

ORIGINAL

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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE FACEBOOK, INC. and MARK ZUCKERBERG,

Plaintiffs-Appellees,

v.

CONNECTU, INC. (formerly known as CONNECTU LLC), 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

**NOTIFICATION OF NECESSITY TO FILE
APPELLEES' SUPPLEMENTAL EXCERPTS OF RECORD
VOLUMES 2 AND 3 UNDER SEAL**

I. Neel Chatterjee
Monte Cooper
Theresa A. Sutton
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, CA 94025
(650) 614-7400

E. Joshua Rosenkranz
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000

Theodore W. Ullyot
Colin S. Stretch
Facebook, Inc.
1601 S. California Avenue
Palo Alto, CA 94304
(650) 543-4800

Attorneys for Appellees

RECEIVED
OFFICE OF THE CLERK
U.S. COURT OF APPEALS
PUBLIC INFORMATION UNIT
2010 JUN 21 PM 3:23
FILED
DOCKETED
DATE INITIAL

Pursuant to Ninth Circuit Rule 27-13, Appellees The Facebook, Inc. and Mark Zuckerberg (collectively, “Facebook”) respectfully hereby notify this Court as to the necessity to file under seal Volumes 2 and 3 of the June 16, 2010, Appellees’ Supplemental Excerpts of Record.

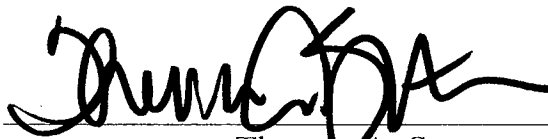
The Appellees’ Supplemental Excerpts of Record include documents filed under seal in this proceeding and proceedings below. These sealed materials contain information designated confidential by one or more of the parties, the disclosure of which is governed by the January 23, 2006 Stipulated Protective Order. The Protective Order is attached hereto as Exhibit A.

In addition, some of the terms of the parties’ Settlement Agreement also are protected from public disclosure by the District Court’s July 2, 2008, Order finding that “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 Court’s July 2, 2008 Order is attached hereto as Exhibit B.

For these reasons, Facebook respectfully requests that the Volumes 2 and 3 of Appellees’ Supplemental Excerpts of Record be filed under seal.

Dated: June 18, 2010

ORRICK, HERRINGTON & SUTCLIFFE LLP

A handwritten signature in black ink, appearing to read 'Theresa A. Sutton', written over a horizontal line.

Theresa A. Sutton
Attorneys for Appellees

COPY

1 G. HOPKINS GUY, III (STATE BAR NO. 124811)
2 I. NEEL CHATTERJEE (STATE BAR NO. 173985)
3 MONTE COOPER (STATE BAR NO. 196746)
4 ROBERT D. NAGEL (STATE BAR NO. 211113)
5 JOSHUA H. WALKER (STATE BAR NO. 224940)
6 ORRICK, HERRINGTON & SUTCLIFFE LLP
7 1000 Marsh Road
8 Menlo Park, CA 94025
9 Telephone: 650-614-7400
10 Facsimile: 650-614-7401

11 Attorneys for Plaintiff
12 FACEBOOK, INC.

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

FACEBOOK, INC.,

Plaintiff,

v.

CONNECTU LLC, CAMERON
WINKLEVOSS, TYLER WINKLEVOSS,
HOWARD WINKLEVOSS, DIVYA
NARENDRA, AND DOES 1-25,

Defendants.

CASE NO. 1:05-CV-047381

STIPULATED PROTECTIVE ORDER

ENDORSED

2006 JAN 23 A 11: 28

KEITH J. NELSON, CLERK OF THE SUPERIOR COURT
COUNTY OF SANTA CLARA, CALIFORNIA
BY _____

DEPUTY CLERK

R. NELSON

1 Disclosure and discovery activity in this Action are likely to involve production of
2 confidential, proprietary, or private information for which special protection from public
3 disclosure and from use for any purpose other than prosecuting this litigation would be warranted.
4 Accordingly, each of the parties, Plaintiff FaceBook, Inc. ("Plaintiff"), Defendants ConnectU
5 LLC, Cameron Winklevoss, Tyler Winklevoss, Howard Winklevoss, and Divya Narendra
6 (collectively "Defendants"), assert that the Parties to This Litigation possess information that one
7 or more parties contends is confidential. The Parties wish to ensure that such Confidential
8 Information shall not be used for any purpose other than This Litigation, shall not be made public,
9 and shall not be disseminated beyond the extent necessary for This Litigation. Accordingly, the
10 following procedure shall be adopted for the protection of the parties' respective Confidential
11 Information.

12 The Parties hereby stipulate to and petition the court to enter the following Stipulated
13 Protective Order ("Order"). The Parties acknowledge that this Order does not confer blanket
14 protections on all disclosures or responses to discovery and that the protection it affords extends
15 only to the limited information or items that are entitled under the applicable legal principles to
16 treatment as confidential. The Parties further acknowledge that this Order creates no entitlement
17 to file Confidential Information under seal; California Rules of Court 243.1 and 243.2 set forth
18 the procedures that must be followed and reflect the standards that will be applied when a Party
19 seeks permission from the court to file material under seal.

20 1. DEFINITIONS

21 1.1 Party: any party to this action, including Plaintiff and Defendants and all of
22 their officers; directors, employees, consultants, retained experts, and outside counsel (and their
23 respective support staffs).

24 1.2 Disclosure or Discovery Material: all items or information, regardless of
25 the medium or manner generated, stored, or maintained (including, among other things,
26 testimony, transcripts, or tangible things) that are produced or generated in disclosures or
27 responses to discovery in This Litigation.

28 1.3 "Confidential" Information or Items: information (regardless of how

1 generated, stored or maintained) or tangible things that contain trade secrets or other confidential
2 research, development, commercial, or business information.

