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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE GOOGLE BUZZ USER) C-10-00672 JW
PRIVACY LITIGATION,)
) SAN JOSE, CALIFORNIA
)
) OCTOBER 4, 2010
)
) PAGES 1-25

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

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

FOR THE PLAINTIFFS: RAM & OLSON
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555 MONTGOMERY STREET, SUITE 820
SAN FRANCISCO, CALIFORNIA 94111

MASON LLP
BY: GARY E. MASON
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BY: WILLIAM B. RUBENSTEIN
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APPEARANCES CONTINUED ON NEXT PAGE

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

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APPEARANCES (CONTINUED)

FOR THE DEFENDANT: PERKINS COIE
BY: SUSAN FAHRINGER
1201 THIRD AVENUE, SUITE 4800
SEATTLE, WASHINGTON 98101

1 SAN JOSE, CALIFORNIA

OCTOBER 4, 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 10-672,
6 IN RE GOOGLE BUZZ PRIVACY LITIGATION, ON FOR
7 PRELIMINARY APPROVAL HEARING.

8 TEN MINUTES EACH SIDE.

9 COUNSEL, PLEASE COME FORWARD AND STATE
10 YOUR APPEARANCES.

11 MR. RAM: GOOD MORNING, YOUR HONOR.
12 MICHAEL RAM OF RAM & OLSON FOR THE PLAINTIFFS.

13 AND I'D LIKE TO PLEASE INTRODUCE LEAD
14 COUNSEL, GARY MASON FROM THE MASON LAW FIRM; AND
15 CO-COUNSEL PROFESSOR WILLIAM RUBENSTEIN.

16 THE COURT: GOOD MORNING.

17 MS. FAHRINGER: SUSAN FAHRINGER FROM
18 PERKINS COIE ON BEHALF OF GOOGLE, INC.

19 THE COURT: GOOD MORNING.

20 MR. MASON: GOOD MORNING, YOUR HONOR.
21 I'M GARY MASON OF MASON LLP, AND I'M GOING TO BE
22 SHARING THE ARGUMENT THIS MORNING WITH
23 PROFESSOR RUBENSTEIN.

24 THIS MORNING, YOUR HONOR, WE'RE HERE ON
25 THE PRELIMINARY APPROVAL HEARING FOR THE GOOGLE

1 PRIVACY SETTLEMENT, AND WE'LL BE ASKING THE COURT
2 THIS MORNING TO CONSIDER SEVERAL ISSUES THAT WERE
3 RAISED IN OUR PAPERS WHICH I'M SURE YOUR HONOR IS
4 FAMILIAR WITH.

5 THE FIRST, OF COURSE, IS WHETHER THE
6 SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE.

7 THE SECOND ISSUE IS WHETHER THE
8 SETTLEMENT SHOULD BE PROVISIONALLY CERTIFIED.

9 THE THIRD ISSUE WE ASK THE COURT TO
10 CONSIDER THIS MORNING IS WHETHER THE PROPOSED
11 NOTICE SHOULD BE APPROVED AND DISSEMINATED.

12 AND LASTLY, WE HOPE TO ASK YOUR HONOR TO
13 ENTER THIS MORNING THE PRELIMINARY APPROVAL ORDER
14 WHICH WE SUBMITTED WITH OUR PAPERS AND WHICH WE
15 AMENDED JUST THIS WEEK, AND LATER IN THIS
16 PRESENTATION I'LL EXPLAIN THE AMENDMENTS.

17 BUT WHAT I'D LIKE TO DO, YOUR HONOR, IS
18 ASK PROFESSOR RUBENSTEIN TO ADDRESS THE FIRST TWO
19 ISSUES, WHETHER THE SETTLEMENT IS FAIR, ADEQUATE,
20 AND REASONABLE, AND WHETHER THE SETTLEMENT CAN BE
21 PROVISIONALLY CERTIFIED.

22 AND THEN, YOUR HONOR, I WOULD LIKE TO
23 DISCUSS THE NOTICE WITH YOU AND REVIEW THE
24 PRELIMINARY APPROVAL ORDER.

25 SO IF THAT'S ACCEPTABLE WITH YOU, I'LL

1 ASK PROFESSOR RUBENSTEIN TO START THE ARGUMENT.

2 THE COURT: VERY WELL.

3 MR. MASON: THANK YOU, YOUR HONOR.

4 MR. RUBENSTEIN: THANK YOU, YOUR HONOR.

5 I'M GOING TO TALK ABOUT FIVE THINGS VERY BRIEFLY:
6 THE FACTS OF THE CASE; THE CAUSES OF ACTION THAT WE
7 RAISED IN OUR COMPLAINT; THE SETTLEMENT PROCESS;
8 THE SETTLEMENT TERMS; AND THE MOTION FOR CLASS
9 CERTIFICATION.

10 THE FACTS OF THE CASE, YOUR HONOR, ARE
11 STARTING ON FEBRUARY 9TH, GOOGLE INTRODUCED A NEW
12 PROGRAM CALLED BUZZ, WHICH IS A SOCIAL NETWORKING
13 PROGRAM, SOMEWHAT OF AN ATTEMPT, WE ALLEGE, TO
14 COMPETE WITH FACEBOOK OR TWITTER.

