehm (SBN 195492)
Katherine Keating (SBN 217908)
560 Mission Street, 25th Floor
San Francisco, CA 94105
Tel: 415/268-2000
Fax: 415/268-1999

Attorneys for Intervenor
CNET NETWORKS, INC.

CORPORATE DISCLOSURE STATEMENT

For the certification required by Federal Rule of Appellate Procedure 26.1, Petitioner CNET Networks, Inc. hereby certifies: CNET Networks, Inc., a Delaware Corporation, is a wholly owned subsidiary of CBS Corporation, a Delaware Corporation whose stock is publicly traded.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

FEDERAL CASES

INTRODUCTION

In essence, the request for an open-ended continuance by Appellees/Cross-Appellants Facebook, Inc. and Mark Zuckerberg ("Facebook") seeks to allow the parties to litigate their appeals in secret indefinitely, as illustrated by the motion to seal the entire Appellants' opening brief filed by the ConnectU, Inc. this week.

Having convinced this Court to seal much of the appellate record based in part on the district court's July 2 order, Facebook contends this Court should not require Facebook to address the many facial invalidities in that order identified in CNET Networks' motion to unseal the appellate record until that order is considered in CNET's petition for writ of mandamus in Case Number 08-74104. Then Facebook argues that the July 2 order cannot be considered by any panel of this Court on the theory that it is not ripe for review even though that same order was ripe enough for Facebook, the ConnectU litigants and this Court (as well as the district court) to rely on it to seal numerous pleadings on appeal and below.

The effect of Facebook's arguments would be to keep the appellate record (and record below) sealed indefinitely without any showing of the "extraordinary justification" necessary to achieve such a result, *Pepsico, Inc. v. Redmond*, 46 F.3d 29, 30 (7th Cir. 1995) (Easterbrook, J., in chambers), and without this Court even considering whether the basis for that sealing met constitutional or common law requirements. Such a result would be untenable and unconstitutional. "In cases

involving a request by the press for access to judicial records, this court has recognized that … delay … can constitute an irreparable injury" because "of the perishable nature of the news." *San Jose Mercury News, Inc. v. U.S. District Court*, 187 F.3d 1096, 1099 (9th Cir. 1999). For that reason, "[t]o delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression." *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994). "'Each passing day [the sealing orders remain in place] may constitute a separate and cognizable infringement of the First Amendment.'" *Id.* (quoting *Nebraska Press Association v. Stuart*, 423 U.S. 1327, 1329 (Blackmun, Circuit Justice 1975)).

Moreover, the sealing in this Court raises issues beyond the July 2 order. Not only were Appellants' emergency motion and Facebook's opposition sealed in their entirety, but, as noted, the ConnectU Appellants have just this week sought to file their appeal under seal.[1] And the parties' requests to seal in this Court are also based in part on two blanket protective orders issued by a California state court and Massachusetts district court in 2006 and 2005 without any particularized showing of good cause and no showing to this Court of the "order[s'] continuing validity" even if they were valid when entered more than "two [and three] years ago." *Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir. 1999).

[1] ConnectU did not serve CNET with its motion. When CNET received electronic notice today that the motion had been filed, it obtained a copy this afternoon.

Thus while it may make sense to consolidate CNET's writ petition and motion to unseal, that would only be appropriate if their consideration is expedited. In the interim, the emergency motion and opposition should be unsealed unless the parties justify in short order the continued wholesale sealing. *Associated Press v. U.S. District Court*, 705 F.2d 1143, 1147 (9th Cir. 1983) (giving parties three days, "until 12:00 noon on May 13," to file "motions to seal any specific documents that they believe should remain sealed," and ordering that any "document now under seal" that is not the subject of such a motion shall "be unsealed immediately"). And ConnectU's motion to seal its Appellants' Brief should be denied. "[T]he parties … must file public briefs." *In re Grand Jury Proceedings of Krynicki*, 983 F.2d 74, 75 (7th Cir. 1992) (Easterbrook, J., in chambers).

I.

CNET'S MOTION SEEKS UNSEALING OF THE APPELLATE RECORD, WHICH IS DISTINCT FROM THE RELIEF SOUGHT IN CNET'S WRIT PETITION, AND REQUIRES IMMEDIATE CONSIDERATION

Facebook's request for a continuance obscures the fact that CNET's motion to unseal in this Court seeks relief that is distinct from the relief sought through its petition for a writ of mandamus directed to the district court. CNET's motion seeks unsealing of ConnectU's emergency motion to stay the judgment and supporting documents, and Facebook's opposition, all filed in this Court.

