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 THE FACEBOOK, INC. and MARK ZUCKERBERG

11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA
 13 SAN JOSE DIVISION

15 THE FACEBOOK, INC. and MARK
 ZUCKERBERG,

16 Plaintiffs,

17 v.

18 CONNECTU, INC. (formerly known as
 19 CONNECTU, LLC), PACIFIC
 NORTHWEST SOFTWARE, INC.,
 20 WINSTON WILLIAMS, and WAYNE
 CHANG,

21 Defendants.

Case No. 5:07-CV-01389-JW

**PLAINTIFFS FACEBOOK INC. AND
 MARK ZUCKERBERG'S PARTIAL
 OPPOSITION TO CNET'S MOTION
 FOR LEAVE TO INTERVENE AND
 TO UNSEAL HEARING
 TRANSCRIPT AND OTHER
 DOCUMENTS**

Date: July 2, 2008
 Time: 10:00 A.M.
 Judge: Honorable James Ware

1 **I. INTRODUCTION**

2 Plaintiffs Facebook, Inc. and Mark Zuckerberg only partially oppose CNET’s motion for
3 leave to intervene in this action for limited purposes. Plaintiffs do not object to intervention by
4 CNET to raise its identified challenges, and do not object to production of a redacted version of
5 the hearing transcript. Plaintiffs do, however, object to the proposed wholesale and unwarranted
6 unsealing of documents previously sealed by this Court.

7 CNET asks the Court to unseal every document filed in this action since August 2005.¹
8 Plaintiffs request that the Court uphold its previous sealing orders. As detailed in previous
9 declarations and motions supporting those sealing orders, the documents that CNET seeks to
10 uncover include source code (including defendants’ code designed to hack into Facebook’s
11 computer systems, steal user information, and spam those users), trade secret information
12 (Facebook’s countermeasures), sensitive financial data and/or information regarding which
13 Plaintiffs have third party confidentiality obligations (company valuations and private securities
14 information), and Constitutionally protected information about private persons. CNET makes no
15 showing as to why the public has a right to see these materials. CNET also makes no showing as
16 to why it never objected to previous motions to seal when those noticed motions were pending
17 weeks, months or years ago. Nor does CNET demonstrate why unsealing every document in this
18 case on a rushed basis is necessary.

19 CNET argues instead that records were improperly sealed because the parties had not met
20 a “compelling interests” standard. In fact, the vast majority of documents filed under seal in this
21 case were, by CNET’s own admission, discovery materials and non-dispositive motions for which
22 only a “good cause” showing was required. Plaintiffs satisfied this “good cause” requirement
23

24 _____
25 ¹ CNET’s motion asks this Court to second-guess sealing orders made by the Superior Court of
26 California and the District of Massachusetts. This case originally was filed in the Superior Court
27 of Santa Clara, and any documents sealed prior to March 28, 2007 would have been sealed by that
28 court. In addition, some of the materials sealed in this case were received by Plaintiffs as a result
of the proceedings currently pending in the District of Massachusetts. That court, too, sealed
documents. If the Court grants CNET’s motion, many documents filed under seal in other courts
will be improperly unsealed in contradiction to those other courts’ orders.

1 long ago, and the records were properly sealed. CNET has not identified any sealed document
2 that relates to a dispositive motion that did not comply with the proper standard.

3 Should the Court believe detailed review of the entire record is necessary, Plaintiffs
4 request that the Court refer this matter to Magistrate Judge Maria-Elena James on a regularly
5 noticed motion to allow Plaintiffs adequate time to parse through the record and determine
6 whether any documents previously sealed no longer need to be sealed.² CNET's omnibus
7 emergency motion, which the Court invited solely for the limited purpose of challenging the
8 closing of the courtroom during a June 23 hearing, affords Plaintiffs no time to adequately
9 respond to its request. A reasoned approach is especially necessary in light of CNET's failure to
10 identify with any specificity which records it seeks to unseal.

