

EXHIBIT A

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

4 FACEBOOK, INC.,) CV-08-5780-JW
5))
6) PLAINTIFF,) SAN JOSE, CALIFORNIA
7))
8) VS.))
9) JUNE 7, 2010
10 POWER VENTURES, INC.,))
11))
12) DEFENDANT.) PAGES 1-52
13 _____))

14 TRANSCRIPT OF PROCEEDINGS
15 BEFORE THE HONORABLE JAMES WARE
16 UNITED STATES DISTRICT JUDGE

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

18 FOR THE PLAINTIFF: ORRICK HERRINGTOPN SUTCLIFFE
19 BY: NEEL CHATTERJEE
20 JULIO AVALOS
21 1000 MARSH ROAD
22 MENLO PARK, CA 94025

23 FOR THE DEFENDANT: LAW OFFICES OF SCOTT BURSOR
24 BY: SCOTT BURSOR
25 369 LEXINGTON AVE, 10TH FL
 NEW YORK, NY 10017

(APPEARANCES CONTINUED ON THE NEXT PAGE)

OFFICIAL COURT REPORTER: SUMMER FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

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FOR THE PLAINTIFF: ORRICK HERRINGTON & SUTCLIFFE
BY: JESSICA PERS
405 HOWARD STREET
SAN FRANCISCO, CA 94105

FOR THE DEFENDANT: BRAMSON PLUTZIK
BY: LAWRENCE TIMOTHY FISHER
2125 OAK GROVE ROAD, STE 120
WALNUT CREEK, CA 94598

ALSO PRESENT: JENNIFER GRANICK

1 SAN JOSE, CALIFORNIA

JUNE 7, 2010

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

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

5 THE CLERK: CALLING CASE NUMBER 08-5780.
6 FACEBOOK, INC. V. POWER VENTURES, INC., ET AL.

7 ON FOR PLAINTIFF'S MOTION FOR JUDGMENT ON
8 THE PLEADINGS AND FOR PARTIAL SUMMARY JUDGEMENT.
9 PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIMS AND TO
10 STRIKE AFFIRMATIVE DEFENSES, AND DEFENDANT'S MOTION
11 FOR SUMMARY JUDGEMENT ON COUNT THREE.

12 30 MINUTES EACH SIDE FOR ALL MOTIONS.
13 COUNSEL, PLEASE COME FORWARD AND STATE YOUR
14 APPEARANCES.

15 MR. BURSOR: GOOD MORNING, YOUR HONOR.
16 SCOTT BURSOR FOR THE DEFENDANTS POWER VENTURES AND
17 STEVEN VACHANI. AND WITH ME IS MY COLLEAGUE
18 TIM FISHER, AND MY CLIENT IS WITH US TODAY AS WELL.
19 THIS IS ROB POLLOCK, THE CEO OF POWER.COM.

20 THE COURT: THANK YOU FOR COMING.

21 MR. CHATTERJEE: GOOD MORNING,
22 YOUR HONOR. NEEL CHATTERJEE FOR FACEBOOK. WITH ME
23 IS JULIO AVALOS AND JESSICA PERS FROM MY OFFICE.

24 THE COURT: THANK YOU. HAVE A SEAT. YOU
25 DON'T HAVE TO SIT DOWN, THE ADVOCATES, I WAS

1 TALKING ABOUT THE REST OF THEM.

2 BUT LET'S SEE, WHAT DO I HAVE? I HAVE A
3 MOTION BY FACEBOOK FOR JUDGMENT ON THE PLEADINGS OR
4 IN THE ALTERNATIVE FOR PARTIAL SUMMARY JUDGEMENT
5 UNDER THIS 502 STATUTE, AND A DEFENDANT'S MOTION
6 FOR SUMMARY JUDGEMENT. AND I HAVE A MOTION TO
7 DISMISS THE COUNTERCLAIMS, STRIKE AFFIRMATIVE
8 DEFENSES -- I CAN SEE WHY MY STAFF SAID 30 MINUTES
9 EACH SIDE IF WE ARE GOING TO ADDRESS ALL OF THIS.

10 ACTUALLY, THE ISSUE THAT I THOUGHT WOULD
11 BE IMPORTANT FOR US TO DISCUSS IS THIS 502 ISSUE.
12 AND I UNDERSTAND THAT THERE ARE CERTAIN AMICUS
13 BRIEFS THAT HAVE BEEN FILED WITH RESPECT TO THIS.
14 SO I WOULD ACTUALLY CALL UPON COUNSEL FOR FACEBOOK
15 FIRST TO ADDRESS THE QUESTION OF WHETHER OR NOT
16 THERE IS A SUFFICIENT ALLEGATION OF A VIOLATION OF
17 502.

18 MR. CHATTERJEE: SURE, YOUR HONOR, I'M
19 HAPPY TO.

20 FIRST, IF I MAY ADDRESS THE AMICUS BRIEF,
21 WE HAD CONTACTED CHAMBERS BECAUSE IT ACTUALLY HAD
22 NEVER BEEN FILED. THERE WAS A MOTION REQUESTING IT
23 AND YOUR HONOR ISSUED AN ORDER SETTING A DEADLINE
24 AND THEN IT WAS NEVER FILED.

25 IF YOUR HONOR IS GOING TO CONSIDER THAT

1 BRIEF, WE WOULD LIKE TO HAVE AN OPPORTUNITY TO FILE
2 A RELATIVELY SHORT RESPONSE TO IT. I CAN ALSO
3 ADDRESS IT DURING THE ARGUMENT TODAY.

4 AFTER YOU GAVE LEAVE, THE AMICUS BRIEF
5 WAS ACTUALLY NOT FILED PER YOUR ORDER. AND IT'S A
6 PROCEDURAL HOUSEKEEPING ISSUE, ALTHOUGH WE THINK
7 THAT BECAUSE THEY DIDN'T FILE IT, IT SHOULD NOT BE
8 CONSIDERED AT THIS POINT.

9 THE COURT: WELL, I HAD -- THERE WAS A
10 DOCUMENT FILED WHICH WAS A MOTION FOR LEAVE TO
11 FILE. AND IT'S THAT, THAT I HAD READ. AND SO YOUR
12 POSITION IS THAT THIS IS NOT THE BRIEF THAT WAS
13 SORT OF FOLLOWED ON THAT WAS GOING TO COME FROM
14 THIS.

15 MR. CHATTERJEE: THEY ATTACHED A BRIEF ON
16 THE MOTION AND THEN YOUR HONOR ISSUED AN ORDER
17 GIVING THEM UNTIL, I BELIEVE THE 14TH, TO ACTUALLY
18 FILE THAT BRIEF.

19 IT WAS, IN FACT, NEVER FILED. WE HAD
20 CONTACTED YOUR HONOR TO FIGURE OUT WHAT WE SHOULD
21 DO, IF ANYTHING. AND ALL I ASK YOUR HONOR IS THAT
22 IF IN FACT YOU ARE GOING TO CONSIDER THEIR
23 SUBMISSION, WE BE GIVEN LEAVE TO FILE A FAIRLY
24 SHORT RESPONSE TO IT. SO IF YOU ARE CONSIDERING
25 THE ISSUE -- ANY ISSUES RAISED THEREIN, WE CAN

1 ENSURE WE'VE HAD AN OPPORTUNITY TO BE HEARD.

2 THE COURT: ALL RIGHT.

3 I HAD ASSUMED THAT I HAD BEFORE ME THE
4 AMICUS MATERIAL AND HAD LOOKED AT IT. SO TO THE
5 EXTENT THAT I FIND THERE'S A NEED FOR YOU TO SAY
6 ANYTHING MORE, PERHAPS YOU CAN RESPOND TO THAT AS
7 WELL.

8 MR. CHATTERJEE: SURE, YOUR HONOR.

9 IF I CAN GRAB SOME AIDES FOR OUR ARGUMENT
10 TODAY ON THE 502(C) ISSUE.

11 THE COURT: SURE.

12 MR. CHATTERJEE: YOUR HONOR, I WILL GIVE
13 OPPOSING COUNSEL A COPY OF THIS. I WILL ALSO GIVE
14 A COPY FOR YOU, AND I'M HAPPY TO GIVE ONE FOR YOUR
15 LAW CLERK AS WELL. THE AIDES ARE FAIRLY
16 STRAIGHTFORWARD, ALMOST ALL OF IT ARE MATERIALS
17 THAT ARE ALREADY SUBMITTED. THERE'S ONLY ONE
18 ADDITIONAL PIECE OF WORK PRODUCT.

19 LET'S START WITH KIND OF, I GUESS THE
20 FUNDAMENTAL ISSUE THAT'S PRESENTED BY THIS MOTION.
21 THE FUNDAMENTAL ISSUE THAT'S PRESENTED BY THIS
22 MOTION IS WHETHER FACEBOOK CAN REGULATE ACCESS TO
23 ITS WEBSITE BY THIRD PARTIES AND OTHER COMMERCIAL
24 ENTITIES. AND IT IS NOT, AS VARIOUS PEOPLE IN THE
25 BRIEFING ON THIS CASE SUGGEST, PURELY ABOUT A TERMS

1 OF USE ISSUE.

2 I WAS VERY INTERESTED IN YOUR HONOR'S
3 COMMENTS ABOUT THE MULTIVEN CASE THAT WAS JUST HERE
4 BECAUSE IT WASN'T A MATTER OF FACEBOOK LOCKING A
5 DOOR, IT WAS FAR MORE THAN THAT. FACEBOOK HAD A
6 TERMS OF USE THAT RESTRICTED ACCESS TO ITS WEBSITE
7 FOR PARTICULAR PURPOSES. WHEN IT WAS CLEAR THAT
8 POWER WAS INCENTIVISING ITS USERS TO VIOLATE THAT
9 TERMS OF USE, FACEBOOK SAID DIRECTLY TO POWER, AND
10 POWER DOESN'T DISPUTE THIS, DON'T ACCESS OUR
11 WEBSITE.

12 POWER AGREED. THEY ACTUALLY SAID, OKAY,
13 WE WON'T ACCESS IT, WE ARE GOING TO TRY TO WORK
14 THROUGH A MECHANISM THAT FACEBOOK DOES ALLOW FOR
15 THAT ACCESS. BUT THEN AT THE LAST MINUTE THEY
16 CHANGED THEIR MIND AND THEY SAID, WE ARE GOING TO
17 CONTINUE ACCESSING FACEBOOK'S WEBSITE DESPITE
18 FACEBOOK'S EXPRESS REQUEST SAYING, DO NOT ACCESS
19 OUR WEBSITE.

20 AT THAT POINT IN TIME FACEBOOK PUT UP
21 TECHNICAL BARRIERS, THEY BLOCKED THE IP ADDRESS OF
22 POWER TO FORECLOSE POWER FROM ACCESSING THE
23 WEBSITE. WHEN THAT HAPPENED POWER, NOW THAT THERE
24 HAD BEEN A LOCK ON THE DOOR, THERE HAD BEEN AN
25 EXPRESS REQUEST NOT TO TRESPASS AND THERE HAD BEEN

1 A FENCE BUILT AROUND THE FACEBOOK WEBSITE, POWER
2 DECIDED TO JUMP OVER IT.

3 THAT, YOUR HONOR, IS AN UNAUTHORIZED
4 TRESPASS TO A COMPUTER SYSTEM. AND AT THE VERY
5 TIME THAT THEY WERE JUMPING OVER THOSE FENCES, THEY
6 THEN ACCESSED THE FACEBOOK WEBSITE AND THEY START
7 SENDING COMMERCIAL MESSAGES THROUGH A CALENDARING
8 FUNCTION OF FACEBOOK TO INVITE POTENTIALLY
9 THOUSANDS OF PEOPLE TO JOIN THE POWER WEBSITE.

