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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

THE FACEBOOK, INC.,) C-07-01389-JW
)
PLAINTIFF,) JUNE 23, 2008
)
V.) **UNSEALED AND REDACTED BY**
) **THE COURT**
)
CONNECTU, LLC, ET AL.,) PAGES 1-79
)
DEFENDANTS.)
-----)

THE PROCEEDINGS WERE HELD BEFORE
THE HONORABLE UNITED STATES DISTRICT
JUDGE JAMES WARE

A P P E A R A N C E S :

FOR THE PLAINTIFF: ORRICK, HERRINGTON & SUTCLIFFE
BY: I. NEEL CHATTERJEE
MONTE M.F. COOPER
SUSAN D. RESLEY
1000 MARSH ROAD
MENLO PARK, CALIFORNIA 94025

FOR THE DEFENDANTS: BOIES, SCHILLER & FLEXNER
BY: DAVID A. BARRETT
EVAN ANDREW PARKE
STEVEN C. HOLTZMAN
575 LEXINGTON AVENUE
7TH FLOOR
NEW YORK, NEW YORK 10022

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER: IRENE RODRIGUEZ, CSR, CRR
CERTIFICATE NUMBER 8074

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A P P E A R A N C E S: (CONT'D)

FOR THE DEFENDANTS: FINNEGAN, HENDERSON,
FARABOW, GARRETT & DUNNER
BY: SCOTT R. MOSKO
JOHN F. HORNICK
STANFORD RESEARCH PARK
3300 HILLVIEW AVENUE
PALO ALTO, CALIFORNIA 94304

FENWICK & WEST
BY: KALAMA LUI-KWAN
555 CALIFORNIA STREET
12TH FLOOR
SAN FRANCISCO, CALIFORNIA
94104

ALSO PRESENT: BLOOMBERG NEWS
BY: JOEL ROSENBLATT
PIER 3
SUITE 101
SAN FRANCISCO, CALIFORNIA
94111

THE MERCURY NEWS
BY: CHRIS O'BRIEN
SCOTT DUKE HARRIS
750 RIDDER PARK DRIVE
SAN JOSE, CALIFORNIA 94190

THE RECORDER
BY: ZUSHA ELINSON
10 UNITED NATIONS PLAZA
SUITE 300
SAN FRANCISCO, CALIFORNIA
94102

CNET NEWS
BY: DECLAN MCCULLAGH
1935 CALVERT STREET, NW #1
WASHINGTON, DC 20009

1 MORE COMPLICATED AND I'LL EXPLAIN WHY IT'S A LITTLE
2 MORE COMPLICATED IN A MOMENT, WHAT WE'RE ASKING THE
3 COURT TO DO IS TO RECOGNIZE THAT THE TERM SHEET AND
4 SETTLEMENT AGREEMENT THAT WE PROVIDED TO YOUR
5 HONOR, THE TWO-PAGE HANDWRITTEN DOCUMENT, IS AN
6 ENFORCEABLE AGREEMENT AND TO ORDER CONNECTU TO OR
7 ORDER THE PRINCIPALS OF CONNECTU TO GIVE US THEIR
8 SHARES IN THE COMPANY IN EXCHANGE FOR THE MONEY AND
9 THE SHARES THAT WE WERE GOING TO GIVE THEM.

10 WE STAND READY TO PERFORM OUR END OF THE
11 DEAL. THEY DO NOT.

12 NOW, THERE IS A DISPUTE OVER A PHRASE AT
13 THE VERY END OF THE AGREEMENT THAT SAYS FACEBOOK
14 WILL TERM THE FORM AND DOCUMENTATION OF THE
15 TRANSACTION CONSISTENT WITH THE CASH AND STOCK FOR
16 STOCK ACQUISITION.

17 IT'S OUR VIEW THAT THE COURT CAN PROPERLY
18 RELY UPON THE DOCUMENTS THAT WE PROVIDED THE COURT
19 IN ORDERING THEM TO SIGN THOSE DOCUMENTS AND COMPLY
20 WITH THEM.

21 THEY HAVE RAISED AN ISSUE AS TO THAT. WE
22 DISAGREE WITH THAT ISSUE AND FUNDAMENTALLY, IF YOUR
23 HONOR WERE TO ENTER A JUDGMENT TELLING THE PARTIES
24 TO COMPLY WITH THE TERM SHEET AND SETTLEMENT
25 AGREEMENT, AND ESSENTIALLY STAPLE IT ON TO THE

1 JUDGMENT THAT THIS IS WHAT THE AGREEMENT IS AND
2 PEOPLE HAVE TO LIVE WITH IT, THAT WOULD BE
3 ACCEPTABLE TO FACEBOOK.

4 THE REASON WHY THE ISSUES HAVE BECOME
5 MORE COMPLEX, YOUR HONOR, WE DIDN'T UNDERSTAND WHY,
6 WHY CONNECTU WAS NOT WILLING TO HONOR THE AGREEMENT
7 THAT IT SIGNED.

