

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

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

2
3 FOR THE DEFENDANTS: FINNEGAN, HENDERSON,
4 FARABOW, GARRETT & DUNNER
5 BY: SCOTT R. MOSKO
6 JOHN F. HORNICK
7 STANFORD RESEARCH PARK
8 3300 HILLVIEW AVENUE
9 PALO ALTO, CALIFORNIA 94304

10
11 FENWICK & WEST
12 BY: KALAMA LUI-KWAN
13 555 CALIFORNIA STREET
14 12TH FLOOR
15 SAN FRANCISCO, CALIFORNIA
16 94104

17
18 ALSO PRESENT: BLOOMBERG NEWS
19 BY: JOEL ROSENBLATT
20 PIER 3
21 SUITE 101
22 SAN FRANCISCO, CALIFORNIA
23 94111

24 THE MERCURY NEWS
25 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

2 P R O C E E D I N G S

3
4 (WHEREUPON, COURT CONVENED AND THE
5 FOLLOWING PROCEEDINGS WERE HELD:)

6 THE CLERK: CALLING CASE NUMBER 07-1389,
7 THE FACEBOOK, INC., VERSUS CONNECTU, LLC.

8 THE COURT: DO YOU KNOW THE PARTIES?

9 THE CLERK: THEY'RE SITTING OVER HERE
10 (INDICATING).

11 LIZ.

12 THE CLERK: YES. TESTING ONE, TWO.

13 THE COURT: STATE YOUR APPEARANCES.

14 MR. CHATTERJEE: GOOD MORNING, YOUR
15 HONOR. NEEL CHATTERJEE REPRESENTING FACEBOOK, MARK
16 ZUCKERBERG, A NUMBER OF OTHER INDIVIDUAL PARTIES TO
17 THE MASSACHUSETTS ACTIONS EXCEPT EDUARDO SAVERIN.

18 WITH ME TODAY ARE MY COLLEAGUES SUSAN
19 RESLEY AND MONTE COOPER WHO WILL BE ASSISTING ME IN
20 THE HEARING TODAY.

21 THE COURT: VERY WELL.

22 MR. MOSKO: GOOD MORNING. SCOTT MOSKO.
23 LET ME -- THERE'S GOING TO BE A BIT OF AN
24 INTRODUCTION HERE. FOR THE PURPOSES OF THE MOTION
25 THAT FACEBOOK HAS FILED, I AM NOT REPRESENTING

1 CONNECTU; HOWEVER, I DO REPRESENT CONNECTU IN THE
2 UNDERLYING CASE.

3 THE COURT: AH.

4 MR. MOSKO: AND I DO REPRESENT THE OTHER
5 DEFENDANTS.

6 WITH ME THIS MORNING IS DAVID BARRETT,
7 STEVEN HOLTZMAN, AND EVAN PARKE WHO ARE
8 REPRESENTING CONNECTU ON THE MOTION CONCERNING THE
9 SETTLEMENT ISSUES.

10 ALSO MY PARTNER JOHN HORNICK.

11 THE COURT: MR. HORNICK. DO I HAVE A
12 THIRD PARTY?

13 MR. CHATTERJEE: YOUR HONOR, THERE IS ONE
14 THIRD PARTY HERE WHICH IS ROBERT HAWK, WHO IS FROM
15 THE HELLER EHRMAN FIRM AND HE REPRESENTS EDUARDO
16 SAVERIN IN THE MASSACHUSETTS ACTION.

17 AND I WANT TO MAKE SURE THAT I UNDERSTOOD
18 CORRECTLY, MR. HORNICK IS NOT ADMITTED IN THIS CASE
19 BUT IN THE MASSACHUSETTS CASE, AND I WANT TO
20 UNDERSTAND IF HE'S REPRESENTING CONNECTU OR
21 CONNECTU AND THE THREE INDIVIDUALS WHO ARE
22 PLAINTIFFS IN THAT CASE.

23 THE COURT: ALL RIGHT. AND I HAVE KALAMA
24 LUI-KWAN.

25 MR. LUI-KWAN: YES, YOUR HONOR.

1 THE COURT: WHO DO YOU REPRESENT?

2 MR. LUI-KWAN: FENWICK & WEST AND --
3 SORRY.

4 KALAM LUI-KWAN FROM FENWICK & WEST. I
5 REPRESENT FENWICK & WEST AND MR. GREGORY ROUSSEL
6 WHO ARE THIRD PARTIES IN THIS ACTION.

7 MR. CHATTERJEE: YOUR HONOR, I'M SORRY, I
8 DON'T MEAN TO INTERRUPT.

9 THE COURT: YES.

10 MR. CHATTERJEE: BUT BEFORE WE BEGIN THE
11 PROCEEDINGS, WE HAD HAD A DISCUSSION BEFORE ABOUT
12 SEALING THE COURTROOM.

13 THE COURT: THAT WAS THE ISSUE I WAS
14 ABOUT TO RAISE.

15 ARE THERE INDIVIDUALS HERE WHO ARE NOT
16 PARTIES OR ATTORNEYS FOR PARTIES INVOLVED IN THIS
17 CASE?

18 MR. O'BRIEN: YES, YOUR HONOR.

19 MR. ROSENBLATT: YES, YOUR HONOR.

20 THE COURT: THE PARTIES HAVE REQUESTED,
21 SINCE THE NATURE OF THIS MOTION CONCERNS A
22 CONFIDENTIAL SETTLEMENT, TO HAVE THE PROCEEDINGS
23 CONDUCTED IN A SEALED PROCEEDING, AT LEAST
24 INITIALLY SO THAT I CAN UNDERSTAND THE NATURE OF
25 THE MOTION AND DECIDE ON A COURSE OF ACTION.

1 ORDINARILY MATTERS PENDING BEFORE THIS
2 COURT ARE CONDUCTED IN PUBLIC, AND IT IS RARE THAT
3 WE CLOSE OUR COURTROOM.

4 THERE ARE CIRCUMSTANCES UNDER WHICH WE DO
5 IN CRIMINAL CASES, AS A MATTER OF COURSE. IT'S
6 RARE THAT WE DO SO IN CIVIL CASES, ALTHOUGH GIVEN
7 THE NATURE OF SOME OF THE TECHNOLOGY WE GET
8 INVOLVED WITH IN THIS COURT THERE ARE OCCASIONS
9 WHEN WE CLOSE OUR COURTROOM IN CIVIL CASES AS WELL.

10 I THINK THAT I WOULD BE ABLE TO BETTER
11 HAVE A FRANK DISCUSSION ABOUT THE NATURE OF THIS
12 MOTION IF I DO SO IN A CLOSED COURTROOM. AND SO I
13 DO INTEND TO CLOSE THE COURTROOM TO SEAL THE RECORD
14 OF THESE PROCEEDINGS.

15 BEFORE I DO, LET ME SEE IF I HAVE ANY
16 OBJECTIONS.

17 MR. O'BRIEN: I'M CHRIS O'BRIEN WITH "THE
18 MERCURY NEWS." JUST TO CLARIFY WHAT YOU'RE ASKING,
19 ARE YOU PLANNING TO BRIEFLY CLOSE THE COURTROOM AND
20 THEN READMIT US OR ARE YOU PLANNING TO CLOSE THE
21 COURTROOM FOR THE WHOLE HEARING THAT YOU'RE
22 PLANNING TO HAVE?

23 THE COURT: WELL, I DON'T KNOW THE ANSWER
24 TO THAT YET.

25 I DO INTEND TO EXCUSE YOU OR ANY PERSON

1 WHO IS NOT A LAWYER FOR ONE OF THE PARTIES OR ONE
2 OF THE PARTIES FOR PURPOSES OF HEARING THE MOTION.

3 AND IF DURING THE COURSE OF THE MOTION I
4 DETERMINE THAT THERE ARE MATTERS THAT SHOULD BE ON
5 THE PUBLIC RECORD, THEN I WOULD OPEN THE COURTROOM
6 FOR THAT PURPOSE.

7 MR. O'BRIEN: WELL, IN THAT CASE WE WOULD
8 REQUEST THAT YOU ALLOW US TO CONTEST THAT AND HAVE
9 AN ATTORNEY PRESENT TO ARGUE OUR CASE ABOUT WHAT
10 THE COURT SHOULD DO.

11 THE COURT: DO YOU HAVE SOMEONE HERE
12 TODAY WHO IS PREPARED TO ARGUE THAT?

13 MR. O'BRIEN: WE DON'T. WE HAVE HEARD
14 FOR THE FIRST TIME THAT YOU ARE PLANNING TO CLOSE
15 IT.

16 THE COURT: YES. ANY OTHER OBJECTION?

17 MR. MCCULLAGH: YOUR HONOR, DECLAN
18 MCCULLAGH FOR CNET, A SUBSIDIARY OF CBS NEWS.

19 WE HAVE THE SAME CONCERNS, AND WE WOULD
20 ALSO REQUEST A CONTINUANCE AND UNTIL WE CAN RETAIN
21 COUNSEL, BRING OUR OUTSIDE COUNSEL DOWN TO SUPPORT
22 OUR FIRST AMENDMENT RIGHT TO OPEN COURT
23 PROCEEDINGS.

24 THE COURT: YES.

25 MR. ROSENBLATT: AND JOEL ROSENBLATT FOR

1 BLOOMBERG NEWS. THE SAME OBJECTION. I UNDERSTAND
2 THAT A FRANK DISCUSSION WOULD HAPPEN WITHOUT US
3 AROUND. SOMETIMES -- YOU HAVE ALWAYS BEEN VERY
4 SENSITIVE TO THIS ISSUE, AND I APPRECIATE THAT BUT
5 THERE SEEMS TO BE SOMETIMES A -- I DON'T
6 UNDERSTAND. I HAVE LOOKED AT THE DOCKET. WHY --
7 WHAT IS THE ARGUMENT?

8 THE PRESS HASN'T BEEN SHOWN FOR THE
9 ARGUMENT WHY IT SHOULD BE CLOSED. I UNDERSTAND
10 IT'S A PREFERENCE, BUT WHEN IS IT A NEED VERSUS A
11 PREFERENCE AND THAT'S OUR CONCERN. AND WE WOULD
12 ALSO LIKE TO HAVE AN ATTORNEY PRESENT IF YOU'RE
13 GOING TO CLOSE IT.

14 THE COURT: I, OF COURSE, I WANT TO GIVE
15 THE PARTIES AN OPPORTUNITY TO EXPLAIN TO ME THE
16 CIRCUMSTANCES THAT BRING THEM BEFORE THE COURT.

17 THIS IS A CASE WHERE THEY REACHED A
18 SETTLEMENT WHICH THEY WOULD NOT OTHERWISE PUT IN
19 THE PUBLIC DOMAIN EXCEPT FOR SOME PART OF IT.

20 AND SO IT IS ALWAYS OF CONCERN TO THE
21 COURT TO CLOSE ITS PROCEEDINGS TO MEMBERS OF THE
22 PUBLIC.

23 I FIRMLY BELIEVE THAT IF PARTIES BRING A
24 LAWSUIT TO A PUBLIC FORUM SUCH AS THE COURTS,
25 THOSE -- THEY CHOOSE TO CONDUCT THEIR BUSINESS IN

1 PUBLIC.

2 HOWEVER, EVEN IN A PUBLIC TRIAL, PARTIES
3 COME TO A POINT IN THEIR CASE WHERE THEY WANT TO
4 CONDUCT PROCEEDINGS IN CHAMBERS BEFORE THE JUDGE,
5 OR COME TO A DISCLOSURE BETWEEN THE TWO OF THEM
6 THAT ARE PRIVILEGED AND THAT THEY WANT TO KEEP
7 CONFIDENTIAL FROM THE PUBLIC WITH THE IDEA THAT
8 SOME PARTS OF IT WOULD BE PUT ON THE PUBLIC RECORD.

9 I'VE MADE A JUDGMENT THAT IT WOULD BE
10 BENEFICIAL TO THE COURT TO AT LEAST HEAR THE NATURE
11 OF THIS DISPUTE THAT COMES OUT OF A CONFIDENTIAL
12 PART OF THEIR PROCESS IN A CLOSED COURTROOM AND
13 THEN TO MAKE A JUDGMENT ABOUT WHAT, IF ANY, PART OF
14 THAT SHOULD BE CONDUCTED IN PUBLIC PROCEEDINGS.

15 BOTH OF THESE ARE LAWSUITS THAT WERE
16 PENDING, AS I UNDERSTAND IT, IN PUBLIC PLACES AND
17 DEPENDING ON WHAT HAPPENS HERE, IT MAY RETURN TO
18 THAT FORUM, BUT I DO WANT TO HAVE THE BENEFIT OF AT
19 LEAST HAVING A CONVERSATION WITH THE PARTIES IN A
20 CLOSED COURTROOM. AND NOTWITHSTANDING THE
21 OBJECTIONS AND A REQUEST FOR A DELAY, I'M GOING TO
22 ASK THE CLERK OF COURT TO CLOSE THE COURTROOM.

23 I'LL ASK THE ASSISTANCE OF THE PARTIES TO
24 IDENTIFY THEIR CLIENTS OR OTHER MEMBERS OF THEIR
25 FIRM, AND I WILL SET UP A TIME TO GIVE THOSE WHO

1 ARE EXCLUDED AN OPPORTUNITY TO MAKE ANY OBJECTIONS.
2 AND I WILL DO MY BEST TO ADVISE YOU AT SOME POINT
3 DURING THE COURSE OF THESE PROCEEDINGS IF I DECIDE
4 TO OPEN IT SO THAT YOU CAN TAKE ADVANTAGE OF COMING
5 BACK INTO THE COURTROOM.

6 BUT AT THIS POINT I INTEND TO CLOSE THE
7 COURTROOM.

8 SO --

9 (PAUSE IN PROCEEDINGS.)

10 THE COURT: I PRESUME IT WON'T BE
11 NECESSARY TO CALL THE MARSHALS.

12 WOULD YOU ASSIST IN JUST IDENTIFYING YOUR
13 CLIENTS AND THOSE INDIVIDUALS.

14 MR. CHATTERJEE: YES, YOUR HONOR. ON THE
15 FACEBOOK SIDE IT'S THE FIRST TWO ROWS ON YOUR
16 RIGHT-HAND SIDE.

17 THE COURT: ALL RIGHT.

18 (PAUSE IN PROCEEDINGS.)

19 THE COURT: SO THE PARTIES ARE SATISFIED
20 THAT IN THE COURTROOM, AT LEAST IN THAT PART, I'LL
21 CONTROL THIS PART UP HERE, ARE INDIVIDUALS WHO YOU
22 WOULD REGARD AS COVERED BY ANY OF THE PRIVILEGES
23 AND CONFIDENTIALITIES APPLICABLE TO YOUR SETTLEMENT
24 PROCESS?

25 MR. CHATTERJEE: YES, YOUR HONOR.

1 MR. MOSKO: ON BEHALF OF THE DEFENDANTS,
2 YES, YOUR HONOR.

3 THE COURT: SO I'LL REGARD THE RECORD AT
4 THIS POINT AS A SEALED RECORD TO BE OPENED ON
5 FURTHER ORDER OF THE COURT OR STIPULATION OF THE
6 PARTIES.