10 YOUR HONOR, THAT IS THE CLASSIC CASE, IT
11 IS AN EXTREME CASE OF COMPUTER TRESPASS, WHICH IS
12 WHAT CALIFORNIA PENAL CODE IN 502(C) SEEKS TO
13 COVER.

14 THE COURT: NOW LET ME SEE IF I CAN PARSE
15 THAT JUST A BIT.

16 SO DO I UNDERSTAND FROM YOUR ARGUMENT
17 THAT FACEBOOK IS NOT CONTENDING THAT POWER'S
18 INITIAL ACCESS WHERE IT DID NOT INVADE ANY
19 TECHNOLOGICAL BARRIER, WAS A VIOLATION OF 502? THE
20 VIOLATION CAME AFTER FACEBOOK INITIATED THE
21 TECHNOLOGICAL BARRIER; AND POWER, USING SOME
22 MECHANISM THAT'S NOT CLEAR TO ME AT THIS POINT,
23 OVERCAME THAT BARRIER?

24 MR. CHATTERJEE: YOUR HONOR, IT'S A VERY
25 GOOD QUESTION.

1 THE ANSWER IS A LITTLE MORE COMPLICATED
2 THAN THAT. THE ISSUE YOUR HONOR RAISED WITH
3 RESPECT TO THE MULTIVEN CASE WAS ONE OF, AT WHAT
4 POINT DOES SOMETHING BECOME A KNOWING VIOLATION?
5 IT WAS THE KNOWLEDGE REQUIREMENT THAT I THINK
6 YOUR HONOR WAS CONCERNED ABOUT IN ASKING THE
7 QUESTIONS ABOUT THE DIRECTOR LEVEL PERSON AND WHAT
8 HE -- WOULD HE KNOW ABOUT OR NOT KNOW ABOUT OR THE
9 OTHER PERSON WHO WAS USING HIS PASSWORD THAT WOULD
10 KNOW ABOUT THE ACCESS TO THE CISCO COMPUTER SYSTEM.

11 WHEN YOU ARE JUST TALKING ABOUT A TERMS
12 OF USE VIOLATION, WE ARE NOT SAYING THAT, IN AND OF
13 ITSELF WOULD NECESSARILY RISE TO A KNOWING
14 VIOLATION; THAT'S AN ISSUE FOR ANOTHER DAY. BUT IN
15 THIS INSTANCE WITH THESE FACTS THAT ARE ADMITTED,
16 THERE IS NO QUESTION THAT THE STOP SIGN WAS ON THE
17 OUTSIDE OF THE FACEBOOK WEBSITE.

18 THERE WASN'T ONE INSTANCE OF A TERMS OF
19 USE GIVING NOTICE, THERE WAS A DIRECT MESSAGE SENT
20 TO POWER THAT THEY ACKNOWLEDGED AND RECOGNIZED THAT
21 THE WELCOME SIGN WASN'T ON AND THEN AFTER THEY
22 CHOSE NOT TO HONOR IT, THEY ADMITTED THAT THEY KNEW
23 WE PUT IN PLACE TECHNICAL BARRIERS AND THEY CHOSE
24 TO JUMP OVER THAT FENCE.

25 WITH THOSE THREE THINGS, THE KNOWING

1 ELEMENT IS UNDISPUTABLE. AND THAT IS THE POINT AT
2 WHICH THERE'S NO QUESTION THERE WOULD BE A
3 VIOLATION UNDER CALIFORNIA PENAL CODE 502(C).

4 DOES THAT ANSWER YOUR QUESTION,
5 YOUR HONOR?

6 THE COURT: I THINK SO.

7 YOU SAID THE ANSWER IS NOT AS
8 STRAIGHTFORWARD AS THAT. I DIDN'T GET AN ANSWER,
9 BUT IT SEEMS THAT THE ANSWER IS YES.

10 INDEED, THERE'S NO CLAIM -- YOU ARE
11 MAKING YOUR CLAIM BASED UPON THE STATE OF THE
12 AFFAIRS THAT EXISTED AFTER OVERCOMING THE TECHNICAL
13 BARRIER, AND PERHAPS IT'S MOOT WHAT HAPPENED
14 EARLIER.

15 BUT AS I WAS READING THROUGH THE HISTORY
16 OF THE CASE, AND AS YOU RECITED IT, THERE WAS AN
17 EARLY ENTRY UNDER DIFFERENT CIRCUMSTANCES. THERE
18 WAS SOME CORRESPONDENCE BETWEEN THE PARTIES WITH
19 RESPECT TO THAT. SOME EFFORT WAS MADE TO SEE
20 WHETHER OR NOT POWER WOULD BECOME AN ACCEPTED USER
21 BECAUSE THIS IS A PROCESS THAT FACEBOOK ALLOWS
22 PERHAPS, AND EVEN ENGAGES IN, BUT DIDN'T HAVE POWER
23 AMONG ITS AUTHORIZED VENDORS FOR PURPOSES OF THIS
24 GATHERING OF INFORMATION THROUGH FACEBOOK.

25 AND THEN IN THE COURSE OF TIME, AS I

1 UNDERSTAND IT, FACEBOOK PUT IN PLACE VARIOUS
2 TECHNOLOGICAL BARRIERS AND THOSE WERE CIRCUMVENTED.
3 AND IT'S THAT STATE OF AFFAIRS, THE CIRCUMVENTION
4 THAT I AM LOOKING AT, TO DETERMINE WHETHER OR NOT
5 THERE'S A 502 VIOLATION.

6 MR. CHATTERJEE: CORRECT, YOUR HONOR.

7 WE ARE NOT MOVING SOLELY UPON THE TERMS
8 OF USE VIOLATION, ALTHOUGH IT'S AN ADMITTED FACT
9 THAT IS RELEVANT FOR YOUR HONOR TO CONSIDER.

10 THE COURT: WELL, AS A HISTORICAL PURPOSE
11 IT SEEMS TO ME -- SO MAYBE THIS IS AN INVITATION
12 FOR THE COURT TO RENDER AN ORDER WHETHER OR NOT
13 TERMS OF USE VIOLATIONS ALONE CONSTITUTE A
14 VIOLATION OF 502 SO AS TO REMOVE THAT FROM A
15 QUESTION.

16 SO IT'S A QUESTION I'M RAISING, NOT A
17 STATEMENT OF SOMETHING I'M GOING TO DO, BUT YOU'VE
18 RAISED AT LEAST ENOUGH OF A CONCERN IN THE COURT'S
19 MIND THAT AN ANSWER TO THAT QUESTION MIGHT BE
20 NECESSARY.

21 LET ME HEAR FROM YOUR OPPONENT AND I WILL
22 COME BACK.

23 MR. CHATTERJEE: YOUR HONOR, IF I CAN
24 JUST SAY, AN ANSWER TO THAT QUESTION IS NOT
25 NECESSARY HERE BECAUSE YOU CAN RELY SOLELY ON THE

1 CIRCUMVENTION AFTER THE REQUEST WAS MADE NOT TO
2 ACCESS AND THE BARRIERS WERE JUMPED OVER.

3 THE COURT: I UNDERSTAND.

4 COUNSEL?

5 MR. BURSOR: YOUR HONOR, I THINK THE
6 COURT IN ITS COLLOQUY WITH MR. CHATTERJEE HAS
7 JUMPED PAST A DISPOSITIVE ISSUE THAT REALLY OUGHT
8 TO BE THE FOCUS OF THE ANALYSIS ON THIS MOTION,
9 WHICH IS NOT WHETHER THERE WAS A VIOLATION OF 502
10 DUE TO AUTHORIZE OR LACK OF AUTHORIZE, AND I CAN
11 ADDRESS WHY WE THINK THERE WAS NO VIOLATION OF 502
12 BECAUSE THE USERS WERE AUTHORIZED TO ACCESS THEIR
13 ACCOUNTS; HOWEVER, THAT DISCUSSION JUMPS OVER A
14 VERY BIG HURDLE AND THAT IS THE BASIS FOR OUR
15 MOTION FOR SUMMARY JUDGEMENT.

16 WE THINK THE COURT DOESN'T EVEN GET THERE
17 BECAUSE FACEBOOK LACKS STANDING TO ASSERT ANY CLAIM
18 FOR 502 EVEN IF THERE WAS A VIOLATION. AND THE
19 REASON IS BECAUSE YOUR HONOR, CALIFORNIA'S PENAL
20 CODE SECTION 502 IS, OF COURSE, A CRIMINAL STATUTE,
21 IT'S MEANT TO BE ENFORCED BY THE GOVERNMENT.

22 IT DOES, HOWEVER, CREATE A PRIVATE RIGHT
23 OF ACTION IN CERTAIN LIMITED CIRCUMSTANCES. AND
24 THOSE ARE SPELLED OUT IN SECTION 502 (E) (1) WHICH
25 CREATES PRIVATE LITIGATE STANDING FOR THE OWNER OR

1 LESSEE OF A COMPUTER WHO HAS SUFFERED DAMAGE OR
2 LOSS BY REASON OF A VIOLATION.

3 AND OUR MOTION FOR SUMMARY JUDGEMENT,
4 YOUR HONOR, IS PREMISED ON THE COMPLETE ABSENCE OF
5 ANY ALLEGATION THAT FACEBOOK SUFFERED DAMAGE OR
6 LOSS COGNIZABLE UNDER THE STATUTE OR THAT IT MADE
7 WHAT'S CALLED A VICTIM EXPENDITURE, WHICH IS A
8 PARTICULAR TYPE OF LOSS, RECOGNIZED UNDER SECTION
9 502.

10 WHAT HAPPENED IN THIS CASE, YOUR HONOR,
11 IS THAT FACEBOOK USERS WHO WERE AUTHORIZED, HAD
12 ACCOUNTS ON FACEBOOK, HAD PASSWORDS AND LOGIN NAMES
13 ISSUED BY FACEBOOK, HAD PERMISSION TO ACCESS THEIR
14 FACEBOOK ACCOUNTS, DID SO THROUGH A DIFFERENT
15 BROWSER OFFERED BY POWER THAT PROVIDED ADDITIONAL
16 UTILITIES THAT FACEBOOK DIDN'T WANT TO HAVE
17 PROVIDED.

18 AND WHEN THOSE USERS ACCESSED THEIR OWN
19 ACCOUNTS THEY DID NOT TAKE ANY ACTION THAT CAUSED A
20 DAMAGE OR LOSS TO FACEBOOK; THEY HAD NO EFFECT ON
21 FACEBOOK WHATSOEVER.

22 SO A FUNDAMENTAL PREREQUISITE FOR A
23 PRIVATE LITIGANT LIKE FACEBOOK TO ASSERT A CLAIM
24 UNDER 502 IS THEY HAVE TO SHOW ONE OF TWO THINGS:

25 THEY HAVE TO SHOW AN INJURY AS DEFINED BY

1 THE STATUTE, WHICH IS DEFINED BY 502 (B) (8) AS THE
2 ALTERATION, DELETION, DAMAGE OR DESTRUCTION OF A
3 COMPUTER SYSTEM, COMPUTER NETWORK, COMPUTER PROGRAM
4 OR DATA, OR THE DENIAL OF ACCESS TO LEGITIMATE
5 USERS; THAT'S ONE THING THEY COULD SHOW.

6 OR ALTERNATIVELY THEY COULD SHOW WHAT'S
7 CALLED A VICTIM EXPENDITURE WHICH IS IDENTIFIED IN
8 502(B)(9) WHICH IS THE EXPENDITURE OF RESOURCES
9 REASONABLY AND NECESSARILY INCURRED BY THE OWNER OR
10 LESSEE OF THE COMPUTER SYSTEM TO VERIFY THAT THE
11 INJURIES DESCRIBED IN (B) (8), NAMELY THE
12 ALTERATION, DELETION, DAMAGE, OR DESTRUCTION OF
13 THEIR COMPUTER SYSTEM, NETWORK OR DATA, EITHER DID
14 OR DID NOT OCCUR.