In their motions to seal in this Court, Facebook and ConnectU "cited no

authority for withdrawing the entire litigation" over ConnectU's emergency motion "from the public record." *In re Krynicki*, 983 F.2d at 75. Instead, they simply argued the appellate motion and opposition related or referred to documents sealed by the district court, Exh. 1 at 1; Exh. 2 at 1-2,[2] which might (or might not, depending on the validity of the sealing below) have justified filing of separate "sealed supplements if necessary to discuss in detail materials that they" believed they were "legally required to keep confidential." *In re Krynicki*, 983 F.2d at 75.

Because the motion and opposition were sealed, there is no way for the public to evaluate the parties' arguments for and against the emergency stay or the Court's decision (which consisted only of the words "Appellant's emergency stay motion is denied"). Exh. 3 at 2; Exh. 4 at 2. The result of "withdrawing [these] element[s] of the judicial process from public view" is that "the ensuing decisions look more like fiat." *In re Krynicki*, 983 F.2d at 75. Independent of any decision the Court may make with respect to the sealing below in ruling on CNET's writ petition, the Court must vacate the wholesale sealing of the motion and opposition absent the "rigorous justification" required for sealing appellate pleadings – particularly since it is impossible for the public to understand and monitor the proceedings and ruling on that motion without access to the pleadings. *Id*.

Moreover, although the issues in CNET's petition – the invalid sealing of

[2] Unless otherwise noted, Exhibit citations are to Exhibits to the Motion to Unseal.

Facebook's motion to enforce the settlement agreement and other documents by the district court and the unwarranted redaction of the transcript of the hearing on that motion – dovetail with some of the issues in CNET's motion to unseal, Facebook's preference to address those issues in an answer to the petition is not a reason to allow it to avoid responding to the motion to unseal. If CNET's motion to unseal is not consolidated with its writ petition for expedited consideration, Facebook should be required to address these issues in response to CNET's motion first, and may refer to those arguments in any subsequent answer to the petition. Such a course of action involves no circumvention of the rule allowing for petitions to be answered only by court order; to the contrary, the possibility that the court might not order Facebook to answer the petition militates ***against*** delaying the time for Facebook to respond to the motion, as the response to the motion that is currently due may be all that Facebook need ever submit on these issues.

Finally, the delay Facebook seeks in ruling on the motion to unseal the appellate pleadings, combined with the expedited briefing schedule ordered in this case, would effectively allow the parties "to hold the entire appellate proceeding off the public record. Such an extraordinary request requires an extraordinary justification, which the parties ha[ve] not supplied." *Pepsico*, 46 F.3d at 30.

II.

THE MOTION IS READY FOR REVIEW BECAUSE THE APPELLATE RECORDS HAVE ALREADY BEEN SEALED AND THE TRIAL COURT'S ORDER HAS FORECLOSED UNSEALING OF THE OTHER RECORDS AT ISSUE

Facebook also argues that CNET's motion is not "ripe for review," on the theory that a magistrate judge may not yet have applied the district court's July 2 order to certain records. But as Facebook's request for continuance apparently recognizes, the July 2 order left the magistrate judge no discretion to unseal anything that Facebook and ConnectU did not agree to unseal.

As the Supreme Court and this Circuit have recognized, "'[t]he fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration' must inform any analysis of ripeness," and both of these factors weigh heavily in favor of the Court's considering CNET's motion as soon as possible. *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568, 581 (1985); *see also, e.g., San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1132 (9th Cir. 1996) ("To determine whether [a party's] claims are ripe for review, we evaluate (1) whether the issues are fit for judicial decision, and (2) whether the parties will suffer hardship if we decline to consider the issues."). Facebook does not dispute that the issues raised in CNET's motion – and its petition – are fully developed and fit for decision, nor does it contend that CNET will not be harmed by delay of this Court's consideration of these issues.

