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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE GOOGLE REFERRER HEADER CASE NO. CV-10-04809-EJD
PRIVACY LITIGATION.

SAN JOSE, CALIFORNIA

AUGUST 29, 2014

PAGES 1 - 68

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE EDWARD J. DAVILA
UNITED STATES DISTRICT JUDGE

A-P-P-E-A-R-A-N-C-E-S

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(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER: IRENE L. RODRIGUEZ, CSR, CRR
CERTIFICATE NUMBER 8074

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY,
TRANSCRIPT PRODUCED WITH COMPUTER.

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

FOR THE DEFENDANTS:

O'MELVENY & MYERS
BY: RANDALL W. EDWARDS
TWO EMBARCADERO CENTER
28TH FLOOR
SAN FRANCISCO, CALIFORNIA
94111

MAYER BROWN
BY: EDWARD JOHNSON
TWO PALO ALTO SQUARE
SUITE 300
PALO ALTO, CALIFORNIA
94306

ALSO PRESENT:

CCAF
BY: THEODORE H. FRANK
1718 M STREET NW, NO. 236
WASHINGTON, DC 20036

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SAN JOSE, CALIFORNIA AUGUST 29, 2014

P R O C E E D I N G S

(COURT CONVENEED.)

THE CLERK: CALLING CASE NUMBER 10-4809, IN RE
GOOGLE REFERRER HEADER PRIVACY LITIGATION.

ON FOR MOTION FOR CLASS ACTION SETTLEMENT AND MOTION FOR
ATTORNEY'S FEES.

COUNSEL, PLEASE COME FORWARD AND STATE YOUR APPEARANCES.

MR. JOHNSON: GOOD MORNING, YOUR HONOR. WARD
JOHNSON FOR GOOGLE.

THE COURT: THANK YOU. GOOD MORNING.

MR. EDWARDS: GOOD MORNING, YOUR HONOR. RANDALL
EDWARDS ALSO FOR GOOGLE.

THE COURT: THANK YOU. GOOD MORNING.

MR. ASCHENBRENER: GOOD MORNING, YOUR HONOR.
MICHAEL ASCHENBRENER ON BEHALF OF PLAINTIFFS AND THE CLASS.

THE COURT: THANK YOU.

MR. CHOROWSKY: ILAN CHOROWSKY FOR THE PLAINTIFF AND
THE CLASS.

THE COURT: GOOD MORNING.

MR. NASSIRI: GOOD MORNING, YOUR HONOR. KASSRA
NASSIRI FOR PLAINTIFFS.

THE COURT: THANK YOU. GOOD MORNING.

MR. STEPICK: GOOD MORNING, YOUR HONOR. ALAN

1 STEPICK FOR THE PLAINTIFFS.

2 THE COURT: THANK YOU VERY MUCH.

3 MR. FRANK: AND THEODORE H. FRANK FOR THE OBJECTOR.

4 THE COURT: THANK YOU. THANK YOU FOR BEING HERE,
5 ALL OF YOU. I APPRECIATE THAT. I HAVE READ YOUR FILINGS AND
6 THANK YOU FOR THOSE. THOSE HAVE BEEN VERY HELPFUL.

7 THIS IS ON TODAY FOR FINAL APPROVAL, AND I NOTE THAT --
8 ARE THERE ANY OTHER OBJECTORS PRESENT? I SEE OR HEAR NO
9 RESPONSE.

10 AND I DO HAVE PLAINTIFFS' REPLY MEMORANDUM, AND THIS IS
11 DOC 75 IN SUPPORT OF THE FINAL APPROVAL. THIS IS ON FOR FINAL
12 APPROVAL.

13 LET ME ASK YOU COUNSEL, ARE THERE ANY CHANGES, ADDITIONS,
14 DELETIONS, AUGMENTATIONS TO YOUR FILINGS IN REGARDS TO FINAL
15 APPROVAL?

16 MR. NASSIRI: NO, YOUR HONOR.

17 MR. ASCHENBRENER: NO, YOUR HONOR.

18 THE COURT: NOTHING FROM THE DEFENSE?

19 MR. EDWARDS: CORRECT, YOUR HONOR.

20 THE COURT: OKAY. ANYTHING FROM THE OBJECTOR?

21 ANYTHING ADDITIONAL TO YOUR --

22 MR. FRANK: I THINK OUR PAPERS DESCRIBE OUR
23 POSITION.

24 THE COURT: OKAY. THANK YOU. WELL, I WILL HEAR
25 FROM THE PARTIES HERE AS WELL AS ANY OBJECTORS THAT ARE PRESENT

1 THAT WISH TO PLACE OBJECTIONS.

2 WHY DON'T I, WHY DON'T I GIVE THE FLOOR TO THE OBJECTOR,
3 MR. FRANK, IF I COULD FOR A MOMENT. LET'S HEAR FROM HIM FIRST,
4 PLEASE. THANK YOU.

5 MR. FRANK: THANK YOU, YOUR HONOR.

6 THE COURT: YOU'RE WELCOME.

7 MR. FRANK: OUR PAPERS DESCRIBE THE POSITION. IN
8 OUR VIEW, LANE, THE SUPREME COURT'S DENIAL OF CERTIORARI,
9 JUSTICE ROBERTS'S DECISION, RESPECTING DENIAL OF CERTIORARI
10 POINTED OUT THAT THE COURT WAS CONCERNED ABOUT CY PRES ISSUES
11 AND A VARIETY OF FACTORS RELATING TO CY PRES ISSUES.

12 AND I THINK THIS SETTLEMENT PRESENTS EXACTLY THE SORT OF
13 PROBLEMS THAT THE COURT WAS CONCERNED ABOUT. THIS IS A \$0
14 SETTLEMENT TO THE CLASS WHERE ALL OF THE MONEY GOES TO CY PRES
15 AND MOST, AND PERHAPS EVEN ALL OF THE CY PRES RECIPIENTS, ARE
16 RECIPIENTS THAT GOOGLE HAS ALREADY GIVEN MONEY TO.

17 IN FACT, SEVERAL OF THEM PROMINENTLY SAY WE'RE SUPPORTED
18 BY GOOGLE ON THEIR WEBSITE. SO THIS IS NOT EVEN A NEW BENEFIT
19 TO THE CLASS. IT'S A CHANGE OF ACCOUNTING ENTRIES TO JUSTIFY
20 THE ATTORNEY'S FEES.

21 SO THERE ARE TWO POSSIBILITIES HERE, EITHER IT'S FEASIBLE
22 TO DISTRIBUTE MONEY TO THE CLASS, AND WE CONTEND THAT IT IS
23 FEASIBLE TO DISTRIBUTE MONEY TO THE CLASS.

24 THE COURT: HOW WOULD THAT WORK WITH THE SHEER SIZE
25 OF THE CLASS?

1 MR. FRANK: WELL, OBVIOUSLY YOU CAN'T JUST MAIL A
2 CHECK FOR \$0.06 TO EVERY CLASS MEMBER, BUT IF YOU HAVE A CLAIMS
3 PROCESS, THE REALITY IS 0.5 PERCENT OF MEMBERS OF THE CLASS
4 FILE CLAIMS ON AVERAGE, MAYBE LESS.

5 THE FRALEY VERSUS FACEBOOK SETTLEMENT, IT'S VERY SIMILAR
6 TO THIS ONE, GIGANTIC CLASS OF OVER 100 MILLION PEOPLE, THEY
7 JUST SAID, OKAY, WE'LL HAVE A CLAIMS PROCESS AND SEE WHO FILES
8 CLAIMS AND WE'LL GIVE EVERYBODY \$10. AND SO FEW PEOPLE FILE
9 CLAIMS THAT THEY ENDED UP GIVING EVERYBODY \$15.

10 WE HAVE \$6 AND A HALF MILLION HERE THAT COULD BE
11 DISTRIBUTED, MAYBE EVEN MORE IF THE ATTORNEY'S FEES --

12 THE COURT: WHAT IS THE CLASS SIZE HERE?

13 MR. FRANK: THE PAPERS SAY OVER A HUNDRED MILLION.
14 IT'S NOT CLEAR FROM WHAT I UNDERSTAND.

15 THE COURT: BUT LET'S SAY IT'S 90 MILLION.

16 MR. FRANK: WELL, EVEN IF IT IS 100 MILLION, AT A
17 1 PERCENT CLAIMS RATE, AND WE NEVER SEE 1 PERCENT CLAIMS RATE
18 IN A SETTLEMENT LIKE THIS, IT'S STILL FEASIBLE TO DISTRIBUTE
19 \$6 MILLION TO A MILLION CLASS MEMBERS AND WHAT IS MORE LIKELY
20 IS A HALF A MILLION CLASS MEMBERS.

21 THE COURT: WHAT IF THERE IS AN ABERRATION THAT WHEN
22 WE SEE 10 PERCENT, 15 PERCENT RESPONSE?

23 MR. FRANK: WELL, THAT WOULD BE CLOSE TO
24 UNPRECEDENTED FOR A CONSUMER SETTLEMENT.

25 THE COURT: THERE'S ALWAYS A FIRST, ISN'T THERE?

1 MR. FRANK: THERE'S ALWAYS A FIRST. AND AT THAT
2 POINT THE PARTIES CAN COME BACK AND SAY, WELL, THIS IS NOT
3 FEASIBLE AND IT WOULD BE MORE EXPENSIVE TO DISTRIBUTE AND THEN
4 AT THAT POINT CY PRES MAY BE APPROPRIATE, THOUGH THE CY PRES
5 WOULD NEED TO BE SOMETHING THAT ISN'T ALREADY AFFILIATED WITH
6 GOOGLE IF IT'S ACTUALLY GOING TO BE A CLASS BENEFIT AND THAT'S
7 DENNIS VERSUS KELLOG, THAT'S SECTION 3.07 AND THAT'S WHAT THE
8 COURT IMPLIES IN MAREK VERSUS LANE.

9 THE COURT: WOULD THAT BE A SITUATION WHERE IF
10 GOOGLE WAS GENEROUS AND DONATED TO JUST ABOUT EVERY CHARITABLE
11 ORGANIZATION IN THE WORLD, WOULDN'T IT MEAN THAT ALL OF THOSE
12 PEOPLE WOULD BE CONFLICTED OUT? IT'S MUCH LIKE A CLIENT GOING
13 TO TALK WITH ALL OF THE HIGH POWERED LAWYERS WHO SPECIALIZE IN
14 A PARTICULAR FIELD AND THEY CONFLICT OUT THOSE LAWYERS?

15 MR. FRANK: WELL, I THINK GOOGLE'S MODEL IS DON'T BE
16 EVIL AND SO MAYBE THEY ARE GIVING TO EVERY CHARITY IN THE
17 WORLD. THEY'RE NOT GIVING TO ME AND SO I AM CHARITY.

18 THE COURT: ARE YOU A 501(C)3.

19 MR. FRANK: I'M A 501(C)3.

20 THE COURT: I SEE.

21 MR. FRANK: BUT WE WOULDN'T TAKE CY PRES MONEY ANY
22 WAY. BUT IN ANY EVENT, THERE ARE TWO POSSIBILITIES. SO IT
23 EITHER IS FEASIBLE TO GIVE MONEY TO THE CLASS THROUGH SOME SORT
24 OF CLAIMS PROCESS IN WHICH CASE CY PRES IS APPROPRIATE OR LET'S
25 SAY THAT IT IS INFEASIBLE TO GIVE MONEY TO THE CLASS, AT WHICH

1 POINT, WELL, WHY IS THIS A CLASS ACTION THEN.

2 THE POINT -- A CLASS ACTION, BEFORE IT CAN BE CERTIFIED,
3 HAS TO BE SUPERIOR TO OTHER MEANS OF ADJUDICATION, AND WITH
4 OTHER MEANS OF ADJUDICATION CLASS MEMBERS GET NOTHING. WITH
5 THIS MEANS OF ADJUDICATION, CLASS MEMBERS GET NOTHING. THAT'S
6 NOT SUPERIOR. THAT'S THE SAME.

7 THE ONLY BENEFICIARY ARE THE ATTORNEYS WHO GET \$2 MILLION
8 AND GOOGLE, WHICH GETS A WAIVER, THE CLASS GETS NOTHING.

9 THEY POINT TO THE INJUNCTIVE RELIEF, BUT, AGAIN, THERE'S
10 ONE OF TWO THINGS HAPPENING HERE, EITHER GOOGLE IS DOING
11 SOMETHING ILLEGAL IN WHICH CASE THIS IS BEING SETTLED FOR FAR
12 TOO LITTLE, OR GOOGLE IS DOING SOMETHING ILLEGAL, AND IN WHICH
13 CASE WHY ARE THE ATTORNEYS COLLECTING \$2 MILLION FOR A CHANGE
14 IN THE BUSINESS PRACTICES THAT IS MEANINGLESS?

15 THE COURT: HOW WOULD YOU VALUE THE DAMAGE ISSUE IN
16 THIS CASE?

17 MR. FRANK: WELL, I THINK THAT'S CERTAINLY A PROBLEM
18 IN BRINGING THE LITIGATION, AND THAT'S WHY IT'S SETTLING FOR SO
19 LITTLE.

20 BUT, YOU KNOW, WE DON'T CONTEST THAT GOOGLE HAS THE RIGHT
21 TO SETTLE THIS FOR VERY LITTLE MONEY BUT IF -- ONCE YOU REALIZE
22 THAT THE 6 MILLION BULK OF THE SETTLEMENT FUND IS JUST A CHANGE
23 IN ACCOUNTING ENTRIES, GOOGLE WAS GOING TO GIVE MONEY TO THE
24 HARVARD BERKMAN CENTER OR TO STANFORD AND IT'S NOW ATTRIBUTING
25 IT TO THE CLASS ACTION SETTLEMENT RATHER THAN TO THEIR NORMAL

1 OUTFLOW OF CHARITABLE FUNDS, THE ATTORNEYS ARE COLLECTING THE
2 ENTIRE BENEFIT.

3 THE COURT: BUT WHAT WOULD, WHAT WOULD THE --
4 GETTING BACK TO MY QUESTION, WHAT IS THE DAMAGE TO THE CLASS?

5 MR. FRANK: AGAIN, THAT'S UP FOR THE PLAINTIFFS TO
6 JUSTIFY WHY THEY HAVEN'T VIOLATED RULE 11 IN BRINGING THIS
7 LAWSUIT.

8 AGAIN, WE'RE NOT SAYING GOOGLE HAS TO SETTLE THIS FOR
9 \$100 MILLION OR GOOGLE HAS TO SETTLE THIS FOR \$200 MILLION.

10 GOOGLE CAN SETTLED THIS FOR BASICALLY WHAT IS \$2 MILLION,
11 BUT WE PROTEST THAT THESE ATTORNEYS ARE GETTING ALL OF THAT
12 \$2 MILLION AND NOBODY ELSE IS GETTING ANYTHING.

13 THE COURT: WHICH GETS BACK TO MY QUESTION IS HOW
14 MUCH, I SUPPOSE, SHOULD -- I'M ASKING YOU TO BE THE JURY, I
15 SUPPOSE, IN THE TRIAL.

16 MR. FRANK: I'M NOT SAYING THAT GOOGLE CANNOT SETTLE
17 THIS FOR VERY LITTLE MONEY. IF THE PARTIES IN AN ARM'S LENGTH
18 NEGOTIATION SAY THAT THIS IS HOW MUCH THE SETTLEMENT IS WORTH,
19 WE'RE NOT CHALLENGING THAT, WE'RE NOT PRIVACY EXPERTS. WE'RE
20 CLASS ACTION PEOPLE.

21 AND WHAT WE'RE SAYING IS, IS THAT THE BULK OF THE
22 SETTLEMENT FUNDS ARE GOING TO THE CLASS COUNSEL AND THERE IS
23 THIS ILLUSORY \$6 MILLION THAT THE CHANGE IN ACCOUNTING ENTRIES
24 TO JUSTIFY THE 2 MILLION FEE.

25 MAYBE THE PROPER RELIEF TO THE CLASS IS A PEPPERCORN AND

1 GOOGLE IS OVER PAYING, BUT IF GOOGLE IS OVERPAYING, THE CLASS
2 IS ENTITLED TO THE PROPORTIONATE SHARE OF THE OVERPAYING.

3 THE COURT: IT SOUNDS LIKE YOU TAKE A LITTLE BIT OF
4 AN ISSUE WITH THE ATTORNEY'S FEES PORTION OF THE SETTLEMENT?
5 IS THAT AN UNDERSTATEMENT?

6 MR. FRANK: WELL, THAT'S GENERALLY A PROBLEM WITH
7 CLASS ACTION LITIGATION AS DISCUSSED IN CASES LIKE EUBANK -- I
8 APOLOGIZE. I'M TALKING WAY TOO FAST. EUBANK VERSUS PELLA
9 CORPORATION, 753 F. 3D 718 AND A NUMBER OF OTHER CASES THAT
10 TALK ABOUT THE INHERENT CONFLICT OF INTEREST IN CLASS ACTION
11 SETTLEMENTS.

12 THE OPTIMAL SETTLEMENTS WHEN CLASS MEMBERS ARE ABSENT FROM
13 THE TABLE IS SOMETHING THAT PAYS THE ATTORNEYS A LOT AND THE
14 CLASS MEMBERS VERY LITTLE AND YOU STRUCTURE THE SETTLEMENT TO
15 CREATE THE ILLUSION OF RELIEF TO JUSTIFY THE ATTORNEY'S FEES,
16 TO JUSTIFY THE DEFENDANT GETTING OUT OF THE CASE.

17 AND EVERYBODY IS HAPPY AND EXCEPT FOR, PERHAPS, THE CLASS
18 MEMBERS WHO ARE FROZEN OUT BUT DON'T HAVE THE INCENTIVE TO COME
19 FORWARD AND OBJECT BECAUSE THEY HAVE TOO LITTLE AT STAKE.

20 THE COURT: UH-HUH. IT'S INTERESTING YOU BEING A
21 STUDENT AND ACADEMIC OF CLASS ACTIONS, I'M SURE YOU HAVE DONE A
22 HISTORICAL VIEW OF CLASS ACTION LITIGATION AND IT'S CHANGED,
23 HASN'T IT?

