

PAGES 1 - 43

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE RICHARD SEEBORG, JUDGE

INTERSERVE, INC. DBA TECHCRUNCH,  
A DELAWARE CORPORATION, AND CRUNCHPAD,  
INC., A DELAWARE CORPORATION,

PLAINTIFFS,

VS.

NO. C 09-5812 RS

FUSION GARAGE PTE LTD., A SINGAPORE  
COMPANY,

DEFENDANT.

SAN FRANCISCO, CALIFORNIA  
THURSDAY  
MAY 13, 2010  
2:00 O'CLOCK P.M.TRANSCRIPT OF PROCEEDINGSAPPEARANCES:**FOR PLAINTIFFS:**WINSTON & STRAWN  
101 CALIFORNIA STREET  
39TH FLOOR  
SAN FRANCISCO, CALIFORNIA 94111-5802**BY: ANDREW P. BRIDGES, ESQUIRE  
MATTHEW A. SCHERB, ESQUIRE****FOR DEFENDANT:**QUINN EMANUEL URQUHART OLIVER & HEDGES  
LLP  
555 TWIN DOLPHIN DRIVE, 5TH FLOOR  
REDWOOD SHORES, CALIFORNIA 94065**BY: CLAUDE M. STERN, ESQUIRE  
EVETTE D. PENNYPACKER, ATTORNEY AT LAW****REPORTED BY: KATHERINE WYATT, CSR 9866, RMR, RPR**OFFICIAL REPORTER - US DISTRICT COURT  
COMPUTERIZED TRANSCRIPTION BY ECLIPSE

KATHERINE WYATT, OFFICIAL REPORTER, CSR, RMR (925) 212-5224

1 MAY 13, 2010

2:00 O'CLOCK P.M.

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

4 THE CLERK: CALLING CIVIL CASE NUMBER 09-5812,  
5 INTERSERVE, INC. VERSUS FUSION GARAGE.

6 PLEASE COME FORWARD, AND STATE YOUR APPEARANCE FOR  
7 THE RECORD.

8 MR. BRIDGES: GOOD AFTERNOON, YOUR HONOR. ANDREW  
9 BRIDGES AND MATTHEW SCHERB FROM WINSTON & STRAWN FOR THE  
10 PLAINTIFFS.

11 MR. STERN: AND GOOD AFTERNOON, YOUR HONOR. CLAUDE  
12 STERN AND EVETTE PENNYPACKER OF QUINN EMANUEL ON BEHALF OF THE  
13 DEFENDANT, FUSION GARAGE.

14 YOUR HONOR, WE HAVE A VARIETY OF ELECTRONIC GIZMOS TO  
15 SET UP, AND I DON'T WANT TO DELAY YOUR SCHEDULE. IT WILL  
16 PROBABLY TAKE US SEVERAL MINUTES JUST TO MAKE SURE THAT  
17 EVERYTHING IS CALIBRATED.

18 THE COURT: WELL, WHY DON'T I GO AHEAD AND GIVE YOU  
19 SOME OF MY PRELIMINARY COMMENTS? AND THEN, THAT MAY HAVE AN  
20 IMPACT ON WHETHER OR NOT YOU WANT THE WHOLE SOUND AND LIGHT TO  
21 BE PROVIDED.

22 SO OKAY. LET ME JUST GO OVER WHAT SOME OF MY  
23 PRELIMINARY IMPRESSIONS HAVING READ THROUGH YOUR PAPERS, BOTH  
24 WITH RESPECT TO THE MOTION FOR PRELIMINARY INJUNCTION AND THEN  
25 THE MOTION TO DISMISS.

1 IF YOU WANT THEN WE CAN TAKE A BRIEF BREAK. AND IF  
2 THERE IS GOING TO BE SOME AUDIO VISUAL PROVIDED TO ME, YOU CAN  
3 SET IT UP.

4 ALL RIGHT. LET ME FIRST ADDRESS THE MOTION FOR  
5 PRELIMINARY INJUNCTION THAT PLAINTIFFS HAVE PRESENTED. AND AS I  
6 UNDERSTAND IT, THE PLAINTIFF IS SEEKING AN INJUNCTION IN ORDER  
7 TO IMPOSE A CONSTRUCTIVE TRUST ON THE REVENUES FROM THE SALE OF  
8 THIS DEVICE, THE JOOJOO DEVICE.

9 IT DOES APPEAR TO ME THAT WITH RESPECT TO THE  
10 LIKELIHOOD-OF-SUCCESS-ON-THE-MERITS PRONG OF THE TEST, WHICH  
11 WE'RE ALL FAMILIAR WITH, THAT THE PLAINTIFF DOES MAKE A SHOWING  
12 WITH RESPECT TO SOME OF ITS CLAIMS ON LIKELIHOOD OF SUCCESS ON  
13 THE MERITS. AND I WILL DISCUSS THIS IN A LITTLE MORE DETAIL AS  
14 I GO THROUGH THIS.

15 I THINK THE RECORD DOES REFLECT THAT THE PARTIES DID  
16 ENTER INTO A JOINT VENTURE, ALBEIT WITH VARIOUS TERMS STILL TO  
17 BE DETERMINED. BUT I THINK THE EVIDENCE THAT I HAVE SEEN DOES  
18 INDICATE THAT IT WENT BEYOND THE NEGOTIATION PROCESS AND  
19 REFLECTED COLLABORATIVE EFFORTS ON A PROJECT THAT I THINK DO  
20 RISE TO THE LEVEL OF A JOINT VENTURE.

21 AND THE VERY FACT THAT AT A CERTAIN POINT IN TIME  
22 THERE'S A DISCUSSION OF HOW THE PARTIES NEED TO REACH A DIVORCE  
23 I THINK DOES, AS PLAINTIFFS SUGGEST, INDICATE THAT THERE WAS  
24 SOMETHING BEYOND AN AGREEMENT TO DISCUSS GOING ON.

25 SO AS TO, IN PARTICULAR, THE BREACH OF FIDUCIARY DUTY

1 CLAIM AND THE FRAUD CLAIM, I THINK THAT FIRST PRONG, AT LEAST IN  
2 MY INITIAL READING, SEEMS TO BE SATISFIED.

3 I AM NOT CONVINCED, HOWEVER, THAT PLAINTIFFS HAVE  
4 MADE A SHOWING OF IRREPARABLE INJURY. I DON'T THINK THEY HAVE  
5 SHOWN THAT THEY WOULD BE UNABLE TO OBTAIN AN ENFORCEABLE  
6 JUDGMENT FOR DAMAGES IN THE EVENT THAT THEY WERE TO PREVAIL. THE  
7 SIMPLE FACT THAT FUSION IS A FOREIGN ENTITY, IT HAS FUNDS  
8 OFFSHORE, THAT'S NOT ENOUGH.

9 PLAINTIFF CLAIMS AN ENTITLEMENT TO A SHARE OF THE  
10 PROFITS, BUT THERE ISN'T ANY RES, IF YOU WILL, TO BE FROZEN HERE  
11 AT THIS POINT. THERE'S SOME INDICATION THAT THERE'S SOME  
12 PRODUCT REVENUE, NOT ALL OF WHICH WOULD BE EVEN UNDER  
13 PLAINTIFFS' THEORY, SOMETHING THAT PLAINTIFF WOULD NECESSARILY  
14 BE ENTITLED TO.

15 AND I'M ALSO AWARE THAT TO FREEZE THE REVENUE HERE  
16 WOULD CARRY THE POTENTIAL OF SHUTTING DOWN THE FUSION'S ABILITY  
17 TO DO BUSINESS. AND I DON'T THINK THAT A SIMILAR HARDSHIP  
18 WOULD BE IMPOSED UPON THE PLAINTIFFS.

19 SO, ACCORDINGLY, MY INITIAL INCLINATION AT THIS  
20 POINT IS TO DENY THE MOTION FOR PRELIMINARY INJUNCTION ON THIS  
21 RECORD ON THE FAILURE TO MAKE AN ADEQUATE IRREPARABLE HARM  
22 SHOWING.

23 BEFORE I GO INTO MY PRELIMINARY COMMENTS ON THE  
24 MOTION TO DISMISS, LET ME DIGRESS FOR A MOMENT ABOUT THE  
25 FILINGS I HAVE RECEIVED AND, IN PARTICULAR, THE FILINGS I HAVE

1 RECEIVED UNDER SEAL. I KNOW THERE WERE A FLURRY JUST IN THE  
2 LAST TWO DAYS OF BACK AND FORTH LAST MINUTE EVIDENTIARY  
3 MATERIAL THAT HAS BEEN PRESENTED. AND I'M NOT ACTUALLY --  
4 THESE COMMENTS ARE NOT SPECIFICALLY DIRECTED TO THAT WAVE, BUT  
5 IN TERMS OF THE FIRST WAVE OF MATERIALS THAT I SAW, I THINK  
6 THERE'S NOTHING THAT QUALIFIED FOR UNDER SEAL FILING.

7 INFORMATION SUCH AS WHETHER OR NOT ONE PARTY IS  
8 SAYING:

9 "LET'S PLAY THE OTHER PARTY ALONG," OR, YOU  
10 KNOW, WHETHER OR NOT E-MAILS WERE FABRICATED IN TERMS OF THEIR  
11 ORIGIN, THINGS LIKE THAT, THAT'S NOT MATERIAL THAT GETS FILED  
12 UNDER SEAL. IT'S NOT CONFIDENTIAL. IT'S NOT PROPRIETARY. IT  
13 MAY BE EMBARRASSING, BUT MY CONCERN IS THAT THERE'S GROSS  
14 OVERDESIGNATION THAT I ALREADY SEE IN THIS CASE.

15 SO AT THE VERY LEAST IN TERMS OF WHAT HAS BEEN  
16 SUBMITTED TO ME PARTIES ARE GOING TO GO BACK AND SCALE DOWN THE  
17 REQUEST TO SEAL. THERE MAY BE -- AND I KNOW IN THE MOST RECENT  
18 WAVE OF MATERIALS THERE WAS SOME REVENUE DISCUSSION AND  
19 CERTAINLY IF THERE WERE, YOU KNOW, BUSINESS PLANS GOING FORWARD,  
20 THAT'S THE KIND OF MATERIAL THAT ARGUABLY CAN BE SEALED. BUT  
21 THE AMOUNT OF STUFF THAT WAS SEALED -- PROPOSED TO BE SEALED WAS  
22 JUST WAY BEYOND THE PALE, IN MY VIEW.

23 SO LET ME TALK A LITTLE ABOUT THE MOTION TO DISMISS.  
24 TO MAKE A LONG STORY SHORT, ON THE FIVE CLAIMS THAT ARE  
25 PRESENTED IN THE COMPLAINT -- AND THIS IS THE DEFENDANT'S MOTION

1 TO DISMISS -- I'M INCLINED TO GRANT THE MOTION TO DISMISS BUT  
2 WITH LEAVE TO AMEND WITH RESPECT TO SEVERAL OF THESE CLAIMS.

3 FIRST OF ALL, WITH RESPECT TO THE LANHAM ACT CLAIM,  
4 THE FIRST CLAIM FOR RELIEF, FALSE ADVERTISING, I DO HAVE SOME  
5 SIGNIFICANT QUESTION ABOUT WHETHER OR NOT PLAINTIFFS CAN PLEAD  
6 THE REQUISITE COMPETITIVE INJURY IN THIS CASE. I THINK THAT  
7 ARGUMENT IS WELL-TAKEN.

8 I'M SKEPTICAL YOU CAN BE A CONCEIVABLE COMPETITOR,  
9 WHICH SEEMS TO BE WHAT PLAINTIFF IS SUGGESTING. THAT, YOU KNOW,  
10 THE PLAN WILL BE BECAUSE THE JOINT VENTURE DOESN'T WORK WE'RE  
11 GOING TO COMPETE WITH YOU IN THE FUTURE.