15 NOW, IN THIS CASE FACEBOOK FILED A
16 COMPLAINT AND THEY FILED AN AMENDED COMPLAINT. AND
17 IN PLEADING THEIR 502 CLAIM IN BOTH INSTANCES THE
18 ONLY INJURY THEY ALLEGE WAS INJURY TO THEIR
19 "REPUTATION AND GOOD WILL." AND YOUR HONOR, THAT'S
20 AT PARAGRAPHS 118 AND 119 OF FACEBOOK'S AMENDED
21 COMPLAINT. THAT'S THE ONLY INJURY THEY ALLEGE.
22 THEY SAY, "OUR REPUTATION AND GOOD WILL WAS
23 HARMED."

24 NOW, IN POWER'S ANSWER WE DENY THAT. AND
25 SO ON THE 12(C) MOTION IT HAS TO BE PRESUMED FALSE.

1 BUT THE MORE IMPORTANT POINT, YOUR HONOR, IS
2 WHETHER THAT ALLEGATION IS TRUE OR FALSE ABOUT AN
3 INJURY TO REPUTATION AND GOOD WILL, THAT TYPE OF
4 INJURY DOES NOT QUALIFY AS AN INJURY UNDER 502
5 (B) (8). IT DOES NOT QUALIFY AS A VICTIM
6 EXPENDITURE UNDER 502 (B) (9) AND DOES NOT QUALIFY
7 UNDER DAMAGE OR LOSS UNDER 502 (B) (1).

8 SO BEFORE FACEBOOK CAN BE HEARD TO
9 COMPLAIN THAT SOMEONE HAS VIOLATED 502 (C), THEY
10 HAVE TO SHOW ONE OF THOSE TWO THINGS.

11 THE COURT: DO YOU EQUATE INJURY AND
12 VICTIM EXPENDITURE UNDER THE STATUTE WITH DAMAGE OR
13 LOSS?

14 IN OTHER WORDS, ARE THE ONLY THINGS THAT
15 ARE DAMAGE OR LOSS, WHAT IS DEFINED UNDER
16 SUBPARAGRAPHS 8 AND 9, DEFINED AS INJURY OR VICTIM
17 EXPENDITURE?

18 MR. BURSOR: YES.

19 THE COURT: WHERE DO YOU GET THAT?

20 MR. BURSOR: WHERE I GET THAT,
21 YOUR HONOR, IS FROM THE FACT THAT 502 (E) (1) USES
22 THE EXACT SAME LANGUAGE VERBATIM AS (B) (9) WHICH
23 DEFINES VICTIM EXPENDITURE.

24 IF YOU LOOK AT (E) (1), THE LANGUAGE THAT
25 TALKS ABOUT ANY EXPENDITURE REASONABLY AND

1 NECESSARILY INCURRED BY THE OWNER OR LESSEE TO
2 VERIFY THAT A COMPUTER SYSTEM, COMPUTER NETWORK,
3 COMPUTER PROGRAM OR DATA WAS OR WAS NOT ALTERED
4 DAMAGED OR DELETED BY THE ACCESS.

5 THAT LANGUAGE IS IDENTICAL TO THE
6 DEFINITION OF VICTIM EXPENDITURE IN (B) (9). AND IF
7 YOU LOOK TO THE DEFINITION OF INJURY IN (B) (8), IT
8 SAYS "INJURY MEANS DAMAGE."

9 INJURY IS A DEFINED TERM TO INCLUDE
10 DAMAGE AND SOME OTHER -- AND TYPES OF DAMAGE LIKE
11 ALTERATION, DELETION, OR DESTRUCTION OF A COMPUTER
12 SYSTEM OR COMPUTER DATA.

13 SO THERE IS NO FORM OF DAMAGE OR LOSS
14 THAT COULD GIVE RISE TO STANDING UNDER 502(E) (1)
15 THAT WOULD NOT ALSO QUALIFY AS AN INJURY OR VICTIM
16 EXPENDITURE UNDER (B) (8) OR (B) (9).

17 THE COURT: LET'S ASSUME I GO THAT WAY,
18 AND I CAN SEE WHY YOU ARGUED THAT, ALTHOUGH THE
19 STATUTE USES TERMS THAT ARE NOT ALWAYS AS DEFINED
20 AS SYMMETRICALLY AS YOU ARE ARGUING.

21 WHY WOULDN'T A CIRCUMSTANCE SUCH AS THIS
22 WHERE THIS CIRCUMSTANCE WHERE FACEBOOK INVESTIGATED
23 WHATEVER WAS GOING ON AND UNDERTOOK MEASURES TO
24 PROTECT THE INTEGRITY, AS IT DEFINED IT, OF ITS
25 SYSTEM, WHY WOULDN'T THOSE QUALIFY AS DAMAGE OR

1 LOSS?

2 MR. BURSOR: WELL, THEY WOULDN'T QUALIFY
3 YOUR HONOR BECAUSE THEY DON'T MEET THE CRITERIA
4 THAT ARE SPELLED OUT IN THE STATUTE.

5 I THINK FACEBOOK CONCEDES THAT THEY HAVE
6 NOT SUFFERED AN INJURY AS DEFINED BY THE STATUTE.
7 THEIR ARGUMENT IS WE MADE THESE EXPENDITURES TO
8 INVESTIGATE WHAT WAS HAPPENING, TO HAVE DISCUSSIONS
9 WITH MR. VACHANI AND THEN TO THEN BLOCK THE IP
10 ADDRESS.

11 AND BECAUSE WE MADE THOSE EXPENDITURES
12 WHICH ARE NOT REALLY SPECIFIED IN ANY WAY, EITHER
13 IN THE PLEADINGS OR EVIDENTIARY MATERIALS BEFORE
14 THE COURT, FACEBOOK'S INTENTION IS ANY EXPENDITURE
15 WILL DO.

16 YOUR HONOR, IN OUR REPLY BRIEF WE BROKE
17 THESE OUT ONE BY ONE AND EXPLAINED WHY EACH ONE OF
18 THEM FAILED THE TEST UNDER 502(B)(9) AND 502(E)(1).

19 NOW, WE HAD THE DISCUSSION ABOUT (B)(8)
20 AND THE DEFINITION OF INJURY AND I THINK THAT'S
21 IMPORTANT, BUT IT'S IMPORTANT TO RECOGNIZE THAT
22 FACEBOOK HAS CONCEDED THAT POINT. THEY DON'T HAVE
23 AN INJURY. THEY RELY ENTIRELY ON THESE
24 EXPENDITURES.

25 SO IT'S ENTIRELY A (B)(9)/(E)(1) ISSUE

1 WHERE (B) (9) AND (E) (1) USE THE IDENTICAL LANGUAGE.

2 AND THERE'S THREE REQUIREMENTS FOR AN
3 EXPENDITURE TO FALL UNDER ONE OF THOSE STATUTES.
4 NUMBER ONE, IT HAS TO BE REASONABLY INCURRED. TWO,
5 IT HAS TO BE NECESSARILY INCURRED. AND NUMBER
6 THREE, IT HAS TO BE BY REASON OF -- IT HAS TO BE
7 INCURRED TO VERIFY "WHETHER AN ALTERATION, DELETION
8 OR DAMAGE HAS OCCURRED TO THE DATA OR THE COMPUTER
9 NETWORK."

10 NOW FACEBOOK --

11 THE COURT: WHERE DO YOU GET THE
12 REASONABLY INCURRED -- THERE'S NO STANDARD AS TO AN
13 AMOUNT HERE, CORRECT?

14 MR. BURSOR: THERE'S NO STANDARD AS TO AN
15 AMOUNT, BUT I GET REASONABLY AND NECESSARILY FROM
16 THE LANGUAGE OF (E) (1) AND (B) (9) WHICH SAYS THAT
17 THE EXPENDITURE HAS TO BE REASONABLY AND
18 NECESSARILY INCURRED.

19 AND IT HAS TO BE REASONABLE AND
20 NECESSARILY INCURRED FOR A PARTICULAR PURPOSE.
21 THAT PURPOSE BEING "TO VERIFY THAT A COMPUTER
22 SYSTEM, COMPUTER NETWORK, COMPUTER PROGRAM OR DATA
23 WAS OR WAS NOT ALTERED, DAMAGED, OR DELETED BY THE
24 ACCESS."

25 SO THE STATUTE DOESN'T SAY ANY

1 EXPENDITURE, IT DOESN'T SAY IT HAS TO BE A CERTAIN
2 AMOUNT.

3 THE COURT: IS THIS A THIRD PARTY
4 STANDARD, REASONABLE AND NECESSARILY INCURRED?

5 MR. BURSOR: YOUR HONOR, I THINK WHEN THE
6 LAW USES THE TERM "REASONABLE," THAT'S AN OBJECTIVE
7 STANDARD, YES.

8 SO YOUR HONOR, WHEN THE MOTION CAME IN,
9 FACEBOOK SAID VERY LITTLE ABOUT WHAT THEY DID OTHER
10 THAN THEY TRACKED AND BLOCKED THE ASSESS.

11 THEY NEVER SAID IN THEIR MOVING PAPERS
12 THAT THE ASSESS CAUSED ANY INJURY, ALTERATION, OR
13 DELETION OF DATA. THEY DIDN'T PUT IN ANY EVIDENCE
14 THAT SUGGESTED THAT THAT HAPPENED. THEY DIDN'T PUT
15 ANY EVIDENCE THAT THEY EVEN HAD A CONCERN THAT THAT
16 HAPPENED. THEY DIDN'T PUT IN EVIDENCE THAT THE
17 REASON THEY TRACKED THE ACCESS WAS OUT OF CONCERN
18 THAT THERE WAS AN ALTERATION OR DELETE OF DATA.
19 NOTHING ABOUT THIS.

20 WE THEN FILED A CROSS MOTION FOR SUMMARY
21 JUDGEMENT ON THIS POINT SAYING FACEBOOK HAS NO
22 STANDING BECAUSE THEY HAVE NO INJURY. THEY'VE ONLY
23 PLEADED HARM TO REPUTATION, THAT DOESN'T QUALIFY.

24 THEY THEN CAME BACK --

25 THE COURT: LET ME SLOW YOU DOWN BECAUSE

1 THESE ARE IMPORTANT ENOUGH THAT I WANT TO
2 UNDERSTAND BECAUSE THIS IS ALL STATUTORY
3 INTERPRETATION.

4 I DON'T HAVE MUCH TO GO ON IN TERMS OF
5 HOW TO LOOK AT THE STATUTE, BUT IT SEEMS TO ME AS I
6 HEAR YOUR ARGUMENT, IF A THIRD PARTY STANDARD OF
7 REASONABILITY IS TO BE APPLIED AND THE OWNER OF THE
8 SYSTEM KNOWS THAT THERE HAS BEEN THIS INTRUSION AND
9 THEY WANT TO INVESTIGATE WHETHER IT HAS ALTERED,
10 DAMAGED ANYTHING, WHETHER OR NOT IT ACTUALLY HAS
11 TAKEN PLACE AND SOME EXPENDITURE IS INCURRED FOR
12 THAT.

