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.

REPLY OF CNET NETWORKS, INC. TO APPELLEES/CROSS-APPELLANTS' OPPOSITION TO 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

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INTRODUCTION

CNET's motion to intervene is unopposed, and its motion to unseal the records on appeal is opposed only by Facebook. While its Opposition attempts to minimize what is at stake, Facebook cannot deny that ***all*** pleadings filed in this Court concerning ConnectU's emergency motion remain sealed, ***all*** exhibits related to that motion remain sealed, and a motion to seal the ***entire*** appellant's opening brief and two volumes of exhibits remains pending. These records were not publicly filed with only minimal redactions, but instead sealed in their entirety.

Unable to offer the "extraordinary justification" required for such extensive sealing of the appellate records, *Pepsico v. Redmond*, 46 F.3d 29, 30 (7th Cir. 1995) (Easterbrook, J.), Facebook does not make the attempt. Instead, it asks this Court to delay until the district court reconsiders the sealing below and to defer to the parties' stipulation as to what may be unsealed. But this Court must evaluate de novo the purported legal bases for sealing, *see San Jose Mercury News v. U.S. Dist. Court*, 187 F.3d 1096, 1100 (9th Cir. 1999), especially in this Court. *See Huffy Corp. v. Superior Court*, 112 Cal. App. 4th 97, 105 (2003). And, as it recognized in refusing to grant an indefinite continuance, this Court should not wait. Not only do the First Amendment and common law compel consideration now, but granting CNET's motion will also resolve ConnectU's pending motion to seal and preclude Facebook from filing its briefs under seal in two weeks.

I.

THE DISTRICT COURT HAS RULED, AND NO APPELLATE BRIEFS OR RECORDS SHOULD REMAIN OR BE SEALED WHILE WAITING TO SEE IF AND WHAT THE PARTIES MAY AGREE TO UNSEAL BELOW

Apparently abandoning its prior argument that the sealing issue was not ripe for consideration, Facebook instead contends this Court should "await the decision of the district court" as to what documents should be unsealed. Opp. 5. Because the parties' motions to seal in this Court have been largely based on the sealing below, Facebook's contention might have some superficial appeal ***if the district court had not already ruled on the issues*** raised in CNET's motion in this Court.[1]

In its July 2 order denying CNET's motion to unseal, the district court held: (1) all records related to the motion to enforce the settlement were exempt from the rights of access, and thus must remain sealed (along with parts of the transcript of the hearing on that motion); (2) the remaining records, including Facebook's motion for partial summary judgment, were non-dispositive; and (3) the non-dispositive records were sealed pursuant to stipulated protective orders, and thus good cause existed to keep them under seal. Exh. S at 4-9 & n.4.

That the July 2 order resolved these issues is illustrated not only by the parties' reliance on that order to justify their motions to seal in this Court, but also

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[1] That was the circumstance in the only authority Facebook cites, in which a journalist moved to unseal in this Court without first moving to unseal below, and thus this Court referred the motion to the district court for an initial determination. *United States v. Comprehensive Drug Testing* 513 F.3d 1085, 1116 (9th Cir. 2008).

by what Facebook is asking this Court to await – the magistrate judge's rubber stamp of the parties' stipulation as to what they are willing to unseal. Opp. 4-5.

But this Court has already instructed that the "parties" cannot be allowed to resolve "the rights of others," such as CNET and the public, to judicial records. *Phoenix Newspapers, Inc. v. U.S. Dist. Court*, 156 F.3d 940, 951 (9th Cir. 1998). Courts "cannot abdicate [their] responsibility ... to determine whether filings should be made available to the public," and "certainly should not turn this function over to the parties." *Proctor & Gamble v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996); *accord, e.g., Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir. 1999) (denying motion to seal on appeal based on district court order improperly allowing parties to decide what to seal); *s.a.r.l. Orliac v. Berthe*, 765 F.2d 30, 31 (2d Cir. 1985) (Pratt, J.) (denying motion to seal appellate briefs and records based on parties' stipulation).

Consequently, there is no basis for this Court to await, let alone defer to, whatever the parties agree to unseal below – especially since ConnectU's motion to seal its appellate brief has been pending since October 6 and, unless the Court rules, Facebook will no doubt move to seal its brief due on November 5. Instead, the Court should not only unseal the records Facebook agrees may be unsealed, it should grant CNET's motion now, before Facebook attempts to file its briefs under seal, and then deny ConnectU's pending motion to seal its brief.

II.

FACEBOOK'S INABILITY TO JUSTIFY SEALING ITS MOTION TO ENFORCE THE SETTLEMENT AND RELATED RECORDS, OR CLOSING THE HEARING ON THAT MOTION, ELIMINATES THE MAIN BASIS ON WHICH SEALING IN THIS COURT HAS BEEN BASED

Though it insists the district court correctly held that all records related to Facebook's motion to enforce the settlement are categorically exempt from the right of access to court records – and that the same reasoning required the court to seal portions of the hearing on that motion – Facebook cites no authority so holding and fails to address, let alone refute, any of the authority to the contrary. And while it attempts to justify the procedural deficiencies below, even Orwell could not transform what occurred – waiting until the hearing to tell the press it was closing the courtroom, then denying its request for counsel to be heard – into adequate notice and a reasonable opportunity to object. Because neither the procedural nor substantive tests for closure and sealing were met, all appellate records sealed on the basis of those orders below must be unsealed.