3 1.4 "Highly Confidential – Attorneys' Eyes Only" Information or Items:
4 extremely sensitive "Confidential Information or Items" whose disclosure to another Party or
5 non-party would create a substantial risk of serious injury that could not be avoided by less
6 restrictive means.

7 1.5 Receiving Party: a Party that receives Disclosure or Discovery Material
8 from a Producing Party.

9 1.6 Producing Party: a Party or non-party that produces Disclosure or
10 Discovery Material in this action.

11 1.7 Designating Party: a Party or non-party that designates information or
12 items that it produces in disclosures or in responses to discovery as "Confidential" or "Highly
13 Confidential — Attorneys' Eyes Only."

14 1.8 This Litigation: Case No. 1:05-CV-047381 currently pending in Superior
15 Court of the State of California between Facebook, Inc. and ConnectU LLC, Cameron
16 Winklevoss, Tyler Winklevoss, Howard Winklevoss, and Divya Narendra, as well as any future
17 lawsuits between the parties in the Superior Court of the State of California.

18 1.9 Massachusetts Litigation: Case No. 1:04-CV-11923 currently pending
19 between ConnectU LLC, Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra, and
20 Facebook, Inc., Mark Zuckerberg, Eduardo Saverin, Dustin Moskovitz, Andrew McCollum, and
21 Christopher Hughes in the U.S. District Court for the District of Massachusetts. The
22 Massachusetts Litigation is governed by a separate second stipulated protective order and not this
23 Order.

24 1.10 Protected Material: any Disclosure or Discovery Material that is designated
25 as "Confidential" or as "Highly Confidential – Attorneys' Eyes Only."

26 1.11 Outside Counsel: attorneys who are not employees of a Party but who are
27 retained to represent or advise a Party in this action.

28 1.12 In-House Counsel: attorneys who are employees of a Party.

1 1.13 Counsel (without qualifier): Outside Counsel and In-House Counsel (as
2 well as their support staffs).

3 1.14 Expert: a person with specialized knowledge or experience in a matter
4 pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert
5 witness or as a consultant in this action and who is not a current employee of a Party or of a
6 competitor of a Party's and who, at the time of retention, is not anticipated to become an
7 employee of a Party or a competitor of a Party. This definition includes any technical experts,
8 discovery experts, and professional jury or trial consultant retained in connection with This
9 Litigation.

10 1.15 Professional Vendors: persons or entities that provide litigation support
11 services (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations;
12 organizing, storing, retrieving data in any form or medium; etc.) and their employees and
13 subcontractors.

14 1.15 Return Material: Protected Material, including all copies, abstracts,
15 compilations, summaries or any other form of reproducing or capturing any of the Protected
16 Material.

17 2. SCOPE

18 The protections conferred by this Stipulation and Order cover not only Protected Material,
19 but also any information copied or extracted therefrom, as well as all copies, excerpts, summaries,
20 or compilations thereof, plus testimony, conversations, or presentations by parties or counsel to or
21 in court or in other settings that might reveal Protected Material.

22 3. DURATION

23 Even after the termination of This Litigation and all appeals therefrom, the confidentiality
24 obligations imposed by this Order shall remain in effect until a Designating Party agrees
25 otherwise in writing or a court order otherwise directs.

26 4. DESIGNATING PROTECTED MATERIAL

27 4.1 Exercise of Restraint and Care in Designating Material for Protection.

28 Each Party or non-party that designates information or items for protection under this

1 Order must take care to limit any such designation to specific material that qualify under the
2 appropriate standards. A Designating Party must take care to designate for protection only those
3 parts of material, documents, items, or oral or written communications that qualify – so that other
4 portions of the material, documents, items, or communications for which protection is not
5 warranted are not swept unjustifiably within the ambit of this Order.

6 Mass, indiscriminate, or mere boiler-plate designations are prohibited. Designations that
7 are shown to be clearly unjustified, or that have been made for an improper purpose (*e.g.*, to
8 unnecessarily encumber or retard the case development process, or to impose unnecessary
9 expenses and burdens on other parties), expose the Designating Party to sanctions.

10 If it comes to a Party's or a non-party's attention that information or items that it
11 designated for protection do not qualify for protection at all, or do not qualify for the level of
12 protection initially asserted, that Party or non-party must promptly notify all other parties that it is
13 withdrawing the designation.

14 4.2 Manner and Timing of Designations. Except as otherwise provided in this
15 Order, or as otherwise stipulated or ordered, material that qualifies for protection under this Order
16 must be clearly so designated before the material is disclosed or produced.

17 Designation in conformity with this Order requires:

18 (a) for information in documentary form (apart from transcripts of
19 depositions or other pretrial or trial proceedings), that the Producing Party affix the legend
20 "Confidential" or "Highly Confidential – Attorneys' Eyes Only" on each page that contains
21 material to be protected. If only a portion or portions of the material on a page qualifies for
22 protection, the Producing Party also must clearly identify the protected portion(s) (*e.g.*, by making
23 appropriate markings in the margins) and must specify, for each portion to be protected, the level
24 of protection being asserted (either "Confidential" or "Highly Confidential – Attorneys' Eyes
25 Only").

26 A Party or non-party that makes original documents or materials available for
27 inspection need not designate them for protection until after the inspecting Party has indicated
28 which material it would like copied and produced. During the inspection and before the

1 designation, all of the material made available for inspection shall be deemed "Highly
2 Confidential – Attorneys' Eyes Only." After the inspecting Party has identified the documents it
3 wants copied and produced, the Producing Party must determine which documents, or portions
4 thereof, qualify for protection under this Order. Then, before producing the specified documents,
5 the Producing Party must affix the appropriate legend ("Confidential" or "Highly Confidential –
6 Attorneys' Eyes Only") on each page that contains material to be protected. If only a portion or
7 portions of the material on a page qualifies for protection, the Producing Party also must clearly
8 identify the protected portion(s) (e.g., by making appropriate markings in the margins) and must
9 specify, for each portion, the level of protection being asserted (either "Confidential" or "Highly
10 Confidential – Attorneys' Eyes Only").