8 AFTER WE FILED THE MOTION TO ENFORCE, WE
9 LEARNED THE REASON WHY.

10 AND THE REASON WHY THERE'S A DISPUTE AS
11 TO THIS AGREEMENT IS NOT BECAUSE OF THE BINDING
12 NATURE OF THE TERM SHEET AND THE SETTLEMENT
13 AGREEMENT.

14 AFTER WE FILED THE MOTION, THE QUINN
15 EMANUEL FIRM, WHO IS NO LONGER COUNSEL OF RECORD
16 FOR CONNECTU, FILED A NOTICE OF LIEN AGAINST ANY
17 PROCEEDS OR ANY JUDGMENT AGAINST THIS COURT OR IN
18 THE BOSTON COURT ASSOCIATED WITH THIS CASE.

19 IT'S OUR VIEW, YOUR HONOR, THAT THE
20 REASON THAT CONNECTU WANTS OUT OF THIS TERM SHEET
21 AND SETTLEMENT AGREEMENT IS NOT BECAUSE IT'S A
22 BINDING AGREEMENT. IT IS.

23 THE REASON THEY WANT OUT OF THE DEAL IS
24 BECAUSE THEY HAVE SOME SORT OF FINANCIAL
25 ARRANGEMENT WITH THE QUINN EMANUEL FIRM THAT IS

1 THE COURT: BUT AS TO THE OTHERS?

2 MR. BARRETT: AS TO THE OTHERS, YOUR
3 HONOR, MY POINT IS A LITTLE DIFFERENT.

4 THEY OBVIOUSLY SIGNED THE DOCUMENT;
5 HOWEVER, JUST BECAUSE SOMEONE ENTERED INTO A
6 CONTRACT DOES NOT GIVE A COURT THE LEGAL POWER TO
7 ORDER THAT PERSON TO SPECIFICALLY PERFORM THE
8 CONTRACT.

9 WHAT IS NECESSARY IS THAT THE PERSON BE
10 SERVED, AND I WILL SAY, YOUR HONOR, THAT THESE
11 THREE INDIVIDUALS PREVAILED ON A MOTION TO DISMISS
12 FACEBOOK'S ORIGINAL COMPLAINT AGAINST THEM, THE
13 COMPLAINT THAT WAS FILED IN STATE COURT AGAINST
14 THEM.

15 THEY PREVAILED ON A MOTION TO DISMISS ON
16 THE GROUND THAT THERE WAS NO PERSONAL JURISDICTION
17 OVER THEM.

18 THE COURT: BUT WHAT DO YOU -- WHAT IS
19 YOUR POSITION WITH RESPECT TO PARAGRAPH 4?

20 MR. BARRETT: I THINK THAT THAT -- IT'S
21 POSSIBLE THAT THAT COULD BE READ AS A SUBMISSION TO
22 JURISDICTION BUT THAT IS DIFFERENT FROM ACTUALLY
23 SERVING PEOPLE AND REQUIRING THEM TO COME INTO
24 COURT AND DEFEND.

25 THEY HAVE NOT BEEN SERVED, YOUR HONOR.

1 I CAN SIGN A CONTRACT WITH
2 MR. CHATTERJEE, BUT HE CAN'T JUST WALK IN FRONT OF
3 YOUR HONOR AND SAY BARRETT AGREED TO SELL ME HIS
4 CAR AND ENFORCE IT AND HE HAS TO SERVE ME WITH A
5 SUMMONS AND COMPLAINT.

6 THE COURT: WHAT IS YOUR POSITION?

7 MR. CHATTERJEE: THE FIRST IS THAT YOU
8 HAVE TWO DECLARATIONS FROM CAMERON WINKLEVOSS.
9 IT'S ABSURD FOR THEM TO SAY THAT CAMERON
10 WINKLEVOSS, WHO SIGNED THIS DOCUMENT AND PUT IN
11 DECLARATIONS IN OPPOSITION TO OUR MOTION, ISN'T
12 FULLY AWARE AND HASN'T HAD AN OPPORTUNITY TO SAY
13 WHAT HE REALLY WANTS TO SAY.

14 THESE THREE PEOPLE CAMERON AND TYLER
15 WINKLEVOSS AND DIVYA NARENDRA CONSTITUTE 99 PERCENT
16 OF THE COMPANY. THEY, THEY ARE THE COMPANY FOR ALL
17 INTENTS AND PURPOSES.

18 WHEN WE FILED THIS MOTION, WE FILED A
19 NOTICE OF THE RELATED CASE OR OF THIS FILING IN
20 BOSTON. MR. HORNICK, WHO IS HERE TODAY, REPRESENTS
21 THEM IN THAT CASE. THEY ARE INDIVIDUALS WHO ARE
22 PLAINTIFFS IN THAT CASE.