7 THIS IS A MOTION BY CONNECTU?

8 MR. CHATTERJEE: NO, YOUR HONOR, IT'S A
9 MOTION BY FACEBOOK TO ENFORCE THE SETTLEMENT.

10 THE COURT: ALL RIGHT. WHAT'S YOUR
11 MOTION?

12 MR. CHATTERJEE: YOUR HONOR, THE MOTION
13 PRESENTED BY FACEBOOK AND THE RELATED INDIVIDUAL
14 DEFENDANTS IS TO ENFORCE A SETTLEMENT AGREEMENT
15 THAT WAS ENTERED INTO BETWEEN FACEBOOK AND ITS
16 RELATED PARTIES AND CONNECTU AND THEIR RELATED
17 PARTIES SUBSEQUENT TO A MEDIATION OR AT THE
18 CONCLUSION OF A MEDIATION BEFORE JUDGE PIAZZA ON
19 JANUARY 22ND AND INTO THE WEE HOURS OF JANUARY
20 23RD.

21 THE COURT: AND WHAT IS IT -- WHEN YOU
22 SAY TO ENFORCE IT, WHAT IS IT THAT YOU WISH THE
23 COURT TO DO?

24 MR. CHATTERJEE: YOUR HONOR, WHAT WE HAVE
25 ASKED THE COURT TO DO, AND THIS HAS BECOME A LITTLE

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 AFFECTING THE ECONOMICS IN SOME WAY THEY DON'T
2 LIKE.

3 THE ISSUE FOR US IS PRESUMING YOUR HONOR
4 FINDS THIS AGREEMENT AN ENFORCEABLE SETTLEMENT
5 AGREEMENT, WE DON'T KNOW WHO TO PAY RIGHT NOW
6 BECAUSE THERE'S A NOTICE OF LIEN THAT HAS BEEN
7 FILED WITH THE COURT AND WE NEED THE COURT'S
8 GUIDANCE ON HOW TO DEAL WITH THAT.

9 WE'RE HAPPY TO PUT THE PROCEEDS THAT ARE
10 REQUIRED UNDER THE AGREEMENT AND INTO SOME SORT OF
11 CONSTRUCTIVE TRUST OR SOMETHING LIKE THAT THAT THE
12 COURT CAN ADMINISTER, SUBJECT TO CONNECTU AND ITS
13 FORMER LAWYERS WORKING OUT WHATEVER IT IS THAT THEY
14 NEED TO WORK OUT ASSOCIATED WITH THE PROCEEDS OF
15 THIS CASE.

16 BUT WHERE WE DON'T WANT TO BE IS WE DON'T
17 WANT TO BE ORDERED TO GIVE CONNECTU THE MONEY ONLY
18 TO HAVE QUINN EMANUEL KNOCKING ON OUR DOOR SAYING
19 WE OWE THEM SOMETHING AND WE DON'T KNOW WHAT IT IS
20 AND WHAT THE TERMS OF THE ARRANGEMENT ARE.

21 AND SO THAT'S ONE THING THAT MAKES THINGS
22 A LITTLE MORE COMPLEX THAN WHEN WE ORIGINALLY
23 ANTICIPATED WHEN WE FILED THE MOTION BECAUSE OF
24 THIS NOTICE OF LIEN.

25 THE COURT: VERY WELL. LET ME HEAR FROM

1 YOUR OPPONENT.

2 MR. BARRETT: YOUR HONOR, THANK YOU VERY
3 MUCH. DAVID BARRETT FROM BOIES, SCHILLER & FLEXNER
4 REPRESENTING CONNECTU, WHICH I SHOULD NOTE IS THE
5 ONLY PARTY THAT -- ON THE DEFENDANT'S SIDE WHICH IS
6 PROPERLY BEFORE THIS COURT, ALTHOUGH THE PLAINTIFFS
7 ARE ASKING THE COURT TO ENTER AN ORDER THAT WOULD
8 COMPEL THE INDIVIDUAL PRINCIPALS OF CONNECTU TO
9 SIGN CERTAIN DOCUMENTS, THE FACT IS THAT THEY
10 HAVEN'T EVEN SERVED THOSE PEOPLE WITH PROCESS THAT
11 WOULD BRING THEM PROPERLY BEFORE THIS COURT.

12 SO THAT'S THE REASON THAT I ONLY APPEAR
13 TODAY IN THIS COURT ON BEHALF OF CONNECTU.

14 SECOND, YOUR HONOR, WITH RESPECT TO
15 MR. CHATTERJEE'S REQUEST, WE DON'T REALLY LITERALLY
16 DO NOT UNDERSTAND WHAT IT IS THAT THE PLAINTIFFS
17 ARE ASKING THIS COURT TO DO.

18 THE PROPOSED ORDER THAT WAS FILED WITH
19 MR. CHATTERJEE'S MOTION BACK IN APRIL IS AN ORDER
20 THAT DOESN'T EVEN MENTION THE TERM SHEET AND WHICH
21 IS THE DOCUMENT THAT HE SAID YOU COULD, YOU COULD
22 JUST STAPLE TO YOUR ORDER.

23 THE PROPOSED ORDER, WHAT THEY WERE
24 ORIGINALLY ASKING FOR, DOESN'T EVEN MENTION THAT
25 TERM SHEET.

1 WHAT IT DOES SAY IS THAT THE COURT WOULD
2 ORDER CONNECTU TO TRANSFER ITS OWNERSHIP TO
3 FACEBOOK BY EXECUTING A DOCUMENT CALLED A STOCK
4 PURCHASE AGREEMENT.

5 AND THAT CONNECTU AND THREE OF ITS FOUR
6 PRINCIPALS, I SHOULD SAY NOT ALL FOUR OF ITS
7 PRINCIPALS BUT THREE OF THE FOUR, TO EXECUTE
8 SOMETHING THAT THEY CALL A CONNECTU STOCKHOLDER'S
9 AGREEMENT.

10 THOSE TWO DOCUMENTS AND THE ASSOCIATED
11 SCHEDULES AND OTHER PARTS OF THEM ARE, YOUR HONOR,
12 A VERY COMPLICATED CORPORATE, CORPORATE
13 TRANSACTIONAL DOCUMENT.

14 THEY'RE OVER A HUNDRED PAGES LONG IN
15 TOTAL. A LAWYER, A CORPORATE LAWYER WHO, WHO
16 WORKED, WAS RETAINED BY CONNECTU BY THE NAME OF
17 GREGORY ROUSSEL, HE'S AN ASSOCIATE AT THE FENWICK
18 FIRM, SIGNED AN AFFIDAVIT WHICH WAS SUBMITTED TO
19 THIS COURT IN SUPPORT OF THE MOTION TO ENFORCE THE
20 SO-CALLED "SETTLEMENT."

21 AND, AND IN THAT -- I'M SORRY. IT'S A
22 DECLARATION, YOUR HONOR, NOT AN AFFIDAVIT.

23 IN THAT DECLARATION MR. ROUSSEL SAID
24 ATTACHED HERETO AS EXHIBIT A IS A CONNECTU'S -- IS
25 A CONNECTU STOCKHOLDER AGREEMENT.

1 THIS AGREEMENT SPECIFIES THE RIGHTS AND
2 RESPONSIBILITIES THAT, THAT OUR SIDE WILL HAVE WITH
3 RESPECT TO THE OWNERSHIP OF FACEBOOK STOCK.

4 AND ATTACHED AS EXHIBIT B TO
5 MR. ROUSSEL'S DECLARATION IS SOMETHING THAT HE
6 CALLS A STOCK PURCHASE AGREEMENT, THE SECOND
7 DOCUMENT THAT IS REFERRED TO IN THEIR PROPOSED
8 ORDER WHEN THEY FILED THIS MOTION.

9 AND HE SAYS, MR. ROUSSEL SAYS, UNDER
10 OATH, QUOTE, "THIS AGREEMENT GOVERNS FACEBOOK,
11 INC.'S, PURCHASE OF CONNECTU'S STOCK AS SET FORTH
12 IN THE SETTLEMENT AGREEMENT." AND IT REFERS TO
13 THAT PROVISION ABOUT CONNECTU BEING -- OR FACEBOOK
14 BEING ABLE TO DETERMINE FORM AND SUBSTANCE.

15 AND MR. ROUSSEL ALSO SAYS THAT CONNECTU,
16 QUOTE, "HAS REFUSED TO EXECUTE THE FORMAL DOCUMENTS
17 REQUIRED TO EFFECTUATE THE STOCK PURCHASE AGREEMENT
18 AND STOCKHOLDER'S AGREEMENT."

19 AND HE ALSO ATTACHES AS EXHIBIT C THE
20 FORM OF SEVERAL OTHER DOCUMENTS THAT HE SAID ARE,
21 QUOTE, "REQUIRED TO FINALIZE THE TRANSACTION."

22 NOW, THAT'S WHAT THEY SAID IN THEIR
23 MOTION, YOUR HONOR. WE RESPONDED TO THAT MOTION
24 AND WE OPPOSED IT ON THE BASIS THAT THE ONE AND A
25 HALF PAGE HANDWRITTEN TERM SHEET WITH CROSS-OUTS

1 AND SO FORTH, NUMBER ONE, IS NOT ENFORCEABLE ON ITS
2 FACE BECAUSE IT IS NOT A COMPLETE ENFORCEABLE
3 CONTRACT.

4 AND, NUMBER TWO, TO THE EXTENT THAT --
5 AND IT'S SET OUT RIGHT HERE IN THEIR PROPOSED
6 ORDER, THEY WERE ASKING NOT FOR WHAT MR. CHATTERJEE
7 SAID HERE TODAY, BUT FOR AN ORDER AGAINST BOTH A
8 PARTY AND NONPARTIES TO EXECUTE THESE VERY
9 COMPLICATED COMPLEX CORPORATE DOCUMENTS, THAT, THAT
10 THE TERMS OF THOSE HUNDRED PLUS PAGE DOCUMENTS ARE
11 SO VARIED FROM ANYTHING THAT YOU CAN REASONABLY GET
12 OUT OF THIS ONE AND A HALF PAGE HANDWRITTEN TERM
13 SHEET THAT, THAT THAT IS A FURTHER REASON THAT,
14 THAT BASICALLY WHAT THE PARTIES HAD IN THAT TERM
15 SHEET, YOUR HONOR, WAS AN AGREEMENT TO AGREE, AN
16 UNENFORCEABLE STATEMENT OF THE GOALS OF A
17 TRANSACTION THAT IF IT WERE WORKED OUT TO THE
18 SATISFACTION OF BOTH PARTIES, MIGHT HAVE RESULTED
19 IN A CLOSING OF A SETTLEMENT. BUT THAT NEVER
20 HAPPENED.

21 WHAT DID HAPPEN WAS IN THE FIRST PLACE
22 THE VERY, THE VERY NEXT DAY AFTER THAT ONE AND A
23 HALF PAGE HANDWRITTEN DOCUMENT WAS, WAS SIGNED,
24 THEIR COUNSEL, FACEBOOK'S COUNSEL, MR. COOPER, IN
25 FACT, WHO IS RIGHT HERE IN THE COURTROOM, JUST

1 HOURS LATER REFERRED IN AN E-MAIL TO, QUOTE, "THE
2 TENTATIVE SETTLEMENT REACHED LAST NIGHT," IN A
3 MESSAGE THAT MR. COOPER PROPOSED TO SEND TO THIS
4 COURT, AND I BELIEVE THAT SOME FORM OF IT WAS
5 ULTIMATELY COMMUNICATED TO THE COURT.

6 HE SAID, QUOTE, "THE PARTIES ARE IN THE
7 PROCESS OF PREPARING A FINAL AGREEMENT," AND I
8 REQUESTED THAT THE COURT, QUOTE, "STAY ALL
9 DEADLINES AND PROCEEDINGS WHILE THE PARTIES,"
10 QUOTE, "COMPLETE THE SETTLEMENT."

11 AND IN THE MASSACHUSETTS ACTION, WHICH
12 WAS THE HOPE WOULD BE SETTLED AS PART OF THIS
13 PROCESS, ANOTHER LAWYER FROM THE OTHER FIRM, FROM
14 THE PROSKAUER ROSE FIRM WHICH WAS REPRESENTING
15 FACEBOOK IN THE MASSACHUSETTS COURT, AND HE'S A
16 LAWYER, BY THE WAY, YOUR HONOR, WHO WASN'T INVOLVED
17 IN THESE NEGOTIATIONS OUT HERE AT ALL.

18 SO HE WAS CLEARLY TELLING SOMETHING TO
19 THE MASSACHUSETTS COURT THAT HE HAD BEEN TOLD BY
20 SOMEONE ON THEIR SIDE BECAUSE HE WOULDN'T HAVE ANY
21 OTHER WAY TO KNOW IT.

22 AND HE SAID IN AN E-MAIL TO THE
23 MASSACHUSETTS COURT, "THE PART --" QUOTE, "THE
24 PARTIES ARE STILL ATTEMPTING TO FINALIZE A
25 SETTLEMENT, AND IT MAY BE A FEW WEEKS,"

1 QUOTE-UNQUOTE.

2 SO THEY RECOGNIZED IMMEDIATELY AFTER THE
3 SETTLEMENT IN DOCUMENTS THAT THEIR OWN LAWYER SENT
4 THAT THIS WAS AN AGREEMENT TO AGREE.

5 AS THE CALIFORNIA STATE CASES PUT IT, IT
6 WAS AN AGREEMENT ON THE GOALS OF THE SETTLEMENT BUT
7 NOT ON THE MEANS BY WHICH THAT SETTLEMENT WAS GOING
8 TO BE AFFECTED.

9 AND I THINK YOU CAN FIND THAT, AND I
10 THINK YOU CAN FIND THAT IN CASES THAT ARE
11 PARTICULARLY PERTINENT TO THAT, YOUR HONOR.

12 AND THEY'RE CITED AT LEAST IN THE
13 SURREPLY BRIEF AND I BELIEVE IN THE OPPOSITION
14 BRIEF THAT WE SUBMITTED CALLED TERRY V. CONLAN AND
15 WEDDINGTON PRODUCTS AGAINST FLICK.

16 THOSE ARE STATE COURT OF APPEAL CASES.
17 AND I THINK THE PARTIES ARE IN AGREEMENT THAT
18 CALIFORNIA CONTRACT LAW CONTROLS THE ISSUE OF
19 WHETHER THIS ONE AND A HALF PAGE DOCUMENT IS AN
20 ENFORCEABLE CONTRACT OR IS NOT.

21 AND THERE IS ALSO A NINTH CIRCUIT
22 DECISION WHICH ESSENTIALLY ADOPTS THE, THE POSITION
23 OF THE STATE COURTS. IT'S CALLED PERFUMBAY.COM
24 AGAINST EBAY.

25 AND, YOUR HONOR, IN TERMS OF THE

1 IMMEDIATE ENFORCEABILITY OF THE CONTRACT, OF THE
2 ONE AND A HALF PAGE HANDWRITTEN TERM SHEET, THERE
3 ARE A NUMBER OF PROBLEMS WITH IT, BUT I THINK THE
4 CLEAREST ONE IS THAT NOTHING, NOTHING IN THAT
5 DOCUMENT DEFINES THE MEANS BY WHICH THIS GOAL OF
6 SETTLING THE CASE IS GOING TO BE AFFECTED.

7 THE MOST IMPORTANT WAY THAT IT FAILS TO
8 DO THAT IS THAT IT FAILS TO SPECIFY WHETHER THE
9 TRANSACTION, WHICH IS DESCRIBED IN THE DOCUMENT AS,
10 AS ESSENTIALLY THE, THE -- IN FACT, LET ME JUST GET
11 IT EXACTLY IN FRONT OF ME.