12 I DON'T THINK THAT THAT IS ENOUGH. BUT I WOULD BE  
13 INCLINED TO LET THE PLAINTIFF SEE IF THEY CAN DEVELOP THAT  
14 THEORY INTO SOME VIABLE FORM.

15 THE BREACH OF FIDUCIARY DUTY CLAIM AS I NOTED IN THE  
16 CONTEXT OF THE PRELIMINARY INJUNCTION DISCUSSION, I THINK THAT  
17 THERE IS A CLAIM THAT HAS BEEN PRESENTED OF A BREACH OF A JOINT  
18 VENTURE.

19 AND I THINK THAT THERE MAY BE SOME CLEANUP REQUIRED,  
20 AS POINTED OUT IN DEFENDANT'S MOTION PAPERS IN TERMS OF BEING  
21 QUITE SPECIFIC AS TO WHICH ENTITIES ARE INVOLVED AND ALONG  
22 THOSE LINES, BUT I THINK THAT'S MORE IN THE NATURE OF SOME  
23 PERFECTING OF THE CLAIM.

24 I THINK THE CLAIM IS A VIABLE ONE AT THIS STAGE OF  
25 THE GAME.

1 THE MISAPPROPRIATION OF BUSINESS IDEAS, I TEND TO  
2 THINK THAT THE DEFENDANTS ARE RIGHT ABOUT THAT CLAIM. I DON'T  
3 THINK THAT THERE IS A VIABLE CLAIM THERE. THE TWO CASES THAT  
4 SEEM TO BE CITED, THE DESNY CASE, WHICH IS A CONTRACT, IMPLIED  
5 CONTRACT CONCEPT, AND THE HOLLYWOOD CASE, WHICH GOES MORE ALONG  
6 TORT LINES, I DON'T THINK EITHER OF THOSE CLAIMS SUPPORT THE  
7 NOTION THAT IN THIS INSTANCE THERE IS SUCH A THING AS AN  
8 AVAILABLE CLAIM FOR MISAPPROPRIATION OF BUSINESS IDEAS.

9 I KNOW THAT PLAINTIFF SAYS:

10 "WE'RE NOT TALKING ABOUT TRADE SECRETS. WE'RE  
11 TALKING ABOUT SOMETHING VERY DIFFERENT. IF THEY WERE  
12 TALKING ABOUT TRADE SECRETS, THEY WOULD HAVE THE  
13 POTENTIAL PREEMPTION PROBLEM."

14 BUT THE BOTTOM LINE IS I JUST DON'T THINK THERE'S A  
15 CLAIM THERE, AND I'M INCLINED TO DISMISS THAT WITHOUT LEAVE TO  
16 AMEND.

17 THE FRAUD CLAIM, I THINK THE FRAUD CLAIM MAY WELL BE  
18 A VIABLE CLAIM. I AM NOT, HOWEVER, SATISFIED THAT NINE -- I  
19 THINK 9 (B) APPLIES, AND I'M NOT COMFORTABLE THAT THERE'S BEEN A  
20 SUFFICIENT AMOUNT OF SPECIFICITY, PARTICULARITY ON THE FOURTH  
21 CLAIM, FROM ALL THE MATERIALS THAT HAVE BEEN FLYING BY ME WITH  
22 RESPECT TO THE PAPERS THAT HAVE BEEN SUBMITTED. I SUSPECT THAT  
23 THAT THAT -- THERE MAY BE MATERIAL THERE THAT WILL PROVIDE THE  
24 PLAINTIFF WITH A SUFFICIENT BASIS TO PROCEED WITH A 9 (B)  
25 OBLIGATION, SO I'M INCLINED TO DISMISS THAT WITH LEAVE TO AMEND.

1 THE 17200 AND 17500 CLAIMS, 17200, AMONGST OTHER  
2 THINGS, REQUIRES SOME UNDERLYING WRONG. I'M ASSUMING THAT, AS  
3 IS SUGGESTED IN THE COMPLAINT, THAT THE UNDERLYING WRONG WOULD  
4 BE THE FRAUD. IF LEAVE TO AMEND IS GRANTED, AND THE PLEADING  
5 SATISFIES 9 (B), THEN PRESUMABLY WOULD BE THE BASIS FOR THE  
6 17200 CLAIM.

7 THE 17500 CLAIM, THE STATE FALSE ADVERTISING CLAIM, I  
8 THINK THAT HAS SOME OF THE SAME PROBLEMS THAT THE LANHAM ACT  
9 CLAIM HAS. AND SO I'M, AGAIN, SKEPTICAL THAT THERE'S GOING TO  
10 BE -- THERE'S, IN THIS INSTANCE, I'D CHARACTERIZE IT AS A  
11 STANDING PROBLEM, BUT A PROBLEM WITH RESPECT TO BEING ABLE TO  
12 SHOW INJURY, IN FACT.

13 SO THOSE ARE MY PRELIMINARY COMMENTS WITH RESPECT TO  
14 THESE MOTIONS. IF YOU WANT, MR. STERN, YOU WANT A MOMENT TO GET  
15 SET UP? IS THAT WHAT YOUR --

16 **MR. STERN:** YOUR HONOR, THERE ARE A COUPLE SLIDES  
17 THAT I WOULD LIKE TO SHOW YOUR HONOR, IF I MAY.

18 **THE COURT:** ALL RIGHT. FINE.

19 **MR. STERN:** ALTHOUGH, OBVIOUSLY, I KNOW IT'S BEST  
20 SOMETIMES TO SIT DOWN AND NOT DO ANYTHING. BUT MY BIGGEST  
21 PROBLEM IS I DO NOT KNOW WHAT COUNSEL IS GOING TO SAY, AND I  
22 DON'T WANT TO THEN START PUTTING ALL THE MACHINERY TOGETHER. SO  
23 PERHAPS I CAN JUST HOOK IT ALL UP THERE, AND WE WILL SEE WHERE  
24 WE GO.

25 **THE COURT:** THAT'S FINE WITH ME. THAT'S FINE.



1 MR. BRIDGES, I ASSUME YOU DON'T HAVE A PROBLEM WITH  
2 THEIR HOOKING UP THEIR EQUIPMENT.

3 MR. BRIDGES: NOT AT ALL, YOUR HONOR. I WOULD LIKE  
4 TO SAY A FEW THINGS IN RESPONSE TO YOUR INITIAL OBSERVATIONS.

5 THE COURT: OH, I'M SURE. BUT WHAT I'M SUGGESTING IS  
6 SO THAT WE DON'T HAVE TO DISRUPT IT, IF HE CAN GET ALL --  
7 WHOEVER WANTS TO SET UP WHATEVER THEY WANT TO SET UP SO THAT  
8 THEN WHEN I COME BACK WE CAN HAVE THE ARGUMENT RATHER THAN HAVE  
9 YOU START, TAKE A BREAK, HAVE HIM SET UP MATERIALS.

10 THAT'S KIND OF HOW I'M SUGGESTING WE PROCEED.

11 MR. BRIDGES: WELL, ONE POSSIBILITY IS HE COULD HEAR  
12 WHAT I HAVE TO SAY, AND THEN DECIDE.

13 THE COURT: WE COULD DO IT THAT WAY.

14 OKAY, MR. BRIDGES. GO AHEAD.

15 MR. BRIDGES: THANK YOU, YOUR HONOR. I'LL ZERO IN ON  
16 JUST A FEW POINTS, BECAUSE WE'VE GIVEN YOU A LOT TO READ AND  
17 IT'S OBVIOUS YOU'VE GOTTEN THROUGH IT.

18 FIRST, ON THE MOTION TO DISMISS, THE MISAPPROPRIATION  
19 TORT IS REAL. AND I THINK THAT IN THE PAPERS THERE'S A CASE  
20 THAT I WOULD ASK THE COURT TO FOCUS ON. WE DIDN'T DISCUSS IT AS  
21 MUCH IN THE PAPERS AS PERHAPS WE SHOULD HAVE.

22 IT'S THE CITY SPORTS CASE. THERE WERE THREE DIFFERENT  
23 CITY SPORTS DECISIONS. THE IMPORTANT ONE TO FOCUS ON IS THE  
24 NINTH CIRCUIT DECISION.

25 THIS IS A CASE THAT THE DEFENDANT CITED FOR SOME

1 OTHER REASONS. BUT THAT CASE UPHELD -- IN THE NINTH CIRCUIT  
2 UPHELD THE EXACT KIND OF MISAPPROPRIATION TORT THAT WE ARE  
3 TALKING ABOUT. AND LET ME SEE IF I CAN GET THE --

4 **THE COURT:** WHAT ARE THE IDEAS THAT WERE  
5 MISAPPROPRIATED?

6 **MR. BRIDGES:** WELL, IN THE CITY SOLUTIONS CASE --

7 **THE COURT:** I'M ASKING IN THIS CASE.

8 **MR. BRIDGES:** RIGHT. IF I COULD JUST GIVE THAT CASE  
9 BY WAY OF --

10 **THE COURT:** ALL RIGHT.

11 **MR. BRIDGES:** WHAT HAPPENED WAS THAT WAS A CASE  
12 WHERE SOME PARTIES GOT TOGETHER TO MAKE INITIAL EFFORTS TO  
13 PREPARE A BID TO PLACE NEWS RACKS IN THE CITY OF SAN FRANCISCO.

14 THE NEWS RACKS WOULD BE FOR FREE. THE CITY WOULD GIVE  
15 THEM PLACES TO PUT THEM. THEY COULD BEAR ADVERTISING AND THE  
16 LIKE. AND THEY ENDED UP NOT DOING THE DEAL. ONE CUT THE OTHER  
17 OUT RIGHT AT THE END.

18 AND THAT CASE ENDED UP GOING FOR THE DEFENDANT ON THE  
19 GROUNDS THAT IT WAS NOT A JOINT VENTURE BECAUSE IT WAS REALLY  
20 JUST PROPOSING A TRANSACTION. IT WAS NOT AN ONGOING OPERATION OF  
21 A BUSINESS. THEY WERE COMING TOGETHER TO TRY TO PROPOSE A BID,  
22 AND THEN THEY ENDED UP NOT BIDDING TOGETHER.

23 THE COURT OF APPEALS FOUND THERE THAT A COUPLE OF  
24 INGREDIENTS OF THE BID WERE THE IDEAS THAT WERE MISAPPROPRIATED.  
25 IN OTHER WORDS, TWO OR THREE ELEMENTS LIKE MAYBE THERE WOULD BE

1 ADVERTISING ON ONLY FIFTY PERCENT OF THE BOXES OR SOMETHING LIKE  
2 THAT, OR THAT THERE WOULD NOT BE A REVENUE SHARE, STRUCTURING  
3 THE BID IN THAT WAY.

4 THE CONTRIBUTION OF THOSE IDEAS WERE CONSIDERED THE  
5 PROPERTY THAT WAS MISAPPROPRIATED. AND THE NINTH CIRCUIT ALLOWED  
6 THAT CLAIM TO PROCEED.

7 **THE COURT:** I'M NOT SUGGESTING THAT THE CASE DOESN'T  
8 SAY THAT. I'LL GO BACK AND LOOK AT IT. BUT THE WHOLE NOTION,  
9 OF COURSE, OF IDEAS, WE'RE SO FAMILIAR WITH THE IDEA THAT THE  
10 IDEAS ARE NOT PROTECTABLE IN THE COPYRIGHT CONTEXT AND OTHER --  
11 YOU KNOW, YOU CAN'T PROTECT AN IDEA. YOU CAN PROTECT HOW THE  
12 IDEA IS PRESENTED OR PERFORMED OR WHAT HAVE YOU.

13 SO THIS NOTION OF IDEAS SEPARATE AND APART FROM TRADE  
14 SECRETS, SEPARATE AND APART FROM COPYRIGHTABLE MATERIAL OR OTHER  
15 INTELLECTUAL PROPERTY IS SOMEWHAT A DIFFERENT NOTION.

