

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Richard Seeborg, Judge

The Facebook, Inc., et al.,)	
)	
Plaintiffs,)	
)	
VS.)	NO. C 07-1389 RS
)	
ConnectU, Inc., et al.,)	
)	
Defendants.)	
_____)	

San Jose, California
Wednesday, January 16, 2008

**TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND
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1 Wednesday - January 16, 2008

2:40 p.m.

2
3 **THE CLERK:** Calling Case Number C 07-01389 RS,
4 Facebook versus ConnectU.

5 **MR. LINCOLN:** Good afternoon, Your Honor. Sean
6 Lincoln on behalf of Facebook.

7 **THE COURT:** Good afternoon.

8 **MR. LINCOLN:** Along with me is Monte Cooper and
9 Theresa Sutton.

10 **THE COURT:** Good afternoon.

11 **MR. LINCOLN:** I apologize on behalf of
12 Mr. Chatterjee who is unavoidably out of town.

13 **THE COURT:** That's all right.

14 **MS. WAGNER:** Valerie Wagner for defendant, David
15 Gucwa.

16 **THE COURT:** Good afternoon.

17 **MR. MOSKO:** And good afternoon, Your Honor. Scott
18 Mosko for the remaining defendants.

19 **THE COURT:** Good afternoon.

20 Let me give you a couple of comments. I did spend
21 some time reading the Case Management Conference Statement, and
22 I know also that we have some motion issues as well and I read
23 through those papers.

24 So why don't you just go ahead and sit down. Let me
25 just run through a few general comments and then we can take

1 this up. Probably the order that I would suggest is we'll take
2 up the questions regarding the motion that's outstanding and
3 then we can talk about some case management issues. They tend
4 to, as you will see, at least in my mind, they merge to some
5 extent. So we'll see as I go through this.

6 Let me first give you some guidance with respect to
7 setting of the trial date. There's a lot of discussion back
8 and forth in the papers about Facebook asking for the summer
9 and ConnectU talking to me about the Olympics and other things.
10 We don't need to get there because I can't try this case in the
11 summer. The summer is full.

12 So what we're going to be looking at is some date
13 later this year at the earliest. I know ConnectU wants it to
14 go into '09. I'm inclined to shoot for some time toward the
15 end of this year, and I think what I'm going to do is throw it
16 back to you to come up with a schedule, propose at least some,
17 my hope is, stipulated schedule with the guidance from me that
18 I want it to be in the late fall of this year.

19 Let me touch on a couple of other issues, general
20 issues. There is some suggestion in the joint statement by the
21 Facebook side that they've got some discovery disputes and do I
22 want to just deal with those. And the answer is, no. I
23 want -- I don't want to deal with discovery issues on the fly
24 in a case management context. I may or may not have a hearing
25 on motions when they get filed, but I want to see something in

1 writing so I know what the issue is rather than just have you
2 start doing it on an informal discussion basis.

3 I have used that mechanism from time to time and, at
4 least in my personal experience, it seems to create more
5 problems than it solves, sometimes because there's always some
6 uncertainty about sometimes what the specific dispute is and
7 then what the judge's -- the scope of the judge's read is on
8 it. And I want at least at the outset to know what the dispute
9 is about in some sort of written form. So I'm not proposing to
10 deal with those issues today.

11 With respect to a settlement conference, I am
12 inclined to want to send you forth to some ADR process. I know
13 we have the issue of related litigation, this litigation. What
14 the ADR process will entail, I'm not sure I -- I'll want to
15 talk to you about that, but I think it is a circumstance in
16 which sooner rather than later I want some ADR to be
17 undertaken; and, as I say, we can discuss what form that will
18 take and to whom that will be directed.

19 With respect to discovery limits and the like, when
20 the parties start to have disagreements, just forwarning, I
21 tend to fall back on the Federal default limits; and, so, that
22 usually is going to win out. So when there's a proposal to
23 let's do this by hours instead of, you know, total hours versus
24 particular limits on particular depositions, and the like, I
25 tend to go back to the basic, I think, workable Federal limits

1 and, perhaps, tweak them a bit but not do some other approach.

2 Okay. Let me bring up an issue that's not in your
3 papers but it's -- and I know it's always frustrating for the
4 parties and I've been there when I was in practice, sealing of
5 documents. I am very concerned that I am getting, on virtually
6 every submission in this very papered case, I'm getting
7 requests to seal everything. And thus far, I have been, I
8 think, fairly -- I've been willing to approve the parties'
9 requests generally.

10 Henceforth, you're forewarned they need to be much
11 more specific and much more limited. I can tell you there's an
12 active discussion amongst the judges in the Northern District,
13 some of whom -- I spoke recently with Judge Hamilton and she
14 said, "I'm denying all of them. I think it's outrageously
15 overbroad what people are asking to seal and I'm denying them
16 all."

17 And I am not proposing I'm going to do that, but I
18 share her sentiment that it's out of control. And, so, I know
19 everybody thinks it's the keys to the kingdoms that they have,
20 but documents that are five years old or that sort of thing,
21 you're going to have to really jump through hoops to show me
22 they ought to be sealed. So you are forewarned. I'm not
23 proposing that people are going to need to resubmit anything
24 that's already been submitted, and it's more of a going forward
25 piece of advice to all of you.

1 Okay. With respect to the motion issue, the summary
2 judgment motion that Facebook has filed and then the request by
3 ConnectU for sort of an interim ruling on their 56(f) argument,
4 my sense of that -- and I'll certainly let you address it,
5 Mr. Mosko -- but I don't want to do this on a piecemeal basis.

