

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 SAN JOSE DIVISION
4

5 THE FACEBOOK, INC. AND) C-07-01389 JW
6 MARK ZUCKERBERG,)
7) SAN JOSE, CALIFORNIA
8) AUGUST 6, 2008
9) PAGES 1-73
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14 TRANSCRIPT OF PROCEEDINGS
15 BEFORE THE HONORABLE JAMES WARE
16 UNITED STATES DISTRICT JUDGE

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

18 FOR THE PLAINTIFF: ORRICK, HERRINGTON & SUTCLIFFE
19 BY: I. NEEL CHATTERJEE,
20 MONTE M.F. COOPER, AND
21 YVONNE GREET
22 1000 MARSH ROAD
23 MENLO PARK, CALIFORNIA 94025

24 APPEARANCES CONTINUED ON NEXT PAGE

25 OFFICIAL COURT REPORTER: LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

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APPEARANCES (CONTINUED)

FOR THE DEFENDANT: BOIES, SCHILLER & FLEXNER, LLP
BY: D. MICHAEL UNDERHILL
5301 WISCONSIN AVENUE, N.W.
WASHINGTON, D.C. 20015

FOR INTERVENOR: O'SHEA PARTNERS, LLP
BY: SEAN F. O'SHEA AND
MARK A. WEISSMAN
90 PARK AVENUE, 20TH FLOOR
NEW YORK, NEW YORK 10016

16:49:33 1 THERE'S NO COMPLAINT IN INTERVENTION THAT
16:49:36 2 DOES IT. IT SIMPLY SEEMS TO BE AN ORDER PERMITTING
16:49:41 3 THAT INTERVENTION WITH THE IDEA THAT IF THE CASE
16:49:44 4 RETURNS TO A LITIGATED STATUS, THEN I NEED TO SORT
16:49:48 5 OUT WHETHER THEY ARE INTERVENING AS PLAINTIFFS OR
16:49:51 6 DEFENDANTS AND WHO ARE THE PARTIES AGAINST WHOM
16:49:54 7 THEY WOULD BE PURSUING THEIR CLAIMS.

16:49:56 8 LET ME PAUSE WITH THOSE INTRODUCTORY
16:49:58 9 COMMENTS AND INVITE MR. O'SHEA OR OTHERS TO COMMENT
16:50:01 10 ON THE COURT'S INTENDED DECISION.

16:50:06 11 MR. O'SHEA: THANK YOU, YOUR HONOR.

16:50:07 12 FIRST OF ALL, JUDGE, THANK YOU FOR
16:50:09 13 HEARING US ON SHORT NOTICE. WE APPRECIATE IT AND
16:50:11 14 WE ARE -- YOU'RE CORRECT THAT WE'RE NEW TO THE FRAY
16:50:15 15 HERE.

16:50:15 16 THIS INTERVENTION MOTION, YOUR HONOR, IS
16:50:17 17 STRAIGHTFORWARD. WE'RE HERE ON BEHALF OF ACTUALLY
16:50:20 18 THREE PERSONS SEEKING INTERVENTION. THE APPLICANT
16:50:22 19 INTERVENORS ARE TYLER AND CAMERON WINKLEVOSS, WHO
16:50:28 20 ARE BROTHERS, AND DIVYA NARENDRA, AS YOUR HONOR IS
16:50:31 21 AWARE, THE INDIVIDUALS WHO SIGNED THE TERM SHEET
16:50:34 22 WHICH YOUR HONOR HELD ENFORCEABLE AND THAT IS GOING
16:50:36 23 TO BE THE SUBJECT OF AN APPEAL.

16:50:38 24 ONE OF THE TERMS OF THAT TERM SHEET IS
16:50:40 25 THAT FACEBOOK GETS OWNERSHIP OF CONNECTU STOCK.

