

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

CONNECTU, INC., CAMERON
WINKLEVOSS, TYLER WINKLEVOSS,
AND DIVYA NARENDRA,

Plaintiff,

v.

FACEBOOK, INC., MARK ZUCKERBERG,
EDUARDO SAVERIN, DUSTIN
MOSKOVITZ, ANDREW MCCOLLUM, and
FACEBOOK, LLC,

Defendants.

Civil Action No. 1:07-CV-10593-DPW

THE FACEBOOK DEFENDANTS' RESPONSE TO 02138'S REQUEST TO UNSEAL

The Facebook Defendants agree to third party 02138's request to unseal as to: (1) the Emergency Request for a Temporary Restraining Order, (2) the Declaration Of I. Neel Chatterjee In Support Of Facebook Defendants' Emergency Request For A Temporary Restraining Order Against Publication Or Dissemination Of Confidential Documents, (3) Exhibits 1-4 and 9-10 to the Chatterjee Declaration, and (4) the proposed order lodged with the Court on November 29, 2007. Doc. No. 162.

02138's request to unseal should be denied, however, as to Confidential Exhibits 5, 6, 7, and 8 to the Chatterjee Declaration. *Id.* On November 28, 2007, the Facebook Defendants learned that 02138 posted on its website documents, including Confidential Exhibits 5, 6, 7 and 8, that were originally filed under seal in this Court. These documents contain personal and sensitive information about the defendants as well as third parties not affiliated with this litigation. The documents were designated "Confidential" by the Facebook Defendants pursuant to the July 6, 2005, Stipulated Protective Order entered by this Court. On November 29, 2007, the Facebook Defendants sought an order requiring 02138 to remove the confidential materials from its website. *Id.* The Court denied the Facebook Defendants' request after it determined that the likely, but unfortunate, source of the documents was the clerk's office due to an administrative error. 11/30/07 Hr'g Tr.

Despite the unfortunate leak, the Facebook Defendants continue to believe that the information contained in Confidential Exhibits 5, 6, 7, and 8 is confidential and was properly filed under seal pursuant to the Second Stipulated Protective Order. The Facebook Defendants ask the Court to ensure that the information remains sealed. Third parties in possession of the documents may, at some point, remove the documents from their website(s), thereby reducing

their availability to the public as a result of the leak.¹ The Facebook Defendants wish to prevent the unnecessary and preventable additional availability of the documents in perpetuity through the District Court case file. The Court can prevent further unnecessary propagation of the information by upholding its original sealing orders protecting the information from public view. Indeed, given the inadvertent disclosure of the materials, preventing increased transmission of the information is an appropriate and reasonable remedy to the otherwise unfortunate disclosure.

The Facebook Defendants also want to prevent Plaintiffs and other third parties from later arguing that the Court's willingness to unseal these exhibits in the present context negates the Facebook Defendants' efforts to protect other documents containing similar confidential, private and/or sensitive information. These documents, which apparently originated from the Court's files, were previously filed under seal by the Court in support of various other motions. The motions to seal these exhibits were unopposed by Plaintiffs. The present state of the investigation into the leak suggests that the documents were not made publicly available through any fault of the parties. The Facebook Defendants should not be deemed to have waived their rights to protection based on a series of events over which they had no control, and continue to act in accordance with the Second Stipulated Protective Order in requesting that their motion to seal these documents be granted as to Confidential Exhibits 5, 6, 7 and 8.

The disclosure of Exhibits 5, 6, 7, and 8 was an unfortunate event. One mishap should not, however, prevent the Facebook Defendants (or any party for that matter) from maintaining the protections of a Stipulated Protective Order entered by this Court. This is especially true where, as here, the party challenging the propriety of the sealing order is not a party to this

¹ In addition, over time, the exposure of the protected documents due to 02138's posting will be substantially reduced. Facebook seeks to prevent the further, ongoing harm 02138's requested unsealing would cause.

litigation or the Protective Order and, indeed, argued that it could not be bound by the Protective Order. 02138 should not be permitted to challenge this Court's previous sealing orders simply because it fortuitously came into possession of otherwise obviously confidential materials.

02138's request to unseal Exhibits 5, 6, 7, and 8 should be denied. The Facebook Defendants otherwise agree to unseal: (1) the Emergency Request for a Temporary Restraining Order, (2) the Declaration Of I. Neel Chatterjee In Support Of Facebook Defendants' Emergency Request For A Temporary Restraining Order Against Publication Or Dissemination Of Confidential Documents, (3) Exhibits 1-4 and 9-10 to the Chatterjee Declaration, and (4) the proposed order lodged with the Court on November 29, 2007. Doc. No. 162.

Dated: December 7, 2007

Respectfully submitted,

/s/ I. Neel Chatterjee /s/

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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 December 7, 2007.

Dated: December 7, 2007.

Respectfully submitted,

/s/ I. Neel Chatterjee /s/

I. Neel Chatterjee