6 The standard which I think works just fine is, if
7 there's a 56(f) argument, it's ordinarily made in the
8 alternative: We oppose summary judgment for these reasons; but
9 in the event we don't prevail on that, we think under 56(f),
10 that we need to do these specific pieces of discovery in order
11 to get the case in a posture that it can be ruled on. And,
12 so -- but I am disinclined to take up the 56(f) part of the
13 opposition first, give you a read on that, and then have you go
14 into any kind of other more substantive objection you have.

15 With respect to the schedule, however, of the
16 pending summary judgment motion, that's going to be kicked
17 back. What I'm proposing to do is to kick it about two weeks
18 back to February 27th. So that would probably result in moving
19 all the dates -- the opposition dates and the reply dates --
20 back a commensurate period of two weeks, which in some sense
21 addresses, perhaps, one issue that I suspect ConnectU has,
22 which is, if they're put to filing a full opposition, they need
23 a little more time, and that would accommodate that. I need to
24 move it in any event, so it's not being moved to adjust for
25 that particular issue.

1 Okay. Those are a bunch of general comments. So
2 I'm going to turn it over to the parties. So why don't you
3 come on up whoever wants to address these issues.

4 **MR. LINCOLN:** Thank you, Your Honor.

5 I would like to add to our agenda of discovery
6 disputes, not in order of importance but to make sure that we
7 have on our agenda, a couple of other items. One is the
8 protective order.

9 **THE COURT:** The protective order, yes.

10 **MR. LINCOLN:** Again, it's not an issue of
11 contention, I believe, so I bring that up first.

12 **THE COURT:** Yes. Thank you. I did see that. You
13 say there's been a protective order in State Court; and if you
14 agree to it, I suspect I will have no problems with it. You
15 probably submitted it to me in the past. If you would resubmit
16 it, I would appreciate it.

17 Remember though, and it goes, again, to the sealing
18 question, you have been addressing 79-5, our Local Rule, and
19 you've been dealing with that appropriately. That I would want
20 to have in the protective order, that 79-5 is the governing
21 procedure for requesting the documents in the court file be
22 sealed.

23 And, again, I don't have a recollection, I may have
24 seen your particular protective order before; but keep in mind
25 that if there's anything in there that essentially says --

1 that's contrary to this notion of 79-5, that we can keep
2 everything under seal in the courthouse, that's not going to
3 fly. So I haven't seen it. With that exception, I'm sure I
4 won't have a problem with it. So if you want to resubmit it,
5 that's fine.

6 **MR. LINCOLN:** If I can explain what occurred. When
7 the defendants removed the case, of course, the process of
8 removal required us to submit all the previous documents that
9 existed in the Superior Court here to the Federal Court. And,
10 so, in terms of submitting it, that's how it got submitted. I
11 would be surprised if that's something that the Court
12 specifically looked at.

13 **THE COURT:** Okay.

14 **MR. LINCOLN:** That's why I think we raised it in the
15 joint Case Management Conference Statement, that we've been
16 operating under as though it were a Federal submitted
17 protective order; but what I propose, as we've done it before,
18 is that plaintiffs prepare a draft protective order, we'll make
19 whatever comments, and I suspect we'll reach an agreement, and
20 then submit it to you for -- as a proposed order.

21 **THE COURT:** That's fine.

22 **MR. MOSKO:** That sounds reasonable.

23 **THE COURT:** I assume there's a protective order in
24 the Massachusetts action; right?

25 **MR. LINCOLN:** Yes, certainly.

1 **THE COURT:** Is that going to be -- I mean, we have
2 materials that are from that litigation this litigation. Are
3 they going to be consistent? I wouldn't want to -- yeah.

4 **MR. LINCOLN:** So the parties have agreed that the
5 discovery that has occurred in Massachusetts can apply in
6 California and vice versa.

7 **THE COURT:** Okay.

8 **MR. LINCOLN:** Certainly there is a protective order
9 in Massachusetts. It is a bit different than the one, I
10 believe, Judge Trumbull has submitted, and I think that's the
11 one that's currently on the Web site, the court's Web site, as
12 a proposed order.

13 **THE COURT:** Yeah. That's just by way of an example.
14 That's not in any way a mandated form that we expect, so...

15 **MR. LINCOLN:** We'll take a look at it. I think the
16 simplest thing is --

17 **THE COURT:** Okay. That's fine.

18 **MR. LINCOLN:** -- to take what we've already been
19 using and living by in State Court --

20 **THE COURT:** I think that's fine.

21 **MR. LINCOLN:** -- and make sure that it doesn't
22 violate Rule 75(f) and make sure that that's expressly called
23 out --

24 **THE COURT:** Okay.

25 **MR. LINCOLN:** -- and submit the rule. If there's

1 something else we need to talk about, we can resolve that.

2 **MR. MOSKO:** That works.

3 **MR. LINCOLN:** Another item for -- and we seek the
4 Court's guidance, and that is two clerical errors in our prayer
5 and we would like to -- we could submit a request to amend but
6 that seems burdensome.

7 **THE COURT:** My suggestion on this, so we don't have
8 amended, second amended, or third amended, but I would
9 suggest -- and you can do it any way you want -- is to say:
10 "Corrected Second-Amended Complaint." I mean, all you're doing
11 is correcting what, as it's been characterized to me, unless
12 you have some problem with it, Mr. Mosko, it sounds like these
13 are just typos effectively.

14 **MR. MOSKO:** In general I don't have any problem.
15 I'd like to take a look at it --

16 **THE COURT:** Okay.