11 (b) for testimony given in deposition or in other pretrial or trial proceedings,
12 that the Party or non-party offering or sponsoring the testimony identify on the record, before the
13 close of the deposition, hearing, or other proceeding, protected testimony, and further specify any
14 portions of the testimony that qualify as "Highly Confidential – Attorneys' Eyes Only." When it
15 is impractical to identify separately each portion of testimony that is entitled to protection, and
16 when it appears that substantial portions of the testimony may qualify for protection, the Party or
17 non-party that sponsors, offers, or gives the testimony may invoke on the record (before the
18 deposition or proceeding is concluded) a right to have up to thirty (30) days after the receipt of
19 the written transcript to identify the specific portions of the testimony as to which protection is
20 sought and to specify the level of protection being asserted ("Confidential" or "Highly
21 Confidential – Attorneys' Eyes Only"). Only those portions of the testimony that are
22 appropriately designated for protection within the thirty (30) days shall be covered by the
23 provisions of this Order.

24 Transcript pages containing Protected Material must be separately bound by the court
25 reporter, who must affix on each such page the legend "Confidential" or "Highly Confidential –
26 Attorneys' Eyes Only," as instructed by the Party or non-party offering or sponsoring the witness
27 or presenting the testimony.

28 (c) for information produced in some form other than documentary, and for

1 any other tangible items, that the Producing Party affix in a prominent place on the exterior of the
2 container or containers in which the information or item is stored the legend "Confidential" or
3 "Highly Confidential – Attorneys' Eyes Only." If only portions of the information or item
4 warrant protection, the Producing Party, to the extent practicable, shall identify the protected
5 portions, specifying whether they qualify as "Confidential" or as "Highly Confidential –
6 Attorneys' Eyes Only."

7 (d) for information produced by former employees of a party, the Receiving
8 Party shall treat all such information as "Confidential" unless and until:

9 (i) the information has been or is obtained through other proper means;
10 (ii) the former employing Party agrees that the information is not
11 "Confidential";

12 (iii) the Receiving Party successfully challenges the "Confidential"
13 designation under Section 5; or

14 (iv) a court of competent jurisdiction decides that the information is not
15 "Confidential."

16 4.3 Computer Source Code and Similar Electronic Media.

17 (a) As used herein, "Computer Source Code" shall mean statements for the
18 programming of computers written in a high-level or assembly language that are readable by
19 humans but are not directly readable by a computer. Any person may specially designate as
20 "Highly Confidential – Attorneys' Eyes Only" any Computer Source Code or other similar
21 extremely sensitive technical materials (whether in electronic or hardcopy form) that it produces
22 in the course of discovery in This Litigation when such person has a good faith belief that such
23 material qualifies for such protection under this Order and that access to such materials would
24 allow replication of an otherwise confidential computer program. Except as otherwise provided
25 herein, "Highly Confidential – Attorneys' Eyes Only" designation made for this reason shall be
26 subject to all of the same restrictions as all other materials so designated with the following
27 additional restrictions:

28 (i) If a person is requested to produce electronic copies of material

1 properly designated as "Highly Confidential – Attorneys' Eyes Only" under Section 4.3(a), any
2 such production shall be made on CD. The disclosing person shall provide to the receiving party
3 at least two (2) identical CD's containing the requested materials.

4 (ii) The Receiving Party shall not make copies in any medium of any
5 "Highly Confidential – Attorneys' Eyes Only" under Section 4.3(a) except as follows:

6 (1) At any given time, the Receiving Party may copy each
7 produced copy of "Highly Confidential – Attorneys' Eyes Only" under Section 4.3(a) only into
8 the RAM of a single computer. Without limiting the generality of the foregoing, a particular copy
9 may not be copied into the RAM of one computer and then, while leaving that copy on the first
10 computer, subsequently copied into the RAM of another computer without prior written approval
11 from counsel for the disclosing person.

12 (2) Any computer into whose RAM material properly
13 designated as "Highly Confidential – Attorneys' Eyes Only" material is copied must be
14 disconnected from any and all networks before the material is copied onto the computer and for
15 the duration of the time the material remains on the computer. Only after all such material is
16 removed from RAM and that computer has been shut down may any network connection be made
17 or restored.

18 (3) Any computer into whose RAM material properly
19 designated as "Highly Confidential – Attorneys' Eyes Only" is copied must remain in the direct
20 control only of those persons specified in Section 6.3 of this Order as properly having access to
21 "Highly Confidential – Attorneys' Eyes Only" material.

22 (4) Except for transitory copies created in the RAM or other
23 internal operating circuitry of a computer, excerpts of material properly designated as "Highly
24 Confidential – Attorneys' Eyes Only" shall be copied onto paper or electronic media only for the
25 purpose of creating submissions to the Court for presentation to the Court at hearings or at trial,
26 and, once having been made, all such excerpts of such material shall be designated "Highly
27 Confidential – Attorneys' Eyes Only" in the name of the disclosing person.

28 4.4 Inadvertent Failures to Designate. Notwithstanding Section 5.2 below, if

1 timely corrected, an inadvertent failure to designate qualified information or items as
2 "Confidential" or "Highly Confidential – Attorneys' Eyes Only" does not, standing alone, waive
3 the Designating Party's right to secure protection under this Order for such material. If material
4 is appropriately designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only"
5 after the material was initially produced, the Receiving Party, on timely notification of the
6 designation, must make reasonable efforts to assure that the material is treated in accordance with
7 the provisions of this Order.