15 TO CREATE THIS, WHAT GOOGLE DID IS IT
16 ATTACHED IT TO GOOGLE'S EXISTING E-MAIL PROGRAM,
17 WHICH IS CALLED GMAIL, SO THAT WHEN GMAIL USERS
18 SIGNED ON TO THEIR GMAIL PROGRAM ON FEBRUARY 9TH,
19 ALL OF A SUDDEN THERE WAS THIS THING CALLED GOOGLE
20 BUZZ THERE AND THEY WERE ASKED TO CLICK ON IT AND
21 CHECK IT OUT.

22 THE WAY GOOGLE ATTEMPTED TO GET STARTED
23 WITH THE SOCIAL NETWORKING PROGRAM WAS TO TAKE
24 INFORMATION FROM GMAIL USER'S E-MAIL ACCOUNTS AND
25 MIGRATE THAT INTO BUZZ.

1 SPECIFICALLY THEY DID THREE THINGS: THEY
2 WENT THROUGH THE USER'S MOST FREQUENT CONTACTS IN
3 THEIR E-MAIL PROGRAM AND THEY IDENTIFIED THOSE.

4 THEN THEY SECOND IMPORTED THOSE INTO BUZZ
5 AS YOUR AUTOMATIC FOLLOWER AND FOLLOWING LISTS,
6 WHICH ARE ESSENTIALLY WHAT YOUR FRIENDS WOULD BE ON
7 FACEBOOK OR YOUR FOLLOWERS ON TWITTER. IT'S YOUR
8 SOCIAL NETWORK.

9 AND SO THEY SUGGESTED OR ACTUALLY
10 AUTOMATICALLY SET UP THE PEOPLE IN YOUR PROGRAM AS
11 THAT.

12 AND THEN, THIRD, THEY AUTOMATICALLY
13 ATTACHED BUZZ TO YOUR GMAIL PROGRAM.

14 SO WHEN USERS WOKE UP AND FOUND THIS IN
15 GMAIL, IF THEY CLICKED THROUGH IT, WHAT HAPPENED
16 WAS ALL OF A SUDDEN THEY HAD THESE FOLLOWER AND
17 FOLLOWING LISTS PUBLICLY AVAILABLE ON THE WEB, AND
18 GOOGLE HAD STATED PUBLICLY THAT THESE WERE THE
19 PEOPLE THAT YOU E-MAILED WITH MOST FREQUENTLY.

20 SO WHAT RAISED PRIVACY CONCERNS WAS THE
21 CONFLATION OF THE E-MAIL CONTACT LIST WITH THE
22 PUBLICITY OF THE SOCIAL NETWORKING PROGRAM, AND IT
23 FELT FOR A LOT OF PEOPLE LIKE THE PEOPLE THEY
24 E-MAILED WITH MOST FREQUENTLY WEREN'T NECESSARILY
25 THE PEOPLE THEY WANTED PUBLICLY IDENTIFIED AS THEIR

1 FRIENDS OR FOLLOWERS IN THIS SOCIAL NETWORKING
2 PROGRAM.

3 WE ALL HAVE IN OUR E-MAIL ACCOUNTS OFTEN
4 VERY PRIVATE INFORMATION. ATTORNEYS MAY HAVE
5 CLIENTS, DOCTORS MAY HAVE THEIR PATIENTS. ALL OF
6 US HAVE CONFIDENTIAL PEOPLE WITH WHOM WE
7 COMMUNICATE WHO WE WOULDN'T WANT TO PUBLICIZE TO
8 THE WORLD AS OUR MOST FREQUENT CONTACTS.

9 SO THERE WAS QUITE A CONCERN ABOUT THE
10 PRIVACY ASPECTS OF THIS WHEN BUZZ WAS LAUNCHED.

11 WE FILED SUIT ON FEBRUARY 17TH, EIGHT
12 DAYS LATER.

13 SUBSEQUENTLY FOUR OTHER GROUPS FILED
14 LAWSUITS, ALL FIVE OF WHICH ARE NOW CONSOLIDATED IN
15 THIS CASE, AND A CONSOLIDATED AMENDED COMPLAINT WAS
16 FILED OVER THE SUMMER.

17 THE COMPLAINT, YOUR HONOR, ALLEGES THREE
18 FEDERAL STATUTORY CLAIMS, STATUTORY CLAIMS UNDER
19 THE STORED COMMUNICATIONS ACT, UNDER THE FEDERAL
20 WIRETAP ACT, AND UNDER THE COMPUTER FRAUD AND ABUSE
21 ACT.

22 WE ALSO ALLEGE TWO STATE LAW CLAIMS, A
23 TORT CLAIM FOR THE PUBLIC DISCLOSURE OF PRIVATE
24 FACTS, AND A CONTRACT CLAIM FOR THE BREACH OF
25 CONTRACT WITH GOOGLE'S TERMS OF SERVICE PROGRAM.

1 ALMOST FROM THE TIME WE FILED THE
2 LAWSUIT, GOOGLE REACHED OUT TO US TO TALK ABOUT THE
3 PROGRAM AND TO SEE IF WE COULD VOLUNTARILY TALK
4 ABOUT SETTling THE PROCESS WITHOUT LITIGATING IT
5 TOO STRENUOUSLY.