16 **MR. BRIDGES:** THOSE OF US WHO PRACTICE A LOT OF  
17 PATENT AND COPYRIGHT LAW CERTAINLY HAVE THAT INSTINCT. BUT WHAT  
18 IS INTERESTING IS IF YOU LOOK AT THE CALIFORNIA SUPREME COURT'S  
19 CASE ON AN INSURANCE CONTEXT, THE LEBOX (PHONETIC) CASE, POINTED  
20 OUT THAT EVERY SINGLE COMMERCIAL GENERAL LIABILITY INSURANCE  
21 POLICY HAS AS ONE OF ITS ADVERTISING INJURIES THE  
22 MISAPPROPRIATION OF ADVERTISING IDEAS OR STYLE OF DOING  
23 BUSINESS.

24 THAT'S THE STANDARD INSURANCE BOILERPLATE. AND THE  
25 LEBOX CASE SAID:

1 "WELL, THAT LANGUAGE EXTENDS TO INCLUDE  
2 TRADEMARK INFRINGEMENT."  
3 THAT WAS THE PURPOSE OF THAT. BUT THE BOTTOM LINE IS  
4 MISAPPROPRIATION OF ADVERTISING IDEAS OR STYLE OF DOING BUSINESS  
5 HAS, INDEED, BEEN RECOGNIZED AS A TORT CONCRETE ENOUGH TO BE  
6 SUBJECT TO A VERY PARTICULAR PHRASE IN VIRTUALLY EVERY INSURANCE  
7 CONTRACT IN THE COUNTRY.

8 AND SO THAT'S NOT SO ALIEN IF YOU STEP INTO THE  
9 INSURANCE WORLD AND OUT OF THE PATENT COPYRIGHT WORLD.

10 SO IT'S OUT THERE. AND I DO COMMEND THE NINTH  
11 CIRCUIT'S DECISION IN THE CITY SPORTS CASE.

12 SO THAT'S THE MAIN THING I WOULD LIKE -- AND IF THE  
13 COURT IS INCLINED TO GRANT THE MOTION TO DISMISS THAT, I WOULD  
14 URGE THE COURT TO GRANT LEAVE TO AMEND SO THAT WE COULD TIE IT  
15 TO THE CITY SPORTS CASE MORE TIGHTLY.

16 BUT HAVING NO LEAVE TO AMEND THERE I THINK WOULD BE A  
17 REAL PREJUDICE.

18 THE OTHER POINT I WANT TO MAKE ON THE PRELIMINARY  
19 INJUNCTION MOTION HAS TO DO WITH IRREPARABLE HARM. AND I'M  
20 FAMILIAR WITH -- I THINK THERE WAS A SEPARATE JURISDICTIONAL  
21 CONCERN THAT THE COURT HAD, I THINK, BACK IN FEBRUARY. IT WAS  
22 KOKKA, K-O-K-K-A. I DON'T KNOW HOW IT'S PRONOUNCED.

23 I DON'T THINK WE HAVE THAT ISSUE HERE BECAUSE THAT  
24 WAS SORT OF A QUESTION WHETHER THE COURT HAD JURISDICTION.

25 HERE WE HAVE CAUSES OF ACTION FOR WHICH STATE LAW

1 CLEARLY PROVIDES CONSTRUCTIVE TRUST. THERE'S SUBSTANTIVE STATE  
2 LAW THAT SAYS THE PROCEEDS WOULD BE A TRUST, SO I DON'T THINK  
3 THAT WE HAVE THAT JURISDICTIONAL ISSUE HERE.

4 BUT ON IRREPARABLE HARM, THE FACT OF THE MATTER IS --

5 **THE COURT:** WELL, LET ME JUST STOP YOU ON THAT  
6 QUESTION, AND NOT FOCUSING PARTICULARLY ON THE ISSUE THAT I HAD  
7 TO ADDRESS IN THAT CASE. JUST FOCUSING HERE, EVEN IF, AS I  
8 UNDERSTAND IT, YOUR CHARACTERIZATION OF WHAT THIS JOINT VENTURE  
9 PROVIDED WAS THAT YOU WERE GOING TO BE ABLE TO HAVE A SHARE OF  
10 THE PROFITS, CORRECT?

11 **MR. BRIDGES:** YES, YOUR HONOR.

12 **THE COURT:** AND YOU'RE SAYING THAT SO FAR CERTAIN  
13 REVENUE HAS BEEN GENERATED FROM THE SALE OF THESE DEVICES, AND  
14 THAT YOU WANT A CONSTRUCTIVE TRUST PLACED OVER THIS REVENUE  
15 BECAUSE SOMEWHERE WITHIN THIS REVENUE WILL BE SOME PORTION OF  
16 PROFITS SOMEDAY WHEN YOU CALCULATE WHAT PROFITS HAVE BEEN  
17 DERIVED, AND YOU GET A PIECE OF THAT. THEREFORE, THE REVENUES  
18 CAN BE PLACED IN A CONSTRUCTIVE TRUST.

19 **MR. BRIDGES:** THAT'S PART OF IT.

20 **THE COURT:** OKAY.

21 **MR. BRIDGES:** THERE'S MORE TO IT.

22 **THE COURT:** WHAT HAVE I LEFT OUT?

23 **MR. BRIDGES:** IN THE NORMAL COURSE, IF THIS HAD  
24 SUCCEEDED AND GONE FORWARD THERE WOULD HAVE BEEN AN ENTITLEMENT  
25 TO THE UNDIVIDED SHARE OF THE PROCEEDS OF THE WHOLE COMPANY

1 WORLDWIDE BASED ON THIS. IT HAPPENS THAT THERE'S ONLY SO MUCH  
2 MONEY BEING GENERATED IN THE UNITED STATES. THERE'S BEEN A  
3 RECENT SPLASH THAT THE DEFENDANT IS NOW SELLING IN CANADA AND IN  
4 EUROPE AND ELSEWHERE. THAT MONEY WILL NEVER BE ANYWHERE CLOSE  
5 TO WHERE THIS COURT CAN REACH IT.

6 **THE COURT:** WELL, BUT YOU CAN GET A JUDGMENT IN A  
7 COURT, AND THEN SEEK TO HAVE IT ENFORCED THROUGH THE PROPER  
8 PROCESS. AND I'M NOT SAYING IT'S EASY, BUT CERTAINLY IN THE  
9 JURISDICTIONS YOU MENTION I SUSPECT YOU COULD TRY TO GO TO  
10 CANADA AND GET A U.S. JUDGMENT ENFORCED IN THE APPROPRIATE  
11 CIRCUMSTANCES.

12 **MR. BRIDGES:** AND I SUSPECT THAT SINCE FUSION GARAGE,  
13 WHICH, BY THE WAY, LAUNCHED ITS PRODUCT WITH A BIG EVENT HERE IN  
14 SAN FRANCISCO, WHICH LAUNCHED ITS PRODUCT ONLY IN THE UNITED  
15 STATES HAS ENGINEERED THAT SO THAT THE UNITED STATES DOESN'T  
16 TOUCH THE MONEY ANYMORE.

17 THIS IS A COMPANY THAT WAS ORIGINALLY U.S. FOCUSED,  
18 U.S. CENTERED, EXCEPT IT HAD A PAYPAL ACCOUNT THAT IT STILL  
19 HASN'T GOTTEN MONEY FROM, AND IT IS CONCERNED BECAUSE PAYPAL FOR  
20 ITS OWN FRAUD PROTECTIONS IS HOLDING ONTO THE MONEY. SO IT'S  
21 NOW MADE SURE THAT IT'S NOT GETTING ANY FUNDS IN THE UNITED  
22 STATES, EVEN THOUGH THE UNITED STATES WAS THE FOCUS OF ITS --

23 **THE COURT:** THERE'S SOME COMPETITIVE REASONS WHY THEY  
24 HAVE TO MAKE SOME ADJUSTMENTS ON THAT; THAT IT'S NOT SIMPLY --  
25 CAN I SIMPLY ASSUME THAT IT'S BECAUSE YOU ARE OUT THERE, AND

1 THEY WANT TO NOW, YOU KNOW, GET OUT FROM UNDER THE PROSPECT THAT  
2 YOU CAN COME AFTER THEM? I MEAN, THERE MAY BE SOME REASONS WHY  
3 THEY HAVE DECIDED THE U.S. MARKETPLACE IS MORE PROBLEMATIC FOR  
4 THEM.

5 **MR. BRIDGES:** WELL, THEY SAID THAT THEY WERE IN THE  
6 U.S. MARKETPLACE WITH PAYPAL. AND THEY SPECIFICALLY LEFT PAYPAL  
7 BECAUSE OF THE RESTRICTIONS THAT IT IMPOSES ON ACCOUNTS THAT  
8 SHOW THIS KIND OF ACTIVITY.

9 NO, AND IF YOU LOOK AT THE CHARACTER OF THE  
10 DEFENDANT'S CONDUCT THROUGHOUT, IT WOULD BE CONSISTENT. I MEAN,  
11 THEY PAID -- YOU KNOW, THEY PAID THEIR PUBLIC RELATIONS AGENCY  
12 HERE CASH IN ADVANCE. THAT'S WHAT THE DOCUMENTS SHOW.

13 **THE COURT:** LET ME FOCUS YOU ON THIS NOTION OF THE  
14 SHOWING YOU MUST MAKE. YOUR ARGUMENT THAT BECAUSE THE DEFENDANTS  
15 ARE OUTSIDE OF OUR JURISDICTION YOU NEED TO HAVE SOME COMFORT  
16 THAT YOU CAN ENFORCE ANY JUDGMENT THAT YOU MIGHT OBTAIN. AND,  
17 THEREFORE, ON INJUNCTIVE RELIEF BASIS YOU NEED TO HAVE THIS  
18 CONSTRUCTIVE TRUST IMPOSED.

19 AREN'T YOU OBLIGED TO DO SOMETHING MORE THAN SAY:

20 "THE FUNDS OF THIS ENTITY ARE, IN LARGE PART,  
21 OUTSIDE THIS COUNTRY"?

22 I MEAN, LITIGATION GOES ON ALL THE TIME WITH  
23 INTERNATIONAL ENTITIES, SO IT CAN'T BE THAT EASY.

24 **MR. BRIDGES:** THAT'S CORRECT, YOUR HONOR. THE OTHER  
25 PART OF IT -- I MEAN, BUT WE DO BELIEVE THAT THAT IS A

1 SIGNIFICANT PART OF IT, BECAUSE WE DO BELIEVE THAT THE PAYMENT  
2 FLOW IS SPECIFICALLY BEING SHAPED TO BE OUTSIDE THE COUNTRY,  
3 OKAY?

4 BUT THERE IS ALSO THE QUESTION OF DISSIPATION, OKAY?  
5 WHAT WAS INTERESTING IS THIS, THIS JOINT VENTURE FELL APART IN  
6 SO MANY DIFFERENT WAYS.

7 ONE THING THAT HAPPENED WHICH THEY CONCEALED FROM THE  
8 PLAINTIFFS WAS THAT THEY HAD GOTTEN TERMINATED BY THE HARDWARE  
9 MANUFACTURER FOR NONPAYMENT AT THE TIME THEY WERE PAYING THEIR  
10 PUBLIC RELATIONS AGENCY TO LAUNCH THEIR OWN PROJECT.

11 SO THEY WERE WIRING MONEY, I GUESS TO THEIR U.S.  
12 PUBLIC RELATIONS AGENCY, WHILE NOT PAYING THE HARDWARE PROVIDER  
13 WHICH CAUSES THE HARDWARE PROVIDER TO WITHDRAW. AND THEY  
14 WEREN'T SETTING UP U.S. BANK ACCOUNTS TO PAY THEIR PUBLIC  
15 RELATIONS AGENCY. THEY WERE SENDING THEM IN FROM OVERSEAS.

16 THE EVIDENCE SUGGESTS -- AND WE'RE EARLY IN THE  
17 DISCOVERY, FRANKLY, YOUR HONOR. THE EVIDENCE SUGGESTS THAT  
18 THERE IS A RISK THAT THE FLOW OF FUNDS IS BEING MANIPULATED  
19 DELIBERATELY TO AVOID THIS COURT HAVING PRACTICAL JURISDICTION  
20 OVER IT.