17 **MR. MOSKO:** -- a little bit more specifically, but I
18 don't anticipate that.

19 **THE COURT:** Okay. Well, assuming that that is what
20 they are, then I would suggest you just file a corrected
21 Second-Amended Complaint.

22 **MR. LINCOLN:** And as long as that's acceptable to
23 Your Honor without making a motion for leave to do so --

24 **THE COURT:** That's fine with me.

25 **MR. LINCOLN:** -- we'll run a draft by them and

1 submit it to you as soon as we can.

2 **MS. WAGNER:** Would the defendants need to answer
3 that again or just --

4 **THE COURT:** No. That's why I wanted to use the term
5 "corrected" as opposed to "amended."

6 **MS. WAGNER:** Right.

7 **THE COURT:** If it's a new amendment, then I think
8 the argument is we've got to start over the whole process
9 again, at least technically, and you're just making -- assuming
10 that when you see it, you agree with that characterization,
11 that it's just -- if it says "Corrected Second-Amended
12 Complaint," it won't trigger any new responsive pleadings.

13 **MR. LINCOLN:** It is not our intention to trigger any
14 need for further responsive pleadings.

15 **THE COURT:** Right.

16 **MR. LINCOLN:** For trial dates, Your Honor, coming to
17 the points that you have raised first.

18 **THE COURT:** Yes.

19 **MR. LINCOLN:** I understand Your Honor having the
20 limitation of not being able to try something in the summer
21 certainly is what it is.

22 If, however, we are going to be moved past, because
23 of at least in part of the defendants' request -- now I've got
24 to be more specific -- the Winklevoss' requests. They are not
25 defendants here. They worked hard to not be defendants here.

1 **THE COURT:** That's true.

2 **MR. LINCOLN:** In all fairness, I think it is
3 reasonable that those parties in the other action not then be
4 seeking a trial date before this one in Massachusetts.
5 Otherwise, we're going to end up with another set of claims,
6 and we're not even at issue in that case; but I'm concerned
7 about how we're going to then turn around and have a problem in
8 Massachusetts.

9 **THE COURT:** Well, I'm not going to weigh into any
10 strategy issues in terms of what other parties are positioning
11 themselves for trial date purposes. I mean, the reason that
12 it's not going to be tried in, you know, July and August is --
13 I mean, I'm not reaching the question of whether or not these
14 particular witnesses' Olympic hopes are the reason -- that's
15 not why it's being moved.

16 I don't know whether or not -- I'm not saying that
17 that isn't, you know, a significant event that I wouldn't take
18 into account, but it's somewhat academic because I can't try
19 the case in July and August, so the Olympics will have come and
20 gone.

21 Now, whether or not the, you know, trial date here
22 is before or after Massachusetts, I mean, all I can tell you is
23 that I'm inclined to think, you know, the case can be tried in
24 '08; but beyond that, I mean, I'm not going to get involved in
25 which one goes first. I'll give you a trial date and you can,

1 you know, do whatever you want to do in Massachusetts; but I
2 mean, I'm not going to position this case one way or the other
3 with respect to the date of a trial in Massachusetts. That's
4 for you guys to fight about.

5 **MR. LINCOLN:** Okay. Next issue was the --

6 **THE COURT:** By the way, though, so we don't -- you
7 know, there are many moving parts and I do want to address
8 this.

9 On this question of these particular witnesses, I do
10 think that, in terms of availability for discovery, that it is
11 not going to be an argument that we have to practice eight
12 hours a day until the Olympics, so there's no way -- I don't
13 know whether or not these depositions are a part of the package
14 in this case; but I don't want you to assume because I said it
15 might have an impact on the trial date, if my schedule was
16 otherwise available, I'm not saying I've determined whether or
17 not that's a basis on which they're precluded from any
18 involvement in the case. I mean, I assume they take a day off
19 here and there, so I don't know.

20 **MR. MOSKO:** May I address that?

21 **THE COURT:** You may.

22 **MR. MOSKO:** I anticipated you were going to ask that
23 question and I'm prepared to respond with respect to what their
24 schedule is so you understand.

25 They practice seven days a week. In most instances,

1 they practice -- they have two actual workouts a day; one in
2 the morning that starts at about 8:00 o'clock that goes for
3 somewhere in the nature of two to two and a half hours, then
4 they break, then they have an afternoon comparable workout.

5 They're single-man athletes; that is, this is the
6 boats where -- these are the boats where they only row one oar,
7 not that that makes too terribly much difference.

8 **THE COURT:** One person rowing two oars or --

9 **MR. MOSKO:** No. A person rowing one oar. So there
10 is three boats where they are competing. There's an
11 eight-person boat --

12 **THE COURT:** Yes.

13 **MR. MOSKO:** -- there's a four-person boat, and
14 there's a two-person boat. Each person is rowing one oar.

15 **THE COURT:** Okay. All right.

16 **MR. MOSKO:** Okay.

17 **THE COURT:** So their unavailability would disrupt
18 the general overall practice of the boat?

19 **MR. MOSKO:** So --

20 **THE COURT:** Okay.

21 **MR. MOSKO:** Yes. In terms of they practice seven
22 days a week, there are either one or two days, I believe, where
23 they have an afternoon off. So they'll have -- in those
24 instances they'll have a schedule where they workout in the
25 morning between 8:00 and 10:30, or whatever, and then they'll

1 have an afternoon off. So that's what's going on right now.