16:50:44 1 UNTIL VERY RECENTLY, JUDGE, MY CLIENTS
16:50:47 2 BELIEVED, AND HAD A SOUND BASIS FOR THAT BELIEF,
16:50:50 3 THEY BELIEVED THAT THEIR RIGHTS ON APPEAL COULD BE
16:50:52 4 ADEQUATELY PROTECTED BY CONNECTU SINCE YOUR HONOR
16:50:55 5 HAD APPOINTED A SPECIAL MASTER, MR. FISHER, WHO IS
16:50:59 6 HERE TODAY, TO MAINTAIN THE STATUS QUO, AND WE WERE
16:51:02 7 AT THAT POINT HAPPY WITH THAT, WITH THAT STATE OF
16:51:04 8 EVENTS.

16:51:05 9 SINCE THEN, YOUR HONOR, FACEBOOK HAS BEEN
16:51:07 10 ASSERTING THAT IT WILL TAKE CONTROL OF CONNECTU'S
16:51:11 11 LITIGATIONS ONCE IT TAKES CONTROL OF CONNECTU'S
16:51:14 12 STOCK, AND WE'VE BECOME VERY CONCERNED THAT WHILE
16:51:17 13 CONNECTU'S APPEAL IS PENDING IN THE NINTH CIRCUIT,
16:51:20 14 THAT FACEBOOK WILL TRY TO ASSUME CONTROL OF
16:51:23 15 CONNECTU AND ABANDON OR OTHERWISE HAMPER OR IMPAIR
16:51:26 16 THE APPEAL.

16:51:27 17 I UNDERSTAND FROM MR. UNDERHILL, WHO
16:51:29 18 REPRESENTS CONNECTU, THAT HE HAS ASKED FOR
16:51:31 19 ASSURANCES FROM MR. CHATTERJEE, FACEBOOK'S COUNSEL,
16:51:35 20 THAT MY CLIENTS' RIGHTS WILL NOT BE -- AND
16:51:38 21 CONNECTU'S RIGHTS WILL NOT BE IMPAIRED ON APPEAL,
16:51:40 22 THAT THE APPEAL WILL BE ALLOWED TO GO FORWARD.

16:51:43 23 BUT FACEBOOK HAS BEEN UNWILLING TO AGREE
16:51:45 24 TO GIVE THOSE ASSURANCES.

16:51:46 25 AND, INDEED, IN THEIR OPPOSITION TO THE

16:51:49 1 STAY MOTION, JUDGE, THEY'VE NOW SAID THAT THE
16:51:51 2 APPEAL IS, IN FACT, MOOT. THEY'VE TAKEN THAT
16:51:53 3 POSITION.

16:51:54 4 SO THAT'S WHY WE'RE HERE TODAY, JUDGE.
16:51:56 5 WE NEED TO INTERVENE. WE NEEDED TO INTERVENE ON
16:51:58 6 SHORT NOTICE SINCE MY CLIENTS NEED REALLY TO
16:52:02 7 PRESERVE THEIR RIGHTS ON APPEAL.

16:52:06 8 AND TO ADDRESS YOUR HONOR'S CONCERNS
16:52:07 9 ABOUT TRYING TO REOPEN OR RELITIGATE THE UNDERLYING
16:52:08 10 MATTER, THAT'S NOT OUR PURPOSE BEFORE THE COURT
16:52:10 11 HERE TODAY.

16:52:10 12 WHAT OUR PURPOSE IS, IS TO GET THE
16:52:12 13 COMPLAINT BEFORE THE COURT SO THAT WE CAN PRESERVE
16:52:14 14 OUR RIGHT TO APPEAL, AND THAT'S WHAT WE'D LIKE TO
16:52:17 15 DO.

16:52:18 16 INTERVENTION IS APPROPRIATE, YOUR HONOR,
16:52:20 17 AND AS YOU KNOW, THE STANDARD FOR, FOR APPLICATION
16:52:23 18 OF INTERVENTION IS VERY LIBERAL. OUR -- IT'S
16:52:26 19 APPROPRIATE HERE UNDER BOTH SECTIONS, SUBSECTIONS
16:52:29 20 OF RULE 24.

