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28***E-FILED 11/30/07***UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FACEBOOK, INC., et al.

Plaintiffs,

v.

CONNECTU LLC, et al.

Defendants.

Case No. C 07-01389 RS

**ORDER DENYING PLAINTIFF'S
MOTION FOR SANCTIONS**

I. INTRODUCTION

Plaintiff Facebook moves to impose sanctions against defendants ConnectU, Cameron Winklevoss, Tyler Winklevoss, Divya Narendra, and their counsel. Although the motion is based on a number of different allegedly wrongful acts, all of the claimed misconduct relates to apparent inconsistencies between the legal and factual positions taken by defendants in this and another action pending between Facebook and ConnectU in Massachusetts. Whether or not the positions taken by ConnectU in the Massachusetts action are fully reconcilable with the positions taken, and discovery responses provided, in *this* action, Facebook has not shown that defendants made any materially false discovery responses or representations here. While Facebook has labored mightily to characterize the alleged wrongdoing as having occurred in this proceeding, it is apparent that the true thrust of its argument is that ConnectU took positions *in Massachusetts* that were not tenable in

1 light of its essentially *truthful* admissions in this action. It is for the Massachusetts court, if at all, to
2 decide whether the representations made to it and the positions taken in those proceedings were
3 based on truthful testimony, within the bounds of proper advocacy. Accordingly, the motion for
4 sanctions will be denied.

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6 II. BACKGROUND

7 As set forth in greater detail in prior orders, this action arises from Facebook’s allegations
8 that defendants accessed its website, “harvested” the email addresses of its members, and then sent
9 those persons email soliciting them to become ConnectU members.¹ As also previously described,
10 the initial dispute between the parties arose from ConnectU’s claim that Mark Zuckerberg,
11 Facebook’s founder, originally agreed to assist ConnectU’s founders in developing their website and
12 business, but that he instead misappropriated their intellectual property to establish Facebook. That
13 claim forms the basis of the litigation filed in the District of Massachusetts by ConnectU against
14 Facebook.

15 The present motion for sanctions grows out of an unfortunate series of events and misguided
16 legal arguments that led ConnectU to take positions in the Massachusetts action that arguably were
17 inconsistent with the positions it took and discovery responses it provided here. Specifically, when
18 this action was originally filed in Santa Clara Superior Court, the named defendants included the
19 three ConnectU founders, Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra.² Although
20 ConnectU did not contest jurisdiction, all four of the individual defendants moved to quash service
21 of summons, based on an argument that they were not subject to personal jurisdiction in California.
22 The individual defendants’ motion rested in large part on an argument that any acts they undertook

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25 ¹ No proceedings on the merits have yet taken place, and nothing in this order should
26 be construed as suggesting otherwise. It does not presently appear, however, that ConnectU
27 disputes the general outline of Facebook’s allegations, but ConnectU does vigorously dispute
28 whether any such conduct was wrongful.

² The complaint also named as a defendant Howard Winklevoss, who is the father of
the Winklevoss brothers and who apparently played some role in funding and supporting the
development of ConnectU. Facebook, however, has not challenged his dismissal from this
action and is not seeking to reinstate him as a defendant.

1 on behalf of ConnectU could not be considered as “contacts” in evaluating whether “minimum
2 contacts” existed to assert personal jurisdiction over them.³ Consistent with that argument,
3 defendants not surprisingly represented in discovery responses and in declarations filed with the
4 court that at all relevant times Cameron Winklevoss, Tyler Winklevoss and Divya Narendra had
5 acted not in their capacities as individuals, but in their capacities as “members” of ConnectU.⁴ For
6 example, in response to Interrogatory No. 14, propounded while this case was maintained in
7 Superior Court, defendants stated, “[m]embers of ConnectU include Cameron Winklevoss, Tyler
8 Winklevoss, and Divya Narendra, as set forth in the Limited Liability Company Operating
9 Agreement These persons have all been Members since ConnectU was formed.”

10 Facebook’s opposition to the individual defendants’ motion to quash did not challenge the
11 assertion that they had acted on “behalf” of ConnectU; rather Facebook argued, correctly, that in the
12 context of tort claims, the fact that an individual defendant acts on behalf of a corporate entity is not
13 a jurisdictional shield. See *Calder v. Jones*, 465 U.S. 783, 790 (1984) (defendants’ “status as
14 employees does not somehow insulate them from jurisdiction.); see also *Natural Resources, Inc. v.*
15 *Wineberg*, 349 F.2d 685 (9th Cir. 1965) (“It is elementary that a person is personally responsible for
16 his own torts.”).

17 In its written opposition to this motion for sanctions, ConnectU endorses the argument
18 Facebook made to the Superior Court. “Facebook had done thorough and compelling research
19 proving this membership issue to be irrelevant Facebook’s opposition convincingly established
20 that a person’s official status or capacity in a fictitious entity cannot immunize that person from the
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23 ³ In support of this argument before the Santa Clara Superior Court, defendants cited
24 *Mihlon v. Superior Court*, 169 Cal.App.3d 703 (1985). In later proceedings before this Court,
25 defendants relied on *Colt Studio, Inc. v. Badpuppy Enterprise*, 75 F.Supp.2d 1104,
26 (C.D.Cal.1999) to make the same argument that the acts of defendants Winston Williams and
Pacific Northwest Software undertaken on behalf of ConnectU were not jurisdictionally
significant. *Colt Studio* relied on and followed *Mihlon*.