24 PERHAPS BECAUSE OF THE ELECTRONIC FRONTIER THAT WE NOW
25 LIVE ON. CLASS ACTIONS IN THE PAST WERE SUING, PERHAPS, AN

1 AUTOMOBILE MANUFACTURER BECAUSE THE DOOR LOCK DIDN'T OPERATE
2 CORRECTLY. AND I'M SURE THERE ARE STILL THOSE LAWSUITS, BUT
3 YOU COULD IDENTIFY WHO BOUGHT A FORD FAIRLANE -- AND I'M NOT
4 PICKING ON FORD OR ANYTHING, AND I'M JUST USING THEM AS AN
5 EXAMPLE HERE -- AND THAT'S A PRETTY IDENTIFIABLE CLASS AND
6 THERE WAS CY PRES, BUT IT REALLY WASN'T, HISTORICALLY I'M
7 TALKING ABOUT, AND YOU CAN PLEASE CORRECT ME HERE AND YOU CAN
8 TEACH ME THIS MORNING ABOUT THIS ANALYSIS, BUT THERE WASN'T
9 A -- CY PRES REALLY WASN'T THAT BIG OF AN ISSUE BECAUSE YOU
10 COULD USUALLY IDENTIFY YOUR CLASS.

11 AND, OF COURSE, THERE WERE SOME PEOPLE WHO MOVED FROM FORD
12 TO GENERAL MOTORS AND THEY DIDN'T CARE ANYMORE, PERHAPS. SO
13 THERE WAS SOME REMAINDER. AND IT WASN'T THAT, THAT BIG OF A
14 DEAL, TO PUT IT THAT WAY, INELEGANTLY.

15 NOW, HOWEVER, WHEN YOU HAVE GOT PEOPLE WHO ARE USING
16 GOOGLE AND ALL OF THESE OTHER TYPE OF INTERNET TYPE OF
17 COMPANIES AND THINGS WORLDWIDE, CLASSES, IT'S NO LONGER LIMITED
18 TO THE PEOPLE WHO BOUGHT A FORD FAIRLANE IN 1968. IT'S NOW
19 JUST HUNDREDS OF MILLIONS OF PEOPLE.

20 AND THE LAW HAS TO -- CLASS ACTION LAW, YOU KNOW, YOU GET
21 THOSE SIZE OF CLASSES, AND IT'S MY GOODNESS, HOW DO YOU --
22 WHICH IS BACK TO MY POINT AGAIN, HOW DO YOU, HOW DO YOU
23 STRUCTURE SOMETHING THAT ALLOWS FOR CONSUMER RECOVERY UNDER
24 RULE 23 IN A CLASS ACTION LAWSUIT?

25 IT'S A CHALLENGE, ISN'T IT?

1 MR. FRANK: WELL, EITHER THE CASE IS MERITORIOUS AND
2 IN WHICH CASE YOU HAVE A LARGE CLASS AND YOU HAVE LARGE DAMAGES
3 OR THE CASE ISN'T MERITORIOUS IN WHICH CASE WHY ARE THE
4 ATTORNEYS COLLECTING SO MUCH OF WHAT THE SETTLEMENT BENEFIT IS?

5 THE COURT: HAVE YOU BEEN ENGAGED IN A TRIAL AND
6 SEEN A TRIAL INVOLVING 100 MILLION INDIVIDUALS IN A CLASS
7 ACTION?

8 MR. FRANK: AGAIN, I NEVER CONTESTED THE IDEA THAT A
9 CLASS CAN BE LARGE. AND, AGAIN, WE'RE NOT CONTESTING THAT
10 GOOGLE AND THE PLAINTIFFS CAN AGREE THAT THIS CASE ISN'T WORTH
11 VERY MUCH.

12 WHAT WE'RE CONTESTING IS THE CREATION OF THE ILLUSION OF
13 RELIEF CALLING WHAT IS REALLY A \$2 MILLION SETTLEMENT AN \$8 AND
14 A HALF MILLION SETTLEMENT AND HAVING THE ATTORNEYS COLLECT ALL
15 OF THAT \$2 MILLION AND HAVING GOOGLE CHANGE ITS ACCOUNTING
16 ENTRIES TO RATIONALIZE THE ATTORNEY'S FEES WITHOUT THE CLASS
17 GETTING ANY ADDITIONAL BENEFIT.

18 THE COURT: OKAY. THANK YOU. WHAT ELSE WOULD YOU
19 LIKE ME TO KNOW, SIR?

20 MR. FRANK: IF YOU HAVE ANY QUESTIONS FOR ANYTHING
21 THAT IS IN OUR PAPERS, I THINK WE HAVE ACQUITTED OURSELVES
22 WELL.

23 THE COURT: THANK YOU FOR BEING HERE. I APPRECIATE
24 YOU BEING HERE. YOUR INPUT IS ALWAYS IMPORTANT, ALWAYS
25 IMPORTANT FOR THE COURT TO HAVE AS MUCH INFORMATION AS POSSIBLE

1 WHEN IT RULES ON A FINAL APPROVAL OF THE CLASS, ANY CLASS
2 ACTION. THEY'RE ALL IMPORTANT.

3 SO I APPRECIATE YOU BEING HERE. I'M SINCERE IN THAT. I
4 APPRECIATE YOUR PAPERS. I APPRECIATE THE TIME YOU TOOK IN
5 FILING YOUR PAPERS. THEY HAVE BEEN HELPFUL, AND I THINK THEY
6 HAVE BEEN HELPFUL TO ALL OF US HERE.

7 MR. FRANK: THANK YOU VERY MUCH, AND I'LL SEE YOU IN
8 A MONTH IN ANOTHER CASE.

9 THE COURT: OH. WELL, THANK YOU FOR THE HEADS UP.

10 ALL RIGHT. COUNSEL, WHY DON'T I HEAR FROM PLAINTIFFS AS
11 TO YOUR THOUGHTS ON WHETHER OR NOT THE COURT SHOULD APPROVE
12 THIS.

13 MR. NASSIRI: THANK YOU, YOUR HONOR. IT IS AN
14 INTERESTING DISCUSSION ABOUT HOW CLASS ACTIONS HAVE CHANGED AND
15 THESE MEGA CLASS ACTIONS HAVE CHANGED THE LANDSCAPE, AND,
16 FRANKLY, CHANGED THE MECHANICS OF HOW THESE SETTLEMENTS WORK.

17 WE WORKED VERY -- THE \$6 AND A HALF MILLION THAT WE'RE
18 PROPOSING FOR CY PRES HERE IS NOT ILLUSORY.

19 THE PROPOSALS, I THINK, WE TOOK MEASURES TO MAKE SURE THAT
20 THE PROPOSED RECIPIENTS, WHICH WE DID IT LIKE A GRANT PROPOSAL
21 AND WE TRIED TO IMPLEMENT BEST PRACTICES AND TRANSPARENCY, AND
22 WE HAVE OVER 100 PAGES OF DETAILED PROPOSALS FROM EACH OF THESE
23 RECIPIENTS, OR POTENTIAL RECIPIENTS AND THESE PROJECTS ARE
24 IMPRESSIVE AND SHOULD RESULT IN SUBSTANTIAL RELIEF FOR
25 CONSUMERS GOING FORWARD ON PRIVACY ISSUES.

1 YOU KNOW, IF WE WERE ABLE TO DISTRIBUTE MONEY TO THE CLASS
2 HERE, IT WOULD BE SOMETHING UNDER A DOLLAR PER CLASS MEMBER,
3 AND I DON'T KNOW WHAT THAT IS WORTH IN TODAY'S WORLD ANYWAY.

4 THE COURT: IS IT WORTH \$2 MILLION OF ATTORNEY'S
5 FEES?

6 MR. NASSIRI: YES, YOUR HONOR, IT IS. I MEAN, WHAT
7 WE'RE ASKING FOR HERE IS THE COMMON FUND. WE'RE ASKING FOR A
8 NINTH CIRCUIT BENCHMARK. IT'S UP TO THE COURT TO USE IT'S
9 DISCRETION AND JUDGMENT.

10 YOU KNOW, WITH RESPECT TO ATTORNEY'S FEES, THERE ARE NO
11 SIGNS OF COLLUSION HERE. WE DIDN'T HAVE A CLEAR SAILING
12 AGREEMENT, AND WE LEAVE IT TO THE COURT'S DISCRETION TO
13 DETERMINE WHETHER OR NOT WE BROUGHT VALUE TO THE CLASS.

14 THE COURT: SO LET ME -- I INTERRUPTED YOU, AND I
15 APOLOGIZE FOR THAT. LET ME GO BACK. YOU WERE TALKING ABOUT
16 THE CY PRES RECIPIENTS AND YOUR PROCESS, AND I DO HAVE SOME
17 QUESTIONS ABOUT THAT.

18 MY FIRST QUESTION WAS GOING TO BE WHETHER OR NOT YOU HAVE
19 CONSIDERED DIRECT PAYMENT TO THE CLASS, AND I THINK YOU JUST
20 TOUCHED ON THAT AND YOU SUGGESTED MAYBE IT WOULD BE A DOLLAR OR
21 SOMETHING LIKE THAT.

22 MR. NASSIRI: OR LESS, YOUR HONOR. THERE'S NO
23 EVIDENCE BEFORE THE COURT HERE THAT THE CLAIMS RATE WOULD BE
24 LOW ENOUGH TO MAKE DIRECT PAYMENTS FEASIBLE.

25 AND WHEN THINKING ABOUT THIS EX ANTE AND HOW WE WERE GOING

1 TO REACH A SETTLEMENT WITH THE DEFENDANT AND DESIGN A CLAIMS OR
2 SETTLEMENT PROCESS, THIS -- WE FOLLOWED IN THE FOOTSTEPS OF
3 SOME CASES BEFORE US, NETFLIX AND BEACON AND BUZZ AND OTHERS,
4 AND GIVEN THE TREMENDOUS SIZE OF THE CLASS HERE, IT'S JUST NOT
5 FEASIBLE UNDER ANY REASONABLE CIRCUMSTANCES TO MAKE A
6 DIRECT PAYMENT.

7 THE COURT: OKAY. WELL, I APPRECIATE YOUR
8 INVESTIGATION INTO THAT TOPIC. I THINK THAT'S, PERHAPS, ONE OF
9 THE FIRST REVIEWS THAT A COURT SHOULD MAKE SAME AS FIDUCIARY
10 FOR THE CLASS AS TO WHAT IS THE BENEFIT, THE REAL BENEFIT FOR
11 THE CLASS AND CAN THEY HAVE SOME DIRECT BENEFIT.

12 AND YOU HAVE TALKED ABOUT THE SHEER NUMBERS HERE, AND WHAT
13 YOU'RE TELLING ME IS THAT YOU HAVE DONE THOROUGH INVESTIGATION
14 ON THAT ISSUE AND IN YOUR OPINION YOU FEEL LIKE IT WOULD BE
15 JUST DE MINIMUS.

16 MR. NASSIRI: YES, YOUR HONOR.

17 THE COURT: OKAY. WELL, LET'S MOVE TO THE NEXT OF
18 THE CY PRES THAT YOU WERE TALKING ABOUT AS WELL. YOU TALKED
19 ABOUT --

20 MR. NASSIRI: YOUR HONOR, IS IT CY PRES OR IS IT
21 CYPRESS? BECAUSE I HAVE BEEN TOLD IT'S CY PRES.

22 THE COURT: WELL, IN THIS COURTROOM HERE I'M SAYING
23 CY PRES.

24 MR. NASSIRI: THAT IS WHAT IT IS HERE TODAY.

25 THE COURT: THAT'S HOW MY CIVIL PROCEDURE PROFESSOR

1 DRILLED IT INTO MY HEAD AND GOD FORBID HE SHOULD WALK IN AND
2 HEAR ME SAY SOMETHING ELSE.

3 SO LET'S TALK ABOUT THAT. YOU DID TELL ME, YOU DID TELL
4 ME -- LET'S SEE, THAT WAS IN AUGUST, WASN'T IT?

5 MR. NASSIRI: ALMOST A YEAR AGO.

6 THE COURT: YEAH, YEAH. WE ALL AGED WELL.

7 MR. NASSIRI: THANK YOU.

8 THE COURT: AND YOU TOLD ME BACK THEN THAT YOU WERE
9 RAISING THE BAR IN REGARDS TO CY PRES RECIPIENTS AND YOU SAID
10 I'M RAISING THE BAR, I THINK, RAISING THE BAR FOR ALL CY PRES
11 SETTLEMENTS LIKE THIS TO FOLLOW.

12 I REMEMBER THOSE WORDS, AND I ASKED STAFF TO GET THE
13 TRANSCRIPT TO SEE IF I HAD IT INCORRECTLY OR NOT. AND YOU
14 SAID, AS YOU JUST DID, WE'RE TREATING THIS CY PRES ALLOCATION
15 LIKE A GRANT PROPOSAL OR A GRANT MAKING ORGANIZATION,
16 PROSPECTIVE GRANT.

17 AND I HAVE LOOKED AT SOME OF THE PROPOSALS AND THEY DO,
18 THEY DO SPEAK AS TO AN APPLICATION FOR A GRANT.

19 AND I GUESS MY THRESHOLD QUESTION IS WHAT WAS THE PROCESS
20 FOR -- WHAT WAS YOUR PROCESS USED TO PUBLICIZE THE GRANT
21 PROPOSALS?

22 WHAT DID YOU DO TO RAISE THAT BAR TO PUBLICIZE TO GET
23 PEOPLE TO RESPOND TO THIS GRANT PROPOSAL?

24 MR. NASSIRI: WELL, TO CLARIFY, YOUR HONOR, THE VERY
25 FIRST STEP IN THE PROCESS WAS NOT LIKE A GRANT PROPOSAL. WE

1 DIDN'T PUBLISH A GENERAL REQUEST FOR PROPOSAL LIKE YOU MIGHT IN
2 A GRANT PROPOSAL BECAUSE WE COULDN'T HERE, YOUR HONOR.

3 IT WAS A MATTER -- THE POTENTIAL CY PRES RECIPIENTS WERE
4 SUBJECT TO AGREEMENT BETWEEN THE PARTIES.

5 AND I BELIEVE WE BRIEFED UP AND OUR PRELIMINARY APPROVAL
6 PAPERS GENERALLY DESCRIBE THE PROCESS BY WHICH WE DECIDED ON
7 THE FINAL PROPOSED RECIPIENTS, WHICH, YOU KNOW, AT THIS POINT
8 WE'RE CALLING PROPOSED RECIPIENTS.

9 WE HAD TO GO THROUGH A PROCESS WITH THE DEFENDANTS OF
10 NARROWING DOWN POTENTIAL CY PRES RECIPIENTS. SO THAT ASPECT OF
11 THE PROCESS WAS NOT LIKE A GRANT MAKING PROPOSAL.

12 THE COURT: IS THAT TRANSPARENT ANYWHERE IN THE
13 PAPERS, THAT PROCESS, THAT NEGOTIATION WITH THE DEFENDANT HERE
14 IDENTIFYING THOSE?

15 MR. NASSIRI: YES, YOUR HONOR, PROVIDED THAT SOME
16 DETAILS WERE WITHHELD BECAUSE THIS WAS IN THE CONTEXT OF A
17 CONFIDENTIAL MEDIATION, AND I BELIEVE YOUR HONOR SAID THAT YOU
18 DIDN'T WANT TO KNOW TOO MUCH ABOUT THE ACTUAL LIKE WHO WAS
19 CONSIDERED AND WHO WAS REJECTED AND THAT KIND OF THING.

20 BUT WE DID GENERALLY DESCRIBE THE NUMBER OF RECIPIENTS
21 PROPOSED OR POTENTIAL RECIPIENTS THAT WERE CONSIDERED IN ROUTE
22 TO NARROWING IT DOWN TO THE SIX AND NOW FIVE PROPOSED
23 RECIPIENTS.

24 THE COURT: AND THESE ARE THE SAME ONES THAT YOU
25 MENTIONED IN AUGUST?

1 MR. NASSIRI: THAT'S RIGHT, YOUR HONOR.

2 THE COURT: SO IT BEGS THE QUESTION, WHAT HAS
3 CHANGED IN THE YEAR? WE STAYED THE SAME WITH OUR YOUTHFUL
4 APPEARANCE, BUT WHAT HAS CHANGED AS FAR AS THE IDENTIFICATION,
5 THESE PEOPLE THAT YOU'VE -- YOU TOLD ME ABOUT THEM IN AUGUST
6 AND YOU WENT THROUGH THIS PROCESS THAT IS GOING TO RAISE THE
7 BAR FOR THIS CASE AND ALL CASES IN THE FUTURE.

8 MR. NASSIRI: OH, I SEE, YOUR HONOR.

9 THE COURT: AND IT'S THE SAME INDIVIDUALS. WHAT HAS
10 CHANGED?

11 MR. NASSIRI: THE PROCESS WAS THE PROCESS OF GETTING
12 THESE PROPOSALS TOGETHER, MAKING SURE THAT THE PROPOSALS MEET
13 THE CRITERIA SET BY THE NINTH CIRCUIT IN LANE AND JUST
14 GENERALLY CONSTITUTIONAL REQUIREMENTS FOR A CY PRES RECIPIENT
15 FOR SPENDING THE CY PRES FUNDS.

16 SO WHAT WE FOCUSSED ON WAS GETTING THESE PROPOSALS IN
17 FINAL FORM. SO WE WORKED CAREFULLY. AGAIN, WE DID NOT DICTATE
18 WHAT THESE PROJECTS WERE GOING TO BE THERE. THEY ARE THE
19 PRIVACY EXPERTS. WE'RE NOT. THEY'RE ACADEMICS RESEARCH
20 INSTITUTIONS AND TECHNOLOGY DEVELOPERS. BUT WHAT WE DID WAS WE
21 GUIDED THEM TO MAKE SURE THEY MET CERTAIN CRITERIA THAT WE
22 BELIEVE ARE IMPORTANT FOR A CY PRES RECIPIENT.

23 THE COURT: AND SO HOW WERE THEY SELECTED? I MEAN,
24 THE ELEPHANT IN THE ROOM, OF COURSE, IS THAT MANY OF THESE ARE
25 LAW SCHOOLS THAT YOU ATTENDED.

1 MR. NASSIRI: YOUR HONOR, WE -- THERE IS A -- THERE
2 IS KIND OF A SHORT LIST OF ENTITIES, ORGANIZATIONS THAT DO THIS
3 KIND OF WORK. LAW SCHOOLS ARE PROMINENT IN THAT LIST AS ARE
4 ORGANIZATIONS THAT ARE NOT AFFILIATED WITH LAW SCHOOLS.

5 AND WE DID -- WE CONDUCTED INDEPENDENT RESEARCH. IT WAS
6 BASED ON OUR EXPERIENCE AND OUR KNOWLEDGE OF THE SPACE AND
7 ULTIMATELY OUT OF A LIST -- AND FORGIVE ME, YOUR HONOR, I
8 DIDN'T KNOW THIS WAS GOING TO COME UP AGAIN -- BUT I THINK WE
9 HAD 40 PROPOSED RECIPIENTS ON THE TABLE AND WE ULTIMATELY
10 NARROWED IT DOWN TO 6, AND IT WAS A MATTER OF WHAT WE COULD
11 AGREE TO, WHAT 6 WE COULD AGREE TO.