6 TO THAT END, WE'VE HAD SEVERAL MEETINGS
7 WITH GOOGLE, THE FIRST OF WHICH WAS ON APRIL 21ST
8 IN SAN FRANCISCO AT THEIR COUNSEL'S OFFICE.

9 AT THAT MEETING, THEY MADE AVAILABLE THE
10 EXECUTIVE VICE-PRESIDENT OF GOOGLE, WHO'S IN CHARGE
11 OF THE BUZZ PROGRAM.

12 HE WALKED US THROUGH AND EXPLAINED THE
13 PROGRAM, AND WE HAD THE OPPORTUNITY TO ASK HIM
14 QUESTIONS AND TALK BACK AND FORTH ABOUT OUR PRIVACY
15 CONCERNS AND HEAR HIS ANSWERS ABOUT THE PROGRAM AT
16 THAT MEETING.

17 AT THAT MEETING, GOOGLE ALSO HAD THEIR
18 LAWYERS PRESENT TO US THEIR REACTION TO OUR LEGAL
19 CLAIMS, WHICH WAS ESSENTIALLY AN ORAL PRESENTATION
20 OF THEIR MOTION TO DISMISS.

21 AND WE THEN SPENT SEVERAL HOURS WITH
22 GOOGLE TALKING ABOUT BOTH THE FACTS AND THE LAW.

23 WE CULMINATED THAT MEETING BY DECIDING TO
24 HAVE A FORMAL MEDIATION LATER THAT SPRING.

25 BEFORE THE FORMAL MEDIATION, WE GOT

1 DOCUMENTS FROM GOOGLE IN PREPARATION FOR THE
2 MEETING.

3 WE THEN PREPARED -- BOTH SIDES PREPARED
4 MEDIATION STATEMENTS. OURS WAS A 75 PAGE BRIEF,
5 YOUR HONOR, WITH 30 PAGE OF LEGAL ARGUMENT, SO IT
6 WAS ESSENTIALLY OUR ANSWER TO THEIR MOTION TO
7 DISMISS.

8 THE MEDIATION WAS HELD ON JUNE 2ND AT THE
9 JAMS OFFICE IN SAN FRANCISCO IN FRONT OF THE
10 HONORABLE FERN SMITH, RETIRED UNITED STATES
11 DISTRICT COURT JUDGE.

12 AT THE BEGINNING OF THE MEDIATION, I
13 SPENT A HALF HOUR IN FRONT OF JUDGE SMITH
14 PRESENTING OUR SIDE OF THE CASE AND THE LEGAL
15 ARGUMENTS TO HER AND TO GOOGLE.

16 WE THEN MEDIATED ALL DAY FOR OVER 14
17 HOURS, AT THE END OF WHICH WE CULMINATED WITH A
18 TERM SHEET WHICH I'LL DESCRIBE IN A SECOND.

19 FOLLOWING THE MEDIATION, DURING THE
20 SUMMER, THERE WAS CONFIRMATORY DISCOVERY. GOOGLE
21 PROVIDED US THOUSANDS OF PAGES OF DOCUMENTS,
22 INCLUDING, PERHAPS MOST IMPORTANTLY, ALL OF THE
23 FEEDBACK THEY HAD RECEIVED FROM CONSUMERS
24 COMPLAINING ABOUT BUZZ.

25 SO WE ACTUALLY GOT TO READ THROUGH ALL

1 THE CONSUMER CONCERNS ABOUT BUZZ. WE SET UP A
2 DATABASE, WE CODED ALL OF THEM AND LOGGED THEM AND
3 WE HAVE A SENSE OF WHAT THE CONSUMER CONCERNS WERE
4 AND HOW THEY FARED.

5 YOUR HONOR, THE SETTLEMENT TERMS
6 THEMSELVES WERE DEVELOPED OR WRITTEN INTO THE
7 SETTLEMENT AGREEMENT OVER THE SUMMER. THERE ARE
8 THREE ESSENTIAL ASPECTS OF THE SETTLEMENT.

9 FIRST, THE SETTLEMENT RECOGNIZES THAT
10 GOOGLE HAS MADE CHANGES TO THE PROGRAM SINCE IT WAS
11 FIRST INSTITUTED IN FEBRUARY, THAT IT MADE THE
12 PRIVACY OPTIONS MORE PALPABLE AND EASIER TO USE FOR
13 USERS.

14 PERHAPS MOST IMPORTANTLY, IN APRIL,
15 SEVERAL MONTHS AFTER THE PROGRAM -- AFTER THE
16 LAWSUIT WAS FILED, GOOGLE GAVE USERS A WHOLE SECOND
17 CHANCE TO GO BACK AND RECHECK THEIR PRIVACY OPTIONS
18 AND SEE IF THEY HAD BUZZ SET UP THE WAY THEY WANTED
19 IT TO BE SET UP.