16:52:30 21 FIRST OF ALL, FOR AN INTERVENTION AS A
16:52:35 22 RIGHT, WE MEET ALL FOUR PRONGS OF THE TEST: ONE,
16:52:37 23 WE'RE TIMELY; SECOND, WE HAVE A SIGNIFICANTLY
16:52:39 24 PROTECTABLE INTEREST; THIRD, THE DISPOSITION OF
16:52:42 25 THIS ACTION, AS A PRACTICAL MATTER, COULD IMPAIR

17:21:01 1 WHAT GOES ON NOW IS THERE'S A CHECK
17:21:03 2 THAT'S WRITTEN EVERY MONTH FOR THE RENTAL OF THE
17:21:05 3 SERVER. THAT'S IT. WE'LL WRITE THE CHECK. HE
17:21:08 4 DOESN'T EVEN HAVE TO WORRY ABOUT THAT.

17:21:10 5 WE WILL NOT MAKE A SINGLE OPERATIONAL
17:21:12 6 CHANGE IN THE SLIGHTEST. YOU KNOW, WE'LL PUT IT
17:21:17 7 OUT OF OUR HANDS.

17:21:18 8 IN FACT, YOUR HONOR, WE WOULD EVEN BE
17:21:20 9 WILLING TO LET CONNECTU OPERATE THE BUSINESS.

17:21:22 10 NOW, THAT'S VERY DISTINCT, BY THE WAY,
17:21:26 11 FROM HAVING THE COMPANY. WE DON'T AGREE THAT THEY
17:21:26 12 CAN HAVE --

17:21:26 13 THE COURT: FACEBOOK.

17:21:27 14 MR. UNDERHILL: I'M SORRY?

17:21:27 15 THE COURT: YOU SAID CONNECTU.

17:21:28 16 MR. UNDERHILL: I'M SORRY.

17:21:29 17 THE COURT: YOU MEAN FACEBOOK.

17:21:31 18 MR. UNDERHILL: MY MISTAKE. I MEANT TO
17:21:33 19 SAY FACEBOOK.

17:21:35 20 OBVIOUSLY WE WILL NOT VOLUNTARILY PERMIT
17:21:37 21 THEM TO TAKE OVER OUR APPEAL BECAUSE WE DON'T THINK
17:21:39 22 THEY WOULD DO AS GOOD A JOB AS WE WILL.

17:21:39 23 WE'RE NOT GOING TO LET THEM TAKE OVER THE
17:21:39 24 MALPRACTICE CASE.

17:21:41 25 BUT IF THEY REALLY JUST WANT TO OPERATE

17:21:42 1 THIS THING, IF THEY WANT TO WRITE THE CHECK TO THE
17:21:45 2 SERVER, YOU KNOW, ONCE A MONTH, IF THEY WANT TO
17:21:49 3 REWRITE THE CODE, IF THEY WANT TO START
17:21:51 4 ADVERTISING, THEY CAN DO WHATEVER THEY WANT WITH
17:21:53 5 IT, IT'S THEIRS, AS LONG AS WE CAN KEEP OWNERSHIP
17:21:56 6 OF CONNECTU SUFFICIENT TO SATISFY AN APPEAL.

17:21:59 7 NOW, WHAT WE HEARD IN THE PRIOR MOTION IS
17:22:03 8 ONE MORE GAMUT TO TRY TO DENY US AN APPEAL.

17:22:07 9 AS MUCH AS MR. CHATTERJEE EXPRESSES
17:22:10 10 CONFIDENCE IN THE COURT'S OPINION, HE SURE IS
17:22:13 11 TRYING AWFULLY HARD TO KEEP THE NINTH CIRCUIT FROM
17:22:16 12 EVER HEARING THESE ISSUES.

17:22:17 13 THE COURT: LET ME ASK THIS, COUNSEL.

17:22:19 14 MR. UNDERHILL: YES, YOUR HONOR.