12 THE COURT: YOU AND GOOGLE?

13 MR. NASSIRI: THAT'S CORRECT.

14 THE COURT: YOU TALK ABOUT THE ISSUE OF -- I DON'T
15 WANT TO USE THE WORD "COLLUSION" BUT PERHAPS CONFLICT OF
16 INTEREST WITH THE LAW SCHOOLS BEING LAW SCHOOLS THAT YOU ALL
17 GRADUATED FROM. AND YOU POINT ME TO, I THINK IT WAS, WHAT WAS
18 IT AN EZ PAY CASE IN SAN DIEGO?

19 MR. ASCHENBRENER: EASYSAYER, YOUR HONOR.

20 THE COURT: YES, EASYSAYER, THANK YOU. AND WHERE
21 THE GOOD JUDGE THERE SUGGESTED THE RECIPIENTS, AND THERE WASN'T
22 ANYTHING UNTOWARD ABOUT THAT, BUT PARTICULARLY WHERE THE
23 RECIPIENTS DIDN'T RECEIVE ANY LESS THAN THE GREATER SHARE.

24 AND I LOOK AT YOUR PLEADING, DOCUMENT NUMBER 75, PAGE 5,
25 YOUR PAGE 5, PAGE 9 ON THE ECF CALENDAR, AND YOU BREAK DOWN THE

1 PERCENTAGES, DON'T YOU, ABOUT THE RECIPIENTS?

2 AND YOU HAVE CARNEGIE MELLON AT 21 PERCENT; AND THE WORLD
3 PRIVACY FORUM AT 17 PERCENT; AND THEN THE ALUMNI RECIPIENTS, IF
4 YOU WILL, STANFORD, CENTER FOR INTERNET AND SOCIETY,
5 16 PERCENT; CHICAGO KENT, COLLEGE OF LAW CENTER FOR INFORMATION
6 SOCIETY AND POLICY, 16 PERCENT; AARP, 15; AND THE BERKMAN
7 CENTER, 15 PERCENT.

8 SO YOU'RE ABOUT FOUR POINTS, FIVE POINTS BELOW.

9 IT LOOKS LIKE IT WAS INTENTIONALLY CREATED --

10 MR. NASSIRI: I CAN EXPLAIN HOW.

11 THE COURT: -- TO STAY UNDER AND STAY WITHIN THE EZ
12 CASE IN SAN DIEGO.

13 I JUST TELL YOU THAT IT GIVES THAT BLUSH LIKE, YOU KNOW, I
14 TELL YOU, I REMEMBER A PHRASE, AND FORGIVE ME AND MAYBE I
15 SHOULDN'T USE THE PHRASE, BUT YOU REMEMBER THE OLD BASKETBALL
16 SCANDALS ABOUT POINT SHAVING.

17 MR. NASSIRI: YES.

18 THE COURT: IT LOOKS LIKE, WAS THIS -- IT HAD TO BE
19 CALCULATED TO KEEP THOSE PERCENTAGES UNDER THE MARK LIKE THE
20 GOOD JUDGE IN SAN DIEGO DID.

21 MR. NASSIRI: IT WAS NOT, YOUR HONOR.

22 THE COURT: OKAY.

23 MR. NASSIRI: I'LL TELL YOU EXACTLY HOW WE ARRIVED,
24 AND WE THOUGHT ABOUT DIFFERENT WAYS TO -- DIFFERENT METHODS FOR
25 PROPOSING THE ALLOCATION.

1 IN THE END WHAT WE DID WAS WE ASKED THESE RECIPIENTS TO
2 GIVE US A BUDGET AND WE -- THESE NUMBERS ARE EXACTLY PRO RATA
3 AGAINST THE BUDGETS THAT THEY REQUESTED WITHOUT ANY INPUT FROM
4 US.

5 SO CARNEGIE MELLON IS GETTING THE MOST BECAUSE THEY ASKED
6 FOR THE MOST, AND HARVARD IS GETTING THE LEAST BECAUSE THEY
7 ASKED FOR THE LEAST. IT WAS THAT SIMPLE. IT WAS VERY
8 OBJECTIVE.

9 ALL OF THESE PROPOSALS WE'RE IMPRESSED WITH, AND WE
10 BELIEVE THAT THAT WAS THE MOST EFFICIENT, EQUITABLE WAY TO
11 ALLOCATE THE MONEY.

12 THE COURT: SO YOU TOLD THESE PEOPLE THAT YOU HAD A
13 CERTAIN POOL OF MONEY AVAILABLE?

14 MR. NASSIRI: CORRECT.

15 THE COURT: AND CARNEGIE MELLON SAID WE WOULD LIKE
16 \$1,249,656.34?

17 MR. NASSIRI: TO THE PENNY.

18 THE COURT: THE \$0.34 IS IMPORTANT TO US. CHICAGO
19 KENT COLLEGE SAID WE NEED 949,875 AND NO CENTS; AND,
20 BERKMAN SAID WE NEED \$935,000; AND,
21 STANFORD SAID WE WOULD LIKE \$971,400; AND,
22 THE WORLD PRIVACY FORUM SAID WE WOULD LIKE \$1,020,000.

23 MR. NASSIRI: CORRECT.

24 THE COURT: IN THOSE FIGURES?

25 MR. NASSIRI: EXACTLY THOSE FIGURES. WE ADDED THEM

1 UP, AND THESE ARE THE PROPOSED ALLOCATIONS BASED ON THE
2 REQUESTED AMOUNTS, WHICH ALSO THE OTHER REASON WE DID IT THIS
3 WAY IS BECAUSE MORE OR LESS MONEY MAY BE AVAILABLE AND IT WILL
4 SCALE UP EASILY AS PERCENTAGE POINTS.

5 BUT THIS IS DIRECTLY DERIVED FROM WHAT THEY REQUESTED IN
6 THEIR BUDGETS.

7 THE COURT: AND, AGAIN, GETTING BACK TO MY
8 TRANSPARENCY QUESTION, WAS THE INFORMATION, THE INVITATION TO
9 THE GRANT, WAS THAT SOMETHING THAT YOU WORKED OUT WITH GOOGLE
10 AS WELL?

11 MR. NASSIRI: WE DID NOT, YOUR HONOR. AND I BELIEVE
12 I ATTACHED EITHER TO OUR SUPPLEMENTAL DECLARATION IN SUPPORT OF
13 THE PRELIMINARY APPROVAL OR THE PRELIMINARY APPROVAL MOTION
14 E-MAILS THAT WE SENT TO THESE POTENTIAL RECIPIENTS LAYING OUT
15 WHAT THE REQUIREMENTS WERE FOR BEING CONSIDERED.

16 THE COURT: YOU KNOW, I THINK I TALKED YOU AND I
17 USED THE WORD PERHAPS TOO COLLOQUIAL, BUT I THINK I USED THE
18 PHRASE "USUAL SUSPECTS."

19 MR. NASSIRI: YES, YOUR HONOR.

20 THE COURT: AND I DON'T MEAN AND I DID NOT MEAN AT
21 THAT POINT AND AT THAT TIME, AND I DON'T TODAY MEAN TO
22 DISPARAGE AT ALL THE GOOD WORK THAT ANY OF THESE IDENTIFIED
23 CY PRES RECIPIENTS DO.

24 I THINK, AND I HOPE YOU APPRECIATE THE SPIRIT OF MY
25 COMMENT WAS, BECAUSE THESE ISSUES WERE SO IMPORTANT, AS YOU

1 HAVE TOLD ME, SHOULD WE CAST A WIDER NET TO CAPTURE, PERHAPS,
2 ADDITIONAL RESEARCH FROM OTHER INDIVIDUALS?

3 AND THAT'S WHAT -- WHEN YOU TALKED TO ME ABOUT SETTING THE
4 BAR HIGHER FOR THIS CASE AND OTHERS TO FOLLOW, I'LL BE VERY
5 CANDID WITH YOU, I'LL BE VERY CANDID, THAT'S WHAT I THOUGHT YOU
6 WERE GOING TO DO.

7 I'LL TELL YOU CANDIDLY AGAIN THAT I'M DISAPPOINTED THAT
8 THE USUAL SUSPECTS ARE STILL USUAL.

9 YOU POINT OUT, I THINK, ON PAGE 7 OF DOCUMENT 75, YOUR
10 PAGE 7, IN FOOTNOTE 10 YOU TELL ME THAT, IN FACT, BERKMAN
11 CENTER HAS BEEN RECEIVED BEFORE SO YOU SHOULD APPROVE IT AGAIN.
12 I SUPPOSE THAT'S WHY YOU PUT THAT FOOTNOTE THERE.

13 YOU REMIND ME THAT IN GOOGLE BUZZ PRIVACY LITIGATION, A
14 \$500,000 CY PRES DONATION OR CY PRES ALLOCATION WAS MADE THERE,
15 WHICH I THINK, IF YOU'LL PARDON ME, SUPPORTS MY VIEW OF USUAL
16 SUSPECTS.

17 AND I THINK I TRIED IN SOME CUMBERSOME WAY AT THAT TIME TO
18 SAY, YOU KNOW, THEY'RE DOING GOOD WORK AND I KNOW THIS IS A
19 MOVING TARGET AGAIN, AND IT'S A FLUID ISSUE, BUT IF THEIR JOB
20 IS TO GET NOTICE OUT AND TO INFORM PEOPLE ABOUT HOW BEST TO
21 PROTECT, EITHER THEIR LITERATURE IS NOT BEING READ OR IT'S
22 BEING IGNORED IN SOME FASHION.

23 AND, AGAIN, I'M NOT BEING CRITICAL OF THEIR GOOD WORKS.
24 PERHAPS IT'S JUST THE STATE OF THE AFFAIRS IN THIS REGARD AND
25 THERE IS A CERTAIN APATHY THAT EXISTS IN THE PUBLIC REGARDING

1 THESE ISSUES, I DON'T KNOW, WHICH THEN GETS TO THE VALUE OF THE
2 SETTLEMENT, DOESN'T IT?

3 MR. NASSIRI: YOU KNOW WHAT IS INTERESTING, YOUR
4 HONOR, IS THAT IN LANE IN THE DISSENT -- YOU KNOW, THERE'S NO
5 CLEAR GUIDANCE FROM THE COURTS ON THIS ISSUE, BUT I WOULD SAY
6 THAT THE CONSENSUS SEEMS TO BE THAT THE INSTITUTIONS RECEIVING
7 THE MONEY SHOULD HAVE A TRACK RECORD. AND, YOU KNOW, THE
8 DISSENT IN LANE HIGHLIGHTED THIS VERY CLEARLY.

9 WE DO HAVE A RELATIVE NEWCOMER IN CHICAGO KENT, AND AARP
10 IS NOT NECESSARILY A USUAL SUSPECT IN THIS KIND OF A CASE, BUT
11 THE OTHER PROPOSED RECIPIENTS, THEY DO FANTASTIC WORK.

12 THE COURT: OH, I AM NOT -- AND I AGREE. I AGREE.
13 I ABSOLUTELY AGREE.

14 AND IT'S NOT FOR ME TO TELL YOU I WANT YOU TO IDENTIFY
15 THIS PERSON OR THAT PERSON. I'M NOT GOING TO DO THAT.

16 BUT I GUESS I THINK BETWEEN THE PACIFIC OCEAN AND THE
17 ATLANTIC, YOU KNOW, THESE INDIVIDUALS ARE IDENTIFIED, AND AS
18 YOU POINT OUT, BERKMAN HAS RECEIVED A LOT. I JUST SCRATCH MY
19 HEAD AND THINK, AREN'T THERE OTHER -- AREN'T THERE OTHER
20 INSTITUTIONS IN THE BAY AREA? ISN'T THERE A LAW SCHOOL ON THE
21 OTHER SIDE ON THE EAST BAY SOMEWHERE? ISN'T THERE A LAW SCHOOL
22 ABOUT TEN MILES FROM HERE? ISN'T THERE A LAW SCHOOL ABOUT
23 394 MILES IN SOUTHERN CALIFORNIA? AND THERE'S A LOT OF THEM
24 DOWN THERE. THERE'S ONE ON THE COAST.

25 SO I SCRATCH MY HEAD A LITTLE BIT, YOU KNOW? THERE'S

1 AROUND THE GREAT LAKES, I THINK THERE'S A COUPLE OF LAW SCHOOLS
2 THERE THAT ARE ACCREDITED.

3 YOUR COLLEAGUE IS EAGER TO SPEAK.

4 MR. NASSIRI: HE IS EAGER TO SPEAK, AND I'M JUST
5 HOGGING THE PODIUM.

6 MR. ASCHENBRENER: YOUR HONOR, THERE ARE A COUPLE OF
7 POINTS TO BE MADE THERE. ONE, MR. NASSIRI IS RIGHT THAT THE
8 GUIDANCE FROM CASE LAW SUGGESTS THAT IT IS GOOD THAT RECIPIENTS
9 HAVE A TRACK RECORD. AND IT'S A BIT OF A DOUBLE EDGE SWORD.

10 THE COURT: IT IS.

11 MR. ASCHENBRENER: TO PUT FORWARD POTENTIAL
12 RECIPIENTS WITHOUT TRACK RECORDS THEN WE WOULD POTENTIALLY BE
13 ATTACKED ON THAT BASIS.

14 AND IN TERMS OF GEOGRAPHY, IT'S A GOOD POINT YOUR HONOR
15 MAKES BECAUSE SOME OF THE GUIDANCE I BELIEVE IN EASYSAYER
16 SUGGESTS THAT IT'S A PROBLEM WHERE THE RECIPIENTS ARE NOT
17 GEOGRAPHICALLY DIVERSE AND HERE AARP AND THE WORLD PRIVACY
18 FORUM ARE NATIONAL IN SCOPE. WE HAVE THE CENTER FOR INTERNET
19 AND SOCIETY AT STANFORD ON THE WEST COAST. WE HAVE THE CENTER
20 FOR INTERNET -- OR INFORMATION SOCIETY AND POLICY IN CHICAGO.
21 WE HAVE CARNEGIE MELLON IN PENNSYLVANIA. WE HAVE BERKMAN
22 CENTER IN MASSACHUSETTS.

23 THE COURT: YOU DIDN'T SAY PITTSBURGH. DO YOU HAVE
24 SOMETHING AGAINST PITTSBURGH.

25 MR. ASCHENBRENER: I HAVE NOTHING AGAINST

1 PITTSBURGH. I DO NOT HAVE EXPERIENCE IN PITTSBURGH ONE WAY OR
2 THE OTHER.

3 SO WE HAVE GEOGRAPHIC DIVERSITY THERE AND I BELIEVE WE
4 ALSO HAVE DEMOGRAPHIC DIVERSITY, WHICH IS IMPORTANT, ESPECIALLY
5 WITH THE INCLUSION OF AARP. AND THAT LEADS REALLY TO WHAT
6 MR. NASSIRI WAS SPEAKING TO A YEAR AGO BEFORE THE COURT IN
7 TERMS OF WHAT WE FEEL IS RAISING THE BAR AND UNDERSTANDING THAT
8 THERE IS SOME MISUNDERSTANDING THERE AS TO WHAT WE MEANT.

9 BUT WHAT IS DIFFERENT HERE, WHAT HAS HAPPENED IN THE LAST
10 YEAR, TO ANSWER THAT QUESTION, YOUR HONOR, IS THAT THE
11 PROPOSALS WERE MADE. AND INSTEAD WHAT WE HAVE SEEN IN PRIOR
12 CLASS ACTION SETTLEMENTS OF THIS NATURE ARE, WELL, HERE ARE
13 RECIPIENTS THAT GENERALLY DO THIS KIND OF WORK AND THEY WILL
14 USE IT FOR THIS PURPOSE, BUT HERE THE PUBLIC -- THERE'S
15 COMPLETE TRANSPARENCY. THE CLASS, THE COURT, AND THE PUBLIC
16 GETS TO SEE EXACTLY HOW THE DOLLARS WILL BE SPENT AND WHAT THE
17 DELIVERABLES WILL BE.

18 THE COURT: I APPRECIATE THE TRANSPARENCY. AND IN
19 THAT REGARD YOU HAVE THAT BEFORE US.

20 I GUESS THE LACK OF TRANSPARENCY IS THE SELECTION PROCESS.

21 MR. ASCHENBRENER: AND THAT WAS A NEGOTIATED POINT
22 IN THE SETTLEMENT PROCESS.

23 THE COURT: I APPRECIATE THAT. AND THAT RAISES, YOU
24 KNOW, CANDIDLY, IT RAISES A RED FLAG, AND I WON'T SAY A BANNER,
25 BUT I WILL SAY A FLAG, TO ME IN THAT IT SPEAKS, PERHAPS, TO

1 SOMETHING THAT MR. FRANK TALKED ABOUT. IT JUST -- WHEN I
2 LOOKED AT THAT, AND I'M BEING VERY CANDID WITH YOU, AND I'M NOT
3 BEING CRITICAL, YOU UNDERSTAND THAT, I'M BEING CANDID WITH YOU,
4 WHEN I LOOK AT THE LACK OF TRANSPARENCY, I UNDERSTAND THIS WAS
5 A MEDIATED PROCESS AND THAT'S PROTECTED AND THAT'S SACROSANCT
6 AND WE CAN'T GET INTO THAT, BUT YOU ADD THAT FACT THAT THAT'S
7 NOT PUBLIC INFORMATION. AND THEN I LOOK AT IT AND I SAY, OKAY,
8 AND THE PUBLIC SEES THAT ALL OF THE AFFILIATES -- NOT ALL,
9 PARDON ME -- BUT A NUMBER OF THE AFFILIATES ARE ALUM, NOTHING
10 WRONG WITH THAT AS EASYSAYER TELLS US AND OTHER CASES TELL US
11 WHEN THE AMOUNTS ARE NOT GREATER THAN ANYONE ELSE. AND I
12 LOOKED AT THE PERCENTAGES HERE AND THEY JUST, YOU KNOW, I'M
13 TRYING TO SQUEEZE A SIZE 9 AND A HALF INTO A SIZE 9 SHOE AND IT
14 FITS COMFORTABLY, AND I CAN DO THAT.

15 IT JUST LOOKS, HONESTLY, IT JUST GIVES ME -- IT DOESN'T
16 PASS THE SMELL TEST I GUESS IS THE EASIEST WAY FOR ME TO SAY
17 THAT.