13 YOUR ARGUMENT IS THAT THAT'S NOT COVERED
14 BY THE STATUTE; IS THAT CORRECT?

15 MR. BURSOR: YOUR HONOR, IN ORDER TO BE
16 COVERED IT WOULD HAVE TO BE REASONABLY INCURRED AND
17 THERE WOULD HAVE TO BE EVIDENCE OF THAT BUT THAT
18 SKIPS OVER --

19 THE COURT: I INCLUDED THAT IN MY
20 HYPOTHETICAL. I SAID IF THEY REASONABLY AND
21 NECESSARILY, MEETING A THIRD PARTY STANDARD,
22 DECIDED THEY ARE GOING TO INVESTIGATE AND WHAT THEY
23 FIND IS THERE'S NO LOSS, THAT THAT EXPENSE OF THE
24 INVESTIGATION IS NOT COVERED; IS THAT CORRECT? IS
25 THAT YOUR ARGUMENT?

1 MR. BURSOR: NO, THAT'S NOT. YOUR HONOR,
2 I THINK THAT WOULD BE COVERED. IF THEY MADE AN
3 EXPENDITURE FOR THE PURPOSE OF VERIFYING --

4 THE COURT: HOW MUCH OF AN EXPENDITURE IS
5 REQUIRED?

6 MR. BURSOR: SOMETHING BEYOND A DE
7 MINIMUS EXPENDITURE.

8 THE COURT: WHERE DO YOU GET THAT?

9 MR. BURSOR: WELL, THERE HAS TO BE SOME
10 EXPENDITURE.

11 THE COURT: RIGHT. BUT THERE'S NO
12 STANDARD.

13 MR. BURSOR: THERE'S NO AMOUNT STATED.

14 THE COURT: IF ANY EXPENDITURE IS MADE TO
15 INVESTIGATE, TO VERIFY, EVEN IF THERE'S NO HARM THE
16 PARTY HAS STANDING?

17 MR. BURSOR: CORRECT.

18 THE COURT: ALL RIGHT.

19 NOW LET ME TURN TO YOUR OPPONENT ON THIS
20 ISSUE. I WILL COME BACK. I WILL COME BACK, BUT I
21 WANT TO HEAR ON THE STANDING ISSUE.

22 MR. CHATTERJEE: I WOULD BE HAPPY TO,
23 YOUR HONOR.

24 FIRST OF ALL THERE ARE TWO CASES THAT I
25 THINK ARE PARTICULARLY IMPORTANT TO READ WITH

1 RESPECT TO THE DAMAGE OR LOSS ISSUE. ONE IS THE
2 COMPUTER FRAUD AND ABUSE ACT CASE AND THE OTHER IS
3 ACTUALLY A CALIFORNIA PENAL CODE 502(C) CASE OUT
4 OF, OF ALL PLACES, THE DISTRICT OF JEW JERSEY.

5 THE COURT: WHY IS THAT NOTEWORTHY?

6 MR. CHATTERJEE: THE ONLY REASON IS IT'S
7 A NEW JERSEY COURT INTERPRETING CALIFORNIA PENAL
8 CODE 502(C) WHICH IS A LITTLE BIT UNUSUAL.

9 THE COURT: I SEE.

10 MR. CHATTERJEE: AND THE NEW JERSEY CASE
11 IS JOSEPH OAT HOLDINGS, AND THE CITE ON IT IS 2009,
12 U.S. DISTRICT LEXIS 95909.

13 AND THEN THE OTHER IS THE
14 SHURGARD STORAGE CENTERS, INC. CASE OUT OF WESTERN
15 DISTRICT OF WASHINGTON, 119 F. SUPP 2D 1121.

16 IN BOTH OF THOSE CASES -- ONE IS UNDER
17 THE COMPUTER FRAUD AND ABUSE ACT, THAT'S THE
18 SHURGARD STORAGE CASE, AND THE JOSEPH OAT HOLDINGS
19 CASE IS UNDER 502(C), THEY BOTH ENDORSE
20 YOUR HONOR'S QUESTION WHICH IS, IF YOU ARE SPENDING
21 EFFORT TO TRY AND STOP AN INTRUSION, THAT IS DAMAGE
22 OR LOSS.

23 NOW THERE'S A STATUTORY INTERPRETATION
24 QUESTION THAT I THINK YOUR HONOR CORRECTLY NOTICED
25 ABOUT THE 502(E)(1) STANDING REQUIREMENT.

1 THE FIRST THING TO NOTICE ABOUT THE
2 DAMAGE OR LOSS LANGUAGE IS THAT DAMAGE OR LOSS IS
3 NOT SOMETHING THAT IS EXPRESSLY DEFINED IN THE
4 STATUTE. I THINK YOUR HONOR'S QUESTIONS PROPERLY
5 NOTED THAT THE DEFINITIONS THAT MR. BURSOR RELIED
6 UPON ARE NOT ABOUT DAMAGE OR LOSS, THEY ARE
7 DEFINING OTHER TERMS.

8 WHY IS THAT SO? BECAUSE THE STATUTE
9 UNDER 502(E)(1) SAYS THAT FACEBOOK, OR A PERSON WHO
10 IS A VICTIM OF THIS CRIME, CAN FILE A CIVIL ACTION
11 AGAINST THE VIOLATOR FOR COMPENSATORY DAMAGES AND
12 INJUNCTIVE RELIEF OR OTHER EQUITABLE RELIEF.

13 FOLLOWING THAT PORTION OF 502(E)(1) THERE
14 IS ONE OF THE THINGS THAT COMPENSATORY DAMAGES
15 SHALL INCLUDE. BUT THE STATUTE IN AND OF ITSELF
16 IDENTIFIES THAT THERE CAN BE OTHER FORMS OF HARM
17 BEYOND COMPENSATORY DAMAGES BECAUSE IT ALLOWS FOR
18 INJUNCTIVE OR OTHER FORMS OF EQUITABLE RELIEF.
19 IT'S PRECISELY THE RELIEF WE ARE SEEKING HERE.

20 IN THIS CASE, WHEN POWER DECIDED TO
21 ENGAGE IN ITS COMPUTER INTRUSION, WE HAD TO COMMIT
22 RESOURCES TO SENDING A CEASE AND DESIST LETTER, WE
23 HAD TO SEND RESOURCES TO ENGAGING IN NEGOTIATION
24 WHICH THEY LATER BAILED OUT OF, WE HAD TO ENGAGE IN
25 EFFORTS AND EXPENDITURES IN ORDER TO PUT UP

1 TECHNICAL BARRIERS, AND THEN WE HAD TO ENGAGE IN
2 EFFORTS TO EVALUATE WHAT HAD ACTUALLY BEEN DONE BY
3 POWER.

4 THOSE ARE ALL THE SORTS OF DAMAGES AND
5 LOSSES THAT 502(C), THE SHURGARD STORAGE CASE AND
6 JOSEPH OAT RECOGNIZED ARE PROPER.

7 THE COURT: WELL, LET ME DO THIS. I TAKE
8 SERIOUSLY THIS QUESTION ABOUT STANDING AND I WILL
9 TAKE A LOOK AT IT. MY INITIAL REACTION IS THAT I
10 SHOULD ACCORD TO FACEBOOK, STANDING TO ASSERT A 502
11 VIOLATION SO THAT I CAN GET TO THE MERITS OF
12 WHETHER OR NOT THIS CONSTITUTES SUCH A VIOLATION,
13 BECAUSE IT SEEMS TO ME THAT I DON'T WANT TO SET TOO
14 HIGH A BARRIER OF ALLEGED VICTIM TO AT LEAST BRING
15 THE MATTER TO A COURT.

16 AND SO IF I WERE TO SAY FACEBOOK HAS NO
17 STANDING I WOULD SAY I'M NOT EVEN GOING TO LISTEN
18 OF WHETHER OR NOT THERE'S BEEN A VIOLATION OF 502,
19 BECAUSE I THINK THE LANGUAGE OF THE STATUTE HAVING
20 TO DO WITH VERIFICATION AND THOSE KINDS OF TERMS
21 ADMIT TO LEGITIMATE, REASONABLE, INVESTIGATION AND
22 WHETHER OR NOT A HARM IS ACTUALLY FOUND AND GIVES
23 STANDING FOR SOMEONE TO BRING THAT TO A COURT.

24 SO GO TO THE QUESTION OF WHETHER OR NOT
25 THERE IS A VIOLATION OF 502 ON THE MERITS.

1 MR. BURSOR: YOUR HONOR, IF I MAY, I
2 THINK -- I DIDN'T GET A CHANCE TO ADDRESS THE
3 REALLY CRUCIAL ISSUE ON THE STANDING POINT WHICH IS
4 THE PURPOSE OF THE EXPENDITURE, NOT THE AMOUNT.

5 WHEN YOU LOOK AT THE EXPENDITURES
6 DESCRIBED IN FACEBOOK'S PAPERS AND THE EXPENDITURES
7 DESCRIBED BY MR. CHATTERJEE AT THIS ARGUMENT, NONE
8 OF THEM HAVE ANYTHING TO DO WITH THE PURPOSE
9 DESCRIBED IN (E) (1).

10 THE EXPENDITURES THEY LIST ARE THEY HIRED
11 OUTSIDE COUNSEL TO SEND A CEASE AND DESIST LETTER.
12 OUTSIDE COUNSEL DO NOT DO THINGS LIKE VERIFY IF THE
13 COMPUTER SYSTEM WAS INJURED.

14 THEY SAY THEY EXPENDED RESOURCES TO BLOCK
15 FUTURE ACCESS. THE PURPOSES PERMITTED UNDER
16 502(E) (1) HAVE NOTHING TO DO WITH FUTURE ACCESS,
17 THEY ARE ALL IN THE PAST TENSE TO VERIFY IF THERE
18 WAS AN INJURY TO THE COMPUTERS CAUSED BY THE
19 ACCESS.

20 SO I THINK, YOUR HONOR, WHEN -- IF THE
21 COURT IS TO FOCUS ON THE AMOUNT OR OTHER ASPECTS OF
22 THE EXPENDITURE THAT WAS MADE, THAT REALLY MISSES
23 THE POINT THAT THESE EXPENDITURES WERE NOT MADE FOR
24 THE PURPOSE DESCRIBED IN THE STATUTE.

25 AND YOUR HONOR, THIS IS A SUMMARY

1 JUDGEMENT MOTION. AND A SUMMARY JUDGEMENT MOTION
2 IS NOT ABOUT THEORIES THAT LAWYERS PUT INTO A
3 BRIEF, IT'S ABOUT EVIDENCE.

4 SO IF THERE WAS AN EXPENDITURE MADE FOR
5 THESE PURPOSES, IT WAS INCUMBENT ON THE DEFENDANTS
6 TO COME FORWARD WITH EVIDENCE.

7 THE COURT: MAYBE YOU MISUNDERSTOOD ME.
8 I'LL LOOK AT YOUR STANDING ISSUE, I'M NOT
9 DISMISSING IT, I'M NOT RULING AGAINST YOU. I'M
10 ASKING YOU TO MOVE ON TO THE MERITS BECAUSE IF I
11 GET OVER IT AND I HAVEN'T HEARD FROM YOU ON THE
12 MERITS THEN YOU ARE IN TROUBLE.

13 MR. BURSOR: YOUR HONOR, ON THE MERITS,
14 THERE WAS NO -- EVEN IF FACEBOOK HAD STANDING BASED
15 ON THIS EPHEMERAL THEORY OF INJURY BECAUSE THEY
16 HIRED LAWYERS, THERE IS NO VIOLATION OF 502(C) BY
17 POWER BECAUSE EVERY ACCESS TO FACEBOOK'S WEBSITE
18 WAS MADE BY AN AUTHORIZED FACEBOOK USER WITH
19 LEGITIMATE LOGIN CREDENTIALS WHO UNDENIABLY HAD
20 PERMISSION TO ACCESS THEIR OWN USER DATA ON
21 FACEBOOK; THERE IS ISN'T EVEN A DISPUTE ABOUT THAT.