11 **II. BACKGROUND FACTS**

12 **A. Confidential Discovery**

13 Plaintiffs commenced this action in August 2005 in Santa Clara Superior Court. In their
14 complaint, they alleged that ConnectU and its principals had violated California Penal Code
15 Section 502, among other laws, by hacking into Plaintiffs' computer systems and stealing
16 personal user information. After learning that ConnectU and its related parties also had
17 developed a program to crawl user profiles and use their email addresses to spam members (to
18 invite them to join a competing social network), Plaintiffs amended their complaint in February
19 2007 by adding CAN-SPAM and Computer Fraud and Abuse Act claims and naming additional
20 parties. ConnectU removed this action to this Court in March 2007.

21 ConnectU also had initiated, in the District of Massachusetts, a lawsuit against Facebook,
22 Mark Zuckerberg and others who were involved with Facebook's early development. ConnectU
23 alleged claims for copyright infringement, trade secret misappropriation, and breach of contract
24 (among other things).

25 In both actions, the parties entered, and the courts adopted, protective orders governing

26 ² In September 2007, the Honorable Richard Seeborg ordered the parties to revisit their sealing
27 requests and de-designate materials where appropriate and provide the requisite Rule 79-5(d)
28 declarations. The parties complied with that Order on September 27, 2007, and de-designated
various documents, resulting in the public filing of numerous documents. Dkt. 174.

1 the use and disclosure of documents produced in these cases. Because both cases involved the
2 parties' confidential business information, source code (including computer scripts detailing
3 ConnectU's hacking activity), and trade secrets (Plaintiffs' responding countermeasures), such
4 protective orders were necessary. In addition, because the parties to these cases were, at the
5 relevant times, college students, many of the materials included information – often private and
6 potentially embarrassing – about other students and persons not involved in these cases. As a
7 result, Plaintiffs designated such information pursuant to the protective orders with the
8 expectation that such information would be used only for the litigation between the parties and
9 would not otherwise be disclosed. Plaintiffs also filed numerous documents publicly over the
10 years and de-designated some materials as appropriately nonconfidential during the course of
11 these proceedings.

12 **B. The Parties' Confidential Motion**

13 On February 22-23, 2008, the parties engaged in private mediation before Antonio Piazza.
14 At the conclusion of that session, the parties signed a Confidential Term Sheet and Settlement
15 Agreement (“Settlement Agreement”). When ConnectU's principals refused to comply with their
16 obligations pursuant to that agreement, Plaintiffs filed a motion to enforce the Settlement
17 Agreement.

18 ConnectU opposed enforcement and in doing so filed documents improperly disclosing
19 the confidential terms of the Settlement Agreement and alleged discussions held during
20 mediation. In response to ConnectU's assertions, Plaintiffs were forced to disclose additional
21 confidential, trade secret, and commercially sensitive financial data about Facebook, Inc.

22 On June 19, 2008, the Court held a telephonic conference with the parties to discuss
23 logistics related to the June 23 hearing. The parties agreed that the financial provisions in the
24 Settlement Agreement were and are confidential and warranted a closed discussion at the hearing.
25 The parties also agreed that knowing precisely when those discussions would arise during the
26 hearing would be impossible to predict and, as a result, the Court agreed to seal the courtroom
27 and re-set the hearing from 9:00 A.M. to 11:00 A.M.

28 On the day of the June 23 hearing several news organizations, including movant CNET,

1 came to the hearing. Prior to any argument from the parties, this Court indicated its intent to
2 close the courtroom because the subject of the disputes between the parties pertained to a
3 “confidential settlement.”

4 CNET now seeks to unseal the filings and a transcript related to Plaintiffs’ motion to
5 enforce the Settlement Agreement, as well as numerous unspecified records filed by the parties in
6 this action since August 2005.

7 **III. LEGAL DISCUSSION**

8 **A. Plaintiffs Do Not Oppose CNET’s Motion for Leave to Intervene for a**
9 **Limited Purpose**

10 CNET seeks leave to intervene in this action in order to challenge “courtroom closure and
11 sealing of records.” CNET’s Mot. to Intervene (“Mot.”) at 3. Plaintiffs do not oppose CNET’s
12 request for the limited purpose of challenging previous orders sealing records in these
13 proceedings. As discussed below, however, the public is not entitled to unfettered access to
14 hearings and documents, and the Court should continue to address the sealing of hearings and
15 documents on a case-by-case basis.³ See *Nixon v. Warner Communications*, 435 U.S. 589, 598
16 (1978); *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213 (9th Cir. 1989); *Goodyear Tire*
17 *& Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir. 2003); *Cincinnati Gas &*
18 *Elec. Co. v. General Elec. Co.*, 854 F.2d 900, 902 (6th Cir. 1988); *U.S. v. Glens Falls*
19 *Newspapers, Inc.*, 160 F.3d 853, 857-58 (2d Cir. 1998).