8 5. **CHALLENGING PROTECTED MATERIAL DESIGNATIONS**

9 5.1 **Timing of Challenges.** Unless a prompt challenge to a Designating Party's
10 Protected Material designation is necessary to avoid foreseeable substantial unfairness,
11 unnecessary economic burdens, or a later significant disruption or delay of the litigation, a Party
12 does not waive its right to challenge a Protected Material designation by electing not to mount a
13 challenge promptly after the original designation is disclosed.

14 5.2 **Meet and Confer.** A Party that elects to initiate a challenge to a
15 Designating Party's Protected Material designation must do so in good faith and must begin the
16 process by conferring directly (in voice to voice dialogue; other forms of communication are not
17 sufficient) with Outside Counsel for the Designating Party. In conferring, the challenging Party
18 must explain the basis for its belief that the Protected Material designation was not proper and
19 must give the Designating Party an opportunity to review the designated material, to reconsider
20 the circumstances, and, if no change in designation is offered, to explain the basis for the chosen
21 designation. A challenging Party may proceed to the next stage of the challenge process only if it
22 first has engaged in this meet and confer process and only after the Designating Party has been
23 given ten (10) calendar days to respond to the challenging Party's objection.

24 5.3 **Judicial Intervention.** A Party that elects to address a challenge to a
25 confidentiality designation after participating in the meet and confer required by Section 5.2 may
26 file and serve a motion that identifies the challenged material and sets forth in detail the basis for
27 the challenge or the designation. Absent good cause for extending the following deadlines, a
28 Party's motion must be filed within fourteen (14) days of (a) the Designating Party's response to

1 the challenge or, if no response, (b) the expiration of the ten (10) days given to the Designating
2 Party to respond. Each such motion must be accompanied by a competent declaration that
3 affirms that the moving Party has complied with the meet and confer requirements imposed in
4 Section 5.2. The burden of persuasion in any such proceeding shall be on the Designating Party.
5 Until the court rules on the challenge, all parties shall continue to afford the material in question
6 the level of protection to which it is entitled under the Producing Party's designation.

7 6. ACCESS TO AND USE OF PROTECTED MATERIAL

8 6.1 Basic Principles. A Receiving Party may use Protected Material that is
9 disclosed or produced by another Party or by a non-party in direct connection with this case or in
10 only for prosecuting, defending, or attempting to settle This Litigation. Protected Material may
11 be disclosed only to the categories of persons and under the conditions described in this Order.
12 When This Litigation (including all appeals) has been terminated, a Receiving Party must comply
13 with the provisions of Section 11 below. Protected Material must be stored and maintained by a
14 Receiving Party at a location and in a secure manner that ensures that access is limited to the
15 persons authorized under this Order.

16 6.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise
17 ordered by the court or permitted in writing by the Designating Party, a Receiving Party may
18 disclose any information or item designated "Confidential" only to:

19 (a) the Receiving Party's Outside Counsel of record in this action and its
20 employees directly involved with This Litigation;

21 (b) the officers, directors, and employees (including In-House Counsel) of the
22 Receiving Party to whom disclosure is demonstrably necessary for This Litigation and who have
23 signed the "Agreement to Be Bound by Protective Order" (Exhibit A);

24 (c) Experts (as defined in this Order) of the Receiving Party to whom
25 disclosure is demonstrably necessary for This Litigation and who have executed the "Agreement
26 to Be Bound by Protective Order" (Exhibit A);

27 (d) the Court, its personnel, and any other person(s) designated by order of the
28 Court;

- 1 (e) court reporters, their staffs, and Professional Vendors;
2 (f) the author, recipients, and persons with prior knowledge of the document
3 or the original source of the information, who have not received such information in violation of
4 this Order or any confidentiality agreement; and
5 (g) any person(s) jointly designated by the parties who have executed the
6 "Agreement to Be Bound by Protective Order" (Exhibit A).

7 6.3 Disclosure of "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES
8 ONLY" Information or Items. Unless otherwise ordered by the court or permitted in writing by
9 the Designating Party, a Receiving Party may disclose any information or item designated
10 "Highly Confidential - Attorney's Eyes Only" only to:

- 11 (a) Receiving Party's Outside Counsel of record in this action and its
12 employees;
13 (b) Experts to whom disclosure is demonstrably necessary for This Litigation,
14 and who have signed the "Agreement to Be Bound by Protective Order" (Exhibit A);
15 (c) the Court, its personnel and any other person(s) designated by order of the
16 Court;
17 (d) court reporters, their staffs, and Professional Vendors;
18 (e) any person(s) jointly designated by the parties who have executed the
19 "Agreement to Be Bound by Protective Order" (Exhibit A); and
20 (f) the author of the document or the original source of the information.

21 6.4 Disclosure of Agreement to Be Bound By Protective Order (Exhibit A).
22 Counsel for the Party retaining the expert or consultant ("Retaining Party") shall provide a copy
23 of the executed Exhibit A to the Designating Party.

24 6.5 Use of Confidential Material in Depositions. Whenever "Confidential" or
25 "Highly Confidential - Attorneys' Eyes Only" material is to be discussed or disclosed in a
26 deposition: (a) any person who has produced or will produce such material may require the
27 exclusion from the room of any person who is not entitled to receive such material under this
28 Order; and (b) any Party who will disclose material previously designated pursuant to Section 5,

1 above, shall first exclude from the room any person who is not entitled to receive such material
2 under this Order.