23 THEY RECEIVED A NOTICE OF THE FILING AND
24 A COPY OF THE BRIEF. HE RECEIVED IT.

25 MR. HORNICK AND MR. MOSKO ARE IN THE SAME

1 FIRM. THEY BOTH REPRESENT CAMERON WINKLEVOSS AND
2 TYLER WINKLEVOSS AND DIVYA NARENDRA. THEY DIDN'T
3 DISPUTE THAT.

4 DIVYA NARENDRA CAME TO COURT AND HE WAS
5 FULLY AWARE OF THIS MOTION AND THIS MOTION WAS
6 SUBMITTED TO JUDGE WOODLOCK AS PART OF THE
7 PROCEEDINGS WHERE THEY WERE REPRESENTING CONNECTU
8 AND THE THREE PRINCIPALS.

9 AT END OF THE DAY, YOUR HONOR, IF YOU
10 FIND THIS AN ENFORCEABLE CONTRACT AGAINST CONNECTU,
11 IT WOULD IN OUR VIEW, NO MATTER WHAT, CONSTITUTE
12 RES JUDICATA AGAINST THE THREE INDIVIDUALS BECAUSE
13 THEY ARE IN PRIVITY WITH THE COMPANY, THEY ARE THE
14 BOARD OF DIRECTORS. IT WOULD ALSO APPLY TO HOWARD
15 WINKLEVOSS AND HE WAS AT THE MOTION.

16 AND SO AT THE END OF THE DAY, HOWEVER
17 THEY CAST IT, IT'S A NONISSUE.

18 THE COURT: WELL, WHAT I'M RAISING FOR
19 MYSELF, AND I HESITATE TO DO THIS BECAUSE IT'S LATE
20 IN THE DAY, BUT IT SEEMS TO ME THAT UNLESS WE'RE
21 TALKING ABOUT A TREASURY STOCK, THEY ALL --
22 CONNECTU STOCK IN EXCHANGE FOR MONEY AND STOCK
23 WOULD REQUIRE FOR MY ENFORCEMENT THE ABILITY TO
24 ORDER INDIVIDUALS WHO OWN CONNECTU STOCK TO MAKE
25 THE EXCHANGE.

1 NOW, MAYBE IT'S NOT IN THIS PROCEEDING
2 THAT THAT HAPPENS BUT SOME, SOME SUBSEQUENT
3 PROCEEDING.

4 I'M JUST TRYING TO THINK THROUGH WHAT IT
5 IS THAT, THAT I'M BEING ASKED TO DO AND AGAINST
6 WHOM I'M BEING ASKED TO DO IT AND THE FORM.

7 THEY'RE NOT PARTIES TO THE CURRENT
8 LITIGATIONS?

9 MR. CHATTERJEE: THEY ARE PARTIES TO THE
10 LITIGATION IN MASSACHUSETTS. THEY ARE PLAINTIFFS
11 IN THAT CASE.

12 THE COURT: I SEE. THEY ARE PLAINTIFFS
13 IN THAT CASE.

14 MR. CHATTERJEE: AND THEY SUBMITTED TO
15 THIS COURT FOR RESOLUTION OF ALL OF THE DISPUTES,
16 YOUR HONOR, AS YOU CORRECTLY NOTED IN PARAGRAPH 4.

17 THE COURT: I KNOW THAT, BUT IT SEEMS TO
18 ME THAT WHAT I UNDERSTOOD FROM COUNSEL IS THAT THEY
19 ARE NOT PARTIES TO THE LITIGATION BUT THEY ARE
20 PARTIES TO AT LEAST THE MASSACHUSETTS LITIGATION.

21 MR. HORNICK: MAY I, YOUR HONOR?

22 THE COURT: YES.

23 MR. HORNICK: I'M JOHN HORNICK, AND I
24 REPRESENT CONNECTU IN THE MASSACHUSETTS CASE. I AM
25 NOT ADMITTED BEFORE THIS COURT, AND I HAVE NOT

1 FILED A MOTION PRO HAC VICE, HOWEVER, I WOULD TAKE
2 THE POSITION THAT THE INDIVIDUALS, THE WINKLEVOSS
3 TWINS AND MR. NARENDRA ARE NOT YET PLAINTIFFS IN
4 THE MASSACHUSETTS CASE BECAUSE ALTHOUGH THERE WAS
5 AN AMENDED COMPLAINT THAT WAS ENTERED ON OR FILED,
6 I SHOULD SAY, ON AUGUST 8TH OF 2007, THAT NAMED
7 THEM AS COPLAINTIFFS FOR THE FIRST TIME,
8 IMMEDIATELY AFTER THAT, THE DEFENDANTS FILED A
9 MOTION TO DISMISS WITH RESPECT TO THAT AMENDED
10 COMPLAINT.