17:22:20 15 THE COURT: IF I GO ALONG WITH THIS
17:22:24 16 PROPOSAL -- I'M NOT SAYING I WILL -- AND THERE IS
17:22:29 17 AN APPEAL THAT IS PURSUED INDEPENDENT OF CONNECTU,
17:22:35 18 WHO PAYS FOR THE COST OF THE APPEAL?

17:22:38 19 MR. UNDERHILL: WE'LL TAKE CARE OF THAT,
17:22:40 20 YOUR HONOR. NO PROBLEM.

17:22:41 21 THE COURT: WHO'S "WE"?

17:22:42 22 MR. UNDERHILL: IT WON'T BE CONNECTU.

17:22:45 23 I'LL WORK IT OUT WITH THE SHAREHOLDERS.

17:22:47 24 THE COURT: AH. I SEE.

17:22:48 25 AND SO YOU'RE REQUESTING, ESSENTIALLY, TO

17:29:31 1 THE ENFORCEMENT MOTION, FRANKLY, YOUR HONOR, IT'S
17:29:34 2 SOMEWHAT ABSURD TO ARGUE THAT.

17:29:36 3 WE WANT THE VALUE OF WHAT WE PURCHASED,
17:29:37 4 AND STAYING THE PROCEEDINGS IS, IS, IS TANTAMOUNT
17:29:41 5 TO NOT RECOGNIZING THE SETTLEMENT AGREEMENT.

17:29:43 6 THERE'S A PUBLIC INTEREST HERE IN
17:29:45 7 RECOGNIZING THESE AGREEMENTS THAT GETS IMPLICATED.
17:29:48 8 YOUR HONOR RECITED THAT YOURSELF AT THE JUDGMENT
17:29:51 9 HEARING.

17:29:51 10 THE ONE THING -- THE ONE OTHER POINT I
17:29:53 11 WANT TO MAKE IS, CANDIDLY, WE HAVE A BIG ISSUE WITH
17:29:56 12 THEM HAVING ANY DECISION MAKING OVER CONNECTU.

17:29:59 13 AND I'M NOT TALKING ABOUT THE LAWYERS.
17:30:00 14 I'M TALKING ABOUT THE WINKLEVOSS BROTHERS AND DIVYA
17:30:03 15 NARENDRA AND HOWARD WINKLEVOSS.

17:30:05 16 THEY INITIATED THE LITIGATION WITHOUT
17:30:07 17 EVER CONSULTING ANYBODY AFTER THE JUDGMENT WAS
17:30:09 18 ENTERED. THEY DON'T LIKE OUR COMPANY.

17:30:11 19 SO IF THINGS AREN'T GOING WELL IN THE
17:30:14 20 NINTH CIRCUIT, THEY CAN DO WHATEVER THEY WANT.

17:30:16 21 THEY HAVE NOT PUT THE STOCK INTO GEORGE
17:30:18 22 FISHER'S HANDS PER YOUR HONOR'S ORDER. THAT WAS
17:30:21 23 DUE MONDAY, AND AT 2:15, GIVE OR TAKE A FEW
17:30:25 24 MINUTES, ON MONDAY, AFTER WE HAD PUT ALL OF OUR
17:30:28 25 CONSIDERATION IN, THAT SUBSTANTIAL AMOUNT OF MONEY

17:30:31 1 AND THE SUBSTANTIAL AMOUNT OF SHARES, THEY NOTIFIED
17:30:35 2 US THAT THEY WERE GOING TO MAKE THE DECISION NOT TO
17:30:37 3 SUBMIT IT TO HIM IN VIOLATION OF YOUR HONOR'S
17:30:39 4 ORDER.

17:30:39 5 WHAT CONFIDENCE COULD WE POSSIBLY HAVE
17:30:42 6 THAT THEY ARE GOING TO PROTECT THE VALUE OF THAT
17:30:44 7 ASSET? IT'S SIMPLY NOT THERE. WE HAVE ZERO
17:30:47 8 CONFIDENCE IN THEM.