2 In, I believe, April there are trials that they call
3 them -- and I hesitate to use that word, but that's what they
4 call them -- where there is, in effect, a competition, which, I
5 understand, which will effectively determine who the two -- who
6 the members of the two-man boat will be; and then the current
7 coach will determine, perhaps based on the trials, perhaps
8 based on other things, will determine who will be rowing in the
9 four-person boat and who will be rowing in the eight-person
10 boat.

11 So that what I'm told is, is that their schedule
12 will only increase between now and those trials, and then will
13 continue on through the Olympics.

14 **THE COURT:** Well, let me -- maybe this is an
15 academic point. Mr. Cooper, is it your plan that you want
16 to -- of these two witnesses that you're going to -- again, I
17 don't particularly want to weigh into discovery disputes right
18 now, but are these people you want to take their deposition
19 between now and whenever this can be done?

20 **MR. LINCOLN:** Yes, Your Honor. And I'm Mr. Lincoln.
21 This is Mr. Cooper.

22 **THE COURT:** I'm sorry.

23 **MR. LINCOLN:** I have no problem with you addressing
24 questions to Mr. Cooper.

25 The answer is, yes, absolutely. We've noticed

1 depositions. And I don't want to respond here to a point which
2 that haven't had yet, which is we should be able to work out
3 some dates. It just can't be the case that we can't get a
4 deposition day in for each of the guys in the next four months
5 or the next two.

6 **THE COURT:** Well, okay. I'm very skeptical that
7 they're -- just what Mr. Lincoln has said, that that can't be
8 done.

9 Now, I understand that if it's more than a part of
10 the day or whatever, it becomes a bit more problematic; but I
11 just can't believe that there isn't a point in time where they
12 can't have -- they can't be deposed, but we'll -- is this --
13 are they for sure they're going to go all the way through? I
14 mean, is it like they're competing to get a slot to then
15 compete in Beijing or are they for sure doing this?

16 **MR. MOSKO:** There are 25 people in the Olympic -- on
17 the Olympic team, and they may not call it an Olympic team
18 yet --

19 **THE COURT:** Okay.

20 **MR. MOSKO:** -- and they are competing for those 12
21 positions.

22 **THE COURT:** Twelve slots, okay.

23 **MR. MOSKO:** Yeah.

24 **THE COURT:** Okay. Okay.

25 **MR. MOSKO:** So that's what's going on. They were

1 selected to be in this group who will then compete.

2 **THE COURT:** And you told me, I think. What's the
3 date that they find out if they're in the 12?

4 **MR. MOSKO:** Well, as I said, I believe it's either
5 late March or April where they have these trials, but I don't
6 want to give the Court the impression that the trials will
7 determine -- shortly thereafter, that will determine who will
8 be in the eight- or the four-person boat. I think that
9 determines who is in the two-person boat.

10 **THE COURT:** Well, does it determine who's not going
11 to be going to the Olympics?

12 **MR. MOSKO:** No. That is whatever happens in these
13 trials, then the coach, I believe his name is Coach Teti, then
14 he will make the decision. It's not clear when that decision
15 is.

16 What they do in these trials, this late March or
17 April trial, is they row two-person boats; and, so, as I
18 understand the process, the coach could pick one from one boat
19 and one from another boat depending on the circumstances. It's
20 a complicated --

21 **THE COURT:** And after I said that the Massachusetts
22 case sort of does its own thing, which is my general view, are
23 they -- I mean, they can't have the position that they're
24 available to do activities related to the Massachusetts action
25 but somehow their training schedule is such that it precludes

1 them from involvement in this action.

2 And I recognize that they are not parties in this
3 case because we went through that issue at some length but they
4 are, certainly from what I know of the case, witnesses of some
5 consequence in this case. So they can't have it both ways.

6 **MR. MOSKO:** And I don't believe -- you asked me what
7 the schedule was --

8 **THE COURT:** Yeah.

9 **MR. MOSKO:** -- and I was explaining what the
10 schedule was.

11 If the demand in terms of discovery, for example,
12 is, "No, we want them for eight hours on Tuesday," then I think
13 we have a problem with that. If, as I said, they're willing to
14 work with us and, you know, we say, "We can give you two hours
15 on Thursday because that's the day of their -- that's the day
16 of the afternoon they have off," then I'm confident that we can
17 work with that.

18 **THE COURT:** Okay.

19 **MR. MOSKO:** I am not of the belief or the
20 understanding, although I am not involved in the Massachusetts
21 case, I'm not of the understanding that there's a position, a
22 contention, that they can't do things in either case.

23 **THE COURT:** All right. Okay. Well, then --

24 **MR. MOSKO:** You asked me the schedule. I wanted to
25 give it to you.

1 **THE COURT:** Well, the first point of involvement
2 here is to see if you can work something out. I mean, I won't
3 weigh further into this particular issue until I see whether or
4 not there's a dispute.

5 **MR. LINCOLN:** We've noticed depositions.

6 **THE COURT:** Okay.

7 **MR. LINCOLN:** We've been told, as I understand it,
8 that those dates won't work. We've got nothing else, unless
9 what this was was an oral motion for protective order until
10 September, which I don't think it was.

11 **THE COURT:** I didn't interpret it that way.

12 **MR. LINCOLN:** Then we would hope that they can work
13 it out, find us some time, and we'll proceed.

14 **THE COURT:** Okay. Just as some guidance, I mean, I
15 would want to have the parties work it out. I would be
16 inclined to think that it's workoutable, meaning that there's
17 got to be some point in time where they're available, but I
18 would also expect some, you know, some understanding on those
19 who want to take the deposition that there is a somewhat
20 unusual situation. Okay.

21 **MR. MOSKO:** Thank you.

22 **THE COURT:** Let's move on to other issues.