11 THE JUDGE NEVER RULED ON THEM. SO I
12 THINK THE QUESTION OF WHETHER OR NOT THEY EVER
13 BECAME PLAINTIFFS IS STILL AN OPEN ISSUE.

14 THE COURT: THANK YOU.

15 MR. CHATTERJEE: YOUR HONOR,
16 RESPECTFULLY, THEY PUT THEMSELVES AS PLAINTIFFS IN
17 THE MASSACHUSETTS CASE.

18 THEY ASSERTED CLAIMS WHICH WE HAD ARGUED
19 WERE NONTRANSFERABLE.

20 THE EXISTENCE OF A MOTION TO DISMISS
21 DOESN'T CHANGE THE FACT THAT THEY IRREVOCABLY
22 SUBMITTED THEMSELVES TO THE MASSACHUSETTS CASE AS A
23 PLAINTIFF IN THAT CASE. THIS IS ABSURD.

24 THE COURT: WELL, I DON'T WANT TO GET
25 INTO THE MERITS OF IT. I SIMPLY HEARD THREE OR

1 FOUR TIMES FROM COUNSEL SOME CONCERN ABOUT HOW FAR
2 THIS MOTION COULD GO WITH RESPECT TO THE
3 INDIVIDUALS.

4 I DO SEE THAT, THAT THEY ARE SIGNATORIES.
5 I DO SEE THAT THEY ARE DESCRIBED AS PARTIES. I
6 ALSO SEE THAT THEY ARE -- I PRESUME THEY'RE BEING
7 REFERRED TO AS FOUNDERS AND THEY MADE CERTAIN
8 REPRESENTATIONS AND WARRANTIES IN THE SETTLEMENT
9 AGREEMENT.

10 AND SO I WILL BE VERY CAREFUL IN
11 ARTICULATING WHATEVER I DO TO SEPARATE MY
12 CONSIDERATIONS SO THAT THE INDIVIDUALS CAN MAKE ANY
13 OBJECTIONS THAT THEY WISH SEPARATE AND APART FROM
14 THE COMPANY.

15 WELL, I --

16 MR. BARRETT: YOUR HONOR, EXCUSE ME. IF
17 I COULD JUST MAKE ONE POINT ABOUT THAT.

18 THE COURT: YES.

19 MR. BARRETT: BECAUSE I'M VERY
20 SYMPATHETIC TO YOUR HONOR'S CONFUSION AND I THINK
21 ALL OF IT ULTIMATELY COMES BACK TO THE FACT THAT,
22 THAT THE PROBLEM HERE IS THAT, IS THAT YOU DON'T
23 HAVE A CLEAR ENFORCEABLE CONTRACT THAT SETS --
24 CLEARLY SETS FORTH THE RIGHTS AND OBLIGATIONS OF
25 BOTH PARTIES TO THE CONTRACT.

1 WHAT THIS LAST FIVE OR TEN MINUTES OF
2 DISCUSSION SHOWS AND IS ILLUSTRATIVE OF IS WHAT
3 FACEBOOK IS REALLY ASKING YOU TO DO IS TO WRITE A
4 CONTRACT FOR THESE PARTIES THAT THEY NEVER AGREED
5 ON FOR THEMSELVES. AND I'M SURE YOUR HONOR KNOWS,
6 THAT IS EXACTLY WHAT, WHAT THE COURT CAN'T DO IN
7 ANY CONTRACT CASE AND WE HAVE CITED, YOU KNOW, ANY
8 NUMBER OF SETTLEMENT CASES THAT, THAT MAKE CLEAR
9 THAT, THAT THAT IS NOT THE FUNCTION OF THE COURT.

10 SO THE COURT IS TRYING TO BEND OVER
11 BACKWARDS TO FIGURE OUT, WELL, CAN I UNDERSTAND
12 PEOPLE WHO MAY HAVE BEEN PARTIES OUT IN
13 MASSACHUSETTS BUT HAVE NOT BEEN PROPERLY SERVED IN
14 THIS ACTION?

15 YOUR HONOR, I DON'T THINK YOU SHOULD HAVE
16 TO DO THAT.

17 YOU SHOULDN'T BE -- HAVE TO BE STRUGGLING
18 WITH THOSE KINDS OF QUESTIONS.

19 LET THEM, YOU KNOW, MAKE A PROPER MOTION
20 OR A PROPER COMPLAINT. LET THEM SERVE PARTIES IF
21 THEY THINK THEY HAVE OR ELSE THERE'S NOTHING HERE
22 TO ENFORCE.

23 THE COURT: I SAID FINAL WORD SO PERHAPS
24 I SHOULD STICK TO MY GUNS. ALTHOUGH I SAW ONE OF
25 YOUR COLLEAGUES PASS YOU A NOTE.