18 MR. ASCHENBRENER: YOUR HONOR, THE COURT AND THE
19 NINTH CIRCUIT IN LANE ADDRESSED MUCH OF THAT VERY CONCERN THAT
20 THE COURT HAS TODAY.

21 AND WHAT THE NINTH CIRCUIT SAID IN REGARD TO THAT AND THE
22 SPECIFIC CONTEXT IN LANE VERSUS FACEBOOK TO THIS POINT WAS THAT
23 WHERE THE RECIPIENTS OF FUNDS IN THAT CASE, WHERE ACTUALLY THE
24 BOARD WOULD BE HELD, POSITIONS ON THE BOARD WOULD BE HELD BY
25 MEMBERS OF FACEBOOK.

1 THE COURT: SURE.

2 MR. ASCHENBRENER: AND, OF COURSE, THAT SETTLEMENT
3 WAS AFFIRMED BY THE NINTH CIRCUIT AND REHEARING EN BANC WAS
4 DENIED AND CERT PETITION WAS DENIED.

5 BUT WHAT THE COURT SAID WAS THAT IT'S OKAY IF WHEN A
6 SETTLEMENT IS THE PRODUCT OF NEGOTIATION, AS IT ALWAYS IS, OF
7 COURSE IT'S GOING TO SERVE THE PARTY'S PROSPECTIVE INTEREST TO
8 SOME DEGREE OR ANOTHER.

9 AND SO EVEN THOUGH MEMBERS OF FACEBOOK WOULD BE ON THE
10 BOARD OF THAT, THAT'S ACCEPTABLE, THAT IS FAIR, ADEQUATE, AND
11 REASONABLE BECAUSE THE SETTLEMENT NECESSARILY IS GOING TO SERVE
12 THE INTEREST OF THE PARTIES.

13 AND SO HERE WE HAVE -- WE'RE AT LEAST ONE STEP, AND I
14 BELIEVE MULTIPLE STEPS REMOVED FROM THAT FACTUAL SCENARIO.
15 THERE ARE NO MEMBERS OF GOOGLE ON ANY BOARDS AND COUNSEL IS NOT
16 ON ANY BOARDS IN ANY OF THIS PROPOSED RECIPIENTS.

17 THE ALMA MATER INSTITUTIONS -- WHAT IS IMPORTANT HERE ON
18 MULTIPLE LEVELS IS THAT THERE ARE NO AFFILIATIONS WITH THE
19 ACTUAL CENTERS RECEIVING MONEY.

20 AND MR. FRANK HAS OBJECTED WITHIN THE INSTITUTION'S
21 HOUSING CENTERS, THE BERKMAN CENTER, FOR EXAMPLE, OR THE CENTER
22 FOR INFORMATION SOCIETY AND POLICY AT CHICAGO KENT.

23 AS I STATED IN MY DECLARATION, I HAVE NO AFFILIATION WITH
24 THAT.

25 MR. FRANK HAS ATTEMPTED TO COUCH THIS THAT THIS IS JUST AN

1 ACCOUNTING CHANGE FOR GOOGLE. ONE, I TAKE ISSUE WITH THAT. I
2 THINK THAT'S INCORRECT. EVEN IF TRUE, AND IT'S NOT, BUT EVEN
3 IF TRUE, UNDER THE GUIDANCE IN LANE, THAT'S PROBABLY NOT A
4 PROBLEM.

5 BUT FORTUNATELY WE DO NOT HAVE THAT ISSUE HERE TODAY.
6 THESE ARE SPECIFIC PROPOSALS. THE MONEY WILL BE USED FOR
7 SPECIFIC PURPOSES, WHICH MEANS THAT IT'S NOT JUST AN ACCOUNTING
8 CHANGE.

9 THE COURT: I APPRECIATE THAT.

10 MR. NASSIRI: YOUR HONOR, MAY I SAY ONE THING?

11 THE COURT: I GUESS I'M RETURNING TO, YOU KNOW, MY
12 EXPECTATIONS RAISED AS WAS THE BAR PROMISED TO BE RAISED AND
13 THAT'S WHERE I HAVE SOME DISAPPOINTMENT, I GUESS, WHERE I LOOK
14 AT IT AS THE SONG WITH THE PHRASE GOING "THE SAME AS IT EVER
15 WAS."

16 MR. NASSIRI: WELL, I BELIEVE THE TRANSPARENCY THAT
17 YOU HAVE ALREADY ACKNOWLEDGED, AND I'M HAPPY TO NOTE THAT YOU
18 HAVE ACKNOWLEDGED IT, I BELIEVE THAT RAISES THE BAR IN A
19 SUBSTANTIAL WAY.

20 BUT I WANT TO JUST SAY ONE MORE THING AT THE RISK OF
21 SAYING TOO MUCH, YOUR HONOR. TO SOME DEGREE I HAVE TO DRAW ON
22 MY EXPERIENCE IN ORDER TO PROPOSE CY PRES RECIPIENTS.

23 AND I SAW WHAT THE BERKMAN CENTER DID FIRSTHAND, AND I
24 KNEW SOME OF THE PEOPLE WHO FOUNDED IT, AND CHARLIE NESSON WAS
25 MY TORTS PROFESSOR AND JOHN ZITTRAIN TAUGHT MY FIRST INTERNET

1 AND SOCIETY CLASSES AT 2L.

2 SO I CAN'T -- I MEAN, I THINK OF THEM AS LEADERS, SMART
3 PEOPLE WHO DO GOOD WORK AND CARE AND WHO HAVE INTERESTS THAT
4 ARE ALIGNED WITH WHAT IS UNDERPINNING THIS LAWSUIT.

5 AND THE FACT THAT I WENT THERE SHOULDN'T DISQUALIFY THEM
6 FROM MY MIND AS SOMEONE WHO COULD DO GREAT GOOD WITH THE MONEY
7 HERE.

8 SO IT'S NOT REALLY SURPRISING THAT I MIGHT THINK OF MY
9 ALMA MATER AND THE WORK THEY DO THERE AT THE BERKMAN CENTER.
10 AND JUST TO CLARIFY ON THE RECORD, I DON'T HAVE ANY AFFILIATION
11 AND I HAVE NEVER HAD ANY AFFILIATION WITH BERKMAN CENTER OR
12 WITH HARVARD SINCE LEAVING. I SIMPLY GOT MY LAW DEGREE THERE,
13 AND THAT'S SIMPLY THE END OF IT.

14 MR. ASCHENBRENER: AND, YOUR HONOR, TO BRING IT BACK
15 TO YOUR CENTRAL CONCERN, THE APPEARANCE OF THIS AND WHETHER THE
16 BAR WAS RAISED, WE CERTAINLY THINK IT WAS, BUT REGARDLESS, THE
17 STANDARD, OF COURSE, FOR FINAL APPROVAL IS WHETHER THE
18 SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE. IT'S NOT WHETHER
19 THE PARTIES OR THE PLAINTIFFS RAISE THE BAR.

20 SO WHETHER WE DID OR DID NOT IS NOT THE STANDARD FOR
21 APPROVAL. THE NINTH CIRCUIT HAS MADE CLEAR THAT THE
22 STANDARD --

23 THE COURT: YOU'RE TELLING ME EVERYTHING I HAVE
24 TALKED ABOUT THIS MORNING DOESN'T MATTER?

25 MR. ASCHENBRENER: NO, YOUR HONOR, I DON'T THINK

1 THAT'S TRUE.

2 THE COURT: THAT'S WHAT I HEAR YOU SAYING. JUDGE, I
3 APPRECIATE YOUR CONCERNS, YOU HAVE RAISED THEM, AND IT'S GOOD,
4 AND IT'S A NICE CONVERSATION FOR A FRIDAY BEFORE A THREE-DAY
5 WEEKEND, BUT IT DOESN'T MATTER, JUDGE, BECAUSE THE COURT SAYS
6 IF IT'S FAIR, ADEQUATE, AND REASONABLE, APPROVE IT AND ALL OF
7 THESE OTHER THINGS ARE JUST INCIDENTAL.

8 MR. ASCHENBRENER: NO, YOUR HONOR, THAT'S NOT WHAT
9 I'M TRYING TO SUGGEST. AND I APOLOGIZE IF THAT IS --

10 THE COURT: NO, NO, NO. I SAY THAT AND I HAVE SAID
11 THAT ONLY BECAUSE I WANT YOU TO KNOW THAT THIS IS VERY
12 IMPORTANT TO ME.

13 MR. ASCHENBRENER: UH-HUH.

14 THE COURT: AND I'M STRUGGLING WITH THIS BECAUSE ALL
15 OF THE THINGS I MENTIONED EARLIER, I THINK THEY'RE A PROBLEM.

16 AND I APPRECIATE YOUR HELPING ME OUT THROUGH THIS PROBLEM,
17 I DO. I DO HAVE SOME PROBLEMS WITH THIS AND ALL OF THESE
18 LITTLE, THESE LITTLE ISSUES TO ME CREATE A LARGER ISSUE THAT
19 CAUSE ME SOME CONCERN, NOTWITHSTANDING IS THIS SETTLEMENT FAIR,
20 ADEQUATE, AND REASONABLE? IT MAY BE, IT MAY VERY WELL BE, BUT
21 THE MECHANISMS, I THINK, ARE PROBLEMATIC, AND I AM HAVING SOME
22 PROBLEM WITH THAT.

23 AND, AGAIN, IT'S NOT BECAUSE, JUST BECAUSE -- I
24 APPRECIATE, MR. NASSIRI, YOU HAVE NO FURTHER AFFILIATION. I'M
25 SURE HARVARD IS VERY DISAPPOINTED THEY'RE NOT RECEIVING ALUMNI

1 CHECKS FROM YOU, AND THAT'S BETWEEN YOU AND THEM.

2 BUT THESE TYPE OF CY PRES RECIPIENTS, THEY SHOULDN'T SERVE
3 AS A SUBSTITUTE, SHOULD THEY, FOR ALUMNI CHECKS? AND THEY
4 SHOULDN'T SERVE AS A SUBSTITUTE FOR, OH, THIS IS ONE OF OUR
5 GRADS AND LOOK WHAT THEY'RE DOING IN THEIR LITIGATION, THEY'RE
6 DIRECTING CY PRES TO US. YOU SHOULD BE FREE FROM THAT.

7 MR. NASSIRI: ABSOLUTELY, YOUR HONOR.

8 THE COURT: YOU SHOULD NOT -- I DON'T WANT TO PUT
9 EITHER OF YOU IN A SITUATION WHERE YOU'RE SUBJECT TO PERSONAL
10 CRITICISM FOR DIRECTING FUNDS TO YOUR ALMA MATERS IN SOME
11 UNTOWARD WAY.

12 SO IN ONE RESPECT I ALSO WANT TO PROTECT YOU
13 PROPHYLACTICALLY IN SOME TYPE OF WAY AND MEASURE TO MAKE SURE
14 THAT YOU ARE FREE FROM THAT TYPE OF CRITICISM. AND I DON'T
15 WANT TO ELIMINATE YOUR PHILANTHROPIC IDEALS WHEN YOU DISCUSS
16 CY PRES. THAT'S VERY IMPORTANT.

17 AGAIN, GETTING BACK TO THE OTHER QUESTION, I'D LIKE TO, IT
18 JUST SEEMS TO ME THAT A WIDER, A BROADER, A LARGER NET CAN BE
19 CAST TO CAPTURE PEOPLE WHO ARE DOING ADDITIONAL WORK.

20 YOU KNOW, IF YOU SAY, WELL, GEE, THESE PEOPLE ARE DOING
21 ALL OF THE WORK AND WE NEED TO HAVE A TRACK RECORD OF PEOPLE,
22 WELL, YOU KNOW WHAT THE SOCIAL IMPLICATIONS OF THAT ARE?

23 MR. NASSIRI: YES.

24 THE COURT: THAT'S WHY WE HAVEN'T HAD WOMEN BE
25 LAWYERS FOR THE LONG TIME BECAUSE, YOU KNOW, WE JUST DON'T

1 ALLOW THEM TO COME IN BECAUSE WE NEVER LOOKED AT THEM BEFORE
2 AND SO WHY SHOULD WE LET WOMEN PRACTICE LAW NOW. YOU
3 UNDERSTAND THAT. IT'S NOT IN THIS CASE.

4 BUT, AGAIN, I'M TALKING ABOUT IN A SOCIAL -- IN A GREATER
5 MEASURE. THERE HAS TO BE A FIRST.

6 MR. NASSIRI: I AGREE, YOUR HONOR. THIS IS A VERY
7 INTERESTING ISSUE, AND THERE'S VERY LITTLE GUIDANCE.

8 THE COURT: PERHAPS, WE'LL CREATE IT. HERE'S A
9 WONDERFUL OPPORTUNITY FOR US TO GIVE GUIDANCE, AND I APPRECIATE
10 THE INVITATION.

11 MR. NASSIRI: IT ALWAYS IS, YOUR HONOR, BUT WE DID
12 THE BEST WE COULD.

13 THE COURT: NO, NO. AND I'M NOT -- AGAIN, THIS IS
14 NOT CRITICISM, GENTLEMEN.

15 MR. NASSIRI: I UNDERSTAND.

16 THE COURT: IT'S AN EFFORT, IT'S AN EFFORT AND AN
17 INVITATION TO DO BETTER, I SUPPOSE.

18 MR. NASSIRI: YES, YOUR HONOR. YOU KNOW, I THINK AT
19 THE HEART OF THIS IN TERMS OF CY PRES'S PROPOSED RECIPIENTS,
20 THIS IS A SETTLEMENT AND THERE HAD TO BE SOME AGREEMENT SO WE
21 HAD TO NEGOTIATE THIS.

22 AND SO THAT DOES -- THAT'S A VERY REAL CONSTRAINT.

23 THE COURT: SURE.

24 MR. NASSIRI: AND I DON'T KNOW HOW WE GET AROUND
25 THAT EVEN WITH DIRECTION FROM THE COURT.

1 THE COURT: I HOPE OUR CONVERSATION IS GOING TO
2 ASSIST YOU. YOU HAVE BRILLIANT LAWYERS SITTING AT THE TABLE
3 OVER THERE, AND I KNOW THAT THEY'RE LISTENING TO THIS, AND
4 THEY'RE NOT HAVING TO STAND AND LISTEN TO IT. THEY HAVE THE
5 PLEASURE OF BEING SEATED BEHIND YOUR BACKS AND LISTENING TO IT.

6 THEY'RE NOT GRINNING, AND THEY'RE NOT SMILING. THEY'RE
7 TAKING NOTES AND ABSORBING THIS, I THINK.

8 WELL, LET ME MOVE TO ANOTHER ISSUE, IF I MAY, AND WE MAY
9 COME BACK TO THE CY PRES, BUT I THINK IT'S APPROPRIATE TO MOVE
10 TO THE NOTICE ISSUE. AND I KNOW YOU WERE PRESENT IN COURT WHEN
11 I WAS DISCUSSING NOTICE WITH THE OTHER CASE EARLIER THIS
12 MORNING. AND I TALKED ABOUT THE IMPRIMATUR OF A GOVERNMENT
13 SEAL OR SOMETHING LIKE THAT. I THINK THAT APPEARS IN THIS?
14 DOES IT? DO YOU HAVE SOMETHING LIKE THAT HERE?

15 MR. NASSIRI: I BELIEVE IT'S THE SEAL BEHIND YOU,
16 YOUR HONOR.

17 THE COURT: RIGHT, RIGHT. NOT QUITE AS ELEGANT AND
18 MAJESTIC, THOUGH, ON YOUR NOTICE. IT'S ONE DIMENSIONAL, OF
19 COURSE. AND I LOOKED AT THAT AND I THOUGHT, THIS IS WHAT
20 RAISED THE QUESTION, AND, PERHAPS, I'M SEARCHING FOR NITS TO
21 PICK, BUT I THOUGHT DOES THIS APPEAR LIKE SOMETHING THAT, YOU
22 KNOW, LIKE THE E-MAIL FROM UNCLE GEORGE IN LONDON WHO LOST HIS
23 WALLET THAT WOULD GET IGNORED?

24 IT JUST, TO ME, IT LOOKED LIKE ONE OF THOSE, CANDIDLY, AND
25 THEN THAT CAUSED ME TO THINK ABOUT THE, AS YOU POINT OUT IN

1 YOUR PLEADINGS, THE OBJECTIONS WERE -- HOW MANY WERE THERE?
2 THERE WERE FOUR? WHAT WERE THERE?

3 MR. NASSIRI: THERE WERE 4 WITH 13 OPT-OUTS.

4 THE COURT: RIGHT. AND IN REGARDS TO THE CLASS, AND
5 YOU POINTED OUT, JUDGE, THIS MUST MEAN APPROVAL BECAUSE WE HAD
6 SO LITTLE, LITTLE NEGATIVE RESPONSE, IF YOU WILL, ADVERSE
7 RESPONSE TO THE SETTLEMENT, AND I APPRECIATE THAT THAT'S AN
8 OBSERVATION THAT COULD BE MADE.

9 THE OTHER SIDE OF THAT COIN IS THAT MAYBE THE NOTICE WAS
10 BAD AND PEOPLE DIDN'T GET IT, AND SO THEY DIDN'T KNOW TO
11 RESPOND? MAYBE IT WAS THE UNCLE IN LONDON WITH THE LOST WALLET
12 AND THEY, YOU KNOW, CLICKED THE DELETE BUTTON BECAUSE IT WAS
13 SOMETHING THAT WAS NOT REAL TO THEM.

14 MR. NASSIRI: ONE OF THE BENEFITS, YOUR HONOR, OF
15 TECHNOLOGY AND --

16 THE COURT: IS IT BRINGS US THESE WONDERFUL CLASS
17 ACTION LAWSUITS?

18 MR. NASSIRI: WELL, NO, NO, YOUR HONOR. IT'S THAT A
19 NOTICE PROGRAM LIKE THE ONE WE IMPLEMENTED IS MEASURABLE. AND
20 THIS WAS A VERY SUCCESSFUL NOTICE PROGRAM. IT WOULD -- NONE OF
21 THIS COULD HAVE BEEN TREATED AS SPAM, AND WE CAN MEASURE THE
22 RESPONSE FROM THE CLASS MEMBER.

23 I BELIEVE WE HAD OVER 200 MILLION IMPRESSIONS AND WE --
24 RICHARD SIMMONS IS HERE, WHO WAS LEADING UP THE EFFORT ON
25 BEHALF OF THE SETTLEMENT ADMINISTRATOR IS HERE, AND HE IS

1 AVAILABLE TO ANSWER DETAILED QUESTIONS IF YOUR HONOR WOULD
2 LIKE. BUT BASED ON THE MEASUREMENTS THAT HE TOOK, WE REACHED
3 OVER 70 PERCENT OF THE CLASS WITH THIS NOTICE.