23 **MR. LINCOLN:** Discovery issues, you stated very
24 clearly that you're not inclined to just wing it here today, if
25 I may characterize what you said.

1 **THE COURT:** That's a fair characterization.

2 **MR. LINCOLN:** But I would still propose that it
3 would have great value to the parties indeed and accordingly
4 would be very efficient if there could be a date some time in
5 the near time future where we could get Your Honor something in
6 advance of such a meeting and have a discovery conference to
7 work it out, otherwise we're going to have literally dozens of
8 serial motions that are going to come before the Court.

9 **THE COURT:** Well, I'll tell you, I am averse to
10 discovery conferences I have to tell you, and it's partly what
11 I said before. I don't find them resolving anything. I find
12 that the parties, I think, instead of working through issues
13 decide, "Well, we're going to have this nice little discussion,
14 so we'll just go and we'll just put everything on the table and
15 we'll chat." And then when the conference ends and people seem
16 to then seek clarification on virtually everything that was
17 discussed the day of the conference. So I have real problems
18 with that.

19 I don't mind at all using different mechanisms to
20 make the lawyers' lives a little easier, that -- you know, if
21 it doesn't warrant a full-blown filing process consistent with
22 the rules, I am amenable to doing things by letter brief and
23 the like.

24 But I want to make sure that the parties know where
25 the battle is; and I don't like the, "Well, let's chat about

1 depositions; and, you know, kind of what issues do you think
2 might come up at these depositions and I'll give you the
3 benefit of my thoughts on that." That doesn't work in my
4 experience. I don't like it. So that's why I'm disinclined to
5 just set a general discussion date about discovery.

6 Then, again, if you want to tee up the disputes for
7 me in a way others -- as I say, in a formal motion process, if
8 you think there are such discrete issues or such easily managed
9 issues that it can be done in the form of a letter brief
10 saying, "These are our five issues. Can we either have you
11 resolve it on the papers or can we do this in the way other
12 than the full 35 day process," I'm not averse to that, but I
13 don't want a roundtable discussion.

14 **MR. LINCOLN:** Understood, Your Honor. I think one
15 of the sources of that request and one of the sources of
16 frustration on our side is the difficulty of even getting
17 through -- I mean, counsel indicates repeatedly he's the only
18 counsel on his side working for these defendants; and, thus,
19 finding a meet-and-confer time has been virtually impossible.
20 Christmas Eve was the only time available for one of the meet
21 and confers and we're still waiting for the response on it.

22 So, from our side, what you're hearing is a request
23 to try to find a concerted way of moving a lot of these
24 discovery disputes along more quickly. And I'm sensitive to
25 not wanting to sit around a table and generally just get

1 thoughts on something and invite further motion practice; but
2 if there was a way to expedite some of these without full
3 serial motion practice, I think it would benefit everyone.

4 **THE COURT:** Well, let's talk about that for a
5 second. You know, I don't want to do the -- because there are
6 obviously very good counsel on both sides, I'm not going to say
7 when a request for meet and confer comes in, it must be
8 responded to in "X" number of days or "X" number of hours. I
9 mean, you're professionals and I defer and respect your ability
10 to defer to you on this question, respect your ability to get
11 things organized.

12 That said, Mr. Mosko, I mean, they do need -- I
13 understand you're staffing the case in a different way than the
14 Facebook side is staffing it, but I'm not going to make any
15 requirements that is, you know, as I say, within certain time
16 parameters you must respond, but it does look there is some
17 need for more interaction and I hope you can facilitate that.
18 Because if there's a pattern that develops beyond what I've
19 seen thus far, then I suppose I have to weigh into it and I
20 don't want to do that.

21 **MR. MOSKO:** Fair enough.

22 And just with respect to Mr. Lincoln's
23 characterizations, when a request for a meet and confer comes
24 in and it's provided, "Get back to us in two or three days,"
25 and I happen to be in deposition in another city, I think it's

1 reasonable to say, "I'm busy. I'm not able to do that."

2 And you have it right about the way in which the
3 various parties have chosen to staff the case. Mr. Lincoln, I
4 think, is the eighth lawyer that we've seen with respect to
5 Facebook. I will get back -- I generally respond to somebody
6 within 48 hours when they make the request, and I say -- I will
7 either say, "I'm available these times, and this is the
8 timeframe that I have to respond," and that's the way it's
9 gone.

10 Unfortunately, because of the staffing decisions,
11 we've gotten the issues of, "Well, we don't accept that." And,
12 so, you can see the push and pull that's gone on.

13 I will do my best to make myself available
14 consistent with my calendar, but Facebook has to understand
15 that just because they set a 48-hour window to respond to a
16 request and then write countless e-mails to me saying, "You're
17 refusing to meet and confer," I think that's unreasonable.

18 I'll do my best to meet their request and to provide
19 a reasonable timeframe in which to respond as long as they are
20 under the -- have the understanding that they don't
21 automatically get their 48-hour window that they usually
22 request for meet and confers.

23 **MR. LINCOLN:** The problem, Your Honor, is the choice
24 that he indicates is made about staffing the case and making
25 himself the only person who can do it all is that they

1 essentially give themselves -- attempts to give himself an
2 unbounded continuance of all of the meet and confers.

3 The last thing we want to do is litigate after we
4 haven't properly met and conferred. That doesn't do anybody
5 any good.

6 But we're now in the position in a couple of
7 instances of having to file a motion because we can't get a
8 response, and we're engaging in e-mail practice over whether
9 they've given us enough time. And what you're seeing is that
10 frustration of having us trying to move it forward.