12 "THE ACQUISITION OF CONNECTU'S SHARES
13 CONSISTENT WITH A STOCK AND CASH FOR STOCK
14 ACQUISITION."

15 THE PROBLEM WITH THAT LANGUAGE, YOUR
16 HONOR, IS AS OUR EXPERT WITNESS, WHO IS A PROFESSOR
17 AT COLUMBIA BUSINESS SCHOOL WHO HAS PARTICIPATED
18 IN, IN HUNDREDS OF MERGERS AND ACQUISITIONS
19 TRANSACTIONS AS AN INVESTMENT BANKER AND TEACHES IN
20 THE FIELD, AS SHE HAS TESTIFIED, YOUR HONOR, THE
21 WORD "ACQUISITION" IS ITSELF AMBIGUOUS. IT IS A
22 BROAD TERM.

23 IT INCLUDES BOTH THE CONCEPT OF A MERGER
24 AND, AND IT ALSO INCLUDES THE CONCEPT OF A SHARE
25 PURCHASE AGREEMENT, A STRAIGHT PURCHASE OF STOCK

1 FROM THE HOLDERS OF THAT STOCK.

2 NOW, WHAT WAS GOING ON BETWEEN FEBRUARY
3 22ND AND MID-APRIL WHERE THE -- WHEN THE
4 NEGOTIATIONS BROKE DOWN HERE, YOUR HONOR, IS THAT
5 THE PARTIES HERE WERE ACTUALLY NEGOTIATING THE
6 TERMS OF WHAT WAS BASICALLY A MERGER TRANSACTION.

7 AND, AGAIN, IF THE AGREEMENT WAS SO
8 CLEAR, AS MR. CHATTERJEE SUGGESTS, THAT FACEBOOK'S
9 RIGHT TO DETERMINE FORM AND DOCUMENTATION ENTITLED
10 THEM TO IN EFFECT DICTATE WHAT THE SUBSTANCE OF THE
11 PARTY'S TRANSACTION WAS GOING TO BE, NOT JUST FORM
12 AND DOCUMENTATION BUT SUBSTANCE, WHY IN THE WORLD
13 WOULD THEY SPEND TWO MONTHS NEGOTIATING A MERGER
14 AGREEMENT IF WHAT THEY REALLY WANTED IS THE
15 AGREEMENT THAT THEY HAVE PUT IN FRONT OF YOUR HONOR
16 AND SAID THAT THEY WANT YOU TO ORDER US TO SIGN,
17 WHICH IS A STOCK PURCHASE AGREEMENT.

18 THEY'RE TWO VERY DIFFERENT KINDS OF
19 TRANSACTIONS. THEY HAVE A LOT OF SIGNIFICANT --
20 SUBSTANTIVE DIFFERENCES, SOME OF THEM HAVING TO DO
21 WITH THE LIABILITIES OF THE BUSINESS THAT IS BEING
22 REQUIRED, SOME OF THEM HAVING TO DO WITH THE TAX
23 CONSEQUENCES ON BOTH SIDES OF THE TRANSACTION WHICH
24 TAX CONSEQUENCES, [REDACTED]

25 COULD BE VERY SIGNIFICANT FOR

1 THE PARTIES.

2 SO, YOUR HONOR, FOR SIX WEEKS OR TWO
3 MONTHS, THEY WORKED ON A MERGER TRANSACTION. THEY
4 WERE HAVING SOME PROBLEMS. THEY, THEY -- THEY
5 WERE, YOU KNOW, MAKING SOME PROGRESS BUT THERE WAS
6 NO AGREEMENT ON THE FINAL TERMS OF THAT MERGER
7 TRANSACTION.

8 AND THEN --

9 THE COURT: COUNSEL, WHAT DO YOU MAKE OF
10 WHAT I'M TO DO?

11 MR. BARRETT: WELL, YOUR HONOR, I THINK
12 THE SIMPLEST THING TO DO AND WHAT WE WOULD ASK YOU
13 TO DO IS TO DENY THE MOTION TO ENFORCE BECAUSE THEY
14 HAVE FAILED TO SHOW YOU THAT THERE'S AN ENFORCEABLE
15 CONTRACT BETWEEN THE PARTIES REPRESENTED BY THIS
16 ONE AND A HALF PAGE TERM SHEET AND THEY HAVE
17 CERTAINLY FAILED, THEY HAVE CERTAINLY FAILED TO
18 SHOW THAT, THAT THERE IS ANY, ANY LEGAL BASIS IN
19 CONTRACT LAW TO ORDER THE CONNECTU, AND PERSONAL
20 JURISDICTION FOR THAT MATTER, TO ORDER THE CONNECTU
21 PARTIES TO EXECUTE THE HUNDRED PLUS PAGES OF
22 COMPLEX CORPORATE DOCUMENTS WHICH THEY, BY THE WAY,
23 SHOWED US FOR THE VERY FIRST TIME WITH THE MOTION
24 THAT THEY FILED HERE.

25 THOSE WERE NOT THE DOCUMENTS THAT WERE

1 UNDER NEGOTIATION BETWEEN THE PARTIES. THOSE ARE
2 COMPLETELY NEW DOCUMENTS. THEY ARE SKEWED FOR ALL
3 KINDS OF ECONOMIC AND LEGAL REASONS AND IN
4 FACEBOOK'S FAVOR. THEY'RE NOT WHAT YOU WOULD
5 EXPECT A NEGOTIATED TRANSACTION OF THIS TYPE TO
6 LOOK LIKE.

7 SO THE FIRST REQUEST WE WOULD MAKE TO
8 YOUR HONOR IS THAT YOU NOT ENFORCE THAT AGREEMENT.

9 NOW, IN ADDITION TO THE CONTRACT LAW
10 PROBLEMS WITH THE DOCUMENT THAT THEY'RE TRYING TO
11 ENFORCE, AND I'D BE HAPPY TO EXPAND ON THOSE
12 FURTHER.

13 [REDACTED]
14
15
16
17
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19
20
21
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23

24 THE COURT: AND I AM A LITTLE CURIOUS
25 ABOUT WHAT THE PARTIES AGREED TO IN THIS DOCUMENT.

1 IS IT YOUR CONTENTION THAT THEY AGREED TO
2 NOTHING?

3 MR. BARRETT: WHAT THEY AGREED TO, YOUR
4 HONOR, IS THAT -- IT'S VERY SIMPLE. IT'S AN
5 AGREEMENT TO AGREE. THEY HAD THE -- THEY HAVE THE
6 FORM OR THE GOALS OF A SETTLEMENT.

7 THE COURT: WELL, BUT, DO YOU, DO YOU --
8 WHAT IS YOUR POSITION WITH RESPECT TO THE EXCHANGE
9 OF CASH AND STOCK? IS THAT SOMETHING THAT THE
10 PARTIES AGREED TO?

11 MR. BARRETT: THAT WAS PART OF THE
12 FRAMEWORK OF THE TRANSACTION, YOUR HONOR. BUT BY
13 IT'S VERY NATURE, THIS KIND OF COMPLEX CORPORATE
14 TRANSACTION, WHETHER IT'S A MERGER OR A SHARE
15 PURCHASE AGREEMENT, AND OUR EXPERT, PROFESSOR
16 HITSCHERICH, REALLY SPEAKS TO THIS. YOU SIMPLY,
17 YOU SIMPLY CAN'T SAY -- IT'S NOT LIKE MY, MY BUYING
18 A CAR FROM YOU, YOUR HONOR.

19 YOU HAVE A 2005 PRIUS AND I SAY, GREAT,
20 I'LL BUY IT FOR \$10,000, AND THAT'S PROBABLY AN
21 ENFORCEABLE TRANSACTION. IT'S PRETTY CLEAR WHAT
22 THE TERMS OF THAT AND THE MISSING TERMS CAN PERHAPS
23 BE IMPLIED BY THE COURT BY WHAT IN TERMS OF WHAT IS
24 REASONABLE.

25 THESE KINDS -- [REDACTED]

1 [REDACTED]

2
3 CORPORATE TRANSACTION INVOLVING THE ACQUISITION OF
4 THE STOCK OF ONE CORPORATION AND THE EXTINGUISHMENT
5 OF ITS EXISTENCE IS NOT THE KIND OF TRANSACTION
6 THAT YOU AND I CAN JUST SAY TO EACH OTHER YOU'LL
7 BUY MY COMPANY [REDACTED]

8 IF WE SAID THAT, THAT WOULD BE GREAT AND
9 THE NEXT THING THAT WE WOULD DO IN THE REAL WORLD,
10 YOUR HONOR, IS THAT WE WOULD GET TEAMS OF LAWYERS
11 AND INVESTMENT BANKERS TO GO OUT AND TO DO DUE
12 DILIGENCE AND SEE, A, WHAT THE LEGAL FORM OF THAT
13 TRANSACTION WOULD BE; AND, B, IS THERE ANY
14 INFORMATION THAT, THAT I, AS THE BUYER, MUST NEED
15 TO KNOW ABOUT THE BUSINESS THAT YOU'RE SELLING ME
16 AS A SELLER?

17 THE COURT: BUT ISN'T THAT, ISN'T THAT --
18 CAN'T THAT BE THE SUBJECT OF AN AGREEMENT?

19 IN OTHER WORDS, I UNDERSTAND THE WORLD
20 THAT YOU'RE, THAT YOU'RE DESCRIBING TO ME BUT, BUT
21 I WOULD PUT THE WORD "SHOULD" IN THAT SENTENCE
22 RATHER THAN "MUST."

23 IN OTHER WORDS, IS THERE A REQUIREMENT
24 UNDER THE LAW --

25 MR. BARRETT: UH-HUH.

1 THE COURT: -- THAT A GROUP OF LAWYERS
2 GET TOGETHER AND DO THIS OR COULD THE PARTIES SAY
3 WE'LL SETTLE OUR DISPUTE BY PAYING YOU CASH AND
4 STOCK AND YOU RELEASE THE CLAIMS?

5 IS THERE ANYTHING ABOUT THAT SETTLEMENT
6 THAT IS ILLEGAL?

7 MR. BARRETT: UM, WELL, YOUR HONOR, THE
8 ANSWER IS, YES, THERE COULD BE IF IT INVOLVES THE
9 EXCHANGE OF STOCK AND THE EXCHANGE OF STOCK UNLIKE
10 THE CASH TRANSACTION FOR THE CAR.

11 THE EXCHANGE OF STOCK IS GOVERNED BY THE
12 SECURITIES ACT OF -- THE SECURITIES EXCHANGE ACT OF
13 1934 AND THAT ACT IMPOSES, IMPOSES ON THE ISSUER,
14 IN THIS CASE FACEBOOK, THE COMPANY THAT IS GIVING
15 UP OR THAT IS PROVIDING ITS STOCK TO MY CLIENT IN
16 EXCHANGE FOR THEIR COMPANY AND THEIR CLAIMS AGAINST
17 FACEBOOK.

18 IT IMPOSES ON THEM IRRESPECTIVE OF ANY
19 QUESTIONS THAT CONNECTU MAY ASK OR ANYTHING ELSE
20 THAT CONNECTU MAY KNOW. NO REQUIREMENT OF
21 RELIANCE.

22 THE KNOWLEDGE OF THE SELLERS, IF YOU WILL
23 IN THIS CASE, MY CLIENTS, IS ACTUALLY IRRELEVANT
24 UNDER SECTION 29 OF THE 1934 SECURITIES ACT IN AN
25 ACTION FOR RESCISSION OR, AS WE HAVE HERE, A

1 DEFENSE TO ENFORCEMENT OF A CONTRACT.

2 IT'S IRRELEVANT IF THE BUYER, THE
3 CONNECTU PARTY, THE FACEBOOK PARTY, FAILS TO
4 DISCLOSE MATERIAL INFORMATION ABOUT, ABOUT THE
5 COMPANY, THEIR COMPANY, WHOSE STOCK, MY CLIENTS,
6 ARE RECEIVING.

7 AND, YOUR HONOR, IN OUR, IN OUR SURREPLY
8 BRIEF --

9 THE COURT: WELL, LET ME -- IF I
10 UNDERSTAND YOUR POSITION, AND I'M NOT MEANING TO
11 SIMPLIFY IT.

12 MR. BARRETT: UH-HUH.

13 THE COURT: BUT IT SEEMS TO ME THAT AT
14 THE HEART OF WHAT I HAVE BEFORE ME IS AN EFFORT BY
15 THE PARTIES TO SETTLE SEVERAL DISPUTES BY AGREEING
16 ON THE AMOUNT OF THE CONSIDERATION AND IN THE
17 LANGUAGE OF THE DOCUMENT, WHICH WAS DRAFTED AT THE
18 CLOSE OF THE CONFIDENTIAL MEDIATION, THE TWO SIDES
19 WANTED TO MAKE SURE THAT, THAT CERTAIN TERMS WERE
20 COMMITTED IN WRITING AND SIGNED TO, AND THEY LEFT
21 THEMSELVES WITH THE OPPORTUNITY TO DRAFT MORE
22 FORMAL DOCUMENTS, PERHAPS CONTEMPLATING THAT AS YOU
23 ACCURATELY POINT OUT, THESE ARE THE KINDS OF
24 TRANSACTIONS WHICH OFTEN ARE ACCOMPANIED BY OTHER
25 DOCUMENTS WITH PROTECTIONS AND WARRANTIES AND ALL

1 KINDB OF THINGS BUT WANTING TO MAKE SURE THAT THOSE
2 THINGS DID NOT STAND IN THE WAY OF THEIR SETTLEMENT
3 BECAUSE THEY WANTED TO MAKE SURE THAT
4 NOTWITHSTANDING ALL OF THAT THE SETTLEMENT DIDN'T
5 FALL APART.

6 AND WHAT I'M TRYING TO ASK IS, IS THAT --
7 IF THAT IS WHAT I FIND TO BE THE CASE, WHAT DO I
8 MAKE OF THAT? I MEAN, WHAT DO I DO WITH THAT?

9 IN OTHER WORDS, I'M, I'M FACED WITH
10 LANGUAGE IN THE SETTLEMENT AGREEMENT WHERE THE
11 PARTIES CLEARLY COMMUNICATE TO ONE ANOTHER THIS IS
12 A SETTLEMENT AGREEMENT.

13 THERE MAY BE ASPECTS OF IT THAT ARE NOT
14 WRITTEN DOWN, BUT THERE ARE ASPECTS THAT
15 THE PARTIES INTEND TO BE BOUND TO.

16 AND ACTUALLY SET UP THIS COURT AS A PLACE
17 TO ENFORCE. THE WORD "ENFORCE" MEANS WE'VE GOT
18 SOMETHING, AND WE NEED A PLACE NOW TO GO MAKE SURE
19 IT TAKES PLACE.

20 THAT IS PRETTY STRONG LANGUAGE TO ENFORCE
21 IT. AND SO IS IT YOUR ARGUMENT THAT, THAT THIS
22 COURT WAS NOT EMPOWERED BY THE PARTIES TO ENFORCE
23 THAT AGREEMENT?