22 POWER NEVER ACCESSED FACEBOOK DIRECTLY,
23 IT WAS ONLY FACEBOOK SUBSCRIBERS ACCESSING THE
24 FACEBOOK WEBSITE THROUGH THE POWER BROWSER. THE
25 SAME WAY ANY USER WOULD ACCESS FACEBOOK THROUGH THE

1 INTERNET EXPLORER BROWSER OR THE FIREFOX BROWSER OR
2 THE SAFARI BROWSER. ALL POWER DID WAS GIVE USERS A
3 MEANS TO ACCESS THEIR OWN DATA WHERE THEY WERE
4 AUTHORIZED TO DO SO.

5 AND YOUR HONOR, THERE IS SOME CASE LAW
6 AND MUCH OF IT IS DISCUSSED IN THE ELECTRONIC
7 FRONTIER FOUNDATION AMICUS BRIEF. WE FOCUSED
8 HEAVILY ON THE STANDING ARGUMENT, AND WE ARGUED
9 AUTHORIZATION AS WELL AND EFF FOCUSED ON THAT AS
10 WELL IN THEIR AMICUS BRIEF.

11 BUT THERE ARE SEVERAL CASES, YOUR HONOR,
12 THAT STAND FOR THE PROPOSITION THAT ACCESS IS NOT
13 UNAUTHORIZED UNDER 502 IF IT'S MADE BY A PERSON WHO
14 HAS AUTHORIZATION TO ACCESS THE COMPUTER BUT THEN
15 ACCESSES THE COMPUTER FOR A PURPOSE OR IN A MANNER
16 THAT GOES BEYOND THE DEFINED AUTHORIZATION.

17 I WILL GIVE TWO EXAMPLES. IN
18 CHRISMAN V. LOS ANGELES, THE CASE BEFORE THE
19 CALIFORNIA COURT OF APPEAL, A POLICE OFFICER HAD
20 GONE AND USED THE POLICE DEPARTMENT'S COMPUTERS,
21 THE CITY'S COMPUTERS, TO LOOK UP INFORMATION ABOUT
22 CELEBRITIES AND OTHER MATTERS THAT HE HAD NO
23 BUSINESS LOOKING AT.

24 SO HE WAS AUTHORIZED TO USE THE COMPUTER
25 SYSTEM BUT HE WAS ONLY AUTHORIZED TO USE IT FOR

1 PROPER POLICE BUSINESS. AND WHEN HE WENT AND
2 LOOKED AT CELEBRITY GOSSIP TYPE GOSSIP THINGS, HE
3 EXCEEDED WHAT HE WAS AUTHORIZED TO DO.

4 AND THE CALIFORNIA COURT OF APPEALS SAID
5 NO, THAT IS NOT UNAUTHORIZED ASSESS UNDER 502
6 BECAUSE THE POLICE OFFICER WAS AUTHORIZED TO USE
7 THE COMPUTER, HE SIMPLY WENT BEYOND THE PROPER
8 PURPOSES.

9 THE COURT: I'M FAMILIAR WITH THAT CASE.
10 LET ME SEE IF I CAN PUT IT IN THE CONTEXT OF WHAT'S
11 HAPPENING HERE.

12 HERE, LET'S ASSUME THAT OFFICER GOES IN
13 AND HE'S LOOKING FOR INFORMATION FOR A PERSONAL
14 PURPOSE, AND THE CITY OR WHOEVER IS OPERATING THE
15 SYSTEM KNOWS THAT PEOPLE ARE DOING THAT SO THEY PUT
16 IN CERTAIN PROTECTIONS WHERE YOU NEED A POLICE CASE
17 NUMBER AND YOU NEED THE SERGEANT WHO IS INVOLVED IN
18 THE CASE AND ALL THAT INFORMATION TO BE ADDED.

19 AND THIS PERSON DOESN'T HAVE THAT, AND SO
20 THE TECHNOLOGY IS SET UP SO THAT HE NEEDS TO GET
21 AROUND THOSE REQUIREMENTS AND HE STARTS TO USE SOME
22 DEVICE TO GET AROUND IT.

23 WOULD THAT CHANGE THE CIRCUMSTANCES WHERE
24 IT BECOMES A HACK AS OPPOSED TO SOMEONE WHO HAS
25 ACCESS?

1 MR. BURSOR: I DON'T KNOW THE ANSWER TO
2 THAT, YOUR HONOR, BECAUSE I DON'T THINK THERE'S A
3 CASE THAT ADDRESSES THAT ISSUE.

4 THE COURT: ISN'T THAT WHAT'S RAISED
5 HERE?

6 IN OTHER WORDS, WHAT FACEBOOK SAID THEY
7 DID WAS IT PUT IN A TECHNOLOGICAL BARRIER TO THE
8 KIND OF ACCESS THAT WAS COMING IN. FOR EXAMPLE, IT
9 IDENTIFIED MAYBE POWER'S, AS A WEBSITE, THAT
10 THROUGH WHICH IT WOULD NOT ALLOW. SO IN ORDER TO
11 GET AROUND THAT, POWER MADE SOME MODIFICATIONS TO
12 ITSELF OR TO HOW IT ACCESSED FACEBOOK TO DISGUISE
13 WHAT'S GOING ON, AND THAT THEN BECAME SOMETHING
14 OTHER THAN THE USER SIMPLY USING POWER AS THE KEY
15 TO ENTERING INTO THEIR OWN ACCOUNT.

16 MR. BURSOR: WELL, ACTUALLY THE LAST PART
17 OF YOUR HONOR'S STATEMENT IS NOT ACCURATE. THE
18 USERS WERE STILL USING THEIR AUTHORIZED USERNAMES
19 AND PASSWORDS TO GET INTO THEIR ACCOUNT.

20 THERE WAS A DISPUTE BETWEEN POWER AND
21 FACEBOOK AS TO WHETHER POWER WAS GOING TO BE
22 ALLOWED TO OFFER THOSE SERVICES SO THAT PEOPLE
23 COULD ACCESS THEIR ACCOUNTS THROUGH POWER.

24 AND I THINK IF YOUR HONOR TAKES A LOOK AT
25 THE EVIDENCE THAT WAS SUBMITTED BY FACEBOOK

1 ATTACHED TO MR. AVALOS'S DECLARATION WHERE HE
2 SUBMITTED THE BACK AND FORTH BETWEEN MR. VACHANI
3 AND THE FACEBOOK FOLKS. YOU CAN SEE THERE'S A BACK
4 AND FORTH WHERE POWER IS A NEW BUSINESS THAT'S
5 STARTING AND THEY WANT TO BE ON GOOD TERMS WITH
6 FACEBOOK SO THEY ARE CONSTANTLY TRYING TO ENGAGE
7 FACEBOOK TO SOLVE WHATEVER PROBLEM FACEBOOK HAS AND
8 ATTACH IN AN APPROPRIATE WAY WITHOUT -- WHETHER
9 POWER HAD A LEGAL ENTITLEMENT TO DO WHAT THEY WERE
10 DOING, WHICH THEY BELIEVE THEY DID, NEVERTHELESS
11 BECAUSE THEY WANTED GOOD RELATIONS, THEY WANTED TO
12 WORK WITH FACEBOOK.

13 AND FACEBOOK HAD THROWN UP THIS BARRIER
14 AND POWER DID CIRCUMVENT THAT BARRIER, AND THAT IS
15 ESTABLISHED BY THE PLEADINGS. BUT POWER'S
16 CIRCUMVENTION STILL DID NOTHING OTHER THAN ALLOW
17 USERS TO CONTINUE TO ACCESS THEIR OWN ACCOUNTS WITH
18 THE KEYS AND PASSWORDS THAT FACEBOOK HAD GIVEN
19 THEM.

20 WHAT POWER DID WAS TO DEFEND ITSELF SO
21 THAT IT WOULD BE ON THE SAME FOOTING WITH EVERY
22 OTHER BROWSER SO THE USER USING THE FACEBOOK
23 BROWSER COULD ACCESS IT THE SAME AS SOMEONE USING
24 INTERNET EXPLORER OR FIREFOX OR SAFARI

25 THE COURT: SO I SHOULD SAY AS A MATTER

1 OF LAW THAT ANY TECHNOLOGICAL BARRIER WHICH
2 FACEBOOK ERECTS TO ITS USERS' ACCESS CANNOT, AS A
3 MATTER OF LAW, VIOLATE 502?

4 MR. BURSOR: WE ARE NOT ASKING YOU TO DO
5 THAT AT THIS HEARING, YOUR HONOR.

6 THE COURT: WELL, WHERE IS THE LINE?

7 IN OTHER WORDS, IF I -- IF THERE IS A
8 TECHNOLOGICAL BARRIER THAT FACEBOOK COULD ERECT
9 WHERE ITS USERS, GOING THROUGH POWER, WOULD VIOLATE
10 502, DON'T I NEED TO KNOW WHERE THAT IS SO THAT I
11 CAN SAY CLEARLY I'M NOT AT THAT LINE IN THIS CASE?
12 SO THAT'S WHY I ASKED THE QUESTION.

13 MR. BURSOR: THAT'S A DIFFICULT QUESTION,
14 YOUR HONOR, PARTICULARLY IN A CASE WHERE THERE'S NO
15 EVIDENTIARY RECORD PERTINENT TO THAT QUESTION.

16 THE COURT: LET ME TAKE THAT AS THE
17 REASON I'M CONCERNED. THIS IS A MOTION FOR
18 JUDGEMENT ON THE PLEADINGS. SO IF THERE IS A --
19 THAT MOTION REQUIRES THAT EVERYTHING I ASSUME ON
20 HIS SIDE CAN BE PROVED AND I'VE GOT TO CONSTRUE THE
21 EVIDENCE FAVORABLY TO POWER IN THIS CASE.

22 THIS IS VERY EARLY IN THIS LITIGATION AND
23 I CAN APPRECIATE WHERE BOTH SIDES WOULD WANT TO
24 HAVE EARLY COURT DETERMINATION, BUT AM I IN A
25 POSITION WHERE SIMPLY THE ADMISSION ON THE PART OF

1 POWER THAT IT USES ITS TOOLS TO ALLOW THOSE WHO
2 WOULD WISH TO ACCESS FACEBOOK THROUGH POWER, AREN'T
3 I TOO EARLY IN THIS CASE TO MAKE A JUDGMENT THAT
4 THAT ALONE VIOLATES 502?

5 MR. CHATTERJEE: NO, YOUR HONOR. YOU CAN
6 ISSUE AN ORDER ON JUDGMENT ON THE PLEADINGS IN OUR
7 FAVOR NOW.

8 THE COURT: WHY?

9 MR. CHATTERJEE: BECAUSE THEY ADMITTED AN
10 EXTRAORDINARY AMOUNT OF FACTS IN THEIR ANSWER, AND
11 THAT IS A KEY ISSUE BECAUSE IT'S THE SAME AS A
12 STIPULATION, A REQUEST FOR ADMISSION.

13 THE COURT: HAVE THEY ADMITTED FACTS
14 HAVING TO DO WITH THE NATURE OF THE TECHNOLOGICAL
15 BARRIER AND THE NATURE OF HOW THEY OVERCAME IT THAT
16 I CAN SAY, AS A MATTER OF LAW, THAT CONSTITUTES
17 HACKING?

18 MR. CHATTERJEE: YES, YOUR HONOR; THEY
19 DID.

20 NOT ONLY DID WE SUBMIT IT, MR. VACHANI
21 HIMSELF PUT IN TESTIMONY SAYING THAT HE DIDN'T
22 THINK PUTTING UP A TECHNICAL BARRIER WAS ALL THAT
23 HARD AND HE CIRCUMVENTED IT.