4 NOW, I DON'T THINK THE MEASUREMENTS COULD TELL US EXACTLY
5 WHAT THEY THOUGHT OF THE NOTICE, BUT I THINK WE HAD A HIGHLY
6 EFFECTIVE SUCCESSFUL NOTICE CAMPAIGN.

7 THE COURT: YOU POINTED OUT THE NETFLIX CASE AS THE
8 SIMILAR SIZE AND SIMILAR CASE, AND I NOTE IN THAT CASE THERE
9 WERE, PERHAPS PROPORTIONATELY MORE, HUNDREDS OF RESPONSES. I
10 MEAN, THEY GOT MORE RESPONSES IN THAT CASE.

11 AND DID YOU LOOK AT THEIR NOTICE AND COPY OF THEIR NOTICE?
12 AND I'M JUST CURIOUS --

13 MR. NASSIRI: WE LOOKED AT THAT CASE CAREFULLY, YOUR
14 HONOR, ESPECIALLY SINCE IT CAME OUT OF YOUR COURTROOM, AND I
15 BELIEVE WE DID TAKE SOME LESSONS FROM IT, BUT THIS IS A
16 DIFFERENT CASE WITH A DIFFERENT CLASS AND WHY WE HIRED
17 MR. SIMMONS IS BECAUSE HE HAS EXPERTISE AND HELPED US DESIGN
18 THE BEST NOTICE PRACTICABLE HERE.

19 THE COURT: I WAS CURIOUS ABOUT THAT AND I COMPARED
20 THAT, AND, OF COURSE, IT WAS A DIFFERENT CASE AND DIFFERENT
21 FACTS AND DIFFERENT PRODUCTS AND THINGS, AND MAYBE THE CLASS
22 THERE IS MORE IDENTIFIABLE. MAYBE THEY'RE MORE INCLINED TO
23 RECEIVE THESE TYPES OF NOTICES FROM NETFLIX BEING A CONSUMER
24 SPECIFIC.

25 BUT THERE WERE MORE RESPONSES. AND WHEN I LOOK AT THE --

1 JUST THE PARSE NUMBER OF RESPONSES, MY FIRST REACTION WAS THAT
2 IT MUST NOT HAVE BEEN AN APPROPRIATE NOTICE. COULD THAT MANY
3 PEOPLE JUST COMPLETELY IGNORE THIS? WOULD THEY?

4 WHAT ARE THE CONCLUSIONS WE DRAW FROM IT?

5 MR. ASCHENBRENER: WELL, WE, AS MR. NASSIRI POINTED
6 OUT, ARE SOMEWHAT LEFT TO SPECULATE AS TO WHAT CONSUMERS
7 THOUGHT OF THE SUBSTANCE.

8 THE COURT: SURE.

9 MR. ASCHENBRENER: BUT WHAT WE DID IN WORKING WITH
10 ANALYTICS, THE CLASS ADMINISTRATOR, WAS RELIED ON THEIR
11 EXPERTISE PRIMARILY BUT WORKED WITH THEM TO DEVISE A NOTICE
12 PLAN THAT WE REALLY THOUGHT WOULD BE EFFECTIVE.

13 AND, AGAIN, I BELIEVE THAT'S THE ISSUE OF WHETHER THE
14 NUMBER OF OPT-OUTS AND OBJECTORS IS A DOUBLE EDGE SWORD BECAUSE
15 THE NINTH CIRCUIT GUIDANCE SAYS IF THAT'S A LOW NUMBER, THAT'S
16 GOOD. OF COURSE, I UNDERSTAND THE COURT'S CONCERN THAT A LOW
17 NUMBER MAY INDICATE A LACK OF UNDERSTANDING OF THE SETTLEMENT
18 AND TOWARD THAT NOTICE WAS INEFFECTIVE.

19 BUT WHAT WE HAVE HERE IS WE USED THE MOST MEASURABLE MEANS
20 POSSIBLE FOR NOTICE CURRENTLY AND TOOLS TO EFFECTUATE NOTICE TO
21 THE GREATEST NUMBER OF PERSONS AND THEN WE WERE ABLE TO
22 MEASURE.

23 SO WE USED THE BEST TOOLS AVAILABLE TO US TO EFFECTUATE
24 NOTICE, AND THE NOTICE COMPORTS WITH THE GUIDELINES PROMULGATED
25 BY THE FEDERAL JUDICIAL CENTER. AND SO WE WORKED WITH -- THERE

1 IS CLEAR GUIDANCE ON THIS ISSUE THAN, PERHAPS, IN, SAY,
2 CY PRES, AND WE WORKED WITHIN THOSE GUIDELINES AND TO MEET AND
3 EXCEED THAT WERE POSSIBLE AND UNLIKE, SAY, PRINT CAMPAIGNS OR
4 OTHER FORMS OF NOTICE, WE WERE ABLE TO BRING TO THE COURT FOR
5 THE HEARING TODAY, AND IN OUR PAPERS LEADING UP TO THIS, THE
6 MEASUREMENTS AS OPPOSED TO HAVING TO MAKE EVEN MORE GUESSES AS
7 WOULD BE NECESSARY IN OTHER SORTS OF CASES.

8 THE COURT: OKAY. THANK YOU.

9 WELL, LET'S TURN TO ATTORNEY'S FEES. AND I HAVE YOUR
10 LODESTAR AMOUNT AND I READ, AS YOU DID, MR. FRANK'S OBJECTIONS.
11 AND WE KNOW, OF COURSE, NOW THE NINTH CIRCUIT'S OPINION OF AT
12 LEAST ONE OF THE CAUSES OF ACTION IN THIS PARTICULAR LAWSUIT.

13 WHAT WOULD HAPPEN? LET ME JUST ASK THE HYPOTHETICAL, WHAT
14 WOULD HAPPEN IF THE CASE WERE TO GO TO TRIAL RIGHT NOW?

15 MR. NASSIRI: NOBODY KNOWS BETTER THAN YOU, YOUR
16 HONOR. WE DID GO THROUGH THIS IN OUR FACEBOOK CLASS ACTION
17 BEFORE THE NINTH CIRCUIT.

18 THESE ARE UNTESTED CLAIMS. THE PRIMARY CLAIM HERE IS FOR
19 STATUTORY DAMAGES UNDER A STATUTE THAT IS HOPEFULLY OUTDATED.
20 WE BELIEVE THERE WAS A VIOLATION HERE, AND WE'RE READY AND ARE
21 READY AND WILLING TO TAKE THE CASE AS FAR AS WE CAN.

22 BUT THERE WERE -- THERE ARE TREMENDOUS RISKS INVOLVED HERE
23 AT EVERY STEP OF THE WAY GOING FORWARD FROM CLASS CERTIFICATION
24 TO SUMMARY JUDGMENT ON, YOU KNOW, WHETHER OR NOT WE STATED A
25 CLAIM, AND THEN IF WE DID STATE A CLAIM UNDER THE SCA, THEY'RE

1 WAITING IN THE WINGS AS A DUE PROCESS ARGUMENT THAT THESE
2 PENALTIES ARE TOO BIG.

3 SO I DON'T KNOW WHAT WOULD HAPPEN, YOUR HONOR.

4 AND WE BELIEVE THAT THE SETTLEMENT HERE IS A GOOD -- IT'S
5 A GOOD COMPROMISE. IT PROVIDES FOR CERTAIN RELIEF AND, YOU
6 KNOW, WE STAND BEHIND THE SETTLEMENT.

7 THE COURT: WELL, IN REGARDS TO RISK, A RISK
8 ANALYSIS IN THE ATTORNEY'S FEES DISCUSSION, WHAT DOES THAT
9 MEAN? WHAT IS THAT? WHAT IS THE RISK?

10 MR. ASCHENBRENER: THE RISK IS OF NOT GETTING PAID
11 AT ALL AND OF THE CASE BEING DISPOSED OF IN THE DEFENDANTS'
12 FAVOR AND THAT THE PLAINTIFFS' LAWYERS WOULD RECEIVE NOTHING.

13 THE COURT: THAT'S SOMETHING THAT -- ISN'T THAT IN
14 EVERY CASE THERE'S A RISK? THAT'S UNIVERSAL IN THE PRACTICE OF
15 LAW, YOU MIGHT LOSE.

16 MR. ASCHENBRENER: WELL, IT'S UNIQUE IN THE SENSE
17 THAT IN THESE CASES THE FEES ARE USUALLY PAID ON A CONTINGENT
18 BASIS.

19 THE COURT: RIGHT.

20 MR. ASCHENBRENER: AND SO I DON'T KNOW THE FEE
21 STRUCTURE BETWEEN DEFENDANTS' COUNSEL AND THE DEFENDANT, BUT
22 OFTENTIMES IT'S NOT CONTINGENT IN NATURE. SO WIN, LOSE OR
23 DRAW, COUNSEL ON ONE SIDE GETS PAID WHILE COUNSEL ON THE OTHER
24 SIDE DOES NOT.

25 THE COURT: SO THE RISK ANALYSIS FOR THE COURT TO

1 LOOK AT IS, JUDGE, WE'VE TAKEN ON THIS CASE AND ITS CONTINGENCY
2 AND IF WE LOSE THIS, WE COULD STAND TO LOSE THOUSANDS OF HOURS,
3 HUNDREDS OF HOURS OF LABOR.

4 MR. ASCHENBRENER: THAT'S CORRECT, YOUR HONOR.

5 THE COURT: AND, THEREFORE, THAT SHOULD BE A
6 CONSIDERATION IN GIVING US ATTORNEY'S FEES.

7 MR. ASCHENBRENER: WELL, IT'S A CONSIDERATION IN
8 THIS CASE SPECIFICALLY -- YES, YOUR HONOR. AND IN THIS CASE
9 SPECIFICALLY IT GOES TO THE LODESTAR CROSSCHECK.

10 OUR READING OF THE CASE LAW SUGGESTED IN THIS CASE THAT
11 THE PRIMARY MECHANISM FOR DETERMINING ATTORNEY'S FEES IS BASED
12 ON THE PERCENTAGE OF THE FUND, BUT THE COURT IS DIRECTED, WE
13 BELIEVE BY THE NINTH CIRCUIT, TO ALSO EMPLOY A LODESTAR
14 CROSSCHECK AND WITHIN THAT LODESTAR CROSSCHECK THE COURT IS
15 ALLOWED TO TAKE INTO ACCOUNT THE RISK FACTOR.

16 THE COURT: AND I KNOW I'VE READ IN YOUR PLEADINGS,
17 YOU'RE A RESPECTED FIRM. YOUR EXPERTISE IS IN THESE CLASSES.
18 SO AM I -- I JUST HAVE TO ASSUME THAT YOU'RE SKILLED, AS YOU
19 TOLD ME YOU WERE, RELYING ON YOUR EXPERTISE, MR. NASSIRI,
20 YOU'RE SKILLED AT PICKING WINNERS. YOU REJECT A LOT OF CASES,
21 I'M CERTAIN, THAT COME IN THE DOOR BECAUSE THEY'RE EITHER
22 NONMERITORIOUS OR THEY'RE CASES THAT ARE NOT GOING TO BE
23 WINNERS, I MEAN, THEY'RE NOT GOING TO WIN. YOU PICK WINNERS.
24 THAT'S THE NATURE OF THE PRACTICE, ISN'T IT?

25 MR. NASSIRI: THAT IS CERTAINLY A CONSIDERATION. WE

1 DO HAVE TO PAY THE BILLS AND KEEP THE LIGHTS ON.

2 THE COURT: SURE.

3 MR. NASSIRI: BUT THESE CASES WERE BIGGER RISKS
4 THAN, SAY, YOUR STANDARD WAGE AND HOUR CASE WHERE IT'S NOT A
5 NOVEL LEGAL THEORY. IT'S NOT A CLASS THAT CAN FILL FOOTBALL
6 STADIUMS.

7 HERE THIS WAS AN EXTRA RISKY CASE TO TAKE ON BUT WHAT WE
8 BELIEVE A VERY MERITORIOUS CASE AND ONE THAT HAD ENOUGH
9 PROBABILITY OF SUCCESS THAT IT MET THAT CALCULUS.

10 THE COURT: SO THE RELIEF HERE IS NOT A CHANGE IN
11 THE PRACTICE; IS THAT RIGHT?

12 MR. NASSIRI: NO, YOUR HONOR. OF COURSE, THERE IS
13 PROSPECTIVE RELIEF HERE THAT IS A CHANGE IN PRACTICE.

14 WE HAVE -- GOOGLE IS NOW OBLIGED PERMANENTLY GOING FORWARD
15 TO DISCLOSE HOW IT HANDLES SEARCH QUERIES AND IN PARTICULAR
16 WHETHER IT DISCLOSES THEM TO THIRD PARTIES IN URL'S.

17 THE COURT: THAT'S THE CHANGE.

18 MR. NASSIRI: THAT'S THE CHANGE. AND JUST ONE
19 THING, YOUR HONOR, IS THAT TO THE EXTENT THAT THERE HAVE BEEN
20 OBJECTORS SAYING THAT GOOGLE COULD CONTINUE TO GO ON DOING ITS
21 LEGAL PRACTICE, WE HAVEN'T STOPPED THEM.

22 AGAIN, PARTICULARLY UNDER THE SCA, IF GOOGLE HAS USER
23 CONSENT TO DISCLOSE SEARCH QUERIES, THEN THERE'S NOTHING IN THE
24 LAW PREVENTING GOOGLE FROM DOING SO. AND SO THE PROSPECTIVE
25 RELIEF HERE GOES DIRECTLY TOWARDS THE CONSENT PORTION OF THE

1 SCA.

2 SO WE HAVE ADDRESSED THE ISSUE AND GOOGLE -- THIS IS
3 PERMANENT PROSPECTIVE RELIEF, YOUR HONOR.

4 THE COURT: I ASKED MR. FRANK THE QUESTION OF THE
5 EVALUATING OF THE DAMAGES. CAN YOU ANSWER THAT QUESTION?

6 MR. NASSIRI: BEST DAY IN COURT, TRILLIONS AND
7 TRILLIONS OF DOLLARS, YOUR HONOR. IT'S ABSURD. I BELIEVE
8 JUDGE SEEBORG SAID IN CASES LIKE THIS, ARE THEY TOO BIG TO
9 SETTLE OR TO RESOLVE OR TO BRING? THEY'RE MONSTROUS. THERE
10 ARE SOME ISSUES HERE, AND THIS IS ONE OF THOSE MEGA CASES.

11 THE COURT: OKAY. SO WHY SHOULD THE COURT GRANT A
12 MULTIPLIER IN THIS CASE? WHY WOULD THAT BE APPROPRIATE IN THIS
13 CASE IF IT IS AT ALL?

14 MR. NASSIRI: BECAUSE OF THE TREMENDOUS RISK THAT WE
15 TOOK, BECAUSE THE MAJORITY OF CASES, THESE PRIVACY CASES ARE
16 DISPOSED OF ON 12 (B) MOTIONS, YOUR HONOR. THERE AREN'T THAT
17 MANY CASES THAT SETTLE, AND WE BELIEVE IT WAS OUR GOOD WORK
18 THAT GOT US TO A SETTLEMENT THAT IS REASONABLE COMPARED TO A
19 HANDFUL OF PRIVACY CLASS ACTIONS THAT HAVE SETTLED BEFORE US.

20 AND, YOU KNOW, WE ALSO BELIEVE THAT THE CY PRES COMPONENT
21 OF THIS WE HAVE DONE BETTER THAN THE CASES BEFORE US.

22 SO WE'RE PROVIDING REAL RELIEF TO THE CASE, THE PERMANENT
23 PROSPECTIVE RELIEF REQUIRING DISCLOSURES FROM GOOGLE AND A
24 SIZEABLE CY PRES FUND THAT IS GOING TO BE USED FOR PROJECTS
25 SPECIFICALLY RELATED TO THE SUBJECT MATTER OF THE COMPLAINT.

1 THE COURT: SOME OF THE PROPOSALS I LOOK AT, I THINK
2 IT WAS MAYBE OUR -- IT MIGHT HAVE BEEN CARNEGIE, THE LANGUAGE
3 WAS VERY GENERAL AS TO WHAT THEY WERE GOING TO DO.

4 IT ALMOST LOOKED LIKE THEY HAD A STANDARD, AND I DON'T
5 MEAN TO BE CRITICAL OF THEM, BUT IT LOOKED LIKE THE RESPONSES
6 WERE PIECES THAT DESCRIBE THE WORK THAT THE INSTITUTES DO IN
7 GENERAL.

8 AND THEN THERE WAS, YOU KNOW, INSERT HERE AND THEN THERE
9 WAS THE DESCRIPTION OF, YOU KNOW, WE'RE GOING TO DO STUDIES,
10 WE'RE GOING TO MEET WITH LEADERS IN THE FIELD, WE'RE GOING TO
11 THEN HAVE AN INVESTIGATION DONE, WE'RE GOING TO PUBLISH RECORDS
12 AND MEET WITH THE LEADERS TO INFORM THE PUBLIC BETTER, ET
13 CETERA, ET CETERA.

14 AND MAYBE THAT'S -- MAYBE THEY CAN'T BE MORE SPECIFIC THAN
15 THAT. I THINK ONE OF THE OTHERS, AND I CAN'T REMEMBER WHICH,
16 AND I APOLOGIZE, SPOKE TO GOING TO WASHINGTON, D.C. AND MEETING
17 WITH LEADERS AND THEN HAVING SUBSEQUENT MEETINGS AND PUBLICITY
18 AND THAT WAS PROBABLY GREATER SPECIFICITY AS TO WHAT AT LEAST
19 THEIR GOALS WERE AS FAR AS THE PROJECT LINE BUT -- AND MAYBE IT
20 WAS TOO MUCH TO ASK THE RECIPIENTS TO GIVE US A TIMELINE OF
21 WHAT EXACTLY THEY'RE GOING TO DO WITH THESE PARTICULAR ISSUES.

22 DO YOU WANT TO COMMENT ON THAT?

23 MR. NASSIRI: YES, YOUR HONOR. I NOTICED THE SAME
24 THING. SOME PROPOSALS ARE MORE SPECIFIC THAN OTHERS.

25 CARNEGIE MELLON, YOUR HONOR, WAS ONE OF THE VERY SPECIFIC

1 ONES AND IN PART BECAUSE THE DELIVERABLE THAT THEY'RE ABLE TO
2 PROVIDE INCLUDES TECHNOLOGY.

3 SO, OF COURSE, WHEN YOU'VE GOT TECHNOLOGY AND YOU'RE
4 TRYING TO DEVELOP A SPECIFIC TOOL, IT'S PROBABLY EASIER TO
5 BRING SOME SPECIFICITY TO THE PROPOSAL.