24 MR. BARRETT: WELL, YOUR HONOR, I THINK
25 THE COURT HAS JURISDICTION TO CONSIDER WHETHER TO

1 ENFORCE IT.

2 WITH RESPECT TO THE LANGUAGE THAT COUNSEL
3 REFERS TO, THESE TERMS ARE BINDING AND THIS
4 DOCUMENT MAY BE SUBMITTED INTO EVIDENCE TO ENFORCE
5 THIS AGREEMENT.

6 YOUR HONOR, THIS WOULD NOT BE THE FIRST
7 CASE WHERE, WHERE TWO PARTIES HAD WHAT THEY THOUGHT
8 WAS A DEAL, AN ENFORCEABLE CONTRACT, AND THEY MAY
9 HAVE EXPRESSED THAT AS THEY DID IN PARAGRAPH 5 OF
10 THE TERM SHEET.

11 AND BY THE WAY, YOUR HONOR, IT'S CALLED
12 TERM SHEET AND SETTLEMENT AGREEMENT.

13 I WOULD CONTEND THAT THE VERY TITLE OF
14 THE DOCUMENT IS ITSELF AMBIGUOUS.

15 IT DOESN'T SAY IT'S A SETTLEMENT
16 AGREEMENT. IT SAYS IT'S A TERM SHEET AND
17 SETTLEMENT AGREEMENT, AND, IN FACT, THE FIRST WORDS
18 ARE TERM SHEET AND A TERM SHEET, I THINK, IN
19 GENERAL BUSINESS LANGUAGE IS PROBABLY NOT AN
20 ENFORCEABLE DOCUMENT.

21 BUT, BUT -- SO, AGAIN, THE DOCUMENT IS
22 KIND OF A STRANGE MIXTURE, IF YOU WILL, OF, YES,
23 THE FACT THAT THEY USE THE WORD "BINDING" AND THE
24 WORD "ENFORCE" IS SOME EVIDENCE THAT THAT IS WHAT
25 THE PARTIES INTENDED.

1 BUT, YOUR HONOR, THE LAW IS EXTREMELY
2 CLEAR THAT, THAT NOTWITHSTANDING THOSE KINDS OF
3 STATEMENTS BY THE PARTIES, IF THE DOCUMENT DOES NOT
4 CONTAIN SUFFICIENT TERMS AND SUFFICIENT CLARITY,
5 AND IF IT IS AMBIGUOUS TO THE POINT WHERE, WHERE IT
6 DOESN'T MEET THE REQUIREMENTS FOR AN ENFORCEABLE
7 CONTRACT UNDER STATE LAW, THEN, THEN
8 NOTWITHSTANDING WHAT THE PARTIES MAY HAVE THOUGHT
9 OR MAY HAVE HOPED WHEN THEY, WHEN THEY HAD THAT
10 HANDSHAKE, WHEN THEY SIGNED THAT PIECE OF PAPER,
11 THE COURT STILL CANNOT ENFORCE IT BECAUSE IT IS NOT
12 A CONTRACT AND CALLING IT A CONTRACT OR CALLING IT
13 ENFORCEABLE DOESN'T MAKE IT SO IF IT DOESN'T HAVE
14 THE REQUIRED TERMS.

15 THE COURT: YOU SEE, YOUR STATEMENT JUST
16 MADE IS CLOSE TO MY UNDERSTANDING OF THE LAW.

17 MR. BARRETT: I'M GLAD, YOUR HONOR.

18 THE COURT: THAT I'M LIMITED IN MY
19 ABILITY TO ENFORCE IT IF THE PARTIES HAVE NOT COME
20 TO AN ENFORCEABLE AGREEMENT.

21 MR. BARRETT: RIGHT.

22 THE COURT: AND SO THAT'S WHY I TURN OVER
23 HERE TO YOUR OPPONENT TO ASK DON'T I NEED TO HAVE A
24 PROCEEDING TO BE CONVINCED THAT THIS IS AN
25 ENFORCEABLE AGREEMENT? AND I DON'T KNOW HOW I GET

1 THERE, BUT I DO NEED TO AT LEAST PUT MYSELF IN A
2 POSITION ON THIS MOTION TO GO THROUGH THIS AND IN
3 SOME WAY TO GET TO THE POINT WHERE I UNDERSTAND
4 WHAT IS IT THAT MAKES THIS ENFORCEABLE AND DO I
5 HAVE ALL OF THE INGREDIENTS HERE?

6 MR. CHATTERJEE: THE ANSWER TO THAT
7 QUESTION IS NO, YOUR HONOR.

8 THE MOTIONS FOR ENFORCEMENT AND THE CASES
9 CITED ARE GENERALLY DEALING WITH THE ISSUE OF IS
10 THERE A MUTUAL ASSENT, IN OTHER WORDS, THAT BOTH
11 PARTIES ACTUALLY AGREED TO SOMETHING.

12 TYPICALLY IN THOSE CASES THERE MIGHT BE
13 E-MAIL EXCHANGES OR THINGS GOING BACK AND FORTH
14 WHERE IT'S NOT CLEAR THAT THE PARTIES HAVE AGREED
15 TO SOMETHING.

16 IN THIS CASE WE HAVE SPECIFIC TERMS. IT
17 SAYS THE TERMS ARE BINDING. IT SAYS THAT YOUR
18 HONOR CAN CONSIDER THIS DOCUMENT FOR PURPOSES OF
19 ENFORCEMENT.

20 IT HAS SPECIFIC SHARES. IT HAS SPECIFIC
21 DOLLARS. UNUSUAL RESTRICTIONS ON WHAT CAN OR CAN'T
22 BE DONE WITH THE SHARES.

23 IT DOESN'T SAY FACEBOOK AND CONNECTU WILL
24 MUTUALLY DETERMINE THE FORM AND DOCUMENTATION OF
25 THE TRANSACTION. IT SAYS FACEBOOK DOES IT.

1 THEY HAD SIX LAWYERS WITH THEM WHEN THEIR
2 CLIENT CHOSE TO SIGN THIS DOCUMENT. SIX LAWYERS.
3 THEY HAD A WHARTON BUSINESS PROFESSOR, HOWARD
4 WINKLEVOSS, WHO IS CONSIDERED AN EXPERT, WHO TAUGHT
5 THERE FOR 12 YEARS WHO WAS AT THE MEDIATION WHEN
6 THEY CHOSE TO SIGN THIS DOCUMENT.

7 THE ISSUE OF THE EVIDENTIARY HEARING IS
8 WHETHER THE PARTIES AGREED TO SOMETHING. THEY
9 AGREED TO THIS AND THE TERMS ARE CLEARLY LAID OUT
10 HERE. THERE IS CONSIDERATION ON BOTH ENDS OF IT.

11 EACH PARTY IS GETTING A BENEFIT OF A
12 BARGAIN THAT THEY STRUCK AND THIS CASE SHOULD BE
13 OVER. THERE IS NO EVIDENTIARY HEARING NECESSARY AS
14 TO WHETHER THEY AGREED TO ANYTHING.

15 ANYTHING, YOUR HONOR, THAT YOU WOULD
16 CONSIDER ABOUT WHAT THIS AGREEMENT MEANS IS GOING
17 TO HAVE TWO ISSUES WITH IT: THE FIRST ONE IS THAT
18 IT WOULD DEAL WITH SUBJECTIVE INTENT; THAT IS, WHAT
19 WAS IN THE MINDS OF THE PARTIES WHEN THEY SIGNED IT
20 RATHER THAN WHAT IS THE INTENTION OF THE THEM THAT
21 THEY EXPRESSED ON THE DOCUMENT.

22 THE SECOND ISSUE IS TO THE EXTENT THAT
23 THERE WAS ANY DISCUSSION BETWEEN THE PARTIES, AND I
24 DON'T WANT TO GO INTO WHAT HAPPENED AT THE
25 MEDIATION AT THIS POINT. IT'S ALL PROTECTED BY THE

1 MEDIATION PRIVILEGE.

2 SO THIS IS THE DOCUMENT WHERE THE PARTIES
3 MANIFESTED THEIR MUTUAL INTENT, CONNECTU DIDN'T
4 AGREE, DIDN'T ASK TO PARTICIPATE IN THE FORM AND
5 DOCUMENTATION OF THE TRANSACTION.

6 IT SPECIFICALLY RECITED THE PARTIES MAY,
7 THAT THEY MAY ENGAGE IN INFORMAL DOCUMENTATION,
8 THAT THE THINGS THAT MR. BARRETT TALKS ABOUT, BUT
9 SHOULD THEY NOT AND THIS IS IT AND ALL YOU NEED TO
10 DO, YOUR HONOR, IS ENFORCE THE WORDS THAT ARE
11 WRITTEN ON THIS PAGE (INDICATING).

12 THE COURT: WELL, DO YOU TAKE ISSUE WITH
13 THE STATEMENT OF LAW THAT THIS MUST BE ENFORCEABLE?

14 MR. CHATTERJEE: IN ORDER FOR THE COURT
15 TO ENFORCE IT?

16 YOUR HONOR, THIS MUST, THIS MUST BE
17 ENFORCEABLE FOR THE COURTS TO ENFORCE IT AND THIS
18 IS AN ENFORCEABLE AGREEMENT.

19 THE COURT: WELL, THAT'S A CONCLUSION
20 THAT YOU WANT ME TO REACH. BUT WHAT MAKES A
21 DOCUMENT ENFORCEABLE UNDER CALIFORNIA LAW DEPENDS
22 UPON WHETHER OR NOT THE PARTIES HAVE AGREED TO
23 WHAT, ALL OF THE MATERIAL TERMS?

24 HOW DO I -- WHAT IS THE DEFINITION OF
25 WHAT MAKES THIS ENFORCEABLE OR NOT.

1 MR. CHATTERJEE: THE DEFINITION OF WHAT
2 MAKES THIS ENFORCEABLE IS IF THEY AGREED TO THE
3 MATERIAL TERMS AND I'LL SUBMIT, YOUR HONOR, YOU
4 CAN'T HAVE THIRD PARTIES THAT WERE NOT INVOLVED IN
5 THE NEGOTIATION COMING IN AND REVISITING OF WHAT
6 MAY OR MAY NOT BE CONSIDERED MATERIAL AFTER THE
7 FACT.

8 HERE ALL OF THE PARTIES WERE ADVISED BY
9 SOPHISTICATED COUNSEL.

10 THEY PUT DOWN EVERYTHING THAT THEY FELT
11 WAS MATERIAL. THEY NEGOTIATED IT, THEY WROTE IT,
12 AND THEY SIGNED IT.

13 THE COURT: WHOSE HANDWRITING IS THIS BY
14 THE WAY?

15 MR. CHATTERJEE: THIS IS MR. HOWITSON'S
16 HANDWRITING.

17 THE COURT: WHO IS HE?

18 MR. CHATTERJEE: HE'S IN-HOUSE COUNSEL
19 FOR FACEBOOK.

20 THIS IS AN ARM'S LENGTH TRANSACTION
21 BETWEEN SOPHISTICATED PARTIES. PEOPLE WILL PUT
22 DOWN WHAT THE MATERIAL INFORMATION THAT THEY NEED
23 IN THERE. THEY CAN'T COME IN THERE AFTER THE FACT
24 AND SAY, OH, I WISH I WOULD HAVE KNOWN THAT OR I
25 WISH I WOULD HAVE KNOWN SOME OTHER THING.

1 THEY HAD AN OBLIGATION AND OPPORTUNITY TO NEGOTIATE
2 FOR IT AND PUT REPRESENTATIONS IN WHERE THEY WANTED
3 IT.

4 THE COURT: WHAT DO I MAKE OF ALL OF THE
5 POST-SHEET CONSIDERATIONS AND DOCUMENTS IN TERMS OF
6 THE KIND OF PROVISIONS THAT WERE THERE WHICH DO NOT
7 APPEAR IN THE SETTLEMENT AGREEMENT?

8 MR. CHATTERJEE: YOUR HONOR, LIKE IT SAYS
9 IN THE AGREEMENT, IT CONTEMPLATED THAT THE PARTIES
10 EXECUTE MORE FORMAL DOCUMENTS.

11 THERE WERE DISCUSSIONS AFTERWARDS ABOUT
12 HAVING SOME OTHER KIND OF AGREEMENT PUT IN PLACE
13 THAT WOULD SUPPLANT THE TERM SHEET AND SETTLEMENT
14 AGREEMENT. AND THERE WAS, THERE WAS THINGS
15 NEGOTIATED BACK AND FORTH AND THAT'S WHAT HAPPENED.

16 NOW, THERE WERE TIMES WHEN CONNECTU'S
17 COUNSEL ASKED OUR CORPORATE COUNSEL FOR MORE TIME
18 BECAUSE HE WAS HAVING DIFFICULTY WITH HIS CLIENTS.
19 BUT THAT IS COMPLETELY IRRELEVANT WHEN IT COMES TO
20 THE ENFORCEMENT OF THE TERMS IN THE SETTLEMENT
21 AGREEMENT. IT CONTEMPLATES THAT IT BE BINDING TO
22 ARBITRATION BUT THIS DID NOT HAPPEN.

23 THE COURT: WELL, IT SOUNDS IN FRAUD IN
24 CONNECTION WITH THE SETTLEMENT PROCESS ITSELF.
25 THERE'S NO PLEADING BEFORE ME THAT RAISES THAT, BUT

1 LET'S ASSUME THAT SOMEHOW THAT'S AN ISSUE. HOW DO
2 I HANDLE THAT IN THE CONTEXT OF THIS DOCUMENT IN
3 TERMS OF YOUR CLIENT'S POSITION?

4 MR. CHATTERJEE: YOUR HONOR, OUR POSITION
5 IS THAT YOU REJECT IT OUTRIGHT. IT'S AN ABSURD
6 POSITION TO TAKE. THERE'S NO REPRESENTATION IN
7 THIS DOCUMENT AS TO SHARE PRICE AND FOR THEM TO
8 RAISE THAT ALLEGATION IS SIMPLY TRANSFORMING WHAT
9 IS AN OPEN MARKET ISSUE. FACEBOOK IS NOT A
10 PUBLICLY TRADED COMPANY.

11 FACEBOOK WAS IN LITIGATION WITH THEIR
12 CLIENTS. DISCOVERY WAS ONGOING. WE PRODUCED
13 CERTAIN DOCUMENTS WITH STOCK EVALUATION AND WE TOLD
14 THEM DISCOVERY WAS COMPLETE. THEY DECIDED TO GO
15 INTO THE MEDIATION KNOWING DISCOVERY WAS
16 INCOMPLETE.

17 THEY THEN TRIED, ONCE THEY DECIDED NOT TO
18 HONOR THE TERM SHEET AND SETTLEMENT AGREEMENT, TO
19 GO TO BOSTON AND INTRODUCE OTHER DISCOVERY ISSUES
20 ASSOCIATED WITH DOCUMENT PRODUCTION AND THIS IS
21 NOTHING SHORT OF JUST A DOCUMENT PRODUCTION ISSUE.

22 AND HERE'S WHAT JUDGE WOODLOCK HAD TO SAY
23 IN THE FEBRUARY ORDER, HE SAID THAT FROM ALL THAT
24 APPEARS THE PARTIES WERE PREPARED TO SETTLE THEIR
25 DISPUTES THEN DESPITE THE FACT THAT ASPECTS OF

1 DISCOVERY IN THIS CASE MOST PRESENTLY FOR PRESENT
2 PURPOSES DOCUMENT PRODUCTION HAD NOT BEEN COMPLETED
3 AND UNRESOLVED DISCOVERY ISSUES REMAINED
4 OUTSTANDING."