20 SO THE SETTLEMENT RECOGNIZES THE CHANGES
21 THAT HAVE BEEN MADE TO MAKE BUZZ MORE PRIVACY
22 FRIENDLY.

23 SECOND, GOOGLE AGREES IN THE SETTLEMENT
24 TO UNDERTAKE A PUBLIC EDUCATION CAMPAIGN ABOUT THE
25 PRIVACY ASPECTS OF BUZZ. THE CONTENT OF THAT HAS

1 YET TO BE DETERMINED, BUT IT WILL BE ROLLED OUT,
2 AND AFTER GOOGLE -- AND WE HAVE THE OPPORTUNITY TO
3 PROVIDE SUGGESTIONS TO THEM FOR THE PROGRAM.

4 AFTER THEY DO THE PUBLIC EDUCATION
5 PROGRAM ABOUT THE PRIVACY CONCERNS, THEY'LL REPORT
6 BACK TO US ON WHAT IT WAS AND WE'LL GET TO
7 SCRUTINIZE WHAT WAS DONE IN THAT PROGRAM.

8 THIRD, PERHAPS MOST IMPORTANTLY, AGAIN,
9 THE THIRD ASPECT OF THE SETTLEMENT TERMS IS THAT
10 GOOGLE HAS AGREED TO SET UP A FUND THAT ENCOMPASSES
11 \$8.5 MILLION.

12 THE FUND WILL BE USED TO BE A CY PRES
13 FUND WITH THE MONIES GOING TO GROUPS THAT DO
14 INTERNET PRIVACY WORK AND PUBLIC POLICY WORK AROUND
15 INTERNET PRIVACY.

16 YOUR HONOR, WE SET UP THE CY PRES FUND
17 BECAUSE THE AMOUNT OF MONEY, \$8.5 MILLION, WHEN
18 DIVIDED BY THE NUMBER OF CLASS MEMBERS -- WE THINK
19 THERE ARE 30 MILLION GMAIL USERS IN THE
20 UNITED STATES WHO WERE OFFERED THE OPPORTUNITY TO
21 USE BUZZ -- THE AMOUNT OF MONEY PER GMAIL USER WAS
22 NOT WORTH THE COST OF DISTRIBUTING TO THE GMAIL
23 USERS IN THIS CIRCUMSTANCE.

24 FURTHERMORE, OUR INFORMATION SHOWED WHEN
25 WE REVIEWED ALL THE COMPLAINTS THAT GOOGLE HAD

1 RECEIVED, VERY FEW PEOPLE HAD ARTICULATED ACTUAL
2 COMPENSATORY DAMAGES OR SUFFERED HARM FROM THE
3 PRIVACY VIOLATIONS.

4 THOSE WHO HAD RAISED CONCERNS HAD
5 CONCERNS ABOUT THEIR PRIVACY BEING VIOLATED, BUT NO
6 ONE HAS PARTICULAR STORIES WHERE THEY HAD
7 COMPENSATORY DAMAGES RAISED.

8 WE THINK THE MAJOR PORTION OF OUR DAMAGES
9 HERE ARE THE STATUTORY DAMAGES UNDER THE FEDERAL
10 STATUTE, AND THE STATUTORY DAMAGES ARE MORE
11 EXEMPLARY THAN COMPENSATORY.

12 SO WE THINK IN THESE CIRCUMSTANCES A 100
13 PERCENT CY PRES FUND IS APPROPRIATE AND IT'S A LOT
14 OF MONEY FOR THE INTERNET PRIVACY GROUPS ONCE IT IS
15 DISTRIBUTED TO THEM, AND WE THINK IT'S A GOOD WAY
16 OF USING THIS MONEY BECAUSE IT WILL ENABLE MORE
17 SCRUTINY ABOUT PRIVACY ON THE INTERNET, WHICH IS
18 WHAT THIS CASE IS ALL ABOUT.

19 FINALLY, YOUR HONOR, WE ASK THAT YOU
20 CERTIFY A CLASS OF ALL GMAIL USERS WHO WERE OFFERED
21 THE OPPORTUNITY TO USE BUZZ IN THE UNITED STATES.

22 THE CLASS MEETS ALL THE REQUIREMENTS OF
23 RULE 23(A). IT'S NUMEROUS. THERE ARE OVER 30
24 MILLION PEOPLE IN THE CLASS, WE BELIEVE. THEY HAVE
25 COMMON LEGAL ISSUES, THE ONES WE'VE DESCRIBED, AND

1 FACTUAL ISSUES.

2 OUR CLASS REPRESENTATIVES HAVE CLAIMS
3 THAT ARE TYPICAL OF ALL THE MEMBERS OF THE CLASS
4 AND WE BELIEVE THEY'RE ADEQUATE REPRESENTATIVES OF
5 THE CLASS IN GENERAL, AND WE'D ASK THAT THE CASE BE
6 CERTIFIED UNDER 23(B)(3).

7 THE COURT: (B)(3)?

8 MR. RUBENSTEIN: YES, YOUR HONOR. IT'S
9 A --

10 THE COURT: I DIDN'T SEE THAT AS CLEARLY
11 SPELLED OUT FOR ME. I WAS THINKING THIS WAS MORE
12 APPROPRIATELY A (B)(2) CLASS.