20 **B. The Public Is Not Entitled to Unfettered Access to All Documents in This**
21 **Matter**

22 Without specifying any documents whatsoever, CNET contends that it should have access
23 to the entirety of court files. Federal courts have repeatedly recognized that not all proceedings
24 and documents come within the ambit of the public’s and media’s right of access. See *Nixon*, 435
25 U.S. at 598; *Times Mirror Co.*, 873 F.2d at 1213; see also, *Goodyear Tire & Rubber Co.*, 332
26 F.3d at 980; *Cincinnati Gas*, 854 F.2d at 902; *Glens Falls Newspapers, Inc.*, 160 F.3d at 158. To

27 ³ To the extent that CNET seeks a blanket order prohibiting the sealing of future hearings, such a
28 request is unwarranted and improper. Any requests for sealing hearings in the future should be
considered when raised.

1 determine whether the right of access extends to particular documents or proceedings, the Court
2 must consider: 1) whether there has been a “tradition of accessibility” or access to the documents
3 or proceedings; and 2) whether public access plays a significant, positive role in the function of
4 the proceeding. *See Times Mirror Co.* 873 F.2d at 1213, citing *Press-Enterprise Co. v. Super.*
5 *Ct.*, 478 U.S. 1, 7 (1986).

6 C. **The Public Does Not have A Right to Access Filings and Hearings Implicating**
7 **Private Parties’ Confidential Information**

8 CNET has not demonstrated a “tradition of accessibility” to hearings related to
9 enforcement of a private settlement or how public access plays a positive role therein. Instead,
10 CNET contends that the Court improperly excluded the public from the courtroom. Mot. at 7:27-
11 8:1. Contrary to CNET’s assertions, however, the Court explained at the outset that the hearing
12 on Plaintiffs’ “motion concerned a confidential settlement.” 6/23/08 Hr’g Trans. at 5:20-25.
13 Courts have repeatedly held that the parties’ right to the privacy of settlement talks outweighs the
14 public’s right of access to civil proceedings. *Goodyear Tire & Rubber Co.*, 332 F.3d 976, 980
15 (6th Cir. 2003) citing *Cincinnati Gas & Elec. Co.*, 854 F.2d 900, 902 (6th Cir. 1988) (Members of
16 the press denied access to pre-trial settlement procedures, relying on the historical secrecy in
17 settlement talks. “The need for privacy in settlement talks outweighed any First Amendment
18 right of access to the proceedings”); *Glens Falls Newspapers, Inc.*, 160 F.3d at 858; *B.H. v.*
19 *Ryder*, 856 F. Supp. 1285, 1290 (N.D. Ill. 1994) (“it is not surprising that the courts have there is
20 no right of public access to settlement conferences”).

21 Because the June 23 hearing was directly related to the enforceability of the confidential
22 Settlement Agreement, the parties expected that disclosure of private discussions leading up to
23 that agreement would be necessary. The public had no inherent right to access those confidential
24 discussions. *Glens Falls Newspapers, Inc.*, 160 F.3d at 858; *Ryder*, 856 F. Supp. at 1290.
25 Furthermore, because of the sensitivity of the discussions, public access threatened the openness
26 and efficiency of the proceedings, rather than positively influencing them. As the Court in *Ryder*
27 wrote in refusing to permit the press access to all post-settlement discussions relating to the
28 Court’s enforcement of a voluntary consent decree in a widely-publicized and contentious class

1 action:

2 To say, then, that the public and the press have a right to be present
3 at all conferences in cases involving issues of great public interest is
4 simply to say that traditional settlement conferences could not occur
5 in those cases. The indispensable attitude for settlement – the
willingness to concede that the other side has a point – would be
absent ...

6 For these reasons, it is not surprising that the courts have held there
7 is no right of public access to settlement conferences. Neither of
8 the requirements for public access is met: there is no historical
tradition of public access, and public access, rather than promoting
the purpose of the proceeding, is likely to frustrate it.