11 And I'm not in the position to tell counsel that he
12 should be bringing somebody else into the case. That's not
13 what I'm suggesting; but it's not fair to us, after two years
14 of being in this case, to still have to wait a month to find
15 out whether they're going to respond to discovery that was due
16 over a month ago. That's where we are.

17 **THE COURT:** Well, the standard in this, as in many
18 things, is reasonableness; and if, you know, I see that as a --
19 I get the flavor that there's some, you know, strategic delay,
20 or what have you, that's not going to be met with a lot of
21 enthusiasm on my part.

22 But if it's -- but at the same time I don't think
23 I -- this case is certainly not, at this point, one that I
24 think I should do something, which to me would be
25 extraordinary, by saying, "Counsel have to respond to each

1 other within a set period of hours."

2 I'm going to assume that as a result of this
3 discussion, the parties are going to do their utmost to be
4 reasonable in response, with the understanding that all of you
5 are busy lawyers with other matters that you're litigating and
6 other demands upon your time.

7 So I will -- if it looks to me like there's dodging
8 going on, that's one thing. If it's the press of business is
9 such that it takes a couple of days to get back to you -- I
10 mean, the example you used, Mr. Lincoln, of, "Well, if it's a
11 month or two months," okay, that is a problem.

12 And if that -- you know, I'm not going to go back
13 now and study exactly how long it took each request to be
14 responded to, but I'm going to assume that people are going to
15 be in reasonable communication and that, you know, Mr. Mosko,
16 if you're going to be out of pocket, you'll delegate somebody
17 to handle issues in your absence. I assume you'll do that.

18 But I'm not going to put some special
19 meet-and-confer response requirement at this juncture, but I
20 don't -- you know, I understand the frustration.

21 Yeah?

22 **MR. MOSKO:** There's never been an instance in which
23 Mr. Lincoln has suggested whether it's been two months.

24 In any event, the interesting issue that's before us
25 literally right now is they insisted that we meet and confer on

1 Monday. I said, "Look, we're going to be together on
2 Wednesday. Let's get all those issues together and we can talk
3 about that after court." Now whether that's reasonable or not,
4 I don't know; but I'm prepared to deal with each one of the
5 issues that they've raised and I've raised with them this
6 afternoon after court --

7 **THE COURT:** Well, that's good. The courtroom is
8 available to you --

9 **MR. MOSKO:** -- and I'd like to go forward with that.

10 **THE COURT:** -- although I have another matter after
11 yours; but once I'm done with that, you can use the courtroom
12 or you can use -- we'll find you another room if you need one.

13 **MR. MOSKO:** Terrific. Thank you, Your Honor.

14 **THE COURT:** So... Okay.

15 **MR. LINCOLN:** The next issue, at least as you had
16 raised them, was settlement conference.

17 **THE COURT:** Was? Pardon me?

18 **MR. LINCOLN:** Settlement conference.

19 **THE COURT:** Settlement conference, yes.

20 **MR. LINCOLN:** ADR of sorts.

21 **THE COURT:** Yes.

22 **MR. LINCOLN:** As I think we included in our papers,
23 we would propose to have a world class mediator of some sort
24 who can come in, and I agree sooner rather than later, to try
25 to address that. We proposed Mr. Piazza or if he's not

1 available, Judge Infante.

2 **THE COURT:** Do you want to go to Maui?

3 **MR. LINCOLN:** I doubt that I'll get to be the one,
4 but somebody else of that skill level, if you will.

5 **THE COURT:** Sure.

6 **MR. LINCOLN:** And I propose that that be --

7 **THE COURT:** Well --

8 **MR. LINCOLN:** -- maybe have that done as soon as
9 possible.

10 **THE COURT:** Well, the issue is -- I mean, I'm
11 perfectly prepared to and will require that you explore some
12 ADR mechanism and you do it sooner rather than later. Where I
13 will need the parties to agree to it, if -- it takes two to
14 tango, if it's, as you suggest, there is going to be discussion
15 of a global resolution, which, frankly, I think makes sense,
16 but be that as it may, I can order you to go and will order you
17 to go and discuss the settlement of this case.

18 I don't think I'm in a position to order that you do
19 a global settlement discussion. I mean, I don't think that I
20 can require the settlement agenda to include the Massachusetts
21 action or any other disputes that you may have, although I
22 think it makes sense. Just, you know, it would be in
23 everybody's interest to do that.

24 So all I can do is require you to go to a settlement
25 conference or some other mediation process within a certain

1 amount of time on this case, and that I will do. It's then the
2 parties -- it's for the parties to determine how broad that
3 process is going to be; and, as I say, it makes sense, as you
4 suggested, that at the very least you should talk about some
5 global resolution but, you know, I can't require you to have on
6 the agenda the Massachusetts litigation because I don't think
7 that's within my purview at the moment.

8 So that's where I was headed when you said --
9 perhaps, your comments were more, "Doesn't it make sense for us
10 to have a global discussion," and I frankly agree with you.

11 **MR. LINCOLN:** That's true, but it also makes sense
12 to have the right people there; and I think if we're going to
13 hear, "Well, we can't meet in the next eight months," because
14 they need to have certain people there who are busy all day
15 long --

16 **THE COURT:** Does this go back to implicating the
17 Winklevoss brothers again? Is this that problem?

18 **MR. LINCOLN:** Exactly. They've indicated that they
19 have to be there at trial. If they're not going to show up for
20 a settlement communication -- settlement conference, it's going
21 to be difficult.