3 7. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN
4 OTHER LITIGATION

5 If a Receiving Party is served with a subpoena or an order issued in other litigation that
6 would compel disclosure of any information or items designated in This Litigation as
7 "Confidential" or "Highly Confidential – Attorneys' Eyes Only," the Receiving Party must so
8 notify the Designating Party, in writing immediately and in no event more than three (3) court
9 days after receiving the subpoena or order. Such notification must include a copy of the subpoena
10 or court order.

11 The Receiving Party also must immediately inform in writing the party who caused the
12 subpoena or order to issue in the other litigation that some or all the material covered by the
13 subpoena or order is the subject of this Order. In addition, the Receiving Party must deliver a
14 copy of this Order promptly to the party in the other action that caused the subpoena or order to
15 issue.

16 The purpose of imposing these duties is to alert the interested parties to the existence of
17 this Order and to afford the Designating Party in This Litigation an opportunity to try to protect
18 its confidentiality interests in the court from which the subpoena or order issued. The
19 Designating Party shall bear the burdens and the expenses of seeking protection in that court of its
20 confidential material – and nothing in these provisions should be construed as authorizing or
21 encouraging a Receiving Party in This Litigation to disobey a lawful directive from another court.

22 8. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

23 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected
24 Material to any person or in any circumstance not authorized under this Order, the Receiving
25 Party must immediately (a) notify in writing the Designating Party of the unauthorized
26 disclosures, (b) use its best efforts to retrieve all copies of the Protected Material, (c) inform the
27 person or persons to whom unauthorized disclosures were made of all the terms of this Order, and
28 (d) request such person or persons to execute the "Acknowledgment and Agreement to Be

1 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

2 DATED: December 30, 2005

ORRICK, HERRINGTON & SUTCLIFFE, LLP

3
4 By: 

Monte M.F. Cooper

Attorneys for Plaintiff Facebook, Inc.

5
6
7 DATED: December ___, 2005

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, LLP

8
9
10 By: _____

Scott R. Mosko

Attorneys for Defendants ConnectU LLC, Cameron
Winklevoss, Tyler Winklevoss, Howard
Winklevoss, Divya Narendra

11
12
13
14
15 PURSUANT TO STIPULATION, IT IS SO ORDERED.

16 **JAN 18 2006**

SOCRATES P. MANOUKIAN

17 DATED: _____

Hon. ~~William J. Elfvig~~
Judge of the Superior Court

1 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

2 DATED: December 30, 2005

ORRICK, HERRINGTON & SUTCLIFFE, LLP

3
4 By: 

5 Monte M.H. Cooper

6 Attorneys for Plaintiff Facebook, Inc.

7 DATED: December 30, 2005

8 FINNEGAN, HENDERSON, FARABOW,
9 GARRETT & DUNNER, LLP

10 By: 

11 Scott R. Mosko

12 Attorneys for Defendants ConnectU LLC, Cameron
13 Winklevoss, Tyler Winklevoss, Howard
14 Winklevoss, Divya Narendra

15 PURSUANT TO STIPULATION, IT IS SO ORDERED.

16 DATED: _____

17 _____
18 Hon. William J. Elfving
19 Judge of the Superior Court

EXHIBIT

A

EXHIBIT A

AGREEMENT TO BE BOUND BY PROTECTIVE ORDER

I, _____, declare under penalty of perjury the following.

I have read in its entirety and understand the Stipulated Protective Order that was issued by the Superior Court of the State of California, Santa Clara County on _____, 200__ in Case No. 1:05-CV-047381 currently pending in Superior Court of the State of California between Facebook, Inc. and ConnectU LLC, Cameron Winklevoss, Tyler Winklevoss, Howard Winklevoss, and Divya Narendra.

I have been provided with, carefully read, and understand the Stipulated Protective Order. I will comply with and to be bound by all the terms of this Stipulated Protective Order. I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not disclose in any manner any confidential information or items that is subject to this Stipulated Protective Order prepared or disclosed to me, including and abstracts, extracts, excerpts, and summaries thereof, to any person or entity except in strict compliance with the provisions of this Order and will return said confidential information or items in my possession to counsel for the party by whom I am designated, employed, or retained.

I hereby submit to the jurisdiction of the Superior Court of State of California, Santa Clara County for the purpose of enforcing the terms of this Stipulated Protective Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint _____ [print or type full name] of _____ [print or type full address and telephone number] as my California agent for service of process in connection with this action or any proceedings related to enforcement of this Stipulated Protective Order.

My address is _____. I am a citizen of the United States.

My present employer is _____.

My present occupation or job description is _____.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

The Facebook, Inc., et al.,
Plaintiffs,
v.
ConnectU, Inc., et al.,
Defendants.

NO. C 07-01389 JW

**ORDER GRANTING NON-PARTY CNET'S
MOTION TO INTERVENE FOR THE
LIMITED PURPOSE OF MOVING TO
UNSEAL COURT RECORDS; SETTING
CONDITIONS WITH RESPECT TO
ACCESS TO MATERIALS PREVIOUSLY
FILED IN THIS CASE**

I. INTRODUCTION

The parties to this lawsuit reached a confidential settlement through private mediation. However, a dispute developed in the execution of the settlement. One of the parties filed what was entitled a "Confidential Motion to Enforce Settlement Agreement," and requested that the Court hear portions of that motion in a closed courtroom. At the hearing, members of the press were present and voiced objections to the proceedings being conducted in a closed courtroom. The Court proceeded to close the courtroom but invited the press to make formal motions with respect to their objection.

Presently before the Court is CNET Networks, Inc.'s ("CNET") Motion for Leave to Intervene and to Unseal Hearing Transcript and Other Documents. (hereafter, "Motion," Docket Item No. 467.) The Court conducted a hearing on July 2, 2008. Based on the papers submitted to date and oral arguments of the parties and CNET, the Court GRANTS CNET's motion to intervene

1 and orders that a redacted transcript of the proceedings be filed for public access. The Court also
2 sets conditions with respect to access to other materials previously filed under seal in this case.