6 AARP ON THE OTHER HAND IS PRIMARILY AN ORGANIZATION THAT
7 EDUCATES OLDER AMERICANS AND THEY WORK WITH LAW ENFORCEMENT AND
8 OTHER REGULATORY BODIES TO TRY AND MAKE SURE THAT PEOPLE'S
9 INTERESTS ARE PROTECTED.

10 SO I AGREE THAT THAT PROPOSAL WAS A LITTLE MORE GENERAL
11 AND IT TALKED ABOUT TRAINING TRAINERS, DEVELOPING TOOLKITS AND
12 THAT SORT.

13 BUT IT ALSO DOES HAVE SPECIFIC DELIVERABLES. IT'S GOING
14 TO ADD SECTIONS TO ITS CALL CENTER TO ADDRESS ONLINE PRIVACY
15 PROTECTION ISSUES.

16 IT DID SAY IT WAS GOING TO OFFER A CONSUMER TOOL TO HELP
17 CONSUMERS EVALUATE THEIR CURRENT PRIVACY PRACTICES AND MAKE
18 THEIR CURRENT RECOMMENDATIONS. THEY DIDN'T GO FURTHER THAN
19 THAT SO I DON'T KNOW WHAT THAT MEANS.

20 BUT THE OTHER THING THAT WE THOUGHT WAS IMPORTANT HERE WAS
21 TO REQUIRE EACH OF THESE ENTITIES TO PUBLISH REPORTS ON THE
22 RESULTS.

23 SO AARP, FOR EXAMPLE, AT THE END OF THIS, WILL LET US KNOW
24 WHETHER THEY REACHED THEIR STANDING GOAL OF SERVING AT LEAST 1
25 MILLION PEOPLE WITH -- THROUGH IT'S CALL CENTER OR THE NUMBER

1 OF PEOPLE THAT IT WAS ACTUALLY ABLE TO TRAIN WITH ITS TOOLKIT.

2 SO EACH ONE OF THESE PROPOSALS INCLUDES KIND OF A REPORT
3 CARD PHASE AT THE END AND SO WE CAN SEE WHAT HAPPENS.

4 THE COURT: IS THAT SOMETHING THAT FUTURE COURTS CAN
5 LOOK AT WHEN THEY CONSIDER WHETHER OR NOT THE RECIPIENT IS
6 APPROPRIATE?

7 MR. NASSIRI: ABSOLUTELY. IT GOES A LITTLE BIT
8 OUTSIDE OF THE SCOPE OF THIS CASE, BUT IT STARTS TO CREATE MUCH
9 LIKE WHAT IS HAPPENING IN THE GRANT WORLD GENERALLY OR IN THE
10 CHARITY WORLD GENERALLY I SHOULD SAY.

11 IT STARTS TO BUILD ON THEIR REPUTATION SO THAT NEXT TIME
12 SOMEONE PROPOSES AARP TO RECEIVE MONEY IN THE CONTEXT OR
13 OUTSIDE OF THE CONTEXT OF THE LAWSUIT, THIS IS SOMETHING THAT
14 EVERYONE WILL BE ABLE TO LOOK AT.

15 SO, YES, ALL OF THESE REPORTS WILL BE PUBLISHED.

16 THE COURT: HAS BERKMAN DONE THAT? WE KNOW THAT
17 THEY RECEIVED AT LEAST HALF A MILLION DOLLARS IN A PREVIOUS
18 CASE. DO WE HAVE A REPORT FROM THEM?

19 MR. NASSIRI: YOUR HONOR, I DON'T KNOW IF THEY HAVE
20 DONE IT PREVIOUSLY, BUT WE DID REQUIRE THEM TO INCLUDE IT IN
21 THEIR PROPOSAL HERE, THAT THEY WILL DO IT HERE.

22 SO EVERYTHING THAT THEY DO IN TERMS OF THE RESEARCH AND
23 THE POLICIES THAT THEY PROPOSE, THE CONFERENCES WILL ALL BE
24 AVAILABLE ON THE WEBSITE.

25 AND THEY'RE ALSO PUBLISHING WHAT THEY'RE CALLING ONE

1 MIDTERM AND ONE FINAL REPORT, BECAUSE THEY'RE A SCHOOL, WHERE
2 THEY WILL REPORT ON HOW THE MONEY HAS BEEN SPENT AND WHAT HAS
3 HAPPENED.

4 THE COURT: MAYBE THERE SHOULD BE -- MAYBE WE SHOULD
5 CREATE -- YOU KNOW, WHEN YOU SAID THERE'S NOT MUCH LAW IN THIS
6 AREA, MAYBE WE SHOULD CREATE SOME POLICY ON THIS SO THERE'S A
7 CY PRES CENTRAL SO THAT PEOPLE CAN GO TO THAT TO LOOK AT THE
8 GOOD WORKS THAT THESE ORGANIZATIONS DO. JUST A THOUGHT.

9 ONE OF THE OTHER PROPOSALS, I CAN'T REMEMBER WHICH ONE
10 THOUGH WHEN I WENT DOWN THE LIST OF WORK THAT THEY WERE GOING
11 TO DO, THEY ALSO TALKED ABOUT SMARTPHONE PRIVACY WHICH HAS
12 LITTLE, I THINK, TO DO WITH THIS CASE, OR DOES IT?

13 MR. NASSIRI: NO, IT HAS A LOT TO DO. I MEAN, I
14 COULD TALK FOR DAYS --

15 THE COURT: LET ME ASK COUNSEL IF THEY HAVE THE
16 TIME.

17 MR. NASSIRI: DO YOU GUYS HAVE TIME?

18 WHILE THEY'RE LEADING THE EFFORT, THEIR CLIENT IS ANYWAY,
19 AND EVERYTHING IS MOVING TO THE MOBILE PLATFORM AND
20 PARTICULARLY SEARCH.

21 I MEAN, AT THE BOTTOM OF THIS CASE IS THIS NOTION THAT
22 WHEN WE SEARCH FOR THINGS, GOOGLE KNOWS WHAT WE'RE THINKING,
23 WHAT WE'RE LOOKING FOR, WHAT WE WANT, AND WHAT OUR HABITS ARE
24 AND ALL OF THAT. AND RIGHT NOW IT'S CUMBERSOME, AND I THINK
25 WE'LL ONE DAY LOOK BACK AND IT'S A PRIMITIVE PROCESS WHERE WE

1 HAVE TO TYPE KEYWORD SEARCHES INTO A BOX ON A COMPUTER AND
2 SOMEWHERE DOWN THE ROAD THEY WILL JUST BE PLUGGED INTO THEIR
3 BRAIN. AND I KNOW I SOUND CRAZY TO SOME PEOPLE, BUT THAT'S
4 KIND OF WHAT IS HAPPENING AND MOBILE IS FACILITATING THIS KIND
5 OF MORE FLUID COMMUNICATION WHERE CONSUMERS GET WHAT THEY WANT
6 AND GET THEIR QUESTIONS ANSWERED BY COMPANIES LIKE GOOGLE.

7 AND I THINK THERE IS AMPLE EVIDENCE. AND YOU ASKED WHAT
8 HAS CHANGED IN THE LAST YEAR? MORE AND MORE OF THE WORLD IS
9 MOVING TOWARDS MOBILE, MORE DEVELOPERS OF APPLICATIONS ARE
10 FOCUSING ON MOBILE, AND ALL OF THE MAJOR PROVIDERS LIKE
11 GOOGLE, FACEBOOK, TWITTER, AND THE LIKE ARE FOCUSING ON
12 MOBILE.

13 SO FOR STANFORD TO FOCUS ON MOBILE, AND I THINK STANFORD
14 IS THE PROPOSED RECIPIENT YOU'RE REFERRING TO, I THINK IT IS
15 GREAT BECAUSE THAT IS WHERE THE WORLD IS HEADED AND THAT'S
16 WHERE THE RESEARCH IS HEADED, YOUR HONOR.

17 THE COURT: AND THAT HAS A NEXUS WITH THIS LAWSUIT
18 AND THE ISSUES ATTENDANT TO IT?

19 MR. NASSIRI: ABSOLUTELY.

20 THE COURT: SO I MADE MY COMMENTS ABOUT THE CY PRES.
21 I THINK, CANDIDLY, I AM TROUBLED BY THAT. PERHAPS I HAD
22 GREATER EXPECTATIONS.

23 I HAVE SOME PROBLEMS WITH THAT WHOLE SELECTION PROCESS.
24 IT IS, YOU KNOW, TO USE THAT PARAPHRASE, IT IS THE SAME AS IT
25 EVER WAS. IT WAS THE SAME WE TALKED ABOUT A YEAR AGO, THOSE

1 SAME GROUPS WERE LISTED.

2 WELL, LET ME HEAR FROM YOUR COLLEAGUES OPPOSITES,
3 MR. EDWARDS AND MR. JOHNSON, AND ANY COMMENTS THEY MIGHT HAVE.
4 THANK YOU VERY MUCH.

5 MR. NASSIRI: THANK YOU, YOUR HONOR.

6 MR. JOHNSON: THANK YOU, YOUR HONOR.

7 THE COURT: GOOD MORNING. YOU HAVE HAD THE
8 PRIVILEGE, I SUPPOSE, OF SITTING AND LISTENING TO OUR
9 CONVERSATION.

10 ANYTHING YOU WANT TO ADD TO THE CONVERSATION?

11 MR. JOHNSON: WELL, I WOULD YIELD TO MY COLLEAGUE,
12 MR. EDWARDS, ON THE CY PRES ISSUE, BUT I WILL SAY THAT WE HAVE
13 LISTENED INTENTLY AND YOUR COMMENTS WERE VERY MUCH HEARD AND
14 REGISTERED, YOUR HONOR.

15 ONE OBSERVATION, THOUGH, I WOULD MAKE RIGHT OFF THE BAT IS
16 THAT NEITHER MR. EDWARDS NOR MY ALMA MATERS WERE COLEAD COUNSEL
17 IN THIS CASE AND WERE REPRESENTED IN ANY WAY IN THE SETTLEMENT.

18 THE COURT: OKAY. THANK YOU. MR. EDWARDS.

19 MR. EDWARDS: JUST TO START WITH, THAT WAS A
20 CRITICAL OPENING FACT.

21 THE COURT: EXPERIENCED TRIAL LAWYERS KNOW WHEN TO
22 MAKE THE APPROPRIATE OPENING, DON'T THEY?

23 MR. EDWARDS: JUST A FEW SUPPLEMENTAL POINTS AND
24 THEN, OF COURSE, I AM HAPPY TO ANSWER ANY QUESTIONS THAT YOU
25 MIGHT HAVE OF GOOGLE ON SOME OF THE ISSUES THAT YOU HAVE

1 RAISED.

2 BUT GOOGLE DOESN'T CONTROL AND DIDN'T CONTROL THE PROCESS
3 OF DEVELOPING THE SPECIFIC PROPOSALS. IT DOESN'T CONTROL THE
4 EXPENDITURE OF THOSE FUNDS.

5 THE SETTLEMENT AGREEMENT IN PARAGRAPHS -- IN PARAGRAPH 3.3
6 HAS A SENTENCE THAT DESCRIBES THAT THE CY PRES FUNDS SHOULD BE
7 USED GENERALLY FOR INTERNET PRIVACY EDUCATIONAL PURPOSES.

8 AND THE REASON FOR THE INCLUSION OF THAT AND THE
9 SETTLEMENT AGREEMENT WAS TO ENSURE THAT THE CY PRES WAS
10 DIRECTIONALLY APPROPRIATE JUST FROM THAT LANGUAGE ALONE SO THAT
11 IT WASN'T A SITUATION WHERE WE'LL JUST GIVE MONEY TO THE
12 AMERICAN RED CROSS. THEY DO GOOD WORK.

13 BUT THE DESIGN COMING OUT OF THE PRELIMINARY APPROVAL
14 PROCESS AND IMPLEMENTING THE SETTLEMENT WAS PLAINTIFFS HAD
15 RESPONSIBILITY AND DID SOLICIT VERY DETAILED PROPOSALS FROM THE
16 LIST OF CY PRES RECIPIENTS AND ENSURED AND ALLOWED THE COURT
17 AND THE PUBLIC AND THE OBJECTORS TO ALL EVALUATE THE VERY
18 DETAILED PROPOSALS THAT EACH OF THOSE RECIPIENTS PROVIDED.

19 ONE OF THE POTENTIAL RECIPIENTS THAT WAS IDENTIFIED IN THE
20 SETTLEMENT AGREEMENT ACTUALLY DROPPED OUT, YOUR HONOR MAY HAVE
21 NOTICED, BECAUSE THEY DIDN'T FEEL THEY WERE GOING TO BE ABLE TO
22 SUBMIT AN APPROPRIATE PROPOSAL WITH THE RIGHT CRITERIA AND THEY
23 WERE NOT THE RIGHT RECIPIENT IN THIS CASE.

24 AND I THINK THAT HELPS SPEAK TO THE APPROPRIATENESS OF
25 THIS PROCESS BECAUSE ULTIMATELY WHEN YOU'RE EVALUATING IS A

1 SETTLEMENT FAIR, REASONABLE, AND ADEQUATE -- ARE THESE
2 APPROPRIATE -- IS THIS AN APPROPRIATE USE OF CY PRES FUNDS?
3 YOU KNOW, THE PROOF IS IN THE PUDDING. THE PROOF IS IN WHAT
4 THE PROPOSALS WILL DO.

5 AND IT MAY VERY WELL BE THAT HAD A DIFFERENT DEFENDANT AND
6 A DIFFERENT PLAINTIFF NEGOTIATED A PRIVACY SETTLEMENT ON A
7 SIMILAR SUBJECT MATTER THAT THEY MIGHT HAVE CHOSEN -- MY ALMA
8 MATER IS NORTHWESTERN, FOR INSTANCE, BUT THAT'S NOT WHAT
9 HAPPENED HERE. THAT DOESN'T -- AND IT COULD HAVE BEEN
10 OBVIOUSLY AN UNAFFILIATED SCHOOL OR OTHER INSTITUTION OF SOME
11 KIND.

12 BUT HERE EACH OF THE INSTITUTIONS THAT ARE THE PROPOSED
13 RECIPIENTS HAVE IDENTIFIED VERY SPECIFICALLY, SOME A LITTLE
14 MORE DETAILED THAN OTHERS, BUT ALL MUCH MORE DETAILED THAN I
15 HAVE EVER SEEN BEFORE THE COURT IS EVALUATING FINAL FAIRNESS,
16 ARE THESE APPROPRIATE USES OF THE FUNDS CONSISTENT WITH KELLOG
17 AND THE OTHER CONTROLLING CASE LAW?

18 AND I WOULD SUBMIT THAT THEY CLEARLY SATISFY THAT.
19 THERE'S A CONNECTION BETWEEN THE WORK THAT IS PROPOSED AND
20 THERE IS, YOU KNOW, DETAIL AND ACCOUNTABILITY WITH ALL OF THAT
21 WORK AND THE GENERAL CONCERNS OF THE ALLEGATIONS IN THE CASE.

22 AND SO I THINK THAT PART OF THE PROCESS -- AND I
23 UNDERSTAND AND I HEARD YOUR HONOR'S COMMENTS ABOUT THE
24 SELECTION AND YOU MIGHT HAVE THOUGHT THAT THERE WOULD BE A
25 DIFFERENT OR SUPPLEMENTAL RECIPIENT AS WELL, BUT ONE OF THE

1 THINGS THAT THIS SETTLEMENT I THINK IS UNIQUE IN IS THE LEVEL
2 OF DETAIL THAT HAS BEEN PRESENTED TO THE COURT BUT HOW THE
3 MONEY IS ACTUALLY GOING TO BE USED.

4 SO FROM THAT PERSPECTIVE, I THINK THAT THAT REALLY
5 STRONGLY SUPPORTS THE FAIRNESS, THE REASONABLENESS, AND
6 ADEQUACY OF THE SETTLEMENT.

7 THE COURT: OKAY.

8 MR. EDWARDS: IN TERMS OF -- I THINK THAT ALSO
9 ADDRESSES THE SELECTION IN THE FOLLOWING SENSE, THAT THE
10 CONCERN WITH SELECTION IS THAT SETTLEMENT FUNDS MIGHT BE
11 STEERED INTO AN INAPPROPRIATE WAY.

12 AGAIN, USE THE RED CROSS AS AN EXAMPLE. AND LET'S PRETEND
13 THAT MY SISTER WAS THE PRESIDENT OF THE AMERICAN RED CROSS AND
14 WE WOULD LIKE TO STEER THE FUNDS BECAUSE WE WOULD LIKE TO MAKE
15 HER LIFE BETTER. I MEAN, HERE THE COURT CAN EVALUATE ARE THESE
16 APPROPRIATE USES OF THE FUNDS, AND ARE THESE INSTITUTIONS
17 CREDENTIALLED, AND DO THEY HAVE A TRACK RECORD AND THE
18 EXPERIENCE TO ACTUALLY DO IT? AND SO THAT WE'RE NOT THROWING
19 FUNDS THAT WON'T BE USED.

20 AND I BELIEVE THAT THE EXPERIENCE OF THESE INSTITUTIONS,
21 WHICH IS DETAILED, AND IT'S ALSO FOR, I BELIEVE ALL OF THEM OR
22 MOST OF THEM, FAIRLY KNOWN, BUT IT'S ALSO DETAILED THAT THEY'RE
23 EXPERIENCED AND THEY CAN DELIVER THE KINDS OF PROJECTS THAT
24 THEY DO AND THEY'RE DIFFERENT PROJECTS RANGING FROM TECHNOLOGY
25 DEVELOPMENT TO THE AARP PROPOSALS.

1 IT WAS NOT AS DETAILED TECHNICALLY, BUT THEY HAVE
2 EXPERIENCE AND THEY HAD A MULTIYEAR PLAN AND THIS IS WHAT WILL
3 HAPPEN IN YEAR ONE, YEAR TWO, YEAR THREE TO ACHIEVE THE GOALS
4 IN THEIR WAY THAT THEY BELIEVE ARE APPROPRIATE.