27 ⁴ ConnectU was initially established as a limited liability company (LLC) in
28 Delaware under the laws of that state. The concept of membership in an LLC is discussed
further below. ConnectU apparently now is a corporation, but that has no bearing on the
issues in this motion.

1 personal jurisdiction of a forum, even where the alleged wrongful action were taken in that person's
2 official capacity." Opposition at 6:26-7:3.

3 Although ConnectU has now essentially conceded that jurisdiction in this proceeding does
4 not turn on the status of the Winklevoss brothers and Narendra as members in, or representatives of,
5 ConnectU, its discovery responses and declarations asserting that the Winklevosses and Narendra
6 were all members of ConnectU presented a jurisdictional problem in the Massachusetts proceeding.
7 That action was commenced in Federal court based solely on diversity jurisdiction. For purposes of
8 diversity jurisdiction, an LLC is treated like a partnership; thus the citizenship of each of its
9 members is relevant. Were Narendra's citizenship to be considered, ConnectU would not have been
10 able to establish a basis for diversity jurisdiction in the Massachusetts action. Accordingly,
11 ConnectU took the position in the Massachusetts litigation that Narendra had *not* been a "member"
12 of ConnectU as of the date that action was filed. Specifically, Narendra filed a declaration stating,
13 "[b]ecause our respective roles, contributions, and shares in the company were uncertain, I was not
14 made a Member of ConnectU LLC until well after September 2, 2004."

15 Facebook did not hesitate to call the Massachusetts court's attention to the apparent
16 inconsistencies in ConnectU's positions. The Massachusetts court ultimately held evidentiary
17 hearings and issued a lengthy written decision on the question of who were members of ConnectU at
18 the time the Massachusetts action was filed. The Massachusetts court's decision, and the record in
19 this action, show all of the following:

20 • ConnectU was formed as an LLC under Delaware law in April of 2004. Although the
21 members of an LLC *may* be specified in the formation documents, there is no requirement to do so.
22 In ConnectU's case, its formation documents did not identify any members.

23 • At the time the LLC was formed, the Winklevoss brothers and Narendra were more
24 focused on launching the ConnectU website than on legal formalities, and the question of who was
25 or was not to be a member of the LLC was given little consideration. Nevertheless, there was at
26 least some general understanding that the Winklevoss brothers would be members, and that
27 Narendra would not. Narendra was, however, fully involved in developing the ConnectU website.

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1 • In August of 2005, an Operating Agreement was executed for the LLC. Under the terms of
2 that agreement, Narendra and the others were all deemed to be founding members of the LLC,
3 retroactive to the date of its formation. Such retroactive agreements are permissible and valid under
4 Delaware law.

5 • Although the Massachusetts court found the retroactive provision of the Operating
6 Agreement to be “admittedly enforceable under Delaware law,” it concluded that the existence of
7 that agreement had no bearing on the question of who were members of the LLC at the time the
8 complaint was filed for the purposes of diversity jurisdiction. The court reasoned that the existence
9 or non-existence of diversity had to be analyzed under a “snapshot” of the “facts as they existed” on
10 the day the complaint was filed, and that the Operating Agreement, formed nearly one year later,
11 was therefore irrelevant.

12 • For purposes of its diversity jurisdiction analysis, therefore, the Massachusetts court
13 concluded that ConnectU had *no* members as of the date the Massachusetts complaint was filed.
14 That conclusion, however, in no way undermines the validity of the Operating Agreement nor does it
15 change the underlying facts that Narendra was directly involved with the development of the
16 ConnectU website from the outset.

17 • The Massachusetts court expressly noted that Narendra’s declaration in that action was not
18 necessarily “completely contradictory” to the response to Interrogatory No. 14. Indeed, the response
19 to Interrogatory No. 14 refers specifically to the Operating Agreement, which made Narendra (and
20 the others) members of the LLC *retroactively*. Narendra’s declaration in the Massachusetts
21 proceedings, in contrast, at least arguably is neither inaccurate nor inconsistent, because it asserts
22 only that *as of* the date the complaint was filed, long *before* the Operating Agreement with its
23 retroactive provisions came into being, Narendra was not a member. The Massachusetts court
24 ultimately applied exactly such a snapshot in its jurisdictional analysis, albeit with the effect of
25 concluding that ConnectU had *no* members, rather than only concluding that Narendra was not a
26 member as ConnectU had urged.