3 **II. BACKGROUND**

4 A full factual background leading to the resolution of this case may be found in the Court's
5 June 25, 2008 Order. (Docket Item No. 461.) The Court briefly reviews facts relevant to this
6 motion.

7 Plaintiffs in this lawsuit are The Facebook Inc. and Mark Zuckerberg (collectively,
8 "Facebook"). Plaintiffs bring this action against ConnectU, Inc., Pacific Northwest Software, Inc.,
9 Winston Williams, and Wayne Chang (collectively, "Defendants") alleging, *inter alia*,
10 misappropriation of trade secrets, unfair competition, and violations of 18 U.S.C. § 1030, *et seq.* In
11 essence, Facebook alleges that ConnectU gained unauthorized access to Facebook's servers and
12 website and took information for its own unlawful use.

13 The parties are engaged in at least two other lawsuits over these matters; in those cases,
14 ConnectU is the Plaintiff and Facebook is the Defendant.¹ In the course of this lawsuit, the parties
15 engaged in private mediation. On February 22, 2008, as the result of the mediation, the parties
16 signed a written "Term Sheet & Settlement Agreement" (the "Agreement"). In the Agreement, the
17 parties agreed to resolve all of their disputes and to dismiss the pending lawsuits. The parties agreed
18 that they "may execute more formal documents but these terms are binding." The parties also
19 stipulated that the federal court in San Jose, California has jurisdiction to enforce the Agreement.
20 After signing the Agreement, the parties attempted to draft formal documents but failed to reach a
21 consensus on certain terms.

22 Based on a belief that a court order was necessary to enforce the Agreement, Facebook
23 moved the Court to enforce settlement and filed its motion under seal. (Docket Item No. 329, filed
24 under seal.) On June 23, 2008, the Court conducted a hearing on Facebook's motion to enforce
25

26
27 ¹ The other actions are ConnectU, LLC v. Zuckerberg, Appeal No. 07-1796 (1st Cir.) and
ConnectU, Inc. v. The Facebook, Inc., Case No. C 07-10593-DPW (D. Mass.).

1 settlement. On June 18, 2008, prior to the hearing, the Court conducted a telephonic conference
2 with the parties to discuss how it should handle the confidential information contained in the parties'
3 motion papers. (See Docket Item No. 437.) As the parties requested in the telephonic conference,
4 and on the record at the hearing, the Court closed its doors to the public in an effort to have a
5 "frank" discussion regarding Plaintiffs' motion. (Tr. at 6.) Relying on the Court's intention to seal
6 the transcript of the hearing, the parties disclosed confidential information that they otherwise might
7 not have disclosed had the hearing been public. (Id.) In the course of litigation, a number of other
8 documents were also filed under seal.

9 As recited above, the Court closed the courtroom during the hearing on Facebook's motion
10 to enforce the Agreement. CNET moves the Court to allow it to intervene in the action for the
11 limited purpose of making a motion and moves the Court to unseal certain court records in this case.

12 III. DISCUSSION

13 It is well established that the media have a right to appear in cases of public concern for the
14 purpose of challenging requests or orders to seal records. See, e.g., San Jose Mercury News Inc. v.
15 U.S. Dist. Ct., 187 F.3d 1096, 1101 (9th Cir. 1999). The parties do not oppose CNET's
16 intervention.² Accordingly, the Court GRANTS CNET's motion to intervene for the limited purpose
17 of moving to unseal court records. The Court proceeds to consider whether certain Court records
18 should be unsealed.

19 Open access to the courts is an important aspect of the United States legal system. Phoenix
20 Newspapers Inc. v. U.S. Dist. Court, 156 F.3d 940, 946 (9th Cir. 1998). In the spirit of open access,
21 "the courts of this country recognize a general right to inspect and copy public records and
22 documents, including judicial documents and records." Nixon v. Warner Commc'ns, Inc., 435 U.S.
23 589, 597 (1978). There is a strong presumption in favor of access unless a particular court record is
24

25
26 ² (Plaintiffs' Partial Opposition to CNET's Motion for Leave to Intervene at 1, Docket Item
27 No. 470.) ConnectU has elected to not file any opposition as invited by the Court's briefing
28 schedule on CNET's motion. (See Docket Item No. 462.)

1 one traditionally kept secret. Kamakana v. City of Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006);
2 Foltz v. State Farm Mutual Auto. Ins. Co., 331 F.3d 1122, 1135 (9th Cir. 2003).

3 If a court record is not one that has traditionally been kept secret, one of two standards is
4 used to determine whether the presumption of public access may be overcome. Only a
5 “particularized showing” under the “good cause” standard of Federal Rule of Civil Procedure 26(c)
6 is required to preserve the secrecy of sealed material related to a non-dispositive motion.
7 Kamakana, 447 F.3d at 1180; Foltz, 331 F.3d at 1138. However, to retain any protected status for
8 documents related to a dispositive motion, the proponent of the motion to seal must meet the
9 “compelling reasons” standard. Kamakana, 447 F.3d at 1177; Foltz, 331 F.3d at 1135. Similar to
10 the compelling reasons standard, a decision to close the court and to conduct a hearing under seal
11 requires a showing that a compelling interest would be harmed and that no alternatives to closure
12 would adequately protect that interest. See Phoenix, 156 F.3d at 946. The “good cause” and
13 “compelling reasons” standards should not be conflated; a “good cause” showing will not, without
14 more, satisfy the “compelling reasons” test. Kamakana, 447 F.3d at 1180; Foltz, 331 F.3d at 1135-
15 36.

16 CNET requests that the Court remove the seal on several types of records in this case. The
17 Court considers each category in turn.