5 SO I THINK THAT THAT TOUCHES ON THE SELECTION PROCESS.
6 I'M HAPPY TO ANSWER ANY ADDITIONAL QUESTIONS THERE.

7 THE COURT: OKAY.

8 MR. EDWARDS: YOU KNOW, I GUESS MAY BE I SHOULD ADD
9 ONE ADDITIONAL POINT, WHICH IS MR. FRANK'S ARGUMENT THAT THIS
10 IS JUST A CHANGE IN GOOGLE ACCOUNTING ENTRIES.

11 AND, AGAIN, I THINK THE LEVEL OF DETAIL OF THESE PROGRAMS
12 AND THE LACK OF GOOGLE'S INVOLVEMENT IN THE DEVELOPMENT OF
13 THESE PROGRAMS REBUTS THAT.

14 THESE WERE, THESE WERE -- IT IS NOT JUST A DONATION TO THE
15 AMERICAN RED CROSS. IT'S NOT EVEN JUST A DONATION TO AN
16 INSTITUTION THAT GOOGLE MAY AT SOME POINT IN THE PAST HAVE
17 PROVIDED SOME MONEY FOR FOR SOME PURPOSE.

18 THESE ARE VERY SPECIFIC PROPOSALS THAT ARE FUNDED OUT OF
19 VERY SPECIFIC FUNDS. AND SO WHEN YOU COMPARE THIS TO, FOR
20 INSTANCE, THE CY PRES IN THE LANE VERSUS FACEBOOK CASE, THIS
21 IS, I BELIEVE, MULTIPLE STEPS AWAY FROM THAT IN TERMS OF THE
22 INVOLVEMENT OF THE DEFENDANT AND IN TERMS OF THE CONCRETENESS
23 OF WHAT MAY COME OUT OF AN APPROVAL OF THE SETTLEMENT THAT
24 ALLOWS THE FUNDS TO BE IMPLEMENTED IN THE WAY THAT HAS BEEN
25 DESCRIBED.

1 AND SO WE FULLY UNDERSTAND THAT, PERHAPS, THE PRELIMINARY
2 APPROVAL PROCESS THERE MAY HAVE BEEN A LITTLE BIT OF A
3 DISCONNECT IN TERMS OF COMMUNICATION WITH YOUR HONOR ABOUT
4 WHERE THE UNPRECEDENTED NATURE OF THE CY PRES PROCESS EXISTS
5 AND TO THE EXTENT THAT THE PARTIES DIDN'T COMMUNICATE THAT
6 APPROPRIATELY, WE OBVIOUSLY WANT TO ADDRESS AND REMEDY THAT
7 NOW.

8 WE THINK THAT THE SETTLEMENT AGREEMENT AND CERTAINLY THE
9 NOTICE IDENTIFIED THE RECIPIENTS AND NOW WE HAVE A MUCH MORE
10 ROBUST RECORD CONCRETELY OF WHAT WOULD HAPPEN.

11 AND WE THINK THAT THAT FULLY SUPPORTS THE APPROPRIATENESS
12 OF BOTH THE SELECTION AND THE USE OF THOSE FUNDS.

13 SO I'M HAPPY TO ADDRESS ISSUES THERE.

14 THE COURT: WELL, THANK YOU. SO I THINK THESE ARE
15 APPROPRIATE ISSUES TO DRILL DOWN AND TALK ABOUT WITH GREATER
16 DETAIL BECAUSE THIS IS A PURE CY PRES. AND SO THE RECIPIENTS,
17 I THINK, ARE VERY IMPORTANT, AND THAT'S WHY I'M ASKING
18 QUESTIONS AND FOCUSSING SO MUCH OF OUR MORNING ON THAT, WHICH
19 DOES INCLUDE THE TRANSPARENCY OF THE SELECTION PROCESS, THE
20 PROTOCOL OF HOW THESE INSTITUTIONS, AND I REITERATE, I'M NOT
21 BEING CRITICAL OF THE WORK THAT THEY DO. AND I THINK YOUR
22 POINT IS WELL TAKEN. THEY'RE GUIDED AND THEY HAVE AN EXCELLENT
23 TRACK RECORD.

24 IT'S THE KIND OF WORK THAT IS APPROPRIATE TO THIS CLASS,
25 THE LAWSUITS, THE ISSUES THAT ARE IN THIS LAWSUIT. SO I

1 UNDERSTAND THAT AND PERHAPS MY GREATEST FOCUS IS ON JUST THE
2 SELECTION PROCESS.

3 AND AS I SAID EARLIER, WHEN YOU PUT AND WHEN I LOOK AT IT,
4 THE USUAL SUSPECTS, I KEEP USING THAT INELEGANT PHRASE, BUT
5 THAT AND THEN THE PERCENTAGES TO, PERHAPS, GET AROUND, I
6 SUPPOSE, OR TO COME WITHIN THE OPINION AND IN THE EASYSAYER
7 CASE, ALL OF THOSE THINGS, I LOOK AT IT AND IT JUST CAUSES SOME
8 QUESTION.

9 AND I'M NOT A NATURALLY SUSPICIOUS PERSON, I PROMISE YOU,
10 BUT IT JUST RAISES AN ISSUE FOR ME OF CAN WE DO BETTER? AND IN
11 THIS CASE THAT WAS -- THE BAR WAS TO BE RAISED, NOT BY YOU, BUT
12 IN THE SELECTION PROCESS.

13 I UNDERSTAND NOW AND I LEARN TODAY THAT THAT'S PROTECTED
14 BECAUSE IT WAS PART OF MEDIATION, AND I HOPE YOU APPRECIATE HOW
15 THAT DOESN'T HELP MY THOUGHT PROCESS. IT CREATES MORE
16 CURIOSITY, I SUPPOSE.

17 I'M NOT TRYING TO SAY THAT WE SHOULD NOT APPROVE THIS
18 BECAUSE THOSE ORGANIZATIONS AREN'T DESERVING, AND I'M NOT
19 TRYING TO SAY THAT YOU SHOULD FUND STARTUP ORGANIZATIONS
20 SOMEWHERE ELSE THAT CAN DO ADDITIONAL WORK, BECAUSE AS WE SAID,
21 A TRACK RECORD OR SOMETHING I NEED TO BE COGNIZANT OF.

22 BUT AT SOME POINT SHOULDN'T A WIDER NET BE CAST OR
23 SHOULDN'T THERE BE ADDITIONAL NUMBERS AND PARTICULARLY NUMBERS
24 OF APPLICATIONS AND PARTICULARLY HERE WHEN THAT ISN'T, TO ME,
25 TRANSPARENT.

1 MR. EDWARDS: WELL, LET ME TRY TO ADDRESS AS MUCH OF
2 THAT AS I CAN BEFORE I GET UNCOMFORTABLE WITHOUT TALKING TO
3 COUNSEL.

4 THE COURT: SURE, OF COURSE.

5 MR. EDWARDS: BUT LET ME START WITH THE ALLOCATIONS.
6 JUST TO BE CLEAR, GOOGLE DID NOT HAVE INVOLVEMENT, AND I THINK
7 MR. NASSIRI EXPLAINED, YOU KNOW, PLAINTIFFS RECEIVED PROPOSALS
8 AND NOT EVERYONE CHOSE THE EXACT SAME NUMBERS.

9 AND THEN DEPENDING ON WHAT YOUR HONOR'S DECISIONS ARE ON
10 THE ATTORNEY FEE ISSUE, I SUPPOSE THAT WILL INFLUENCE THE TOTAL
11 DOLLARS THAT ARE OTHERWISE AVAILABLE.

12 BUT GOOGLE DIDN'T IDENTIFY IN THE PROPOSALS AND DIDN'T SAY
13 THAT WE WANT YOU TO SUBMIT FOR X DOLLAR AMOUNT.

14 AND SO, YOU KNOW, THERE WAS NO INVOLVEMENT FROM MY CLIENT
15 AND FROM EVERYTHING THAT I UNDERSTAND FROM PLAINTIFFS EITHER IN
16 TERMS OF STEERING WE WANT 1 PERCENT LESS OF ONE FROM ONE TO
17 ANOTHER.

18 THESE ARE ALL GENERALLY WITHIN THE BALLPARK. A COMMENT
19 THAT GOOGLE DID SHARE AT THE OUTSET WAS THAT ALTHOUGH IT WAS
20 NOT TAKING THOSE SPECIFIC PROPOSALS AND DICTATING DOLLAR
21 AMOUNTS, IT WOULD HAVE BEEN DISAPPOINTED AND WOULD HAVE HAD
22 SIGNIFICANT ISSUES IF, ONE, RECIPIENT HAD RECEIVED 95 PERCENT
23 OF ALL OF THE FUNDS AND THE OTHER RECIPIENTS RECEIVED \$10 EACH.

24 BUT BEYOND THAT EXTREME SITUATION THAT WAS NOT AN AREA
25 WHERE THERE WAS ANY INFLUENCE EXERCISED OR DECISION MADE BY

1 GOOGLE ABOUT HOW THOSE DOLLARS CAME IN, THEY COME IN AT
2 SLIGHTLY DIFFERENT AMOUNTS BECAUSE OF THE DIFFERENT NATURES OF
3 BOTH I SUPPOSE WHAT WAS BEING PROPOSED AND ALSO WHAT EACH OF
4 THESE PROPOSED RECIPIENTS THOUGHT THEY COULD GET AND JUSTIFY.

5 SO I DON'T KNOW THAT I CAN SAY MUCH MORE THAN THAT BECAUSE
6 THERE WAS NO INVOLVEMENT BY GOOGLE IN THE SELECTION OF THAT.

7 I THINK THAT THEY ALL ARE -- THERE WAS INVOLVEMENT BY
8 GOOGLE AS WELL AS PLAINTIFFS, OF COURSE, IN IDENTIFYING THE
9 RECIPIENTS.

10 AND THE THINKING IS THAT YOU DON'T WANT TO HAVE 100
11 RECIPIENTS NECESSARILY. ALL KINDS OF REASONS.

12 THE COURT: SURE.

13 MR. EDWARDS: AND IN THIS CASE THE DECISION WAS MADE
14 ON BOTH SIDES THAT YOU ALSO DON'T WANT TO HAVE ONE OR TWO.
15 IT'S A NICE CROSS-SECTION. THEY'RE DOING DIFFERENT KINDS --
16 DIFFERENT RECIPIENTS ARE DOING DIFFERENT KINDS OF THINGS AND
17 IT'S A MANAGEABLE NUMBER, AND IT'S A NUMBER IN WHICH AS WE CAN
18 SEE FROM LOOKING AT THE PROPOSALS WE CAN GET LEGITIMATE
19 SIGNIFICANT PROPOSALS THAT ADDRESS THE SUBJECT MATTER.

20 AND I, YOU KNOW, IN A COUNTER-FACTUAL WORLD WE CAN
21 SPECULATE IF WE DOUBLED THE NUMBER OF RECIPIENTS AND CUT IT IN
22 HALF, EACH OF THE PROPOSALS, WHAT WOULD THOSE PROPOSALS LOOK
23 LIKE? PERHAPS IT WOULD ALSO BE FAIR, ADEQUATE, AND REASONABLE
24 TO DO SOMETHING LIKE THAT. PERHAPS. I CAN'T JUDGE.

25 BUT WHAT WE CAN JUDGE IS I THINK A HALF A DOZEN, I THINK

1 ORIGINALLY SEVEN, HALF A DOZEN, CAME THROUGH THE PROCESS WITH
2 PROPOSALS FOR WHICH THEY'RE BROADLY SPEAKING IS THE APPROPRIATE
3 AMOUNT OF MONEY REQUESTED TO DO THINGS THAT WE BELIEVE ARE
4 APPROPRIATE OR CERTAINLY SUPPORTABLE.

5 AGAIN, IT'S NOT A GOOGLE DESIGN AND CHOSE THESE SPECIFIC
6 RESEARCH PROJECTS AND DEVELOPMENT PROJECTS, BUT CERTAINLY
7 WITHIN THE RANGE IS THIS A FAIR, REASONABLE, AND ADEQUATE PART
8 OF A PACKAGE IN TERMS OF THE SETTLEMENT COUPLED WITH THE
9 DISCLOSURE PROVISION?

10 YOU KNOW, I THINK THAT -- I'LL END ON THIS NOTE WHERE I
11 BEGAN WHICH IS THE PROOF IS IN THE PUDDING. YOU CAN LOOK AT IT
12 AND YOU CAN SEE. THERE MAY BE OTHER SETTLEMENTS WHERE YOU CAN
13 HAVE A DIFFERENT GROUP OF RECIPIENTS BUT THERE'S NOTHING WRONG
14 WITH THIS GROUP IN TERMS OF THEIR CREDENTIALS AND WHAT THEY
15 WOULD DO AND HEARKENING BACK TO LANE, WELL WITHIN THE BOUNDS OF
16 WHAT PRECEDENT WOULD SAY IS APPROPRIATE.

17 THE COURT: I GUESS THE DISTINCTION HERE MIGHT BE
18 THE CONFLICT OF INTEREST ISSUE WHICH GETS TO -- AND I TALKED
19 ABOUT WITH MR. NASSIRI AND WHETHER OR NOT THAT'S A REAL ISSUE,
20 WHETHER OR NOT IT'S SOMETHING THAT THE COURT SHOULD BE
21 CONCERNED ABOUT.

22 AND TO THAT END, I WAS CURIOUS ABOUT, AGAIN, THE
23 PUBLICATION OF THE REQUEST FOR AN INVITATION TO APPLY I
24 SUPPOSE. THAT WOULD HAVE BEEN INTERESTING TO KNOW WHAT THAT
25 PROCESS WAS AND WHAT WAS THE TARGET AUDIENCE FOR THOSE ROI'S,

1 OR WHATEVER IT WAS THAT WAS SENT OUT. THAT WOULD HAVE BEEN
2 NICE TO KNOW.

3 AND THE RESPONSE RATE TO THAT WOULD HAVE BEEN INSTRUCTIVE
4 ALSO. YOU KNOW, WAS BERKELEY ONE OF THOSE TARGETED PEOPLE?
5 WAS USD, SANTA CLARA? I CAN NAME ANY SCHOOL. AND DO THEY HAVE
6 PROGRAMS THAT MIGHT, MIGHT ALSO FALL UNDER THE LANE RUBRIC OF
7 APPROVAL?

8 AND, AGAIN, GETTING BACK TO THE HISTORY OF THIS CASE,
9 THESE RECIPIENTS WERE NAMED PREVIOUSLY, AND SO I GUESS THAT'S
10 THE DISAPPOINTMENT, IF I HAVE ANY. WHAT IS DIFFERENT NOW THAN
11 IN AUGUST OF 2013.

12 MR. EDWARDS: WELL, LET ME TRY TO ANSWER THAT
13 STARTING WITH YOUR LAST POINT WHAT IS DIFFERENT NOW THAN IN
14 AUGUST OF 2013?

15 IN TERMS OF THE RECIPIENTS, YOU KNOW, IT'S NOT AS IF THERE
16 WERE ADDITIONAL RECIPIENTS ADDED. I THINK MR. NASSIRI
17 ACKNOWLEDGED THAT AS WELL.

18 WHAT IS DIFFERENT IS THE VERY DETAILED SUBMISSION. HOW
19 ARE THESE FUNDS TO BE USED? ARE THESE APPROPRIATE USES FOR THE
20 FUNDS? DOES IT FIT WITHIN THE CONFINES OF KELLOG AND LANE AND
21 THE OTHER PRECEDENTIAL AUTHORITIES ON THIS POINT?

22 AND THAT IS REALLY WHAT IS NEW.

23 IN FACT, YOU KNOW, FROM PRELIMINARY APPROVAL UNTIL NOW,
24 YOU KNOW, AT THE TIME WE HAD AN AGREED UPON LIST OF WHAT WE
25 BELIEVED WOULD BE APPROPRIATE ORGANIZATIONS, AND AS WE NOTED

1 EARLIER, AND THE MACARTHUR FOUNDATION DROPPED OUT BECAUSE THEY,
2 LIKELY APPROPRIATELY, DECIDED THAT THEY DIDN'T FEEL THAT THEY
3 COULD SUBMIT A PROPOSAL THAT WOULD SATISFY THE CRITERIA THAT
4 THE SETTLEMENT CONTEMPLATED HERE.

5 BUT AT THE TIME THAT THEY WERE IDENTIFIED FOR PRELIMINARY
6 APPROVAL THAT, YOU KNOW, WE HAVE THIS, WHAT WE BELIEVE WAS A
7 REASONABLE NUMBER, AN APPROPRIATE CROSS-SECTION OF RECIPIENTS,
8 NOW LET'S GO AND MAKE SURE THAT THEY CAN DO WHAT THE AGREEMENT
9 IS THAT THEY WILL DO AND DO SOMETHING THAT THE COURT WILL FIND
10 TO BE APPROPRIATE IN TERMS OF A DIRECTION FOR THE CY PRES
11 FUNDS.

12 AND THAT'S, YOU KNOW, AND THAT'S WHAT WAS DELIVERED THEN
13 COMING BACK.

14 THE COURT: OKAY. WELL, LET ME ASK YOU WHAT MIGHT
15 BE AN UNCOMFORTABLE QUESTION, BUT DO YOU WISH TO COMMENT ON ANY
16 OF THE OTHER TOPICS THAT I RAISED, THE NOTICE TOPIC AND THE
17 ATTORNEY'S FEES TOPIC?

18 MR. EDWARDS: SO LET ME TURN IT OVER TO MR. JOHNSON
19 TO ADDRESS NOTICE AND THE OTHER ASPECTS OF THE SETTLEMENT.

20 ON THE ATTORNEY FEE ISSUE, GOOGLE IS NOT GOING TO ASSERT
21 -- THERE'S NO CLEAR SAILING PROVISION IN THE SETTLEMENT, BUT
22 WE'RE NOT ASSERTING A POSITION ON THAT. WE BELIEVE THAT'S
23 APPROPRIATELY DECIDED BY YOUR HONOR AND THE AGREEMENT DEFINES,
24 YOU KNOW, WHATEVER YOUR HONOR'S AWARD IS.

25 THE MONIES ARE NOT REVERTED BACK TO GOOGLE AND THAT'S

1 REALLY THE ONLY THING WE HAVE TO SAY ON THE ATTORNEY FEE POINT.

2 THE COURT: OKAY. THANK YOU VERY MUCH.

3 MR. JOHNSON: YOUR HONOR, ON NOTICE, WE BELIEVE THAT
4 THE PLAN THAT THE COURT APPROVED ITS PRELIMINARY APPROVAL WAS A
5 GOOD ONE AND A SOUND ONE AND MR. SIMMONS IS HERE TO TALK ABOUT
6 ITS IMPLEMENTATION WHICH SEEMS TO BE EQUALLY SOUND.

