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 Northern District of California,
Case No. CV 07-01389-JW, The Honorable James Ware

APPELLEES' RESPONSE TO APPELLANTS' "MOTION FOR JUDICIAL NOTICE IN SUPPORT OF APPELLANTS' REPLY BRIEF"

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INTRODUCTION[1]

Appellants Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra (the "CU Founders") ask this Court to take judicial notice of the appellate briefs and associated documents that were filed by the parties prior to when this Court issued its opinion in *Petro-Ventures. Inc. v. Takessian*, 967 F.2d 1337 (9th Cir. 1992). The CU Founders argue that "the opinion and the briefs in that case confirm" that Appellees Facebook, Inc. and Mark Zuckerberg ("Facebook") have presented "a misdescription of that case." Reply 3-4. Facebook would not ordinarily oppose a motion to take judicial notice of briefs—and certainly not if the briefs could help discern the true meaning of an ambiguous published opinion. If the Court wishes to read an extra 141 pages of briefs, Facebook has no objection. We respond simply to advise the Court that indulging the CU Founders' request will be a waste of time, for the opinion itself is perfectly clear and the briefs definitively confirm Facebook's reading of the case.

ARGUMENT

Facebook's brief fully explains why *Petro-Ventures* is relevant to this case. Specifically, it holds that a broad release of all known and unknown claims, executed by sophisticated business parties represented by legal counsel and aimed

[1] Appellants' Opening and Reply Briefs will be cited as "OB" and "Reply," respectively, and their Motion for Judicial Notice will be cited as "MJN." Facebook's Appellee Brief will be cited as "Resp."

at bringing to an end contentious litigation, was valid for purposes of Section 29(a) of the Securities Exchange Act of 1934, notwithstanding that the plaintiff specifically alleged that its later asserted claims for securities violations were unknown at the time that it executed the release, and arose in part from statements made during the settlement discussions. Resp. 37-39. The CU Founders attempt to distinguish *Petro-Ventures* by asserting that the plaintiff's securities law claims there arose before it entered into the settlement and release, so this Court did not hold that the plaintiff had released an unknown claim that the settlement agreement was induced by securities fraud. They claim that "[t]he question in *Petro-Ventures* was whether, after settling a prior case about a securities transaction, the plaintiff could bring a second fraud case about the same transaction." Reply 3 (citing MJN 2 at 1; *id.* Ex. 3 at iv-v). They are wrong.

The opinion is clear. Some alleged misrepresentations affecting securities occurred before the settlement and release, and were the subject of the litigation that was settled. But other misrepresentations occurred during the settlement discussions themselves. *See Petro-Ventures*, 967 F.2d at 1339 (quoting Decl. of B. Keaton Cudd, III, at para. 8). In arguing otherwise, the CU Founders completely ignore passages in the opinion that disprove their position. Most notable among them is the passage of the opinion reporting that Petro-Venture's president alleged in a declaration:

> During the settlement negotiations neither defendant nor anyone else connected with Great American Resources, Inc. or Great American Partners disclosed to me or Petro-Ventures, Inc. the earlier misrepresentations and omissions surrounding the May, 1986 purchase agreement. In particular, *defendant continued to lead me to believe* that the Great American Partners securities were in fact registered with the Securities Exchange Commission.

Id. (quoting Decl. of B. Keaton Cudd, III, para. 8) (emphasis added); *see also id.* at 1342 n.3 (referring to this assertion as one of the "claims of omissions and misrepresentations in [plaintiff's] complaint" (citation and internal quotation marks omitted)).

The CU Founders suggest that the appellate briefs impeach this clear statement from this Court's opinion. But the briefs only prove that the opinion meant what it said, and Facebook's description is perfectly accurate. The briefs confirm that the plaintiff in *Petro-Ventures* claimed that some misrepresentations giving rise to its claims arose from the conduct of the settlement itself. For instance, the precise "Issue Presented for Review" set forth by Petro-Ventures in its opening brief was as follows:

> Were Plaintiff's *unknown claims* pursuant to Federal Securities laws released or waived by Plaintiff's execution of a written release that, pursuant to state law, allegedly released all claims, known *or unknown*, that may have arisen from a transaction?

RJN Ex. 1, at 2 (emphasis added). Similarly, the first sentence of Petro-Ventures' Argument section reads:

> Even in the absence of the fraud or illegality alleged by the Plaintiff that *tainted the May 29, 1987 settlement and release agreement*, Plaintiff simply

did not, and could not, release its *unknown claims* pursuant to the 1933 or 1934 Federal Securities Acts.

RJN, Ex. 1 at 7 (emphasis added).

The point that some of the plaintiff's "unknown" securities claims arose from misrepresentations made during the settlement discussions themselves is even more vivid upon fuller review of the same declaration that this Court quoted in its *Petro-Ventures* opinion. That declaration, which appears in the record materials proffered by the CU Founders, unambiguously reflects that some of the exchanges of unregistered securities and alleged misrepresentations arose as a result of the settlement discussions:

> (7) Had I been aware of the securities law violations at settlement, including the misrepresentations and omissions of material facts as alleged in the Complaint filed herein, there would have been no incentive for Petro-Ventures to settle the litigation as it did because complete rescission and return of consideration would have been available as remedies together with other remedies provided by law and statute. Specifically, *I lost approximately $245,000 on the resale of the Great American Partners partnership units, including the resale of units made to Great American Resources, Inc. as part of the May 29, 1987 settlement agreement and release*. Had I known of these claims I at least would have had additional bargaining power and leverage to use during the settlement negotiations.
>
> (8) During the settlement negotiations neither defendant nor anyone else connected with Great American Resources, Inc. or Great American Partners disclosed to me or Petro-Ventures, Inc. the earlier misrepresentations and omissions surrounding the May, 1986 purchase agreement. In particular, *defendant continued to lead me to believe* that the Great American Partners securities were in fact registered with the Securities and Exchange Commission. *Defendant's assertion that the securities were properly registered* in May, 1986, coupled with the fact that the Great American Partners units were publicly and continuously listed on the

> National Association of Securities Dealers Automated Quotations (NASDAQ) system until March, 1988, *gave me no reason to suspect that they were not registered* until I read [an article published in *The Wall Street Journal* in September of 1987] as described above.

RJN, Ex. 1, at "Exhibit B" A-22 (Decl. of B. Keaton Cudd, III, paras. 7-8; emphasis added). *See also* RJN, Ex. 1 at 6 (defendant Tarkassian "had represented to [Cudd] the units were properly registered" and "[t]he release of securities law claims was not discussed during settlement negotiations"); *Id* at 9 (same).

Throughout the briefs, Petro-Ventures makes exactly the same arguments that the CU Founders are making here—namely, that the Securities Acts do not permit the release of *any* unknown securities claims in litigation, especially where it is alleged that the over-riding *settlement agreement* was tainted by fraud as a result of the fact that defendant misled plaintiff into believing no such violations could exist. RJN Ex. 1, at 2, 7, 9-10, 12- 13; Ex. 4, at 1, 5, 7. There simply is no way to read these briefs to support the CU Founders' reading of *Petro-Ventures*.

CONCLUSION

The CU Founders' motion for judicial notice is pointless. If this Court grants the motion and reads the briefs, it will only confirm what is already evident on the face of the opinion.

Dated: August 27, 2010 ORRICK, HERRINGTON & SUTCLIFFE LLP

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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Marilyn Ortiz
Marilyn Ortiz