18 **A. Settlement Terms and Mediation Negotiations**

19 Courts have traditionally “granted protective orders to protect confidential settlement
20 agreements.” Phillips ex rel. Estates of Byrd v. Gen. Motors Corp., 307 F.3d 1206, 1212 (9th Cir.
21 2002) (citing Hasbrouck v. BankAmerica Housing Serv., 187 F.R.D. 453, 455 (N.D.N.Y. 1999);
22 Kalinauskas v. Wong, 151 F.R.D. 363, 365-67 (D. Nev. 1993)). For instance, the ADR Local Rules
23 of the Northern District of California explicitly provide:

24 [T]his court, . . . all counsel and parties, and any other persons attending the mediation shall
25 treat as “confidential information” the contents of the written Mediation Statements,
26 anything that happened or was said, any position taken, and any view of the merits of the
27 case formed by any participant in connection with any mediation. “Confidential
28 information” shall not be: (1) disclosed to anyone not involved in the litigation; (2) disclosed

1 to the assigned judge; or (3) used for any purpose, including impeachment, in any pending or
2 future proceeding in this court.

3 ADR L.R. 6-11(a). Other circuits have also spoken to the necessity for secrecy in settlement terms
4 and negotiations:

5 [T]he presumption of public access to settlement conferences, settlement proposals, and
6 settlement conference statements is very low or nonexistent under either constitutional or
7 common law principles. Weighed against this presumption is the strong public policy which
8 encourages the settlement of cases through a negotiated compromise. . . . In a perfect world,
9 the public would be kept abreast of all developments in the settlement discussions of lawsuits
10 of public interest. In our world, such disclosure would . . . result in no settlement discussions
11 and no settlements.

12 United States v. Glens Falls Newspapers, Inc., 160 F.3d 853, 855-56 (2nd Cir. 1998). For this
13 reason alone, allowing a confidential settlement to remain privileged “serves a sufficiently important
14 public interest.” Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 980 (6th
15 Cir. 2003).

16 Aside from the fact that confidentiality fosters settlement, it also may be the case that what is
17 stated for purposes of settlement is puffing or posturing. Glens Falls, 160 F.3d at 858. “Settlement
18 positions are often extreme and should they be made public a litigant would reasonably fear being
19 judged in the court of public opinion based upon what are nothing more than bargaining positions.
20 These concerns would hardly encourage negotiations.” Id.

21 In this case, in formalizing their Agreement, the parties explicitly added a confidentiality
22 clause to protect their interests: “All terms of agreement are confidential . . .” (Agreement ¶ 3.)
23 Since the ADR Local Rules provide for confidentiality of mediation and settlement negotiations, and
24 other circuits have recognized the importance of preventing disclosure of these types of agreements,
25 the Court finds that the terms of the parties’ settlement and the related negotiations at their
26 mediation fall within the category of information “traditionally kept secret,” and are not subject to
27 public disclosure.³

28

³ This includes the redacted portions of records which have been publically disclosed, such
as the redacted “Term Sheet & Settlement Agreement” in the Court’s June 25, 2008 Order.

1 Accordingly, the Court refers CNET's motion to unseal particular records which relate to the
2 parties' settlement terms or negotiations to the assigned Magistrate Judge Maria-Elena James, for a
3 determination consistent with this Order.

4 **B. Court Records Related to Non-Dispositive Motions**

5 "Good cause" is the showing a party must make when seeking to prevent disclosure of
6 documents filed with a non-dispositive motion. Pintos v. Pacific Creditors Ass'n., 504 F.3d 792,
7 801 (9th Cir. 2007) (citing Phillips, 307 F.3d at 1206). This is because courts recognize that non-
8 dispositive motions are often "unrelated, or only tangentially related" to the underlying cause of
9 action, and therefore, the public's interest in accessing dispositive materials does not apply with
10 equal force to non-dispositive materials. Id. at 802 (citing Kamakana, 447 F.3d at 1179). "Applying
11 the 'compelling interest' standard under these circumstances would needlessly 'undermine a district
12 court's power to fashion effective protective orders.'" Id. (citing Foltz, 331 F.3d at 1135).

13 In this case, all the sealed documents relating to non-dispositive motions were sealed
14 pursuant to a protective order entered by the Court. Under Phillips, a motion by a party to seal a
15 document pursuant to a valid protective order satisfies the "good cause" standard. Phillips, 307 F.3d
16 at 1213 (noting that "when a court grants a protective order for information produced during
17 discovery, it already has determined that 'good cause' exists to protect this information from being
18 disclosed to the public"). The Court finds that sealed documents relating to non-dispositive motions
19 are not subject to public disclosure if "good cause" to have sealed them was, or subsequently is,
20 established.

21 Accordingly, the Court refers CNET's motion to unseal particular records relating to non-
22 dispositive motions to the assigned Magistrate Judge Maria-Elena James, for a determination
23 consistent with this Order.

24 **C. Sealed Materials Attached to Dispositive Motions**

25 To satisfy the "compelling reasons" standard required for keeping documents associated with
26 dispositive motions under seal, a party seeking to maintain the seal must articulate compelling
27

1 reasons supported by specific factual findings that outweigh the public policy favoring disclosure.
2 Kamakana, 447 F.3d at 1178-79; San Jose Mercury News, 187 F.3d at 1102-03. Generally,
3 “compelling reasons” sufficient to outweigh the public’s interest in disclosure and justify sealing
4 court records exist when the court files might become a vehicle for improper purposes, such as the
5 use of records to gratify private spite, promote public scandal, circulate libelous statement, or release
6 trade secrets. Kamakana, 447 F.3d at 1179; Nixon, 435 U.S. at 598. The mere fact that the
7 production of records may lead to a litigant’s embarrassment, incrimination, or exposure to further
8 litigation will not, without more, compel the court to seal its records. Kamakana, 447 F.3d at 1179;
9 Foltz, 331 F.3d at 1136. “The judge need not document compelling reasons to unseal; rather, the
10 proponent of sealing bears the burden with respect to sealing. A failure to meet that burden means
11 that the default posture of public access prevails.” Kamakana, 447 F.3d at 1182.