9 *Ryder*, 856 F. Supp. at 1290. The logic of the court in *Ryder* is equally relevant in the present
10 case, and this Court properly excluded the public from the hearing concerning enforcement of the
11 settlement agreement.

12 Furthermore, prior to the hearing, the Court held a telephonic conference regarding the
13 sealing of the courtroom. The parties agreed that sealing was appropriate to protect specific,
14 confidential terms in the Settlement Agreement, but that predicting precisely when those
15 discussions would arise during the hearing was impossible. As a result, the hearing was closed to
16 the public to allow the Court to hold an orderly hearing while protecting the parties' confidential,
17 settlement discussions and business information.⁴

18 CNET incorrectly argues that “protection of financial information is not a sufficient basis
19 for barring access to a civil proceeding... .” Mot. at 8. “Confidential information . . . is a species
20 of property to which the corporation has the exclusive right and benefit.” *See Carpenter v.*
21 *United States*, 484 U.S. 19, 25-26 (1987) citing *Dirks v. SEC*, 463 U.S. 646, 653 n.10 (1983));
22 *Board of Trade of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236, 250-51 (1905)).
23 Confidential information derives its value from exclusive access to and use by the owner of the
24 information. Public access to Plaintiffs' confidential information would, therefore, not only
25 interfere with, but potentially destroy the value of such information. *See Ruckelhaus v. Monsanto*,

26 _____
27 ⁴ CNET complains that the Court rejected its request for a continuance of the June 23 hearing.
28 Mot. at 7. CNET provides no authority for the proposition that CNET's purported right to delay
the hearing to object outweighs Plaintiffs' right to resolution of their motion, which had been
pending for two months.

1 467 U.S. 986, 1003-04 (1984).

2 Because Facebook is a private company, it actively protects such information from public
3 disclosure. Indeed, public policy favors the protection of a person’s interest in maintaining the
4 confidentiality of commercially sensitive information. *See, e.g., Champion v. Super. Court*, 201
5 Cal. App. 3d 777, 789-90 (1988) (granting application to seal entire file of case in action seeking
6 declaration of rights and duties of partners under partnership agreement); *see also, Encyclopedia*
7 *Brown Prods., Ltd. v. Home Box Office, Inc.*, 26 F. Supp. 2d 606, 614 (S.D.N.Y. 1998) (party
8 would be irreparably harmed by disclosure of confidential business information, supporting
9 sealing, even though documents dealt with business information dating back several years); *see*
10 *also* 18 U.S.C. § 1905 (Trade Secrets Act) and 5 U.S.C. § 552(b)(4) (trade-secret and commercial
11 or financial-information exemption to Freedom of Information Act). The “disclosure of
12 confidential information is the quintessential type of irreparable harm that cannot be compensated
13 or undone by money damages.” *See Hirshfeld v. Stone*, 193 F.R.D. 175, 187 (S.D.N.Y. 2000).
14 The Court properly sealed the courtroom to protect the parties’ confidential financial information
15 and settlement discussions.

16 Notwithstanding the parties’ right to maintain the confidentiality of their settlement,
17 Plaintiffs do not object to the release of the June 23 hearing transcript with minor redactions to
18 protect the parties’ agreed-upon financial arrangements. Plaintiffs also are prepared to review
19 their sealed filings related to the Confidential Motion to enforce the Settlement Agreement. To
20 the extent the documents do not include private financial information, settlement discussions or
21 Constitutionally protected private information,⁵ Plaintiffs have no objection to unsealing them.
22 Plaintiffs need, however, a reasonable time in which to review those materials to ensure that all

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24 _____
25 ⁵ As part of its opposition, ConnectU improperly included alleged statements made during the
26 parties’ confidential, private mediation. ADR Local Rule 6-11 strictly prohibits the disclosure of
27 anything that was said or happened during mediation. Strong public policy protects these
28 discussions to encourage the use of the alternative dispute process. In its June 25 Order granting
Plaintiffs’ Motion to Enforce the Settlement Agreement, the Court declined to violate the
privilege. 6/25/08 Order at fn 11. CNET should not be allowed to penetrate it either. To the
extent any documents purport to discuss what happened or was said at mediation, those records
must remain sealed.

1 confidential information is maintained as such.