21 **THE COURT:** ALTHOUGH NOT TO CASTIGATE THIS PRODUCT IN  
22 ANY WAY, BUT IT DOESN'T LOOK LIKE IT'S ACHIEVING -- I MEAN, YOU  
23 MAY BE FIGHTING OVER A RATHER FINITE AND RELATIVELY SMALL POOL  
24 OF MONEY.

25 I MEAN, YOU KNOW -- AND I'M NOT BEING FACETIOUS ABOUT



1 IT BECAUSE EITHER IT'S GOING TO BE A ROARING SUCCESS IN WHICH  
2 CASE THE ENTITY YOU'RE SUING IS GOING TO BE FLUSH WITH CASH THAT  
3 YOU CAN GO AFTER, OR THIS IS ALL GOING TO DIE ON THE VINE, AND  
4 THERE'S -- YOU KNOW, CONSTRUCTIVE TRUST OR OTHERWISE, THERE'S  
5 NOTHING REALLY OUT THERE.

6 **MR. BRIDGES:** I UNDERSTAND THAT, YOUR HONOR. BUT I  
7 THINK PRODUCTS DO EVOLVE. PRODUCTS WHICH COME INTO THE MARKET IN  
8 THE WRONG WAY CAN FIND THEIR FEET. IT IS IMPORTANT TO GET IT SET  
9 UP CORRECTLY SO THAT WE DO -- SO THAT THE PLAINTIFFS DO GET  
10 THEIR RIGHTFUL SHARE.

11 BUT I WILL SAY ALSO, I MEAN, LIKE RIGHT NOW THERE ARE  
12 A NUMBER OF CASES THAT THIS COURT HAS SAID WHERE THE DISSIPATION  
13 OF FUNDS -- THE THREAT OF DISSIPATION OF FUNDS IS SUFFICIENT. SO  
14 HOW DO FUNDS GET DISSIPATED?

15 THEY GET DISSIPATED BY PAYING OUT MONEY FOR NEW --  
16 FOR NEW EXPENSES, WHERE THE MONEY NEEDS TO BE HELD NOW FOR THE  
17 OBLIGATIONS THAT EXIST NOW.

18 AND ONE THING THAT'S INTERESTING -- AND THIS GOES  
19 ALSO TO THE BALANCE OF HARMS -- FUSION GARAGE HAS, ACCORDING TO  
20 MR. RATHAKRISHNAN'S DEPOSITION TESTIMONY SEEMS TO HAVE DONE FINE  
21 SO FAR WITHOUT ACTUALLY RECEIVING ANY PENNIES YET OF THE  
22 PROCEEDS OF THE JOOJOO. AND HE'S QUITE PROUD OF THE INVESTMENT.

23 **THE COURT:** BECAUSE OF THE VENTURE CAPITAL FUNDS.

24 **MR. BRIDGES:** THAT'S RIGHT. BECAUSE OF THE FINANCING  
25 THAT HE'S GOTTEN BEFORE AND BECAUSE OF THE FINANCING THAT HE'S

1 EXPECTING TO GET IN THE FUTURE. HE NOW VALUES THIS COMPANY AT  
2 40 TO \$50 MILLION.

3 SO AT FUSION GARAGE'S END, THERE DOESN'T SEEM TO BE  
4 THE PINCH THAT NORMALLY A DEFENDANT WOULD EXPRESS WHEN IT COMES  
5 TO BALANCE OF HARMS. AND IF YOU LOOK AT THE CEO'S OWN WORDS,  
6 HE'S QUITE CONFIDENT ABOUT HIS FINANCIAL STATUS. AND THEY HAVE  
7 TRIED TO SAY THAT:

8 "NO, NO."

9 IN FACT, TECHCRUNCH HAD IT ALL WRONG BASED ON WHAT  
10 TECHCRUNCH HEARD. TECHCRUNCH THOUGHT THAT FUSION GARAGE WAS  
11 GOING DOWN THE TUBES.

12 THEY SAID:

13 "NO. NO. WE'RE NOT GOING DOWN THE TUBES."

14 THAT MAY BE FINE, SO IT'S NOT GOING TO HURT THEM SO  
15 MUCH. THE PROBLEM IS ALL THE MONEY THEY ARE GETTING IS PARKED  
16 ELSEWHERE.

17 WE DO THINK THAT IT'S RELEVANT THAT THIS COURT BE IN  
18 A POSITION -- HOWEVER LARGE OR SMALL THE RECOVERY, WE DO BELIEVE  
19 IT'S IMPORTANT THAT THIS COURT ENSURE THAT THERE BE AN EFFECTIVE  
20 RECOVERY AT THE CONCLUSION OF THE CASE.

21 **THE COURT:** ALL RIGHT. DO YOU WANT TO DISCUSS THE  
22 PRELIMINARY INJUNCTION?

23 WELL, WHAT DO YOU WANT TO DO, MR. STERN? DO YOU  
24 STILL WANT TO SET IT UP?

25 **MR. STERN:** IF COUNSEL IS FINISHED, I'LL RESPOND. I

1 WON'T HAVE TO SET IT UP, YOUR HONOR. THAT'S ALL RIGHT.

2 **THE COURT:** GO AHEAD.

3 **MR. STERN:** I WANT TO TALK ABOUT, IF YOUR HONOR --  
4 I'LL ADDRESS THE POINTS YOU HAVE RAISED, NAMELY THE THRESHOLD  
5 QUESTION ABOUT WHETHER OR NOT THIS IS AN APPROPRIATE CASE FOR A  
6 FREEZING OF ASSETS, WHICH IS REALLY WHAT HAS BEEN ASKED FOR.

7 WE BROUGHT UP THE GRUPO MEXICANO CASE IN OUR PAPERS.  
8 AND, YOUR HONOR, IT IS OUR POSITION WE INSIST THAT UNDER GRUPO  
9 MEXICANO, THIS CASE IS ONE THAT IS ABSOLUTELY INAPPROPRIATE FOR  
10 ANY SORT OF CONSTRUCTIVE TRUST.

11 NOW, YOUR HONOR MAY BE THINKING:

12 "WELL, IT'S NOT NECESSARY TO ADDRESS THIS, MR.  
13 STERN, BECAUSE I'M DENYING IT BASED ON THE FACT THAT  
14 THERE IS NO IRREPARABLE INJURY."

15 BUT THIS IS MORE, I THINK, A FINER POINT. YOUR HONOR  
16 KNOWS --

17 **THE COURT:** YOU'RE SAYING AS A MATTER OF LAW YOU  
18 CAN'T IMPOSE A CONSTRUCTIVE TRUST EVEN IF SOMEONE WERE TO BE  
19 ABLE TO SHOW IRREPARABLE INJURIES.

20 **MR. STERN:** I AM, YOUR HONOR.

21 **THE COURT:** I UNDERSTAND.

22 **MR. STERN:** UNDER GRUPO MEXICANO -- I KNOW YOUR HONOR  
23 IS FAMILIAR WITH THE CASE. I'VE READ YOUR HONOR'S DECISIONS ON  
24 THE SUBJECT -- THE QUESTION IS WHETHER OR NOT THE CLAIMS THAT  
25 ARE ASSERTED HERE ARE EQUITABLE CLAIMS.

1           NOW, THE CLAIMS -- AND, YOU KNOW, I HATE TO BE  
2 PUNCTILIOUS ABOUT THIS, BUT IF YOUR HONOR LOOKS AT THE  
3 COMPLAINT, THE COMPLAINT ASSERTS THE FOLLOWING CLAIMS. THERE'S  
4 A BREACH OF FIDUCIARY DUTY CLAIM. THERE'S A LANHAM ACT CLAIM.  
5 THERE'S A FRAUD CLAIM. THERE'S A FALSE ADVERTISING CLAIM.  
6 THERE'S AN UNFAIR COMPETITION CLAIM.

7           THOSE US CLAIMS ARE ALL LEGAL CLAIMS. WHAT I MEAN BY  
8 THAT IS THAT -- AND, I MEAN, SPECIFICALLY --

9           **THE COURT:** MONEY DAMAGES.

10          **MR. STERN:** -- ALL MONEY DAMAGES. AND HERE'S THE  
11 INTERESTING THING ABOUT THE COMPLAINTS FILED IN THIS CASE.  
12 EVERY SINGLE ALLEGATION REQUIRES DAMAGES. THE ONLY TIME THE  
13 WORD "INJUNCTION" IS USED IN THIS CASE IS IN THE PRAYER.

14          THAT'S NOT AN ACCIDENT, AND IT'S NOT -- THAT HAS  
15 LEGAL MOMENT. TECHNICALLY, THE PRAYER IS NOT CONSIDERED A PART  
16 OF THE COMPLAINT.

17          THE CAUSES OF ACTION THAT WERE PLED HERE, ACTUALLY  
18 PLED HERE ALL SEEK ONLY DAMAGES. AND IF YOUR HONOR --

19          **THE COURT:** YOU CAN HAVE INJUNCTIVE RELIEF UNDER A  
20 LANHAM ACT CLAIM IF IT'S PLED AND YOU SUCCEED.

21          **MR. STERN:** OF COURSE. ABSOLUTELY. BUT THAT  
22 WOULDN'T TURN THE CLAIM INTO A SORT OF EQUITABLE CLAIM. THAT  
23 WOULD TURN THE CLAIM -- THAT STILL IS A LEGAL CLAIM.

24          SO UNDER -- AND, YOUR HONOR, FOR THE AUTHORITY ON THE  
25 POINT THAT THE PRAYER IS IRRELEVANT, WE WOULD CITE YOUR HONOR TO

1 A NORTHERN DISTRICT CASE, SANBROOK VERSUS OFFICE DEPOT. AND I  
2 CAN PROVIDE YOUR HONOR WITH THE CITATION.

3 **THE COURT:** OKAY.

4 **MR. STERN:** IT'S 2008, WEST LAW, 1994884, A MAY 5TH,  
5 2008 DECISION FROM THIS COURT.

6 AND WHAT THAT MEANS IS THAT UNDER -- I THINK THE  
7 APPROPRIATE THRESHOLD HOLDING THAT THIS COURT SHOULD HOLD IS:

8 "WAIT A MINUTE. INTERSERVE HAS COME IN HERE AND  
9 SAID: 'WE WANT A CONSTRUCTIVE TRUST, AN ASSET  
10 FREEZE, WITH RESPECT TO CLAIMS THAT HAVE BEEN  
11 ASSERTED THAT ARE NOT EQUITABLE IN NATURE.'"

12 THERE'S NO FRAUDULENT CONVEYANCE CLAIM. THERE'S NO  
13 CLAIM -- IN THE VARIOUS CASES THEY HAVE CITED, THERE ARE CERTAIN  
14 STATUTES THAT SPECIFICALLY -- THEY CITE ONE PARTICULAR CASE  
15 WHERE THE STATUTE SPECIFICALLY AUTHORIZES A CONSTRUCTIVE TRUST.

16 I MEAN, IT'S A FEDERAL STATUTE. THERE IS NO SUCH  
17 STATUTE HERE. SO AS A THRESHOLD MATTER, THIS COURT, WITH ALL  
18 DUE RESPECT, I THINK, IS WITHOUT AUTHORITY TO EVEN ADDRESS THIS  
19 QUESTION OF ISSUING AN INJUNCTION TO FREEZE ASSETS WHETHER IT'S  
20 A DOMESTIC ENTITY OR WHETHER IT'S A FOREIGN ENTITY.

21 SO THAT'S POINT NUMBER ONE.

22 POINT NUMBER TWO -- AND THIS COMES DOWN TO -- YOU  
23 KNOW, I KNOW YOUR HONOR HAS LOOKED AT THE RECORD.

24 THIS IS AN UNUSUAL CASE FROM AN EVIDENTIARY  
25 STANDPOINT FOR ME.

1           YOUR HONOR, THE MOTION FOR PRELIMINARY INJUNCTION WAS  
2 FILED, AND IN SUPPORT OF IT WAS A SINGLE DECLARATION. AND THE  
3 SINGLE DECLARATION WAS THE DECLARATION OF MICHAEL ARRINGTON.