A. Facebook Cites No Authority Creating A Categorical Exemption From Access For Dispositive Motions To Enforce Settlements, And It Fails To Address The Authority Rejecting All Attempts To Seal Such Motions

Instead of addressing the authority refusing to allow sealing of motions to enforce or approve settlements, Facebook notes that this Court has said the right of access "does not apply to records that have 'traditionally been kept secret for important policy reasons,'" Opp. 9 (quoting *Kamakana v. City and County of*

Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006)) (further quotation omitted), and tries to extend that exemption to dispositive civil motions to enforce settlements.

But *Kamakana* rejected an effort to extend the "narrow range of [exempt] documents" to civil records. 447 F.3d at 1178. It thus remains the case that this Court has only "identified two types of documents" as "'traditionally kept secret,'" grand jury transcripts and pre-indictment warrant materials. *Id.* at 1185. And even "documents we have identified as 'traditionally kept secret' are not sacrosanct," so that "[s]imply invoking a blanket claim, such as privacy ... will not, without more, suffice to exempt a document from the public's right of access." *Id.* at 1185 ("Few documents are categorized thus because the consequences are drastic.").

As for the cases Facebook cites to support extending this "narrow" exemption to this case, they all involved "[s]ettlement techniques," like settlement conferences, which are closed to facilitate reaching a settlement. *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900, 903 (6th Cir. 1988); *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976 (6th Cir. 2003). As the Second Circuit explained in the other case Facebook cites, there is a material difference in the access analysis between "settlement conferences ... and settlement conference statements," to which access is generally denied, and motions for "judicial ratification or rejection" of a settlement, which "must become a public record" and for which there "must be a proceeding in open court." *U.S. v. Glens*

Falls Newspapers, Inc., 160 F.3d 853, 856-57 (2d Cir. 1998).

Thus these cases are consistent with those cited by CNET, and not addressed by Facebook, which recognize that, "[h]aving undertaken to utilize the judicial process to interpret [a] settlement and to enforce it, the parties are no longer entitled to invoke the confidentiality ordinarily accorded settlement agreements. Once a settlement is filed in the district court, it becomes a judicial record, and subject to the access accorded such records." *Bank of America Nat'l Trust v. Hotel Rittenhouse Associates*, 800 F.2d 339, 345 (3d Cir. 1986) (reversing order sealing motion to enforce settlement and related records); *Jessup v. Luther*, 277 F.3d 926 (7th Cir. 2002) (reversing order denying motion to unseal settlement filed for court approval); *U.S. ex rel. McCoy v. California Medical Review*, 133 F.R.D. 143 (N.D. Cal. 1990) (denying motions to close settlement hearing and seal related pleadings, to which First Amendment and common law rights of access attached).[2]

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[2] Aware that the weight of authority holds that settlements filed for court approval or enforcement are subject to the right of access, Facebook now argues that the "modest redaction" of the settlement terms in the order granting the motion to enforce was necessary to "protect Facebook's proprietary financial information." Opp. 9-10. But this not only overlooks that the motion to enforce and the agreement remain sealed, it also was not the basis on which the district court redacted this information. Exh. S at 5 & n.3. Moreover, simply asserting the information was "proprietary" and "financial" does not satisfy the stringent standard for redacting dispositive records and transcripts. *See, e.g.*, *Kamakana*, 447 F.3d at 1184 (invoking a "general category" as basis for protection insufficient to meet compelling reasons standard); *Phoenix Newspapers*, 156 F.3d at 950 ("'general statements' which simply stated that security interests compelled closure" insufficient to establish compelling interest to seal or redact transcripts).

B. Facebook Also Cites No Authority Holding That The District Court's Announcement That It Was Closing The Hearing, And Its Refusal To Allow Counsel For The Press Time To Appear And Object, Provided Meaningful Notice And A Reasonable Opportunity To Be Heard

The unredacted transcript of the closed June 23 hearing should be unsealed because the same fatally flawed analysis used to seal the motion was cited to justify redacting the transcript. Exh. S at 8-9. It should also be unsealed because Facebook's contention that the closure was procedurally proper is without merit.

"Without adopting an inflexible rule," this Court has recognized that notice should come a "reasonable time before" closure. *U.S. v. Brooklier*, 685 F.2d 1162, 1168 (9th Cir. 1982). Unlike where no advance notice is possible because a surprise closure motion is made orally in court, the district court secretly discussed closure with the parties five days before the hearing, yet unreasonably provided no advance notice. Instead, it waited until the hearing to announce its "inten[t] to close the courtroom to seal the record of these proceedings." Exh. N at 6.