13 IS THERE A REASON WHY (B)(3)?

14 MR. RUBENSTEIN: YES, YOUR HONOR. WE
15 WERE THINKING ABOUT THE SAME QUESTION IN THINKING
16 ABOUT THIS.

17 THERE ARE SEVERAL REASONS. ONE IS, OF
18 COURSE, IN A (B)(1) AND (B)(2) CLASS, THOSE ARE
19 NON-OPT OUT CLASSES.

20 ONE THING, BECAUSE OF THE CY PRES FUND,
21 IS WE WANTED TO MAKE SURE THAT ANYONE WHO DID FEEL
22 LIKE THEY HAVE PERSONAL DAMAGES COULD OPT OUT AND
23 BRING THEIR OWN CASE IF THEY WANTED TO.

24 SECOND, WE ARE ASKING FOR MONEY DAMAGES
25 AND WE ARE RECEIVING MONEY DAMAGES OF \$8.5 MILLION.

1 THE MONEY IS NOT GOING DIRECTLY TO THE
2 CLASS MEMBERS, SO IT'LL BE TO A CY PRES. SO IT IS
3 A MONEY DAMAGE CLASS ACTION.

4 THIRD, WE'RE NOT ASKING FOR INJUNCTIVE
5 RELIEF UNDER (B) (2). THERE'S NO ACTUAL INJUNCTION
6 AGAINST GOOGLE ISSUING FROM THE CASE.

7 AND, OF COURSE, WE --

8 THE COURT: SO YOU'RE SATISFIED THAT
9 WHATEVER MODIFICATIONS THAT NEED TO BE MADE TO THE
10 BUZZ PROGRAM HAVE ALREADY BEEN MADE?

11 MR. RUBENSTEIN: WE'RE SATISFIED THAT THE
12 COMBINATION OF THE CHANGES THAT HAVE BEEN MADE AND
13 THE PUBLIC EDUCATION CAMPAIGN ABOUT THOSE CHANGES
14 AND ABOUT THE PRIVACY ASPECTS OF BUZZ, PLUS THE
15 MONIES THAT ARE GOING TO GO TO THE PRIVACY GROUPS
16 ARE SUFFICIENT SETTLEMENT OF THE CLASS'S CLAIMS IN
17 THIS CONTEXT, YES, YOUR HONOR.

18 THE COURT: SO THAT MAYBE THIS IS A
19 HYBRID. I JUST -- IT IS A STRANGE (B) (3) MAKEUP.

20 IS THERE -- AND THE REASON, THE PRIMARY
21 REASON, THEN, AS I HEAR IT, FOR CERTIFYING IT UNDER
22 (B) (3) IS TO PROVIDE FOR OPT OUTS.

23 MR. RUBENSTEIN: THAT'S CORRECT, YOUR
24 HONOR, ALTHOUGH I ALSO WOULD SAY THIS.

25 WE TEND TO THINK OF THE (B) (3) CLASS

1 ACTION AS A MONEY DAMAGE CLASS ACTION AS OPPOSED TO
2 INJUNCTIVE CLASS ACTION OR A LIMITED FUND CASE.

3 IF YOU ACTUALLY GO BACK AND READ THE TEXT
4 OF (B) (3), IT DOESN'T USE THAT LANGUAGE. IT SIMPLY
5 SAYS THAT THERE ARE CLAIMS IN THE CASE IN WHICH
6 COMMON ISSUES PREDOMINATE OVER INDIVIDUAL ISSUES
7 AND THE CLASS PROCEEDING WOULD BE SUPERIOR. THOSE
8 ARE THE ONLY ACTUAL TECHNICAL REQUIREMENTS.

9 THE COURT: I DID THAT ACTUALLY WHEN I
10 WAS THINKING ABOUT THIS. I WENT BACK TO THE
11 LANGUAGE, AND YOU'RE CORRECT.

12 I SPENT MOST OF MY TIME READING THE NOTES
13 BECAUSE THE CASE LAW IS PROBABLY FAR MORE
14 INSTRUCTIVE AS TO THE DIFFERENCE BETWEEN THE TWO.

15 I'M NOT -- LET ME ASK THIS. YOUR LEGAL
16 RESEARCH SUGGESTS THAT IF IT'S CERTIFIED UNDER
17 (B) (2) WITHOUT OPT OUTS, THAT WOULD PRECLUDE, THEN,
18 AN INDIVIDUAL CLASS MEMBER LATER WHO CLAIMS DAMAGES
19 FROM BRINGING A CLAIM?

20 MR. RUBENSTEIN: I THINK IT WOULD, YOUR
21 HONOR, YES, ABSOLUTELY.

22 IF IT WAS A -- I UNDERSTAND GOOGLE WOULD
23 HAVE THE OPPORTUNITY TO ARGUE THAT THOSE CLAIMS
24 WERE PRECLUDED BY THE (B) (2) JUDGMENT.

25 YOUR HONOR, I --

1 THE COURT: AND THEN AS TO THE STATUTORY
2 CLAIMS WITH THEIR STATUTORY DAMAGES, IT IS REALLY
3 THE AMOUNT OF THE SETTLEMENT THAT MAKES IT SMALL,
4 AS OPPOSED TO THE KINDS OF DAMAGES THAT ARE
5 AVAILABLE UNDER THE STATUTES, STATUTORY DAMAGES.