4           AND IN THAT DECLARATION, MR. ARRINGTON MADE TWO  
5 STATEMENTS. ONE, HE CHARACTERIZED A PARTNERSHIP -- AND HE USED  
6 THAT WORD IN HIS DECLARATION -- A PARTNERSHIP EXISTING BETWEEN  
7 MY CLIENT AND TECHCRUNCH OR CRUNCHPAD. IT'S NOT CLEAR WHICH.

8           **THE COURT:** RIGHT.

9           **MR. STERN:** AND NUMBER TWO, HE STATED CATEGORICALLY  
10 IN PARAGRAPH 31 OF HIS DECLARATION THAT THERE WAS AN AGREEMENT,  
11 NOT MY WORDS, YOUR HONOR. BUT HE SAID:

12                   "I AGREED" -- THE WORD WAS "AGREED -- THAT THE  
13 PARTIES WOULD EACH ABSORB THEIR OWN EXPENSES. BUT IF  
14 THE PROJECT WAS SUCCESSFUL, THEN THEY WOULD SHARE  
15 PROFITS."

16           THAT'S THE QUOTE. IT'S UNDER OATH. THIS IS NOT  
17 ARGUED.

18           **THE COURT:** RIGHT.

19           **MR. STERN:** IN THE DEPOSITION I TOOK OF MR.  
20 ARRINGTON, AS YOUR HONOR KNOWS -- AND THIS IS WHAT MUCH OF THE  
21 PRESENTATION WAS, BUT YOUR HONOR HAS THE EVIDENCE BEFORE HIM --  
22 MR. ARRINGTON, WITHOUT THE INTERFERENCE OF COUNSEL, WITHOUT THE  
23 INSTRUCTION OF COUNSEL, REFUSED TO ANSWER QUESTIONS ABOUT  
24 PARTNERSHIP CLAIMING THAT IT WAS A LEGAL CONCLUSION.

25           **THE COURT:** RIGHT.

1           **MR. STERN:**   AND WHEN I ASKED QUESTIONS ABOUT:

2                           "FORGET PARTNERSHIP.   TELL ME ABOUT THE  
3                           AGREEMENTS THAT WERE REACHED WITH RESPECT TO PROFIT,"  
4 HIS ANSWER WAS THE SAME. HIS ANSWER WAS:

5                           "I'M NOT ANSWERING QUESTIONS BECAUSE I'M,"  
6                           QUOTE, "UNCOMFORTABLE TALKING ABOUT LEGAL  
7                           CONCLUSIONS."

8                           AND THE RECORD IS REplete WITH THAT.

9           **THE COURT:**   YOU GAVE ME QUITE A FEW EXCERPTS AND  
10 SHOWED THE "I'M NOT COMFORTABLE WITH LANGUAGE," BUT --

11           **MR. STERN:**   IF I CAN JUST -- I DON'T WANT TO  
12 INTERRUPT, OF COURSE.

13           **THE COURT:**   GO AHEAD.

14           **MR. STERN:**   WHEN I ASKED HIM ABOUT WHY IT WAS IN HIS  
15 DECLARATION HE'S PREPARED TO TALK ABOUT THE WORD "PARTNERSHIP,"  
16 BUT THAT IN FRONT OF ME ON CROSS-EXAMINATION ON THE RECORD HE'S  
17 NOT PREPARED TO, HIS RESPONSE WAS:

18                           "I HAVE NO ANSWER FOR YOU."

19                           THAT'S NOT ME MAKING THAT UP.   HE SAID THAT.

20                           I THINK THERE'S SOMETHING ACUTELY INEQUITABLE ABOUT A  
21 PARTY COMING TO YOUR HONOR SEEKING EQUITY SAYING:

22                           "HERE ARE THE FACTS ABOUT THE ESTABLISHMENT OF A  
23                           JOINT VENTURE OR PARTNERSHIP," BUT WHEN THEY ARE IN  
24 THE CRUCIBLE OF CROSS-EXAMINATION OR DEPOSITION THEY CLAM UP.

25                           AND I AM NOT -- I WANT TO MADE THIS CLEAR.   MR.

1 BRIDGES DID NOT INSTRUCT HIM NOT TO ANSWER THE QUESTIONS. HE  
2 SIMPLY REFUSED TO ANSWER THE QUESTIONS.

3 I KNOW YOUR HONOR HAS MADE A PRELIMINARY  
4 DETERMINATION, ALTHOUGH I KNOW IT'S NOT BINDING, THAT THERE WAS  
5 SOME SORT OF JOINT VENTURE.

6 AND BECAUSE OF THE PERSON WHO WE ARE FACING, MR.  
7 ARRINGTON, WHO HAS AN ENORMOUSLY POPULAR BLOG, I'M CONCERNED  
8 ABOUT THE INTERPRETATION THAT WILL BE GETTING IN A VARIETY OF  
9 DIFFERENT LOCATIONS.

10 **THE COURT:** I AM AWARE OF YOUR VIGOROUS ARGUMENT THAT  
11 THE DEPOSITION TRANSCRIPT OF MR. ARRINGTON SOMEHOW EITHER  
12 REPRESENTS SOME ADMISSION OR SOME -- HE'S ESTOPPED FROM ARGUING  
13 CONTRARY OR WHATEVER, I HAVE TO SAY I THINK TOO MUCH -- PERHAPS  
14 YOUR PUTTING MORE EMPHASIS ON THAT PARTICULAR TESTIMONY THAN I  
15 WOULD.

16 I LOOKED AT WHAT APPEARS TO BE A RECORD OF SOLID  
17 RATHER THAN EXTENSIVE INTERACTION BETWEEN THE TWO PARTIES GOING  
18 FORWARD ISSUES SUCH AS PERSONNEL FROM PLAINTIFFS GOING TO  
19 SINGAPORE, WORKING WITH FUSION.

20 I UNDERSTAND THAT FUSION SAYS:

21 "OH, THEY WERE SPYING ON US," OR WHATEVER.

22 BUT TO TAKE A DEPOSITION OF, INDEED, A CENTRAL PLAYER  
23 ON THE PLAINTIFFS' SIDE WHERE THERE'S A BACK AND FORTH WITH  
24 COUNSEL ASKING QUESTIONS WHERE THE ANSWERS YOU THINK, TO PUT IT  
25 IN THE VERNACULAR, AS BEING FAR TOO CAGEY THAN HE SHOULD BE, MY



1 REACTION TO THAT IS TO SOME EXTENT THAT'S A DISCOVERY MOTION  
2 THAT NEEDS TO BE BROUGHT. AND IT IS NOT THE TYPE OF TESTIMONY  
3 THAT SHOULD PROMPT ME TO SAY:

4 "THIS IS SO TERRIBLE THAT I'M NOT GOING TO LOOK  
5 AT ANYTHING ELSE THAT IS COMING DOWN THE PIKE."

6 AND THERE IS A LOT OF CONDUCT THAT IS REFLECTED IN  
7 THE MATERIALS THAT I'VE BEEN RECEIVING. AND I RECOGNIZE YOU  
8 SAID, MR. STERN, THAT YOU WERE REACTING -- YOU WERE TAKING THIS  
9 BACK TO THE INITIAL POINT WHERE ALL YOU HAD WAS A DECLARATION,  
10 AND YOU WERE FOLLOWING THEM FROM THAT.

11 AND THERE'S BEEN A LOT OF FLURRY OF MATERIALS COMING  
12 IN POST THAT PERIOD.

13 BUT THE MATERIALS THAT HAVE COME IN POST THAT PERIOD  
14 REFLECT TO ME SOME CONDUCT THAT LOOKS TO ME LIKE A JOINT  
15 VENTURE.

16 **MR. STERN:** WELL, YOUR HONOR, IF I CAN JUST --  
17 THERE'S A DECISION THAT I THINK THAT YOUR HONOR -- I WOULD LIKE  
18 TO FOCUS YOUR HONOR ON ALL OF THE CASES CITED IN THE MOTION TO  
19 DISMISS AND IN THE PRELIMINARY INJUNCTION MOTION. I THINK THE  
20 CASE THAT IS THE MOST INSTRUCTIVE IS THE BUSTAMANTE DECISION.  
21 AND IT'S CALLED BUSTAMANTE VERSUS INTUIT. AND THE REASON  
22 BUSTAMANTE IS SO IMPORTANT IS BECAUSE IN THAT CASE BUSTAMANTE,  
23 THE PLAINTIFF, AND INTUIT, SPENT A YEAR-AND-A-HALF, A  
24 YEAR-AND-A-HALF WORKING TOGETHER TO DEVELOP MEXICO AS THE  
25 LOCATION WHERE BUSTAMANTE WOULD ULTIMATELY HAVE AN EXCLUSIVE

1 LICENSE TO DISTRIBUTE QUICKBOOKS PRODUCT. THAT'S INTUIT'S  
2 AWARD-WINNING PRODUCT.

3 AND BUSTAMANTE SUED UNDER TWO THEORIES. HE SAID,  
4 NUMBER ONE, ULTIMATELY AFTER A YEAR-AND-A-HALF, INTUIT SAID:

5 "YOU KNOW WHAT? WE'RE DONE. WE'RE ABSOLUTELY  
6 DONE HERE. WE ARE DOING THIS ON OUR OWN."

7 THEY DIDN'T USE BUSTMANTE. BUSTAMANTE SUED UNDER  
8 BREACH OF CONTRACT AND UNDER PARTNERSHIP THEORY. AND THE COURT  
9 SAID, THE CALIFORNIA COURT OF APPEAL -- THE TRIAL COURT THREW  
10 THE CASE OUT ON SUMMARY JUDGMENT. THEY WENT UP TO THE  
11 CALIFORNIA COURT OF APPEAL.

12 AND THE COURT OF APPEAL AFFIRMED. AND IT'S A VERY  
13 IMPORTANT DECISION, BECAUSE I THINK IT BEARS DIRECTLY ON THIS  
14 CASE. AND THE REASON IT DOES IS IN THIS CASE, THE FOCUS OF THE  
15 PARTIES' ATTENTION WAS NOT THE DEVELOPMENT OF THE JOOJOO OR THE  
16 CRUNCHPAD. IT WAS -- THE FOCUS OF THE INTENTION OF THE PARTIES  
17 WAS ON THE MERGER.

18 AND I CANNOT STRESS THIS ENOUGH, YOUR HONOR. THE FACT  
19 OF THE MATTER IS THE PIVOTAL DATE -- AND THIS IS IN THE  
20 RECORD -- THE PIVOTAL DATE IS THAT ON JUNE 27 -- ON JUNE 27,  
21 YOUR HONOR. AND I'M HAPPY TO PROVIDE THE EXHIBITS TO YOUR  
22 HONOR. ON JUNE 27 OF 2009, MICHAEL ARRINGTON WROTE AN E-MAIL TO  
23 MY CLIENT, CHANDRASEK RATHAKRISHNAN, AND SAID TO HIM:

24 "YOU KNOW WHAT? I'M TIRED OF ALL THIS. IT  
25 DOESN'T LOOK LIKE YOU HAVE THE ABILITY TO SPEAK FOR

1 YOUR INVESTORS. IT DOESN'T LOOK LIKE WE'RE GOING TO  
2 BE GETTING ANYWHERE. I'M CALLING THE DEAL OFF."  
3 AND THAT'S NUMBER ONE, AND NUMBER TWO, HE SAID:

4 "I'M TELLING THE INVESTORS, THE POTENTIAL  
5 INVESTORS, THAT THIS ISN'T GOING FORWARD."

6 IN RESPONSE TO THAT, MY CLIENT RESPONDED ON THAT DATE  
7 AND SAID:

8 "YOU KNOW WHAT? I REALLY WANT TO DO A DEAL.  
9 LET'S SEE IF WE CAN DO A DEAL."