Rather, Facebook's sole argument appears to be that the parties may agree that certain documents sealed pursuant to their blanket stipulated protective order need not be sealed. Request at 6. But the issues to be determined would not change at all – let alone "shrink measurably" – even if the parties ask the magistrate judge to unseal certain documents. *Id*. The question of whether the district court applied the appropriate legal standards in refusing to unseal certain records and in releasing a hearing transcript in redacted form remain the same regardless of whether the parties ask the court to unseal any particular document.[3]

Facebook's disingenuous suggestion that the district court has not yet determined whether the records at issue will be unsealed ignores the fact that the district court determined that (1) because "the terms of the parties' settlement and the related negotiations at their mediation fall within the category of information 'traditionally kept secret,' and are not subject to public disclosure," the confidential motion to enforce the settlement agreement is categorically exempt from the right of access; (2) "a motion by a party to seal a document pursuant to a valid protective order satisfies the 'good cause' standard" and "[i]n this case, all the

[3] Facebook's argument may be more fairly characterized as a mootness argument, as Facebook contends that the future unsealing of certain documents, through the parties' agreement, may make this Court's consideration of certain issues moot. It is well settled, however, that judicial access issues are appropriate for review even after access has been granted because they are capable of repetition, yet evading review. *See, e.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 6 (1986); *Phoenix Newspapers, Inc. v. U.S. District Court*, 156 F.3d 940, 945 (9th Cir. 1998).

sealed documents relating to non-dispositive motions were sealed pursuant to a protective order entered by the Court"; (3) Facebook's motion for partial summary judgment may remain sealed as a non-dispositive record without satisfying the "compelling reasons" standard of *Kamakana v. City of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006); and (4) portions of the transcript of the hearing on the motion to enforce the settlement agreement would remain sealed. Exh. 6-S at 5-9.

The July 2 order thus not only requires continued sealing of the motion to enforce the settlement and parts of transcript, it forecloses the possibility of other records – such as records sealed pursuant to the protective orders – being unsealed. "The issue[s] presented" are "purely legal, … will not be clarified by further factual development" and should be decided. *Thomas*, 473 U.S. at 581; *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1434 (9th Cir. 1996) ("Legal questions that require little factual development are more likely to be ripe.").

That the district court directed a magistrate judge to carry out the administrative work of applying the court's decision to particular documents does not alter the impact of its order, which prevents unsealing of the records at issue. Facebook does not argue – nor could it – that the July 2 order gives the magistrate judge latitude to unseal any of the documents at issue and CNET is not required to undertake the futile efforts of being denied by the magistrate judge before seeking appellate review. *Herrington v. County of Sonoma*, 834 F.2d 1488, 1496 (9th Cir.

1987) (claim not unripe despite technical lack of final agency decision where "efforts [to obtain a favorable final decision] would have been futile").[4]

To the contrary, it is apparent that the magistrate judge is bound by the district court's legal determinations with respect to the documents at issue (that the motion to enforce the settlement agreement will remain sealed because documents related to settlement are categorically exempt from disclosure; that the hearing transcript will be released in redacted form; that documents designated by parties as confidential under a stipulated blanket protective order will remain sealed; and that only a motion that actually disposes of a case is a "dispositive motion" for purposes of applying the "compelling reasons" standard).

As the district court itself recognized, its ruling precludes the magistrate judge from unsealing anything except "[t]o the extent that CNET contends there are other dispositive motions filed with the Court." Exh. 6-S at 7. But since the district court also said the motion for partial summary judgment was not dispositive, *id.* at 7 n.4, and that "the only dispositive motion resolved by the Court was Facebook's confidential motion to enforce the settlement," which it held must remain sealed, *id.* at 7, there is nothing for the magistrate judge to do "consistent with this Order" except keep the records sealed., *id.*, except to the limited extent

[4] Overruled on other grounds by *Nitco Holding Corp. v. Boujikian*, 491 F.3d 1086, 1090 (9th Cir. 2007), as stated in *Baden Sports, Inc. v. Kabushiki Kaisha Molten*, 541 F. Supp. 2d 1151, 1157 (W.D. Wash. 2008).

Facebook and ConnectU decide that certain records may be unsealed.[5]

Significantly, Facebook did not indicate that it considered the July 2 order to be in any way provisional, preliminary or uncertain when it urged this Court to rely on that order to grant Facebook's August 12 motion to seal its opposition to ConnectU's emergency motion to stay the judgment. Exh. 2 at 1-2. Facebook not only cited the July 2 order as a basis for granting its appellate motion to seal but also attached a copy of the order to its motion. Exh. A to Exh. 2.