12 In this case, the only dispositive motion that was resolved by the Court was Facebook’s
13 confidential motion to enforce the settlement. By their very nature, all documents attached to the
14 parties’ papers addressing this motion concerned the terms of the settlement and the negotiations
15 preceding it. Since, as noted above, these records are of the kind “traditionally kept secret,” the
16 Court need not reach the issue of whether there are compelling reasons for keeping them from being
17 publically disclosed. To the extent that CNET contends there were other dispositive motions filed
18 with the Court, CNET may make a specific request that documents associated with such motions be
19 unsealed.⁴ This will provide parties the opportunity to make a showing of compelling reasons to
20 keep those documents sealed.

21 Accordingly, the Court refers CNET’s motion to unseal particular records relating to
22 dispositive motions to the assigned Magistrate Judge Maria-Elena James, for a determination
23 consistent with this Order.

24
25
26 ⁴ The Court does not regard Facebook’s Motion for Partial Summary Judgment as
27 dispositive because the Court never addressed the motion on the merits. Rather, after granting
Facebook’s confidential motion, the Court found the motion for partial summary judgment moot and
ordered the Clerk of Court to terminate it from the Court’s docket. (See Docket Item No. 466.)

D. Hearing Transcript

While a court has the right to temporarily seal access to court records pending a hearing, the hearing may be closed to the public and the transcript sealed only when: “(1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest.” Phoenix, 156 F.3d at 949-50. In other words, the public’s right to access a hearing is overcome only by a finding “that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986). Ordinarily, transcripts of properly closed proceedings should be released when the danger of prejudice has passed, i.e., when the competing interests precipitating hearing closure are no longer viable. United States v. Brooklier, 685 F.2d 1162, 1172 (9th Cir. 1982); Phoenix, 156 F.3d at 947-48.⁵

In this case, the parties do not object to the transcript of the Court’s June 23, 2008 hearing being disclosed to the public as long as the certain statements that were made at the hearing are redacted. These statements specifically relate to the terms of the parties’ confidential settlement agreement, the vast majority of which have already been disclosed, and statements made or allegedly made in the mediation between the parties which resulted in the settlement. Since the proposed redacted statements are, once again, the type which are “traditionally kept secret,” the parties have a compelling interest in keeping them from being disclosed. This interest would be harmed if the statements were disclosed, because such disclosure would harm the general peace reached by the parties.

Significantly, beyond agreeing that their settlement would be “confidential,” the parties expressly carved out a provision where neither side would be permitted to “disparage[] any other parties and no party will comment further publicly related to facts underlying or related to this

⁵ However, circumstances exist where permanent sealing is justified, such as the sealing of portions of hearings related to grand jury proceedings where those proceedings are sealed by law. Id. (citing United States v. Sierra, 748 F.2d 1518 (11th Cir. 1986)).

1 dispute.” (Agreement ¶ 3.) In light of this provision of the Agreement, the Court finds it
2 appropriate to redact those portions of transcript which would invite public scrutiny regarding the
3 parties’ motivation to settle or their characterization of the settlement process beyond what is
4 reflected in the Court’s June 25, 2008 Order.


5 Accordingly, as an alternative narrowly tailored to best serve the interests of the parties and
6 the public, the Court conditionally grants CNET’s motion to unseal the transcript of the June 23,
7 2008 hearing. The transcript of the June 23, 2008 hearing, as redacted by the Court, shall be filed in
8 accordance with General Order No. 59 of the Court.

9 **IV. CONCLUSION**

10 The Court GRANTS CNET’s Motion for Leave to Intervene for the limited purpose of
11 moving to unseal the court records. The Court orders the Court Reporter to file the redacted
12 transcript of the June 23, 2008 hearing in accordance with General Order No. 59 of the Court.
13 Nothing in this Order prohibits the Court Reporter from charging members of the public for copies
14 of the filed redacted transcript.

15 The Court refers all matters pertaining to access to any other documents or pleadings filed
16 under seal, including the Confidential Motion to Enforce Settlement and responsive papers, to
17 Magistrate Judge Maria-Elena James. Judge James will determine the timing of the hearing of any
18 motion with respect to access to those documents or pleadings.

19
20 Dated: July 2, 2008



JAMES WARE
United States District Judge

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

Chester Wren-Ming Day cday@orrick.com
D. Michael Underhill MUnderhill@BSFLLP.com
David A. Barrett dbarrett@bsflp.com
Evan A. Parke eparke@bsflp.com
George Hopkins Guy hopguy@orrick.com
I. Neel Chatterjee nchatterjee@orrick.com
Jonathan M. Shaw jshaw@bsflp.com
Kalama M. Lui-Kwan klui-kwan@fenwick.com
Monte M.F. Cooper mcooper@orrick.com
Rachel E. Matteo-Boehm rachel.matteo-boehm@hro.com
Scott Richard Mosko scott.mosko@finnegan.com
Sean Alan Lincoln slincoln@Orrick.com
Steven Christopher Holtzman sholtzman@bsflp.com
Theresa Ann Sutton tsutton@orrick.com
Tyler Alexander Baker Tbaker@fenwick.com
Valerie Margo Wagner valerie.wagner@dechert.com
Yvonne Penas Greer ygreer@orrick.com
Rachel E. Matteo-Boehm, rachel.matteo-boehm@hro.com
Roger Rex Myers, roger.myers@hro.com

Dated: July 2, 2008

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy