

CA Nos. 08-16745, 08-16849, 08-16873, 09-15021, 09-15133 (consolidated)
DC No. C 07-01389 JW

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

THE FACEBOOK, INC., ET AL.,
Plaintiffs/Appellees/Cross-Appellants,

v.

CONNECTU, INC.,
Defendant/Appellee,

and

CAMERON WINKLEVOSS, TYLER WINKLEVOSS
and DIVYA NARENDRA,
Defendants/Appellants/Cross-Appellees.

Appeal From Judgment Of The United States District Court
For The Northern District Of California
(Hon. James Ware, Presiding)

**REQUEST FOR JUDICIAL NOTICE IN SUPPORT
OF APPELLANTS'/CROSS-APPELLEES'
OPENING BRIEF**

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Appellees Cameron Winklevoss, Tyler
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Appellants and Cross-Appellees Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra (the “Founders”) request that this Court take judicial notice of certain filings in the related litigation between the Founders and ConnectU (as plaintiffs) and Facebook and Mark Zuckerberg (as defendants) in the United States District Court for the District of Massachusetts (the “Massachusetts actions”). The Founders bring these matters to the Court’s attention for two reasons: (1) to provide a complete procedural history, and (2) to avoid any inadvertent comment by this Court that might be perceived as affecting the resolution of the Massachusetts discovery issues described below, which are not before this Court for decision.

The Court may take judicial notice of court filings and other matters of public record. *See Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1364 (9th Cir.1998). Judicial notice is appropriate to discern the procedural status of related actions involving the same parties. *See Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006). The accompanying court filings from the Massachusetts action demonstrate the current status of that action.

As mentioned in Appellants’/Cross-Appellees’ Opening Brief, the Massachusetts action remains pending and, unlike the California action that is the subject of these appeals, has not been dismissed pursuant to the disputed settlement. On December 15, 2008, Facebook filed a motion to dismiss the Massachusetts action pursuant to the purported settlement.

Declaration of John P. Duchemin (“Duchemin Decl.”) Ex. D. That same day, motions to dismiss signed by the Founders’ counsel were filed in the Massachusetts action, by direction of the California District Court. *Id.* Ex. E (motion to dismiss filed by the Founders “under protest and subject to their rights of appeal”); 1-Excerpts of Record (“ER”)-23:23-24:7; 44:21-25; 3-ER-328:21-24; 329:21-26; 337:24-338:4; 5-ER-892-93. The Massachusetts court has not yet ruled on those motions to dismiss and will do so only after this Court decides the present appeals, as explained below.

Another matter remains for consideration by the Massachusetts court, even if the orders and judgments enforcing the disputed settlement in the California action were to be affirmed. This matter relates to Facebook’s document production to the Founders in the Massachusetts actions before the parties attended the global mediation at issue before this Court. On May 20, 2008, while Facebook’s motion to enforce the Term Sheet was pending in the California action, ConnectU filed in the Massachusetts action a Sealed Emergency Motion For Expedited Hearing And In Camera Examination Of Documents And Of The Expert Parmet. Duchemin Decl. ¶9. On June 2, 2008, the District Court held a partially public hearing on that motion, in which issues were discussed related to electronically stored information that consultant Jeff Parmet had retrieved from Facebook hard drives. *Id.* Ex. G at 6:12-13, 6:15-20, 7:23-24, 9:7-11, 10:8-9, 10:22-11:19, 13:20-23, 14:4-14, 15:10-14. At the conclusion of that hearing, the District Court placed under

seal certain materials Mr. Parmet had submitted to the court. *See id.* Ex. G at 91:19-92:2. The court otherwise did not rule on ConnectU's motion. *Id.* at 91-94.

On November 21, 2008, after the California court had granted Facebook's motion to enforce the settlement, ConnectU and the Founders filed a motion in the Massachusetts action requesting, among other things, that the Massachusetts court not dismiss the Massachusetts action and compel discovery of Facebook's "suppression of evidence." *Id.* Ex. H. This motion relates to the information Mr. Parmet located and submitted to the Massachusetts court. The motion itself is publicly available but most of the supporting papers were filed under seal. *Id.* ¶11.

On September 30, 2009, the Massachusetts court stayed the proceedings before it pending the outcome of the present appeals before this Court. *Id.* Ex. F. At the same time, the Massachusetts court terminated all pending

motions without prejudice to renewal within 30 days of this Court issuing its mandate in the present appeals. *Id.* Ex. F.