The same is true of ConnectU's motion this week to seal its Appellants' Brief and Volumes II and III of its Excerpts of Record. ConnectU's new motion expressly asserts that sealing of its entire opening brief and two volumes of exhibits is required "because these documents (i) contain reference to financial terms of a purported settlement agreement that the district court has ordered to be sealed; (ii) include reference to materials that [Facebook has] represented are confidential and covered by operative protective orders; and (iii) include references to materials that the district court has ordered to be filed under seal." ConnectU Motion to Seal at 1. All three of these justifications for sealing the Appellants'

[5] Facebook says "[t]he Magistrate Court requested that the parties identify those documents that need not be considered as covered by the protective orders, which the parties have done," and "[t]he matter remains under consideration." Request at 6 n.2. But CNET has not been served with any such request by the magistrate judge or any withdrawal of confidentiality designations by the parties. Any such communications between the magistrate judge and the parties have been conducted – like so much of this litigation – away from the public eye.

brief refer to the district court's July 2 order, since that order also accepted Facebook's arguments about the binding nature of parties' stipulated protective orders on the courts. ConnectU's motion also attaches the July 2 order (as well as the stipulated protective orders from the California state court and Massachusetts district court), and, again, gives no indication whatsoever that ConnectU views the July 2 order as preliminary, provisional or subject to change.

Even the district court staff has treated the July 2 order as conclusive as to the documents addressed in it. On July 14 – 12 days after the district court issued the July 2 order and apparently as a result of it – district court staff entered notations in the docket that scores of documents previously sealed provisionally – pending a determination on administrative motions to seal – were now sealed. This rush of activity following the July 2 order suggests that the staff, in addition to the parties, considered the order to have resolved the status of the sealing issues.

Finally, of course, the appellate records to which CNET's motion is addressed have been sealed. This Court must decide whether the records at issue – which consist not only of records sealed below but also a motion and opposition prepared for and filed in these consolidated appeals – can legitimately remain sealed, a decision independent of any administrative action the magistrate judge may take. And it must decide whether ConnectU can be allowed to file its Appellants' Brief under seal despite the long-standing rule that briefs are public.

CONCLUSION

"In light of the values which the presumption of access endeavors to promote, … access should be immediate and contemporaneous," *Grove Fresh*, 24 F.3d at 897, because the "effect of the [sealing] order[s] is a total restraint on the public's first amendment right of access even though the restraint is limited in time." *Associated Press*, 705 F.2d at 1147. For these reasons, among others, CNET respectfully requests that Facebook's request for an extension of time to respond to CNET's motion to unseal be denied. Since Facebook's response is due this week, a brief continuance of a week may be appropriate to take into account any time lost while awaiting the Court's ruling on Facebook's request, but not the indefinite extension it seeks. And ConnectU's motion to seal the Appellants' Brief and exhibits should be denied because it is unsupported by the "rigorous justification[s]" necessary to seal appellate briefs. *In re Krynicki*, 983 F.2d at 75.

DATED: October 9, 2008

HOLME ROBERTS & OWEN LLP
ROGER MYERS
RACHEL MATTEO-BOEHM
KATHERINE KEATING

By: /s/ Roger Myers
Roger Myers
Attorneys for CNET Networks, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2008, 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

I. Neel Chatterjee, Esq. Warrington, S. Parker III, Esq. Orrick, Herrington & Sutchcliffe 1000 Marsh Road Menlo Park, CA 94025 Ph: 650-614-7400 Fx: 650-614-7401	**Attorneys for Appellees-Cross-Appellants Facebook, Inc. and Mark Zuckerberg**
Steven C. Holtzmann, Esq. Boise, Schiller & Flexner LLP 1999 Harrison Street, Suite 900 Oakland, CA 94612 Ph: 510-874-1000 Fx: 510-874-1460 David A. Barrett Boies, Schiller & Flexner LLP 575 Lexington Avenue New York, NY 10022 Ph: 212-446-2310 Fx: 212-446-2350 Jonathan M. Shaw, Esq. D. Michael Underhill, Esq. Bois, Schiller & Flexner LLP 5301 Wisconsin Avenue, N.W. Washington, DC 20015	**Attorneys for Defendant ConnectU LLC**

Sean F. O'Shea O'Shea Partners LLP 90 Park Avenue, 20th Floor New York, NY 10016 Ph: 212-682-4426 Fx: 212-682-4437 Mark A. Byrne Byrne & Nixon LLP 800 W. Sixth Street, Suite 430 Los Angeles, CA 90017 Ph: 213-620-8003 Fx: 213-620-8012	**Attorneys for Defendants ConnectU; Tyler Winklevoss, Cameron Winklevoss and Vidya Narendra** **Attorneys for Defendants Tyler Winklevoss, Cameron Winklevoss and Vidya Narendra**
John F. Hornick, Esq. Finnegan Henderson Farabow Garrett & Denner LLP 901 New York Ave, N.W. Washington, DC 20001	

/s/ Roger Myers