Nor did the district court provide a "reasonable opportunity to state ... objections." *Oregonian Pub. Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1466 (9th Cir. 1990). After asking if there were "any objections," Exh. N at 6, the court refused to grant the press a brief continuance to present those objections through counsel before ejecting the reporters. *Id.* at 7-10. This hardly constitutes the "reasonable steps" required to provide those present "an opportunity to submit their views to the court before exclusion is accomplished." *Brooklier*, 685 F.2d at 1168. Rather,

"[t]he record does not demonstrate that any [such] steps ... were taken here." *Id.*[3]

III.

FACEBOOK ALSO FAILED TO JUSTIFY SEALING IN THIS COURT ON THE BASIS OF THE PARTIES' CONFIDENTIALITY DESIGNATION WITHOUT A PARTICULARIZED SHOWING OF GOOD CAUSE

The parties also sought sealing in this Court based on the ruling below that sealing a document pursuant to a protective order "satisfied the 'good cause' standard" for sealing "documents relating to non-dispositive motions." Exh. S at 6. Although not raised in its motion to seal in this Court, Facebook now also claims it should be allowed to keep records sealed to protect trade secrets and proprietary information. Opp. 6.[4] But Facebook has never established good cause or shown that "any of these documents contain a trade secret or something comparable whose economic value depends on its secrecy." *Baxter Int'l v. Abbott Labs.*, 297 F.3d 544, 547 (7th Cir. 2002) (Easterbrook, J.) (denying sealing on appeal).

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[3] Contrary to Facebook's suggestion, providing notice and an opportunity to object would not have resulted in a "'material delay in the underlying proceedings.'" Opp. 11 (quoting *Brooklier*, 685 F.2d at 1168). The court could have required notice when it discussed closure with the parties five days in advance. Exh. S at 3. Moreover, the motion to enforce had been pending for months, and a delay of an hour or two to allow counsel to appear would not have been material.

[4] Puzzlingly, Facebook contends "[CNET] does not claim that the court erred when it applied [the] 'compelling interest' standard to the motions that it did." Opp. 8. But the court did not apply the compelling interest (or compelling reasons) standard. Instead, it held that records related to the only motion it considered to be dispositive – Facebook's motion to enforce the settlement – could be sealed without meeting ***any*** standard, on the theory they are "traditionally kept secret." It never considered the other interests Facebook asserts in its Opposition and never applied a good cause – let alone a compelling interest – test to them.

A protective order can only justify sealing if the court has already found that "particularized harm will result from disclosure of information" and "determined that 'good cause' exists to protect this information from being disclosed to the public." *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1211, 1213 (9th Cir. 2002). Where, as here, "the parties had simply stipulated to the protective order, a particularized showing of 'good cause' to keep the documents under seal had never been made to the court as required." *Kamakana*, 447 F.3d at 1176.

Facebook also errs in asserting "CNET, not Facebook, bears the burden of establishing a basis for unsealing" records sealed pursuant to a stipulated protective order. Because Facebook "has not ... shown ... specific harm ... that it expects will arise from disclosure of any particular documents," it "failed to meet the [initial] burden imposed by Rule 26(c) of making a 'particular showing' of good cause." *Foltz v. State Farm Mutual Auto. Ins.*, 331 F.3d 1122, 1131 (9th Cir. 2003).

This is no less true of Facebook's claim that the records contain trade secrets and proprietary information. Opp. 6-8. Facebook must show that the records contain a trade secret or something akin to a trade secret. *Baxter Int'l*, 297 F.3d at 547; *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 663 (3d Cir. 1991) ("information alleged to be confidential 'is not entitled to the same level of protection from disclosure as trade secret'"); *Littlejohn v. BIC Corp.*, 851 F.2d 673, 685 (3d Cir. 1988). It has not done so.

CONCLUSION

Tellingly, Facebook now concedes there was "no need to seal the vast majority" of the records at issue. Opp. 2. But the cure for this belated admission is not for this Court to defer to the parties' stipulation as to what may be unsealed. Indeed, the district court's deferral to the parties' stipulations is what created this problem, which it compounded when it attempted to justify its actions by creating categorical exemptions to the right of access that violate the First Amendment and common law, and on which the parties then seized to justify sealing on appeal.

Rather, the cure is for this Court to correct those constitutional and legal errors, to vacate the sealing orders in this Court and to deny the pending and any future motions to seal. As Judge Easterbrook asked in denying similar motions to seal appellate records, "Have the litigants ... done more to justify the sealing of the briefs than the litigants in cases such as *Pentagon Papers*, where disclosure was said to threaten the national security, and *The Progressive*, where disclosure was said to threaten the survival of mankind?" *In re Krynicki*, 983 F.2d 74, 76 (7th Cir. 1992) (Easterbrook,. J.). "Not exactly." *Id.*

DATED: October 24, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 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:

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