5 THEY KNEW THAT THEY DIDN'T HAVE ALL OF
6 THE INFORMATION THEY NEEDED. FOR THEM TO COME IN
7 NOW AND SAY WE HAVE SOME SORT OF OBLIGATION TO TELL
8 THEM SOMETHING THEY DIDN'T KNOW, WHEN THEY DIDN'T
9 ASK FOR THE REPRESENTATION IN THIS DOCUMENT, THEY
10 KNEW THEY DIDN'T HAVE ALL OF THE DOCUMENTS.

11 IN FACT, THE MICROSOFT INFORMATION AND
12 THE PRESS RELEASE THAT THEY SUBMIT IN THEIR PAPERS,
13 THEY DIDN'T HAVE ANY OF THOSE CORPORATE DOCUMENTS
14 AND THEY KNEW IT AND FOR THEM TO COME IN AND SAY
15 THAT, OH, WE HAD INCOMPLETE INFORMATION WHEN WE
16 SETTLED THE CASE, YOUR HONOR, THAT'S WHAT HAPPENS
17 IN SETTLEMENT.

18 THE COURT: BUT IN ORDER TO REJECT THAT,
19 DOESN'T IT HAVE TO BE TENDERED TO THE COURT IN SOME
20 FORM? I'M A LITTLE CONCERNED THAT THE MOTION TO
21 ENFORCE THE SETTLEMENT AGREEMENT DOES NOT PROVIDE
22 ME WITH AN OPPORTUNITY TO ADJUDICATE THE ISSUE OF
23 WHETHER THERE WAS FRAUD IN THE INDUCEMENT OF THE
24 SETTLEMENT AGREEMENT, NOW MAYBE IT DOES AND I NEED
25 TO SEE CLEARLY HOW I HANDLE THAT IN CONNECTION WITH

1 THE MOTION.

2 I HAVEN'T READ ENOUGH CASES WHERE PARTIES
3 HAVE TENDERED A SETTLEMENT AGREEMENT AND SOMEONE
4 HAS OBJECTED TO IT ON THE GROUNDS THAT IT WAS
5 INDUCED BY FRAUD AND THE COURT GOES AHEAD AND SAID,
6 WELL, I'M GOING TO SOLVE THAT IN CONNECTION WITH A
7 MOTION AND AS OPPOSED TO A TRIAL AND THAT'S WHAT
8 I'M ASKING FOR IS WHAT IS THE PROCESS?

9 IT'S CLEAR THAT THE PARTIES AGREED THAT I
10 CAN ENFORCE THIS AGREEMENT AND THAT THIS AGREEMENT
11 WOULD BE SUBMITTED INTO EVIDENCE AS PART OF THAT
12 ENFORCEMENT.

13 AND I UNDERSTAND FROM CALIFORNIA LAW THAT
14 A MOTION IS PERMISSIBLE IN THE CONTEXT OF AN OPEN
15 CASE THAT WOULD ENFORCE THE SETTLEMENT AGREEMENT.

16 BUT I HAVEN'T GONE FAR ENOUGH INTO IT TO
17 FIND WHAT HAPPENS IF ANOTHER PARTY IN THAT SAYS,
18 WELL, IT WAS INDUCED BY FRAUD. HOW DO I SOLVE
19 THAT?

20 MR. CHATTERJEE: THANK YOU FOR THAT
21 QUESTION.

22 ONE OF THE ISSUES THAT CONNECTU HAS
23 RAISED IS THAT THIS CONTRACT IS VOID UNDER SECTION
24 29 OF THE SECURITIES EXCHANGE ACT. WITH THE
25 UNDERLYING VIOLATION OF SECTION 29 BEING A 10 OR

1 10(B) VIOLATION AND THEIR POSITION IS THAT THIS
2 AGREEMENT CANNOT BE ENFORCED UNDER SECTION 29 SO
3 THEIR OPPOSITION EFFECTIVELY HAS PUT THIS ISSUE
4 BEFORE YOU.

5 I DON'T THINK YOU NEED TO HAVE FURTHER
6 EVIDENCE SUBMITTED, YOUR HONOR.

7 THEY ARE TAKING THE POSITION THAT THIS
8 AGREEMENT IS VOID. IF THEY, IF THEY MAKE -- IF
9 THEY SUBMIT THAT ARGUMENT TO YOU, YOUR HONOR, AND
10 YOU DECIDE TO ENFORCE THIS AGREEMENT, YOU HAVE
11 REJECTED THAT ARGUMENT.

12 FOR THEM TO PROCEED ON THEIR FRAUD
13 THEORY, I THINK THEY HAVE TO PUT FORTH SOME KIND OF
14 SHOWING. THEY HAVE PUT FORWARD NO SHOWING OF ANY
15 SCIENTER.

16 THEIR CLAIM APPEARS TO BE SOME SORT OF
17 OMISSION IN A PRIVATELY HELD ARM'S LENGTH
18 TRANSACTION. THAT WOULD ONLY COME INTO PLAY IF
19 THERE WAS A DUTY AND THEY DON'T ANSWER THE QUESTION
20 OF THEIR KNOWLEDGE OF THE FACT THAT DISCOVERY WAS
21 ONGOING AND INCOMPLETE.

22 IN FACT, THEY ENDORSE JUDGE WOODLOCK'S
23 RECOGNITION OF THAT IN HIS ORDER. YOU CAN REJECT
24 THE EFFORT TO TRY AND VOID THIS AGREEMENT UNDER
25 SECTION 29 BASICALLY BY SAYING THEY HAVE PUT

1 FORWARD ANY EVIDENCE, NONE TO SUPPORT A 10(B)
2 VIOLATION THAT WOULD IN TURN LEAD TO SECTION 29
3 VOIDING OF THE AGREEMENT.

4 THE COURT: WHAT IS YOUR ANSWER TO MY
5 QUESTION THE PARTIES AGREE THAT THIS MATTER CAN BE
6 STIPULATED THAT SAN JOSE FEDERAL COURT JURISDICTION
7 TO ENFORCE THIS AGREEMENT, SUBMIT THIS INTO
8 EVIDENCE TO ENFORCE THE AGREEMENT AND CALIFORNIA
9 LAW PROVIDES THAT A, THAT A MOTION TO ENFORCE IS,
10 IS PERMISSIBLE. HOW DO I HANDLE A CLAIM THAT THERE
11 IS FRAUD IN CONNECTION WITH THE AGREEMENT?

12 MR. BARRETT: WELL, YOUR HONOR, WE WOULD,
13 OF COURSE, BE PLEASED TO SUBMIT ANY PLEADINGS THAT,
14 THAT YOUR HONOR BELIEVES IS NECESSARY TO ASSIST IT
15 IN DECIDING THAT QUESTION.

16 I DO, I DO THINK THAT, THAT IT WAS RAISED
17 IN OUR OPPOSITION BRIEF AND IN OUR SURREPLY BRIEF
18 AND SOME OF THE EVIDENCE WAS PRESENTED IN THE FORM
19 OF AFFIDAVITS WITH THOSE TWO SUBMISSIONS WHICH WE
20 UNDERSTAND YOUR HONOR WOULD TAKE INTO ACCOUNT IN
21 DECIDING WHAT TO DO.

22 AND THEN TO ANSWER COUNSEL'S QUESTION,
23 FIRST OF ALL, WHEN THIS BECAME A SECURITIES
24 TRANSACTION, [REDACTED]

25

1 [REDACTED] WHETHER OR NOT THEY
2 KNEW ABOUT IT, THEY INTENDED IT, WHETHER ALL OF
3 THOSE FANCY CORPORATE LAWYERS THAT THEY HAD ON
4 THEIR SIDE, AND YOU HEARD THAT THIS TERM SHEET WAS
5 WRITTEN BY THEIR IN-HOUSE GENERAL COUNSEL, WHETHER
6 OR NOT THEY FOCUSSED ON THE FACT THAT THEY HAD
7 DISCLOSURE OBLIGATIONS BY VIRTUE OF THE SECURITIES
8 LAW, THEY HAD THOSE OBLIGATIONS.

9 THE LAW IS VERY CLEAR ON THAT, YOUR
10 HONOR. WE WOULD BE HAPPY TO BRIEF THAT FURTHER,
11 ALTHOUGH I THINK WE HAVE GOT AMPLE BRIEFING ON IT
12 IN OUR SURREPLY. SO THAT'S WHERE THE DUTY COMES
13 FROM.

14 THE DUTY COMES FROM WHEN A COMPANY TRADES
15 IN ITS OWN SECURITIES WITH AN OUTSIDE PARTY, IT
16 DOESN'T MATTER WHO THEY ARE, IT DOESN'T MATTER IF
17 IT'S US OR MICROSOFT. THEY HAVE A DUTY TO DISCLOSE
18 MATERIAL INFORMATION.

19 SOMETIMES THAT DUTY IS IMPLEMENTED BY
20 INVITING THE OTHER SIDE TO COME IN AND DO DUE
21 DILIGENCE. THAT'S ONE WAY TO DEAL WITH IT TO MAKE
22 SURE THE OTHER SIDE GETS ANYTHING THEY NEED. YOU
23 JUST GIVE THEM ACCESS TO YOUR COMPANY AND YOUR
24 BOOKS AND RECORDS.

25 THAT DIDN'T HAPPEN HERE. [REDACTED]

1 [REDACTED]
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16 THEY, WITH THEIR, NOT ONLY THEIR GENERAL
17 COUNSEL, BUT THEIR CHIEF FINANCIAL OFFICER, MR. YU,
18 AND, AND MR. ZUCKERBERG, WHO IS NOT ONLY THE CEO OF
19 THE COMPANY BUT IS ON THE BOARD OF DIRECTORS OF THE
20 COMPANY, AND THAT'S IMPORTANT FOR REASONS I'LL GET
21 TO IN A MINUTE, THE THREE OF THEM WERE PRESENT AT
22 THE MEDIATION.

23 [REDACTED]
24
25

1 [REDACTED]

2
3
4
5 WHAT, WHAT THEY DIDN'T TELL US, WHAT
6 THOSE THREE FACEBOOK EXECUTIVES WHO WERE SITTING IN
7 THAT MEDIATION DIDN'T TELL US, EVEN THOUGH AS A
8 MATTER OF FEDERAL SECURITIES LAW THEY HAVE AN
9 ABSOLUTE OBLIGATION TO DISCLOSE MATERIAL
10 INFORMATION WHETHER WE ASKED FOR IT OR NOT, YOUR
11 HONOR, REMEMBER, SECURITIES LAW IS NOT CAVEAT
12 EMPTOR. SECURITY LAWS IS DISCLOSURE WHEN THE LAW
13 SAYS THAT YOU HAVE TO MAKE IT AND THE LAW SAYS THAT
14 WHEN THEY DO THIS TRADE, THEY HAVE TO MAKE IT.

15 WHAT THEY DIDN'T TELL US WAS THAT THE
16 FACEBOOK BOARD, OF WHICH MR. ZUCKERBERG, WHO WAS AT
17 THAT MEETING WAS A MEMBER, AND UNDOUBTEDLY THE CFO
18 AND GENERAL COUNSEL KNEW ABOUT THIS BECAUSE THAT'S
19 PART OF THEIR JOB.

20 BUT WHAT THEY DIDN'T TELL US AND THEY
21 ONLY TOLD US LATER ON IN MARCH WHEN THE CORPORATE
22 LAWYERS, IF YOU WILL, PERHAPS, DOING SOME OF THAT
23 DUE DILIGENCE IN NEGOTIATING THE TRANSACTION ASKED
24 THE QUESTION, THEY DIDN'T TELL US ABOUT WHAT IS
25 CALLED A 409(A) VALUATION. AND I DON'T KNOW IF

1 YOUR HONOR HAS RUN ACROSS THAT TERM IN SOME OF YOUR
2 OTHER CASES.

3 BUT THAT IS A VALUE THAT, THAT A
4 VALUATION THAT, THAT A PRIVATE COMPANY HAS A HUGE
5 INCENTIVE TO MAKE UNDER THE INTERNAL REVENUE CODE
6 RECENTLY AMENDED WITHIN THE LAST COUPLE YEARS.

7 THE REASON IT HAS A HUGE INCENTIVE TO DO
8 THAT IS THAT BECAUSE IF IT GRANTS STOCK OPTIONS AT
9 A PRICE LOWER THAN THE 409(A) VALUATION OR, OR
10 HIGHER, IT, IT -- THE EMPLOYEES WHO RECEIVED THOSE
11 OPTIONS MAY FACE EXTREME, EXTREME TAX PENALTIES IN
12 CONNECTION WITH RECEIVING THOSE OPTIONS AND THE
13 COMPANY MAY, MAY INCUR SOME LIABILITY AS WELL.

14 SO THERE IS A VERY STRONG TAX REASON TO
15 DO AN ACCURATE 409(A) VIOLATION.

16 IN ORDER FOR THAT VALUATION TO BE
17 EFFECTIVE UNDER THE INTERNAL REVENUE CODE, THE
18 COMPANY HAS TO GO THROUGH CERTAIN STEPS THAT ARE
19 PRESCRIBED IN THE STATUTE.

20 AND ULTIMATELY THOSE STEPS CULMINATE IN
21 THE COMPANY'S BOARD OF DIRECTORS PASSING A
22 RESOLUTION WHICH SAYS THAT THE FAIR MARKET VALUE OF
23 OUR STOCK IS X. SO THIS IS NOT, YOU KNOW, SOME
24 VAGUE, VAGUE CONCEPT OF VALUATION. THIS IS, THIS
25 IS A RESOLUTION OF THE BOARD OF DIRECTORS AND YOU

1 HAD A MEMBER OF THE BOARD OF DIRECTORS AND YOU HAD
2 THE SENIOR FINANCIAL OFFICER AND THE SENIOR LEGAL
3 PERSON OF THE COMPANY SITTING THERE AT THAT
4 MEDIATION, KNOWING THAT THEY HAD AN OBLIGATION TO
5 DISCLOSE ALL MATERIAL INFORMATION.

6 [REDACTED]

7
8
9 AND YOUR HONOR, WHAT WAS THE FAIR MARKET
10 VALUE ACCORDING TO THE BOARD OF DIRECTORS AT THAT
11 TIME? [REDACTED]

12
13
14 YOUR HONOR, WE ALSO HAVE TO SHOW IT WAS
15 MATERIAL. [REDACTED]

16
17
18
19
20 COUNSEL IS RIGHT, WE HAVE TO SHOW
21 SCIENTER. YOUR HONOR, I THINK I JUST DESCRIBED A
22 BASIS OF PRIMA FACIE SCIENTER [REDACTED]

1 [REDACTED]

2 THEY KNEW BECAUSE THEY PARTICIPATED IN
3 THESE BOARD MEETINGS. MR. ZUCKERBERG MUST HAVE
4 BECAUSE HE'S A BOARD MEMBER AND THE OTHERS I'M SURE
5 DID BECAUSE OF THEIR POSITION. [REDACTED]

6
7 THE COURT: LET ME GO BACK AND I'VE READ
8 ALL OF THIS. BUT LET ME GO BACK TO A STATEMENT
9 THAT YOU MADE THAT UNDER THE SECURITIES LAW THERE
10 WAS AN OBLIGATION TO, TO MAKE THE, MAKE THE -- MAKE
11 A CERTAIN KIND OF DISCLOSURE.