10 AND THE NUMBER THAT WAS BANTERED ABOUT WAS EITHER  
11 35 PERCENT OR 40 PERCENT.

12 WHAT IS UNEXPLAINED IN THIS CASE AND WHICH I THINK IS  
13 A CRITICAL FACTOR IN THIS CASE, WHICH WE BROUGHT UP IN OUR  
14 OPPOSITION, IS THAT IN SEPTEMBER OF 2009, THREE MONTHS LATER,  
15 THERE'S AN E-MAIL EXCHANGE THAT TAKES PLACE BETWEEN MR.  
16 ARRINGTON AND MS. HARDE, WHO IS -- OR HARDE, H-A-R-D-E, WHO IS  
17 HIS CFO.

18 AND IN THAT E-MAIL THEY ARE TALKING ABOUT VARIOUS  
19 DIFFERENT INTERESTS THAT THEY WOULD PROVIDE FUSION GARAGE IN  
20 CRUNCHPAD. AND THOSE INTERESTS -- IT'S A EXHIBIT EIGHT TO THE  
21 DEPOSITION WHICH IS PART OF THIS RECORD.

22 AND IN THAT DOCUMENTS, WHAT IS DISCUSSED IS CONTROL.  
23 MS. HARDE AND MR. ARRINGTON ESSENTIALLY SAY:

24 "WE'VE JUST DISCOVERED SOMETHING. IF WE GIVE  
25 FUSION GARAGE 35 PERCENT OF CRUNCHPAD, IT'S NOT THAT

1 THE OTHER 65 PERCENT BELONGS TO TECHCRUNCH. BECAUSE  
2 OF VARIOUS THIRD-PARTY INVESTORS WHO ARE GOING TO BE  
3 PUTTING CAPITAL IN AND THEREBY TAKING AN INTEREST, AT  
4 35 PERCENT GIVEN TO FUSION GARAGE AND 65 PERCENT  
5 GIVEN TO TECHCRUNCH, THE ACTUAL INTEREST THAT  
6 TECHCRUNCH HAS IN CRUNCHPAD IS BELOW 50 PERCENT.  
7 THEY LOSE CONTROL."

8 AND FOR THAT REASON THEY DECIDE THAT THEY CANNOT  
9 ACCEPT 35 PERCENT. IT'S TOO BIG.

10 AND ON OCTOBER 16TH, 2009, A TERM SHEET -- NOT A  
11 "TERM SHEET," I'M SORRY -- A CAP TABLE IS SENT, A CAPITALIZATION  
12 TABLE IS SENT BY THEM TO MY CLIENT SAYING:

13 "THE NUMBER IS TWENTY-THREE-AND-A-HALF PERCENT.  
14 TWENTY-THREE-AND-A-HALF PERCENT."

15 NOW, AT THAT POINT -- WHY THIS IS IMPORTANT, YOUR  
16 HONOR, IS UNDER PARAGRAPH 19 OF MR. ARRINGTON'S DECLARATION HE  
17 SWORE TO YOUR HONOR THAT THERE WAS A DEAL AT 35 PERCENT.

18 WE KNOW THAT'S CATEGORICALLY FALSE NOW. IN HIS  
19 DEPOSITION, IT'S CATEGORICALLY FALSE. AND THE REASON --

20 **THE COURT:** BUT DOES THAT NECESSARILY MEAN THERE WAS  
21 NO JOINT VENTURE?

22 **MR. STERN:** YES, YOUR HONOR.

23 **THE COURT:** WHY?

24 **MR. STERN:** BECAUSE -- AND THIS IS THE BUSTAMANTE  
25 DECISION -- THE POINT IS WHEN THE PARTIES -- WHEN THE FOCUS OF

1 THE PARTIES' ATTENTION IS ON A PARTICULAR POINT OF TRANSACTION,  
2 AND IN THE BUSTAMANTE CASE THE FOCUS OF THE ATTENTION WAS ON THE  
3 EXCLUSIVE LICENSING AGREEMENT. NOT ON A PARTNERSHIP. NOT ON A  
4 JOINT VENTURE. BUT IT WAS ON A PARTICULAR SORT OF TRANSACTION.  
5 THAT ACCORDING TO THE BUSTAMANTE DECISION, THAT'S THE FOCUS OF  
6 THE TRANSACTION.

7 WHAT THERE ISN'T IS NOT SOME SORT OF SPILLOVER EFFECT  
8 OR DEFAULT THAT:

9 "WELL, IF THE PARTIES DON'T END UP WITH THAT  
10 FOCUS-OF-ATTENTION TRANSACTION, THEN A JOINT VENTURE  
11 OR PARTNERSHIP OR SOME OTHER ERSATZ RELATIONSHIP  
12 ARISES DUE TO THE FACT WHAT THEY ARE LOOKING FOR ISN'T REALLY  
13 THERE, AND THAT'S CRITICAL HERE.

14 **THE COURT:** WELL, THAT'S ONE WAY TO LOOK AT IT. ONE  
15 WAY TO LOOK AT IT IS THE PARTIES ARE STEAMING ALONG LOOKING  
16 TOWARDS SOME KIND OF OWNERSHIP DIVISION AND MERGER, AND WHAT  
17 HAVE YOU, BUT IN THE MEANTIME THEY ARE ALSO ENGAGED IN A JOINT  
18 ENTERPRISE TO DEVELOP A PRODUCT.

19 AND YOU'RE SAYING IT'S SOMEWHAT -- IF IT DOESN'T COME  
20 TO COMPLETE FRUITION, THE FORMER, THE MERGED ENTITY WITH A  
21 SPECIFIC OWNERSHIP DELINEATION BETWEEN THE PARTIES, THEN EVEN IF  
22 THEY HAVE ENGAGED IN CONDUCT FOR A YEAR-AND-A-HALF, TWO YEARS TO  
23 DEVELOP A PRODUCT IN THE MEANTIME, THEY HAVE NOT BEEN ENGAGED IN  
24 A JOINT VENTURE.

25 IF THEY THINK THEY HAVE, THEY HAVEN'T, BECAUSE IT

1 NEVER CAME TO FRUITION AT THE END. AND IF BUSTAMANTE -- AND  
2 I'LL GO BACK AND LOOK AT IT -- STANDS FOR THE PROPOSITION THAT  
3 NO MATTER WHAT THE ACTIVITY HAS BEEN AND HOW COLLABORATIVE IT  
4 HAS AND NO MATTER WHAT PERIOD OF TIME IT CAN NEVER THEN BE  
5 TERMED A JOINT VENTURE? WELL, OKAY, I'LL TAKE A LOOK AT IT  
6 AGAIN. BUT THAT'S NOT MY UNDERSTANDING.

7 **MR. STERN:** THAT'S NOT WHAT BUSTAMANTE HOLDS. I  
8 DON'T WANT TO SUGGEST IN NO POSSIBLE WORLDS. THE SIMILARITY  
9 BETWEEN BUSTAMANTE AND THIS CASE IS THE FOLLOWING.

10 IN BOTH CASES IT'S UNDISPUTED THAT THE WAY THIS DEAL  
11 WAS SUPPOSED TO BE STRUCTURED, THE WAY THIS DEAL WAS SUPPOSED TO  
12 BE STRUCTURED WAS THAT FUSION GARAGE AND VARIOUS OUTSIDE  
13 INVESTORS AND TECHCRUNCH WERE ALL GOING TO BUY SOME SORT OF  
14 INTEREST IN CRUNCHPAD -- CRUNCHPAD WAS GOING TO BE THE ENTITY  
15 THAT WAS GOING TO BE DOING WHATEVER IT WAS DOING.

16 IN ORDER TO MAKE THIS DEAL WORK, THEY HAD TO RAISE  
17 \$2 MILLION IN CLIENTS. AND THAT'S THE NUMBER. IT WAS \$2  
18 MILLION.

19 WHEN I DEPOSED MR. ARRINGTON -- BY THE WAY, THAT  
20 BEARS DIRECTLY ON THIS MOTION. MY CLIENT RAISED \$3 MILLION. IF  
21 TWO -- MR. ARRINGTON CONCEDED THAT \$2 MILLION WAS AN ADEQUATE  
22 FUNDING TO START AND LAUNCH A PRODUCT.

23 CERTAINLY MY CLIENT'S DEVELOPING \$3 MILLION IS  
24 ADEQUATE. BUT IN ALL EVENTS, WHAT EVERYBODY UNDERSTOOD THAT A  
25 DEPENDENT CONDITION, A CONTINGENCY FOR THIS WHOLE DEAL WAS THAT

1 THIRD PARTIES WERE GOING TO INVEST. AND THERE'S A SPECIFIC  
2 DOCUMENT WHICH -- I KNOW IT'S BEFORE YOUR HONOR. I'M SORRY,  
3 YOUR HONOR. I'M -- THERE IS A SPECIFIC DOCUMENT THAT WE HAVE.  
4 AND IN THAT DOCUMENT IT'S A -- IT IS THE -- IT'S EXHIBITS 13 TO  
5 MR. ARRINGTON'S DEPOSITION.

6 IN THAT DOCUMENT IT SHOWED THAT TO GET THE \$2 MILLION  
7 THEY HAD TO TALK TO AT LEAST, AT LEAST FOUR DIFFERENT INVESTORS.  
8 AND THOSE DIFFERENT INVESTORS WERE AT THE TIME A COMPANY CALLED  
9 "FIRST ROUND CAPITAL," A GENTLEMAN BY THE NAME OF RONALD  
10 CONWAY, AND AN ORGANIZATION CALLED SOFTTECH VENTURES. AND THEN,  
11 THE BULK WAS SOME UNIDENTIFIED ASIAN INVESTOR, SINGAPOREIAN  
12 INVESTOR.

13 SO, REMEMBER, THIS WHOLE -- THE WHOLE DEAL, WHETHER  
14 THEY COULD WORK TOGETHER, WHETHER THEY WOULD FINANCE AN  
15 OPERATION, WHETHER THEY COULD GO FORWARD TOGETHER THAT WAS  
16 CONTINGENT ON THEM GETTING FINANCING.

17 EVERYBODY UNDERSTOOD IT WAS PART OF THE DEAL HERE.  
18 NEVER CAME THROUGH. FORGET WHAT MY CLIENT DID, YOUR HONOR.  
19 IGNORE QUESTIONS ABOUT WHETHER OR NOT MY CLIENT HAD GHOSTWROTE A  
20 LETTER TO ONE OF ITS INVESTORS. THE FACT OF THE MATTER IS  
21 MICHAEL ARRINGTON FAILED TO GET ANY CAPITAL RAISED. ANY. NOT A  
22 DOLLAR. NOT A DOLLAR.

23 DON'T LOOK AT MY CLIENT. NONE OF THESE PARTIES  
24 COMMITTED TO PAYING AT ALL. THEY WERE ALL BEING CONTACTED. BUT  
25 AFTER -- FROM DECEMBER, 2008, THROUGH NOVEMBER, 2009, MICHAEL

1 ARRINGTON COULDN'T GET A SINGLE PERSON SIGNED UP.

2 NOW, THIS IS WHERE BUSTAMANTE COMES IN. BUSTAMANTE  
3 COMES IN AND SAYS THAT WHEN THE PARTIES ARE NEGOTIATING A  
4 RELATIONSHIP, AND THAT RELATIONSHIP IS DEPENDENT ON VARIOUS  
5 CONTINGENCIES, PARTICULARLY FINANCING CONTINGENCIES BY THIRD  
6 PARTIES AND THOSE THIRD-PARTY CONTINGENCIES NEVER ARISE, THERE'S  
7 NO DEAL. THERE IS NO DEAL.

8 AND THEY PUT IT IN TERMS OF --

9 **THE COURT:** WELL, YOU'RE DEALING IN -- AND PERHAPS IF  
10 YOU ARE EQUATING THE TWO CONCEPTS, AND IT'S FAIR TO DO SO, BUT  
11 YOU'RE USING "DEAL" AND "JOINT" -- YOU'RE SAYING "THEREFORE,  
12 THERE'S NO JOINT VENTURE."