6 MR. RUBENSTEIN: THAT'S CORRECT.

7 THE STATUTORY DAMAGES, UNDER THE PRIMARY
8 CLAIM, WHICH IS THE STORED COMMUNICATIONS ACT
9 CLAIM, ARE \$1,000 PER CLASS MEMBER.

10 AGAIN, YOU KNOW, IN SETTling THE CASE,
11 OBVIOUSLY WE HAVEN'T RECEIVED THAT LEVEL OF MONEY
12 FOR CLASS MEMBERS.

13 AND IT IS A SETTLEMENT, SO IT IS A SMALL
14 CLAIM SETTLEMENT IN THAT REGARD, THAT'S CORRECT.

15 YOUR HONOR, I WRITE ABOUT CLASS ACTION
16 LAW. THIS IS WHAT I DO. I EDIT NEWBERG ON CLASS
17 ACTIONS AND WRITE ABOUT CLASS ACTION LAW, AND I HAD
18 THE SAME KIND OF REACTION TO THINKING ABOUT
19 CERTIFYING THIS CLASS AS YOU HAVE.

20 BUT THE MORE I THOUGHT ABOUT IT, I DID
21 THINK (B) (1) AND (B) (2) WERE INAPPROPRIATE VEHICLES
22 BECAUSE OF THE NON-OPT OUT.

23 AND I DO THINK, ALTHOUGH ALL THE MONEY IS
24 GOING TO CY PRES, THIS IS A MONEY DAMAGE CLASS
25 ACTION. WE'RE DEFINITELY SECURING \$8.5 MILLION OF

1 DISGORGEMENT FROM GOOGLE AND I THINK (B) (3) IS THE
2 PROPER CATEGORY TO PUT THE CASE INTO FOR THOSE
3 PURPOSES.

4 THE COURT: WHAT DOES YOUR CHAPTER ON CY
5 PRES SAY WHEN THERE'S NO NAMED DAMAGES, IT'S ALL CY
6 PRES?

7 CY PRES IS WHAT I USED TO UNDERSTAND TO
8 BE AS SORT OF THE LEFT OVER. THIS IS LIKE THE MAIN
9 PART.

10 MR. RUBENSTEIN: THAT'S CORRECT. THAT'S
11 CORRECT.

12 IT'S AN ODD SETTLEMENT IN THAT REGARD.
13 WE FOUND OTHER PRECEDENTS FOR IT.

14 FOR US IT'S A COMBINATION OF TWO FACTORS.
15 WE'D LOVE TO GET MONEY TO THE CLASS, OBVIOUSLY, BUT
16 THE AMOUNT OF MONEY THAT'S AVAILABLE AND NUMBER OF
17 CLASS MEMBERS MAKES IT IMPLAUSIBLE.

18 WHAT GIVES US, I THINK, COMFORT IN THE
19 100 PERCENT CY PRES IS TWO THINGS. NO CLASS
20 MEMBERS HAVE BEEN ABLE TO ARTICULATE ACTUAL DAMAGES
21 THEMSELVES, THEIR DAMAGES ARE STATUTORY, AND THE
22 PURPOSE OF STATUTORY DAMAGES IS TO DETER, NOT SO
23 MUCH -- AND TO ENABLE LITIGATION, NOT SO MUCH TO
24 PUT THE MONEY IN THE HANDS OF PARTICULAR PEOPLE.

25 STATUTORY DAMAGES ARE EXEMPLARY TO

1 ENCOURAGE PEOPLE TO PURSUE LITIGATION AND THE CLASS
2 ACTION HAS SERVED THAT FUNCTION HERE.

3 AND SECOND, WE ACTUALLY THINK THE MONEY,
4 IF YOU TAKE ALL THIS MONEY AND YOU SPREAD IT OVER
5 30 MILLION PEOPLE, EVERYONE GOES HOME WITH A
6 QUARTER AND NOTHING HAPPENS.

7 BUT IF YOU GIVE THE MONEY TO INTERNET
8 PRIVACY ORGANIZATIONS AS WE'RE PROPOSING, I
9 ACTUALLY THINK IT IS A BETTER USE OF THE MONEY FROM
10 A PUBLIC POLICY --

11 THE COURT: THAT'S NOT MY CONCERN. I
12 ACTUALLY THINK THAT'S WELL THOUGHT OUT. IT JUST
13 SEEMS TO ME THAT I WORRY ABOUT THE PRECEDENT SET BY
14 THE COURT IN CERTIFYING THIS UNDER (B) (3) UNDER
15 THESE CIRCUMSTANCES, AND I -- I WILL -- I'LL
16 PRELIMINARILY APPROVE IT BECAUSE THAT WOULD STILL
17 GIVE ME TIME TO THINK ABOUT IT AND SEE WHAT HAPPENS
18 IN THE PROCESS BEFORE I HAVE TO FINALLY TAKE
19 ACTION.