12 MR. BARRETT: UH-HUH.

13 THE COURT: THAT'S THE PART I, I GUESS, I
14 NEED EDUCATING ON.

15 IN OTHER WORDS, IN THE CONTEXT OF A
16 SETTLEMENT, IF STOCK IS OFFERED IN THE GIVE AND
17 TAKE OF THE SETTLEMENT IN CASH, AT THAT POINT THE
18 NEGOTIATIONS HAVE TO TAKE A DIFFERENT TURN IS WHAT
19 YOU'RE TELLING ME.

20 AT THAT POINT THE PARTY CANNOT OFFER
21 STOCK BUT MUST AT THAT POINT MAKE A DISCLOSURE
22 ABOUT DUE DILIGENCE KIND OF DISCLOSURE AND COMPLY
23 WITH ALL OF THE SECURITIES LAWS WITH RESPECT TO THE
24 DISCLOSURE.

25 AND INDEED IT COULD NEVER, UNDER THE LAW,

1 OFFER STOCK WITHOUT THOSE DISCLOSURES AND IF STOCK
2 IS OFFERED AS A PART OF THE SETTLEMENT, IT IS
3 ILLEGAL.

4 MR. BARRETT: WELL, THEY ARE CERTAINLY --
5 IF THEY DO THAT, YOUR HONOR, I THINK THAT'S
6 ESSENTIALLY CORRECT. IF THEY DO THAT --

7 THE COURT: WHAT IS YOUR AUTHORITY FOR
8 THAT?

9 MR. BARRETT: I'LL GET TO THAT IN ONE
10 MINUTE. IF THEY DO THAT, THEY'RE CERTAINLY TAKING
11 THAT RISK.

12 THE COURT: WELL, BOTH SIDES ARE TAKING A
13 RISK, IT SEEMS TO ME, BECAUSE IT COULD BE THAT THE
14 PARTY WHO GETS THE STOCK, GETS STOCK WHEN THE
15 DISCLOSURE COMES OUT IS WORTH MORE.

16 MR. BARRETT: ABSOLUTELY. AND
17 OBVIOUSLY --

18 THE COURT: IT JUST DEPENDS ON, IT
19 DEPENDS ON, AND AS I UNDERSTAND THIS TRANSACTION
20 NEITHER SIDE IS TRYING TO MOVE AWAY FROM THE
21 TRANSACTION BECAUSE THEY BELIEVE THAT SOMETHING
22 ABOUT THE VALUE IS DIFFERENT. IT'S BECAUSE OF THE
23 FAILURE TO DISCLOSE, YOUR ARGUMENT IS THE FAILURE
24 TO DISCLOSE THE VALUATION FOR THE STOCK BENEFITS IS
25 INFORMATION THAT SHOULD HAVE BEEN DISCLOSED.

1 BUT RATHER THAN IN A MINUTE, I NEED THE
2 AUTHORITY NOW. THAT FOR ME IS VERY IMPORTANT TO
3 UNDERSTAND A CASE WHERE A JUDGE HAS HELD THAT IN
4 THE CONTEXT OF A SETTLEMENT THE PROPOSAL OF STOCK
5 OF THAT KIND IS ILLEGAL WITHOUT THE DISCLOSURES
6 ACCOMPANYING IT.

7 DO YOU HAVE A CASE AUTHORITY TO THE
8 CONTRARY THAT IN THE COURSE OF A SETTLEMENT THE
9 OFFER OF CASH AND STOCK IS OKAY EVEN WITHOUT THE
10 DISCLOSURES THAT WOULD ACCOMPANY THE, THE STOCK IF
11 IT WERE BEING SOLD IN AN ARM'S LENGTH TRANSACTION?

12 MR. CHATTERJEE: YOUR HONOR, WE HAVE NOT
13 BEEN ABLE TO LOCATE CASES ON EITHER SIDE OF THIS
14 CANDIDLY.

15 I DO THINK THAT ONCE YOU ENGAGE IN AN
16 ARM'S LENGTH TRANSACTION AND YOU'RE NOT TALKING
17 ABOUT THE OPEN MARKET, THE DYNAMICS DO CHANGE
18 CONSIDERABLY.

19 I MEAN, THE DUTY TO DISCLOSE COMES UP
20 BASED UPON THE SOPHISTICATION OF THE RELATIONSHIP,
21 THE NATURE OF THE TRANSACTION, PRIVATELY HELD
22 VERSUS PUBLICLY HELD. ALL OF THAT IS PRETTY
23 STANDARD CASE LAW. AND IF YOU LOOK AT THE CONTEXT
24 OF THIS NEGOTIATION, THEY CAN'T COME IN AND SAY
25 THERE WAS NO MISREPRESENTATION, THERE WAS NO

1 MISREPRESENTATION MADE IN THIS DOCUMENT AS TO SHARE
2 PRICE.

3 EVERYTHING YOU HEARD MR. BARRETT SAY
4 ABOUT HOW MUCH THEY VALUED IT, NONE OF THAT IS
5 EMBODIED IN THIS DOCUMENT.

6 AND IF WHATEVER THEIR SUBJECTIVE
7 INTENTIONS WERE, AT THIS POINT IT SEEMS LIKE AN
8 AFTER-THE-FACT JUSTIFICATION FOR TRYING TO
9 ESTABLISH FRAUD RATHER THAN SOMETHING THAT THEY
10 UNDERSTOOD AT THE TIME AND HAD AN OPPORTUNITY TO,
11 TO HAVE WRITTEN DOWN.

12 THE COURT: UM, THE QUINN EMANUEL LIEN
13 WAS MENTIONED.

14 DOES THAT PLAY A PART IN THIS?

15 MR. BARRETT: YOUR HONOR, I DON'T THINK
16 IT PLAYS ANY PART IN THIS AT ALL.

17 [REDACTED]

18
19
20
21
22
23
24 THE COURT: BUT IF I, IN OTHER WORDS,
25 PART OF WHAT YOU WOULD HAVE ME DO IS TO EVALUATE

1 THE SETTLEMENT?

2 MR. BARRETT: NO, YOUR HONOR.

3 THE COURT: WELL, HOW DO YOU KNOW THAT
4 THE VALUE IS WHAT YOU'RE CLAIMING IT TO BE?

5 MR. BARRETT: I'M JUST USING THEIR
6 NUMBERS, YOUR HONOR.

7 THE COURT: I KNOW, BUT WHAT IF THEIR
8 NUMBER IS NOT CORRECT?

9 MR. CHATTERJEE: THOSE ARE THEIR NUMBERS.
10 THOSE ARE NUMBERS THAT THEY SUBMITTED. I WANT TO
11 BE VERY CLEAR ABOUT THAT. THEY CAME UP WITH THE
12 [REDACTED] PER SHARE. THAT'S
13 THEIR NUMBER.

14 THE COURT: I UNDERSTAND THAT. BUT YOUR
15 POSITION IS THAT THE SETTLEMENT CAN'T BE ENFORCED
16 BECAUSE THERE WAS A FAILURE TO DISCLOSE THIS STOCK
17 OPTION PRICE.

18 MR. BARRETT: YES, IT'S A STOCK OPTION,
19 PRICE, BUT WHAT IT IS, IS A FAILURE TO DISCLOSE A
20 RESOLUTION OF THE BOARD OF DIRECTORS THAT SAYS THAT
21 THE FAIR MARKET VALUE OF COMMON STOCK IS [REDACTED]

22 THE REASON I BRING UP THE VALUE, YOUR
23 HONOR, IS NOT -- IS PURELY TO SHOW YOU THE
24 MATERIALITY OF THE MISREPRESENTATION, HOW OBVIOUS
25 IT IS THAT THIS IS, THAT THIS IS MATERIAL NONPUBLIC

1 INFORMATION.

2 NOW, THEY CAN DO -- YOU CAN DO A PRIVATE,
3 A PRIVATE TRADE IN YOUR STOCK BUT WHAT YOU HAVE TO
4 DO IS YOU HAVE TO MAKE SURE THAT THE OTHER PARTY
5 HAS ALL MATERIAL INFORMATION OR HAS ACCESS TO
6 MATERIAL INFORMATION. THAT WASN'T DONE HERE.

7 YOUR HONOR, YOU ASKED FOR, YOU ASKED FOR
8 SOME, SOME CASE AUTHORITY. FIRST OF ALL, I WANT TO
9 CITE A CASE CALLED LIVID HOLDINGS AGAINST SOLOMON
10 AND SMITH BARNEY, WHICH IS A NINTH CIRCUIT CASE AT
11 PAGE 13 OF OUR SURREPLY.

12 AND THAT WAS A CASE, AMONG OTHER THINGS,
13 DISCUSSING THE QUESTION OF SCIENTER THE NINTH
14 CIRCUIT SAID IF YOU ALLEGE THAT THE DEFENDANTS IN
15 THIS CASE, THE PLAINTIFF FACEBOOK, KNEW THE
16 CONTESTED STATEMENTS MOST OBVIOUS INTERPRETATION
17 WAS FALSE WHEN MADE.

18 THAT'S --

19 THE COURT: WELL, WHAT I'M ASKING,
20 THOUGH, THERE ARE LOTS OF SECURITIES CASES. WHAT
21 I'M CONCERNED WITH IS WHETHER OR NOT THERE IS A
22 DIFFERENCE WHEN PARTIES COME TOGETHER TO SETTLE A
23 LAWSUIT --

24 MR. BARRETT: RIGHT.

25 THE COURT: -- AND TRY TO IN THE COURSE

1 OF THAT COME TO TERMS THAT THEY ARE SATISFIED WITH.

2 I'M JUST NOT AS FAMILIAR WITH THAT
3 BECOMING THE SUBJECT OF LITIGATION LATER ON OVER
4 EVALUATION BECAUSE ONCE I OPEN THAT UP, THERE'S
5 GOING TO BE A LOT OF LITIGATION IN THE COURT.

6 PARTIES ARE PERMITTED TO, IN THE COURSE
7 OF SETTLEMENT, SAY THAT THE PRICE WILL DEPEND ON AN
8 AUDIT; LATER ON WE'LL DO SOME KIND OF THINGS TO
9 FIGURE OUT THE PRICE. I'M NOT USED TO PARTIES
10 SAYING, OKAY, IT'S GOING TO BE [REDACTED] PLUS
11 STOCK.

12 MR. BARRETT: UH-HUH.

13 THE COURT: AND THEN LATER ON HAVING COME
14 TO THE COURT AND SAY, WELL, YOU KNOW, I SAID
15 [REDACTED] WORTH OF STOCK, BUT I THOUGHT THE STOCK WAS
16 WORTH A LOT MORE THAN IT TURNS OUT TO BE.

17 MR. BARRETT: RIGHT, RIGHT.

18 THE COURT: AND I NOW WANT TO GET A -- I
19 WANT TO BACK AWAY FROM THIS AND ASKING THE COURT
20 FOR PERMISSION TO DO IT.

21 YOU'RE NOT QUITE ASKING THAT BUT THAT'S
22 WHAT I'M CONCERNED ABOUT.

23 AND I'D LIKE TO SEE CASES THAT SAY THAT A
24 PARTY IS PERMITTED TO DO THAT BECAUSE ONCE YOU PUT
25 STOCK INTO THE MIX, THERE HAS TO BE A DISCLOSURE

1 THAT GOES WITH THE STOCK WHICH THEN BECOMES A BASIS
2 IF NOT DONE FOR SAYING TO THE PARTIES ALTHOUGH YOU
3 WANTED TO SETTLE ALONG THOSE TERMS AND YOU DIDN'T
4 ASK FOR IT, THE LAW GETS IT. AND IF PAGE 13 GETS
5 ME THERE, I'LL LOOK AT IT AND SEE IF IT GETS ME
6 THERE.

7 MR. BARRETT: I DON'T THINK IT DOES, YOUR
8 HONOR. IT DOESN'T ADDRESS THAT SPECIFIC ISSUE.
9 AND I THINK LIKE MR. CHATTERJEE, WE HAVE NOT
10 LOCATED, ALTHOUGH WE'RE STILL LOOKING FOR A CASE
11 THAT ANSWERS YOUR HONOR'S PRECISE QUESTION.

12 ALTHOUGH WE CAN GIVE YOU CHIARELLA
13 AGAINST THE UNITED STATES, THE GENERAL PRINCIPLE
14 THAT A COMPANY SELLING ITS OWN STOCK HAS AN
15 AFFIRMATIVE DUTY TO ABSTAIN FROM TRADING IN THE
16 SHARES UNLESS IT FIRST DISCLOSES ALL MATERIAL
17 NONPUBLIC INFORMATION WHICH, WHICH IT KNOWS.

18 NOW, THERE IS NO, THERE IS NO -- I DON'T
19 THINK THERE'S ANY SETTLEMENT EXCEPTION. I DON'T
20 KNOW ANY REASON WHY THERE WOULD BE.

21 THIS, IN MANY WAYS, I THINK IS REALLY A
22 SUI GENERIS CASE.

23 I THINK TYPICALLY WHAT YOU WOULD HAVE IN
24 A SITUATION LIKE THIS IS THAT IF YOU HAD PARTIES
25 FIGHTING AND THEN A SETTLEMENT THAT INVOLVED THE

1 EXCHANGE OF STOCK AND PRIVATELY HELD BUSINESS I --
2 IT WOULD PROBABLY BE PARTIES THAT HAD BEEN DOING
3 BUSINESS WITH EACH OTHER, YOU KNOW, FOR EXAMPLE,
4 FORMER PARTNERS OR SOMETHING LIKE THAT WHERE THE
5 CHANCES ARE THAT THEY WOULD ACTUALLY HAVE A GREAT
6 DEAL OF INFORMATION ABOUT EACH OTHER ALREADY
7 BECAUSE OF THE NATURE OF THEIR BUSINESS
8 RELATIONSHIP OR THEY MIGHT PROVIDE, AS YOU WOULD DO
9 IN A CORPORATE ACQUISITION OR A MERGER CONTEXT,
10 YES, HERE'S THE AGREEMENT IN PRINCIPAL, WE'LL, YOU
11 KNOW, TRADE THIS MUCH SHARES OF STOCK FOR THIS MANY
12 AND SUBJECT TO NORMAL DUE DILIGENCE, SUBJECT TO AN
13 APPRAISAL AS YOUR HONOR SUGGESTED, SUBJECT TO AN
14 AUDIT.

15 BUT TO COME IN HERE AND AS THEY ARE
16 SAYING IN EFFECT SAYING THAT THERE WAS INFORMATION,
17 AND YOU DON'T HEAR THEM DENYING IT, [REDACTED]

18 THAT'S THE BOARD OF
19 DIRECTORS NUMBER. THEIR COUNSEL GAVE IT TO OUR
20 CORPORATE COUNSEL. [REDACTED]

21
22 THE COURT: LET ME ASK JUST AS A MATTER
23 OF HISTORIC FACT, THAT BOARD EVALUATION WAS DONE
24 SUBSEQUENT TO THE MICROSOFT TRANSACTION, WHATEVER
25 THAT WAS?

1 MR. BARRETT: YES, YES. OUR
2 UNDERSTANDING, YOUR HONOR, WAS THAT IT WAS.
3 ALTHOUGH I CANNOT TELL YOU THE EXACT DATE. THEY
4 WOULD NOT DISCLOSE THAT TO US.