24 THE COURT: ARE ALL TECHNOLOGICAL
25 BARRIERS TREATED EQUALLY?

1 IN OTHER WORDS, ARE THERE SOME
2 TECHNOLOGICAL BARRIERS SUCH AS MAYBE -- I KNOW
3 THERE ARE IN USE CERTAIN ENTRY DEVICES SUCH AS,
4 TYPE THE WORD THAT APPEARS BELOW, AND IT'S KIND OF
5 A LITTLE ASKEW SO AS TO ASSURE THERE'S A REAL HUMAN
6 BEING ON THE OTHER SIDE, THAT'S A TECHNOLOGICAL
7 BARRIER. BUT THERE COULD BE OTHERS THAT MAY OR MAY
8 NOT SERVE AS A LINE OVER WHICH YOU CAN OR CANNOT
9 CROSS UNDER 502. AND AREN'T I TOO EARLY IN THIS
10 CASE TO BE DOING THE LINE DRAWING? BECAUSE A
11 JUDGMENT ON THE PLEADINGS MEANS CASE OVER.

12 MR. CHATTERJEE: SURE, YOUR HONOR. BUT
13 THIS IS A CASE THAT'S CONSIDERABLY MORE THAN THAT,
14 RIGHT? BECAUSE NOT ONLY WERE THERE TECHNOLOGICAL
15 BARRIERS, WE TOLD THEM WE DIDN'T WANT THEM TO
16 ACCESS.

17 THE REGISTER V. VERIO CASE, WHICH WE
18 CITE, IT WAS A CASE WHERE A C&D WAS SENT AND THEY
19 SAID, PLEASE DON'T ACCESS OUR WEBSITE IN THIS WAY.

20 AND THAT'S ENOUGH -- IF YOUR HONOR IS PUT
21 IN THE POSITION OF DECIDING WHAT KIND OF TECHNICAL
22 BARRIER IS ENOUGH, THERE'S NO SUPPORT FOR THAT KIND
23 OF LANGUAGE IN THE STATUTE.

24 IN THIS CASE IT'S NOT A PLACE WHERE THE
25 LINE IS CLOSE, THEY CROSSED IT REALLY FAR. WHAT

1 MORE COULD FACEBOOK HAVE DONE? WE HAD A TERMS OF
2 USE; WE ALERTED THEM TO THE TERMS OF USE; WE SENT
3 THEM A CEASE AND DESIST; WE TRIED TO WORK WITH
4 THEM; THEY ASSURED US THEY WERE GONNA WORK WITH US.

5 ALL OF THESE ARE ADMITTED IN THE
6 PLEADINGS. WE THEN ERECTED A TECHNICAL BARRIER.
7 THEY SAID, MAYBE YOU SHOULDN'T APPLY 502(C) IN THIS
8 INSTANCE BECAUSE IT WASN'T REALLY THAT HARD TO WORK
9 AROUND IT. AT WHAT POINT DOES THE COURT COME IN
10 AND SAY, WELL, WE ARE NOT GOING TO RECOGNIZE WHAT
11 502(C) SAYS BECAUSE THE BARRIER WASN'T ENOUGH --

12 THE COURT: SO YOU DON'T THINK ANY
13 TECHNOLOGICAL BARRIER IS SUFFICIENT?

14 MR. CHATTERJEE: I WOULD SAY UNDER THE
15 FACTS THAT ARE ADMITTED IN THIS CASE, THE
16 ESCALATION THAT WAS FOLLOWED AND THE INTENTIONAL
17 DECISION THAT CONSTANTLY DID NOT HONOR FACEBOOK'S
18 REQUESTS. THERE WAS A KNOWING AND WITHOUT
19 PERMISSION ACCESS TO THE FACEBOOK WEBSITE.

20 THEY MET THE EXPRESS -- THOSE ADMISSIONS
21 MEET THE EXPRESS LANGUAGE OF CALIFORNIA PENAL CODE
22 502(C).

23 MR. BURSOR: YOUR HONOR, MAY I?

24 THE COURT: CERTAINLY.

25 MR. BURSOR: THE ACTUAL ACCESS THAT

1 OCCURRED IN THIS CASE ALL OCCURRED WITHIN A TWO
2 MONTH SPAN, TWO AND A HALF MONTHS -- LATE DECEMBER
3 OF '08 THROUGH FEBRUARY OF '09.

4 AND THE VERY SPARSE EVIDENCE THAT IS IN
5 THE RECORD FROM THE VACHANI DECLARATION AND FROM
6 MR. AVALOS'S DECLARATION ATTACHING A CORRESPONDENCE
7 BETWEEN FACEBOOK AND MR. VACHANI, WHAT THAT SHOWS
8 IS THAT THE PARTIES AT THAT TIME WERE ATTEMPTING TO
9 RESOLVE THIS THROUGH HAVING POWER CONNECT TO
10 FACEBOOK THROUGH MEANS THAT WERE GOING TO BE
11 ACCEPTABLE TO BOTH SIDES.

12 WHAT IS NOT IN THE RECORD IS THE TIMING
13 OF WHEN THE SUPPOSED BARRIER OF THE IP BLOCKING WAS
14 IMPLEMENTED, WHAT IS NOT IN THE RECORD IS WHAT THE
15 CIRCUMVENTION WAS THAT GOT AROUND THE IP BLOCKING.
16 WHAT IS NOT IN THE RECORD IS WHERE THE PARTIES WERE
17 IN THEIR DISCUSSIONS AND WHETHER THE CIRCUMVENTION
18 WAS NECESSARY.

19 THE COURT: CAN I -- LET ME ASK YOU THIS:
20 CAN I SAY AT LEAST, HOWEVER, THAT IF FACEBOOK
21 ERECTS A TECHNOLOGICAL BARRIER, ANY CONDUCT TO
22 OVERCOME IT IS WITHOUT PERMISSION, BY DEFINITION?

23 MR. BURSOR: I DON'T THINK YOUR HONOR HAS
24 THE RECORD BEFORE YOU TO MAKE A SWEEPING
25 PRONOUNCEMENT OF THAT NATURE.

1 IF THERE'S GOING TO BE A BROAD GENERAL
2 STATEMENT TO THAT EFFECT, IT OUGHT TO BE MADE ON A
3 FULL EVIDENTIARY RECORD BY A COURT THAT KNOWS WHAT
4 HAPPENED IN THIS CASE, KNOWS IT HAS AN ACTUAL CASE
5 OR CONTROVERSY BEFORE IT THAT CALLS FOR RESOLUTION
6 IN THAT MATTER.

7 THE COURT: THAT MAY BE.

8 IN OTHER WORDS, ISN'T THE ESSENCE OF
9 PERMISSION THAT YOU DON'T HAVE TO DO SOMETHING TO
10 OVERCOME A BARRIER, PERMISSION MEANS THE GATE IS
11 OPEN. SO IF THEY DO ANYTHING TO LOCK THE GATE,
12 AREN'T YOU, BY DEFINITION, THEN ENTERING WITHOUT
13 PERMISSION?

14 MR. BURSOR: CLEARLY NOT, YOUR HONOR,
15 BECAUSE THAT WOULD CLEARLY BE WRONG, WITH ALL DUE
16 RESPECT, BECAUSE THERE WAS A GATE AND THERE WAS A
17 LOCK ON THE GATE, WHICH WAS THE USERNAME AND
18 PASSWORD ISSUED TO THE FACEBOOK USERS. FACEBOOK
19 USERS HAD PERMISSION TO USE THAT KEY AND THAT GATE
20 BY USING THE LOGIN NAME AND PASSWORD; THAT'S A
21 BARRIER.

22 THE COURT: THAT'S A FORM OF PERMISSION
23 TO THE USER. AND I CAN WORD IT IN A WAY SUCH THAT
24 IF THE TECHNOLOGICAL BARRIER STILL ALLOWED ACCESS
25 SIMPLY USING THE USERNAME AND PASSWORD, THAT'S NOT

1 A TECHNOLOGICAL BARRIER, IT'S ACTUALLY THE SAME.

2 BUT IF THE BARRIER IS ANYTHING MORE THAN
3 THAT -- I'M TRYING TO GET TO WHETHER OR NOT I'M IN
4 A 502 WORLD BECAUSE THE CLAIM IS UNDER 502, AND IF
5 I'M IN THE 502 WORLD IT STILL RAISES THE QUESTION
6 OF THE MERITS OF THE CLAIM.

7 THE QUESTION THAT I'M PUTTING IS, AND I
8 PUT IT TO BOTH SIDES QUITE FRANKLY IS, IF THERE
9 WERE TECHNOLOGICAL BARRIERS AREN'T I, AS OPPOSED TO
10 USERNAME AND PASSWORD, ISN'T THAT WHAT 502 IS ALL
11 ABOUT?

12 MR. BURSOR: LET ME EXPLAIN, YOUR HONOR,
13 I THINK VERY QUICKLY AND PRECISELY, WHY THE COURT
14 CAN'T MAKE THAT DETERMINATION NOW.

15 THE COURT DOESN'T HAVE A RECORD OF WHAT
16 THE BARRIER WAS OR CIRCUMVENTION WAS. SO IF THE
17 PARTIES ARE IN THE COURSE OF NEGOTIATING A
18 RESOLUTION OR ATTEMPTING TO, WHICH IS CLEARLY THE
19 CASE, SEE THE AVALOS DECLARATION, AND FACEBOOK SAYS
20 WE DON'T WANT YOU ACCESSING OUR SITE IN THIS MANNER
21 FROM THIS IP THEREFORE WE'VE BLOCKED IT, AND POWER
22 IS WORKING ON A DIFFERENT MEANS OF ACCESS, TRYING
23 TO IMPLEMENT FACEBOOK CONNECT AND IS DOING SO
24 THROUGH A DIFFERENT IP ADDRESS -- AND I'M NOT
25 SAYING THOSE ARE THE FACTS. I'M SAYING YOUR HONOR

1 DOESN'T HAVE THE FACTS BECAUSE FACEBOOK PUT IN NO
2 EVIDENCE.

3 IF THAT WAS THE CASE, THE COURT DOESN'T
4 HAVE A RECORD OF WHAT THE BARRIER WAS, WHY IT WAS
5 IN PLACE, HOW IT WAS CIRCUMVENTED, WHETHER THE
6 CIRCUMVENTION WAS PART OF THE JOINT PROJECT BETWEEN
7 THE TWO COMPANIES OF TRYING TO FIND COMMON GROUND
8 ON IMPLEMENTING THIS FACEBOOK CONNECT TECHNOLOGY.

9 THESE ARE ALL OPEN QUESTIONS IN THE CASE
10 BECAUSE FACEBOOK BROUGHT ITS MOTION BEFORE ANY
11 EVIDENCE WAS DEVELOPED, WITHOUT ANY DISCOVERY.

12 THEY COULD HAVE SUBMITTED A DECLARATION
13 FROM AN EMPLOYEE SAYING, THIS IS THE MEANS WE USED
14 TO BLOCK, AND SPECIFIED IT, AND HERE'S HOW IT WAS
15 OVERCOME AND HERE'S WHY WE DID THAT.

16 THE COURT: BY BRINGING THE MOTION IT
17 GIVES THE COURT AN OPPORTUNITY TO NARROW THE CASE.

18 SO ARE YOU SAYING I SHOULD RESIST EVEN
19 THE TEMPTATION TO SAY IN ORDER TO STATE A CLAIM
20 UNDER THIS YOU MUST ALLEGE A TECHNOLOGICAL BARRIER
21 AND GIVE ME FACTS?

22 AND IT SEEMS TO BE YOUR POSITION IS I
23 SHOULDN'T EVEN SAY THAT, THE TECHNOLOGICAL BARRIER
24 BY DEFINITION -- THERE'S NO BARRIER THAT CAN BE TOO
25 HIGH OR TOO LOW. AND SOMEHOW I'M BOTHERED BY THE

1 NOTION THAT I SHOULDN'T SAY ANYTHING.

2 NOW, I AM INTRIGUED BY THE NOTION THAT
3 THERE'S A SETTLEMENT BECAUSE I ALWAYS BELIEVE IN
4 WORLD PEACE AND I BELIEVE IT STARTS RIGHT HERE.