2 **D. All Other Filings in This Case Submitted Under Seal Should Remain**
3 **Confidential**

4 Plaintiffs object to CNET's rushed, wholesale attempt to unseal everything filed before
5 April 23, 2008. CNET does not specify exactly which records should be unsealed but instead
6 vaguely requests that the Court unseal "scores of other documents." Mot. at 12. This request
7 must be denied. CNET fails to articulate how unfettered disclosure of protected materials will
8 afford the public an opportunity to positively influence the proceedings or if the information is
9 traditionally accessible. *See Times Mirror Co.* 873 F.2d at 1213 citing *Press-Enterprise Co. v.*
10 *Super. Ct.*, 478 U.S. 1, 7 (1986). Indeed, CNET cannot do so. This matter involves the
11 settlement of a civil dispute between two closely-held, private corporations. Thus, no heightened
12 public interest in disclosure exists to require public access, as may be the case in toxic tort or
13 other litigation that implicates the health or welfare of the general public. *See Cincinnati Gas &*
14 *Elec. Co.*, 854 F.2d at 904 (6th Cir. 1988) ("[P]ublic access to summary jury trials over the
15 parties' objections would have significant adverse effects on the utility of the procedure as a
16 settlement device ... and would not play a "significant positive role in the functioning of the
17 particular process in question."). Plaintiffs' interests in the protection of their private and
18 sensitive information, therefore, overrides the right of public access to the filings and transcript
19 that are the subject of this motion.

20 Despite CNET's contention that the "parties' stipulated protective order is a manifestly
21 insufficient basis to seal any documents filed with the Court" (mot. at 10), courts have recognized
22 the importance of such agreements to an orderly administration of justice. *Beam Sys. v.*
23 *Checkpoint Sys.*, 1997 U.S. Dist. LEXIS 8812 (C.D. Cal. Feb. 5, 1997) ("The use of protective
24 orders is vital to the efficient litigation of every stage of many intellectual property disputes.");
25 *see also Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1134 (9th Cir. 2003) citing
26 *Phillips v. GMC*, 307 F.3d 1206, 1213 (9th Cir. 2002) ("when a court grants a protective order for
27 information produced during discovery, it already has determined that 'good cause' exists to
28 protect this information from being disclosed to the public by balancing the needs for discovery

1 against the need for confidentiality”). The parties here relied on the protective orders to guard
2 trade secret information, source code, sensitive business information, and Constitutionally
3 protected information of private persons. In addition, as discussed above, the types of
4 information sealed in this case are commonly protected from public disclosure. *See, e.g.,*
5 *Champion*, 201 Cal. App. 3d at 789-90; *Encyclopedia Brown Prods., Ltd.*, 26 F. Supp. 2d at 614.
6 CNET’s request to unseal every record in these proceedings will unnecessarily invade the rights
7 of private parties without showing a compelling need to do so. Such an invasion is not warranted
8 and should be rejected.

9 As CNET readily admits, the Ninth Circuit permits courts, for good cause, to seal non-
10 dispositive motions and documents that were produced in discovery. Mot. at 6, fn3; *see also*
11 *Foltz*, 331 F.3d at 1134. The vast majority of the documents CNET seeks to unseal are, in fact,
12 such non-dispositive motions and materials produced during discovery. Plaintiffs have met the
13 good cause standard and, therefore, the documents were properly sealed. In contrast, however,
14 CNET has not identified any sealed documents for dispositive motions for which Plaintiffs have
15 not met the requisite burden.

16 **IV. CONCLUSION**

17 Plaintiffs respectfully request that the Court deny CNET’s motion and maintain the
18 confidentiality of certain filings and transcripts filed under seal in this case. CNET’s belated and
19 vague request on shortened time is unduly burdensome. If the Court is inclined to consider
20 CNET’s motion to second-guess this Court and the two-previous courts that issued sealing orders,
21 Plaintiffs request that the matter be submitted to Magistrate Judge Maria-Elena James on a
22 regularly noticed motion to afford the parties time to review the “scores of other documents.”

23
24 ORRICK, HERRINGTON & SUTCLIFFE LLP

25
26 /s/ Theresa A. Sutton /s/

27 Theresa A. Sutton
28 Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on June 30, 2008.

Dated: June 30, 2008

Respectfully submitted,

/s/ Theresa A. Sutton /s/
Theresa A. Sutton