22 **THE COURT:** Well, I'm going to order that you go
23 off, and we'll talk about what the order is going to look like;
24 and I'm going to talk to the mediator, whoever that may be, to
25 determine who he or she thinks has to be there and how they

1 orchestrate all of that. I mean, that is for the settlement
2 conference judge or a mediator to decide, I think, who they
3 need to have and what their particular orders are.

4 I mean, I have -- Judge Spero, for example, has a
5 different order than I do about who has to be there when we're
6 conducting settlement conferences, so I wouldn't intrude on a
7 particular other mediator's process.

8 That said, I do want you to go and have a session,
9 an ADR session, at the very least involving this case and I
10 want it to happen in the next 60 days.

11 Now, it can either be a private mediator or I can
12 order you to either go to one of our panel mediators or I can
13 order you to go to one of my colleagues. So I want your input,
14 each of you -- all of you on that question.

15 Anyone want to speak up?

16 **MR. MOSKO:** I'll respond. If -- we're perfectly
17 happy subject to the scheduling and who needs to appear to do a
18 mediation in front of one of the magistrate judges or a
19 settlement conference, as it's referred to, and Mr. Lincoln
20 made reference to world class mediators. I think you've got
21 those right here, frankly.

22 For example, Judge Trumbull I have all the
23 confidence in the world in and would propose that the case go
24 to her initially; and if there is additional need or there's a
25 possibility where additional time is necessary, if she doesn't

1 have the time to spend on it, then I think we can -- we can
2 investigate other possibilities. But I would be more than
3 happy to have a settlement conference before Judge Trumbull.

4 As the Court knows, Judge Lloyd is not a possibility
5 with respect to my condition.

6 **THE COURT:** I know. Yeah.

7 **MR. LINCOLN:** Plaintiffs coming in from the side
8 bar, Your Honor. I understand that Judge Trumbull has
9 disqualified herself from this matter. It's (inaudible).

10 **THE COURT:** I didn't know that, but okay.

11 **MR. MOSKO:** Is that right, Monte?

12 **MR. COOPER:** Yeah. My understanding, Your Honor, is
13 that Magistrate Judge Trumbull was originally assigned. I can
14 reverify this, but upon removal my recollection is --

15 **MR. MOSKO:** I think it was always Judge Seeborg
16 but --

17 **MR. COOPER:** If I'm mistaken about that, but --

18 **THE COURT:** We don't have to -- this doesn't have to
19 be a whole mess.

20 **MR. LINCOLN:** I can qualify, Your Honor, and now I
21 understand. What happened was we had a motion to compel in the
22 Massachusetts case that was originally assigned to Whyte and to
23 Magistrate Judge Trumbull, several different subpoenas served
24 by plaintiffs' counsel.

25 The one that was assigned to Judge Trumbull,

1 Magistrate Judge Trumbull, she eventually actually withdrew
2 from consideration deciding an undisclosed conflict, and I
3 apologize. That's the conflict.

4 **MR. MOSKO:** Okay, well --

5 **THE COURT:** Well, you know, I can make it easy for
6 you because I was probably -- if we go the judicial mediator
7 angle, I was going to explore San Francisco colleagues of mine.

8 But the first issue is whether or not it ought to go
9 to, you had suggested, Mr. Lincoln, private mediation. Is
10 there any suggestion about that? I mean, to someone like
11 Mr. Piazza, obviously, requires the parties to agree because
12 it's not without cost. Has there been discussion about that?

13 **MR. MOSKO:** There has not.

14 **THE COURT:** All right. And I'm -- just in light of
15 the general sense I have about the likelihood of agreements on
16 things, I'm thinking that it's perhaps better for me to just
17 simply assign you to a wonderful free mediation service.

18 So the question is whether or not there is -- you
19 know, our panel mediators are, you know, some of the more
20 respected lawyers in the community; and, so, I'm somewhat
21 tempted by that.

22 But I think what I'm inclined to do is to have you
23 go and see, perhaps, either Judge -- well, unfortunately, Judge
24 Spero is already overburdened with some of my matters -- so,
25 perhaps, Judge Chen or -- probably send it up to Judge Chen

1 actually if he was available.

2 And, again, I'm not sure. You know, I say 60 days
3 to say I want to motivate the parties to do that. I don't know
4 what his schedule is like. He may not be free to do that.

5 But I'm also willing to here somebody if there are
6 other suggestions of people that you have in mind. Go ahead.
7 Tell me.

8 **MR. MOSKO:** If we're going to take advantage of your
9 courtroom this afternoon, I wonder if we can table that and
10 then come back to you as to see if we can't reach some kind of
11 an agreement.

12 **THE COURT:** All right. Just with the understanding
13 that it has to be some -- some ADR has to go on in the next,
14 say, 60 to 90 days, and I can be flexible about it. If the
15 parties agree, the more the better; but there will not be an
16 option to say, "We can't agree, so leave us alone."

17 **MR. MOSKO:** I understand.

18 **THE COURT:** There will be some ADR process within
19 the next 60 to 90 days of the case.

20 **MR. MOSKO:** I understand.

21 **THE COURT:** Okay. Anything else?

22 **MR. LINCOLN:** The next item that you had listed was
23 discovery limits, and I didn't understand you're ruling on any
24 of that.

25 **THE COURT:** I wasn't --

1 **THE COURT:** All right.

2 **MR. LINCOLN:** Five defendants. One of the
3 defendants happens to be a principal.

4 Ms. Sutton is the person who has been running point
5 on all the discovery.

6 **THE COURT:** Okay.

7 **MR. LINCOLN:** So I turn to look at her, not for any
8 other reason than she's going to be the one who has to then
9 explain to me why I got it wrong if I get it wrong.