20 BUT THANK YOU FOR YOUR PRESENTATION.

21 MR. RUBENSTEIN: THANK YOU, YOUR HONOR.

22 WE DO THINK THAT UNDER OTHER
23 CIRCUMSTANCES, 100 PERCENT CY PRES MAY NOT BE
24 APPROPRIATE, BUT WE FEEL WE'LL BE ABLE TO SHOW YOU
25 AT THE FINAL APPROVAL THAT THIS IS ONE OF THEM IN

1 WHICH IT IS.

2 THE COURT: THANK YOU, COUNSEL.

3 MR. RUBENSTEIN: THANK YOU, SIR.

4 THE COURT: COUNSEL.

5 MR. MASON: YOUR HONOR, I WANTED TO
6 ADDRESS THE COURT ON THE NOTICE PROGRAM WHICH WE'RE
7 ASKING THE COURT TO APPROVE TODAY AND JUST DISCUSS
8 SOME FEATURES OF THE PRELIMINARY APPROVAL ORDER
9 THAT WE WOULD LIKE YOU TO ENTER TODAY.

10 THE COURT: ALL RIGHT, QUICKLY.

11 MR. MASON: VERY QUICKLY. WE HAVE AN
12 EXTENSIVE NOTICE PROGRAM PLANNED, YOUR HONOR. IT'S
13 BASICALLY E-MAIL NOTIFICATION TO UPWARDS OF
14 MILLIONS, TENS OF MILLIONS OF INDIVIDUALS. IT'S
15 DESIGNED TO GET TO A VERY HIGH PERCENTAGE OF THE
16 CLASS. THAT'S GOING TO BE SUPPLEMENTED BY A
17 WEBSITE AND A JOINT PRESS RELEASE.

18 WE'VE SUBMITTED THE NOTICE TO THE COURT.
19 IT HAS -- IT MEETS ALL THE REQUIREMENTS OF DUE
20 PROCESS BY SETTING FORTH THE TERMS OF THE
21 SETTLEMENT, THE CLASS MEMBERS' RIGHTS, ET CETERA,
22 ALL CONSISTENT WITH THE MANUAL FOR COMPLEX
23 LITIGATION.

24 YOUR HONOR, THE AMENDED --

25 THE COURT: DO I HAVE A COPY OF THE

1 NOTICE ITSELF?

2 MR. MASON: YES. IT'S AN EXHIBIT TO OUR
3 PRELIMINARY -- OUR MEMORANDUM IN SUPPORT OF
4 PRELIMINARY APPROVAL.

5 DO YOU HAVE THAT? DO YOU KNOW WHAT
6 EXHIBIT THAT IS?

7 MR. RUBENSTEIN: B.

8 THE COURT: EXHIBIT B.

9 MR. MASON: AND WE'RE DOING SOME EDITING
10 TO IT, SOME SLIGHT EDITING TO IT, BUT NOTHING
11 SUBSTANTIVE, AS WE'RE WORKING WITH OUR NOTICE
12 PROVIDER, THE GARDEN CITY GROUP.

13 BUT I CAN ASSURE YOUR HONOR THAT IT
14 COVERS THE LITIGATION HISTORY, THE TERMS OF THE
15 SETTLEMENT AGREEMENT, THE BINDING EFFECT OF THE
16 SETTLEMENT, THE RIGHT TO OPT OUT, THE RIGHT TO
17 OBJECT, WHOM TO CONTACT FOR ADDITIONAL INFORMATION.

18 IT SETS FORTH THAT WE'RE SEEKING
19 ATTORNEYS' FEES OF 25 PERCENT AND WE WILL BE
20 SEEKING AN INCENTIVE FEE FOR THE CLASS
21 REPRESENTATIVE OF \$2500.

22 ONE FEATURE THAT WE ADDED, YOUR HONOR, IN
23 LIGHT OF THE RECENT MERCURY INTERACTIVE CASE, THE
24 NINTH CIRCUIT COURT OF APPEALS CASE, WE WANTED TO
25 BE VERY SPECIFIC IN HERE, AND THIS IS WHAT WE ADDED

1 IN THE AMENDED NOTICE, THAT THE DEADLINE FOR
2 OBJECTIONS WILL BE TWO WEEKS AFTER THE DEADLINE FOR
3 FILING OUR APPLICATION FOR ATTORNEYS' FEES.

4 UNDER THE NINTH CIRCUIT PRECEDENT NOW,
5 WHICH RECENTLY CAME OUT AT THE END OF AUGUST,
6 THAT'S REQUIRED.

7 THERE'S NO SET GUIDELINES, YOU KNOW, HOW
8 FAR IN ADVANCE. WE THOUGHT 14 DAYS IN ADVANCE
9 WOULD BE SUFFICIENT FOR OBJECTORS TO REVIEW OUR
10 APPLICATION AND FOR -- IF ANYONE IS GOING TO OBJECT
11 TO OUR APPLICATION FOR ATTORNEYS' FEES AND FOR
12 INCENTIVE AWARD, THEY'LL HAVE SUFFICIENT TIME TO DO
13 SO.

14 AND LASTLY, YOUR HONOR, BY OUR
15 CALCULATION, WE WOULD PROPOSE, IF THE COURT HAS THE
16 DATE AVAILABLE, MONDAY, DECEMBER 20TH AS A DATE FOR
17 THE FAIRNESS HEARING, OR LATER INTO JANUARY.