17:30:48 9 THE COURT: WELL, HERE'S THE DILEMMA THAT
17:30:51 10 I SEE. I CONTINUE TO BELIEVE THAT THE JUDGMENT WAS
17:30:53 11 PROPERLY ENTERED HERE.

17:30:54 12 BUT I ALSO BELIEVE THAT ANY JUDGMENT IS
17:31:01 13 APPEALABLE TO A HIGHER COURT, ANY JUDGMENT OF THIS
17:31:04 14 COURT.

17:31:05 15 AND I'M IN A CIRCUMSTANCE WHERE IT'S NOT
17:31:10 16 A MONEY JUDGMENT WHERE A BOND WOULD BE SUFFICIENT,
17:31:16 17 SO THAT I'M TRYING TO WALK MY WAY THROUGH A PROCESS
17:31:20 18 BY WHICH, EVEN IF I'M DISPOSED TO DENY THE STAY OF
17:31:24 19 EXECUTION, I WON'T DENY THE RIGHT TO APPEAL.

17:31:31 20 SO IF I UNDERSTAND THAT THE EXECUTION
17:31:38 21 COULD AMOUNT TO THE PLAINTIFF HERE TAKING THE
17:31:44 22 UNUSUAL STEP OF SAYING, "WELL, NOW AS THE
17:31:47 23 SHAREHOLDER, I TERMINATE THE APPEAL," THE EXECUTION
17:31:51 24 WOULD BE, IN EFFECT, A PLACING OF THE RIGHT OF
17:31:55 25 APPEAL, BUT DENYING THE RIGHT TO APPEAL. IT WOULD

17:31:59 1 TERMINATE BY THE EXECUTION.

17:32:01 2 I'VE NEVER FACED THAT SITUATION BEFORE,
17:32:02 3 AND SO IT'S UNCHARTED WATER FOR ME.

17:32:05 4 AND SO THAT'S WHAT I NEED HELP WITH,
17:32:07 5 BECAUSE UNLESS YOU CONVINCED ME THAT THERE SHOULD BE
17:32:12 6 NO RIGHT TO APPEAL, I HAVE TO PUT THE OPPOSING
17:32:14 7 PARTY TO MY JUDGMENT IN A POSITION SO THEY CAN
17:32:17 8 CHALLENGE MY JUDGMENT.

17:32:19 9 MR. CHATTERJEE: SO, YOUR HONOR, I THINK
17:32:20 10 WHAT YOU'RE IDENTIFYING IS, IS THE CONFLICT THAT WE
17:32:22 11 HAVE HERE OF HARDSHIPS.

17:32:24 12 WE PURCHASED AN ASSET. WE WANT TO GET
17:32:26 13 VALUE FOR THE ASSET.

17:32:27 14 AND WE ALSO SOUGHT PEACE, AND THERE'S A
17:32:30 15 LOT OF HARDSHIP IN NOT ACKNOWLEDGING THAT PEACE.

17:32:33 16 THEIR PURPORTED HARDSHIP IS ESSENTIALLY
17:32:35 17 THE RISK OF MOOTING AN APPEAL ON BEHALF OF
17:32:39 18 CONNECTU.

17:32:39 19 IF YOU ALLOW INTERVENTION, YOUR HONOR,
17:32:41 20 CANDIDLY, THAT MAY BECOME A NON-ISSUE DEPENDING ON
17:32:44 21 WHATEVER RIGHTS THE INDIVIDUALS HAVE UPON
17:32:47 22 INTERVENTION, BECAUSE AS YOUR HONOR NOTICED BEFORE,
17:32:49 23 THEY ESSENTIALLY ARE ASSERTING THE SAME SORTS OF
17:32:52 24 CLAIMS OF A THIRD PARTY COMPLAINANT.

17:32:54 25 NOW, WHEN YOU HAVE THESE TWO COMPETING