5 SO IF YOU TELL ME THAT THE PARTIES ARE
6 WORKING OUT SOME KIND OF A RESOLUTION TO THIS
7 PROBLEM WHICH WOULD AVOID THE COURT HAVING TO
8 COMMENT AT ALL ON 502 AND WHERE IT STANDS, BECAUSE
9 I SEE THE AMICUS AND THAT MEANS THAT THERE'S A
10 COMMUNITY OF PEOPLE OUT THERE, NOT SAYING YOU TWO
11 DON'T REPRESENT THAT COMMUNITY, BUT THAT ARE
12 CONCERNED WITH THE STATUTE AND HOW FAR IT GOES.

13 SO QUITE FRANKLY I THOUGHT THAT IT WOULD
14 BE BENEFICIAL TO STATE SOMETHING ON IT, BUT I DON'T
15 BELIEVE IN ACTING IF THERE'S NO REASON TO ACT. SO
16 IF YOU TELL ME THAT THESE TWO PARTIES WILL RESOLVE
17 THIS AND I WILL LEAVE IT TO SOME OTHER JUDGE TO
18 DEFINE THESE MATTERS, I'M HAPPY TO DO THAT.

19 MR. CHATTERJEE: YOUR HONOR, WE DID TRY
20 MEDIATION IN THIS CASE THROUGH THE COURT'S PROGRAM.
21 WE MADE ZERO PROGRESS.

22 JUST TO BE CLEAR, WHAT DOES FACEBOOK WANT
23 OUT OF THIS LITIGATION? WHAT FACEBOOK WANTS OUT OF
24 THIS LITIGATION AT THE END OF THE DAY IS THAT IF
25 POWER CHOOSES TO ACCESS THE FACEBOOK WEBSITE, IT

1 ACCESS IT THROUGH THE CONNECT PROGRAM WHICH IS WHAT
2 HUNDREDS OF THOUSANDS OF OTHER COMPANIES DO,
3 INCLUDING POWER COMPETITORS.

4 THAT'S ALL WE WANT. THAT'S ALL WE'VE
5 EVER WANTED IN THIS CASE. AND WE DON'T UNDERSTAND
6 WHY THEY CAN'T DO THAT. INSTEAD, THEY WANT TO
7 ENGAGE IN THIS UNRESTRICTED INTRUSION INTO OUR
8 COMPUTER, AND THEY PUT IT UNDER THE GUISE OF USER
9 REQUESTS.

10 IF YOU LOOK AT PARAGRAPH 75 AND 66 OF
11 THEIR OWN ANSWER, THEY ADMIT THEY ARE THE ONES
12 DOING IT, POWER IS, NOT THE USERS.

13 THE COURT: WELL, I'M ABOUT TO TAKE THIS
14 MATTER UNDER SUBMISSION, BUT I WILL GIVE YOU EACH
15 KIND OF A CLOSING WORD.

16 MR. BURSOR: YOUR HONOR --

17 THE COURT: I UNDERSTAND I'VE GOT THESE
18 ANTI-TRUST CLAIMS, BUT I'M NOT DEALING WITH THOSE
19 TODAY.

20 MR. BURSOR: ALL RIGHT.

21 YOUR HONOR, MY CLOSING WORD WILL BE THIS: I CAN
22 UNDERSTAND HOW IN THIS SORT OF NOVEL AREA OF THE
23 LAW, WE ARE AT A DIFFICULT SORT OF STITCH IN A
24 SOMEWHAT NEW AREA OF THE LAW AND THE COURT WANTS TO
25 STATE A RULE WITH SOME CLARITY SO THAT NOT ONLY

1 THESE PARTIES BUT OTHER PEOPLE OUT THERE IN THE
2 WORLD IN THIS FIELD CAN KNOW WHAT THEIR
3 RESPONSIBILITIES AND WHAT THEIR OBLIGATIONS ARE. I
4 CAN UNDERSTAND THE COURT'S DESIRE TO DO THAT.

5 BUT I THINK THE COURT HAS TO FOCUS IN ON
6 THE MOTION BEFORE IT. AND THE MOTION THAT'S BEFORE
7 IT DOES NOT PRESENT THE OPPORTUNITY FOR SUCH A
8 SWEEPING PRONOUNCEMENT. AND THE REASON IT DOES NOT
9 PRESENT THE OPPORTUNITY IS BECAUSE AS A MOTION FOR
10 SUMMARY JUDGEMENT, THE COURT HAS TO LOOK TO WHETHER
11 FACEBOOK HAS MET ITS EVIDENTIARY BURDEN.

12 A SUMMARY JUDGEMENT MOTION IS AN
13 EVIDENTIARY MOTION, YOU HAVE TO PUT ON EVIDENCE.
14 AND THEY HAVE NOT PUT ON ANY EVIDENCE THAT COULD
15 ALLOW THE COURT TO FORM A COGENT ANSWER TO ANY OF
16 THE VERY -- YOU KNOW, THE QUESTIONS THE COURT ASKED
17 WERE VERY ON POINT, VERY IMPORTANT, THEY GO TO THE
18 HEART OF THE MATTER. BUT THAT DOESN'T CHANGE THE
19 FACT THAT FACEBOOK HASN'T PUT IN EVIDENCE TO MEET
20 ITS EVIDENTIARY BURDEN UNDER RULE 56 TO GET SUMMARY
21 JUDGEMENT.

22 WE HAVE -- ON THE STANDING POINT, WE DID
23 PUT IN EVIDENCE. WE PUT IN A DECLARATION FOR
24 MR. VACHANI THAT SAID NONE OF THESE INJURIES
25 HAPPENED, THEY NEVER COULD HAVE HAPPENED, FACEBOOK

1 HAD NO CONCERN EVER THAT THEY WOULD HAVE HAPPENED.

2 AND IF YOU GO AND LOOK AT THE
3 CORRESPONDENCE BETWEEN MR. VACHANI AND FACEBOOK,
4 THE CONTEMPORANEOUS CORRESPONDENCE, THERE'S NO
5 CONCERN EXPRESSED BY ANY PARTY TO THOSE
6 COMMUNICATIONS ABOUT ANY OF THESE THINGS TALKED
7 ABOUT IN 502(E)(1) OR 502(B)(9).

8 AND SO YOU HAVE A CASE WHERE YOU HAVE A
9 TOTALLY UNINJURED PARTY THAT'S TRYING TO BULLY SOME
10 SMALLER START UP THAT WANTS TO COMPETE WITH THEM.
11 AND THEY HAVEN'T SHOWN AN INJURY AND THEY HAVEN'T
12 PUT ON EVIDENCE OF A VIOLATION TO GET SUMMARY
13 JUDGEMENT.

14 SO THEIR MOTION FOR SUMMARY JUDGEMENT
15 SHOULD BE DENIED, OURS SHOULD BE GRANTED BECAUSE
16 THEY DON'T HAVE STANDING UNDER 502(E)(1).

17 IF YOU WANT TO COME INTO THIS COURT AND
18 GET RELIEF UNDER 502, YOU HAVE TO SHOW YOU MADE AN
19 EXPENDITURE REASONABLY OR NECESSARILY INCURRED FOR
20 THESE PURPOSES. THEY DIDN'T DO THAT. OR YOU HAVE
21 TO SHOW YOU HAVE AN INJURY, AND THEY CONCEDE THEY
22 DIDN'T HAVE AN INJURY.

23 THANK YOU, YOUR HONOR.

24 THE COURT: VERY WELL.

25 COUNSEL.

1 MR. CHATTERJEE: I GUESS I WILL START
2 WITH THE CORE DISAGREEMENT AS TO WHETHER THIS IS IN
3 FACT A NOVEL QUESTION OF LAW; IT ISN'T.

4 COURTS HAVE RECOGNIZED FOR A LONG TIME
5 THAT COMPUTER INTRUSIONS ARE PROTECTED. THEY HAVE
6 BEEN PROTECTED UNDER THE COMPUTER FRAUD AND ABUSE
7 ACT AND THEY HAVE BEEN PROTECTED AS THE
8 NINTH CIRCUIT CASE OF EBAY V. BITTERS EDGE THAT I'M
9 SURE YOUR HONOR IS FAMILIAR WITH THAT TRESPASS TO
10 CHATTELS, AND CALIFORNIA PENAL CODE 502(C).

11 JUDGE SEEBORG IN THE CONNECTU CASE
12 RECOGNIZED THAT THIS TYPE OF ACTION, A FAR LESS
13 AGGRESSIVE FORM OF THIS TYPE OF ACTION, IS
14 ACTIONABLE UNDER CALIFORNIA PENAL CODE 502(C).

15 THE JOSEPH OAT HOLDINGS CASE THAT I
16 REFERRED TO YOU GRANTED SUMMARY JUDGEMENT FOR A
17 COMPUTER INTRUSION, YOUR HONOR.

18 WE'RE NOT ASKING YOU TO DO ANYTHING
19 HIGHLY UNUSUAL HERE, WE ARE ASKING YOU TO FOLLOW
20 WHAT THE LEGIONS OF CASES HAVE SAID IN THE PAST
21 THAT WHEN YOU SAY THE WELCOME LIGHT IS NOT ON AND
22 PEOPLE DECIDE TO WALK RIGHT PAST IT, THAT THAT IS
23 CONSIDERED AND SHOULD BE CONSIDERED A TRESPASS.
24 WHEN WE HAVE TO CONTINUALLY EXPEND MONEY TO NOTIFY
25 THEM AND KEEP THE TRESPASSERS OUT, THAT THAT IS A

1 PROPER DAMAGE OR LOSS UNDER THE LAW.

2 THESE ARE ALL ADMISSIONS UNDER THE
3 COMPLAINT. IN TAB A OF THE BINDER I GAVE YOU,
4 YOUR HONOR, WE ACTUALLY WENT THROUGH EACH ONE OF
5 THE ELEMENTS OF CALIFORNIA PENAL CODE 502(C) AND WE
6 MARRIED IT TO THE VERY ADMISSIONS OR OTHER EVIDENCE
7 SUBMITTED BY THE PARTIES TO SHOW HOW EACH ELEMENT
8 IS MET.

9 YOUR HONOR, THERE'S NO QUESTION HERE THAT
10 POWER MADE THE DECISION NOT TO COME INTO FACEBOOK
11 THROUGH THE AUTHORIZED CHANNELS, BUT AFTER THEY
12 WERE EXPRESSLY TOLD AND REPEATEDLY TOLD THAT THAT'S
13 THE ONLY WAY THEY SHOULD COME IN, THEY CHOSE NOT TO
14 DO THAT AND DECIDED TO HACK AROUND THE TECHNICAL
15 MEASURES THAT FACEBOOK PUT IN PLAY.

16 THOSE ARE THE PRECISE TYPES OF THINGS
17 THAT CALIFORNIA PENAL CODE 502(C) SEEKS TO PROTECT.

18 THE PREMISE THAT THE PLAINTIFF IS --
19 WE'RE THE PLAINTIFF, I'M SORRY -- THAT POWER IS
20 ARGUING, IS THAT IT SHOULDN'T BE -- IT SHOULD HAVE
21 TO BE A REALLY, REALLY BIG DEAL.

22 YOUR HONOR, THE STATUTE DOES NOT DEFINE
23 AT WHAT POINT A TECHNICAL MEASURE HAS TO BE SO
24 SUBSTANTIAL THAT IT COULD CONSTITUTES AN INTRUSION.