7 I WOULD JUST MAKE THE OBSERVATION, AND IT WAS CITED IN THE
8 PLAINTIFFS' BRIEF, THE COHORST CASE, WHICH IS AT A FINAL
9 APPROVAL, ABSENT NEWLY DISCOVERED EVIDENCE SOME KIND OF A
10 PROBLEM, NOTICE THAT HAS GONE OUT TYPICALLY IS NOT RECONSIDERED
11 AT FINAL APPROVAL.

12 THE COURT: THANK YOU. I APPRECIATE THAT. I RAISE
13 THE TOPIC THIS MORNING BECAUSE OF THE, CANDIDLY, THE LOW
14 RESPONSE.

15 MR. JOHNSON: AND I THINK I FELT AND TOOK THE IMPORT
16 OF YOUR HONOR'S COMMENTS, AND, YOU KNOW, YOU READ THE STATS
17 HERE AND YOU SEE WHAT WAS DONE.

18 IT WAS REASONABLE, IT WAS TRIED AND TRUE METHODS. IT'S --
19 I UNDERSTAND AND SENSE MAYBE ALMOST A DISAPPOINTMENT IN THAT IT
20 IS LIKE AN ELECTION IS WELL TURNED OUT.

21 BUT SOMETIMES IT COULD DEPEND NOT ON THE VEHICLE OR NOT ON
22 HOW PEOPLE VOTE BUT ON HOW EXCITING THE CANDIDATES ARE AND HOW
23 STRONGLY THEY FEEL ABOUT THE CONDUCT ALLEGED HERE.

24 THE COURT: WHICH GETS BACK TO THE DAMAGE QUESTION
25 THAT I WAS ASKING MR. NASSIRI EARLIER, PERHAPS.

1 ALL RIGHT. ANYTHING FURTHER YOU WOULD LIKE ME TO KNOW?

2 MR. EDWARDS: NO, YOUR HONOR.

3 MR. JOHNSON: NO, YOUR HONOR.

4 THE COURT: THANK YOU VERY MUCH.

5 MR. EDWARDS: THANK YOU.

6 THE COURT: MR. NASSIRI, YOU ARE ON YOUR FEET.

7 MR. NASSIRI: MAY I ADDRESS THE COURT BRIEFLY?

8 THE COURT: YES.

9 MR. NASSIRI: AGAIN, AT THE RISK OF SAYING TOO MUCH
10 BUT THIS IS INTERESTING BECAUSE IT IS NEW AND YOU FOCUSSED SOME
11 TIME THIS MORNING ON THE SELECTION PROCESS, AND I'M TRYING TO
12 IMAGINE WHAT AN ALTERNATIVE SELECTION PROCESS WOULD LOOK LIKE.

13 IF YOU OPEN IT UP TO THE PUBLIC, I MEAN, YOU CAN HAVE AN
14 AMERICAN IDOL TYPE COMPETITION WHERE IT'S OPEN TO VOTES BUT
15 PEOPLE OPPOSE -- THE PUBLIC ISN'T A COMMON WISDOM AND
16 OUTSOURCING IS NOT ALWAYS THE BEST WAY TO MAKE A SELECTION LIKE
17 THIS AND IT MAY NOT STAND UP TO CONSTITUTIONAL SCRUTINY.

18 THE COURT: I AM NOT ADVOCATING FOR THAT. I
19 APPRECIATE YOU ARE NOT.

20 MR. NASSIRI: I AM BRAIN STORMING, YOUR HONOR. AND
21 WE THOUGHT ABOUT THIS GOING INTO THE SETTLEMENT, TOO.

22 THE OTHER THING IS THAT IF WE HAD SAID, OKAY, LET'S HAVE
23 AN OPEN BID PROCESS AND THEN WE'LL DECIDE. I MEAN, AGAIN, THIS
24 IS A SETTLEMENT. WE HAVE TO GET SIGNOFF FROM GOOGLE. IT'S
25 UNAVOIDABLE.

1 IT MAY HAVE BEEN -- WE MAY HAVE BEEN WORSE OFF, AND I'LL
2 TELL YOU WHY. ONE THING WE HAD TO FIGHT FOR WAS CONTROL OVER
3 THE PROCESS ONCE THE RECIPIENTS, PROPOSED RECIPIENTS WERE
4 SELECTED.

5 THE COURT: SO I DON'T WANT YOU TO SPEAK TO ANYTHING
6 IN REGARDS TO YOUR MEDIATION.

7 MR. NASSIRI: I WON'T, YOUR HONOR. I WON'T CROSS
8 OVER ANY LINES. LET ME KNOW IF I DO.

9 BUT IT WAS IMPORTANT THAT THESE ENTITIES WERE ABLE TO
10 DECIDE HOW TO BEST SPEND THE MONEY IN A WAY WHERE THEY WEREN'T
11 UNDER THE INFLUENCE FROM, IN MY PERSPECTIVE, FROM DEFENDANTS.

12 AND YOU'LL SEE THAT SOME OF THESE PROPOSALS GO DIRECTLY
13 TOWARDS GOOGLE AND ARE AIMED DIRECTLY AT GOOGLE AND IN MAKING
14 SURE THAT GOOGLE IS ACCOUNTABLE AND IT ADHERES TO ITS PRIVACY
15 POLICIES.

16 I'M THINKING SPECIFICALLY ABOUT CARNEGIE MELLON'S PROPOSAL
17 FOR CREATING A TOOL THAT WOULD ALLOW THIRD PARTIES, REGULATORS,
18 POLICY MAKERS, POLICY ADVOCATES TO, FROM OUTSIDE OF THE GOOGLE
19 ECOSPHERE, TO SEE WHETHER OR NOT GOOGLE WAS ACTUALLY ADHERING
20 TO ITS PRIVACY POLICIES. THAT'S NOT SOMETHING THAT GOOGLE
21 WOULD NECESSARILY AGREE TO FUND.

22 STANFORD, THE F.T.C. FINE OF \$22 AND A HALF MILLION
23 DOLLARS BECAUSE GOOGLE CIRCUMVENTED THE APPLE SAFARI PRIVACY
24 BROWSER SELECTION, THAT WAS A RESULT OF STANFORD'S WORK.

25 SO BY -- IF WE HAD HAD AN OPEN BID PROCESS, I'LL CIRCLE

1 BACK NOW TO MY POINT, IF WE HAD AN OPEN BID PROCESS WHERE WE
2 TOOK BIDS AND PROPOSALS FROM 100 POTENTIAL RECIPIENTS AND THEN
3 MADE OUR DECISION, WE MAY HAVE BEEN WORSE OFF BECAUSE ANYTHING
4 THAT GOOGLE FOUND TO BE THREATENING THAT WE THOUGHT WAS
5 ACTUALLY VERY EFFECTIVE, THEY MIGHT NOT HAVE EVER AGREED TO.

6 SO WE BELIEVE THIS IS A GOOD PROCESS, AND I THINK
7 MR. EDWARDS PUT IT WELL, WE ENDED UP WITH PROPOSALS WHERE IF
8 YOU LOOK AT THE PROPOSALS ON THE MERITS, THEY'RE VERY GOOD
9 PROPOSALS AND VERY EFFECTIVE, AND I THINK THEY SHOULD BE
10 APPROVED, YOUR HONOR.

11 THE COURT: OKAY. MR. FRANK, YOU'RE ON YOUR FEET.

12 MR. FRANK: THANK YOU, YOUR HONOR. TWO THINGS VERY
13 QUICKLY, AND I'M GOING TO AVOID REPEATING MYSELF, BUT IF YOU GO
14 TO THE STANFORD WEB PAGE AND YOU LOOK AT THEIR DONERS, NUMBER
15 ONE RIGHT THERE IS GOOGLE.

16 AND SO, YES, THIS IS A SEPARATE PROGRAM, BUT, YOU KNOW, I
17 HAVE APPLIED FOR SEPARATE GRANTS FOR PROGRAMS, AND, AGAIN, IT'S
18 JUST AN ACCOUNTING ENTRY. YOU CAN'T TELL ME THAT GOOGLE IS NOT
19 GOING TO HAVE ANY INFLUENCE OF WHAT STANFORD DOES WITH ITS
20 MONEY BECAUSE STANFORD DEPENDS HEAVILY ON THAT FUNDING.

21 AND YOU GO TO THE WEB PAGE AND NUMBER ONE WAS GOOGLE AND
22 RIGHT UNDER IT IS ALL OF THE LAW FIRMS THAT HAVE GIVEN IT
23 CY PRES.

24 THE COURT: AND DID THE FOUNDERS OF GOOGLE ATTEND
25 THAT INSTITUTION?

1 MR. FRANK: AND FOUNDERS OF GOOGLE ATTENDED
2 STANFORD. THAT IS WHERE THEY STARTED.

3 THE PARTIES RELY A LOT ON THE EASYSAYER CASE AND THE COURT
4 INDICATED IT WAS GIVING IT SOME CONSIDERATION, AND I WOULD
5 CAUTION AGAINST THAT. WE HAVE THAT CASE ON APPEAL. I HAVE
6 BRIEFED IT. WE'LL ARGUE IT AT SOME TIME IN 2015 OR 2016, OR
7 WHENEVER THE NINTH CIRCUIT SCHEDULES IT, BUT I INVITE THE COURT
8 TO READ THOSE BRIEFS AT 13-55373 AND I -- IT'S A FOOL'S ERRAND
9 TO PREDICT EVER WHAT THE NINTH CIRCUIT IS EVER GOING TO DO BUT
10 IF YOU PUT A GUN TO MY HEAD ON ANY NINTH CIRCUIT CASE, THAT'S
11 THE ONE I WOULD STAKE MY LIFE ON.

12 IF YOU HAVE ANY OTHER QUESTIONS, I'D BE HAPPY TO ANSWER
13 THEM.

14 THE COURT: NO. THANK YOU. I APPRECIATE YOUR
15 PARTICIPATION.

16 MR. FRANK: THANK YOU.

17 THE COURT: ANYTHING FURTHER FROM YOUR TABLE,
18 MR. NASSIRI?

19 MR. NASSIRI: NO, YOUR HONOR.

20 THE COURT: MR. JOHNSON?

21 MR. JOHNSON: NO, YOUR HONOR.

22 THE COURT: WELL, THANK YOU FOR THE CONVERSATION
23 THIS MORNING. I APPRECIATE YOU SUFFERING MY CONCERNS, AND I
24 APPRECIATE THE CONVERSATION.

25 I DO HAVE REAL CONCERNS, AND I NEED TO GIVE IT SOME

1 ADDITIONAL THOUGHT HERE.

2 I SHOULD TELL YOU IN REVIEWING MY NOTES AND REVIEWING YOUR
3 PLEADINGS, WHICH WERE HELPFUL, INCLUDING MR. FRANK'S, MY
4 INITIAL REACTION WAS IN MY NOTE TO SELF HERE AND IN MY PAPER IN
5 FRONT OF ME SAYS TO NOT APPROVE AND GET AN ORDER OUT TELLING
6 YOU WHAT I THINK NEEDS FIXING.

7 AND THAT'S PROBABLY WHAT I'M GOING TO DO. I DON'T WANT
8 YOU TO BE IN SUSPENSE LEAVING HERE WAITING FOR THE ORDER, BUT
9 I'LL TELL YOU THAT'S PROBABLY WHAT -- I DO HAVE SOME CONCERNS.

10 AND THEY MIGHT BE, YOU KNOW, THEY MIGHT BE NITS THAT I'M
11 PICKING HERE AND MAYBE PLAINTIFFS' TABLE WILL, YOU KNOW, STRIKE
12 THEIR FOREHEADS AND SAY, GEE, WHAT IS THIS GUY THINKING? AND
13 AT LEAST I'LL SHARE MY THOUGHTS WITH YOU IN AN ORDER.

14 YOU'VE BEEN HELPFUL TODAY DESCRIBING TO ME AND FOR ME THE
15 PROCESS BUT I JUST, I THINK I HAVE INDICATED THOSE INDICATORS
16 THAT CAUSE ME SOME CONCERN, AND I DO FEEL THAT THE TRANSPARENCY
17 ABOUT THE SELECTION PROCESS HAS NOT BEEN GREAT, NOTWITHSTANDING
18 YOUR EXPLANATION OF IT. I APPRECIATE THAT.

19 I GUESS IT GETS BACK TO THIS WHOLE NET ISSUE AND WHETHER
20 OR NOT IT SHOULD BE LARGER OR NOT, PARTICULARLY WHEN THERE'S
21 THE ALLEGED CONFLICT OF INTEREST. I'M NOT GOING TO CALL IT A
22 REAL CONFLICT OF INTEREST, JUST THIS ALLEGATION OF THAT, THE
23 PERCENTAGES, YOU KNOW, WHY CARNEGIE MELLON THINKS \$0.34 IS
24 APPROPRIATE TO ASK FOR IN THEIR RESPONSE IS INTERESTING TO ME.

25 AND, AGAIN, I'M NOT BEING CRITICAL OF THOSE ORGANIZATIONS

1 AND THE WORK THEY DO, IT'S JUST THAT WHOLE PROCESS CAUSES ME
2 SOME CONCERN.

3 THE ATTORNEY'S FEES PORTION IS INTERESTING, AND MAYBE,
4 MR. NASSIRI, IF YOU WOULD RISE TO SPEAK FURTHER AS TO, AGAIN,
5 WHY YOU THINK A MULTIPLIER IS APPROPRIATE IN THIS CASE, I
6 SHOULD AFFORD YOU THAT OPPORTUNITY.

7 MR. NASSIRI: WELL, YOUR HONOR, AGAIN, THIS WAS A
8 VERY RISKY CASE, AND THESE ARE VERY DIFFICULT CASES. AND THE
9 MAJORITY OF THEM ARE DISMISSED WITHOUT ANY RELIEF WHATSOEVER TO
10 THE CLASS.

11 GOOGLE OBVIOUSLY HAD NOT JUST ONE BUT TWO NATIONALLY
12 PROMINENT RECOGNIZED LAW FIRMS AND THEY'RE FANTASTIC LAWYERS.

13 AND WE DON'T HAVE A LOT OF PRECEDENT TO WORK WITH, SO
14 WE'RE KIND OF, YOU KNOW, WORKING IN A LITTLE BIT -- THERE'S NOT
15 A LOT OF MODELING IN HERE SO WE HAD TO BE INNOVATIVE AND
16 CREATIVE, AND I BELIEVE WE WERE ABLE TO GET PERMANENT
17 PROSPECTIVE RELIEF AND A SUBSTANTIAL SUM OF MONEY THAT IS A
18 TESTAMENT TO THE GOOD WORK THAT WE DID OVER THE COURSE OF YEARS
19 NOW.

20 I BELIEVE IT'S ALSO APPROPRIATE FOR THE COURT TO CONSIDER
21 THE LIKELIHOOD THAT SHOULD WE GET APPROVAL, THAT THIS WILL GO
22 UP ON APPEAL AND MAYBE UP AGAIN AND IT COULD BE SIX OR EIGHT
23 YEARS FROM THE TIME THAT WE FILED AND STARTED PUTTING MONEY
24 INTO THIS CASE THAT WE EVER GET PAID, IF AT ALL.

25 I RUN A SMALL FIRM. THIS IS -- THIS WAS A BIG RISK AND A

1 BIG INVESTMENT, AND SO I BELIEVE THAT THE RESULTS JUSTIFY THIS.
2 THIS IS COMPARABLE TO THE MEGA PRIVACY CLASS ACTION SETTLEMENTS
3 THAT HAVE COME BEFORE OURS. IT'S NO WORSE. AND IN SOME WAYS I
4 BELIEVE IT'S BETTER, YOUR HONOR.

5 THE COURT: OKAY. THANK YOU VERY MUCH.

6 MR. NASSIRI: ONE MORE THING, YOUR HONOR. I MEAN,
7 IF THERE'S -- THE SELECTION PROCESS AND TO THE EXTENT THAT IT'S
8 COVERED BY THE MEDIATION PROCESS, IF THAT IS AN IMPEDIMENT HERE
9 AND IF IT WOULD MAKE ANY DIFFERENCE TO THE COURT'S RULING, YOU
10 KNOW, MAYBE WE COULD CONFER WITH THE DEFENSE COUNSEL NOW AND
11 THERE'S NOT A WHOLE LOT MORE TO TELL YOU TO BE HONEST. IT WAS
12 A NEGOTIATION, BUT, YOU KNOW, WE MIGHT BE ABLE TO OFFER YOU
13 MORE INFORMATION IF WE CAN AGREE AND IT WOULD BE USEFUL TO THE
14 COURT. MAYBE IT WOULD AND MAYBE IT WOULDN'T.

15 THE COURT: WELL, YOU HAVE HEARD MY CONCERNS, AND I
16 SUPPOSE THEY'RE BASED ON OUR CONVERSATION A YEAR AGO AND PART
17 AND PARCEL IN THE TRANSCRIPT THAT I READ TO YOU.

18 MR. NASSIRI: AND I TRY NEVER TO SET EXPECTATIONS
19 WITH MY CLIENTS THAT ARE INCORRECT, AND I AM KICKING MYSELF
20 NOW. I THOUGHT I WAS CLEAR, YOUR HONOR, AND APPARENTLY I
21 WASN'T.

22 BUT, YOU KNOW, WE HAD OUR LIST OF PROPOSED RECIPIENTS IN
23 THE SETTLEMENT AGREEMENT. IT HAS BEEN FIXED BECAUSE IT WAS A
24 MATTER OF AGREEMENT.

25 THE COURT: NO. I APPRECIATE THAT. YOU MENTION

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THEM AND THEN YOU TALKED ABOUT SETTING THE BAR HIGH AND THE
PROCESS.

MR. NASSIRI: YEAH.

THE COURT: AND IT GETS BACK TO MY REJOINDER ABOUT,
WELL, WHAT IS DIFFERENT? OTHER THAN WE KEEP GETTING YOUNGER.
THAT'S THE ONLY DIFFERENCE I SUPPOSE.

WELL, THANK YOU. THANK YOU VERY MUCH, AND WE'LL GET THE
ORDER OUT, AND WE'LL SEE WHERE IT GOES.

MR. NASSIRI: THANK YOU, YOUR HONOR.

MR. JOHNSON: THANK YOU, YOUR HONOR.

MR. EDWARDS: THANK YOU, YOUR HONOR.

(COURT CONCLUDED AT 10:55 A.M.)

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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, IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.



IRENE RODRIGUEZ, CSR, CRR
CERTIFICATE NUMBER 8076

DATED: SEPTEMBER 8, 2014