1 III. DISCUSSION

2 A. Proceedings in Superior Court

3 Facebook asserts that defendants committed fraud and proffered false testimony in this action
4 prior to its removal from Superior Court. It is not entirely clear, however, what Facebook contends
5 was false with respect to any of the factual positions taken by defendants in discovery responses or
6 in pleadings while the case was pending in that forum. It seems that Facebook may be arguing it
7 was “false” for Narendra to claim to have been a member of ConnectU from its inception, given the
8 evidence that he was *not* considered a member at the time the LLC was formed, and was never
9 actually made a member until the Operating Agreement was executed in August of 2005. The
10 response to Interrogatory No. 14, however, expressly referenced the Operating Agreement and
11 Facebook has not challenged the propriety of its retroactivity under Delaware law.⁵

12 Facebook also seems to be arguing that defendants “tricked” the Superior Court into granting
13 the motion to quash based on the argument that they had acted only as “members” of ConnectU.
14 There are at least two problems with this argument. First, because the Superior Court granted the
15 motion to quash without explaining its reasoning, it would be entirely speculative to conclude that it
16 did so based on the argument that defendants acted solely on behalf of ConnectU, given that
17 ConnectU had advanced other independent arguments as to why jurisdiction did not exist. Second,
18 even assuming the Superior Court did accept that argument, Facebook has not shown that ConnectU
19 did anything sanctionable to obtain such a result. The facts presented by ConnectU were essentially
20 true. Although the legal formalities necessary to make the Winklevosses and Narendra actual
21 members of ConnectU did not take place until the retroactive Operating Agreement was executed,
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27 ⁵ Facebook points to the fact that other discovery responses asserted that the
28 Winklevosses and Narendra acted as members of ConnectU without expressly referencing
the Operating Agreement. It is not clear why Facebook deems this significant, given that the
response to Interrogatory No. 14 set out the basis of the membership claim.

1 that does not change the fact that they were at all times acting on behalf of ConnectU. The legal
2 authority presented by ConnectU has never been expressly overruled.⁶

3 Finally, Facebook appears to be making at least some argument that it was improper for any
4 of the defendants to argue that they were acting as members of ConnectU during the summer of
5 2004 given that the Operating Agreement was not executed until the fall of 2005. The fact that
6 defendants may have failed to formalize their legal status until after the fact does not render their
7 contentions that they were “members” in 2004 sanctionable.

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9 B. Discovery obligations

10 Facebook asserts that Narendra has “admitted” that he answered and verified written
11 discovery without reviewing the questions asked. The testimony on which Facebook relies,
12 however, shows only that Narendra did not have the actual form interrogatories in front of him at the
13 time he signed the responses. Narendra stated that, “the questions are in a completely different
14 document,” thereby implying that he had in fact seen the questions at some point in time. The Court
15 sees no reason to presume that there was any impropriety in the process by which Narendra, with the
16 assistance of his lawyers, responded to the written discovery. That he may have been provided a
17 final version of the answers to verify without having the questions in front of him at that particular
18 moment does not establish that there was anything reckless or cavalier in Narendra’s approach to
19 complying with his discovery obligations.

20 Facebook also suggests that ConnectU failed to produce a few documents in this proceeding
21 that it later offered as evidence in the Massachusetts case. In the course of extensive discovery, it is
22 not unusual for documents to turn up that were not produced initially. In appropriate circumstances,

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24 ⁶ As mentioned above, ConnectU’s opposition to this motion fully acknowledges that
25 the fact that individuals may have acted on behalf of an entity does not shield them from
26 personal jurisdiction in the tort context. Moreover, the opposition expressly states that it
27 came to this understanding when it reviewed Facebook’s opposition to the motion to quash in
28 Superior Court. Indeed, ConnectU contends it abandoned the argument by making no
reference to it in the reply brief in support of the motion to quash. It is troubling that
defendants presented the same argument to this Court in connection with the motion to
dismiss of Winston Williams and Pacific Northwest Software notwithstanding their assertion
that they concluded it was not tenable upon review of Facebook’s opposition to the motion to
quash.

1 sanctions can be imposed where a failure to produce documents appears to reflect a willful
2 indifference to complying with discovery obligations, rather than mere inadvertence. Here,
3 Facebook has not shown there is any reason to believe that the documents at issue were not
4 produced earlier through any sanctionable neglect.

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6 C. Proceedings in Massachusetts

7 Facebook argues that ConnectU attempted to “manufacture” diversity jurisdiction in
8 Massachusetts by recanting on the statements it made here that Narendra was a “member” of
9 ConnectU from its inception. As reflected above, the positions taken by ConnectU here and in
10 Massachusetts were not *wholly* irreconcilable. Even assuming, however, that ConnectU exceeded
11 the bounds of reasonable advocacy in the arguments and evidence it submitted in Massachusetts ,
12 that is a matter for that court to evaluate and address as it sees fit. It is worth noting, however, that
13 the Massachusetts court ultimately *agreed*, albeit for different reasons, that Narendra was *not* a
14 member of ConnectU at the relevant time for purposes of jurisdiction, but the court went on to
15 conclude it lacked diversity jurisdiction in any event.

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18 IV. CONCLUSION

19 For the reasons set forth above the motion for sanctions is denied.

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21 IT IS SO ORDERED.

22 Dated: November 30, 2007

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RICHARD SEEBORG
United States Magistrate Judge