DATED: February 12, 2010.

Respectfully,

JEROME B. FALK, JR.
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By /s/ John P. Duchemin
JOHN P. DUCHEMIN

*Attorneys for Appellants and Cross-
Appellees Cameron Winklevoss, Tyler
Winklevoss and Divya Narendra*

DECLARATION OF JOHN P. DUCHEMIN

I, John P. Duchemin, declare as follows:

1. I am an attorney licensed to practice law in the State of California and a member of the bar of this Court. I am an associate at the law firm of Howard Rice Nemerovski Canady Falk & Rabkin, A Professional Corporation, counsel to Appellants and Cross-Appellees Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra. I make this Declaration based upon my personal knowledge of the matters stated herein, except where otherwise indicated (thereupon testifying from information and belief). If called as a witness, I could and would testify competently to the facts stated herein.

2. Exhibit A is a copy of the Complaint filed in the United States District Court for the District of Massachusetts on September 2, 2004, in Case No. 04-11923, *Connectu LLC v. Mark Zuckerberg, Eduardo Saverin, Dustin Moskovitz, Andrew McCollum, Christopher Hughes, and TheFacebook.com a/k/a The Facebook*.

3. Exhibit B is a copy of the First Amended Complaint that ConnectU filed in that same case on October 28, 2004.

4. Exhibit C is a copy of the Complaint filed in the United States District Court for the District of Massachusetts on March 28, 2007, in Case No. 07-10593, *Connectu LLC v. Mark Zuckerberg, Eduardo Saverin, Dustin Moskovitz, Andrew McCollum, Christopher Hughes, and TheFacebook LLC*.

5. On August 8, 2007, ConnectU filed a First Amended Complaint in Case No. 07-10593, which is the operative complaint in the second Massachusetts action. That First Amended Complaint is filed under seal. (Although there are technically two actions pending in Massachusetts, the second action, No. 07-10593, is where recent pleadings have been filed.)

6. Exhibit D is a copy of Facebook's December 15, 2008 Motion to Dismiss with Prejudice filed in Case No. 07-10593. Facebook filed an identical motion to dismiss on December 15, 2008 in Case No. 04-11923.

7. Exhibit E is a copy of the Founders' December 15, 2008 Motion to Dismiss with Prejudice filed in Case No. 07-10593. The Founders filed an identical motion to dismiss on December 15, 2008, in Case No. 04-11923.

8. Exhibit F is a copy of the Massachusetts court's September 30, 2009 Memorandum and Order staying the Massachusetts case and terminating all outstanding motions without prejudice.

9. On May 20, 2008, ConnectU filed a Sealed Emergency Motion For Expedited Hearing And In Camera Examination Of Documents And Of The Expert Parmet. All of the documents related to that motion were filed under seal.

10. On June 2, 2008, the Massachusetts court held a hearing on ConnectU's Sealed Emergency Motion. The public portion of the transcript of that hearing is attached here as Exhibit G. At the close of that hearing, the Court placed under seal certain materials submitted to the Court by

consultant Jeff Parmet. The Court did not otherwise rule on ConnectU's motion.

11. On November 21, 2008, ConnectU filed a Motion For Sanctions Of Non-Dismissal Or In The Alternative To Vacate Final Judgment filed on November 21, 2008, in Case No. 07-10593. A copy of that motion is attached as Exhibit H.

12. To collect or confirm the information stated above concerning the Massachusetts action, I viewed the docket in the 2004 and 2007 Massachusetts cases and either downloaded the documents attached to this declaration or confirmed that the copies my office already possessed were true and correct.

I declare under penalty of perjury that the foregoing is true and correct.
Executed this 12th day of February 2010 in San Francisco, California.

/s/ John P. Duchemin
JOHN P. DUCHEMIN

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2010, I electronically filed the foregoing **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF APPELLANTS'/CROSS-APPELLEES' OPENING BRIEF** 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. On February 12, 2010, I caused the foregoing document described as **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF APPELLANTS'/CROSS-APPELLES' OPENING BRIEF** to be dispatched through the regular mail collection process at the law offices of Howard Rice Nemerovski Canady Falk & Rabkin, A Professional Corporation, located at Three Embarcadero Center, Seventh Floor, San Francisco, California, for deposit in the United States Postal Service to the following non-CM/ECF participants:

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