13 I'M NOT SURE YOU PUT THE TWO TOGETHER. THERE MAY WELL  
14 BE A BREAKDOWN OF AN ULTIMATE DEAL IN THE SENSE THAT THE  
15 COMPANIES DO NOT FORM AN ENTITY THAT THEN GOES FORWARD AND DOES  
16 BUSINESS AND THE LIKE.

17 BUT YOU ARE THEN SAYING:

18 "THEREFORE, THERE COULD NOT HAVE BEEN A JOINT  
19 VENTURE IN THE MEANTIME."

20 AND YOU MAY BE RIGHT. I'LL LOOK AT IT AGAIN. BUT  
21 THAT WAS NOT MY INITIAL READ ON WHAT YOU NEEDED TO SHOW TO SHOW  
22 THAT FOR A CERTAIN PERIOD OF TIME A JOINT VENTURE WAS UP AND  
23 RUNNING.

24 **MR. STERN:** WELL, AND THIS IS THE POINT: THERE ARE  
25 JOINT VENTURES, AND THERE ARE JOINT VENTURES. IT COULD BE, YOUR



1 HONOR -- IT'S PERFECTLY PLAUSIBLE IF I'M WORKING WITH MY BROTHER  
2 AND WE OPEN UP A SHOP, AND THERE'S NO AGREEMENT -- THERE'S NO  
3 WRITTEN AGREEMENT BETWEEN EACH OTHER. BUT WHAT WE DO IS WE  
4 START WORKING TOGETHER COLLABORATIVELY, AND TIME GOES BY, AND  
5 AFTER AWHILE WE DECIDE IT'S NOT GOING TO WORK OUT, SOMEONE CAN  
6 SAY:

7 "YOU KNOW WHAT? EVEN THOUGH THERE WAS NO PAPER,  
8 WE HAD A JOINT VENTURE."

9 **THE COURT:** AND IF I CAN INTERRUPT YOU FOR A MOMENT,  
10 THE CONSEQUENCE OF THAT -- AND WE'VE BEEN SPENDING A LOT OF TIME  
11 TALKING ABOUT WHETHER OR NOT A JOINT VENTURE DID OR DID NOT  
12 EXIST. AND THE REASON WE ARE DOING THAT IS BECAUSE THAT'S WHERE  
13 THE BREACH OF FIDUCIARY DUTY COMES INTO PLAY.

14 **MR. STERN:** ABSOLUTELY.

15 **THE COURT:** BECAUSE IF DURING THAT PERIOD OF TIME YOU  
16 AND YOUR BROTHER HAD WHATEVER UNDERSTANDING IT MAY BE, IT ROSE  
17 TO THE LEVEL OF THE TYPE OF UNDERSTANDING WHERE FIDUCIARY  
18 OBLIGATIONS AROSE, THAT IS WHY THIS IS ALL IMPORTANT.

19 **MR. STERN:** I AGREE WITH YOUR HONOR.

20 **THE COURT:** YES.

21 **MR. STERN:** BUT THE POINT IS, AS WELL, THAT IF DURING  
22 THAT SAME PERIOD OF TIME IT'S NOT -- THE EXAMPLE I GAVE THERE  
23 ARE NO CONTINGENCIES. WE'RE JUST MARCHING ALONG TOGETHER, JUST  
24 ME AND MY BROTHER.

25 BUT WHEN YOU'RE TALKING ABOUT A SITUATION WHERE

1 EVERYBODY UNDERSTANDS THAT THE DEAL IS DEPENDENT ON THESE  
2 THIRD-PARTY FINANCING CONTINGENCIES, EVERYBODY UNDERSTANDS IT.

3 AND BY THE WAY, AN IMPORTANT FOOTNOTE HERE: WE'RE  
4 OUT LOOKING FOR FINANCING FOR OURSELVES. ARRINGTON IS LOOKING  
5 OUT FOR FINANCING FOR HIMSELF.

6 I MEAN, I DON'T WANT YOU TO GET THE IMPRESSION  
7 BECAUSE THE CASE -- THE EVIDENCE CLEARLY SHOWS THIS. HE'S  
8 SENDING HIS OWN PEOPLE TO SINGAPORE TO LOOK FOR INDEPENDENT  
9 FINANCING SO IF IT DOESN'T WORK OUT WITH US -- THIS IS THE  
10 E-MAILS FROM HIS PERSON NICK CUBRILOVIC TO US SAYING:

11 "YOU KNOW WHAT? LET'S KILL FUSION GARAGE.  
12 LET'S POACH THEIR EMPLOYEES."

13 **THE COURT:** I SAW THOSE.

14 **MR. STERN:** BY THE WAY, YOUR HONOR, INTERESTING  
15 LANGUAGE FOR A FIDUCIARY TO USE TOWARD ANOTHER.

16 BUT THE POINT IS -- BY THE WAY, I DON'T SLIGHT THEM  
17 FOR THAT. THE FACT OF THE MATTER IS THAT TECHCRUNCH AND FUSION  
18 GARAGE WERE OUT EACH DOING THEIR OWN THING. THEY WERE TRYING TO  
19 RAISE FINANCING ANY WAY THEY COULD. IF THEY COULD DO IT  
20 TOGETHER, AS MY GRANDMOTHER WOULD SAY:

21 "GESUNDHEIT. CONGRATULATIONS. THAT'S GREAT."

22 **THE COURT:** YOU MAY HAVE TO SPELL THAT FOR THE COURT  
23 REPORTER.

24 **MR. STERN:** IT'S "GESUNDHEIT."

25 BUT IF THEY CAN'T, IF THEY CAN'T, YOUR HONOR, THEN

1 WHAT HAPPENS IS THEY GO THEIR SEPARATE WAYS. AND WHOEVER GETS  
2 THE FINANCING FIRST GOES. AND, YOUR HONOR, THAT'S WHAT THIS  
3 CASE IS ABOUT. IT'S NOT A CASE OF A JOINT VENTURE OR PARTNER  
4 WHERE TWO PEOPLE ARE LOCKED ARM-IN-ARM TOGETHER WORKING TOWARD A  
5 COMMON GOAL, IGNORING EVERYTHING ELSE.

6 EACH PERSON HAD THEIR OWN AGENDA, AND THEY WERE ALL  
7 TALKING IN THEIR OWN GROUPS. NICK CUBRILOVIC TO MIKE ARRINGTON.

8 **THE COURT:** WELL, IN THE INTEREST -- YOU KNOW, EACH  
9 SIDE WILL POINT OUT THE OTHER SIDE, AS THEY LOOK IN RETROSPECT,  
10 WAS UNDERMINING THEM AND ENGAGING IN NEFARIOUS CONDUCT AND THE  
11 LIKE. THAT DOESN'T NECESSARILY MEAN, AGAIN, THAT A JOINT  
12 VENTURE WASN'T FORMED.

13 IT IS PERHAPS THAT BOTH PARTIES WILL SAY:

14 "THE OTHER SIDE WAS ACTING ABOMINABLY AND  
15 CONTRARY TO THEIR FIDUCIARY OBLIGATIONS."

16 I UNDERSTAND YOUR POINT IS TO SAY "NO FIDUCIARY  
17 OBLIGATIONS AROSE."

18 BUT YOU'RE USING AS THE ARGUMENT FOR NO FIDUCIARY  
19 OBLIGATIONS AROSE:

20 "THE PARTIES WERE BEHAVING VERY BADLY. AND  
21 BEHIND THE BACK OF THE OTHER PARTY ONE IS POACHING,  
22 THINKING ABOUT POACHING THE OTHER."

23 AND THE OTHER SIDE IS SENDING E-MAILS OFF THAT ARE  
24 PURPORTING TO SAY:

25 "INVESTORS ARE BACKING OUT," WHEN THEY ARE NOT.

1 I MEAN, SOME OF THAT IS SORT OF LOOKING AT THAT AND  
2 SAYING:

3 "THEREFORE, THESE PARTIES COULD NOT HAVE BEEN IN  
4 A JOINT VENTURE."

5 AND I'M NOT SURE YOU'RE LOOKING AT IT IN THE ORDER IN  
6 WHICH I WOULD LOOK AT.

7 **MR. STERN:** WE'RE HERE ON A PRELIMINARY INJUNCTION  
8 MOTION. AND THE QUESTION YOUR HONOR HAS IS WHETHER OR NOT  
9 SOMEONE IS LIKELY TO SUCCEED ON THE MERITS.

10 **THE COURT:** RIGHT.

11 **MR. STERN:** WHAT I WANTED TO ADDRESS WAS JUST THAT  
12 PRONG WITH RESPECT TO THE LIKELIHOOD OF SUCCESS ON THE MERITS.

13 **THE COURT:** I KNOW YOU WANT TO CLING ONTO THE  
14 IRREPARABLE INJURY PART.

15 **MR. STERN:** WELL, THE IRREPARABLE INJURY I'M HAPPY  
16 WITH.

17 **THE COURT:** I UNDERSTAND.

18 **MR. STERN:** AND, BY THE WAY, I THINK THE GREATEST  
19 PROOF OF THAT, THERE'S THE OBVIOUS GRUPO MEXICANO ISSUE THAT WE  
20 HAVE. BUT I THINK THE MORE IMPORTANT THING IS: HOW CAN  
21 ARRINGTON COME TO YOUR HONOR AND SAY THAT:

22 "IT WAS REASONABLE FOR ME, MICHAEL ARRINGTON, TO  
23 TRY TO RAISE \$2 MILLION TO LAUNCH THIS, AND THAT WAS  
24 ADEQUATE. THAT WAS ADEQUATE FUNDING, NOT UNDER  
25 CAPITALIZED. THAT WAS ENOUGH MONEY TO GET THIS THING

1 MOVING."

2 AND MY CLIENT RAISES \$3 MILLION, AND HE COMES INTO  
3 COURT AND SAYS:

4 "THIS IS AN UNDERCAPITALIZED ORGANIZATION THAT  
5 MIGHT BE USURPING MY MONIES."

6 THAT'S JUST COUNTERINTUITIVE. POINT NUMBER ONE.

7 POINT NUMBER TWO, WHICH I WANT TO JUST -- THEN I'M  
8 GOING TO STEP DOWN FROM THIS, YOUR HONOR.

9 ACCORDING TO MICHAEL ARRINGTON'S DECLARATION, THE  
10 ENTIRE AMOUNT OF MONEY INVESTED IN THIS PROPOSITION WAS  
11 \$400,000. THAT'S THE LAST PARAGRAPH. IT JUST SAYS -- IT'S A  
12 CONCLUSORY STATEMENT SAYING THAT TECHCRUNCH INVESTED \$400,000.

13 IN HIS DEPOSITION, WHICH I THINK YOU THINK MAY BE  
14 MORE APPROPRIATE FOR THE SUBJECT OF A MOTION TO COMPEL, OR  
15 DISCOVERY MOTION, I ASKED HIM ABOUT THE \$400,000.

16 I SAID:

17 "TELL ME ABOUT THE \$400,000."

18 HE DIDN'T KNOW ABOUT IT.

19 NOW, ON THIS MOTION, ON THIS MOTION WHERE THE PARTY  
20 HAS TO SHOW LIKELIHOOD OF SUCCESS ON THE MERITS AND IRREPARABLE  
21 INJURY I DON'T SEE ANY GAUGE FOR THEIR JURY AT THIS POINT, LET  
22 ALONE IRREPARABLE INJURY.

23 I MEAN, I KNOW HE MAY BE CLAIMING THAT HE HAS THE  
24 RIGHT TO SOME SORT OF UNDISCLOSED PROFITS IN THE FUTURE, BUT ON  
25 THE RECORD WHERE THE WITNESS, THE ONLY WITNESS ON THE QUESTION

1 OF INJURY OR DAMAGES AT ALL SAYS -- BY THE WAY, HE SAID AT HIS  
2 DEPOSITION:

3 "I DON'T KNOW ABOUT THESE NUMBERS," DESPITE WHAT  
4 HE SAID IN HIS DECLARATION, "YOU HAVE TO TALK TO  
5 MS. HARDE ABOUT THAT."