18 AND THE REASON WE SAY THAT IS AS FOLLOWS:
19 FIRST OF ALL, YOUR HONOR, THE CAFA NOTICE -- EXCUSE
20 ME -- THE CAFA NOTICE IS WELL UNDER WAY, SO THAT'S
21 NOT AN ISSUE. THE 90 DAYS REQUIRED BY CAFA WILL
22 BE -- WILL HAVE EXPIRED WELL IN ADVANCE OF THE DATE
23 IN DECEMBER .

24 MORE IMPORTANTLY ARE THE DEADLINES FOR
25 OBJECTIONS AND FOR FILING EXCLUSIONS, WHICH

1 ACCORDING TO THE SETTLEMENT AGREEMENT IS 60 DAYS
2 FROM WHEN THE NOTICE GOES OUT.

3 WE ANTICIPATE THAT WE WILL BE ABLE TO
4 DISSEMINATE NOTICE AND -- WITHIN TWO WEEKS, AND SO
5 WE CAN'T HAVE THE HEARING ANY SOONER THAN 60 DAYS
6 AFTER THAT, WHICH WILL BRING US INTO EARLY
7 DECEMBER.

8 SO --

9 THE COURT: WELL, YOU KNOW, MY STAFF PUT
10 TOGETHER SOME DATES AND MAYBE THEY SHOULD GO OVER
11 THEM WITH YOU BEFORE YOU LEAVE TODAY.

12 MR. MASON: SURE.

13 THE COURT: BECAUSE THE DATES THEY HAD
14 TAKES YOU INTO JANUARY, TOWARD THE END OF THE
15 JANUARY FOR THE FAIRNESS HEARING.

16 BUT IT COULD BE THAT YOU KNOW THINGS
17 ABOUT THE SPEED AT WHICH YOU CAN DO THINGS THAT
18 WOULD AFFECT THE COURT'S DATES.

19 SO WHY DON'T YOU STAND BY FOR A LITTLE
20 BIT AFTER THE CLOSE OF THE --

21 MR. MASON: SURE.

22 THE COURT: -- CALENDAR AND REVIEW THOSE.

23 MR. MASON: WHAT THEY MAY NOT HAVE
24 ANTICIPATED IS THAT THE CAFA NOTICE HAS ALREADY
25 GONE OUT. THAT'S A 90-DAY PERIOD.

1 THE COURT: THAT'S A POTENTIAL.

2 MR. MASON: THANK YOU, YOUR HONOR.

3 THE COURT: ALL RIGHT. SO DOES GOOGLE'S
4 COUNSEL WANT TO SPEAK TO THIS ISSUE?

5 MS. FAHRINGER: THIS MOTION IS MADE WITH
6 THE SUPPORT OF GOOGLE, AND WE DON'T NECESSARILY
7 AGREE WITH THE FACTUAL RECITATIONS AND THE
8 ALLEGATIONS MADE BY THE PLAINTIFFS OBVIOUSLY, BUT
9 WE DO -- WE DO BELIEVE THAT THE SETTLEMENT SHOULD
10 BE PRELIMINARILY APPROVED TODAY.

11 THE COURT: ALL RIGHT. AND I'M NOT BEING
12 ASKED TO DO ANYTHING TO REQUIRE THAT YOU CONDUCT
13 YOURSELF IN ANY PARTICULAR WAY, BUT IT DOES SOUND
14 AS THOUGH THIS EDUCATION PROGRAM THAT YOU'RE GOING
15 TO UNDERTAKE AS A PART OF THIS IS DESIGNED TO
16 EDUCATE YOURSELF AND THE PUBLIC AS TO HOW TO AVOID
17 THESE KINDS OF CIRCUMSTANCES.

18 MS. FAHRINGER: CERTAINLY SO, YOUR HONOR.

19 THE COURT: I GUESS THAT'S THE ONLY OTHER
20 ASPECT OF THIS THAT WORRIES ME IS I'VE HAD SEVERAL
21 INSTANCES WHERE I'VE APPROVED EDUCATIONAL PROGRAMS
22 AND WHAT IT TURNED INTO WAS CIRCUMSTANCES WHERE THE
23 PLAINTIFF SIMPLY EXPLAINED THAT THEY HAD DONE
24 NOTHING WRONG, AND SO THE EDUCATION DIDN'T WORK
25 QUITE THE WAY I THOUGHT IT SHOULD.

1 SO -- BUT WITH A PROFESSOR ON THE OTHER
2 SIDE, MAYBE A CURRICULUM WILL BE ESTABLISHED HERE
3 THAT WILL BE BENEFICIAL TO THE PUBLIC.

4 VERY WELL. THE COURT WILL ISSUE AN ORDER
5 PRELIMINARILY APPROVING THIS SETTLEMENT.

6 THANK YOU ALL.

7 MR. MASON: THANK YOU, YOUR HONOR.

8 MR. RUBENSTEIN: THANK YOU, YOUR HONOR.

9 MS. FAHRINGER: THANK YOU, YOUR HONOR.

10 THE COURT: BUT STAND BY TO TALK WITH MY
11 STAFF FOR THE DATES. IN FACT, SOMEBODY MIGHT TALK
12 TO YOU NOW SO YOU DON'T HAVE TO STAND BY TOO LONG.

13 (WHEREUPON, THE PROCEEDINGS IN THIS
14 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.

/s/

LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595