10 **THE COURT:** No shame in consulting with one's
11 colleagues.

12 How many do you think you need, Mr. Mosko?

13 **MR. MOSKO:** Probably less than 15, Your Honor, so --

14 **THE COURT:** Well, it sounds like everyone at this
15 juncture can live with 15. So I'll use 15.

16 And then the other discovery limits, it would seem
17 to me, would be -- as I say, the jumping-off point is what the
18 fallback is, the 25 interrogatories per party, and the like.

19 Again, if there are particular reasons why you need
20 some different limits, I'm willing to consider it. I'd like to
21 know why, but --

22 **MR. LINCOLN:** The question there, Your Honor, is
23 whether the original set of interrogatories that was aimed at
24 the jurisdictional claims --

25 **THE COURT:** Yes.

1 **MR. LINCOLN:** -- in State Court, for example, and
2 otherwise, whether those going to count towards this or whether
3 we're going to get another set. I think that is the source of
4 some of the distinction that the parties are...

5 **MR. MOSKO:** And I'm happy to respond to that. As
6 the Court correctly, I think, observed in its recent order in
7 the motion to compel, the discovery that was done was not
8 simply related to jurisdiction; that is, it wasn't, "Tell me
9 all the contacts that you've had in a particular location."

10 Most of it, in fact, went to the heart of the
11 matter; and we're not, of course, taking the position that it's
12 only relevant to personal jurisdiction, and I think -- I think
13 literally all of that discovery that they propounded, and I
14 think there were hundreds of interrogatories and hundreds of
15 document requests, literally go towards the ultimate issues in
16 the case.

17 If the defendants are -- if the plaintiffs seek an
18 amendment to the 25 interrogatories, and I think they've
19 propounded substantially more than that, then I would propose
20 there would be some kind of a motion so the Court can look at
21 that issue similar to the other issues.

22 **THE COURT:** At this juncture are you saying that --
23 you're saying you want 25 more, you want more than 25 more? I
24 mean, what is your position on that? I have to go back and
25 look.

1 **MR. COOPER:** Your Honor, I was integrally involved
2 at the State level and to answer that, if you could let me just
3 preface the problem.

4 When we were in front of Judge Elfing in the State
5 level, Judge Elfing initially did grant that we could go
6 forward on jurisdictional discovery. We served both what you
7 may be familiar with are the form interrogatories that are
8 approved by the State Judicial Council. Those are some of the
9 interrogatories Mr. Mosko is referring to.

10 Most of those went -- the only ones that matter
11 relevant to this particular proceeding are those that were
12 served on ConnectU because both the form and special
13 interrogatories which were also served at that time went to the
14 three dismissed parties, as well as Howard Winklevoss and
15 ConnectU.

16 The problem that would be faced without just having
17 a clean slate of 25 interrogatories not directed to
18 jurisdiction is that they were written and they were served in
19 that period of time prior to the motion to quash with those
20 issues in mind, not with the substantive issues of the
21 litigation as it would go forward after discovery.

22 Having said that, the special interrogatories, I
23 believe we served 23 on ConnectU and they were served at the
24 time of the jurisdictional dispute, among the other problems we
25 would face is we got a motion to compel granting some further

1 answers of those; and I wouldn't even know how to have
2 forwarded compliance with those special rogs as they were
3 answered at that time. I see no viable way other than to clean
4 the slate and say that the parties start with 25.

5 **THE COURT:** Well, what I want you to do right now, I
6 have to deal with a pretrial conference that's got a bunch of
7 motions and then I have to go to a judges' meeting at
8 4:00 o'clock, so I want you to go and start your meeting and
9 conferring on some of these issues that we've talked about.

10 I'm going to deal with their case and then check in
11 with you right before I go to the judges' meeting, and we'll
12 kind of go from there and see if I can -- well, I can go do my
13 thing there and come back.

14 But I want you to start the process and you have
15 several things to work on at the moment, the trial date being
16 sort of -- the schedule being the first, and then also some of
17 these discovery limits, and the like; and go forth and do that.
18 And then I will deal with this other case and then come back to
19 you in a few minutes. We can get you a room down the hallway.

20 **MR. MOSKO:** That's great. Thank you, Your Honor.

21 **THE COURT:** So I will ask my law clerk, my judicial
22 assistant -- my law clerk. All right.

23 **MR. LINCOLN:** Your Honor, one last thing. I just
24 want to make sure that I understood what you were saying. You
25 said that you were inclined to move the summary judgment and

1 56(f) motions to the same date two weeks back. Is that a date
2 certain?

3 **THE COURT:** February 27th.

4 **MR. LINCOLN:** Thank you.

5 **MR. MOSKO:** I want to check with my calendar to see
6 if that date's good; and if it is, that's fine. And I think
7 what we'll do --

8 **THE COURT:** Okay.

9 **MR. MOSKO:** -- with Your Honor's guidance, is that
10 we will withdraw our current motion for Rule 56(f) and then
11 include it in one document --

12 **THE COURT:** Correct.

13 **MR. MOSKO:** -- so the Court can see what the issues
14 are.

15 **THE COURT:** Correct. And everyone you made your --
16 you filed your motion. Everything then will get moved back in
17 terms of the filing deadline consistent with the February 27th
18 date. So your reply date -- your reply brief moves, your
19 opposition moves.

20 **MR. MOSKO:** I understand.

21 **THE COURT:** Okay.

22 **MR. MOSKO:** Thank you, Your Honor.

23 (Proceedings adjourned at 3:29 p.m.)

24

25