6 AND WE DON'T HAVE ANY INFORMATION FROM MS. HARDE ON  
7 THAT. I THINK THE ANSWER IS CLEAR. YOUR HONOR IS RIGHT. THERE  
8 IS SIMPLY NO PROOF OF IRREPARABLE INJURY.

9 AND WITH RESPECT TO THE MOTION TO DISMISS WE WILL  
10 SUBMIT ON YOUR HONOR'S RULING.

11 **THE COURT:** WHY DON'T YOU ADDRESS FIRST THE POINT MR.  
12 STERN MAKES ABOUT PUTTING ASIDE THE TRADITIONAL IRREPARABLE  
13 INJURY ANALYSIS WE GO THROUGH? THIS IS NOT AS A MATTER OF LAW  
14 A CONSTRUCTIVE -- A CONSTRUCTIVE TRUST CANNOT BE IMPOSED IN THIS  
15 CIRCUMSTANCE.

16 **MR. BRIDGES:** HIS STATEMENTS VIOLATES OR FLOUTS  
17 CALIFORNIA COURT OF APPEALS' DECISION IN HECKMANN, WHICH  
18 EXPRESSLY SAID THAT A CONSTRUCTIVE TRUST IS AN APPROPRIATE  
19 REMEDY FOR BREACH OF FIDUCIARY DUTY.

20 THAT'S THE HECKMANN CASE, H-E-C-K-M-A-N-N, WHICH WE  
21 CITED IN OUR PAPERS.

22 MOREOVER, I CITE TO THE COURT CALIFORNIA CORPORATIONS  
23 CODE SECTION 16404 (B):

24 "A PARTNER'S DUTY OF LOYALTY TO THE PARTNERSHIP  
25 AND THE OTHER PARTNERS INCLUDES ALL OF THE FOLLOWING:

1 ONE: TO ACCOUNT TO THE PARTNERSHIP AND HOLD AS  
2 TRUSTEE FOR IT ANY PROPERTY, PROFIT OR BENEFIT  
3 DERIVED BY THE PARTNER IN THE CONDUCT AND WINDING UP  
4 OF THE PARTNERSHIP BUSINESS OR DERIVED FROM A USE BY  
5 THE PARTNER OF PARTNERSHIP PROPERTY OR INFORMATION,  
6 INCLUDING THE APPROPRIATION OF A PARTNERSHIP  
7 OPPORTUNITY."

8 SO STATE LAW COULD NOT BE CLEARER, YOUR HONOR, ABOUT  
9 THE APPROPRIATENESS OF A CONSTRUCTIVE TRUST.

10 I WOULD LIKE TO JUST RESPOND TO A COUPLE MORE THINGS.

11 I FRANKLY THINK THE DEFENDANT'S COUNSEL MAY HAVE DUG  
12 A DEEPER HOLE THAN HE INTENDED TO WHEN HE CHARACTERIZED THIS AS  
13 AN AGREEMENT WITH:

14 "WHOEVER GETS THE FIRST FINANCING GOES."

15 THERE IS NO SUGGESTION THAT THAT WAS AN  
16 UNDERSTANDING. EVERYBODY WAS OUT TRYING TO RAISE FINANCING. AND  
17 WHY DID TECHCRUNCH COME INTO COURT SAYING:

18 "WELL, THEY ARE UNDERFUNDED AND GOING DOWN"?

19 BECAUSE THEY NEVER DISCLOSED UNTIL AFTER THIS CASE  
20 WAS STARTED THE FINANCING THAT MR. STERN CLAIMS WAS THE  
21 CONTINGENCY FOR THIS TO GO FORWARD. AS A MATTER OF FACT, THEY  
22 WERE OFF RAISING MONEY. AND I THINK THE TESTIMONY SHOWS THEY  
23 STARTED GETTING MONEY AND STARTED REORGANIZING THEMSELVES  
24 INTERNALLY IN SEPTEMBER, 2009. IT'S RIGHT THEN THAT YOU LOOK AT  
25 THE DEALINGS WITH THE PR FIRM. THE DIVORCE IS UNDERWAY IN

1 SEPTEMBER WHEN THEY RAISE MONEY.

2 THE MONEY THEY RAISED, EVEN TAKING HIS ARGUMENT ABOUT  
3 BUSTAMANTE AT FACE VALUE, WHICH IS DEAD WRONG, EVEN TAKING HIS  
4 ARGUMENT AT FACE VALUE THAT CONTINGENCY WAS FULFILLED WHEN HE  
5 GOT THAT \$3 MILLION BECAUSE THEY NEVER EVER MENTIONED THAT TO  
6 TECHCRUNCH.

7 AND THAT'S THE CLASSIC SEIZURE OF AN OPPORTUNITY, A  
8 PARTNERSHIP OPPORTUNITY.

9 I THINK THOSE ARE REALLY THE THINGS. THE BUSTAMANTE,  
10 I NOTICE MR. STERN BACK OFF WHEN YOU PRESSED HIM ABOUT  
11 BUSTAMANTE, BECAUSE HE ACTUALLY REALLY ACCURATELY DESCRIBED IT,  
12 AND THEN IT GOES THE WRONG WAY FOR HIM.

13 HE SAID THEY WERE FOCUSED ON A PARTICULAR  
14 TRANSACTION. INDEED, THAT'S WHAT BUSTAMANTE WAS ABOUT, AND  
15 THAT'S WHY IT WAS NOT A JOINT VENTURE. IT WAS A TRANSACTION THAT  
16 WAS NOT CONSUMMATED.

17 THEIR ENTIRE EFFORT IS TO SAY:

18 "THIS IS A FAILED MERGER AND NOTHING MORE."

19 AND WE THINK THE RECORD HAS BEEN CLEAR, AND WE THINK  
20 THE COURT HAS OBSERVED WHAT IS IN THE RECORD THAT SHOWS THAT  
21 THIS WAS FAR, FAR, FAR MORE, FAR MORE OF AN OPERATION OF A  
22 BUSINESS THAN SIMPLY A FAILED MERGER.

23 THANK YOU, YOUR HONOR.

24 **THE COURT:** THANK YOU.

25 ANY FURTHER COMMENTS?



1           **MR. STERN:** NO, YOUR HONOR.

2           **THE COURT:** OKAY. WITH RESPECT TO THE HOUSEKEEPING  
3 ISSUE OF UNDER SEAL FILINGS, I DO WANT TO LEAVE IT TO THE  
4 PARTIES TO GO BACK AND TAKE A LOOK AT WHAT THEY HAVE SUBMITTED  
5 TO ME AND MAKE ANOTHER RUN AT IT IN TERMS OF WHAT YOU ARE GOING  
6 TO SUBMIT.

7           AND THEN, IF YOU'VE PARED IT DOWN, THEN PERHAPS IT  
8 WILL BE FINE, AND I'LL JUST GO AHEAD AND THEN SIGN THE ORDER.

9           BUT IN THE MEANTIME, JUST FOR YOUR UNDERSTANDING,  
10 I'LL KEEP ALL THE PAPERS. I'VE READ THEM ALL. I'LL HAVE THEM,  
11 BUT THEY OBVIOUSLY WON'T GO IN THE COURT FILE DESPITE MY RANT  
12 ABOUT SEALING, I WON'T THEN FILE THEM. I'LL LET DO YOU ANOTHER  
13 RUN AND TELL ME WHAT YOU THINK NEEDS TO BE FILED UNDER SEAL, AND  
14 WE WILL GO FROM THERE.

15           **MR. BRIDGES:** THANK YOU, YOUR HONOR.

16           **THE COURT:** OKAY.

17           **MR. STERN:** THANK YOU VERY MUCH, YOUR HONOR.

18           **THE COURT:** THANK YOU. AND LET'S SEE. DO YOU NEED  
19 ANY -- WE WILL TAKE THIS UNDER SUBMISSION. GO BACK AND TAKE A  
20 LOOK. GIVE YOU AN ORDER ON BOTH THE PRELIMINARY INJUNCTION  
21 MOTION AND THEN THE MOTION TO DISMISS.

22           WE DON'T HAVE ANYTHING FURTHER SCHEDULED BECAUSE YOU  
23 NEED MY ORDER ON THE PLEADING MOTION.

24           **MR. STERN:** I DON'T THINK, YOUR HONOR -- I DON'T  
25 THINK WE HAVE A CASE MANAGEMENT CONFERENCE.

1           **THE COURT:** WELL, I WOULDN'T EXPECT IT BECAUSE SEEING  
2 THAT ONE OF THE THINGS UNDER SUBMISSION IS A MOTION TO DISMISS.  
3 WHAT I'LL DO IS I'LL GIVE YOU AN ORDER ON THAT.

4           ASSUMING THAT THERE'S LEAVE TO AMEND AT LEAST IN  
5 WHOLE OR IN PART, I WANT TO GET THE PLEADINGS ESTABLISHED BEFORE  
6 WE START DOING SCHEDULING AND OTHER THINGS.

7           SO WITH MY ORDERS YOU WILL BE GETTING SOME DIRECTION  
8 ON A CMC. IF IT'S NOT IN THERE AT A CERTAIN POINT WHEN YOU THINK  
9 IT SHOULD BE IN THERE, FEEL FREE TO ALERT ME, AND WE CAN  
10 SCHEDULE SOMETHING.

11           BUT CORRECT ME IF I'M WRONG. I KNOW THIS CASE HAS  
12 BEEN AROUND, AND I'VE INHERITED IT AND ALL THAT.

13           BUT DO WE NEED A CASE MANAGEMENT CONFERENCE? DON'T  
14 YOU FIRST NEED TO KNOW WHERE THESE MOTIONS ARE GOING TO GO?

15           **MR. STERN:** I JUST WANTED TO MAKE SURE, YOUR HONOR.  
16 WE WERE ORIGINALLY IN FRONT OF JUDGE WARE.

17           **THE COURT:** OKAY.

18           **MR. STERN:** AND THEN, IT GOT TRANSFERRED TO YOU, AND  
19 I THOUGHT YOU MIGHT BE UNDER THE IMPRESSION WE WERE ALREADY SET,  
20 AND WE WEREN'T.

21           **THE COURT:** ALL RIGHT.

22           SO THERE ARE NO DATES. YOU NEVER SAW JUDGE WARE.

23           **MR. STERN:** WE WERE TRANSFERRED TO YOU.

24           **THE COURT:** GOOD.

25           ALL RIGHT. THANK YOU VERY MUCH.

1           **MR. BRIDGES:** THANK YOU, YOUR HONOR.

2           **THE CLERK:** COURT'S ADJOURNED.

3                           (THEREUPON, THIS HEARING WAS CONCLUDED.)

4                           CERTIFICATE OF REPORTER

5           I, KATHERINE WYATT, THE UNDERSIGNED, HEREBY CERTIFY  
6 THAT THE FOREGOING PROCEEDINGS WERE REPORTED BY ME, A CERTIFIED  
7 SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED BY ME INTO  
8 TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE  
9 RECORD OF SAID PROCEEDINGS.

10           I FURTHER CERTIFY THAT I AM NOT OF COUNSEL OR  
11 ATTORNEY FOR EITHER OR ANY OF THE PARTIES IN THE FOREGOING  
12 PROCEEDINGS AND CAPTION NAMED, OR IN ANY WAY INTERESTED IN THE  
13 OUTCOME OF THE CAUSE NAMED IN SAID CAPTION.

14           THE FEE CHARGED AND THE PAGE FORMAT FOR THE  
15 TRANSCRIPT CONFORM TO THE REGULATIONS OF THE JUDICIAL  
16 CONFERENCE.

17           IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND THIS  
18 17TH DAY OF MAY, 2010.

19  
20  
21  
22                           \_\_\_\_\_  
23 /S/ KATHERINE WYATT  
24  
25