5 MR. CHATTERJEE: YOUR HONOR, IF I COULD
6 EXPLAIN BECAUSE I SEE SOME CONFUSION IN YOUR EYES,
7 AND I THINK THERE ARE A COUPLE OF IMPORTANT ISSUES
8 HERE.

9 THE MICROSOFT TRANSACTION WAS FOR
10 [REDACTED] AND A BUSINESS DEAL.

11 CONNECTU DIDN'T GET THAT AND THEY KNEW
12 THEY WEREN'T GETTING THAT.

13 IF YOU LOOK AT THE SETTLEMENT AGREEMENT
14 THERE'S A RESTRICTION FOR SERIES D PREFERRED STOCK,
15 ONLY ONE, BUT THE DOCUMENT ON IT'S FACE IDENTIFIES
16 THAT THERE IS SERIES D PREFERRED STOCK AND THERE'S
17 COMMON STOCK.

18 WHAT MICROSOFT GOT OUT OF THE DEAL AND
19 WHAT CAUSED THESE VALUATION NUMBERS OF THE PRESS
20 RELEASE ARE FUNDAMENTALLY DIFFERENT THAN WHAT
21 CONNECTU IS GETTING OR THE PRINCIPALS OF CONNECTU,
22 WHICH WAS SUBJECT TO THE FAIR MARKET VALUATION
23 NUMBER.

24 THERE IS NOT A FAIR MARKET VALUATION THAT
25 HAS BEEN DONE OF THE SERIES D PREFERRED STOCK.

1 I'LL POINT OUT TO YOU, YOUR HONOR, THAT
2 WE DID PRODUCE SEVERAL FAIR MARKET VALUATIONS
3 THROUGHOUT THE LITIGATION, AND IN THOSE DOCUMENTS
4 IT SPECIFICALLY CALLED OUT OTHER DEALS THAT
5 FACEBOOK WAS CONSIDERING WHERE PREFERRED STOCK WAS
6 PART OF THE CONSIDERATION FOR THE PARTNERSHIPS.

7 IN THOSE DOCUMENTS THERE WAS SPECIFIC
8 PREFERRED PRICES THAT WERE IN THERE THAT WERE
9 SUBSTANTIALLY DIFFERENT THAN WHAT THE CONCLUDED
10 FAIR MARKET VALUE OF THE COMMON SHARES WERE.

11 WHAT THAT MEANS IS THAT THE DOCUMENTS WE
12 PRODUCED IN THE LITIGATION THAT THEY SOUGHT
13 IDENTIFY ON THEIR FACE THAT THE PREFERRED STOCK HAD
14 DIFFERENT VALUE THAN THE COMMON STOCK.

15 BUT, AGAIN, YOUR HONOR, I DON'T THINK YOU
16 NEED TO REACH THAT ISSUE BECAUSE THEY HAD THE
17 OPPORTUNITY TO ASK FOR A REPRESENTATION AS TO
18 VALUE.

19 YOU'RE ABSOLUTELY RIGHT THAT THEY DID NOT
20 ASCRIBE A DOLLAR VALUE AND ASK FOR AN INDEPENDENT
21 APPRAISAL. THAT WOULD BE A VERY COMMON COURSE.

22 HERE THEY AGREED TO A VERY SPECIFIC
23 NUMBER OF SHARES, AND THAT'S WHAT WE'RE ASKING YOUR
24 HONOR TO HONOR AND THEY'RE COMMON SHARES. THEY'RE
25 NOT THE [REDACTED] SHARES THAT MICROSOFT GOT.

1 THERE'S NONE OF THE OTHER BUSINESS
2 PARTNERSHIP THAT MICROSOFT GOT OUT OF THE DEAL.
3 THEY'RE COMMON SHARES.

4 MR. BARRETT: YOUR HONOR, UM, UM, THOSE,
5 THOSE -- THERE ARE THOSE ADDITIONAL EVALUATIONS.
6 THOSE CAME AT A MUCH EARLIER POINT IN TIME AND AS,
7 PERHAPS, IS OBVIOUS, FACEBOOK IS A COMPANY THAT HAS
8 BEEN ON AN INCREDIBLE UPWARD TRACK IN TERMS OF ITS,
9 ITS SUCCESS AND SO A VALUATION, EVEN IF IT'S ONLY A
10 FEW MONTHS OLD, MAY, MAY WELL BE OUTDATED.

11 BUT THAT REALLY ISN'T THE POINT, YOUR
12 HONOR.

13 THE POINT IS THAT THEIR DUTY IS TO
14 DISCLOSE ALL MATERIAL, ALL MATERIAL INFORMATION,
15 NOT INFORMATION FROM THE PAST THAT THEY MAY HAVE
16 HAPPENED TO DISCLOSE IN THE COURSE OF DISCOVERY.

17 IT'S TO DISCLOSE ALL INFORMATION THAT IS
18 MATERIAL TO A REASONABLE PURCHASER AT THE TIME OF
19 THE TRANSACTION THAT THEY'RE ENGAGING IN.

20 AGAIN, THEY'RE IN A FUNNY POSITION
21 BECAUSE THEY'RE A PRIVATE COMPANY AND THEY'RE NOT
22 OUT THERE IN THE MARKETPLACE AND MAKING 10-K AND
23 13-D DISCLOSURES AND ALL OF THE THINGS THAT PUBLIC
24 COMPANIES DO WHEN SOMETHING MATERIAL TO THE COMPANY
25 HAPPENS. THEY DON'T HAVE TO DO THAT.

1 BUT IF THEY DECIDE TO ENGAGE IN A PRIVATE
2 TRADE OF THEIR STOCK, THEY DO HAVE TO DISCLOSE
3 MATERIAL INFORMATION.

4 THE COURT: BUT THAT'S THE PART THAT I'M,
5 THAT I'M STUCK ON AND I DO WANT TO, I DO WANT TO,
6 TO STUDY FOR A MOMENT BEFORE I GO FURTHER IN THIS
7 BECAUSE I'LL TELL YOU, MY INITIAL REACTION IS THAT
8 AS YOU'RE BOTH ACCURATELY DESCRIBING, THERE'S NO
9 REAL DISPUTE HERE, THAT WHAT I HAVE BEFORE ME IS A
10 TERM SHEET AND SETTLEMENT AGREEMENT.

11 WHEN I PRACTICED LAW FOR 15 YEARS, I DID
12 LOTS OF THESE. AS A JUDGE FOR THE LAST 15 SOME ODD
13 YEARS, I'VE SEEN LOTS OF THESE, AND IT DOES SEEM TO
14 ME -- I KNOW IT'S LONGER -- BUT IT DOES SEEM TO ME
15 THAT I HAVE SEEN CIRCUMSTANCES WHERE THE PARTIES
16 TRY TO GO AS THESE PARTIES APPEAR TO HAVE GONE TO
17 THE POINT OF MAKING IT BINDING.

18 AND WHEN PARTIES ATTEMPT TO MAKE IT
19 BINDING, IT PUTS THE COURT IN A POSITION OF WANTING
20 TO SUPPORT THE MEDIATION RESOLUTION DISPUTE PROCESS
21 BY GIVING IT BINDING EFFECT BECAUSE EITHER ONE OF
22 YOU COULD HAVE BEEN BEFORE THIS COURT ARGUING THAT
23 YOU WANT TO ENFORCE THIS AGREEMENT.

24 THERE'S NOTHING ON THE FACE OF THIS
25 DOCUMENT THAT SUGGESTS THAT SOMEBODY WAS TAKEN

1 ADVANTAGE OF ONE WAY OR THE OTHER.

2 AND SO EITHER SIDE WOULD BE DEPRIVED OF
3 THE BENEFIT OF THIS PROCESS IF COURTS WERE NOT TO
4 HONOR THE LANGUAGE THAT THEY CAME TO.

5 IT, IT -- AND SO WHAT I'M, WHAT I'M
6 TRYING TO BE CAREFUL ABOUT IS, IS THERE SOME POLICY
7 OF CALIFORNIA OR FEDERAL OR OTHER LAW THAT, THAT
8 SUPERIMPOSES UPON THE PARTIES WHO COME TO WHAT THEY
9 CONSIDER TO BE A BINDING AGREEMENT AND SAYS,
10 ALTHOUGH YOU HAVE CONSIDERED IT BINDING, THE LAW
11 RESTRICTS YOU IN SOME WAY?

12 NOW, I AM CONCERNED THAT IN THE POST-TERM
13 SHEET SETTLEMENT AGREEMENT SUBMISSION THAT THERE
14 WERE ALL KINDS OF THINGS HAVING TO DO WITH THIS
15 TRANSACTION THAT DON'T SHOW UP ON THE FACE OF THIS.

16 AND THE MOST THAT, THAT IT SEEMS THAT I,
17 THAT I CAN DO AT THIS POINT IS TO ENFORCE THIS
18 AGREEMENT AND NOTHING MORE.

19 THE PARTIES NEED, PERHAPS, MORE, BUT THIS
20 IS WHAT THEY AGREED TO.

21 THIS IS COMMON STOCK. IT DOESN'T SAY
22 ANYTHING ABOUT IT BEING LETTERED STOCK IN ANY WAY.
23 IT OUGHT TO BE FREELY TRADED, UNLESS SOMEONE
24 CONVINCES ME THAT THERE WAS SOMETHING ABOUT THE
25 COMMON SHARES THAT REQUIRE IT HAVE RESTRICTIONS ON

1 IT AND AS I READ THROUGH THE DOCUMENT THERE WERE
2 RESTRICTIONS THAT WERE BEING SUGGESTED.

3 THIS TALKS ABOUT A STOCK ACQUISITION.
4 THERE'S NOTHING ABOUT A MERGER. THERE'S NOTHING
5 ABOUT SUBSIDIARIES.

6 I UNDERSTAND FROM THE TRANSACTION THAT
7 DIFFERENT KINDS OF TERMS WERE BEING SUGGESTED SO
8 IT -- THE TWO QUESTIONS THAT I CAME TO THE BENCH
9 HOPING TO GET CLARIFICATION ON IS WHAT ARE THE
10 ESSENTIAL MATERIAL TERMS THAT ARE MISSING FROM THIS
11 IF ANY, AND TO HEAR WHETHER OR NOT THERE WAS SOME
12 LEGAL BASIS UPON WHICH I COULD NOT ENFORCE THIS.

13 AS I HAVE SAID, I WAS SOMEWHAT CONCERNED
14 THAT THIS WAS DONE THROUGH A MOTION AS OPPOSED TO
15 PLEADINGS AND SOMEONE WAS RAISING QUESTIONS HAVING
16 TO DO WITH FRAUD IN THE INDUCEMENT AND THAT MEANS
17 THAT THERE IS SOMETHING BEYOND THE DOCUMENT THAT I
18 HAVE TO CONSIDER FOR THAT PURPOSE. THAT'S A LITTLE
19 BIT IN CONFLICT WITH THE NATURE OF THE SETTLEMENT
20 AGREEMENT WHERE I'M RESTRICTED TO THE FACE OF IT.

21 THERE IS -- I HAVEN'T ACTUALLY ASKED YOU
22 ALL ABOUT THE NATURE OF THE MEDIATION PRIVILEGE AND
23 THE CONFIDENTIALITIES THAT THIS COURT IS BOUND TO
24 RESPECT WITH RESPECT TO GOING INTO THOSE
25 NEGOTIATIONS, CALLING THE MEDIATOR, HAVING THEM

1 CROSS-EXAMINED ABOUT WHO CAME UP WITH THESE TERMS,
2 AND WHETHER OR NOT ONE PARTY IS BEING, IS BEING
3 SOMEHOW TAKEN ADVANTAGE OF AND IN THE COURSE OF
4 THIS, I HAVEN'T CROSSED THAT BRIDGE. I DON'T THINK
5 THAT I ACTUALLY NEED TO UNLESS SOMEONE CONVINCED ME
6 THAT THERE'S A BASIS FOR DOING THAT.

7 SO I GUESS WHAT I HAVE ARE TWO MOTIONS.
8 ONE IS A MOTION FOR AN EVIDENTIARY HEARING OF SOME
9 SORT AND THE OTHER IS TO ENFORCE THE AGREEMENT AS
10 IT IS WRITTEN AND ATTACH IT TO A JUDGMENT AND, AND
11 THE REASON I'M, I'M SORT OF GIVING YOU THIS STREAM
12 OF CONSCIOUSNESS IS TO SORT OF TELL YOU WHAT I'M
13 THINKING AT THIS POINT AND SEE IF YOU WANT TO ADD
14 ANYTHING TO WHAT YOU HAVE SAID UP TO NOW TO
15 INFLUENCE WHAT I DO WITH THIS.

16 YOU'RE THE MOVING PARTY. YOU GO FIRST.

17 MR. CHATTERJEE: YOUR HONOR, IT SEEMS
18 LIKE YOU UNDERSTAND THAT THIS IS A BINDING
19 SETTLEMENT AGREEMENT AND TERM SHEET. I UNDERSTAND
20 YOUR QUESTIONS.

21 I DON'T THINK WE REALLY HAVE ANYTHING
22 ELSE TO ADD. WE DON'T THINK AN EVIDENTIARY HEARING
23 IS NECESSARY. THERE ARE MOTIONS TO COMPEL AGAINST
24 A THIRD PARTY CURRENTLY PENDING BEFORE JUDGE LLOYD
25 ASSOCIATED WITH THE DEPOSITIONS OF GREG ROUSSEL ON

1 THE FOLLOW-ON DISCUSSIONS WHERE THEY TRIED TO AGREE
2 UPON FORMAL DOCUMENTS. WE DON'T THINK THAT ANY OF
3 THAT IS NECESSARY. WE THINK YOUR HONOR CAN ENTER
4 JUDGMENT IN THE WAY THAT WE REQUESTED.

5 THE COURT: THIS -- IF THIS IS PART OF A
6 JUDGMENT, THIS WOULD THEN BE PUT IN THE PUBLIC
7 DOMAIN?

8 MR. CHATTERJEE: YOUR HONOR, AS WE SAID I
9 THINK DURING OUR PHONE CALL THE OTHER DAY, IF IT
10 WERE ATTACHED AS A JUDGMENT, WE WOULD ASK THAT YOUR
11 HONOR SEAL AT LEAST PARAGRAPH 7 OF THE AGREEMENT.

12 I THINK EVERYTHING ELSE --

13 THE COURT: WHERE DOES IT SAY THAT THAT
14 IS NOT PART OF WHAT WOULD BE PUT IN THE PUBLIC?

15 MR. CHATTERJEE: I'M SORRY?

16 THE COURT: IT SAYS ALL TERMS ARE
17 CONFIDENTIAL.

18 MR. CHATTERJEE: WE WOULD ASK, IF YOUR
19 HONOR WANTS TO PUT ALL OF THIS IN, IT IS CERTAINLY
20 APPROPRIATE AND COVERED BY THE SETTLEMENT
21 AGREEMENT.

22 IT'S BASED UPON OUR PHONE CALL THE OTHER
23 DAY WHERE OUR FUNDAMENTAL CONCERN ON
24 CONFIDENTIALITY IS REALLY PARAGRAPH 7, BUT I DON'T
25 KNOW WHAT MR. BARRETT'S VIEWS ARE.