1 HERE, FACEBOOK DID EVERYTHING IT POSSIBLY
2 COULD. POWER DECIDED NOT TO HONOR ANY OF IT. AND
3 AT THAT POINT THEY SHOULD BE ENJOINED FROM ENTERING
4 FACEBOOK WITHOUT OUR EXPRESS PERMISSION. IT'S THE
5 ONLY WAY WE CAN GET THAT RELIEF, AND THAT'S WHAT
6 502(C) SEEKS TO PROTECT.

7 THE COURT: THANK YOU BOTH.

8 I THOUGHT THAT I WAS GOING TO ACTUALLY
9 HEAR FROM AN AMICUS. MY STAFF GAVE ME A NOTE THAT
10 WE HAD ACTUALLY CONSIDERED THAT THEIR BRIEF WAS
11 FILED AND WHAT WE WANTED WAS TO HAVE IT FILED
12 SEPARATELY FROM THEIR REQUEST FOR PERMISSION.

13 SO I SHOULD SAY THAT NOTWITHSTANDING THE
14 PARTIES' UNDERSTANDING PERHAPS THAT THE COURT DID
15 NOT HAVE THAT BRIEF UNDER CONSIDERATION BECAUSE IT
16 WAS NOT FILED, I READ IT AND I CONSIDERED IT AND IT
17 IS PART OF THE CONSIDERATIONS THAT THE COURT BRINGS
18 TO AT LEAST A PART OF THIS QUESTION. AND PERHAPS
19 THE ARGUMENT TODAY HAS ADVANCED THE QUESTION BEYOND
20 THAT TERMS OF USE ISSUE, BUT I HAD THOUGHT IT WOULD
21 BE WORTHWHILE TO ADDRESS IT.

22 VERY WELL. YES?

23 MS. GRANICK: I'M JENNIFER GRANICK AND
24 I'M A LAWYER FOR THE ELECTRIC FRONTIER FOUNDATION.
25 WE FILED THE AMICUS BRIEF IN QUESTION.

1 THE COURT: VERY WELL.

2 MS. GRANICK: JUST ON THE PROCEDURAL
3 POINT, IF I MAY.

4 OUR UNDERSTANDING OF THE --

5 THE COURT: COME FORWARD.

6 MS. GRANICK: OUR UNDERSTANDING OF THE
7 ORDER THAT THE COURT HAD FILED WAS THAT THE BRIEF
8 WHICH HAD BEEN ATTACHED TO OUR MOTION FOR LEAVE
9 WOULD BE FILED ON THE COURT DOCKET. I DIDN'T
10 UNDERSTAND FROM THE MOTION THAT WE WERE SUPPOSED TO
11 TAKE ADDITIONAL ACTION TO FILE THE BRIEF.

12 THE COURT: I SEE.

13 MS. GRANICK: WE HAD ATTACHED IT WITH THE
14 MOTION FOR LEAVE.

15 THE COURT: OKAY.

16 MS. GRANICK: NOW GIVEN YOUR DISCUSSION
17 TODAY I UNDERSTAND THAT WHAT WAS BEING ASKED FOR US
18 WAS TO TAKE THE BRIEF AND GO THROUGH ECF AND FILE
19 IT AGAIN.

20 THE COURT: SEPARATE FROM THE MOTION FOR
21 LEAVE.

22 BUT I HAVE IT, SO I WILL CONSIDER --
23 UNLESS THERE'S SOME OBJECTION, IT SOUNDED LIKE THE
24 NAMED PARTIES BELIEVED THAT SINCE YOU HADN'T DONE
25 ANYTHING FURTHER THEY NEED NOT RESPOND TO IT. AND

1 PERHAPS WHAT I UNDERSTAND THERE TO BE A REQUEST
2 BEFORE I ISSUE AN ORDER, I GIVE THEM AN OPPORTUNITY
3 TO RESPOND.

4 MS. GRANICK: RIGHT.

5 AND YOUR HONOR IT MAY BE APPROPRIATE,
6 GIVEN THE DISCUSSION WE HAD IN THE COURT TODAY, IT
7 MAY BE APPROPRIATE AT THIS POINT FOR US TO, GIVEN
8 THE WAY THE ARGUMENT HAS GONE AND WHAT IT SEEMS
9 THAT YOUR HONOR'S CONCERN IS AND THE PARTICULAR
10 QUESTION OF TECHNOLOGICAL MEASURES AND
11 CIRCUMVENTION, IT MIGHT BE APPROPRIATE FOR US TO
12 AMEND OUR BRIEF TO ADDRESS MORE SPECIFICALLY THE
13 ISSUES THAT WERE RAISED IN THE HEARING TODAY AND
14 THEN TO FILE THAT AT SOME POINT IN TIME.

15 THE COURT: SURE. I WELCOME YOUR INPUT,
16 UNLESS THERE'S AN OBJECTION FROM THE PARTIES.

17 SO WHATEVER WE DO TODAY, SINCE I PRESUME
18 I HAVE A REQUEST FOR YOU TO HAVE LEAVE TO RESPOND
19 TO THE AMICUS.

20 MR. CHATTERJEE: YES, YOUR HONOR, WE DO.

21 ALTHOUGH WE WOULD PREFER FOR THINGS TO BE
22 SET, SUBMITTED BECAUSE THIS HAS BEEN LINGERING
23 AROUND.

24 THE COURT: YOU LIKE CLOSURE, AND
25 EVERYBODY DOES AND SO DO I.

1 BUT IT DOES SEEM TO ME THE INITIAL
2 CONCERN WITH TERMS OF USE STILL REMAINS WITH THE
3 COURT AND I INTEND TO ADDRESS IT. BUT IF YOU HAVE
4 CONCERNS THAT WOULD ADVANCE THE ISSUE FOR THE
5 AMICUS TO EVEN TECHNOLOGICAL BARRIERS, HOW LONG
6 WOULD IT TAKE YOU TO PROVIDE THE COURT WITH YOUR
7 SUPPLEMENTAL BRIEF?

8 MS. GRANICK: I DON'T THINK IT WOULD TAKE
9 VERY LONG. I, FRANKLY, THINK IT COULD BE SOMETHING
10 WE COULD DO IN TWO WEEKS.

11 THE COURT: TWO WEEKS IS A LONG TIME FOR
12 ME. I WILL BE ON VACATION.

13 MS. GRANICK: YOU ARE THE JUDGE, SO I
14 CAN --

15 THE COURT: TWO WEEKS? YOU GOT IT. HOW
16 LONG WILL YOU NEED AFTER THE TWO-WEEK PERIOD THAT
17 COUNSEL IS ASKING FOR FOR HER SUPPLEMENTAL TO
18 RESPOND TO THAT?

19 MR. CHATTERJEE: YOUR HONOR, I WOULD SAY
20 ONE TO TWO WEEKS.

21 THE COURT: AND SIMULTANEOUSLY --

22 MR. BURSOR: WE WOULD LIKE TO RESPOND.

23 THE COURT: SO THE WHOLE THING WILL BE
24 BEFORE ME THEN IN FOUR WEEKS?

25 MR. CHATTERJEE: YOUR HONOR, IF I MAY ASK

1 A QUESTION, SHOULD THESE -- I JUST WANT TO MAKE
2 SURE WE ARE NOT GOING THROUGH AND REHASHING ALL OF
3 THE PAST.

4 SHOULD WE BE FOCUSING ON THE QUESTION
5 YOUR HONOR ASKED ABOUT TECHNOLOGICAL MEASURES AND
6 WHERE SHOULD THE LINE BE DRAWN, OR SHOULD IT BE
7 ANYTHING PEOPLE WANT TO SAY?

8 THE COURT: WELL, THAT IS THE AREA I'M
9 CONCERNED ABOUT. I WOULD HAVE YOU RESPOND TO THE
10 EXTENT YOU WISH TO, TO TWO AREAS.

11 FIRST IS THE ISSUE OF THE TERMS OF USE
12 BARRIER AND WHETHER THAT QUALIFIES UNDER 502, WHICH
13 WAS THE INITIAL POSITION I HAD FROM THE AMICUS.

14 AND TO THE EXTENT THAT THE AMICUS BRIEF
15 WOULD ADD FURTHER ARGUMENT BEYOND WHAT YOU'VE
16 ALREADY ARGUED ON TECHNOLOGICAL TERMS AS PLED.

17 YOU CALLED IT A MOTION FOR SUMMARY
18 JUDGEMENT, BUT TECHNICALLY IT'S A MOTION FOR
19 JUDGMENT ON THE PLEADINGS. SO I ACCEPT WHATEVER
20 POWER HAS ALLEGED AS PROVABLE, AND SO WHAT I HAVE
21 BEFORE ME IS FACEBOOK'S ARGUMENT THAT THAT
22 CONSTITUTES A VIOLATION OF 502.

23 YOUR AMICUS BRIEF HAS TO MAKE THE SAME
24 ASSUMPTION TO BE USEFUL. SO YOU HAVE AN
25 OPPORTUNITY IN YOUR BRIEF TO RESPOND TO WHATEVER

1 NEW INFORMATION IS SUBMITTED.

2 MR. CHATTERJEE: SO WE ARE FOCUSING ON
3 THE TECHNOLOGICAL MEANS?

4 THE COURT: YES.

5 MR. CHATTERJEE: OKAY. THANK YOU.

6 MS. GRANICK: BUT I THINK ALSO, IF I
7 UNDERSTAND CORRECTLY, THE SUBSTANTIVE, THE BRIEF WE
8 ATTACHED --

9 THE COURT: YES, I SAID THAT INITIALLY.

10 IN OTHER WORDS, THERE IS AN INITIAL
11 MATTER IT SEEMS TO ME WE'VE OVERCOME, BUT I WASN'T
12 CLEAR WE HAD OVERCOME IT WITH AN ACKNOWLEDGEMENT
13 THAT IT WAS NOT A VIOLATION.

14 I DO INTEND TO ADDRESS IT. THAT'S IN THE
15 FIRST AMICUS BRIEF. SO TO THE EXTENT YOU HAVEN'T
16 RESPONDED TO THAT AND YOU WISH TO, YOU MAY IN THIS
17 BRIEF.

18 MR. CHATTERJEE: RIGHT. THANK YOU,
19 YOUR HONOR.

20 MR. BURSOR: YOUR HONOR, CAN I ASK FOR
21 ONE SUBTLE CLARIFICATION.

22 THERE WAS ALSO A MOTION ON OUR
23 COUNTERCLAIMS THAT WAS NOTICED FOR TODAY. DOES THE
24 COURT INTEND TO RULE ON THOSE OR TO HAVE ARGUMENT
25 ON THOSE AT SOME DATE IN THE FUTURE AND THEN RULE

1 ON THEM?

2 THE COURT: I DON'T -- I WILL LET YOU
3 KNOW. THIS WAS THE ONLY MOTION, THE MOTION HAVING
4 TO DO WITH THE 502 THAT I THOUGHT WAS RIPE FOR A
5 DECISION ONE WAY OR THE OTHER, DENY IT, GRANT IT.
6 AND THE OTHER MOTIONS I WILL SET FORWARD TO ANOTHER
7 TIME.

8 MR. BURSOR: THANK YOU, YOUR HONOR.

9 MR. CHATTERJEE: THANK YOU, YOUR HONOR.

10 MS. GRANICK: THANK YOU VERY MUCH,
11 YOUR HONOR.

12 THE COURT: VERY WELL. THAT COMPLETES
13 OUR LAW AND MOTION CALENDAR.

14 (WHEREUPON, THE PROCEEDINGS IN THIS
15 MATTER WERE CONCLUDED.)

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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT
REPORTER OF THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,
CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED
TRANSCRIPTION TO THE BEST OF MY ABILITY.

SUMMER A. FISHER, CSR, CRR
CERTIFICATE NUMBER 13185