1 BUT IF WE PUT THE WHOLE THING UNDER SEAL,
2 WE CERTAINLY WOULDN'T HAVE ANY OBJECTION TO THAT.

3 THE COURT: ALL RIGHT. FINAL WORDS?

4 MR. BARRETT: YES, YOUR HONOR. I DO
5 THINK THAT, FIRST OF ALL, AS YOU SAY, THERE'S A
6 MOTION TO ENFORCE. I THINK THE FIRST THING IS THAT
7 THE COURT CAN DENY THAT MOTION ON THE BASIS OF
8 THESE PAPERS.

9 THE SECOND THING YOU, YOU ASKED WHAT ARE
10 THE MATERIAL TERMS THAT ARE MISSING?

11 I HAVE TO SAY THAT BASED ON WHAT -- THE
12 WAY THAT FACEBOOK HAS LITIGATED THIS MOTION, I AM
13 COMPLETELY AT A LOSS TO UNDERSTAND THEIR POSITION.

14 THEY CAME IN HERE. THEY FILED THIS
15 MOTION. THEY SAID THEY ASKED THIS COURT IN THE
16 FORM OF A PROPOSED ORDER AND IN A DECLARATION, A
17 SWORN STATEMENT FROM THEIR COUNSEL THAT NOT JUST
18 CONNECTU, BUT THE PRINCIPALS WHO ARE NOT EVEN
19 PROPERLY BEFORE THIS COURT, BE ORDERED TO SIGN,
20 EXECUTE CERTAIN DOCUMENTS TO SIGN THE DEED, IF YOU
21 WILL, IN EFFECT.

22 AND NOW THIS MORNING FOR THE FIRST TIME
23 MR. CHATTERJEE IS GETTING UP SAYING, NEVER MIND, WE
24 DON'T NEED ANY OF THAT. THAT'S NOT IMPORTANT. ALL
25 WE WANT YOU TO DO IS TO ATTACH THIS TO THE

1 JUDGMENT.

2 I DON'T EVEN KNOW, YOUR HONOR, WHERE WE
3 WOULD START, WHAT, WHAT THAT TRANSACTION WOULD BE.

4 AS I INDICATED EARLIER, YOUR HONOR, THE
5 NOTION OF THE ACQUISITION OF CONNECTU SHARES,
6 CONSISTENT WITH THE STOCK AND CASH FOR STOCK
7 ACQUISITION, IS IN THE EXPERT OPINION OF AT LEAST
8 ONE BUSINESS PROFESSOR WHO HAS DONE HUNDREDS OF
9 THESE TRANSACTIONS, LITERALLY INCOMPREHENSIBLE
10 LANGUAGE. YOU DON'T KNOW IF IT'S GOING TO BE A
11 MERGER OR ESSENTIALLY JUST A PURCHASE OF STOCK.

12 AND THAT LANGUAGE, AS A MATTER OF USAGE
13 IN THE BUSINESS, IS AMBIGUOUS AS TO THAT POINT.

14 WELL, THAT IS THE MOST FUNDAMENTAL
15 STRUCTURAL ASPECT OF THE TRANSACTION.

16 THE COURT: AND THERE'S NOTHING ABOUT A
17 MERGER ON HERE?

18 MR. BARRETT: THE WORD ISN'T USED, YOUR
19 HONOR. BUT AN ACQUISITION OF STOCK FOR CASH AND
20 STOCK IS A TERM OF ART THAT ENCOMPASSES A MERGER.

21 AND THE DISTINCTION, YOUR HONOR, IS THAT
22 THE WAY THAT THAT TRANSACTION IS SET UP, IF IT'S A
23 MERGER OR IF IT'S A STOCK PURCHASE.

24 AND WHAT THEY PUT BEFORE YOU, REMEMBER,
25 WASN'T DENOMINATED ACQUISITION. IT WAS DENOMINATED

1 BY THEM A STOCK PURCHASE, HAS HUGE TAX SEQUENCES,
2 [REDACTED]

3 TURN JUST ON THE FORM OF THAT TRANSACTION. SO IT
4 IS CLEARLY A MATERIAL TERM.

5 OUR EXPERT TESTIFIES THAT THAT ISSUE OF
6 THE TRANSACTION IN A PROPERLY DONE, EVEN TERM
7 SHEET, IS SOMETHING THAT WOULD BE ADDRESSED IN THE
8 DOCUMENT, THAT YOU WOULD EXPECT TO BE ADDRESSED IN
9 A DOCUMENT OF A DECLARATION OF THIS TYPE. THEY
10 DIDN'T DO THAT.

11 YOUR HONOR, IF YOU ENTER THE JUDGMENT
12 THAT MR. CHATTERJEE IS SUGGESTING, I SUBMIT WHAT IS
13 GOING TO HAPPEN IS NEXT WEEK OR NEXT MONTH WE'RE
14 GOING TO BE BACK IN FRONT OF YOU AND WE'RE GOING TO
15 BE SAYING, YOUR HONOR, WE DON'T KNOW WHAT WE'RE
16 SUPPOSED TO DO.

17 WE'RE HAVING A FIGHT NOW ABOUT, ABOUT
18 WHAT, WHAT YOU KNOW, YOU CAN'T, YOU CAN'T JUST DO
19 ONE OF THESE TRANSACTIONS. MAYBE THEY NOW WANT TO.
20 MAYBE THEY DON'T CARE ABOUT THE RIGHT OF FIRST
21 REFUSAL, ABOUT THE LOCK UP.

22 BECAUSE AS YOUR HONOR, BECAUSE -- ABOUT
23 THE INDEMNITIES AND WARRANTIES. MAYBE THEY'RE
24 SAYING THAT'S NOT IMPORTANT. IT SURE WAS IMPORTANT
25 TO THEM WHEN THE CORPORATE LAWYERS WERE NEGOTIATING

1 A MERGER; IT SURE WASN'T IMPORTANT TO THEM WHEN
2 MR. ROUSSEL PUT IN THE DECLARATION AND SWORE THAT
3 THESE DOCUMENTS WERE REQUIRED. THAT'S ALL OVER
4 THOSE DOCUMENTS.

5 IF THEY'RE SAYING THAT THEY DON'T CARE
6 ABOUT THOSE, THEY DON'T THINK THAT THEY'RE
7 MATERIAL, I HAD A STRANGE FEELING, YOUR HONOR,
8 THAT, THAT THAT ORDER, WHILE COUNSEL, WHILE COUNSEL
9 SAYS HE WANTS IT NOW, YOU KNOW, IS NOT GOING TO
10 WORK BECAUSE THE TRANSACTION THAT THE INFORMATION
11 THAT YOU HAVE HERE JUST, JUST ISN'T, ISN'T SPECIFIC
12 AND DETAILED ENOUGH TO DO THIS KIND OF A
13 TRANSACTION.

14 [REDACTED]

15
16
17 YOU CAN'T DO IT WITH THIS KIND OF A
18 TRANSACTION. THAT IS -- THERE IS DISPUTED FACTUAL
19 EVIDENCE IN FRONT OF YOUR HONOR ON THAT ISSUE AND I
20 SUBMIT THAT THAT -- THAT THE CASES, BOTH THE STATE
21 CASES AND THE NINTH CIRCUIT CASES, ARE QUITE CLEAR
22 THAT UNDER THOSE CIRCUMSTANCES YOU CANNOT, YOU
23 CANNOT SUMMARILY ENFORCE THE SETTLEMENT.

24 AND IN ADDITION, AS YOUR HONOR POINTED
25 OUT, THERE IS THE WHOLE QUESTION OF WHETHER THOSE,

1 THOSE NUMBERS THAT ARE IN THERE THE MOST
2 FUNDAMENTAL TERM, WHICH AS PLAINTIFF'S COUNSEL
3 INDICATES, THE NUMBER OF SHARES OF STOCK WAS
4 INDUCED BY FRAUD.

5 AND THAT IS CERTAINLY A QUESTION, A
6 QUESTION THAT AS YOUR HONOR POINTED OUT, WE WOULD,
7 WE WOULD NEED TO BE ABLE TO SUBMIT EVIDENCE AND I
8 WOULD THINK THAT YOU WOULD -- MIGHT WELL WANT TO,
9 TO HOLD A HEARING ON.

10 ALSO, YOUR HONOR, PERHAPS TO ANSWER YOUR
11 PROCEDURAL QUESTION, PERHAPS IT WOULD MAKE SENSE TO
12 ACTUALLY HAVE A COMPLAINT FILED SEEKING ENFORCEMENT
13 OF THIS AGREEMENT TO HAVE AN ANSWER THAT, THAT SETS
14 OUT DEFENSES IN THE MANNER THAT, THAT IS, PERHAPS,
15 ONE THAT IS MORE, MORE USUAL IN LITIGATION SO THAT
16 THE COURT HAS THE CLAIMS AND WE, AND WE KNOW WHAT
17 THE ACTUAL CLAIM IS BECAUSE, AS I SAY, THEY KEEP
18 CHANGING THEIR POSITION ON WHAT IT IS THAT THEY'RE
19 REALLY ASKING FOR.

20 IF WE HAVE A COMPLAINT, IT WILL SET FORTH
21 THE CLAIM, AND WE CAN ANSWER IT AND PUT IN OUR
22 DEFENSES TO THE CLAIM THAT THEY'RE ACTUALLY MAKING
23 AND THEN, AND THEN WE CAN FIGURE OUT, YOU KNOW, IF
24 THEY WANT TO SEEK SUMMARY JUDGMENT, WE CAN FIGURE
25 OUT IF WE NEED DISCOVERY, WHAT DISCOVERY IT IS WE

1 NEED, AND, AND ESSENTIALLY HAVE IT IN THE FORM OF
2 AN INDEPENDENT PROCEEDING TO ENFORCE THE SETTLEMENT
3 AGREEMENT.

4 AND PERHAPS THAT WOULD CLARIFY SOME OF
5 THE PROCEDURAL UNCERTAINTY THAT I UNDERSTAND IS
6 CONCERNING YOUR HONOR.

7 THE COURT: WELL, LET ME ASK ONE
8 HOPEFULLY FINAL AREA BECAUSE I DO NEED TO BRING
9 THIS TO A CLOSE.

10 SEVERAL TIMES YOU HAVE MENTIONED THE
11 PARTIES. MY UNDERSTANDING OF THIS AGREEMENT IS
12 THAT IT SETTLES ALL DISPUTES BETWEEN CONNECTU AND
13 ITS RELATED PARTIES.

14 MR. BARRETT: UH-HUH.

15 THE COURT: AND FACEBOOK AND IT'S RELATED
16 PARTIES.

17 AND THEN THE STATEMENT IS THAT, "THE
18 PARTIES STIPULATE THAT THE COURT SHALL HAVE
19 JURISDICTION TO ENFORCE THIS."

20 AND THE SIGNATURES ARE BY VARIOUS PEOPLE.

21 MR. BARRETT: UH-HUH.

22 THE COURT: INCLUDING THE COMPANIES AS
23 WELL AS INDIVIDUALS.

24 IS YOUR POSITION THAT ONLY THE COMPANIES
25 ARE PARTIES TO THIS SETTLEMENT AGREEMENT AND NOT

1 THE INDIVIDUALS?

2 MR. BARRETT: THERE ARE TWO POINTS, YOUR
3 HONOR. FIRST OF ALL, THERE IS ONE SHAREHOLDER,
4 HOWARD WINKLEVOSS.

5 THE COURT: I UNDERSTAND.

6 MR. BARRETT: WHO IS NOT A PARTY TO THE
7 DOCUMENT.

8 THE COURT: RIGHT.

9 MR. BARRETT: SO HE'S NOT A PARTY TO THE
10 DOCUMENT, PERIOD.

11 THE COURT: IS HE REPRESENTED HERE TODAY?

12 MR. BARRETT: HE IS NOT AS SUCH, YOUR
13 HONOR, BECAUSE HE'S NOT BEEN SERVED AND NO RELIEF
14 IS BEING SOUGHT IN OUR VIEW AGAINST HIM.

15 MR. CHATTERJEE: ALTHOUGH HE DID APPEAR
16 IN THE BOSTON HEARING WHERE THIS VERY MOTION WAS
17 DISCUSSED IN DETAIL.

18 MR. BARRETT: I'M NOT SURE WHAT YOU MEAN
19 BY "APPEAR."

20 THE COURT: YOU DON'T REPRESENT HIM?

21 MR. BARRETT: NOT FOR THIS PURPOSE.

22 THE COURT: NO ONE ELSE HERE REPRESENTS
23 THAT PERSON?

24 MR. BARRETT: THAT IS CORRECT, YOUR
25 HONOR.

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.

1 IS THERE ANYTHING?

2 MR. CHATTERJEE: YOUR HONOR, I'M NOT
3 GOING TO BELABOR WHAT HAPPENED IN THE OTHER CASE.

4 THE ONLY THING I WANT TO SAY ABOUT THEIR
5 CHARACTERIZATION OF THERE NOT BEING A MEETING OF
6 THE MINDS ON THE STOCK IN CASH FOR STOCK
7 ACQUISITION, WHAT MR. HITSCHERICH SAID, WHICH WAS
8 THEIR EXPERT, WAS THAT THAT COULD BE A BROAD SET OF
9 DIFFERENT TYPES OF TRANSACTIONS, NOT THAT IT ISN'T
10 ANY OF THEM. IT COULD BE ALL OF THEM.

11 AND THE FOLLOWING SENTENCE SAYS THAT "WE
12 WILL DETERMINE THE FORM AND DOCUMENTATION OF THE
13 ACQUISITION OF CONNECTU'S SHARES."

14 IT SPECIFICALLY CONTEMPLATED THERE MAY BE
15 MULTIPLE DIFFERENT FORMS THAT ARE CONSISTENT WITH
16 IT AND FACEBOOK CAN DETERMINE IT.

17 THAT WAS THE ONLY POINT I WANTED TO MAKE
18 TO RESPOND TO HIS POINT.

19 THANK YOU, YOUR HONOR. I APPRECIATE YOUR
20 TIME.

21 MR. BARRETT: BUT THEY CAN'T CHANGE THE
22 SUBSTANCE, THE MATERIAL SUBSTANCE OF THE
23 TRANSACTION AND THAT'S --

24 THE COURT: PRECISELY. THANK YOU. THANK
25 YOU BOTH.

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MR. BARRETT: THANK YOU, YOUR HONOR.
SHOULD WE AWAIT THE COURT OR --
THE COURT: I DON'T KNOW THE -- IF I KNEW
THE TIMING OF WHAT I DO IN THIS JOB.
SOMEONE ONCE REMINDED ME, AS I BECAME A
JUDGE, THAT JUDGING IS A CONTEMPLATED ART.
I HAVE NEVER TAKEN FULL ADVANTAGE OF THAT
BECAUSE I RARELY FEEL I HAVE TIME TO CONTEMPLATE.
BUT I HAVE BENEFITED FROM YOUR ARGUMENT
TODAY, AND I'LL HAVE THE MATTER UNDER SUBMISSION.
I WILL GIVE YOU A DECISION AS QUICKLY AS
I CAN.
I UNDERSTAND HOW IMPORTANT THIS IS THAT
YOU HAVE A QUICK DECISION. IF I CAN DO IT IN 24
HOURS, I'LL DO MY BEST TO DO THAT.
MR. CHATTERJEE: THANK YOU, YOUR HONOR.
MR. BARRETT: THANK YOU, YOUR HONOR.
(WHEREUPON, THE EVENING RECESS WAS
TAKEN.)